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J. Alexandra Gonzales

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**THE REPERCUSSIONS OF LOSING THE RIGHT
TO RESPOND: WHY MATCHING FUNDS
SHOULD BE CONSTITUTIONAL FOR JUDICIAL
ELECTIONS EVEN AFTER *ARIZONA FREE
ENTERPRISE CLUB'S FREEDOM CLUB PAC V.
BENNETT***

*J. Alexandra Gonzales**

The balance between preventing corruption and protecting a speaker's First Amendment rights has long been a source of conflict in campaign finance jurisprudence.¹ However, as examination of some recent cases in this area reveal, the United States Supreme Court has placed much more emphasis on the First Amendment than the concern for corruption.² While this may be justifiable for political elections, it proves to be very problematic for judicial elections.

In the Supreme Court's latest case on campaign finance, *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*,³ the Court invalidated Arizona's matching funds provision for state political elections as a violation of the First Amendment.⁴ Matching funds (also

* Juris Doctor Candidate, University of North Carolina School of Law, 2013.

1. See *Buckley v. Valeo*, 424 U.S. 1, 26–27, 48–49 (1976) (per curiam).

2. Compare *Citizens United v. FEC*, 558 U.S. ___, ___, 130 S. Ct. 876, 876–77 (2010) (holding that restrictions on independent expenditures by corporations violate the First Amendment), and *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002) (holding that speech by judicial candidates during an election is protected under the First Amendment), with *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 652 (1990), *overruled by Citizens United*, 558 U.S. ___, 130 S. Ct. 876 (holding restrictions on corporate contributions or expenditures are permitted in order to curb the corruptive influence of corporate money in campaigns). Much of the shift can be attributed both to the expenditure and contribution distinction that dates back to *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), and the rise of corporate participation, and protection, in elections. See *Citizens United*, 558 U.S. at ___, 130 S. Ct. at 910.

3. ___ U.S. ___, 131 S. Ct. 2806 (2011).

4. *Id.* at ___, 131 S. Ct. at 2828.

called “trigger funds” or “rescue funds”),⁵ typically consist of additional funds provided to a publicly financed candidate when a self-financed or privately-financed opponent spends above a certain trigger threshold.⁶ The Court found that because these funds were triggered as a direct result of someone else’s speech, the choice independent groups and privately-financed candidates had to make, to either speak and risk triggering the funds to their opponent or not speak at all, was incredibly burdensome.⁷ Moreover, the Court held that the interests in leveling the electoral opportunities for candidates and preventing corruption or the appearance of corruption were not sufficient to justify the burdens these matching funds placed on privately-financed candidates and independent groups.⁸

The Court references the North Carolina matching funds provision in a footnote,⁹ sharply suggesting the provision is unconstitutional.¹⁰ However, one noticeable difference between the Arizona matching funds provision and the North Carolina provision, that the Court also seems to subtly recognize, is that the North Carolina provision applied to judicial elections.¹¹ Regardless of one’s feelings

5. See Eric H. Wexler, Comment, *A Trigger Too Far?: The Future of Trigger Funding Provisions in Public Campaign Financing After Davis v. FEC*, 13 U. PA. J. CONST. L. 1141, 1143 (2011).

6. Richard M. Esenberg, *The Lonely Death of Public Campaign Financing*, 33 HARV. J.L. & PUB. POL’Y 283, 288–89 (2010). Some matching fund provisions also provide funds when independent expenditures are spent on behalf of the privately-financed candidate or against the publicly funded candidate. *Id.*

7. *Bennett*, ___ U.S. at ___, 131 S. Ct. at 2819–20.

8. *Id.* at ___, 131 S. Ct. at 2826–27.

9. *Id.* at ___ n.3, 131 S. Ct. at 2816 n.3.

10. See *Friday Interview: Supreme Court Ruling Should Impact N.C. Elections*, CAROLINA J. ONLINE (Aug. 19, 2011), http://www.carolinajournal.com/exclusives/display_exclusive.html?id=8128 (“[I]t’s very clear. North Carolina’s matching-fund provisions are unconstitutional.”).

11. N.C. GEN. STAT. § 163-278.67 (2011). *But see Election Law & Policies: Notice*, N.C. STATE BD. OF ELECTIONS, <http://www.ncsbe.gov/content.aspx?id=56> (last visited Apr. 1, 2011) (“By order of the State Board on December 22, 2011 as a result of the *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011) ruling by the United States Supreme Court, the matching funds and reporting provisions as to public financing of appellate judicial races as set out in GS 163-278.66(a) and GS 163-278.67 are no longer implemented.”). North Carolina has a separate statute, the Voter-Owned Election Act, which provides matching funds for the offices of Council of State offices of Auditor, Superintendent of Public Instruction, and Commissioner of Insurance. See N.C. GEN. STAT. §§ 163-278.95–

about campaign finance in the political realm, the Court's decision in *Bennett*, coupled with its decision in *Citizens United v. Federal Election Commission*,¹² pose significant troubles and concerns about the increasing influence of wealth in judicial elections in general¹³ and North Carolina in particular.¹⁴ Many scholars have addressed the constitutionality of the North Carolina matching funds provision for judicial elections with mixed outcomes.¹⁵ However, few arguments separate the analysis of matching funds for political elections from those

99B (2011). Arizona's statute, however, provided funds for the state legislature (both House and Senate), mine inspector, treasurer, superintendent of public instruction, corporation commission, secretary of state, attorney general, or Governor. *See* ARIZ. REV. STAT. ANN. § 16-950(D) (West 2006 & Supp. 2011). The Judicial Campaign Reform Act, however, is separate under section 163-278.67 of the General Statutes of North Carolina. *See also* Tom Breen, *N.C. campaign spending law challenged*, ASSOCIATED PRESS, Sept. 13, 2011, available at http://www.news-record.com/content/2011/09/13/article/nc_campaign_spending_law_challenged ("North Carolina's law also primarily applies to candidates for judicial office, although in 2008 it was expanded to include races for state auditor, insurance commissioner and superintendent of public instruction.").

12. 558 U.S. ___, ___, 130 S. Ct. 876, 876–77 (2010) (holding that restrictions on independent expenditures by corporations violate the First Amendment).

13. *See* Raymond J. McKoski, *Judicial Disqualification After Caperton v. A.T. Massey Coal Company: What's Due Process Got to Do with It?*, 63 BAYLOR L. REV. 368, 368 (2011) ("The influence of special-interest money on judicial elections may be the greatest threat to the public's continued trust in the independence and impartiality of the judiciary.").

14. *See* Gene Nichol, Professor of Law, Univ. of N.C., Dir., Ctr. On Poverty Work & Opportunity, *An Intersection of Laws: Citizens United v. FEC: Citizens United and the Roberts Court's War on Democracy*, Speech at Georgia State University Law Review Symposium (Summer 2011), in 27 GA. ST. U. L. REV. 1007, 1013, 1016–18. *See also* *Citing Unique Role of Judges, Groups Urge Court to Uphold Public Finance Law*, JUSTICE AT STAKE (June 17, 2011), http://www.justiceatstake.org/newsroom/press-releases-16824/?citing_unique_role_of_judges_groups_urge_court_to_uphold_public_finance_law&show=news&newsID=10903 (arguing that the Wisconsin court should uphold trigger funds for judicial elections because of unique role of judges and that such a decision could impact North Carolina elections as well).

15. *See generally* Jason Bradley Kay & Jack McDaniel Sawyer, *The Constitutionality of "Rescue Fund Triggers" in North Carolina's Judicial Campaign Reform Act*, 2 FIRST AMEND. L. REV. 267 (2004) (arguing that these matching funds are unconstitutional); *see also* Wexler, *supra* note 5, at 1188–89 (written before the *Bennett* decision predicting that the Court would uphold matching funds).

for judicial elections.¹⁶ Such a coupled approach assumes that these elections are the same with regard to the nature of the election, the speech involved, and the consequences of not having the right to respond. This analysis is not misguided, as the Court has appeared to treat judicial and political elections as the same.¹⁷

However, subtle indications in two cases involving judicial elections¹⁸ suggest that the Court, although considering judicial and legislative elections to be substantially similar, may consider corruption and its impact to be the slight difference between judicial elections and political elections.¹⁹ Such an approach allows for distinguishing these elections based on the nature of the election,²⁰ the speech involved, and the consequences of not having the right to respond.²¹ Because of the similarities in the perception and ramifications of corruption in political

16. Most articles choose to group North Carolina's matching funds for judicial elections with other state provisions that do not provide for matching funds for judicial elections. See George LoBiondo, Note, *Pulling the Trigger on Public Campaign Finance: The Contextual Approach to Analyzing Trigger Funds*, 79 FORDHAM L. REV. 1743, 1753–55 (2011); see also Wexler, *supra* note 5, at 1156. But see James Bopp, Jr. & Josiah Neeley, *How Not to Reform Judicial Elections: Davis, White, and the Future of Judicial Campaign Financing*, 86 DENV. U. L. REV. 195, 196 (2008) (arguing that matching funds for judicial elections of the type in North Carolina are unconstitutional prior to the Court's ruling in *Bennett*).

17. See *Republican Party of Minn. v. White*, 536 U.S. 765, 781–83 (2002).

18. See *id.*; see also *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).

19. See Stephen M. Hoersting & Bradley A. Smith, *Speech and Elections: The Caperton Caper and the Kennedy Conundrum*, 2008–09 CATO SUP. CT. REV. 319, 341 (2008–09) (“The difference between the judicial and legislative functions is a weak distinction for finding that independent expenditures that cannot create a threat of quid pro quo in a legislator *must* create a direct, personal or pecuniary interest in a judge.”).

20. See Erwin Chemerinsky & James Sample, *Stanching the Cash Flow*, AM. PROSPECT, Oct. 2011, at 51–52 (noting the “special nature of judicial elections” and that “there is reason to believe that even the Roberts Court might recognize that judicial elections are different from others”).

21. See Brief for Common Cause in Wisconsin, et al. as Amici Curiae Supporting Defendants-Appellees at 23, *Wis. Right to Life PAC v. Brennan*, No. 11-1769 (7th Cir. 2011) (noting that by ensuring the right to respond in judicial elections, it incentivizes participation in public funding, which in turn leads to the appearance of an impartial judiciary).

and judicial elections,²² the Court's analysis of campaign finance regulations in general,²³ and of matching funds in particular,²⁴ should be different for judicial elections than for political elections.²⁵ Moreover, the analysis of the effect of matching funds on the campaign itself should also be different for judicial elections.²⁶

One scholar argues that, because the Court's most recent decision on judicial elections²⁷ correctly accounted for both the First Amendment and due process concerns at issue, it

reflects a realpolitik grounding that ought to extend to making the constitutional case for a whole range of legitimate judicial campaign finance regulation, including, for instance, so-called "trigger matching funds" in response to independent expenditures supportive of a candidate's adversary in the growing number of states adopting public financing systems for their elected judiciaries.²⁸

While that argument focuses on expenditure limits in judicial elections generally,²⁹ this Note seeks to expand and apply it to matching funds specifically. Particularly, this Note argues that preserving the right to respond through these matching funds in judicial elections helps achieve

22. See Hoersting & Smith, *supra* note 19, at 339 (noting that the corruption standard from *Buckley* and the bias standard as noted in *Caperton* are "strikingly similar").

23. See James Sample, *Democracy at the Corner of Fourth and Fourteenth: Judicial Campaign Spending and Equality*, 66 N.Y.U. ANN. SURV. AM. L. 727, 730 (2011).

24. See *Citing Unique Role of Judges*, *supra* note 14.

25. See *Republican Party of Minn. v. White*, 536 U.S. 765, 805 (2002) (Ginsburg, J., dissenting).

26. See Jason D. Grimes, Note, *Aligning Judicial Elections With Our Constitutional Values: The Separation of Powers, Judicial Free Speech, and Due Process*, 57 CLEV. ST. L. REV. 863, 866 (2009) ("In the post-*White* era, judicial candidates are emboldened to proclaim their views on the campaign trail, which impedes the appearance and reality of impartiality when deciding cases related to such matters." (footnote omitted)).

27. See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).

28. Sample, *supra* note 23, at 732 (footnote omitted). *But see* Bopp & Neeley, *supra* note 16, at 196 (arguing that matching funds for judicial elections are unconstitutional).

29. See Sample, *supra* note 23, at 729.

an impartial judiciary, a compelling state interest sufficient to survive strict scrutiny.³⁰ This Note also argues that while the footnote referencing the North Carolina matching funds³¹ strongly suggests the unconstitutionality of the North Carolina matching funds provision,³² the provision may, and should, be constitutional for North Carolina's judicial elections³³ as well as in other states that provide matching funds for judicial elections.³⁴ Although many of the states that provide matching funds for judicial elections, including North Carolina, have since indicated that matching fund provisions will not be implemented for the 2012 elections because of the Court's decision in *Bennett*,³⁵ this Note argues that such provisions should not be repealed.

Section I examines the Court's definition of corruption in political elections that is reaffirmed in *Bennett*. It also describes the

30. See *White*, 536 U.S. at 774–75 (stating that strict scrutiny will apply to speech “about the qualifications of candidates for public office”). The Court has indicated that judicial elections are still electoral processes and as such, campaign speech is still a fundamental First Amendment right. See *id.* at 805 (Ginsburg, J., dissenting). As indicated in her dissent in *White*, Justice Ruth Bader Ginsburg, however, does not agree with the notion that “an election is an election,” and as such, speech may be treated differently in judicial elections than from speech in political ones. *Id.*

31. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, ___ U.S. ___, ___ n.3, 131 S. Ct. 2806, 2816 n.3 (2011).

32. See *Friday Interview*, *supra* note 10.

33. See *Chemerinsky & Sample*, *supra* note 20, at 52. *But cf.* N.C. GEN. STAT. §§ 163-278.95–99B (2011) (providing matching funds for the offices of Council of State offices of Auditor, Superintendent of Public Instruction, and Commissioner of Insurance under the Voter-Owned Election Act).

34. See N.M. STAT. ANN. §§ 1-19A-1 to 1-19A-17 (West Supp. 2011); W. VA. CODE ANN. §§ 3-12-1 to 3-12-17 (LexisNexis 2011); WIS. STAT. §§ 11.50–11.522 (2010) (repealed 2011); see also *Wexler*, *supra* note 5, at 1152 n.87.

35. See *Election Law & Policies: Notice*, *supra* note 11 (noting that the North Carolina State Board of Elections will not issue matching funds for North Carolina judicial elections in 2012); see also Lawrence Messina, *Funding setback, recent ruling scale down W.Va. public funding pilot for Supreme Court races*, ASSOCIATED PRESS, Oct. 30, 2011, available at <http://bdtonline.com/local/x1607580178/Capital-Focus-W-Va-attempts-scaled-down-candidate-funding-pilot/print> (noting that the attorney general of West Virginia has since concluded that the decision in *Bennett* “nixes” the matching funds provision for West Virginia judicial elections in 2012). See also Viveca Novak, *Under the Influence*, AM. PROSPECT, Oct. 2011, at 39 (indicating that Wisconsin recently had to eliminate all public financing for judicial elections because of budget constraints).

Court's definitions of impartiality from *Republican Party of Minnesota v. White*, and its perception of bias from *Caperton v. A.T. Massey Coal Co.*, arguing that the definition of corruption in the political context is different, but yet completely the same as in judicial elections.³⁶ The section also examines these standards and how they create issues for evaluating the extent the influence of money has on individual judges and the judiciary as a whole. Both the concern for *quid pro quo* corruption and the corruptive influence of money in judicial elections are part of the compelling state interest in preserving the impartiality of the judiciary.³⁷ Section II examines the matching funds at issue in *Bennett* and the Court's rejection of their validity as a means of combating corruption or the appearance of corruption.³⁸ It also examines the North Carolina matching funds provision for judicial elections and the purposes behind it. Further, the section compares the North Carolina provision in both content and purpose to those found in other states that had matching fund provisions for judicial elections. Section III argues that preserving the appearance of impartiality both during and after the election through the right to respond does not burden the speech of individuals or groups who wish to spend during the election. Instead, it burdens judicial candidates and potential litigants and, as a result, defeats the purpose and function of the judiciary. Section IV concludes that given the consequences not having the right to respond has on the impartiality of the judiciary, matching funds not only satisfy the compelling state interest, but they are necessary to preserving that interest.

36. See Hoersting & Smith, *supra* note 19, at 339 (noting that the Court's description of bias in *Caperton* "seems strikingly similar" to the definition of corruption in *Buckley*).

37. See *Citing Unique Role of Judges*, *supra* note 14.

38. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, ___ U.S. ___, ___, 131 S. Ct. 2806, 2826 (2011).

I. CORRUPTION

A. Corruption in Political and Judicial Elections

The distinction the Supreme Court made between contributions and expenditures in *Buckley v. Valeo*,³⁹ has come to shape campaign finance regulation and jurisprudence.⁴⁰ The Court in *Buckley* defined corruption as *quid pro quo* and found that:

[C]ontribution limitation focuses precisely on the problem of large campaign contributions—the narrow aspect of political association where the actuality and potential for corruption have been identified—while leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources. Significantly, the Act’s contribution limitations in themselves do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties.⁴¹

Thus, the Court makes a clear distinction between expenditures and contributions in campaigns and the corresponding likelihood of, and concern for, corruption.⁴² The Supreme Court and lower courts have continued to adhere to this distinction, holding that because independent

39. 424 U.S. 1 (1976) (per curiam).

40. See E. Stewart Crosland, Note, *Failed Rescue: Why Davis v. FEC Signals the End to Effective Clean Elections*, 66 WASH. & LEE L. REV. 1265, 1272 (2009) (citing David R. Ortiz, *The First Amendment and the Limits of Campaign Finance Reform*, in THE NEW CAMPAIGN FINANCE SOURCEBOOK 91, 92 (2005) (stating that the *per curiam* opinion of *Buckley* “created constitutional guidelines that continue to oversee campaign finance regulations”)).

41. *Buckley*, 424 U.S. at 28–29.

42. *Id.*

expenditures are not connected with the candidate, there is not a concern for *quid pro quo* corruption, and as such, cannot be limited.⁴³ However, because contributions to candidates are directly connected, there is a greater concern for *quid pro quo* corruption, and thus such contributions can be regulated and limited.⁴⁴

As evidenced in cases such as *Austin v. Michigan State Chamber of Commerce*⁴⁵ and *McConnell v. Federal Election Commission*,⁴⁶ the Court has wavered in its definition of corruption.⁴⁷ It appeared as though the concern about corruption in those cases was about the corruptive influence of massive amounts of money, particularly from corporations, and the appearance that could have on and in the democratic system.⁴⁸ Thus, corruption can have two faces: that of *quid pro quo* and that of the corruptive influence of substantial amounts of money, particularly corporate money.⁴⁹

As evidenced in *Bennett*, the Court has re-narrowed its definition of corruption in the political context to once again mean *quid pro quo*.⁵⁰

43. *Id.* See also *Citizens United v. FEC*, 558 U.S. ___, ___, 130 S. Ct. 876, 910 (2010).

44. See *Buckley*, 424 U.S. at 28–29.

45. 494 U.S. 652 (1990), *overruled by Citizens United*, 558 U.S. ___, 130 S. Ct. 876.

46. 540 U.S. 93 (2003), *overruled by Citizens United*, 558 U.S. ___, 130 S. Ct. 876.

47. See Richard L. Hasen, *Citizens United and the Orphaned Antidistortion Rationale*, 27 GA. ST. U. L. REV. 989, 991–92 (2011) (noting the Court’s consideration of the corruptive influence of large amounts of money on the outcomes in the election as well as the distortive impact on issues).

48. See *id.* at 992. See also *Austin*, 494 U.S. at 659 (“We therefore have recognized that ‘the compelling governmental interest in preventing corruption support[s] the restriction of the influence of political war chests funneled through the corporate form.’” (quoting *FEC v. Nat’l Conservative PAC*, 470 U.S. 480, 500–01 (1985))).

49. *McConnell*, 540 U.S. at 136 (“Our treatment of contribution restrictions reflects more than the limited burdens they impose on First Amendment freedoms. It also reflects the importance of the interests that underlie contribution limits—interests in preventing ‘both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption.’” (quoting *FEC v. Nat’l Right to Work Comm.*, 459 U.S. 197, 208 (1982))).

50. *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, ___ U.S. ___, ___, 131 S. Ct. 2806, 2826–27 (2011).

And corruption or the appearance of corruption is not considered to be a legitimate compelling state interest that justifies placing limitations on independent expenditures in political elections.⁵¹ The Court has reasoned that independent expenditures are, by definition, political speech that is presented to the electorate and that is considered independent and not coordinated with the candidate.⁵² As such, this separation between the speaker and the candidate negates the risk of *quid pro quo* corruption.⁵³ Moreover, the Court has also held that when the speaker is the candidate, there is no risk of *quid pro quo* corruption.⁵⁴ In *Davis v. Federal Election Commission*,⁵⁵ the Court struck down the “Millionaire’s Amendment” that allowed for additional funds to a candidate when his or her opponent spent from personal funds.⁵⁶ The Court held that because the candidate’s use of his or her own funds could not lead to *quid pro quo* corruption with himself or herself, the provision did not serve a compelling state interest.⁵⁷ Thus, because of the disconnect and the fact that it is direct speech expressed through an expenditure,⁵⁸ the Court has continually held that preventing corruption through the regulation of such expenditures is not a sufficient government interest to suppress speech.⁵⁹

The concerns and justifications for regulating expenditures in judicial elections, although facially different than those expressed for political elections, are in actuality, completely the same.⁶⁰ Two Supreme

51. *Id.* at ___, 131 S. Ct. at 2826.

52. *Id.* at ___, 131 S. Ct. at 2826 (quoting *Citizens United v. FEC*, 558 U.S. ___, ___, 130 S. Ct. 876, 910 (2010)).

53. *Id.* at ___, 131 S. Ct. at 2826–27.

54. *See Davis v. FEC*, 554 U.S. 724, 740–41 (2008).

55. *See id.*

56. *Id.* at 729, 740.

57. *See id.* at 738–41.

58. *See Buckley v. Valeo*, 424 U.S. 1, 39–40, 47–48 (1976) (per curiam) (holding that because independent expenditures are expressions of core political speech, they cannot be limited).

59. *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, ___ U.S. ___, ___, 131 S. Ct. 2806, 2826–27 (2011).

60. *See Richard M. Esenberg, If You Speak Up, Must You Stand Down: Caperton and Its Limits*, 45 WAKE FOREST L. REV. 1287, 1334 (2010) (citing Hoersting & Smith, *supra* note 19, at 340).

Court cases illustrate and shape how both speech and corruption are to be regulated, or not regulated, within the context of judicial elections.⁶¹

In *Republican Party of Minnesota v. White*,⁶² the Court held that the First Amendment applies to protect the right of judicial candidates to express their views on disputed legal issues during a campaign.⁶³ The Court held Minnesota's "announce clause,"⁶⁴ which prohibited candidates for judicial office from "announc[ing] his or her views on legal or political issues,"⁶⁵ to be an unconstitutional burden on speech under the First Amendment.⁶⁶ The Court rejected the proposed state interest in preserving the impartiality or appearance of impartiality in the judiciary under three different definitions of impartiality.⁶⁷ The Court defined impartiality as: (1) "lack of bias for or against either party to the proceeding";⁶⁸ (2) "lack of a preconception in favor of or against a particular legal view";⁶⁹ and (3) "openmindedness" to the views and arguments at issue.⁷⁰ The Court noted that it considered the "root meaning"⁷¹ of impartiality to be "the lack of bias for or against either party to the proceeding"⁷² and acknowledged that while the announce clause at issue in *White* was "barely tailored to serve"⁷³ the state interest of impartiality with regards to each party, it did "not disagree"⁷⁴ that the state had an interest in this form of impartiality.⁷⁵

Although *White* is often read as the Court's indication that it considers judicial elections to be the same as political elections,⁷⁶ the

61. See generally *Republican Party of Minn. v. White*, 536 U.S. 765 (2002); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).

62. 536 U.S. 765.

63. *Id.* at 788.

64. *Id.* at 770.

65. *Id.* at 768, 770 (quoting Minn. Code of Judicial Conduct, Canon 5(A)(3)(d)(i) (2002)).

66. *Id.* at 788.

67. *Id.* at 775–78.

68. *Id.* at 775.

69. *Id.*

70. *Id.* at 778.

71. *Id.* at 775.

72. *Id.*

73. *Id.* at 776.

74. *Id.* at 777 n.7.

75. See *id.*

76. *Id.* at 781–83.

Court suggests that the difference between judicial and legislative elections is minimal, not as “greatly exaggerate[d]”⁷⁷ as Justice Ginsburg suggests in her dissent.⁷⁸ The Court appears to subtly suggest that the difference between them is small, not that a difference does not exist. Another indication of the Court’s subtle recognition of the difference between the two types of elections, even if minimally so, is found in the Court’s statement that “we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office.”⁷⁹ Thus, the Court indicates that although it treats judicial elections the same as legislative ones with regard to candidate speech, it may encounter situations where “the First Amendment allows greater regulation of judicial election campaigns than legislative election campaigns.”⁸⁰ And so, the Court seems to acknowledge that if the speech involved in a judicial election resulted in bias for or against a party to the proceeding, thus defeating the impartiality of the judge, such speech may be regulated under the First Amendment.

The Court appeared to encounter such a situation in *Caperton v. A.T. Massey Coal Co.*,⁸¹ holding that recusal is required where there is a “serious risk of actual bias”⁸² because of substantial campaign support to a later presiding judge.⁸³ The Supreme Court thus implicitly acknowledged the difference between judicial and political elections and the impact corporate contributions and expenditures can have on the due process rights of litigants opposing those corporations before the judge the corporations helped elect.⁸⁴

At issue in *Caperton* was the money Don Blankenship spent in helping get Brent Benjamin elected to the Supreme Court of Appeals of West Virginia.⁸⁵ At the time of the election, however, Blankenship’s

77. *Id.* at 784.

78. *See id.*; *id.* at 805–806 (Ginsburg, J., dissenting).

79. *Id.* at 783 (majority opinion).

80. *Id.*

81. 556 U.S. 868 (2009).

82. *Id.* at 884.

83. *Id.* at 884–85.

84. *See Sample, supra* note 23, at 729.

85. *See Caperton*, 556 U.S. at 873.

company,⁸⁶ A.T. Massy Coal Company, was in the process of appealing a fifty million dollar jury verdict against it to the Supreme Court of Appeals of West Virginia.⁸⁷ Blankenship gave one thousand dollars in direct contributions to Justice Benjamin's campaign, and spent three million dollars in independent expenditures running attack ads against Justice Benjamin's opponent.⁸⁸ Justice Benjamin of course won the election, and, after refusing to recuse himself, went on to side with the majority in reversing the jury verdict against Blankenship's company.⁸⁹

Although the Supreme Court's holding in *Caperton* dealt with the issue of recusal when judges had received campaign contributions and expenditures from litigants under the Fourteenth Amendment due process clause specifically,⁹⁰ it shed light on the Court's stance on campaign contributions and expenditures in judicial elections generally.⁹¹ The Court concluded that recusal is required where:

[T]here is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent.⁹²

Thus, the Court is seeking to ensure the appearance of an impartial judge by requiring recusal when there is a "serious risk of actual bias."⁹³

86. *See id.* ("Don Blankenship [was] Massey's chairman, chief executive officer, and president.").

87. *See id.*

88. *Id.*

89. *See id.* at 873–76.

90. *See id.* at 876 (noting that "most matters relating to judicial disqualification [do] not rise to a constitutional level" (quoting *FTC v. Cement Inst.*, 333 U.S. 683, 702 (1948))).

91. *See Sample, supra* note 23, at 729.

92. *Caperton*, 556 U.S. at ___, 129 S. Ct. at 2263–64. *See also* Ronald D. Rotunda, *Constitutionalizing Judicial Elections After Republican Party of Minnesota v. White, Caperton, and Citizens United*, 64 ARK. L. REV. 1, 68 (2011) (criticizing the standard of bias set out in *Caperton*, saying that it "does not create a test of when the judge must disqualify himself. It simply lists various factors for the judge to consider.").

93. *Caperton*, 556 U.S. at 884.

It is also important to remember that the Court was ultimately concerned with both forms of Blankenship's spending: the three million dollars in independent expenditures and the one thousand dollar direct contribution.⁹⁴ Some scholars argue that this concern indicates that independent expenditures can have just as much of a corruptive influence as contributions in the context of judicial elections⁹⁵ and so can be regulated.⁹⁶ Thus, although the Court has continually held that independent expenditures cannot be regulated for fear of corruption, the Court proceeded to hold as much in *Caperton* when the election at issue was a judicial one.⁹⁷

Although the Court concedes that there was "no allegation of a *quid pro quo* agreement,"⁹⁸ that is exactly what the opposing litigant and other members of the public perceived Justice Benjamin's decision in favor of Blankenship's company to be.⁹⁹ Thus, in attempting to protect the impartiality and integrity of the judge by defining the standards for recusal when a judge appears to be biased, the Court is essentially attempting to prevent *quid pro quo* corruption or at least the appearance of it.¹⁰⁰ Moreover, the fact that the three million dollars was "more than the total amount spent by all other Benjamin supporters and three times the amount spent by Benjamin's own committee,"¹⁰¹ suggests the Court's concern for the influence this amount had on both the outcome of the election and the bias Justice Benjamin showed once elected.¹⁰²

James Sample argues that "*Caperton* makes clear that corruption is not the only interest that justifies balancing the First Amendment against other constitutional concerns."¹⁰³ He claims that as part of due

94. See Sample, *supra* note 23, at 729.

95. See Hoersting & Smith, *supra* note 19, at 340–41.

96. See Sample, *supra* note 23, at 729.

97. *Caperton*, 556 U.S. at 884–87.

98. *Id.* at 886.

99. See *id.* at 884–85.

100. See Hoersting & Smith, *supra* note 19, at 340–41 ("The holding in *Caperton* . . . suggests that if independent expenditures create the probability of bias, they must also create at least the 'appearance of corruption,' that is, the possibility that political actors will respond to the wishes of donors rather than constituents.").

101. *Caperton*, 556 U.S. at 873.

102. See *id.* at 884.

103. Sample, *supra* note 23, at 769–70.

process, litigants have a right to impartial courts.¹⁰⁴ Moreover, structurally, courts have a duty to protect the impartiality, and the appearance of impartiality, of the judicial system.¹⁰⁵ As such, “given [the] compelling state interests in an impartial and independent judiciary, expenditure limits in judicial elections meet strict scrutiny, and appropriately balance the First Amendment with due process and structural concerns of equally important constitutional magnitude.”¹⁰⁶ Sample finds the expenditure-contribution distinction “counterproductive” in judicial elections because “due process of law is fundamental to the courts to a degree unmatched by the risk of corruption in the constituent branches.”¹⁰⁷ Thus, Sample frames the notion of impartiality of courts in terms of due process rights and structural function of the courts,¹⁰⁸ separating it from the notion of corruption.¹⁰⁹ Another scholar claims that the “appearance of impropriety can be as damaging to the integrity of the justice system as quid pro quo exchanges between campaign supporters and judges.”¹¹⁰ Thus, it seems entirely possible to view the notion of preserving the impartiality of the courts as preventing corruption.¹¹¹

Thus, “*Davis* and *Citizens United*, read together, confirm that the prevention of quid pro quo corruption or its appearance remains the only ‘legitimate and compelling’ government interest.”¹¹² However, when read with *Caperton* and *White* for judicial elections,¹¹³ there is an

104. See *id.* at 773. See also *Caperton*, 556 U.S. at 875 (quoting *In re Murchinson*, 349 U.S. 133, 136 (1955)).

105. See Sample, *supra* note 23, at 775.

106. *Id.* at 782.

107. *Id.* at 728.

108. *Id.* at 774–75.

109. *Id.* at 771–73.

110. Thomas M. Susman, *Reciprocity, Denial, and the Appearance of Impropriety: Why Self-Recusal Cannot Remedy the Influence of Campaign Contributions on Judges’ Decisions*, 26 J. L. & POL. 359, 363 (Spring 2011).

111. But see Bopp & Neeley, *supra* note 16, at 231 (“One should not make the mistake, however, of equating increases in the amount of money spent on judicial campaigns with an increase in corruption.”).

112. Wexler, *supra* note 5, at 1183 (citations omitted).

113. See Hoersting and Smith, *supra* note 19, at 345 (noting that “*White* makes clear that the standard for speech in judicial elections is strict scrutiny,” but that “if the Court were ever to accept greater limits on speech in judicial elections, the seed of such a decision will have to be planted in *Caperton*” (footnotes omitted)).

additional concern for the corruptive influence of money, creating the compelling state interest: an impartial, or the appearance of an impartial, judiciary,¹¹⁴ particularly as it pertains to a party in the litigation.¹¹⁵ Moreover, the conflation of expenditures and contributions by Justice Kennedy in *Caperton* suggests that both forms of spending can pose a threat of *quid pro quo* corruption and contribute to the corruptive impact of money that leads to a biased or corrupt judiciary, either of which can suffice as a compelling state interest.¹¹⁶

The fear of corruption in the political context stems from the idea that if corporations or individuals contribute massive amounts of money to facilitate the election of a legislative or executive member, once elected, that official will be under the control of¹¹⁷ or indebted to the individuals or corporations.¹¹⁸ This appears to be what is happening in the context of judicial elections. Both the *quid pro quo* corruption and the significant influx of money into judicial elections create a biased, or the appearance of a biased, judiciary.¹¹⁹ Thus, although the Court defines the standard of corruption in judicial elections to be facially different from the standard in political elections,¹²⁰ the standard for corruption is

114. Sample, *supra* note 23, at 774.

115. See *Republican Party of Minn. v. White*, 536 U.S. 765, 775 (2002).

116. See Sample, *supra* note 23, at 729.

117. See Nichol, *supra* note 14, at 1011 (quoting David D. Kirkpatrick, *Lobbies' New Power: Cross Us, And Our Cash Will Bury You*, N.Y. TIMES, Jan. 22, 2010, at A1, available at 2010 WLNR 1385477).

118. See Monica Youn, Citizens United: *The Aftermath*, AM. CONST. SOC'Y FOR L. & POL'Y, ISSUE BRIEF 6 (2010), available at http://www.acslaw.org/sites/default/files/ACS_Issue_Brief_Youn_Citizens_United.pdf (“Indeed, corporations may be able to use their new ability to run campaign attack ads to coerce elected officials into compliance with a particular agenda, even if the corporations never have to make good on their threats by actually running the ads.”).

119. See *Citing Unique Role of Judges*, *supra* note 14 (referring to amicus briefs filed in *Wisconsin Right to Life v. Brennan* that argue that the Wisconsin court should uphold trigger funds for judicial elections because of unique role of judges and noting that such a decision could impact North Carolina elections as well).

120. *Compare Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (per curiam) (noting the concern for “the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime”), with *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884 (2009) (expressing concern with the “serious risk of actual bias”).

essentially the same as the standard for bias,¹²¹ because, by definition, “an influenced judiciary is a corrupt judiciary.”¹²² Moreover, these standards not only comply with the applicable definitions of impartiality in *White*,¹²³ but they make such concerns compelling under *White*.¹²⁴ Thus, both the concern for *quid pro quo* corruption and the corruptive influence of copious amounts of money through independent expenditures pose threats to the impartiality of the judiciary that are sufficient to satisfy a compelling state interest.¹²⁵ Regardless of whether the Court considers a biased judiciary or the appearance of a biased judiciary to be corruption, either through the influence of money or as *quid pro quo*, or as a completely separate government interest, either concern is a sufficient government interest to pass strict scrutiny.¹²⁶

II. CORRUPTION IN *BENNETT* AND *CAPERTON*

A. *Bennett and Caperton*

In *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*,¹²⁷ the Supreme Court held “that Arizona’s matching funds scheme substantially burdens protected political speech without serving a compelling state interest and therefore violates the First Amendment.”¹²⁸ The speech at issue was considered political speech because it concerned

121. *But see* Hoersting & Smith, *supra* note 19, at 339–41 (arguing that the interest in preventing a biased or the appearance of a biased judiciary is a more narrow interest than the interest in preventing corruption).

122. Jill E. Moenius, Comment, *Buying Promises: How Citizens United’s Campaign Expenditures Convert Our “Impartial” Judges and Their Nonpromissory Campaign Statements into an Indebted, Influenced, and Dependent Judiciary*, 59 U. KAN. L. REV. 1101, 1138 (2011).

123. *See supra* notes 68–75 and accompanying text.

124. *See* Republican Party of Minn. v. White, 536 U.S. 765, 776–77 (2002).

125. *See Citing Unique Role of Judges*, *supra* note 14 (arguing that Wisconsin has a “compelling interest in using public financing to protect the integrity of its courts and assuring that they appear ‘impartial’”).

126. *See* Chemerinsky & Sample, *supra* note 20, at 52.

127. ___ U.S. ___, 131 S. Ct. 2806 (2011).

128. *Id.* at ___, 131 S. Ct. at 2813.

“speech uttered during a campaign for public office.”¹²⁹ Thus, because “[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation’ of our system of government,”¹³⁰ “[l]aws that burden political speech are accordingly subject to strict scrutiny.”¹³¹ In order to survive strict scrutiny, the “Government [must] prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.”¹³²

The provisions for Arizona’s matching funds¹³³ at issue were a part of the Arizona Citizens Clean Election Act and were stated in sections 16-952(A), (B), and (C)(4)–(5) of the Arizona Revised Statutes.¹³⁴ The matching funds were available during primary and general elections.¹³⁵ Under section 16-950(D) of the Arizona Revised Statutes, public funding, and thus matching funds, was available for qualified candidates for the offices of: the state legislature (both House and Senate), mine inspector, treasurer, superintendent of public instruction, corporation commission, secretary of state, attorney general, or Governor.¹³⁶ In exchange for the acceptance of these funds, and thus the matching funds, candidates agreed to certain campaign restrictions such as limiting expenditures of their personal funds, an overall expenditure cap, and returning all unused funds.¹³⁷

129. *Id.* at ___, 131 S. Ct. at 2817 (quoting *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989)).

130. *Id.* at ___, 131 S. Ct. at 2816–17 (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (*per curiam*)).

131. *Id.* at ___, 131 S. Ct. at 2817 (quoting *Citizens United v. FEC*, 558 U.S. ___, ___, 130 S. Ct. 876, 898 (2010)).

132. *Id.* at ___, 131 S. Ct. at 2817 (quoting *Citizens United*, 558 U.S. at ___, 130 S. Ct. at 898).

133. See Wexler, *supra* note 5, at 1143. Recall that matching funds (also called “trigger funds” or “rescue funds”) typically consist of additional funds provided to a publicly financed candidate when a self-financed or privately-financed opponent spends (or independent expenditures are spent on the privately-financed candidate’s behalf) above a certain trigger threshold. See *id.*

134. See *Bennett*, ___ U.S. at ___, 131 S. Ct. at 2813–14.

135. *Id.* at ___, 131 S. Ct. at 2814; see also ARIZ. REV. STAT. ANN. § 16-952(A)–(C) (2010).

136. ARIZ. REV. STAT. ANN. § 16-950(D); see also *Bennett*, ___ U.S. at ___, 131 S. Ct. at 2813.

137. *Bennett*, ___ U.S. at ___, 131 S. Ct. at 2814 (citing ARIZ. REV. STAT. ANN. §§ 16-941(A), 16-941(A)(2), and 16-953).

Section 16-952 of the Arizona Revised Statutes indicated when matching funds were triggered during both the primary and the general elections and how much the publicly funded candidate was allotted.¹³⁸ During the primary, “matching funds are triggered when a privately financed candidate’s expenditures combined with the expenditures of independent groups made in support of the privately financed candidate or in opposition to a publicly financed candidate exceed the primary election allotment of state funds to the publicly financed candidate.”¹³⁹ Once the matching funds were triggered in a primary election, “each additional dollar that a privately financed candidate spends during the primary results in one dollar in additional state funding to his publicly financed opponent (less a 6% reduction meant to account for fundraising expenses).”¹⁴⁰

Similarly, for general elections:

[M]atching funds are triggered when the amount of money a privately financed candidate receives in contributions, combined with the expenditures of independent groups made in support of the privately financed candidate or in opposition to a publicly financed candidate, exceed the general election allotment of state funds to the publicly financed candidate.¹⁴¹

“[E]very dollar that a candidate receives in contributions—which includes any money of his own that a candidate spends on his campaign—results in roughly one dollar in additional state funding to his publicly financed opponent.”¹⁴²

The Court found that the burden imposed by the matching funds provision was the “choice that confronts privately financed candidates and independent expenditure groups”¹⁴³ once the spending threshold has

138. See ARIZ. REV. STAT. ANN. § 16-952; see also *Bennett*, ___ U.S. at ___, 131 S. Ct. at 2814.

139. *Bennett*, ___ U.S. at ___, 131 S. Ct. at 2814 (citing ARIZ. REV. STAT. ANN. § 16-952(A), (C)).

140. *Id.* at ___, 131 S. Ct. at 2814.

141. *Id.* See also ARIZ. REV. STAT. ANN. § 16-952(B).

142. *Bennett*, ___ U.S. at ___, 131 S. Ct. at 2814.

143. *Id.* at ___, 131 S. Ct. at 2823; *Cf.* *Davis v. FEC*, 554 U.S. 724, 738–40 (2008) (“The burden imposed . . . on the expenditure of personal funds is not

been crossed.¹⁴⁴ Independent groups who wished to support a particular candidate could only avoid triggering the matching funds by either changing its message “from one addressing the merits of the candidates to one addressing the merits of an issue, or refrain from speaking altogether.”¹⁴⁵ This choice “contravenes ‘the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.’”¹⁴⁶ Because this provision placed a “burden on speech [that] is significantly greater . . . than in *Davis*,”¹⁴⁷ it must be “justified by a compelling state interest”¹⁴⁸ and be “narrowly tailored to achieve that interest.”¹⁴⁹

If such analysis is applied to judicial elections, the result is that the burden the Court detests shifts to the judicial candidates.¹⁵⁰ The impact such choices have on the impartiality of the judiciary constitutes a compelling state interest necessary to pass strict scrutiny,¹⁵¹ and thus allow for matching funds.

B. Corruption and Matching Funds

In *Bennett*, the Court struck down Arizona’s matching funds because they did not further the anti-corruption interest either directly or indirectly.¹⁵² The State argued that the matching funds prevented corruption “by eliminating the possibility of any *quid pro quo* between private interests and publicly funded candidates by eliminating contributions to those candidates altogether.”¹⁵³ But, because of the wording of the statute and a statement once posted on the Citizens Clean Elections Commission’s website that mentioned the purpose as leveling

justified by any governmental interest in eliminating corruption or the perception of corruption.”).

144. *Bennett*, ___ U.S. at ___, 131 S. Ct. at 2823.

145. *Id.* at ___, 131 S. Ct. at 2819–20.

146. *Id.* at ___, 131 S. Ct. at 2820 (quoting *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995)).

147. *Id.* at ___, 131 S. Ct. at 2820.

148. *Id.* at ___, 131 S. Ct. at 2820.

149. *Id.* at ___, 131 S. Ct. at 2817.

150. *See infra* Section III.A.

151. *See infra* Section III.A.

152. *Bennett*, ___ U.S. at ___, 131 S. Ct. at 2826–27.

153. *Id.* at ___, 131 S. Ct. at 2825.

the playing field for candidates,¹⁵⁴ the Court chose to first see the provision as an attempt to equalize funding, not the prevention of corruption as the State argued.¹⁵⁵ The Court rejected the equalization justification because the Court saw it as an “intrusion by the government into the debate over who should govern.”¹⁵⁶ As the Court noted in *Bennett*,¹⁵⁷ *Davis* extinguished “any claim that trigger funding could survive heightened scrutiny on the basis of an equalization rationale.”¹⁵⁸ Moreover, the Court rejected the claim that by equalizing the funds in some way could indirectly serve the anti-corruption interest.¹⁵⁹

However, as discussed below, when examined in the context of judicial elections, matching funds do not attempt to equalize funds, but rather simply provide the right to respond.¹⁶⁰ Doing so does not attempt to equalize funding, but rather increase speech, a notion the Court flatly rejected.¹⁶¹ As such, matching funds directly serve the anti-corruption interest of preserving the impartiality of the election and the judiciary as a whole, sufficing as a compelling state interest to pass strict scrutiny.¹⁶²

In *Bennett*, Arizona also argued that equal funding “serve[d] the compelling interest of combating corruption [or] the appearance of corruption.”¹⁶³ The Court rejected this justification for several reasons.¹⁶⁴ First, the Court found that under *Davis*, the matching funds provision “counts a candidate’s expenditures of his own money on his own campaign as contributions, and to that extent cannot be supported by any anticorruption interest.”¹⁶⁵ Also, because Arizona had such “ascetic contribution limits, strict disclosure requirements, and the general availability of public funding, it is hard to imagine what marginal

154. *Id.* at ___ n.10, 131 S. Ct. at 2825 n.10.

155. *Id.* at ___, 131 S. Ct. at 2825.

156. *Id.* at ___, 131 S. Ct. at 2826.

157. *Id.* at ___, 131 S. Ct. at 2820–21.

158. Wexler, *supra* note 5, at 1183.

159. *Bennett*, ___ U.S. at ___, 131 S. Ct. at 2825–26.

160. *See infra* notes 210–14 and accompanying text.

161. *See* Erwin Chemerinsky, Dean & Distinguished Professor of Law, Univ. of Cal., Irvine, Sch. of Law, Not a Free Speech Court, Isaac Marks Memorial Lecture (Mar. 8, 2011), in 53 ARIZ. L. REV. 723, 732–34.

162. *See infra* notes 210–14 and accompanying text.

163. *Bennett*, ___ U.S. at ___, 131 S. Ct. at 2826.

164. *Id.* at ___, 131 S. Ct. at 2826.

165. *Id.* at ___, 131 S. Ct. at 2826.

corruption deterrence could be generated by the matching funds provision.”¹⁶⁶ Moreover, the Court rejected the State’s argument that the matching funds “indirectly serve[] the anticorruption interest, by ensuring that enough candidates participate in the State’s public funding system.”¹⁶⁷ The fact that “burdening constitutionally protected speech might indirectly serve the State’s anticorruption interest, by encouraging candidates to take public financing, does not establish the constitutionality of the matching funds provision.”¹⁶⁸

In justifying its holding in *Bennett* that the burden in matching funds lies in the fact that groups or privately-financed candidates may not spend if the direct result would be additional funding to their adversaries,¹⁶⁹ the Court proclaimed that “every other court to have considered the question after *Davis*”¹⁷⁰ has reached the same conclusion. The Court then goes on to list decisions invalidating the matching fund provisions in Florida, Connecticut, and Minnesota.¹⁷¹ However, the Court failed to mention, either in this footnote or elsewhere in its opinion, the matching fund provisions in New Mexico, West Virginia, and Wisconsin

166. *Id.* at ___, 131 S. Ct. at 2827 (citing ARIZ. REV. STAT. ANN. §§ 16-905(A)(1), 941(B)(1) (West 2006 & Supp. 2010)) (“Contributions to statewide candidates are limited to \$840 per contributor per election cycle and contributions to legislative candidates are limited to \$410 per contributor per election cycle.”).

167. *Id.* at ___, 131 S. Ct. at 2826.

168. *Id.* at ___, 131 S. Ct. at 2826. Again it is important to note that Arizona’s provisions applied for candidates for the offices of: the state legislature (both House and Senate), mine inspector, treasurer, superintendent of public instruction, corporation commission, secretary of state, attorney general, or Governor, not for judicial candidates. See ARIZ. REV. STAT. ANN. § 16-950(D) (West 2006 & Supp. 2010).

169. *Bennett*, ___ U.S. at ___, 131 S. Ct. at 2823.

170. *Id.* at ___, 131 S. Ct. at 2823.

171. *Id.* at ___, 131 S. Ct. at 2823–24. The Court references the case that invalidated Minnesota’s matching fund provision, *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), even though it was decided fourteen years before *Davis*, simply because it supports its conclusion. The Court, however, neglects to reference that the most authoritative case speaking to North Carolina’s matching funds for judicial elections is the Fourth Circuit’s opinion in *N.C. Right to Life Comm. Fund v. Leake*, 524 F.3d 427 (4th Cir. 2008), which upheld the matching funds for judicial elections. Since this case was decided almost two months before *Davis* it does not fall into the Court’s categorical dismissal. Compare *Leake*, 524 F.3d 427 (decided May 1, 2008), with *Davis*, 554 U.S. 724 (decided June 26, 2008).

—all of which provided trigger funding in judicial elections.¹⁷² This omission suggests the Court’s subtle recognition that judicial elections may be different from political ones, particularly with regard to matching funds.¹⁷³

What is even more telling is that the judge at issue in *Caperton*, Justice Benjamin, was an elected member of The Supreme Court of Appeals of West Virginia.¹⁷⁴ In 2011, in the wake of *Caperton*, West Virginia passed the West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program¹⁷⁵ applicable to the 2012 elections.¹⁷⁶ In order to curb the influence of money in judicial elections and achieve the compelling state interest of preventing corruption and the appearance of a biased judiciary,¹⁷⁷ the West Virginia legislature included a matching funds provision¹⁷⁸ within this public financing scheme. The attorney general of West Virginia has since indicated the Court’s decision in *Bennett* makes the matching fund provision invalid for the 2012 judicial elections, and thus the state will not be distributing any matching funds.¹⁷⁹ Regardless, the fact that the Court neglected to mention these provisions in *Bennett* suggests that it does not consider matching funds in judicial elections to be comparable to the Arizona provision or the others that apply only to political elections.¹⁸⁰

172. N.M. STAT. ANN. §§ 1-19A-1 to 1-19A-17 (West Supp. 2011); W. VA. CODE ANN. §§ 3-12-1 to 3-12-17 (LexisNexis 2011); WIS. STAT. ANN. §§ 11.50–11.522 (2010) (repealed 2011); *see also* Wexler, *supra* note 5, at 1152 n.87. *But see* Messina, *supra* note 35 (noting that the attorney general of West Virginia has since concluded that matching funds will not be distributed in the 2012 judicial elections).

173. *See* Chemerinsky & Sample, *supra* note 20, at 51 (noting that the Court’s recent campaign-finance decisions have not involved judicial decisions and that the Court may be “more accepting of the need to limit the role of money in the selection of judges”).

174. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 873 (2009).

175. W. VA. CODE ANN. § 3-12-1 (LexisNexis 2011).

176. *Id.* *But see* Messina, *supra* note 35.

177. W. VA. CODE ANN. § 3-12-2(9).

178. W. VA. CODE ANN. § 3-12-11(e)–(g). *But see* Messina, *supra* note 35.

179. *See* Messina, *supra* note 35.

180. The author assumes that the North Carolina provision was mentioned while the others were not because of the Fourth Circuit’s case, *N.C. Right to Life Comm. Fund v. Leake*, 524 F.3d 427 (4th Cir. 2008), that upheld the matching fund provision in North Carolina. There are no Court of Appeals decisions on the other statutes.

Another indication that the Court considers judicial elections to be different from political elections is found in the Court's failure to reference *Wisconsin Right to Life PAC v. Brennan*,¹⁸¹ a case in which the federal district court in Wisconsin upheld Wisconsin's matching funds for judicial elections.¹⁸² This decision was not only rendered after *Davis*, but while *Bennett* was being considered by the Court.¹⁸³ The district court in *Brennan* saw the choice faced by privately-financed candidates and independent groups to be "a tactical decision, not unlike one faced by all contributors to a campaign regardless of the Act's matching funds provision,"¹⁸⁴ and thus not burdensome to their speech.¹⁸⁵ Moreover, the court also noted the state's strong interest in promoting this public financing scheme and its provisions in order to combat the risk of bias or the appearance of bias that the Supreme Court warned against in *Caperton*.¹⁸⁶ The failure to mention the *Brennan* decision, or even its existence, suggests that the Court in *Bennett* recognizes the difference between matching funds for judicial elections and political ones that were recognized by the court in *Brennan*.¹⁸⁷ The Court in *Bennett* thus

181. No. 3:09-cv-00764-wmc (W.D. Wis. Mar. 31, 2011), http://brennan.3cdn.net/c3eb1383d35204dcad_bjm6ivikh.pdf.

182. *Id.* at 3. It is important to note, however, that Wisconsin recently had to eliminate all public financing for judicial elections because of budget concerns. See Novak, *supra* note 35, at 39; see also Peter Hardin, *Both Sides Ask Dismissal in Public Financing Appeal*, GAVEL GRAB (July 1, 2011), <http://www.gavelgrab.org/?p=22308>. It is also interesting that since public funding has been eliminated, including the matching funds, public confidence of the Wisconsin Supreme Court has plummeted. See *New Poll: Confidence in Wisconsin Supreme Court Plunges*, JUSTICE AT STAKE (July 21, 2011), http://www.justiceatstake.org/newsroom/press-releases-16824/?new_poll_confidence_in_wisconsin_supreme_court_plunges&show=news&newsID=111188.

183. Compare Transcript of Oral Argument at 1, *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett and McComish v. Bennett*, ___ U.S. ___, 131 S. Ct. 2806 (Mar. 28, 2011) (Nos. 10-238, 10-239), with *Brennan*, No. 3:09-cv.-00764-wmc.

184. *Brennan*, No. 3:09-cv-00764-wmc at 31.

185. *Id.*

186. See *id.* at 33.

187. See *id.* at 34. See also *Wisconsin Right to Life PAC v. Michael Brennan*, BRENNAN CTR. FOR JUSTICE, http://www.brennancenter.org/content/resource/wisconsin_right_to_life_political_action_committee_v._michael_brennan/ (last visited Mar. 31, 2012) (discussing the opinion and the amicus brief the Brennan Center filed on behalf of Common Cause in Wisconsin, the Wisconsin Democracy

appears to reference the matching funds provisions and their respective cases that apply to political elections, not judicial ones, suggesting a subtle, yet substantial difference between the two.

In states where matching funds apply to judicial elections, this concern for both forms of corruption is a compelling state interest because by curbing corruption through the right to respond, it preserves the independence and integrity of the judicial system and their elections.¹⁸⁸ “North Carolina’s Judicial Campaign Reform Act creates a system of optional public funding for candidates seeking election to the state’s supreme court and court of appeals.”¹⁸⁹ The stated purpose of the North Carolina Public Campaign Fund is to ensure:

[T]he fairness of democratic elections in North Carolina and to protect the constitutional rights of voters and candidates from the detrimental effects of increasingly large amounts of money being raised and spent to influence the outcome of elections, those effects being especially problematic in elections of the judiciary, since impartiality is uniquely important to the integrity and credibility of the courts. Accordingly, this Article establishes the North Carolina Public Campaign Fund as an alternative source of campaign financing for candidates who demonstrate public support and voluntarily accept strict fund-raising and spending limits. This Article is available to candidates for justice of the Supreme Court and judge of the Court of Appeals in elections to be held in 2004 and thereafter.¹⁹⁰

Thus, the North Carolina legislature explicitly states that the key difference between judicial and political elections is the concern for

Campaign, and the League of Women Voters of Wisconsin Education fund arguing that matching funds should be constitutional for judicial elections).

188. See Brief for Common Cause, *supra* note 21, at 23.

189. N.C. Right to Life Comm. Fund v. Leake, 524 F.3d 427, 432 (4th Cir. 2008).

190. N.C. GEN. STAT. § 163-278.61 (2011).

impartiality.¹⁹¹ As such, the legislature deems the integrity and impartiality of the judiciary to be sufficient and compelling interests.¹⁹²

Although the justification of fairness would probably not be considered a sufficient compelling state interest for such a restriction on speech under *Bennett*¹⁹³ and *Buckley*,¹⁹⁴ the concern for an impartial and independent judiciary should be considered compelling for judicial elections.¹⁹⁵ But, these reasons listed here are for the public funding of judicial elections in general.¹⁹⁶ There is no mention of the matching funds in this provision. In fact, there were no stated purposes for the matching funds.¹⁹⁷ This indicates that the matching funds were used to further this interest of an impartial judiciary and should survive strict scrutiny.¹⁹⁸ The Fourth Circuit noted as much in *North Carolina Right to Life Committee Fund v. Leake*,¹⁹⁹ holding that “North Carolina’s effort to protect this vital interest in an independent judiciary”²⁰⁰ through the

191. *Id.*

192. *Id.*

193. *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, ___ U.S. ___, ___, 131 S. Ct. 2806, 2826 (2011).

194. *See Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam).

195. *See Chemerinsky & Sample, supra* note 20, at 52 (stating that the “special nature of judicial elections is a compelling reason” why matching funds should be allowed for judicial elections).

196. *Compare* N.C. GEN. STAT. § 163-278.61 (stating the purpose for the public fund for judicial elections), *with* N.C. GEN. STAT. § 163-278.67 (the provision for matching funds in judicial elections). *But see Election Law & Policies: Notice, supra* note 11.

197. N.C. GEN. STAT. § 163-278.67 (2011). *But see Election Law & Policies: Notice, supra* note 11.

198. *See LoBiondo, supra* note 16, at 1773–74 (arguing that when determining whether “a particular provision of a public financing statute is justified by the state’s interest in preventing corruption, courts must first ascertain the provision’s purpose within the context of the larger initiative. Where the provision does not help advance the anticorruption strategy of the larger package, or where the entire public finance regime fails to prevent corruption, courts should strike it down. However, where a provision implements or facilitates the public finance regime’s other sections, and thereby serves the larger legislative package’s anticorruption goals (albeit indirectly), as trigger funds usually do, courts should uphold the provision”).

199. 524 F.3d 427 (4th Cir. 2008).

200. *Id.* at 441.

public financing system generally and matching funds in particular are “within the limits placed on the state by the First Amendment.”²⁰¹

Similarly, West Virginia’s stated purpose for the public funding of judicial elections is to:

[E]nsure the fairness of democratic elections in this state, protect the Constitutional rights of voters and candidates from the detrimental effects of increasingly large amounts of money being raised and spent to influence the outcome of elections, protect the impartiality and integrity of the judiciary, and strengthen public confidence in the judiciary.²⁰²

Thus, the West Virginia legislature also explicitly states that it is concerned about the corruptive impact of the substantial amounts of money being spent in judicial elections on both the actual and perceived impartiality of the judiciary.²⁰³

The West Virginia statute notes that “[c]urrent campaign finance laws permit certain independent parties to raise and spend unlimited amounts of money to influence the outcome of elections.”²⁰⁴ This, and the expenditures that were at issue in *Caperton*,²⁰⁵ suggest that West Virginia considers both contributions and expenditures from independent groups to be detrimental to the actual impartiality of the judiciary and its appearance of impartiality to the public.²⁰⁶ In order to achieve the interest of an impartial judiciary, West Virginia enacted a matching fund

201. *Id.*; see also Chemerinsky & Sample, *supra* note 20, at 52.

202. W. VA. CODE ANN. § 3-12-2(9) (LexisNexis 2011).

203. *Id.*

204. W. VA. CODE ANN. § 3-12-2(2).

205. See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872–76 (2009). It was the Court’s concern for the three million dollars in independent expenditures, rather than the one thousand dollar contribution that was really at issue in *Caperton*. *Id.* See also Sample, *supra* note 23, at 729.

206. W. VA. CODE ANN. § 3-12-2(7)–(8) (“As spending by candidates and independent parties increases, so does the perception that contributors and interested third parties hold too much influence over the judicial process. The detrimental effects of spending large amounts by candidates and independent parties are especially problematic in judicial elections because impartiality is uniquely important to the integrity and credibility of courts.”). See also Messina, *supra* note 35.

provision similar to North Carolina's matching fund provision²⁰⁷ that simply provided for the right to respond. Matching funds were triggered when either: (1) a privately-financed candidate spent money that was above the threshold (perhaps when a contribution was made, perhaps not); (2) when an independent expenditure was made in support of the privately-financed candidate; or (3) when an independent expenditure was made against the publicly financed candidate.²⁰⁸ As stated, the language of the statute suggests that the legislature sees both contributions and independent expenditures as adversely affecting the impartiality or the appearance of the impartiality of the judiciary.²⁰⁹

Note, however, that neither the West Virginia legislature nor the North Carolina legislature attempted to limit or prohibit the speech of these independent groups.²¹⁰ In fact, neither the concern nor effect was to equalize funds.²¹¹ Rather, the goal was to ensure an impartial judiciary through the right to respond.²¹² Although the Court states in *Bennett* that this right to respond is not protected, and in fact makes such speech more

207. Compare N.C. GEN. STAT. § 163-278.67 (2011), with W. VA. CODE ANN. § 3-12-11(e)–(g) (LexisNexis 2011). *But see Election Law & Policies: Notice, supra* note 11; Messina, *supra* note 35.

208. N.C. GEN. STAT. § 163-278.67; W. VA. CODE ANN. § 3-12-11(e)–(g). *But see Election Law & Policies: Notice, supra* note 11; Messina, *supra* note 35.

209. See N.C. GEN. STAT. § 163-278.61; W. VA. CODE ANN. § 3-12-2(7). See also Sample, *supra* note 23, at 728.

210. See W. VA. CODE ANN. § 3-12-2(2) (“Current campaign finance laws permit certain independent parties to raise and spend unlimited amounts of money to influence the outcome of elections.”).

211. See Bopp & Neeley, *supra* note 16, at 215 (arguing that North Carolina's provision of rescue funds does not achieve equality in terms of dollars spent because the matching funds are not triggered if a group makes an independent expenditure in support of a publicly funded candidate or opposing his privately-funded opponent, but are triggered if a group speaks in favor of the privately-financed candidate or against the publicly funded candidate). Also, most matching funds schemes only allow for the allotment of matching funds up to two or three times. *Id.* at 216.

212. See N.C. Right to Life Comm. Fund v. Leake, 524 F.3d 427, 437 (4th Cir. 2008) (citing Buckley v. Valeo, 424 U.S. 1, 92–93 (1976) (per curiam)) (claiming that “the distribution of these funds ‘furthers, not abridges, pertinent First Amendment values’ by ensuring that the participating candidate will have an opportunity to engage in responsive speech”). See also Chemerinsky, *supra* note 161, at 732–34.

effective,²¹³ this result is much less favorable in the context of judicial elections.²¹⁴ This right to respond during judicial elections serves a compelling interest in preserving the impartiality or the appearance of impartiality of the judiciary both during the election and once elected. As such, matching funds should survive strict scrutiny because the consequences of not providing them outweigh the potential burden of choice independent groups may have to make about whether to spend during a campaign.

III. RAMIFICATIONS

A. Shifting the Burden to Judicial Candidates

The Court noted in *Bennett* that “the burden imposed by the matching funds provision is evident and inherent in the choice that confronts privately financed candidates and independent expenditure groups.”²¹⁵ A group faced with such a choice “can either opt to change its message from one addressing the merits of the candidates to one addressing the merits of an issue, or refrain from speaking altogether.”²¹⁶ And to force “that choice—trigger matching funds, change your message, or do not speak—certainly contravenes the fundamental rule of protection under the First Amendment that a speaker has the autonomy to choose the content of his own message.”²¹⁷ Thus, the Court was concerned with the choice those in the electorate would face, not the candidates themselves.²¹⁸ As such, the Court neglects to consider the imposition and burden the candidates themselves may face in not being able to choose the content of their own messages.

213. See *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, ___ U.S. ___, ___, 131 S. Ct. 2806, 2824 (2011).

214. See Chemerinsky & Sample, *supra* note 20, at 52 (noting that courts should uphold restrictions on both expenditures and contributions “as essential to ensur[ing] fairness and due process of law”).

215. *Bennett*, ___ U.S. at ___, 131 S. Ct. at 2823.

216. *Id.* at ___, 131 S. Ct. at 2819–20.

217. *Id.* at ___, 131 S. Ct. at 2820 (quoting *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos.*, 515 US 557, 573 (1995)).

218. *Id.*

While these choices may certainly prove to be burdensome in the context of judicial elections as well, the burden of choice is also double-sided. By removing these matching funds in judicial elections, it essentially shifts the burden of this choice from those expending on behalf of the campaign to those running in the campaign.²¹⁹ Removing matching funds also forces weighing the First Amendment right of freedom of speech with the Fourteenth Amendment due process right to an impartial judiciary.²²⁰

Without matching funds, and thus the right to respond, judges facing significant independent expenditures either against them or for their opponent are faced with three equally unappealing and undemocratic options:

- (1) subtly and sometimes not so subtly signaling a favorable disposition towards other organized, concentrated interests—a clear abdication of the ideals of the judicial role;
- (2) the daunting and statistically almost impossible specter of raising enough money to meaningfully counter the funded speech—even inaccurate funded speech without engaging in option (1); or
- (3) surrender—often before ever entering a race at all.²²¹

Forcing judges and judicial candidates to make these choices subjects them to a greater burden than that faced by the groups in *Bennett*, and has much wider and detrimental consequences to the candidates running and the potential litigants.

219. See Barak Y. Orbach & Frances R. Sjoberg, *Excessive Speech, Civility Norms, and the Clucking Theorem*, 44 CONN. L. REV. 1, 42–43 (2011) (“Put simply, the majority in *Davis* and *Bennett* opposed regulatory schemes that added speech, based on the theory that the additional speech, or clucking, is a burden that diminishes the effectiveness of existing speech. The majority dismissed the possibility that some of the existing speech, the privately funded speech, could be the source of burdensome clucking, and that establishing greater vocal parity may mitigate the symptoms.”).

220. See Mary Eileen Weicher, Comment, *The Expansion of the First Amendment in Judicial Elections: Another Cause for Reform*, 38 LOY. U. CHI. L.J. 833, 835 (2007) (noting that “the states’ interests in preserving the reality and perception of judicial impartiality must be balanced against the weight of the First Amendment”).

221. Sample, *supra* note 23, at 756 (footnote omitted).

Not allowing for matching funds also forces a judge to make a choice: either accept public funding and have the appearance of an impartial campaign, and thus an impartial court, or lose.²²² When faced with the choice of accepting public funding and not being able to formulate a response, or privately funding one's campaign and ensuring the right to respond if necessary, any candidate will likely choose the latter.²²³ After all, who wants to engage in a competitive campaign with "no corresponding means of reply?"²²⁴ A reliance on "independent" groups may result, not because judges like being susceptible to the control of independent groups, but because they do not want to lose.²²⁵ Not only does this choice render the public financing system essentially obsolete,²²⁶ thus removing any source for unbiased funding, it also forces judges to participate and engage in a campaign like a politician.²²⁷ This

222. See Bert Brandenburg, *Funding Justice: Big Money and Impartial Justice: Can They Live Together?*, 52 ARIZ. L. REV. 207, 215 (2010) (noting that "[p]ublic financing reduces the burden on judicial candidates to raise money from special interests"); see also Patrick Caldwell, *Disorder in the Court*, AM. PROSPECT, Oct. 2011, at 49 ("Once judges accept campaign donations, impartiality loses any semblance of legitimacy.").

223. See Crosland, *supra* note 40, at 1313 ("The primary impediment to effective administration of Clean Elections has long been the risk of candidates being deterred from accepting public funds because of the threat of limitless spending by nonparticipating opponents and, more significantly, independent groups making hostile [independent expenditures]." (footnote omitted)).

224. Nichol, *supra* note 14, at 1016.

225. See Crosland, *supra* note 40, at 1313.

226. See Nichol, *supra* note 14, at 1016; see also Crosland, *supra* note 40, at 1313.

227. See Charles Gardner Geyh, *Additional Perspectives: Judicial Elections in the Aftermath of White, Caperton, and Citizens United*, 53 ADVOC. 78, 78 (2010), available at http://www.litigationsection.com/downloads/Advocate_Vol_53_Winter_2010.pdf (noting that judicial elections are thought to politicize judges because "they lead judicial candidates to commit themselves to deciding future cases in particular ways; candidates receive campaign support so substantial as to appear beholden to their supporters; and incumbents are put at risk of losing their tenure for being affiliated with an unpopular political party, for invalidating unconstitutional but popular laws, or for upholding the rights of unpopular litigants"); see also Grimes, *supra* note 26, at 884 ("In order to get elected, many state supreme court judges need to raise millions of dollars. To raise that much money, judges must become politicians and run political campaigns.").

extreme politicizing of judges is neither the purpose nor the role of the judiciary.²²⁸

The 2010 Iowa Supreme Court election provides a clear example of the influence and impact money from independent expenditures can have on judicial elections and the choice judges are now forced to make about the influence independent groups will have on their campaign and the resulting appearance of bias of their courts. Although Iowa operates under the “Missouri Plan” for placing judges on the bench²²⁹ as opposed to the non-partisan primary method used in North Carolina,²³⁰ judges vying for a seat on the Iowa Supreme Court are still subject to elections.²³¹ The “Missouri Plan,” also known as the “merit plan,”²³² involves a process by which the Governor appoints judges from a list of candidates put forth by an independent nominating committee.²³³ After certain periods of time, the public then votes in retention elections on whether the judges appointed by the Governor should remain in office.²³⁴ The independent committee is a panel of fifteen that consists of seven members selected by the Governor, seven members of the bar association, and a sitting state supreme court justice.²³⁵ During the interview, panelists are forbidden from asking the nominee about his or her political ideology, thus attempting to keep the judiciary de-politicized.²³⁶ Once selected by the committee, the nominee is placed on the ballot for the upcoming election and is up for “reelection” every eight years.²³⁷

228. See *Republican Party of Minn. v. White*, 536 U.S. 765, 805–07 (2002) (Ginsburg, J., dissenting); see also Caldwell, *supra* note 222, at 50.

229. See Caldwell, *supra* note 222, at 46.

230. See Paul D. Carrington, *Public Funding of Judicial Campaigns: The North Carolina Experience and the Activism of the Supreme Court*, 89 N.C. L. REV. 1965, 1967 (2011).

231. Caldwell, *supra* note 222, at 46 (“Supreme court justices go on the ballot at the first general election after they are selected and every eight years after.”).

232. See Moenius, *supra* note 122, at 1105.

233. *Id.* at 1105–06.

234. *Id.* at 1106.

235. See Caldwell, *supra* note 222, at 46.

236. See *id.*

237. See *id.*

Until recently, these retention elections for the judiciary had been anticlimactic, inexpensive, and non-political events.²³⁸ However, after the influx of money from independent groups, judicial elections became highly publicized, expensive, and political affairs.²³⁹ Thus, the judges in Iowa are still confronted with the same issues and concerns under the “Missouri Plan” as they would be in a non-partisan judicial election like North Carolina holds²⁴⁰ because, although the candidates may be initially appointed, they must still “face the electorate to confirm their nomination.”²⁴¹

The influence of independent groups in the 2010 Iowa Supreme Court election was spurred after the Iowa Supreme Court found bans on same-sex marriage to be unconstitutional in *Varnum v. Brien*.²⁴² As a result of the decision, Bob Vander Plaats “spearhead[ed] an effort to remove” three of the justices who took part in the opinion who were up for retention election the following November.²⁴³ Vander Plaats created an organization called Iowa for Freedom that embodied his evangelical social conservatism.²⁴⁴ Vander Plaats’ anti-retention campaign was successful due to funding his organization received from the American Family Association (AFA).²⁴⁵ The funding allowed Iowa for Freedom to begin running TV ads in early September, and “the attacks bombarded viewers the rest of the fall.”²⁴⁶ One of the most interesting aspects of this campaign, however, is that AFA was not concerned with these three particular justices or even the politics of Iowa.²⁴⁷ Rather, AFA used the campaign to flood money into the election as a method to voice its opposition to judicial activism: “[s]tate judges would know their jobs

238. *See id.*

239. *See id.* at 48–50.

240. *See Carrington, supra* note 230, at 1966 n.1 (explaining the process of how North Carolina elects its judges and how that process came to be for each level of the judiciary).

241. *See Rotunda, supra* note 92, at 7.

242. 763 N.W.2d 862 (Iowa 2009).

243. *See Caldwell, supra* note 222, at 47.

244. *See id.* at 46–47.

245. *See id.* at 47–48.

246. *See id.* at 48.

247. *See id.*

would be at stake when they ruled against the values social conservatives cherished.”²⁴⁸

After three of his fellow justices lost their reelections due to the influence exerted by Vander Plaats and his organization, Justice David Wiggins, another justice from the *Varnum* opinion, is up for reelection in 2012.²⁴⁹ Justice Wiggins is now faced with the possibility of having to form a campaign committee and actively campaign for his reelection against Vander Plaats and other possible opposition groups.²⁵⁰ The Justice realizes that by not launching response campaigns, his former colleagues “took the position that judges should not get involved in politics[,]”²⁵¹ and that they “maintained their integrity.”²⁵² But as a result, these three justices lost their jobs.²⁵³ Thus, Justice Wiggins is now faced with a choice to either campaign like a politician, or lose.²⁵⁴ Because Iowa does not have a matching funds provision (or public financing),²⁵⁵ Justice Wiggins must form his own campaign committee to combat the ads that will presumably be run by Vander Plaats and hope there are other groups who will be willing to provide both contributions and independent expenditures on his behalf²⁵⁶ in order to be heard by voters. If Justice Wiggins does not campaign, Vander Plaats may then run ads like he did against the previous justices, and “portray [Justice Wiggins] any way he want[s].”²⁵⁷ But if Justice Wiggins was afforded the right to respond, he would be able to run commercials and explain to voters who he is and what he stands for, combating any messages about

248. *Id.*

249. *Id.* at 50.

250. *See id.* (noting that there is an Iowa rule that a justice cannot campaign unless there is an active opposition, giving Justice Wiggins some time. But the recent results indicate that opposition from a real candidate need not exist, just independent groups who oppose a particular justice or candidate).

251. *Id.* (quoting Justice Wiggins).

252. *Id.* (quoting Justice Wiggins).

253. *See id.*

254. *See id.* at 50.

255. *See* IOWA CODE ANN. §§ 68A.202, 301 (West 2011) (indicating when and from whom judicial candidates may collect campaign funds, and not mentioning any funds provided from the state).

256. *See* Caldwell, *supra* note 222, at 50. While this situation may be an argument for public funding of judicial elections in general, it strengthens the justification for matching funds as well.

257. *Id.*

him that Vander Plaats may portray,²⁵⁸ without having to rely on others to respond for him or surrender his spot on the bench without a fight.

The happenings in the Iowa Supreme Court election are comparable to the possibilities judges in North Carolina will now face.²⁵⁹ No matching funds were needed in the 2004 elections for either North Carolina's Supreme Court or Court of Appeals.²⁶⁰ "[B]ecause the [matching funds] gave our candidates the ability to respond to special interest attacks from the political left and right, . . . many groups stayed out of North Carolina because they knew that our candidates . . . had the resources to fight back and set the record straight."²⁶¹ However, an influx of independent group advertisements arose in the 2006 election.²⁶² Justice Sarah Parker's opponent spent more than the allotted scheme, resulting in the issuance of trigger funds to Justice Parker.²⁶³ Justice Parker went on to win the election, despite being outspent,²⁶⁴ suggesting that the right to respond helped Justice Parker win because she could have either clarified misrepresentations or given the appearance of an impartial campaign by accepting state funding to respond.

However, without the matching funds, judges have not only potentially lost the right to respond, but they have also lost the potential

258. *See id.* Although the Justices who were not retained did not campaign at all, "if [they] had responded to the attacks—introduced themselves to voters on TV, planted yard signs—they wouldn't have been the disembodied figures voters could so easily dismiss." *Id.*

259. *See Election Law & Policies: Notice, supra* note 11 (stating that because of the Court's decision in *Bennett*, matching funds will not be distributed for judicial elections in 2012); *see also* Paul D. Carrington, *NC voters don't want judgeships for sale*, WINSTON-SALEM J., Jan. 8, 2012, <http://www2.journalnow.com/news/2012/jan/08/wsopin02-paul-d-carrington-guest-columnist-informe-ar-1788184/> (suggesting that because of the loss of matching funds, NC elections will be comparable to those of other states that are subject to multi-million dollar campaigns that put justice up for sale).

260. *See Carrington, supra* note 230, at 2004.

261. *Id.* at 2004–05 (quoting Chris Heagarty, former executive director of the N.C. Center for Voter Education).

262. *See id.* at 2006.

263. *See id.*

264. *Id.*

to give the perception of impartial courts.²⁶⁵ Without these matching funds, judges will be burdened with the choice of either giving the appearance of uninfluenced campaigns, and thus impartial courts (and also increasing the likelihood of an actual impartial court), or losing.²⁶⁶ Thus, in order to provide for the appearance of an impartial judiciary and the absence of corruption in the courtroom, there need to be protections for the appearance of an impartial judiciary and the absence of corruption during the campaign.²⁶⁷

B. Controlling the Voice of the Law

Politicizing the courts subjects the judiciary to the control of outside influences in another way. The choice judges must now make, to “change your message, or . . . not [to] speak,”²⁶⁸ is comparable to the burden faced by the independent groups in *Bennett*.²⁶⁹ However, this burden is much more problematic because it forces judicial candidates to make an additional choice: have views that independent groups will likely support, or lose.²⁷⁰ Thus, without matching funds, judicial candidates must forego their First Amendment right to control what they want to say in hopes of attracting support from independent groups in order to support their campaigns.²⁷¹ This creates the possibility for the

265. See McKoski, *supra* note 13, at 368 (“The influence of special-interest money on judicial elections may be the greatest threat to the public’s continued trust in the independence and impartiality of the judiciary.”).

266. See also Carrington, *supra* note 230, at 2004–06.

267. See Caldwell, *supra* note 222, at 50 (quoting former Justice Streit, who noted that when judges get involved with politics, “[they] get labeled” by themselves or by others, and then must live up to those labels). Although Justice Streit was speaking about the politicization of judges generally, the same argument may be applied to situations in which there is no right to respond. Judges who are not able to correctly “label” themselves will be forced to wear the label given to them by independent groups. See *id.*

268. *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, ___ U.S. ___, ___, 131 S. Ct. 2806, 2820 (2011).

269. See *id.* at ___, 131 S. Ct. at 2820.

270. See Rotunda, *supra* note 92, at 28.

271. See Youn, *supra* note 118, at 6 (“Mere awareness of a corporation’s potential general treasury fund war chest can be expected to affect the decision-making of elected officials in ways that will often be difficult to trace.”).

emergence of a “judge with a vision,”²⁷² or “the social-engineering judge with an agenda,”²⁷³ in several ways. First, it may be relatively easy for judges to find “independent” groups or rely “independently” on groups who support their views to support their campaigns.²⁷⁴ If not, the judge can easily adopt such views—subjecting the judiciary to the views of whoever is willing to pay.²⁷⁵ This is not the purpose or function of the judiciary.²⁷⁶

As already discussed,²⁷⁷ the Court held in *White* that the First Amendment applies to protect the rights of judicial candidates to express their views on disputed legal issues during a campaign.²⁷⁸ Although the Court made a distinction between discussion of legal issues and promissory statements,²⁷⁹ after *Citizens United*, this creates the problem of potential “implied promise[s].”²⁸⁰ When judicial candidates issue statements regarding how previous courts have ruled or their views on legal issues, the statements are technically considered “nonpromissory” and thus protected by the First Amendment under *White*.²⁸¹ However, if a corporation agrees with this view, it now has the power under *Citizens United* to make independent expenditures either in support of this

272. Garrett Epps, *Beware: Judges with a Vision*, AM. PROSPECT, Oct. 2011, at 40.

273. *Id.* at 42. Although Epps writes speaking specifically about the court-packing of the Supreme Court and the results in social changes or the freezing of the status quo, the term has implications in elected state judges as well. *See id.*

274. *See* Rotunda, *supra* note 92, at 70 (“Judges, of course, want to preserve their ‘independence.’ Yet, when judges decide billion-dollar class actions or decide hot-button social issues like gay marriage or drug policy, it should be no surprise that deep-pocketed individuals . . . or entities . . . are drawn to the judicial campaign like flies to sugar.”).

275. *See* Grimes, *supra* note 26, at 884 (“The broad free speech protections granted by *White* came at a convenient time, for they enable judicial candidates to send targeted messages to special interests letting them know that the judicial candidate may be counted on. Special interest groups are unlikely to gamble with unknown commodities, giving candidates further incentives to announce, pledge, or promise their intended behavior from the bench.”).

276. *See* Republican Party of Minn. v. White, 536 U.S. 765, 805–07 (2002) (Ginsburg, J., dissenting).

277. *See supra* Section I.A.

278. *See White*, 536 U.S. at 788.

279. *See id.* at 778–81.

280. Moenius, *supra* note 122, at 1130.

281. *See id.* at 1126.

candidate or against his or her opponent.²⁸² This indirectly ties the corporation and its views to those of the candidate, creating both a misperception that will affect how voters will vote and how they will perceive the partiality of the judicial candidate.²⁸³ It must be remembered, however, that the Court does not consider bias in terms of a preconception towards a legal view to be a compelling state interest.²⁸⁴ Thus, it is the perceived bias towards the corporation as a party resulting from the independent ads that creates the assumed partiality. As such, the right to respond to clarify the judge's stance on the issue, in turn, alleviates the perceived bias by distancing the judge from the corporation. Preserving this impartiality from the corporation as a party suffices as a compelling state interest.²⁸⁵

These independent ads are a greater concern after *Bennett* because, without the right to respond, judicial candidates no longer have the chance to combat these expenditures or separate themselves from the views of the independent group or corporation.²⁸⁶ If a publicly financed candidate does not have the funds to respond, he is forced to make another choice: either attract "independent" groups who share his views to respond through expenditures on his behalf,²⁸⁷ or leave his views unsaid.²⁸⁸ Without the right to respond, independent ads could potentially

282. *See id.* at 1130.

283. *See Orbach & Sjoberg, supra* note 219, at 46 (noting that the most likely effects of "clucking," or the additional privately-funded speech are to stifle and confuse public discourse).

284. *See White*, 536 U.S. at 777.

285. *See id.* at 775.

286. *See Orbach & Sjoberg, supra* note 219, at 46 (claiming that the second-best solution to the confusion and misinformation in public discourse would be "to diminish clucking's effectiveness with more speech"). But, the reasoning and holdings of *Citizens United*, *Davis*, and *Bennett* are "inconsistent with the goal of fostering healthy public debate" in that they prohibit the entry of more speech. *See id.*

287. *See Esenberg, supra* note 60, at 1299–1301 (noting that such support may also create perception of bias and due process problems if the candidate is elected).

288. *But see Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, ___ U.S. ___, ___, 131 S. Ct. 2806, 2824 (2011) (arguing that "an advertisement supporting the election of a candidate that goes without a response is often more effective than an advertisement that is directly controverted").

misconstrue not only what the law is, but also how a judge will interpret it.²⁸⁹

“Campaigns go to great lengths to develop precise messages and strategies. An insensitive or ham-handed ad campaign by an independent third party might distort the campaign’s message or cause a backlash against the candidate, even though the candidate was not responsible for the ads.”²⁹⁰ If the expenditures are truly independent, neither the candidate they advocate for nor the candidate they oppose has control over what is being said.²⁹¹ These expenditures essentially indicate to the electorate how the judicial candidate would or would not rule on an issue once on the bench, but without the candidate actually expressing those views.²⁹² Thus, without the right to respond, a candidate does not have the chance to correct the potential misconceptions, creating the perception of a biased campaign when, in fact, it may not be.²⁹³

Politicizing the judiciary to this extent also creates the possibility for a “judge with a vision”²⁹⁴ in other ways as well. Aside from the concern that judges will shape their views so as to gain financial support, such politicizing also creates a risk that judges will use their courtroom as a platform. In order to gain support, judicial candidates may be forced to make statements during the campaign that are considered “nonpromissory,”²⁹⁵ but that are couched in terms so as to gain support

289. See Esenberg, *supra* note 60, at 1335 (“The form of bias likely to arise from interest-group support, then, is likely to be a perceived inclination toward a particular legal or political position.”).

290. Rotunda, *supra* note 92, at 47 (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, ___, 129 S. Ct. 2252, 2273 (2009) (Roberts, C.J., dissenting)).

291. See *Citizens United v. FEC*, 558 U.S. ___, ___, 130 S. Ct. 876, 910 (2010) (“By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate.”).

292. See Rotunda, *supra*, note 92, at 47 (commenting on the situation from *Caperton* in which once a company executive made his independent expenditures to a judge who later heard a case involving the company, there was little that either judicial candidate could do about it); see also Moenius, *supra* note 122, at 1130.

293. See Orbach & Sjoberg, *supra* note 219, at 43 n.241 (arguing that the “privately funded speech could divert attention from important issues or confuse voters without any corrupt motives”).

294. See Epps, *supra* note 272, at 41.

295. See *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002); see also Moenius, *supra* note 122, at 1130.

from independent groups or corporations.²⁹⁶ Such statements also indirectly tie the judicial candidate to the group that made the expenditure, creating a sense of “indebtedness [that] judges naturally will feel towards those corporations and organizations that make substantial expenditures on the judicial candidate’s behalf.”²⁹⁷ Also, even if the judge did not technically promise anything to these groups in exchange for support, this creates additional problems if the groups think the judge did, and so support the candidate or oppose his adversary, either explicitly or implicitly,²⁹⁸ expecting something in return.²⁹⁹

First, by politicizing judicial elections to this extent, it creates the problem that the judge feels indebted to these corporations and thus rules in their favor.³⁰⁰ Although the Court has continually held that independent expenditures do not result in corruption or the appearance of corruption because such expenditures are supposedly organized without the candidate knowing,³⁰¹ few judicial candidates will be oblivious to the reality that a group or individual has spent on their behalf.³⁰² This

296. See Moenius, *supra* note 122, at 1129–30.

297. *Id.* at 1131.

298. See Esenberg, *supra* note 60, at 1335 (“In theory, there is no reason that endorsements—particularly by a large group—cannot create the same type of ‘debt of gratitude’ that was of concern in *Caperton*.”). Unlike North Carolina’s provision for matching funds, Wisconsin’s provision did not provide additional funds to a candidate participating in the public funding if advertisements in support of his or her opponent were paid for by independent groups. See James Sample, *Court Reform Enters the Post-Caperton Era*, 58 DRAKE L. REV. 787, 804 (2010). As a result, “the majority of the television advertising in the state’s court races” were sponsored by independent groups. *Id.*

299. See Moenius, *supra* note 122, at 1130 (noting the possibility that if a judge makes a statement on his or her stance on an issue, independent groups and corporations may create advertisements for or against that judge, turning a nonpromissory campaign statement into an implied promise).

300. See Susman, *supra* note 110, at 364.

301. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

302. It is also possible that the converse is true. If judges are not oblivious to who makes certain expenditures on his behalf, the judge is also not oblivious to who makes expenditures against him. Thus, the due process rights of the group or individual who was able to exercise their First Amendment right against the election of the judge, may also be in jeopardy not because the judge would be biased in their favor, but because the judge may be biased against them. See Esenberg, *supra* note 60, at 1336 (“The potential for apparent impropriety or an unacceptable probability

“debt of gratitude” that may be owed to, at least, the support of an independent group representing a particular interest or point of view (as opposed to, as Justice Kennedy seemed to see it, being virtually an alter ego of a particular party with a private interest) is indistinguishable from the type of pressure that may flow from a judge’s recognition of who supports her and how those supporters’ behavior may impact future elections.³⁰³

Thus, when the judge arrives on the bench, “the indebtedness and dependence judges may feel to corporations and organizations that quite obviously had a lot to do with putting those judges on the bench,”³⁰⁴ means that these “independent” groups wield control over both who decides the law and how it is decided.³⁰⁵ Moreover, if a candidate had to make a statement during the campaign to gain support and get elected, once on the bench, the “temptation to avoid contradicting a campaign statement will be almost automatic—regardless of impartiality considerations.”³⁰⁶

Second, organizations may think that the judge promised them something and may threaten to withhold support or advocate for the judge’s opponent in the next election if the judge does or did not rule in the organization’s favor.³⁰⁷ Thus, judges may be hesitant to contradict the statement that resulted in this kind of support for fear of the withdrawal of that support.³⁰⁸ In addition to the possibility that judges will decide

of bias is just as likely to stem from opposition to a judge as from support for a judge.”).

303. Esenberg, *supra* note 60, at 1334.

304. Moenius, *supra* note 122, at 1131.

305. *See id.* at 1124 (“This unregulated power to expend endless amounts of money to ensure that a particular candidate is put on the bench, combined with the substantial deterioration of judicial campaign speech regulations, allows corporations to buy promises of partial decisions, and thus nearly erases the minimal independence left in the elected judiciary.”); *see also supra* notes 98–99 and accompanying text.

306. Moenius, *supra* note 122, at 1132.

307. *See* Youn, *supra* note 118, at 5 (recounting the facts of *Caperton* to show an “example in which an independent expenditure ad campaign unseated an elected official who was at odds with a corporate agenda”).

308. *See* Moenius, *supra* note 122, at 1131.

cases in favor of those who helped get them elected, there is also the risk that judges will decide cases because they do not want to alienate potential donors.³⁰⁹ Corporations can now control judges by proclaiming: either rule in the way that best benefits our company, or we will run ads that favor your opponent.³¹⁰ The fact that corporations can wield the power in determining how a judge comes out on a matter of law not only when they are before the court, but also when ruling a certain way could have a detrimental impact on their business, is not the function of the judiciary.³¹¹

These concerns clearly implicate the Court's definition of "impartiality" as "the lack of bias for or against either *party* to the proceeding"³¹² that is a sufficient compelling state interest.³¹³ The indebtedness the judge either explicitly feels or implicitly indicates suggests that the judge does and will favor the party that contributed to his or her campaign once that party arrives in court.

Moreover, these concerns are not nearly as problematic in the context of political elections because of the inherent nature of the political system.³¹⁴ Voters expect politicians to be in favor of a certain issue or viewpoint precisely because of their ideology that they professed during the election.³¹⁵ This expectation is part of the democratic system;

309. *See id.*

310. *See* Nichol, *supra* note 14, at 1011.

311. *See* Esenberg, *supra* note 60, at 1296–97 (noting that it is unclear from *Caperton* whether a judge must recuse himself if the campaign support came from an advocacy or interest group, or whether the rule of recusal only applies when the supporter is a particular litigant).

312. *Republican Party of Minn. v. White*, 536 U.S. 765, 775 (2002).

313. *Id.*

314. *See* Chemerinsky & Sample, *supra* note 20, at 51 (noting that "a legislator is not disqualified from voting on a bill that benefits those who spent a great deal of money for his or her election"); *see also* Caldwell, *supra* note 222, at 50 ("It's essential for voters to know what kinds of policies a politician would pursue.").

315. *See* Eric Sandberg-Zakian, *Rethinking "Bias": Judicial Elections and the Due Process Clause After Caperton v. A.T. Massey Coal Co.*, 64 ARK. L. REV. 179, 198 (2011) (noting that elected officials consider "which course of action is most consistent with the ideological commitments and policy goals of their constituents"). Sandberg-Zakian also notes that consideration of career aspirations and reelection prospects is recognized in political elections, and that these considerations are often weighed when making decisions consistent with the ideologies and policy goals of their constituents. *Id.*

voters understand that majority wins, and so then the majority's viewpoint controls.³¹⁶ While this may influence how the law is crafted, it should not determine who wins under it.³¹⁷

Thus, not only will the expenditures from these independent groups in effect determine *who* will interpret the law,³¹⁸ but it also suggests that they determine *how* it will be interpreted.³¹⁹ Although people elect representatives and senators to further their views and craft laws expressing those views, “[i]t is not up to the people to determine what our Constitution means.”³²⁰ “If that were the case, we would not have integrated schools, we would not have integrated lunch counters, we would not have women voting. All those civil rights pioneered by the courts, if they were left up to the people, would be different.”³²¹ Thus, while individuals and independent groups no doubt have the right to spend money through independent expenditures to express their views about what they think the law should be,³²² they should not have the unfettered right to determine what interpretation prevails.³²³ As Justice Ginsburg noted in her dissent in *White*, “even when [judges] develop common law or give concrete meaning to constitutional text, judges act

316. See *White*, 536 U.S. at 798 (Stevens, J., dissenting) (“In a democracy, issues of policy are properly decided by majority vote.”).

317. See Moenius, *supra* note 122, at 1125 (noting that it is possible “from a ‘consumer’ standpoint, it would be cheaper to purchase a few judges than it would be to buy an entire legislature”).

318. See *id.* at 1131 (remarking that the influx of independent expenditures means that “not only will special interests be deciding races but they will be deciding law”).

319. See generally Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions & Judicial Decision*, 86 N.Y.U. L. REV. 69, 100 (2011) (empirical analysis finding statistically significant relationship between campaign contributions and judicial decisions in favor of contributors’ interests in partisan elections). But under this analysis, the effects could be the same for expenditures.

320. Caldwell, *supra* note 222, at 50 (quoting Justice Michael Streit, one of the justices ousted in the Iowa retention election).

321. *Id.* (quoting Justice Streit). This raises a different aspect of judicial activism that, while not at issue in this Note, plays into the context of the judges acting to get a certain result for a certain litigant.

322. See *Buckley v. Valeo*, 424 U.S. 1, 28–29 (1976) (per curiam); see also Rotunda, *supra* note 92, at 58.

323. See Caldwell, *supra* note 222, at 50.

only in the context of individual cases, the outcome of which cannot depend on the will of the public.”³²⁴ Thus, while “[l]egislative and executive officials act on behalf of the voters who placed them in office; ‘judges represent the [l]aw.’”³²⁵ As such, the right to respond in judicial elections is crucial so as to combat the perception that these outside influences now control both who makes the law and who wins under it.³²⁶

C. *Shifting the Burden to Potential Litigants*

Even if these expenditures in support of a candidate are actually independent, the problem of “implied promises” still exists in the eyes of the voters.³²⁷ These expenditures essentially indicate to the electorate how the judicial candidate would or would not rule on an issue once on the bench.³²⁸ Thus, even if a judge claims to be impartial, how impartial a judge says that he or she is or will be is not always relevant.³²⁹ Rather, what matters is how impartial those judges appear in court to the litigants opposing the groups who made the expenditures.³³⁰

A poll conducted earlier this year by Justice at Stake, a non-partisan Washington, D.C. based campaign working to keep state and

324. See *Republican Party of Minn. v. White*, 536 U.S. 765, 806 (2002) (Ginsburg, J., dissenting).

325. *Id.* at 803 (quoting *Chisom v. Roemer*, 501 U.S. 380, 411 (1991) (Scalia, J., dissenting)).

326. See Hasen, *supra* note 47, at 1003 (“Independent spending favoring officeholders (or attacking their opponents) can help spenders curry favor with elected officials, and legislative actions therefore may be skewed toward the interests of the big spenders. This is a distortion of legislative rather than electoral outcomes.”).

327. Moenius, *supra* note 122, at 1130.

328. *Id.*

329. See *White*, 536 U.S. at 790 (O’Connor, J., concurring) (“Even if judges were able to refrain from favoring donors, the mere possibility that judges’ decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public’s confidence in the judiciary.”); see also Sample, *supra* note 23, at 775.

330. See Sample, *supra* note 23, at 775 (arguing that the perspective of the individual litigant is the most fundamental structural characteristic distinguishing the courts from the legislative and executive branches).

federal courts fair and impartial,³³¹ and the N.C. Center for Voter Education revealed how North Carolinians generally perceived the effect of contributions to judges during their campaign on the outcomes of court cases.³³² The poll revealed that forty-three percent of the people polled believed that campaign contributions greatly impact the later rulings of judges.³³³ The poll also showed that eighty-five percent believed that judges should disqualify themselves when contributions have been made in support of or against the judge hearing the case.³³⁴ The poll also found that forty-eight percent of individuals believed that public funding of judicial elections reduced corruption.³³⁵

This poll reveals several interesting perceptions about judicial elections in North Carolina and how North Carolinians view these elections. First, in the eyes of North Carolinians, bias equals corruption.³³⁶ Second, these numbers indicate that almost half of North Carolinians think their judges could potentially be biased, but that they believe public financing can solve this problem.³³⁷ As noted previously, without matching funds, the public financing system is essentially rendered obsolete.³³⁸ Third, while the poll only specifically asks about contributions, it is likely that few voters would actually know whether an ad in support of or against a judicial candidate that was paid for by a corporation qualified as a direct contribution or independent expenditure.³³⁹ Thus, if voters see ads run in support or opposition to a

331. See *Justice at Stake's Mission*, JUSTICE AT STAKE, <http://www.justiceatstake.org/about/index.cfm> (last visited Mar. 16, 2012).

332. *North Carolina Registered Voter Survey*, JUSTICE AT STAKE (Feb. 22, 2011), http://www.justiceatstake.org/file.cfm/media/cms/q165_freq_limited_release_9E72F4684EB8B.pdf.

333. *Id.*

334. *Id.*

335. *Id.*

336. See Press Release, *N.C. Voters: Campaign Contributions Influence Court Rulings*, N.C. CTR. FOR VOTER EDUC. (Feb. 22, 2011), http://ncvotered.com/research/2011/2_22_11_judicial_poll.php.

337. *Id.* (“Voters believe that giving judicial candidates an alternative to special-interest money to fund their campaigns is key to protecting the integrity of our courts.” (quoting Damon Circosta, executive director of the N.C. Center for Voter Education)).

338. See *supra* notes 215–21 and accompanying text.

339. Although ads may state “paid for by” a certain company that still creates an indirect connection for the voter.

candidate that are paid for by independent groups or corporations, voters are likely to assume the connection between the candidate and the corporation, regardless of the actual form of spending.³⁴⁰ This assumed connection might influence not only how voters vote,³⁴¹ but also how they perceive the judge both during the election and once on the bench.³⁴²

Without matching funds for judicial elections, the burden of choice also shifts to the potential litigants facing those who made contributions or expenditures in judicial elections.³⁴³ Thus, by not allowing states to burden these groups because of the choice they must make in deciding whether to speak or not, they impose burdens on litigants who must choose: bring suit and face the risk of bias, or do not bring suit at all. This situation reflects the “openmindedness” definition of impartiality the Court discussed in *White*.³⁴⁴ Although the Court notes that defining impartiality to describe “openmindedness” is not common,³⁴⁵ the Court acknowledges “impartiality in this sense, and the appearance of it, are desirable in the judiciary.”³⁴⁶ The Court considers “openmindedness” as the willingness of a judge to “consider views that

340. See Carrington, *supra* note 230, at 1984–85.

341. Moenius, *supra* note 122, at 1131 (“Because the general public knows little about judicial qualifications, an uninformed citizen is likely—when choosing between two judicial candidates she knows little about—to vote for the judge she remembers seeing the insurance company’s advertisements for, or maybe even more understandably, not vote for the judge she saw advertisements against.”).

342. See Esenberg, *supra* note 60, at 1299–1301.

343. See *Republican Party of Minn. v. White*, 536 U.S. 765, 778 (2002); see also Grimes, *supra* note 26, at 884 (noting that because judicial candidates must cultivate constituent, and thus donor relationships, in order to keep their jobs, “a combination of bias-creating (but protected) speech and bias-ensuring (but legal) campaign money, litigants on the wrong side of a state supreme court majority often do not stand a chance”). This presents the image of favoring the wealthy, as people perceive justice can be bought and is thus only available for those who can afford it. See Nichol, *supra* note 14, at 1016–17.

344. See *White*, 536 U.S. at 766.

345. *Id.*

346. *Id.* The Court rejected the definition of impartiality as “openmindedness” with respect to the announce clause in *White* because they did not think “the Minnesota Supreme Court adopted the announce clause for that purpose.” *Id.* at 778.

oppose his preconceptions, and remain open to persuasion.”³⁴⁷ Additionally, the Court states that this “sort of impartiality seeks to guarantee each litigant, not an *equal* chance to win the legal points in the case, but at least *some* chance of doing so.”³⁴⁸ The burden potential litigants face in weighing their probability of justice defeats the purpose of the judiciary, as a potential litigant with a viable claim may decide not to bring suit because she thinks she does not have a chance given what was said about the judge’s views during the campaign.³⁴⁹ Moreover, a situation where a judicial candidate is left without the right to respond is even more problematic because the potential litigant may base such a decision on information provided by interest groups, not the candidate.

Furthermore, under the Court’s standard for proving the burden on one’s First Amendment right in *Bennett*,³⁵⁰ one would not even have to prove that he or she actually did not bring suit because of fear of bias.³⁵¹ Just the fact that a potential litigant was faced with the choice of whether to bring the suit and risk bias, or not bring it at all, would deem that choice an unjustifiable burden.³⁵² Such a choice is far more burdensome in that it potentially deprives the potential litigant of the right to a fair trial in a fair tribunal under due process of law before they even get to the courtroom. This is perhaps the most problematic consequence of losing the right to respond because it begs the question of

347. *Id.* See also Esenberg, *supra* note 60, at 1318 (noting that there is a sense “in which we believe that a judge ought to be open to argument and willing to change her mind”).

348. *White*, 536 U.S. at 778.

349. See Grimes, *supra* note 26, at 884.

350. *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, ___ U.S. ___, 131 S. Ct. 2806, 2823 (2011).

351. See *id.* (“While there is evidence to support the contention of the candidates and independent expenditure groups that the matching funds provision burdens their speech, ‘it is never easy to prove a negative’—here, that candidates and groups did not speak or limited their speech because of the Arizona law.” (quoting *Elkins v. United States*, 364 U.S. 206, 218 (1960))).

352. *Id.* at ___, 131 S. Ct. at 2823 (“we do not need empirical evidence to determine that the law at issue is burdensome”). See also Steven D. Schwin, *The Right to Campaign Without a Response: Analysis of Arizona Free Enterprise*, CONSTITUTIONAL LAW PROF. BLOG (June 29, 2011), <http://lawprofessors.typepad.com/conlaw/campaign-finance/> (“[T]he Court doesn’t seem interested in whether Arizona’s public financing system deters speech *in fact*; it’s only interested in whether it deters speech *in its own theory*.”).

whether the First Amendment right of speech would trump the Fourteenth Amendment right of due process.³⁵³

Recusal standards cannot solve this problem because, as noted, the due process rights of potential litigants are not affected unless and until the litigants are before a judge.³⁵⁴ A judge cannot recuse him or herself if the case has not yet been brought. Moreover, even if the state has adopted recusal standards for situations such as this, it does not ensure that the judge will perceive the presence of a campaign supporter as a conflict.³⁵⁵ Certain human characteristics, such as reciprocity and denial, “make it impossible for those judges to recognize threats to their impartiality, and difficult to recuse themselves as frequently as they should.”³⁵⁶ “Reciprocity, the often unconscious impulse to return a favor,”³⁵⁷ and denial, “the inability to confront or even perceive inconvenient facts,”³⁵⁸ make recusal standards essentially meaningless.

Additionally, the reliance on recusal standards assumes that potential litigants are aware of the current judicial standards for recusal and know when a judge will have to recuse himself. If, in fact, the litigant is not aware of such standards or the ability to have the judge recused, he or she may refrain from bringing the suit at all or proceed under a judge whom he or she believes, and perhaps the judge believes as well, to be impartial. This deprives the litigant of justice before he or she even gets to the courtroom because of the appearance of a biased judiciary. As such, the bias that results falls within two of the Court’s definitions of impartiality that are potentially compelling state

353. See Sandberg-Zakian, *supra* note 315, at 214 (indicating how the “increased competitiveness of judicial elections and the advent of expensive TV advertising” raises new due process issues). See also Weicher, *supra* note 220, at 835.

354. See Grimes, *supra* note 26, at 878 (“Potential bias toward a litigant or her cause may only manifest itself in actual cases or controversies.”).

355. See Susman, *supra* note 110, at 360 (noting that society often considers judges to be “superhuman,” expecting them to be above certain flaws).

356. *Id.* (arguing that the principles of reciprocity and denial create the probability that judges will be influenced by campaign support from parties and lawyers before them, no matter the amount, and that any standard of recusal will likely be inadequate to counter that impartiality).

357. *Id.*

358. *Id.*

interests.³⁵⁹ The burden potential litigants face defeats impartiality as defined as “the lack of bias for or against either *party* to the proceeding,”³⁶⁰ and the “openmindedness” of a judge to “consider views that oppose his preconceptions, and remain open to persuasion.”³⁶¹ As such, the biased judiciary that results from losing the right to respond constitutes a compelling state interest sufficient to satisfy strict scrutiny.

IV. CONCLUSION

Despite the fact that the Court rejects the notion that matching funds serve a compelling state interest in preventing corruption for political elections, the same cannot be said for judicial elections. Although phrased differently, the standards for corruption in political elections are essentially the same as “bias” and thus fall outside the definitions of “impartiality.” Thus, the matching funds prevent corruption by preserving the appearance of an impartial judiciary. A biased judiciary, or the appearance of one, can result from *quid pro quo* corruption, or the appearance of it, which arises from direct contributions, and the corruptive influence of money resulting from numerous independent expenditures. However, the right to respond erodes the perception of bias, as judges are able to clarify misperceptions and create distance from unwanted or potentially bias-creating connections. Furthermore, independent groups or corporations are still free to express their views whenever, however, and for whomever they wish. Matching funds simply provide the judicial candidate with a way to preserve independence and impartiality, or at least the appearance of it, in no way without taking speech rights from others. Although these groups may be burdened by their decision of whether or not to spend,³⁶² that burden does not outweigh the burden faced by judicial candidates and potential litigants. As such, preserving the right to respond through matching funds in judicial elections protects both the actual and perceived impartiality of the judiciary. Not only is this perceived and

359. *Republican Party of Minn. v. White*, 536 U.S. 765, 775–78 (2002).

360. *Id.* at 775.

361. *Id.* at 778.

362. *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, ___ U.S. ___, 131 S. Ct. 2806, 2819–20 (2011).

actual impartiality a sufficient compelling state interest to survive strict scrutiny, preserving the impartiality is necessary in light of the influx of special interest money into judicial elections.