

THE “BRAVE LITTLE STATE OF VERMONT” CAN OVERCOME *CITIZENS UNITED* ALL BY ITSELF

James Marc Leas^{*†}

“I love Vermont because of her hills and valleys, her scenery and invigorating climate. But most of all because of her people. They are a race of pioneers who have almost beggared themselves in the service of others. If the spirit of Liberty should vanish from other parts of the Union and the support of our institutions should languish, it could all be replenished from the generous store held by the people of the brave little state of Vermont.”

—United States President Calvin Coolidge, 1921¹

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* James Marc Leas is a patent lawyer who lives in South Burlington, Vermont.

† The Author thanks attorney Rob Hager for reviewing and offering helpful suggestions.

1. President Calvin Coolidge, Vermont is a State I Love (Sept. 21, 1928), <https://coolidgefoundation.org/resources/speeches-as-president-1923-1929-21/>.

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INTRODUCTION

Vermont can take action now to restrain the corrupting effects of money in elections without running afoul of *Citizens United*.² With a result joined by all nine Justices, in *Nevada Commission on Ethics v. Carrigan*,³ the Supreme Court approved legislative conflict of interest recusal as a method to prevent corruption.⁴

Recusal takes a cut at the corruption problem in a manner that is opposite to the way the old limits on election spending attempted. Vermont's own reasonable contribution limits were declared unconstitutional by the United States Supreme Court in *Randall v. Sorrell* based on the notion that money is protected speech.⁵ The United States Supreme Court initiated this line of decisions with *Buckley v. Valeo*,⁶ continuing through *Citizens United* and more recent cases that take its logic even further. Recusal rules straightforwardly address the heart of corruption in democracy while entirely avoiding any entanglement in the convoluted and mostly improvised First Amendment reasoning of those decisions.

Outrage over *Citizens United* was initially directed toward advocacy of a constitutional amendment to permit restoration of election spending restrictions. However, the Supreme Court's decision in *Nevada Commission on Ethics* means that updating our recusal rules provides a far easier and faster way for Vermont to begin to stamp out the corrupting influence of money on elections.

I. VERMONT STATE SENATE AND HOUSE RECUSAL RULES

Perhaps the most important recusal fix would be to update Vermont House and Senate legislative rules that have long been in place to prevent conflicts of interest.

2. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).
 3. *Nev. Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343 (2011).
 4. *Id.* at 2350–51.
 5. *Randall v. Sorrell*, 548 U.S. 230, 236–37 (2006).
 6. *Buckley v. Valeo*, 424 U.S. 1 (1976).

Current Vermont Senate Rule 71: No senator shall be permitted to vote upon any question in which he or she is directly or immediately interested.⁷

Current Vermont House Rule 75: Members shall not be permitted to vote upon any question in which they are immediately or directly interested.⁸

Corruption of elected officials can be addressed at either side of the corrupting transaction, the money side or the voting/decisionmaking side. Existing Vermont rules allow members of the legislature to own a business and to otherwise enjoy gains from private business interests while serving in the legislature. The existing rules address self-dealing corruption by prohibiting a member from voting in the Vermont Senate or House on any question in which the member has such a private interest. While the phrasing of the existing recusal rules is sufficiently broad to apply to a range of situations, they have not explicitly covered election-expenditure-created conflicts of interest.

A. Vermont Executive Branch Appointees Are Covered by Recusal Rules

An Executive Order issued by Vermont Governor Peter Shumlin on July 21, 2011, explicitly includes a wide range of anti-corruption provisions, including a recusal rule.⁹ The Executive Order prohibits an executive branch appointee from taking “any action in any particular matter in which he or she has either a conflict of interest or the appearance of a conflict of interest”¹⁰ It prohibits an appointee from “[u]ndermining his or her independence or impartiality or action;” or “[t]aking official action on the basis of unfair considerations;” or “[g]iving preferential treatment to any private interest on the basis of unfair considerations.”¹¹

7. PERMANENT RULES OF THE VERMONT SENATE 14 (Vt. 2013), <http://legislature.vermont.gov/assets/All-Senate-Documents/Senate-Rules.pdf>.

8. RULES AND ORDERS OF THE HOUSE OF REPRESENTATIVES 14 (Vt. 2014), <http://www.leg.state.vt.us/HouseClerk/houserules.htm>.

9. Exec. Order No. 09-11, VT. STAT. ANN. tit. 3A, § 3-53 (2015), <http://legislature.vermont.gov/statutes/fullchapter/03APPENDIX/003>.

10. *Id.* § 3-53 (III)(A)(2).

11. *Id.* § 3-53 (II)(A)(1)–(3).

B. Elected Officials Are Not Covered for Election Spending

However, the Executive Order covers only appointees, not elected officials. Nor are any Vermont elected officials otherwise prohibited from voting or taking action on a matter of importance to developers and other businesses that spent, or promised to spend, a substantial amount of money to help the officials get elected.

The Governor's Executive Order recognizes that "any payment, gift or favor from any private interest" can create a conflict of interest for an appointed official.¹² Strangely, however, no Vermont law requires similar recognition by Vermont elected officials when they take action on a matter of interest to a business which invested a substantial amount of money to help elect the official. Money spent by these special interest groups on a public official's election can be the cause of an unfair consideration when weighed against what would best serve the interests of the public at large.

Elected officials play a leading role in setting and carrying out State policy. Consequently, risks to the public from election-spending-created conflicts of interest are significantly greater than the risks from conflicts properly avoided by existing appointee recusal rules. Enacting a similar rule requiring recusal from decisionmaking for Vermont elected officials based on conflict-creating and independent-judgment-impairing election spending can resolve this contradiction.

C. Election Money from Businesses

Supreme Court decisions, including *Buckley*, *Citizens United*, and *McCutcheon v. F.E.C.*,¹³ and legislation passed by Congress in 2014¹⁴ drastically increased the amount of money in politics.¹⁵

Much of the election spending ultimately comes from businesses or their owners or managers. The money may be directly spent by the business itself. Or such money may be channeled through nonprofits, such as business associations or national associations of elected officials¹⁶ that raise most of

12. *Id.* § 3-53 (III)(A)(6).

13. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434 (2014).

14. Consolidated and Further Continuing Appropriations Act, Pub. L. No. 113-235, § 101, 128 Stat. 2772 (2015).

15. Rob Hager, *Five Years of Citizens United*, COUNTERPUNCH (Jan. 23, 2015), <http://www.counterpunch.org/2015/01/23/five-years-of-citizens-united/>.

16. Andy Bromage, *A Knockout Punch for Sorrell?*, SEVEN DAYS (Aug. 15, 2012), <http://www.sevendaysvt.com/vermont/a-knockout-punch-for-sorrell/Content?oid=2184623>.

their money from big corporations and unions.¹⁷ Or this money may be routed through lobbyists, super PACs¹⁸, or party committees. Such business-funded front groups have had decisive influence on several Vermont elections.¹⁹

Businesses that invest money in electioneering may commonly expect a return on that investment through passage of particular legislation. This is a matter of “IOUs, if you will, real or perceived to be there” as described by Vermont Attorney General Bill Sorrell.²⁰

Some legislators may already reasonably interpret the existing Vermont legislative recusal rules to cover such a situation. Thus, they may recuse themselves when a question comes before the legislature that is of interest to a business that contributed or spent a substantial amount of money toward their election. Some of these legislators may resist the inherent pressure to pass legislation that these businesses favor. In doing so, they risk losing contributions from these businesses and having those contributions diverted to their opponents. Other Vermont elected officials may not feel themselves bound to recuse themselves on matters important to their campaign’s contributors since they are not explicitly required by any rule or statute to do so.²¹

Since the Supreme Court declared Vermont’s reasonable contribution limits unconstitutional and made unlimited independent expenditures legal, a reasonable legislator feels increasing pressure. The need to raise money again for a future election may drive legislators to limit the thought given to deciding whether to voluntarily recuse themselves—especially when the text in the existing legislative recusal rules was written for a different era and is left entirely to their own interpretation. The possibility that a substantial dose of money in the next election cycle will go to their opponent may give legislators an incentive to temporarily suspend their independent judgment. Instead, they may consider the IOUs created by their business supporters when called upon to vote on matters of interest to those businesses, even if there was absolutely no agreement to do so.

17. Paul Heintz, *Traveling Salesman: Shumlin Pitches Himself Coast to Coast*, SEVEN DAYS (Mar. 19, 2014), <http://www.sevendaysvt.com/vermont/traveling-salesman-shumlin-pitches-himself-coast-to-coast/Content?oid=2337314>.

18. Paul Heintz, *Big Fish: Sorrell Nets Corren, but Did He Catch the Wrong Guy?*, SEVEN DAYS (Apr. 1, 2015), <http://www.sevendaysvt.com/vermont/big-fish-sorrell-nets-corren-but-did-he-catch-the-wrong-guy/Content?oid=2546959>.

19. Kevin J. Kelley, *The South Burlington City Council Chair May Have Violated Campaign-Finance Law; Could She Get Busted for It?*, SEVEN DAYS (Sept. 11, 2013), <http://www.sevendaysvt.com/vermont/the-south-burlington-city-council-chair-may-have-violated-campaign-finance-law-could-she-get-busted-for-it/Content?oid=2266027>.

20. Heintz, *supra* note 18.

21. *See id.* (referencing maneuvering by candidates for lieutenant governor among others).

The Supreme Court created this relatively new type of private interest in elected officials, and the 2014 and 2015 federal appropriations bills expanded election spending and dark money.²² It was also enhanced in Vermont by the increase in contribution limits enacted in Act 90, adopted by the Vermont legislature in 2014.²³ Legislators know they increasingly need a decent slice of electioneering money contributed or spent on their behalf to ensure reelection.

No formal or informal agreement between a business and an elected official is needed. The prospect of receiving continued contributions (or independent expenditures) versus seeing that same money going to their opponent itself compromises the independence of judgment and the votes of legislators. The oath of office for Vermont officials provided in Vermont's constitution²⁴ to "do equal right and justice to all persons, to the best of your judgment and ability" has effectively been replaced by special rights for those with big dollars to spend.

Unchecked by an updated, explicit, and vigorously enforced recusal requirement, over time the result is likely to be as described in the opening paragraphs of Vermont Act 90, with campaign contributions having "the ability to corrupt and create the appearance of corrupting candidates and the democratic system."²⁵ One person, one vote, and the provision in Vermont's constitution "that all elections ought to be free and without corruption" are effectively being replaced by one dollar, one vote.

D. Supreme Court Unanimously Endorsed Recusal to Deter Corruption

In *Nevada Commission on Ethics v. Carrigan*, as mentioned above, the United States Supreme Court reviewed and unanimously approved the Nevada Ethics in Government Law as a way to deter corruption. The approved law stated:

[A] public officer shall not vote upon or advocate the passage or failure of . . . a matter with respect to which the independence of judgment of a reasonable person in his situation would be

22. Rob Hager, *Rackets Science: Obama's Omnibus, or the Influence Peddlers Protection Act of 2015 (Pt 1)*, HUFFINGTON POST (Jan. 7, 2016), http://www.huffingtonpost.com/rob-hager/rackets-science-cromnibus_b_8914836.html.

23. An Act Relating to Campaign Finance Laws, No. 90, S.82, 2013-14 Legis. Sess. (Vt. 2014).

24. VT. CONST. ch. 2, § 56.

25. An Act Relating to Campaign Finance Laws § 1(5).

materially affected by . . . [h]is commitment in a private capacity to the interests of others.²⁶

The public officer found to have a conflict of interest in violation of the Ethics in Government Law was an elected member of the city council.²⁷ He had voted to approve a project from which his friend and former election campaign manager would benefit as a consultant.²⁸

The issue was whether the independence of judgment of a reasonable person in the public officer's position would be materially affected by the fact that his friend and former election campaign manager would benefit from the vote. Nevada's Commission on Ethics found that it was, and censored the public official.²⁹ A Nevada district court denied his petition but the Nevada Supreme Court reversed, holding that the First Amendment protects city council voting.³⁰ Applying strict scrutiny, the majority found that the relevant provision of Nevada's Ethics in Government Law was unconstitutionally overbroad.³¹ The United States Supreme Court was then asked to consider the constitutionality of Nevada's Ethics in Government Law.

E. A Legislator's Vote Is Not Protected Speech

In overturning the decision of the Nevada Supreme Court and affirming the constitutionality of Nevada's Ethics in Government Law, the Supreme Court held in *Nevada Commission on Ethics* that a legislator's vote is not protected speech.³² The Court further held, therefore, that First Amendment reasoning "has no application when what is restricted is not protected speech."³³ The Court said that "[r]estrictions on legislators' voting are not restrictions on legislators' protected speech."³⁴ It further explained that "'the procedures for voting in legislative assemblies . . . pertain to legislators not as individuals but as political representatives executing the legislative process."³⁵ It also noted that "the legislator casts his vote 'as trustee for his constituents, not as a prerogative of personal power.' In this respect, voting

26. Nev. Comm'n on Ethics v. Carrigan, 131 S.Ct. 2343, 2352 (2011) (Kennedy, J., concurring) (quoting NEV. REV. STAT. § 281A.420(2) (2007)).

27. *Id.* at 2346 (majority opinion).

28. *Id.* at 2347.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 2350.

35. *Id.* (quoting *Coleman v. Miller*, 307 U.S. 433, 469–70 (1939)).

by a legislator is different from voting by a citizen.”³⁶ Because “a legislator has no right to use official powers for expressive purposes,”³⁷ the Court held that, unlike laws restricting election spending, legislative recusal rules *cannot* violate the First Amendment.³⁸

F. Recusal Is Constitutional

The Supreme Court reinforced its position by further noting in *Nevada Commission on Ethics* that legislative conflict of interest recusal rules go back nearly to the founding of the United States, and that a “universal and long-established tradition of prohibiting certain conduct creates a strong presumption that the prohibition is constitutional.”³⁹ The Court noted that within a week of the United States House first achieving a quorum in 1789 it adopted a rule that “[n]o member shall vote on any question, in the event of which he is immediately and particularly interested.”⁴⁰ This is very similar to the Vermont wording. Both the federal term “particularly” and the Vermont term “directly” can be understood as meaning “specially,” as used in the common phrase “special interest,” as distinguished from a “general” or “public interest.”

G. The United States Senate Recusal Rule as Formulated by Thomas Jefferson

The Court also quoted from a rule adopted by the United States Senate when Thomas Jefferson was its President that was included in *A Manual of Parliamentary Practice for the Use of the Senate of the United States* drafted by Jefferson:⁴¹

Where the private interests of a member are concerned in a bill or question, he is to withdraw. And where such an interest has appeared, his voice [is] disallowed, even after a division. In a case so contrary not only to the laws of decency, but to the fundamental principles of the social compact, which denies to any man to be a

36. *Id.* (quoting *Raines v. Byrd*, 521 U.S. 811, 821 (1997)).

37. *Id.* at 2351.

38. *Id.* at 2347.

39. *Id.* at 2347–48 (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 785 (2002)).

40. *Id.* at 2348 (quoting 1 *Annals of Cong.* 99 (1789)).

41. THOMAS JEFFERSON, JEFFERSON’S MANUAL OF PARLIAMENTARY PRACTICE 194 (1801), <https://www.gpo.gov/fdsys/pkg/HMAN-112/pdf/HMAN-112-jeffersonman.pdf> (last visited Apr. 18, 2016).

judge in his own case, it is for the honor of the house that this rule, of immemorial observance, should be strictly adhered to.⁴²

The Court further noted that “[t]oday, virtually every State has enacted some type of recusal law, many of which, not unlike Nevada’s, require public officials to abstain from voting on all matters presenting a conflict of interest.”⁴³

H. Nobody Has Rights to a Legislator’s Vote

If, as the Supreme Court painstakingly explained in *Nevada Commission on Ethics*, a legislator does not have First Amendment rights regarding his or her own vote in the legislature, nobody can argue that a special interest that spends money in an election has rights regarding that legislator’s vote. Therefore, one who spends or gives money that the Supreme Court considers “speech” cannot also claim that they have a right to have the beneficiary of that “speech” vote on the matter for which the money “spoke.” Without a claim to a right in that vote, this special interest could not have standing to object to a recusal rule on the grounds that it deters them from spending money (“speech”). There is no right to receive a vote on the matter, particularly a vote favorable to their interest.

II. UPDATE TO VERMONT’S SENATE RECUSAL RULE

One proposed update to the Vermont Senate recusal rule currently in place would add the following words in italics:

No senator shall be permitted to vote upon any question in which he or she is directly or immediately interested, *including when the independence of judgment of a reasonable person in his or her situation would be materially affected by election expenditures or a promise concerning election expenditures, where the original source of the money for such election expenditures was or will be from others who are specially interested in that question.*

A. Recusal Rules Specifically Target Corruption

The update would clarify that the personal interest of Vermont legislators includes their interest in money spent by others on their election

42. *Nev. Comm’n on Ethics*, 131 S. Ct. at 2348 (quoting JEFFERSON, *supra* note 41, at 194).

43. *Id.* at 2349.

or reelection. The update would prohibit the legislator from voting on a question benefitting the special interest of another if its electioneering spending was sufficient so that the independence of judgment of a reasonable person in the legislator's situation would be materially affected.

The updated rule could spell out in detail reasonable rules related to the amounts of money and the nature of special interests that would trigger recusal. Recusal because of receiving money from primarily economic interests, such as a business, its owners or its managers, or any front group or series of front groups that collect, aggregate, or funnel money from businesses, would be consistent with the original House and Senate rules. Enforcement procedures could employ juries, which are commonly used for making judgments about "reasonable person" standards.

Unlike the direct restrictions on contributions and spending declared unconstitutional by the Supreme Court, a recusal limit triggered by a specified amount of money or by the type of entity that spent the money, would not invoke First Amendment reasoning. First, electioneering money-speech itself is not restricted. Second, no one has a right to a legislator's vote—not even the legislator himself or herself—as clearly described in *Nevada Commission on Ethics*.

B. Recusal Can Solve Money-Conflict Problems for All Elected Officials

The Vermont House could similarly update its rule to preserve what Jefferson called the "honor of the House."⁴⁴ Town selectboards or town meetings could enact such a rule for that town's selectboard and could recommend that the Legislature enact such rules for itself and for Vermont executive branch elected officials. The Legislature could also enact a law to put similar wording in place to cover voting by all elected Vermont town selectboard members. It could also enact legislation covering decisionmaking by executive branch elected officials, including city mayors, the governor, and the attorney general. The legislation could also apply to other Vermont statewide elected officials, and county elected probate judges and assistant judges.

Legislation along the following lines would broadly cover all elected officials:

No public officer shall be permitted to vote or take any other official action upon any matter with respect to which the independence of judgment of a reasonable person in his or her situation would be materially affected by his or her commitment

44. JEFFERSON, *supra* note 41, at 194.

in a private capacity to the interests of others, including when such a conflict of interest is caused by election expenditures or a promise concerning election expenditures.

Each house in other states and each house of the United States Congress could similarly update their recusal rules. Congress could also adopt similar wording to cover the two federal executive branch elected officials.

C. Recusal Rules Do Not Challenge “Money Is Speech”

Updated recusal rules solve the problem of money in elections in a completely different way than the old spending restrictions did. Consequently, updated recusal rules do not challenge the law enacted by the Supreme Court in its line of “money is speech” decisions.

The rule established in *Buckley v. Valeo*, that electioneering money supposedly spent independent of the candidate’s control has the highest level of protection offered by the First Amendment, is not challenged by the updated recusal rules.⁴⁵ Nor do the updated recusal rules interfere with the means for systemic corruption legalized when the Supreme Court decided *McCutcheon*. There the Court enabled individual plutocrats to contribute millions of dollars in a single election period.⁴⁶

Nor do the updated recusal rules challenge the view, established in *Citizens United*, that independent election spending from any source, including corporations, cannot be banned. The Court established a sole exception in *Bluman v. FEC*: spending by a foreign source can be banned.⁴⁷

Under the updated recusal rules, corporations and developers with business interests in bills before the legislature can keep spending their money in elections. They can do this either directly or through independent super PACs⁴⁸ to help elect a Vermont legislator they favor, or block an opponent they disfavor.

The updated rules solve the corruption problems created by the Supreme Court in the simplest way possible. They require the legislator who benefits from such expenditures to recuse himself or herself on a question of interest

45. *Buckley v. Valeo*, 424 U.S. 1, 51 (1976).

46. *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1462 (2014) (holding that statutory limits on how much money a donor may contribute in total to all political candidates or committees (called “aggregate limits”) violate the First Amendment).

47. *Bluman v. Fed. Election Comm’n*, 132 S. Ct. 1087 (2012), *aff’g* *Bluman v. Fed. Election Comm’n*, 800 F. Supp. 2d 281 (D.D.C. 2011) (holding that corporations cannot be banned from contributing to elections, as elucidated by the Court in *Citizens United*, with the sole exception of spending by foreign corporations).

48. *SpeechNow.org v. Fed. Election Comm’n*, 599 F.3d 696 (D.C. Cir. 2010) (en banc).

to such a spender if a reasonable person would find their independence of judgment impaired by such spending.

D. McCutcheon Points to Recusal

In *McCutcheon*, Chief Justice John Roberts wrote that “[t]he right to participate in democracy through political contributions is protected by the First Amendment, but that right is not absolute. Our cases have held that Congress may regulate campaign contributions to protect against corruption or the appearance of corruption.”⁴⁹ Roberts further said, “Congress may target only a specific type of corruption—‘quid pro quo’ corruption. . . . Spending large sums of money in connection with elections, *but not in connection with an effort to control the exercise of an officeholder’s official duties*, does not give rise to such quid pro quo corruption.”⁵⁰

E. Different Standards for Spending Limits and Recusal

To be valid under *McCutcheon*, Congress (or a legislature) must tailor its election spending restriction law so it restricts only the type of spending that is quid pro quo corruption as defined by the Supreme Court. The spending must be of large enough sums of money in connection with elections and delivered as a contribution to the individual official to show an intention to buy and sell influence. It must also be in connection with an effort to control the exercise of an officeholder’s official duties, such as the officeholder’s vote in the legislature or selectboard, or the officeholder’s executive decisionmaking.

Proof of such effort to control may be far beyond the normal constraints on evidence gathering. It may not be explicit. It may be in private or through an elaborate dance of winks and nods by third parties. The most effective effort to control may be one that involves no effort, just letting the inherent possibility that money spent to help elect the official might be withheld or diverted to an opponent in the next election guide the official’s decisionmaking.

It is much easier to find that a conflict of interest recusal rule is valid. Nevada’s Ethics in Government Law, approved unanimously by the United States Supreme Court, established that the standard is retention of

49. *McCutcheon*, 134 S. Ct. at 1441 (citing *Buckley*, 424 U.S. at 26–27); *see also Buckley*, 424 U.S. at 67 (1976) (noting that “disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity”).

50. *McCutcheon*, 134 S. Ct. at 1450 (emphasis added).

“independence of judgment” as determined by a reasonable person in the legislator’s position.⁵¹

To the extent any application of the updated recusal rule could “burden” the “money-speech” allowed by *Buckley*, the rule narrowly implicates only election spending that a reasonable person would consider creates a conflict of interest or the appearance of a conflict of interest. In each of the money equals speech cases, the Supreme Court acknowledged that States have a sufficient interest in avoiding corruption to justify imposing that type of burden on speech, if narrowly tailored.

The updated recusal rule would not prevent a legislator from voting on matters unrelated to the business interests of persons or businesses that spent money to fund his or her election. Thus, the updated recusal rule would not burden independent election spending, no matter how large or who it was from, on such matters. Nor would it burden election spending too insignificant in amount to control the elected official’s vote. However, the recusal rules do apply when expenditures from persons with similar goals are aggregated together to reach a level that would impair the independent judgment of a reasonable person in the legislator’s position. Furthermore, the recusal rule would not burden large election spending that a reasonable person would find is not in connection with an effort to control the vote of the elected official. Nor would it burden large election spending that a reasonable person would otherwise find does not impair the elected official’s independence of judgment.

The updated recusal rule only affects “large sums of money” spent “in connection with elections” and only precludes “an effort to control the exercise of an officeholder’s official duties.”⁵² Thus, although it only need meet the recusal rule standard affirmed by the United States Supreme Court in *Nevada Commission on Ethics*, which avoids any “money is speech” First Amendment analysis, the updated recusal rule suggested here actually meets the First Amendment quid pro quo standard in *McCutcheon*. This makes it doubly secure from judicial review.

F. Deterrent Effect

The presence of such an updated recusal fix would likely discourage the kind of election spending that any reasonable person would find corrupting. That is precisely the kind of election spending that the United States Supreme Court said Congress and state legislatures could legitimately take action to

51. *Nev. Comm’n on Ethics v. Carrigan*, 131 S.Ct. 2343, 2352 (2011) (quoting NEV. REV. STAT. § 281A.420(2) (2007)).

52. *McCutcheon*, 134 S. Ct. at 1450.

suppress in the line of cases starting with *Buckley* and including *Citizens United* and *McCutcheon*.

G. Odor of Money

In terms the Roberts Court likes to use, chasing after all the different sources of money—including dark sources—flowing into the political system as “quids” is far more difficult and fraught with intricate constitutional hurdles than simply preventing the single “quo” vote by an incumbent whenever the odor of corrupting money is detected by the reasonable person standard.

H. Inherently Narrowly Tailored

The broad brush of the old law, which the Supreme Court ruled was unconstitutional, restricted independent expenditures regardless of whether a particular expenditure was actually corrupting. The updated recusal rule is narrowly tailored to prohibit a legislator from voting only in those situations where a reasonable person would believe the vote involved a payback for election expenditures.

I. “Reasonable Person” Test

The “reasonable person” test is important because politicians commonly plead exceptionalism. They consider themselves to be such important, strong, moral people that they cannot be influenced by money in a way that ordinary reasonable people would. Hillary Clinton’s response in an interview with Charlie Rose on December 1, 2015, illustrates this point.

Clinton said she doesn’t think criticism that she is too close to Wall Street has hurt her image while running for president:

“And did you take the money,” Rose asked?

“Yeah. But that has nothing to do with my positions. Anybody who thinks that they can influence me on that ground doesn’t know me very well,” Clinton said.⁵³

53. *Hillary Clinton Details Plan to Defeat ISIS, Defends Ties to Wall Street*, CBS NEWS (Dec. 1, 2015, 7:07 AM), <http://www.cbsnews.com/news/hillary-clinton-on-fighting-isis-in-syria-iraq-libya-defends-ties-with-wall-street/>.

The point of the reasonable person test is that one does not have to know Hillary Clinton or any other politician very well. It establishes one standard for all.

A glimpse at the views of a reasonable person may be seen in a *New York Times* poll conducted in June 2015. In answer to the question, “[h]ow often do you think candidates who win public office promote policies that directly help the people and groups who donated money to their campaigns[?]”, 55% said “most of the time,” 30% said “sometimes,” and 9% said “rarely.”⁵⁴ Only 4% said “never.”⁵⁵

J. Prospects for Supreme Court Review

Recusal based on the lack of independence of judgment as determined by a reasonable person got a strong stamp of approval in *Nevada Commission on Ethics*. Moreover, updated recusal is narrowly tailored to serve an important state interest, satisfying First Amendment review.

To overturn the recusal rule the Court would likely have to first overrule its own decision that prohibiting legislators from voting does not raise any First Amendment questions. It would then have to overturn its own reasoning in the entire line of cases since *Buckley*. Under that reasoning, a State can legitimately ban election-money-speech if an important state interest is at risk, such as avoiding a conflict of interest indicative of quid pro quo corruption. The updated recusal rule provided here is therefore likely to meet approval if adopted and challenged in court under the First Amendment, the only constitutional tool the Court has wielded to legalize political corruption.

K. Passage in One House

In Vermont, each legislative house has sole authority to amend its own rules.⁵⁶ Thus, a simple majority in either the Senate or the House can update its recusal rule without waiting for the other house to approve it. Nor is updating a legislative rule subject to veto by the governor. If even one house of Vermont’s legislature or Congress guards itself by adoption of an updated recusal rule, passage of laws that depend on the corrupting influence of money in elections could be blocked by that one house even if the other is already deeply under the influence of money in elections. The recusal-provided capacity of one house to block any legislative action in which the

54. *Americans’ Views on Money in Politics*, N.Y. TIMES (June 2, 2015), http://www.nytimes.com/interactive/2015/06/02/us/politics/money-in-politics-poll.html?_r=0.

55. *Id.*

56. VT. CONST. ch. II, § 19.

election-money-influence of business interests is evident is likely to gain approving public notice. Such approval could quickly influence other branches of state and federal governments to adopt updated recusal rules.

L. Legislators Won't Be Able to Vote on Anything?

One argument against the fix proposed here is that it might prevent legislators from voting on anything. First, given the current levels of money in politics it might be better that the legislature does nothing, rather than act under the shadow of systemic corruption. Second, the legislature could avoid such an affect if the recusal rule is enacted with a provision that it comes into effect after the next election and with capacity for vigorous enforcement. This is because the prohibition on voting in the legislature so enforced would strongly de-motivate election spending that a reasonable person would find to be corrupting without affecting any other type of election spending.

CONCLUSION

The update to Vermont recusal rules described in this paper is made necessary by the line of Supreme Court decisions that unleashed a flood of formerly illegal money into politics. That flood of formerly illegal election expenditures, in turn, created a crisis for democracy.

The conflicts of interest created are not just for each legislator as an individual. The conflicts have become or are becoming systemic. By vastly increasing both incumbents' need for election money and the IOUs such money produces, the Supreme Court decisions tilted control over government toward the one percent.

Because the long-existing legislative recusal rules do not cover these election-expenditure-created conflicts, and because of the pressure legislators increasingly feel to obtain money for reelection, the existing recusal rules have not been effective.

The United States Supreme Court opened the door wide for Vermont to solve this problem by updating its legislative and executive branch recusal rules. These rules could foreclose payback for election investments—the corrupting incentive for most money in elections—without restricting any legitimate First Amendment election spending and without running afoul of any Supreme Court decisions in the “money equals speech” line of decisions. Recusal is narrowly tailored to prevent corruption, as those decisions would require if there were any First Amendment issues. But recusal was fully removed from First Amendment protection by the unanimous United States Supreme Court decision in *Nevada Commission on Ethics*.

Other states and the federal government can also use the same approach. Unless, of course, they are already too corrupted. It may be up to the “people of the brave little state of Vermont”⁵⁷ to establish the model for recovering democracy from the tyranny of political corruption legalized by the United States Supreme Court, much like Vermont’s 1777 constitution⁵⁸ which established the American model for constitutional democracy freed from the tyranny of empire.

57. President Calvin Coolidge, *supra* note 1.

58. VT. CONST. of 1777, http://avalon.law.yale.edu/18th_century/vt01.asp