

Congress Shouldn't Tinker With Supreme Court Rules**Connecticut Law Tribune****Monday, March 07, 2011****Copyright 2011, ALM Properties, Inc.****Printed for****Congress Shouldn't Tinker With Supreme Court Rules**

By NORM PATTIS

Christopher Murphy wants to be a U.S. senator, so it is understandable that he will tilt at windmills from time to time. But his poking at the U.S. Supreme Court doesn't make a whole lot of sense, and ought to be rejected. An independent judiciary is fundamental.

The Connecticut congressman wants justices to disclose publicly why they recuse themselves from any given case. Under the laudable goal of transparency, he also wants the Court to develop a procedure for parties to request a decision from the Court about potential conflicts of interests before justices decide a case.

Let's just call him Makework Murphy.

He is inspired, of course, by the ghosts of the increasingly infamous Koch brothers, the billionaire bankrollers of the right, who spend lavishly propagating union-busting libertarianism. The duo inherited a fortune, and is now worth some \$35 billion. The brothers back Gov. Scott Walker in Wisconsin, help fund the Cato Institute, and are the secret financiers of many a rightward tilting ship. The Koch brothers are the sort of folks who get all warm and fuzzy over such things as the Supreme Court's decision in *Citizen's United*, which conferred First Amendment free speech rights on the corporations.

The Kochsters are also lavish hosts at retreats for attended by the likes of Supreme Court Justices Antonin Scalia and Clarence Thomas.

Murphy's heart is in the right place wondering whether Supreme Court justices can be trusted to police themselves on matters of ethics. Paradoxically, the Judicial Code of Conduct, which applies to all other federal judges, is merely advisory as the top nine judges on the court.

But I shudder at the thought potential loss of judicial independence implicit in Murphy's proposal. Do we really want to encourage litigants to make claims about judicial conflicts? It is a pretty wild world out there, those with real-world experience in the courts will tell you. The thought of Congress trying to reign in judges is risible: the partisan squalor on Capitol Hill transforms almost everything it touches into farce. There will shortly come a time in which Americans will simply turn their back on Congress in disgust, seeking the shelter of private associations as public institutions fumble, falter and fail.

The last thing I want to see when I appear in a court, whether at the trial or appellate level, is a judge beholden to a constituency. I am no fan of that school of thought maintaining the popular constitutionalism is best served by an elected judiciary. There is little so dangerous as a mob, even a voting mob, all stoked up in self-righteous fury and the false confidence that comes of singing in unison. A courageous judge can say no to the mob, even a mob of well-heeled lawmakers and congressman: the most dangerous branch of government is, to my mind, the legislature. Just read a statute book some time if you doubt it.

Let judges call the balls and strikes at trial and on appeal. Yes, there is a danger that they will get it wrong, and that they will do so for venal reasons. But opening the veins of judges to congressmen, interests groups and disgruntled litigants will only paralyze an already too timorous judiciary, at least when it comes to the rights of the unpopular and the accused.

If Murphy is outraged by *Citizens United* and the scent of Koch cash circulating through the system, he ought to get behind a movement to amend the Constitution to declare that corporations aren't people with expressive lives. Limiting liability through a formal business entity and then giving those entities the right to monopolize the marketplace of ideas is obscene. But Murphy won't do that. Odds are, his list of contributors is chock-a-block with corporate contributors too.

This is not an auspicious start for a man who wants to become a senator. •

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