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Aligning Judicial Elections with Our Constitutional Values: The Separation of Powers, Judicial Free Speech, and Due Process

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ALIGNING JUDICIAL ELECTIONS WITH OUR CONSTITUTIONAL VALUES: THE SEPARATION OF POWERS, JUDICIAL FREE SPEECH, AND DUE PROCESS

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> I never felt so much like a hooker down by the bus station in any race I've ever been in as I did in a judicial race. Everyone interested in contributing has very specific interests. They mean to be buying a vote. Whether they succeed or not, it's hard to say.
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> *– Ohio Supreme Court Justice Paul E. Pfeiffer*[1]

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[1] Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006, at A1.

I. INTRODUCTION

The Model Code of Judicial Conduct states, "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including . . . instances where: . . . [t]he judge has a personal bias or prejudice concerning a party."[2] No modern issue in legal ethics raises more questions than how judges are chosen and how well such judges do their jobs.[3] States that retain judicial elections increasingly will be called upon to reconcile judges' expanding free-speech rights with litigants' due process right to an impartial judge. The goal of this Note is to address these constitutional rights in the context of the Framers' conception of the separation of powers.

The Framers of the Constitution would be unlikely to recognize most states' current judicial landscape. No judges were elected for the first fifty years of our nation's history, whereas thirty-nine states currently elect at least some of their judges.[4] In 1788, Alexander Hamilton wrote in Federalist Paper No. 78 that "[t]he complete independence of the courts of justice is peculiarly essential" under the separation of powers.[5] By "separation of powers" Hamilton and the Framers envisioned governments with limited powers, with three branches that could use their different powers to check those of the others.[6] Hamilton called the judiciary "the least dangerous" branch, for it held neither the "purse" strings of the legislature nor the force of the executive.[7] The judiciary wielded "merely judgment" that was to be protected from outside influence by safeguards to its independence such as appointment and extended tenure.[8] By contrast, judges today are likely to be able to solicit contributions directly from the lawyers and organizations most likely to

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[2] MODEL CODE OF JUDICIAL CONDUCT Canon 3(E)(1) (2007).

[3] For a comprehensive bibliography (through 1998) of resources on judicial selection, see Amy B. Atchison, Lawrence Tobe Liebert & Denise K. Russell, Bibliography, *Judicial Independence and Judicial Accountability: A Selected Bibliography*, 72 S. CAL. L. REV. 723 (1999). *See also* Malia Reddick, *Merit Selection: A Review of the Social Scientific Literature*, 106 DICK. L. REV. 729, 729 (2002) ("As one judicial selection scholar noted, 'It is fairly certain that no single subject has consumed as many pages in law reviews and law-related publications over the past [fifty] years as the subject of judicial selection.'" (quoting Philip L. Dubois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 SW. L.J. 31, 31 (1986))).

[4] Phyllis Williams Kotey, *Public Financing for Non-Partisan Judicial Campaigns: Protecting Judicial Independence While Ensuring Judicial Impartiality*, 38 AKRON L. REV. 597, 602 (2004).

[5] THE FEDERALIST NO. 78, at 292 (Alexander Hamilton) (New York, J. & A. McLean 1788).

[6] *See, e.g.*, Springer v. Gov't of Phil. Is., 277 U.S. 189, 201-02 (1928) ("[U]nless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; [and] the judiciary cannot exercise either executive or legislative power.").

[7] THE FEDERALIST No. 78, *supra* note 5, at 291.

[8] *Id.*

appear before them in court.[9] Courts have recently held that judicial candidates' free-speech rights extend to false or misleading statements about opponents in advertisements.[10] In addition, candidates may make "pledges and promises" on issues likely to come before them in the near future.[11]

Almost all contributions to judicial candidates come from attorneys and litigants who expect to come before those to whom they are contributing.[12] Attorneys and litigants appear to give significant contributions to judicial candidates for one of two reasons: they hope the contributions will sway judges in their favor, or they seek the election of those with judicial philosophies attuned to their interests.[13] Those who downplay money's influence argue the second point—that contributors simply support like-minded candidates.[14] Whatever a contributor's motive, it often makes no difference to the litigant on the other side, whose faith in the system is dashed.[15] Individual litigants are not the only ones who feel that equal justice is subverted by judicial campaign contributions. A recent Ohio poll found that nine out of ten citizens believe campaign contributions play a role in how judges decide cases.[16] When one side gives thousands of dollars to a judge who later hears its case, may that judge's impartiality "reasonably be questioned"?

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[9] *See e.g.*, Carey v. Wolnitzek, No. 3:06-36-KKC, 2006 U.S. Dist. LEXIS 73869 (E.D. Ky. Oct. 10, 2006).

[10] *See* Weaver v. Bonner, 309 F.3d 1312 (11th Cir. 2002).

[11] *See* N.D. Family Alliance, Inc. v. Bader, 361 F. Supp. 2d 1021, 1035-37 (D.N.D. 2005) (striking down North Dakota's "pledge and promise" clause by equating it with the "announce" clause struck down in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002)). *But see In re* Kinsey, 842 So. 2d 77, 87-88 (Fla. 2003) (holding that Florida's "pledges and promises" clause was narrowly tailored to protect the compelling interest in judicial impartiality).

[12] *See* Catherine Turcer & Jason Danklefsen, *Contributions to Candidates for Justice of the Ohio Supreme Court, January 1-October 4, 2006*, OHIO CITIZEN ACTION, Oct. 31, 2006, http://www.ohiocitizen.org/moneypolitics/2006/judicial.html ("Robert Cupp and Terrence O'Donnell received most of their contributions from lawyers and law firms, the insurance industry, and the health care field" and "Ben Espy had strong support from labor unions.").

[13] In support of the first notion, see David Barnhizer, *"On the Make": Campaign Funding and the Corrupting of the American Judiciary*, 50 CATH. U. L. REV. 361, 379-80 (2001) ("The truths of the situation are simple. Money shapes behavior.") and Aman McLeod, *If At First You Don't Succeed: A Critical Evaluation of Judicial Selection Reform Efforts*, 107 W. VA. L. REV. 499, 505 (2005). In support of the second notion, see Glenn Sheller, Editorial, *Politicians Don't Sell Out Their Beliefs for Campaign Contributions*, COLUMBUS DISPATCH, Oct. 5, 2006, at A15.

[14] Sheller, *supra* note 13.

[15] *See* Liptak & Roberts, *supra* note 1. The article tells the story of an Ohio litigant who felt that several Ohio Supreme Court justices' acceptances of large campaign contributions during trial was tantamount to accepting a bribe. *See infra* Part II.B (discussing the recent controversy surrounding the Ohio Supreme Court).

[16] T.C. Brown, *Majority of Court Rulings Favor Campaign Donors*, PLAIN DEALER (Cleveland), Feb. 15, 2000, at A1.

Whatever the answer, it must come in the wake of the United States Supreme Court's landmark 2009 decision in *Caperton v. Massey*.[17] In *Caperton*, Justice Kennedy's opinion, joined by the four-member "liberal wing" of the Court, held that litigants' constitutional due process rights may be compromised when another litigant makes extraordinary campaign contributions to a judge who is likely to hear a case involving that litigant.[18] This was the first time the Court had extended the *constitutional* right of due process this far. Previously, the Court's position was that a litigant's due process rights were compromised only when the judge held "a direct, personal, substantial, pecuniary interest" in the case at hand.[19]

The other major case that must be reckoned with is *Republican Party of Minnesota v. White*.[20] In that case, the five-justice majority held that judges have the same free-speech protections to announce their views on disputed legal and political topics as candidates for other offices.[21] Judges are now likely to do just that during campaign season.[22] Since *White*, the pace toward more openness in the areas of judicial free speech and perceived "accountability" to voters has accelerated. One extreme example came out of South Dakota in 2006. Had it been successful, that state's initiative, called "Jail 4 Judges," would have ended judges' traditional immunity from prosecution for their decisions on the bench.[23] States that elect their judges have less power than ever to regulate political and electioneering speech during and after judicial campaigns.[24]

The constitutional values of judicial free speech and judicial impartiality are in danger of falling out of balance. 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.[25]

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[17] Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009).

[18] *Id.* at 2265.

[19] Tumey v. Ohio, 273 U.S. 510, 523 (1927).

[20] Republican Party of Minn. v. White, 536 U.S. 765 (2002). For a critical assessment of this seminal case, see Wendy R. Weiser, *Regulating Judges' Political Activity After* White, 68 ALB. L. REV. 651 (2005). For a positive assessment of *White*, see Michael R. Dimino, *Pay No Attention to That Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians*, 21 YALE L. & POL'Y REV. 301 (2003).

[21] *White*, 536 U.S. at 788.

[22] *See, e.g.*, Christian Coal. of Ala. v. Cole, 355 F.3d 1288 (11th Cir. 2004) (neglecting to enforce Alabama's Judicial Inquiry Commission's recommendation that judges not reply to appellants' political questionnaire); Griffen v. Ark. Judicial Discipline & Disability Comm'n, 130 S.W.3d 524 (Ark. 2003) (holding that judge's comments on race relations were protected free speech).

[23] Editorial, *Voting for Judicial Independence*, N.Y. TIMES, Nov. 2, 2006, at A26.

[24] *See* Dennis J. Willard, *Candidates in a Rematch for High Court*, AKRON BEACON J., Oct. 18, 2006, at A1.

[25] *See* Robert M. O'Neil, *The Canons in the Courts: Recent First Amendment Rulings*, 35 IND. L. REV. 701 (2002). *But see* Erwin Chemerinsky, *Restrictions on the Speech of Judicial Candidates are Unconstitutional*, 35 IND. L. REV. 735 (2002) (arguing that if states choose to elect their judges, candidates' free speech rights cannot be restricted).

Several commentators have argued that litigants' due process rights are violated by the current judicial campaign finance system.[26] None have argued, however, that the Framers' understanding of the separation of powers requires a lower threshold for finding a violation of such rights. Reclaiming the doctrine of separation of powers is a powerful corrective to ill-conceived notions of the fundamental role of judges. To protect litigants' due process interests in the appearance and reality of judicial impartiality, states have a compelling interest to restrict the flow of money into judicial campaigns. For states that choose to retain judicial elections, only public financing will temper the appearance of partiality arising out of the current climate of unfettered judicial speech. Indiana Supreme Court Justice Randall T. Shepard has written that "[s]ociety's commitment to the rule of law may be irreparably damaged if losing litigants do not respect adverse judgments because they perceive them to have been rendered in biased courts."[27]

This Note consists of five Parts. Part II traces the historical development of state judicial elections from the perspective of the Framers' doctrine of separation of powers. It shows that judicial elections were borne more of historical contingency than constitutional design. Part II then assesses the recent history of elections to the Ohio Supreme Court. It determines that Ohio's judicial elections share two problems with many other states: millions of dollars given to judicial candidates by special interests likely to appear before the court, and candidates' broad freedom of speech to earn the political and financial support of these special interests.[28] Part III analyzes the important cases discussing judicial candidates' free speech rights and litigants' due process right to an impartial tribunal. Further, it explores how these conflicting constitutional rights may be reconciled. Part III then looks at recent cases where litigants or their counsels have sought judges' recusal because of perceived bias. Finally, Part III weighs the rights of judicial candidates, litigants, and contributors and concludes that there is a compelling state interest in severely limiting those of contributors by instituting full public financing of judicial campaigns.

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[26] *See* Mark Andrew Grannis, Note, *Safe Guarding the Litigant's Constitutional Right to a Fair and Impartial Forum: A Due Process Approach to Improprieties Arising from Judicial Campaign Contributions from Lawyers*, 86 MICH. L. REV. 382 (1987) (arguing that contributions from lawyers should be tightly regulated); Scott D. Wiener, Note, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 HARV. C.R.-C.L. L. REV. 187 (1996) (arguing that Congress must legislate judicial elections out of existence, but not addressing the fact that such action is barred by the Tenth Amendment).

[27] Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059, 1067 (1996).

[28] In 2002, Justice-elect Maureen O'Connor said this in an election night speech:

> I can't underestimate the influence of the medical community, the doctors of the state of Ohio that have been so concerned about patient access to quality medical treatment here in the state of Ohio. And their efforts will pay off toward restoring confidence not only in our physicians and their ability to continue to treat patients but in our hospitals.

Laura A. Bischoff, *Stratton, O'Connor Win Ohio Supreme Court Races: Female Justices to be in Majority*, DAYTON DAILY NEWS, Nov. 6, 2002, at A5. This statement acknowledges both that the contributions "of the medical community" helped her win and that she intended to represent their interests from the bench. *Id.*

Part IV looks at several ways in which current judicial election systems may be improved to bring back judicial independence and impartiality. It argues that the standard of judicial recusal must be changed to require judges to bow out of many more cases than current practice dictates. Part IV then sketches out the possibilities (and perils) of full public funding of judicial elections. The best plan, which would require no taxpayer money, would allow states to retain judicial elections while reclaiming the Framers' separation of powers interest in judicial independence. Part V concludes this Note with alternate visions of the near future where both "worse-case" and "better-case" scenarios have taken hold.

II. HISTORICAL BACKGROUND

A. The Three Eras of State Judicial Selection

The history of judicial selection in the United States may be divided into three distinct eras. The first era ran from the Nation's founding until 1832, the year Mississippi became the first state to select judges by popular vote.[29] For the United States' first fifty years, all state and federal judges were appointed by the other branches of government.[30] Before our country's independence, judges were appointed by the crown in England.[31] In the Declaration of Independence, the Framers condemned England's King George III for making "'judges dependent on his will alone, for tenure of their offices, and the amount and payment of their salaries.'"[32] The Framers modified the British system by providing in the Constitution that federal judges be appointed by the Executive "with the Advice and Consent of the Senate."[33] The Framers assumed states would formulate similar selection schemes, as the concept of an elected judiciary was unknown in the eighteenth century.[34]

The Framers used the phrase "separation of powers" to describe the "checks and balances" that each of the three branches would exhibit on the other two in order to

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[29] Rachel Paine Caufield, *In the Wake of* White*: How States are Responding to* Republican Party of Minnesota v. White *and How Judicial Elections are Changing*, 38 AKRON L. REV. 625, 626-27 (2005).

[30] Symposium, *The Case for Partisan Judicial Elections*, 33 U. TOL. L. REV. 393, 394 (2002).

[31] Kelley Armitage, *Denial Ain't Just a River in Egypt: A Thorough Review of Judicial Elections, Merit Selection and the Role of State Judges in Society*, 29 CAP. U. L. REV. 625, 628 (2002).

[32] Kotey, *supra* note 4, at 600 (quoting THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776)).

[33] U.S. CONST. art. II, § 2, cl. 2.

[34] *See* DeRolph v. State, 754 N.E.2d 1184, 12032-03 (Ohio 2001) (Douglas, J., concurring) (commenting that Ohio's state government mirrors the Framers' federal conception of the separation of powers). Entrusting election of most judges to citizens appears to be uniquely American. *See* G. Alan Tarr, *Rethinking the Selection of State Supreme Court Justices*, 39 WILLAMETTE L. REV. 1445, 1465-66 (describing judicial selection methods in Western European countries).

achieve a limited, republican form of government.[35] To strengthen the judicial branch's standing in relation to the other branches, the Framers put two safeguards in place. First, judges were appointed for life during "good behavior," with guaranteed salaries.[36] Alexander Hamilton noted in Federalist Paper No. 79, "[A] power over a man's subsistence amounts to a power over his will."[37] The Framers, therefore, sought to shield judges from negative influence from the other branches of government. Second, the people's elective officials were to appoint judges, which would keep them free from the influence of a passionate electorate.[38] Article II, Section 2 of the Constitution established that judges in the federal system were to be nominated by the Executive "with the Advice and Consent of the Senate."[39] This era lives on in the eleven states (including ten of the original thirteen colonies) that continue to appoint all of their judges.[40]

In the second era of judicial selection, Jacksonian populism ushered in both a new way of selecting judges and a new understanding of judges' role in society. President Andrew Jackson sought to radically change the republican nature of our system of governing.[41] He wished to eliminate the Electoral College and institute the popular election of U.S. senators and federal judges.[42] In place of the Framers' concern for judicial independence, Jackson and the populists demanded political accountability from politicians and judges alike.[43] Groups such as Ohio's "Barnburners" sought to remake society, liberating "common folk" from stratification and elitism in the learned professions.[44] Even some nineteenth-century judges came to support judicial elections, believing popular validation from the polls would rebalance growing legislative and executive branch power.[45] Ironically, many who favor judicial elections today do so because they believe it is the best way to

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[35] *DeRolph*, 754 N.E.2d at 1202-03 (Douglas, J., concurring).

[36] Kotey, *supra* note 4, at 599-600.

[37] THE FEDERALIST NO. 79, at 299-300 (Alexander Hamilton) (New York, J. & A. McLean 1788) (emphasis omitted).

[38] Kotey, *supra* note 4, at 600.

[39] U.S. CONST. art. II, § 2, cl. 2.

[40] Cristopher Rapp, Note, *The Will of the People, the Independence of the Judiciary, and Free Speech in Judicial Elections after* Republican Party of Minnesota v. White, 21 J.L. & POL. 103, 114 n.85 (2005).

[41] Jason Miles Levien & Stacie L. Fatka, *Cleaning Up Judicial Elections: Examining the First Amendment Limitations on Judicial Campaign Regulation*, 2 MICH. L. & POL'Y REV. 71, 74 (1997).

[42] MICHAEL E. SOLIMINE ET AL., CTR. FOR LAW & JUSTICE AT THE UNIV. OF CINCINNATI COLL. OF LAW, JUDICIAL SELECTION IN OHIO: HISTORY, RECENT DEVELOPMENTS, AND AN ANALYSIS OF REFORM PROPOSALS 5 (2003), http://www.law.uc.edu/institutes/rosenthal/docs/judseloh0309.pdf.

[43] *Id.*

[44] Paul D. Carrington & Adam R. Long, *The Independence and Democratic Accountability of the Supreme Court of Ohio*, 30 CAP. U. L. REV. 455, 455-57, 471 (2002).

[45] Kotey, *supra* note 4, at 602.

check judges' power to decide cases that are contrary to their wishes.[46] Those who tout judicial accountability believe judges need to be reined in by the will of the people at the ballot box.

The third era of judicial selection has been marked by a struggle between camps that are legacies of the first two eras. The first camp is trying to reclaim what it perceives to be judges' lost independence and appearance of impartiality.[47] The other camp seeks to increase state judges' accountability to the people, so that those who "legislate from the bench" may be voted out if their decisions do not reflect majority will. This era of conflict began in 1940 when Missouri became the first state to move away from elections.[48] The so-called "Missouri Plan," a modified judicial appointment scheme, provided for initial "merit selection" by a non-partisan committee followed by retention elections.[49] The Missouri Plan is a compromise between those who favor elections to keep judges accountable and those who favor appointments to ensure the most qualified candidates ascend to the bench.[50]

In this era, ballot measures giving citizens the chance to end judicial elections have routinely failed.[51] Therefore, many states have taken other approaches to differentiate judicial elections from purely political elections. For example, Ohio's judicial ethics rule that imposed limits on expenditures for judicial candidates was declared unconstitutional in *Suster v. Marshall*.[52] The Sixth Circuit said such limits violated *Buckley v. Valeo*,[53] in which the United States Supreme Court declared valid limits on contributions but not expenditures.[54] To this day, no Supreme Court majority has acknowledged a fundamental difference between judicial elections and

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[46] *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed. Josephine Ann Bickel 1986) (1962).

[47] The American Bar Association, through its Standing Committee on Judicial Independence, has led the charge for stricter enforcement of its Model Rules of Judicial Conduct. *See* ABA Standing Committee on Judicial Independence, http://www.abanet.org/judind/home.html (last visited Oct. 11, 2009).

[48] Caufield, *supra* note 29, at 627 n.19.

[49] *See* Jona Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, 49 U. MIAMI L. REV. 1, 50-51 (1994). "Merit selection" denotes a system where prominent lawyers, judges, legislators, or community members nominate candidates for open judgeships. *Id.* at 2. The final choice is then made by an executive committee, the state's legislature, or the governor. *Id.*

[50] *See* Marie A. Failinger, *Can a Good Judge Be a Good Politician? Judicial Elections from a Virtue Ethics Approach*, 70 MO. L. REV. 433, 443-45 (2005).

[51] Kathy Bushouse, *County to Keep Electing Judges*, S. FLA. SUN-SENTINEL, Nov. 8, 2000, at B6; William Glaberson, *Lawyers' Study Says States Should Pay for Court Races*, N.Y. TIMES, July 21, 2001, at A10; Editorial, *Moyer Continues Fight: Chief Justice Hasn't Flagged in Effort to Increase Respect for the Ohio Supreme Court*, COLUMBUS DISPATCH, Nov. 13, 2002, at A12.

[52] Suster v. Marshall, 149 F.3d 523 (6th Cir. 1998).

[53] Buckley v. Valeo, 424 U.S. 1 (1976).

[54] *Id.* at 15-23.

other kinds of elections.[55] Most recently, Wisconsin and North Carolina have had some success with publicly-funded judicial elections.[56]

While many in this third era have sought a return to the Framers' separation of powers model of judicial independence, others have labored to secure the same level of free speech for judicial candidates as candidates for political offices have always enjoyed.[57] This camp won a decisive victory in 2002 when the United States Supreme Court decided *Republican Party of Minnesota v. White*.[58] This seminal case struck down, on free-speech grounds, Minnesota's ethics rule prohibiting judicial candidates from announcing their views on contested legal issues.[59] Since that time, several lower federal courts have relied on expansive interpretations of *White* to strike down state rules that prohibit judicial candidates from personally soliciting campaign contributions[60] or making "pledges or promises" regarding their future conduct on the bench.[61] At the same time, many judges,[62] scholars,[63] and

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[55] Barnhizer, *supra* note 13, at 410 ("Suster offered the opportunity to establish a different standard for judicial campaigns, but the federal courts chose to find no compelling difference between judicial and legislative races of a kind sufficient to allow limits on campaign expenditures.").

[56] See *infra* Part IV.C for further discussion of North Carolina's and Wisconsin's efforts to institute public funding of judicial elections.

[57] For positive assessments of expansive judicial candidate free speech, see Chemerinsky, *supra* note 25, and Michael R. Dimino, Sr., *The Worst Way of Selecting Judges—Except All the Others That Have Been Tried*, 32 N. KY. L. REV. 267 (2005).

[58] *See* Republican Party of Minn. v. White, 536 U.S. 765 (2002).

[59] *Id.* at 788.

[60] *See* Carey v. Wolnitzek, No. 3:306-36-KKC, 2006 U.S. Dist. LEXIS 73869, at *3 (E.D. Ky. Oct. 10, 2006) (holding that Kentucky's Judicial Code provision prohibiting judges from personally soliciting campaign contributions was a violation of their First Amendment rights).

[61] *See* Family Trust Found. of Ky., Inc. v. Ky. Judicial Conduct Comm'n, 388 F.3d 224, 227 (6th Cir. 2004) (upholding the district court's determination that the only difference between a judicial code's "announce clause" and its "promises and commit" clause was one of labeling).

[62] Chief Justices Thomas Moyer of Ohio, Randall Shepard of Indiana, and Shirley Abrahamson of Wisconsin, and Justices Paul J. De Muniz and Hans A. Linde of Oregon have all strongly advocated for judicial selection reform in their states. *See* Shirley S. Abrahamson, *Thorny Issues and Slippery Slopes: Perspectives on Judicial Independence*, 64 OHIO ST. L.J. 3 (2003); Paul J. DeMuniz, *Judicial Selection in Oregon: Money, Politics, and the Initiative Process*, 39 WILLAMETTE L. REV. 1265 (2003); Hans A. Linde, *Elective Judges: Some Comparative Comments*, 61 S. CAL. L. REV. 1995 (1988); Thomas J. Moyer, *Commission on the 21st Century Judiciary*, 38 AKRON L. REV. 555 (2005); Shepard, *supra* note 27.

[63] *See, e.g.*, Erwin Chemerinsky, *Preserving an Independent Judiciary: The Need for Contribution and Expenditure Limits in Judicial Elections*, 74 CHI.-KENT L. REV. 133 (1998); Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43 (2003); Roy Schotland, *To the Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 WILLAMETTE L. REV. 1397 (2003).

citizens' groups[64] are working either to do away with judicial elections completely or to regulate them in a way that protects free speech and also judicial independence and impartiality.

B. Ohio Supreme Court Elections, 1994-2008

Recent elections to the Ohio Supreme Court have drawn much scholarly discussion.[65] Most of the scholarly literature has been concerned with two perceived problems: large contributions from special interests to candidates that share a perceived "judicial philosophy," and ever-expanding free speech rights for candidates to use political campaign language to appeal to voters and contributors. This section analyzes these trends from the perspective of the Framers' interest in maintaining judicial independence through the separation of powers.

In recent years, Ohio's Supreme Court races have been as expensive and partisan as any in the Union. While general elections for judges are technically non-partisan (no party name is listed on the ballot), in order to run in the general election, judicial candidates must first win a partisan primary. Commentators have noted that Ohio's system is the worst of two worlds—already under-informed voters have nothing to go by (such as party affiliation on the ballot), while those who closely follow the court may infer from the partisan primaries which candidates merit their contributions.[66] The vast majority of contributions to Ohio Supreme Court candidates over the past decade have come from special interest groups such as the medical and insurance communities, labor unions, large corporations, and attorneys.[67] Labor unions and plaintiffs' firms have given almost exclusively to candidates emerging from the Democratic primaries, and business interests and corporate law firms have given to the "Republican" candidates.[68]

On October 1, 2006, the *New York Times* published a cover story that investigated how Ohio Supreme Court justices voted on non-unanimous cases involving large contributors.[69] It found that, as a group, the justices voted in their contributors' favor seventy percent of the time, while Justice Terrence O'Donnell

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[64] Three of the most active citizens' groups seeking judicial reform are American Judicature Society, http://www.ajs.org/ (last visited Oct. 15, 2009); Justice at Stake, http://www.justiceatstake.org/ (last visited Oct. 15, 2009); and Ohio Citizen Action, http://www.ohiocitizen.org/ (last visited Oct. 15, 2009).

[65] *See* Carrington & Long, *supra* note 44, at 455-57; David Goldberger, *The Power of Special Interest Groups to Overwhelm Judicial Election Campaigns: The Troublesome Interaction Between the Code of Judicial Conduct, Campaign Finance Laws, and the First Amendment*, 72 U. CIN. L. REV. 1 (2003); Nancy Marion, Rick Farmer & Todd Moore, *Financing Ohio Supreme Court Elections 1992-2002: Campaign Finance and Judicial Selection*, 38 AKRON L. REV. 567 (2005); Michael E. Solimine, *The False Promise of Judicial Elections in Ohio*, 30 CAP. U.L. REV. 559 (2002).

[66] Barnhizer, *supra* note 13, at 376 n.49 (citing Alexander Wohl, *Justice for Rent: The Scandal of Judicial Campaign Financing*, AM. PROSPECT, May 22, 2000, at 34).

[67] *See* Turcer & Danklefsen, *supra* note 12.

[68] *Id.*

[69] Liptak & Roberts, *supra* note 1.

sided with his contributors ninety-one percent of the time.[70] The article told the story of Duane J. Adams, whose Chrysler minivan broke down so many times that he filed a "lemon law" case in 2000.[71] Between 2000 and 2004 when the case was decided, the automotive companies that he was suing (and their representatives) gave over $115,000 to the four Ohio Supreme Court justices who would eventually rule against him.[72] Desperate to keep up, Adams' attorneys contributed $12,000 to five of the justices while the case was ongoing.[73] Reflecting on his loss in the lawsuit, Adams stated that his adversaries "'should be prosecuted for what I consider is taking a bribe.'"[74] Such a comment may give pause to many who are concerned about elevating the public's image of the judiciary.

Campaign finance statistics show that attorneys and law firms are far more partisan in their contributions to judicial candidates than they are to those in real political races. One large Columbus-based law firm gave over $250,000 to Ohio Republican candidates for political office (that is, the executive and legislative branches) in 2005-2006, but it also gave $200,000 to Democratic candidates.[75] In contrast, the same firm gave an average of $15,144 to each Republican judicial candidate but only an average of $6,333 to each Democratic candidate in the past two election cycles.[76] Perhaps the law firm sensed that it could realize greater gains from its contributions in the judicial races.

Special interest judicial campaign contributions go both ways. By far, the largest per capita donors are plaintiffs' personal injury firms, which contribute almost exclusively to Democratic candidates.[77] In the 2004 Supreme Court election, nine of the thirteen firms that contributed more than $30,000 to judicial candidates were plaintiffs' firms, even though they were outnumbered by the four corporate firms at a rate of thirty-lawyers-to-one.[78] When aggregating these nine personal injury firms

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[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] Jim Siegel, *Lawyers Hired to Fight First Strickland Veto; GOP Legislators Authorize Up to $150,000*, COLUMBUS DISPATCH, Feb. 1, 2007, at B3.

[76] CATHERINE TURCER & BRANDI WHETSTONE, OHIO CITIZEN ACTION EDUC. FUND, ELECTION 2004: CAMPAIGN CONTRIBUTIONS TO CANDIDATES FOR CHIEF JUSTICE AND JUSTICE OF THE OHIO SUPREME COURT FROM NOVEMBER 2, 2003–OCTOBER 13, 2004 (2004), http://www.ohiocitizen.org/moneypolitics/2004/2004pregeneralfinal.doc. Ohio Supreme Court candidate Judge William O'Neill was not factored in, as he accepted no money from any source during his campaign. Not surprisingly, he lost to Justice Terrence O'Donnell for the second time in a row.

[77] *Id.*

[78] *Id.* The following table of the nine plaintiffs' firms and four corporate firms that contributed over $30,000 in 2004's Ohio Supreme Court races is calculated based on numbers of Ohio-based attorneys from the Martindale-Hubbell directory (www.martindale.com) and firms' websites.

together, a total of ninety lawyers (and their families) contributed a total of $346,489.[79] No individual or interest group would give so much without believing that the money carried serious influence—either on an election's outcome or on a judge once seated.

In contrast to previous election cycles, 2008 was a quieter year for Ohio Supreme Court elections. Two justices were up for reelection—Republicans Evelyn Lundberg Stratton and Maureen O'Connor.[80] Their opponents, respectively, were Democrats Peter Sikora and Joseph Russo. Both were state court judges from Cleveland without state-wide name recognition. More importantly, they were at a combined six-to-one disadvantage in fundraising.[81] Incumbents have won every Ohio Supreme Court race since 1986. Both lost by two-to-one margins in a year where Democrats

Plaintiffs' Firms / # of Ohio-Based Attorneys	**Corporate Firms / # of Ohio-Based Attorneys**
Nurenberg, Paris, Heller & McCarthy / 13	Vorys, Sater, Seymour & Pease / 315
Murray & Murray / 16	Porter, Wright, Morris & Arthur / 318
Weisman, Kennedy & Berris / 7	Squire, Sanders & Dempsey / 270
Waite, Schneider, Bayless & Chesley / 17	Jones Day / 325
Spangenberg, Shibley & Liber / 10	
Williams, Jilek, Lafferty, Gallagher & Scott / 9	
Allen Schulman & Associates / 3	
Okey Law Firm / 6	
Clark, Perdue, Roberts & Scott / 9	
Mean Number of Ohio-Based Attorneys = 10	Mean Number of Ohio-Based Attorneys = 307

* Another Plaintiffs' firm, Burke & McGrath, was excluded from the data because a family member gave a (legal) contribution of $50,000 to Democrat Nancy Fuerst's campaign.

[79] Amounts contributed are as calculated from page fourteen of the report available. *See* TURCER & WHETSONE, *supra* note 76, at 14.

[80] James Nash, *Ohio Judicial Campaigns: 2 High-Court Races Uphill for Dems; Outspent Candidates Sikora and Russo Struggle for Recognition on Ballot Without Party Labels*, COLUMBUS DISPATCH, Nov. 2, 2008, at B3.

[81] *Id.* ("As of Oct. 15, Sikora and Russo had raised a combined $378,286, while Stratton, O'Connor and a business-backed group that supports them, the Partnership for Ohio's Future, had raised more than $2.4 million.").

dominated other parts of the ticket. The Ohio Supreme Court will remain an all-Republican enclave until the next election cycle.[82]

III. CONSTITUTIONAL VALUES IN CONFLICT

A. Courts' Recognition of the Unique Role of Judges Under the Doctrine of Separation of Powers

Courts often tout the importance of judicial independence, hearkening back to the Framers' understanding of the separation of powers.[83] Alexander Hamilton wrote that removal from office "is the only provision . . . which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own constitution in respect to our own judges."[84] Although he was writing in respect to the federal judiciary, the Framers expected state courts to, at least broadly, reflect their conception of checks and balances under the separation of powers.[85] Modern courts have attempted to reconcile the classic conception of judges as independent with this era's desire for judicial accountability. In *League*, the Fifth Circuit Court of Appeals turned the Framers' understanding of judicial independence on its head. In that case, the court held that Texas' system of electing judges "advances the effectiveness of its courts by balancing the virtues of accountability with the need for independence. The state attempts to maintain the fact and appearance of judicial fairness . . . by insuring that judges remain accountable to the range of people within their jurisdiction."[86] The court went on to argue that judicial independence was actually strengthened by taking judicial appointments out of the hands of local politicians, and giving that power to the people via elections.[87] This leads to a classic "out of the frying pan, into the fire" scenario. Any independence judges gain by being less beholden to the political branches is likely to be lost when

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[82] *GOP Keeps Lock on High Court; Victories by O'Connor and Stratton Mean Seven-Member Court Stays Republican*, DAYTON DAILY NEWS, Nov. 5, 2008, at AA12.

[83] *See* League of United Latin Am. Citizens v. Clements, 999 F.2d 831 (5th Cir. 1993) (arguing that judicial independence from the other branches is maintained by judicial elections); United States v. Mendoza, No. CR 03-730 DT, 2004 U.S. Dist. LEXIS 1449 (C.D. Cal. Jan. 12, 2004) (determining that a legislative act's mandatory sentencing provision violated judicial discretion under the separation of powers); Hastings v. Judicial Conference of the U.S., 593 F. Supp. 1371 (D.D.C. 1984) (discussing the power of the federal legislature to censure federal judges under the separation of powers); Winter v. Coor, 695 P.2d 1094 (Ariz. 1985) (removing local elected magistrate judges at will found to be harmful to judicial independence); *In re* Inquiry Concerning a Judge, 976 P.2d 581 (Utah 1999) (discussing the separation of powers provision in Utah's Constitution).

[84] THE FEDERALIST No. 79, *supra* note 37, at 301.

[85] *See* DeRolph v. Ohio, 754 N.E.2d 1184, 1202 (Ohio 2001) (Douglas, J., concurring) ("'Separation of powers' is a misnomer. There is no explicit declaration concerning separation of powers in either the federal Constitution or our state Constitution. Both Constitutions separate government into three branches while fusing certain functions and powers of those bodies."), *vacated*, 780 N.E.2d 529 (Ohio 2002).

[86] *League*, 999 F.2d. at 869.

[87] *Id.*

they insert themselves into the political process and are forced to campaign for the allegiance of blocs of voters.

There is little caselaw supporting the notion that judicial elections should reflect the fundamental differences between judges and members of the political branches of government.[88] The Sixth Circuit Court of Appeals refused an invitation to do just that in the 1998 case of *Suster v. Marshall*. In that case, Ronald Suster, a candidate for a trial court judgeship in Cleveland, challenged the constitutionality of Ohio's Code of Judicial Conduct Canon VII(C)(6)(d), which limited campaign expenditures at that level to $75,000.[89] The court struck down any limits on campaign expenditures as violative of political free speech.[90] Relying on the landmark campaign finance case of *Buckley v. Valeo*, the Sixth Circuit reasoned that limiting candidates' use of their *own* money was not narrowly tailored to any compelling state interest in judicial independence.[91] Indeed, "the very fact that the candidate is allowed to spend his or her own money without any restriction is . . . the assurance that the candidate is 'beholden to no one.'"[92] The Sixth Circuit followed the holding of the United States Supreme Court in *Federal Election Commission v. National Conservative Political Action Committee*,[93] setting the bar of what would trigger strict scrutiny: "[T]he only interest compelling enough to infringe upon the First Amendment rights of a candidate seeking an electoral office is the prevention of corruption or the appearance of corruption."[94] Note the different standard than that which would require a judge's recusal under the Model Code: "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned."[95] To date, no Supreme Court majority has held that fundamental differences between judges and members of the political branches create a compelling interest to "check" the free speech of judicial candidates.

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[88] *See, e.g.*, O'Donoghue v. United States, 289 U.S. 516, 530 (1933) ("This separation [of powers] is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, namely, to preclude a commingling of these essentially different powers of government in the same hands." (citation omitted)).

[89] Suster v. Marshall, 149 F.3d 523, 525 (6th Cir. 1998).

[90] *Id.* at 530. In *Suster*, the court maintained that

> [T]he language of *Buckley* [has] necessarily determined, irrespective of the *kind* of position sought, that any spending restriction in any *electoral* campaign process is an infringement on a candidate's First Amendment rights, and is subject to "exacting scrutiny." The guarantees of the First Amendment are not shaped and reshaped simply because a litigant wishes to distinguish one type of election from another. Neither the First Amendment, nor *Buckley* can be read so narrowly.

Id. (citation omitted).

[91] *Id.* at 532.

[92] *Id.*

[93] Fed. Election Comm'n v. Nat'l Conservative Political Action Comm., 470 U.S. 480 (1985).

[94] *Suster*, 149 F.3d at 532.

[95] MODEL CODE OF JUDICIAL CONDUCT Canon 2.11(A) (2007).

Justice Stevens' and Justice Ginsburg's dissents in *Republican Party of Minnesota v. White* contain the most extensive discussion of how the Framers' doctrine of separation of powers figures into judicial elections. In that case, the majority held that judicial campaigners enjoy the same free speech rights as other political candidates.[96] Both dissenters rejected that approach, in part, because they were concerned that such political speech would destroy the independence of the judiciary. Justice Stevens contended that judges "occupy an office of trust that is fundamentally different from that occupied by policymaking officials. Although [many] stand for election . . . , that fact does not lessen their duty to respect essential attributes of the judicial office that have been embedded in Anglo-American law for centuries."[97] He argued that when judicial candidates announce their views on issues that are likely to come before the court, they make it nearly impossible to display the most essential of judicial attributes: impartiality.[98] Thus, he wrote that Minnesota's "announce clause" should survive strict scrutiny, as it was necessary to protect against potential bias toward future litigants.[99]

In her dissent, Justice Ginsburg also argued that the "announce clause" did not violate the First Amendment due to the fundamental differences between the role of judges and other political candidates.[100] The core of her argument is cast in separation of powers terms:

> The Framers . . . sought to advance the judicial function through the structural protections of Article III [of the U.S. Constitution], which provide for the selection of judges by the President on the advice and consent of the Senate . . . . Minnesota . . . has decided to allow its citizens to choose judges directly in periodic elections[,] but . . . has not thereby opted to install a corps of political actors on the bench; rather, it has endeavored to preserve the integrity of its judiciary by other means.[101]

The means Minnesota chose to differentiate between judicial and political elections was to make the former non-partisan and to place some limits on judicial candidates' speech. She would instead continue what had been done for nearly a century: "[D]ifferentiate elections for political offices, in which the First Amendment holds full sway, from elections designed to select those whose office it is to administer justice without respect to persons."[102] Justice Ginsburg argued that these safeguards helped preserve judicial independence and impartiality and, thus, should survive strict scrutiny.[103] Rather than broadly restricting candidates' ability to "announce"

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[96] Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002).

[97] *Id.* at 797 (Stevens, J., dissenting).

[98] *Id.* at 797-803.

[99] *Id.* at 801.

[100] *Id.* at 803-21 (Ginsburg, J., dissenting).

[101] *Id.* at 804.

[102] *Id.* at 805.

[103] *Id.* at 805-08.

their views on all politically-charged issues, Minnesota's announce clause restricted candidates from doing so only on issues likely to come before them as judges.[104]

B. When Does a Judge's "Personal Interest" in a Case Affect Due Process Rights?

It is impossible to determine a judge's bias or impartiality in the abstract. Potential bias toward a litigant or her cause may only manifest itself in actual cases or controversies.[105] In two cases, *Tumey v. Ohio*[106] and *Ward v. Village of Monroeville*,[107] the United States Supreme Court provided the modern standard by which a judge may be deemed impermissibly biased toward a litigant. The judge in *Tumey* was also the town's mayor, and he was compensated out of revenues brought in by the fines he levied.[108] The Court held that it violated a litigant's due process rights to "subject his liberty or property to [a judge that] has a *direct, personal, substantial pecuniary interest* in reaching a conclusion against him in his case."[109]

In *Ward*, the judge (who was also the mayor) was not paid from the fines he levied; he controlled the village's finances, which consisted largely of such fines.[110] The United States Supreme Court still held that the mayor's impartiality could be seen as compromised.[111] A defendant's due process rights were violated if the "situation is one 'which would offer a possible temptation to the average man as a judge to forget the burden of proof required . . . or which might lead him not to hold the balance nice, clear, and true between the state and the accused . . . .'"[112] In expanding *Tumey*'s definition of what a "direct" interest in the outcome of a case might look like, *Ward* also expanded litigants' due process rights to cases where a judge may even appear to have a personal interest in the outcome.

After *Ward*, claimants first tried to apply *Ward*'s expansive view of due process rights to administrative agency proceedings. In *Marshall v. Jerrico, Inc.*, the Court declined to extend *Ward* to parties appearing before officials whose roles more closely resembled prosecutors than judges.[113] Still, the Court emphasized that litigants may expect judges to "preserve[] both the appearance and reality of fairness, ' . . . so important to a popular government, that justice has been done,' by ensuring that . . . the arbiter is not predisposed to find against him."[114] In *Aetna Life*

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[104] *Id.* at 810-11.

[105] U.S. CONST. art. III, § 2, cl. 1.

[106] Tumey v. Ohio, 273 U.S. 510 (1927).

[107] Ward v. Vill. of Monroeville, 409 U.S. 57 (1972).

[108] *Tumey*, 273 U.S. at 515, 521-22.

[109] *Id.* at 523 (emphasis added).

[110] *Ward*, 409 U.S. at 58.

[111] *Id.* at 60.

[112] *Id.* (quoting Tumey v. Ohio, 273 U.S. 510, 532 (1927)) (alteration in original).

[113] Marshall v. Jerrico, Inc., 446 U.S. 238 (1980); *see also* Withrow v. Larkin, 421 U.S. 35 (1975) (holding that it did not violate due process for an administrative board to fulfill both investigative and adjudicative roles).

[114] *Marshall*, 446 U.S. at 242 (quoting Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 172 (1951)) (citation omitted).

Insurance Co. v. LaVoie, the Court held that an Alabama Supreme Court justice should not sit on a case involving an insurance company against which he had a pending suit.[115] Chief Justice Burger held that a judge cannot be "'permitted to try cases where he has an interest in the outcome.'"[116] While the Court refused to draw a bright line as to where disqualification would be required, it further expanded *Tumey* and *Ward* by stating that litigants' due process rights "'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high functions in the best way, "justice must satisfy the appearance of justice."'"[117] In *LaVoie*, the Court proclaimed that a litigant's due process rights may be violated by even an appearance of judicial bias.[118]

These cases were those that the majority opinion primarily cited in the recent landmark case of *Caperton v. Massey Coal Co*.[119] Much has been, and will be, written about this case in the months and years to come. For our purposes, however, only a brief outline is needed. The facts of *Caperton* read like a pulpy John Grisham novel.[120] Don Blankenship, owner of Massey Energy, lost a fifty million dollar jury verdict in favor of Hugh Caperton and his small coal company.[121] While the case was about to be appealed to the West Virginia Supreme Court, Blankenship created a Political Action Committee called "And for the Sake of the Kids" to funnel over three million dollars to his chosen candidate, Brent Benjamin.[122] This was over one million dollars more than the total amount of money spent by both sides and more than triple that of Benjamin's own campaign committee.[123] Benjamin won the race against the incumbent. When the case came before the state's highest court, Benjamin denied Caperton's motion to recuse, arguing that no objective evidence existed to suggest that he was actually biased in Massey's (or Blankenship's) favor.[124] Eventually, Benjamin cast the deciding vote in the three-to-two decision to overturn the fifty million dollar verdict.[125]

Caperton sought relief before the United States Supreme Court on due process grounds. The Court accepted the case, and a five-justice majority held in his favor. In his majority opinion, Justice Anthony Kennedy was careful to limit the Court's

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[115] Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986).

[116] *Id.* at 833 (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)).

[117] *Id.* at 825 (citing *In re* Murchison, 349 U.S. 133, 136 (1955)).

[118] *Id.*

[119] Caperton v. Massey Coal Co., 129 S. Ct. 2252 (2009).

[120] *Caperton* is, in fact, the basis of a John Grisham novel. *See* JOHN GRISHAM, THE APPEAL (Bantam Dell, 2008) (2008); *see also* Jess Bravin, *Justices Set New Standard for Recusals*, WALL ST. J., June 9, 2009, at A3.

[121] *Caperton*, 129 S. Ct. at 2257.

[122] *Id.*

[123] *Id.*

[124] *Id.* at 2258.

[125] *Id.* at 2257-58.

holding to extreme cases such as this.[126] Justice Kennedy held that under the circumstances, the probability of bias was so great that the Due Process Clause must be invoked. Analyzing the case in light of the well established due process jurisprudence of *Tumey*, *Ward*, and *Lavoie*,[127] the majority held that "Blankenship's significant and disproportionate influence—coupled with the temporal relationship between the election and the pending case—'offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'"[128]

The *Caperton* decision is surely a victory for those who fear the corrupting influence of money in judicial campaigns. Its significance should not be overstated, however. First, its facts are almost comically extreme. Second, the majority holding is reasonably limited to similar cases. And third, Justice Kennedy clearly notes that the Due Process Clause of the Constitution is something of a last resort—providing minimal protection for the most extreme breaches of justice.[129] Justice Kennedy reminds us that state legislatures and Bar Associations are free to regulate such activities more strictly within the boundaries of the Constitution. As discussed below, one such boundary that has yet to be clearly established is that of judicial candidates' free-speech rights. It remains to be seen how these rights will be reconciled with other fundamental constitutional values such as the separation of powers and litigants' due process rights.

C. Judicial Candidates' Expanding Right to Campaign Free Speech

While litigants have the right to a judge who neither is nor appears to be partial, judicial candidates are now freer than ever to disclose their views on issues they may face on the bench.[130] In *Republican Party of Minnesota v. White*, Justice Scalia's majority opinion found Minnesota's judicial ethics code restriction on candidates' right to "announce" their views on issues that may come before the court to be unconstitutional.[131] Justice Scalia applied the classic strict scrutiny test, holding that the clause was not narrowly tailored to meet the compelling state interest in protecting political speech.[132] The defendants argued that the state had a compelling interest in both impartiality and the appearance of impartiality in the state judiciary.[133] In the course of his opinion, Justice Scalia addressed three meanings of the word "impartiality": (1) lack of bias toward a party to a proceeding; (2) lack of

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[126] *Id.* at 2263-65. "On these extreme facts the probability of actual bias rises to an unconstitutional level." *Id.* at 2265.

[127] *See supra* notes 107-16 and accompanying text.

[128] *Caperton*, 129 S. Ct. at 2265 (quoting Atena Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986)) (alteration in original).

[129] *Id.* at 2265-66.

[130] *See generally* Nat Stern, *The Looming Collapse of Restrictions on Judicial Campaign Speech*, 38 SETON HALL L. REV. 63 (2008) (envisioning a post-*White* future of unrestrained judicial campaign speech).

[131] Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002).

[132] *Id.* at 776.

[133] *Id.* at 775.

preconceptions toward particular legal views; and (3) "openmindedness."[134] He concluded that the provision was underinclusive because it only prohibited such statements on the campaign trail—precisely when political speech is most protected.[135] Second, he argued that there was no interest, compelling or otherwise, in judges to be without well-formed opinions on the law.[136] Finally, he argued that the defendants had not shown "that campaign statements are uniquely destructive of openmindedness."[137] According to Justice Scalia, the "announce" clause failed to protect judges' free speech rights in its effort to protect judges' appearance and reality of impartiality.[138]

Justice O'Connor joined the majority, but in a strongly-worded concurrence called into question whether state judicial elections have any value.[139] She argued that judicial impartiality is very difficult to maintain when judges' decisions impact, and are impacted by, voters and contributors.[140] She wrote that Minnesota's "claim that it needs to significantly restrict judges' speech in order to protect judicial impartiality is particularly troubling. If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges."[141] In his concurrence, Justice Kennedy agreed with the majority that the judicial code's provision was poorly tailored to achieve its stated purpose, but he reiterated that states do have a compelling interest in impartial judiciaries. He acknowledged that "[states] may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards."[142]

D. Buckley, McConnell, *and the Less-Protected Speech of Campaign Contributions*

First Amendment free speech and Fourteenth Amendment due process rights inevitably come into conflict in determining how states may regulate judicial campaigns within the bounds of the Constitution.[143] The landmark campaign-finance case *Buckley v. Valeo* held that two unequal free speech interests are at play when analyzing campaign speech.[144] The Court distinguished the highest level of

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[134] *Id.* at 775-79.

[135] *Id.* at 776.

[136] *Id.* at 777.

[137] *Id.* at 781.

[138] *Id.* at 776.

[139] *Id.* at 788-92 (O'Connor, J., concurring).

[140] *Id.* at 789-90.

[141] *Id.* at 792.

[142] *Id.* at 794 (Kennedy, J., concurring).

[143] *See* Burson v. Freeman, 504 U.S. 191 (1992) (holding under strict scrutiny that political speech may be limited in order to accommodate the right to vote, another fundamental right); City of Mobile v. Bolden, 446 U.S. 55, 76 (1980) ("[A] law that impinges upon a fundamental right explicitly or implicitly secured by the Constitution is presumptively unconstitutional.").

[144] Buckley v. Valeo, 424 U.S. 1 (1976).

protection afforded candidates' "political" speech rights from the less-protected right of campaign contributors to "electioneering" speech.[145] The Court maintained that political expression is "'at the core of our electoral process and of the *First Amendment* freedoms.'"[146] The Court then contrasted the less-robust rights of campaign contributors and reasoned that such rights may be curtailed "to limit the actuality and appearance of corruption resulting from large individual financial contributions."[147] Thus, the Court upheld laws limiting contributions while striking down provisions limiting expenditures as not being narrowly tailored to meet this compelling interest.[148]

In the 2003 case of *McConnell v. Federal Election Commission*,[149] the United States Supreme Court expanded on *Buckley*'s core holding. It upheld most of the Bipartisan Campaign Reform Act of 2002,[150] which sought to close loopholes in "soft money"—money given to political parties by corporations and unions to circumvent restrictions on direct contributions.[151] It followed *Buckley* in holding that contribution limits to candidates, Political Action Committees,[152] or political parties are constitutional and are not subject to strict scrutiny.[153] The Court confirmed the vital "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'"[154] and that such "interests directly implicate '"the integrity of our electoral process."'"[155]

After *McConnell*, it is clear that ordinary political campaigns may be regulated to protect against corruption. Why has the Court refused to provide more strict due process safeguards in the conduct of judicial campaigns? Commenting on due process, Justice Powell has stated that it "'is not a technical conception with a fixed

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[145] *Id.* at 19-21.

[146] *Id.* at 39 (quoting Williams v. Rhodes, 393 U.S. 23, 32 (1968)).

[147] *Id.* at 26.

[148] *Id.* at 52-53.

[149] McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003).

[150] Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified in part at 2 U.S.C. § 431 (2006)).

[151] *McConnell*, 540 U.S. at 141; *see generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1079-82 (3d ed. 2006).

[152] *See also* Cal. Med. Ass'n v. Fed. Election Comm'n, 453 U.S. 182, 193-94 (1981) (holding that the principles of *Buckley* may be expanded to allow legislatures to limit contributions to Political Action Committees).

[153] *McConnell*, 540 U.S. at 141.

[154] *Id.* at 136 (quoting Fed. Election Comm'n v. Nat'l Right to Work Comm., 459 U.S. 197, 208 (1982)).

[155] *Id.* at 136 (quoting Fed. Election Comm'n v. Nat'l Right to Work Comm., 459 U.S. 197, 208 (1982) (quoting United States v. Int'l Union United Auto., Aircraft & Agric. Implement Workers of Am., 352 U.S. 567, 570 (1957))).

content unrelated to time, place and circumstances.'"[156] "'[D]ue process is flexible and calls for such procedural protections as the particular situation demands.'"[157] The "situation" of apparent judicial bias has never been so obvious as it is in the current climate. *White* shows a Supreme Court unwilling to curtail political speech; thus, judicial candidates are free to announce their legal and political biases with impunity. Only four current Supreme Court Justices are known to recognize great differences between judicial races and legislative or executive races.[158] In their dissents in *White*, Justices Stevens and Ginsburg (each joined by Justices Souter and Breyer) both argued that political speech during a judicial race may be limited because judges are fundamentally different under the Constitutional doctrine of separation of powers. Justice Stevens acknowledged the "critical difference between the work of the judge and the work of other public officials."[159] Justice Ginsburg argued that the speech sanctioned by the majority compromises litigants' due process right to an impartial tribunal.[160] It is true that campaign contributions may be limited, but the greater issue is whether states have a compelling interest in doing so to protect litigants' constitutional rights.

IV. RECLAIMING THE APPEARANCE AND REALITY OF JUDICIAL IMPARTIALITY

A. Judges Often Allow Political Considerations to Affect their Neutrality

Umpires are the trial court judges of the baseball diamond. Now imagine if umpires were elected and forced to fundraise. Like lawyers, Major League Baseball players would have a vested interest to contribute money to the campaigns. Now, let us say your favorite player came to bat and was called out on a questionable third strike. How much confidence would you have in that call if you knew, or later discovered, that the pitcher gave $10,000 to that particular umpire's election campaign?[161]

Under the present standards of judicial ethics, almost no elected judges are censured for the appearance of partiality, absent blatant corruption.[162] This is true,

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[156] Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961)).

[157] *Id.* (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)) (alteration in original).

[158] *See* Suster v. Marshall, 149 F.3d 523, 523-35 (6th Cir. 1998) (relying on *Buckley* and finding Ohio's limit on expenditures in judicial campaigns to be unconstitutional).

[159] Republican Party of Minn. v. White, 536 U.S. 765, 798 (2002) (Stevens, J., dissenting).

[160] *Id.* at 814-17 (Ginsburg, J., dissenting).

[161] James Andrew Wynn, Jr., *Judging the Judges*, 86 MARQ. L. REV. 753, 760 (2003).

[162] Barnhizer, *supra* note 13, at 366. Barnhizer minces no words:

> The corruption of the judiciary includes deliberate judicial wrongdoing in exchange for financial contributions. But it also involves more subtle judicial behavior shaped to fit contributors' agendas. The belief that judges are directly or indirectly trading rulings for contributions has significant potential for developing among citizens a widespread perception of corrupt judicial fundraising and related favor-selling. Even if judicial corruption through decisions that favor special interests is not empirically demonstrable, the public's perception will be that judicial

even though the system has remarkable similarities to the baseball analogy above. 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. 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.[163] 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.

Interest groups' contributions create this dilemma: do they give large contributions to specific candidates because they appear to share "judicial philosophies," or do they do it to secure their vote in future disputes? The result is the same under either scenario. When forced to act like a politician, a judicial candidate becomes just that, representing (even cultivating) constituents from the bench. In the baseball analogy, the pitcher who gives the umpire $10,000 does it with a clear objective—to gain an advantage. If he does not get the "return" he expects from the first umpire, the next time his dollars will go to another one. Hence, the first umpire knows what he has to do to keep the money coming. State supreme court elections require a tremendous amount of money, which force judicial candidates to cultivate constituencies to keep their jobs. Through 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.

Jonathan L. Entin argues that so much money and thought have been put into recent Ohio Supreme Court races because the court has tremendous influence over politically-charged topics such as tort reform and school funding.[164] He states that Ohio's contentious judicial elections result "less from the state's method of choosing judges than from a political culture that places substantial weight on judicial philosophy and case outcomes."[165] This may be true, but it does nothing to solve the problem of citizens' lack of confidence in the judiciary. By giving large contributions, special interests seek to elect the candidate that they believe will best represent their interests.[166] It is only natural that judges then decide cases according

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> decision-making favors special interests to which the judge is obligated through financial or other campaign support.

Id.

[163] *Id.* at 364 ("Judges need to attract the contributions both for their own campaigns and to keep the funds . . . away from potential competitors. Judges do this by crafting messages that signal to the contributors that the candidates are willing to provide what the donors want in exchange for their money.").

[164] *See* Jonathan L. Entin, *Judicial Selection and Political Culture*, 30 CAP. U. L. REV. 523 (2002).

[165] *Id.* at 525.

[166] Symposium, *Appointment Versus Election: Balancing Independence and Accountability*, 33 U. TOL. L. REV. 287 (2002). One panel member was Steven Hantler, DaimlerChrysler's Assistant General Counsel for litigation strategy and communication. He claimed that large corporate contributions were necessary to ensure a level playing field:

to the needs of the next campaign. Such a climate seems to demand a presumption toward those whose disputes are heard by judges who have accepted large contributions from the other side. In abandoning the Framers' conception of separation of powers, we may have lost much of the judicial independence that doctrine was instituted to protect.

B. Judges Should Have More Strict Recusal Requirements

Today, judges recuse themselves only if they have had close political[167] or financial[168] dealings with a client or the client's counsel. *Tumey*'s "direct, personal, substantial[,] pecuniary interest"[169] standard should be expanded to require recusal in more situations in which judges' lack of the appearance of impartiality compromises courts' integrity. Several commentators have called for recusal when judges have been outspoken on issues or persons that they will be required to adjudicate.[170]

> Why is the method by which we place state court judges on the bench such an important issue[,] . . . [and] why does the trial bar, the American Bar Association, and American business make this such an important issue?
>
> I think that answer to either question is that we all have so much at stake in how the American legal system works. My comments on this point are, of course, from the perspective of American business. What does American business want from the civil side of the legal system?
>
> We want four things. We want predictability, fairness, timeliness, and efficiency.

Id. at 299. He then argued that separation of powers was better maintained by having judges elected by the people rather than appointed by government's other branches. *Id.* at 301.

[167] *See* Caleffe v. Vitale, 488 So. 2d 627, 628 (Fla. Dist. Ct. App. 1986) ("The judicial inquiry should focus on the reasonableness of the affiant's belief that the judge may be biased, and not the judge's own perception of his or her ability to act fairly."); Aetna Cas. & Sur. Co. v. Berry, 669 So. 2d 56, 74 (Miss. 1996) (holding that "[i]f a reasonable person, knowing all the circumstances, would harbor doubts about the judge's impartiality, he is required to recuse himself"; here, one party's attorney had been "heav[il]y involved" in judge's election campaign). *But see* Gluth Bros. Constr. v. Union Nat'l Bank, 548 N.E.2d 1364 (Ill. App. Ct. 1989) (holding that a judge need not recuse himself or herself even though counsel served as campaign manager six years earlier); Ainsworth v. Combined Ins. Co. of Am., 774 P.2d 1003 (Nev. 1989) (holding that a judge need not recuse himself or herself even though counsel served as campaign co-chairman).

[168] *See* Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847 (1988) (affirming the lower court's sanctions against judge who should have known about financial conflict of interest in case before him); Chase Manhattan Bank v. Affiliated FM Ins. Co., 343 F.3d 120 (2d Cir. 2004) (holding that trial judge abused discretion when denying party's recusal motion; judge had considerable stock in bank); Moody v. Simmons, 858 F.2d 137 (3d Cir. 1988) (determining that judge should have recused himself when daughter was employee of company in bankruptcy proceedings and could have benefited financially from favorable ruling).

[169] *See* Tumey v. Ohio, 273 U.S. 510, 523 (1927).

[170] *See* Katherine A. Moerke, *Must More Speech be the Solution to Harmful Speech? Judicial Elections After* Republican Party of Minnesota v. White, 48 S.D. L. REV. 262, 319 (2003) (commenting favorably on states that, post-*White*, are strengthening recusal requirements in their judicial ethics codes); Thomas R. Phillips & Karlene Dunn Poll, *Free Speech for Judges and Fair Appeals For Litigants: Judicial Recusal in a Post-*White *World*,

Others have called for rules to be implemented requiring recusal when a litigant has contributed more than a certain amount to the judge's campaign.[171] Like the baseball umpire of the previous section, fans will assess differently an umpire who regularly berates Barry Bonds in the press when he makes a controversial call against him. One unfair umpire lowers the esteem in which the entire group is held. In such as situation, it would be better for baseball simply to assign such an umpire to other teams' games.

Currently, judges do not recuse themselves when one party, or their counsel, appearing before them has given them a large campaign contribution.[172] In *MacKenzie v. Breakstone*,[173] the Florida Supreme Court decided that a trial judge need not recuse herself from a case in which one party had donated $500 to her husband's election campaign. The Court held that an allegation that a litigant or litigant's counsel has legally contributed money either to the trial judge or her spouse, without some other aggravating detail, was not a sufficient ground to grant a motion for recusal.[174] In *Cicchini v. Blackwell*,[175] the Sixth Circuit Court of Appeals refused to grant relief to a plaintiff complaining that his due process rights had been violated when Ohio Supreme Court justices refused to recuse themselves.[176] The plaintiff requested recusal solely on the basis of campaign contributors' *amicus curiae* briefs, without claiming that this created a "'direct, personal, substantial'" interest in finding in favor of contributors.[177]

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55 DRAKE L. REV. 691 (2007) (calling on the legal community to devise stricter recusal standards in the wake of expanding judicial campaign speech); Matthew J. Medina, Note, *The Constitutionality of the 2003 Revisions to Canon 3(E) of the Model Code of Judicial Conduct*, 104 COLUM. L. REV. 1072, 1096-99 (2004) (arguing that the recusal standard in Texas' Code of Judicial Conduct is likely to survive strict scrutiny in the wake of *Republican Party of Minnesota v. White*). *But see* Matthew D. Besser, Note, *May I Be Recused? The Tension Between Judicial Campaign Speech and Recusal After* Republican Party of Minnesota v. White, 64 OHIO ST. L.J. 1197, 1218-25 (2003) (arguing that judges need not recuse themselves in cases where they previously gave their opinions while campaigning).

[171] *See, e.g.*, John A. Meiser, Note, *The (Non)Problem of a Limited Due Process Right to Judicial Disqualification*, 84 NOTRE DAME L. REV. 1799 (2009) (offering an early assessment of the impact of *Caperton* and arguing that recusal rules are the best we can hope for since due process is such a difficult standard to meet).

[172] *See, e.g.*, Shepherdson v. Nigro, No. 97-5504, 1998 U.S. Dist. LEXIS 6712 (E.D. Pa. May 14, 1998) (denying litigants' claim for damages from a judge who heard his case and had received modest campaign contributions from the opposing side); Rocha v. Ahmad, 662 S.W.2d 77, 78 (Tex. App. 1983) ("If a judge cannot sit on a case in which a contributing lawyer is involved as counsel, judges who have been elected would have to recuse themselves in [most cases]."). *But see* Geary v. Renne, 911 F.2d 280, 292 n.9 (9th Cir. 1990) (commenting that in a criminal matter, when judges receive large donations from fraternal police groups, "[d]efense counsel may well wonder whether their clients will receive a fair shake from the recipients of that largesse.").

[173] MacKenzie v. Breakstone, 565 So. 2d 1332 (Fla. 1990).

[174] *Id.* at 1338.

[175] Cicchini v. Blackwell, 127 Fed. App'x 187 (6th Cir. 2005).

[176] *Id.* at 191.

[177] *Id.* (citation in original).

In the post-*White* climate of unfettered judicial speech, litigants and their attorneys are unlikely to be successful in efforts to force judges to recuse themselves based on prior statements. Judicial candidates have been emboldened not only to announce their views, but even to make pledges or promises of future conduct on the bench. For example, Ohio Court of Appeals Judge William O'Neill announced during his run for the Ohio Supreme Court in 2006 that he was "'the labor candidate in this race,'" and pledged that he expected to side with labor "'roughly 60 to 70 percent of the time.'"[178] If Wal-Mart were to draw Judge O'Neill for an "employees' right to organize" case, one may conclude that Wal-Mart would be distinctly disadvantaged because of Judge O'Neill's prior statements. Similarly, if a judge boasts in his or her campaign, "If I am elected, convicted murderers will pay the price," one could reasonably believe the judge would have difficulty being impartial in assessing mitigating factors during sentencing.

Yet, there are several recent cases that point to increased judicial sensitivity to parties' claims of judicial bias. In one case, five Ohio Supreme Court justices recused themselves in a case involving Tom Noe, a Republican fundraiser.[179] Noe, who contributed over $23,000 to the justices, has since been jailed for instigating a rare coin investment scandal.[180] In the other case, four Ohio justices were either targets or beneficiaries of issue advertisements from "Citizens for a Strong Ohio," a political arm of the Ohio Chamber of Commerce.[181] The justices recused themselves from a case involving the political group explaining that they sought to avoid any appearance of conflicts of interest.[182]

In another example, the Sixth Circuit recently held in *Fieger v. Ferry*[183] that federal courts may consider denials of recusal motions in state courts where judges' prior statements may have made them appear to be biased toward a party.[184] The parties in this long-time dispute are Geoffrey Fieger, a controversial plaintiffs' lawyer and former Michigan Democratic gubernatorial candidate, and four

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[178] *See* Dennis J. Willard, *Candidates in a Rematch for High Court*, AKRON BEACON J., Oct. 18, 2006, at A1.

[179] *See* James Drew & Mike Wilkinson, *Most Justices Sit out Lawsuits Involving Noe; Blackwell Reviews Coin Dealer's Campaign Donations Since 1990*, TOLEDO BLADE, May 19, 2005, at A1; James Drew & Steve Eder, *Task Force Claims Former Taft Aide Funneled Noe Cash: Lobbyist Gave to 3 Justices' Campaigns*, TOLEDO BLADE, Jan. 28, 2006, at A1.

[180] Drew & Wilkinson, *supra* note 179.

[181] *See* Jim Provance, *4 Justices Recuse Selves; Judges Cite Influence of Chamber's Ads*, TOLEDO BLADE, Nov. 9, 2004, at A3.

[182] *Id.*; *see also* Jim Provance, *Skip FirstEnergy Case, 5 Ohio Justices Urged: Watchdog Cites $125,000 in Campaign Gifts*, TOLEDO BLADE, Sept. 16, 2005, at A1; Carl Weiser, *Ohio Court Elections Costly: Report Blasts Secret-Donor System*, CINCINNATI ENQUIRER, May 7, 2004, at B1 (discussing how special interest money and issue advertisements affected Ohio's Supreme Court elections in 2000 and 2002); Daniel Tokaji, *Ohio's "Coingate" Scandal: How it Exposes the Flaws of our Campaign Finance System*, FINDLAW, July 7, 2005, http://writ.news.findlaw.com/commentary/20050707_tokaji.html.

[183] Fieger v. Ferry, 471 F.3d 637 (6th Cir. 2006).

[184] *Id.* at 646.

Republican members of Michigan's Supreme Court.[185] All four justices spoke out against Fieger during their judicial campaigns in 2000.[186] One stated with disapproval that Fieger "'has $90 million in lawsuit awards pending in the State Court of Appeals.'"[187]

Since then, Fieger has unsuccessfully sought these justices' recusal in every case in which he has appeared.[188] Fieger lost multi-million dollar awards for his clients (and himself) in *Gilbert v. DaimlerChrysler Corp.*[189] and *Graves v. Warner Bros.*[190] In both cases, the four anti-Fieger justices were pivotal in overturning substantial jury verdicts.[191] This led Fieger to sue the justices in federal court via a Section 1983 civil rights action, seeking the right to challenge the justices' refusal to recuse themselves.[192] The federal district court dismissed Fieger's claim.[193] On appeal, the Sixth Circuit held that federal courts are only precluded from deciding matters of state law retrospectively.[194] Therefore, the appellate court reversed and entered a declaratory judgment giving Fieger the right to relief prospectively.[195] The Sixth Circuit's decision granting the right to sue and depose these four justices in the future is a personal victory for Fieger.[196] More importantly, this decision may signal

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[185] Molly McDonough, *Feisty Fieger Carries On His Fight*, A.B.A. J., e-report, Feb. 14, 2007, http://www.abanet.org/journal/ereport/j12fieger.html.

[186] *Id.*

[187] *Fieger*, 471 F.3d at 643 (citation omitted). Fieger has been reprimanded regularly for name-calling and using vulgar language in reference to the four justices. *See* Grievance Admin. v. Fieger, 719 N.W.2d 123 (Mich. 2006). In 1999, he called the four justices "Nazis" on a radio program. Dawson Bell, *Justices Say Fieger Spoke Wrongly: Vulgarity Wasn't Allowable, High Court Rules*, DETROIT FREE PRESS, Aug. 1, 2006, at 1.

[188] *See* Adam Liptak, *Unfettered Debate Takes Unflattering Turn in Michigan Supreme Court*, N.Y. TIMES, Jan. 19, 2007, at A21 (describing Justice Elizabeth A. Weaver's ongoing dispute with four of her conservative colleagues who in her opinion "should have disqualified themselves from Mr. Fieger's case because they had displayed 'bias and prejudice' in public comments made about him").

[189] Gilbert v. DaimlerChrysler Corp., 685 N.W.2d 391, 394 (Mich. 2004) (finding the punitive damages award to be excessive and ordering a new trial).

[190] Graves v. Warner Bros., 656 N.W.2d 195 (Mich. Ct. App. 2002); *see also* Graves v. Warner Bros., 669 N.W.2d 552 (Mich. 2004) (denying Fieger's motion for recusal of Michigan Supreme Court justices).

[191] Of course, Fieger was denied the substantial contingency fees he expected to earn.

[192] *See* Fieger v. Ferry, 471 F.3d 637 (6th Cir. 2006); *see also* Allan Falk, *Proof of Actual Bias is Prerequisite to Judge's Disqualification*, MICH. LAW. WKLY., Jan. 22, 2007 (claiming that each of the four justices who have spoken out against Fieger has "an individual legal philosophy, where each conscientiously considers each case on its own terms, . . . without regard to the parties or attorneys involved").

[193] Fieger v. Ferry, No. 04-60089, 2005 U.S. Dist. LEXIS 44190, at *2 (E.D. Mich. Jan. 13, 2005).

[194] *Fieger*, 471 F.3d at 646.

[195] *Id.*

[196] *See* McDonough, *supra* note 185.

growing concern within the American legal community that judges that lack the appearance of impartiality severely harm the public's perception of the judiciary.

Still, there is no dollar amount that a contributor could give, within the legal limits, which would compel a judge to recuse himself or herself from a case involving that contributor. Even if the four dissenting justices in *White* might find a compelling interest in the due process rights of a litigant such as the unlucky Chrysler minivan owner Duane J. Adams,[197] the rest of the Court would be unlikely to go along. This is especially true after the retirement of Justice O'Connor, whose concurrence in *White* expressed strong reservations about judicial elections' continuing validity.[198] Thus, the best solution is to expand *Buckley* and *McConnell*'s campaign finance restrictions to the realm of judicial campaigns. Having opened the door for strict regulation of contributions in political campaigns, further restriction of such contributions in judicial campaigns will best preserve litigants' due process rights.

C. Public Funding of Judicial Elections

Most states with elected judiciaries are unlikely to switch to appointive systems in the near future. When such measures are put on ballots, voters usually choose to retain their right to elect judges.[199] Ohio voters have twice rejected ballot measures that would bring the state merit selection of judges.[200] States such as Illinois, Louisiana, North Carolina, Pennsylvania, Texas, West Virginia, Arkansas, and Minnesota have also rejected merit selection in the past thirty-five years.[201]

At the same time, surveys have shown that the public, and even many judges, believe that campaign contributions affect how judges decide cases. A 2002 "Justice at Stake" survey of 2,428 state court judges found that 35% of state supreme court justices, and 26% of judges overall, felt that campaign contributions had some influence on judges' decisions.[202] In 1999, a survey of 1,826 citizens found that 78% agreed with this statement: "'Elected judges are influenced by having to raise campaign funds.'"[203] If litigants' due process rights are compromised by both the

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[197] *See* Liptak & Roberts, *supra* note 1.

[198] Republican Party of Minn. v. White, 536 U.S. 765, 788-92 (2002) (O'Connor, J., concurring).

[199] *See* Lenore L. Prather, *Judicial Selection—What is Right for Mississippi?*, 21 MISS. C. L. REV. 199, 206 (2002). Of course, the main reason is that when voters are given the choice between retaining or giving up a power they currently hold, they will usually choose the former.

[200] Lawrence Landskroner, Editorial, *An Unmeritorious Way to Select Judges*, PLAIN DEALER (Cleveland), Jan. 29, 1994, at B7.

[201] Prather, *supra* note 199.

[202] JUSTICE AT STAKE CAMPAIGN, JUSTICE AT STAKE—STATE JUDGES FREQUENCY QUESTIONNAIRE 5 (2001-2002), http://faircourts.org/files/JASJudgesSurveyResults.pdf.

[203] Thomas J. Moyer, *supra* note 62, at 556 (quoting NAT'L CTR. FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS, A 1999 NATIONAL SURVEY (1999), http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicViewCrtsPub.pdf.) (alteration in original).

reality and appearance of judicial partiality, these rights create a compelling state interest in protecting them.

One way states have sought to remedy the ills of judicial elections without doing away with them entirely is by instituting public financing plans.[204] Although promising, public financing has not taken off nationally. In 1973, Wisconsin became the first state to undertake public financing for its supreme court races.[205] It achieved its funding by placing opt-in provisions on citizens' tax forms. After a promising initial period, the number of citizens contributing to the fund has dwindled over the years.[206] Today, public financing in Wisconsin is on its last legs. By contrast, North Carolina's system of publicly-financed judicial elections is thriving.[207] Two main factors have contributed to its success since it was instituted in 2002.[208] First, the change has had genuine grassroots support. Like Wisconsin, North Carolina relies on voluntary check-offs on state tax forms, as well as a voluntary additional yearly fee for the state's lawyers.[209] Because much of the money raised has gone to education and voter guides, citizens are more educated about, and thus supportive of, the initiative.[210] Second, in order to be eligible for public funds, candidates must get small contributions from at least three hundred and fifty contributors, ensuring that the candidates have some popular support.[211]

In order for public financing of judicial elections in Ohio to work over the long term, it must avoid several pitfalls. The first, lack of adequate funding, has harmed Wisconsin and may do the same in North Carolina after the first wave of citizen enthusiasm wears off. This can be avoided by funding judicial campaigns via a small surcharge on the initial filing fee for complaints filed in state court.[212] Second, public funding of judicial elections must be accompanied by vigorous civic education. This may include television advertisements, voter guides, or other

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[204] *See* Charles Gardner Geyh, *Publicly Financed Judicial Elections: An Overview*, 34 LOY. L.A. L. REV. 1467 (2001) (offering a sober-minded but positive assessment of ways to bring about full public financing); Deborah Goldberg, *Public Funding of Judicial Elections: The Roles of Judges and the Rules of Campaign Finance*, 64 OHIO ST. L.J. 95 (2003).

[205] *See* Geyh, *supra* note 204, at 1476-78 (detailing Wisconsin's public-financing experiment).

[206] *Id.* at 1477.

[207] *See* Am. Judicature Society, Judicial Selection in the States: North Carolina, http://web.archive.org/web/20071011054407/http://www.ajs.org/js/NC.htm (last visited Oct. 12, 2009) (listing grassroots groups working to ensure the success of North Carolina's system of full public financing).

[208] *See* Doug Bend, Note, *North Carolina's Public Financing of Judicial Campaigns: A Preliminary Analysis*, 18 GEO. J. LEGAL ETHICS 597 (2005).

[209] *Id.* at 601-02.

[210] *Id.* at 602.

[211] Legislative Summary of Senate Bill 1054—N.C. Judicial Campaign Reform Act, http://www.ncvotered.com/downloads/j_reform_act/leg_summary.doc (on file with author).

[212] Judge William M. O'Neill, Ohio Eighth Dist. Court of Appeals, Lecture given at Cleveland-Marshall College of Law (Nov. 2, 2006); *see also* Geyh, *supra* note 204, at 1475.

initiatives to educate the public about the role of the judiciary in general and about individual candidates in particular.

To make public financing work, states' legislators must ensure a consistent stream of revenue. The best way to do that is to add a nominal, yet compulsory, surcharge to initial court filings. The second potential pitfall is the uncertain constitutionality of spending limits on judicial campaigns. *Buckley v. Valeo* upheld only voluntary spending caps on Presidential candidates who opt-in to public financing.[213] Because states have a compelling interest in protecting the dwindling due process rights of their citizens, this Note concludes that mandatory public financing of judicial election campaigns is likely to survive the lower scrutiny that judicial campaign contributions merit under the First Amendment.

V. CONCLUSION

Imagine that you are an attorney in one of the following two states in the near future. In State A, candidates for the state's Supreme Court spend ten million dollars on advertising and campaign appearances every two years. The Republican candidate vows at her appearances that she will strike down any law that aids "the baby-killers." She also proclaims that the state's business climate is stifled by over-regulation, and, if elected, she will make sure State A is "open for business." Her Democratic opponent is a millionaire trial lawyer who stumps for "Big Labor" and "the little guy." As a result, each candidate is supported by shadowy organizations that spend millions of dollars on "issue" advertisements that lambaste the other candidate. You and your colleagues appear regularly before State A's Supreme Court. Lastly, your administrative assistant has just notified you that "Judge Marshall O'Shea is on the other line" and wants to know if he "can count on your financial support in the upcoming election?"

The people of State B voted to maintain an elected judiciary years ago. However, due to public awareness campaigns from state and local bar associations, there is strong public support for the state's public financing system for judicial elections. These elections are funded by a $50 surcharge on lawsuits filed in the state courts (also cutting down on frivolous suits). This fund provides $250,000 for each party's high-court candidates to promote their credentials and judicial philosophy. It also provides $2,000,000 for non-partisan public awareness campaigns, such as mailing district-specific information about judicial candidates to all registered voters. Judicial candidates enjoy the right to communicate their legal philosophies without commenting directly on issues likely to come before the court. Such comments are best avoided; otherwise, judges would have to recuse themselves down the road. The people of State B again see judges as "umpires" rather than "just politicians."

It is hard to predict the future of state judicial elections in the wake of *Caperton*. For every trend showing contested judicial elections may be on the way out,[214] there

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[213] Buckley v. Valeo, 424 U.S. 1, 95, 108 (1967).

[214] *See* James Nash, *Moyer Bashes Judicial Fundraising; He also Sees Three Upcoming Cases as Standouts in His 22-Year Tenure*, COLUMBUS DISPATCH, Aug. 13, 2009, at B3 (detailing speech given by Thomas Moyer, the Chief Justice of the Ohio Supreme Court, in which he came down more strongly than ever against contested judicial elections); *see also* Alan Scher Zagier, *O'Connor Defends Missouri Judicial Selection Plan*, ST. LOUIS POST-DISPATCH, Mar. 1, 2009, at C8 (describing former U.S. Supreme Court Justice Sandra Day

is a counter-trend showing their continued vitality.[215] Judicial elections will remain a political reality for the foreseeable future. And, the scope of protected judicial speech is expanding. Such speech will increase many litigants' uncertainty whether their judges are truly impartial. Litigants' due process rights are violated when judges' words and actions combine to compromise their impartiality. Special interest money is making full-fledged politicians out of judicial candidates, further dashing citizens' faith in judges as impartial "umpires."

To combat this, judges must reclaim the high standards to which they have been held in the past. States have a compelling interest to mandate publicly financed judicial elections. In this battle, states must reclaim the Framers' doctrine of separation of powers for the twenty-first century. By doing so, they will bring judges' right of free speech and litigants' due process right to an impartial tribunal back into a constitutional balance.

O'Connor's quest to end contested judicial elections). "'Justice is a lot like friendship,' O'Connor said. 'If you have to pay for it, it's not worth too much.'" *Id.*

[215] *See supra* notes 55-56 and accompanying text.