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Judicial Elections: Recent Developments, Historical Perspective, and Continued Viability

Laura Zaccari

In the United States today the vast majority of states conduct elections in some form or fashion to select members of the judiciary.¹ These elections bring into conflict two ideals of American government: officials who are accountable to the people, and the idea of a fair and impartial judiciary. Organizations such as the American Bar Association and the American Judicature Society have expressed misgivings about judicial elections for years; however, judicial elections continue to have support from voters.² Judicial elections raise a myriad of ethical and political questions that have been the source of heated debate for years; however, several recent state and federal court decisions may have brought the debate to a head. Addressing issues such as the Voting Rights Act,³ and the First Amendment⁴ issues of campaign spending limits and restrictions on campaign speech, the courts have taken the position that competitive judicial elections are subject to the same laws as all other elections. This line of cases recently culminated in the Supreme Court's decision in *Republican Party of Minnesota v. White*.⁵

In the wake of recent decisions, and given the current state of politics in general, judicial elections appear to be at a crossroads. Historical justifications for judicial elections no longer seem to match the political realities faced by judicial candidates. An examination of this apparent dichotomy necessarily begins with the history behind the rise of the elected judiciary and why so many states found this a preferable method of judicial selection. Beyond the history, however, is a recent body of law and the body politick, both of which seem to indicate that judicial elections may be an idea past their prime. This thesis examines both the historical justifications and the modern context in which judicial elections occur, ultimately concluding that the delicate balance of judicial independence and direct democracy is threatened by recent developments.

I. A Brief History of Judicial Elections in the United States

In order to understand the history of judicial elections, one must first examine the philosophies supporting an appointed judiciary versus those supporting an elected judiciary. On the Federal level, judges are appointed for life; the most often cited support for this method of judicial selection comes from the Federalist Number 78, in which Alexander Hamilton justifies life tenure for judges by writing:

[T]hat as liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments...and that as nothing can contribute so much to its firmness and independence, as

¹ See Larry C. Berkson, *Judicial Selection in the United States: A Special Report*, 64 JUDICATURE 176 (1980), available at www.ajs.org/js/berkson.pdf (last visited Mar. 7 2004).

² See Terry Carter, *Boosting the Bench*, 88 A.B.A.J. 28, Oct. 2002.

³ Voting Rights Act, 42 U.S.C. § 1973 *et seq.* (2000).

⁴ U.S. CONST. amend. I.

⁵ *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution....⁶

The Framers considered life tenure a necessary measure to protect judges from political pressures.⁷ In contrast, judges on the local level needed to be responsive to their communities, and early in our history the states began to provide for election of judges.⁸ Whereas the Framers were concerned with issues of judicial independence, state legislatures were concerned with issues of public trust, and believed that an elected judiciary would be more respected within the community that elected them.⁹

Our early history as a nation follows very much in the pattern of our history as a colony of England. In colonial times, the King appointed judges.¹⁰ The appointment of the judiciary was thoroughly debated during the ratification of the Constitution, ultimately resulting in life tenure for the federal judiciary. Most states followed suit,¹¹ appointing their judges either by the executive or by the legislature.¹² Until 1845, every state that entered the union did so with a state constitution that provided for appointed judges, but from 1845 until the early 1900s the opposite was true—every state admitted provided for judicial elections.¹³ With the rise of Jacksonian Democracy, people began to attack the appointed judiciary as a bastion of the upper class, and many states instituted systems whereby judges would be elected.¹⁴ New York changed its constitution to allow for elected judges in 1846, and by the time of the Civil War, twenty-four (24) of thirty-four (34) states had an elected judiciary.¹⁵

With the rise of the elected judiciary, however, came the ills of elective politics, and it seemed that the people had traded one set of problems for another. Political machines often selected judges, and their qualifications were often called into question.¹⁶ Voters often had a low level of knowledge or interest.¹⁷ Even in the late nineteenth century, issues of campaign funding, and campaign content were eroding the legitimate arguments in favor of an elected judiciary.¹⁸ Legislators often recognized the problems and limits of judicial elections during this time, but it was not until the American Bar Association rose to prominence in the early part of the twentieth century, that states began to reexamine their judiciaries.¹⁹ Such judicial luminaries as Learned

⁶ THE FEDERALIST NO. 78 (Alexander Hamilton).

⁷ STANDARDS ON STATE JUDICIAL SELECTION 31 (A.B.A. Standing Committee on Judicial Independence ed., 2000).

⁸ *Id.*

⁹ *See id.*

¹⁰ *See Berkson, supra note 1, at 176.*

¹¹ In 1788, Virginia provided for judges to be elected by the General Assembly. While terms of office have changed, this has been the judicial selection method in the Commonwealth ever since. The only exception was a twenty-year period from 1850-1870 when judges were popularly elected. *History of the Supreme Court of Virginia*, at <http://www.courts.state.va.us/scov/cover.htm> (last visited Sept. 20, 2003).

¹² *See Berkson, supra note 1, at 176.*

¹³ Polly J. Price, *Selection of State Court Judges*, in STATE JUDICIARIES AND IMPARTIALITY: JUDGING THE JUDGES 9, 13 (Roger Clegg & James D. Miller eds., 1996).

¹⁴ Berkson, *supra note 1, at 176.*

¹⁵ Berkson, *supra note 1, at 176.*

¹⁶ Berkson, *supra note 1, at 176-77.*

¹⁷ STANDARDS ON STATE JUDICIAL SELECTION, *supra note 7, at 31.*

¹⁸ STANDARDS ON STATE JUDICIAL SELECTION, *supra note 7, at 31.*

¹⁹ *See Price, supra note 13, at 14.*

Hand, William Howard Taft, and Roscoe Pound attacked the politicization of the judiciary.²⁰ It was not until the 1940s that states began to implement alternatives to appointment or election of judges.²¹ In 1940, Missouri became the first state to adopt a commission plan whereby judges are appointed and face retention elections.²² Today, the fundamental tensions still remain—an appointed judiciary may be contrary to democratic principles, whereas an elected judiciary appears to compromise its impartiality in the political process.

II. Why an Elected Judiciary?

The premise that judicial elections are at a turning point is predicated on the idea that at one time this method of selecting judges did have some utility. While many of the justifications to be discussed are historical remnants, they are nonetheless useful, and often still pertinent to the current state of affairs.

As mentioned in Part I, *infra*, the single most important factor in the introduction of judicial elections on the state level was the rise of Jacksonian Democracy.²³ Within this broad umbrella are many factors that continue to shape our view of all elective politics, not just judicial elections. One cornerstone in the rise in popularity of an elected judiciary was the notion that if the people elected judges, those people would have greater trust of the judges and decisions would command more respect.²⁴ This notion is central to the general role of democratic government, in which officials are accountable to their constituents, by way of representation and participation.²⁵ Additionally, an elected judiciary would be *more* independent than an appointed one because issues of patronage would not be a factor.²⁶ Furthermore, elected judges would exercise a more effective restraint on all government power.²⁷ This issue became important to Jeffersonians and Jacksonians in the wake of *Marbury v. Madison*²⁸ because they felt that that decision reflected a lack of judicial accountability.²⁹ All of these factors reflect the delicate balance between the representative ideals of Jacksonian Democracy and the notion of an “independent” judiciary.³⁰

Beyond the goals of popular sovereignty are several related issues that were often cited historically and continue to be part of the debate on the efficacy of judicial elections, albeit for different reasons. As with many popular measures, judicial elections grew in influence because of notorious (but isolated) instances of misconduct.³¹ Voters also perceived the appointed judges

²⁰ Price, *supra* note 13, at 14; *see also* Berkson, *supra* note 1, at 177.

²¹ *See* Price, *supra* note 13, at 15.

²² *See* Price, *supra* note 13, at 14.

²³ *See* Price, *supra* note 13, at 13.

²⁴ STANDARDS ON STATE JUDICIAL SELECTION, *supra* note 7, at 31.

²⁵ *See* DANIEL R. PINELLO, THE IMPACT OF JUDICIAL-SELECTION METHOD ON STATE-SUPREME-COURT POLICY: INNOVATION, REACTION, AND ATROPHY 1 (1995).

²⁶ Price, *supra* note 13, at 13-14.

²⁷ Price, *supra* note 13, at 13-14.

²⁸ 1 Cranch 137 (1803).

²⁹ Jay A. Daugherty, *The Missouri Non-Partisan Court Plan: A Dinosaur on the Edge of Extinction or a Survivor in a Changing Socio-Legal Environment?*, 62 MO. L. REV. 315-16 (1997).

³⁰ *See generally* PINELLO, *supra* note 25, at 1-6.

³¹ Price, *supra* note 13, at 13-14.

as part of the landed class and wanted to terminate their exercise of privilege.³² Hand-in-hand with a desire to terminate the privileges of the upper class was a desire to select a judiciary that was more sympathetic to the needs of the “common man” and the previously disenfranchised.³³

Modern justifications for an elected judiciary are not so much new ideas, but reformulations of the original notions that an elected judiciary gets its authority from, and is responsible to, the people who elect it. One view reflecting this concept is that judicial review has an inherently political function and that a legislature will not be so quick to intervene in what it considers to be “poor” decisions if it knows a remedy is available at the ballot box to remove judges.³⁴ Similarly, elected judges would reflect the views of the voting majority; therefore tension between the legislative and judicial branches would be minimized.³⁵ Courts that have examined various issues related to judicial elections have also provided modern context to the basic idea that elected judges are part of a democratic ideal. In *In re Hon. John M. Chmura*,³⁶ (discussed in detail in Part IV (B), *infra*) the Michigan Supreme Court explained that judicial elections continue to be important because “meaningful debate should periodically take place concerning the overall direction of the courts and the role of individual judges in contributing to that direction.”³⁷

The history and reasoning behind the rise of judicial elections and their continued popularity are central to the notion that time has eroded many of these justifications. Modern political realities intrude on notions of representative democracy on all levels and offices, including the judiciary. As will be seen, efforts to insulate judicial elections from these modern political realities have essentially failed, which brings into question many of the original justifications supporting an elected judiciary.

III. Current Methods of Judicial Selection

While no two states employ exactly the same method by which they select their judiciary, there are four primary methods for selecting judges, three of which involve some sort of elective process. In the United States today, 87% of trial and appellate judges face elections—53% of appellate judges and 77% of trial judges face contested elections.³⁸ The following overview is compiled in large part from American Judicature Society “Summary of Initial Judicial Selection Methods” and is intended to provide a background of the myriad of methods of judicial selection.

A. Merit Selection (“Commission Plans”) and Combined Methods

Merit selection systems are the most varied of the selection methods. As a general rule, a nominating commission will provide a list of qualified candidates to the governor, who then

³² LARRY BERKSON, ET AL., JUDICIAL SELECTION IN THE UNITED STATES: A COMPENDIUM OF PROVISIONS 3 (American Judicature Society 1980).

³³ See PINELLO, *supra* note 25, at 2.

³⁴ STANDARDS ON STATE JUDICIAL SELECTION, *supra* note 7, at 31.

³⁵ See PINELLO, *supra* note 25, at 3.

³⁶ 608 N.W.2d 31 (2000).

³⁷ *Id.* at 42.

³⁸ Roy A. Schotland, *Financing Judicial Elections 2000: Change and Challenge*, L. REV. MICH. ST. U. DET. C.L. 849, 853 (2001).

appoints the judges.³⁹ At some point early in the judge's tenure, most plans call for nonpartisan retention elections, with periodic follow-up elections at longer intervals.⁴⁰ These plans may be employed on the appellate level and not at the trial level (as in Kansas), or even vary from county to county (as in Indiana).⁴¹ Commission members may be appointed by any number of methods, including appointments by the governor, legislature, state bar, or any combination thereof. In Florida, for example, the nine member judicial selection commission consists of three members appointed by the governor, three members appointed by the Florida Bar Association, and three members selected by the six already appointed.⁴² Florida uses the commission plan and retention elections on the appellate level, and nonpartisan contested elections on the circuit court level.⁴³ Since Missouri was the first state to use a commission and retention election plan, this type of judicial selection method is often known as the "Missouri Plan."⁴⁴

B. Partisan Election

Currently nine states employ partisan elections as their primary judicial selection method.⁴⁵ Even within this category, there are variations on the theme that may appear more like retention elections (such as in Illinois) or nonpartisan elections (such as in Louisiana, as the result of open primaries).⁴⁶ Additionally, many states conduct partisan elections at the circuit court level, even if they employ another method on the appellate level.⁴⁷

C. Nonpartisan Election

Twelve states use nonpartisan elections as their primary method of judicial selection.⁴⁸ As the name implies, nonpartisan elections do not list party affiliation on the ballot, but in many states, the political parties are still active in the nominating process, and are able to campaign on behalf of "their" candidate. Thus a technically nonpartisan election assumes the characteristics of a partisan election.⁴⁹

³⁹ See Berkson, *supra* note 1, at 177-78.

⁴⁰ AMERICAN JUDICATURE SOCIETY, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS (2002), available at www.ajs.org/js/JudicialSelectionCharts.pdf (last visited Mar. 7 2004). States using merit selection include Alaska, Arizona, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, Oklahoma, South Dakota, Tennessee, Utah, and Wyoming.

⁴¹ *Id.*

⁴² See Price, *supra* note 13, at 16.

⁴³ AMERICAN JUDICATURE SOCIETY, *supra* note 40.

⁴⁴ Price, *supra* note 13, at 14.

⁴⁵ AMERICAN JUDICATURE SOCIETY, *supra* note 40. These states are Alabama, Illinois, Louisiana, Michigan, North Carolina, Ohio, Pennsylvania, Texas, and West Virginia.

⁴⁶ AMERICAN JUDICATURE SOCIETY, *supra* note 40.

⁴⁷ AMERICAN JUDICATURE SOCIETY, *supra* note 40.

⁴⁸ AMERICAN JUDICATURE SOCIETY, *supra* note 40. These states are Arkansas, Georgia, Idaho, Kentucky, Minnesota, Mississippi, Montana, Nevada, North Dakota, Oregon, Washington, and Wisconsin.

⁴⁹ AMERICAN JUDICATURE SOCIETY, *supra* note 40. Michigan and Ohio are the prime examples of this phenomena, and are therefore considered to conduct partisan elections.

D. Appointment

Five states appoint their judiciaries, but even this method yields five different outcomes.⁵⁰ In California, the governor appoints judges to the appellate level who face retention elections (trial judges are selected by nonpartisan election).⁵¹ In Maine and New Jersey, the governor appoints judges to an initial term, and then may reappoint them with the consent of the state legislature.⁵² In Virginia and South Carolina, the state legislatures appoint the judiciary, and may elect to reappoint members of the judiciary after their initial term.⁵³ Notably, no state uses the federal method of judicial selection, although in Massachusetts and New Hampshire, judges may serve until reaching age seventy once selected by commission, and in Rhode Island, judges may serve for life once selected by nominating commission.⁵⁴

IV. The Intersection of Ethics Rules, Campaign Finance, and the Voting Rights Act in Judicial Elections

While there are numerous issues that impact modern judicial elections, there are three areas that have been most common in recent litigation surrounding elections and campaigns. Two of these issues, ethics rules and campaign finance, are actually both sub-issues of First Amendment jurisprudence. The Voting Rights Act⁵⁵ cases are important extensions of the Fourteenth Amendment body of law. All three of these areas of election law bring into question some of the cornerstone justifications of an elected judiciary—public trust, community leadership, class divisions, and impartiality.

A. The Voting Rights Act and Its Impact on Judicial Elections

In *Chisom v. Roemer*,⁵⁶ the Supreme Court provided for the first time clear guidance to the states on whether the provisions of Voting Rights Act extended to judicial elections. In *Chisom* and its companion case, *Houston Lawyers' Association v. Attorney General of Texas*,⁵⁷ the Supreme Court held that, notwithstanding the use of the word “representative” in Section 2 of the Voting Rights Act, the Act intended to include judicial elections.⁵⁸ At issue in *Chisom* was the composition of state supreme court judicial election districts in Louisiana. One of the supreme court districts around New Orleans was composed of four parishes: the Orleans parish comprised about half of the population of the supreme court district, and was approximately 50% African-American; the other three parishes were about 75% Caucasian.⁵⁹ The Supreme Court did not address whether this composition in fact violated the Voting Rights Act by “dilut[ing]

⁵⁰ AMERICAN JUDICATURE SOCIETY, *supra* note 40.

⁵¹ AMERICAN JUDICATURE SOCIETY, *supra* note 40.

⁵² AMERICAN JUDICATURE SOCIETY, *supra* note 40.

⁵³ AMERICAN JUDICATURE SOCIETY, *supra* note 40.

⁵⁴ AMERICAN JUDICATURE SOCIETY, *supra* note 40.

⁵⁵ 42 U.S.C. §§ 1973 *et seq.* (2000).

⁵⁶ 501 U.S. 380 (1991).

⁵⁷ 501 U.S. 419 (1991).

⁵⁸ See *Chisom* at 404. Section 2(b) of the Voting Rights Act reads, in part: “[denial or abridgement based on race or color] is established if...members of a class of citizens protected by subsection (a)...have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” 42 U.S.C. § 1973 (2000)).

⁵⁹ *Chisom* at 384-85.

minority voting strength.”⁶⁰ Rather, the Court addressed only the issue of whether the Voting Rights Act applied to judicial elections, and held that it does apply.⁶¹ The companion case, *Houston Lawyers’ Association*, held that the Voting Rights Act applies to the election of *trial* judges in Texas, based on a similar set of facts.⁶²

In both *Chisom* and *Houston Lawyers’ Association*, the Court was dealing with contested judicial elections; however, whether the Voting Rights Act applied to retention elections was still an unresolved issue. In 1997, the District Court for the Eastern District of Missouri faced this question in *African-American Voting Rights Legal Defense Fund, Inc. v. State of Missouri*.⁶³ Several voting rights groups challenged the “Missouri Plan” alleging that African-Americans were under-represented on the bench.⁶⁴ Holding that the Voting Rights Act does apply to retention elections as well as traditional elections, the district court also held that no remedy could be fashioned to alleviate the under-representation issue because the concentration of black voters on opposite sides of the state (for example, in Kansas City and St. Louis) would create a district that was neither “geographically compact nor contiguous.”⁶⁵ In reaching its conclusion, the court made several findings of fact regarding the racial composition of the bench, African-American access to retention elections, and the cohesiveness of the African-American vote in retention elections.⁶⁶

The application of The Voting Rights Act to judicial elections is a fairly recent development, and its long-term impact on the viability of judicial elections is still unknown. The Supreme Court’s holding in *Chisom* made it clear that the Voting Rights Act applied to contested judicial elections, and *African-American Voting Rights Legal Defense Fund* extended the application of the Voting Rights Act to retention elections. While these cases may seem clear-cut, their impact could be far-reaching. With all types of judicial elections now subject to Section 2 of the Voting Rights Act, litigation regarding the composition of judicial districts and years of minority exclusion or under-representation on the bench could now become the source of litigation. The voluminous findings of fact listed in the district court opinion in *African-American Voting Rights Legal Defense Fund* indicate the types of issues that courts may face when dealing with Voting Rights Act cases in the future.⁶⁷ While it would seem that contested elections would be more subject to this type of potential litigation, as the *African-American Voting Rights Legal Defense Fund* case indicates, states that conduct retention elections are not exempt from Section 2 and Voting Rights Act litigation. These factors, and the fact that women and minorities have historically been under-represented in elective systems as opposed to appointive or merit systems, may spawn more litigation on this issue in the future.⁶⁸

⁶⁰ *Id.* at 385.

⁶¹ *Id.* at 404.

⁶² *Houston Lawyers’ Ass’n*, 501 U.S. at 421.

⁶³ 994 F.Supp. 1105 (1997), *aff’d*, 133 F.3d 921 (1998).

⁶⁴ *Id.* at 1110.

⁶⁵ *Id.* at 1123.

⁶⁶ *See id.* at 1112-18.

⁶⁷ *See id.*

⁶⁸ *See PINELLO, supra* note 25, at 3.

The Voting Rights Act and the potential litigation it may cause are not likely to be the determining factors in whether a state changes its method of selecting the bench. However, considered in combination with other factors, such as the cost of elections and the detriment they may have on the reputation of the bench and bar, the impact of the Voting Rights Act cases could have a significant impact on states contemplating such a change.

B. State Ethics Rules and the First Amendment

States that conduct judicial elections have attempted to regulate candidate conduct during judicial elections by limiting what candidates can say or how much they can spend in the campaign. Ohio, Michigan, and Alabama are of particular interest because their attempts to regulate judicial candidates are well litigated and most clearly reflect the tension between popular democracy and judicial independence. Each of these three states, all of which conduct partisan elections, have attempted to regulate judicial candidates.⁶⁹ The outcomes in these states, coupled with most recent Supreme Court decision in *Republican Party of Minnesota v. White*, could have an impact on how all states conduct their judicial selection, possibly to the point where states may reevaluate their selection method.

Analysis of campaign finance law necessarily begins with *Buckley v. Valeo*.⁷⁰ In that landmark case, the Supreme Court examined the constitutionality of the 1974 amendments to the Federal Election Campaign Act⁷¹ that limited both contributions and expenditures that could be made in the course of a political campaign.⁷² The Court held that limits on contributions were valid as it “is unnecessary to look beyond the Act’s primary purpose—to limit the actuality and appearance of corruption resulting from large individual contributions—in order to find a constitutionally sufficient justification...”⁷³ In contrast, the Court invalidated restraints on campaign expenditures: “It is clear that a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, groups and candidates. The restrictions...limit political expression ‘at the core of our electoral process and of the First Amendment freedoms.’”⁷⁴

In *Suster v. Marshall*, the District Court for the Northern District of Ohio addressed the issue of limits on campaign expenditures in judicial contests.⁷⁵ The Ohio Code of Judicial Conduct Canon 7(C)(6) placed a ceiling on how much a candidate for judicial office could spend during a campaign.⁷⁶ Judge Suster, who was running for reelection and wanted to spend more than the \$75,000 limit placed on candidates for the court of common pleas, requested a preliminary injunction to enjoin enforcement of the canon provision.⁷⁷ Applying strict scrutiny to the Ohio Code of Judicial Conduct, and relying heavily on the logic of *Buckley v. Valeo*, the

⁶⁹ AMERICAN JUDICATURE SOCIETY, *supra* note 40.

⁷⁰ 424 U.S. 1 (1976).

⁷¹ Federal Election Campaign Act, 2 U.S.C. § 441 *et seq.* (2003).

⁷² *Buckley*, 424 U.S. at 7.

⁷³ *Id.* at 26.

⁷⁴ *Id.* at 39 (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)).

⁷⁵ 951 F.Supp. 693, 695 (N.D. Ohio 1996). (The Court also addressed the issue of use of leftover campaign funds, however the outcome of that portion of the case is not relevant to the First Amendment issue).

⁷⁶ *Id.* at 695.

⁷⁷ *Id.* at 696.

District Court in *Suster* held that the canon was “not narrowly tailored to achieve the state interest of ensuring the independence of the judiciary.”⁷⁸ The court rejected the argument that “judicial election speech” is different from “legislative election speech” because of the unique nature of the position of judge.⁷⁹ Finding that it was likely that Judge Suster would succeed on the merits of his constitutional claim, the court granted a preliminary injunction against enforcement of the canon.⁸⁰

Along with campaign finance issues, political speech and the extent to which a state may control that speech, has also been the focus of a great deal of litigation. In just the last two years, the Supreme Courts of Alabama and Michigan have addressed the issue of whether judicial canons may limit what a candidate for judicial office may say during the course of a campaign.⁸¹

The canons at issue in both *Butler v. Alabama Judicial Inquiry Commission*⁸² and *In re Chmura*⁸³ were very similar and sought to proscribe candidates for judicial office from making public communications that the candidates know to be false or misleading.⁸⁴ The Michigan Supreme Court held the canon unconstitutional because “it is not narrowly tailored to serve the state’s compelling interest in maintaining the integrity of the election process and ensuring public confidence in the judiciary.”⁸⁵ The court focused on the aspects of the canons that restricted “core political speech”:

We accept the principle that judges are different from legislative and executive-branch officials. By providing for the election of judges, the people of Michigan have not transformed judges into legislators or executives. They have, however, adopted a method of judicial selection that takes place in the arena in which the First Amendment affords its broadest protection.⁸⁶

⁷⁸ *Id.* at 700.

⁷⁹ *Id.* at 698-99.

⁸⁰ *Id.* at 701, 705.

⁸¹ Ohio addressed a similar issue in *In re Complaint Against Judge Harper*, 673 N.E.2d 1253, 1267-68 (1996). The Ohio court rejected a constitutional challenge to a canon proscribing certain campaign speech. For reasons that will become apparent in Part IV(C), *infra*, Ohio’s decision is no longer valid.

⁸² 802 So.2d 207, 211 (2001).

⁸³ 608 N.W.2d at 33.

⁸⁴ The judicial canon at issue in *Chmura* is Michigan Canon of Judicial Conduct 7(B)(1)(d) and it provides, [A] candidate for judicial office should not use or participate in the use of any form of public communication that the candidate knows or reasonably should know is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading, or which is likely to create an unjustified expectation about results the candidate can achieve.

Chmura, 608 N.W.2d at 33 n.1. The Canon at issue in *Butler* is 7B.(2) of the Alabama Canons of Judicial Ethics which reads:

During the course of any campaign for nomination or election to judicial office, a candidate shall not, by any means, do any of the following: Post, publish, broadcast, transmit, circulate, or distribute false information concerning a judicial candidate or an opponent, either knowing the information to be false or with reckless disregard of whether the information is false; or post, publish, broadcast, transmit, circulate, or distribute true information that would be deceiving or misleading to a reasonable person.

Butler, 802 So.2d at 213.

⁸⁵ *Chmura*, 608 N.W.2d at 38.

⁸⁶ *Id.* at 39-40.

The Michigan Court was concerned about the canon's potentially chilling effect on one of the stated reasons for conducting judicial elections providing a forum for debate regarding the direction and state of the judiciary.⁸⁷ Ultimately, the court invalidated all but the portion of the canon prohibiting the dissemination of information that is *known* to be false.⁸⁸

The following year, *Butler* posed a constitutional challenge to Alabama's canons. The Alabama Supreme Court held that its canon restricting speech during judicial campaigns was unconstitutional and could only survive if it was narrowly tailored to prohibit knowingly false statements.⁸⁹ The *Butler* court adopted the *Chmura* reasoning, adding an important gloss on political speech in judicial elections:

The people of Alabama have chosen to select their judges in partisan, contested elections. So long as this is the case, it is essential that judicial candidates have 'the unfettered opportunity to make their views known,' so that voters may intelligently evaluate the candidates' positions on issues of vital public importance. *Thus, the political speech of judicial candidates in this state must be guaranteed the fullest application of the First Amendment's protections.*⁹⁰

C. *Republican Party of Minnesota v. White*

The jurisprudence discussed above can be summarized as follows: elections are elections, regardless of what kind of office is at stake. Consequently, the protections of the Voting Rights Act and First Amendment attach. While this is an admittedly simplistic summary of a complex area of law, it fairly represents the context in which the Supreme Court decided *Republican Party of Minnesota v. White*⁹¹ in the summer of 2002.

In *Chmura* and *Butler*, the issues involved were essentially the same, and the judicial canons in controversy were virtually identical. In *White*, the issue is the same—whether the First Amendment can allow regulation of political speech—but the canon at the heart of the dispute, the so-called "Announce Clause," sought to prevent candidates for judicial office from announcing their views on disputed issues.⁹² The Minnesota Code of Judicial Conduct Canon 5(A)(3)(d)(i) states that "a candidate for judicial office, including an incumbent judge, [shall not] announce his or her views on disputed legal or political issues."⁹³ Minnesota, like Alabama and Michigan, conducts elections for judicial office; however the elections in Minnesota are nonpartisan.⁹⁴ Minnesota's stated justifications for the announce clause, with which the Court of Appeals agreed, were preserving both actual impartiality and the appearance of impartiality.⁹⁵

⁸⁷ *Id.* at 42-43.

⁸⁸ *Id.* at 43 (emphasis added).

⁸⁹ *Butler*, 802 So.2d at 218.

⁹⁰ *Id.* at 214-15 (emphasis added).

⁹¹ 536 U.S. 765 (2002).

⁹² *Id.* at 768.

⁹³ *Id.*

⁹⁴ AMERICAN JUDICATURE SOCIETY, *supra* note 40.

⁹⁵ *White*, 536 U.S. at 775.

While campaigning for associate justice of the Minnesota Supreme Court, Gregory Wersal criticized several Minnesota Supreme Court decisions.⁹⁶ This resulted in a complaint being filed against Wersal with the Minnesota Office of Lawyers Professional Responsibility.⁹⁷ Although the complaint against Wersal was dismissed, he filed suit attacking the constitutionality of the announce clause.⁹⁸ The Republican Party of Minnesota joined in the suit, and ultimately became the named party.⁹⁹

In its brief to the United States Supreme Court, the Republican Party attacked the logic of the announce clause on several grounds. It claimed that the announce clause was “irrational” because it applied only during election campaigns¹⁰⁰ and did not take into account the fact that judges’ opinions are issued as a matter of course in judicial opinions, and are a critical part of the judicial function.¹⁰¹ Furthermore, the Republican Party argued, judges need not recuse themselves when cases are remanded to them because of the presumption of impartiality.¹⁰² The petitioner’s brief attacks the announce clause as not being narrowly tailored to meet the stated goal of judicial impartiality.¹⁰³

While the Eighth Circuit Court of Appeals agreed that the State had met its burden and demonstrated a compelling interest in judicial impartiality, the United States Supreme Court reversed its decision. In the Court’s opinion, Justice Scalia sided with the Republican Party of Minnesota in that the canon is not narrowly tailored to satisfy the stated government interest of impartiality.¹⁰⁴ The opinion distinguishes “impartiality” from “interest.” Justice Scalia wrote:

A judge’s lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason....¹⁰⁵ “It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers.”¹⁰⁶

The opinion also attacks the canon as under inclusive because a person is limited in addressing issues only while a *candidate*, and not at any other time, including while on the bench.¹⁰⁷ In perhaps the most interesting passage of the opinion, at least with respect to the efficacy of judicial elections, Justice Scalia criticized Justice Ginsburg’s dissenting opinion that it is a violation of due process for a judge to sit in a case in which his ruling would impact his election chances: “So if [Justice Ginsburg is correct], then—quite simply—the practice of electing judges is itself a violation of due process.”¹⁰⁸

⁹⁶ *Id.* at 768.

⁹⁷ *Id.* at 769.

⁹⁸ *Id.* at 769-70.

⁹⁹ *Id.* at 770.

¹⁰⁰ Brief for Petitioner at 12, *Republican Party of Minn. v. White*, 536 U.S. 765 (2002) (No. 01-521).

¹⁰¹ *Id.* at 15.

¹⁰² *Id.* at 14.

¹⁰³ *Id.* at 22 n.23.

¹⁰⁴ *White*, 536 U.S. at 776.

¹⁰⁵ *Id.* at 777.

¹⁰⁶ *Id.* at 777-78 (quoting *Laird v. Tatum*, 409 U.S. 824, 835 (1972)).

¹⁰⁷ *Id.* at 779-80.

¹⁰⁸ *Id.* at 782.

Ultimately, the Court held that Minnesota's announce clause unconstitutional because it was not narrowly tailored and because it abridged core political speech.¹⁰⁹ While Justice Scalia's opinion largely refrains from commenting on the wisdom of judicial elections, Justice O'Connor devotes her entire concurring opinion to the matter. Her opinion cites numerous scholarly works that draw particular attention to the effects of money on judicial campaigns.¹¹⁰ Justice O'Connor writes: "I am concerned that, even aside from what judicial candidates may say while campaigning, the very practice of electing judges undermines this interest [in an impartial judiciary]."¹¹¹ Furthermore, Justice O'Connor fears that judges will not only feel political pressure to decide cases, but that funding a campaign will invite partiality. She concludes: "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."¹¹² Justice Scalia's majority opinion and Justice O'Connor's concurring opinion again bring to the forefront the inherent tension between popular elections of judges and the need for judicial independence. While it is too soon to know *White's* full impact, it is not beyond reason that Justice O'Connor's opinion, in particular, will serve as a catalyst for those who would move away from contested judicial elections.

D. The Impact of Recent Cases

State ethics rules regarding spending and speech are closely related First Amendment issues, both of which have a tremendous impact on how judicial elections are being conducted. *Suster v. Marshall* held that Ohio's canon of judicial conduct limiting the amount of campaign expenditures was unconstitutional, based largely on the logic enunciated by the Supreme Court in *Buckley v. Valeo*.¹¹³ While few states had such spending limits, the clear message to other states contemplating such restrictions was that such limits would have difficulty passing constitutional muster. Similarly, state canons restricting the type of campaign speech that could be used in judicial elections were held unconstitutional in both Alabama¹¹⁴ and Michigan.¹¹⁵ *Chmura* and *Butler* made clear that limits on political speech are at the heart of the First Amendment, and as a consequence will be strictly scrutinized, even when a legitimate purpose such as a "fair and impartial judiciary" is at stake.¹¹⁶ Taken together, these cases stand for the proposition that judicial candidates are subject only to the most narrow of restrictions on how they may conduct their campaigns.

The impact of these cases is substantial in the realm of judicial elections. First, these decisions bring judicial candidates under essentially the same rules as any other political office-seeker. While this may seem self-evident, when held against the original intent of judicial elections, there is a stark dichotomy. For example, one justification that has historically been offered to support judicial elections is that an elected judiciary is more responsive to the needs of the "common man" and disenfranchised than the appointed judges who were perceived to be part

¹⁰⁹ *Id.* at 788.

¹¹⁰ *See id.* at 788-92.

¹¹¹ *Id.* at 788.

¹¹² *Id.* at 792.

¹¹³ *Suster*, 951 F.Supp. at 697-98, 701 (N.D. Ohio 1996) (*citing* *Buckley*, 424 U.S. 1 (1976)).

¹¹⁴ *See Butler*, 802 So.2d at 213.

¹¹⁵ *See Chmura*, 608 N.W.2d at 45.

¹¹⁶ *Butler*, 802 So.2d at 215; *Chmura*, 608 N.W.2d at 39.

of the landed gentry and out of touch with ordinary voters.¹¹⁷ A common criticism of modern politicians, and political leaders in general, is that they are beholden to special interests, and as a consequence are out of touch with average voters. By bringing judicial elections into the same realm as legislative and executive elections (that is, no limits on spending and very limited restrictions on campaign speech) these decisions have essentially obviated a core principle of an elected judiciary and further highlighted the two conflicting ideals of judicial independence and representative democracy.

In addition to bringing judicial campaigns into the same sphere as other brands of politics, these decisions also blur the lines between the judicial and legislative branches. As mentioned in Part II, *infra*, another rationale for judicial elections was that by going through the elective process themselves, judges would be more aware of the responsibility of judicial review, and its impact on the political process. In theory, the legislature and judiciary would then be less likely to act to counter the other branch because an appropriate remedy was available to the voters at the ballot box.¹¹⁸ While this is still true, the nature of the elective process changes the dynamic between the branches considerably. In light of the decisions already outlined, those campaigning for judicial offices are not limited to discussing what has already occurred, but they are free to discuss matters that may arise. Thus, a judicial candidate is free to declare that he or she *would* overturn an act of the legislature as part of their constitutionally protected political speech. As Justice Scalia points out in *White*, a judge who has not contemplated issues is neither desirable nor realistic,¹¹⁹ however, when the political reality is compared side-by-side with the historical justification, there is conflict. The historical model viewed judicial elections as remedial, whereas the modern reality is that judicial elections are at least as prospective as they are remedial. The net effect of the constitutional protections for political speech in judicial campaigns is that the very character of the process has transformed into something that bears a close resemblance to every other political campaign, as the two case studies that follow point out.

V. The “Modern Election” Case Studies

Before any conclusions as to the efficacy of judicial elections can be drawn, it is important to understand the context in which these elections occur today. After all, the “modern election” encompasses the political reality in which judicial elections take place and provide the benchmark by which historical justifications for judicial elections may be examined. For years, Texas served as the most notorious example of excess in judicial elections.¹²⁰ The 2000 election year was a departure from this pattern, as the examples below indicate. These examples are illustrative of some of the more extreme problems that currently exist and what could be on the horizon for many other states in light of the recent state and federal decisions on campaign spending and speech.

¹¹⁷ See PINELLO, *supra* note 25, at 3; BERKSON, *supra* note 1, at 1.

¹¹⁸ STANDARDS ON STATE JUDICIAL SELECTION, *supra* note 7, at 31.

¹¹⁹ *White*, 536 U.S. at 777-78.

¹²⁰ See generally Schotland, *supra* note 38, at 881-82.

In the 2000 judicial elections for state supreme court seats, candidates raised over \$45 million, and non-candidate spending added another \$16 million.¹²¹ For example, thirteen candidates for the five open Supreme Court seats in Alabama spent an average of \$1.1 million each.¹²² The spending levels in Alabama reflected several “hot-button” issues facing the Alabama judiciary including mandatory arbitration and punitive damage awards, both of which were the topic of radio and TV advertisements.¹²³ This is also the election cycle that gave rise to the *Butler* litigation described in Part IV, *infra*. The *ABA Journal*'s recent article entitled “Boosting the Bench” by Terry Carter pointed out that one of the biggest contributors to these campaigns is the United States Chamber of Commerce.¹²⁴ In the 2000 election, the Chamber of Commerce spent \$1.9 million in TV ads, outspending the trial lawyers and unions combined by \$1 million.¹²⁵ The Chamber's ads (as well as those of other organizations) are now almost exclusively issue ads, thus circumventing most donor disclosure laws.¹²⁶ In addition to their ad spending, the Chamber of Commerce spent over \$10 million nationwide on various judicial races.¹²⁷ In general, the Chamber of Commerce's goal in pumping so much money into judicial elections is to make the bench more pro-business while simultaneously vilifying “trial lawyers and ambulance chasers.”¹²⁸ The problems and challenges posed by this influx of money and issue advertising could be encapsulated by the campaigns in Michigan and Ohio in 2000.

Michigan and Ohio became the primary battlegrounds for issue ads in the 2000 campaign. Democratic party ads in Michigan claimed that the incumbent court “ruled against families and for corporations 82% of the time.”¹²⁹ Republican ads accused an appellate judge running for the supreme court of being soft on pedophiles.¹³⁰ The Chamber of Commerce participation yielded the most infamous issue ad aired in Ohio:

[T]he ad features a statue of Lady Justice who peeks underneath her blindfold as piles of special interest money tip her scales [and] states [that] Justice Resnick ruled nearly 70 percent of the time in favor of trial lawyers who have given her more than \$750,000 since 1994...Concluded the announcer: “Alice Resnick. Is justice for sale?”¹³¹

Not only were the ad campaigns pointed, the campaigns began earlier and the vast majority of individual campaign contributors were lawyers or their spouses.¹³²

The 2000 Supreme Court campaign in Idaho is also indicative of the type of issues now being raised in judicial elections. The central issue in the campaign was an environmental

¹²¹ *Id.* at 850-51.

¹²² *Id.* at 866.

¹²³ *See id.* at 867-68.

¹²⁴ Carter, *supra* note 2, at 30.

¹²⁵ *See id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 32.

¹²⁸ *Id.* at 32 (quoting Chamber of Commerce President, Thomas J. Donahue).

¹²⁹ Schotland, *supra* note 38, at 871.

¹³⁰ *Id.* at 871-72.

¹³¹ *Id.* at 872 (The ad backfired, and Judge Resnick won the election).

¹³² *See id.* at 87r (For example, in two races in Michigan, lawyers or their spouses comprised 123 of 133 individual donors contributing over \$1000 in one race and 173 of 182 donors in the other).

decision in favor of the federal government, which galvanized conservatives against the “liberal” justice who ruled in the case.¹³³ A Republican challenged a then-sitting Idaho Supreme Court Justice Cathy Silak not only on the environmental issue and her participation in the decision, but supporters of the culturally conservative Republican candidate ran ads insinuating that re-electing the “activist” justice could lead to the legalization of same-sex marriages and partial birth abortions, and result in more gun control.¹³⁴ A sitting justice was defeated for the first time in Idaho since 1944 despite vehemently denying the challenger’s accusations.¹³⁵

These few examples highlight that judicial elections are increasingly being conducted in the same manner as other elections with fundraising and issue ads making a substantial impact. While there is some restraint on what judicial candidates may themselves say in the course of an election as the result of state ethics rules,¹³⁶ there is no such restraint on those airing issue ads.

Merit-selection plans and retention elections may be considered viable alternatives to the kind of political issues raised by the 2000 election cycle, but even the judicially trail-blazing state of Missouri has discovered that politics is playing an ever-larger role in retention elections. Since the “Missouri Plan” was implemented in 1940, judges have often been retained by margins approaching 90%.¹³⁷ By 1990, the trend in Missouri indicated that many judges would not be retained in the 1992 election, as margins fell to below 60%.¹³⁸ This erosion in retention percentages, coupled with special-interest attacks such as the Voting Rights Act challenge to the Missouri Plan (see Part IV(A), *infra*), prompted Plan supporters and opponents to begin a public relations campaign exhorting the virtues and vices of the Plan.¹³⁹ Many proponents of the Missouri Plan worried that voter anger would mean the most experienced members of the bench would be removed, and qualified attorneys would be discouraged from serving.¹⁴⁰ The average retention percentage in 1992 and 1994 was approximately 62%, and the percentage in 1996 (after the flurry of advertising and “town meetings”) increased to just over 66%.¹⁴¹

While retention elections may be less contentious than popular elections, exit polls in Missouri indicate that voters are aware of and influenced by even low-key advertising. In a 1992 Kansas City retention election, a radio ad indicating one local judge had a 28% approval rating from lawyers, while another judge boasted a 93% approval rating swayed one third of voters.¹⁴² Ultimately, the judge with higher approval rating was retained by a large margin, and the judge with the lower rating was denied retention by a slim margin.¹⁴³ While these results may not indicate the death of the Missouri Plan, they do point out that even non-partisan retention

¹³³ See *id.* at 883-84.

¹³⁴ *Id.* at 884-85.

¹³⁵ See *id.* at 883, 885.

¹³⁶ See, e.g., the discussion regarding the Hunter and Chmura cases *infra* Part IV. In both cases, the courts held that judges could not *knowingly* make false statements.

¹³⁷ Daugherty, *supra* note 29, at 320.

¹³⁸ Daugherty, *supra* note 29, at 320.

¹³⁹ Daugherty, *supra* note 29, at 322.

¹⁴⁰ See generally Daugherty, *supra* note 29, at 320-21.

¹⁴¹ See Daugherty, *supra* note 29, at 322.

¹⁴² Daugherty, *supra* note 29, at 326.

¹⁴³ Daugherty, *supra* note 29, at 327.

elections are growing more susceptible to the sort of overt issue campaigning prevalent in the 2000 judicial elections in states like Ohio and Michigan.

VI. Conclusions

At the heart of this difficult issue is the inherent tension between a “fair and impartial judiciary” and the democratic process. Add to this mix the very essence of First Amendment protection of political speech, and voters are left to wonder which of these cornerstones of American life they find most valuable. Even without the recent body of law culminating in *White*, judicial elections have been under attack for some time. As noted earlier, the American Bar Association and other organizations have been advocating merit systems since the early part of the twentieth century, and many states now have some sort of merit selection coupled with retention elections.¹⁴⁴ In spite of the criticism, most states employ judicial elections on some level.

It is critical to bear in mind some of the original purposes judicial elections served. Often cited as the best reason to have contested elections of this sort is that an elected judiciary is more responsive and accountable to the people. Other important reasons for conducting judicial elections include preventing corruption and cronyism. While no system of selecting judges is immune from problems, contested elections are particularly susceptible in recent years to many of the ills they were originally intended to ameliorate, as the Michigan and Ohio examples illustrate.

Perhaps the most unsettling aspect of modern judicial elections is the impact of large campaign contributions on judicial races. One of the primary justifications for judicial elections is the notion that an elected judiciary is more responsive to the people and more reflective of the populace, not the elite.¹⁴⁵ What the modern trend indicates is just the opposite. In addition to the active role the United States Chamber of Commerce took in the 2000 election,¹⁴⁶ attorneys or their spouses may be making the vast majority of individual campaign contributions (if the trend in Michigan's two races is an accurate indicator).¹⁴⁷ While lawyers are free to make political contributions just as anyone else, the *appearance* of lawyers contributing to the campaigns of judges before whom they appear is certainly unsettling, if not unethical.¹⁴⁸ The combination of interest groups and lawyer contributions raises the question: have the voters traded the influence of one group of elites for another? Increasingly, the answer appears to be ‘yes.’ While it is no longer the landed gentry who are selecting the judges, special interests are contributing to campaigns in unprecedented levels, and undoubtedly influencing the outcome of elections, as occurred in Idaho in 2000. In the wake of *White*, *Suster*, *Chmura*, and *Hunter*, all of which make judicial campaigns more closely resemble their political brothers, money is becoming the key to victory in increasingly contentious campaigns.

¹⁴⁴ See generally Parts I and III, *infra*.

¹⁴⁵ See PINELLO, *supra* note 25, at 3.

¹⁴⁶ See generally Carter, *supra* note 2.

¹⁴⁷ Schotland, *supra* note 38, at 873074.

¹⁴⁸ For a discussion of many of the issues of financing judicial elections, including several anecdotes regarding lawyers appearing before judges to whom they did or did not contribute, see David Barnhizer, “On the Make”: *Campaign Funding and the Corrupting of the American Judiciary*, 50 CATH. U.L. REV. 361 (2001).

Another troubling aspect of modern judicial campaigns is that rather than being an effective restraint on government power, the elected judiciary is campaigning on its own agenda. As the holding in *White* indicates, there is now nothing to stop a judicial candidate from declaring a position on any issue, even those that may come before the court.¹⁴⁹ Again, drawing on historical justifications for judicial elections, proponents believed that the legislature would not feel compelled to act on court rulings because the court members themselves were subject to the will of the people. While this might have been a reasonable assumption at one time, judges are now campaigning on many of the same issues as legislators. The 2000 campaign in Idaho highlights this issue. An Idaho Supreme Court Justice was labeled “liberal” and “activist” based largely on one unpopular decision, and her opponent insinuated she would be “liberal” with respect to social issues.¹⁵⁰ A potentially “activist” judge was deemed unacceptable for the Idaho Supreme Court; however, modern judicial campaigns encourage would-be judges of all political persuasions to rail against the doctrine of *stare decisis*. There appears to be very little political worth in campaigning on a platform of “following the law” (as supporters of the Idaho judge found out). Rather, candidates center their campaigns on how tough they will be on criminals (or how soft their opponents have been), and how they would not have decided a case the same way as the sitting court did. In effect, all judges are forced to be “activists” by the campaigning process and are essentially competing with legislators to see who can address the needs of voters first. This flies in the face of the notion that the judiciary is a check on legislative power; rather the judiciary becomes a quasi-legislature with its own campaign agenda, and is placed in the position of including voter sentiment in both their campaigns and judicial decision-making.¹⁵¹

The recent court decisions beg the question, what *can* be done to perpetuate the positive attributes of judicial elections while still ensuring judicial independence? Until recently, states were in a position to regulate judicial candidates using codes of judicial conduct, largely modeled after the American Bar Association’s Model Code of Judicial Conduct.¹⁵² In particular, the Code prohibits all judges and candidates from making statements that “appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.”¹⁵³ While this language is somewhat different than the “announce clause” at issue in *White*, the cases outlined herein indicate that even such mild language as appears in the Model Code of Judicial Conduct may be unconstitutional. While it would seem that *White*, *Chmura* and *Suster* leave very little room for regulation of judicial elections, there is likely a narrow gap where some regulation of conduct would be constitutional. For example, the *Chmura* court held that an appropriately tailored, compelling state interest in limiting judicial campaign speech included preventing fraud and libel, which adversely impact the integrity of the election process and the judiciary.¹⁵⁴ As a result, the court amended the judicial canon at issue to prevent only that speech which is “knowingly, or with reckless disregard,” false.¹⁵⁵ Although judges and lawyers are subject to discipline for their behavior, special interest groups are not, so even the

¹⁴⁹ See generally *White*, 536 U.S. at 778, 788.

¹⁵⁰ See Schotland, *supra* note 38, at 884-85.

¹⁵¹ States in which voter referenda are common pose another challenge to elected judges who may ultimately be in a position to overturn popular ballot measures. See generally, Julian N. Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. COLO. L. REV. 733 (1994).

¹⁵² MODEL CODE OF JUDICIAL CONDUCT (1990).

¹⁵³ MODEL CODE OF JUDICIAL CONDUCT § 5(A)(3)(d)(ii) (1990).

¹⁵⁴ *Chmura*, 608 N.W.2d at 40.

¹⁵⁵ *Id.* at 43.

most narrowly tailored of ethics rules will not solve all of the problems associated with recent judicial elections. Likewise, the court in *Suster* followed the Supreme Court's reasoning in *Buckley v. Valeo*, thus allowing for caps on campaign contributions.¹⁵⁶ Several states have contemplated more stringent disclosure laws, and even public funding of judicial campaigns that would be able to exist within the current constitutional framework of *Buckley*.¹⁵⁷ However, relying on *Buckley* and its progeny is tenuous at best. As Justices Thomas and Scalia stated in their dissent in *Nixon v. Shrink Missouri Government PAC*¹⁵⁸ they would not hesitate to overturn *Buckley*: "*Buckley's* ratification of the government's attempt to wrest this fundamental right [of campaign contributions] from citizens was error."¹⁵⁹ Given that the Court is likely to review campaign finance reform in this term of the Court, all laws relating to campaign finance could be facing an overhaul in the near future.

In spite of the increasingly expensive and contentious nature of judicial elections, most states that have recognized problems have not changed their judicial selection method. For example, voters in the 2000 Florida election rejected a ballot initiative that would have introduced merit selection.¹⁶⁰ While most states continue to have judicial elections, some commentators feel that the Supreme Court's decision in *White* might be central to turning the public away from partisan elections: "Things are only going to get uglier and nastier, and the only good news is that merit selection might become a reality if these campaigns become too squalid for words."¹⁶¹ Merit selection has its own pitfalls, however, as Missouri discovered in the 1990s.¹⁶² In addition, retention elections historically have suffered from low voter turnout and uninformed voter decision-making.¹⁶³

Perhaps lost in all of the commentary is the idea expressed in both *Butler* and *Chmura* that judicial elections offer voters a periodic debate on the direction of the judiciary, and that concept alone justifies judicial elections. Implied in that logic is that it is better to know where a judicial candidate stands on issues of importance to voters and allow them to participate in selection, than to allow a small group (whether legislators, a commission, or executive) to determine who will serve on the bench based upon a set of criteria generally unknown to the populace. This notion obviously reflects the desire to have a judiciary that is accountable to the people.

Ultimately, the continued viability of judicial elections hinges on the inherent tension between elective politics and judicial independence. While historical justifications for an elected judiciary may still ring true with average voters who feel that they know their local judges, on a larger scale, judicial independence is threatened when judges are subject to the same political system and pressures as other politicians. Voters must decide which they value more: political process or judicial independence. All agree that protecting the judiciary from actual or apparent impropriety is essential, yet the future of judicial elections seems fraught with conflicts of

¹⁵⁶ See *Suster*, 951 F.Supp. at 700.

¹⁵⁷ See generally Barnhizer, *supra* note 148, at 416-20.

¹⁵⁸ *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000).

¹⁵⁹ *Id.* at 420.

¹⁶⁰ Carter, *supra* note 2, at 32.

¹⁶¹ Carter, *supra* note 2, at 32 (quoting Professor Charles G. Geyh, University of Indiana School of Law).

¹⁶² See Part V, *infra*.

¹⁶³ See Daugherty, *supra* note 29, at 322-23.

interest, partisan politics and policy discussions previously absent. Judicial independence and direct democracy have managed to coexist for the last 150 years, yet in the wake of *White* and other recent cases, that coexistence is increasingly fragile.