

# **Political Judges and Popular Justice: A Conservative Victory or a Conservative Dilemma?**

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## Introduction

What follows is a polemic on the transformation of the American judiciary. It is aimed at conservatives, for they are the driving force in the movement to make campaigns for judicial offices exactly like campaigns for other “political” offices. I seek to establish, as a matter of policy, that conservative principles argue for a presumption against politicization. With this policy perspective in place, I then examine the law concerning elected judges, focusing on the Supreme Court decision in *Republican Party of Minnesota v. White*,<sup>1</sup> the major victory for what is currently viewed as the conservative position. I argue that *White* rests on flawed premises and should be narrowly construed.

Most of the judges in America are elected.<sup>2</sup> Yet the institution of the elected judiciary is in trouble, perhaps in crisis.<sup>3</sup> The pressures of campaigning, particularly raising money, have produced an intensity of electioneering that many observers see as damaging to the institution itself.<sup>4</sup> It is true that states with elected judges have had in place mechanisms to regulate judicial elections, what candidates say and how they raise money, for example. However, these mechanisms – based on the American Bar Association’s Model Code of Judicial Conduct<sup>5</sup> – have increasingly been invalidated by the courts.<sup>6</sup> Obviously, governmental regulation of political activities raises serious First Amendment problems, particularly in the

context of elections where, the Supreme Court has said, the Amendment has its fullest and most urgent application.<sup>7</sup>

Although this development predates it,<sup>8</sup> the Supreme Court decision in *White* gave enormous momentum to the attack on the Canons and the state rules derived from them.<sup>9</sup> The Court, by a majority of five to four, struck down Minnesota's Announce Clause, which stated that a judicial candidate shall not "announce his or her views on disputed legal or political issues."<sup>10</sup> Since *White* the Canons have been under siege. A familiar pattern has emerged. The challenges are brought by conservative candidates and groups, often represented by prominent conservative lawyer, James Bopp.<sup>11</sup> The state judicial establishment, bar associations and reformers line up on the other side, either as parties or amici. The battles bear a close resemblance to those fought over campaign finance reform. Indeed, the issues coalesce, with conservatives rallying under the First Amendment banner in tones that evoke the strong dissents of Justices Scalia and Thomas in campaign finance cases.<sup>12</sup> The challengers have argued, in essence, that states cannot have it both ways. If states choose to "tap the energy and the legitimizing power of the democratic process,"<sup>13</sup> they must accord judicial candidates the full panoply of the First Amendment protections that would apply to all other elections. As Justice Kennedy put it, "[A] state cannot opt for an elected judiciary and then assert that its democracy, in order to work as desired, compels the abridgement of speech."<sup>14</sup> For the challengers, defenders of the Canons are trying to prevent the politicization of politics, like King Canute trying to hold back the sea.

In this article, I present an alternative conservative position.<sup>15</sup> My policy arguments are based in federalism, certainly a bedrock conservative doctrine. The starting premise is that conservatives have a substantial stake

in the health and vitality of the state courts. Doctrines of judicial federalism are central to concepts of federalism in general, and those doctrines rest on the notion of parity<sup>16</sup>—particularly the view that state courts are equally as capable as the “independent” federal judiciary of providing fair trials and protecting individual rights. State courts play a fundamental role in the American Constitutional order. If the election of state judges has somehow reached a point that threatens the capability of state courts, the entire conceptual framework of judicial federalism is placed in doubt.

Two other aspects of federalism are invoked. The first is the importance of the states’ ability to structure their institutions. As Justice O’Connor stated, “it is in the manner that a state structures its government that it defines itself as a sovereign.”<sup>17</sup> There is little dispute, at least so far, that states can choose to *have* elected judges.<sup>18</sup> Yet both the majority and dissenting opinion in *White* clearly view those with whom they disagree as seeking to undermine the institution.<sup>19</sup>

The second federalism question is how far states can experiment in the manner of selection. Judicial selection, with its complex issues of law and policy, is an ideal area for states to fulfill their laboratory role. How to reconcile the elected judiciary and the values of accountability, with rule of law values, particularly the need to afford litigants due process, is one of the fundamental questions facing the American legal system. Pre-*White*, state regulation of judicial elections permitted different approaches to calibrating the values. After *White*, the road seems open for the challengers to achieve a single, nationwide model: a politicized judiciary that is, essentially, another political branch. Beyond both federalism points is the importance of public perception of the state judiciaries as viable entities. Perception and symbolism play an important role in federalism debates: particularly in the

recurring question whether states are inferior entities, or co-equal sovereigns with the national government.<sup>20</sup>

Law trumps policy, of course, assuming for purposes of argument that the distinction is clean cut. *White* represents “the law,” but the decision is seriously flawed as well as sharply divided. The majority virtually ignored fundamental precepts of separation of powers in treating the judiciary as a political branch because it (sometimes) makes policy.<sup>21</sup> The dissenters did not have an easy time either, relying on the troubling distinction between political and nonpolitical elections.

The questions raised by the politicization debate are not easy ones. Indeed, I think the debate would benefit if participants recognized just how hard these questions are. They include the following:

- ♦ Can states “square the circle:” can they choose an elected judiciary while conducting the elections in a manner that makes it look like an appointed one?
- ♦ Should *White* be broadly read, to the point of invalidating all Canon-based regulation of judicial elections?
- ♦ Can there be a distinction between political and nonpolitical elections, or does the First Amendment apply with equal force in all contexts? In other words, can differences in the offices to be chosen lead to different degrees of regulation?
- ♦ If the answer is potentially yes, just how different is the judicial function from that of legislation? Is it minimal in that they both make policy, or great in that adjudication/application of law is fundamentally different from legislative making of law? What about the fact that legislators have constituencies, while judges, in theory, do not?
- ♦ Of what relevance is the contention that choosing an adjudicator is a political act, but the process of adjudication is

not? Can it be said that judges derive their legitimacy from the office itself, not from their mode of selection?

- ♦ In our constitutional system, what, if any, are the limits of popular control of the judiciary through the electoral process? Is a point reached at which the due process rights of litigants or the ability of courts to protect minorities are threatened?
- ♦ Does the practice of campaign contributions from potential parties also threaten due process? How can a campaign be run without money, assuming no public financing?

What follows can best be viewed as a concept paper.<sup>22</sup> My focus is not on whether a particular regulation is valid, but rather on whether *any* regulation is valid. My main target audience is legal conservatives, particularly those who view post-*White* developments as a long overdue removal of impediments to democracy in the area of judicial selection. I think the conservative position should be far more nuanced, based on a sense of the constitutional role of state courts, as well as the constitutional rights of state court candidates. There is always a risk in attempting to juxtapose structural, seemingly abstract values, such as federalism and separation of powers, with the concrete rights of those who, for example, wish to campaign. But there is another group of rightholders very much in the picture: those who must appear before those candidates once they become judges, and whose personal rights to due process must also be considered. Perhaps this debate is an example of the scenario envisaged by Justice Breyer in an important campaign finance opinion: one where important constitutional interests lie on both sides of the equation.<sup>23</sup> In any event, I have chosen to write at a high level of generality in the hope of moving the debate toward some agreement on the range of interests at stake.

Section I of the article focuses on the current “problems” created by state judicial elections, and asks whether they are in fact problems or the normal play of the democratic process. Special attention is paid to campaign contributions and to public opinion surveys that identify these contributions as fostering a negative perception of the state courts. Section II makes the case for conservative concern about the health of state courts and about the bearing of federalism arguments on state judicial elections. This section posits the presumption against politicization. Section III develops possible conservative rebuttals to the presumption – both in the domain of law and of policy. This section also presents an analysis and critique of *White*. Section IV examines what the post-*White* world of judicial elections might look like. It considers alternative scenarios, and recommends one which contains some degree of regulation as well as a second generation of judicial campaign measures.

## I. The Transformation of the American Judiciary – Is it Real? Is it a Problem?

We may well be witnessing a transformation of the American Judiciary, at least in the thirty-nine states that use some form of election to choose at least some of their judges.<sup>24</sup> Whether this sea change is a problem is the subject of intense debate, but there is no disagreement that it is happening. Judicial elections are becoming increasingly like elections to legislative and executive offices. As one critical observer puts it, “disturbing trends documented in recent years include a staggering escalation of the money used to support judicial campaigns, a growth in the participation of political parties and other interest groups in judicial campaigns, increases in

the amount of television advertising, [and] a deterioration in the tone of campaigns ...”<sup>25</sup> In other words, we are witnessing the “politicization”<sup>26</sup> of judicial campaigns. My goal in this part is to examine and elaborate on the phenomenon as a prelude to the argument that conservatives should be troubled by it.

#### A. Politicization – The New Judicial Campaigns.

Consider three aspects of the trend. The first is the tendency of candidates to run touting advertisements – emphasizing not only their qualifications but also their positions. Examples include ads such as “Maximum Marion Bloss. You do the crime, you do the time,”<sup>27</sup> or declarations that a candidate is pro-life and for “traditional marriage,”<sup>28</sup> or that she is the only candidate who has put “thousands of criminals behind bars.”<sup>29</sup>

A second, often remarked, phenomenon is the rise of negative ads, many paid for by independent, or “special interest” groups.<sup>30</sup> According to one study, negative ads accounted for one-fifth of all ads in 2004, twice the rate of the previous election cycle.<sup>31</sup> The recent Republican primary in the Alabama race for Chief Justice featured remarkable negative advertising from both candidates. The following is a description of exchanges between challenger Tom Parker and sitting Chief Justice Drayton Nabers:

One spat occurred in April of 2006, when the late Supreme Court Justice Hugo Black was inducted into the Alabama Lawyers Hall of Fame. Parker used the event to lambaste Nabers, a former law clerk of Black’s. He distributed a diatribe at the ceremony, which stated that “[Black’s induction was] a shameful disgrace to the people of Alabama,” and that Black “personally launched the war to kick

God out of the public square in America.” In an attempt to solidify his conservative credentials, Nabers released a television advertisement in which he stated that he is conservative, pro-life, and will always support traditional marriage. Parker responded with an ad of his own, questioning Nabers’ stances on the aforementioned issues, and calling Nabers “too liberal, too wrong for Alabama.” In another ad, Parker targeted the issue of gay marriage. While spooky music is played, the viewer is informed that a “liberal judge” in Georgia had recently thrown out the state’s same-sex marriage ban. An image of two homosexual men dressed in tuxedos appears on the screen as the announcer asks, “Is Alabama next?” He answers the question, “Maybe! Chief Justice Drayton Nabers and a *liberal* state court majority say they will back all federal court orders—even one ordering Alabama to recognize gay marriages!” In another ad, Parker takes aim on a court decision which took a convicted rapist and murderer off death row. Once again, music worthy of a horror film is played, and a black-and-white image of a hand holding a knife is displayed on the screen. Then, a less-than-flattering image of Nabers appears next to a French flag, then a Mexican flag and a United Nations flag, and the viewer is informed that Nabers and the Alabama Supreme Court used foreign law to overturn the death sentence of this convicted murderer.<sup>32</sup>

The aspect of politicization that has received the most attention from academics and other observers<sup>33</sup> is the dramatic increase in the amount of money spent on judicial elections. Writing in 1985, Professor Schotland stated that “we have the spectacle of judges during campaign season



receiving not just checks but even cash at public gatherings, and we have an increasing spate of news articles about funding in judicial campaigns.”<sup>34</sup>

The trend continues. As the National Law Journal put it: “Running for state judge has never been pricier.”<sup>35</sup> Statistics abound. According to the New York Times, “Spending . . . is skyrocketing, with some judges raising \$2 million or more for a single campaign.”<sup>36</sup> In 2006, the most expensive judicial race in the country was the aforementioned election of Alabama’s chief justice. The three candidates raised 8.2 million dollars.<sup>37</sup> However, the most expensive race remains that for a seat in the Illinois Supreme Court in 2004. The two candidates spent 9.3 million dollars.<sup>38</sup>

An extremely helpful source of information on money in judicial elections is the periodic reports by the Justice at Stake Campaign (JAS): a Washington-based reform group.<sup>39</sup> Given the group’s reform orientation, one may question its ultimate conclusions about the current state of judicial campaigns, but its compilation of data is indispensable for those studying the issue. Here are two excerpts from the 2004 study:

*More Fundraising in More States.* In 2003-2004, candidates combined to raise over \$46.8 million. In the past three cycles, candidates have raised \$123 million, compared to \$73.5 million in the three cycles prior. Nine states broke candidate fundraising records in the 2003-2004 cycle.

*Average Cost of Winning Jumps 45 Percent in Two Years.* In 2004, the average amount raised by winners in the 43 races in which candidates raised any money leapt to \$651,586 from \$450,689 in 2002. Average fundraising among all candidates who raised money climbed to \$434,289.<sup>40</sup>

The JAS Report on 2006 sounds many of the same themes, referring to 2006 as “the most threatening year yet to the fairness of America’s state

courts.”<sup>41</sup> JAS notes increased spending, including the fact that “[o]f the 10 states that had entirely privately financed contested Supreme Court campaigns in 2006, five . . . set state records for candidate fundraising in a single court race, as well as records for total fundraising by all high court candidates.”<sup>42</sup>

The Report also expresses concern over vitriolic negative advertisements,<sup>43</sup> and the spread of politicization to intermediate and trial courts.<sup>44</sup> However, it is not all negative. Indeed, it suggests the potential for self-correction within the system:

In 2006 judicial candidates who sought to put disputed political and legal issues at the center of their candidacy lost more often than they won. In state after state, when judicial campaigns began to sound like politics as usual, many voters seemed wary.<sup>45</sup>

March 2007 marked a further escalation of the politicization of judicial campaigns. A newly-formed group—The Democratic Judicial Campaign Committee—entered the fray with a resounding broadside.<sup>46</sup> Declaring itself “the only organization whose primary mission is to elect Democrats to state courts,”<sup>47</sup> the DJCC declared that

Beginning in the early 1990’s, political consultants such as Karl Rove have orchestrated the conservative takeover of our state courts. These efforts have been funded by large contributions from corporate interests. Today, Republicans control 39 of 63 seats on courts with partisan elections. If these judges remain on the bench, consumers’ and workers’ rights, environmental protections, and the opportunity for individual citizens to find justice in our court system will continue to disappear. The DJCC fights against this right-wing insurgency to restore justice and democracy to our nation’s court systems.<sup>48</sup>

The DJCC described the Republican-backed judges in the following terms: “They are often unqualified for the office, ignorant of the law of their state, unconcerned with the facts of the cases before them, dismissive of

lower court rulings, and without concern for their own professional reputation or the appearance of a biased court. In short, these judges are bought and paid for by the corporations who funded their campaigns.”<sup>49</sup> It is too early to tell how much the emergence of such a group is a step towards treating state court races as part of the national political picture – perhaps on a par with tallies of how many governorships have gone to which parties. The DJCC is quick to point out that national conservative interest groups are already active players. It seems fair, however, to characterize the development as an escalation of the rhetoric surrounding judicial campaigns.

In sum, the politicization of judicial elections shows every sign of increasing to the point where the elections, and perhaps the judiciary itself, are transformed. As Professor James Gibson put it,

The confluence of broadened freedom for judges to speak out on issues, the increasing importance of state judicial policies, and the infusion of money into judicial campaign have produced what may be described as the “Perfect Storm” of judicial elections. This storm is radically reshaping the atmosphere of state judicial elections as it gathers strength and spreads across the nation.<sup>50</sup>

This situation is a marked contrast to the phenomenon, which prevailed until recently, of low visibility, low salience elections.<sup>51</sup> Part of the explanation is no doubt the spread to the judicial arena of practices found in every other type of American election. In the judicial context, however, there is an additional explanation: the removal of barriers erected to prevent this very phenomenon.

#### B. The Fall of the Canons and the Rise of the Challengers.

The American Bar Association has, over the years, promulgated codes regulating judicial conduct including conduct in elections.<sup>52</sup> States

gradually adopted most or all of the ABA's Canons of Judicial Ethics (the Canons) to the point that they became the dominant source of governance of judicial elections. The Canons cover such matters as forbidding making "commitments" or "pledges or promises" about a candidate's views,<sup>53</sup> and financial aspects of a campaign including a prohibition on direct solicitation of funds by candidates.<sup>54</sup> Obviously the Canons, or more precisely the state rules adopting them in a binding fashion, (generally adopted by State high courts) operated to prevent the politicization described here. That was their goal.<sup>55</sup> At the same time, however, they had a direct, negative effect on candidate speech, thus raising serious First Amendment questions.

Even before the Supreme Court's 2002 decision in *Republican Party of Minnesota v. White*<sup>56</sup> successful challenges were mounted.<sup>57</sup> *White*, discussed in more detail in Part III,<sup>58</sup> relied on the First Amendment to strike down a Minnesota rule forbidding a judicial candidate to "announce his or her views on disputed legal or political issues."<sup>59</sup> The majority left the question open,<sup>60</sup> but suggested that "judicial and legislative elections"<sup>61</sup> might be governed by the same constitutional rules.<sup>62</sup> *White* was clearly seen by many potential challengers of the Canons to have precisely that effect. Their challenges have often succeeded, particularly in federal courts.<sup>63</sup>

The challenge to the Canons has a distinctly conservative flair. Justice Scalia wrote the Court's opinion in *White*, joined by Chief Justice Rehnquist, and Justices Thomas, Kennedy and O'Connor.<sup>64</sup> The latter two justices also wrote concurring opinions, while joining in the Court's opinion.<sup>65</sup> Justices Stevens and Ginsburg each wrote a dissent, joined by the other members of the Court's "liberal" wing.<sup>66</sup> The challengers themselves are primarily conservative candidates and groups<sup>67</sup> whose complaints stress

a desire to inject conservative views and subjects into judicial elections.<sup>68</sup> As developed in Section III, the challengers' motives include the concern that these views may be excluded under the Canons, and the conviction that greater popular exposure to where candidates stand will move the law in a conservative direction.<sup>69</sup> What has developed then, is a debate between two groups that I will call the ABA establishment reformers (reformers) on the one hand, and the First Amendment absolutist challengers (challengers) on the other.<sup>70</sup> In order to develop my thesis on how conservatives *ought* to view the issue, it is necessary to examine briefly the debate and some underlying assumptions.

### C. Is Politicization Bad?

The position of the reformers rests on a central premise: the manner in which judicial campaigns are conducted affects the subsequent operation and perception of the judiciary. As a general matter, it is easy to characterize the reformers as mired in a nineteenth-century conception of the law as a gentleman's profession, and the operation of the judiciary as all that is good and noble in that conception. Thus they want judicial elections – which they regard as a necessary evil, at best – to reflect that image. However, I think that their main point is that for the judiciary to perform properly, it must be kept separate from the hurly-burly, rough-and-tumble world of politics. The ideal figure of the judge is a neutral, somewhat distant individual.<sup>71</sup> From this perception there flows a more general concept of judging: judges apply the law, in a neutral fashion. When they do make law their actions are subject to constraints such as formalized presentation adversarial precedent – they are not legislators.<sup>72</sup>

The Canons dealing with elections reflect two primary concerns. The first, exemplified by the prohibitions on pledges and promise,<sup>73</sup> is that judges should strive to avoid committing themselves in advance to particular results. There is a double danger: injustice and the appearance of injustice. A second concern, exemplified by the prohibition of direct solicitation,<sup>74</sup> is that money will taint the judicial process. Judges may favor, or appear to favor, those who have helped put them on the bench.<sup>75</sup>

In evaluating these concerns and the support they provide for the reformers one must ask whether they flow from informed common sense or whether there is actual evidence that the practices the reformers decry do hurt the judicial process and/or the perception thereof. In the case of campaign contributions, there is substantial evidence that a problem exists. Professor Gibson reports the results of a recent empirical study as follows: “the strongest effects on institutional legitimacy come from campaign contributions. When groups with direct connections to the decision maker give contributions, legitimacy suffers substantially.”<sup>76</sup> Numerous public opinions polls reach similar conclusions. For example, a Marist Institute poll conducted in New York in 2003 concluded that, “Eighty-three percent of registered voters in the state indicate that having to raise money for election campaigns has at least some influence on the decisions made by judges.”<sup>77</sup> A 1999 national poll for the National Center for State Courts found that “slightly over 75% of the respondents agreed that having to raise campaign funds influences elected judges.”<sup>78</sup> In a Pennsylvania survey the figures reached 95 percent.<sup>79</sup> Perhaps most disturbing is a recent New York Times analysis of campaign contributions and the Ohio Supreme Court.<sup>80</sup> It suggests empirical support for the intuitive conclusion in the surveys – Ohio justices voted in favor of contributors seventy percent of the time.<sup>81</sup>

But is there a problem? The same surveys show a relatively high overall degree of confidence in the courts.<sup>82</sup> The doubts raised by campaign finance practices are likely to increase – especially given clear evidence that more money is being spent on judicial campaigns.<sup>83</sup> However, any connection between campaign *pronouncements* and justice or the appearance thereof may be harder to prove. Professor Gibson reports that “*Perhaps the single most important finding of this paper is that candidates for judicial office can engage in policy debates with their opponents without undermining the legitimacy of courts and judges.*”<sup>84</sup> The challengers would rush to say that this proves their point: that judicial electioneering is just as normal and healthy as electioneering in any other context. Moreover, there is substantial evidence of public support for retaining the elected judiciary.<sup>85</sup>

Perhaps the sky has not fallen, at least not yet.<sup>86</sup> Things can change, however.<sup>87</sup> Indeed Professor Gibson concludes his study – the focus of which is on the institutional legitimacy of courts – with the following warning: “Those concerned about threats to the legitimacy of the elected state courts would do well to turn their attention away from substantive policy pronouncements and focus instead on the corrosive effects of politicized campaigning.”<sup>88</sup> However, drawing the line between “substantive policy pronouncements” and “politicized campaigning” is not always easy. Dissenting in *White Justice* Ginsburg raised due process concerns in noting the “grave danger to litigants from campaign promises.”<sup>89</sup> She also expressed broader concerns about politicized judicial campaigns:

“The perception of that unseemly quid pro-quo – a judicial candidate’s promises on issues in return for the electorate’s votes at the polls – inevitably diminishes the public’s faith in

the ability of judges to administer the law without regard to personal or political self-interest.”<sup>90</sup>

Whether one calls it “electioneering,” “politicization” or something else, there is a real risk that the kind of campaigning for judicial seats that we see today will only go in one direction – towards a similarity of campaigns for *all* offices that will obscure what makes the judiciary different. And that is a problem. In saying this, I accept the reformers’ premise that the nature of campaigns can affect the operation of the institution and the way it is perceived.

Indeed, one of the fundamental questions in the whole debate is whether it is only about regulating elections, not about regulating the judiciary. Was the Eight Circuit right when it said, in upholding a challenge to two Minnesota Canons, “This case... is not about what happens after an election”?<sup>91</sup> Perhaps there is an oversimplification in the challengers’ apparent assumption that “anything goes” is good. This need not mean automatic acceptance of the reformers’ solutions.<sup>92</sup> My point is that current developments are cause for concern, *at least as much for conservatives as for any other group*. Conservatives need to take a hard look at the developing situation in the state courts, and ask if it is a salutary development. I say this because there are grounds to justify worrying about the health of those courts, and the health of the state courts is central to conservative visions of judicial federalism. Moreover, every time a court strikes down a state regulation of judicial campaigns, it strikes at the heart of the state’s ability to “define itself as a sovereign” and its efforts to find the elusive balance between accountability (election of judges) and the role of law (fair adjudication).<sup>93</sup> The First Amendment is not the only constitutional



value in play. Indeed, important structural concerns based in federalism coupled with the basic due process rights of individuals to fair adjudication, suggest that the presumption, for conservatives as for others, should be *in favor* of efforts to prevent politicization of the state courts.

## II. Federalism and the State Courts – A Presumptive Conservative Position Against Politicization

Let us proceed on the assumption that politicization at least puts in question the viability of the state courts. Public perception of them as above the battle and places where all citizens can receive impartial justice may falter. Extensive campaign promises and political debts may lead to prejudgment. Campaign contributions, in particular, may create a class of favored litigants. Suppose that both citizens in general and close observers of the legal system lose confidence in the state courts. Why would such a situation be of particular concern to conservatives?

### A. Judicial Federalism – The Parity Debate<sup>94</sup>

A recurring theme in the debates governing federal jurisdiction is that state courts are just as capable of vindicating federal rights as federal courts. This premise of parity underlines decisions concerning such diverse subjects as abstention,<sup>95</sup> habeas corpus,<sup>96</sup> and, to some degree, the Eleventh Amendment.<sup>97</sup> Several points require emphasis in the context of this article. The first is that parity-based doctrines are of great practical significance in the day-to-day operation of the state courts. They prevent, or limit, federal court interference with state court proceedings at both the initial stage and the post-trial stage.<sup>98</sup> These doctrines frequently raise the question whether the state courts can police the officials of their own governments.<sup>99</sup> They

sometimes send litigants to state courts despite their desire to be in a federal forum.<sup>100</sup>

Equally important is a second aspect of these doctrines: their symbolism. Perhaps the most famous statement of the symbolic element of parity-based doctrines is Justice Black's evocation of "Our Federalism" in *Younger v. Harris*.<sup>101</sup> The symbol is that of a co-equal court system, just as one broader vision of federalism depicts the federal and state governments generally as co-equal sovereigns.<sup>102</sup> Indeed, the doctrines reflect a fundamental assumption underlying the judicial system as a whole: that state courts are equal partners with federal courts in the enforcement of federal law generally. Narrow rules concerning when a case "arises under" federal law<sup>103</sup> may prevent cases presenting significant federal issues from being brought in or removed to a federal court. They are heard in state courts, an allocation of authority that reflects, in part, a belief that the two systems are of equal competence. In the realm of constitutional rights, Professor Paul Bator stressed the role of state courts as protectors of those rights. He spoke of

The importance of creating and maintaining conditions that assure that, in the long run, the state courts will be respected and equal partners with the lower federal courts in the enterprise of formulating and enforcing federal constitutional principles. . . We must never forget that under our constitutional structure it is the state, and not the lower federal, courts that constitute our ultimate guarantee that a usurping legislature and executive cannot strip us of our constitutional rights.<sup>104</sup>

There is, of course, the competing vision, particularly with respect to the enforcement of constitutional rights. As Professors Solimine and Walker note, "Skeptics of parity... argue that historical conditions – notably the outcome of the Civil War and the passage of constitutional amendments

during the Reconstruction Era – have elevated the federal government in general, and federal courts in particular, to a place of prominence over their state counterparts.”<sup>105</sup> As the quote suggests, the parity doctrines are profoundly conservative in nature.<sup>106</sup> They stand in direct opposition to what Professor Bator referred to as the nationalist theme that federal courts “are to be preferred”<sup>107</sup> in the adjudication of federal rights. It is no surprise that there is an intense nationalist critique of decisions like *Younger*.<sup>108</sup> Thus, for conservatives there is a lot at stake, both practically and doctrinally, in the parity debate. Arguments over judicial federalism mirror broader arguments about federalism, for example, the equality of state and national institutions versus the superiority of the latter. Professor Bator gives a nice example of how the two levels of federalism discourse blend. Invoking the classic federalism theme of decentralization, he contends that state judges can enrich the discourse over federal constitutional rights by bringing to it an emphasis on structural and institutional values.<sup>109</sup> However, their ability to enrich the discourse will be substantially diminished if other participants in it view the state judges as political hacks.

My goal in this part is not just to remind conservatives of the importance of the parity debate, but to link it to today’s debate over the effect of politicization on the state judiciaries. The parity debate has, more often than not, come out in a conservative direction. Perhaps conservatives take this for granted. Yet, decisions like *Younger* and its progeny<sup>110</sup> were often hard fought battles. They represent one of the triumphs of the American legal conservatism. They could be undermined, if not undone, if their major premise – the viability and fairness of state courts – were widely seen as discredited. This premise is crucial not only in the context of specific decisions such as *Younger*, or even specific aspects of the parity

debate. It underlies the American judicial order, and the vital role of state courts within it. It is hard to believe that conservatives would take a position that threatens that order.

The parity debate – as well as broader notions of judicial federalism – hinges on notions of the quality of state courts. These perceptions are, in part, as Professor Bator said, “intuitive.”<sup>111</sup> In individual cases, the decision about federal interference with state adjudication often turns on whether the state system offers a “full and fair opportunity” for the presentation of federal claims.<sup>112</sup> Of far greater importance is the general perception held by federal courts of how a state judicial system operates as a whole.

Dissenting in *Dombrowski v. Pfister*<sup>113</sup>, Justice Harlan criticized the federal intervention in that case as resting upon “the unarticulated assumption that state courts will not be as prone as federal courts to vindicate constitutional rights promptly and effectively. Such an assumption should not be indulged in the absence of a showing that such is apt to be so in a given case.”<sup>114</sup>

Justice Harlan’s opinion prefigured the emergence of generalized abstention doctrines in cases such as *Younger*. Perhaps the most explicit statement of the importance of general perceptions of state courts is found in Justice Powell’s opinion in *Stone v. Powell*:<sup>115</sup>

The policy arguments that respondents marshal in support of the view that federal habeas corpus review is necessary to effectuate the Fourth Amendment stem from a basic mistrust of the state courts as fair and competent forums for the adjudication of federal constitutional rights. The argument is that state courts cannot be trusted to effectuate Fourth Amendment values through fair application of the rule, and the oversight jurisdiction of this Court on certiorari is an inadequate safeguard. The principal rationale for this view emphasizes the broad differences in the respective institutional settings within which federal judges and state judges operate. Despite differences in institutional environment and the unsympathetic attitude to federal constitutional

claims of some state judges in the past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several states.<sup>116</sup>

Thus, at the moment, parity prevails. However, as the quote from *Stone* indicates, that rests on current perceptions of the state courts. Those perceptions could change. Professor Bator stated the matter succinctly: “When mistrust of the state courts is justified and endemic, federal supervision must be strengthened.”<sup>117</sup> For him, “If we are fundamentally suspicious of the state court system – if the central problem continues to be the problem of mistrust – then the ‘full and fair opportunity’ formula will not do.”<sup>118</sup> Although it arose in the context of federal court interference with state administrative proceedings, *Gibson v. Berryhil*<sup>119</sup> is instructive. There were two different types of optometrists in Alabama, but the board that regulated the profession was composed of only one group. In the face of abstention arguments, the Supreme Court upheld the propriety of a federal court challenge to a pending disciplinary proceeding. Although the case might be viewed as context based, an example of the “full and fair opportunity” doctrine, it is clear that the Court saw the board as structurally incapable of rendering an unbiased judgment against a class of parties.<sup>120</sup>

*Gibson* could be an indication of far broader things to come in the context of state judiciaries. What I have referred to here as the politicization phenomenon could lead to generalized mistrust. It is no coincidence that most influential critique of the parity-based doctrines – written thirty years ago by Professor Neuborne<sup>121</sup> – focuses on the election of state judges as a reason for mistrust.<sup>122</sup> Current developments could be seen as leading to an unfair judiciary: judges who have prejudged cases, and favored litigants

based on campaign contributions. On a deeper level, mistrust can stem from erosion of the ideal of the state courts as *different* from the political branches. Recall that a central goal of the challengers is to have all elections treated alike – both because of the commands of the First Amendment and the view that judges are policymakers just like legislators.<sup>123</sup>

In a remarkable development, four Supreme Court justices recently voiced concern about the effects of politicization on state courts.<sup>124</sup> They noted polling data that show “fear that people will lose trust in the system,” and concern that “[c]ampaign contributions and political pressure will make judges accountable to politicians and special interest groups instead of the law and the Constitution.”<sup>125</sup> A core issue is whether the state judiciary can protect individual rights. As we move toward judicial elections that yield judges who look like legislators, the question inevitably arises whether those judges can protect citizens from those legislators – and the officials who execute their laws. The challengers will have won a pyrrhic victory if their litigation successes lead to a state judiciary which the federal judiciary does not trust. Protecting rights might be seen as a relatively small proportion of the state courts’ workload, but it is a vitally important one – both symbolically and practically.

The challengers might claim that issues of *federal* rights will not enter into electoral debates. In *White*, Justice Scalia referred to the role of state courts in shaping *state* constitutions.<sup>126</sup> But constitutional adjudication frequently involves both state and federal claims, often closely interwoven. The judge who does not want to face the electoral backlash of releasing a notorious criminal on a “technicality,” is not likely to take a different approach to federal technicalities than to state ones. It is naïve to assume that federal law issues will not play a role in state judicial elections. The

Alabama advertisements discussed earlier brought up enforcement of *federal* court orders on same sex marriage.<sup>127</sup> Indeed, one candidate “suggested defiance of U.S. Supreme Court precedent...”<sup>128</sup> in the criminal law context. Questionnaires in Kentucky and North Carolina “asked candidates to agree or disagree with the following statement: ‘I believe that *Roe v. Wade* was wrongly decided.’”<sup>129</sup> A Kentucky judicial candidate stated his support for “having the Ten Commandments in our schools and courthouses...”<sup>130</sup>

Conservatives have always emphasized the symbolic aspects of federalism, rightly so. This concern also extends to the practical dimensions of the parity-based doctrines. It is not a victory for conservatives if the politicized state courts are viewed as hierarchically inferior tribunals whose vital operations require federal supervision. As Solimine and Walker put it, the parity decisions are “a challenge to maintain and enhance the quality of state judicial systems...”<sup>131</sup> Professor Bator also stressed “the importance of creating and maintaining conditions that assure that, in the long run, these state courts will be respected and equal partners with the lower federal courts in the enterprise of formulating and enforcing federal constitutional principles...”<sup>132</sup> Beyond substantive rights lies the issue of the basic fairness of state courts – their ability to provide procedural due process. From a conservative perspective, focusing on these values, it is hard to see politicization as anything but a step backward.

## B. From Judicial Federalism to General Federalism – Difference and Experimentation

Judicial federalism arguments depend largely on the “justness” of state courts and whether they are perceived as equal to the federal courts in

quality and potential fairness. These arguments, however, lead to more general considerations of federalism – considerations that depend not so much on the link between the quality of state courts and the methods of selecting their judges, as on the value of having different methods. This value reflects fundamental aspects of the broader federal system.

### 1. Difference as a value in itself.

Professor Steven Calabresi puts the basic case for federalism in these terms:

The opening argument for state power is that social tastes and preferences differ, that those differences correlate significantly with geography, and that social utility can be maximized if governmental units are small enough and powerful enough so that local laws can be adapted to local conditions, something the national government, with its uniform lawmaking power, is largely unable to do.<sup>133</sup>

“Local laws” surely include those by which a state organizes and regulates its governmental organization. In *Gregory v. Ashcroft*<sup>134</sup> the Supreme Court declared that the manner in which a state organizes itself is an important element of how it defines its sovereignty.<sup>135</sup> This general principle suggests that there might well be several different ways of structuring a state judiciary, including the method of its selection. Professor Schotland describes as “striking” the manner in which “the states vary the selection systems for their different courts.”<sup>136</sup> He identifies fourteen varieties of selection methods.<sup>137</sup> These include different uses of the election technique.<sup>138</sup>



Such a range of differences is obviously an example of federalism in operation. The question then becomes whether the ability to choose the election method includes the power to regulate the election in ways to make it, for example, more or less political. In a critique of *White*, Wendy Weisser has argued that attempts to reduce politicization of the election of judges are an attempt to create an independent judiciary, in particular, one independent of the political branches.<sup>139</sup> She answers in the affirmative the question whether the state can regulate the election with an eye to determining the nature of the institution – the down-the-road question. For her, the Canons, including the one struck down in *White*, “are part of a broader institutional design by which Minnesota defines and controls its judiciary.”<sup>140</sup>

Minnesota’s system of judicial elections cannot be understood apart from the carefully crafted constitutional and statutory scheme of which it is a part. The structure and provisions of the state constitution all point to the conclusion, recognized by the state’s supreme court, that this scheme was designed primarily to preserve judicial independence within a structure of separated powers. Instead of using the federal methods of appointment and life tenure, Minnesota pursues this ideal through a variety of other mechanisms aimed at insulating judges and judicial candidates from political pressures. Over time, and in response [to] the state’s experience, Minnesota has tinkered with these mechanisms to better achieve its constitutional goal. The overriding goal, however, has remained the establishment of an independent judiciary protected from political pressures from both the political branches and the public.<sup>141</sup>

In other words, states should not only be free to choose to have an elected judiciary, but should also be free to decide how to protect it from forces that can reasonably be viewed as preventing it from acting in a judicial manner.

The freedom is not absolute; the First Amendment obviously applies to all

elections. The question is whether federalism and rule of law values argue against an absolutist view of the amendment that pushes elected state judiciaries toward looking like political branches in derogation of their judicial nature. Federalism suggests that states ought to be able to regulate judicial elections so as to “preserve judicial independence within a system of separated powers.”

## 2. Experimentation – The Laboratory Theory at Work.

What I present here as the presumptive conservative argument against politicization thus draws strong support from another, closely related, basic principle of federalism: the “laboratory” theory, or the value of experimentation. The very fact that states differ permits them to approach problems differently. The most famous statement of this aspect of federalism is Justice Brandeis’:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.<sup>142</sup>

State experimentations in governance obviously have value beyond the realm of the “social and economic.” Indeed, the question of how best to regulate election of judges would seem a good example, given its importance, controversial nature, and the wide range of opinions on the subject. The point is not just that states can differ from the federal model of appointed judges, but that difficult questions of how to accommodate the

institution of elected judges with rule of law values argue for states offering differing answers.<sup>143</sup> An important article by Professor William Marshall on campaign finance reform<sup>144</sup> provides helpful insights. Writing at a time of great uncertainty over federal campaign finance reform efforts, Marshall proposed that “the regulation of campaign finance of federal election matters ... be devolved to the states.”<sup>145</sup> He contended that “if the states are experimenting with different types of reform, the problems inherent in particular proposals may become apparent more quickly by virtue of comparison.”<sup>146</sup>

There are striking parallels. Judicial election regulation is a type of campaign reform, and clearly related to campaign finance reform.<sup>147</sup> Regulating judicial elections presents the same First Amendment problem that the Court’s campaign finance cases have grappled with since *Buckley v. Valeo*.<sup>148</sup> One can say of *White* what Marshall said of *Buckley*: “The most likely benefit to First Amendment concerns is that increased litigation might allow the constitutional issues left open as ambiguous in [the case] to percolate into a more coherent doctrine.”<sup>149</sup> My point is not to argue that federalism values trump the First Amendment, but to establish a presumption that conservatives (presumably staunch federalists)<sup>150</sup> should look with favor on states’ efforts to structure their judicial elections, and with dismay on the phenomenon of politicization, in particular its effects on notions of parity and federalism in general.

### 3. Who are the True Federalists in the Judicial Election Debate?

Those who tend to agree with the argument to this point would probably also agree with the following statement:

By recognizing a conflict between the demands of electoral politics and distinct characteristics of the judiciary, we do not have to put States to an all or nothing choice of abandoning judicial elections or having elections in which anything goes.<sup>151</sup>

However, it is from Justice Stevens' *dissent* in *White*. The majority saw the case as presenting essentially a First Amendment problem. Once Minnesota chose to elect its justices, the Amendment governed the process to the same extent it would govern any other election.<sup>152</sup> Strict scrutiny allowed little room for state regulation of judicial campaigns. The closest thing to a discussion of federalism in the majority's opinions is found in Justice O'Connor's concurrence.<sup>153</sup> But it was hardly an endorsement of state freedom. For Justice O'Connor, once the state had chosen to select judges through contested elections, it had "voluntarily taken on the risks to judicial bias..."<sup>154</sup> "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."<sup>155</sup> In other contexts, Justice O'Connor has been a champion of federalism generally, and of the laboratory theory in particular.<sup>156</sup>

A more extensive judicial discussion of federalism concerns is that found in the Eighth Circuit's en banc consideration of two further Minnesota Canons in the remand of *White* from the Supreme Court.<sup>157</sup> The court struck down both Canons, one of which dealt with partisan activity, and one of which dealt with solicitation of campaign contributions.<sup>158</sup> The court acknowledged the importance of state sovereignty, and recognized that "States have wide authority to set up their state and local governments as they wish."<sup>159</sup> However, even if viewed as "concurrent," state sovereignty is subject to the Supremacy Clause.<sup>160</sup> Thus federal rights can be curtailed as

part of the structuring process only if federal constitutional doctrine permits it.<sup>161</sup> In the case of political speech, protected by the First Amendment, that doctrine is strict scrutiny.<sup>162</sup>

Thus for the challengers, who once again prevailed, the presumption against politicization – whether labeled mere policy or policy grounded in constitutional values – is trumped by the virtually absolute thrust of the First Amendment rights that they see as governing all elections, regardless of the office at stake. To them, it makes no sense for a critic such as Ms. Weisser to say that “Unfortunately, the *White* decision reads as a straightforward First Amendment election decision instead of a decision addressing the complex interplay between competing constitutional values.”<sup>163</sup> For them, that is the point. *White* was an election case, nothing more. Even if “constitutional values” are somehow present, they do not rise to the level of a compelling state interest required by strict scrutiny. *White* is obviously the centerpiece of the challengers’ offensive. However, before analyzing the case itself, I wish to discuss two important sets of arguments that the challengers would regard as sufficient by themselves to rebut the presumption that I have tried to establish above. They would contend that *White* is not necessary to establish that the true conservative position is one that favors unfettered speech, and related activities, in judicial elections.

### III. Rebutting the Presumption – The Challengers as the True Conservatives

#### A) The Campaign Finance Reform Trap

##### 1) Conservatives and Campaign Finance Reform

A major theme of conservative legal thought – found in the work of both judges and academics – is deep skepticism about proposals for campaign finance reform.<sup>164</sup> The challengers no doubt view defenders of

restrictions on judicial campaigns as falling into what might be called the campaign finance reform trap: the view that restricting electoral activities protected by the First Amendment can make elections somehow “better.”<sup>165</sup> As a general matter, conservatives have stressed the centrality of First Amendment freedoms in the electoral context.<sup>166</sup> They frequently cite *Brown v. Hartlage*,<sup>167</sup> a decision authored by Justice Brennan, for such propositions as “The free exchange of ideas provides special vitality to the process at the heart of American constitutional democracy – the political campaign.”<sup>168</sup> They see reformers as attempting to use the First Amendment as a grant of legislative power to achieve political equality by limiting the role of wealth in the electoral process. Professor Lillian BeVier, a leading conservative academic, views these efforts as follows: “The rejection of the prevailing view that the First Amendment has force merely as a negative restraint on government and that government regulation of speech is the antithesis of freedom.”<sup>169</sup> Professor Allison Hayward sees a sharp contrast between a Madisonian “preference for leaving political activity free from governmental control,”<sup>170</sup> and Progressive “social engineering ideals”<sup>171</sup> aimed at a “constitutional democracy-enhancing purpose.”<sup>172</sup> The enhancement would come from elimination of private influence based on wealth in the operation of the political system.

It is not immediately apparent that regulating *judicial* elections represents the same type of broad social goals. Nonetheless, the two forms of regulation are linked by a number of themes, including the perceived need to circumscribe First Amendment freedoms.<sup>173</sup> In the next two subsections, I wish to discuss two of those themes of special interest to conservatives: the risk that reform equals entrenchment; and, the

relationship between campaign regulations and the redistribution of political power.

## 2) Entrenchment

A frequent criticism of campaign finance reform proposals is that they are designed by incumbent officeholders and will work to entrench incumbent officeholders. As Professor BeVier puts it, “protection of incumbents tends to be a wolf too readily disguised in the sheep’s clothing of reform.”<sup>174</sup> Incumbents can “reform” the system in a way that preserves the advantages of incumbency while making it harder for challengers to overcome them. Dissenting in *McConnell v. Federal Election Commission*,<sup>175</sup> Justice Scalia outlined the connection between the First Amendment and the entrenchment problem. He first described the “heart” of First Amendment protection as “the right to criticize the government.”<sup>176</sup> He then noted that the legislation before the Court (the Bipartisan Campaign Act) would operate to limit criticism of incumbents.<sup>177</sup> Here is how he described the link to the First Amendment:

To be sure, the legislation is evenhanded: It similarly prohibits criticism of the candidates who oppose Members of Congress in their reelection bids. But as everyone knows, this is an area in which evenhandedness is not fairness. If *all* electioneering were evenhandedly prohibited, incumbents would have an enormous advantage. Likewise, if incumbents and challengers are limited to the same quantity of electioneering, incumbents are favored. In other words, *any* restriction upon a type of campaign speech that is equally available to challengers and incumbents tends to favor incumbents.<sup>178</sup>

How should one apply what Professor BeVier calls the “premise of distrust”<sup>179</sup> to the network of Canon-based regulations of judicial elections?

It certainly is reform in the general “good government” sense that one might apply to campaign finance reform. The challengers can draw on conservative critiques of the latter to point out serious entrenchment problems. The argument runs as follows. The state canons generally are drawn up by members of the local legal establishment, and promulgated by the state’s highest court. Thus, the particular body promulgating them has a direct interest in their effect. Moreover, incumbent judges at all levels, as well as state bar insiders have an interest. These interests are served by low visibility elections that favor incumbents and disfavor challengers. Preventing politicization, as described earlier in this article, serves this goal directly. Thus state canons are likely to forbid pledges or promises, or commitments about how a candidate would decide cases,<sup>180</sup> limit candidates’ fundraising activities,<sup>181</sup> or establish nonpartisan elections.<sup>182</sup>

Referring to a nonpartisan state canon, the Eighth Circuit stated that its fruits “appear to bear witness to its remarkably pro-incumbent character.”<sup>183</sup> Most observers, whatever their ideological perspective, agree on this point. Professor Chemerinsky, an opponent of the Canons states that “Voters rarely know enough about judicial candidates to make a knowledgeable choice.”<sup>184</sup> Professor Schotland, a supporter, quotes other scholars to the effect that, “Traditionally, ‘political campaigns for judicial posts [were] as exciting as a game of checkers . . . [p]layed by mail.’ [l]ow-key affairs conducted with civility and dignity.”<sup>185</sup> Writing from a general election law perspective, Dean Briffault describes judicial elections as “traditionally... low salience events, with low public interest, very low free media coverage, and, as a result, low voter turnout.”<sup>186</sup> He views this state of affairs as burdening challengers.<sup>187</sup>



Not surprisingly, conservatives have made the connection between campaign reform generally and judicial election reform. Professor Rotunda writes that “*White*... and its rationale suggest that the Court will be wary of campaign reform legislation that is disguised as incumbent protection legislation.”<sup>188</sup> Conservatives view Canon-based judicial election reforms as not only aimed at keeping some people in, but at keeping *them* out. Professor Stern has noted the phenomenon of conservative groups fighting restrictions on candidates expressing their views on social issues such as abortion and same-sex marriage.<sup>189</sup> Candidates, and judges, who get into trouble under existing regulations tend to be those who express conservative views such as a tough on crime stance.<sup>190</sup> To the extent, then, that I have posed the question whether the challengers can rebut the presumption against politicization posited in Section II, the entrenchment argument that conservatives have advanced in the campaign finance context is a point in their favor.

### 3) Judicial Campaign Regulation as Social Engineering

Another theme of the conservative critique of campaign finance reform is that it represents social engineering in at least two respects. On a specific level it represents an attempt to alter the rules governing elections in order to achieve “greater democracy,” a more “equal” electoral system. On a general level, reform aims at using this presumed equality to achieve governmental policies that are themselves more redistributionist and egalitarian in nature. Professor BeVier notes the reformers’ claim of a “basic tension between a private market economy and a modern democratic polity,”<sup>191</sup> and their assumption of a relationship between “economic inequalities” and “political inequalities.”<sup>192</sup> Thus proposals for campaign

finance reform may, in fact, reflect a basic hostility to free markets and a preference for “collectivized” economic decision-making.<sup>193</sup>

Certainly, some proponents of campaign finance reform are not shy about voicing such views. According to Jamin Raskin and John Bonifaz “candidates backed with wealth get a longer and far more respectful hearing than those who are not; in government, public policy rapidly comes to reflect and reinforce wealth inequalities.”<sup>194</sup> They elaborate as follows:

The systemic degradation of political influence of the nonaffluent is best witnessed by government policy. Congress is far more responsive to the political interests of the wealthy than the poor, and often acts to the detriment of those who do not participate in the wealth primary. As political campaign costs and expenditures have soared in the last two decades, poor and working class people have steadily lost economic ground, while wealthy individuals and corporations have been greatly enriched.”<sup>195</sup>

Although such arguments were dealt a serious setback in *Buckley v. Valeo*,<sup>196</sup> they are still part of the campaign finance reform debate.<sup>197</sup>

Obviously they are anathema to conservatives. In general, one could characterize conservatives as highly supportive of the free market and of the notion that resources acquired in that market can be deployed to advance one’s political views. The question is whether the effort to regulate judicial elections – here presented as analogous to campaign finance reform – can in any way be viewed as an attempt at potentially massive social engineering and an attack on the existing socio-economic order.

At first blush, the answer seems clearly no. The debate between those described here as the reformers and the challengers seems not so much about restructuring the democratic process to achieve redistributionist goals in the broader society as it seems a debate about how to adapt the imperatives of the democratic process – particularly its First Amendment dimensions – to

the imperatives of the judicial process. Thus one could conclude that the conservative critique of this dimension of campaign finance reform does not carry over to judicial election reform, and does not operate to rebut the conservative presumption posited in Section II.

There is, if anything, a certain amount of conservative redistributionism in the challengers' attacks on the Canon-based system backed by the reformers. They start with the important point that different methods of judicial selection will result in different degrees of power over the process by participants in it.<sup>198</sup> The ultimate result will be the selection of judges (and presumably their decisions once on the bench) congruent with the views of those who hold the most power. This sounds like the premise of the campaign finance reformers. However, in the judicial context, the challengers appear to be the Robin Hoods. They see the Canon-based system as designed to keep power away from "the lower classes,"<sup>199</sup> and to make sure that it remains with elites.<sup>200</sup>

To some extent, this argument parallels the conservative critique of campaign finance reform. It is an argument against entrenchment and a call for an open system in which all forces have influence. However, conservatives who were opposed to social engineering in the campaign finance context may simply not find it present in the efforts of the judicial reformers and the Canon-based system. Indeed, some conservatives may be uncomfortable with the populism of the challengers. Obviously, as noted above, there is no all-embracing definition of "conservative." Some who wear the label are comfortable with the elitism of the framers.<sup>201</sup> In the judicial context, other conservatives see more open elections, more politicization, as a means of taking back the law and diminishing the role of elites. A recent profile of James Bopp describes his views as follows:

“Judges making law according to the values of the people is a good thing.”<sup>202</sup> Whenever a state has opted for an elected judiciary, the argument runs, the elections must be as open as those for any other office. That is why so many of the challengers are conservatives, especially those concerned with social issues, who regard the Canon-based system as shutting them out. Overall, I do not dispute that conservative opposition to campaign finance reform may carry over, to some extent, to judicial campaign reform. (I am referring to policy objections based on calculations of likely winners and losers, rather than First Amendment issues. These are dealt with in my analysis of *White*.) The entrenchment objection seems stronger than that based on social engineering, which is considerably more problematic. Putting aside the fact that some conservatives favor some aspects of campaign finance reform, I do not think the parallels are sufficiently strong to rebut the presumption against politicization.

#### B) Popular Control over the Judiciary and Conservative Values.

As suggested above, whatever attempts at social engineering are present in the debate over Canon-based regulation may, in fact, be coming from conservatives. The challengers can thus seek to rebut the presumption by arguing that politicization of judicial elections leads to greater popular control of the judiciary, which advances conservative values. The argument might run as follows: judges make law; if elected, their elections should mirror those of other lawmakers so as to best reflect the popular will. A true reflection of the popular will can be expected to lead to more conservative outcomes in such fields as social issues and criminal justice.<sup>203</sup> For conservatives, these gains ought to outweigh theoretical constructs such as judicial federalism.

An initial response to this argument is that it is in some tension with the doctrine of separation of powers, a staple of both state and federal constitutional law. The contention suggests a blending of the judiciary and the political branches rather than a distinction. Dean Briffault offers the following observation on one aspect of the general problem:

Judicial independence is linked to impartiality since only a judge independent of outside pressures can impartially apply law to all the parties who appear before her. But independence also implicates the separation of powers and the freedom of the courts from the other branches of government... [I]ndependence has been treated as particularly important for the courts, as it enables judges to pursue their special role in protecting the constitutional rights of minorities and vindicating the rule of law even for unpopular parties. The executive and legislative branches have to work together in order for government to function as a whole. But the independence of the courts from the assertedly more political branches is essential if courts are to apply the rule of law and protect minorities. As a result, although we celebrate the role of political parties in linking up the separate houses of a bicameral legislature, the legislature with the executive, and the different levels of our federal system to facilitate more effective governance, if the parties were comparably effective in coordinating the actions of the courts with other branches, the capacity of the courts to carry out their duties could be seriously undermined.<sup>204</sup>

Obviously, judicial independence extends beyond independence from political parties to relations between the courts and the electorate itself. The very concept of an elected judiciary creates a separation of powers problem.<sup>205</sup> Yet the majority opinion in *White* seems careful to affirm the constitutionality of the elected judiciary.<sup>206</sup> Perhaps one should restate the challengers' linking of untrammelled elections to conservative values as a theoretical/institutional position after all – a defense of the institution of

elected state courts and a desire to maximize their legitimacy. In this sense, the argument is more about theory than about outcomes.

Certainly, the issue of legitimacy appears frequently in discussions of the institution.<sup>207</sup> According to Professor Gibson,

Social scientists have long been concerned with understanding the legitimacy of all political institutions but of courts in particular. Every institution needs political capital in order to be effective, to get its decisions accepted by others and successfully implemented. Since courts are typically thought to be weak institutions – having neither the power of the “purse” (control of the treasury) nor the “sword” (controls over agents of state coercion) – their political capital must be found in resources other than finances and force. For courts, political capital can be indexed by institutional legitimacy.

Legitimacy Theory is one of the most important frameworks we have for understanding the effectiveness of courts in democratic societies. Fortunately, considerable agreement exists among social scientists and legal scholars on the major contours of the theory. For instance, most agree that legitimacy is a normative concept, having something to do with the right – moral and legal – to make decisions. “Authority” is sometimes used as a synonym for legitimacy. Institutions perceived to be legitimate are those with a widely accepted mandate to render judgments for a political community. Basically, when people say that laws are “legitimate,” they mean that there is something rightful about the way the laws came about... the legitimacy of law rests on the way it comes to be: if that is legitimate, then so are the results at least most of the time.<sup>208</sup>

The challengers can argue that they do not seek to *undermine* the legitimacy of state courts. They would recognize that conservative values are furthered by respect for state institutions and a view of them as legitimate. Indeed, they would no doubt agree with the judicial federalism argument raised earlier: state courts can best play their role in the constitutional scheme if their legitimacy is widely accepted. For the challengers, conservatives should recognize that the legitimacy of elected

state courts turns on the openness of the election. As Justice Scalia stated in *White*, “If the State chooses to tap the energy and the *legitimizing* power of the democratic process, it must accord the participants in that process... the First Amendment rights that attach to their roles.”<sup>209</sup> These contentions are certainly one side of the coin, but conservatives should not view them as dispositive. The debate at the core of this Article is not over whether elected state court legitimacy is desirable, but rather how to achieve it. To emphasize the other side of the coin, let me quote again from Professor Gibson:

Exposure to legitimizing judicial symbols reinforces the process of distinguishing courts from other political institutions. The message of these powerful symbols is that “courts are different,” and owing to these differences, courts are worthy of more respect, deference, and obedience – in short, legitimacy. Because courts use non-political processes of decision making, and since judicial institutions associate themselves with symbols of impartiality and insulation from ordinary political pressures, those more exposed to courts come to accept the “myth of legality.” This process of social learning explains why citizens who are more aware of and knowledgeable about courts tend to adopt less realistic views of how these institutions make decisions and operate. Thus courts profit greatly from the perception that they are different from ordinary political institutions. They are different owing primarily to their decision-making processes. Judges are not perceived to be self-interested; rather, they are impartial.

The threat of politicized judicial campaigns is that electioneering may undermine the belief that courts are essentially non-political institutions. Citizens may learn that courts are quite like other political institutions if that is the message to which people are exposed. Indeed, this is precisely the most worrisome consequence of the politicized style of judicial elections: To the extent that campaigning takes on the characteristics of “normal” political elections, courts will be seen as *not* special and different, with the consequence that their legitimacy may be undermined. At the most general level, I hypothesize that those who become aware of and attuned to campaigns in politicized judicial elections will judge courts

and other political institutional similarly, and will therefore extend less legitimacy to courts. Consequently, politicized judicial campaigns may seriously disrupt the normal supply of legitimacy by portraying judges as nothing more than ordinary politicians. Thus, the general hypothesis of this research is that politicized campaign activity undermines the perceived impartiality of judicial institutions.<sup>210</sup>

The challengers' objection to Canon-based regulation may rest on such notions as an ABA campaign to subvert the elected judiciary and turn it into something like an appointed one (the ABA's preferred institutional approach).<sup>211</sup> But, as Professor Gibson's observations suggest, regulation is an effort to save it. Moreover, it may be the case that judges derive their legitimacy more from the office itself – with its particular traditions and methods of proceeding – than from its method of selection.<sup>212</sup> Professor Gibson points to “*legitimizing* judicial symbols [that distinguish] courts from other political institutions.”<sup>213</sup> The wide variety of selection methods – Professor Schotland identifies fourteen<sup>214</sup> – lends support to the view that legitimacy derives from the office itself. Thus, if conservatives are attracted to the presumption against politicization and the view that it depends on state courts that are viable and perceived as such, the argument that unfettered elections are necessary for legitimacy seems unconvincing at best.

If the “soft,” theoretical/institutional argument is weak, perhaps one should focus on the role of unfettered elections in achieving substantive conservative goals. Such elections are more likely than regulated ones to lead to outcomes that reflect these goals. Popular justice will be conservative justice. This is the “strong” argument for rejecting the presumption against politicization. As a starting point, it is helpful to consider what state courts do. In *White*, Justice Scalia made the following observation:



Complete separation of the judiciary from the enterprise of “representative government” might have some truth in those countries where judges neither make law themselves nor set aside the laws enacted by the legislature. It is not a true picture of the American system. Not only do state-court judges possess the power to “make” common law, but they have the immense power to shape the States’ constitutions as well.<sup>215</sup>

This focus on the political role of state courts overlooks one of their core functions: adjudicating disputes and hearing appeals from those adjudications. Nonetheless, let us begin with the political dimension in its purest form: the making of state common law. It is here that the challengers’ appeal to conservatives is strongest. Unless one is to attempt to resurrect discredited views of oracular judges finding the law,<sup>216</sup> it must be conceded that there are similarities between judicial lawmaking, especially its appeal to public policy, and legislative lawmaking. Of course, judicial lawmaking takes place in a very different context – resolution of a particular dispute – and reflects that difference in many different ways such as adversary presentation and the role of precedent. Still, it can be contended that the overall lawmaking enterprise offers enough similarities that the elections for both positions ought to be equally open and unfettered – in short, democratic, and, if you will, political.

Popular control over judicial review is considerably more complex. As the earlier reference to separation of powers suggests, there is tension between this control and the judicial function itself. If courts are completely majoritarian institutions, exactly like legislatures, it will be difficult for them to protect minorities against legislative actions that flow from the same electoral base. This is the point of the separation of powers quote from Dean Briffault.<sup>217</sup> On the other hand, it is perhaps significant that Justice Scalia

referred to *state* constitutions.<sup>218</sup> They may already be subject to popular control through easy amendment. In any event, one can regard the interplay of forces that shape the making and interpretation of state constitutional law as largely a matter for the states, as long as federal norms are not somehow violated.<sup>219</sup>

It is here, however, that the judicial federalism arguments come into play, with a vengeance. State courts also interpret and apply the federal Constitution. As noted, that is a key part of their role in the constitutional plan. That exercise cannot be subject to the whim of fifty state electorates, or any electorate. There will not always be a dividing line between state and federal constitutional rights. Many claims will rest on both.<sup>220</sup>

Any argument for state electoral control over federal constitutional law must fail. Moreover the potential for influence over decisions on federal law calls into question the foundational assumption of parity: that state courts will consider federal claims within a general framework of openness and neutrality similar to that found in federal courts.<sup>221</sup> Thus popular control is a two-edged sword. If politicization leads to a widespread perception of state judicial hostility toward rights assertion, the federal judiciary may well pull back from the parity-based doctrines in order to assert a greater rights enforcing role. In other words, rather than somehow reinforcing state courts, politicization could weaken them in a vital area. One need not envisage broad-scale nullification-like applications of federal law, although inhospitable readings are a distinct possibility, as recent campaign suggests. Rather, it is the adjudicatory function of state courts that could play a crucial role in developments in judicial federalism. Parity relies on confidence that there is a “full and fair opportunity” to raise federal claims in

state proceedings.<sup>222</sup> Trial judges hostile to federal rights have enormous power to negate that opportunity.

One example in this context is the role of federal habeas corpus. The Antiterrorism and Effective Death Penalty Act of 1996<sup>223</sup> is an effort to cut back federal habeas corpus review of state convictions.<sup>224</sup> It can be seen as a congressional adoption of judicially developed parity principles.<sup>225</sup> Yet the act leaves “a host of interpretative questions...”<sup>226</sup> Fact-intensive inquiries are frequent.<sup>227</sup> Difficult issues arise regarding such matters as equitable tolling<sup>228</sup> and “structural error.”<sup>229</sup> Obviously, the extent to which the federal courts have confidence in the state courts will be a driving force in the spirit and scope of habeas review. A highly politicized state judiciary whose members have committed themselves to obtaining convictions is likely to receive diminished confidence. Judicial federalism will be undermined. One can picture an ironic scenario in which unfettered popular control leads to more convictions which are then reversed by federal courts. It is hard to see how this “advance” in conservative goals does anything to rebut the presumption against politicization.

A further word needs to be said about politicized justice and adjudication – the core function of courts, and one which in some circumstances, only they can perform.<sup>230</sup> Courts make common law, but so do legislatures, albeit in very different ways. They can overrule judicial decisions making common law. Legislatures do not conduct civil trials. They cannot pass a law to overturn the result in a civil trial. To say that the legislative and judicial functions are fundamentally different is not to make the naïve assertion that courts do not make policy. The challengers seem to assume that any attempt to emphasize the value of neutrality rests on this assumption. Neutrality in adjudication is essential, a point reinforced by the

notion of separation of powers.<sup>231</sup> Neutrality in the conduct of a trial requires a decision maker who is not subject to pressure from the parties, and *a fortiori* from the public at large.<sup>232</sup> There is something contrary to this ideal in the notion of an adjudicator campaigning on how he or she is going to adjudicate. The existence of political “debts”, especially campaign contributions, “owed” to parties who then litigate before the debtor raises the same concerns. Claims have been made in high profile cases that due process required recusal when a donor was before a judge.<sup>233</sup> The Supreme Court has so far declined to review these cases.<sup>234</sup> But not so long ago it refused to review punitive damages awards challenged on due process grounds.<sup>235</sup> Now it does.<sup>236</sup> Again there is the possibility that federal court distrust of politicized state courts will affect relations between the two systems. The notion of popular control over the judiciary raises interesting and complex questions. It is problematic enough that I doubt many conservative analysts of the judiciary will see it as sufficiently strong to rebut the presumption against politicization.

### C. The Challengers’ Trump Card – An Analysis and Critique of *White*

Let us assume that conservative readers agree with the analysis to this point: that the conservative policy arguments against regulation do not rebut the presumption against politicization. At this point the challengers can play their trump – *White* – to prove not only that they have a Supreme Court precedent, but that the law and policy of the First Amendment are squarely on their side.

#### 1) The Decision.

In *Republican Party of Minnesota v. White*<sup>237</sup> the Supreme Court, by a margin of five to four, struck down Minnesota’s Announce Clause. That clause stated that “a candidate for a judicial office, including an incumbent

judge, [shall not] announce his or her views on political issues.”<sup>238</sup>

Although lower courts had narrowed it to “reach only disputed issues, that are likely to come before the candidate if he is elected judge,”<sup>239</sup> Justice Scalia, for the majority, viewed that as a minimal limitation in light of the range of legal or political issues that can come before “a judge of an American court, state or federal, of general jurisdiction.”<sup>240</sup> He emphasized the direct bearing of the First Amendment on “speech about the qualifications of candidates for public office,”<sup>241</sup> and applied strict scrutiny.<sup>242</sup> Minnesota had advanced preserving the impartiality of its judiciary, and the appearance thereof, as compelling state interests.<sup>243</sup> However, Justice Scalia viewed the underlying concept of impartiality as undefined.<sup>244</sup> He then invoked three possible definitions, and applied First Amendment analysis to them.

He viewed the first, and clearest, meaning of impartial as without bias to a *party* to a proceeding.<sup>245</sup> He appeared to accept this concept of impartiality as a compelling state interest,<sup>246</sup> but viewed the Announce Clause as aimed at *issues* rather than *parties*.<sup>247</sup> Thus it could not be seen as narrowly tailored to further any interest against party bias.<sup>248</sup> He dismissed a second possible reading of impartial as without preconceptions on legal views, largely on the ground that judges with no views about the law would be unqualified for the office.<sup>249</sup> He considered a possible concept of impartiality as open-mindedness, but found any measure that focuses on the campaign period to be underinclusive since judges and would-be judges make statements about the law all the time.<sup>250</sup>

The opinion might have stopped here. However, Justice Scalia continued with an in-depth discussion of the applicability of the First Amendment to regulation of judicial elections, partly in response to the

dissents, and partly, one suspects, to strike a blow against such regulation. He invoked cases such as *Brown v. Hartlage*<sup>251</sup> to emphasize the First Amendment's protection of discussion of candidates and issues in an election.<sup>252</sup> Such discussion is at the "core" of the electoral process.<sup>253</sup> He disclaimed any implication that "the First Amendment requires campaigns for judicial office to sound the same as those for legislative office,"<sup>254</sup> but stated that Justice Ginsburg's dissent "greatly exaggerates the difference between judicial and legislative elections."<sup>255</sup> American state courts do not exist in "complete separation" from representative government; they possess great power in making common law and shaping state constitutions.<sup>256</sup>

Justice Scalia finished with a swipe at reformers, such as the ABA, who would prefer an appointive system, but, in default, attempt to structure systems that do not look like true elections with the protections mandated by the First Amendment.<sup>257</sup> He closed his analysis with a quote from an earlier election case:

The greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance. If the State chooses to tap the energy and the legitimizing power of the democratic process it must accord the participants in that process. . . the First Amendment rights that attach to their roles.<sup>258</sup>

In sum, Justice Scalia treated *White* as a case about elections and the First Amendment rather than a case about *judicial* elections and the First Amendment. This seems clear despite his several disclaimers and suggestions that the Amendment *might* permit "greater regulation of judicial election campaigns than legislative election campaigns."<sup>259</sup> The key is not just his repeated citation of First Amendment-election cases. It lies in his virtual equation of judicial elections with elections to other political

offices,<sup>260</sup> and his insistence that the “legitimizing” role of elections requires one set of rules. This requirement flows from a focus on how the judiciary is chosen and a view that its functions – at the state level – are not all that different from those of the (other) political branches. To view the matter this way seriously undercuts *any* effort to promulgate special rules for judicial elections if they raise First Amendment questions.<sup>261</sup> In other words, *White* may signal the end of a wide range of reforms, well beyond the Announce Clause.<sup>262</sup>

While joining the majority opinion, Justices O’Connor and Kennedy wrote separate concurrences. Each touched obliquely on federalism – an issue that the Court ignored – although not in the way that one might expect. Justice O’Connor expressed doubts about the elected judiciary as an institution. She noted problems that could arise from judges needing to please the electorate and raise money for campaigns, particularly from lawyers.<sup>263</sup> Minnesota could not, however, attempt to remedy these problems through restricting speech.<sup>264</sup> “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.”<sup>265</sup> Justice Kennedy emphasized the First Amendment aspects of the case, particularly his view that the state was attempting to regulate speech based on its content.<sup>266</sup> He too sounded the theme that the state had chosen to elect its judges.<sup>267</sup> However, he expressed some sympathy for the institution and for efforts to regulate it such as a code of conduct or tough recusal standards.

What Minnesota may not do, however, is censor what the people hear as they undertake to decide for themselves which candidate is most likely to be an exemplary judicial officer. Deciding the relevance of candidate speech is the right of voters, not the State. See *Brown v.*

*Hartlage*. The law in question here contradicts the principle that unabridged speech is the foundation of political freedom.<sup>268</sup>

Thus the five “conservative” justices abandoned federalism in favor of other goals: perhaps a First Amendment absolutism in the electoral context; perhaps an opposition to campaign regulation; perhaps a belief that unfettered elections would further conservative outcomes.<sup>269</sup>

Justices Stevens and Ginsburg, joined by Justices Breyer and Souter, each authored dissenting opinions.<sup>270</sup> Federalism plays some role in their analysis.<sup>271</sup> However, Justice Stevens and Justice Ginsburg mainly countered the majority’s First Amendment analysis by focusing on the unique characteristics of the judicial branch and the relationship between those characteristics and political campaigns. Justice Stevens criticized the Court for “obscuring the fundamental difference between campaigns for the judiciary and the political branches . . .”<sup>272</sup> He emphasized the differences between the two types of branches. Members of the political branches need to be “popular,”<sup>273</sup> but judges deal with “issues of law and fact [that] should not be determined by popular vote.”<sup>274</sup> Judges do not serve constituencies.<sup>275</sup> Since there is a conflict between “the demands of electoral politics and the distinct characteristics of the judiciary,”<sup>276</sup> states need not be put to “an all or nothing choice of abandoning judicial elections or having elections in which anything goes.”<sup>277</sup>

Justice Stevens thus took issue with the majority’s implicit general assumption that elections to any office should be governed by the same First Amendment standards. For him, a difference in the nature of the office could trigger a difference in the degree of regulation of electoral speech. Thus the state could sanction statements that effectively convey the message “Vote for me because I believe X, and I will judge cases accordingly.”<sup>278</sup>



He also took issue with the majority's specific analysis of impartiality. Campaign statements touting unbroken records of affirming rape convictions "imply a bias in favor of a particular litigant (the prosecution) and against a class of litigants (defendants in rape cases)."<sup>279</sup> He also addressed the Court's third definition of impartiality: open-mindedness. He contended that statements prohibited by the Announce Clause frequently demonstrate a lack of open-mindedness or the appearance thereof.<sup>280</sup> Finally, he expressed concern that the legitimacy of the judicial branch – which he saw as resting on "its reputation for impartiality and nonpartisanship"<sup>281</sup> – could be threatened by "electioneering."<sup>282</sup>

Justice Ginsburg's somewhat longer dissent sounded many of the same themes.<sup>283</sup> She emphasized the nonmajoritarian nature of the judiciary – a branch "owing fidelity to no person or party"<sup>284</sup> – and the importance of maintaining public confidence in the judiciary as a compelling state interest.<sup>285</sup> There are several aspects of her opinion that take the analysis further.

First, and most importantly, she was more explicit in making the link between the nature of the office and the process of election to it. For her, the fact that an election is involved is not the end of First Amendment analysis. Cases like *Brown v. Hartlage* govern "political elections,"<sup>286</sup> but they do not dictate a "unilocular, 'an election is an election' approach."<sup>287</sup> Because of the differences between the political and judicial functions – decision of individual cases should not depend on a popular will<sup>288</sup> – the First Amendment permits "an election process geared to the judicial process."<sup>289</sup> The central premise of this argument is thus that the conduct of the election can affect the functioning of the office. Indeed, Justice Ginsburg goes so far as to say that "[t]he ability of the judiciary to discharge its unique role rests

to a large degree on the manner in which judges are selected.”<sup>290</sup> Thus, contrary to Justice Scalia, she would allow a state to regulate its elected judiciary to further the goals that the federal government furthers through appointment.

Having taken this analytical step, Justice Ginsburg found the Announce Clause aimed at statements that are incompatible with the judicial office.<sup>291</sup> Moreover, she tied that Clause to Minnesota’s broader system, including its Pledges or Promises Clause.<sup>292</sup> After *White*, candidates can make pledges or promises by labeling them as announcements of views, even though the two are functionally similar.<sup>293</sup>

A third important feature of Justice Ginsburg’s dissent is her extensive discussion of the Court’s precedents dealing with judicial due process.<sup>294</sup> Her goal was to show that regulation of judicial elections presents a situation where “constitutionally protected interests lie on both sides of the legal equation.”<sup>295</sup> She began with *Tumey v. Ohio*,<sup>296</sup> a case in which a judge had a direct pecuniary interest in the outcome of cases.<sup>297</sup> She argued that *Tumey* had been extended to cases that present a temptation to rule in a certain way, a probability of unfairness.<sup>298</sup> Party bias cannot be the sole issue. States may enact prophylactic measures to deal with situations such as campaign promises that create a probability that a judge will rule a certain way.<sup>299</sup>

Finally, although it was not a major portion of her opinion, Justice Ginsburg raised questions of federalism. She rejected the notion that the states should be forced to “choose one role or the other.”<sup>300</sup> She saw the states as faced with the difficult task of reconciling “the complex and competing concerns in this sensitive area.”<sup>301</sup> Thus she argued for deference to state “experiments” in balancing “the constitutional interests in

judicial integrity and free expression within the unique setting of an elected judiciary.”<sup>302</sup>

## 2) A Critique of *White* and the Question of How Broadly to Read It.

Limited to its facts, *White* might not seem a major decision. The Announce Clause was regarded as constitutionally vulnerable,<sup>303</sup> and was not a central feature of Canon-based regulation.<sup>304</sup> However, the analysis in *White* indicates a decision of potentially great precedential force. As commentators have pointed out,<sup>305</sup> Justice Scalia’s analysis can be read as equating judicial elections with other elections to the point that the First Amendment applies in the same way in every case. *White* may signal the downfall of virtually all the Canons.<sup>306</sup> Certainly the lower courts, particularly the federal courts, have read it broadly.<sup>307</sup>

In this subsection I will argue that the challengers’ trump card is not as strong as they claim (while admitting that their claims have so far generally been successful). The legal arguments are not sufficiently strong to override the presumption against politicization. The challengers might contend that the presumption is only a policy argument<sup>308</sup> – even if based on constitutional values – and that *White* trumps it precisely because *White* is a decision emphasizing the Constitutional rights of individual candidates. However, close analysis suggests that *White* is seriously flawed and should not be read broadly. Its weaknesses flow not only from the constitutional imperative of separation of powers, but also from the due process rights of litigants who must appear before elected judges. Thus there are constitutional *rights* “on both sides of the legal equation.”<sup>309</sup> My critique of *White* rests on disagreement with two fundamental premises of the decision. The first is that courts, because they make law, are part of “the enterprise of ‘representative government...’”<sup>310</sup> Common law courts are certainly

engaged in the business of making law and policy. As Professor Dimino argues, anyone who contends otherwise is falling into the trap of magisterial visions of the judiciary that have been discredited by legal realism and the work of political scientists.<sup>311</sup>

However, as argued above, this equation of the judicial with the political branches glosses over significant differences between the two. The *White* dissenters focused on one such difference: the fact that the obligations of office are quite different in the judicial and political branches. Legislators are expected to have allegiances and to favor their supporters; judges are not.<sup>312</sup> Justice Stevens invoked the ideal of a judiciary “owing fidelity to no person or party. . . .”<sup>313</sup> Speech is particularly important in the context of election to the political branches because citizens need to hear the views of candidates in order to pick a representative.<sup>314</sup> We expect, for example, legislative candidates to state how they will vote on a pending bill. For a judicial candidate to state how he will vote in a pending case would seem to enter the forbidden realm of bias.

Another way to highlight the difference is to focus again on what the branches do. Judges adjudicate. Legislatures generally do not. The Constitution, to some extent, directly forbids them from adjudicating. This is the role of the ban on bills of attainder, a ban which applies both to the states and the federal government.<sup>315</sup> The Supreme Court has long adhered to the view that “a bill of attainder is a legislative act which inflicts punishment without a judicial trial.”<sup>316</sup> Writing for the Court in *United States v. Lovett*,<sup>317</sup> Justice Black wrote that the framers “intended to safeguard the people of this country from punishment without trial by duly constituted courts.”<sup>318</sup> Professor Tribe sums up the sometimes complex law in this area as follows:

Most basic of all, trial by legislature – the use of lawmaking process, or of a trial-like process in a lawmaking setting, to inflict punitive disabilities on identifiable persons – would be radically incompatible with the safeguards provided by trial before a neutral judge and an impartial jury . . . . Accordingly, article I forbids passage of any bill of attainder by Congress or by State.<sup>319</sup>

The specific prohibition against bills of attainder not only tells us what legislators may not do; it reminds us of the special functions of courts. They are entrusted with the task of adjudication, in part because of their removal from the passions and politics prevalent in legislative bodies.<sup>320</sup> Indeed, the difference between adjudication and legislation is a bedrock principle of constitutional and administrative law. An important early case is *Londoner v. Denver*.<sup>321</sup> At issue was a special assessment, including a determination of the amount of benefit to individuals. The Supreme Court held that the Due Process Clause required a hearing.<sup>322</sup> Yet in *Bi-Metallic Investment Co. v. State Board of Equalization*<sup>323</sup> the Court held that an individualized hearing was not required before a general property tax increase. The Court distinguished *Londoner* in the following terms, “A relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds, and it was held that they had a right to a hearing.”<sup>324</sup> Justice Holmes, for the Court, noted that in the case of general legislative action, groups can bring political power to bear. Adjudication is, at least in its generally accepted form, not a test of political strength manifested over the decision maker.<sup>325</sup> Indeed, the hallmark of an adjudication that satisfies due process is a neutral decision maker.<sup>326</sup> Obviously, in the administrative state, many adjudications do not, and need not, take place before a court.<sup>327</sup> But as long ago as *Wiener v. United States*<sup>328</sup> the Supreme Court held that the legislative choice to allocate

certain claims to an administrative agency for adjudication “according to law” conferred on that agency’s adjudication of them an “intrinsic judicial character. . .”<sup>329</sup> The agency had to act “on the merits of each claim supported by evidence and governing legal considerations,”<sup>330</sup> free from political influence.<sup>331</sup> What is true for agencies is a fortiori true for courts, the quintessential adjudicative body.

If, then, we focus on what courts do, and how they do it, we find significant differences between the judicial and political branches. It is helpful to consider three aspects of the judicial function: common-law making, constitutional interpretation, and dispute resolution.<sup>332</sup> I have conceded some similarity of function in common-law making, although, even there, much of a court’s job is adjudication, including law application. If the legislative process has been set in motion, particularly at the stage of floor debate over new legislation, it seems inaccurate to apply the term *law application*, let alone adjudication. The processes for making new law in the two settings are quite different. Legislatures engage in logrolling, bargain and trade, and extensive interactions with interested persons and groups, both in formal and informal settings. The kind of *ex parte* contracts that would be forbidden in an adjudication are normal, even expected. Constitutional interpretation makes the comparison even more problematic. If legislation is challenged on constitutional grounds, the underlying assumption is that a nonmajoritarian process is being applied to the outcome of a majoritarian one. And if one focuses on adjudication – whether in private dispute resolution or cases involving government defendants – the difference between the branches appears with the greatest force.<sup>333</sup> In sum, it is hard to argue with the notion of the judiciary as fundamentally different from the political branches. It seems equally hard to argue that the existence

of an elected judiciary erases these fundamental differences, unless one is prepared to argue that courts with elected judges represent a different kind of judiciary from those with appointed judges. In each case, they do the same things in the same way. At the risk of sounding “unilocular,”<sup>334</sup> I am inclined to say that a court is a court.

However, even if Justice Scalia is wrong in suggesting that courts are like legislatures, that does not, by itself, show that elections for the two branches can differ insofar as the First Amendment applies. After all, governors perform quite different functions from legislators, but that does not justify different First Amendment standards in the context of elections to the two offices. Indeed, this point leads to the second of Justice Scalia’s fundamental premises: that the strong First Amendment protections enunciated in cases such as *Brown v. Hartlage* apply in the same way to all elections. The premise is perhaps implicit in *White*. Indeed, Justice Scalia at first denies relying on it, “[W]e neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office.”<sup>335</sup> However, he not only proceeds to suggest there is no meaningful difference between the two offices – the first premise, discussed above – but goes on to make the following categorical statement: “If the State chooses to tap the energy and legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles.”<sup>336</sup> The statement is a quote from a separate opinion in an earlier election case involving the rights of political parties.<sup>337</sup> Justice Ginsburg was correct in characterizing his opinion as adopting an “election is an election” approach.<sup>338</sup>

The question then becomes whether this premise is sound. It has the advantages of directness, workability and a privileging of the First

Amendment. All of these aspects explain why *White* has proven to be such a powerful precedent.<sup>339</sup> Yet that does not make the premise correct.

Analysis of the problem leads to the conclusion that the Constitution permits a state to vary the rules governing an election depending on the office to be elected. This governmental power reaches judicial campaigns and the First Amendment rights of those who participate in them.

In an important study of *White* and its impact, Dean Richard Briffault makes the following general point: “the Supreme Court has repeatedly indicated that the constitutional norms governing elections – such as the scope of suffrage, the allocation of voting power, and the power to restrict campaign finance practices – may vary according to the subject to be put before the voters or the powers and responsibilities of the office to be filled.”<sup>340</sup> Some of the examples he cites are not highly persuasive, notably special districts, bond issues, and county government reorganization.<sup>341</sup> However, cases involving the judiciary<sup>342</sup> and campaign finance<sup>343</sup> are closer to the mark.

One might break the issue down into two separate questions. The first is whether a court, in evaluating an election regulation, can look “down the road” at what happens after the election. One might argue that the state cannot reach this stage of behavior through regulation of an election and the campaign that precedes it. Perhaps any such regulation should, at least presumptively, be limited to securing the goals of “fair” voting and campaign practices. Thus a state could outlaw vote buying, for example, or campaigning within the polling place itself.<sup>344</sup> Such a concern seems to have motivated the Eighth Circuit in the remand of *White*. An en banc majority struck down Minnesota’s partisan activities clause.<sup>345</sup> In a key passage the majority stated that, “We note that Appellees fret over the kind



of influence political parties have not only in elections, but also governmental decisions made thereafter. *This case, however is not about what happens after an election.*”<sup>346</sup> Dean Briffault, however, views Supreme Court doctrine as permitting a state to impose regulations “in light of the government actions affected by the election,” and “the differences in the dangers posed by the regulated behavior on the public offices... determined by the election.”<sup>347</sup>

The classic example of government’s ability to look down the road is the treatment of campaign contribution limits in *Buckley v. Valeo*.<sup>348</sup> *Buckley* is the foundation of modern campaign finance doctrine. Despite attacks from different sides of the spectrum,<sup>349</sup> *Buckley* appears to retain its force.<sup>350</sup> The Court upheld a restriction on campaign contributions even though there was infringement on First Amendment rights<sup>351</sup> that required the “closest scrutiny.”<sup>352</sup> The core interest advanced in support of limits was “the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates’ positions and on *their actions if elected to office*.”<sup>353</sup>

The Court accepted this interest as constitutionally sufficient. It conceded that precise empirical evidence might not be available,<sup>354</sup> but held that “to the extent that large contributions are given to secure political quid pro quos from current and potential office holders, the integrity of our system of representative democracy is undermined.”<sup>355</sup> Thus the Court upheld prophylactic legislation aimed at a down-the-road evil. It is particularly important to note that opponents of the contribution limits argued that government should be limited to dealing with the evil when it occurs. They invoked bribery laws and disclosure requirements as a less restrictive means of dealing with it.<sup>356</sup> The invocation of bribery is a form

of down the road First Amendment argument: government should deal with corruption when it arises, not through limits on protected activity at the campaign stage. The Court rejected the argument, however, and upheld clearly prophylactic limits on campaign activity: the giving of contributions.<sup>357</sup>

This leads to a second question: assuming that down the road analysis is appropriate in some contexts, is it appropriate in judicial elections? Can the election, more precisely the campaign, affect the functioning of an office? As Dean Briffault puts it, are there “aspects of the judicial office that support greater regulation of judicial elections than elections for the legislative and executive branches?”<sup>358</sup> Certainly the network of Canon-based regulation is aimed at preventing campaign behavior – statements, political activities, financial dealings with supporters – that could affect, or appear to affect, the operation of the judiciary. It represents what Justice Ginsburg called “an election process geared to the judicial office.”<sup>359</sup>

Courts and commentators have read the majority opinion in *White* as casting serious doubt on any such approach when forced to withstand First Amendment scrutiny.<sup>360</sup> Yet Justice Scalia’s discussion of party bias points the other way. He suggests that preventing “speech for or against particular parties”<sup>361</sup> constitutes a compelling state interest.<sup>362</sup> There is certainly an intuitive appeal to the notion that some campaign speech could threaten due process.

If the appeal of Jones’ rape conviction is pending during the election for the State Supreme Court, there would be serious due process problems presented by a successful candidate’s statement that “if elected, I will vote to uphold the Jones conviction.” The problem can take more complicated forms. In *White*, Justice Stevens argued that one cannot always draw a sharp

line between bias against particular litigants and bias against a class of litigants.<sup>363</sup> What about even more difficult scenarios such as a judicial candidate who promises to give special credibility to the testimony of law enforcement officials?<sup>364</sup> It is worth noting that some of *White*'s strongest defenders appear to concede that there are some things that judicial candidates may be prevented from saying.<sup>365</sup> My point is not to contend for the validity of any particular Canon. Rather, it is to show that judicial elections represent a strong case for the state's ability to take the down the road consequences into account in attempting to regulate activities that can claim First Amendment protection. Indeed, they represent the quintessential case.

If, then, one concludes that not all "political" offices are alike, and that all elections need not, for First Amendment purposes, be alike. *White*'s foundations appear as weakened, and its status as a precedential juggernaut diminished. While the First Amendment applies, courts should be receptive to finding a compelling state interest in broad protection of future litigants' due process rights.<sup>366</sup> The concept of avoiding the appearance of unfairness certainly deserves more attention than it received in *White*. Beyond any general interest in avoiding the appearance of corruption present in campaign contribution cases<sup>367</sup> lies the particular importance of public perception of the judiciary as fair, unbiased and not tainted by prejudgment.<sup>368</sup> Conceivably, courts could require a less than compelling interest—a First Amendment form of intermediate scrutiny—as campaign finance cases have suggested.<sup>369</sup>

The arguments behind the presumption against politicization retain their force. I have emphasized arguments that appeal to conservatives, in part because, as the lineup in *White* itself suggests, most liberals are already

on board in terms of preserving Canon-based regulation.<sup>370</sup> An appeal to conservatives also makes sense both because they are the driving force behind the challengers and because an anti-regulatory stance has inherent appeal to them. My goal is not a 180 degree turn, let alone an abandonment of the First Amendment, but a recognition of the complexities of the problem and a sympathy for *some* regulation. Wherever one stands in the overall debate, it must be recognized that *White* is the guiding precedent. It is the only Supreme Court decision on Canon-based regulation of judicial elections.<sup>371</sup> The arguments presented above are not aimed at securing its overruling – a dubious objective – but at slowing down its snowball effect in the lower courts, and at influencing any future Supreme Court consideration of the issue.<sup>372</sup> In the meantime, life goes on. Judicial elections will continue to be held, particularly since a shift away from them seems highly unlikely.<sup>373</sup> I will conclude with a brief examination of what they might look like in the post-*White* world.

#### IV. The Post-*White* World

One can envisage three possible scenarios: a return to the prior system of Canon-based regulation; an end to regulation of judicial campaigns other than that applicable to political branch offices; and, a second generation of rules and practices including (perhaps) some coercive measures, voluntary limits on campaign practices and new forms of state involvement in judicial elections such as public financing. The first scenario can be quickly ruled out. *White* is not going away; the current Court is virtually certain not to overrule it. The question for judges and policymakers is how much regulation, if any, is permissible under *White*, and where to go beyond regulation.

The second scenario – what the *White* dissenters referred to as “political elections,”<sup>374</sup> or “anything goes”<sup>375</sup> is a distinct possibility. In an excellent recent analysis Professor Stern contends that, “efforts to preserve potent constraints on judicial campaign speech are overwhelmingly doomed to failure. Whatever the merits of restrictions in the abstract, *White* has nullified their underlying premise: *viz.*, that a state, having chosen to select judges through elections, can substantially modify the ordinary operation of principles governing political speech. Rather, *White* embodies rejection of the notion that states can insulate judicial campaign speech from these principles.”<sup>376</sup> He sees *White* as a decision of great precedential force, emphasizing the following aspects: the denial of “judicial exceptionalism;”<sup>377</sup> – the notion that judicial elections should be different from other elections – the difficulty that strict scrutiny review poses for any regulation;<sup>378</sup> the majority’s use of *Brown v. Hartlage*; – a case with a strong thrust against regulation of campaign speech generally – and the *White* majority’s apparent reluctance to credit the state’s assertion of interests in regulating judicial campaign speech.<sup>379</sup> Professor Stern also places considerable emphasis on “lower courts’ receptiveness to attacks on other judicial campaign speech restrictions”<sup>380</sup> after *White*’s invalidation of the Announce Clause.<sup>381</sup>

For Professor Stern the post-*White* world is not necessarily a bad place. He views as important the availability of recusal<sup>382</sup> as a possible less restrictive alternative and thus “a means to avoid infringing on speech and conduct ordinarily protected by the First Amendment.”<sup>383</sup> He also notes the classic First Amendment argument, invoked by Justice Kennedy in *White*,<sup>384</sup> that the remedy for irresponsible speech is “open debate and voters’ reactions...”<sup>385</sup> This argument has become a cornerstone of conservative

attacks on the Canons' restriction of judicial campaign speech. Professor Dimino, for example, draws on Justice Brandeis' opinion in *Whitney v. California*<sup>386</sup> to argue that "the proper corrective for speech promoting improper ideas is 'more speech' promoting the proper ideas..."<sup>387</sup>

Although Professor Stern predicts the fall of the Canons, he is not necessarily predicting the arrival of "anything goes." He notes that "proponents of reform have advanced other means to temper the excesses of judicial campaigning and promote the election of worthy judges."<sup>388</sup> These "other means" are essentially nonregulatory, in keeping with the dictates of *White*. I will develop them at length, in the context of the third scenario. At this point, it is important to note that the possibility of self-correction, within the *White* parameters, is an initial justification for the challengers' position. Justice At Stake's 2006 Report states that "the message" from voters is that "if you want to campaign like a politician, maybe you should run for the legislature. At least in the short term, American voters seem to be sending a strong message to would-be judges: tell us why you would be a good judge, not about your personal political views."<sup>389</sup> However, this "message" raises a number of questions. After all, we are only at the beginning of the post-*White* world. Is this, presumably salutary, phenomenon short-term only? How can contentious, perhaps prejudicial, issues be kept out of judicial campaigns? What about the problem of campaign finance, particularly direct solicitation from lawyers and potential litigants? Does not self-correction, ultimately, require a degree of regulation to make it stick?

This brings us to the third scenario for post-*White* (and post-Canon) "regulation" of judicial campaigns. It is distinctly possible that a component of this new generation will be true regulation. Some of the existing Canons, or something like them, may survive *White*. Scholars have differed sharply

on the question. Dean Briffault has suggested that Canons such as those dealing with pledges or promises, misrepresentations, personal solicitation of contributions, and partisan political activity will survive. As noted, Professor Stern doubts any will survive. Much depends, obviously, on whether one accepts the arguments advanced here for a narrow reading of *White*.

In this article, I do not discuss specific Canons. My goal is to analyze and influence the conservative position on the general question of regulation of judicial campaigns. It is important to note, however, that the pro-regulation case is stronger in some areas than others. Given the nature of the judicial office, the solicitation of campaign funds seems particularly problematic, and potentially susceptible to regulation. The spectacle of judges/candidates raising money from litigants/lawyers who then appear before them raises troubling questions about due process for opposing parties as well as the general fairness of state courts. As Dean Briffault states, “personal solicitation highlights the dangers of abuse by focusing on the potentially coercive nature of the request for contributions aimed at a potential donor who has or is likely to have business before the judge seeking the contribution.”<sup>390</sup>

In making this point, Dean Briffault invokes the campaign finance case and their emphasis on preventing corruption or its appearance.<sup>391</sup> Although a majority of the Eighth Circuit rejected the applicability of anti-corruption rationales to judicial elections,<sup>392</sup> I think this is too hasty a conclusion. Granted, there is debate within the Supreme Court over the breadth of the concept of corruption.<sup>393</sup> One could extrapolate from some cases a broad view of corruption as unfaithfulness to the “obligation of office,”<sup>394</sup> to conclude that any incurring of political debts – such as partisan

obligations – is a “corruption” of the judicial office.<sup>395</sup> However, even if one limits corruption to quid pro quo corruption or the appearance thereof,<sup>396</sup> the area of judicial campaign financing invites regulation. In invoking *Buckley*, I recognize that many conservatives oppose its pro-regulatory aspects, particularly if read broadly.<sup>397</sup> However, *Buckley* not only remains intact, but is the reference point for most Supreme Court analysis of campaign finance reform legislation.<sup>398</sup> Reports of its demise<sup>399</sup> are greatly exaggerated.

The third scenario might also encompass a number of nonregulatory measures. A report to the Chief Judge of the State of New York from the Commission to Promote Public Confidence in Judicial Elections<sup>400</sup> listed such possibilities as “independent commissions to evaluate the qualifications of judicial candidates throughout the state,”<sup>401</sup> “the creation of a campaign ethics and conduct center,”<sup>402</sup> the expansion of judicial campaign finance disclosure,<sup>403</sup> and the establishment of a State-sponsored judicial election voter guide.”<sup>404</sup> Professor Stern cites the possibility of “conversion of mandatory restraints on speech to guidelines that candidates are urged to follow.”<sup>405</sup>

Perhaps most interesting is the sharp increase in focus on public financing of judicial campaigns in the post-*White* world.<sup>406</sup> As of this writing, bills for public financing of Supreme Court races have been introduced in several states.<sup>407</sup> North Carolina’s existing system of public finance has survived an initial judicial challenge, brought by a conservative group.<sup>408</sup> New Mexico has recently adopted it.<sup>409</sup> There is a good deal of irony in the prospect of successful challenges to the Canons, mounted by conservatives, leading to widespread adoption of public financing of judicial campaigns. Opposition to public financing has long been a core aspect of



conservative views on campaign finance reform.<sup>410</sup> Indeed, conservatives may feel that the pressures to run as a “clean judicial elections” candidate, to adhere to “voluntary” restraints, or respect the rulings of campaign conduct committees represent the kind of coercion associated with regulatory regimes that they thought *White* had eliminated. Once again, the “victory” has unintended consequences.

The notion that judicial elections are different, and should be subject to a different set of rules, from elections to the political branches is one that won’t go away. At the same time, *White* is on the books, and is, along with its progeny, the guiding precedent in the area. Many conservatives regard the decision as a great victory.<sup>411</sup> My goal in this article is to persuade conservatives to at least slow down their assault on the Canons, and take a sober second look. I recognize that we are in the post-*White* world. Thus, some version of scenarios two or three is where the system is headed.<sup>412</sup> The challengers are likely to be suspicious of the third scenario, particularly to the extent they view it as an attempt to re-introduce the pre-*White* world – the first scenario – by the back door.

If one accepts the arguments – both policy and legal – offered here, conservatives ought to favor a strong version of the third scenario: one that contains some traditional regulation as well as newer approaches. I have argued that as a matter of law, *White* need not be read broadly. I base this conclusion not so much on a hopeful reading of the majority’s disclaimer,<sup>413</sup> as on my view of the weakness of its premises. Much hinges on how one assesses the results of politicization. The challengers appear to view it as an unmixed good: one that furthers the values of the First Amendment while advancing conservative goals. But if the state courts are weakened in their ability to do justice in parity with the federal courts, and are so perceived,

core conservative values are threatened. The threat to due process that flows from politicization is a threat to judicial federalism – a fundamental building block of our constitutional system. One might even view politicization and its consequences as a step towards the ultimate demise of the elected judiciary.<sup>414</sup> Right now the challengers are winning. At some point those who are inclined to sympathize with them may well be reminded of two venerable maxims: “be careful what you wish for,” and “another such victory and I am undone.”

### Conclusion

The American judiciary is undergoing a fundamental transformation, at least in the thirty nine states that use elections as some part of their judicial selection process. That process is becoming more politicized, more like the rough-and-tumble electoral process for legislative and executive offices. This dramatic change is the result of a breakdown in the existing system of campaign regulation based on the ABA Canons. The state regulations are an attempt to hold the system in a form of equipoise—permitting the election of judges, but limiting campaign conduct that harms the judiciary once successful candidates are on the bench. Their breakdown is fueled by the Supreme Court decision in *Republican Party of Minnesota v. White*, which struck down a state regulation based on the Canons. *White* is but one of a number of successful challenges to Canon-based regulation. Many conservatives think this development is a great victory. Indeed, conservatives are the driving force behind the challenges. In this article, I have argued that conservatives should oppose politicization of the state judiciaries. It calls into question important tenets about federalism and the value of states in achieving the rule of law. For example, judicial federalism

rests on fundamental assumptions about the American Constitutional order, and the central role of state courts in that order. The widespread acceptance of this vision is a victory for conservative principles. One would hardly expect conservatives to support a transformation of the state judiciaries that undermine that order. *White* need not be read as requiring wholesale invalidation of Canon-based regulation. The system need not descend into “anything goes.” That hardly seems a victory worth seeking.

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<sup>1</sup> 536 U.S. 765 (2002).

<sup>2</sup> See, e.g., Richard Briffault, *Judicial Campaign Codes after Republican Party of Minnesota v. White*, 153 U. PA. L. REV. 181 (2004).

<sup>3</sup> See, e.g., Justice at Stake Campaign, *The New Politics of Judicial Elections 2006*, i, vi, [hereinafter JAS Report 2006] available at <http://www.justiceatstake.org/files/NewPoliticsofJudicialElections2006.pdf>, (this report was prepared by the Justice at Stake campaign and two of its partners, the Brennan Center for Justice, and the National Institute of Money in State Politics); see generally Roy Schotland, *New Challenges to States' Judicial Selection*, 95 GEO L.J. 1077 (2007); but 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, 356 (2003).

<sup>4</sup> See JAS Report 2006, *supra* note 3; Wendy R. Weiser, *Regulating Judges' Political Activity After White*, 68 ALB. L. REV. 651 (2005).

<sup>5</sup> MODEL CODE OF JUDICIAL CONDUCT (2007), available at [http://www.abanet.org/judiciaethics/ABA\\_MCJC\\_approved.pdf](http://www.abanet.org/judiciaethics/ABA_MCJC_approved.pdf). [hereinafter MCJC 2007]

<sup>6</sup> E.g., *White*; *Beaulieu v. Alabaster*, 454 F.3d 1219 (11th Cir. 2007); *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir. 2005); *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002); *Indiana Right to Life v. Shepard*, 2006 WL 3314565 (N.D. Ind. 2006); *North Dakota Family Alliance v. Bader*, 361 F.Supp.2d 1021 (D.N.D. 2005); *Griffen v. Arkansas*, 355 Ark. 38 (Ark. 2003).

<sup>7</sup> E.g., *Brown v. Hartlage* 456 U.S. 45, 53 (1982).

<sup>8</sup> E.g., *In re Chmura*, 461 Mich. 517 (Mich. 2000).

<sup>9</sup> 536 U.S. 765; see, e.g., Weisser, *supra* note 4 (“Since *White*, state regulatory systems designed to promote the independence and impartiality of their judiciaries have been thrown into disarray. By articulating a robust conception of First Amendment protections in the context of judicial elections, the *White* decision has left the canons--many of which touch on matters within the scope of the First Amendment--susceptible to attack”).

<sup>10</sup> See *White*, 536 U.S. at 768.

<sup>11</sup> Mr. Bopp successfully represented the plaintiffs in *White*. Plaintiffs have included right to life groups, groups concerned with promoting family values, and various Republican organizations.

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- <sup>12</sup> *McConnell v. Federal Election Commission*, 540 U.S. 93, 247 (2003) (Scalia, J., concurring in part, dissenting in part); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000) (Thomas, J., dissenting). It should be noted that Justice Scalia is the author of the *White* opinion, which was joined by Justice Thomas.
- <sup>13</sup> *White*, 536 U.S. at 788.
- <sup>14</sup> *Id.* at 795 (Kennedy, J., concurring).
- <sup>15</sup> My definition of conservative is somewhat general, of the “big tent” variety. Within the legal context, I refer to those who generally agree with justices such as Justice Scalia and Justice Thomas, and, for example, support federalism, and take a hard line on criminal justice issues. As a general matter one might make a loose red-state/blue-state division. For a discussion of the problem of defining “Judicial Conservative,” see Richard H. Fallon, *The ‘Conservative’ Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 446-52 (2002). Support for *White* is not limited to conservatives. See Erwin Chemerinsky, *Restrictions on Speech of Judicial Candidates are Unconstitutional*, 35 Ind. L. Rev. 735 (2002).
- <sup>16</sup> See Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213, 251 (1983).
- <sup>17</sup> See *Gregory v. Ashcroft*, 501 U.S. 452, (460) (1991).
- <sup>18</sup> See *White*, 536 U.S. at 792-795 (Kennedy, J., concurring) (“In resolving this case, however, we should refrain from criticism of the State’s choice to use open elections to select those persons most likely to achieve judicial excellence. States are free to choose this mechanism rather than, say, appointment and confirmation.”). Justice O’Connor, however, expressed her “concerns about judicial elections generally.” *Id.* at 788.
- <sup>19</sup> The majority accused Justice Ginsburg of “undermining” judicial elections. *Id.* at 782
- <sup>20</sup> See generally Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994).
- <sup>21</sup> See *White*, 536 U.S. at 784 (rejecting “complete separation of the judiciary from the enterprise of ‘representative government....’”).
- <sup>22</sup> A good model of such a paper, coming at related issues from a different perspective, is Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 Yale L.J. 1049 (1996). Prof. Smith’s essay “challenges the basic assumptions of campaign finance reform advocates, rather than mechanics or structure of regulation.” *Id.* at 1048-50.
- <sup>23</sup> *Shrink*, 528 U.S. at 399 (Breyer, J., concurring). Justice Ginsburg cited this scenario in her *White* dissent. 536 U.S. at 813.
- <sup>24</sup> For a useful description of judicial selection methods see Schotland, *supra* note 3, at 9-11.
- <sup>25</sup> Weisser, *supra* note 4, at 654.
- <sup>26</sup> *Id.*
- <sup>27</sup> See Schotland, *supra* note 3, at 26. The phenomenon pre-dates *White*, but seems almost certain to intensify.
- <sup>28</sup> Amanda Bronstad, *Cash is Flowing in Judicial Elections*, National Law Journal, Oct. 9, 2006, at 9.
- <sup>29</sup> Daniel P. Elliott, *The Politicization of the Judiciary*, unpublished manuscript on file with the author, at 22.
- <sup>30</sup> Weisser, *supra* note 4, at 654; JAS Report 2006, *supra* note 3, at 8.
- <sup>31</sup> Justice at Stake Campaign, *The New Politics of Judicial Elections 2004*, 1, 4 [hereinafter *JAS Report 2004*], available at <http://www.justiceatstake.org/files/NewPoliticsReport2004.pdf>.
- <sup>32</sup> Elliott, *supra* note 28, at 21
- <sup>33</sup> Bronstad, *supra* note 27.
- <sup>34</sup> Roy A. Schotland, *Elective Judges’ Campaign Financing: Are States Judges’ Robes the Emperor’s Clothes of American Democracy?*, J.L. AND POL. 57, 90 (1985).
- <sup>35</sup> *Id.*
- <sup>36</sup> Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court’s Rulings*, N.Y. Times, Oct. 1, 2006, at 11.
- <sup>37</sup> JAS Report 2006, *supra* note 3, at 15; Votelaw.com, *Alabama: New Chief Justice Calls for Non-Partisan Elections*, Nov. 20, 2006, available at <http://www.votelaw.com/mt/mt-tb.cgi/3811>; see also Patrick Marley, *Ziegler Wins Court Seat*, Apr. 4, 2007, available at <http://www.jsonline.com/story/index.aspx?id=586679> (2006 Wisconsin race was the most expensive in state history).

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<sup>38</sup> JAS Report 2004, *supra* note 30, at vi.

<sup>39</sup> *Id.*, at vii; JAS Report 2006, *supra* note 3, at vi.

<sup>40</sup> *Id.* at vii.

<sup>41</sup> JAS Report 2006, *supra* note 3, at i.

<sup>42</sup> *Id.* at 15.

<sup>43</sup> *Id.* at 8.

<sup>44</sup> *Id.* at 29.

<sup>45</sup> *Id.* at 35.

<sup>46</sup> Democratic Judicial Campaign Committee Initial Press Release [hereinafter DJCC], *available at* <http://djcc.org/web/index.php> (unpaginated); DJCC material is summarized in the Justice at Stake newsletter, March 22, 2007 “Eyes on Justice: Are Democrats About to Up the Ante in the Judicial Election Wars?”.

<sup>47</sup> DJCC.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Testing Legitimacy Theory in the Context of “New-Style” Judicial Campaigns 2* (June 24, 2007), Version 1.41, American Political Science Review (forthcoming 2007).

<sup>51</sup> See Briffault, *supra* note 2, at 205.

<sup>52</sup> MCJC 2007, *supra* note 5. The current Canons reflect an effort to adapt to *White*; see generally Dimino, *supra* note 3, at 314-15 (summarizing ABA efforts).

<sup>53</sup> MCJC 2007, *supra* note 5, Canon 1, Canon 4: rule 4.1 A(13)

<sup>54</sup> *Id.*, Canon 4: rule 4.1 A(8).

<sup>55</sup> See Weisser, *supra* note 4 (“[the Canons] have long served as one of the primary means by which states seek to ensure the distinct characters and constitutional roles of their judicial branches”).

<sup>56</sup> 536 U.S. 765.

<sup>57</sup> *In re Chmura*, 461 Mich. 517 (Mich., 2000).

<sup>58</sup> See discussion *infra* Part III.

<sup>59</sup> *White*, 536 U.S. at 770.

<sup>60</sup> *Id.* at 783 (“we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office.”).

<sup>61</sup> *Id.* at 784.

<sup>62</sup> *Id.*

<sup>63</sup> See Weisser, *supra* note 4, at 693 (“State courts...have been much more sensitive to separation of powers concerns.”).

<sup>64</sup> *White*, 536 U.S. at 766.

<sup>65</sup> *Id.* at 788, (O’Connor, J., concurring)

<sup>66</sup> *Id.* at 804, (Ginsburg, J., dissenting)

<sup>67</sup> Amici on the challengers’ behalf in the *White* remand included Republican Seniors, Minnesota College Republicans, and Indian Asian American Republicans of Minnesota.

<sup>68</sup> The litigation in *White* was triggered by a Republican judicial candidate’s desire to criticize the Minnesota Supreme Court, “on issues such as crime, welfare and abortion.” 536 U.S. at 768.

<sup>69</sup> See discussion *infra* Part III.

<sup>70</sup> I realize that there is a temporal anomaly in that the reformers have already achieved their goals, and represent the existing establishment. The challengers might consider themselves as the true reformers.

<sup>71</sup> Judge Carl McGowan referred to “the adversary trial carried on in the sanitized and insulated atmosphere of the courthouse.” He stated that “anyone with experience of both knows that a courtroom differs markedly in style and tone from a legislative chamber.” Cited in JERRY L. MASHAW, RICHARD A. MERRILL, PETER M. SHANE, *ADMINISTRATIVE LAW THE AMERICAN PUBLIC LAW SYSTEM, CASES AND MATERIALS*, 5th ed. 571 (2003).

<sup>72</sup> See generally *Gregory v. Ashcroft*, 501 U.S. 452, 487 (1991).

<sup>73</sup> MCJC 2007, *supra* note 5, Canon 4: rule 4.1 A(13). See also note 332 *infra* (discussing nonpartisanship under Canons).

<sup>74</sup> MCJC 2007, *supra* note 5, Canon 4: rule 4.1 A(8).

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<sup>75</sup> See Briffault, *supra* note 2, at 225. (“Surely, solicitation- - the act of asking for a contribution—raises the same dangers of undue influence and the appearance of impropriety as the contribution itself. Indeed, personal solicitation highlights the dangers of abuse by focusing on the potentially coercive nature of the request for contributions aimed at a potential donor who has or is likely to have business before the judge seeking the contribution. Personal solicitation thus particularly threatens the appearance of impropriety and undermines the appearance of evenhanded treatment essential to the judicial role.”).

<sup>76</sup> Gibson, *supra* note 48, at 22.

<sup>77</sup> Commission to Promote Public Confidence in Judicial Elections, *Final Report to the Chief Judge of the State of New York* [hereinafter NY Report 2006], appendix E, (Feb. 6, 2006).

<sup>78</sup> National Center for State Courts, *How the Public Views the State Courts*, 42 (1999).

<sup>79</sup> Republican Party of Minnesota v. White, 416 F.3d 738, 774-775 (Gibson, J., dissenting) (8th Cir. 2005).

<sup>80</sup> Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court’s Rulings*, N.Y. Times, Oct. 1, 2006, at 11.

<sup>81</sup> *Id.*

<sup>82</sup> NY Report, 2006, *supra* note 75, at 83; National Center for State Courts, *supra* note 68, at 2.

<sup>83</sup> See generally JAS Report 2006, *supra* note 3; JAS Report 2004, *supra* note 30.

<sup>84</sup> Gibson, *supra* note 48, at 22.

<sup>85</sup> Nat S. Stern, *The Looming Collapse of Restrictions on Judicial Campaign Speech*, 5, (March 2007). FSU College of Law, Public Law Research Paper No. 249 Available at SSRN: <http://ssrn.com/abstract=967653> (discussing “the reality that ‘people want to elect judges....’”).

<sup>86</sup> Dimino, *supra* note 3, at 356.

<sup>87</sup> See Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 635 (1980-1981).

<sup>88</sup> Gibson, *supra* note 48, at 28.

<sup>89</sup> White 536 U.S. at 817 (Ginsburg, J., dissenting).

<sup>90</sup> *Id.* at 818.

<sup>91</sup> Republican Party of Minnesota v. White, 416, F.3d at 753 (8th Cir. 2005).

<sup>92</sup> Indeed, those who relied on the Canons may not have been fully aware of the First Amendment broadside that was sure to come.

<sup>93</sup> Gregory, 501 U.S. at 460.

<sup>94</sup> Bator, *supra* note 85, at 625-29.

<sup>95</sup> Younger v. Harris, 401 U.S. 37 (1971).

<sup>96</sup> E.g. Stone v. Powell, 428 U.S. 465 (1976).

<sup>97</sup> See Idaho v. Coeur D’Alene Tribe of Idaho, 521 U.S. 261, 275 (1997) (“While we can assume there is a special role for Article III courts in the interpretation and application of federal law in other instances as well, we do not for that reason conclude that state courts are a less than adequate forum for resolving federal questions. A doctrine based on the inherent inadequacy of state forums would run counter to basic principles of federalism”); cf. Alden v. Maine, 527 U.S. 706, 754 (1999) (noting possibility of federal-law based suits against states in state courts).

<sup>98</sup> See e.g. Hicks v. Miranda, 422 U.S. 332, 347-50 (1975).

<sup>99</sup> See LARRY W. YACKLE, FEDERAL COURTS, 21-22 (2d. ed. 2003).

<sup>100</sup> This is the case, for example, with *Pullman* abstention and much Eleventh Amendment litigation.

<sup>101</sup> Younger v. Harris, 401 U.S. 37, 44 (1971).

<sup>102</sup> Federal Maritime Commission v. South Carolina Ports Authority, 536 U.S. 743 (2002); see generally George D. Brown, *Counterrevolution?—National Criminal Law after Raich*, 66 OHIO ST. L.J. 947, 976 (2005) (discussing importance of symbolic dimensions of the new federalism).

<sup>103</sup> ERWIN CHEMERINKSY, FEDERAL JURISDICTION, 265-88 (4<sup>th</sup> ed. 2003) (discussing constitutional and statutory tests for “arising under” determination).

<sup>104</sup> Bator, *supra* note 85, at 627.

<sup>105</sup> Solimine & Walker, *supra* note 16, at 223.

<sup>106</sup> Cf. YACKLE, *supra* note 95, at 23-24.

<sup>107</sup> Bator, *supra* note 85, at 667.

<sup>108</sup> Solimine & Walker, *supra* note 16, at 218.

<sup>109</sup> Bator, *supra* note 85, at 631-34.

<sup>110</sup> E.g. Steffel v. Thompson, 415 U.S. 452 (1974).

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<sup>111</sup> Bator, *supra* note 85, at 629.

<sup>112</sup> *Id.* at 625.

<sup>113</sup> *Dombrowski v. Pfister*, 380 U.S. 479, 498 (Harlan, J., dissenting) (1965).

<sup>114</sup> *Id.* at 499; *see also* Bator, *supra* note 85, at 625 (“we are talking, in the case of the injunction action, about whether a state judge should be prohibited from adjudicating a proceeding for the enforcement of state law and policy, not because there has been a showing that federal defenses to the proceeding will not receive a full and fair hearing in the state court, but again because of a general mistrust of the competence and sensitivity of state judges.”).

<sup>115</sup> *Stone*, 428 U.S. 465.

<sup>116</sup> *Id.* at 493.

<sup>117</sup> Bator, *supra* note 85 at 635.

<sup>118</sup> *Id.* at 627.

<sup>119</sup> 411 U.S. 564 (1973).

<sup>120</sup> *See id.* at 579 (“It is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes.”). The Court cited *Tumey v. Ohio*, 271 U.S. 510 (1927) and *Ward v. Village of Monroe*, 409 U.S. 57 (1972); both of which are important cases on procedural due process within state courts. It is significant that the Court stated that *Ward* “indicates that the financial stake need not be as direct or positive as it appeared to be in *Tumey*.” *Id.* at 579.

<sup>121</sup> Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

<sup>122</sup> *See id.* at 1127-28.

<sup>123</sup> *See White*, 536 U.S. at 784 (noting power of state judges to “make” common law).

<sup>124</sup> *F.E.C. v. Wisconsin Right to Life, Inc.*, 127 S.Ct. 2652, 2657 n.2 (2007) (Souter, J., dissenting).

<sup>125</sup> *Id.* Because of the extraordinary nature of this commentary by four Supreme Court justices on the condition of the state judiciary, it is set forth in its entirety:

State judicial campaigns have become flush with cash as well, with state supreme court candidates raising over \$30 million in the 2005-2006 cycle. Sample et al., *The New Politics of Judicial Elections 2006*, p. 16 (2007), available at <http://www.justiceatstake.org/files/NewPoliticsofJudicialElections2006.pdf>. In a single 2004 judicial election in Illinois, the candidates raised a breathtaking \$9.3 million, an amount the winner called “‘obscene.’” The Justice-elect wondered, “‘How can people have faith in the system?’” Moyer & Brandenburg, *Big Money and Special Interests are Warping Judicial Elections*, *Legal Times*, Oct. 9, 2006, p. 50 (quoting Justice Lloyd Karmeier of the Illinois Supreme Court). According to polling data, the fear that people will lose trust in the system is well founded. With respect to judicial elections, a context in which the influence of campaign contributions is most troubling, a recent poll of business leaders revealed that about four in five thought that campaign contributions have at least “some influence” on judges’ decisions, while 90 percent are at least “somewhat concerned” that “[c]ampaign contributions and political pressure will make judges accountable to politicians and special interest groups instead of the law and the Constitution.” Zogby International, *Attitudes and Views of American Business Leaders on State Judicial Elections and Political Contributions to Judges 4-5* (May 2007), available at [http://www.ced.org/docs/report/report\\_2007judicial\\_survey.pdf](http://www.ced.org/docs/report/report_2007judicial_survey.pdf).

These four justices are the *White* dissenters. Their emphasis is on money, but clearly goes beyond it to a general unease with the highly politicized system that *White* helps bring about. The *WRTL* dissent may have an element of “we told you so”.

<sup>126</sup> *White*, 536 U.S. at 784

<sup>127</sup> Elliott, *supra* note 28.

<sup>128</sup> JAS Report 2006, *supra* note 3, at 4.

<sup>129</sup> *Id.*, at 30.

<sup>130</sup> *Id.*

<sup>131</sup> Solimine & Walker, *supra* note 16, at 253.

<sup>132</sup> Bator, *supra* note 85, at 627.

<sup>133</sup> Steven G. Calabresi, *A Government of Limited and Enumerated Powers: In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 775 (1995).

<sup>134</sup> *See Gregory*, 501 U.S. at 463.

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<sup>135</sup> *Id.*

<sup>136</sup> Schotland, *supra* note 3, at 10.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> See Weisser, *supra* note 4, at 655, 664, 668-72, 688-91.

<sup>140</sup> *Id.* at 664.

<sup>141</sup> *Id.* at 681.

<sup>142</sup> New State Ice Co. v. Liebmann, 284 U.S. 262, 311 (1932).

<sup>143</sup> See White, 536 U.S. at 821 (Ginsburg, J., dissenting); Schotland, *supra* note 34 at 81-86 (discussing problem of accountability and differing approaches).

<sup>144</sup> William P. Marshall, *The Last Best Chance for Campaign Finance Reform*, 94 NW. U. L. REV. 335 (2000).

<sup>145</sup> *Id.* at 376.

<sup>146</sup> *Id.* at 380.

<sup>147</sup> Weisser, *supra* note 4, at 695.

<sup>148</sup> See Weisser, *supra* note 4, at 695; In the *White* remand, the 8<sup>th</sup> Circuit, en banc, divided over the relevance of the Supreme Court's anti-corruption cases. Compare majority at 416 F.3d at 756 note 8, with *id.* at 769 (Gibson, J., dissenting).

<sup>149</sup> Marshall, *supra* note 139, at 385 ("Crafting reforms that navigate between competing interests is not easy....Finally, the unsettled constitutional law surrounding campaign reform favors experimentation.").

<sup>150</sup> See generally Fallon, *supra* note 15.

<sup>151</sup> *White*, 536 U.S. at 799-800 (Stevens, J., dissenting). See also *id.* at 812 (Ginsburg, J., dissenting).

<sup>152</sup> *Id.* at 792.

<sup>153</sup> *Id.* at 788.

<sup>154</sup> *Id.* at 792.

<sup>155</sup> *Id.*

<sup>156</sup> See e.g. *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting) (dispute over medical marijuana "exemplifies the role of States as laboratories").

<sup>157</sup> See *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir. 2005).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 747.

<sup>160</sup> See *id.* at 747-48; U.S. Const. art. VI, cl. 2.

<sup>161</sup> See *White*, 416 F.3d at 747-48.

<sup>162</sup> *Id.* at 749-50.

<sup>163</sup> Weisser, *supra* note 4, at 665.

<sup>164</sup> *McConnell*, 540 U.S. at 248 (Scalia, J., concurring and dissenting in part); see generally Smith, *supra* note 21.

<sup>165</sup> See Dimino, *supra* note 3, at 376; see also Ronald D. Rotunda, *Judicial Elections, Campaign Financing, and Free Speech*, 2 ELECTION L.J. 79 (2003). Professor Rotunda emphasizes the implications of *White* for campaign finance reform generally.

<sup>166</sup> *McConnell*, 540 U.S. at 248 (Scalia, J., concurring and dissenting in part).

<sup>167</sup> 456 U.S. 45 (1982).

<sup>168</sup> *Id.* at 53.

<sup>169</sup> Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments Intractable Dilemmas*, 94 COLUM. L. REV. 1258, 1260 (1994); Smith, *supra* note 21 at 1057 ("Reformers have failed to show why a system of campaign finance that has existed throughout the nation's history must be overturned. They have failed to prove that new, unique circumstances justify infringement of First Amendment rights, or even that these infringements will cure the alleged ills.").

<sup>170</sup> Allison Hayward, *The Fallacy of Campaign Finance Reform*, 7 The Journal of the Federalist Society Practice Groups, Issue 2, 185 (October 2006).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> The campaign finance cases do not play any significant role in *White*. However, Justice Ginsburg's dissent did discuss such concepts as "the compelling state interest [in] preserving the public's confidence in the integrity and impartiality of its judiciary." 536 U.S. at 817 (Ginsburg, J., dissenting). Such an



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“appearance” analysis is similar to that found in the campaign finance cases. *See also* Republican Party of Minnesota v. White, 416 F.3d 769-70 (8th Cir. 2005) (Gibson, J., dissenting) (identifying unifying themes in campaign finance cases, judicial elections cases, and Hatch Act restrictions on executive branch employees).

<sup>174</sup> BeVier, *supra* note 164, at 1259, 1279.

<sup>175</sup> *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003).

<sup>176</sup> *Id.* at 248 (Scalia, J., dissenting).

<sup>177</sup> *Id.* at 249.

<sup>178</sup> *Id.* He then analyzed particular features of the legislation that would favor incumbents. *See generally* Hayward, *supra* note 147, at 186 (discussing the historical evidence of entrenchment.).

<sup>179</sup> BeVier, *supra* note 164, at 1279.

<sup>180</sup> MCJC 2007, *supra* note 5, Canon 4: rule 4.1 A(13).

<sup>181</sup> *Id.*, Canon 4: rule 4.1 A(8).

<sup>182</sup> *Id.*, Canon 4: rule 4.1 A(1, 2); Briffault, *supra* note 2, at 181.

<sup>183</sup> *Republican Party of Minnesota v. White*, 416 F.3d at 758 n.9. (8th Cir. 2003).

<sup>184</sup> Chemerinsky, *supra* note 15, at 753.

<sup>185</sup> Schotland, *supra* note 3, at 3.

<sup>186</sup> Briffault, *supra* note 2, at 196.

<sup>187</sup> *Id.*; *see* Dimino, *supra* note 3, at 374-75.

<sup>188</sup> Rotunda, *supra* note 160, at 89.

<sup>189</sup> Stern, *supra* note 83, at 27-28.

<sup>190</sup> *In re Kinsey*, 842 So. 2d 77 (Fla. 2003).

<sup>191</sup> BeVier, *supra* note 164, at 1260.

<sup>192</sup> *Id.* (quoting CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 84 (1993)).

<sup>193</sup> BeVier, *supra* note 164, at 1264.

<sup>194</sup> Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL’Y REV. 273, 274 (1993).

<sup>195</sup> *Id.* at 301.

<sup>196</sup> 424 U.S. at 48-49 (“It is argued, however, that the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation on express advocacy of the election or defeat of candidates imposed by [18 U.S.C.A. § 608]’s expenditure ceiling. But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed ‘to secure the widest possible dissemination of information from diverse and antagonistic sources,’ and ‘to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’”).

<sup>197</sup> It seems clear that such equality considerations played a role in the Vermont campaign finance regulation struck down in *Randall v. Sorrell*, 126 S. Ct. 2479 (2006).

<sup>198</sup> Dimino, *supra* note 3, at 313 n.76.

<sup>199</sup> *Id.* at 375.

<sup>200</sup> *Id.*

<sup>201</sup> *See id.* at 309.

<sup>202</sup> Terry Carter, *The Big Bopper*, ABA Journal, Nov., 2006, at 30. The quote is from the author of the article; it is not a direct quote from Mr. Bopp.

<sup>203</sup> *See* Stern, *supra* note 83, at 20-32.

<sup>204</sup> Briffault, *supra* note 2 at 199 (punctuation altered).

<sup>205</sup> At most, under this view politicization exacerbates it.

<sup>206</sup> *White*, 536 U.S. at 782-83 (noting that the Due Process Clause of the Fourteenth Amendment “has coexisted with the election of judges ever since it was adopted....”). *But see id.* at 788 (O’Connor, J., concurring).

<sup>207</sup> *Id.* at 802 (Stevens, J., dissenting), (“the legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and non-partisanship”); *id.* at 818 (Ginsburg, J., dissenting) (same).

<sup>208</sup> Gibson, *supra* note 48, at 6.

<sup>209</sup> *White*, 536 U.S. 788; *see* Dimino, *supra* note 3, at 374.

<sup>210</sup> Gibson, *supra* note 48, at 6-8.

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<sup>211</sup> See *White*, 536 U.S. at 787-88 (citing repeated expressions by ABA of preference for merit selection.).

<sup>212</sup> Cf. *Weisser*, *supra* note 4, at 672 (emphasizing judicial independence and separation of powers rather than any particular selection mechanism).

<sup>213</sup> *Gibson*, *supra* note 48, at 7.

<sup>214</sup> *Schotland*, *supra* note 3, at 10.

<sup>215</sup> *White*, 536 U.S. at 784.

<sup>216</sup> See *Dimino*, *supra* note 3, at 360 (“One would be hard pressed to find any knowledgeable observer who believes in the ‘oracular’ theory that judges discover (and do not make) law.”) (footnotes omitted).

<sup>217</sup> See source cited *supra* note 199.

<sup>218</sup> *White*, 536 U.S. at 784.

<sup>219</sup> Like Justice Scalia, Prof. Dimino emphasizes the power of state courts over state law. See *Dimino*, *supra* note 3, at 359.

<sup>220</sup> This is frequently the case in criminal matters where claims such as an improper search or seizure can be based on both the federal and state constitutions.

<sup>221</sup> See *supra* text accompanying notes 90-118.

<sup>222</sup> *Bator*, *supra* note 85, at 625.

<sup>223</sup> 28 U.S.C. 509 (1996).

<sup>224</sup> *CHEMERINSKY*, *supra* note 99, at 872-73.

<sup>225</sup> *Fallon*, *supra* note 15, at 465-66.

<sup>226</sup> *Id.* at 466.

<sup>227</sup> E.g. *Arthur v. Allen*, 452 F.3d 1234 (11th Cir. 2006); *Belleque v. Kephart* 465 F.3d 964 (9th Cir. 2006); *Joseph v. Coyle*, 469 F.3d 441 (6th Cir. 2006); *Knowles v. Mirzaynce*, 751 USLW 3250 (Nov. 7, 2006) (describing petition for certiorari from unpublished 9<sup>th</sup> Circuit decision of April 10<sup>th</sup>, 2006).

<sup>228</sup> *Belleque v. Dietrich*, 75 USLW 3515 (describing petition for certiorari from unpublished opinion by 9<sup>th</sup> Circuit in *Dietrich v. Cznriech* (sept. 28, 2006))

<sup>229</sup> See *U.S. v. Gonzales-Lopez* 2006 75 USLW 1550 (2007) (“Application of the principles described by these [habeas] cases has proven to be fertile ground for fundamental disagreements among state and federal judges on whether and how to apply harmless-error analysis to violations of the Sixth Amendment right to counsel.”).

<sup>230</sup> See *infra* text accompanying notes 308-313.

<sup>231</sup> See *supra* text accompanying note 197.

<sup>232</sup> Cf. *Henry J. Friendly, Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1289 (1975) (emphasizing importance of neutral decision maker).

<sup>233</sup> E.g., *Gilbert v. DaimlerChrysler Corp*, 469 Mich. 883 (Mich., 2003).

<sup>234</sup> E.g., *Avery v. State Farm Mutual Auto. Ins. Co.*, 126 S.Ct. 1470 (2006) (denying certiorari)).

<sup>235</sup> E.g., *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989).

<sup>236</sup> See *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

<sup>237</sup> 536 U.S. 765 (2002).

<sup>238</sup> *Id.* at 768.

<sup>239</sup> *Id.* at 771.

<sup>240</sup> *Id.* at 773 (quoting *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 229 (C.A.7 1993)).

<sup>241</sup> *White*, 536 U.S. at 774 (quoting decision of lower court, 247 F.3d 854, 861 (8th Cir. 2001)).

<sup>242</sup> *White*, 536 U.S. at 775 (citing *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214 (1989); *Brown v. Hartlage*, 456 U.S. 45 (1982)).

<sup>243</sup> *White*, 536 U.S. at 775.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 775-76.

<sup>246</sup> *Id.* at 775. Justice Scalia described lack of bias concerning parties as the “root meaning” of impartiality.

<sup>247</sup> *Id.* at 776-77. In a footnote he conceded Justice Stevens’ point that statements concerning issues such as an “unbroken record of affirming convictions for rape” might exhibit a bias against parties. However, such instances would not suffice to meet a requirement of narrow tailoring to serve the interest of preventing party bias. *Id.* n.7.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 777-78.

<sup>250</sup> *Id.* at 778-79.

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<sup>251</sup> 456 U.S. 45 (1982).  
<sup>252</sup> *White*, 536 U.S. at 781-82 (citing *Eu*; *Brown*; *Wood v. Georgia* 370 U.S. 375 (1962)).  
<sup>253</sup> *White*, 536 U.S. at 781 (citing *Wood*).  
<sup>254</sup> *Id.* at 783.  
<sup>255</sup> *Id.* at 784.  
<sup>256</sup> *Id.*  
<sup>257</sup> *Id.* at 787-88.  
<sup>258</sup> *Id.* at 788.  
<sup>259</sup> *Id.* at 783.  
<sup>260</sup> *Id.* at 784.  
<sup>261</sup> *See generally* Stern, *supra* note 83, at 14.  
<sup>262</sup> *Id.*  
<sup>263</sup> *White*, 536 U.S. at 787-92.  
<sup>264</sup> *Id.* at 792.  
<sup>265</sup> *Id.*  
<sup>266</sup> *Id.* at 794, 795.  
<sup>267</sup> *Id.* at 795.  
<sup>268</sup> *Id.* at 794.  
<sup>269</sup> *See generally* Fallon, *supra* note 15 (advancing possibility that conservative justices may, in particular cases, be willing to abandon federalism in order to promote substantive goals).  
<sup>270</sup> *White*, 536 U.S. at 797, 803.  
<sup>271</sup> *See e.g., White* 536 U.S. at 821 (Ginsburg, J., dissenting).  
<sup>272</sup> *Id.* at 796.  
<sup>273</sup> *Id.* at 798.  
<sup>274</sup> *Id.*  
<sup>275</sup> *Id.* at 799.  
<sup>276</sup> *Id.*  
<sup>277</sup> *Id.* at 800.  
<sup>278</sup> *Id.*  
<sup>279</sup> *Id.* at 800-01.  
<sup>280</sup> *Id.* at 801-802.  
<sup>281</sup> *Id.* at 802 (quoting *Mistretta v. United States*, 288 U.S. 361 (1989)).  
<sup>282</sup> *White*, 536 U.S. at 802-03. He quoted at length from an article by an elected judge, Paul J. De Muniz, *Politicizing State Judicial Elections: a Threat to Judicial Independence*, 38 WILLAMETTE L. REV. 367 (2002).  
<sup>283</sup> *White*, 536 U.S. at 805 (Ginsburg, J., dissenting).  
<sup>284</sup> *Id.* at 804.  
<sup>285</sup> *Id.* at 817-18.  
<sup>286</sup> *Id.* at 806.  
<sup>287</sup> *Id.* at 805.  
<sup>288</sup> *Id.* at 806.  
<sup>289</sup> *Id.* at 805.  
<sup>290</sup> *Id.* at 804.  
<sup>291</sup> *Id.* at 810-11. She placed considerable emphasis on the narrowing construction of the clause by the courts below, which would exempt general statements of views.  
<sup>292</sup> *Id.* at 812-13.  
<sup>293</sup> *Id.* at 819-20.  
<sup>294</sup> *Id.* at 813-17.  
<sup>295</sup> *Id.* at 813 (quoting *Shrink*, 628 U.S. at 400).  
<sup>296</sup> 273 U.S. 510 (1927).  
<sup>297</sup> In *Tumey*, a local judge received a portion of fines which he levied.  
<sup>298</sup> *White*, 536 U.S. 814-17 (citing, *e.g.*, *Ward v. Monroeville* 409 U.S. 57 (1972)).  
<sup>299</sup> *White* 536 U.S. at 815-17.  
<sup>300</sup> *Id.* at 821.  
<sup>301</sup> *Id.*

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<sup>302</sup> *Id.*

<sup>303</sup> Stern, *supra* note 83, at 5.

<sup>304</sup> *Id.* at 7 (discussing challenges to speech restrictions).

<sup>305</sup> See e.g., Stern, *supra* note 83; Dimino, *supra* note 3.

<sup>306</sup> Stern, *supra* note 83 at 1-2 (“most attempts to curtail judicial candidates’ speech [will] suffer the same fate as Minnesota’s announce clause.”).

<sup>307</sup> Republican Party of Minnesota v. White, 416 F.3d 738 (8th Cir. 2005); Weaver v. Bonner, 309 F.3d 1312 (11th Cir. 2002).

<sup>308</sup> I do not assume that there is always a clear distinction between legal and policy arguments. Nonetheless I have based my initial presumption largely on what I regard as conservative policy about the legal system.

<sup>309</sup> *Shrink*, 528 U.S. at 400 (Breyer, J. concurring). Justice Breyer referred to a situation in which there are constitutional interests on both sides. However in judicial elections we are dealing with rights: the immediate rights of the candidate and the future due process rights of litigants who must appear before him.

<sup>310</sup> *White*, 536 U.S. at 784.

<sup>311</sup> Dimino, *supra* note 3 at 357-67.

<sup>312</sup> E.g., *White*, 536 U.S. at 803-04 (Stevens, J., dissenting).

<sup>313</sup> *Id.* at 804.

<sup>314</sup> This is the case even if the “representative” adopts the view he should express his own views, rather than those of the voters.

<sup>315</sup> U.S. Const. art. III, § 3, cl. 2.

<sup>316</sup> *Cummings v. Missouri*, 71 U.S. 277, 323 (1866).

<sup>317</sup> *United States v. Lovett*, 328 U.S. 303 (1946).

<sup>318</sup> *Id.* at 317.

<sup>319</sup> LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 3.d Ed., 641 (2000).

<sup>320</sup> I recognize that this could be an argument against the institution of elected judges generally. That is why the tempering of passion and politics produced by Canon-based regulation is an important contribution to the acceptability of the practice. See Editorial, *The Best Judges Business Can Buy*, N.Y. Times, Jun. 18, 2007, available at <http://www.nytimes.com/2007/06/18/opinion/18mon3.html>.

<sup>321</sup> 210 U.S. 373 (1908).

<sup>322</sup> *Id.* at 381.

<sup>323</sup> 239 U.S. 441 (1915).

<sup>324</sup> *Id.* at 446.

<sup>325</sup> ALFRED C. AMAN & WILLIAM T. MATYON, *ADMINISTRATIVE LAW*, 147 (2d ed. 2001) (In the context of individualized determinations, as opposed to legislative or rulemaking decisions, “the power of the group to protect its interests, or a variety of interests, is no longer a factor.”).

<sup>326</sup> Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1289 (1975).

<sup>327</sup> See Administrative Procedure Act 5 U.S.C. §§ 554-557 (governing adjudications before administrative agencies).

<sup>328</sup> 357 U.S. 349 (1958).

<sup>329</sup> *Id.* at 355.

<sup>330</sup> *Id.*

<sup>331</sup> *Id.* at 355-56. Court was referring to political pressure from one of the other branches.

<sup>332</sup> Obviously, more than one of these aspects can be present in any given case.

<sup>333</sup> I recognize that state courts engage in some broad “public law litigation,” and that such suits are a departure from the bi-polar model which I have highlighted. See Dimino, *supra* note 2, at 364. However I do not regard such litigation as a major component of the state court workload. When necessary, this form of litigation channels public participation into such formalized mechanisms as participation by amici and enlargement of the scope of the lawsuit, such as adding new parties. However the system seeks to follow the adjudicative rather than the legislative model. There are, of course, other important differences between the judicial and legislative models. See, e.g., Bd. of Ed. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687, 716 (1994) (O’Connor, J., concurring) (“a legislature, unlike the judiciary..., has no obligation to respond to any group’s requests.”). The point reinforces the notion of a nonpoliticized judicial process open to all on an equal basis. Justice Brennan once stated that “[l]egislators, influenced by the passions and exigencies of the moment, the pressure of constituents and colleagues, and the press of business, do not always pass sober constitutional judgment on every piece of legislation they enact....”

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Marsh v. Chambers, 463 U.S. 783, 814 (1983) (Brennan, J., dissenting). Justice Brennan discussed the possibility that James Madison had changed his views on an important issue concerning the Establishment Clause. He contended that Madison's "later views may not have represented so much a change of *mind* as a change of *role*, from a Member of Congress engaged in the hurly-burly of legislative activity to a detached observer engaged in unpressured reflection." For Justice Brennan, "the latter role is precisely the one with which this Court is charged...." *Id.*

<sup>334</sup> *White*, 536 U.S. at 815 (Ginsburg, J., dissenting).

<sup>335</sup> *Id.* at 783. He also viewed the announce clause as under-inclusive, even if greater regulation of judicial campaigns is possible. However, it seems clear from his subsequent analysis that the election law cases are not relied on for the sole purpose of dealing with inclusiveness.

<sup>336</sup> *Id.* at 788.

<sup>337</sup> *Renne v. Geary*, 501 U.S. 312 (1991). At issue in *Renne*, was a state constitutional provision prohibiting political parties from endorsing candidates for nonpartisan offices.

<sup>338</sup> *White*, 536 U.S. at 805 (Ginsburg, J., dissenting).

<sup>339</sup> See generally Stern, *supra* note 83.

<sup>340</sup> Briffault, *supra* note 2, at 192.

<sup>341</sup> *Id.* at 188-90.

<sup>342</sup> *Id.* at 191-92. Dean Briffault discusses the applicability to judicial elections of the one person, one vote rule, and the Voting Rights Act.

<sup>343</sup> *Id.* at 190-91.

<sup>344</sup> The current controversy over fraudulent voting can be seen as an example of such regulation

<sup>345</sup> *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir. 2005). In addition to the partisan activities clause, the decision also struck down the Minnesota Canon prohibiting personal solicitation by judicial candidates. The validity of both Canons had been left unresolved by the Supreme Court decision. Post *White* debates over the interaction between the Canons and the nature of judicial elections appear to focus on Canons dealing directly with speech – such as announce, pledges or promises, and commitment clauses – and the regulation of fundraising activities. The former are highly visible because of *White*: the latter are equally as visible because of the controversial nature of judicial fundraising. Somewhat lost in the shuffle has been the issue of nonpartisan elections. For an interesting recent discussion of the issue, see Russell S. Sobel and Joshua C. Hall, *The Effect of Judicial Selection Processes on Judicial Quality: The Role of Partisan Politics*, 27 CATO JOURNAL 69, 79 (Winter 2007) (concluding in part that "it is the partisan nature of elections that causes judicial quality to decline, not simply the electoral process as has been the commonly accepted wisdom from previous research.")

<sup>346</sup> *Id.* at 753 (emphasis added).

<sup>347</sup> Briffault, *supra* note 2, at 188.

<sup>348</sup> 424 U.S. 1 (1976).

<sup>349</sup> Liberals tend to attack *Buckley* for prohibiting limitations on campaign *expenditures*, while conservatives disagree with its approval of limits on *contributions*.

<sup>350</sup> See generally *Randall v. Sorrell*, 126 S. Ct. 2479 (2006). Two members of the court invoked stare decisis in relying on *Buckley*. Others suggested that it might be reconsidered, but the dominant theme of the opinion appears to be the application of the *Buckley* framework to find the Vermont law in question unconstitutional. See discussion at *infra* note 352.

<sup>351</sup> *Buckley*, 424 U.S. at 23-25. The Court identified both rights of speech and association as at issue.

<sup>352</sup> *Id.* at 25.

<sup>353</sup> *Id.* (emphasis added).

<sup>354</sup> *Id.* at 27.

<sup>355</sup> *Id.* at 26-27.

<sup>356</sup> *Id.* at 27-28

<sup>357</sup> *Id.* The challengers can be viewed as engaging in down-the-road analysis. "Anything goes" elections also will affect the *functioning* of the institution by leading to law made "according to the values of the people." Indeed, as I have suggested, they may be taking down-the-road analysis a considerable, and dubious, step further to the proposition that the conduct of the election affects the *nature* of the institution. Untrammelled elections will help the judiciary take its rightful place as one of the political branches, a majoritarian institution.

<sup>358</sup> Briffault, *supra* note 2, at 198.

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<sup>359</sup> *White*, 536 U.S. at 805.

<sup>360</sup> *See, e.g.*, *Republican Party of Minnesota v. White*, 416 F.3d 738, 746 (8th Cir. 2005) “The facts of this case demonstrate the extent to which these provisions chill, even kill, political speech and associational rights”; *see generally* Stern, *supra* note 83.

<sup>361</sup> *White*, 536 U.S. at 776.

<sup>362</sup> *Id.* at 775-77.

<sup>363</sup> *Id.* at 800-01.

<sup>364</sup> *Kinsey*, 842 So. 2d 77 (FLA 2003).

<sup>365</sup> *E.g.*, Dimino, *supra* note 2, at 380-82 (indicating approval of, for example, prohibition on speech concerning pending cases).

<sup>366</sup> *See* Duwe v. Alexander, 16 (W.D. Wisc., May 29 2007) (Discussing compelling state interest in open-mindedness).

<sup>367</sup> *See* Schotland, *supra* note 34, at 120 (discussing issues of campaign financing and whether or not the problem rises to the level of corruption).

<sup>368</sup> *Id.*

<sup>369</sup> *See* *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000).

<sup>370</sup> The four dissenting justices – Justices Breyer, Ginsburg, Souter, and Stevens – are generally viewed as the Court’s “liberal wing”. I think that most observers would consider the ABA a liberal organization within the framework advanced here. However, at least one notable liberal academic has expressed his approval of *White*. *See* Chemerinsky, *supra* note 15.

<sup>371</sup> *See* Briffault, *supra* note 2, at 191-92. Dean Briffault discusses Supreme Court decisions on voting rights in judicial elections.

<sup>372</sup> Given the volume of post-*White* litigation percolating in the lower courts it is highly likely that the matter will return to the Supreme Court. *See* *Jefferson Co. Racing Ass’n, Inc. v. Barber*, \_\_ S.Ct \_\_ (2007), 2007 WL1115696 (denying certiorari in case requesting recusal when judges had as candidates made statements on the general issues presented).

<sup>373</sup> Stern, *supra* note 83, at 5.

<sup>374</sup> *White*, 536 U.S. at 806 (Ginsburg, J., dissenting).

<sup>375</sup> *Id.* at 800 (Stevens, J., dissenting).

<sup>376</sup> Stern, *supra* note 83, at 1.

<sup>377</sup> *Id.* at 14.

<sup>378</sup> *Id.* at 16-19.

<sup>379</sup> *Id.* at 19-21.

<sup>380</sup> *Id.* at 12.

<sup>381</sup> *E.g.*, *Beaulieu v. Alabaster*, 454 F.3d 1219 (11th Cir. 2007); *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir. 2005); *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002); *Indiana Right to Life v. Shepard*, 2006 WL 3314565 (N.D. Ind. 2006); *North Dakota Family Alliance v. Bader*, 361 F.Supp.2d 1021 (D.N.D. 2005); *Griffen v. Arkansas*, 355 Ark. 38 (Ark. 2003).

<sup>382</sup> Stern, *supra* note 83, at 21-22, 42, 47.

<sup>383</sup> *Id.* at 47. I am less confident about the utility of recusal as a means of answering the objections of those who must appear before judges who have already expressed opinions contrary to those the future litigants must advance. One of the unfortunate byproducts of this approach is the inevitable development of a substantial body of constitutionally based, federal “recusal law.” *Cf.* *Jefferson Co. Racing Ass’n, Inc. v. Barber*, \_\_ S.Ct \_\_ (2007), 2007 WL1115696 (denying certiorari in case requesting recusal when judges had as candidates made statements on the general issues presented).

<sup>384</sup> 536 U.S. at 792 (Kennedy, J., concurring); Stern, *supra* note 83, at 54.

<sup>385</sup> Stern, *supra* note 83, at 43.

<sup>386</sup> Dimino, *supra* note 3, at 304 n.20.

<sup>387</sup> *Id.*

<sup>388</sup> Stern, *supra* note 83, at 51.

<sup>389</sup> *See* JAS Report 2006, *supra* note 3, at 34.

<sup>390</sup> Briffault, *supra* note 2, at 225.

<sup>391</sup> *Id.*

<sup>392</sup> *Republican Party of Minnesota v. White*, 416 F.3d 738, 756 n.8 (8th Cir. 2005).

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<sup>393</sup> E.g., *McConnell*, 540 U.S. 286 (Kennedy, J., concurring in part and dissenting in part); *Shrink*, 528 U.S. at 369.

<sup>394</sup> *McConnell*, 540 U.S. at 241.

<sup>395</sup> *Republican Party of Minnesota v. White*, 416 F.3d 738, 769-770 (8th Cir. 2005) (Gibson, J. dissenting).

<sup>396</sup> *McConnell*, 540 U.S. at 286 (Kennedy, J., concurring in part and dissenting in part); *id.* at 350 (Rehnquist, J., dissenting).

<sup>397</sup> *Id.* at 286 (Kennedy, J., concurring in part and dissenting in part); *Shrink*, 528 U.S. at 370 (Thomas, J. dissenting).

<sup>398</sup> E.g., *Randall*, 126 S. Ct. 2479 (2006).

<sup>399</sup> See James Coleman, *The Slow, Just, Unfinished Demise of the Buckley Compromise: Randall v. Sorrell*, 126 S.Ct. 2470 (2006), 30 Harv. J.L. & Pub. Pol’y 427, 437 (2006) (“The Court’s fractured opinions in *Randall* show that the *Buckley* compromise is falling apart....”). However, it should be noted that *Shrink*, decided in 2000, was described as possibly the beginning of the end of *Buckley*. See Richard Briffault, *Nixon v. Shrink Missouri Government PAC: The Beginning of the End of the Buckley Era?*, 85 MINN. L. REV. 1729 (2001). The Court’s two most recent campaign finance decisions have an anti-regulatory thrust. *Randall*, decided two terms ago, struck down a Vermont regulatory scheme. Last term *Federal Election Commission v. Wisconsin Right to Life Inc.*, \_\_\_ S.Ct. \_\_\_ (2007) struck down a key section of the Bi-Partisan Campaign Reform Act of 2002 as applied to “issue advocacy” by a corporation. Both the plurality and concurring opinions emphasize the importance of speech in the political context. Thus one might argue that a conservative majority is choosing to focus on the anti-regulatory side of *Buckley*. At the same time, however, the Court appeared to accept *Buckley*’s anti-corruption rationale at least if the concept of corruption emphasizes political quid pro quos. See *id.* at \_\_\_. Thus, I am inclined to view *Buckley* as alive and well. I recognize the theoretical possibility of acceptance of the argument that any form of third-party political expenditure, including contributions, enhances political dialogue. Thus *Buckley*’s emphasis on the need for a quid pro quo could come to be limited to express agreements of the bribery sort. This was the position rejected in *Buckley*, and I do not see the current Court as moving toward it. Initial reactions by academics, focusing on the effect of *WRTL* and the issue of barring certain forms of speech as apparently permitted by *McConnell*, showed a wide range of views. E-mails from Rick Hasen, Rick Pildes, and Daniel Lowenstein to the election law listserve [http://mojoromo.lls.edu/cgi-bin/lwgate/ELECTION-LAW\\_GL/](http://mojoromo.lls.edu/cgi-bin/lwgate/ELECTION-LAW_GL/). (on file with the author). Professor Hasen called the decision a “major victory for those who oppose campaign finance reform...,” and predicted the “full overruling of *Buckley*....” Professor Pildes saw the decision as a “constitutional seachange” in an anti-regulatory direction. *Id.* However, Professor Lowenstein saw *WRTL* as “no blockbuster” and an “incremental decision....” *Id.*

<sup>400</sup> NY Report 2006, *supra* note 75.

<sup>401</sup> *Id.* at 10.

<sup>402</sup> *Id.* at 11.

<sup>403</sup> *Id.*

<sup>404</sup> *Id.*

<sup>405</sup> Stern, *supra* note 83, at 52 (“proponents of reform have advanced other means to temper the excesses of judicial campaigning and promote the election of worthy judges. These proposals fall roughly into three categories: voluntarist, informational, and structural.”).

<sup>406</sup> *Id.* (“Public financing of judicial elections, notably undertaken by North Carolina in the wake of *White*, has been advanced by many as a means of curbing the influence of campaign contributors.”) (notes omitted).

<sup>407</sup> See, e.g., Amanda Bronstad, *Seven States Look at Public Financing for Judicial Races*, 29 National Law Journal No. 16, Apr. 16, 2007.

<sup>408</sup> *Jackson v. Leek*, 2006 WL 2264027 (MDNC 2006).

<sup>409</sup> Deborah Baker, *Governor Signs Public Financing of Judges’ Races*, Associated Press, April 14, 2007.

<sup>410</sup> See BRAD SMITH, UNFREE SPEECH, 88-105, (2001). (noting problems with public financing of political campaigns). Prof. Dimino, however, has expressed approval of public financing for judicial campaigns. Michael Dimino, *Appoint? Objection!*, Philadelphia Inquirer, May 04, 2007.

<sup>411</sup> See James Bopp, U.S. Supreme Court Denies Review of Decision Striking Down Bans on Judicial Candidates’ Political Activities and Campaign Funds Solicitation, James Madison Center for Free Speech, Jan. 23, 2006 (describing denial of certiorari from *White* decision on remand as a “major victory”).

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<sup>412</sup> Implicit in this statement is that the second scenario will not exist in its pure form. I have already ruled out the first scenario.

<sup>413</sup> *White*, 536 U.S. at 783 (“we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office”); see Stern, *supra* note 83, at 10 (“Much other commentary as well has been marked by varying degrees of optimism that *White* left other significant restraints intact.”).

<sup>414</sup> See Editorial, *The Best Judges Business Can Buy*, N.Y. Times, Jun.18, 2007, available at <http://www.nytimes.com/2007/06/18/opinion/18mon3.html>, (“If the courts are going to pursue justice rather than advance special-interest agendas, states must either adopt public financing and strict fund-raising rules for judicial elections or switch to a nonelective merit selection system.”). See also JAS Report 2006, *supra* note 3, at VIII (noting increased interest in merit selection in Minnesota); Votelaw.com, *Alabama: New Chief Justice Calls for Non-Partisan Elections*, Nov. 20, 2006, available at <http://www.votelaw.com/mt/mt-tb.cgi/3811>; Votelaw.com, *Alabama: Judge Writes in Favor of Missouri Plan*, Nov. 20, 2006, available at <http://www.votelaw.com/mt/mt-tb.cgi/3810> (calls by members of the Alabama Supreme Court for a new method of judicial selection). See Emilie Lounsberry, *Forum Asks: Does Money Sway Judges?*, Philadelphia Inquirer (May 31, 2007), available at: [http://www.philly.com/inquirer/local/20070531\\_Forum\\_asks\\_\\_Does\\_money\\_sway\\_judges\\_.html](http://www.philly.com/inquirer/local/20070531_Forum_asks__Does_money_sway_judges_.html) (Quoting Pennsylvania’s Governor Rendell as in favor of changing from an elected system to an appointed one.). See Mark H. Alcott, *Judicial Selection: Time for True Reform*, 237 N.Y.L.J. 13 (col. 1) (01/22/2007) (“True reform of the system requires nothing less than a constitutional amendment implementing a merit selection process for judges.”).