AN IMPOSSIBLE BALANCE: JUDICIAL ELECTIONS AND THE CONSTITUTION

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INTRODUCTION

In today's climate of highly controversial, highly partisan judicial elections, it may seem surprising that, until recently, judicial elections were uneventful and uncontroversial.[1] One commentator has in fact described the state of judicial elections up until a decade ago as being "as exciting as a game of checkers . . . [p]layed by mail."[2] Yet, the dull and sensible judicial elections that treated the judiciary as being apart from the normal partisan, controversial elections of the other branches, seem to have passed.[3] In the last few years, judicial races have become increasingly expensive and controversial.[4] In fact, judicial elections are now twenty-seven to thirty-one percent more contested than ever before.[5]

This increased competition in judicial races means that judicial elections now involve more money and advertising.[6] Judicial candidates, their supporters, and their contributors, now have more at stake than ever.[7] This has meant that judicial electioneering and campaign finance laws that were once considered well settled have recently come under fire.[8] In the past, what judges could or could not say in their campaign ads was of little consequence, as there was very little campaign advertising to be done.[9] Additionally, since judicial elections were rarely expensive affairs, judicial campaign finance laws were not thought much about either.[10]

Today, however, increasing activity in judicial elections has brought to light constitutional issues surrounding these particular

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1 Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L. J. 1077, 1079, 1081 (2007).

2 *Id.* at 1079 (internal citations omitted).

3 *See id.* at 1081.

4 *Id.* at 1078.

5 *See* Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69, 81 (2011).

6 *Id.* at 82, 86.

7 *Id.* at 85, 89, 107.

8 *See* Russ Feingold, *The Money Crisis: How Citizens United Undermines Our Elections and the Supreme Court*, 64 STAN. L. REV. ONLINE 145, 147 (2012), http://www.stanfordlawreview.org/online/money-crisis.

9 *See id.* at 148.

10 *See id.* at 149.

laws.[11] While laws limit the things that judicial candidates can say and promise in their campaign advertisements may help protect judicial impartiality, there is legitimate concern that regulating what candidates can say in their political speech may violate First Amendment Free Speech protections.[12] Moreover, while regulating contributions and spending in judicial campaigns may seem like a violation of First Amendment rights of contributors, as established in *Buckley v. Valeo*,[13] that must be balanced with Due Process requirements that the judge must not have a bias towards one party.[14] This becomes a serious issue when one party has made substantial donations to that judge's campaign.[15]

It is impossible to craft the perfect structure that will eliminate the bias that results from judicial elections.[16] There is simply no way to elect judges and not have them, at least at some level, beholden to their donors and the people that elected them.[17] This is because the political process does not fit within the judicial process; politics and judging are fundamentally different.[18] Politicians are expected to broker deals and to work towards creating policy changes that the people they represent want.[19] Judges, however, are supposed to create unbiased, just rulings, based on the specific facts at hand.[20] Judges are tasked, not with promoting the will of the people, but instead are tasked with upholding the law as it is written.[21] These two roles are intrinsically different functions and cannot be treated as if they are the same.[22] However, when we chose to elect our judges like they are politicians, that is exactly what is happening: we are

[11] L. PAIGE WHITAKER, THE CONSTITUTIONALITY OF CAMPAIGN FINANCE REGULATION: *BUCKLEY V. VALEO* AND ITS SUPREME COURT PROGENY 1 (2008), https://fas.org/sgp/crs/misc/RL30669.pdf.

[12] *Id.*

[13] 424 U.S. 1, 39–40, 143–44 (1976); WHITAKER, *supra* note 11, at Summary.

[14] Andrew Cohen, *An Elected Judge Speaks Out Against Judicial Elections*, THE ATLANTIC (Sept. 3, 2013), http://www.theatlantic.com/national/archive/2013/09/an-elected-judge-speaks-out-against-judicial-elections/279263/.

[15] *Id.*

[16] *See id.*

[17] *See id.*

[18] *The Trouble with Electing Judges*, THE ECONOMIST (Aug. 23, 2014), http://www.economist.com/news/united-states/21613276-theyre-not-politicians-so-they-shouldnt-act-them-trouble-electing-judges.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] Cohen, *supra* note 14.

pretending like they are the same.[23]

Only moving to a merit-based system of selecting judges will alleviate these problems. In a merit system, judicial nominees are selected by a nominating body based on certain criteria set by the state to determine what makes a good judge.[24] Then, the governor (or other officials in some states) chooses who to appoint from the pool of nominees.[25] Because a merit system does not involve judicial elections, it eliminates all the issues created by elections, including being beholden to donors, making unethical campaign promises, and the potential desire to appease voters.[26]

This Note will evaluate judicial electioneering and campaign finance laws across the nation and throughout history to show that longstanding support for a non-elected judiciary has consistently existed.[27] Further, this Note will analyze a number of studies and surveys that shed light on public opinion surrounding judicial campaign finance and electioneering concerns, which will prove how electing judges undermines the integrity of the judicial system.[28] Finally, this Note will look to proposed solutions concerning the judicial election problem and explain how only moving to an entirely merit-based appointment system will adequately insulate the judiciary from bias and ensure the integrity of the judicial system.[29]

I. THE EVOLUTION OF JUDICIAL ELECTIONS

Although it may be a surprise to modern-day Americans, most of whom have lived their entire lives with an elected judiciary, the election of judges was not something fundamental to the structure of our nation.[30] In fact, at the time of the founding, there were very few, if any, elected judges. Judges were almost always appointed

[23] *See The Trouble with Electing Judges*, *supra* note 18.

[24] THE MISSOURI BAR, THE MISSOURI PLAN – KEEPING THE INFLUENCE OF POLITICS AND MONEY OUT OF OUR COURTS, http://www.mobar.org/uploadedFiles/Home/Legislative/Non-Partisan_Court_Plan/speak%20up%20booklet%20revised%206-12.pdf (last visited Feb. 18, 2016).

[25] *Id.*

[26] *See id.*

[27] Schotland, *supra* note 1, at 1086.

[28] *See* Kang & Shepherd, *supra* note 5, at 71–72; Cohen, *supra* note 14.

[29] LARRY C. BERKSON, JUDICIAL SELECTION IN THE UNITED STATES: A SPECIAL REPORT, AM. JUDICATURE SOC'Y (1980), http://judicialselection.us/uploads/documents/Berkson_1196091951709.pdf.

[30] ARTHUR T. VANDERBILT, THE CHALLENGE OF LAW REFORM 14–15 (1955).

by the executive or legislature.[31] It was not until the Jacksonian Era that people began to elect judges.[32] Jacksonians distrusted government officials, especially unaccountable ones, and preferred election by ordinary people.[33] People during this era felt that elected judges would be more accountable to the general population, instead of being beholden to the government official that appointed them.[34] This trend lasted until about the 1920s and 30s.[35] At this time, the trend towards an elected judiciary reversed, and the public began pushing for nonpartisan elections and merit selection plans.[36] By this time, Americans felt that judges elected by popular vote were "inept, corrupt, and securely in the pocket of the ruling political machine."[37] Much of this concern seems to have stemmed from the fact that judicial candidates were suddenly being forced to campaign in the way only candidates for political office had done so before.[38] Often, the candidates were selected by party leaders and "thrust upon an unknowledgeable electorate," one major critic of judicial elections was quoted in saying, "putting courts into politics, and compelling judges to become politicians . . . [had] almost destroyed the traditional respect for the bench."[39] Another critic, in a speech to the Cincinnati Bar, William Howard Taft, said that, judicial candidates' running political campaigns was "so shocking, and so out of keeping with the fixedness of moral principles," that the practice "ought to be 'condemned.'"[40]

Today, the particular way judges are selected varies greatly from state to state.[41] For lower court positions: eighteen states use a

31 *Id.*

32 BERKSON, *supra* note 29.

33 *Id.*

34 *Id.*

35 *Id.*

36 *Id.*

37 Rachel Paine Caufield, *In the Wake of White: How States are Responding to Republican Party of Minnesota v. White and How Judicial Elections are Changing*, 38 AKRON L. REV. 625, 627 (2005).

38 BERKSON, *supra* note 29.

39 *Id.*

40 *Id.*

41 *See* Joanna Shepherd & Michael S. Kang, *Skewed Justice:* Citizens United*, Television Advertising and State Supreme Court Justices' Decisions in Criminal Cases,* SKEWEDJUSTICE.ORG, http://skewedjustice.org (last visited Feb. 2, 2016); *Judicial Selection in the States - Methods of Judicial Selection,* NAT'L CTR. FOR ST. CTS., [hereinafter Judicial Selection] www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state= (last visited Feb. 2, 2016) (discussing the various methods of judicial selection in all fifty states).

nonpartisan election system; seventeen states use appointments, either by the governor or legislature; ten states use partisan elections; and five states use a combination of selection methods (generally either having partisan primaries and nonpartisan general elections, or varying selection method by district).[42] As for appellate judicial selection: thirteen states use nonpartisan elections; twenty-eight states use appointments by the governor or legislature; and nine states use partisan elections.[43] Of the states that appoint appellate judges, twenty-one of those use merit selection plans.[44] Another way in that the states vary is the way in which they retain judges.[45] Almost ninety percent of state appellate court judges must be re-elected regularly.[46] States also vary in the method used for judicial retention for their highest courts: fourteen states use nonpartisan elections; nine states use reappointment by the governor, legislature, or committee; six states use partisan elections; and three states have permanent tenure.[47]

Not only do a large number of states today use elections to fill at least some of their judicial offices, but these elections have become more competitive than ever before.[48] In 1990, only forty-four percent of nonpartisan and sixty-eight percent of partisan judicial elections were contested.[49] Comparatively, by 2000, seventy-five percent of nonpartisan and ninety-five percent of partisan judicial elections were contested.[50] Additionally, incumbent judges are now having a harder time being reelected. In 1980, merely four percent of judicial incumbents lost nonpartisan and partisan reelections.[51] In 2000, eight percent of judicial incumbents lost in nonpartisan elections, and a shocking fifty percent lost in partisan elections.[52]

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42 Judicial Selection, *supra* note 41.

43 *Id.*; Shepherd & Kang, *supra* note 41.

44 Shepherd & Kang, *supra* note 41.

45 *Id.*

46 *Id.*

47 *Id.*

48 Shepherd & Kang, *supra* note 41.

49 *Id.*

50 *See* Chris W. Bonneau, *Patterns of Campaign Spending and Electoral Competition in State Supreme Court Elections*, 25 JUST. SYS. J. 21, 27 tbl.6 (2004).

51 Kang & Shepherd, *supra* note 5, at 81 (citing Melinda Gann Hall, *Competition as Accountability in State Supreme Court Elections, in* RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS 165, 177 (Matthew J. Streb ed., 2007)).

52 *Id.* at 82 (citing Melinda Gann Hall, *Competition as Accountability in State Supreme Court Elections, in* RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS 165, 177 (Matthew J. Streb

This is significant because the loss rate of incumbent judges is now higher than the loss rate for incumbents in legislative offices.[53] Essentially, judicial races are now even harder to win than political, legislative ones.[54]

II. PROBLEMS OF CONTESTED ELECTIONS

The result of this drastic increase in the competitiveness of judicial elections is that judicial campaigns are now engaging in more electioneering (campaign advertising and communications) and more fundraising.[55] This means that the laws that used to suit judicial campaigns are now being tested, and it is now become clear that these laws have constitutional implications.[56] First, laws that limit judicial electioneering (restrict what a judicial candidate can promise, guarantee, or say about herself or her views) clearly touch on First Amendment concerns regarding Free Speech.[57] Secondly, while helping to ensure that Due Process is achieved, judicial campaign finance laws (laws that regulate fundraising for judicial candidates, who can donate to the candidate, where the candidate committee can spend money, etc.) may also implicate freedom of speech issues.[58] It is this exact balancing of constitutional concerns that places judicial elections, and the laws regulating them, in a uniquely precarious position.[59]

The problem is that this balance can never be struck in a way as to ensure the impartial judiciary that was intended by our founders.[60] As explained in *Federalist 78*, the judiciary is supposed

ed., 2007)).

[53] *Id.*

[54] *Id.*

[55] Kang & Shepherd, *supra* note 5, at 82.

[56] Shepherd & Kang, *supra* note 41.

[57] *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, 303, 314 (2003) (discussing First Amendment concerns with restricting free speech shaped the American Bar Association's revisions of the Canons of Judicial Ethics); Bill Kenworthy, *Judicial Campaign Speech*, FIRST AMEND. CTR. (Nov. 4, 2004), http://www.firstamendmentcenter.org/judicial-campaign-speech.

[58] *See* William C. Boak, *Supreme Court: States may Prohibit Judicial Candidates from Personally Soliciting Campaign Contributions*, RHOADS & SINON LLP (Oct. 2015), http://www.rhoadssinon.com/updates-publications-343.html.

[59] *See id.*; Kenworthy, *supra* note 58.

[60] THE FEDERALIST NO. 78, at 402–03, 405 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001); *see* Dimino, *supra* note 57, at 306–07, 310–12 (discussing the framers' intent regarding the judiciary and the practice of states to implement methods contrary to the intent of the framers).

to be totally independent of the will of the people.[61] This is necessary "to guard the [C]onstitution and the rights of individuals from the effects of those ill humours[,] which . . . have a tendency, in the mean time, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community."[62] This means that despite issues of freedom of speech, the judiciary must be completely insulated from the whims of the people; judges must be entirely apart from the political process that contaminates their impartiality in order for Due Process to be preserved.[63] This is simply not possible if we must worry about candidates and their Free Speech rights.[64]

A. Electioneering Laws and Freedom of Speech

The first restrictions on electioneering in judicial races came about in 1924.[65] In that year the American Bar Association ("ABA") produced the Canons of Judicial Ethics ("Code").[66] This Code was created because the ABA believed that maintaining an independent and impartial judiciary was important to the American system of justice.[67] The Code established standards for the conduct of judges and judicial candidates, encouraging them to maintain impartiality and independence thereby protecting the American justice system.[68] This first enactment of the Code included provisions that a candidate for judicial office "should not announce in advance his conclusions of law on disputed issues to secure class support[.]"[69] Later, in 1972 the ABA updated this restriction by creating Canon 7(B)(1)(c) which stated that judicial candidates "should not make pledges or promises of conduct in

61 THE FEDERALIST NO. 78, *supra* note 60, at 405 (Alexander Hamilton); Dimino, *supra* note 58, at 307.

62 THE FEDERALIST NO. 78, *supra* note 60, at 405 (Alexander Hamilton).

63 *See* Dimino, *supra* note 57, at 302–03, 306–07; Billy Corriher, *Merit Selection and Retention Elections Keep Judges Out of Politics*, CTR. FOR AM. PROGRESS ACTION FUND (Nov. 1, 2012), https://www.americanprogessaction.org/issues/civil-liberties/report/2012/11/01/4305/merit-selection-and-retention-elections-keep-judges-out-of-politics/.

64 *See* Corriher, *supra* note 63; THE ECONOMIST, *Keeping Up Appearance*s (May 5, 2015), http://www.economist.com/blogs/democracyinamerica/2015/05/free-speech-and-judges.

65 *See* CANONS OF JUDICIAL ETHICS Preamble (AM. BAR ASS'N 1924); Dimino, *supra* note 57, at 314; Kenworthy, *supra* note 57.

66 Dimino, *supra* note 57, at 314; Kenworthy, *supra* note 57.

67 CANONS OF JUDICIAL ETHICS Preamble, Canon 2 (AM. BAR ASS'N 1924).

68 CANONS OF JUDICIAL ETHICS Preamble, Canon 14 (AM. BAR ASS'N 1924).

69 CANONS OF JUDICIAL ETHICS Canon 30 (AM. BAR ASS'N 1924).

office other than the faithful and impartial performance of the duties of the office; [or] *announce his views on disputed legal or political issues* . . . ."[70] This language of Canon 7(B)(1)(c) of the 1972 Model Code became known as the "announce clause" and "pledges clause."[71] Finally in 1990 the ABA again modified the Model Code by eliminating the announce clause and replacing it instead with a requirement that judicial candidates "shall not 'make statements that commit or appear to commit the candidate with respect to cases, controversies[,] or issues that are likely to come before the court.'"[72] This language of the 1990 Model Code came to be known as the "commit clause."[73]

Although the language was modified over the years, the central theme and goal of the ABA remained: to discourage judicial candidates from making statements regarding political and legal issues.[74]

> Prior to the *White* ruling, nine states (including Minnesota) used variations of . . . the "announce clause" from the 1972 Model Code. . . . [t]wenty-five states have adopted language based on the [1990] "commit clause[.]". . . [and] four states [have some type of judicial electioneering] restrictions that are not based on language from the ABA Model Code of Judicial Conduct.[75]

This means that, by 2002, thirty-eight states had some type of restriction on judicial electioneering.[76]

However, in 2002 the Supreme Court drastically changed the doctrine governing judicial electioneering laws.[77] In *Republican Party of Minnesota v. White,* Minnesota's judicial electioneering laws, modeled after the 1972 announce clause, were challenged by a judicial candidate, Gregory Wersal, who wanted to make statements about disputed issues including crime, welfare, and abortion.[78] Wersal claimed that Minnesota's judicial electioneering

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[70] MODEL CODE OF JUDICIAL CONDUCT Canon 7 (B)(1)(c) (AM. BAR ASS'N 1972) (emphasis added).

[71] Matthew D. Besser, *May I Be Recused? The Tension Between Judicial Campaign Speech and Recusal After Republican Party Of Minnesota v. White*, 64 OHIO ST. L. J. 1197, 1200–01 (2003).

[72] *Id.* at 1200–01 (quoting MODEL CODE OF JUDICIAL CONDUCT Canon 5 (A)(3)(d)(ii) (AM. BAR ASS'N 1990)) (emphasis omitted).

[73] *Id.* at 1201.

[74] Dimino, *supra* note 57, at 314–15.

[75] Caufield, *supra* note 37, at 630.

[76] 2002 being the year *White* was decided. *See id.*

[77] Republican Party of Minn. v. White, 536 U.S. 765, 768, 788 (2002); Dimino, *supra* note 57, at 315.

[78] *White*, 536 U.S. at 768.

restrictions were a violation of the First Amendment of the United States Constitution as they prevented him from making statements about his views on issues.[79] The Republican Party of Minnesota entered the suit as plaintiffs, alleging that Minnesota's announce clause prevented them from learning enough about Wersal's views to be able to either support or oppose him.[80]

The Supreme Court, in an opinion authored by Justice Scalia, held that Minnesota's "announce clause" based restriction was unconstitutional.[81] The Court applied strict scrutiny and found that the law placed an undue burden on Wersal's speech.[82] Minnesota argued that they had compelling interests in preserving the impartiality and the appearance of impartiality of the judiciary.[83] However, the majority rejected this argument, defining "impartiality" as meaning that a judge does not enter into the case with a bias for one party over the other.[84] The majority explained that the announce clause did not achieve the state interest of preserving impartiality or the appearance thereof because the announce clause limited what candidates could say about *issues*, not about *parties* to the case.[85] However, the logic underpinning this ruling does not hold because, even using Justice Scalia's incredibly narrow definition of impartiality, judicial electioneering speech still threatens judicial impartiality.[86] Assuming that impartiality just means that a judge does not enter into a case with a bias for one particular party, there are plenty of types of electioneering speech that would give the judge a bias for one party over another.[87] For example, if a candidate says that he is "tough on criminals" or "is going to keep criminals off our streets" that could arguably give him a bias against any criminal defendant that is before him.[88]

After *White*, courts held a number of judicial campaign

[79] *Id.* at 769–70.
[80] *Id.* at 770.
[81] *Id.* at 768, 788.
[82] *Id.* at 774–75, 788.
[83] *Id.* at 775.
[84] *White*, 536 U.S. at 775, 776.
[85] *Id.* at 776 (emphasis in original).
[86] Alexandrea Haskell Young, *The First Chink in the Armor? The Constitutionality of State Laws Burdening Judicial Candidates After Republican Party of Minnesota v. White*, 77 S. CAL. L. REV. 433, 447 (2004) (discussing Justice O'Connor's concurrence).
[87] *See White,* 536 U.S. at 802 (Stevens, J. dissenting).
[88] Pa. Family Inst., Inc. v. Celluci, 521 F. Supp. 2d 351, 378–79 (E.D. Pa. 2007).

restrictions to be unconstitutional.[89] It has now been established that state restrictions on judicial electioneering based on the 1972 announce clause are unconstitutional.[90] However, that does not mean that states cannot have judicial electioneering restrictions.[91] While it did strike down use of the announce clause, the Supreme Court in *White* did not address the constitutionality of laws using the 1990 Model Code's "commit clause"[92] (on which the majority of states with judicial electioneering restrictions base their laws).[93] Subsequently, there have been attacks on such "commit clause" language, but none of these challenges has yet made it to the Supreme Court.[94] Currently, the federal circuits are taking different approaches to the issue: some holding that the commit clause also violates Free Speech, and some holding that it does not.[95]

The majority of challenges concerning the commit clause seem to deal with special interest groups soliciting answers to policy questions by sending questionnaires to judicial candidates.[96] In *North Dakota Family Alliance v. Bader*, The North Dakota Family Alliance (a conservative special interest group) sent issue questionnaires to all candidates seeking judicial office.[97] A number of the candidates refused to respond, allegedly because they were concerned about violating North Dakota's commit clause restriction.[98] The district court held the commit clause to be unconstitutional because it violated candidates' right to speech.[99]

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[89] *See* Richard Briffault, *New Issues in the Law of Democracy: Judicial campaign Codes after Republican Party of Minnesota v. White,* 153 U. PA. L. REV. 181, 183 (2004) (citing Weaver v. Bonner, 309 F.3d 1312 (11th Cir. 2002); Spargo v. N.Y. State Comm'n on Judical Conduct, 224 F. Supp. 2d 72 (N.D.N.Y. 2003), *vacated on other grounds*, 351 F.3d 65 (2d Cir. 2003)).

[90] *Id.* at 182.

[91] *Id*. at 182–83.

[92] CTR. FOR JUDICIAL ETHICS OF THE NAT'L CTR. FOR STATE COURTS, CASE LAW FOLLOWING REPUBLICAN PARTY OF MINNESOTA V. WHITE, 536 U.S. 765 (2002) 1 (2015).

[93] Paul Brace & Brent D. Boyea, *Judicial Selection Methods and Capital Punishment in the American States, in* RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS 195 (Matthew J. Streb ed., 2007).

[94] Briffault, *supra* note 89, at 214–15.

[95] *See* Schotland, *supra* note 1, at 1078.

[96] CTR. FOR JUDICIAL ETHICS OF THE NAT'L CTR. FOR STATE COURTS, *supra* note 92, at 1.

[97] N.D. Family Alliance, Inc. v. Bader, 361 F. Supp. 2d 1021, 1025–26 (D. N.D. 2005).

[98] *Id.* at 1028–29.

[99] *Id.* at 1044–45.

The law violated speech because it put a "chilling effect" on candidates' political speech and furthermore the commit clause used by North Dakota was essentially the same as the announce clause used in *White*. [100] However, a number of federal courts have held that the commit clause is constitutional despite the holding in *White*.[101]

In *Bauer v. Shephard*, Indiana Right to Life, Inc. (a pro-life special interest group) sent questionnaires to judicial candidates containing questions asking whether the candidates supported abortion.[102] Most of the candidates declined to respond to the questionnaire, and a few said they could not respond because they did not want to violate Indiana's commit clause based electioneering restriction.[103] The 7th Circuit concluded that Indiana's law did not violate the constitution because speech covered by the commit clause is not constitutionally protected anyway.[104] The circuit court concluded that it could not be permissible to make pledges, promises, or commitments that would be inconsistent with the impartial role of judicial office.[105] Additionally, in *Pennsylvania Family Institute, Inc.,* another interest group sent out a similar type of questionnaire.[106] In this case, the district court favored a narrow interpretation of the commit clause that allowed judicial candidates to say anything short of an outright promise or commitment to find a particular way in a case.[107] The court held that this interpretation was narrowly tailored enough to fulfill the state's compelling interest in preserving judicial impartiality and protecting due process.[108] Clearly, until the Supreme Court grants certiorari, it will continue to be unclear whether the commit clause is a constitutional restriction on judicial candidate's speech.[109]

Moreover, while the majority in *White* did hold that a judicial candidate's speech is protected, they also explicitly stated that they

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[100] *Id.*

[101] *See* CTR. FOR JUDICIAL ETHICS OF THE NAT'L CTR. FOR STATE COURTS, *supra* note 92, at 3 (describing multiple cases where the commit clause was deemed constitutional).

[102] Bauer v. Shepherd, 620 F.3d 704, 706–07 (7th Cir. 2010).

[103] *Id.* at 707.

[104] *Id.* at 714.

[105] *Id.* at 716.

[106] Pa. Family Inst., Inc. v. Celluci, 521 F. Supp. 2d 351, 356–57 (E.D. Pa. 2007).

[107] *Id.* at 383–84.

[108] *Id.*

[109] Young, *supra* note 86, at 466.

"neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office."[110] This shows that, even while striking down restrictions on judicial elections, the Supreme Court at some level accepts that judges are not the same as politicians and they should not be selected in the same manner.[111] Additionally, the Court in *White* did not consider the portions of Minnesota law that prohibited judicial candidates from attending and speaking at party events, identifying their party affiliation, or seeking or using endorsements from parties.[112] This means that, at least for now, these restrictions are still valid.[113] In sum, although the decision in *White* took a major bite out of judicial electioneering laws, there are still many ways in which states can constitutionally place limits on judicial candidates' electioneering communications.[114] However, *White* has opened the door for a plethora of challenges to such laws and until the Supreme Court rules on additional issues including the use of the commit clause and the partisanship restrictions it will remain unclear exactly how much judicial candidates' speech can be limited in order to protect due process and the appearance of impartiality.[115] Regardless of whether the other electioneering restrictions are upheld, they will still not be enough to protect judicial impartiality.[116] The majority in *White* made it clear that any state interest prefaced on maintaining impartiality or the appearance of impartially on issues before the Court will not be accepted.[117] The only way to remedy this problem and ensure that real judicial impartiality is protected is to abandon the election of judges altogether.[118] Justice O'Connor explained in her concurrence that "the very practice of electing judges undermines [judicial impartiality]" because elected judges will continue to have a personal interest in every case because they know that each decision they make will have an impact on their political popularity.[119]

110 Republican Party of Minn. v. White, 536 U.S. 765, 783 (2002)

111 *Id.*

112 Caufield, *supra* note 37, at 633.

113 *See id. See generally White,* 536 U.S. at 774–77 (discussing the other issues in the absence of overturning of these restrictions).

114 *See White*, 536 U.S. at 783.

115 *Id.* at 773–77.

116 *Id.* at 776–77.

117 *Id.* at 775.

118 *See id.* at 788–89.

119 *Id.* at 788–89 (alteration from original).

Moreover, the concerns about electioneering do not stop with what the judges themselves have to say.[120] Due to recent developments in campaign finance law, there is an increase in interest groups engaging in "independent expenditures."[121] This is where an interest group pays for media that advocates for or against a candidate for office while not directly coordinating with the candidate's campaign.[122] These independent expenditures have major effects on judicial candidates that in turn effect the decisions they make as judges.[123] One study found that the number of television ads aired during a judicial election affected the likelihood that a judge would rule in favor of a criminal defendant.[124] This is because most ads directed towards judicial candidates have to do with crime, i.e. accusing judges that they are "soft on crime."[125] The study showed that the more ads that were aired during a judicial race the less likely a judge was to find in favor of criminal defendants.[126] Not only did more ads mean that judges were "harder on crime," but the higher number of ads there were the greater effect the ads had.[127] For example, the study found that if 2,000 ads were shown the judge was two percent less likely to find for criminal defendants, however if 10,000 ads were shown, the judge was seven percent less likely to find for criminal defendants.[128] Clearly, all types of electioneering have an effect on judicial impartiality, not just electioneering that comes directly from the judge's own campaign.[129] Additionally, this is not a problem that the ABA or even overturning *White* would solve since these independent expenditures are not at all related to the candidate's campaigns.[130] The only way to eliminate this kind of threat to judicial impartiality is to cease judicial elections which would remove the ability and need for interest groups to engage in

120 *See, e.g.*, *Coordinated Communications and Independent Expenditures Brochure*, FED. ELECTION COMM'N, (last updated Jan. 2015) http://www.fec.gov/pages/brochures/indexp.shtml [hereinafter *Brochure*].

121 *Id.*

122 *Id.*

123 *See* Derek Willis, *'Soft on Crime' TV Ads Affect Judges' Decisions, Not Just Elections*, N.Y. TIMES (Oct. 21, 2014), http://www.nytimes.com/2014/10/22/upshot/soft-on-crime-tv-ads-affect-judges-decisions-not-just-elections.html?_r=0.

124 *Id.*

125 *Id.*

126 *Id.*

127 *Id.*

128 *Id.*

129 *See* Willis, *supra* note 123.

130 *See, e.g.*, *Brochure*, *supra* note 120.

such kinds of electioneering.[131]

B. Campaign Finance Laws and Due Process

Campaign finance laws, as applied to all candidates, have been subject to significant debate.[132] The landmark case of *Buckley v. Valeo* established that an individual spending money to support a candidate for public office was a form of political speech and therefore was entitled to at least some protection under the First Amendment.[133] It has been that established right that all laws restricting campaign donations have had to take into account.[134] However, the most recent cases concerning campaign finance laws have even further expanded this notion that political donations equate to speech.[135] In *Citizens United v. Federal Election Commission*, the Court expanded *Buckley*'s protection of political contributions as a form of speech to corporations and labor unions.[136] Additionally, the Court ruled that corporations and unions not only may (through their political action committees) make contributions to candidates' campaigns, but they may also engage in advertising and promotion for or against a candidate without a direct contribution to a campaign committee.[137] These advertisements are called "independent expenditures" and they have massively increased in elections for all varieties of office since the *Citizens United* decision.[138] Most recently in *McCutcheon v. Federal Election Commission*, the Court ruled that aggregate limits restricting the total amount a donor can give to all candidates or committees was unconstitutional per First Amendment freedom of speech.[139] These recent cases have clearly established that individuals, including corporations and unions, have a protected right to make campaign contributions and

131 *See generally* Willis, *supra* note 123 (explaining threat interest groups pose to judicial elections).

132 *See, e.g.*, *Buckley*, 424 U.S. at 12–14 (1976).

133 *Id.*

134 *See generally id.* (explaining the importance of First Amendment restrictions).

135 *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 318–19 (2010).

136 *Id.* at 351–53.

137 *Id.* at 353.

138 *Id.* at 318–19; Andrew Mayersohn, *Four Years After Citizens United: The Fallout*, OPENSECRETS.ORG (Jan. 21, 2014), http://www.opensecrets.org/news/2014/01/four-years-after-citizens-united-the-fallout/.

139 McCutcheon v. FEC, 134 S. Ct. 1434, 1442 (2014).

independent expenditures as a form of speech.[140] This means that in the context of judicial elections, these individual Free Speech rights have to be balanced with the assurance of Due Process.[141]

As established by *Tumey v. Ohio*, Due Process requires that a person not be subject to the judgment of a judge who "has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case."[142] These two rights are precarious to balance because, although individuals have a right to make contributions or campaign for judicial candidates, once that candidate reaches the bench there can be no bias towards any party that comes before the court.[143] A bias can potentially be created when one of the parties has made substantial contributions or independent expenditures towards a judge's campaign.[144] This has increasingly become a concern in recent years with the rise of campaign donations and expenditures connected with judicial races.[145] Just as increased competition in judicial races has led to more electioneering, this also means that judicial campaigns are now more expensive than ever.[146] In the 1989-90 election cycle, state supreme court candidates raised less than $6 million.[147] However, by the 2007-08 election cycle, judicial candidates raised over $45 million.[148] Additionally, since the decision in *Citizen's United* independent expenditures in judicial races have dramatically increased.[149] This recent explosion in independent expenditures has had a major impact on the substance of judicial

[140] *See Citizens United,* 558 U.S. at 371–72 (describing the way in which political speech is made through monetary contributions).

[141] *See, e.g.*, Jason D. Grimes, *Aligning Judicial Elections With Our Constitutional Values: The Separation of Powers, Judicial Free Speech, and Due Process*, 57 CLEV. ST. L. REV. 863, 892 (2009).

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

[143] *See generally* Grimes, *supra* note 141, at 878, 880 (discussing how any pecuniary interest that could affect a judicial decision violates Due Process and the balance required for fairness).

[144] JAMES SAMPLE, ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS, 2000-2009: DECADE OF CHANGE 63 (Charles Hall ed., 2010), http://www.justiceatstake.org/media/cms/JASNPJEDecadeONLINE_8E7FD3FEB83E3.pdf.

[145] Christina A. Cassidy, *Campaign Cash in State Judicial Elections Grows*, THE ASSOCIATED PRESS (Dec. 28, 2015), http://bigstory.ap.org/article/a8b9c2e0085f459d9f743d8bb375f2de/campaign-cash-state-judicial-elections-grows.

[146] *See* SAMPLE, *supra* note 144, at 5 (noting that the public is aware of the increased funding and change in campaigning practices).

[147] *Id.*

[148] *Id.*

[149] *See* Cassidy, *supra* note 145.

races with forty-four percent of independent expenditure television ads in 2012 being negative.[150] The majority of these negative ads focus on highly controversial issues, namely crime.[151] This not only frames the public debate surrounding judicial elections, but has a statistical impact on the way judges decide cases.[152] One study revealed that "the more [television attack] ads aired during state supreme court judicial elections . . . the less likely [judges were] . . . to vote in favor of criminal defendants."[153] This is at least arguable because judges now have to be concerned that each time they rule in favor of a criminal defendant, they are supplying special interests with fodder to be used against them in their next campaign.[154]

These concerns are reflected in the various campaign finance laws created by states to prevent campaign contributions from having an effect on the impartiality of elected judges.[155] An example of this type of law is a restriction on judicial candidate solicitation of campaign donations.[156] These laws, based off of the ABA Model Code, prohibit judicial candidates from directly asking people and groups for campaign donations.[157] Instead they must rely on supporters to fundraise on their behalf.[158] Over twenty of the states that elect their judges have this type of restriction.[159] These laws exist to protect against *quid pro quo* corruption that states fear could exist if judges can directly ask donors for money to support their campaign.[160] However, there are concerns that this prohibition of direct judicial solicitation is a violation of the Free

150 ALICIA BANNON, ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS, 2011- 12: HOW NEW WAVES OF SPECIAL INTEREST SPENDING RAISED THE STAKES FOR FAIR COURTS 22 (Laurie Kinney and Peter Hardin, eds., 2013), http://www.brennancenter.org/sites/default/files/publications/New%20Politics%20of%20Judicial%20Elections%202012.pdf.

151 *See generally id.* at 22–23 (citing specific instances where state campaigns made the candidate appear to either be a criminal or side with criminals).

152 Shepherd & Kang, *supra* note 41.

153 *Id.*

154 *See id.*

155 *See, e.g.*, Stephen Wermiel, *SCOTUS for Law Students: Financing Judicial Elections*, SCOTUSBLOG, (Dec. 23, 2014, 1:43 PM), http://www.scotusblog.com/2014/12/scotus-for-law-students-financing-judicial-elections/ (noting that by preventing direct solicitation the judge would feel less pressure if the donor were to be in court).

156 *Id.*

157 *See id.*

158 *See generally id.* (explaining if they cannot directly solicit, an alternative would be to raise the money through fundraising through a committee).

159 *Id.*

160 *See, e.g.*, *id.*

Speech rights of the judicial candidates.[161]

This contention between the protection against corruption and the speech rights of candidates is exactly what was at issue in the most recent Supreme Court case, *Williams-Yulee v. Florida Bar*.[162] In this case, a judicial candidate (Lanell Williams-Yulee) signed a letter asking for campaign contributions.[163] Williams-Yulee was subsequently found in violation of Canon 7C(1) of the Florida Code of Judicial Conduct which prohibits candidates for judicial office from "personally solicit[ing] campaign funds[.]"[164]

After an unsuccessful challenge of the decision, Williams-Yulee was publically reprimanded and ordered to pay $1,860 in court costs.[165] Williams-Yulee argued that Canon 7 violates her First Amendment rights because it restricts her speech while not being narrowly tailored enough to serve the state's interest.[166] Respondents, the Florida Bar, said that Canon 7 advances the state's compelling interest of avoiding actual and apparent judicial corruption and argues that there is a long held tradition of upholding laws that work to prevent *quid pro quo* corruption.[167] The Florida Bar further contended that this Canon 7 prevents actual and apparent *quid pro quo* corruption by removing the "direct link between the contributor and the judicial candidate."[168] To support this contention, the Florida Bar relied on *McCutcheon*, which explained how the risk of real and apparent *quid pro quo* corruption is limited when "the chain of attribution" of the donations gets longer because any credit for the donation must be shared through multiple actors.[169] Additionally, the Florida Bar argued that the law is sufficiently narrowly tailored as it does not restrict the candidate or their supporters' ability to engage in free expression and hardly burdens a candidate's ability to raise money, since their committee can still fundraise.[170]

The Supreme Court in a 5-4 decision held in favor of the Florida Bar.[171] The majority opinion, authored by Chief Justice Roberts,

161 *See* Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1662 (2015).
162 *Williams-Yulee*, 135 S. Ct. at 1662.
163 *Id.* at 1663.
164 *Id.* at 1663–64 (citing FLA. CODE OF JUDICIAL CONDUCT. Canon 7C(1)).
165 *Id.* at 1664, 1673.
166 *Id.* at 1670.
167 *Id.* at 1672.
168 *Williams-Yulee*, 135 S. Ct at 1667.
169 Brief for Respondent at 11, Williams-Yulee v. Fla. Bar, 135 S.Ct. 1656 (2015) (No. 13-1499) (citing McCutcheon v. FEC, 134 S. Ct. 1434, 1452 (2014)).
170 *See Willliams-Yulee*, 135 S. Ct. at 1664, 1667.
171 *Id.* at 1661, 1673.

agreed with the Florida Bar and the Florida Supreme Court that Canon 7 was narrowly tailored to promote the compelling state interest of "preserving public confidence in the integrity of the judiciary," and that this is "one of the rare cases in which a speech restriction withstands strict scrutiny."[172] This decision again proves that the Supreme Court recognizes that judges serve a fundamentally different function from politicians and their selection should be, at least in some ways, different.[173] Moreover, since this was only a 5-4 decision it is clear that this is the farthest the Supreme Court will go in restricting Free Speech to prevent judicial bias.[174] This means the only way to avoid Free Speech complications and truly insulate the judiciary from the bias created by campaign donations is to move towards a fully appointed judiciary.[175]

The concerns of judicial bias due to campaign donations that drive state laws are not unsubstantiated; data suggests that campaign donations can have a real impact on judicial decisions.[176] This is not only due to the fact that interest groups can fund judicial candidates that they think will be sympathetic to their causes, but there is also a risk that judges may (consciously or not) make decisions based on donors, either to draw their support or to avoid opposition.[177] This effect seems to be most prevalent in states with partisan judicial elections. A study revealed "a statistically significant, positive relationship between the level of campaign contributions from business groups and partisan-elected judges' votes in favor of business litigants in all case types."[178] Additionally, the study showed that the business group's share of the judge's total contributions is also positively related to partisan-elected judges' votes in the same way.[179] Moreover, in both partisan

[172] *Id.* at 1662, 1666.

[173] *Id.* at 1662 ("Judges are not politicians, even when they come to the bench by way of the ballot. And a State's decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for political office.").

[174] *See generally id.* at 1661–62, 1664–66 (discussing how the judiciary intends to preserve its honor and integrity, that Canon 7C(1) restricts Yulee's speech, and the rarity in prevailing in restricting an individual's Free Speech).

[175] *See generally id.* at 1662 (discussing how Florida voters responded to corruption scandals by amending the law to have judges appointed by the Governor).

[176] Kang & Shepherd, *supra* note 5, at 73.

[177] *See generally id.* at 74–75 (discussing how contributions from business groups might give an incentive for judges to rule in favor of business litigants).

[178] *Id.*at 112.

[179] *Id.* at 112–13.

and non-partisan elected judges' last terms before retirement, the favoritism towards business litigants "essentially disappears."[180] The data collected suggested that "direct campaign contributions have the potential to affect hundreds of case outcomes each year."[181] This significant possibility of judicial bias due to campaign contributions is why First Amendment rights of donors must be balanced alongside preserving litigants' Due Process protections.[182]

The risk of judicial bias created by campaign donations is so significant that the Supreme Court was forced to take the issue head-on in *Caperton v. A.T. Massey Coal Co. Inc.*[183] In this case, a contract dispute between two coal mining companies, Don Blankenship (Massey's chairman) spent a significant amount of money in both donations and advertising supporting the campaign of Brett Benjamin, whom was running for the Supreme Court of Appeals of West Virginia.[184] Blankenship made these donations while anticipating an appeal before the Supreme Court of Appeals of West Virginia.[185] After the campaign and Benjamin's successful defeat of the incumbent Justice, Massey's case was in fact appealed to the West Virginia court.[186] Despite Caperton's motion to disqualify Benjamin as a justice to hear the case, Benjamin refused to recuse himself.[187] The Supreme Court of Appeals of West Virginia then ruled three to two to reverse, in favor of Massey.[188]

The Supreme Court held that the Due Process clause was violated here under the theory of *Tumey*, which "incorporated the common-law doctrine that a judge must recuse himself when he has a 'direct, personal, substantial, pecuniary interest in a case.'"[189] The Court reasoned that in the circumstances there was "a serious, objective risk of actual bias that required Justice Benjamin's recusal."[190] The Court articulated a standard that requires recusal when "the probability of actual bias on the part of the judge or

[180] *Id.* at 104.
[181] *Id.* at 99.
[182] *See generally* Kang & Shepherd, *supra* note 5, at 75 (discussing an example of how judicial influence can exist due to campaign contributions).
[183] 556 U.S. 868, 872 (2009).
[184] *Id.* at 872, 873.
[185] *Id.* at 873.
[186] *Id.* at 873, 874.
[187] *Id.* at 874.
[188] *Id.* at 875.
[189] *Caperton*, 556 U.S. at 876, 884 (citing Tumey v. Ohio, 273 U.S. 510, 523 (1927)).
[190] *Id.* at 886.

decision maker is too high to be constitutionally tolerable."[191] This determination of whether "a serious risk of actual bias" exists is "based on objective and reasonable perceptions [of] when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent."[192]

This determination centers on an analysis of the "contribution's relative size in comparison to the total amount of money contributed to the campaign, . . . and the apparent effect such contribution had on the outcome of the election."[193] Then the Court is to make "an objective inquiry into whether the contributor's influence on the election under all the circumstances 'would offer[s] a possible temptation to the average . . . judge.'"[194]

The Court "conclude[d] that Blankenship's campaign efforts had a significant and disproportionate influence in placing Justice Benjamin on the case."[195] Blankenship contributed approximately $3 million to elect Justice Benjamin.[196] He not only contributed the statutory maximum directly to Justice Benjamin's campaign, but also made substantial donations to a political organization that supported Justice Benjamin and personally financed independent expenditures in the form of direct mailings, solicitation letters, and television and newspaper advertisements.[197] In fact, Blankenship's contributions and expenses exceeded the total amount spent by all the rest of Justice Benjamin's supporters and the total amount spent by the campaign committee.[198] Due to the "significant and disproportionate" impact that Blankenship's contributions and expenditures had in electing Justice Benjamin, and the fact that it was reasonably foreseeable that the pending case would come before Benjamin, if elected, the circumstances created a possible temptation to the average judge.[199] Accordingly, the Court determined that it was a violation of Due Process for Justice Benjamin to have heard the case.[200] Therefore, per the rule in

191 *Id.* at 872 (citing to Withrow v. Larkin, 421 U.S. 35, 47, 95 S. Ct. (1975)).
192 *Id.* at 884.
193 *Id.*
194 *Id.* at 885 (citing *Tumey*, 273 U.S. at 532).
195 *Caperton*, 556 U.S. at 884.
196 *Id.*
197 *Id.* at 873.
198 *Id.* at 884.
199 *Id.* at 884, 886.
200 *Id.* at 885, 886.

Caperton, Due Process is violated when a party with a stake in the outcome of a case that is pending or imminent, makes campaign contributions that have a significant and disproportionate impact on the outcome of the election, so as to create a risk of bias in an average judge.[201] Although the decision in *Caperton* recognizes that there is a risk of judicial bias being created by campaign contributions, this ruling only remedies the most egregious examples of this problem.[202] In this case the party to the case essentially had to be the judge's largest donor to a significant degree for the court to be willing to intervene.[203] That means that, arguably, contributions that are less disproportionately overwhelming but could still pose a threat to impartiality will not be addressed under the *Caperton* rule.[204]

In addition to the real concerns of campaign donations effecting judicial decisions, there are also serious concerns that allowing judges to accept campaign donations creates an appearance of bias and impropriety.[205] When the public feels that judges are unable, because of campaign donations, to adjudicate fairly there is a risk of a loss of public confidence in the judicial system as a whole.[206] In a survey that polled registered voters, ninety-three percent said that in a case where one party has "spent a significant amount to support the judge's election campaign," that case should be heard by a more impartial judge instead.[207] Additionally, "Seventy-six percent (76%) of voters . . . [reported] believ[ing] that campaign contributions made to judges have at least some influence on their decisions."[208] Sixty-seven percent of voters also reported that they felt that "individuals or groups who [gave] money to judicial candidates often get favorable treatment."[209] These results

[201] *Caperton*, 556 U.S. at 886.

[202] *Id.* at 884, 885.

[203] *See id.* at 884.

[204] *See id.*

[205] *See id.* at 884, 888.

[206] COMM'N TO PROMOTE PUB. CONFIDENCE IN JUDICIAL ELECTIONS, FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF N.Y. 11 (2006), http://www.nycourts.gov/reports/JudicialElectionsReport.pdf.

[207] NATIONAL REGISTERED VOTERS FREQUENCY QUESTIONNAIRE REF 2011-184, 20/20 INSIGHT LLC 3 (2011), http://www.justiceatstake.org/media/cms/NPJE2011poll_7FE4917006019.pdf.

[208] Letter from Stan Greenberg, Chairman & CEO, Greenberg Quinlan Rosner Research, Linda A. DiVall, President, American Viewpoint, to Geri Palast, Exec. Director, Justice at Stake Campaign (Feb. 14, 2002), at 1, http://www.justiceatstake.org/media/cms/PollingsummaryFINAL_9EDA3EB3BEA78.pdf.

[209] *Id.*

illustrate that judicial campaign donations can undermine public belief in the judiciary.[210]

Moreover, it is not only the public at large that has concerns about the influence donors and their money may have on the outcome of cases.[211] Polling data also reveals that judges themselves share these concerns.[212] In a poll of state judges, twenty-six percent stated that they "believe that campaign contributions . . . have at least some influence on their decisions."[213] Additionally, eighty-four percent of state judges reported that they were concerned with special interest groups attempting to influence the outcome of judicial elections through advertising.[214] Forty-six percent of judges also admit that they feel they are under pressure to raise money in order to fund their campaigns.[215] In fact, concern about judicial bias connected with campaign donations prompted twenty-seven former state Supreme Court Justices and Chief Justices to submit an amicus brief in *Caperton* stating that they "uniformly believe that the participation [of the justice receiving substantial campaign contributions from a party in the case] created an appearance of impropriety" and that all the judges participating in the brief "would have recused if they had benefited from the level and proportion of independent expenditures by the CEO of a party to a case pending before the court."[216]

III. SOLUTION

Despite their inherent risks, the majority of Americans are decidedly in favor of judicial elections.[217] In a 2002 survey, eighty percent of people asked said that they prefer elected judges and seventy percent said that they believe "[p]ublic criticism of judges

210 *See id.*
211 *Id.*
212 *Id.*
213 *Id.*
214 Letter from Stan Greenberg, Chairman & CEO, Greenberg Quinlan Rosner Research, *supra* note 208, at 2.
215 *Id.*
216 Brief Amici Curiae of 27 Former Chief Justices and Justices in Support of Petitioners at 2, Caperton v. A.T. Massey Coal Co., Inc. 556 U.S. 868 (2009) (No. 08-22).
217 David B. Rottman, *The* White *Decision in the Court of Public Opinion: Views of Judges and the General Public*, 39 CT. REV. 16, 21 (2002), http://aja.ncsc.dni.us/courtrv/cr39-1/CR39-1Rottman.pdf.

makes judges more accountable and leads to better decisions."[218] However, although fifty-nine percent of people in the survey reported that they "[a]lmost always" vote in judicial elections, only thirteen percent stated having a "great deal of information" about their judicial candidates.[219] Additionally, eighty-one percent of the people surveyed said they agreed that courts "should be free of political and public pressure."[220] Clearly, although Americans are sure that they want judicial elections, they admit that they are not fully informed when electing judges and are simultaneously wary of pressures that elections put on courts.[221] Additionally, other studies show that Americans are significantly concerned with the impact that campaign donations have on judicial impartiality.[222] Therefore, relying on conflicting public opinion, especially when the public does not understand the complexities of the judiciary, is not the best way to create a solution.[223]

The major problem of shaping this type of policy is that constructing a system of judicial selection implicates major constitutional issues.[224] Continuing to hold judicial elections clearly requires a balance of both Due Process (through ensuring that judges are unbiased either through pre-stated political beliefs or through receiving campaign donations from potential future parties) and concerns of Freedom of Speech (both the electioneering speech of candidates and donors' speech through contributions).[225] Courts have attempted to strike this balance and create rules that both protect judicial candidates' and their supporters' Free Speech while still ensuring just results and an unbiased judiciary.[226] Firstly, *White* established that restrictions on general announcements of broader policy views by judicial candidates cannot be constitutionally valid.[227] However, this case still left the door open for restrictions on partisan activity and perhaps some restrictions on commitments made by judicial

[218] *Id.*
[219] *Id.* at 20.
[220] *Id.* at 19.
[221] *Id.* at 20, 21.
[222] Letter from Stan Greenberg, Chairman & CEO, Greenberg Quinlan Rosner Research, *supra* note 208, at 1.
[223] *See* Rottman, *supra* note 217, at 24.
[224] *See supra* notes 56–58 and accompanying text.
[225] *See id.*
[226] *See* Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1675 (2015) (citing Republican Party of Minn. v. White, 536 U.S. 765, 821 (2002)).
[227] *See White,* 536 U.S. at 768, 788.

candidates.[228] Secondly, *Caperton* reinforced the rule that Due Process requires that judges cannot constitutionally preside over a case in which one of the parties made substantial donations to their campaign, creating a serious risk of actual bias.[229] This preserved the ability of supporters to make donations while somewhat preventing judges from presiding over cases in which they may have a bias.[230] However, the *Caperton* rule still allows for parties who have made contributions to a judge's campaign to come before the court and left much discretion to lower courts to determine what constitutes a significant donation that would cause an average judge the possibility of prejudice.[231]

For example, in *E.I. DuPont de Nemours and Co. v. Aquamar S.A.*, a Florida appellate court held that a trial judge who had received donations from the attorney representing a party in a case before him could still hear the case.[232] Additionally, although restrictions on personal solicitation by judicial candidates that protect against *quid pro quo* corruption were recently upheld in *Williams-Yulee* there are plenty of ways for judges to be influenced by donors regardless of whether the judge herself makes the direct fundraising ask.[233]

All of these attempts by the courts to make the judicial election system work have fallen short.[234] This is not because of any major flaw in their decisions; rather it is because there is something intrinsically wrong with electing a judiciary.[235] The only way to avoid Free Speech and Due Process conflicts and truly ensure that judges are no longer beholden to donors or the constant whims of

[228] *See generally id.* at 792 (O'Connor, J., concurring)(discussing how the use of a partisan popular election can still allow for bias and thus a narrowly tailored rule to prevent a biased ruling).

[229] *See* Caperton v. A.T. Massey Coal Co. Inc., 556 U.S. 868, 872, 873, 884 (2009).

[230] *See id.*

[231] *Id.*

[232] E.I. Dupont De Nemours & Co. v. Aquamar S.A., 24 So. 3d 585, 585 (Fla. Dist. Ct. App. 2009).

[233] Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1662 (2015); *see* AM. B. ASS'N COAL. FOR JUSTICE, ET. AL, ROAD MAPS: JUDICIAL SELECTION: THE PROCESS OF CHOOSING JUDGES 8 (2008), https://www.americanbar.org/content/dam/aba/migrated/JusticeCenter/Justice/PublicDocuments/judicial_selection_roadmap.authcheckdam.pdf [hereinafter THE PROCESS OF CHOOSING JUDGES].

[234] THE PROCESS OF CHOOSING JUDGES, *supra* note 233, at 8–9.

[235] *See generally id.* at 8–9 (problems include: influence, high cost of campaigns, confluence of money, special interests, and encouraging voters to vote based on politics).

public opinion is to move to an entirely merit-based system of judicial selection.[236] Under this system nominees would be selected by a qualified committee and then appointed by the state's executive.[237]

Therefore, those who become judges will never have made any campaign promises and never have taken any money from individuals or special interest groups.[238] This idea has strong support from the ABA, which has contended that states should eliminate judicial elections altogether and replace them with merit plans.[239]

A notable merit selection plan is the Missouri Plan.[240] This is the system that the State of Missouri uses to select its judges for the Supreme Court of Missouri and the Missouri Court of Appeals.[241] Under this plan, judicial candidates are selected by a judicial nominating commission based upon their "qualities for becoming a judge[.]"[242]

The commissions consist of both attorneys and non-attorneys; the attorneys are selected by the bar association and the non-attorneys are appointed by the governor.[243] After the nominating commission selects a list of qualified candidates, the governor then makes the final determination.[244] The Missouri Plan includes retention elections for judges at the end of each term; if the public does not vote to retain a judge then the selection process starts over.[245] Approximately thirty states already have plans based at least somewhat on the Missouri Plan.[246] By using a nominating commission and gubernatorial appointment instead of a partisan or non-partisan election, this plan eliminates a great deal of the problems associated with judicial elections.[247]

However, even retention elections can attract special interest

236 *Id.* at 7–8, 9.

237 *Id.* at 6.

238 *See, e.g.*, *Merit Selection: The Best Way to Choose the Best Judges*, AM. JUDICATURE SOC'Y (last visited Feb. 14, 2016), http://www.judicialselection.us/uploads/documents/ms_descrip_1185462202120.pdf.

239 THE PROCESS OF CHOOSING JUDGES, supra note 233, at 7.

240 *Id.* at 6.

241 *See generally id.* at 5 (discussing how Missouri's merit system elects judges).

242 *See* THE MISSOURI BAR, *supra* note 25.

243 THE PROCESS OF CHOOSING JUDGES, *supra* note 234, at 10.

244 *Id.* at 4.

245 *Id.*

246 *Id.* at 5.

247 *See id.* at 6, 7–8.

groups which can have a corrupting influence on the process of selecting and retaining judges.[248] Therefore, this plan could be further improved by eliminating the retention elections and providing judges with either a life tenure or limiting them to a single term of set years.[249]

The only alternatives to instituting a merit plan to replace judicial elections are either impractical or unworkable.[250] The first solution is merely to keep our current system in which states hold judicial elections with various degrees of limitations on judicial candidates.[251] These limitations are subsequently challenged as violating Free Speech.[252] This system has failed us as it has led to a complicated and confusing system of rules and holdings.[253] *White*, *Caperton*, and *Williams-Yulee* create a complex web of rules and guidelines that lower courts and state lawmakers are forced to navigate.[254] States can place restrictions on judicial candidates' electioneering speech, but not if it is based on the "announce clause,"[255] or (in some circuits) is substantially the same as the "announce clause."[256] Further, judges cannot hear cases in which a party has made substantial contributions to their campaign that would create a serious risk of bias; however it is up to lower courts to engage in complicated balancing to determine in each case whether the contribution is enough to have created the possibility of such bias.[257] This complicated system of rules that has been created by the Supreme Court will inevitably lead to some state laws falling through the cracks; there will be times that despite serious risk of bias judges are permitted to hear cases and

[248] *Id.* at 7–8.

[249] *See* THE PROCESS OF CHOOSING JUDGES, *supra* note 233, at 7–8.

[250] *See* ROSIE ROMANO, ET AL., INTEREST GROUP CAMPAIGNS IN JUDICIAL RETENTION ELECTIONS: A CASE STUDY, WASH. RESEARCH LIBRARY CONSORTIUM 7 (2012), http://aladinrc.wrlc.org/bitstream/handle/1961/10679/Romano,%20Rosie%20-%20Spring%2012.pdf?sequence=1.

[251] *See, e.g.*, *id.* at 39–40.

[252] *See supra* note 57 and accompanying text.

[253] *See, e.g.*, Romano, *supra* note 250, at 32 (using the example of a 2010 gubernatorial race to demonstrate how this system is influenced by political means, and how holdings are effected as such).

[254] Lawrence Baum, *Symposium: The Justices' Premises About Judicial Elections*, SCOTUSBLOG (Apr. 30, 2015, 2:42 PM), http://www.scotusblog.com/2015/04/symposium-the-justices-premises-about-judicial-elections/.

[255] *See supra* notes 64–87 and accompanying text.

[256] *Id.*

[257] *Id.*

situations where individuals' speech will be too greatly limited.[258]

An alternative argument is to further lessen the restraints we currently have on judicial candidates and have completely partisan judicial elections.[259] Proponents of this view argue that allowing voters to ascertain a judicial candidate's party affiliation provides "most voters all the information they seek" and will therefore lead to more informed judicial elections.[260] Additionally, supporters of partisan judicial elections assert that judges have essentially become policymakers and therefore must be accountable to the people.[261] However, as explained by the *Federalist*, judges are supposed to be directly apart from the people.[262] Thus, the judicial system was designed to be apart from the whims and desires of the people, as opposed to the legislature (the actual policymaking body).[263] Removing judicial elections and instead using merit plans would help reinsulate the judiciary in the way that they were designed to be.[264] Finally, proponents of judicial elections claim that judges selected through merit plans act in an "inappropriately activist fashion" and lead to "judicial overreaching."[265] However, it is not necessarily true that elected judges are not activist; data suggests that amongst elected judges campaign donations and securing support from donors and avoiding the opposition of special interests can have an impact on how judges decided cases.[266] Therefore, it would seem that having judicial elections may not prevent having "activist" judges; it would merely make it more likely that people can choose how they want judges to be activist.[267]

One notable proponent of the continued election of judges is Professor James Gibson of Washington University in St. Louis. Professor Gibson recently released a book, *Electing Judges, The Surprising Effects of Campaigning on Judicial Legitimacy*.[268] In this book, Gibson argued that elections actually increase the

258 *Id.*

259 *See* THE PROCESS OF CHOOSING JUDGES, *supra* note 234, at 6.

260 Michael DeBow, et al., *The Case for Partisan Judicial Elections*, THE FEDERALIST SOC'Y (Jan. 1, 2003), http://www.fed-soc.org/publications/detail/the-case-for-partisan-judicial-elections.

261 *Id.*

262 *See supra* note 62 and accompanying text.

263 *See* DeBow, *supra* note 260.

264 *See* THE PROCESS OF CHOOSING JUDGES, *supra* note 233, at 7–8.

265 DeBow, *supra* note 260.

266 *See supra* note 145–55 and accompanying text.

267 *Id.*; DeBow, *supra* note 260.

268 JAMES L. GIBSON, ELECTING JUDGES, THE SURPRISING EFFECTS OF CAMPAIGNING ON JUDICIAL LEGITIMACY 88 (The University of Chicago 2012).

legitimacy of judges and benefit the judicial system.[269] These findings are based upon a study conducted by Gibson on voters in the state of Kentucky (which elects its judges through non-partisan elections).[270] This study showed that many voters were more confident in their elected judges and that many voters supported a more politicized judiciary.[271] For instance, nearly half of those surveyed agreed that judges should be "involved in politics, since ultimately they should represent the majority."[272] However, this study merely reflects the misguided understanding that much of the American public has regarding the function of the judiciary.[273] In fact, Gibson's study revealed that a number of voters viewed judges as filling basically the same function of legislators (i.e. "judges are little more than politicians in robes[ ]") rather than distinguishing between judicial and political offices.[274] When someone believes that judges serve the same function as an elected politician, of course they will want them to be selected in the same manner.[275]

However, judges serve a fundamentally different role than legislators and executives.[276] As explained by Justice Steven's dissent in *White,* "it is the business of legislators and executives to be popular.[277] But in litigation, issues of law or fact should not be determined by popular vote; it is the business of judges to be indifferent to unpopularity."[278] Moreover, Gibson's study showed that many voters premised their ideas about judicial selection based on the theory that in many situations mechanical decision making is impossible because there will be times when a clear, legal, technical answer does not exist.[279] Therefore, the judges will end up making a value judgment and that value judgment should be made in accordance with the values of the majority.[280] However, that type of belief is antithetical to the entire premise of our

269 *Id.* at 88.
270 *Id.* at 93.
271 *See id.* at 93, 186.
272 *Id.*
273 *Id.* at 95.
274 GIBSON, *supra* note 268, at 102.
275 *See id.* at 103.
276 Republican Party of Minn. v. White, 536 U.S. 765, 798 (2002) (Stevens, J., dissenting).
277 *Id.*
278 *Id.*
279 *See* GIBSON, *supra* note 268, at 12.
280 *Contra White*, 536 U.S. at 798 (Stevens, J., dissenting).

judiciary.[281] While it may be true that judges are often faced with difficult questions with unclear answers, that certainly does not mean that those answers are to be resolved according to public opinion.[282]

Returning again to the *Federalist*, it is clear that this is the exact opposite of what the judiciary was intended to do.[283] The judiciary was set up "to guard the Constitution and the rights of individuals" from the will of the majority.[284] The idea that judges will sometimes have to make value judgments so they might as well make value judgments that the voters want them to is not a real solution to the issue of judicial impartiality.[285] This would only make judges more biased towards whatever the majority of people want at the time.[286] The proposal is similar to attempting to put out a fire with kerosene: making judges closer to the will of the people will only enlarge the problem.[287] We currently have a broken system of judicial selection that does not protect the interests of Due Process, the answer is to find a solution that actually promotes impartiality, not one that gives up on impartiality altogether.[288] Judges were never intended to be beholden to the will of the people and the only way to truly ensure that they are not is to remove elections from the equation and move towards a merit selection plan.[289]

Moving to a system based completely on merit selection is the best way to protect Due Process by ensuring that the judiciary remains independent while avoiding burdening Free Speech.[290] This independence is essential to maintaining a legitimate judicial system.[291] As explained by retired Supreme Court Justice, Sandra Day O'Connor, a major proponent of removing judicial elections, "[j]udges must not engage in partisan politics, which threatens independent decision-making and erodes public confidence in the

[281] *See, e.g.*, THE FEDERALIST NO. 78, *supra* note 60, at 449 (Alexander Hamilton) (discussing that the premise of our judiciary is the manner of constituting and unfolding the defects of the existing Confederation).

[282] *See id.* at 452.

[283] *See id.* at 453.

[284] *Id.*

[285] *See White*, 536 U.S. at 798 (Stevens, J., dissenting).

[286] *See id.* at 800.

[287] *See id.*

[288] *See supra* note 234 and accompanying text.

[289] *See, e.g.*, THE PROCESS OF CHOOSING JUDGES, *supra* note 233, at 9.

[290] *See generally* Corriher, *supra* note 63.

[291] *Id.*

judicial system."[292] As there is nothing to show that judicial elections will become less partisan and contentious the best way to safeguard Due Process is to eliminate judicial elections altogether.[293] As Justice O'Connor explained in her concurring opinion in *White*, when judges are elected they "are likely to feel that they have at least some personal stake in the outcome of every publicized case."[294] This is because, as long as they must be reelected a judge "cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects."[295] This reaction to the whim of popular opinion is exactly what Hamilton warned against in *Federalist 78*.[296] Moreover, without funds to rise for a campaign, judges will not have to feel "indebted to certain parties or interest groups."[297] Although it may not be what the American public has in mind, eliminating judicial elections and replacing them with merit plans is the only way to truly protect judicial impartiality.[298]

A merit plan with, either lifetime tenure, or set term limits, is the best way to properly insulate judges from the influences of not only contributors and interest groups, but also from the whims of the majority voters at large.[299] There will never be a sufficient way to create judicial elections that protect against these intrusions.[300] Even if *White* was overturned and all future cases came out in favor of protecting judicial impartiality there is always the chance that something will fall through the cracks.[301] Judges cannot be truly independent when they rely on the public to elect them.[302] Therefore, in the interest of protecting Due Process the only solution is to replace the system of electing judges with one of merit selection and appointment.[303]

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[292] SANDRA DAY O'CONNOR & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., THE O'CONNOR JUDICIAL SELECTION PLAN 3 (2014), http://iaals.du.edu/sites/default/files/documents/publications/oconnor_plan.pdf.

[293] *See* Republican Party of Minn. v. White, 536 U.S. 765, 788–89 (2002).

[294] *Id.*

[295] *Id.*

[296] THE FEDERALIST NO. 78, *supra* note 60, at 454 (Alexander Hamilton).

[297] *White,* 536 U.S. at 790.

[298] *See supra* notes 217–18 and accompanying text.

[299] *See generally* Corriher, *supra* note 63 (discussing how the merit system focuses on a judge's qualifications rather than a political influence).

[300] THE PROCESS OF CHOOSING JUDGES, *supra* note 233, at 9.

[301] *See id.*

[302] *See* Corriher, *supra* note 63.

[303] *See generally id.* (discussing how many states have moved toward a merit-system to curb the political influence).