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

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## POLITICAL JUDGES AND POPULAR JUSTICE: A CONSERVATIVE VICTORY OR A CONSERVATIVE DILEMMA?

GEORGE D. BROWN\*

### ABSTRACT

*Most of the judges in America are elected. Yet the institution of the elected judiciary is in trouble, perhaps in crisis. The pressures of campaigning, particularly raising money, have produced an intensity of electioneering that many observers see as damaging to the institution itself. In an extraordinary development, four justices of the Supreme Court recently expressed concern over possible loss of trust in state judicial systems. Yet mechanisms that states have put in place to strike a balance between the accountability values of an elected judiciary and rule of law values of unbiased adjudication are increasingly invalidated by the federal courts. This Article presents*

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*an argument against this 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. I review the judicial "parity" debate, and conclude that conservatives have a tremendous stake in the health and viability of state courts—and in perceptions of the quality of those courts. Broader issues of federalism are at stake as well—particularly the "laboratory" value of state experimentation in seeking the optimal balance between accountability and rule of law values. With this policy perspective in place, the Article then examines the Supreme Court decision in Republican Party of Minnesota v. White, the major victory for the pro-politicization position. I argue that White rests on flawed premises and should be narrowly construed.*

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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. This Article seeks to establish, as a matter of policy, that conservative principles argue for a presumption against politicization. With this policy perspective in place, this Article then examines 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. This Article argues 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. These mechanisms—based on the American Bar Association’s Model Code of Judicial Conduct (Canons)<sup>5</sup>—have increasingly been invalidated

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1. 536 U.S. 765 (2002).

2. See Richard Briffault, *Judicial Campaign Codes After Republican Party of Minnesota v. White*, 153 U. PA. L. REV. 181, 181 (2004) (noting that, “[b]y one count, 87% of the state and local judges in the United States have to face the voters at some point” (footnote omitted)).

3. See, e.g., JAMES SAMPLE, LAUREN JONES & RACHEL WEISS, JUSTICE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS 2006, at vi (2007), available at <http://www.justiceatstake.org/files/NewPoliticsofJudicialElections2006.pdf> [hereinafter JAS REPORT 2006] (this report was prepared by the Justice at Stake Campaign and two of its partners, the Brennan Center for Justice and the National Institute on Money in State Politics). See generally Roy A. 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. & POLY REV. 301, 355-56 (2003).

4. See JAS REPORT 2006, *supra* note 3, at 29-31; Wendy R. Weiser, *Regulating Judges’ Political Activity After White*, 68 ALB. L. REV. 651, 651-52 (2005).

5. MODEL CODE OF JUDICIAL CONDUCT Canon 4 (2007), available at [http://www.abanet.org/judicialethics/ABA\\_MCJC\\_approved.pdf](http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf) [hereinafter MCJC 2007].

by the courts, however.<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 the Minnesota Code of Judicial Conduct'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

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6. See, e.g., *White*, 536 U.S. at 768; *Beaulieu v. City of Alabaster*, 454 F.3d 1219, 1232-34 (11th Cir. 2007); *Republican Party of Minn. v. White*, 416 F.3d 738, 748-49, 766 (8th Cir. 2005); *Weaver v. Bonner*, 309 F.3d 1312, 1320-25 (11th Cir. 2002); *Ind. Right to Life v. Shepard*, 463 F. Supp. 2d 879, 881 (N.D. Ind. 2006); *N.D. Family Alliance v. Bader*, 361 F. Supp. 2d 1021, 1024-25, 1044-45 (D.N.D. 2005); *Griffen v. Ark. Judicial Discipline & Disability Comm'n*, 130 S.W.3d 524, 535-38 (Ark. 2003).

7. See, e.g., *Brown v. Hartlage*, 456 U.S. 45, 52-54 (1982).

8. See, e.g., *In re Chmura*, 608 N.W.2d 31, 42-45 (Mich. 2000).

9. Weiser, *supra* note 4, at 651 ("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.").

10. *White*, 536 U.S. at 768 (citing MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2000)).

11. *Id.* at 766. Mr. Bopp successfully represented the petitioners in *White*. Other plaintiffs have included right-to-life groups, groups concerned with promoting family values, and various Republican organizations.

12. See *McConnell v. FEC*, 540 U.S. 93, 247-48 (2003) (Scalia, J., concurring in part, dissenting in part); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 410-12 (2000) (Thomas, J., dissenting). It should be noted that Justice Scalia is the author of the *White* opinion, which

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, “[t]he 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.

This Article presents an alternative conservative position.<sup>15</sup> The 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—particularly the view that state courts are equally as capable as the “independent” federal judiciary of providing fair trials and protecting individual rights.<sup>16</sup> 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, “[t]hrough the structure of its government,

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was joined by Justice Thomas.

13. *White*, 536 U.S. at 788 (quoting *Renne v. Gerry*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)).

14. *Id.* at 795 (Kennedy, J., concurring).

15. My definition of conservative is somewhat general, of the “big-tent” variety. Within the legal context, I refer to those who generally agree with judges 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, Jr., *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 the Speech of Judicial Candidates Are Unconstitutional*, 35 IND. L. REV. 735, 735 (2002).

16. 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, 250-52 (1983).

and the character of those who exercise government authority, a state defines itself as 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 opinions 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 the 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 important roles in federalism debates, particularly in the recurring question of 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,

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17. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

18. See *White*, 536 U.S. at 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 (O'Connor, J., concurring).

19. For example, the majority accused Justice Ginsburg of "undermining" judicial elections. *Id.* at 782 (majority opinion).

20. See generally Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994).

21. See *White*, 536 U.S. at 784 (rejecting "complete separation of the judiciary from the enterprise of 'representative government'").



relying on the troubling distinction between political and nonpolitical elections.<sup>22</sup>

The questions raised by the politicization debate are not easy ones. Indeed, the debate would benefit if participants recognized just how hard these questions are. They include the following: (1) 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?; (2) Should *White* be broadly read, to the point of invalidating all Canon-based regulation of judicial elections?; (3) 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?; (4) 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?; (5) 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?; (6) 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?; and (7) Does the practice of accepting 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>23</sup> The Article's focus is not on whether a particular regulation is valid, but rather on whether *any* regulation is valid. The main target audience is legal conservatives, particularly those who view post-*White* developments as a long overdue removal of impediments to democ-

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22. *Id.* at 797 (Stevens, J., dissenting).

23. 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). Professor Smith's essay "challenges the basic assumptions of campaign finance reform advocates, rather than the mechanics or structure of regulation." *Id.* at 1049-50.

racy in the area of judicial selection. This Article argues that 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 rights holders 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>24</sup> In any event, the Article is written at a high level of generality in hopes of moving the debate toward some agreement on the range of interests at stake.

Part 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. Part 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. Part 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*. Part IV examines what the post-*White* world of judicial elections might look like. It considers alternative scenarios, and recommends one that contains some degree of regulation as well as a second generation of judicial campaign measures.

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24. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 399-401 (Breyer, J., concurring). Justice Ginsburg cited this scenario in her *White* dissent. See *White*, 536 U.S. at 813 (Ginsburg, J., dissenting).

## 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>25</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 put it:

[D]isturbing trends documented in recent years include a staggering escalation of the amount of 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 of the tone of campaigns ....<sup>26</sup>

In other words, we are witnessing the "politicization"<sup>27</sup> of judicial campaigns. The goal of 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>28</sup> or declarations that a candidate is pro-life and for "tradi-

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25. For a useful description of judicial selection methods, see Schotland, *supra* note 3, at 1084-88 & app. 1.

26. Weiser, *supra* note 4, at 654 (footnotes omitted).

27. *Id.*

28. See Schotland, *supra* note 3, at 1098. The phenomenon predates *White*, but seems almost certain to intensify.

tional marriage,"<sup>29</sup> or that she is the only candidate who has put "thousands of criminals behind bars."<sup>30</sup>

A second, often remarked, phenomenon is the rise of negative ads, many paid for by independent, or "special interest," groups.<sup>31</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>32</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 appeared 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

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29. Amanda Bronstad, *Cash Is Flowing in Judicial Elections*, NAT'L L.J., Oct. 9, 2006, at 1, 9.

30. Daniel P. Elliott, *The Politicization of the Judiciary* 22 (unpublished manuscript, on file with the author).

31. JAS REPORT 2006, *supra* note 3, at 8; Weiser, *supra* note 4, at 654.

32. DEBORAH GOLDBERG ET AL., JUSTICE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS 2004, at 1, available at <http://www.justiceatstake.org/files/NewPoliticsReport2004.pdf> [hereinafter JAS REPORT 2004].

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>33</sup>

The aspect of politicization that has received the most attention from academics and other observers is the dramatic increase in the amount of money spent on judicial elections.<sup>34</sup> Writing in 1985, Professor Schotland stated, “[W]e 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 and judicial campaigns.”<sup>35</sup> The trend continues. As the *National Law Journal* put it: “Running for state judge has never been pricier.”<sup>36</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>37</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.<sup>38</sup> The most expensive race, however, remains that for a seat in the Illinois Supreme Court in 2004. The two candidates spent \$9.3 million.<sup>39</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>40</sup> Given the group’s reform orientation, one may question its ultimate conclusions about the

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33. Elliott, *supra* note 30, at 21.

34. Bronstad, *supra* note 29, at 1.

35. Roy A. Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?*, 2 J.L. & POL'Y 57, 90 (1985).

36. Bronstad, *supra* note 29, at 1.

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

38. JAS REPORT 2006, *supra* note 3, at 15; see also Patrick Marley, *Ziegler Wins Court Seat*, MILWAUKEE J. SENTINEL, Apr. 4, 2007, available at <http://www.jsonline.com/story/index.aspx?id=586679> (noting that the 2007 Wisconsin Supreme Court race was the most expensive in state history).

39. JAS REPORT 2004, *supra* note 32, at vi.

40. *Id.* at vii; JAS REPORT 2006, *supra* note 3, at vi.

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>41</sup>

The 2006 JAS Report sounded many of the same themes, referring to 2006 as “the most threatening year yet to the fairness of America’s state courts.”<sup>42</sup> JAS noted 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>43</sup>

The Report also expressed concern over vitriolic negative advertisements<sup>44</sup> and the spread of politicization to intermediate and trial courts.<sup>45</sup> The JAS findings were not all negative, however. Indeed, the Report suggested the potential for self-correction within the system: “[I]n 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, the more that judicial campaigns sounded like politics as usual, the warier the voters seemed.”<sup>46</sup>

March 2007 marked a further escalation of the politicization of judicial campaigns. A newly formed group—The Democratic Judicial

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41. JAS REPORT 2004, *supra* note 32, at vii.

42. JAS REPORT 2006, *supra* note 3, at vi.

43. *Id.* at 15.

44. *Id.* at 8-9.

45. *Id.* at 24 (noting that “[a]fter all, the vast majority of civil cases are resolved by trial and intermediate courts, not state Supreme Courts”).

46. *Id.* at 35.

Campaign Committee (DJCC)—entered the fray with a resounding broadside.<sup>47</sup> Declaring itself “the only organization whose primary mission is to elect Democratic judges to state courts,”<sup>48</sup> the DJCC declared:

In the early 1990s, large corporate interests began buying control of many of our state Supreme Courts and many of our lower courts. Orchestrated by a political consultant named Karl Rove, these campaigns began in Texas and Alabama, spending millions of dollars. Today, in states with contested, partisan elections, Republicans control 30 of 37 seats on our Supreme Courts. In states with “non-partisan” elections, Republican interest groups have put an additional 30 justices on the bench.... The DJCC is working together to pull together a national donor network to help elect qualified, intellectually honest judges to our state courts.<sup>49</sup>

The DJCC described the Republican-backed judges in the following terms:

While there certainly are honest Republican justices, they are becoming a rare breed as corporate interests are focused on taking over our judicial system. Millions of dollars from insurance, oil and drug corporations are being spent to install judges who are bought and paid for by big business. As long as 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.<sup>50</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 par with tallies of how many governorships have gone to which parties. The DJCC is quick to point out

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47. See Democratic Judicial Campaign Committee—About, <http://djcc.org/about/index.html> (last visited Mar. 7, 2008) [hereinafter DJCC]. DJCC material is summarized in *Are Democrats About To Up the Ante in the Judicial Election Wars?*, EYES ON JUSTICE, Mar. 22, 2007, available at <http://justiceatstake.org/JASnews/22March07.htm>.

48. DJCC, *supra* note 47.

49. *Id.*

50. *Id.*

that national conservative interest groups are already active players.<sup>51</sup> 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 has asserted:

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 campaigns 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 throughout the nation.<sup>52</sup>

This situation is a marked contrast to the phenomenon, which prevailed until recently, of low-visibility, "low-salience" elections.<sup>53</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,<sup>54</sup> including conduct in elections.<sup>55</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," "pledges," or "promises" about a candidate's views,<sup>56</sup> as well as financial aspects of a

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51. *Id.*

52. James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and "New-Style" Judicial Campaigns*, 102 AM. POL. SCI. REV. 59, 61 (2008).

53. See Briffault, *supra* note 2, at 205.

54. See MODEL CODE OF JUDICIAL CONDUCT, available at <http://www.abanet.org/cpr/mcjc/toc.html>.

55. MCJC 2007, *supra* note 5. The current Canons reflect an effort to adapt to *White*.

56. *Id.* R. 4.1(A)(13).



campaign, including a prohibition on direct solicitation of funds by candidates.<sup>57</sup> Obviously the Canons—or more precisely the state rules adopting them in a binding fashion, generally by state high courts—operated to prevent the politicization described here. That was their goal.<sup>58</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>59</sup> successful challenges were mounted.<sup>60</sup> *White*, discussed in more detail in Part III,<sup>61</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>62</sup> The majority left the question open,<sup>63</sup> but suggested that "judicial and legislative elections"<sup>64</sup> might be governed by the same constitutional rules.<sup>65</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>66</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, as well as Justices Thomas, Kennedy, and O'Connor.<sup>67</sup> The latter two justices also wrote concurring opinions, while joining in the Court's opinion.<sup>68</sup> Justices Stevens and

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57. *Id.* R. 4.1(A)(8).

58. See Weiser, *supra* note 4, at 651 ("[State rules governing campaigns for judicial office] 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.").

59. 536 U.S. 765 (2002).

60. See, e.g., *In re Chmura*, 608 N.W.2d 31 (Mich. 2000).

61. See discussion *infra* Part III.C.

62. *White*, 536 U.S. at 770 (citing MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2002)) (internal quotation omitted).

63. *Id.* at 783 ("[W]e neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office.").

64. *Id.* at 784.

65. See *id.*

66. See Weiser, *supra* note 4, at 693 ("State courts ... have been much more sensitive to separation of powers concerns."). But see *Pa. Family Inst., Inc. v. Celluci*, 521 F. Supp. 2d 351 (E.D. Pa. 2007) (lifting injunction against enforcement of pledges or promises and commit Canons).

67. *White*, 536 U.S. at 766.

68. *Id.*

Ginsburg each wrote a dissent, joined by the other members of the Court's "liberal" wing.<sup>69</sup> The challengers themselves are primarily conservative candidates and groups<sup>70</sup> whose complaints stress a desire to inject conservative views and subjects into judicial elections.<sup>71</sup> As developed in Part 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>72</sup> What has developed then is a debate between two groups that this Article will call the ABA establishment reformers (Reformers) on the one hand, and the First Amendment absolutist challengers (Challengers) on the other.<sup>73</sup> In order to develop the thesis on how conservatives *ought* to view the issue, it is necessary to briefly examine 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. As a result, they want judicial elections—which they regard as a necessary evil, at best—to reflect that image. It appears 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,

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69. *Id.*

70. Amici on the challengers' behalf in the *White* remand included Republican Seniors, Minnesota College Republicans, and Indian Asian American Republicans of Minnesota. See Supplemental Brief of Plaintiffs-Appellants at 2, *Republican Party of Minn. v. White*, 456 F.3d 912 (8th Cir. 2006) (No. 99-4021), 2002 WL 32102161.

71. 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." *White*, 536 U.S. at 768.

72. See discussion *infra* Part III.

73. 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 to be the true reformers.

somewhat distant individual.<sup>74</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 adversarial presentation and precedent; they are not legislators.<sup>75</sup>

The Canons dealing with elections reflect two primary concerns. The first, exemplified by the prohibitions on pledges and promises,<sup>76</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 on direct solicitation,<sup>77</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>78</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: "[T]he strongest effects on institutional legitimacy come from campaign contributions. When groups with direct connections to the decision maker give contributions, legitimacy suffers substantially."<sup>79</sup> Numerous public opinion polls reach similar conclusions. For example, a Marist Institute poll conducted in New York in 2003 concluded that "[e]ighty-three

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74. Judge Carl McGowan referred to "the adversary trial carried on in the sanitized and insulated atmosphere of the courthouse." Carl McGowan, *Regulatory Analysis and Judicial Review*, 42 OHIO ST. L.J. 627, 637 (1981). He stated that "[a]nyone with experience of both knows that a courtroom differs markedly in style and tone from a legislative chamber." *Id.*

75. See generally *Gregory v. Ashcroft*, 501 U.S. 452, 487 & n.1 (1991) (Blackmun, J., dissenting).

76. MCJC 2007, *supra* note 5, at R. 4.1(A)(13).

77. *Id.* R. 4.1(A)(8).

78. 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.").

79. Gibson, *supra* note 52, at 69.

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>80</sup> A 1999 national poll for the National Center for State Courts found that “[s]lightly over 75% of the respondents agreed that having to raise campaign funds influences elected judges.”<sup>81</sup> In a Pennsylvania survey, the figures reached 95 percent.<sup>82</sup> Perhaps most disturbing is a recent *New York Times* analysis of campaign contributions and the Ohio Supreme Court.<sup>83</sup> It suggests empirical support for the intuitive conclusion in the surveys—Ohio justices voted in favor of contributors “70 percent of the time.”<sup>84</sup>

But is there a problem? The same surveys show a relatively high overall degree of confidence in the courts.<sup>85</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>86</sup> Any connection, however, between campaign *pronouncements* and justice or the appearance thereof may be harder to prove. Professor Gibson reports, “*Perhaps the single most important finding of this article is that candidates for judicial office can engage in policy debates with their opponents without undermining the legitimacy of courts and judges.*”<sup>87</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>88</sup>

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80. COMM’N TO PROMOTE PUB. CONFIDENCE IN JUDICIAL ELECTIONS, FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF N.Y. app. C, at iv (2006), <http://www.courts.state.ny.us/reports/JudicialElectionsReport/Appendices.pdf> [hereinafter N.Y. REPORT 2006].

81. NAT’L CTR. FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS 42 (1999), available at [http://ppc.unl.edu/publications/documents/how\\_public\\_views\\_the\\_state\\_courts.pdf](http://ppc.unl.edu/publications/documents/how_public_views_the_state_courts.pdf).

82. See *Republican Party of Minn. v. White*, 416 F.3d 738, 774-75 (8th Cir. 2005) (Gibson, J., dissenting).

83. See Liptak & Roberts, *supra* note 37.

84. *Id.*

85. N.Y. REPORT 2006, *supra* note 80, app. E, at 4; see also NAT’L CTR. FOR STATE COURTS, *supra* note 81, at 2.

86. See generally JAS REPORT 2006, *supra* note 3; JAS REPORT 2004, *supra* note 32.

87. Gibson, *supra* note 52, at 72 (emphasis added).

88. Nat Stern, *The Looming Collapse of Restrictions on Judicial Campaign Speech*, 38 SETON HALL L. REV. 63, 68 (2008) (discussing states’ attempts to deter campaign abuses, faced with “the reality that ‘people want to elect judges’” (quoting Jan Witold Baran, *Judicial*

Perhaps the sky has not fallen, at least not yet.<sup>89</sup> Things can change, however.<sup>90</sup> Indeed, Professor Gibson concludes his study—the focus of which is on the institutional legitimacy of state courts—with the following warning: “Those concerned about threats to the legitimacy of 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>91</sup> Drawing the line between “substantive policy pronouncements” and “politicized campaigning,” however, is not always easy. Dissenting in *White*, Justice Ginsburg raised due process concerns in noting the “grave danger to litigants from judicial campaign promises.”<sup>92</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>93</sup> Whether one calls it “electioneering,” “politicization,” or something else, there is a real risk that the kind of campaigning for judicial seats that one sees today will only go in one direction—towards a similarity of campaigns for *all* offices that will obscure what makes the judiciary different. This Article accepts 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 Eighth Circuit right when it said, in upholding a challenge to two Minnesota Canons, “[t]his case ... is not about what happens after an election”?<sup>94</sup> Perhaps there is an oversimplifi-

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*Candidate Speech After Republican Party of Minnesota v. White*, CT. REV., Spring 2002, at 12, 12)).

89. Dimino, *supra* note 3, at 355-56.

90. See generally Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981).

91. Gibson, *supra* note 52, at 72.

92. *Republican Party of Minn. v. White*, 536 U.S. 765, 817 (2002) (Ginsburg, J., dissenting).

93. *Id.* at 818.

94. *Republican Party of Minn. v. White*, 416 F.3d 738, 752 (8th Cir. 2005). The circuit court made this statement in its decision on remand from the Supreme Court. The decision on remand struck down Canons concerning partisan activity and solicitation of funds. The Supreme Court did not rule on the validity of these Canons.

cation in the Challengers' apparent assumption that "anything goes" is good. This need not mean automatic acceptance of the Reformers' solutions.<sup>95</sup> Rather, this Article's 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. This is 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"<sup>96</sup> and its efforts to find the elusive balance between accountability (election of judges) and the rule of law (fair adjudication). 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

This Article proceeds on the assumption that politicization at least puts in question the viability of the state courts. Public perception of them as 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?

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

96. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

*A. Judicial Federalism—The Parity Debate*<sup>97</sup>

A recurring theme in the doctrines governing federal jurisdiction is that state courts are just as capable of vindicating federal rights as federal courts.<sup>98</sup> This premise of parity underlies decisions concerning such subjects as abstention,<sup>99</sup> habeas corpus,<sup>100</sup> and, to some degree, the Eleventh Amendment.<sup>101</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 and the post-trial stages.<sup>102</sup> These doctrines frequently raise the question of whether state courts can police the officials of their own governments.<sup>103</sup> They sometimes send litigants to state courts despite their desire to be in a federal forum.<sup>104</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>105</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>106</sup>

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97. See generally Bator, *supra* note 90, at 623-29.

98. See ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 37 (5th ed. 2007) (noting that some commentators "vehemently maintain that state courts are equal to federal courts in their ability and willingness to protect constitutional rights") (footnote omitted).

99. See, e.g., *Younger v. Harris*, 401 U.S. 37 (1971).

100. See, e.g., *Stone v. Powell*, 428 U.S. 465 (1976).

101. See *Idaho v. Coeur D'Alene Tribe*, 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, 753-56 (1999) (noting the possibility of federal law-based suits against states in state courts).

102. See, e.g., *Hicks v. Miranda*, 422 U.S. 332, 348-50 (1975).

103. See LARRY W. YACKLE, *FEDERAL COURTS* 21-22 (2d ed. 2003).

104. This is the case, for example, with *Pullman* abstention and much Eleventh Amendment litigation. See *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 501 (1941) (discussing the doctrine of abstention).

105. *Younger v. Harris*, 401 U.S. 37, 44 (1971).

106. See *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 768-69 (2002). See generally George D. Brown, *Counterrevolution?—National Criminal Law After Raich*, 66 OHIO ST. L.J. 947, 976 (2005) (discussing the importance of symbolic dimensions of the new

Indeed, the doctrines reflect a fundamental assumption underlying the judicial system as a whole: 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 may prevent cases presenting significant federal issues from being brought in or removed to a federal court.<sup>107</sup> 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

[t]he 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>108</sup>

There is, of course, the competing vision, particularly with respect to the enforcement of constitutional rights. As Professors Solimine and Walker note, “[s]keptics of parity ... argue that historical considerations—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>109</sup> As the quote suggests, the parity doctrines are profoundly conservative in nature.<sup>110</sup> They stand in direct opposition to what Professor Bator referred to as the nationalist theme that federal courts “are to be preferred” in the adjudication of federal rights.<sup>111</sup> It is no surprise that there is an intense nationalist

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federalism).

107. See, e.g., CHEMERINSKY, *supra* note 98, at 265-95 (discussing constitutional and statutory tests for “arising under” determination).

108. Bator, *supra* note 90, at 627.

109. Solimine & Walker, *supra* note 16, at 223.

110. Cf. YACKLE, *supra* note 103, at 23-24.

111. Bator, *supra* note 90, at 607.



critique of decisions like *Younger*.<sup>112</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. They often discuss, 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>113</sup> Their ability to enrich the discourse, however, will be substantially diminished if other participants in it view the state judges as political operatives.

The 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.<sup>114</sup> Perhaps conservatives take this for granted. Yet, decisions like *Younger* and its progeny<sup>115</sup> were often hard fought battles. They represent one of the triumphs of American legal conservatism. Yet, these decisions could be undermined, if not undone, if their major premise—the viability and fairness of state courts—was 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 that order. It is hard to believe that conservatives would take a position that threatens this allocation of authority.

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>116</sup> In individual cases, the decision about federal interference with state adjudication often turns on whether the state system offers a “full

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112. See Solimine & Walker, *supra* note 16, at 218.

113. Bator, *supra* note 90, at 631-34.

114. See, e.g., *Younger v. Harris*, 401 U.S. 37 (1971).

115. See generally CHEMERINSKY, *supra* note 98, at 832-56 (discussing extension of *Younger*).

116. Bator, *supra* note 90, at 629.

and fair opportunity” for the presentation of federal claims.<sup>117</sup> Of far greater importance is the general perception held by federal courts of how a state judicial system operates as a whole.<sup>118</sup> Dissenting in *Dombrowski v. Pfister*,<sup>119</sup> Justice Harlan criticized 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>120</sup> Justice Harlan’s dissent 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>121</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 years 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>122</sup>

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117. See *id.* at 625.

118. See *id.* (noting a potential generalized mistrust of state courts).

119. 380 U.S. 479, 498 (1965) (Harlan, J., dissenting).

120. *Id.* at 499; see also Bator, *supra* note 90, 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.”).

121. 428 U.S. 465 (1976).

122. *Id.* at 493 n.35.

Thus, at the moment, parity prevails. As the quote from *Stone* indicates, however, parity's position 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>123</sup> For him, "[i]f 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>124</sup> Although it arose in the context of federal court interference with state administrative proceedings, *Gibson v. Berryhill*<sup>125</sup> is instructive. In that case there were two different types of optometrists in Alabama, but the board that regulated the profession was composed of only one group.<sup>126</sup> In the face of abstention arguments, the Supreme Court upheld the propriety of a federal court challenge to a pending disciplinary proceeding.<sup>127</sup> Although the case might be viewed as a context-based 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>128</sup>

*Gibson* could be an indication of far broader things to come in the context of state judiciaries. What this Article has referred to here as the politicization phenomenon could lead to generalized mistrust. It is no coincidence that the most influential critique of the parity-based doctrines, written thirty years ago by Professor Neuborne,<sup>129</sup> focuses on the election of state judges as a reason for mistrust.<sup>130</sup> Current developments could be seen as leading to an unfair judiciary with judges who have prejudged cases and favored litigants based on campaign contributions. On a deeper level, mistrust can

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123. Bator, *supra* note 90, at 635.

124. *Id.* at 627.

125. 411 U.S. 564 (1973).

126. *See id.* at 578.

127. *See id.* at 580-81.

128. *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*, 273 U.S. 510 (1927), and *Ward v. Village of Monroeville*, 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*." *Gibson*, 411 U.S. at 579.

129. Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

130. *See id.* at 1127-28.

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>131</sup>

In a remarkable development, four Supreme Court Justices recently voiced concern about the effects of politicization on state courts.<sup>132</sup> They noted polling data that show “fear that people will lose trust in the system,” and concern that “campaign contributions and political pressure will make judges accountable to politicians and special interest groups instead of the law and the Constitution.”<sup>133</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 that 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.

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131. See *Republican Party of Minn. v. White*, 536 U.S. 765, 784 (2002) (noting the power of state judges to “make” common law).

132. *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2687 (2007) (Souter, J., dissenting).

133. *Id.* at 2687 n.2. 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. 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?” 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 “campaign contributions and political pressure will make judges accountable to politicians and special interest groups instead of the law and the Constitution.”

*Id.* (internal citations and quotation marks omitted). These four Justices—Souter, Stevens, Ginsburg, and Breyer—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. Their dissent may have an element of “we told you so.” Former Justice O’Connor has recently voiced similar sentiments on politicized state judiciaries. Sandra Day O’Connor, Op-Ed., *Justice for Sale*, WALL ST. J., Nov. 15, 2007, at A25.

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>134</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>135</sup> Indeed, one candidate “suggested defiance of U.S. Supreme Court precedent”<sup>136</sup> in the criminal law context. Questionnaires in Kentucky and North Carolina “asked judicial candidates to agree or disagree with the following statement: ‘I believe that *Roe v. Wade* was wrongly decided.’”<sup>137</sup> A Kentucky judicial candidate stated his support for “having the Ten Commandments in our schools and courthouses.”<sup>138</sup>

Conservatives have always emphasized the symbolic aspects of federalism, and 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>139</sup> Professor Bator also stressed “[t]he 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.”<sup>140</sup> Beyond substantive rights rests the issue of the basic fairness of state courts, their ability to provide procedural due process. From a conservative perspective, focusing

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134. *White*, 536 U.S. at 784 (“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.”).

135. See *supra* note 33 and accompanying text.

136. JAS REPORT 2006, *supra* note 3, at 4.

137. *Id.* at 30.

138. *Id.* at 36.

139. Solimine & Walker, *supra* note 16, at 253.

140. Bator, *supra* note 90, at 627.

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>141</sup>

“Local laws” surely include those by which a state organizes and regulates its governmental organization. In *Gregory v. Ashcroft*,<sup>142</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>143</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

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141. Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: In Defense of *United States v. Lopez*, 94 MICH. L. REV. 752, 775 (1995).

142. 501 U.S. 452 (1991).

143. See *id.* at 460 (“Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a Sovereign.”).

as “striking” the manner in which “the states vary the selection systems for their different courts.”<sup>144</sup> He identifies fifteen varieties of selection methods.<sup>145</sup> These include different uses of the election technique.<sup>146</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 that make it, for example, more or less political. In a critique of *White*, Wendy Weiser 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>147</sup> She answers affirmatively the question of 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>148</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>149</sup>

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144. Schotland, *supra* note 3, at 1084.

145. *See id.*

146. *See id.* at 1085-86.

147. *See Weiser, supra* note 4, at 655, 664, 668-72, 688-91.

148. *Id.* at 664.

149. *Id.* at 671.

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 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 structure of separated powers.”<sup>150</sup>

## *2. Experimentation: The Laboratory Theory at Work*

What the Article presents 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’s:

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>151</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 of experimentation, 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

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150. *Id.* at 664.

151. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).



differing answers.<sup>152</sup> An important article by Professor William Marshall on campaign finance reform<sup>153</sup> provides helpful insights. Writing at a time of great uncertainty over federal campaign finance reform efforts, Marshall proposed that “[t]he regulation of campaign finance of federal election matters could be devolved to the states.”<sup>154</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>155</sup>

There are striking parallels between campaign finance reform and judicial election reform. Judicial election regulation is a type of campaign reform, and clearly related to campaign finance reform.<sup>156</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>157</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 *Buckley* to percolate into a more coherent doctrine.”<sup>158</sup> This Article’s point is not to argue that federalism values trump the First Amendment, but to establish a presumption that conservatives (presumably staunch federalists)<sup>159</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. Thus, they

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152. See *Republican Party of Minn. v. White*, 536 U.S. 705, 821 (2002) (Ginsburg, J., dissenting); Schotland, *supra* note 35, at 81-86 (discussing the problem of accountability and differing approaches).

153. See William P. Marshall, *The Last Best Chance for Campaign Finance Reform*, 94 NW. U. L. REV. 335 (2000).

154. *Id.* at 376.

155. *Id.* at 380.

156. See Weiser, *supra* note 4, at 695.

157. 424 U.S. 1 (1976); see also Weiser, *supra* note 4, at 696. In the *White* remand, the Eighth Circuit was divided over the relevance of the Supreme Court’s anti-corruption cases. Compare *Republican Party of Minn. v. White*, 416 F.3d 738, 756 (8th Cir. 2005) (en banc), with *id.* at 769 (Gibson, J., dissenting).

158. Marshall, *supra* note 153, at 380; see also *id.* at 385 (“Crafting reforms that navigate between competing interests is not easy.... Finally, the unsettled constitutional law surrounding campaign reform favors experimentation.”).

159. See generally Fallon, *supra* note 15.

should seek to fit those efforts within the First Amendment, rather than contend that it forbids them.

### 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 the 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>160</sup>

This statement, however, is from Justice Stevens's *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>161</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>162</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>163</sup> She continued, "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>164</sup> In other contexts, Justice O'Connor has been a champion of federalism generally, and of the laboratory theory in particular.<sup>165</sup>

A more extensive judicial discussion of federalism concerns is found in the Eighth Circuit's en banc consideration of two further

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160. *Republican Party of Minn. v. White*, 536 U.S. 765, 799-800 (2002) (Stevens, J., dissenting); see also *id.* at 805 (Ginsburg, J., dissenting).

161. *Id.* at 792 (O'Connor, J., concurring).

162. *Id.*

163. *Id.*

164. *Id.*

165. See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting) (noting that California's program of legalized medicinal marijuana "exemplifies the role of States as laboratories").

Minnesota Canons in the remand of *White* from the Supreme Court.<sup>166</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>167</sup> The court acknowledged the importance of state sovereignty and recognized that “[s]tates have wide authority to set up their state and local governments as they wish.”<sup>168</sup> Even if viewed as “concurrent,” however, state sovereignty is subject to the Supremacy Clause.<sup>169</sup> Thus federal rights can be curtailed as part of the structuring process only if federal constitutional doctrine permits it.<sup>170</sup> In the case of political speech, protected by the First Amendment, that doctrine is strict scrutiny.<sup>171</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. Weiser to say that “[u]nfortunately, the *White* decision reads as a straightforward First Amendment election decision instead of a decision addressing the complex interplay between competing constitutional values.”<sup>172</sup> For the Challengers, 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. Before analyzing the case itself, however, this Article will discuss two important sets of arguments that the Challengers would likely regard as sufficient by themselves to rebut the presumption that I have developed above. They would likely 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.

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166. See *Republican Party of Minn. v. White*, 416 F.3d 738 (8th Cir. 2005).

167. *Id.* at 766.

168. *Id.* at 747.

169. See U.S. CONST. art. VI, cl. 2; *White*, 416 F.3d at 747-48.

170. See *White*, 416 F.3d at 747-48.

171. *Id.* at 749.

172. Weiser, *supra* note 4, at 665.

### 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>173</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 normally protected by the First Amendment can make elections somehow “better.”<sup>174</sup> As a general matter, conservatives have stressed the centrality of First Amendment freedoms in the electoral context.<sup>175</sup> They frequently cite *Brown v. Hartlage*,<sup>176</sup> a decision authored by Justice Brennan, for such propositions as “[t]he free exchange of ideas provides special vitality to the process traditionally at the heart of American constitutional democracy—the political campaign.”<sup>177</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>178</sup> Professor

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173. *E.g.*, *McConnell v. FEC*, 540 U.S. 93, 248 (2003) (Scalia, J., concurring in part and dissenting in part). *See generally* Smith, *supra* note 23.

174. *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) (emphasizing the implications of *White* for campaign finance reform generally).

175. *McConnell*, 540 U.S. at 248 (Scalia, J., concurring in part and dissenting in part).

176. 456 U.S. 45 (1982).

177. *Id.* at 53.

178. Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258, 1260 (1994); *see also* Smith, *supra* note 23, 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

Allison Hayward sees a sharp contrast between a Madisonian “preference for leaving political activity free from governmental control,”<sup>179</sup> and Progressive “social engineering ideals”<sup>180</sup> aimed at a “constitutional democracy-enhancing ‘purpose.’”<sup>181</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>182</sup> In the next two subsections, this Article discusses 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>183</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>184</sup> Justice Scalia

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infringements will cure the alleged ills.”).

179. Allison Hayward, *The Fallacy of Campaign Finance Reform*, ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS, Oct. 2006, at 185, available at [http://www.fed-soc.org/doclib/20070321\\_EngageOct06.pdf](http://www.fed-soc.org/doclib/20070321_EngageOct06.pdf) (reviewing JOHN SAMPLES, *THE FALLACY OF CAMPAIGN FINANCE REFORM* (2006)).

180. *Id.*

181. *Id.*

182. The campaign finance cases do not play any significant role in *White*. Justice Ginsburg’s dissent did, however, discuss such concepts as the “compelling state interest [in] preserving the public’s confidence in the integrity and impartiality of its judiciary.” *Republican Party of Minn. v. White*, 536 U.S. 765, 817 (2002) (Ginsburg, J., dissenting). Such an “appearance” analysis is similar to that found in the campaign finance cases. *See also* *Republican Party of Minn. v. White*, 416 F.3d 738, 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).

183. BeVier, *supra* note 178, at 1259.

184. 540 U.S. 93 (2003).

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>185</sup> He then noted that the legislation before the Court (the Bipartisan Campaign Reform Act) would operate to limit criticism of incumbents.<sup>186</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>187</sup>

How should one apply what Professor BeVier calls the “premise of distrust”<sup>188</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 are generally 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, promises, or commitments about how a candidate would

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185. *Id.* at 248 (Scalia, J., concurring in part and dissenting in part).

186. *Id.* at 249.

187. *Id.* He then analyzed particular features of the legislation that would favor incumbents. *See also* Hayward, *supra* note 179, at 186 (discussing the historical evidence of entrenchment).

188. BeVier, *supra* note 178, at 1279.

decide cases,<sup>189</sup> and to limit candidates' fundraising activities,<sup>190</sup> or establish nonpartisan elections.<sup>191</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>192</sup> Most observers, whatever their ideological perspective, agree on this point. Professor Chemerinsky, an opponent of the Canons, states that "[v]oters rarely know enough about judicial candidates to make a knowledgeable choice."<sup>193</sup> Professor Schotland, a supporter, quotes other scholars to the effect that "[t]raditionally, 'political campaigns for judicial posts [were] as exciting as a game of checkers ... [p]layed by mail....' [They were] 'low-key affairs conducted with civility and dignity.'"<sup>194</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>195</sup> He views this state of affairs as burdening challengers.<sup>196</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>197</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>198</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>199</sup> To

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189. MCJC 2007, *supra* note 5, at R. 4.1(A)(13).

190. *Id.* R. 4.1(A)(8).

191. *Id.* R. 4.1(A)(1)-(2); Briffault, *supra* note 2, at 181.

192. *Republican Party of Minn. v. White*, 416 F.3d 738, 758 n.9 (8th Cir. 2005).

193. Chemerinsky, *supra* note 15, at 753.

194. Schotland, *supra* note 3, at 1079 (internal citation omitted).

195. Briffault, *supra* note 2, at 196.

196. *See id.*; *see also* Dimino, *supra* note 3, at 374-75.

197. Rotunda, *supra* note 174, at 89.

198. Stern, *supra* note 88, at 98-100.

199. *See, e.g., In re Kinsey*, 842 So. 2d 77, 80 (Fla. 2003) (finding that a judicial candidate's use of campaign literature stating that she would "help law enforcement by putting criminals

the extent, then, that this Article has posed the question whether the Challengers can rebut the presumption against politicization posited in Part 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>200</sup> and their assumption of a relationship between "economic inequalities" and "political inequalities."<sup>201</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>202</sup>

Certainly, some proponents of campaign finance reform are not shy about voicing such views. According to Jamin Raskin and John Bonifaz: "In politics, 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>203</sup> They elaborate as follows:

The systemic degradation of the 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

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where they belong ... behind bars," was conduct unbecoming of a candidate to a judicial post).

200. BeVier, *supra* note 178, at 1260 (internal citation omitted).

201. *Id.* (internal citation omitted).

202. *Id.* at 1264.

203. Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273, 275 (1993).



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>204</sup>

Although such arguments were dealt a serious setback in *Buckley v. Valeo*,<sup>205</sup> they are still part of the campaign finance reform debate.<sup>206</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 clearly seems to be no. The debate between those described here as the Reformers and the Challengers seems not to be so much about restructuring the democratic process to achieve redistributionist goals in the broader society as it seems to be 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 Part II.

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204. *Id.* at 301.

205. 424 U.S. 1, 48-49 (1976). In *Buckley*, the Court stated:

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.] § 608(e)(1)'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."

*Id.* (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266, 269 (1964) (internal quotation marks omitted)).

206. It seems clear that such equality considerations played a role in the Vermont campaign finance regulation scheme struck down in *Randall v. Sorrell*, 548 U.S. 230 (2006) (invalidating state limits on expenditures and contributions).

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>207</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. In the judicial context, however, 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>208</sup> and to make sure that it remains with "elite[s]."<sup>209</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. Conservatives who were opposed to social engineering in the campaign finance context, however, 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."<sup>210</sup> Some who wear the label are comfortable with the elitism of the framers.<sup>211</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>212</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

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207. Dimino, *supra* note 3, at 313 & n.76 (describing judicial selection systems from an "interest group politics" perspective).

208. *Id.* at 375.

209. *Id.* at 377 (citing W. Bradley Wendel, *The Ideology of Judging and the First Amendment in Judicial Election Campaigns*, 43 S. TEX. L. REV. 73, 105 (2001)).

210. See *supra* note 15 (defining conservatives as those who "generally agree with judges such as Justice Scalia and Justice Thomas" and support federalism).

211. See Dimino, *supra* note 3, at 309-10.

212. Terry Carter, *The Big Bopper*, A.B.A. J., Nov. 2006, at 31, 33. The quote is from the author of the article paraphrasing Bopp's statement, rather than a direct quote from Mr. Bopp.

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*.)<sup>213</sup> The entrenchment objection seems stronger than the social engineering-based objection, which is considerably more problematic. Putting aside the fact that some conservatives favor some aspects of campaign finance reform,<sup>214</sup> 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>215</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:

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213. See *infra* Part III.C.

214. See, e.g., Press Release, The White House, President Signs Campaign Finance Reform Act (Mar. 27, 2002), available at <http://www.whitehouse.gov/news/releases/2002/03/20020327.html>.

215. See Stern, *supra* note 88, at 98-104.

Judicial independence is linked to impartiality since only a judge independent of outside pressures can impartially apply the 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 the 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 the other branches, the capacity of the courts to carry out their duties could be seriously undermined.<sup>216</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>217</sup> Yet the majority opinion in *White* seems careful to affirm the constitutionality of the elected judiciary.<sup>218</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 outcomes.

Certainly, the issue of legitimacy appears frequently in discussions of the institution.<sup>219</sup> According to Professor Gibson:

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216. Briffault, *supra* note 2, at 199 (footnote omitted).

217. At most, under this view politicization exacerbates the separation of powers problem.

218. *Republican Party of Minn. v. White*, 536 U.S. 765, 782-83 (2002) (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) ("I am concerned that ... the very practice of electing judges undermines [an impartial judiciary].").

219. *See, e.g., id.* at 802 (Stevens, J., dissenting) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."); *id.* at 818

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 to be successfully implemented. Because courts are typically thought to be weak institutions—having neither the power of the “purse” (control of the treasury) nor the “sword” (control over agents of state coercion)—their political capital must be grounded 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>220</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*, “[i]f the State chooses to tap the energy and the *legitimizing* power of the

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(Ginsburg, J., dissenting).

220. Gibson, *supra* note 52, at 61 (quoting LAWRENCE M. FRIEDMAN, *AMERICAN LAW: AN INTRODUCTION* 256 (2d ed. 1998) (internal citations omitted)).

democratic process, it must accord the participants in that process ... the First Amendment rights that attach to their roles.”<sup>221</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. Emphasizing the other side of the coin, Professor Gibson asserts:

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 nonpolitical processes of decision making ... and because 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 not like ordinary political institutions. They are different owing primarily to their decision-making processes. Judges are not perceived as self-interested; rather, they are impartial.

The threat of politicized judicial campaigns is that electioneering activity may undermine the belief that courts are essentially nonpolitical institutions. Citizens may learn that courts are quite like other political institutions if that is the message to which people are exposed during elections. Indeed, precisely the most worrisome consequence of the politicized style of judicial elections is that, 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

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221. *White*, 536 U.S. at 788 (emphasis added) (internal citation omitted); see also Dimino, *supra* note 3, at 374 (“If judges are to receive the benefit of legitimacy that comes from having periodic elections, it seems that elections should encourage participation by as many eligible voters as possible.”).

other political institutions similarly and will therefore extend less legitimacy to the judiciary.<sup>222</sup>

Consequently, politicized judicial campaigns may seriously disrupt the normal supply of legitimacy by portraying judges as nothing more than ordinary politicians. The general hypothesis of Professor Gibson's research is thus that politicized campaign activity undermines the perceived impartiality of judicial institutions.

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>223</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>224</sup> Professor Gibson points to "*legitimizing* judicial symbols [that reinforce the process] of distinguishing courts from other political institutions."<sup>225</sup> The wide variety of selection methods—Professor Schotland identifies fifteen<sup>226</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 perceived as viable, then 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:

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222. Gibson, *supra* note 52, at 61 (internal citations omitted).

223. See *White*, 536 U.S. at 787 (citing repeated expressions by the ABA of its preference for merit selection).

224. Cf. Weiser, *supra* note 4, at 672 (emphasizing judicial independence and separation of powers rather than any particular selection mechanism).

225. Gibson, *supra* note 52, at 61 (emphasis added).

226. Schotland, *supra* note 3, at 1084.

[C]omplete 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>227</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>228</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 varied 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,<sup>229</sup> 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>230</sup> On the other hand, it is perhaps significant that Justice Scalia referred to *state* constitutions.<sup>231</sup> They may already be subject to popular control through easy amendment. In any event, one can regard the

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227. *White*, 536 U.S. at 784.

228. See Dimino, *supra* note 3, at 360 (“[O]ne would be hard pressed to find any knowledgeable observer who believes in the ‘oracular’ theory that judges discover (and do not make) law.” (footnote omitted)).

229. See *supra* text accompanying notes 216-17.

230. See *supra* text accompanying note 216.

231. *White*, 536 U.S. at 784.



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>232</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.<sup>233</sup> As noted, that is a key part of their role in the constitutional plan.<sup>234</sup> 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>235</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>236</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 campaigns suggest. Rather, it is the adjudicatory function of state courts that could play a crucial role in judicial federalism developments. Parity relies on confidence that there is a "full and fair" opportunity to raise federal claims in state proceedings.<sup>237</sup> Trial judges hostile to federal rights have enormous power to negate that opportunity.

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232. Like Justice Scalia, Professor Dimino emphasizes the power of state courts over state law. See Dimino, *supra* note 3, at 359.

233. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 83 (2000) (Stevens, J., dissenting) (describing the Washington State Supreme Court's interpretation of the U.S. Constitution).

234. See *supra* text accompanying notes 117, 140.

235. 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.

236. See *supra* Part II.A.

237. Bator, *supra* note 90, at 625.

One example in this context is the role of federal habeas corpus. The Antiterrorism and Effective Death Penalty Act of 1996<sup>238</sup> was an effort to cut back federal habeas corpus review of state convictions.<sup>239</sup> It can be seen as a congressional adoption of judicially developed parity principles.<sup>240</sup> Yet the Act leaves “a host of interpretative questions.”<sup>241</sup> Fact-intensive inquiries are frequent.<sup>242</sup> Difficult issues arise regarding such matters as equitable tolling<sup>243</sup> and “structural error.”<sup>244</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. Such politicization will undermine judicial federalism. 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 a function, in some circumstances, which only they can perform.<sup>245</sup> Courts make common law, but so do legislatures, albeit in very different ways. They can overrule judicial decisions that make common law. Legislatures do not conduct civil trials. They cannot pass a law to overturn the result in a civil trial.

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238. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 18 U.S.C., 28 U.S.C., and 49 U.S.C.).

239. See CHEMERINSKY, *supra* note 98, at 872-73.

240. See Fallon, *supra* note 15, at 465-66.

241. *Id.* at 466.

242. See, e.g., Joseph v. Coyle, 469 F.3d 441, 469 (6th Cir. 2006); Roy v. Lampert, 465 F.3d 964, 975 (9th Cir. 2006); Arthur v. Allen, 452 F.3d 1234, 1253 (11th Cir. 2006); Knowles v. Mirzayance, 175 F. App'x 142, 143 (9th Cir. 2006), *vacated*, 127 S. Ct. 1247 (2007).

243. See, e.g., Dietrich v. Czerniak, 202 F. App'x 288, 289 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 2250 (2007).

244. See *Denial of Right to Counsel at 'Critical Stage' Didn't Give Rise to Presumption of Prejudice*, 75 U.S. L. WK. 1550, 1551 (2007) (“Application of the principles described in 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.”).

245. See *infra* text accompanying notes 338-50.

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. However, neutrality in adjudication is essential, a point reinforced by the notion of separation of powers.<sup>246</sup> Neutrality in the conduct of a trial requires a decision maker who is not subject to pressure from the parties or, a fortiori, from the public at large.<sup>247</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. Parties in high profile cases have claimed that due process required recusal when a donor was before a judge.<sup>248</sup> The Supreme Court has so far declined to review these cases.<sup>249</sup> But not so long ago it refused to review punitive damages awards challenged on due process grounds.<sup>250</sup> Now it does.<sup>251</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 sufficiently problematic that it is doubtful 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 card—*White*—to

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246. See *supra* text accompanying notes 75, 147-50.

247. Cf. Henry J. Friendly, “*Some Kind of Hearing*,” 123 U. PA. L. REV. 1267, 1289 (1975) (emphasizing the importance of a neutral decision maker).

248. See, e.g., *Gilbert v. DaimlerChrysler Corp.*, 669 N.W.2d 265, 265-66 (Mich. 2003).

249. See, e.g., *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801 (Ill. 2005), *cert. denied*, 547 U.S. 1003 (2006).

250. See, e.g., *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276-77 (1989).

251. See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429 (2003).

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*, the Supreme Court, by a margin of five to four, struck down Minnesota's Announce Clause.<sup>252</sup> That clause stated that a "candidate for a judicial office, including an incumbent judge," shall not "announce his or her views on disputed legal or political issues."<sup>253</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>254</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>255</sup> He emphasized the direct bearing on the First Amendment of "speech about the qualifications of candidates for public office,"<sup>256</sup> and applied strict scrutiny.<sup>257</sup> Minnesota had advanced preserving the impartiality of its judiciary, and the appearance thereof, as compelling state interests.<sup>258</sup> Justice Scalia, however, viewed the underlying concept of impartiality as undefined.<sup>259</sup> He then invoked three possible definitions, and applied First Amendment analysis to each.<sup>260</sup>

He viewed the first, and clearest, meaning of impartial as being without bias to a *party* to a proceeding.<sup>261</sup> Justice Scalia appeared to accept this concept of impartiality as a compelling state interest,<sup>262</sup>

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252. *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002).

253. *Id.* at 768 (quoting MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2000)).

254. *Id.* at 771.

255. *Id.* at 772 (quoting *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 229 (7th Cir. 1993)).

256. *Id.* at 774 (citing decision of lower court, *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 861 (8th Cir. 2001)).

257. *Id.* at 774-75 (citing *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989), and *Brown v. Hartlage*, 456 U.S. 45, 54 (1982)).

258. *Id.* at 775.

259. *Id.*

260. *Id.* at 775-79.

261. *Id.* at 775-76.

262. *Id.* at 775. Justice Scalia described lack of bias as the "root meaning" of impartiality.

but viewed the Announce Clause as aimed at *issues* rather than *parties*.<sup>263</sup> Thus it could not be seen as narrowly tailored to further any interest against party bias.<sup>264</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>265</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>266</sup>

The opinion might have stopped there. Justice Scalia, however, 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>267</sup> to emphasize the First Amendment's protection of candidates' discussion of issues in an election.<sup>268</sup> Such discussion is "at the core of [the] electoral process."<sup>269</sup> He disclaimed any implication that "the First Amendment requires campaigns for judicial office to sound the same as those for legislative office,"<sup>270</sup> but stated that Justice Ginsburg's dissent "greatly exaggerates the difference between judicial and legislative elections."<sup>271</sup> American state courts do not exist in "complete separation" from representative government, Justice Scalia stated; they possess great power in making common law and shaping state constitutions.<sup>272</sup>

Justice Scalia finished with a swipe at reformers, such as the ABA, who would prefer an appointive system, but, by default,

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263. *Id.* at 776-77. In a footnote, he conceded Justice Stevens's point that statements concerning issues such as an "unbroken record of affirming convictions for rape" might exhibit a bias against parties. *Id.* at 777 n.7. Such instances, however, would not suffice to meet a requirement of narrow tailoring to serve the interest of preventing party bias. *Id.*

264. *Id.* at 776-77.

265. *Id.* at 777-78.

266. *Id.* at 778-79.

267. 456 U.S. 45 (1982).

268. *White*, 536 U.S. at 781-82 (citing *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214 (1989), *Hartlage*, 456 U.S. 45 (1982), and *Wood v. Georgia*, 370 U.S. 375 (1962)).

269. *Id.* at 781 (quoting *Eu*, 489 U.S. at 222-23).

270. *Id.* at 783.

271. *Id.* at 784.

272. *Id.* ("This complete separation of the judiciary from the enterprise of 'representative government' ... is not a true picture of the American system.").

attempt to structure systems that do not look like true elections with the protections mandated by the First Amendment.<sup>273</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>274</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>275</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>276</sup> and his insistence that the “legitimizing” role of elections requires one set of rules.<sup>277</sup> 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>278</sup> In other words, *White* may signal the end of a wide range of reforms, well beyond the Announce Clause.<sup>279</sup>

Although joining the majority opinion, Justices O'Connor and Kennedy wrote separate concurrences.<sup>280</sup> 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

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273. *Id.* at 787-88.

274. *Id.* at 788 (quoting *Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)) (internal quotation marks omitted).

275. *Id.* at 783.

276. *See id.* at 784.

277. *Id.* at 787-88 (quoting *Renne*, 501 U.S. at 349).

278. *See generally* Stern, *supra* note 88, at 81.

279. *Id.*

280. *White*, 536 U.S. at 788 (O'Connor, J., concurring); *id.* at 792 (Kennedy, J., concurring).

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>281</sup> Minnesota could not, however, attempt to remedy these problems through restricting speech.<sup>282</sup> She noted, "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>283</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>284</sup> He too sounded the theme that the state had chosen to elect its judges.<sup>285</sup> He expressed, however, 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. The law in question here contradicts the principle that unabridged speech is the foundation of political freedom.<sup>286</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, or perhaps a belief that unfettered elections would further conservative outcomes.<sup>287</sup>

Justices Stevens and Ginsburg, joined by Justices Breyer and Souter, each authored dissenting opinions.<sup>288</sup> Federalism plays only a limited role in their analyses. Justices Stevens and Ginsburg mainly took issue with the majority's First Amendment analysis by focusing on the unique characteristics of the judicial branch and the

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281. *Id.* at 788-90 (O'Connor, J., concurring).

282. *Id.* at 792.

283. *Id.*

284. *Id.* at 794-95 (Kennedy, J., concurring).

285. *Id.* at 795.

286. *Id.* at 794 (citing *Brown v. Hartlage*, 456 U.S. 45, 60 (1982)).

287. See generally Fallon, *supra* note 15 (advancing the possibility that conservative justices may, in particular cases, be willing to abandon federalism in order to promote substantive goals).

288. *White*, 536 U.S. at 797 (Stevens, J., dissenting); *id.* at 803 (Ginsburg, J., dissenting).

relationship between those characteristics and political campaigns. Justice Stevens criticized the Court for “obscuring the fundamental distinction between campaigns for the judiciary and the political branches.”<sup>289</sup> He emphasized the differences between the two types of branches. Members of the political branches need to be “popular,”<sup>290</sup> but judges deal with “issues of law or fact [that] should not be determined by popular vote.”<sup>291</sup> Judges do not serve constituencies.<sup>292</sup> Because there is a conflict between “the demands of electoral politics and the distinct characteristics of the judiciary,”<sup>293</sup> states need not be put to “an all or nothing choice of abandoning judicial elections or having elections in which anything goes.”<sup>294</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>295</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 prosecutor) and against a class of litigants (defendants in rape cases).”<sup>296</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>297</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>298</sup>—could be threatened by “electioneering.”<sup>299</sup>

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289. *Id.* at 797 (Stevens, J., dissenting).

290. *Id.* at 798.

291. *Id.*

292. *Id.* at 799.

293. *Id.*

294. *Id.* at 800.

295. *Id.* (internal quotation marks omitted).

296. *Id.* at 800-01.

297. *Id.* at 801-02.

298. *Id.* at 802 (quoting *Mistretta v. United States*, 288 U.S. 361, 407 (1989)).

299. *Id.* 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



Justice Ginsburg's somewhat longer dissent sounded many of the same themes.<sup>300</sup> She emphasized the nonmajoritarian nature of the judiciary—a branch “owing fidelity to no person or party”<sup>301</sup>—and the importance of maintaining public confidence in the judiciary as a compelling state interest.<sup>302</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>303</sup> but they do not dictate a “unilocular, ‘an election is an election,’ approach.”<sup>304</sup> Because of the differences between the political and judicial functions,<sup>305</sup> the First Amendment permits “an election process geared to the judicial office.”<sup>306</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>307</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 to be aimed at statements that are incompatible with the judicial office.<sup>308</sup> Moreover, she tied that clause to Minnesota's broader system, including its Pledges or Promises Clause.<sup>309</sup> After *White*, candidates can make pledges or promises by

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WILLAMETTE L. REV. 367 (2002).

300. *White*, 536 U.S. at 805 (Ginsburg, J., dissenting).

301. *Id.* at 804.

302. *Id.* at 817-18.

303. *Id.* at 806.

304. *Id.* at 805.

305. For example, decisions of individual cases should not depend on popular will. *Id.* at 806.

306. *Id.* at 805.

307. *Id.* at 804.

308. *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.

309. *Id.* at 812-13.

labeling them as announcements of views, even though the two are functionally similar.<sup>310</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>311</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>312</sup> She began with *Tumey v. Ohio*,<sup>313</sup> a case in which a judge had a direct pecuniary interest in the outcome of cases.<sup>314</sup> She argued that *Tumey* had been extended to cases that present a temptation to rule in a certain way, which leads to a probability of unfairness.<sup>315</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>316</sup>

Finally, although it was not a major portion of her opinion, Justice Ginsburg's opinion raised questions of federalism. She rejected the notion that the states should be forced to "choose one pole or the other."<sup>317</sup> She saw the states as faced with the difficult task of reconciling "the complex and competing concerns in this sensitive area."<sup>318</sup> Thus, she argued for deference to state "experiment[s]" in balancing "the constitutional interests in judicial integrity and free expression within the unique setting of an elected judiciary."<sup>319</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>320</sup> and

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310. *Id.* at 819-20.

311. *Id.* at 813-17.

312. *Id.* at 813 (quoting *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 400 (2000)).

313. 273 U.S. 510 (1927).

314. In *Tumey*, a local mayor serving as judge received a portion of fines that he levied. *Id.* at 520.

315. *White*, 536 U.S. at 814-17 (Ginsburg, J., dissenting) (citing *Ward v. Monroeville*, 409 U.S. 57 (1972)).

316. *Id.* at 815-17.

317. *Id.* at 821.

318. *Id.*

319. *Id.*

320. See Stern, *supra* note 88, at 108 ("The Court therefore did not have to pronounce on

was not a central feature of Canon-based regulation.<sup>321</sup> The analysis in *White* indicates a decision of potentially great precedential force, however. As commentators have pointed out,<sup>322</sup> Justice Scalia's analysis can be read as equating judicial elections with other elections to the point that the First Amendment applies with full force in every case. *White* may signal the downfall of virtually all the Canons.<sup>323</sup> Certainly the lower courts, particularly the federal courts, have read it broadly.<sup>324</sup>

This subsection will argue that the Challengers' trump card is not as strong as they claim (although admittedly 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>325</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. Close analysis, however, 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>326</sup>

This Article's critique of *White*, or at least of any broad reading of it, rests on disagreement with two fundamental premises of the decision. The first is that courts, because they make law, are part of

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the wider invalidity of campaign speech restrictions in order to strike down this especially vulnerable provision.”).

321. *Id.* at 68-71 (discussing challenges to speech restrictions).

322. *See, e.g.*, Dimino, *supra* note 3; Stern, *supra* note 88.

323. Stern, *supra* note 88, at 64 (“[I]t is reasonable to expect that most attempts to curtail judicial candidates' speech will suffer the same fate as Minnesota's announce clause.”).

324. *See, e.g.*, Republican Party of Minn. v. White, 416 F.3d 738 (8th Cir. 2005); Weaver v. Bonner, 309 F.3d 1312 (11th Cir. 2002). *But see* Pa. Family Inst. v. Celluci, 521 F. Supp. 2d 351 (E.D. Pa. 2007) (upholding, after giving narrow construction, state Canons on pledges or promises and commitments).

325. 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.

326. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 400 (2000) (Breyer, J., concurring). Justice Breyer referred to a situation in which there are constitutional interests on both sides. In judicial elections, however, we are dealing with rights: the immediate rights of the candidate and the future due process rights of litigants who must appear before a judge.

“the enterprise of ‘representative government.’”<sup>327</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>328</sup> As argued above, however, this equation of the judicial with the political branches glosses over significant differences between the two.<sup>329</sup> 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>330</sup> Justice Ginsburg invoked the ideal of a judiciary “owing fidelity to no person or party.”<sup>331</sup> Speech is certainly 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>332</sup> One expects, 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, whereas legislatures generally do not. The Constitution, to some extent, directly forbids legislatures from doing so. This is the role of the ban on bills of attainder, a ban which applies both to the states and the federal government.<sup>333</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>334</sup> Writing for the Court in *United States v. Lovett*,<sup>335</sup> Justice Black wrote that the framers “intended to safeguard the people of this country from punishment without trial by

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327. *Republican Party of Minn. v. White*, 536 U.S. 765, 784 (2002).

328. Dimino, *supra* note 3, at 357-67.

329. *See supra* Part III.B.

330. *See, e.g., White*, 536 U.S. at 803-04 (Ginsburg, J., dissenting).

331. *Id.* at 804.

332. This is the case even if the “representative” adopts the view that he should express his own views, rather than those of the voters.

333. U.S. CONST. art. I, § 9 (“No Bill of Attainder or ex post facto Law shall be passed.”); *id.* § 10 (“No State shall ... pass any Bill of Attainder, ex post facto Law ....”).

334. *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323 (1866).

335. 328 U.S. 303 (1946).

duly constituted courts.”<sup>336</sup> Professor Tribe sums up the sometimes complex law in this area as follows:

Most basic of all, trial by legislature—the use of the 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 any state.<sup>337</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>338</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>339</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>340</sup> Yet, in *Bi-Metallic Investment Co. v. State Board of Equalization*,<sup>341</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>342</sup> Justice Holmes, for the Court, noted that in the case of general legislative action, groups can bring political power to bear.<sup>343</sup> In

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336. *Id.* at 317.

337. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 641 (3d ed. 2000) (citations omitted).

338. I recognize that this is 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, June 18, 2007, at A18.

339. 210 U.S. 373 (1908).

340. *Id.* at 381.

341. 239 U.S. 441 (1915).

342. *Id.* at 446.

343. *Id.* at 445.

Justice Holmes's view, adjudication was, at least in its generally accepted form, not a test of political strength manifested over the decision maker.<sup>344</sup> Indeed, the hallmark of an adjudication that satisfies due process is a neutral decision maker.<sup>345</sup> Obviously, in the administrative state, many adjudications do not, and need not, take place before a court.<sup>346</sup> But, as long ago as *Wiener v. United States*,<sup>347</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>348</sup> The agency had to act "on the merits of each claim, supported by evidence and governing legal considerations,"<sup>349</sup> free from political influence.<sup>350</sup> What is true for agencies is a fortiori true for courts, the quintessential adjudicative body.

If, then, one focuses on what courts do and how they do it, significant differences between the judicial and political branches become apparent. It is helpful to consider three aspects of the judicial function: common law making, constitutional interpretation, and dispute resolution.<sup>351</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

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344. *Id.*; see also ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* 147 (2d ed. 2001) (noting that, in the context of individualized determinations, as opposed to legislative or rule-making decisions, "[t]he power of the group to protect its interests, or a variety of interests, is no longer a factor").

345. See Friendly, *supra* note 247, at 1289 (describing a system in which administrative law judges with no connection to an agency would have the responsibility of developing the relevant facts and making a just decision).

346. See Administrative Procedure Act, 5 U.S.C. §§ 554-57 (2006) (governing adjudications before administrative agencies).

347. 357 U.S. 349 (1958).

348. *Id.* at 355 (internal quotation marks omitted).

349. *Id.*

350. *Id.* at 355-56. The Court was referring to political pressure from one of the other branches.

351. Obviously, more than one of these aspects can be present in any given case.

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 and are 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. Additionally, 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>352</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>353</sup> I am inclined to say that a court is a court.

Even if Justice Scalia is wrong, however, in suggesting that courts are like legislatures, that does not, by itself, show that elections for

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352. 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 3, at 364. I do not, however, 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. The system, however, 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 Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 716 (1994) (O'Connor, J., concurring in part and concurring in the judgment) (“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.” 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.” *Id.* at 815. For Justice Brennan, “the latter role is precisely the one with which this Court is charged.” *Id.*

353. Republican Party of Minn. v. White, 536 U.S. 765, 805 (2002) (Ginsburg, J., dissenting).

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*<sup>354</sup> 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>355</sup> He not only proceeds to suggest, however, that 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 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>356</sup> The statement is a quote from a separate opinion in an earlier election case involving the rights of political parties.<sup>357</sup> Justice Ginsburg was correct in characterizing his opinion as adopting an "election is an election" approach.<sup>358</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>359</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.

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354. 456 U.S. 45 (1982).

355. *White*, 536 U.S. at 783. He also views the Announce Clause as underinclusive, even if greater regulation of judicial campaigns is possible. It seems clear from his subsequent analysis, however, that the election law cases are not relied on for the sole purpose of dealing with inclusiveness.

356. *Id.* at 788 (quoting *Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)).

357. *Renne*, 501 U.S. at 349 (Marshall, J., dissenting). At issue in *Renne* was a state constitutional provision prohibiting political parties from endorsing candidates for nonpartisan offices.

358. *White*, 536 U.S. at 805 (Ginsburg, J., dissenting).

359. See generally Stern, *supra* note 88.



In an important study of *White* and its impact, Dean Richard Briffault makes the following general point:

[T]he 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>360</sup>

Some of the examples he cites are not highly persuasive, notably special districts, bond issues, and county government reorganization.<sup>361</sup> Cases involving the judiciary<sup>362</sup> and campaign finance<sup>363</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>364</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>365</sup> In a key

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360. Briffault, *supra* note 2, at 192.

361. *Id.* at 188-90.

362. *Id.* at 191-92. Dean Briffault discusses the applicability to judicial elections of the “one person, one vote” rule and the Voting Rights Act.

363. *Id.* at 190-91.

364. The current controversy over fraudulent voting can be seen as an example of such regulation.

365. *Republican Party of Minn. v. White*, 416 F.3d 738, 744 (8th Cir. 2005) (en banc). In addition to the partisan activities clause, the decision also struck down the Minnesota Canon prohibiting personal solicitation by judicial candidates. *Id.* 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

passage, the majority stated: "We note that Appellees fret over the kind of influence political parties have in not only elections, but also governmental decisions made thereafter. *This case, however, is not about what happens after an election.*"<sup>366</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>367</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>368</sup> *Buckley* is the foundation of modern campaign finance doctrine, and despite attacks from different sides of the spectrum,<sup>369</sup> the case appears to retain its force.<sup>370</sup> The Court in *Buckley* upheld a restriction on campaign contributions, even though there was infringement on First Amendment rights<sup>371</sup> that required the "closest scrutiny."<sup>372</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>373</sup>

The Court accepted this interest as constitutionally sufficient. It conceded that precise empirical evidence might not be available,<sup>374</sup> but held that "[t]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential office

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& Joshua C. Hall, *The Effect of Judicial Selection Processes on Judicial Quality: The Role of Partisan Politics*, 27 CATO J. 69, 79 (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").

366. *White*, 416 F.3d at 752 (emphasis added).

367. Briffault, *supra* note 2, at 188.

368. 424 U.S. 1 (1976).

369. Liberals tend to attack *Buckley* for prohibiting limitations on campaign expenditures, while conservatives tend to disagree with its approval of limits on contributions.

370. See generally *Randall v. Sorrell*, 548 U.S. 230 (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 *infra* at note 422.

371. *Buckley*, 424 U.S. at 23-25. The Court identified both rights of speech and association as at issue.

372. *Id.* at 25 (internal citation omitted).

373. *Id.* (emphasis added).

374. *Id.* at 27.

holders, the integrity of our system of representative democracy is undermined.”<sup>375</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>376</sup> The invocation of bribery is a down-the-road 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>377</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>378</sup> Certainly the network of Canon-based regulation is aimed at preventing campaign behavior, such as statements, political activities, or 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>379</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>380</sup> Yet, Justice Scalia’s

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375. *Id.* at 26-27.

376. *Id.* at 27.

377. *Id.* at 27-28. Ironically, 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.” See Carter, *supra* note 212. 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.

378. Briffault, *supra* note 2, at 198.

379. Republican Party of Minn. v. White, 536 U.S. 765, 805 (2002) (Ginsburg, J., dissenting).

380. See, e.g., Republican Party of Minn. 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

discussion of party bias points the other way. He suggests that preventing “speech for or against particular parties”<sup>381</sup> constitutes a compelling state interest.<sup>382</sup> There is certainly an intuitive appeal to the notion that some campaign speech could threaten due process.

If, for instance, the appeal of Jones’s rape conviction is pending during an 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>383</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>384</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>385</sup> This Article’s 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, then *White*’s foundations appear 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 litigants’ due process rights.<sup>386</sup> The

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speech and associational rights.”). See generally Stern, *supra* note 88.

381. *White*, 536 U.S. at 776 (emphasis omitted).

382. *Id.* at 775-77.

383. *Id.* at 800-01 (Stevens, J., dissenting) (“Expressions that stress a candidate’s unbroken record of affirming convictions for rape, for example, imply a bias in favor of a particular litigant (the prosecutor) and against a class of litigants (defendants in rape cases).” (footnote omitted)).

384. See *In re Kinsey*, 842 So. 2d 77, 88 (Fla. 2003).

385. See, e.g., Dimino, *supra* note 3, at 380-82 (indicating approval of, for example, prohibition on speech concerning pending cases).

386. See *Duwe v. Alexander*, 490 F. Supp. 2d 968, 975-77 (W.D. Wis. 2007) (discussing compelling state interest in open-mindedness).

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>387</sup> lies the particular importance of public perception of the judiciary as fair, unbiased, and not tainted by prejudgment.<sup>388</sup> Conceivably, courts could require a less than compelling interest—a First Amendment form of intermediate scrutiny—as campaign finance cases have suggested.<sup>389</sup> The policy arguments behind the presumption against politicization retain their force, and are not trumped after all. This Article has 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>390</sup> An appeal to conservatives also makes sense both because they are the driving force behind the challenges and because an anti-regulatory stance has inherent appeal to them. The goal of this Article is not a 180-degree turn, but a recognition of the complexities of the problem and a sympathy, however difficult, 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>391</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>392</sup>

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387. See Schotland, *supra* note 3, at 1086 (discussing issues of campaign financing and whether the problem rises to the level of corruption).

388. *Id.* at 1079.

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

390. 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. At least one notable liberal academic, however, has expressed his approval of *White*. See Chemerinsky, *supra* note 15 ("I have long believed that the Model Code's restrictions on speech by candidates for judicial office are unconstitutional under basic First Amendment principles." (footnote omitted)).

391. See Briffault, *supra* note 2, at 182-83, 191-92 (discussing Supreme Court decisions on voting rights in judicial elections).

392. 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 County Racing Ass'n, Inc. v. Barber*, 127 S. Ct. 2975 (2007) (denying certiorari in case requesting recusal when judges had made statements as candidates on the general issues presented); *Barber v. Jefferson County Racing Ass'n*, 960 So. 2d 599, 619 (Ala. 2006) (Bolin, J., statement of nonrecusal).

In the meantime, life goes on. Judicial elections will continue to be held, particularly because a shift away from them seems highly unlikely.<sup>393</sup> This Article concludes 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; or 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>394</sup> or “anything goes,”<sup>395</sup>—is a distinct possibility. In an excellent recent analysis, Professor Stern contends:

[E]fforts 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>396</sup>

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393. See Stern, *supra* note 88, at 68 (noting that “[a] poll conducted in 2001 found that voters in states with elected judges overwhelmingly preferred election to appointment; the resounding defeat of proposals in Ohio and Florida to switch from elective to appointive systems appear to confirm this attitude” (footnotes omitted)).

394. *Republican Party of Minn. v. White*, 536 U.S. 765, 806 (2002) (Ginsburg, J., dissenting).

395. *Id.* at 800 (Stevens, J., dissenting).

396. Stern, *supra* note 88, at 64.

He sees *White* as a decision of great precedential force, emphasizing the following aspects: the denial of “judicial exceptionalism;”<sup>397</sup> the notion that judicial elections should be different from other elections; the difficulty that strict scrutiny review poses for any regulation;<sup>398</sup> the majority’s use of *Brown v. Hartlage*<sup>399</sup>—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>400</sup> Professor Stern also places considerable emphasis on “lower courts’ receptiveness to attacks on other judicial campaign speech restrictions”<sup>401</sup> after *White*’s invalidation of the Announce Clause.<sup>402</sup>

For Professor Stern, the post-*White* world is not necessarily a bad place. He views as important the availability of recusal<sup>403</sup> as a possible less restrictive alternative and thus “a means to avoid impinging on speech and conduct ordinarily protected by the First Amendment.”<sup>404</sup> He also notes the classic First Amendment argument, invoked by Justice Kennedy in *White*,<sup>405</sup> that the remedy for irresponsible speech is “open debate and voters’ reactions.”<sup>406</sup> This

397. *Id.* at 81.

398. *Id.* at 87-95.

399. 456 U.S. 45 (1982).

400. Stern, *supra* note 88, at 89-91.

401. *Id.* at 78.

402. *See, e.g.*, *Beaulieu v. City of Alabaster*, 454 F.3d 1219, 1232-34 (11th Cir. 2006); *Republican Party of Minn. v. White*, 416 F.3d 738, 751-53, 759-60, 766 (8th Cir. 2005); *Weaver v. Bonner*, 309 F.3d 1312, 1318-24 (11th Cir. 2002); *Ind. Right to Life, Inc. v. Shepard*, 463 F. Supp. 2d 879, 882-83 (N.D. Ind. 2006); *N.D. Family Alliance v. Bader*, 361 F. Supp. 2d 1021, 1035-37 (D.N.D. 2005); *Griffen v. Ark. Judicial Discipline & Disability Comm’n*, 130 S.W.3d 524, 535-38 (Ark. 2003).

403. Stern, *supra* note 88, at 91-92 (“Instead, a judge whose statement betrayed implacable bias could be replaced by an openminded judge as an alternative less restrictive of speech.” (footnote omitted)).

404. *Id.* at 127. 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” for state courts. *Cf. Jefferson County Racing Ass’n, Inc. v. Barber*, 127 S. Ct. 2975 (2007) (denying certiorari in case requesting recusal when judges had as candidates made statements on the general issues presented); *Barber v. Jefferson County Racing Ass’n*, 960 So. 2d 599, 619 (Ala. 2006) (Bolin, J., statement of nonrecusal).

405. *Republican Party of Minn. v. White*, 536 U.S. at 765, 792, 794-95 (Kennedy, J., concurring); Stern, *supra* note 88, at 135.

406. Stern, *supra* note 88, at 121.

argument has become a cornerstone of conservative attacks on the Canons' restriction of judicial campaign speech. Professor Dimino, for example, draws on Justice Brandeis's concurring opinion in *Whitney v. California*<sup>407</sup> to argue that "the proper corrective for speech promoting improper ideas is 'more speech' promoting the proper ideas."<sup>408</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 curb the excesses of judicial campaigning and promote the election of worthy judges."<sup>409</sup> These "other means" are essentially nonregulatory, in keeping with the dictates of *White*. This Article will discuss them, 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>410</sup> This "message," however, 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

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407. 274 U.S. 357, 377 (1927) (Brandeis, J., concurring); see also Dimino, *supra* note 3, at 304 n.20.

408. Dimino, *supra* note 3, at 304.

409. Stern, *supra* note 88, at 132.

410. See JAS REPORT 2006, *supra* note 3, at 38.



pledges or promises, misrepresentations, personal solicitation of contributions, and partisan political activity will survive.<sup>411</sup> As noted, Professor Stern doubts any will survive.<sup>412</sup> Much depends, obviously, on whether one accepts the arguments advanced here for a narrow reading of *White*.

This Article does not discuss specific Canons. Its 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, “[P]ersonal 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>413</sup>

In making this point, Dean Briffault invokes the campaign finance cases and their emphasis on preventing corruption or its appearance.<sup>414</sup> Although a majority of the Eighth Circuit rejected the applicability of anti-corruption rationales to judicial elections,<sup>415</sup> this seems too hasty a conclusion. Granted, there is debate within the Supreme Court over the breadth of the concept of corruption.<sup>416</sup> One could extrapolate from some cases a broad view of corruption as unfaithfulness to the obligation of office,<sup>417</sup> to conclude that any incurring of political debts—such as partisan obligations—is a “corruption” of the judicial office.<sup>418</sup> Even if one limits corruption to

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411. See generally Briffault, *supra* note 2.

412. See generally Stern, *supra* note 88.

413. Briffault, *supra* note 2, at 225.

414. *Id.* (“The Supreme Court, in cases from *Buckley* through *McConnell*, has repeatedly held that campaign contributions raise the dangers of corruption ....”).

415. *Republican Party of Minn. v. White*, 416 F.3d 738, 756 n.8 (8th Cir. 2005).

416. See, e.g., *McConnell v. FEC*, 540 U.S. 93, 290 (2003) (Kennedy, J., concurring in part and dissenting in part); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 388-89 (2000).

417. *McConnell*, 540 U.S. at 241 (majority opinion).

418. *White*, 416 F.3d at 769-70 (Gibson, J., dissenting).

quid pro quo corruption or the appearance thereof,<sup>419</sup> however, 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>420</sup> *Buckley* not only remains intact, however; it is also the reference point for most Supreme Court analysis of campaign finance reform legislation.<sup>421</sup> Reports of its demise<sup>422</sup> are greatly exaggerated.

The third scenario might also encompass a number of non-regulatory measures. A report to the Chief Judge of the State of New York from the Commission to Promote Public Confidence in Judicial Elections<sup>423</sup> listed such possibilities as “independent commissions to evaluate the qualifications of judicial candidates throughout the State”;<sup>424</sup> “the creation of a campaign ethics and conduct center; the expansion of judicial campaign finance disclosure; and the establishment of a State-sponsored judicial election

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419. *McConnell*, 540 U.S. at 292-98 (Kennedy, J., concurring in part and dissenting in part); *id.* at 357 (Rehnquist, C.J., dissenting).

420. *Id.* at 297-98 (Kennedy, J., concurring in part and dissenting in part); *Shrink*, 528 U.S. at 422-27 (Thomas, J., dissenting).

421. *See, e.g.*, *Randall v. Sorrell*, 548 U.S. 230 (2006).

422. *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) (“[T]he Court’s fractured opinions in *Randall* show that the *Buckley* compromise is falling apart ....”). It should be noted, however, that *Shrink*, decided in 2000, was also described as possibly the beginning of the end of *Buckley*. *See generally* 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. During the last term, *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2672-74 (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 emphasized the importance of speech in the political context. *Id.* at 2674 (Alito, J., concurring), 2675, 2678 (Scalia, J., concurring). 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 2672-73 (majority opinion). 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.

423. *See* N.Y. REPORT 2006, *supra* note 80.

424. *Id.* at 10.

voter guide.”<sup>425</sup> Professor Stern cites the possibility of “conversion of mandatory restraints on speech to guidelines that candidates are urged to follow.”<sup>426</sup>

Perhaps most interesting is the sharp increase in focus on public financing of judicial campaigns in the post-*White* world.<sup>427</sup> As of this writing, bills for public financing of supreme court races have been introduced in several states.<sup>428</sup> North Carolina’s existing system of public finance has survived an initial judicial challenge, brought by a conservative group.<sup>429</sup> New Mexico has recently adopted it.<sup>430</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>431</sup> Indeed, conservatives may feel that the pressures to run as a “clean judicial elections” candidate, to adhere to “voluntary” restraints, or to respect the rulings of campaign conduct committees represent the kind of coercion associated with the 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 those governing elections to the political branches is one that will not go away. At the same time, *White* is on the books, and, along with its progeny, is the guiding precedent in the area. Many conservatives regard the decision as a

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425. *Id.* at 11.

426. Stern, *supra* note 88, at 132 (citation omitted).

427. *Id.* at 133-34 (“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.” (citations omitted)).

428. See, e.g., Amanda Bronstad, *Seven States Look at Public Financing for Judicial Races*, NAT’L L.J., Apr. 16, 2007, at 1.

429. See *generally* Jackson v. Leek, No. 1:056CV00691, 2006 WL 2264027 (M.D.N.C. Aug. 7, 2006).

430. See Deborah Baker, *Governor Signs Bill Passed in Special Legislative Session*, AM. JUDICATURE SOC’Y, Apr. 14, 2007, available at <http://www.judicialselection.us/news/detail.cfm?statenewsid=115>.

431. See BRAD SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 88-105 (2001) (noting problems with public financing of political campaigns). Professor Dimino, however, has expressed approval of public financing for judicial campaigns. See Michael Dimino, Op-Ed., *Appoint? Objection!*, PHILA. INQUIRER, May 4, 2007.

great victory.<sup>432</sup> This Article's goal 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>433</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. This Article has argued that as a matter of law, *White* need not be read broadly. This conclusion is based not so much on a hopeful reading of the majority's disclaimer,<sup>434</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>435</sup> Right now the Challengers are winning. At some

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432. See Press Release, James Madison Ctr., U.S. Supreme Court Denies Review of Decision Striking Down Bans on Judicial Candidates' Political Activities and Campaign Funds Solicitation (Jan. 23, 2006), <http://www.jamesmadisoncenter.org/Test/content.html> (scroll to bottom of posted press releases) (describing denial of certiorari from *White* decision on remand as a "major victory").

433. Implicit in this statement is that the second scenario will not exist in its pure form. I have already ruled out the first scenario.

434. Republican Party of Minn. v. White, 536 U.S. 765, 783 (2002) ("[W]e 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 88, at 75 ("Much other commentary as well has been marked by varying degrees of optimism that *White* left other significant restraints intact." (footnote omitted)); see also *id.* at 75 n.96 (listing legal commentary on *White*).

435. See Editorial, *supra* note 338 ("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 Emilie Lounsberry, *Forum Asks: Does Money Sway Judges?*, PHILA. INQUIRER, May 31, 2007, at B1 (quoting Pennsylvania's Governor Ed Rendell as being in favor of changing from an

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's decision in *Republican Party of Minnesota v. White*, which struck down a state regulation that was modeled 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.

This Article has argued that conservatives should oppose politicization of the state judiciaries. It calls into question important tenets about federalism and the role 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 undermines that order. As a policy matter, *White* need not be read as requiring wholesale invalidation of Canon-based

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elected system to an appointed one); JAS REPORT 2006, *supra* note 3, at viii (noting increased interest in merit selection in Minnesota); Mark H. Alcott, *Judicial Selection: Time for True Reform*, N.Y.L.J., Jan. 22, 2007, at 13 ("True reform of the system requires nothing less than a constitutional amendment implementing a merit selection process for judges."); *Alabama: Judge Writes in Favor of Missouri Plan*, Posting of Ed to Votelaw.com, <http://www.votelaw.com/blog/archives/004773.html> (Nov. 20, 2006, 08:01 EST) (noting calls by members of the Alabama Supreme Court for a new method of judicial selection).

regulation. The system need not descend into “anything goes.” That hardly seems a victory worth seeking.