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# Justice for Sale: State Judicial Elections and Campaign Finance in the United States in the Post-Citizens United Era

"I never felt so much like a hooker down by the bus station in any race I've ever been in as I did in a judicial race."
Ohio Supreme Court Justice Paul Pfeifer[2]

## 1. Introduction

Campaign finance law currently – or rather, consistently – occupies much of American political discussion. A quintessentially American tradition and at the same time a significant – if at times overlooked – aspect of this issue is state judicial elections. Almost entirely uniquely,[3] the United States elects a majority of its state judges.[4] While traditionally judicial

[1] E-mail: oradics@law.gwu.edu. I would like to thank Tamás Nagy for his relentless support and friendship. This Article is dedicated to my husband, for everything.

[2] Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court' Rulings*, N.Y.TIMES, Oct. 1, 2006. Available at: http://www.nytimes.com/2006/10/01/us/01judges.html?pagewanted=all (last visited January 20, 2012).

[3] The only other countries that hold some form of judicial elections are Switzerland and Japan, and as of fairly recently, Bolivia, where they elected national judges for the first time in October 2011. For more on the Bolivian judicial elections, *see*: http://www.bbc.co.uk/news/world-latin-america-15294746 (last visited February 1, 2012); http://af.reuters.com/article/energyOilNews/idAFN1E79C13P20111013?pageNumber=1&virtualBrandChannel=0 (last visited February 1, 2012). In Japan, Supreme Court justices are appointed by the Cabinet (with the Chief Justice appointed by the Emperor), and their retention is decided by the people at the first general election of members of the House of Representatives following their appointment. The review continues to be held every 10 years. *See*: http://www.courts.go.jp/english/system/system.html. In Switzerland, judges in some smaller cantons are directly elected by the people. In larger cantons, judges are elected by parliamentary deputees. *See*: Herbert M. Kritzer, *Law is the Mere Continuation of Politics by Different Means: American Judicial Selection in the 21st Century*, 56 DEPAUL L. REV. 423, 431 (2007). In France, to highlight another example, commercial court judges are elected by tradesmen and manifacturers. *See:* Rachel Paine Caufield, *The Curious Logic of Judicial Elections*, 64 ARK. L. REV. 249, 258-259 (2011). The *en masse* election of judges in the U.S. clearly baffles other nations. As Hans Linde, a retired justice on the Oregon Supreme Court, said: "(t)o the rest of the world…American adherence of judicial elections is as incomprehensible as

elections used to be low-salient events, the situation has undergone a dramatic transformation in recent years, with these elections going from low-cost, docile occasions to "noisier, nastier, costlier campaigns."[5] Needless to day, this transformation – according to several academic commentators and a large portion of the members of the judiciary branch – has a significant negative impact on the prestige of the justice system and citizen trust in the rule of law. Charles Geyh sums up some of the most pressing concerns regarding judicial elections in what he calls the "Axiom of 80":

> "(1) Roughly 80% of the public prefers to select its judges by election and does so; (2) Roughly 80% of the electorate does not vote in judicial elections; (3) Roughly 80% of the electorate cannot identify the candidates for judicial office; and (4) Roughly 80% of the public believes that when judges are elected, their decisions are influenced by the campaign contributions they receive."[6]

As we shall see in the coming sections, judicial elections are problematic for a number of reasons. Increased spending in these races – especially by interest groups and corporations, some of whom will later be represented in cases in front of the very same judges whose campaigns they have supported financially – may lead to corruption or the appearance of corruption, which can undermine judicial independence and citizen trust in the integrity and impartiality of the judicial system. It is also doubtful how much judicial accountability – while an important democratic goal – is served by elections in which voters often have very little, if any, knowledge about candidates and accordingly have little incentive to vote.

In Part II., I shall lay out how increased spending and a more lenient campaign finance environment following the Supreme Court's 2010 decision in Citizens United v. Federal Election Commission[7] has affected judicial elections, and has lead to intensified and often nastier judicial campaigns with a predominant role accorded to campaign money. In Part III., I discuss the evolution of the various judicial selection methods used in the U.S. in a historical perspective. In Part IV., the importance of the balance between judicial independence and judicial accountability in a democracy is examined, especially with regard to countermajoritarianism, judicial review and judicial function, with solutions offered in Part V.

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our rejection of the metric system". In: Adam Liptak, *U.S. Voting for Judges Perplexes Other Nations*, N.Y TIMES, May 25, 2008, http://www.nytimes.com/2008/05/25/world/americas/25iht-judge.4.13194819.html.

[4] Federal judges – in accordance with Art. III. of the U.S. Constitution – are appointed for a life term. U.S. CONST. art. III.

[5] Roy A. Schotland, *New Challenges to State Judicial Selections*, 95 GEO. L. J. 1077, (2007) (quoting Richard Woodbury, Is Texas Justice for Sale?, TIME, Jan. 11, 1988, at 74).

[6] Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L. J. 43, 52 (2003).

[7] Citizens United v. FEC, 130 S.Ct. 876 (2010).

## 2. State Judicial Elections – Current Status

### 2.1. Numbers Don't Lie

The change we are witnessing in the nature, volume and tone of judicial elections is the result of a combination of several things. For one, although this is certainly not a new development, the majority of cases (95%) are heard by state courts and not federal courts,[8] and today the influence of the state justice system over everyday citizen life is non-neglectable. While at the dawn of American jurisprudence, state judges were not important because state courts were not important, the situation at present couldn't be more different. State courts decide an enormous amount of high-profile, high-dollar cases in torts, medical malpractice, products liability and other key areas, besides handling a large number of criminal cases.[9] Supreme courts throughout the states face a growing number of cases that have sweeping policy implications, which naturally raise the stakes in litigations and attract attention to state judicial elections. In today's increasingly partisan, divisive political atmosphere, state courts often become the centre of ideological battlegrounds. Michael Buenger notes: "Unlike the past, state courts are finding themselves at the center of, and not the periphery of, many divisive political maelstroms."[10]

All this, of course, means that interests groups of all kinds have not only recognized their pronounced interest in the composition of these courts, but they have also been trying to exert an influence over the selection of the judges by way of campaign contributions or independent spending. These efforts, combined with a more lenient campaign finance climate, have lead to record-breaking spending in state judicial elections, a tendency that shows no signs of stopping. This has resulted in rising campaign costs, and generally more high-profile elections. Consequently, current campaign costs are often well in the millions for a single judicial seat.[11] In the past decade, fundraising has doubled in state judicial campaigns in more than twenty states[12]. Out of the twenty-two states that elect their supreme court judges, twenty

[8] *See:* Edward Lazarus, *As Retired Justice O'Connor Speaks Out Against the Problems Plaguing State Judicial Elections, the Supreme Court Still Refuses to Allow Reform*, FindLaw: Legal Professionals, http://writ.lp.findlaw.com/lazarus/20080228.html, February 28, 2008.

[9] *Id.*

[10] Michael L. Buenger, *Of Money and Judicial Independence: Can Inherent Powers Protect State Courts in Tough Fiscal Times?*, 92 KY.L.J. 979, 1020 (2003).

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

[12] Adam Skaggs, Brennan Center for Justice, *Buying Justice: The Impact of Citizens United on Judicial Elections* 3 (2010), available at: http://www.brennancenter.org/page/-/publications/BCReportBuyingJustice.pdf?nocdn=1. Between 2000 and 2009, fundraising reached $206.4

set fundraising records between 2000 and 2009.[13] Independent spending, especially on television advertising, also set records in the past decade. Between 2000 and 2009, $93.6 million was spent on television advertising in connection with judicial elections.[14] The trend of rising fundraising costs and independent spending continued, with a total of $38.5 million spent on state high court elections in 2009-2010 alone.[15] $16.8 million was spent on television advertising in the same period, the most in judicial elections so far, and the number of television ads also rose.[16] A new development in this arena is that even high court judges running for retention – thus without competition – were targeted by negative TV ads.[17] TV advertising was financed, in the most part, by non-candidate, independent spenders, and in the case of the costliest campaigns, this was done so in a four-to-one ratio.[18]

Campaigns for state judicial seats have transformed into a war, where the weapon of choice is money. Not only have the costs of running a state judicial campaign risen enormously, especially for high court seats, independent spending has also significantly increased and the tone of the competition has turned more aggressive than ever before. Now, as indicated earlier, even incumbent high court judges running for retention are targeted by negative ads from outside groups.[19] In a chilling turn of events, for instance, three Iowa justices running for retention were targeted by a conservative campaign that attacked the justices for their vote to lift the ban on same-sex marriage in the state.[20] The campaign quickly became a heated clash of ideologies and views on social issues. All three justices lost

million in state supreme court elections in 20 states across the nation, going up from $83.3 million between 2000 and 2009. Candidate fundraising topped $45 million in *three of the last five election cycles.*

[13] DRI – The Voice of the Defense Bar, *Without Fear or Favor in 2011: A New Decade of Challenges to Judicial Independence and Accountability*, at 12, 2011. Available for download at: http://www.luc.edu/law/news/pdfs/~1794745.pdf (last visited July 16, 2012) (hereinafter: Without Fear of Favor in 2011).

[14] *Id*. at 13. 2008 itself was a record-shattering year in this respect. More television ads were aired than ever before in supreme court judicial contests, and $20 million was spent in races for 26 supreme court seats.

[15] Brennan Center for Justice, National Institute on Money in State Politics & Justice at Stake Campaign, *The New Politics of Judicial Elections 2009-2010: How Special Interest "Super Spenders" Threatened Impartial Justice and Emboldened Unprecedented Legislative Attacks on America's Courts,* 3, October 2011; http://newpoliticsreport.org/site/wp-content/uploads/2011/10/JAS-NewPolitics2010-Online-Imaged.pdf.

[16] *Id*. at 13-14. 46,659 television ads ran in 2009-2010, compared to 35,720 in the previous non-presidential election cycle.

[17] *Id*.

[18] *Id*.

[19] Prior to 2010, retention elections received much less notice from interest groups than other judicial elections. But in 2010, 12% of all election spending was in relation to retention elections, as compared to the 1% of the entire previous decade. *Id*. at 7-8.

[20] *Id*. at 9.

their seats, and their defeat, engineered by tightly organized, well-funded conservative forces, was intended as a nationwide warning to judges.[21]

Another interesting development, as a report by the Brennan Center for Justice notes, is that in several states, a handful of "super spenders" tend to dominate the judicial elections.[22] In 2010, business and conservative groups were prominently featured among the top ten super spenders nationwide.[23] There is a general tendency for single-issue interest groups to become more and more involved in elections.[24] Lawyers and lobbyists contributed the most by sector in 2010, followed by business interests and political parties.[25]

This also means that the information that reaches the larger public about candidates is often controlled by only a handful of donors, which makes the question of an informed citizenry all the more pertinent, especially since lack of knowledge and apathy on voters' part with regards to judicial candidates is endemic. This is an important facet of the debate around judicial elections, since some commentators argue that more spending and more ads mean better informed voters.[26] In view of the fact that the information comes from limited sources with clear interest in the outcome of the race, I'd argue that this is not strictly so. It is also necessary to note that success in judicial campaigns is strongly correlated to spending; just like in elections for other public offices, those candidates that spend the most have the best chance of winning a seat.[27] Thus it matters who and under what conditions can contribute to or spend on state judicial campaigns, and how this affects the state justice systems.

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[21] *Id*.
[22] *Id*. at 5.
[23] *Id*. A good example of the kind of interest group over-spending that we are talking about here is the year 2000 judicial campaign in Ohio, where the U.S. Chamber of Commerce – in an effort to unseat incumbent judges on the Ohio Supreme Court with whose jurisprudence it disagreed – and its interest groups far outspent the total spending by the candidates, the organizations that supported the candidates and both political parties. For a detailed account and analysis of this campaign, *see:* David Goldberger, *The Power of Special Interest Groups to Overwhelm Judicial Election Campaigns: The Troublesome Interaction between the Code of Judicial Conduct, Campaign Finance Laws, and the First Amendment*, 72 U. CIN.L. REV. 1, 4-11 (2003).
[24] Chris W. Bonneau & Melinda Gann Hall, *Mobilizing Interest: The Effects of Money on Citizen Participation in State Supreme Court Elections*, 52 AM. J. POL. SCI. 457, 459 (2008). *See also*: Michael R. Dimino, *Counter-Majoritarian Power and Judges' Political Speech*, 58 FLA. L. REV. 53, 92-93 (2006): "In recent years, however, as judicial elections have become opportunities for referenda on the justice system generally, interest groups have used the courts as means for influencing policy in myriad subject areas. Notably, tort liability and the role of religion in society and government have been salient campaign themes."
[25] Goldberger, *supra* note 22, at 6.
[26] *See*: CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS (2009); Bonneau & Hall, *supra* note 23, (arguing that campaign spending might have a positive effect on the democratic process by increasing citizen participation).
[27] Rachel Paine Caufield, *Reconciling the Judicial Ideal and the Democratic Impulse in Judicial Retention Elections*, 74 MO. L. REV. 573, 580 (2009).

## 2.2. The Supreme Court Steps in the Arena

Besides the – often negative – attention that judicial elections have received in recent years, the Supreme Court has also entered the debate and has issued several important decisions in the past decade, starting with Republican Party of Minnesota v. White[28] in 2002, and two other key decisions in 2009 and 2010: Caperton v. A.T. Massey Coal Company[29] and Citizens United v. Federal Election Commission.[30]

In **Republican Party of Minnesota v. White**, the Court held the "announce clause" of the Minnesota Supreme Court's canon of judicial conduct unconstitutional; the clause prohibited candidates for judicial office from announcing their views on disputed legal or political issues.[31] In a 5-4 decision, written by Justice Scalia, the Court found that Minnesota's announce clause violated the First Amendment because it is a content-based restriction and because it affects a category of speech that lies at the core of First Amendment protection: speech about the qualification of candidates for public office.

Since 1858, Minnesota has elected all of its judges by popular – and since 1912 – nonpartisan elections.[32] Since 1974, its code of judicial conduct has prohibited a candidate for a judicial office from announcing his or her views on disputed legal or political issues.[33] In 1996, Gregory Wersal, a candidate for associate justice of the Minnesota Supreme Court, distributed literature in the course of the campaign criticizing prior decisions of the court, notably on abortion, welfare and crime.[34] Due to the resulting investigation, and being wary of the ethical implications of such a procedure on his law practice, Wersal eventually withdrew from the race, but in 1998, he ran again for the same office, and after seeking an advisory opinion from the Minnesota Lawyers Professional Responsibility Board, he filed a

[28] Republican Party of Minnesota v. White, 536 U.S. 765 (2002).
[29] Caperton v. A.T. Massey Coal Company, 129 S. Ct. 2252 (2009).
[30] Citizens United v. F.E.C., 130 S.Ct. 876 (2010).
[31] "Announcing", as the Court in White pointed out, is different than promising to decide a legal issue a certain way. The Minnesota code of judicial conduct had a separate section, the "pledges and promises clause", that prohibits judicial candidates from making pledges or promises of conduct in office, other than faithful and impartial performance of the duties that come with the office. White, 536 U.S. at 770.
Also, according the Minnesota jurisprudence, the announce clause meaning was narrowed by the following interpretations: it did not apply to past decisions and it reached only issues that were likely to come before the candidate. *Id*. at 771-772.
[32] *See: infra* note 135.
[33] Minn. Code of Judicial Conduct, Canon 5(A)(3)(d)(i) (2000).
[34] White, 536 U.S. at 768-769.

lawsuit challenging the constitutionality of the announce clause in view of the First Amendment.[35]

The Supreme Court found the announce clause unconstitutional in light of the First Amendment.[36] It held that the clause was not narrowly tailored to serve a compelling governmental interest, or any interest at all,[37] and that this kind of restriction "prohibits speech on the basis of content and burdens a category of speech that is 'at the core of our First Amendment freedoms' – speech about the qualifications of candidates for judicial office."[38] Citing its decision in *Wood v. Georgia*[39], the Court stated: "The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance."[40] In the Court's opinion, letting judicial candidates express their opinions on disputed legal and political questions serves to provide the voting population with more information about the qualification and views of the candidates, thereby enhancing the political debate.[41]

Even before White, judicial elections had become more and more intense and aggressive in many states across the U.S.; nevertheless, the post-*White* world promises an aggravation of the situation that – as the Brennan Center for Justice notes – cannot be "overstated".[42] Although judicial candidates are still not allowed to make "pledges and promises", they can now clearly state their views on legal and political matters that are likely to end up before them once they are on the bench. Although no express promises can be made, a judge can still make it quite clear on what side of an issue he or she stands; often, such statements would be expected of him or her in exchange for contributions to the

[35] *Id*. at 769-770.

[36] It is important to mention that the Minnesota version of the announce clause that the Court found unconstitutional was the oldest of two announce clauses in use at the time. The newer version, adopted by the American Bar Association and a growing number of states, is considerably less restrictive on candidate speech since it allows them to make position statements, but still restricts them from making statements that "commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court". The newer version's constitutionality was not touched upon by the Court in *White*. *Id*. 773 n.5. (quoting the Model Code of Judicial Conduct Canon 5(A)(3)(d)(ii) (2000); Goldberger, *supra* note 22, at 20.

[37] White, 536 U.S. at 776. The governments interests identified by respondents in support of the restriction were preserving the impartiality and the appearance of impartiality of the state judiciary. *Id*. at 775.

[38] *Id*. at 774.

[39] Wood v. Georgia, 370 U.S. 375 (1962).

[40] *Id*. at 781-782, quoting Wood v. Georgia, 370 U.S., at 395.

[41] *See id*. at 782.

[42] *See*: Brennan Center for Justice, *Republican Party of Minnesota v. White: What does the decision mean?* Available at: http://www.brennancenter.org/content/resource/republican_party_of_minnesota_v_white_what_does_the_decision_mean/ (last visited June 11, 2012).

campaign. Big donors might feel the need to pressurize candidates to issue such statements as a condition of their donations, and in a system where the more is spent on a judicial campaign, the bigger the chance of winning, judges will no doubt feel an enhanced pressure to issue such statements, especially with regards to certain "hot button" issues.[43] Needless to say, even if these statements were not promises per se, they could easily be interpreted as such later on by the donors, the judge, and the general public, doing irreparable damage to the image of the judiciary, not to mention the actual harm that might arise from the derailment of fairness and impartiality in the justice system. The original objective of these judicial canons, protecting the impartiality and independence of the judiciary and limiting the public influence on its members in the course of their decision-making,[44] is still protected to a certain extent after *White*, but the foundations are shaking.

In its 2009 decision in **Caperton v. A.T. Massey Coal Company**, the Court set the constitutional standards for judicial recusal or disqualification. The Supreme Court of Appeals of West Virginia, in a 3-2 decision, reversed a jury verdict of $50 million. Prior to the decision, one of the justices, Justice Brent Benjamin, denied a recusal motion that was based on the fact that the justice had received campaign contributions "in an extraordinary amount" from Don Blankenship, the board chairman and principal officer of the A. T. Massey Coal Company that had been found liable for the damages by the jury in the verdict on appeal.[45]

In 2002, a West Virginia jury awarded Caperton[46] the sum of $50 million in compensatory and punitive damages against A.T. Massey Coal Company for fraudulent misrepresentation, concealment and tortuous interference with existing contractual relations.[47] In 2004, the state trial court denied Massey's post-trial motion challenging the verdict and damages award, and in 2005, the trial court denied Massey's motion for judgment as a matter of law.[48] Between the verdict and the appeal, West Virginia held its 2004 judicial elections. Don Blankenship, knowing that it would be the Supreme Court of Appeals of West Virginia that would review the appeal in the case, decided to support Brent Benjamin, an attorney, who sought to replace one of the justices on the court.[49] Besides contributing the $1,000 statutory maximum to Benjamin's campaign committee, Blankenship also donated almost $2.5 million

[43] *Id*.
[44] Dimino, *supra* note 23, at 109.
[45] Caperton v. Massey, 129 S.Ct. at 2256-2257.
[46] Petitioners were Hugh Caperton, Harman Development Corp., Harman Mining Corp., and Sovereign Corp. Sales (hereinafter Caperton). *Id*. at 2257.
[47] *Id*.
[48] *Id*.
[49] *Id*.

to a §527 organization supporting Brent for office, thereby accounting for more than two-thirds of the total donations raised.[50] Moreover, Blankenship spent over half a million dollars on independent expenditures in support of Benjamin.[51] As the Court stated: "To provide some perspective, Blankenship's $3 million in contributions were more than the total amount spent by all other Benjamin supporters and three times the amount spent by Benjamin's own committee."[52] Perhaps not surprisingly, considering such a well-funded campaign, Benjamin won the election.

Before Massey filed its appeal, Caperton moved to disqualify Justice Benjamin from deciding the case under the Due Process Clause of the Fourteenth Amendment, as well as the West Virginia Code of Judicial Conduct, based on the campaign involvement of Don Blankenship. Justice Benjamin denied the motion, finding "no objective information" to show bias or prejudice in his case. In 2007, the Court reversed the jury verdict of $50 million, with Justice Benjamin joining the majority opinion. Following the verdict, the parties moved to dismiss three justices.[53] Upon rehearing, with Justice Benjamin as now acting chief justice, Caperton moved once again for disqualification, arguing that the justice had failed to apply the correct legal standard in the case, and also introducing the results of a public opinion poll that showed that 67% of West Virginians harbored doubts as to the fairness and impartiality of Justice Benjamin.[54] The verdict was once again reversed, following Justice Benjamin's decision not to withdraw as judge from the case.

In its 5-4 opinion written by Justice Kennedy, the Supreme Court stated that the Due Process Clause of the Fourteenth Amendment required the recusal of Justice Benjamin, due to the "serious risk of actual bias". The Court concluded that "there is a serious risk of actual bias – based on objective and reasonable perceptions – when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent."[55] Due process can also require recusal "whether or not actual bias exists or can be

[50] *Id*.
[51] *Id*. The independent expenditures were spent on direct mailings, letter campaigns and television and newspaper ads in support of Brent Benjamin.
[52] *Id*.
[53] Justice Maynard, who granted Caperton's recusal motion, was photographed vacationing on the French Riviera with Don Blankenship while the appeal was pending, while on the other side, Justice Starcher also granted the recusal motion, based on his public criticism of Blankenship's role in the 2004 judicial elections. *Id*. at 2258.
[54] *Id*.
[55] *Id*. at 2263-2264.

proved."[56] The Court argued that although not every campaign contribution by a litigant is suspect, this case merits special attention due to the contribution's relative size as compared to the total amount of campaign contributions to Benjamin's campaign.[57] Based on that, the Court found that Blankenship's campaign contributions "had a significant and disproportionate influence in placing Justice Benjamin on the case."[58] It also had a bearing on the outcome that the contributions to the campaign were made while the case was still pending, and it was reasonably foreseeable that Benjamin, if elected, would be involved in deciding the case.[59] Although falling short of an explicit, quid pro quo agreement, Blankenship made his significant contributions to Benjamin's campaigns at a time when he had a serious stake in the outcome of a case that would come before the very same court that Benjamin sought to be a member of; in a way, it can be said that Blankenship chose his own judge.[60] All this lead to the Court to hold that there was a serious, objective risk of actual bias, unconstitutional under the Due Process Clause, which required Justice Benjamin's recusal.

While the significance of *Caperton v. Massey* cannot be denied, the recusal standards it set are not clearly defined and thus might prove to be hard to apply in practice. It's important to note that *Caperton v. Massey* is one of the rare cases that raise judicial disqualification to the level of constitutionality; usually this area is left to be regulated by legislative action, and as the Court concluded, application of this constitutional standard should be used only in rare, exceptional cases, such as the one at hand.[61] Nevertheless, *Caperton v. Massey* can be an important building block in a comprehensive regime to fight corruption and bias in the judicial branch. Thirteen states have already proposed more stringent recusal and disqualification rules. Proposals usually take two forms: they either establish threshold contribution amounts above which a judge becomes automatically disqualified (*per se rules for disqualification*), or they require independent review and adjudication of recusal motions.[62] Any regime of recusal and disqualification, however, can be effective only if accompanied by adequate campaign finance regulation, especially with regards to disclosure and disclaimer.

[56] *Id*. at 2265.
[57] *Id*. at 2263-2264.
[58] *Id*. at 2264.
[59] *Id*.
[60] *Id*.
[61] *Id*. at 2267.
[62] Lo, Londenberg, Nims & Weinberg, *Spending in Judicial Elections: State Trends in the Wake of Citizens United*, 31 (2011), available at: http://www.uchastings.edu/public-law/docs/judicial-elections-report-and-appendices-corrected.pdf (last visited July 11, 2012).

As one hand gives, the other takes away. As a significant step towards "noisier, nastier, costlier campaigns",[63] the Court's 2010 decision in **Citizens United v. FEC**, rejecting decades of settled law, opened the floodgates to corporate money in elections by removing formerly existing restrictions on independent expenditures. In a decision involving electioneering communications[64] before a general election under the Bipartisan Campaign Reform Act (hereinafter 'BCRA'), the Court found political speech – regardless of the identity of the speaker – a protected form of speech, thereby affording corporations the same speech rights as natural persons.[65]

As a result of the sweeping decision in *Citizens United*, corporations are currently allowed to use general treasury funds for political spending instead of resorting to separate segregated funds, and there is no limit to the amount they can spend on political activity. The effects of this decision can already be felt to a great extent in the political scene with record spending in the 2010 midterms and an expected spending of cosmic proportions in the 2012 presidential elections.[66] The creation of SuperPACs – another consequence of the decision –

[63] *Supra* note 4.

[64] An electioneering communication is any broadcast, cable or satellite communication that refers to a clearly identified federal candidate, is publicly distributed by a television station, radio station, cable television system or satellite system for a fee, and is distributed within 60 days prior to a general election or 30 days prior to a primary election to federal office, as defined by § 203 of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002).

[65] The facts of Citizens United are the following: in January 2008, Citizens United, a nonprofit organization, released a documentary ('Hillary'), critical of then-Senator Hillary Clinton, who was at the time a candidate for the Democratic Party's Presidential nomination. In anticipation of making Hillary available on cable television through video-on-demand within 30 days of primary elections, Citizens United produced several television ads to run on broadcast and cable television. These plans potentially conflicted with several provisions of Section 203 of the BCRA that regulates the purchase of electioneering communications made within 60 days of a general election or 30 days of a primary election. Section 203 did not allow corporations or labor unions to fund electioneering communications from their general treasury funds (with certain exceptions), and even permissible electioneering communications were subject to the disclosure and disclaimer requirements of the Act.
Citizens United, in anticipation of possible penalties, sought an injunction to block the Federal Election Commission from enforcing these sections on the grounds that they violated the First Amendment to the United States Constitution. The United States District Court for the District of Columbia did not grant the request, noting that the Supreme Court of the United States upheld Section 203 of the BCRA in McConnell v. FEC, 540 U.S. 93 (2003) (restricting campaign spending by corporations and unions). The Supreme Court, however, reversed the judgment of the court below, overruling McConnell and Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) (upholding restrictions on corporate spending to support or oppose political candidates).

[66] According to a report by Public Citizen, spending by outside groups reached $294.2 million in the 2010 election cycle. This is a 427% increase from the last mid-term elections in 2006, when outside spending topped at $68.9 million. It is even more worrying that more than 75% of the $294.2 million was spent by groups that accepted contributions larger than $5,000 or that did not reveal the sources of their money, and nearly half of the $294.2 million came only from ten groups. *See*: http://www.citizen.org/documents/Citizens-United-20110113.pdf (last visited March 8, 2012). As for the 2012 presidential elections, as of this moment, they are still very much under way. Nevertheless, there are several political watchdogs, news sites and nonprofit research groups tracking the flow of money into the election cycle. *See e.g.:*

has also radically transformed the campaign finance field.[67] Although more attention has been focused on political elections, judicial elections have also been affected by the decision in *Citizens United*. Justice Stevens' powerful dissent in the case warned of the possible consequences of the majority's decision with regards to the judicial branch:

> "The consequences of today's holding will not be limited to the legislative or executive context. The majority of the States select their judges through popular elections. At a time when concerns about the conduct of judicial elections have reached a fever pitch… the Court today unleashes the floodgates of corporate and union general treasury spending in these races."[68]

At present, there is no real check on corporate donations to state judicial campaigns.[69] Regulation is up to the states. Although some states have banned direct corporate contributions to such campaigns, corporate money usually finds other ways to reach the candidates, now in the form of increased independent expenditures.[70] The impact of the decision on judicial elections can be especially severe if we consider – as the Brennan Center for Justice points out – that record-breaking special interest spending had already occurred before the *Citizens United* decision, when around half the states had prohibitions against

http://www.opensecrets.org/pres12/ (last visited March 8, 2012); http://elections.nytimes.com/2012/campaign-finance (last visited March 8, 2012); http://www.huffingtonpost.com/2012/02/21/2012-presidential-campaigs_n_1292214.html (last visited March 8, 2012).

[67] SuperPACs came into existence starting from July 2011, following the decision of the D.C. Circuit Court of Appeals in SpeechNow.org v FEC, 599 F.3d 686 (D.C. Cir. 2010).
PACs or (political action committees) have been around since the 1940s; they were first organized by labor unions to circumvent regulation prohibiting them using their general treasury funds to make contributions to candidates for federal office. PACs collected voluntary contributions from union members and used these separate segregated funds for political contributions. Due to changes introduced in the 1974 Amendments to Federal Election Campaign Act, PACs started to rise in number and importance from the 1970s. Act of Oct. 15, 1974, Pub. L. No. 93 – 443, 88 Stat. 1263, amending the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3.
In SpeechNow, the D.C. Circuit ruled that individual contributions to advocacy groups (tax-exempt groups organized under Section 527 of the Internal Revenue Code, or '527s') may not be limited, and limits on annual individual contributions are unconstitutional. The decision came as a consequence of Citizens United, which identified a single Government interest acceptable to restrict contributions to political speech: corruption or the appearance of corruption. Justice Kennedy held in Citizens United that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption", Citizens United, 130 S.Ct. at 909. This part of the opinion lead the Circuit Court in SpeechNow to hold that since independent expenditures do not corrupt, neither do contributions to groups that make them. Previously, PACs (political action committees) were not allowed to accept corporate or union contributions at all (nor individual contributions in excess of $5,000). In light of Citizens United, the D.C. Circuit held in a unanimous decision that such restrictions were no longer understood as constitutional.
SuperPACs are thus the new PACs, but with a significant advantage: they can raise unlimited sums of money from individuals, corporations and labor unions and use that to advocate for and against political candidates.

[68] Citizens United, 130 S.Ct. at 968.

[69] CPA Amicus Brief, at 4.

[70] *Id*.

corporate general treasury spending in elections.[71] Now with these types of restrictions being deemed unconstitutional, spending in judicial elections might truly spin out of control. Such spending can substantially hinder judicial impartiality and potentially influence the outcome of cases. Even if it does not, the mere appearance of inappropriateness or corruption can erode citizen trust in the judiciary and weaken the prestige of the institution, not to mention the loss of faith in the rule of law. We will no doubt see a rise in situations comparable to *Caperton v. Massey*, and the effect that this can have on the perceived fairness and impartiality of the judiciary, not to mention its actual one, could indeed be devastating.[72]

### 2.3. Money Is Not the Only Problem

Money – whatever the source and goal of donation – is not the sole concern of judicial elections. Voter apathy is also an issue of increased importance. Elections only work if voters possess knowledge – real, substantive knowledge – about the candidates. This is not so in judicial elections. As noted by Charles Geyh, in his Axiom of 80,[73] roughly 80% of voters are unable to identify judicial candidates in elections. Without information on the candidates' abilities and qualifications for the job, voting for judges becomes a random act, a far cry from the democratic ideal of popular elections and the form of judicial accountability or voter control these elections would – at least in theory – aim to establish over state judges.[74]

According to some commentators, one of the main reasons why voters possess so little information about judicial candidates and why they do not feel the need to gather more information about them is the relatively little stake they have in the outcome of these elections, as compared to, for instance, legislative elections, where the outcome can have a more direct bearing on a voter's life.[75] With the exception of certain high-visibility topics – where the personal values of voters also come to play[76] – that attract voters to the voting booths, and that often drive voters to search out information on the candidates on their own account, most voters have little interest in acquiring information about judicial candidates,

[71] *Supra* note 11, at 2.
[72] Id., at 1.
[73] *See supra* note 5.
[74] It is worth noting that in the merit selection system, discussed in detail in part III., retention elections – since they are usually non-competitive – attract even less voters than traditional judicial elections. *See*: Kelly J. Varsho, *In the Global Market for Justice: Who is Paying the Highest Price for Judicial Independence?*, 27 N. ILL. U. L. REV. 445, 469- 470 (2007).
[75] Goldberger, *supra* note 22, at 28.
[76] *Id*. at 31-32.

and in fact have little interest in the technicalities involved in the day-to-day work of a judge, which should arguably also form an important part of the decision about the abilities of the candidates.[77] That is why today's more salient, ideologically laden judicial elections often attract more voters, and often result in more information being readily available and accessible about the candidates, and the issues.

This, however, raises an additional issue: the – often limited – information that voters come to possess about the candidates tend to come from only a few sources, namely those with the biggest purse and the most at stake, which can often lead to a debate that is seriously skewed. Interest group spending on judicial elections also tends to result in putting heightened emphasis on single, ideology-heavy issues, and can transform judicial campaigns into political battlegrounds, whilst the focus on the candidates' abilities and credentials often becomes lost. Against this backdrop, the ancillary question arises, and one that I do not attempt to answer here: shouldn't voter education be a part of any judicial election systems? And if so, whose responsibility is to provide voters with basic information on the function of the judiciary and the professional background of the candidates? When, at what age should voter education start?[78]

An added issue with asking voters to evaluate judicial candidates in elections – be they contested or non-contested – is that a large proportion of voters lacks the legal knowledge necessary for this kind of evaluation to be truly about the qualities that make or break a good judge.[79]

Judicial evaluations can form an important part of providing voters with well-rounded information about the candidates for judicial seats. Several states have established official mechanism to evaluate judicial performance – first in the framework of retention elections[80] –

[77] *Id*. at 28-31.

[78] Former Supreme Court Justice, Sandra Day O'Connor founded iCivics in 2009, to "reverse Americans' declining civil knowledge and participation." The website offers free educational materials, aimed at the younger generations. *See*: http://www.icivics.org/. There are similar civic education-minded websites, providing free educational materials about the U.S. constitutional system. *See e.g.*: the Annenberg Classroom, http://www.annenbergclassroom.org/; Center for Civic Education, http://new.civiced.org/; Campaign for the Civic Mission of Schools, http://www.civicmissionofschools.org/; Citizenship Counts, http://citizenshipcounts.org/; C-SPAN Classroom, http://www.c-spanclassroom.org/; Discovering Justice, http://www.discoveringjustice.org/; The American Bar Association's Division for Public Education, http://www.americanbar.org/groups/public_education/resources/educational_resources/teaching_resource_guides/resources_for_teachers_students.html; Federal Judicial Center, http://www.fjc.gov/, Constitutional Rights Foundation Chicago, http://www.crfc.org/, Street Law, http://www.streetlaw.org/en/home, to name but a few.

[79] *See:* Caufield, *supra* note 26, at 576.

[80] These states were Alaska, Arizona, Colorado, Tennessee and Utah.

in order to provide more information about the candidates to voters.[81] These Judicial Performance Evaluation Commissions had as their primary objective the provision of information to voters that would help them in making a choice in judicial elections, but have come to serve various other purposes besides that, such as providing feedback for judges.[82] The commissions are usually made up of lawyers, judges and members of the public, with an aim at being sufficiently diverse.[83] As for dissemination of reports, every state follows a different practice, whether it is sending out reports by mail to all registered voters or putting information on a website.[84] Although how much voters actually rely on the information provided by these commissions is often contested,[85] nevertheless, judicial performance evaluation should be a part of any elective system in some form, in order to provide voters with reliable information about the candidates running for judicial office.[86]

Another issue that is raised with regards to state judicial elections and judicial selection methods more generally is whether the quality of judges is influenced by the type of selection method that is in use in a state. Rachel Paine Caufield examines the issue in detail, and based on the Chamber of Commerce Institute for Legal Reform rankings for state judges in 2010, she notes that selection methods do count: with regards to fairness, competence, and overall quality, as well as judicial ethics and discipline, merit-selected judges are usually better ranked.[87] This result suggest that the selection method in use for judges has a direct bearing on the quality of judges, a factor that should weigh heavily in the discussion.

Another issue arising with regards to elections is diversity on the bench. It is important to note that – according to several studies – judicial selection methods have an effect on bench

[81] B. Michael Dann & Randall M. Hansen, *Judicial Retention Elections*, 34 LOY.L.A.L.REV.1429, 1438 (2001). For an overview of judicial performance evaluation commissions by state, *see*: http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/judicial&CISOPTR=218 (last visited June 14, 2012).

[82] Dann & Hansen, *supra* note 80, at 1438-1439.

[83] *Id*. *See also:* Marla N. Greenstein, Dan Hall & Jane Howell, *Improving the Judiciary through Performance Evaluations*, reprinted from Chapter 19, Improving the Judiciary through Performance Evaluations." GORDON M. GRILLER, E. KEITH STOTT, JR, THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE, 7TH EDITION, 2001. Available at: http://www.ncsconline.org/WC/Publications/KIS_JudPerJudiciaryPub.pdf (last visited June 14, 2012).

[84] Dann & Hansen, *supra* note 80, at 1439.

[85] *Id*.

[86] For the American Bar Association's Black Letter Guidelines for the Evaluation of Judicial Performance, *see:* http://www.americanbar.org/content/dam/aba/migrated/jd/lawyersconf/pdf/jpec_final.authcheckdam.pdf (last visited June 14, 2012). For a review of the methodology and success of the Alaska, Arizona, Colorado and Utah programs – to achieve a sense of how these work – *see* Greenstein, Hall & Howell, *supra* note 82.

[87] Caufield, *supra* note 2, at 275-276. I am talking about merit selection in detail in Part III.

diversity as well.[88] Since diversity is linked to the promotion of legitimacy, justice, equality and fairness in a number of important ways, the importance of enhancing diversity on the bench cannot be overstated.[89] Since findings vary from court level to court level and significantly differ with regards to gender and racial diversity, the framework of this Article does not permit me to examine the issue in the detail that it would deserve; nevertheless, it is essential to note that the linkage between bench diversity and selection methods has to feature as a significant part in the debate around judicial election.[90]

### 2.4. Restrictions on State Judicial Campaigns

As noted in the previous section on key Supreme Court decisions regarding state judicial elections, there are various restrictions pertaining to these campaigns. Some of these restrictions are part of the federal election canon and state election laws applying to all elections,[91] while other restrictions apply specifically to judges and they are usually contained in state codes of judicial conduct.

Regarding election law, as the Supreme Court has indicated, federal law and jurisprudence is the starting point for regulation.[92] As for campaign expenditures by outside parties, *Citizens United* will no doubt lead to – and to a certain extent, has already done so – significant consequences in this area, as alluded to previously. Spending by advocacy groups, corporations and even unions will no doubt intensify in state judicial elections, especially for state supreme court seats.

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[88] It is just as important to note that according to several other commentators and studies, there can be no link established between judicial selection methods and diversity on the bench. Malia Reddick, Michael J. Nelson, and Rachel Paine Caufield, *Examining Diversity on State Courts: How Does the Judicial Selection Environment Advance – and Inhibit – Judicial Diversity?*, 2010. Available at: http://www.judicialselection.us/uploads/documents/Examining_Diversity_on_State_Courts_2CA4D9DF458DD.pdf (last visited June 14, 2012).

[89] *Id*.

[90] The above cited Article by Reddick, Nelson and Caufield contains an excellent study on the relationship between judicial selection methods and gender and racial diversity, broken down to court levels, and taking into account a number of factors, such as the legal framework, regional differences, and political environment, to name but a few. The study establishes the importance of treating and examining gender and racial diversity differently, as well as the importance of conducting separate studies per court levels. *Id*.

[91] For a state-by-state crack down of campaign finance regulation, *see* the summary of American Judicature society. Available at http://www.judicialselection.us/judicial_selection/campaigns_and_elections/campaign_financing.cfm?state (last visited June 13, 2012).

[92] Ciara Torres-Spelliscy, *Transparent Elections After Citizens United*, Brennan Center for Justice, 5(2011) (Arguing that federal regulation represent the floor, not the ceiling, with regards to campaign finance regulations, with reference to McConnell v. FEC, 540 U.S. 93 at 207-08 (2003)(quoting Buckley)) .

Prior to *Citizens United*, twenty-two states prohibited corporations from using general treasury funds for independent expenditures and two other states placed severe restrictions on corporate campaign spending.[93] These restrictions are now considered unconstitutional under *Citizens United*; some state legislatures have started to repeal the laws that put them in place, and in others, state courts have invalidated such laws.[94] Even prior to *Citizens United*, up until the adoption of the Bipartisan Campaign Reform Act of 2003, corporations could escape the limits of campaign finance law by using the "issue advocacy" loophole.[95] Nevertheless, in the states that had restrictions on corporate campaign spending, corporations did in fact spend significantly less in judicial races.[96] Now with *Citizens United*, corporations can freely use their general treasuries to fund independent ads, even if they can't contribute directly to campaigns, and the result will no doubt be increased corporate – and union – spending. As the Brennan Center for Justice notes, in those states where campaign spending by corporations was not restricted previously, corporate spending represented a much greater proportion of overall election spending that in those states where restrictions were in place.[97] As for other "big spenders", such as political action committees and now SuperPACs, and special interest groups that are not in the corporate form, they can spend as before on supporting such campaigns.[98] In fact, their spending will probably increase with SuperPACs on the rise and with increased spending by everyone else.

At the same time, disclosure rules are still constitutional after *Citizens United*. As Ciara Torres-Spelliscy for the Brennan Center for Justice argues, these rules need to be

[93] Skaggs, *supra* note 11, at 8.
[94] *See e.g.* Ritter v. FEC, 227 P.3d 892 (Colo. 2010).
[95] The issue advocacy loophole was a consequence of one of the most (in)famous campaign finance decisions in the U.S., Buckley v. Valeo, 424 U.S. 1 (1976). Buckley, in interpreting the 1974 Federal Election Campaign Act Amendments ('FECA'), *supra* note 66, distinguished between issue advocacy and express advocacy. The independent expenditure limitations of the law – in the Court's construction – only applied to „expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office". Buckley, 424 U.S. at 44. Thus advertising that uses the "magic words" of "Elect John Doe" or "Defeat Jane Doe" is subject to campaign finance regulations. Issue advertising, that is advertising that avoids the use of these terms, is not subject to the restrictions that apply to express advocacy; placing burdens on such speech would be a violation of the First Amendment. The Bipartisan Campaign Finance Reform Act of 2002 did away with the issue ad loophole by creating a new category (electioneering communications) that are now subject to disclosure and regulation. I have written elsewhere in detail about campaign finance regulations in the U.S., including Buckley and the express/issue advocacy question. *See*: Olivia Radics, *Campaign Finance Law and Corporate Political Speech in the U.S. in Light of Citizens United v. FEC*, De Iurisprudentia et Iure Publico, 2011/3. Available at: http://dieip.hu/2011_3_10.pdf. *See also:* Goldberger, *supra* note 22, at 38-39; Trevor Potter and Kirk L. Jowers, Speech Governed by Federal Election Laws, THE NEW CAMPAIGN FINANCE SOURCEBOOK (Anthony Corrado et als. eds., Brookings Institute 2005), at 205-231; Torres-Spelliscy, *supra* note 91, at 4.
[96] Skaggs, *supra* note 11, at 8.
[97] *Id*.
[98] Goldberger, *supra* note 22, at 40.

strengthened in this new campaign finance climate to provide for transparency in the democratic process, despite the increase in the influx of money in elections.[99] Contribution limits – for now – are also still constitutional, as long as they are not too low.[100] There is, however, a concentrated attack against campaign finance legislation in general, and the coming years will be decisive with regards to its fate.[101]

Campaign activity by judges and judicial candidates themselves is severely restricted. Notwithstanding the effect of *White*, judicial candidates still face a number of restraints with regards to their contact and communication with voters.[102] The American Bar Association amended portions of the Model Code of Judicial Conduct in the aftermath of *White*. While the "announce clause" has been eliminated since 2001, the "pledges and promises" clause has been reinforced.[103] A newly added section of the Model Code requires disqualification if the judge "while a judge or a candidate for judicial office, has made a public statement, other than in court proceeding, judicial decision or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or the controversy",[104] and according to Rule 2.10, judges may not make public statements regarding pending or impending cases.[105] Other relevant parts of the Canon emphasize the importance of freedom from external influences with regards to judges' conduct, such as freedom from fear from criticism, the impermissibility of allowing familial, social, financial or other interests influence the decision-making of the judge, and the Canon also states that "the judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge."[106] These restrictions are often reflected to one extent or

[99] Torres-Spelliscy, *supra* note 91, at 3.
[100] Randall v. Sorrell, 548 U.S. 230 (2006) (invalidating Vermont's contribution limits, ranging from $200 to $400).
[101] *See e.g.*: http://prospect.org/article/citizen-bopp (last visited July 13, 2012).
[102] Goldberger, *supra* note 22, at 16.
[103] *See*: Cynthia Gray, Center for Judicial Ethics, *Developments Following Republican Party of Minnesota v. White, 536 U.S. 765 (2002)*, 1 (2012). Available at: http://www.ajs.org/ethics/pdfs/DevelopmentsafterWhite.pdf (last visited June 14, 2012). This report also discusses changes made by each state in the aftermath of the White decision regarding speech by judges and disqualification of judicial candidates and judges.
[104] ABA Model Code of Judicial Conduct Canon 2.11 (A)(5).
[105] ABA Model Code of Judicial Conduct Canon 2.10 (A). Several state codes of judicial conduct also prohibit the candidates from speaking on pending cases. *See:* Goldberger, *supra* note 22, at 22-23 (arguing that this kind of restriction denies voters access to information that is of immediate relevance, and it provides for a one-sided flow of information, since the incumbent judge, who is involved in deciding the pending case, cannot respond to criticism or attacks regarding his past handling of the case by his challengers).
[106] ABA Model Code of Judicial Conduct, Canon 2.4(A)(B)(C). In comment, the Canon states: "Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences."

another in state judicial conduct codes as well, and they restrict the speech of judges and judicial candidates during their campaign for office as well as their time on the bench.

As for campaign and political activities, judges are severely limited in these in order to preserve their independence. Candidates are generally not permitted to hold political office,[107] or to endorse political candidates,[108] identify as affiliated with a political party,[109] or contribute to political campaigns,[110] and they are also prohibited from accepting endorsements from political parties,[111] or "personally solicit, or accept campaign contributions for the private benefit of the judge, the candidate, or others."[112] There are, however, several exceptions from these rules, contained in Rule 4.2 of the Canon, that allow candidates in certain selection methods to participate in some of the above activities during their campaign.[113] Nevertheless, judges and judicial candidates cannot personally solicit campaign contributions, but they can campaign on their own behalf and are allowed to establish campaign committees that can solicit funds for them.[114]

These rules create significant obstacles for judges to engage in campaign activities, especially with regards to communication with the voters and seeking contributions, in order to ensure impartiality and the appearance of impartiality and independence on the part of the candidates and judges. In other words, the rules serve to insulate judges – as much as possible – from outside influence. Nevertheless, this insulation – while necessary to strengthen judicial independence and impartiality – can also backfire, especially when interest groups and corporations flood judicial campaigns with money and negative attack ads, often leaving the candidates – whether challengers or incumbents – without effective ways to respond. While it is absolutely certain that all of the above rules, as said, are necessary to protect the independence of judges and the judiciary, it is also probable that to ensure the continued integrity, impartiality and independence of the judicial branch and individual judges, it is not necessarily these rules that need to be pulled tighter. Regulation must come from the campaign finance side, and other methods for the selection of state judges must be examined as well.

[107] ABA Model Code of Judicial Conduct Canon 4.1 (A)(1).
[108] ABA Model Code of Judicial Conduct Canon 4.1 (A)(3).
[109] ABA Model Code of Judicial Conduct Canon 4.1 (A)(6).
[110] ABA Model Code of Judicial Conduct Canon 4.1 (A)(4).
[111] ABA Model Code of Judicial Conduct Canon 4.1 (A)(7).
[112] ABA Model Code of Judicial Conduct Canon 4.1 (A)(8).
[113] ABA Model Code of Judicial Conduct Canon 4.2.
[114] ABA Model Code of Judicial Conduct Canon 4.4.

## 3. Judicial Selection Methods in a Historical Perspective

Although the main focus of this Article is state judicial elections, for a comprehensive understanding of state judiciaries, all methods of selection for state judges currently or previously employed need to be examined in a historical context. The method(s) that a country chooses to select members of its judiciary branch is of a formative force with regards to its constitutional balance[115]. As Sandra Day O'Connor said in 2009: "The question of how we choose our judges, whom we entrust to uphold and interpret our laws, speaks to foundational principles of our judiciary and, indeed, our nation."[116]

Even during the revolutionary period, the selection method of judges was a question of primary importance. As Lawrence Friedman notes:

> "American statesmen were not naïve; they knew that what judges believed, and who they were, made a difference. How judges were to be chosen and how they were supposed to behave was a political issue in the Revolutionary generation…State after state – and the federal government – fought battles over issues of selection and control of the judges."[117]

The states initially favored *appointment*. This principally meant legislative appointment,[118] in large part to avoid the stigma that was attached to colonial era judges who were appointed by the executive branch and who were usually loyal to the Crown.[119] The legislative appointment of judges meant that voters had at least an indirect say in the selection of judges; it also reinforced the American ideal of checks on power from below.[120] Another reason for establishing legislative control over the appointment of state judges was the fact that in colonial times – as well as in the years after the Revolution –, the demarcation line between

[115] *See*: Mark S. Cady & Jess R. Phelps, *Preserving the Delicate Balance between Judicial Accountability and Independence: Merit Selection in the Post-White World*, 17 CORNELL J. L. & PUB. POL'Y. 343, 346 (2008)

[116] Sandra Day O'Connor, *The Essentials and Expendables of the Missouri Plan*, Earl F. Nelson Lecture, University of Missouri School of Law (presented at the University of Missouri School of Law, Feb. 27, 2009). Available at: http://law.missouri.edu/lawreview/docs/74-3/OConnor.pdf. (last visited July 16, 2012).

[117] Lawrence M. Friedman, A HISTORY OF AMERICAN LAW 80 (3rd ed. 2005).

[118] Among the thirteen original states, eight provided for legislative appointment by one or both houses, and five used gubernatorial appointment with concurrence by the legislation. Most states provided for lifetime appointment, with good behavior. Joseph R. Grodin, *Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969, 1970 (1988).

[119] *See also* F. Andrew Hanssen, *Learning about Judicial Independence: Institutional Change in the State Courts*, 33 J. LEGAL STUD. 431, 440 (2004). *See also*: Grodin, *supra* note 117, 1970. As Grodin notes, the King's power to appoint and remove judges was deeply resented by the colonist; the Declaration of Independence listed amongst one of its grievances the Crown's such power.

[120] *Id*. at 81. *See also:* Hanssen, *supra* note 118, 440.

judicial and lawmaking functions was still not clear: "To early Americans, lawmaking and judging were not the essentially distinct activities that they would become."[121] Thus, the first twenty-nine states used legislative appointment for selecting their judges.[122]

This shift from executive appointment to legislative appointment was followed by another shift – this time towards elections – during the presidency of Andrew Jackson (1829-1837).[123] Two developments lead here: the emergence of what came to be called "Jacksonian democracy", a movement – spearheaded by the President himself – that emphasized the importance of popular control over democratic institutions and lead to a rise in direct elections and an eroding trust in elected legislatures,[124] and at the same time, as state constitutions started to contain more elements of control over the legislative branch, the state judiciary naturally started to emerge as the executor of this control.[125] Other forces, such as court reformers, were intent on providing the judicial branch with its own "independent base of power" and to raise its prestige by removing the power of selection from the legislature.[126] Thus one objective was to provide more independence to the judiciary from the appointing legislative or in some cases, executive branch, and another – sometimes perceived as contrary – goal was to increase judicial accountability to the populace, in part by lessening "the power of judges to impose a vision of society different from the people's."[127] This latter objective expressed criticism and resentment towards the countermajoritarian role that the majority of the Founders envisioned for the judiciary during the Revolutionary period.[128]

These sentiments lead to the introduction of election of state judges in several states,[129] most notably in the ones that entered the Union following Jackson's presidency,[130]

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[121] Hanssen, *supra* note 118, at 444.
[122] Cady & Phelps, *supra* note 114, at 349.
[123] *Id. at* 349.
[124] Hanssen, *supra* note 118, at 445-446. Legislatures were increasingly viewed with criticism for providing "special favors" and for incurring debts and deficits.
[125] *Id*. at 447-448.
[126] *Id*.
[127] Michael R. Dimino, *Pay No Attention to That Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians*, 21 YALE L. & POL'Y REV. 301, 311 (2003).
[128] John M. Walker, Jr., *Politics and the Confirmation Process: The Importance of Congressional Restraints in Safeguarding Judicial Independence*, 55 SYRACUSE L. REV. 1, 2 (2004): "The American constitutional experience rested, at the bottom, on an attempt to reconcile majoritarian rule, on the one hand, with the evident danger of majoritarian intemperance and oppression, on the other. Central to the Framers' idea of necessary restraint on majoritarian rule was that majority power should be diffused and separated among the various branches of government. To achieve this separation, the Framers determined not only to separate the executive from the legislature, (…) but also to free the judicial branch from any direct influence by the legislature."
[129] As Steven Croley notes, it is difficult to pinpoint what exact factors lead to the adoption and rise of state judicial elections; this was probably the result of a number of parallel events and developments, such as the rise of Jacksonian democracy, the much criticized decision in Marbury v. Madison, that strengthened the role

but some former states in the Union also changed their constitutions accordingly.[131] The first state to elect at least some of its judges was Georgia (1812), and the first state to elect all of its judges was Mississippi (1832).[132] By the Civil War, 24 of 34 states used popular elections to select members of their judiciary.[133] These popular elections were conducted along *partisan* lines, which were presumed to provide voters with more information regarding the political ideology of otherwise often little known judicial candidates.[134]

Towards the end of the 19th century, it became clear that partisan elections do not provide real independence for the judicial branch, and in fact they are prone to render judges dependent on the very same political forces that they were supposed to shield them from.[135] As an alternative to partisan elections and as a means to limit the influence of special interest and other political forces, *nonpartisan judicial elections* started to gain popularity, and by 1927, twelve states adopted this method.[136] Some states adopted and then soon abandoned nonpartisan elections, mainly because voters were unable to make informed choices about candidates without party labels.[137] At the same time, judicial candidates were still preselected by the political parties, therefore it was soon recognized that nonpartisan elections offered little remedy to the problem of judicial dependence.[138]

As criticism of nonpartisan and partisan elective methods grew stronger, the search for a new method for selecting judges began anew. *Retention election* was used for the first time

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of the judicial branch in whole, judicial corruption, resistance to common law traditions, to name but a few. Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U.CHI.L. REV.689, 717 (1995).

130 All of the new states in the Union – joining after 1846 – chose popular election to select at least some of their judges until Alaska's admission in 1959. Larry C. Berkson & Rachel Caufield, JUDICIAL SELECTION IN THE UNITED STATES: A SPECIAL REPORT 1 (2005); http://www.ajs.org/selection/docs/Berkson%205-09.pdf (last visited April 20, 2012). *See also*: Rachel Paine Caufield, *In the Wake of White: How States are Responding to Republican Party of Minnesota v. White and How Judicial Elections are Changing*, 38 AKRON L. REV. 625, 627 (2005); Ferris K. Nesheiwat, *Judicial Restraint: Resolving the Constitutional Tension Between First Amendment Protection of Political Speech and the Compelling Interest in Preserving Judicial Integrity During Judicial Elections*, 24 QUINNIPIAC L. REV. 757, 758 (2006).

131 Cady & Phelps, *supra* note 114, at 349.

132 Berkson & Caufield, *supra* note 129, 1. *See also:* Caufield, *supra* note 129, 626-627.

133 Berkson & Caufield, *supra* note 129, at 1.; Caufield, *supra* note 129, at 627.

134 Judith L. Maute, *Selecting Justice in State Courts: The Ballot Box or the Backroom?*, 41 S. TEX. L.REV.1197, 1204 (2000). There are also indications that more people vote when there is more information available about the candidates, such as party support.

135 Cady & Phelps, *supra* note 114, at 350. *See also:* Berkson & Caufield, *supra* note 129, 1.

136 Caufield, *supra* note 129, at 627. The first instance of using nonpartisan elections was in Cook County, Illinois, in 1873, based on an initiative by judges. *See also:* Berkson & Caufield, *supra* note 129, at 2.

137 Caufield, *supra* note 129, 627.

138 Berkson & Caufield, *supra* note 129, at 2. *See also:* Caufield, *supra* note 2, at 253.

in California in 1934.[139] This system filled judicial vacancies by gubernatorial appointment with approval by a commission.[140] Not long after the initial appointment, judges thus appointed faced an uncontested retention election, where the voters would decide whether to keep them in their position or not.[141] In 1937, the ABA endorsed retention election for judges.[142]

As a parallel development, in 1906, Dean Pound's speech on *The Causes of Popular Dissatisfaction with the Administration of Justice* powerfully argued against the intertwinement of courts and politics: "Putting courts into politics and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the Bench."[143] In 1914, Albert Kales, a law professor at Northwestern University and director of research at the American Judicature Society put into practice the needed change Dean Pound talked about, and developed a plan of *merit selection*.[144]

His original plan involved nomination of judicial candidates by a diverse and nonpolitical nominating commission set up by the state that also contained lay members. Appointees were to be selected by a chief justice.[145] This was later modified so that the final selection was to be made by the executive branch or a legislative body.[146] The plan was adopted in 1937 by the ABA, and included the element that judges thus selected must stand for periodic, non-competitive retention elections after their initial appointment expires.[147] These uncontested elections would provide for the accountability of judges by giving the public a chance to evaluate judges from time to time. Since the first state to apply this plan was Missouri in 1940, the merit selection plan is often referred to as the "Missouri Plan".[148] Thus the Missouri plan in essence adopted and refined the California retention election plan.[149] Currently twenty states use retention elections in some form; many use the Missouri

[139] Attila Badó, A bírák kiválasztása, a tisztességes eljárás és a politika. A Pártatlanság megdönthető vélelme, 54, in A BÍRÓI FÜGGETLENSÉG, A TISZTESSÉGES ELJÁRÁS ÉS A POLITIKA, (Attila Badó ed., Gondolat Kiadó 2011).
[140] Dann & Hansen, *supra* note 80, at 1442.
[141] *Id*.
[142] *Id*.
[143] Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. Rep. 395 (1906).
[144] Jona Goldschmidt, *Selection and Retention of Judges: Is Florida's Present System Still the Best Compromise? Merit Selection: Current Status, Procedures, and Issues*, 49 U. MIAMI L. REV. 1, 8 (1994).
[145] *Id*. at 8.
[146] *Id*. at 9.
[147] *Id*. at 10.
[148] *Id*. at 2. The plan is sometimes also referred to as the merit plan, the Kales plan or the commission plan. Berkson & Caufield, *supra* note 129, at 2.
[149] *Supra* notes 143-147.

Plan, while others have added a senate approval element or have modified the Plan in some way.[150]

Merit selection plans intend to combine elements of judicial independence (initial selection by a nonpolitical commission based on "merit") and judicial accountability (aimed to be ensured by periodic retention elections).[151] This "best of both worlds" approach has been embraced by a large number of states and is currently in use in some form at some level of state judicial elections in thirty seven states and the District of Columbia.[152] Although in recent times, fewer states have converted to its use than in the first decades after its conception, nevertheless those that have, have not abandoned it for a different method.[153]

Merit selection does preserve the right to vote for judges, amidst the framework of retention elections, but this right to vote is conserved only in a diminished form.[154] And while merit selection places emphasis on the quality of the candidates selected, and the elimination of partisanship from the selection process, it is important to note that the appointment process is not entirely free from the latter, since governors often choose their appointees based on political affiliation.[155] It is also worth noting that voter apathy in merit plans is even more endemic than in elections; the non-competitive nature of the race seems to stymie interest in the candidates and often leads to decreased voter turnouts.[156] Critics also argue that voter choice is narrowed with the use of noncompetitive retention elections, and that these elections rarely result in a loss for the incumbent judge.[157] As Rachel Paine Caufield notes, however, this argument implies that elections only reach their purpose if an incumbent judge is removed.[158] Despite the criticism, it seems that most states that have adopted a merit selection system for choosing some or more of their judges are content with their choice. The plan

[150] Dann & Hansen, *supra* note 80, at 1443. For a state-by-state comparison, *see*: http://www.impartialcourts.org/pdf/State-by-State.pdf (last visited June 14, 2012).
[151] Caufield, *supra* note 26, at 573-575.
[152] *See*: http://www.judicialselection.us/uploads/documents/Judicial_Merit_Charts_0FC20225EC6C2.pdf (last visited April 20, 2012); http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state= (last visited April 20, 2012). The American Judicature Society also published a summary of the current status of the merit selection plan on its website, containing a state-by-state breakdown, available at: http://www.judicialselection.us/uploads/documents/Judicial_Merit_Charts_0FC20225EC6C2.pdf (last visited April 20, 2012).
[153] Caufield, *supra* note 2, at 255.
[154] Geyh, *supra* note 5, at 55-56.
[155] *Id*. at 56.
[156] *See:* Varsho, *supra* note 73, 469-470; Dann & Hansen, *supra* note 80, at 1437.
[157] A study of retention elections between 1964-2006 by Larry Aspin shows that retention elections still routinely result in a confirmation of the incumbent judge. Larry Aspin, Judicial Retention Election Trends 1964-2006, 90 JUDICATURE 208, 213 (2007).
[158] Caufield, *supra* note 26, 577.

seems to afford a carefully balanced compromise between the complementary goals of judicial accountability and judicial independence, the subjects of the following section. Another important factor to take into account with regards to merit selection plans is that they tend to result in judges who rank better in terms of competence, fairness and quality, as well as judicial ethics, than judges chosen by other selection methods.[159]

As discussed above, currently the following judicial selection systems are in use in the U.S.: gubernatorial or legislative appointment, partisan, non-partisan and retention elections, and a hybrid system (election/appointment)/the merit plan.[160] As you can see, these selection methods are either appointment or election-based, or a combination of these. At present, thirty-nine states elect at least some of their judges,[161] but only eight states select all of their judges through partisan elections.[162] Thirteen states use nonpartisan elections to select judges.[163] Altogether, 9 out of 10 of all state judges (87%) run in election either to gain their seat in the first place or to retain it.[164] Even merit selection plans tend to contain an elective element in the form of retention elections, which despite their non-competitive nature, still establish a form of voter control. Elections are thus a core element of the judicial selection system in the U.S. on the state level, and are unlikely to be easily overhauled.

As discussed in detail in the following section, two concepts: judicial independence and judicial accountability have the most to do with defining the direction in which a state goes in selecting a method.[165] States prioritizing judicial accountability will lean towards judicial elections, whereas states favoring judicial independence will probably opt for appointment or merit selection plans.

[159] *See supra* note 85.
[160] Cady & Phelps, *supra* note 114, at 349. Selection methods for the judiciary are outlined in the state constitutions. *See*: http://www.judicialselection.us/judicial_selection/reform_efforts/altering_selection_methods.cfm?state= (last visited April 20, 2012).
[161] Dorothy Samuels, *The Selling of the Judiciary: Campaign Cash 'in the Courtroom'*, N.Y. TIMES, April 14, 2008. Available at: http://www.nytimes.com/2008/04/15/opinion/15tues4.html (last visited January 17, 2012). The American Judicature Society has compiled comprehensive information on judicial selection processes in each state, providing an invaluable database for such inquiries. *See*: http://www.judicialselection.us/ (last visited January 17, 2012).
[162] Without Fear or Favor in 2011, *supra* note 12, at 26.
[163] *Id*.
[164] Skaggs, *supra* note 11, at 2.
[165] Cady & Phelps, *supra* note 114, at 347.

## 4. Judicial Independence and Judicial Accountability

> "An accountable judiciary without any independence is weak and feeble. An independent judiciary without any accountability is dangerous."
> Stephen B. Burbank[166]

### 4.1. Judicial Independence

The lack of a uniform method of selection for state judges is symbolic of the absence of understanding regarding the role and status of the judiciary. As David E. Pozen notes, "Americans are conflicted about how we select our judges because we are conflicted about what we want them to do."[167] America wants its judges to be independent from the other branches of government, it wants them to be above the reach of politics, but it also wants them to be accountable to the people in some ways – usually by way of popular elections. Elections provide a way to exercise the control from below that Americans are so fond of, but it also renders the judges susceptible to political and ideological battles, which stands at odds with the neutrality and impartiality that is required of them. [168] Thomas Jefferson wrote of the judicial function: "When one undertakes to administer justice, it must be with an even hand, and by rule; what is done for one must be done for everyone in an equal degree."[169] It is the independence of the judiciary that can assure that this is so, but too much independence is also considered dangerous. This is why "judicial elections, including retention elections, illustrate profound and irreconcilable tensions" in American democracy.[170]

At issue here are two concepts: judicial *independence* and judicial *accountability*. Over the course of the American history of judicial selection, these two concepts have battled for recognition and dominance, with varying success in achieving balance.[171] As Malia Reddick writes:

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[166] Stephen B. Burbank, *What Do We Mean by "Judicial Independence"?*, 64 OHIO ST. L. J. 323, 325 (2003).
[167] David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM . L. REV. 265, 272 (2008).
[168] *See e.g.*: Goldberger, *supra* note 22, at 1.: "The widespread use of judicial elections to select state judges continues to create a serious tension between our respect for elections as a preferred mechanism to select our state court judges and our desire to have judges who are sufficiently removed from politics to be fair and impartial decision-makers."
[169] Thomas Jefferson, as quoted in Caufield, *supra* note 2, 251.
[170] Caufield, *supra* note 26, at 573.
[171] *See*: Without Fear or Favor in 2011, *supra* note 12, at 21.

> "Generally, judicial independence refers to the common law tradition of a judiciary that is institutionally immune from outside political pressures in the resolution of individual cases, whereas judicial accountability comports with democratic principles and allows the judiciary to be responsive to changes in public opinion."[172]

The United Nations defined the contours of judicial independence in the 1985 *Basic Principles on the Independence of the Judiciary* by emphasizing decision-making by judges "without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter for any reason".[173] In 2007, the American Bar Association endorsed this definition.[174]

It is important to note that judicial independence is important in both the *institutional* sense (i.e. that the entire judicial branch should be independent from pressure from the other two branches of power, as in the doctrine of the separation of powers), and as *decisional* independence, which concerns the individual judge's freedom from outside influence in the decision-making process.[175] In the American democratic system, both aspects of judicial independence are invaluable: institutional independence – firmly established for the federal judiciary in Marbury v. Madison[176] – is essential in drawing constitutional boundaries around the legislative and the executive branch in order to exercise a check over them, whereas decisional independence is necessary to insure judicial integrity and impartiality. As John Ferejohn and Larry Kramer note: "Independent judging makes it possible that substantive

[172] Malia Reddick, *Merit Selection: A Review of the Social Scientific Literature*, 106 DICK. L. REV. 729, 729 (2002).

[173] U.N. Dept. Int'l Econ. Soc. Affs., U.N. Secretariat, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Aug. 26-Sept. 6, 1985, *Basic Principles on the Independence of the Judiciary,* 59, U.N. Doc. A/CONF.121/22/Rev.1 (1985), available at: http://www1.umn.edu/humanrts/instree/i5bpij.htm.
Certain forms of pressure are inevitable and permissible, as John A. Ferejohn and Larry D. Kramer note, such as the legislature changing the applicable law, a fact that needs to be expressed in judicial decisions as well. John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y. U. L. REV. 962, 965 (2002).

[174] *See:* David Pimentel, *Reframing the Independence v. Accountability Debate: Defining Judicial Structure in Light of Judges' Courage and Integrity*, 57 CLEV. ST. L. REV. 1, 4-5 (2009).

[175] *Id*. at 11.

[176] Marbury v. Madison, 5 U.S. 137 (1803). Interestingly, although not surprisingly, given the background of Marbury v. Madison, Thomas Jefferson, who had been a supporter of life tenure for judges to ensure independence for the branch, argued for limited terms and election for judges following Marbury v. Madison. Concerns about unelected judges intensified in the aftermath of this groundbreaking decision. Croley, supra note 128, at 715.

rules adopted now will be reliably upheld in the future, even in the face of strong temptations to do otherwise."[177]

This leads us to our next point: the judiciary also has the responsibility to provide protection for the minority from the preferences of a perpetually shifting majority by upholding individual rights. This "countermajoritarian independence"[178] concerns both institutional and decisional independence, and it is through the concept of *judicial review* that it has gained reality – and teeth – in the U.S. Judicial review is what ties together the concept of democracy – rule by many, – and constitutionalism – the creation of restraints on the will of the majority, in order to protect individual rights, usually in the form of a constitution – in the American system of government, since it is the judiciary that is charged with the authoritative interpretation of the Constitution.[179]

Judicial review has changed much about the way the public sees the judiciary.[180] By exercising judicial review, the branch that was formerly seen as the weakest even by the Founders themselves,[181] suddenly gained power, as noted by Rachel Paine Caufield.[182] Many express and have long expressed dissatisfaction and alarm at the judiciary's power to overrule the majority's decisions. This is to be expected. But a fundamental tenet of the American justice system is that one of its core functions "may be to protect the minority from the 'tyranny of the majority'".[183] The Founders, as Erwin Chemerinsky points out, were very much wary of majoritarianism; quoting Charles Beard, he writes: "majority rule was

[177] Ferejohn & Kramer, *supra* note 172, at 967.
[178] Sambhav N. Sankar, *Disciplining the Professional Judge*, 88 CALIF. L. REV. 1233, 1238-1239 (2000).
[179] Croley, *supra* note 128, at 702-707.
[180] Another facet of this issue is that the perception and popularity of the current Supreme Court and its decisions have a definitive influence on how the population perceives judicial review. Jill Lepore writes in a The New Yorker article: "What people think about judicial review usually depends on what they think about the composition of the Court. When the Court is liberal, liberals think judicial review is good, and conservatives think it's bad. This is also true the other way around." Jill Lepore, *Benched: The Supreme Court and the Struggle for Judicial Independence,* NEW YORKER, June 18, 2012, at 78.
[181] Note how Alexander Hamilton wrote of the weakness of the judicial branch as compared to the other two branches in The Federalist No. 78: "(...)the judiciary is beyond comparison the weakest branch of the three departments of power, (…) it can never attack with success either of the other two, and (…) all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter, (…) so long as the judiciary remains truly distinctive from both the legislature and the Executive." In a footnote, Hamilton concludes, citing Montesquieu: "Of the three powers above mentioned, the judiciary is next to nothing." Alexander Hamilton, The Federalist No. 78. Available at: http://www.constitution.org/fed/federa78.htm (last visited June 11, 2012).
[182] Caufield, *supra* note 2, at 260.
[183] Pimentel, *supra* note 173, at 5.

undoubtedly more odious to most of the delegates to the Convention than was slavery."[184] James Madison thus wrote of the dangers inherent in the power of the majority:

> "Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents."[185]

This perspective was very much in line with the common sentiment during the 18th century that the legislative was indeed the most dangerous branch due to its close ties to the people.[186] Specifically during the revolutionary period in America, both the judiciary and the executive were thought of as relatively weak branches, and thus much less effort was made to draw boundaries around them to constrain their power.[187] At the same time, neither the executive, nor the judiciary was strong enough at first to exercise the kind of check on the legislature that had been originally conceived under the plan of separation of powers.[188]

Besides the legislative and executive branches, today majoritarian pressures can come from other sources as well, such as the media.[189] Moreover, in today's more intensive election climate, majoritarian pressures often become amplified through campaign spending by interest groups. As a result, state judicial elections become more and more similar to legislative elections: they are – as referred to earlier – "noisier, nastier, costlier",[190] and it is the independence of the judiciary that becomes endangered in the process.

Judicial independence, as it stands today, is the result of a lengthy process, and is continuously shaped by the circumstances of every era, similarly in many ways to the institution of judicial review. In the first decades of the Republic, the judiciary was far from being the veritable third branch of power that it later became. Judicial independence mostly

[184] Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 65(1989).
[185] Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), as quoted in Ferejohn & Kramer, *supra* note 172, at 968.
[186] John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353, 378 (1999).
[187] *Id*. at 379. As it turned out later, however, the power of the federal executive branch was underestimated by the Framers, and the executive was not timid in exercising more control over the judiciary than what was acceptable for an independent judicial branch. A good example of this is the battle over the makeup of the judiciary by Presidents John Adams and Thomas Jefferson. An interesting remark from Ferejohn is that the president was most dangerous to the judicial branch when he was most popular with the people – the same danger that Madison and others alluded to with regards to the legislature. *Id*. at 380-381.
[188] *Id*.
[189] Ferejohn & Kramer, *supra* note 172, 969-971.
[190] *Supra* note 4.

converged around the independence of individual judges or decisional independence, while institutional independence received significantly less attention.[191] Emblematic of this is the fact that early constitutions generally left the structure of the courts unregulated.[192] This also meant that originally legislatures still possessed significant influence over court structure, and the separation of powers principle was far from being realized. As Michael Buenger notes, "modern concepts of the judiciary's institutional independence (…) are the result of a long evolutionary process, not the result of universal acceptance present at the Foundation of the Republic."[193]

On the federal level, it is mostly the power to decide whether a law passes constitutional muster – exercising judicial review – that has elevated the judiciary to become a separate branch,[194] whereas decisional independence was provided for by lifetime tenure and secure compensation.[195] On the state level, it took a series of structural transformations, such as the increasing supervisory roles of supreme courts and the introduction of modern court administration – at the most basic level – to reach the kind of institutional independence that we traditionally talk about with regards to the judiciary.[196] Individual independence never reached the same level as for federal judges, since lifetime tenure is not granted to state judges, and also because elections are still used in some form to select an overwhelming majority of state judges, and this also diminishes judicial independence.

The judiciary branch's independence – in an institutional sense and both on the federal and state level – is also somewhat curtailed by the legislative branch's power over their creation, and of the "purse", their budget, as well as by the legislation's power to determine the jurisdiction of the courts,[197] and the executive branch's power over the "sword" – the enforcement of judicial decisions.[198] In Alexander Hamilton's words:

> "(…)In a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution (…). The Executive not only dispenses the honors, but

[191] Michael L. Buenger, *supra* note 9, 1002-1005.
[192] *Id.* at 1007-1008.
[193] *Id*. at 1009.
[194] *Id*. at 1024-1025.
[195] Mira Gur-Arie & Russell Wheeler, *Judicial Independence in the United States: Current Issues and Background Information*, Available at: http://www.fjc.gov/public/pdf.nsf/lookup/JudIndep.pdf/$file/JudIndep.pdf (last visited May 4, 2012).
[196] Buenger, *supra* note 9, at 1016-1021.
[197] Ferejohn & Kramer, *supra* note 172, 984-987.
[198] Ferejohn & Kramer, *supra* note 172, at 982-983.

> holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatsoever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." (*emphasis in the original*)[199]

It is also important to remark that complete decisional independence does not exist, nor should it be pursued as an objective.[200] As many commentators urge, judicial independence – as well as judicial accountability, as we shall come to see – should serve as a "means to an end",[201] the end being a judiciary that is impartial, that is true to the rule of law and that holds itself to consistent adjudicatory standards. In order for judicial independence to reach this end, it needs to be balanced by a certain degree of judicial accountability in order to ensure democratic control over the judiciary and to provide safeguards against arbitrary decision-making. In theory, everyone seems to agree readily that judicial independence and judicial accountability should and could easily co-exist and complement each other. It is in the practical application of these concepts that problems tend to arise.

### 4.2. Judicial Accountability

It is challenging to draw clear margins around judicial independence, since – as alluded to earlier – a certain degree of accountability is necessary to complement it. Judicial accountability serves a number of functions that are often so intertwined that we fail to properly distinguish them. It is connected to establishing and maintaining public confidence in the courts – very much like judicial independence is for other reasons –, and it is a means of providing democratic control over the judiciary. We cannot forget that – especially with the evolution of judicial review – the judiciary is still a political branch, although admittedly much less than the executive and the legislative branches. While it is true that judges cannot be as responsive to the will of the populace as other elected officers need to be, nevertheless,

[199] The Federalist No. 78, *supra* note 180.
[200] For once, the separation of powers dictates that none of the three branches can exercise full independence in disregard of the decisions of the other two branches. *See:* Burbank, *supra* note 165, at 327.
[201] Burbank, *supra* note 165, at 324. *See also:* Ferejohn & Kramer, *supra* note 172, at 963-964.

certain political concerns have always surrounded the function and status of the judiciary, and more and more so today, as judges make more and more policy decisions, be this a welcome development or not. That is also why the complete independence of the judicial branch will never be realized; nor should it. At the same time, while a certain degree of judicial accountability is a necessary feature of democracy, judges cannot be held accountable to the public will – or whim – in the same way as members or officials of the other branches need to be responsive. It is indeed this feature that makes the judicial branch unique and is in many ways a cornerstone of its status as a veritable third branch.[202]

Judges also need to be held accountable to the rule of law.[203] It is imperative, as Sambhav Sankar notes, that "neutral principles rather than a judge's personal preferences motivate her decision".[204] Moreover, judges need to adhere to certain standards of conduct and behavior – both on and off the bench.[205] All this is essential for the legitimacy and integrity of the court system. Errors are unavoidable, but a difference should be drawn between honest mistakes and decisions that blatantly disregard the law. In the former case, correction is needed; in the latter, accountability is unavoidable. As Tennessee Justice Adolpho Birch put it: "Judicial independence is the judge's right to do the right thing, or, believing it to be the right thing, to do the wrong thing."[206] Admittedly, outside the realm of theory, deciding the difference between an honest mistake and a deliberate overstepping of legal boundaries is a hard task, especially since probably no judge would admit to intentional wrong-doing.

For federal judges, accountability is ensured through the *politicized appointment process* and the possibility of *impeachment*.[207] Following the appointment process, federal judges are tenured for life, which provides considerable insulation to members of the federal judiciary, especially considering the rather scarce use of the impeachment procedure.

With regards to the state judiciary, the states have recourse to a number of disciplinary methods when it comes to holding judges accountable for their actions in the course of or outside their work. *Impeachment* is one way to do so. Nearly all fifty states have the possibility of impeachment set out in their respective constitution, mostly with the

[202] Sankar, *supra* note 177, at 1238 - 1239.
[203] Pimentel, *supra* note 173, at 15-16. *See also*: Charles Gardner Geyh, *Rescuing Judicial Accountability from the Realm of Political Rhetoric*, 56 CASE W. RES. 911, 916 (2006).
[204] Sankar, *supra* note 177, at 1237 – 1238.
[205] *Id*. at 1238.
[206] Linda Greenhouse, *Judges Seek Aid in Effort To Remain Independent*, N.Y. TIMES, Dec. 10, 1998, at A20.
[207] Sankar, *supra* note 177, at 1239.

legislative branch making the decision.[208] The usual grounds for the procedure are "gross misconduct", some type of "malfeasance", or "maladministration", to name but a few.[209] Impeachment is not a common practice in the states, and as the American Judicature Society notes, in the past fifteen years only two judges have been successfully impeached.[210]

Other removal options include the *legislative address*, provided for by only sixteen state constitutions, and as the AJS notes, a "remnant of colonial times",[211] *recall elections* for serious offenses, [212] and *judicial conduct commissions.*[213] Judicial conduct commissions – first established in California in 1960 and now existing in every state – are the most used disciplinary method for state judges.[214] The procedure usually starts with a confidential investigation prompted by a complaint from a member of the public; after formal charges, a hearing is held which ends with a vote by the commission on the charges.[215] Sanctioning power resides either with the commission or upon the recommendation of the commission with the supreme court of the state.[216]

### 4.2.1. Elections as Disciplinary Control

Besides the above disciplinary actions, which serve as a means of control, today *elections* are considered by many to serve as the primary vehicle for exercising a check over state judges.[217] Due to a lack of information about the candidates, their abilities and qualities on the voters' part, judicial elections rarely, if ever, serve truly disciplinary purposes; rather, voters – if they vote at all – vote against unpopular decisions and therefore the main, and

[208] American Judicature Society, Methods of Removing State Judges, http://www.ajs.org/ethics/eth_impeachement.asp (last visited May 3, 2012).
[209] Usually the impeachment procedure starts with a House of Representatives vote on the impeachment. If it passes, the procedure follows in the state Senate with a trial, and a Senate vote on whether or not to convict. *Id*.
[210] *Id*.
[211] The legislative or bill of address allows the legislature to vote for the removal of a judge. This often requires gubernatorial consent as well. Most states use impeachment instead of legislative address these days. It is also a much broader category than impeachment, and covers a wide range of causes for removal. *Id*.
[212] Recall elections exist only in a few states, and are applied only for serious offenses. It is a two-part process, starting with a recall petition from voters presented to elections officials, and in case the requisite number of signatures is met and there are no successful challenges to the petition, a recall election takes place where the judge is removed if the majority votes for his or her recall. *Id*.
[213] *Id*.
[214] *Id*.
[215] *Id*.
[216] Sanctions can range from reprimand through censure, fine, suspension, involuntary retirement to removal. *Id*.
[217] Geyh, *supra* note 5, at 49.

perhaps only, objective that judicial elections can in all fairness serve is democratic accountability.[218]

The problem with using elections as the primary tool for disciplinary control is manifold. Judges may fear that as a consequence of their decisions, which can run contrary to the public will, they might lose reelection; this of course can influence their impartiality.[219] It is a dangerous development if judicial campaigns become a standardized vehicle for removing judges whose decisions run counter to the sentiments of the majority, and this is exactly the kind of danger that Madison warned about.[220] It is worth noting that many special interest groups that target specific incumbent judges with whose prior decisions, judicial philosophy or political leanings they disagree, intend their well-funded, often very negative campaigns to send a message to other judges who might be of the same political or judicial sentiment.[221] It is hard – or in fact, almost impossible – to establish how often these warnings achieve their objective, but we can probably all agree that even one occasion is more than enough.

To serve a truly disciplinary purpose, voters should possess adequate information about judicial candidates, their credentials and their work on the bench. As noted earlier,[222] and as studies indicate, currently this is not the norm. Without reliable and adequately in-depth information about the candidates, it is hard to surmise that elections can serve the kind of disciplinary function that some commentators claim they do. It is also worth noting that the qualities that make a judge good at his profession do not always coincide with the qualities required to run a successful judicial campaign: "The worst of judges may run the best of campaigns and be reelected."[223]

### 4.2.2. Elections as a Means of Democratic Control

Aside from the sort of disciplinary control that elections have come to signify, their other primary purpose is to hold judges accountable to the populace, especially since the judiciary has the power to overrule executive and legislative decisions: decisions that are made by

[218] Sankar, *supra* note 177, 1250-1251.
[219] Geyh, *supra* note 5, at 51-52.
[220] *See supra* note 184.
[221] *See supra* note 20.
[222] *See supra* note 5.
[223] IRENE A. TESTITOR & DWIGHT B. SINKS, JUDICIAL CONDUCT ORGANIZATIONS 2 (1980), as quoted in Sankar, *supra* note 177, at 1250.

elected, and thus accountable, officials. As discussed earlier, democratic accountability is an integral part of the system of checks and balances with regards to all three branches of power, including the judiciary. Complete independence cannot be a realistic or even desirable objective in a well-functioning democracy. Nevertheless, while judicial accountability is a necessary and complementing counterweight to judicial independence, judicial elections carry with them the danger of exposing the candidates to the same dangers that they had been threatened by from the other branches before their institutional independence was carved out. As Ferejohn and Kramer state: "Separating the judiciary from the other branches of government means little if judges are then subjected directly to the very same pressures that caused us to mistrust executive and legislative influence in the first place."[224]

As detailed in Part II., these pressures are very real, and can have a profound effect on the functioning of the political system. Special interests have long tried to influence the legislative and executive branches; lobbying and fundraising for political campaigns provide the perfect avenues for that. With a laxer campaign finance environment – due to the deregulative impact of recent Supreme Court decisions, such as *Citizens United* –, campaign fundraising is spinning out of control for all three branches of government.[225] Even judicial elections have become more high profile compared to previous decades, and money has taken center stage.[226] As noted earlier, interest groups and corporations are foremost among the supporters of judicial campaigns. Many of those who donate or spend on these campaigns will at some point be involved in a case that may end up in front of the very judge whose campaign they had previously supported, as was the case in *Caperton v. Massey*. Obviously, when this happens, the impartiality of the judge is called into question, and grave doubts emerge as to whether due process was realized for all parties.[227]

Judicial elections may not be in and of themselves harmful to the image (and reality) of an impartial judiciary. It is elections coupled with robust campaign spending that distorts this otherwise democratic process.[228] Lack of voter knowledge about the candidates is an additional facet of this issue. In other words, while elections may not be the best method for selecting state judges, they are not inherently bad for justice and due process, and can serve

[224] Ferejohn and Kramer, *supra* note 172, at 969.
[225] *See infra* Section II. 2.
[226] *See infra* Section II. 1.
[227] Brief of the Center for Political Accountability and the Carol and Lawrence Zicklin Center for Business Ethics Research as Amici Curiae Supporting Petitioners, Caperton v. A.T. Massey Coal Company, 129 S. Ct. 2252 (2009) (No. 08-22).
[228] *See:* Brief of the Brennan Center for Justice at NYU School of Law et al. as Amici Curiae Supporting Petitioners, Caperton v. A.T. Massey Coal Company, 129 S. Ct. 2252 (2009) (No. 08-22).

accountability. Elections are, however, prone to many dangers, especially when money is allowed free reign. Corruption and the appearance of corruption or outside influence over judicial decisions can prove to be lethal to the integrity of the judiciary.

If the population loses faith in the integrity and fairness of the judicial system, the result can be devastating for this branch. As former Chief Justice of the Supreme Court of Texas, Thomas R. Phillips notes, "the authority of the 'least dangerous branch' rests almost entirely on the voluntary compliance with its rulings by the other branches of government and by the public at large".[229] In this respect, not only the actual independence of the court matters, but also its perceived impartiality and fairness.[230] A lack of trust in the judiciary can impair the functioning of the entire democratic process; citizens who perceive the judiciary as biased might look for alternative ways to solve their disputes.[231]

Fighting corruption and the appearance of corruption must start from the inside. It is very hard to control private interests attempting to exercise undue control over judges, especially in today's deregulated and laxer campaign finance environment, not to mention the fact that beyond a certain point – what point that may be is, as it stands now, subject to an often fluctuating Supreme Court interpretation of free speech rights, – tempering with the individual rights of political participants in the marketplace of free speech will most likely be deemed unconstitutional. American constitutional jurisprudence has traditionally afforded robust protections to the freedom of speech, on several occasions to the hindrance of other constitutional rights. The current Supreme Court fully extended these robust protections to corporations as well with *Citizens United*, and corporations' war chests can be almost bottomless, not to mention the fact that many of them have serious stakes at litigations in state courts. As for other forms of restraint on private actors – economic or social, – those might be even harder to establish from both a constitutional and democratic standpoint.[232] As John Ferejohn notes:

> "(…)It is also clear that the democratic branches are dangerous as well, and that constitutional protections that private interests enjoy appropriately provide them with powerful protections against governmental attempts to check their powers or regulate their actions. Therefore, we should expect that, within a liberal

[229] The Honorable Thomas R. Phillips, *Electoral Accountability and Judicial Independence*, 64 OHIO ST. L. J. 137, 144 (2003).
[230] *See:* Commission to Promote Public Confidence in Judicial Elections, Judicial Elections Report, at 1. Available at: http://www.nycourts.gov/reports/JudicialElectionsReport.pdf.
[231] *Id*.
[232] Ferejohn, *supra* note 185, at 370 - 371.

> democracy, the problem of private interests inappropriately influencing legal processes is likely to be chronic."[233]

The problem is indeed chronic, as testified to by the numbers involved. But what are the solutions?

## 5. A Way Out? - Solutions

There is no shortage of proposed solutions to the dilemma presented by state judicial elections. The proposals differ in approach: some aim to reform election law, or more specifically, they would tighten campaign finance regulations, whereas others would initiate a change in selection methods, or they would eliminate judicial elections altogether.

### *1) Eliminating Contested Judicial Elections*

Time and time again, the proposal to eliminate contested elections altogether arises, with merit selection being advanced as a replacement for elections.[234] There have already been efforts to that extent in some states. In November 2010, Nevada held a ballot to decide whether to eliminate judicial elections and replace them with merit selection for high court judges; the ballot measure was defeated.[235] Other states have also manifested plans to replace contested elections with some form of merit plan.[236]

While merit selection has proven to be a workable, balanced compromise between judicial independence and accountability, and is free from many of the flaws of judicial elections, it is – for the foreseeable future at least – quite improbable that contested elections will be dispensed with altogether in the fifty states. For now, competitive judicial elections seem to be much too ingrained in a majority of the states as a means of holding judges accountable to the populace; change will come slowly, or not at all in many places, as the Nevada ballot indicates.

[233] *Id*. at 371.
[234] Skaggs, *supra* note 11, at 13.
[235] Associated Press, Nevada Voters Reject Judicial Ballot Measures, LAS VEGAS SUN, Nov. 3, 2010, available at http://www.lasvegassun.com/news/2010/nov/03/nv-nevada-measures-2nd-ld-writethru/.
[236] Skaggs, *supra* note 11, at 13. Efforts are under way in Pennsylvania, Ohio and Minnesota to introduce merit selection as a replacement for competitive election.

*2) Campaign Finance Reform*

*a) Public Financing Plans for Judicial Elections*

In case traditional, competitive elections are here to stay, there are also suggestions to make elections cleaner; the adoption of public financing plans – perhaps similar to the one already in place for presidential elections[237] – is one example.[238] As a report by the Brennan Center for Justice points out, there is a wide range of models available – developed for various state and local elections in the past decades – that could serve as a guideline in the development of public financing system(s) for judicial elections.[239] Based on the type of election for which it would be used (contested or retention elections, for instance), these models can be accordingly tailored.[240] Within the public financing system, the most common variants are: direct cash grants to candidates, financing the campaigns fully or partially, complemented by an agreed spending limit for the candidates; tax breaks or cash refunds that reimburse campaign contributors to a certain extent; and in-kind benefits, such as free or reduced-priced advertising.[241]

The first full public financing system for judicial elections was introduced in North Carolina in 2004.[242] Other states, such as Kentucky, Wisconsin (which would be rejoining), and Ohio, are also considering joining the public financing system in 2012.[243] Indirect reimbursements in the form of tax breaks or cash refunds to campaign contributors can be combined with partial public funding, or can stand alone; their advantage is that they

[237] The presidential public financing systems allows qualified presidential candidates to receive federal government funds to pay for their campaigns in both the primary and general elections. National political parties also receive federal funds for their nominating conventions. The first public funding program for presidential elections was administered by the Federal Election Commission in 1976, chiefly as part of the reform efforts in the aftermath of the Watergate scandal. The public financing system was set up by the 1974 FECA Amendments. 2 U.S.C. §431 et seq. (Public Law 92-225). In order to be eligible, candidates must agree to spending limits in their campaign. The system is financed from dollars voluntarily checked off by taxpayers on their federal income tax returns.
For a summary of the presidential public financing system, *see*: http://www.fec.gov/pages/brochures/pubfund.shtml (last visited June 26, 2011).

[238] Skaggs, *supra* note 11, at 12.

[239] Deborah Goldberg, Brennan Center for Justice, *Public Funding of Judicial Elections: Financing Campaigns for Fair and Impartial Courts*, 3, (2002), available at: http://brennan.3cdn.net/41535ba38d3d460fc6_kwm6b1ecu.pdf (last visited June 26, 2012).

[240] *Id*. at 4.

[241] *Id*. at 6-7.

[242] *Id*. at 9. Such a scheme is in place in Minnesota, where both of these advantages have been noted in publicly financed judicial elections.

[243] Bill Raftery, *New Public Financing Systems for Judicial Elections to be Considered in Kentucky, Ohio & Wisconsin*, Jan. 18, 2012, available at http://gaveltogavel.us/site/2012/01/18/new-public-financing-systems-for-judicial-elections-to-be-considered-in-kentucky-ohio-wisconsin/ (last visited July 16, 2012).

encourage constituent support and reduce the size of contributions, and thus can have a positive effect on overall campaign spending.[244]

Deborah Goldberg argues that the system that would promote impartial courts best is the full public funding system, since this scheme reduces the most the influence of money on elections, and thus, on candidates.[245] At the same time, it might also serve to advance diversity on the bench by encouraging qualified candidates without the support of a wealthy community as well as minority or women candidates to enter the race when they would otherwise be discouraged to do so.[246] A full public financing system for judicial elections could be complemented with in-kind benefits – such as free television time or voter guides – that would also be useful in providing more information about the candidates.[247] Also according to Goldberg, such a system would need to be complemented with contribution limits for those candidates that opt out of the public funding system, as well as adequate reporting requirements and adequate public access to the data thus gathered.[248]

*b) Tightening Disclosure and Disclaimer Rules*

As noted earlier, Citizens United has radically transformed the campaign finance landscape, and has made a significant step towards deregulation, by undoing limits on independent expenditures. Although tightening campaign finance rules would no doubt benefit state judicial elections by restricting the amount of money flowing into these elections, as a result of the Court's decision, the playing field in this area is very limited for regulators. Limits on independent expenditures are thus prohibited under the First Amendment after Citizens United, as has been reaffirmed (with regards to corporations) by the Court in a 5-4 decision in American Tradition Partnership, Inc. v. Bullock in June 2012.[249] This means that many states

[244] Goldberg, *supra* note 238, at 9.
[245] *Id*. at 10.
[246] *Id*.
[247] *Id*.
[248] *Id*. at 11-12. Reporting requirements should cover both candidates that participate in the public funding system and candidates that don't. It should also cover third party independent expenditure. Although reporting requirements exist in every state that holds judicial elections, full disclosure often fails because of campaign finance loopholes, such as the Supreme Court-orchestrated difference between express and issue advocacy (only spending on express advocacy needs to be reported). Id. at 14. For the difference between express and issue advocacy, *see: supra* note 94.
[249] 567 U.S._ (2012).The Supreme Court overturned a Montana Supreme Court decision that upheld a 1912 voter-approved ban on corporate political spending.

that have previously prohibited corporate and union spending in campaigns now find themselves in a radically transformed campaign finance landscape.[250]

However, other forms of campaign finance restrictions could still be applied in a constitutional manner in state judicial elections and these avenues of regulation gain added significance and urgency in today's laxer campaign finance climate. Campaign finance disclaimer[251] and disclosure rules have been constantly upheld as constitutional in the past three decades by the Supreme Court.[252] As corporate and union spending intensifies across the board, campaign finance disclosure becomes one of the primary tools of providing transparency in these elections. Since corporations and other big spenders often use intermediaries other than PACS, such as trade associations or other nonprofit entities, to hide their involvement in campaigns, existing state disclosure rules may have to be reformed to the extent that they could continue to provide effective disclosure to the public about such spending.[253]

Stringent and enforceable disclaimer and disclosure rules – especially if they provide easy access to reporting and data for the public – can be essential in providing the electorate with much needed information about the source of money in judicial campaigns, whilst potentially discouraging corrupt practices as well.[254] "Sunlight is said to be the best of disinfectants", Justice Brandeis famously said in 1913.[255] Indeed. Transparency is the first baseline in campaign finance law; in the absence of effective, enforced disclosure laws, everything else stands on shaky foundations. So far, twenty-seven states have proposed more stringent disclosure and disclaimer rules, and thirteen states have passed such legislation, usually focusing on independent expenditures.[256]

[250] Torres-Spelliscy, *supra* note 91, at 6.
[251] A campaign finance disclaimer is "a statement placed on a public communication that identifies the person(s) who paid for the communication and, where applicable, the person(s) who authorized the communication." http://www.fec.gov/pages/brochures/notices.shtml (last visited July 11, 2012).
[252] Torres-Spelliscy, *supra* note 91, at 3, 8.
[253] *Id*.
[254] Torres-Spelliscy, *supra* note 91, at 8-9.
[255] Louis D. Brandeis, *What Publicity Can Do*, Harper's Weekly, Dec. 20, 1913, at 10; electronic copy available at: http://c0403731.cdn.cloudfiles.rackspacecloud.com/collection/papers/1910/1913_12_20_What_Publicity_Ca.pdf (last visited July 5, 2012).
[256] Lo, Londenberg, Nims & Weinberg, *supra* note 61, 25.

*c) Contribution Limits*

Contribution limits are still considered constitutional, and several states have proposed such limits, either in the form of a uniform limit on the amount that can be donated by any person or entity, or in the form of specific contribution limits for corporations.[257] Contribution limits have been continuously upheld as constitutional by the Supreme Court in the past decades.[258] Ever since Buckley v. Valeo, the Supreme Court has been adamant in treating contributions and independent spending differently. As the Court held: "a contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support".[259] Since a contribution is more symbolic in nature than an expenditure, its expressive content does not have a direct relation to its quantity, or "the quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing"; therefore a cap on contributions does not affect the nature of the act and as such, does not pose a direct threat to free political speech.[260] Capping contributions is thus less problematic from a constitutional standpoint than capping independent expenditures, which – more than simple gestures of support – aim to communicate a person's own ideas. At the same time, the danger of *quid pro quo* corruption and bias is more pronounced in the case of campaign contributions than with independent expenditures, where – at least, theoretically – spenders do not coordinate their spending with the candidates.[261] Limiting contributions to judicial campaigns is thus still a constitutional option, as long as the rules are drawn narrowly.

Unfortunately, limiting contribution usually has the effect of increasing independent expenditures.[262] Besides, contribution limits can only be effective if tied with an effective disclosure regime, and constitutional only if they are not too low.[263]

[257] *Id*. at 35. New Mexico has proposed a flat ban on attorney contributions to judicial campaigns. *Id*. at 36.
[258] Low contribution limits were, however, struck down by the Court in Randall v. Sorrell, 548 U.S. 230 (2006) (invalidating Vermont's contribution limits, ranging from $200 to $400). The Court reasoned that "contribution limits that are too low can also harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability." Randall v. Sorrell, 548 U.S., at 548-549.
[259] Buckley, 424 U.S. at 21.
[260] *Id*.
[261] *Id*. at 26-27.
[262] Lo, Londenberg, Nims & Weinberg, *supra* note 61, at 37-38.
[263] *Id*. at 37. *See also: supra* note 257.

*d) Limiting Corporate Spending*

Corporate spending is endemic in all elections, judicial elections being no exception, and in the aftermath of Citizens United, this spending will no doubt only intensify. While limiting independent expenditures or making corporations to spend only through their PACs and not their general treasury founds is unconstitutional in light of the First Amendment, limits on corporate contributions to judicial campaigns will likely still be upheld against constitutional challenges.

Another option that is being pursued more intensively in both federal and state legislation is requiring shareholder (or sometimes board) consent for political spending.[264] "Managerial misuse of shareholders' money" has been a significant driving force behind campaign and corporate law regulations in the past century.[265] Corporate political spending is often correlated with a negative effect on future excess returns in the long run, and is often indicative of deeper agency problems within firms.[266] Unfortunately, neither corporate statutes, nor campaign finance law – especially after Citizens United – has managed to regulate such spending effectively.

The United Kingdom has successfully reformed its corporate political spending climate in 2000. While the U.K. allows for direct corporate donations in elections, since 2000,[267] British companies are required to disclose political contributions to their shareholders, and even more importantly, they have to ask for permission from their shareholders before making such donations.[268] It would of course be inconvenient, and next to impossible, to request shareholder authorization before each and every political expenditure that a company wishes to make. Under the British system, managers ask for a political budget for a year or longer for a certain sum, and shareholders vote on this proposal.

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[264] Lo, Londenberg, Nims & Weinberg, *supra* note 61, at 43-44.

[265] Adam Winkler, *McConnell v. FEC, Corporate Political Speech, and the Legacy of the Segregated Fund Cases*, 3 ELECTION L.J. 361, 362 (2004).

[266] Rajesh K. Aggarwal, Felix Meschke & Tracy Wang, *Corporate Political Donations: Investment or Agency*, 15. Available at: http://ssrn.com/abstract=972670 (last visited July 13, 2012).

[267] Political Parties, Elections, and Referendums Act, c. 41 §§ 139, 140 sched. 19 (2001), http://www.legislation.gov.uk/ukpga/2000/41/notes/contents. The Companies Act was amended in 2006 to exclude trade unions from this rule. More interestingly, directors are jointly and severally liable for unauthorized political spending. Companies Act c. 46 §§ 369, 374 (2006). *See also*: Ciara Torres-Spelliscy, *Corporate Campaign Spending: Giving Shareholders a Voice*, fn. 56 (Brennan Center for Justice, 2010. Electronic copy available at: http://brennan.3cdn.net/54a676e481f019bfb8_bvm6ivakn.pdf (last visited July 13, 2012); Ciara Torres-Spelliscy, *Corporate Political Spending & Shareholders' Rights: Why the U.S. Should Adopt the British Approach*, quoting TSC Indus v. Northway, Inc., 426 U.S. 438, 449 (1976) at 51 (Brennan Center for Justice, 2010). Electronic copy available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1474421 (last visited July 13, 2012).

[268] Torres-Spelliscy, *supra* note 266, at 16.

Experiences with the reform in Britain have been positive. In general, corporate political spending has significantly dropped in the U.K. post-2000.[269] While there is a general tendency to refrain more from political spending, several corporations, such as British Airways, decided to forgo such spending altogether.[270] Most political budget requests have been approved by shareholders, but at least on one occasion, shareholders have refused to accept such a budget.[271]

Although this is without a doubt a very different election climate as compared to state judicial elections, nevertheless, prior shareholder consent, together with director liability in case spending occurs without shareholder approval, could be established as a requirement for corporate political spending in the U.S. as well. In fact, efforts at introducing a model similar to the British one has been under way. The Shareholder Protection Act,[272] sponsored by Rep. Michael Capuano (D-MA8), was reintroduced in Congress in July 2011; the Act aims to amend the Securities and Exchange Act of 1934 to require a shareholder authorization before a public company can make political expenditures.[273] Among the states, to date only Iowa has passed legislation requiring board (and not shareholder) consent for corporate political expenditures.[274] This provision has so far passed constitutional muster.[275]

Other proposals to reign in corporate political spending have included adoption of a new constitutional amendment to overturn Citizens United. Five states (Hawaii, New Mexico, California, Vermont, and Rhode Island) have already passed resolutions calling for a

[269] Torres-Spelliscy, *supra* note 266, at 53-54.
[270] Torres-Spelliscy, *supra* note 266, at 57.
[271] Torres-Spelliscy, *supra* note 266, at 59.
[272] The bill was re-introduced in Congress July, 2011: H.R. 2517--112th Congress: Shareholder Protection Act of 2011. (2011). In *GovTrack.us (database of federal legislation).* Retrieved December 22, 2011, from http://www.govtrack.us/congress/bill.xpd?bill=h112-2517. Also: S. 1360--112th Congress: Shareholder Protection Act of 2011. (2011). In *GovTrack.us (database of federal legislation).* Retrieved December 22, 2011, from http://www.govtrack.us/congress/bill.xpd?bill=s112-1360.
[273] For a brief summary on the proposed bill, *see* Lucian Bebchuk's blog post at http://blogs.law.harvard.edu/corpgov/2011/07/14/the-re-introduction-of-the-shareholder-protection-act/ (last visited July 16, 2012). The Act would require public companies to disclose to their shareholders the amounts and recipients of their political spending each year. The Act would also require a board of directors vote on corporate expenditures on political activities. As a third requirement, shareholder authorization of certain political expenditures would be necessary. All three rules would be mandatory for public companies, and would greatly improve transparency in corporate political spending, as well shareholder control over the corporation's assets, and it is quite possible that such increased control over corporate assets would reign in excessive corporate political spending too.
[274] Lo, Londenberg, Nims & Weinberg, *supra* note 61, at 48.
[275] *Id*.; Iowa Right to Life Committee, Inc. v. Smithson, 750 F.Supp.2d 1020 (S.D. Iowa 2010)

constitutional amendment saying that corporations are not people.[276] Another would request an amendment that would add language to the First Amendment to exclude campaign finance regulation.[277] It is absolutely certain that for such a constitutional amendment proposal to be taken seriously, a nationwide consensus and real momentum is necessary. As noted, so far only five states have adopted resolutions to that extent, which is far from promising.[278]

*e) Recusal and Disqualification*

The Supreme Court's decision in Caperton v. Massey provides litigants with a procedural due process right to request recusal by a judge who has financial stake in the litigation.[279] This right only makes sense, of course, if adequate campaign finance disclosure rules are in place that can shed light on excessive funding of judicial campaigns by current or prospective litigants.[280] Therefore the tightening of disclaimer and disclosure rules in state judicial elections is the first step in order for Caperton v. Massey to be applicable in practice. So far, thirteen states have proposed new, strict disqualification and recusal rules.[281] Proposals usually take two forms: either establishing threshold contribution amounts above which a judge becomes automatically disqualified (*per se rules for disqualification*), or requiring independent review and adjudication of recusal motions.[282] In light of Caperton v. Massey, it is likely that these proposals would pass constitutional muster.

## 6. Conclusion

Since the Founding Era, there has been an ongoing debate about the function and nature of the judiciary in the U.S. This debate is today more important than ever, and a significant part of the national conversation necessarily must turn around the method of selecting state judges, who decide a significant majority of cases and who are more and more involved in making decisions with serious, sweeping policy consequences.

[276] *See*: http://www.amend2012.org/site/c.8qKOJXMvFaLUG/b.7939705/k.1AA3/Reverse_Citizens_United_because_only_people_are_people.htm (last visited July 13, 2012).
[277] Lo, Londenberg, Nims & Weinberg, *supra* note 61, at 59.
[278] As Lo, Londenberg, Nims & Weinberg note, the two constitutional amendments introduced in the 111th U.S. Congressional session have both failed. *Id*.; H.J. Res 13, 111th Cong. (2010); H.J. Res. 68 111th Cong. (2010).
[279] Torres-Spelliscy, *supra* note 91, at 11.
[280] *Id*. at 12.
[281] Lo, Londenberg, Nims & Weinberg, *supra* note 61, at 30.
[282] *Id*. at 31.

Currently, the majority of state judges are elected in one form or another. Elections, especially popular elections, can be useful as a means for establishing judicial accountability to voters, but it also renders the judicial branch less independent and more vulnerable to outside influence. In today's deregulated campaign finance environment, the situation of judicial elections nationwide is especially dire, with judicial elections becoming more money- and issue-driven and aggressive than ever before. More money can mean more conversation, but it can also mean corruption, loss of integrity and impartiality, and majoritarian pressures for the judiciary; although more money can mean more communication, that communication often tends to center more around hot-button issues that divide the population, and less around the function of the judiciary.

A change is thus needed. While there is no shortage of reform proposals, the bigger question is how many, if any, of these will manage to go through. It is doubtful that popular elections will be altogether dispensed with for selecting state judges, but retention elections seem to offer a workable compromise, creating a delicate balance between judicial independence and judicial accountability. While retention elections are not free from faults,[283] studies suggest that they result in result in judges who rank better in terms of competence, fairness and quality, as well as judicial ethics, than judges chosen by other selection methods.[284] This regime has been applied with success in several states and the District of Columbia,[285] and has not been abandoned by any state that has adopted it.[286]

On the campaign finance front, full or partial public financing of judicial could eliminate many of the dangers inherent in competitive elections, such as corruption or bias, or the appearance of these. These regimes are considered constitutional, as are disclosure and disclaimer rules, and contribution limits, at least for now. Disclosure and disclaimer rules are the first baseline in any effective campaign finance regime, and they are also the foundation of any effective recusal and disqualification regime for state judges. These methods, tied with other proposals, such as shareholder protection plans, could also help reign in ever-increasing corporate political spending.

Any of the above proposals, or indeed, any combination of them, would be useful in maintaining and improving the health and integrity of the state judiciary. The judiciary serves an essential function not only as the third branch of government and as adjudicator, but also as

[283] *See supra* notes 153-156.
[284] *See supra* note 158.
[285] *See supra* note 151.
[286] *See supra* note 152.

a protector of individual and minority rights in the face of ever-shifting majoritarian pressures and preferences. As such, the judiciary is an essential part in the democratic vision that the Founders drew up, but it can only be so if its integrity and impartiality is rigorously maintained and safeguarded. A regime where judicial elections can be bought, where money and not professional ability decides elections, and where litigants can pick their own judges, does not fit in with such vision. Naturally, a certain amount of judicial accountability is called for, but disciplinary actions other than elections, or non-competitive retention elections should be enough to serve this purpose. The importance of judicial independence, however, and the appearance and reality of an unbiased state judiciary cannot be understated.