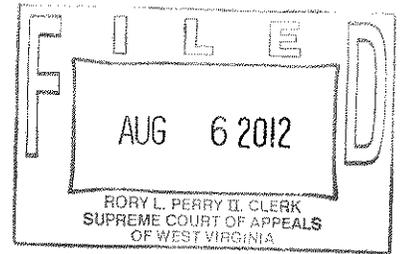


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WITH MOTION



IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 12-0899

STATE OF WEST VIRGINIA, ex rel, ALLEN H. LOUGHRY II,
candidate for the Supreme Court of Appeals of West Virginia

Petitioner,

v.

NATALIE E. TENNANT, in her official capacity as West Virginia Secretary of State;
NATALIE E. TENNANT, GARY A. COLLIAS, WILLIAM N. RENZELLI, and
ROBERT RUPP, in their official capacities as members of the West Virginia State Election Commission;
GLENN B. GAINER III, in his official capacity as West Virginia State Auditor; and JOHN PERDUE, in
his official capacity as West Virginia State Treasurer,

Respondents.

APPENDIX TO ANTHONY J. DELLIGATTI'S AMICUS CURIAE BRIEF

I certify that everything in the appendix is a true and accurate replication of the original.

A handwritten signature in black ink, appearing to read "Anthony J. Delligatti".

Anthony J. Delligatti
Pro Se

Anthony J. Delligatti
1619 Westbrook Dr.
Fairmont, WV26554
304-612-9291

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¹ The phrase “a horse of a different color . . . probably derives from a phrase coined by Shakespeare, who wrote “a horse of that color” (Twelfth Night, 2:3), meaning “the same matter” rather than a different one. By the mid-1800s the term was used to point out difference rather than likeness.” AMERICAN HERITAGE DICTIONARY OF IDIOMS (1996). The idiom was popularized in The Wizard of Oz (Metro Goldwyn Meyer 1939):

Dorothy: Oh, please! Please, sir! I've got to see the Wizard! The Good Witch of the North sent me!

Guardian of the Emerald City Gates: Prove it!

Scarecrow: She's wearing the ruby slippers she gave her.

Guardian of the Emerald City Gates: Oh, so she is! Well, bust my buttons! Why didn't you say that in the first place? That's a horse of a different color! Come on in!

While in politics lack of actual impropriety is an absolute defense to everything but the raging of the press, in the judiciary the appearance of impropriety is as reprehensible as the real thing.² **West Virginia Supreme Court of Appeals Justice Richard Neely**

I. INTRODUCTION

In 2011, in *Arizona Free Enter. Club's Freedom Club PAC v. Bennett* (“*Arizona Free Enterprise Club*”), the United States Supreme Court held an Arizona voluntary public financing law for legislative and executive elections unconstitutional because of a matching funds provision.³ Under the Arizona matching funds provision a publicly funded candidate would receive increased amounts of funds based on expenditures made by privately funded candidates or independent organizations.⁴ This holding, along with much of the modern campaign finance jurisprudence, should not be extended to judicial elections because the judiciary is distinguishable from the other two governmental branches, both in terms of the state interests at play and the regulation of speech in pursuing those interests.⁵ In a tripartite government, the state’s interest in an independent judiciary should be considered greater than the state’s interest in an independent legislative or executive branch (collectively referred to as the “political branches”).⁶

Campaign speech in legislative and executive elections promotes democracy in the marketplace of ideas; however, such speech in judicial elections is often a threat to the integrity and independence of the judiciary. Historically the judiciary has been treated differently in terms of the enforcement of its independence. Not only have the methods for enforcing judicial independence been different from those applied to the political branches, so too have the selection methods used. At the birth of the United States, all state judges were appointed by either the legislature or the governor.⁷ States adopted elections for judges during the nineteenth century due to rising concerns that the judiciary had become too political and dependent on the legislative branch.⁸ The same rationales

² RICHARD NEELY, *HOW COURTS GOVERN AMERICA* 194 (1981).

³ *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011).

⁴ *Id.*

⁵ See *infra* Part II.

⁶ The political branches are made up of elected representatives fighting on behalf of their constituencies. The judiciary is composed of judges who interpret and apply the law. Politicians are also known as representatives. A healthy democracy requires politicians to represent their constituents. There is no such thing as a judicial representative. See *infra* Part II.

⁷ CHRIS W. BONNEAU & MELINDA GANN HALL, *IN DEFENSE OF JUDICIAL ELECTIONS* 4 (Routledge 2009); Matthew J. Streb, *Judicial Elections and Public Perceptions of the Courts*, in *THE POLITICS OF JUDICIAL INDEPENDENCE* 147, 150 (Bruce Peabody ed., 2011).

⁸ Matthew J. Streb, *Judicial Elections and Public Perceptions of the Courts*, in *THE POLITICS OF JUDICIAL INDEPENDENCE*, *supra* note 7, at 150.

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for switching to judicial elections in the nineteenth century and the desire for an independent judiciary are being touted in the twenty-first century as a rationale to revert back to judicial appointments.⁹

This history of distinguishing the judiciary by showing a need for greater protection of its independence conflicts with the Roberts Court's recent line of cases striking down campaign finance laws. The *Arizona Free Enterprise Club* Court held that the matching funds provision enacted in Arizona violated the First Amendment free speech rights of privately financed candidates by substantially burdening political speech. In 2010, the West Virginia Legislature adopted a similar program, albeit solely for judicial elections, by enacting a voluntary public financing law known as the West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program ("Pilot Program")¹⁰ for West Virginia Supreme Court of Appeals elections. Under the Pilot Program, a candidate who qualifies for public financing receives public funding based on what opponents and/or independent persons spend in opposition to the publicly funded candidate.¹¹

The West Virginia legislature passed the Pilot Program in response to the United States Supreme Court's ruling in *Caperton v. A.T. Massey Coal Co., Inc.*,¹² which held that due process required West Virginia Supreme Court Justice Brent Benjamin to recuse himself from a \$50 million case pending before the West Virginia Supreme Court of Appeals, when the company's chairman and CEO spent \$3 million on the 2004 supreme court election which successfully secured Benjamin a seat on the West Virginia Supreme Court of Appeals.¹³ The Court stated that "[j]ust as no man is allowed to be a judge in his own cause, similar fears of bias can arise when—without the other parties' consent—a man chooses the judge in his own cause."¹⁴

The West Virginia legislature modeled the Pilot Program after North Carolina's voluntary public financing law for judicial elections,¹⁵ the constitutionality of which was upheld by the Fourth Circuit.¹⁶ The Court in *Arizona*

⁹ See *Republican Party of Minnesota v. White*, 122 S. Ct. 2528, 2542 (2002) (O'Connor, J., concurring) (arguing that judicial elections themselves are a threat to judicial independence).

¹⁰ W. VA. CODE ANN. § 3-12-1 (LexisNexis 2010).

¹¹ See *infra* Part V.

¹² *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252, 2256 (2009).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See N.C. GEN. STAT. ANN. § 163-278.61 (LexisNexis 2012).

¹⁶ *N. Carolina Right To Life Comm. Fund For Indep. Political Expenditures v. Leake*, 524 F.3d 427, 432 (4th Cir. 2008). There are currently two states offering public financing for elections to state courts of last resort New Mexico, and West Virginia. New Mexico Voter Action Act, N.M. STAT. ANN. § 1-19A-1 (LexisNexis 2012) (enacted in 2007); West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program, W. VA. CODE ANN. § 3-12-1 (LexisNexis 2012) (enacted in 2010); West Virginia H.B. 4130, 79th Leg., 2d Sess. (2010). Wisconsin did have a public financing system for judicial elections but repealed the statute in 2011. WIS. STAT. ANN. §§ 11.50 to 11.522 (LexisNexis 2012) repealed by 2011 Act 32, §§ 13vb to 16e, eff. July 1, 2011. North Carolina had a public financing system for judicial elections.

Free Enterprise Club did not mention or address the Fourth Circuit's decision regarding the North Carolina public financing program and failed to distinguish between the judiciary and the political branches.¹⁷

Just as judicial elections have been distinguished from legislative and executive elections by the Supreme Court regarding equal protection analysis,¹⁸ judicial elections should be viewed in a broader context in the realm of free speech analysis. The Pilot Program should be upheld for two reasons: first, because strict scrutiny should not apply to freedom of speech issues in judicial elections, and second, because the law passes strict scrutiny analysis due to the fact that it is narrowly tailored to restore the appearance of independence in the West Virginia judiciary. A relaxed standard of scrutiny should apply, giving legislatures greater discretion when attempting to balance free speech and judicial independence in crafting judicial selection methods.¹⁹

Judicial selection methods should be evaluated based upon the selection method's effects on two factors: speech and corruption/independence. Such a two-pronged framework gives states greater discretion in choosing judicial selection methods. Greater discretion in crafting judicial selection methods, compared to legislative and executive selection methods, is essential because the issue of judicial independence is, and historically has been, more important than legislative or executive independence, and such judicial independence must be weighed against any free speech issues stemming from laws regulating elections.

Part II lays out the history of distinguishing the judiciary from the political branches. Next Part III explains modern campaign finance jurisprudence. Part IV outlines *Caperton v. Massey*,²⁰ and demonstrates that modern campaign finance jurisprudence is in conflict with the long history of distinguishing the judicial branch from the political branches. Part IV also shows that there is an appearance of impropriety surrounding the West Virginia Supreme Court of Appeals and demonstrates that recent judicial elections are a cause of the public's perception of impropriety. Part V analyzes the Pilot Program and argues that *Arizona Free Enterprise Club* does not invalidate the Pilot Program's matching funds provision. Part VI provides a framework for evaluating policies to address the appearance of impropriety. Finally, Part VII concludes that because the judiciary is a distinct branch of government, judicial elections should not be subject to a strict scrutiny analysis under the First Amendment. Instead

North Carolina Public Campaign Fund N.C. GEN. STAT. ANN § 163-278.61 (LexisNexis 2012) (enacted in 2002 and struck down in 2012 on a motion for summary judgment when the state chose not to defend the law in *N. Carolina Right to Life Political Action Comm. v. Leake*, 5:11-CV-472-FL, 2012 WL 1825829 (E.D.N.C. May 18, 2012).

¹⁷ *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011).

¹⁸ *See Wells v. Edwards*, 93 S. Ct. 904 (1973).

¹⁹ For an argument that the balance of impartial courts and free speech is in danger, see Bert Brandenburg & Roy A. Schotland, *Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns*, 21 GEO. J. LEGAL ETHICS 1229 (2008).

²⁰ *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252 (2009).

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First Amendment issues in judicial elections should be subject to a balancing test. This way, West Virginia's Pilot Program can maintain the integrity, impartiality, and independence that originally gave rise, reason and repute to the judiciary.

II. A HORSE OF A DIFFERENT COLOR: DISTINGUISHING THE JUDICIARY

The judiciary has a long history of being viewed through a different lens than other operations of government.²¹ For instance, bribery began as a common law offense that only applied to judges and acts of a judicial nature.²² In 1628, Sir Edward Coke wrote a definition of bribery:

Bribery is a great misprision (1), when any man in judicial place (2) takes any fee or pension, robe, or livery, gift, reward (3) or brocage (4) of any person, that hath to do before him anyway (5), for doing his office, or by colour of his office, but of the king only, unlesse it be of meat and drink, and that of small value, upon divers, and grievous punishments.²³

²¹ Former West Virginia Supreme Court Justice Richard Neely argued that it is the "contemplative nature" of the judiciary that distinguishes judges from other less temperate governmental officials. Neely argued that "if Earl Warren had been made a deputy sheriff in McDowell County, West Virginia, within six months he would have been beating up suspects in the back of police cars. It is not the quality of men which makes temperate judges, but the contemplative nature of the institution." NEELY, *supra* note 2 at 146. Neely went on to further distinguish the judiciary from the other branches:

In elected politics, the legislature and executive take idealistic, energetic, ambitious young men and turn them into whores in five years; the judiciary takes good, old, tired experienced whores and turns them into virgins in five years. The men are not the source of either transformation—they are of the same type, particularly since judges are either graduates or rejects of politics. The decisive factor is the institution—whether the exact same creatures are quartered in the local house of ill fame or in the Temple of Vestal Virgins. . .

....

Since it has been implicitly recognized that officials will be either whores or virgins in response to their surroundings, the emphasis on the judiciary has not been the selection of the personnel but rather on the molding of the institution.

...

....

For those who did not find my comparison to virgins compelling, there is another simile: judges bear a striking resemblance to eunuchs; their emasculation entitles them to free access to life's temptations. The emasculation is the product of both historical accident and conscious molding of the institution.

Id. at 190–91.

²² See *Perrin v. U. S.*, 100 S. Ct. 311, 314 (1979) for a discussion on the history of bribery.

²³ SIR EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAUSES* 144 (E. & R. Brooke ed., 1797) (originally written in 1628).

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The definition of bribery has since been extended to all branches of government. Nonetheless, bribery laws are the last and weakest means of addressing corruption, and only rarely stop corruption because the stringent requirements of the law require that five elements be proven: that a 1) public official 2) receives something of value 3) from someone with a corrupt intent 4) to influence 5) an official act.²⁴ Furthermore, bribery laws are especially poorly suited for controlling the appearance of impropriety in judicial elections because the appearance of corruption begins during the election process.

The distinction between the judiciary and the political branches continued through the formation of the United States. The Federalist Papers stressed the importance of an independent judiciary and called for the appointment of judges rather than elections, which the Federalist Papers maintained were important for the political branches. In Federalist 78, Alexander Hamilton wrote:

If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community....

....

[I]t is easy to see, that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community.

But it is not with a view to infractions of the Constitution only, that the independence of the judges may be an essential safe-

²⁴ DANIEL HAYS LOWENSTEIN ET AL., *ELECTION LAW CASES AND MATERIALS* 640 (Carolina Academic Press, 4th ed. 2008) (citing 18 U.S.C. § 201).

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guard against the effects of occasional ill humors in the society²⁵

The Constitution then explicitly distinguished the judiciary from the political branches by setting up a congress and president that are both elected to terms, while setting up a judiciary that is appointed for life terms. The Constitution also implicitly distinguishes judicial selection at the state level by requiring that states have a “Republican Form of Government,” knowing that states were appointing their judiciaries.

The attitude of treating the political branches differently from the judicial branches extended to the formation of the state of West Virginia. During the Debates and Proceedings of the First Constitutional Convention of West Virginia, representatives from the northwestern counties of Virginia had a lively debate on the topic.²⁶ Mr. Battelle of Ohio County laid out the struggle between judges being accountable to the public and judges being independent of the public:

[W]ith the responsibilities, as I understand it of a judicial officer to the people are very distinct and different. Or rather they are responsible in different ways. A merely representative officer . . . is responsible only to the laws of the land; but according to our theory of government he is responsible, and wisely so, to the will of his constituents Now, sir, according to our theory of government . . . a judicial officer is responsible also to the people but in a different way. He is responsible in the eye of your written law, whether his term of office be long or short, his responsibility should be clear, distinct, and emphatic . . .

²⁵ THE FEDERALIST NO. 78 at 180-87 (Alexander Hamilton) (Lawrence Goldman ed., 2008). The Antifederalists agreed with the Federalists on this issue arguing that:

[The Constitution] made the judges independent, in the fullest sense of the word. There is no power above them, to control any of their decisions. There is no authority that can remove them, and they cannot be controlled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.

THE ANTIFEDERALIST NO. 78, at 222 (“Brutus” (likely Robert Yates)) (Morton Borden ed., 1965).

²⁶ 2 DEBATES AND PROCEEDINGS OF THE FIRST CONSTITUTIONAL CONVENTION 756-892 (1939). This debate took place on January 22-24, 1862 in Wheeling, Virginia. The conventioneer who moved for a discussion on “the number and character of the courts” was Waitman T. Willey, a lawyer from Monongalia County. *Id.* at 756. At the time Willey represented the Restored Government of Virginia in the United States Senate and then went on to represent West Virginia in the United States Senate. Senator Willey was the father of William P. Willey who was a professor at the West Virginia University College of Law and founded the WEST VIRGINIA LAW REVIEW in 1894, known then as THE BAR. B. M. Ambler, *William P. Willey—An Appreciation*, 25 W. VA. L. Q. 1-3 (1917-1918). Professor Willey was the editor of THE BAR from 1894 until 1917. *Id.* at 2. Of the 61 conventioners present only sixteen were lawyers while nineteen were farmers. 1 DEBATES AND PROCEEDINGS OF THE FIRST CONSTITUTIONAL CONVENTION 59-60 (1939).

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(H)e is responsible – wisely so – for the proper discharge of the duties of his office, not to the caprice, prejudice or whims of people, but he is responsible to the written law as you yourselves have put it down and nominated in the bond. Now, sir, a judge, in obedience to the dictate of his high office, may sometimes feel himself, in vindication of the principle of justice in the person of one citizen of your county, compelled to violate the wishes and prejudices and the caprice of every other man in the county. If he does so unjustly, let it be written in your law that he shall be subject to impeachment and removal from office. But if a judge be compelled, while vindicating the law in the person perhaps one of humblest citizens of the community though he may run counter to the feelings and desires of every other in the community, we ought to put it into our law that by frequent returns to popular elections that man may not be tempted to swerve from the requirements of his duty though those requirements lead him in the face of a large majority of his constituents.²⁷

Mr. Stevenson of Wood County disagreed with Mr. Battelle:

The whole argument is based on the supposition that the position of judge is something very different from all other positions in society, that it must be regulated upon an entirely different principle. That is not more true than it is of any other office. There is a difference between a legislative office and an executive office. In fact, there is a difference in almost all the offices to some extent²⁸

Conventioners put forth many policy proposals on judicial selection methods and terms of office. At the heart of the debate was the question: from what or who should judges be independent?

²⁷ 2 DEBATES AND PROCEEDINGS OF THE FIRST CONSTITUTIONAL CONVENTION 791–92 (1939).

²⁸ *Id.* at 792.

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A. *Independent from Whom?*²⁹

MR. VAN WINKLE. Before the gentleman sits down, I should like to ask him one question.

MR. SMITH. Yes, sir?

MR. VAN WINKLE. Who are these judges to be independent of?

MR. SMITH. They are to be independent of everybody but their own duty.

MR. VAN WINKLE. I suppose the gentleman remembers in England, where the crown could not say, go down there, but could say come up here.³⁰

Debates and Proceeding of the First Constitutional Convention of West Virginia. January 23 1862

Both the founders of the United States in Philadelphia in 1776, as well as the founders of West Virginia in Wheeling in the early 1860s, harbored concerns about judicial independence. These concerns beg the question, “independent from whom?” Are judges to be independent of the legislature, the executive, litigants, attorneys, the public, or some combination thereof? Most would agree on the most basic level that judges should be independent of the litigants and the lawyers appearing in their court.

On January 23, 1862, at the first constitutional convention of West Virginia, Mr. Van Winkle of Wood County and Mr. Smith of Logan County held differing opinions regarding fromwhomjudges shall be independent.³¹ Mr. Van Winkle thought that judges should be independent of the political branches (favoring elections), while Mr. Smith thought that judges should be independent of the public at large, or, more specifically, those appearing in the judge’s court (favoring appointments).³² Mr. Smith was also concerned about the integrity of

²⁹ Lewis Kornhauser argues that judicial independence is not a useful concept because the confusion over the term’s meaning cannot be overcome. Lewis A. Kornhauser, *Is Judicial Independence a Useful Concept?*, in *JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH* 45 (Stephen B. Burbank & Barry Friedman eds., 2002). Cf. Charles M. Cameron *Judicial Independence: How Can You Tell It When You See It? And, Who Cares?*, in *JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH* 134 (Stephen B. Burbank & Barry Friedman eds., 2002) (arguing that judicial independence is synonymous with judicial autonomy and can be observed easily and measured precisely).

³⁰ 2 DEBATES AND PROCEEDINGS OF THE FIRST CONSTITUTIONAL CONVENTION 807–08 (1939).

³¹ *Id.* at 797–803. Peter G. Van Winkle went on to become a United States Senator representing West Virginia.

³² Mr. Van Winkle:

(The) independence of the judiciary . . . is one of the principles of constitutional liberty of our forefathers in the mother country. It was adopted there because the courts stood between the crown and the people. The judges being appointed by the crown, and being—as has been admitted, I believe in all generations, that notwithstanding they were made life-estates and so removed from the fear of the crown. I do think one of the most contemptible curs in

a man who would "prostitute himself"³³ for office and "give out liquor for votes."³⁴ Another factor concerning the participants at the convention, which is

history is Sir Edward Cooke[sic]—the father of all the lawyers (Laughter). A more servile scoundrel never stepped, perhaps on the face of this earth.

Id. at 797.

Mr. Smith responded:

We have no monarchy before whom to bow but the monarchy of law; and that law is administered by the judiciary. That monarchy ought to be pure and learned, he ought to be, but for the prejudices of the country, lifted up to independence. I know it is a position that will rather startle the public mind; for I say it is the interest of the poor and humble that he should be so. The great and powerful need no protection; their influence in the country - their wealth buys them protection, secures it to them; but to the weak and humble it is far otherwise. They are the subjects of oppression, but give power and independence to the judiciary and there is their shield, their protection. I go for the independence of the judiciary. I am in favor of it as an original principle, not on account of the rich and wealthy but on account of the poor and humble who may ask protection from it and ask it in safety. Our distinguished Chief Justice Marshall in the later period of his life when in the Convention of Virginia in 1829-30 makes the remark that "of all the ills that heaven can inflict on a weak community, the worst is a too dependent judiciary." I concur in the sentiment. There is a judge to be elected; he comes in for office; he has served one term and he seeks re-election. Every man who is his elector may be sued in court; and however just and righteous he may be, he will be swerved more or less by interest. It will control the best; and when a man who has a hundred votes at his beck and a poor humble dependent that can hardly control his own vote come in collision in his court, how does the poor and humble man stand? Here the judge says I decide in favor of the humble man and lose a hundred votes. I decide against him, I gain a hundred. Now I ask you, considering the frailty of human nature, its inability to stand against temptation whether justice is secure under such a contrariety of interest on the part of the judge? To make him independent, to place before him no temptation but the desire to do right and to be upright and honorable with a high reputation in his position, where the humble can stand on the same pedestal as the rich - the man with his two hundred or three hundred and the man with his million - so there shall be no difference between them. He stands his equal in every respect before the judge . . .

Id. at 803.

³³Mr. Smith told a story about a man he knows:

Sir, I undertake to say that the judiciary of Virginia has declined in learning and wisdom and purity. I have had some experience of it in my own country; I know how it operates there. There is a man now who is fleeing to the South in pursuit of his "rights" who has been elected to that office but is unworthy to untie the latches on the shoes of a competent man. He has neither learning nor integrity; yet he takes the stump for four months; he prods about his neighbors' log cabins, kissing every dirty child he meets to secure this office. I maintain that he who will prostitute himself to secure an office by electioneering for a judicial office is unworthy of the position. He should not have my vote. But it is done. I recollect in the convention I said I did not believe that any man who aspired to this office would dare to take the stump to electioneer for it; but now, sir, at the cross roads every sort of maneuver and trick is resorted to by those who aspire to that part of the judiciary. I am disgusted; I

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also related to judicial independence, was term limits. There were concerns about creating a “life estate”³⁵ in office if judges were selected for life, but there were also concerns about the effect that short terms would have on judges seeking reelection. Elections may cause judges to rule with the upcoming election in mind. West Virginia Supreme Court Justice Richard Neely wrote:

Most of my day is consumed by working as the inside man at the judicial skunkworks where I slog through tedious criminal, worker’s compensation, and products liability cases. If I say to myself, “the hell with those Frenchmen at Michelin!” and give some injured West Virginian a few hundred thousand dollars, it doesn’t shatter the foundations of West Virginia’s commercial world. Since I’m paid to choose between deciding for Michelin and sleeping well, I choose sleeping well. Why hurt my friends when there is no percentage in it?³⁶

claim to have no interest in this matter; but I have a love for my country, and I desire to do that which will promote its great interests. I am here defending the rights of the poor and the humble. I will not undertake to defend the rights of the rich.

Id. at 804

I am an old man and have had much experience in the judiciary, and I pray you, in the name of Heaven, if you do make a judiciary, make it independent - as independent as you can. Forget all these narrow little prejudices that grow up in the public mind and come up magnanimously to the issue; to the question of the interests of those who are involved, and do your duty fearless of consequences

Id. at 806

³⁴ Mr. Smith said:

I claim to be the advocate of the humble, the honest, the industrious laboring community, not those who are running from precinct and from township to township, going to cross-roads, giving out liquor and leaving money to electioneer with. I go against all that. I go for a judiciary that are in a condition not of temptation but to do justice to all.

Id. at 807. West Virginia has a storied history of buying votes with liquor. *See Generally* ALLEN H. LOUGHRY, *DON’T BUY ANOTHER VOTE , I WON’T PAY FOR A LANDSLIDE: THE SORDID AND CONTINUING POLITICAL CORRUPTION IN WEST VIRGINIA* 178 (2006).

³⁵ Mr. Haymond of Marion County said, “I am opposed to anything like a life estate in this government.” 2 *DEBATES AND PROCEEDINGS OF THE FIRST CONSTITUTIONAL CONVENTION* 787 (1939). Similarly, Mr. Hervey of Brooke County said, “[O]ur policy is not to invest men with life estates in office. We have been pursuing a different policy heretofore.” *Id.* at 790.

³⁶ RICHARD NEELY, *THE PRODUCT LIABILITY MESS: HOW BUSINESS CAN BE RESCUED FROM STATE COURT POLITICS* 6–7 (1988). Justice Neely was making the point that national reform was needed in product liability cases otherwise justices would rule for instate plaintiffs because it was in their best interest.

There is also social pressure exerted on attorneys and litigants to give money to judicial campaigns. Keith Swisher argues that because campaign support may influence judicial decisions, trial attorneys fall into a “prisoner’s dilemma” whereby attorneys must support the judge to gain favor, or risk that the other side supported the judge. Even though both sides would be better off if

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Justices may make decisions to foster an upcoming election³⁷ or an upcoming reappointment, or even as payback for the appointment (*e.g. Bush v. Gore*).³⁸ Politics are always present in any decision-making body, especially one that is sometimes charged with formulating policy. West Virginia Supreme Court Justice Larry V. Starcher, arguing for partisan judicial elections, noted:

(T)he issue is *not* whether there will be politics in the judicial selection process, for the selection of judges always has been and always will be political. The issue is: what sort of politics? The politics of the few — or the politics of the many?³⁹

In Justice Starcher's view there is a greater threat of being beholden to the executive and legislative branches of government than to the public. The struggle to determine who justices should be independent from and how to secure that independence has been going on for a very long time. Over the course of and in response to the debate, several different methods of selecting judges have developed. The cursory explanation of such methods is provided next.

B. *A Brief History of Judicial Selection to State Courts of Last Resort*

Judicial selection methods have varied over the years. Presently, the vast majority of state trial court judges are elected.⁴⁰ Selection methods to state courts of last resort have gone through stages based upon the politics of the times.⁴¹ With the exception of partisan elections most of the selection methods used by states would violate either the First Amendment or the Guarantee Clause if used for the selection of governors or legislators.⁴² Figures 1 and 2 show

neither spent money on the judge's campaign it is each party's best option irrespective of what the opposing counsel does to give money to the judge. Keith Swisher, *Legal Ethics and Campaign Contributions: The Professional Responsibility to Pay for Justice*, 24 GEO. J. LEGAL ETHICS 225, 252-54 (2011).

³⁷ For a discussion of judges deciding cases due to their reelection potential, see Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995).

³⁸ A debt of gratitude can arise from those who appointed judges to their position. For instance *Bush v. Gore* is often cited as an example. See, e.g., *Bush v. Gore*, 121 S. Ct. 525 (2000).

³⁹ Larry V. Starcher, *Choosing West Virginia's Judges*, THE W. VA. LAW., OCT. 1998, at 19 (1998).

⁴⁰ For an in depth summary of every state's judicial selection processes, see Methods of Judicial Selection, AM. JUDICATURE SOC'Y, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state= (last visited Dec. 30, 2011).

⁴¹ Courts of last resort are the highest courts in a state and are often called state supreme courts.

⁴² Courts have held that for many legislative and executive offices it is in violation of candidates' associational rights under the First Amendment to require non-partisan elections. See generally Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 29 (2004).

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the history of judicial selection to state courts of last resort. Figure 1 separates selection methods into four categories—1. Partisan Elections, 2. Non-Partisan Elections, 3. Merit Selection, and 4. Appointment—and displayed the number of states using each selection method from 1776–2000. Figure 2 separates out lifetime appointments from term appointments to show that lifetime appointments are now markedly rare.

Lee Epstein and her colleagues break the history of selection methods to state courts of last resort into four time periods or “chapters.”⁴³ First, the revolutionary period was dominated by appointed judiciaries, most of which had lifetime appointments.⁴⁴ Second, Jacksonian democracy brought with it partisan elections that dominated judicial selection.⁴⁵ Third, as a response to machine politics, reformers transitioned to non-partisan elections.⁴⁶ Fourth, “legal progressives” brought an onslaught of merit selection plans (appointment with retention election).⁴⁷ The primary arguments in support of various methods of judicial selection in each of these time periods have been 1) public accountability, 2) free speech, and 3) judicial independence. These enumerated considerations have created friction in rules governing judges and judicial elections. The various selection methods as well as arguments for and against them are more-thoroughly analyzed in Part VI.

C. *Republican Party of Minnesota v. White, the ABA Model Code of Judicial Conduct, and Judges as (non)Representatives*

Just as selection methods for judicial office have been historically distinguished from the political branches, so too has the regulation of judicial speech. Regulation of judicial speech and judicial campaign speech regulation in almost all states has its roots in the 1924 Canons of Judicial Ethics, which was written by the American Bar Association⁴⁸ and adopted by West Virginia on

Furthermore the appointment schemes and merit selection would likely be in violation of the Guarantee clause that guarantees states will have a Republican Form of Government if such schemes were applied to the political branches. Similarly, such non-elective schemes may violate due-process and equal protection if applied to the political branches.

⁴³ Lee Epstein, Jack Knight, Olga Shetsova, *Selecting Selection System*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 196 (Stephen B. Burbank & Barry Friedman eds., 2002).

⁴⁴ *Id.* at 196.

⁴⁵ *Id.* at 197.

⁴⁶ *Id.* at 198.

⁴⁷ *Id.* at 199.

⁴⁸ ABA MODEL CANONS OF JUDICIAL ETHICS (1924) available at http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/1924_canons.authcheckdam.pdf. The American Bar Association’ original canons sought to limit the conduct of judicial candidates in Canon 30:

A candidate for judicial position should not make or suffer others to make for him, promises of conduct in office which appeal to the cupidity or prejudices of the appointing or electing power; he should not announce in advance his conclusions of law on disputed issues to secure class support, and he should

November 21, 1924.⁴⁹ The West Virginia canons cite “ancient precedents” including Francis Bacon’s *Of Judicature* from the early 1600s, which professes against “*parasiticuriae*” (parasites of the court) who “puff[] a court up beyond her bounds, for their own scraps and advantage.”⁵⁰ Ironically, Bacon was removed from the office of Lord Chancellor of England in 1621 for accepting bribes from litigants, maintaining as his defense the fact that he was bribed by both sides.⁵¹ The modern 2007 ABA Model Code of Judicial Conduct is composed of four canons, each with a number of rules. The four canons are:

Canon 1:

A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

do nothing while a candidate to create the impression that if chosen, he will administer his office with bias, partiality or improper discrimination.

While holding judicial office he should decline nomination to any other place which might reasonably tend to create a suspicion or criticism that the proper performance of his judicial duties is prejudiced or prevented thereby.

If a judge becomes a candidate for any office, he should refrain from all conduct which might tend to arouse reasonable suspicion that he is using the power or prestige of his judicial position to promote his candidacy or the success of his party.

He should not permit others to do anything in behalf of his candidacy which would reasonably lead to such suspicion.

⁴⁹ CANONS OF JUDICIAL ETHICS, 98 W. Va. XXXIV (1924).

⁵⁰ FRANCIS BACON, *Of Judicature*, in ESSAYS, CIVIL AND MORAL VOL. III, PART 1. THE HARVARD CLASSICS (P.F. Collier & Son ed. 1909–14) available at <http://www.bartleby.com/3/1/56.html>.

The place of justice is an hallowed place; and therefore not only the bench, but the foot-pace and precincts and purprise thereof, ought to be preserved without scandal and corruption. For certainly *grapes* (as the Scripture saith) *will not be gathered of thorns or thistles*; neither can justice yield her fruit with sweetness amongst the briars and brambles of catching and polling clerks and ministers. The attendance of courts is subject to four bad instruments. First, certain persons that are sowers of suits; which make the court swell, and the country pine. The second sort is of those that engage courts in quarrels of jurisdiction, and are not truly *amici curiae*, but *parasiticuriae* [not friends but parasites of the court], in puffing a court up beyond her bounds, for their own scraps and advantage. The third sort is of those that may be accounted the left hands of courts; persons that are full of nimble and sinister tricks and shifts, whereby they pervert the plain and direct courses of courts, and bring justice into oblique lines and labyrinths. And the fourth is the poller and exacter of fees; which justifies the common resemblance of the courts of justice to the bush whereunto while the sheep flies for defence in weather, he is sure to lose part of his fleece. On the other side, an ancient clerk, skilful in precedents, wary in proceeding, and understanding in the business of the court, is an excellent finger of a court; and doth many times point the way to the judge himself.

⁵¹ NEELY, *supra* note 2, at 109; Barbara Shapiro, *Sir Francis Bacon and the Mid-Seventeenth Century Movement for Law Reform*, 24 AM. J. LEGAL HIST. 331, 333 (1980).

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Canon 2:

A judge shall perform the duties of judicial office impartially, competently, and diligently.

Canon 3:

A judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office.

Canon 4:

A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary.⁵²

In the comments under the fourth canon, the ABA distinguishes between the judiciary and the political branches:

Even when subject to public election, a judge plays a role different from that of a legislator or executive branch official. Rather than making decisions based upon the expressed views or preferences of the electorate, a judge makes decisions based upon the law and the facts of every case. Therefore, in furtherance of this interest, judges and judicial candidates must, to the greatest extent possible, be free and appear to be free from political influence and political pressure. This Canon imposes narrowly tailored restrictions upon the political and campaign activities of all judges and judicial candidates, taking into account the various methods of selecting judges.⁵³

The Supreme Court has distinguished the judiciary from the political branches in some contexts, such as equal protection when applying the "one person one vote" doctrine.⁵⁴ However, in 2002, the Court failed to distinguish between campaign speech in judicial campaigns and campaign speech during campaigns for political office.⁵⁵ In *Republican Party of Minnesota v. White* ("White"), the Supreme Court held that a Minnesota canon of judicial conduct prohibiting judicial candidates from announcing their opinions on political or legal issues (known as an "announce clause") violated the First Amendment right to free speech.⁵⁶ *White* held that when utilizing any notion of impartiality, the announce clause fails a strict scrutiny analysis.⁵⁷ Justice Scalia, writing for the majority, was concerned about the respondent's notion of what was meant

⁵² MODEL CODE OF JUDICIAL CONDUCT Canons 1–4.

⁵³ ABA MODEL CODE OF JUDICIAL CONDUCT R. 4.1, Comment 1 (2007).

⁵⁴ *Wells v. Edwards*, 93 S. Ct. 904 (1973).

⁵⁵ *See generally* *Republican Party of Minnesota v. White*, 122 S. Ct. 2528 (2002).

⁵⁶ *Id.*

⁵⁷ *Id.* at 2535.

by “impartiality,” and further explained that “[c]larity on this point is essential before we can decide whether impartiality is indeed a compelling state interest, and, if so, whether the announce clause is narrowly tailored to achieve it.”⁵⁸ Justice Scalia’s opinion leaves open the issue of whether judicial elections should be treated differently than elections to the political branches, writing:

[W]e neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office. What we do assert, and what Justice Ginsburg ignores, is that, *even if* the First Amendment allows greater regulation of judicial election campaigns than legislative election campaigns, the announce clause still fails strict scrutiny because it is woefully underinclusive, prohibiting announcements by judges (and would-be judges) only at certain times and in certain forms.⁵⁹

Justice O’Connor, in concurrence, argued that judicial elections themselves cause an appearance of impropriety and are a bad policy.⁶⁰ O’Connor cites Roscoe Pound from 1906: “compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the bench.”⁶¹ O’Connor was also concerned that judges may be influenced by upcoming elections and wrote “Even if judges were able to suppress their awareness of the potential electoral consequences of their decisions and refrain from acting on it, the public’s confidence in the judiciary could be undermined simply by the possibility that judges would be unable to do so.”⁶²

Justice Stevens and Justice Ginsburg wrote dissenting opinions, both joined by Justices Breyer and Souter, arguing that regulating speech in judicial elections is entirely different from regulating speech in legislative and executive elections. First, Justice Stevens dissented:

By obscuring the fundamental distinction between campaigns for the judiciary and the political branches, and by failing to recognize the difference between statements made in articles or opinions and those made on the campaign trail, the Court defies any sensible notion of the judicial office and the importance of impartiality in that context

Elected judges, no less than appointed judges, occupy an office of trust that is fundamentally different from that occupied by

⁵⁸ *Id.*

⁵⁹ *Id.* at 2539.

⁶⁰ *Id.* at 2542 (O’Connor, J., concurring).

⁶¹ *Id.* (O’Connor, J., concurring) (citing Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 8 BAYLOR L.REV. 1, 23 (1956) (reprinting Pound’s speech).

⁶² *White*, 122 S. Ct. at 2542.

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policymaking officials. Although the fact that they must stand for election makes their job more difficult than that of the tenured judge, that fact does not lessen their duty to respect essential attributes of the judicial office that have been embedded in Anglo-American law for centuries.

There is a critical difference between the work of the judge and the work of other public officials. In a democracy, issues of policy are properly decided by majority vote; it is the business of legislators and executives to be popular. But in litigation, issues of law or fact should not be determined by popular vote; it is the business of judges to be indifferent to unpopularity.⁶³

Justice Stevens adamantly distinguished the judicial branch and argued that not doing so goes against the grain of centuries of Anglo-American Law. Similarly, Justice Ginsburg argued in dissent that judges are not representatives or political actors:

I do not agree with this unilocular, “an election is an election,” approach. Instead, I would differentiate elections for political offices, in which the First Amendment holds full sway, from elections designed to select those whose office it is to administer justice without respect to persons. Minnesota’s choice to elect its judges, I am persuaded, does not preclude the State from installing an election process geared to the judicial office.

Legislative and executive officials serve in representative capacities. They are agents of the people; their primary function is to advance the interests of their constituencies. Candidates for political offices, in keeping with their representative role, must be left free to inform the electorate of their positions on specific issues.... Judges, however, are not political actors.⁶⁴

Justice Scalia’s majority opinion is directly at odds with the dissenters’ belief that the judiciary should be treated differently because judges are not representatives. In *White*, Justice Scalia wrote:

This complete separation of the judiciary from the enterprise of “representative government” might have some truth in those countries where judges neither make law themselves nor set aside the laws enacted by the legislature. It is not a true picture of the American system. Not only do state-court judges possess

⁶³ *Id.* at 2546-47 (Stevens, J. dissenting).

⁶⁴ *Id.* at 2551 (Ginsburg, J. dissenting).

the power to “make” common law, but they have the immense power to shape the States’ constitutions as well.⁶⁵

Justice Scalia’s take on whether judges are representatives was much different when applying Section 2 of the Voting Rights Act to judicial districting. Justice Scalia’s dissent in *Chisom v. Roemer* put forth a starkly different notion of judges as representatives:

There is little doubt that the ordinary meaning of “representatives” does not include judges. The Court’s feeble argument to the contrary is that “representatives” means those who “are chosen by popular election.” On that hypothesis, the fan-elected members of the baseball all-star teams are “representatives”—hardly a common, if even a permissible, usage. Surely the word “representative” connotes one who is not only *elected* by the people, but who also, at a minimum, *acts on behalf of* the people. Judges do that in a sense—but not in the ordinary sense. As the captions of the pleadings in some States still display, it is the prosecutor who represents “the People”; the judge represents the Law—which often requires him to rule against the People. It is precisely because we do not *ordinarily* conceive of judges as representatives that we held judges not within the Fourteenth Amendment’s requirement of “one person, one vote.”⁶⁶

In *White*, four of the nine justices (Ginsburg, Stevens, Breyer, and Souter) believed First Amendment cases involving judicial elections should be treated differently from elections for political offices, and another Justice (O’Connor) questioned the entire judicial election process. *White* created more questions than answers. The Court applied strict scrutiny to judicial campaign speech, leaving lower courts to ascertain the validity of other parts of judicial ethics codes from around the country.⁶⁷ The Court’s ruling that judicial cam-

⁶⁵ *Id.* at 2528.

⁶⁶ *Chisom v. Roemer*, 111 S. Ct. 2354, 2372 (1991) (Scalia, J., dissenting) (citing *Wells v. Edwards*, 93 S. Ct. 904 (1973)). Internal citations omitted. See also Mary Thrower Wickham, *Mapping the Morass: Application of Section 2 of the Voting Rights Act to Judicial Elections*, 33 WM. & MARY L. REV. 1251 (1992).

⁶⁷ See Richard L. Hasen, *First Amendment Limits on Regulating Judicial Campaigns*, in *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS* 15 (Matthew J. Streb ed., 2007). For an argument that judges should be treated as politicians because judges make policy decisions, see Michael R. Dimino, *Pay No Attention to That Man Behind the Robe: Judicial Elections, the First Amendment, and Judges As Politicians*, 21 YALE L. & POLY REV. 301 (2003). The title of Dimino’s article, like the title of this note, comes from the movie *The Wizard of Oz*. *THE WIZARD OF OZ* (Metro Goldwyn Meyer 1939). I personally agree that judges make policy decisions and have no problem with judges advancing policy. In fact every law school casebook is a book of judge made law. Whether someone refers to the judge made law as an “activist” ruling depends upon which side of the fence she is on. The problem lies

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paign speech is subject to strict scrutiny may cause many judicial rules of ethics to come into constitutional question, including.⁶⁸

- a. Restrictions on pledges or promises, which are unconstitutional for legislative and executive races.⁶⁹
- b. Speech restrictions of sitting judges, such as not allowing judges to campaign on behalf of others.
- c. Limitations on personally raising campaign funds, which many states have in their judicial codes of conduct, but are unconstitutional for non-judicial elections.⁷⁰
- d. Nonpartisan judicial elections and limitations on political activities by judges and judicial candidates.
- e. Restrictions on leftover campaign money going to partisan elections.
- f. Restrictions from associating with political organizations and taking leadership roles in political organizations.

If strict scrutiny is applied to the above activities, they are in danger of being struck down, severely weakening the canons of judicial ethics. Most of the rules

in the fact that judges make policy through the litigations process, and the role judges play is as representing none of the litigants. That is far different than the "representation" that dominates the legislative and executive branches.

⁶⁸ Hasen, *supra* note 67, at 17. For an analysis of how various provisions in judicial ethics codes may be affected by *White*, see Richard Briffault, *Judicial Campaign Codes After Republican Party of Minnesota v. White*, 153 U. PA. L. REV. 181 (2004).

⁶⁹ The remedy for violating the pledges or promises provision in West Virginia has been self-recusal. For instance, in 2008, West Virginia Supreme Court of Appeals candidate Menis Ketchum said, while speaking to the West Virginia State Medical Association, "I think we have an obligation to comment on specific issues. Because if we don't talk about specific issues, then how can you judge whether to vote for us or not. It's not enough for me to get up here and say 'I'm a good guy, and I'll consider it.' And the law of land says we can comment on specific issues. I do know about the Medical Professional Liability Act and each of its reforms. The Medical Professional Liability Act is constitutional. I will not vote to overturn it. I will not vote to change it. I will not vote to modify it. That is my position." THE WEST VIRGINIA RECORD, Feb. 13, 2008, available at

<http://www.wvrecord.com/news/207894-supreme-court-candidates-speak-at-medical-forum>. The speech is available online. Consumerforjustice, *Menis Ketchum*, YOUTUBE (April 16, 2008), <http://www.youtube.com/watch?v=qLnnEdg5Kng>. Upon being elected, Justice Ketchum recused himself when the issue came before the court in *MacDonald v. City Hosp., Inc.*, 715 S.E.2d 405, 425 (W. Va. 2011). Justice Ketchum is a former editor of the West Virginia Law Review.

⁷⁰ The 11th circuit struck down the ban on personally soliciting campaign funds for judges in *Weaver v. Bonner*, 309 F.3d 1312, 1315 (11th Cir. 2002), but the 10th Circuit declined to follow in *Bauer v. Shepard*, 620 F.3d 704, 706 (7th Cir. 2010) *cert. denied*, 131 S. Ct. 2872 (U.S. 2011).

of judicial ethics are in place to prevent judges from representing or appearing to represent persons or groups.

As I discussed in Part I, the judiciary was not established as a representative branch of government. Judges are not representatives, and should not be treated as such. Black's Law Dictionary defines "representative" as "[o]ne who stands for or acts on behalf of another."⁷¹ The judiciary is a distinct branch of government because unlike legislators and executives in the political branches, judges do not act as representatives. Rather, judges should be neutral arbiters who interpret and apply the law. Although judges are sometimes charged with making policy, judges do not make policy in a representative capacity. The political branches are made up of elected representatives fighting on behalf of their constituencies, as it should be, because a healthy democracy requires politicians to represent their constituents. There is no such thing as a judicial representative. Accordingly, the representative/political branches of government must be distinguished from the judiciary.

Both the liberal and conservative wings of the Supreme Court have made the argument that the judiciary should be distinguished from officials in the political branches. Justice Scalia once made an argument similar to the Justice Ginsburg and Justice Stevens dissents in *White*. Justice Scalia, in a dissenting opinion, interpreted the definition of "representatives" in a case where voters sought to enforce Section 2 of the Voting Rights Act with respect to judicial districting.⁷² Scalia emphatically rejected the notion of judges being representatives and claimed that judges are no more representative than are Major League Baseball fan selected all-stars.⁷³

This issue of whether "one person one vote" applies to judicial elections came to the Court in *Wells v. Edwards*,⁷⁴ which addressed whether or not judges are "representatives."⁷⁵ The "one person, one vote" jurisprudence guarantees equally weighted votes (equal district size) and equal representation for voters in the representative/political branches of government.⁷⁶ *Wells* addressed whether Louisiana's scheme for electing its state supreme court violated the 14th Amendment by violating the equal protection rights of some voters. The Louisiana Supreme Court was elected by districts. Each district voted only on candidates from within that district. The Louisiana constitution set the supreme court districts *without regard to population*.⁷⁷ The district court upheld the election scheme: "[j]udges do not represent people, they serve people."⁷⁸ Thus, the ra-

⁷¹ BLACK'S LAW DICTIONARY 1328 (8th ed. 2004).

⁷² See *Chisom v. Roemer*, 111 S. Ct. 2354, 2372 (1991) (Scalia, J., dissenting).

⁷³ *Id.*

⁷⁴ *Wells v. Edwards*, 93 S. Ct. 904 (1973). See also *Stokes v. Fortson*, 234 F. Supp. 575, 576 (N.D. Ga. 1964).

⁷⁵ *Id.*

⁷⁶ See *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.* 90 S. Ct. 791, 792 (1970); *Baker v. Carr*, 82 S. Ct. 691 (1962).

⁷⁷ *Wells v. Edwards*, 93 S. Ct. 904 (1973).

⁷⁸ *Id.*

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tionale behind the one-man, one-vote principle, which evolved out of efforts to preserve a truly representative form of government, was shown to be irrelevant to ensuring equal “representation” in the judiciary.”⁷⁹ The Supreme Court summarily affirmed *Wells* without opinion,⁸⁰ although Justice White wrote a dissent joined by Douglas and Marshall.⁸¹

The well-grounded history of distinguishing the judiciary in both selection methods and the speech regulations of office holders begs the question of whether the judiciary should be distinguished with regard to modern campaign finance jurisprudence.

III. THE *BUCKLEY* PARADIGM OF CAMPAIGN FINANCE JURISPRUDENCE

All campaign finance jurisprudence since the late 1970s has been analyzed through a framework set forth in the landmark decision *Buckley v. Valeo*.⁸² In *Buckley*, the Court took on various challenges to the Federal Election Campaign Act of 1971, as amended in 1974.⁸³ Those challenges included challenges to: 1) limits on campaign contributions, 2) limits on campaign expenditures, and 3) public financing.

A. *Distinguishing Campaign Contributions and Expenditures*

Buckley distinguished between campaign contributions and campaign expenditures, holding that limits on campaign contributions are constitutional, while limits on campaign expenditures violated First Amendment associational and speech rights.⁸⁴ Campaign expenditures include all money that a candidate, or campaign committee spends to get elected. Independent expenditures include money that a person or organization spends on getting someone else elected or supporting an issue. These are distinguished from campaign contributions whereby money is given directly to a candidate or candidate’s campaign committee.⁸⁵

⁷⁹ *Wells v. Edwards*, 347 F.Supp. 453, 455 (MD La.1972), aff’d, 409 U.S. 1095, 93 S.Ct. 904 (1973) (citing *Buchanan v. Rhodes*, 249 F.Supp. 860 (N.D.Ohio 1960)).

⁸⁰ *Wells v. Edwards*, 93 S. Ct. 904 (1973).

⁸¹ *Id.* Justice White did not address whether judges are representatives, but rather he argued that equal protection, and one person one vote doctrines do apply to the judiciary irrespective of whether judges are representatives.

⁸² *Buckley v. Valeo* 96 S.Ct. 612 (1976). *Buckley* is a Per Curium opinion that set new precedent in many areas of election law. At over 138 pages in the United States Reports *Buckley* is the longest Per Curium opinion the Supreme Court has ever issued. DANIEL HAYS LOWENSTEIN ET AL., *ELECTION LAW CASES AND MATERIALS* 680 (Carolina Academic Press, 4th ed. 2008)

⁸³ Federal Election Campaign Act of 1971, Pub.L. No. 92-225, 86 Stat 3 (codified as amended at 2 U.S.C. § 431).

⁸⁴ *Buckley* at 627.

⁸⁵ Many scholars find that this is a distinction without a difference. See, e.g., Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045, 1063–65 (1985); David Schultz, *Revisiting Buckley v. Valeo: Eviscerating the*

Campaign expenditure limits cap the overall speech that a candidate or organization may use, and the Court found such caps to be unconstitutional. To illustrate this point, the Court in a footnote states: "Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline."⁸⁶ The Court went on to say that even limits on independent expenditures "fail to serve any substantial governmental interest in stemming the reality or appearance of corruption."⁸⁷ The Court distinguished campaign expenditures from campaign contributions, finding that contribution limits were constitutional because "[t]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined."⁸⁸ Thus limitations on campaign finances are limited to contributions. In the current state of campaign finance jurisprudence, overcoming these limitations for the sake of judicial independence is no easy task.

B. *The Compelling State Interest Against Corruption and the Appearance of Corruption*

For campaign finance regulations that affect constitutional rights to pass constitutional muster, they must serve a compelling state interest. Plausible state interests abound, including preventing or curing corruption, preventing or curing the appearance of corruption, equalizing the playing field, reducing incumbent advantage, reducing the amount of time candidates spend fundraising, making elections more competitive, and limiting distortion of claims made during campaigns. However, the *Buckley* Court found that the only compelling state interests are the interests against corruption and the appearance of corruption.

Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions. In *CSC v. Letter Carriers*, the Court found that the danger to "fair and effective government" posed by partisan political conduct on the part of federal employees charged with administering the law was a sufficiently important concern to justify broad restrictions on the employees' right of partisan political association. Here, as there, Congress could legitimately conclude that the avoidance of the appearance of improper influence "is also crit-

Line Between Candidate Contributions and Independent Expenditures, 14 J.L. & POL. 33, 35-51 (1998).

⁸⁶ *Buckley* n. 18 at 634.

⁸⁷ *Id.* at 648.

⁸⁸ *Id.* at 638.

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ical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.”⁸⁹

While the Supreme Court, since *Buckley*, has focused on corruption and the appearance of corruption as compelling state interests, Zephyr Teachout argues that the Constitution itself contains within it a freestanding “anti-corruption principle.”⁹⁰ Teachout makes a compelling case that the Court has weakened the historical constitutional treatment of corruption and that it should not be treated as a compelling state interest but rather as a fundamental constitutional principle.⁹¹ As a fundamental constitutional principle the court should give corruption co-equal constitutional consideration with the First Amendment.⁹² However, it is unlikely that courts will return to analyzing First Amendment and anti-corruption concerns as coequals anytime in the near future.

The Pilot Program’s stated purpose is to eliminate the appearance of corruption and foster independence and integrity on the West Virginia Supreme Court of Appeals, but it is questionable whether it is a “representative” body.⁹³ This constitutionality of the Pilot Program is analyzed in Part IV *infra*.

C. *Away From Balancing, Toward Strict Scrutiny*

The *Buckley* Court struggled with the level of scrutiny to apply to First Amendment issues in campaign finance, at times using the terms “rigorous standard of review,”⁹⁴ “exacting scrutiny,”⁹⁵ and “balancing,”⁹⁶ but the Court appeared to apply different levels of scrutiny to different issues that arose in the case. In 2000, in *Shrink Missouri*, the Court rejected the use of strict scrutiny, adopting a contextual analysis whereby “[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.”⁹⁷ Following *Shrink Missouri*, the Roberts Court has weakened the tools with which states can prevent corruption or the appearance of corruption through campaign finance laws by applying strict scrutiny to speech issues, first in *Wisconsin Right to Life*⁹⁸ and then in *Citizens United*.⁹⁹

⁸⁹ *Id.* at 638-39 (citing U. S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers, AFL-CIO, 93 S. Ct. 2880, 2890 (1973)).

⁹⁰ Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 342 (2009).

⁹¹ *Id.* at 346-72.

⁹² *Id.* at 345.

⁹³ W. VA. CODE ANN. § 3-12-1 (LexisNexis 2011).

⁹⁴ *Buckley* at 640.

⁹⁵ *Id.* at 647.

⁹⁶ *Id.* at 735.

⁹⁷ *Nixon v. Shrink Missouri Gov’t PAC*, 120 S. Ct. 897, 906 (2000).

⁹⁸ *Fed. Election Comm’n v. Wisconsin Right To Life, Inc.*, 127 S. Ct. 2652 (2007). (Applied strict scrutiny and held that banning “electioneering communication” by a corporation in the

It is often stated that when the Court applies strict scrutiny it is “strict in theory and fatal in fact.”¹⁰⁰ Strict scrutiny requires a law that inhibits speech to be struck down by the court unless it is shown that the law is narrowly tailored to a compelling state interest.¹⁰¹ It is important to note that *Citizens United* does not overturn *Buckley*, but rather extends the paradigm set forth in *Buckley* establishing that independent expenditures of corporations and unions shall not be limited. The ban on expenditure limitations previously only applied to natural persons.

Stevens addressed the issue of judicial elections in his *Citizens United* dissent:

[T]oday’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. Perhaps “*Caperton* motions” will catch some of the worst abuses. This will be small comfort to those States that, after today, may no longer have the ability to place modest limits on corporate electioneering even if they believe such limits to be critical to maintaining the integrity of their judicial systems.¹⁰²

D. *Strict Scrutiny Should Not Apply to Judicial Campaign Speech*

Strict scrutiny should not apply to the regulation of judicial speech, judicial campaign speech, or judicial campaign spending. Because the judiciary plays a different role in our system of governance, states should be given greater leeway in drafting regulations to uphold the integrity and impartiality of the courts and prevent corruption and the appearance of corruption. Applying strict scrutiny judicial campaign regulations threatens provisions in the Model Code of Judicial Conduct. The Seventh Circuit recently applied a balancing approach in deciding whether a judicial candidate can endorse candidates in the political

months prior to an election violated free speech. The law violated free speech because Wisconsin Right to Life was airing issue only ads. It was still okay to limit candidate advocacy ads.)

⁹⁹ *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010). (Held that restricting political spending of corporations violates the First Amendment. In other words, the free speech protections with respect to campaign spending afforded to natural persons were extended to non-natural persons.)

¹⁰⁰ The phrase was first used by Gerald Gunther. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on A Changing Court: A Model for A Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

¹⁰¹ The fourth footnote in the Supreme Court case *United States v. Carolene Products* is famous for introducing levels of judicial scrutiny, including strict scrutiny. *United States v. Carolene Prods. Co.*, 304 U.S. 144, n.4 (1938).

¹⁰² *Citizens United* at 968 (internal citations omitted).

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branches and upheld a law against it, reasoning that judges are akin to government employees.¹⁰³ Strict scrutiny does not apply to the regulation of political speech of government employees under the Hatch Act,¹⁰⁴ rather it is subject to a balancing test.¹⁰⁵ Courts should extend this type of balancing to the regulation of campaign spending in judicial elections, in which free speech concerns must be balanced with concerns of judicial independence.

Even if strict scrutiny is applied, states should be able to tailor a number of policies to prevent the appearance of corruption, although the policies may violate free speech if applied to the political branches. This distinction in application arises because the state interest of maintaining an appearance of independence in the judiciary is a compelling interest that does not exist in the political branches. Parts IV and V of this Note demonstrate that West Virginia has a problem with the appearance of impropriety of its judiciary, and that efforts to remedy such problems, like the Pilot Program, are narrowly tailored to serve that purpose.

IV. THE *CAPERTON* CONUNDRUM AND THE EROSION OF TRUST IN THE JUDICIARY

Nemo iudex in causasua (no one should be a judge in their own cause).

I've been around West Virginia long enough to know that politicians don't stay bought, particularly ones that are going to be in office for 12 years. So I would never go out and spend money to try to gain favor with a politician. Eliminating a bad politician makes sense. Electing somebody hoping he's going to be in your favor doesn't make any sense at all.¹⁰⁶ **Don Blankenship 2009**

In 2004, wealthy coal baron and former Massey Energy CEO, Don Blankenship spent over three million dollars of his own money on the West Virginia Supreme Court of Appeals race to defeat incumbent Justice Warren McGraw.¹⁰⁷ Blankenship gave \$2.5 million to "And for the Sake of the Kids,"

¹⁰³ Siefert v. Alexander, 608 F.3d 974, 983 (7th Cir. 2010) *cert. denied*, 131 S. Ct. 2872 (U.S. 2011).

¹⁰⁴ The Hatch Political Activities Act of July 19, 1940, Pub.L. No. 76-753 (codified as amended at 5 U.S.C. §§ 7321-7326).

¹⁰⁵ *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1953 (2006); *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 67 S. Ct. 556 (1947) (assessing the constitutionality of The Hatch Political Activities Act of July 19, 1940, Pub. L. No. 76-753).

¹⁰⁶ Adam Liptak, *Case May Alter Judge Elections Across Country*, N.Y. TIMES (Feb 14, 2009), <http://www.nytimes.com/2009/02/15/washington/15scotus.html?ref=washington>.

¹⁰⁷ *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252 (2009). This case, along with the 2004 West Virginia Supreme Court of Appeals election, is widely rumored to be the inspiration of John Grisham's bestselling novel "The Appeal." See <http://www.pbs.org/wnet/need-to-know/five->

an organization formed to run attack ads against Justice Warren McGraw.¹⁰⁸ The group's strategy was clear: *audactercahumniare, semper aliquidhaeret* (slander boldly, something always sticks). Blankenship spent another \$500,000 soliciting support for Brent Benjamin.¹⁰⁹ Blankenship's expenditures exceeded both Democratic candidate Warren McGraw's and Republican candidate Brent Benjamin's campaign committees combined by one million dollars.¹¹⁰ Benjamin won the election, becoming the first Republican voted on to a full term to the WV Supreme Court since 1928.¹¹¹ The controversy over the election is not only due to the amount of money that Blankenship spent, but also the fact that Massey Energy was at the time appealing a 2002 \$50 million verdict to the five member West Virginia Supreme Court of Appeals and Blankenship knew that the election may affect that appeal.¹¹² Benjamin refused to recuse himself from the Massey suit. In 2007, on appeal, the West Virginia Supreme Court of Appeals overturned the verdict with Justice Benjamin in the 3-2 majority, saving Massey over \$50 million.¹¹³

After the 2007 reversal, the Charleston Gazette uncovered photographs of another justice, Elliot "Spike" Maynard, vacationing together with Don Blankenship on the French Riviera in 2006 while Caperton was appealing the case to the West Virginia Supreme Court of Appeals.¹¹⁴ Upon this revelation, Justice Maynard recused himself from a rehearing.¹¹⁵ Caperton also moved again for Justice Benjamin to recuse himself, but Benjamin refused. Another justice, Larry V. Starcher, also recused himself from the rehearing, because he publicly criticized Don Blankenship, Brent Benjamin, and Spike Maynard for their roles

things/massey-ceo-don-blankenship/842/. For other scholarly articles focused on the West Virginia judiciary, see Brian P. Anderson, *Judicial Elections in West Virginia: "By the People, for the People" or "By the Powerful, for the Powerful?" A Choice Must Be Made*, 107 W. VA. L. REV. 235 (2004); Larry V. Starcher, *Choosing West Virginia's Judges*, THE W. VA. LAW., Oct. 1998, at 19 (1998) (West Virginia Supreme Court of Appeals Justice Larry Starcher arguing for partisan judicial elections); Richard A. Brisbin, Jr. & John C. Kilwein, *The Future of the West Virginia Judiciary: Problem and Policy Options*, 24 THE W. VA. PUB. AFF. R., 2 (2007). For an inside look at Warren McGraw's 2004 campaign for the West Virginia Supreme Court of Appeals, see THE LAST CAMPAIGN (Wayne Ewing 2005) a documentary that follows McGraw through each stage of the campaign and compares it to his first campaign for office in 1972 which was portrayed in another documentary by Wayne Ewing, IF ELECTED (Wayne Ewing 1972).

¹⁰⁸ Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252, 2257 (2009). This was before *Citizens United* when Massey Energy was itself barred from campaign spending. After *Citizen's United* the \$3 million could have come directly from Massey Energy.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ One Republican Justice, Charles Hayden, was elected to a short term in 1972 after having been appointed by Governor Arch Moore.

¹¹² *Id.* at 2257.

¹¹³ Caperton v. A.T. Massey Coal Co., Inc. 2007 WL 4150960 (not published, a later opinion substituted this one).

¹¹⁴ Caperton at 129 S. Ct. at 2258.

¹¹⁵ *Id.*

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in the debacle.¹¹⁶ After Justices Starcher and Maynard recused themselves, Justice Brent Benjamin, while acting as chief justice, appointed two judges to fill those vacancies.¹¹⁷ Once again the court in a 3-2 decision ruled in favor of Massey, with Justice Benjamin again in the majority.

In 2009, the United States Supreme Court heard arguments to determine whether due process required Justice Benjamin to recuse himself. The court looked to whether Caperton's due process rights under the Fourteenth Amendment were violated by Benjamin ruling on the case. Justice Kennedy cited his concurrence in *White*: "The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order."¹¹⁸ The Court held that due process required Benjamin to recuse himself because Blankenship's expenditures created a "debt of gratitude" from Benjamin to Blankenship, creating an appearance of bias and a serious risk of actual bias.¹¹⁹ The Court went on to say that "[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, but this is an exceptional case."¹²⁰ Nor must the contribution be a "but for" cause of being elected, or actual bias proven.¹²¹ Rather, the proper analysis is made by, upon taking all of the circumstances into account and inquiring into whether there was an objective risk of bias to the average judge in such circumstances.¹²²

The Kennedy opinion held:

There is no allegation of a *quid pro quo* agreement, but the extraordinary contributions were made at a time when Blankenship had a vested stake in the outcome. Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when-without the other parties' consent-a man chooses the judge in his own cause. Applying this principle to the judicial

¹¹⁶ *Id.*

¹¹⁷ Press Release, West Virginia Supreme Court of Appeals, Justice Benjamin Appoints Judge Fox to Massey Case (Feb. 15, 2008) *available at* http://www.state.wv.us/wvsca/press/feb15c_08.htm. Benjamin was the Acting Chief Justice filling in for Maynard. In West Virginia it is the role of the Chief Justice or Acting Chief Justice to fill vacancies "in his or her discretion." W. Va. R. App. P. 33 (h).

¹¹⁸ *Caperton* at 129 S. Ct. at 2666 (citing *White*, 536 U.S. at 779 (Kennedy, J., concurring)).

¹¹⁹ *Caperton*, 129 S.Ct. at 2264.

¹²⁰ *Id.* at 2263.

¹²¹ *Id.* at 2264.

¹²² For analysis of various judicial recusal standards, see Raymond J. McKoski, *Judicial Disqualification After Caperton v. A.T. Massey Coal Company: What's Due Process Got to Do with It?*, 63 BAYLOR L. REV. 368, 369 (2011); Eric Sandberg-Zakian, *Rethinking "Bias": Judicial Elections and the Due Process Clause After Caperton v. A.T. Massey Coal Co.*, 64 ARK. L. REV. 179 (2011).

election process, there was here a serious, objective risk of actual bias that required Justice Benjamin's recusal.¹²³

Justice Kennedy then backtracked from that statement when deciding *Citizens United*:

Caperton v. A.T. Massey Coal Co., (2009), is not to the contrary. *Caperton* held that a judge was required to recuse himself “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.” The remedy of recusal was based on a litigant's due process right to a fair trial before an unbiased judge . . . *Caperton*'s holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned.¹²⁴

The Roberts Court is determined to apply strict scrutiny to campaign finance laws, but *Caperton* presents a problem because the Court in *Caperton* indicated that independent campaign expenditures in a judicial election can cause an appearance of impropriety. If independent expenditures can cause an appearance of impropriety in judicial elections as *Caperton* claims, then under a *Buckley* paradigm, a state would be on firm constitutional footing regulating speech in pursuit of preventing and eliminating such an appearance of judicial corruption arising out of independent campaign expenditures. In *Caperton*, Justice Kennedy, upon concluding that “Judicial integrity is, in consequence, a state interest of the highest order” admitted that there was an appearance of impropriety that arose from independent expenditures, and then, in *Citizen's United* stated that the expenditures only required the recusal of Justice Benjamin and did not pertain to speech in elections. It is true that *Caperton* concerned due process and not the First Amendment. No state law tried to hinder Blankenship's speech; thus the court could not rule on whether such a law could do so. The Pilot Program gives the courts a chance to assess whether the appearance of impropriety or corruption it found in *Caperton* could be addressed by regulating campaign finance.

¹²³ *Id.* at 2256. Former West Virginia Supreme Court Justice Richard Neely gave his opinion on how he would solve the case: “This is how I would conclude the opinion if I were on the Supreme Court. There has been a due process violation in this case and the rule is: When you see an owl at a mouse picnic, you know he didn't come for the sack races.” Richard Neely, *Judicial Elections and Due Process*, AMERICAN CONSTITUTION SOCIETY (Feb. 26, 2009) <http://blip.tv/american-constitution-society/judicial-elections-and-due-process-4802432> (quote is at 33 minutes 20 seconds).

¹²⁴ *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 910 (2010) (citing *Caperton*).

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A. *Charleston, We Have a Problem: The Appearance of Judicial Impropriety*

“This crisis of confidence in the impartiality of the judiciary is real and growing. Left unaddressed, the perception that justice is for sale will undermine the rule of law that the courts are supposed to uphold.”¹²⁵ **Retired Justice Sandra Day O’Connor (August 2010)**

“We figured out a long time ago that it’s easier to elect seven judges than to elect 132 legislators.”¹²⁶ **An Ohio AFL-CIO official (1990)**

West Virginians have lost faith in the independence of the state supreme court. Even prior to the 2004 election, West Virginians were weary of the judicial selection process. In 1995, 56% of West Virginians said their confidence in the legal system now, as compared to five years earlier, decreased, while only 6% had said that their confidence in the legal system had increased.¹²⁷ In a January 1998 poll when West Virginians were asked about their preferred judicial selection methods, West Virginians chose as follows: 38% for nonpartisan elections, 35% for partisan elections, and 19% for gubernatorial appointments.¹²⁸ In 2008, when Mark Blankenship Enterprises asked a similar question, the support for partisan elections dropped to 19%, with 37% choosing merit selection and 36% choosing nonpartisan elections.¹²⁹ In that same poll, 60% of respondents disagreed with the statement that partisan elections create a fair court system. In 2005, the West Virginia Institute for Public Affairs polled West Virginia circuit judges, magistrates and family court judges and found that a majority of circuit judges, magistrates, and family court judges supported elections over appointments.¹³⁰

¹²⁵ Sandra Day O’Connor, Foreword to James Sample et. al. *The New Politics of Judicial Elections 2000-2009: Decade of Change* 22 (2010) available for download at: http://www.brennancenter.org/content/resource/the_new_politics_of_judicial_elections/. The project was a joint effort among the Brennan Center for Justice at NYU School of Law, the Justice at Stake Campaign, and the National Institute on Money in State Politics.

¹²⁶ J. Christopher Heagarty, *The Changing Face of Judicial Elections*, 7 N.C. St. B.J. 20, 21 (2002).

¹²⁷ Ryan, McGuinn, Samples Research, *The West Virginia Poll*, Jun. 1995.

¹²⁸ Ryan, McGuinn, Samples Research, *The West Virginia Poll*, Jan. 1998.

¹²⁹ Mark Blankenship Enterprises, *MBE Presentation to Governor’s Independent Commission on Judicial Reform and Former U.S. Supreme Court Justice Sandra Day O’Connor* (2009) (Poll was conducted in August 2008) available at <http://www.markblankenship.com/web/news/Independent%20Commission%20on%20Judicial%20Reform%20Presentation%20Final.pdf>.

¹³⁰ &Kilwein, *supra* note 107, at 4. Note that most of those in the poll were elected, so it is no surprise that judges dance to the song that got them their office.

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In 2010, Justice at Stake conducted a poll in West Virginia asking many questions about the judiciary.¹³¹ When asked about the degree to which campaign contributions affect judicial decisions, only 5% of respondents believed they had no influence, while 41% said that contributions had some influence, and 37% said contributions had a great deal of influence. When asked about independent groups spending \$50,000 or more on a candidate, 76% believed it was a serious problem.

Interestingly, the surveyors sought to measure the effect of hearing about the Blankenship-Benjamin affair by asking a series of questions, explaining details of the Don Blankenship - Brent Benjamin relationship, then asking those same series of questions.¹³² After running through the questions, respondents were told:

As you may know, in two thousand four Massey Coal corporation owner [sic] Don Blankenship spent three million dollars through a third party group to help elect Brent Benjamin as Supreme Court justice. Then when Massey Coal went to trial for a separate matter, Justice Benjamin did not remove himself from the case and ruled in favor of Massey Coal.¹³³

Sixty-eight percent of West Virginians believed that candidates receiving contributions from potential litigants was a serious or very serious problem. After being exposed to the above paragraph, that number jumped to 89%. When asked about public financing of elections, 52% supported it while 39% opposed it. But upon being exposed to the above paragraph, support for public financing jumped to 61%, and opposition dropped to 30%. These data indicate that knowledge of the 2004 election and the subsequent refusal of Benjamin to recuse himself decrease confidence in the judiciary.

While much of the lack of trust in the independence of the judiciary stems from the Blankenship-Benjamin affair, it may run much deeper. Between 2000 and 2009 West Virginia's Supreme Court elections have become one of the costliest in the nation when considering the amount of money candidates raised per general election vote.¹³⁴ In that time period, West Virginia Supreme Court of Appeals candidates raised and spent far more money per general election vote than surrounding states (See Figure 3). In West Virginia, candidates raised \$2.80 per general election vote. Even knowing that candidate funding in

¹³¹ Justice at Stake, *West Virginia - 2010 Poll*, (2010) available at http://www.justiceatstake.org/media/cms/West_Virginia_Poll_Results_674E634FDB13F.pdf.

¹³² The survey implemented a quasi-experiment designed to test the effect of knowing about the Blankenship-Benjamin affair by first asking a series of questions on judicial issues followed by a stimulus (reading the paragraph above) and then re-asking the questions.

¹³³ This is the exact language from the survey. Massey Energy was a public company, and Blankenship, although a large shareholder, was not "the owner," rather he was the CEO.

¹³⁴ The data on expenditures were retrieved from Sample et al., *supra* note 125125. The data on state general elections were retrieved from the following secretaries of states websites.

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West Virginia court elections is far outside the norm, it pales in comparison to the amount of money Don Blankenship spent in relation to the number of votes Benjamin received in 2004 (See Figure 4). Don Blankenship spent almost eight dollars per Brent Benjamin vote.

Historically, general elections to the West Virginia Supreme Court of Appeals were not very competitive from the mid-1930s through 2000 (See Figure 5). The decade that followed has had multiple competitive elections.¹³⁵ This rise in campaign spending and accompanying lack of faith in the judiciary is reflected on the national level as well.¹³⁶ In the past, judicial elections had been low-key affairs, but things changed in the 1990s and 2000s when a nationwide battle over “tort reform” engulfed court races.¹³⁷ Pro-business groups sought to limit injured plaintiffs’ access to the civil justice system as well as the damages that injured plaintiffs could receive. All the while, plaintiffs’ attorneys and unions spent vast resources to halt the imposition of such limits on the civil justice system.

After controlling for inflation the amount spent of money raised and spent by judicial candidates on judicial elections has skyrocketed since 1990.¹³⁸ The rise in spending is most prominent in partisan judicial elections which are more costly than nonpartisan elections.¹³⁹ Along with candidate expenditures, independent expenditures have risen, resulting in far more television ads.¹⁴⁰ Furthermore, the ads have become more negative, especially those paid for by independent groups.¹⁴¹ Just as spending has increased, confidence in the independence of the judiciary has decreased, and confidence in state courts is lower in states with partisan elections than in states with other selection methods.¹⁴² National polls show that about three quarters of Americans believe that campaign contributions to judges impact their decisions.¹⁴³

¹³⁵ While spending and competitiveness are associated, the causal direction of that relationship is difficult to parcel out. Does more money make the election competitive, or do competitive elections result in more money being spent? The relationship is likely reciprocal. See generally Chris W. Bonneau, *The Effects of Campaign Spending in State Supreme Court Elections*, 60 POL. RES. Q. 489 (2007).

¹³⁶ Sample et al., *supra* note 125.

¹³⁷ *Id.* at 14.

¹³⁸ *Id.* at 5 (figure one). See also Chris W. Bonneau *The Dynamics of Campaign Spending in State supreme Court Elections*, in *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS* 63–65 (Matthew J. Streb ed., 2007); CHRIS W. BONNEAU & MELINDA GANN HALL, *IN DEFENSE OF JUDICIAL ELECTIONS* 30–33 (Routledge 2009).

¹³⁹ Chris W. Bonneau, *The Dynamics of Campaign Spending in State supreme Court Elections*, in *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS* 65–66 (Matthew J. Streb ed., 2007).

¹⁴⁰ Sample et al., *supra* note 119, at 24–31.

¹⁴¹ *Id.*

¹⁴² Sara C Benesh, *Understanding Public Confidence in American Courts*, 68 AM. J. POL. SCI. 697, 704 (2006) (using a 1999 survey).

¹⁴³ *Id.*

B. *Impartial Courts are a National Concern*

A 2009 USA Today/Gallup Poll found that 89% of Americans believe the influence of campaign contributions on judge's rulings is a problem, with 52% believing it is a major problem.¹⁴⁴ More than 90% said judges should be removed from a case if it involves a campaign contributor. This distrust of judges when it comes to deciding cases of campaign contributors may only be exacerbated by the surge in spending on negative campaign advertisement in judicial races.¹⁴⁵

Judges across the United States are also concerned by both the rise of campaign spending and the impact of increased spending on judicial independence. Chief Justice of the Texas Supreme Court Wallace Jefferson wrote in the Houston Chronicle:

In a close race, the judge who solicits the most money from lawyers and their clients has the upper hand. But then the day of reckoning comes. When you appear before a court, you ask how much your lawyer gave to the judge's campaign. If the opposing counsel gave more, you are cynical.¹⁴⁶

A Republican Ohio Supreme Court Justice, Paul Pfeifer, who had previously run for office in non-judicial elections, compared how it felt running for judicial office and non-judicial office:

I never felt so much like a hooker down by the bus station in any race I've been in as I did in a judicial race. . . . Everyone interested in contributing has very specific interests. They mean to be buying a vote. Whether they succeed or not, it's hard to say.¹⁴⁷

A 2001 national survey of 2,428 state and local judges found that 55% thought the tone of judicial campaigns had gotten worse in the past five years while only 8% thought the tone had gotten better.¹⁴⁸ Seventy-four percent of judges are concerned that "nearly half of all supreme court cases involve some-

¹⁴⁴ Joan Biskupic, *Supreme Court case with the feel of a best seller*, USA TODAY, (Feb 16, 2009) available at http://www.usatoday.com/news/washington/2009-02-16-grisham-court_N.htm.

¹⁴⁵ Sample et al., *supra* note 125, at 24-31.

¹⁴⁶ Wallace B. Jefferson, *Make Merit Matter by Electing New System of Selecting Judges*, HOUS. CHRON., (March 21, 2009), <http://www.chron.com/opinion/outlook/article/Wallace-B-Jefferson-Make-merit-matter-by-1544078.php>.

¹⁴⁷ Adam Liptak and Jane Roberts, *Campaign Cash Mirrors High Court's Ruling*, N. Y. TIMES, (Oct. 1, 2006), <http://www.nytimes.com/2006/10/01/us/01judges.html>.

¹⁴⁸ Greenberg QuinlinRosner Research Inc. *Justice at Stake State Judges Poll (2001-2002)* available at http://www.justiceatstake.org/media/cms/IASJudgesSurveyResults_EA8838C0504A5.pdf.

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one who has given money to one or more of the judges hearing the case.”¹⁴⁹ Eighty-four percent of state court judges are concerned that there are “few restrictions on special interest groups who buy advertising to influence the outcome of judicial elections and decisions.”¹⁵⁰ Also, 84% of judges are concerned that special interest groups attempt to use the courts as a means to their public policy ends.

These attitudes among judges have led to support for reform among judges. Fifty-six percent of judges themselves believe that “judges should be prohibited from presiding over and ruling in cases when one of the sides has given money to their campaign.”¹⁵¹ Sixty percent of judges would support public financing for judicial elections, while only 29% would oppose public financing.¹⁵² However, only 45% of judges would support a merit selection plan with retention elections, while 50% would oppose such a plan.¹⁵³

While there is great concern for judicial independence, we must ask if there is any actual connection between campaign spending and judicial rulings. Not surprisingly, there is empirical evidence that shows a strong association between interest group donations and how a judge votes.¹⁵⁴ For instance, after controlling for a host of variables, one scholar found that for each million dollars a judge receives in campaign donations from insurance companies in a partisan election, a judge is 87% more likely to rule in favor of the original defendant in a tort case.¹⁵⁵ It is important to note that a regression model finding an association between campaign spending and judicial voting, while demonstrative of a link between spending and voting, does not show a causal relationship.¹⁵⁶ Furthermore, should a causal relationship exist, a regression model like the one used cannot parcel out the direction of the causality. In other words, do judges rule a certain way because of how much money they received from certain groups, or do interest groups give to judges because of the way they are going to rule? My guess is the relationship is reciprocal and works both ways.

When I asked one West Virginia attorney in 2012 why he was giving the maximum donation to a Supreme Court candidate running for reelection who has vast personal wealth that she is spending on the campaign he said, “It is not that I think she has a realistic chance of losing, or that she needs the money, but I just got a favorable judgment from the Supreme Court and I don’t want that to stop.”

¹⁴⁹ *Id.* at 9.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 11.

¹⁵² *Id.* at 12.

¹⁵³ *Id.* at 13.

¹⁵⁴ Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623 (2009).

¹⁵⁵ *Id.* at 671-672.

¹⁵⁶ *Id.* at 672.

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In response to the appearance of corruption many states have implemented various reforms. West Virginia has responded and its reforms are outlined next.

V. THE WEST VIRGINIA SUPREME COURT OF APPEALS PUBLIC CAMPAIGN FINANCING PILOT PROGRAM PASSES CONSTITUTIONAL MUSTER

The courts of this state shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without *sale*, denial or delay.¹⁵⁷ **The Constitution of West Virginia**

As a response to the fallout from *Caperton v. Massey*, in 2010, the West Virginia Legislature passed the Pilot Program, setting up a voluntary public financing option for West Virginia Supreme Court of Appeals candidates in the 2012 election.¹⁵⁸ The stated purpose of the legislation is codified:

The detrimental effects of spending large amounts by candidates and independent parties are especially problematic in judicial elections because *impartiality is uniquely important to the integrity and credibility of courts*; An alternative public campaign financing option for candidates running for a seat on the Supreme Court of Appeals will ensure the fairness of democratic elections in this state, protect the Constitutional rights of voters and candidates from the detrimental effects of increasingly large amounts of money being raised and spent to influence the outcome of elections, protect the impartiality and integrity of the judiciary, and strengthen public confidence in the judiciary.¹⁵⁹

The West Virginia legislature found the impartiality and integrity of the judiciary to be a vital interest in need of protection.¹⁶⁰ Upon finding an increase

¹⁵⁷ W. VA. CONST. ART. III, § 17 (emphasis added).

¹⁵⁸ W. VA. CODE ANN. § 3-12-1 (LexisNexis 2011). This piece of legislation was sponsored by and introduced by former West Virginia Law Review editor and current Speaker of the House of Delegates Richard Thompson. Former Governor Joe Manchin championed the bill and the bill passed along party lines with Democrats supporting the bill and Republicans opposing. The votes for the House of Delegates can be found at <http://www.legis.state.wv.us/legisdocs/2010/RS/votes/house/00150.pdf>. It should also be noted that the West Virginia Association for Justice (trial lawyers) supported the passage of the Pilot Program, while the Chamber of Commerce opposed it. THE WEST VIRGINIA RECORD, March 18, 2010, available at

<http://www.wvrecord.com/arguments/225445-their-view-trial-lawyers-support-public-financing>.

¹⁵⁹ *Id.* at § 3-12-2 (8-9) (emphasis added).

¹⁶⁰ *Id.* at § 3-12-2 (3-7).

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in expenditures for the West Virginia Supreme Court of Appeals elections coupled with the fallout from the *Caperton v. Massey* affair, the legislature acted by starting a public financing pilot program for the 2012 elections. The legislature most likely opted for this reform because switching to the appointment of judges would have required a constitutional amendment¹⁶¹ that would unlikely pass a 2/3 majority of both houses and a statewide public vote.¹⁶²

Under the Pilot Program, candidates wishing to participate in the public financing program must raise between \$35,000 and \$50,000 in qualifying contributions, from at least 500 registered voters in West Virginia.¹⁶³ All qualifying contributions must be between \$1 and \$100, and a minimum of 10% of all qualifying contributors must be individuals registered to vote in each of the three congressional districts.¹⁶⁴ In a contested primary, qualified candidates receive \$200,000 minus the qualifying contributions.¹⁶⁵ In an uncontested primary, qualified candidates receive \$50,000 minus the qualifying contributions.¹⁶⁶ In the general election, qualified candidates receive \$35,000 if it is uncontested and \$350,000 if it is contested.¹⁶⁷ Qualified candidates may receive matching funds based upon independent expenditures or privately financed candidate expenditures that exceed the initial allotment by 20% or more.¹⁶⁸ The State Election Commission decides whether that threshold has been met and may release additional funds to publicly financed candidates not to exceed an additional \$400,000 in a primary election and \$700,000 in a general election.¹⁶⁹ If the fund has been depleted of money and candidates are not able to receive matching funds, then candidates can raise their own funds up to the unfunded amount.¹⁷⁰

In response to the *Arizona Free Enterprise Club* decision discussed below, West Virginia Attorney General Darrell McGraw issued an opinion to Secretary of State Natalie Tennant's office on the legality of the Pilot Program,

¹⁶¹ The West Virginia Constitution requires that the Supreme Court of Appeals be elected: "The justices shall be elected by the voters of the state for a term of twelve years, unless sooner removed or retired as authorized in this article. The Legislature may prescribe by law whether the election of such justices is to be on a partisan or nonpartisan basis." W. VA. CONST. ART. VIII, § 2. While the Constitution of West Virginia has required the election of justices since its adoption in 1872, in 1974 it was amended to note that the legislature could choose to have the judges elected by partisan or nonpartisan elections. ROBERT M. BASTRESS, *THE WEST VIRGINIA STATE CONSTITUTION* 224–25 (2011).

¹⁶² West Virginians do not support an appointed judiciary. Public opinions are discussed *infra* Section III.

¹⁶³ W. VA. CODE ANN. § 3-12-8 (a,c) (LexisNexis 2011).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at § 3-12-11 (a-1).

¹⁶⁶ *Id.* at § 3-12-11 (a-2).

¹⁶⁷ *Id.* at § 3-12-11 (b-1,2)

¹⁶⁸ *Id.* at § 3-12-11 (g).

¹⁶⁹ *Id.* at § 3-12-11 (g,h).

¹⁷⁰ *Id.* at § 3-12-11 (d).

claiming that it is unconstitutional citing *Arizona Free Enterprise Club*.¹⁷¹ Attorney General McGraw reasoned that “nothing in the recent jurisprudence of the United States Supreme Court would lead us to predict a “judicial exception” to the Court’s political speech line of cases.”¹⁷² McGraw went on to misstate the Supreme Court’s reasoning by claiming “[i]f combating corruption is not a compelling state interest — and the Court held in no uncertain terms in *Arizona Free Enterprise Club* that it is not — we cannot envision it finding the perception of possible judicial partiality to be sufficient.”¹⁷³ As will be discussed below the Supreme Court did state that corruption and the appearance of corruption are compelling state interests, but the Arizona law was not narrowly tailored to that interest.¹⁷⁴ West Virginia Secretary of State, Natalie Tennant, indicated that she would not follow the Pilot Program as passed by the West Virginia Legislature, but rather follow the opinion of Attorney General McGraw.¹⁷⁵ The state had in essence decided to “declare the bread stale before it has baked.” Only one of the 2012 candidates (Democrat-turned-Independent-turned-Republican Allen Loughry) qualified for the Pilot Program.¹⁷⁶

In June 2012, the State Election Commission (“SEC”) met and reiterated its intent to not follow the matching funds part of the Pilot Program. Then in July 2012, after candidate Robin Davis triggered the matching funds by spending more than \$420,000 since the primary, the State Election Commission met to decide whether to disperse the funds. Although the Pilot Program gave the SEC no discretion on whether to release matching funds once triggered, the SEC, in a 2-2 vote, chose not to disperse the funds.

While the reason for public financing itself is to prevent the appearance of impropriety, the reason for a matching funds provision is to provide an efficient way to price judicial elections, as opposed to just setting a high flat rate of public financing. Without a matching funds provision the legislature has the option of draining the state’s coffers by allotting a high set rate of public financing, setting a low rate that no candidate will participate in it, or not engaging in public financing at all.

¹⁷¹ Letter from West Virginia Attorney General Darrell McGraw to Secretary of State Natalie Tennant. 2011 WL 3680078 (W. Va. A.G. July 28, 2011).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Arizona Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2826 (2011).

¹⁷⁵ Interestingly, the only 2012 candidate for the West Virginia Supreme Court of Appeals who qualified for public financing was Allen Loughry who used to work for Attorney General McGraw, and now works for the West Virginia Supreme Court as a clerk. However, Attorney General McGraw and Allen Loughry are not political bedfellows. In Loughry’s book on the history of corruption in West Virginia, Loughry dedicated a chapter to brothers Darrell and Warren McGraw, both of whom have served on the West Virginia Supreme Court of Appeals. ALLEN H. LOUGHRY, *DON’T BUY ANOTHER VOTE, I WON’T PAY FOR A LANDSLIDE: THE SORDID AND CONTINUING POLITICAL CORRUPTION IN WEST VIRGINIA* 178 (2006).

¹⁷⁶ This phrase comes from a statute of limitations case. See *Fleishman v. Eli Lilly & Co.*, 96 A.D.2d 825, 826, (App. Div. 1983).

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Buckley upheld public financing because the limits to expenditures on the part of candidates accepting public financing were voluntary.¹⁷⁷ The Court looked only at the federal public financing law for presidential elections, which appropriates a set amount of money to those candidates accepting public financing in the general election, and appropriates funds to primary candidates based upon how much private money the candidates raise.¹⁷⁸ The Court reasoned that public financing expands speech rather than inhibits it:

[Public financing] is a Congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people. Thus, [public financing] furthers, not abridges, pertinent First Amendment values.¹⁷⁹

Arizona Free Enterprise Club brought to a more conservative Court the issue of conditioning public finances based upon what opposing candidates or independent organizations spend.

A. *Arizona Free Enterprise Club*

In *Arizona Free Enterprise Club*, Justice Roberts applied the strict scrutiny outlined in *Citizen's United* and held that a matching funds provision, under which a candidate's allotment of public financing is determined by opponent spending, substantially burdens political speech and thus is unconstitutional.¹⁸⁰ The Court reasoned that a matching funds provision is in essence akin to an expenditure limit.¹⁸¹ *Arizona Free Enterprise Club* also held that Arizona's anti-corruption interest in its legislature and executive offices does not justify the substantial burden on the speech of privately financed candidates and independent spenders.¹⁸² The Court reached its conclusion by applying *Buckley* and *Citizens United*:

We have also held that "independent expenditures ... do not give rise to corruption or the appearance of corruption." *Citizens United*, "By definition, an independent expenditure is po-

¹⁷⁷ *Buckley v. Valeo* 96 S.Ct. 612, 666 (1976).

¹⁷⁸ *Id.* at 668.

¹⁷⁹ *Id.* at 670.

¹⁸⁰ *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011). For a comprehensive discussion of matching funds (also called trigger funds or rescue funds) cases in lower courts prior to *Arizona Free Enterprise Club* see Eric H. Wexler, *A Trigger Too Far?: The Future of Trigger Funding Provisions in Public Campaign Financing After Davis v. FEC*, 13 U. PA. J. CONST. L. 1141, 1143 (2011).

¹⁸¹ *Id.*

¹⁸² *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011).

litical speech presented to the electorate that is not coordinated with a candidate.” The candidate-funding circuit is broken. The separation between candidates and independent expenditure groups *negates the possibility that independent expenditures will result in the sort of quid pro quo* corruption with which our case law is concerned. Including independent expenditures in the matching funds provision cannot be supported by any anti-corruption interest.¹⁸³

The Court disregarded *Caperton*, which indicated that an appearance of corruption resulted from independent expenditures in a judicial election. A “multiplier effect” concerned the Court, whereby “[e]ach dollar spent by the privately funded candidate results in an additional dollar of funding to each of that candidate’s publicly financed opponents.”¹⁸⁴ This in turn puts privately financed candidates at a disadvantage because “[e]ven if that candidate opted to spend less than the initial public financing cap, any spending by independent expenditure groups to promote the privately financed candidate’s election—regardless whether such support was welcome or helpful—could trigger matching funds.”¹⁸⁵

The Court made clear that it is not declaring public financing all together unconstitutional, stating that “[i]t is not the amount of funding that the State provides to publicly financed candidates that is constitutionally problematic in this case. It is the manner in which that funding is provided—in direct response to the political speech of privately financed candidates and independent expenditure groups.”¹⁸⁶ Thus, states implementing public financing schemes will be required to set flat rates and will run the risk of under distributing or over distributing funds to publicly funded candidates.

The Pilot Program is structured like the Arizona law and contains a similar matching funds provision. In *Arizona Free Enterprise Club*, the laws only apply to legislative and executive elections; thus, the Court could not distinguish between the political branches and the judiciary. In fact, *Arizona Free Enterprise Club* “did not deal specifically with judicial elections at all, because the Arizona law at issue involved only legislative and executive races. As a result, there are strong arguments that judicial public financing would survive a court challenge like that in *Arizona Free Enterprise Club*.”¹⁸⁷

¹⁸³ *Id.* at 2826-27 (citing *Citizens United*. internal citations omitted).

¹⁸⁴ *Id.* at 2810.

¹⁸⁵ *Id.* at 2819.

¹⁸⁶ *Id.* at 2824.

¹⁸⁷ Adam Skaggs and Maria da Silva, *The New Politics of Judicial Elections 2009-2010*, 22 (2011) available for download at: http://www.brennancenter.org/content/resource/the_new_politics_of_judicial_elections_2009-10/. The project was a joint effort among the Brennan Center for Justice at NYU School of Law, the Justice at Stake Campaign, and the National Institute on Money in State Politics.

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B. Does Arizona Free Enterprise Club Overrule North Carolina Right To Life?

In 2008, prior to *Arizona Free Enterprise Club*, the Fourth Circuit addressed the issue of a matching funds provision in a public financing scheme for judicial elections in *North Carolina Right To Life Committee Fund For Independent Political Expenditures v. Leake*.¹⁸⁸ Citing *Buckley*, the court rejected First Amendment challenges to the matching funds scheme because candidates and independent spenders “remain free to raise and spend as much money, and engage in as much political speech, as they desire.”¹⁸⁹ The court goes beyond just stating that the public financing scheme does not violate free speech, rather it “furthers, not abridges, pertinent First Amendment values by ensuring that the participating candidate will have an opportunity to engage in responsive speech.”¹⁹⁰

The Fourth Circuit further stressed that the “vital interest in an independent judiciary” has been protected “at least [back] to our nation’s ing.”¹⁹¹ However, the Supreme Court in *Arizona Free Enterprise Club* ignored the issue of publicly financed matching funds in a judicial race and did not mention or cite *North Carolina Right To Life*. The Supreme Court had the opportunity to review *North Carolina Right To Life*, but instead denied it *cert*.¹⁹² While *Arizona Free Enterprise Club* called in to doubt the constitutionality of the North Carolina law, it does not explicitly make matching funds schemes in a judicial race unconstitutional. The Seventh Circuit took briefs on the Wisconsin matching fund provision for its judicial election public financing, but never decided the issue because the legislature changed the law.¹⁹³

Attorney General McGraw was wrong to simply say *Arizona Free Enterprise Club* made the Pilot Program unconstitutional without acknowledging *North Carolina Right To Life*.¹⁹⁴ The constitutionality of matching funds provisions for judicial elections will likely be reviewed by courts sometime during or after the 2012 election. In doing so a court should look not only to *Arizona Free Enterprise Club*, but also to *North Carolina Right To Life* and the history of distinguishing the judiciary in selection methods and the regulation of campaign

¹⁸⁸ *N. Carolina Right To Life Comm. Fund For Indep. Political Expenditures v. Leake*, 524 F.3d 427, 432 (4th Cir. 2008). The late Judge M. Blane Michael, who wrote this opinion, was a native of West Virginia and graduated of West Virginia University as an undergrad. Note that West Virginia is also in the Fourth Circuit. For a discussion of publically financed judicial elections focused around the experience in North Carolina, see Paul D. Carrington, *Public Funding of Judicial Campaigns: The North Carolina Experience and the Activism of the Supreme Court*, 89 N.C. L. REV. 1965 (2011).

¹⁸⁹ *N. Carolina Right To Life Comm.* at 436 (citing *Buckley* at 612).

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 441.

¹⁹² *Duke v. Leake*, 129 S. Ct. 490, 172 L. Ed. 2d 357 (2008).

¹⁹³ See *Wisconsin Right to Life Polit, et al v. Michael Brennan, et al.*, 11- 1769, (7th Cir. 2011).

¹⁹⁴ Letter from West Virginia Attorney General Darrell McGraw to Secretary of State Natalie Tennant. 2011 WL 3680078 (W. Va. A.G. July 28, 2011).

speech. If a court applies a balancing test, it will likely find that any speech it hinders is outweighed by the compelling state interest of preventing corruption and the appearance thereof. However, if strict scrutiny is extended to judicial elections, even then the Pilot Program should be upheld because it is narrowly tailored to fix the appearance of impropriety on the West Virginia Supreme Court of Appeals. Part VI compares the Pilot Program with other methods of judicial selection and weighs the pros and cons of each method.

VI. SOLVING THE CONFLICT BETWEEN MODERN CAMPAIGN FINANCE JURISPRUDENCE AND HISTORICAL NOTIONS OF JUDICIAL INDEPENDENCE

The Judicial Selection process is exactly like the two restaurants in a small WV town. I once had business affairs in a small West Virginia town and when I was a boy, I first went into that town about lunch time and I asked a constable where to eat. He said, "Oh son, there are two restaurants here, X and Y and they're both about the same, you could eat at either one of them." And I said, "Well, which one do you think is better." And he said, "Oh, they're just exactly the same, I'd go to whatever one is closer." And I said, "Well, if you were going to eat at one, which one would you pick." He said, "It wouldn't make a bit of difference to me, but," he said, "I'll tell you one thing boy - which ever one you pick, you'll wish to hell you'd picked the other one." And that's the system of judicial selection.¹⁹⁵**Former West Virginia Supreme Court of Appeals Justice Richard Neely.**

Due to the historically greater state interest in an independent judiciary, and the overwhelming evidence of the appearance of impropriety in judicial decisions, when evaluating judicial campaign regulation, courts and policy makers alike should weigh the interests of an independent judiciary with concerns for the freedom of speech. Accordingly, a balancing approach should be used.

States have wildly varying methods of judicial selection.¹⁹⁶ Generally there are two methods for judicial selection: judicial elections and judicial appointments. Within judicial elections there are partisan elections (like in West

¹⁹⁵ Lisa A. Stamm, 1995 *Chief Justice Richard Neely "Uniquely Unconventional"*, W. VA. LAW., (Jan. 1995) at 16, 20.

¹⁹⁶ For an in depth summary of every state's judicial selection processes and make of the judiciary see, *Methods of Judicial Selection*, AM. JUDICATURE SOC'Y, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state= (last visited Dec. 30, 2011). See also *Methods of Judicial Selection: Removal of State Judges*, AM. JUDICATURE SOC'Y, http://www.judicialselection.us/judicial_selection/methods/removal_of_judges.cfm?state= (last visited Dec. 30, 2011) (describing how judges may be removed from office in each state). See Part II.B.

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Virginia), and nonpartisan elections.¹⁹⁷ Within judicial appointments there are legislative appointments and executive appointments. Many states have attempted to combine appointments with elections under “merit selection,” in which an independent group selects a number of possible nominees and the governor and/or the legislature picks one. After being appointed under merit selection, the judge is then subject to a retention election after a period of time in which the judge is subject to an up or down vote from the public without any competitors.

Selection methods should be evaluated by weighing their effect on the independence of the judiciary with their effect on free speech rights. Figure 6 shows a two dimensional diagram that can be used to evaluate what selection method should be chosen. The ideal policy should land in quadrant one, and no policy landing in the fourth quadrant should be adopted.

Figure 7 illustrates the pros and cons of each of the judicial selection methods in the speech-independent judiciary framework. There is no magic cure to ensure that a state maximizes speech and upholds the independence and integrity of the judiciary. The Supreme Court’s campaign finance jurisprudence creates the problem of states having to choose between taking the voters out of the equation or allowing judicial elections to be lawless, Wild West-like affairs. Partisan elections without any additional regulation are a threat to judicial independence even though freedom of speech is maintained. Nonpartisan elections do little to solve the potential for corruption. In fact, political parties may endorse and work to get judicial candidates elected in “nonpartisan” races.¹⁹⁸ But the Roberts Court’s campaign finance jurisprudence has set up a conflict between the distinct interest in an independent judiciary and electoral politics run rampant. The Court leaves no middle ground. Justice Stevens recognized a “conflict between the demands of electoral politics and the distinct characteristics of the judiciary.”¹⁹⁹ Dissenting in *White*, Justice Stevens said “we do not have to put States to an all or nothing choice of abandoning judicial elections or having elections in which anything goes. . . [W]e cannot know for sure whether an elected judge’s decisions are based on . . . political expediency.”²⁰⁰

Because judicial elections have the potential to threaten the judiciary many states appoint judges, but this takes voters out of the equation hampering any voice they have independent of lobbying the governor or legislature. Proponents of merit selection believe that appointments straight from the governor or legislature are also too political and subject to inter-branch *quid pro quo* corruption that may create a separation of powers problem. Under merit selection, an independent committee, usually made up of attorneys, is charged with choos-

¹⁹⁷ For an analysis of the pros and cons of judicial elections see David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265 (2008).

¹⁹⁸ See generally *Renne v. Geary*, 111 S. Ct. 2331 (1991).

¹⁹⁹ *Republican Party of Minnesota v. White*, 122 S. Ct. 2528, 2548 (2002) (Stevens, J., dissenting).

²⁰⁰ *Id.*

ing a list of people for the legislature and/or governor to choose from. This only further separates the voters from the selection of judges, but proponents of merit selection, like Justice O'Connor, believe it is best at upholding the independence and integrity of the judiciary. Proponents of merit selection are concerned about justices ruling on cases based on the reelection implications of the decision. Merit selection is best criticized by analogy:

Imagine that Congress enacted a law under which the nation's bank presidents elect three people to serve as candidates for Secretary of the Treasury, and the President is required to appoint one of these candidates. Or suppose that a state required its governor to choose the chief of the state police from a slate of three candidates elected by the state troopers.²⁰¹

One journalist facetiously quipped that "merit selection of legislators might be a better idea than merit selection of judges - of course, there might be some constitutional questions involved."²⁰² The point is that such a scheme is undemocratic. It is for this reason that merit selection is usually combined with retention elections so that voters have a say whether or not to renew a judges term.

Some states have begun to move toward public financing of judicial elections as a middle-of-the-road approach to limit the impact of electioneering on the integrity of the judiciary while maintaining direct accountability to the voters.²⁰³ The purpose of publicly financed judicial elections is to limit the potential for *quid pro quo* corruption and the appearance of impropriety while also maintaining electoral accountability. States may offer voluntary public financing for all types of elections, but now under *Arizona Free Enterprise Club* states run the risk of over-spending or under-spending on public financing without a matching funds provision (at least in legislative and judicial elections). Even if *Arizona Free Enterprise Club* is applied to judicial elections rendering matching funds unconstitutional, there may be a number of ways for states to adequately price public financing without a matching funds provision.

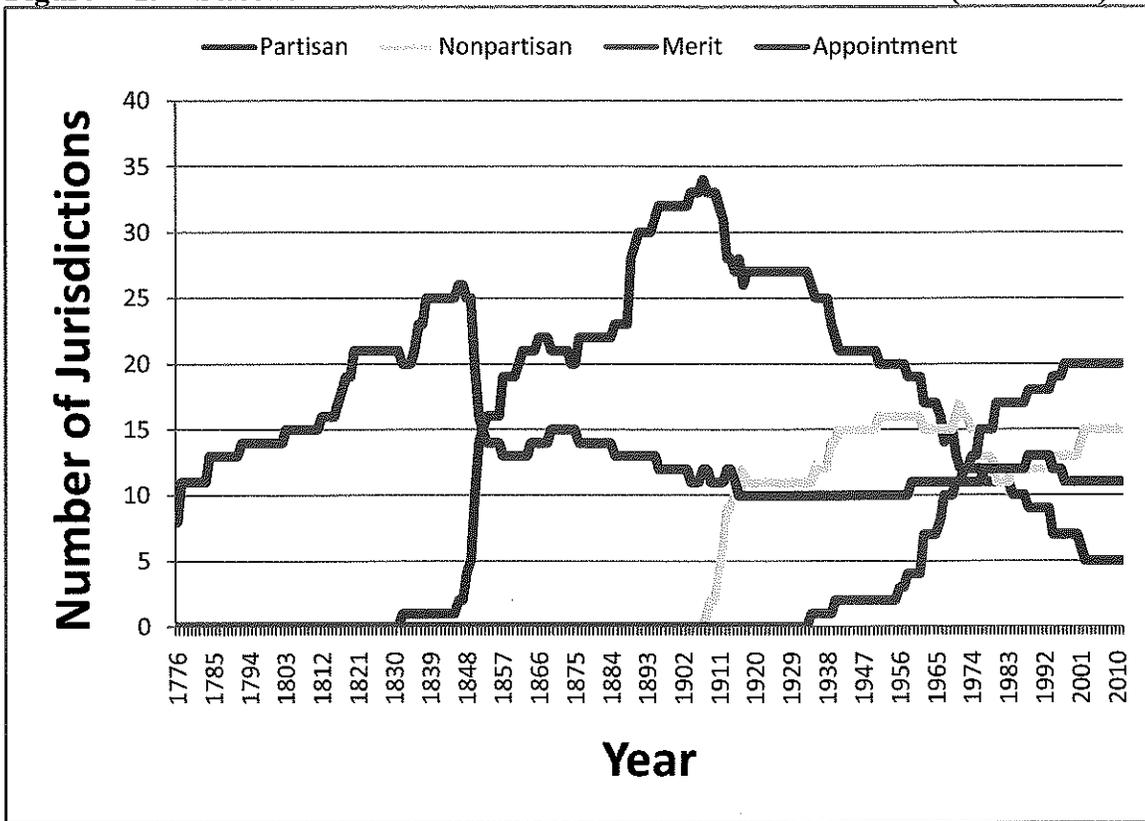
First, a state may allow a publicly financed candidate to raise additional money privately as opponents and independent groups outspend the publicly financed candidate. Second, a state may offer metered voluntary public financing. Under this type of scheme, publicly financed candidates would have to get more signatures and small private donations once opposition spending has passed a threshold in order to receive a second or third round of public financ-

²⁰¹ Nelson Lund, *May Lawyers Be Given the Power to Elect Those Who Choose Our Judges? "Merit Selection" and Constitutional Law*, 34 HARV. J.L. & PUB. POL'Y. 1043 (2011).

²⁰² Matthew Bieniek, *The People Should Elect Judges*, THE JOURNAL, (March 16, 2009), <http://www.journal-news.net/page/content.detail/id/517082/The-people-should-elect-judges.html>.

²⁰³ See Phyllis Williams Kotey, *Public Financing for Non-Partisan Judicial Campaigns: Protecting Judicial Independence While Ensuring Judicial Impartiality*, 38 AKRON L. REV. 597 (2005) for an argument in support of publicly financed non-partisan judicial elections.

Figure 1. Selection to State Courts of Last Resort (1776-2011)²⁰⁴



²⁰⁴ These data up to 2000 are available for download. Lee Epstein, Jack Knight, & Olga Shvetsova for *Replication data for: Selecting Selection Systems*, http://dvn.iq.harvard.edu/dvn/dv/mra/faces/study/StudyPage.xhtml?studyId=736&studyListingIndex=0_01df50fe82e5125a48dd56d9df35. I have updated the raw data and made some interactive graphs and maps that can be seen at <http://wvjustice.blogspot.com/2012/07/this-is-first-of-series-of-posts-that.html>.

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ing. Third, a state may try to condition funding based on something other than opposition spending such as spending in non-judicial races or public interest in the race. A state could conduct polls and if public interest in a judicial election reaches a certain level (likely as a result of a great deal of spending) then more public financing would be allotted. All of these ways around *Arizona Free Enterprise Club* but would be facially constitutional because the increase in public financing is not a direct result of opposition spending.

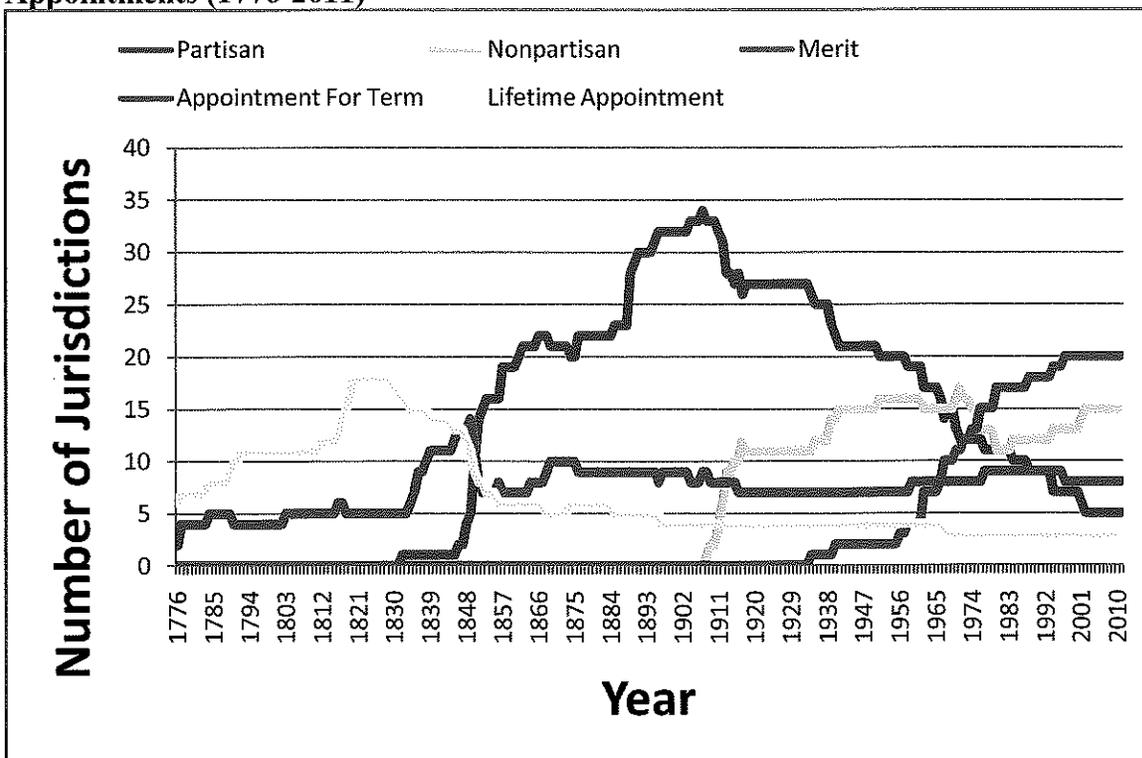
VII. CONCLUSION

Judicial elections are a horse of a different color. There is a long history of distinguishing the judiciary from the other branches when it comes to speech regulation and selection methods. Distinguishing the judiciary from the political branches is so historically grounded that by writing this paper I have essentially beaten a dead horse (of a different color). Nevertheless, modern campaign finance law is at odds with the history of distinguishing the judiciary. Modern campaign finance law from the Roberts Court threatens the sanctity of judicial independence of state courts. Accordingly, First Amendment issues in judicial elections should be viewed differently than First Amendment issues in elections for political offices. Courts should take a balancing approach, weighing the effect of a law on judicial independence with its effect on First Amendment free speech rights.

In applying such a standard to the Pilot Program, the importance of protecting the integrity and impartiality of the West Virginia judiciary is far greater than any speech it may hinder. Secondarily, the Pilot Program withstands strict scrutiny because it is narrowly tailored to the compelling state interest of reducing the unfortunate appearance of impropriety on the West Virginia Supreme Court of Appeals.

Anthony J. Delligatti

Figure 2. Selection to State Courts of Last Resort Separating Lifetime Appointments (1776-2011)²⁰⁵



²⁰⁵ *Id.*

Figure 3. State Supreme Court Candidate Funds Raised 2000-2009 Divided by General Election Vote Totals²⁰⁶

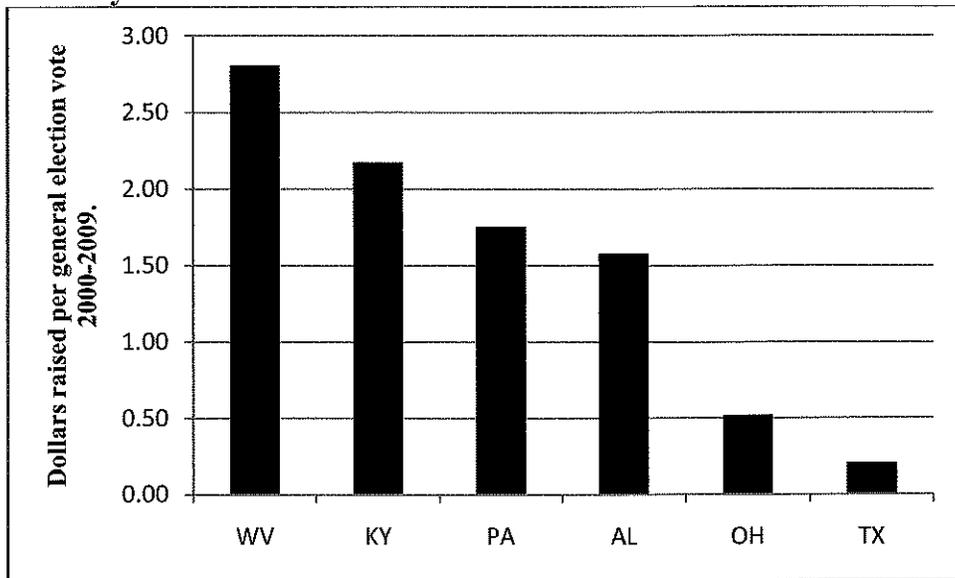
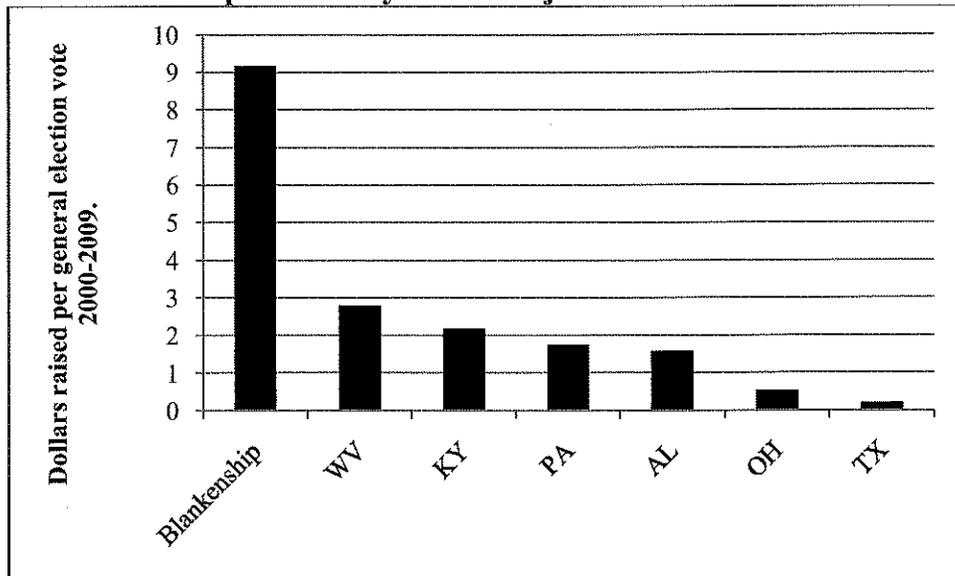


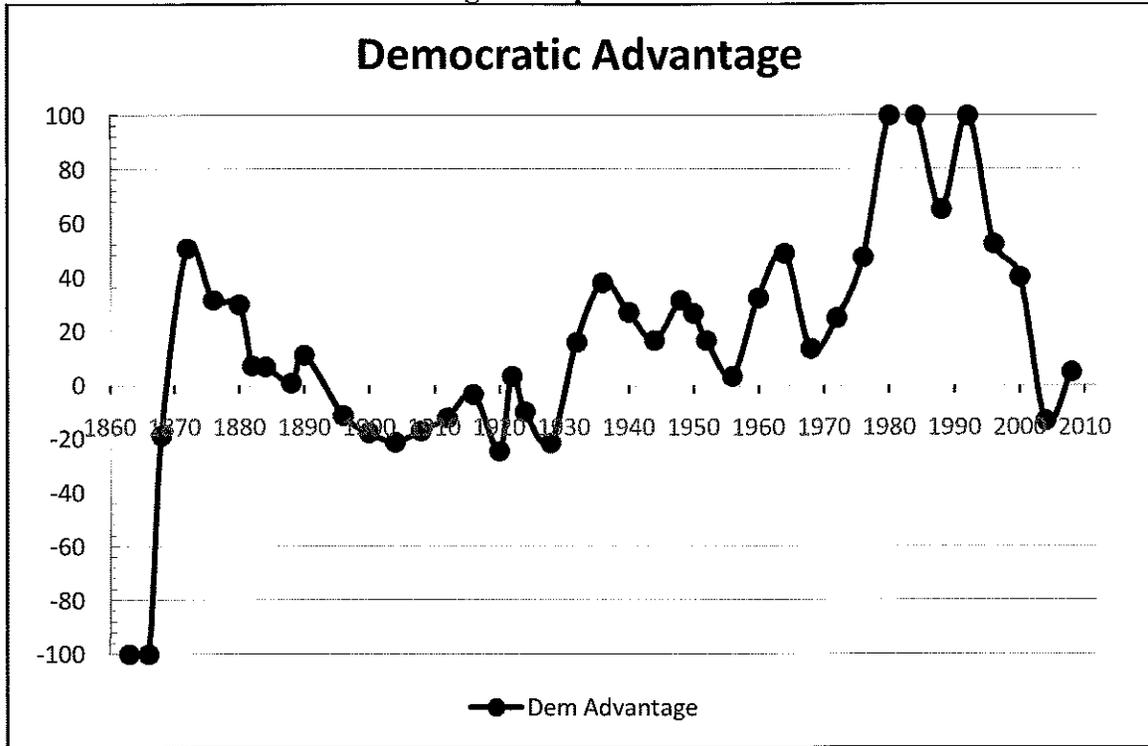
Figure 4. State Supreme Court Candidate Funds Raised 2000-2009 Divided by General Election Vote Totals. Plus 2004 Expenditures by Don Blankenship Divided by Brent Benjamin Vote Total.²⁰⁷



²⁰⁶The data on expenditures were retrieved from Sample et al., *supra* note 125.

²⁰⁷ *Id.*

Figure 5. Democratic Advantage: The Percentage of Democratic Votes Minus the Percentage of Republican Votes.²⁰⁸



²⁰⁸ The data were compiled by West Virginia Supreme Court of Appeals Clerk Rory Perry (former editor of the *West Virginia Law Review*) with the assistance of Brian O'Donnell from Wheeling Jesuit University and then updated and analyzed by me. The Democratic Advantage ("DA") calculates only Republican and Democratic Votes. All of the years are weighted based upon how many candidates from each party were running. For instance in 2008, one Republican ran against two Democrats for two seats. The DA takes into account the number of candidates running and not just the total number of votes cast.

Figure 6. Theoretical Judicial Selection Diagram

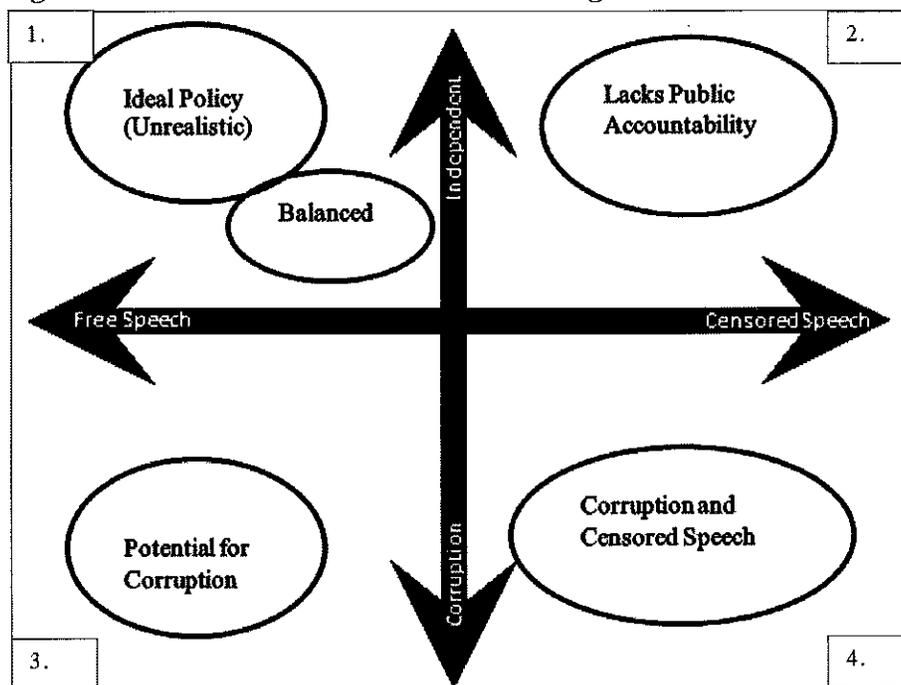


Figure 7. Judicial Selection Policies' Effects

Policy	Effect on	Effect on Judicial	Constitution-
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	Speech	Independence	al?
Partisan Elections (Base Line)			Yes
Nonpartisan Elections	-Takes away associational rights of candidate to associate with a party. - Parties may still endorse candidate. -May cause less money to be spent on elections.	-May slightly diminish appearance of impropriety and appearance of judicial independence.	Yes, for judicial elections. Depends for political offices.
Appointment / Merit Selection	-Severely limits speech of voters and contributors by putting the decision in the hands of the executive and legislative branches.	-Prevents "election buying" and the appearance of corruption that stems from the election process, but may be no less partisan or political. -Quid pro quo occurs between the legislators or governors and the judge instead of between donors/ independent spenders and the judge.	Yes, for judicial elections. Depends for political offices.
Retention Election	Limits public speech on who should be in office until after a term, limits it only to whether the incumbent should stay rather than who should replace the incumbent.	Same as above, but allows accountability to the voters at a later date.	Yes, for judicial elections. Questionable, for political elections.
Involuntary Public Financing	Limits the speech of those wanting to privately finance campaigns	Broadly takes away most opportunities to influence judicial candidates through private contributions.	No
Banning Independent Expenditures	Severely limits the speech rights of independent groups and individuals, but allows candidates to take ownership of their message.	Narrowly tailored to prevent the Blankenship-Benjamin type of appearance of corruption (Debt of gratitude) that appears when an outside entity expends vast resources.	No
Public Financing	Arguably increases speech, but may decrease the value or effectiveness of any individual expenditure of money.	Allows judicial candidates to not have to "dial for dollars" taking away the appearance of corruption.	Yes
Public Financing w/ Matching Funds	Arguably increases speech, but may decrease the value or effectiveness of any individual expenditure. Matching funds may deter spending because it will be offset by public monies.	Allows judicial candidates to not have to "dial for dollars" taking away the appearance of corruption.	Maybe for judicial elections. No, for political elections.
Recusal Standards	May deter those hoping to influence judges from spending or donating money.	May prevent some impropriety (or appearance thereof) from judges sitting on cases of benefactors.	Yes for judicial offices. Irrelevant for political offices.