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IS JUSTICE FOR SALE IN OHIO? AN EXAMINATION OF OHIO JUDICIAL ELECTIONS AND SUGGESTIONS FOR REFORM FOCUSING ON THE 2000 RACE FOR THE OHIO SUPREME COURT

I. INTRODUCTION

“Is justice for sale in Ohio?” asked a television advertisement in October 2000.¹ Another advertisement informed voters that “today in Ohio, instructors teach and students learn, in spite of Justice Alice Resnick.”² These advertisements are examples of the derogatory judicial campaigning that is becoming prevalent in the United States.³

The cost of judicial campaigning is also steadily increasing.⁴ For example, in Pennsylvania in 1987, the largest sum of money a candidate raised was \$407,711.⁵ In seven years, this number had risen to \$1,848,142.⁶ These increases were not limited to expenditures by the

1. Darrel Rowland & James Bradshaw, *State Elections Panel Reaffirms Legality of Anti-Resnick TV Ad*, COLUMBUS DISPATCH, Oct. 27, 2000, at 1D. This advertisement was produced by an independent activist group called Citizens for a Strong Ohio in opposition to Justice Alice Robie Resnick’s campaign for the Ohio Supreme Court, although its mission is technically classified as “issue advocacy” rather than “express advocacy”. *Id.* See *infra* note 132 and accompanying text for an explanation of these terms.

2. *October 25* (visited Feb. 10, 2001) <<http://www.ohiochamber.com/court/index.html>>.

3. See Charles D. Clausen, *The Long and Winding Road: Political and Campaign Ethics Rules for Wisconsin Judges*, 83 MARQ. L. REV. 1, 34-35 (1999). This is not the first time that Justice Resnick herself has been attacked. *Id.* In a prior race against Judge Sara Harper, Harper ran a derogatory ad against Resnick. *Id.* The ad read:

On the Ohio Supreme Court, one Justice has a problem. It’s money. Most of Resnick’s money comes from just one place, the plaintiff lawyers who sue, sue, sue. Over \$300,000.00 just from them. This small group of suing lawyers wants Resnick with her liberal rulings to make it easier for them to collect millions in fees. It’s time for a change to Judge Sara Harper. Recommended, endorsed, highly rated, twenty years as a Judge, Marine Corps Lieutenant Colonel. Judge Sara Harper.

Id.

4. Erwin Chemerinsky, *Preserving an Independent Judiciary: The Need for Contribution and Expenditure Limits in Judicial Elections*, 74 CHI.-KENT L. REV. 133, 136 (1998).

5. *Id.*

6. *Id.* These are not the only examples of abuse in the state of Pennsylvania. In 1986, expenditures for the race for chief justice had risen to \$2,700,000 from \$100,000 in 1980. *Id.*

candidates themselves.⁷ In 1985, the race for the Texas Supreme Court was heavily funded by two corporations vying to secure seats on the bench.⁸ The problem of outside expenditures was also prevalent in the 2000 race for the Ohio Supreme Court.⁹

Part II of this comment will focus on the 2000 Ohio Supreme Court campaign between Alice Robie Resnick and Terrence O'Donnell as an example of current problems in judicial campaigning.¹⁰ The effect of this campaign and of similar other campaigns on the judicial system and public perceptions of justice will be explored in Part III.¹¹ Part IV will identify and discuss limits to reforming the system.¹² Finally, Part V will explore possible solutions to this growing problem, including campaign regulation¹³ and merit selection and retention.¹⁴ Part VI will conclude with a summary of the points that were addressed.

II. THE RESNICK-O'DONNELL RACE

A. *Citizens for a Strong Ohio Advertising Campaign*

Citizens for a Strong Ohio (Citizens) is a non-profit organization that is a branch of the Ohio Chamber of Commerce (Chamber).¹⁵ This

7. Jason Miles Levien & Stacie L. Fatka, *Cleaning Up Judicial Elections: Examining the First Amendment Limitations on Judicial Campaign Regulation*, 2 MICH. L. & POL'Y REV. 71, 71 (1997).

8. *Id.* Penzoil contributed \$315,000 and Texaco contributed \$72,700. *Id.* These two entities were then involved in litigation in the court and may have been attempting to gain leverage for their respective cases. *Id.* The court eventually ruled for Penzoil. *Id.*

9. This race was dominated by the Ohio and United States Chambers of Commerce. Randy Ludlow, *Justice Resnick Survives TV Ad Salvos*, CINCINNATI POST, Nov. 8, 2000, at 15A. One commentator stated that "[b]y now, O'Donnell and Resnick appear to be little more than underfunded spectators in their own campaigns." *Profile: Supreme Court Race in the State of Ohio* (NPR radio broadcast Nov. 3, 2000).

10. See *infra* notes 15-73 and accompanying text. Although Justice Resnick eventually won reelection, the campaign leading to this result was a disturbing scene. See Ludlow, *supra* note 9, at 15A. After the election, Resnick herself lamented, "I'm not a vindictive person, but they really did attack my honor and integrity." Mike Wagner, *Despite Negative Ads, Resnick Retains Seat*, DAYTON DAILY NEWS, Nov. 8, 2000, at 1A. Although the ads were not successful in Ohio, the Chamber's efforts did pay off in several other states, such as Alabama, Michigan, Mississippi and Indiana. Associated Press, *Chamber's Ads Efforts Failed in Ohio, Worked in Other States*, COMMERCIAL APPEAL (Memphis, Tenn.), Nov. 9, 2000, at DS6. The Chamber considered its efforts to be a victory well worth the \$6-7 million investments. *Id.*

11. See *infra* notes 74-119 and accompanying text.

12. See *infra* notes 120-135 and accompanying text.

13. See *infra* notes 136-155 and accompanying text.

14. See *infra* notes 156-170 and accompanying text.

15. William Hershey, *Court Election Hottest*, DAYTON DAILY NEWS, Oct. 22, 2000, at 1A. The Ohio Chamber of Commerce is a organization of businesses and business owners. *Ohio*

division of the Chamber formed in order to express its opinions on the 2001 Ohio Supreme Court race.¹⁶ The group is officially engaged only in issue advocacy and is therefore not subject to campaign disclosure requirements.¹⁷ However, the group's involvement in the campaign was extensive, and its advocacy was, at best, narrowly related to business issues.¹⁸

The Chamber of Commerce did not favor the re-election of Justice Resnick because of previous rulings that the Chamber considered to be anti-business.¹⁹ The decision that Chamber found most offensive was that of *State ex. rel. Ohio Academy of Trial Lawyers v. Sheward*.²⁰ This decision struck down legislation that placed a limit on the amount of damages that plaintiffs could recover in tort cases.²¹ Businesses favored this legislation because it would have limited the amount that they would likely pay as tort defendants.²² The Chamber also opposed Resnick's opinion in *DeRolph v. State of Ohio*²³ which held that the Ohio system of

Chamber of Commerce (visited Feb. 10, 2001) <<http://www.ohiochamber.com/chamber/chamber.html>>. Its primary purposes include presenting "the business perspective" on issues to the Ohio legislature. *Id.* The group also aims to elect legislators that are favorable to business objectives. *Id.* They hope to create a business climate in Ohio that is "responsive to expansion and growth." *Id.*

16. James Bradshaw, *O'Donnell Laments Secret Ads*, COLUMBUS DISPATCH, Oct. 24, 2000, at 1B.

17. *See, e.g.*, OHIO REV. CODE ANN. § 3517.105 (B)(1) (Anderson 2000). This statute, like others regarding campaign disclosures, applies only to groups "advocating the election or defeat of an identified candidate." § 3517.105(B)(1). This distinction is based on First Amendment overbreadth concerns. *See infra* notes 120-34 and accompanying text.

One confirmed supporter of the group is Ohio governor, Robert Taft. Alan Johnson & James Bradshaw, *Ads Still Hot Topic in Race for Court Seat*, COLUMBUS DISPATCH, Oct. 26, 2000, at 1C. Governor Taft has admitted telephoning people and asking for contributions to the group. *Id.* Although he did not apologize for helping to fund the group, he did concede that the ads were inappropriate. *Id.*

18. *See infra* notes 25-48 and accompanying text.

19. Bradshaw, *supra* note 16, at 1B. This conclusion was based on studies released in 1996 and 1997. *Id.* Only one other member of the court, Andrew Douglas, was considered to be more anti-business than Justice Resnick. *Id.*

20. *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062 (Ohio 1999).

21. *Id.* at 1095. The legislation limited non-economic damages to \$250,000 or three times the economic damages, whichever was greater. *Id.* at 1092. When the plaintiff was permanently disabled, the legislation would allow him to recover \$1 million, or \$35,000 times the number of years the plaintiff was expected to live, whichever was greater. *Id.* The court determined that these caps on tort recovery were unconstitutional because they violated citizens' right of due process. *Id.* The limits that the legislature attempted to create were "unreasonable and arbitrary." *Id.* The court also scolded the legislature for essentially reenacting a piece of legislation that is substantially similar to legislation that the court had previously declared to be unconstitutional for the same reasons. *Id.* at 1095.

22. Hershey, *supra* note 15, at 1A.

23. *DeRolph v. State of Ohio*, 728 N.E.2d 993 (Ohio 2000).

public school funding was unconstitutional.²⁴ Because the Chamber of Commerce and Citizens considered Justice Resnick to be an “activist” and “anti-business,” they opposed her re-election to the Ohio Supreme Court.

Citizens’ for a Strong Ohio’s first anti-Resnick advertisement began airing on October 11, 2000.²⁵ The advertisement depicted lady justice holding the traditional scales of justice.²⁶ After someone dumped a load of money onto one side of the scales, she peeked out from behind her blindfold and tipped the scales in that direction.²⁷ The voice in the background informed viewers that Justice Resnick has received over \$750,000 from personal injury lawyers since 1994 and suggested that these donations have caused her to rule in favor of plaintiffs in more than 70 percent of cases.²⁸ The voice also told voters that Justice Resnick is the only Supreme Court Justice to ever reverse herself.²⁹ The advertisement concluded by asking voters, “Is Justice for Sale in Ohio? You decide.”³⁰

The advertisement based these allegations on *Episcopal Retirement Homes, Inc. v. Ohio Department of Industrial Relations*.³¹ The court

24. *Id.* at 999-1000. Ohio schools are funded by a complex system that relies primarily on property tax revenues generated in the school district. *Id.* at 999. This system was held to be unconstitutional because the Ohio Constitution requires a “thorough and efficient” method of common schooling. OHIO CONST., art. VI, § 2. Because of the lack of funding in some areas, some schools barely had enough funds to operate. *DeRolph*, 728 N.E.2d at 998. The Chamber of Commerce and Citizens for a Strong Ohio are examples of groups that attack judicial candidates based on the results rather than the merits of their decisions. See Lawrence H. Averill, Jr., *Observations on the Wyoming Experience with Merit Selection of Judges: A Model for Arkansas*, 17 U. ARK. LITTLE ROCK L. REV. 281, 314 (1995).

25. *October 11* (visited Feb. 10, 2001) <<http://www.ohiochamber.com/court/news2.html>>.

26. *Group Asks Elections Commission to Rule Ad Campaign Illegal*, ASSOCIATED PRESS NEWSWIREs, Oct. 26, 2000.

27. *Id.*

28. See *October 11 supra* note 25. This information was based on Chamber of Commerce studies involving limited subjects such as employment, medical malpractice and environmental issues. Bradshaw, *supra* note 16 at 1B. Another study conducted by Rev. Werner Lange of the Akron Clean Money Campaign concluded that Justice Resnick only voted in favor of her campaign contributors on 56.2% of cases. *Id.*

29. *Id.* For an analysis of this allegation and its misleading character see *infra* notes 31-37 and accompanying text.

30. See *October 11 supra* note 25.

31. *Episcopal Retirement Homes, Inc. v. Ohio Dep’t of Indus. Relations*, 575 N.E.2d 134 (Ohio 1991), *reh’g granted*, 578 N.E.2d 819 (Ohio 1991), *reh’g vacated*, 582 N.E.2d 606 (Ohio 1991). The issue in this case was whether a privately owned nursing home was required to pay construction workers the state prevailing wage when the remodeling project was funded by county owned bonds. *Id.* at 136. In the first case, the Court held that the nursing home did not have to pay the prevailing wage because the project was not a “public improvement.” *Id.* at 135. The project was not considered to be a public improvement because the nursing home controlled the project, the

first decided this case on August 14, 1991³² at which time Justice Resnick joined in the majority opinion.³³ On August 26, 1991, the Ohio State Building and Construction Trade Council, who had filed an amicus brief in the original case, filed a motion for reconsideration.³⁴ The court denied the motion but granted a rehearing *sua sponte* on October 8, 1991.³⁵ The court vacated the decision to grant the rehearing on December 6, 1991.³⁶ Justice Resnick clearly was not given the opportunity to switch her vote as the case was never reheard and the original decision remained binding on the parties.³⁷

On October 25, 2000, Citizens began airing another anti-Resnick television advertisement.³⁸ This advertisement depicted students fooling around in an unattended classroom.³⁹ The announcer described how a decision by Justice Resnick blocked the legislature's effort to ensure that

county did not benefit from nor have an interest in the project. *Id.* at 137-38. This decision was favorable to business organizations such as the Chamber of Commerce because building costs would be lower if businesses were not forced to pay the state prevailing wage.

32. *Id.* at 135.

33. *Id.* at 139. The court was split four-three with Chief Justice Moyer, Justice Holmes, Justice Wright and Justice Resnick in the majority and Justice Sweeney, Justice Douglas and Justice Brown dissenting. *Id.*

34. *Episcopal Retirement Homes, Inc. v. Ohio Dep't of Indus. Relations*, 582 N.E.2d 606, 609 (Ohio 1991) (Resnick, J., dissenting).

35. *Episcopal Retirement Homes, Inc. v. Ohio Dep't of Indus. Relations*, 578 N.E.2d 819 (Ohio 1991). The decision to grant the rehearing was also a four-three decision with Justice Sweeney, Justice Douglas, Justice Brown and Justice Resnick granting the rehearing and Chief Justice Moyer, Justice Holmes and Justice Wright dissenting. *Id.* This appears to be the vote on which the advertisement based its claim that Justice Resnick switched her vote. Andrew Welsh-Huggins, *U.S. Chamber Intervenes in Resnick-O'Donnell Race*, ASSOCIATED PRESS NEWSWIREs, Oct. 26, 2000. After this decision, the court, *sua sponte*, made a motion for the "recusal and or disqualification of Justice Alice Robie Resnick" on Nov. 13, 1991. 579 N.E.2d 1392 (Ohio 1991). The motion was stricken the same day. *Id.* The basis for making and striking this motion was not provided.

36. *Episcopal*, 582 N.E.2d 606 (Ohio 1991). This decision was once again by a vote of four to three. Chief Justice Moyer, Justice Holmes, Justice Wright and Justice Brown voted in the majority. Justice Sweeney, Justice Douglas and Justice Resnick dissented. *Id.* Interestingly, Justice Brown was the justice who literally switched his vote. He voted to grant the rehearing on October 8, 578 N.E.2d 819, and to deny the rehearing on December 6, 582 N.E.2d 606.

37. *Episcopal*, 582 N.E.2d 606. *But see* 582 N.E.2d 606, 610-11 (Resnick, J., dissenting). In her dissenting opinion Justice Resnick states "that this court possesses inherent authority to correct a miscarriage of justice and should do so in a timely manner. The citizens of Ohio cannot afford the luxury of waiting for another case identical to this one to come before us." *Id.* Although it does not directly identify this case as a "miscarriage of justice" or specifically state how she would have voted upon rehearing, this statement suggests that Resnick would have changed her vote if given an opportunity to do so. *Id.*

38. *See October 25, supra* note 2.

39. Spencer Hunt, *Campaign 2000; Anti-Resnick Ad Pulled, Replaced*, CINCINNATI ENQUIRER, Oct. 25, 2000, at B2.

teachers spend more time in the classroom.⁴⁰ As the screen changes to the same classroom of students listening attentively to their teacher, the announcer explained that the United States Supreme Court overturned that decision.⁴¹ Finally, the commercial concluded, “[s]o today in Ohio, instructors teach and students learn, in spite of Justice Alice Resnick.”⁴²

The allegations in this advertisement were loosely based on the case of *American Association of University Professors v. Central State University*.⁴³ This case involved a statute that prohibited university professors from bargaining collectively about their workloads in order to ensure that professors spent more time in the classroom.⁴⁴ The Ohio Supreme Court struck down the statute as a violation of the Equal Protection Clause.⁴⁵ The United States Supreme Court later reversed

40. *Id.*

41. *Id.* The commercial literally claimed that “The United States Supreme Court stood up for common sense and overturned Resnick’s opinion.” *Id.*

42. *See October 25, supra* note 2. The Resnick campaign, the Democratic Party, and other supporters did create television commercials to combat the negative effects of these commercials. *Id.* Resnick’s commercials emphasized her independence and willingness to resist the pressure of special interest groups. *Id.* Although these ads did derogate the special interest groups for dispensing misleading information, they did not disparage O’Donnell in any way. *Id.* O’Donnell himself also did not support this type of campaigning from interest groups. Bradshaw, *supra* note 16, at 1B. He stated that “I want to run a positive campaign. I have not spoken negatively about my opponent.” *Id.*

43. *American Ass’n of Univ. Professors, Cent. State Univ. Chapter v. Central State Univ.*, 699 N.E.2d 463 (Ohio 1998), *rev’d*, 526 U.S. 124 (1999), *remanded to*, 717 N.E.2d 286 (Ohio 1999).

44. *University Professors*, 699 N.E.2d at 465-66. OHIO REV. CODE § 3345.45 provided that: On or before January 1, 1994, the Ohio board of regents jointly with all state universities, as defined in section 3345.011 of the Revised Code, shall develop standards for instructional workloads for full-time and part-time faculty in keeping with the universities’ missions and with special emphasis on the undergraduate learning experience. The standards shall contain clear guidelines for institutions to determine a range of acceptable undergraduate teaching by faculty. On or before June 30, 1994, the board of trustees of each state university shall take formal action to adopt a faculty workload policy consistent with the standards developed under this section. Notwithstanding section 4117.08 of the Revised Code, the policies adopted under this section are not appropriate subjects for collective bargaining. Notwithstanding division (A) of section 4117.10 of the Revised Code, any policy adopted under this section by a board of trustees prevails over any conflicting provisions of any collective bargaining agreement between an employees organization and that board of trustees.

OHIO REV. CODE ANN. § 3345.45 (West 2001).

45. *University Professors*, 699 N.E.2d at 464. Because this statute did not discriminate against a protected class or infringe upon a fundamental right, it was subject only to minimal scrutiny. *Id.* at 468. The court concluded that the statute did serve a legitimate government interest. *Id.* However, the statute was not rationally related to its goal of increasing classroom time. *Id.* at 470. After looking at numerous reports, the court concluded that none of these reports linked

this decision as a misapplication of federal law.⁴⁶ Although Justice Resnick wrote an opinion that was reversed by the United States Supreme Court, the implications that the advertisement seems to draw from this case are improper. Justice Resnick's opinion was not entirely implausible.⁴⁷ Furthermore, reversal by the United States Supreme Court is not uncommon. Again, the deceptive advertising campaign misrepresented the facts.⁴⁸

B. *United States Chamber of Commerce Advertisement*

The United States Chamber of Commerce is similar to Chamber in that it is a non-profit organization of businesses.⁴⁹ It is also exempt from mandatory disclosure requirements because it is not classified as a political action committee.⁵⁰ Like Chamber, the United States Chamber of Commerce televised advertisements relating to the Resnick-O'Donnell race.⁵¹ The United States Chamber's advertisement was similar to Citizens' first commercial.⁵² It depicted a female judge in a

collective bargaining to the decline in classroom time. *Id.* at 469. Actually the reports indicated that teachers would rather spend more time in the classroom than researching and would likely bargain for this benefit. *Id.* at 470.

46. *Central State Univ. v. American Ass'n of Univ. Professors*, Cent. State Univ. Chapter, 526 U.S. 124, 129 (1999). The Court concluded that the Ohio Supreme Court had misapplied federal law in their prior decision. *Id.* at 127. The statute and its goal were rationally related in that "the policy animating the law would have been undercut and likely varied if it were subject to collective bargaining." *Id.* at 128. The court also pointed out that the state did not have an obligation to produce evidence that the two were causally related. *Id.*

47. The court was presented with several studies indicating other causes of the decline in classroom time and none which indicated that collective bargaining was the cause. *University Professors*, 699 N.E.2d at 469. Three other Ohio Supreme Court Justices, Justice Sweeney, Justice Pfeifer at Justice Douglas, joined in her judgment. *Id.* at 470. Also Justice Stevens of the United States Supreme Court agreed with Justice Resnick. *Central State*, 526 U.S. 124, 130 (1999) (Stevens, J., dissenting).

48. *See supra* notes 31-42 and accompanying text. The case itself did not directly involve students or education. It was merely about the working conditions of university professors. 669 N.E.2d 463, 466 (Ohio 1991). The ad was also misleading in that it failed to specify that the case involved only teachers at the collegiate level rather than in elementary or secondary school. Hunt, *supra* note 39, at B2. It is not difficult for advocacy groups to present facts to the public in a deceptive manner. Clausen, *supra* note 3, at 52. ("Even truthful statements, however, can be seriously misleading, through incompleteness, innuendo, or otherwise. When the electorate is misled, the electorate is disserved, whether the misleading occurs through conscious false statement or carefully crafted half-truths, smears, irrelevancies, or distortions").

49. Welsh-Huggins, *supra* note 35.

50. *See Buckley v. Valeo*, 424 U.S. 1 (1976). The group engages merely in issue advocacy and does not use express words of advocacy in its advertisements. *Id.* at 44.

51. Welsh-Huggins, *supra* note 35. The group has also engaged in issue advocacy regarding the state Supreme Court race in Michigan and Mississippi. *Id.*

52. *See supra* notes 25-37 and accompanying text.

black robe sitting at her desk.⁵³ She checked the box for the defendant on a voting form.⁵⁴ After someone dumped a pile of cash on her desk, she changed her vote to the plaintiff's side.⁵⁵ The announcer identified the same concerns about campaign contributions by personal injury lawyers that were espoused by Citizens' commercial.⁵⁶ Again these allegations were based on *Episcopal Retirement Homes, Inc. v. Ohio Department of Industrial Relations*⁵⁷ and were again misleading.⁵⁸

C. Challenges to these Campaign Practices

On October 17, 2000, Common Cause Ohio⁵⁹ filed a formal complaint with the Ohio Elections Commission⁶⁰ based on Citizens' commercials.⁶¹ The complaint alleged that Citizens was actually a political action committee and, therefore, required to make mandatory disclosures.⁶² A panel of three found that there was not probable cause to believe that Citizens was a political action committee and denied Common Cause's petition.⁶³ This decision was based on *Buckley v.*

53. Welsh-Huggins, *supra* note 35.

54. *Id.*

55. *Id.*

56. *October* 27, (visited Feb. 10, 2001) <<http://www.ohiochamber.com/chamber/chamber.html>>.

57. *Episcopal Retirement Homes, Inc. v. Ohio Dep't of Indus. Relations*, 575 N.E.2d 134 (Ohio 1991), *reh'g granted*, 578 N.E.2d 819 (Ohio 1991), *reh'g vacated*, 582 N.E.2d 606 (Ohio 1991).

58. Welsh-Huggins, *supra* note 35. *See also supra* notes 31-37 and accompanying text.

59. Common Cause Ohio is a non-profit organization that is dedicated to restoring ethics in government. *Introduction* (visited Feb. 11, 2001) <<http://www.commoncause.org/states/ohio/intro.html>>. This group has been active in the area of campaign finance reform. *Id.* The group also claims to have been a major factor in pushing the Ohio Secretary of State to require that campaign disclosure forms be accessible through the internet. *Id.* Common Cause has almost 250,000 members nationwide with the Ohio branch consisting of about 5,400. *Id.*

60. The Ohio Elections Commission is the administrative body that investigates and rules on complaints relating to elections. OHIO REV. CODE ANN. § 3517.153(A) (West 2001). This body also has the power to recommend legislation and issue advisory opinions. OHIO REV. CODE ANN. § 3517.153(D) (West 2001). The Commission is composed of seven members. OHIO REV. CODE ANN. § 3517.152 (West 2001). Six members of the commission are appointed by the governor. *Id.* The governor appoints three commissioners from each list of five potential candidates submitted by the two prevailing political parties. *Id.* The six appointed members will then elect the seventh member by majority vote. *Id.* This procedure ensures that the commission is not a partisan body. *Id.*

61. *October* 18 (visited Feb. 10, 2001) <<http://www.ohiochamber.com/chamber/chamber.html>>.

62. *Id.*

63. *Group Asks Elections Commission to Rule Ad Campaign Illegal*, ASSOCIATED PRESS NEWSWIREs, Oct. 26, 2000.

*Valeo*⁶⁴ which seemed to require that an advertisement contain magic words such as “vote for” or “defeat” in order to be classified as express advocacy.⁶⁵

A second complaint by Alliance for Democracy⁶⁶ was filed with the commission against Citizens.⁶⁷ This complaint was combined with another filed by Common Cause Ohio against the United States Chamber of Commerce.⁶⁸ Initially a three member panel concluded that there was no probable cause to believe that a violation occurred.⁶⁹ However, on rehearing by another panel, the Commission voted three-two that probable cause existed.⁷⁰ This change was caused by a November decision of a Mississippi District Court judge.⁷¹ The

64. *Buckley v. Valeo*, 424 U.S. 1 (1976). This lengthy per curium opinion thoroughly analyzed the constitutionality of comprehensive federal election reform legislation. *Id.* The initial reform legislation was passed in response to an advertisement in the New York Times advocating the impeachment of President Nixon for the bombing of Cambodia. Joel M. Gora, *Buckley v. Valeo: A Landmark of Political Freedom*, 33 AKRON L. REV. 7, 10-11 (1999).

65. Andrew Welsh-Huggins, *Perspective: Ruling's "Magic Words" Clause Decides Elections Complaints*, ASSOCIATED PRESS NEWSWIREs, Oct. 30, 2000. This decision was later affirmed by the entire commission. *Id.* If these ads had been run by an opposing candidate rather than an independent group, the ads would almost certainly be illegal campaign practices. *See In re Complaint Against Harper*, 673 N.E.2d 1253 (Ohio 1996). This case involved a derogatory ad run by Judge Harper against Justice Resnick. *See supra* note 3. Here the court held that these ads violated Canons 2(A) and 7(B)(1)(a) of the Ohio Code of Judicial Conduct. *Harper*, 673 N.E.2d at 1268. Because these ads are likely to have the same effect on judicial integrity, it make little sense that they should be treated differently simply because of their source. Clausen, *supra* note 3, at 56.

66. Alliance for Democracy is a non-profit organization with about 2,500 members. *We the People, Alliance for Democracy* (visited Feb. 11, 2001) <<http://www.afd-online.org/>>. “The mission of the Alliance for Democracy is to free all people from corporate domination of politics, economics, the environment, culture and information; to establish true democracy; and to create a just society with a sustainable, equitable economy.” *Id.* The group believes that large corporations control almost every aspect of life and perpetuate the aggregation of wealth and therefore must be stopped before true democracy can exist again. *Id.*

67. James Bradshaw, *New Hearing Sought on Anti-Resnick Ads*, COLUMBUS DISPATCH, Nov. 2, 2000, at 11C.

68. Ohio Election Comm’n, *Probable Cause Panel Minutes*, Nov. 6, 2000 (unpublished minutes from commission meeting, can be located at the Office of the Ohio Elections Commission, Wyandotte Building, 21 W. Broad St., Columbus, Ohio) [hereinafter *Probable Cause Panel Minutes*].

69. *Id.*

70. *Id.*

71. *Id.* *See also* Jim Bebbington, *Mississippi Case Cited in Court Race Complaint*, DAYTON DAILY NEWS, Nov. 4, 2000, at 5B. In this case U.S. District Court Judge Henry Wingate decided that the U.S. Chamber of Commerce ads in Mississippi constituted express advocacy and ordered the Chamber to make campaign disclosures despite the fact that the ads did not use the magic words of express advocacy. *Id.* Because this judge found a violation without express words of advocacy, the Commission concluded that probable cause of a violation did exist. *Probable Cause Panel Minutes, supra* note 68. The Commission had previously relied on the bright line magic words standard. Bebbington, at 5B. Because this District Court Judge was willing to expand the definition, the commission concluded that a violation could have occurred in this case as well.

Mississippi judge held that a Chamber of Commerce advertisement was express advocacy even though it did not use the magic words when advocating.⁷² A hearing was held on April 4, 2001, before the full Commission to determine whether a violation in fact occurred.⁷³

III. THE EFFECTS OF CAMPAIGNING ON JUDICIAL INTEGRITY

As the example of the recent Resnick-O'Donnell race illustrates, judicial campaigns can be fraught with problems.⁷⁴ Commentators have long argued that judicial positions are not appropriate for adversarial elections.⁷⁵ The most common reason for opposition to the judicial election process is that the appearance of impropriety will cause the public to lose faith in the judiciary.⁷⁶ Commentators are also concerned that judges may engage in acts of actual impropriety to garner campaign support or to sway public opinion.⁷⁷ These two concerns will be fully explored in the subsequent sections.

Probable Cause Panel Minutes, *supra* note 68.

72. *Id.* See also *Bigger Business Role in Judicial Elections Stirs Controversy*, FED. & ST. INS. WK., Nov. 6, 2000 [hereinafter *Bigger Business*]. Judge Wingate concluded that although the advertisements did not use the "magic words," they clearly advocated for the election of certain candidates. *Id.* The ad described these candidates as justices who would "use common sense, ensure prompt adjudication of death penalty cases and uphold victim's rights." *Id.* These words could only be interpreted as advocating the election of a particular candidate. *Id.* The commercial also urged viewers to visit its website which identifies the Litigation Fairness Campaign as an organization that is "dedicated to mobilizing concerned citizens like you to help us fight for more fairness against this ever increasing tidal wave of new, frivolous and expensive lawsuits." *America Needs Your Help* (visited Feb. 18, 2000) <http://www.litigationfairness.org/Index_hiu.htm>. This particular advertisement was sponsored by the United States Chamber of Commerce Institute for Legal Reform and its affiliate, Litigation Fairness Campaign. *Bigger Business supra* note 72. These groups intend to combat the influence that unions and trial lawyers have over judicial elections. *Trial Lawyers, Unions Target Court Races Money Pours Into Judicial Campaigns* (April 2000) <http://www.uschamber.com/Institute+for+Legal+Reform/_Articles/_Trial+Lawyers.htm>. "Business cannot sit on the sidelines and leave the judicial selection process solely in the hands of the trial lawyers. If we do nothing, then a 'fair hearing' for business will be a thing of the past. All anyone wants - and deserves - is competent and impartial judges," says Jim Wootton, president of the Institute. *Id.*

73. Telephone interview with Betty Springer, Secretary of the Ohio Elections Commission (Feb. 16, 2001). The Ohio Elections Commission has the authority to hear cases under Ohio Rev. Code § 3517.156(C)(2) which provides that if the panel determines there is probable cause "it shall refer the complaint to the full commission, and the full commission shall hold a hearing." OHIO REV. CODE ANN. § 3517.156(C)(2) (West 2001).

74. See *supra* notes 15-73 and accompanying text.

75. See, e.g., Averill, Jr., *supra* note 24, at 315 (arguing that it is not elections in themselves that are detrimental to judicial integrity, but that "[i]t is the advocacy for the position that makes these elections so threatening to the judicial system and to judicial independence").

76. See *infra* notes 88-104 and accompanying text.

77. See *infra* notes 105-110 and accompanying text.

A. *The Importance of Impartiality*

The judicial branch has traditionally been detached from American political life.⁷⁸ The United States Constitution requires that federal judges be appointed.⁷⁹ These judges also have lifetime tenure in their offices.⁸⁰ The purpose of these protections are to ensure that the judiciary is an independent body that would protect and enforce the Constitution.⁸¹ The Framers of the Constitution considered impartiality and its appearance to be essential enough to remove the judiciary from popular elections.⁸²

The appearance of impartiality remains essential to the judicial system today.⁸³ The purpose of the judicial system is not to reflect public opinion,⁸⁴ but to uniformly apply the public will to diverse factual

78. Martha W. Barnett, *The 1997-98 Florida Constitution Revision Commission: Judicial Election or Merit Selection*, 52 FLA. L. REV. 411, 415 (2000). Barnett traces the history of judicial selection plans which began with all states using appointment rather than election to select judges. *Id.* This lasted until the 1830's when many states began converting to judicial elections. *Id.* Currently sixteen states use merit selection and retention, twenty-one use elections (8 being partisan and 13 non-partisan), nine use merit selection and another method and four use pure appointment. *Id.* at 416.

79. U.S. CONST. art. II, § 2, cl. 2 provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court." U.S. CONST. art. II, § 2, cl. 2.

80. U.S. CONST. art III, § 1 provides that "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1.

81. THE FEDERALIST NO. 76, at 457 (Alexander Hamilton) (Clinton Rossiter ed. 1961); THE FEDERALIST NO. 78, at 468-71 (Alexander Hamilton) (Clinton Rossiter ed. 1961). The Framers believed that this method of nomination and approval was necessary to ensure that the judiciary was responsive neither to the president nor the legislature. THE FEDERALIST NO. 76, at 457 (Alexander Hamilton) (Clinton Rossiter ed. 1961). The Senate would prevent the President from appointing unfit persons for improper purposes. *Id.* The Senate likewise would not unnecessarily oppose a nominee in favor of another because they could not be sure who the president's next nominee would be. *Id.* The Framers also considered lifetime tenure to be essential to the independence of the judiciary. THE FEDERALIST NO. 78, at 468-71 (Alexander Hamilton) (Clinton Rossiter ed. 1961). "[I]t 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." *Id.* at 470.

82. *Id.* at 471.

83. Barnett, *supra* note 78, at 414 (2000) (pointing out that proponents of judicial independence argue that "without such independence, judges would be beholden to transitory popular whim and its partisans"). Barnett also identifies that this independence must be somewhat balanced against accountability in judicial action. *Id.* See also *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 835 (1978) (identifying that public confidence in the competence of the judiciary is also essential to the proper functioning of the judicial branch as a whole).

84. Donald W. Jackson & James W. Riddlesperger, Jr., *Money and Politics in Judicial Elections: The 1988 Election of the Chief Justice of the Texas Supreme Court*, 74 JUDICATURE 184, 184 (1991) (arguing that although people expect legislators to reflect the interests of their

situations as identified by the legislature.⁸⁵ It is essential, therefore, that judges are driven solely by the application of existing law rather than the creation of new policy.⁸⁶ Judges would be unable to fulfill their purpose in our system of government without the appearance of impartiality.⁸⁷

B. *The Appearance of Impropriety*

Judicial campaigns could create the appearance of impropriety in a number of ways.⁸⁸ As the anti-Resnick advertisements did, campaigns could directly call the impartiality of the judge into question.⁸⁹ Such allegations may be untrue and unsubstantiated,⁹⁰ but they still have an effect on public perception.⁹¹ Voters are not likely to know much about judicial candidates prior to an election.⁹² What they learn through judicial campaigning is likely to shape their opinions about the

supporters, this is not the traditional role of judges).

85. Matthew J. O'Hara, Note & Comment, *Restriction of Judicial Election Candidates' Free Speech Rights after Buckley: A Compelling Constitutional Limitation?*, 70 CHL-KENT L. REV. 197, 197 (1994) ("the notion of an independent, impartial judiciary that decides cases based on their factual and legal merits, and not on any other considerations, is fundamental to our common law tradition").

86. Levien *supra* note 7, at 71.

87. *Id.* Fortunately in response to a recent survey seventy-five percent of respondents stated that they did have faith in the United States Supreme Court and in their various local state courts. Clausen, *supra* note 3, at 576.

88. *See infra* notes 89-104 and accompanying text. Judges running for other political offices may also create the appearance of partiality. *Morial v. Judiciary Comm'n of the State of La.*, 565 F.2d 295, 302 (5th Cir. 1977). While running for another political office, judges may be tempted to make rulings in favor of their contributors or decisions that would favor their political agendas. *Id.* In order to avoid this problem, Louisiana enacted a law requiring judges to resign their judicial positions before seeking another political office. *Id.* at 297. The court upheld this restriction as a reasonably necessary means to prevent undue influence. *Id.* at 303.

89. *See supra* notes 15-73 and accompanying text.

90. The anti-Resnick campaign may be an example of such a practice. One study has suggested that Justice Resnick is in fact the most independent Justice currently serving on the Ohio Supreme Court. Sandy Theis & T.C. Brown, *U.S. Chamber Pours \$1 Million into Attack on Resnick*, PLAIN DEALER, Oct. 27, 2000, at 1A.

91. The Ohio State Bar Association disparages the ads as "an attack of the integrity of the supreme court and our entire judicial system." Editorial, *Anti-Resnick Ads Cry for Full Review*, DAYTON DAILY NEWS, Oct. 23 2000, at 6A. Even untrue and unsubstantiated accusations could have an effect on the public's perception of judges. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 835 (1978). In this case, Virginia law prohibited the release of information regarding the proceedings of the Virginia Judicial Inquiry and Review Commission which investigated complaints against judges. *Id.* at 830. This law was intended to protect the judiciary from suffering because of claims that may later be proven to be groundless. *Id.* at 835. Although the Court recognized this a laudable goal, the law was struck down as a violation of the First Amendment. *Id.* at 845.

92. Barnett, *supra* note 78, at 418. This problem is accentuated by the fact that Codes of Judicial Conduct often prevent judges from making their opinions known. *Id.*

candidates.⁹³ If judicial campaign materials attack the impartiality of a candidate, the public is likely to accept that representation and may attribute it to the judicial system as a whole.⁹⁴

Campaign contributions could also easily lead to the appearance of impropriety.⁹⁵ Lawyers who appear before these judges are often the largest contributors to their campaigns.⁹⁶ Although we trust judges to be impartial, one cannot help but speculate whether these contributions influence judicial decision making.⁹⁷ It is conceivable that judges will be aware of these monetary contributions and the need to secure them again for the following election when making judicial decisions.⁹⁸ Campaign disclosures help to combat this problem, but the possibility for impropriety remains.⁹⁹

93. *Id.*

94. Jennifer L. Brunner, Comment, *Separation of Power as a Basis for Restraint on a Free Speaking Judiciary and the Implementation of Canon 7 of the Code of Judicial Conduct in Ohio as a Model for Other States*, 1999 DET. C. L. REV. 729, (1999). Brunner cites a study of Ohio citizens to which twenty-five percent of respondents stated that the conduct of judicial candidates and ads about judicial candidates tend to “diminish respect for judges in Ohio.” *Id.* at 738-39. During the campaign, Resnick herself expressed concerns about the ads’ effect on the judicial system. John Seewer, *Justice Targeted by Pro-Business Group Thinks Ads Will Backfire*, DAYTON DAILY NEWS, Oct. 30, 2000, at 3B. Resnick did not suffer from these derogatory statements as she prevailed in the November election. Ludlow, *supra* note 9, at 15A. This could however be attributable to other phenomena such as her incumbency or pure name recognition. *See* Chemerinsky, *supra* note 4, at 137 (identifying name recognition as an asset that few judicial candidates have when entering a race).

95. Averill, Jr., *supra* note 24, at 302 (arguing that suspicions of favoritism are inevitable in judicial elections).

96. Chemerinsky, *supra* note 4, at 133 (arguing that campaign and expenditure limits are the only way to effectively curb the appearance of impropriety). Chemerinsky does not however espouse that lawyers should be prohibited from contributing to judicial campaigns. *Id.* at 147. This solution would be particularly inequitable in areas of law such as personal injury where plaintiffs’ contributors would come mainly from lawyers and defendants’ contributions would not. *Id.*

97. John D. Felice & John C. Kilwein, *Strike One, Strike Two . . . : The History of and Prospect for Judicial Reform in Ohio*, 75 JUDICATURE 193, 196 (1992). This effect may also be supplemented by the contributors’ expectations. *Id.* “People don’t contribute large sums of money and expect the other guy to be treated fairly.” *Id.* quoting Bill Weisenberg, Ohio Bar Association Director of Govt. Affairs. One study indicates that contributors themselves say that they do not expect favorable decisions in return for their contributions but that other contributors do. Jackson, *supra* note 84, at 189.

Some argue that disqualifying judges from hearing the cases of their contributors may be a solution to this problem. Clausen, *supra* note 3, at 10. This, however, could discourage lawyers, who are most knowledgeable about the judicial candidates, from making contributions. *Id.* Disqualification may also disadvantage judges who would be forced to decide between trying to finance their campaigns alone and being required to disqualify themselves in a large number of cases. *See id.* at 11.

98. Clausen, *supra* note 3, at 64-65 (identifying the possibility that the public will perceive that judges are economically reliant on their contributors).

99. Chemerinsky, *supra* note 4, at 145. The theory behind mandatory campaign disclosures is

Indirect advocacy, such as that of Citizens, presents an even larger problem.¹⁰⁰ Although these groups do not directly contribute to a candidate's campaign, they may nevertheless influence the outcome of an election.¹⁰¹ A candidate may still appear to be obligated to an advocacy group for his victory even if not directly associated with the group.¹⁰² If these groups are successful in obtaining victory for their candidate, they create an appearance that the most money can buy a judicial seat.¹⁰³ These groups are especially dangerous because they are

that it is a check on corruption. *Buckley v. Valeo*, 424 U.S. 1, 45 (1976). If campaign contributions are publically known, judicial impropriety will be more easily detectible by the press and others. *Id.* If judges know that they are more likely to get caught, they will be less likely to based their judicial decision making on monetary goals. *See id.* Chemerinsky argues that disclosure requirements may actually have a destructive effect in judicial campaigns because they allow the judges to have access to this information as well. Chemerinsky *supra* note 4, at 145. If judges did not know who contributed to their campaigns and in what amount, this could not influence their decision making. *Id.* Yet he also argues that eliminating disclosure may not be wise as it would allow judges to conduct campaign business outside of the public eye. *Id.*

100. Ian Ayres & Jeremy Bulow, *The Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence*, 50 STAN. L. REV. 837, 861 (1998) (arguing that because they are anonymous and therefore not accountable for their actions, independent groups are more likely to be particularly derogatory in their campaign communications).

101. Election EFFORTS PAY OFF: 83% Of Chamber Endorsed Candidates Win (visited Feb. 10, 2001) <http://www.uschamber.com/Elections/_postelec.htm>. The chamber attributes this victory to the expansions in its endorsement practices in recent years. *Id.*

102. Because these groups may play such a large role in influencing the elections, there is no reason that candidates would not appear indebted to them as they would to large campaign contributors. Richard L. Hasen, *The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 48 UCLA L. REV. 265, 281 (2000) ("Sham issue advocacy has every bit the potential for corruption or the appearance of corruption if it ends with 'Call Smith and tell him you don't like his stand on school vouchers,' rather than 'Vote for Jones'"). Because donors can contribute to issue advocacy groups in unregulated amounts, the possibility of corruption may even be greater than for express advocacy. Daniel M. Yarmish, Note, *The Constitutional Basis for a Ban on Soft Money*, 67 FORDHAM L. REV. 1257, 1280 (1998) (arguing that all large contributions of soft money, greater than \$100,000 should be completely banned and that this action would be constitutionally permissible). *But see* Lillian R. BeVier, *The Issue of Issue Advocacy: An Economic, Political, and Constitutional Analysis*, 85 VA. L. REV. 1761, 1781-82 (1999) (arguing that independent advocacy does not present as great a risk of corruption because the absence of coordination and inability for the candidate to solicit the contributions somewhat dispels suspicion that the candidate and the contributor agreed on the arrangement prior to the contribution). This argument is not as convincing in judicial elections as judges are traditionally prohibited from personally soliciting their contributions. *See, e.g.*, OHIO CODE OF JUDICIAL CONDUCT Canon 7(C)(2)(a) (2000). ("a judicial candidate shall not solicit or receive campaign funds [but] . . . may establish a committee to secure and manage the expenditure of funds").

103. This is evidenced by the increase in judicial campaign spending in recent years. *See supra* notes 4-9 and accompanying text. *But see* Election EFFORTS PAY OFF: 83% Of Chamber Endorsed Candidates Win (visited Feb. 10, 2001) <http://www.uschamber.com/Elections/_postelec.htm>. The Chamber claims that they were able to prevail in most of these elections despite the efforts of a "better-funded and better-organized opponent." *Id.* The chamber reports that labor unions spent more than 56 million dollars on their

often not subject to mandatory campaign disclosures.¹⁰⁴

C. Actual Impropriety

Judges are merely human beings in black robes. They are subject to all the pressures as ordinary men and women. Occasionally these forces will overcome them and lead them to make judicial decisions for their own selfish purposes rather than on a legal basis.¹⁰⁵ In an effort to please “a powerful friend,” a judge’s decisions may be biased.¹⁰⁶

A judge may also be tempted to act out against those who supported his opponent.¹⁰⁷ In one extreme case, a judge kept a list of attorneys who had supported his opponent.¹⁰⁸ The judge posted this list on his office wall.¹⁰⁹ Although it is unclear whether the judge ever acted on these outward biases, partiality was likely.¹¹⁰

D. The Effect of Impropriety - Actual or Perceived

Because of the judiciary’s traditional role as independent arbiters, it is essential that the public have faith in their ability to be impartial.¹¹¹ One of the judicial branch’s main purposes is to protect minority ideas.¹¹² Majority ideas are expressed and protected in the traditional

campaign efforts although the chamber does not disclose how much it spent on the election. *Id.*

104. *See infra* notes 132-135 and accompanying text. However, anonymous communications have historically been important to American campaigns. Vermont Right to Life Comm’n, Inc. v. Sorell, 221 F.3d 376, 387 (2d Cir. 2000). Anonymity allows one to express controversial ideas that he might not express if his identity were disclosed. *Id.*

105. Clausen, *supra* note 3, at 57 (recognizing the significance of the temptation created by judicial elections).

106. *Id.* These temptations may not fully disappear even if judicial elections did not exist. *See Id.* Judges may also be tempted to compromise their oaths in an effort to gain a future appointment to a higher position. *Id.*

107. James J. Alfini & Terrence J. Brooks, *Ethical Constraints on Judicial Election Campaigns: A Review and Critique of Canon 7*, 77 KY. L.J. 671, 704 (1989).

108. *Id.* The judge had previously run for a higher judicial office than the one he currently held. *Id.* He lost this race and was therefore bitter towards his opponent and his opponent’s supporters. *Id.*

109. *Id.*

110. *Id.* Several of the attorneys whose names were on the list justifiably asked that the judge be recused from hearing their cases because they feared reprisal. Alfini, *supra* note 107, at 704. Surprisingly all of these motions were denied. *Id.*

111. Leven, *supra* note 7, at 71. Leven and Fatka contend that “the very survival of law and order in our society is dependant upon public confidence in the integrity and impartiality of every sitting jurist in the United States.” *Id.*

112. Robert P. Davidow, *The Search for Competent and Representative Judges, Continued*, 77 KY. L.J. 723, 732-33 (1989). Davidow argues that minority ideas are best protected by having a representative sample of judges serving on the bench. *Id.* at 732. Persons of different backgrounds interpret facts and circumstances differently due to their different beliefs, attitudes and values. *Id.* at

political model by the elected representatives of the legislative and executive branches.¹¹³ Judges, however, are controlled by the law and often must make decisions independent of the majority's interests.¹¹⁴ This role of protector of the minority could be seriously jeopardized if judges appear to be controlled by majority ideas.¹¹⁵

It is also essential that citizens believe that judges are fair and keep the justice system functioning effectively.¹¹⁶ An organized system of justice is one of the characteristics of a civilized society.¹¹⁷ Fair adjudication of cases in the courtroom minimizes the need for vigilante justice.¹¹⁸ If people do not feel that they will be treated fairly in a court of law, they may be more likely to take matters into their own hands.¹¹⁹ Because of these possibilities, it is essential that citizens retain confidence in the judiciary.

IV. FIRST AMENDMENT CONSTRAINTS ON CAMPAIGN SPEECH

Political speech during election campaigns is precisely the type of speech that the First Amendment was designed to protect.¹²⁰ Thus,

733. Therefore, to have a representative sample of ideologies in the judiciary, there should be a representative sample of persons from different backgrounds serving on the bench. *Id.*

113. THE FEDERALIST NO. 10, at 82 (James Madison) (Clinton Rossiter ed. 1961) (describing a republican form of government as one in which the views of the people are represented through their chosen representatives). This system relies upon the people choosing the proper representative. *Id.* at 83. This system also depends on the representatives knowing their constituents' desires and representing them adequately in the legislature. THE FEDERALIST NO. 56, at 346 (James Madison) (Clinton Rossiter ed. 1961).

114. Nicole C. Allbritain, Comment, *One Step Closer to Merit-Based Judicial Selection: Ohio's New Limitations on Judicial Campaign Contributions and Expenditures*, 64 U. CIN. L. REV. 1323 (1996). Judges should not face the political pressures that the other branches face because judges' roles in the system are different. *Id.* at 1326. This allows judges to be faithful to the laws rather than the whims of the majority. *Id.*

115. *Id.*

116. *Landmark Communications Inc. v. Virginia*, 435 U.S. 829, 835 (1978).

117. Kelly D. Hine, *Vigilantism Revisited: An Economic Analysis of the Law of Extra-judicial Self-help or Why Can't Dick Shoot Henry for Stealing Jane's Truck*, 47 AM. U. L. REV. 1221, 1243 (1998). Hine argues that without an organized judiciary and law enforcement procedures, classical western vigilantism would rise in abundance. *Id.*

118. *Id.* at 1226. Vigilantes believe that the law existed before the people and that the people are the source of the law. *Id.* Therefore, if the chosen entity is not fulfilling their responsibility as enforcers of the law, vigilantes believe that they are justified in taking the power back from the delegated officials. *Id.*

119. *Id.* at 1230. Vigilantism also occurs when citizens conclude that the benefits of taking matters into their own hands outweighs the potential costs of criminal prosecution. Hine, *supra* note 117 at 1230. To avoid this problem, law enforcement officials should consistently punish vigilantism. *Id.* at 1243.

120. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. Amend. I. The Framers

restrictions on political speech are generally subject to strict scrutiny when reviewed by the courts.¹²¹ Therefore, the government must have a compelling interest for its restrictions in these areas, and the restrictions must be necessary to serve the state's purpose.¹²² This burden is difficult to meet and because of this heavy burden, much legislation is struck down by the courts as unconstitutional.¹²³

Many types of restrictions have already been analyzed by the courts. The government can not restrict total expenditures by an individual or an organization.¹²⁴ It is permissible, however, for the government to restrict expenditures by a corporation.¹²⁵ Conditioning a

considered political speech and debate to be essential to an informed democracy. *Gora*, *supra* note 64, at 8-9. Because of America's system of representative democracy, it is essential that citizens be able to freely discuss candidates and ideas. *Id.* at 9. Voters need to have access to all information regarding candidates and issues in order to make informed decisions at the polls. *Id.*

121. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). Restrictions on contributions have not been held to this high standard as they do not affect the quantity of an individual's speech, but to which groups he can donate. *Buckley v. Valeo*, 424 U.S. 1, 21 (1976). The individual may still spend as much as he wants independent of other groups. *Id.* at 21. Merely contributing to the campaign is the political speech in this context as this is the showing of support for the candidate. *Id.* Candidates are likewise able to solicit as much money as they need but they are required to do it from a greater number of sources. *Id.* at 22. This limitation on contributions also does not impede individuals' freedom of association. *Id.*

122. *Austin*, 494 U.S. at 652 (1990).

123. Restrictions on elections must be examined under a strict analysis. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). The state must justify the restriction with a compelling governmental purpose. *Id.* The court must also find that the restriction is necessary to justify impeding on the First Amendment rights of voters and candidates for political office. *Id.*

124. *Buckley v. Valeo*, 424 U.S. 1, 45 (1976). Expenditures have been distinguished from contributions which the government may restrict. *Id.* at 21. Expenditures are considered a more pure form of speech and do not present the same possibility of impropriety as contributions. *Id.* at 45. Contributions create a greater chance for actual or potential corruption. *Id.* at 25. Some have argued that this distinction should not apply to judicial elections in the same way that it has been applied to legislative and executive elections because of the added concern of preserving faith in the judiciary. *Levien*, *supra* note 7, at 71. This argument has actually been rejected by the courts. *Suster v. Marshall*, 951 F. Supp. 693 (N.D. Ohio 1996).

125. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). Corporate speech is still subject to the First Amendment and strict scrutiny. *Id.* at 657. Limiting campaign contributions by corporations however is justified by a compelling state interest and therefore does not violate the First Amendment. *Id.* at 660. Corporations have several features that allow them to amass large quantities of wealth. *Id.* This ability presents more of a threat of influencing candidates or creating an appearance of impropriety. *Id.* at 659. There is also a danger that the views espoused by the corporate entity will not be those of the shareholders who actually contributed the wealth. *Id.* at 660. Corporations are however able to make contributions through separate funds. *Austin*, 494 U.S. at 660. States must also make exceptions for certain types of corporations that do not pose these identified threats. *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 714 (4th Cir. 1999). When corporations are organized for a political purpose, their members most likely support the political message that the group espouses. *Id.* These corporations are also usually not organized for profit and do not present the risk associated with the accumulation of wealth. *Id.* Groups that meet these two criteria do not pose a threat to the political process, and therefore must be exempt from

consensual spending limit on the receipt of government funds is another possible limit that courts have held to be constitutional.¹²⁶ The state may require mandatory disclosure of contributors' names and the amounts that they contributed.¹²⁷ Although the government may not directly restrict campaign expenditures, there are several ways in which it may indirectly restrict them.

Also, the state may not limit all of the things that a candidate may talk about during an election.¹²⁸ Most states currently have adopted some form of a judicial code of ethics.¹²⁹ Most of these regulations contain, at least, some restriction on judicial speech, either while in office or during a campaign.¹³⁰ Although these restrictions seek to fill the laudable goal of preserving judicial integrity, they may likely be unconstitutional.¹³¹

contribution limitations. *Id.*

126. *Buckley v. Valeo*, 424 U.S. 1, 87 (1976). Candidates are free to accept or decline this offer and therefore are accepting the restriction on expenditures voluntarily. *Id.* at 95.

127. *Buckley v. Valeo*, 424 U.S. 1 (1976). Disclosure requirements serve several important state interests. *Id.* at 66. They allow voters to know the affiliations of candidates. *Id.* at 67. They also expose possible corruption to the public eye. *Id.* Finally, they allow the government to monitor possible illegal contributions. *Id.* at 68. These substantial concerns outweigh this limitation on speech. *Id.* at 72. To avoid vagueness problems this holding only applies to statutes requiring disclosure for groups that expressly advocate the election or defeat of a specific candidate. *Id.* at 80.

128. *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953 (Ky. 1991). This case recognizes that judicial candidates have the same rights to free speech as other candidates and citizens. *Id.* at 954-55. The Supreme Court of Kentucky struck down the former ABA Model Code of Judicial Conduct Canon 7(B)(1) which prevented judicial candidates from making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; (or) announc[ing] his views on disputed legal or political issues." *Id.* at 955. The court held that this prohibition was not narrowly drawn as it prohibited almost all speech by candidates and was therefore unconstitutional. *Id.* at 956.

129. *See Clausen*, *supra* note 3, at 7.

130. The Ohio Code of Judicial Conduct prohibits judicial candidates from a variety of activities including, making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office", making "statements that commit or appear to commit the judge or judicial candidate with respect to cases or controversies that are likely to come before the court", and commenting "on any substantive matter relating to a specific pending case on the docket of the judge." OHIO CODE OF JUDICIAL CONDUCT Canon 7(C) (2000). Provisions such as these serve to prevent a judge from deciding an issue before being presented with it in a proper factual and legal context. *Stretton v. Disciplinary Bd. of the Supreme Court of Pa.*, 944 F.2d 137, 144 (1991). If a judge commits himself prior to hearing the case, he may not be able to consider it impartially. *Id.* Even if the result is one that the judge would ultimately have reached, the appearance of possible impropriety continues to exist. *Id.*

131. *See, e.g., Beshear v. Butt*, 863 F. Supp. 913 (E.D. Ark. 1994). This case involved provisions of the Arkansas Code of Judicial Conduct which prohibited judicial candidates from giving their opinions on "disputed legal or political issues." *Id.* at 916. The plaintiff claimed that a judicial candidate violated this rule by expressing that he would not accept plea bargaining if elected. *Id.* at 915. The court held that this provision was overbroad and over vague. *Id.* at 917. It

Beyond these constitutional limitations, the state is even more limited in how it may regulate groups that are merely engaged in issue advocacy.¹³² The government may not require disclosures of members because these activities do not theoretically present the same risk of corruption and its appearance.¹³³ Members are also permitted to contribute unlimited amounts to a single cause.¹³⁴ Corporations may also contribute to these organizations in unlimited amounts.¹³⁵ The First Amendment prevents the state from regulating many aspects of an issue advocacy group that the state can regulate regarding express advocacy groups.

V. AN ANALYSIS OF POSSIBLE SOLUTIONS TO THE PROBLEM

A. *Expand the Definition of Express Advocacy*

Currently express advocacy is narrowly defined by the courts.¹³⁶ A group will not be considered to be engaging in express advocacy unless the advocate uses the “magic words,” expressly advocating the election or defeat of a specific candidate.¹³⁷ This definition is, in part,

would be difficult for a candidate to know what speech is prohibited and would excessively proscribe speech without a compelling state interest. *Id.* at 918. *But see* Brunner, *supra* note 94, at 734. Brunner argues that a judge expressing an opinion on a matter that is likely to come before the court is akin to issuing an advisory opinion. *Id.* Therefore the prohibition of this activity is not only constitutionally permissible, it is constitutionally mandated. *Id.* *See also* Stretton v. Disciplinary Bd. of the Supreme Court of Pa., 944 F.2d 137, 143-44 (1991) (upholding Canon 7(B)(1)(c) against constitutional challenge as narrowly tailored to serve the compelling interest of protecting judicial integrity by adopting a restrictive interpretation of the prohibition on expressing views about political and legal issues).

132. *Buckley v. Valeo*, 424 U.S. 1, 79 (1976). Issue advocacy groups do not call for the express election or defeat of a specific candidate. *Id.* The purpose of issue advocacy groups is to discuss “issues of public concern, including candidates’ positions on those issues - by, among other means, distributing voter guides to the general public.” *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 708 (4th Cir. 1999). Issue advocacy groups can, however, and often do, affect the result of elections. *Perry v. Bartlett*, 231 F.3d 155 (4th Cir. 2000), *cert. denied*, 121 S.Ct. 1229 (2001).

133. *Buckley*, 424 U.S. at 81. The state may require disclosure of groups engaging in express advocacy in order to further the compelling state interest in preventing the appearance of impropriety. *Id.* at 72. The threat of actual or perceived impropriety does not exist when a group is merely presenting an issue. *Id.* at 81.

134. Hasen, *supra* note 102, at 267.

135. *Id.* (identifying that corporations contributed approximately \$150 million to issue advocacy commercials in 1996).

136. *Buckley v. Valeo*, 424 U.S. 1, 44 (1976).

137. *Id.* “[E]xpress words of advocacy of election or defeat” include terms “such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ [and] ‘reject.’” *Id.* at 44 n.52. These magic words did not appear to be mandatory in *Buckley* although the

constitutionally mandated.¹³⁸ The definition cannot be expanded greatly or it will run the risk of becoming overbroad and infringing upon constitutionally protected speech.¹³⁹

Although the definition of express advocacy could not and should not be considerably expanded, it should be expanded as much as constitutionally permissible.¹⁴⁰ Any new test in this area must adequately balance two competing interests: 1) The interest groups' valid interest in protecting their constitutional right to free speech;¹⁴¹ and 2) the state's legitimate interest in protecting the integrity of the judicial system.¹⁴²

Court later stated that they were a requirement. *Federal Elections Comm'n v. Massachusetts Citizens for Life, Inc.*, 497 U.S. 238, 249 (1986). The communications at issue in this case urged voters to vote "pro-life" and identified "pro-life" candidates. *Id.* Although it did not support a specific candidate, the Court held that the ads constituted express advocacy. *Id.*

The magic words test has been exalted by other courts as a clear bright line rule. *Perry v. Bartlett*, 231 F.3d 155 (4th Cir. 2000), *cert. denied*, 121 S.Ct. 1229 (2001). Without this bright line standard, it would be difficult for courts to accurately discern the intent of the advocacy group. *Id.* at 161. Removal of the bright line test may also have a chilling effect on groups who fear mandatory disclosures but wish to engage in issue advocacy. *Id.*

138. *Buckley*, 424 U.S. at 79. The Court was concerned that a broad definition could encompass issue advocacy as well which is not justified by a compelling state interest. *Id.* Disclosure of issue advocacy is not needed because it does not create the appearance of impropriety and does not reflect upon the type of people who support the candidate. *Id.* at 81.

139. *Id.* The circuit courts have also been reluctant to expand the definition of express advocacy. *See, e.g., Perry v. Bartlett*, 231 F.3d 155 (4th Cir. 2000), *cert. denied*, 121 S.Ct. 1229 (2001). *Perry* is factually quite similar to the Resnick case. *Id.* An issue advocacy group, Farmers for Fairness, ran advertisements that specifically named candidates and spoke negatively of them but did not use any express words of advocacy. *Id.* at 159. The court held North Carolina's statute unconstitutionally overbroad, because it did not require the magic words of express advocacy before requiring a group to make campaign disclosures. *Id.* at 161. *See also* North Carolina Right to Life, Inc. v. Bartlett, 168 F.3d 705 (4th Cir. 1999).

140. This is needed to prevent anonymous attacks on judicial integrity such as that presented by the Resnick-O'Donnell race. Clever groups could easily circumvent the current regulations. Glenn J. Moramarco, *Beyond "Magic words": Using Self-Disclosure to Regulate Electioneering*, 49 CATH. U. L. REV. 107, 119 (1999). *But see* Hasen, *supra* note 102, at 281 (arguing that disclosure requirements for issue advocacy would probably not prevent derogatory ads by advocacy groups).

141. *Buckley v. Valeo*, 424, U.S. 1, 79 (1976). Anonymity is a valuable tool for some political groups. Rachel J. Grabow, Note, *McIntyre v. Ohio Elections Commission: Protecting the Freedom of Speech or Damaging the Electoral Process?*, 46 CATH. U. L. REV. 565, 572-74 (1997). Anonymity can be used for positive purposes such as criticizing the government or proposing controversial reform. *Id.* at 573. If these individuals were forced to disclose their identities, or knew of this possibility, they may be less likely to engage in the political process. *Id.* This choice to remain anonymous is an integral part of free speech. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995). Although the Framers often relied on anonymity, there is little evidence that they considered it to be a constitutional right. Grabow, *supra*, at 597-98.

142. Leven, *supra* note 7, at 85 (arguing that "preserving the independence and integrity of the judiciary" may be a compelling state interest). *See also* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 835 (1978) (recognizing that protecting judicial integrity is a valid state concern, but that it is not sufficient to prevent newspapers from publishing articles regarding

One way to expand express advocacy is to include any expenditure that identifies a specific candidate by name and could purport to serve no reasonable goal other than to elect or defeat that candidate. This definition is likely to withstand constitutional scrutiny.¹⁴³ The definition will probably not burden constitutionally protected speech.¹⁴⁴ Groups are still able to adequately discuss issues without crossing over into express advocacy.¹⁴⁵ This definition better serves the purposes of the express-issue distinction because it will be more successful in restricting speech likely to create the appearance of impropriety while also protecting pure issue advocacy.¹⁴⁶

possibly groundless or frivolous complaints of judicial misconduct).

The benefits of disclosure also include preventing fraudulent and false statements. Grabow, *supra* note 141. One acting anonymously is more likely to commit fraud as he knows that he is unlikely to be caught. *Id.* at 607. The United States also has a longstanding tradition of requiring disclosure in campaign materials. *Id.* at 599.

143. This standard captures the essence of *Buckley's* spirit of restraint. See *Buckley v. Valeo*, 424 U.S. 1, 80 (1976). In *Vermont Right to Life Comm'n, Inc. v. Sorrell*, the Second Circuit Court of Appeals was faced with a standard similar to the proposed standard. 221 F.3d 376, 388 (2d Cir. 2000). This district court interpreted the Vermont law requiring disclosure for express advocacy groups to include any group that "expressly or without doubt or reservation advocate[d] the victory or defeat of a candidate." *Id.* Because the court disagreed with the district court's interpretation of the word "implicitly" in the statute, it did not have occasion to rule on whether the district court's proposed standard would withstand constitutional scrutiny. *Id.* It is difficult to know, however, whether expansions of the definition of express advocacy would be upheld because of the Supreme Court's failure to address this issue since *Buckley* in 1976. Trevor Potter, *Buckley v. Valeo, Political Disclosure and the First Amendment*, 33 AKRON L. REV. 71, 79 (1999). The lower courts' interpretations of these standards have also not been fully coherent. *Id.* at 105.

144. This proposed standard is barely more broad than the "magic words" standard. It would still easily exclude protected issue advocacy. See *Buckley v. Valeo*, 424 U.S. 1, 79 (1976). It merely expands the definition of express slightly to prevent clever express advocacy groups from clearly advocating the defeat of a candidate by presenting the candidate derogatorily without saying the word "defeat."

145. David A. Pepper, *Recasting the Issue Ad: The Failure of the Court's Issue Advocacy Standards*, 100 W. VA. L. REV. 141, 183 (1997) (arguing for the adoption of a reasonable person standard rather than the current magic words standard). Under this standard an advertisement would be considered to be express advocacy if a reasonable person viewing the ad in context would conclude that it advocates the election of a specific candidate. *Id.* at 179.

But see BeVier, *supra* note 102, at 1771. BeVier argues that although standards similar to the proposed standard are most likely not overbroad, they may present problems of vagueness. *Id.* Groups are significantly less likely to know if they are subject to regulation than they would under the magic words standard. *Id.*

146. Other expansions of express advocacy have been suggested. Hasen, *supra* note 102, at 279. Hasen analyzes Richard Briffault's bright-line proposal regulating communications that clearly identify a candidate, expend a large sum of money and occur within a specified time of the election. *Id.* Hasen concludes that although this standard is most likely not void for vagueness, it is may be overbroad in that it could reach protected forms of issue advocacy such as advertisements urging an incumbent to take action on an issue. *Id.* Hasen however urges that it is more desirable to regulate a few additional expenditures than to allow the current problem to continue. *Id.* at 281. This proposal is similar to those also proposed by Congress. Moramarco, *supra* note 140, at 124.

In addition, this rule will not be as simple for special interest groups to circumvent.¹⁴⁷ As the Resnick case makes clear, the “magic words” standard could easily be avoided.¹⁴⁸ As long as groups do not use one of these terms, they can freely express any derogatory idea while hiding behind the guise of issue advocacy.¹⁴⁹ The new standard would create more discretion for judicial decision makers.¹⁵⁰ It will allow the state to require disclosure when it is abundantly clear that the advertisement is advocating for the election or defeat of a named candidate, even without expressly stating this purpose.¹⁵¹

As applied to the Resnick-O’Donnell race, the new standard would classify Citizens and the United States Chamber of Commerce as express advocacy groups. All of their advertisements specifically named Justice Resnick¹⁵² and identified her as a justice who changes her vote based on campaign contributions, makes biased decisions and does not care about proper education.¹⁵³ These qualities are certainly not positive ones for a judge to possess. The combination of these characteristics would lead any reasonable person to conclude that this judge does not deserve a vote to remain in office.¹⁵⁴ No other logical conclusion could

Another proposed solution allows the groups themselves to designate whether their advertisements are express or issue advocacy. *Id.* at 127. If the government believes that a group has made the wrong designation, it may challenge the group’s choice. *Id.* The government would then be required to prove that the group intended to influence the outcome of the election using objective criteria such as: 1) using the candidate’s name; 2) the time span between the communication and the election; 3) the method of communicating the message; and 4) the amount spent on the advertisement. *Id.* If the government proves that the group intended to influence the outcome of the election, the group may be fined for making the untruthful designation. *Id.*

147. Pepper, *supra* note 145, at 179. The magic words standard made it simple for advocacy groups to determine whether their communications constituted express advocacy. *Id.* The reasonable person standard requires more analysis to make this determination. *Id.*

148. See *supra* notes 15-73 and accompanying text.

149. Moramarco, *supra* note 140, at 119 (identifying the ease with which groups could circumvent regulation by avoiding certain words in their campaign communications). Issue advocacy groups freely admit that their participation in election propaganda “can and does influence the outcome of elections.” *Perry v. Bartlett*, 231 F.3d 155, 159 (4th Cir. 2000), *cert. denied*, 121 S.Ct. 1229 (2001).

150. See Scott E. Thomas & Jeffrey H. Bowman, *Is Soft Money Here to Stay under the “Magic Words” Doctrine?*, 10 STAN. L. & POL’Y REV. 33, 43-44 (1998). Judges must still be careful to construe the new definition narrowly in order to avoid a chilling effect on constitutionally protected speech. *Buckley v. Valeo*, 424 U.S. 1, 80 (1976).

151. See *infra* note 155 and accompanying text.

152. See *supra* notes 15-73 and accompanying text.

153. *Id.*

154. This reasonableness standard allow the viewer to regard the communication as a whole rather than simply the language. Pepper, *supra* note 145, at 179. The images and the temporal context of the advertisement should also be considered. *Id.* As applied to this case, the imagery of the advertisement was clearly derogatory especially when coupled with the language. The ads also

be drawn. The new standard adequately protects all competing interests in this case and in others that could be presented.¹⁵⁵

B. Merit Selection and Retention: "The Missouri Plan"

Many campaign disclosure problems could be avoided by abandoning the system of judicial elections.¹⁵⁶ Several other states have already adopted a system of merit selection and retention.¹⁵⁷ In this system, a committee typically nominates several candidates for judgeships.¹⁵⁸ One of these persons is appointed by the governor of the state to fill the vacancy.¹⁵⁹ The newly appointed judge will fulfill his duties for a specified number of years.¹⁶⁰ He will then run in a retention election at which the people will vote on whether he should retain his position or be replaced by a new appointee.¹⁶¹

The merit selection and retention process has several advantages. The most obvious benefit is that merit selection will greatly reduce the likelihood of derogatory judicial elections.¹⁶² Merit selection may result in more minority and woman judges being selected for judgeships.¹⁶³ It

began to air close to the election which suggests that they were intended to influence its result.

155. See *supra* notes 141-142 and accompanying text.

156. Although retention elections are usually held in states that have adopted merit selection, these elections do not generally present the same problems as traditional contested elections. Averill, *supra* note 24, at 300.

There are also some benefits of judicial elections that would be lost with a switch to merit selection. Barnett, *supra* note 78. Judicial election may result in judges who are more sensitive to the needs of the community. *Id.* at 417. Elections are also generally supported by the democratic ideal. *Id.*

157. Barnett, *supra* note 78, at 416. Sixteen states are currently using merit selection to appoint judges to the bench. *Id.* More states are also considering changing to a merit selection system. Allbritain, *supra* note 114, at 1330.

158. See Barnett, *supra* note 78 at 416. The committee is typically composed of citizens of various backgrounds, including those both inside and outside the legal profession. *Id.* The committee also researches the history and background of these candidates, including their profession and personal lives. *Id.*

159. *Id.* The committee will submit its recommendations along with all of the information that it has compiled. *Id.*

160. *Id.*

161. *Id.* These elections are not contested by an opponent. *Id.* The citizens merely have the option of choosing "yes" to retain the judge or "no" to have him replaced by the committee. *Id.* Robert P. Davidow argues that these retention elections should not be held as they reduce the representativeness of the judiciary. Davidow, *supra* note 112, at 739. Although selection of judges by committee allows minorities to have a greater voice in judicial selection, retention elections allow the majority to remove these appointees for expressing minority viewpoints. *Id.* at 735.

162. Barnett, *supra* note 78 at 416. This will definitely reduce the cost of judicial elections which has greatly increased in recent years. See *supra* notes 4 to 9 and accompanying text.

163. Barnett, *supra* note 78 at 419. This contention however is not undisputed and several studies have come to conflicting conclusions. *Id.* Although merit selection may increase the

may also result in a more diverse make-up of Court's in other ways, such as more individuals vying for positions because they are not confronted with the pressures of an election.¹⁶⁴ Merit selection also reduces the amount of time that judges must spend campaigning.¹⁶⁵ It is possible that these advantages may increase the quality of the judicial body.¹⁶⁶

Despite these advantages, it is unlikely that merit selection will be successful in Ohio.¹⁶⁷ It has been suggested twice, but rejected by the voters.¹⁶⁸ Although the Ohio Bar Association and many other groups supported the change, its opponents, including the AFL-CIO, were successful in defeating the proposal as contrary to Ohioans' inherent right to vote.¹⁶⁹ However, there is still a possibility for judicial reform as it also did not come to other states without a fight.¹⁷⁰

VI. CONCLUSION

One thing is clear from the evidence presented in this Comment—there is a need for reform in the judicial election process in Ohio. The Resnick-O'Donnell race is merely one glaring example of the problem. The current law of campaign disclosure is not sufficient to protect the integrity of Ohio's judiciary. This integrity is essential to the functioning of the judicial system. Although Justice Resnick prevailed in the race, despite the attack on her honor, the scar on the judicial system, as a whole, remains.

Two possible solutions to this problem have been suggested to

presence of minorities on the bench, some argue that the judiciary will still not be sufficiently representative. See Davidow, *supra* note 112 at 725, n.9. This is due to the existence of retention elections and the appointment of the selection committee by a partisan official, usually the governor. *Id.*

164. Barnett *supra* note 78 at 418. Although many people may want to become judges and would perform well at the position, they may be turned off by the prospect of campaign speeches and propaganda. *Id.* Also, the qualifications that make a good politician are not necessarily the same as those that make a good judge. *Id.*

165. Averill, *supra* note 24, at 296.

166. *Id.* at 418. The committee's deep investigation into the candidate's history and background may also result in higher quality judges initially appointed to the bench. *Id.* This is in comparison to voters, who know little to nothing about the candidates and their beliefs, making the decision. *Id.* Performance evaluations of judges will also be used by the committee whereas they are rarely used in judicial elections. *Id.* at 316. Merit selection may also alleviate instability in state courts that may be attributable to judicial elections. Stanley H. Friedelbaum, *State Courts and the Separation of Powers: A Venerable Doctrine in Varied Contexts*, 61 ALB. L. REV. 1417, 1458-59 (1998).

167. Felice, *supra* note 97.

168. *Id.* at 193.

169. *Id.* at 199.

170. Averill, *supra* note 24, at 325.

solve this problem. First, the groups for which disclosures are currently required could be expanded. Although this may not be a dramatic change due to important constitutional limitations, the expansion may be enough to protect the judiciary from anonymous attack. However, a more dramatic change in the structure of elections may be necessary. The second option then is changing to a system of merit selection and retention because this system would prevent many, but not all, of the problems associated with judicial elections. Although no solution is perfect, changes must be made before justice truly is for sale in Ohio.

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