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JUDICIAL SELECTION AND POLITICAL CULTURE

JONATHAN L. ENTIN*

The 2000 election campaign for the seat held by Ohio Supreme Court Justice Alice Robie Resnick was by far the most contentious in the Buckeye State's history. Justice Resnick, part of the four-member majority on a court that had decided a number of high-stakes cases, was targeted for defeat by business groups, notably the state and national Chambers of Commerce.¹ Millions of dollars poured into the campaign, much of it devoted to television advertisements accusing Justice Resnick of selling her judicial vote to trial lawyers and labor unions.² The tone of the campaign was so vitriolic that Chief Justice Thomas J. Moyer, who regularly dissented from the controversial rulings, urged disclosure of advertising sponsors in the future and the adoption of an appointive system in place of judicial elections.³ The Ohio campaign was the latest in a series of highly contentious state judicial elections in recent years.⁴ For example, in 1986 California's Chief Justice Rose Bird and two of her colleagues were ousted after a campaign that focused on the trio's decisions in death penalty cases.⁵ Then in 1996, Nebraska Chief Justice David

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* Professor of Law and Political Science, Case Western Reserve University. My father's final illness prevented me from delivering this paper in person at the Capital University Law School symposium on judicial selection in January 2001. My deepest gratitude goes to the editors who have permitted me to participate vicariously in the proceedings.

1 T.C. Brown, *2 Campaigns for Top Court Exceed \$6 Million: Spending, Attack Ads Some of Worst in Country*, PLAIN DEALER, Dec. 27, 2000, at B1.

2 *Id.*; William Glaberson, *Fierce Campaigns Signal a New Era for State Courts*, N.Y. TIMES, June 5, 2000, at A1. One advertisement that aired repeatedly showed the traditional scales of justice with a voice-over saying, "Is justice for sale in Ohio?" James Bradshaw, *Ad Signals Tough Fight for Ohio Supreme Court Seat*, COLUMBUS DISPATCH, Oct. 16, 2000, at C6; Spencer Hunt, *Campaign 2000—TV Ads Help Mold Supreme Court Race*, CIN. ENQUIRER, Oct. 22, 2000, at B1; Sandy Theis, *Controversial Ad Becomes Issue in Court Race*, PLAIN DEALER, Oct. 21, 2000, at 5B.

3 James Bradshaw, *Select, Don't Elect, Moyer Says*, COLUMBUS DISPATCH, Nov. 10, 2000, at B6; T.C. Brown, *Moyer Urges Appointing of Top Court*, PLAIN DEALER, Nov. 10, 2000, at B1; T.C. Brown, *Top Judge Wants Ad Campaign Backers Identified*, PLAIN DEALER, Dec. 12, 2000, at B5; Spencer Hunt, *Campaign Secrecy to Face Attack*, CIN. ENQUIRER, Dec. 12, 2000, at B1; Spencer Hunt, *Chief Justice; Appoint Judges*, CIN. ENQUIRER, Nov. 10, 2000, at C1.

4 Glaberson, *supra* note 2, at A1.

5 See generally PREBLE STOLZ, *JUDGING JUDGES: THE INVESTIGATION OF ROSE BIRD AND THE CALIFORNIA SUPREME COURT* (1981); see also Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*,

(continued)

Lanphier lost his seat after writing a unanimous opinion that invalidated a term-limits amendment to the state constitution,⁶ and Justice Penny White of the Tennessee Supreme Court was defeated largely on the basis of her joining an opinion overturning the death penalty in a notorious rape and murder case.⁷

Meanwhile, Alabama has had a series of tumultuous supreme court election campaigns over the past decade.⁸ In short, the Resnick campaign reflected the increasing involvement of interest groups in judicial elections and the escalation of the cost of those elections.⁹ Chief Justice Moyer's reform

61 S. CAL. L. REV. 2007 (1988).

6 Duggan v. Beermann, 515 N.W.2d 788 (Neb. 1994) (holding that sponsors of the amendment, which had been approved in the 1992 general election, submitted an insufficient number of valid signatures on their initiative petition so the amendment was void). Opposition to Lanphier also arose from several rulings overturning second-degree murder convictions. Traciell V. Reid, *The Politicization of Retention Elections: Lessons from the Defeat of Justices Lanphier and White*, 83 JUDICATURE 68, 70-71 (1999).

7 State v. Odom, 928 S.W.2d 18 (Tenn. 1996). The court unanimously concluded that errors during the trial's penalty phase required a new sentencing hearing, *id.* at 32-33, although two of the five justices based their conclusion on narrower grounds than did the majority. *Id.* at 33-35 (Anderson, C.J., joined by Drowota, J., concurring and dissenting). On the sources of opposition to Justice White, see Reid, *supra* note 6, at 70.

8 See generally Stephen J. Ware, *Money, Politics and Judicial Elections: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 656-61 (1999). The 1994 election for chief justice was not decided for nearly a year due to a dispute over counting absentee ballots. Roe v. Alabama, 68 F.3d 404 (11th Cir. 1995). In 2000, the voters chose Roy Moore as their new chief justice. *Other Races in the South: "Ten Commandments Judge" Elected to Lead Alabama High Court*, ATLANTA J. & CONST., Nov. 8, 2000, at E12. Moore was a trial judge who gained notoriety by displaying the Ten Commandments in his courtroom. *Id.* When his display prompted litigation, the Governor threatened to call out the National Guard to keep the Ten Commandments on view, but the legal dispute ended inconclusively. See Ala. Freethought Ass'n v. Moore, 893 F. Supp. 1522 (N.D. Ala. 1995) (concluding that the plaintiffs challenging Judge Moore's display of the Ten Commandments lacked standing); *Ex parte* Moore, 773 So. 2d 437 (Ala. 2000) (per curiam) (dismissing as moot Judge Moore's challenge to the Alabama Judicial Inquiry Commission's investigation relating to the controversy over his display of the Ten Commandments in his courtroom); *Ex parte* State *ex rel.* James v. ACLU, 711 So. 2d 952 (Ala. 1998) (finding the dispute over Judge Moore's display of the Ten Commandments to be nonjusticiable); cf. Harvey v. Cobb County, 811 F. Supp. 669 (N.D. Ga. 1993) (holding that courtroom display of the Ten Commandments violates the Establishment Clause), *aff'd*, 15 F.3d 1097 (11th Cir. 1994) (unpublished table decision). Chief Justice Moore recently had a massive sculpture containing the Ten Commandments installed in the rotunda of the Alabama Supreme Court building. Jeffrey Gettleman, *Conviction Cast in Stone*, L.A. TIMES, Aug. 2, 2001, at A9; Dahleen Glanton, *Judge Unveils Bible-Based Monument*, CHI. TRIB., Aug. 16, 2001, at 1.

9 See generally Anthony Champagne, *Interest Groups and Judicial Elections*, 34 LOY.

(continued)

proposals mirror ideas that have received nationwide support.¹⁰

This article examines the background to the 2000 Ohio Supreme Court election and suggests that the contention surrounding Justice Resnick's reelection bid arose less from the state's method of choosing judges than from a political culture that places substantial weight on judicial philosophy and case outcomes. If legal doctrine is politically salient, those who care about the law will seek to influence the composition of the judiciary. This in turn counsels against unrealistic expectations about reform of the judicial selection process. Things may improve at the margin, but the most likely check on the worst excesses might well be the difficulty of sustaining a slash-and-burn political strategy at least in the judicial context. After all, Justice Resnick did win despite the heavy artillery she faced last year.¹¹

This article proceeds in four stages. Part I examines the major rulings, relating to tort reform and school funding, that prompted the harsh and expensive Ohio campaign. Part II compares the process for appointing federal judges, particularly Supreme Court justices, which has also become notably contentious over the past three decades. Part III discusses the trend away from strict limitations on campaign speech by judicial candidates, which combined with the expansive protections afforded to independent expenditures in election campaigns will facilitate sharp rhetoric by those inclined in that direction. Finally, Part IV assesses the prospects for elevating the level of discourse in judicial selection.

I. THE UNDERLYING ISSUES IN THE 2000 OHIO SUPREME COURT ELECTION

Two major issues galvanized interest group involvement in Justice Resnick's reelection campaign.¹² One was tort reform, the other school funding.¹³ During the year preceding the November 2000 election, Resnick wrote the majority opinion in important cases dealing with both subjects.¹⁴ Both times the Ohio Supreme Court was divided four to three so that electoral

L.A. L. REV. 1391 (2001); Glaberson, *supra* note 2.

10 William Glaberson, *A Bipartisan Effort to Remove Politics from Judicial Races*, N.Y. TIMES, Oct. 23, 2000, at A18; William Glaberson, *Justices Urge Stricter Rules for Judicial Elections*, N.Y. TIMES, Jan. 26, 2001, at A16; William Glaberson, *Lawyers' Study Says States Should Pay for Court Races*, N.Y. TIMES, July 23, 2001, at A10; William Glaberson, *States Taking Steps to Rein In Excesses of Judicial Politicking*, N.Y. TIMES, June 15, 2001, at A1.

11 James Bradshaw, *High Court Unchanged Despite Negative TV Ads*, COLUMBUS DISPATCH, Nov. 8, 2000, at A1.

12 Ken McCall, *Resnick Preparing for Fight of Her Life*, DAYTON DAILY NEWS, July 27, 2000, at A1.

13 *Id.*

14 *DeRolph v. State*, 728 N.E.2d 993 (Ohio 2000); *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062 (Ohio 1999).

fate might well have determined the direction of legal doctrine in the state on these and similar issues.¹⁵ This section examines Justice Resnick's opinions in the high-profile cases that became the focus of the campaign debate. Although those opinions were open to criticism, her most strident opponents in the business community obscured the real analytical difficulties in ways that helped her galvanize support and win reelection.

A. Tort Reform

Between 1975 and 1987, the Ohio General Assembly enacted several measures designed to make it more difficult for tort plaintiffs to recover and limiting how much they could receive.¹⁶ Beginning in 1986, the Ohio Supreme Court invalidated some of the central provisions of the new laws for violating the state constitution.

Many of these rulings concerned the time within which medical malpractice actions must be filed. The legislature set a one-year statute of limitations accompanied by a four-year statute of repose.¹⁷ This meant that all malpractice claims had to be brought within one year after the plaintiff discovered the injury, but in any event within four years of the occurrence of the alleged malpractice.¹⁸ The court incrementally gutted these requirements in a series of rulings.¹⁹ First to go was the statute of repose as applied to minors below the age of ten.²⁰ The malpractice law tolled the time limits for only four years.²¹ This would prevent a child injured before her tenth birthday from suing in her own right because the four-year statute of repose would expire before she turned eighteen.²² Denying the right to sue contravened the due course of law provision of the Ohio Constitution.²³ Soon afterward the court rejected the statute of repose as applied to plaintiffs who did not discover their injuries within the four-year deadline.²⁴ This restriction contravened the state

15 Justice Deborah L. Cook, who dissented in the contentious cases, was also up for reelection but was generally expected to win another term. William Glaberson, *A Spirited Campaign for Ohio Court Puts Judges on New Terrain*, N.Y. TIMES, July 7, 2000, at A15.

16 The most important of these were the Ohio Medical Malpractice Act, 1975 Ohio Laws 2809, and the Tort Reform Act of 1987, 1987 Ohio Laws 1661.

17 *Mominee v. Scherbarth*, 503 N.E.2d 717, 719-20 (Ohio 1986).

18 *Id.*

19 *Id.*; *Hardy v. Vermeulen*, 512 N.E.2d 626 (Ohio 1987); *Gaines v. Preterm-Cleveland, Inc.*, 514 N.E.2d 709 (Ohio 1987).

20 *Mominee*, 503 N.E.2d at syl.

21 *Id.* at 721.

22 *Id.* Although the state had a disability statute that tolls the statute of limitations for minors, this statute did not apply to malpractice claims. *Id.*

23 *Id.* at 722; OHIO CONST. art. I, §16.

24 *Hardy*, 512 N.E.2d at syl.

constitutional right to remedy for personal injury.²⁵ Next came a ruling striking down the statute of repose as applied to a plaintiff who discovered her injury in the fourth year after the occurrence of the alleged malpractice.²⁶ Enforcing the statute of repose would give such a plaintiff less than one full year to prepare her case before filing suit, but the one-year statute of limitations showed that the legislature intended malpractice plaintiffs to have that long to go to court.²⁷ The statutory distinction between those claimants who discovered their medical injuries in time to file within one year and those who discovered their medical injuries less than a year before the expiration of the statute of repose violated the state constitutional guarantee of equal protection because there was no rational basis for the distinction.²⁸

Other procedural restrictions met a similar fate based on the separation of powers.²⁹ First down was a statutory ban on including a specific amount of damages in the complaint when the plaintiff sought more than \$25,000.³⁰ This ban conflicted with a procedural rule promulgated by the court that required plaintiffs to specify the amount of damages they sought.³¹ Because the state constitution empowered the supreme court to "prescribe rules governing practice and procedure in all courts,"³² the procedural rule trumped an inconsistent statute.³³ The same reasoning led to the demise of an additional pleading requirement for malpractice plaintiffs.³⁴ The malpractice statute mandated that complaints document that the plaintiff or her lawyer had sought to examine or copy the patient's medical records before filing suit.³⁵ This statutory requirement conflicted with another procedural rule that contained no provision for affidavits or other verification in malpractice pleadings, so the inconsistent statute had to fall.³⁶

25 *Id.* at 629.

26 *Gaines v. Preterm-Cleveland, Inc.*, 514 N.E.2d 709, syl. (Ohio 1987).

27 *Id.* at 714.

28 *Id.* at 714–15; OHIO CONST. art I, §2. The court added that affording malpractice claimants less than a full year to sue after discovering their injuries violated the open courts provision. 514 N.E.2d at 716; OHIO CONST. art. I, §16.

29 *Hiatt v. S. Health Facilities, Inc.*, 626 N.E.2d 71 (Ohio 1994); *Rockey v. 84 Lumber Co.*, 611 N.E.2d 789 (Ohio 1993).

30 *Rockey*, 611 N.E.2d at syl. The statutory provision applied to all tort actions, not only to malpractice claims. *Id.* at 790. Although *Rockey* was an ordinary personal injury suit, two of the consolidated cases challenging the provision involved medical malpractice claims. *Id.* at 789, 792–93.

31 *Id.* at 791–92.

32 OHIO CONST. art. IV, § 5(B).

33 *Rockey*, 611 N.E.2d at 792.

34 *Hiatt*, 626 N.E.2d at syl.

35 *Id.* at 72–73.

36 *Id.* at 73.

The legislature did not confine itself to procedural barriers.³⁷ The malpractice statute also imposed restrictions on damages, but the court did away with those as well.³⁸ The ceiling of \$200,000 on general damages was first to go.³⁹ Although the cap was promoted as a way to address the crisis in medical malpractice insurance, the majority found no rational connection between general damage awards and malpractice insurance rates.⁴⁰ Accordingly, the cap violated the Ohio constitutional guarantee of due process of law.⁴¹ Then came a ruling that overturned a provision requiring that malpractice damages in excess of \$200,000 be paid periodically rather than in a lump sum.⁴² This requirement could result in a successful plaintiffs receiving less than the full amount of the verdict, which violated the state constitutional right to a jury trial.⁴³

The court took a similarly skeptical view of tort reform in general.⁴⁴ Having effectively dispatched the malpractice statute of repose, the justices struck down a ten-year statute of repose for architects and engineers.⁴⁵ That deadline could prevent persons injured as a result of negligent design or construction from obtaining relief from those responsible for their injuries and therefore violated Ohio's constitutional right to remedy.⁴⁶ This ruling relied heavily on an earlier decision invalidating a two-year statute of limitations for plaintiffs exposed to diethylstilbestrol (DES).⁴⁷ That case involved a provision that triggered the statute of limitations when a woman learned from a physician that

37 See *Galayda v. Lake Hosp. Sys., Inc.*, 644 N.E.2d 298 (Ohio 1994); *Morris v. Savoy*, 576 N.E.2d 765 (Ohio 1991).

38 *Id.*

39 *Morris*, 576 N.E.2d at syl.

40 See *id.* at 770.

41 *Id.* at 771; OHIO CONST. art. I, § 16. The lead opinion, which was joined by three of the six participating justices, also expressed concern that "the statute treat[ed] the most seriously injured malpractice victims differently from the rest of the class [of malpractice victims]," but concluded that the distinction passed equal protection muster under the most deferential standard of review. *Id.* at 772. Two other justices thought that the damage cap violated several state constitutional provisions, including the equal protection guarantee. *Id.* at 777, 778-80, 781-83 (Sweeney, J., joined by Resnick, J., concurring in part and dissenting in part).

42 *Galayda*, 644 N.E.2d at syl.

43 *Id.* at 301-02; OHIO CONST. art. I, § 5. The periodic payment requirement also violated the due course of law guarantee. 644 N.E.2d at 302; OHIO CONST. art. I, § 16.

44 See *Adamsky v. Buckeye Local Sch. Dist.*, 653 N.E.2d 212 (Ohio 1995); *Brenneman v. R.M.I. Co.*, 639 N.E.2d 425 (Ohio 1994); see also *Cyrus v. Henes*, 640 N.E.2d 810 (Ohio 1994).

45 *Brenneman*, 639 N.E.2d at syl.

46 639 N.E.2d at 430; OHIO CONST. art. I, § 16.

47 639 N.E.2d at 430-31.

she had an injury "which may be related" to her exposure to DES during her mother's pregnancy.⁴⁸ Relying on the earlier decisions against unduly restrictive time limits for filing medical malpractice actions, the majority concluded that the DES time limit violated the right to remedy and due process clauses of the Ohio Constitution.⁴⁹ The court also held that a two-year statute of limitations for personal injury claims against political subdivisions of the state could not be applied to minors.⁵⁰ The law authorizing suits against governmental entities contained no tolling provision.⁵¹ This meant that adults would have two years to file suit; children might never have a chance to do so because minors may not pursue claims in court.⁵² Accordingly, the two-year limitation violated the state equal protection clause and could not bar a minor's suit.⁵³

Other restrictions met a similar fate. For example, an effort to limit all claims by employees against their employers to worker's compensation proceedings was held unconstitutional.⁵⁴ Employee claims involving intentional torts were not subject to worker's compensation because they arose outside the employment relationship.⁵⁵ Accordingly, the legislature could not include such claims in worker's compensation proceedings.⁵⁶ Addressing a more general restriction, the court invalidated a statute that empowered the trial judge to determine the amount of punitive damages to be awarded if the jury decided that such damages were appropriate.⁵⁷ Because fixing the amount of punitive damages was a traditional jury function, the statute infringed a plaintiff's right to a jury trial.⁵⁸ Similarly, the court rejected a legislative effort to repeal the collateral source rule, under which insurance payments and other benefits do not affect the amount of damages awarded in a tort action.⁵⁹ Doing away with the collateral source rule, the majority reasoned, violated several provisions of the Ohio Constitution: the right to jury trial, because a deduction for collateral benefits was required even if the collateral payments did not

48 *Burgess v. Eli Lilly & Co.*, 609 N.E.2d 140, 141 (Ohio 1993).

49 *Id.* at 141-43.

50 *Adamsky v. Buckeye Local Sch. Dist.*, 653 N.E.2d 212, syl. (Ohio 1995).

51 *Id.* at 213.

52 *Id.* at 214.

53 *Id.* at 215; OHIO CONST. art. I, §2.

54 *Brady v. Safety-Kleen Corp.*, 576 N.E.2d 722, syl. (Ohio 1991).

55 *Id.* at 729. In reaching this conclusion, the majority opinion quoted extensively from the dissenting opinion in *Taylor v. Acad. Iron & Metal Co.*, 522 N.E.2d 464, 476 (Ohio 1988) (Douglas, J., dissenting).

56 576 N.E.2d at 728-29; OHIO CONST. art. II, §35.

57 *Zoppo v. Homestead Ins. Co.*, 644 N.E.2d 397, syl. (Ohio 1994).

58 *Id.* at 401; OHIO CONST. art. I, §5.

59 *Sorrell v. Thevenir*, 633 N.E.2d 504, syl. (Ohio 1994); *see also* *Depew v. Ogella*, 635 N.E.2d 310 (Ohio 1994); *May v. Tandy Corp.*, 633 N.E.2d 504 (Ohio 1994).

compensate for any injury covered by the jury award;⁶⁰ the right to due course (or due process) of law, because the elimination of the collateral source rule did not further a compelling interest in promoting access to affordable insurance or eliminating double recoveries;⁶¹ the guarantee of equal protection of the laws, because jury awards in medical malpractice cases were subject to a different collateral source rule than were jury awards in all other tort cases;⁶² and the right to remedy and open courts, because the repeal of the collateral source rule could deprive some plaintiffs of their entire jury award.⁶³

Two points about these rulings bear emphasis. One is that reasonable legal minds could differ about the issues in these cases. Few of these decisions were unanimous,⁶⁴ but only three reflected the four to three split that has characterized the Ohio Supreme Court in recent years.⁶⁵ The possibility of legitimate disagreement means that the direction of tort law could be an acceptable issue in judicial selection.

The other is that the court's opinions are not especially well reasoned.⁶⁶ To take just one example, one can focus on *Sorrell v. Thevenir*, the case that struck down the repeal of the collateral source rule.⁶⁷ The majority opinion never addressed the fundamental issues that have made the rule controversial.

60 *Sorrell*, 633 N.E.2d at 510.

61 *Id.* at 511.

62 *Id.* at 512-13.

63 *Id.* at 513.

64 In two non-unanimous cases, there were no dissenting opinions; the justices who disagreed simply noted their dissent. *Hiatt v. So. Health Facilities, Inc.*, 626 N.E.2d 71, 73 (Ohio 1994) (Wright & Pfeifer, JJ., dissenting); *Burgess v. Eli Lilly & Co.*, 609 N.E.2d 140, 144 (Ohio 1993) (Moyer, C.J., dissenting).

65 The only four to three decisions in this series of cases were *Brenneman v. R.M.I. Co.*, 639 N.E.2d 425 (Ohio 1994), *Brady v. Safety-Kleen Co.*, 576 N.E.2d 722 (Ohio 1991), and *Hardy v. Vermentlan*, 512 N.E.2d 626 (Ohio 1987). Despite the disagreement among the justices in *Hardy*, the result was unanimous. See *Hardy*, 512 N.E.2d at 632 n.12 (Wright, J., joined by Markus & Holmes, JJ., concurring in judgment only and dissenting in part). Three justices dissented insofar as the case invalidated the four-year statute of repose in medical malpractice actions. *Id.* They agreed, however, that this time limit could not constitutionally be applied to the plaintiff because the alleged malpractice occurred before the effective date of the statute. *Id.*

66 This problem is not confined to tort cases. A notable example from a very different context is *State v. Lessin*, 620 N.E.2d 72 (Ohio 1993), a four to three ruling that set aside a conviction for incitement to violence arising from the burning of an American flag during an antiwar demonstration. The decision was based on inadequate jury instructions. *Id.* at syl. Both the majority opinion and the dissenters missed the fundamental constitutional issues in the case. See Jonathan L. Entin, *Right, Wrong in Lessin Decision*, PLAIN DEALER, Nov. 3, 1993, at B7.

67 633 N.E.2d 504, syl. (Ohio 1994).

The rule prohibits consideration of collateral payments, such as insurance benefits, in awarding damages.⁶⁸ Those who emphasize compensation as the primary goal of tort law regard the collateral source rule as an anachronism because it enables plaintiffs to obtain a windfall: tort damages that come on top of compensation received from other sources.⁶⁹ Supporters of the rule believe it furthers the goal of punishing wrongdoers by requiring them to pay the full amount of damages they have caused.⁷⁰ Both compensation and punishment are fundamental purposes of tort law.⁷¹ The *Sorrell* Court never acknowledged the tension between these purposes, but simply proceeded to treat the rule as encompassed by various fundamental rights protected by the Ohio Constitution.⁷² This was especially peculiar in light of the recency of the rule's explicit adoption in Ohio and the entire absence of references to the state constitution in the case that endorsed the rule.⁷³ Moreover, the majority opinion raised serious doubts about the continuing vitality of the three-year-old ruling upholding the statutory abrogation of the collateral source rule in medical malpractice cases.⁷⁴ At the same time, the dissenters offered an incomplete analysis. They asserted that "the underlying purpose of tort law is to wholly compensate victims" without addressing tort law's punitive goal or explaining why they regarded compensation as primary.⁷⁵

Whatever the merits of the Ohio Supreme Court's approach to these issues, the General Assembly entered the fray with a comprehensive 1996 statute that purported to overturn many of the court's decisions and to enact

68 RESTATEMENT OF TORTS § 920 cmt. e (1939); RESTATEMENT (SECOND) OF TORTS § 920A(2) & cmts. b-c (1979).

69 E.g., John G. Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CAL. L. REV. 1478 (1966).

70 E.g., Joel K. Jacobsen, *The Collateral Source Rule and the Role of the Jury*, 70 OR. L. REV. 523, 528-31 (1991).

71 RESTATEMENT OF TORTS § 901(a), (c) (1939); RESTATEMENT (SECOND) OF TORTS § 901(a), (c) (1979).

72 *Sorrell*, 633 N.E.2d at 510-13. The court's failure to address the view that "[t]he collateral-source rule is of common law origin and can be changed by statute," RESTATEMENT (SECOND) OF TORTS § 920A cmt. d (1979), is understandable, however. Any statutory change in the rule must, of course, comport with constitutional requirements.

73 The majority opinion observes that the rule was "adopted" in *Pryor v. Webber*, 263 N.E.2d 235 (Ohio 1970). *Sorrell*, 633 N.E.2d at 509. The *Pryor* court cited Ohio cases dating back a century in support of its explicit endorsement of the collateral source rule. *Pryor*, 263 N.E.2d at 238 (citing *Klein v. Thompson*, 19 Ohio St. 569 (1869)).

74 *Sorrell*, 633 N.E.2d at 512 (discussing *Morris v. Savoy*, 576 N.E.2d 765, 772 (Ohio 1991)). Indeed, the *Sorrell* majority reasoned that the different statutory approaches to the collateral source rule in the malpractice and general tort contexts violated Ohio's constitutional guarantee of equal protection. *Id.*

75 *Id.* at 514 (Moyer, C.J. joined by Wright, J., dissenting).

numerous other tort reforms.⁷⁶ Trial lawyers and organized labor filed an original action in the supreme court challenging the measure's constitutionality. In *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*,⁷⁷ the court struck down the entire statute by a four to three vote.⁷⁸ Justice Resnick wrote the majority opinion.⁷⁹ The opinion is remarkable both in its organization and in its tone, both of which provided ample fodder for critics.⁸⁰ The most striking organizational feature was the final section, Part VII, a nine-page rebuttal to the dissenters' principal arguments, which followed what was labeled as the conclusion in Part VI.⁸¹ By choosing this form of comeback, Justice Resnick might have given more credence than necessary to the dissenters' views. She might have blunted their criticisms more effectively by incorporating her responses directly into her own discussion, particularly in footnotes, rather than elevating them to additional prominence as the final portion of her opinion.⁸²

Beyond its structure, the opinion raised questions of substance. For example, Part III concluded that the challengers, who were seeking to vindicate public rights, could proceed without demonstrating "any legal or special individual interest in the result."⁸³ But this section did not fully explain the urgency of allowing a group of trial lawyers and the state labor federation to pursue a facial attack on the entire statute rather than waiting for individual plaintiffs to raise specific issues in the ordinary course of litigation.⁸⁴ It was left to a concurring opinion to explain that the very existence of the statutory tort reforms would deter the filing and pursuit of potentially meritorious

76 Act of Sept. 26, 1996, 1996 Ohio Laws 3867. For a generally sympathetic but not uncritical assessment of this legislation, see Stephen J. Werber, *Tort Reform Versus the Ohio Constitution*, 69 TEMP. L. REV. 1155 (1996).

77 715 N.E.2d 1062 (Ohio 1999).

78 *Id.* at 1070.

79 *Id.* at 1071.

80 There has been no shortage of criticism. E.g., Basil M. Loeb, Comment, *Abuse of Power: Certain State Courts Are Disregarding Standing and Original Jurisdiction Principles So They Can Declare Tort Reform Unconstitutional*, 84 MARQ. L. REV. 491 (2000); Jonathan Tracy, Note, *Ohio ex rel. Ohio Academy of Trial Lawyers v. Sheward: The End Must Justify the Means*, 27 N. KY. L. REV. 883 (2000); *State Tort Reform - Ohio Supreme Court Strikes Down State General Assembly's Tort Reform Initiative*, 113 HARV. L. REV. 804 (2000).

81 *State es rel. Ohio Academy of Trial Lawyer*, 715 N.E.2d at 1103-11.

82 The structure of Justice Resnick's opinion might have resulted from pressure to release the decision rather than from a deliberate rhetorical strategy. The original complaint was filed in November 1997, and the decision was released in August 1999. *Id.* at 1062, 1068. The case's importance might have militated against further delay in polishing the opinion, at least in the majority's eyes.

83 *Id.* at 1084-85.

84 *Id.* at 1118-19 (Moyer, C.J., joined by Cook & Lundberg Stratton, JJ., dissenting).

claims, and that it might take some time for the unconstitutional provisions to be authoritatively invalidated, if the issues were left to be resolved in ordinary litigation.⁸⁵

Moreover, Justice Resnick's reliance on separation of powers in rejecting the legislature's effort to reenact provisions that the court had previously rejected was curious.⁸⁶ As Chief Justice Moyer explained in his dissent, "enactment of a law that may be, or even is likely to be, later deemed void by this court does not constitute a violation of the doctrine of separation of powers."⁸⁷ He added that the judiciary remains free to invalidate the new measures as well.⁸⁸ Although the chief justice did not say so, this statement means that the court should have struck down the reenacted measures for violating the same constitutional provisions as the original measures did.⁸⁹ If the first statute of repose violated the right to remedy or due course of law, the new statute of repose likewise violated those constitutional guarantees. Using separation of powers to reach this result confuses rather than illuminates the legal analysis.

Justice Resnick disposed of the rest of the 1996 tort statute by concluding that the bill contravened the Ohio Constitution's single-subject rule.⁹⁰ Moreover, it was impossible to sever any permissible provisions from the invalid portions.⁹¹ The dissenters disagreed, opining that the statute dealt with the general subject of tort reform (thereby satisfying the single-subject rule)⁹² and that any invalid provisions were indeed severable.⁹³ Why the majority took its approach to these issues can be understood more clearly by examining one last facet of the case.

The opinion had a particularly striking tone. Justice Resnick began by characterizing the bill as "a challenge to the judiciary as a coordinate branch of government."⁹⁴ She curtly rejected the legislature's attempts to reenact measures that mirrored or differed only cosmetically from those that the court had previously invalidated—including statutes of repose for claims against architects and engineers, certificates of merit for medical malpractice claims, substantial abrogation of the collateral source rule, and caps on punitive and general damages.⁹⁵ She described these legislative measures as attempts "to

85 See *id.* at 1111–12 (Pfeifer, J., concurring).

86 See *id.* at 1087–97.

87 *Id.* at 1120 (Moyer, C.J., joined by Cook & Lundberg Stratton, JJ., dissenting).

88 See *id.* at 1121 (Moyer, C.J., joined by Cook & Lundberg Stratton, JJ., dissenting).

89 See *id.*

90 *Id.* at 1101; OHIO CONST. art. II, §15(D).

91 *State ex rel. Ohio Academy of Trial Lawyers*, 715 N.E.2d at 1102.

92 *Id.* at 1127 (Lundberg Stratton, J., joined by Moyer, C.J., and Cook, J., dissenting).

93 *Id.* at 1128 (Lundberg Stratton, J., joined by Moyer, C.J., and Cook, J., dissenting).

94 *Id.* at 1073.

95 *Id.* at 1085–95. This portion of the opinion also invalidated legislative efforts to
(continued)

usurp this court's constitutional authority"⁹⁶ and denounced the bill for "brushing aside a mandate of this court on constitutional issues as if it were of no consequence," an action that "threatens the judiciary as an independent branch of government and tears at the fabric of our Constitution."⁹⁷ The General Assembly's reenactment of a previously rejected procedural requirement was "so fundamentally contrary to the principle of separation of powers that it deserves no further comment."⁹⁸ The new caps on punitive damages "create[d] the illusion of compliance" with the court's previous ruling,⁹⁹ but were in fact an "egregious" attempt to subvert the judiciary's role.¹⁰⁰ The legislature had apparently forgotten that "[t]his is a Constitution we are dealing with."¹⁰¹

This blunt language provided ammunition to those who regarded the opinion as a piece of unbridled judicial activism. Chief Justice Moyer expressed concern that, with this "inflammatory and accusatory language, the majority appears to be throwing down the gauntlet to that coequal legislative branch of government."¹⁰² There is, however, another way of understanding Justice Resnick's opinion. Her controversial rhetoric was analogous to the United States Supreme Court's expansive conception of the judicial role in *Cooper v. Aaron*:¹⁰³ the Court's interpretation of the Constitution is final and binding on all other officials.¹⁰⁴ From this perspective, the Ohio General Assembly's attempt to overrule the Ohio Supreme Court's interpretation of the Ohio Constitution by passing a statute was reminiscent of the efforts by Arkansas Governor Orval Faubus and other segregationists to nullify *Brown v. Board of Education*.¹⁰⁵ Like those latter-day proponents of interposition, the General Assembly's gambit did not deserve to be taken seriously, so the argument in favor of Justice Resnick's approach would go.

Still, this is not the only view of the Ohio situation. Unlike the southern

overrule judicial decisions about the standard for summary judgment in toxic tort cases and the admissibility of evidence of a common insurer in medical malpractice cases. *Id.* at 1095-96.

96 *Id.* at 1086.

97 *Id.* at 1087.

98 *Id.*

99 *Id.* at 1091.

100 *Id.*

101 *Id.*; cf. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) ("we must never forget that it is a *constitution* we are expounding").

102 *State ex rel. Ohio Academy of Trial Lawyers*, 715 N.E.2d at 1114 (Moyer, C.J., joined by Cook & Lundberg Stratton, JJ., dissenting).

103 358 U.S. 1 (1958).

104 See *id.* at 17-19. This view has attracted its share of criticism. See generally Daniel A. Farber, *The Supreme Court and the Rule of Law: Cooper v. Aaron Revisited*, 1982 U. ILL. L. REV. 387 (1982).

105 347 U.S. 483 (1954).

resisters, the legislature did not attack the state supreme court's rulings as illegitimate or seek to justify defiance of those decisions.¹⁰⁶ Rather, the General Assembly explained that it "respectfully disagree[d]" with the Ohio Supreme Court and intended to "recognize" the positions taken by dissenting justices and in lower court rulings that the high court had reversed.¹⁰⁷ Although this language might simply have been a cunningly understated rhetorical salvo in an undeclared tort "war,"¹⁰⁸ it could alternatively have been seen as part of an interbranch conversation about the meaning of the Ohio Constitution. On this view, all three branches have an obligation to interpret the constitution; while the judiciary's interpretation is conclusive as to the parties to a lawsuit, that interpretation does not necessarily bind everyone else, including the legislative and executive branches.¹⁰⁹ The legislature's 1996 tort statute might have been regarded as an invitation for the court to reconsider its recent decisions.¹¹⁰

Nevertheless, it is not entirely surprising that Justice Resnick and her majority colleagues took a less charitable and more adversarial view toward the General Assembly. The decisions targeted by the 1996 tort reform bill were, for the most part, decided by relatively wide margins: generally at least five justices supported the results in those cases.¹¹¹ Although one new defense-oriented justice (Deborah L. Cook) had been elected in 1994, there was no reason to believe that this change would lead the court to rethink its recent torts jurisprudence. The legislature's sweeping reform measure went well beyond what the slightly realigned supreme court could be expected to approve and undoubtedly reflected the priorities of the state's newly energized Republican party, which in 1994 regained control of both houses of the General Assembly for the first time in more than two decades, swept all five executive offices, and ran an aggressive campaign against Justice Resnick in her successful bid for reelection.¹¹²

106 This is in marked contrast to the Southern Manifesto, a joint statement condemning *Brown* by almost all members of Congress from the South. 102 CONG. REC. 4460-61, 4515-16 (1956).

107 *State ex rel. Ohio Acad. Of Trial Lawyers*, 715 N.E.2d at 1073-75 n.7, 1086.

108 *See id.* at 1072 n.4 (quoting Werber, *supra* note 76; at 1156).

109 *E.g.*, Jonathan L. Entin, *Congress, the President, and the Separation of Powers: Rethinking the Value of Litigation*, 43 ADMIN. L. REV. 31, 43-48 (1991); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 580-81, 655-58 (1993).

110 There is some history of such invitations at the federal level. For example, the Truman administration filed a brief in 1950 that asked the Supreme Court to repudiate *Plessy v. Ferguson*, 163 U.S. 537 (1896). Brief for the United States at 35-49, *Henderson v. United States*, 339 U.S. 816 (1950) (No. 25). More recently, the Reagan and first Bush administrations repeatedly asked the Court to overrule *Roe v. Wade*, 410 U.S. 113 (1973). *Planned Parenthood v. Casey*, 505 U.S. 833, 844 (1992).

111 *See supra* notes 64-65 and accompanying text.

112 Justice Resnick was the only Democrat to win a statewide race that year, and hers
(continued)

There will be more to say about this, but for now, some tentative conclusions can be reached. First, tort doctrine was emerging as a contentious subject in Ohio. The supreme court had become decidedly sympathetic to plaintiffs on issues over which there were legitimate grounds for disagreement.¹¹³ Second, many opinions in tort cases—whatever position they took—were not especially persuasive, although perhaps only law professors care very much about inelegant prose and inadequate reasoning.¹¹⁴ Third, the majority believed that the issues raised by the legislature's omnibus tort bill were sufficiently significant to justify the use of expansive procedural devices to expedite judicial review of that measure.¹¹⁵ Fourth, the tone of the legal debate had become increasingly harsh as the 2000 election approached.¹¹⁶

The law of torts, however, was not the only contentious issue in Ohio. The dominant focus of political debate was school funding, a subject that was put on the agenda by another controversial state supreme court ruling.

B. School Funding

In 1991, a coalition of school districts, educators, parents, and children filed a lawsuit alleging that Ohio's system of financing public schools violated the Ohio Constitution.¹¹⁷ In *DeRolph v. State*,¹¹⁸ by the same four to three vote that struck down the 1996 tort bill,¹¹⁹ the supreme court held that primary reliance on local property taxes violated the Thorough and Efficient Clause of the Ohio Constitution.¹²⁰ The lead opinion, by Justice Francis E. Sweeney, relied heavily on trial testimony about the deplorable conditions in many

was a nominally nonpartisan election. See LAWRENCE BAUM, *AMERICAN COURTS: PROCESS AND POLICY* 115 (4th ed. 1998); RONALD A. CARP & RONALD STIDHAM, *JUDICIAL POLITICS IN AMERICA* 263 (4th ed. 1998). For further discussion of Justice Resnick's 1994 reelection, see *infra* notes 292-299 and accompanying text.

113 See *supra* notes 16-25 and accompanying text.

114 See *supra* notes 64-75 and accompanying text.

115 State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1079-85 (Ohio 1999) (stating that an action for the extraordinary writs of mandamus and prohibition were appropriate to review the tort reform bill).

116 See *supra* note 3 and accompanying text.

117 *Nine Years of Litigation*, COLUMBUS DISPATCH, May 12, 2000, at A6.

118 677 N.E.2d 733 (Ohio 1997) [hereinafter referred to as *DeRolph I*].

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

120 *DeRolph I*, 677 N.E.2d at 747; OHIO CONST. art. VI, § 2 ("The general assembly shall make such provisions, by taxation, or otherwise, as . . . will secure a thorough and efficient system of common schools throughout the State . . ."). The court issued an order clarifying its first ruling in *DeRolph v. State*, 678 N.E.2d 886 (Ohio 1997), but that order contains little of substance for the present discussion. It reiterated the main point of *DeRolph I*, that property taxes could continue to be used as long as they were not the primary means for financing public schools. *Id.*

school districts in concluding that the state had breached its constitutional obligations.¹²¹ The court provided no specific remedial guidelines, saying only that the legislature "must create an entirely new school financing system" within one year.¹²² Perhaps recognizing the weakness of an opinion built largely on anecdotal evidence, Justice Douglas wrote a comprehensive concurrence that examined the system of public school funding in considerable detail,¹²³ describing the inadequacy and inequity of the current funding system with examples from several of the plaintiff school districts,¹²⁴ and tracing the history and antecedents of Ohio's constitutional provisions relating to education.¹²⁵ Justice Douglas also directly addressed the impact of *Board of Education v. Walter*,¹²⁶ which rejected an earlier challenge to a subsequently repealed state school aid formula.¹²⁷ This was particularly significant because the dissenters based much of their argument on that case, contending the legislature was constitutionally required only to fund schools that met minimum standards; how much more the state should spend on elementary and secondary education was a nonjusticiable political question.¹²⁸

DeRolph I generated widespread controversy, including some apparently serious proposals to strip the courts of jurisdiction over school funding cases.¹²⁹ Cooler heads prevailed, and the General Assembly authorized substantial increases in state funding for public schools. The plaintiffs returned to court, and, in May 2000, Justice Resnick wrote for another four to three majority to hold the legislature's response insufficient.¹³⁰ In marked contrast to the tort case,¹³¹ her opinion was extremely deferential to the legislature. She noted the "substantial amount of legislation" that had been adopted in response to the court's first ruling,¹³² described the adjustment of the state's basic aid formula

121 *Derolph I*, 677 N.E.2d at 742-45.

122 *Id.* at 747.

123 *Id.* at 750-57 (Douglas, J., concurring).

124 *Id.* at 757-68 (Douglas, J., concurring).

125 *Id.* at 768-73 (Douglas, J., concurring).

126 390 N.E.2d 813 (Ohio 1979).

127 *DeRolph I*, 677 N.E.2d at 773-74 (Douglas, J., concurring).

128 *Id.* at 782, 783, 785, 786 (Moyer, C.J., joined by Cook & Lundberg Stratton, JJ., dissenting). On the merits, the dissenters found no violation of the Thorough and Efficient Clause even if the issues were justiciable. *Id.* at 793 (Moyer, C.J., joined by Cook & Lundberg Stratton, JJ., dissenting).

129 Jonathan L. Entin, *Schools Need the Judicial Process*, COLUMBUS DISPATCH, Mar. 12, 1999, at A13.

130 *DeRolph v. State*, 728 N.E.2d 993, 1020-22 (Ohio 2000) [hereinafter referred to as *DeRolph II*].

131 See *supra* note 94-101 and accompanying text.

132 *DeRolph II*, 728 N.E.2d at 1003.

as "certainly a positive step,"¹³³ "acknowledge[d] the progress the General Assembly has made" in elevating public education as a budgetary priority,¹³⁴ observed that the legislature "has attempted to formulate a viable plan to fund the construction of new school facilities and to repair Ohio's decaying school buildings,"¹³⁵ and recognized that the state "has taken some steps to eliminate forced borrowing" by local school districts.¹³⁶ All of this was "evidence of some positive developments."¹³⁷

Despite the conciliatory tone, the majority concluded that much remained to be done.¹³⁸ A glaring deficiency identified in *DeRolph I* was overreliance on property taxes, but "this aspect of the former system persists in the state's current funding plan, *wholly unchanged*."¹³⁹ Moreover, improvements were needed in almost every other area.¹⁴⁰

The *DeRolph II* opinion had many fewer problems than did its counterpart in *DeRolph I*, and its rhetoric is much less acerbic than that in *Ohio Academy of Trial Lawyers*, the tort case. Nonetheless, certain aspects of *DeRolph II* left Justice Resnick vulnerable to criticism in the election. One potential problem was her inability or unwillingness to define the limits of judicial oversight, as in her observations that "[t]he definition of 'thorough and efficient' is not static"¹⁴¹ and that "much more is involved in this process than merely providing funds."¹⁴² This raises the specter of an unending cycle of judicial supervision of the state's school funding and budgetary priorities, which is at least a fair criticism at election time.¹⁴³

¹³³ *Id.* at 1005.

¹³⁴ *Id.* at 1008.

¹³⁵ *Id.* at 1009.

¹³⁶ *Id.* at 1012.

¹³⁷ *Id.* at 1020.

¹³⁸ *Id.* at 1021-22.

¹³⁹ *Id.* at 1013. The only meaningful effort to move away from property taxes was a proposal to increase the state sales tax, but the voters rejected that idea by a wide margin in May 1998. *Id.* at 1015.

¹⁴⁰ *Id.* at 1021. The dissenters adhered to their view that the case presented nonjusticiable political questions but opined that, on the merits, the state's response to *DeRolph I* had been more than adequate. *Id.* at 1029 (Moyer, C.J., joined by Cook & Lundberg Stratton, JJ., dissenting). Justice Cook contended that the court should simply acknowledge its prior mistake and treat the case as nonjusticiable. *Id.* at 1036 (Cook, J., dissenting).

¹⁴¹ *Id.* at 1001.

¹⁴² *Id.* at 1019-20. One indication of the potential open-endedness of the lawsuit appeared in the midst of her lengthy conclusion, where she for the first time broached the need for classroom computers. *See id.* at 1020.

¹⁴³ *See id.* at 1029 (Moyer, C.J., joined by Cook & Lundberg Stratton, JJ., dissenting); *see also DeRolph I*, 677 N.E.2d 733, 786-87 (Ohio 1997) (Moyer, C.J., joined by Cook & Lundberg Stratton, JJ., dissenting).

Justice Resnick's authorship of the lead opinions in two of the most publicized and contentious cases on the Ohio Supreme Court's docket in the runup to her reelection provided ample opportunity for legitimate criticism. This does not, however, explain why the campaign became so vitriolic.¹⁴⁴ Although most states elect their judges,¹⁴⁵ few serious contests occur even for supreme court seats.¹⁴⁶ The seeming excesses of judicial elections, such as the 2000 Ohio campaign, have prompted some reformers to advocate the elimination, or at least reduction, of popular voting for the third branch of state government.¹⁴⁷ The notion that politics can be removed from judicial selection is a heroic one. The next section addresses this problem.

II. POLITICS AND JUDICIAL SELECTION

Any system of judicial selection must address the cardinal values of independence and accountability.¹⁴⁸ Judges must be independent enough to decide cases according to law rather than popular whim, but accountable enough not to run roughshod over the people's liberties.¹⁴⁹ The states have emphasized accountability, with most judges having to face the electorate at some point.¹⁵⁰ Chief Justice Moyer's proposal to appoint rather than elect state judges in the wake of last year's ugly Ohio Supreme Court campaign implies that accountability has been taken to excess.¹⁵¹

Aside from the unlikely prospect that Ohio will stop electing judges anytime soon,¹⁵² Chief Justice Moyer's proposal implies that the influence of politics can be removed (or at least reduced) by opting for a different mode of choosing judges.¹⁵³ In fact, the federal model of appointing judges can serve as a useful check on this idea. It turns out that elective and appointive systems do not differ all that much in their actual operation. For example, most incumbent

144 See generally *supra* notes 1-3 and accompanying text.

145 BAUM, *supra* note 112, at 114-15; CARP & STIDHAM, *supra* note 112, at 262-64.

146 BAUM, *supra* note 112, at 116, 120; Richard L. Hasen, "High Court Wrongly Elected": A Public Choice Model of Judging and Its Implications for the Voting Rights Act, 75 N.C. L. REV. 1305, 1320 (1997).

147 CARP & STIDHAM, *supra* note 112, at 265.

148 See Roger Handberg, *Selection and Retention of Judges: Is Florida's Present System Still the Best Compromise?*, 49 U. MIAMI L. REV. 127, 134 (1994) (suggesting accountability is "as critical as" independence).

149 See BAUM, *supra* note 112, at 101.

150 *Id.* at 114-15.

151 See Bradshaw, *supra* note 3.

152 Julie Carr Smyth, *Legislators Uninterested in Appointed Judges: Chief Justice Seeking Allies to Push Idea*, PLAIN DEALER, Jan. 18, 2001, at B2. The idea of appointing judges in Ohio is not new. See Francis R. Aumann, *The Selection, Tenure, Retirement, and Compensation of Judges in Ohio*, 5 U. CIN. L. REV. 408, 420-21 (1931).

153 See Bradshaw, *supra* note 3.

judges are rarely opposed for reelection, and the overwhelming majority of judges who face the voters retain their seats.¹⁵⁴ Meanwhile, federal judges sometimes find themselves at the center of political controversy. Consider in this regard the story of Judge Harold Baer of the United States District Court for the Southern District of New York. After granting a motion to suppress evidence in a drug case, he was threatened with impeachment by congressional leaders and virtually invited to resign by the White House, where the press secretary declared President Clinton would await Judge Baer's ruling on the government's motion to reconsider his original ruling before taking a formal stand on Judge Baer's continuance in office.¹⁵⁵

This section focuses on the federal bench, both the Supreme Court and the lower courts. The politics of federal judicial appointments can be seen most clearly in connection with the selection of Supreme Court justices.¹⁵⁶ This is hardly surprising in light of the Court's position at the apex of the national judiciary. For at least two decades, however, appointments to federal district courts and courts of appeals have also reflected political concerns.¹⁵⁷ The main conclusion to be drawn from this brief discussion is that political considerations are ubiquitous in judicial selection, even when the judges need not face the voters.

A. *The Supreme Court*

Political considerations have long influenced the selection of Supreme Court justices.¹⁵⁸ Presidents generally nominate justices who share their political ideology, but they must take account of the views of various interest groups as well as the Senate's role in confirming nominees.¹⁵⁹ For much of the twentieth century, discussion about prospective justices focused on supposedly

154 See BAUM, *supra* note 112, at 120; B. Michael Dann & Randall M. Hansen, *Judicial Retention Elections*, 34 LOY. L.A. L. REV. 1429, 1429-30 (2001).

155 Carl E. Stewart, *Contemporary Challenges to Judicial Independence*, 43 LOY. L. REV. 293, 298-300 (1997). Judge Baer seems to have gotten the message; on reconsideration he decided that the drug evidence was admissible after all. *United States v. Bayless*, 913 F. Supp. 232 (S.D.N.Y. 1996), *vacated on reconsideration*, 921 F. Supp. 211 (S.D.N.Y. 1996), *aff'd*, *United States v. Bayless*, 201 F.3d 116 (2d Cir. 2000) (finding no abuse of discretion by Judge Baer in reconsidering his initial ruling on suppression and rejecting the defendant's argument that her trial counsel was ineffective for failing to seek Judge Baer's recusal), *cert. denied*, 529 U.S. 1061 (2000).

156 See Part II.A. *infra*.

157 See Part II.B. *infra*.

158 See generally William G. Ross, *Participation by the Public in the Federal Judicial Selection Process*, 43 VAND. L. REV. 1, 3-25 (1990).

159 See HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON 17-52* (1999).

neutral factors relating to judicial competence.¹⁶⁰ To be sure, there were controversies about some nominees, but the debate turned largely on symbolic questions of ethics and character because explicit consideration of ideology was regarded as inappropriate.¹⁶¹ The lengthy dispute about Justice Brandeis's nomination in 1916 illustrates this phenomenon.¹⁶² Until 1970, the only twentieth-century nominee who faced significant ideological opposition in the Senate was Judge John Parker, whose nomination was rejected in 1930.¹⁶³ Parker was attacked by the NAACP for racist campaign speeches he made as the unsuccessful Republican candidate for governor of North Carolina in 1918 and for by unions his rulings in labor cases.¹⁶⁴

The public gentility that shrouded the politics of Supreme Court appointments began to erode in 1968 when Chief Justice Earl Warren announced his retirement effective on the confirmation of his successor.¹⁶⁵ The announcement came well into a presidential election year in which Republican candidate Richard Nixon seemed likely to win (as he in fact did).¹⁶⁶ Warren's timing fueled concern that he wanted to deprive Nixon, who had criticized many Warren Court decisions and who had been his political rival in California, of the chance to fill the vacancy with his own selection.¹⁶⁷ Outgoing President Lyndon Johnson nominated his old friend Justice Abe Fortas to fill the vacancy, but Fortas withdrew in the face of a Senate filibuster.¹⁶⁸ He remained on the Court for another year, then was forced to resign under an ethical cloud.¹⁶⁹

The public role of ideology began to increase in salience with President Nixon's failed nomination of Judge Clement Haynsworth to succeed Fortas in

160 *Id.* at 1-2.

161 *Id.* at 3.

162 See generally A. L. TODD, *JUSTICE ON TRIAL: THE CASE OF LOUIS D. BRANDEIS* (1964).

163 See generally KENNETH W. GOINGS, "THE NAACP COMES OF AGE": THE DEFEAT OF JUDGE JOHN J. PARKER (1990); JOSEPH P. HARRIS, *THE ADVICE AND CONSENT OF THE SENATE: A STUDY OF THE CONFIRMATION OF APPOINTMENTS BY THE UNITED STATES SENATE* 127-32 (1953).

164 Ross, *supra* note 158, at 10-13.

165 *Id.* at 15-16.

166 See ABRAHAM, *supra* note 159, at 218.

167 BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT - A JUDICIAL BIOGRAPHY* 680-82 (1983); G. EDWARD WHITE, *EARL WARREN: A PUBLIC LIFE* 306-07, 309 (1982).

168 See ABRAHAM, *supra* note 159, at 218-19. Most of the explicit arguments against Fortas dealt with cronyism because Fortas had a long and close relationship with Johnson before his appointment as an associate justice in 1965. *Id.* at 216. Nonetheless, general hostility to the Court's liberal rulings, as opposed to any particular Fortas opinion, played some role in the opposition. *Id.* at 31-32.

169 LAURA KALMAN, *ABE FORTAS: A BIOGRAPHY* 359-78 (1990); BRUCE ALLEN MURPHY, *FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE* 545-77 (1988).

1970.¹⁷⁰ Although Haynsworth was attacked for alleged ethical lapses,¹⁷¹ his opponents emphasized his rulings in favor of management in labor cases and his conservative approach to civil rights issues.¹⁷² But ideological concerns receded after the Senate rejected Haynsworth.¹⁷³ President Nixon's next choice, Judge Harrold Carswell, was regarded as extremely conservative, but the opposition concentrated on his obvious lack of competence.¹⁷⁴ Ideology played almost no role in the confirmation of Nixon's third choice, Justice Harry Blackmun, although Blackmun's civil rights record had weaknesses that were never pursued.¹⁷⁵

Ideology emerged with a vengeance during the pitched battle over President Reagan's unsuccessful nomination of Judge Robert Bork in 1987.¹⁷⁶ Bork's confirmation hearing featured a five-day grilling on an extraordinary array of issues, and, in the end, he was rejected largely because his views on important constitutional questions were regarded as extreme.¹⁷⁷ Ideology also played a prominent role in the debate over the nomination of Justice Clarence Thomas, although that subject was overshadowed by the controversy over

170 Ross, *supra* note 158, at 16.

171 JOHN P. FRANK, CLEMENT HAYNSWORTH, THE SENATE, AND THE SUPREME COURT 21-22, 45, 51-56 (1991).

172 Jonathan L. Entin, *The Confirmation Process and the Quality of Political Debate*, 11 YALE L. & POL'Y REV. 407, 412-14 (1993). His most controversial civil rights ruling came in *Griffin v. Board of Supervisors*. *Id.* at 412. Haynsworth held that the federal courts should abstain from hearing a lawsuit challenging the closure of the public schools in Prince Edward County, one of the original defendants in *Brown v. Board of Education*, while a parallel case was proceeding slowly in the Virginia courts. *Griffin v. Bd. of Supervisors*, 322 F.2d 332, 343-44 (4th Cir. 1963). The Supreme Court reversed that ruling and ordered the schools reopened. *Griffin v. County Sch. Bd.*, 377 U.S. 218 (1964).

173 Ross, *supra* note 158, at 19-20.

174 ABRAHAM, *supra* note 159, at 11-12; Entin, *supra* note 172, at 414-15. Carswell's fate was effectively sealed when his leading Senate supporter, defending him against charges of mediocrity, said: "Even if he were mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they, and a little chance? We can't have all Brandeises and Frankfurters and Cardozos and stuff like that there." FRANK, *supra* note 171, at 112.

175 Entin, *supra* note 172, at 417-18. Ideological opposition was almost completely absent when Nixon chose another southerner, Lewis Powell, for a subsequent vacancy, even though Powell also had an awkward civil rights record. *Id.* at 418-19.

176 See generally ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA (1989).

177 Some senators voted against Bork less out of conviction than on straightforward political calculation: a desire to satisfy important constituency groups. *Id.* at 285-86, 289-92. Bork's opponents, like some of Justice Resnick's, used a sophisticated but not always accurate publicity campaign in an effort to scuttle his confirmation. *Id.* at 157-60, 177-80.

Anita Hill's sexual harassment allegations against him.¹⁷⁸

On the other hand, ideological debate was subdued in other recent confirmation proceedings. For example, Justice Sandra Day O'Connor was selected in large part to fulfill President Reagan's campaign pledge to appoint the first woman to the Court; most of the limited criticism she encountered came from those who complained that she was too sympathetic to abortion rights.¹⁷⁹ Justice Antonin Scalia was touted as the Court's first Italian American member and won unanimous confirmation.¹⁸⁰ Justice Anthony Kennedy's conservative record on the Ninth Circuit generated almost no opposition; he was confirmed with the backing of some of Judge Bork's harshest critics.¹⁸¹ Many skeptics suspected that Justice David Souter was a closet extremist based on his sponsorship by the very conservative White House chief of staff, but they had little other basis for condemning him because he was almost completely unknown before his nomination.¹⁸² Most recently, Justices Ruth Bader Ginsburg and Stephen Breyer faced questions that related to ideology but evaded them without much negative reaction from senators, and both were easily confirmed.¹⁸³

At the same time, ideological considerations did affect these nominations. President Reagan and the first President Bush certainly sought relatively conservative nominees who could be confirmed by the Senate when they selected O'Connor, Scalia, Kennedy, and Souter.¹⁸⁴ President Clinton twice seriously considered Secretary of the Interior Bruce Babbitt, but ultimately chose Ginsburg and Breyer due in part to the prospect of opposition from powerful Republican Senators.¹⁸⁵ Moreover, Clinton was almost dissuaded from choosing Ginsburg, who had litigated most of the major gender discrimination cases that reached the Court during the 1970's, because some

178 See generally JANE MAYER & JILL ABRAMSON, *STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS* (1994); TIMOTHY M. PHELPS & HELEN WINTERNITZ, *CAPITOL GAMES: CLARENCE THOMAS, ANITA HILL, AND THE STORY OF A SUPREME COURT NOMINATION* (1992).

179 ABRAHAM, *supra* note 159, at 284.

180 *Id.* at 293-94. Scalia's prospects were helped by his being nominated at the same time that then-Justice Rehnquist was selected to succeed Chief Justice Burger. Rehnquist's nomination was controversial, which might have deflected opposition to Scalia. *Id.* at 292, 294.

181 BRONNER, *supra* note 176, at 337-38.

182 ABRAHAM, *supra* note 159, at 305-06.

183 Elena Kagan, *Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919, 925-29 (1995).

184 ABRAHAM, *supra* note 159, at 284, 294, 299, 305. Although Souter has not turned out to be as conservative as expected, ex-President Bush professes no disappointment at this development. *Id.* at 308.

185 *Id.* at 317, 322.

feminists viewed her as insufficiently committed to their cause.¹⁸⁶

This brief summary should suffice to show that political considerations play a substantial role in Supreme Court appointments. Ideology matters to the Presidents who appoint justices and often affects the confirmation process.¹⁸⁷ Opposition is more likely with a chief executive from one party and a Senate controlled by the other, as was true of the Haynsworth, Carswell, Bork, and Thomas nominations. But divided government does not necessarily lead to confrontation, as the examples of Blackmun, Kennedy, Souter, and Breyer demonstrate. Conflict is also more probable when the seat at issue can affect the Court's direction, as demonstrated by the filibuster against Fortas during the 1968 presidential election campaign¹⁸⁸ and the Bork controversy, which arose in large measure because he seemed likely to provide the deciding vote on several high-stakes issues and had announced his willingness to repudiate precedents of which he disapproved.¹⁸⁹ This last observation has significant implications for understanding the vigorous campaign against Justice Resnick: on a court divided four to three on issues that matter intensely to various interest groups, defeating one member of the majority can change the direction of legal doctrine. This point will be addressed again later, but first it is worth devoting some attention to the politics of appointments to the federal appellate and district courts.

B. *The Lower Federal Courts*

A somewhat different sort of politics typifies the process for appointing federal circuit and district judges. Although the Constitution gives the President the power to nominate these judges subject to the advice and consent of the Senate,¹⁹⁰ senators have long played a major role in judicial selection. This has been especially true of district judgeships, where the tradition of senatorial courtesy allowed a home-state senator of the chief executive's party to recommend judicial candidates and to block other nominees.¹⁹¹ Senatorial courtesy does not apply at the appellate level, although it is understood that each state in a circuit is entitled to its share of seats and senators from the party that controls the White House typically recommend candidates.¹⁹²

Appointments to the lower courts have become a more visible matter in

186 *Id.* at 318-19.

187 *See supra* notes 184-86 and accompanying text.

188 *See supra* note 168 and accompanying text.

189 *See supra* notes 176-79 and accompanying text.

190 U.S. CONST. art. II, § 2, cl. 2.

191 ABRAHAM, *supra* note 159, at 20-21; BAUM, *supra* note 112, at 107; CARP & STIDHAM, *supra* note 112, at 224-26. When a state had senators of different parties, they occasionally negotiated an arrangement under which the senator of the opposite party could recommend a few district judges. BAUM, *supra* note 112, at 108-09.

192 CARP & STIDHAM, *supra* note 112, at 232.

recent decades, however, as various administrations have regarded those courts as important political vehicles. President Reagan and the first President Bush tried to appoint conservatives to circuit and district judgeships,¹⁹³ whereas President Johnson sought to select judges, especially in the South, who were sympathetic to civil rights.¹⁹⁴ President Clinton focused less strictly on ideology than on increasing the diversity of the federal bench.¹⁹⁵

The process became notably contentious during the Clinton years, especially after Republicans captured control of the Senate in the 1994 election. The pace of confirmations slowed to a crawl, with only seventeen judges (none at the appellate level) approved during the second session of the 104th Congress in 1996.¹⁹⁶ Although the administration was partly at fault for taking longer than its predecessors to nominate judges, the Senate also extended the time it took to act on those nominations.¹⁹⁷ An especially egregious example is Judge Richard Paez, who waited four years to be confirmed for a seat on the Ninth Circuit.¹⁹⁸ Partisan sniping over judicial appointments has continued since Clinton left office.¹⁹⁹

Several factors help to explain the increasing difficulty of filling lower court judgeships. An important one is divided government: a Senate controlled by one party has little interest in allowing a President of the other to pack the federal bench and will exercise its constitutional prerogatives more assiduously than it would if the same party controlled both branches.²⁰⁰ Beyond

193 BAUM, *supra* note 112, at 111.

194 *Id.* This contrasted with President Kennedy's acquiescence to pressure from powerful Senators who insisted on the appointment of segregationists. CARP & STIDHAM, *supra* note 112, at 230.

195 *Id.*; CARP & STIDHAM, *supra* note 112, at 230, 233; Carl Tobias, *Judicial Selection at the Clinton Administration's End*, 19 LAW & INEQ. 159, 159 (2001). The overwhelming majority of Clinton's judicial appointments were Democrats, though. See ABRAHAM, *supra* note 159, at 50.

196 BAUM, *supra* note 112, at 112; Stephan O. Kline, *Judicial Independence: Rebuffing Congressional Attacks on the Third Branch*, 87 KY. L.J. 679, 761 (1999).

197 Lauren M. Cohen, *Missing in Action: Interest Groups and Federal Judicial Appointments*, 82 JUDICATURE 119, 121 (1998); Sheldon Goldman & Elliot Slotnick, *Clinton's Second Term Judiciary: Picking Judges Under Fire*, 82 JUDICATURE 265, 271-73 (1999); Thomas O. Sargentich, *Report of the Task Force on Federal Judicial Selection of Citizens for Independent Courts*, 51 ADMIN. L. REV. 1031, 1044 (1999).

198 Michael J. Gerhardt, *Norm Theory and the Future of the Federal Appointments Process*, 50 DUKE L.J. 1687, 1709 n.79 (2001).

199 See Amy Goldstein, *Bush Blasts Democrats for Lagging on Judicial Nominees*, WASH. POST, May 4, 2002, at A4; Neil A. Lewis, *Bush and Democrats in Senat Trade Blame for Judge Shortage*, N.Y. TIMES, May 4, 2002, at A9.

200 BAUM, *supra* note 112, at 112; Brannon P. Denning, *Reforming the New Confirmation Process: Replacing "Despise and Resent" with "Advice and Consent,"* 53 (continued)

that factor, however, are several others that have emerged in recent years: the heightened salience of intractable issues like abortion and affirmative action that do not lend themselves to compromise, the activities of interest groups that closely monitor judicial appointments, and the permanent campaign that leads both parties to begin mobilizing toward the next election within hours of the final vote tabulation.²⁰¹ All of these factors have contributed to institutional changes in the Senate that have complicated the judicial confirmation process.

Among these are a decline in deference to colleagues, the more frequent use or threatened use of procedural devices that give individual Senators an effective veto power over committee and floor agendas, and the power of committee chairs to refuse to act on nominations.²⁰²

The federal experience has implications for the Buckeye State. As deplorable as the excesses of 2000 might be, those excesses cannot be attributed exclusively to the process for choosing members of the Ohio Supreme Court. The election was certainly political,²⁰³ but contemporary federal experience suggests that politics cannot be transcended by using a purely appointive system.²⁰⁴ Moreover, recent developments in the rules relating to judicial campaigning raise serious questions about the prospects for compelling those who care about judicial selection to adhere to higher standards of discourse.²⁰⁵ The next section focuses on some of those developments.

III. THE DUBIOUS PROSPECT OF LIMITING CAMPAIGN ATTACKS

Harsh campaign rhetoric in judicial elections may be ameliorated by enforcing existing rules that limit what judges and judicial candidates may say.

Speech restrictions in judicial elections have been controversial,²⁰⁶ but this approach has been tried in Ohio. The leading case, *In re Harper*,²⁰⁷ arose from Justice Resnick's successful 1994 reelection campaign. Resnick's opponent in that race, Judge Sara J. Harper, was reprimanded for running a television advertisement that attacked Resnick for accepting more than \$300,000 in

ADMIN. L. REV. 1, 12 (2001); Goldman & Slotnick, *supra* note 197, at 271.

201 BAUM, *supra* note 112, at 112; Denning, *supra* note 200, at 12–14.

202 BAUM, *supra* note 112, at 112; Denning, *supra* note 200, at 14–21.

203 See *supra* notes 1–3 and accompanying text.

204 See Parts II.A. and B. *supra*.

205 See Part III *infra*.

206 See, e.g., Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059 (1996) (supporting restrictions); Lloyd B. Snyder, *The Constitutionality and Consequences of Restrictions on Campaign Speech by Candidates for Judicial Office*, 35 UCLA L. REV. 207 (1987) (opposing most restrictions).

207 673 N.E.2d 1253 (Ohio 1996). The tribunal that decided this case was a special panel made up of twelve appellate judges sitting by designation on the Ohio Supreme Court. *Id.* at 1255 n.1.

contributions from trial lawyers.²⁰⁸ The ad showed a large check drawn on an account called "Sue & Sue, Trial Lawyers" and signed "Cheatem Good."²⁰⁹ Harper was found to have undermined public confidence in the integrity and impartiality of the judiciary and to have failed to maintain the dignity appropriate to the judicial office in violation of two provisions of the Ohio Code of Judicial Conduct.²¹⁰ Voters, the court concluded, might reasonably have inferred from the ad that plaintiffs' lawyers as a class are dishonest and that these dubious characters wanted Resnick to win.²¹¹ Whatever else might be said about the controversial spot,²¹² it appears rather tame compared to the thinly veiled charges of corruption and vote selling that aired repeatedly in 2000.²¹³

The provisions under which Judge Harper was charged were superseded when Ohio adopted new standards in 1995.²¹⁴ Canon 7 of Ohio's new Code of Judicial Conduct, which directs judges and candidates to "refrain from political activity inappropriate to judicial office," contains two specific provisions that bear on this subject. One limits what candidates may say about themselves.²¹⁵ Canon 7(B) proscribes "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."²¹⁶ The other restricts what they can say about others.²¹⁷ Canon 7(E) prohibits an incumbent or aspiring judge from disseminating "information concerning a judicial candidate or an opponent, either knowing the information to be false or with reckless disregard of whether or not it was false or, if true, that would be deceiving or misleading to a reasonable person."²¹⁸

It is not at all certain that rigorous enforcement of these provisions can elevate the tone of judicial election campaigns. Restrictions on what judges and judicial candidates may say could well violate the First Amendment. That

208 *Id.* at 1256.

209 *Id.*

210 *Id.* at 1267-68.

211 *Id.* at 1267.

212 Judge Harper, who had never before been disciplined in a long career on the bench, initially had reservations but eventually approved the ad for use in her campaign. *Id.* at 1256.

213 See *supra* note 2 and accompanying text.

214 Both sets of rules were based on American Bar Association proposals. See MODEL CODE OF JUDICIAL CONDUCT (1972); MODEL CODE OF JUDICIAL CONDUCT (1990). The 1972 rules were adopted in forty-seven states, the 1990 version in twenty-two. JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS § 1.02, at 3-5 & nn.19-23 (3d ed. 2000).

215 OHIO CODE OF JUDICIAL CONDUCT at Canon 7(B)(2)(d).

216 *Id.*

217 *Id.* Canon 7(E)(1).

218 *Id.*

argument was raised unsuccessfully in *Harper*,²¹⁹ but it has fared better in some other courts.²²⁰ Because these restrictions apply to political speech, they are evaluated under strict scrutiny.²²¹ Accordingly, regulations must serve a compelling interest and be narrowly tailored to advance that interest.²²² Courts have consistently held that the states have a compelling interest in protecting the integrity of the judiciary.²²³ The dispositive question has been whether the restrictions satisfy the narrow tailoring requirement.²²⁴

Consider Canon 7(B)'s prohibition on statements that reflect an advance commitment on matters that are likely to come before the court.²²⁵ The case law on this topic has arisen under a version of the Code of Judicial Conduct that forbade a judge or judicial candidate from "announc[ing] his or her views on disputed legal or political issues."²²⁶ Courts have generally agreed that this sweeping language, literally understood, would prohibit almost any statement other than bland promises to perform faithfully and impartially on the bench.²²⁷ So construed, therefore, this limitation raises serious questions of overbreadth.²²⁸ The restriction might be saved from invalidity through a narrowing construction that it applies only to speech on matters that are likely to come before the court.²²⁹ The federal courts of appeals have disagreed on whether such a narrowing construction could salvage the rule.²³⁰ The Third Circuit held that the restriction should be so limited and upheld on this basis in

219 Judge Harper argued that the two provisions of the prior version of the Code of Judicial Conduct were unconstitutionally vague and overbroad both on their face and as applied. *Harper*, 673 N.E.2d at 1260-67.

220 The Ohio Supreme Court avoided the merits of a constitutional challenge to the prior version of Canon 7(E)(1), on procedural grounds. *Christensen v. Bd. of Comm'rs*, 575 N.E.2d 790 (Ohio 1991) (per curiam). First Amendment arguments seem not to have been raised in other recent disciplinary proceedings arising from judicial campaigns. *E.g.*, *Office of Disciplinary Counsel v. Evans*, 733 N.E.2d 609 (Ohio 2000); *In re Kienzle*, 708 N.E.2d 800 (Ohio Comm'n of Judges 1999); *In re Runyan*, 707 N.E.2d 580 (Ohio Comm'n of Judges 1999) (dismissing the complaint for lack of evidence); *In re Burick*, 705 N.E.2d 422 (Ohio Comm'n of Judges 1999); *In re Carr*, 658 N.E.2d 1158 (Ohio Comm'n of Judges 1995).

221 *Stretton v. Disciplinary Bd.*, 944 F.2d 137, 141 (3d Cir. 1991).

222 *Id.*

223 *Id.* at 142.

224 *See, e.g., id.* at 142-44.

225 OHIO CODE OF JUDICIAL CONDUCT Canon 7(B).

226 MODEL CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(c) (1972).

227 *See, e.g., Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 228 (7th Cir. 1993).

228 *Id.*

229 *Stretton v. Disciplinary Bd.*, 944 F.2d 137, 143 (3d Cir. 1991).

230 Robert M. Brode, Note, *Buckley v. Illinois Judicial Inquiry Board and Stretton v. Disciplinary Board of the Supreme Court: First Amendment Limits on Ethical Restrictions of Judicial Candidate's Speech*, 51 WASH. & LEE L. REV. 1085, 1086 (1994).

Stretton v. Disciplinary Board of the Supreme Court of Pennsylvania.²³¹ The Seventh Circuit, in an opinion by Judge Richard A. Posner, held to the contrary in *Buckley v. Illinois Judicial Inquiry Board*.²³² A sharply divided panel of the Eighth Circuit recently sided with the Third Circuit and upheld the restriction as narrowly construed.²³³

In June 2002, a closely divided Supreme Court reversed the Eighth Circuit and held that the Announce Clause of the old Canon 7(B) violates the First Amendment. In *Republican Party of Minnesota v. White*,²³⁴ a five to four majority concluded that the proscription against a judicial candidate's announcing her views on disputed legal or political issues was not narrowly tailored to promote the state's interests in judicial impartiality or the appearance of impartiality.²³⁵ The Court considered three possible meanings of judicial impartiality and found that the restriction failed under all of them. To the extent that impartiality means the absence of bias for or against a litigant, which the majority apparently assumed to be a compelling interest, the Announce Clause was irrelevant because it did not apply to speech favoring or opposing specific litigants but rather to speech about legal questions.²³⁶ Protecting impartiality in the sense of avoiding declarations about views favoring or opposing a specific legal point, the majority opined, was simply not a compelling interest and hence could not pass muster as a justification for the restriction.²³⁷ Finally the ban could not be justified as a means of protecting judicial open mindedness both because the state had not relied on this justification in adopting Canon 7(B) and because this restriction was fatally underinclusive in that it did not limit other forms of speech about disputed legal issues.²³⁸

Of course, Ohio's new Canon 7(B) explicitly limits its prohibition to comments on issues that are likely to come before the court.²³⁹ This alone might save the provision from First Amendment attack.²⁴⁰ That is the lesson of Kentucky's experience. In *J.C.J.D. v. R.J.C.R.*,²⁴¹ the state supreme court held that the blanket ban on statements about disputed legal or political issues was

231 944 F.2d 137, 144 (3d Cir. 1991).

232 997 F.2d 224, 230 (7th Cir. 1993).

233 *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 881-83 (8th Cir. 2001); *but see id.* at 894 (Beam, J., dissenting).

234 122 S. Ct. 2528 (2002).

235 *Id.* at 2534-37.

236 *See id.* at 2535.

237 *Id.* at 2536.

238 *See id.* at 2536-37.

239 OHIO CODE OF JUDICIAL CONDUCT Canon 7(B)(2)(d).

240 *See Stretton*, 944 F.3d at 144.

241 803 S.W.2d 953 (Ky. 1991).

unconstitutionally overbroad and refused to adopt a narrowing construction.²⁴² The state then adopted a new provision that is identical with Ohio's new Canon 7(B), which the court upheld against First Amendment challenge in *Deters v. Judicial Retirement and Removal Commission*.²⁴³ Before concluding that this decision resolves the constitutional question, it should be noted that there was a strong dissenting opinion arguing that even this narrower restriction violated the First Amendment.²⁴⁴ The problem with limiting the prohibition to statements about matters "that are likely to come before the court," as Judge Posner explained in *Buckley*, is that almost any controversial matter could come before a court, so that limitation might not meaningfully confine the scope of the restriction.²⁴⁵ This question need not be resolved here. This question need not be resolved here, although some language in the majority opinion in *Republican Party of Minnesota* suggests that the Supreme Court might reject even the new Canon 7(B)'s narrow limitation on judicial speech.²⁴⁶ For now, it suffices to say that the constitutionality of the new Canon 7(B) remains unsettled.

It is now appropriate to consider Canon 7(E)'s prohibition on false, deceiving, or misleading campaign statements.²⁴⁷ The case law from other jurisdictions has generally dealt with an earlier proscription against any statement that "the candidate knows or reasonably should know is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation of fact or law."²⁴⁸ Several recent decisions have found this proscription unconstitutional.²⁴⁹ The leading case on false statements is *In re*

242 *Id.* at 956.

243 873 S.W.2d 200, 204-05 (Ky. 1994); *see also* Ackerson v. Ky. Judicial Retirement & Removal Comm'n, 776 F. Supp. 309, 315 (W.D. Ky. 1991) (denying preliminary injunction against enforcement of the ban on statements about issues "that are likely to come before the court" but granting an injunction against enforcement of a ban on campaign speech about matters of judicial administration); Summe v. Judicial Retirement & Removal Comm'n, 947 S.W.2d 42, 47-48 (Ky. 1997) (relying on *Deters* to reject a First Amendment challenge to the new restriction on speech about matters "that are likely to come before the court").

244 *Deters*, 873 S.W.2d at 205-07 (Wintersheimer, J., concurring in part and dissenting in part); *see also* Summe v. Judicial Retirement and Removal Comm'n, 947 S.W.2d at 52, 54 (Graves, J., dissenting).

245 *Buckley*, 997 F.2d at 229.

246 *See* *Republican Party of Minn. v. White*, 122 S. Ct. at 2537-38 (expressing skepticism that judges will feel compelled to rule consistently with campaign statements that do not entail promises to vote in a particular way on a particular issue).

247 OHIO CODE OF JUDICIAL CONDUCT Canon 7(E).

248 *See, e.g., In re Chmura*, 608 N.W.2d 31, 36 (Mich. 2000), *cert. Denied sub nom.* *Chimura v. Mich. Judicial Tenure Comm'n*, 531 U.S. 828 (2000).

249 *Id.* at 45; *Weaver v. Bonuer*, 114 F. Supp. 2d 1337, 1342-43 (N.D. Ga. 2000).

Chmura,²⁵⁰ in which the Michigan Supreme Court held that the proscription was not narrowly tailored to serve the state's compelling interest in protecting judicial integrity and impartiality.²⁵¹ The decision rested on overbreadth concerns: the restriction permitted punishment for false statements that were not made with actual malice.²⁵² To avoid this problem, the court narrowed it to cover only false statements made with knowledge of their falsity or reckless disregard for the truth.²⁵³ A federal district court in Georgia relied on *Chmura* to strike down a similar Peach State restriction on judicial campaign speech.²⁵⁴ The court declined to adopt a narrowing construction that might have saved the prohibition despite recognizing the importance of the state interests at stake.²⁵⁵ The provision of Ohio's Canon 7(E) prohibiting false statements explicitly requires such statements to be made with knowledge of falsity or with reckless disregard for the truth.²⁵⁶ Accordingly, this portion appears to satisfy First Amendment requirements.

The situation might be different with regard to deceptive or misleading statements, however. *Chmura* found that the ban on such statements "greatly chills debate regarding the qualifications of candidates for judicial office."²⁵⁷ This was one reason that the Michigan court found the old restriction facially unconstitutional.²⁵⁸ The Alabama Supreme Court just recently struck down language that is identical with Ohio Canon 7(E)'s ban on statements "that would be deceiving or misleading to a reasonable person."²⁵⁹ In *Butler v. Alabama Judicial Inquiry Commission*,²⁶⁰ the court held that this provision "is unconstitutionally overbroad because it has the plain effect of chilling First Amendment rights."²⁶¹ Relying heavily on an opinion by a federal district judge at an earlier stage of the proceedings,²⁶² the court explained that

250 608 N.W.2d 31 (Mich. 2000), *cert. denied sub nom.* *Chmura v. Mich. Judicial Tenure Comm'n*, 531 U.S. 828 (2000).

251 *Id.* at 45.

252 *Id.* at 41; *cf.* *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964) (defining actual malice as knowledge of falsity or reckless disregard for the truth).

253 *Chmura*, 608 N.W.2d at 43. The court emphasized that this standard was objective, unlike the subjective standard approved in *New York Times v. Sullivan*. *Id.* at 43-44.

254 *Weaver v. Bonner*, 114 F. Supp. 2d 1337, 1342-43 (N.D. Ga. 2000).

255 *Id.* at 1343.

256 OHIO CODE OF JUDICIAL CONDUCT Canon 7(E).

257 *Chmura*, 608 N.W.2d at 42.

258 *Id.* at 43.

259 OHIO CODE OF JUDICIAL CONDUCT Canon 7(E)(1).

260 802 So. 2d 207 (Ala. 2001).

261 *Id.* at 218.

262 The case arose when Justice Harold See of the Alabama Supreme Court filed suit in federal district court challenging the constitutionality of campaign speech restrictions that formed the basis of an investigation by the state's Judicial Inquiry Commission. *Id.* at 210-11.

(continued)

candidates would be deterred from making even true statements for fear of incurring potentially severe sanctions and that this would in turn unduly limit political debate.²⁶³ The state court accordingly removed the language about deceptive or misleading statements, leaving only the prohibition on false statements made with actual malice.²⁶⁴

These decisions strongly suggest that the provision in Ohio's Canon 7(E) prohibiting the dissemination of "true [statements] that would be deceiving or misleading to a reasonable person"²⁶⁵ also contravenes the First Amendment. This is particularly troublesome for proponents of limits on obnoxious attacks of the sort that were directed at Justice Resnick because many of those attacks were not literally false. Instead, as in *Harper*, the business groups' ads got their bite from deception, exaggeration, or omission rather than from knowing or reckless falsity.²⁶⁶

Even if the Code of Judicial Conduct's campaign speech restrictions survive First Amendment scrutiny, however, that would not address the problems that arose in the 2000 Ohio Supreme Court election. The offending advertisements last year were not run by candidates, but by interest groups that are not subject to the Code of Judicial Conduct.²⁶⁷ The corruption charges appear to have been independent expenditures, and restrictions on that kind of spending present different First Amendment concerns.

The Supreme Court has not addressed the validity of restrictions on independent expenditures in judicial races, but it has expressed considerable skepticism about such limits in other election campaigns.²⁶⁸ For example, in *Buckley v. Valeo*,²⁶⁹ the Court invalidated a \$1,000 ceiling on independent expenditures that explicitly advocate the election or defeat of a candidate.²⁷⁰ Applying strict scrutiny, the Court held that the ceiling was not narrowly

After proceedings in the district court, the Eleventh Circuit certified questions to the state supreme court about the validity of the restrictions and the commission's procedures. *Butler v. Ala. Judicial Inquiry Comm'n*, 245 F.3d 1257, 1265-66 (11th Cir. 2000). The case arose from a tumultuous Republican primary for the party's nomination chief justice. William Glaberson, *States Rein in Truth-Bending in Court Races*, N.Y. TIMES, Aug. 23, 2000, at A1. Justice See's opponent, who won, was Judge Roy Moore. See *supra* note 8 and accompanying text.

263 *Butler*, 802 So. 2d at 217-18 (quoting extensively from *Butler v. Alabama Judicial Inquiry Comm'n*, 111 F. Supp. 2d 1224, 1234-36 (M.D. Ala. 2000)).

264 *Id.* at 218.

265 OHIO CODE OF JUDICIAL CONDUCT Canon 7(E).

266 See *supra* notes 207-14 and accompanying text.

267 See *supra* note 2 and accompanying text.

268 *Buckley v. Valeo*, 424 U.S. 1 (1976); *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.* 479 U.S. 238 (1986); *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480 (1985).

269 424 U.S. 1 (1976) (per curiam).

270 *Id.* at 42-43.

tailored to advance the government's compelling interest in preventing corruption or the appearance of corruption.²⁷¹ Because the restriction applied only to explicit advocacy concerning the election or defeat of a specific candidate, it could be evaded by the simple expedient of not using the magic words calling for the electorate to vote for or against a named individual.²⁷² Moreover, independent expenditures did not "pose dangers of real or apparent corruption" sufficient to justify regulation.²⁷³ Such spending, if truly uncoordinated with a favored candidate's campaign, might dilute or even contradict the candidate's campaign and was less likely to reflect the danger that the expenditure was part of a quid pro quo, a danger that justified limits on large contributions directly to candidates.²⁷⁴

The Court reached a similar conclusion on the same reasoning in *Federal Election Commission v. National Conservative Political Action Committee*²⁷⁵ and *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*²⁷⁶ In *NCPAC*, the Court invalidated a criminal statute that forbade political action committees from making independent expenditures in excess of \$1,000 in support of a presidential candidate who accepted public funding for the campaign.²⁷⁷ The restriction on independent expenditures failed to survive strict scrutiny because there was no risk that such spending would promote corruption or the appearance of corruption.²⁷⁸ Accordingly, the restriction was not narrowly tailored to promote a compelling government interest.²⁷⁹ In *Massachusetts Citizens for Life* the Court held unconstitutional as applied a statutory prohibition on the use of corporate treasury funds for independent expenditures in federal elections while permitting such expenditures by a corporation from a separate fund made up of voluntary contributions.²⁸⁰ The Court first reiterated that only "express advocacy" supporting or opposing a particular candidate fell under the definition of independent expenditures.²⁸¹ At the same time, *Massachusetts Citizens for Life* although chartered as a

271 *Id.* at 44.

272 *Id.* at 45.

273 *Id.* at 46.

274 *See id.* at 47.

275 470 U.S. 480 (1985).

276 479 U.S. 238 (1986).

277 *Nat'l Conservative Political Action Comm.*, 470 U.S. at 482-83.

278 *Id.* at 496-97.

279 *Id.*

280 *Massachusetts Citizens for Life*, 479 U.S. at 241.

281 *Id.* at 249. The Court added that the newsletter at issue was "express advocacy": it exhorted people to vote for prolife candidates and contained the names and photographs of candidates who fulfilled the organization's criteria in that regard. *Id.* This was, Justice Brennan wrote, "in effect an explicit directive: vote for these (named) candidates." That was sufficient, even though the newsletter did not actually tell readers to vote for any named candidate. *Id.*

corporation, was not the sort of large economic entity whose involvement in elections could pose a risk of corruption or distortion.²⁸² Accordingly, the ban on corporate treasury funds for independent expenditures could not validly apply to that organization.²⁸³

Both of these cases contained language suggesting that prohibitions on independent expenditures by other corporations might be justifiable.²⁸⁴ Those suggestions were vindicated in *Austin v. Michigan Chamber of Commerce*,²⁸⁵ which upheld a law prohibiting corporations from using treasury funds for independent expenditures supporting or opposing any candidate for state office while permitting such expenditures from a segregated fund made up of voluntary contributions.²⁸⁶ This law differed from the ban on spending corporate treasury funds in connection with referenda that had been struck down in *First National Bank of Boston v. Bellotti*.²⁸⁷ The prohibition against corporate spending in candidate elections was designed to promote the state's compelling interest in alleviating "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."²⁸⁸ Moreover, the law was "precisely targeted" to advance this interest by eliminating the corrosive effects of direct corporate spending while simultaneously permitting corporations to operate segregated political funds that could make independent expenditures on behalf of or against particular candidates.²⁸⁹

Austin might rest in uneasy tension with *Bellotti*, but it remains good law. Taken together, these independent expenditure cases suggest that it could be exceedingly difficult for states to control spending in judicial elections. Of course, corporations might have to set up separate political action committees, but *Buckley*, *NCPAC*, and *Massachusetts Citizens for Life* erect a high barrier against intrusive restrictions on independent expenditures. Further, limiting the definition of "independent expenditures" to express advocacy supporting or opposing a named candidate provides yet another severe obstacle to reining in vitriolic attacks. None of the controversial anti-Resnick ads, for example, directly advocated a vote against her or in favor of her opponent. Accordingly, whatever the scope of permissible restrictions on independent expenditures in

282 See *id.* at 263-64.

283 *Id.*

284 See *id.*; *Nat'l Conservative Political Action Comm.*, 470 U.S. at 490-501.

285 494 U.S. 652 (1990).

286 *Id.* at 654-55.

287 435 U.S. 765 (1978); See *Austin*, 494 U.S. at 659-60 (distinguishing the Michigan regulation because "it ensure[d] that expenditures reflect actual public support for the political ideas espoused by corporations").

288 *Id.* at 660.

289 *Id.*

judicial races, those restrictions might not apply to many obnoxious statements.²⁹⁰

There is one last obstacle to consider. Even if independent expenditures could be limited, judicial candidates themselves have been raising more and more money for their campaigns.²⁹¹ This trend will likely continue in the wake of federal court rulings overturning spending limits in judicial races. In *Suster v. Marshall*,²⁹² several candidates for common pleas judgeships successfully challenged the \$75,000 limit that the Ohio Supreme Court had promulgated.²⁹³

The U.S. District Court for the Northern District of Ohio issued a preliminary injunction against enforcement of that limit because it was not narrowly tailored to advance the state's at least arguably compelling interests in preventing judges from being distracted from their duties by the need to concentrate on fund-raising and in promoting public trust in the judiciary.²⁹⁴ The Ohio Supreme Court responded by varying the cap based on the population of the jurisdiction served by each judgeship, with a maximum of \$125,000 for common pleas judgeships in the largest counties.²⁹⁵ The district court concluded that the new limits still ran afoul of the First Amendment because they were not narrowly tailored to promote any compelling governmental interest.²⁹⁶ The increase in the ceiling for larger jurisdictions did not address the fundamental problem that spending caps were not an effective means of promoting judicial integrity.²⁹⁷

In short, restricting what judicial candidates say about themselves or about their opponents might run afoul of the First Amendment. Even if direct

290 As a matter of fact, this problem has prevented action to compel disclosure of the donors who supplied the money used for the anti-Resnick ads. The Ohio Elections Commission, after changing its mind twice, decided that it lacked jurisdiction over the spots because they did not expressly advocate the election or defeat of any candidate. T.C. Brown, *Officials Won't Review Ads Against Judge*, PLAIN DEALER, Apr. 5, 2001, at B4; Joe Hallett, *Free Speech Protects Attack Ads, Ruling Says*, COLUMBUS DISPATCH, Apr. 5, 2001, at A1. Both state and federal courts have also declined to order disclosure. *U.S. Judge Rejects Suit Over Resnick Attack Ads*, PLAIN DEALER, Mar. 30, 2002, at B4.

291 Sarah McKenzie, *Page Warns of Dangers of Campaign Money in State Judicial Elections*, STAR TRIB., Nov 16, 2001, at A13.

292 951 F. Supp. 693 (N.D. Ohio 1996), *aff'd*, 149 F.3d 523 (6th Cir. 1998).

293 *Id.* at 696. The Ohio Supreme Court had imposed spending caps on races for other judicial offices. 149 F.3d at 525 n.1.

294 951 F. Supp. at 699-701. The court refused to enjoin a separate provision forbidding judicial candidates from using funds raised while campaigning for a nonjudicial office, in large measure because such funds might well have been raised in circumstances that violate other legitimate restrictions on judicial candidates' speech. *See id.* at 703.

295 *Suster v. Marshall*, 121 F. Supp. 2d 1141, 1144 n.2 (N.D. Ohio 2000).

296 *Id.* at 1151.

297 *Id.*

restrictions on candidate speech pass constitutional muster, the debasing effects of independent expenditures may still go unaddressed.

IV. BEYOND TINKERING WITH THE RULES

Before giving up in despair, we should consider the lessons of the last Ohio Supreme Court election must be considered. Millions of dollars were spent last year, many of them for scurrilous attacks, but Justice Resnick won by a large margin.²⁹⁸ In fact, the attacks apparently helped her mobilize support.²⁹⁹ Many observers believe that the aggressive anti-Resnick campaign by business groups actually enabled her to win an election that she otherwise would have lost.³⁰⁰ Republicans have dominated Ohio politics lately, and there was a respectable—albeit not airtight—case to be made against her record.³⁰¹ Nor was Ohio the only state where aggressive business advertising failed: the chief justice of the Mississippi Supreme Court was defeated despite the support of corporate and industry groups, although political strategists for business interests profess themselves satisfied with the overall results.³⁰²

This was not the first time that rhetorical overkill by interest groups backfired. The National Conservative Political Action Committee, at one time the scourge of liberals, lost much of its luster with a series of shrill attacks on the apparently vulnerable Senator Paul Sarbanes of Maryland in 1982.³⁰³ Things got so bad that his Republican opponent, the purported beneficiary of those efforts, urged NCPAC to stop because Sarbanes (like Resnick) was using the attacks to mobilize support for what turned out to be an easy victory.³⁰⁴ No

298 Bradshaw, *supra* note 11; T.C. Brown, *Resnick Overcomes Attacks, Wins High Court Race*, PLAIN DEALER, Nov. 8, 2000, at A1.

299 E.g., James Bradshaw, *Group Begins Campaign of Pro-Resnick Ads*, COLUMBUS DISPATCH, Nov. 1, 2000, at C2; Paul Souhrada, *Labor Leaders Rally Troops for Resnick*, COLUMBUS DISPATCH, Nov. 1, 2000, at C3.

300 E.g., Brent Larkin, *Campaign "Geniuses" Hinder Both Parties*, PLAIN DEALER, Nov. 12, 2000, at G1; *A Campaign That Backfired*, PLAIN DEALER, Nov. 9, 2000, at B12; *A Landslide, Thanks to the Chamber of Commerce*, PLAIN DEALER, Nov. 9, 2000, at B13.

301 See *supra* text accompanying notes 80-87, 94-110, and 141-143.

302 Emily Heller, *Mixed Results for C of C*, NAT'L L.J., Nov. 20, 2000, at A1; see also Louis Jacobson, *Lobbying for "Justice" in State Courts*, 32 NAT'L J. 3678 (2000).

303 See Wilbur C. Leatherberry, *Rethinking Regulation of Independent Expenditures by PACs*, 35 CASE W. RES. L. REV. 13, 27 (1984).

304 Alison Muscatine, *Hogan Again Denounces NCPAC Ads in Debate with Sarbanes*, WASH. POST, Oct. 15, 1982, at B3.

Crude intervention by outsiders sometimes works, however. Consider the three-way 1970 Senate race in New York. Hoping to defeat Democratic candidate Richard Ottinger, the Nixon White House dispatched Vice President Spiro Agnew to attack Senator Charles Goodell, a moderate Republican who had alienated the administration and trailed badly in the polls. The third candidate was James Buckley, the nominee of the Conservative Party and more in

(continued)

one claims that the level of political discourse has improved since then, so it should not be expected that the failure of the anti-Resnick campaign will ennoble judicial elections by discouraging similar efforts.³⁰⁵

At the same time, Justice Resnick's victory shows how difficult it is to unseat an incumbent jurist. The examples of Rose Bird and her California colleagues, David Laphier, and Penny White resonate in part because they are so unusual. Indeed, those examples have alerted other potentially vulnerable judges of the dangers of complacency. By way of illustration, Justice White's 1996 defeat led Justice Adolpho Birch, the author of the opinion that was used to devastating effect against White, to begin planning his 1998 reelection campaign early; he managed to win, though with a reduced margin.³⁰⁶

Regardless of how often interest groups succeed in their efforts, the increasing coarseness of judicial elections gives incumbent judges reason to worry that they might be the next target. This in turn increases the hazards to judicial independence and fuels calls for reforming campaign speech or replacing judicial elections with some type of appointive system.³⁰⁷ This article has tried to show that the problems involved are not likely to get fixed simply by tinkering with the rules. The law might not be only about politics, but it certainly is partly about politics. This reality cannot be escaped no matter how hard it is tried.

sympathy with the administration than either of the others. Agnew skewered Goodell so badly that he gained enough votes at Ottinger's expense from outraged liberals and moderates that Buckley managed to squeak through to victory. See generally MICHAEL BARONE ET AL., *THE ALMANAC OF AMERICAN POLITICS* 1972, at 509-10, 512-13; JULES WITCOVER, *WHITE KNIGHT: THE RISE OF SPIRO AGNEW* 372-80, 387-88, 393-94 (1972); Irving Roshwalb & Leonard Resnicoff, *The Impact of Endorsements and Published Polls on the 1970 New York Senatorial Election*, 35 PUB. OP. Q. 410 (1971).

305 For example, the architect of the anti-Resnick campaign in Ohio expressed no regrets and promised more such efforts in future years. Larkin, *supra* note 300; Paul Souhrada, *Resnick Revels in Getting the Last Laugh*, COLUMBUS DISPATCH, Nov. 9, 2000, at D1. Interest groups have been gearing up for what might be an even more costly judicial election in 2002. David Bennett, *Court in the Balance*, CRAIN'S CLEV. BUS., Jan. 28, 2002, at 1.

306 Reid, *supra* note 6, at 74-75.

307 See, e.g., Bradshaw, *supra* note 3.