

SIX FATAL FLAWS: A COMMENT ON BOPP AND NEELEY

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INTRODUCTION

Let us enter a scene that James Bopp Jr. and Josiah Neeley urge us to allow:

In Judge J's courtroom one morning, this occurs: The judge is about to hear argument between two leading local lawyers. As the argument opens, he says: "Gentlemen, you know I'm running for reelection and you know how much I'd appreciate your support." Counsel answer, "Yes, your Honor, we certainly support you." To which the Judge replies, "Well, I haven't yet had any contribution from either of you, can I count on you?" To which each counsel responds, "You'll have my check before I leave." [Would you react to this differently if one lawyer promised \$1,000 and the other said he could send only \$100?] The prior afternoon, as the judge ended a jury trial with his customary in-chambers chat with the jurors, he asked them too for contributions.

As for Judge J's opponent: A respected local lawyer is considering running against J. She's told by friends—eager to see her on the bench because they believe she'd be a stellar judge—that she'll have to raise a substantial campaign fund. In her view, campaigning is an unpleasant hurdle but one she can tolerate, and she's confident she can put together a strong campaign committee. However, when she learns that to be effective in fund-raising she'll have to do the solicitation herself, she calls off her effort.¹

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1. The above scenario stems from the comment by an ex-President of the ABA shortly after the Eleventh Circuit's *Weaver* decision, invalidating the entire Canon on personal soliciting. *Weaver v. Bonner*, 309 F.3d 1312, 1315, 1322-23 (11th Cir. 2002), *reh'g en banc denied*, 57 F. App'x 416 (11th Cir. 2003). I asked him whether he thought lawyers would be asked for contributions before or after oral argument. He said: "Why not during?"

The scenario, to one reader of these pages, is "far-fetched." But given the sweep and absolutism of the Bopp-Neeley argument that limits on judicial candidates' personal soliciting are unconstitutional, this scenario is not merely taking their position to its logical extreme. The point of the scenario is to ask whether *any* limits on personal soliciting are constitutional. For example, the Eighth Circuit narrowly tailored the Canon, drawing a line that is at least arguably sound. *Republican Party of Minn. v. White (White II)*, 416 F.3d 738, n.23 (8th Cir. 2005) (en banc). Bopp-Neeley misleadingly treat the Eighth Circuit decision as simply supporting their position. See James Bopp, Jr. & Josiah Neeley, *How Not to Reform Judicial Elections: Davis, White, and the Future of Judicial Campaign Financing*, 86 DENV. U. L. REV. ___, nn. 50, 51, 58 (2008).

According to Bopp-Neeley, the only negative aspects of allowing judicial candidates to *personally* solicit campaign funds are these: It is “unpleasant and time consuming for candidates and awkward for potential contributors. Other objections . . . are, *if true*, much more serious.”² Banning personal solicitation does “allow states to maintain the fiction that judges are not directly involved in the campaign fundraising process.”³ Any bans on personal solicitation “do not serve an interest in preventing corruption” and are inconsistent with *White* and have been enjoined by four federal courts.⁴ “What raises impartiality concerns is not the solicitation of funds, but rather a judge’s knowledge of the source [A]ny impartiality concerns raised by the personal solicitation . . . are inherent in the state’s decision to elect judges and cannot be used as a rationale to limit candidates’ First Amendment rights.”⁵

Allowing scenes like the ones suggested above has six fatal flaws. The flaws listed here are not in order of priority because, although all of

Certainly some line-drawing may improve the Canon; the above scenario aims at two points: 1) To say that *no* limits are constitutional, goes too far; e.g., the reader just mentioned considers it preposterous to argue that it is unconstitutional “to prohibit solicitation in the courthouse with your robe on.” 2) What line-drawing does make sense? I reject lines like these: if the soliciting is outside the courthouse the same day as the oral argument; if the soliciting is to lawyers or litigants in a pending or imminent case; if they come before that judge with any frequency or he or she is the only judge in their jurisdiction or reasonably likely to hear any case they are involved in. In short, any one-on-one or small-group soliciting by a sitting judge (or candidate for that seat) seems inescapably freighted with so much pressure, that there is undue risk to both impartiality in fact and the perception of impartiality.

Bopp-Neeley claim that “any impartiality concerns raised by the personal solicitation of campaign funds are inherent in the state’s decision to elect judges.” *Id.* at __; but that assumes that judicial elections must be the same as elections for non-judicial offices, which *White* rejected explicitly (and clearly correctly, see *infra* Part I.B).

Last on this: Bopp-Neeley equate the pressure in solicitations by judicial candidates with solicitations by legislative and executive candidates. Bopp-Neeley, *supra* at __. But a judge’s decisions, reached after a constitutionally cabined process, impact directly and specifically X lawyer or litigant. In contrast, it is inherent in executive and legislative action that they almost always affect many people, and all who may be affected are free to engage with the officials in all kinds of contact, argument and support.

2. Bopp-Neeley, *supra* note 1 (emphasis added).

At the outset let me note that I agree with Mr. Bopp and Mr. Neeley on several issues. For example, on public funding (which I do not oppose but which I believe is severely oversold, distracting us from steps that will be more productive), I agree on many aspects that they list and I expect they would agree with others that I have listed. See Bert Brandenburg & Roy A. Schotland, *Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns*, 21 GEO. J. LEGAL ETHICS 1229, 1251, 1254-58 (2008).

Although Bopp, Neeley and I do not agree about *White* and other issues, this comment treats only the matter of soliciting campaign contributions, which has drawn little attention and is, I believe, incomparably more important than generally realized. Even on this matter, I only note here that regulation of campaign contributions is *not* subject to strict scrutiny. See, e.g., *Randall v. Sorrell*, 548 U.S. 230, 247-48 (2006) (adhering to the treatment since *Buckley*); see also *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 387-88 (2000). Even applying strict scrutiny, the Maine and Arkansas courts have upheld this Canon since *White*, and the Third Circuit and Oregon Supreme Court did so earlier. *In re Dunleavy*, 2003 ME 124, ¶ 30, 838 A.2d 338, 350 (Me. 2003); *Simes v. Ark. Judicial Discipline and Disability Comm’n*, 247 S.W.3d 876, 879, 884 (Ark. 2007); see *Stretton v. Disciplinary Bd.*, 944 F.2d 137, 141-43 (3d Cir. 1991); *In re Fadeley*, 802 P.2d 31, 41 (Or. 1990).

3. Bopp-Neeley, *supra* note 1, at __.

4. *Id.* at __.

5. *Id.* at __.

them are powerful, they would draw different priorities from different observers:

1. For generations, and in almost all states with judicial elections, judicial candidates have been barred from *personally* soliciting campaign funds.

2. All states that have chosen to have some or all of their judges face some form of election have also chosen an array of state-constitutional differences between the judges and other elective officials. We cannot ignore that array. Nor can we say that because there are judicial elections the campaign conduct cannot be regulated; an analogy is our limiting highway speed even though we have superhighways and powerful cars.

3. *White* is, to understate it, distinguishable. The lower-court decisions are, as noted more fully below, (a) far from the Bopp-Neeley position (Eighth Circuit), (b) only a *sua sponte* departure from *White* (Eleventh Circuit), (c) still on appeal (Tenth Circuit), (d) only a preliminary injunction that explicitly did not review for constitutionality (Kentucky District Court), or (e) flatly contrary to Bopp-Neeley (Arkansas Supreme Court).

4. Not only First Amendment rights are involved but also litigants' Due Process rights to an impartial judge, as well as protecting the Separation of Powers values served by preserving the differences between judges and other elective officials.

5. Not only constitutionality is at issue. We cannot ignore how no-holds-barred election campaigns will affect who will be willing to run for the bench, and for re-election. Many, probably most, of the kind of people who would be fine judges are undeniably different personalities from the kind of people who enjoy campaigns or are at least willing to get into them.

6. To allow conduct like that in the scenes described above will jeopardize public confidence in the courts to an unusually acute and demonstrable degree. Scenes like those above bring the risk, even the likelihood, that some observers will see little or no difference between contributions and bribes. Empirical studies of voters' reactions to the post-*White* reduction of limits on campaign speech show there is little concern about that change but high concern about campaign contributions.⁶

6. James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and "New-Style" Judicial Campaigns*, 102 AM. POL. SCI. REP. 59 (2008) (Kentucky voters); James L. Gibson, "New-Style" Judicial Campaigns and the Legitimacy of State High Courts: Results from a National Survey (forthcoming) ("When judges express their policy views during campaigns . . . no harm is done to the institutional legitimacy of courts At the same time, the current system of campaign contributions does appear to be injurious to courts.") (manuscript at 19-20,

I. SIX FATAL FLAWS

A. *Personal Solicitation of Campaign Funds*

For generations, and in thirty-four of the thirty-nine states with judicial elections, judicial candidates have been barred from *personally* soliciting campaign funds; their campaign committees do the soliciting. As the Conference of Chief Justices put it in an amicus brief,

[w]ithout this Canon, even the most highly respected judges will be forced to join a “race to the bottom” One can imagine the very dire, yet very real, consequences if the Canon is stricken. Will judges be free to solicit funds in the courthouse, before or after oral argument (or, as asks a former ABA President, “Why not during oral argument?”)? Will judges be free to solicit from jurors? While new Canons surely could limit such extreme practices, the “race to the bottom” is bound to dominate.⁷

Three courts have stated the reasons for this Canon. First, the Third Circuit:

[A]s a practical matter, so long as a state chooses to select its judges by popular election, it must condone to some extent the collection and expenditure of money for campaigns. Unquestionably, that practice invites abuses that are inconsistent with the ideals of an impartial and incorruptible judiciary. . . . There is no aspect of the electoral system of choosing judges that has drawn more vehement and justifiable criticism than the raising of campaign funds, particularly from lawyers and litigants likely to appear before the court. Plaintiff is correct that the currently approved practices do involve the candidate deeply, albeit indirectly, in the process. Nevertheless, *we cannot say that the state may not draw a line at the point where the coercive effect, or its appearance, is at its most intense—personal solicitation by the candidate. [P]laintiff’s contention that this is the most effective means for raising money only underscores the fact that solicitation in person does have an effect—one that lends itself to the appearance of coercion or expectation of impermissible favoritism.*⁸

The Oregon Supreme Court wrote this:

on file with author), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1023785 (follow “Download” hyperlink).

7. Brief of Conference of Chief Justices Amici Curiae in Support of Defendants/Appellees, at 20, 22, *Republican Party of Minn. v. White*, 361 F.3d 1035 (8th Cir. 2004) (No. 99-4021). This article draws upon that amicus brief as well as the CCJ’s amicus brief at the Supreme Court in *White* in 2002; I co-authored both briefs.

8. *Stretton v. Disciplinary Bd.*, 944 F.2d 137, 144-46 (3d Cir. 1991) (emphasis added). The Third Circuit was prescient in writing, “[t]here is no aspect of the electoral system of choosing judges that has drawn more vehement and justifiable criticism than the raising of campaign funds” The public’s strong criticism has been consistent and widespread. See *infra*, note 47 (discussing the results of many polls).

[The Canon] protects . . . the state's interest in maintaining, not only the integrity of the judiciary, but also the appearance of that integrity. . . . The impression created when a lawyer or potential litigant, who may from time to time come before a particular judge, contributes to the campaign of that judge is always unfortunate. . . . [T]he outside observer cannot but think that the lawyer or potential litigant either expects to get special treatment from the judge or, at the least, hopes to get such treatment. It follows that, if it is at all possible to do so, the spectacle of lawyers or potential litigants directly handing over money to judicial candidates should be avoided if the public is to have faith in the impartiality of its judiciary.⁹

And the Maine Supreme Court:

It is exactly this activity that potentially creates a bias, or at least the appearance of bias, for or against a party to a proceeding. If a contribution is made, a judge might subsequently be accused of favoring the contributor in court. If a contribution is declined, a judge might be accused of punishing a contributor in court.¹⁰

All three courts essentially found the same compelling state interests: “[t]he stake of the public in a judiciary that is both honest in fact and honest in appearance”¹¹ The most recent decision, noted fully below, strongly affirms the same position.¹²

B. *State Constitutional Differences for Judicial Elections*

All thirty-nine states that have chosen to have some or all of their judges face some form of election have also chosen an array of state-constitutional differences between the judges and other elective officials. We cannot ignore that array. The Supreme Court has long recognized a “fundamental tension between the ideal character of the judicial office and the real world of electoral politics”¹³ Acutely aware of that tension, the states that have chosen some form of judicial election have included in that choice an array of constitutional provisions unique to the judiciary to assure that judicial independence is protected. Most of these provisions would be unthinkable for other elected officials in the legislative and executive branches. For example, in all thirty-nine states, judges' terms are longer than any other elective officials' terms.¹⁴ In

9. *In re Fadeley*, 802 P.2d 31, 41 (Or. 1990).

10. *In re Dunleavy*, 2003 ME 124, ¶ 31, 838 A.2d 338, 351 (Me. 2003).

11. *Stretton*, 944 F.2d at 145; *In re Fadeley*, 802 P.2d at 40; see also *In re Dunleavy*, 838 A.2d at 346-51; *Morial v. Judiciary Comm'n*, 565 F.2d 295, 302 (5th Cir. 1977) (calling the state's interest in preserving the integrity of the judicial system “grave and honorable”).

12. *Simes v. Ark. Judicial Discipline and Disability Comm'n*, 247 S.W.3d 876, 881-82 (Ark. 2007).

13. *Chisom v. Roemer*, 501 U.S. 380, 400 (1991).

14. Except that Nebraska's Regents' terms are longer than their judges' terms. Of appellate judges facing elections, thirty-nine percent have terms of ten to fifteen years and another sixty-one percent have terms of six to eight years. Of trial judges facing elections, thirteen percent have terms of ten to fifteen years, and another sixty-eight percent have terms of six to eight years. CITIZENS FOR

almost all, only judges are subject to both impeachment and special disciplinary process. In thirty-three states, judges are the only elective state officials subject to requirements of training or experience or both (except that in ten of those, the attorney general is subject to similar requirements). In twenty-three states, only judges are subject to mandatory retirement.

This pattern of provisions shows that the choice of elections, as the Third Circuit put it, “while perhaps a decision of questionable wisdom, does not signify the abandonment of the ideal of an impartial judiciary carrying out its duties fairly and thoroughly.”¹⁵ The thirty-nine states have recognized that, far from fulfilling the historic purpose in allowing for the popular election of judges, any effort to treat judicial elections like others wholly undermines the judiciary’s independent role under their constitutions. The states’ balanced approach to the proper structure for an elected judiciary embodies the understanding that

the word “representative” connotes one who is not only *elected by* the people, but who also, at a minimum, *acts on behalf of* the people. Judges do that in a sense—but not in the ordinary sense. . . . [T]he judge represents the Law—which often requires him to rule against the People.¹⁶

Judges are subject to the array of unique provisions because the judges’ jobs are so different:

[O]ther elected officials are open to meeting—at any time and openly or privately—their constituents or anyone who may be affected by their action in pending or future matters, but judges are not similarly open; nonjudicial candidates [are free to] seek support by making promises about how they will perform; [o]ther elected officials are advocates, free to cultivate and reward support by working with their supporters to advance shared goals; other elected officials pledge to change law, and if elected they often work unreservedly toward change; other elected officials participate in diverse and usually large multi-member bodies; other elected incumbents build up support through “constituent casework,” patronage, securing benefits for communities, etc.; almost all other elected officials face challenges in

INDEPENDENT COURTS, UNCERTAIN JUSTICE: REPORT OF THE CITIZENS FOR INDEPENDENT COURTS TASK FORCE ON SELECTING STATE COURT JUDGES 77, 90-92, 116-17 (2000).

Other unique provisions on the judiciary: in twenty-one states, only judicial nominations go through nominating commissions; in six states, this applies even to interim appointments. Last, in eighteen states, only judges cannot run for a nonjudicial office without first resigning. For citations to examples of all these provisions, see Brief of Amici Curiae Conference of Chief Justices in Support of Respondents, at 6-7 nn.6-11, *Republican Party of Minn. v. White*, 536 U.S. 765 (2002) (No. 01-521).

15. *Stretton*, 944 F.2d at 142.

16. *Chisom*, 501 U.S. at 410-11 (Scalia, J., dissenting).

every election; [and last, fundraising by judicial candidates is uniquely constrained].¹⁷

To say that when judges face elections “an election is an election”—meaning that these elections cannot be regulated differently from other elections—would be to deny the differences between judges and other elective officials, and to deny the recognition of those differences in so many constitutional provisions. It would be like saying that because we have superhighways and powerful cars, we cannot limit highway speed. Of course regulation must be narrowly tailored, but the fact that the obsolete, *never-enforced* “Announce” clause was unconstitutional does not sweep the field—as is explicit in the recent Arkansas Supreme Court decision noted last in the following review of the decisions.

C. *White is Distinguishable*

White does not touch this Canon. “[The] solicitation clause fundamentally differs from the announce clause analyzed by the Supreme Court in *White*.”¹⁸

Bopp, who deserves credit for his successful argument of *White*, has always read it expansively, even elastically. He argued, as a good lawyer, that the decision of the issue in *White* (the “Announce” clause’s constitutionality) would not touch even the most similar Canon (the Pledge/Promise clause).¹⁹ But ever since winning that case he has used it (in understandable advocacy but merely that) to challenge the Pledge/Promise clause, the solicitation Canon, the political-activities Canon, and others.²⁰

In the first federal court decision after *White*, an Eleventh Circuit panel in *Weaver v. Bonner* invalidated the Georgia Canon—a provision that was law in thirty-four states—requiring that judicial candidates not *personally* solicit campaign contributions but instead have it done by their campaign committees.²¹ *But*, the *Weaver* panel (1) acted *sua*

17. Robert M. O’Neil, *The Canons in the Courts: Recent First Amendment Rulings*, 35 IND. L. REV. 701, 716-17 (2002).

18. *Simes v. Ark. Judicial Discipline and Disability Comm’n*, 247 S.W.3d at 881.

19. See Brief for Petitioners Republican Party of Minn., at 31, *Republican Party of Minn. v. White*, 536 U.S. 765 (2002) (No. 01-521).

20. Bopp has represented plaintiffs in more than half of the 33 post-*White* cases attacking various Canons. *E.g.*, *Kan. Judicial Review v. Stout*, 519 F.3d 1107, 1111 (10th Cir. 2008) (injunction vacated in part and certified in part to the Kansas Supreme Court).

21. *Weaver v. Bonner*, 309 F.3d 1312, 1315, 1322-23 (11th Cir. 2002), *reh’g en banc denied*, 57 F. App’x 416 (11th Cir. 2003).

How has *Weaver* fared in operation? In 2008, in Georgia’s only contested statewide judicial election, an unofficial judicial campaign conduct committee succeeded in getting pledges from most judicial candidates that they will not do any personal soliciting. With seven candidates for this open seat, four signed the committee’s pledge and, of the three others, one says he is doing no personal soliciting. In the three election cycles in Georgia since *Weaver*, a few candidates apparently have done personal soliciting but not actively; the only certainty is that one candidate happened to personally solicit the young lawyer who is “staff” for the committee. Apparently, after some candidates engaged in personal soliciting, their opponents did the same to meet the challenge.

sponte: the provision had not been challenged by plaintiff nor argued at trial or on appeal (Georgia's appeal was from a decision limiting the applicability of another Canon);²² (2) incorrectly read *White* to require judicial elections to sound the same as legislative and executive elections, despite the *White* majority's explicit limitation to the contrary;²³ (3) simply ignored three contrary decisions, one by the Third Circuit, another after *White* by the Maine Supreme Court, and one by the Oregon Supreme Court;²⁴ and (4) wrongly chose strict scrutiny. That panel's *sua sponte* activism led it to sweep away the entire Canon, in contrast to the tailoring by the Eighth Circuit, noted in the next paragraph.

The next decision on which Bopp-Neeley rely—the Eighth Circuit on remand in *White*—did indeed find the solicitation Canon unconstitutional, but only *in part*. The court *upheld* the limit on personal solicitation *but* found that it must be narrowly tailored to allow a candidate's "personally signing a solicitation letter or making a blanket solicitation to a large group":

An actual or mechanical reproduction of a candidate's signature on a contribution letter will not magically endow him or her with a power to divine, first, to whom that letter was sent, and second, whether that person contributed to the campaign or balked at the request.²⁵

There is no question that the Eighth Circuit's line upholding the ban on *personal* solicitation (thus banning scenes like those that open these pages) but allowing "blanket solicitation" to large groups and also solicitation by mail (at least via mass mailings), seems reasonable, perhaps advisable—whether one agrees with it, or disagrees as I do. Like the Bopp-Neeley reading of *White*, this decision they more than stretch: they distort it.

As for two other decisions on which Bopp-Neeley rely, one, as noted earlier, is now on appeal.²⁶ In the other, they cite a District Court decision that was only a preliminary injunction which explicitly did not reach a constitutional decision; however, last month that court did find the Canon unconstitutional.²⁷

Gresham's Law rules again. Telephone interviews with a Georgia judge and (10/8/08) with Jeremy Berry, Co-chair, Ga. Comm. for Ethical Judicial Campaigns, in Atlanta, Ga.

22. All-out "judicial activism," which normally Bopp actively opposes. "[I]t is judicial activism that threatens judicial independence Judicial activism is at the core of the attacks on judicial independence." James Bopp Jr., *Preserving Judicial Independence: Judicial Elections as the Antidote to Judicial Activism*, 6 FIRST AMENDMENT L. REV. 180, 185, 191 (2007).

23. *Compare White*, 536 U.S. at 783, with *Weaver*, 309 F.3d at 1322-23.

24. *Stretton v. Disciplinary Bd.*, 944 F.2d 137 (3d Cir. 1991); *In re Dunleavy*, 2003 ME 124, 838 A.2d 338 (Me. 2003); *In re Fadeley*, 802 P.2d 31 (Or. 1990).

25. *White II*, 416 F.3d 738, 765-766 (8th Cir. 2005) (en banc).

26. *Kan. Judicial Review v. Stout*, 519 F.3d 1107, 1111 (10th Cir. 2008) (injunction vacated in part and certified in part to the Kansas Supreme Court).

27. *Carey v. Wolnitzek*, No. 3:06-36-KKC, 2008 WL 4602786, at *11 (E.D. Ky. Oct. 15, 2008).

Most recent is a 2007 Arkansas Supreme Court decision—*Simes v. Arkansas Judicial Discipline and Disability Commission*—explicitly against the Bopp-Neeley position, which they try to put aside as “out of step” with *White* and as unduly concerned about “the subjective feelings of those solicited.”²⁸ What *Simes* says is that “[a]ttorneys ought not feel pressured to support certain judicial candidates in order to represent their clients”—which I would not characterize as mere “subjective feelings.”²⁹ And *Simes* relies on much more:

Allowing a judge to personally solicit or accept campaign contributions, especially from attorneys who may practice in his or her court, not only has the possibility of making a judge feel obligated to favor certain parties in a case, it inevitably places the solicited individuals in a position to fear retaliation if they fail to financially support that candidate. Attorneys ought not feel pressured to support certain judicial candidates in order to represent their clients. In addition, the public should be protected from fearing that the integrity of the judicial system has been compromised, forcing them to search for an attorney in part based upon the criteria of which attorneys have made the obligatory contributions. Thus, we take this opportunity to acknowledge that, in Arkansas, avoiding the appearance of impropriety is also a compelling state interest.

. . . In the instant case, the petitioner was found to have made direct, personal solicitations [including to an attorney who “appeared before the petitioner about two or three times a quarter and had cases pending in the petitioner’s court at the time of the solicitation”]. . . . Contrary to the Eighth Circuit’s finding . . . it is very likely in the instant case that the petitioner, or any other judge making such a personal solicitation, would have a “direct, personal, substantial, pecuniary interest in reaching a conclusion [for or] against [a particular litigant in a case]” based upon that litigant’s support.

. . . Arkansas’s Canon 5C(2) seeks to insulate judicial candidates from the solicitation and receipt of funds while leaving open, ample alternative means for candidates to raise the resources necessary to run their campaigns. To this end, Canon 5C(2) provides that candidates may establish campaign committees to conduct fundraising on their behalf. . . . [T]he state is doing nothing more than seeking a

28. Bopp-Neeley, *supra* note 1, at _.

29. *Simes v. Ark. Judicial Discipline and Disability Comm’n*, 247 S.W.3d at 882. A lawyer is likely to feel pressured for several reasons: she may be concerned about being able to remain effective for her clients; she may believe the soliciting judge is unworthy of support; she may fear that the soliciting judge’s opponent is the kind of person who would keep track of who contributed to whom; she may lack the funds to make a notable contribution; and/or she may well feel the personal solicitation and surrounding circumstances involve unprofessional conduct. Solicitation by a judge raises possible pressures different from any raised by solicitation for non-judicial campaigns. That is why, as *Simes* noted, the Canons not only address campaign contributions but also preclude judges “from using their office for fundraising or membership solicitation at any time.” *Id.* at 883.

Even totally subjective feelings may be rational, e.g., when one does all one can to avoid contact with a person carrying a contagious disease.

balance between allowing people to elect their judges and safeguarding the process so that the integrity of the judiciary and due process will not be compromised. For all of the above reasons, we reject the arguments presented by the petitioner and find that Canon 5C(2) of the Arkansas Code of Judicial Conduct is narrowly tailored to serve the compelling state interests.³⁰

D. Litigants' Due Process Rights to an Impartial Judge

Not only First Amendment rights are involved but also litigants' Due Process rights to an impartial judge. And also the constitutional structure at stake in protecting the Separation-of-Powers values served by preserving the differences between judges and other elective officials.

The Due Process Clause's guarantee of impartial judges, both as a matter of fact and as a matter of perception, is a compelling state interest.³¹

As for the separation of powers: in choosing judicial elections, states have not abandoned their concern with preserving fully separated powers. The States know that if candidates for judicial office appeal for voters' support on the same basis as legislative candidates—if they answer to the same electoral majorities—the courts run the grave risk of becoming second legislatures. As electoral twins to the legislatures, courts would lose the independence—and the crucial public perception of that independence—required for them to discharge their high constitutional duty of judicial review.

E. Elective Campaigns and the Judicial Pool

Not only constitutionality is at issue. We cannot ignore how no-holds-barred elective campaigns will affect the pool of people willing to run for election to the bench, and for re-election.

The whole goal of efforts surrounding judicial selection is to bring to the bench people as suitable as we can find for the unique responsibilities and powers of judges. Debate about the strengths and weaknesses of different systems has drawn more ink and sweat than any other subject in American law. But the fact is—whether one applauds it (as do Bopp-Neeley) or abhors it (I do not, I am an unwavering agnostic)—the overwhelming majority of state judges face some type of election.³²

What kind of election campaign looms at the entry to the bench is a significant filter affecting who will seek a seat or seek re-election. There are differences between the average person who seeks to be a judge and the average person who chooses elective politics. Politicians like cam-

30. *Id.* at 878, 882-84 (emphasis added).

31. See Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059, 1069, 1074 (1996).

32. See data *infra* note 51.

paigns, or at least tolerate them well. Politicians are out-going personalities ready for the rough-and-tumble. Of course views will differ about “the judicial personality.” In my view, the more wide-open and lively (let alone nasty) are judicial election campaigns, the more would-be judges will be hesitant or even unwilling to run for the bench or for reelection. For example: when the California Judges Association in 1983 sent its members a questionnaire about their campaign experience, one judge’s reply included this: “The best lawyers are not applying for judgeships because of lack of faith in the appointment process and they do not want to engage in political campaigns in order to gain reelection.”³³

One example, even before judicial elections became “nastier, noisier and costlier:”³⁴ Pennsylvania’s revered Judge Edmund B. Spaeth Jr. (“the kind of person a judge ought to be—a sequoia in a Philadelphia judiciary sometimes noted for its saplings”),³⁵

thinks electing judges is a bad idea, but it’s not the reason that he finds the process distasteful. “The worst thing is,” he says with sadness baked on his face, “is raising money.” He says “money” the way a sick man says the name of his disease. . . . [H]e announced that he would not seek retention in [November] because political campaigning by judges is “fundamentally incompatible with the judicial process”—thus ending, prematurely, one of the most distinguished legal careers in Pennsylvania.³⁶

That was long before *White*. Spaeth’s approach, when asked how he would decide cases, was to reply, “I can only tell you that I will decide each case as conscientiously as I can.”³⁷ Spaeth had originally been appointed to a vacancy and soon faced a contestable election for a full term but lost after unluckily drawing a poor ballot position; soon after, he was appointed to another vacancy, ran again, campaigned vigorously throughout the state, and won.³⁸

The “judicial personality” has been studied by the presiding judge of the San Bernardino trial courts, using the “most appropriate psychometric tool” (Myers-Briggs Type Inventory, “MBTI”). Studying more

33. AM. BAR ASS’N, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYERS’ POLITICAL CONTRIBUTIONS: PART TWO 17 (1998) [hereinafter ABA TASK FORCE] (quoting Roy A. Schotland, *Elective Judges’ Campaign Financing: Are State Judges’ Robes the Emperor’s Clothes of American Democracy?*, 2 J.L. & POL. 57 app. b at 162 (1985)).

34. See Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why it Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1269 (2008) (“If Professor Roy Schotland had licensed his characterization of judicial races . . . when he made the statement in the 1980s, the royalties would have made him a rich man today.”); see, e.g., James L. Gibson, *Nastier, Noisier, Costlier—and Better*, MILLER-MCCUNE.COM, July 14, 2008, <http://www.miller-mccune.com/article/495> (using the phrase in applauding the changes).

35. William Ecenbarger, *The Judge Who Wouldn’t Run*, THE PA. LAW., Oct. 15, 1985, at 23.

36. *Id.*

37. *Id.*

38. See *id.* at 25.

than 1,300 American judges with the MBTI distinction between “extroversion” and “introversion” (differentiating between those “who tend to be concerned with the opinions of others” and those who focus “on their own thoughts and values”), the study found that about sixty percent of judges are introverts, unlike two-thirds of the adult public.³⁹

This should be no surprise, as the law, by definition, is an introvert’s design. It deals with core values and principles, and resists change based on transitory shifts in the tide of popular public opinion. Moreover, the judiciary calls to service those who are willing to apply legal values and principles even when the results are highly unpopular. . . . In our society, most introverted characteristics are disfavored. This may partially explain why the public tends to entertain negative opinions about judges, believing them cold and aloof.⁴⁰

Of course these are only “broad caricatures of judges [N]o one fits neatly into any one . . . category [V]ery few judges can be found at the extremes. All types can be excellent judges; there is no ‘best’ type for the judiciary.”⁴¹

Strikingly, in a later study Kennedy found that nearly sixty percent of female judges are extroverts, in contrast to only about forty percent of male judges.⁴²

Judge Kennedy’s findings support the prediction—or fear!—that the kinds of unrestrained campaigns that are the norm for politicians, would—for a significant proportion of the kinds of people likely to be fine judges—be an entry *barrier* resulting in a weaker bench.

F. *Public Confidence in the Courts*

Allowing conduct like that in the scenes described at the outset will jeopardize public confidence in the courts to a destructive degree. Situations akin to those above bring the risk, even the likelihood, that “outside

39. See John W. Kennedy, Jr., *Personality Type and Judicial Decision Making*, 37 *JUDGES’ J.*, Summer 1998, at 4, 5-6, 8.

40. *Id.* at 6.

41. *Id.* at 9.

One former clerk for a federal judge, who very helpfully read this article in draft, wrote this: “Frankly, the judge for whom I clerked, and for whom I have utterly immense respect as a jurist, fits the MBTI test to a ‘T’ (excuse the alphabet pun). Were the federal judiciary elected, I couldn’t even *conceive* of the possibility of him as a candidate. That is not to say there aren’t great state candidates and great state jurists in elected states.... [Y]our article made me think of this in a way that I never had previously”

And one of the student editors of these pages: “I found [the judicial pool argument] to be especially convincing as a more or less introverted person who has judicial aspirations—I would never put myself through an election.”

42. John W. Kennedy, Jr., *Judging, Personality, and Gender: Not Just a Woman’s Issue*, 36 *U. TOL. L. REV.* 905, 906 & n.2 (2005) (commenting on his sample, Kennedy notes, “I strongly suspect that far more than 60 percent of the male judiciary is introverted”); see also *id.* at 906 n.2 (finding one sample of appellate judges to be “a whopping 76 percent” introverts). Perhaps this difference between female and male judges is some of the reason why, in recent years, female candidates for the bench are generally deemed to have an edge over male candidates.

observers”⁴³ (including lawyers and litigants) will see little or no difference between contributions and bribes. As Senator Russell Long put it: “[W]hen you are talking in terms of large campaign contributions . . . the distinction between a campaign contribution and a bribe is almost a hair’s line difference”⁴⁴

How campaign funds are raised has become dramatically more important as campaign spending has soared. In the past four election cycles (2000-2006), judicial candidates “have raised over \$157 million, nearly double the amount raised by candidates in the four cycles prior [1992-1998].”⁴⁵ Since 2006, the sharp escalation has continued, setting new records in many states; for example, in 2007 in a Pennsylvania contest

43. *In re Fadeley*, 802 P.2d 31, 41 (Or. 1990).

44. Quoted by the Courts of Appeals in *Buckley v. Valeo*, 519 F.2d 821, 838 (D.C. Cir. 1975), *aff’d in part and rev’d in part*, 424 U.S. 1 (1976); see also JOHN T. NOONAN, JR., *BRIBES* 622-62 (1984) (writing before he went on the Ninth Circuit).

A Chief Justice sent me this comment on Senator Long’s statement: “I never saw that a campaign contribution bore much relationship to a bribe. Campaign money goes to consultants, TV stations, printing companies, rent, etc. Bribes go into one’s pocket.”

Campaign contributions present several problems that must be separated: 1) They may “buy” the kind of action the donor seeks. How large this problem is may depend on how large is the contribution relative to the candidate’s total funds, or how great is the concentration of such contributions (e.g., if a large proportion of the candidate’s total funds come from people or entities who want X action). 2) They may not buy or even influence action but only support a candidate who will, if elected, take the kind of action the donor seeks with or without the donor’s contribution. (This motivation is supported by “the weight of anecdotal evidence at least”, according to Kyle Cheek, an academic authority, in an e-mail (on file with author) to Professor Vernon Palmer at Tulane Law School, who is the author of a relevant recent article, on Oct. 21, 2008.) That raises real problems of who reaches office but reflects upon the institution and the system, not the particular candidate. 3) A candidate may attack contributions to her opponent, depending on factors like how much is raised overall, or how large or concentrated are particular contributions, or who and where the contributions come from. Such attacks may be mere campaign moves or may point to real problems. 4) Especially with judicial candidates, given the “neutrality” that judges are supposed to bring to their job, contributions may reduce public confidence.

If judicial candidates face some form of election, they will have to raise funds. Campaign funding may raise acute problems whether or not any direct contributions are problematic. Because: even if there is public funding (as three states have for some of their appellate courts), instead of direct contributions there may be “independent” spending to support X candidate; in fact, in several of the highest-spending recent campaigns (e.g. in Illinois and West Virginia), a great deal or even almost all of the spending was “independent”, not contributions.

It is unrealistic and unfair to criticize any candidate whose contributions are within legal limits (or, if there are no limits, are reasonable) and are unconcentrated, and if independent spending is not significant in that race. Campaign funds in judicial races “unquestionably [jeopardize] confidence in the courts”, which increases the need for knowledgeable observers to speak and write realistically about this (quoting from Roy A. Schotland, *Judicial elections in the United States: is corruption an issue?*, in TRANSPARENCY INTERNATIONAL, *GLOBAL CORRUPTION REPORT 2007* at 26, 29).

45. See JAMES SAMPLE, LAUREN JONES & RACHEL WEISS, *JUSTICE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS 2006* app. at 15 (Jesse Rutledge ed., 2007), <http://www.justiceatstake.org/files/NewPoliticsofJudicialElections2006.pdf>.

Strikingly, the escalation in judicial campaign spending is far greater than in campaign spending generally. See Brandenburg & Schotland, *supra* note 2, at 1230 (providing comparative data). And, campaign spending matters in major ways even during uncontested elections. *Id.* at 1234 n.18.

\$9.5 million was raised and in Wisconsin \$2.7 million, not counting major “independent” spending.⁴⁶

Many public opinion polls, both national and single-state over many years, consistently show that large majorities of the public “believe that campaign contributions have at least some impact on judges’ decisions.”⁴⁷ An interesting addition to those polls are the recent empirical studies of voters’ reactions to the post-*White* reduction of limits on campaign speech. These studies found little concern about the change in campaign *speech* but high concern about campaign contributions.⁴⁸ As a Florida judge wrote shortly after the Eleventh Circuit panel wiped out Florida’s limits on personal soliciting: “What sort of appearance of fairness will be fostered by a system where judges are now expected to not only go on the campaign stump, but go there with hands outstretched?”⁴⁹

II. FEASIBLE REFORM STEPS

This Canon, like all regulation (indeed, all law!), has strengths and weaknesses. But first, is a Canon like this “merely a band-aid” that leaves uncorrected the undeniably major problems raised by campaign contributions to judicial candidates, and by having judicial elections at all? If it were feasible to replace contestable judicial elections with another system, the matter would be very different. But despite the sharp rise in concern about judicial elections since spending started soaring in 2000, with problems compounded by the intensifying of campaigns and coarsening of campaign speech, states are not ending judicial elections. Yes of course that may change.⁵⁰ But a century of experience is relevant.

46. Data compiled and forthcoming by Justice At Stake, www.justiceatstake.org.

47. Ten polls from 1997-2004 are cited by Thomas A. Gottschalk, *Judicial Recusal as a Campaign Finance Reform*, Appendix, a paper presented at a 2008 Conference: Our Courts and Corporate Citizenship (Sandra Day O’Connor Project on the State of the Judiciary, at Georgetown Law Center (publication forthcoming). The quotation is from the 2004 national survey by Justice at Stake. A new nationwide Harris Poll, with input from the ABA, finds that fifty-five percent of the voting-age public think elections should be used to select judges. *See* Poll finds most voters want to elect judges, MINN. LAWYER, Oct. 24, 2008, available at <http://www.minnlawyer.com/type.cfm/Legal%20News> (scroll down for link, registration required).

48. Gibson, *supra* note 6, at 60, 62-63.

49. Charles Kahn, *Will [Weaver] Leave State Judges with Their Hands Out?*, ST. PETERSBURG TIMES, Oct. 29, 2002.

50. The 2008 elections produced local successes in Greene County, Missouri and also (for interim appointments to vacancies) in two Alabama counties, joining six other Alabama counties. In Missouri, “merit” selection (often referred to as “the Missouri plan”) has been in place since 1940 for their appellate judges (and some trial judges), and since 1970 and 1973 for counties totaling about one-third of Missouri’s trial judges. *See* American Judicature Society, http://www.ajs.org/selection/sel_voters.asp (last visited Nov. 11, 2008); *see also* http://www.judicialselection.us/judicial_selection/reform_efforts/formal_changes_since_inception.cfm?state=MO (last visited Nov. 11, 2008) (providing a history of reform efforts in Missouri).

Three recent statewide efforts are notable (leaving out places that don’t get beyond a bill being introduced). In Minnesota in 2008, a well-organized, strong drive to end contestable elections failed when it was opposed by the trial judges. That effort may succeed in the next few years if limited to appellate judges. Such limited systems are found in five states: California, Florida, Maryland, South Dakota, and Tennessee. In New York, both the high court and intermediate appellate courts are appointive, but the intermediate appellate judges are appointed from the trial bench and

First, in 2001, I wrote that despite all-out efforts since 1906 to change from roughly eighty-six percent of state judges facing contestable elections, we shifted about one percent per decade on trial judges and about three to four percent per decade on appellate judges.⁵¹ Second, given how up-hill (to understate it) are efforts to end contestable judicial elections, that naturally attractive goal must not be allowed to distract from work on feasible steps.

For those two reasons, the most feasible reform steps are ones like (i) relying on the Canons; (ii) having appropriate limits on campaign contribution amounts (as almost all states have although lacking coverage of aggregate contributions)⁵² and on disclosure (as almost all states have although lacking coverage of “independent” spending); (iii) improving recusal when campaign-related connections loom large,⁵³ and

when their terms are up, must run for re-election. See ABA TASK FORCE, *supra* note 33, at app. 2. I am among the people who believe that trial judges run greater risk of voter retaliation for unpopular decisions than do appellate judges.

In Nevada in 2007, the legislature took the first step to switch from the state's current nonpartisan elective system to a retention system for all judges. If the next legislative session approves, the change will go before the electorate in 2010. See AJS website noted above. (Without implying any prediction, note that (a) Nevada voters have twice rejected such a change, and (b) in recent years, voters in three other states have rejected, by large margins, ending contestable elections. See Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO.L.J. 1077, 1081-82 (2007).)

But in Tennessee, their “merit” plan for appellate judges (which had been adopted by statute) “sunsetting”, effective in early 2009. In Spring 2008, the legislature failed to extend it and so, unless the legislature acts in 2009, Tennessee will become the first jurisdiction ever to move back to contestable elections. Richard Locker, *Judicial selection system backed—Chief Justice Holder against general elections*, MEMPHIS COMMERCIAL APPEAL, Sep. 4, 2008, at B6.

51. “In 2005, a conference of thirty-eight states’ chief justices, justices, judges, and others, sent to the CCJ a Call To Action that included this: ‘The fact—which becomes constantly clearer and more widespread—is that whatever may be the view of a state’s courts and lawyers, “Don’t let them take away your vote” (to use the phrasing of ads in more than one state) has been an insuperable hurdle.’” Schotland, *supra* note 50, at 1090.

For almost a century—starting in 1906 with a landmark speech to the ABA by Roscoe Pound—the Bar, and so much more than the Bar, has given enormous energy to getting rid of competitive elections. Back in 1900, roughly 14% of our judges did not face competitive elections. Today, after that century of major effort, we boosted that 14% to 23% of our trial judges of general jurisdiction and 47% of our appellate judges. That’s a shift of 1% per decade for the trial judges, and 3-4% per decade for appellate judges. At that rate we’ll end contestable elections for trial judges in only another 770 years, and for appellate judges in only another 160 years.

Roy A. Schotland, *Introduction: Personal Views*, 34 LOY. L.A. L. REV. 1361, 1366-67 (2001) (introducing Call to Action and papers from National Summit on Improving Judicial Selection) (citations omitted). Updating the data to 2004, we find little change other than a slight increase in the proportions facing contestable elections, because of the reorganization of courts in California and Oregon. See Schotland, *supra* note 50, at 1092.

52. See Roy A. Schotland, *Proposed Legislation on Judicial Election Campaign Finance*, 64 OHIO ST. L.J. 127, 128-30 (2003).

53. Deborah Goldberg, James Sample, & David E. Pozen, *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L.J. 503, 528-30 (2007); Thomas R. Phillips & Karlene Dunn Poll, *Free Speech for Judges and Fair Appeals for Litigants: Judicial Recusal in a Post-White World*, 55 DRAKE L. REV. 691, 710-11 (2007).

(iv) implementing unofficial steps like having campaign conduct committees and “educating” judicial candidates.⁵⁴

As for the strengths and weaknesses of this particular Canon:

(a) Having a committee do the soliciting does not assure that the judge or candidate is unaware of who is solicited and who contributed.⁵⁵ We should go further, as the Minnesota Canon does almost uniquely,⁵⁶ to explicitly prohibit the committee from disclosing to the candidate the names of who did or did not contribute. But even such a provision is porous. As a “distinguished Arkansas intermediate appellate judge” said:

I go out of my way to know nothing about the contributors. I never look at the information in the official filings, I never talk with my campaign committee about who gives what, I don't have fundraisers, I really do all I can. But there I am at a bar association dinner or some event, and lawyers come up to me and in the middle of something else, eagerly tell me that they gave so-and-so to my last campaign. What more can I do?⁵⁷

It would be cynical to believe that many judges, perhaps even most, aren't trying as hard as they can to avoid all involvement in fundraising and all information about their contributions. But it would be naïve to believe that it doesn't happen, even with some fine judges and to an extent that is troublesome—and the public surely is suspicious.⁵⁸

(b) What of the Canon's impact on the Incumbent-versus-Challenger picture? Here, another distinction from *White*, as *Simes* noted: “Implicit in the . . . opinions in *White* is that Minnesota's an-

54. David B. Rottman, *Conduct and Its Oversight in Judicial Elections: Can Friendly Persuasion Outperform the Power to Regulate?*, 21 GEO. J. LEGAL ETHICS 1295, 310-12 (2008).

55. A nationally respected trial judge (Judge Kevin Burke, formerly Chief Judge, Hennepin County, Minnesota) sent me this comment:

Almost every candidate for judicial office runs the ad which lists the lawyers supporting him or her. What does the public think? That judges don't look at their own ads? Or that they don't look at the list of supporters of an opponent? Can I ask you to be on my steering committee? Yes in every state. Can I ask the steering committee to go raise money for me? Yes in every state. Should contributions be publicly disclosed? Yes! Available on line so the public can see easily where the money came from? Yes for all branches of government!!! Why then does anyone think the public is not at least going to be suspicious that a judge might not go on line and find out who helped.

56. Colorado and Utah (both with only retention elections) have similar provisions. ABA TASK FORCE, *supra* note 33, at 40 n.73.

57. *Id.*

58. A Mississippi judge reported a telling example:

In January 1997, at one of the [Mississippi] House of Representatives' committee meetings, a judge was asked whether or not having a big contributor bring a case before the judge would give the judge cause to question the judge's own impartiality. When the judge explained that under the Code of Judicial Conduct the judge would not know who was a big contributor, there was disbelief on the part of the legislative committee members that anyone would be naïve enough to follow those rules The problem seems to be one of credibility or accountability

Id.

nounce clause, partisan-activities clause, and solicitation clauses were pro-incumbent. . . . [This] Canon . . . does not have a pro-incumbent character”⁵⁹ Limiting candidates’ “requests” obviously has more impact on incumbents, whose “requests” carry more weight. As a Pennsylvania lawyer said in explaining his contribution to a local judge (to whom many local lawyers contributed “although they doubted [his] qualifications”): “What could I say? He was a sitting judge.”⁶⁰

CONCLUSION

A Chief Justices’ 2001 Symposium on Judicial Campaign Conduct and the First Amendment adopted four principles (and also recommendations), starting with “Judicial elections are different from other elections . . .” and ending with this:

Principle 4: Efforts to ensure that judicial campaigns remain different depend ultimately on the success of steps to assure candidate professionalism and to strengthen the norms and culture that enable judicial elections to fulfill their proper role in the balance of electoral accountability and judicial independence.

The Canons, campaign conduct oversight committees, education of candidates and of the press, etc. all draw upon the deepest traditions of the role of the courts and of the bar. Political campaigning places most judicial candidates in unfamiliar situations, and involves challenging time pressures and incentives. The goal is to strengthen the norms and the culture of judicial campaigns so as to protect the ability of state courts to meet their responsibilities in our federal system and under the rule of law.⁶¹

Judicial elections exist to assure accountability in our pluralist democracy by putting choices to the voters. No one can be surprised that democracy is not problem-free. Nor is it any surprise that among the best answers to such problems are more active pluralism and more informed democracy. We must continue pursuing all feasible steps to assure that judicial elections bring an appropriate balance between judicial accountability and judicial independence.

59. *Simes v. Ark. Judicial Discipline & Disability Comm’n*, 247 S.W.3d at 883 (citing *White II*, 416 F.3d 738 (8th Cir. 2005)).

60. Roy A. Schotland, *Elective Judges’ Campaign Financing: Are State Judges’ Robes the Emperor’s Clothes of American Democracy?*, 2 J.L. & POL. 57, 63 (1985) (citation omitted).

61. *The Way Forward: Lessons from the National Symposium on Judicial Campaign Conduct and the First Amendment*, 35 IND. L. REV. 649, 652-53 (2002).