

STILL ON THE BACKBURNER: REFORMING THE JUDICIAL SELECTION PROCESS IN ALABAMA

Think of all that has happened here, on this earth. All the blood hot and strong for living, pleasuring, that has soaked back into it. For grieving and suffering too, of course, but still getting something out of it for all that, getting a lot out of it, because after all you dont have to continue to bear what you believe is suffering; you can always choose to stop that, put an end to that.¹

INTRODUCTION

In 1973 Chief Justice Howell Heflin told the Second Citizens' Conference that their proposal of changing the method of judicial selection from partisan elections to merit selection would have to "be placed on the back burner for awhile."² Chief Justice Heflin was concerned about the political viability of reforming the selection process and the reform's effects on the success of the comprehensive revision of the Alabama judicial system.³ As he did with the Constitutional Revision Commission created by Governor Albert Brewer in 1969,⁴ Chief Justice Heflin correctly gauged the political sentiment and sacrificed certain reforms for the most essential reform—rewriting the judicial article and bringing the Alabama judiciary into the twentieth century.⁵

Omitting the merit provision from the 1970 reform package was a brilliant tactical move. The revised article VI passed the legislature and was ratified with 62% of the electorate's support.⁶ Alabama has reaped many benefits from the reform. In fact, the reform of the 1970s turned the Alabama court system into one of the nation's best.⁷ Before 1971, the disjointed structure of the court system and the supreme court's lack

1. William Faulkner, *The Old People*, in *GO DOWN MOSES* 186 (1940).

2. Robert A. Martin, *Alabama's Courts—Six Years of Change*, 38 ALA. LAW. 8, 16 (Jan. 1977).

3. Tony A. Freyer & Paul M. Pruitt, Jr., *Reaction and Reform: Transforming the Judiciary Under Alabama's Constitution, 1901-1975*, 52 ALA. L. REV. (forthcoming 2001).

4. Charles D. Cole, *Judicial Reform in Alabama: A Reflection*, 60 ALA. LAW. 185, 188 (May 1999).

5. Freyer & Pruitt, *supra* note 3.

6. *Id.*

7. Robert A. Martin, *It Was About Power and Judicial Independence*, 60 ALA. LAW. 196, 199 (May 1999).

of authority over procedural and administrative matters often thwarted the ordered administration of justice,⁸ however, as a result of the 1971-75 reforms, the supreme court rewrote the rules of procedure, made pivotal administrative changes, and effectively controlled its caseloads as well as those of the lower courts.⁹ As Chief Justice Heflin wrote, the new judicial article "laid to rest a system that served well in the 18th and 19th centuries, but which was strained by the economic, political and social conditions of the 20th century."¹⁰ Much of the success of our current system is attributable both to the bench and bar's efforts from 1950 to the 1970s to reform our judicial system and to the perennial quality of our bench.

Yet Chief Justice Heflin did not dismiss further reform, including addressing problems associated with selection of judges. Those such as Charles Cole who worked closely with Heflin during the 1970s and were equally as instrumental in the success of the reform have recently argued for further reform, as has Justice Hugh Maddox.¹¹ After all, reflecting on the 1975 reform, Chief Justice Heflin "warned that the judicial process must have continuing improvement."¹² Ironically, the current problem of the Alabama judicial system, the high-cost, high-intensity judicial campaigns, originates in the success of the 1970s reform. And while current reform should include changing the method of selection and implementing campaign finance reform, thus taking a different shape than that envisioned by the reformers of the 1970s, the goal of today's reform is directly analogous to the goal of the 1970s reform—increased judicial independence.¹³

Using the successful 1970s reform as a paradigm, this Comment analyzes the potential of contemporary reform. First, this Comment identifies factors consequential to the success of the 1970s reform. Then, it examines today's reform movement in light of these factors. After discussing the merits of two election reform alternatives—regulating privately funded elections and implementing publicly funded elections—the Comment evaluates the likelihood of contemporary reform. It concludes with the observation that while reform will probably continue to stay on the backburner in the near future, factors are present that presage successful reform.

8. Freyer & Pruitt, *supra* note 3.

9. *Id.* See generally Ned Mitchell, *The Judicial Article Implementation Act—An Overview*, 38 ALA. LAW. 31 (Jan. 1977).

10. *Morgan County Comm'n v. Powell*, 293 So. 2d 830, 854 (Ala. 1974) (Heflin, C.J., dissenting).

11. Cole, *supra* note 4, at 195 (stating that changing the method of selection is the "most important of the suggested reforms"); Justice Hugh Maddox, *Reflections on the 25th Anniversary of the Judicial Article*, 60 ALA. LAW. 182, 184 (May 1999) (stating that changing the method of selection is an "area that I believe merits future consideration").

12. Martin, *supra* note 2, at 20.

13. Martin, *supra* note 7, at 196.

I. THE FRAMEWORK OF REFORM

Robert Martin, who was integral to the success of the 1970s reform, explains that the reform "was about the independence and power of the judicial branch of state government."¹⁴ The reformers of the 1970s primarily sought independence of the judiciary from the legislative branch of government.¹⁵ The legislature had final authority to make rules for the judiciary; the supreme court had only ambiguous rule-making authority. The legislature, however, did not exercise its authority, although it was active in creating new courts of limited jurisdiction. Consequentially, the Alabama court system was in disarray.¹⁶ In addition, the supreme court did not have the administrative apparatus to manage the disjointed court system. As Professor Cole relates, Governor Emmet O'Neal in 1915 observed that the Alabama judicial system was a "patchwork" of different courts of limited jurisdiction with no administrative head.¹⁷ As a result, the Alabama judiciary was not capable of fulfilling its constitutional role as an independent branch of government.¹⁸ By 1970, the path toward judicial independence was clear: unify the judicial system, transfer to the supreme court administrative and procedural rule-making authority, and abolish antiquated offices of the Justice of the Peace.¹⁹

Yet the reformers had significant political obstacles to overcome, demonstrated by the failed procedural reform movement of 1955-57, as well as the persistence of the "patchwork" problem for over fifty years.²⁰ Moreover, the supreme court, then as now, was not interested in altering the political landscape, demonstrated by its inactivity in the wake of the failed 1957 reform.²¹ Nevertheless, reform was successful in 1973.

Professors Tony Freyer and Paul Pruitt have identified several factors which ultimately combined for success in the 1970s. They argue that two preconditions of reform were the changes in the social and economic environment experienced by Alabama in the 1950-70s.²² According to Freyer and Pruitt, in the 1950-60s, Alabama became a predominantly urban state with an increasingly national economy.²³ The localized, disjointed judicial system was detrimental to the interests of this economy and urban population, both of which placed new pressures on the market for legal services. In addition, the composition of the bar also changed, almost doubling in size from 1950-1980.²⁴ The reformers

14. *Id.*

15. Freyer & Pruitt, *supra* note 3.

16. *Id.* See also Martin, *supra* note 7, at 196-97; Cole, *supra* note 4, 186-88.

17. Cole, *supra* note 4, at 187.

18. Martin, *supra* note 2, at 9.

19. Freyer & Pruitt, *supra* note 3; Cole, *supra* note 4, at 189-91.

20. Freyer & Pruitt, *supra* note 3.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

therefore initially had success with the younger, less entrenched element of both the bar and the business community by pointing out the problems of the current system and focusing on the benefits of reform.

Chief Justice Heflin and his staff, including Robert Martin, were a constitutive factor in the success.²⁵ Their coordinated effort was essential in overcoming the status quo. Through organization and resources available to them through the Chief Justice and national organizations, the reformers, building on the momentum of the 1950s, were able to consolidate support within the legal profession before approaching the legislature with their proposals, which were thoughtfully framed.²⁶ They ingeniously approached the reform in parts, first acquiring from the legislature the authority to promulgate rules for the judicial institution, then passing the revised article VI, which required popular referendum.²⁷ Thus, in 1971, before the revised article had been passed, the supreme court convinced the legislature to give up its rule-making power. By 1973 the court had enacted the Alabama Rules of Civil Procedure, something the legislature could not do in 1957.²⁸ Finally, in their effort to revise article VI, the reformers targeted the electorate, blitzing the public with a media campaign.²⁹

Freyer and Pruitt identify another factor that played a significant role—the “federal element.”³⁰ In analyzing state law, the eminent legal historian James Willard Hurst emphasized the impact of federalism, both as a mechanism of diffusing power among states but also between national and state governments.³¹ As Professor Harry Scheiber relates, Hurst observed “that federalism often worked against rationality in destructive or at least mindless ways.”³² Federalism has a tendency to create pressures for states to accept minimum standards, creating a competitive race to the bottom.³³ Of course, federalism can also create pressures for states to impose high standards, as the successful reform of the 1970s illustrates. The Alabama judicial system by the 1970s was impugned nationally; in addition, judicial reform was occurring nationwide. Thus, federalism worked both to motivate the reform and to create

25. Martin, *supra* note 2, at 8; Cole, *supra* note 4, at 186; Freyer & Pruitt, *supra* note 3.

26. Freyer & Pruitt, *supra* note 3.

27. *Id.*; Martin, *supra* note 2, at 14.

28. Freyer & Pruitt, *supra* note 3.

29. Martin, *supra* note 2, at 17-18.

30. Freyer & Pruitt, *supra* note 3. See also Harry N. Scheiber, *Federalism and the Process of Governance in Hurst's Legal History*, 18 L. & HIST. REV. 205, 209 (2000).

31. *Id.*

32. Scheiber, *supra* note 30, at 211. In this respect, federalism is viewed in relation to Professor Hurst's theory of drift and default, “the element of irresponsibility and/or shortsightedness and/or mindlessness that Hurst made a main theme in his generalized model of nineteenth-century legal process.” *Id.* Essentially, the concept of drift and default depicts law, not as a “conceptually complete pattern of human interests,” JAMES WILLARD HURST, *LAW AND SOCIAL ORDER IN THE UNITED STATES* 24 (1977), but as a result of institutional inertia and parochialism.

33. The quickie divorce episode in Alabama during the 1950s illustrates this aspect of federalism.

an infrastructure for the Alabama reformers to incorporate in their reform effort.

Federalism impacts state policy in another aspect, as the failed reform of the 1950s illustrates; that is, federal policy influences state policy and often in "mindless ways." For example, one of the primary arguments against procedural reform was its perceived affiliation with federal intervention, which was manifesting itself in the 1950s in the federal judiciary and civil rights laws.³⁴ Ironically, Chief Justice Heflin and the reformers in the 1970s succeeded because federal intervention had occurred to such a degree by federal courts under civil rights laws that it was obvious that the new judicial article clearly did not involve federal intervention.

The success of contemporary reform will similarly depend on the confluence of certain factors. And an analysis of the present context suggests that though judicial reform is currently still on the backburner, it has begun to simmer. For like the 1970s, a change in the economy and society emphasizes the problems of our current system. Alabamians, as well as Americans as a whole, are a litigious society. Certain Alabama jury pools have traditionally been very receptive to claims against businesses. Accompanied by sizeable verdicts, increased litigation has fueled in part the intensity of judicial races.

Accordingly, the high-cost, high-intensity campaigns have recently engendered from the bench and bar criticism of our present system of selection. In 1995 a Third Citizens' Conference, called by the bar in coordination with the Alabama Judicial Planning Commission appointed by Chief Justice Hornsby in 1992, recommended changing the method of selection to nonpartisan elections, as well as revising the Judicial Canons to include, among other provisions, contribution amount limitations on judicial candidates.³⁵ Recently, many distinguished jurists and lawyers in the state have argued in favor of changing the method of selection, noting the increased costs of campaigns, the impropriety associated with large contributions to judicial candidates, and the influence of political parties in judicial elections.³⁶ On the other hand, others argue for a system of campaign finance limitations as the reform most directly addressing the problems of our current system.³⁷ The proponents of both reforms share a common goal—increasing judicial independence from

34. Freyer & Pruitt, *supra* note 3.

35. Report of the Third Citizens' Conference on Alabama State Courts (1995) (on file with the Alabama State Bar).

36. See, e.g., Wade Baxley, *Merit Selection of Judges—A Concept Whose Time Has Come*, 60 ALA. LAW. 366 (Nov. 1999); Warren B. Lightfoot, *Non-Partisan Judicial Elections*, 58 ALA. LAW. 70 (Mar. 1997) [hereinafter Lightfoot, *Non-Partisan Judicial Elections*]; Warren B. Lightfoot, *Accentuate the Positive*, 57 ALA. LAW. 326 (Nov. 1996) [hereinafter Lightfoot, *Accentuate the Positive*]; Justice Maddox, *supra* note 11.

37. Hon. Pamela Willis Baschab, *Putting the Cash Cow Out to Pasture: A Call to Arms for Campaign Finance Reform in the Alabama Judiciary*, 30 CUMB. L. REV. 11, 28 (1999).

political parties and interest groups.

Yet, an analysis of problems identified by the bench and bar suggests that neither reform on its own sufficiently addresses all of the problems of judicial elections. Instead, to fully address the problems plaguing the Alabama judicial system, some combination of the two reforms is required, as recognized by the Third Citizens' Conference.

States use one of four methods for selecting their judiciary: appointment, partisan elections, nonpartisan elections, and merit selection. Appointment was the method chosen by the original colonies as well as every state that entered the union until the early nineteenth century.³⁸ Then, the Jacksonian juggernaut influenced many states to elect their judiciaries through democratic popular elections.³⁹ However, the "evil tendenc[y] of party politics"⁴⁰ soon manifested itself, and states switched to nonpartisan elections.⁴¹ But such elections did not remove all of the evils from judicial elections, so states began selecting judges through the merit system, with Missouri, in 1940, being the first state to adopt a merit, or commission, system.⁴² Since then, states have adopted the merit plan more frequently than any other system: fifteen states currently use the merit system,⁴³ with Rhode Island adopting the plan in

38. See Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1, 13 (1995).

39. Nathan S. Heffernan, *Judicial Responsibility, Judicial Independence and the Election of Judges*, 80 MARQ. L. REV. 1031, 1035-36 (1997). Alabama switched from appointments to partisan popular elections of supreme court justices in 1868. See ALA. CONST. art. VI. In 1850, by a constitutional amendment, Alabama began selecting its county and circuit court judges. See MALCOLM COOK MCMILLAN, *CONSTITUTIONAL DEVELOPMENT IN ALABAMA, 1789-1901: A STUDY IN POLITICS, THE NEGRO, AND SECTIONALISM* 64-67 (Fletcher M. Green et al. eds., The Reprint Co., Publishers 1978). Appellate judges were selected by the General Assembly until 1868. Alabama's 1865 constitution, its first attempt to rejoin the United States, left the method of selection unchanged. MCMILLAN, *supra*, at 103-105. However, when Congress refused to seat Alabama representatives elected under the 1865 Constitution, Alabama held another constitutional convention, the "Reconstruction convention," and among many changes to the 1868 Constitution was a change to an elected judiciary. *Id.* at 142. Many political leaders in Alabama opposed an elected judiciary. See *id.* at 200. But even with the 1875 constitutional convention, a convention that made wholesale changes to the 1868 Constitution, the provision for popularly electing the judiciary remained. *Id.* Though the majority at the 1875 convention desired to return to a judiciary elected by the General Assembly, in the end, the convention accepted the provision for popular election because the delegates feared that to provide otherwise would "defeat the new constitution when submitted to the people." *Id.*

40. THE HUNTSVILLE DEMOCRAT, July 11, 1849, *quoted in* MCMILLAN, *supra* note 39, at 64-65. The arguments contained in this quote anticipated many of Alabama's contemporary arguments:

It would bring judges, the mere creatures of the popular will, directly in contact with litigants. . . . Making the people the electors, he has, in every instance, his partisans or his opposers before him. To what extent his conduct would be influenced by such circumstances may be easily conjectured. . . . It would expose the judiciary to all evil tendencies of party politics.

Id.

41. Samuel Latham Grimes, Comment, "*Without Favor, Denial, or Delay*": *Will North Carolina Finally Adopt the Merit Selection of Judges?*, 76 N.C. L. REV. 2266, 2273 (1998).

42. See Webster, *supra* note 38, at 30.

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

1994.⁴⁴

While each method has different degrees of political party involvement, each retains an element of popular accountability and will therefore be subject to high-cost, high-intensity campaigns. Either nonpartisan elections or merit selections would undoubtedly remedy some of the problems of direct political involvement in judicial elections. Nevertheless, though often overlooked and almost never discussed in tandem with changing the method of selection, campaign finance regulation of judicial candidates is a necessary component of effective reform. In fact, the change in the political and economic environment of the 1980s and 1990s, as well as the division within the bar occurring since the 1970s, suggests that effective reform requires campaign finance laws, not just changing the method of selection, as the Second Citizens' Conference recommended in 1973.⁴⁵

Before the 1970s reform movement and for most of the twentieth century, Alabama was essentially a one-party state,⁴⁶ with the majority of justices and judges initially appointed to their office.⁴⁷ The electorate, not spurred by a divided bar or interest groups, was generally satisfied to return judicial incumbents to office. In fact, Heflin's first being elected to the chief justiceship was aberrant; most chief justices were initially appointed by the governor.⁴⁸ Moreover, with antiquated procedural rules and restrictive administrative rules of the supreme court itself, the court did not have the institutional capabilities to allow it to respond to the changing milieu.⁴⁹ Policy was often sacrificed for expediency, with many cases decided on technicalities, not on the merits.⁵⁰ Thus, there was little interest in the supreme court as a policymaker. Consequently, interest groups were not concerned with judicial elections, further insulating the justices and campaigns from the travails of spirited political campaigning. In this context, campaign finance regulations had little relevance; reformers could, as they did, focus on the manner of selection.

Since the 1970s, however, the judicial landscape has changed. Alabama is now a "strong" two-party state.⁵¹ And the efficacy of Heflin's reforms in unifying the court system and centering administrative and procedural authority in the supreme court has enabled the court to modify doctrines according to the dictates of society and the economy.⁵²

74-75 (1997). The states include Alaska, Arizona, California, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, Oklahoma, South Dakota, Utah, and Wyoming. *Id.*

44. Mark Hansen, *A Run for the Bench*, 84 A.B.A. J., Oct. 1998, at 68, 70.

45. See Martin, *supra* note 2, at 16.

46. Baxley, *supra* note 36, at 366.

47. Freyer & Pruitt, *supra* note 3.

48. *Id.*

49. *Id.*

50. *Id.*

51. See Baxley, *supra* note 36, at 366.

52. Martin, *supra* note 2, at 20; Martin, *supra* note 7, at 199.

Now that the supreme court is institutionally capable of responding to change by modifying legal doctrines, compounded by the legislature's inability to pass tort reform legislation, supreme court races have garnered more interest.⁵³ The court's increased ability to respond to social and economic needs also has had an auxiliary effect on the legal institution: the bar is divided—with business interests and defense bar generally advocating tort reform while plaintiff's bar generally opposes such reform. The convergence of these changes has significantly affected the nature of judicial races.

Thus, the need for campaign finance reform in judicial elections contains a paradox; that is, the independence sought and won in the 1970s is now threatening the judiciary's independence in 2001. Just as Heflin and the reformers of the 1950-70s sought, the Alabama judiciary is an independent branch of state government: it is a policymaker. Yet, as a policymaker, it is in the public, or political, purview. The broader institutional changes, including the divided bar, interest group pressure, and interested political parties, make being in an elected judicial office tantamount to being involved in highly politicized, expensive campaigns.⁵⁴

The spending by judicial candidates has steadily, if not dramatically, increased over the last twenty years. In 1986, two supreme court races totaled \$237,281; in 1996, the total rose to \$2,080,000,⁵⁵ an increase of 776%.⁵⁶ In 1998, supreme court party candidates spent over \$7 million for three seats.⁵⁷ Not only has the cost increased but also the nature of the campaigns, evidenced dramatically in Alabama by the infamous "skunk" ads⁵⁸ and more recently by the mischaracterizations during the last campaign.⁵⁹ Political parties are also very involved in judicial races;

53. See Baschab, *supra* note 37, at 23-24; see also Baxley, *supra* note 36, at 367.

54. Of course, another factor is the rise in costs of advertising. See Levien & Fatka, *supra* note 43, at 75.

55. Hansen, *supra* note 44, at 70.

56. Baschab, *supra* note 37. Alabama is not alone in experiencing rising expenditures on judicial elections; other states electing their judges in partisan elections—as well as in nonpartisan and merit retention elections, as will be discussed—have similarly experienced increased costs. In Pennsylvania in 1987, two supreme court candidates spent \$523,000; in 1995, two candidates were forced to raise \$2.8 million. Additionally, in Texas during the election cycles of 1994-96, the seven supreme court justice candidates raised \$9.2 million for their races. Hansen, *supra* note 44, at 69-70.

57. Baschab, *supra* note 37.

58. George Lardner, Jr., *Speech Rights and Ethics Disputed in Judicial Races*, WASH. POST, Oct. 8, 2000, at A13. In the 1996 election, Justice Kenneth Ingram and his committee ran advertisements showing a skunk fading into a picture of now Justice Harold See. Accompanying the picture was a caption, "Some things you can smell a mile away." *Id.*

59. *Id.* In the Republican primary, Justice See, his campaign committee and strategist Karl Rove ran advertisements accusing now Chief Justice Moore of being soft on convicted drug dealers. The advertisements stated that Judge Moore "let convicted drug dealers off with reduced sentences or probation at least 40 times[.]" listing forty-one case numbers in the background. The Judicial Campaign Oversight Committee found the advertisements misleading, in violation of the Alabama Canons of Judicial Ethics. Justice See filed suit in federal court arguing that the canons as applied in this matter violated the First Amendment; Judge Ira DeMent issued a temporary

in the last election the Republican Party swept the judicial elections.⁶⁰

The changes in judicial races have costs measured in ways other than in spending for campaigns. The public's perception of the judiciary is affected.⁶¹ In recent articles, prominent Alabama lawyers have chronicled the public's reaction to judicial campaigns, noting that "members of the public perceive that the winning candidate will lean toward issues supported by a particular special interest group and decide cases in favor of the special interest group which financed that candidate's campaign."⁶²

In this aspect, Alabama is not alone. In 1993, as part of a review of the Ohio Code of Judicial Conduct ordered by the Ohio Supreme Court, an opinion poll, conducted by the University of Cincinnati's Institute for Policy Research, found that 58% of voters in Ohio believe that contributions influenced decision-making.⁶³ Ohio voters seem to be representative of voters generally.⁶⁴ Moreover, the electorate's association of contributions with favorable decisions is not completely unfounded. Judges have suggested that political contributions can influence decisions. In a recent poll, 48% of Texas judges admitted that contributions influenced judicial decisions.⁶⁵ As Justice Benjamin Cardozo eloquently stated, "The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by."⁶⁶

injunction, prohibiting the enforcement of the canon, holding that the First Amendment claim is likely to succeed on the merits. *Id.*

60. With an observation that is particularly apt today, Justice Pelham J. Merrill in his keynote address to the Citizens' Conference on Alabama State Courts in 1966 stated that party sweeps are a significant problem of partisan elections:

In strong two party states, fine Republican judges have been defeated in a Democratic sweep, and fine Democratic judges have been defeated in a Republican sweep.

. . . .

Whether they were good officers or judges was not the question. Their names just were not in the party column the voters preferred in that particular Republican sweep.

Justice Pelham J. Merrill, *The Facts About Alabama Courts and Judges Today*, 28 ALA. LAW. 139, 144 (Apr. 1967).

61. See Baschab, *supra* note 37.

62. Baxley, *supra* note 36, at 367; see also Lightfoot, *Accentuate the Positive*, *supra* note 36, at 326-27.

63. For a discussion of the opinion poll and the Ohio Supreme Court's implementation of expenditure and contribution limitations see *Suster v. Marshall*, 149 F.3d 523, 531 (6th Cir. 1998).

64. In addition to the Ohio poll, a North Dakota poll, where judges are elected in nonpartisan elections, found that 70% of those polled believe that judges' decisions are influenced by contributions. Dale Wetzel, *North Dakota Residents Support Courts, But with Reservations*, BISMARCK TRIB., Nov. 17, 1999, at 6C. A poll conducted on Louisiana voters, where their supreme court justices are elected on a nonpartisan basis, found that 56% of the voters believed judges were influenced by contributions. Michelle Millhollon, *Funds Can Sway Louisiana Judges*, ADVOCATE (Baton Rouge, La.), Jan. 10, 2000, at 1-A.

65. Peter A. Joy, *Insulation Needed for Elected Judges*, NAT'L L.J., Jan. 10, 2000, at A19. This study was one study in a series conducted on the Texas judiciary. The first study surveyed the public and found that the public held the judiciary in "generally high regard" while suspecting that contributions could influence decisions. Osler McCarthy, *Campaign Gifts Sway Judges*, AUSTIN-AM. STATESMAN, June 10, 1999, at B1.

66. BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 168 (1921).

Regardless of public perception, there is no real indication that contributions translate into favorable decisions.⁶⁷ Nevertheless, the public's perception of the judiciary is a significant problem. Judge Pamela Baschab phrased the problem well: not only must one ask whether there is an actual influence, but one must also ask whether the public believes there is an influence.⁶⁸ While the answer to the first question is unclear, the answer to the second is yes.⁶⁹

The changes occurring since the 1973 Citizens' Conference have altered the contours of effective judicial reform. Even though in 1973 changing the method of selection was sufficient to achieve reformist goals, namely increasing judicial independence, in 2001 it is an incomplete solution because many of the factors identified in politicizing judicial races will be present under any method of selection that retains an element of popular accountability.⁷⁰ Removing direct political party involvement with elections would certainly moderate campaigns, as would having only single candidate retention elections, yet the remaining interest groups, fomented by the supreme court's role as policymaker, would continue to politicize judicial races.

The experiences from other states demonstrate that changing the method of selection on its own will not remove the excessive costs of judicial campaigns. Nationwide, not only has spending in partisan judicial races increased exponentially, but also spending in nonpartisan and merit retention elections. For example, in Ohio in 1980 the nonpartisan race for chief justice cost \$100,000; in 1986, it cost \$2.7 million.⁷¹ The statistics from nonpartisan races in other states show similar increases. In Kentucky in 1978, the race for one supreme court seat cost \$52,000, while in 1996, the race for two seats cost \$412,362.⁷² Likewise, in Montana a race for one supreme court seat in 1984 cost \$63,647; in 1996, \$138,460.⁷³

Moreover, the merit system has not obviated the need for campaign finance reform in judicial elections; recent merit elections have experienced a similar increase in both campaign cost and intensity. In 1972 the Reporter of the committee revising the Model Code of Judicial Conduct ("MCJC") recognized that merit elections retained many of the same problems of other elections: "In theory the merit system election removes a judge from politics and from the rigors of the campaign trail,

67. See Richard Briffault, *Public Funding and Democratic Elections*, 148 U. PA. L. REV. 563, 579-83 (1999).

68. Baschab, *supra* note 37.

69. As Professor Briffault writes, the real problem is not whether contributions actually influence officials, but whether the American public believes that they do. For there is much evidence from academic studies of legislative voting patterns that contributions do not in fact influence voting patterns. See Briffault, *supra* note 67, at 581.

70. For an article that reaches a similar conclusion, see Levien & Fatka, *supra* note 43.

71. Hansen, *supra* note 44, at 69.

72. *Id.* at 70.

73. *Id.*

but in a significant number of instances the theory fails.”⁷⁴ The two most recent well-known campaigns, the 1986 retention election in California and the 1996 retention election in Tennessee, are well documented but not isolated occurrences. In 1986, in California’s retention elections, three of its supreme court justices were forced to raise \$4,100,000 while their opposition raised \$6,600,000.⁷⁵ Notably, their opposition was supported by the Republican Party, special interest groups, and business interests.⁷⁶ The largest supporters of the justices were members of the plaintiff’s bar, giving almost \$310,000 to the campaign, perhaps because they were pleased with some favorable tort decisions of the justices.⁷⁷ In Tennessee, Justice Penny White’s campaign for retention to the supreme court in 1996 also ended in defeat and high costs. The campaign against Justice White, led by the Tennessee Conservative Union and Republican governor,⁷⁸ was fueled by her vote in granting a new sentencing hearing to a convicted murderer.⁷⁹

Other retention elections have been fiercely contested as well. Just two weeks after the Tennessee retention elections, Nebraska Supreme Court Justice David Lanphier was defeated by opponents who raised over \$200,000.⁸⁰ The campaign against Justice Lanphier was fueled by the justice’s rejection of term limits for Nebraskan officials.⁸¹ And finally, in the 1998 retention elections for the California Supreme Court, two justices were opposed by a \$2 million campaign aimed at their decision in an abortion case.⁸² These costs parallel the cost of partisan elections in Alabama, causing some commentators, including Alabama Supreme Court Justice Harold See, to conclude that “the same problems of tone and large expenditures are present—perhaps in an even more pernicious form—in [the merit system].”⁸³

Accordingly, states with merit selection of judges continue to regulate campaign finances in retention elections. Missouri, the state with the most experience with retention elections, has detailed provisions in its Campaign Finance Disclosure Law that apply to judges running for retention. Missouri regulates incumbent judges,⁸⁴ their committees,⁸⁵ and

74. E. WAYNE THODE, REPORTER’S NOTES TO CODE OF JUDICIAL CONDUCT 100 (1973).

75. Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 S. CAL. L. REV. 2007, 2038 (1988).

76. Thompson, *supra* note 75, at 2036-38.

77. *Id.* at 2038.

78. Justice Robert L. Brown, *From Whence Cometh Our State Appellate Judges: Popular Election Versus the Missouri Plan*, 20 U. ARK. LITTLE ROCK L.J. 313, 321 (1998). Justice White was appointed by a Democratic governor. *Id.*

79. Hansen, *supra* note 44, at 70.

80. *Id.*

81. *Id.* The chief justice reportedly raised over \$1 million dollars for his campaign. *Id.*

82. *Id.* at 69-70.

83. Harold See, *Comment: Judicial Selection and Decisional Independence*, 61 L. & CONTEMP. PROBS. 141, 145 (1998).

84. MO. ANN. STAT. § 130.011(3) (West Supp. 2001) defines candidate as including “an individual standing for retention in an election to an office to which the individual was previously

groups that organize to oppose the judges' retention.⁸⁶ The regulations fall into two categories: they limit the source and the amount of the contribution and require reporting of the contribution and disclosure of expenditures. For example, committees and candidates are limited in the amount of cash contributions as well as in the number of anonymous contributions.⁸⁷ Committees are also limited in the amount of contributions that they can receive from any "person,"⁸⁸ which includes political parties, PACs, or other associations.⁸⁹ The limits vary depending on the office sought and the size of the electoral district, ranging from \$250 to \$1,000.⁹⁰

Missouri judges, furthermore, are subject to the requirements in the Code of Judicial Conduct promulgated by the Missouri Supreme Court. According to the Missouri Supreme Court, judges standing for retention elections cannot begin soliciting funds through their committees⁹¹ until their candidacy "has drawn active opposition."⁹² Therefore, in a retention election that is contested, incumbents would campaign as they would in standard elections between competing candidates. Judges as well as the groups opposing them would be governed by Campaign Finance Disclosure Laws. If retention were not contested, judges would not be permitted to receive contributions and, through an exemption in the Campaign Finance Disclosure Laws, would not have to make any filings pursuant to that statute.⁹³

Similarly, in Florida, where state supreme court judges are selected in a merit system,⁹⁴ the state legislature and supreme court regulate campaign finances of those judges. Unlike Missouri, the Florida Supreme Court allows incumbents in retention elections to "conduct . . . limited campaign activities" even before groups campaign against the

appointed[.]”

85. Candidate committees, defined in section 130.011(9), must be formed by candidates if those candidates receive contributions from sources outside their family.

86. Groups in opposition to judges in retention elections, if they accept contributions, must form a committee. MO. ANN. STAT. § 130.011(7) (West Supp. 2001). If the committee is formed for the purpose of opposing the retention, the committee is a campaign committee. *Id.* § 130.011(8). If the committee is or has been formed for other purposes but still opposes the retention, the committee is a continuing committee. *Id.* § 130.011(10). Both types of committees are subject to the Campaign Finance Disclosure Laws. *Id.* § 130.011(8), (10).

87. *Id.* § 130.031.

88. "Person" is defined broadly in section 130.011(22) to include "an individual, . . . corporation, . . . committee, . . . professional or business association, . . . political party[.]"

89. Of course, limiting the contributions of political parties to candidates does not address the problem of soft money. *See supra* note 56 and accompanying text.

90. MO. ANN. STAT. § 130.032.1(1-6) (West 1997). These limits were upheld by the United States Supreme Court in *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000).

91. Judges in Missouri, like Alabama, are prohibited from personally soliciting contributions. MO. SUP. CT. R. 2.03, Canon 5B(2) (2001).

92. *Id.* Canon 5B(3).

93. MO. ANN. STAT. § 130.016.6 (West 1997) (exempting judicial candidates from filing and disclosing where aggregate contributions and expenditures do not exceed \$1000 and no single contributor contributed over \$250).

94. FLA. CONST. art. V, §§ 10-11.

justices.⁹⁵ When the justices face “active opposition,” however, they can campaign to the extent of the canons and the Florida campaign financing laws,⁹⁶ which apply to judges facing retention elections.⁹⁷ The campaign financing laws, like the Missouri laws, regulate contributions (limiting contributions from individuals and PACs to \$500),⁹⁸ regulate independent expenditures (requiring disclosure and reporting of any independent expenditures over \$100),⁹⁹ and mandate disclosure of contributions and expenditures.¹⁰⁰

That is not to say that changing the method of selection would not be effective in remedying the current ills. It would. But changing the method of selection, while a necessary reform, is alone not a sufficient one. Campaign finance reform, either retaining privately-funded elections and imposing contribution regulations or implementing publicly-funded elections, is also needed. Although regulation through contribution limitations addresses the problems of the current system in Alabama, the implementation of publicly-funded elections is a more comprehensive solution, though it has not been discussed in Alabama. Still, both reforms encounter similar political obstacles and require similar reform efforts to overcome the status quo.

II. CAMPAIGN FINANCE REFORM

A. Contribution limitations

The most prevalent method of regulating campaign finances is by limiting contributions and requiring their disclosure. Thirty-nine states impose contribution limits; conversely, Alabama is one of only eleven states that have no contribution amount limits.¹⁰¹ And while contribution and reporting regulations cannot remedy all of the problems of high-cost, high-intensity elections, they do directly address a significant problem of Alabama’s judicial campaigns—the appearance of impropriety resulting from large contributions by those very groups that appear before the judges.

An interesting aspect of reforming judicial campaign finances through contribution limitations is the reform’s relation to the 1970s

95. FLA. STAT. CODE OF JUDICIAL CONDUCT, Canon 7C(2) (1998).

96. *Id.* Canon 7C(2).

97. FLA. STAT. ch. 105 § 105.08(1) (1992 & Supp. 2000) (stating that “candidate[s] for judicial office. . . may accept contributions and may incur only such expenses as are authorized by law.”).

98. *Id.* § 106.08.

99. *Id.* § 106.071.

100. *Id.* § 106.07.

101. The states with no campaign finance contribution amount limitations are Alabama, California, Idaho, Indiana, Iowa, Mississippi, New Mexico, North Dakota, Pennsylvania, Utah, and Virginia.

reform in both origin and potential solution. The need for contribution limitations arises because of the politicization of judicial races; this politicization is a product of the institutional independence of the supreme court, which was attained in large part by the 1970s reformers. Similarly, the solution, imposing contribution limitations, is also rooted in the 1970s reform, since the supreme court has the authority, inherited from the 1970s reform and the revised article VI, to impose contribution amount limitations on judicial candidates.¹⁰² In this respect, the imposition of contribution limitations is directly analogous to one of the goals attained in the 1970s—vesting in the supreme court the authority to make rules for the judiciary.¹⁰³

And in the face of legislative inertia, the supreme court's using its rule-making authority to impose contribution limitations on judicial candidates is appealing. In fact, precisely because rule making in the legislature was so politicized, resulting in few innovations for judicial procedure and administration, the reformers of the 1970s wanted that authority located in the supreme court, which could respond more flexibly and swiftly to the needs of the judiciary.¹⁰⁴ For example, while the legislature was unable to enact the Alabama Rules of Civil Procedure ("ARCP") in 1957, the supreme court, once given the authority, acted quickly, enacting the ARCP by 1973;¹⁰⁵ in other words, what the legislature could not accomplish because of politicization, the court could because of its isolation from legislative politics. For analogous reasons, the revised Article VI expressly gives the supreme court the authority to promulgate a canon of ethics.¹⁰⁶

The court has acted pursuant to its authority to regulate judicial campaigns. In 1997, the court revised the canons to respond to problems in judicial campaigns, notably the 1994 and 1996 campaigns.¹⁰⁷ The Third Citizens' Conference made recommendations for revising the Code of Judicial Conduct in 1995, and two years later the supreme court incorporated several of the recommendations. For example, the revised canon 7 now prohibits judicial candidates from personally soliciting contributions¹⁰⁸ and from making promises during a campaign for anything other than the "faithful and impartial performance of the duties of the office."¹⁰⁹ Moreover, candidates are held vicariously liable for actions of their campaign committees.¹¹⁰ Finally, candidates are limited in

102. See *supra* text accompanying notes 25-29.

103. See Martin, *supra* note 7, at 199.

104. See Martin, *supra* note 2, at 20.

105. See Freyer & Pruitt, *supra* note 3.

106. ALA. CONST. art. VI, § 6.08(c).

107. See Glenn C. Noe, Comment, *Alabama Judicial Selection Reform: A Skunk in Tort Hell*, 28 CUMB. L. REV. 215 (1998), for an extended discussion on the court's revision of the Code of Judicial Conduct in 1997.

108. ALA. CANONS OF JUDICIAL ETHICS, Canon 7B(4)(a) (Supp. 2000).

109. *Id.* Canon 7B(1)(c).

110. *Id.* Canon 7B(3).

the time period in which they can accept contributions.¹¹¹ While the revised canon 7 certainly ameliorates some of the problems occurring in the 1994 and 1996 elections, it does not address the most pressing problem—limiting large contributions and removing the appearance of impropriety. Under the revised canon 7, judicial candidates can still receive large contributions and will learn of the source of the contributions since the disclosure provisions of the Fair Campaign Practices Act¹¹² are applicable to judicial candidates.¹¹³ Therefore, the same problems of impropriety resulting from large contributions still exist. And the recusal statute¹¹⁴ leads only to a cul-de-sac, not the remedy for perceived impropriety.

The ineffectiveness of the current regulatory scheme was recently illustrated in the Senator Lowell Barron case. Senator Barron's \$15.2 million dollar verdict against Alfa presented a potentially embarrassing situation for the justices of the supreme court. All of the justices knew that their campaigns had received contributions ranging between \$200 and \$15,000 from at least one of the parties involved in the case. Notwithstanding the possibility of recusal, Justice Gorman Houston stated, "There is a terrible appearance of conflict."¹¹⁵ The justices responded by proposing reform, advocating either changing the method of selection or imposing campaign finance regulations on judicial candidates.¹¹⁶ However, changing the method of selection alone does not directly address the Barron situation; under every method, campaigns have the potential to be high-cost races, requiring large contributions.

Instead, imposing amount limits for contributions would directly address the Barron situation—the appearance of impropriety associated with large contributions. A supreme court's imposing amount limitations would not be unusual, and is indeed constitutional. In fact, the Ohio Supreme Court in 1995 acted pursuant to its authority to regulate the judiciary and revised the Ohio Code of Judicial Conduct, imposing contribution and expenditure limitations on its judicial candidates.¹¹⁷ Ohio's revised canon 7 is a detailed regulation of judicial campaign finances, limiting contributions by two methods: first, by distinguishing the source of the contribution, then by limiting the amount of the contribution.

Ohio's canon 7C(2) prohibits candidates and their committees from accepting contributions from one of several sources, including employ-

111. *Id.* Canon 7B(4)(b).

112. ALA. CODE §§ 17-22A-1 to 23 (1995 & Supp. 2000).

113. ALA. CODE § 17-22A-8 (1995).

114. ALA. CODE §§ 12-24-1, 2 (Supp. 2000) The recusal statute has never been enforced since the state has yet to get approval from the Department of Justice as required by the Voting Rights Act of 1965.

115. Michael Sznajderman, *Alfa Case May Bring Contribution Conflicts with Court*, BIRMINGHAM NEWS, Mar. 3, 2000, at 1A.

116. *Id.* at 8A. Of course, intuitively when one party does not contribute and one does, there is more of a "terrible appearance of conflict."

117. OHIO REV. CODE ANN. CODE JUD. CONDUCT Canons (West 2000).

ees of the court. Then, canon 7C(5)(a) places an aggregate limit on contributions with the limits depending on the source of the contributions and the level of the court of the candidate. For example, the limit for an individual's contributions to a supreme court justice is \$2000; to a court of appeals judge, \$500; and to a trial level judge, \$250.¹¹⁸ The maximum any organization, which includes PACs,¹¹⁹ can contribute is \$5000 to a supreme court candidate and \$2500 to any other candidate.¹²⁰ The contributions by political parties are similarly limited.¹²¹ Finally, the court imposed expenditure limitations on all judicial candidates.¹²²

In *Suster v. Marshall*,¹²³ a federal district court upheld the Ohio Supreme Court's revision of canon 7, yet struck down the expenditure limitations as violative of the First Amendment.¹²⁴ Holding that the Ohio Supreme Court did not act ultra vires of its authority, the court rejected the plaintiffs' claims that the supreme court contravened the legislature's authority to regulate elections and set qualifications for judges. "Rather," the court concluded, "Canon VII may be viewed as an application of the Court's 'inherent power and duty to maintain the honor and dignity' of the state's judiciary."¹²⁵

Other state supreme courts have imposed amount contribution limitations as well. For instance, the Michigan Supreme Court prohibits judicial candidates' committees from "soliciting campaign contributions from lawyers in excess of \$100 per lawyer."¹²⁶ In addition, the 2000 Model Code of Judicial Conduct ("MCJC") now provides for campaign finance regulations for judicial candidates, after determining, as it did in 1972, that "[t]he old canons [still] do not come to grips with this critical issue."¹²⁷ After cautiously approaching the issue in the 1972 and 1990

118. *Id.* Canon 7C(5)(a)(i).

119. *Id.* Canon 7A(7) (defining organization to mean political action committee).

120. *Id.* Canon 7C(5)(a)(ii). Also, in canon 7C(5)(c)(i), the Ohio Supreme Court attempts to remedy the problem of the same organization funding multiple PACs in order to avoid the contribution limitations. The canon states that PACs that are "established, financed, maintained, or controlled by the same corporation, . . . association, . . . or other entity, . . . shall be considered to have been received from a single [PAC]." Canon 7C(9) provides for contribution reporting and expenditure disclosure requirements, thus helping enforce the contribution limitations.

121. *Id.* Canon 7C(5)(a)(iii). Of course, this limitation does not address the problem of soft money, which by definition is money not subject to expenditure regulations. Still, as the McCain-Feingold Bill suggests, soft money can be regulated on the contribution end.

122. *Id.* Canon 7C(6). The limits varied depending on the level of the court and the size of the electoral district.

123. 121 F. Supp. 2d 1141 (N.D. Ohio 2000).

124. The plaintiffs argued that the expenditure limitations violated the First Amendment as interpreted in *Buckley*. The court agreed with the plaintiffs that the expenditure limitations were unconstitutional. *Suster*, 121 F. Supp. 2d at 1152-53. Before *Suster*, many commentators believed that expenditure limits in judicial campaigns might be constitutional. See, e.g., Erwin Chemerinsky, *Preserving an Independent Judiciary: The Need for Contribution and Expenditure Limits in Judicial Elections*, 74 CHI.-KENT L. REV. 133, 143 (1998); Levien & Fatka, *supra* note 43, at 73.

125. *Suster*, 121 F. Supp. 2d at 1152 (internal quotations omitted).

126. MODEL CODE OF JUDICIAL CONDUCT, Canon 7B(2)(c) (1972).

127. THODE, *supra* note 74, at 98.

MCJC,¹²⁸ the 2000 MCJC adds two new provisions to canon 5C, now providing that candidates limit and report contributions as determined by each jurisdiction.¹²⁹

Likewise, the Alabama Supreme Court has the constitutional authority to impose amount limitations on contributions to judicial candidates. The revised article VI explicitly gives the supreme court the authority to make canons of ethics: "The supreme court shall adopt rules of conduct and canons of ethics . . . for the judges of all courts of this State."¹³⁰ The court's authority is not unfettered, however: it cannot make rules that contravene other provisions of the constitution,¹³¹ including the legislature's right to administer elections¹³² and to set qualifications for judges,¹³³ and it must comply with the federal constitution and laws.¹³⁴

The provisions of the Alabama constitution most likely implicated are the provisions giving the legislature authority to set qualifications for judges and administer elections, which in turn implicates the separation of powers provision.¹³⁵ But, as the cases from other states demonstrate¹³⁶ and the jurisprudence from Alabama suggests, the power to

128. The 1972 Code did not limit the amount of contributions a candidate could accept, although it did prohibit retention candidates from soliciting funds until opposed. The 1990 Code imposed a reasonableness requirement on the amount of the contribution that candidates or their committees could accept. Canon 7 of the MCJC "has seen perhaps more change than any other, due to the continuing evolution of the judicial selection process." LISA L. MILORD, *THE DEVELOPMENT OF THE ABA JUDICIAL CODE* 44 (1992).

129. Canon 5(C) now reads:

(3) A candidate shall instruct his or her campaign committee(s) at the start of the campaign not to accept campaign contributions for any election that exceed, in the aggregate, [the limit chosen by the jurisdiction] from an individual or [the limit chosen by the jurisdiction] from an entity. This limitation is in addition to the limitations provided in Section 5(C)(2).

(4) In addition to complying with all applicable statutory requirements for disclosure of campaign contributions, campaign committees established by a candidate shall file with [appropriate depository] a report stating the name, address, occupation and employer of each person who has made campaign contributions to the committee whose value in the aggregate exceed [limit chosen by jurisdiction]. The report must be filed within [a time period chosen by the jurisdiction] days following the election.

130. ALA. CONST. art. VI, § 6.08(c).

131. *Id.* (providing that such canons and rules shall not be "inconsistent with the provisions of this Constitution").

132. ALA. CONST. amend. 579, art. VIII(c) (providing that the "[l]egislature shall by law provide for . . . the administration of elections").

133. ALA. CONST. amend. 328, § 6.07.

134. Thus, when the court revised canon 7, it had to receive preclearance from the Department of Justice under the Voting Rights Act of 1965. *See* 247 Op. Att'y Gen. 16 (1997).

135. ALA. CONST. art. III, § 43.

136. Besides *Suster*, other courts have considered the scope of a supreme court's authority to regulate judicial elections and come to similar conclusions, specifically, that supreme courts have the authority to "perform any function reasonably necessary to . . . protect the judiciary as an independent department of the government." *Judicial Qualifications Comm'n v. Lowenstein*, 314 S.E.2d 107, 108 (Ga. 1984) (quoting *Wallace v. Wallace*, 166 S.E.2d 718, 724 (Ga. 1969)). *Accord In re Fadley*, 802 P.2d 31, 37 (Or. 1991) (holding that provisions in the Oregon Constitution giving the legislature authority to regulate elections and mandating separation of powers did not prohibit the supreme court from regulating the "election activities of its members and potential members").

regulate campaigns of judicial candidates, including contributions, is properly located within the state supreme court's authority to maintain the judicial institution. Notwithstanding Alabama's constitutional provision for separation of powers, the Alabama Supreme Court has "fully accepted" two additional principles: "(1) the independence of the judiciary, and (2) the inherent power of a court to protect its judicial function."¹³⁷ In *Board of Commissioners of the Alabama State Bar v. Baxley*,¹³⁸ the court found that the regulation of the bar is an inherent power.¹³⁹ Analogously, the real power being exercised when state supreme courts impose contribution requirements on judicial candidates is the power to maintain the integrity and independence of the judiciary, not the power to set qualifications for judges.

Contribution limits, while not eliminating the problems of judicial elections, would reduce the size of contributions each candidate could receive and thereby reduce the perception of corruption.¹⁴⁰ And contribution limits are constitutional under *Buckley v. Valeo*, as long as the limits are not too low to prevent effective advocacy.¹⁴¹ For example, the Eighth Circuit has held that a \$100 limit on contributions for supreme court justices and appellate court judges running in state-wide elections is unconstitutional.¹⁴² In the context of judicial elections, the supreme court, with an intimate knowledge of the needs of its judicial candidates statewide, could tailor such limits for specific offices, similar to what the Ohio Supreme Court did.

Admittedly, state-wide campaign finance reform would be beneficial, since the legislature could not only limit contributions to candidates but also enact more comprehensive regulations—addressing the ubiquitous problem of soft money. Soft money, "contributions to . . . regulated campaign committees in excess of the aggregate amounts permitted for .

137. *Morgan County Comm'n v. Powell*, 293 So. 2d 830, 834-35 (Ala. 1974).

138. 324 So. 2d 256 (Ala. 1975).

139. *Baxley*, 324 So.2d at 263.

140. See Baschab, *supra* note 37.

141. *Buckley v. Valeo*, 424 U.S. 1, 28-29 (1976). The Court reasoned that small contributions are less likely either to contribute to the perception of corruption or lead to corruption. *Buckley*, 424 U.S. at 21. Therefore, contribution limits that prevent contributions of some minimal amount are unconstitutional. The circuit courts struggled to define the proper constitutional test for contribution limits. In *Nixon v. Shrink Missouri Government PAC*, 524 U.S. 377 (2000), the United States Supreme Court further elucidated a constitutional test. Justice Souter, writing for the Court, stressed that the proper test for contribution limits was whether the contribution limitations "would have any dramatic[ally] adverse effect on the funding of campaigns and political associations." *Nixon*, 524 U.S. at 395 (quoting *Buckley*, 424 U.S. at 21). In determining whether the Missouri limit prevented effective advocacy, the Court analyzed the percentage of the contributions of the previous election that the limit would have excluded. The Court concluded with an instruction to the lower courts:

[T]he issue in later cases cannot be truncated to a narrow question about the power of the dollar, but must go to the power to mount a campaign with all the dollars likely to be forthcoming. . . . [T]he dictates of the First Amendment are not mere functions of the Consumer Price Index.

Id. at 397.

142. *Russell v. Burris*, 146 F.3d 563, 568-71 (8th Cir. 1998).

. . . elections,"¹⁴³ is the result of loopholes in regulatory statutes, the Federal Elections Campaign Act ("FECA"), in particular.¹⁴⁴ At the national level, the McCain-Feingold Bill, introduced again in the 2001 legislative session, specifically addresses the soft money problem, prohibiting national, state, and local political party committees from spending or raising money not subject to FECA.¹⁴⁵ Similarly, states can address the problem of soft money, in part, by comprehensively regulating political parties. Alabama can also regulate PAC to PAC transfers, an issue that the legislature has debated for some time.¹⁴⁶

A closer analysis of the Alabama Supreme Court's imposition of limitations reveals that such reform will probably not be imposed by the present court. One reason for the court's inactivity thus far is also the root of the very need for limitations: the politization of the supreme court. The supreme court is now a politicized branch of government, evidenced by the increased costs and interest in judicial campaigns. The justices are in competitive, expensive campaigns every six years. Like their counterparts in the legislature, the justices have a stake in the current system. Imposing limitations, aside from making reelection more difficult, would also have repercussions throughout state government. For one thing, the imposition would probably lead to increased media focus and public attention on the legislature and its failure to impose similar limitations. Besides forcing the legislature's hand for reforming its own elections, the supreme court justices would be isolating themselves politically from their own parties. With the court now heavily Republican, and the Republican Party not generally supporting widespread campaign reform, justices could face significant resistance from their own parties during reelection. The 2000 elections demonstrate the pervasive impact that parties have in judicial elections.

In other words, the changing political landscape and the role of the

143. *Common Cause v. Federal Election Comm'n*, 692 F. Supp. 1397, 1398 (D.D.C. 1988).

144. As Professor Anthony Corrado explains, in the 1970s the Federal Elections Commission ("FEC") ruled that state political party committees could accept contributions from corporations and labor unions, not regulated by FECA, to use in voter drives which would benefit both state and federal candidates. The political party committee had to allocate a portion of the cost to federally regulated funds, however. See ANTHONY CORRADO, *SOFT MONEY*, IN *CAMPAIGN FINANCE REFORM: A SOURCEBOOK* 171-76 (Anthony Corrado et al. eds., 1997). The same ruling applied to national political parties as well. The FEC later ruled that national political party committees could use non-federally regulated funds to defray administrative costs and for other general party-building purposes. Moreover, in 1979 Congress amended FECA allowing federal political parties to spend unlimited amounts on voter registration drives and related events. Thus, the problem of soft money was created. National political parties could collect money governed only by state laws and spend the "soft" money for general federal election purposes.

145. S. 27, 107th Cong. § 323(a)-(e) (2001). The bill should be constitutional since it targets contributions to political parties, not expenditures made by those parties, which, if independent, cannot be limited. For arguments that regulating soft money is constitutional, see Daniel M. Yarmish, Comment, *The Constitutional Basis for a Ban on Soft Money*, 67 *FORDHAM L. REV.* 1257 (1998).

146. See Sharon E. Wheeler, Comment, *Money in Politics: Reforming Alabama's Campaign Finance and Ethics Laws*, 45 *ALA. L. REV.* 675, 689-91 (1994).

judiciary in Alabama complicate the exercise of the court's authority. The supreme court is not an insular branch of government; its campaign policy is interrelated to the policy of the other branches of government. Thus, it seems that reforming judicial campaign finances must have party-wide support, ironically bringing this aspect of the court's rule-making powers into the obstacle of politicization that locating the power in the court was intended to circumvent. Since judicial campaign finance reform essentially entails legislative acceptance of the reform, the reform is placed back into the political arena, necessitating a coordinated and organized effort to overcome the status quo.

B. *Implementing Publicly-Funded Elections*

The alternative method of reforming judicial elections implementing publicly-funded elections—clearly faces significant political obstacles. Nevertheless, it is the most comprehensive solution to the current problems of judicial campaigns. Public funding reduces dependence on large private contributions by replacing private contributions, in whole or in part, with public funds. As one scholar observes, “by reducing officeholders’ dependence on large private donors, public funding would remove one source of special interest influence.”¹⁴⁷ As a result, the public is freed from wondering whether decisions are simply a mouthpiece for certain interests. At the same time, a base level of funding allows more lawyers and potential judges to compete in elections.

Furthermore, public funding is particularly suited for judicial candidates. It is particularly apropos that Alabama's judicial candidates and future judges of the State of Alabama, who are responsible to each individual litigant appearing before them, campaign with money from each anonymously, yet from none specifically. For the judiciary is the only branch of government that does not formally represent groups or particular interests, but individuals. And the constitutionality of public funding was established in *Buckley v. Valeo*.¹⁴⁸ While public funding has existed at the national level since 1976, its popularity at the state level is at its peak. According to one study, over twenty-four states and cities, including Minnesota, Wisconsin, New York, Los Angeles, and most recently San Francisco, have partially publicly-funded systems for some of their elected officials, generally executive and legislative officials.¹⁴⁹ Moreover, four states since 1996 have amended their constitutions to implement full publicly-funded elections.¹⁵⁰ Maine, Arizona, and Ver-

147. Briffault, *supra* note 67, at 590.

148. *Buckley*, 424 U.S. at 85-108. The constitutionality of publicly-funded systems was subsequently reaffirmed in *Republican National Committee v. Federal Election Commission*, 487 F. Supp. 280, 289 (S.D.N.Y. 1980).

149. Briffault, *supra* note 67, at 566-67.

150. The states are Maine, Vermont, Massachusetts, and Arizona.

mont had their first "clean" elections in 2000.¹⁵¹ Still, only one state, Wisconsin, provides public funds for judicial elections, though several states offer encouragements for candidates to comply with spending limits.

Although the details of the different systems vary, publicly-funded systems all share a common design. Public funding provides financing of a candidate's campaign from the state treasury. In return for the public funds, the candidate normally agrees to abide by strict spending and contribution limits. Further, before being eligible to receive state funds, the candidate must qualify by getting a specified number of small contributions from different donors. After qualifying for public funding, the candidate receives public funds. Virtually every publicly-funded system provides other inducements as well, including a protective provision that releases candidates from expenditure limits when their nonparticipating opponents spend in excess of the spending limit.¹⁵²

The most common publicly-funded system is partial public funding, where a state transfers either a fixed amount of money or matching funds to participating candidates, usually legislative or executive candidates. Minnesota and Kentucky both have enacted partial public funding, Minnesota for legislative and executive officials and Kentucky only for Governor and Lieutenant Governor. In Minnesota, after candidates attain a certain amount of qualifying contributions¹⁵³ and agree to the spending limit,¹⁵⁴ the state transfers to the candidates a specified percentage from the State Election Fund.¹⁵⁵ The Fund, financed by \$5 taxpayer designations, has performed well. Over 99% of legislative candidates took public funds in 1999.¹⁵⁶

Kentucky, on the other hand, distributes matching funds to its com-

151. Carey Goldberg, *Publicly Funded Elections Put to the Test in 3 States*, N.Y. TIMES, Nov. 19, 2000, SS1, at 44.

152. Release provisions that are triggered by spending of privately-funded opponents have generally been upheld by the federal courts. See, e.g., *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1547-51 (8th Cir. 1996); *Wilkinson v. Jones*, 876 F. Supp. 916, 926-28 (W.D. Ky. 1995).

153. MINN. STAT. § 10A.323 (1997 & Supp. 2001) (requiring that the aggregate amount of contributions, counting only the first \$50, be a certain amount of money, from \$35,000 for gubernatorial candidates to \$3000 and \$1500 for state senators and representatives respectively).

154. *Id.* § 10A.25. The limit varies with the office sought. There is a trigger provision as well, releasing a candidate from the spending limit under certain circumstances. *Id.* § 10A.25(10).

155. *Id.* § 10A.30. Minnesota's fund, unlike most state funds, allows taxpayers to designate whether their contribution be paid to the general fund, which is distributed to all complying candidates, or the fund of their political party, which is first distributed to candidates in their district and of their party. *Id.* at § 10A.31(5a). This choice combats a common criticism of public funding—that taxpayers are forced to subsidize candidates of all districts and parties. See MINN. STAT. ANN. § 10A.31(5a) (explaining that Minnesota created this provision "[t]o ensure that money will be returned to the counties from which it was collected and to ensure that the distribution of money rationally relates to the support for particular parties or for particular candidates within legislative districts"). However, no candidate can receive more than the expenditure limit; excess funds from a party account are then transferred to the general account and apportioned among other candidates. See *id.* §§ 10A.31(6), (6a), (5), (7).

156. Richard P. Jones, *Election Fund Check-off Gets a Push From Campaign Finance Reform Group*, MILWAUKEE J. SENTINEL, Apr. 4, 2000, at 2B.

plying candidates for Governor and Lieutenant Governor. Unlike Minnesota, Kentucky does not require qualification contributions but matches in a two-to-one ratio all contributions up to \$600,000.¹⁵⁷ Of course, the contributions must comply with the general Campaign Finance Laws, which regulate contributions based on source and amount.¹⁵⁸ The spending limit then is \$1.8 million—the sum of the total matching funds, \$1.2 million, and private contributions of \$600,000.¹⁵⁹

Full public funding operates very similarly to partial public funding with one significant exception—candidates retain no private contributions once they agree to accept public funds.¹⁶⁰ Candidates can, nevertheless, receive limited private contributions before they agree to the spending limits while they are soliciting their \$5 qualifying contributions.¹⁶¹ Upon agreeing to accept public funds, candidates transfer to the state fund their qualifying contributions.¹⁶² Both Arizona and Maine also have a “release provision,” protecting the candidates from being outspent by their nonparticipating opponents. In such cases, grants are made to the participating candidates equalling the excess expenditures of the nonparticipating candidates.¹⁶³

Also, full public-funding systems, like partial public funding, offer inducements for candidates to accept public funds. For example, Arizona employs what the First Circuit has called a “contribution cap gap.”¹⁶⁴ Arizona’s general campaign laws, which apply to judges since judges are not covered under the Clean Elections Act, limit contributions that an individual or committee can make and that a candidate or committee can accept.¹⁶⁵ However, nonparticipating candidates, when their opponents are participating candidates, are limited to 20% of those general limits.¹⁶⁶

157. KY. REV. STAT. ANN. § 121A.080(1) (Michie 1993). A candidate is allowed additional matching funds if a nonparticipating opponent spends in excess of the spending limit. *Id.* §§ 121A.080(4)(a), (5). This trigger provision was upheld in *Wilkinson*, 876 F. Supp. at 927-28.

158. KY. REV. STAT. ANN. § 121.150.

159. *Id.* § 121A.030.

160. See, e.g., ARIZ. REV. STAT. ANN. § 16-941(A)(1) (West Supp. 2000); ME. REV. STAT. ANN. tit. 21A § 1125(6) (West Supp. 2000).

161. See, e.g., ME. REV. STAT. ANN. tit. 21A § 1125(5) (allowing “seed contributions”). For the number of requisite qualifying contributions, see ARIZ. REV. STAT. ANN. § 16-941(A)(1) (requiring qualifying contributions); ARIZ. REV. STAT. ANN. § 16-951(D) (number of contributions linked to office sought); and ME. REV. STAT. ANN. tit. 21A § 1125(3) (fixing the number as a variable of the office sought).

162. ARIZ. REV. STAT. ANN. § 16-946 (requiring that qualifying contributions be made payable to the Arizona Election Fund); ME. REV. STAT. ANN. tit. 21A § 1125(3) (requiring that all qualifying contributions be made payable to the Maine Clean Election Fund).

163. ARIZ. REV. STAT. ANN. §§ 16-952, 16-952(E) (capping the additional grant at three times the original grant); ME. REV. STAT. ANN. tit. 21A § 1125(9).

164. *Vote Choice v. DiStefano*, 4 F.3d 26, 30 (1st Cir. 1993).

165. See ARIZ. REV. STAT. ANN. § 16-905. The limits vary depending on the office sought, but for state-wide office the limits for individual and committee contributions are \$760. *Id.* § 16-913(B)(1),(2).

166. *Id.* § 16-941(B).

And full publicly-funded systems have performed well in their first election. In Maine, one-third of the candidates accepted public funds in the 2000 general elections.¹⁶⁷ Of those candidates, 54% won, with a higher number of women winning than in past years.¹⁶⁸ The Maine fund provided \$5 million for participating candidates,¹⁶⁹ distributing to each candidate 75% of the average total spent in the previous two elections for that position.¹⁷⁰ The fund is supported from several sources, including the qualifying contributions, tax check-offs, court fines, and general revenue.¹⁷¹ The Arizona fund, totaling about \$10 million¹⁷² supported from similar sources as the Maine fund,¹⁷³ also had sufficient funding, but fewer candidates participated, and participating candidates received significantly less than 75% of the average of the expenditures of the last two elections.¹⁷⁴

Nevertheless, public funding cannot regulate all areas of campaign spending. The same problems of issue advocacy, independent expenditures, and soft money are present in publicly-funded elections as in privately-funded ones. In fact, Maine identified independent expenditures as its primary problem in the 2000 elections.¹⁷⁵ Yet, as the Supreme Court has noted, independent expenditures give less appearance of corruption than contributions.¹⁷⁶ And states can regulate soft money in part by regulating contributions to political parties.

Wisconsin is the only state that provides public funding to its judicial candidates, in addition to imposing other regulations on those candidates.¹⁷⁷ The Wisconsin Election Code¹⁷⁸ imposes on judicial candidates, as well as political committees, defined to include PACs,¹⁷⁹ contribution limitations¹⁸⁰ and disclosure requirements.¹⁸¹ Even more sig-

167. Ellen S. Miller, *The Clean Money Solution*, AM. PROSPECT, Sept. 25, 2000, at 36.

168. Carey Goldberg, *Publicly Held Elections Put to Test in Three States*, N.Y. TIMES, Nov. 19, 2000, at 44.

169. A.J. Higgins, *Today Deadline to File as "Clean" Candidates*, BANGOR DAILY NEWS, Mar. 16, 2000, available in 2000 WL 4260225.

170. ME. REV. STAT. ANN. tit. 21A § 1125(8) (distributing funds according to average of last two elections).

171. *Id.* §§ 1124(2)(A)-(H).

172. *New Rules of the Game Raised in Arizona*, TELEGRAPH HERALD (Dubuque, Iowa), Oct. 22, 2000, at A5.

173. ARIZ. REV. STAT. ANN. § 16-954 (West Supp. 2000). The sources include \$5 tax check-offs, 10% surcharge on civil and criminal fines and penalties, and \$100 from fees on lobbyists.

174. Each candidate received \$10,000 for the primaries and \$15,000 for the general election. *New Rules of the Game*, *supra* note 172, at A5.

175. Nancy Grape, *Maine Law Worked, With Glitches*, PORTLAND PRESS HERALD, Dec. 17, 2000, at 5C.

176. *Buckley v. Valeo*, 424 U.S. 1, 45-47 (1976).

177. Wisconsin judges are elected in nonpartisan elections.

178. WIS. STAT. § 11.01(1) (1996) (defining candidate as "every person for whom it is contemplated . . . that votes be cast at any election").

179. *Id.* § 11.01(4) (defining political committee as two or more individuals that accept or make contributions or make disbursements for political purpose); § 11.01(16) (defining political purpose as for the purpose of influencing an election).

180. *Id.* § 11.26. Wisconsin distinguishes between the office and source of contribution. For example, individuals are limited to a \$10,000 contribution to a supreme court justice, §

nificantly, judicial candidates are also eligible to accept public funds in the form of a state grant from the Wisconsin Election Fund.¹⁸² To qualify for the grant, candidates must voluntarily agree to limit their spending (a supreme court justice would limit spending to \$215,625) and raise 10% of the expenditure limit, \$215,625, through contributions of \$100.¹⁸³ The Fund is then apportioned equally,¹⁸⁴ with the candidates free to raise the balance of their expenditure limit through private contributions.

The Wisconsin fund has not performed as well as the Minnesota, Maine, and Arizona funds, however. That the Wisconsin fund is not as successful can be attributed to both its lack of promotion by the state and its failure to adjust the spending limits for inflation.¹⁸⁵ Financed solely by \$1 tax check-offs, the fund in the past few elections has only averaged a \$30,000 grant to supreme court candidates.¹⁸⁶ Taxpayer participation has been low, 8.7% in 1998, but has increased over the past few years, a reaction to high-cost, high-intensity races, notably, the 1997 race for supreme court chief justice.¹⁸⁷ With the grants small, few candidates have chosen to accept the spending limits;¹⁸⁸ for instance, neither supreme court candidate accepted public funds in 1997, and only 37% of candidates overall accepted public grants in 1998.¹⁸⁹ A bill introduced in 1999 that would have guaranteed the full grant of \$97,000 to supreme court candidates proposed that the grants be financed through either an appropriation from the general fund or a \$1 increase in court fees. The bill, however, caught in a partisan struggle, did not pass.¹⁹⁰

Several states offer other incentives for judicial candidates to restrict

11.26(1)(a); committees are limited to a percentage of the voluntary expenditure limit in their contribution to candidates and other committees, § 11.26(2), and political parties are limited. WIS. STAT. § 11.26(8)(a).

181. *Id.* § 11.20.

182. *Id.* § 11.31(1)(d) (for disbursement limitation); *Id.* § 11.31(2)(m) (for voluntary requirement); *Id.* § 11.50 (for Wisconsin Election Fund). The Fund is financed through donations, § 11.50(13), and income tax designations up to \$100. WIS. STAT. § 71.10(3).

183. *Id.* § 11.50(2)(a) (the contribution can be greater than \$100, but only \$100 of the contribution counts toward the qualifying amount).

184. *Id.* § 11.50(3) (explaining that 8% of the total fund is allocated to the supreme court account with the account apportioned equally among the qualifying candidates).

185. Mike McCabe, *Tax Checkoff Improves System*, CAPITAL TIMES, Apr. 12, 2000, at 6A. Compare the \$1 check-off with Minnesota's \$5 check-off that has generated seven times more funds than Wisconsin. *Id.* Also, Arizona has adopted a \$5 tax check-off. ARIZ. REV. STAT. ANN. § 16-954(A) (West 1993).

186. David Callender, *Count Campaign Reform on Agenda*, CAPITAL TIMES, Sept. 28, 1999, at 2A.

187. *Taxpayers Giving More Money to Elections*, TELEGRAPH HERALD (Dubuque, Iowa), Aug. 14, 1999, at A13. The participation in 1996 was 8.1%; in 1997, 8.4%. In 1979, on the other hand, participation was 20%. *Id.*

188. David Callender, *GOP Attacks Checkoff Financing of Campaigns*, CAPITAL TIMES, June 23, 1999, at 2A.

189. Jones, *supra* note 156, at 2B; see also McCabe, *supra* note 185, at 6A.

190. Callender, *supra* note 186, at 2A.

their spending. Texas, for example, as part of the Judicial Campaign Fairness Act,¹⁹¹ created a Judicial Fairness Fund¹⁹² to finance voter education projects,¹⁹³ one of which is to compile a list of judicial candidates.¹⁹⁴ Those candidates who voluntarily agree to limit their expenditures¹⁹⁵ are listed in the compilation as complying candidates; moreover, those candidates are allowed to state on political advertisements that they are complying candidates.¹⁹⁶ Similarly, Montana provides that candidates and committees who comply with its voluntary limit of \$150,000 can declare on political advertisements that they are complying committees or candidates and will be noted as such in the voter information packet.¹⁹⁷

Thus, several states are creatively and effectively resolving the problems of campaign costs and large contributions. Public funding offers the Alabama judiciary independence from private special interest contributors. Of course, that independence comes at a price, the financing of the fund. But the Minnesota and Maine systems demonstrate that funds can be secured without placing too great a burden on the state. With a properly financed fund, many Alabama judicial candidates would choose to accept public funds. And through public funding, Alabamians would retain the ability to select their judges while being freed from many problems associated with contemporary elections.¹⁹⁸

III. JUDICIAL REFORM—STILL ON THE BACKBURNER

Still, although our current system has engendered criticism and calls for reform, whether in the guise of a change in the method of selection or campaign finance reform, currently no organized reform movement exists. One factor consequential in overcoming the status quo in the 1970s, but not yet formidable in today's movement, is effective leadership, the kind Chief Justice Heflin gave in the 1970s. The two most likely groups to assume a leadership role are the bar and the supreme court. The bar supports reform, evidenced by several prominent members, including two past presidents, who support change.¹⁹⁹ In addition, the Board of Bar Commissioners has proposed to amend article VI to

191. TEX. ELEC. CODE ANN. §§ 253.151-253.176 (West 2000).

192. *Id.* § 253.175.

193. *Id.* § 253.175(c).

194. *Id.* § 253.175(d).

195. *Id.* § 253.168. The limits vary depending on the office sought and size of electoral district, from \$100,000 to \$500,000. Moreover, the Judicial Fairness Fund Act ("JFFA") limits the size of contributions a candidate can accept, *see* TEX. ELEC. CODE ANN. § 253.155, and imposes a reporting and disclosure requirement on independent expenditures. *See id.* § 253.163(b).

196. *Id.* § 253.166.

197. MONT. CODE ANN. § 13-37-250 (1999).

198. Of course, the implementation of public funding would require a comprehensive refiguration of Alabama campaign finance laws, regulating PAC-to-PAC transfers as well as soft money.

199. *See* Baxley, *supra* note 36; Lightfoot, *Non-Partisan Judicial Elections*, *supra* note 36.

allow for merit selection of appellate judges.²⁰⁰ Nonetheless, the bar has limited resources. The supreme court, while having the resources, does not seem interested in reform. The court now is eight-to-one Republican, and no justice has been a particularly strong proponent of reform.²⁰¹ Little is known of the Chief Justice's position on campaign reform.

Another potentially significant factor in campaign finance reform is the current constitutional revision movement. Linking the movements to revise the constitution and reform the judicial system could engender support and attention for the judiciary. In 1971, Chief Justice Heflin separated the two.²⁰² However, in 2001, constitutional reform can benefit judicial reform, for unlike the 1970s, today's judicial movement does not have widespread support from the bar and only ambiguous support from the electorate. In contrast, constitutional revision is widely supported, one poll showing that 73% of Alabamians support the revision.²⁰³

Although presently latent, another basis of support for campaign finance reform of judicial elections exists. As in the 1970s, the disadvantages of our present system and the advantages of reforming the system could appeal to groups with vested interest in the current system—specifically, the large contributors, special interest groups and the business community. Currently, businesses and special interests groups, like lawyers, feel that they must contribute to judicial campaigns, if for nothing else, for protection.²⁰⁴ Businesses fear that their competitor will contribute and judges will decide, in some part, however subtly, against them based on who contributed.²⁰⁵ In addition, evidenced by the hiring of Karl Rove to run the campaign of the Republican judges last year,²⁰⁶ political parties, businesses, and special interests also believe that they have something to gain by financing judicial elections—something to gain in the short run.

Yet this perspective on judicial elections and the resulting benefits is a myopic one. Instead, businesses' excessively financing judicial elections is detrimental to the interests of business in the long run, a conclusion that the Center for Economic Development ("CED"), a research organization of over 250 businesses nationwide, reached at the national level.²⁰⁷ For if businesses and parties are correct and there is a benefit to

200. See Merit Selection of Appellate Judicial Candidates § 6.13(a), (b) (1997) (on file with the Alabama State Bar).

201. See Baschab, *supra* note 37.

202. Freyer & Pruitt, *supra* note 3.

203. *Id.*

204. Lightfoot, *Accentuate the Positive*, *supra* note 36, at 326; Charles E.M. Kolb & Christopher Dreibelbis, *Campaign Finance Reform: A Business Perspective*, 50 CATH. U. L. REV. 87, 108 (2000).

205. Kolb & Dreibelbis, *supra* note 204, at 108.

206. Baschab, *supra* note 37.

207. See COMMITTEE REPORT OF THE COMMITTEE FOR ECONOMIC DEVELOPMENT, INVESTIGATING THE PEOPLE'S BUSINESS: A BUSINESS PROPOSAL FOR CAMPAIGN FINANCE

victory, then that victory will be a short-run benefit since the policy espoused by the supreme court can change every election cycle. Moreover, if contributions influence individual decisions, then public policy will not be consistent.²⁰⁸ As the CED concluded, “[i]f public policy decisions are made—or appear to be made—on the basis of political contributions, not only will policy be suspect, but its uncertain and arbitrary character will make business planning less effective and the economy less productive.”²⁰⁹ In addition, new businesses will be less attracted to Alabama, thus harming existing businesses. Furthermore, because the public often associates large contributions with businesses, and thereby with political corruption, businesses will tend to be perceived as corrupt. As a result, the public’s confidence in business will decline, making businesses less profitable and the economy less productive.²¹⁰ In the long run, then, campaign finance reform of judicial elections is in the best interest of Alabama businesses, just as it was in the businesses’ interest to unify the judicial system in the 1970s.

Another target for reformers must be the electorate, who are dissatisfied with current elections yet are not pushing for campaign finance reform. As the CED found, “[m]any citizens have lost faith in the political process and doubt their ability as individuals to make a difference.”²¹¹ Accordingly, with judicial candidates accepting large contributions from businesses, special interests, and both sides of the bar, the public has grown cynical about the election process and, as polls demonstrate, the judicial process. Reformers must convince the public that changes will deliver the judicial selection process from large contributors and political interests back into the hands of Alabama’s citizens.

In this respect, public funding presents a better solution than merit selection, although both reforms are premised on perfectly laudable yet competing principles—popular accountability and judicial independence. Merit selection attempts to achieve greater independence of judges from the electorate and remove political considerations from the selection process.²¹² However, the experience with merit systems suggests that they do not provide their intended benefit.²¹³ While historically

REFORM I (1999).

208. Of course, in an elected system there will be some volatility; not all judges have the same views. But with races financed heavily by special interests and businesses, the candidates’ beliefs about particular issues are determinative of their campaign and success. In such an environment, policy in business-related areas will be overly volatile because it is this policy that determines election and will determine reelection. Under a system not dominated by business and special interests, while composition may change, the change will not so dramatically and consistently impact one specific area of the law, thereby allowing for a more consistent jurisprudence.

209. COMMITTEE FOR ECONOMIC DEVELOPMENT, *supra* note 207, at 1.

210. *Id.*

211. *Id.*

212. Kurt E. Scheuerman, Comment, *Rethinking Judicial Elections*, 72 OR. L. REV. 459, 470-76 (1993).

213. See The Honorable Jay A. Daugherty, *The Missouri Non-Partisan Court Plan: A Dinosaur on the Edge of Extinction or a Survivor in a Changing Socio-Legal Environment?*, 62 MO. L.

merit elections have resulted in uncompetitive elections, which reduce significantly the costs of elections and the resulting problems of large contributions, recent elections have garnered more interest, and the percentage of affirmative votes for judges has decreased.²¹⁴ When voter interest is high, retention elections do not remedy the problems of cost or majoritarian pressure present in competitive elections.²¹⁵ California Justice Otto Kauss admitted that his vote in a decision in a retention election year may have been influenced by the prospect of the election.²¹⁶ When voter interest is low, as in many retention elections, voter participation will also be low. Thus, although judges will not need to vigorously campaign, the electorate will be ill-informed.²¹⁷ The result is that while large contributions will not stigmatize the judiciary, the electorate will feel less a part of the judiciary and have less confidence in it; moreover, judges will have little accountability to the electorate.²¹⁸

The merit selection process also falls short of its theoretical luster. Merit systems typically establish a nominating committee that submits a list of several, normally three, judges to the governor for appointment.²¹⁹ The plan discussed in Alabama is that the nominating commission will be composed of four non-lawyers appointed collectively by the Governor, Lieutenant Governor, and Speaker of the House, four lawyers elected by the Board of Bar Commissioners, and a judge elected by the appellate judges.²²⁰ After appointment, judges stand periodically for retention elections, where the only question before the voters is whether or not the judges should continue in office.

Although in theory a representative commission would select judges that are representative of the Alabama electorate, in practice, merit sys-

REV. 315, 339 (1997) (observing that "[t]here have been significant problems with the implementation of the Non-Partisan Court Plan in Missouri and elsewhere").

214. See *supra* text accompanying notes 80-82. See also Larry T. Aspin & William K. Hall, *What Twenty Years of Judicial Retention Elections Have Told Us*, 70 JUDICATURE 340, 347 (1987) (concluding that retention elections generally have low voter turnout and the electorate is ill-informed of the judicial candidates). Aspin and Hall also observed that since the 1980s the retention rate has consistently fallen as has the mean affirmative vote, which fell from 85% in 1960 to 73% in 1978. *Id.* at 344. Judge Daugherty, a Missouri state court judge, similarly observed that the mean affirmative retention vote has steadily fallen in Missouri since the 1980s, dropping to 62.5% in the 1992 elections. See Daugherty, *supra* note 213, at 325.

215. See *supra* text accompanying notes 74-83.

216. John T. Wold & John H. Culver, *The Defeat of the California Justices: The Campaign, the Elections, and the Issue of Judicial Accountability*, 70 JUDICATURE 348, 351 (1987).

217. Aspin & Hall, *supra* note 214, at 347.

218. Daugherty, *supra* note 213, at 341 (noting that a common criticism of retention elections is that the low voter interest and turnout result in little popular accountability).

219. See Noe, *supra* note 107, at 226-31 (describing Model Merit provisions). Professor Albert Kales, a professor at Northwestern University School of Law in the early twentieth century, developed the merit, or commission, system. The system proposed by Professor Kales called for a nominating commission of presiding judges which would provide a list of judicial candidates to the state's chief justice, who was the only judge elected through partisan elections. The chief justice selected the judge, and the judge was subjected to periodic uncontested retention elections where the voters decided whether the judge should serve another term or whether another judge should be appointed. Webster, *supra* note 38, at 29 n.190.

220. See Noe, *supra* note 107, at 227.

tems fail to live up to their theoretical promise. Political considerations permeate the selection process. The 1984-85 scandal surrounding the appointment of a Missouri Supreme Court justice illustrates the inherent tendency of merit systems to political manipulation. The Missouri Governor, in collaboration with the nominating commission, manipulated the selection process, appointing his Chief of Staff, who had no previous judicial experience.²²¹ With low voter turnout for the retention election the next year, the aid was retained as justice.²²² A Missouri state court judge recently concluded that the Missouri merit selection system appears to many to be too political. Given the power to appoint and lobby commission members, the Governor has significant control over the commission; the "white male majority of the bar effectively selects the other . . . members of the commission"; and the judge elected to the commission "is the product of the same commission on which he now sits."²²³ The result is that the selection process has a tendency to be "too secretive, undemocratic, not representative, too political, and not accountable or responsive to the public."²²⁴

While the proposed Alabama system attempts to countervail the political biases of the nominating commission members by dividing the appointment power between two groups,²²⁵ like Missouri's system, it too could have problems of under-representation of minorities and women. Of those who select the nominating commission, an overwhelming majority are white male lawyers.²²⁶ The composition of this group clearly does not reflect the diversity in Alabama's population. Even though the

221. Daugherty, *supra* note 213, at 328.

222. *Id.*

223. *Id.* at 341.

224. *Id.* Even though often conflicting, evidence suggests that the judiciary is most representative of the electorate when judges are elected. See Thomas E. Brennan, *Nonpartisan Election of Judges: The Michigan Case*, 40 Sw. L.J. 23, 24 (1986). Brennan observes that partisan elections provide the most representative judiciary. However, with nonpartisan elections coupled with the implementation of public funding, more candidates from all ethnicities and gender will be able to mount a potentially successful campaign, evidenced by a higher percentage of women winning state congressional seats in Maine in 2000 under a publicly-funded system. See *supra* text accompanying note 168. As in Maine, more minority and women judicial candidates would be able to run successful campaigns. In fact, minority groups have attacked merit systems for producing fewer minority judges, and recently merit systems have been challenged under the Voting Rights Act. See Daugherty, *supra* note 213, at 340 (relating that the Missouri merit system has been challenged on the grounds that such system "results in under-representation of minorities"). See also Rene A. Torrado, Jr., *The Challenge of Merit Selection*, 10 CBA REC. 10 (Apr. 1996); PATRICIA A. GARCIA, ROADMAPS: JUDICIAL SELECTION 15 (1998). For commentators concluding that merit systems produce a more diverse bench see Lawrence H. Averill, Jr., *The Arkansas Courts: Observations on the Wyoming Experience with Merit Selection of Judges: A Model for Arkansas*, 17 U. ARK. LITTLE ROCK L.J. 218, 318 (1995); Martha W. Barnett, *The 1997-98 Florida Constitutional Revision Commission: Judicial Election or Merit Selection*, 52 FLA. L. REV. 411, 419 (2000); Justice Robert L. Brown, *From Whence Cometh Our State Appellate Judges: Popular Election versus the Missouri Plan*, 20 U. ARK. LITTLE ROCK L.J. 313, 323-24 (1998).

225. See Noe, *supra* note 107, at 228.

226. The Governor, Lieutenant Governor, and Speaker of the House are all white males, as are the majority of the members of the Board of Bar Commissioners. For instance, of the officers on the board, six are white males while one is a white female.

plan would require that “[a]ll appointments and elections of members to the Judicial Nominating Commission shall be made with due consideration to the . . . gender, racial, and ethnic diversity of the state,”²²⁷ still the status quo would control the selection process by controlling the nominating process. The ultimate result could be the appointment of judges with the same political and societal views as the established power structure, since the establishment handpicks the nominating committee and, therefore, the judges.

Thus, not surprisingly, commission members generally will not leave their politics out of the selection process, just as politics was not left out of the selection of the commission members.²²⁸ Likewise, the nominating commission will not necessarily select judges according to enlightened criteria, which merit proponents argue will result in a more qualified bench.²²⁹ The appointment debacle of Judge Ronnie White of Missouri, who did not gain confirmation to the federal bench, demonstrates that even judicial pundits, including the Attorney General of the United States, base their decisions on particularly inappropriate grounds.²³⁰

Instead, the implementation of nonpartisan and publicly-funded elections best addresses the problems of Alabama judicial races.²³¹ Together, the two reforms would significantly reduce the influence of political parties and interest groups in campaigns, allowing the electorate to select its judges. And the electorate, contrary to many assumptions, is qualified to select its judiciary. Currently, the citizens are ill-informed and disinterested not just about judicial elections, but elections in general, because they feel that elected officials do not impartially represent them; therefore, the public distrusts the political system.²³² Far from being a justification for switching to merit selection and removing the judiciary farther from the public, the root of the disinterest and distrust is the problem that reform needs to address.

Public funding, whether partial or full, directly addresses this problem by removing the influence of large contributors and political parties and giving more candidates the economic base required to run an effective campaign without the excessive support of the established power structure of state government and special interests. When the electorate

227. Merit Selection of Appellate Judicial Candidates, *supra* note 200, § 6.13(a)(3).

228. See, e.g., Ray M. Harding, *The Case for Partisan Election of Judges*, 55 A.B.A. J. 1162 (1969).

229. Scheuerman, *supra* note 212, at 476-78.

230. According to Senator John F. Kerry, among others, including the Congressional Black Caucus, then Senator John Ashcroft distorted Judge White's record, opposing the judge's confirmation based on isolated decisions. See John F. Kerry, *Opposition to Attorney General Nominee John Ashcroft*, CONG. PRESS RELEASE, Feb. 2, 2001; see also Lizette Alvarez, *Ashcroft Meets with Black Lawmakers Who Opposed His Nomination*, N.Y. TIMES, Mar. 1, 2001, at A21.

231. See Brown, *supra* note 78, at 324 (concluding that Arkansas should consider public funding as an alternative reform to merit selection).

232. COMMITTEE FOR ECONOMIC DEVELOPMENT, *supra* note 207, at 1.

feels again that it can make a difference by voting, it will become informed and vote. Government and the judiciary is the business of all citizens,²³³ not just the few elite who are appointed by the power structure to sit on a nominating committee.

Changing the method of selection to nonpartisan elections, as the Third Citizens' Conference suggested, and implementing publicly-funded elections for judicial candidates would better serve the Alabama judicial system. If convinced that public funding will indeed return the judiciary to an impartial adjudicator of all claims that come before it, citizens will support public funding, despite the costs of financing state grants. The judiciary impacts the lives of all Alabamians, and the public is aware of this influence, as the 62% vote in the 1973 referendum for the revised article VI demonstrates. Just as reformers in the 1970s demonstrated to the public the benefits of a unified judicial system, so can today's reformers convince the public of the benefits of public funding.

CONCLUSION

Thus, an analysis of judicial elections in Alabama demonstrates that merely changing the method of selection will not completely address the problems associated with the judicial selection process. Instead, campaign finance reform is necessary. And reform is possible, even in the face of significant institutional and political inertia, for "the seeds of discontent"²³⁴ are present in our current system. A lesson learned from the 1970s reform is that the campaign must be diligent and that judicial reform efforts can overcome the entrenchment of the status quo. In the spirit of William Faulkner, judicial reform is an act of political consciousness that is attainable, "because after all you dont have to continue to bear what you believe is suffering; you can always choose to stop that, put an end to that."²³⁵

Scott William Faulkner

233. Glenn R. Winters, *Justice is Everybody's Business*, 28 ALA. LAW. 182 (Apr. 1967) (addressing the First Citizens' Conference in 1966).

234. Freyer & Pruitt, *supra* note 3.

235. William Faulkner, *The Old People*, in *GO DOWN MOSES*, *supra* note 1, at 186.

