

THE INDEPENDENCE AND DEMOCRATIC ACCOUNTABILITY OF THE SUPREME COURT OF OHIO

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I. INTRODUCTION

The Supreme Court of Ohio, like many highest state courts, is in a crisis resulting from an unseemly flood of money into statewide judicial election campaigns.¹ We address that crisis in this article.

Most judges around the world are not elected. And, of course, our federal judges are not. We hope it will not try the patience of readers if we first explain why those who sit on the state courts in Ohio are elected. That hope is nourished by the fact that the best published justification for electing judges was written in Chillicothe, Ohio, in 1848 in a work we will briefly review.

The reasons why Ohioans chose in the nineteenth century to elect their judges are still present and perhaps greater even than they were in 1848, but the impediments to such elections are now much greater. The question we propose to answer is whether there are steps that might be taken that would ease the present crisis without abandoning the aims of the state constitution. We believe there are.

II. WHY DOES OHIO ELECT ITS JUSTICES?

The provisions of the Ohio constitution bearing on the Supreme Court of the state were crafted by Ohioans known to their political adversaries as Barnburners.² Barnburners derived their politics from two texts they deemed sacred: Thomas Jefferson's Declaration of Independence and

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¹ These problems are, indeed, the object of national concern. They have recently been examined by the Century Fund. See UNCERTAIN JUSTICE: POLITICS AND AMERICA'S COURTS: THE REPORTS OF THE TASK FORCES OF CITIZENS FOR INDEPENDENT COURTS (2000) [hereinafter UNCERTAIN JUSTICE]. The American Bar Association has recently staged several conferences pertaining to the general subject. The papers for the conference held in Philadelphia in December 1998 are published in colloquy, *Judicial Independence and Accountability*, 61 LAW & CONTEMP. PROBS. (Winter 1999), and at its 2001 meeting made specific recommendations bearing on the problem that are reflected in the proposal advanced in the second part of this article.

² The name Barnburners was meant to suggest that that they were the sort of folks who would burn their barns to drive the rats out.

Andrew Jackson's Bank Veto Message.³ Barnburners preferred to identify themselves as members of an "Equal Rights Party;" this "party" was not a political organization, but merely a shared intention to resist the claims of privilege. Its motto was "free labor, free speech, free trade, and free schools," meaning they opposed slavery, practiced divergent forms of Protestantism, resisted the claims of corporate industry to a protective tariff, and sought education for their children in community schools.⁴ Their ideal was a classless society.

Barnburner ideas about law dominated American legal institutions in the nineteenth century. They led the assault on apprenticeship requirements for admission to the bar, which they saw as undemocratic sanctuaries of privilege.⁵ They were advocates for the simplification of civil procedure to reduce the amount of arcane knowledge needed to present a case in court.⁶ They were the champions of the contingent fee⁷ and the American Rule forbidding routine fee-shifting against losing parties⁸ to protect the access of impecunious plaintiffs to judicial forums. They disfavored the mysteries of judge-made law and promoted

³ "It is to be regretted that the rich and powerful too often bend the acts of government to their selfish purposes. . . . [W]hen the laws undertake to add to [their] natural and just advantages artificial distinctions, to grant titles, gratuities and exclusive privileges, to make the rich richer and the potent more powerful, the humbler members of society—the farmers, mechanics, and laborers—who have neither the time nor the means of securing like favors to themselves, have a right to complain of the injustice of their government. There are not necessary evils in government. Its evils exist only in its abuses. If it would confine itself to equal protection, and as heaven does its rain, shower its favours alike on the high and the low, the rich and the poor, it would be an unqualified blessing." 2 COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS 590 (J.D. Richardson comp. 1908).

⁴ For a more complete discussion of the ideology of the Equal Rights Party, see generally MARVIN MEYERS, *THE JACKSON PERSUASION, POLITICS AND BELIEF* (1957).

⁵ For brief accounts of their efforts in this field, see MAXWELL BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876* 32-58 (1976); SAMUEL HABER, *THE QUEST FOR AUTHORITY AND HONOR IN THE AMERICAN PROFESSIONS, 1750-1900* 91-116 (1991).

⁶ See generally CHARLES HEPBURN, *THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND* (1897); ROBERT WYNESS MILLAR, *CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE* (1952); Steven Subrin, *David Dudley Field and the Field Code: An Historical Analysis of an Earlier Procedural Vision*, 6 *LAW & HIST. REV.* 311 (1988).

⁷ F.B. MACKINNON, *CONTINGENT FEES FOR LEGAL SERVICES: A STUDY OF PROFESSIONAL ECONOMICS AND RESPONSIBILITIES* 36-38 (1964); CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 56 (1986).

⁸ John Leubsdorf, *Toward A History of the American Rule on Attorney Fee Recovery*, 47 *LAW & CONTEMP. PROBS.* 9 (Winter 1984).

codification to make the law's texts equally accessible to all.⁹ They also favored the popular election of judges to limited terms as a means of assuring both their independence from the selfish manipulators of legislative assemblies and their accountability for their fidelity to the legal texts, common interests, and moral values of the communities they served.¹⁰ They viewed all of these programs for law reform as means of facilitating the protection of the equal rights of citizens otherwise exposed to the unwarranted claims of privilege.

The leading Barnburner in matters of law reform was David Dudley Field of New York.¹¹ Others of a more academic bent established law schools at New York University¹² and the University of Michigan.¹³ One, Thomas Cooley of Michigan,¹⁴ was the most respected lawyer in America through most of the second half of the nineteenth century and the author of an elegant book comparing the constitutional laws of the states.¹⁵ But the principal Barnburner legal theorist was Frederick Grimké of Chillicothe.

Grimké was born in South Carolina in 1791, one of fourteen children sired by a Charleston lawyer educated at Eton and Cambridge University.¹⁶ His father served as a lieutenant colonel in the revolutionary army and represented South Carolina in the Continental Congress. The young Grimké was the senior orator of his Yale class of 1810 and practiced law in Charleston with his father until 1819. When his father died, he moved to the pioneer village of Chillicothe, where he was quickly recognized as a

⁹ See generally CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM 185-200* (1981). For a recent review of a very successful codification movement in nineteenth century Montana, and a reconsideration of this initiative, see Andrew P. Morris et al., *Debating the Field Code 105 Years Later*, 61 MONT. L. REV. 371 (2000).

¹⁰ EVAN HAYNES, *THE SELECTION AND TENURE OF JUDGES* 92-93 (1944); Caleb Nelson, *A Re-evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190 (1993).

¹¹ For a comprehensive biography of Field, see DUAN VAN EE, *DAVID DUDLEY FIELD AND THE RECONSTRUCTION OF THE LAW* (1986).

¹² NEW YORK UNIVERSITY, 1832-1932 6 (Theodore F. Jones, ed. 1933); LESLIE JAY TOMPKINS, *NEW YORK UNIVERSITY LAW SCHOOL, PAST AND PRESENT* 11-14 (1984).

¹³ ELIZABETH G. BROWN, *LEGAL EDUCATION AT MICHIGAN, 1859-1959* 3-6 (1959); Thomas M. Cooley, *The Founding of the Law Department of the University of Michigan*, in SENIOR LAW CLASS ANNUAL 93 (1894).

¹⁴ For a discussion of Cooley's illustrious career, see PAUL D. CARRINGTON, *STEWARDS OF DEMOCRACY: LAW AS A PUBLIC PROFESSION* 47-117 (1999).

¹⁵ See THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN CONSTITUTION* (1878).

¹⁶ A more detailed biography of Grimke is presented in Arthur A. Ekirch Jr., *Frederick Grimke: Advocate of Free Institutions*, 11 J. HIST. IDEAS 75 (1950).

man of exceptional ability and modesty. Within eighteen months of his arrival in Ohio, he was appointed to the Court of Common Pleas. In 1837, he was elevated to the Supreme Court of Ohio, a position from which he retired in 1842 in order to devote himself to philosophy.

Grimké remained a bachelor throughout his life. For much of his forty years in Ohio, he lived and worked in a hotel room in Chillicothe. His personal life is known almost entirely from his correspondence with his sister, Sarah.¹⁷ She and another sister, Angelina, both joined a Quaker Meeting and became ardent and renowned emancipationists and feminists. Grimké was also the uncle of Francis¹⁸ and Archibald Grimké,¹⁹ the notable black sons of his brother, both of whom devoted long and vigorous careers to the cause of equal rights for blacks.

Grimké wrote two books, one on literature and one on law. The latter was entitled *Considerations upon the Nature and Tendency of Free Institutions*. It was first published in Cincinnati in 1848.²⁰ He revised it once. Neither edition was widely read, as he must have expected, because his stated purpose was to “correct . . . the vitiated taste for reading which prevails in our country.”²¹ A reviewer for the distinguished Boston monthly, the *North American Review*, praised *Free Institutions* cautiously, giving “great praise,” as Grimké noted, “unwillingly, as if none but a Bostonian could write a great work.”²²

On many matters it treats, Grimké’s work may be the most perceptive law book written in the nineteenth century. It was republished by the Harvard University Press in 1968.²³ It is, however, a book that will not

¹⁷ This correspondence is located at the Clements Library of the University of Michigan.

¹⁸ Francis Grimké was a graduate of Princeton and Presbyterian minister. THE WORKS OF FRANCIS J. GRIMKE (Carter G. Woodson ed., 1942).

¹⁹ After graduating from Harvard Law School, Archibald Grimké was appointed by President Grover Cleveland in 1894 as consul to Santo Domingo. Archibald supported W.E.B. Dubois, Moorfield Story, and others in the founding of the National Association for the Advancement of Colored People. Angelina W. Grimké, *A Biographical Sketch of Archibald H. Grimke*, OPPORTUNITY: J. NEGRO LIFE, Feb. 1925, at 44.

²⁰ See FREDERICK GRIMKE, CONSIDERATIONS UPON THE NATURE AND TENDENCY OF FREE INSTITUTIONS (H.W. Derby & Co. 1848). Grimké revised the work and Derby published a second edition in 1852. It also appears as 1 THE WORKS OF FREDERICK GRIMKE (Columbus Printing Co. 1871).

²¹ Frederick Grimke, *Preface to the Second Edition* of FREDERICK GRIMKE, THE NATURE AND TENDENCY OF FREE INSTITUTIONS 45, 45 (John William Ward ed., Harvard Univ. Press 1968) (1848) [hereinafter GRIMKE, FREE INSTITUTIONS].

²² John William Ward, *Introduction* to GRIMKE, FREE INSTITUTIONS, *supra* note 21, at 2 n.5 (quoting Grimké).

²³ See GRIMKE, FREE INSTITUTIONS, *supra* note 21. It was republished under an abbreviated title by the Harvard University Press with editorial comment by John William

appeal to contemporary readers. First, Grimké, despite having nephews of African descent, was a racist. He deplored slavery as inconsistent with the ideals of a free society and offered no defense for it, but he expressed a lack of confidence in the ability of black citizens to participate in democratic government on even terms,²⁴ even though he regarded acceptance of social equality as an indispensable condition of “free institutions.”²⁵ Neither slave owner nor abolitionist could find comfort in his words on that subject.

Also, although Grimké ridiculed the nullification doctrine advanced by his fellow South Carolinians,²⁶ he expressed the belief, rejected by

Ward. *Id.* All subsequent citations to *CONSIDERATIONS UPON THE NATURE AND TENDENCY OF FREE INSTITUTIONS* will be to the Harvard University Press’s 1968 edition, titled *THE NATURE AND TENDENCY OF FREE INSTITUTIONS*.

²⁴ Grimké’s lack of confidence in the capacity of slaves of African descent to participate in free society is repeated throughout *THE NATURE AND TENDENCY OF FREE INSTITUTIONS*. See, e.g., *id.* at 418 (labeling African slaves “an inferior and unenlightened order of men”). The tension between his negative assessment of the capacity of African slaves as freed persons and his discomfort with the existence of slavery within a free society also pervades the book. See, e.g., *id.* at 579.

But if one only knew how to deal with so difficult and delicate a subject, if one only had the ability requisite to remove the institute without leaving worse consequences behind, there can be no doubt that it would be better that all the occupations of society should be filled by a free population exclusively.

Id.

²⁵ Grimké viewed equality in a manner similar to what was later popularly dubbed the “American Dream.” With government promising equality before the law, those with ability, motivation, and ingenuity could ascend the socio-economic ladder. As proof, Grimké noted that “[individuals] without education, with ordinary faculties, and who commenced life with little or nothing, are continually emerging from obscurity and displacing those who have acquired fortunes by inheritance.” *Id.* at 115. This effect of social equality, consistent with Social Darwinism, explains why legal equality actually “brings out in bolder relief all the natural inequalities of men.” *Id.* at 116. “The different degrees of sagacity, energy, and opportunity which fall to the lot of individuals will forever create a wide difference in their respective fortunes.” *Id.* at 575. The importance of social equality to free institutions lies in the political protections it provides against a tyranny of the wealthy: “as a large proportion of the envious are constantly rising into the ranks of the envied; a powerful check is imposed upon the revolutionary tendencies of the former.” *Id.* at 116. For a more complete discussion of Grimké’s views on equality, slavery, and “free institutions,” see *id.* at 105-18, 572-608.

²⁶ See *id.* at 494:

It is remarkable that those who advocate [the nullification doctrine] have taken for granted the existence of a power which is nowhere recognized in the constitution and at the same time deny the

Marshall, Webster, Jackson, Story, and Lincoln, that a state could secede from the union.²⁷ Indeed, he predicted that before America had a population of 150 million, it would divide into several confederacies.²⁸

It has been said that Grimké was “a sociologist of politics.”²⁹ He might better be denoted as a political moralist. The theme of his work was advocacy of a moral duty of lawyers and judges responsible for “free (i.e., self-governing) institutions” to practice self-control and submission to legal texts understood in light of the values of the community they purport to serve. He presented the Constitution of the United States as a framework for the practice of that public virtue, not, as most today would, as a framework for judicial supremacy. “Free,” in his vocabulary, referred to the freedom of citizens to govern themselves; only incidentally to that freedom was he concerned with the individual rights that so preoccupy American politics today.

Grimké imposed a lesser but equally important duty on non-lawyer citizens sharing responsibility for “free institutions.” The citizen’s duty is not only to engage actively in politics, but also to give moral reinforcement to the duty of officers to control themselves and to engage in mutual self-control by imposing moral as well as legal restraints on one another’s selfish or idiosyncratic political impulses. Apathetic citizens will, Grimké foretold, become the objects of government as a “self-existing institution,”³⁰ and those who, while participating in public affairs, aggressively pursue their own idiosyncratic preferences or self-interest will beget destabilizing mistrust.

The chief virtue of democracy, in Grimké’s view, was its nurturing of a wholesome and productive sense of individual autonomy and self-esteem on the part of citizens, moderated by a shared sense of mutual responsibility. “Kingly authority” he dismissed as “an illusion of the imagination”³¹ that stunts the moral development of a people. He did not suppose that political conflict among citizens would be painless or that wise decisions would always be made, but did suppose that the process of democratic resolution of conflict rendered men more prudent and more considerate of their fellow citizens than they would otherwise be.³² He

jurisdiction of the supreme court, which is contained in language as unequivocal as could be desired

For a more expansive criticism of the nullification doctrine by Grimké, see *id.* at 477-502.

²⁷ *Id.* at 477-517.

²⁸ *Id.* at 362.

²⁹ John William Ward, *Introduction* to GRIMKÉ, *FREE INSTITUTIONS*, *supra* note 21, at 12.

³⁰ Grimké used this term repeatedly to denote political institutions lacking accountability to the people they govern.

³¹ *Id.* at 692.

³² This theme is also repeated throughout Grimké’s works. *See, e.g., id.* at 582.

was also mindful that one is less likely to resent and more likely to accept a political decision that one had a hand in making or at least an opportunity to oppose directly by the power of the ballot.

It is from these premises regarding the merits of self-government that Grimké wrote his most informed and illuminating chapter on the judicial power.³³ It begins by dismissing the reassurance of Montesquieu (and implicitly of Hamilton in *Federalist Paper No. 78*)³⁴ that the judiciary is the weakest of the three departments of government.³⁵ He conceded that the judiciary deals less directly and less frequently with political issues, but those it handles have political consequences, and “[i]f then the judges are appointed for life, they may have the ability to act upon society, both inwardly and outwardly, to a greater degree than the other departments.”³⁶ Indeed, given the frequency with which other officers rotate in and out of office, he prophesized that “[i]f the executive officers of the courts were only appointed by the courts, we might say that the judiciary has usurped nearly all the executive power of the state.”³⁷

“There may,” Grimké wrote, “be the most solid reasons why, in a monarchical government, the judges should be independent, in the English sense of the term; and yet these reasons may be inapplicable in a republic. . . .”³⁸ Of course, he conceded, judges should be freed from the control of other individuals, especially those who litigate, but they should not be independent of “the community which they are appointed to serve.”³⁹ He did not quote Lord Acton’s famous apothegm about the corrupting effect of power, especially absolute power, but he assures us that such an effect is not unknown among members of the judiciary.⁴⁰

³³ See *id.* at 438-75.

³⁴ THE FEDERALIST NO. 78 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The reassurance was perpetuated by ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

³⁵ See GRIMKE, *FREE INSTITUTIONS*, *supra* note 21, at 438 (“[I]n a democratic republic, where the legislative and executive authority is strictly bounded on all sides, the judicial may become a very imposing department.”).

³⁶ *Id.* at 438-49.

³⁷ *Id.* at 444.

³⁸ *Id.* at 445.

³⁹ *Id.*

⁴⁰ For Grimké, public opinion serves to ensure self-control on the part of judges and lawyers. Grimké saw the disregard of public opinion by judges as an abuse of the power given them within the republic. Life tenure increases the likelihood that judges will grow independent of the community they serve:

[W]hen the judge is sure, provided he commits no technical violation of duty, that he will retain his station for life, he is very apt to regard himself as entirely absolved from [the influence of public opinion].

Grimké emphasized that judicial power to expound the law is essentially a legislative function. He was in effect a nineteenth century Legal Realist. In a statement that both hints of later Realist thought and offers possible insight into voter apathy in more recent judicial elections, Grimké noted that “if it is not wise to confer a permanent tenure of office upon the executive and legislative, it should not be conferred upon the judiciary; and the more so, because the legislative functions which the last perform is a fact entirely hidden from the great majority of the community.”⁴¹

The legislative function of the judiciary “is inevitable,” Grimké said,

. . . and arises from the inherent imperfection which attends all human institutions. It is not in the power of any . . . legislative assembly, however fertile in resources their understandings may be, to make a system of ready-made rules which shall embrace all, or any thing like all, the cases which actually occur.⁴²

“Perhaps,” he speculated, “it is no more than happens to every department of knowledge; for every conquest which science makes . . . only presents a new vantage ground whence the mind can see further and take in a wider scope than it did before.”⁴³ He denied that decisions can be mere deductions from general principles, even those crafted by a legislature of geniuses. The term of judicial office should therefore be “long enough to enable the public to make a fair trial of the ability and moral qualities of the incumbent; and not so long as to prevent a removal in a reasonable time if he is deficient in either.”⁴⁴

Grimké emphasized that it is also inevitable that persons will be elevated to the bench “who are deficient in both the moral and intellectual qualities” required. For Grimké, some good lawyers are bad judges, and lawyers “less than the most eminent” occasionally become very distinguished judges. He opposed any principle giving an incompetent or badly-disposed judge a place on a high court for thirty or forty years merely because he was not a flagrant criminal.⁴⁵

And although he may not outrage the law in a single instance, he may give evidence of the narrowest views and the most rooted bigotry, which, although unperceived by himself, will give a tinge to the whole administration of justice.

Id. at 448.

⁴¹ *Id.* at 452.

⁴² *Id.* at 449.

⁴³ *Id.* at 450.

⁴⁴ *Id.* at 457-58.

⁴⁵ *Id.* at 452.

Grimké's contemporary, John Stuart Mill, offered an additional expression implicit in Grimké's observations about the need to impose restraints on judges:

The disposition of mankind, whether as rulers or fellow-citizens, to impose their own opinions and inclinations as a rule of conduct for others, is so energetically supported by some of the best and some of the worst feelings incident to human nature, that it is hardly ever kept under restraint by anything but want of power⁴⁶

Grimké saw a judiciary without accountability as a likely cause of political instability because of its tendency to identify with a ruling or propertied class. He reckoned that a substantial measure of social equality is a precondition to the republican form of government providing political stability. A republic marked by the existence of a permanent ruling class is unlikely, he insisted, to remain politically stable because the greed of the privileged few will dissolve the loyalties of the subordinate many. He thus perceived that an arrogant judiciary and a pretentious legal profession are a perpetual threat to the social and political equality on which "free institutions" depend.

Grimké's opposition to life tenure was not specifically directed at the federal judiciary. Many states, even before the federal constitution was drafted, had with little reflection adopted the provision governing the tenure of the English judiciary who since 1700 had served "for good behavior"⁴⁷ that was also later written into Article III of the federal Constitution.⁴⁸ He was chiefly concerned with the state courts for they were in his time much more important institutions than the federal courts.⁴⁹

There was no discussion of the term "for good behavior" at Philadelphia in 1787. Indeed, there is little evidence that those who wrote eighteenth century constitutions understood that, by sending the highest courts on political errands, they had made those institutions fundamentally different from the substantially depoliticized English law courts they had known. The Founders should perhaps have foreseen that the high courts they devised would not be staffed by apolitical technocrats of the law such as judges sitting in England at the time, but would often be institutions

⁴⁶ John Stuart Mill, *On Liberty*, in UTILITARIANISM, ON LIBERTY, ESSAY ON BENTHAM 140 (Mary Warnock ed., 1962). Justice Rehnquist also quoted this passage in his dissent in *Furman v. Georgia*, 408 U.S. 238, 467 (1971) (Rehnquist, J., dissenting).

⁴⁷ Act of Settlement Act, 1700, 12 & 13 Will. 2, c. 2, § 3 (Eng.).

⁴⁸ U.S. CONST. art. III, § 1.

⁴⁹ There was in 1848 no federal question jurisdiction in the federal courts, very little litigation in which the United States was a party, and no federal bill of rights applicable to limit the power of state legislatures where most legislation was made. Hence, the bulk of federal litigation were diversity cases.

working in political thickets.⁵⁰ It seems, however, that they did not see this aspect of their work, or else they surely would not have conferred life tenure on members of high courts.⁵¹

One aspect of the problem of life tenure that none could then foresee was the extension of life expectancies occurring in the twentieth century, making it likely that in another generation we will have many Justices sitting on the Supreme Court of the United States for a half century. In today's world, life tenure would be unthinkable to many and is retained as a feature of the Supreme Court of the United States only because the federal Constitution is so difficult to amend.

Being thus very clear that term limits for judges were indispensable, Grimké faced up to the question of deciding on what conditions a judge's term should be extended. He celebrated the New York Constitution of 1846 drafted by his fellow Barnburner David Dudley Field as "one of the greatest experiments which has ever been made upon human nature."⁵² One of the most promising "experiments" in his opinion was the popular election of judges, an experiment that had been previously initiated in other states.

Grimké affirmed that elected judges would have greater independence from the unworthy influence of governors and legislators and their managers and might thus hope to secure greater trust by the people. He acknowledged the difficulty faced by voters in discerning the professional competence of a judicial candidate, but endorsed as imperative the need to subordinate the judicial power to the will of self-governing citizens. He

⁵⁰ This was entirely evident by 1800 when President Adams made his midnight appointments, to the frustration of the incoming Secretary of State, James Madison. A purpose of those appointments was stated by Gouverneur Morris: to withstand "'a heavy gale of adverse wind.'" RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 15 (1971) (quoting Gouverneur Morris). Martin Van Buren later referred to the device as the creation of an "an ark of safety" from which Federalists could continue to control the federal government. MARTIN VAN BUREN, *INQUIRY INTO THE ORIGIN AND COURSE OF POLITICAL PARTIES IN THE UNITED STATES* 278 (1867).

⁵¹ Perhaps they did consider the problem when they wrote Article II. It is quite possible that the elaborate and sometimes screwy system for electing the President set forth in that Article was designed for the purpose of keeping the Supreme Court of the United States from having any role in presidential politics and preventing the sort of thing that happened in the 2000 election. *See Bush v. Gore*, 531 U.S. 98, 103 (2000) (holding, in a 5-4 decision, that the Florida Supreme Court's decision authorizing manual recounts in the aftermath of the 2000 presidential election violated the Equal Protection Clause, effectively ending the controversy and establishing George W. Bush as the victor). At least in hindsight, it seems obvious that the last persons in government at any level who should be assigned a role in counting votes are the Justices whose own personal political power depends on the identity of other Justices to be appointed by an incoming President.

⁵² GRIMKE, *FREE INSTITUTIONS*, *supra* note 21, at 461.

reacted to the rejoinder that the life-tenured judicial power is needed to balance the power of a legislative body too responsive to momentary popular sentiment, observing that “the system of interior checks can never be relied upon where there exists no power external to the government to act upon all the departments and to maintain each in its proper place.”⁵³ Perhaps the people would not always pick the ablest judges possible, but it was more important that the judges understand that their role in the political system is limited by a measure of accountability to the people. Term limits and elections together serve those needs. One may hope for more than that understanding, but, given the demerits of alternative methods of selecting judges, it is best to assure that primary purpose.

Grimké’s writing on the judicial power foretold the drafting of the Ohio constitution of 1851,⁵⁴ which, like the Michigan constitution of 1850,⁵⁵ tracked the New York constitution of 1846.⁵⁶ All three were written by Barnburners and were remarkably similar; all provided for the election of judges, most of them to six year terms. His position on the need for judicial elections was endorsed by the revered Thomas Cooley even after he had been defeated for re-election in a partisan landslide.⁵⁷ Cooley brought the late nineteenth century English observer, Lord Bryce, reluctantly to the conclusion that such elections were justified.⁵⁸

The thoughts expressed in Grimké’s *Free Institutions* also bear similarities to ideas contemporaneously expressed by some Whigs, the political adversaries of Jacksonian Democrats. There were in Grimké’s time thoughtful Whigs conducting in Cincinnati⁵⁹ and Lexington,

⁵³ *Id.* at 635.

⁵⁴ The Ohio Constitution of 1851 remains in effect, as amended. *See generally* OHIO CONST.

⁵⁵ The Michigan Constitution of 1850 was repealed and replaced with a new Constitution in 1908. SUSAN P. FINO, *THE MICHIGAN STATE CONSTITUTION: A REFERENCE GUIDE* 8-14 (1996).

⁵⁶ The New York Constitution of 1846 was repealed and replaced with a new Constitution in 1867. PETER J. GALIE, *ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK* 117-21 (1996).

⁵⁷ A brief account of Cooley’s defeat is set forth in CARRINGTON, *supra* note 14, at 67. His twenty-year tenure on the Supreme Court of Michigan is also briefly discussed. *See id.* at 55-67. For a more comprehensive account of Cooley’s career on the bench, see generally George Edwards, *Why Justice Cooley Left the Bench: A Missing Page of History*, 33 WAYNE L. REV. 1563 (1987).

⁵⁸ 1 JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 507-08 (3d ed. 1905).

⁵⁹ On the politics of Timothy Walker, the founder of the Cincinnati Law School, see generally Paul D. Carrington, *Teaching Law in the Antebellum Northwest*, 23 U. TOL. L. REV. 3 (1992).

Kentucky,⁶⁰ two of the nation's major law schools. Most respected by thoughtful lawyers of that era was the work of Francis Lieber, a Prussian immigrant teaching at the College of South Carolina, who admired the politics of the Federalist Alexander Hamilton.⁶¹ Lieber published a decade before Grimké works on *Political Ethics*⁶² and *Legal Hermeneutics*⁶³ that were widely read and were revived in the 1880s and again in the 1990s.⁶⁴ The difference between Grimké's beliefs and those of contemporary Whigs such as Lieber was one of degree in the extent to which an elite professional class of lawyers could or should seek to impose its politics on self-governing citizens. Even Lieber was for a time persuaded that the election of judges was a sound idea.⁶⁵ Whig lawyers and judges were prone to question the capacity not only of the electorate, but also of those they elect as representatives to make wise and humane political decisions. They saw the legal profession as political saviors, a role for which they were cast by Hamilton in *The Federalist Papers* and by other adherents to the doctrine of judicial supremacy. Barnburners were somewhat more optimistic about the capacities of the electorate, but chiefly more pessimistic about the capacities of an elite professional class, represented by the judiciary, to exercise sound judgment regarding the common interest or to gain the acceptance and moral support of citizens whose political choices they tended to disdain or frustrate.⁶⁶

⁶⁰ On the politics of the Transylvania faculty, see Paul D. Carrington, *Teaching Law and Virtue at Transylvania Univ.: The George Wythe Tradition in the Antebellum Years*, 41 MERCER L. REV. 673 (1990).

⁶¹ Lieber published eighteen books and is the subject of six biographies. He was also the founding intellect of the Columbia Law School and the "patron saint" of American international law. For a brief account of Lieber's career, see generally Paul D. Carrington, *The Aims of Early American Law Teaching: The Patriotism of Francis Lieber*, 42 J. LEGAL EDUC. 339 (1992).

⁶² FRANCIS LIEBER, *MANUAL OF POLITICAL ETHICS* (1838).

⁶³ FRANCIS LIEBER, *LEGAL AND POLITICAL HERMENEUTICS* (2d ed. 1939), which first appeared serially in *AMERICAN JURIST* in 1837 and 1838.

⁶⁴ *LEGAL HERMENEUTICS* was most recently republished in 1995 in volume 16 of the *Cardozo Law Review*. See Francis Lieber, *Legal and Political Hermeneutics, or Principles of Interpretation and Construction in Law and Politics, with Remarks on Precedents and Authorities*, 16 *CARDOZO L. REV.* 1883, 1883-2105 (1995).

⁶⁵ He was for a time supportive of the election of judges, but changed his mind. See FRANCIS LIEBER, *ON CIVIL LIBERTY AND SELF-GOVERNMENT* 221-28 (2d ed. 1859). His defense of the institution of the jury was ardent.

⁶⁶ Grimké's position with respect to the role of the judiciary and legal profession within a republican form of government represented not only the Barnburners of his own era, but was also shared by many who came later, including Thomas Cooley and some leaders of the Progressive movement of the early twentieth century such as Louis Brandeis,

Most persons who have thought responsibly about the problem of imposing political power on judges sitting on courts of last resort have agreed with Grimké that life tenure for those responsible for the enforcement of a constitution that is difficult to amend is a genuinely bad idea. Since he wrote in 1848, there have been hundreds of constitutions written for American states and for other nations that provide for judicial oversight of other branches of government. We have found only one that copies the provision of the federal Constitution allowing Justices to sit until they are impeached and removed by the legislature. That is the constitution of Western Samoa,⁶⁷ and that instrument is much easier to amend than is the Constitution of the United States.⁶⁸ All others, whether American or foreign, impose limits on the terms of office and provide a practicable system of constitutional amendment to correct the excesses of the judiciary in their enforcement.⁶⁹ On the other hand, very few constitutions written for other countries provide for the election of judges by vote of the people.

Yet some states have carried the idea of popular accountability much further than Ohio. Most controversial was the constitutional provision for recall of judges.⁷⁰ California has such a provision in its constitution, alongside its generous provisions for initiative and referendum. When Arizona sought statehood with a constitution containing such a provision, President Taft vetoed its statehood. The offending provision was removed, statehood was achieved, and the state constitution was then amended to

Ernst Freund (the founding spirit of the University of Chicago Law School), and Learned Hand. See CARRINGTON, *supra* note 14. (1999).

⁶⁷ A recent compilation is CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flantz eds., 1990). For a compilation of current provisions bearing on the selection of judges in the fifty states, see 33 COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 127-28 (2001).

⁶⁸ The ease with which errant "counter-majoritarian" decisions can be overruled by the legislature is an additional dimension of the problem; the amendment process can be a means of accountability for high courts that abuse their authority. RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (Sanford Levinson ed., 1995); Erwin Chemerinsky, *Amending the Constitution*, 96 MICH. L. REV. 1561 (1998). Thus, as an alternative to electing judges, Francis Lieber urged frequent amendment of the federal Constitution. FRANCIS LIEBER, AMENDMENT OF THE CONSTITUTION OF THE UNITED STATE SUBMITTED TO THE CONSIDERATION OF THE AMERICAN PEOPLE (1865).

⁶⁹ *But cf.* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995) (arguing that democratic accountability is an unconstitutional threat to individual rights).

⁷⁰ See, e.g., Walter F. Dodd, *The Recall and The Political Responsibility of Judges*, 10 MICH. L. REV. 79 (1911).

restore what had been removed to secure the President's assent.⁷¹ President Theodore Roosevelt favored the reversal of unwelcome judicial decisions by popular referendum.⁷² It was at the time that these provisions were being added to other state constitutions that the people of Ohio amended their constitution to require the vote of a supermajority of Justices to invalidate democratically enacted legislation.⁷³ Although there are thus numerous variations, the important fact is that highest court judges are in some form directly accountable to the people in thirty-nine states, and in the others they serve limited terms, have mandatory retirement ages, or are removable by address of the legislature.

Although Grimké was aware of problems with judicial elections, especially the difficulty of supplying the necessary information to voters, additional problems emerged with experience in the nineteenth century. In some states, political parties gained control of the judiciary, a situation remedied in some states by making judicial elections non-partisan. Some judicial candidates sought office by committing themselves in advance of hearing arguments by parties to disputes on issues likely to be brought before their courts. Laws and rules were enacted to discourage this practice,⁷⁴ with the adverse effect of further diminishing the interest of the public in the question it was called upon to decide.

⁷¹ The details of Arizona's experience with judicial recall are provided by J. Patrick White, *Progressivism and The Judiciary: A Study of the Movement for Judicial Reform, 1901-1917*, at 150-51 (1971) (unpublished Ph.D. dissertation, University of Michigan).

⁷² Theodore Roosevelt, Speech at Carnegie Hall, New York (Oct. 20, 1911), in 18 *WORKS OF THEODORE ROOSEVELT* 244, 274 (Herman Hagedorn ed., 1920). An account of this remarkable event is provided by Edward Hartnett, *Why Is The Supreme Court of the United States Protecting State Judges from Popular Democracy?*, 75 *TEX. L. REV.* 907, 933-49 (1997).

⁷³ OHIO CONST. art. IV, § 2.

⁷⁴ Forty-nine states and the District of Columbia have adopted all or significant parts of some version of the American Bar Association's Model Code of Judicial Conduct, which provides a "gag rule" for judicial candidates. JEFFREY M. SHAMAN ET AL., *JUDICIAL CONDUCT AND ETHICS* 3-4, nn.19 & 20 (3d ed. 2000). The 1972 version provides in relevant part that a candidate for judicial office "should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position or other fact." MODEL CODE OF JUDICIAL CONDUCT Canon 7B(1)(c) (1972). The 1990 version states in relevant part that:

A candidate for judicial office . . . shall not (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; (ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; or (iii)

Many public-spirited people and institutions, including the American Bar Association, the American Judicature Society, the League of Women Voters, and most state bar organizations, responded to the problems of judicial elections by expressing preference for “merit selection” of judges.⁷⁵ That idea was popular in numerous states in the twentieth century, but in its application to courts of last resort it is linked to a vision of judicial office that is technocratic and apolitical. Although there was a time in the late nineteenth and early twentieth centuries when many American lawyers and some citizens deluded themselves with the belief that judges could be trained to be professional technicians interpreting statutes and constitutions without regard to their political consequences,⁷⁶ there is virtually no one who thinks that today.

As applied to highest state courts making decisions laden with political consequences, merit selection is therefore an increasingly difficult idea to sell, especially in an era in which the Supreme Court of the United States has undertaken so visibly to exercise such enormous political power and discretion with inconsistent regard for legal texts. The citizenry is quick to see that political power would be transferred from themselves to those who do the merit selecting. Despite the considerable advantages of merit selection for selecting professional technicians who sit on lower courts, its

knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent.

MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d) (1990). *Cf.* Republican Party v. Kelly, 247 F.3d 854 (8th Cir. 2001) (upholding the constitutionality of Canon 5 of Minnesota’s Code of Judicial Conduct, which was modeled on the 1990 version of the ABA Model Code). For a discussion of the constitutionality of restrictions on candidates’ speech in judicial elections, see generally Adam R. Long, Note, *Keeping Mud off the Bench: The First Amendment and Regulation of False or Misleading Statements by Candidates in Judicial Elections*, 51 DUKE L.J. 787 (2001).

⁷⁵ On the history and ideology of merit selection, see Kermit L. Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850-1920*, 1984 ABF RES. J. 345; Glenn R. Winters, *Selection of Judges—An Historical Introduction*, 44 TEX. L. REV. 1081 (1966).

⁷⁶ Christopher Columbus Langdell, the founder of the case method and modern legal instruction at Harvard Law School, is perhaps the most famous proponent of the view of law as a technocratic pursuit. According to Langdell, the courts use certain fundamental principles and the common law to find the “correct” answer to legal questions. For Langdell, policy and politics play no part in jurisprudence. While Langdell’s case method approach to legal instruction grew in popularity, his “scientific” view of the law failed to garner widespread acceptance. The Realists, who arose in part as a reaction against the Langdellian view of law as a science, believed that judges decide first how they wish to rule, and then use legal texts to justify their decision. For Realists, policy and politics *is* jurisprudence. Paul D. Carrington, *Hail! Langdell!*, 20 J. L. & SOCIAL INQUIRY 691 (1995).

time as a politically viable alternative to judicial elections has passed. As recently as 1987, Ohio voters rejected merit selection of judges by a two to one margin.⁷⁷ The demand for judicial accountability remains a powerful force in Ohio politics, and in light of the increased preoccupation of voters with the political consequences of diverse judicial decisions and the drumbeat of costly advertising calling attention to its role, it seems unlikely that the vote would be as close if the issue were raised in 2001. There is even talk today of dismantling merit selection for the Supreme Court of Alaska.⁷⁸ The issues presented by merit selection are again actively studied by the American Judicature Society and the American Bar Association, the League of Women Voters, and the Conference of Chief Justices. While law reform is in the air, and merit selection is again being considered in Pennsylvania,⁷⁹ the prospects for public approval of a system of selecting judges conferring primary responsibility on a committee of lawyers seem dim.

Grimké's reasons for electing judges abide. The concern that haughtiness of excessively independent judges begets political instability may be more pertinent today than we would like to believe. Class divisions are becoming more marked in the United States than they have been in the past. Judges who reside in guarded subdivisions, attend sporting events in skyboxes, and send their children to private schools are

⁷⁷ E.g., T.C. Brown, *Majority of Court Rulings Favor Campaign Donors*, PLAIN DEALER (Cleveland), Feb. 15, 2000, at 1A. A number of prominent Ohioans, including Chief Justice Thomas J. Moyer of the Ohio Supreme Court, continue to advocate merit selection of judges, despite its political unpopularity. *Id.* The Ohio Bar Association also supports a state constitutional amendment to replace the current judicial election system with a merit system. Croley, *supra* note 69, at 787. Other groups, like the Ohio Roundtable, a nonprofit, nonpartisan education and research organization, oppose a merit selection system for Ohio Supreme Court justices. *Ohio Roundtable Opposes Ending Judicial Elections*, COLUMBUS DISPATCH, Nov. 21, 2000, at 4B. For a complete discussion of the past and future of merit selection in Ohio, see John D. Felice, John C. Kilwein & Elliot E. Slotnick, *Judicial Reform in Ohio*, in JUDICIAL REFORM IN THE STATES 51-71 (Anthony Champagne & Judith Haydel eds., 1993).

⁷⁸ William T. Cotton, *Legislative Confirmation of Judges?*, ANCHORAGE DAILY NEWS, Mar. 28, 1998, at B8. There is now, however, renewed talk of merit selection in Pennsylvania.

⁷⁹ See George Strawley, *Ridge, Advocates Talk of Electing Pennsylvania Judges*, LEGAL INTELLIGENCER, Apr. 11, 2001, at 3 (describing former Governor Tom Ridge's "repeated call to put the question of 'merit selection' of judges onto the ballot statewide in two years" in Pennsylvania); see also John M.R. Bull, *Ridge's Last Words to Legislators: 'Play Nice'*, PITTSBURGH POST-GAZETTE, Oct. 3, 2001, at A1 (reporting that, in his farewell address to a joint session of the state legislature, former Governor Ridge called on the legislature to "[p]ass a judicial merit selection bill").

unlikely to be in touch with the people they serve. Growing divisions of class in America are reflected not merely in the architecture of our athletic stadiums, but in numerous political issues. The current political movement for education vouchers represents one manifestation of the impulse of the privileged class to separate itself from common folk. Another is the movement to allow the investing class to substitute investment accounts for the social security system on which ordinary retirees must depend for old age insurance. Most clearly motivated by the aim of consolidating a privileged class are the repeal of the gift and estate tax and the rule against perpetuities. We do not enumerate these phenomena to argue their merits, but to confirm that social trends in America today would cause alarm among Barnburners like Grimké and to explain why Ohio voters may be increasingly reluctant to be governed by Justices who have no accountability to them, but only to a profession that sees itself as part of a hegemonic elite.

Courts, even more than schools and attendance at athletic contests, are institutions in American society that must be shared by a diverse public whose trust must be earned and maintained. Maybe a ruling class can perpetuate itself in the United States by withdrawing its children from the public schools and endowing them with wealth to assure them elite educations, seats in the skyboxes, and a long, leisurely retirement. But if the members of such an elite are expecting to do those things, then it is all the more important *to them*, as Grimké saw, that the legal system be one commanding the trust of those common citizens not sharing those privileges. Prudent aristocrats who care about their descendants must see the connection.

Until recent times, judicial campaigns were traditionally dull and uninformative. Despite these inherent difficulties, Ohio and numerous other states have lived with the election of judges for one hundred and fifty years and could go on living peacefully with judicial elections but for several developments of the last third of a century.

III. CONTEMPORARY PROBLEMS WITH JUDICIAL ELECTIONS: THE OHIO EXPERIENCE

A chief justice of another state not long ago declared that there is no method of selecting and retaining judges that is worth a damn.⁸⁰ He was not the first to express that wisdom.⁸¹ However, although there may be no good method of selecting and retaining judges, there is a worst method, and Ohio is among the states to have found it. That worst method is one in which judges qualify for their jobs by raising very large sums of money

⁸⁰ ROSCOE POUND FOUND., PRESERVING THE INDEPENDENCE OF THE JUDICIARY 15 (1998).

⁸¹ For an elaboration, see Roger Traynor, *Who Can Best Judge the Judges?*, 53 VA. L. REV. 1266 (1967).

from lawyers, litigants, and special interest groups, and retain their offices only by continuing to raise such funds.

The initial source of the present difficulty was a secondary effect of the civil rights movement resulting in the high visibility of the Supreme Court of the United States during the Warren years.⁸² Following the Warren Court, highest state courts across the country elevated the frequency with which they made dramatic, high visibility decisions on issues of great concern to citizens. The Supreme Courts of California and New Jersey led the way, but Ohio was not far behind, and there was perhaps no state in which that influence was not felt.⁸³ Only professional lawyers with a trained incapacity to see failed to notice that courts such as the Supreme Court of Ohio were making “impact decisions,” for even the refusal to have impact was itself seen by more observant persons as a political choice. The Warren Court and its contemporaries at the state level inadvertently proved beyond debate the validity of Legal Realism.

This secondary effect of the Warren Court led to a tertiary response. If highest state courts visibly exercise so much power, then those hoping for impact or feeling or fearing its adverse effects were motivated to take a greater interest in the selection of the members of such courts. The breakout event occurred in California in the 1970s when voters reacted strongly against a series of decisions of their state supreme court. The Chief Justice barely survived a retention election in 1978,⁸⁴ and she and two of her colleagues were removed from the court by the voters in 1986 in response to her refusal to participate in the enforcement of the death penalty after the voters had amended the state constitution to overrule her earlier decision that executions are unconstitutional.⁸⁵ Meanwhile, some trial lawyers, realizing that they had an enormous stake in the law of torts being made by highest courts, began to groom and support candidates. This event, of course, led to a further reaction by insurers and others having contrary interests. Thus, the medical profession in Texas has come to take a serious interest in judicial politics for the purpose of influencing

⁸² On the lionization of the Warren Court, see L. A. POWE JR., *THE WARREN COURT AND AMERICAN POLITICS* (2000); LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 42-59 (1996).

⁸³ See generally G. ALAN TARR & MARY CORNELIA ALDIS PORTER, *STATE SUPREME COURTS IN STATE AND NATION* (1988). For a recount of Texas's experience with high profile state supreme court decisions, see Paul D. Carrington, *Big Money in Texas Judicial Elections: The Sickness and Its Remedies*, 53 *SMU L. REV.* 263 (2000).

⁸⁴ PREBLE STOLZ, *JUDGING JUDGES: THE INVESTIGATION OF ROSE BIRD AND THE CALIFORNIA SUPREME COURT* 43-44, 84-87 (1981).

⁸⁵ For a brief account of Rose Bird and the California Supreme Court, see CARRINGTON, *supra* note 14, at 81-87.

the development of malpractice law. What we have established in high court elections is interest group politics in its most unwelcome forms.⁸⁶

Stephen Ware's recent study confirms that such monetary investments by interest groups can yield a nice return.⁸⁷ In Alabama, he tells us, campaign contributions have been effective to produce lock-step discipline on the part of almost every judge to sit on the Supreme Court of that state when she has been confronted with issues bearing on the hot-button issue (in Alabama) of arbitrability of disputes. In recent years, justices supported by trial lawyers vote against arbitration, and those supported by business interests vote for it, virtually without regard for the facts or the law.⁸⁸ Observations like Ware's must stimulate other interest groups to seek representation in highest state courts.

Intensifying this advent of interest group politics in judicial elections was the discovery in the 1960s of the power of television advertising. That medium is extraordinarily effective, especially in lower visibility campaigns such as those for seats on highest state courts. It is especially useful for the communication of degrading observations about adversaries. Television advertising is also extraordinarily expensive. To make such advertising work, one needs to hire experts in the art form who can deploy the right images and the right musical background. So equipped, a candidate or anyone else can plant thoughts in the minds of an involuntary audience not on guard against the ploys of deception. It is a confirmed fact that such advertising, if well done, "melts down" in our minds;⁸⁹ that is to

⁸⁶ For more tales from the world of campaign finance in judicial elections, see, e.g., Kurt M. Brauer, *The Role of Campaign Fundraising in Michigan's Supreme Court Elections: Should We Throw the Baby Out with the Bathwater?*, 44 WAYNE L. REV. 367 (1998) (discussing Michigan's experience with campaign finance in judicial elections); Carrington, *supra* note 83 (discussing Texas's experience with campaign finance in judicial elections); Nathan S. Heffernan, *Judicial Responsibility, Judicial Independence and the Election of Judges*, 80 MARQ. L. REV. 1031 (1997) (discussing Wisconsin's experience with campaign finance in judicial elections); Glenn C. Noe, *Alabama Judicial Election Reform: A Skunk in Tort Hell*, 28 CUMB. L. REV. 215 (1998) (discussing Alabama's experience with campaign finance in judicial elections); see also David Barnhizer, "On the Make": *Campaign Funding and the Corrupting of the American Judiciary*, 50 CATH. U. L. REV. 361, 364 (2001) ("One consequence of the rising cost of judicial elections and the amassing of large pools of campaign funds by special interests is that many judicial candidates are consciously and unconsciously selling their votes on issues.").

⁸⁷ Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J. LAW & POL. 645 (2001).

⁸⁸ One of the sixteen Justices in Ware's sample did occasionally stray. See *id.* And after publication of his paper, the court strayed. See *Harold Allen's Mobile Home Factory Outlet, Inc. v. Butler*, 2002 Ala. LEXIS 16.

⁸⁹ KATHLEEN HALL JAMIESON, *DIRTY POLITICS: DECEPTION, DISTRACTION AND DEMOCRACY* 123-35 (1992).

say that we forget where we learned that a particular judicial candidate is a skunk. We only remember that she is.

The expensiveness of media campaigns has the dramatic effect of forcing not only judicial candidates but sitting judges hoping for re-election to seek and accumulate large campaign war chests. Often, lawyers or litigants who are likely to appear before the judge constitute large proportions of the contributions to judicial candidates. A report released on June 29, 2000 by the Ohio Citizens Against Lawsuit Abuse revealed that incumbent Justice Alice Robie Resnick received \$329,175 or eighty-four percent of her total campaign contributions at that point of the campaign from Ohio trial lawyers.⁹⁰ The other three candidates in the race for Resnick's Supreme Court seat combined received only \$55,000 from Ohio trial lawyers.⁹¹ Despite the public criticism generated by her campaign contributions from trial lawyers, Justice Resnick's 2000 re-election bid garnered more publicity because she was reportedly outspent by her critics by at least seven to one, thanks in large part to the increased use of unregulated "soft money" by third party "issue advocates."⁹²

For her 1996 Ohio Supreme Court re-election bid, Justice Evelyn Stratton received "\$74,885 from finance, insurance and real estate firms; \$134,900 from lawyers and lobbyists, most of whom represent big business before the court; and \$16,476 from medical interests."⁹³ The law firm that handled Justice Stratton's campaign later represented the tobacco industry in a case before the Ohio Supreme Court.⁹⁴ When asked about the motivations of her campaign contributors, Justice Stratton asserted that "her donors aren't seeking specific rulings but simply 'want a level playing field.'"⁹⁵ Justice Stratton's statement is one often heard in other states, but it raises the obvious question of why contributors would view a donation as necessary to ensure "a level playing field."

At best, campaign fundraising by judicial candidates is unseemly and degrading. At worst, it tempts those with an interest in a state's law to try to buy a high court. The sin committed should not be viewed as bribery in the conventional criminal sense of that word because no judge who wins an expensive election is required by his or her benefactors to surrender all

⁹⁰ *Personal Injury Lawyers Bankroll Resnick's Re-election*, PR NEWSWIRE, June 29, 2000.

⁹¹ *Id.*

⁹² See David Ruppe, *Soft Money's Spread: Business Buys a Voice During Ohio Supreme Court Race*, ABCNews.com, at http://abcnews.go.com/sections/politics/DailyNews/ohiosoftmoney_001103.html (last visited Dec. 2, 2000) (on file with the authors).

⁹³ T.C. Brown, *Majority of Court Rulings Favor Campaign Donors*, PLAIN DEALER (Cleveland), Feb. 15, 2000, at 1A.

⁹⁴ *The Buying of the Bench*, NATION, Jan. 26, 1998.

⁹⁵ *Id.*

professional judgment and responsibility or to decide a particular case in favor of his or her supporters. Instead, big money picks as candidates individuals who have clear and strong predispositions favoring its interests. The benefit acquired by the interest group prevailing in a judicial election is not a specific outcome, but control over the court as an institution and influence on the law that it makes. Professor Ware's data from Alabama notwithstanding,⁹⁶ the effect of that control may never be seen in actual decisions of cases, but only in the settlement value of claims and defenses for which the members of the highest court are known to have particular political predispositions. That effect can often provide a generous return on the investment. We can be sure that those who funded pro-business campaigns in Alabama have received a very good return on their money in the form of reduced amounts needed to settle claims against them.

Those responding to this temptation to influence the law of Ohio in this way are responsible for the perpendicular increase in the cost of statewide judicial campaigns in many states. Before the 2000 election, one observer estimated that the campaign for one Ohio Supreme Court seat would generate at much as \$12 million in fundraising.⁹⁷ Twenty years ago, a campaign for an Ohio Supreme Court seat cost \$100,000.⁹⁸

In addition to the large amounts a candidate must collect to run for judicial office, numerous states, including Ohio, are now witnessing an arms race between competing special interest groups. Although soft money first became a major issue in Ohio judicial elections in 1996, the 2000 Supreme Court race marked the first time third party groups escaping registration as political action committees [PACs] contributed large amounts.⁹⁹ Critics of Justice Resnick, including the United States Chamber of Commerce, various insurance groups, and an organization called Citizens for a Strong Ohio, all ran "unregulated 'issue' ads criticizing Resnick's record."¹⁰⁰ Business and insurance organizations worked to defeat the incumbent Justice Resnick, "in part, for writing the 4-3 majority opinion invalidating a law that would limit corporate liability in civil lawsuits filed by injured Ohioans."¹⁰¹ Anti-Resnick advertisements first surfaced a year before the election "when a national lobbying group

⁹⁶ See *supra* note 87 and accompanying text.

⁹⁷ Wood R. Foster, Jr., *Latest Decision on Miranda is a Strong Case in Point for Judicial Independence*, STAR-TRIB. (Minneapolis-St. Paul), July 15, 2000, at 21A.

⁹⁸ William Glaberson, *Fierce Campaigns Signal a New Era for State Courts*, N.Y. TIMES, June 5, 2000, at A1.

⁹⁹ Ruppe, *supra* note 92.

¹⁰⁰ *Id.*

¹⁰¹ T.C. Brown, *Resnick Overcomes Attacks, Wins High Court Race*, PLAIN DEALER (Cleveland), Nov. 8, 2000, at 1A. For the decision which initiated the Ohio business community's opposition to Justice Resnick, see *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1090-96 (Ohio 1999).

for the insurance industry began a series of radio ads accusing her of perpetuating outrageous lawsuits.”¹⁰²

The advertisements promulgated by special interest groups in the campaign for Justice Resnick’s seat demonstrate the ferocity and exaggeration that has become a hallmark of once tame state supreme court elections. Citizens for a Strong Ohio, a pro-business organization closely aligned with the Ohio Chamber of Commerce¹⁰³ and not subject to campaign finance regulation, accused Justice Resnick “of having an anti-business bias, encouraged by the donations of trial lawyers.”¹⁰⁴ In one television advertisement, Justice Resnick was depicted “in black robes switching a vote after someone dumped bags of money on her desk. Another show[ed] a blindfolded lady justice peeking at a pile of money on her scales, before she and the scales fall over and break.”¹⁰⁵ Citizens for a Strong Ohio successfully avoided disciplinary measures based on the accuracy of its advertisements after the Ohio Election Commission, in a 4-3 decisions, determined that “Citizens did not have to file as a [political action committee] and so [is not] subjected to state campaign finance and truthful advertising laws.”¹⁰⁶

In the 2000 elections, the United States Chamber of Commerce spent for the first time in its history an undisclosed but substantial amount of unregulated soft money in a number of state supreme court races and a state attorney general race.¹⁰⁷ Although the United States Chamber of

¹⁰² Brown, *supra* note 101, at 1A.

¹⁰³ *Corrupting Influences Grow in Contests for Judgeships*, USA TODAY, Nov. 2, 2000, at 16A; Ruppe, *supra* note 91.

¹⁰⁴ Brown, *supra* note 101, at 1A.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* In addition, “issue” advocates like Citizens for a Strong Ohio do not fall within the bounds of the Ohio Canons of Judicial Ethics, which regulate only the campaign behavior of actual candidates.

¹⁰⁷ Ruppe, *supra* note 92. The U.S. Chamber of Commerce’s unprecedented foray into Ohio’s judicial elections was no doubt instigated by recent state court decisions invalidating “tort reform” laws. *See, e.g.*, *Crowe v. Owens Corning Fiberglas*, 718 N.E.2d 923 (Ohio 1999) (per curiam) (holding that a punitive damages cap is unconstitutional); *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062 (Ohio 1999) (invalidating an omnibus tort reform statute that, inter alia, included caps on non-economic damages and punitive damages and an abrogation of the collateral source rule on separation of powers and single-subject rule grounds); *Sorrell v. Thevenir*, 633 N.E.2d 504 (Ohio 1994) (holding that the deduction of collateral benefits from jury awards violated the right to trial by jury, due process, and equal protection and the right to a remedy); *Zoppo v. Homestead Ins. Co.*, 644 N.E.2d 397 (Ohio 1994), *cert. denied sub. nom.*, *Damian v. Galayda*, 516 U.S. 810 (1995) (finding that a law requiring that future damages in medical malpractice cases be paid periodically rather than as a lump sum violated the right to a jury trial and due process); *Morris v. Savoy*, 576 N.E.2d 765 (Ohio 1991) (finding that a

\$200,000 cap on general damages in medical malpractice cases violated due process rights); *Pryor v. Webber*, 263 N.E.2d 235 (Ohio 1970) (holding that evidence of compensation from collateral sources to diminish damages is prejudicial and inadmissible); *Gladon v. Greater Cleveland Reg. Transit Auth.*, No. 64029, 1994 WL 78468 (Ohio App. Mar. 10, 1994), *rev'd on other grounds*, 662 N.E.2d 626 (Ohio 1996) (holding that a \$250,000 non-economic damage cap violated the right to a jury trial and equal protection).

Of course, the Ohio courts are not alone in their invalidation of tort reform legislation. *See, e.g.*, *Am. Legion Post No. 57 v. Leakey*, 681 So. 2d 1887 (Ala. 1996) (holding that a statute admitting evidence of collateral source payments in personal injury cases violated the plaintiff's right to a jury trial, equal protection, and due process), *overruled by* *Marsh v. Green*, 782 So. 2d 223 (Ala. 2000); *Smith v. Schulte*, 671 So. 2d 1334 (Ala. 1995) (per curiam), *cert. denied*, 517 U.S. 1220 (1996) (finding that a \$1 million cap in wrongful death cases against health care providers violated both equal protection and the right to a jury trial), *abrogated in Ex parte Apicella*, No. 1992273, 2001 WL 306906 (Ala. Mar. 30, 2001); *Moore v. Mobile Infirmary Assocs.*, 592 So. 2d 156 (Ala. 1991) (holding that a \$400,000 non-economic damage cap in medical malpractice cases violated both jury trial and equal protection guarantees); *Clark & Halliburton Indus. Servs. Div. v. Container Corp. of Am.*, 589 So. 2d 184 (Ala. 1991) (holding that a statute permitting periodic payments of personal injury damage awards greater than \$150,000 violated the right to a jury trial); *Armstrong v. Roger's Outdoor Sports, Inc.*, 581 So. 2d 414 (Ala. 1991) (finding that a statute ordering courts to make no presumptions about the correctness of punitive damage awards violated separation of powers principles); *Boswell v. Phoenix Newspapers*, 730 P.2d 186 (Ariz. 1986), *cert. denied*, 481 U.S. 1029 (1987) (holding that a retraction in lieu of damages in defamation actions violated the state's open courts provision); *Kirk v. Denver Publ'g Co.*, 818 P.2d 262 (Colo. 1991) (finding that a statute designating one-third of punitive damages as due to the state's general fund violated the takings clause of the state and federal constitutions); *Smith v. Dep't of Ins.*, 507 So. 2d 1080 (Fla. 1987) (per curiam) (holding that a \$450,000 cap on non-economic damages recoverable in actions for personal injury violated the state's open court provision); *Denton v. Con-Way S. Express, Inc.*, 402 S.E.2d 269 (Ga. 1991) (finding that a statute admitting collateral source payments violated the right to a remedy), *overruled by*, *Grisson v. Gleason*, 418 S.E.2d 27 (Ga. 1992); *Jones v. State Bd. of Med.*, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977) (holding that a medical malpractice damages cap was unconstitutional on equal protection grounds); *Best v. Taylor Machine Works*, 689 N.E.2d 1057 (Ill. 1997) (finding that a \$500,000 cap on non-economic damages was a legislative remittitur, which violated the separation of powers doctrine and constituted impermissible special legislation); *Wright v. Cent. Du Page Hosp. Ass'n*, 347 N.E.2d 736 (Ill. 1976) (finding that a \$500,000 cap on damages in personal injury action was unconstitutional on equal protection grounds); *Thompson v. KFB Ins. Co.*, 850 P.2d 773 (Kan. 1993) (holding that allowing the jury to consider collateral source benefits when prayer for relief is in excess of \$150,000 violated equal protection); *Kan. Malpractice Victims Coalition v. Bell*, 757 P.2d 251 (Kan. 1988) (holding that medical malpractice caps violated jury trial and due process rights and constituted a legislative remittitur), *overruled in part by* *Bair v. Peck*, 811 P.2d 1176 (Kan. 1991); *Farley v. Engleken*, 740 P.2d 1058 (Kan. 1987) (finding that the repeal of the collateral source rule

violated equal protection guarantees); *Wentling v. Med. Anesthesia Servs., P.A.*, 701 P.2d 939 (Kan. 1985) (same); *Williams v. Wilson*, 972 S.W.2d 260 (Ky. 1998) (holding that changes to standards governing the availability of punitive damages violated the right to a jury trial, the right to remedy, the prohibition on damage caps, and wrongful death rights guarantee); *O'Bryan v. Hedgespeth*, 892 S.W.2d 571 (Ky. 1995) (finding that a statute admitting evidence of collateral source payments in personal injury cases violated separation of powers and established judicial powers to set rules of practice); *Waldon v. Housing Auth.* 854 S.W.2d 777 (Ky. Ct. App. 1991) (holding that immunity from damages when the injury results from intervening criminal act violated the right to a remedy); *Chamberlain v. State*, 624 So. 2d 874 (La. 1993) (holding that a \$500,000 ceiling on general damages recoverable in a personal injury suit against the state violated the right to remedy where sovereign immunity has been waived), *superceded by* LA. CONST. art. XII, § 10(c); *Trovato v. DeVeau*, 736 A.2d 1212 (N.H. 1999) (holding that a \$50,000 cap on wrongful death claims where no dependent relative survives violated the right to a remedy and equal protection guarantees); *Brannigan v. Usitalo*, 587 A.2d 1232 (N.H. 1991) (finding that an \$875,000 limit on noneconomic damages recoverable in actions for personal injury violated equal protection guarantees); *Carson v. Mauer*, 424 A.2d 825 (N.H. 1980) (finding that the abrogation of the collateral source rule and a \$250,000 noneconomic damage cap in medical malpractice cases was unconstitutional on equal protection grounds); *Richardson v. Carnegie Library Rest., Inc.*, 763 P.2d 1153 (N.M. 1989) (holding that a damages cap in the dram shop act was unconstitutional on equal protection grounds), *overruled in part by* *Trujillo v. City of Albuquerque*, 965 P.2d 305 (1998); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1979) (invalidating a statute imposing a \$300,000 limit on damages recoverable in a medical malpractice action and abrogating the collateral source rule on equal protection and due process grounds); *Reynolds v. Porter*, 760 P.2d 816 (Okla. 1988) (holding that a cap based on the relative age of the claim invalid as special legislation); *Lakin v. Senco Prods., Inc.*, 987 P.2d 476 (Or. 1999) (finding that a \$500,000 cap on non-economic damages in personal injury and wrongful death actions violated the right to a trial by jury); *Tenold v. Weyerhaeuser Co.*, 973 P.2d 413 (Or. App. 1994) (same); *Viadock v. Nesbitt Mem'l Hosp.*, 489 A.2d 240 (Pa. Super. Ct. 1985) (finding that a collateral source modification was not severable from a medical malpractice arbitration statute, which was invalidated as a violation of the right to trial by jury); *Boucher v. Sayeed*, 459 A.2d 87 (R.I. 1983) (holding unconstitutional on equal protection grounds a statute admitting evidence of collateral source payments in medical malpractice cases); *Knowles v. United States*, 544 N.W.2d 183 (S.D. 1996) (finding that a statute limiting medical malpractice compensatory damages to \$1 million violated substantive due process); *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988) (holding that a statute limiting liability to \$500,000 for damages in medical malpractice cases violated the open courts guarantee); *Condemarin v. Univ. Hosp.*, 775 P.2d 349 (Utah 1989) (finding that a statute limiting medical malpractice liability of state hospitals to \$100,000 violated the right to trial by jury); *Sofie v. Fiberboard Corp.*, 771 P.2d 711 (Wash. 1989) (holding that a statute imposing a cap on non-economic damages for personal injury at a rate of 0.43 times the average annual wage and life expectancy of the plaintiff violated the jury trial guarantee); *Martin v. Richards*, 531 N.W.2d 70 (Wis. 1995) (declining to impose a \$1 million cap on non-economic damages retroactively); *Discount*

Commerce's ads did not help Cuyahoga County appellate court Judge Terrence O'Donnell prevail over Justice Resnick, the Chamber's candidates prevailed in ten of the twelve supreme court races it targeted.¹⁰⁸ The U.S. Chamber of Commerce's use of advertisements attacking Justice Resnick was denounced by every major newspaper in Ohio.¹⁰⁹ One report estimated that the United States Chamber of Commerce and Citizens for a Strong Ohio combined spent "\$5 million or more" on advertisements attacking Justice Resnick.¹¹⁰ Another report stated that interest groups spent more than \$10 million total in the campaign for Justice Resnick's seat.¹¹¹

Of course, the United States Chamber of Commerce's purpose was not to bribe judges in particular cases, but to assure "an even playing field," i.e., that the law of Ohio and other states is friendly to their corporate members in their contests with consumers, employees, and environmental groups, by defeating any judge whose assessment of the public interest differs from that of the Chamber of Commerce. Its members will as a result of this success more than recover the cost of the Chamber's investment in savings effected by reducing their settlement offers in claims brought against them. Of course, there are other interest groups making similar investments for the same economic purpose.

There are persons endowed with a passionate commitment to the glories of market economics who suppose that high bidders make efficient, i.e. good, law. Bradley Smith seems to be such a theorist when he urges that busy people with money to spend on judicial elections should not be disfavored in their efforts to buy recognition and their competition with candidates who are blessed with advantageous names.¹¹² Perhaps neither or both of the candidates in such a contest would make good law, but if the successful candidate has acquired the office by making a high bid, the court is not, in Grimké's term, a "free institution" worthy of the enduring respect of citizens.

The problem faced by Ohio in its contested judicial elections has been encountered in some other states in a quite different form. Over half a

Fabric House v. Wis. Tel. Co., 345 N.W.2d 417 (Wis. 1984) (holding invalid on public policy grounds an exculpatory contract that limited liability for errors and omissions in paid advertising).

¹⁰⁸ Spencer Hunt, *Chief Justice: Appoint Judges*, CINCINNATI ENQUIRER, Nov. 10, 2000, at C01.

¹⁰⁹ *Chamber's Ad Efforts Failed in Ohio, Worked in Other States*, COMMERCIAL APPEAL (Memphis, Tenn.), Nov. 9, 2000, at 6.

¹¹⁰ Brown, *supra* note 101, at 1A.

¹¹¹ Tony Mauro, *Judges Shouldn't Have to Please Voters*, USA TODAY, Oct. 18, 2000, at 17A.

¹¹² Bradley A. Smith, *Some Problems with Taxpayer-Funded Political Campaigns*, 148 U. PA. L. REV. 591, 599 (1999).

century ago, the American Judicature Society began to promote the idea of a judicial retention election as a means of providing a measure of democratic accountability to make merit-selection more palatable to voters.¹¹³ A retention election is one in which a sitting judge runs for an additional term without an opponent. It was thought that this protected the judiciary from the deficiencies of free-swinging elections on the one hand and life tenure on the other. But the same conditions that have resulted in the tainting of competitive elections in Ohio have affected retention elections as well. Sitting justices on high courts can become sitting ducks for political adversaries willing to spend big bucks to drive them off the bench.¹¹⁴ Even if a given campaign of this sort is unsuccessful, it may have an effect on the market value of claims and defenses adjudicated by courts mindful of the willingness of special interest to spend vast sums to terminate their judicial careers.

So widely shared is the despair that a meeting of Chief Justices was held soon after the 2000 elections under the auspices of the National Center for State Courts. William Glaberson of the *New York Times* described the summit as “a response to growing concerns about the million-dollar war chests, attack advertising and even outright distortion of an opponent’s record that seem to have become more widespread in judicial races this year and threaten public confidence in the courts.”¹¹⁵ The issue under consideration remained: given the technological and political developments and the current state of First Amendment jurisprudence, how if it all can our high courts be maintained as “free institutions?” The expressed concerns of the judges led the American Bar Association to create its commission to consider the problem.

IV. REPAIRING JUDICIAL ELECTIONS

As the Chief Justices and the members of the ABA commission perceived, the system is broken and not easily repaired. Major impediments to repair the rules of campaign finance have been constructed by the Supreme Court of the United States. Three recently minted principles of constitutional law, none of them ever imagined by Grimké, must be addressed by those seeking a suitable method of selecting and retaining justices.¹¹⁶ Most troublesome is the holding in *Buckley v.*

¹¹³ Winter, *supra* note 75.

¹¹⁴ A few examples are briefly described in CARRINGTON, *supra* note 14, at 110-111.

¹¹⁵ William Glaberson, *Chief Justices to Meet on Abuses in Judicial Races*, N.Y. TIMES, Sept. 8, 2000, at A14.

¹¹⁶ On the extravagant development of First Amendment law in recent decades, see Paul D. Carrington, *Our Imperial First Amendment*, 34 U. RICHMOND L. REV. 1167 (2001). *Cf.*, e.g., Long, *supra* note 74 (examining the constitutionality of prohibitions on false or misleading statements by judicial candidates).

*Valeo*¹¹⁷ that campaign spending caps violate candidates' First Amendment free speech protections.¹¹⁸ The Court in *Buckley* treated election expenditures as political speech, giving such expenditures the highest level of First Amendment protection possible.¹¹⁹ The second is the extension of the holding in *New York Times v. Sullivan*,¹²⁰ stripping candidates for judicial office from the protections long afforded by the law of defamation. The third is the extension of the holding in *NAACP v. Alabama*,¹²¹ affording a right to anonymity in politics.¹²² The practical result of these three holdings demonstrates the severity of the situation: the First Amendment seems to allow special interest groups to spend as much as they want, to say virtually anything they wish about judicial candidates, regardless of how misleading and unfair the statements may be, and to continue to maintain the anonymity of their members during the advertising onslaught.

These statements of the Court's principles are oversimplified, but it is not our purpose here to analyze or criticize them. We mean only to relate them to the problem of judicial elections. The combined effect of the Court's rulings tends to entrench the right of privileged interest groups anonymously to buy quantities of television time for the purpose of disparaging a candidate for judicial office with costly but effective spot ads. It is remarkably easy to disparage any judge who has decided more than a few cases because many decisions can be mischaracterized in spot advertising and presented as the work of a reckless wrongdoer indifferent to the welfare of the community. For example, one ad run in Ohio during the 2000 election depicted a candidate as the judge who ruled against a factory worker dismembered by a defective machine. Of course, any judge who has ever voted to reverse a conviction, for any reason, can be presented as the champion of criminals.

¹¹⁷ 424 U.S. 1 (1976). For recent criticism of the decision, see Richard L. Hasen, Shrink Missouri, *Campaign Finance and "The Thing That Wouldn't Leave,"* 17 CONST. COMMENTARY 483 (2000). An early critique is provided in J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609 (1982). For an extended defense of the proposition that campaign expenditures are a protected form of speech, see BRADLEY A. SMITH, UNFREE SPEECH (2001); Joel M. Gora, *No Law . . . Abridging*, 25 HARV. J.L. & PUB. POL. 843 (2001); Martin H. Redish, *Free Speech and the Flawed Postulates of Campaign Finance Reform*, 3 U. PA. J. CONST. LAW 783 (2001).

¹¹⁸ *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

¹¹⁹ *Id.*

¹²⁰ 376 U.S. 254 (1964).

¹²¹ 357 U.S. 449 (1963).

¹²² *Id.* at 462 (recognizing "the vital relationship between freedom to associate and privacy in one's association").

If we are obliged to give full and uncompromising respect to those three principles of judge-made First Amendment law allowing anonymous defamation of judicial candidates by individuals or interest groups free to spend infinite sums,¹²³ then the management of respectable judicial campaigns under the present regime is impossible. Our law will simply be for sale to high bidders. We will, like it or not, have an Ohio judicial oligarchy selected by those with the money to buy it.

The Ohio Supreme Court tried to save judicial elections in Ohio. It had been thought that the Supreme Court of the United States might cut some slack for rules governing judicial campaigns.¹²⁴ The Ohio plan, which set spending and individual contribution limits only in judicial campaigns, was struck down in 1998 in a regrettable but not altogether surprising application of Supreme Court doctrine by the Sixth Circuit Court of Appeals.¹²⁵ The Attorneys General of eighteen other states and the United States Justice Department all joined Ohio to ask the court to reverse or qualify *Buckley v. Valeo* and allow the establishment of mandatory spending limits for judicial elections,¹²⁶ but all efforts to save the campaign expenditure limits were fruitless. The result probably did not affect the outcome of Ohio elections because those who seek to gain control of the Ohio courts have discerned the “soft money” loophole to which the Ohio court’s rule did not apply.¹²⁷ Because of *Buckley*, none of the limitations imposed by the Ohio court were applicable to money spent independently by interest groups or individuals other than candidates.

Efforts have been made in other states to tighten the rules for disclosure of funding sources, and for disqualification of judges who have been too generously supported by lawyers and litigants appearing before

¹²³ Cf. Long, *supra* note 74 (arguing that prohibitions on false or misleading statements by judicial candidates can be sufficiently narrow and well-defined to guarantee their constitutionality).

¹²⁴ See Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803 (1999).

¹²⁵ See *Suster v. Marshall*, 149 F.3d 523 (6th Cir. 1998), *cert. denied* 525 U.S. 1114 (1999). In *Suster*, the Sixth Circuit refused to overturn *Buckley v. Valeo* and found that Ohio’s newly imposed campaign expenditure limits for judicial candidates violated the First Amendment. 149 F.3d at 528-34. The Sixth Circuit held that, after *Buckley*, all campaign expenditure limits were subject to strict scrutiny, regardless of the office sought in election. *Id.* at 529.

¹²⁶ Bob Hohler, *Ban on Election Limits Facing Challenges on Two Fronts*, BOSTON GLOBE, Mar. 18, 1997, at A11.

¹²⁷ James Bradshaw, *Spending Limits Rejected*, COLUMBUS DISPATCH, Sept. 29, 2000, at 1C.

them.¹²⁸ The major inadequacies of such legislation are that it fails to reach direct spending on judicial elections by political organizations and other interest groups, and that its provisions are enforceable only by civil and criminal sanctions imposed on violators by elected prosecutors. This approach is more promising if it provides for mandatory recusal of judges receiving illegal support. But it is not imaginable that all judges receiving support from an interest group such as the Chamber of Commerce could be disqualified from deciding any case involving any of its members or contributors even if all their names are disclosed.

The plan under consideration in North Carolina¹²⁹ proposes a variation on public funding of judicial election campaigns that might work. It is a variation on plans for “voter-owned” elections that have been advanced in a few states. Some funding for the North Carolina plan would come from a fifty-dollar annual tariff on all the lawyers in the state, save those who openly refuse to share the burden, plus a one dollar designation on the state income tax form unless the taxpayer refuses. There would also be a noticeable filing fee imposed on the candidates that would be paid from contributions limited to a hundred dollars. A candidate unable to secure enough small contributions to pay the fee would not appear on the ballot.

Some of the money thus raised would be invested in an elaborate Voter’s Guide resembling that now in use in the state of Washington. Not only would candidates be encouraged to present their qualifications and to make a personal statement in the guide, but the same opportunity would be afforded to other individuals or pre-existing groups that wished to endorse a candidate for judicial office and to give reasons for their endorsement, with a reasonable right of an opposing candidate to reply to any adverse statement made about him or her. A reasonable charge would also be imposed on those making endorsements.

The judicial voters guide could be distributed in print form without charge at every public library and courthouse in the state and by mail to anyone asking for it, or perhaps even to all registered voters.¹³⁰ In videotape form, it could be available without charge to any television station willing to broadcast in its entirety all portions bearing on a particular race at a reasonable time. It would also be available to any organization willing to show it to a gathering of its members. In addition, it would be available in electronic form to anyone having access to the internet.

¹²⁸ *E.g.*, Texas Judicial Campaign Fairness Act of 1995, Acts 1995, 74th Leg., ch. 763, § 1, *amended by* Acts 1997, 75th Leg., ch. 479 § 1, *amended by* Acts 1997, 75th Leg., ch. 479 § 1 et seq. (codified as TEX. ELEC. CODE § 253.151-253.176 (Vernon 2001)).

¹²⁹ *See* N.C. S. 1054 (Oct. 2, 2001) (introduced by Senator Gulley).

¹³⁰ Some voter’s guides are now so distributed. The question remains whether this type of bulk distribution marks them as mere junk mail.

Any candidate or supporter publishing in the official guide would be required to consent to certain conditions in exchange for the public support being received in the form of the guide. One condition would be a rigorous requirement of publicity as to the source of the funds being used to buy a place in the guide or for any other purpose bearing on the campaign. Candidates would have to agree not to borrow money and to limit to a modest sum the amount accepted from any source. Organizations publishing endorsements in the guide would also have to agree to limit their campaigning extrinsic to the guide. Because judicial elections produce low voter turnout, any scheme that brings accurate, comparative information to even a small number of voters could have a substantial effect on the outcome of a judicial election.

Candidates and “issue advocates” would remain free to avoid these commitments by eschewing the guide. Such candidates would then be listed in the guide, but the only information supplied about them would be that they had declined to accept the conditions of a “voter-owned” election. This would leave the voter free to draw any appropriate inference.

Most of the money received from the lawyers would primarily be used as “rescue money” to rebut efforts or organizations to use “soft money” to influence the results of the campaign. One might hope that the availability of such a fund would have a prophylactic effect. Maybe the United States Chamber of Commerce or other like groups would be deterred from spending money to denounce a candidate for judicial office if they foresaw a substantial response from a neutral source.

In its present form, the North Carolina scheme will not deploy any appropriated public funds. Wisconsin has provided public money for judicial candidates and is considering providing more.¹³¹

A not insoluble problem lies in the identity of a sufficiently neutral group to administer the system. That organization essentially will be a close cousin to the group that would nominate judges under a merit selection system. Retired judges or citizens who have given long and honorable years of public service in other roles are a group from whom we would hope to find members. They would be authorized to conduct a public relations campaign to explain their mission and role to the voters.

The current proposal in North Carolina is supported by the North Carolina Bar, the American Association for Retired Persons, the League of Women Voters, the Black Caucus, and several groups favoring election law reforms. We are told that the proposal will be voted on in 2002.

There can be no guarantee that this scheme would achieve its intended effects. If adopted in Ohio, it is quite possible that there is an interest group that will be so intent on buying the Supreme Court of Ohio, and thus gaining control over the law of Ohio, that it will invest bundles in fancy

¹³¹ William Glaberson, *States Take Steps to Rein in Excesses of Judicial Politicking*, N.Y. TIMES, June 15, 2001, at 1.

television advertising designed to alarm voters about a candidate otherwise headed for election. The possibility remains that the people of Ohio will be successfully deceived by such a group and vote in response to misleading sound bites uttered by professional actors to the accompaniment of Beethoven. If so, the scheme will have failed. This scheme also undoubtedly will have unforeseen and unintended consequences, as all reforms do.

A beauty of the North Carolina scheme is that it can be put in place by a state legislature and requires no amendments of state constitutions. For those willing to take on the challenge of amending a constitution, other options are available.

An idea under discussion in Ohio newspapers is a proposal for a substantial lengthening of terms of office. There is much to be said for that idea. It has been urged by the study group of the Century Fund after its consideration of the crisis.¹³² It would mean that at any one time, many members of the Ohio Supreme Court would see the re-election campaign as no more than a distant threat. Hence, there would be more independence of a sort. On the other hand, the stakes in each election would rise. If the terms are made very long, then the system of accountability advocated by Grimké is weakened or destroyed, and the court would be increasingly free to impose its political will on the people of Ohio.

Also worthy of consideration is the elimination of partisan primaries and the introduction of preferential voting. The purpose would be to abbreviate campaigns and thereby reduce their costs. This would serve to magnify the effectiveness of the scheme presently under consideration in North Carolina.

If merit selection is to be reconsidered, it will, we think, need some rethinking. One possibility is to reconsider the identity of the merit selectors. Possibly they might be elected for terms. It might also be useful to consider the possibility that the nominations of judges, however made, go directly to the voters for a confirmation election. The nominating group might also be assigned the role of evaluating judicial performance and making a recommendation with respect to retention. It might then be equipped with funds to conduct a "rescue" on behalf of a judge they vote to retain who is calumniated by an issue-advocacy group.

Whether the voters of Ohio could be sold any of these ideas we cannot say. The reader will note, however, that all the suggestions we have proposed are faithful to the purpose of judicial elections as explained by Grimké. Ohio judges would be given ample reason to know that they are the servants of the people of Ohio, not their rulers. Perhaps they would not be the most luminous candidates available to fill their offices, but they would be more likely to understand and accept the limits to their authority

¹³² See UNCERTAIN JUSTICE, *supra* note 1, at 90-91.

and they would be protected from the efforts of powerful persons and groups seeking to intimidate and control them.

In discussing these ideas with an audience in Columbus, the question was asked whether judges selected by democratic means could be relied upon to be sufficiently resistant to majoritarian demands. The only response that can be made to that question is another question: to whom do the people of Ohio want their judges beholden? To high-spending issues advocates? Or perhaps like the federal judiciary only to their own sense of self-restraint, if any? As noted earlier, there is no method of selecting judges that is worth a damn.

V. CONCLUSION

In conclusion, we invoke the words of another important Ohioan of Grimke's time, Timothy Walker of Cincinnati, the founder of the law school in that city and a person whose politics were very different from those of Grimke. In 1838, he told his students that:

We are trying the greatest political experiment the world ever witnessed; and the experience of all history warns us not to feel too secure. A voice from the tombs of all departed republics tells us that if our liberty is to be ultimately preserved, it is at the price of sleepless vigilance. I refer not to foreign aggression, for this we have nothing to fear; our only foes are those of our own household. Domestic aggression may come from two quarters. On the one hand, power [and wealth are] always tending to augmentation. Those who have some, employ it to gain more; and if not seasonably withstood, become too strong to be resisted. And on the other hand, liberty is always tending to licentiousness. The more men have, the more they are likely to want. Being free from many restraints, they would do away with all. Now when dangers threaten, from either of these quarters; when [the powerful] would trample the law under their feet, or mobs would rise to overthrow it; who are the sentinels to give the alarm? Do I assume too much in saying [those] whose profession it is to watch over the law?¹³³

Walker and Grimke, despite differences in their partisanships, were united in the view that judges must be independent from the control of both the privileged few and the licentious many. They also reckoned together on the need for a measure of accountability to assure that those exercising lawmaking power remain in control of their partisan and self-indulgent impulses, attentive to their competing obligations, and faithful to the law.

¹³³ TIMOTHY WALKER, INTRODUCTION TO AMERICAN LAW vii (1837).

The judicial system they devised would today be to them a cause for alarm calling for prompt remediation. Perhaps there are better solutions for Ohio than the ones we propose, but inaction is not one.