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THE FUTURE OF JUDICIAL ELECTIONS IN NORTH DAKOTA*

I. INTRODUCTION

In North Dakota, the idea that popular election of judges is preferable to appointment has always been embraced.¹ Ever since North Dakota entered the Union in 1889, state judges in North Dakota have been selected through an election process.² North Dakota is not alone in its preference for electing judges.³ The vast majority of state trial and appellate judges in the United States are selected or retained through popular election.⁴ Indeed, the notion that judges should be elected by the people they serve seems almost intuitive in a democratic society.⁵ After all, it is not only legislators who have the ability to shape the law; judges also interpret and refine the law.⁶ Many Americans feel more comfortable with the thought of selecting judges through the election process rather than through appointment,⁷ perhaps because a system of appointment means citizens have less control over

*Winner of a North Dakota State Bar Foundation Outstanding Note/Comment Award.

1. See N.D. CONST. of 1889, art. IV, § 90 (1889) (providing that “judges shall be elected at general elections”); see also Herbert L. Meschke & Ted Smith, *The North Dakota Supreme Court: A Century of Advances*, 76 N.D. L. REV. 217, 225-26 (2000) (indicating that at the first state election in North Dakota, held in October of 1889, the first justices of the North Dakota Supreme Court were chosen through an election).

2. Meschke & Smith, *supra* note 1, at 225-26.

3. See Christopher Rapp, *The Will of the People, the Independence of the Judiciary, and Free Speech in Judicial Elections After Republican Party of Minnesota v. White*, 21 J.L. & POL. 103, 105 (2005) (reporting that 87% of state trial and appellate judges are selected or retained by popular election).

4. *Id.*

5. See *id.* at 109 (noting that the early supporters of judicial elections in the United States “felt that selecting judges via popular election would save the judiciary from becoming the tool of the other branches of government by making judges beholden to the people rather than to legislatures and governors”).

6. See *Republican Party of Minn. v. White*, 536 U.S. 765, 784 (2002) (suggesting that election of state judges became popular precisely because “[n]ot only do state-court judges possess the power to ‘make’ common law, but they have the immense power to shape the States’ constitutions as well.”) (citation omitted).

7. See, e.g., J. Christopher Heagarty, *Public Opinion and an Elected Judiciary: New Avenues for Reform*, 39 WILLAMETTE L. REV. 1287, 1300 (2003) (discussing polls conducted by the North Carolina Center for Voter Education and Greenberg Quinlan Rosner Research, Inc., showing that 85% of North Carolinians and 76% of voters nationwide favor election of judges over appointment); Thomas R. Phillips, *Keynote Address: Electoral Accountability and Judicial Independence*, 64 OHIO ST. L.J. 137, 145 (2003) (citing a 2001 national survey conducted by Greenberg Quinlan Rosner Research, Inc., indicating that voters favor judicial elections by a two-to-one margin).

the judiciary. Research has shown that voters across the United States overwhelmingly favor the election of judges over appointment.⁸ However, significant changes in the area of judicial elections have taken place in recent years—changes that have become a source of concern for many in the legal community and beyond.⁹

Judicial elections necessarily involve a voting process.¹⁰ Candidates running for judicial election, like other candidates for elected office, must attract voters.¹¹ This basic premise has not changed.¹²

What has changed is the climate in which judicial candidates compete.¹³ In some states, judicial elections have become free-for-all political campaigns, complete with television advertising and fundraising.¹⁴ According to Deborah Goldberg, program director for the Brennan Center for Justice at New York University, fundraising by candidates for state supreme courts increased by 61% between 1998 and 2000.¹⁵ Political parties and interest groups spent approximately \$16 million in the 2000 supreme court races—and that was just in the four states with the most contested elections.¹⁶

Not only are judicial elections changing in terms of how much judges must spend to get elected, but some recent federal court decisions may also

8. Phillips, *supra* note 7, at 145.

9. *See, e.g.*, Editorial, *Free Judiciary from Election Politicking*, LEXINGTON HERALD-LEADER (Ky.), Feb. 13, 2005, at D1 (warning that “Kentucky’s judiciary could soon be plunged into the putrid swirl of big-money, special interest politics” because of the “one-two punch of big money from business interests and the court-ordered freeing of judicial candidates to take stands on political controversies”).

10. *See, e.g.*, N.D. CONST. art. VI, § 7 (stating that the “justices of the supreme court shall be chosen by the electors of the state for ten-year terms, so arranged that one justice is elected every two years”).

11. *See id.* (indicating that judges must run for popular election).

12. *Compare* N.D. CONST. of 1889, art. IV, § 90 (1889) (providing for the selection of judges through general election), *with* N.D. CONST. art. VI, § 7 (providing for the selection of judges through general election).

13. *See* RESEARCH AND POLICY COMM. OF THE COMM. FOR ECON. DEV., JUSTICE FOR HIRE 2 (2002) [hereinafter JUSTICE FOR HIRE], available at http://www.ced.org/docs/report/report_judicial.pdf (noting that the “problems inherent in judicial elections have become especially acute in the past two decades,” and the “character of judicial contests in a growing number of states has changed dramatically”).

14. *See* DEBORAH GOLDBERG ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2004 vi-viii (Jesse Rutledge ed., 2005) [hereinafter NEW POLITICS 2004], available at <http://www.justiceatstake.org/files/NewPoliticsReport2004.pdf> (presenting the results of a study by researchers at the Brennan Center for Justice at New York University School of Law, the Institute on Money in State Politics, and the Justice at Stake Campaign).

15. DEBORAH GOLDBERG, PUBLIC FUNDING OF JUDICIAL ELECTIONS: FINANCING CAMPAIGNS FOR FAIR AND IMPARTIAL COURTS 1 (2002), available at <http://www.brennancenter.org/resources/ji/ji3.pdf>.

16. *Id.*

lead to a change in the tone of judicial campaigns.¹⁷ In 2002, the United States Supreme Court decided *Republican Party of Minnesota v. White*,¹⁸ a case in which the Court ruled that a Minnesota canon of judicial conduct prohibiting candidates from announcing their views on legal and political issues violated the First Amendment.¹⁹ In *North Dakota Family Alliance, Inc. v. Bader*,²⁰ a federal district court held unconstitutional a North Dakota judicial canon precluding candidates from discussing their views on cases or issues likely to come before the court.²¹ Some commentators fear that allowing judicial candidates to advertise their views on controversial subjects will turn elections into partisan political battles and affect the ability of candidates to be impartial once they succeed to the bench.²²

The purpose of this note is to discuss the current state of judicial elections and to explore the possible implications of the federal court decisions that have given judicial candidates more latitude to express their personal views. Special attention will be given to the judicial election process in North Dakota. Part II of this note sets forth a brief history of judicial elections in the United States. Part III discusses recent changes in the judicial election process, and Part IV considers whether the time has come in North Dakota to rethink our method of judicial selection.

II. ELECTION OF JUDGES: A BRIEF HISTORY

A. HISTORY OF JUDICIAL ELECTIONS IN THE UNITED STATES

Alexander Hamilton argued that the “complete independence of the courts of justice is peculiarly essential in a limited constitution.”²³ Hamilton favored permanent appointments and saw periodical appointments as “fatal to [judges’] necessary independence.”²⁴ Out of the thirteen

17. See, e.g., Rachel Paine Caufield, *In the Wake of White: How States Are Responding to Republican Party of Minnesota v. White and How Judicial Elections Are Changing*, 38 AKRON L. REV. 625, 639-40, 644-46 (2005) (describing the responses of federal and state courts to the Supreme Court’s decision in *White*, a case which limited states’ ability to restrict judicial campaign speech).

18. 536 U.S. 765 (2002).

19. *White*, 536 U.S. at 788.

20. 361 F. Supp. 2d 1021 (D.N.D. 2005).

21. *Bader*, 361 F. Supp. 2d at 1044.

22. See, e.g., Tim Dallas Tucker & Christina L. Fischer, *Merit Selection: A Better Method to Select South Dakota’s Circuit Court Judges*, 49 S.D. L. REV. 182, 182 (2004) (expressing concern that “evolving federal court decisions have opened the door to misleading advertising and political attacks” and that the “independence, fairness and competence of our judiciary” is at stake).

23. THE FEDERALIST NO. 78, at 402 (Alexander Hamilton) (George W. Carey & James McClellan eds., 1990).

24. *Id.* at 406.

original colonies, eight states had a system in which judges were appointed by the legislature, and judges in the remaining five states were appointed by the governor.²⁵ All states entering the Union between 1776 and 1830 adopted some form of judicial selection by appointment.²⁶ However, the appointment method declined in popularity during the Jacksonian era.²⁷ During this period, the ideals of representative government and citizen participation prompted a shift from the appointment method to election of judges.²⁸ The existing states began to move toward a direct election system, and every new state admitted to the Union between 1846 and 1912 provided for a judicial election system.²⁹

Originally, judicial elections were often partisan.³⁰ By the beginning of the twentieth century, however, many states began to replace partisan elections with nonpartisan nomination and election systems.³¹ Author Philip L. Dubois explained that this reform originated out of “concern over the adverse effects of partisan politics on the quality and operation of the judiciary.”³²

The debate over the wisdom of mixing politics and the judicial selection process continued throughout the twentieth century.³³ In 1940, Missouri adopted a plan which provided for a hybrid of the election and appointment processes.³⁴ The “merit plan” or “Missouri Plan,” as it is now called, involves a judicial nominating commission made up of lay persons and attorneys who suggest a list of candidates to the governor.³⁵ The governor then appoints one of the candidates on the list, but the new judge must later run unopposed for election.³⁶ The Missouri Plan gained acceptance in the 1960s and 1970s, and twelve states had adopted it by 1976.³⁷

25. CHARLES H. SHELDON & LINDA S. MAULE, CHOOSING JUSTICE 2-3 (1997).

26. *Id.* at 3.

27. *Id.* But see Roy A. Schotland, *To the Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 WILLAMETTE L. REV. 1397, 1400 (2003) (arguing that “the move to judicial elections was led by moderate lawyer-delegates to increase judicial independence and stature” and was not motivated by an emotional response to the Jacksonian philosophy, as some have suggested).

28. PHILIP L. DUBOIS, FROM BALLOT TO BENCH 3 (1980).

29. *Id.*

30. *Id.*

31. *Id.* at 4.

32. *Id.*

33. *Id.* at 4-5.

34. *Id.*

35. *Id.* at 4.

36. *Id.*

37. *Id.* at 5.

B. HISTORY OF JUDICIAL ELECTIONS IN NORTH DAKOTA

North Dakota gained statehood in 1889, and judges were selected by election from the beginning.³⁸ Initially, North Dakota Supreme Court elections were partisan; candidates were nominated during the political parties' conventions.³⁹ However, public opinion regarding election of judges quickly soured after a particularly nasty campaign in 1906.⁴⁰ Republican candidate John Knauf had been appointed to the North Dakota Supreme Court in August of 1906 and ran for election the following November.⁴¹ Justice Knauf lost the election to Democrat Charles J. Fisk.⁴² Some believe Justice Knauf was defeated because of attacks on his character during the campaign.⁴³ For example, there were false allegations that Knauf "was a boozier and a libertine."⁴⁴ The public saw judicial elections in a more negative light after Justice Knauf's ordeal.⁴⁵ It did not take long for the North Dakota Legislature to respond.⁴⁶ By 1909, the Legislature had enacted a law providing for nonpartisan election of judges.⁴⁷ Since 1910, judicial candidates in North Dakota have not had a political affiliation behind their names on election ballots.⁴⁸ North Dakota was the first state in the nation to adopt a nonpartisan system for high-court elections.⁴⁹

Although North Dakota has a judicial election system, the reality is that a good number of judges are appointed when they first take office.⁵⁰ In

38. Meschke & Smith, *supra* note 1, at 226-27.

39. *Id.* at 239.

40. *See id.* at 239-40 (describing the 1906 North Dakota Supreme Court race between John Knauf and Charles Fisk).

41. *Id.* (citing USHER L. BURDICK, GREAT JUDGES AND LAWYERS OF EARLY NORTH DAKOTA (1956)).

42. *Id.* at 240.

43. *Id.*

44. *Id.* (quoting BURDICK, *supra* note 41, at 4).

45. *Id.* (citing COLONEL CLEMENT A. LOUNSBERRY, NORTH DAKOTA HISTORY AND PEOPLE 452 (1917)).

46. *Id.*

47. *See* 1909 N.D. Laws 84 (providing that the political affiliation of judicial candidates must not be designated on ballots).

48. Meschke & Smith, *supra* note 1, at 240.

49. F. Andrew Hanssen, *Learning About Judicial Independence: Institutional Change in the State Courts*, 33 J. LEGAL STUD. 431, 434 (2004).

50. *See* North Dakota Supreme Court, *A Historical Sketch of the Supreme Court: Method of Attaining Office and Length of Service*, <http://www.ndcourts.com/history/> (last visited Jan. 28, 2006) (indicating that twenty-five justices were elected, and twenty-five were appointed). Justice Daniel Crothers is not yet on this list. *Id.* Governor John Hoeven appointed Justice Crothers in 2005 to fill the vacancy left by Justice William Neumann. Dave Kolpack, *Governor Appoints Justice*, BISMARCK TRIB. (N.D.), June 11, 2005, at 1A.

1981, the Legislature established a Judicial Nominating Commission.⁵¹ Today, the Commission consists of six permanent members and three temporary members.⁵² The governor, the chief justice, and the president of the State Bar Association of North Dakota each appoint two permanent members and one temporary member to the Commission.⁵³ When there is a judicial vacancy, the Commission compiles a list of qualified candidates and submits it to the governor.⁵⁴ Upon receiving the list, the governor has thirty days in which to either (1) fill the vacancy by appointing one of the candidates on the list, (2) return the list and order the Committee to reconvene, or (3) call a special election.⁵⁵

Approximately half of all North Dakota Supreme Court justices were appointed to the bench.⁵⁶ After being appointed, judges have no long-term guarantees of job security.⁵⁷ They are required to answer to voters in the next general election.⁵⁸ In this way, the judicial selection system in North Dakota comes full circle. While a large number of judges are appointed in the beginning, citizens nevertheless have the opportunity to show their agreement or disagreement with the governor's choice during the next election.

C. JUDICIAL SELECTION METHODS TODAY

Today, election remains the most common method of judicial selection in the United States.⁵⁹ Thirty-eight states use some form of judicial election for state high court races.⁶⁰ Six states have partisan elections, fifteen states have nonpartisan elections, and seventeen states have uncontested retention elections after initial appointment.⁶¹

51. See 1981 N.D. Laws ch. 330, at 942-44 (codified as amended at N.D. CENT. CODE §§ 27-25-01 to -09) (providing for a Judicial Nominating Commission to find candidates for judicial vacancies).

52. N.D. CENT. CODE § 27-25-02 (2005).

53. *Id.*

54. N.D. CENT. CODE § 27-25-03 (2005).

55. N.D. CENT. CODE § 27-25-04 (Supp. 2005).

56. North Dakota Supreme Court, *supra* note 50.

57. See N.D. CONST. art. VI, § 13 (providing that appointments continue until the next general election, at which time appointed judges must face voters).

58. *Id.*

59. American Bar Association, *Justice in Jeopardy: Report of the American Bar Association Commission on the 21st Century Judiciary* (2003), <http://www.abanet.org/judind/jeopardy/fact.html> (showing that the majority of states have some type of judicial election process).

60. *Id.*

61. *Id.* Alabama, Illinois, Louisiana, Pennsylvania, Texas, and West Virginia have partisan elections. *Id.* Arkansas, Georgia, Idaho, Kentucky, Michigan, Minnesota, Missouri, Montana, Nevada, North Carolina, North Dakota, Ohio, Oregon, Washington, and Wisconsin have nonpartisan elections. *Id.* Alaska, Arizona, California, Colorado, Florida, Indiana, Iowa, Kansas,

For trial courts of general jurisdiction, thirty-nine states hold elections.⁶² Although most states elect their judges, the controversy over whether state judges should be elected or appointed continues.⁶³ Professor Polly J. Price remarked: “One striking conclusion to be drawn from the history of judicial selection in the United States is the cyclical nature of the debate between election and appointment of judges.”⁶⁴ Even in the states that have moved toward the idea of appointment, election often remains part of the equation (as in retention elections).⁶⁵ To be sure, Americans seem unprepared to abandon the popular election method.⁶⁶ However, some recent changes in the landscape of judicial elections may force states to reconsider their judicial selection methods.⁶⁷

III. GOING DOWN A PRECARIOUS PATH: MODERN DEVELOPMENTS IN JUDICIAL SELECTION

Take tough competition⁶⁸ and big money,⁶⁹ and add to the mix the recent federal court decisions allowing judicial candidates to announce their

Maryland, Missouri, Nebraska, New Mexico, Oklahoma, South Dakota, Tennessee, Utah, and Wyoming use the hybrid system of retention elections after appointment. *Id.*

62. *Id.* Eight states (Alabama, Illinois, Louisiana, New York, Pennsylvania, Tennessee, Texas, and West Virginia) have partisan elections for all trial courts of general jurisdiction. *Id.* Twenty states (Arkansas, California, Florida, Georgia, Idaho, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Washington, and Wisconsin) hold nonpartisan elections for trial court judges. *Id.* Seven states (Alaska, Colorado, Iowa, Nebraska, New Mexico, Utah, and Wyoming) have retention elections. *Id.*

63. Polly J. Price, *Selection of State Court Judges, in STATE JUDICIARIES AND IMPARTIALITY: JUDGING THE JUDGES* 10 (Roger Clegg & James D. Miller eds., 1996).

64. *Id.*

65. *Id.*

66. See Phillips, *supra* note 7, at 145 n.54 (explaining the findings of a 2001 survey by Greenberg Quinlan Rosner Research, Inc., which indicated that voters in states that currently have judicial elections prefer to retain that system by a two-to-one margin).

67. See Caufield, *supra* note 17, at 635-36 (predicting that the *White* decision will have “ramifications for all thirty-nine states that use some form of judicial elections”).

68. See Owen G. Abbe & Paul S. Herrson, *Campaigning for Judge: Noisier, Nastier?*, CAMPAIGNS & ELECTIONS, Apr. 1, 2002, at 43 (reporting that “about 47% of all judicial elections were decided by vote margins of less than 20 percentage points, making them more competitive than both U.S. House and state legislative elections”). A number of factors may be responsible for the increasingly competitive nature of judicial campaigns, including the growing number of high-profile court cases which put judges in the national spotlight, and the view among many trial lawyers and business organizations that judicial elections are a “battleground for tort reform.” *Id.* But see G. Alan Tarr, *Rethinking the Selection of State Supreme Court Justices*, 39 WILLAMETTE L. REV. 1445, 1451 (2003) (pointing out that “judicial elections vary widely in their competitiveness”).

69. DEBORAH GOLDBERG, CRAIG HOLMAN & SAMANTHA SANCHEZ, THE NEW POLITICS OF JUDICIAL ELECTIONS: HOW 2000 WAS A WATERSHED YEAR FOR BIG MONEY, SPECIAL INTEREST PRESSURE, AND TV ADVERTISING IN STATE SUPREME COURT CAMPAIGNS 7 (2002) [hereinafter WATERSHED YEAR], available at <http://www.justiceatstake.org/files/JASMoneyReport.pdf>

views on controversial issues.⁷⁰ Put these ingredients together, and what we have is the potential for judicial candidates to run full-blown political campaigns.⁷¹ This section discusses the emergence of judges as politicians and explains why some observers are apprehensive about the direction judicial elections are taking.⁷²

A. MORE ADVERTISING, MORE MONEY, AND HIGHER STAKES

1. *How Much Money Are Candidates Spending?*

During an election year, it is common to turn on one's television and see a political advertisement—or two, or three. Candidates for political office regularly use television and other media to promote themselves to the voting public. But the day may be coming when partisan political advertisements focus not only on gubernatorial and legislative candidates, but also on judicial candidates.⁷³ In some states, that day is already here.⁷⁴

The Research and Policy Committee of the Committee for Economic Development viewed the 2000 elections as a watershed event, “due to the unprecedented amounts of money spent in judicial races and the fierce competition that took place in a number of high-profile state supreme court

(indicating that between 1998 and 2000, fundraising for state supreme court campaigns increased 61%).

70. *See, e.g.*, Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002) (holding that a Minnesota canon of judicial conduct, which prohibited judicial candidates from announcing their political views, violated the First Amendment).

71. *See* Owen G. Abbe & Paul S. Herrnson, *How Judicial Election Campaigns Have Changed*, 85 JUDICATURE 286, 288 (2002) (detailing the results of a 1999 study of judicial candidates from twenty-nine states). Abbe and Herrnson found that judicial elections are “even more competitive than elections for the U.S. House of Representatives and most state legislatures.” *Id.* at 289. Judicial elections were traditionally uncompetitive, but this began to change in the 1970s. *Id.* at 286. During the 1980s, there were “numerous examples of extremely competitive and remarkably expensive judicial elections.” *Id.* at 288. Recent elections have proven that judicial campaigns are becoming more expensive, more combative, and more political. JUSTICE FOR HIRE, *supra* note 13, at 3, 20.

72. *See, e.g.*, James Michael Scheppele, Note, *Are We Turning Judges into Politicians?*, 38 LOY. L.A. L. REV. 1517, 1527 (2005) (arguing that “putting judges in the position of having to raise substantial amounts of money to finance election campaigns, and to withstand humiliating commercial depictions of themselves, creates the risk of bias in favor of contributors and against opposing parties” and presents “an appearance of impropriety”).

73. *See, e.g.*, Bill Salisbury, *Judge Races Could Soon Get Nasty*, ST. PAUL PIONEER PRESS (Minn.), Oct. 24, 2005, at 1A (suggesting that although Minnesota and North Dakota were the only two states in which supreme court candidates did not run television ads in 2000 or 2004, the situation may soon change).

74. *See* Emily Heller, *As Election Day Approaches, Judicial Races Get Meaner*, LEGAL INTELLIGENCER, Oct. 26, 2004, at 4 (describing an over-the-top Illinois Supreme Court race in which advertising proliferated and candidates had raised over \$5.2 million two weeks before the election).

contests.”⁷⁵ Judicial candidates in many parts of the country are now finding it necessary to spend substantial sums of money in order to win.⁷⁶ In fact, some researchers have concluded that judicial elections are now “one of the most competitive types of elections.”⁷⁷ It is not uncommon for today’s state trial court candidates to spend \$35,000 on their campaigns.⁷⁸ This number compares to the cost of most campaigns for state House of Representatives.⁷⁹ Candidates for state appellate and supreme courts commonly spend around \$200,000.⁸⁰

One example of big money in judicial elections is the 2004 race between Illinois Supreme Court candidates Lloyd Karmeier and Gordon Maag.⁸¹ Final spending reports indicated that the combined cost of their campaigns exceeded \$9 million.⁸² In 2002, total judicial campaign fundraising in Ohio exceeded \$6.2 million, and in Texas fundraising reached nearly \$5.9 million.⁸³ According to researchers Deborah Goldberg of the Brennan Center for Justice and Samantha Sanchez of the Institute on Money in State Politics, campaign fundraising for judicial candidates in 2002 topped the \$1 million mark in seven states: Alabama, Illinois, Louisiana, Mississippi, Ohio, Pennsylvania, and Texas.⁸⁴ In a number of other states, candidates raised over \$300,000.⁸⁵ In the 2004 West Virginia Supreme Court of Appeals race, Justice Warren McGraw, the incumbent, and Brent Benjamin, who defeated Justice McGraw, raised \$2.8 million for their own campaigns.⁸⁶ Since 1993, candidates vying for seats on the

75. JUSTICE FOR HIRE, *supra* note 13, at 10.

76. *Id.* at 13; *see also* NEW POLITICS 2004, *supra* note 14, at 13 (pointing out that “the cost of winning continues to climb, and the fundraising disparity between winners and losers is also growing”); Abbe & Herrnson, *supra* note 68, at 43 (noting that “a growing number of judicial elections are competitive and involve substantial campaign spending and significant campaign activity by outside groups”).

77. Abbe & Herrnson, *supra* note 68, at 43.

78. *Id.*

79. *Id.*

80. *Id.*

81. Brian Brueggmann, *\$9.17 Million Was Spent in Karmeier-Maag Race*, BELLEVILLE NEWS-DEMOCRAT (Ill.), Feb. 1, 2005, at A1.

82. *Id.*; *see also* NEW POLITICS 2004, *supra* note 14, at 14 (detailing total candidate fundraising in 2004 state supreme court elections).

83. DEBORAH GOLDBERG & SAMANTHA SANCHEZ, THE NEW POLITICS OF JUDICIAL ELECTIONS 2002 19 (Bert Brandenburg ed., 2004), *available at* <http://faircourts.org/files/NewPoliticsReport2002.pdf>.

84. *Id.*

85. *See id.* (showing that candidates in California, Georgia, Michigan, Nevada, North Carolina, and Washington raised less than \$1 million, but more than \$300,000).

86. Carol Warren & Richie Robb, Editorial, *Deep-Pockets Influence Election*, CHARLESTON GAZETTE & DAILY MAIL (W. Va.), Sept. 1, 2005, at 5A.

Alabama Supreme Court have raised over \$40 million, which puts Alabama at the top of the list for state supreme court election spending.⁸⁷

A significant portion of money raised in judicial campaigns is used to pay for advertising.⁸⁸ Spending on television advertising has increased dramatically; the total spent on airtime in 2000 was a record \$10.6 million.⁸⁹ But spending in 2004 surpassed \$24 million, handily breaking the 2000 record.⁹⁰ In Ohio alone, candidates in the 2004 supreme court elections paid a total of \$5,412,499 in television advertising costs.⁹¹ As judicial candidates become more competitive, it seems there is growing pressure to begin advertising earlier and earlier in the election cycle.⁹² In 2002, judicial candidates in only two states advertised on television during the primary election season.⁹³ Candidates in nine states advertised during the primaries in 2004.⁹⁴ Television advertising is perhaps the most effective way to reach today's voters, given that many Americans watch several hours of television every day.⁹⁵ Professor Anthony Champagne argues that television advertising is so effective that "the strong correlation between television media markets and voting percentages should not be ignored."⁹⁶ Undoubtedly, however, television advertising is expensive.⁹⁷ Candidates who do not have enough financial backing to purchase airtime may find it difficult to compete.⁹⁸

2. *Who Contributes to Judicial Campaigns?*

As campaign costs go up, so must fundraising. Understandably, some judicial candidates are unable to find the thousands—or even millions—of

87. Bobby Segall, *Judicial Selection Proposal Good for the State*, MONTGOMERY ADVERTISER (Ala.), Sept. 25, 2005, at A11.

88. See NEW POLITICS 2004, *supra* note 14, at 6 (noting that by 2004, one in every four dollars judicial candidates raised was spent on television airtime costs).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 7. Candidates in Illinois and Idaho advertised during the 2002 primary elections. *Id.*

93. *Id.*

94. *Id.* Candidates in Alabama, Arkansas, Georgia, Louisiana, Nevada, Ohio, Oregon, Washington, and West Virginia advertised during the 2004 primary elections. *Id.*

95. See Anthony Champagne, *Television Ads in Judicial Campaigns*, 35 IND. L. REV. 669, 670 (2002) (commenting that "television has become the major venue for modern day supreme court campaigns").

96. *Id.* at 671.

97. *Id.*

98. See *id.* n.10, 686 (noting that in a study of Texas Supreme Court races from 1992 to 2000, established candidates received between 12% and 18.5% more votes in the media markets in which they bought television airtime).

dollars it takes to run for election in their own pockets. The money has to come from somewhere, and today that “somewhere” consists of businesses, attorneys, labor interests, and political parties, to name a few sources.⁹⁹ In the 2004 supreme court elections, business donations comprised 34% of all contributions.¹⁰⁰ Lawyers were the second largest source of funding, providing 25% of all contributions.¹⁰¹ Political parties “more than doubled their contributions to Supreme Court office seekers since the last cycle” and comprised 14% of all donations.¹⁰²

Special interest groups are becoming significant sources for campaign financing in some states as well.¹⁰³ In Illinois, interest groups became heavily involved in the Karmeier-Maag race.¹⁰⁴ The district in which Karmeier and Maag were running is a “popular venue for class action lawsuits around the country.”¹⁰⁵ Groups representing doctors, hospitals, and trial lawyers took interest in the outcome of the election and opened their pocketbooks accordingly.¹⁰⁶ The Illinois State Election Board is now investigating two organizations that allegedly donated at least \$830,000 and failed to comply with campaign disclosure laws.¹⁰⁷ The United States Chamber of Commerce’s Institute of Legal Reform is another example of an interest group that became aggressively involved in state judicial races.¹⁰⁸ The Institute reportedly spent at least \$10 million dollars on races in Alabama, Indiana, Michigan, Mississippi, and Ohio.¹⁰⁹ Interestingly, of the candidates endorsed by the Institute, thirteen out of fifteen won the election.¹¹⁰ After the Institute began donating to Mississippi candidates, trial lawyers formed two political action committees to combat the Institute’s efforts.¹¹¹ Mississippians for an Independent Judiciary and

99. See NEW POLITICS 2004, *supra* note 14, at 20 (discussing a chart which shows the breakdown of campaign contributions in the 2004 supreme court elections).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 23.

104. See *id.* at 25-27 (detailing the contributions of businesses, medical donors, and lawyers).

105. Brian Mackey, *Campaign Funding Raises Questions*, SPRINGFIELD ST. J.-REG. (Ill.), Feb. 11, 2005, at 13.

106. See *id.* (stating that campaign contributions from these groups “poured into both candidates’ coffers”).

107. *Id.*

108. See JUSTICE FOR HIRE, *supra* note 13, at 19 (calling the Institute of Legal Reform’s role “[t]he most extensive campaign in 2000” by an interest group).

109. *Id.* (citing Kenneth P. Doyle, *Judicial Campaign Trend Seen Heading Toward Nastier, More Expensive Battles*, BNA MONEY & POL. REP., Apr. 19, 2001, at 1).

110. *Id.*

111. *Id.*

Mississippians for Fair Justice, the two committees, spent \$312,000 combined.¹¹²

3. *Why Is Fundraising for Judicial Campaigns a Concern?*

Unlike candidates for other political offices, judicial candidates must walk a very fine line.¹¹³ On one hand, they are expected to run for election.¹¹⁴ This necessarily involves raising money.¹¹⁵ Unless they are independently wealthy, judicial candidates must obtain funding from sources other than their own bank accounts.¹¹⁶ On the other hand, judges are expected to be fair and impartial once they are on the bench.¹¹⁷ A candidate for state legislature, after being elected, can continue to rely on his or her own political views, associate with partisan groups, and listen to the requests and suggestions of constituents.¹¹⁸ But judges are supposed to forget everything that took place during the election, including all the groups that donated large sums of money.¹¹⁹

Obviously, the tension between these expectations can be problematic.¹²⁰ As the Research and Policy Committee of the Committee for Economic Development explains, “judges do not represent constituencies” like other political candidates do.¹²¹ Judges “cannot initiate specific policies or advocate specific policy views that are shared by broad segments of the electorate or hold special appeal to particular groups of citizens.”¹²² In short, judges must follow the law; they must not allow political

112. *Id.*

113. See David B. Rottman & Roy A. Schotland, *What Makes Judicial Elections Unique?*, 34 LOY. L.A. L. REV. 1369, 1370-71 (2001) (discussing the problems judicial candidates experience in having to run for election).

114. *Id.*

115. *Id.*

116. See NEW POLITICS 2004, *supra* note 14, at 13-16 (noting the increase in campaign costs for judicial candidates and indicating that fundraising is becoming necessary in order to win).

117. Rottman & Schotland, *supra* note 113, at 1370-71.

118. See Patrick E. McGann, *Ethical Campaign Practices for Illinois Judicial Candidates*, 90 ILL. B.J. 76, 76 (2002) (stating that candidates for the legislative and executive branches, unlike judicial candidates, have an obligation to inform the public about the policies and programs they plan to enact).

119. See JUSTICE FOR HIRE, *supra* note 13, at 20-21 (explaining that rising campaign costs have led judicial candidates to accept funds from partisan interest groups, which in turn has caused citizens to doubt the integrity and impartiality of the courts).

120. See Rottman & Schotland, *supra* note 113, at 1370 (suggesting that the “ideal judge is committed to the rule of law—he or she will respect the authority of higher courts, follow existing precedent, and adhere to accepted procedures for interpreting statutes and deciding issues”).

121. JUSTICE FOR HIRE, *supra* note 13, at 16.

122. *Id.*

considerations to obscure their ability to apply the law to the facts of each case.¹²³

Professor Roy A. Schotland provides an illustration of what can happen when interest groups enter the arena of judicial elections.¹²⁴ An Ohio law firm represented a plaintiff in a personal injury case against a railroad company.¹²⁵ Before the Ohio Supreme Court had announced whether it would hear the appeal, the plaintiff's law firm, nine individual attorneys in the firm, and seven of the attorneys' spouses made considerable contributions to the campaigns of two associate justices.¹²⁶ After the campaign reports were released, the railroad company filed a motion for recusal of the two justices.¹²⁷ Neither the justices nor the court addressed the motion, and the case was decided in favor of the plaintiff.¹²⁸

Situations like the one Professor Schotland describes may challenge the public's perception of judges as being fair and impartial. Derek Bok, president emeritus of Harvard and former dean of the Harvard Law School, reported the impact of special interest groups' participation in judicial elections.¹²⁹ A National Center for State Courts survey found that 77% of the public believed elected judges are influenced because of campaign fundraising.¹³⁰ Perhaps even more disturbing are the results of a Texas State Bar Association survey, which found that 48% of judges, 68% of court personnel, and 79% of attorneys thought campaign contributions influenced judges' decisions.¹³¹ Surveys in other states have confirmed that the involvement of special interest groups in judicial elections seems to affect public opinion.¹³² A survey conducted in Washington reported that 76% of respondents believed political decisions influence judges, and 66% thought judges were influenced by having to raise campaign money.¹³³ A

123. See Rottman & Schotland, *supra* note 113, at 1371 (noting that the "tension between the judges' fundamental obligations, and the necessity to campaign for election or reelection, is undeniable").

124. See Roy A. Schotland, *Campaign Finance in Judicial Elections*, 34 LOY. L.A. L. REV. 1489, 1502-04 (2001) (describing the influence of a law firm's contributions prior to a 1998 Ohio Supreme Court race).

125. *Id.* at 1503.

126. *Id.*

127. *Id.*

128. *Wightman v. Consol. Rail Corp.*, 715 N.E.2d 546, 554 (Ohio 1999); Schotland, *supra* note 124, at 1503.

129. Derek Bok, *Too Many Beholden Judges*, NAT'L L.J., Nov. 25, 2002, at A8.

130. *Id.*

131. *Id.*

132. JUSTICE FOR HIRE, *supra* note 13, at 23-24.

133. *Id.* at 24.

1995 survey in Ohio showed that nine out of ten respondents believed campaign contributions affected the decisions of judges.¹³⁴

The tone of some campaign advertisements has also become a concern.¹³⁵ Interest groups, by definition, have certain interests in mind.¹³⁶ When an interest group takes out an advertisement in favor of a particular judicial candidate, the goal may not always be to inform voters about the candidate's personal qualifications.¹³⁷ Instead, the group may want to highlight its own agenda or attack the opponent.¹³⁸ An egregious instance of damaging advertising tactics occurred before the 2004 West Virginia Supreme Court election.¹³⁹ A group called "And for the Sake of the Kids" paid for ads that attacked incumbent Justice Warren McGraw.¹⁴⁰ One of the ads accused Justice McGraw of being soft on child molesters because he had voted to release a child rapist from prison.¹⁴¹ The ad stated that Justice McGraw is "too soft on crime" and "too dangerous for our kids."¹⁴² As it turns out, "And for the Sake of the Kids" received \$2.5 million of its \$3.6 million from the chief executive of a company with an environmental case that was expected to go before the West Virginia Supreme Court.¹⁴³

Ads like the one "And for the Sake of the Kids" purchased are problematic on multiple levels. First, these ads give the impression that because a judge voted a certain way in one case, he or she would vote the same way in all cases.¹⁴⁴ Ideally, the role of judges is to make decisions based on the facts of each individual case.¹⁴⁵ When ads single out one decision as

134. *Id.*

135. *See, e.g.*, NEW POLITICS 2004, *supra* note 14, at 4-5, 17-19, 33 (showing examples of negative television ads which aired in West Virginia, Illinois, and Alabama during the 2004 judicial election season).

136. *See* JUSTICE FOR HIRE, *supra* note 13, at 17 (stating that the purpose of interest groups is to influence the composition of the courts and other branches of government in order to support their causes).

137. *See id.* at 18-19 (indicating that television advertisements paid for by interest groups in battleground states largely took the form of "issue advocacy" and "emphasized highly controversial, 'hot-button' political issues").

138. *Id.*

139. Pat Doyle, *Judges' Races to Have New Spin*, STAR TRIB. (Minneapolis, Minn.), Aug. 7, 2005, at 1B (describing a television ad that an interest group used to attack the credibility of a West Virginia judicial candidate).

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. Clive Thomas et al., *Interest Groups and State Court Elections: A New Era and Its Challenges*, 87 JUDICATURE 135, 142-43 (2003).

145. Daniel Burke, Code of Judicial Conduct Canon 7B(1)(c): *Toward the Proper Regulation of Speech in Judicial Campaigns*, 7 GEO. J. LEGAL ETHICS 181, 204-05 (1993) (listing the characteristics of an "ideal" judge).

representative of a judge's personal views, they ignore the fundamental role of judges.¹⁴⁶

A second problem is that attack ads may fuel hostility toward judges.¹⁴⁷ Tony Mauro, a United States Supreme Court correspondent, argues that allowing special interest groups to become involved in judicial elections actually threatens the safety of our nation's judges.¹⁴⁸ Pointing to recent attacks on a judge in Atlanta and a judge's family in Chicago, Mauro contends that animosity toward judges is a problem in this country.¹⁴⁹ Mauro states, "One factor may be the increasing venom and politicization engulfing the processes by which judges are chosen. Special-interest groups have turned state judicial elections into costly mudslinging matches."¹⁵⁰ Judges' decisions often affect individual people, whereas the decisions of other elected officials affect large segments of the population.¹⁵¹ It is important to preserve public respect for judges because they regularly deal with people who are at the lowest points in their lives.¹⁵² A general lack of trust in and respect for judges could lead to disaster.¹⁵³

Campaign fundraising may work in the case of other candidates for elected office, but it clearly poses problems for judicial candidates.¹⁵⁴ The pressure to raise money may lead judicial candidates to accept money from groups that expect something in return later.¹⁵⁵ The waters become especially murky when law firms contribute to judges before whom they have

146. See Thomas et al., *supra* note 144, at 142-43 (criticizing the fact that a politically unpopular decision can come back to haunt a judge in the next election). In 2002, Congress passed and the president signed the Bipartisan Campaign Finance Reform Act. See Bipartisan Campaign Finance Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2, 18, 28, 36, and 47 U.S.C.). The Act gives states more authority to regulate sham issue ads. See Justice at Stake Campaign, *What Does Campaign Finance Reform Mean for Judicial Elections?*, <http://www.justiceatstake.org/contentViewer.asp?breadcrumb=3,570,578> (last visited Jan. 28, 2006) (examining what the Act will mean for judicial campaign financing).

147. See Tony Mauro, Editorial, *Fear Mustn't Infringe Upon Our Open Courts*, USA TODAY, Mar. 16, 2005, at 15A (expressing concern that attack ads jeopardize the safety of judges).

148. *Id.*

149. *Id.*

150. *Id.*

151. See Rottman & Schotland, *supra* note 113, at 1370 (reflecting on the differences between judges and other elected officials).

152. Sharon E. Crawford & Becky Purser, *Midstate Judges Fear for Safety in Wake of Shooting*, MACON TELEGRAPH (Ga.), Mar. 12, 2005, available at 2005 WLNR 3830921 (reporting that judges in Georgia became more aware of how their decisions affect people's lives after the fatal shooting of an Atlanta judge).

153. See *id.* (suggesting that some judges are concerned about the possibility of retaliation by people who are upset with them).

154. JUSTICE FOR HIRE, *supra* note 13, at 21, 23-24.

155. *E.g.*, Doyle, *supra* note 139, at 1B (noting that the interest group "And for the Sake of the Kids," which spent millions on a West Virginia Supreme Court race, obtained most of its funding from a mining company that had a major case heading toward that court).

cases pending.¹⁵⁶ When the public begins questioning the impartiality of judges, the justice system is in serious jeopardy.¹⁵⁷

B. COURTS REMOVE RESTRICTIONS ON CAMPAIGN SPEECH

For years, judicial candidates have had to watch what they say on the campaign trail.¹⁵⁸ In response to criticism of judicial elections, the American Bar Association (ABA) promulgated its Canons of Judicial Ethics in 1924.¹⁵⁹ The Canon stated that a judge “should not announce in advance his conclusions of law on disputed issues to secure class support.”¹⁶⁰ The Canon was revised in 1972 in an effort to make the provisions more specific.¹⁶¹ The new version provided that judicial candidates must not “make pledges or promises of conduct in office” or “announce [their] views on disputed legal or political issues.”¹⁶² The Canon was again revised in 1990 due to “concerns that the 1972 version unconstitutionally infringed on the free speech rights of judicial candidates.”¹⁶³ The 1990 version removed some of the broad language which seemed to prohibit all political speech,¹⁶⁴ replacing it with a provision that judges shall not “with respect to cases, controversies, or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with impartial performance of the adjudicative duties of the office.”¹⁶⁵ Today, most states have adopted either the 1972 or 1990 version, and therefore restrict judicial campaign speech in some way.¹⁶⁶

The rationale for limiting what judicial candidates can say goes back to the notion of preserving the fairness and neutrality of the bench—or at least

156. Doug Bend, *North Carolina's Public Financing of Judicial Campaigns: A Preliminary Analysis*, 18 GEO. J. LEGAL ETHICS 597, 597 (2005) (stating that a conflict of interest arises when an attorney or law firm contributes to a judge's campaign and later comes before that judge in a case).

157. See, e.g., Nathan Richard Wildermann, Note, *Bought Elections: Republican Party of Minnesota v. White*, 11 GEO. MASON L. REV. 765, 784 (2003) (discussing the importance of maintaining public confidence in the judiciary).

158. Rapp, *supra* note 3, at 110-14 (detailing the history of restrictions on judicial campaign speech).

159. *Id.* at 111.

160. CANONS OF JUD. ETHICS Canon 30 (1924).

161. Michael R. Domino, *Pay No Attention to That Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians*, 21 YALE L. & POL'Y REV. 301, 314 (2003).

162. CANONS OF JUD. ETHICS Canon 7(B)(1)(c) (1972).

163. Domino, *supra* note 161, at 314.

164. *Id.*

165. MODEL CODE OF JUD. CONDUCT Canon 5(A)(3)(d)(i) (1990).

166. Domino, *supra* note 161, at 315.

the appearance of it.¹⁶⁷ As Shirley S. Abrahamson, Chief Justice of the Wisconsin Supreme Court, explains, “Restrictions on judicial campaign speech were designed to maintain judicial impartiality and the perception of that impartiality. The traditional view is that if a judge comments on a pending case, the comments will reduce the litigants’ and the public’s confidence in the impartiality and fairness of our courts.”¹⁶⁸ Any student of constitutional law knows, however, that the First Amendment presents a barrier when the government attempts to regulate political speech. In recent years, judicial canons restricting campaign speech have come under fire.¹⁶⁹ This section discusses several key decisions that have the potential to change the way judicial candidates conduct themselves on the campaign trail.

1. Republican Party of Minnesota v. White—
United States Supreme Court

In *White*, the United States Supreme Court considered the constitutionality of Canon 5(A)(3)(d)(i) of the Minnesota Code of Judicial Conduct.¹⁷⁰ The Canon stated that a “candidate for a judicial office” shall not “announce his or her views on disputed legal or political issues.”¹⁷¹ Petitioner Gregory Wersal, a Minnesota attorney, ran for associate justice of the Minnesota Supreme Court in 1996.¹⁷² During Wersal’s campaign, a complaint was filed against him because he had distributed literature criticizing some court decisions on controversial issues like crime, welfare, and abortion.¹⁷³ The complaint was filed with the Office of Lawyers Professional Responsibility, the agency charged with investigating and prosecuting ethical violations of lawyers running for judicial office.¹⁷⁴ The complaint was dismissed, but Wersal ultimately withdrew from the election because he feared that if more ethical complaints were filed, his ability to practice law would be jeopardized.¹⁷⁵

Wersal decided to run for election again in 1998, and he asked the Lawyers Board for an advisory opinion on whether it would enforce Canon

167. Shirley S. Abrahamson, *Making Judicial Independence a Campaign Issue*, WIS. LAWYER, Feb. 2005, at 17.

168. *Id.*

169. *See, e.g.*, Heller, *supra* note 74, at 4 (discussing cases in which restrictions on judicial campaign speech have been challenged).

170. Republican Party of Minn. v. White, 536 U.S. 765, 768 (2002).

171. MINN. CODE OF JUD. CONDUCT Canon 5(A)(3)(d)(i) (2000).

172. *White*, 536 U.S. at 768.

173. *Id.* at 768-69.

174. *Id.* at 769.

175. *Id.*

5(A)(3)(d)(i) (the “announce clause”).¹⁷⁶ The Board responded by telling Wersal it could not answer his question because it did not know what announcements Wersal wanted to make.¹⁷⁷ Wersal filed a lawsuit in federal district court against the state boards and offices responsible for the judicial ethics rules.¹⁷⁸ Wersal argued that the announce clause violated the First Amendment and asked for an injunction against its enforcement.¹⁷⁹ The Minnesota Republican Party and other plaintiffs in the suit argued that the announce clause prevented them from learning Wersal’s views, and they, therefore, were unable to support or oppose his candidacy.¹⁸⁰

The district court held that the announce clause did not violate the First Amendment because it was narrowly tailored to serve the state’s compelling interest in “maintaining the actual and apparent integrity and independence of its judiciary, while not unnecessarily curtailing protected speech.”¹⁸¹ The court concluded that the Minnesota Supreme Court would interpret the announce clause narrowly—as only precluding discussions about issues likely to come before the court.¹⁸² The Eighth Circuit affirmed.¹⁸³

Justice Scalia, writing for the majority in *White*, explained why the scope of the announce clause is not as narrow as it appears to be.¹⁸⁴ The Court disagreed with the lower courts’ interpretation of the announce clause as only reaching disputed issues likely to come before the candidate, if elected.¹⁸⁵ First, the Court noted, the announce clause forced candidates to “choose between stating their views critical of past decisions and stating their views in opposition to *stare decisis*.”¹⁸⁶ Second, the Court pointed out that it does no good to limit the scope of the announce clause to issues likely to come before the court when, in reality, “there is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction.”¹⁸⁷ In this respect, the “limitation” is not much of a limitation.¹⁸⁸ Third, the Court found it of no use to

176. *Id.*

177. *Id.*

178. *Id.* at 765, 769.

179. *Id.* at 770.

180. *Id.*

181. *Republican Party of Minn. v. Kelly*, 63 F. Supp. 2d 967, 986 (D. Minn. 1999).

182. *Id.*

183. *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 885 (8th Cir. 2001).

184. *Republican Party of Minn. v. White*, 536 U.S. 765, 772 (2002).

185. *Id.* at 771-72.

186. *Id.* at 772.

187. *Id.* (quoting *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 229 (7th Cir. 1993)).

188. *Id.*

construe the clause as allowing general discussions of judicial philosophy, given that “philosophical generalities” would mean little to the voting public.¹⁸⁹

Applying strict scrutiny, the Court concluded that the announce clause was not narrowly tailored to serve the proffered state interest of preserving the appearance of impartiality in the judiciary.¹⁹⁰ In fact, the Court stated that the clause “is barely tailored to serve that interest *at all*, inasmuch as it does not restrict speech for or against particular *parties*, but rather speech for or against particular *issues*.”¹⁹¹ Finding unpersuasive respondents’ argument that the announce clause serves the interest of fostering open-mindedness, the Court acknowledged the reality that judicial candidates enter elections with personal opinions.¹⁹² Under Minnesota’s scheme, a judicial candidate could announce his or her political views repeatedly before or after the election season, but not during the season.¹⁹³ Taking into consideration the context in which the speech was restricted, the Court explained that public debate on the qualifications of candidates running for election is at the heart of the First Amendment.¹⁹⁴

Justice Ginsburg dissented, vigorously arguing that judges “are not political actors” and are removed from the “partisan fray.”¹⁹⁵ For that reason, Justice Ginsburg proposed, judicial campaign speech may be limited in ways that would be impermissible in other types of elections.¹⁹⁶ In responding to Justice Ginsburg’s dissent, the Court stated that Justice Ginsburg “exaggerates the difference between judicial and legislative elections.”¹⁹⁷ Judges have the power to make law and shape state constitutions; therefore, viewing the judiciary as completely separate from the legislature does not present a “true picture of the American system.”¹⁹⁸

The Court recognized that the ABA has opposed judicial elections for years, and that the House of Delegates voted five times between August 1972 and August 1984 to state its preference for merit selection and retention.¹⁹⁹ The Court noted that the Founding Fathers would have supported

189. *Id.* at 773.

190. *Id.* at 775-76.

191. *Id.* at 776.

192. *Id.* at 779.

193. *Id.*

194. *Id.* at 781. The Court stated that “we have never allowed the government to prohibit candidates from communicating relevant information to voters during an election.” *Id.* at 782.

195. *Id.* at 807 (Ginsburg, J., dissenting).

196. *Id.* at 806-07.

197. *Id.* at 784 (majority opinion).

198. *Id.*

199. *Id.* at 787.

the ABA's position.²⁰⁰ But if states choose to elect rather than appoint judges, they cannot place restrictions on candidates' campaign speech.²⁰¹ Justice O'Connor echoed this sentiment in her concurrence, arguing that "if the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges."²⁰² Essentially, the Court concluded that Minnesota cannot have its cake and eat it too.²⁰³ It cannot require judges to run for election and, at the same time, limit what candidates can say on the campaign trail.²⁰⁴ Striking down the announce clause as unconstitutional, the Court remanded the case to the Eighth Circuit.²⁰⁵

2. Republican Party of Minnesota v. White— *Eighth Circuit Remand*

On remand, the Eighth Circuit granted a request for en banc review.²⁰⁶ Two issues were considered in light of the Supreme Court's decision—the constitutionality of the partisan-activities and solicitation clauses of Canon 5.²⁰⁷ The partisan-activities clause states that a "judge or a candidate for election to judicial office shall not: (a) . . . identify themselves as members of a political organization, except as necessary to vote in an election . . . [or] (d) attend political gatherings; or seek, accept or use endorsements from a political organization."²⁰⁸ The solicitation clause provides that a "candidate shall not personally solicit or accept campaign contributions or personally solicit publicly stated support. A candidate may, however, establish committees to conduct campaigns for the candidate . . ." ²⁰⁹

After finding that Minnesota had a compelling state interest in "protecting litigants from biased judges," the Eighth Circuit went on to consider whether the clauses are narrowly tailored.²¹⁰ In examining the partisan-activities clause, the court concluded that the mere fact that a judge belongs to a particular political party is not enough to support a credible

200. *Id.* at 787-88.

201. *Id.* at 788.

202. *Id.* at 792 (O'Connor, J., concurring).

203. *See id.* at 788 (majority opinion) (stating that the "First Amendment does not permit [Minnesota] to achieve its goal by leaving the principle of elections in place while preventing candidates from discussing what the elections are about").

204. *Id.*

205. *Id.*

206. Republican Party of Minn. v. White, 416 F.3d 738, 744 (8th Cir. 2005).

207. *Id.*

208. MINN. CODE OF JUD. CONDUCT Canon 5(A)(1)(a), (d) (2000).

209. MINN. CODE OF JUD. CONDUCT Canon 5(B)(1)(a) (2000); *White*, 416 F.3d at 745.

210. *White*, 416 F.3d at 754.

claim of bias.²¹¹ Further, the court found the partisan-activities clause “underinclusive,” in that it prohibited candidates from associating with political parties during the campaign, but it allowed them to be politically active up until the moment they announce their candidacy.²¹² The clause was also found to be underinclusive because it only prohibited association with political parties and made no mention of association with other politically-motivated groups.²¹³ The court held that the partisan-activities clause did not pass constitutional muster because its “under-inclusiveness . . . is not indicative of a legitimate policy choice on the part of Minnesota.”²¹⁴

Next considering the solicitation clause, the Eighth Circuit concluded that it did not advance any interest in preserving impartiality.²¹⁵ The court reasoned that Minnesota law prohibited a committee from disclosing the identity of contributors, and an “actual or mechanical reproduction of a candidate’s signature on a contribution letter will not magically endow him or her with a power to divine, first, to whom that letter was sent, and second, whether that person contributed to the campaign or balked at the request.”²¹⁶

The court also entertained the notion of characterizing the word “impartiality” as “openmindedness.”²¹⁷ If the compelling state interest of preserving judicial impartiality were viewed in terms of promoting open-mindedness, the solicitation clause would still not be narrowly tailored.²¹⁸ Keeping in mind that the Canon prevents candidates from knowing the identity of contributors, the court found nothing objectionable about allowing judges to sign mass mailings or ask large audiences for donations.²¹⁹ The court concluded that the clause “seems barely tailored to in any way affect the openmindedness of a judge.”²²⁰ Because the clause did not pass strict scrutiny, the court held that the clause violates the First Amendment.²²¹

211. *Id.* at 755.

212. *Id.* at 756-58.

213. *Id.* at 759.

214. *Id.* at 763.

215. *Id.* at 765-66. The court defined “impartiality” as a “lack of bias for or against a party to a case.” *Id.*

216. *Id.* at 765.

217. *Id.* at 766.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

3. *A Second Appeal—United States Supreme Court Denies Certiorari*

In *Dimick v. Republican Party of Minnesota*,²²² the United States Supreme Court denied an appeal of the Eighth Circuit's decision on remand.²²³ The Court did not comment on its decision to deny certiorari.²²⁴ The Eighth Circuit decision now stands—a fact that worries opponents of judicial elections.²²⁵

4. *Response to Republican Party of Minnesota v. White*

The saga of *Minnesota Republican Party v. White* ended with the announce clause, the partisan-activities clause, and the solicitation clause all being held unconstitutional.²²⁶ The door had now been opened for groups to challenge the constitutionality of other states' attempts to regulate judicial campaign speech.²²⁷ In many states, challengers seized the opportunity and walked right through the open door.²²⁸

In *Family Trust Foundation of Kentucky, Inc. v. Kentucky Judicial Conduct Commission*,²²⁹ the Sixth Circuit considered the constitutionality of Kentucky's version of the pledges and promises clause and a clause prohibiting judges from making statements that commit or appear to commit the candidate regarding issues likely to come before the court.²³⁰ The district court had issued an order enjoining enforcement of these provisions in light of the Supreme Court's decision in *White*, and the Kentucky Judicial Conduct Commission filed an emergency motion asking the Sixth Circuit to stay the district court's order.²³¹ Denying the motion, the court acknowledged that the clauses do not contain the same language as the announce clause involved in *White*.²³² Nevertheless, the Sixth Circuit agreed with the district court's conclusion that Kentucky enforced the

222. 74 U.S.L.W. 3303 (U.S. Jan. 23, 2006).

223. *Dimick*, 74 U.S.L.W. at 3303.

224. *Id.*

225. See David G. Savage, *Court Moves Toward Partisan Contests for Judgeships*, L.A. TIMES, Jan. 24, 2006, available at 2006 WLNR 1261779 (quoting Professor Roy Schotland, who said the decision “means we are moving toward no-holds-barred elections for judges”).

226. *Republican Party of Minn. v. White*, 416 F.3d 738, 766 (8th Cir. 2005) (stating that the three clauses violated the First Amendment).

227. See Heller, *supra* note 74, at 4 (discussing post-*White* litigation in state courts).

228. *Id.*

229. 388 F.3d 224 (6th Cir. 2004).

230. *Family Trust Found.*, 388 F.3d at 227.

231. *Id.* at 226-27.

232. *Id.* at 227.

promises and commit clauses as a “de facto announce clause.”²³³ Calling the decision in *White* “binding precedent,” the court stated that “a well informed electorate is essential to the democratic election process guaranteed by the Kentucky Constitution. The right . . . of the voting public to hear what a candidate has to say is a compelling one.”²³⁴

The Eleventh Circuit had occasion in *Weaver v. Bonner*²³⁵ to rule on the constitutionality of a Georgia canon barring judicial candidates from using a form of public communication that the candidate knows is false or misleading.²³⁶ In 1998, Weaver ran for election to the Georgia Supreme Court.²³⁷ As part of his campaigning efforts, Weaver distributed pamphlets and purchased a television ad that quoted his opponent as saying traditional moral standards are “pathetic and disgraceful” and calling the electric chair “silly.”²³⁸ After receiving complaints about Weaver, the Judicial Qualifications Commission publicly reprimanded him, finding that he had violated the false and misleading clause contained in the Georgia Code of Judicial Conduct.²³⁹ Weaver lost the election, and he subsequently filed a lawsuit alleging that the false and misleading clause violates the First Amendment.²⁴⁰

The Eleventh Circuit held that although Georgia’s interest in preserving judicial impartiality may be compelling, the false and misleading clause was not narrowly tailored because it resulted in broad restriction of speech.²⁴¹ By prohibiting not only false statements made with actual malice, but also false statements negligently made and true statements that are misleading or deceptive, the clause “[did] not afford the requisite ‘breathing space’ to protected speech.”²⁴² The court also held unconstitutional a clause prohibiting candidates from soliciting campaign contributions.²⁴³ The clause did not pass the strict scrutiny standard because it “completely chill[ed]” candidates’ ability to speak to potential contributors.²⁴⁴

233. *Id.*

234. *Id.* at 227-28 (quoting *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953, 956 (Ky. 1991)).

235. 309 F.3d 1312 (11th Cir. 2002).

236. *Weaver*, 309 F.3d at 1315.

237. *Id.* at 1316.

238. *Id.* at 1316-17.

239. *Id.* at 1316.

240. *Id.* at 1317.

241. *Id.* at 1319.

242. *Id.*

243. *Id.* at 1322-23.

244. *Id.* at 1323.

In *Christian Coalition of Alabama v. Cole*,²⁴⁵ the Eleventh Circuit revisited the topic of judicial campaign speech.²⁴⁶ The Christian Coalition sent questionnaires to all judicial candidates running in the 2000 Alabama general election.²⁴⁷ The questionnaires asked candidates about their views on subjects such as abortion and gun control.²⁴⁸ Two sitting judges who received the questionnaire sought an advisory opinion from the Alabama Judicial Inquiry Commission as to whether answering the questionnaire would be ethically proper.²⁴⁹ The Commission issued an advisory opinion in which it stated that answering some of the questions would constitute a violation of certain judicial canons.²⁵⁰ In response, the Christian Coalition and three candidates filed a lawsuit seeking declaratory and injunctive relief.²⁵¹ While the case was pending, the Supreme Court's decision in *White* was handed down, and the Commission withdrew its advisory opinion.²⁵² The Commission then filed a motion to dismiss, arguing that the case was now moot in light of the ruling in *White* and the fact that Alabama was now considering changes to its judicial canons.²⁵³ The Eleventh Circuit agreed, holding that the case was now rendered moot.²⁵⁴

Several lower courts have also held judicial canons restraining campaign speech as unconstitutional, citing *White* as the basis. In *Alaska Right to Life Political Action Committee v. Feldman*,²⁵⁵ a federal district court concluded that Alaska's pledges and promises clause and commit clause violated the First Amendment.²⁵⁶ However, the court upheld a clause that required judges to disqualify themselves from a case if they have a particular bias, or if their impartiality might reasonably be questioned.²⁵⁷ The recusal clause was found to be narrowly tailored to serve the compelling interest of assuring parties that judges will apply the law equally.²⁵⁸ In *Smith v. Phillips*,²⁵⁹ a federal district court held unconstitutional a Texas judicial canon precluding candidates from making statements that indicate

245. 355 F.3d 1288 (11th Cir. 2004).

246. *Cole*, 355 F.3d at 1290.

247. *Id.* at 1289-90.

248. *Id.* at 1290.

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.* at 1293.

255. 380 F. Supp. 2d 1080 (D. Alaska 2005).

256. *Feldman*, 380 F. Supp. 2d at 1083.

257. *Id.* at 1084.

258. *Id.*

259. No. CIV.A.A-02CV111JRN, 2002 WL 1870038 (W.D. Tex. Aug. 6, 2002).

an opinion on issues that may come before the candidate later if elected.²⁶⁰ The court found no distinction between this clause and the announce clause invalidated in *White*.²⁶¹ Some state courts have also held unconstitutional certain other restrictions on judicial speech.²⁶²

5. *North Dakota Family Alliance, Inc. v. Bader*

The judicial canons regulating campaign speech in North Dakota were also challenged after the Supreme Court's decision in *White*.²⁶³ In *Bader*, the North Dakota Family Alliance (the Alliance) sent questionnaires to judicial candidates in order to compile and publish data about candidates' political philosophies.²⁶⁴ The Alliance is a nonprofit, nonpartisan organization whose goal is to "help North Dakota citizens by providing accurate, up-to-date information on key issues that affect today's family."²⁶⁵ The following are examples of the questions the Alliance asked the candidates: "Do you support/oppose/undecided (circle one) a judge's display of the Ten Commandments in his or her courtroom?"; "Rate your judicial philosophy on a scale of 1-10 with strict constructionist being a 10 and living document approach being a 1."²⁶⁶

Many candidates declined to respond to the questionnaire, explaining that the judicial ethics canons did not permit them to answer certain types of questions.²⁶⁷ Other candidates responded to the questionnaire in detail.²⁶⁸ The North Dakota Code of Judicial Conduct, in Canon 5A(3)(d)(i)-(ii), provides that a judicial candidate shall not "(i) make pledges or promises of

260. *Smith*, 2002 WL 1870038, at *1.

261. *Id.*

262. *See, e.g.*, *Griffen v. Ark. Judicial Discipline and Disability Comm'n*, 130 S.W.3d 524, 538 (Ark. 2003) (finding unconstitutional as applied to a particular judge a clause prohibiting judges from appearing before a legislative body except on legal matters); *Miss. Comm'n on Judicial Performance v. Wilkerson*, 876 So. 2d 1006, 1008, 1014 (Miss. 2004) (holding that the Commission could not constitutionally sanction a judge for extra-judicial, anti-homosexual statements). *But see In re Kinsey*, 842 So. 2d 77, 85-87 (Fla. 2003) (deeming constitutional Florida's version of the pledges and promises and commit clauses because they are sufficiently narrow); *In re Watson*, 794 N.E.2d 1, 4, 7-8 (N.Y. 2003) (upholding New York's pledges and promises clause because it "does not ban all 'pledges and promises' but only those that compromise the faithful and impartial performance of the duties of the office"); *In re Raab*, 793 N.E.2d 1287, 1293 (N.Y. 2003) (upholding a rule prohibiting judicial candidates from contributing money to political groups).

263. *North Dakota Family Alliance, Inc. v. Bader*, 361 F. Supp. 2d 1021, 1025 (D.N.D. 2005).

264. *Id.* at 1025.

265. North Dakota Family Alliance, About Us, <http://www.ndfa.org/aboutus.asp> (last visited Oct. 11, 2005).

266. *Bader*, 361 F. Supp. 2d at 1027.

267. *Id.* at 1025-26.

268. *Id.* at 1029-30.

conduct in office other than the faithful and impartial performance of duties of the office; or (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.”²⁶⁹ Before the surveys were sent out, the Judicial Ethics Advisory Committee sent a letter to judicial candidates that discussed the impact of *White* on North Dakota’s Canon 5.²⁷⁰ The letter informed candidates that the North Dakota canons do not contain an announce clause, and that candidates could request a formal opinion if specific ethical questions arose.²⁷¹ None of the candidates sought an opinion as to whether he or she should respond to the questionnaire.²⁷² After being turned down by many candidates who declined to answer the questionnaire, the Alliance filed a lawsuit in federal district court seeking declaratory and injunctive relief.²⁷³

In comparing North Dakota’s pledges and promises clause and commit clause to the announce clause held unconstitutional in *White*, Chief Judge Daniel L. Hovland found little difference.²⁷⁴ The North Dakota clauses, like Minnesota’s announce clause, restricted judicial candidates from expressing their views on political issues.²⁷⁵ Another similarity between the North Dakota and Minnesota provisions was the justification put forth for their enforcement, namely, preservation of an impartial judiciary.²⁷⁶ Judge Hovland pointed out that this justification did not withstand strict scrutiny in *White*, and the Court in *White* clearly held that candidates cannot be prohibited from announcing their political views on controversial issues.²⁷⁷ Therefore, Judge Hovland reasoned, judicial candidates cannot be banned from expressing their views in the context of a survey questionnaire.²⁷⁸

Judge Hovland found the language of the provisions impermissibly overbroad and concluded that the “appear to commit” language was not cured by its application only to judicial candidates and only to issues “likely to come before the court.”²⁷⁹ The clause would extend to anyone who publicly expressed intent to someday run for, or remain in, an elected

269. N.D. CODE OF JUD. CONDUCT Canon 5A(3)(d)(i)-(ii) (2004).

270. *Bader*, 361 F. Supp. 2d at 1026.

271. *Id.*

272. *Id.* at 1030.

273. *Id.*

274. *See id.* at 1039 (stating that the North Dakota clauses “essentially forbid the same speech that the United States Supreme Court held was constitutionally-protected in *White*”).

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

judicial office.²⁸⁰ If impartiality were defined as “openmindedness,” the clauses still would not further the state’s interest.²⁸¹ The clauses allowed attorneys and judges to promise or commit themselves to any legal, political, or social issue right up until the day they declare their candidacy.²⁸² But the moment candidacy was announced, all promises and commitments were suddenly supposed to be forgotten.²⁸³ Overall, the court determined that the clauses failed to meet the strict scrutiny test because they were not narrowly tailored to serve the state’s interest in preserving judicial impartiality.²⁸⁴ Therefore, the clauses were unconstitutional.²⁸⁵

The Alliance also challenged the constitutionality of Canon 3E(1), which provides that a “judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned”²⁸⁶ The court found that the purpose of the provision was to “offer a guarantee to parties that the judge will apply the law in the same manner that would be applied to any other litigant.”²⁸⁷ Finding that North Dakota has an interest in preserving judicial impartiality, the court stated that an impartial judge was essential to due process and the administration of justice.²⁸⁸ The recusal clause was narrowly tailored to serve this interest because it simply required judges to disqualify themselves when they have a particular bias or prejudice.²⁸⁹

6. *Judicial Elections After White*

It is unclear how *White* and its progeny will affect judicial elections in the coming years.²⁹⁰ Certainly, these cases have expanded candidates’ ability to inform voters about their views on key social and political issues.²⁹¹ Some argue that *White* will have a positive effect on elections because it

280. *Id.*

281. *Id.* at 1040.

282. *Id.*

283. *See id.* (recognizing that “lawyers and judges have often committed themselves on disputed legal, political, and social issues long before they became candidates for judicial office, either in the form of speeches, lectures, books, letters to the editor, law review articles, legal articles, legal briefs, or previous rulings”).

284. *Id.* at 1042.

285. *Id.*

286. *Id.* at 1043. N.D. CODE OF JUD. CONDUCT Canon 3E(1) (2004).

287. *North Dakota Family Alliance, Inc. v. Bader*, 361 F. Supp. 2d 1021, 1043-44 (D.N.D. 2005).

288. *Id.* at 1043.

289. *Id.* at 1043-44.

290. *See Rapp, supra* note 3, at 127 (suggesting that the long-term effects of the *White* decision may not be clear until a few election cycles have passed).

291. *Doyle, supra* note 139, at 1B (stating that the *White* decision could “expand the number of hotly contested, expensive state judicial races”).

will break down the barrier between judicial candidates and voters.²⁹² Greg Wersal, the plaintiff in *White*, stated that “more money will probably be involved, but that’s OK because it takes money in order to get a message out to people so that they have some understanding of what candidates are about.”²⁹³ Political commentator George F. Will calls Minnesota’s choice to select judges through the election process “understandable, but unwise.”²⁹⁴ However, he asks, “[W]hat is the point of elections, if candidates are forbidden to talk about the very things the voters are interested in and the election is supposedly about?”²⁹⁵ Barbara E. Reed, an assistant public defender in Wisconsin, asserts that while some view *White* as a “catastrophe of constitutional proportions,” it is “better regarded as a relatively small seismic event.”²⁹⁶ Reed suggests that there are now two categories of judicial speech on either side of *White*—the “say nothing” approach, and the “say anything” approach.²⁹⁷ Making a case for using a combination of the two, Reed proposes that *White* has created an opportunity rather than a disaster.²⁹⁸

Not everyone is optimistic about the long-term effects of *White*.²⁹⁹ Some believe that *White* has left judicial regulatory systems in disarray because the Court did not explain the scope of its decision.³⁰⁰ Others fear that judicial elections will become even costlier and more contentious.³⁰¹ The increased politicization of judicial elections may also drive away qualified candidates, hurt the public image of judges, and even corrupt the

292. See George F. Will, *One Nation Under Judges*, NEWSWEEK, July 8, 2002, at 64 (arguing that if Minnesota is going to have judicial elections, then candidates should be allowed to communicate with voters).

293. Doyle, *supra* note 139, at 1B.

294. Will, *supra* note 292, at 64.

295. *Id.*

296. Barbara E. Reed, *Tripping the Rift: Navigating Judicial Fault Lines in the Post-White Landscape*, 56 MERCER L. REV. 971, 971-72 (2005).

297. *Id.* at 972.

298. *Id.* Reed advocates a response to *White* that involves a “combination of narrow tailoring, a commitment by the bench and bar to the highest aspirational standards, and an assertive campaign of public education.” *Id.*

299. See Caufield, *supra* note 17, at 637 (quoting Professor Roy Schotland, who said the *White* decision will “downgrade the pool of candidates for the bench, reduce the willingness of good judges to seek reelection, add to the cynical view that judges are merely ‘another group of politicians,’ and thus hurt state courts and indirectly hurt all our courts”).

300. See Wendy R. Weiser, *Regulating Judges’ Political Activity After White*, 68 ALB. L. REV. 651, 652-53 (2005) (contending that the Court in *White* “did not provide sufficient guidance for determining when judicial elections must and when they need not sound like those for non-judicial office”).

301. See, e.g., Caufield, *supra* note 17, at 636 (stating that “there was (and is) general agreement that *White* is likely to produce longer, more contentious, and more costly judicial campaigns”).

judicial branch.³⁰² Steven Lubet, a professor at Northwestern University, goes so far as to argue that *White* has validated unfair judicial conduct and allows the prejudging of cases.³⁰³

Though disagreement abounds over the effects of *White* and its progeny, one thing is certain—lawmakers and concerned citizens across the country are taking a second look at judicial elections.³⁰⁴ The ABA revised its model code in 2003 in response to *White*.³⁰⁵ A number of states have changed their judicial canons in order to comport with the Court's holding in *White*.³⁰⁶

In 2002, North Carolina adopted a system of public funding for judicial campaigns in the hope of mitigating the damage a judicial election system can create.³⁰⁷ Some observers are calling for an even more drastic solution: getting rid of judicial elections entirely and moving to a merit selection system.³⁰⁸ The Honorable Tim Dallas Tucker, a South Dakota Circuit Court Judge, maintains that “South Dakota’s independent, fair and competent judiciary is threatened. Evolving federal court decisions have opened the door to misleading advertising and political attacks.”³⁰⁹ He argues that South Dakota should adopt merit selection (e.g. the Missouri Plan) because it “provides for a system where merit and qualifications, not money and politics, determine who will be South Dakota’s judges.”³¹⁰ So far, the argument for adoption of merit selection has gained very limited popular support.³¹¹ While it is still too early to predict how states will ultimately handle the challenge of preserving an impartial judiciary in an evermore competitive era, the recent court decisions affecting judicial elections have

302. See *id.* at 636-37 (summarizing the arguments of those critical of the *White* decision).

303. Steven Lubet, Editorial, *Muzzle Views of Candidates for Judgeships*, ATLANTA J.-CONST. (Ga.), July 3, 2002, at A18.

304. See Caufield, *supra* note 17, at 644-45 (discussing the states that have decided to revise their codes of judicial conduct).

305. See *id.* at 644 n.140 (noting the ABA revisions).

306. See *id.* at 644-46 (noting that the Missouri Supreme Court repealed Missouri’s announce clause, Pennsylvania removed the announce clause from its code, Texas repealed a provision prohibiting candidates from expressing their opinions on topics subject to judicial interpretation, North Carolina repealed its pledges and promises clause, and several other states issued advisory opinions explaining the impact of *White*).

307. See Doug Bend, *North Carolina’s Public Financing of Judicial Campaigns: A Preliminary Analysis*, 18 GEO. J. LEGAL ETHICS 597, 598 (2005) (analyzing the problems involved in judicial elections and the ways in which North Carolina has attempted to address them).

308. See Tucker & Fischer, *supra* note 22, at 182 (advocating that the South Dakota Constitution be amended to provide for a merit system of judicial selection).

309. *Id.*

310. *Id.* at 204.

311. Tarr, *supra* note 68, at 1460-61.

clearly prompted debate among scholars, lawmakers, members of the bar, and citizens.³¹²

IV. JUDICIAL SELECTION IN NORTH DAKOTA: WHERE DO WE GO FROM HERE?

Few would argue with the proposition that judicial elections in North Dakota have not involved the level of competition and politicization that states like Illinois and Texas have experienced.³¹³ In terms of population, North Dakota is a small state.³¹⁴ Our elections do not often draw national attention, and special interest groups have not spent millions of dollars to influence judicial elections here.³¹⁵ But judicial elections are changing, and North Dakota is not necessarily immune. The *White* and *Bader* decisions will allow North Dakota judicial candidates more latitude when speaking to voters on the campaign trail. In addition, the days of unopposed judicial campaigns in North Dakota may be numbered. Traditionally in North Dakota, “a judge’s race is a rarity.”³¹⁶ People have been especially reluctant to run against an incumbent judge.³¹⁷

However, there have been several contested judicial elections in recent years.³¹⁸ In 1996, Justice Mary Maring and challenger Sarah Vogel ran a relatively close race for a seat on the North Dakota Supreme Court.³¹⁹ Statewide polls taken in the weeks before the election showed Vogel and Justice Maring in a “statistical dead heat.”³²⁰ Justice Maring retained her seat on the court with 52% of the vote, while Vogel received 48% of the vote.³²¹ The race became rather heated when Vogel criticized Justice Maring for telling a news reporter that Vogel was not qualified for the

312. See Rapp, *supra* note 3, at 127-28 (discussing the debate over the implications of *White*).

313. Dale Wetzel, *N.D. Residents Support Courts, but with Reservations*, BISMARCK TRIB. (N.D.), Nov. 17, 1999, at 6C (quoting North Dakota Supreme Court Justice William Neumann, who said “[t]hings often are not the same in North Dakota as they are in a lot of other states”). Justice Neumann also remarked, “We’re lucky to have the kind of place where things are usually done on a very much up-and-up basis.” *Id.*

314. See United States Census Bureau, *State and County QuickFacts*, <http://quickfacts.census.gov/qfd/states/38000.html> (last visited July 8, 2006) (indicating that the 2005 estimate for North Dakota’s population was 636,677).

315. WATERSHED YEAR, *supra* note 69, at 11 (showing that campaign fundraising for the North Dakota Supreme Court races in 2000 totaled \$13,925).

316. Ryan Bakken, *Breaking Down: This Election Runs the Gamut*, GRAND FORKS HERALD (N.D.), June 6, 2004, at A1.

317. *Id.*

318. *Id.*

319. Janell Cole, *Maring Keeps Seat on Court*, BISMARCK TRIB. (N.D.), Nov. 6, 1996, at 1B.

320. *Id.*

321. *Id.*

court.³²² Vogel suggested that Justice Maring violated judicial ethics by misrepresenting an opponent's qualifications.³²³ Vogel also questioned the propriety of a commercial advertisement in which Governor Edward Schafer appeared in support of Justice Maring.³²⁴ Interestingly, the two candidates were divided along political lines.³²⁵ Vogel, who had been elected to two terms as North Dakota Agriculture Commissioner on the Democratic ticket, is a "great believer in the Democratic and NPL philosophy."³²⁶ Justice Maring, on the other hand, was appointed by Republican Governor Edward Schafer.³²⁷ For some, the Vogel/Maring race provided an example of the undesirability of requiring judicial candidates to run for election.³²⁸ Justice Maring's struggle during the 1996 election reinforced her opinion that North Dakota should adopt retention elections rather than popular elections.³²⁹ The popular election system, Justice Maring said, works against career lawyers who run for judicial office against well-known politicians.³³⁰ Justice Maring suggested that the system of campaigning for judicial office could jeopardize the fairness and impartiality of the judiciary.³³¹ Vogel remained optimistic about the existing judicial election system, stating that "voters are very smart" and are able to "look at the candidates' credentials."³³²

In more recent judicial elections, several races have been contested. Four candidates ran in the 2004 primary election to fill retiring Judge Bruce Bohlman's vacancy in the Northeast Central Judicial District.³³³ In the East Central Judicial District, fifteen candidates ran in 2004 for three judgeships,

322. Janell Cole, *High Court Candidates Trade Barbs*, BISMARCK TRIB. (N.D.), Nov. 2, 1996, at 6A.

323. *Id.*

324. *Id.*

325. See *Supreme Court Candidates Find Ways to Campaign*, BISMARCK TRIB. (N.D.), Nov. 1, 1996, at 6C (noting that Justice Maring is a Republican appointee and Vogel appeared at Democratic Party events).

326. Sue Ellyn Scaletta, *Vogel Plans Private Practice*, GRAND FORKS HERALD (N.D.), Dec. 5, 1996, at B1 (quoting Sarah Vogel).

327. Liz Fedor, *Different Paths Lead Maring, Vogel to Supreme Court Contest*, GRAND FORKS HERALD (N.D.), Sept. 9, 1996, at A1.

328. The political aspect was incorporated into this article after consultation with Michael Williams, president of the State Bar Association of North Dakota. Mr. Williams suggested that politics can divide judicial candidates.

329. Dave Clark, *Candidates Disagree on Election of Justices*, GRAND FORKS HERALD (N.D.), Oct. 29, 1996, at B4.

330. *Id.*

331. *Id.*

332. *Id.*

333. Bakken, *supra* note 316, at A1.

two of which were vacant because of retirement and one of which was held by an appointee.³³⁴

A 1999 poll commissioned by the North Dakota Supreme Court indicated that while most North Dakotans trust the state's judiciary, many believe politics and campaign contributions influence judges.³³⁵ Seventy percent of respondents said judges' decisions are influenced by politics; 57% said judges' rulings are influenced by the need to raise funds for their election campaigns.³³⁶ Justice William Neumann commented that these results may have been affected by national stories that portrayed the judiciary in a negative light.³³⁷ Nevertheless, the results seem to suggest that North Dakota is not sheltered from the challenges facing judges in other parts of the country.

Judge Bruce Bohlman, who served as Northeast Central Judicial District Judge from 1987 to 2004, was appointed by Governor Sinner.³³⁸ He ran for election three times during his tenure, always unopposed.³³⁹ Running for election was not an enjoyable experience for Judge Bohlman, even though he did not have to spend money on advertising and campaigning.³⁴⁰ In talking with other judges at judicial conferences, Judge Bohlman was shocked to find out how much money it takes in some states to get elected.³⁴¹ Judge Bohlman says that he would never have become a judge if he would have had to run for election in such an environment.³⁴² Although North Dakota is a small state, Judge Bohlman thinks the recent federal court decisions on judicial elections could have an effect.³⁴³ His advice to a candidate running for election in North Dakota is to remember that "you're not required to make commitments."³⁴⁴ He believes that candidates "should not make commitments" or become " beholden to any group" because judges must "make decisions based on the facts and the law."³⁴⁵

John Kapsner, an attorney with the Vogel Law Firm in Bismarck, believes the *White* and *Bader* decisions will not spark any significant

334. *Id.*

335. Wetzel, *supra* note 313, at 6C.

336. *Id.*

337. *Id.*

338. Interview with Judge Bruce Bohlman, North Dakota Surrogate Judge, in Grand Forks, N.D. (Sept. 19, 2005).

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.*

345. *Id.*

changes in the short term.³⁴⁶ But there may be long-term consequences, he says.³⁴⁷ Kapsner assisted in drafting an amicus brief which was submitted in the Eighth Circuit remand of *White*.³⁴⁸ The Eighth Circuit's decision, in which the court struck down Minnesota's solicitation clause,³⁴⁹ is troubling to Kapsner.³⁵⁰ Allowing judges to solicit contributions face-to-face could be problematic in a small state like North Dakota, Kapsner says.³⁵¹ A judge running for reelection can now look a lawyer right in the eye and ask for a contribution.³⁵² In a small state, the temptation is greater because "everyone knows everyone."³⁵³

North Dakota lawmakers have taken note of the *White* and *Bader* decisions and the surrounding controversy. In 2005, the North Dakota Legislature amended campaign finance rules so that judicial candidates must now report funding received from contributors who give more than two hundred dollars, the aggregated amount received from each listed contributor, and the date the last contribution was received from each contributor.³⁵⁴ The Legislature also passed a resolution to study judicial elections.³⁵⁵ The resolution explains that "recent decisions by federal courts in other jurisdictions which have invalidated various restrictions on the activities of candidates for judicial offices may have a significant impact on the conduct of judicial elections in this state."³⁵⁶ The Judicial Process Committee has been assigned to conduct the study.³⁵⁷ Representative Joyce Kingsbury, who is a member of the Committee, states that the Committee will receive comments from judges and the North Dakota State Bar

346. Telephone Interview with John Kapsner, Attorney, Vogel Law Firm, in Bismarck, N.D. (Sept. 26, 2005).

347. *Id.*

348. *Id.*; see Brief of Conference of Chief Justices as Amici Curiae Supporting Appellees at 1, Republican Party of Minn. v. White, 416 F.3d 738 (2005) (No. 99-4021), 2002 WL 32737305 (arguing that limits on fundraising for judicial campaigns are a "constitutional means of protecting the judiciary from corruption").

349. *White*, 416 F.3d at 766.

350. Telephone Interview with John Kapsner, *supra* note 346.

351. *Id.*

352. *Id.*

353. *Id.*

354. N.D. CENT. CODE § 16.1-08.1-03.9 (2005).

355. H.R. Con. Res. 3014, 59th Leg. Assem., Reg. Sess. (N.D. 2005).

356. *Id.*

357. N.D. Legis. Branch, *Assigned Studies and Responsibilities*, <http://www.state.nd.us/lr/assembly/59-2005/interim-info/committeinterim.html#jp> (last visited Oct. 13, 2005).

Association and then make a recommendation.³⁵⁸ Any recommendations or necessary legislation will come before the next legislative session.³⁵⁹

Chief Justice Gerald VandeWalle of the North Dakota Supreme Court testified before the Judicial Process Committee in September 2005.³⁶⁰ He suggested that if candidates choose to seek political party endorsements, declare their political views, or solicit campaign contributions, they are more likely to have to recuse themselves later.³⁶¹ Given that North Dakota has a small judiciary, recusals cause problems because it is difficult to find replacement judges.³⁶² Chief Justice VandeWalle stated that North Dakota's judicial canons will now have to be revised before the next election.³⁶³ Although Chief Justice VandeWalle said that he does not have a solution to the current problems with judicial elections, he did note his opinion that judicial elections are different from other types of elections.³⁶⁴

The State Bar Association of North Dakota (SBAND) is also evaluating the future of judicial elections in North Dakota. SBAND has created the Task Force on Judicial Selection which will, among other things, "review the judicial selection process in North Dakota," consider the issues raised by *White* and *Bader*, "evaluate the options utilized in selecting judges in other state and federal jurisdictions," and "make specific recommendations for any necessary changes to North Dakota rules or law"³⁶⁵ The Task Force will also assist the Judicial Process Committee in its study.³⁶⁶

Michael Williams, president of SBAND, says that SBAND is "extremely concerned" about judicial selection in North Dakota.³⁶⁷ He thinks that "after *White*, the rules have changed."³⁶⁸ Even in North Dakota, Williams says, special interest groups could begin to influence elections.³⁶⁹ In fact, Williams says, out-of-state special interest groups could come into a

358. E-mail Interview of Joyce Kingsbury, member of the N.D. House of Representatives (Oct. 10, 2005) (on file with author).

359. *Id.*

360. N.D. Legis. Branch, *Minutes of the Judicial Process Committee*, <http://www.state.nd.us/lr/assembly/59-2005/interim-info/minutes/jp091905.html> (last visited Oct. 5, 2005).

361. *Id.*

362. *Id.*

363. *Id.*

364. *Id.*

365. Letter from Michael J. Williams, SBAND President, to Jack Marcil, SBAND Task Force member (Aug. 26, 2005) (on file with author).

366. N.D. Legis. Branch, *Minutes of the Judicial Process Committee*, *supra* note 357.

367. Interview with Michael Williams, President of SBAND, in Fargo, N.D. (Sept. 29, 2005).

368. *Id.*

369. *Id.*

small state like North Dakota and virtually buy an election.³⁷⁰ Additionally, Williams points out, an interest group would have to spend much less money to “buy” an election in North Dakota than it would have to in other states.³⁷¹ Williams hopes that those studying judicial elections will come up with a “good, creative solution” to the problems surrounding judicial elections—a solution that will fit North Dakota’s needs.³⁷²

Recently, the North Dakota Supreme Court began the process of revising the North Dakota Code of Judicial Conduct.³⁷³ The Court has revised the Code in order to make it clear that candidates may answer questionnaires or participate in interviews that ask about candidates’ political views, but the Code warns candidates to “proceed with caution.”³⁷⁴ The North Dakota Judiciary Standards Committee proposed other amendments to Canon 5 in March 2006.³⁷⁵ The Supreme Court approved the amendments in an Order of Adoption effective March 27, 2006.³⁷⁶ An amendment to Canon 5A(1)(d) replaces the word “party” with the word “organization,” so that judicial candidates are now prohibited from seeking or accepting endorsements or letters of support from political organizations in general, not just political parties.³⁷⁷ The change in terminology was made in order to avoid underinclusiveness.³⁷⁸ Canon 5C(2), the solicitation clause, has been amended to allow candidates to solicit contributions or support in front of large groups or organizations.³⁷⁹ The amendment also allows candidates to place their signatures on materials distributed by campaign committees which solicit contributions or public support.³⁸⁰ However, the amendment “retain[s] and make[s] explicit the prohibition against directly and personally soliciting contributions or publicly stated support.”³⁸¹

370. *Id.*

371. *Id.*

372. *Id.*

373. Dale Wetzel, *North Dakota Judge Candidates May Seek Political Backing*, GRAND FORKS HERALD (N.D.), Jan. 23, 2006, available at <http://www.grandforks.com/mld/grandforks/13694686.htm>.

374. N.D. CODE OF JUD. CONDUCT Canon 5A cmt. 6 (2006).

375. North Dakota Supreme Court Order of Adoption No. 20060065 (Mar. 27, 2006), available at <http://www.ndcourts.com/court/notices/20060065/order.htm>.

376. *Id.*

377. Letter from Douglas L. Mattson, Chair of the Judiciary Standards Committee, to Gerald W. VandeWalle, Chief Justice of the North Dakota Supreme Court 3 (Mar. 8, 2006), available at http://www.ndcourts.com/_court/notices/20060065/petition.pdf.

378. *Id.*

379. *Id.*

380. *Id.*

381. *Id.*

Judge Steven McCullough of the East Central Judicial District knows firsthand that North Dakota is not immune from the difficulties that judicial elections can present.³⁸² When he ran for election in 2005, he competed against four other candidates in the primary.³⁸³ He found the campaigning process “incredibly stressful” and time-consuming.³⁸⁴ In order to reach voters, his campaign spent a significant portion of its funds on television and radio advertising.³⁸⁵ He found the experience well worth the time and effort because he enjoys his job and the opportunity to make a difference in people’s lives.³⁸⁶ However, he notes the recent changes in judicial selection and fears that elections in North Dakota will become partisan.³⁸⁷ He is also concerned about the cost of running for election, even in North Dakota.³⁸⁸ It is possible, Judge McCullough says, that some qualified people do not run for election because they cannot afford it.³⁸⁹ For example, a candidate who comes from a small law firm or solo practice may find it very difficult to put in the time and money it takes to run for election and, at the same time, make ends meet at the firm.³⁹⁰ Judge McCullough is a member of the SBAND Task Force and the Judiciary Standards Committee and is participating in the study of judicial elections.³⁹¹

V. CONCLUSION

Without a doubt, judicial elections are going through some very important changes.³⁹² Today’s candidates must compete more, campaign more, and spend more.³⁹³ Recent federal court decisions have also made it possible for candidates to divulge more information about their personal views on political and social issues.³⁹⁴ While no candidate is compelled to express his or her personal opinions,³⁹⁵ the pressure to do so may increase.

382. Interview with Judge Steven McCullough, East Central Judicial District Judge, in Fargo, N.D. (Oct. 7, 2005).

383. *Id.*

384. *Id.*

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.*

390. *Id.*

391. *Id.*

392. Rottman & Schotland, *supra* note 113, at 1372-73.

393. Rapp, *supra* note 3, at 116-17.

394. *See, e.g.*, Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002) (holding that states may not prohibit judicial candidates from announcing their opinions on legal and political issues).

395. *See, e.g.*, N.D. CODE OF JUD. CONDUCT Canon 5A cmt. 6 (2006) (indicating that it is a candidate’s choice whether to respond to questions regarding political issues).

North Dakota has a somewhat unique situation. It is a small state with a close-knit legal community. Candidates who discuss their stance on controversial political and social issues may later find themselves in a dilemma.³⁹⁶ They may have to disqualify themselves from hearing a case if their impartiality is called into question, but replacement judges could be hard to find.³⁹⁷ Another problem in a small state is fundraising.³⁹⁸ It is much more difficult for an attorney to say no to a judicial candidate who asks for contributions when the attorney knows he or she will have to see the candidate frequently.³⁹⁹

The direction North Dakota should take in judicial selection remains up for debate. Some would argue that North Dakota should abandon judicial elections altogether and adopt an appointment system in its place.⁴⁰⁰ Although popular election is not a perfect method of selection, neither are the appointment and merit selection methods.⁴⁰¹ Elections allow citizens to have direct input into the judicial branch of government.⁴⁰² In addition, elections prompt judicial candidates to connect with citizens—something that judges might not otherwise do.⁴⁰³ The appointment and merit selection methods keep judges less accessible to the public, at least to some degree.⁴⁰⁴ It seems the answer is not to rush into a decision to abolish judicial elections, but rather to contemplate a solution that works for North Dakota. As Michael Williams put it, we need a “good, creative solution.”⁴⁰⁵

396. See N.D. Legis. Branch, *Minutes of the Judicial Process Committee*, *supra* note 357 (discussing Chief Justice VandeWalle’s concern that outspoken judicial candidates could create problems later when they have to recuse themselves from a case).

397. *Id.*

398. Telephone Interview with John Kapsner, *supra* note 346.

399. *Id.*

400. See Lloyd Omdahl, Editorial, *Politics Threatens Judicial Elections*, GRAND FORKS HERALD (N.D.), Apr. 18, 2005, at A (arguing that “North Dakota judgeships have been chosen with a minimum of politics” up to this point, but the situation may soon change due to the availability of outside money and new opportunities for judicial candidates to politicize their campaigns). Omdahl suggests that North Dakota adopt a system of appointment by the governor. *Id.*

401. Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 978-88 (2001) (discussing the advantages and disadvantages of the election and appointment systems).

402. *Id.* at 979.

403. See *id.* at 977 (stating that Abrahamson, who is chief justice of the Wisconsin Supreme Court, favors judicial elections because “the elective system can be an educational experience for both the judges and the electorate”).

404. See *id.* (observing that “judges who are running for election take the time to visit with law enforcement officers, make rounds with social workers and doctors, visit schools and factories, and lunch with the fork-and-knife clubs and bar associations”). These opportunities, argued Abrahamson, allow judges to “understand the legal system from the perspective of the users: litigants and lawyers.” *Id.*

405. Interview with Michael Williams, *supra* note 367.

North Dakota lawmakers and legal community members have taken a positive step by initiating a study of judicial elections. Preserving the integrity and fairness of our judiciary is an unquestionable necessity. While there is no easy answer to the problems judicial elections present, it is important that a dialogue has begun.

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