THE EFFECT OF *MINNESOTA V. WHITE* ON CAMPAIGNING FOR THE JUDICIARY

by LOUIS ALFRED TROSCH, SR.* AND RONALD A. MADSEN**

I. INTRODUCTION

Candidates running for judicial office in states that require them to be selected by popular election face an impossible dilemma. On one hand, they must be able to express their viewpoints on various legal or political issues to the populace in order to attract the needed votes and monetary finances to run an effective political campaign. However, by taking positions on controversial legal and political topics, the candidate may be in violation of Canon 7 of the 1972 American Bar Association Model Code of Judicial Conduct[1] which provides that any candidate running for political office:

> Should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position or other fact.[2]

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[1] MODEL CODE OF JUDICIAL CONDUCT CANON 7B(1)(c) (1972).

[2] *Id.*

Many states, including Minnesota, have adopted a version of Canon 7. Violation of the provision could cause the candidate to be disbarred, placed on probation or suspended.[3]

It is this judicial dilemma that was squarely addressed by the United States Supreme Court in the landmark case, *Republican Party of Minnesota v. White*[4] in 2002. The Supreme Court ruled that Minnesota's version of Canon 7 violates the judicial candidate's right of free speech. Candidates for judicial office may now speak in a partisan fashion without fear of reprimand from either the state judicial standards commissions or the state bars. Some of the expected consequences are politicization of the judiciary, an increase in the number of opportunistic candidates "playing to the public,"[5] and an increased use of deceptive sound bites on radio and television.[6]

It is the purpose of this article to analyze the legal reasoning leading to the decision protecting a judicial candidate's freedom of speech rights during an election campaign. The article will also discuss the negative ramifications of the court decision, other methods of judicial selection and finally recommend a proposal for reforming the system so that the impartiality and integrity of judicial decisions can be maintained.

II. THE ANNOUNCE CLAUSE LIMITED JUDICIAL CAMPAIGN SPEECH

The American Bar Association first created a model code of judicial ethics in 1924.[7] Recognizing the potential ill effects of political speech in judicial elections, the original provision restricting judicial campaign speech stated that a judge "should not announce in advance his conclusions of law on disputed issues to secure class support."[8] The canons also declared that judicial candidates "should avoid making political speeches."[9] In this context, "political" appears to have meant "partisan;" thus judges were to refrain from giving speeches that

[3] *See* MINN. RULES OF BD. ON JUDICIAL STANDARDS R. 4(a)(6), 11(d) (2003).

[4] 536 U.S. 765 (2002).

[5] Amy M. Craig, *The Burial of An Impartial Judicial System: The Lifting of Restrictions on Judicial Candidate Speech in North Carolina*, 33 WAKE FOREST L. REV. 413, 436 (interview with Thomas W. Ross, Resident Superior Court Judge for Guilford Co., N.C., in Concord, N.C. (Jan. 13, 1998)) (1998).

[6] *See id.* (citing *Judges on the Stump?*, NEWS & OBSERVER (Raleigh, NC), July 18, 1997, at A14).

[7] *See* STEPHEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS: STATUTES AND STANDARDS 621 (2003).

[8] ABA CANONS OF JUDICIAL ETHICS CANON 30 (1924). Only Montana employs this standard of restraint of judicial speech. *See* Mont. Canons of Judicial Ethics Canon 30 (1963).

[9] ABA CANONS OF JUDICIAL ETHICS CANON 28 (1924).

advanced or were connected to a particular political party's cause.[10] The Canons of Judicial Ethics were adopted and relied upon by most states for nearly fifty years.[11]

During the late 1960s, the ABA created the Special Committee on Standards of Judicial Conduct "to draw up modern standards and to replace the Canons of Judicial Ethics."[12] The American Bar Association adopted the committee's Code of Judicial Conduct in 1972.[13]

Canon 7 of the 1972 Code of Judicial Conduct forms the basis of the announce clause which states that a candidate, including an incumbent judge, "should not...announce his views on disputed legal or political issues...."[14] The announce clause was adopted in part because it was believed that a candidate's views on these issues were irrelevant to his or her tasks as a judge.[15] The 1972 rule is more restrictive than the 1924 canons in that it prohibits a judicial candidate from announcing his or her position on any contemporary political matter that may be controversial.[16] The announce clause was stricken down in 2002 by the landmark decision, *Republican Party of Minnesota v. White.*[17]

Canon 7 does permit candidates to engage in some political activities aimed at improving the law.[18] The 1972 Model Code allows candidates to engage in political activities "on behalf of measures to improve the law, the legal system, or the administration of justice."[19] This provision has been criticized as being a type of "catch-22." Judge Posner opined that, "almost anything a judicial candidate might say about 'improving the law' could be taken to cast doubt on his capacity to decide some case impartially, unless he confined himself to the most mundane and technical proposals for law reform."[20] The 1972 Model Code was

[10] *See* PATRICK M. MCFADDEN, ELECTING JUSTICE: THE LAW AND ETHICS OF JUDICIAL ELECTION CAMPAIGNS 86 (1990).

[11] GILLERS & SIMON, *supra* note 7, at 621.

[12] *Id.* The Special committee on Standards of Judicial Ethics was chaired by noted jurist and then California Supreme court Justice Robert Traynor. *Id.*

[13] *Id.*

[14] MODEL CODE OF JUDICIAL CONDUCT CANON 7B(1)(c) (1972). The Model Code provides that candidates for judicial office, "should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact." *Id.*

[15] *See* MCFADDEN, *supra* note 10, at 85.

[16] *See id.* at 86.

[17] 536 U.S. at 780-81.

[18] *See id.* at 87.

[19] MODEL CODE OF JUDICIAL CONDUCT CANON 7A(4) (1972).

[20] Buckley v. Illinois Judicial Inquiry Bd., 997 F.2d 224, 229 (7th Cir. 1993) (alteration in original).

designed to be more enforceable than the 1924 canons.[21] The 1972 Model Code announce clause was adopted by half of the states.[22]

In the 1980s, the ABA examined the Model Code in an effort to provide more guidance on the political conduct of judges and judicial candidates.[23] In 1990, the ABA issued a redrafted Model Code of Judicial Conduct.[24] The 1972 version of Canon 7 was renumbered as Canon 5 in the 1990 Model Code. The 1990 Model Code replaced the announce clause with narrower language. Canon 5A(3)(d) declares that a judicial candidate shall not:

> Make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; or knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidates or an opponent.[25]

The 1990 Model Code attempts to replace the broad prohibition that the 1972 Model Code imposed against candidates announcing their views on disputed legal or political issues with a more narrow rule against making statements that appear to improperly commit the candidate to matters likely to come before the court to which the candidate seeks election.[26] The ABA promulgated the revised rule to balance the need for a rule consistent with the constitutional guarantee of free speech, and the need to prevent the harm that can come from statements damaging to the appearance of judicial integrity and impartiality.[27] Since the 1990 Model Code addresses the ethical conduct of elected, appointed and merit-based judges, its commit clause has been adopted by many states.[28]

[21] *See* THEODORE J. BOUTROUSE, JR., ET AL., STATE JUDICIARIES AND IMPARTIALITY; JUDGING THE JUDGES 121 (Roger Clegg & James D. Miller, eds., 1996); *see also* MODEL CODE OF JUDICIAL CONDUCT pmbl. (1972).

[22] *See id.* The states that had adopted the prohibition include: Alaska, Arkansas, Florida, Georgia, Indiana, Iowa, Kentucky, Louisiana, Maryland, Minnesota, Mississippi, Missouri, Nebraska, New York, North Carlina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Washington, West Virginia, and Wyoming. *Id.*

[23] *See id.* at 121.

[24] THE MODEL CODE OF JUDICIAL CONDUCT (1990) was adopted by the House of Delegates of the American Bar Association on August 7, 1990. Model Code of Judicial Conduct, preface (1990).

[25] MODEL CODE OF JUDICIAL CONDUCT CANON 5A(3)(d) (1990).

[26] *See* LISA L. MILORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE 50 (1992).

[27] *See id.*

[28] Prior to the Court's decision in White, the following states had language similar to the 1990 Model Rule's commit clause: Alaska, Arizona, Arkansas, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Nebraska, New Mexico, New York, North

III. *REPUBLICAN PARTY OF MINNESOTA V. WHITE*

Former Minnesota Supreme Court candidate Gregory Wersal sought a declaratory judgment that the announce clause[29] in Minnesota's Judicial Ethics Canon violated the First Amendment. Minnesota's judicial election codes required that a "candidate for a judicial office, including an incumbent judge: shall not...announce his or her views on disputed legal or political issues...."[30]

Minnesota selects its judges by popular election.[31] The judicial candidates have been subject to the restrictions of Minnesota Judicial Ethics Canon 5 since 1974.[32] The campaign restrictions place a significant burden on candidates as they are subject to disciplinary action for failure to comply.[33] Disciplinary action for an incumbent judge who is found in violation of the cannons may include removal, censure, civil penalties and suspension without pay.[34] Attorneys running for judicial office who fail to comply with the Code of Judicial Conduct may be disbarred, placed on probation or suspended.[35]

Wersal ran for associate justice of the Minnesota Supreme Court in 1996.[36] During his campaign, he distributed literature criticizing several Minnesota Supreme Court decisions on issues such as crime, welfare, and abortion.[37] One piece of his campaign literature stated, "[t]he Minnesota Supreme Court has issued decisions which are marked by their disregard for the legislature and a lack of common sense."[38] It went on to criticize a decision excluding from evidence confessions by criminal

Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Washington, Wisconsin, and Wyoming.

[29] The announce clause is found in Minnesota Code of Judicial Conduct Canon 5(A)(3)(d)(i), which says a candidate for judicial office:

> Shall not make pledges or promises of conduct in office other that the faithful and impartial performance of the duties of the office; announce his or her views on disputed legal or political issues; or misrepresent his or her identity, qualifications, present position or other fact, or those of the opponent....

MINN. CODE OF JUDICIAL CONDUCT CANON 5(A)(3)(d)(i) (2003).

[30] *White*, 536 U.S. at 769-70; *see also* Republican Party of Minn. v. Kelly, 996 F. Supp. 875, 878 (D. Minn. 1998).

[31] *See* MINN. CONST. art. VI, 7.

[32] *See White*, 536 U.S. at 768.

[33] *See* MINN. RULES OF BD. ON JUDICIAL STANDARDS R. 4(a)(6), 11(d) (2003).

[34] *See id.*

[35] *See* MINN. RULES ON LAWYERS PROF'L RESPONSIBILITY R. 8-14, 15(a) (2003). Attorneys running for judicial office must comply with the Code of Judicial Conduct. MINN. RULES OF PROF'L CONDUCT R. 8.2(b) (2003).

[36] *See White*, 536 U.S. at 768.

[37] *See id.*

[38] *Id.* at 771.

defendants that were not tape-recorded, asking "should we conclude that because the Supreme Court does not trust police, it allows confessed criminals to go free?"[39] Other campaign literature criticized a decision striking down a state law restricting welfare benefits, asserting that "it's the Legislature which should set our spending policies."[40] Wersal characterized a decision requiring public financing of abortions for poor women as "unprecedented" and as a "pro-abortion stance."[41]

A complaint against him was filed with the Office of Lawyers Professional Responsibility, the agency which, under the direction of the Minnesota Lawyers Professional Responsibility Board, investigates and prosecutes ethical violations of lawyer candidates for judicial office.[42] The complaint was dismissed by the Director of the Lawyers Board upon a finding that Wersal's criticism of prior Minnesota Supreme Court decisions did not violate the announce clause and noting that language similar to the announce clause had been either struck down or interpreted narrowly in other jurisdictions.[43] Nevertheless, Wersal withdrew his candidacy for judicial office, "fearing that further ethical complaints would jeopardize his ability to practice law."[44]

Two years later, Wersal ran again for associate justice.[45] During his 1998 campaign, he sought an advisory opinion from the Lawyers Board regarding whether the announce clause of Canon 5 would be enforced.[46] The Lawyers board replied that it could not advise him on whether it would enforce the announce clause as he had not provided information about any particular statements he wished to make.[47] Wersal filed suit in Federal District Court seeking a declaration that the announce clause violates the First Amendment and an injunction against its enforcement.[48] Wersal alleged that the announce clause restrained him from answering questions during his 1998 campaign, and that his inability to announce his views cost him potential voter support.[49] The district court denied Wersal's motion for an injunction,[50] and the Eighth Circuit affirmed.[51]

[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *See id.* at 768-69.
[43] *See* Republican Party of Minn. v. Kelly, 247 F.3d 854, 859 (8th Cir. 2001).
[44] *Id.*
[45] *See id.*
[46] *See id.*
[47] *See id.*
[48] *See White*, 536 U.S. at 769-70.
[49] *See id.*
[50] *See Kelly*, 996 F. Supp. at 880.
[51] *See Kelly*, 247 F.3d. at 885.

Writing for a five justice majority, Justice Scalia stated that Canon 5 regulates a form of speech that is "at the core of our electoral process and of the First Amendment freedoms"[52] and cannot do so unless it is narrowly tailored to protect a compelling state interest.[53] The Lawyers Board and the Minnesota Board on Judicial Standards ("Judicial Board") argued that the announce clause is a narrowly tailored mechanism for protecting the dual state interests of electing an impartial state judiciary and creating the appearance of an impartial state judiciary.[54]

Because it had not been defined by the Minnesota Code of Judicial Conduct, the ABA Codes of Judicial Conduct, the Eight Circuit's opinion or the briefs of the parties,[55] Justice Scalia assessed three possible definitions of "impartiality" to test the viability of the purported state interest.[56] The first possible meaning of "impartiality" in the judicial context is "the lack of bias for or against either *party* to the proceeding."[57] Impartiality in this sense, Justice Scalia observed, "guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party."[58] Minnesota's announce clause is not narrowly tailored to prevent this harm as it restricts speech for or against particular issues rather than speech for or against particular parties.[59] If a candidate has taken a stance on a particular issue, any party taking the opposite position is likely to lose because the judge is applying the law, as he sees it, evenhandedly.[60] The announce clause, therefore, does not even address impartiality or the appearance of impartiality in this sense.[61]

Justice Scalia observed that another, less common, usage of "impartiality" in the judicial context is "the lack of preconception in favor of or against a particular *legal view*."[62] This type of impartiality would guarantee litigants an equal opportunity to persuade the court on the legal points of their case.[63] While this may be the type of impartiality protected by Minnesota's announce clause, Justice Scalia cautioned that

[52] *White*, 536 U.S. at 781.
[53] *See id.*, at 777.
[54] *See id.*, at 775.
[55] *See id.*
[56] *See id.* at 775-85.
[57] *Id.* at 775 (emphasis in original) (noting that this is the traditional use of the term)(citing WEBSTER'S NEW INTERNATIONAL DICTIONARY 1247 (2d ed. 1950) (defining "impartial" as "not partial; esp., not favoring one more than another; treating all alike; unbiased; equitable; fair; just")).
[58] *Id.* at 776.
[59] *See id.* at 776.
[60] *See id.* at 776-77.
[61] *See id.*
[62] *Id.* at 777.
[63] *See id.*

it is not the sort of interest that justifies restricting political speech.[64] He noted that this type of impartiality or its appearance is not only impossible to achieve, it is not desirable.[65] The Minnesota constitution requires judicial candidates to be learned in the law[66] and the majority of such candidates are likely to come to the bench when their legal careers have been well established. Thus, "proof that a justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias."[67]

Finally, the Court analyzed a third possible meaning of "impartiality": open-mindedness.[68] This sort of impartiality would require a judge to remain open to persuasion when issues arise in a pending case.[69] The Lawyers Board and the Judicial Board argued that the announce clause serves this type of impartiality because "it relieves a judge from pressure to rule a certain way in order to maintain consistency with statements the judge has previously made."[70] Justice Scalia admonished that this function of impartiality is implausible as judicial candidates often express their views on disputed legal issues in classes, books, papers and speeches[71] and are encouraged to do so by the Minnesota Code.[72] Statements made in election campaigns are such a small portion of public commitments to legal positions in comparison.[73] Justice Scalia observed that the announce clause is "woefully under inclusive" as a means of pursuing the objective of open-mindedness because it creates an absurdity.[74] Judicial candidates may state their views on disputed legal issues prior to announcing their candidacy and after being elected to the bench, but are prohibited from making the same statements while running for office.[75] Furthermore, the problem of judges feeling compelled to rule consistently with views previously expressed is addressed by a separate provision of the Minnesota Code of

[64] *See id.*

[65] *See id.* at 778.

[66] MINN. CONST. art. VI, §5.

[67] *See White*, 536 U.S. at 778 (quoting Laird v. Tatum, 409 U.S. 824, 835 (1972) (memorandum opinion)).

[68] *See id.*

[69] *See id.*

[70] *Id.* at 778-79.

[71] *See id.* at 779.

[72] *See id.* at 779 (citing MINN. CODE OF JUDICIAL CONDUCT 4(B) (2002) (a judge may write, lecture, teach, speak and participate in other extra-judicial activities concerning the law..."); MINN CODE OF JUDICIAL CONDUCT 4(B), Comment. (2002) ("To the extent that time permits, a judge is encouraged to do so...")).

[73] *See id.*

[74] *See id.* at 780.

[75] *See id.*

Judicial Conduct which prohibits campaign "pledges or promises."[76] Justice Scalia regarded as doubtful that:

> a mere statement of position enunciated during the pendency of an election will be regarded by a judge as more binding—or as more likely to subject him to popular disfavor if reconsidered—than a carefully considered holding that the judge set forth in an earlier opinion denying some individual's claim to justice.[77]

Finally, Justice Scalia warned that allowing the government to prohibit candidates from freely expressing their views on matters of public importance contravenes First Amendment jurisprudence.[78] He further noted that "'debate on the qualifications of candidates' is 'at the core of our electoral process and of the First Amendment freedoms....'"[79]

IV. EFFECT OF *WHITE* ON JUDICIAL CAMPAIGNS

Candidates for judicial office may now speak in a more partisan fashion with less fear of reprimand from either the state judicial standards commissions or the state bars.

A. Politicization of the Judiciary

Clearly, the relaxed standards serve only to increase the politicization of state judicial elections. The judiciary has long served as a check on the power of the elective branches of government and as a mechanism that ensures the stability of transcending legal principles imbedded in the Constitution, statutes and common law. The politicization of the judiciary threatens to erode not only public respect for the judiciary, but also the ability of the courts to fulfill their constitutional role.

Partisan elections in general have many disadvantages. Opponents often argue that judicial candidates are not selected based on merit, but rather on the basis of political criteria,[80] resulting in elections turning on national politics rather than judicial qualifications.[81] Besides spending money on campaigns, a judge must spend time that otherwise could be

[76] *See id.*

[77] *Id.* at 780-81.

[78] *Id.* at 780-81.

[79] *Id.*

[80] *See* Kurt E. Scheuerman, *Rethinking Judicial Elections*, 72 OR. L. REV. 459, 461 (1993) (citing Patrick W. Dunn, *Comment, Judicial Selection in the States: A Critical Study with Proposals for Reform*, 4 HOFSTRA L. REV. 267, 289-90 (1976)).

[81] *See id.* (citing W. St. John Garwood, *Democracy and the Popular Election of Judges: An Argument*, 16 SW. L.J. 216, 222 (1962)).

used for fulfilling judicial duties, such as hearing and deciding cases.[82] Partisan elections may also serve as a deterrent to lawyers who might otherwise seek judgeships. Many successful lawyers may be reluctant to invest their "reputation, time, money and effort seeking a job that is neither guaranteed nor highly paid."[83] An additional deterrent is the possibility of having to answer to political parties and contributors.[84] Partisan elections are also believed to damage the prestige and dignity of the judiciary.[85]

Another problem raised by partisan elections is the "majoritarian difficulty."[86] A major function of an independent judiciary is judicial review, whereby the courts can step in and protect the interests of the minority against the actions of the majority when they overstep constitutional bounds. However, if the judiciary is also electorally accountable, there will be a tendency for judges to follow the whims of the majority, possibly at the expense of the minority.[87] Alexis de Tocqueville, in 1835, recognized judicial elections as an encroachment on judicial independence.

> Some other state constitutions make the members of the judiciary elective, and they are even subjected to frequent re-elections. I venture to predict that these innovations will sooner or later be attended with fatal consequences; and that it will be found out at some future period that by thus lessening the independence of the judiciary they have

[82] *See* Judith L. Maute, *Selecting Justice in State Courts: The Ballot Box or the Backroom?*, 41 S. TEX. L. REV. 1197, 1205 (2000).

[83] *Id.* at 1205 (citing CHARLES H. SHELDON & LINDA S. MAULE, CHOOSING JUSTICE: THE RECRUITMENT OF STATE AND FEDERAL JUDGES 70 (1997)).

[84] *Id.*

[85] Scheuerman, *supra* note 80, at 461 (quoting Dorothy W. Nelson, *Variations on a Theme—Selection and Tenure of Judges*, 36 S. CAL. L. REV. 4, 30 (1962) ("Under the partisan system, there is the spectacle of tavern electioneering and billboard advertising by judges.")).

[86] A full discussion of majoritarianism and counter-majoritarianism is beyond the scope of this piece. See generally Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 725 (1995); Scheuerman, *supra* note 80, at 471-76; Maura Anne Schoshinski, *Towards an Independent, Fair, and Competent Judiciary: An Argument for Improving Judicial Elections*, 7 GEO. J. LEGAL ETHICS 839, 843-44 (1994).

[87] *See generally* Croley, *supra* note 86; Scheuerman, *supra* note 80, at 471-76. "This independence of the judges is equally requisite to guard the constitution and the rights of individuals, from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to a better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community." ALEXANDER HAMILTON, THE FEDERALIST NO. 78, at 508 (First Modern Library ed., 1941) (quoted in Scheuerman, *supra* note 80, at 472).

> attacked not only the judicial power, but the democratic republic itself.[88]

William Howard Taft also criticized judicial elections. In an article published in 1913, he stated, "the instances of great and able judges who have been placed on the bench by election are instances of the adaptability of the American people and their genius for making the best out of bad methods, and are not a vindication of the system."[89] Thus, partisan elections have many disadvantages and have been criticized from their inception to the present day. Because of these problems and criticisms, all but seven states have abandoned this method of selection.

Most commentators argue that nonpartisan elections are an inferior alternative to partisan elections rather than an improvement.[90] Voters are less informed than in partisan elections because they lack the important party voting cue, resulting in votes based upon other irrelevant factors, such as ballot position and name.[91] Low voter turnout and drop-off are also prevalent in nonpartisan elections.[92] Like partisan elections, nonpartisan elections are becoming more expensive and time consuming.[93] Some commentators argue they are more expensive than partisan elections because it costs more to inform the voters in the absence of party labels.[94] William Howard Taft specifically criticized nonpartisan elections because they made it possible for unqualified candidates who could not even get the support of a political party to get elected.[95] One commentator aptly stated that nonpartisan elections "possess all the vices of partisan elections and none of the virtues."[96]

Appellate and trial level judicial candidates must be able to reevaluate their views in the light of an adversarial presentation and to

[88] 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 289 (Vintage ed. 1954) (quoted in Robert L. Brown, *From Whence Cometh Our State Appellate Judges: Popular Election Versus the Missouri Plan*, 20 U. ARK. LITTLE ROCK L. J. 313, 314-15 (1998)).

[89] William H. Taft, *The Selection and Tenure of Judges*, 38 A.B.A. REP. 418, 421 (1913).

[90] *See* Peter D. Webster, *Selection and Retention of Judges: Is There One Best Method?*, 23 FLA. ST. U.L. REV. 1, 26 (1995).

[91] *See id.*

[92] *See id.*

[93] *See id.* (noting also that the problems of campaign financing and the perception that justice is for sale apply equally to nonpartisan elections). Former Chief Justice Exum groups all elections—partisan, nonpartisan, and retention—when describing the disadvantages of raising money, distractions from regular judicial duties, deterrent to many able lawyers, and that "they are at odds with the notion that judges should be career public servants." James Exum, *Judicial Selection in North Carolina,* 35 N.C. ST. B.Q., Summer 1988, at 8-10.

[94] *See id.* at 27 (citing Anthony Champagne, The Selection and Retention of Judges in Texas, 40 SW. L.J. (Special Issue), May 1986, at 63).

[95] Taft, *supra* note 89, at 422-23 (cited in Croley, *supra* note 86, at 723-24).

[96] Webster, *supra* note 90, at 26.

apply the governing rule of law even when inconsistent with those views.[97] Trial court judges in particular have an obligation to follow the precedent of the State's highest court, not his or her personal proclivities or the whims of the populous.

As the judiciary becomes politicized, lawmakers become more willing to criticize judges for controversial decisions. Campaigns that emphasize a candidate's personal predilections rather than his or her qualifications for judicial office compromise the judicial reputation for impartiality.[98]

> Informed criticism of court rulings, or of the professional or personal conduct of judges, should play an important role in maintaining judicial accountability. However, attacking courts and judges—not because they are wrong on the law or the facts of a case, but because the decision is considered wrong simply as a matter of political judgment—maligns one of the basic tenets of judicial independence—intellectual honesty and dedication to enforcement of the rule of law regardless of popular sentiment. ... What is so troubling about criticism of court rulings and individual judges based solely on political disagreement with the outcome is that it evidences a fundamentally misguided belief that the judicial branch should operate and be treated just like another constituency-driven political arm of government.[99]

Public criticism of judicial decisions by the legislative and executive branches implies that judges should modify their rulings even if they are consistent with controlling legal precedent. This criticism misrepresents the role of the judiciary to the public, giving voters the false impression that a candidate for the judiciary will be able to and should decide cases based on his or her personal views rather than consistently with the legal principles that have ensured the stability of American jurisprudence for over two hundred years.

While the courts have never been entirely divorced from politics, one poll shows that politics are more influential today than ever before.[100] Former federal appeals court judge, congressman and White House counsel, Abner J. Mikva recalled "When I started practicing law in Chicago [in 1952].... It was a patronage operation, and you became a judge by kowtowing to the powers that be."[101] The Justice at Stake Campaign, a political watchdog group in Washington, polled eight

[97] *See id.*

[98] *See* White, 536 U.S. at 801 (Stevens, J., dissenting).

[99] *Id.* (Stevens, J., dissenting) (quoting De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 38 WILLIAMETTE L. REV. 367, 387 (2002)).

[100] *See* Mike France and Lorraine Woellert, *How Politics, Ideology, and Special Interests are Compromising the Courts*, BUSINESS WEEK, Sept. 27, 2004, at 38.

[101] *Id.*

hundred ninety-four elected judges in 2001 and 2002.[102] The findings were disturbing. Forty-eight percent of the polled judges "felt a 'great deal' of pressure to raise money during election years" and forty-six percent admitted that campaign contributions influenced their decisions.[103]

B. Unqualified Candidates

Complete freedom in political speech among judicial candidates will increase the number of ill-qualified candidates running for office. Former North Carolina Supreme Court Chief Justice James Exum commented on this problem when he addressed a Judicial Selection Study Committee:

> The skills needed for the job of judging have little or no relation to the skills needed to win elections. Although there are good judges who can also win elections, there are many potentially excellent judges who, for one reason or another, cannot, or do not want to try. The skills needed to be a good judge are not readily discernable in the electoral process.[104]

John Hill, former Chief Justice of the Texas Supreme Court offered a similar assessment:

> The qualities that make a good judge are different from the qualities that make a good politician, and it is by no means always the case that the two sets of qualities exist in the same person. When they do not, the chances are that in the primary election the less capable judicial candidate will be nominated.[105]

In 2002, a seat on the North Carolina Supreme Court was filled by a candidate with no judicial experience.[106] This is the first time a candidate with little or no judicial experience had won an appellate seat.[107] The election of judges thus opens up the bench to unqualified candidates and can also shut out those who are exceptionally qualified but not as well suited to the rigors of campaigning.

[102] *See id.*

[103] *See id.* (stating that 4% said that contributions had "a great deal of influence" on their decisions, 22% said "some influence," and 20% said "just a little influence").

[104] Exum, *supra* note 93, at 8.

[105] John L. Hill, Jr., *Taking Texas Judges Out of Politics: An Argument for Merit Election*, 40 BAYLOR L. REV. 339, 349 (1988) (citing McKnight, *How Shall Our Judges Be Selected?*, 5 TEX. L. REV. 470, 472-3 (1928)).

[106] *See* COURT WATCH OF NORTH CAROLINA, INC., ANALYSIS OF THE NORTH CAROLINA 2002 JUDICIAL ELECTIONS 3 (2003) (also reporting that two candidates with no judicial experience won seats on the North Carolina Court of Appeals in 2002).

[107] *See id.*

C. Special Interest Money Controls the Elected Judiciary

Judicial candidates are running attack ads, completing questionnaires detailing their beliefs, and soliciting funding from large donors—all things that were once considered beneath the dignity of the office.[108] The *White* decision has opened the door to a class of campaign speech that is "driving away potential judges, making partisan credentials of nominees more important than intellectual heft, putting pressure on jurists to favor contributors, eroding public respect for the bench, and little by little diminishing the ability of the courts to fulfill their constitutional role as a check on the power of the elective branches."[109]

Candidates seeking seats on appellate courts must often run statewide campaigns, attempting to reach as many voters as Senatorial candidates without the commensurate financial or staffing resources. Traditionally, judicial candidates relied on the local and state bars to support their campaigns with financial contributions and to educate the public about their qualifications. Special interest groups are increasingly turning to the courts to advance goals they cannot win legislatively[110] and candidates are finding the donations necessary to win elections.[111] In nine out of ten of the 2002 state judicial races in which television advertisements were used, the candidate with the most combined spending by himself and special interest groups won the election.[112]

There are two broad categories of interest groups fighting over the state judiciaries.[113] The first category consists of stake-holders in tort reform. The U.S. Chamber of Commerce, major corporations such as Home Depot and Wal-Mart Stores and some small businesses seek to outbid plaintiff's law firms and the Association of Trial Lawyers of America.[114] State judges are the target of these special interest groups because the majority of large product-liability and consumer-protection cases are filed in state courts.[115] "For the past decade or so, momentum has been on the side of the business community, which helped oust incumbents in Alabama, Mississippi, and North Carolina in 2000."[116]

[108] *See id.*
[109] France and Woellert, *supra* note 100, at 38.
[110] *See id.*
[111] *See* DEBORAH GOLDBERG & SAMANTHA SANCHEZ, JUSTICE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS 2002: HOW THE THREAT TO FAIR AND IMPARTIAL COURTS SPREAD TO MORE STATES IN 2002 (Burt Brandenburg, ed. 2004) 7 (2004).
[112] *See id.*
[113] *See* France and Woellert, *supra* note 100, at 40.
[114] *See id.*
[115] *See id.*
[116] *Id.*

The second category of special interest groups focuses on social controversies such as gay marriage, affirmative action and abortion.[117]

The *White* decision enables judicial candidates to comment on policy issues, "prompting interest groups to elicit candidates' views on ... hot-button issues—and [to] use the information to decide who gets money."[118] In Illinois in 2004, the Illinois Civil Justice League sent a questionnaire to all judicial candidates in the state seeking their positions on issues ranging from class-action rules to the constitutionality of punitive damages.[119] Similarly, the League of Christian Voters sought responses from Alabama Supreme Court candidates to questions about their church attendance and their definition of marriage.[120]

Candidates and interest groups spent over eight million dollars on television airtime in America's top one hundred media markets and the number of special interest groups buying airtime for state judicial races doubled from 2000 to 2002.[121] Advertisements are routinely crafted to offer voters clues as to how the candidate is likely to decide future cases.[122] Only thirty-six percent of 2002 Supreme Court candidate television advertisements focused on candidate qualification.[123] Jess Dickinson, a candidate for the Mississippi Supreme Court televised an advertisement saying, "frivolous lawsuits are costing us our health care and our jobs. Mississippi is suffering while a few lawyers are becoming multi-millionaires."[124] The opponent responded that "rich lawyers and big companies shouldn't control our courts,"[125] listing the business contributors to Dickinson's campaign.[126] Sue Myerscough, a candidate for the Illinois Supreme Court claimed that she "kept children safe from sexual predators and kept violent juveniles off our streets.... On the Supreme Court, I'll keep fighting because as any crime victim will tell you, there's a lot more to be done."[127] Myerscough's opponent defended

[117] *See id.*
[118] *Id.* at 41.
[119] *See id.*
[120] *See id.* (also citing a Christian Coalition questionnaire circulated among Georgia candidates inquiring whether they agreed with the majority opinion or the dissent in the U.S. Supreme Court's gay-rights case, Lawrence v. Texas).
[121] *See id.*
[122] *See* GOLDBERG & SANCHEZ, *supra* note 111, at 11 (also noting that in officially nonpartisan elections in which political parties were not mentioned on the ballot, third parties went out of their way to mention the party affiliation of candidates). *Id.*
[123] *See id.* at 12.
[124] *Id.*
[125] *Id.*
[126] *See id.*
[127] *Id.*

herself, stating that "she's worked with police, prosecutors and victims to put violent criminals and sexual predators in jail."[128]

All of the interest group advertisements in 2002 state judicial elections alluded to divisive political topics.[129] In the 2000 elections, eighty percent of special interest advertisements attacked candidates while fewer that twenty percent of candidates engaged in such tactics.[130] After significant voter backlash to such tactics, several 2002 candidates disavowed interest group support and less than fifty percent of special interest advertisements were negative in 2002.[131]

The *White* decision has created a judicial campaign culture that has become unmanageable as candidates cast aside traditional customs of civility and diplomacy and degrade themselves to the tactics of special interest politicking. This new tenor of judicial speech will diminish public respect for the judiciary and will cast doubt on any judicial politician's commitment to impartiality. "As more voters come to see court campaigns as a series of thinly veiled appeals to decide cases the 'right' way, they will increasingly wonder whether their judge's decisions are based on the facts and the law, or on pressure and promises and interest group dollars."[132]

V. A PROPOSAL FOR REFORM

States relied on provisions such as the "announce clause" to deter the type of polarizing political speech that has become common in judicial elections. Politicization and mud-slinging campaigns are not likely to be deterred by the more narrowly drawn restrictions of the "commit clause." The commit clause merely prevents a candidate from making statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court. The provision is too narrowly drawn and permits more general ideological statements about hot-button issues. In this new political climate in which money wins elections, candidates will continue to feel compelled to jump into the pockets of special interest groups.

[128] *Id.*

[129] *See id.* at 13.

[130] *See id.* at 14 (noting that the Law Enforcement Alliance of America produced an advertisement calling Jess Dickinson "a strong leader who supports the death penalty to keep our families same...a common sense leader who supports our right to bear arms. And Chuck McRae? He was the only judge to vote to reverse the conviction of the murderer of a three-year-old girl"). *Id.*

[131] *See id.*

[132] *Id.*

A. Eliminate the Electoral Process

Appointment was initially the most common method of selection in the early years after independence.[133] The independence of the judiciary is always cited as the major advantage of the appointive method of selection.[134] Proponents also argue that this method enables more women and minorities to reach the bench while weeding out unqualified candidates.[135] Currently, only four states use gubernatorial appointment and two more use legislative appointment.[136]

An appointive system of judicial selection would cure many of the ills of the election process, particularly in the wake of the *White* decision. A pure appointive system, however, has its disadvantages. Opponents argue that appointments are no less political than partisan elections,[137] and that appointments are most often based, not on qualifications, but primarily upon political considerations.[138] Opponents further argue that placing the appointment power in one individual leaves open the risk of a mistake in judgment, while legislative confirmation is an inadequate safeguard of judicial qualification.[139] That is, the system promotes judicial independence by having no substantial check on the judge after the confirmation process."[140] The Merit selection method is often suggested as an alternative that combines the benefit of the appointment process with public accountability.

The American Judicature Society, formed in 1913 for the purpose of improving the quality of the judiciary, proposed a system of selecting judges that utilized a "special commission" composed of members of the

[133] Norman Krivosha, *In Celebration of the 50th Anniversary of Merit Selection*, 74 JUDICATURE 128, 128 (1990).

[134] *See e.g.*, Scheuerman, *supra* note 80, at 462 (citing Harold J. Laski, The Technique of Judicial Appointment, 24 MICH. L. REV. 529, 532-33 (1926)).

[135] Webster, *supra* note 90, at 14 (citing Nicholas O. Alozie, *Distribution of Women and Minority Judges: The Effects of Judicial Selection Methods*, 71 SOC. SCI. Q. 315 (1990)). Another major advantage of appointment is the elimination of the need for judges to participate in lengthy campaigns that are expensive, consume valuable time, and degrade the dignity and prestige of the judiciary.

[136] *See* Larry C. Berkson, *Judicial Selection in the United States: A Special Report*, 64 AM. JUD. SOC'Y 176 (1980), *updated by* Rachel Caufield, *available at* http://www.ajs.org/js/berkson_2005.pdf (last visited February 16, 2006). Gubernatorial appointment is also used to fill unexpired terms in a majority of states, regardless of normal method of selection employed. *See* Webster, *supra* note 90 at 13.

[137] Scheuerman, *supra* note 80, at 462.

[138] *See* Webster, *supra* note 90, at 16 (citing Robert P. Davidow, *Judicial Selection: The Search for Quality and Representativeness*, 31 CASE W. RES. L. REV. 409, 428 (1981)).

[139] *See* Scheuerman, *supra* note 80, at 462-63 (citing Glenn R. Winters, *One-Man Judicial Selection*, 45 J. AM. JUDICATURE SOC'Y 198, 200 (1962)).

[140] *See* Anthony Champagne, *The Selection and Retention of Judges in Texas*, 40 SW. L.J. (Special Issue), May 1986, at 58 (quoted in Webster, *supra* note 6, at 14).

bar and the public.[141] First adopted by Missouri, this method has become known as merit selection.[142] Merit selection is generally viewed as a compromise between appointive methods and elective methods.[143] It originated in 1914 with a proposal by Albert M. Kales, law professor at Northwestern University and American Judicature Society (AJS) director of research. Kales' plan called for nomination by a nonpolitical committee, appointment by a popularly elected chief justice from the commission's list of nominees, and periodic unopposed retention elections.[144] The AJS endorsed the proposal in 1928 as modified by British political scientist, Harold Laski, who in 1926 suggested that the governor make the nomination instead of the chief justice.[145] The American Bar Association adopted the merit plan in 1937.[146] Currently,

[141] *See id.* at 415-16.

[142] *See id.* at 416. The Missouri Plan adopted in 1940 provided for the commission selection of judges of the supreme court, court of appeals and the circuit courts for Jackson County (Kansas City) and the city of St. Louis. *See* Peter D. Webster, *supra*, note 90 at 30. California actually adopted a type of merit plan before Missouri. California's plan for its supreme court and intermediate courts, still in use today, provides for the governor to make nominations to fill vacant seats which must be approved by a commission composed of the chief justice, a justice of the court of appeals and the attorney general. The judge must then stand for retention at regular intervals. *See* Maute, *supra*, note 82, at 1207-08.

[143] Webster, *supra* note 90, at 29. *See also* Scheuerman, *supra* note 80, at 463 ("This system is designed as a compromise between the accountability of elections and the independence achieved by appointment.").

[144] *See* Jona Goldschmidt, *Selection and Retention of Judges: Is Florida's Present System Still the Best Compromise?: Merit Selection: Current Status, Procedures, and Issues*, 49 U. MIAMI L. REV. 1, 7 (1994) (stating that the thirteen original colonies retained, but diffused the appointive power).

[145] *See id.* at 9 (citing Harold J. Laski, *The Technique of Judicial Appointment*, 24 MICH. L. REV. 529, 533 (1926) and *The Eligible List of Judicial Candidates*, 11 J. AM. JUDICATURE SOC'Y 131, 131-32 (1928)).

[146] *See id.* at 9-10. The ABA plan proposed

> (a) The filling of vacancies by appointment by the executive or other elective official or officials, but from a list named by another agency, composed in part of high judicial officers and in part of other citizens, selected for the purpose, who hold no other public office.
>
> (b) If further check upon appointment be desired, such check may be supplied by the requirement of confirmation by the State Senate or other legislative body of appointments made through the dual agency suggested.
>
> (c) The appointee shall after a period of service be eligible for reappointment periodically thereafter or go before the people upon his record with no opposing candidate, the people voting upon the question, Shall Judge Blank be retained in office?

See John Perry Wood, Basic *Propositions Relating to Judicial Selection, in Fourth Session*, 23 A.B.A. J. 102, 105 (1937) and Fourth Session, 23 A.B.A. J. 102, 108 (1937) (both cited in Goldschmidt, *supra* note 144, at 9-10.

sixteen states use some form of merit selection as their primary method of judicial selection.[147]

The primary argument in favor of merit selection is that it removes politics from the process of selecting judges,[148] while the periodic retention elections preserve accountability to the electorate.[149] Opponents to merit selection argue that politics is not removed from the selection process; rather it is moved "outside the light of the electoral system and into the backroom, allowing for private decision-making by politically-appointed nomination committees."[150] Both proponents and critics "agree that one key to the success of any type of 'merit' plan lies in the provisions regarding the composition and powers of the nominating commission."[151] Very often this key issue has not been adequately addressed, with the result being that politics is still a factor.[152] Opponents have also criticized merit selection for minimizing accountability by vesting control of the judicial system in the legal profession rather than the electorate.[153] Many of these same critics argue that unopposed retention elections are "undemocratic, misleading to voters, and allow little meaningful choice."[154] With the recent politicization of retention elections,[155] campaign contributions must still be sought if a judge is targeted by a special interest group.[156] Thus, retention elections

[147] *See* Larry C. Berkson, *Judicial Selection in the United States: A Special Report*, 64 AM. JUD. SOC'Y 176 (1980), *updated by* Rachel Caufield, *available at* http://www.ajs.org/js/berkson_2005.pdf (last visited February 16, 2006).

[148] Webster, *supra* note 90, at 31.

[149] *See* Scheuerman, *supra* note 80, at 463 (quoting Albert M. Kales, *Methods of Selecting and Retiring Judges*, 11 J. AM. JUDICATURE SOC'Y 133, 143 (1928)).

[150] *Id.* (citing Webster, *supra* note 90, at 32).

[151] Webster, *supra* note 90, at 32. "To have any hope of achieving its asserted goals, such a plan must be based upon provisions which ensure a truly independent, impartial, and diverse commission, with the power and resources to investigate thoroughly those who come before it as candidates. Most objective observers agree, further, that, in general, the plans currently in use have not included such provisions." *Id.*

[152] *Id.*

[153] *See* Scheuerman, *supra* note 80, at 464 (citing R. Neal McKnight et al., *Choosing Judges: Do the Voters Know What They're Doing?*, 62 JUDICATURE 94, 98 (1978)).

[154] Maute, *supra* note 82, at 1209 (citing John M. Roll, *Merit Selection: The Arizona Experience*, 22 ARIZ. ST. L.J. 837, 863-68 (1990)).

[155] *See* generally Brown, *supra* note 89, at 316 (discussing the 1986 Supreme Court retention election in California where three justices were removed and the 1996 Supreme Court retention election in Tennessee where one justice was removed after being targeted by special interest groups); See *Comment, Judicial Selection and Decisional Independence*, 61 LAW & CONTEMP. PROB. 141, 145-47 (1998) ("There is little if any discernible difference in tone among the contested partisan elections in Texas and Alabama, the Missouri Plan retention elections of Penny White in Tennessee and Rose Bird in California, and the confirmation hearings of Robert Bork and Clarence Thomas in the United States Senate."); Webster, *supra* note 90, at 35-37.

[156] Maute, *supra* note 82, at 1209-10.

can become very much like partisan and nonpartisan judicial elections, with the same problems and criticisms.[157] For example, as in nonpartisan elections, voters lack party label as a meaningful voting cue. Finally, the usually low-key nature of retention elections, the lack of information about judges up for retention, and the lack of understanding of the retention election itself have resulted in more significant voter drop-off than in either partisan or nonpartisan judicial elections.[158] Thus, without voter participation, accountability is lost and the merit selection system begins to look more like the appointive system, only with the addition of retention elections that can become nasty, partisan battles when special interest groups target a sitting judge for defeat.

We propose a modified gubernatorial appointment system. This method would provide for gubernatorial appointment of all judges from a pool of applicants screened by a "State Judicial Council"[159] subject to Senate confirmation. The screening is a variation on the nomination process found in traditional merit selection systems. Under this plan, the State Judicial Council (SJC) would constantly accept applications from attorneys, examine their qualifications, and make determinations as to their fitness for judicial office. The SJC would apply stringent standards regarding qualification, experience and integrity. Applicants for trial and appellate seats would be required to have demonstrated sufficient experience practicing at the trial and appellate levels.[160]

[157] *See* Webster, *supra* note 90, at 34 (stating that the "empirical evidence suggests that retention elections are subject to virtually all of the criticisms directed at partisan and nonpartisan judicial elections, and then some."). *See also* Exum, *supra* note 93, at 8-10 (describing disadvantages of partisan, nonpartisan, and retention elections together).

[158] *See id.*

[159] This "State Judicial Council" should be modeled after the one proposed by the Futures Commission. *See* Commission for the Future of Justice in the Courts of N.C., *Without Favor, Denial or Delay: A Court System for the 21st Century*, at 9 (1996) [hereinafter FUTURES COMMISSION REPORT]. Thus, it would be composed of the chief justice, chief judge of the Court of Appeals, a district attorney appointed by the district attorneys (the Futures Commission also proposed a unified circuit, but for our purposes we will use districts), a public defender chosen by that group, a district judge selected by district judges (circuit judge in FUTURES COMMISSION REPORT), two lawyers appointed by the State Bar, one lawyer and one nonlawyer appointed by the chief justice, and three members (two nonlawyers and one lawyer) appointed by each of the following: the governor, the speaker of the House, and the president pro tem of the Senate (these nine, would thus represent half the members). *See* FUTURES COMMISSION REPORT, at 34.

[160] The amounts of experience required should be determined by the State Judicial Council. The Council could also institute some type of examination, modeled after the Bar exam, as part of the screening process. If nothing more, this would increase public confidence in the qualifications of judges. *See also* Maute, *supra* note 82, at 1226 (suggesting the use of "special examinations to be administrated to all judicial aspirants, whether elected or appointed, and to those up for retention or renewal of appointment. The National Conference of Bar Examiners, or another professional test-drafting organization, could be commissioned to design an exam format to test for competent mastery over the

Approved applicants' names would then be submitted to the governor for nomination. The nominee would then be presented to the legislature for confirmation by simple majority vote. This process would place another check on the governor's appointment power[161] and further the goal of accountability.[162] Judges would serve ten-year terms under this plan and judicial vacancies would be filled using the same process.

A "reconfirmation" process should be instituted for retention purposes. To serve an additional term, the judge would be subject to a performance evaluation conducted by the SJC.[163] The Council should establish uniform standards for judicial performance by drawing on recommendations from the ABA and information should be collected from other judges, litigants, attorneys and jurors who appeared before the judge as well as a self-evaluation by the judge.[164] We propose that the Council's recommendation go the legislature for "reconfirmation." The Council's recommendation would be accorded "extraordinary" weight, requiring two-thirds vote of the legislature for reversal.[165] The judge could complete this process one more time, imposing a three-term

categories of law encountered by different types of courts, making distinctions among trial and appellate courts, and the context in which procedural, substantive and ethical questions are likely to arise.").

[161] John Korzen compares this check to that of the nominating commission in Missouri plan jurisdictions. *See* John J. Korzen, *Changing North Carolina's Method of Judicial Selection*, 25 WAKE FOREST L. REV. 253, 284 (1990). He also points out that the General Assembly, in its implementing legislation, would need to address recess appointments since it is not in session for several months in odd numbered years and for almost all months in even numbered years. *See id.*

[162] Exum, in describing his plan for gubernatorial appointment with legislative confirmation, states that it "puts responsibility for selection squarely on our elected representatives." Exum, *supra* note 93, at 10. Exum also discusses generally the proposition that elections are not necessary to hold judges accountable for what they do, noting that all North Carolina judges are susceptible to administrative removal by action of the Judicial Standards Commission. *See id.*; *see also* Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROB. 79, 114 (1998) (stating that "citizens who disapprove the selections know which elected politicians to blame for appointments they disapprove and can punish them if they stand for reelection.").

[163] Judicial performance evaluations are used in several merit selection states to provide information to voters in retention elections. *See* Samuel Latham Grimes, *"Without Favor, Denial, or Delay": Will North Carolina Finally Adopt the Merit Selection of Judges?*, 76 N.C. L. REV. 2266, 2322 (1998) (citing *Editorial, The Need for Judicial Performance Evaluations for Retention Elections*, 75 JUDICATURE 124, 124 (1991)).

[164] *See* FUTURES COMMISSION REPORT, supra note 159, at 36.

[165] The Judicial Selection Study Commission made a similar proposal in 1989. Under that proposal, the Judicial Standards Commission would recommend to both houses whether to reconfirm the judge. The recommendation would be given "extraordinary" weight, with a two-thirds vote in both houses required for reversal. *See* Korzen, *supra* note 161, at 256 (citing JSSC REPORT, *supra* note 59, at 10-12). *See supra* notes 58–66 and accompanying text.

limit with any ten year term expiring when the judge reaches a mandatory retirement age of seventy-two. The three-term limit would avoid the problem of a judge losing touch with the real world as may happen with life tenure and would provide for reasonable turnover in the judiciary.[166] To further ensure accountability, there should be a provision for recall elections, initiated by citizen petition.

B. Provide Public Funding for Judicial Campaigns

If judicial elections are to be continued, cost and fund raising issues will need to be addressed. With the costs of judicial campaigns soaring to record highs,[167] there is an urgent need for campaign finance reform. As the cost of elections rise, so does the influence of those who contribute to these campaigns. Money has become one of the most important factors in nonpartisan judicial races.[168] State legislatures must eliminate the need for special interest money by financing judicial elections. The American Bar Association is advocating for publicly financed elections.[169] In 2002, North Carolina became the first state to fully fund judicial campaigns.[170]

North Carolina's Judicial Campaign Reform Act creates four necessary components to successful campaign finance reform. Candidates for the appellate level courts who raise a threshold amount of money and who agree to strict spending and fundraising limits are entitled to receive a lump sum of public funding to run their general election campaign.[171] The law also provides for rescue money in the event that a publicly financed candidate is dramatically outspent by their non-publicly financed opponent.[172] The law lowers contribution limits to help keep special interest money out of the courtrooms. Political action committees, as well as individuals, are limited to a one thousand dollar campaign contribution to candidates for statewide judicial office.[173] This lowered limit applies to all candidates, including those who opt-out of the public funding program.[174]

[166] *See* Exum, *supra* note 93, at 10

[167] *See* COURT WATCH OF NORTH CAROLINA, INC., *supra,* note 106, at 1-8 (reporting that spending in the 2002 North Carolina Supreme Court race peaked, and that spending in the superior and district court had risen since 2002).

[168] *See id.* at 9.

[169] *See* France and Woellert, *supra,* note 100, at 44.

[170] *See* 2001 N.C. Sess. Laws 2002-158.

[171] *See id.*

[172] *See id.*

[173] *See id.*

[174] *See id.*

The passage of the Reform Act also called for the creation of a Public Campaign Fund.[175] This Fund pays for both the production of a voter guide and the financing of candidates' campaigns.[176] In North Carolina, the Fund is supported by three main sources: private donations, voluntary contributions of fifty dollars from attorneys when they file their annual privilege license renewal forms, and a three dollar designation that citizens can make on their state income tax forms.[177] The sources under the North Carolina scheme are unreliable and could render the fund useless.[178] We propose that states should appropriate mandatory funding to carry out public financing.

States should adopt a similar system of public financing for judicial elections with appropriations for funding public financing. Such reform will ensure a level playing field for aspirants by providing financial aid to qualified candidates. More candidates will be able to raise the threshold amount needed to gain statewide name recognition. A voter guide funded and promulgated by the state will create a more informed electorate, providing voters with useful information about the candidates' experience and qualifications for the judiciary. Public financing coupled with contribution limits will free judges from the pressure of special interests.

Finally, state bar associations should create bipartisan committees to oversee state campaigns and criticize candidates who employ misleading ads, overtly partisan rhetoric or positions that cast doubt on their ability to rule impartially.

VI. CONCLUSION

The inherent weaknesses of the process of selecting state judges by popular election have been exacerbated by the *White* decision. Issues of policy are properly decided by majority vote in a democracy such as ours.[179] While it is the business of legislators and executives to be popular, "it is the business of judges to be indifferent to unpopularity"[180] when considering issues of law or fact in litigation.[181] Unlike executives and legislators, judges do not serve a constituency. Judges have a duty to uphold the law and to follow the dictates of the Constitution.

[175] *See id.*

[176] *See id.*

[177] *See id.*

[178] *See* COURT WATCH OF NORTH CAROLINA, INC., *supra,* note 106, at 11 (arguing that if less that ten percent of voters use the check off on their state tax returns, the fund probably won't have sufficient money to fully finance the public financing provisions let alone the voter guide).

[179] *See* White, 536 U.S. 765, 799 (Stevens, J., dissenting).

[180] *Id.*

[181] *See id.*

Political speech among judicial candidates presents three dangers. The first danger is that such speech may compromise the appearance of institutional impartiality. The second danger is that a judge, once elected, may feel pressured to decide a particular case or issue consistently with ideological statements or promises made on the campaign trail, thereby preventing litigants from receiving a fair hearing. Finally, politicizing judicial elections may increase the number of unqualified candidates getting on the bench.

We strongly recommend the modified gubernatorial appointment plan which offers many of the advantages of a merit selection system without the problems associated with nominating commissions and preserves accountability through the legislative confirmation and reconfirmation processes. This plan would enhance judicial independence by eliminating judicial elections and the attendant problems. Finally, if judicial elections are to be continued we do recommend that states adopt laws similar to North Carolina's Judicial Campaign Reform Act (modified to ensure adequate and mandatory campaign funding).