

## THE THREATS OF PARTISANSHIP TO MINNESOTA'S JUDICIAL ELECTIONS

George W. Soule<sup>†</sup>

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† George W. Soule is a founding partner of Bowman and Brooke LLP in Minneapolis. From 1992 to 2003, he served on the Minnesota Commission on Judicial Selection, including as its Chair during the term of Governor Jesse Ventura. Soule has also served as chair of, and consultant to, several judicial campaigns. Portions of this article are adapted from Mr. Soule's other writings on judicial elections. He expresses his gratitude for the research assistance of his colleague Michael R. Carey in preparing this article.

## I. INTRODUCTION

Minnesota was the breeding ground for judicial candidates' newly won First Amendment rights and is now a testing ground for the encroachment of partisanship into non-partisan judicial elections.<sup>1</sup> Litigation pressed by Minnesotans culminated in the United States Supreme Court decision *Republican Party of Minnesota v. White*,<sup>2</sup> which freed judicial candidates to voice their views on legal and political issues.<sup>3</sup> Now, more than five years later, Minnesotans continue to debate the impact of that decision and that of its progeny on the state's judicial elections.<sup>4</sup> The central issue is whether increasing involvement of political parties and related interests in judicial elections will diminish the judiciary's ability to be fair and impartial.<sup>5</sup>

This article examines the judicial selection system established by the state's constitutional founders, a system largely intact today, as well as the selection process that has developed in recent decades.<sup>6</sup> The article also presents court decisions expanding judicial candidates' rights to free political speech in their campaigns, and examines how those decisions have affected Minnesota's elections to date.<sup>7</sup> Finally, the article discusses the threat of partisanship in judicial elections, the future of elections in Minnesota, and potential reforms to deter partisanship.<sup>8</sup>

## II. THE FOUNDATION OF MINNESOTA'S JUDICIAL SELECTION SYSTEM

As Minnesota approached statehood, Republicans and Democrats held separate conventions to draft the state's constitution in 1857.<sup>9</sup> Convention delegates debated the potential methods of selecting judges, and both conventions chose a system of judicial elections, rather than the federal system of lifetime

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1. See *infra* Part IV.

2. 536 U.S. 765, 774–75 (2002).

3. *Id.* at 788.

4. See discussion *infra* Parts VI, VII.

5. See *infra* Part VII.

6. See *infra* Parts II, III.

7. See *infra* Parts IV, V.

8. See *infra* Parts VI, VIII.

9. See Laura Benson, *The Minnesota Judicial Selection Process: Rejecting Judicial Elections in Favor of a Merit Plan*, 19 WM. MITCHELL L. REV. 765, 768 (1993) (discussing the background of Minnesota's judicial election process).

appointments.<sup>10</sup> The constitution provided that “judges of the supreme court shall be elected by the electors of the state at large”<sup>11</sup> and district judges “shall be elected by the electors [of the judicial districts].”<sup>12</sup> The constitution also provided for appointment of judges: “[i]n case the office of any judge shall become vacant before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the governor until a successor is elected and qualified.”<sup>13</sup>

With minor exceptions, the system established at statehood remains in place 150 years later. The term of office for judges was originally set at seven years, but was reduced to six years by constitutional amendment in 1883.<sup>14</sup> The timing of the first election for an appointed judge was also changed. Originally, judges ran for election “at the first annual election that occurs more than thirty days after the vacancy shall have happened.”<sup>15</sup> In 1956, a constitutional amendment changed this provision so that a judge runs for election “at the next general election occurring more than one year after [an] appointment.”<sup>16</sup> Currently, the constitution provides:

The term of office of all judges shall be six years and until their successors are qualified. They shall be elected by the voters from the area which they are to serve in the manner provided by law.<sup>17</sup>

Whenever there is a vacancy in the office of judge the governor shall appoint in the manner provided by law a qualified person to fill the vacancy until a successor is elected and qualified. The successor shall be elected for a six year term at the next general election occurring more than one year after the appointment.<sup>18</sup>

Thus, the constitution establishes a mixed system of appointments and elections. The framers chose gubernatorial appointments, rather than special elections, as the method for

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10. *Id.* at 768.

11. MINN. CONST. of 1857, art. VI, § 3.

12. *Id.* at § 4.

13. *Id.* at § 10.

14. Act of March 1, 1883, 1883 Minn. Laws 9.

15. MINN. CONST. of 1857, art. VI, § 10.

16. Act of April 15, 1955, ch. 881, 1955 Minn. Laws 1551.

17. MINN. CONST. art. VI, § 7.

18. *Id.* at § 8.

filling vacancies occurring before the end of judges' terms.<sup>19</sup> Soon after an appointment voters participate in the selection process, deciding whether to elect the appointee to a full term.<sup>20</sup>

In the first sixty years of statehood, elections played a greater role in selection of Minnesota Supreme Court justices.<sup>21</sup> Through 1917, half of the first thirty-two justices on the Minnesota Supreme Court were elected to office rather than appointed.<sup>22</sup> Since then, appointments have predominated; only six out of the fifty-three justices who have taken office since 1917 were first elected to their positions.<sup>23</sup>

Supreme Court elections in the first decades of statehood were partisan contests.<sup>24</sup> In 1912, however, the legislature "adopted a non-partisan ballot" for judicial elections,<sup>25</sup> and they have continuously remained officially non-partisan.<sup>26</sup> Finally, in 1949, the legislature changed the form of ballots by placing the word "incumbent" by the names of judges running for election, a practice that remains in place today.<sup>27</sup>

### III. THE MODERN JUDICIAL SELECTION SYSTEM

#### A. *Growth of the Minnesota Judiciary*

As Minnesota has grown in population and complexity, the judiciary has increased in both numbers and relative prominence. In 1980, the Minnesota Supreme Court was comprised of nine justices.<sup>28</sup> Additionally, there were seventy-two district court judges and 134 municipal or county court judges.<sup>29</sup> By 1987, the municipal/county court system was merged into the district court

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19. 1874 Minn. Laws 799.

20. *Id.*

21. Chronological List of Justices and Judges of the Minnesota Appellate Courts, Minn. State Law Library *Docket Series*, <http://www.lawlibrary.state.mn.us/judges.html> (last visited Nov. 21, 2007).

22. *Id.*

23. *Id.*

24. *See* Benson, *supra* note 9.

25. Gwenyth Jones, *By The People? Judicial Selection in Minnesota*, BENCH & B. OF MINN. 18 (Feb. 1993).

26. *Id.*

27. MINN. STAT. § 204B.36, subdiv. 5 (2006); *see also* Jones, *supra* note 25, at 19.

28. MINN. LEGIS. MANUAL 352 (1981–82).

29. *Id.*

system,<sup>30</sup> and there were 217 district court judges.<sup>31</sup> In 1982 Minnesota voters approved a constitutional amendment establishing an intermediate court of appeals, and the supreme court was reduced to seven justices.<sup>32</sup> By 2008, there will be 312 judges in Minnesota: seven supreme court justices, nineteen court of appeals judges, and 286 district court judges.<sup>33</sup>

As the number of judicial positions has increased, the governor's responsibilities in making appointments have grown.<sup>34</sup> An occasional gubernatorial task is now a monthly duty.<sup>35</sup>

### B. *Minnesota Commission on Judicial Selection*

As they were called on to make more judicial appointments, Minnesota governors created a process for screening judicial candidates. Governors Al Quie and Rudy Perpich established commissions "to assist them in choosing judges."<sup>36</sup> For decades, the Minnesota State Bar Association and citizens' groups lobbied for the creation of an "independent commission to screen judicial candidates based on merit."<sup>37</sup> An opportunity to create such a proposal arose because some criticized Governor Perpich's judicial appointments as excessively political.<sup>38</sup> In 1990, the Legislature established the Minnesota Commission on Judicial Selection to

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30. MINN. STATE BAR ASS'N, FOR THE RECORD: 150 YEARS OF LAW & LAWYERS IN MINNESOTA 174 (1999) [hereinafter FOR THE RECORD].

31. See generally MINN. LEGIS. MANUAL (1987-88).

32. MINN. STAT. §§ 480.01, 480.011 (2006); FOR THE RECORD, *supra* note 30, at 163.

33. 2007 Minn. Laws, ch. 54, art. 1, §§ 4-5, 2007 Minn. Sess. Law. Serv. 161 (West) (authorizing public safety appropriations for three new court of appeals seats and seven new trial court seats).

34. See MINN. CONST. art. V, § 3.

35. During Governor Arne Carlson's eight years in office (1991-99), he appointed ninety-six district court judges. FOR THE RECORD, *supra* note 30, at 179. Governor Jesse Ventura (1999-2003) appointed sixty district court judges. T.W. Budig, *Assistant Anoka County Attorney Sean Gibbs Appointed Tenth District Judge by Gov. Pawlenty*, HOMETOWN SOURCE, Mar. 8, 2005, available at <http://www.hometownsource.com/capitol/2005/march/8gibbs.html>. In his first term, Governor Tim Pawlenty (2003-07) appointed fifty-one district court judges. See Minnesota Judicial Branch, Minnesota District Courts, <http://www.mncourts.gov/?page=238> (last visited Dec. 27, 2007).

36. FOR THE RECORD, *supra* note 30, at 178.

37. *Id.*; see also Position Statement of Minnesota State Bar Association Judicial Merit Selection Committee (Oct. 16, 1987) ("The MSBA supports a statutory merit selection plan . . .")

38. Betty Wilson, *Kelley Faults Perpich's Choices for Judges*, STAR TRIB. (Minneapolis), Jan. 26, 1990, at B5.

recruit, screen and recommend to the governor candidates for appointment to the district courts.<sup>39</sup>

The Commission consists of forty-nine members, including nine at-large members and four members from each of the state's ten judicial districts.<sup>40</sup> Of the at-large members, the governor appoints seven, and the supreme court appoints two.<sup>41</sup> The governor and supreme court each appoint two members from each judicial district.<sup>42</sup> Three of the at-large members and two members from each district cannot be attorneys.<sup>43</sup> Thirteen members meet to deliberate on each district court vacancy. The nine at-large members are joined by the four members from the judicial district in which the vacancy occurs.<sup>44</sup>

The statute creating the Commission requires consideration of several factors in screening candidates: "integrity, maturity, health if job related, judicial temperament, diligence, legal knowledge, ability and experience, and community service."<sup>45</sup> After reviewing applications, conducting background checks, and interviewing candidates, the Commission recommends three to five finalists for each vacant position, and forwards those recommendations to the governor.<sup>46</sup> The Commission seeks and receives significant input from the public while screening candidates.<sup>47</sup> Since the Commission's inception, governors have interviewed the finalists personally to select their appointees.<sup>48</sup>

While governors have constitutional authority to appoint any qualified person as a judge, they have nearly without exception chosen a finalist named by the Commission.<sup>49</sup> The Commission has become recognized as a vital part of the selection process, helping

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39. Elections and Ethics Reform Act, 1990 Minn. Sess. Law Serv. 608 (West) (codified as Minn. Stat. § 480B.01 (2006)).

40. MINN. STAT. § 480B.01, subdiv. 2 (2006).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at subdiv. 3.

45. *Id.* at subdiv. 8.

46. *Id.*

47. *Id.* at subdiv. 10. *See also* Office of the Minnesota Governor, Tim Pawlenty: Commission on Judicial Selection, <http://www.governor.state.mn.us/media-center/pressreleases/JudicialSelections/index.htm> (last visited Dec. 1, 2007).

48. George Soule, *Judicial Appointments in the Ventura Administration*, 68 HENNEPIN LAW., Nov. 1999 at 4; James H. Gilbert, *The Appointment System Is Working Well*, BENCH & B. MINN., Feb. 1993 at 22, 26.

49. FOR THE RECORD, *supra* note 30, at 179.

to reduce politicization and promote merit-based selection.<sup>50</sup> If the governor stacked the Commission with partisans, routinely ignored the Commission's recommendations, or appointed unqualified political allies, the governor likely would pay the price in public opinion.

The Commission's role is confined to recommending candidates for appointment to the district court, and not the appellate courts.<sup>51</sup> Recent governors have formed Commission-like committees to screen candidates for the court of appeals and supreme court.<sup>52</sup> This process is not governed by Minnesota statutes.<sup>53</sup>

The vast majority of judges in Minnesota attain their office through appointment by the governor.<sup>54</sup> Often, judges reach retirement age or decide to resign in the midst of a six year term, triggering a vacancy and gubernatorial appointment.<sup>55</sup> A few judges have timed their departures to ensure that the governor can appoint a successor, rather than open the position for election.<sup>56</sup> In 2003, ninety-one percent of trial and appellate judges were initially appointed by the governor, including six out of seven supreme court justices.<sup>57</sup>

### C. *Judicial Elections*

Elections play a vital role in the judicial selection process. Elections provide a safety valve, a method for voters to replace a judge who has committed moral or ethical breaches or has not performed adequately.<sup>58</sup> Elections make judges broadly

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50. *Id.*

51. See About the Commission on Judicial Selection, <http://www.governor.state.mn.us/mediacenter/pressreleases/JudicialSelections/PROD007916.html>. The Commission also screens candidates for the Workers' Compensation Court of Appeals. See MINN. STAT. §480B.01 subdiv. 1 (2006) ("If a judge of the district court or Workers' Compensation Court of Appeals dies, resigns, retires, or is removed during the judge's term of office, or if a new district or Workers' Compensation Court of Appeals judgeship is created, the resulting vacancy must be filled by the governor as provided in this section.").

52. FOR THE RECORD, *supra* note 30, at 178.

53. *Id.*

54. Pam Louwagie, *Voters in Judicial Elections Just Go Through the Motions*, STAR TRIB. (Minneapolis), Aug. 3, 2003 at A1.

55. *Id.* at A18.

56. *Id.*

57. *Id.*

58. FOR THE RECORD, *supra* note 30, at 177.

accountable to the people they serve. If judges perform poorly, it is more likely they will draw opponents for election.

In recent elections, most judges have run unopposed to retain their seats. In the six elections from 1996 through 2006, only thirty-one percent of Minnesota appellate judges, and eleven percent of district judges, have drawn opponents.<sup>59</sup> In the last six elections, there have been only seven open seats, all for the district court, up for election.<sup>60</sup> Supreme Court Justice Alan Page won the most recent open seat on an appellate court in 1992.<sup>61</sup> None of the appellate judges running from 1996 to date were defeated.<sup>62</sup> Challengers defeated only five district court judges during this same period.<sup>63</sup>

Spending by candidates in contested judicial elections has been modest compared to spending by candidates for legislative or executive positions or by judicial candidates in partisan election states. In the last six elections, incumbent appellate judges spent an average of \$87,430 on campaigns in contested elections.<sup>64</sup> Appellate challengers spent an average of \$4147.<sup>65</sup> In district court races, incumbents spent an average of \$19,359 in contested elections, while challengers spent an average of \$9903.<sup>66</sup>

Former Minnesota Supreme Court Justice Edward Stringer spent the most money by a judicial candidate during this period: \$305,616 in winning fifty-four percent of the vote in 1996.<sup>67</sup> Only three other campaigns have exceeded \$100,000 in spending: former supreme court Chief Justice Kathleen Blatz (\$138,595) and Justice James Gilbert (\$196,853) in 2000,<sup>68</sup> and Susan Burke

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59. Data compiled from Minnesota Secretary of State election results [hereinafter SOS Election Results] (on file with author).

60. *Id.*

61. See Minnesota State Law Library: Chronological List of Justices and Judges of the Minnesota Appellate Courts, <http://www.lawlibrary.state.mn.us/judges.html> (last visited Dec. 27, 2007).

62. SOS Election Results, *supra* note 59.

63. *Id.*

64. See MINN. CAMPAIGN FIN. & PUB. DISCLOSURE BD., 1996 to 2006 CAMPAIGN FINANCE SUMMARIES, available at [http://www.cfboard.state.mn.us/all\\_pubs.htm](http://www.cfboard.state.mn.us/all_pubs.htm) [hereinafter 1996 to 2006 CAMPAIGN FINANCE SUMMARIES] (summary spreadsheets on file with author).

65. *Id.*

66. *Id.*

67. MINN. CAMPAIGN FIN. & PUB. DISCLOSURE BD., 1996 CAMPAIGN FINANCE SUMMARY, tbl. E (1997), available at [http://www.cfboard.state.mn.us/campfin/Summary/CFSM\\_96.pdf](http://www.cfboard.state.mn.us/campfin/Summary/CFSM_96.pdf); SOS Election Results, *supra* note 59.

68. MINN. CAMPAIGN FIN. & PUB. DISCLOSURE BD., 2000 CAMPAIGN FINANCE

(\$112,938), a successful candidate for an open seat on the Hennepin County District Court in 2004.<sup>69</sup>

The spending by most challengers in appellate and district court elections was minimal or even non-existent.<sup>70</sup> In 42 races, challengers spent less than \$5,000, many spending so little that they did not need to file a campaign finance disclosure report.<sup>71</sup> Expenditures by candidates for open district court seats tended to be higher than by other district court candidates.<sup>72</sup> In races for the seven open seats, eight candidates spent more than \$40,000 each.<sup>73</sup> Several district court candidates largely self-financed their efforts, investing significant personal funds in their campaigns.<sup>74</sup>

#### D. *The Model of Non-Partisanship*

Since the 1912 enactment of legislation making judicial elections non-partisan,<sup>75</sup> Minnesota's judicial elections have been largely devoid of partisanship. The Minnesota Code of Judicial Conduct contained a number of restrictions to enforce non-partisanship in judicial campaigns. Since 1974, the Code included the Announce Clause, which provided that a judicial candidate shall not "announce his or her views on disputed legal or political issues."<sup>76</sup> The Code also prohibited a judicial candidate's

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SUMMARY (2000), available at <http://www.cfboard.state.mn.us/campfin/Summary/summary00/index.html>.

69. MINN. CAMPAIGN FIN. & PUB. DISCLOSURE BD., 2004 CAMPAIGN FINANCE SUMMARY, at 27–28 (2005), available at <http://www.cfboard.state.mn.us/campfin/Summary/CFSUMM2004.pdf>.

70. See 1996 to 2006 CAMPAIGN FINANCE SUMMARIES, *supra* note 64.

71. *Id.* A candidate "must begin to file the reports required by this section in the first year it receives contributions or makes expenditures in excess of \$100 and must continue to file until the committee, fund, or party unit is terminated." MINN. STAT. § 10A.20, subdiv. 1 (2006).

72. 1996 to 2006 CAMPAIGN FINANCE SUMMARIES, *supra* note 64.

73. *Id.*

74. In 2004, Susan Burke made personal contributions of \$81,644 to her campaign, which spent a total of \$112,938. MINN. CAMPAIGN FIN. & PUB. DISCLOSURE BD., 2004 CAMPAIGN FINANCE SUMMARY, at 27–28 (2005), available at <http://www.cfboard.state.mn.us/campfin/Summary/CFSUMM2004.pdf>. Candidate John Mellbye contributed all of the money he spent on his 2006 campaign: \$56,246. Letter from John Mellbye, Judge, to Joyce Larson, Campaign Finance & Public Disclosure Board (Jan. 26, 2007), available at <http://www.cfbreport.state.mn.us/pdfStorage/2006/CampFin/YE/1409.pdf>.

75. See *supra* Part II.

76. The Announce Clause went further than the ABA Model Code of Judicial Conduct, which in 1990 replaced the Announce Clause with a prohibition on statements by judicial candidates "that commit or appear to commit the candidate

involvement in political party activities, appeals for support by political parties, or use of political party support in a judicial campaign.<sup>77</sup>

In the 1990s, there were efforts to involve political parties in judicial elections. The Code of Judicial Conduct did not and could not preclude political parties from promoting candidates in judicial elections. In 1998, the Republican Party of Minnesota amended its constitution to permit endorsements of judicial candidates,<sup>78</sup> although the Party voted not to endorse candidates for the Minnesota Supreme Court in that year's election.<sup>79</sup>

At its 2000 state convention, the Republican Party issued its first modern endorsements for appellate court candidates. The party endorsed Gregory Wersal in his challenge to supreme court Justice James Gilbert—who had been appointed to the court by Republican Governor Arne Carlson—and court of appeals judges G. Barry Anderson, Jill Halbrooks and James Harten.<sup>80</sup> The court of appeals judges rejected the endorsements and requested the party not include them in any campaign activities.<sup>81</sup> While the Republican Party was free to promote its endorsement of Mr. Wersal, the Code of Judicial Conduct prohibited his use of the endorsement.<sup>82</sup> Justice Gilbert prevailed in the election, winning sixty-nine percent of the vote.<sup>83</sup>

#### IV. FREEDOM OF SPEECH FOR JUDICIAL ELECTIONS

##### A. *Federal Court Decisions*

In *Republican Party of Minnesota v. White*, two-time Minnesota

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with respect to cases, controversies or issues likely to come before the court.” MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (2000), *cited in* Republican Party of Minn. v. White, 536 U.S. 765, 773 n.5 (2002).

77. See David Schultz, *Judicial Selection in Minnesota: Options After Republican Party v. White*, BENCH & B. MINN. 17 (Nov. 2005).

78. Robert Whereatt, *GOP Weighs Whether to Endorse Judicial Candidates*, STAR TRIB. (Minneapolis), June 14, 2002, at 20A.

79. Conrad deFiebre, *In Close Vote, Delegates Reject Endorsing Judicial Candidates*, STAR TRIB. (Minneapolis), June 21, 1998, at 13A.

80. Robert Whereatt, *Republicans Make First Endorsements for a Supreme Court Justice*, STAR TRIB. (Minneapolis), June 11, 2000, at 14A.

81. Robert Whereatt, *Endorsed Judges Tell GOP to Stay Clear*, STAR TRIB. (Minneapolis), June 13, 2000, at 1B.

82. MINNESOTA CODE OF JUDICIAL CONDUCT Canon 5(B)(1), (A)(3)(d)(i).

83. SOS Election Results, *supra* note 59.

Supreme Court candidate Gregory Wersal and the state's Republican Party challenged Minnesota's Announce Clause on First Amendment grounds.<sup>84</sup> Mr. Wersal claimed he was forced to abandon his 1996 election bid because of an ethics complaint stemming from his criticism of several recent Minnesota Supreme Court decisions.<sup>85</sup> In 1998, Mr. Wersal renewed his bid for the bench.<sup>86</sup> This time, however, Wersal sought an advisory opinion from the Minnesota Lawyers Professional Responsibility Board seeking to determine whether he would again face scrutiny for expressing his views.<sup>87</sup> When the Board refused to issue an opinion, Wersal, along with the Republican Party of Minnesota, brought suit in federal court.<sup>88</sup>

The district court granted summary judgment to the defendants, upholding the constitutionality of the Announce Clause, and the Eighth Circuit Court of Appeals affirmed.<sup>89</sup> In June 2002 the United States Supreme Court reversed the court of appeals decision and struck down the Announce Clause.<sup>90</sup> In *Republican Party of Minnesota v. White*, the Supreme Court held that the Announce Clause violated the First Amendment because it was not narrowly tailored to serve a compelling state interest in preserving the state judiciary's impartiality and appearance of impartiality.<sup>91</sup>

After remand of the *White* case, the plaintiffs continued their efforts to purge Minnesota's restrictions on partisan activities in judicial elections.<sup>92</sup> The plaintiffs prevailed again in August 2005 when the Eighth Circuit Court of Appeals, sitting *en banc*, struck down the Partisan-Activities Clause and the Solicitation Clause of the Minnesota Code of Judicial Conduct.<sup>93</sup> The court of appeals invalidated rules that judicial candidates could not identify themselves as members of a political party, attend or speak at

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84. *Republican Party of Minn. v. White*, 536 U.S. 765, 768–69; *Republican Party of Minn. v. White*, 416 F.3d 738, 746 (8th Cir. 2005), *petition for cert. denied*, 2006 WL 152093 (U.S. Jan. 23, 2006).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Republican Party of Minn. v. Kelly*, 63 F. Supp. 2d 967, 986 (D. Minn. 1999), *aff'd*, 247 F.3d 854 (8th Cir. 2001).

90. *Republican Party of Minn.*, 536 U.S. at 766.

91. *Id.*

92. *See Republican Party of Minn. v. White*, 361 F.3d 1035 (8th Cir. 2004).

93. *Republican Party of Minn.*, 416 F.3d at 744.

political gatherings, or seek, accept or use political party endorsements.<sup>94</sup> The court also invalidated the Solicitation Clause to the extent that it prohibited candidates from soliciting contributions by speaking to a large group or in signing a campaign letter.<sup>95</sup> The plaintiffs had not challenged the restriction on a candidate personally soliciting contributions from individuals.<sup>96</sup>

Other courts have also ruled on the constitutionality of restrictions on judicial campaign activities. In *Weaver v. Bonner*, the Eleventh Circuit Court of Appeals struck down provisions of the Georgia Code of Judicial Conduct that prohibited judicial candidates from (a) making communications that are false or contain a material misrepresentation, and (b) personally soliciting campaign contributions and publicly stated support.<sup>97</sup> The court stated that the First Amendment protects false communications unless they are made with knowledge of their falsity or with reckless disregard as to whether they are false.<sup>98</sup>

Several federal courts have also struck down the Pledges and Promises and Commitment Clauses of state judicial conduct codes.<sup>99</sup> The courts held that rules prohibiting judicial candidates from making pledges or promises of conduct other than the faithful and impartial performance of the duties of the office, or

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94. *Id.* at 763–66.

95. *Id.*

96. *Id.* at 765.

97. 309 F.3d 1312, 1312 (11th Cir. 2002).

98. *Id.*

99. *Indiana Right to Life, Inc. v. Shepard*, 463 F. Supp. 2d 879 (N.D. Ind. 2006); *Kan. Judicial Watch v. Stout*, 440 F. Supp. 2d 1209 (D. Kan. 2006); *Ala. Right to Life Political Action Comm. v. Feldman*, 380 F. Supp. 2d 1080 (D. Alaska 2005); *N.D. Family Alliance v. Bader*, 361 F. Supp. 2d 1021 (D. N.D. 2005); *Family Trust Found. of Ky. v. Wolnitzek*, 345 F. Supp. 2d 672 (E.D. Ky. 2004). *But see* *Duwe v. Alexander*, 490 F. Supp. 2d 968 (W.D. Wis. 2007) (holding that Wisconsin's Pledges, Promises, and Commitments Clause was constitutionally permissible even though a particular recusal provision was void for vagueness and overbreadth); *In re Kinsey*, 842 So. 2d 77 (Fla. 2003) (upholding disciplinary charges against judge for campaign statements such as “[p]olice officers expect judges . . . to help law enforcement by putting criminals where they belong . . . behind bars” as “pledges or promises” of conduct in office, which violated the state’s Code of Judicial Conduct, not protected by the First Amendment); *In re Watson*, 763 N.Y.S.2d 219 (N.Y. 2003) (upholding disciplinary charges against judge who stated during his campaign that “[w]e are in desperate need of a judge who will work with police, not against them. We need a judge who will assist our law enforcement officers as they aggressively work towards cleaning up our city streets” as pledges and promises that are not protected by the First Amendment).

statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court, violated the First Amendment.<sup>100</sup> Each of the courts sustained code provisions that require a judge to disqualify himself or herself in any proceeding in which his or her impartiality might reasonably be questioned.<sup>101</sup>

*B. Minnesota Code of Judicial Conduct*

The Minnesota Supreme Court has taken a conservative approach in amending the state's Code of Judicial Conduct in response to the *White* decisions. The court issued rule changes after each *White* decision. In the first round, in September 2004, the court deleted the Announce Clause, clarified the Pledges and Promises Clause, and amended the prohibition on candidate misrepresentations by banning false campaign statements only if they were made "knowingly, or with reckless disregard for the truth."<sup>102</sup> The court also added a provision requiring a judge to disqualify himself or herself where "the judge, while a judge or a candidate for judicial office, has made a public statement that commits the judge with respect to: (i) an issue in the proceeding; or (ii) the controversy in the proceeding."<sup>103</sup> The court "decline[d] to adopt the . . . amendments [recommended by an advisory committee] expanding the scope of permissible partisan political activity. . . . [W]e are not convinced the recommended changes are either necessary or desirable on their merits."<sup>104</sup>

The second round of rule changes was made in March 2006. The court struck down provisions that precluded judicial candidates from identifying themselves as members of a political organization, attending or making speeches to political gatherings, or seeking or using endorsements from political organizations.<sup>105</sup> The court also amended the Code to allow judicial candidates to personally solicit publicly stated support from individuals and organizations.<sup>106</sup> While the former Code completely prohibited

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100. See cases cited *supra* note 99.

101. *Id.*

102. Order *In re* Amendment of the Code of Judicial Conduct, No. C4-85-697 (Sept. 14, 2004).

103. MINN. CODE OF JUDICIAL CONDUCT Canon 3(D)(1)(e) (2007).

104. Order *In re* Amendments of the Code of Judicial Conduct, *supra* note 102.

105. Order *In re* Amendments of the Code of Judicial Conduct, No. C4-85-697 (Mar. 29, 2006).

106. *Id.*

candidates from personally soliciting campaign contributions, the amendments permit a candidate to “make a general request for campaign contributions when speaking to an audience of 20 or more people; and . . . sign letters, for distribution by the candidate’s campaign committee, soliciting campaign contributions . . . .”<sup>107</sup> The campaign still must ensure that the candidate will not learn the identity of those who made contributions to the campaign, or those who were solicited but did not contribute.<sup>108</sup>

Going into the 2008 elections, candidates will be permitted to engage in a wide range of political activities.<sup>109</sup> But, unless the court issues additional changes, candidates will not be able to personally solicit or receive campaign contributions from individuals or make pledges or promises “with respect to cases, controversies or issues that are likely to come before the court.”<sup>110</sup> In addition, a candidate risks disqualification as the judge in a proceeding if he or she makes a “public statement that commits the judge with respect to . . . an issue . . . or the controversy in the proceeding.”<sup>111</sup>

#### V. POST-*WHITE* JUDICIAL ELECTIONS IN MINNESOTA

The United States Supreme Court’s opinion in *White* was announced on June 27, 2002.<sup>112</sup> While *White* opened the door to some partisan campaign activity, Minnesota’s judicial campaigns in 2002, 2004 and 2006 did not change significantly from those in prior years.

The number of contested judicial elections has not increased. In the 2004 and 2006 elections, three supreme court justices ran without challengers.<sup>113</sup> Only eight percent of district court judges up for election in those years drew opponents.<sup>114</sup> Spending on judicial races also has not changed appreciably since the *White*

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107. *Id.*

108. *Id.*

109. See Barbara L. Jones, *With “White” Now the Law, Judicial Races are in for a Change*, MINN. LAWYER, Jan. 30, 2006, <http://www.minnlawyer.com/story.cfm?id=4848>.

110. MINN. CODE OF JUDICIAL CONDUCT, Canon 5(A)(3)(d) (2007).

111. *Id.* at 3(D)(1)(e).

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

113. SOS Election Results, *supra* note 59.

114. *Id.*

decision.<sup>115</sup> The only exception was that in 2006 three challengers to district court judges were well-funded, each spending more than \$30,000.<sup>116</sup>

In the post-*White* elections, there has been little partisan activity and judicial candidates have focused principally on their qualifications and experience.<sup>117</sup> There have been a few minor exceptions. Bemidji lawyer Tim Tinglestad ran for the supreme court in 2004 on a conservative, faith-based platform.<sup>118</sup> The Minnesota Family Council published a voter's guide that year, focused on issues such as taxpayer funding of abortion, the right to assisted suicide, and same-sex marriage.<sup>119</sup> Although the Republican Party did not endorse any judicial candidates in 2004, it issued a voter's guide—"a brief overview of relevant facts relating to [judicial candidates'] qualifications and abilities to be a member of the judiciary."<sup>120</sup>

In 2006, the Republican Party endorsed Justice G. Barry Anderson and Court of Appeals Judges Christopher Dietzen and Gordon Shumaker. All three declined the endorsements.<sup>121</sup> Only two candidates for the district court sought and obtained political party endorsement, both Republicans: State Representative Scott Newman in the First Judicial District, and Child Support Magistrate Tim Tinglestad in the Ninth Judicial District.<sup>122</sup> In the Second Judicial District, St. Paul City Council Member Jay Benanav often reminded voters of his DFL background, and called his opponent Judge Elena Ostby a "Republican appointee."<sup>123</sup>

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115. 1996 to 2006 CAMPAIGN FINANCE SUMMARIES, *supra* note 64.

116. *Id.*

117. See George Soule, *Judicial Election in Minnesota: Past, Present, and Future*, HENNEPIN LAW., Jan. 2007 at 7.

118. Brad Swenson, *Tinglestad Says Judges Must Serve Up Impartial Justice*, BEMIDJI PIONEER, Sept. 10, 2006, at A15.

119. See MINN. FAMILY INST., VOTER'S GUIDE 2004 (on file with author).

120. See REPUBLICAN PARTY OF MINN., STATEWIDE JUDICIAL ELECTIONS VOTER GUIDE (2004) (detailing the judicial candidates' educational and professional backgrounds, some of their community involvements, and some excerpts from their opinions) (on file with author).

121. Conrad deFiebre, *Republican State Convention: Notebook; GOP Delegates Want Voter OK on Stadium Tax*, STAR TRIB. (Minneapolis), June 3, 2006, at 8A.

122. Swenson, *supra* note 118; Michelle Lore, *Eight Judicial Seats Contested*, MINN. LAWYER, July 24, 2006, available at <http://www.minnlawyer.com/story.cfm?ID=28898>.

123. Shannon Prather, *Judicial Candidates Spar Over Politics*, ST. PAUL PIONEER PRESS (Minnesota), Oct. 27, 2006, at 1B.

There was some evidence in Minnesota's 2006 elections that voters penalized candidates for their partisan campaign activities.<sup>124</sup> Mr. Newman drew criticism for seeking partisan support, and later in the campaign he rarely featured his Republican endorsement.<sup>125</sup> Judge Michael Savre defeated Mr. Newman, fifty-six percent to forty-four percent.<sup>126</sup> Mr. Tingelstad placed third in the primary election, ending his candidacy.<sup>127</sup> Despite widespread name recognition, Mr. Benanav lost the election to Judge Ostby, fifty-eight percent to forty-one percent.<sup>128</sup> Nationally, candidates who focused on political or disputed legal issues "lost more often than they won."<sup>129</sup>

## VI. THE THREATS OF PARTISANSHIP

### A. *Supreme Court Races in Partisan Election States*

In considering what Minnesota may face if judicial elections become more partisan, recent races in partisan election states provide a ready source of information. In ten states, candidates are commonly identified with a political party or seek judicial election on partisan ballots.<sup>130</sup> There are several recent examples of partisan slugfests in these states.

One race in Illinois in 2004 set a national record for spending in a single state supreme court race; the candidates in Illinois's Fifth Judicial District, a rural district in southern Illinois, raised more than \$9.3 million.<sup>131</sup> Business interests supporting Republican Judge Lloyd Karmeier and plaintiffs' lawyers and labor groups supporting Democratic Judge Gordon Maag poured millions of dollars into the race.<sup>132</sup>

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124. See *infra* text and accompanying notes 125–29.

125. See Lee Ostrom, Editorial, *Need To Ensure Judicial Independence*, MCLEOD COUNTY CHRON., Apr. 21, 2006.

126. SOS Election Results, *supra* note 64.

127. *Id.*

128. *Id.*

129. JAMES SAMPLE ET AL., *THE NEW POLITICS OF JUDICIAL ELECTIONS 2006* 35 (Jesse Rutledge ed., 4th ed. 2007).

130. *Id.* at 25 (partisan election states are Alabama, Illinois, Louisiana, Michigan, North Carolina, New Mexico, Ohio, Pennsylvania, Texas and West Virginia).

131. DEBORAH GOLDBERG ET AL., *THE NEW POLITICS OF JUDICIAL ELECTIONS: 2004* 18 (Jesse Rutledge ed., 3d ed. 2005).

132. *Id.* at 19.

In Alabama, races for the supreme court are often expensive, partisan free-for-alls.<sup>133</sup> In June 2006, a slate of “pick-and-choose” candidates ran against incumbent Republican justices.<sup>134</sup> The challengers were so called because they contended that the Alabama Supreme Court should not obey rulings of the United States Supreme Court with which the Alabama justices disagreed.<sup>135</sup> In particular, they urged defiance of the United States Supreme Court decision that banned the death penalty for defendants convicted of murders committed when they were minors.<sup>136</sup> The challengers were led by Justice Tom Parker, a follower of former Chief Justice Roy Moore.<sup>137</sup>

Campaign messages based on hot-button political issues were common in the 2006 Alabama races.<sup>138</sup> Chief Justice Drayton Nabers, for example, told voters that “[i]ssues relating to the right to life and the sanctity of marriage are in the soul of Alabamians, and they want a judge who shares their conservative views.”<sup>139</sup> Justice Parker accused Chief Justice Nabers of backing “the same precedents that allow abortion up to the date of delivery” and “would enforce a federal court order mandating Alabama legalize gay marriages.”<sup>140</sup>

The “pick-and-choose” candidates all lost in the June primary,<sup>141</sup> but the Republican incumbents faced Democratic challengers in the general election.<sup>142</sup> Candidates spent \$8.2 million in the supreme court races.<sup>143</sup> Chief Justice Nabers alone spent more than \$4 million on his campaign, but he lost in the

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133. See Drew Juber, *There's Nothing Civil About Alabama Judicial Race*, ATLANTA J.-CONST., June 5, 2006, at A2.

134. See Geri L. Dreiling, *Pick and Choose Judicial Candidates Defeated: Alabama Voters Reject Slate That Argued It Could Ignore U.S. Supreme Court Rulings*, ABA J., June 9, 2006, available at <http://www.abanet.org/journal.ereport.jn9parker.html>.

135. *Id.*

136. Tom Parker, Editorial, *Alabama Justices Surrender to Judicial Activism*, BIRMINGHAM NEWS, Jan. 1, 2005, available at <http://www.alliancealert.org/2006/20060106.htm> (last visited Dec. 27, 2007).

137. See SAMPLE ET AL, *supra* note 129, at 4.

138. See Juber, *supra* note 133.

139. *Id.*

140. *Id.*

141. See generally Ala. Sec'y of State, *Alabama Secretary of State 2004 Republican Primary Results*, <http://www.sos.state.al.us/downloads/dl3.aspx?trgturl=election/2004/primary/repcert-amend-6-11-2004.pdf&trgtfile=repcert-amend-6-11-2004.pdf> (last visited Nov. 17, 2007).

142. See Brendan Kirby, *Supreme Court Incumbents Fend Off Challenges*, ALA. PRESS-REGISTER, June 7, 2006 at A1.

143. SAMPLE ET AL, *supra* note 129, at 5.

general election to his Democratic opponent.<sup>144</sup> The winner, Chief Justice Sue Bell Cobb, called the cost of the campaigns “obscene.”<sup>145</sup>

*B. Partisan Trial Court Races*

Party politics often shape elections for local trial court seats in partisan election states. The experience of Dallas County, Texas in 2006 is instructive. Before the 2006 election, all of the district judges were Republicans.<sup>146</sup> In 2006, however, Democrats dominated county elections.<sup>147</sup> Democratic challengers defeated twenty Republican judges.<sup>148</sup> In eight contests for open seats, Democrats defeated Republicans.<sup>149</sup> Five Republican judges retained their positions because they ran unopposed.<sup>150</sup>

Before the election, the Republican bench likely was varied in qualifications and competence, and the same is true about the largely Democratic bench after the election.<sup>151</sup> Their selection had much to do about politics and little to do with merit: “Judging by the voting percentages in judicial races, the voters didn’t differentiate between the good and bad Democrats, nor the good and bad Republicans, opting for a wholesale party swap without regard to each candidate’s particular qualifications.”<sup>152</sup> This type of partisan turnover in the judiciary detracts from stability of the bench and may discourage some of the best candidates from seeking appointment or election.

*C. The Wisconsin Experience—2007*

States like Illinois, Alabama and Texas are well known for partisanship in judicial elections. Minnesota can also look to other

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144. Phillip Rawls, *Court Race Most Expensive in America*, DECATUR DAILY, Feb. 2, 2007.

145. *Id.*

146. See Tex. Sec’y of State, *2002 General Election Dallas County Race Summary*, <http://elections.sos.state.tx.us/elchist.exe> (last visited Dec. 27, 2007).

147. Matt Pulle, *Accidental Victors*, DALLAS OBSERVER, Nov. 16, 2006, available at [www.dallasobserver.com/2006-11-16/news/accidental-victors/full](http://www.dallasobserver.com/2006-11-16/news/accidental-victors/full) (“Last Tuesday, local Democrats . . . beat Republicans in every contested countywide race, as a rather lazy electorate lumped civil judges and obscure administrators with an unpopular war and president.”).

148. See Tex. Sec’y State, *supra* note 146.

149. *Id.*

150. *Id.*

151. Pulle, *supra* note 147.

152. *Id.*

Midwestern states with similar demographics and political outlook to consider whether partisanship can dominate judicial elections. The April 2007 election for an open seat on the Wisconsin Supreme Court is informative.

In the election, Circuit Judge Annette Ziegler defeated Madison private lawyer Linda Clifford fifty-eight percent to forty-two percent to replace a retiring Supreme Court justice.<sup>153</sup> Although Wisconsin's judicial elections are non-partisan, Ziegler was identified as the Republican candidate, while Clifford was known as the Democratic candidate.<sup>154</sup> The race cost a total of \$6 million.<sup>155</sup> The candidates each raised over \$1 million for their campaigns, including each candidate's own "six-figure" loan.<sup>156</sup> The Wisconsin Manufacturers & Commerce and Club for Growth Wisconsin spent over \$2 million in support of Ziegler, while "Democrat-leaning" Greater Wisconsin Committee spent \$320,000 on ads for Clifford.<sup>157</sup> The business groups were apparently motivated by recent decisions of the Wisconsin Supreme Court that "struck down caps on medical malpractice damages" and that allowed "a lawsuit against the lead-paint industry [to] continue" even without product identification.<sup>158</sup>

The victor in the race, Judge Ziegler, acknowledged that "the tone of the race troubled her, and that she wished third parties would stay out of judicial contests."<sup>159</sup> Candidate Clifford felt "disappointed in the fact that judicial elections in our state are now so overwhelmed by money . . ."<sup>160</sup> Nevertheless, the Wisconsin Manufacturers & Commerce reportedly views the next election as "an opportunity to solidify a conservative majority" on the court.<sup>161</sup>

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153. Wisconsin State Elections Board, Results of Spring General Election, <http://elections.state.wi.us/docview.asp?docid=11121&locid=47> (last visited Dec. 27, 2007).

154. See Patrick Marley, *Ziegler Wins Court Seat*, MILWAUKEE J. SENTINEL, Apr. 4, 2007, at A1.

155. Patrick Marley, *Pricey Court Race Might Set New Pace*, MILWAUKEE J. SENTINEL, Apr. 6, 2007, at B1.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. Marley, *supra* note 154.

161. *Id.*

*D. Characteristics of Partisan Judicial Elections*

The campaign participants and methods are often the same in partisan supreme court elections. In recent years, business interests have squared off against plaintiffs' lawyers and labor groups in supporting competing candidates.<sup>162</sup> Many such elections have featured abundant television advertising, negative campaigning, and criticism of judges' opinions in criminal cases.<sup>163</sup> Spending on television advertising in 2006 supreme court races topped \$16 million.<sup>164</sup> In contested supreme court elections since 2000, only Minnesota and North Dakota have not featured television advertising.<sup>165</sup>

Many of the advertisements—sponsored by interest groups and by candidates—are attack ads, well known to voters in races for executive and legislative offices.<sup>166</sup> Negative ads often feature criminal cases, even though their sponsors may have other motivations. For example, in the 2004 election for West Virginia Supreme Court, a group financed by business ran advertisements accusing Justice Warren McGraw of “having assigned a known sex-offender to work in a West Virginia high school.”<sup>167</sup>

Another growing factor in judicial elections is requests by interest groups for judicial candidates to declare their views on judicial and political issues.<sup>168</sup> Conservative groups have distributed most questionnaires that often focus on issues such as abortion, school choice and same-sex marriage.<sup>169</sup> Such groups publish and circulate responses, or a candidate's lack of response, to their members.<sup>170</sup> Most judicial candidates have declined to respond to issue-oriented questionnaires.<sup>171</sup>

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162. SAMPLE ET AL., *supra* note 129, at 1.

163. *Id.*

164. *Id.* at 3.

165. *Id.* at 2.

166. *Id.* at 1.

167. GOLDBERG ET AL., *supra* note 131, at 4.

168. *Id.* at 23.

169. *Id.* at 30.

170. *Id.*

171. *Id.* at 29.

## VII. THE FUTURE OF MINNESOTA'S JUDICIAL ELECTIONS

### A. *Threats of Partisanship to Minnesota's Judiciary*

Minnesotans are now wrestling with two issues: whether increasing partisanship in judicial elections would harm the state's judiciary and citizens, and whether the partisanship displayed in other states is likely to materialize in Minnesota's judicial elections.

There is a lively debate on the first issue between the First Amendment activists—mostly Republicans or conservatives—and the state's legal community. The proponents of partisan elections contend that “politicizing the process [will] inform voters better about candidates for the bench.”<sup>172</sup> They argue that “free and open” elections are necessary to prevent judicial activism and promote accountability.<sup>173</sup>

The prevailing position in the legal community is represented by the findings of the Citizens Commission for the Preservation of an Impartial Judiciary. In response to changes fostered by *White* and its progeny, the Commission was formed in February 2006 “to review and make recommendations concerning the method of selection of Minnesota's state court judges.”<sup>174</sup> Former Governor Al Quie chaired the Commission, consisting of five judges and twenty-five other members from the legal, business, labor and education communities.<sup>175</sup>

After a one-year study of the Minnesota system and the new judicial campaign freedoms, the Commission identified several “threats to our system of nonpartisan elections.”<sup>176</sup> These threats included turning “Minnesota's system of nonpartisan elections into partisan elections,” “pressing [candidates] to solicit financial support from those likely to have interests” in cases, allowing political parties and interests to elect judges to serve their “interests rather than follow the rule of law,” increasing the cost of judicial campaigns, inviting “interests to fund campaigns for the purpose of influencing judicial decisions,” and promoting negative

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172. deFiebre, *supra* note 121.

173. William F. Mohrman, *Wersal's Attorney Responds to Blatz*, MINN. LAWYER, June 19, 2000, at 3, 10.

174. CITIZENS COMM'N FOR THE PRES. OF AN IMPARTIAL JUDICIARY, FINAL REPORT AND RECOMMENDATIONS 1 (2007) [hereinafter CITIZENS COMM'N REPORT].

175. *Id.*

176. *Id.* at 5.

campaigning and television advertising.<sup>177</sup> These activities “threaten a litigant’s fair day in court.”<sup>178</sup>

They also impair the core functions of courts to protect individual rights and liberties, check the legislative and executive branches to ensure they act within the bounds of their authority, protect and uphold the Minnesota and U.S. Constitutions, protect and uphold federal and state laws, and preserve and promote our democratic system of government.<sup>179</sup>

Judicial independence is the principle that judges should reach legal decisions free from outside pressures, strictly according to the law, and without fear of reprisal.<sup>180</sup> If judges are independent, fair and impartial, then justice will be served.<sup>181</sup> Excessive partisanship in the selection process threatens judicial independence. Justice may be impaired when judges think about how a decision may affect partisans or special interests, what campaign contributions may be gained or lost, or how a ruling may sit with the legislature. Judicial independence is not absolute, but must be balanced with accountability.

Partisan judicial elections focused on the hot-button issues of the day may also deceive voters. Minnesota courts, especially district courts, rarely if ever issue rulings on issues such as abortion, gun control or same-sex marriage.<sup>182</sup> Campaigns based on these issues may disingenuously distract voters from real issues, such as qualifications, experience, demeanor, and philosophy. In addition, a candidate who takes positions on divisive issues may be

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177. *Id.* at 5–6.

178. *Id.* at 7.

179. *Id.*

180. Peterson v. Stafford, 490 N.W.2d 418, 420 (Minn. 1992).

181. *See id.*

182. *See, e.g.,* Women of the State v. Gomez, 542 N.W.2d 17 (Minn. 1995) (holding that state statutes restricting women’s use of public assistance funds for therapeutic abortions were unconstitutional); State v. Merrill, 450 N.W.2d 318 (Minn. 1990) (answering certified question that the state unborn child homicide statutes were constitutional); Hickman v. Group Health Plan, Inc., 396 N.W.2d 10 (Minn. 1986) (holding state statute barring wrongful birth actions was constitutional); *In re* Application of Atkinson, 219 N.W.2d 396 (Minn. 1980) (commenting on standards for gun permits); Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971) (stating that state statute did not authorize marriage between same-sex couples); Lilly v. City of Minneapolis, 527 N.W.2d 107 (Minn. Ct. App. 1995) (upholding judgment enjoining city from extending health benefits to partners of employees in same-sex domestic partnerships).

disqualified from presiding over proceedings involving those issues.<sup>183</sup>

Turning judicial elections into partisan battlegrounds, targeted by special interests with large war chests, may provide a significant disincentive for prospective judicial candidates. Many lawyers who would be good judges have little political background and are wary of running a high-profile election campaign.<sup>184</sup> They want to focus on being good judges, not politicians.<sup>185</sup> If elections turn out to be partisan, expensive battles, many qualified judicial candidates may be deterred.<sup>186</sup>

*B. The Encroachment of Partisanship in Minnesota's Judicial Elections*

As the First Amendment litigation and Republican Party endorsements have shown, there are legal and political activists pushing for more partisanship in Minnesota's judicial elections.<sup>187</sup> While these activists have succeeded in changing the rules of judicial elections, both in-state and nationally, they have not yet significantly affected the state's judicial campaigns or elections.<sup>188</sup>

There are a number of factors that will impede efforts to politicize Minnesota's judicial elections. First, because judicial offices are non-partisan, party affiliations of candidates will not appear on the ballot like they do in partisan election states.<sup>189</sup> Second, the state has developed a culture of non-partisanship in its judiciary, an outlook firmly held by the majority of the state's legal community.<sup>190</sup> Third, Minnesota courts have not ruled on many hot-button issues in recent years.<sup>191</sup> Finally, the movement to make judicial elections more partisan has not gained traction in the state's business community. While business groups are active in

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183. See MINN. CODE OF JUDICIAL CONDUCT Canon 3(D)(1)(e) (2007). See generally 10 DUNNELL MINN. DIGEST *Courts* § 5.08 (5th ed. 2003) (detailing general information on disqualification of judges for bias and interpreting the judicial code).

184. See *Peterson*, 490 N.W.2d at 422–423.

185. See *id.* (noting that practitioners fear giving up their livelihoods “only to be defeated by a politician with a popular name at some future election”).

186. See *id.*

187. See *supra* Parts IV, V.

188. See *supra* Part V.

189. CITIZENS COMM'N REPORT, *supra* note 174, at 4.

190. See *id.* (the Commission recommended changes to the judicial selection process in Minnesota to preserve non-partisanship after federal court decisions granted rights to candidates to run partisan campaigns).

191. See *supra* note 182.

partisan elections in other states, the business community in Minnesota appears to be quite content with the state's judiciary. A recent study by the U.S. Chamber of Commerce's Institute for Legal Reform ranked Minnesota's court system second in the nation for its "fairness in the litigation environment."<sup>192</sup>

While these factors may stabilize non-partisan judicial elections in the next several years, the state will likely lose its immunity from partisanship. A society deeply divided by many social and economic issues, and prone to resolve many disputes by lawsuits, may force the courts to make rulings that will disappoint one side or the other. Nationally, and at the State Capitol, the winds of partisanship blow strongly. It is doubtful that tradition and culture can resist these political factors for many years to come.<sup>193</sup>

## VIII. POTENTIAL REFORMS TO DETER PARTISAN ELECTIONS

### A. *Changes to the Selection Process*

The Citizens Commission for the Preservation of an Impartial Judiciary issued its Final Report and Recommendations in March 2007.<sup>194</sup> The Commission majority proposed a constitutional amendment that would substitute retention elections for non-partisan elections as the method of determining whether incumbent judges would serve another term.<sup>195</sup> The Commission also recommended that the governor appoint all Minnesota judges

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192. Inst. for Legal Reform, State Res. Ctr.: Minn., <http://www.instituteforlegalreform.com/states/state.cfm?state=MN&submit=go> (last visited Dec. 27, 2007); see also INST. FOR LEGAL REFORM, LAWSUIT CLIMATE 2007: RATING THE STATES, EXECUTIVE SUMMARY, [http://www.instituteforlegalreform.com/lawsuitclimate2007/pdf/Executive\\_Summary.pdf](http://www.instituteforlegalreform.com/lawsuitclimate2007/pdf/Executive_Summary.pdf) (last visited Dec. 27, 2007).

193. Officials of Minnesota Citizens Concerned for Life (MCCL), an anti-abortion organization, stated that the group plans to be active in judicial elections. Barbara L. Jones, *With 'White' Now the Law, Judicial Races Are in For a Change*, MINN. LAWYER, Jan. 30, 2006. The group has announced that it will support a challenger to Justice Paul Anderson in 2008. *Id.* "We'll be working to replace him with someone who will not be an activist, will not legislate from the bench, and will uphold the constitution in its text and history." *Id.*

194. CITIZENS COMM'N REPORT, *supra* note 174.

195. *Id.* at 21-23. This is the third time in the last sixty years in which an independent commission has recommended adoption of retention elections. The 1948 Constitutional Commission and 1972 Constitutional Study Commission "urged the adoption of a retention-type election for incumbent judges." Hon. Lawrence R. Yetka & Christopher H. Yetka, *The Selection and Retention of Judges in Minnesota*, 15 HAMLINE J. PUB. L. & POL'Y 169, 174-75 (1994).

from candidates nominated by merit selection commissions.<sup>196</sup> Presently, there is no statutory requirement that a commission screen candidates for appellate judgeships, and the governor is constitutionally free to select district judges regardless of the nominations of the Minnesota Commission on Judicial Selection.<sup>197</sup> Finally, the Commission recommended evaluation of judges' performances by an independent commission, and publication on the retention ballot whether the evaluation commission found the judge "qualified" or "not qualified."<sup>198</sup>

The Commission majority favored retention elections over non-partisan elections, concluding that retention elections "promote judicial accountability based on quality and performance."<sup>199</sup> The Commission found that "information regarding the quality and performance of judges" would influence voters in retention elections.<sup>200</sup> The record in retention election states showed that a campaign against a specific judge did not influence voters to defeat all the judges on the ballot.<sup>201</sup>

A minority of the Commission favored an appointive model for judicial selection.<sup>202</sup> The proposal called for merit selection and gubernatorial appointment, but also for a "judicial-evaluation commission" rather than the voters in a retention election to determine renewal of judges' terms.<sup>203</sup> The proponents of an appointive system argued that it would diminish the role of partisanship and money in judicial selection, would "better insulate judges from electoral politics," and a judicial-evaluation commission would be better informed than voters in deciding whether a judge should serve another term.<sup>204</sup>

A second appointive model, requiring legislative confirmation of gubernatorial appointments and renewals of judges' terms was discussed by the Commission, was favored by one member, and has been proposed in the legislature.<sup>205</sup> The Commission, however,

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196. CITIZENS COMM'N REPORT, *supra* note 174, at 11.

197. See MINN. STAT. § 480B.01 (2006).

198. CITIZENS COMM'N REPORT, *supra* note 174.

199. *Id.* at 22.

200. *Id.*

201. *Id.*; see also Larry Aspin et al., *Thirty Years of Retention Elections: An Update*, 37 SOC. SCI. J. 1, 8–11 (2000).

202. CITIZENS COMM'N REPORT, *supra* note 174, at 25–33.

203. *Id.* at 30–31.

204. *Id.* at 31.

205. *Id.* at 33–39; S.F. 324, 85th Leg., Reg. Sess. (Minn. 2007) (sponsored by Sen. Thomas Neville). Senator Neville's bill would require Senate confirmation

found little support among its members for legislative involvement in judicial selection.<sup>206</sup>

Retention elections provide a good balance between judicial independence and accountability.<sup>207</sup> This system promotes stability in the bench because it is likely that good judges will be retained.<sup>208</sup> Retention elections also provide a mechanism to remove a judge who has behaved badly or whose performance has not been satisfactory.<sup>209</sup> In this system, the citizens have a voice in who serves on the bench, but its structure mitigates partisanship.<sup>210</sup>

### B. *Financing Elections*

In 2004, North Carolina became the first state in the country to offer full public financing to appellate court candidates.<sup>211</sup> In 2001 New Mexico joined North Carolina by providing full public financing for statewide judicial elections.<sup>212</sup> In signing the New Mexico bill into law, Governor Bill Richardson commented that “[p]ublic financing helps assure that Court of Appeals and Supreme Court judges can run for office without the pressures of partisan campaigning or fundraising . . . .”<sup>213</sup>

Wisconsin has public financing of judicial elections as well, but does not fully fund campaigns like systems in North Carolina and

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of the governor’s appointments. *Id.* Elections would be abolished and judges could apply to the Senate for reappointment after a six-year term. *Id.*

206. CITIZENS COMM’N REPORT, *supra* note 174, at 33.

207. Aspin et al., *supra* note 201, at 2. “Merit selection combined with retention elections is designed to obtain qualified judges, insulate those judges from political influences by removing partisan politics from the judicial selection process, and still provide a mechanism for removal of judges through public accountability.” *Id.*

208. *Id.* at 8 (fifty defeated judges out of 3912 retention elections in 1964–1994). “[R]egular retention voters are very precise in singling out a judge for defeat” while “retention losses are accompanied by little collateral damage” to other judges. *Id.* at 11–12.

209. CITIZENS COMM’N REPORT, *supra* note 174, at 21–22.

210. Aspin, et al., *supra* note 201, at 1–17.

211. N.C. GEN STAT. §§ 163-278.61 (2005); GOLDBERG ET AL., *supra* note 131, at vii.

212. 2007 N.M. Legis. Serv. 1658–63 (West).

213. Press Release, Office of New Mexico Governor, Governor Richardson Signs Landmark Public Campaign Financing Bill; Makes State Second in Nation To Provide Public Financing for Statewide Judicial Elections, April 13, 2007, available at [http://governor.state.nm.us/press/2007/april/041307\\_01.pdf](http://governor.state.nm.us/press/2007/april/041307_01.pdf).

New Mexico.<sup>214</sup> In the 2007 Wisconsin Supreme Court election, both candidates declined the public subsidies.<sup>215</sup> The candidates would “have received about \$48,000 each if they had agreed to limit their overall spending to \$215,000 and not lent their campaigns more than \$20,000 each.”<sup>216</sup> However, the candidates each raised over \$1 million in their campaigns.<sup>217</sup>

Although contributions to Minnesota judicial candidates must be disclosed publicly, there are no limits on the amount of such contributions.<sup>218</sup> Raising sufficient funds to run an effective judicial campaign has been difficult, and campaign war chests have been relatively small.<sup>219</sup> Anticipating potential problems from excessive campaign contributions in future elections, legislators have proposed limits on the amount of contributions. One proposal would limit such contributions to \$2000 per contributor in an election year and \$500 per contributor in other years.<sup>220</sup>

#### IX. CONCLUSION

Minnesota’s judicial selection system of appointments and elections has worked well to maintain a non-partisan, fair and impartial judiciary. In the last five years, however, the rules of judicial campaign conduct have changed profoundly. While Minnesota is better situated than most states to resist partisanship in its judicial elections, the barriers to partisanship find their basis in political will, not in legal boundaries. Once ignited, the flames of partisanship could overcome tradition and culture.

For the third time in the last sixty years, an independent commission has recommended a constitutional amendment to adopt retention elections to improve Minnesota’s judicial selection

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214. WIS. STAT. § 11.50 (Supp. 2006). Wisconsin has considered fully funded judicial campaigns. See Mike McCabe, Exec. Dir. Wis. Democracy Campaign, *Campaign Finance Reform in Wisconsin: Where We’ve Been, Where Things Stand Today and Where We Go From Here* (Oct. 17, 2002), [http://www.wisdc.org/campfinreform\\_progprpt.php](http://www.wisdc.org/campfinreform_progprpt.php) (last visited Nov. 17, 2007).

215. Marley, *supra* note 154.

216. *Id.*

217. *Id.*

218. MINN. STAT. §10A.20 (2006).

219. See discussion *supra* Part III.C.

220. S.F. 1558, 85th Leg. Reg. Sess. (Minn. 2007). The 2007 ABA Model Code of Judicial Conduct uses the same method of setting contribution limits, with different limits in election and non-election years, but leaves the actual amounts to be set by states. See MODEL CODE OF JUDICIAL CONDUCT R. 4.4(B)(1) (2007), available at [http://abanet.org/judicialethics/ABA\\_MCJC\\_approved.pdf](http://abanet.org/judicialethics/ABA_MCJC_approved.pdf).

process.<sup>221</sup> Minnesota's judicial elections already share several characteristics of retention elections: there are few open seats up for election; most good judges are not challenged for election; judges are identified as incumbents on the election ballot; and incumbents can be defeated if they behave or perform badly.<sup>222</sup> As in retention election states, most judges in Minnesota are appointed by the governor after nomination by a merit selection commission.<sup>223</sup>

Retention elections strike a good balance between independence and accountability, and provide more protection against partisanship than the present election system. Minnesotans would be wise to make the change to retention elections now, before judicial selection becomes embroiled in partisanship.

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221. CITIZENS COMM'N REPORT, *supra* note 174, at 22–23 (Appendix C).

222. *Id.* at 7–8.

223.

It seems clear that Minnesota has adopted its own middle-of-the-road approach to judicial selection. The open election process has been retained, but with a quasi-retention feature which simply informs the voter who the incumbent candidate is and who the challenger is. This arrangement acts as a check on the gubernatorial appointment process by keeping the ultimate choice with the voters while, at the same time, recognizing the unique independent nature of the judicial function. *Peterson v. Stafford*, 490 N.W.2d 418, 425 (Minn. 1992).