

**IN THE WAKE OF *WHITE*: HOW STATES ARE
RESPONDING TO *REPUBLICAN PARTY OF MINNESOTA V.
WHITE* AND HOW JUDICIAL ELECTIONS ARE CHANGING**

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I. INTRODUCTION

The complete independence of the courts of justice is peculiarly essential in a limited Constitution.¹

By obscuring the fundamental distinction between campaigns for the judiciary and the political branches, and by failing to recognize the difference between statements made in articles or opinions and those made on the campaign trail, the Court [in *Republican Party of Minnesota v. White*] defies any sensible notion of the judicial office and the importance of impartiality in that context.²

In *Republican Party of Minnesota v. White*, the U.S. Supreme Court fundamentally altered the landscape of state judicial elections. In declaring a portion of Canon 5 of Minnesota's Code of Judicial Conduct (commonly known as the "announce" clause) unconstitutional, the decision nullified similar provisions in eight other states. But the impact of the ruling went far beyond the borders of those eight states. In total, thirty-nine states use judicial elections to choose some or all of their judges. Although the states' Codes of Judicial Conduct do not all share the language of Minnesota's Canon 5, the broader message of the decision made clear that the States would need to ensure that their Codes

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1. THE FEDERALIST NO. 78, at 203 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
2. *Republican Party of Minn. v. White*, 536 U.S. 765, 797 (2002) (Stevens, J., dissenting).

of Judicial Conduct allowed sufficient latitude to protect the First Amendment rights of judicial candidates while still insulating the courts from undue or excessive political influence.

The fundamental issue in *White* gets to the heart of how we perceive and design our judicial institutions in a democratic society. The founding fathers recognized a tension between the need for accountability in the judicial branch and the unique role of judges. To that end, they insulated judges from democratic majorities, while still providing for checks by the legislative and executive branches of government. Of vital import was the plan for selecting judges. By combining presidential appointment and Senatorial confirmation with judicial tenure for “good behavior,” the founding fathers set up the U.S. Constitution to limit political influence within the federal judiciary even while democratically elected representatives of the public would have an opportunity to approve and remove judges. Alexander Hamilton, in Federalist #78, recognized the possibility of poor decision-making, but argued quite effectively that judicial independence is so vital as to necessitate the risk:

The standard of good behavior for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws.³

The tension between these two conflicting values – democratic accountability and judicial independence – was critical in the design of the national judiciary. It is equally critical in understanding the debate over judicial selection in each of the fifty states.

Until the early 1800s, most states chose their judges through appointment.⁴ In 1812, Georgia became the first state to amend its Constitution to popularly elect inferior court judges.⁵ When Indiana joined the Union in 1816, it too provided for the election of inferior court judges.⁶ By 1832, Mississippi became the first state to allow for

3. THE FEDERALIST NO. 78, *supra* note 1, at 230.

4. Larry C. Berkson, *Judicial Selection in the United States: A Special Report*, AM. JUDICATURE SOC'Y (1999), available at <http://ajs.org/js/berkson.pdf>, at 1 (last visited March 15, 2005).

5. *Id.*

6. *Id.*

popular election of all judges.⁷ The push for broader democratic accountability resulted in a clear trend. This trend is generally attributed to the reform movement of the day, Jacksonian Democracy.⁸ By 1865, twenty-four of the thirty-four states had adopted elections.⁹ Between 1865 and 1959, every state that was admitted to the Union adopted popular election of state judges.¹⁰

Popular elections, however, proved problematic in many states and often led to calls for reform.¹¹ Judges were generally thought to be inept, corrupt, and securely in the pocket of the ruling political machine.¹² To address the influence of political parties, states introduced nonpartisan elections.¹³ Nonpartisan elections were thought to mitigate the influence of political interests and quickly gained momentum.¹⁴ By 1927, twelve states had adopted nonpartisan elections.¹⁵ Other states tried nonpartisan elections and quickly abandoned the effort.¹⁶ Most notably, Iowa, Kansas, and Pennsylvania all adopted nonpartisan elections and found that they limited public choices because, without party labels to guide their decision-making, voters were uninformed about judicial candidates.¹⁷

During the 1930s, state legislatures began to propose a new method of judicial selection – the merit selection plan.¹⁸ Developed by Albert Kales, the merit selection plan (sometimes referred to as the “Missouri plan”¹⁹) was designed to preserve the independence of the judiciary while still allowing for democratic accountability. Under the merit selection plan, the state sets up a bipartisan judicial nominating

7. *Id.*

8. *Id.*

9. Berkson, *supra* note 4.

10. *Id.* at 2.

11. *Id.*

12. *Id.*

13. The move to nonpartisan elections was actually initiated by judges in Cook County, Illinois, as early as 1873. *Id.*

14. Berkson, *supra* note 4, at 1.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. The merit selection plan is commonly referred to as the Missouri Plan because Missouri was the first to adopt the plan in 1940. Berkson, *supra* note 4. Today, Missouri is classified as a “hybrid” system of selection. Although the state Constitution dictates that judges of the Supreme Court, Courts of Appeals, and Circuit Courts in Jackson, Clay, Platte, and Saint Louis Counties be selected through this process, other Circuit Courts have opted to use partisan elections. *Judicial Selection in the States: Appellate and General Jurisdiction Court*, AM. JUDICATURE SOC’Y (2002), available at <http://www.ajs.org/jjs/JudicialSelectionCharts.pdf> (last visited March 15, 2005).

commission, made up of individuals selected by both public and private officials.²⁰ This commission reviews applications for judgeships, compiles a list of applicants they consider to be the most qualified, and submits that list to the governor.²¹ The governor then appoints one of the candidates from the commission's list of recommendations. Once appointed, the judges regularly face the public in retention elections, where voters are asked whether or not the judge should remain in office.²²

Today, judicial selection in the states is a topic of continuing controversy. Fourteen states²³ and the District of Columbia use a merit selection process. Another six states²⁴ have opted to appoint their state judiciaries. Eight states²⁵ use partisan elections and thirteen²⁶ (including Minnesota) use nonpartisan elections. The other nine states²⁷ use a combination of methods, often referred to as "hybrid" systems.²⁸

The historical development of state judicial selection is central to understanding the questions that states face today as they respond to *White*. The concerns facing the states today are no different than the concerns that they've faced in the past. How is the role of judges similar to the role played by other governmental officials? How is it different? If we want democratic accountability, how do we get it? *Who* should hold judges responsible? Do popular elections necessarily create

20. Berkson, *supra* note 4, at 2.

21. *Id.*

22. *Id.*

23. The fourteen states that use merit selection are Alaska, Colorado, Connecticut, Delaware, Hawaii, Iowa, Maryland, Massachusetts, Nebraska, New Mexico, Rhode Island, Utah, Vermont, and Wyoming. *Id.*

24. Of the six states that utilize appointment, four (California, Maine, New Jersey, and New Hampshire) allow the governor to appoint judges, while two (Virginia and South Carolina) allow the state legislature to appoint state judges. *Id.*

25. The eight states that use partisan elections are Alabama, Illinois, Louisiana, Michigan, Ohio, Pennsylvania, Texas, and West Virginia. *Id.*

26. The thirteen states that use nonpartisan elections are Arkansas, Georgia, Idaho, Kentucky, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Oregon, Washington, and Wisconsin. Berkson, *supra* note 4, at 3.

27. Arizona, Florida, Indiana, Kansas, Missouri, New York, Oklahoma, South Dakota, and Tennessee all use a hybrid system. *Id.*

28. Most frequently, hybrid systems use different methods of selection for different levels of courts or they allow some general jurisdiction courts to use different selection methods. For example, Florida uses the merit selection plan for judges on the Supreme Court and the District Courts of Appeals, but uses nonpartisan elections for Circuit Court judges. Arizona, on the other hand, has adopted a merit selection plan for all levels of courts, but has also distinguished between general jurisdiction courts in counties that include more than 250,000 citizens and those that include fewer than 250,000 citizens. General jurisdiction courts in counties with fewer than 250,000 citizens use nonpartisan elections. *Judicial Selection in the States: Appellate and General Jurisdiction Courts*, *supra* note 19.

democratic accountability? How informed does the public need to be to make informed and reasonable choices when electing judges? How independent does the judiciary need to be? In short, what is the proper balance between the competing goals of democratic accountability and judicial independence? The Supreme Court's decision in *White* has important implications for how states are addressing these questions today.

To explore the states' responses to *White*, I first discuss restrictions on campaign speech prior to the *White* ruling. I then move to a consideration of the Supreme Court's reasoning in *White*. Next, I consider the predicted consequences of *White* and the implications for judicial selection in the states today. The discussion then turns to how states have chosen to respond to *White*, beginning with a discussion of how the attitudes of the public and judicial candidates shape the context for state response. I conclude with a summary of how states are attempting to strike an appropriate balance between democratic accountability and judicial independence and impartiality in the post-*White* environment.

II. REGULATION OF CAMPAIGN SPEECH BEFORE *WHITE*

Thirty-nine states use some form of election to select some or all of their judges.²⁹ Each of these states has attempted to find that magic line in the sand – the precise point at which public accountability does not inherently violate the independence and impartiality that is essential to the judicial function. This is not an easy task. Judicial candidates, in their quest to be elected, may step over the line by making statements that compromise their impartiality—or at least appear to do so.³⁰ States with judicial elections have therefore attempted to limit what judicial candidates can say, thereby actively removing judges from the political fray and insulating them, to some extent at least, from the political world inhabited by other elected officials.³¹ Most state provisions are based on language that has been offered in the ABA's Model Code of Judicial Conduct.³²

In 1924, the ABA proposed a model code of judicial conduct that

29. *Id.*

30. Brennan Center for Justice, *Republican Party of Minnesota v. White (formerly known as Kelly): What Does the Decision Mean for the Future of State Judicial Elections?*, available at http://www.brennancenter.org/programs/dem_fc_lit_white_kellymemo.html (last visited Mar. 15, 2005).

31. *Id.*

32. *Id.*

included a statement that judicial candidates “should not announce in advance [their] conclusions of law on disputed issues of fact to secure class support.”³³ This was revised in 1972, and the ABA produced Canon 7B(1)(c) of the Model Code, which provided that candidates for judicial positions should not “make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.”³⁴ The provision also stated that candidates should not “announc[e] [their] views on disputed legal or political issues.”³⁵ Another round of revisions occurred in 1990, and the ABA retained the language of the “pledges or promises” clause but added Canon 5A(d)(ii), which prohibits “statements that commit or appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court.”³⁶ Today, only Montana continues to use the language from the 1924 Model Code.³⁷ Prior to the *White* ruling, nine states (including Minnesota) used variations of both the “pledges or promises” clause and the “announce” clause from the 1972 Model Code.³⁸ Three states employ only the “pledges or promises” clause from the 1972 Model Code.³⁹ Twenty-five states have adopted language based on the “commit” clause from the 1990 Model Code.⁴⁰ Another four states use restrictions that are not based on the ABA Model Code of Judicial Conduct.⁴¹

As states have sought to negotiate the conflicting demands of public accountability and judicial independence, they have looked to these campaign speech restrictions as a way to preserve, at least in part, the impartiality of judges. Limits on the campaign speech of judicial candidates have been in place for eight decades.⁴² Since 1990,⁴³ these restrictions have been the subject of legal challenges.

33. *Id.*

34. *Id.*

35. Brennan Center for Justice, *supra* note 30.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. Brennan Center for Justice, *supra* note 30.

41. *Id.*

42. *Id.*

43. The first successful challenge occurred in 1990 in Florida, where the court struck down prohibitions on candidate speech, including the “announce” clause and the “pledges or promises” clause, based on the protection of free speech under the First Amendment. *See* *ACLU v. Florida Bar*, 744 F. Supp. 1094, 1098-99 (N.D. Fla. 1990). For a discussion, *see* Jason E. Williams, *Republican Party of Minnesota v. White Threatens Judicial Impartiality in Texas*, 41 HOUS. L. REV. 201, 204 (2004).

In two federal cases, *Stretton v. Disciplinary Board*,⁴⁴ and *Buckley v. Illinois Judicial Inquiry Board*,⁴⁵ the courts reached opposing conclusions.⁴⁶ In *Stretton*, the U.S. Court of Appeals for the Third Circuit, explicitly recognizing the state's compelling interest in maintaining an impartial judiciary, upheld a Pennsylvania provision that prohibited judicial candidates from announcing their views on legal issues, holding that it was narrowly tailored to achieve the goal of an impartial judiciary.⁴⁷ The ruling was based, in part, on a recognition of the unique function of the judiciary and the fundamental assertion that judicial candidates should be treated differently than candidates for legislative or executive positions.⁴⁸

In *Buckley*, the U.S. Court of Appeals for the Seventh Circuit ruled both the "announce" clause and the "pledges and promises" clause to be unconstitutionally overbroad.⁴⁹ Although the Seventh Circuit expressly noted the value of an impartial judiciary and a compelling state interest in achieving an impartial judiciary by limiting campaign speech, it declined to follow the Third Circuit's narrow interpretation of the statute in question.⁵⁰ Instead, it reasoned that candidates would only be able to comply with a literal interpretation of the rule if they were to be completely silent.⁵¹ Therefore, in recognizing the competing interests of candidate speech and impartial justice, the *Buckley* ruling said that these two provisions failed to strike the right balance.

Both the *Stretton* and *Buckley* decisions, considering statutes from Pennsylvania and Illinois respectively, were deciding the question of campaign speech in partisan judicial elections. In those states that use nonpartisan elections, the restrictions on judicial campaign speech are not simply a way to maintain the integrity and dignity of the courts by promoting impartiality, but they are the cornerstone of the election process itself. For nonpartisan elections to function at all, candidates must be limited in their ability to share their political beliefs with voters. For states that use nonpartisan elections, impartiality is not only an

44. *Stretton v. Disciplinary Bd.*, 944 F.2d 137 (3d Cir. 1991).

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

46. These two cases are often cited as the leading cases on the constitutionality of speech restrictions before *White*. See Ryan W. Babcock, *Republican Party of Minnesota v. Kelly: Regulating Judicial Speech in State Elections*, 71 U. CIN. L. REV. 721, 723 (2002). See also Williams, *supra* note 43, at 204

47. *Stretton*, 944 F.2d at 144.

48. *Id.* at 142.

49. *Buckley*, 997 F.2d at 229.

50. *Id.* at 230-31.

51. *Id.* at 231.

institutional goal, but it is also a procedural imperative. Such is the case in Minnesota.

III. WHAT *WHITE* SAID (AND WHAT IT DID NOT)

The facts of *Republican Party of Minnesota v. White* are widely addressed in the legal literature,⁵² and I will not re-examine them in any depth here. Instead, I briefly introduce the case facts and further discussion focuses narrowly on the majority ruling in *White*, particularly as it is relevant to current revision efforts in the states.

Gregory Wersal, a candidate for the Minnesota Supreme Court in 1996, withdrew from the race after a complaint was filed with the Minnesota Lawyers Professional Responsibility Board (“The Board”).⁵³ The complaint focused on distribution of campaign literature that criticized the state Supreme Court’s rulings on crime, welfare, and abortion, and claimed that Wersal was improperly “announcing” his views on these legal and political issues.⁵⁴ He ran again in 1998, and sought clarification from the Board regarding its implementation of the “announce” clause found in Canon 5 of Minnesota’s Canons of Judicial Conduct.⁵⁵ The Board did not respond because Wersal had not included a specific list of the statements (or “announcements”) he intended to make.⁵⁶ It did, however, express some doubt as to the constitutionality of the “announce” clause, saying that it had “significant doubts as to whether or not this provision would survive a facial challenge to its constitutionality under the First Amendment to the United States Constitution.”⁵⁷ The Board then unanimously decided that it would not enforce the “announce” clause unless the federal courts held it constitutional.⁵⁸ Based on this advisory opinion, the Republican Party filed for a preliminary injunction in U.S. District Court.⁵⁹ The District Court and the U.S. Court of Appeals for the Eighth Circuit both upheld the law, with District Judge Michael Davis ruling that “the court is convinced that the announce clause is constitutional when narrowly

52. See Williams, *supra* note 43, at 203-06.

53. *Republican Party of Minn. v. White*, 536 U.S. 765, 768-69 (2002).

54. *Id.*

55. *Id.* at 769.

56. *Id.*

57. Edward J. Cleary, *Republican Party, et. l. v. Kelly, et. al.*, BENCH AND BAR OF MINNESOTA (Feb. 2002), available at <http://www2.mnbar.org/benchandbar/2002/feb02/prof-resp.htm> (last visited Sept. 24, 2004). Edward Cleary was the director of the Office of Lawyers Professional Responsibility in Minnesota when the events took place.

58. *Id.*

59. *Id.*

construed.”⁶⁰

In September 2001, the Republican Party of Minnesota petitioned the U.S. Supreme Court for a writ of *certiorari*.⁶¹ In December of 2001, the U.S. Supreme Court agreed to hear one of five questions presented in the petition for *certiorari*: whether the language of the announce clause, which prohibited a judicial candidate from “announcing his or her views on disputed legal or political issues” was unconstitutional.⁶²

It is important to recognize the questions that the Supreme Court did not consider in *White*. Because Minnesota uses nonpartisan judicial elections, portions of Canon 5 forbid judicial candidates to attend or speak at party gatherings, identify their party affiliation, seek, accept or use party endorsements, or solicit campaign contributions.⁶³ The Republican Party of Minnesota initially appealed to the Court with three questions, only one of which the court decided.⁶⁴ The Supreme Court did not consider “whether the severe burdens imposed by various provisions unconstitutionally impinge on the right of political parties to endorse candidates for judicial office” and whether those provisions that “forbid a candidate for elective judicial office from attending or speaking at any political party gathering – while permitting such a candidate to attend or speak at gatherings of all other organizations unconstitutionally impinges” on free speech rights under the First and Fourteenth Amendments to the U.S. Constitution.⁶⁵

The Court did, however, hear and decide the challenge to the “announce” clause.⁶⁶ Writing for the five-member majority, Justice Scalia began by considering the meaning and intent of the “announce” clause.⁶⁷ Because Minnesota’s Canons of Judicial Conduct include additional provisions that ban “pledges or promises” regarding their future decision-making as a judge, Scalia reasoned that the “announce” clause “extends to the candidate’s mere statement of his current position, even if he does not bind himself to maintain that position after

60. Republican Party v. Kelly, 63 F. Supp. 2d 967, 985 (D. Minn. 1999). As Cleary reports “the court then went on to narrow the language of the announce clause to ‘only prohibiting [sic] discussion of a judicial candidates’ predisposition to issues likely to come before the court,’ thus serving the state’s compelling interests in ‘maintaining the actual and apparent integrity and independence of its judiciary, while not unnecessarily curtailing protected speech.” See Cleary, *supra* note 57.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. Republican Party of Minn. v. White, 536 U.S. 765, 770 (2002).

67. *Id.*

election.”⁶⁸ Rejecting the Eighth Circuit’s narrow construction of the statute, the majority opinion goes on to say that:

. . . the announce clause prohibits a judicial candidate from stating his views on any specific nonfanciful legal question within the province of the court for which he is running, except in the context of discussing past decisions – and in the latter context, as well, if he expresses the view that he is not bound by stare decisis. . . .⁶⁹

Therefore, the majority reasoned that the “announce” clause placed burdens on candidates’ speech that addressed exactly those factors that qualified them for the position: speech that is fundamental in a democratic society and therefore deserves strict scrutiny under the First Amendment.⁷⁰ Strict scrutiny would require the state to demonstrate that the limits on candidate speech were narrowly fashioned to serve a compelling state interest.⁷¹ The decision then considered two possible compelling interests: preserving the impartiality of the judiciary and preserving the appearance of the impartiality of the judiciary.⁷²

Offering three definitions of “impartiality,” the majority favored the traditional notion of impartiality, or a “lack of bias for or against either party to the proceeding.”⁷³ Under this definition, “impartiality” implies that the judge is open-minded or evenhanded, and does not enter the proceedings with predetermined support for one *party* over the other.⁷⁴ The majority opinion then set out to explain that, using this definition, the “announce” clause fails to survive strict scrutiny because the language used in Canon 5 is not narrowly tailored to serve a compelling state interest in promoting the actual impartiality or the appearance of impartiality of the judiciary.⁷⁵ In fact, it serves no interest in preserving the actual or perceived impartiality of the judiciary because the “announce” clause does not limit what judicial candidates can say about parties to a case – only what they can say about issues.⁷⁶ The majority goes on to say that the “announce” clause actually inhibits speech precisely because it assumes that any statement about *issues* would automatically result in a bias against any *party* that argues the opposite

68. *Id.*

69. *Id.* at 773.

70. *Id.* at 774.

71. Republican Party of Minn. v. White, 536 U.S. 765, 774 (2002).

72. *Id.* at 775.

73. *Id.*

74. *Id.* at 776-77.

75. *Id.* at 777.

76. Republican Party of Minn. v. White, 536 U.S. 765, 776 (2002).

side of these issues.⁷⁷ Noting the tension between the popular election of judges and the limits imposed by the “announce” clause that prohibit any discussion of issues that would be relevant to voters’ decision-making in judicial elections,⁷⁸ the majority declared the provision unconstitutional.

The Supreme Court recognized concerns about the implications of the decision in the struggle to weigh the value of electoral accountability against the imperative of a fair and impartial judicial branch. Justice Scalia’s majority opinion noted that, “[the justices in the majority] neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office.”⁷⁹ Justice O’Connor, however, spoke directly to the importance of judicial selection processes in promoting democratic ideals, implying that allowing democratic accountability inevitably compromises judicial impartiality.⁸⁰ In her concurring opinion, she wrote that:

We of course want judges to be impartial, in the sense of being free from any personal stake in the outcome of the cases to which they are assigned. But if judges are subject to regular elections they are likely to feel that they have at least some personal stake in the outcome of every publicized case.⁸¹

Justice O’Connor added that:

. . . . Minnesota has chosen to select its judges through contested popular elections instead of through an appointment system or a combined appointment and retention election system along the lines of the Missouri Plan. In doing so the State has voluntarily taken on the risks to judicial bias described above. As a result, the State’s claim that it needs to significantly restrict judges’ speech in order to protect judicial impartiality is particularly troubling. If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.⁸²

The Court’s decision in *White* has significant implications for the system of judicial elections.

77. *Id.* at 777. It is important to note that Justice Stevens, in his dissent, argued that the emphasis on parties to a case is mistaken and that the definition of impartiality adopted by the majority is the narrowest possible definition. *Id.* at 800-01 (Stevens, J., dissenting).

78. *Id.* at 787.

79. *Id.* at 783.

80. *Republican Party of Minn. v. White*, 536 U.S. 765, 788-89 (2002).

81. *Id.* at 788.

82. *Id.* at 792.

IV. THE “FALLOUT” FROM *WHITE*

Minnesota’s “announce” clause was a particularly broad variation of the provision proposed by the ABA in 1972.⁸³ However, the Supreme Court’s reasoning could easily be adopted to strike down narrower language (or other provisions) used by other states. Therefore, beyond the immediate impact for Minnesota and the eight other states that have adopted identical language in their own Codes of Judicial Conduct, the *White* decision has ramifications for all thirty-nine states that use some form of judicial elections. Following the ruling, scholars and court-watchers across the country publicly ruminated about the implications. A few common themes emerged in their assertions.

First, there was (and is) general agreement that *White* is likely to produce longer, more contentious, and more costly judicial campaigns. Deborah Goldberg, of the Brennan Center for Justice at NYU School of Law, speculated that a new freedom to speak out on disputed legal and political issues would allow judicial candidates an opportunity to attract more special interest money.⁸⁴ Similarly, she suggested that candidates may see more pressure from campaign donors seeking to persuade judicial candidates to adopt positions consistent with the donors’ interests.⁸⁵ Some observers went so far as to say, for example, that:

...by loosening standards for campaign speech, the *White* decision lit a time bomb that could drive more big money into campaigns, give special interests new powers to pressure judicial candidates, and tempt judicial candidates to pander to special interests or face their wrath. In other words, the *White* decision will accelerate the growing threat to our courts, and to the 86% of America’s state judges who must stand for election.⁸⁶

They go on to say that:

Under *White*, the future of judicial campaigns is a New Dating Game where special interests quiz judges to find out who will meet their litmus tests, and judges are pressured to provide answers that will please their suitors. At stake: big money, powerful endorsements, and

83. ANNOTATED MODEL CODE OF JUDICIAL CONDUCT (2004). The ABA modified the model code in 1972 and 1990. After the *White* decision, the ABA published an amendment that changes the wording of the “commit” clause. MODEL CODE OF JUDICIAL CONDUCT, Amendments (Aug. 2003) (defining impartiality and making changes to Canons 3 and 5).

84. Interview: *The new rules for judicial elections*, EYES ON JUSTICE (Justice At Stake, The Justice at Stake Newsletter, New York, N.Y.), September 12, 2002, at 2.

85. *Id.*

86. Deborah Goldberg et al., *The New Politics Of Judicial Elections* (2002), available at <http://www.justiceatstake.org/files/JASMoneyReport.pdf>, at 23 (last visited March 27, 2005).

platoons of grass roots support.⁸⁷

There was (and is) additional concern that the decision would corrupt the very foundation of the judicial branch by allowing judges to behave more as politicians. Robert Hirshon, president of the ABA when the decision was announced, declared it a “bad decision” that will “open a Pandora’s box.”⁸⁸ Hirshon went on to say that:

Now we are going to have judicial candidates running for office by announcing their positions on particular issues. They will know that the voters will evaluate their performance in office on how closely their rulings comport with those positions. This is not impartial justice.⁸⁹

Cynthia Gray, director of the Center for Judicial Ethics at The American Judicature Society, reacted by saying, “judges are supposed to decide the facts of a particular case, without thinking about what was promised during the campaign and how this will look in the press. . . . Integrity is important in all elected offices, but it is particularly important in judicial offices.”⁹⁰ Steven Lubet, a law professor at Northwestern University said, “it’s bad, bad, bad, because justices aren’t aldermen . . . you expect politicians to make promises, but judges should not make promises.”⁹¹ Georgetown Law Professor Roy Schotland concluded that:

the decision will make a change in judicial election campaigns that will downgrade the pool of candidates for the bench, reduce the willingness of good judges to seek reelection, add to the cynical view that judges are merely ‘another group of politicians,’ and thus directly hurt state courts and indirectly hurt all our courts.⁹²

Is the sky falling in on judicial elections? What are the practical effects of *White*? Pennsylvania can serve as a guidepost in predicting the practical effects on judicial campaigns. Prior to the *White* decision, Pennsylvania’s Code of Judicial Conduct included the “announce”

87. *Id.* at 24.

88. Robert E. Hirshon, *Statement re: Decision of the Supreme Court of the United States in the Case of Republican Party of Minnesota v. White* (June 27, 2002), available at <http://www.abanet.org/media/june02/hirshonkellyfinal0627.html> (last visited Feb. 13, 2005).

89. *Id.*

90. Jan Crawford, *Justices: States Can’t Block Judge Hopefuls’ Speech*, CHI. TRIB., June 28, 2002.

91. *Id.*

92. Roy A. Schotland, *Should Judges Be More Like Politicians?*, COURT REVIEW, Spring 2002, at 8.

clause; after *White*, this provision was struck from the Code.⁹³ Unlike most states, Pennsylvania holds judicial elections in odd-numbered years.⁹⁴ Therefore, unlike most states, Pennsylvania held judicial elections in 2003 – and became the first state to witness a full judicial campaign cycle in the post-*White* era.⁹⁵ In 2003, Pennsylvanians elected one Supreme Court justice and three Superior Court judges.⁹⁶ The 2003 Supreme Court race can give us some idea of what other states can expect in years to come.

The Pennsylvania Supreme Court race attracted more money than any other judicial contest in the 2002-2003 election cycle – a combined \$3.34 million was contributed to the two candidates.⁹⁷ Democrat Max Baer won the vacant Supreme Court seat against opponent Joan Orié Melvin, outspending the Republican by over \$400,000.⁹⁸ Forty-three percent of the contributions came from over 1,000 lawyers and law firms, a significant increase from their 10 percent share of all contributions in 2001.⁹⁹

Are these effects unique to Pennsylvania? Evidence from the 2004 judicial election cycle indicates that they are not. In fact, in 2004, judicial campaigns across the country saw increased spending and a bigger role for special interests. In Illinois, West Virginia, and Alabama, 2004 was the most costly judicial campaign cycle in those states' history.¹⁰⁰ In 2004, Justice At Stake monitored Supreme Court races around the country and concluded that

Candidates raised at least \$39 million for state Supreme Court races,

93. The Pennsylvania Supreme Court officially revised Pennsylvania's Canon 7 on November 21, 2002. See *In re* Amendment of Canon 7B(1)(c) of the Code Judicial Conduct, No. 246 Magisterial Docket, No. 1 (Pa. 2002), available at <http://www.courts.state.pa.us/OpPosting/Supreme/out/246jad-1.pdf> (last visited Mar. 27, 2005). The revision does include a "pledges or promises" clause and a "commit" clause and it restricts other political activities of judicial candidates. See *In re* Amendment of Rule 15D(3) of the Rules Governing Standards of Conduct of District Judges, No. 137 Magisterial Docket, No. 1, Book 2 (Pa. 2002), available at <http://www.courts.state.pa.us/Index/Aopc/PressReleases/137mag.pdf> (last visited Mar. 27, 2005).

94. See Pennsylvanians for Modern Courts, *As Pennsylvania Goes, So Goes the Nation: A Case Study of a Supreme Court Election in the Post-White Era*, available at <http://www.pmconline.org/pagoesnation.htm> (last visited Mar. 27, 2005).

95. *Id.*

96. *Id.*

97. Samantha Sanchez, *A Costly Contest: Pennsylvania 2003 Supreme Court Race Tops all 2001-02 Judicial Races in Fundraising*, THE INSTITUTE ON MONEY IN STATE POLITICS, May 19, 2004, at 2.

98. *Id.*

99. *Id.* at 2-3.

100. Press Release, Justice at Stake, Justice At Stake Assesses Highs and Lows From 2004 State Supreme Court Election Campaigns (Nov. 23, 2004) (on file with author).

compared to the \$29 million raised by candidates in 2002. . . . Spending on television advertising spread to 15 states in 2004, nearly a four-fold jump from 2000, when only four states had TV ads run in their Supreme Court races. . . at least \$21 million was spent on those TV ads, more than double the \$10 million spent two years ago.¹⁰¹

With more money being spent than ever before, and campaign contributions from special interests becoming more important in judicial campaigns, states are faced with a significant problem. Public esteem is likely to drop further¹⁰² and the integrity of the judiciary itself is threatened. As the influence of *White* is felt and candidates' First Amendment rights conflict with the due process rights of litigants, the stage is set for significant reform.

V. THE IMPLICATIONS FOR REFORM OF JUDICIAL ELECTIONS

Where does this leave state judicial selection today? Over the past two and a half years, the states have wrestled with *White* to determine what restrictions are allowed. In doing so, state policy-makers must understand and respond to judicial decisions contesting other restrictions on judicial campaign conduct while still recognizing the needs and demands of the public and judicial candidates. Each is considered in turn.

A. *Subsequent Judicial Decisions*

The decision in *White* expressly addressed the “announce” clause and specifically sidestepped any of the other provisions included in Minnesota’s Code of Judicial Conduct, including the “commit” clause, the “pledges or promises” clause, and restrictions on candidates’ personal solicitation of campaign funds. In the wake of *White*, judicial candidates around the country have used that decision to challenge these provisions and others like them. How these cases are decided will help explain where we go from here.

In *Weaver v. Bonner*, the U.S. Court of Appeals for the Eleventh Circuit considered the constitutionality of two provisions included in Georgia’s Code of Judicial Conduct.¹⁰³ The Special Committee on Judicial Election Campaign Intervention reprimanded George Weaver

101. *Id.*

102. See Brennan Center for Justice, *supra* note 30.

103. *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002).

for a TV ad he ran that discussed the views of his opponent.¹⁰⁴ Under Canon 7(B)(1)(d) of Georgia's Code of Judicial Conduct, candidates are prohibited from making false and misleading statements.¹⁰⁵ Weaver challenged Canon 7(B)(1) as well as Canon 7(B)(2) which prohibited candidates from personally soliciting campaign contributions.¹⁰⁶ The court ruled that, based on the rationale presented in *White*'s majority opinion, both provisions were unconstitutional.¹⁰⁷

In 2003, a federal judge in New York's northern district considered the case of *Spargo v. New York State Commission on Judicial Conduct*.¹⁰⁸ The Commission accused Judge Spargo of misconduct, including charges that he "failed to observe high standards of conduct . . . ; failed to avoid impropriety and the appearance of impropriety . . . ; failed to respect and comply with the law . . . ; and failed to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary" ¹⁰⁹ District Court judge David Hurd ruled that the provisions that prohibited judges from participating in inappropriate political activity were overly broad, and, relying on the reasoning in *White*, declared them unconstitutional.¹¹⁰ The U.S. Court of Appeals for the Second Circuit vacated and remanded this decision in December 2003.¹¹¹

Also in 2003, the Florida Supreme Court considered a case in which Patricia Kinsey asked the court to strike down Canon 7 of the Florida Code of Judicial Conduct.¹¹² Kinsey was accused of encouraging the impression that she was tough on crime and would support the police in criminal proceedings.¹¹³ The Florida Supreme Court ruled that her campaign statements did violate Canon 7, and that Florida's "pledges or promises" clause and "commit" clause were narrowly tailored enough to stand up against constitutional challenge.¹¹⁴

The New York Court of Appeals considered two similar cases in

104. *Id.* at 1317.

105. *Id.* at 1319.

106. *Id.* at 1318.

107. *Id.* at 1319-23.

108. *Spargo v. N.Y. State Comm'n on Judicial Conduct*, 244 F. Supp. 2d 72 (N.D.N.Y. 2003), vacated by *Spargo v. N.Y. State Comm'n on Judicial Conduct*, 351 F.3d 65 (2d Cir. 2003).

109. *Id.* at 79.

110. *Id.* at 92.

111. *Spargo v. N.Y. State Comm'n on Judicial Conduct*, 351 F.3d 65 (2d Cir. 2003), cert. denied, 124 S. Ct. 2812 (2004).

112. See *In re Kinsey*, 842 So. 2d 77 (Fla. 2003).

113. *Id.* at 87-92.

114. *Id.*

2003, *In re Raab* and *In re Watson*.¹¹⁵ In both cases, the State's highest court was asked to assess New York's Code of Judicial Conduct (specifically, the "pledges or promises" clause and restrictions that bar judicial candidates from inappropriate political activities) in light of *White*.¹¹⁶ The court held that both provisions were acceptable because they were narrow enough to serve a compelling governmental interest.¹¹⁷

The wave of litigation that has followed *White* is not likely to end anytime soon. In fact, one notable feature of the post-*White* litigation is the increased presence of interest groups. In September of 2004, the Family Trust Foundation, a conservative group in Lexington, Kentucky, filed a lawsuit in Federal District Court alleging that the State's "commit" clause, which bars candidates from making statements that "commit or appear to commit candidates with respect to cases, controversies or issues that are likely to become before the court," is unconstitutional under the First Amendment guarantees of freedom of speech and freedom of association.¹¹⁸ The suit began when the group sought to collect and distribute information about judicial candidates' political views.¹¹⁹ Family Trust sent out surveys that asked candidates about a wide variety of issues, including cloning, pornography, and public displays of the Ten Commandments, and received few responses.¹²⁰ Most judicial candidates declined to respond because they believed that they would be violating Kentucky's judicial canon if they did so.¹²¹ Executive Director Kent Ostrander summarized the position of the group: "The current powers that be in Kentucky place restrictions on what a judicial candidate can say, which, in other words, limits their free speech. . . and that, in turn, limits the knowledge that the voters need to make a wise decision."¹²² The District Court granted an emergency injunction, ruling that the "commit" clause (Canon 5B(1)(c)) did violate the U.S. Constitution, and the federal appeals court upheld the decision on October 28, 2004.¹²³

Plaintiffs have brought similar cases across the country, most

115. See *In re Raab*, 100 N.Y.2d 305 (N.Y. 2003); *In re Watson*, 100 N.Y.2d 290, 302 (N.Y. 2003).

116. *Raab*, 100 N.Y.2d 305 at 312-13; *Watson*, 100 N.Y.2d at 299-01.

117. *Raab*, 100 N.Y.2d 305 at 315; *Watson*, 100 N.Y.2d 290 at 303.

118. Family Trust Found., Inc. v. Wolnitzek, 345 F. Supp. 2d 672 (E.D. Ky. 2004).

119. Beth Musgrave, *Group Sues for Judges' Free Speech*, LEXINGTON HERALD-LEADER, Sept. 29, 2004.

120. *Id.*

121. *Id.*

122. *Id.*

123. Family Trust Found. of Ky., Inc. v. Ky. Judicial Conduct Comm'n, 388 F.3d 224, 226 (6th Cir. 2004).

notably in North Dakota, Indiana, and Alaska. Emily Heller notes a new trend of multi-state litigation, whereby groups hope to use surveys to challenge judicial campaign restrictions in several states at once.¹²⁴ James Bopp, Jr. is lead counsel in the four cases arguing that the Supreme Court's reasoning in *White* should be extended to "commit" clauses in the states.¹²⁵ As candidates and groups continue to challenge state restrictions on judicial candidates' speech, and court decisions force the states to loosen their Codes to permit more candidate speech, the states will need to develop new tools to preserve the impartiality of the judiciary. As they sort through the judicial decisions that have shaped a new post-*White* electoral environment, states face difficult decisions about how to satisfy the public's demands for electoral accountability while still insulating the judiciary from overt political influence that would undermine the unique functional role of the courts.

B. The Needs and Demands of the Public and Judicial Candidates

In striking the balance between democratic accountability and the need to maintain the independence and impartiality of the judiciary, the public definitely seems to favor the latter.¹²⁶ Eighty percent of surveyed citizens believe that judges in their state should be elected, and 70 percent report being convinced that "public criticism of judges makes judges more accountable and leads to better decisions."¹²⁷ Nonetheless, while 59 percent of respondents to a Justice at Stake survey in the fall of 2001 report that they "almost always" vote in judicial elections, only 13 percent say that they have "a great deal of information" about judicial candidates.¹²⁸ To complicate matters, poll data from 2001 indicated that the public is wary of the implications of judicial elections.¹²⁹ In fact, 81 percent of respondents agree that "Courts are unique institutions that should be free of political *and public* pressure."¹³⁰ Similarly, only 6 percent of respondents think that campaign contributions do not affect

124. Emily Heller, *Judicial Races Get Meaner*, NATIONAL LAW JOURNAL (Oct. 25, 2004), available at <http://www.law.com/jsp/article.jsp?id=1098217051328> (last visited Mar. 27, 2005).

125. *Id.*

126. David B. Rottman, *The White Decision in the Court of Public Opinion: Views of Judges and the General Public*, COURT REVIEW, Spring 2002, at 21.

127. *Id.*

128. *Id.* at 20.

129. *Id.* at 19.

130. *Id.* (emphasis added). The article examines a poll conducted by the Justice at Stake campaign in the Fall of 2001. Justice O'Connor cited this polling data in her concurring opinion in *White*. Brief for the Brennan Center for Justice at New York University School of Law as Amicus Curiae in Support of Respondents, *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

judicial decision-making¹³¹ and 80 percent agree that judges should be “prohibited from presiding over and ruling in cases where one of the sides has given money to their campaigns.”¹³²

The public has contradictory expectations and demands for the judicial branch, making it difficult for the states to satisfy their citizens when it comes to judicial selection. As judicial elections become more contentious, more expensive, and more political, the public is likely to become disillusioned.

For their part, judicial candidates are also divided. After the Supreme Court decided *White* in June of 2002 (in the middle of the campaign season in most states), candidates across the country were faced with a new electoral environment. As journalists reported the story, they sought comment from candidates. These comments, as a whole, reveal the same conflicting views expressed by voters. For example, Edwin Pittman, Chief Justice of the Mississippi Supreme Court, in a statement about how the *White* decision would affect elections in Mississippi (a state that had removed the “announce” clause from its own Code of Judicial Conduct in April of 2002, less than two months before the Supreme Court handed down *White*) said: “First, I want clean, good, desirable campaigns, and I want men and women who want to be a judge to adopt judicious speech and attitudes. . . on the other hand, I’ve always believed and still believe in open government. Open discussion is good for the public that has to vote.”¹³³ Similarly, in Kentucky, Supreme Court candidate Will T. Scott, said, “he thinks the majority of people like the fact that judicial candidates don’t take positions or make promises” and that, “he returned the Family Trust survey [unanswered] because he thought his answers might violate judicial ethics laws.”¹³⁴ At the same time, he admits that he “understands why people would want to know more about a judicial candidate beyond statements about being fair and impartial.”¹³⁵

Survey evidence indicates, however, that judges are also concerned about the presence of big money and special interests in the judicial arena.¹³⁶ Sixty-one percent of judges polled by Justice at Stake feel that the “tone of judicial campaigns” has gotten worse over the past 5

131. Rottman, *supra* note 126, at 22.

132. *Id.* at 23.

133. Emily Wagster, *Miss. Judicial Candidates Less Restricted*, MEMPHIS COMMERCIAL APPEAL, June 28, 2002.

134. Musgrave, *supra* note 119.

135. *Id.*

136. Rottman, *supra* note 126, at 17.

years.¹³⁷ On the role of money, 57 percent of state Supreme Court justices, 49 percent of intermediate appeals court judges, and 40 percent of trial court judges report that they feel a “great deal” of pressure to raise campaign money.¹³⁸ Rottman concludes that “the result is a complex image of judges. Both judges and the public hold equivocal views of where the judge as decision-maker intersects with the judge as fundraiser and campaigner.”¹³⁹

With the rise of litigation, the conflicting state and federal court rulings, evidence of unhappy judges, and a public that favors elections but is deeply cynical about the side-effects, states face a complicated political and legal environment as they seek to find a legally acceptable—yet practical—way to satisfy competing demands.

VI. HOW TO STRIKE A BALANCE

So what is a state to do? States have responded to *White* in a number of ways. In assessing the trends of state response, it is difficult to draw conclusions because many states are trying to reconcile their early approaches with new legal precedent. Nonetheless, I outline a few general categories of state response.

First, states are revising their Codes of Judicial Conduct.¹⁴⁰ Immediately after the *White* decision was announced, states started to revise their Codes of Judicial Conduct.¹⁴¹ In Missouri, one of the eight states with the “announce” clause, the State Supreme Court repealed the provision in July of 2002, just after it announced that it would not enforce the provision for the remainder of the 2002 judicial elections.¹⁴² In November of 2002, Pennsylvania amended its Code of Judicial Conduct to remove the “announce” clause.¹⁴³ Texas changed its Code of Judicial Conduct after the *White* decision to repeal a provision that prohibited statements that disclosed candidates’ opinions “on any issue that may be subject to judicial interpretation.”¹⁴⁴ Instead, Texas adopted

137. *Id.*

138. *Id.*

139. *Id.* at 16.

140. After the *White* decision, the ABA set up its own committee to review and revise the model code. The revisions were put into effect in 2003. See ABA BACKGROUND PAPER: JOINT COMMISSION TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, available at <http://www.abanet.org/judicialethics/about/background.html> (last visited March 27, 2005).

141. Heller, *supra* note 124.

142. *In re* Enforcement of Rule 2.03, Canon 5.B(1)(c), Campaign Conduct (Mo. 2002).

143. See *supra* note 93.

144. Cynthia Gray, *The States’ Response to Republican Party of Minnesota v. White*, 86 JUDICATURE 163 (November-December 2002).

the following language:

A judge or judicial candidate shall not make pledges or promises of conduct in office regarding pending or impending cases, specific classes of cases, specific classes of litigants, or specific propositions of law that would suggest to a reasonable person that the judge is predisposed to a probable decision in cases within the scope of the pledge.¹⁴⁵

Among the most drastic alterations of a state code, North Carolina changed its code to repeal the “pledges or promises” clause and to allow candidates greater freedom to endorse other candidates and directly seek campaign contributions.¹⁴⁶ The justices justified these changes as reasonable responses to the decisions in *White*, *Bonner*, and *Spargo*.¹⁴⁷ A number of other states, most notably Missouri, Georgia, Ohio, Indiana, Kentucky, and Florida issued a series of advisory opinions clarifying the implications of *White* for their Judicial Codes.¹⁴⁸

In August of 2002, the California Commission on Judicial Performance “dismissed a proceeding against a former judge charged with campaign speech violations.”¹⁴⁹ Similarly, the Alabama Judicial Inquiry Commission withdrew an advisory opinion that suggested that judicial candidates should not respond to a questionnaire from the Christian Coalition.¹⁵⁰ In Ohio, the Supreme Court Board of Commissioners on Grievances and Discipline offered an advisory opinion, including eleven guidelines for judicial candidates.¹⁵¹

Many of these advisory opinions simply stated that the state Code would not be altered as a result of *White*, but given ongoing legal battles in the courts, it is unclear whether or not existing provisions like the “pledges or promises” clause and the “commit” clause will withstand judicial scrutiny. In light of *White* and cases spawned by *White*, states will be in a continual state of uncertainty regarding the constitutionality of their speech restrictions.

Another method states have chosen to deal with the decision in *White* is to create advisory boards that can offer specific advice to

145. *Id.*

146. Bill Kenworthy, Judicial Campaign Speech at the First Amendment Center, *available at* http://www.firstamendmentcenter.org/speech/campaignfinance/topic.aspx?topic=judicial_speech (last visited March 27, 2005).

147. *Id.*

148. Gray, *supra* note 144, at 163.

149. Kenworthy, *supra* note 146.

150. Gray, *supra* note 144, at 164 (citing Alabama Advisory opinion 00-763).

151. *Id.* (citing 2002 Ohio Griev. Discip. LEXIS 11 (Ohio Griev. Discip. 2002)).

specific candidates during the campaign. In Mississippi, the Code of Judicial Conduct was changed in April of 2002, two months before the Supreme Court's decision in *White*.¹⁵² Mississippi retained its "commit" clause and its "pledges or promises" clause, but it also established the Special Committee on Judicial Election Campaign Intervention.¹⁵³ The Committee's five members are charged with the task of reviewing allegations of misconduct.¹⁵⁴ By setting up official campaign conduct committees, or allowing the bar association to establish bar association committees, states can deal with allegations of wrongdoing or complaints in a timely and organized way.

Other options are available. States may choose to allow looser Canons while setting and enforcing tighter standards regarding recusal. This response was suggested by Justice Kennedy in his concurring opinion, where he wrote that states "may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards."¹⁵⁵ The ABA's Standing Committee on Judicial Independence adopted this option in its suggestions for revisions to the Model Code.¹⁵⁶

One state, North Carolina, has found considerable success in implementing public financing of judicial campaigns, an alternative that preserves democratic accountability in the judiciary but eliminates the worst effects by limiting the influence of campaign contributions by special interests.¹⁵⁷

Alternatively, states may opt to simply bypass the electoral process altogether. It is not unreasonable to consider that if we move further down the path of unlimited campaign speech, we may have no other alternative but to choose between accountability and independence rather than strike a balance between them. If this comes to pass, there is

152. Edwin Pittman Chief Justice of the Mississippi Supreme Court at the Mississippi Bar Association meeting, *Candidate Free Speech Ruling Does Not Affect Mississippi Code of Judicial Conduct* (July 2002), available at <http://www.mssc.state.ms.us/news/07.10.02code.htm> (last accessed March 27, 2005).

153. *Id.*

154. *Id.*

155. *Republican Party of Minn. v. White*, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring).

156. American Bar Association Standing Committee on Judicial Independence, Standing Committee on Ethics and Professional Responsibility, Judicial Division Coalition for Justice, Standing Committee on Federal Judicial Improvements, *Report To The House Of Delegates Recommendation* (Aug. 2003), available at <http://www.abanet.org/judind/judiciaethics/amendments.pdf> (last accessed Mar. 15, 2005).

157. N.C. Bucks Trend of Nasty Judicial Elections, THE REFORM LETTER (N.C. Ctr. for Voter Educ., Raleigh, N.C), Dec. 2004, available at <http://www.ncvotered.com/downloads/newsletter/dec2004.pdf> (last visited Mar. 15, 2005).

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no logical explanation for choosing accountability over independence. At heart, the state courts cannot continue to fulfill their function in a democratic society without the unique and indispensable independence that provides the cornerstone of judicial integrity.