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# NORTH CAROLINA IN THE POST *WHITE* DECISION WORLD: WHERE WE ARE, HOW WE GOT THERE, AND WHERE TO GO NEXT

J. CHRISTOPHER HEAGARTY\*

## I. INTRODUCTION

Of all the problems, both theoretical and practical, involved with the election of state judges, one area has received tremendous attention and discussion within the past two years – restrictions on judicial campaign speech. If the epicenter of this earthquake of debate was the U.S. Supreme Court decision in *Republican Party of Minnesota v. White*,<sup>1</sup> then North Carolina has surely become the site of an aftershock. Shortly after the *White* decision was announced, and following the conclusion of a state Supreme Court race in which compliance with the North Carolina Code of Judicial Conduct was made a significant campaign issue,<sup>2</sup> North Carolina's

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1. 536 U.S. 765 (2002).

2. See, e.g., Matthew Eisley, *Complaint Filed Against Judge*, NEWS & OBSERVER (Raleigh, N.C.), July 12, 2002, at 5B; Matthew Eisley, *Judging Judges, Part 2*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 23, 2002, at 5B [hereinafter Eisley, *Judging Judges*]; Matthew Eisley, *Sharply Making their*

Supreme Court amended the state's judicial canon of ethics.<sup>3</sup>

What do these changes mean in terms of the conduct of North Carolina's judicial elections and the preservation of concepts of judicial independence and impartiality? This comment will review the reasons these changes were made, analyze the resultant positive and negative impacts on North Carolina's judicial elections, and examine reforms that might be enacted to counter the possible negative impacts. Upon examination of *White* and the changes in North Carolina's Code of Judicial Conduct, this comment will present possible avenues for keeping the symbolic "baby," a judicial election system free from real or perceived improper conduct, while throwing out the undesirable "bathwater" of unconstitutional restrictions on free speech. Specifically, this comment will make the case for the potential utility of judicial campaign conduct committees in promoting responsible and ethical judicial campaigns without violating First Amendment protections.

## II. THE *WHITE* DECISION & RESPONSE

At issue in *White* was the "announce clause" of Minnesota's judicial canon of conduct governing judicial campaign speech,<sup>4</sup> which was based on the American Bar Association's 1972 Model of Judicial Conduct.<sup>5</sup> The U.S. Supreme Court found the announce clause unconstitutional under the First Amendment.<sup>6</sup> Shortly after the ruling, some of America's most prominent legal organizations expressed what could politely be called "concern" over the decision. Robert Hirshon, President of the American Bar Association, called it "[a] bad decision," elaborating that "[i]t will open a Pandora's box. . . . It is not the type of justice the American

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*Cases*, NEWS & OBSERVER (Raleigh, N.C.), Oct. 24, 2002, at 1B; Matthew Easley, *Voters in Dark About Judges' Ethical Records*, NEWS & OBSERVER (Raleigh, N.C.), Oct. 14, 2002, at 1A [hereinafter Easley, *Voters in Dark*].

3. See Order Adopting Amendments to the North Carolina Code of Judicial Conduct, (Apr. 2, 2003), available at <http://www.aoc.state.nc.us/www/public/aoc/NCJudicialCode.pdf> [hereinafter 2003 Judicial Code Amendments].

4. MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2000).

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

6. *Id.* at 788.

people want.”<sup>7</sup> Deborah Goldberg, Deputy Director of the Brennan Center for Justice at New York University School of Law, declared, “Today’s decision lowers the standards for judicial campaign conduct at exactly the wrong time.”<sup>8</sup> Geri Palast, Executive Director of the Justice at Stake Campaign, commented, “More candidates will be pressured to resort to politics as usual to become judges.”<sup>9</sup>

When North Carolina’s Supreme Court amended the state’s judicial ethical canon in the wake of *White* in order to “get ahead of a trend in federal court rulings and to avoid lawsuits over the state requirements,”<sup>10</sup> similar criticism was to follow. The amendments removed restrictive language in broader areas of judicial campaign speech, judicial fundraising, and partisan political activity by judges.<sup>11</sup> Defenders of the new code claimed that these changes were logical following the ruling in *White*, and that the changes were necessary to avoid any legal controversy over what candidates legally could or could not do.<sup>12</sup>

Critics of the new code, however, argued that the changes far exceeded what was required to comply with *White* and other court rulings and that it would encourage more politicking by judicial candidates.<sup>13</sup> In addition, the North Carolina code changes

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7. Press Release, Justice at Stake Campaign, Top Legal Organizations Express Concern About Impact of Supreme Court’s *White* Decision on Fair and Impartial Courts (June 27, 2002), available at [http://www.brennancenter.org/presscenter/releases\\_2002/pressrelease\\_2002\\_0525.html](http://www.brennancenter.org/presscenter/releases_2002/pressrelease_2002_0525.html).

8. *Id.*

9. *Id.*

10. Matthew Eisley, *Code Loosens Grip on Judges*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 20, 2003, at 1B.

11. See 2003 Judicial Code Amendments, *supra* note 3.

12. See Matthew Eisley, *Jurists Deplore Relaxed Rules*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 30, 2003, at 1B [hereinafter Eisley, *Relaxed Rules*]; Matthew Eisley, *Judicial Politics Get Look*, NEWS & OBSERVER (Raleigh, N.C.), Jan. 14, 2004, at 5B [hereinafter Eisley, *Judicial Politics*].

13. See Jack Betts, *Judges Face Temptations Under New Conduct Code*, CHARLOTTE OBSERVER, Apr. 13, 2003, at 5D; *Courts’ Integrity at Stake*, WINSTON-SALEM JOURNAL, Sept. 24, 2003, at 12A; *Unwise Judgment*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 27, 2003, at 22A; *From the Bench to the Gutter*, WILMINGTON MORNING STAR, Oct. 12, 2003, at 6E. See also Matthew Eisley, *Court: Judges May Speak Up*, NEWS & OBSERVER (Raleigh, N.C.),

drew negative reactions from nationally recognized commentators on judicial issues. Georgetown University law professor Roy Schotland, an advisor to the American Bar Association on judicial codes of conduct, decried them as “unbelievably extreme,” adding of the justices who revised them, “They’ve said, ‘Let’s have a jungle.’”<sup>14</sup>

### III. THE IMPACT OF THE *WHITE* DECISION IN NORTH CAROLINA

There are countless examinations of the *White* decision and it is not the purpose of this comment to express support for, or opposition to, the decision, but rather to accept the decision and look at *White*-friendly options for addressing concerns over improper campaign speech. It is necessary, however, to provide some background information to help develop the context for the comment’s proposed actions.

What exactly does the *White* decision mean? Specifically, it holds that the announce clause of Minnesota’s Code of Judicial Conduct violates the First Amendment.<sup>15</sup> The announce clause, as defined in the case, prohibits a “candidate for a judicial office” from “announc[ing] his or her views on disputed legal or political issues.”<sup>16</sup> As suggested by the reaction of opinion leaders within the legal community,<sup>17</sup> the impact of the decision reaches far beyond Minnesota. Of the almost 9,750 state appellate court and general jurisdiction trial court judges in America, over 8,500 face some form of election and over 7,250 stand for contestable election.<sup>18</sup> Thus, the constitutionality of permissible speech in judicial campaigns effects, at some level, over a majority of all state judges. This is not to say that *White* had a direct effect on all of these judges. In fact, only eight states had some version of the specific “announce clause”

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June 28, 2002, at 14A.

14. Matthew Easley, *Ethics Rules Panned*, NEWS & OBSERVER (Raleigh, N.C.), Oct. 9, 2003, at 5B.

15. Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002).

16. *Id.* at 768.

17. See Press Release, Justice at Stake Campaign, *supra* note 7.

18. A.B.A. TASK FORCE ON LAWYERS’ POLITICAL CONTRIBUTIONS, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYERS’ POLITICAL CONTRIBUTIONS 69, 73 (1998).

language struck down by the U.S. Supreme Court.<sup>19</sup> However, the *White* decision has been used to challenge other restrictions on campaign speech<sup>20</sup> and to justify changes and revisions to state codes of judicial conduct, as best evidenced by the example of North Carolina.<sup>21</sup>

North Carolina's Supreme Court changed the state's ethical canons following the *White* decision,<sup>22</sup> even though the state had already removed the announce clause from its code of conduct in 1997.<sup>23</sup> State judicial candidate J. Mark Brooks challenged the Code's constitutionality after he was reprimanded by the North Carolina State Bar for violating Canon 7B(1)(c) of the Code of Judicial Conduct with his 1996 campaign statements that he was "pro-life."<sup>24</sup> Brooks was granted a temporary restraining order on the State Bar's action on October 18, 1996, by U.S. District Court Judge Frank Bullock, Jr., who wrote "[t]he public has an interest in knowing the views of candidates for elective office, and an overly broad and vague restriction of voter information, applied in an uneven and inconsistent manner, frustrates this interest and causes candidates to refrain from expressing constitutionally protected ideas."<sup>25</sup> But Bullock later reversed himself and on October 28, 1996, dissolved the temporary restraining order and wrote: "While the public has an interest in knowing the views of candidates for

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19. J.J. GASS, AFTER *WHITE*: DEFENDING AND AMENDING CANONS OF JUDICIAL CONDUCT 2 (2004), available at <http://www.brennancenter.org/resources/ji/ji4.pdf>.

20. See *Smith v. Phillips*, No. CIV.A.A-02CV111JRN, 2002 WL 1870038 (W.D. Tex. Aug. 6, 2002).

21. See *Eisley*, *supra* note 10; 2003 Judicial Code Amendments, *supra* note 11.

22. See 2003 Judicial Code Amendments, *supra* note 11.

23. See Order Adopting Amendments to the Code of Judicial Conduct, 346 N.C. 806 (1997) [hereinafter 1997 Judicial Code Amendments]; see also Joseph Neff, *Judicial Elections Ungagged*, NEWS & OBSERVER (Raleigh, N.C.), July 16, 1997, at 1A.

24. Amy M. Craig, *The Burial of an Impartial Judicial System: The Lifting of Restrictions on Judicial Candidate Speech in North Carolina*, 33 WAKE FOREST L. REV. 413, 426-27 (1998).

25. *Brooks v. N.C. State Bar*, No. CIV.A.2:96CV00857, 1996 U.S. Dist. LEXIS 16099 (M.D.N.C. Oct. 18, 1996) (order granting temporary restraining order).

elective office, the public also has a significant interest in elections in which the rules are applied equally to all candidates.”<sup>26</sup> Judge Bullock directed the parties to bring all other interested parties before the court so that a trial on the merits could determine the ultimate constitutionality of Canon 7B(1)(c).<sup>27</sup> Threatened with the possibility that a federal judge might declare their state Judicial Code unconstitutional, the North Carolina Supreme Court met in May 1997 to revise Canon 7B(1)(c) and removed the announce clause—the section prohibiting discussion of legal or political issues.<sup>28</sup>

Though *Brooks v. North Carolina State Bar*<sup>29</sup> was settled before a ruling was made, the actions by the North Carolina Supreme Court to change the codes of conduct did in fact change the way judges campaigned in North Carolina, with some judicial candidates taking advantage of this change in the very next election.<sup>30</sup> Whether removal of the clause was a positive or negative development is a matter of debate,<sup>31</sup> but many judges, as I have personally observed in my professional role, continue to refrain from discussing their personal views on issues that might come before them in court.<sup>32</sup> Accordingly, it is appropriate to ask whether the *White* decision actually necessitated a change to North Carolina’s judicial canons.

When the *White* decision was handed down, North Carolina had just emerged from a Supreme Court race in which accusations of violating the state’s judicial canon of ethics had been made

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26. *Brooks v. N.C. State Bar*, No. CIV.A.2:96CV00857, 1996 U.S. Dist. LEXIS 16447 at \*5 (M.D.N.C. Oct. 28, 1996) (order dissolving temporary restraining order).

27. *Id.*

28. See Craig, *supra* note 24, at 430.

29. *Brooks*, 1996 U.S. Dist. LEXIS 16099.

30. *Judges Start to Speak Their Mind*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 21, 1997, at 3B.

31. For a more in-depth analysis of this code change and discussion of its potential negative effects, see Craig, *supra* note 24, at 426-36.

32. This is based on my own anecdotal knowledge and awareness as an observer of these races, and there is no evidence I can find to counter this claim. Some exceptions exist, but the vast majority of North Carolina judicial candidates have, in my opinion, practiced restraint in refraining from discussing their personal views on issues that might come before them in court.

against two incumbent appellate judges.<sup>33</sup> It is no exaggeration to claim that these accusations were one of the principal issues in that campaign, that both sides claimed the accusations were politically motivated, and that both sides thought that such tactics helped “drag judicial races further down into muck and mire.”<sup>34</sup> Yet, none of the charges of ethics code violations were based on the announce clause; rather, the accusations centered on issues such as political activity and maintaining a legal practice while serving as a judge.<sup>35</sup>

At the time of the *White* decision and prior to the 2003 revision, the North Carolina Code permitted judicial candidates to announce their views on issues but prohibited the more serious action of making pledges or promises of future rulings.<sup>36</sup> The *White* decision did not specifically address this type of prohibition. In fact, Justice Scalia wrote in the majority opinion that the

Minnesota Code contains a so-called ‘pledges or promises’ clause, which *separately* prohibits judicial candidates from making ‘pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office,’ . . . a prohibition that is not challenged here and on which we express no view.<sup>37</sup>

For those who read the *White* decision to mandate no more than the simple elimination of the announce clause, North Carolina’s changes to its Code of Judicial Conduct would seem to go too far. Cynthia Gray, director of the American Judicature

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33. Eisley, *Voters in Dark*, *supra* note 2 (“Republican Justice Bob Orr of the Supreme Court and Democrat Judge Bob Hunter of the Court of Appeals [were] investigated for judicial misconduct. . .”).

34. Eisley, *Judging Judges*, *supra* note 2 (quoting N.C. Supreme Court Justice Robert Orr).

35. See sources cited *supra* note 2 (describing the specific accusations against specific judges).

36. See 1997 Judicial Code Amendments, *supra* note 23 (amending Canon 7B(1)(c) to read that a candidate “should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; nor misrepresent his identity, qualifications, present position, or other fact.”).

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



Society's Center for Judicial Ethics in Chicago, claimed the court's action "[went] further than the U.S. Supreme Court decision in *Republican Party of Minnesota v. White*, any subsequent federal court decision, or any subsequent code revision by any other state supreme court."<sup>38</sup> J.J. Gass of the Brennan Center for Justice likens the amendments to the North Carolina Code to an attack on the canons "in the guise of 'reforms'" and argues, "North Carolina not only turned the political activity regulations [of judges] on their heads . . . but also eliminated the Pledge or Promise Clause and the ban on candidates' personally soliciting campaign contributions."<sup>39</sup> State lower court judges expressed their reaction through negative comments and formal statements of condemnation issued by governing associations representing the lower courts,<sup>40</sup> including a unanimous resolution from the Executive Committee of the Conference of Superior Court Judges to reconsider the revisions.<sup>41</sup> Even Chief Justice I. Beverly Lake of the North Carolina Supreme Court, who would champion and defend the amendments to the canons,<sup>42</sup> reportedly said at the time the *White* ruling was announced that he doubted whether the state's "remaining political restrictions in the Code of Judicial Conduct [would] fall as a result of the ruling."<sup>43</sup>

In defense of the revisions, the North Carolina Supreme Court justices have fallen back on a broader interpretation of the *White* decision, seeing it as larger than a simple repudiation of a statutory "announce clause." For some time, Chief Justice Lake has been skeptical, from a First Amendment standpoint, of the code provisions relating to campaign speech.<sup>44</sup> Although perhaps

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38. Eisley, *supra* note 14.

39. GASS, *supra* note 19, at 4.

40. See, e.g., Eisley, *Judicial Politics*, *supra* note 12 ("[G]overning associations of the state's Superior Court and District Court judges said the code overhaul had gone far beyond what was necessary and would undermine public confidence in the courts.").

41. See Eisley, *Relaxed Rules*, *supra* note 12.

42. Michael Dayton, *State Supreme Court Amends Judicial Code*, N.C. LAW. WKLY., Apr. 14, 2003, at 1.

43. See Eisley, *supra* note 13.

44. See Joseph Neff, *High Court Contenders Run Quiet Race*, NEWS & OBSERVER (Raleigh, N.C.), Nov. 2, 1992, at 2B.

difficult to reconcile with his earlier statement that the *White* ruling would not necessitate any change in the North Carolina Code, Chief Justice Lake, in response to criticism of the amended code, stated, "In light of the recent federal constitutional developments in this area, one thing is clear: if you are going to have judicial elections, you cannot deprive the candidates of their constitutional right to participate in the political process."<sup>45</sup> The immediate past-president of the American Bar Association and noted supporter of judicial selection reform, Alfred P. Carlton, a North Carolina resident, also took a supportive stand, opining that the court's amendments were a natural extension of the *White* decision.<sup>46</sup>

Indeed, the elimination of the prohibition against directly soliciting campaign funds came after the *Weaver v. Bonner*<sup>47</sup> decision, in which the Eleventh Circuit struck down Georgia's rule against personally soliciting campaign contributions from the bench.<sup>48</sup> Also at that time, a federal district judge had recently struck down New York's rules governing partisan political activity by judges.<sup>49</sup>

Yet, there is reason to believe that the trend toward striking down further regulation of judicial speech on First Amendment grounds may be reversing itself. Recently, challenges to pledges and promises clauses have been defeated in New York's highest court, the Court of Appeals. In *In re Watson*,<sup>50</sup> the court upheld the state's judicial canon prohibiting judges or judicial candidates from making promises to voters that would interfere with the impartial administration of justice. In *In re Raab*,<sup>51</sup> the court confirmed the constitutionality of the state judicial canon preventing judges from engaging in partisan politics. Additionally, as mentioned earlier, the U.S. Supreme Court in *White* only ruled on the announce clause and remanded the other provisions in question to the U.S. Court of

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45. Dayton, *supra* note 42.

46. Betts, *supra* note 13.

47. 309 F.3d 1312 (11th Cir. 2002).

48. *Id.* at 1319-20.

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

50. 794 N.E.2d 1 (N.Y. 2003) (*per curiam*).

51. 793 N.E.2d 1287 (N.Y. 2003).

Appeals for the Eighth Circuit.<sup>52</sup> The panel decision, issued in March 2004,<sup>53</sup> upheld Minnesota's judicial canon prohibiting judicial candidates from personally soliciting campaign contributions<sup>54</sup> and remanded the issue of restrictions on partisan political activity to the district court for reconsideration.<sup>55</sup> The panel decision was vacated by the Eighth Circuit sitting en banc, and rehearing was scheduled for October 2004.<sup>56</sup>

A final note about the interpretation of the *White* decision and the amendments to North Carolina's Code of Judicial Conduct deserves mention. Defenders of the new code suggest that Canon 1<sup>57</sup> provides sufficient protection against undesirable campaign behavior inappropriate to the office of judge, arguing that, though many prohibitions against specific types of campaign behavior were removed, this canon by itself can be utilized to bring complaints of inappropriate judicial conduct before the appropriate review commission. There is reason to believe, however, that Canon 1 would be insufficient were it used to bring disciplinary action against a judicial candidate for inappropriate behavior not specifically covered by Canon 7, Section C.<sup>58</sup> By removing the

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

53. *Republican Party of Minn. v. White*, 361 F.3d 1035 (8th Cir. 2004), vacated, 2004 U.S. App. LEXIS 10232 (8th Cir. May 25, 2004).

54. *Id.* at 1048-49.

55. *Id.* at 1047-49.

56. *Republican Party of Minn. v. Kelly*, No. 99-4021, 2004 U.S. App. LEXIS 10232 (8th Cir. May 25, 2004) (en banc).

57. Canon 1 provides, "A judge should uphold the integrity and independence of the judiciary. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, appropriate standards of conduct to ensure that the integrity and independence of the judiciary shall be preserved." N.C. CODE OF JUDICIAL CONDUCT Canon 1 (2003).

58. Canon 7(C) provides,

Prohibited political conduct. A judge or a candidate should not:

- (1) solicit funds on behalf of a political party, organization, or an individual (other than himself) seeking election to office, by specifically asking for such contributions in person, by telephone, by electronic media, or by signing a letter, except as permitted under subsection B of this Canon or otherwise within this Code;
- (2) endorse a candidate for public office except as

enumeration of so many disallowed activities and behaviors from Canon 7, there is little context for Canon 1 interpretation. A canon requiring only observance of “appropriate standards of conduct to ensure that the integrity and independence of the judiciary shall be preserved”<sup>59</sup> seems extremely vulnerable to challenge, in that it imposes overly broad and imprecise standards. Such was the case in Nevada, where similar language was struck down by a federal judge in *Mahan v. Nevada Judicial Ethics and Election Practices Commission*.<sup>60</sup> Furthermore, with the removal of so many of the prohibitions in Canon 7, and no comparable set of opinions, precedents, or rulings<sup>61</sup> on which North Carolina’s Judicial Standards Commission<sup>62</sup> might base their rulings, any sanction or disciplinary action for campaign behavior in violation of Canon 1, but not covered under Canon 7, Section C, likely would be ruled unconstitutional.<sup>63</sup>

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permitted under subsection B of this Canon or otherwise within this Code;

(3) intentionally and knowingly misrepresent his identity or qualifications.

*Id.* Canon 7(C).

59. *Id.* Canon 1.

60. No. CV-D-98-01663-DAE, 2000 WL 33937547, at \*\*5-8 (D. Nev. Mar. 20, 2000) (holding that the NEVADA CODE OF JUDICIAL CONDUCT Canon 5A(3)(a) (2000), which provides that a judicial candidate “shall maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary,” unconstitutionally burdened political speech).

61. Chief Justice Lake established the Advisory Committee on Permissible Political Conduct to help develop some guidelines for the codes, but the committee appears to be a work in progress. See Eisley, *Judicial Politics*, *supra* note 12.

62. The Judicial Standards Commission was established in 1973 “to consider complaints against judges and, where appropriate, to make recommendations for censure or removal.” JOAN G. BRANNON, *THE JUDICIAL SYSTEM IN NORTH CAROLINA* 26 (2000). This commission is the body charged with ruling on complaints based upon violations of the Judicial Canon of Ethics. See North Carolina Judicial Standards Commission, at <http://www.nccourts.org/Courts/CRS/Councils/Standards.asp> (last visited Jan. 17, 2005) (on file with the First Amendment Law Review).

63. *Cf. Mahan*, 2000 WL 33937548, at \*\*5-8 (holding that because Canon 5A(3)(a) failed to provide guidance as to specific prohibited conduct, it could not be used to enforce sanctions imposed on a judicial candidate for his

Thus, it would appear that the state faces a grave conflict. On one hand, the North Carolina Supreme Court has changed the canons governing campaign speech and political activity by judicial candidates. It extended First Amendment protection beyond the holding of *White* by amending the Code to allow not just announcements of judicial candidate's views on disputed issues, which were already permitted in North Carolina,<sup>64</sup> but to also permit previously prohibited judicial campaign activities of other types. Members of the court claim this was necessary in order to "avoid the piecemeal disassembly of the North Carolina Code of Judicial Conduct by federal courts."<sup>65</sup> On the other hand, in addition to challenging whether or not this was actually a necessary step, critics have charged that judicial impartiality is threatened by this new Code.<sup>66</sup> The conflict, therefore, is that if we accept the two premises—(1) that previously prohibited judicial campaign speech is constitutionally protected, but that (2) the amended, more permissive code may endanger candidates' independence and impartiality—then are North Carolinians faced with an inevitable, yet constitutionally protected, erosion of impartiality and judicial independence?

As stated, the purpose of this comment is not to judge either side of the argument over North Carolina's Code of Judicial Conduct. The amendments to North Carolina's Code of Judicial Conduct are in effect, and the North Carolina Supreme Court has indicated no intention of further amending the Code. Therefore, it is under these amended canons that judicial campaigns must be conducted. What remains to be determined is whether the impact of the amendments produces any undesirable, even if mandated,

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television ad depicting convicted criminals celebrating his opponent's chance of winning).

64. See 1997 Judicial Code Amendments, *supra* note 23.

65. Matthew Eisley, *Judges Balk at Too Much Freedom*, NAT'L L.J., Oct. 17, 2003, at 7 (quoting N.C. Supreme Court Justice Mark Martin).

66. In addition to the arguments cited above and throughout section III, many of the arguments used by critics of the amendments to North Carolina's ethical canons of judicial speech argue that preserving judicial impartiality ensures due process. For a more thorough examination of this argument, see Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059 (1996).

effects and, if so, what can legally be done to address these effects.

#### IV. UNFETTERED SPEECH IN JUDICIAL CAMPAIGNS: PROS & CONS

The debate over the regulation of judicial campaign speech is hotly contested. Professor Steve Lubet best captures the essence of the debate when he condenses it to two sentences:

There are those who say something like, "You don't lose your First Amendment rights simply because you are running for judge." The equally emphatic response is "Oh yes you do," followed by the necessary explanation of which, and how many, restrictions the First Amendment can tolerate when it comes to judicial campaigns.<sup>67</sup>

Lubet sums up the debate in a nutshell, but it would be a disservice to discuss how North Carolina might approach potential problems with judicial campaign speech without a closer look at some of the individual arguments by various scholars on this issue.

Is more speech in judicial campaigns a good or bad thing? The simple answer is that it depends upon the content of what is actually spoken. Explained another way, to quote Professor Stephen Gillers, it is "an 'on the one hand, on the other hand'" dilemma.<sup>68</sup> On the one hand, since voters elect judges, voters are naturally going to ask for information in order to cast a vote. That means voters are going to ask about the current political issues of the day or issues they have seen in court or in the media. On the other hand, as Gillers explains, judicial candidates should not make prejudicial or extrajudicial comments about the law, particularly regarding the hot button issues on which voters may query them.<sup>69</sup> So then, how are they to answer?

Gillers articulates the dilemma more succinctly in a *New*

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67. Steven Lubet, *Judicial Campaign Conduct Committees: Some Reservations About an Elegant Solution*, 35 IND. L. REV. 807, 808 (2002).

68. Stephen Gillers, "If Elected I Promise [\_\_\_\_\_]" - *What Should Judicial Candidates Be Allowed to Say?*, 35 IND. L. REV. 725, 725 (2002).

69. *Id.*

*York Times* article:

Free speech for judges brings benefits and dangers. On one hand judges can increase general understanding of the law and legal institutions. Silencing them would deny the public much wisdom. On the other hand, no asset is more precious to the judiciary than public confidence that judges are above the fray, with no personal stake in how cases are decided.<sup>70</sup>

Are not the two goals, unconflicted judges and informed voters, equally worthwhile?

Voters insist that they do not have enough information about judicial candidates and also express concern that judges are elected for reasons other than their qualifications.<sup>71</sup>

At the North Carolina Center for Voter Education, we strive to provide voters with more information about candidates so they can cast an informed vote. We try to explain to voters the potential conflicts that arise from judges taking stands or making campaign promises on controversial issues that may come before them. We try to explain to voters the concept of recusal. Yet, because judicial campaigns are becoming more and more like other political campaigns,<sup>72</sup> voters expect the same type of poll-generated, slogan-driven campaign materials and speeches that they are subjected to in other races. We conduct interviews of judicial

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70. Stephen Gillers, *For Justice to Be Blind, Must Judges Be Mute?*, N.Y. TIMES, Mar. 4, 2001, § 4, at 3.

71. J. Christopher Heagarty, *Public Opinion and an Elected Judiciary: New Adventures for Reform*, 39 WILLAMETTE L. REV. 1287, 1298-1299 (2003).

72. There are many sources for this observation. See Mike France & Lorraine Woellert, *The Battle Over the Courts – How Politics, Ideology, and Special Interests are Compromising the US Justice System*, BUSINESS WEEK, Sept. 27, 2004, at 36. See generally DEBORAH GOLDBERG & SAMANTHA SANCHEZ, JUSTICE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS - 2002 (May 2004); Christopher Heagarty, *The Changing Face of Judicial Elections*, 7 N.C. ST. BAR J. 20, 21-22 (Winter 2002); Owen G. Abbe & Paul S. Herrnson, *How Judicial Election Campaigns Have Changed*, 85 JUDICATURE 286 (May/June 2002); Nancy Perry Graham, *The Best Judges Money Can Buy*, GEORGE (Dec./Jan. 2001) at 76-77, 90-92.

candidates in which we try to ask questions that would be appropriate under the ABA's Model Canon of Ethics, and we also promote and manage an Internet-based voter guide that allows candidates to list their legal and judicial experience along with a candidate statement.<sup>73</sup> What they choose to say in their statement is their choice, subject to our word limit. Since the amendments to North Carolina's Code of Judicial Conduct in 2003, however, there is a marked difference in the content of these statements, with more candidates freely discussing their political affiliations and views on specific issues.<sup>74</sup>

Is this a good or a bad thing?

#### *A. Arguments for Unrestricted Speech*

One school of thought argues not just that restrictions on judicial campaign speech are unconstitutional, but that the discussion of personal views by candidates is a necessary benefit to voters. Constitutional law Professor Erwin Chemerinsky argues that an individual's views affect how he or she acts on the bench as a judge,<sup>75</sup> that those selecting a judicial candidate should consider the views of the individual as they relate to likely performance on the bench,<sup>76</sup> and that restrictions on speech, such as those found in the ABA's Model Code of Judicial Conduct, prevent candidates from expressing their views and prevent voters from learning these views.<sup>77</sup>

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73. N.C. Ctr. for Voter Education, *N.C. VOTERED Guide to Judicial Elections*, at <http://voterguide.ncvoterred.com> (last visited Jan. 12, 2005) (on file with the First Amendment Law Review).

74. See N.C. Ctr. for Voter Education, at <http://www.ncvoterguide.org> (last visited Jan. 5, 2005) (containing audio clips of interviews with judges and the 2004 N.C. voter guide) (on file with the First Amendment Law Review); N.C. Ctr. for Voter Education, at <http://www.ncvoterred.com> (last visited Jan. 5, 2005) (containing the 2002 N.C. voter guide) (on file with the First Amendment Law Review).

75. Erwin Chemerinsky, *Restrictions on the Speech of Judicial Candidates are Unconstitutional*, 35 IND. L. REV. 735, 736 (2002). Chemerinsky is now a professor at Duke Law School; at the time of the article he was on the faculty of the University of Southern California Law School.

76. *Id.* at 737.

77. *Id.* at 739.



Chemerinsky presents the case that it is better for attorneys and litigants to know where a judge stands on an issue in advance as it makes any pre-existing bias known, providing the opportunity to address bias if it exists.<sup>78</sup> I conclude that he would believe that restrictions on speech simply hide bias, that the elements of bias could exist in judges and, through canons restricting speech, this bias would remain hidden rather than revealed through campaign speech.

Mr. James Bopp of the James Madison Center for Free Speech<sup>79</sup> makes a bolder case:

Now then if you ask then the people of the state to select those judges, to pick among competing candidates for the responsibility of making law that will govern the people, it is quite appropriate for the people to say, or the Supreme Court to say as they did in *White*, that it is relevant, that the views of a judge on disputed legal and political issues is (sic) relevant to those who would make the law, influenced often by those views.<sup>80</sup>

Bopp further argues this case, asking, "What is the role of a judge?"<sup>81</sup> He answers that it is "to resolve disputed legal and political issues by announcing their views on those disputed legal and political issues."<sup>82</sup>

Bopp's first statement can be the subject of healthy debate. However, his second statement erroneously blends two concepts together, failing to make enough of a distinction between a judge resolving disputed legal and political issues through his or her application and understanding of relevant legal precedent versus a

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78. *Id.* at 745.

79. James Madison Center for Free Speech, *Corporate Officers, Directors, and General Counsel*, <http://www.jamesmadisoncenter.org/corporateofficers.html> (sic) (last visited Jan. 12, 2005) (on file with the First Amendment Law Review).

80. James Bopp, Remarks at First Amendment Law Review Symposium on Judicial Campaign Speech (Mar. 26, 2004) (on file with N.C. Center for Voter Education).

81. *Id.*

82. *Id.*

judge resolving disputed legal and political issues based upon his or her own personal views of those disputed issues. While it is possible those personal views could be based on legal precedent, it is equally possible that they may not be. Or, to use Gillers's<sup>83</sup> vehicle to explain this distinction, on the one hand a judge may have a deep-rooted moral opposition to the death penalty, but on the other hand a judge may respect her sworn oath to obey the laws and constitution of her state and her duty to apply the death penalty if it has been properly imposed by the government. In this example, there are two competing ways in which the judge may form her opinion, based on her view of the general issue or on her understanding of the law. She may not agree with the law, but she may agree that it has been properly applied.

This argument is also flawed because when Bopp questions criticism of judicial campaign speech and asks if it is not the role of judges to "resolve disputed legal and political issues by announcing their views on those disputed legal and political issues,"<sup>84</sup> he fails to note the critical factor of *when* this announcement of views is made: after a thorough review of the facts, law, and legal precedents in a case. That is different from announcing an opinion *prior* to such a review and gives the impression of bias before hearing all of the facts. Announcing an opinion after such consideration would be seen as appropriate by all, while announcing such an opinion, without the benefits of such consideration, during a campaign would be considered inappropriate by the supporters of regulation of judicial campaign speech.

### *B. Arguments Against Unrestricted Speech*

Those who see potential harm in unregulated judicial campaign speech often express concern similar to that expressed in *Ackerson v. Kentucky Judicial Retirement and Removal Commission*<sup>85</sup> over promises made by judicial candidates that "impair the integrity of the court by making the candidate appear to have pre-judged an issue without benefit of argument of counsel,

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83. See Gillers, *supra* note 68.

84. Bopp, *supra* note 80.

85. 776 F. Supp. 309, 315 (W.D. Ky. 1991).

applicable law, and the particular facts of the case.”<sup>86</sup> That is, while supporters of campaign speech regulation express concern about bias, it is not assumed that simply having a personal belief on an issue equates to bias, but rather that bias will override the complete consideration or full deliberation a judge should give to every case, especially when expressed in the form of a pledge or a promise during a campaign that could impair such consideration.

Let us consider the arguments made by those who take the opposite point of view from Bopp over the legality of the regulation of judicial campaign speech. Opponents fear that judges would be elected who promise to resolve disputed legal and political issues based on their pre-existing views of an issue, giving those views precedence over the written law. Or, they fear judges would be elected based upon the public belief that they would allow their own personal beliefs to take precedence over the law.

Opponents of Bopp’s position believe that regulation of judicial speech does serve a compelling state interest and that there is potential harm in the pledges and promises of judicial candidates to rule a certain way in future cases. They argue that canons restricting speech serve three interests of constitutional magnitude: the separation of powers, the rights of litigants to impartial courts, and the preservation of public confidence in the courts.<sup>87</sup>

These critics of unregulated judicial campaign speech point to *Ackerson*, a pre-*White* case, which states that there “is a compelling state interest in so limiting a judicial candidate’s speech because the making of campaign commitments on issues likely to come before the court tends to undermine the fundamental fairness and impartiality of the legal system,”<sup>88</sup> as a compass pointing to the proper interpretation of the constitutionality of speech restrictions.

Professor Robert O’Neil, Director of the Thomas Jefferson Center for the Protection of Free Expression, sides in this instance with those seeking regulation of judicial campaign speech, arguing that “the core concern is nothing less than ensuring due process for litigants.”<sup>89</sup> He presents the debate over the issue as a question

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86. GASS, *supra* note 19, at 13.

87. *See id.* at 5-9.

88. *Ackerson*, 776 F. Supp. at 315.

89. Robert M. O’Neil, *The Canons in the Courts: Recent First*

posed by Indiana Chief Justice Randall T. Shepard about whether a legal review of canons restricting judicial speech should be confined to First Amendment issues, or whether the judge should place more value on the ability of the courts to afford litigants due process of law in individual cases and affirm canons designed to prevent political speeches that will diminish the court's ability to render impartial justice and ability to be viewed as impartial.<sup>90</sup> O'Neil and Shepard's answer, obviously, is the latter.

If a state may not deny a person the equal protection of the laws,<sup>91</sup> can it deny a litigant a trial deemed fair and impartial, as defined by a hearing by a judge who has not already expressed prejudicial opinions on the subject matter before the case is heard, or who has not, through his campaign speech, suggested a lack of open-mindedness toward the arguments of both parties?

O'Neil argues as well for the interest in preserving judicial integrity and limiting political partisanship, as well as for maintaining a level of professionalism and civility within the judiciary.<sup>92</sup>

Gass discusses the dangers of pledges and promises, both for particular cases and for classes of cases, explaining that they can "create the impression that voters can guarantee [the outcome of those cases or types of cases] – no matter what the fact and law require – by choosing a particular candidate."<sup>93</sup>

Gass argues further that even the impression, be it true or false, that judges would uphold these promises would appear to be a clear bias for a particular class or a refusal to be "open minded"<sup>94</sup> enough to provide litigants a fair trial, and thus would be damaging to the public's perception and confidence in the impartiality of the courts. At worst, he argues judicial candidates could feel a moral or political obligation to fulfill his or her end of the bargain once on

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*Amendment Rulings*, 35 IND. L. REV. 701, 715 (2002).

90. *Id.*

91. U.S. CONST. amend. XIV, § 1.

92. O'Neil, *supra* note 89, at 712-15.

93. GASS, *supra* note 19, at 18.

94. *Republican Party of Minn. v. White*, 536 U.S. 765, 778 (2002) ("Openmindedness" is a concept described by Justice Scalia in the majority opinion in *White* as one of the possible definitions of "impartiality.").

the bench, "compromising or eliminating the openmindedness and lack of bias towards parties that are essential to judging."<sup>95</sup>

This concern over the threat that pledges and promises pose to public confidence in the judiciary is also expressed in the *Watson* decision, where it is stated:

Such promises, even if they are not kept once a candidate is elected, damage the judicial system because the newly elected judge will have created a perception that will be difficult to dispel in the public mind. With all the uncertainties inherent in litigation, litigants and the bar are entitled to be free of the additional burden of wondering whether the judge to whom their case is assigned will adjudicate it without bias or prejudice and with a mind that is open enough to allow reasonable consideration of the legal and factual issues presented.<sup>96</sup>

Justice O'Connor admits as much in her concurrence with the *White* decision, stating, "Even if judges were able to suppress their awareness of the potential electoral consequences of their decisions and refrain from acting on it, the public's confidence in the judiciary could be undermined simply by the possibility that judges would be unable to do so."<sup>97</sup>

Justice Ginsberg, in her dissent against the *White* decision, describes how campaign pledges and promises could go so far as to suggest a quid pro quo between voters and candidates.<sup>98</sup> Essentially, restrictions on judicial campaign speech are designed to prohibit such a quid pro quo, even a perceived one between candidates and voters or campaign contributors. Specifically, the restrictions are intended to prevent the kind of situation that arises when a candidate tells a campaign contributor or special interest group, "Vote for me, I believe in *X* and *Y*," when *X* and *Y* represent positions on issues likely to come before the court that

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95. GASS, *supra* note 19, at 18.

96. *In re Watson*, 794 N.E.2d 1, 7 (N.Y. 2003).

97. *White*, 536 U.S. at 789 (O'Connor, J., concurring).

98. *Id.* at 820 (Ginsburg, J., dissenting).

are also of direct interest to the contributor or interest group in question.

When such a quid pro quo, real or perceived, is made, it threatens the notion of judicial independence and impartiality held dear by so many jurists and scholars. There is recognized legal precedent upholding the value of the perceived fairness of the court system. The U.S. Supreme Court ruled in *Mistretta v. United States*<sup>99</sup> that “[w]hile the problem of individual bias is usually cured through recusal, no such mechanism can overcome the appearance of institutional partiality that may arise from judiciary involvement in the making of policy. The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship.”<sup>100</sup>

Even Chemerinsky, a foe of restrictions on judicial speech, will concede there is a significant problem in the inherent tension between judicial elections and judicial independence. He states that “the need for judicial candidates to raise ever increasing amounts of campaign funds when their primary financial supporters are lawyers and litigants is inimical to judicial independence,”<sup>101</sup> a fact upheld by numerous independent sources.<sup>102</sup> He relates a personal story of a California Superior Court judge describing how his various jurist peers on their lunch break openly and casually discuss which firms contribute the most money to their campaigns before returning to the bench to hear and decide cases involving those very same lawyers.<sup>103</sup>

This is where, I believe, the arguments for the regulation of judicial speech start to evolve beyond promoting an aspirational code of how judges should conduct their campaigns and where they begin to demonstrate themselves as a remedy against the corrupting influence the exchange of money has over public confidence.

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99. 488 U.S. 361 (1989).

100. *Id.* at 407.

101. Chemerinsky, *supra* note 75, at 736.

102. See generally DEBORAH GOLDBERG, CRAIG HOLMAN, & SAMANTHA SANCHEZ, THE NEW POLITICS OF JUDICIAL ELECTIONS (Mar. 2004), available at <http://www.justiceatstake.org/files/JASMoneyReport.pdf>; see also A.B.A. TASK FORCE ON LAWYERS' POLITICAL CONTRIBUTIONS, *supra* note 18, at pt. 2.

103. Chemerinsky, *supra* note 75, at 736.

Everyone seems to fancy quoting former California Supreme Court Justice Otto Kaus's statement that "deciding controversial cases while facing reelection" and trying to ignore the political consequences of visible decision is "like ignoring a crocodile in your bathtub."<sup>104</sup> But take the analogy a bit further: when judicial candidates make pledges or promises about specific issues of interest to campaign contributors, when the contributors give their money to the candidates, and when those candidates win, the public, when asked to believe, no matter how true, that these donations could not possibly constitute a quid pro quo arrangement, attribute to these statements the same sincerity as crocodile tears.

Such is evidenced by numerous public opinion polls in North Carolina,<sup>105</sup> other states,<sup>106</sup> and nationwide.<sup>107</sup> Nationally, nearly seventy-one percent of Americans stated that they believe that campaign contributions from interest groups have at least some influence on judges' decisions in the courtroom. Over eighty percent of African-Americans expressed this view, including a majority (fifty-one percent) who said contributions carried a "great deal" of influence.<sup>108</sup>

Such cynicism about judicial campaign financing extends to the motivations behind a judicial candidate's choice to express views or to make pledges or promises on disputed issues. The same survey revealed that eighty-two percent of Americans are very or somewhat concerned that the decision in *Republican Party of Minnesota v. White* (explained in the poll as "permitting candidates

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104. *Id.* at 735; see also *Republican Party of Minn. v. White*, 536 U.S. 765, 789 (O'Connor, J., concurring) (citing Julian E. Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. COLO. L. REV. 733, 739 (1994)).

105. Heagarty, *supra* note 71, at 1306.

106. A Pennsylvania survey of 500 respondents revealed 88% of those polled believed judges to be influenced by big donors at least sometimes. See *An Interview with Roy Schotland*, CT. REV., Fall 1998, at 17.

107. See Zogby Int'l, *March 2004 Survey Highlights: Americans Speak Out on Judicial Elections*, at <http://faircourts.org/files/ZogbyPollFactSheet.pdf> (last visited Jan. 12, 2005) (on file with the First Amendment Law Review); see also Heagarty, *supra* note 71, at 1306.

108. Zogby Int'l, *supra* note 107.

for judicial office to announce views on disputed issues”) will result in special interest groups pressuring judicial candidates to stake out positions on controversial issues. More than seventy percent in every demographic subgroup are somewhat or very concerned. Those most concerned include Americans over fifty years of age, residents of Southern states, and those who are strongly ideological (progressive or very conservative).<sup>109</sup>

One might dismiss such numbers as the product of a public generally uninformed or uneducated about the workings of the judiciary or without a deep understanding of judicial ethics. However, a 1999 survey of Texas state judges conducted by that state’s Supreme Court and bar association found that almost half believed that campaign contributions did have a significant effect on courtroom decisions.<sup>110</sup> Nationally, a survey of appellate and trial court judges produced somewhat less striking but still significant results.<sup>111</sup>

In a world of loosened restrictions of campaign speech, particularly in areas where candidates may not only announce their views but make pledges and promises and directly solicit contributions, is it so unreasonable to believe that special interest group involvement in elections, both in the form of contributions and endorsements, will increase? Organizations such as the Justice at Stake Campaign are documenting this very phenomenon, from issue-advocacy organizations using *White* as justification to demand answers to specific questions on issues of abortion, homosexual rights, and tort reform, to an increase in third-party issue-advocacy based advertising in support or opposition to the “judicial agendas” of various judicial candidates around the nation.<sup>112</sup>

### C. Case Studies

While not to diminish the potential threat to judicial

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109. *Id.*

110. Heagarty, *supra* note 71, at 1307.

111. *Id.* at 1307. About one third of high court judges believe contributions have a great deal of influence on judicial elections, about one quarter of trial court judges expressed the same opinion.

112. GOLDBERG ET AL., *supra* note 102, at 23-25.



independence from such special-interest activity, the constitutionality of restrictions on electioneering speech by issue-advocacy and political organizations is an issue I will not examine here. Rather, I think it is more appropriate to provide two case studies of judicial campaign speech that go beyond the restrictions of the ABA's model canon in these early days of the post-*White* era. Will these serve as definitive proof that such speech is either good or bad? No, that will remain, I believe, a judgment for the reader to make. But there is value in moving these discussions from the theoretical to an examination of the practical applications of less-restricted campaign speech. The examples below are also interesting in the contrasting ways candidates engaging in more speech have chosen to talk about it. Arguably, good points are made both for and against speaking on issues through these candidates' words and deeds. Also, by documenting these actions, perhaps some future enterprising researcher may examine this sort of campaign behavior in connection with the opinions and performance of these judges as they serve their elected terms.

In 2003, Pennsylvania held elections for state Supreme Court justice and other statewide judicial posts for the first time since the *White* decision was handed down.<sup>113</sup> Pennsylvania, like Minnesota, utilized a judicial canon of ethics that had restricted candidates from announcing their views on disputed legal issues, and, prior to the *White* decision, a federal court had enjoined its enforcement in a 1991 judicial election. The injunction was later vacated, but not before a candidate's announcement had been circulated in newspapers that "the testimony of police was more reliable than that of defendants."<sup>114</sup>

In post-*White* elections, Pennsylvania judicial candidates were no longer constrained by an announce clause but were still governed by Canon 7 (B)(1)(c) of their Code of Judicial Conduct from making statements that "commit or appear to commit the

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113. PENNSYLVANIANS FOR MODERN CTS., AS PENNSYLVANIA GOES, SO GOES THE NATION: A CASE STUDY OF A SUPREME COURT ELECTION IN THE POST-WHITE ERA 2, 5-6 (Aug. 2004), available at <http://www.justiceatstake.org/files/PennsylvaniaReport.pdf>.

114. Emily Heller, *Electing Judges: The New Freedom – A Candidate's Views on Abortion, Torts*, NAT'L L.J., Oct. 20, 2004, at 1, 26.

candidate with respect to cases, controversies, or issues that are likely to come before the court.”<sup>115</sup> These canons were in place before the 2003 elections began.<sup>116</sup>

Special interest groups and issue advocacy organizations are reported to have increased their activity, particularly in issuing surveys to judicial candidates, some specifically citing the *White* decision as justification for requesting candidates specifically to declare positions on hot-button campaign issues, some of which could likely appear before the Pennsylvania Supreme Court.<sup>117</sup> Bert Brandenburg, spokesperson for the Justice at Stake Campaign, predicted that interest groups would use the *White* case as a “new tool” in an aggressive push to encourage judicial candidates to take positions on controversial issues, luring them with the promise of campaign contributions.<sup>118</sup>

Pennsylvania’s sole Supreme Court race featured Max Baer, a Democrat Allegheny trial court judge, running against Joan Orie Melvin, a Republican state appellate judge.<sup>119</sup> The two candidates took very different views of appropriate campaign behavior after *White*. Melvin took the position that, despite *White*, it was inappropriate and problematic for candidates to discuss disputed legal and political issues.<sup>120</sup> She explained that while expressing particular views might engender support from certain political groups, such action might also create expectations of specific outcomes in court, even if the candidate explains that his or her views do not constitute a promise. Such expectations undercut fair hearings.<sup>121</sup> “Your personal opinion is totally irrelevant when you are applying the rule of law to facts,” stated the Republican appellate judge.<sup>122</sup>

Baer took a much different approach, claiming that “[t]alking about your views lets voters align with candidates with

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115. See PENNSYLVANIANS FOR MODERN CTS., *supra* note 113, at 2.

116. *Id.* at 2, 5–6.

117. *Id.*

118. Heller, *supra* note 114, at 26.

119. Emily Heller, *He Speaks on Issues, Wins State Court Seat – The Election Tested the New Right to Take a Stand*, NAT’L L.J., Nov. 10, 2003, at 7.

120. Heller, *supra* note 114, at 26.

121. *Id.*

122. *Id.*

whom they share 'a vision of life,'" and that he agreed with the *White* decision because "gagging candidates violated their free speech rights."<sup>123</sup> However, Baer emphasized that he had to "make it very clear" that his view is not a prediction of how he'd rule in an actual case.<sup>124</sup>

Baer would state after the campaign that "it's better that the public knows what you stand for"<sup>125</sup> as explanation for his free discussion of his support for labor unions and gun control and his opposition to abortion and capping tort judgments.<sup>126</sup>

This difference became central to their highly competitive campaign, with Melvin championing the concept of judicial impartiality and Baer crusading against voter ignorance. Voter education was the point Baer seems to have utilized the most as justification for breaking this long-running judicial campaign speech taboo. In televised debates between Baer and Melvin, Baer would argue a position I believe to be similar to arguments made by James Bopp during the First Amendment Law Review's Symposium on Judicial Campaign Speech,<sup>127</sup> that "you wouldn't want a judge on the bench who didn't have opinions, who didn't have sufficient life experiences, who hadn't thought about things enough, didn't care passionately about society enough to have opinions."<sup>128</sup> In arguments that likely resonated with the voters, Baer took this reasoning a step further, saying, "And where [Melvin] and I differ is that I'm willing to tell you [my beliefs], because I don't think an ignorant voter, an ill-informed voter is a good thing."<sup>129</sup> Of course, to ensure that his statements remained definable as "announcements" and not "commitments," Baer added, "And so I tell you, with the caveat that I still am going to do my job as a judge[:]"<sup>130</sup> or, in other words, that he could base his opinions on the law and facts rather than these announced opinions.

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123. *Id.*

124. *Id.* at 1.

125. *Heller*, *supra* note 119, at 7.

126. *Id.*

127. *Bopp*, *supra* note 80.

128. *PENNSYLVANIANS FOR MODERN COURTS*, *supra* note 113, at 4.

129. *Id.*

130. *Id.*

Melvin, on the other hand, employed arguments similar to those offered by O'Neil,<sup>131</sup> Gass,<sup>132</sup> and other supporters of ethical speech restrictions, stating,

Members of the public need to believe that they have an even playing field. When you are going out speaking on the issues, the public believes there is a predisposition that this judge will rule consistently with what their personal beliefs are. Impartiality of the courts is a fundamental prerequisite to a fair hearing, and that can be deemed compromised by appearances alone. . . . It's the appearance and the due process rights of litigants.<sup>133</sup>

Another area of fundamental difference in this debate is seen in Baer's statements regarding his announcement of his opposition to caps on non-economic damages in all tort cases. Baer explained that his opposition to the caps did not mean he would vote against them should the issue come before the court, claiming that if another tort reform measure passed the legislature and was approved by referendum, he would abide by it.<sup>134</sup> However, despite taking a vocal public stand on the issue, Baer went on to say that he would not recuse himself in such a case if he were elected.<sup>135</sup>

Melvin put a higher standard on recusal, explaining that the recusal issue was one of the reasons she refrained from discussing issues that might appear in court. As Pennsylvania's standard for mandatory recusal is whether "a significant minority" would reasonably question the court's impartiality, Melvin questioned how an outspoken judge could avoid frequent recusals.<sup>136</sup>

The results of this race? No single supreme court race held anywhere in America during that 2002-2003 cycle proved to be more expensive than this Pennsylvania seat.<sup>137</sup> Contributions to the

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131. O'Neil, *supra* note 89.

132. GASS, *supra* note 19.

133. PENNSYLVANIANS FOR MODERN CTS., *supra* note 113, at 4.

134. Heller, *supra* note 114, at 26.

135. *Id.*

136. *Id.*

137. PENNSYLVANIANS FOR MODERN CTS., *supra* note 113, at 3.

two candidates topped \$3.34 million, with Baer raising over \$400,000 more than Melvin, and this number does not include any of the third party expenditures made in support of or against either candidate.<sup>138</sup> Baer won by about 52% of the vote, which is even more impressive considering that, according to St. Joseph's University Professor Randall M. Miller, Democrats had previously been dominated by Republicans, who had filled nearly every statewide office.<sup>139</sup> Newspapers praised and endorsed Baer for his "openness," and, when asked whether he credited his victory to his outspoken promotion of his views, Baer confirmed, "Absolutely."<sup>140</sup>

The second case study focuses on North Carolina. In 2002, one of the two state Supreme Court races made headlines with both candidates in the race having to defend themselves against accusations of violating the judicial canon of ethics.<sup>141</sup> This case study, however, will examine the other race, in which no complaints appear to have been filed, as the events of this race raised important First Amendment issues.

To review, while North Carolina had removed the announce clause language from its canons,<sup>142</sup> limitations still remained in 2002 on what constituted acceptable judicial campaign speech. But did those limitations apply to all candidates or only those currently serving in some judicial office? Rule 8.2 of the North Carolina Rules of Professional Conduct for attorneys states that "a lawyer who is a candidate for judicial office shall comply with applicable provisions of the Code of Judicial Conduct."<sup>143</sup> Further, Comment Two to this rule specifies, "When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity."<sup>144</sup> And, as noted, while there was no "announce clause" or any sort of prohibition on *announcing* views, Canon 7(B)(c) clearly stated that candidates "should not make pledges or promises of conduct in office other than the faithful and impartial performance

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138. *Id.*

139. Heller, *supra* note 119, at 7.

140. *Id.*

141. See generally sources cited *supra* note 2.

142. See *supra* note 23 and accompanying text.

143. N.C. REVISED RULES OF PROF'L CONDUCT R. 8.2 (2004).

144. *Id.* at cmt. 2.

of the duties of the office.”<sup>145</sup>

The application of the code to non-judges is significant to note because one of the candidates, Republican Edward Brady, was a decorated military veteran and criminal defense attorney from Fayetteville with an extensive death penalty trial practice but no judicial experience.<sup>146</sup> During the 2002 Republican primary,<sup>147</sup> Brady defeated North Carolina Court of Appeals Judge Ralph Walker,<sup>148</sup> despite Walker’s receiving the endorsement of every major legal group and every major newspaper in the state.<sup>149</sup> Walker’s defeat was a surprise to most political observers, with some well respected attorneys admitting they had been unaware that Walker was even opposed.<sup>150</sup>

While many theories have been advanced, it has been noted that Brady campaigned aggressively and derided his veteran jurist opponent as a “moderate Republican.”<sup>151</sup> There is little documented information available about Brady’s primary campaign, as much of the campaign was conducted through direct mail. Nevertheless, in Brady’s next contest, a general election campaign against incumbent North Carolina Supreme Court Justice G.K. Butterfield, many of his election materials were made public.<sup>152</sup>

In one letter to Republican voters, Brady wrote, “I need your support on my crusade.”<sup>153</sup> In another, he pledged, “You may be assured that I will support our Republican agenda as the newest associate justice of the court.”<sup>154</sup> In yet another letter, he made the

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145. N.C. CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(c) (1999).

146. Matthew Eisley, *Stark Contrast Marks Hopefuls*, NEWS & OBSERVER (Raleigh, N.C.), Oct. 30, 2002, at 1B.

147. The 2002 election was the last in which North Carolina appellate judges ran in partisan primaries. See Act of Oct. 10, 2002, ch.163, 4, 2002 N.C. Sess. Laws 626.

148. Eisley, *supra* note 146.

149. Bob Burtman, *Silence of the Lambs*, INDEP. WKLY (Durham, N.C.), Nov. 20-27, 2002, at 5.

150. *Id.*

151. Eisley, *supra* note 146.

152. *Id.*

153. *Id.*

154. *Id.*

following promise:

Our nation's decline of its core family values and traditions, abortion issues, gay rights, and the Democratic liberal partisan interpretation by the Supreme Court of Florida arising out of the 2000 president [sic] election are some of the issues of recent years which have brought me to the irreversible conclusion that I must do my part in seeking this office so as to address these and other critical issues.<sup>155</sup>

Brady's letters defined an agenda that included opposing abortion except in cases of rape, incest, or danger to the mother's life, and defending the gun-ownership rights of law-abiding citizens.<sup>156</sup>

Like Judge Melvin in Pennsylvania, Brady's opponent, Justice G.K. Butterfield, was critical of this style of campaigning and instead tried to promote his own judicial experience. Justice Butterfield was a veteran Superior Court trial judge before he was appointed to fill a vacancy on the Supreme Court.<sup>157</sup> He stated of his opponent:

The last thing we need in our judicial system is judges or candidates who have an agenda. We don't need judges who write their supporters, lay out their political ideology, and promise to take their ideology to the court. That is what my opponent is doing. That tells me he does not understand the proper role of a judge.<sup>158</sup>

Brady, however, refuted this characterization, telling the media that he admitted the state Supreme Court cannot outlaw abortion, but maintaining that making his views known benefits voters by helping them make their choice in the election.<sup>159</sup> He also stated plainly to the press, "I have no political agenda."<sup>160</sup>

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155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

The issue of partisanship in North Carolina's 2002 elections is interesting as different candidates took different views of the issue, though perhaps none as stark as Brady's. Sanford Steelman, a Republican Superior Court judge who ran for and won a seat in that year's Court of Appeals elections, expressed his opinion that party affiliation "gives voters some idea where candidates stand."<sup>161</sup> But fellow Republican candidate Eric Levinson, a Charlotte District Court judge who also won election to the Court of Appeals, took the strategy of trying to reach beyond Republicans to "as many people as possible."<sup>162</sup> He would explain, "Everybody agrees that politics doesn't have anything to do with what we do inside the court room."<sup>163</sup>

In addition to his past judicial experience and the position that he had "much greater qualifications for the job," Butterfield ran on the argument that his presence as an African-American brought needed diversity to the court.<sup>164</sup> Brady did not approve of this appeal, calling it "terribly wrong" and arguing that race should not enter into the debate, refusing to label himself as "the European-American" candidate.<sup>165</sup> As for the argument over who was better qualified, Brady responded, "I'm eminently qualified to do this. I'm very focused, very dedicated. It's my way of paying back. It's public service. Somebody needs to do it. Somebody needs to take a stand."<sup>166</sup> As noted above, Brady claimed that he had no agenda.<sup>167</sup> Yet in the following statements documented in his campaign materials, Brady appears to make clear reference to supporting an agenda: "I need your support on my *crusade*[:]"<sup>168</sup> "I will *support our Republican agenda*[:]"<sup>169</sup> "someone needs to *take a stand*[:]"<sup>170</sup> and "I must do my part in *seeking this office to address*

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161. Matthew Eisley, *Getting Mileage From Parties*, NEWS & OBSERVER (Raleigh, N.C.), Oct. 23, 2002, at 1B.

162. *Id.*

163. *Id.*

164. Eisley, *supra* note 146.

165. *Id.*

166. *Id.*

167. See *supra* note 160 and accompanying text.

168. Eisley, *supra* note 161 (emphasis added).

169. *Id.* (emphasis added).

170. *Id.* (emphasis added).



*these and other critical issues.*"<sup>171</sup> In a post-election interview with the *Charlotte Observer*, Brady appeared to liken his statements to announcements rather than pledges, stating that he will base his decisions on the facts of each case, not on his own private political views.<sup>172</sup> "As a judge or a justice, you are entitled to your views, but that would never enter into my decisions," Brady stated.<sup>173</sup> While such a statement is comforting, its post-election timing and absence from the campaign materials—where these views and proposed actions are detailed—does little to ameliorate his previous campaign behavior.

This case would be extremely troubling to observers like Gass, who have already warned of the dangers of judges making pledges and promises.<sup>174</sup> How could these statements not create the impression that Brady's voters could expect his support for the favorable outcome of cases restricting abortion rights, protecting gun ownership, or supporting a partisan agenda? And of course, the greatest threat is the one unspoken by most critics: that a judge making these kinds of statements might actually fulfill these election promises at the expense of providing a fair and impartial hearing on these matters.

Taking a hard critical approach to unfettered judicial campaign speech, the question emerges as to which is the greater offense: the possibility that a candidate could deliberately mislead voters into believing he or she would be favorably inclined to support issues of concern to them when hearing cases in court, or the possibility of a judge actually honoring such statements and being so predisposed?

If one took a more permissive view of unfettered judicial campaign speech, one might retort that, if such biases do in fact exist, it is preferable that voters be aware of them in advance of the election. Further, if voters choose to make decisions based on such information, such is their right.

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171. *Id.* (emphasis added).

172. Eric Frazier, *Lawyer's Election Raises Concerns*, CHARLOTTE OBSERVER, Nov. 7, 2002, at 6B.

173. *Id.*

174. GASS, *supra* note 19, at 13 (citing *Ackerson v. Ky. Judicial Ret. & Removal Comm'n*, 776 F. Supp. 309, 315 (W.D. Ky. 1991)).

The issues of pledges and promises that trouble Gass and others, however, would appear to be of little concern to the majority of North Carolina voters in 2002. Despite Justice G.K. Butterfield earning, as did Judge Ralph Walker, the endorsement of every major legal organization and every major newspaper,<sup>175</sup> Edward Brady defeated him with fifty-four percent of the vote to Butterfield's forty-six percent.<sup>176</sup>

Again, I hope these case studies provide some contrasting real-life examples of how the theoretical arguments about campaign speech translate into practical application. I am unable to answer whether or not the campaign speech described here – announced positions or pledges and promises of behavior – has or will result in bias in the performance of either judge's duties, and would not presume to make such a prediction. I merely use these case studies to provide a real-world example for purposes of examining the disputed behavior and helping to frame the debate.

#### *D. A Problem Looking for an Answer*

At this point, it is probably clear that I agree that there are many compelling public policy justifications behind the limitation of judicial campaign speech. These justifications serve to preserve due process, to uphold public confidence in the judiciary, and to prevent the proliferation of undue special interest influence over the outcome of judicial elections. However, as evidenced by Chemerinsky's admission above,<sup>177</sup> one can recognize the many ways that irresponsible judicial campaign speech can threaten judicial independence but still make a case that restrictions on such speech are unconstitutional.<sup>178</sup>

I close this section feeling that I have confirmed Lubet's description of the debate over judicial campaign speech as accurate. While Lubet leaves the constitutional question over judicial campaign speech open to debate, he argues, and I agree, that the

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175. Burtman, *supra* note 149.

176. *Election Results*, CHARLOTTE OBSERVER, Nov. 7, 2002, at 3B.

177. Chemerinsky, *supra* note 75, at 735-36.

178. *Id.* at 742-46 (arguing that restrictions on political speech of judicial candidates fail to meet strict scrutiny).

principles behind regulation of judicial campaign speech are noble, that “the public and the judiciary are better served when judicial campaigns are clean and honest, and most especially when the candidates refrain from committing themselves to future rulings. There is simply no good argument in favor of turning judicial elections into referenda on specific outcomes.”<sup>179</sup>

Justice Paul De Muniz of the Oregon Supreme Court writes of the dangers of outcome-determinative criticism,<sup>180</sup> stating specifically that such criticism “implies that a judge should always reach a particular outcome regardless of the law.”<sup>181</sup> Pledges and promises in judicial races promote public focus solely on the outcome of decisions rather than the process by which the decisions are reached, which is a disservice to voters and misleads them as to how courts are supposed to function. De Muniz provides the practical illustration of a judge or court excluding critical evidence under the constitutionally mandated exclusionary rule of the Fourth Amendment.<sup>182</sup> A ruling of this kind can lead to the release of a violent felon or the perpetrator of a brutal or heinous crime. Making such a ruling can imperil that judge in the public eye if exploited by opposing candidates or organizations.<sup>183</sup> This situation creates the impression, in terms of harsh practical politics, that “judges are free to ignore the law in favor of the perceived will of the majority.”<sup>184</sup>

Returning to Gass’s warning about candidates feeling a moral or political obligation to fulfill his or her political promises once on the bench,<sup>185</sup> there is, in fact, research to suggest that the politicization of judicial decisions and political issues in campaigns might affect judicial behavior. In death penalty cases, one study found that politicization of the issue in California, Tennessee, and South Carolina has “affected state court behavior” and resulted in

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179. Lubet, *supra* note 67, at 809.

180. Paul J. De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 38 WILLAMETTE L. REV. 367, 387 (2002).

181. *Id.* at 388.

182. *Id.*

183. *Id.* at 388-89.

184. *Id.* at 388.

185. GASS, *supra* note 19, at 13.

lower reversal rates following political campaigns.<sup>186</sup>

If this research is valid, is it then too unreasonable to connect the dots and to claim that certain judicial campaign speech may obligate some candidates to voters, perhaps biasing their rulings, even if this might only occur very rarely? Is it not possible that, despite the honorable behavior of thousands of men and women who serve as elected judges, the political benefits to be reaped by judicial campaign speech that wins votes might tempt at least a few candidates each election cycle?

In other words, regardless of the debate over whether judicial canons restricting campaign speech are constitutional, we recognize this problem exists and, for the most part, agree that something should be done about it. Without a new legal challenge to specifically affirm the constitutionality of certain limits on judicial speech, it is unlikely that the problems with judicial speech in judicial elections, which were clearly acknowledged by Justices O'Connor and Kennedy in *White*, will be solved in North Carolina by further amending the Judicial Canon of Ethics. Instead, we must look to other solutions that will address these problems while still complying with the *White* decision. Luckily, some options exist.

#### V. THE CHALLENGES FACING SUGGESTED OPTIONS FOR REFORM IN NORTH CAROLINA

There are several ways North Carolina could avoid the potential pitfalls and harms related to judicial campaign speech. The first proposed solution is the simplest in terms of eliminating the problem, but is also likely to be the most difficult to implement: eliminating judicial campaigns. Selecting judges through a merit based, or even a politically-based, appointive system would remove many of the concerns associated with judicial campaign speech.

Justice O'Connor clearly favors such an approach. In her concurring opinion in *White*, she acknowledged the conflicts created by campaign speech in judicial elections and blamed the state's method of judicial selection rather than the allowable

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186. De Muniz, *supra* note 180, at 389 (citing John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465, 503 (1999)).

conduct within judicial elections:

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.<sup>187</sup>

In her view, the appropriate solution would be to implement a new judicial selection process, not restrict judicial speech. Although the elimination of elections would alleviate many of the conflicts examined in this comment, such action would leave other public policy and separation of powers questions unanswered.

North Carolina's Supreme Court, in answering questions and criticism of their amendments to the codes of judicial conduct, has offered the alternative of a judicial selection via appointment. The justices have explained that their changes were necessary if judges continue to be selected via election rather than an appointive system.<sup>188</sup>

O'Connor's implied solution of eliminating judicial elections solves the problem of troublesome campaign speech, as the problem would no longer exist. Additionally, the North Carolina State Bar Association endorses replacing judicial elections with a system of merit-based appointment.<sup>189</sup> However, these

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187. *Republican Party of Minn. v. White*, 536 U.S. 765, 792 (2002) (O'Connor, J., concurring).

188. Gary Wright, *Revised Conduct Code Lets Judges Talk Issues*, CHARLOTTE OBSERVER, Apr. 11, 2003, at 1B.

189. See N.C. State Bar Ass'n, *Judicial Selection in North Carolina*, at <http://www.ncbar.org/public/communications/judicialSelection.aspx> (last visited Jan. 12, 2005) (on file with the First Amendment Law Review).

endorsements have failed to gain acceptance in the state legislature.<sup>190</sup> O'Connor's solution is far easier said than done, and most scholars acknowledge this. Among those already cited in this article, O'Neil states plainly that we should assume judges will continue to be elected.<sup>191</sup> Chemerinsky concurs, explaining, "judicial elections are here to stay; there is no indication that states with such systems for choosing and retaining judges are likely to abandon them."<sup>192</sup> Roy Schotland puts it more bluntly when he reviews the ninety-eight year history of attempts to end contestable elections, noting recent defeats in Texas and Florida of merit-based selection proposals and the lack of any real progress in decades.<sup>193</sup> By his calculations, if progress towards merit-based appointment continues at its current pace, we will see the end of contestable elections for appellate court judges in about 160 years.<sup>194</sup> And that is the good news; ending contestable elections for the trial courts would take, at its current pace, about 770 years.<sup>195</sup>

My own research into this subject confirms that North Carolina is not likely to move to an appointment-based system of judicial selection anytime soon, nor will any other state until significant shifts are made in public opinion.<sup>196</sup> Even if approved by a legislature, almost any shift from an elected to an appointment-based system will require the amendment of a state's constitution, and that requires a popular vote of the people.<sup>197</sup> Studies of public opinion nationwide reveal a reluctance to abandon elections in favor of appointing judges, and North Carolina appears to be more resistant to this than other states.<sup>198</sup>

This is not to say that the notion of an appointment-based system should be abandoned. Rather, this should serve as a reality-

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190. The recent history of the legislation concerning merit selection is briefly revisited in Wright, *supra* note 188.

191. O'Neil, *supra* note 89, at 714.

192. Chemerinsky, *supra* note 75, at 736.

193. Roy A. Schotland, Address at the N.C. Bar Association Continuing Legal Education Seminar (Oct. 7, 2004).

194. *Id.*

195. *Id.*

196. Heagarty, *supra* note 71, at 1290-1305.

197. *Id.* at 1291-92. Delaware remains an exception. *Id.*

198. *Id.* at 1300-02.

check that such a solution is not coming any time soon, and not without significant shifts in public opinion. Advocates for an appointment-based system must develop a new way to talk about the issue that resonates with the average voter. Rhetoric used in legislatures and in communications with the legal community falls flat when used to persuade non-lawyers. The concept of “judicial independence” can be interpreted as an argument for the election of judges, keeping judges “independent” of the politicians. An ABA Harris poll study found a large majority of citizens believed that elected, not appointed, judges were in fact more fair and impartial.<sup>199</sup> Until those attitudes change, an appointive system is, at best, more of a long-term goal than a practical solution. Moreover, without any new ideas or any new approach for *how* to change those attitudes, there is no reason to believe the glacial pace towards ending judicial elections will accelerate.

A potential reform that shows a bit more promise for acceptance in the near-term would be a shift toward what are commonly known as retention elections. Each election year, the voters would have the opportunity to vote on judges who are near the end of their term. But unlike candidates for public office, the judges would not have a named opponent on the ballot. Rather, the public is asked to vote whether or not to retain the judge for another term. If a judge receives a simple majority of “yes” votes, the judge may serve another full term. Generally, retention elections take place after an initial appointment of a judicial candidate to office after an apolitical screening process, but there are some variations.<sup>200</sup> Justice O’Connor has advocated for this retention election proposal, commonly referred to as The Missouri Plan.<sup>201</sup>

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199. *Id.* at 1300.

200. See AMERICAN JUDICATURE SOCIETY, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS, at [http://www.ajs.org/js/JudicialSelectionCharts\\_old.pdf](http://www.ajs.org/js/JudicialSelectionCharts_old.pdf) (last visited Jan. 23, 2005) (on file with the First Amendment Law Review).

201. *Republican Party of Minn. v. White*, 536 U.S. 765, 791 (2002) (O’Connor, J., concurring) (arguing that the Missouri Plan “reduce[d] threats to judicial impartiality, even if it [did] not eliminate all popular pressure on judges”) (citing Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 724 (1995)).

Public opinion polling in regards to retention elections show greater public acceptance of the concept but also reveals some confusion.<sup>202</sup> The potential for a hybrid retentive/elective system of judicial elections, in which candidates stand for retention election after initial selection in a general election, is, in my opinion, more likely to be adopted based on our public opinion research, but also because I suspect that, with some clever legislative crafting, some states may be able to adopt such a system without a constitutional amendment.

While there may be greater acceptance of retention elections than of selection strictly by appointment, one should not be optimistic about the viability of this change. Even in states that utilize retention election at some levels, expansion of this type of selection method to other levels of the court has proven to be problematic. In Florida, for example, where appellate judges are already selected through merit appointment and retention elections, a referendum to adopt the same system for their trial court judges met with convincing defeat.<sup>203</sup>

Twenty states use some form of judicial retention election for appellate level judges, and twelve states use retention elections for at least a portion of their trial court judges.<sup>204</sup> Yet, while a system of retention elections would address many general problems associated with judicial selection, would it solve many of the problems associated with judicial campaign speech? In my opinion, perhaps not.

Consider that judges running in retention elections will still have to campaign. What will they say? How will their speech be governed? While retention elections seem to be less competitive than standard candidate versus candidate elections,<sup>205</sup> retention

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202. Heagarty, *supra* note 71, at 1301.

203. See Anita Kumar, *Referendum - Judicial Selection: Floridians Keep Right to Elect Judges*, ST. PETERSBURG TIMES, Nov. 8, 2000, at 4B. For a more detailed account of the Florida campaign for retention elections, see also Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, L. REV. M.S.U.-D.C.L. 849, 886-93 (2001).

204. B. Michael Dann & Randall M. Hansen, *Judicial Retention Elections*, 34 LOY. L.A. L. REV. 1429, 1443-44 (2001).

205. The nationwide historical percentage rates of judges defeated in retention elections is about one percent. *Id.* at 1429-1430. Compare that to



candidates must still raise money, speak to voters, and answer questions from the public, the media, and special interest groups. Are these elections not then still vulnerable to the types of abuse described in Section IV?

Tennessee provides evidence that judges in retention elections are not necessarily protected from political or outcome-determinative criticism. In fact, they are just as vulnerable, if not more so, to attack by special-interest electioneering. In 1996, Tennessee Supreme Court Justice Penny White became the first Tennessee judge not to be retained by the voters. Although White received a favorable recommendation from the judicial evaluation commission, a coalition of special-interest groups mobilized to oppose her retention because of her stance in an emotionally charged death penalty case. Pro- and anti-White coalitions were formed and White was ultimately ousted.<sup>206</sup>

The case of Penny White is especially valuable because it reveals that the problems of unrestricted speech in judicial campaigns, in this case the ability to criticize judges for unpopular rulings, are not restricted to candidates. A similar case occurred in Nebraska, where a justice who wrote an opinion striking down term limits, which was agreed to unanimously by the state supreme court, was targeted for defeat in a retention election by a statewide organization backing term limits. After spending approximately \$200,000, compared to the justice's \$80,000, numbers that cannot be confirmed because the organization has not filed any disclosure documents and claims it does not have to, the group opposing retention of the justice succeeded in ousting the justice.<sup>207</sup> These

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North Carolina, where one of five incumbent appellate division judges was re-elected in 2002. See N.C. State Bd. of Elections, at [http://www.sboe.state.nc.us/index\\_data.html](http://www.sboe.state.nc.us/index_data.html). Two of five incumbent appellate divisions judges were re-elected in 2000. See N.C. State Bd. of Elections, at <http://www.sboe.state.nc.us/y2000elect/stateresults.htm> (last visited Jan. 12, 2005) (on file with the First Amendment Law Review).

206. AMERICAN JUDICATURE SOCIETY, JUDICIAL SELECTION IN THE STATES: TENNESSEE, at <http://www.ajs.org/js/TN.htm> (last visited Jan. 23, 2005) (on file with the First Amendment Law Review). See also John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465, 471 (1999).

207. *An Interview with Roy Schotland*, CT. REV., Fall 1998, at 16.

examples are extremely problematic for supporters of regulating judicial campaign speech through codes of judicial conduct because these codes do not, and cannot, regulate speech by non-candidates.

Issue advocacy organizations, political parties, and independent political expenditures already account for a significant share of judicial campaign advertising.<sup>208</sup> While steps have been taken to regulate the activities of these organizations in North Carolina in terms of how they raise and spend money and when they can engage in “electioneering” communications,<sup>209</sup> the content of their advertising is not regulated. Thus, a situation exists where a candidate, be it in a retention election or a standard election, can be attacked by methods of campaign speech that would be forbidden by an opposing candidate and is likely prohibited by the candidate himself for use in his defense.

This unlevel playing field between candidates restricted by canons and their own fundraising limitations and well-funded special interest advocacy organizations, exists in states both with and without systems of retention elections. North Carolina, however, has not yet seen the level of independent expenditure and issue advocacy advertising documented in other states.<sup>210</sup> In a retention system, candidates are not opposed by other candidates who would be subject to the same restrictions applied by the code of judicial ethics. Rather, they face an “opposition committee,” typically a state-authorized political committee that would *not* be bound by similar restrictions as the retention candidate. Thus, it is my opinion that this situation could invite more campaigning outside of the conduct typically recognized by the canons as fair and appropriate criticism of the judiciary and could pose a major threat to judicial independence.

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208. See also Justice at Stake Campaign, *2004 State Supreme Court Elections Monitoring Project*, at <http://faircourts.org/contentViewer.asp?breadcrumb=3,500,502> (last visited Jan. 12, 2005) (on file with the First Amendment Law Review); see generally Press Release, Brennan Justice Center, *Buying Time 2004: Judicial Election Spending Nears \$5 Million Dollar Mark* (Oct. 6, 2004), available at [http://www.brennancenter.org/presscenter/releases\\_2004/pressrelease\\_2004\\_1006.html](http://www.brennancenter.org/presscenter/releases_2004/pressrelease_2004_1006.html).

209. Act of July 20, 2004, ch. 163, 2004 N.C. Sess. Law 125.

210. See GOLDBERG ET AL., *supra* note 102.

This is not to discount the many advantages of a retention-election system that have not been discussed here. I only wish to acknowledge that judges running under such systems would still be vulnerable to unfair or irresponsible criticism. Whereas retention elections may pose a solution to other problems of judicial selection, they do not necessarily protect against the concerns to judicial independence posed by election campaigns.

If an appointment-only system is not achievable at this time and retention elections, despite their advantages in some areas, still retain the campaign-speech related problems (with perhaps a greater vulnerability associated with special interest attacks and unfair judicial criticism), then how can we protect judicial independence and still guarantee the First Amendment freedoms of judicial candidates?

#### VI. MEETING THE CHALLENGES THROUGH JUDICIAL CAMPAIGN CONDUCT COMMITTEES

The third suggested reform is one that, I believe, is both immediately achievable and would directly meet the challenges to judicial independence that earlier versions of North Carolina's Code of Judicial Conduct sought to address. The creation and proliferation of bodies known as independent judicial campaign conduct committees could address cases of unfair judicial criticism and irresponsible judicial campaign speech. They could also serve a valuable role in improving public awareness and understanding of the proper role of judges and the judiciary. I believe that such committees have been proven somewhat effective in other states. The best part of this suggested reform is that, if the correct committee structure is utilized, it should be free of First Amendment entanglements.

Again, I will return to this commentary's premise that some forms of campaign speech are damaging to the public's faith and confidence in an impartial and independent judiciary, but that changes made to loosen restrictions on judicial campaign speech in North Carolina were arguably made to ensure their legality under the First Amendment and are unlikely to change anytime soon. I turn to the concept of judicial campaign conduct committees as a

method of countering the negative effects of harmful judicial campaign speech primarily because of their ability to avoid the First Amendment hurdles and obstruct other regulatory measures.

Even calling these committees “regulatory measures” is a misnomer, for rather than restricting speech, they broaden it – rather than regulating it, they build upon it. In fact, the very *raison d’être* of these committees is best explained by the remedy Justice Kennedy provides within his concurrence with the *White* decision:

The legal profession, the legal academy, the press, voluntary groups, political and civic leaders, and all interested citizens can use their own First Amendment freedoms to protest statements inconsistent with standards of judicial neutrality and judicial excellence. Indeed if democracy is to fulfill its promise, they must do so. They must reach voters who are uninterested or uninformed or blinded by partisanship, and they must urge upon the voters a higher and better understanding of the judicial function and a stronger commitment to preserving its finest traditions.<sup>211</sup>

The concept of judicial campaign conduct committees is not a new one. In fact, North Carolina could do well to examine the models presented by states that have already adopted and experimented with them.

#### *A. Defining Judicial Campaign Conduct Committees*

What exactly is a judicial campaign conduct committee? Despite the many resource materials available to those interested in establishing such an organization,<sup>212</sup> there is no succinct definition of

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211. *Republican Party of Minn. v. White*, 536 U.S. 765, 795 (2002) (Kennedy, J., concurring).

212. And there are many. In my opinion, the best sources are the websites established by the National Ad Hoc Advisory Committee on Judicial Campaign Conduct of the National Center on State Courts, at <http://www.judicialcampaignconduct.org/>, and by the A.B.A. Standing Committee on Judicial Independence, at

what a judicial campaign conduct committee actually *is*. They exist in many different forms. One way to define these types of committees is by what they actually *do*.

The ABA defines the work of a judicial campaign conduct committee as follows:

These committees seek to improve the conduct of judicial campaigns by promoting compliance with the spirit and letter of the state canons of judicial ethics that govern campaign speech and conduct. Conduct, or oversight, committees serve three primary functions: educating candidates at the beginning of the campaign about relevant judicial canons and campaign finance regulations; reviewing campaign materials in advance and answering candidates' questions about campaign communications or tactics; and, as a last resort, publicly disclosing any instances of misconduct or referring complaints to the official judicial discipline entity.<sup>213</sup>

Note the heavy reliance upon the canons for guidance. We will come back to that later.

The National Ad Hoc Advisory Committee on Judicial Campaign Conduct [hereinafter "the Ad Hoc Committee"] in their guide, *Effective Judicial Campaign Conduct Committee: A How-To Handbook*,<sup>214</sup> defines these types of organizations in two ways. One definition involves the organizations' goals:

1. To educate judges and judicial candidates about ethical campaign conduct;
2. To encourage and support appropriate campaign conduct, and work to deter

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<http://www.abanet.org/judind/resourcekit/conductcomm.html>.

213. A.B.A. Standing Committee on Judicial Independence, *supra* note 212.

214. NATIONAL AD HOC ADVISORY COMMITTEE ON JUDICIAL CAMPAIGN CONDUCT, *EFFECTIVE JUDICIAL CAMPAIGN CONDUCT COMMITTEE: A HOW TO HANDBOOK* 11 (Nat'l Ctr. for State Courts ed., 2004), available at <http://www.judicialcampaignconduct.org/Handbook%20Final.pdf>.

inappropriate conduct;

3. To publicly criticize inappropriate conduct that cannot otherwise be resolved; and,

4. To protect the public interest in having a fair and impartial judiciary.<sup>215</sup>

Furthermore, the Ad Hoc Committee defines the organizations by what they do – educate judicial candidates about appropriate campaign conduct, deter inappropriate campaign conduct, and criticize inappropriate judicial campaign conduct that does occur – and by what they do not do – endorse judicial candidates or offer evaluations of judges.<sup>216</sup>

The Louisiana Judicial Campaign Oversight Committee, which serves the same role as a judicial campaign conduct committee, is defined through its charge to serve as a resource for judges and judicial candidates: assist in educating judges and judicial candidates about ethical campaign conduct and help deter unethical judicial campaign conduct.<sup>217</sup>

Blend all of these examples together and there emerges a consensus that these committees exist to educate judges and judicial candidates about appropriate campaign conduct and to criticize inappropriate conduct. In addition, the committees may perform other functions, such as reviewing campaign materials or statements to screen them prior to release, acting as a deterrent to inappropriate behavior (along the lines of “the best defense is a good offense,” to present a credible threat of sanction and no one will test the committee), and issuing formal complaints to judicial disciplinary committees.

Does anything seem missing here? One more thing to which we will return.

The actual structure of such committees also varies slightly depending upon whom you ask. The ABA divides possible structures into two categories: *official committees*, which are those established by state supreme courts, judicial disciplinary agencies, or state bar associations in which membership is mandatory for

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215. *Id.* at 4.

216. *Id.* at 9.

217. LA. SUP. CT. R. 35.

lawyers, and *unofficial committees*, which are generally established by local bar associations or state bar associations in which attorney membership is voluntary.<sup>218</sup>

I will take this opportunity to tweak my friends at the ABA for a distinct bias towards (what else?) bar associations, reminding them to keep in mind that there are other professional, academic, and civic organizations that can play valuable leadership roles in such an effort. While this may sound like a technicality, this is actually an important point to address amongst other criticisms and suggestions for a North Carolina model.

The Ad Hoc Committee corrects this oversight by including in their listing of committee structures the *official committees* sanctioned by the states' highest courts or mandatory bar associations, *unofficial committees* run by state or local bars, and *unofficial committees* run by civic organizations, such as the League of Women Voters.<sup>219</sup>

Barbara Reed, former counsel and policy director of the Constitution Project, has written about these committees with Roy Schotland.<sup>220</sup> Their article both categorizes the committees by how they are organized and distinguishes them by the different powers afforded such committees, resulting in three different types. Committees in Florida, Ohio, Georgia, and Nevada are classified as *official committees*, as they are sanctioned by their state supreme courts and have some official disciplinary powers.<sup>221</sup> Committees in Alabama, Michigan, and South Dakota are considered *quasi-official committees* and are either committees created by their Supreme Courts, just like the "*official committees*" in other states, or created via a mandatory bar's establishment of regional commissions.<sup>222</sup> The distinction is that the *quasi-official committees* lack the formal disciplinary powers of their *official* counterparts.

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218. A.B.A. Standing Committee on Judicial Independence, *supra* note 212.

219. NATIONAL AD HOC ADVISORY COMMITTEE HANDBOOK, *supra* note 214, at 6.

220. Barbara Reed & Roy A. Schotland, *Judicial Campaign Conduct Committees*, 35 IND. L. REV. 781 (2002).

221. *Id.* at 785-86.

222. *Id.* at 786-87.

*Unofficial committees*, however, are organized solely by non-government entities, such as local bar associations.<sup>223</sup> As such, they lack the disciplinary powers available to the courts or mandatory bars.

Regardless of precise definition, it is important to distinguish between committees that are independent of the government and those that are organized or operated by the government. We can see this when we look at North Carolina and its history of regulation of judicial campaign speech by different types of review committees.

### *B. History of Campaign Conduct Committees in North Carolina*

The idea of a group that monitors and regulates judicial behavior is not new to our state. Judicial campaign speech currently falls under the supervision of the North Carolina Judicial Standards Commission, which is empowered to consider complaints against judges and, where appropriate, to make recommendations for censure or removal.<sup>224</sup>

The Commission's charge goes well beyond simply monitoring and regulating judicial campaign speech, hearing all complaints against judges and dispensing disciplinary action; but in many ways it has served, in addition to all of its other functions, as a *de facto* campaign conduct committee. As the commission is a construct of the government,<sup>225</sup> it would likely fall under the common definition of an *official committee*. It has been argued, as part of the water-cooler talk about why North Carolina's codes of judicial conduct were amended so drastically, that the Commission's ability to restrict judicial campaign speech through the threat of censure or removal from the bench could constitute a

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223. *Id.* at 787.

224. See N.C. Admin. Office of the Courts, Judicial Standards Comm'n, at <http://www.nccourts.org/Courts/CRS/Councils/Standards.asp> (last updated Mar. 6, 2002).

225. The seven-member commission is composed of three judges appointed by the chief justice (a Court of Appeals judge, a Superior Court judge, and a District Court judge), two attorneys appointed by the State Bar Council, and two non-lawyer citizens appointed by the governor. Each member serves a six-year term. *Id.*



governmental denial of a First Amendment right. Thus, the Commission's ability to regulate protected speech (under our former codes of conduct) through sanction, it is argued, is impermissible under the *White* decision.<sup>226</sup>

Therefore, the argument goes that the codes of conduct, the guidelines for what constitutes grounds for disciplinary action, had to be amended, according to the North Carolina Supreme Court.<sup>227</sup> As a result, judicial speech – a concern for many scholars and citizens – is now outside of the Commission's jurisdiction as redefined in the new canons.

There are other precedents in North Carolina for both *official* and *unofficial committees*. It is at this point, however, that I would move to drop the term "*unofficial committees*" in favor of the more descriptive term "*private committees*." Private committees, by my definition, are committees not affiliated with the government and therefore are not bound by the same restrictions levied against a governmental regulating body by the U.S. Constitution and the First Amendment. They may include government officials but are organized and operate exclusively of any government organization.

The earliest example of a *private committee* in North Carolina was established in 1990 by the North Carolina Bar Association (a voluntary bar<sup>228</sup>) and chaired by former North Carolina Supreme Court Chief Justice Rhoda Billings.<sup>229</sup> It included twelve citizens of diverse gender, ethnicity, and geographical and professional background, all of whom were

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226. While I cannot attribute these general conversations around the courthouse, I can provide some of the legal reasoning behind them. Professor Lubet cites *Oberholzer v. Commission on Judicial Performance*, 975 P.2d 663 (Cal. 1999), as evidence that even letters informing judges of ethical violations, with no penalties or further consequences, require constitutional protections; this suggests, I believe, that the harsher punishments granted to North Carolina's Judicial Conduct Commission as options for sanction would also require such protections. See Lubet, *supra* note 67, at 811.

227. See *infra* Parts II & III.

228. See N.C. Bar Ass'n, *About the NCBA: History*, <http://www.ncbar.org/about/history/index.aspx> (last visited Jan. 12, 2005) (on file with the First Amendment Law Review).

229. Reed & Schotland, *supra* note 220, at 787.

recognized and credible figures within their communities.<sup>230</sup> The group raised about \$50,000 for their efforts, published over half a million judicial candidate voter guides, and produced debates on public television for the statewide judicial candidates.<sup>231</sup> While the committee was organized by late August before the election and was ready to hear any complaints, none were made.<sup>232</sup> Nor does there appear to be any record of any judicial campaign behavior that would have merited a complaint. It can reasonably be argued that the commission might have deterred objectionable campaigning, or it may simply have been that the candidates that year all chose to follow a higher standard of behavior than experienced at other times in other places. Regardless, an important voter education role was served and the machinery was in place to respond to controversial campaigning, had it surfaced. However, the committee does not appear to have continued its work in future elections.

A more recent investigation into establishing a *private committee* was initiated in 2003 by Democracy North Carolina. Bob Hall, co-executive director of this organization, assembled former jurists, including former Chief Justices Rhoda Billings and Henry Frye, representatives of the state's voluntary bar association, prominent leaders of the state's legal community, and several civic leaders to serve on the committee.<sup>233</sup> The group listened to presentations from the Ohio State Bar Association about its efforts to respond to unfair judicial criticism, destructive campaign tactics, and irresponsible campaign speech deemed a threat to judicial independence.<sup>234</sup> While the meeting did not produce an active committee, the seeds were planted for future work. Democracy North Carolina has begun a monitoring project of its own, monitoring judicial campaign advertising and researching

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230. *Id.*

231. *Id.*

232. *Id.*

233. Telephone Interview with Bob Hall, Research Director, Democracy North Carolina (Oct. 8, 2004).

234. For more information about the Ohio State Bar Association's current campaign monitoring activities, see Ohio State Bar Ass'n, *OSBA Judicial Election Campaign Advertising Monitoring Committee Responds to Complaint*, at <http://www.ohiobar.org/pub/?articleid=448> (Aug. 3, 2004).

contributors to judicial races.<sup>235</sup> Meanwhile, the North Carolina Center for Voter Education has begun an initiative to develop judicial campaign conduct committees at a local level, to be detailed later in this article.

Finally, the most recent organization to display the organizational and functional characteristics of a judicial campaign conduct committee in North Carolina is the Judicial Response Committee, established by Chief Justice Lake's Commission on Professionalism in 2003 and currently chaired by former North Carolina Supreme Court Chief Justice Burley Mitchell, Jr.<sup>236</sup> The purpose of this bi-partisan committee of former governors, judges, law school deans, and bar presidents is "to respond to unwarranted attacks on judges by the media and public . . . [,] to join in this non-partisan effort to defend the members of our judiciary when they are wrongly attacked . . . [and] to respond to unwarranted attacks within the same media cycle."<sup>237</sup> As the committee is made up entirely of attorneys and is a construct of the government, it is best labeled an *official committee* or, more accurately, a *quasi-official committee* (as it has no official disciplinary power) rather than a *private committee*.

It is interesting to note that, to date, the committee has revealed publicly that it has heard three complaints and in each case has declined to respond.<sup>238</sup> In one case, in which a complaint was lodged against Doug Berger, a state industrial commissioner who was running for a seat on the North Carolina Court of Appeals, the committee feared a response would have exacerbated the situation.<sup>239</sup> Berger, however, dropped out of his race for the Court of Appeals and instead ran for state Senate after the complaint became public.<sup>240</sup>

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235. Telephone Interview with Bob Hall, *supra* note 233.

236. See The N.C. Court System Judicial Response Committee, at <http://www.nccourts.org/Courts/CRS/Councils/Professionalism/Response.asp> (last updated Mar. 19, 2004) (on file with the First Amendment Law Review).

237. *Id.*

238. Matthew Eisley, *Judicial Contests Watched*, NEWS & OBSERVER (Raleigh, N.C.), Jan. 9, 2004, at 5B.

239. *Id.*

240. Lynn Bonner & Rob Christensen, *A Candidate, Again*, NEWS & OBSERVER (Raleigh, N.C.), Mar. 25, 2004, at 5B.

It is also interesting to note the language describing the committee on the North Carolina court system website: "This committee will not respond to all attacks on judges but does want the superior and district court judges to know that there is a group of lawyers and judges willing to stand up for their lawful actions and to support them in the media whenever necessary."<sup>241</sup> This language suggests that perhaps this committee was created in response to criticism by the lower court judges, documented earlier, of the weakened codes of judicial conduct.<sup>242</sup>

Regardless of the motivations that may have prompted its creation, the committee's existence is meritorious. The committee would seem, however, to be limited in its activity and possibly constrained by what it can do due to its affiliation with the government, and because of the *White* decision.

### C. *A Plan for North Carolina*

So then, given these examples and the advice offered by national advocacy organizations and existing committees, what should North Carolina do?

I believe judicial campaign conduct committees provide the best course of action for North Carolinians interested in protecting the judiciary and the public from the real problems identified earlier resulting from irresponsible judicial campaign speech. Let us look at how to construct a model North Carolina committee, why some options are better than others, and how the committee can address different problems that might arise.

A model judicial campaign conduct committee for North Carolina should be a *private committee*, unaffiliated with the government. Establishing *private* conduct committees requires no legislative action, no public referendum, nor any of the other barriers that might obstruct other suggested reforms. These advantages alone make committees worthwhile, even if they are nothing more than an interim step to take while pursuing a more ambitious reform. Additionally, and perhaps most importantly in

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241. See The N.C. Court System Judicial Response Committee, *supra* note 236.

242. See Eisley, *supra* note 12.

the context of this paper, the actions taken by a private group made up of members of “[t]he legal profession, the legal academy, the press, voluntary groups, political and civic leaders, and all interested citizens . . . [using] their own First Amendment freedoms to protest statements inconsistent with standards of judicial neutrality and judicial excellence”<sup>243</sup> completely avoids the legal entanglements over the freedom of political speech that so concerned the Justices ruling in the majority in *White*.

A *private committee* meets speech with speech. It does not hold any government sanction over the heads of candidates who would be threatened with a restriction of their own speech or punishment by their government. Clearly, the conduct of a *private committee* should itself be responsible and comply with laws regarding slander, libel, electioneering, and the like. The committee members themselves, however, retain the free speech rights afforded to every citizen and can use the construct of the committee as a platform for announcing their own views. Yes, the establishment of private committees does sacrifice the power of a government-backed sanction, but this does not leave the model committee powerless by any means. Rather than becoming a “pointless ‘scolding commission,’” as Lubet cites as one of the potential pitfalls of campaign conduct committees,<sup>244</sup> the private committee retains the ability, through its speech, to become a potent voice on the bully pulpit, with the ability to affect election outcomes. The prospect of a government-sanctioned or government-affiliated committee affecting election outcomes must send up warning flares to anyone concerned with the First Amendment. But such action by a group of private individuals, done on their own time and of their own accord, is part of the American political process and equally protected under the First Amendment.

What exactly would a model committee in North Carolina do? Much like the functions identified earlier by other organizations, its primary purpose should be to educate judges and judicial candidates about appropriate campaign conduct and to

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243. *Republican Party of Minn. v. White*, 536 U.S. 765, 795 (2002) (Kennedy, J., concurring).

244. Lubet, *supra* note 67, at 811.

criticize inappropriate conduct. Secondary purposes might include the review of campaign materials or statements for appropriateness prior to their release, issuing formal complaints to the North Carolina Judicial Standards Commission when appropriate, and acting as a deterrent to inappropriate behavior. However, just as important as educating judges and judicial candidates is educating the public, a function that is often forgotten at worst or at best minimized by other organizations advocating for campaign conduct committees.<sup>245</sup>

It is a criticism I have made before,<sup>246</sup> but often the legal community forgets about those citizens who are not lawyers but who play, in states like North Carolina, a larger role in selecting judges than lawyers do. Quite simply, if the general public understood the role of the judiciary in the same context as most attorneys, many of the campaign tactics that utilize pledges and promises would not be as effective as they seem to be. But my experiences suggest that the public often does not understand the *process* by which a decision is reached and instead defines justice and fairness by the *outcome* of a judge's decision. A model campaign conduct committee should not simply suggest or dictate a set of aspirational codes of behavior to judicial candidates and chastise, in legal terms, those who deviate from it. Rather, the committee should actively work to explain certain legal concepts to the public, such as why indicating a preference for one class of litigants over another is wrong, or why a judge cannot prejudge drunken driving or child support cases or promise "zero tolerance" without reviewing the facts of a specific case. So long as the public views conflicts over the appropriateness of judicial campaign speech as inside-baseball between legal scholars, jurists, and (to honor my southern roots) "high-falutin'" attorneys, they will never understand the seriousness of the problems identified earlier in this article. The public wants more information about judicial

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245. See A.B.A. Standing Committee on Judicial Independence, *supra* note 212; NATIONAL AD HOC ADVISORY COMMITTEE HANDBOOK, *supra* note 214.

246. See generally Heagarty, *supra* note 71 (explaining the importance of public opinion in electing judges).

candidates<sup>247</sup> and, as demonstrated by Max Baer's campaign, unless given a persuasive counter argument, they are apt to accept – even praise – campaign behavior that gives them more information, even if that information suggests bias or misleads them into expecting specific decisions to be rendered by the judge.

Thus, the plan for a model committee in North Carolina should include a public education component. Methods such as the voter guide created by the 1990 North Carolina Bar Association committee are one way this can be accomplished. A far less expensive way, however, is to take advantage of the power of the Internet. Internet voter guides, such as the ones created by the North Carolina Center for Voter Education have drawn praise from the media, candidates, and citizens. A model committee can use a website (preferably with a memorable name that voters can easily remember and access) as a clearing house for valuable voter information about what to look for in judicial candidates, what the exact duties of each specific judicial office are, what is appropriate and inappropriate campaign behavior, and why such behavior is considered appropriate or inappropriate. A website also helps to establish permanence, providing a quick and easy resource for candidates, so that the volunteer members of a private committee are not deluged by numerous candidate queries or requests that could be answered online. A website also serves as a good media resource, which is an important factor considering that the effectiveness of the committee is dependent upon favorable press coverage.

Education of the judicial candidates themselves is not only important, it should be considered essential. It would be unfair to assess the behavior of the candidates if they have not been made aware of the standards by which they are being judged. One effective step a model committee could take would be to present the standards of behavior being suggested by the committee and asking all candidates to confirm that they have read and understand the committee's standards. A further step would be to ask them to sign a pledge to conduct their campaigns by these standards. The Ad Hoc Committee's guide on judicial campaign conduct

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247. *Id.*

committees offers several recommended standards and also presents what committees in other states have done, at a statewide or county level, to encourage candidate adherence to their standards.<sup>248</sup>

Organizations like the ABA and Ad Hoc Committee place heavy emphasis on compliance with the spirit and intent of a state's judicial canon of ethics.<sup>249</sup> In North Carolina, where the canons do not restrict much campaign behavior,<sup>250</sup> and in some areas specifically permit behavior that would violate the ABA's Model Canons,<sup>251</sup> such reliance on the state's canons for guidance is, in my opinion, meaningless. Compliance with the North Carolina Code of Judicial Conduct ought to be simply the ground floor from which any deviation is completely unacceptable. A model committee in North Carolina should aspire to a higher set of standards, perhaps by adopting the ABA's model canons or, alternatively, the similar standards put forth by The Constitution Project.<sup>252</sup>

The structure of a model North Carolina committee will be another factor affecting the standards the committee uses to evaluate candidate campaign behavior and speech. Unlike past attempts to create a judicial campaign conduct committee in North Carolina, these committees should be created at a local level, as opposed to a statewide level.

The 1990 ABA commission, the group commissioned by Democracy North Carolina, and the sub-committee of the Chief Justice's Commission on Professionalism were all organized to

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248. NATIONAL AD HOC ADVISORY COMMITTEE HANDBOOK, *supra* note 214, at 25-7.

249. See sources cited *supra* note 212.

250. See generally N.C. CODE OF JUDICIAL CONDUCT (2004), available at <http://www.aoc.state.nc.us/www/public/html/rulesjud.htm>.

251. Compare MODEL CODE OF JUDICIAL CONDUCT Canon 5 (2004), with N.C. CODE OF JUDICIAL CONDUCT Canon 7 (2004) (illustrating that specific areas of conflict include whether a candidate should be able to solicit money directly and some level of political behavior. Some key components of the ABA Code, such as restrictions against making pledges, promises, and commitments on issues that may appear in court, no longer exist within the North Carolina Code.).

252. THE CONSTITUTION PROJECT, THE HIGHER GROUND: STANDARDS OF CONDUCT FOR JUDICIAL CANDIDATES, available at <http://www.constitutionproject.org/ci/standards.pdf>.



review statewide campaign activity. However, there are several successful models for committees organized on a much smaller level, with many of these formed in cooperation with county bar associations.<sup>253</sup> North Carolina has several active county- or municipal-based bar associations, which could take up the task of organizing committees on their own or could be important partners in the organization of locally-based committees by other organizations.

This local model relates to the standards by which a model committee evaluates campaign speech and behavior in that it allows local committees to take into account local community standards of behavior. Standards for behavior can sometimes vary considerably from place to place. What is considered perfectly acceptable in one area of the country, or even within one area of the state, may be shocking or scandalous elsewhere. While there are some basic precepts that should be held in common no matter where a model conduct committee is organized (such as those of the ABA model canons), the specific standards for what is appropriate for maintaining the integrity of the office might vary. This variation is helpful if a model committee is to review campaigns of all levels of the judiciary. What may be acceptable in a large urban community may be less so in a conservative rural area, and vice versa. Variation also gets at the importance of credibility, in that a committee of respected local leaders who are widely known and respected within the community may have more credibility with the voters in a local trial court race than “outsiders” from the state capital. The best of both worlds, of course, would be a committee composed of members respected both locally and statewide, but this is not always possible.

As mentioned, community-based bar associations, such as the Wake County Bar Association<sup>254</sup> and the Mecklenburg Bar

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253. Local judicial campaign conduct committees exist in California, Florida, New York, Ohio, and Washington. Details on each can be found at <http://www.judicialcampaignconduct.org/committees.htm> (last visited Jan. 23, 2005) (on file with the First Amendment Law Review).

254. See Wake County Bar Ass’n, at <http://www.lawsight.com/wcba.htm> (last visited Jan. 16, 2005) (on file with the First Amendment Law Review).

Association,<sup>255</sup> may be good places to start organizing. But what of the rest of the state? Some of the smaller, more rural counties in North Carolina simply do not have the resources for a committee, and it is questionable how effective such committees would be. Instead, committees eventually could be formed to represent the various judicial districts around the state, so that, in some areas, a committee could be formed from multiple counties that all belong in the same district court, superior court, or prosecutorial districts. Looking at maps of these districts, we see that there are over thirty such districts at each level and that the different districts do not neatly overlap.<sup>256</sup> However, if local organizers can select one level of the courts they think deserves more attention than the others, it makes sense for them to organize around a common district where they would all be reviewing the same set of candidates.

Such smaller committees, once they are established and have worked out their kinks after an election cycle or two, are perfect laboratories for discovering what does and does not work and what an eventual statewide committee may look like. Rather than starting with a statewide committee that might not be able to sustain itself, I feel that creating one or two model committees based around a county bar association or a judicial district will build the kind of local support and track record for success that is necessary to convince a larger audience to accept this innovation without uncertainty. These committees can also fulfill the extremely valuable role of educating the voting public about trial court judges and monitoring their behavior in a way that might not be possible for a statewide committee without multiple

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255. See Mecklenburg County Bar, at <http://www.meckbar.org> (last visited Jan. 16, 2005) (on file with the First Amendment Law Review).

256. Institute of Government, University of North Carolina at Chapel Hill, *N.C. District Court Districts*, at <http://www.iog.unc.edu/library/judicial/jpgs/DistCt01.jpg> (Jun. 30, 2001); Institute of Government, University of North Carolina at Chapel Hill, *N.C. Prosecutorial Districts*, at <http://www.iog.unc.edu/library/judicial/jpgs/PrDist01.jpg> (Jun. 30, 2001); Institute of Government, University of North Carolina at Chapel Hill, *N.C. Superior Court Districts and Divisions*, at <http://www.iog.unc.edu/library/judicial/jpgs/SupCt01.jpg> (last modified Jun. 30, 2001).

representatives in the various judicial districts.

Whether the decision is made to start locally and build incrementally or to try to establish a statewide committee, North Carolina will benefit. While it may be preferable to start locally, the alternative would not be counter-productive or lead to failure.

To summarize, a model committee in North Carolina should be *private*, and should be organized at the local level initially. The committee should work to educate judicial candidates about community standards for appropriate judicial campaign behavior. It should play a proactive public education role, teaching voters about the special functions of the judicial branch and how and why it is different from the legislative and executive branch. The committee should respond to irresponsible campaign speech and behavior to alert voters and the media that such behavior is wrong and why it is wrong. Also, a committee could take up matters independently or could be complaint-driven. Once the committee has been established and its existence is known, the best way to operate and help preserve the integrity of the committee is to be complaint- or inquiry-driven, rather than proactively judging these campaigns. Having a pool of monetary resources to draw from can increase the operating options available to a committee, but the committee can be established and can operate on very little money. Most of its activities will be in the form of speaking directly with candidates and communicating with the media, though the committee may choose to take on other voter education functions.

The construction of a model committee is relatively simple. The options for its structure and function are known, but what will determine if the committee is successful?

A viable committee needs only two things in order to be successful: credibility and dedicated, diligent members. Because the true power of a *private committee* is in its ability to speak out against inappropriate speech, rather than levy some official sanction, it is important that when the committee makes a statement it is both heard and heeded. The best way to accomplish these goals is through a committee membership and spokesperson with a high degree of credibility that will not be seen as partisan or biased towards a particular interest.

Credibility is essential. The model committee must be seen

as fair and not motivated by partisan concerns. Its members must be well known and respected. If the committee is based in a county or city, it is important that the majority, if not all, of its members be local. Committee membership must be balanced. A committee filled with too many powerful attorneys from the local bar could be seen as a group of “establishment insiders,” while, at the same time, a group of activists or reformers without sufficient representation from the bar could be seen as “rabble-rousing outsiders.” In either case, it is likely that the credibility of the committee would be compromised and that the group would suffer public backlash against its recommendations. There is no universal definition of what constitutes an insider or outsider, and thus it is important to listen to local voices on the matter.

The issue of neutrality can be sticky, and the issue is one of the other pitfalls Lubet warns against when establishing these types of committees.<sup>257</sup> Ideally, all committee members who serve would agree to refrain from making any judicial campaign contributions, endorsements, or fundraising appeals. Obviously, those individuals most concerned about judicial campaigns are typically primary candidates for committee membership, but they are also the individuals most likely to make contributions to judicial candidates. Their abstinence in this regard, however, will improve the credibility of the committee, and their committee membership provides them a solid excuse not to make campaign contributions. If committee members really feel the need to participate in the process through their own philanthropy, perhaps they could make their contributions toward the committee’s work instead.

Lubet’s concern is, I feel, based on the suggestion that for a committee to be neutral it must be disinterested. I disagree and would argue that the absence of political interest is not the only guarantee of neutrality. A committee having equal and balanced political interests would also be valid. Committee members can be noted members of political parties, provided there is bipartisan balance among the members. Through opinion research on topics such as campaign finance reform, we have found the importance of bipartisanship in delivering messages and in choosing

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257. Lubet, *supra* note 67, at 815-16.

spokespersons.

Uniting prominent Democrats and Republicans behind one message can be powerful and persuasive, even if partisan voters express a strong dislike for one side or the other.<sup>258</sup> Rather than trying to form a model committee of apolitical individuals, I believe a more successful strategy would be to unite well-known and respected public figures who may be political but who are part of a balanced group designed to show united bipartisan support.

Finally, in order to establish credibility with the majority of the voting public, it is important that the model committee feature non-attorneys. Public opinion concerning attorneys in North Carolina shows a very slight negative bias towards attorneys and their opinions on political issues.<sup>259</sup> Because it is the general voting population, not simply the legal community, who will be voting on these judges, it is important that the model committee have non-attorney members who are widely recognized and respected and who are able to comment on these issues. I would conclude from our research data that the expressed views of a committee composed solely of lawyers would be viewed slightly more negatively than positively by the general public. The Ad Hoc Committee concurs that all-lawyer committees may have limited credibility with the larger public and “may . . . raise concerns that lawyers might promote personal or political agendas through their committee decisions.”<sup>260</sup> The committee makes the important point that “non-lawyers also are heavily affected by a state’s judiciary and

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258. MICHAEL VASU, N.C. CENTER FOR VOTER EDUCATION, CAMPAIGN REFORM IN NORTH CAROLINA 27 (2000) (on file with the N.C. Center for Voter Education and the First Amendment Law Review).

259. N.C. Center for Voter Education, Strategic Analysis and Messaging (Feb. 19-21, 2000) (unpublished survey, on file with the N.C. Center for Voter Education). The N.C. Center for Voter Education conducted a telephone survey of 800 registered voters in the state of North Carolina who were screened for likelihood of participation in the next general election. The margin of error for this survey is plus or minus 3.4 percent. The sample population was scientifically selected to meet rigid criteria of random selection and geographical allocation. Appropriate weights were assigned to bring data into line with known and presumed demographic characteristics.

260. NATIONAL AD HOC ADVISORY COMMITTEE HANDBOOK, *supra* note 214, at 7-8.

have important interests in the tone of campaigns.”<sup>261</sup>

Bringing together former legislators, governors, or local government leaders with leaders of the business, civic, and religious community can form a solid pool of non-lawyers to add to the leaders in the legal community needed to properly form a model committee. Geographic and demographic diversity, in addition to political diversity, will strengthen the credibility of the committee in the eyes of various communities.

But the fundamental quality needed in every potential member of a model committee is dedication to the work of the committee. As a volunteer organization, it is essential that all members are prepared to attend meetings, participate in conference calls, or communicate regularly through whatever means are required. Members are free to have a healthy, spirited debate over individual cases they may consider, but all members must be willing to back the majority decisions of the committee. The workload of a committee will vary from year to year depending upon the number of races on the ballot in a given election and, of course, the specific behavior or speech exercised by candidates. An active, vigilant committee is an effective committee. Potential committee members should be made aware of this upfront and their commitment should be secured before naming them to the membership.

While all the details of the Berger case mentioned above in relation to Chief Justice Lake’s subcommittee are not known, it is entirely possible that the committee’s actions contributed to the candidate’s decision to drop out of the race. Though not wielding the power of official government sanction, judicial campaign conduct committees do possess a tremendous amount of power that can be used effectively to dissuade, deter, and, if necessary, respond to campaign speech and conduct that would violate the standards of conduct needed to ensure judicial independence. Such power must be wielded responsibly, as actions that are interpreted as endorsing candidates or engaging in electioneering activities pose a real danger to the committee. Committees must address specific incidents of speech and conduct and otherwise remain removed

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261. *Id.* at 8.

from the political process.

The establishment of *private* judicial campaign conduct committees has great potential in North Carolina to address issues of campaign speech not currently allowable under the state's current canons of judicial conduct. Not only can these committees respond to and address actions by candidates, they can directly respond to attacks by special interest groups and non-candidates, something the canons are currently powerless to address. By meeting campaign speech with more speech, everyone concerned about judicial independence and the integrity of judicial elections can answer far more threats than they could by attempting to find remedies under the codes of conduct or currently allowable under state law. By addressing speech with more speech, privately organized groups can actively engage and educate the public in the importance of the judiciary and the importance of concepts like impartiality and due diligence, without running afoul of the First Amendment.

## VII. CONCLUSION & POSTSCRIPT

No reform is perfect, and every problem associated with judicial campaigns cannot be solved while there remains so much debate over what does and does not actually constitute a problem.<sup>262</sup> However, establishing private judicial campaign conduct committees provides a positive, practical, and, most of all, achievable step towards reform. With minimal costs, and without the prerequisites of government sanction, a committee with strong leadership can be organized and activated within a matter of months.

North Carolina amended its Judicial Code of Conduct following the *White* decision, and North Carolina just experienced its first elections under the revised codes. As this article has been written, the campaign tactics of various candidates in these races

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262. Other options may still be considered as long-term solutions. I did not discuss other issues such as strengthened recusal standards or establishing some sort of system of judicial candidate evaluation. However, the reform I am proposing would not conflict with any of these other ideas, both of which are worth exploring.

has become clearer. For example, one newspaper account detailed how four appellate division judicial candidates were stating their personal positions on such issues as abortion, the death penalty, gay marriage, and displaying the Ten Commandments in public buildings, with three of them campaigning “vigorously” on those issues.<sup>263</sup> What trends in campaigning emerge, and whether candidates limit themselves to announcing their views, rather than pledging or promising specific results in future decisions remains to be seen. Based on the success of Edward Brady in his 2002 campaign for North Carolina Supreme Court, it is not unreasonable to assume that, free from any judicial codes of conduct restricting them from such behavior, some candidates will follow his lead.

However, if those who believe that the integrity and independence of the judiciary are threatened by irresponsible campaign speech that suggests pledges and promises of future court decisions are correct, then taking important steps toward reform now will protect us from hazards later. If they are not correct, and unrestricted judicial campaign speech poses no threat and is in fact beneficial to public debate, then by establishing judicial campaign conduct committees we have only added to that discourse and increased the information available to the voters, further benefiting the public.

It is rare to develop public policy that can truly be considered a “win-win” solution. But no matter which side one takes in the debate over what constitutes responsible judicial campaign speech, judicial campaign conduct committees in North Carolina would seem to present a solution with no downside. In the spirit of the *White* decision, this author would like to formally announce his belief that they do.

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263. Matthew Eisley, *Bench Hopefuls Bank On Personal Beliefs*, NEWS & OBSERVER (Raleigh, N.C.), Oct. 31, 2004, at 1B.



