Perspectives on Michigan Judicial Elections

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As you might imagine, the subject of judicial independence is one that is near and dear to my heart; its importance cannot be overstated. The concept became part of my mindset when I was in law school, and has only grown more meaningful with each phase of my career. It was always part of my thinking as a lawyer, but the idea of an independent judiciary became even more present in my life during my tenure as a Justice on the Michigan Supreme Court.

It is important to me now, as president of the American Bar Association, to speak out about the importance of the judicial branch, and how it works -- how we can maintain and protect its independence. People in this country need to know just how important the rule of law is, and how our justice system plays a fundamental, critical role in upholding the rule of law. Particularly in these uncertain times – times of terror threats and increased security at home and abroad – the rule of law, and the underpinnings of our justice system, are critically important. They define who we are, and ensure that our Constitution, our Bill of Rights and our civil liberties, are protected and supported through our justice system.

The American Bar Association strongly advocates for the independence of the judiciary. Where judges are elected, we recognize that their campaigns are necessarily different, because the role of the judge is different. Judicial campaigns are not - and cannot be – traditional political campaigns. Judges do not represent constituencies, and they MUST remain - and appear - impartial.

When money and politics overtake judicial election campaigns, the integrity of the whole justice system is called into question. The perception of influence - that judges can be ‘bought’ - is anathema to our system. If that perception were ever to become widespread, if our citizens lose confidence in the fairness and impartiality of the Courts, the very foundation of our democracy is undermined.

That is a risk we cannot afford to take. And I believe we, as lawyers, judges and concerned citizens, have a responsibility to uphold the integrity of the judicial process in every way that we can.

One of the primary issues I have focused on during my year as president is diversifying the profession. In my mind, this goes to the heart of public confidence and respect for our system of justice. If people don’t see that lawyers, judges, courtroom personnel and others don’t look like they do, they aren’t as likely to believe that they’ll get fair treatment in the system.

We held a conference last October in Washington, DC, to look at ways to increase diversity in the profession. We had top-level speakers who addressed issues of establishing a pipeline for lawyers of color. Educators talked about how to interest more students of color in the law; how to get to kids in elementary and high school, to let them know what’s great about being a lawyer. We also focused on what happens after law school; how do we open the pipeline for lawyers of color to get into good firms, corporate counsel positions, law school deanships and other areas. We talked about opening doors and mentoring for lawyers of color at all levels. We gave people information and tools, to bring diversity to their own workplaces, and to make it a priority. In the end, the only way to achieve a truly diverse judiciary is to increase the number of lawyers of color and make sure that those lawyers have an equal opportunity to pursue careers on the bench.
Diversity was just one part of a report we released last year, “Justice in Jeopardy” that outlines some of the problems facing our state court systems. Among its findings is that within communities of color, there is widespread belief that they receive unequal, inferior treatment from the justice system. Keep in mind that the communities of color will be the majority in just fifty years. We cannot have the majority of our population believing that they don’t receive justice in our system. It simply won’t work. Our system relies on –depends on – the trust and confidence of the American people.

The report also noted that there is a widespread perception that there are two systems of justice – one for the wealthy and one for the poor. Another factor that undermines confidence in the system.

“Justice in Jeopardy” is a product of the ABA’s Commission on the 21st Century Judiciary, and it raises many issues that affect our courts and our judiciary. Those issues range from the mounting problems with court funding in states throughout the country, to how we run our judicial campaigns and the use of ‘attack’ ads, to questions of limits on judicial campaign speech, and pressure on judges to vote either to satisfy a particular political constituency or popular expectation. The report makes recommendations that we hope will help those facing these issues, and will give guidance to policymakers who struggle to achieve a fair and balanced system among competing interests.

The first hearing of our Commission was held right here at Wayne State University Law School in 2002, and I testified along with many others about some of the issues involved in our elections in Michigan. That was just after the 2000 election, which I don’t have to remind you was fraught with many problems, in many states around the country. But one of the remarkable things about the judicial elections in 2000 was the much more significant role that big money played in state Supreme Court elections. In those campaigns, in Supreme Court races around the country, candidates raised forty-five-point-six million dollars. That is an increase of more than 60 percent over the amount candidates raised in the election two years earlier.

In Michigan, Supreme Court candidates raised a total of six-point-seven million dollars in 2000. Political parties and interest groups added at least as much in spending on television advertising. Our state was second on the list of most money raised by candidates in 2000.

After Alabama, where candidates raised on average, one-point-two million dollars, Michigan candidates raised an average of more than $750,000 in 2000. And the only reason we were 2nd, was because some of our losing candidates didn’t raise any money, which brought our totals down. But we were up there. The money rolled in.

The good news is that Court of Appeals candidates didn’t have the influx of big money that Supreme Court candidates did. There, amounts raised were significantly lower, due in part, I’m sure, to the system favoring incumbents.

But the idea that lawyers, business interests, unions, political parties, and others are giving money to judges that may one day rule on a case involving them, leaves people with a bad taste; they wonder how judges can remain impartial.

In a study done by the Money in Judicial Politics Project, looking at Michigan’s judicial races between 1990 and 1998, it turned out that lawyers made up an average 23-percent of Supreme Court campaign contributors. But the majority of those lawyers who gave money -- at least 80 percent of them -- never appeared before the Court during that period. Those who did appear made up just over 6-percent of the money contributed to candidates. So the influence may not be as great as our worst fears. But again, we’re battling perceptions of influence, and those perceptions are just as important as reality.
The results of a survey of the Michigan judiciary conducted by the sponsors of this symposium show that judges are also concerned about the direction of judicial campaigns and the impact on the public’s perception of the courts. Over eighty percent of the Michigan judges responding to this survey expressed dissatisfaction with the tone and conduct of recent judicial campaigns in our state. And when asked about interest group advertising in judicial elections, over eighty-six percent of judges responding to the survey were concerned about the affect of such advertising on the actual or perceived fairness of the justice system.

During my time on the Court, my colleagues and I lamented the fact that the election process required that we raise money for our candidacies to be competitive. We didn’t want to raise money – it was a necessary evil. It is the system that the citizens of our state – and many other states – have chosen as one they believe gives candidates equal opportunities to run for a seat on the bench.

And given that judicial elections are part of the process in many states, we at the A-B-A and those of us who are concerned about these issues have a duty to ensure that elections are administered as fairly as possible. The recent Supreme Court decision on campaign finance, *McConnell versus the Federal Election Commission*, may help to address the perception of influence. The Court upheld efforts to limit soft money contributions in presidential and congressional campaigns. States are now in a position to revisit laws and regulations relating to money in judicial campaigns, particularly spending on so-called “issue advertising” that seeks to influence voters without explicitly calling for the election or defeat of a particular judicial candidate. In the recent survey of Michigan judges, ninety-three percent of respondents agreed that Michigan should require disclosure of contributors to committees that pay for electioneering communications that seek to affect the outcome of judicial elections.

Here in Michigan, the Supreme Court has adopted changes to Canon 7 of the Michigan Code of Judicial Conduct that address attorney contributions to judicial campaigns. The changes, which just took effect on January 1, prohibit judicial candidates from using funds they gathered during previous campaigns for other offices. These types of measures are necessary to ensure that judicial campaigns are fair and free of undue influence.

Judicial campaigns must be free from the rancor and partisanship that often permeates other elections. The public should demand full disclosure of campaign contributions and strong disqualification requirements where those contributions give rise to even the perception of a conflict.

The A-B-A has policy recommending that states adopt a public financing scheme for judicial campaigns, and last year, North Carolina became the first state to provide full public funding for Supreme Court and Court of Appeals races. The Michigan State Bar has joined the chorus of groups calling for public financing of judicial campaigns, an option that should be actively explored. Other options to address the role of money in judicial campaigns and give voters the power to make better-informed decisions include changing the length of judicial terms, so that judges don’t have to run as often; making judicial elections truly non-partisan; strengthening disclosure laws so that citizens know who is contributing and how much; establishing standards of conduct for campaigns, along with citizen committees that are set up to monitor them; providing voters with guides to the candidates, including challengers; and setting up judicial evaluation commissions.

I would be remiss if I didn’t mention the proliferation of judicial campaign ads – particularly on television - in the last several election cycles. In the 2000 judicial races, more
than 10-million dollars were spent on television ads. Those ads ran in 25-percent of states with contested races. Just two years later, in 2002, ads ran in 64-percent of the states with contested races.

Most of the ads are still paid for by the candidates, but increasingly money is coming from outside groups and political parties. In 2002 Supreme Court elections, candidates and outside groups ran ads in more than twice as many states as they did in 2000. And they poured money into their ad budgets that year, spending more than $2.5 million in the hundred largest media markets. In Michigan, the state Chamber of Commerce spent more on airtime than all of the judicial candidates combined.

Many of these so-called “issue ads” are troubling. You probably remember the ads that ran in Michigan in 2000, depicting Supreme Court Justices dancing from within the pockets of special interest group representatives – indicating that the Justices are swayed by campaign contributions. It was a very effective image, and one that I’m sure stuck with many people. The culture of the ‘sound bite,’ and the jarring visual image is very effective. In fact, judges who air the best, most effective ads, and run them frequently, more often than not win their races. Where outside groups ran ads in 2002, they outspent their opponents. And in nearly every instance, the candidate who spent more television ad money won the race.

The message that many of these ads send is one meant to signal how a judicial candidate will rule on a certain issue. That may be O-K in a legislative or executive branch race – but it’s not O-K in judicial campaigns. Again, judges are different. Their campaigns need to be different. They cannot signal how they might vote or decide on a specific issue that may come before them. It’s antithetical to our system of justice. It undermines confidence.

In June of 2002, the Supreme Court ruled in Republican Party of Minnesota versus White, invalidating a provision of Minnesota’s canons regulating campaign speech. By catapulting to the national stage the debate over a judge’s First Amendment rights and a state’s interest in providing for an impartial judiciary, the case has had a dramatic impact on what judges can and cannot say during elections. There have been varying interpretations of how far the Court’s ruling reaches, and it has become clear that states are struggling to find a balance between two important, yet competing, interests. Following the decision in White, the ABA adopted amendments to the Model Code of Judicial Conduct, changing provisions of the canons that regulate campaign speech. The White decision and its progeny exemplify the necessity to take a close look at the way states regulate judicial conduct. With that in mind, the ABA recently commissioned a blue-ribbon group to evaluate the Model Code of Judicial Conduct in its entirety. The commission is holding a series of public hearings across the country and expects to submit recommendations to the ABA House of Delegates in February 2005. The work of the commission is but one example of the ABA’s efforts to maintain the relevance, currency, and applicability of its policy.

Our republic is based on majority rule, but our democracy protects and ensures the liberty and freedom of all – even the unpopular or the minority voice. Our independent judiciary provides the check that maintains the rule of law and prevents tyranny of the majority, ensuring a civil society.

The organized bar is committed to ensuring that our democratic principles are upheld, and that individual rights are protected. We will continue to work with the administration and others to further the rule of law both here and through our international rule of law projects in countries around the world. We will also work to improve our justice system here at home.
As lawyers, our impact is truly global: we have local, national, and international impact. And if you aren’t a member already, I would encourage you to become a member of the American Bar Association.

When lawyers work with the bar in improving access to justice for the underrepresented, or maintaining judicial independence or more broadly speaking out for the profession—there is a direct benefit to the entire society. There is also a direct benefit for the individual lawyer who volunteers: the lawyer stays connected to the fundamental purpose of the legal profession—which is making life better for people with justice and liberty for all.
In conjunction with the symposium Perspectives on Judicial Elections in Michigan, the sponsors carried out a survey of state judges in Michigan. The panels at the symposium featured a broad range of academics, representatives of the Michigan bar, former legislators, representatives of good government organizations, journalists, and participants in the political process. They did not, by design, include any judges. Instead, the planning committee undertook the survey of all the judges in Michigan in order to provide symposium participants with knowledge about Michigan judges’ views on the current judicial election environment in the State and on various policy proposals for changes in the judicial selection process.

Our survey used as its model a national survey of state judges carried out in late 2001 by the advocacy group Justice at Stake. In November 2003 we mailed surveys to the 608 state judges in Michigan. This included the 7 Justices of the State Supreme Court, 28 Appeals Court judges, and 573 local judges (district, circuit and probate judges). A follow-up reminder was sent in early December. We received 277 completed surveys. Appendix One compares the sample who responded with the population of judges to whom surveys were sent. While the sample of 277 judges is not a random sample of the population, it seems to reflect the population quite well. As with all non-random samples, one must be cautious in making inferences about the population, since there may be differences between judges who responded and judges who did not that could affect the results.

In the discussion that follows, data are presented for both the national sample from the Justice at Stake survey and the Michigan sample from our survey. In most cases, the questions on the surveys were identical; I use the version of the question from our survey, which names Michigan as the state of reference. In other cases, as noted, wording varied slightly.

The symposium featured three panels, entitled “Providing Voters the Information They Need for Judicial Selection,” “Financing Judicial Elections,” and “Selecting Judges: Election or Appointment?” The presentation of the survey results is organized along these lines, beginning with data about judges’ assessment of the performance of judges in their state.

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1 The symposium was held at the Wayne State University Law School on January 12, 2004. The sponsors of the symposium were the Michigan Campaign Finance Network, the State Bar of Michigan, the League of Women Voters of Michigan, the Wayne State University Law School, the Wayne State University State Policy Centr, and the Gerald R. Ford School of Public Policy at the University of Michigan.


3 For instance, it may be that judges who chose to respond did so because they have greater levels of concern about the current electoral environment in Michigan or because they feel more strongly about some of the proposed reforms. Were this the case, inferences from the sample data would overestimate the levels of concern. On the other hand, if whether or not a judge responded had more to do with how busy s/he was or her/his general attitude toward responding to surveys, then inferences from the sample would be subject to less bias.
Performance of Judges

Both surveys asked judges to rate the overall performance of their colleagues. It is clear that judges believe that the on-the-job performance of their colleagues is strong.

*How would you rate the overall job being done by judges in Michigan?*

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<thead>
<tr>
<th></th>
<th>Michigan</th>
<th>National</th>
</tr>
</thead>
<tbody>
<tr>
<td>% responding “excellent” or “good”</td>
<td>93%</td>
<td>94%</td>
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</table>

Voter Information and Participation

In Michigan, the Constitution calls for the election of judges for all state courts. This naturally raises questions about the level of citizen participation and the degree to which voters are equipped to make informed choices at the polls. On both dimensions, judges across the country and in Michigan are quite concerned:

*In Michigan’s last two elections, more than one-fourth of voters who went to the polls failed to cast a ballot for a candidate for the Supreme Court. How concerned are you about this level of voter participation?*

<table>
<thead>
<tr>
<th></th>
<th>Michigan</th>
<th>National</th>
</tr>
</thead>
<tbody>
<tr>
<td>% “somewhat” or “very” concerned</td>
<td>81%</td>
<td>82%</td>
</tr>
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</table>

*How concerned are you that because voters are insufficiently informed about judicial candidates, judges may be selected for reasons other than their qualifications?*

<table>
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<tr>
<th></th>
<th>Michigan</th>
<th>National</th>
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</thead>
<tbody>
<tr>
<td>% “somewhat” or “very” concerned</td>
<td>81%</td>
<td>82%</td>
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</table>

In both surveys, judges were asked their views about a number of proposals that have been put forward as ways to increase the information voters have about judicial candidates and to increase the percentage of voters who cast votes in these races. In both surveys, most judges are not satisfied with television advertising as a means of informing voters. A majority in both surveys express support for state-produced voter guides, independent citizen boards to monitor campaign conduct and inform the public about inappropriate advertising, and public debates among candidates. Michigan judges, however, are less enthusiastic about two of these proposals than their colleagues in other states.

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4 The national survey asked about the performance of “judges and courts.”
5 The national survey item was “In some states, as few as 13% of people vote in judicial elections.”
6 The national survey item was “Because voters have little information about judicial candidates, judges are often selected for reasons other than their qualifications.”
Television ads are the best way for judicial candidates to make their qualifications known.  

<table>
<thead>
<tr>
<th>Michigan</th>
<th>National</th>
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<tbody>
<tr>
<td>% who “somewhat” or “strongly” agree</td>
<td>31%</td>
</tr>
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</table>

*Michigan should produce voter guides for citizens prior to judicial elections to help inform them about the judicial candidates.*

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<th>Michigan</th>
<th>National</th>
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<tbody>
<tr>
<td>% who “somewhat” or “strongly” agree</td>
<td>65%</td>
</tr>
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</table>

*Michigan should develop a system of independent citizen boards to monitor judicial campaigns and to inform the public about misleading or inaccurate advertising in judicial campaigns.*

<table>
<thead>
<tr>
<th>Michigan</th>
<th>National</th>
</tr>
</thead>
<tbody>
<tr>
<td>% who “somewhat” or “strongly” agree</td>
<td>57%</td>
</tr>
</tbody>
</table>

*Judicial candidates should participate in publicly sponsored debates.*

<table>
<thead>
<tr>
<th>Michigan</th>
<th>National</th>
</tr>
</thead>
<tbody>
<tr>
<td>% who “somewhat” or “strongly” agree</td>
<td>53%</td>
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</table>

**Conduct and Financing of Judicial Campaigns**

The Supreme Court election in 2000 in Michigan was characterized by levels of expenditure and negative campaigning that far exceeded those of previous elections. The effects of this election are shown in the responses of judges to questions about the conduct and tone of recent judicial elections.

*How satisfied are you with the conduct and tone of recent judicial campaigns in Michigan?*

<table>
<thead>
<tr>
<th>Michigan</th>
<th>National</th>
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</thead>
<tbody>
<tr>
<td>% “somewhat” or “very” dissatisfied</td>
<td>83%</td>
</tr>
</tbody>
</table>

*How would you describe the trend in the conduct and tone of judicial campaigns in Michigan over the past five years?*

<table>
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<th>Michigan</th>
<th>National</th>
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</thead>
<tbody>
<tr>
<td>% “somewhat” or “much” worse</td>
<td>88%</td>
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</tbody>
</table>

Among Michigan judges, 80% of those responding were both dissatisfied with the conduct and tone of recent elections and thought the trend over the past five years was in the wrong direction. Their views are distinctly more negative than those of their colleagues in other states.

Michigan judges were also greatly concerned about effects of advertising in judicial elections sponsored by special interest groups:
There are few legal restrictions in Michigan on special interest groups who buy advertising to influence the outcomes of judicial elections. How concerned are you that such advertising affects either the fair administration of justice or the appearance of the fair administration of justice in Michigan?

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<tr>
<th></th>
<th>Michigan</th>
<th>National</th>
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<tbody>
<tr>
<td>% “somewhat” or “very” concerned</td>
<td>88%</td>
<td>NA</td>
</tr>
</tbody>
</table>

At the heart of concerns about money in judicial elections are the effects such contributions have on judicial behavior. In both surveys, judges indicate that they feel under moderately strong pressure to raise money for their campaigns.

While holding a position as a judge, how much pressure have you been under to raise money for your own campaign?8

<table>
<thead>
<tr>
<th></th>
<th>Michigan</th>
<th>National</th>
</tr>
</thead>
<tbody>
<tr>
<td>% “some” or “a great” deal</td>
<td>44%</td>
<td>46%</td>
</tr>
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</table>

Breaking these responses down by the level of the court, 64% of appellate and supreme court judges in Michigan feel some or a great deal of pressure to raise money, compared to only 42% of trial court judges.

When it comes to the fear that campaign contributions may influence the decisions of judges in cases that come before them, judges across the nation seem confident that they and their colleagues will not be influenced by money in campaigns, with Michigan judges expressing a greater degree of confidence than their colleagues in other states.

How much influence do you think judicial campaign contributions have on judges’ decisions in cases?

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<th>Michigan</th>
<th>National</th>
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</thead>
<tbody>
<tr>
<td>% “moderate” or “a great” deal</td>
<td>18%</td>
<td>26%</td>
</tr>
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</table>

Both surveys asked judges about their views on a variety of proposals aimed at improving judicial elections. Nationally, each of the proposals receives majority support from state judges. In Michigan, only three of the five proposals receive this level of support. In both surveys the support for disclosure of contributions and contribution limits is quite strong, with judges in Michigan being somewhat more supportive. Support for the other three drops off, particularly among Michigan judges, despite the higher levels of concern and dissatisfaction with the system of judicial elections by the latter group. Support for judges recusing themselves in cases to which contributors are a party is the lowest among the proposals, presumably reflecting the fact that most judges do not believe that campaign contributions influence judges’ decisions.

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7 This question was not asked as part of the national survey.
8 In the national survey, the question was “Are you under any pressure to raise money for your campaign during election years?”
Michigan should require disclosure of the contributors to all committees that pay for
electioneering communications that try to affect the outcome of judicial elections.

% who “somewhat” or “strongly” agree
Michigan: 93%
National: 92%

Michigan should have limits on contributions to all committees that pay for
electioneering communications that try to affect the outcome of judicial elections.

% who “somewhat” or “strongly” agree
Michigan: 78%
National: 71%

Michigan should develop a system of independent citizen boards to monitor judicial
campaigns and to inform the public about misleading or inaccurate advertising in
judicial campaigns.

% who “somewhat” or “strongly” agree
Michigan: 57%
National: 70%

Michigan should create a publicly financed election fund that qualified judicial
candidates could use to finance their election campaigns. Candidates who choose to use
public funding would no longer raise money from private sources and their spending
would be limited to the amount they receive from the fund.

% who “somewhat” or “strongly” agree
Michigan: 44%
National: 61%

A judge should be prohibited from presiding over and ruling in cases where one of the
sides has given money to his/her campaign.

% who “somewhat” or “strongly” agree
Michigan: 30%
National: 56%

Given the declining levels of support by Michigan for these proposals as we go
down the list, it is useful to consider the full range of responses, as shown below:

<table>
<thead>
<tr>
<th>StA</th>
<th>SoA</th>
<th>N</th>
<th>SoD</th>
<th>StD</th>
</tr>
</thead>
<tbody>
<tr>
<td>Disclosure</td>
<td>67%</td>
<td>26%</td>
<td>4%</td>
<td>2%</td>
</tr>
<tr>
<td>Contribution Limits</td>
<td>55%</td>
<td>23%</td>
<td>8%</td>
<td>7%</td>
</tr>
<tr>
<td>Monitoring Boards</td>
<td>25%</td>
<td>31%</td>
<td>15%</td>
<td>14%</td>
</tr>
<tr>
<td>Public Funding</td>
<td>19%</td>
<td>25%</td>
<td>16%</td>
<td>13%</td>
</tr>
<tr>
<td>Recusal</td>
<td>14%</td>
<td>16%</td>
<td>15%</td>
<td>19%</td>
</tr>
</tbody>
</table>

For the first three proposals, judges expressing support clearly outnumber those
who oppose them. Support for public funding of judicial campaign is evenly balanced.
Only in the case of the recusal proposal does the number of opponents clearly outweigh
the number of supporters.

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The headings mean: StA = Strongly Agree, SoA = Somewhat Agree, N = Neither Agree nor Disagree,
SoD = Somewhat Disagree, StDx = Strongly Disagree. Some rows may not total to 100% because of
rounding.
Methods of Selecting Judges

As noted earlier, Michigan is a state that elects its judges, at all levels. Supreme Court justices are nominated by political parties but are listed in the nonpartisan portion of the ballot in the general election. The nomination and elections for appellate and trial court judges are nonpartisan. Most of the public attention focuses on the election process, but this misses an important fact about the Michigan judiciary. In practice, half of the judges in Michigan gained their current office through an appointment to fill a vacancy. On this dimension, Michigan is not different from other states. In Michigan, vacancies are filled by gubernatorial appointment.

In your current position, were you initially appointed to fill a vacancy or were you elected?

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<thead>
<tr>
<th></th>
<th>Michigan</th>
<th>National</th>
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<tbody>
<tr>
<td>Appointed to fill a vacancy</td>
<td>49%</td>
<td>53%</td>
</tr>
<tr>
<td>Elected</td>
<td>51%</td>
<td>47%</td>
</tr>
</tbody>
</table>

Given the very high rate at which incumbent judges are re-elected, appointment to office is often a near-guarantee of long career as a judge.

Both surveys asked respondents about their satisfaction with the methods used to select judges in their state. The questions were phrased differently, so direct comparisons are not possible. In addition, the methods used to select judges vary considerably across the states, meaning that the likely anchor for judges’ responses (the status quo in their state) varies as well.

In the national survey, respondents were asked “How satisfied are you with the judicial appointment process—for vacancies and full terms—at the state level?” Overall, 27% said they were very satisfied, 46% were somewhat satisfied, 17% were somewhat dissatisfied, and 9% were very dissatisfied (1% didn’t respond).

Both surveys asked judges for their views on various alternative methods of selecting judges. Here, too, the questions were phrased sufficiently differently that direct comparisons are difficult to make. In the national survey, a bare majority (52%) of state judges favored “merit selection followed by retention election” for appellate judges; next on the list was “non-partisan popular election,” favored by 19% of judges. At the trial court level, the level of support for these two options was 40% and 30%, respectively.

In the Michigan survey, we asked more detailed questions about views on current methods of selection:

How satisfied are you with the current process for electing trial court judges in Michigan?

<table>
<thead>
<tr>
<th></th>
<th>Michigan</th>
</tr>
</thead>
<tbody>
<tr>
<td>% “somewhat” or “very” satisfied</td>
<td>72%</td>
</tr>
</tbody>
</table>
How satisfied are you with the current process for electing appellate and supreme court judges in Michigan?

Michigan
% “somewhat” or “very” satisfied  28%

How satisfied are you with the current judicial appointment process for filling vacancies in Michigan’s trial courts?

Michigan
% “somewhat” or “very” satisfied  66%

How satisfied are you with the judicial appointment process for filling vacancies in Michigan’s appellate and supreme courts?

Michigan
% “somewhat” or “very” satisfied  52%

It is clear that judges are least satisfied with elections for appellate and supreme court judges. As noted above, appellate judges are elected in a nonpartisan process while Supreme Court justices are selected through a partisan nomination process and a nonpartisan election. Because of the wording of the question, we cannot separate judges’ views about the appellate courts and the Supreme Court. Given the uproar associated with the conduct of the 2000 Supreme Court election, it seems most likely that the judges’ responses reflect their views on that race rather than the appellate court races. Judges seem reasonably satisfied with methods of appointing/electing trial court judges (recall that most respondents are trial court judges). They see room for improvement in both electing and filling vacancies in courts above the trial court level.

In the Michigan survey we asked judges to rate eleven different methods of selecting judges on a scale of 1 (low) to 10 (high). These include two options for direct elections, eight involving gubernatorial appointment (with different combinations of legislative involvement and retention elections), and one that would have the legislature appoint judges (with retention elections). The status quo in Michigan for electing Supreme Court justices is the first option (partisan nomination process followed by a nonpartisan election). Unfortunately, we did not include in the survey the status quo method for appellate and supreme court elections (nonpartisan nomination and nonpartisan election). The status quo for filling vacancies—which is how half the judges obtained their initial appointment to their current position—is a variation on the fifth option (appointment by the governor with retention elections).

These options are described in the following table. The number in the left-hand column is used to identify the options in the two graphs that follow, which show the ratings judges assigned to the options for the appellate and supreme courts (first graph)

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10 The status quo in Michigan for appellate and supreme court justices is the first option—partisan nomination process followed by a nonpartisan election. Unfortunately, we did not include in the survey the status quo method for trial court elections—nonpartisan nomination and nonpartisan election.
and trial courts (second graph). The differences between the two sets of ratings are minor.\textsuperscript{11}

**Direct Election**
1. Nonpartisan popular election with partisan nomination process
2. Partisan popular election with partisan nomination process

**Gubernatorial Appointment (No Nonpartisan Screening Panel)**
3. Appointment by the Governor with legislative approval, with retention election
4. Appointment by the Governor with legislative approval, without retention election
5. Appointment by the Governor without legislative approval, with retention election
6. Appointment by the Governor without legislative approval, without retention election

**Gubernatorial Appointment (With a Nonpartisan Screening Panel)**
7. Screening and recommendation by a nonpartisan panel followed by appointment by the Governor with legislative approval, with retention election
8. Screening and recommendation by a nonpartisan panel followed by appointment by the Governor with legislative approval, without retention election
9. Screening and recommendation by a nonpartisan panel followed by appointment by the Governor without legislative approval, with retention election
10. Screening and recommendation by a nonpartisan panel followed by appointment by the Governor without legislative approval, without retention election

**Appointment of Judges by the Legislature**
11. Legislative appointment, with retention election

The box graphs in these figures show the options ordered from left to right in terms of the ratings given them by judges. The number of the option is shown in the lower part of the “box.” The box for an option shows the range of ratings given by the middle half of the respondents. The bottom of the box is at the 25\% percentile, the top of the box is at the 75\% percentile, and the horizontal line across the middle of the box shows the rating given by the median respondent. The lines extending above and below the boxes indicate the highest and lowest ratings assigned by respondents. For all methods except the two on the right, at least one respondent gave each method a 1 and at least gave each a 10. The height of the boxes is a measure the spread of the ratings on a given selection method. In most cases, there is considerable variation in judges’ ratings.\textsuperscript{12}

\textsuperscript{11} Because of limitations of the software (or the author’s ability to use it), the numbers corresponding to selection methods have been handwritten into the boxes in the graphs. Readers who find themselves with a copy that does not include these numbers should write the following numbers into the boxes:

- Appellate/Supreme Court Graph: 7, 9, 5, 10, 3, 8, 1, 4, 6, 2, 11
- Trial Court Graph: 9, 7, 5, 10, 3, 8, 1, 4, 6, 2, 11

\textsuperscript{12} To illustrate these features of a box graph, consider the most highly rated method is Number 7 (recommendation by a screening panel, appointment by the governor, approval by the legislature, with a retention election). Judges rated it from 1 to 10, with 50\% of the ratings being between 3 and 9, and the median rating being a 6.) The second most highly rated method (which drops legislative approval) has the same median rating, but the middle half of respondents gave ratings between 2 and 8. In the case of the least highly rated method, legislative appointment, the ratings ranged from 1 to 6, the middle half of the ratings being between 1 and 3, and the median rating being a 1.
First, note that the rankings of the methods for selection of appellate/supreme court judges and trial court judges are nearly the same. The only difference comes in the ratings of the two methods at the top, which switch between the two graphs. In case of appellate and Supreme Court judges, respondents give the highest rating to the method that is most involved—screening by a nonpartisan panel, appointment by the governor, approval of the legislature, and retention elections. The second most highly rated method drops the legislative approval; its median rating is the same as the most highly rated method. In the case of trial court judges, these two options are reversed, most likely reflecting a belief that appellate and Supreme Court judgeships are sufficiently small in number and sufficiently important that legislative approval adds another important layer of discourse and accountability.

The status quo for Supreme Court elections—partisan nomination and nonpartisan election—ranks 7th among the 11 options. Michigan judges seem to see ample opportunity to improve on the status quo in this arena.

In general, judges like the idea of a nonpartisan screening panel. Each of the options that includes such a panel receives significantly higher ratings than the
comparable option that does not include such a panel. Judges also like retention elections; here, too, each of the options that includes a retention election provision receives higher ratings than the comparable option with a retention election.

Interestingly, a variant on the status quo for filling vacancies—appointment by the governor with retention elections—ranks 3rd in both cases.13

At the other end of the spectrum, there is little or no enthusiasm for fully partisan elections and in both graphs the lowest ratings by far were associated with legislative appointment of judges (with retention elections).

These ratings do not vary across most important groupings of judges. Whether we look at judges at the appellate/supreme court or the trial level, Republicans or Democrats, males or female, Blacks or Whites, the rankings are the same. When it comes to rating methods of selecting appellate/supreme court judges, the only group I identified that had substantially different ratings were judges who were satisfied with the status quo method of selecting appellate and supreme court judges. I found no group that didn’t rank the legislative appointment method last of the eleven methods.

Conclusion

On each of the topics addressed by the symposium’s panels, judges in Michigan, like their peers around the nation, express considerable concern and dissatisfaction with key elements of the current process of selecting judges for state courts. For the most part, they also express support for initiatives aimed at informing voters and increasing their participation in judicial elections, regulating conduct and money in judicial campaigns, and changing methods of selecting judges to involve an independent screening panel that would recommend appointments to the Governor.

13 The difference is that under the current system, judges may face opposition, whereas the option in question refers to a retention election, in which voters respond to the question “Should Judge _____ be retained?”
Appendix One

Comparing the Sample and the Population

Surveys were mailed to 608 judges and 277 were returned. The splits between appellate/supreme court judges and trial court judges in the population and sample are identical.

<table>
<thead>
<tr>
<th></th>
<th>Appellate/Supreme Court</th>
<th>Trial Court</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number in Population</td>
<td>35</td>
<td>573</td>
<td>608</td>
</tr>
<tr>
<td>Number in Sample</td>
<td>15</td>
<td>254</td>
<td>269</td>
</tr>
<tr>
<td>(8 respondents did not indicate the level of their court)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Proportion of Population</td>
<td>5.8%</td>
<td>94.2%</td>
<td></td>
</tr>
<tr>
<td>Proportion of in Sample</td>
<td>5.6%</td>
<td>94.4%</td>
<td></td>
</tr>
</tbody>
</table>

In September 2003, a senior analyst in the Detroit regional office of the State Court Administrative Office carried out an analysis of the racial, ethnic and gender composition of the population of trial court judges in Michigan. Between then and the time the survey was mailed, there were a small number of changes in this population. Comparison of this population and those who responded to the survey indicates that the sample is quite similar to the population in terms of these characteristics. The percentages below are based on the 220 respondents who answered all three of the race, ethnicity and gender questions.

<table>
<thead>
<tr>
<th></th>
<th>% of Population</th>
<th>% of Sample</th>
<th>Response Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>White Non-Hispanic Males</td>
<td>69.4%</td>
<td>73.6%</td>
<td>40.3%</td>
</tr>
<tr>
<td>White Non-Hispanic Females</td>
<td>16.2%</td>
<td>15.5%</td>
<td>36.2%</td>
</tr>
<tr>
<td>Black Non-Hispanic Males</td>
<td>6.2%</td>
<td>5.0%</td>
<td>30.6%</td>
</tr>
<tr>
<td>Black Non-Hispanic Females</td>
<td>7.4%</td>
<td>3.6%</td>
<td>18.6%</td>
</tr>
<tr>
<td>Hispanic Males</td>
<td>.5%</td>
<td>1.4%</td>
<td>100.0%</td>
</tr>
<tr>
<td>Hispanic Females</td>
<td>.2%</td>
<td>.5%</td>
<td>100.0%</td>
</tr>
</tbody>
</table>

The analysis in this paper has not weighted the responses to reflect the differential response rates of the sub-populations. For the most part, responses to other questions are not strongly related to race, ethnicity or gender.
The respondents to the survey indicate a broad range of partisan leanings. We do not have population figures for this characteristic, but any fear that the sample is packed with partisans of one type is allayed by the following numbers (51 of the 277 judges chose not to answer this question):

*Generally speaking, which of the following best describes your political orientation?*

- 10.6% Strong Democrat
- 6.2% Weak Democrat
- 18.1% Independent-lean Democrat
- 19.9% Independent/Nonpartisan
- 19.9% Independent-lean Republican
- 5.8% Weak Republican
- 19.5% Strong Republican
At last count, 31 states plus the District of Columbia select at least some of their judges by means of popular elections. Does that mean that elections for judicial office in these states are indistinguishable from elections for other offices, such as legislator, governor, or county drain commissioner? More specifically, does the First Amendment allow a state to impose greater limits on the speech of candidates in judicial elections than in other kinds of elections?

These were the central questions in the case of Republican Party of Minnesota v. White, decided by the United States Supreme Court in 2002. The White case involved a provision of Minnesota’s Code of Judicial Conduct known as the “Announce Clause,” which had been adopted from an earlier version of the ABA’s Model Code of Judicial Conduct. The Announce Clause prohibited “a candidate for judicial office” from “announce[ing] his or her views on disputed legal or political issues.” A candidate for the Minnesota Supreme Court filed a lawsuit challenging the Clause as violative of the First Amendment. By a 5-to-4 vote, with the Court’s five most conservative justices in the majority, the Court agreed with the candidate that the Announce Clause was an impermissible restriction on freedom of speech.

The Court’s opinion, written by Justice Antonin Scalia, reasoned as follows. First, Justice Scalia noted that all the parties to the case agreed that the Announce Clause, as a restriction on “speech about the qualifications of candidates for public office,” should be subjected to what is known as “strict scrutiny.” Under strict scrutiny, a restriction on speech will be invalidated unless the state can demonstrate that the restriction is “narrowly tailored to serve a compelling state interest.”

The State of Minnesota offered two closely connected interests supposedly served by the Announce Clause: “preserving the impartiality of the state judiciary and preserving the appearance of the impartiality of the state judiciary.” “Impartiality,” Justice Scalia noted, is a rather vague term; and so Justice Scalia posited three possible meanings for it. One meaning of judicial “impartiality” was “the lack of bias for or against either party to the proceeding.” But the Announce Clause was not narrowly tailored to achieve this kind of impartiality, Justice Scalia concluded, because “it does not restrict speech for or against particular parties, but rather speech for or against particular issues.”

“Impartiality,” Justice Scalia continued, also might mean “lack of preconception in favor of or against a particular legal view.” Preserving this type of judicial impartiality, however, was “not a compelling state interest.” According to Justice Scalia, “[a] judge’s lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about

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1 122 S. Ct. 2528 (2002).
3 122 S. Ct. at 2534.
4 Id. at 2535.
5 Id.
6 Id.
7 Id. at 2536.
the law.” Indeed, Justice Scalia asserted, “even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so,” for a lack of existing legal views “would be evidence of lack of qualification, not lack of bias.”

Finally, judicial “impartiality” might mean simply “open-mindedness”—the quality of being “willing to consider views that oppose [a judge’s own] preconceptions, and remain open to persuasion, when the issues arise in a pending case.” But while this might in fact be a compelling interest, Justice Scalia determined, and while the Announce Clause might in fact serve that interest, the Court did “not believe the Minnesota Supreme Court adopted the announce clause for that purpose.” Because the Announce Clause regulated only the speech of judicial candidates during campaigns, it was “so woefully underinclusive as to render belief in” the purpose of judicial open-mindedness “a challenge to the credulous.” After all, judicial candidates often make known their views on disputed political and legal issues before they become candidates, in fora like law review articles, speeches, op-ed contributions, and so forth. According to Justice Scalia, the Announce Clause could hardly serve the purpose of judicial open-mindedness by regulating only speech during campaigns but leaving all this pre-campaign speech unregulated.

And so the Court determined that the twin goals of preserving both the actuality and the appearance of judicial impartiality did not justify the speech restrictions imposed by the Announce Clause, and thus the Clause did not survive strict scrutiny and was invalid under the First Amendment.

I must say, with all due respect to Justice Scalia and the other members of the majority, that the Court’s opinion in the White case is among the least persuasive judicial opinions I have ever read. I say this not simply because I disagree with the Court’s conclusions; I often disagree with the conclusions reached by Justice Scalia and the other conservative members of the Court, but rarely do I find their opinions to be as riddled with logical holes as this one. I will discuss in a moment what I consider to be the two most gaping holes in the Court’s reasoning in White. First, however, it is important to emphasize the narrow scope of the Court’s holding in the case.

The provision stricken down in the White case, you’ll recall, prohibited judicial candidates from “announc[ing] [their] views on disputed legal or political issues.” There was a closely related provision of the Minnesota Code, however, that was not under challenge in the case and that was therefore left standing by the Court’s holding. That provision, known as the “Pledges or Promises Clause,” prohibited judicial candidates from making “pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.” The majority in White took pains to note that it was “express[ing] no view” on the constitutionality of the Pledges or Promises Clause, and indeed the Court’s reasoning arguably suggests that such a clause would survive strict scrutiny.

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8 Id. (quoting Laird v. Tatum, 409 U.S. 824 (1972)) (quotation marks omitted).
9 Id.
10 Id.
11 Id. at 2537.
12 Id. at 2532.
As such, while the White decision affects those relatively few states that have provisions resembling Minnesota’s Announce Clause in their codes of judicial conduct, it does not affect the greater number of states whose codes contain only a version of the Pledges or Promises Clause, which is based on a more recent revision of the ABA Model Code.\(^\text{13}\) (Michigan’s Code, by the way, contains neither sort of provision.) And in fact the few lower courts that have examined the constitutionality of “pledge or promise” clauses since the White decision have upheld them under strict scrutiny.\(^\text{14}\)

Moreover, it is unclear what effect, if any, White may have on the provisions in most states’ codes of judicial conduct that regulate activities such as campaign fundraising, soliciting of endorsements, and participation in partisan politics by judicial candidates. Some lower courts have interpreted White to greatly restrict a state’s ability to regulate the political activities of judicial candidates;\(^\text{15}\) other courts have disagreed.\(^\text{16}\) (As an aside, the few lower court decisions that have come down since the White case suggest an interesting pattern: The state courts have universally interpreted White rather narrowly, upholding provisions of their states’ codes of judicial conduct against First Amendment challenges, while the federal courts have universally interpreted White rather broadly, striking down provisions of state codes.\(^\text{17}\) Depending upon how one looks at it, this nascent trend is either predictable, on the theory that state courts have a stake in upholding their own codes of judicial conduct, or surprising, on the theory that appointed federal judges ought to be less than sympathetic to the idea of open, unfettered judicial elections.)

In any event, it seems entirely plausible to predict that the White holding ultimately will not be extended to prohibit restrictions on the funding of judicial campaigns, on endorsements of and by judicial candidates, on the participation of judicial candidates in partisan political activities, and so on. I suggest this because the Supreme Court has recently shown itself willing to uphold financing and speech restrictions in the context of non-judicial political campaigns, largely on the theory that things like soft money and issue ads create an appearance of corruption in democratic politics.\(^\text{18}\) If the “appearance of corruption” theory works in ordinary politics, I suspect it will also work in the special context of judicial politics, where the state’s interest in avoiding apparent favoritism seems even more compelling.

At bottom, then, the Court’s decision in the White case may not be all that significant in the grand scheme of things. But let me conclude by suggesting nonetheless that the decision, and particularly the reasoning by which the decision was reached, exemplify a troublingly mistaken view of the nature of judicial election campaigns and of the judicial role itself.

The trouble exists on two levels. First and most obviously, the majority in White took a rather myopic view of the particular character of speech in the context of an election. When a candidate, judicial or otherwise, announces his or her views on a disputed issue during a campaign, he or she is in effect making a promise that his or her

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\(^{14}\) See In re Watson, 794 N.E.2d 1 (N.Y. 2003); In re Kinsey, 842 So. 2d 77 (Fla. 2003).

\(^{15}\) See, e.g., Weaver v. Bonner, 309 F.3d 1312 (11th Cir. 2002); Spargo v. New York State Comm’n on Jud. Conduct, 244 F. Supp. 2d 72 (2003).

\(^{16}\) See, e.g., In re Raab, 793 N.E.2d 1287 (N.Y. 2003).

\(^{17}\) See sources cited supra notes 14-16.

conduct once elected will be consistent with those views. An announcement is merely a promise in sheep’s clothing. To adapt an example used by Justice Ginsburg in her dissent in *White*, imagine two possible statements made by a judicial candidate during a campaign. The candidate might say, “I promise that, if elected, I will give the maximum sentence to every drunk driver in my courtroom.” That would be a “pledge or promise” for which the candidate, under *White*, could permissibly be punished by the state. Or the candidate might be a little more careful about her phrasing and say instead, “I believe that drunk drivers should receive the maximum sentence permitted by law.” This isn’t a “pledge or promise,” because the candidate isn’t actually promising to do anything; it is merely an “announcement” of the candidate’s position on a disputed legal issue. As such, the candidate cannot be punished for the statement, or prevented from making it, under the Court’s holding in *White*.

As Justice Ginsburg effectively points out in her dissent, however, the *White* decision not only invalidates “announce” clauses like the Minnesota one challenged in that case; it also as a practical matter eviscerates “pledge or promises” clauses like the one the Court said it was not evaluating in *White*.

Any judicial candidate who wants to make what everyone will perceive as a campaign promise to decide particular cases in particular ways need only phrase the promise as a mere “announcement” of her position on a disputed issue. The statement will then magically be transformed from a prohibited “pledge or promise” to something that is, according to the *White* majority, absolutely protected by the First Amendment. To put it charitably, such a result does not make much sense.

There is, however, a deeper and more worrisome flaw in the Court’s reasoning in *White*. That reasoning is based upon the premise that judicial elections, like elections for other offices, are “all-or-nothing” affairs: either they must be accompanied by the full election regalia of unfettered political speech, or the state must find another way to choose its judges. But this premise fundamentally misconceives the point of judicial elections, and indeed the distinctive role of judges in our system of government.

The role of judges is to apply general norms in specific cases. The general norms—in the form of statutes, administrative regulations, constitutional provisions, or principles of the common law—are generated by processes that are more accountable and representative than the process of deciding a single court case. For example, a state legislature may legitimately create a law that binds everyone in the state because everyone in the state is, to some meaningful extent at least, represented in the process of creating the law. Thus there is nothing wrong with a candidate for the state legislature announcing his positions on disputed issues of policy, or even promising to vote a certain way with respect to those issues once he is elected. The voters are entitled to know how a candidate stands on policy issues, because the candidate, if elected, will be involved in making general policy that will bind those voters.

A judge, however, is not supposed to make general policy; she is supposed to apply general policy on the facts of particular cases. In doing so, the judge has two sets of responsibilities: one to the legislature or other politically accountable body that has created the general policy, and the other to the litigants before her in the particular case to whom the general policy will be applied. The judge’s responsibility to the legislature is to faithfully and accurately implement the general policy that the legislature has

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19 See 122 S.Ct. at 2553 (Ginsburg, J., dissenting).
produced. The judge’s responsibility to the litigants is to listen and respond, in good faith and in a meaningful fashion, to the proofs and the arguments the litigants offer with respect to how that general policy should be applied in their particular case.

Judicial precommitment to particular decisions of particular issues, in the form either of campaign promises or of slightly more subtle campaign “announcements” of the judge’s “views” on those issues, undermines both of these judicial responsibilities. It undermines the judge’s responsibility to the legislature because it commits the judge to deciding an issue according to the policy the judge prefers, even if that policy is not the one the legislature has enacted into law. And it undermines the judge’s responsibility to the litigants who will come before her because it commits the judge to deciding an issue in a particular way, regardless of the proofs and arguments offered by those litigants. Judicial precommitment thus violates both the judge’s role of subservience to the legislature and her duty of responsiveness to the litigants in particular cases.

These are the reasons why a state like Minnesota does in fact have the most compelling of interests in preventing judges from precommitting themselves to particular decisions while campaigning, whether those precommitments come in the form of overt promises or in the more subtle guise of mere “announcements.” The broader point here, one entirely denied by the majority in the White case, is that judicial elections are fundamentally different from elections for other government offices. While elections for political office have the purpose of selecting officials who will create general policy, elections for judicial office have the much more limited purpose of selecting officials who will faithfully and fairly implement that general policy in particular cases. Thus judicial candidates, unlike ordinary political candidates, have no license to declare their views about general policy or to precommit to applying general policy in particular ways. The purpose of a judicial election is precisely to select judges who will not endeavor to make general policy and will not prejudge cases without fairly entertaining the proofs and arguments offered by the litigants.

Respectfully, then, I believe the Supreme Court got it wrong in the White case. But I am comforted somewhat by the hope that the influence and scope of that holding will be closely limited to the particular facts of the case.
VOTERS ARE EMPLOYERS:  
THE RESPONSIBILITY OF CHOOSING WHO WORKS FOR YOU 
Patricia Donath

The League of Women Voters is known far and wide for sponsoring candidate forums and providing Voter Guides with information about the candidates. Like a lot of people, we are concerned about the falling percentage of those who are registered who actually vote and the number of voters who go to the polls but do not vote the judicial part of the ballot. Just like the judges who were surveyed, we are concerned about the lack of information about judicial candidates—even though we have been trying to provide such information to voters for many years.

The question is, in a state where voters overwhelmingly want to elect their judges, how do we encourage them to act responsibly and treat the selection of judges as an important decision? And then how do we get them the information to enable them to do that?

As the title of my remarks indicates, I think one answer is to educate citizens about what their true role in the process is. It is often overlooked that elections are the work of a collective employment committee—known as “the voters”—choosing who will be employed to do the people’s business. The circumstances do not look like the typical job interview, and many people who are voters are in no other way in their lives the “employer” of someone else. However, to those who are not used to being an “employer”, I would say “just as you would like to choose who works next to you, and would want to get as much information about the potential candidates as you could if you got to make that decision, you need to look at those you choose to do the work of running your government as carefully.”

And those who want the job should be just as eager to share information about themselves as would a potential employee in the business arena.

When it comes to candidates for judicial positions, an employer/voter usually has an even bigger task—first they need to figure out what the qualifications are that they should be evaluating. Then they come to the challenge of how to find that information.

How do busy people with many other things to do responsibly handle their duty to choose those who will be the best to serve as a judge?

The League of Women Voters has been producing Voter Guides for years—and many people rely on them for information about their “prospective employees”—also known as the “candidates”. Our guides have included biographies and questions for judicial candidates, as well as candidates for partisan offices.

Our statewide and local community printed guides have word limitations because of printing costs. We now put our statewide print guide on our web site, as do many local Leagues. The League also has another web site—Dnet—which is web based only. Candidates are contacted and those who want to participate get a password so they can put up their own biographical information and answer the questions themselves. They can even raise more issues and respond to them. Two candidates for the same office could, in that way, do an on-line “debate” on any issues they wanted. There are no word limitations—though a candidate with sense would probably not post a very long document because people won’t read it.

The Secretary of State in the last election invited candidates to submit biographical information which appeared on that web site along with information on what was on the ballot, where a voter’s polling place was and how the voting system at that polling site worked. While having print information in the hands of voters is something that is done in a few states, and we would suggest that that is the best way to improve voter knowledge about the candidates, we also
recognize that mailing such a print document to all registered voters would be cost prohibitive, particularly in the current budgetary environment. However, expanding the content of the Secretary of State web site and having a big publicity effort about its availability could be accomplished at much less cost.

Judicial candidates and judicial elections are particularly interesting because people are less likely to know who the candidates are, or know what questions to ask, and are, moreover, uncomfortable making the “hiring” decision. The League has asked judicial candidates questions for a number of years. We are now doing more judicial candidate forums. These are not “debates” as that term implies a more confrontational format than any League candidate event would be and are more in keeping with the role of judges as well.

And because judges are not like Legislators or the Governor, the method for choosing the right person to vote for is not as easy as finding out whether that person will “represent” your opinion on issues of concern to you. You can ask a judicial candidate “how would you decide this case?” but if you get a response for a particular undecided case, then that candidate, if elected, would be obligated to NOT hear the case because they had already said how they’d vote before the case had been presented to them. The analogy of an umpire is often used to illustrate the problems of campaigning and campaign financing. It is true here as well. If the umpire said how he’d rule--ball or strike--based on what he knew before the ball was thrown, you would not want him as your umpire if his “pre throw” decision did not favor you--and you’d get him rejected as “biased”.

Where the “line” is in terms of judicial candidates expressing their opinion has always been open to question. While there have been judicial canons on the subject, their use required interpretation. The recent Supreme Court decision has caused concern that judicial candidates will now make statements on issues that call the impartiality of the courts into question.

On the other hand the White decision also seems to have enabled judicial candidates to participate in judicial candidate events without worrying about whether they would violate the canons or in the alternative make voters unhappy because they refused to answer a question based on their understanding of those canons. Further, it has made those running candidate forums feel more comfortable that they would not violate the “rules” without realizing it.

So while White can be argued to be bad for maintaining the distance and independent stance of judges, it has also encouraged the kind of discourse that needs to happen if the “employers”--the Voters--are going to take their obligation seriously and become acquainted with the people who want to be their judges.

The basic question is how do I decide who to vote for? There are many ways of deciding who to vote for.

- You can choose to vote for someone who looks just like you.
- You can choose to vote for someone who has had the same experiences you have had.
- You can choose to vote for someone who talks like you.
- You can choose to vote for someone who is older (or younger) than you.
- You can choose to vote for someone who has the same ethnic name as you.
- You can choose to vote for someone who has a name you vaguely recognize.

Or

You can begin with the qualities you should be looking for in someone who will be serving as a judge:

- Someone who is thoughtful;
- Someone who is fair;
- Someone with experience;
Someone with integrity;
Someone with professional competence;
Someone who will not be swayed by public opinion or the opinions of peers;
Someone who understands that for our system of government to work, the third branch of government—the judicial branch—is the “last resort” and must be independent.

What is “judicial independence”? The ABA Standing Committee on Judicial Independence stated it this way:
“Independence makes a system of impartial justice possible by enabling judges to protect and enforce the rights of people and by allowing judges, without fear of reprisal, to strike down actions of the legislative and executive branches that exceed their designated power. Independence is not for the personal benefit of the judges, but for the protection of the people.”

“Who should I vote for?”
The decision is yours.
To do it responsibly begins with finding information. One of the best is to talk to the candidate directly. Next is to ask specific questions of those who “recommend” who to vote for. Campaign literature and ads can be helpful. The message the candidate thinks is important to talk about can tell you something about them.
Negative ads can tell you things as well. If it is the candidate’s ad, then you need to evaluate whether that candidate is behaving as you want and expect your judge to behave.
If it isn’t the candidate’s ad, but is sponsored by an outside group you don’t know if the candidate agrees with it. It may contain helpful information, or it may contain misinformation. In some states, such as Ohio, a special committee has been formed to help monitor and evaluate ads for judicial candidates. Such a committee could be formed here.
Many groups put out a “voter guide”. The League of Women Voters’ Voters Guide is a non-partisan publication that asks all candidates for a particular office the same questions and publishes their responses as they are received. Other groups may print a voter guide that tells you which candidate that group believes is the “best” or asks questions with a particular issue focus. They can be a good source of information about what a candidate believes, and can be helpful even if the group that produced the voter guide is not one you support.
An endorsement by another important public official or former public official can be an indication of who’s best but it is also a campaign strategy. A candidate often solicits endorsements and uses them when they believe the person doing the endorsement can have a positive impact. The person who is doing the endorsing may have reasons for their endorsement aside from judicial qualifications. An endorsement does not mean that the person endorsed will handle cases exactly as the person who did the endorsing.
The internet will certainly have more information in the next election, than in the last, as use by both candidates and voters increases. Internet information and access are the future, but where on the internet information is obtained is still an important consideration—just as it is with other forms of communication.

It is easy to say: “Voting is hard work, I think I’ll just stay home.”
And you’ve probably heard versions of that statement from strangers and from friends. The League’s response, and I hope your response, to such statements should be something like this:
“Look again at the role a judge could play in your life. Think about the reliance you place on having a judiciary that is independent and impartial.”
If the person who hears your case matters, so does your vote.
THE ROLE OF THE MEDIA IN JUDICIAL ELECTION CAMPAIGNS
Nolan Finley

Well I guess this is where I'm supposed to stand up and thrash myself and my colleagues in the newspaper business for the god-awful job we do in covering judicial elections.

And I'm more than happy to do take the heat. Because we don't do very well at covering judicial races. In fact, most judges run for and get elected to office barely getting their names in the newspaper.

We see the results of that indifference. We know that one-quarter to one-third of voters stop marking the ballot by the time they get to the place where they're typically asked to pick 19 candidates from a list of 22 names they’ve likely never heard before.

And if they are still voting by the time they get to the non-partisan ballot, they might as well be tossing darts. They are armed with very little information about the candidates, and have no idea of whether they're picking a competent and qualified jurist, or a drunken sot. Not that the two are mutually exclusive, of course.

A League of Women Voters' study found that many, if not most, voters choose a judicial candidate based on gender or perceived ethnicity. I've long felt that anyone in this state with the last name of Cavanaugh ought to go ahead and name their babies "Judge" at birth and get it over with.

For sure, we in the press ought to do a better job of informing the electorate. Electing judges - electing any candidate, for that matter - in the shadows is a dangerous practice, damaging to democracy. Good government depends on well-informed voters.

It's not enough of a defense on our part to say that voters simply aren't interested in judicial campaigns. That given a choice between watching judges debate on television or the latest episode of Queer Guy's Eye, or whatever, they'll pick the cotton candy, the fluff every time. Increasingly, when it comes to political and governmental coverage, our audiences' attention span is shorter than Britney Spear's marriage.

It's our job then to make them understand that the outcome of these races can have a tremendous impact on the way they live. With courts becoming increasingly active, with judges involving themselves ever deeper in policy-making, with courts now even deciding who will be president, it’s vital that the electorate pay attention to who they're placing on the bench.

I know today there's much debate about whether we should scrap elections altogether and go to an appointed bench. But I'm not ready to give up on voters, or to excuse them from their responsibility to shape their own government.

Increasingly, we think the answer to a lazy electorate, one that is susceptible to the power of incumbency and well-financed campaigns, is to restrict democracy. To ask voters to make fewer choices. To protect them from themselves. We did that with term-limits, and I'm not sure we're any better off in Lansing today because of it.

Voters have a responsibility to make informed choices. And since we in the press serve the voters, we have a responsibility to deliver the information they need to make sound choices, whether they pay attention to us or not.

So what is our role?
First, to report what the candidates actually say - and whether it's truthful.
Second, to report what the candidates' supporters and opponents are saying - and whether it's truthful.
And third, report who is backing the candidates, and follow the money.
That third responsibility is perhaps the most important because even though the average voter isn't paying much attention to the judicial ballot, special interest groups certainly are.
There was a time when judicial races were quiet and dignified affairs, very much befitting the office. Very little money was spent, and the incumbents and their challengers were forbidden by judicial codes of ethics from saying much of anything other than that they would work hard, be honest and fair, and remain independent from outside influences.
But today, judicial campaigns are much more like campaigns for all other offices. The pretense of non-partisanship has all but been surrendered. Candidates raise and spend money – sometimes lots of money - and hire political consultants to shape their image and message.
They throw mud, and get hit by mud.
And they both benefit and are harmed by surrogates from both within the legal fraternity and outside of it who, recognizing the increased policy-making role of the judiciary, feel they have a financial stake in the outcome of judicial elections.
Nowhere have we seen a better example of that than in the 2000 race for seats on the Michigan Supreme Court. Millions of dollars were spent by a variety of groups interested in either retaining the incumbent justices or defeating them.
Vicious ads were crafted and broadcast. Records were distorted. Individual character was called into question. The most dastardly of motives were assigned to the candidates, who were accused of being in this pocket or the other.
I can't imagine this improved the image of the legal system in the eyes of the public, or did much for public confidence in the integrity and impartiality of judges.
And this race occurred at a time when judicial ethics codes forbade incumbents and their challengers from directly commenting on pending judicial issues.
Since then, the U.S. Supreme Court has ruled that codes banning comment on political or disputed issues by judicial candidates are a violation of the First Amendment.
Candidates are now free to give substantive answers to questions about those issues.
You can be certain that they will be asked those questions. And you can expect the press to report the answers.
There's an obvious downside, of course. There will be much more distortion, much more mud-slinging, many more personal attacks.
The real issues of integrity, legal acumen and temperament may get lost in the barrage of well-funded attack ads.
But the up-side is that voters will pay more attention.
It will be our job in the press to work our way through the noise and put things in context. This will require a lot more effort on our part. We'll have to do more truth checks. Fairly describing the reasoning behind debated court opinions, and their impact, without boring readers or viewers with detail will be one of the toughest challenges for those covering judicial elections.
In the 2000 Supreme Court race, for example, a court ruling upholding the conviction of sheriff's department officers was described as anti-defendant. Reporters will have to go behind such accusations and check the facts for themselves. Voters need and deserve more information than can be delivered in a 30-second commercial.

Frequently in judicial campaigns, outside groups issue studies of judicial rulings. An attorney for the state AFL-CIO issued one such study in the 2000 Supreme Court race. The state Chamber of Commerce issued another. So did a group that wants to reign in trial lawyers.

As you know, these studies came to sharply different conclusions. They can be worthwhile tools for voters, but only if they come with some context.

It is our job to provide that perspective. To explain who is paying for the studies, and what motives they may have beyond simply electing qualified judges.

As more money pours into judicial campaigns, we'll have to spend more time following the money. When groups form and call themselves Citizens for Justice or Supporters of a Sound Economy, it's our job to find out and report who these groups really are, and where their financial support comes from.

As we talk about ways to reform and improve the system, one of the things that ought to be considered is dropping the pretense of non-partisanship.

There are darn few politically unaligned judges in this state, or in any state. And voters are pretty clear on what the two parties stand for. If we're looking for higher voter participation and a better-informed electorate, that may be a place to start. And it certainly would be a step toward full disclosure.

Improving our coverage of judicial campaigns will be easy at the top of the food chain. Supreme Court races garner the most heat and light, and they should. Those races have a relatively few number of candidates, and the campaigns are very public.

But nine-tenths of all cases stop at the state Court of Appeals. There are more judges in those courts, and more candidates. They deserve scrutiny as well, particularly since they aren't nominated at party conventions so their political support may be much less apparent to voters.

The real challenge for us will be in the lower courts. District courts tend to get a good deal of coverage from the hometown newspapers, and are more familiar to voters who likely have had to show up there to pay a traffic fine or answer for some other minor infraction.

But county courts, particularly in Metro Detroit, fall between the cracks. There are too many races, too many candidates. It's too easy for us to just mail out questionnaires, make an endorsement, and then do very little beyond that to tell voters anything substantive about the candidates and the campaigns.

And yet these courts are the entry point into the legal system for most people. It is vital that these benches be filled with competent, hard-working and fair-minded judges. This is where our commitment to do a better job of informing our readers will be tested.

An elected judgeship was never intended to be a lifetime job. Yet incumbent judges in Michigan are almost never defeated. It may well be that that's because they all do such an outstanding job, and are persons of such integrity and wisdom that voters can't stand the thought of parting with them.
But more likely, it's because voters aren't paying enough attention to the workings of the courts, or to the judges who occupy them.

Often times, the most press judges at the local level get is when they screw up, when a decision they make is put up for ridicule, or if a criminal slips through their courts and strikes again.

Then everyone asks: Who is that judge? Where did he come from? Who elected her?

Good reporters and good newspapers should make sure that that question is answered before a judge gets on the bench.
Judicial independence is a fundamental tenet of our democratic system of government. In 1776 Thomas Jefferson wrote:

“The dignity and stability of government in all its branches, the morals of the people and every blessing of society depend so much upon an upright and skillful administration of justice, that the judicial power ought to be distinct from both the legislative and executive and independent from both, that so it may be a check upon both, as both should be checks upon that.”1

There is very broad agreement on the need for judicial independence, but there is wide divergence of opinion in Michigan and across the nation as to the best means to achieve this goal.

Questions regarding judicial independence often elicit passionate arguments for or against election of state judges, particularly appellate judges. This debate occurred with great vigor in Michigan during the constitutional convention of 1963, resulting in our present system of judicial elections. Since then, there have been numerous proposals to modify the system. None has succeeded, despite the prominence and influence of some of the proponents.

Michigan is not alone in its reluctance to revisit constitutional choices on judicial selection. In the majority of other states, whether their judges are appointed or elected, it is extremely hard to persuade either legislators or citizens to tinker with the status quo because of the tremendous political forces that tend to align on either side of the issue seeking to gain or to oppose perceived political advantages by various interest groups.

The State Bar of Michigan has been deeply involved in the series of discussions in our state on judicial selection. At various times, the Bar has supported both appointment and election of judges. This is not to suggest that the Bar is fickle. In other very important areas the Bar has shown steadfast consistency on matters of public policy. A few examples: the Bar has always been opposed to legislation that would encroach on judicial independence; it has been stalwart in its support for adequate legal services for the poor; it has lobbied annually for adequate funding for the judicial branch; and it has been unwavering in advocacy for protection of the public from the unauthorized practice of law.

In my opinion, the delicate subject of judicial selection is unique in the continuous consternation caused to the bench, the bar, our legislators and hapless citizens. Indeed, debates frequently arise between factions that are nominally (albeit temporarily) on the same side of the election/appointment conundrum. For example, even among those who favor the election of judges, there remain serious questions about the means: the length of terms; the need for districts and their composition; “slating” versus “slotting”; campaign finance limits; judicial campaign speech; the incumbent designation; and for the Supreme Court, the question of partisan nomination. The following is a brief chronology of the State Bar of Michigan’s consideration of judicial selection issues over the last 30 years:

1 Thomas Jefferson to George Wythe, 1776. Papers 1:410
March 1973: Supported in principle a system of merit selection of all Michigan judges and recommended the formation of a Citizens Committee on Michigan's Judiciary.

September 1973: Approved in principle a proposal to amend the Constitution to provide for (1) appointment of all Michigan judges by the Governor from a list of nominees submitted to him by a nominating commission, and (2) requiring all judges so appointed to run against their record within a specified period following appointment.

September 1974: Defeated a proposal to endorse legislation requiring certain minimum qualifications before an attorney is eligible to become a judicial candidate, including being of the age of majority and having practiced law for a minimum number of years.

April 1978: Adopted a motion endorsing a Constitutional amendment providing for appointment of Supreme Court Justices and Judges of the Court of Appeals advocated by a coalition known as the Michigan Citizens to Take the Courts Out of Partisan Politics.

May 1981: Adopted a proposal to recommend to the Michigan Supreme Court that temporary appointment of judges be limited to those who do not leave office after a defeat in a general or special election.

May 1981: Adopted a proposal that the State Bar endorse a Constitutional Amendment providing for the appointment of Supreme Court Justices, Court of Appeals Judges, and the members of the State Board of Education and the governing boards of Michigan State University, the University of Michigan and Wayne State University; and that members of the State Bar of Michigan be urged to assist efforts to place this proposal on the ballot for the 1982 general election; and (2) to permit Lt. Governor James H. Brickley to speak in support thereof.

May 1984: Endorsed an amendment to the Michigan Constitution which would replace the present partisan party convention process for nominating candidates for Supreme Court justice by a nonpartisan primary election.

April 1989: Require that candidates for judicial office must have been licensed to practice law for at least five years, and candidates for the position of hearing officer within the executive branch must have been licensed to practice law at least three years, before they are eligible for appointment or election to office.

September 2001: Adopted a resolution endorsing “a system for the election of judges in all Michigan state courts which reduces, to the greatest degree possible, the politicization of judicial selection,” and urging the Michigan Legislature, the Supreme Court, and the State Bar to educate voters on our justice system, and on the background, experience and qualifications of candidates in judicial elections.

The State Bar Representative Assembly considered the election/appointment issue in 2001 in part because judicial campaign speech was a major topic of discussion following the November 2000 election. Many asked, “How can respect for the justice system be maintained when voters are bombarded by campaign commercials telling them that judicial candidates are bought and paid-for, and when voters are besieged by bedsheets ballots of judicial candidates about whom they know little or nothing of substance?”

In Michigan and in other states where judges are elected, the bench and bar have attempted to protect the perception of impartiality of the judiciary by placing restrictions on candidate speech in judicial campaigns. The efforts have been severely restricted, however, by a 2002 decision of the United States Supreme Court.

In Republican Party of Minnesota v White, the Supreme Court addressed Minnesota’s Code of Judicial Conduct, which prohibited any candidate for judicial office, including

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incumbent judges, from announcing their views on disputed legal or political issues. Judges who violated the clause were subject to discipline, including suspension without pay or even removal from office. Attorneys who violated the clause faced discipline in the form suspension, or even disbarment. In a 5-4 decision, the court in White, applying strict scrutiny, held the clause unconstitutional, finding that it was not narrowly tailored to the state’s interest in preserving the judiciary’s impartiality and the appearance of impartiality.

In a concurring opinion, Justice Sandra Day O’Connor agreed that the Minnesota restrictions on judicial campaign speech violated the 1st Amendment. She wrote separately to emphasize her concern that it is the very practice of electing judges that inherently undermines their impartiality. She opined:

“[I]f judges are subject to regular elections they are likely to feel that they have at least some personal stake in the outcome of every publicized case. Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their election prospects.”

In dissent, Justices Stevens and Ginsburg argued for the Jeffersonian position that the judicial office is fundamentally distinct from the legislative and executive branches in its function in a democratic society. Accordingly they found the Minnesota restrictions to be completely consistent with the 1st Amendment because of the state’s compelling interest in preservation of public confidence in the rule of law.

In 2002, Dennis Archer, a former Michigan Supreme Court Justice, brought together a group of Michigan lawyers and interest group representatives to figure out how to make the 2002 Michigan Supreme Court campaigns more civil than the 2000 season. I attended the meetings as Chair of the State Bar of Michigan’s Public Policy Committee. At our first session, Archer, a Past-President of the State Bar, showed a series of clips from campaign commercials of 2000. The overarching theme of these advertisements was that judges distort the law for the benefit of special interests and to the detriment of the public welfare.

After several meetings, Archer, who one year later would become the first African American President of the American Bar Association, presented those assembled with a proposed pledge to engage in clean campaigns. The pledge was not for signature by judicial candidates; instead it was for representatives of the various interest groups, many of whom were responsible in one way or another for creating and funding the negative ads we all decried. After negotiations over language, some of the interest groups signed the pledge and others declined. The State Bar of Michigan, which is prohibited from partisan political activity, has had no role in election campaigns. Nevertheless, in the interest of supporting a voluntary “ceasefire” in these perceived attacks on our precious justice system, consistent with the “depoliticization” position of the Representative Assembly in 2001, the Bar’s Board of Commissioners endorsed the pledge.

We will never know exactly how much the discussions led by Dennis Archer helped to quiet the 2002 judicial campaign season. Some would argue that political realities and a tight gubernatorial campaign were largely responsible for the relative dearth of attacks on Supreme Court candidates. On the other hand, it must be noted that the only 2000-style attack ads during the 2002 judicial campaigns came from a national group that did not attend the Archer meetings or sign the pledge.

The American Bar Association has approached judicial campaign issues in another way. In 2002 the ABA's Standing Committee on Judicial Independence adopted the report of its
Commission on Public Financing of Judicial Campaigns, which recommends public financing of judicial campaigns, to address the perception that improper influences may result when judicial candidates accept private contributions from those interested in cases those candidates may later decide from the bench. The Commission found in its research that the tremendous expenses associated with today’s state appellate court campaigns require judges to seek very large contributions from persons and groups who are directly interested in affecting the outcomes of cases. It reasoned that requiring judges, whom Thomas Jefferson believed to be distinct from the political branches of government, to campaign like their legislative and executive branch counterparts, “contributes to the inappropriate politicization of the judiciary.”

In Michigan we provide public financing for gubernatorial races, but not for judicial contests. (Thomas Jefferson would probably find this circumstance to be quite ironic.) In these lean budget times, it is not likely that a public financing proposal will be met with great enthusiasm by those responsible for allocating our scarce public funds. More importantly, public funding will not stop special interest groups from engaging in protected free speech in the form of damaging attack ads. Interest groups would still be able to run independent expenditure campaigns over which the candidates have no control, or use so-called “issue ads” that do not advocate for or against the election of a specific candidate or slate.

In December, 2003, the United States Supreme Court upheld the McCain-Feingold campaign finance law’s restriction on soft money contributions and regulation of electioneering communications in *Mitch McConnell v Federal Election Commission.* In its lead opinion, the court declared that Congress’s legitimate interests in the campaign finance arena extend beyond prevention of cash-for-vote corruption to reach even the appearance of such undue influence.

Reconciling the *White* case from Minnesota with the *McConnell* decision is difficult, but doing so may shed some light on the ability of states to construct solutions that will protect the independence of the judiciary while honoring the 1st Amendment.

In the interim, we should promote a combination of the Archer and ABA approaches, by continuing efforts that rely on the good will of those who believe we must preserve and strengthen public confidence in the justice system, and by providing a public funding and regulatory scheme that will relieve our judges of the terrible burden of soliciting others to raise millions of dollars for their campaigns.

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3 124 S Ct 619 (2003).
STANDING DOWN FROM MUTUALLY ASSURED DESTRUCTION
Rich Robinson

I am going to focus my remarks on Michigan Supreme Court campaigns. The survey results reported by Professor Chamberlin show that our state’s judges are most concerned about selection for appeals courts and I believe that this is where the electorate’s concerns are as well. I occasionally hear from voters concerned about trial court campaigns, mainly about big-spending, self-funded campaigns. I hear a great deal from voters concerned about the tone and implications of high-priced Supreme Court campaigns. And even though we had our first half-million dollar Court of Appeals campaign in 2002, I’d like to set that aside for the moment and talk about campaigns for our highest court.

From 1994 to 2000, the average cost of a winning Supreme Court campaign quadrupled from $286,000 to $1.3 million. That trend line was broken in 2002, when the average amount raised by the two winners was $450,000, but there were mitigating circumstances. The contentious gubernatorial campaign absorbed most of the political money in play in the state, and the two opposing major-party nominees raised less than $56,000 between them.

For the last two elections, that is only half the money story. In both 2000 and 2002, independent expenditures by the political parties and PACs and spending on so-called issue advertising was at a level that nearly met, or may have exceeded, candidate spending. Roughly $9 million was spent for messages such as “Weak on crime. Wrong for the Court. Wrong for our kids;” and, “…Where are my judges? Just where they’ve always been – right in your pocket.” Those advertisements did not specifically exhort a vote, however, so spending for them was entirely off the books. Those ads carried disclaimers from the sponsoring entities, the political parties and the Chamber of Commerce, but nowhere in the public record can we learn who gave the sponsoring entities the $9 million.

This spending on campaign ads masquerading as issue ads is in conflict with public values. Ninety-three percent of the judges in the recent survey said that contributors to committees that pay for such electioneering communications should be disclosed. Even Justice Anthony Kennedy, who voted to strike down Title II of the Bipartisan Campaign Reform Act, which regulates issue speech in federal election campaigns, noted during oral argument that the distinction between express ads and issue ads is a false distinction.

Campaigning through issue ads does more than subvert accountability by concealing the identity of the speaker. It opens the door to contributions from sources that cannot legally contribute to a candidate’s campaign committee. Corporate shareholders’ funds and organizations’ membership dues are used to pay for issue ads. Furthermore, such soft money contributions to the state political parties are not disclosed in any financial report. This is in contrast to federal law where soft money must be reported to the Federal Election Commission.

Michigan campaign finance law contrasts with federal law in another way that profoundly affects state campaigns, including judicial campaigns. There are no limits on what an individual can give to the state parties or political action committees. It has become common for wealthy individuals to give hundreds of thousands of dollars to the
state parties and PACs and for those committees to turn the unlimited contributions into
unlimited “independent expenditures.” Since the recipient committees of those
contributions are free to coordinate with a candidate’s committee under state law, this
effectively allows circumvention of any contribution limits. In another context, I believe
we would call this money laundering.

By now, I hope you have a feel for the fact that Michigan’s campaign finance law
is deficient in establishing limits and accountability. I argue that contribution limits are a
good thing, whether to limit the appearance of corruption or undue influence, or to
provide equal protection for those of us whose $100 political speech is overwhelmed by
others who speak at 1000 times that volume. In fact, I would argue that money is not
speech. I believe Justice Lewis Powell had it right when he said, “Money is not speech.
Money is property.”

The Congress and the U.S. Supreme Court may have provided us an answer to the
accountability problem. The definition of electioneering has been changed and it no
longer depends on the old Buckley v. Valeo magic words-test. In our state law, as in
federal law, it is illegal to use corporate or union treasury funds for political campaigns.
Has the new precedent given us a means to challenge the use of all corporate or union
 treasury money by state political committees? I’ll let Bob LaBrant interpret that.

So far, I have been talking about Michigan’s porous campaign finance law in
general terms and I haven’t addressed the uniqueness of judicial campaigns. I’d like to
cite two items from a statewide poll conducted for my organization by Mitchell Research
in 2002 to frame the problem. First, 88 percent of Michigan voters believe judges should
be independent of influence from contributors to their campaigns. Yet 80 percent of
voters believe campaign contributions influence judges’ decisions. That is the perception
and the conflict.

Research conducted by the National Institute for Money in State Politics shows
that 86 percent of the cases heard by the Michigan Supreme Court in the decade of the
90s involved at least one contributor to at least one of the justices. That is the scope of the
perception problem.

This matters because the rule of law depends on a shared belief in equal justice
for all. Consider an observation from the eye of the figurative storm. Justice Elizabeth
Weaver has written, “In my opinion, the escalating cost and rhetoric of Michigan
Supreme Court justice campaigns have not served to better inform the electorate
regarding the qualifications of the candidates. Spending $16 million or more in a
Supreme Court campaign is unseemly, wasteful, and ultimately damaging to the public’s
trust and confidence in the Supreme Court, and therefore, the judiciary. The judiciary
cannot afford to be perceived by the public as ‘bought and paid for.’ A system that allows
and encourages the expenditure of huge amounts of money on Supreme Court elections
needs reconsideration.1"

That brings me to the Cold War-inspired title of my remarks. I have heard both
sides say that there will be no unilateral disarmament. That is why I am calling for a joint
stand-down from mutually assured destruction. In order to dispel any notion that the
justices act on behalf of any confederation of interest groups, I am advocating for a
system of voluntary full public funding for Michigan Supreme Court campaigns. This

1 Gilbert v. DaimlerChrysler; SC: 122457; opinion on motion for recusal, September 17, 2003.
would allow candidates to make an unambiguous statement that they propose to work for the people of the state of Michigan.

Such a system would provide a set amount of public funding for qualifying candidates and require that they limit their spending to just that amount. Simple? No.

Would this deprive candidates of their First Amendment rights? No, because participation would be voluntary. Any candidate choosing to raise money from select individuals and interest groups instead would be free to do so.

Could a publicly funded candidate be competitive? Funding for qualified candidates could be pegged at an amount based on recent campaigns. If a privately funded campaign exceeded that level of spending or if interest groups pursue independent spending, the publicly funded candidate would be provided matching funds so the contest remains one of qualifications and ideas rather than size of marketing budget.

Who could qualify? I don’t believe eligibility could be limited to nominees of the major parties. Minor parties and petitioners would have to be eligible as well.

Can a state with profound budget problems afford it? I propose that our state’s public fund for gubernatorial campaigns should be redirected to pay for Supreme Court campaigns. The gubernatorial public funding system has been overmatched by contemporary campaign finance trends and needs an overhaul if it is to be a viable and relevant proposition.

Public financing, an excellent and universally-known voter guide and a new commitment from the fourth estate to provide thoughtful and serious coverage of judicial campaigns could make judicial selection a point of pride in Michigan.

Again, to quote Justice Weaver: “To insure the independence of the Court and to better inform the public about the process, it is time to initiate a public dialogue regarding the method by which Michigan Supreme Court justices are selected. A first step in this process should be the creation of a commission to study the possible methods of selecting Michigan Supreme Court justices. A commission would generate ideas that can improve our current system and educate the public about options. I urge the Governor, the Legislature or the Michigan Supreme Court or any combination of these branches of government, to form a commission to study and report on the important issue of the selection of Michigan Supreme Court justices, which is vital to the well-being of the judiciary.”

I agree.

\[2\] Ibid
I would like to discuss the financing of judicial campaigns in Michigan over the past decade and the impact of the recent U.S. Supreme Court decision in *McConnell v. FEC* on judicial elections in Michigan in 2004 and beyond.

Since the 1970’s at both the federal and state levels campaign finance has become a highly regulated activity. The passage of the Federal Election Campaign Act in 1971 and the Watergate inspired amendments of 1974 led to the U.S. Supreme Court ruling in *Buckley v. Valeo* which set the constitutional parameters of campaign finance that operated pretty much as intended until the mid 1990’s.

Michigan enacted the Michigan Campaign Finance Act (PA 388 of 1976) based on the federal model. In 1994 the ban on corporate contributions which had been a part of Michigan election law since 1911 was extended to labor unions. The ban was further extended in 1995 to domestic dependent sovereigns - that’s a ten dollar term for Indian tribes.

By 1995 campaign finance at the federal level had evolved into a bifurcated system of hard dollars and soft dollars. The one system of hard dollars was highly regulated, limited contributions, funds from corporations and labor unions were prohibited and had periodic disclosure. The other system of soft dollars was unregulated, unlimited, unrestricted as to corporate and labor union funds and undisclosed.

The AFL-CIO pioneered issue advocacy advertising in Michigan with attack ads beginning in the fall of 1995 against freshman Congressman Dick Chrysler. What was unique about those ads at the time was the use of union treasury dollars to finance the ads that stopped just short of express advocacy ending with the tag line “call Congressman Chrysler and tell him it’s time to stand up for working men and women.”

Those ads were seemingly coordinated with other interest groups like Citizen Action and Sierra Club who ran their own ads. When one group finished a media buy the other interest group would go up on the air. This piggy-backing of ads sustained the total buy from Labor Day in 1995 to Election Day in 1996.


The Democrat ad featured talking trees chanting “Taylor, Markman and Young, oh my; Taylor, Markman and Young, oh no.” In the Democrat ad they claimed a study showed the three Justices supported big corporations and insurance companies 82% of the time over the “little guy.” Dawson Bell reporting for the *Detroit Free Press* analyzed the study and found that in a case won by an insurance company, the person the Democrats classified as the “little guy” in the lawsuit was an arsonist who burned down his building to collect the insurance money.

The Michigan Chamber responded to the Democrat ad in early August. We tracked down a tree costume from the New York City theatrical company, had it shipped overnight by truck and went into TV production lampooning the Democratic Party ad. In
our ad one of the talking trees reads the *Detroit Free Press* article and apologizes for being duped by that phony study.

After Labor Day, the Democratic Party went up with a second spot featuring a Phil Marlow-like detective looking into the record of Justices Taylor, Markman and Young. Again, the Michigan Chamber responded with another ad lampooning the Phil Marlow detective with one of our own using a Magnum PI character complete with a Detroit Tiger baseball cap.

By September, the Democrats had nominated their own candidates for the Court and the Chamber ran ads attacking the records of Marietta Robinson, Tom Fitzgerald and Ed Thomas and sustained that effort through October.

The Michigan Democratic Party continued to run issue ads attacking Taylor, Markman and Young. One ad showed three miniature Justices dressed in English wigs and dancing in the coat pocket of an insurance company CEO. Another ad tried to tie the Justices to defective Firestone tires that had caused Ford Explorer rollovers.

The Michigan Republicans had their own issue ad implying that Tom Fitzgerald was soft on pedophiles.

The 2000 Supreme Court campaign was funded with record amounts of hard dollars totaling nearly 6 million dollars and even more massive amounts of soft dollars. I estimated that about 8 million dollars were spent on issue ads by all sides.

Looking back at the 2000 election, the tactical error made by the Democrats was the early ads starting in late July. Had they waited until mid-October, we never would have had the time to raise the money to respond in kind. The Democratic ads galvanized our constituency to raise over $3,000,000 by early November.

In 2002, the Michigan Chamber raised nearly a million dollars just in case the Democrats were to launch an October surprise. As it turned out, Democratic soft money was shifted almost entirely to the gubernatorial campaign – $7.2 million in total. The Michigan Chamber having raised $900,000 for court issue ads went ahead and aired a positive spot that ran for two weeks statewide that we developed on Justices Betty Weaver and Bob Young.

How did we get to this place in the financing of judicial campaigns?

Once upon a time…Supreme Court campaigns were rather modest. $200 – $300,000 was the norm. Today that amount won’t even buy a good weekend of statewide TV.

This was the case, in spite of the fact, that the 1963 Constitution needlessly politicized the Supreme Court by throwing it into the “political thicket” each decade requiring the Court to choose a redistricting plan whenever the Commission on Legislative Apportionment deadlocked – which was always.

Low keyed, low funded Supreme Court campaigns all changed a decade ago. In 1994 Judge Donald Shelton ran for the Supreme Court. As a past president of the Michigan Trial Lawyers Association, before his appointment to the bench, Shelton doubled the norm in spending by raising nearly $520,000 mostly from trial lawyers concerned about on-going legislative efforts to enact tort liability reform.

His campaign ran a statewide ad featuring a very short basketball player attempting to dribble past a huge center. The voice over in the commercial said “Don Shelton will stand up for the little guy against big corporations and insurance companies”
– so much for the restrictions on making pledges or promises of performance in office under the Canons of Judicial Ethics.

In 1994, Betty Weaver, the lone female in a five-person field including Shelton, won the open seat spending less than $200,000. The Michigan Chamber PAC contributed a whopping $2,500 to her campaign. Ours was one of only two PAC contributions to Weaver’s campaign.

For the Michigan Chamber the 1994 election was a wake-up call. In 1995-96 we mobilized the business and professional community to meet the trial lawyer challenge in judicial elections.

In 1996 we supported Hilda Gage who raised a record $723,000. One of her opponents, Bill Murphy was strongly supported by trial lawyers and raised just under $700,000. However, the open seat was won by Marilyn Kelly who raised $553,274.

In 1998 we supported Maura Corrigan who won the open seat raising over $1 million dollars.

By 2000, with the resignations of Justices Conrad Mallett and James Brickley and the appointments of Bob Young and Steve Markman to the Supreme Court the stage was set for the battle of Armageddon.

Congress enacted in early 2002 the Bipartisan Campaign Reform Act better known by its acronym BCRA, the more cynical among us would say that BCRA stands for Before Campaigning Retain an Attorney. The Act is also known by the names of its sponsors McCain-Feingold in the Senate and Shays-Meehan in the House.

Looking back BCRA had two modest goals: 1) restore the concept of contribution limits by banning national party committees and its officers, federal candidates and officeholders from soliciting and accepting soft money 2) regulate issue ads including a ban on electioneering communication by corporations and labor unions.

BCRA provided for expedited legal review in the federal courts. A three judge federal panel provided initial review holding oral argument in McConnell v. Federal Election Commission in December 2002. Last May in a 2-1 decision the panel upheld most of BCRA. The United States Supreme Court normally begins its new term the first Monday in October, but because of the importance of a timely decision before the 2004 election, oral argument in this case was held in early September, 2003. The Supreme Court on December 10th in a 5-4 decision upheld BCRA striking down only two minor provisions of the law upholding the ban on soft money and the regulation of so-called issue ads.

By its decision in McConnell the U.S. Supreme Court blew away those constitutional arguments that had been used previously to justify soft money issue ads. The court abandoned the distinction between express advocacy and issue advocacy. The so-called “magic words” test – i.e. “vote for, vote against, elect, defeat, etc.” was declared by the court to be functionally meaningless.

What impact does McConnell have on the Michigan Campaign Finance Act (MCFA) and on future issue advocacy ads?

Back in 1998, then Secretary of State, Candice Miller promulgated an administrative rule (R 169.39b) banning soft money ads 45 days before an election. That rule was challenged in Federal District Court by two distinctly different plaintiffs: Planned Parenthood of Michigan and Right to Life of Michigan.
One case was tried in Federal District Court for the Eastern District of Michigan, before a Federal Judge appointed by a Democratic President and the other case was tried in Federal District Court for the Western District of Michigan, before a Federal Judge appointed by a Republican President. The results from the two cases were the same: both courts held that the new administrative rule was unconstitutional in violation of the First Amendment. Both Courts said that regulation of issue ads required express advocacy. In the absence of “magic words” no regulation was permitted.

In the wake of those two court decisions the Department of State incorporated the so-called “magic words” test into two interpretative statements. Those court rulings and administrative actions led to a full-scale escalation of issue ads in the 2000 Supreme Court race and later in the 2002 gubernatorial and attorney general election.

Just as the passage of the 1974 amendments to the FECA and the U.S. Supreme Court ruling in *Buckley v. Valeo* led most states to revise their state campaign finance laws in the late 1970’s. Passage of BCRA and the Supreme Court ruling in *McConnell* will lead to another round of state campaign finance legislation across the nation.

This will be particularly true in those states where corporate or labor unions contributions are currently prohibited. Such Great Lake states as Michigan, Ohio, Pennsylvania, Wisconsin and Minnesota will likely see legislative efforts to enact BCRA-like state legislation. In states like Illinois and Indiana where corporate and labor union contributions are currently permitted, reform efforts are less likely.

A ban on corporate and union funded issue ads could be achieved even without legislative action in 2004 by having the Secretary of State promulgate new administrative rules or request that the Attorney General petition Judge Hood and Judge Bell to reconsider their 1998 rulings and lift their respective permanent injunctions to R 169.39b in light of *McConnell v. FEC*. It should be noted that R 169.39b has never been rescinded by the Department of State.

Let me close by issuing a word of caution. The escalation of campaign spending in Michigan Supreme Court races that began in 1994 will likely continue with or without soft dollars in the future as long as interest groups or justices themselves view the Court as a co-equal policy making branch of government. If interest groups look at the Court as just another institution in which to take another bite out of the policy-making apple, where it takes only four votes, instead of 56 or 20 votes to write or re-write laws, Supreme Court races will continue to be expensive and fiercely contested.

The Court needs discipline to avoid acting as a super legislature. Instead it should focus on interpreting the law and applying the text of the constitution or statute according to its ordinary meaning. The Court should be prepared to live with the result of the plain application of such text regardless of whether the individual justices personally agree or disagree with the outcome. In that role, judges are not the lawgivers in our society; rather, they are the interpreters of the law. Understanding that role will go a long way toward depoliticizing the Court. If interest groups want to change the law their focus should be on the legislature and not on the Court.
Judges do matter. And as you look at the impact that we have seen our judiciary have in our lives, it’s important to have the dialogue as to whether or not the money, and the nature of elections versus appointment, and the like, ought to be discussed. The fact is, they do matter and they matter greatly.

I look at the analogy in some ways, and I know that there’s going to be discussion a little bit later in more depth, as it relates to appointments versus elections, to the Lord of the Flies. Do you remember the William Golding book that a lot of your kids or others have been reading, and you remember you had it in school? And you had, in my way of thinking, a real crystallization. You had these proper English boys that were marooned on a desert island, and after a few days they turned into beasts, basically. There was a clear choice there: it was between Ralph, who kind of represented democracy, and he had that conch shell, and you had to sit around, and if you wanted to speak, you had to get the conch shell. It was kind of a messy process, you know. And then there was Jack, on the other hand. He was kind of the leader of saying, ‘if you do it my way and follow what I tell you to do,’ really the basis of totalitarianism, ‘I’ll give you meat. And this is easy for you to follow me.’ And, of course, you saw that a lot of them did follow him and headed toward just following somebody just because they say this is the easier way to go, as opposed to listening to what everyone has to say. This is really the debate, I believe, between judges having a touchstone and being elected and subjecting themselves to voter approval and having, really, a less independent judiciary. So we want, I believe, our judges to have that touchstone. I don’t think there’s anything wrong with having members of the Supreme Court or court of appeals or the circuit court, or what have you, going to the Freedom Fund dinner or going to the various forums and having them to actually have to touch people and to understand what people have to say. We don’t want our judges to be politicians but we want them to be accountable to the public.

Now, let’s talk about the money a little bit more in detail. I was at a forum recently up in Ann Arbor and the general counsel to the University of Michigan has a class and he invited me and the chair of the Republican Party to have a little bit of a dialogue in front of his class. One of things we got into was financing. I started out with a supposition that we could all come to an agreement that there is just too much money in politics. And I looked across the table and there wasn’t agreement as it relates to that. I do believe there’s too much money, not just in politics, but I think there’s too much money particularly in judicial politics. I think the money has gotten out of hand. The costs are spiraling, largely because of television. I mean it’s just what it costs in order to book ads on various television stations. And when you have these third parties, issue advocacy coming in from outside, that even makes the escalation go up even more. One side has to respond to the other side, has to respond to the other side, and pretty soon you’re looking at real money.

Now, I will say this, the ads politicize the judiciary in a way that I’m uncomfortable with. I’m just uncomfortable with it. And I think that it reduces the public confidence in the fairness of the system. I will take a little bit of issue, as it relates to my friend the previous speaker, as it relates to the history of some of this stuff. I remember
the first ad that really began to sensationalize judicial politics in the state of Michigan was the Clark Durant ad. You may recall he had that woman running down the hallway with a knife. Completely changed the nature of what we had ever seen before in the state of Michigan as it relates to ads for a judicial office. It caught everyone by surprise. All the editorial boards talked about it, but essentially the genie was out of the bottle with that ad. Yes, there were ads pointing out, in our view, certain current members of the Court and their decisions as it relates to the support of the insurance and business interests. Yes, those ads were definitely on the air, but when you look at the other ads that came into being, you know I was chairman of Judge Fitzgerald’s campaign for the Michigan Supreme Court, and the pedophile ad that came on went beyond the pale, I believe, beyond the pale. So there’s a lot of problem that we have with the current system of these TV ads and how the money for those TV ads has gotten on the air.

I will say this, a candidate that now is going to be nominated by one of the two major parties for the Michigan Supreme Court is going to spend two full days a week on the phone raising money. They’re going to spend two days a week raising money. It’s problematic for a lot of reasons but this is the nature of what they’re going to have to do in order to raise the dollars in order to run. That’s too much time and I believe it corrupts the efforts of what we want to have in terms of an independent judiciary.

And by the way, sometimes you can see the reverse in history. I was looking though the transcripts of the ‘63 Constitutional Convention. One of the sections on judicial reform was being chaired by Dick Van Deusen, you remember he used to be the chair of Dickinson Wright, and in it also, before his days in the state Senate, was Coleman Young. And they were having a discussion about the nature of campaign finance and whether judges should be elected or appointed, and you might be interested to note that Dick Van Deusen, who was a Republican, was advocating for election of judges and Coleman Young was advocating for appointments. And when you look at who was controlling what at that time, you know, it depends I guess on the perspective of history as to what you do.

You know, appointments increase, I believe, also the power of the governor. They say the definition of a judge is a lawyer who knows the governor. I don’t know if that’s true or not, but it’s an old saw that’s been out there. You know, it’s just politics of a different sort. If you look at a number of other states that have done away with it and there’s a question as to whether the quote/unquote “elites” still end up with all of the appointments. Those from the big law firms and from the law enforcement area end up getting the appointments and you have a problem in a lot of those states with diversity as well.

There has been some discussion on the White case and I won’t belabor that other than to say clearly judges do have a more extensive right to campaign now. I mean, I think that’s what the Court is saying. The argument before White, as I understand it, was that judges couldn’t defend themselves in the case of certain attacks. Now they can, but at what price? Now judges do have this First Amendment right to announce their views on disputed legal and political issues but it raises certain questions.

From a practical standpoint, I just look at how does the electorate fare in some of this. We have on balance over the years about a 20 percent fall off from the top of the ballot to where you get to the nonpartisan judicial ballot. In urban areas in Michigan, in Detroit, Flint, Pontiac, Saginaw and Grand Rapids, it’s 30, sometimes 35 percent. After
you vote for President and members of Congress and the like until you get to the nonpartisan end of the ballot. That means a huge section of the electorate is not having any say at all in terms of who our judges are. For a lot of people that affects their lives more than anybody else – when you look at who your local district judge is, it affects them tremendously.

I believe that the money used in judicial races should be used to give voters information. That’s the bottom line. So there’s the question of whether judicial candidates should debate. I’m not so sure I do think that. On the other hand, I do believe forums on judicial philosophy are not such a bad idea.

I would like to see the media play an expanded role, particularly editorial boards in explaining the credentials of the various candidates, although I guess with The Detroit News I want to think about that again for a minute.

It’s been said before, I won’t belabor it, but I think full disclosure is an obvious and clear step in the right direction. Also, I think voter guides would be tremendously important. By the way they are being used in a number of other states – California, Oregon, Washington, Alaska.

My party hasn’t taken a position, but I like public funding. I think it could be an important step for judicial elections. I think we should move in that direction. It would do something to deal with decreasing that spiraling that we’re seeing in cost and reducing the influence of special interests and preserving independence. I think it would go a long way in that regard. We’re seeing that movement across the country. In Michigan, the state bar policy committee has voted to support that; Georgia is moving in that direction; Idaho - there’s a resolution supporting that before the state bar; Illinois - legislature’s moving in that direction – both houses; in Texas polls show 79 percent support for that. There are things to be ironed out about the mechanics, but the broad concept, I think, is important - where you have qualifying contributions in a limited fashion, then having support from the state. This takes dramatic pressure away from all of that time you have to spend incurring favor.

And look at some of the other issues. What about a judge who has in front of her a major contributor? Do we continue to push the nature of recusals for that on that kind of basis? As we see these contributions going further and further out there, I think that’s an issue that’s going to bedevil us more and more.

There’s another issue - what about the candidate for judicial office that has his own money that he can obviously spend and the First Amendment questions? The more enlightened proposals I’ve seen on public financing say that essentially, once you’re a qualifier, once you’re in that system, they are able to match the independent judge who chooses not to opt into the system dollar for dollar.

Now we’re looking a state budget that is not healthy, no question about that. We just got out of a $920 million dollar deficit and I spoke with the budget director last week and we’re going to be looking at a billion dollars for next year. That’s just the reality. But I think the discussion of going towards getting the money out of politics and preserving judicial independence is worth having and I think it is the right direction. The money is out of hand. We’ve got to fix that mess for the sake of our democracy.
ALTERNATIVES TO JUDICIAL ELECTIONS

John W. Reed

Let me begin by reminding you of how we got to where we are–167 years of Michigan judicial selection history in about four minutes, beginning with the year 1837.

When Michigan achieved statehood, in 1837, only two states provided for popular election of appellate court judges; and so it is unremarkable that our first constitution provided for gubernatorial appointment of the justices of the Supreme Court (though it did provide for election of trial judges).

By the middle of the century a great wave of Jacksonian populism had swept the country. That wave produced–particularly in the midwest–a move toward popular election of judges. Under that influence, Michigan’s 1850 constitution and accompanying legislation eliminated gubernatorial appointment and provided for election of supreme court justices, a method from which we have never retreated.

Fifty-eight years later, our 1908 constitution continued the election method of judicial selection but directed that there be partisan nominations and nonpartisan elections at the supreme court level. In 1938 a constitutional amendment conferred on the legislature the authority to determine the mode of judicial nominations and directed that lower court elections also be nonpartisan. But most notably, the 1938 amendment allowed an incumbency designation on the ballot, giving sitting judges an overwhelming advantage in judicial races. Michigan is one of only a few states that grants such designations, and the only one that does so by constitutional provision.

At about the same time as that 1938 amendment, the American Bar Association and the American Judicature Society formulated model judicial selection processes which provided for gubernatorial appointment from a screened panel of nominees, subject to retention elections in which the judge would run not against an opponent but against his or her own record.

The state of Missouri was the first to adopt a similar process, doing so in 1940; and so it has come to be known as the “Missouri Plan.” As adopted by other states, there are many variations: sometimes only appellate courts; if trial courts, then sometimes statewide, sometimes local option; perhaps requiring legislative confirmation; and of course variation in the makeup of the nominating commissions. But all of these are assumed under the rubric of the “Missouri Plan” or “merit selection.” Many states have adopted a version of merit selection, and it has worked so well that not one has thereafter abandoned it.

As we moved to formulate the current constitution in 1963, the ConCon Judiciary Committee recommended the Missouri Plan, but the convention rejected the proposal. It did, however, adopt several reforms. One was to allow incumbents to file affidavits of candidacy for reelection, reducing if not eliminating the need for party support. Another was to remove the governor’s power to fill vacancies—a power that was restored by amendment five years later—and to create a Judicial Tenure Commission. (Someone has observed that with the 1963 constitution and the 1968 amendments, we now have a system in which, in effect, approximately half of all judges are appointed by the governor for life through a combination of vacancy appointments, candidacy affidavits, and incumbency designations, with the Tenure Commission as the only check, and that check from inside the system.)
Since 1968 there has been almost constant ferment for change in the selection process, usually in the direction of the Missouri Plan, but none has succeeded.

So here we are in 2004, 35 years later, still talking about the possibility of merit selection, with, I confess, at least a fleeting sense of resignation to the near inevitability in Michigan of the election method and with useful discussion, therefore, directed to improvement of that flawed process.

But I suggest that the title of this panel—“merit appointment or election”—suggests a false, or at least exaggerated, dichotomy. The dichotomy is false in at least two ways:

First, “election versus merit appointment” implies that the election process does not take merit into account. It is hard, if not impossible, to prove that a merit system produces more capable judges, in the sense of intellect, wisdom, judicial temperament, impartiality and objectivity. There is anecdotal evidence of really excellent merit judges and abysmally poor elected judges; but anecdotes don’t equal data. There is some experience to suggest, also, that merit appointment induces some excellent people to offer themselves for consideration who would have been unwilling to become candidates for election, with all the hassles that entails. But it is not possible to say with any confidence that merit appointment produces a clearly superior judiciary.

The second way in which the merit versus election dichotomy is overstated is that although we are listed as having an elected judiciary, half of our judges reach the bench by gubernatorial appointment. And only the most cynical among us would argue that governors don’t use merit as a significant criterion for their appointments. And although those so appointed have to run for office in the next election cycle, their advantage as an incumbent labeled as such is overwhelming. So it’s fair to characterize the Michigan system as hybrid: half elected for a term, half appointed for life. The hitch is that a Michigan governor’s appointments are constrained by little but public opinion.

And that brings us to a vital element of merit appointment. Although there are variations among the states, the best guarantee of merit selection is the use of a well constituted nominating commission. A typical scheme at the appellate court level is a nine-person commission—four lawyers and five non-lawyers, with the lawyers chosen by a majority vote of the governor, the chief justice, and the attorney-general, and the non-lawyers appointed by the governor. No more than five of the nine may be from one political party. Another variation is a larger commission resembling the screening committees used by Senator Carl Levin at the federal level, chosen to represent management, labor, education, social work, banking and finance, plaintiffs’ and defendants’ bars, and so on. There are yet other modes of constituting nominating commissions, but the desirable hallmarks include nonpartisanship (or at least bipartisanship), sociological and demographic diversity, and high competence and earnest responsibility.

Some supporters characterize merit selection as non-political. That, of course, is a patent overstatement. Gubernatorial appointments have political elements too. But I submit that the political elements are less blatant and less extreme than when judges must campaign for office. More importantly, appointed judgeships are not so easily tainted by money or blemished by wild campaign charges and counter-charges and overwrought language that diminish the credibility and legitimacy of our courts.

One’s view of these matters—election versus merit appointment—is closely coupled with his view of the role of the judiciary. The other two branches of government are responsible to
the electorate—why not the judges? The argument is that, at least in theory, the judges are responsible not to the electorate but to the law, to concepts of justice. It is what sometimes is called “the majoritarian difficulty.” Judges are not charged with deciding cases the way a majority of the electorate wants but rather the way the constitution, the legislative acts, and the received common law dictate. When, however, courts begin to change the law by, for example, frequent overruling of recent precedents, they are implementing policy changes and are close to exercising legislative powers. In that view, one can plausibly argue that election, primarily at the appellate level, is called for.

Appointment of judges as a mode of judicial selection, it is argued, takes the power of selection away from the people. The more relevant question is, “Do the people have it now?” At very least, the nominating commission and the governor will know who it is they are placing on the bench, which is more than can be said for the voters.

In short, I strongly support a merit appointment plan for Michigan, especially for the appellate courts, with the following general characteristics.

1. Nonpartisan, or at least bipartisan, nominating commissions made up of both lawyers and nonlawyers will nominate three persons when a judicial vacancy occurs. The commission may seek out nominees as well as receive applications and suggestions.
2. The governor must appoint one of the three or reject the list. If the governor rejects the list, the nominating committee is to produce another three-person panel.
3. Once appointed, the judge must run for retention at an ensuing regular election, with the ballot question being “Shall Judge X be retained.” If retained, the length of the judge’s term will be the number of years of the regular term for that court, at the end of which time he or she will run again for retention. If not retained, the judgeship will become vacant, and the nominating commission will begin the appointment process as before.
4. Finally, there needs to be a muscular system of accountability, with a strong judicial tenure commission.

In view of the history of failed initiatives in this direction, and in view of the popular appeal of the largely emotional argument that the people must not relinquish the power to choose their judges, I assume that to propose merit selection again is a Quixotic venture—that is to say, an “impossible dream.” But like the fabled Sisyphus, who rolled a stone to the top of the hill only to have it roll back down again, and again, and again, I keep going up Michigan’s judicial selection hill in the firm belief that, against all odds, some day the stone of merit selection will finally come to rest on top of Michigan’s hill.
JUDICIAL ELECTION = INDEPENDENCE AND ACCOUNTABILITY
Lynn Jondahl

One of the most entertaining myths that some folks nurture about Supreme Court selection is that the judicial selection process can or ought to be less political. They suggest replacing the election of judges with appointment of judges — by a politician.

Try this question. If Governor Granholm appoints judges to sit on the Supreme Court of Michigan are these appointments less political than if the party conventions nominate people who are then elected by citizens? Hardly, I think.

Another question. If Governor Granholm appoints judges to sit on the Supreme Court of Michigan are these appointments less political than if a committee called “independent” selects people who are then appointed by the Governor? Hardly, I think.

Even with an elected judiciary, as we have it in Michigan, a significant number of judges (four of the seven current Supreme Court justices [Justice Corrigan initially was appointed to the Court of Appeals] and when I counted a couple years ago at least 14 of the 28 current Court of Appeals judges) initially were appointed by the governor. That’s because the governor is given the authority to fill vacancies in judicial positions.

An alternative selection process often put forth is called the “merit plan” or “Missouri Plan.” Under this scheme a state’s governor appoints a person from a list suggested by a panel - usually of lawyers and sometimes including non-lawyer lay persons - that evaluates possible judicial appointees. After the appointee from this process has served for a period of time a vote is put to the electorate asking if they wish to retain the judge. If the voters reject the judge, the process for a new appointment takes place again. Is this less political? Hardly.

A study of the first 25 years of the Missouri Plan (“The Politics of the Bench and the Bar,” Richard A. Watson and Ronald G. Downing, 1969) described the Plan as follows: “Thus, far from taking judicial selection out of politics, the Missouri Plan actually tended to replace politics, wherein the judge faces popular election (or selection by a popularly elected official), with a somewhat subterranean process of bar and bench politics, in which there is little popular control.” (Citation from a “White Paper” titled “The Case for Partisan Judicial Elections,”’ by a committee of authors chaired by Michael DeBow, Professor of Law at Cumberland School of Law, Sanford University).

Another question for you to try: Is the quality of decisions by lawyers better than the quality of decisions by voters? Hardly, I think.

In 1998 the Chicago Bar Association sponsored “The Judicial Voters Survey” (www.chicagobar.org/public/judicial/survey.html) which is instructive as we try to understand how well citizens feel prepared for voting in judicial elections. Importantly and impressively, the survey showed that information matters. Among voters who said they had a great deal of information about State Supreme Court candidates, 95 percent voted in one or more Supreme Court election. Among voters who said they had a great deal of information about Circuit Court candidates, 87 percent voted in one or more Circuit Court election.

Fifty-eight percent of those who did not vote said it was because they did not have enough information and 35 percent said it was because they didn’t know any of the candidates. Fifty-three percent said “more information” would help change their minds about voting. Nonvoters want to know background (28%): academic, work experience, courtroom experience and beliefs, opinions on issues. Twenty percent want to know about court cases they presided over, decisions. Eight percent want trial outcomes, sentencing practices.
What kind of information would be most important to them as voters in judicial elections? Forty-eight percent of non-voters said it would be extremely important to know the candidate’s opinion on the death penalty; 50 percent on business and labor issues; 46 percent on social issues such as abortion or gay rights. Are these appropriate questions? What is appropriate information?

How do we balance the competing virtues of judicial independence and judicial accountability? This is probably the balance we seek whatever alternative we choose for selecting judges. Too great a commitment to independence could lead to arbitrary justice. Too great a commitment to accountability could lead to poll-driven justice.

Rather than advocating various proposals for reducing the role of the electorate and increasing other roles in the process of judicial selection, I would favor spending our energy trying to figure out how to improve the quality of judges by improving the quality of judicial elections.

Let’s face it, judicial races are boring, at best, and more often invisible. Canon 7 from the Code of Judicial Conduct is the rule that addresses political conduct of persons running for judicial positions. There is a phrase in the Canon 7. B. (1) (c) that reads: “A candidate, including an incumbent judge, for a judicial office: should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.” This gets widely and, I would argue, too restrictively translated in most judicial races to mean that the candidates cannot discuss anything that might possibly come before the courts at some time. Therefore, judicial campaigns limit themselves to pictures of people in robes and words like “tough”, “experienced”, “caring”, “dependable”, “honest” and similar less than voter-helpful claims.

Think how exciting and interesting and valuably educational it would be to have the Supreme Court candidates explain their positions on abortion and how these personal beliefs would affect their ability to adjudicate a case. The electorate should know the responses to that and similar questions. Candidates need not make a pledge or promise regarding how they would decide an issue in order to engage in this discussion. Judicial campaigns could and should take advantage of these political teaching moments.

Judicial candidates, whether for election or appointment, pretend that they have no opinions, ideas, philosophies or agendas. But we really know better — or at least those who spend millions of dollars on judicial campaigns know better. Whether judges are appointed or elected does not alter the fact that they have opinions, ideas, philosophies or agendas. Do you remember the exchange between Senator Leahy and Justice Clarence Thomas during the Justice’s Senate confirmation hearing?

SENATOR LEAHY: “You were in law school at the time Roe v Wade was decided. Was it discussed while you were there? Have you ever had discussion of Roe v. Wade in the 17 years it has been there?”

JUSTICE THOMAS: Only in the most general sense that other individuals express concerns, and you listen and you try to be thoughtful. If you are asking me whether or not I have ever debated the contents of it, that answer to that is no, Senator.” He should have been rejected for lack of intellectual curiosity. (Senate Confirmation Hearings September 11, 1991)

Let’s adopt a more refreshing, honest and realistic perspective and recognize that the more information people have about judicial candidates, the more likely they are to vote in
judicial elections. This is true even if the voters are not representing major interest groups. And information needn’t violate Canon 7.

There is plenty of research supporting the notion that judicial decisions are, to some degree, affected by the values and experiences of judges. That underscores the importance to voters of being able to evaluate judicial candidates — their values and experiences.

Certainly the supporters of judicial candidates believe that candidate values and experiences are important. While labor leaders advance the need for electing a Democratic majority in order for the concerns of working people to be heard again before the Michigan Supreme Court, the Michigan Chamber of Commerce runs ads inviting prospective businesses in Ohio to come to Michigan where the “judicial restraint of the Michigan Supreme Court and fair laws have helped create a healthy economic climate,” in contrast to the Ohio Supreme Court which has “rejected reasonable legal reform.”

Betsy DeVos, upon her resignation from a previous term as chair of the Michigan Republican Party, reflected on what, during her tenure, she felt best about. First, she said, was “taking philosophical control of the Supreme Court.” One of the appointed Supreme Court Justices, Robert Young, addressing the Eastside Republican Club late last year repudiated unnamed “activist” judges, saying they are supported by “the other side’s infrastructure including the Michigan Trial Lawyers Association, the AFL-CIO, the Democratic Party and the Detroit Free Press.” Obviously and correctly, I would concur, he thinks voters ought to know his thinking about who is supporting judicial candidates.

So we have researchers, political parties, interest groups, lawyers, judges and justices, all telling us that we’re practicing ignorance if we ignore the values and experience of judicial candidates.

The last election campaign for the Michigan Supreme Court would have been exciting if the candidates and the media had given people what they want — information about the candidates and how they think. To help us the Michigan Supreme Court has issued an opinion that invites such information and debate about the significance of the information. In ordering the Michigan Judicial Tenure Commission to reconsider a case in which the Commission punished a judge for using what his opponent characterized as “false, fraudulent, misleading or deceptive” claims, the Court identified criticism of court decisions to be “core political speech” and, therefore, protected. They went on to say: “A rationale for judicial elections is that meaningful debate should periodically take place concerning the overall direction of the courts and the role of individual judges in contributing to that direction.” That sounds pretty healthy and should help to empower citizens to make critical democratic decisions in voting for judicial candidates. That should lead to accountability.

Bill Moyers [fall of 1999] produced a program on the price of justice for Public Broadcasting’s “Frontline” program. He reported on a survey conducted by the Texas Bar Association. Forty-nine percent of the state’s judges and over seventy-five percent of its lawyers agreed that campaign contributions significantly influence judicial decisions. A Kalamazoo attorney whose client was injured and unsuccessfully sued for damages from an insurance company called the decision, “completely political…almost an absurd decision on its face. …Until widows and orphans can donate as much money as insurance companies [to judicial campaigns] we’ll continue to see these types of decisions.”

The reform that begs to be implemented is the creation of public funding for judicial races. Changing the method of funding campaigns would do more to encourage judicial
independence than changing the method of nominating or selecting candidates. Michigan needs an “impartial justice” law that would provide for full public funding for state judicial races. Candidates who choose public funding would agree to accept no private funding. They then would receive full funding for their campaigns from a designated fund established from public revenues. If a candidate who chooses public funding is facing a privately funded candidate, the publicly funded candidate would be assured of adequate funding to match his/her opponent. In Wisconsin diverse groups including the State Bar, the AFL-CIO and the Wisconsin Realtors Association support such a proposal. In Michigan 78 percent of voters support full public funding for Supreme Court races. (February 2002 poll conducted by Mitchell Research and Communication for the Michigan Campaign Finance Network.) However, only 44 percent of Michigan judges support public funding for judicial races. (Survey of Judges in Michigan conducted by Professor John Chamberlin of the University of Michigan in November of 2003.)

In 1998 Justice Corrigan became the first Michigan Supreme Court candidate to spend more than $1,000,000 to win election to the court. Now with multiple Supreme Court candidates expected to spend in excess of a million dollars each for their campaigns each year, we quickly will see the value in creating a system that allows them to be independent from the interest groups trying to capture control of the judiciary.

Inviting the public to become more substantively involved in the process enhances democracy and justice. Reducing public access is a solution that assures a weaker judicial system with less accountability and, consequently, less credibility.
Biographies of Presenters

Dennis W. Archer

Dennis W. Archer is president of the American Bar Association. An African-American, he is the first person of color elected to the highest office of the association. Mr. Archer served two four-year terms as mayor of the city of Detroit (1994-2001), and during the last year was president of the National League of Cities. Since leaving the mayor’s office, Archer was elected chairman of Dickinson Wright PLLC, a 200-person Detroit-based law firm with offices in Michigan and in Washington, D.C. He sits on the corporate boards of Johnson Controls Inc., Compuware Corporation and Covisint.

Archer earned his Juris Doctor from Detroit College of Law in 1970. He began practicing law thereafter, working as a trial lawyer and a partner in several Detroit firms, and serving as associate professor of the Detroit College of Law and adjunct professor at Wayne State University Law School.

In 1985 Gov. James Blanchard appointed Archer an associate justice of the Michigan Supreme Court. He was elected to an eight-year term the following year. In his final year on the bench, Archer was named the most respected judge in Michigan by Michigan Lawyers Weekly.

Archer has long been active in the organized bar, as president of the Wolverine Bar Association in 1979-80, the National Bar Association in 1983-84, and the State Bar of Michigan in 1984-85. He is a Life Member of the Fellows of The American Bar Foundation and the National Bar Association; a Fellow of the International Society of Barristers; and Life Member of the Sixth Circuit Judicial Conference.

Archer has achieved national, state and municipal leadership positions despite humble beginnings. Born in Detroit, he was raised in Cassopolis, MI, and took his first job at the age of eight, as a caddy for a local golf course. Archer held a series of odd jobs, working his way through college and law school. He earned a Bachelor of Science degree in Education from Western Michigan University, and then taught learning disabled children at two Detroit public schools from 1965-70, while he earned his law degree from Detroit College of Law.

In 2000, Mayor Archer was named Public Official of the Year by Governing magazine. He received an Award of Excellence and was named 1998 Newsmaker of the Year by Engineering News-Record magazine, a sister publication of Business Week. In addition, Archer has been named one of the 25 most dynamic mayors in America by Newsweek magazine; one of the 100 Most Influential Black Americans by Ebony magazine; and one of the 100 Most Powerful Attorneys in the United States by the National Law Journal.

Archer is married to Trudy DunCombe Archer, judge of Michigan’s 36th District Court. They have two sons, Dennis W. Archer, Jr., and Vincent DunCombe Archer, both of whom are graduates of the University of Michigan.

John R. Chamberlin

John Chamberlin is Professor of Political Science and Public Policy at the Gerald R. Ford School of Public Policy at University of Michigan, where he has been a member of the faculty since 1970. He received his B.S. in Industrial Engineering from Lehigh
University and his Ph.D. from the Graduate School of Business at Stanford University. His research interests include ethics and public policy, political representation and election systems, legislative redistricting and mathematical models of politics. His teaching interests include ethics and public policy, statistics, nonprofit organizations, and mathematical models of politics.

Professor Chamberlin served as Interim Dean of the School of Public Policy from 1997-1999. He has also served as Associate Dean of the Horace H. Rackham School of Graduate Studies (1986-1989) and the College of Literature, Science and the Arts (1991-95) and the Gerald R. Ford School of Public Policy (1999-2001).

Chamberlin is chair of Common Cause in Michigan and served on the National Governing Board of Common Cause from 1996-2002. He also serves on the Advisory Council of the Michigan Public Policy Initiative, a program of the Michigan Nonprofit Association.

He is married to Marsha Chamberlin, who is the President/CEO of the Ann Arbor Art Center. John and Marsha have two children. Ethan, 32, is a vice-president of GM-Planworks in Detroit and the proud father of twins born two days before Thanksgiving. Sarah, 29, works in New York City for Madstone Theaters, where she manages their internet marketing department.

**Patricia Donath**

Patricia Donath served as president of the League of Women Voters of Michigan from 1999-2003. She was president of the Lansing area LWV from 1995-1997 and director of governmental affairs for LWV-MI from 1997-1999. She is currently a member of the LWV-MI state board and League lobbyist.

Ms. Donath is an attorney in private practice. She is a former legal counsel for the Michigan House Republican Caucus and former assistant counsel for the Michigan House Judiciary Committee. Prior to her work with the Michigan Legislature she was legal counsel for the New Jersey State Senate and State Assembly Judiciary Committees.

Donath was a member of the Ingham County Board of Canvassers for eight years and a founding board member of the Michigan Campaign Finance Network and Michigan Voters for Clean Elections. She is active with Plymouth Congregational Church of Lansing, Capital Area United Way and other community groups.

She earned her B.A. from Michigan State University and her J.D. from Northwestern University School of Law.

**Nolan Finley**

Nolan Finley is editorial page editor of *The Detroit News*, a position he's held since May 1, 2000. In that position, he directs the expression of the newspaper's editorial position on various national and local issues, and also writes a Sunday column.

Prior to that, Finley was the newspaper's deputy managing editor, directing the newsroom.

Previously, he served as business editor, and in various editing positions on the city, state and metro desks. He was also a reporter, covering Detroit City Hall during the Coleman Young administration.
Finley has been with the newspaper for 25 years, starting as a copy boy in the newsroom while a student at Wayne State University. He is a graduate of both Schoolcraft College in Livonia and Wayne State University, where he earned a Bachelor's degree in journalism. In 2001, Schoolcraft named him its outstanding alumni. Finley is a native of Cumberland County, Kentucky, and the father of a son and two daughters.

**Paul Hillegonds**

Since 1997 Paul Hillegonds has been president of Detroit Renaissance, a nonprofit civic organization composed of Southeast Michigan business leaders. The organization focuses its efforts on economic development and public policy issues.

Mr. Hillegonds served in the Michigan House of Representatives from 1979 to 1996. He led the Republican Caucus from 1986-1996, including one term as Speaker of the House and one term as Co-Speaker. Prior to his service in the legislature, he was on the staff of Congressman Phillip Ruppe.

Hillegonds serves on numerous boards, including the Wayne State University Board of Governors, and those of the Michigan Economic Development Corporation, the Nature Conservancy of Michigan, Michigan Future, Henry Ford Health System, Southeast Michigan Consortium for Water Quality and the Detroit Riverfront Conservancy.

Hillegonds was honored by *Governing* Magazine as Public Official of the Year in 1994 and by *The Detroit News* as Michiganian of the Year in 1996. He has been awarded honorary degrees by Grand Valley State University, Western Michigan University, Ferris State University and Central Michigan University.

Mr. Hillegonds has a B.A from the University of Michigan and a J.D. from Thomas M. Cooley Law School.

Mr. Hillegonds and his wife Nancy have two children: Sarah, 14, and Michael, 11.

**Melvin J. Hollowell, Jr.**

Melvin Butch Hollowell is chairman of the Michigan Democratic Party, a member of the Democratic National Committee and general counsel of the Democratic National Committee’s Voting Rights Institute in Michigan.

Mr. Hollowell practices law with Butzel Long PC in Detroit. He has over fifteen years experience in the areas of public finance, public contracting, real estate, administrative issues, and business and corporate law. Prior to entering private practice, he held various positions in Wayne County Government: assistant county executive; director, Purchasing Division; director, Human Relations Division; and assistant corporation counsel.

In addition to his corporate legal practice and public sector experience, Mr. Hollowell is extremely active in various professional, civic and charitable organizations. He has served as chairman of the NAACP Freedom Fund Dinner, and on the boards of Albion College’s Gerald R. Ford Institute for Public Service, the Nature Conservancy of Michigan, Wayne State University Medical School and United Way of Southeast
Michigan, among many others. Mr. Hollowell writes regular columns for the Michigan Chronicle and the Jewish News.

Hollowell is a graduate of Albion College (B.A., 1981) and the University of Virginia School of Law (J.D., 1984). He is a member of the State Bar of Michigan, the National Bar Association, the Wolverine Bar Association, and is a life member of the U.S. Court of Appeals, Sixth Circuit, Judicial Conference. He was appointed co-chair of the Citizen Advocacy Committee for the U.S. District Court in Detroit by U.S. Senator Carl Levin. He has received many honors and awards including: Crain’s, “40 under 40;” Detroit Monthly’s “75 Future Leaders;” Detroit Free Press, “10 Reasons Detroit is in Good Hands;” and Ebony’s, “50 Leaders of the Future.”

He and his wife, Detroit Free Press columnist Desiree Cooper, have been married for 18 years. They live in Detroit with their two children, Melvin and Desiree.

H. Lynn Jondahl

In December of 1994 Lynn Jondahl ended 22 years of service as a Michigan state representative from the East Lansing-Meridian Township area. As a legislator, he sponsored and led successful efforts to enact major environmental and consumer protection legislation, including Michigan’s Mandatory Deposit Act (“Bottle Bill”), the Sand Dune Protection Act, the Generic Drug Act, and the Handicapper Civil Rights Act. For 12 years he chaired the House Taxation Committee and played a key role in many taxation issues, especially those focused on education finance reform. In 1994 he gave up his House seat to run for the Democratic nomination for governor. His legislative experience followed work as a campus pastor (he was ordained a minister in the United Church of Christ upon graduation from Yale University Divinity School).

From 1995 through July of 2002 Jondahl served as co-director of the Michigan Political Leadership Program at Michigan State University. From November of 2002 through January of 2003 he served as director of transition for the new administration of Governor Jennifer Granholm. He has participated in a number of international seminars and training programs on local and regional government, in Siberia and Ukraine (1995), Moscow (1999), Seoul, South Korea (2000), and Malawi and Ghana (2002-2003).

Mr. Jondahl currently is executive director of the Michigan Prospect for Renewed Citizenship.


Robert S. LaBrant

For 26 years Bob LaBrant has been on the staff of the Michigan Chamber of Commerce beginning in 1977 as manager of Political Action Programs. In that position he was a pioneer in helping business to organize politically by establishing political action committees within corporations, associations and local chambers across Michigan.
Today in addition to directing the Michigan Chamber PAC, its ballot question committee and its issue advocacy programs, LaBrant serves as the Chamber’s lobbyist on campaign finance, lobby law and redistricting legislation.

LaBrant also coordinates litigation by the Michigan Chamber. One of the lawsuits brought by the Chamber reached the U.S. Supreme Court in 1990 (Austin v. Michigan Chamber of Commerce). In 1999 LaBrant was named by Michigan Lawyers Weekly as one of their ‘Lawyers of the Year’ for challenging the authority of the State Bar of Michigan, as a public body, to operate LAWPAC.

LaBrant is a former Captain in the U.S. Army, with service in Vietnam. After working on the staff of the Appleton, Wisconsin Chamber of Commerce, he served as Press Secretary and later District Assistant to Congressman Harold Froehlich of Wisconsin. LaBrant later became the State Legislative Lobbyist and PAC Coordinator for the Metropolitan Milwaukee Association of Commerce. He came to the Michigan Chamber from the Business-Industry Political Action Committee (BIPAC) headquartered in Washington, D.C. where he was its Midwest Regional Manager.

A graduate of the University of Wisconsin-Stevens Point, with a Political Science degree, summa cum laude, he did his graduate studies in Public Relations at the American University in Washington, D.C. LaBrant holds a Juris Doctorate, cum laude, from the Thomas M. Cooley Law School in Lansing, Michigan.

For fifteen years, LaBrant was on the adjunct faculty at Lansing Community College teaching courses in State and Local Government and American Government and has been an adjunct professor at Thomas M. Cooley Law School teaching a course on Election Law. In 1995 LaBrant was selected by the International Republican Institute to conduct seminars on election law in Cambodia.

He has served as the chairman of the Michigan Political Leadership Program at Michigan State University and as president of the Michigan Political History Society. LaBrant has served on the Secretary of State’s Study Committee to Recodify the Michigan Election Code, the Secretary of State’s Task Force on Voter Registration and the Secretary of State’s State Plan Advisory Committee to implement the Help America Vote Act.

After the 1990 election, he was one of the transition legal advisors to Governor-Elect John Engler. Following the 1994 election, LaBrant served as the transition leader for Secretary of State-Elect Candice Miller and after the 2002 election, served on the transition team for Attorney General-Elect Mike Cox.

In 1998 LaBrant received the Outstanding Public Leadership Award from the Institute for Public Policy and Social Research at Michigan State University. In 1999 he received from the Michigan Society of Association Executives its Chairman’s Gavel Award for his efforts to protect the rights of associations to participate in the political process. In 2002, LaBrant was inducted into the Michigan Association Hall of Fame.

Christopher J. Peters

Christopher J. Peters is the Associate Dean and an Associate Professor of Law at Wayne State University Law School in Detroit, where he has taught since 1997. He received his B.A. summa cum laude from Amherst College in 1989, where he was awarded the Alfred F. Havighurst Prize for the outstanding honors thesis in history, and his J.D. cum laude from the University of Michigan in 1992, where he served on the
Following law school, Professor Peters practiced in general civil litigation with the Chicago office of Latham & Watkins and served as a Bigelow Teaching Fellow and Lecturer in Law at the University of Chicago Law School. Professor Peters teaches and writes in the areas of constitutional law, political and constitutional theory, jurisprudence, procedure, and legal process. He has taught as a visiting professor at the University of Michigan Law School, and his articles have been published in the *Harvard Law Review*, the *Yale Law Journal*, the *Columbia Law Review*, the *Northwestern University Law Review*, the *Iowa Law Review*, the *Boston University Law Review*, and the peer-reviewed journal *Legal Theory*. Professor Peters has served on the board of the Humanities Center at Wayne State University and was selected by the Wayne State Academy of Scholars to deliver the 2002 Outstanding Junior Faculty Lecture in the humanities. He has received three Teacher of the Year awards from the Law School Student Board of Governors and was honored with the 2001 Donald H. Gordon Award for Teaching Excellence.

**John W. Reed**

John Reed is Thomas M. Cooley Professor of Law Emeritus at the University of Michigan Law School. In addition to his decades of service on the Michigan faculty, during which he was honored repeatedly by his students for teaching excellence, Professor Reed has served as dean at the University of Colorado Law School and, in retirement, at Wayne State University Law School. His visiting appointments have included Harvard, Yale, Chicago and NYU, among others. He has maintained close contact with courts and the practicing bar in such fields as evidence rules, judicial selection, bar examinations, and continuing education for both lawyers and judges; and he has received distinguished service awards from the American College of Trial Lawyers, the Association of Continuing Legal Education Administrators, and the State Bar of Michigan. He is an Academic Fellow of the International Society of Barristers and serves as its administrative director and editor. Reed's law degrees are from Cornell and Columbia.

**Richard L. Robinson**


Robinson has worked for the public purpose throughout his career, beginning with a stint as a Peace Corps volunteer and program manager in the Philippines. He has worked in local and state government as well, although the majority of his work-life has been in the nonprofit sector, including six years with the Center for International Earth Science Information Network.

Robinson, a native of Sault Ste. Marie, has a B.S., M.A. and Master of Public Policy, all from the University of Michigan. He lives with his son and daughter in East Lansing.
Reginald M. Turner, Jr.

Reginald M. Turner practices law with Clark Hill PLC, where he serves on its Executive Committee, its Labor and Employment Practice Group and its Government Policy and Practice Group. Mr. Turner has more than 15 years experience in labor and employment law and governmental relations, and he is one of the 12 Clark Hill attorneys named in *The Best Lawyers in America*.

Mr. Turner is vice president of the National Bar Association, immediate past president of the State Bar of Michigan and a member of the American Bar Association’s Standing Committee on Judicial Independence. He is a Fellow of the American Bar Foundation, an honor reserved to less than one percent of lawyers in each state.

Mr. Turner has governmental experience at the federal, state and local levels. In 1996-97, he completed a White House Fellowship in Washington, D.C. where he spent his tenure managing a Presidential Task Force and working as an aide to former Housing and Urban Development Secretaries Henry Cisneros and Andrew Cuomo. He is chairman of the City of Detroit Board of Ethics. In September 2003, Governor Jennifer Granholm appointed Mr. Turner to the Michigan State Board of Education. From 2000-2003, Mr. Turner represented Detroit Mayors Dennis Archer and Kwame Kilpatrick on the Detroit Board of Education. He formerly served on Governor John Engler's Blue Ribbon Commission on Michigan Gaming and on the City of Detroit Brownfield Redevelopment Advisory Authority.

Mr. Turner is also active in civic and charitable organizations. He is a vice chairman of the board of the Detroit Institute of Arts and he is a director of United Way Community Services and the Greater Downtown Partnership, Inc.