AN ALABAMA CASE STUDY: REFORMING JUDICIAL SELECTION AFTER *BUTLER V. ALABAMA JUDICIAL INQUIRY COMMISSION* (AND *REPUBLICAN PARTY OF MINNESOTA V. WHITE*)—WHERE DO WE GO FROM HERE?

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I. INTRODUCTION

> While one may question the propriety of Alabama's system of electing its state judges, the fact remains that it is the system chosen by the citizens of Alabama. As such, it is a system bound to collide with the modern day realities of political campaigns. That is, with candidates for the state judiciary running political campaigns, the Canons of Judicial Ethics will inevitably collide with issues of free speech.[1]

"[E]xperience suggests that, at least in Alabama, attack advertisements cause their own redress by causing a backlash which usually defeats the attacker in the election."[2]

The decision of the United States Supreme Court in *Republican Party of Minnesota v. White* has had a meaningful, although somewhat indirect, impact in Alabama.[3] *White*'s impact is only indirect because just months before that decision, the Alabama Supreme Court, in *Butler v. Alabama Judicial Inquiry Commission*, held that a campaign speech restriction in the Alabama Canons of Judicial Ethics violated the First Amendment.[4] In *White*, Justice Scalia found Minnesota's "announce clause" overly broad and struck it down applying a strict scrutiny analysis.[5] Similarly, the Alabama Supreme Court in *Butler*, also applying strict scrutiny, found the Alabama Canons' restrictions on judicial campaign speech overly broad (i.e., not narrowly tailored) and thus unconstitutional.[6] When *White* appeared a few months later, it simply served to confirm the Alabama Supreme Court's reasoning in *Butler*.[7]

For those concerned by the tone or content of political rhetoric in

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1. Butler v. Ala. Judicial Inquiry Comm'n, 111 F. Supp. 2d 1241, 1247 n.7 (M.D. Ala. 2000).

2. Butler v. Ala. Judicial Inquiry Comm'n, 802 So. 2d 207, 221 (Ala. 2001).

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

4. *Butler*, 802 So. 2d at 218.

5. *White*, 536 U.S. at 776.

6. *Butler*, 802 So. 2d at 218. Professor Roy Schotland offers a thumbnail sketch of the *Butler* litigation in Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. REV. M.S.U.-D.C.L. 849, 869 (2001) (commenting that the then-pending *Butler* litigation brought out "[t]he uniqueness of judicial elections"). Interestingly, one of the protagonists in that litigation, Justice See, has argued that judicial elections are no more unique than municipal elections. CTR. FOR LEGAL POLICY AT THE MANHATTAN INST., JUDICIAL ELECTIONS: PAST, PRESENT, FUTURE 25–26 (2001), *available at* http://www.manhattan-institute.org/pdf/mics6.pdf [hereinafter REMARKS OF JUSTICE SEE].

7. *See White*, 536 U.S. at 765. Interestingly, *White* does not mention *Butler*.

judicial campaigns, the message in Alabama and elsewhere is the same: the attempt to regulate judicial campaign speech through canons of judicial ethics will only be marginally effective. Accordingly, reformers are now forced to direct their efforts toward the more difficult task of reforming the mechanisms of judicial selection. Two main options are presented: nonpartisan elections and merit selection. As of January 2007, both options are under active study in Alabama. Only time will tell whether either will be adopted.

This Article first recounts the effort to reform the tone and content of Alabama partisan judicial elections through the adoption of Canon 7B(2) of the Alabama Canons of Judicial Ethics. The successful challenge in the *Butler* litigation to the core portions of Canon 7B(2) is also outlined. Finally, after discussing the continuing need for judicial selection reform in Alabama, this Article will outline current efforts to reform judicial selection in the state.

II. ADOPTION OF CANON 7B(2) OF THE ALABAMA CANONS OF JUDICIAL ETHICS

Under the Alabama Constitution, judges must be popularly elected.[8]

8. ALA. CONST. art. VI, § 152 ("All judges shall be elected by vote of the electors within the territorial jurisdiction of their respective courts."). Alabama did not always elect judges. Under Alabama's original constitution adopted in 1819, the legislature appointed judges. ALA. CONST. of 1819, art. V, § 12. An 1850 amendment provided for election of trial judges, but legislative appointment of supreme court justices continued. *Id.* amend. III. One might have guessed that election of supreme court justices was a function of the state's Jacksonian heritage, but actually it was the "Carpetbagger" constitution of 1868 that extended the popular election of judges to the state supreme court. ALA. CONST. of 1868, art. VI, § 11 ("Judges of the supreme court . . . shall be elected . . . ."). The elective principle was continued in the constitution of 1875, in the constitution of 1901, and in the revision of the judicial article by amendment 328, adopted in 1973. ALA. CONST. of 1875, art. VI, § 12; ALA. CONST. of 1901, art. VI, § 152; ALA. CONST. of 1901, amend. 328, § 6.13 (codified as ALA. CONST. art. VI, § 152). Reform efforts in the early 1970s under the leadership of Alabama Chief Justice Howell T. Heflin resulted in the 1975 implementation of a new judicial article to the Alabama Constitution that created a model "Unified Judicial System." Efforts to provide for merit selection or nonpartisan elections in the new article were ultimately abandoned as likely to scuttle the entire project. Those leading the effort to adopt a unified judicial system regretfully concluded that reform of judicial selection had to be postponed until another day. *See* Charles D. Cole, *Judicial Reform in Alabama: A Reflection*, 60 ALA. LAW. 185, 185 (1999) (Professor Cole served as director of the 1971–1975 effort); *see also* Scott William Faulkner, Commentary, *Still on the Backburner: Reforming the Judicial Selection Process in Alabama*, 52 ALA. L. REV. 1269, 1269 (2001) (recalling that in 1973, Chief Justice

Until 1994, Alabama judicial elections were fairly quiet affairs. Though judges technically were elected in partisan contests, Alabama remained, as it had been through much of the twentieth century, a "one party" state in which the Democratic nomination for judicial and other local and statewide offices was tantamount to victory.[9] In 1994, however, Republican Perry Hooper challenged the sitting chief justice, Democrat Sonny Hornsby, in the general election.[10] After a contest involving an issue

Heflin told the Second Citizens' Conference, which was called to propose the new judicial article, that their proposal to change to "merit selection [of judges] would have to 'be placed on the back burner for awhile'"). For more on the adoption of Alabama's judicial article, see generally Hugh Maddox, *Reflections on the 25th Anniversary of the Judicial Article*, 60 ALA. LAW. 182 (1999); Robert A. Martin, *It Was About Power and Judicial Independence*, 60 ALA. LAW. 196 (1999); Janie L. Shores, *A Tribute to Howell Thomas Heflin and His Achievements as Chief Justice of the Alabama Supreme Court*, 48 ALA. L. REV. 417, 419–22 (1997); Janie L. Shores & Robert Martin Schaefer, *The Judicial Article as Amended and Adopted in 1973*, 33 CUMB. L. REV. 319 (2003).

9. One party may really have meant no party. As of 1949, with respect to the South's one party (Democratic) system, "the conclusion could well be that there is in reality no party in the South." V.O. KEY, JR., SOUTHERN POLITICS IN STATE AND NATION 385 (1949). *See also* Wade Baxley, *Merit Selection of Judges—A Concept Whose Time Has Come*, 60 ALA. LAW. 366 (1999) ("Prior to 1980, judicial offices generally were filled through appointments by the governor when vacancies occurred as a result of the death or retirement of a sitting judge. Of course, this was during a period of time when a single-party (or a no-party) political system dominated the Alabama electoral process.").

10. LAURA STAFFORD & SAMANTHA SANCHEZ, THE INST. ON MONEY IN STATE POLITICS, CAMPAIGN CONTRIBUTIONS AND THE ALABAMA SUPREME COURT 3 (2003), http://www.followthemoney.org/press/AL/20030505.pdf. In 1994, tort reform emerged as a dominant issue in Alabama judicial politics. *Id.* In 1987, the Alabama legislature passed a number of tort reform measures designed to curb large jury verdicts. *Id.* Hornsby, former president of the Alabama Trial Lawyers Association, a group consisting of plaintiffs lawyers, was elected chief justice in 1988. *Id.* During his tenure, the Alabama Supreme Court held many of the legislatively adopted tort reform measures to be unconstitutional under various provisions of Alabama's state constitution. *Id.* The 1994 election also saw the entry of political consultant Karl Rove into Alabama judicial politics. Joshua Green, *Karl Rove in a Corner*, THE ATLANTIC MONTHLY, Nov. 2004, at 92, 92 (Green called the 1994 Alabama Supreme Court race "a greater testament to [Rove's] skill" than the 2000 presidential race). The election revolved around a dispute over whether absentee ballots that had not been notarized or witnessed by two witnesses, as required by statute, could be counted as required by an Alabama trial court—which would have permitted the ballots as long as there was substantial compliance with the statute. *Id.* at 93. Ultimately, the Eleventh Circuit ruled that the statutorily deficient absentee ballots should not be counted, and directed that Hooper be sworn in. Roe v. Alabama, 68 F.3d 404, 409 (11th Cir. 1995). Meanwhile, Hornsby continued to serve as chief justice under a holdover provision of the Alabama statute until Hooper was sworn in on October 20, 1995, not quite a full year after election day. Hornsby v. Sessions, 703 So. 2d 932, 942–43 (Ala. 1997).

surrounding the counting of absentee ballots (somewhat foreshadowing the controversies of the 2000 presidential election in Florida), Hooper won by 262 votes.[11]

The 1994 race for the chief justiceship had been a political slugfest, but it was the 1996 race between Democratic incumbent, Kenneth Ingram, and Republican challenger, Harold See, that drove political rhetoric to a new low in Alabama. Both sides ran negative ads, but the race is best known for the infamous "skunk ad" which showed a picture of a skunk that dissolved into the image of Harold See.[12]

Prior to the 1996 election, bar and citizen groups were already studying and recommending various reforms of the state's judicial selection methods.[13] Three separate reforms were under active consideration: (1) merit selection; (2) nonpartisan elections; and (3) amendments to the Alabama Canons of Judicial Ethics that would restrict campaign rhetoric in judicial elections.[14] The skunk ad intensified interest in all these initiatives, but particularly in amending the Canons of Judicial Ethics. This type of reform would address the troubling issue of rhetoric that demeaned the judiciary, and because the Alabama Supreme Court has the state constitutional power to promulgate standards of judicial conduct, this was a reform the court could effect on its own initiative.[15]

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11. Stafford & Sanchez, *supra* note 10, at 3. This race marked the beginning of the Republican Party's Alabama Supreme Court ascendancy. By 1998, Republicans held a majority of the nine seats on the court. In 2006, Democrat Sue Bell Cobb won election to the chief justiceship and took her seat as the only Democrat on the court. Eric Velasco, *Cobb Defeats Nabers, Is Court's Lone Democrat*, BIRMINGHAM NEWS, Nov. 8, 2006, at 1A.

12. *See* Dale Russakoff, *Legal War Conquers State's Politics: In Tort Reform Fight, Alabama Court Race Cost $5 Million*, WASH. POST, Dec. 1, 1996, at A1.

13. *See* Baxley, *supra* note 9, at 366. In 1990, an Alabama State Bar Task Force on Judicial Selection chaired by Mobile attorney Robert Denniston recommended merit selection at all levels of the judiciary. *Id.* The Board of Bar Commissioners, in response to the Denniston Task Force report, instead recommended nonpartisan elections, again at all levels. *Id.* In 1995, a 150-member Citizen's Conference co-chaired by former Governor Albert Brewer and former Alabama Supreme Court Justice Oscar Adams (who had been the first African-American on the court) made two sets of recommendations. Glenn C. Noe, Comment, *Alabama Judicial Selection Reform: A Skunk in Tort Hell*, 28 CUMB. L. REV. 215, 218 (1998). One was for nonpartisan elections at the trial and appellate levels. *Id.* at 223. The other was for amendment of the Canons of Judicial Ethics to strengthen restrictions on campaign rhetoric and solicitation of campaign contributions. *Id.* at 220–23.

14. Noe, *supra* note 13, at 217–18; *see also supra* Part II.

15. ALA. CONST. art. VI, § 147(c) provides that: "The supreme court shall adopt rules of conduct and canons of ethics, not inconsistent with the provisions of this

Accordingly, on November 12, 1996—only days after the conclusion of the skunk ad election (which the Republican challenger See had won)—Chief Justice Hooper appointed a task force on judicial reform consisting of highly regarded appellate and trial judges.[16] In December 1996, a separate body, the Alabama Supreme Court's Advisory Committee on Judicial Ethics, made recommendations for strengthening the judicial canons. Based on the work of both groups, in August 1997, the Alabama Supreme Court promulgated a revision to Canon 7 of the Alabama Canons of Judicial Ethics, including a new provision—Canon 7B(2).[17] The most controversial portion of Canon 7B(2) was the final phrase, which prohibited "true information . . . that would be deceiving or misleading to a reasonable person."[18] The complete text of Canon 7B(2) follows:

> CAMPAIGN COMMUNICATIONS. During the course of any campaign for nomination or election to judicial office, a candidate shall not, by any means, do any of the following:
>
> > Post, publish, broadcast, transmit, circulate, or distribute false information concerning a judicial candidate or an opponent, either knowing the information to be false or with reckless disregard of whether that information is false; or post, publish, broadcast, transmit, circulate, or distribute true information about a judicial candidate or an opponent that would be deceiving or misleading to a reasonable person.[19]

Interestingly, Justice See, though the target of the skunk ad, voted against the promulgation of Canon 7B(2) arguing that it infringed upon the First Amendment guarantee of freedom of speech.[20]

Constitution, for the judges of all courts of this State."

16. Butler v. Ala. Judicial Inquiry Comm'n, 802 So. 2d 207, 224–25 (Ala. 2001) (Houston, J., dissenting).

17. *Id.* at 225.

18. ALA. CANONS OF JUDICIAL ETHICS Canon 7B(2) (2002).

19. *Id.* For an example of information that is true, but nonetheless misleading, see REMARKS OF JUSTICE SEE, *supra* note 6, at 22. In his remarks, Justice See discussed an opponent's ad in the 1996 contest that pointed out that See, a law professor at the University of Alabama Law School, had not passed the Alabama state bar examination. *Id.* That was true; however, it was misleading in neglecting to mention that See, who had been a member of the Illinois Bar when he practiced law in Chicago, had been admitted to the Alabama Bar on motion. *Id.* For his part, See likes to recount that once while traveling in northern Alabama, he met an elderly man who had been misled by the opponent's ad to believe that See was not a lawyer, and who voted for him for that very reason. *Id.*

20. The history of the adoption of Canon 7B(2) is recounted by Justice

III. THE UNCONSTITUTIONALITY OF ALABAMA JUDICIAL CANON 7B(2)

In 2001, Justice See successfully challenged the constitutionality of Canon 7B(2).[21] Having become an associate justice in the 1996 skunk ad race, See decided in 2002 to seek the chief justiceship to succeed retiring Chief Justice Hooper. Opposing See in the Republican primary was trial judge Roy Moore, better known as the "Ten Commandments Judge." During the primary contest, an ad by See charged Moore with being soft on crime in sentencing drug dealers as trial judge.[22] The See campaign distributed to the press statistics supporting the ad's claim. The statistics were technically accurate but failed to note that the sentences were often recommended by the prosecuting attorney, creating a misleading image of leniency towards drug dealers. Based on the ads, the Alabama Judicial Inquiry Commission filed a complaint against See with the Alabama Court of the Judiciary.[23] The complaint was grounded in part on the last sentence of Canon 7B(2) which prohibits "distribut[ing] true information about a judicial candidate or an opponent that would be deceiving or misleading to a reasonable person."[24]

See then filed an action in federal district court asking for an injunction against the Alabama Judicial Inquiry Commission from proceeding on its complaint, contending that Canon 7B(2), on its face and as applied, was an unconstitutional abrogation of the First Amendment right to free speech. The United States District Court for the Middle

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Houston in his dissent in *Butler*, 802 So. 2d at 224–26. (Houston, J., dissenting).

21. *Id.* at 218.

22. The ad stated: "'Moore let convicted drug dealers off with reduced sentences or probation at least 40 times.'" Schotland, *supra* note 6, at 869 n.85 (quoting George Lardner, Jr., *Speech Rights and Ethics Disputed in Judicial Races*, WASH. POST, Oct. 8, 2000, at A13).

23. The Alabama Judicial Inquiry Commission was created by § 156 of the Official Recompilation of the Alabama Constitution of 1901, and the Court of the Judiciary was created by § 157 of the Official Recompilation of the Alabama Constitution of 1901. The Alabama Judicial Inquiry Commission conducts investigations and receives or initiates complaints concerning any judge in the state judicial system. Upon a finding by a majority of its members of a reasonable basis for doing so, the commission files a complaint with the Alabama Court of the Judiciary. The Alabama Court of the Judiciary hears complaints filed and prosecuted by the commission. It has the power to remove from office, suspend without pay, or censure a judge. A judge aggrieved by a ruling may appeal to the Alabama Supreme Court.

24. *Compare* ALA. CANONS OF JUDICIAL ETHICS Canon 7B(2) (2002) (showing second clause which is quoted), *with* ALA. CANONS OF JUDICIAL ETHICS Canon 7B(2) (2006) (showing second clause was removed after found unconstitutional under the First Amendment).

District of Alabama issued a temporary restraining order[25] and then a preliminary injunction,[26] indicating its belief that See was likely to prevail on his First Amendment claim. The Eleventh Circuit, reviewing the case on appeal from the district court, certified certain procedural questions to the Alabama Supreme Court. At the same time, the Eleventh Circuit issued an open invitation to the Alabama Supreme Court to "resolve this important question about Alabama law and the United States Constitution"[27] and further, "to remedy federal constitutional defects, if any, that it may find in the judicial canons challenged by Justice See."[28]

The Alabama Supreme Court accepted the Eleventh Circuit's invitation.[29] The court applied strict scrutiny in testing the validity of Canon 7B(2).[30] The court recognized Alabama had a compelling interest in preserving the reputation and integrity of the judiciary, but held the canon was overly broad and not narrowly tailored to serve that compelling state interest.[31] Accordingly, it narrowed Canon 7B(2) by eliminating the phrase relating to the dissemination of true information that might deceive or mislead a reasonable person.[32] As narrowed by the court, the canon only prohibits the dissemination of demonstrably false information and then only if done with "actual malice," that is, under the standard of *New York Times v. Sullivan* in libel cases of actual knowledge of falsity or reckless disregard of falsity.[33] Although the Alabama Supreme Court did not have the guidance of the United States Supreme Court opinion in *White*, its opinion is consistent with the views later expressed in that case.

IV. A CONTINUING NEED TO REFORM JUDICIAL SELECTION IN ALABAMA

The concerns that motivated the Alabama Supreme Court's original adoption of Canon 7B(2) still exist.

25. Butler v. Ala. Judicial Inquiry Comm'n, 111 F. Supp. 2d 1224, 1240 (M.D. Ala. 2000).
26. *Id.*
27. Butler v. Ala. Judicial Inquiry Comm'n, 245 F.3d 1257, 1266 (11th Cir. 2001).
28. *Id.* at 1266 n.9.
29. Butler v. Ala. Judicial Inquiry Comm'n, 802 So. 2d 207, 212–13 (Ala. 2001).
30. *Id.* at 215.
31. *Id.* at 217–18.
32. *Id.* at 218–19.
33. N.Y. Times v. Sullivan, 376 U.S. 254, 279–80 (1964).

A. *The Compelling Interest in Integrity and Impartiality*

One concern is the state's interest in the integrity and reputation of its judiciary in that regard. In fact, in *Butler*, the Alabama Supreme Court recognized that this concern represented a compelling state interest for purposes of strict scrutiny analysis, but found that Canon 7B(2) was not narrowly tailored to protect that interest.[34]

Another concern is the impartiality of the state judiciary. In *Republican Party of Minnesota v. Kelly*, the Eighth Circuit Court of Appeals found that Minnesota's interest in preserving the impartiality of its judiciary as well as the appearance of impartiality was a compelling interest. The Eighth Circuit also identified a compelling interest in an "independent judiciary."[35]

B. *Skyrocketing Campaign Contributions*

In Alabama, an additional but related concern is the skyrocketing levels of campaign contributions in judicial races. In the 1996 See/Ingram race, the winning candidate, See, raised $2.68 million while the losing candidate, Ingram, raised $1.76 million.[36] Even in less-high profile races, a competitive candidacy now requires a minimum of $1 million in contributions. In 1998, with three of the nine seats on the court up for election, all but one of the six major party candidates raised over $1 million.[37] In 2000, with five seats up for election, total supreme court

34. *Butler*, 802 So. 2d at 218.

35. Republican Party of Minn. v. Kelly, 247 F.3d 854, 867 (8th Cir. 2001).

36. Stafford & Sanchez, *supra* note 10, at 3.

37. In Alabama, the election of the nine justices to the supreme court is staggered over a six-year cycle, but as a result of elections to fill vacancies, the staggering is presently uneven. The biennium in which three of the nine are elected (1998 was such a year) is followed two years later by an election in which five justices, including the chief justice, are elected. That was the case in the year 2000. In the next cycle, two years later, only one judge is elected. That was the case in 2002; the 2004 election then involved three seats. The election held in 2006 was a five–seat election, including a race for chief justice that pitted incumbent Republican Drayton Nabers Jr., against challenger Democrat Sue Bell Cobb. Velasco, *supra* note 11, at 1A. Cobb won the 2006 race. *Id.* The 2006 election involved three other contested races, all won by the Republican nominee. *Id.* A fifth seat was not contested and was thus retained by the incumbent justice, a Republican. *Id.* The election in 2008 will involve only one seat on the supreme court. One might expect that the staggering of terms would be even, with three seats up every two years, and indeed that was the system originally adopted. However, under the Alabama Constitution, the Governor fills any vacancy by appointment. The term of the appointed justice only lasts until the next general

campaign contributions exceeded $13 million.[38] In that year, of all the candidates for judicial election in the various states, four of the top six recipients of campaign contributions were in Alabama.[39]

In the recent 2006 election in which five seats, including that of the chief justice, were filled, candidates raised a total of $11.5 million.[40] This figure was reported to be four times the amount raised in Texas, the next highest state.[41] Chief Justice Nabers raised $4.4 million, while the victorious challenger, Sue Bell Cobb, raised $1.9 million.[42] The two candidates were ranked first and second nationally in judicial campaign contributions.[43] In the Alabama associate justice races, incumbent justice and Republican nominee Jacquelyn "Lyn" Stuart raised $1.8 million, placing her third nationally.[44] In a separate race, Republican nominee Glenn Murdock raised $1.5 million, placing him fifth nationally.[45] Thus, of the five judicial campaigns with the highest levels of campaign contributions in the nation, four were in Alabama.[46]

1. *Impact of Campaign Contribution Levels on Potential Candidates*

The necessity of raising such large sums in judicial races has several

election. The person selected in the general election then serves for a full six year term. ALA. CONST. art. VI, § 152.

38. Schotland, *supra* note 6, at 866.

39. Velasco, *supra* note 11, at 1A. For analysis of the contributions to the various candidates in the 2000 Alabama judicial elections, see *id.* In 2005, Alabama lawyer Bobby Segall, two months into his term as president of the state bar, found (tongue-in-cheek) a reason for state pride in reporting that in the decade ending in 2004, Alabama had led the nation in judicial campaign expenditures with $41 million, while runner-up Texas could only manage a "paltry $27.5 million." Bobby Segall, *The Independence of Our Judiciary*, 66 ALA. LAW. 324, 329 n.1 (2005).

40. Velasco, *supra* note 11, at 1A.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* On the Nabers/Cobb race, see John Archibald, *Home Turf Didn't Favor Candidates*, BIRMINGHAM NEWS, Nov. 9, 2006, at 1B; Kathy Kemp, *Let's Just Shine the Light Tomorrow*, BIRMINGHAM NEWS, Nov. 12, 2006, at 1E (discussing Cobb's most memorable campaign ad as one featuring the traditional American hymn, *This Little Light of Mine*); Tom Scarritt, *Candidates Should Use Rotary Test*, BIRMINGHAM NEWS, Nov. 12, 2006, at 1D ("In a Supreme Court chief justice race that saw allegations slung in both directions, . . . [v]oters preferred the positive image [of Democrat Cobb's ad], even in a year when every other high court race went to the Republicans.").

consequences. Candidates must spend an inordinate amount of time raising campaign funds just to be competitive. As a result, otherwise worthy candidates may be discouraged from seeking judicial office. The Alabama Ethics Commission has ruled that candidates may make direct appeals for funds to potential donors. But even if fundraising responsibilities are delegated to others, those fortunate enough to be elected face difficult issues when hearing cases involving law firms or parties that contributed, either directly or through Political Action Committees (PACs), to their campaigns. Political fundraising on the scale occurring in Alabama thus creates at least an appearance of the lack of integrity or lack of impartiality identified as compelling interests by the Alabama Supreme Court in *Butler* and by the Eighth Circuit in *White*.[47]

2. *Impact of Campaign Contribution Levels on Campaigns*

With the high level of campaign contributions received, and with the employment of hard-nosed partisan political consultants, judicial candidates who are otherwise persons of civil and restrained discourse are led almost inevitably to engage in negative campaigning and the use of attack ads. Candidates may also feel pressure to set forth views on high profile legal issues in a way that goes beyond stating a judicial philosophy and in effect pre-judges issues likely to come before them. This is particularly true given the single issue orientation of some campaign fund contributors. Given the rulings in both *Butler* and *White*, however, restrictions on such announcements are now pretty clearly unconstitutional.[48]

3. *Impact of Participation by Single Issue Interest Groups*

The excessive need to fundraise forces candidates to focus their efforts on large special interests which necessarily evaluate a candidate on his or her views on a single issue. Even apart from the question of whether

47. For example, according to news reports covering one high profile case in 2000, all nine members of the Alabama Supreme Court received campaign contributions directly or through PACs from individuals connected with the case. Michael Sznajderman, *Alfa Case May Bring Contribution Conflicts with Court*, BIRMINGHAM NEWS, Mar. 3, 2000, at 1A.

48. *See* Republican Party of Minn. v. White, 536 U.S. 765, 783 (2002) ("[T]he obvious point that this underinclusiveness cannot be explained by resort to the notion that the First Amendment provides less protection during an election campaign than at other times."); Butler v. Ala. Judicial Inquiry Comm'n, 802 So. 2d 207, 218 (Ala. 2001) (noting that the canon in question was "unconstitutionally overbroad because it had the plain effect of chilling legitimate First Amendment rights").

this is the appropriate way to select a judge to address that particular issue, the caseload of the elected judge will primarily involve legal problems not related to the one or two high profile issues that led campaign contributors to support that particular candidate. Wills and trusts will be interpreted, divorce decrees reviewed, zoning disputes resolved, and tax rulings made by judges supported (or opposed) primarily for their views on issues that form only a portion of the court's work, rather than by judges selected for their overall learning and ability.[49]

4. *Impact on the Public's Perception of the Justice System*

Regardless of the personal and intellectual integrity of judges elected through large campaign contributions, the public perception will necessarily be that monetary campaign contributions are necessary for a litigant to be on a level playing field, or worse, that justice is for sale. In fact, a 1998 survey in Texas, a partisan election state, found that 83% of Texas adults believed campaign contributions influenced judicial decisions "very significantly" or "fairly significantly."[50] A 1999 analysis of Alabama Supreme Court justices' votes on arbitration cases and their sources of campaign funds found a "remarkably close correlation" and concluded that the study "provide[d] a striking example of contributors to judicial election campaigns buying changes in law and policy, much like contributors to other election campaigns buy changes in law and policy."[51]

49. In Alabama, as in several other states, the single issue of consequence is that of tort reform. Plaintiff lawyers contribute heavily to candidates, generally Democrats, who are believed to be disposed to defer to jury verdicts, but who will also give little deference to arguably unconstitutional tort legislation. Business groups, by contrast, contribute significantly to candidates, generally Republicans, who are believed to be willing to closely scrutinize high jury verdicts yet cast a sympathetic judicial eye on tort reform legislation. Anthony Champagne, *Tort Reform and Judicial Selection*, 38 LOY. L.A. L. REV. 1483, 1488 (2005). Professor G. Alan Tarr, a consultant to the American Bar Association Commission on the Twenty-First Century Judiciary, has observed: "Were the Alabama, Ohio, and Texas Supreme Courts to cease dealing with torts and tort reform, one suspects that the plaintiffs' bar and business groups would no longer offer huge campaign contributions to candidates for seats on those courts." G. Alan Tarr, *State Judicial Selection and Judicial Independence*, *in* ABA, JUSTICE IN JEOPARDY: REPORT OF THE COMMISSION ON THE 21ST CENTURY JUDICIARY, app. D, at 7–8 (2003).

50. ABA, *supra* note 49, at 25.

51. Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 646 (1999).

V. WHERE DO WE GO FROM HERE?

Butler and *White* have essentially eliminated the possibility of using the canons of judicial ethics to curb the excesses of partisan election campaigning. The result is to focus reform efforts on adopting measures that alter the method by which judges are selected. There are two basic options. One is a change from partisan elections to nonpartisan elections. The other is the more thorough reform of merit selection.

A. *The Alabama State Bar's Merit Selection Initiative*

The Alabama State Bar Association favors merit selection of appellate judges.[52] The Alabama State Bar Board of Bar Commissioners first endorsed merit selection in 1997 under the leadership of then-president Warren Lightfoot.[53] In 2005, the Board, now chaired by former Alabama Supreme Court Justice Gorman Houston, renewed its commitment to merit selection by establishing a nonpartisan task force on judicial selection.[54] At a meeting on January 30, 2007, the task force again renewed its commitment to merit selection.[55]

Since the Alabama Constitution presently provides for the election of judges, a constitutional amendment is necessary to bring about merit selection. The task force has drafted such a constitutional amendment, which is expected to be introduced in the 2007 regular session of the Alabama legislature when it convenes in March 2007.[56] The state bar proposal applies to the state's appellate courts only, i.e., to the Alabama Supreme Court, the Alabama Court of Civil Appeals, and the Alabama Court of Criminal Appeals.[57] The amendment creates a Judicial

52. Alabama State Bar Merit Selection, http://www.alabar.org/members/merit-selection.cfm (last visited Apr. 2, 2007) [hereinafter Alabama State Bar].

53. News Release, Alabama State Bar Responds to Inaccurate Information on Merit Judicial Selection (Aug. 24, 2005), http://www.alabar.org/media/news/05-0824.cfm.

54. Alabama State Bar, *supra* note 52.

55. As a member of the Task Force, the author was present for the January 30, 2007 meeting at which the Task Force renewed its commitment to merit selection. That decision was confirmed in a letter from Task Force Chairman J. Gorman Houston, Jr., to the members of the Task Force (copy on file with author).

56. *See* ALA. STATE B. ASS'N, PROPOSED AMENDMENT TO ALA. CONST. ART. VI. (2004), *available at* http://www.alabar.org/members/merit_selection_amendment.pdf.

57. *Id.* § 6.13(a).

Nominating Commission of nine members.[58] The commission is comprised of four attorneys, four non-attorneys, and one appellate judge.[59]

The state bar proposal addresses appointment to initial terms[60] as well as the filling of midterm vacancies resulting from death, resignation, or removal.[61] In any of those circumstances, the Judicial Nominating Commission evaluates the pool of candidates and submits to the governor a list of three.[62] The governor then appoints one of the three.[63] At the end of the term to which he or she is appointed, an appointee is subject to a nonpartisan retention election, preceded by an evaluation of his or her performance by a Judicial Evaluation Commission—also created by the amendment and separate from the Judicial Nominating Commission.[64] If a sitting member of one of the appellate courts does not stand for retention at the end of his or her term, or the electorate votes against retention, a vacancy is created which must be filled through the Judicial Nominating Commission process.[65]

B. *Chief Justice Cobb's Two-Pronged Initiative*

The state bar's proposal will most likely minimize the large campaign contributions and attack ads that have been characteristics of Alabama appellate court elections for more than a decade. But while merit selection coupled with retention elections may be preferred by lawyers and perhaps many judges, it may not be acceptable to the Alabama electorate. The Third Citizen's Conference on Alabama's State Courts in 1995, chaired by former Governor Albert Brewer and Alabama Supreme Court Justice Oscar Adams, recommended nonpartisan election.[66] This recommendation took into account the concerns of Alabama's African-American citizens, some of whom feel they fought hard to obtain an untrammeled right to vote only a couple of decades ago and are reluctant to see that right diluted.[67]

58. *Id.*
59. *Id.* § 6.13(a)(1).
60. *Id.* § 6.13 (discussing selection, evaluation, and retention of appellate judges).
61. *Id.* § 6.14 (discussing vacancies of judicial offices).
62. *Id.* § 6.13(b).
63. *Id.*
64. *See id.* § 6.13(c)–(d).
65. *See id.* § 6.14.
66. Cole, *supra* note 8, at 193–94.
67. *See* Noe, *supra* note 13, at 235.

Against this background, newly elected Alabama Supreme Court Justice Sue Bell Cobb has come forward with a proposal for a two-prong approach.[68] One prong relates to the selection of appellate judges for a full, initial term.[69] In contrast to the state bar merit selection proposal, Chief Justice Cobb has advocated nonpartisan elections, followed by retention elections at the conclusion of an appellate judge's term.[70] She also favors reform of the way Alabama Supreme Court justices and intermediate appellate court judges are initially selected.[71] But while the state bar favors a nomination process by a Judicial Nominating Commission, Chief Justice Cobb has endorsed nonpartisan elections.[72] Under her proposal, a supreme court justice or appellate judge would first have to be elected to an initial term in a nonpartisan election. Similar to the state bar proposal, at the end of his or her term a sitting judge would be subject to a retention election.[73]

Thus, the critical difference in the two proposals is that under Chief

68. Jennifer Ekman, *Judged by Perception*, BUS. ALA., Jan. 2007, at 25, 26.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* There were actually two bills introduced in the 2006 regular session of the Alabama legislature proposing nonpartisan election of appellate judges. *See* H.B. 446, Leg. Reg. Sess. (Ala. 2006); S.B. 392, Leg. Reg. Sess. (Ala. 2006). Although there were minor differences between the two bills, each would bring about a conversion to nonpartisan elections simply through amendments to provisions of the state's election laws in Title 17 of the Alabama Code. Thus, in § 17-8-1 of the Alabama Code of 1975, which prescribes the form of the official ballot, each bill adds a provision that "[t]he names of all candidates for state judicial offices shall be placed on the ballot without any type of party designation." H.B. 446, Leg. Reg. Sess. (Ala. 2006); S.B. 392, Leg. Reg. Sess. (Ala. 2006). Each bill contemplated the use of a separate, nonpartisan judicial ballot. At the time of primary elections, the separate, nonpartisan judicial ballot would appear on all party primary ballots at the top and above any party designations, and would list all candidates for a particular judicial office. Thus, the same separate, nonpartisan judicial ballot listing all candidates for a particular office that appeared on the ballot handed to voters who state they are voting in the Democratic primary would also appear on the ballot handed to voters voting in the Republican primary. An interesting feature of each bill is that if any candidate receives a majority of the total votes cast by all voters at the time of the primary election, he or she is the only person listed for that position on the official general election ballot—i.e., subject to any write-in challenge, he or she has won. If no one obtains a majority at the time of the primary election, the two top candidates are placed on the general election ballot. The general election ballot is also nonpartisan and appears at the top of the ballot above the races being contested on a partisan basis. Neither bill made any provision for retention elections.

Justice Cobb's proposal, initial selection to an appellate judgeship is by nonpartisan election, while under the state bar proposal this is done through merit selection consisting of nomination by the Judicial Selection Commission and gubernatorial appointment.

The second prong of Chief Justice Cobb's initiative involves interim appointments to fill vacancies resulting from the mid-term death, resignation, or removal of a judge. Presently, at the appellate level and in all but sixteen of Alabama's sixty-seven counties, the governor simply appoints a replacement. In those sixteen counties, a judicial nominating commission has been created and the governor makes the appointment from a list submitted by the commission. At present, this procedure is only followed for trial court positions in those counties. This would change under the second prong of Chief Justice Cobb's proposal. She proposes adoption of a constitutional amendment that would extend the system throughout the state and to appellate as well as trial court positions. This proposal, however, would only apply to interim appointments, not to appointments for a full term.

VI. CONCLUSION

American baseball player and philosopher Yogi Berra supposedly once declared, "When you come to a fork in the road, take it." In terms of judicial selection reform, Alabama faces a fork in the road in 2007. One option consists of the state bar's proposal for merit selection at the appellate level. The other option is Chief Justice Cobb's two-pronged proposal for nonpartisan elections at the appellate level, coupled with extension of a judicial selection commission process for interim appointments. Only time will tell which option Alabama chooses, but one thing does appear certain—*White* and *Butler* have excluded the possibility of enforcing decorum in campaign speech as a matter of judicial ethics.

Which approach is preferable? Merit selection does more to remove politics from the selection of judges. However, because the Alabama Constitution presently requires that judges be elected by the people, merit selection could only be brought about by constitutional amendment. This would require a vote of the legislature followed by a vote of the electorate, and the people may very well be reluctant to give up their right to participate in the selection of judges. Nonpartisan elections may serve to remove some of the fiery intensity from the selection of judges, and could be accomplished more simply by legislative enactment. Hopefully, one of these approaches will be adopted in 2007 as concerns of the degradation of judicial integrity and impartiality will continue to grow under Alabama's

current judicial selection process.