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The Minnesota Judicial Selection Process: Rejecting Judicial Elections in Favor of a Merit Plan

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**THE MINNESOTA JUDICIAL SELECTION PROCESS:
REJECTING JUDICIAL ELECTIONS IN
FAVOR OF A MERIT PLAN**

Laura Benson

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[T]he explicit or implicit goal of the constitutional provisions and enabling legislation is the same—to create and maintain an independent judiciary, as free from political, economic and social pressure as possible to allow judges to decide cases without those influences.¹

I. INTRODUCTION

A recent Minnesota Supreme Court election raised several important issues about the fairness and overall effectiveness of electing judges.² The method for selecting state and federal judges varies.

1. *Peterson v. Stafford*, 490 N.W.2d 418, 419 (Minn. 1992).

2. The 1992 Minnesota Supreme Court elections presented a notable exception to the past 50 years of judicial election history in Minnesota:

This year, there is a contest for an open seat on the seven-member court and three incumbents have opponents. It is very rare for all the Supreme Court justices running for re-election to be challenged. The last defeat of an incumbent justice that court veterans could recall was half a century ago.

Virginia Rybin, *Bounty of Challengers gives Voters Wide Choice in Selection of Justices*, ST. PAUL PIONEER PRESS, Oct. 25, 1992, at 3B. The number of challengers for Minnesota Supreme Court seats was not typical of statewide judicial elections in 1992. Only two of about 70 state trial court judges running were challenged, and no court of appeals judges were challenged. *Id.*

Selection of judges is unique because of the inherent conflict between the democratic process and the need to keep the judiciary unaffected and uninfluenced by political interests. Pursuant to the state constitution, Minnesota is among the states that use judicial elections to select its judges.³

Both partisan and non-partisan judicial elections present many problems that could be avoided by implementing a merit plan for selecting judges. Under a merit plan, the governor appoints a judge, and the electorate simply votes on whether the appointed judge should remain in office.⁴ The merit system eliminates many of the problems associated with judicial elections, while preserving the judges' accountability to the public. To select the judiciary most fairly, this Comment argues that the Minnesota Legislature should amend the Minnesota Constitution to require a merit plan.

II. BACKGROUND

A. Federal Selection of Judges

The framers of the Federal Constitution chose to grant life tenure to federal judges in order to free the judiciary from external pressures.⁵ The framers considered life tenure indispensable to furthering societal interests in an independent judiciary.⁶ Alexander Hamilton wrote, "[a]s nothing can contribute so much to . . . [the judiciary's] firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution and, in a great measure, as the citadel of the public justice and the public security."⁷ The only limit on the President's power to appoint federal judges is the Constitution's provi-

3. The Minnesota Constitution provides, in pertinent part, "all judges . . . shall be elected." MINN. CONST. art. VI, § 7. Minnesota's judicial elections are non-partisan.

4. Merit plans are also known as retention plans or Missouri plans. The plan operates in the following manner:

When a vacancy in a judicial office occurs, a non-partisan judicial commission submits three names to the governor who appoints one of them to fill the vacancy. After holding office for a limited period, the name of the appointee is submitted to the electorate without a competing candidate on the question: "Shall Judge _____ be retained in office?" If a majority of the votes cast on the question are in the affirmative, the appointee remains in office for a new and full term. If the vote is in the negative, the process is repeated.

Maynard E. Pirsig, *The Proposed Amendment of the Judiciary Article of the Minnesota Constitution*, 40 MINN. L. REV. 815, 838 (1956).

5. *Peterson*, 490 N.W.2d at 420 (citing THE FEDERALIST No. 78, at 484 (Alexander Hamilton) (G.P. Putnam ed., 1923)).

6. *Id.*

7. *Peterson v. Stafford*, 490 N.W.2d 418, 420 n.9 (citing THE FEDERALIST No. 78, at 484 (Alexander Hamilton) (G.P. Putnam ed., 1923)).

sion requiring that executive appointments receive the advice and consent of the Senate.⁸

B. State Selection of Judges

States have pursued a variety of methods to maintain a balance between keeping judges accountable to voters, yet impartial and free from political influences.⁹ Beginning in the 1800's, democratic theories developed, arguing that judges should be responsive to the people. The acceptance of these theories resulted in a shift to judicial elections.¹⁰ The first judicial elections were primarily partisan, but, by the end of the 1800's, the trend shifted toward non-partisan elections.¹¹

In the early 1900's, due to problems associated with both non-partisan and partisan elections, the American Bar Association considered alternative methods of selecting justices.¹² Merit selection was one alternative considered.¹³ Support for the plan grew, and, in 1940, Missouri became the first state to adopt a merit plan.¹⁴ Currently, states use a variety of methods for judicial selection including executive appointment,¹⁵ partisan election,¹⁶ non-partisan elec-

8. See EUGENE W. NICKOK, JR., *JUDICIAL SELECTION: MERIT, IDEOLOGY, AND POLITICS* 3, 9 (1990).

9. See SARA MATHIAS, *ELECTING JUSTICE: A HANDBOOK OF JUDICIAL ELECTION REFORMS* 6 (1990).

10. See SUSAN B. CARBON & LARRY C. BERKSON, *JUDICIAL RETENTION ELECTIONS IN THE UNITED STATES* 1 (1980). Jacksonian democracy gave rise to the idea of selecting judges by general election. *Id.* Mississippi was the first state to choose all of its judges by election in 1832. *Id.*

11. See ALLAN ASHMAN & JAMES J. ALFINI, *THE KEY TO JUDICIAL MERIT SELECTION: THE NOMINATING PROCESS* 10 (1974).

12. John M. Roll, *Merit Selection: The Arizona Experience*, 22 ARIZ. ST. L.J. 837, 842 (1990) (citing Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice* (1906), reprinted in 46 J. AM. JUDICATURE SOC'Y 55, 66 (1962)). In 1913, William Howard Taft argued before the American Bar Association that the non-partisan judicial ballot process had failed. *Id.* Taft "asserted that such a system permitted unqualified persons who were incapable even of political support to become elected through a vigorous campaign." See ASHMAN & ALFINI, *supra* note 11, at 10-11.

13. See CARBON & BERKSON, *supra* note 10, at 2. Albert Kales, professor of law at Northwestern University and Director of Research for the American Judicature Society, was the first person to propose a retention or merit plan for selecting justices. *Id.* Kales argued that there was "no such thing as the selection of judges by the people It is one of our most absurd bits of political hypocrisy." *Id.* (footnote omitted). See also MARVIN COMISKY & PHILIP C. PATTERSON, *THE JUDICIARY—SELECTION, COMPENSATION, ETHICS, AND DISCIPLINE* 4 (1987) (discussing Albert Kales' invention of the merit plan).

14. See Roll, *supra* note 12, at 843.

15. See MATHIAS, *supra* note 9, at 5. In appointive-system states, the governor or the legislature appoints and/or reappoints judges. *Id.*

16. *Id.* A partisan elective system involves voter selection and/or retention of judges from among competing candidates identified by political party label. *Id.*

tion,¹⁷ and merit selection.¹⁸ Most states currently use some combination of these methods.¹⁹

C. Minnesota's Judicial Electoral Process

Minnesota's method of selecting the judiciary reflects a need to balance judicial accountability with judicial impartiality.²⁰ In 1857, two state constitutional conventions addressed methods for selecting justices.²¹ Those who attended the conventions determined that distinguishing judicial elections from other elections could best be accomplished by providing judges with seven-year terms.²²

As a result, in 1857, the Minnesota Constitution provided for judicial elections to select judges with seven-year terms.²³ In 1883, by amendment, the seven-year term was reduced to six years.²⁴ Later, legislators grew concerned with the problems of partisan judicial elections and, in 1912, enacted non-partisan election legislation.²⁵ In 1948, the legislature held a special constitutional convention open to the public.²⁶ The convention recommended revisions to the judicial article of the state constitution, but these revisions were rejected.²⁷ Ultimately, Minnesota retained non-partisan elections as its method for selecting judges.²⁸

Section 10 of the original judiciary article does not mandate a spe-

17. *Id.* A non-partisan elective system involves voter selection and/or retention of judges from among competing candidates that are not identified by political party label. *Id.*

18. *Id.* For a description of the merit selection method, see *supra* note 4.

19. MATHIAS, *supra* note 9, at 5.

20. See WILLIAM ANDERSON & ALBERT J. LOBB, A HISTORY OF THE CONSTITUTION OF MINNESOTA (1921).

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

22. *Id.*

23. MINN. CONST. art. VI, § 3.

24. *Peterson*, 490 N.W.2d at 420 n.12.

25. See 1912 MINN. LAWS EXTRA SESS., ch. 2. In *Peterson*, the court explained why Minnesota adopted non-partisan elections:

While getting elected may be a not unimportant prerequisite of holding public office, it was felt this prerequisite should not detract from the judicial function to decide cases free from political maneuvering and in accordance with the law, regardless whether a decision is, at the time, popular or unpopular. To assure a measure of fair-mindedness and impartiality, the legislature, in 1912, decreed that elections for judicial office be non-partisan.

Peterson, 490 N.W.2d at 422.

26. *Peterson v. Stafford*, 490 N.W.2d 418, 420-21 (Minn. 1992).

27. *Id.* at 421 n.14. In 1949, statutory amendments were passed, and, in 1956, constitutional amendments were again suggested but rejected. *Id.* at 421-22 nn.15-16.

28. *Id.* at 423. In 1972, a subcommittee recommended the implementation of a "Missouri plan." *Id.* The Missouri plan was rejected by the Minnesota Legislature. *Id.* See *infra* text accompanying notes 128-132.

cial election to fill a judicial vacancy.²⁹ Rather, governor appointment fills the vacancy, with an election to follow at the next annual election occurring more than 30 days after the vacancy happens.³⁰ A 1972 amendment provided for an election to succeed the appointee "at the next general election occurring more than one year after the appointment."³¹ Thus, a central element of Minnesota's system is that the governor may fill judicial vacancies created by incumbents who do not file for re-election.³²

The Minnesota Constitution provides that voters elect all judges.³³ Those who crafted Minnesota's judicial election process over the years must have questioned the effectiveness of judicial elections, because they did not adhere to a purely electoral system. In addition to switching from partisan to non-partisan judicial elections, the legislature implemented an incumbency designation on Minnesota judicial ballots, a designation that identifies which candidate is currently serving as a Minnesota judge.³⁴

Minnesota's method of selecting judges—a middle-of-the-road method—employs elements of non-partisan election, retention, and appointment systems.³⁵ Minnesota's judicial elections are similar to retention elections because the electorate can decide if the incumbent does not deserve to be re-elected and can vote for the chal-

29. *Id.*

30. *Id.*

31. *Peterson v. Stafford*, 490 N.W.2d 418, 423 (Minn. 1992). The Minnesota Constitution states:

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

MINN. CONST. art. VI, § 8.

32. *Peterson*, at 423 n.19. The 1992 judicial elections in Minnesota were rare because vacancies are usually filled by the Governor between elections and the appointed judges run without competitors. Criticism of the Governor's selections has often been harsh:

In a sense, political contamination of the process by [former Governor] Rudy Perpich is at the root of this year's unrest. The ever-inventive Perpich set a record for using the judiciary as a spoils system, a high-style jobs program for political friends whose legal qualifications were sometimes hard to detect. Perpich made some sound appointments, too, especially of women and minorities, but the overall experience left the legal rabble aroused.

D.J. Tice, *State Judicial Selection Process Merits the Attention it is Getting this Year*, ST. PAUL PIONEER PRESS, Oct. 20, 1992, at 8A.

33. MINN. CONST. art. VI, § 7.

34. MINN. STAT. § 204B.36(5) (1992) provides, "[i]f a chief justice, associate justice, or judge is a candidate to succeed again, the word 'incumbent' shall be printed after that judge's name as a candidate." *Id.*

35. See CARBON & BERKSON, *supra* note 10, at 107 (outlining the judicial selection process of each state, including Minnesota).

lenger.³⁶ Minnesota's process also resembles an appointment system, because the governor has the power to appoint judges to fill vacancies between elections.³⁷

A local newspaper recently argued that Minnesota's system has been "thrown together over the decades chiefly because the powers that be lack confidence in the system the state constitution establishes—an election system."³⁸ This lack of confidence is also reflected in the few Minnesota cases deciding judicial election issues.

1. Gustafson v. Holm

In *Gustafson v. Holm*,³⁹ the petitioner was a judicial candidate.⁴⁰ Gustafson argued that the Minnesota Constitution did not create six separate and distinct offices of associate justice, rather, Gustafson contended that candidates must run against each other as a group.⁴¹ Accordingly, he challenged the constitutionality of the statute providing for separate and distinct offices of associate justices.⁴² Gustaf-

36. However, one commentator argued that the incumbent designation creates an unfair advantage:

The incumbency designation . . . [turns] judges' re-election bids into "retention" elections, in which voters are asked whether they want to retain sitting judges. Most often there are no other names on the ballot.

Incumbents' Special Advantage Honor Constitution on Judicial Elections, ST. PAUL PIONEER PRESS, Oct. 1, 1992, at 10A. *But see* Peterson v. Stafford, 490 N.W.2d 418, 424 (Minn. 1992).

In *Peterson*, the court described Minnesota's judicial elections: "The open election process has been retained, but with a *quasi-retention* feature which simply informs the voter without comment, who is the incumbent candidate . . . and who is the non-incumbent challenger." *Id.* (emphasis added).

37. *See* Tice, *supra* note 32.

38. *Id.* Tice criticized the system for its subversion of the electoral process:

Minnesota's constitution was drafted in 1857, just about high tide for faith in undiluted democracy. The trend then was for states to reject the U.S. Constitution's preference for life-tenured judges and to substitute wide open elections. But by the turn of the century it was clear that partisan politics corrupted the judiciary and the law. Ever since, Minnesota has been trying to correct the mistake the state's founders made.

Trouble is, advocates of a depoliticized judicial system have never been able to persuade the Legislature to go all the way, to abandon the appearance of competitive elections and adopt something like the "Missouri system," under which all judges are initially appointed and then periodically stand for "retention" elections, in which voters decide to retain them or to have someone new appointed.

What we have gotten instead is a gradual, sleight-of-hand subversion of judicial elections.

Id.

39. 232 Minn. 118, 44 N.W.2d 443 (1950).

40. *Id.* at 119, 44 N.W.2d at 444.

41. *Id.* at 121, 44 N.W.2d at 445.

42. *Id.* at 119, 44 N.W.2d at 445. The statute provided:

When two or more associate justices of the Supreme Court . . . are to be nominated at the same primary election or elected at the same general elec-

son further argued that the statute was unconstitutional because it gave incumbent justices an unfair advantage over other candidates.⁴³

In rejecting this argument, the court determined the incumbency designation was intended to benefit the voter, not the candidate.⁴⁴ The court concluded the legislature had a rational basis for the statute because its underlying purpose was to identify the candidate so the voter would know for whom he or she was voting.⁴⁵

In its decision, the court noted that the Minnesota Constitution is silent regarding the method of nomination of candidates.⁴⁶ The court upheld the statute as constitutional,⁴⁷ and rejected petitioner's claim that the incumbency designation was unfair.⁴⁸

2. Peterson v. Stafford

In *Peterson v. Stafford*,⁴⁹ a candidate for Associate Justice of the Minnesota Supreme Court filed a petition⁵⁰ claiming the judicial elections ballot statute was unconstitutional.⁵¹ Peterson filed his affidavit of candidacy on July 15, 1992 for the seat held by Associate

tion, the notice of election shall state the name of each such associate justice or judge whose successor is to be nominated or elected. *Each associate justice or judge is deemed to hold a separate non-partisan office.*

Id. (citing MINN. STAT. § 205.82 (repealed 1959) (emphasis added)).

Prior to the statute's enactment, all six candidates who filed for the three positions to be filled would have appeared on the general ballot. However, under the statute, petitioner's name could not appear on the ballot because "he was the lowest of the three running for the office which he sought and was thereby eliminated." *Gustafson*, 232 Minn. at 121, 44 N.W.2d at 445.

43. *Id.* at 126-27, 44 N.W.2d 447. Gustafson based his argument on the fact that, if a justice was a candidate to succeed himself, the word incumbent was placed after his name on the ballot. *Id.* at 126, 44 N.W.2d at 447.

44. *Gustafson v. Holm*, 232 Minn. 118, 127, 44 N.W.2d 443, 448 (1950). "[W]e fail to see why [the legislature] . . . lacks constitutional power to permit identification of a present officeholder by use of the word 'incumbent' to denote the person who presently holds the office." *Id.*

45. *Id.* at 127, 44 N.W.2d at 447. The court reasoned that, for the electorate to know who candidates are, it is not always possible to treat candidates with equality. *Id.*

46. *Id.* at 118, 44 N.W.2d 443.

47. *Id.*

48. *Id.*

49. 490 N.W.2d 418 (Minn. 1992). Justices Keith, Tomljanovich, and Gardebring took no part in this decision because their participation, as candidates for reelection, created a conflict of interest. *Id.*

50. *Id.* at 418. Peterson filed a petition pursuant to MINN. STAT. § 204B.44 (1990). This statute allows an individual to file a petition to correct "[a]n error or omission in the placement or printing of the name or description of any candidate on any official ballot." MINN. STAT. § 204B.44(a) (1992).

51. *Id.* at 419. Peterson's argument centered on the incumbency designation required by MINN. STAT. § 204B.36(5) which provides that "[i]f a chief justice, associate justice, or judge is a candidate to succeed again, the word 'incumbent' shall be printed after that judge's name as a candidate." *Peterson*, 490 N.W.2d at 419.

Justice Sandra S. Gardebring.⁵² Peterson argued that the form of ballot used in judicial elections and the incumbency designation mandated by statute created an unfair advantage for incumbents.⁵³ He contended that the advantage violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and a similar provision in the Minnesota Constitution.⁵⁴

Peterson filed his petition forty-eight days after he submitted his affidavit of candidacy.⁵⁵ According to the court, Peterson's petition was a challenge to the traditional judicial election process.⁵⁶ The court rejected Peterson's request to invalidate election procedures that treat incumbents differently than non-incumbent candidates.⁵⁷ The court noted that Minnesota judicial ballots have included the incumbency designation since 1949.⁵⁸ Thus, the court reasoned that constitutional history provided one rationale for the incumbency designation.⁵⁹ Additionally, the court justified the legislature's prerogative to treat judicial election ballots differently than legislative or executive election ballots because the role played by the judiciary is fundamentally different from the other two branches of

52. *Peterson*, 490 N.W.2d at 419.

53. *Id.* Peterson argued that a special designation on the ballot violated MINN. STAT. § 204B.35(2), by providing an unfair advantage to an incumbent candidate. In describing the method of ballot preparation, MINN. STAT. § 204B.35(2) states that

Ballots shall be prepared in a manner that enables the voters to understand which questions are to be voted upon and the identity and number of candidates to be voted for in each office and to designate their choices easily and accurately. The name of a candidate shall not appear on a ballot in any way that gives the candidate an advantage over an opponent, including words descriptive of the candidate's occupation, qualifications, principles, or opinions, except as otherwise provided by law.

Id.

54. *Peterson v. Stafford*, 490 N.W.2d 418, 419 (Minn. 1992). The Minnesota Constitution states, "No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers." MINN. CONST. art. I, § 2.

55. *Id.* at 419.

56. *Id.* Although the court questioned the petition's timeliness, the court chose to address the petition's merits. "[B]ecause of the nature of these proceedings, we have chosen to address the merits of this broad challenge to the traditional judicial election process." *Id.* at 420.

57. *Id.* at 424-25. The court rationalized the incumbency designation as informative:

Use of the word "incumbent" following the candidate's name, simply informs the voter of the person who presently holds the position. In assisting voters to cast their votes intelligently for offices unfamiliar to the average voter, it is only a matter of fairness that he be advised who the present judge is.

Id. at 423-24 (quoting *Gustafson v. Holm*, 232 Minn. 118, 126-27, 44 N.W.2d 443, 447 (1950)).

58. *Id.* at 423.

59. *Peterson v. Stafford*, 490 N.W.2d 418, 423 (Minn. 1992).

government.⁶⁰

Further, the court recognized the inherent dichotomy existing in the judicial election process, a process that seeks to seat judges who are responsive to the people yet free from political influence.⁶¹ The court referred to *Gustafson v. Holm*, stressing that the purpose of the incumbency designation is to inform voters.⁶² The court concluded that the incumbency designation merely assists “voters [in casting] their votes intelligently for offices unfamiliar to the average voter”⁶³

In rejecting Peterson’s challenge, the court applied a rational basis test,⁶⁴ finding that the statute did, in fact, serve a legitimate interest: “the overriding purpose of the ballot designation has been to assure an able, independent and stable judiciary while at the same time requiring incumbent judges to submit to voter appraisal in an open election.”⁶⁵

In arriving at its decision, the court relied heavily on the history of judicial elections in Minnesota, noting the long-standing use of the designation.⁶⁶ Dealing the final blow to Peterson’s challenge, the court noted that, if the incumbency designation is unfair, the legislature—not the court—should change the law.⁶⁷

Minnesota case law on judicial elections reflects just a few of the problems inherent in the process. An analysis of these deficiencies and others leads to the conclusion that the merit plan better meets the goals of judicial selection.

60. *Id.* at 424.

61. *Id.* at 420.

62. *Peterson v. Stafford*, 490 N.W.2d 418, 423-24 (Minn. 1992).

63. *Id.* at 423-24.

64. The court noted that “application of something akin to the rational basis test to judicial election practices is neither new nor novel.” *Id.* at 423-24 (citing three examples of courts’ application of the rational basis test with regard to election practices).

65. *Id.* at 424. Further, the court reasoned:

The fact that some statistical advantage may at the same time accrue to one of the candidates by virtue of his or her incumbency does not for constitutional purposes invalidate that otherwise legitimate purpose, especially where that advantage remains problematic and variable from election to election.

Id. at 424 (quoting *Clough v. Gussi*, 416 F. Supp. 1057, 1068 (D. Mass. 1976)).

66. *Id.* at 423. The court stated, “[t]he petitioner appears to proceed from the assumption that the level of equal protection scrutiny is an open question with regard to judicial elections.” *Id.*

67. *Id.* at 424.

III. ANALYSIS

A. Current Problems with Minnesota Judicial Elections

1. Lack of Voter Interest and Awareness

One purpose of judicial elections is to maintain democratic accountability to the general population.⁶⁸ Yet, if voters lack interest and awareness regarding the electoral procedure and the candidates, the process will not work properly.⁶⁹ A person who enters the voting booth and is unfamiliar with the judicial candidates cannot make an educated choice.⁷⁰ The result is failure to elect the candidate that an adequately informed electorate would have chosen. This problem arises more often in judicial elections than other elections, due in part to the limits judicial ethics place on candidates' ability to speak about most issues.⁷¹

68. See, e.g., CARBON & BERKSON, *supra* note 10, at 13. "Elections force judges to publicly account for decisions they have made, policies they have established, and actions they have taken." *Id.*

69. Accountability is a reason for judicial elections, but it is questionable whether judicial elections actually achieve that goal. "Judicial elections promise accountability, but that promise remains unfulfilled, and elections lose their ostensible justification, when the voters have no meaningful information upon which to base their choices." PATRICK M. McFADDEN, *ELECTING JUSTICE: THE LAW AND ETHICS OF JUDICIAL ELECTION CAMPAIGNS* 10 (1990).

One judge noted the ignorance of non-voters, voters, and the media in judicial elections: "I have witnessed the media ignoring the appointment of judges and the swearing-in ceremonies of those appointed. I have witnessed the one major newspaper using the wrong first name of an individual who was nominated by the governor to fill a vacancy." Dennis J. Seitz, *Citizen Knowledge*, 73 *JUDICATURE* 125 (1989).

Voters lack awareness because they are rarely part of the judicial system. "The average voter does not realize that he has anything but a very remote interest in the election of a good judge. The ordinary citizen very seldom comes into direct contact with the courts." ALLEN T. KLOTS, *JUDICIAL SELECTION AND TENURE, THE SELECTION OF JUDGES AND THE SHORT BALLOT*, 113 (Glenn R. Winters ed., 1967).

70. Studies show that the electorate is not well-informed about judicial elections. See MATHIAS, *supra* note 9, at 17. For example, an exit poll conducted in Lubbock, Texas revealed only 14.2% of the voters could identify the judicial candidate on the ballot immediately after voting. *Id.*

Similarly, less than 20% of responding voters registered in Washington and Oregon felt that they had sufficient information to vote in the 1982 primary elections. *Id.* Instead, 35.2% of those voters reported that they had no information at all about judicial candidates and another 44.3% felt that they had inadequate information to reach an informed decision. *Id.* Part of the problem may be that voters are uninformed about the operation of the judicial system and the function of the judges within that system. *Id.* A nationwide survey indicated "few registered voters could correctly answer a questionnaire about the roles of different levels of judges, the differences between civil and criminal courts, and the relationship between the state and federal judiciaries." *Id.*

71. See, e.g., MINNESOTA CODE OF JUDICIAL CONDUCT Canon 7B (1992); Gail Diane Cox, *The Judgemaker: Strategist Joseph R. Cerrell has Helped Keep Dozens on the Bench*, NAT'L. L.J., June 22, 1992, at 1. Cox pointed out that "the nitty gritty of how a person

Uninformed voters may make decisions based on improper reasons instead of the candidates' experience and qualifications.⁷² In the 1992 Minnesota judicial election, some commentators felt that name recognition contributed to the successful candidacy of Alan Page, a former Minnesota Vikings star.⁷³ Justice Page probably was discussed more frequently in local newspapers than any other candidate⁷⁴ and was also the only non-incumbent to win a seat in the 1992 Minnesota Supreme Court elections.⁷⁵

Lack of information makes voters vulnerable to deceptive or questionable campaign tactics. This, in turn, tempts some campaigns to use these tactics.⁷⁶ Judicial campaigns can mislead voters, when they

campaigns for an office whose holder is supposed to be impartial on issues, personally aloof and in many jurisdictions non-partisan remains something of a mystery." *Id.*

72. For example, the decision may be based solely on a candidate's views "on race, gender, or party affiliation." See MCFADDEN, *supra* note 69, at 18 (footnote omitted). See also COMISKY & PATTERSON, *supra* note 13 at 10. Comisky and Patterson explain that the electorate may vote on the basis of irrelevant considerations such as the candidates' political affiliations, the possession of a well-known name, the location of the candidate's name on the ballot, or the candidate's television personality." *Id.* (footnotes omitted).

73. Many criticized Page for using his name to win a seat on the bench in Minnesota's 1992 judicial election:

Alan Page . . . probably has the raw name recognition he needs to defeat estimable Hennepin County assistant prosecutor Kevin Johnson. Page is apt to make an able justice. But if there is something to the complaint that the strength of Page's candidacy owes more to celebrity than to legal stature, it only demonstrates that Minnesota's current judicial selection process can't even protect the bench from high-image politics. That was, until now, one of the few virtues to be claimed for it.

See Tice, *supra* note 32.

74. See, e.g., Richard Nelson, *Page Tackles the State Supreme Court*, MINNESOTA LAWYER, Aug. 1992, at 1; Brian Bonner & Thomas J. Collins, *Page Elected to High Court*, ST. PAUL PIONEER PRESS, Nov. 4, 1992, at 12A; *Page to Run for Minnesota Court*, CHI. TRIB., Aug. 9, 1992, at 3C; Dane Smith, *The Relentless Pursuer Page Looks to Shed Legal Obstacles in his Career Path*, MINNEAPOLIS STAR TRIB., July 12, 1992, at 1A; *Why Shouldn't Page Run?*, MINNEAPOLIS STAR TRIB., July 20, 1992, at 9A.

Page's media attention may have been due, in part, to the lawsuit that he filed against Governor Arne H. Carlson. In *Page v. Carlson*, 488 N.W.2d 274 (Minn. 1992), Page successfully challenged the Secretary of State's refusal to place his name on the judicial ballot, due to the governor's action in extending Minnesota Supreme Court Associate Justice Lawrence R. Yetka's term. *Id.* at 274. The Governor's action eliminated an election for Justice Yetka's seat on the Minnesota Supreme Court in 1992. *Id.* at 276. The court held:

[A]n extension of a judge's term should be granted only when it is necessary to permit the judge to serve for the minimum number of years to become eligible for a pension, but the extension should not be granted to permit a judge to maximize or enhance a pension for which the judge is already eligible, and thus avoid an election.

Id. at 282.

75. See Bonner & Collins, *supra* note 74.

76. Edmund B. Spaeth, Jr., *Reflections on a Judicial Campaign: Should Judges Ride a*

involve false or misleading materials, campaign promises, or improper "appeals to voters' self-interest, emotions, and biases."⁷⁷ The public can also be misled by outright lies or by more subtle tactics, such as the failure to tell the entire truth about a particular fact.⁷⁸ Campaign promises mislead voters because a promise may conflict with the candidate's job responsibilities if the candidate wins election. Judges simply cannot fulfill most campaign promises because their jobs require them to be impartial.⁷⁹ Despite the requirement of impartiality and the fact that the judicial code prohibits the making of pledges, promises and misrepresentations, such activity still occurs.⁸⁰

Some argue that citizens are not as ill-informed as many portray the "average voter" to be.⁸¹ These commentators suggest that, while the electorate as a whole might be uninformed, the focus should be on those who actually vote.⁸² This analysis ignores the importance of the many votes lost because of lack of information and may overestimate the level of knowledge of those who actually

Political Bandwagon?, 60 JUDICATURE 10, 13 (1976) (asserting that, based on his election experiences as a former Pennsylvania Superior Court judge, voter ignorance tempts judicial candidates to engage in sensational campaigns).

77. See MATHIAS, *supra* note 9, at 32.

78. *Id.* The code regulating judicial conduct prohibits the making of campaign pledges or promises, the making of statements that appear to commit the candidate on issues that are likely to come before him or her, and the making of knowing misrepresentations about an opposing candidate or about him or herself. MINNESOTA CODE OF JUDICIAL CONDUCT, Canon 7B(1)(c) (1992).

79. See MATHIAS, *supra* note 9, at 33.

80. For example, an Illinois judge reported in his campaign literature that the local bar association had found him "hard-working" and "fair-minded" but failed to mention that the local bar association had said nothing else favorable about him in an otherwise negative interview. *Id.* at 31.

Similarly misleading were two 1989 races for seats on the Milwaukee Circuit Court. The two winning candidates based their campaigns on anti-crime platforms, with one promising to reduce the number of cases disposed of through plea bargaining and the other promising tougher sentences. *Id.* at 32. Neither explained that plea bargaining and sentencing depend on factors outside a judge's control. Such factors include the charges brought against the defendant, the agenda of the prosecuting attorney, and the fact that legislative action is required to raise minimum and maximum sentences. *Id.*

81. See Nicholas P. Lovrich et al., *Citizen Knowledge and Voting in Judicial Elections*, 73 JUDICATURE 28 (1989).

82. It has been suggested that

[P]opular elections should not be seen as infrequent gatherings of the great unwashed, wherein rational outcomes are a matter largely of chance occurrence. Rather the judicial electorates involve a rather self-selected group of voting participants. These participants are likely to be atypical of the general public with regard to their uncommon interest in public affairs, their years of experience following local affairs in their own area and their level of knowledge about local government.

Id. at 33.

vote.⁸³

Minnesota has attempted to address the apparent lack of voter interest and awareness through use of the incumbency designation⁸⁴ and the separate seat designation.⁸⁵ The incumbency and separate seat designations guide voters who are unfamiliar with both candidates.

2. Upholding the Dignity of the Bench

Even if voter awareness increased, other problems remain inherent to the process of judicial elections.⁸⁶ While the public has become accustomed to a certain amount of mud-slinging and dirty politics in political campaigns, it can be disturbing to see the same behavior from judicial candidates.⁸⁷ The functioning of our legal system depends on judges maintaining an impartial demeanor.⁸⁸ Judicial elections force judges to temporarily hang up their robes and

83. See *infra* text accompanying notes 104-119.

84. See MINN. STAT. § 204B.36(5) (1992). For a discussion of the incumbency designation, see *supra* part II.C.2.

85. *Id.* § 204B.06(6) (1992).

86. One commentator argued that campaign advertising on city buses in New York City suggests a lack of dignity in the local judicial selection process. Mordecai Rosenfeld, *Tying the Judicial Knot*, 205 N.Y. L.J. 6 (1991).

87. One commentator noted:

If we believe that campaign conduct reflects directly on the judiciary as a whole, we will require of candidates the same level of conduct we associate with the judiciary. . . .

But judicial campaigns are a part of electoral politics, where puffing, sharp debate and stinging (sometimes unfounded) criticism are expected. Voters, it can be argued, do not necessarily equate candidates with the institutions they seek to join, or equate their conduct as candidates with their conduct as officeholders. It thus becomes plausible, for example, to distinguish between the conduct of candidates and the conduct of judges, as our codes of judicial ethics sometimes do. The propriety of these distinctions, and whether they should be widened or narrowed, are the subjects of continuing and vigorous debate.

See MCFADDEN, *supra* note 69, at 73.

88. The code which regulates judicial conduct states that all judicial candidates must "maintain the dignity appropriate to judicial office." MINNESOTA CODE OF JUDICIAL CONDUCT Canon 7B(1)(a) (1992). This rule has been explained as follows:

The requirement can be read to regulate both the form and the substance of a candidate's remarks. The formal component is reflected in those advisory opinions suggesting that criticism of opponents be carried on at a "high level plane." So understood, the requirement arguably advances the public interest in maintaining respect for the judiciary, without harming the candidates' interest (constitutional or otherwise) in discussing their opponents' qualifications, or the public's interest in the ventilation of all relevant campaign issues.

The rule does, however, turn on the nebulous concept of "dignity," and advisory bodies have sometimes shown a remarkably low tolerance for all but the most genteel campaign statements.

See MCFADDEN, *supra* note 69, at 78-79 (footnote omitted).

act like politicians. Judicial candidates are thrust into the same political arena yet are expected to remain impartial.

As long as Minnesota employs judicial elections, judicial candidates will criticize one another. In the 1992 Gardebring-Peterson race, Peterson openly criticized Associate Justice Gardebring.⁸⁹ In addition to challenging the incumbency designation, Peterson maintained repeatedly that Justice Gardebring was not qualified to be an appellate judge because most of her career did not involve the actual practice of law.⁹⁰ Peterson also accused Justice Gardebring of accepting contributions from lawyers, a practice that Peterson believed created a conflict of interest.⁹¹

Because such remarks are essential components to electoral politics, they should not be prohibited. In addition, such remarks are arguably protected by the First Amendment and thus cannot be prohibited.⁹² But campaign attacks only hurt the already damaged reputation of the legal profession among the public. As long as Minnesota employs a system that incorporates judicial elections, "attacks" will be unavoidable.

Although Peterson's loss may reflect public dissatisfaction with his campaign tactics, more likely, the public never heard any of his attacks, and Justice Gardebring won by virtue of her reputation as an incumbent on the court. Either way, judicial elections are problematic because challengers are caught in a virtual no-win situation. Candidates who publicly criticize the incumbent run the risk of alienating the public by acting in an undignified manner. Candidates who do not criticize the incumbent face almost certain defeat because of lack of voter interest and awareness.

3. Campaign Contributions

Campaign contributions create another problem for judicial campaigns.⁹³ Campaigns have grown more expensive over the years.⁹⁴

89. Rybin, *supra* note 2, at 3B.

90. See *Minnesota Supreme Court*, ST. PAUL PIONEER PRESS, NOV. 1, 1992 at 8 (Voters Guide).

91. *Id.*

92. See Elizabeth I. Kiovsy, Comment, *First Amendment Rights of Attorneys and Judges in Judicial Election Campaigns*, 47 OHIO ST. L.J. 201 (1986) (arguing in favor of using traditional first amendment analysis to regulate judicial campaign speech rather than the heightened analysis imposed on judicial candidates under the Code of Judicial Conduct).

93. Minnesota's judicial conduct code provides as follows:

A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates should not solicit or accept campaign funds, or solicit publicly stated support, but may establish committees of responsible persons to secure and manage the expenditure of funds for the campaign and to obtain public statements of support. Such committees are not prohibited from soliciting campaign contributions and

Judicial candidates obviously need financing to run a campaign and to educate the public.⁹⁵ Affluent candidates have a definite advantage because they can fund their own campaigns. Because judicial elections do not usually gain much public attention, candidates unable to fund their own campaigns must seek donations. Fundraising for any candidacy raises the issue of how to generate funding without developing conflicts of interest. In his judicial campaign, Peterson criticized the incumbents for accepting contributions from lawyers on the grounds it created a conflict of interest when those lawyers came before the court.⁹⁶ Justice Tomljanovich replied that, in order to avoid possible conflicts of interest, she never knows the identity of her contributors.⁹⁷ Chief Justice Keith stated he does know the identity of his contributors but said that he probably often rules against them and that "lawyers understand that."⁹⁸ Chief Justice Keith also stated that his contributions are relatively small, a \$1,000 maximum per lawyer.⁹⁹

It is easy to understand why the public questions judges' impartial-

public support from lawyers. A candidate should not use or permit the use of campaign contributions for private benefit.

MINNESOTA CODE OF JUDICIAL CONDUCT, Canon 7B(2) (1993).

94. For example, two candidates for chief justice of the Montana Supreme Court spent \$250,000 in 1986, which was a 320 percent increase since 1980. See MATHIAS, *supra* note 9, at 43 (citations omitted). In 1986, the race for chief justice of the Ohio Supreme Court cost \$2.7 million dollars, whereas the race cost less than \$100,000 in 1980. *Id.*

95. See, e.g., *Testimony by Cynthia Kelly Before the Joint Select Committee on the Judiciary of the Texas Legislature*, 72 JUDICATURE 158, 161 (1988).

96. Rybin, *supra* note 2.

97. *Id.*

98. *Id.*

99. *Id.* A group of Minnesota lawyers (the Minnesota Justices Committee) took an active role in the incumbent justices' campaigns in 1992. The Committee sent letters to potential contributors to raise \$50,000 on behalf of the three incumbent justices. The letter requested contributions ranging from \$50 to \$1,000. The letter stated that the challenges to the incumbents "could jeopardize Minnesota's judicial integrity. . . . [and] disturb judicial concentration and undermine judicial stability." Jack Coffman, *Lawyers Raising Money for Incumbent Justices*, ST. PAUL PIONEER PRESS, Sept. 23, 1992, at 2D.

Similarly, in a letter to the Editor of the Star Tribune, one of the committee members referred to the judicial challenges as "frivolous" and argued that "[j]udicial elections are a means to retain judicial excellence, not dilute its quality." Leonard E. Lindquist, *Supreme Court Races*, MINNEAPOLIS STAR TRIB., Oct. 24, 1992, at 14A (quoting the Minnesota Justice Committee's letter to potential contributors).

The committee received loud criticism regarding its fundraising letter, namely that the committee's "judicial stability" concern was suspect because Minnesota judges are rarely voted out of office. There was no reason to believe that this election was any different. See Clinton Collins, Jr., *A Strange Route to Judicial Integrity*, ST. PAUL PIONEER PRESS, Oct. 30, 1992, at 23A.

Clinton Collins also argued that the letter from the Minnesota Justices Committee reinforced the public's view of "lawyers as deep pocketed opportunists," and that

ity. Two days after the 1992 election, the justices on the Minnesota Supreme Court heard a case where the attorneys were from firms that contributed heavily to some of the justices' re-election campaigns.¹⁰⁰ While judges probably can remain impartial, "it undermines the appearance of fairness and in our system of justice, perception often becomes reality."¹⁰¹ A system that forces judges into the political realm to raise large sums of money to campaign for election is flawed.¹⁰² Adoption of a merit plan for selecting judges would eliminate the problems associated with funding campaigns.¹⁰³

B. *Proposals for Improving Minnesota's System*

1. *Increasing Voter Interest and Awareness*

Although deceptively simple, increased education would provide one answer to lack of voter interest and awareness. Educating the public is difficult, however, because candidates are prohibited from speaking about many of the subjects that would allow the electorate to reach an informed decision.¹⁰⁴ The Minnesota Legislature has at-

the committee consisted of "shrewd political operators protecting their own turf." *Id.* Collins suggested that the committee should have used the money [to] convince voters why judicial elections, particularly for our highest court, are destabilizing and, as a result, not in our best interests.

A more politically honest way to promote "judicial integrity" is for groups like the Minnesota Justices Committee to enlist citizens from across the political and professional spectrum . . . to change the way our state constitution approaches judicial selection.

Id.

100. Nick Coleman, *Judges Shouldn't be Courting Votes*, ST. PAUL PIONEER PRESS, NOV. 12, 1992, at 1B. One side was represented by Donald Selzer of Oppenheimer, Wolff & Donnelly and the other by Thomas Tinkham of Dorsey & Whitney. The Oppenheimer firm contributed \$5,000 to the Minnesota Justices Committee for the justices re-election campaign; the Dorsey & Whitney firm contributed \$3,390. *Id.*

101. *Id.* (quoting Clinton Collins, Jr., a visiting professor at William Mitchell College of Law).

The Minnesota Code of Judicial Conduct provides that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." MINNESOTA CODE OF JUDICIAL CONDUCT, Canon 3C(2) (1992).

102. See Coleman, *supra* note 100. See also Bradley A. Siciliano, *Attorney Contributions in Judicial Campaigns: Creating the Appearance of Impropriety*, 20 HOFSTRA L. REV. 217 (1991) (examining potential conflicts of interest that arise when lawyers are permitted to contribute to judicial campaigns).

103. See generally Marlene Arnold Nicholson, *Judicial Ethics: Political Activity and Fund Raising*, 22 LOY. U. CHI. L.J. 597 (1991) (analyzing the problems associated with fundraising in Illinois judicial campaigns).

104. A judicial candidate "should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his or her views on disputed legal or political issues; or misrepresent his or her identity, qualifications, present position, or other fact." MINNESOTA CODE OF JUDICIAL CONDUCT, Canon 7B(1)(c) (1992).

The result of this Canon is that "voters are likely to remain largely ignorant of

tempted to assist voters in judicial elections by implementing separate seat and incumbency designations.¹⁰⁵

Other methods are available to educate voters and to improve knowledge of judicial candidates.¹⁰⁶ First, voter pamphlets that include a biography prepared by the candidate could be distributed.¹⁰⁷ Second, the bar could publish judicial performance evaluations.¹⁰⁸ Third, community groups could organize a meet-the-candidates program.¹⁰⁹ The fourth method of educating voters is to encourage media coverage.¹¹⁰ Fifth, bar polls could be used to increase voter awareness. Bar polls indicate bar association members' opinions of the candidates.¹¹¹ Sixth, the media could make broadcast time af-

the candidates' positions on the issues . . . [because the Canon] forbids candidates from making pledges or promises regarding conduct in office other than to promise faithful performance of the duties of the office." COMISKY & PATTERSON, *supra* note 13 at 10 (footnote omitted).

One judge who advocates changing the Code noted:

Citizens know that judges did not grow up and develop in a vacuum. Lawyers who do litigation, along with courthouse staff, have information about individual judges on which they base their daily activities. That information about individual judges ought to be available to voters if an electoral system is to be meaningful. The public will continue to distrust the legal system—and our profession—if we continue to expect the electorate to vote blind in judicial elections.

Peggy S. Hedrick, *Voters Should Know Where Judges Stand*, NAT'L L.J., Oct. 22, 1990 at 12.

105. See MINN. STAT. § 204B.36 (4)-(5).

106. See MATHIAS, *supra* note 9, at 18.

107. *Id.* Alaska, California, Oregon, and Washington mail voters' pamphlets to registered voters prior to judicial elections. *Id.* In some other states, citizens groups voluntarily distribute the pamphlets. *Id.*

108. *Id.* at 20. Several state and local bar associations have established judicial performance evaluations. *Id.*

109. *Id.* at 23. Another option is a public debate. On October 21, 1992, the Minnesota Justice Foundation sponsored a debate between all eight candidates for the Minnesota Supreme Court. The debate was held at William Mitchell College of Law. Local media covered portions of the debate. The event was informative and acquainted the public with the candidates. Donna Halvorsen, *Judicial Candidates' Debate is Polite Look at Broad, Bland Issues*, MINNEAPOLIS STAR TRIB., Oct. 22, 1992, at 4B.

110. See MATHIAS, *supra* note 9, at 24. Media coverage could be increased in several ways:

(1) enlisting a local broadcaster or newspaper to co-sponsor a bar poll or performance evaluation; (2) arranging media coverage of a meet-the-candidates' panel or public forum . . . ; or (3) requesting the media, especially public radio and television, to conduct a series of thoughtful interviews with the candidates individually.

Id.

111. *Id.* at 25. Bar polls are sometimes as short as one question, where attorneys are asked, "Does this candidate have the integrity, temperament, and professional competence to be a good judge?" *Id.* Bar Polls can also be extremely lengthy questionnaires. *Id.* Bar associations can either endorse or refuse to endorse judicial candidates on the basis of the polls. Some jurisdictions simply publish the poll results for the public. *Id.*

fordable so that advertisement is a viable alternative for the candidates.¹¹² Lastly, the supreme court, in its role as judicial administrator, could ease restrictions on campaign speech and materials.¹¹³

The most controversial portion¹¹⁴ the Code of Judicial Conduct prohibits expression of “views on disputed legal or political issues.”¹¹⁵ Proponents of this restriction argue that such views are irrelevant because judges must apply the law impartially.¹¹⁶ Opponents argue it violates the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.¹¹⁷ Opponents also believe that some states interpret the provision so that candidates have nothing to discuss except “the man in the moon and the weatherman.”¹¹⁸ Finally, opponents of limitations on judges’ ability to speak about legal and political issues argue that the general legal and political philosophy of a judge is relevant because it reflects the ideology guiding a judge’s decision.¹¹⁹

2. The “Merit” Plan

Missouri was the first state to implement a merit plan. The Missouri plan provides a model that Minnesota should follow.¹²⁰ Under the Missouri merit plan, a non-partisan judicial commission submits several names to the governor when a vacancy in a judicial office occurs.¹²¹ The governor then appoints one of the candidates to fill the vacancy.¹²² After the judge has held office for a limited period of

112. *Id.* at 27.

113. *Id.*

114. MATHIAS, *supra* note 9, at 27.

115. See MINNESOTA CODE OF JUDICIAL CONDUCT Canon 7B(1)(c) (1992). See also *supra* note 104.

116. See MATHIAS, *supra* note 9, at 28.

117. *Id.*

118. *Id.* (quoting FLORIDA SUPREME COURT COMMISSION ON STANDARDS OF CONDUCT GOVERNING JUDGES, at 78 (1978)).

119. *Id.*

120. See ASHMAN & ALFINI, *supra* note 11, at 24.

121. Peterson v. Stafford, 490 N.W.2d 418, 422 (Minn. 1992) (citing Maynard E. Pirsig, *The Proposed Amendment of the Judiciary Article of the Minnesota Constitution*, 40 MINN. L. REV. 815, 838 (1956)).

A judicial nominating commission is central to the merit plan because “the nominating commission has ultimate authority to determine which candidates are qualified to hold judicial office.” See ASHMAN & ALFINI, *supra* note 11, at 22 (pointing out that the effectiveness of the merit plan is dependent upon the successful functioning of the nominating commission).

When Missouri implemented a merit plan in 1940, its nominating commission included a member of the judiciary along with an equal number of lawyer and non-lawyer members. *Id.* at 24. The majority of states that have implemented merit plans have followed Missouri’s lead regarding nominating commissions. *Id.*

122. Peterson, 490 N.W.2d at 422. A variation on the Missouri merit plan requires

time, the appointee's name is submitted to the electorate without a competing candidate.¹²³ The electorate votes yes or no to the question, "Shall Judge _____ be retained in office?"¹²⁴ If a majority of the electorate votes yes, the judge stays in office.¹²⁵ If a majority of the electorate votes no, the process, beginning with the submission of names by a non-partisan judicial commission, is repeated.¹²⁶

The solution to Minnesota's problem does not simply lie in eliminating the incumbency designation, regardless of how unfair the designation is to a challenger. Without it, voters who are unfamiliar with both candidates would be forced to randomly choose between them, which is the reason the designation was implemented originally.¹²⁷

The better alternative is to amend the Minnesota Constitution to eliminate judicial elections in favor of a merit plan. This has been attempted before. In 1972, the Constitutional Study Commission urged the Minnesota Legislature to adopt a merit plan.¹²⁸ The Commission believed that a merit plan would encourage a greater number of qualified lawyers to seek appointment to judicial office because potential candidates would not be subject to the many problems associated with judicial elections.¹²⁹ The Commission also noted that the public finds it distasteful for judges to become embroiled in politics¹³⁰ or to become so deeply involved in civic matters that they cannot consider the merits of controversial issues.¹³¹ The legislature rejected the commission's recommendations and refused to implement a merit plan.¹³²

voters to approve the appointment before the judge takes office. See Siciliano, *supra* note 102, at 234 (citing Edmund B. Spaeth, Jr. *Reflections on a Judicial Campaign*, 60 JUDICATURE 10, 19-20 (1976)).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. See *Incumbents' Special Advantage Honor Constitution on Judicial Election*, ST. PAUL PIONEER PRESS, Oct. 1, 1992, at 10A. If judicial elections are retained, Minnesota should attempt to better educate voters so that they are able to make well-educated choices between judicial candidates.

128. *Peterson v. Stafford*, 490 N.W.2d 418, 422 (Minn. 1992).

129. *Id.* The Commission stated:

Under the present system, too many qualified and competent lawyers who are successful practitioners decline to be considered for fear they will give up their practice only to be defeated by a politician with a popular name at some future election.

Id. at 422-23 (quoting JUDICIAL BRANCH COMMITTEE REPORT, MINNESOTA CONSTITUTIONAL STUDY COMMISSION at 24-25 (1972)).

130. *Id.* at 423.

131. *Id.*

132. *Peterson v. Stafford*, 490 N.W.2d 418, 423 (Minn. 1992).

More than twenty years have passed since the merit plan was rejected by the legislature, but the idea certainly has not been forgotten. The only way to implement a merit plan in Minnesota is to amend the Minnesota Constitution.¹³³ Arguably, Minnesota's current elaborate system of electing justices circumvents the constitution by involving elements not provided for in the constitution.¹³⁴ Thus, "[e]ither an effort should be mounted to amend the state constitution, eliminating the requirement for judicial elections, or politicians and judges should start respecting that requirement."¹³⁵

The 1992 judicial election illustrates the many problems inherent to Minnesota's current process.¹³⁶ The costs of maintaining judicial elections that are responsive to the public are inordinately high because of the problems associated with running a dignified campaign and soliciting campaign contributions. A merit plan would serve the same function as the incumbency designation because voters could vote for or against the incumbent judge. Under a merit plan, candidates for judicial office would not be forced to use undignified cam-

133. See Pirsig, *supra* note 4, at 839. Pirsig noted that it is possible to argue that a merit plan would not offend the language of the constitution: *Id.* He stated, "[v]oting on the question of retention in office might be deemed an election and the initial appointment by the governor for a limited period as merely preliminary to the election." *Id.* Because such an interpretation stretches the language, amending the constitution is a better approach.

134. See *Incumbents' Special Advantage Honor Constitution on Judicial Elections*, ST. PAUL PIONEER PRESS, Oct. 1, 1992, at 10A. Minnesota's method reflects the opinion that the process required by the constitution is not sufficient:

What is at work here is a longstanding belief among Minnesota officialdom that real competitive elections are not the best way to select judges. The state constitution calls for elections, but for decades judges and governors have contrived to create convenient vacancies and thus to maintain a de facto appointive system. The incumbency designation builds on the pattern.

Id.

Some argue that, until the constitution is amended, judicial elections should not be altered.

As we have suggested before, an elected judiciary is not necessarily preferable to an appointed one. But the Minnesota Constitution requires elections, and it should be respected. Those who believe an appointed judiciary would serve the public better should mount an effort to amend the constitution. In the meantime, the fancy footwork to exclude voters from the judicial selection process should stop.

A Sound Decision, ST. PAUL PIONEER PRESS, Aug. 9, 1992, at 16A.

135. See *Judicial Selection Process: It's Time to End Political Game-Playing*, ST. PAUL PIONEER PRESS, July 13, 1992, at 6A.

136. Comments regarding the 1992 election have included references to Thomas Jefferson:

Jefferson said a little rebellion now and then is a good thing. That recommendation is one reason Minnesotans should welcome the minor uprising within the state's judiciary this election season. Here's another: Minnesota's jerry-rigged system of selecting judges needs the good shaking up it is getting.

See Tice, *supra* note 32.

paign tactics. Moreover, financial problems associated with running a campaign would be eliminated.¹³⁷

Once appointed, judges would be free to devote their time entirely to judicial responsibilities and would not have to take time away from the bench to run campaigns.¹³⁸ A merit system would not be free completely from political influence; however, a merit plan would be an improvement over the current system.¹³⁹ Merit plans do not typically solve the problem of low voter turn-out.¹⁴⁰ Education is one means to create voter awareness and interest and, in turn, effect greater voter participation. The merit plan and efforts to increase education should be implemented concurrently.

Over time, the legislature has backed away from the Minnesota Constitution's provision for judicial elections. Because retention and appointment are already characteristic of Minnesota's own process, amending the Minnesota Constitution would not be a dramatic change. Rather than returning to pure judicial elections, the legislature should implement a merit plan.

IV. CONCLUSION

Over the years, the legislature has departed significantly from the pure judicial election model mandated by the constitution by switching to non-partisan elections and adding the incumbency designation requirement. It is time to legitimize Minnesota's judicial electoral system by taking the final step in the process that the legislature has already started.

As the Minnesota Supreme Court noted in *Peterson v. Stafford*,¹⁴¹ changing Minnesota's system is a job for the legislature rather than the court.¹⁴² The legislature should amend the Minnesota Constitution in favor of a merit system and steps must be taken to increase voter awareness and interest in the judicial selection process.

137. See John L. Hill, Jr., *Taking Texas Judges out of Politics: An Argument for Merit Election*, 40 BAYLOR L. REV. 339 (1988) (arguing for the implementation of a merit plan in Texas because of the problems associated with campaign contributions and impartiality in judicial elections).

138. See Roll, *supra* note 12, at 856.

139. Some argue that merit selection "relies too much on the good intentions of the incumbent Mayor or Governor . . ." Gary Spencer, *Hearings on Judicial Election Open Today*, N.Y. L.J., May 5, 1992, at 1. (quoting Randolph Scott-McLaughlin, an associate professor at Pace University School of Law). See ASHMAN & ALFINI, *supra* note 11, at 70-85 (identifying outside influences on the nominating process).

140. Susan E. Liontas, Note, *Judicial Elections Have No Winners*, 20 STETSON L. REV. 309, 317 (1990) (citing Anne Rankin Mahoney, *Citizen Evaluation of Judicial Performance: The Colorado Experience*, 72 JUDICATURE 210, 211 (1989)).

141. 490 N.W.2d 418 (Minn. 1992).

142. *Id.* at 424.

