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ARE THERE ANY LIMITS ON JUDICIAL CANDIDATES' POLITICAL SPEECH AFTER *REPUBLICAN PARTY OF MINNESOTA V. WHITE*?

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I. INTRODUCTION

Republican Party of Minnesota v. White[1] is the anticipated collision of two powerful forces present during state judicial elections: constraints imposed to protect the value of an independent, impartial judiciary, versus the value of a judicial candidate's freedom of speech during those judicial elections. While the state has an interest in both, it is often more willing to forfeit the informative value of what a candidate may say for the elevated interest of protecting the value of an independent and impartial judiciary.[2] In *White*, the Supreme Court of the United States has rejected the state's choice.

In a five-to-four split,[3] *White* supported a state's decision to elect its bench but made clear that the state must also take the bitter with the sweet;[4] that is, a state must

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* Class of 2004, University of New Mexico School of Law. I would like to acknowledge with sincere gratitude Professor Raquel D. Montoya-Lewis for teaching me and mentoring my legal writing and Professor Michael B. Browde for his constitutional wisdom. Their collective assistance and advice were invaluable, but above all else, the relationships that were built around the expounding of this note were by far the greatest return on my investment. I would also like to thank my mom, my family, and my friends for their continuing support in all my endeavors.

1. 536 U.S. 765 (2002), *rev'g* Republican Party of Minn. v. Kelly, 247 F.3d 854 (8th Cir. 2001).

2. This assertion is supported by the numerous judicial speech codes that are present in almost every state that elects its judiciary. *See infra* note 25.

3. The split was on the usual conservative/liberal divide: Justice Antonin Scalia wrote for the majority and was joined by Chief Justice William H. Rehnquist and Justices Sandra Day O'Connor, Anthony Kennedy, and Clarence Thomas. Justices John Paul Stevens, David H. Souter, Ruth Bader Ginsburg, and Stephen G. Breyer comprised the dissent. *But see* Ronald D. Rotunda, *Judicial Elections, Campaign Financing, and Free Speech*, 2 ELECTION L.J. 79, 80-81 (2003). "Oddly enough, the West headnote for *White*...[regarding whether strict scrutiny was the correct test to apply] argues that there was only a plurality of Justice[s] on this issue." *Id.* at 80. *See also id.* n.9 ("This headnote also incorrectly claims that there is no majority opinion. I have written West Publishing Company about this issue and it may be corrected in future printings.").

White is an example of the Court reversing roles in at least two ways. First, this conservative Court played the role of liberals in being the "champions of the First Amendment." Erwin Chemerinsky, *Judicial Elections and the First Amendment*, TRIAL, Nov. 2002, at 78.

> The most fascinating aspect of *White* is the ideological split among the justices. Over the next year or two, as the Court considers issues such as the constitutionality of the hate crime statutes and campaign finance restrictions, the shift in ideology reflected in this decision is likely to be of great significance.

Id. at 81.

Second, the Rehnquist Court is a well-known champion of state's rights and shifting the federalism balance in favor of state's sovereign immunity. *Id.* at 78 n.4 (citing FMC v. S.C. State Ports Auth., 535 U.S. 743 (2002), and Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001)). But this result was also predictable for at least one very apparent reason: the Supremacy Clause. U.S. CONST. art. VI. *See* J. Bonner Dorsey, *Post Conference Reflections of Justice J. Bonner Dorsey*, 43 S. TEX. L. REV. 207, 207-08 (2001) ("Both [the First Amendment and restrictions on judicial candidates' political speech] are founded on excellent public policies, but when they conflict, the constitutional imperative will prevail.").

4. The language "bitter with the sweet" was first used by then-Justice Rehnquist. Arnett v. Kennedy, 416 U.S. 134, 153-54 (1974), *rev'd* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) ("We believe that at the very least it gives added weight to our conclusion that where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet."). That language was later rejected in *Loudermill*, 470 U.S. at 540-41 ("In light of these holdings, it is settled that the 'bitter with the sweet' approach misconceives the constitutional guarantee."). I use the language "bitter with the sweet" in this note to imply a similar sentiment: the

follow the constitutional consequences of its choice by forfeiting some of its interest in an impartial and independent state judiciary. The Court deemed the restraints through the Minnesota judicial speech codes, which were intended to prevent a judicial candidate from giving voice to personal beliefs and private biases, an unconstitutional means of preventing candidates from attempting to inform the voters of their qualifications for judicial office.[5] A state forfeits its interest in an impartial, and the appearance of an impartial, judiciary when it decides to elect its bench, and the state must now allow candidates to fully exercise their First Amendment political speech right.[6]

There is no doubt that the interests of the state and the judicial candidate are at odds with one another. The resolution of *White* provides significant insight into the highest court's perception of a judicial candidate's constitutionally protected right to engage in political speech when that speech is in conflict with the state's interest in an independent and impartial elected bench. The majority places the weight of its decision on the now famous and most-often quoted line from *White*: "We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election."[7] This is the thrust of the majority opinion; it indicates the Court's unwillingness to tolerate governmental interference of judicial candidates' political speech when that speech informs the voters during the political process of judicial elections.

With *White* comes the inevitable question of whether the unconstitutionality of the Minnesota announce clause[8] signals the impending death of other judicial candidate speech restrictions as similarly violative of the Constitution's First Amendment. This note examines three other restrictions on judicial candidates' speech that are implicated by the court's decision in *White*:[9] the commitment clause,[10] the political activities clauses,[11] and the pledges and promises clause.[12]

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state cannot reap the benefits of electing its judges without the constitutional consequences that attach to its choice.

5. *White*, 536 U.S. at 788.

6. *Id.* ("'If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process...the First Amendment rights that attach to their roles.'") (quoting Renne v. Geary, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)).

7. *Id.* at 782.

8. Judicial speech codes generally restrict what both incumbent and judicial candidates may say when they are campaigning for elected judicial office. The codes are intended to preserve the independence and impartiality of a state judiciary in order that the people will have confidence in the elected bench to decide cases without bias.

9. The American Bar Association's Model Code provisions, as the generic standard, will be examined generally, while a closer assessment of the New Mexico Code of Judicial Conduct restrictions will be considered for comparison.

10. MODEL CODE OF JUD. CONDUCT Canon 5(A)(3)(d)(ii) (1990) (forbidding "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court").

11. The MODEL CODE OF JUD. CONDUCT Canon 5(A)(1)(a)-(e) (1990) states,

A. All Judges and Candidates

(1) Except as authorized in Sections 5B(2), 5C(1) and 5C(3), a judge or a candidate for election or appointment to judicial office shall not:

(a) act as a leader or hold an office in a political organization;

(b) publicly endorse or publicly oppose another candidate for public office;

(c) make speeches on behalf of a political organization;

(d) attend political gatherings; or

These clauses restrict what a judicial candidate may say and do while campaigning for judicial office. Closer examination of these clauses are necessary to properly assess the reach and possible impact of *White* in forecasting the future of political speech and activity restrictions on state judicial campaigns.[13]

II. HISTORICAL BACKGROUND

To properly understand how the Supreme Court of the United States was led to resolve a case of state judicial speech restrictions on judicial candidates for state judicial office, it is prudent to understand the history leading up to *White*. While Alexander Hamilton's Federalist Number 78, explaining the role and value of an independent federal judiciary, does not dictate the proper role of politics in *state* judicial elections, it serves as a useful comparison to examine the Progressive influences that promoted state judicial accountability to the electorate by way of judicial elections.[14] These politicized elections gave the appearance of partiality and clashed with the electorate's expectation of a neutral arbitral body.

In order to combat the partial appearance, the states' innovative new idea of restricting what judicial candidates could say while running for judicial office is what sparked the heated debate over the constitutionality of those state speech restrictions on judicial candidates.[15] The federal question was whether states could place restrictions on political speech, in the face of the federal Constitution's First Amendment guarantee and, in particular, the Court's heightened protection of political speech.[16] That history led the Supreme Court to finally confront and resolve the federal question presented by *White* in favor of the First Amendment guarantee.

Selection to the bench through an appointment system was favored by Alexander Hamilton in his Federalist No. 78: "If the power of [creating a judiciary] was committed...to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity."[17] Furthermore,

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> (e) solicit funds for, pay an assessment to or make a contribution to a political organization or candidate, or purchase tickets for political party dinners or other functions.

12. MODEL CODE OF JUD. CONDUCT Canon 5(A)(3)(d)(i) (1990) (noting that a judicial candidate "shall not...make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office....").

13. What is important about examining the ABA standard and the New Mexico judicial code provisions is that the majority of the variety seen from state to state is embodied in these two examples. Therefore, for the purposes of this note, the American Bar Association (ABA) standard and the New Mexico restrictions will be examined. But, because each state's judicial code of conduct has its own particular restrictions, specifically, those that have been judicially interpreted, the variety warrants a closer examination into the unique nature of each state's restriction.

14. *Infra.*

15. *Infra.*

16. Gitlow v. New York, 268 U.S. 652 (1925).

17. THE FEDERALIST No. 78 (Alexander Hamilton).

> That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult

> [t]he framers of the U.S. Constitution provided for a federal judiciary appointed by the President, and confirmed by the Senate, for life tenure. This judicial selection system was viewed as necessary to provide the judiciary with the independence required to protect individual liberties and the Constitution from encroachment by other government branches....[18]

But, as a result of Jacksonian Democracy, intertwined with Progressive influences, "the Federalists' aristocratic mistrust for the electorate was replaced with the democratic belief in the equality of all men and the popular control of government."[19] One development of the shift in ideology was the determination that the electorate would also determine who would sit in the state courts.[20] By 1861, the practice of electing judges was the popular method of filling state judicial positions.[21] Yet, "this goal was...undermined by the injection of partisan politics into the judicial process."[22] Against this backdrop began the various methods used by the states to cabin in the resulting unintended consequences of partisan politics wreaking havoc with an uninformed electorate.[23] After other restrictive methods failed,[24] the judicial speech codes were an innovative response.

True to the form of a democratic government, there are states where the judiciary continues to be popularly elected.[25] In the vast majority of those states, judicial

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> popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.

Id.

18. Robert C. Berness, Note, *Norms of Judicial Behavior: Understanding Restrictions on Judicial Candidate Speech in the Age of Attack Politics*, 53 RUTGERS L. REV. 1027, 1029-30 (2001).

19. *Id.* at 1032.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 1033.

> Rather than eliminate judicial elections outright, progressive reformers attempted to improve elections by removing politics from the election process. Several states tried removing candidate party labels from ballots. Unfortunately, this had the adverse effect of causing voters to be even less informed about candidates and their qualifications than they had been during partisan elections. Other states attempted to reform judicial elections without completely removing partisanship by either eliminating partisan nominating conventions or opting for direct primaries....The most modern reform, first adopted by Missouri in 1940, is the "merit selection plan," in which an elected official, usually the governor, selects judges from a list of candidates nominated by an independent, nonpartisan judicial nominating commission of lawyers and lay persons.

Id. (quoting PHILIP L. DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY 3 (1980)).

24. *Id.*

25. Brief of Amicus Curiae Conference of Chief Justices in Support of Respondents, app. at 1a, Republican Party of Minn. v. White, 536 U.S. 765 (2002) (No. 01-521). States where the state judiciary is elected, in one form or another, at the time of the case are the following:

> PARTISAN: Alabama, *Idaho*, *Illinois*, Indiana, Kansas, Louisiana, Michigan, Missouri, New Mexico, New York, *North Carolina*, Ohio, *Pennsylvania*, *Tennessee*, Texas, West Virginia; RETENTION: Alaska, *Arizona*, *California*, Colorado, Florida, Illinois, Indiana, Iowa, Kansas, *Maryland*, *Missouri*, Nebraska, *New Mexico*, *Oklahoma*, *Pennsylvania*, South Dakota, *Tennessee*, Utah, Wyoming; NON-PARTISAN: Arkansas, Arizona, California, Florida, Georgia, Idaho, Indiana, Kentucky, Maryland, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Washington, Wisconsin; NO JUDICIAL ELECTIONS: *Connecticut*, Delaware, Hawaii, Massachusetts, *Maine*, New Hampshire, New

speech codes restrict what an incumbent judge or judicial candidate may express[26] during his or her election campaign for judicial office. Most of these speech codes find their home in the Rules of Judicial Conduct of the various states and were modeled after the American Bar Association's Canon 7.[27] That Canon provided speech restrictions on judicial candidates in an effort to remove the "evils of politics" from the assumed elevated field of judicial elections.[28]

Judicial speech codes are a fairly recent restriction; the ABA created its first judicial speech restrictions in 1924 and has since redrafted them twice.[29] As a result of the ABA's efforts to formalize a uniform set of rules, states have adopted identical, or similar forms of, governmental restrictions on judicial candidates' speech.[30] One such restriction was the announce clause, which stated that a candidate for judicial office shall not "announce his or her views on disputed legal or political issues."[31] The driving force for the restriction was to take politics out of judicial elections.[32] The reason is simple: the state has deemed the preservation of the impartiality, and the appearance of impartiality, of its judiciary as vitally important, and this interest compels the restrictions on judicial candidates' speech while they are campaigning.

Finally, the language of the First Amendment protects the freedom of speech from unlawful restrictions;[33] while it mentions only that Congress lacks the ability to restrict speech, the Court has applied it with equal force to the other branches of government.[34] The Fourteenth Amendment's substantive due process clause applies the same prohibition to states attempting to impose similar restrictions on its own citizens' speech.[35] Therefore, any attempt by a state's judicial and legislative branches to restrict the speech of a state citizen will trigger the same constitutional analysis.

Recent Supreme Court decisions have analyzed First Amendment challenges using a two-tiered approach. First, the constitutional inquiry begins by distinguish-

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> Jersey, Rhode Island, *South Carolina*, *Vermont*, Virginia. (Italicized states have different judges facing different types of elections).

Id.

26. The term "express" is used here to cover all forms of First Amendment activity, including spoken speech, written speech, public appearances, and general advocating of political ideals, etc. For example, when Wersal wrote the pamphlets, he criticized past rulings of the Minnesota Supreme Court through written expression. Republican Party of Minn. v. Kelly, 247 F.3d 854, 858 (2001), *rev'd sub nom.* Republican Party of Minn. v. White, 536 U.S. 765 (2002). Furthermore, Wersal attended events sponsored by the Republican Party of Minnesota and also sought endorsement from the party for his bid for election. *Id.* His activities covered all forms of expression.

27. *See* Appendix 1 [hereinafter Appendix to ABA Amicus Brief].

28. Brief of American Bar Association as Amicus Curiae in Support of Respondents at 5, Republican Party of Minn. v. White, 536 U.S. 765 (2002) (No. 01-521) [hereinafter ABA Amicus Brief].

29. Berness, *supra* note 18, at 1035-37.

30. *Id.* at 1035.

31. MINN. CODE OF JUD. CONDUCT, Canon 5(A)(3)(d)(i) (2000).

32. *Id.* Canon 5(A) ("Each justice of the supreme court and each court of appeals and district court judge is deemed to hold a separate nonpartisan office.").

33. "Congress shall make no law...abridging the freedom of speech...." U.S. CONST. amend. I.

34. NORMAN REDLICH ET AL., UNDERSTANDING CONSTITUTIONAL LAW 359 (2d ed. 1999).

35. Gitlow v. New York, 268 U.S. 652 (1925); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) ("It is now clear that 'Freedom of speech...[is]...protected by the First Amendment from infringement by Congress, [and is] among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action.'").

ing between content-based versus content-neutral governmental restrictions on speech.[36] Second, if the restriction is based on the content of the message *itself*, as opposed to content-neutral regulation, then the restriction is subject to the highest review: strict scrutiny.[37] Minnesota's judicial speech code, more specifically, Canon 5's announce clause at issue in *White*, is a content-based restriction on judicial candidates' political speech because it limits what a candidate may say during an election based on the content of the message; the judicial candidate cannot announce his or her view on disputed legal or political issues.[38]

Political speech is at the core of the First Amendment[39] because the "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution."[40] But highly protected political speech is not inviolate; it can be overridden when the government has a narrowly tailored solution to a compelling state interest.[41] *White* holds that the state's interests in an impartial, and the appearance of an impartial, state judiciary are not sufficient to deny the First Amendment guarantee, and the announce clause is, therefore, unconstitutional.

III. STATEMENT OF THE CASE

Since 1974, the Minnesota Code of Judicial Conduct has included provisions regulating the conduct of judicial candidates in nonpartisan judicial elections.[42] Canon 5 states that each justice is "deemed to hold a separate nonpartisan office";[43]

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36. *See generally* Erwin Chemerinsky, *Restrictions on the Speech of Judicial Candidates Are Unconstitutional*, 35 IND. L. REV. 735, 740 (2002); KATHLEEN M. SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW 193 (1999).

37. *See* Chemerinsky, *supra* note 36, at 740-42; SULLIVAN & GUNTHER, *supra* note 36, at 193-98. There are four types of content-based restrictions that have been examined by the Court: (1) Viewpoint restriction: *Brandenburg v. Ohio*, 395 U.S. 444 (1969), *R.A.V. v. St. Paul*, 505 U.S. 377 (1992); (2) Subject matter restrictions: *R.A.V.*, 505 U.S. 377, *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972), *Simon & Schuster v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991), *Burson v. Freeman*, 504 U.S. 191 (1992); (3) Speaker restrictions: *Madsen v. Women's Health Ctr.*, 512 U.S. 753 (1994); *Cornelius v. NAACP*, 473 U.S. 788 (1985); and (4) Communicative impact on the audience restrictions: *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), *R.A.V.*, 505 U.S. 377, *Boos v. Barry*, 485 U.S. 312 (1988). *See also* Chemerinsky, *supra* note 36, at 741 (Judicial speech codes implicate both subject matter restrictions and viewpoint restrictions: "[R]egulating the topics that can be addressed...constitutes a subject matter restriction on speech. Moreover,...candidates cannot express their views about issues likely to come before their courts. This too, by definition, is a viewpoint restriction of speech.").

38. 536 U.S. at 774. Initially, content-based governmental restrictions on speech required an examination into whether the restricted expression fell into either a protected or unprotected category of speech. *See Chaplinsky*, 315 U.S. at 571-72. Unprotected speech consists of obscenity, fraudulent misrepresentation, defamation, advocacy of imminent lawless behavior, and "fighting words." *Id.* at 572. All other speech is protected speech and any restriction of it is presumptively unconstitutional. *See* SULLIVAN & GUNTHER, *supra* note 36, at 12. Since the Court's decision in *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964), however, the Court has shifted away from strict categorization, to the more tailored approach afforded by balancing. The Court has since resolved First Amendment issues by creating individualized tests for each area of speech: "We must 'make an independent examination of the whole record,' so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." *Id.* at 285 (quoting Edwards v. South Carolina, 372 U.S. 229, 235 (1963)).

39. *See* Williams v. Rhodes, 393 U.S. 23, 32 (1968) ("Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms.").

40. Buckley v. Valeo, 424 U.S. 1, 14 (1976).

41. *See, e.g.*, Eu v. S.F. County Democratic Cent. Comm., 489 U.S. 214, 225 (1989).

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

43. MINN. CODE OF JUD. CONDUCT Canon 5(A) (2000).

therefore, it places various restrictions on judicial candidates when they are campaigning.[44]

Gregory F. Wersal ran for the position of associate justice to the Minnesota Supreme Court twice.[45] During the first campaign, a complaint was filed with the Minnesota Office of Lawyers Professional Responsibility (Lawyers Board),[46] alleging that Wersal was violating Minnesota's announce clause.[47] The Board, in response to the complaint, stated that it doubted the clause's constitutionality and did not sanction him.[48] During his second campaign, Wersal sought an advisory opinion from the Lawyers Board,[49] and the Board reiterated that it doubted the constitutionality of the announce clause.[50]

To be on the safe side, Wersal filed suit against the Lawyers Board in the U.S. District Court for the District of Minnesota, seeking both a declaration that Minnesota's announce clause violated the rights afforded by the First and Fourteenth Amendment of the U.S. Constitution and an injunction against its enforcement.[51] The district court, in balancing the hardships, determined that Minnesota had "a compelling interest in maintaining the actual and apparent integrity and independence of its judiciary...[and] the Canons [were] narrowly tailored to serve the state's compelling interest."[52] Wersal appealed the decision to the Court of Appeals for the Eighth Circuit, where the court held there was no violation of his First Amendment right.[53] Wersal then sought review of that decision by the Supreme Court of the United States,[54] alleging that Minnesota's announce clause restricted protected political speech and was, therefore, a violation of his fundamental First Amendment right. Reviewing the constitutionality of Minnesota's announce clause, the Supreme Court found it violated the First Amendment guarantee.[55]

IV. RATIONALE AND ANALYSIS

A. The Majority's Approach to Judicial Speech Restrictions

The Supreme Court's opinion began with an explanation for its use of strict scrutiny and then divided the rest of the opinion into four major parts: the first was a search for a narrowed construction of the announce clause by those courts having

44. MINN. CODE OF JUD. CONDUCT Canon 5(A)(3)(d)(i) (2000).

45. *White*, 536 U.S. at 768-69 (running first in 1996 and again in 1998). It is rumored that he plans to run again. *See* David G. Savage, *Running Stance*, 88 ABA J. 32 (2002).

46. *White*, 536 U.S. at 768-69.

47. *Id.* at 769.

48. *Id.* Despite the dismissal, Wersal withdrew from the race due to concerns that future complaints might potentially affect his ability to practice law. *Id.*

49. *Id.*

50. *Id.*

51. Republican Party of Minn. v. Kelly, 63 F. Supp. 2d 967, 980 (D. Minn. 1999), *rev'd sub nom.* Republican Party of Minn. v. White, 536 U.S. 765 (2002).

52. *Id.*

53. Republican Party of Minn. v. Kelly, 247 F.3d 854, 857 (8th Cir. 2001), *rev'd sub nom.* Republican Party of Minn. v. White, 536 U.S. 765 (2002).

54. Republican Party of Minn. v. Kelly, 534 U.S. 1054, 1054 (2001), *rev'd sub nom.* Republican Party of Minn. v. White, 536 U.S. 765 (2002) ("Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit granted limited to Question 1 presented by the petition.").

55. *White*, 536 U.S. at 788.

interpreted it,[56] the second was a "definition hunt" where the Court attempted to properly define "impartiality" in order to determine whether the announce clause's restrictions could pass strict scrutiny,[57] the third was the Court's examination of the continuing history of judicial candidate speech restrictions and the implications that stem from the recent nature of those restrictions,[58] and the fourth was the Court's understanding of the tension present in every state where judges are elected but also restricted from speaking about their qualifications for office.[59] These four parts, analyzed on the strict scrutiny template, led the Court to conclude that Minnesota's announce clause was an unconstitutional abridgment of a judicial candidate's right to use political speech while campaigning for elected judicial office.[60]

There was complete agreement between the parties that strict scrutiny was the correct standard of review,[61] and the Court relied on *Eu v. San Francisco County Democratic Central Commission*[62] for the proper constitutional test because the First Amendment freedom was being abridged.[63] In order to withstand a First Amendment challenge, strict scrutiny requires the state to show that a given restraint is narrowly tailored to further a compelling state interest.[64] The burden was on the state to show that the announce clause was narrowly tailored by showing that the clause did not "unnecessarily circumscrib[e] protected expression."[65]

As a preliminary matter, the Court began by examining limitations urged by the respondents as illustrative that Minnesota's announce clause was not overly broad.[66] The lower courts, in deciding this case, created these limitations so that the announce clause was applied in a narrowly tailored way.[67] The first was that judicial candidates were allowed to criticize past judicial decisions.[68] Wersal's literature fell into this category as the Lawyers Board decided not to discipline him for his conduct when the issue was before them, due in part to their belief that his conduct did not violate the announce clause.[69]

The second limitation was found in construing the announce clause in such a way that it would only reach speech about "disputed issues that are likely to come before the candidate if he is elected judge."[70] This limited reading by the federal District

56. *Id.* at 771-74.
57. *Id.* at 774-84.
58. *Id.* at 785-87.
59. *Id.* at 787-88.
60. *Id.* at 788.
61. *Id.* at 774.
62. 489 U.S. 214 (1989).
63. *Id.* at 222.
64. *White*, 536 U.S. at 774-75.
65. *Id.* at 775 (quoting Brown v. Hartlage, 456 U.S. 45, 54 (1982)).
66. *Id.* at 770-74.
67. *See* Republican Party of Minn. v. Kelly, 63 F. Supp. 2d 967 (D. Minn 1999); Republican Party of Minn. v. Kelly, 247 F.3d 854 (8th Cir. 2001).
68. *White*, 536 U.S. at 772 (citing *In re* Code of Judicial Conduct, 639 N.W.2d 55 (Minn. 2002)) ("The Eighth Circuit relied on the Judicial Board's opinion in upholding the announce clause,...and the Minnesota Supreme Court recently embraced the Eighth Circuit's interpretation.").
69. *Id.* at 771.
70. *Id.* at 772.

Court of Minnesota was adopted by the Eighth Circuit, which added its own flavor: allowing for "general discussions of case law and judicial philosophy."[71]

The Court pointed out the inconsistencies with these limiting interpretations.[72] First, at oral argument it was admitted that the first limitation on the announce clause was not available to a judicial candidate who announced his or her view *and* also stated that he or she is against stare decisis.[73] "[T]o look at it more concretely, [the candidates] may state their view that prior decisions were erroneous only if they do not assert that they, if elected, have any power to eliminate erroneous decisions."[74] But, Justice Ginsburg, in her dissent, believed the Court erred in taking as the proper rule of law what the arguing attorney said during rapid-fire questioning.[75] The correct approach was to take the proper construction, adopted by the Eighth Circuit, that candidates *may* discuss past appellate judicial decisions.[76]

Also, to restrict the clause's applications to issues that are likely to come before the judicial candidate, should he or she be elected, was no limitation at all.[77] While questions pertaining to federal law might be asked, those answers are not likely to be the most informative to voters.[78] The voters in a state judicial election are more interested in knowing how disputed legal or political issues would be resolved in their own state.[79] Furthermore, "there is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction."[80] Again, Justice Ginsburg's dissent attempts to clarify that "[t]he provision does not bar a candidate from generally 'stating her views' on legal questions; it prevents her from 'publicly making known how [she] would *decide*' disputed legal issues."[81]

Third, construing the clause to allow for "general discussions of case law and judicial philosophy" is less helpful in an election.[82] The voters would not be fully abreast of an issue when their questions were answered with generalities and judicial philosophy.[83] The Court used the example of a candidate asserting that he was a "strict constructionalist."[84] Making that assertion did not violate the announce clause, yet the majority of voters were not likely to understand what the implications were of that view, unless they had a concrete example or a context within which to place the information.[85] Announcing the concrete example or a specific context is where candidates cross the line: they are no longer generally discussing case law or

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71. *Id.* at 773; *Kelly*, 247 F.3d at 882.
72. *White*, 536 U.S. at 772-74.
73. *Id.* at 773 (citing Official Tr. of Oral Argument at 33-34 n.4, Republican Party of Minn. v. White, 536 U.S. 765 (2002)).
74. *Id.* at 772.
75. *Id.* at 810 (Ginsburg, J., dissenting).
76. *Id.* (Ginsburg, J., dissenting).
77. *Id.* at 772.
78. *Id.*
79. *Id.*
80. *Id.* (quoting Buckley v. Ill. Judicial Inquiry Bd., 997 F.2d 224, 229 (7th Cir. 1993)).
81. *Id.* at 809 (Ginsburg, J., dissenting).
82. *Id.* at 773.
83. *Id.*
84. *Id.*
85. *Id.*

judicial philosophy and would be in violation of the announce clause.[86] Finding that the asserted limitations are no limitation at all, the Court begins the constitutional inquiry into the compelling state interest.[87]

Having prevailed below, the respondents again asserted that Minnesota's interests in both impartiality and the appearance of impartiality of its state judiciary were compelling interests to justify why the announce clause was necessary.[88] The respondents proffered the first justification to "protect the due process rights of litigants,"[89] and the second as "preserv[ing] the public confidence in the judiciary."[90] Justice Scalia, writing for the majority, believed that the correct meaning of the word "impartiality" had to first be ascertained in order to properly examine Minnesota's announce clause under strict scrutiny.[91] He looked to three separate, but related, species of impartiality: a "lack of bias," a "lack of preconception," and "open-mindedness."[92] After analyzing each definition of impartiality, the state's asserted compelling interest, the Court held that each definition failed to pass at least one of the prongs of strict scrutiny.[93] The Court's approach to each definition of impartiality was to determine whether the definition did *not* meet one of the two prongs, and the Court struck each definition on that basis alone, rather than the usual approach of testing whether each prong is met.[94]

The Court's first definition of impartiality was the "lack of bias for or against either party to the proceeding"[95] as illustrated by "the cases cited by respondents and amici for the proposition that an impartial judge is essential to due process."[96] After examining the announce clause, the Court drew the distinction that its language was intended to restrict speech for or against *issues*, rather than *parties*,[97] based on the words used in the clause: a candidate for judicial office shall not "announce his or her views on disputed legal or political *issues*."[98] Therefore, the announce clause

86. *Id.*
87. *Id.* at 774.
88. *Id.* at 775.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 775-83.
93. *Id.*
94. *Id.*
95. *Id.* at 775 ("This is the traditional sense in which the term is used. See Webster's New International Dictionary 1247 (2d ed.1950) (defining 'impartial' as '[n]ot partial; esp., not favoring one more than another; treating all alike; unbiased; equitable; fair; just').").
96. *Id.* at 776. In *Tumey v. Ohio*, 273 U.S. 510 (1927), the "'direct, personal, substantial[, and] pecuniary interest'" of a judge who would receive some benefit of fines collected from the defendants whom he found guilty, was a violation of due process. *White*, 536 U.S. at 776 (quoting *Tumey*, 273 U.S. at 523). This reasoning was extended to *Ward v. Monroeville*, 409 U.S. 57 (1972), where the judge himself, who also served as mayor, did not have a pecuniary interest in the outcome of the particular case, but an interest in another capacity: returning convictions where the village would benefit from the fines collected. Both cases were applied to *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), where the judge had a personal interest in the determination of the case on which he was sitting, as a favorable resolution would positively affect another case from which he would benefit. In these cases, the Court ruled that the parties were denied the due process guarantee of an impartial arbiter. *White*, 536 U.S. at 776.
97. *White*, 536 U.S. at 776.
98. *Id.* at 768.

was "barely tailored"[99] to meet the state's asserted interest of impartiality in protecting against bias for or against *parties* to a litigation.[100]

The majority did not address the possibility of a compelling nature to the state's interest.[101] Rather, the Court determined that Minnesota's asserted interest in the lack of bias for or against either party to the litigation, a definition the Court created, as the reason for restricting judicial speech through the vehicle of the announce clause, was not narrowly tailored to serve the state's interest.[102] Therefore, the Court found that the narrowly tailored prong of the strict scrutiny test was not satisfied, leading to the conclusion that the state's interest, whether compelling or not, would not be sufficient to override judicial candidates' political speech.[103]

The Court's second definition of impartiality was a "lack of preconception in favor of or against a particular *legal view*."[104] This definition was said to guarantee a litigant an equal *chance* of persuading the court on the legal points in his or her case.[105] While it *might* be an interest served by the announce clause, the Court found it was not a *compelling* interest as required by strict scrutiny to override the First Amendment right,[106] because "[a] judge's lack of predisposition regarding [a relevant issue] has never been thought to be a necessary component of equal justice."[107]

Here, unlike the first definition of impartiality, the Court did not address the narrowly tailored aspect of the strict scrutiny test but instead invalidated this

99. *Id.* at 776.

100. *Id.* Justice Ginsburg's dissent reached a different conclusion in examining the same cases; she concluded that the situation presented by Wersal is a textbook example of the harm that the Minnesota Supreme Court was intending to prevent in promulgating its judicial speech code. *Id.* at 814-15 (Ginsburg, J., dissenting). Therefore, the announce clause, the pledges and promises clause, and the Code's other proscriptions protect due process rights and are narrowly tailored solutions to the state's compelling interest in impartiality and the appearance of impartiality. *Id.* at 817 (Ginsburg, J., dissenting).

Part III, the heart of Justice Ginsburg's dissent, focuses on the interdependence of the various pieces of the Minnesota judicial speech code and why it is imperative that the other clauses, specifically the pledges and promises clause, are integrated into the Court's analysis. *Id.* at 812 (Ginsburg, J., dissenting); *see* MINN. CODE OF JUD. CONDUCT, Canon 5(A)(3)(d)(i). Justice Ginsburg compares the conclusions that can be drawn from the parties' agreement that the pledges and promises clause is vital to preserving the impartiality and the appearance of impartiality of the judicial office: "The reasons for this agreement are apparent. Pledges and promises of conduct in office, however commonplace in races for the political branches, are inconsistent 'with the judge's obligation to decide cases in accordance with his or her role.'" *White*, 536 U.S. at 813 (Ginsburg, J., dissenting) (quoting Official Tr. of Oral Argument at 16, Republican Party of Minn. v. White, 536 U.S. 765 (2002)).

101. *White*, 536 U.S. at 775-77.

102. *Id.* at 776 ("We think it plain that the announce clause is not narrowly tailored to serve impartiality (or the appearance of impartiality) in this sense.").

103. *Id.*

104. *Id.* at 777.

105. *Id.*

106. *Id.* Writing that it would be "virtually impossible to find a judge who does not have preconceptions about the law," *id.*, Justice Scalia goes on to quote then-Justice Rehnquist from *Laird v. Tatum*, 409 U.S. 824, 835 (1972) (mem.): even if a judge could be found whose mind "was a complete *tabula rasa*," it would likely be considered "evidence of lack of qualification, not lack of bias." *White*, 536 U.S. at 778. And, lest we forget, the Minnesota Constitution forbids selecting judges who are impartial in the sense that they have no view on the law. *Id.* As the Minnesota Constitution states, "Judges of the supreme court, the court of appeals and the district court shall be learned in the law." MINN. CONST. art. VI, § 5. Therefore, placing a value on "avoiding [the appearance of] judicial preconceptions on legal issues is neither possible nor desirable, pretending" to do so cannot be a compelling state interest. *White*, 536 U.S. at 778.

107. *White*, 536 U.S. at 777.

definition by finding that the asserted interest was not compelling.[108] Holding that the state's interest in the lack of preconception in favor of or against a particular *legal view*, again a definition the Court created, was not a *compelling* state interest;[109] it did not have to go on to determine whether the announce clause was narrowly tailored to meet that interest. Therefore, finding that one prong of the strict scrutiny test was not satisfied, the Court concluded that the state's asserted interests would not be sufficient to override a judicial candidate's political speech by way of the announce clause.[110]

The final definition of impartiality was open-mindedness:[111] "This quality in a judge demands, not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case."[112] Open-mindedness failed as a proper definition of impartiality because the Court was not persuaded that the announce clause was adopted for that purpose and did not pursue the inquiry.[113] Essentially, the Court did not even analyze whether the state's interest in open-mindedness was compelling or whether the announce clause solution was narrowly tailored, because the Court did not believe that open-mindedness was what Minnesota was striving to achieve in creating the announce clause.[114]

The Court wrote that the announce clause was "woefully underinclusive"[115] and, therefore, was not the most effective means to have served the interests of open-mindedness of the state judiciary.[116] It was "woefully underinclusive" because a judicial candidate could have announced his or her view on disputed legal or political issues "up until the very day before he declares himself a candidate, and may say it repeatedly (until litigation is pending) after he is elected."[117] Essentially, even if Minnesota *could* have persuaded the Court that its interest in the open-mindedness of its elected judges was compelling, the state's announce clause was still unconstitutional because it was not tailored to the harm it was intended to remedy. This improper fit is an indication that the problem the state says it is remedying is not what the state is really attempting to remedy, and, therefore, the Court did not pursue the inquiry into Minnesota's interest in open-mindedness.[118] Minnesota cannot suppress a judicial candidate's First Amendment right to employ political speech during his or her judicial campaign.

None of the examined alternative definitions of impartiality met strict scrutiny's elevated test for finding a narrowly tailored solution to a compelling state interest. Therefore, the Minnesota Supreme Court could not constitutionally be allowed to restrict a judicial candidate's First Amendment right to announce his or her views

108. *Id.* at 777-78.
109. *Id.* at 777.
110. *Id.* at 778.
111. *Id.* at 778-84.
112. *Id.* at 778.
113. *Id.*
114. *Id.*
115. *Id.* at 780.
116. *Id.*
117. *Id.* at 779-80.
118. *Id.* at 778.

while on the campaign trail by enforcement of the announce clause's proscriptions.[119] The majority's fruitless search for a workable definition for impartiality led to the elimination of each one by failing the definition on one prong, without having to examine the other. In the case of open-mindedness, the majority did not do even that much; it dismissed the definition because it reasoned that the state was not attempting to remedy a lack of open-mindedness when creating the announce clause.

After having analyzed the Court's three definitions of impartiality, the Court addressed the recent tradition of prohibiting judicial candidates from announcing their views.[120] By all accounts, "[t]he practice of prohibiting speech by judicial candidates on disputed issues...is neither long nor universal."[121] This recent trend of restricting judicial speech during campaigns, through vehicles like the announce clause, could not be upheld in the face of the weighty tradition and distinguished history of the First Amendment guarantee of protection of political speech.[122] Finding that the judicial speech restrictions were too recent to be characterized as evincing a long tradition, the Court goes on to buttress their conclusion by looking to the root of the problem: Minnesota's choice to elect its judges.[123]

The Minnesota Constitution's command that judges be popularly elected was in tension with the Minnesota Supreme Court's announce clause provision, which restricted political speech by judicial candidates for office.[124] But, the First Amendment of the U.S. Constitution guarantees a fundamental right to free speech and, more importantly, "does not permit [achievement of] its goal by leaving the principle of elections in place while preventing candidates from discussing what the elections are about."[125] Quoting *Renne v. Geary*,[126] the Court wrote, "'If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process...the First Amendment rights that attach to their roles.'"[127] The Court essentially determined that the states must take the bitter with the sweet in deciding to popularly elect its judiciary.[128]

B. Where the Justices' Viewpoints Diverge

The prevailing factor for the majority was the benefit to voters to be informed as to the qualifications of candidates for judicial office: "We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election."[129] Based on the distinction between the role of judges

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119. *Id.*

120. *Id.* at 785-87. For a discussion of the practice of limiting judicial candidates' free speech, see *supra* part II.

121. *Id.* at 785. In truth, the recent phenomena is only as old as the first code regulating judicial conduct set out by the ABA in 1924, after which many states have patterned their own judicial speech codes. *Id.* at 786. Although there have been numerous drafts and multiple adoptions by many states, overall adoption of the judicial restriction is not unanimous and ultimately not universal. *Id.*

122. *Id.* at 786.

123. *Id.* at 787-88.

124. *Id.* at 787.

125. *Id.* at 788.

126. 501 U.S. 312 (1991).

127. *White*, 536 U.S. at 788 (quoting *Renne*, 501 U.S. at 349 (Marshall, J., dissenting)).

128. *See supra* note 4.

129. *White*, 536 U.S. at 782.

versus the role of politically accountable actors, the dissenters, Justices Stevens, Ginsburg, Souter, and Breyer,[130] would have found the announce clause narrowly tailored to meet the state's compelling interest in the impartiality, and the appearance of impartiality, of its state judiciary; holding the restriction on judicial candidates' political speech a permissible burden on their First Amendment freedom.[131] Rounding out the opinion with concurrences, Justice O'Connor questioned the wisdom of relying on an electoral system for choosing judges in state elections,[132] while Justice Kennedy advocated his long-held belief that protected First Amendment speech should not be subject to balancing.[133]

The dissenters agreed that the majority's failure was in ignoring the fundamental distinctions between judicial office and political office, and, therefore, the majority's

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130. Justices Stevens and Ginsburg both wrote separate dissents but joined one another's. Justices Souter and Breyer joined in both dissents.

131. *White*, 536 U.S. at 797-821. *See also* Republican Party of Minn. v. Kelly, 63 F. Supp. 2d 967 (D. Minn. 1999), *rev'd sub nom.* Republican Party of Minn. v. White, 536 U.S. 765 (2002); Republican Party of Minn. v. Kelly, 247 F.3d 854 (8th Cir. 2001), *rev'd sub nom.* Republican Party of Minn. v. White, 536 U.S. 765 (2002).

132. Justice O'Connor, joining in the opinion of the majority, wrote separately to look at a more fundamental problem, examining the wisdom of choosing an electoral system for filling judicial positions in the first instance. *White*, 536 U.S. at 788-92 (O'Connor, J., concurring). She observes that "the very practice of electing judges undermines [the interest in impartiality and the appearance of impartiality]." *Id.* at 788 (O'Connor, J., concurring). She details two points that lend strength to her assertion: (1) elected judges have a personal stake in the outcome of cases because their job might be on the line at the next election and (2) campaign financing furthers the personal stake. *Id.* at 788-92 (O'Connor, J., concurring). As fittingly put, to ignore "the political consequences of visible decisions is 'like ignoring a crocodile in your bathtub.'" *Id.* at 789 (O'Connor, J., concurring) (quoting Julian N. Eule, *Ira C. Rothgerber, Jr. Conference on Constitutional Law: Guaranteeing a Republican Form of Government, Crocodiles in the Bathtub, State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. COLO. L. REV. 733, 739 (1994)). "Minnesota has chosen to select its judges through contested popular elections instead of through an appointment system or a combined appointment and retention election system along the lines of the Missouri Plan." *Id.* at 791 (O'Connor, J., concurring). Therefore, if "the State has voluntarily taken on the risks to judicial bias described above, [t]he State's claim that it needs to significantly restrict judges' speech in order to protect judicial impartiality is particularly troubling." *Id.* at 792 (O'Connor, J., concurring). *But see* Stephen C. Aldrich, *Minnesota Judicial Elections: Better than the Missouri Plan*, 59 BENCH & B. MINN. 27 (2002).

133. Justice Kennedy, while joining in the opinion of the Court, wrote separately to reiterate his view that the Court need not venture down the path of determining narrowly tailored compelling state interest in this and similar cases. *White*, 536 U.S. at 792-96 (Kennedy, J., concurring). Because political speech is protected speech under Supreme Court precedent, and the restriction in *White* does not fall within any of the exceptions to previously recognized content-based restrictions, the proper route was invalidation on that ground alone. *Id.* at 792-93 (Kennedy, J., concurring) (citing Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Board, 502 U.S. 105, 124 (1991) (Kennedy, J., concurring)). The ultimate result reached by the majority could have been accomplished by Justice Kennedy's approach *and* would have had the added advantage of being even more protective of the freedom of speech preserved by the First Amendment, with proper emphasis on the value of core political speech. *Id.* at 793.

Justice Kennedy, first in *Simon & Schuster, Inc.*, 502 U.S. at 124 (Kennedy, J., concurring) ("The regulated content has the full protection of the First Amendment and this, I submit, is itself a full and sufficient reason for holding the statute unconstitutional."), the following year in *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (Kennedy, J., concurring) (writing that generally the compelling interest test is not applicable, although its use may be legitimate when there are multiple constitutional rights at issue, for example, freedom of speech and the right to vote), and most recently in *White*, 536 U.S. at 793 (Kennedy, J., concurring) ("I adhere to my view...that content-based speech restrictions that do not fall within any traditional exception should be invalidated without inquiry into narrow tailoring or compelling government interests. The speech at issue here does not come within any of the exceptions of the First Amendment recognized by the Court."), argues for a more categorical/absolutist approach to the First Amendment protection of speech. *See* Elizabeth B. Coffin, Note, *Constitutional Law: Content-Based Regulations on Speech: A Comparison of the Categorization and Balancing Approaches to Judicial Scrutiny*—Simon & Schuster, Inc. v. New York State Crime Victims Board, *112 S. Ct. 501*, 18 U. DAYTON L. REV. 593 (1993).

reasoning, and ultimately its decision, was flawed.[134] Justice Stevens, in particular, pointed to the critical difference in the *work* done by one elected to judicial office and one elected to political office;[135] while a judge must often make anti-majoritarian and unpopular decisions, political officeholders are bestowed with the mandate to make decisions for the popular will.[136] He went on to explain that a judicial candidate's emphasis of his or her beliefs and ideas, as opposed to his or her qualifications for office, compromises the impartiality of the judiciary as a whole and is a signal that the candidate is unfit for judicial office.[137] Furthermore,

> attacking courts and judges not because they are wrong on the law or the facts of the case, but because the decision is considered wrong simply as a matter of political judgment—maligns one to the basic tenets of judicial independence—intellectual honesty and dedication to enforcement of the rule of law regardless of popular sentiment.[138]

By pointing to the Court's history of recognizing the difference between the position of a judge and that of other elected officials, Justice Stevens illustrated that the Court had always viewed the impartiality and the appearance of impartiality as worthy goals.[139]

Justice Stevens' dissent reinforced Justice Ginsburg's dissent.[140] Justice Ginsburg wrote, "Judges...are not political actors. They do not sit as representatives of particular persons, communities, or parties; they serve no faction or constituency."[141] Minnesota's judicial speech code was evidence that it was not Minnesota's intention to create a system of electing judges that mirrors that of the election for other political offices; in fact, they "tailored judicial selection to fit the character of third branch office holding."[142] For Justice Ginsburg, it was the state's answer to Minnesota's constitutional command that judges be elected by popular vote; it prevents those elections from degrading into campaigns similar to those for political office.[143]

Justice Scalia's criticism of both dissents attacked their premise that the majority was equating the latitude in speech allowed in campaigns for political office with those for judicial office.[144] He intended to make clear that the majority's position

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134. *White*, 536 U.S. at 797-821 (Stevens & Ginsburg, J.J., dissenting).

135. *Id.* at 797-803 (Stevens, J., dissenting).

136. *Id.* at 798.

137. *Id.*

138. *Id.* at 803 (quoting Paul J. De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 38 WILLAMETTE L. REV. 367, 387 (2002)).

139. *Id.* at 802. The Court then goes on to say, "'The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action.'" *Id.* (quoting Mistretta v. United States, 488 U.S. 361, 407 (1989)).

140. *See White*, 536 U.S. at 797 (Stevens, J., dissenting) ("In her dissenting opinion, Justice Ginsburg has cogently explained why the Court's holding is unsound. I therefore join her opinion without reservation. I add these comments to emphasize the force of her arguments and to explain why I find the Court's reasoning even more troubling than its holding.").

141. *Id.* at 806 (Ginsburg, J., dissenting).

142. *Id.* at 808 (Ginsburg, J., dissenting).

143. *Id.* (Ginsburg, J., dissenting).

144. *Id.* at 784.

was this: "*even if* the First Amendment allows greater regulation of judicial election campaigns than legislative election campaigns, the announce clause still fails strict scrutiny because it is woefully underinclusive, prohibiting announcements by judges (and would be judges) only at certain times and in certain forms."[145] Therefore, it was the reasoned determination of the majority that Minnesota's announce clause impermissibly interfered with political speech and was a constitutional violation of the First Amendment freedom.[146]

V. IMPLICATIONS

A. Which Judicial Speech Restrictions Are Constitutional after White?

Since the ruling in *White* was issued, the states that have announce clauses, and generally those states that restrict what judicial candidates may say during an election campaign, have been working to conform their judicial speech codes to the standard enunciated by the Supreme Court.[147] And, while the majority, concurrences, and dissents in *White* lay out varying implications quite clearly, this note addresses three applications of *White*, using the New Mexico Code of Judicial Conduct language as the principle example in order to explore what is constitutionally left within judicial speech codes now that *White* has rendered the announce clause unconstitutional.[148]

There is widespread speculation that *White* allows judicial candidates a free for all when it comes to judicial elections.[149] But, *White* did not address first, the constitutionality of the announce clause's successor, the commitment clause; second, to what extent a judicial candidate can participate in political activity while campaigning; and third, whether a judicial candidate may pledge or promise certain results in an effort to be elected to the bench.[150]

145. *Id.* at 783. *See* Marla N. Greenstein, *The New Right to Judicial Free Speech: A New Threat to Judicial Independence?*, 42 JUDGES' J. 34, 34 (2003) ("The holding in *White* is significant because it treats the Code of Judicial Conduct in the same manner as any other government regulatory effort. In striking down a restriction on campaign speech by judicial candidates, the Court implicitly declined to distinguish judicial "ethics" regulation from executive regulation, at least in the area of speech.").

146. *Id.* at 788.

147. *See* Peter Wong, *Campaign Rules May Change for Judges*, STATESMAN J. (Salem, Or.), Apr. 5, 2003, at 2C; Daniel Wise, *Limits of Judicial Speech in Election Debated by Panel*, N.Y.L.J., May 5, 2003, at 1; Gene R. Nichol, *Judges' Appointed Hour*, NEWS OBSERVER (Raleigh, N.C.), Apr. 20, 2003, at A25. *See also Developments Regarding Judicial Campaign Speech*, American Judicature Society (Aug. 21, 2002), *available at* http://www.ajs.org/ethics/story.asp?content_id=45. *See also* North Dakota Judicial Ethics Advisory Opinion, *Impact of Republican Party v. White, 122 S. Ct. 2528 (2002) on N.D. CODE JUDICIAL CONDUCT, Canon 5(A)(3)(d)(ii)* (July 16, 2002), CLR Seq. No. E-12, *available at* http://www.court.state.nd.us/Court/Committees/jud_ethc/canmemo.htm.

148. For an in-depth look at the New Mexico process for selecting judges, see Leo M. Romero, *Judicial Selection in New Mexico: A Hybrid of Commission Nomination and Partisan Election*, 30 N.M. L. REV. 177 (2000).

149. *See* Brian Morris, *Free Speech in Judicial Elections*, 27 MONT. LAW. 5 (2002). *See also* Greenstein, *supra* note 145, at 35 ("What will happen in a world where judges freely answer surveys on abortion rights, tobacco cases, drunk driving penalties, and gun regulations? We can easily picture the graphs on the front page of USA Today indicating judges' differing views by state, gender, or race.").

150. *White*, 536 U.S. at 770. The *White* decision only addressed the constitutionality of the announce clause and reserved judgment regarding the other provisions: "the Minnesota Code contains a so-called 'pledges or promises' clause, which *separately* prohibits judicial candidates...a prohibition that is not challenged here and on which we express no view." *Id.*

The weightiest concern by those crafting statutes and supporting arguments to restrict judicial candidates' speech during campaigns is that *White* decided that impartiality and the appearance of impartiality were not found to pass strict scrutiny, albeit by the Court's own definitions.[151] The problem now comes down to either creating a definition of impartiality that is significantly different than those examined in *White* that will pass constitutional muster,[152] or the alternative of asserting an interest the Court will find compelling to defeat strict scrutiny, knowing that the Court has just struck a state's strongest argument for restricting judicial candidates from giving voice to their biases during campaigns for elected judicial office. The real question for those working on these issues is whether making *any* assertion is worthwhile since any other interest does not seem more important than impartiality and the appearance of impartiality of a state's judiciary.[153]

What follows are applications of *White's* reasoning to three other restrictive clauses in judicial speech codes that would also be subjected to strict scrutiny review: the commitment clause, political activities clauses generally, and the pledges and promises clause. Each section ends with a forecast of whether the provisions might survive constitutional challenge in the wake of *White*.

B. The Commitment Clause

The New Mexico Code of Judicial Conduct commitment clause[154] provides a useful example for examining the constitutionality of the commitment clause. New Mexico's code provision is identical to the ABA commitment clause[155] and forbids making "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court."[156] There were approximately twenty-five other states that had this clause in place when *White* was decided.[157] Applying *White*'s first definition of impartiality, lack of bias for or

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151. *Id.* at 788.

152. *See* Molly McDonough, *New York Judge Wins Speech Case*, 2 ABA J. E-REPORT 1 (Mar. 7, 2003) ("The ABA has begun considering how to tweak its Model Code of Judicial Conduct to conform to *White*, including coming up with a definition of impartiality.").

153. While the Court footnotes an observation that an "independent" judiciary was used interchangeably with an "impartial" judiciary in describing Minnesota's compelling state interest, *White*, 536 U.S. at 775 n.6, the Court did not rule on the compelling nature of an independent judiciary. *Id.* Yet the mention in a footnote hurts the argument that the two are different. An attempt to distinguish between an independent and an impartial judiciary might be worthwhile, in that the Court did not rule on that specific interest, but it does not seem likely to carry the day. Furthermore, limiting speech before and after elections would not solve the problem either because it would severely chill First Amendment protected political speech and also be unconstitutional. Justice Stevens' cure would be more speech, *id.* at 797 (Stevens, J., dissenting), a solution that conflicts with the alternative of restricting speech.

154. N.M. CODE OF JUD. CONDUCT § 21-700(B)(4)(b) (1995).

155. MODEL CODE OF JUD. CONDUCT Canon 5(A)(3)(d)(ii) (1990).

156. N.M. CODE OF JUD. CONDUCT § 21-700(B)(4)(b).

157. *See* Brief for the Petitioners at 30 n.19, Republican Party of Minn. v. White, 536 U.S. 765 (2002) (No. 01-521).

> Alaska Code of Jud. Conduct Canon 5A(3)(d) (2001); Ark. Code of Jud. Conduct Canon 5A(3)(d) (1997); Cal. Code of Jud. Conduct Canon 5B (2001); Fla. Code of Jud. Conduct Canon 7A(3)(d) (2001); Ga. Code of Jud. Conduct Canon 7B(1)(c) (2001); Ill. Sup. Ct. Rules Rule 67, Canon 7A(3)(d) (2001); Ind. Code of Jud. Conduct Canon 5A(3)(d) (2001); Kan. Sup. Ct. Rules Rule 601A, Code of Jud. Conduct Canon 5A(3)(d) (2001); Ky. Sup. Ct. Rule 4.300, Canon 5B(1)(c) (2001); La. Code of Jud. Conduct Canon 7B(1)(d) (2001); Me. Code of Jud. Conduct Canon 5B(2) (2001); Neb. Code of Jud. Conduct Canon 5A(3)(d) (2001); Nev. Code of Jud.

against parties, to the commitment clause yields the same doomed fate. The Court, as it did in *White*, is likely to reason that the commitment clause is not narrowly tailored for the exact same reason the announce clause was not narrowly tailored: both are aimed at restricting a candidate from voicing his or her opinion about legal *issues*, rather than aiming the prohibition squarely against *parties*.[158] The problem here is with the language used by the state in restricting the speech: Minnesota's announce clause used "disputed legal *issues*," while the commitment clause uses "with respect to cases, controversies or *issues*." Therefore, this definition would also be labeled "barely tailored" to meet the compelling state interest and, therefore, not sufficient to overcome strict scrutiny.

Lack of preconception in favor of or against a particular legal view would lead the Court to reference the identical cases for their identical holding: a judge's lack of predisposition regarding a relevant *issue* has never been thought to be a necessary component of equal justice[159] because a judge, who's mind "'[i]s a complete *tabula rasa*,...would be...evidence of lack of qualification, not lack of bias.'"[160] Like *White*, the asserted interest, promotion of a lack of preconception in favor of or against a particular legal view, as a reason for creating the commitment clause would fail for not being a *compelling* interest. So, like *White*, finding that one prong of the strict scrutiny test was not satisfied, the Court would conclude that the state's asserted interests would not be sufficient to override a judicial candidate's political speech by way of the commitment clause.

Open-mindedness as a compelling state interest for restricting speech through the commitment clause is more difficult to predict. The New Mexico, and ABA, commitment clause forbids "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court."[161] The commitment clause is the modernized version of the 1972 ABA announce clause, and this fact can work either in favor of or against the clause's constitutionality. It could be argued that because the commitment clause's purpose is to restrict judicial candidates' speech that might improperly influence how the electorate votes, then the clause would essentially be the same as the announce clause and should be struck as unconstitutional.

But, when the ABA reformulated its approach to the judicial speech codes in 1990, the new formulation changed the language from "announce" to "appear to commit," and it was thought that this new language would avoid the constitutional

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Conduct Canon 5A(3)(d) (2001); N.Y. Code of Jud. Conduct Canon 5A(4)(d) (2001); N.D. Code of Jud. Conduct Canon 5A(3)(d) (2001); Ohio Code of Jud. Conduct Canon 7(B)(2)(d) (2001); Okla. Code of Jud. Conduct Canon 5A(3)(d) (2001); R.I. Code of Jud. Conduct Canon 5A(3)(d) (2001); S.C. Code of Jud. Conduct Canon 5A(3)(d) (2000); S.D. Stat., ch. 16-2, app., Code of Jud. Conduct Canon 5A(3)(d) (2001); Tenn. Sup. Ct. R. 10, Code of Jud. Conduct Canon 5A(3)(d) (2001); Vt. Code of Jud. Conduct Canon 5B(4) (2000); Wash. Code of Jud. Conduct Canon 7(B)(1)(c) (2001); W. Va. Code of Jud. Conduct Canon 5(A)(3)(d) (2000); Wyo. Code of Jud. Conduct Canon 5A(3)(d) (2000).

Id.

158. *White*, 536 U.S. at 776.
159. *Id.* at 777.
160. *Id.* at 778 (quoting Laird v. Tatum, 409 U.S. 824, 835 (1972) (mem.)).
161. N.M. CODE OF JUD. CONDUCT § 21-700(B)(4)(b); MODEL CODE OF JUD. CONDUCT Canon 5(A)(3)(d)(ii) (1990).

problems that seemed looming for the 1972 announce clause.[162] In particular, the language was an attempt to make more clear the field of speech that was being restricted.[163] With that in mind, and looking to the "commit" language, it seems more reasonable that the restriction on judicial candidates' speech is intended to encourage and secure the open-mindedness of a state's judiciary. Yet, intuitively, the language of the commitment clause seems to lie closer to the field of pledges and promises restrictions,[164] rather than announce clause restrictions.

In addition, the ABA's amicus brief stated that the clauses are essentially the same[165] and reminded the Court that the limiting constructions given the announce clause were modeled on the language of the commitment clause.[166] Since the Court did not find the limiting constructions to be any limit at all, the forthright assertion that there is a distinction between the clauses weighs against any suggestion of a significant difference.[167] Therefore, like *White*, the Court would reason that the strong connections between the announce clause and the commitment clause demonstrate that the purpose of the commitment clause was not to promote open-mindedness, and the commitment clause would also be labeled "woefully underinclusive." The commitment clause, like the announce clause, does not cast the net wide enough to include within its prohibitions persons who have or will commit themselves to issues before and after a judicial election. Again, prior restraint would not be a solution since chilling political speech is viewed as one of the most apparent violations to the First Amendment freedom of speech.[168]

Attempting to determine the tradition of prohibiting judicial speech during judicial elections would quickly run the commitment clause into problems; particularly because it, as a reformulation of the announce clause, has had a much shorter history. If the longer tradition of the announce clause was not long enough for the Court to say that a tradition had been established, then the shorter history of the commitment clause would suggest the same, or even stronger, conclusion.

Furthermore, the Court's focus on the tension between the state's constitutional command to elect its judges and the restriction on the candidates' political speech during those elections is not remedied by a state's adoption of the commitment clause in place of the announce clause. The close relationship between the commitment clause and the unconstitutional announce clause, as well as their shared

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162. ABA Amicus Brief, *supra* note 28, at 8-9.

163. *Id.* at 6.

164. *See* MODEL CODE OF JUD. CONDUCT Canon 7B(1)(c) (1972) (noting that 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"). There are nine states with this restriction. *See* Appendix to ABA Amicus Brief, *supra* note 27, at 1a (citing ARIZ. CODE OF JUD. CONDUCT Canon 5(B)(1)(d)(iv); IOWA CODE OF JUD. CONDUCT Canon 7(B)(1)(c); MD. CODE OF JUD. CONDUCT Canon 5(B)(5); MINN. CODE OF JUD. CONDUCT Canon 5(A)(3)(d)(i); MISS. CODE OF JUD. CONDUCT Canon 7(B)(1)(c); PA. CODE OF JUD. CONDUCT Canon 7(B)(1)(c)).

165. *See* ABA Amicus Brief, *supra* note 28, at 5.

166. *Id.* "Minnesota's announce clause has the same scope as the corresponding provision in the 1990 ABA Model Code—namely, it prevents judicial candidates from seeking political support on the basis of commitments or apparent commitments on how they would decide cases if elected." *Id.*

167. *See* McDonough, *supra* note 152 ("In light of *White*, the ABA will undergo a two-year review of its Model Code and likely will rework it. The last overhaul of the code was in 1990.").

168. *See* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) ("Any system of prior restraint of expression comes to this Court bearing a heavy presumption against its constitutional validity.").

purpose to restrict judicial candidates' speech, predictably leads the Court down the same analytical path.

C. The Political Activities Clauses

The political activities clauses vary from state to state, but the standard is the ABA Canon 5(A).[169] The New Mexico Code of Judicial Conduct political activity restrictions are not identical to the ABA Canon, but reading sections 21-700[170] and 21-800[171] together essentially precludes the same activity as the ABA Canon.[172] Under the prohibitions of the ABA's political activities clauses a candidate may not

> act as a leader or hold an office in a political organization;...publicly endorse or publicly oppose another candidate for public office;...make speeches on behalf of a political organization;...attend political gatherings; [and]...solicit funds for, pay an assessment to or make a contribution to a political organization or candidate, or purchase tickets for political party dinners or other functions.[173]

The prohibitions seem to be rooted in the broad assumption that the partisan information will influence persons to vote party lines, rather than investigating the qualifications of a candidate.

A state's assertion of a compelling interest in promoting a lack of bias for or against parties as the reason for creating the political activities clauses does not necessarily compel the same result as in *White*. The motive for these provisions would seem to be to create and/or maintain the appearance of the judge's disinterestedness in the judicial office, a catchall provision that covers the most apparent appearances of partiality. At the root of these provisions would be the goal of protecting against the appearance of a bias against political ideology and, inferentially, preventing a bias against those parties not in accord with the judge's political point of view.

While the same argument was used in *White*, the Court was not persuaded; however, there might be a difference with this argument. Because the focus of the political activities clauses are aimed at preventing judicial candidate's from making known their political affiliations, the possibility of a bias for or against parties is more likely when a judicial candidate participates in political activity.[174] In

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169. *See supra* note 11.
170. *See* Appendix 3.
171. *See* Appendix 4.
172. This is the one area of judicial speech codes that is the least uniform from state to state.
173. *See supra* note 11.
174. While recusal is always an alternative, the judicial expense of time and work is seemingly too high a cost to pass on to the voters and community members. *See* Morris, *supra* note 149, at 5.

> Judges themselves will not be immune from the change. Montana's liberal system of one peremptory challenge for each side currently strains judicial resources as judges, especially those from more remote judicial districts struggle to find a colleague willing to travel to Thompson Falls or Broadus to sit on a case from which they have been substituted. More motions to disqualify judges for cause seem inevitable when you throw into the equation judges who have gone on record in their campaigns to halt the rise of 'frivolous lawsuits' or to 'crack down on corporate polluters.' More motions to disqualify judges for cause, on top of the present peremptory challenge system, will lead to a game of judicial musical chairs that threatens to stretch Montana's overburdened justice system beyond the breaking point.

particular, the state's interests in an impartial and the appearance of an impartial judiciary are more likely to be blighted when political activity is not restricted. With that reasoning, this definition of impartiality, as applied to the political activities clauses, shows itself to be more than "barely tailored" to meet the state's interest and would likely lead the Court to examine whether impartiality in this sense is a compelling state interest. Since the Court did not indicate its opinion on the compelling nature of the interest, we are again left to speculate how it would rule on this question.

The state's interest in promoting a lack of preconception in favor of or against a particular legal view will likely preclude the application of the political activities clauses to judicial candidates; the result of which would be that the political activities clauses are unconstitutional. *White* found that the state's interest might have been an interest served by restricting what the judicial candidates could say, but that it was not a *compelling* state interest as required by strict scrutiny.[175] This was due in part to both the impossibility of finding a judge with no preconceptions on the law, and the state's prerogative to elect its judges.[176] The same could be said in the context of political activity: it would be nearly impossible to find a judge who had not previously participated, in one way or another, in some type of political activity before becoming a candidate for judicial office, and, ultimately, it is the state's prerogative to elect its judges.

It could be argued that the state's interest is compelling when the state is attempting to protect the political process.[177] Arguing that interference from partisan campaign machines would taint partisan *elections*, a state would be hard pressed to show the Court how restricting non-judicial candidates' protected speech is justified. Because literature and persuasive studies have already established the effects of elections on the judiciary and the electorate,[178] the better position might be to argue that the partisan campaign machines have the potential to taint, and in some circumstances have tainted, the judicial *candidate's* approach to their job after he or she is elected.[179] The state would seem to have a stronger argument for a compelling interest in seeing justice doled out properly in its state courts, as most state constitutions require their judiciary to follow the law.

Open-mindedness would not yield the same result for the political activities clauses as the announce clause in *White*. There, open-mindedness failed as a proper definition of impartiality because the Court was not persuaded that the announce clause was adopted for the purpose of guaranteeing litigants a judge who will remain open to persuasion, even when those views advocated by a litigant oppose the

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Id. The same concerns should be felt in New Mexico, as one peremptory challenge per party to a proceeding is allowed by statute, N.M. STAT. ANN. 38-3-9 (Michie 1985), compounded by the vast distances from one place to another, make for an inhospitable climate for a judicial candidate to reveal his or her views on disputed legal or political issues.

175. Republican Party of Minn. v. White, 536 U.S. 765, 777 (2002).

176. *Id.* at 777-78.

177. *See, e.g.*, Burson v. Freeman, 504 U.S. 191 (1992). *See also* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

178. *See White*, 536 U.S. at 788-92 (O'Connor, J., concurring).

179. This was Justice O'Connor's point. *See id.* (O'Connor, J., concurring). Certainly she would be on board with this argument.

judge's preconceptions.[180] The opposite could be said about the political activities clauses. The prohibition is aimed at doing away with the most obvious appearance of bias—political affiliation—and the clause can be said to have been adopted for the purpose of guaranteeing litigants a judge who will remain open to persuasion, even when those views advocated by a litigant oppose the judge's preconceptions.[181] The clause clearly conveys that information.

As it stands, the clauses seem to be catchall provisions that prohibit certain conduct while the judicial candidate is running for judicial office. But, unlike *White*, these clauses are not "woefully underinclusive," as similar clauses do prevent the same activity once a judge is elected and has secured her seat. Thus, there is some indication that the remedy to the state's interest, the political activities clauses, is narrowly tailored to achieve the goals it purports to accomplish.

On the other hand, a judicial candidate who has previously become known within the community for her position within various political organizations, having previously announced her political affiliation while lecturing, speaking, or teaching, or having previously donated to or received donations from partisan sponsors, would find it nearly impossible to make voters forget about the candidate's previous experience. In some cases, these revelations would be hard to conceal, especially with the zealousness of the media and the prevalence of partisan political machines. Therefore, while the proscriptions prove the inadequacy of the political activities clauses at restraining the media, that is not the focus of *White's* inquiry. *White* inquires into the conduct of a judicial candidate.[182] But, because the judicial candidate may state his or her political affiliation and hold office within a political party "up until the very day before he declares himself a candidate, and may say it repeatedly (until litigation is pending) after he is elected,[183] [the political activities clause] is so woefully underinclusive as to render belief in that purpose a challenge to the credulous."[184]

An examination of the historical tradition of restricting political activity of judicial candidates should be determined by reference to the ABA's first promulgated proscription in 1924. Like *White*, the Court's search for a lengthy tradition of restricting political activity is not present in the historical search, and relying on a current trend does not further the position, as many states retain and encourage partisan elections of its judiciary.[185] Furthermore, *White's* emphasis on giving voters the information they need to make an informed choice weighs in favor of finding a First Amendment violation. The Court's protection of the value of political speech is contradictory to the restriction on candidates' political activity; participating in partisan events sends a political message as well: it is usually a good indicator of the values the judicial candidate holds and practices.

In addition, partisan groups like the Republican Party of Minnesota have the resources to engage in a fuller investigation into judicial candidates that

180. *Id.* at 777.
181. *Id.*
182. *See id.* at 782.
183. *Id.* at 779-80.
184. *Id.* at 780.
185. *See supra* note 25.

encompasses more than the potential candidate's education and awards. The sheer amount and type of information those groups can present might be invaluable to a voter who does not have the time to do such a thorough analysis on her own. If it is argued that seeking political endorsement and revealing one's political party potentially have the power to educate voters and help them make informed decisions, the Court might be willing to strike this prohibition as an unconstitutional restriction of political speech.

Recently, *White* was applied in a political activities clause case that examined the state's interest in the independence, as opposed to the impartiality, of its judiciary in *Spargo v. New York State Commission on Judicial Conduct.*[186] The court there closely followed *White's* analysis and held that the political activity involved—handing out coupons for donuts and coffee, giving away gift certificates for $5.00 in gas[187]—was unconstitutionally circumscribed because the political activities clauses were vague.[188] The *Spargo* court went through three definitions of independence, looked at the tradition of prohibiting the conduct, and ultimately determined that the clauses were overly broad, and, therefore, a violation of the First Amendment's protection of political speech.[189] Should the parties seek and be granted review by the Supreme Court of the United States, we will then know whether there are any limits on judicial candidates' speech after *White.*

Interestingly, Judge Thomas J. Spargo asserted a section 1983 claim[190] to vindicate a federally guaranteed right that was denied him through state action.[191] Should this ruling stand, the ability of judges to use a section 1983 cause of action to enforce a federal right to employ political speech during their judicial elections

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186. *Spargo*, 1:20-CV-1320 2003 U.S. Dist. LEXIS 2364 (N.D.N.Y. Feb. 20, 2003). *See also* McDonough, *supra* note 152; Kevin J. O'Brien, *Exposing the Charade*, N.Y.L.J., May 3, 2003, at 2.

187. *Spargo*, 1:20-CV-1320 2003 U.S. Dist. LEXIS 2364 at 16-17.

> It is alleged that Spargo offered items of value to induce votes on his behalf. Specifically, the allegations are that on two occasions Spargo handed out coupons that could be redeemed for free donuts and coffee in a local convenience store; on one occasion he distributed coupons redeemable for $5.00 in gasoline to the first five motorists who drove up to a local convenience store; on four or five occasions, he introduced himself as a candidate for Town Justice and purchased a round of drinks for everyone at the bar of a local restaurant; on several occasions he introduced himself as a candidate for Town Justice and handed out fifty half-gallons of cider and donuts to town residents at the town dump; on several occasions he gave pizzas to teachers at a local school, town highway personnel, town barn personnel, school bus garage personnel, and patrons of a local store. The total value of the items given away is estimated to be $2,000.00.

Id.

188. *Id.* at 38-48.

189. *Id.*

190. 42 U.S.C. § 1983. Civil action for deprivation of rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id.

191. *Spargo*, 1:20-CV-1320 2003 U.S. Dist. LEXIS 2364 at 3.

also leads to the possibility of recovery for attorney's fees.[192] This provides an increased incentive—at least a monetary incentive—to work at a faster clip to create constitutional judicial restrictions, or decide to do away with them altogether; this is the ultimate Catch-22.[193]

D. The Pledges and Promises Clause

The pledges and promises clause is likely to remain a valid constitutional burden on judicial candidates' speech because the implications for impartiality and the appearance of impartiality are more pronounced in cases involving promises made by the candidate to the electorate. In New Mexico, the pledges and promises clause[194] reads, a judicial candidate "shall not...make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office...."[195] The language in the ABA model is identical.[196]

White's first definition of impartiality, lack of bias for or against parties to a litigation, is a closer fit for this clause than it was for the announce clause. The restriction is on the judicial candidate from pledging or promising to rule a certain way in given scenarios.[197] For example, if a judicial candidate were to promise to impose the stiffest penalties in all DWI cases, this would imply an overt bias against parties being tried for DWI.[198] The act of promising or pledging creates, at the very least, the appearance of a bias that is much more apparent than announcing one's views on disputed legal or political issues, and even more so than committing to a certain position during a judicial election. Viewed in this light, the pledges and promises clause seems more than barely tailored to meet the state's compelling interest in an impartial judiciary and is clearly the most narrowly tailored of the judicial speech restrictions examined to this point.

Barring pledges and promises comports with the Court's second definition of impartiality: lack of preconception in favor of or against a particular legal view. When a judge refrains from making promises while on the campaign trail, he or she furthers the preservation of the image of the fair and impartial adjudicator.[199] This

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192. 42 U.S.C. § 1988(b) states: "In any action or proceeding to enforce a provision of section[]...1983..., the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." Damages, while allowed by section 1983, are barred by the state's Eleventh Amendment Immunity in federal court, Quern v. Jordan, 440 U.S. 332 (1979), and sovereign immunity in its own court, Will v. Mich. Dept. of State Police, 491 U.S. 58 (1989).

193. WEBSTER'S NEW WORLD COLLEGE DICTIONARY 221 (3rd ed. 1997) ("[A] paradox in a law, regulation, or practice that makes one a victim of its provisions no matter what one does."). *See* JOSEPH HELLER, CATCH-22 (1961).

194. N.M. CODE OF JUD. CONDUCT § 21-700(B)(4)(a) (1990).

195. *Id.*

196. MODEL CODE OF JUD. CONDUCT Canon 5A(3)(d)(i) (1990).

197. *Id.*

198. *See* Morris, *supra* note 149, at 7.

> The entire legal profession will be affected by this phenomenon. Few lawyers practicing family law will feel comfortable walking with their client, an estranged husband involved in a child support dispute, into the courtroom of a judge who campaigned on a pledge to lock up deadbeat dads. The same goes for criminal defense lawyers about to face a judge who has vowed to "get tough" with crime and to stop letting criminal[s] go free based on "technicalities."

Id.

199. Refraining might just be the only alternative. *See* Dorsey, *supra* note 3, at 210-11.

is a crucial component of equal justice.[200] Restricting what a judicial candidate may promise on the campaign trail makes the judge appear "fair and impartial."[201]

Furthermore, the Court need not be concerned about a shortage of judges who have not already pledged or promised to rule a certain way before becoming a judicial candidate, because the purpose of pledging or promising, in this instance, is to be elected and would occur during the campaign period. This is important because the judicial restriction would only apply during the judicial campaigns, not before or after. This was one of the failings of the announce clause, but it might not be fatal here because the judge is bound to rule in accordance with the law, not in accordance with his or her pledge or promise.

Finally, the constitutional choice to elect judicial candidates would not be hindered by restricting the judicial candidates from making pledges or promises; elections could still continue with the restriction in place. The purpose for the restriction is to protect the political process, but it is also to prevent the candidates from giving voice to their private biases that might influence an easily impressionable electorate that has only a few minutes to decide whether or not to retain the judicial candidate in office.

Open-mindedness squarely targets the pledges and promises clause. The Court in *White* was not persuaded that the announce clause was adopted for the purpose of guaranteeing litigants a judge who will remain open to persuasion.[202] The pledges and promises clause, on the other hand, *was* adopted for that very purpose: to guarantee litigants a judge who will remain open to persuasion, even when those views advocated by a litigant oppose the judge's previous pledge to rule a certain way. By restricting a judge from pledging certain results to the electorate in order to be elected, the state ensures that the decisions handed down in its courts are based on the facts of each case, rather than a "fixed" result determined long before the case was even filed. In this sense, the state's interest in open-mindedness is greatly furthered by the restriction on judicial candidates' ability to pledge and promise results in exchange for votes.

> The U.S. Constitution's First Amendment becomes applicable to state judicial elections through the operation of the Fourteenth Amendment. In order for the restriction on judicial speech to be trumped by the First Amendment some state action is necessary. Nationwide, as in Texas, a state agency is mandated by law to enforce the Canons of Judicial Conduct....The elimination of state enforcement of the Canons would perhaps take the issue from the reach of the Fourteenth Amendment.

Id. See also Greenstein, *supra* note 145, at 35.

> Judges should feel the full weight of responsibility when choosing to engage in public political speech. This is not a right to be exercised flippantly. Words from a judge in a public forum carry more power than those of a mere citizen. Judges enjoy high public respect in this country. Their words are invested with the credibility of the fair and unbiased institution that they represent. In the aftermath of *White*, individual judges have the ethical obligation to balance the integrity of the entire judiciary against their personal desires to publicly state views on controversial issues likely to come before our courts.

Id.

200. *See* Republican Party of Minn. v. White, 536 U.S. 765, 797-821 (2002) (Stevens & Ginsburg, J.J., dissenting).

201. *Id.*

202. *Id.* at 778.

Furthermore, in *White*, Justice Scalia dismissed Justice Stevens' concern that "statements made in an election campaign pose a special threat to open-mindedness, because the candidate, when elected judge, will have a particular reluctance to contradict them"[203] by characterizing the threat to open-mindedness as one falling within the realm of the pledges and promises clause.[204] This would seem to suggest that the majority, and possibly the dissenters, would be in agreement that the pledges and promises clause is narrowly tailored and properly serves the state's asserted interest: impartiality and the appearance of impartiality of its judiciary.

The tradition of restricting pledges and promises is not as long as that of the ABA's first Model Code of Judicial Conduct, which was promulgated in 1924. In fact, restricting pledges and promises was an addition to the 1972 Model Code. This will present a problem as the Court looks to the length of time that the provision has been in existence as an indication of the tradition of prohibiting the conduct, as compared to the tradition of allowing political speech. History shows that political speech has been protected longer than the restriction of pledging and promising has been around.[205]

Furthermore, unlike the tension between the announce clause and the Minnesota Constitution's command of electing judges, there is no tension between the pledges and promises clause and a state's prerogative to elect its judges. In fact, the two work together to provide the electorate with the opportunity to retain accountability, while the state retains its compelling interest in the impartiality and the appearance of impartiality of its judiciary. The mere appearance of judges making pledges and promises in order to be elected implicates the core value of adjudication: fairness. It is likely that the pledges and promises prohibition will remain in place. Therefore, the pledges and promises clause reinforces the interest in the impartiality of state judges and is not an unconstitutional abridgement of First Amendment political speech.

VI. CONCLUSION

Ultimately, *White*'s unmistakable emphasis on voters' entitlement to information with which to make an informed choice leads to the conclusion that almost *any* restriction that infringes on the rights of voters to *hear* judicial candidates' speech, even in the face of the state's interest in an impartial and the appearance of an impartial judiciary, will likely be found unconstitutional. By allowing judicial candidates to announce their views on disputed legal and political issues, *White* has irreversibly altered society's image of the fair and impartial black-robed arbiter, often captured in romantic oil paintings hanging in courtrooms around the country. That image, whether created through experience or pure imagination, is what judicial speech codes intend to protect: society's collective expectation of an impartial and the appearance of an impartial adjudicator.

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203. *Id.* at 780.
204. *Id.*
205. *Id.* at 785-87.

APPENDIX 1

Brief of American Bar Association as Amicus Curiae in Support of Respondents app., Republican Party of Minn. v. White, 536 U.S. 765 (2002) (No. 01-521).

From section 1a: The following states have adopted an "announce" clause substantively the same as the one in the 1972 ABA Model Code: Arizona, Ariz. Code of Jud. Conduct Canon 5(B)(1)(d)(iv); Iowa, Iowa Code of Jud. Conduct Canon 7(B)(1)(c); Maryland, Md. Code of Jud. Conduct Canon 5(B)(5); Minnesota, Minn. Code of Jud. Conduct Canon 5(A)(3)(d)(i); Mississippi, Miss. Code of Jud. Conduct 7(B)(1)(C); and Pennsylvania, Pa. Code of Jud. Conduct Canon 7(B)(1)(c).

From sections 1a–2a: The following states have adopted a "commit" clause substantively the same as the one in the 1990 ABA Model Code: Alaska, Alaska Code of Jud. Conduct Canon 5(A)(3)(d)(ii); Arizona, Ariz. Code of Jud. Conduct Canon 5(B)(1)(d)(ii); Arkansas, Ark. Code of Jud. Conduct Canon 5(A)(3)(d)(ii); California, Cal. Code of Jud. Ethics Canon 5(B); Florida, Fla. Code of Jud. Conduct Canon 7(A)(3)(d)(ii); Georgia, Ga. Code of Jud. Conduct Canon 7(B)(1)(c); Illinois, Ill. Sup. Ct. R. 67, Canon 7(A)(3)(d)(i); Indiana, Ind. Code of Jud. Conduct Canon 5(A)(3)(d)(ii); Kansas, Kan. Code of Jud. Conduct Canon 5(A)(3)(d)(ii); Kentucky, Ky. Sup. Ct. R. 4.300, Canon 5(B)(1)(c); Louisiana, La. Code of Jud. Conduct Canon 7(B)(1)(d)(ii); Maine, Me. Code of Jud. Conduct Canon 5(B)(2)(b); Nebraska, Neb. Code of Jud. Conduct Canon 5(A)(3)(d)(ii); Nevada, Nev. Code of Jud. Conduct Canon 5(A)(3)(d)(ii); New Mexico, N.M. Code of Jud. Conduct Rule 21-700(B)(4)(b); New York, N.Y. Code of Jud. Conduct Canon 5(A)(4)(d)(ii); North Dakota, N.D. Code of Jud. Conduct Canon 5(A)(3)(d)(ii); Ohio, Ohio Code of Jud. Conduct Canon 7(B)(2)(d); Oklahoma, Okla. Code of Jud. Conduct Canon 5(A)(3)(d)(ii); Rhode Island, R.I. Code of Jud. Conduct Canon 5(A)(3)(d)(ii); South Carolina, S.C. Code of Jud. Conduct Canon 5(A)(3)(d)(ii); South Dakota, S.D. Code of Jud. Conduct Canon 5(A)(3)(d)(ii); Tennessee, Tenn. Code of Jud. Conduct Canon 5(A)(3)(d)(ii); Vermont, Vt. Code of Jud. Conduct Canon 5(B)(4)(b); Washington, Wash. Code of Jud. Conduct Canon 7(B)(1)(c)(ii); West Virginia, W. Va. Code of Jud. Conduct Canon 5(A)(3)(d)(ii); and Wyoming, Wyo. Code of Jud. Conduct Canon 5(A)(3)(d)(ii).

From sections 2a–3a: The following states use other language in restricting speech in judicial elections: Alabama, Ala. R. Jud. Ethics Canon 7(B)(1)(c) ("A candidate for judicial office...shall not announce in advance the candidate's conclusions of law on pending litigation."); Colorado, Colo. Code of Jud. Conduct Canon 7(B)(1)(c) ("A judge who is a candidate for retention in office...should not...announce how the judge would rule on any case or issue that might come before the judge."); Missouri, Mo. Code of Jud. Conduct Canon 5(B)(1)(c) ("A candidate, including an incumbent judge, for a judicial office...shall not ... announce views on disputed legal issues."); Montana, Mont. Canons of Jud. Ethics Canon 30 (A candidate for judicial position should not make or suffer others to make for him, promises of conduct in office which appeal to the cupidity or prejudices of the appointing or electing power; he should not announce in advance his conclusions of law on disputed issues to secure class support, and he should do nothing while a

candidate to create the impression that if chosen, he will administer his office with bias, partiality or improper discrimination.); New Mexico, N.M. Code of Jud. Conduct Rule 21-700(B)(4)(c) ("Candidates for election to judicial office...shall not...announce how the candidate would rule on any case or issue that may come before the court."); Ohio, Ohio Code of Jud. Conduct Canon 7(B)(2)(e) ("A judge or judicial candidate shall not do any of the following:...Comment on any substantive matter relating to a specific pending case on the docket of a judge"); Texas, Tex. Code of Jud. Conduct Canon 5(1) (A judge or judicial candidate shall not make statements that indicate an opinion on any issue that may be subject to judicial interpretation by the office which is being sought or held, except that discussion of an individual's judicial philosophy is appropriate if conducted in a manner which does not suggest to a reasonable person a probable decision on any particular case.); Tex. Code of Jud. Conduct Canon 5(2)(i) (adopting the "pledges or promises" clause but stating that "a judge or judicial candidate...may state a position regarding the conduct of administrative duties"); Wisconsin, Wis. Sup. Ct. R. 60.06(3) (A judge who is a candidate for judicial office shall not make or permit others to make in his or her behalf promises or suggestions of conduct in office which appeal to the cupidity or partisanship of the electing or appointing power. A judge shall not do or permit others to do in his or her behalf anything which would commit the judge or appear to commit the judge in advance with respect to any particular case or controversy or which suggests that, if elected or chosen, the judge would administer his or her office with partiality, bias or favor).

APPENDIX 2

The MODEL CODE OF JUD. CONDUCT Canon 5(A)(1)(a)-(e) (1990) states,

A. All Judges and Candidates

(1) Except as authorized in Sections 5B(2), 5C(1) and 5C(3), a judge or a candidate for election or appointment to judicial office shall not:

(a) act as a leader or hold an office in a political organization;

(b) publicly endorse or publicly oppose another candidate for public office;

(c) make speeches on behalf of a political organization;

(d) attend political gatherings; or

(e) solicit funds for, pay an assessment to or make a contribution to a political organization or candidate, or purchase tickets for political party dinners or other functions.

APPENDIX 3

The N.M. CODE OF JUD. CONDUCT § 21-700(B) (1995) states,

B. Candidates for election to judicial office. Candidates for election to judicial office in partisan, non-partisan and retention elections, including judges, lawyers and nonlawyers, are permitted to participate in the electoral process, subject to the requirements that all candidates:

(1) shall maintain the dignity appropriate to judicial office, and should encourage members of the candidate's family to adhere to the same standards of political conduct in support of the candidate;

(2) shall prohibit public officials and employees subject to the candidate's direction or control from doing for the judge what the candidate is prohibited from doing under these rules;

(3) shall not allow any other person to do for the candidate what the candidate is prohibited from doing under these rules, except activities permitted to a campaign committee;

(4) shall not:

(a) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;

(b) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court;

(c) announce how the candidate would rule on any case or issue that may come before the court; or

(d) misrepresent the candidate's identity, qualifications, present position or other material fact;

(5) may speak at public meetings, subject to these rules;

(6) may use advertising that does not contain any misleading contents, provided that the advertising is within the bounds of proper judicial decorum and does not, in nonpartisan elections, contain any reference to the candidate's affiliation with a political party; and

(7) may respond to personal attacks or attacks on the candidate's record as long as the response does not violate Paragraph B(4) of this rule.

APPENDIX 4

The N.M. CODE OF JUD. CONDUCT § 21-800 (1995) states,

A judge shall refrain from campaign fund-raising activity which has the appearance of impropriety.

A. Contributions creating appearance of impropriety. Candidates for judicial office in both partisan and retention elections shall refrain from campaign fund-raising activity which has the appearance of impropriety, and shall not accept any contribution that creates an appearance of impropriety.

B. Solicitation for other campaigns and candidates. Subject to the restrictions of this rule, candidates in both partisan and retention elections for judicial office may solicit contributions for their own campaigns, but shall not solicit funds for any other political campaign, or for any candidate for any other office. Judicial candidates may run for election as part of a slate of judicial candidates and may participate in joint fund-raising events with other judicial candidates.

C. Campaign committees. Candidates in both partisan and retention elections shall establish committees of one or more responsible persons to conduct campaigns for the candidate using media advertisements, brochures, mailings, candidate forums and other means not prohibited by law or these rules. Campaign committees may solicit and accept reasonable campaign contributions, and obtain public statements of support in behalf of the candidate, subject to the restrictions of these rules. All campaign contributions shall be paid or turned over to the campaign committee, and shall be managed and disbursed by the committee. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

D. Unopposed candidates in partisan elections. Candidates in partisan elections for judicial office who have a campaign fund, but who are unopposed or become unopposed in the campaign, shall return all unused and uncommitted campaign funds pro rata to the contributors of the funds, or donate the funds to a charitable organization, or to the State of New Mexico, as the candidate may choose, with disbursement of such funds to occur within thirty (30) days after the absence of opposition becomes known.

E. Unused campaign funds. A candidate for judicial office in either a partisan or retention election who has unused campaign funds remaining after election, and after all expenses of the campaign and election have been paid, shall refund the remaining funds pro rata to the campaign contributors, or donate the funds to a

charitable organization, or to the State of New Mexico, as the candidate may choose, within thirty (30) days after the date the election results are certified.

F. Contributions by attorneys and litigants. Candidates for judicial office, in both partisan and retention elections, shall not personally solicit or personally accept campaign contributions from any attorney, or from any litigant in a case pending before the candidate. Contributions from attorneys and litigants shall be made only to a campaign committee, and are subject to all the requirements of this rule. Campaign committees may solicit contributions from attorneys. Campaign committees shall not knowingly solicit a contribution from a litigant whose case is then pending before the candidate. Campaign committees shall not disclose to the judge or candidate the identity or source of any funds raised by the committee. If a case is pending before any candidate for the judicial office being contested, restrictions of this subparagraph apply to all candidates for that office.