



UNC
SCHOOL OF LAW

FIRST AMENDMENT LAW REVIEW

Volume 1 | Issue 1

Article 9

3-1-2003

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Recommended Citation

Kara A. McCraw, *Judicial Campaign Speech and Fundraising: Will Republican Party of Minnesota v. White Be a Catalyst for Reform*, 1 FIRST AMEND. L. REV. 177 (2017).

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Judicial Campaign Speech and Fundraising: Will *Republican Party of Minnesota v. White* Be a Catalyst for Reform?

Kara A. McCraw*

INTRODUCTION

Ohio citizens this past fall witnessed one of the most expensive campaigns in the history of judicial elections, with nearly ten million dollars spent by candidates and third parties in the quest for four seats.¹ The barrage of advertising accompanying the heavy fundraising was so vitriolic that the Ohio State Bar Association created a commission to monitor the ads.² The need for an impartial and independent judiciary in a legitimate political system was recognized long before the formation of the United States³ and embraced by the founders of this nation.⁴ In recent decades, events such as the ones in Ohio have created unease with judges, the bar, and the general citizenry.⁵ The more costly and competitive elections for judicial seats and the increased role of special interest groups in judicial campaigns have created the perception of impartiality in state judges.⁶ Announce clauses⁷ in

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1. Molly McDonough, *Money and the Bench, Ohio Groups Sling Cash, Mud in Judicial Election Campaign* (Nov. 1, 2002), at WL 42 A.B.A. J. E-Report 3.

2. *Id.*

3. See David Barnhizer, "On the Make": *Campaign Funding and the Corrupting of the American Judiciary*, 50 CATH. U. L. REV. 361, 371 (2001) (noting that Plutarch recognized the corruption of the judiciary as a key factor in the decline of the Roman Republic).

4. See THE FEDERALIST No. 78 (Alexander Hamilton). Hamilton argues that "[t]he complete independence of the courts is peculiarly essential in a limited Constitution." *Id.*

5. See Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POL'Y 273, 275-76 (2002).

6. See Richard Briffault, *Public Funds and the Regulation of Judicial Campaigns*, 35 IND. L. REV. 819, 819 (2002) ("[E]lections that were once 'low-key affairs, conducted with civility and dignity,' have become increasingly politicized, marked by heated charges and sharp criticisms of the records and decision of sitting judges.").

state Codes of Judicial Conduct that limit the issues on which a campaigning judge may speak have long been employed by many states to address such concerns.⁸ However, such clauses may no longer be an available means for ensuring judicial impartiality in light of the recent decision by the United States Supreme Court in *Republican Party of Minnesota v. White*, which held that the announce clause in Minnesota's Judicial Canon violates the First Amendment.⁹ The elimination of announce clauses restricting judicial election speech raises significant concerns about the perception of judicial impartiality, especially in light of the current controversy surrounding judicial fundraising.¹⁰

Part I of this Note reviews the background of the announce clause in Judicial Canons and lower court interpretations of their constitutionality.¹¹ Part II analyzes the *White* decision regarding the role of the state judiciary and its connection to the elective selection method.¹² Part III examines this decision in light of the current climate of judicial elections, provides an overview of the potential impacts of the ruling on judicial fundraising, and offers a brief survey of possible solutions for reconciling these concerns.¹³

I. THE ROAD TO *WHITE*: PAST CHALLENGES TO ANNOUNCE CLAUSES

The selection of judges at the state level in the United States varies widely, with thirty-eight of the fifty states using

7. See *infra* note 20 and accompanying text for a description of an announce clause.

8. See Plymouth Nelson, *Don't Rock the Boat: Minnesota's Canon 5 Keeps Incumbents High and Dry While Voters Founder in a Sea of Ignorance*, 28 WM. MITCHELL L. REV. 1607, 1614–17 (2002).

9. *Republican Party of Minn. v. White*, 122 S.Ct. 2528, 2542 (2002).

10. See Amy Longo, *Supreme Court Enlarges Scope of Permissible Speech by Judicial Candidates*, *Litigation News*, Nov. 2002, at 2 (“White will exacerbate the growing influence of fundraising on judicial elections.” (quoting Deborah Goldberg, Deputy Director of the Democracy Program at the Brennan Center for Justice)).

11. See *infra* notes 14–48.

12. See *infra* notes 49–96.

13. See *infra* notes 97–127.

elections for selection or retention of some of their judges.¹⁴ The format of such elections varies considerably among the states. Elections are the initial selection method for the judiciary in twenty-one states, with slightly more than half using non-partisan ballots and the rest holding partisan elections.¹⁵ Some states use elections to select both appellate and trial court seats; other states use elections to select only one type of seat.¹⁶ A number of states use elections exclusively for retention rather than primary selection, allowing, in effect, a voter referendum after appointment for a certain term of office.¹⁷ As nearly four-fifths of the states use elections in some form, the issue of free speech in such races has a nationwide impact.

Since the drafting of the American Bar Association's [ABA] first Canon of Judicial Ethics in 1924, various clauses have been adopted by states to regulate appropriate campaign conduct, including the content of campaign speech.¹⁸ Two versions of the Model Code are widely used in a majority of the states.¹⁹ The 1972 version of the Model Code contains an "announce clause" stating that a candidate for judicial office should not "announce his or her views on disputed legal or political issues."²⁰ Concerns about the constitutionality of this language prompted the ABA to

14. American Judicature Society, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS, 2 (Oct. 2002) at <http://www.ajs.org/selection/Jud%20Sel%20Chart-Oct%202002.pdf>. There are three other commonly used methods of selection—merit selection, executive appointment or legislative appointment. *Id.* Sixteen states use a form of merit commission to select their judges; however, the composition of the membership of these commissions varies widely from state to state. *Id.* Selection by the legislature or executive without the use of a nominating commission is employed by five states. *Id.* Finally, nine states use some combination of approaches to select their judicial branches. *Id.* No state uses the federal model in its entirety for selection and retention of judges. *Id.*

15. *Id.*

16. *Id.* at 3–9.

17. *Id.*

18. See Robert M. O'Neil, *The Canons in the Courts: Recent First Amendment Rulings*, 35 IND. L. REV. 701, 701 (2002).

19. See Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS, 1059, 1065 (1996).

20. MODEL CODE OF JUDICIAL CONDUCT Canon 7(B)(1) (1972) (amended 1990).

revise the provision in its 1990 version of the Model Code.²¹ The reworded clause instructs candidates to refrain from 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.”²² Additionally, both versions of the Model Code contain provisions frequently referred to as the “pledges and promises” clause, that explicitly forbid candidates to make specific pledges or promises regarding the outcome of cases.²³

The revised announce clause in the 1990 Model Code did not allay concerns about the limits imposed by this restriction on speech. The provision was quickly challenged in a number of states which had adopted the revised language, beginning in Florida in 1990.²⁴ In *ACLU v. Florida Bar*, the Florida Code of Judicial Conduct, which used the revised version of the announce clause, was challenged on First Amendment grounds as a content-based restriction on candidate speech.²⁵ The United States District Court for the Northern District of Florida, using a strict scrutiny analysis, enjoined the use of the clause on the grounds that such a provision was not the least restrictive means available for the state to ensure the compelling interest of an impartial judiciary.²⁶

The ruling in *ACLU* was followed by a series of challenges in other states to both the “announce” and “pledge and promise” provisions.²⁷ As federal and state courts began to enjoin use of both clauses in the early 1990s, some distinctions began to emerge in the rulings.²⁸ Some courts upheld Canon provisions for

21. See Nelson, *supra* note 8, at 1615–1616.

22. MODEL CODE OF JUDICIAL CONDUCT Canon 5 (A)(3)(d)(ii) (1990).

23. See MODEL CODE OF JUDICIAL CONDUCT Canon 5 (A)(3)(d)(i) (1990); MODEL CODE OF JUDICIAL CONDUCT Canon 7 (B)(1) (1972) (amended 1990).

24. See *ACLU v. Florida Bar*, 744 F. Supp. 1094, 1096 (N.D. Fla. 1990).

25. *Id.*

26. *Id.* at 1097–99.

27. See Shepard, *supra* note 19, at 1070–74.

28. See *Beshear v. Butt*, 773 F. Supp. 1229, 1231, 1234 (E.D. Ark. 1991) (enjoining enforcement of Canon 7 of the Arkansas Code of Judicial Conduct for campaign promise by judicial candidate to not permit plea bargaining if elected) *rev'd*, 966 F.2d 1458 (8th Cir. 1992), *remanded to* 863 F.Supp. 913, 918 (E.D. Ark. 1994) (enjoining enforcement of Canon 7 against the judicial candidate); *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953, 953–54 (Ky. 1991) (finding for judicial candidate subjected to disciplinary action for criticisms of previously

adjudicatory pledges, but enjoined Code provisions that restricted speech regarding administrative promises.²⁹ This trend for upholding broader announce clause provisions turned again after the 1993 Seventh Circuit decision, *Buckley v. Illinois Judicial Inquiry Board*.³⁰ The Seventh Circuit held that the announce clause was unconstitutional in preventing a candidate from promoting his past record of decisions in specific types of cases.³¹ Like many of the earliest decisions regarding the provisions, the court posited that such prohibitions were overbroad, preventing virtually any comment from a candidate.³² Such restrictions during election time “would deprive the audience of the show,” preventing voters from obtaining relevant information about candidates.³³ As a result, the restriction failed to pass a strict scrutiny analysis.³⁴

The United States Supreme Court resolved the dispute among lower courts during the 2002 term in *Republican Party of Minnesota v. White*.³⁵ Gregory Wersal, a Minnesota attorney, first ran for a position on the Minnesota Supreme Court in 1996.³⁶ In the course of the election, he criticized several decisions of that court on issues such as crime, welfare and abortion.³⁷ These criticisms were challenged as violations of Minnesota’s announce

decided cases, specific legal rules and standard of review in worker’s compensation cases).

29. See *Ackerson v. Ky. Judicial Retirement & Removal Comm’n*, 776 F. Supp. 309, 315–16 (W.D. Ky. 1991) (enjoining enforcement of Arkansas Code of Judicial Conduct with regards to candidate’s campaign promises on administrative improvements but upholding Code with regards to discussion of general legal issues); *Stretton v. Disciplinary Bd.*, 763 F. Supp. 128, 139 (E.D. Pa. 1991) (enjoining enforcement of Pennsylvania Code of Judicial Conduct Canon which prevented comment on disputed legal or political issues), *aff’d in part and vacated in part by*, 944 F.2d 137, 143–44 (3d Cir. 1991) (upholding Canon as narrowly construed on basis of compelling interest of state in judicial quality and integrity).

30. *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224 (7th Cir. 1993).

31. *Id.* at 231.

32. See *id.* at 228–29.

33. See *id.* at 229.

34. *Id.* at 229.

35. 122 S.Ct. 2528 (2002).

36. *Id.* at 2531.

37. *Id.*

clause, and although subsequently dismissed, resulted in Wersal's withdrawal from the race.³⁸ Wersal made a second attempt for the same office in 1998,³⁹ and sought an advisory opinion from the supervising Lawyers Board to determine what views he could safely announce at the start of his campaign.⁴⁰ The Board refused the request on the grounds that Wersal had not given any specific examples of announcements upon which the Board could rule.⁴¹ Wersal then filed suit in Federal District Court seeking an injunction against enforcement of the clause and challenging its constitutionality as a violation of the First Amendment.⁴²

In a five to four decision, the Court held that the announce clause in the Minnesota Code of Judicial Conduct⁴³ violated the First Amendment guarantee of free speech.⁴⁴ Justice Scalia, writing for the plurality, interpreted the announce clause broadly, arguing that the clause prohibited a judicial candidate "from stating his views on any specific nonfanciful legal question within the province of the court for which he is running," with only a few exceptions, such as past decisions.⁴⁵ Justice Scalia emphasized that election speech has continuously been recognized as a core First Amendment freedom which merits the highest protection from governmental intrusion.⁴⁶ In applying a strict scrutiny analysis, Justice Scalia concluded that the provision was not narrowly tailored enough to serve the compelling state interests of either judicial impartiality or the public perception of judicial impartiality.⁴⁷ The ruling was limited to the Minnesota announce

38. *Id.*

39. *Id.* at 2531–2532.

40. *Republican Party of Minn. v. White*, 122 S.Ct. 2528, 2532 (2002).

41. *Id.*

42. *Id.*

43. *See id.* at 2534 n.5. The announce clause in question, Minn. Code of Judicial Conduct, Canon 5(A)(3)(d)(i) (2000), adopts the language of the 1972 Model Code. *Id.* Oral arguments by the respondents suggested that this earlier version was no broader in scope than the more specific 1990 revision. *Id.* However, the Court noted that the constitutional analysis did not turn on this distinction. *Id.*

44. *Id.* at 2542.

45. *Republican Party of Minn. v. White*, 122 S.Ct. 2528, 2534 (2002).

46. *See id.* at 2538.

47. *See id.* at 2535.

clause and did not address the unchallenged “pledges and promises” prohibition in the Minnesota Code.⁴⁸

II. THE CONSTITUTIONALITY OF ANNOUNCE CLAUSES UNDER *WHITE*

The First Amendment has been construed by the courts to indicate that campaign speech deserves the “highest protection,” as that speech is at the root of the American system of government.⁴⁹ Such a strong commitment to election speech, repeatedly upheld in races involving executive and legislative offices, faces a unique challenge with regard to the judicial branch.⁵⁰ As discussed in this section, varying perceptions on the nature of the elected office in *White* clearly divide the members of the Court on this issue. As sitting Justices on the highest court in the nation, all nine are familiar with the responsibilities of a judge as a neutral arbiter of

48. See *id.* at 2532, 2554–59 (Ginsburg, J. dissenting). The “pledges and promises” provision formed a large part of Justice Ginsburg’s dissent. She argued that the two provisions operated in tandem. *Id.* The announce clause was essential if the pledges and promises provision, a prohibition all parties agreed was necessary, was essential. *Id.* Eliminating this provision opened the door for candidates to “announce” their views in a thinly-disguised promise to rule in a particular fashion upon election. *Id.*

49. See *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 222–23 (1989) (“We have recognized repeatedly that ‘debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution.’ Indeed, the First Amendment ‘has its fullest and most urgent application’ to speech uttered during a campaign for political office.”) (internal citations omitted); *Brown v. Hartlage*, 456 U.S. 45, 52–54 (1982) (internal citations omitted). The Court stated in *Brown*:

[I]f it be conceded that the First Amendment was ‘fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people,’ then it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office. The political candidate does not lose the protection of the First Amendment when he declares himself for public office.

Id.

50. See Behrens, *supra* note 5, at 277–78. Behrens and Silverman argue, “[E]lections threaten judicial independence by pressuring judges to follow the will of the majority, which may run counter to the rule of law.” *Id.*

the law. However, only two, Justices Souter and O'Connor, have experience as state court judges, and only one, Justice O'Connor, was elected to a state judicial post.⁵¹ This knowledge of the responsibilities of the bench, but unfamiliarity with the unique role of state judges, produces a fractured decision that provides no guidance to states on how to ensure impartiality in the increasingly costly and contentious world of judicial elections. *White* provides no clear majority analysis as to what type of restriction, if any, would satisfy a strict scrutiny analysis and legitimize the recognized state interest in regulating speech in judicial elections.

A. *The Majority*

Five Justices joined together to hold that Minnesota's announce clause is a violation of the First Amendment.⁵² Three Justices reached this conclusion by finding that the clause was not narrowly tailored to meet the compelling interests of impartiality advanced by the state.⁵³ In reaching this conclusion, Justice Scalia adopted a narrow definition of impartiality: the "lack of bias for or against either party to the proceeding . . . equal application of the law."⁵⁴ This definition recognized only the obligation of a judge to ensure due process,⁵⁵ and rejected the more expansive definitions of impartiality as a "lack of preconception in favor of or against a particular legal view,"⁵⁶ or a judge's open-minded "willingness to consider views that oppose his preconceptions, and remain open to persuasion."⁵⁷ Using this restricted definition, Justice Scalia

51. See *Biographies of Current Members of the Supreme Court*, at <http://www.supremecourtus.gov/about/biographiescurrent.pdf>. Justice Souter served by appointment on the Supreme Court of New Hampshire. Justice O'Connor was elected as a Superior Court judge in Arizona prior to appointment on the Arizona Court of Appeals. *Id.*

52. See *Republican Party of Minn. v. White*, 122 S.Ct. 2528, 2535 (2002). Justice Scalia authored the majority opinion and was joined by Chief Justice Rehnquist and Justice Thomas. Justices O'Connor and Kennedy filed concurring opinions reaching the holding through different analysis.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 2536.

57. *Republican Party of Minn. v. White*, 122 S.Ct. 2528, 2536–37 (2002).

determined that the announce clause was not sufficiently narrowly tailored to pass the strict scrutiny analysis required by a challenge to the fundamental right of campaign speech.⁵⁸

This narrower definition of impartiality reflected Justice Scalia's view that state judiciaries play a broad role as policymakers, and thus their election serves a purpose similar to those for legislature and executive offices. Justice Scalia noted that, "[n]ot only do state-court judges possess the power to 'make' common law, but they have immense power to shape the States' constitutions as well Which is precisely why the election of state judges became popular."⁵⁹

This acknowledgment of the unique role of the state judiciary was echoed in Justice Kennedy's concurrence. Justice Kennedy recognized the right of states to select judges in a manner that suits their judicial needs.⁶⁰ He noted that the Court should refrain from criticism of the states' selection methods, because such criticism "implicitly condemns countless elected state judges . . . without warrant."⁶¹ Justice Kennedy went even further than the majority in recognizing the unique role of state judges, when he stated that no traditional exception would justify content-based restrictions on judicial election speech.⁶²

The historical record and state governmental structure supports the majority view of the role of state judges as policy-

58. *Id.* at 2535.

59. *Id.* at 2539–40. This argument is further put into context by the statement immediately preceding: "This complete separation of the judiciary from the enterprise of 'representative government' might have some truth in those countries where judges neither make law themselves not set aside the laws enacted by the legislature. It is not a true picture of the American system." *Id.*

60. *Id.* at 2545–46.

61. *Id.* at 2545–46. Justice Kennedy concludes that many state judges, "despite the difficulties imposed by the election system, have discovered the law of enlightenment, instruction, and inspiration that make them independent-minded and faithful jurists of real integrity." *Id.*

62. *Republican Party of Minn. v. White*, 122 S.Ct. 2528, 2544 (2002). Justice Kennedy argues 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 to the First Amendment recognized by the Court." *Id.*

makers. The development of judicial elections, an outgrowth of the Jacksonian period of democratic reform, first began in Mississippi in 1812.⁶³ In colonial times, judges traditionally were appointed either through the executive and legislative branches or some process of joint selection between the two branches.⁶⁴ Scholars of the late nineteenth century attributed the change in selection of judges to the sentiment and emotion of the early 1800s, where many traditionally-appointed offices were converted to elected positions to ensure the power of the people.⁶⁵ However, more modern scholars have insisted that the real inclination behind the move to an elected third branch was, in fact, to ensure the impartiality of the judiciary from the legislative and executive branches, which many at the time feared had grown too powerful.⁶⁶

The decision by many states to reject the federal model and subject their judiciary to periodic elections also suggests that a primary concern was making the judiciary politically responsive to the people.⁶⁷ Elected state judges were not intended by their states to be independent in the same manner as the federal judiciary; rather, they were intended to be autonomous of the other branches, while maintaining accountability to the people.⁶⁸

The need for greater responsiveness at the state level was directly related to the larger policy-making role of state judges in their routine development of substantive common law, a task not shared by federal courts.⁶⁹ The fact that the state judiciary is at

63. See Kelley Armitage, *Denial Ain't Just A River In Egypt: A Thorough Review of Judicial Elections, Merit Selection and the Role of State Judges in Society*, 29 CAP. U. L. REV. 625, 629 (2001).

64. *Id.* at 628–29.

65. See Caleb Nelson, *A Reevaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 190–91 (1993).

66. *Id.* at 193.

67. *Id.* at 198.

68. *Id.* at 196–97.

69. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 77 (1938).

Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of

times another policy-making branch lends credence to the decision to elect these individuals.⁷⁰

In addition to their function as makers of common law, state courts often occupy a more active, less restrained role in state government than the federal judiciary. Unlike federal courts, some state judiciaries issue advisory opinions,⁷¹ author public statements on constitutional rights,⁷² and perform administrative functions beyond those handled by the federal courts.⁷³ Many judiciary clauses in state constitutions lack the language in Article III of the United States Constitution, which limits justiciability of the federal courts through the “case or controversy” requirement.⁷⁴ While all fifty states have adopted a similar model of three branches subject to checks and balances, they do not mirror precisely those of the federal government.⁷⁵ Thus, state judiciaries have a more active

federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.

Id.

70. Michael DeBow et al., *Judicial Selection White Papers: The Case for Partisan Judicial Elections*, The Federalist Society at <http://www.fed-soc.org/Publications/White%Papers/judiciaelection.htm> (last visited March 15, 2003) (on file with the First Amendment Law Review).

71. See *Advisory Opinions on the Constitutionality of Statutes*, 69 HARV. L. REV. 1302, 1303 (1956) (noting that at least nine state courts issue advisory opinions authorized by constitutional or statutory provision).

72. Helen Hershoff, *State Courts and the “Passive Virtues”*: Rethinking the Judicial Function, 114 HARV. L. REV. 1834, 1875–76 (2001).

73. *Id.* at 1836–37.

74. *Id.* at 1879–80. This limitation on the federal judiciary, with its unique shield of lifetime appointment, is necessary in the structure of the federal separation of powers. See *Allen v. Wright*, 468 U.S. 737, 750 (1984).

75. Rogan Kersh, Suzanne B. Mettler, Grant D. Reeher & Jeffery M. Stonecash, “*More a Distinction of Words Than Things*”: The Evolution of Separated Powers in the American States, 4 ROGER WILLIAMS U.L. REV. 5, 9 (1998). See also *Risea v. Thompson*, 930 F. 2d 549, 552 (7th Cir. 1991).

[T]he Constitution does not require a state to imitate the separation of powers prescribed for the federal government by the Constitution. It therefore does not

and broader role in state governance, checked by increased political accountability, while federal courts operate in a more restricted role, but are not subject to the political pressures of state judges.

The role of state courts presented by the majority, while accurately reflecting the nature of state judiciaries as distinct from federal, is not entirely complete, as the dissenters in *White* illustrated. Five members of the court clearly exhibited some discomfort with the role of the judge as a political actor.⁷⁶

B. *The Dissent*

The tension created by requiring a judge to fill the role of both impartial decision-maker and political creature led the dissenters to insist that this very dichotomy compelled removal of judicial elections from the realm of the fundamental protection of election speech provided in the First Amendment.⁷⁷ Both Justices Stevens and Ginsburg stressed in their dissents that the premise of a judgeship being the same as any other political office was fundamentally flawed.⁷⁸

require a state to allocate powers among the branches of state government in the same manner in which the Constitution prescribes that allocation among the branches of the federal government.

Id. (internal citations omitted).

76. See *Republican Party of Minn. v. White*, 122 S.Ct. 2528 (2002) (O'Connor, J., concurring, Ginsburg, J. and Stevens, J., dissenting, joined by Breyer, J. and Souter, J.).

77. *Id.* at 2551 (Ginsburg J. dissenting) ("Thus the rationale underlying unconstrained speech in elections for political office—that representative government depends on the public's ability to choose agents who will act at its behest—does not carry over to campaigns for the bench.").

78. *Id.* at 2546 (Stevens, J. dissenting) ("Elected judges, no less than appointed judges, occupy a position of trust that is fundamentally different from that occupied by policymaking officials."). See also *id.* at 2550 (Ginsburg, J. dissenting) ("Whether state or federal, elected or appointed, judges perform a function fundamentally different from that of the people's elected representatives.").

Justice Stevens' dissent focused on the unique aspect of the judicial office in comparison with other elected officials.⁷⁹ He argued that past decisions by the Court have required a disinterested judiciary.⁸⁰ He noted that throughout the Anglo-American legal tradition, judges have been held as critically different from other public officials, as the issues they are called upon to decide (issues of law and fact) should not be made upon the basis of popular opinion, but upon the rule of law.⁸¹ "[I]ssues of policy are properly decided by majority vote; it is the business of legislators and executives to be popular."⁸²

Justice Ginsburg focused on the special role of courts in the government structure, arguing that judges are not "political actors" and that Minnesota's system of judicial selection did not intend to make them so.⁸³ Echoing Justice Stevens' contention, Justice Ginsburg noted that rather than representing a constituency, judges represented the law.⁸⁴ A judge's mission is to "decide individual cases and controversies on individual records, neutrally applying legal principles and when necessary, 'stand[ing] up to what is generally supreme in a democracy: the popular will.'"⁸⁵

Like the majority analysis, there is also historical support for the view presented by the dissenters. The possibility of impartiality in an elected judiciary was contemplated by many of the earliest state conventions that instituted elections at the state level.⁸⁶ Most concluded that the need to run for office would not create an inherent bias in the judiciary because of the unique role

79. *Id.* at 2548.

80. *Republican Party of Minn. v. White*, 122 S.Ct. 2528, 2549 (2002) (Stevens, J. dissenting). Justice Stevens further notes that judges do not serve constituencies in the same manner as other public officials: "The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. The 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)).

81. *Id.* at 2547.

82. *Id.* at 2547.

83. *Id.* at 2551–53 (Ginsburg, J. dissenting).

84. *Id.* at 2550.

85. *Republican Party of Minn. v. White*, 122 S.Ct. 2528, 2549 (2002) (Ginsburg, J. dissenting).

86. *See Nelson, supra* note 65, at 194–97.

of the judge.⁸⁷ Debates at these conventions reveal that most delegates perceived a difference in the roles of the legislature and judiciary.⁸⁸ Members of the general assemblies were expected to express positions on issues and then presumably to follow those positions in representing the citizens.⁸⁹ A judge was viewed less as a creator, like the legislator, and more as a scientist or engineer, working with a concrete set of rules to apply fairly and impartially the laws as written.⁹⁰ Thus, the records of the debates of the inception of judicial elections serve to support the dissenters' views of a judiciary with an inherently different role than the more policy-oriented legislature.

In addition to the views of the dissenters, Justice O'Connor's concurrence took issue with the majority view of the judge as a political actor. Although she joined the majority in *White*, she wrote a separate concurrence focusing on what she perceived as the inherent impartiality created by the existence of judicial elections, which undermined the state's alleged compelling interest in regulating speech in those races.⁹¹ She defined impartiality as "being free from any personal stake in the outcome of the cases to which [judges] are assigned."⁹² However, she argued that regular elections force judges to perceive they in fact do have a stake in every highly-publicized case decided because of the potential impact on their re-election prospects.⁹³ She joined the majority on the basis that Minnesota opted to use a method of selection which inherently resulted in bias and could not, therefore, rely on a compelling interest of preventing bias to justify burdening free speech.⁹⁴

87. *Id.* at 210–14.

88. *Id.*

89. *Id.* at 211.

90. *Id.*

91. *Republican Party of Minn. v. White*, 122 S.Ct. 2528, 2544 (2002) (O'Connor, J. concurring) ("If the State has a problem with judicial impartiality, it is largely one the state brought upon itself by continuing the practice of popularly electing justices.").

92. *Id.* at 2542.

93. *Id.*

94. *Id.* at 2544.

C. *The Road Ahead*

These differing lines of analysis by members of the Court leave no clear roadmap for states that wish to prevent potential due process concerns and to preserve the impartiality of the judiciary in a broader sense than defined by Justice Scalia's opinion. Justice O'Connor's opinion suggested that states can never argue they have a compelling interest in impartiality as long as they use elections as a selection method. Justice Kennedy's opinion also took the extreme stance that no encumbrance on the content of a judicial candidate's speech would ever be acceptable. His position contrasts with the much broader view taken by the dissenters that the state had a compelling interest in preserving judicial impartiality in light of the unique role of judges as impartial arbiters of the law. Finally, Justice Scalia's opinion leaves some possibility that a state could regulate speech to preserve the impartiality of the judiciary. His opinion recognized the legitimacy of judicial elections, but did not go so far as to indicate that judicial and legislative elections were identical.⁹⁵ Rather, his holding is limited to ensuring a strict scrutiny analysis for regulation of speech in judicial election campaigns.⁹⁶

III. JUDICIAL ELECTIONS IN THE WAKE OF *WHITE*

The *White* Court clearly held that announce clauses fail to pass constitutional muster as a method of regulating judicial elections. Beyond this, however, the divided Court provided no clear directions to states on how to handle key issues raised by the elimination of such speech restrictions. One of the most pivotal of these key issues is the closely-connected concern of judicial fundraising.⁹⁷

95. *Id.* at 2539.

96. *Republican Party of Minn. v. White*, 122 S.Ct. 2528, 2539 (2002).

97. *See id.* at 2554–59 (Ginsburg, J. dissenting). This paper does not address the potential increase in due process violations addressed by Justice Ginsburg's dissenting opinion. Justice Ginsburg argues that commitment of judges to an issue, whether in general terms or explicit promises, creates a due process violation if the judge is later called upon to rule on that issue. *Id.* For further discussion of this issue, *see generally* Barnhizer, *supra* note 3. Barnhizer

A. *The Growing Problems in Judicial Fundraising*

The funding of judicial elections has become a major concern for many members of the legal community and the citizenry as a whole as the cost of judicial elections has rapidly risen.⁹⁸ Fundraising for judicial seats has skyrocketed in the most recent campaign cycles.⁹⁹ Whether or not there is an actual impact on judicial decisions as costs have risen, citizens' perceptions of the impact of campaign contributions have arguably undermined the impartiality of the judiciary.¹⁰⁰ Judges are also aware of the

suggests one solution could be to adopt more liberal rules and statutes that provide further opportunities for recusal of judges, to address due process concerns, or to require disqualification of a judge in cases where the issue statements during the campaign cast doubt on the judge's ability to rule impartially. *Id.* He further notes that such a remedy would increase judicial costs and could be construed as electoral fraud for failing to carry out the voters' wishes in selecting members for the bench whose rulings would reflect certain positions on issues. *Id.*

98. See Barnhizer, *supra* note 3, at 361.

99. Terry Carter, *Footing the Bill for Judicial Campaigns, North Carolina Enacts Law for Public Financing of Judicial Elections* (Oct. 18, 2002), at WL 40 A.B.A. J. E-Report 1. Carter reports that during the 2000 election cycle, nationwide fundraising for judicial campaigns rose to more than \$45 million, a sixty-one percent increase over the 1998 elections. *Id.* See also McDonough, *supra* note 1. McDonough indicates that results from 2002 campaigns are likely to be even higher, with initial reports from races for four seats on the Ohio Supreme Court indicating that \$5.5 million had been raised by candidates in that state alone. *Id.*

100. See Barnhizer, *supra* note 3, at 370–71. Surveys of voters have indicated that this is a common perception. See *Justice at Stake Frequency Questionnaire 7*, at <http://www.justiceatstake.org/files/JASNationalSurveyResuts.pdf>. This 2001 survey of voters found two-thirds of respondents believed favorable judicial treatment was received by litigants who made contributions to a judge's candidacy. *Id.* The same survey found that seventy-six percent of voters thought campaign contributions influenced the outcome of judicial decisions. *Id.* See also National Center for State Courts, *How the Public Views the State Courts: A 1999 National Survey 8*, at http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicViewCrtsPub.pdf. This 1999 survey revealed similar responses, where seventy-eight percent of those surveyed believed that elected judges were influenced by having to

growing importance of fundraising and the potential for impartiality it can create.¹⁰¹

There are two possible outcomes of the interaction between fundraising and the broader judicial election speech now permitted by *White*. Arguably, in striking down the announce clause provision, the Supreme Court's decision may cure some of the concerns about impartiality raised by judicial fundraising. As candidates make positions known, donors with similar viewpoints and policy perspectives will naturally gravitate to support like-minded candidates.¹⁰² This weakens the assertion that a contribution has swayed the judge's viewpoint, since the articulated judicial philosophy is arguably the draw for the funding rather than the funding motivating the judge's previously unknown position on an issue.¹⁰³ Some would further argue the elimination of the announce clause will make it easier for candidates to avoid financial entanglement, as they can better distinguish themselves through their personal philosophy and decrease reliance on name recognition promoted by heavy campaign spending.¹⁰⁴

raise funds for campaigns, and eighty-one percent thought that political considerations influenced judicial decisions. *Id.*

101. See *Justice at Stake—State Judges Frequency Questionnaire 4–5*, at <http://faircourts.org/files/JASJudgesSurveyResults.pdf>. This nationwide survey indicated that more than ninety percent of judges felt some to a great deal of pressure to raise money during election years. *Id.* Further, nearly a third of judges believed that campaign contributions influenced judicial decisions. *Id.* The surveyed judges were nearly equally divided on this issue, with approximately a third believing there was some to great influence, another third who believed there was little to no influence, and nearly 20 percent who were unsure. *Id.* Appellate court judges tended to be more equally divided on this issue, while trial court judges were more likely to believe there was no influence. *Id.*

102. Barnhizer, *supra* note 3, at 363.

103. See *id.* (arguing that any increase in contributions could occur only because contributors feel certain the candidates would support their positions).

104. See Marie Hojnacki and Lawrence Baum, *Choosing Judicial Candidates: How Voters Explain Their Decisions*, 75 JUDICATURE 300 (1992) (arguing that greater information on issues may decrease the current focus on non-substantive factors, such as age, race, gender, physical appearance, or name recognition gleaned primarily from the ballot, and serve to further engage voters in the process of judicial elections).

However, such openness in judicial speech is more likely to have the opposite effect. Expressing a view reinforced by like-minded funding sources creates an implicit promise to uphold such views when deliberating on the bench.¹⁰⁵ The additional element of funding in support of this position is likely to increase these commitments. In controversial areas of law such as capital punishment, evidence suggests that judges who rule, or fail to rule, in particular ways do in fact face voter wrath.¹⁰⁶ The public's awareness of rulings which contradict a judge's previously-stated positions, relied upon by voters in casting their ballots, may therefore significantly decrease chances of re-election for judges who follow the rule of law rather than their stated beliefs in determining cases.

Additionally, as costs for races continue to rise, candidates may begin to tailor issue statements solely to attract donations, making them far more subject to criticism than under the current system, where there is no explicit statement in support of the contributors' views.¹⁰⁷ Thus, more open election speech is likely to decrease the perception of fairness, if not actual impartiality, of elected judges who are viewed as captured by special interests.¹⁰⁸

In addition to the potential for bias towards certain special interest groups in judicial decision-making, many fear the pressure to announce on issues which garner public support will slant judicial deliberations toward the majority view rather than a fair and independent analysis of the law.¹⁰⁹ Some research suggests that an individual, when exposed to an audience as a judge is in an election, will attempt to act in a manner in which the audience will approve, over time developing a strong pressure from the constituency to be a dedicated advocate for their preferred

105. Brian Morris, *Free Speech in Judicial Elections*, 27 MONT. LAW 5, 7 (2002).

106. Charles F. Baird, *See Breaking the Most Vulnerable Branch: Do Rising Threats to Judicial Independence Preclude Due Process In Capital Cases?* 31 COLUM. HUM. RTS. L. REV. 123, 134 (1999).

107. Barnhizer, *supra* note 3, at 364-65.

108. *See id.* at 371.

109. *See* Neil K. Sethi, *The Elusive Middle Ground: A Proposed Constitutional Speech Restriction for Judicial Selection*, 145 U. PA. L. REV. 711, 721-22 (1997).

outcomes.¹¹⁰ Judges who announce views which appeal to the majority of the voting populace in order to win elections may find themselves over time unable to engage in neutral, detached decision-making because of their commitment to their announced positions. The United States Supreme Court recognized the possibility of unconscious judicial commitment to a position in *In re Murchinson*, which held that a judge sitting on the criminal trial of a defendant whom he had formerly indicted violated due process.¹¹¹ Such a sublimation of majority voter views in the judicial branch raises concerns about the ability to protect minority rights and impartially decide unpopular legal issues.¹¹²

B. *Solutions to the Problems of Judicial Impartiality*

If these types of negative impacts are the result of the aftermath of the *White* decision, they may serve as a catalyst for significant reform in judicial election finance. Several options exist for states who wish to approach the judicial impartiality issue through fundraising reform.

One possible solution is public financing for judicial elections. Public financing would alleviate the need for fundraising and decrease some of the negative impacts of judicial issue speech. One state, North Carolina, has recently implemented a new fundraising scheme in an attempt to mitigate some of the inherent problems of judicial fundraising.¹¹³ Unlike prior legislation in this area which enacted donation limits but maintained a direct link between contributors and candidates, this recently-enacted legislation established a fund to finance fully general judicial elections.¹¹⁴ Although participation in the fund

110. *Id.* at 722.

111. *In re Murchinson*, 349 U.S. 133, 137–38 (1955) (“Having been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused.”).

112. Sethi, *supra* note 109, at 721–722.

113. Justice at Stake Press Release, *North Carolina Adopts Public Financing For Supreme Court and Appellate Judicial Campaigns 1* (Oct. 10, 2002) at <http://faircourts.org/files/NCsigning.pdf>.

114. N.C. Gen. Stat. § 163-278 (2002). This fund will be available to candidates starting in 2004. *Id.*

program is voluntary, it provides an attractive source of funding, because the legislation also places stricter contribution limits on those who elect to raise funds privately.¹¹⁵ The legislation also addresses the issue of voter information by providing for a state-wide judicial voters' guide, including general information and brief statements by each candidate.¹¹⁶ Several other states are currently considering similar legislation.¹¹⁷ This type of reform may serve to reduce some of the problems of judicial campaign speech, as fundraising becomes a less important element of campaigns. However, the United States Supreme Court limited its regulation in the landmark case of *Buckley v. Valeo* because money is a form of speech itself.¹¹⁸ Nonetheless, limits such as those enacted by North Carolina will likely survive a constitutional challenge due to their voluntary nature.¹¹⁹

States might rather employ a system of voluntary public funding as an incentive to candidates who avoid issue speech during campaigns altogether.¹²⁰ It is unclear whether such an incentive to restrict speech would be constitutional, and such a program would have to be examined under the unconstitutional

115. See Carter, *supra* note 99.

116. *North Carolina Adopts Public Financing*, *supra* note 113, at 1.

117. *Id.* at 1-2. Interest groups, legislators, governors and members of the courts in Georgia, Idaho, Illinois, Michigan, Ohio, Texas and Wisconsin have begun to push for public financing of judicial elections in those states.

118. *Buckley v. Valeo*, 424 U.S. 1, 57 (1976).

The First Amendment denies the government the power to determine that spending to promote one's political views is wasteful, excessive or unwise. In the free society ordained by our Constitution it is not the government, but the people individually as citizens and candidates and collectively as associations and political committees who must retain control over the quantity and range of debate on public issues in a political campaign.

Id.

119. See Briffault, *supra* note 6, at 823-24 (suggesting that as long as such funding schemes are voluntary and do not force candidates to accept public funding, they will be found constitutional).

120. *Id.* at 820-21.

conditions doctrine established by the Court.¹²¹ A program conditioning the receipt of public campaign funds on a prospective candidate's willingness to abide by speech restrictions may be unconstitutional if it does not permit outside fundraising, thereby causing all of the candidate's speech to be restricted.¹²² However, a narrowly-drawn restriction, in combination with a voluntary program, might be constitutional if it does not unduly infringe on a candidate's right to free speech in light of the compelling governmental interest of judicial impartiality.¹²³

A more drastic solution for remedying the dual problems of speech and campaign finance would be to adopt Justice O'Connor's suggestion to eliminate judicial elections altogether.¹²⁴ States may consider switching from elections to a merit or appointment based system of judicial selection, which uses some combination of the executive, legislature or independent commission to select the candidates for office, sometimes followed by retention elections.¹²⁵ However, such an alternate system may not reflect the state's desire for accountability to the citizenry rather than other branches of state government.¹²⁶ Political trends suggest that such a reform may enjoy mixed popular support. Despite strong advocacy from the American Bar Association for merit-based judicial reform, no states have adopted merit selection at any level in nearly a decade.¹²⁷

121. *Id.* at 828–29. The unconstitutional conditions doctrine requires the consideration of several factors in determining if a condition attached to a subsidy in an unconstitutional constraint on speech. *Id.* These factors include whether the grant promotes governmental speech or private speech, whether the condition constitutes viewpoint discrimination, whether the condition applies to all the grantee's speech or only to the speech subsidized by the grant, and whether the grant can be said to distort a medium of expression. *Id.*

122. *Id.* at 832.

123. *See id.* at 836.

124. *Republican Party of Minn. v. White*, 122 S. Ct. 2528, 2542–44 (2002) (O'Connor, J., concurring). *See also supra* notes 91–94 and accompanying text.

125. *See Behrens, supra* note 5, at 299–300.

126. *See DeBow et al., supra* note 70.

127. *See Jona Goldschmidt, Merit Selection: Current Status, Procedures, and Issues*, 49 U. MIAMI L. REV. 1, 20 (1994).

IV. THE ROAD AFTER *WHITE*

Private action may serve to curb potential excesses in fundraising and impartiality, even though state governments may be reluctant to change due to uncertainty as to what action may be constitutional in light of *White*.¹²⁸ Initial reaction to the outcome in *White* suggests development at the state level of a more activist bar and self-policing judiciary in an attempt to preserve the integrity of the court.¹²⁹ On a national level, the President of the American Bar Association, Alfred P. Carlton, recently created the Commission on the 21st Century Judiciary to examine problems with judicial selection methods, including speech and fundraising issues.¹³⁰

Challenges to restrictions on judicial campaigns have already begun to emerge in the wake of *White*. In October of 2002, the Eleventh Circuit Court of Appeals struck down several provisions in the Georgia Canon of Judicial Conduct, including restrictions on misleading campaign speech and judicial solicitation of campaign funds, citing *White* as a basis for the ruling.¹³¹ This decision confirms that the outcome in *Republican Party of Minnesota v. White* has added an additional layer to the

128. William F. Dressel, *Judicial Independence—Free Speech Means Impartiality*, 10 Nev. Lawyer 35 (Aug. 2002). Dressel, President of the National Judicial College, suggested in reaction to the decision that judges would have to become more self-policing in their campaigns to maintain the integrity of the office. *Id.*

129. Fred Engler Jr., *Judges, Politics, and The First Amendment* (Aug. 9, 2002), available at WL 4 No. 16 Lawyers J. 4. Engler, President of the Allegheny County Bar Association, has suggested that bar associations will need to become more active in working with judicial candidates to ensure open speech does not result in a negative perception of the judiciary. *Id.* He suggested that some type of campaign finance reform for judicial elections would be necessary to ensure that the speech offered provided solid and reliable information for voters, rather than a method of attracting campaign funds, but that this might be done through voluntary agreements between the bar and judicial candidates, even if states did not pass actual legislation. *Id.*

130. McDonough, *supra* note 1.

131. *Weaver v. Bonner*, 309 F.3d 1312,1319 (11th Cir. 2002). See also David L. Hudson Jr., *Georgia Judicial Candidates Free to Speak, Federal Appeals Court Strikes Campaign Speech Regulations* (Oct. 25, 2002), at WL 41 A.B.A. J. E-Report 2.

current uncertain climate of judicial selection.¹³² The decision will likely have a significant effect on judicial fundraising and exacerbate the public's negative perception of elections.¹³³ As a result, despite the lack of direction from the Court, the uncertainty and dissatisfaction of judges, the bar, and citizens may spark crucial changes in judicial elections.¹³⁴

132. *See supra* notes 49–96 and accompanying text.

133. *See supra* notes 97–112 and accompanying text.

134. *See supra* notes 128–130 and accompanying text.

