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A MATTER OF PERSPECTIVE

THE HONORABLE PENNY J. WHITE*

INTRODUCTION

The American justice system has long been revered by other countries for its distinctive quality – judicial independence. Symbolized worldwide as a blindfolded¹ Lady Justice,² its insulation

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This article grew out of a wonderful opportunity to participate in the First Amendment Law Review's Symposium on judicial speech in the spring of 2004, while I served as a visiting law professor at the University of North Carolina School of Law. I extend my gratitude to the student members of the First Amendment Law Review for allowing me to participate, and to Dean Gene Nichol and the entire faculty at the University of North Carolina School of Law for welcoming and embracing me during my visit. I also wish to thank my colleagues Professors Otis Stephens and Joseph Cook for their counsel, and Todd Reutzel, my research assistant, for his tenacity. While all of their support is greatly appreciated, my deepest appreciation goes to Mike Okun, of Patterson Harkavy, in Raleigh, North Carolina, and a graduate of the University of North Carolina School of Law, for the many questions he raised, most of which I did not sufficiently answer.

1. Scholars maintain that the blindfold was added to the justice imagery during the sixteenth and seventeenth centuries, coincidental with the establishment of an independent judiciary, standing apart from the control of the sovereign. *See generally* Dennis E. Curtis & Judith Resnik, *Images of Justice*, 96 *YALE L. J.* 1727, 1755-58 (1987). One explanation posits that:

Lady Justice is a blend of Themis and Justitia. The blindfold with which Justice is now associated probably started in the 16th century. In some of the Washington D.C. statues, Justice holds scales, blindfolds, and swords. In one representation she is fighting evil with her gaze, although her sword is still sheathed.

N.S. Gill, *The Goddess of Justice*, ANCIENT CLASSICAL HISTORY –

COMPREHENSIVE ANCIENT GREEK AND ROMAN HISTORY SITE, at <http://ancienthistory.about.com/cs/godsreligion/a/justicegoddess.htm> (last visited Feb. 17, 2005) (on file with the First Amendment Law Review). Contrast the explanation offered by William Penn that:

Justice is justly represented blind, because she sees no difference in the parties concerned. She has but one scale and weight, for rich and poor, great and small. Her sentence is not guided by the person, but the cause

Impartiality is the life of justice, as that is of government.

WILLIAM PENN, *FRUITS OF SOLITUDE: PART I: IMPRACTICALITY* 71 (11th ed., Lakeside Press 1906) (1693) (lines 407-411).

2. Historians have suggested that the image of Lady Justice is a combination of Greek and Roman influences. Most attribute the image to Greek and Roman figures. Themis, a Titan, appears in Greek mythology as a figure whose role was to impose “some kind of order or control over gatherings” See Gill, *supra* note 1 (citing TIMOTHY GANTZ, *EARLY GREEK MYTH: A GUIDE TO LITERARY AND ARTISTIC SOURCES, VOL. I* (1996)). “Iustitia, or Justitia, was the Roman personification of justice.” *Id.*

Two of the many Lady Justice statues across the country bear particular relevance to this article. One of these statues, located in Virginia City, Nevada, and built in 1875, is seen peeking from behind her blindfold. After the decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), this image prompts the question of whether justice across America will peek from behind her blindfold in order to see who is watching.

According to a news report published in 1876:

The facade will be ornamented by a figure representing Justice, with scales and sword that are orthodoxically supposed to belong to her. In the drawing she is represented without her eyes being blindfolded, which may be objected by some as unconventional, but when one considers that this representative dispenser of awards and punishments will be compelled to stand out and take all the sand thrown in her eyes by the Washoe zephyrs, it will be readily conceded that her eyesight would not last long enough for her to get so much as a glimpse of the great wealth to be obtained by wickedly swaying the scales of Right and Wrong. It makes but little difference whether the blind is on or off.

RONALD M. JAMES, *TEMPLES OF JUSTICE: COUNTY COURTHOUSES OF NEVADA* 137-39 (1994).

The second statue of particular relevance to this article is in Concord, New Hampshire at the Warren B. Rudman Courthouse. Ironically, this courthouse is said to be across the street from Justice Souter’s barber. The stainless steel statue of justice wears a full-length gown, but reaches above her

from politics and influence has been its most coveted attribute – until now. Some have described the “sea-change”³ brought about by the decision in *Republican Party of Minnesota v. White*⁴ as a new vision of judicial rights and obligations. Others have said it creates a new landscape for justice in America. For many, myself included, if indeed *White* offers a new vision, it is an extremely near-sighted one, seemingly blinded to distant disasters; and, if *White* creates a new landscape, the new terrain is very bleak.

When five members of the United States Supreme Court elevated the process of winning judicial elections – with all its free speech implications – above the process of doing and appearing to do justice, the Court transformed justice in America.⁵ No longer

head to tighten the knot on her own blindfold. According to some, the sculpture signifies that rather than being blindfolded by others, Lady Justice “imposes the symbol of impartiality on herself.” *The Blindfold of Justice*, LEGAL AFF., July-Aug. 2003, at 68.

3. In Shakespeare’s *The Tempest*, Ariel sings deceitfully to Ferdinand:

Full fathom five thy father lies;
Of his bones are coral made;
Those are pearls that were his eyes;
Nothing of him that doth fade
But doth suffer a sea-change
Into something rich and strange.

WILLIAM SHAKESPEARE, *THE TEMPEST*, act 1, sc. 2.

Critics claim that the phrase “sea-change” is “almost always improperly used and is greatly over-used,” becoming “dull and tiresome.” Paul Brians, *Common Errors in English Usage*, at <http://www.wsu.edu:8080/~brians/errors/sea.html> (last visited Feb. 17, 2005) (on file with the First Amendment Law Review). They caution writers to “[a]void the phrase; otherwise you will irritate those who know it and puzzle those who do not.” *Id.* I accept the risk, believing that any word that is said to mean a “large change caused by sea,” *id.*, and that has come to signify any drastic, catastrophic change, even if technically inappropriate, is a fitting word for the changes caused by the *White* decision.

4. 536 U.S. 765 (2002).

5. While *White* dealt only with elected judges in state justice systems, the general public’s perception of justice is largely undifferentiated. The public perceives justice as a whole, rarely distinguishing between state and federal judges or trial and appellate judges. Nor does the public have sufficient appreciation of the differences between trial and appellate courts. For example, in my home state of Tennessee several death sentences have been set aside by a federal district judge as a result of petitions for writs of habeas

will citizens expect judges to only sift through facts, apply the law, and render a verdict. Instead, citizens will expect judges to rule based on views and opinions announced while campaigning, unfettered by the uniqueness of the facts or the complexities of the law.

The purpose of this article is to evaluate the effects that *Republican Party of Minnesota v. White* is having on the American system of justice. The article begins with a brief discussion of the case and the majority, concurring, and dissenting opinions. The second section discusses the perspectives of some of the justices who made up the majority in this closely divided case. The third section of the article describes the landscape of some state judicial elections before and after *White* and details some of the ramifications of the *White* decision. The last section of the article discusses so-called “solutions,” ways in which various states are attempting to follow *White* while preserving judicial independence, the centerpiece of the American judicial system.

I. THE DECISION

In *Republican Party of Minnesota v. White*, a five-four majority of the United States Supreme Court held that a provision of the Model Code of Judicial Conduct, in effect in Minnesota⁶ and

corpus. See *Abdur' Rahman v. Bell*, 999 F. Supp. 1073, 1077 (M.D. Tenn. 1998) (holding that death sentence was to be set aside due to writ of habeas corpus upon grounds of ineffective counsel) *rev'd*, 226 F.3d 696 (6th Cir. 2000); *Austin v. Bell*, 126 F.3d 843, 845 (6th Cir. 1997) (holding that while the murder conviction was affirmed, possible ineffective representation during sentencing compels the court to remand the death sentence); *Heck Van Tran v. Bell*, 145 F. Supp.2d 939, 942 (W.D. Tenn. 2001) (holding that a murderer's death sentence needs to be set aside until an accurate and uncontested mental retardation assessment is performed). Some of the decisions have resulted in new trials being granted decades after the crime, prompting public anger. In one of my campaigns, which unfortunately followed closely on the heels of one such grant of habeas corpus (and remand for a new trial), many voters demanded to know why I had “set a killer free.” My efforts to explain that I was not “that judge” frequently went unheard, even when I pointed out that the case in question had been tried before I completed elementary school.

6. Canon 5(A)(3)(d)(i) of the Minnesota Code of Judicial Conduct was actually a part of the 1972 Model Code of Judicial Conduct, adopted by the

referred to as the “announce” clause, violated the First Amendment of the United States Constitution.⁷ The announce clause provided that “a candidate for judicial office, including an incumbent judge . . . shall not announce his or her views on disputed legal or political issues.”⁸

Minnesota retained the prohibition despite its replacement in the Model Code of Judicial Conduct by other provisions believed to be “more in line with constitutional guarantees of free speech.”⁹ Those other provisions, referred to as the “pledges and promises” clause¹⁰ and the “commitment” clause,¹¹ rather than the announce clause are in effect in the majority of states.

When a candidate for the Minnesota Supreme Court challenged the constitutionality of the announce clause,¹² the state

Minnesota Supreme Court in 1974. See *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 857 (8th Cir. 2001). The American Bar Association (ABA) amended the Model Code of Judicial Conduct in 1990. The announce clause was not retained. LISA L. MILORD, *THE DEVELOPMENT OF THE ABA JUDICIAL CODE 50* (1992).

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

8. MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (1996). Throughout this article, the phrase “announce clause” refers to this provision.

9. MILORD, *supra* note 6, at 50. For a complete discussion of the circumstances surrounding Minnesota’s decision to retain the provision, see Penny J. White, *Preserving the Legacy: A Tribute to Chief Justice Harry L. Carrico, One Who Exalted Judicial Independence*, 38 U. RICH. L. REV. 615, 649 (2004).

10. The “pledges and promises” clause, found in Canon 5(A)(3)(d)(i) of the Model Code, provides that “[a] candidate for judicial office . . . shall not . . . make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.” MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (1996). Throughout this article, the phrase “pledges and promises clause” refers to this provision.

11. The “commitment” clause, found in Canon 5(A)(3)(d)(ii) of the Model Code, provides that “[a] candidate for judicial office . . . shall not . . . 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.” *Id.* at Canon 5(A)(3)(d)(ii). Throughout this article, the phrase “commitment clause” refers to this provision.

12. For a complete discussion of Gregory Wersal, his bids for the Minnesota Supreme Court, and the lawsuits he filed challenging various provisions of the Minnesota Code of Judicial Conduct, see *White*, *supra* note 9, at 629-31, 665-66.

argued that the provision served two compelling state interests – preserving the impartiality and the appearance of impartiality of the state judiciary.¹³ Although the district court and the Eighth Circuit Court of Appeals described those interests as “compelling” and “undeniably compelling,” the Supreme Court majority held that the announce clause was not narrowly tailored to serve a compelling state interest.¹⁴

The majority opinion in *White* was authored by Justice Scalia and joined by Chief Justice Rehnquist and Justices Thomas, O'Connor, and Kennedy. Chief Justice Rehnquist and Justice Thomas joined the majority opinion without separate comment. Justice O'Connor wrote separately to “express [her] concerns about judicial elections generally.”¹⁵ Perhaps most noteworthy in her concurrence was her “assumption of the risk” rationale: since Minnesota (and thirty-eight other states) chose some method of judicial election, “the State has voluntarily taken on the risks to judicial bias 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 judges.”¹⁶

Justice Kennedy was less critical of the states' choice to elect its judges.¹⁷ He was equally critical, however, of the state's attempt to restrict speech. Adhering to the viewpoint that content-based speech restrictions “that do not fall within any traditional exception should be invalidated without inquiry into narrow

13. *White*, 536 U.S. at 775. Justice Scalia attributes this characterization of the state interests at issue to the Eighth Circuit. *Id.* (citing *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 867 (8th Cir. 2001)). While the lower courts also asserted the issue as one of preserving judicial independence, Justice Scalia concluded that the parties were using the terms “impartiality” and “independence” interchangeably. *Id.* at 775 n.6. This assertion allowed him to focus his attention on the definitions of impartiality. *Id.* at 776-780.

14. *Id.* at 766.

15. *Id.* at 788 (O'Connor, J., concurring).

16. *Id.* at 792 (O'Connor, J., concurring).

17. *Id.* at 795-96 (Kennedy, J., concurring) (“[W]e should refrain from criticism of the State's choice to use open elections to select those persons most likely to achieve judicial excellence By condemning judicial elections across the board, we implicitly condemn countless elected state judges and without warrant.”).

tailoring or compelling governmental interests,”¹⁸ Justice Kennedy joined the majority and concluded that “[e]ven the undoubted interest of the State in the excellence of its judiciary does not allow it to restrain candidate speech by reason of its content.”¹⁹

Justices Stevens and Ginsberg authored dissenting opinions in *White*.²⁰ Justice Ginsberg wrote to expose the majority’s reasoning, which she described as a “unilocular, ‘an election is an election’ approach.”²¹ Her position, succinctly stated, was that judges, though elected, are not political actors; therefore, the unconstrained free speech rights that apply in political elections “do not carry over to campaigns for the bench.”²² Similarly, Justice Stevens concluded that “the flawed premise [of the majority opinion] that the criteria for the election to judicial office should mirror the rules applicable to political elections is profoundly misguided.”²³

II. PERSPECTIVE²⁴

Republican Party of Minnesota v. White is a staggering decision, which will have, and is having, a dramatic impact on the promise of equal justice in America. The decision is made more problematic by its closeness: it is the result of a one-vote majority of the Court. Certainly, five-four decisions are not a rarity, but the *White* five-four division is particularly troubling because of the obliqueness of Justice O’Connor’s separate concurrence.²⁵

18. *Id.* at 793 (Kennedy, J., concurring).

19. *Id.* at 796 (Kennedy, J., concurring).

20. The two dissents were joined by each of the four dissenting judges.

21. *White*, 536 U.S. at 805 (Ginsberg, J., dissenting).

22. *Id.* at 806 (Ginsberg, J., dissenting).

23. *Id.* at 803 (Stevens, J., dissenting).

24. Author Ingrid Bengis said “[p]erspective, I soon realized, was a fine commodity, but utterly useless when I was in the thick of things.” See Lightsmith Publishing, “*I Could Have Said That...*” *About Life*, at <http://www.bcsupernet.com/users/lightsmith/quotelif.htm> (last visited Feb. 17, 2005) (on file with the First Amendment Law Review). Bengis’s opinion is particularly appropriate to this section of the article, which concludes that some of the justices’ perspectives on impartiality were influenced by the fact that they were, indeed, in the thick of things.

25. See *White*, 536 U.S. at 788 (O’Connor, J., concurring).

While Justice O'Connor clearly agreed with the majority's conclusion in *White*, she did so in an opinion that described, but ultimately ignored, the damaging effects of the decision.²⁶ Among the effects of open judicial campaigning lamented in Justice O'Connor's concurring opinion are these:

We of course want judges to be impartial, in the sense of being free from any personal stake in the outcome of the cases to which they are assigned. But if judges are subject to regular elections they are likely to feel that they have at least some personal stake in the outcome of every publicized case. Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects. Even if judges were able to suppress their awareness of the potential electoral consequences of their decisions and refrain from acting on it, the public's confidence in the judiciary could be undermined simply by the possibility that judges would be unable to do so.

Moreover, contested elections generally entail campaigning. And campaigning for a judicial post today can require substantial funds. Unless the pool of judicial candidates is limited to those wealthy enough to independently fund their campaigns, a limitation unrelated to judicial skill, the cost of campaigning requires judicial candidates to engage in fundraising. Yet relying on campaign donations may leave judges feeling indebted to certain parties or interest groups. Even if judges were able to refrain from favoring donors, the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public's

26. *Id.*

confidence in the judiciary.²⁷

Justice O'Connor seemingly realized what was ahead for her former state judge colleagues, but then absolved herself (and the majority) of any responsibility.²⁸

Perhaps mere recognition of the impact of the decision in *White* by one of the majority justices should be applauded, particularly in light of the views of judicial impartiality held and exhibited by other members of the majority. A persuasive argument can be made that the perspectives of Justice Scalia and Chief Justice Rehnquist on judicial impartiality and the importance of the public's perception of impartiality led to the analysis employed in *White*. In other words, the personal opinions of these justices dictated the result. Ironically, this is the very evil that the announcement clause was intended to guard against.

An overly simplified argument could be made that federal judges, who are appointed for life, may not comprehend the rigors of becoming or remaining a state-court judge. They may be naïve about the process. Of course, many federal judges, including some of the justices in the *White* majority, were previously state-court judges.²⁹ Thus, while there is merit to the argument that federal judges may not fully appreciate the realities of judicial campaigning and may lack perspective on the election process – that position is not taken here. Rather, the position that I advance in this article is that the *White* decision was reached because of the jaundiced perspectives on judicial impartiality, and its appearance, held and

27. *Id.* at 788-90 (O'Connor, J., concurring) (internal citations omitted).

28. *See id.* at 792 (O'Connor, J., concurring); *see also supra* text accompanying note 16.

29. That experience alone does not necessarily give a judge an understanding of judicial campaigns. Justice O'Connor, for example, seems to believe that all of the problems she identified in her concurring opinion are present only when judges are selected "through contested popular elections instead of through an appointment system or a combined appointment and retention election system . . ." *Id.* Yet, she cites a law review article written by Justice Grodin, one of three California Supreme Court justices removed from the bench in an uncontested retention race laced with special-issue politics. *Id.* at 791 (O'Connor, J., concurring) (citing Joseph R. Grodin, *Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969, 1980 (1988)).

exhibited by some of the majority justices.

Less than a year after Chief Justice Rehnquist was appointed Associate Justice,³⁰ he had an opportunity to express his opinion on judicial impartiality and its appearance. Respondents in a case before the Supreme Court had petitioned for a rehearing in a case based upon Justice Rehnquist's refusal to disqualify himself despite his involvement in the case as a lawyer.³¹ While serving as head of the Office of Legal Counsel to the President, attorney Rehnquist had testified before the Senate as an expert witness.³² In the respondent's view, Justice Rehnquist had previously adjudged the issue before the Court when he publicly, in oral and written testimony before the Senate, expressed his opinion on the issue. Citing a long line of examples, Justice Rehnquist resolved the issue simply:

The fact that some aspect of [a judge's]
propensities may have been publicly

30. The current Chief Justice, William H. Rehnquist, was nominated Associate Justice of the Supreme Court of the United States by President Nixon on October 21, 1971 and sworn in on January 7, 1972. He was nominated Chief Justice by President Reagan on June 17, 1986 and sworn in on September 26, 1986. Cornell Legal Info. Inst., *Supreme Court Collection: William Hubbs Rehnquist*, at <http://supct.law.cornell.edu/supct/justices/rehnquist.bio.html> (last visited Feb. 17, 2005) (on file with the First Amendment Law Review).

31. The issue of federal judicial disqualification is covered by statute. *See* 28 U.S.C. § 455 (2000). Numerous scholars have written about this statute and related rules. *See generally, e.g.*, Debra L. Bassett, *Judicial Disqualification in the Federal Courts*, 87 IOWA L. REV. 1213 (2002); John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605 (1947); Jeffrey W. Stempel, *Rehnquist, Recusal and Reform*, 53 BROOK. L. REV. 589 (1987). Since the specifics of recusal rules are not relevant to a recitation of what the justices *said* they believed about disqualification and the appearance of impartiality, a discussion of the specifics of federal court recusal is unnecessary and beyond the intended scope of this article.

32. While serving as head of the Justice Department's Office of Legal Counsel to the White House, Rehnquist testified before the Ervin Subcommittee on the subject of the statutory and constitutional authorization of the executive branch to gather information. *See Laird v. Tatum*, 409 U.S. 824, 825-26 (1972). In addition, Justice Rehnquist supervised the preparation of a legal memorandum commenting on the appellate decision in the case before the court, as well as other precedent. *Id.* at 828.

articulated . . . cannot, in my opinion, be regarded as anything more than a random circumstance which should not by itself form a basis for disqualification.

. . . .

. . . [N]either the oath, the disqualification statute, nor the practice of former Justices of this Court guarantee a litigant that each judge will start off from dead center in his willingness or ability to reconcile the opposing arguments of counsel with his understanding of the Constitution and the law.³³

In the end, Justice Rehnquist conceded that whether he should disqualify himself was “fairly debatable,”³⁴ and an issue upon which “fair minded judges might disagree.”³⁵ Nonetheless, *he* did not find disqualification necessary.³⁶ Neither the public perception of his participation as a justice in the case, nor the appearance of impropriety was included in the discussion.³⁷

33. *Id.* at 836, 838-39. Justice Rehnquist did differentiate between statements made prior to nomination and statements made during confirmation. For a nominee to “express any but the most general observation about the law would suggest that, in order to obtain favorable consideration of his nomination, he deliberately was announcing in advance, without benefit of judicial oath, briefs, or argument, how he would decide a particular question that might come before him as a judge.” *Id.* at 836 n.5. This is *exactly* the argument made by the respondents in *White*, which Chief Justice Rehnquist, as a member of the majority, discounted. *See White*, 536 U.S. at 778-82.

34. *Laird*, 409 U.S. at 837.

35. *Id.* at 836.

36. It should be noted that one basis for the decision was Justice Rehnquist’s belief that Supreme Court justices had a heightened duty to sit when not statutorily disqualified in order to avoid equally divided decisions by the Court. *Id.* at 837.

37. The statute under which Justice Rehnquist analyzed disqualification provided that

[a]ny justice . . . shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, *in his opinion*, for him to sit

Two years after the decision on the petition to rehear in *Laird v. Tatum*, Congress amended the federal disqualification statute to provide that “[a]ny justice, judge, or magistrate [judge] of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”³⁸ It would be thirty years before Chief Justice Rehnquist was called upon to re-evaluate his view that a judge’s personal opinion, not public perception or objective appearance, determined whether a judge should sit in a case. That re-evaluation would occur not when the Chief Justice’s recusal was requested in a case, but when members of Congress, troubled by another Justice’s failure to recuse himself, asked the Chief Justice to explain the Court’s recusal policy.

In March 2004, the Sierra Club asked Justice Scalia to disqualify himself in *Cheney v. United States District Court for the District of Columbia*,³⁹ a case raising issues about compliance with provisions of the Federal Advisory Committee Act pertaining to public records.⁴⁰ The Vice President, among the named defendants from whom discovery was sought, had filed an emergency writ of mandamus, seeking to vacate discovery orders. Certiorari was granted when the Court of Appeals for the District of Columbia dismissed the motion for mandamus. The motion to disqualify was based on a recent duck hunting trip on which Justice Scalia had accompanied the Vice President. The motion alleged that “Justice Scalia’s vacation with the Vice President [had] led to reasonable questions about the justice’s impartiality.”⁴¹

Publicity concerning the Associate Justice’s vacation with the Vice President was intense and generally disfavorable.⁴² Some

28 U.S.C. § 455 (1973) (emphasis added).

38. 28 U.S.C. § 455(a) (2000).

39. 124 S. Ct. 2576, 541 U.S. __ (2004).

40. *See id.*

41. Respondent’s Motion for Recusal at 2, *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 124 S. Ct. 2576 (2004) (No. 03-475).

42. The Motion to Recuse is twelve pages in length. *See id.* The exhibits to the motion cover fifty-six pages. They include cartoons, articles, and editorials, with titles that are highly critical of Justice Scalia. *See, e.g., Friend of Court: Justice Scalia’s Impartiality Highly Questionable*, HOUS. CHRON., Feb. 9, 2004, at 18; *If it walks like a duck . . .*, CHI. TRIB., Feb. 13, 2004, at 26; *Judicial Arrogance: Scalia’s Attitude in Cheney Case Reflects Badly on the*

legal ethicists and court veterans recommended that Justice Scalia disqualify himself in the case.⁴³ It was at this juncture that Justice Scalia's view on the importance of judicial impartiality and public perception hinted at in *White* would be fully exposed.

Justice Scalia first responded publicly to the publicity in January 2004 in a letter sent to the Washington Bureau of the *Los Angeles Times*, apparently in response to a letter he received. In the letter, Justice Scalia asserted:

I do not think my impartiality could *reasonably* be questioned. Social contacts with high-level executive officials (including cabinet officers) have never been thought improper for judges who may have before them cases in which those people are involved in their official capacity, as opposed to their personal capacity. For example, Supreme Court Justices are regularly invited to dine at the White House, whether or not a suit seeking to compel or prevent certain presidential action is pending. I expect that all of the Justices were invited to the Vice President's annual Christmas party. The invitation was not improper, nor was the attendance.⁴⁴

A few days after Justice Scalia wrote to the *Los Angeles Times* about his vacation with the Vice President,⁴⁵ Senators Patrick

Supreme Court, BUFF. NEWS, Feb. 18, 2004, at B8; *Scalia's Blind Eye*, L. A. TIMES, Feb. 6, 2004, at B12; *Shot in the Foot*, FT. WORTH STAR-TELEGRAM, Feb. 7, 2004, at 16; *Supreme Contempt*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 6, 2004, at A12.

43. Professor Steven Lubet wrote in a Northwestern University News Release that “[i]n a country in which no person is suppose to be above the law, it is disturbing to watch Supreme Court justices ignoring basic principles concerning conflicts of interest.” Press Release, Steven Lubet, Northwestern University School of Law, Court Reputation at Stake in ‘Conflicts,’ at http://www.northwestern.edu/univ-relations/media_relations/releases/2004_03/lubet_text.html (Mar. 9, 2004).

44. Respondent's Motion for Recusal at Exhibit 2, *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 124 S. Ct. 2576 (2004) (No. 03-475).

45. The letter also advised its recipient, David Savage, that the “duck hunting was lousy” but that Justice Scalia “did come back with a few ducks,

Leahy⁴⁶ and Joseph Lieberman⁴⁷ wrote the Chief Justice “with regret . . . to inquire about published reports that Justice Antonin Scalia recently spent extended time with [the Vice President] on an out-of-town trip.”⁴⁸ Ultimately the Senators asked what “canons, procedures and rules are in place for Supreme Court justices to determine whether they must or should recuse themselves”⁴⁹

In a style reminiscent of his *Laird* decision, and notwithstanding some criticisms of his position raised when he was nominated for Chief Justice,⁵⁰ Chief Justice Rehnquist responded to

which tasted swell.” *See id.*

46. Senator Leahy, who is from Vermont, signed the letter as “Patrick Leahy, Ranking Member, Committee on the Judiciary.” *See* Letter from Patrick Leahy and Joseph Lieberman, Members, United States Senate, to William Rehnquist, Chief Justice, United States Supreme Court (Jan. 22, 2004), <http://leahy.senate.gov/press/200401/012204b.html> [hereinafter Leahy & Lieberman Letter].

47. Senator Lieberman, who is from Connecticut, signed the letter as “Joseph I. Lieberman, Ranking Member, Committee on Governmental Affairs.” *See id.*

48. *Id.* The letter stated that the trip “raises questions,” since it “[comes] just three weeks after” the grant of certiorari in the case. *See id.*

49. *Id.* The letter concluded:

We would also like to know what mechanisms exist for obtaining advisory opinions before activities are undertaken and whether any such mechanism was utilized by Justice Scalia before his recent trip with Vice President Cheney. Further, we inquire whether mechanisms exist for the Supreme Court to disqualify a Justice from participating in a matter or for review of a Justice’s unilateral decision to decline to recuse himself. Additionally, we would like to know whether the Supreme Court has given any guidance to its Members about the propriety of, and any conditions for, accepting access to private jets for travel to extra-judicial activities. You have often observed that the integrity and independence of our federal courts is one of the crown jewels of the American legal system. We agree. We thank you for your prompt attention to this important matter.

Id.

50. When Justice Rehnquist was nominated for Chief Justice in 1986, he was widely criticized for not disqualifying himself in *Laird*. *See* Stempel, *supra*

the Senators' letter quickly and simply: "there is no formal procedure for Court review of the decision of a Justice in an individual case. This is because it has long been settled that each Justice must decide such a question for himself."⁵¹

The Chief Justice characterized the Senators' suggestion that Justice Scalia should recuse himself as "ill considered."⁵² Thus, the Chief Justice's view that a judge's personal opinion (rather than considerations of public perception) should determine issues of disqualification apparently remains intact.⁵³

note 31, at 589-90, nn. 1-3.

51. Leahy & Lieberman Letter, *supra* note 46.

Apparently the Court has a quasi-policy that justices should err in favor of not disqualifying themselves, recently demonstrated in *Microsoft Corporation v. United States*. 530 U.S. 1301 (2000). Microsoft was represented by Goodwin, Procter, and Hoar, the Boston firm at which the Chief Justice's son, James C. Rehnquist, was a partner involved in the litigation. The Chief Justice "decided that [he] should not disqualify himself from the[] cases" because, among other reasons, the "negative impact that the unnecessary disqualification of even one Justice may have upon our Court." *Id.* at 1303.

Justice Ginsburg cited a similar policy when she declined to disqualify herself from a case involving the NOW Legal Defense and Education Fund. Justice Ginsburg explained that "some of my colleagues think a recusal in the Supreme Court is equivalent to a vote against the petitioner There is no one to replace us. It makes it quite important that we not lightly recuse ourselves." David G. Savage & Richard A. Serrano, *Ginsburg Stands By Involvement With Group*, L.A. TIMES, Mar. 13, 2004, at A14. Justice Ginsburg also detailed a formal agreement in which the four Justices who have spouses or children who practice law have agreed not to step aside in cases simply because of the relative's law firm's involvement. *See id.*

Very recently, Justice Breyer was criticized for not recusing himself in a case involving the constitutionality of the federal sentencing guidelines. Justice Breyer had served as a lawyer for the Senate Committee on the Judiciary, which helped draft the guidelines, and as a member of the Sentencing Commission from 1985 until 1989. Ultimately, and apparently after seeking advice, Justice Breyer decided to hear the case, *United States v. Booker*, 125 S. Ct. 738, 543 U.S. __ (2005), and authored the opinion of the court in part on whether the guidelines could remain applicable as advisory guidelines after the offending mandatory provisions were excised. *See Tony Mauro, Breyer Consulted Ethics Expert Over Sentencing Case Recusal*, LEGAL TIMES, Jan. 17, 2005, at 10.

52. Leahy & Lieberman Letter, *supra* note 46.

53. Legal scholars disagreed with Chief Justice Rehnquist's view. In a special editorial to the *Los Angeles Times*, Professors Lubet and Erwin

A dismissive attitude toward the importance of public perception and the appearance of impropriety was equally apparent in Justice Scalia's response to the Motion to Recuse.⁵⁴ Justice Scalia quoted from the motion, which argued that

damage 'to the integrity of the system' is being done right now Because the American public, as reflected in the nation's newspaper editorials, has unanimously concluded that there is an appearance of favoritism, any objective observer would be compelled to conclude that Justice Scalia's impartiality has been questioned.⁵⁵

In a fashion typical of Justice Scalia, he mocked the very notion that the public's perception is of consequence.⁵⁶ Discounting any need to view the issue from any perspective other than his own, Justice Scalia, as had then-Justice Rehnquist in *Laird*, simply concluded that "[s]ince I do not believe my impartiality can reasonably be questioned, I do not think it would be proper for me to recuse."⁵⁷

With these perspectives on judicial impartiality and the

Chemerinsky, commented that the Chief Justice "has committed the Supreme Court to an each-justice-decides-alone position that places individual decision beyond review Judicial disqualification is a serious matter for the U.S. Supreme Court, which depends on public confidence for its legitimacy." Erwin Chemerinsky & Steven Lubet, Commentary, *In One Key Area, (the Chief) Justice Is Indeed Blind*, L.A. TIMES, Mar. 19, 2004, at B15.

54. See *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 124 S. Ct. 1391, 1399-1403 (2004).

55. *Id.* at 1399 (quoting Respondent's Motion for Recusal at 3-4, *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 124 S. Ct. 1391 (2004) (No. 03-475)).

56. In his response, Justice Scalia wrote:

The implication of this argument is staggering. I must recuse because a significant portion of the press, which is deemed to be the American public, demands it Many of them do not even have the facts right Such a blast of largely inaccurate and uninformed opinion cannot determine the recusal question.

Id. at 1399-1400.

57. *Id.* at 1401.

public's perception of justice, the decision reached in *White* comes as no surprise. If the only viewpoint that matters on judicial impartiality is the judge's, no definition of impartiality is likely to require judicial disqualification. Similarly, if the public's perception of justice is devalued, and if its effect on the respect for and continued viability of the justice system is discounted, then it will not matter what candidates for judicial office say or do to acquire the bench. In light of these perspectives, an analysis like that in *White*, which boosts free speech above the integrity of the justice system, is not unexpected.

III. BEFORE THERE WAS *WHITE*

From the inception of the Code of Judicial Conduct,⁵⁸ those who sought judicial office followed both a required⁵⁹ and time-honored⁶⁰ tradition of not announcing their views on legal issues. The premise behind the rule and the tradition was that judges, and those who would hope to become judges, ought not prejudge cases. They should instead base their decisions on the facts that they heard, carefully presented in accordance with well-established rules of evidence and procedure and in accordance with the law dictated by the legislature or precedent established by other courts.⁶¹ Announcing in advance a viewpoint on a legal issue was considered

58. See generally MODEL CODE OF JUDICIAL CONDUCT (1990). This article uses the phrase "Code of Judicial Conduct" to refer to various versions of the ABA Model Code of Judicial Conduct.

59. Every state, through its supreme court, eventually adopted some version of the Code of Judicial Conduct. See *Republican Party of Minn. v. White*, 536 U.S. 765, 786 (2002) (discussing, indirectly, the state-by-state adoptions of the Code).

60. The Eighth Circuit Court of Appeals relied on this history to sustain Minnesota's announce clause. See *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 879-80 (8th Cir. 2001), *rev'd* 536 U.S. 765 (2002). Justice Scalia summarily rejected this notion based on his assertion that "[t]he practice of prohibiting speech by judicial candidates on disputed issues, however, is neither long nor universal." *White*, 536 U.S. at 785.

61. For more on this point, see generally BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921); R. Pound, *The Causes of Popular Dissatisfactions with the Administration of Justice*, 8 BAYLOR L. REV. 1, 23 (1956).

inconsistent with the view of an impartial judiciary that based its decisions on the rule of law, not personal opinions.

Formal judicial ethics rules had actually recognized the limits on judicial speech in a number of ways. Some limitations applied only during the election process. Thus, for example, some states disallowed candidates from “announcing” their views; others disallowed candidates from committing or appearing to commit themselves with respect to issues and controversies; still others forbade candidates from making pledges and promises.⁶² Regardless of the specifics of the prohibition, and some states included all three prohibitions in their codes, the goal was the same: to create an environment in which judges in actuality and in appearance decided cases based on precedent and the evidence presented in the courtroom, unaffected by political pressure or special interests.

Similarly, judicial codes limited a candidate’s “speech” in seeking campaign contributions and political support. Even in states in which judges were elected to the bench, rules prohibited judges and candidates for judicial office from requesting contributions and soliciting support, requiring instead that committees be established to perform those functions.⁶³

In addition to these restrictions on fund-raising and support-soliciting, many states also restricted other political activity by judges and judicial candidates, including speeches and attendance at political gatherings. These restrictions on judicial speech and conduct were considered consistent with the general role of the judge, summarized succinctly in the familiar oath of office taken by those who become judges:

I, — — —, do solemnly swear (or affirm) that I

62. See *supra* notes 8, 10-11.

63. In some states, the prohibitions seemed to emphasize form over substance. While the judge or candidate was prohibited from knowing who contributed to the campaign and the amount of the contribution, the judge or candidate was required to sign the campaign donation disclosure form, which listed the donors and their donations. Cf. TENN. SUP. CT. R. 10, Canon 7B (2) (1994); TENN. CODE ANN. § 2-10-105(h)(1)(A) (1994 Repl.). The Supreme Court of Tennessee added commentary to Canon 7 that provided “[u]nless the candidate is required by law to file a list of his campaign contributors, their names should not be revealed to the candidate.” *Id.*

will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as — — — under the Constitution and laws of the United States. So help me God.⁶⁴

Many state court judges take oaths of office that promise to decide cases in accordance with the law “without respect to persons” and with neither “fear nor favor.”⁶⁵

In addition to these speech and conduct limitations applicable during campaigns, judicial codes also limited the speech of judges once on the bench. Thus, for example, judges were disallowed from commenting on a pending or impending case, from making speeches on behalf of political candidates, from holding political offices, from voluntarily appearing as a character witness, and from lobbying, except on matters pertinent to the administration of justice.⁶⁶

Like the restrictions on campaign speech and conduct, these additional limitations were intended to ensure the role of the judiciary as an independent, impartial branch of government, outside and beyond the reach and control of the other branches and the influence of partisan politics and special interests. The goal was not only to secure a judiciary outside the political fray, but also to instill in the public the requisite confidence and respect to assure the continued viability of the system of justice.

Before these restrictions were challenged in the case that ultimately reached the Supreme Court, concern brought about by constitutional challenges in other courts prompted the American Bar Association to review the 1972 Model Code of Judicial Conduct.⁶⁷ After laborious work,⁶⁸ a revised code was adopted in

64. This oath of office, taken by federal judges and found in 28 U.S.C. § 453, is the model which most state court oaths follow.

65. *See, e.g.*, PA. CONST. art. VI, § 3 (requiring judges to discharge the duties of their office “with fidelity”); TENN. CONST. art. 5, § 1.

66. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 5 (1990).

67. The ABA had long-standing concerns about the constitutionality of some of the campaign speech and conduct provisions of the Code of Judicial

August 1990.⁶⁹

Canon 5, which concerned the political activity of judges, was substantially revised, removing the announce clause at issue in *White* and retaining a prohibition against making pledges and promises of conduct in office. In place of the announce clause, the 1990 Model Code contained a new prohibition against 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”⁷⁰

IV. AND THEN THERE WAS *WHITE*

Against this backdrop, the United States Supreme Court was given the opportunity to speak broadly on the constitutionality of restrictions on speech and conduct in judicial campaigns in *White*. If a silver lining exists in the Court’s decision, it is found in the Court’s selectivity of issues.

The petition for certiorari⁷¹ filed with the Court in *White* raised three issues,⁷² all based on provisions of the Minnesota Code

Conduct. Based upon a 1986 survey of “authorities in the fields of judicial ethics,” a comprehensive review of the 1972 Code was undertaken. MILORD, *supra* note 6, at 3.

68. The work is described as including consultation with state judicial conduct organizations, the ABA Judicial Administration Division, the American Judicature Society, and other groups and organizations, review of state judicial conduct literature and opinions, and submission of nearly 5,000 copies of a discussion draft. *Id.*

69. Canon 5 was substantially revised, purportedly to put it “more in line with constitutional guarantees of free speech, while preventing the harm that can come from statements damaging the appearance of judicial integrity and impartiality.” *Id.* at 50.

70. MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (1990). The Committee originally proposed a prohibition against “stat[ing] personal views on issues that may come before the court,” but replaced that version with the “commitment” prohibition. MILORD, *supra* note 6, at 99.

71. Petition for Certiorari, Republican Party of Minn. v. Kelly, 534 U.S. 1054 (No. 01-521).

72. The issues raised in the petition for certiorari were:

1. Whether the provision of the Minnesota Code of Judicial Conduct that prohibits a candidate for elective judicial office from “announc[ing] his or her views on

of Judicial Conduct.⁷³ The petition challenged on First and Fourteenth Amendment grounds provisions of the Code that restricted speech and conduct during judicial campaigns. Included in the petition for certiorari were challenges to the Minnesota Code's prohibitions on attendance at political gatherings, party identifications, party endorsements, and solicitation of campaign contributions.⁷⁴

disputed legal or political issues" unconstitutionally impinges on the freedom of speech as guaranteed by the First and Fourteenth Amendments to the United States Constitution.

2. Whether the severe burdens imposed by various provisions of the Minnesota Code of Judicial Conduct unconstitutionally impinge on the right of political parties to endorse candidates for elective judicial office in violation of the freedom of speech, freedom of association, and equal protection of law as guaranteed by the First and Fourteenth Amendments to the United States Constitution.

3. Whether the provision of the Minnesota Code of Judicial Conduct that forbids a candidate for elective judicial office from attending or speaking at any political party gathering - while permitting such a candidate to attend or speak at gatherings of all other organizations - unconstitutionally impinges on the freedom of speech, freedom of association, and equal protection of the law as guaranteed by the First and Fourteenth Amendments to the United States Constitution.

Id. at i.

73. Judges in Minnesota have been subject to ethical codes since at least 1950. Originally, the Minnesota judges adopted the 1924 version of the ABA Canons of Judicial Ethics, but, in 1974, the Minnesota Supreme Court adopted a more modern version based largely on the ABA's 1972 Model Code of Judicial Conduct. While that Code has likewise been altered by the Minnesota Supreme Court on numerous occasions, the provision regulating a candidate's announcement of his or her views remained as written in the 1972 ABA Code. An advisory committee appointed to study the 1990 Model Code of Judicial Conduct and make recommendations to the Minnesota Supreme Court recommended that Minnesota adopt the later version, but the court declined to do so. *See Republican Party of Minn. v. White*, 536 U.S. 765, 786-87 (2002).

74. *Petition for Certiorari at i, Republican Party of Minn. v. Kelly*, 534 U.S. 1054 (No. 01-521).

The Court granted certiorari solely on the first issue listed in the Petition for Certiorari. As stated in the petition, the issue was:

Whether the provision of the Minnesota Code of Judicial Conduct that prohibits a candidate for elective judicial office from “announc[ing] his or her views on disputed legal or political issues” unconstitutionally impinges on the freedom of speech as guaranteed by the First and Fourteenth Amendments to the United States Constitution.⁷⁵

Ultimately, a five justice majority answered the question affirmatively, striking down the announce clause in an opinion which, on the surface, had limited implications.⁷⁶

In fact, Justice Scalia described the issue quite narrowly in the opening sentence of the majority opinion as “whether the First Amendment permits the Minnesota Supreme Court to prohibit candidates for judicial election in that State from announcing their views on disputed legal and political issues.”⁷⁷ Finding that the provision was not narrowly tailored to meet any compelling state interest, the Court concluded that the announce clause violated the First Amendment. Justice Scalia specifically confined the ruling to the announce clause,⁷⁸ noting that provisions regulating judicial

75. *Id.* at i. Thus, as framed, the decision may seem to apply only in the thirty-nine states in which judges are selected by the voters, but see *infra* notes 169-75 and accompanying text.

76. Since the clause had been repudiated by the ABA in their 1990 revision and remained in effect in only a few states, the impact of the decision, on its face, appeared slight.

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

78. Although Justice Scalia’s opinion emphasized that the decision did not affect the pledges and promises provision, Justice Kennedy, a concurring member of the majority, seemed to forecast his view that such a provision would likewise fail First Amendment scrutiny. Justice Kennedy, in his short concurring opinion, noted that:

I adhere to my view, however, 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

promises, pledges, or commitments, in effect in the majority of the state's judicial codes, were neither at issue, nor ruled upon.⁷⁹

Court. "Here, a law is directed to speech alone where the speech in question is not obscene, not defamatory, not words tantamount to an act otherwise criminal, not an impairment of some other constitutional right, not an incitement to lawless action, and not calculated or likely to bring about imminent harm the State has the substantive power to prevent. No further inquiry is necessary to reject the State's argument that the statute should be upheld." The political speech of candidates is at the heart of the First Amendment, and direct restrictions on the content of candidate speech are simply beyond the power of government to impose.

Id. at 793 (Kennedy, J., concurring) (quoting *Simon & Schuster Inc. v. N.Y. State Crime Victims' Bd.*, 502 U.S. 105, 124 (1991) (Kennedy, J., concurring)) (internal citations omitted).

This viewpoint alarmed the dissent. Justice Stevens noted that:

Justice Kennedy would go even further and hold that no content-based restriction of a judicial candidate's speech is permitted under the First Amendment. While he does not say so explicitly, this extreme position would preclude even Minnesota's prohibition against "pledges or promises" by a candidate for judicial office The unwisdom of this proposal illustrates why the same standards should not apply to speech in campaigns for judicial and legislative office.

Id. at 802 n.4 (Stevens, J., dissenting) (internal citations omitted).

Arguably, Justice Stevens overstates Justice Kennedy's position. Justice Kennedy seems to endorse the proposition that states may impose restrictions on judges *as* judges, but not as judicial candidates. He says: "[e]xplicit standards of judicial conduct provide essential guidance for judges in the proper discharge of their duties and the honorable conduct of their office . . . [y]et these standards may not be used by the State to abridge the speech of aspiring judges in a judicial campaign." *Id.* at 794 (Kennedy, J., concurring). *But see infra* notes 203-04, 207-08 and accompanying text.

79. Justice Scalia limited the scope of the opinion by stating:

[T]he Minnesota Code contains a so-called "pledges or promises" clause, which *separately* prohibits judicial candidates from making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of office," – a prohibition that is not challenged here and on which we express no view.

Id. at 770 (internal citations omitted).

Additionally, the majority carefully demarcated what it was not holding. Although the First Amendment gave judges the right to announce their legal and political views during campaigns, they were not “*compelled*” to do so.⁸⁰

V. AND, STILL THERE IS *WHITE*

Even if *White*’s holding appeared narrow on its face, directly affecting only a few states, the flurry of activity that followed evidenced immediate confusion⁸¹ and eventual alarm.⁸² As is often

80. In further clarifying the scope of the opinion Justice Scalia stated:

Nor do we assert that candidates for judicial office should be *compelled* to announce their views on disputed legal issues. Thus, Justice Ginsburg’s repeated invocation of instances in which nominees to this Court declined to announce such views during Senate confirmation hearings is pointless. That the practice of *voluntarily* demurring does not establish the legitimacy of *legal compulsion* to demur is amply demonstrated by the unredacted text of the sentence she quotes in part from *Laird v. Tatum*.

Id. at 783-84 n.11 (internal citation omitted).

81. Some of the confusion was the result of the separate concurring opinions, written by two justices who were essential to the majority. Justice O’Connor, in her concurring opinion, seemed anguished with the result. She indicated that her separate concurrence was motivated by her “concerns about judicial elections generally.” *Id.* at 788 (O’Connor, J., concurring). Were one to read only the first five of her seven paragraphs, and then attempt to speculate whether she was joining the majority or the dissent, it would surely be the latter. But, she concludes, as follows:

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 In doing so the State has voluntarily taken on the risks to judicial bias described above 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 judges.

Id. at 792 (O’Connor, J., concurring).

On this point, which may be described as “you get what you asked for,” Justice Kennedy took issue:

[W]e should refrain from criticism of the State’s choice to use open elections to select those persons most likely to

the case, the decision raised as many questions as it answered. States and special interest groups began to search for answers to these questions on their own.

Some states seemed anxious to disavow provisions of their codes that even remotely resembled that at issue in *White*. The California Commission on Judicial Performance, for example, dismissed charges filed against a judge based on campaign materials that arguably did little to announce the judge's views.⁸³ Instead, the materials criticized the conduct of the judge's opponent, a public defender, in defending his clients in the court in which the judge presided. Notwithstanding an acknowledgment that California had no announce clause, the California Supreme Court amended its judicial code in response to *White*, citing a fear of

achieve judicial excellence. States are free to choose this mechanism By condemning judicial elections across the board, we implicitly condemn countless elected state judges and without warrant.

Id. at 795-96 (Kennedy, J., concurring). For a discussion of the confusion in Justice Kennedy's concurring opinion, see *infra* notes 203-04, 207-08 and accompanying text.

82. The decision was released on June 27, 2002. Many states had judicial elections scheduled during the fall of 2002. Thirty-three states were holding Supreme Court elections that fall. Candidates for office and judicial conduct commissions were forced to react quickly. See *infra* notes 149-75 and accompanying text.

83. Patricia Gray, No. 159 (Cal. Comm'n on Judicial Performance Aug. 27, 2002). In campaign literature, Judge Gray, the California Supreme Court incumbent, described herself as a "Tough Judge Who Makes Criminal Lawyers Unhappy." *Hearing Set for Ex-Judge Charged with Ethics Violations*, METROPOLITAN NEWS-ENTERPRISE, Aug. 17, 2001, at 1. She also stated in the mailer that her opponent "Cares About the Rights of Violent Criminals" while she "Cares About the Rights of Crime Victims." *Id.*

The opponent, and winner of the race, Elliot Daum, was a deputy public defender. He filed the complaint against Gray after defeating her in the election. Among the campaign materials about which Daum complained about was one entitled "Cop Killer," which stated that Daum had "demanded that all charges against the cop killer be dropped." *Id.* The mailer also detailed other cases involving Daum's clients for whom Gray imposed maximum sentences. *Id.* The race between Daum and Gray was described by one local newspaper as the "bitterest and most expensive Sonoma judicial campaign in memory" with the two candidates spending more than \$280,000. *Id.*

overinclusiveness.⁸⁴

Some states, like California, amended their codes, while others issued orders indicating that certain provisions would not be enforced.⁸⁵ The Texas Code of Judicial Conduct, for example, contained a provision that was similar to the announce clause, but that seemed, at least on its face, more defensible. It provided that judges or judicial candidates

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.⁸⁶

The provision was challenged, however, in a suit brought by a candidate for the Texas Supreme Court.⁸⁷ Because of the

84. California Advisory Commission Comments Canon 5(B)(1) (added "appears to commit"); *id.* Canon 5(B)(2) (added "or with reckless disregard for the truth"). For a discussion of the rule, see Cornell Legal Info. Inst., *California Legal Ethics, Judicial and Legal Officials*, at http://www.law.cornell.edu/ethics/ca/narr/CA_NARR_8.HTM (last visited Feb. 17, 2005) (on file with the First Amendment Law Review).

85. The Missouri Supreme Court, sitting en banc, issued an order on July 18, 2002, that Canon 5.B.(1)(c), Missouri's announce clause, "shall not be enforced against candidates for judicial office that is filled (1) by public election between competing candidates; or (2) by candidates appointed to or retained in office . . . but *only* when their candidacy has drawn active opposition." *In re Enforcement of Rule 2.03, Canon 5.B.(1)(c)* (Mo., July 18, 2002), *available* at <http://www.courts.mo.gov/sup/index.nsf/d45a7635d4bfdb8f8625662000632638/f1c626db4da8b14086256bfa0073b302?OpenDocument>.

The Pennsylvania Supreme Court deleted the "announce clause" and substituted a "commit clause" in its judicial code. See Am. Judicature Society, *Judicial Selection in the States, Pennsylvania: Judicial Campaigns and Elections*, at http://www.ajs.org/js/PA_elections.htm (last visited Feb. 17, 2005) (on file with the First Amendment Law Review). Texas struck a provision that was similar to, but distinguishable from, the announce clause following court action. See *infra* note 87 and accompanying text.

86. See TEX. CODE OF JUDICIAL CONDUCT Canon 5(1) (1994).

87. The plaintiff, described at the time as Austin solo practitioner Steven

pendency of *White* in the Supreme Court, the United States District Court for the Western District of Texas had issued a stay.⁸⁸ After *White* was decided the court concluded, literally without discussion, the following: “this Court finds no distinction between [the

Wayne Smith, became Associate Justice Steven Wayne Smith. Smith was no newcomer to the courts. In the early 1990s, Smith sued the University of Texas Law School on behalf of white applicants and won a decision in the Fifth Circuit Court of Appeals striking down racial preferences. *Hopwood v. Tex.*, 78 F.3d 932 (5th Cir. 1996). The conservative theme resonated in his campaign, and at least, initially, fell outside the parameters of approved judicial speech. Smith originally campaigned on the platform that he was a “conservative,” but, according to news sources, beginning in September (one month after the district court found the ethics rule to be unconstitutional), “Smith trumpeted his role in the *Hopwood* decision.” Beth Henary, *On the Right Side of the Law*, THE DAILY STANDARD, at <http://www.weeklystandard.com/content/public/articles/000/000/001/692xnozx.asp?pg=1> (Sept. 23, 2002).

Smith first defeated incumbent Xavier Rodriguez in the Republican primary, despite the vast differences in campaign spending. Rodriguez, who labeled himself a “moderate” reportedly spent over \$550,000, while Smith spent less than \$10,000. *Id.* Another source asserted an even greater difference in expenditures, placing Rodriguez at \$700,000 and Smith at \$8,000. Max B. Baker, *Justice on Supreme Court Faces Primary Challenge*, FORT WORTH STAR-TELEGRAM, Dec. 31, 2003, at 3B. In the general election, Smith faced a state appeals judge, Margaret Mirabal, who had gained the endorsement of many groups that often endorse Republicans, including the Texans for Lawsuit Reform. Henary, *supra*.

Smith’s views were clear to the voters. One local Republican Party member summarized Smith’s candidacy: “I will vote for him come November. . . . The majority of Republicans are against affirmative action We should be comfortable with someone who holds that position.” Smith does not deny being against racial preferences, but describes his position as follows: “If you’re going to take a stand [against] racial preferences, you’ve got a special responsibility to ensure that our laws on equal opportunity are enforced. You can’t be against racial preferences unless you make sure that the race, age, and sex discrimination that does exist is prosecuted.” *Id.*

Smith won the general election and became an Associate Justice in 2002. Smith was then defeated by Paul Green in the March 2004 primary; Green was unopposed in the November general election and was accordingly elected to that post. See Texas Secretary of State, *Statewide Elected Officials*, at <http://www.sos.state.tx.us/elections/voter/elected.shtml> (last visited Feb. 17, 2005) (on file with the First Amendment Law Review).

88. *Smith v. Phillips*, No. CIV.A-A-02CV111JRN, 2002 WL 1870038, at *1 (W.D. Tex. Aug. 6, 2002).

announce clause in Minnesota] and Texas' Code of Judicial Conduct 5(1). . . . [The provision] violates the First Amendment."⁸⁹

Other states were required to determine how the decision in *White* affected other provisions in the Code of Judicial Conduct. One such case gave the Supreme Court an opportunity to weigh in with further guidance on the issue of judicial campaign speech, this time on a pledges and promises provision.⁹⁰ The case involved a Florida County Judge,⁹¹ against whom the Florida Supreme Court

89. *Id.* at *1.

90. The *White* decision was issued on June 27, 2002. The petition for certiorari in *Inquiry Concerning Judge Kinsey* was denied on October 6, 2003. *In re Kinsey*, 842 So. 2d 77 (Fla. 2003), *cert. denied*, 540 U.S. 825 (2003).

91. Judge Patricia Kinsey was charged with twelve ethical violations arising out of her 1998 campaign for County Judge in Escambia County. Each of the charges are recited, along with the recommendation made by the Judicial Qualifications Commission, in the Florida Supreme Court's opinion. *Id.* at 80. In summary, the charges, which were primarily proved by the introduction of campaign brochures and radio excerpts, alleged that Kinsey either promised or pledged certain conduct or made statements suggesting a commitment to certain rulings. *Id.*

Kinsey's campaign was a traditional "law and order" campaign. Her campaign materials included a full-page picture of her with ten uniformed, armed police officers, in which she asked, "Who do these guys count on to back them up?" *Id.* at 87. She asserted, for example, that she was "[t]he unanimous choice of law enforcement"; that "police officers expect judges to take their testimony seriously and to help law enforcement by putting criminals where they belong . . . behind bars"; that criminals probably would not want to read her campaign literature; that judges must support "hard-working law enforcement officers by putting criminals behind bars"; that she would "bend over backward to ensure that honest, law-abiding citizens are not victimized a second time by the legal system that is supposed to protect them"; and that she "above all else [] identifies with the victims of crime." *Id.* at 80-82. Kinsey characterized her opponent as a "liberal," noting that the judge, a former criminal defense lawyer, was "still in that defense mode" and characterized an accused as a "thug." *Id.* at 82-83. Kinsey misrepresented facts about judicial hearings, and claimed that her opponent failed to revoke bond in a case, thereby showing "a shocking lack of compassion for the victims of violent crime," and used the nickname "Let 'em Go Green" for her opponent, an incumbent judge. *Id.* at 82-84. Kinsey described her responsibility as a judge as to be "absolutely a reflection of what the community wants." *Id.* at 89. She was ultimately found guilty or partially guilty of nine ethical violations. In defense of her conduct, Kinsey argued that her campaign conduct was protected by the First Amendment. *Id.* at 85.

had upheld a public reprimand and a \$50,000 fine⁹² for numerous violations of the Florida Code of Judicial Conduct,⁹³ including the prohibitions against making pledges, promises, and commitments. The judge acknowledged that some of her campaign conduct and speech violated the letter of Florida's ethics provisions,⁹⁴ including the pledges and promises⁹⁵ and commitment⁹⁶ provisions, but urged the Florida justices to find that enforcement of those provisions

92. *Id.* at 90. One justice concurred in part and dissented in part, expressing his opinion that the "only rational conclusion would be the removal of Judge Kinsey from the position secured through inappropriate pledges and promises. . . ." *Id.* at 99 (Lewis, J., concurring in part and dissenting in part).

93. In addition to the pledges and promises and commitment provisions, Kinsey was charged with violating a part of Canon 3 referred to as the "comment clause," which prohibits a judge "while a proceeding is pending or impending in any court from mak[ing] any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing." FLA. CODE OF JUDICIAL CONDUCT Canon 3B(9) (2003). The court, however, found that Canon 3B(9) was not applicable and instead reviewed the claim in light of Canon 7A(d)(3)(ii), the commitment clause. Finding insufficient evidence of a violation, the Florida Supreme Court referred the matter to the Judicial Ethics Advisory Committee for study expressing "concern[]" as to whether it is appropriate for a judicial candidate to make public comments on pending cases where such comments could affect their future outcomes. . . ." *Kinsey*, 842 So. 2d at 91. One opinion states that judges running for office may not use the words "prosecutor" or "state attorney" in campaign literature. Florida Judicial Ethics Advisory Committee, *In re: Report of the Judicial Ethics Advisory Committee Regarding Judicial Conduct*, at <http://www.jud6.org/LegalPractice/opinions/judicialethicsadvisoryopinions/2002/2002-12.html> (last visited Feb. 17, 2005) (on file with the First Amendment Law Review).

94. *Kinsey*, 842 So. 2d at 88.

95. FLA. CODE OF JUDICIAL CONDUCT Canon 7A(3)(d)(i) (2003). This Florida ethics rule prohibits a candidate for judicial office from "mak[ing] pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office." *Id.* This is the same provision raised, but not addressed by the United States Supreme Court in *White*. See *Republican Party of Minn. v. White*, 536 U.S. 765, 770 (2002).

96. FLA. CODE OF JUDICIAL CONDUCT Canon 7A(3)(d)(ii) (2003). This Florida ethics rule provides that a candidate for judicial office "shall not . . . 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." *Id.*

violated the First Amendment.⁹⁷

The Florida Supreme Court refused to extend *White* to invalidate the promises and pledges provision.⁹⁸ Although two of the Florida justices dissented based on *White*,⁹⁹ and a third found that most of the judge's statements were "announc[ements of] position," not pledges or promises,¹⁰⁰ a majority of the Florida Supreme Court upheld the pledges and promises provision in spite of the constitutional attack.¹⁰¹

97. *Kinsey*, 842 So. 2d at 85.

98. *Id.* at 89.

99. *Id.* at 100 (Wells, J., dissenting). Two other justices mentioned *White*. Justice Lewis noted that *White* did not dispose of the issue since the Florida case involved the pledges and promises provision. *Id.* at 99 (Lewis, J., concurring in part and dissenting in part). Justice Pariente, perhaps unintentionally, credited *White* with having declared the pledges and promises provision unconstitutional, writing that:

Indeed, since our Code was amended in 1994 to remove the 'pledge and promise' clause – the very clause found to be unconstitutional in [*White*] – hundreds of candidates campaigning for judgeships have successfully balanced the competing interests inherent in judicial elections without making statements that impugn their impartiality, cater to a particular group, or make misrepresentations as to their opponents' qualifications and track records.

Id. at 94 (Pariente, J., concurring).

100. *Id.* at 100 (Wells, J., dissenting).

101. *Id.* at 92. Florida has remained consistent, if not clear, in its approach. In *Kinsey*, the Florida Supreme Court held that

the restraints are narrowly tailored to protect the state's compelling interests [in preserving the integrity of the judiciary and maintaining the public's confidence in an impartial judiciary] without unnecessarily prohibiting protected speech. As is clear from the canons and related commentary, a candidate may state his or her personal views, even on disputed issues.

Id. at 87. The Florida Supreme Court Judicial Ethics Advisory Committee has concluded that a candidate "may respond to an opinion survey so long as the candidate follows the mandate of Canon 7," Fla. Judicial Ethics Advisory Comm. Op. 2004-24 (2004); that a "candidate may state his views orally or in writing on disputed issues, as long as the candidate also states that the candidate will uphold the law," Fla. Judicial Ethics Advisory Comm. Op. 2004-09 (2004); and that a "candidate may state his or her views on . . . controversial issues," but "should emphasize in any public statement the candidate's duty to

Kinsey petitioned the United States Supreme Court for certiorari, asserting that the pledges and promises provision and the commitment provision of the Florida Code of Judicial Conduct violated the First Amendment.¹⁰² The petition for certiorari gave the Court an opportunity to determine the parameters on judicial speech restrictions in effect in most states. The Court, however, denied certiorari without dissent or opinion.¹⁰³

uphold the law regardless of his or her personal views.” Fla. Judicial Ethics Advisory Comm. Op. 2002-13 (2002).

102. The petition recited that “Canon 7A(3) of the Florida Code of Judicial Conduct, as interpreted and applied by the Florida Supreme Court, is an unconstitutional restriction of a judicial candidate’s speech and directly conflicts with the First Amendment and [White]” and “create[s] the ‘state-imposed voter ignorance’ condemned by [White].” Petition for Certiorari at *6, *Kinsey v. Fla. Judicial Qualifications Comm’n*, 842 So. 2d 77 (Fla. 2003) (No. 02-1855), *cert. denied*, 540 U.S. 825 (2003). That Canon in Florida contains both the pledges and promises provision, which the Florida Supreme Court upheld, and the commitment provision, which arguably, the Florida court did not specifically address. FLA. CODE OF JUDICIAL CONDUCT CANON 7A(3) (2003). In any event, because Kinsey had been disciplined for violating both, and because her petition for certiorari included both, the Supreme Court had the opportunity to address the application of the First Amendment to these provisions.

103. *Kinsey v. Fla. Judicial Qualifications Comm’n*, 540 U.S. 825 (2003). The Nevada Supreme Court latched onto the denial of certiorari as a means of assuring its citizens of the integrity of the state judiciary. In a press release, Chief Justice Miriam Shearing stated that the

U.S. Supreme Court recognized in a Florida case that a state may establish limits on judicial campaign speech. The [C]ourt refused to review the case in which a judge was fined \$50,000 by the Florida Supreme Court for inappropriate campaign rhetoric The U.S. Supreme Court let stand the fine and the determination that the judge had stepped over the ethical line.

Press Release, Nevada Supreme Court, Chief Justice Miriam Shearing Clarifies Supreme Court Position on Judicial Campaign Speech, at http://nvsupremecourt.us/press/press_040707_campaignSpeech.html (July 7, 2004). Therefore, Justice Shearing continued, “[c]itizens of Nevada are entitled to feel comfortable that their judges will be fair and impartial and have not made prior commitments to decide cases in particular ways even before hearing the evidence and arguments.” *Id.* But, in *Maryland v. Baltimore Radio Show Inc.*, 338 U.S. 912 (1950), the Court, opining on denial of certiorari, wrote:

Like Florida, the highest court of New York declined to extend *White*, sustaining its pledges and promises clause despite a First Amendment challenge. In *In re Watson*,¹⁰⁴ the New York Court of Appeals concluded that a candidate's campaign statements¹⁰⁵ "articulated a pledge or promise of future conduct . . . that compromises the faithful and impartial performance of judicial duties."¹⁰⁶ Review in the Supreme Court was not sought.

What is similar about the two cases – and in stark contrast to *White* – is the contextual analysis undertaken by both state courts. In both the New York and Florida cases, judges were disciplined for campaign conduct and speech in violation of state ethics rules. Both judges defended their actions by claiming that the discipline violated their First Amendment rights. Conversely, the candidate in *White* raised the First Amendment issue in a lawsuit seeking declaratory and injunctive relief from the

Inasmuch, therefore, as all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated.

Id. at 919.

104. 794 N.E.2d 1 (N.Y. 2003).

105. Judge Watson locked onto the "law and order" platform as a means for securing votes. Watson wrote a letter to law enforcement personnel asking for their votes in order to "put a real prosecutor on the bench." *Id.* at 2. Watson also stated in the letter that the city needed a judge who would "work with the police, not against them [and who will] assist our law enforcement officers as they aggressively work towards cleaning up our city streets." *Id.* Watson also wrote letters to the editors of a local newspaper commending his work as a prosecutor and asking voters to elect him so that the city could send a similar message, presumably by his presence on the bench. *Id.* at 2-3. His newspaper ads focused on his "proven experience in the war against crime." *Id.* at 3. He also insinuated that the incumbent judges were responsible for soaring arrests in the local communities. *Id.* After the complaints were filed, the judge admitted that his comments had violated the ethics rules and apologized. *Id.* Nonetheless, the New York Commission on Judicial Conduct recommended his removal from office. *Id.* at 4.

106. *Id.* at 4-5.

enforcement of the ethics provisions. His *proposed* speech and conduct were abstract, and absent context. The absence of context attributed to the majority's purely academic and functional analysis. Arguably, it also prompted a greater reliance on preconceived notions.

The restrictive reading of *White* employed by the Florida and New York courts did not prove persuasive to the Eleventh Circuit Court of Appeals. Rather than follow the state courts' narrow interpretation of *White*, the Eleventh Circuit extended the *White* rationale to invalidate parts of the Georgia Code of Judicial Conduct in effect in many other states.

George Weaver, a Georgia lawyer, mounted a campaign against Justice Leah Sears for a seat on the Georgia Supreme Court.¹⁰⁷ In his campaign materials, Weaver claimed that Justice Sears "stood for" same sex marriage, questioned laws that prohibited sex with children under fourteen, and referred to the electric chair as "silly."¹⁰⁸ As a result of these and other comments, ethics complaints were filed and ultimately resolved against Weaver by the Georgia Judicial Qualifications Commission.¹⁰⁹ Weaver sued claiming that the Georgia judicial canon's "false statement clause," which prohibited judicial candidates from making statements that the candidate "knows or reasonably should know [to be] false"¹¹⁰ violated the First Amendment.¹¹¹

107. *Weaver v. Bonner*, 309 F.3d 1312, 1316-17 (11th Cir. 2002).

108. *Id.*

109. *Id.*

110. *Id.* at 1315 (quoting GA. CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(d) (1998)). The entire provision of the canon at issue in *Weaver* forbids public communication:

which the candidate knows or reasonably should know is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation of fact or law or omits a fact necessary to make the communication considered as a whole not materially misleading or which is likely to create an unjustified expectation about results the candidate can achieve.

GA. CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(d) (1998).

111. *Weaver*, 309 F.3d at 1319. Weaver's lawsuit challenged the judicial canons that prohibited "false, fraudulent, misleading, [or] deceptive" communications by candidates as well as communication which contains "a

The Eleventh Circuit agreed with Weaver. In order to pass constitutional muster, the court held that the prohibited statements “must be limited to false statements that are made with knowledge of falsity or with reckless disregard as to whether the statement is false.”¹¹²

This part of the *Weaver* decision was of minimal consequence because the false statement clause, like the announce clause, was not widely included in state judicial ethics codes.¹¹³ Of great consequence, however, is the remainder of the Eleventh Circuit’s decision, which has been described as demonstrating “how reckless a federal court can be.”¹¹⁴ Despite the fact that neither Weaver nor his opponent had challenged, argued, or briefed it, the court invalidated an ethics rule,¹¹⁵ in effect in thirty-five states, that prohibited candidates for judicial office from “themselves solicit[ing] campaign funds or . . . publicly stated support.”¹¹⁶ The

material misrepresentation of fact or law or omits a fact necessary to make the communication considered as a whole not materially misleading or which is likely to create an unjustified expectation about results the candidate can achieve.” GA. CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(d) (1998). In addition, Weaver challenged Canon 7(B)(2), which prohibited judicial candidates from personally soliciting campaign funds or publicly stated support, requiring instead that the candidate establish an election committee which may undertake such solicitation on behalf of the candidate. *Weaver*, 309 F.3d at 1322.

112. *Id.* at 1319.

113. At one time, Alabama and Michigan had similar ethics provisions. While an appeal was pending in the Eleventh Circuit on the constitutionality of the Alabama provision, the Alabama Supreme Court amended the provision to prohibit only knowing or reckless false statements. *Butler v. Ala. Judicial Inquiry Comm’n*, 802 So. 2d 207, 218 (Ala. 2001). See also *In re Chmura*, 608 N.W.2d 31 (Mich. 2000) (striking down similar provision).

114. Howard A. Levine & Roy A. Schotland, *Judicial Campaign Rules*, N.Y. L.J., Aug. 13, 2003, at 2. The Eleventh Circuit opinion does not discuss why the issue was decided by the court, but Schotland and Levine state that the provision “had not been challenged by plaintiff, nor argued nor briefed at trial or on appeal. *Id.*”

115. *Weaver*, 309 F.3d at 1322-23 (finding Canon 7(B)(2) of the Georgia Code of Judicial Conduct unconstitutional).

116. GA. CODE OF JUDICIAL CONDUCT Canon 7(B)(2) (2004). The parallel provision of the 1990 Model Code of Judicial Conduct, found in Canon 5(C)(2), provides that a “candidate shall not personally solicit or accept campaign contributions or personally solicit publicly state support. A

court concluded, with sparse citation to authority,¹¹⁷ that the provision “completely chilled [candidates] from speaking to potential contributors and endorsers about their potential contributions and endorsements.”¹¹⁸

In reaching its conclusion on the false statement provision, the Eleventh Circuit incorrectly attributed to the *White* majority this conclusion: “the standard for judicial elections should be the same as the standard for legislative and executive elections.”¹¹⁹ In support of this attribution, the Eleventh Circuit quoted Justice Scalia, who commented that the differences between judicial and legislative elections had been “‘greatly exaggerate[d],’”¹²⁰ but ignored Justice O’Connor, the necessary fifth vote for the majority,

candidate may, however, establish committees of responsible persons to conduct campaigns for the candidate Such committee may solicit and accept reasonable campaign contributions . . . and obtain public statements of support for his or her candidacy.” MODEL CODE OF JUDICIAL CONDUCT Canon 5(C)(2) (1990).

117. The court cited only Justice O’Connor’s concurrence in *White*. See *Weaver*, 309 F.3d at 1322 (citing *White*, 536 U.S. at 789-90 (O’Connor, J., concurring)). The rationale was similar in the style, but not the content, of Justice O’Connor’s concurrence. While Justice O’Connor lamented the fact that elected judges may feel beholden to their financial supporters, *White*, 536 U.S. at 789-90, the Eleventh Circuit stated that “[t]he impartiality concerns, if any, are created by the State’s decision to elect judges publicly,” *Weaver*, 309 F.3d at 1322.

The Eleventh Circuit did not appear moved by the decisions on similar provisions reached by the District Court for Minnesota, see *Republican Party of Minn. v. Kelly*, 63 F. Supp. 2d 967, 983 (D. Minn. 1999) (holding that the Codes are narrowly tailored to serve the compelling governmental interest of preventing undue influence or the appearance thereof), or the Eighth Circuit, see *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 876 (8th Cir. 2001) (upholding the restrictions placed on judicial candidates’ partisan activities). Nor did the Supreme Court’s decision not to grant certiorari on similar provisions seem to affect their decision. *Republican Party of Minn. v. Kelly*, 534 U.S. 1054, 1054 (2001). The Court limited the grant of certiorari to “Question 1 presented by the petition.” *Id.* Question One of the petition dealt with the “‘announce’ clause,” while Question Two dealt with “‘endorsement’ clauses,” and Question Three with “‘attend and speak’ clauses.” *Petition for Certiorari* at i, 3, *Kelly*, 247 F.3d 854 (No. 01-521).

118. *Weaver*, 309 F.3d at 1322.

119. *Id.* at 1321.

120. *Id.* (quoting *White*, 536 U.S. at 874).

who wrote separately to express her concern about judicial elections.¹²¹ Such an expansive reading of the *White* rationale, particularly in light of the reservations expressed in Justice O'Connor's concurrence, is ill advised.

The Eleventh Circuit's decision was issued some four months after *White*. A request for rehearing en banc was denied¹²² and neither party sought certiorari in the United States Supreme Court. Nonetheless, the appellate court's willingness to extend *White*, even without request, was apparently sufficient impetus to prompt another federal court to follow suit. In *Spargo v. New York State Commission on Judicial Conduct*,¹²³ the United States District Court for the Northern District of New York¹²⁴ enjoined the enforcement of certain provisions¹²⁵ of the New York Code of

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

122. *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002), *reh'g denied* *Weaver v. Bonner*, No. 00-15188-DD, 2003 U.S.App. LEXIS 464 *1 (11th Cir. Jan. 9, 2003). Thus, three judges, sitting as the panel that decided *Weaver*, two from the Eleventh Circuit, and one visiting from the Fifth, without the benefit of advocacy of counsel invalidated ethics provisions in effect in numerous states.

123. 244 F. Supp. 2d 72 (N.D.N.Y. 2003).

124. Demonstrating perhaps the strength of his conviction that the provisions were unconstitutional, the same district judge refused to stay his ruling pending appeal. Judge David Hurd wrote that "[w]hile confusion and delay in misconduct proceedings may be a temporary result of this injunction, it cannot be said that it is in the public interest to allow the commission to violate a judge's . . . core First Amendment rights." *Spargo v. N.Y. State Comm'n of Judicial Conduct*, No. 1:02-CV-1320, 2003 WL 2002762, at *3 (N.D.N.Y. Apr. 29, 2003) (denying stay).

125. The relevant New York ethics rules provided:

[Neither a judge nor a candidate for judicial office] shall directly or indirectly engage in any political activity . . . includ[ing]:

. . . .

- (c) engaging in any partisan political activity [except for participation in the judge's own campaign];
- (d) participating in any political campaign for any office or permitting his or her name to be used in connection with any activity of a political organization;
- (e) publicly endorsing or publicly opposing (other than by running against) any other candidate for public office;

Judicial Conduct prohibiting judges and candidates for judicial office from participating in political activity¹²⁶ while state disciplinary proceedings were pending against the plaintiff.¹²⁷ Amidst varying predictions,¹²⁸ the Second Circuit vacated the

(f) making speeches on behalf of a political organization or another candidate;

(g) attending political gatherings;

....

A judge... shall maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary....

Spargo, 244 F. Supp. 2d at 81-82 (quoting N.Y. COMP. CODES R. & REGS. Tit. 22, § 100.5 (2003)).

126. *Id.* at 92. The court held that the prohibitions were impermissible prior restraints on a judicial candidate's free speech rights. The court described the provisions as:

even broader than prohibiting specific speech, such as views on legal or political issues as in *White*. [H]ere judges and judicial candidates are essentially precluded from participating in politics at all except to participate in their own election campaigns. Moreover, a wholesale prohibition on participating in political activity for fear of influencing a judge ignores the fact that a judicial candidate must have at one time participated in politics or would not find him or herself in the position of a candidate.

Id. at 88.

127. The case actually involved three plaintiffs. *Spargo* was a Town Justice and a candidate for judicial office charged with violation of the ethics rules. Because of the pendency of the disciplinary proceedings against him, the defendants argued that the district court should abstain from jurisdiction under the *Younger* doctrine since the "state disciplinary proceeding provide[d] *Spargo* with a fully adequate forum to raise his constitutional challenges." *Spargo v. State Comm'n on Judicial Conduct*, 351 F.3d 65, 68 (2d Cir. 2003), *cert. denied*, 124 S. Ct. 2812 (2004) (mem.) (citing *Younger v. Harris*, 401 U.S. 37, 44-45 (1971), for the proposition that "federal courts should generally refrain from enjoining pending state court proceedings"). The remaining two plaintiffs, McNally and Kermani, sued, however, as voters or party office holders, and were not the subject of disciplinary complaints. The defendants' position was that the principles of federalism and comity nonetheless required abstention from their cases as well.

128. Tom Perrotta, of the *New York Law Journal*, described the panel as "skeptical" during oral argument, noting that one judge was "not necessarily impressed with the substance of the judge's arguments." Tom Perrotta,

judgment and remanded the case, with an instruction that the district court abstain from taking jurisdiction.¹²⁹ The petition for certiorari to the United States Supreme Court was denied without opinion.¹³⁰

The missed, or avoided, opportunities¹³¹ to revisit *White* are

Spargo's Challenge Meets Stiff Resistance From Second Circuit Panel, N.Y.L.J., Sept. 30, 2003, at 1. Another observer, however, described the oral argument as a "dispassionate, scholarly discussion . . . [about] a hotly emerging area of federal constitutional law." Bernard Malone, Jr., *Spargo Oral Argument: Another Point of View*, N.Y. L.J. Oct. 1, 2003, at 2.

129. *Spargo*, 351 F.3d at 85-86. New York officials had urged the United States District Court for the Northern District of New York to abstain on the basis of "a strong federal policy against federal-court interference with pending judicial proceedings absent extraordinary circumstances." *Spargo*, 244 F. Supp. 2d at 82 (quoting *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982)). The district court declined to abstain for two reasons. First, the court expressed concerns as to whether *Spargo* could seek mandatory review over the decision of the Commission in the New York Court of Appeals. Second, the court noted that neither of the other two plaintiffs were parties to *Spargo's* disciplinary action. *Id.* at 82- 85.

Because the New York Court of Appeals, subsequent to the district court decision, confirmed that it conducted a mandatory review of the Commission's disciplinary decisions, *see In re Raab*, 793 N.E.2d 1287 (N.Y. 2003) (*per curiam*); *In re Watson*, 794 N.E.2d 1 (N.Y. 2003) (*per curiam*), and because the claims of the other two plaintiffs were intertwined with *Spargo's*, the Second Circuit found that abstention was required.

Apparently, retired New York Court of Appeals Judge Howard Levine agreed with the decision. He noted, just months before it was issued, that: "State Supreme Courts work hard at writing and enforcing rules that balance judicial independence with accountability. When such an effort is attacked as unconstitutional, the federal courts owe the states at least decent respect." *Levine & Schotland*, *supra* note 114, at 2.

130. *Spargo v. New York Comm'n on Judicial Conduct*, 124 S. Ct. 2812, 2812 (2004) (mem.).

131. At least one other decision since *White*, this one rendered by a state supreme court, has dealt with First Amendment challenges to judicial ethics rules. The Maine Supreme Judicial Court upheld provisions that disallowed sitting judges from soliciting support for political candidates and organizations and from purchasing tickets to political functions. *In re Dunleavy*, 838 A.2d 338 (Me. 2003), *cert. denied*, 124 S. Ct. 1722 (2004) (mem.). The court found that the provision was "narrowly tailored to serve [the] compelling state interest . . . in preserving the appearance of, and the impartiality, of the state judiciary." *Id.* at 350-51. The court further found that the prohibition "applies only to conduct which presents the greatest risk to that interest." *Id.* at 351.

not at an end, and will not be for some time. Since the Court granted certiorari on only one of several issues presented in *White*, the lawsuit was remanded for further action to the Eighth Circuit.¹³² In March 2004, the Eighth Circuit, in a two-one decision, remanded the case to the district court with specific instructions.¹³³ First, because of the reversal of its decision on the announce clause, that part of the case was remanded for the district court to enter judgment for the plaintiff.¹³⁴ Similarly, since neither side had appealed the original decision upholding the restrictions on campaign fund solicitations, a provision invalidated in *Weaver*, that part of the case was remanded for entry of judgment for the defendant.¹³⁵ Lastly, the court remanded the challenges to the ban on political activities to the district court for a decision on whether its prior disposition was consistent with the Supreme Court's decision.¹³⁶ When this order was challenged, the court granted a petition for rehearing en banc and scheduled oral argument.¹³⁷

Some courts and judicial conduct commissions are filling the vacuum left by *White* with inconsistent and sometimes poorly reasoned decisions. Thus, some say a rush to study, amend, delete, and revise codes of judicial conduct throughout the country has occurred. While deleting or declining to enforce announce clauses is constitutionally required, and thus understandable, far more than the thirteen states that have announce clauses are engaged in the painstaking process of reviewing their ethics codes and attempting to predict the constitutionality of the remaining speech and conduct

Finally, the court noted, “[i]t is exactly this [prohibited] activity that potentially creates a bias, or at least the appearance of bias, for or against a party to a proceeding.” *Id.* No petition for certiorari to the United States Supreme Court appears to have been filed in this case.

132. *Republican Party of Minn. v. White*, 361 F.3d 1035 (8th Cir. 2004).

133. *Id.* at 1049.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Republican Party of Minn. v. White*, No. 99-4021, 2004 U.S. App. LEXIS 10232 (8th Cir. May 25, 2004). The court heard oral arguments in the case the week of October 18, 2004. The arguments can be heard on the website for the Eighth Circuit Court of Appeals, at <http://www.ca8.uscourts.gov/case/csFrame.html> (last visited Feb. 17, 2005).

provisions. Of particular concern are the inconsistent decisions reached by courts addressing lawsuits challenging other provisions. The inconsistencies only increase the difficulty faced by state judicial commissions and judges.

Because the American Bar Association predicted¹³⁸ that other provisions of the Model Code of Judicial Conduct would run afoul of the First Amendment, the organization recommended that a definition of impartiality consistent with *White* be added to the Code.¹³⁹ The drafters hoped that restrictions on judicial speech would survive constitutional attacks if a definition of impartiality was added to the Code; if each restriction was narrowly drawn to further a compelling state interest; and if the restrictions applied to

138. The issue of judicial independence had been on the American Bar Association's radar screen for several years, but had been a prime issue since at least the fall of 1996, when both candidates for President of the United States called for the resignation or impeachment of Judge Harold Baer, Jr., a federal district judge, due to a decision he reached on a suppression motion. American Judicature Society, *Political Threats to Judicial Independence*, at http://www.ajs.org/cji/cji_politicalthreats.asp (last visited Feb. 17, 2005) (on file with the First Amendment Law Review).

A Standing Committee on Judicial Independence was created by the American Bar Association shortly after the Judge Baer fiasco. In September, 2001, the Committee formed a Working Group on the First Amendment and Judicial Campaigns. The group was working to evaluate Canon 5, the political activities provision, of the Model Code of Judicial Conduct when the *White* decision was released. Joint Comm'n to Evaluate the Model Code of Judicial Conduct, Am. Bar Ass'n, *Background Paper*, at <http://www.abanet.org/judicialethics/about/background.html> (last visited Feb. 20, 2005) (on file with the First Amendment Law Review).

139. See Ed O'Brien, Am. Bar Ass'n, *Independent Courts: How Important Are They?* n.6, available at <http://www.abanet.org/publiced/resources/indcourtsarticle>. "Impartial" or "impartiality" is now defined in the Terminology section of the Code as "denot[ing] absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge." See MODEL CODE OF JUDICIAL CONDUCT Terminology (2003), http://www.abanet.org/cpr/mcjc/pream_term.html#TERMINOLOGY. The term is referenced in five sections and several comments in the Code. A draft of proposed revisions to the code was released on January 28, 2005. Press Release, Am. Bar Ass'n, *ABA Commission Releases Draft Revisions to Judicial Ethics Code Rules About Political Activity*, at <http://www.abanet.org/media/releases/news012805.html> (Jan. 28, 2005).

all of the judge's official duties, not just campaign speech, thereby avoiding a claim of underinclusiveness.¹⁴⁰ At its annual meeting in August 2003, the American Bar Association House of Delegates adopted the amendments.¹⁴¹

140. To this end, the Code now contains two provisions, Canon 3(B)(10) and Canon 3(E)(1)(f), which provide, respectively:

A judge shall not, with respect to cases, controversies or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.

...

A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (f) the judge, while a judge or a candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to (i) an issue in the proceeding; or (ii) the controversy in the proceeding.

MODEL CODE OF JUDICIAL CONDUCT Canons 3(B)(1) and 3(E)(1)(f) (1999). The comments to these new rules attempt to vigorously assert the state interest. For example, the comment to Canon 3(B)(10) provides that these "restrictions on judicial speech are essential to the maintenance of the integrity, impartiality, and independence of the judiciary." MODEL CODE OF JUDICIAL CONDUCT Canons 3(B)(10) cmt. (1999).

141. Eileen Gallagher, *Judicial Ethics and The First Amendment - A Survey of States*, 42 THE JUDGES' J. 26, 28 (Spring 2003). The campaign speech amendments provide:

(3) A candidate for a judicial office: (a) shall maintain the dignity appropriate to judicial office and act in a manner consistent with the impartiality, integrity and independence of the judiciary, and shall encourage members of the candidate's family to adhere to the same standards of political conduct in support of the candidate as apply to the candidate;

....

(d) shall not: (i) with respect to cases, controversies, or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office

MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(a) & (d)(i) (2003). Some of the related comments to the rules were revised as well.

The effect of the amendments pertaining to judicial speech is to combine the previous pledges and promises and commitment clauses into one rule, to tie that rule to a vigorously asserted state interest in impartiality, and to require adherence to that compelling state interest in all of a judge's activities, not just his or her campaign conduct. Commentary has been added to three canons to emphasize the importance of an impartial and independent judiciary.¹⁴²

In addition to these modifications,¹⁴³ the ABA Standing Committee on Judicial Independence undertook a comprehensive review of the 1990 Model Code of Judicial Conduct to be completed and submitted for possible adoption by early 2005.¹⁴⁴ Throughout the proposed draft provisions, the Commission's concern with First Amendment challenges is obvious. For example, in Canon 1, the proposed draft adds the following commentary: "A judiciary of integrity is one in which judges are known for their probity, fairness, honesty, uprightness, and soundness of character. An independent judiciary is one free of inappropriate outside influences."¹⁴⁵

This commitment to preserving an independent judiciary is also apparent in the draft revisions of Canon 5. The proposed Canon provides that a "judge or candidate for judicial office shall refrain from political activity that is inconsistent with the impartiality, integrity and independence of the judiciary."¹⁴⁶ In

142. See O'Brien, *supra* note 139.

143. A number of states including Arizona, Minnesota, and New Mexico have proposed or adopted amendments to their state judicial ethics rules to incorporate these changes. The New York Commission to Promote Public Confidence in Judicial Elections has recommended some of the changes in the ABA amendments to the Chief Justice of the New York Court of Appeals. The N.Y. Comm'n to Promote Public Confidence in Judicial Elections, *Appendix C: Proposed Changes to Part 100 of the Rules of the Chief Administrator of the Courts Governing Judicial Conduct*, at <http://law.fordham.edu/commission/judiciaelections> (Dec. 2003).

144. ABA Joint Comm'n to Evaluate the Model Code of Judicial Conduct, *Background Paper*, at <http://www.abanet.org/judicialethics/about/background.html> (last visited Feb. 17, 2005) (on file with the First Amendment Law Review).

145. MODEL CODE OF JUDICIAL CONDUCT Canon 1 cmt. (2003).

146. Press Release, Am. Bar Ass'n, ABA Commission Releases Draft

announcing this proposal, the Commission stated its intent that revised Canon 5 would “continue to restrict judges from engaging in politics, except during campaigns for election or appointment, and even then would confine judges’ activity as closely as permitted under recent court rulings.”¹⁴⁷

VI. AFTER *WHITE*, NOW WHAT?

As the American Bar Association works to lend guidance, some states scurry to act on their own while others await the ABA revisions. The underlying motivation is the same: to assure a fair, impartial, respected state judiciary notwithstanding the now recognized right of judges, as candidates, to announce their views on legal issues while seeking the office.

If, as is predicted here, the decision in *White* will have devastating effects on state judiciaries, what can a state do to assure the impartiality of and respect for its judiciary? How can a state assure its citizens that their elected judges will not have prejudged issues without hearing the evidence or argument?

At least six “solutions” have been tried or suggested. Each of these solutions is discussed below. Three of these were previewed in the Supreme Court’s decision in *White*. The other three are in various stages of experimentation in the states. Whether any will have the desired effect of accommodating First Amendment rights without sacrificing judicial independence, the crown jewel¹⁴⁸ of the American judiciary, remains to be determined.

Revisions to Judicial Ethics Code Rules About Political Activity, at <http://www.abanet.org/media/releases/news012805.html> (Jan. 28, 2005). The proposal differentiates between those who are currently candidates and those who are not and imposes more restrictions in the latter case.

147. *Id.*

148. Numerous sources have credited Chief Justice William Rehnquist with calling the independent American judiciary the “crown jewel of American democracy.” See, e.g., Justice at Stake, *Court-Stripping Back in Fashion as Congress, Executive Seek to Limit Power of Courts to Protect Rights*, at <http://justiceatstake.org/contentViewer.asp?breadcrumb=3,436> (last visited Feb. 17, 2005) (on file with the First Amendment Law Review); see also *supra* note 49 and accompanying text.

A. *Change the Rules*

As the efforts of the American Bar Association and some states demonstrate, one solution is to change the rules. Rule changing, unfortunately, is not one-size-fits-all; many states have their own idiosyncrasies with which they must deal. Alabama is a prime example.

As a state in the Eleventh Circuit, Alabama was faced not only with *White*, but with *Weaver* as well.¹⁴⁹ The Alabama Code of Judicial Conduct contained both a pledges and promises clause and a misleading statement clause.¹⁵⁰ The latter had an intent requirement similar to the one in Georgia's "false statement" provision invalidated in *Weaver*. When the Alabama misleading statement provision was attacked on First Amendment grounds, prior to either the *White* or *Weaver* decisions,¹⁵¹ the Alabama

149. The sua sponte portion of the *Weaver* decision struck portions of the Georgia Code of Judicial Conduct that were virtually identical to the provisions in other states, including Alabama. *Weaver v. Bonner*, 309 F.3d 1312, 1321-22 (11th Cir. 2002).

150. The Alabama rule provided:

During the course of any campaign for nomination or election to judicial office, a candidate shall not . . . post, publish, broadcast, transmit, circulate, or distribute false information concerning a judicial candidate or an opponent, either knowing the information to be false or with reckless disregard of whether the information is false; or post, publish, broadcast, transmit, circulate, or distribute true information about a judicial candidate or an opponent that would be deceiving or misleading to a reasonable person.

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

151. *Butler v. Ala. Judicial Inquiry Comm'n*, 802 So. 2d 207, 216 (Ala. 2001). In fact, *Butler* was viewed as significant precedent by the Eleventh Circuit in *Weaver*, as was a prior Michigan Supreme Court decision, *In re Chmura*, 608 N.W.2d 31 (Mich. 2000). The relevant provision of the Michigan Code of Judicial Conduct was described by the Eleventh Circuit in *Weaver* as "nearly identical" to the Georgia provision. *Weaver*, 309 F.3d at 1322 n.12. Canon (7)(B)(1)(d) of the Michigan Code provides that:

[A] candidate for judicial office, including an incumbent judge, should not use or participate in the use of any form of public communication that the candidate knows or

Supreme Court invalidated the provision as written and modified it to prohibit only knowing or reckless false statements.¹⁵² With that hurdle behind it, the Alabama Judicial Inquiry Commission now faced interpreting *White* and *Weaver* in an election year.

To comply with the Eleventh Circuit's invalidation of the personal solicitation provision, the Alabama Supreme Court Standing Committee on Judicial Canons and Ethics recommended that the parallel Alabama canon, which prohibited personal solicitation of funds, be changed to "strongly discourage" a candidate from "personally soliciting campaign contributions."¹⁵³ Compliance with the *White* decision would not prove as simple. While *White* was pending, all Alabama state judges received a questionnaire from the Christian Coalition of Alabama, which the Coalition intended to use to formulate a voter's guide. The questionnaire asked the candidates to respond to each question by marking either "agree," "disagree," "undecided," or "decline." The responses, but no narrative or explanations, were to be published in

reasonably should know is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading, or which is likely to create an unjustified expectation about results the candidate can achieve.

Chmura, 608 N.W.2d at 36. The Alabama provision, though substantially different, was before the Eleventh Circuit for review in 2001, *Butler v. Ala. Judicial Inquiry Comm'n*, 245 F.3d 1257 (11th Cir. 2001), but because of pending disciplinary proceedings in Alabama, the appeals court remanded the case with certified state law questions concerning abstention. *Id.* at 1265-66. On remand, the Alabama Supreme Court declared the provision in violation of the First Amendment and narrowed the Canon to apply only to knowing or recklessly negligent false statements. *Butler v. Ala. Judicial Inquiry Comm'n*, 802 So. 2d 207, 218 (Ala. 2001). The Eleventh Circuit then found that the issue was moot. *Butler v. Ala. Judicial Inquiry Comm'n*, 261 F.3d 1154, 1157-58 (11th Cir. 2001).

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

153. The Alabama Canons of Judicial Ethics provides in Canon 7(B)(4) that "candidates shall not personally solicit campaign contributions." ALA. CANONS OF JUDICIAL ETHICS Canon 7(B)(4) (2002). The parallel Georgia provision, invalidated by the Eleventh Circuit Court of Appeals, prohibited judicial candidates from personally soliciting campaign contributions and public support. *Weaver*, 309 F.3d at 1322.

the voter's guide.

The questions asked the candidates' views on "a number of social and political issues such as abortion, gun control, and the role of a judge's religious belief in decision making."¹⁵⁴ Judges and judicial candidates seeking election asked the Alabama Judicial Inquiry Commission whether the Alabama ethics rules allowed them to reply. Initially, the Commission answered "no"¹⁵⁵ and offered this explanation:

The inquiries under consideration in the questionnaire at issue call for or appear to solicit the judicial candidate's predisposition toward specific legal views on matters pending or impending before any number of trial and appellate courts A judge's response to such questions would clearly violate [the canons] Such remarks raise the "red flag" of potential bias.¹⁵⁶

The Alabama judicial code did not prohibit candidates from announcing their views as had Minnesota's, but instead prohibited a candidate from announcing "in advance the candidate's conclusions of law on pending litigation."¹⁵⁷ In addition, a separate provision in Canon 7(B) prohibited promises "other than the faithful and impartial performance of the duties of office." The Commission relied on these two provisions, as well as a third prohibiting public comments on pending cases and requiring impartiality and integrity, for its opinion that judges could not respond to the

154. *Christian Coalition of Ala. v. Cole*, 355 F.3d 1288, 1290 (11th Cir. 2004). The Christian Coalition of America's website includes among its agenda items the passage of legislation to prohibit civil rights for domestic partners, to require notice for minor's abortions, to restrict abortion rights of adults, and to allow states to display the Ten Commandments. Christian Coalition of America, *Agenda for the 109th Congress (2003-2004)*, at <http://www.cc.org/issues.cfm> (last visited Feb. 17, 2005) (on file with the First Amendment Law Review).

155. Answering Questions to Be Used in Preparation for Organization's Voters Guide, Ala. Judicial Inquiry Comm'n Op. 00-763 (September 8, 2000) (this opinion was subsequently withdrawn on July 19, 2002).

156. *Id.*

157. ALA. CANONS OF JUDICIAL ETHICS Canon 7B(1)(a) & (c) (2002).

questionnaire.

In response to the Commission's opinion, the Christian Coalition of Alabama first reduced the number of questions from thirty to fifteen, and then joined with three candidates running for Alabama judgeships to sue the Commission in federal court.¹⁵⁸ The district court initially enjoined the enforcement of the restrictions in the Judicial Inquiry Commission's opinion but abstained from reaching the merits of the issue, deferring to the state court.¹⁵⁹ The decision in *White* was released before the district court could comply with the Eleventh Circuit's reversal and remand. The Commission withdrew the opinion and ultimately succeeded in having the lawsuit dismissed as moot.¹⁶⁰

Following *White* and the hasty withdrawal of the Commission's Advisory Opinion, the Alabama Supreme Court's Standing Committee on Judicial Canons and Ethics recommended that the canons be supplemented with an explanation of the requirement of judicial integrity, but did not recommend any changes in the remaining announce and promises provisions.

The Alabama Commission's defensive and hasty reaction is illustrative of actions taken by other states; an action perhaps indicating fear, certainly indicating a desire to avoid litigation, and an action the result of which in an over-application of *White*.

An example of what happens when a state does not "change the rules" occurred in Alaska where state judges face retention votes.¹⁶¹ Judges and judicial candidates received a questionnaire

158. See *Christian Coalition of Ala.*, 355 F.3d at 1290 (reciting history of litigation).

159. *Pittman v. Cole*, 117 F. Supp.2d 1285, 1315 (S.D. Ala. 2000). On appeal, the Eleventh Circuit vacated the district court decision and ordered the court to certify questions to the Alabama Supreme Court, but to address the merits of the controversy, after receiving the state court's answers to questions that were determinative. *Pittman v. Cole*, 267 F.3d 1269, 1291 (11th Cir. 2001).

160. See *Christian Coalition of Ala.*, 355 F.3d at 1290.

161. That special interest groups solicit answers to questions from judges subject to retention elections proves the point that, despite the argument that *White* applies only to judges who are elected, the decision will impact even those jurisdictions where judges are retained either by vote of the citizenry or the legislature.

from the state Right-to-Life Committee. Utilizing the same four-choice response system as did the Alabama Christian Coalition, the questionnaire asked judges to mark “agree,” “disagree,” “undecided,” or “decline” with regard to statements such as this:

Recognizing the judicial obligation to follow binding precedent of higher courts and applicable constitutional and statutory provisions, to honor stare decisis, and to decide any future case based on the law and facts of that case, in accord with the position of the Alaska Right to Life Committee, I believe that the unborn child is biologically human and alive and that the right to life of human beings should be respected at every stage of their biological development.¹⁶²

The Alaska questionnaire was introduced with this statement:

The Alaska Right to Life Committee certainly recognizes that judicial candidates should maintain actual and apparent impartiality [and] should not pledge or promise certain results in particular cases that may come before

162. Candidate Questionnaire from Alaska Right to Life Committee 3 [hereinafter Candidate Questionnaire] (on file with the First Amendment Law Review). In the 2003 Pennsylvania judicial races, the questions included:

Do you support the rights of LGBT (lesbian, gay, bisexual, transgendered) people to the following: a. marriage? b. protection from discrimination in employment, housing and access to public accommodations? . . . Do you support the death penalty? Do you support restricting abortion rights in Pennsylvania? If so, which restrictions do you support? . . . Do you believe a parent’s sexual orientation should be a determining or influencing factor in custody decisions?

PENNSYLVANIANS FOR MODERN CTS., AS PENNSYLVANIA GOES, SO GOES THE NATION: A CASE STUDY OF A SUPREME COURT ELECTION IN THE POST-WHITE ERA (Aug. 2004), available at <http://www.justiceatstake.org/files/PennsylvaniaReport.pdf> (internal citations omitted).

them. . . This questionnaire is intended to elicit candidates' views on issues of vital interest to the constituents of the Alaska Right to Life Committee without subjecting candidates answering its questions of accusations of impartiality or requiring candidates to recuse themselves in future cases.¹⁶³

The questionnaire mirrored a similar questionnaire sent to candidates in Indiana, which, according to one source, was accompanied by a legal opinion, authored by counsel for some of the plaintiffs in *White*¹⁶⁴ advising judges that the questionnaire included "only questions with answers protected by the First Amendment."¹⁶⁵

The Alaska Commission on Judicial Conduct responded to the Alaska Right to Life Committee and warned its judges that, should they answer the questions, they would create "situations that would require them to be disqualified from sitting on cases

163. Candidate Questionnaire, *supra* note 162, at 1.

164. According to the Justice at Stake Newsletter, *Eyes on Justice*, the letter was written by James Bopp, of Bopp, Coleson, and Bostrom, Terra Haute, Indiana. *Campaign Speech: Loose Lips on the Campaign Trail*, EYES ON JUSTICE (Justice at Stake, Washington, D.C.), Oct. 24, 2002 at 4 (on file with the First Amendment Law Review). James Bopp is General Counsel to the National Right to Life Committee. Bopp's resume lists that he is currently President of the National Legal Center for the Medically Dependent and Disabled, Inc., General Counsel for the James Madison Center for Free Speech, and General Counsel for the Opportunity Project of Indiana, Inc. Resume of James Bopp, Jr., Esq., available at <http://www.jamesmadisoncenter.org/Documents/Bopp%20Resume%209.3.04.pdf>.

165. *Campaign Speech*, *supra* note 164. It would not be overly speculative to suggest that the Indiana Commission on Judicial Qualifications, rather than those of the Alaska Commission on Judicial Conduct, could have been the next defendant. Apparently, the Indiana Commission on Judicial Qualifications, which had previously counseled judges against making "pledges or promises of conduct in office and against making statements which appear to commit the candidates to the outcomes of cases," issued an opinion amending its prior advice, but asserting that it would continue to enforce the pledges and promises and commitment provisions. See generally *Permissible Campaign Speech*, Ind. Comm'n on Judicial Qualifications, Op. No. 1-02 (2002).

involving those issues.”¹⁶⁶ The Commission and its members were sued, on October 1, 2004, in a suit filed in federal district court seeking to block enforcement of the Alaska rules and brought by a resident of the North Pole who sought information on state judicial candidates.¹⁶⁷ The lawsuit requests a preliminary injunction against the enforcement of the Alaska rules.¹⁶⁸ The contrast between the Alabama and Alaska situations suggests that the “change the rules solution” is economically attractive, albeit timid.

B. Appoint the Judges

Some would suggest that shifting the selection of the judiciary from the electorate to an appointing authority is a

166. Letter from Marla N. Greenstein, Executive Director, Alaska Commission on Judicial Conduct, to Karen Vosburgh, Executive Director, Alaska Right to Life (Oct. 16, 2002) (on file with the First Amendment Law Review). According to a lawsuit filed against the Commission, the Commission advised judges that “questions that reflect a pre-judgment of a controversial issue or judicial philosophy that could predict outcome in a case are to be avoided.” *Id.*

167. Press Release, James Madison Center, Alaska Rules on Judicial Speech Challenged (Oct. 1, 2004), <http://www.jamesmadisoncenter.org/Test/content.html>.

168. *Id.* The suit suggested urgency in order to enable the Right-to-Life Committee to receive and publish the judge’s responses before the November, 2004, retention election. *Id.*

A lawsuit similar to the one filed in Alaska was filed in Kentucky by the Family Trust Foundation. The Foundation sought answers to a survey from candidates for judicial office in the November 2004 election. Based on the Kentucky Code of Judicial Conduct, several Kentucky judges declined to respond; others sought guidance from the Kentucky Judicial Conduct Commission. As a result the Family Trust Foundation sued. The federal court for the Eastern District of Kentucky granted an injunction against the enforcement of the pledges and promises clause of the Kentucky Code of Judicial Conduct. *Family Trust Found. of Ky., Inc. v. Wolnitzek*, 245 F. Supp. 2d 672 (E.D. Ky. 2004). The district judge acknowledged that *White* did not involve a promises clause, but found the difference between the two clauses to be “simply one of a label.” *Family Trust Found. of Ky., Inc. v. Wolnitzek*, 388 F.3d 224, 227 (6th Cir. 2004). The Sixth Circuit agreed that the pledges and promises clause was the “functional equivalent” of the announce clause struck down in *White* and thus declined to stay the enforcement of the injunction. *Id.* at 228.

“solution” to the problems created by *White*. The majority decision in *White* was reached, presumably, because Minnesota chose to allow its citizens to elect its judges. The issue was phrased and decided in terms of the “right” of “candidates for judicial office.”¹⁶⁹ Once the state chose to place judicial selection in the political arena, it was required to honor the accouterments of political speech and to accept the accompanying risks to judicial integrity.

For the majority, for example, Justice Scalia wrote, relying on two voting rights cases:

The greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance. 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.¹⁷⁰

Similarly, Justice Kennedy, in his concurrence, suggested some solutions for the state, including the adoption of ethics codes and recusal standards, but concluded that “[w]hat Minnesota may not do . . . is censor what the people hear as they undertake to decide for themselves which candidate is most likely to be an exemplary judicial officer. Deciding the relevance of candidate speech is the right of the voters, not the State.”¹⁷¹ Thus, the First Amendment has its “fullest and most urgent application precisely to the conduct of campaigns for political office.”¹⁷²

169. *Republican Party of Minn. v. White*, 536 U.S. 765, 769 (2002).

170. *Id.* at 788 (quoting *Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting) (citing *Meyer v. Grant*, 486 U.S. 414, 424-25 (1988))).

171. *Id.* at 794 (Kennedy, J., concurring) (citing *Brown v. Hartlage*, 456 U.S. 45, 60 (1982)).

172. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) (citations omitted). See also *Buckley v. Valeo*, 424 U.S. 1, 52-53 (1976) (per curiam) (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)) (citations omitted). In that case the majority held:

[I]t is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues

Most direct of all Justices on this point was Justice O'Connor, who contrasted the Minnesota choice of electing judges with an "appointment system or a combined appointment and retention election system."¹⁷³ What Justice O'Connor expressed and the majority implied was that states could remove the risk of judicial bias by removing judges from the electoral process. Justice O'Connor even opined that among the solutions would be a combined appointment/retention system.¹⁷⁴

This suggestion ignores the reality that judges who are retained by the voters or the legislature, just as judges who are popularly elected, will be called upon to "announce" their views. Judges, subject to retention – not election – have been targeted by special interest campaigns; similarly, legislators have selectively scrutinized some judges facing legislative appointment based on politically unpopular decisions.¹⁷⁵

before choosing among them on election day. Mr. Justice Brandeis' observation that in our country "public discussion is a political duty" applies with special force to candidates for public office.

Id.

173. *White*, 536 U.S. at 792 (O'Connor, J., concurring).

174. *Id.*

175. Justice David Lanphier was a retention judge who was voted off the court as a result of two issues on which he wrote for the Nebraska Supreme Court. The first concerned a term limits initiative that had been approved by the voters. The other issue – whether malice was a required element of second-degree murder – resulted in the reversal of a number of murder convictions, as a result of returning malice as a required element of second-degree murder. Those who opposed the rulings joined to form Citizens for Responsible Judges, which raised and spent money to defeat Justice Lanphier but refused to comply with the state's campaign disclosure laws, arguing that the law did not apply to judicial retention races. Am. Judicature Society, *Judicial Selection in Nebraska: An Introduction*, at <http://www.ajs.org/js/NE.htm> (last visited Feb. 17, 2005) (on file with the First Amendment Law Review). Some might suggest another example occurred in Tennessee and involved the author of this article. See The Constitution Project, *Examples of Intimidation*, at http://www.constitutionproject.org/ci/newsroom_guide/38.htm (last visited Feb. 17, 2005) (on file with the First Amendment Law Review).

C. Trust Democracy

Another “solution” offered expressly by Justice Kennedy may be summarized as “trust democracy.” In his concurrence he opined:

If Minnesota believes that certain sorts of candidate speech disclose flaws in the candidate’s credentials, democracy and free speech are their own correctives. The legal profession, the legal academy, the press, voluntary groups, political and civic leaders, and all interested citizens can use their own First Amendment freedoms to protest statements inconsistent with the standards of judicial neutrality and judicial excellence. Indeed, if democracy is to fulfill its promise, they must do so. They must reach voters who are uninterested or uninformed or blinded by partisanship, and they must urge upon voters a higher and better understanding of the judicial function and a stronger commitment to preserving its finest traditions. Free elections and free speech are a powerful combination: Together they may advance our understanding of the rule of law and further a commitment to its precepts.¹⁷⁶

At least two problems with this “solution” are obvious. First, as has been well documented, voters do not “turn out” for judicial elections.¹⁷⁷ One scholar has identified this phenomenon as

176. 536 U.S. at 795 (Kennedy, J., concurring).

177. Charles Gardner Greyh, *Why Judicial Elections Stink*, 64 OHIO ST. L. J. 43, 52-3 (2003). In his article, Greyh explains:

Eighty percent public support for judicial elections is the first of four political realities in the “Axiom of 80.” The second political reality is in tension with the first: despite the overwhelming popularity of judicial elections on a conceptual level, it is not uncommon to find that 80% or more of eligible voters fail to vote in judicial elections.

the “Axiom of 80:”

Eighty percent of the public favors electing their judges; eighty percent of the electorate does not vote in judicial races; eighty percent is unable to identify the candidates for judicial office; and eighty percent believes that when judges are elected, they are subject to influence from the campaign contributors who made the judges’ election possible.¹⁷⁸

A second problem is that those who do vote may be uniquely motivated. Citizens in Oregon, for example, anxious for an opportunity to vote against incumbents, proposed an initiative that would add “none of the above” as a choice in all judicial races in which a candidate was unopposed.¹⁷⁹ Citizens in Colorado also mounted a campaign, the platform of which was “Vote No On All Judges.”

Not only do suspect motives surface among individual voters, but special interest groups, business groups, and political

On the one hand, when judicial and political branch candidates share the same ballot, there is a well-documented “roll off” of voters, who cast ballots in the political branch races but not the judicial. On the other hand, when judicial elections do not share the ballot with high-profile political branch contests, voters simply stay home.

Id. at 53.

178. *Id.* at 43.

179. In 2000, an Oregon tax reform advocate, angered by a series of controversial court rulings which reversed voter-approved initiatives and by the release in 2000 of a death row inmate on speedy trial grounds, proposed Measure 21. In order to allow voters to express their displeasure with races in which judicial candidates were unopposed, Measure 21 would have added a “None of the Above” selection in each such race. Despite strong opposition from citizens groups, judges and former judges, former governors, conservationist and land use groups, the American Civil Liberties Union of Oregon, Planned Parenthood Advocates of Oregon, the Oregon State Bar, and the League of Women Voters of Oregon, the “None of the Above” measure was rejected only by a 44-56 margin. Am. Judicature Society, *Judicial Selection in the States, Oregon History of Judicial Reform*, at http://www.ajs.org/js/OR_history.htm (last visited Feb. 17, 2005) (on file with the First Amendment Law Review).

parties promote candidates they believe will represent their interests once on the bench. Often the publicized promotions and advertisements do not identify the sponsors, choosing instead to refer viewers to web sites such as “litigationfairness.org” or “citizensforfaircourts.org.”¹⁸⁰ Trusting democracy, as patriotic and honorable as it may sound, may not be the surest guarantee of an impartial and independent judiciary.

D. Rely on Honor

Several commentators have remained optimistic that the honorable men and women who comprise the state judiciaries will prove to be the “solution” to the dilemma created by *White*.¹⁸¹ Justice Kennedy warned that a condemnation of the process of elections would be an unfair criticism of “countless elected states judges and without warrant, [m]any of [whom], despite the difficulties imposed by the elected system, have discovered in the law the enlightenment, instruction and inspiration that make them independent-minded and faithful jurists of real integrity.”¹⁸²

Even if a majority of judges are “independent-minded and faithful jurists of real integrity,” the *White* decision has helped

180. The United States Chamber of Commerce, for example, in the 2000 Mississippi Supreme Court race used the banner “LitigationFairness.org” at the end of their advertisements. Chamber of Commerce of the United States v. Moore, 288 F.3d 187, 191 (5th Cir. 2002), *cert. denied*, U.S. LEXIS 8339 (2002). Mississippi law required any person spending a designated amount of money on campaigns to file an expenditure disclosure form with the state. The Chamber of Commerce challenged the law, and ultimately prevailed in the Court of Appeals for the Fifth Circuit. *Id.* The United States Supreme Court denied certiorari. *Id.*

181. Despite my own strong disagreement with the majority’s ruling, I stated in a speech given in the spring of 2003 that “every judge has a choice – to exercise his or her First Amendment rights, to further obscure the vast differences between the role of judges and the role of other government actors, or to forsake personal freedom for a greater liberty, a lasting legacy in America . . . of an independent [judiciary].” See *White*, *supra* note 9, at 625.

182. Republican Party of Minn. v. White, 536 U.S. 765, 796 (2002) (Kennedy, J., concurring) (“We should not, even by inadvertence, ‘impute to judges a lack of firmness, wisdom, or honor.’”) (quoting *Bridges v. California*, 314 U.S. 252, 273 (1941)).

convince the majority of citizens otherwise. More than eighty percent of Americans are concerned that the decision in *Republican Party of Minnesota v. White* will result in pressure being placed on judicial candidates by special interest groups to take positions on controversial issues; and more than seventy percent of Americans – and nearly eighty percent of African Americans – believe that special interest campaign contributions already influence judicial decisions in the courtroom.¹⁸³ This perception of justice is the one with which we must contend, even if the citizens are incorrect.

E. Fund the Elections

One “solution” for which North Carolina has been applauded is the “fund the elections” solution.¹⁸⁴ In late 2002, the governor of North Carolina signed into law the nation’s “first full-funding system for judicial elections.”¹⁸⁵ Some suggest this new law set the stage for “a new wave of reforms in states worried about the growing tidal wave of money in court campaigns.”¹⁸⁶

As Justice O’Connor noted in her concurring opinion in *White*, “campaigning for a judicial post today can require substantial funds.”¹⁸⁷ Since the belief that money influences judicial

183. Justice at Stake, *March 2004 Survey Highlights: Americans Speak Out on Judicial Elections*, at <http://faircourts.org/files/ZogbyPollFactSheet.pdf> (March 17-19, 2004).

184. Press Release, Justice at Stake, North Carolina Adopts Public Financing for Supreme Court and Appellate Judicial Campaigns (Oct. 10, 2002) [hereinafter North Carolina Adopts Public Financing] (on file with the First Amendment Law Review).

185. *Id.*

186. *Id.*

187. 536 U.S. at 789 (O’Connor, J., concurring) (citing as examples the Alabama 2000 Supreme Court race, which cost more than one million dollars; a 1995 Pennsylvania Supreme Court candidate who spent 1.8 million dollars; a 1986 Ohio Chief Justice candidate who spent 2.7 million dollars). If anything, Justice O’Connor’s concern, and the examples she cites, are an understatement. In 2002, more than 29 million dollars was spent on state supreme court races. Kathleen Hunter, *Money Matter More in Judicial Elections*, STATELINE.ORG, at <http://www.stateline.org/stateline/?pa=story&sa=showstoryInfo&id=371284> (May 12, 2004). In seven states, supreme court races costs more than one million dollars, with the average candidate spending almost \$800,000. And,

decisions undermines respect for the judiciary, and since most voters believe that campaign contributions do influence decision making,¹⁸⁸ the North Carolina solution is based on the belief that public financing would eliminate the perception that “justice may be for sale.”¹⁸⁹

Some states seem to share a belief that public financing may be a viable solution to the conflict created by *White*. At least seven other states reportedly are studying or proposing forms of public financing for judicial elections,¹⁹⁰ and, furthermore, citizens seem to approve of the idea.¹⁹¹

money counts – winners have out-raised losers in state supreme court races by a margin of 91 million dollars to 53 million dollars. In twenty of twenty-five contested supreme court races in the most recent election, the top money raiser won the seat. *Id.*

An American Bar Association Commission found “a pervasive public perception that campaign contributions influence judicial decision-making.” ABA STANDING COMMITTEE ON JUDICIAL INDEPENDENCE, REPORT OF THE COMMISSION ON PUBLIC FINANCING OF JUDICIAL CAMPAIGNS 2 (2002), *available at* http://www.soros.org/initiatives/justice/articles_publications/publications/judicial_campaigns_20020201/commissionreport.pdf.

If 2003 was any indication, and if the Brennan Center for Justice is right in its predictions, the spending for 2004 may be even higher. Press Release, Brennan Center, Buying Time 2004: \$4.2 Million Already Spent on Advertising for State Supreme Court Elections (Sept. 15, 2004), *available at* http://www.brennancenter.org/presscenter/releases_2004/pressrelease_2004_09_15.html. The single most expensive race ever for a state supreme court was run in Pennsylvania in 2003 by Justice Max Baer. Contributions to the two candidates vying for the seat exceeded 3.34 million dollars, with Baer outspending his opponent by about \$400,000. PENNSYLVANIANS FOR MODERN CTS., *supra* note 162.

188. Justice O’Connor cites the Rosner Research survey which indicates that 76 percent of registered voters believe that campaign contributions influence judicial decisions. 536 U.S. at 790 (O’Connor, J., concurring) (citing GREENBERG QUINLAN ROSNER RESEARCH, INC. & AMERICAN VIEWPOINT, NATIONAL PUBLIC OPINION SURVEY FREQUENCY QUESTIONNAIRE 4 (2001), *available at* <http://www.justiceatstake.org/files/JASNationalSurveyResults.pdf>).

189. North Carolina Adopts Public Financing, *supra* note 184.

190. *Id.* (summarizing efforts in Georgia, Idaho, Illinois, Michigan, Ohio, Texas, and Wisconsin).

191. A survey by Justice at Stake found that eight of ten voters and six of ten state judges generally support the idea of publicly funded judicial

But the public funding solution is not uniformly endorsed and may also be subject to First Amendment attack.¹⁹² Will North Carolina, or any state for that matter, be able to convince a federal court that a compelling state interest justifies a state's limitations on fund raising and campaign spending? If what a state cannot do "is censor what people hear as they undertake to decide for themselves which candidate is most likely to be an exemplary judicial officer,"¹⁹³ may a state limit a candidate who does not opt to accept

campaigns. *Id.*

192. Although a discussion of the First Amendment and campaign financing is beyond the scope of this article, some general observations should be made. Some states have seen public financing initiatives soundly defeated by voters who do not want tax dollars spent on elections. Some state courts have ruled that candidates may not be forced to participate in public financing schemes, while others have ruled that public finance schemes, which require some candidate fund-raising to qualify, discriminate against the poor. See The Brookings Institute, *Recent Developments in Campaign Finance Regulation: Public Financing*, at <http://www.brookings.org/gs/cf/publicfin.htm> (last visited Feb. 17, 2005) (on file with the First Amendment Law Review); Robert A. Levy, *Public Funding for Judicial Elections: Forget It*, CATO INSTITUTE, at <http://www.cato.org/dailys/08-13-01.html> (Aug. 13, 2001).

The outside limits of the constitutional authority seem to be that the government can act to insulate the electoral process from corruption, violence, and fraud. In *Ex parte Yarbrough*, 110 U.S. 651, 658 (1884), the Court held that without that power, the government would be "left helpless before the two great natural and historical enemies of all republics, open violence and insidious corruption." Since that early pronouncement, the Court has ruled frequently on the constitutionality of campaign regulations. In one of the most famous of those cases, *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court upheld campaign contribution limitations against a First Amendment attack because of the state's interest in limiting corruption and the appearance of corruption. *Id.* at 26-7. Thus, the Court held that

[t]o the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined Of almost equal concern [is] . . . the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.

Id. But to what extent a state, or Congress, can *require* candidates for certain offices to participate in legislative public financing schemes is an open question.

193. *Republican Party of Minn. v. White*, 536 U.S. 765, 794 (2002)

public funds in his or her own fund raising and expenditures? Or is raising and spending money to get elected political conduct that is at the “foundation of political freedom?”

F. Recuse the Judge

Some states have determined that an aggressive recusal remedy may be an answer to the dilemma created by *White*.¹⁹⁴ The draft proposed amendments to the Model Code of Judicial Conduct, under study by the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, contains this new recusal provision: “A judge shall disqualify himself or herself if the judge, while a judge or a candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to an issue in the proceeding or the controversy in the proceeding.”¹⁹⁵ A comment to the proposed rule suggests that a judge disclose information “that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.”¹⁹⁶

When special interest groups submitted their questionnaires to judges in Alaska, the Alaska Judicial Qualifications Commission advised the groups that judges who responded to the group’s questionnaires might be required to recuse themselves in cases concerning the issue.¹⁹⁷ Similarly, in a letter responding to judges’

(Kennedy, J., concurring).

194. See generally J.J. GASS, BRENNAN CTR. FOR JUSTICE, AFTER *WHITE*: DEFENDING AND AMENDING CANONS OF JUDICIAL ETHICS 23 (2004), <http://www.brennancenter.org/resources/ji/ji4.pdf> (discussing recent attacks on canons and possible responses); see also *State v. Stockert*, 684 N.W.2d 605, 616 (N.D. 2004) (Maring, J., dissenting) (disagreeing with majority’s holding that judge did not need to recuse himself despite fact that victim’s uncle was judge’s campaign manager).

195. ABA JOINT COMM. TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, DRAFT CANON 2.12(F) 11 (2004), available at http://www.abanet.org/judicialethics/draft_canon2_051104.pdf.

196. *Id.* Commentary [2] at 12.

197. Alaska, like many states, has a judicial peremptory disqualification statute. ALASKA STAT. § 22.20.022 (2004); see Marla Greenstein, *Judicial Disqualification in Alaska Courts*, 17 ALASKA L. REV. 53 (2000). Thus, in

inquiries about the impact of *White*, the North Dakota Judicial Ethics Advisory Committee advised that “[c]andidates should note the disqualification provisions of . . . the North Dakota Code of Judicial Conduct. Any candidate that takes a position on legal or political issues may be required to recuse from a case if her or his impartiality might reasonably be questioned.”¹⁹⁸

In some states, the state’s highest court, rather than the state body that disciplines judges, has advised judges of the recusal remedy. To that end, the Missouri Supreme Court, in an opinion that notified candidates of the unenforceability of the Missouri announce clause¹⁹⁹ and the continued viability of the pledges and promises clause, offered this caution: “Recusal, or other remedial action, may nonetheless be required of any judge in cases that involve an issue about which the judge has announced his or her views as otherwise may be appropriate under the Code of Judicial Conduct.”²⁰⁰

The idea of requiring sitting judges to recuse themselves when their impartiality may be questioned in the state system²⁰¹ is not new. It is, however, arguably untested, at least in the post-*White* environment.²⁰²

Alaska, even if a judge declined to disqualify himself from a case, the litigants would have a statutory right to recusal “once during the proceeding” provided that the action by the litigant was taken in good faith. *Id.*

198. Letter from Ronald E. Goodman, Chair, Judicial Ethics Advisory Committee, to judicial candidates (August 22, 2002), *available at* http://www.court.state.nd.us/_court/committees/jud_ethc/canlet.htm.

199. To the surprise of many, Missouri elects some of its judges. The Missouri Judiciary, *Selection of Supreme Court Justices*, at <http://www.courts.mo.gov/SUP/index.nsf/Judges?OpenView> (last visited Feb. 17, 2005) (on file with the First Amendment Law Review).

200. *Id.* The July 18, 2002, Order of the Missouri Supreme Court, entitled *In re: Enforcement of Rule 2.03, Canon 5.B(1)(c)*, provided that the announce provision would not be enforced against candidates for judicial office “that is filled [b]y public election between competing candidates” or “[b]y candidates appointed to or retained in office . . . but *only* when their candidacy has drawn active opposition.” *Id.*

201. Recusal of federal judges is addressed by congressional statutes and by Supreme Court decisions. It has been frequently discussed and debated. *See, e.g.*, CODE OF CONDUCT FOR UNITED STATES JUDGES, *available at* <http://www.uscourts.gov/guide/vol2/ch1.html>.

202. *See generally* Matthew D. Besser, *May I Be Recused? The Tension*

Justice Kennedy in his concurring opinion in *White* suggested recusal as a viable answer to the problems *White* would create, but then planted a seed of doubt that certainly will be fertilized by those aggressively working to expand *White*. First, Justice Kennedy recognized the importance of the state's asserted interest in judicial integrity, an interest which he proposed could be protected by "[a]rticulated standards of judicial conduct,"²⁰³ rather than limiting a candidate's speech.

Explicit standards of judicial conduct provide essential guidance for judges in the proper discharge of their duties and the honorable conduct of their office. . . . Yet these standards may not be used by the State to abridge the speech of aspiring judges in a judicial campaign.

....

. . . [The state] may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards.²⁰⁴

While the Court has drawn the constitutional limits on judicial recusal at the due process line, it has often asserted that the states and Congress are entitled to draw the lines elsewhere.²⁰⁵ Thus, the Court has stated that "[a]ll questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion."²⁰⁶ Presumably then, a state could adhere to *White*, but protect its interest in judicial integrity and both actual and apparent neutrality by requiring judges who have announced their views during

between Judicial Campaign Speech and Recusal after Republican Party of Minnesota v. White, 64 OHIO ST. L.J. 1197 (2003).

203. *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring).

204. *Id.* at 794.

205. Besser, *supra* note 202, at 1219-20.

206. *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (holding further that a defendant's due process rights are violated if a judge has a "direct, personal, substantial, pecuniary interest" in a particular conclusion).

campaigns to recuse themselves in all cases touching on the issues commented upon.

But is that a safe assumption? If a state is not permitted after *White* to regulate the speech of candidates for judicial office, may that state remove some of the privileges of judicial office, once acquired, as a result of the exercise of those protected rights? Again, Justice Kennedy seemed to suggest initially that recusal as a remedy raised no constitutional issue. He treated the state's right to promulgate and enforce standards of judicial conduct as a given. But indirectly, almost as if to assure that he did not predict a future outcome, he retreated:

This case does not present the question whether a State may restrict the speech of judges because they are judges – for example, as part of a code of judicial conduct Whether the rationale of *Pickering v. Board of Ed. Of Township High School Dist. 205, Will Cty.* and *Connick v. Myers* could be extended to allow a general speech restriction of sitting judges – regardless of whether they are campaigning – in order to promote the efficient administration of justice, is not an issue raised here.²⁰⁷

Admittedly, Justice Kennedy's comment concerned whether states could restrict public statements by judges *after* they attained the bench,²⁰⁸ but his acknowledgment that the state's right in that

207. 536 U.S. at 796 (Kennedy, J., concurring) (citations omitted). In *Pickering v. Board of Education of Township High School District 205, Will County*, 391 U.S. 563, 568 (1968), the court held that the Court's task is to "arrive at a balance between the interests of the [government employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Similarly, in *Connick v. Myers*, 461 U.S. 138, 142 (1983), the Court reiterated the balance test set forth in *Pickering*.

208. Many, perhaps most states, have not seriously questioned whether ethics rules can constitutionally limit what a sitting judge may say. Ohio, for example, in its eleventh guideline for judicial candidates, issued after *White*, states that "[j]udicial speech is not only restrained in the context of judicial campaigns – an incumbent judge has ethical restrictions on judicial speech,

regard had not been ruled upon by the Court raises a red flag for mandatory recusal provisions as well.

Even if it is unlikely that mandatory recusal provisions would be found to conflict with a judge's First Amendment rights, *White* is already impacting the way judges and conduct commissions view judicial conduct. Three recent cases bear on this issue. One case involved a sitting state appellate judge who was admonished as a result of public statements he made to a state legislative caucus.²⁰⁹ The judge told the Arkansas Legislative Black Caucus that the recent firing of a basketball coach at the University of Arkansas at Fayetteville had been racially motivated.²¹⁰ Following the issuance of an admonishment, the judge challenged the constitutionality of the Commission's action in a federal lawsuit.²¹¹ Despite obvious

regardless of whether he or she is engaged in a judicial campaign." Bd. Of Comm'rs on Grievances and Disciplines Op. 2002-8 (Aug. 9, 2002).

Another state that does not share my concern about Justice Kennedy's statement is Maine. In *In re Dunleavy*, 838 A.2d 338 (Me. 2003), cert. denied, 158 L. Ed.2d 401, 124 S. Ct 1722 (2004), the Maine Supreme Court referred to the same comment by Justice Kennedy in his *White* concurrence as "suggesting that the rationale of *Pickering* . . . and *Connick* . . . might be extended to permit 'a general speech restriction on sitting judge[s] . . . in order to promote the efficient administration of justice.'" 838 A.2d at 350 (citations omitted) (quoting *White*, 536 U.S. at 796 (Kennedy, J., concurring)).

209. Judge Wendell Griffen appeared before the Arkansas Legislative Black Caucus in the wake of the termination of Nolan Richardson, the basketball coach at the University of Arkansas at Fayetteville. Judge Griffen expressed his belief that the dismissal of the coach was racially motivated. He urged the caucus to "send [the University] a budgetary vote of no confidence concerning sorry leadership about racial inclusion over the past 130 years at the University of Arkansas. SHOW THEM THE MONEY." *Griffen v. Ark. Judicial Discipline and Disability Comm'n.*, 130 S.W.3d 524, 526-27 (Ark. 2003) (emphasis in original). The judge's comments also appeared in local and national newspapers. The Arkansas Judicial Commission received three complaints against Judge Griffen, and ultimately, after investigation and response, dismissed two of the complaints. *Id.* at 528. After a hearing, the Commission voted to admonish the judge only for violating Canon 4C(1) of the Arkansas Judicial Code that prohibited judicial appearances with legislative bodies "except on matters concerning the law, the legal system or the administration of justice . . ." *Id.* at 528 (quoting Canon 4(C)1).

210. *Griffen v. Ark. Judicial Discipline and Disability Comm'n.*, 130 S.W.3d 524, 526 (Ark. 2003).

211. *Griffen v. Ark. Judicial Discipline and Disability Comm'n.*, 266 F.

discontent with the situation, the district court found that it lacked jurisdiction.²¹²

Supp.2d 898, 908 (E.D. Ark. 2003).

212. *Id.* The court concluded its opinion:

The Court enters this opinion with some dismay. Mainly, the Court sympathizes with Judge Griffen's consternation over the deafening silence coming from the Commission and the Arkansas Supreme Court. The Commission and the Arkansas Supreme Court have decided, thus far, not to indicate in any manner that they will hear and review Judge Griffen's constitutional claims. This silence comes at a time when judges across the country are seeking guidance from judicial commissions and state supreme courts about the balance of their ethical obligations and First Amendment rights.

... Although the Arkansas Supreme Court has no obligation to step into the fray *sua sponte*, the gravity of these issues might dictate that the Arkansas Supreme Court take a more proactive stance, if the Arkansas Supreme Court is to weigh in at all.

The Arkansas Supreme Court's silence is unfortunate at a time when judges are seeking guidance as to how to preserve their independence, yet also are seeking to promote the integrity and impartiality of the system. While a significant number of judges historically have attempted to seclude themselves in chambers and, at times, hide behind codes of judicial conduct, those days have past [sic]. Today's judicial landscape is a complicated patchwork of restrictions on judges intermingled with First Amendment considerations. And judges are attempting to make sense of this patchwork. The public quite reasonably expects judges to be visible in the community and to serve as role models and leaders. And perhaps this is as it should be to promote the public's faith in the judiciary. A judge has an inherent responsibility to contribute to the public understanding of the court's role of preserving the basic freedoms of our society. A judge also is obligated to assert a leadership role and to act as a role model. Much of this can be done without jeopardizing the integrity of the court system. A judge must always temper his or her leadership role with the judge's duty to appear impartial, so as not to compromise the judge's oath of office or the integrity of

The Supreme Court of Arkansas quashed the admonishment, concluding that the ethics provision as applied to the judge violated his First Amendment rights.²¹³ *White* figured

the judiciary. While a judge is not required to surrender his or her rights or opinions as a citizen, a judge must accept reasonable restrictions that promote the public's faith and trust in the system.

This balance is a difficult and delicate one, but it is entirely manageable. The real issue is achieving and maintaining such a balance. It calls into question what restrictions from judicial codes of conduct are reasonably necessary to promote and manage the public's faith and trust in the judiciary. While good judges are mindful of the need to protect the public confidence in the judiciary, they need guidance as to the interplay between First Amendment principles, judicial codes of conduct, and their own leadership roles. That is why guidance at this time, in the State of Arkansas and across the country, is paramount. Judges have a right to expect such guidance from their respective judicial ethics commissions and supreme courts.

Despite the silence of the Commission and the Arkansas Supreme Court on this important matter, this Court cannot review Judge Griffen's claims. Our federal system commits such decisions to the capable hands of the State Supreme Courts and the United States Supreme Court; this Court simply has no jurisdiction over this issue, no matter how vital it may be. Moreover, based upon the assertions of Defendants' counsel at oral argument on this matter, there are no procedural bars to Judge Griffen bringing his constitutional claims before the Arkansas Supreme Court. With this in mind, this Court leaves it in the hands of the Arkansas Supreme Court to provide guidance to Judge Griffen. . . .

Id. at 907-08.

213. *Griffen*, 130 S.W.3d at 538. The Arkansas Supreme Court provided guidance to Judge Griffen, perhaps, in the grant of his requested relief, but the opinion did little to clarify the provision's future enforceability. The majority opinion, perhaps intentionally, concluded with statements like "we are hard pressed to find a violation of the canon," and "without proof of a 'narrow tailoring' of the exception by the Judicial Commission[,] . . . [the canon] as applied to Judge Griffen, violates his First Amendment rights." *Id.* Additionally, three justices dissented.

prominently in the majority's opinion, not for what it held concerning judicial elections but for what it implied concerning judicial speech.

In a second case, a sitting judge's off-the-bench statements in a letter to the editor resulted in a recommendation that he be sanctioned. The letter did not pertain to an election, but expressed the judge's opinions on gays and lesbians.²¹⁴ The judge's statements first appeared as a letter to the editor of the local newspaper²¹⁵ and

The court did conclude its opinion with a request that the Arkansas Judicial Discipline and Disability Commission study the canon and make recommendations to the court. *Id.* In July 2004, after receiving the Commission's recommendations, the Arkansas Supreme Court adopted an amendment to its Code of Judicial Conduct. The amendment provides: "(1) A judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice." The amendment deleted a provision of the prior rule ("or except when acting pro se in a matter involving the judge or the judge's interests"), which had occupied a large part of the parties' argument in the case. *In re Ark. Code of Judicial Conduct*, 2004 Ark. LEXIS 448 (July 1, 2004).

214. *Miss. Comm'n on Judicial Performance v. Wilkerson*, 876 So. 2d 1006, 1008 (Miss. 2004) (en banc).

215. In response to an article about rights extended to gay and lesbian couples in some states, the Justice Court Judge for George County wrote *The George County Times* a letter to the editor signed individually and bearing his home address and phone number with no reference to his position. The 2000 census listed the population of George County as 19,144, with a little more than fifty percent being male and almost ninety percent being white. U.S. CENSUS BUREAU, FEDERAL CENSUS STATISTICS FOR GEORGE COUNTY, MISSISSIPPI (2000), available at <http://www.fedstats.gov/mapstats/more.data/28039.html>.

The letter was based on what the judge called his "Christian beliefs" and was stamped "Bro. Connie G. Wilkerson." The full text of the letter was:

Dear Editor:

I got sick on my stomach today as I read the (AP) news story on the Dog attach [sic] on the front page of THE MISSISSIPPI PRESS and had to respond!

AMERICA IS IN TROUBLE!

I never thought that we would see the day when such would be here in AMERICA.

The last verse of chapter one of the book of Romans in our HOLY BIBLE is my reason for responding and sounding the alarm to this. You need to know as I know

later as an interview with a radio reporter²¹⁶ and were critical of gays and lesbians and of courts and legislatures that extended rights to those individuals.

When the Mississippi Commission on Judicial Performance recommended that the judge be sanctioned for his comments, the judge asserted his First Amendment rights as a defense. The court held that the judge's comments "constitute religious and political/public issue speech specially protected by the First Amendment [F]orced concealment of views on political/public issues serves to further no compelling governmental, public or judicial interest"²¹⁷ Of particular importance was the court's matter-of-fact conclusion that it could not "impose sanctions for violation of a Canon where doing so would infringe on rights

that GOD in Heaven is not pleased with this and I am sounding the alarm that I for one am against it and want our LORD to see and here [sic] me say I am against it.

I am sorry that the California Legislature enacted a law granting gay partners the same right to sue as spouses or family members. Also, that Hawaii and Vermont have enacted such a law too. In my opinion gays and lesbians should be put in some type of a mental institute instead of having a law like this passed for them.

I don,t [sic] know but I believe if we vote for folks that are for this we have to stand in thh [sic] judgement [sic] of GOD the same as them. I am thankful for our Legislators and pray for wisdom for them, on such unbelievable legislation as this. May GOD bless each one of them in JESUS CHRIST name I pray!

Thank you for printing this.

Connie Glen Wilkerson

Bro. Connie C. Wilkerson

Wilkerson, 876 So. 2d 1006, 1020.

216. *Id.* at 1008. The phone interview was conducted by the reporter about two weeks after the judge's letter was published. The judge said that the reporter encouraged him to repeat the comments he had expressed in his letter. The judge also said that he did not give permission to the reporter to air the interview. The interview was aired and was, in the judge's opinion, "'unfairly interspersed' with comments from known homosexual activists." *Id.*

217. *Id.* at 1009. This comment seems to stem from a Fifth Circuit decision, *Scott v. Flowers*, 910 F.2d 201 (5th Cir. 1990), in which the circuit court concluded that promoting an impartial judiciary would be "ill served by casting a cloak of secrecy around the operations of the courts" *Id.* at 213.

guaranteed under the First Amendment, including the freedom of speech.”²¹⁸

Clear differences exist between the imposition of a sanction against a judge for a violation of ethics rules and the application of a mandatory recusal rule. When, for example, a judge is censured or reprimanded based on an ethics violation, regardless of the specifics, the judge suffers some damage to his reputation. When a judge is disqualified from participating in a case, such damage does not necessarily occur. The tradition of recusal carries with it no badge of dishonor.

But in the post-*White* climate, is it not to be expected that a judge,²¹⁹ subject to a mandatory recusal provision, will extrapolate from the discipline cases the argument that the mandatory recusal provision in effect “punishes” the judge for exercising valid First Amendment rights? The penalty imposed is not damage to reputation per se, but, the recused judge might argue, is instead a deprivation of the privileges of the office. Has a judge who is disqualified because of a mandatory recusal provision based upon

218. *Wilkerson*, 876 So. 2d at 1010. The court relied on cases from the Fifth Circuit, including *Scott*, 910 F.2d 201, and *Morial v. Judiciary Commission of Louisiana*, 565 F.2d 295 (5th Cir. 1977) (en banc), cert. denied, 435 U.S. 1013 (1978). In *Scott*, a judge’s letter critical of local officials resulted in his being recommended for a reprimand. The Fifth Circuit disallowed the discipline because Scott’s statements were on “public issues” and touched upon “core first amendment values.” 910 F.2d at 212-13 (quoting *Morial*, 565 F.2d at 1301). *Morial*, which upheld a provision of the Louisiana judicial code which required judges to resign before seeking another political office, was distinguished. *Id.* at 212.

219. My suggestion that a judge might refuse to obey a mandatory recusal statute, or sue to enjoin the enforcement of one, is not meant to impugn known or unknown judges. The practicality of the matter is this: special interest groups would not be spending millions of dollars to put like-minded candidates on the bench only to have those candidates removed under mandatory recusal rules in cases that affect the groups.

While a litigant might be more likely to want to raise the issue, in order to keep the judge from being disqualified, it would appear that they would lack standing to do so. But, maybe this too, is not a foreclosed issue. In *Republican Party of Minnesota v. White*, the Party’s interest in the case as plaintiffs was based on their claim that the prohibition made them “unable to learn [the judge’s] views and support or oppose his candidacy accordingly.” 536 U.S. 765, 770 (2002).

statements that the judge made while campaigning for the office been denied the privileges of the office? If holding judicial office entitles one to the privileges of that office, including presiding over cases that fall within the court's jurisdiction, would a mandatory recusal rule,²²⁰ imposed against judges who had announced their positions during campaigns, violate the First Amendment because it penalizes the judge for exercising those rights?

Few would likely question that Judge Griffen in Arkansas should be disqualified from hearing an employment discrimination case brought by the terminated coach. Indeed, existing ethics provisions would suggest that recusal was required. Should recusal likewise be required if the judge's comments were made during a campaign? For example, if in response to a question concerning his views on employment discrimination, Judge Griffen had responded that he fully supported laws that deter racially motivated firings, should the university's motion for recusal be granted in a subsequent discrimination case brought by a terminated minority employee? More specifically, could the Arkansas Judicial Commission force the judge's recusal under a mandatory recusal provision patterned after the ABA proposal?

Assume instead that the state of Mississippi passed a domestic partnership act enabling those who, despite their gender, have cohabited together for at least six continuous months under circumstances in which at least one is responsible for the other's financial welfare to have certain privileges otherwise reserved for married persons.²²¹ If a domestic partner sued and alleged that the

220. Justice Kennedy recognized that "legislative bodies, judicial committees, and professional associations" have the right to promulgate standards of judicial conduct. *Id.* at 794 (Kennedy, J., concurring) (citing ADMINISTRATIVE OFFICE OF U.S. COURTS, CODE OF JUDICIAL CONDUCT FOR UNITED STATES JUDGES (1999)). But he made clear that the right to promulgate standards is not unlimited. *Id.* ("Yet these standards may not be used by the State to abridge the speech of aspiring judges in a judicial campaign.").

221. This definition is purely hypothetical, but draws upon some suggested definitions of domestic partner. *See, e.g.*, Human Rights Campaign Foundation, *Domestic Partners Definition*, at http://www.hrc.org/Content/NavigationMenu/Work_Life/Get_Informed2/The_Issues/Domestic_Partners_Definition/Domestic_Partners_Definition.htm

privileges were withheld by, for example, an employer, a court would interpret and apply the statute, a task that judges perform countless times each year, based on established principles of statutory construction.

If individuals claiming to be domestic partners filed a claim under the statute and learned that the case had been placed on Judge Wilkerson's docket, should Judge Wilkerson recuse himself, either *sua sponte* or upon motion? That question would be answered under existing recusal rules, but if Mississippi had adopted a mandatory recusal provision requiring recusal of a judge who had made "a public statement that commits, or appears to commit, the judge with respect to an issue," could Judge Wilkerson refuse to recuse himself, based upon his claim that his statements were protected First Amendment speech? Similarly, if Judge Wilkerson's statements had been in answer to a questionnaire, during a campaign, seeking his view on domestic partnerships, could he nonetheless insist on hearing the case since his view had been expressed as fundamental First Amendment campaign speech?²²² These questions were neither raised nor considered by the Mississippi Supreme Court, which gratuitously endorsed recusal as a means of assuring an impartial judiciary: "the objects of judicial prejudice are entitled to seek a level playing field through recusal motions. . . ."²²³

Another case raising questions about the state's ability to solve the *White* dilemma with mandatory recusal statutes is *In re Disciplinary Proceeding Against Sanders*,²²⁴ which involved a Washington Supreme Court justice who was sanctioned for speaking at a pro-life rally.²²⁵ The Washington Supreme Court

(2004).

222. Conversely, would the party that claimed the protection of the statute have a due process right to disqualify the judge? See *infra* notes 194-208 and accompanying text. Applying the *Tumey* standard, would the situation offer a "possible temptation to the average man . . . not to hold the balance nice, clear and true[?]" *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

223. *Wilkerson*, 876 So. 2d at 1016. Rather than undertaking to "calm the waters," as the court viewed the Commission's request, the court said it should instead "help[] our citizens to spot the crocodiles." *Id.*

224. 955 P.2d 369 (Wash. 1998).

225. Justice Sanders was incorrectly introduced at the rally as the

disallowed the sanction broadly holding that:

A judge does not surrender First Amendment rights upon becoming a member of the judiciary. . . . In a system . . . in which judges are elected, they are, in effect, always seeking reelection. If a person does not completely surrender his or her right to freedom of speech upon becoming a candidate, then we cannot expect the candidate to do so once elected to judicial office.²²⁶

The simple truth is that in a state in which judges are subject to election or retention, they and their opponents are *always* candidates and are *always* campaigning. If the First Amendment protects the candidate's right to announce views during a campaign, then arguably it must protect a judge or candidate's right to announce views all the time. The obvious question remaining is whether the judge may be required to recuse him or herself because he or she previously announced views.

G. *The Conflicting Constitutional Right Solution: Due Process*

Perhaps the difficulties raised by the *White* decision will be addressed by adherence to the principles of an equally important

Washington Chief Justice. His comments at the rally, which immediately followed his investiture, were:

Well, I'm not quite Chief Justice, but I am a Justice. That's plenty good enough for me. I want to give all of you my best wishes in this celebration of human life. Nothing is, nor should be, more fundamental in our legal system than the preservation and protection of innocent human life. By coincidence, or perhaps by providence, my formal induction to the Washington State Supreme Court occurred about an hour ago. I owe my election to many of the people who are here today and I'm here to say thank you very much and good luck. Our mutual pursuit of justice requires a lifetime of dedication and courage. Keep up the good work.

Id. at 371.

226. *Id.* at 375 (internal citations omitted).

constitutional right – the right to due process. The cases that are creating the new judicial landscape were brought by four categories of litigants: judges, judicial candidates, voters, and party leaders. Each asserted a First Amendment right to either speak or hear.

Judges and judicial candidates have raised the First Amendment issue in three ways. Some candidates, in advance of a campaign, have sought declaratory judgments that campaign restrictions are unconstitutional. Others have sought injunctions to prohibit judicial campaign committees from enforcing certain campaign prohibitions. Still others have asserted the First Amendment as a defense in disciplinary actions brought against them for conduct and speech used during their campaigns or after they took the bench.²²⁷

On a few occasions, a judge or judicial candidate has joined forces with others.²²⁸ In *White*, for example, among the plaintiffs was the Republican Party of Minnesota.²²⁹ The party alleged that prohibiting judges from announcing their views affected their members' ability to cast intelligent votes in judicial elections. Specifically, the party claimed that because the clause kept a judicial candidate from announcing views on matters of interest to

227. In one interesting case demonstrating an extreme *attempted* application of *White*, a former judicial candidate sued the New York Commission on Judicial Conduct following his admonition for an ethics violation, charging that the Commission was required to reopen his case and annul his discipline in light of *White*. *La Cava v. N.Y. State Comm'n on Judicial Conduct*, 299 F. Supp. 2d 176 (S.D.N.Y. 2003).

La Cava and the Commission had stipulated the facts of the matter in 1999. La Cava had agreed to an admonition from the Commission as discipline for violating the state's commitment clause. La Cava filed an application to reopen three years after the admonition. After that application was denied, he filed his lawsuit in March 2003. The federal court dismissed La Cava's complaint under the *Rooker-Feldman* doctrine. *Id.* at 178-79.

228. See *infra* notes 123-127 and accompanying text discussing how the presence of a voter and a party leader as plaintiffs was one factor the court cited as a reason to resist a *Younger* abstention in *Spargo v. Commission of Judicial Conduct*.

229. Other plaintiffs in *White* included the Indian Asian American Republicans of Minnesota, the Republican Seniors, the Young Republican League of Minnesota, the Minnesota College Republicans, the Minnesota African American Republic Council, and the Muslim Republicans. See *Republican Party of Minn. v. White*, 361 F.3d 1035, 1035 (8th Cir. 2004).

party members, they were “unable to learn those views and support or oppose [a candidate] accordingly.”²³⁰

While the Supreme Court’s opinion in *White* focused on the candidate’s First Amendment rights, the right of the party member—that is, the voter—to hear the candidate’s speech was an important underlying principle.²³¹ Justice Scalia, for example, relying on two voters’ rights cases, cautioned that:

The greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance. 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.²³²

Justice Kennedy was even more emphatic about the importance of the voter’s right to hear: “What Minnesota may not do . . . is censor what the people hear as they undertake to decide

230. *Republican Party of Minn. v. White*, 536 U.S. 765, 770 (2002).

231. This underlying theme arose logically from the core of the First Amendment, recognized universally as protecting political speech. The free exchange of ideas is that which promotes public discourse and, ultimately, brings about political and social change, prompted by the public’s selection of those who lead the government. Thus, the Court has concluded that the First Amendment has its “fullest and most urgent application precisely to the conduct of campaigns for political office.” *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).

[I]t is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates’ personal qualities and their positions on vital public issues before choosing among them on election day. Mr. Justice Brandeis’ observation that in our country “public discussion is a political duty” applies with special force to candidates for public office.

Buckley v. Valeo, 424 U.S. 1, 52-53 (1976) (per curiam) (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)) (internal quotation marks and citations omitted).

232. *White*, 536 U.S. at 788 (quoting *Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)); *accord Meyer v. Grant*, 486 U.S. 414, 424-25 (1988).

for themselves which candidate is most likely to be an exemplary judicial officer. Deciding the relevance of candidate speech is the right of the voters, not the State.”²³³

Accepting the First Amendment rights of judges, judicial candidates, and voters, how are those rights reconciled when they conflict with equally fundamental constitutional rights of others? How does the First Amendment right fare in the face of another equally compelling constitutional right, the right of litigants to have fair, impartial, and independent arbiters of the facts and law in their cases?

The potential conflict between the First Amendment rights of judges and voters and the due process rights of litigants, although in a slightly different form, was recognized in Justice O'Connor's concurring opinion: “[E]ven aside from what judicial candidates may say while campaigning, the very practice of electing judges undermines [the compelling state] interest” in having “an actual and perceived . . . impartial judiciary.”²³⁴ Explaining her concern, Justice O'Connor described judges as having a “personal stake” in the outcome of cases and as being motivated to “favor[] donors.”²³⁵ Justice O'Connor mused that judges must be aware that certain rulings will hurt their reelection efforts, bemoaned the escalating expense of judicial campaigns, and acknowledged that fundraising efforts can undermine the public's confidence in the judiciary and leave judges “feeling indebted to certain parties or interest groups.”²³⁶

233. *Id.* at 794 (Kennedy, J., concurring) (citing *Brown v. Hartlage*, 456 U.S. 45, 60 (1982)).

234. *Id.* at 788 (O'Connor, J., concurring).

235. *Id.* at 788-90 (O'Connor, J., concurring). This terminology of “personal stake” comes from the Court's cases discussing whether due process is violated by judges who preside over cases despite personal interest in the outcome. See *infra* notes 243-46.

236. *Id.* at 790 (O'Connor, J., concurring). Justice Kennedy's “leave it to honor” discussion, see *id.* at 793-96, finds some opposition in an early due process case, in which the Court found that the paltry sum of twelve dollars, paid to a justice of the peace only when a defendant was convicted, violated the due process clause.

[T]he requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it

But it was Justice Scalia who cited the Court's seminal cases on due process violations arising from biased judges, albeit for the purpose of belittling the dissent's concerns about judges being motivated by their reelection prospects.²³⁷ If it violates due process for a judge to "sit in a case in which ruling one way . . . increases his prospects for reelection, then – quite simply – the practice of electing judges is itself a violation of due process."²³⁸ Justice Scalia

no without danger of injustice. Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.

Tumey v. Ohio, 273 U.S. 510, 532 (1927).

237. In the Court's opinion, Justice Scalia included the following laundry list of citations:

Tumey v. Ohio, 273 U.S. at 523, 531-534 (1927) (judge violated due process by sitting in a case in which his financial interest would be benefited by his ruling against one party); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822-825 (1986) (same); *Ward v. Monroeville*, 409 U.S. 57, 58-62 (same); *Johnson v. Mississippi*, 403 U.S. 212, 215-216 (1971) (*per curiam*) (judge violated due process by sitting in a case in which one of the parties had successfully sued him); *Bracy v. Gramley*, 520 U.S. 899, 905 (1997) (judge would violate due process if judge ruled against one who did not bribe him in order to hide fact that judge regularly ruled for those who did bribe him); *In re Murchison*, 349 U.S. 133, 137-139 (1955) (judge violated due process by sitting in the criminal trial of defendant whom he had indicted).

White, 536 U.S. at 776.

238. *Id.* at 782. Justice Scalia was apparently referring to Justice Ginsburg's observation that the judicial obligation to decide cases based on the facts and law, and not based on preannounced viewpoints, "corresponds to the litigant's right, protected by the Due Process Clause of the Fourteenth Amendment, to an 'impartial and disinterested tribunal in both civil and criminal cases.'" *Id.* at 813 (quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980)).

Perhaps demonstrating wishful thinking, a United States District Court in the Southern District of New York recently credited Justice Ginsburg's above-quoted statement to the majority. In *Feinberg v. Katz*, 2003 U.S. Dist. LEXIS 1677 (S.D.N.Y. Feb. 5, 2003), the parties were at odds over whether an

discarded the premise he discovered quickly by returning to his “original intent” view of the Constitution.²³⁹

But the litigant’s right to due process was not before the Court in *White*. Whereas Justice Scalia’s view of the larger question – the constitutionality of judicial elections – is obvious, the parallel question – whether forcing a litigant to try a case before a judge who has expressed his or her view on the matter – is, arguably, not so easily discarded as the majority suggested.²⁴⁰

The conflict between the First Amendment rights of judges or judicial candidates and the due process rights of litigants may arise in at least two ways. First, the issue may underlie a pretrial motion to recuse or disqualify a judge. Second, the issue may arise post-trial, in either a motion to set aside the verdict, a motion for new trial, or a petition for habeas corpus, when facts not previously known come to the attention of the parties.

In the first situation, a litigant armed with a copy of a judge’s campaign materials, television advertisements, answers to special interest group’s questionnaires, and newspaper interviews will move the judge to disqualify himself or herself based on actual or perceived bias. Before *White*, the litigant would rarely have more than campaign brochures and advertisements. When the campaign was general, the litigant would have little more than a

attorney who served as an arbitrator should have been disqualified in a later-related case from serving as counsel. In discussing the distinctions between the role of arbitrator and judge, the court noted that unlike judges, partisan arbitrators are not expected to be neutral.

That neutrality is one cornerstone of what constitutes a judge’s role should be beyond dispute. In a recent Supreme Court case, involving the free speech rights of judges, the Court reiterated that there is a “judicial obligation to avoid prejudgment,” which “corresponds to the litigant’s right, protected by the Due Process Clause of the Fourteenth Amendment, to ‘an impartial and disinterested tribunal’”

Id. at n.6 (citing *Republican Party of Minn. v. White*, 536 U.S. 765 (2002) (quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980))).

239. *White*, 536 U.S. at 768-82.

240. *But see infra* notes 77-78, 238 and accompanying text. Justice Scalia has often announced his views on issues that were pending before the Court. On occasion, he has disqualified himself, but not uniformly.

hunch that the judge was predisposed against the litigant. Defendants in criminal cases, for example, might feel concern should their case be tried by judges who campaigned on “law and order” or “tough on crime” platforms.²⁴¹ Their concern, however, certainly would not support a claim that the judge’s participation in the case would violate due process.

After *White*, however, a litigant’s arsenal to support a Motion to Disqualify will likely be much more formidable. It may include a judge’s answers to specific questions about sentencing practices, opinions on the applications of civil rights, or viewpoints on prior decisions reached by other courts. A defendant charged with child sexual abuse may learn that a judge scheduled to hear the case has said that sexual offenders should receive maximum sentences, that pedophiles are incapable of rehabilitation, or that a great challenge for the criminal justice system is recidivism among pedophiles. Now, instead of general, ambiguous comments, a litigant may have evidence that the judge may be “predisposed to find against”²⁴² the defendant.

Suppose instead that a litigant is a plaintiff in a civil action against a medical doctor and a hospital, alleging malpractice and requesting punitive damages. The plaintiff learns that the judge responded to questionnaires submitted by special interest groups. The groups asked questions about “frivolous lawsuits” and “escalating damage awards.” The judge’s responses indicated support for pending legislation to set maximum amounts for damage awards. Ultimately, the judge was endorsed by the groups, which gave a substantial amount of money to the judge’s campaign fund. The judge may be facing reelection and may once again need the support of the groups. The plaintiff gathers these documents and files them as exhibits with the Motion to Disqualify.

Does either litigant have a due process claim if the judge refuses recusal? Do the constitutional limits on judicial recusal, drawn by the Court at the due process line, apply in these cases?

The decisions on when judicial interest or bias rises to the

241. In fact, some judge’s platforms have advised defendants of this fact. See *infra* notes 83, 91, 105.

242. *White*, 536 U.S. at 813 (Ginsberg, J., dissenting) (quoting *Marshall*, 446 U.S. at 242).

level of a due process violation are not easy to apply. If the cases are bound by their facts, then a violation of due process, based on judicial bias, will rarely be found. When, for example, a judge is compensated only when the judge rules in favor of a particular party, due process is violated.²⁴³ A judge who is being bribed by one

243. *Tumey v. Ohio*, 273 U.S. 510 (1927). *Tumey* is perhaps the most frequently cited of the Court's due process cases that concern judicial neutrality. In *Tumey*, state law bestowed jurisdiction in the town mayor to try certain offenses without a jury. *Id.* at 516-17. The mayor's decision in such a case was subject to review in the Court of Common Pleas only upon the filing of a bill of exceptions. *Id.* at 517. The judgment of the mayor was conclusive, unless the court found that it was "clearly unsupported by the weight of the evidence as to indicate some misapprehension or mistake or bias on the part of the trial court, or a willful disregard of duties." *Id.* Statutes also provided that the mayor would "receive or retain the amount of his costs in each case, in addition to his regular salary, as compensation for hearing . . . cases." *Id.* at 520. *Tumey* was convicted and fined. He challenged the mayor's right to try him, alleging that under the Fourteenth Amendment, the mayor should be disqualified from the case because of the mayor's pecuniary interest. Ultimately, the United States Supreme Court agreed with *Tumey* and reversed his conviction.

The Court tracked the history of judicial disqualification, noting that "[t]here was at the common law the greatest sensitiveness over the existence of any pecuniary interest, however small or infinitesimal, in the justices of the peace." *Id.* at 525. Despite the small amount received by the mayor in *Tumey's* case (twelve dollars), the Court concluded that

[w]e can not regard the prospect of receipt or loss of such an emolument in each case as a minute, remote, trifling or insignificant interest. It is certainly not fair to each defendant . . . that the prospect of such a loss by the Mayor should weigh against his acquittal.

Id. at 532.

Similarly in *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), the Court invalidated a system in which the mayor's salary, as judge, was not contingent on conviction, but in which the "revenue produced from a mayor's court provides a substantial portion of a municipality's funds." *Id.* at 59 (quoting *Monroeville v. Ward*, 271 N.E.2d 757, 761 (1971)). Of importance in *Ward* is the Court's expansion of the due process principle outlined in *Tumey*. The Court rejected the argument that the principle announced in *Tumey* was intended to be limited to cases in which the judge shared "directly" in the fees and costs. *Id.* at 60. Instead, the Court, drawing from more general language in *Tumey*, expressed the test as one of "possible temptation to the average man." *Id.* (quoting *Tumey*, 273 U.S. at 532). "This . . . is a 'situation in which an official perforce occupies two practically and seriously inconsistent

defendant in a criminal case but not another, and who rules to camouflage that fact, violates due process.²⁴⁴ Similarly, judges who sue, or have been sued, by a party to the action,²⁴⁵ and judges who have a “direct, personal, substantial, [and] pecuniary” interest in

positions, one partisan and the other judicial, [and] necessarily involves a lack of due process of law . . .” *Id.* (quoting *Tumey*, 273 U.S. at 534).

244. *Bracy v. Gramley*, 520 U.S. 899 (1997). The petitioner in *Bracy* argued that he was denied his right to a fair trial because he was tried by a judge who accepted bribes in some cases and, as a means of hiding his corruption, was biased in favor of the prosecution in other cases. *Bracy* had not bribed the judge, Thomas J. Maloney, one of the Operation Greylord judges who was later convicted of taking bribes in criminal cases. *See id.* at 901; *United States v. Maloney*, 71 F.3d 645, 650 (7th Cir. 1995). But because Maloney was “fixing” other murder cases around the same time as *Bracy*’s case, he argued that Maloney “had an interest in [his] conviction . . . [in order] to deflect suspicion that he was taking bribes in other cases. . . .” *Bracy*, 520 U.S. at 901. The case arose after Maloney’s conviction, when the petitioner, sentenced to death, filed a petition for habeas corpus relief. The petition was dismissed by the district court who found that it did not contain sufficient specificity or good cause to warrant discovery. *United States ex rel. Collins v. Welborn*, 868 F. Supp. 950, 991 (N.D. Ill. 1994). The Seventh Circuit, in a divided opinion, affirmed the dismissal. *Bracy v. Gramley*, 81 F.3d 684, 696 (7th Cir. 1996). Thus, the issue on certiorari was whether petitioner should have been given an opportunity to conduct discovery in the case, not whether a due process violation had been established. The Supreme Court commented, however, that “there is no question that, if it could be proved, such compensatory, camouflaging bias on Maloney’s part in petitioner’s own case would violate the Due Process Clause of the Fourteenth Amendment.” *Bracy*, 520 U.S. at 905. Finding that the presumption that public officials properly discharge their duties had been solidly rebutted by the bribery conviction of the judge, the Court reversed the dismissal and remanded to permit discovery. *Id.* at 909-10.

245. *Johnson v. Mississippi*, 403 U.S. 212 (1971) (per curiam). In *Johnson*, a seemingly simple case, a trial judge, alleged to be biased against civil rights workers, found the defendant, a civil rights worker, in contempt and sentenced him to serve four months in jail for “walking between the space reserved for jurors and county officers and the judge.” *Id.* at 212. The Supreme Court reversed and remanded for a trial before a new judge, not based on the affidavits of bias filed by counsel in the case, but because the judge had previously been sued successfully by the defendant for civil rights violations. *Id.* at 215. Significantly the Court ordered the recusal on a sparse record because the judge was “so enmeshed in matters involving petitioner as to make it most appropriate for another judge to sit.” *Id.* at 215-16.

the outcome of the case²⁴⁶ violate due process by remaining as

246. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 826 (1986). In one of the few civil cases alleging that judicial bias violated the litigant's due process rights, the Court reversed, but did not vacate, a decision of the Alabama Supreme Court. The facts in *Lavoie* are complex, but succinctly stated, a member of the Alabama Supreme Court, Justice Embry, had authored the court's per curiam opinion in a case involving an issue that was similar to that raised in two lawsuits which the justice had filed as plaintiff during the pendency of the case. *Id.* at 817. The offended parties challenged Justice Embry's participation in the case as well as the other justices' participation in a rehearing motion that they filed. *Id.* Each justice of the Alabama Supreme Court, potential class members in one of the lawsuits filed by Justice Embry, refused recusal. *Id.* at 817-18. The Supreme Court held that Justice Embry's involvement in the case violated the litigant's due process rights. *Id.* at 825. "Justice Embry's opinion for the Alabama Supreme Court had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case." *Id.* at 824. Thus, Justice Embry "acted as a 'judge in his own case.'" *Id.* (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

Of particular note is this statement by the Court:

We make clear that we are not required to decide whether in fact Justice Embry was influenced, but only whether sitting on the case then before the Supreme Court of Alabama "would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true." The Due Process Clause 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scale of justice equally between contending parties.

Id. at 825 (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (quoting *Tumey*, 273 U.S. at 532 and *Murchison*, 349 U.S. at 136) (internal citations omitted)).

The remaining members of the Alabama Supreme Court were not required to recuse themselves, both because their interests, if any, were not "direct, personal, substantial, [and] pecuniary," *id.* at 826 (quoting *Tumey*, 273 U.S. at 523), and, perhaps, because of the "rule of necessity." *Id.* at 825. (citing *United States v. Will*, 449 U.S. 200, 214 (1980) ("accepting appellant's expansive contentions might require the disqualification of every judge in the State.")).

Once the Court determined that Justice Embry's participation violated the litigant's due process rights, the Court turned to a matter of first impression: whether the decision made by a multi-judge panel should be vacated because of Justice Embry's participation. *Id.* at 827. Because the decision was divided 5-4, and Justice Embry's participation was vital and decisive, the Court concluded that the "'appearance of justice' will best be served by vacating the decision and remanding for further proceedings." *Id.* at

jurists in the case.

But if the underlying themes espoused in those cases may be applied generally to much different facts, then due process violations based on judicial bias should be found in the post-*White* landscape far more frequently.

Arguably, the Court itself has suggested that a more general application is appropriate, acknowledging that the test for a due process violation, while imprecise, must cover more than actual, provable bias. “[O]ur system of law has always endeavored to prevent even the probability of unfairness. To this end no man is permitted to try cases where he has an interest in the outcome.”²⁴⁷ In attempting to devise a standard to apply to other facts, Justice Taft, for a unanimous court, stated: “[e]very procedure which

828.

247. *Murchison*, 349 U.S. at 136. Michigan law allowed a judge to sit as a one-person grand jury. *Murchison*, a policeman, was called as a witness before such a grand jury to testify about suspected gambling in Detroit, as well as about bribery of police officers. A second witness, *White*, was similarly questioned, but refused to answer on Fifth Amendment grounds. *White* was cited for contempt and *Murchison* was indicted for perjury. Both were tried by the same judge who had conducted the grand jury, despite their objection. The Supreme Court nullified the procedure, holding that:

A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that “every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.” Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way “justice must satisfy the appearance of justice.”

Id. at 136 (quoting *Tumey*, 273 U.S. at 532; *Offutt v. United States*, 348 U.S. 11, 14 (1954)) (internal citations omitted.).

would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true . . . denies . . . due process of law.”²⁴⁸

Would a criminal court judge who had espoused strong views about sexual offenders “hold the balance nice, clear, and true” in an accused sexual offender’s trial? Would a judge who had publicly supported damage maximums, now faced with the constitutionality of a statutory maximum, be tempted to ignore the burden of proof? Would a candidate for reelection, previously endorsed by special interest groups supportive of damage limits in malpractice cases and desirous of their financial support, have a personal stake in rulings in malpractice cases?

The second situation in which a litigant may raise a due process claim arising out of judicial partiality arises after trial. The litigant who has discovered facts supporting a Motion to Disqualify may file the motion after the trial as part of a Motion for New Trial or a Motion to Set Aside a Verdict. In a criminal case, the motion may be filed after conviction and appeal as grounds for finding a constitutional violation on post-conviction or federal habeas corpus. It should be expected that litigants facing significant loss of liberty, particularly those with death sentences, will more aggressively litigate due process claims against judges. Thus, those charged with capital offenses and those already convicted and sentenced to death will undoubtedly structure claims for relief based on arguments that a trial judge’s bias or interest violated their due process rights.

The easy answer is that due process was not meant to stretch so far. Courts can engage in a number of methods to reach that facile conclusion. After all, judges, like jurors, are presumed to follow their oath, and evil motives should not be subscribed to our elected officials. The rule of necessity, at the very least, would undermine such an extension of due process. In the end, since it is a matter of perspective, claims of due process violations are unlikely to be any more viable than the other solutions employed as

248. *Turney*, 273 U.S. at 532. While Justice Taft offered the test in a criminal case, and thus was concerned with holding the balance true “between the State and the accused,” *id.*, the right to due process in a state court is equally guaranteed in a civil proceeding between private parties.

a result of *White*.

CONCLUSION

The five-four decision in *Republican Party of Minnesota v. White* will continue to foster disrespect for the American justice system. The speech and conduct which *White* sanctions will become commonplace among those vying for the bench. The same speech and conduct, however, will undermine the public's perception of fairness in the courts. As the public's confidence in the fairness of the system declines, so will their respect for the judiciary. And, eroding respect will challenge the very viability of the justice system as an appropriate means for resolving disputes.

States can change rules, alter selection methods, or fund campaigns, but none of those "solutions" will alleviate the problems created by diminished respect for the judiciary. Neither can the effects of disrespect be eliminated by a blind, albeit patriotic, faith in the voters or the candidates. While states may adopt rigorous judicial recusal standards, those standards may ultimately not survive constitutional challenge.

Our system does provide a viable mechanism for addressing these problems. That mechanism is a renewed commitment to fundamental due process. If, in reality, we are committed to the principle that "justice must satisfy the appearance of justice,"²⁴⁹ then the due process rights of litigants must be more essential than the First Amendment rights of those who seek public office. If we are to sustain the long-held reverence for the American justice system, if justice is to remain blind seeing "no difference in the parties concerned," then courts must rededicate themselves to the most fundamental aspect of due process – actual and perceived fairness to all.

249. *Offutt v. United States*, 348 U.S. 11, 14 (1954).

