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I Am Pro-Choice, Pro-Union and I Oppose Capital Punishment - I Want You to Elect Me to the Pennsylvania Supreme Court: Is This the Future of Pennsylvania's Judicial Elections

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2003]

“I AM PRO-CHOICE, PRO-UNION AND I OPPOSE CAPITAL
PUNISHMENT—I WANT YOU TO ELECT ME TO THE
PENNSYLVANIA SUPREME COURT”: IS THIS THE
FUTURE OF PENNSYLVANIA’S JUDICIAL ELECTIONS?

*“The complete independence of the courts of justice is peculiarly essential
in a limited Constitution.”¹*

I. INTRODUCTION

Should attorneys who are running for the bench, or incumbent judges attempting to remain on the bench, be allowed to say whatever they want during their campaigns?² Consider the following hypothetical statement: “If elected to this state’s Supreme Court, I will impartially uphold existing law. I am pro-choice, pro-Union and I oppose capital punishment.” Does this sound like someone who would impartially administer justice?

The debate over the optimal method of judicial selection has lingered since the birth of our nation.³ The main point of contention in this heated debate is typically whether state judges should be selected by appointment or general election.⁴ In fact, state judicial selection methodology was most uniform when the thirteen “original” states all appointed judges; this was, of course, accomplished through different legislative mechanisms.⁵

1. THE FEDERALIST NO. 78, at 434 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

2. Cf. generally Lloyd B. Snyder, *The Constitutionality and Consequences of Restrictions on Campaign Speech by Candidates for Judicial Office*, 35 UCLA L. REV. 207 (1987) (arguing that judicial candidates should be permitted to comment freely).

3. See THE FEDERALIST NOS. 76-77, at 427-32 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (arguing judges and other proposed government officials should be appointed and not elected).

4. See, e.g., Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 691-93 (1995) (discussing general pros and cons of electing and appointing judges). The appointment method of judicial selection is also known as a “merit” system and will thus be referred to interchangeably throughout this Note. See *id.* at 724 n.109 (noting “merit plan” entails appointing judges who are most qualified).

5. See LARRY BERKSON ET AL., JUDICIAL SELECTION IN THE UNITED STATES: A COMPENDIUM OF PROVISIONS 3 (1980) (discussing different methods of judicial appointment in early America). Amid burgeoning Federalist sentiment, the original thirteen states modeled their judicial selection systems after the federal merit system. See *id.* (discussing early American judicial selection systems). Thus, state judges were appointed by three methods: (1) one or both houses of the state legislature; (2) the governor; or (3) the governor with legislative approval. See *id.* (same).

In the early 1800s, however, the states shifted towards populist governance, resulting in the popular election of state judges.⁶ Since that time, in an effort to strike a fair balance between judicial integrity and government “by the people,” the states have continuously enacted and experimented with different methods of judicial selection.⁷ These coexisting laboratories of democracy, however, ultimately produced the current situation in which no state utilizes the same method of judicial selection as another.⁸ Thus, the heated debate over whether state judges should be appointed or elected currently retains ample fervor.⁹ From this debacle, further issues concerning the effect of state ethical codes upon judicial candidates’ campaign conduct have recently emerged.¹⁰

The states have generally adopted, in whole or with minor amendments, the American Bar Association’s (ABA) Model Code of Judicial Ethics (ABA Model Code).¹¹ Recently, provisions in state versions of the ABA Model Code concerning judicial campaign conduct have resulted in especially fierce litigation.¹² Interestingly, these scrutinized ethical provisions

6. See DANIEL R. PINELLO, *THE IMPACT OF JUDICIAL-SELECTION METHOD ON STATE-SUPREME COURT POLICY: INNOVATION, REACTION, AND ATROPHY 2* (1995) (discussing methods of judicial selection in early America). For a discussion of the history of judicial selection in the United States, see *infra*, notes 7-10, 25-41 and accompanying text.

7. See, e.g., Justice Paul J. De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 38 WILLAMETTE L. REV. 367, 377 (2002) (discussing Oregon’s 1931 legislative act creating non-partisan judicial elections to replace former partisan elections).

8. See BERKSON ET AL., *supra* note 5, at 6 (noting lack of uniformity amongst state judicial mechanisms).

9. See David Barnhizer, “On the Make:” *Campaign Funding and the Corrupting of the American Judiciary*, 50 CATH. U. L. REV. 361, 413-14 (2001) (illustrating flaws in arguments promoting election and appointment of judges).

10. See, e.g., Snyder, *supra* note 2, at 228-29 (arguing that various state ethics codes’ restrictions upon judicial campaign speech violate candidates’ First Amendment rights). In this Note, the term “judicial candidate” denotes attorneys running for judicial office as well as incumbent judges up for re-election. State judicial ethics codes apply to both categories of candidates during elections. See, e.g., PA. CODE OF JUDICIAL CONDUCT Canon 7(B)(1) (2002) (expressing application to candidates and incumbent judges).

11. See LISA L. MILORD, *THE DEVELOPMENT OF THE ABA JUDICIAL CODE 7* (1992) (discussing ABA’s most recent Model Code’s creation). For a discussion of the evolution of the ABA Model Code’s effect upon judicial campaign speech, see *infra* notes 14-16, 42-52 and accompanying text.

12. See, e.g., *Stretton v. Disciplinary Bd. of Sup. Ct. of Pa.*, 944 F.2d 137, 144 (3d Cir. 1991) (upholding Pennsylvania restriction upon judicial candidates announcing their views on disputed legal and political issues); see also MODEL CODE OF JUDICIAL CONDUCT Canons 5, 7 (1990) (collecting ethical provisions applying to judicial candidates during their campaigns); Snyder, *supra* note 2, at 212-14 (discussing ABA Model Code’s various prohibitions concerning political campaign conduct that raises inferences of impartiality).

were actually written for the noble purpose of preserving judicial impartiality.¹³

The 1972 ABA Model Code prohibited judicial candidates from “announc[ing] . . . [their] views on disputed legal or political issues;” this is commonly referred to as the “announce clause.”¹⁴ At least four states currently maintain this restriction.¹⁵ Recently, however, a judicial candidate challenged Minnesota’s version of the announce clause under the First Amendment.¹⁶ In *Republican Party of Minnesota v. White*,¹⁷ the Supreme Court held that Minnesota’s version of the announce clause violated the First Amendment.¹⁸ Nonetheless, *White*’s outcome raises additional ques-

13. See Snyder, *supra* note 2, at 212 (noting intent of ABA Code is to avoid extra-judicial activity by judges which could undermine their impartiality).

14. MODEL CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(c) (1972). For a discussion of the evolution of the ABA’s proscription of judicial candidates discussing disputed legal and political issues, see *infra* notes 15-19, 42-52 and accompanying text.

15. See IOWA CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(c) (2002) (“[Judicial candidates] . . . should not . . . announce views on disputed legal or political issues.”); MD. CODE OF JUDICIAL CONDUCT Canon 5(B)(5) (2002) (same); MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2002) (same); MO. CODE OF JUDICIAL CONDUCT Canon 5(B)(1)(c) (2002) (same). Pennsylvania’s judicial code also originally prevented judicial candidates from announcing their views on disputed legal and political issues. See PA. CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(c) (2002) (“[Judicial] candidate[s] . . . should not . . . announce [their] views on disputed legal or political issues.”). On November 21, 2002, however, the Pennsylvania Supreme Court announced that it was amending Canon 7(B)(1)(c) to conform with the 1990 ABA Model Code, which prevents judicial candidates from making statements “that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.” MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (1990); see also Jeff Blumenthal, *Pennsylvania Justices Alter Judicial Election Conduct Rules*, LEGAL INTELLIGENCER, Nov. 25, 2002, at 1 (discussing amendments to Pennsylvania’s judicial code).

16. See generally *Republican Party of Minn. v. Kelly*, 996 F. Supp. 875 (D. Minn. 1998) (denying plaintiff’s motions for temporary restraining order and preliminary injunctive relief against state from enforcing its judicial code to prohibit judicial candidates from announcing their views on disputed legal and political issues), *aff’d*, 1998 U.S. App. LEXIS 27946 (8th Cir. Nov. 2, 1998) (unpublished opinion); see also *Republican Party of Minn. v. Kelly*, 63 F. Supp. 2d 967, 986 (D. Minn. 1999) (granting state’s motion for summary judgment as to all claims that Minnesota’s various restrictions upon judicial candidates’ campaign conduct violates First Amendment rights), *aff’d*, 247 F.3d 854 (8th Cir. 2001), *cert. granted*, 534 U.S. 1054 (2001) (granting certiorari only to issue of whether Minnesota’s restrictions upon judicial candidates announcing their views on disputed issues violates First Amendment), *rev’d sub nom. Republican Party of Minn. v. White*, 122 S. Ct. 2528 (2002). For a discussion of the relevant facts and procedural history in *White*, see *infra* notes 93-105 and accompanying text.

17. 122 S. Ct. 2528 (2002).

18. See *id.* at 2542 (invalidating Minnesota’s announce clause for violating judicial candidates’ First Amendment rights).

tions concerning the future of state judicial elections across the country, and especially in Pennsylvania.¹⁹

This Note addresses the role that *White* and its rationale has had upon Pennsylvania's judicial code, as well as its potential effect upon future judicial elections. Part II summarizes the development of judicial selection and ethics in the United States, with its main focus on Minnesota and Pennsylvania law.²⁰ Part II also discusses the First Amendment's application to state elections.²¹ Part III discusses the facts and procedural history of the *White* decision.²² Part IV summarizes the Court's rationale in *White*, while Part V critiques that rationale.²³ Finally, Part VI addresses *White*'s immediate and potential impact upon Pennsylvania's upcoming judicial elections.²⁴

II. BACKGROUND

Part II first discusses the history of judicial selection in the United States, followed by the evolution of judicial ethics concerning judicial campaign speech. Finally, Part II addresses the First Amendment's application to campaign speech.

A. *The History and Evolution of Judicial Selection in the United States*

During the Colonial Era of the early Eighteenth Century, England's ruling monarch appointed judges and often retained the lion's share of authority over these "impartial" arbiters of English law.²⁵ As a result, American states have since strived to maintain judicial selection systems preserving "that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty."²⁶ The Framers re-

19. For a discussion of *White*'s potential effects upon Pennsylvania judicial elections, see *infra* notes 188-206 and accompanying text.

20. For a discussion of the evolution of judicial selection, as well as judicial ethics concerning free speech in the United States, see *infra* notes 25-52 and accompanying text.

21. For a discussion of the First Amendment's application to state legislative and judicial elections, see *infra* notes 53-92 and accompanying text.

22. For a discussion of *White*'s relevant facts and procedural history, see *infra* notes 93-105 and accompanying text.

23. For a discussion of the various opinions rendered in *White*, see *infra* notes 106-63 and accompanying text. Also, for a critique of the various opinions rendered in *White*, see *infra* notes 164-87 and accompanying text.

24. For a discussion of *White*'s immediate and potential effects upon Pennsylvania's future judicial elections, see *infra* notes 188-206 and accompanying text.

25. See BERKSON ET AL., *supra* note 5, at 3-4 (discussing early judicial selection systems). The English Monarchs' omnipresent power over their appointed judges was even listed as a grievance in the Declaration of Independence. See Croley, *supra* note 4, at 714 (citing THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776)) ("He [the King] has made Judges dependant on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.").

26. THE FEDERALIST NO. 78, at 437 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (discussing desirable qualities for America's judiciary).

garded appointive systems as the optimal method of judicial selection.²⁷ The original thirteen states similarly appointed state judges in the late 1700s.²⁸

In the early Nineteenth Century, however, the states' appointive judicial selection systems experienced criticism and rapid decline.²⁹ In 1812, Georgia amended its constitution to provide for the election of trial judges; it was the first state to do so.³⁰ This concept of popular sovereignty soon spread so rapidly that twenty-four out of thirty-four states elected their judiciaries by the time of the Civil War.³¹

The public quickly realized, however, that elected judiciaries were just as prone to abuse as the former appointive judicial selection systems.³² As a result, some states tried to maintain public confidence in their judiciaries by amending their constitutions to allow non-partisan judicial elections.³³ These efforts temporarily ameliorated the problem, however, the inequities of state judicial elections continued into the early 1900s, spurn-

27. See U.S. CONST. art. II, § 2, cl. 2 (“[President] appoints . . . supreme Court [judges].”). Discussing methods of selecting officers to lead the new Union, Alexander Hamilton wrote that the “merit” system was the best calculated system to retain able and judicious individuals. See THE FEDERALIST NO. 76, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (explaining that vesting responsibility of appointing judges in one individual [President] inspires responsibility, duty and care seldom present in popular elections). Hamilton further wrote that life tenure was essential in maintaining independent judges because “periodic appointments . . . would . . . be fatal to their independence.” THE FEDERALIST NO. 78, at 439 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (elaborating that judges' requisite expertise in legal precedent further mandated life tenure).

28. For a discussion of the original thirteen states' methods of judicial appointment, see *supra* note 5 and accompanying text.

29. See BERKSON ET AL., *supra* note 5, at 3-4 (discussing development of judicial elections in early America).

30. See *id.* at 3 (discussing Georgia's constitutional amendment providing for popular election of judges).

31. See *id.* at 3-4 (attributing new state methods of electing judges to populist thought under Jacksonian Democracy); see also PINELLO, *supra* note 6, at 2 (same). During the early 1800s, the general public became dissatisfied with property owners' alleged control over the appointive judicial selection process. See BERKSON ET AL., *supra* note 5, at 3 (discussing rise of judicial elections in early America).

32. See BERKSON ET AL., *supra* note 5, at 4 (discussing judicial elections' rapid demise in spite of their rapid ascent to popularity). Judicial elections were actually criticized as early as 1853 by the Massachusetts Legislature when it declined to adopt such a system. See *id.* (noting rising division over judicial selection in early America). The Massachusetts Legislature cited New York's failed judicial election system as a primary reason for not amending the state's Constitution. See *id.* (discussing Massachusetts Legislature's rejection of judicial elections).

33. See *id.* (noting that goal of having judges unencumbered by special interests had not been attained). The first non-partisan judicial elections took place in Cook County, Illinois in 1873, however, by 1927, only twelve states utilized that method of judicial selection. See *id.* (discussing short-lived popularity of non-partisan judicial elections). Interestingly, Pennsylvania had already adopted and subsequently abandoned non-partisan judicial elections by 1927. See *id.* (discussing rapid decline of judicial elections in America in early 1900s); see also PA. CONST. art. V, § 13(a) (providing for popular partisan election of state judges).

ing demands for reform.³⁴ In 1940, Missouri responded to this dilemma by adopting an innovative judicial selection system consisting of gubernatorial appointment, aided by a non-partisan advisory committee.³⁵

Today, no two states select their judiciary in precisely the same manner.³⁶ Thus, the debate over the optimal method of judicial selection continues.³⁷ In Pennsylvania, for example, most state judges are selected by partisan elections to ten-year terms.³⁸ Incumbent state judges subsequently run unopposed in retention elections for the same term of service.³⁹ Minnesota's judges, on the other hand, are selected by general non-partisan elections to six-year terms.⁴⁰ While Pennsylvania and Minne-

34. See BERKSON ET AL., *supra* note 5, at 4 (discussing rising public criticism of judicial elections). State judicial elections gained such ill repute during the early 1900s that Roscoe Pound, in a well-known address to the American Bar Association in 1906, stated that, "putting courts into politics, and compelling judges to become politicians . . . [had] almost destroyed the traditional respect for the bench." *Id.* at 5.

35. See *id.* (explaining non-partisan advisory committee in so-called Missouri System consisted of lawyers and non-lawyers). Albert Kales, a faculty member at Northwestern University School of Law during the early 1900s, allegedly invented the Missouri System of judicial selection. See Croley, *supra* note 4, at 724 (discussing evolution of elected judiciaries in America). Professor Kales's plan originally provided for legislative aid in the appointment process, as well as subsequent retention elections to maintain the general public's participation in the judicial selection process. See *id.* (describing as well as discussing pros and cons of Professor Kales's system of judicial selection).

36. For a comparison between Minnesota's and Pennsylvania's respective methods of judicial selection exemplifying the non-uniformity in state judicial selection, see *infra* notes 38-41 and accompanying text.

37. See PINELLO, *supra* note 6, at 2-3 (discussing theory that judicial elections open state selection process to many groups who are not ordinarily exposed to it, while bar associations, chambers of commerce and commercial groups usually dominate appointment systems); see also *Throw Out the Baby; Abolish Judicial Elections, Not Contributions*, PITT. POST-GAZETTE, Jan. 17, 2001, at A8 [hereinafter *Throw Out the Baby*] (arguing that Pennsylvania judges should be appointed, not elected).

38. See PA. CONST. art. V, §§ 13, 15 (providing for popular election of most judges to ten-year terms); PA. STAT. ANN. tit. 42, §§ 3131, 3152(a)(3) (West 2002) (same). Although Philadelphia's municipal and traffic court judges are similarly elected, they only serve six-year terms. See PA. CONST. art. V, § 15(a) (mandating six-year terms); see also PA. STAT. ANN. tit. 42, §§ 3131, 3152(a)(1) (mandating popular election for six-year terms). Pittsburgh's magistrate judges are appointed by the mayor, with the advice and consent of the city council, for an undetermined term; the mayor also assigns magistrate judges to traffic court. See PA. STAT. ANN. tit. 42, §§ 1331, 3131(d), 3152(a)(2) (West 2002) (requiring that neither magistrate nor traffic court judges may all be members of same political party).

39. See PA. CONST. art. V, § 15(b) (providing that incumbent judges may elect to run unopposed). It should be noted that Pennsylvania's governor fills all premature judicial vacancies, provided that such appointments are made with the advice and consent of two-thirds of the state senate. See PA. CONST. art. V, § 13(b) (stating procedure for filling premature court vacancies).

40. See MINN. CONST. art. VI, § 7 (providing for general election of judges for six-year terms); MINN. STAT. ANN. §§ 480A.02, 487.03 (West 2002) (same); see also MINN. STAT. ANN. § 488A.19 (West 2002) (mandating general elections for Ramsey County municipal judges to six-year terms).

sota may have different judicial selection systems, both states formerly agreed to restrict judicial campaign speech.⁴¹

B. THE ABA, MINNESOTA AND PENNSYLVANIA JUDICIAL CODES OF CONDUCT AND CAMPAIGN SPEECH RESTRICTIONS

Responding to various problems with the American bench, the ABA promulgated its first Model Code of Judicial Conduct in 1924.⁴² In an effort to promote judicial integrity, the 1924 ABA Model Code provided that a judicial candidate “should not announce in advance his conclusions of law on disputed issues to secure class support.”⁴³ In 1972, however, the ABA amended this language along with a substantial portion of the Model Code to provide that a judicial candidate should not “announce his views on disputed legal or political issues” (the announce clause).⁴⁴ In re-

41. See MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2002) (prohibiting judicial candidates from announcing their views on disputed legal and political issues); PA. CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(c) (2002) (same). These restrictions have both been either invalidated or amended. See *Republican Party of Minn. v. White*, 122 S. Ct. 2528, 2542 (2002) (invalidating Minnesota’s announce clause for First Amendment reasons); see also Blumenthal, *supra* note 15, at 1 (discussing amendments to Pennsylvania’s announce clause). For further discussion of Minnesota’s and Pennsylvania’s restrictions on judicial campaign speech, see *infra* notes 50-52 and accompanying text.

42. See MILORD, *supra* note 11, at 6-7 (discussing history of judicial codes in America); see also Justice Shirley S. Abrahamson, *Foreword* to JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS, at vii (2000) (noting Chief Justice William Howard Taft’s involvement in drafting 1924 ABA Model Code). Commentators have opined that the 1924 ABA Model Code actually resulted from the aftermath of the 1919 World Series’s infamous Black Sox Scandal. See *id.* (citing JOHN P. MACKENZIE, THE APPEARANCE OF JUSTICE 180-82 (1974)). Not uncharacteristically looking for some credibility, Major League Baseball appointed United States District Judge Kennesaw Mountain Landis as Commissioner, paying him \$42,500 a year, while Judge Landis made \$7,500 as a United States District Judge. See *id.* (detailing possible background behind ABA’s first Model Judicial Code). The Framers would also view Judge Kennesaw’s employment situation as a serious threat to his judicial independence. See THE FEDERALIST NO. 79 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (“[P]ower over . . . man’s subsistence amounts to . . . power over his will.”).

43. MILORD, *supra* note 11, at 140-41 (quoting MODEL CODE OF JUDICIAL CONDUCT Canon 30 (1924)). Canon 30 was subsequently amended in 1933, however, the ABA retained its language prohibiting candidates from announcing conclusions of law in advance to gain class support. See *id.* at 140 n.3 (discussing development of 1924 ABA Model Code). It should be noted that the 1924 ABA Model Code also prohibited judges from giving “political speeches.” See *id.* (citing MODEL CODE OF JUDICIAL CONDUCT Canon 28 (1924)).

44. E. WAYNE THODE, REPORTER’S NOTES TO CODE OF JUDICIAL CONDUCT 98 (1973) (noting that judicial candidates should not “base” their campaigns on their ideas of “solutions to political problems”); see also MILORD, *supra* note 11, at 128 (citing MODEL CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(c) (1972)) (same). The ABA Committee believed that judicial candidates should rely solely upon their “ability, experience and record.” See THODE, *supra*, at 98 (detailing adoption of 1972 ABA announce clause). Thode was sure to acknowledge, however, the apparent tension between democratic elections and the ABA Committee’s ideal judicial

ponse, the federal judiciary and an overwhelming majority of the states adopted the 1972 ABA Model Code, either in whole or by incorporating many of its provisions into their own judicial codes.⁴⁵

But, in 1990, the ABA again substantially revised the Model Code.⁴⁶ Concerned with the announce clause's burden upon judicial candidates' First Amendment rights, the ABA amended its language to currently provide that judicial candidates should 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."⁴⁷ In response, at least twenty-five states have adopted the announce clause's 1990 amended version.⁴⁸ Conversely, at least four states have retained the announce

standards. *See id.* (noting announce clause's uncertainty concerning First Amendment rights).

45. *See* MILORD, *supra* note 11, at 7 (discussing history of judicial codes in America); *cf.* MINN. CODE OF JUDICIAL CONDUCT Canon 7(B)(c) (1993) (prohibiting judicial candidates and incumbents from announcing their views on disputed legal and political issues).

46. *See* MILORD, *supra* note 11, at 3 (discussing revision of 1972 ABA Model Code).

47. *Id.* at 50 (citing MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (1990)). Commentary to Canon 5(A)(3)(d) provides that judicial candidates should emphasize in their public statements that judges are bound to uphold the law regardless of personal ideology. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d) cmt. (1990) (elaborating that Canon 5(A)(3)(d) applies to statements made during judicial elections and nominations). Canon 5(a)(3)(d)(ii) replaced the former "broad" restriction against candidates stating their personal views on disputed matters with a narrow restriction against committing, or appearing to commit, on issues likely to come before the court. *See* MILORD, *supra* note 11, at 50 (noting that discussion draft originally prohibited judicial candidates from stating "personal views" on matters likely to come before them, however, this language was not retained). The ABA Committee believed that Canon 5(A)(3)(d)(ii) protected judicial candidates' First Amendment rights much more effectively, while eliminating the appearance of impartiality and impropriety. *See id.* (noting that announce clause was not practical in application, while "revised rule protects candidates from improper questioning in polls and questionnaires").

48. *See* ALASKA CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (2002) ("[Judicial] candidate[s] . . . 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."); ARIZ. SUP. CT. R. 81 Canon 5(B)(1)(d)(ii) (2002) (same); ARK. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (2002) (same); CAL. CODE OF JUDICIAL ETHICS Canon 5(B)(1) (2002) (same); FLA. CODE OF JUDICIAL CONDUCT Canon 7(A)(3)(d)(ii) (2002) (same); GA. CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(c) (2002) (same); ILL. SUP. CT. R. 67 Canon 7(A)(3)(d)(i) (2000) (same); IND. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (2002) (same); KY. SUP. CT. R. 4.300 Canon 5(B)(1)(c) (2002) (same); LA. CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(d)(ii) (2002) (same); ME. CODE OF JUDICIAL CONDUCT Canon 5(B)(2)(b) (2002) (same); MISS. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (2002) (same); NEV. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (2002) (same); N.M. CODE OF JUDICIAL CONDUCT § 21-700(B)(4)(b) (2002) (same); N.Y. CODE OF JUDICIAL CONDUCT § 100.5(A)(4)(d)(ii) (2002) (same); N.D. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (2002) (same); OHIO CODE OF JUDICIAL CONDUCT Canon 7(B)(2)(d) (2002) (same); OKLA. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (2002) (same); R.I. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (2002) (same); S.D. CODE OF JUDICIAL CONDUCT

clause in full.⁴⁹

Pennsylvania and Minnesota both initially retained the announce clause's former version, prohibiting judicial candidates from announcing

Canon 5(A)(3)(d)(ii) (2002) (same); TENN. SUP. CT. R. 81 Canon 5(A)(3)(d)(ii) (2002) (same); VT. CODE OF JUDICIAL CONDUCT Canon 5(B)(4)(b) (2001) (same); WASH. CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(c)(ii) (2002) (same); W. VA. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (2002) (same); WYO. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (2002) (same). Additionally, at least two states' judicial code provisions concerning campaign speech closely resemble the announce clause's 1990 amended version. See ALA. CODE OF JUDICIAL ETHICS Canon 7(B)(1)(c) (2002) ("[J]udicial candidates . . . shall not announce in advance [their] conclusions of law."); COLO. CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(c) (2002) ("[J]udicial candidates . . . should not . . . announce how they would rule on an issue coming before the court.").

49. See IOWA CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(c) (2002) ("[Judicial candidates] . . . should not . . . announce views on disputed legal or political issues."); MD. CODE OF JUDICIAL CONDUCT Canon 5(B)(5) (2002) (same); MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2002) (same); MO. CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(c) (2002) (same). For a discussion of Pennsylvania's former announce clause as well as its subsequent amendments, see *supra* note 15 and accompanying text. Kansas's judicial code limits the announce clause's application to candidates' statements other than those in defense of their record. See KAN. SUP. CT. R. 610A Canon 7(B)(2)(b) (2002) ("[n]or state the candidate's views on disputed legal and political issues except those directed at a candidate's record in office"). It should be noted that at least ten states do not limit judicial campaign speech, but prohibit inappropriate political activity in general. See CONN. CODE OF JUDICIAL CONDUCT Canon 7 (2002) (proscribing inappropriate political activity in general); DEL. CODE OF JUDICIAL CONDUCT Canon 7 (2002) (same); HAW. CODE OF JUDICIAL CONDUCT Canon 5 (1992) (same); MASS. CODE OF JUDICIAL CONDUCT Canon 7 (2002) (same); MICH. CODE OF JUDICIAL CONDUCT Canon 7 (2002) (same); N.H. CODE OF JUDICIAL CONDUCT Canon 5 (2002) (same); N.J. CODE OF JUDICIAL CONDUCT Canon 7 (1999) (same); N.C. CODE OF JUDICIAL CONDUCT Canon 7 (2002) (same); OR. CODE OF JUDICIAL CONDUCT JR 4-102(B) (2002) (same); UTAH CODE OF JUDICIAL CONDUCT Canon 5 (2002) (same); VA. CODE OF JUDICIAL CONDUCT Canon 5 (2002) (same). Texas and Wisconsin, however, have adopted comparatively unique versions of the announce clause. See TEX. CODE OF JUDICIAL CONDUCT Canon 5(1) (2002) (prohibiting inappropriate judicial campaign speech); WIS. SUP. CT. R. 60.06(3) (2002) (same). Texas's code provides:

[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.

TEX. CODE OF JUDICIAL CONDUCT Canon 5(1) (2002). Wisconsin's code provides:

[Judicial candidates] shall not make or permit others to make in his or her behalf promises or suggestions of conduct in office which appeal to the cupidity or partisanship of the electing or appointing power. A judge shall not do or permit others to do in his or her behalf anything which would commit the judge in advance with respect to any particular case or controversy or which suggests that, if elected or chosen, the judge would administer his or her office with partiality, bias or favor.

WIS. SUP. CT. R. 60.06(3) (2002).

their views on disputed legal and political issues.⁵⁰ In addition, both states' versions of the announce clause were challenged under the First Amendment.⁵¹ The Supreme Court invalidated Minnesota's announce clause in *White*, while Pennsylvania's announce clause was recently amended in response to *White*, despite having survived its previous constitutional challenge.⁵²

50. See MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (providing former Minnesota announce clause); PA. CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(c) (2002) (providing former Pennsylvania announce clause). Minnesota has enforced the announce clause since at least 1993. See *Republican Party of Minn. v. Kelly*, 996 F. Supp. 875, 876 (D. Minn. 1998) (discussing history of Minnesota announce clause). Although the Minnesota Supreme Court amended Canon 7 in 1995, the announce clause's present language was retained. See *id.* (discussing briefly former Minnesota announce clause's background); see also MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (providing former Minnesota announce clause). Pennsylvania's former Code of Judicial Conduct did not comment on either the scope or purpose behind the announce clause, although it did mention that Canon 7, containing the announce clause, was amended on November 9, 1998. See PA. CODE OF JUDICIAL CONDUCT Canon 7 (providing rules of judicial conduct for political activity). Pennsylvania's administrative code, however, requires judicial campaigns to be conducted "with the dignity and integrity required of the office . . . [and] no references to ethnic groups, religions, sex, political or other issues, which tend to stir up the emotions or impugn the candidate's capabilities for functioning impartially and without bias." 207 PA. CODE § 39.3 (2002) (mandating further that "sensationalism" should be avoided). Furthermore, Pennsylvania judges are advised against conducting partisan political activities due to the negative connotations that such activities translate to their impartiality. See 207 PA. CODE § 39.8 (2002) (discouraging judges from engaging in partisan political activities).

51. Compare *Republican Party of Minn. v. White*, 122 S. Ct. 2528, 2542 (2002) (declaring Minnesota's announce clause unconstitutional), with *Stretton v. Disciplinary Bd.*, 944 F.2d 137, 144 (3d Cir. 1991) (upholding Pennsylvania's announce clause as constitutional).

52. See *White*, 122 S. Ct. at 2542 (declaring Minnesota's announce clause unconstitutional); see also Blumenthal, *supra* note 15, at 1 (discussing amendments to Pennsylvania's judicial code in light of *White*). After *White*, Pennsylvania's announce clause remained in force until it was either challenged or amended by the Pennsylvania Supreme Court. See Edward Walsh, *Speech Restrictions on Judicial Candidates Struck Down*, PITT. POST-GAZETTE, June 28, 2002, at A15 (stating that Pennsylvania's announce clause still stands after *White*); see also Alyssa Litman, *Pennsylvania Rule on Judicial Speech Faces Challenges*, LEGAL INTELLIGENCER, July 15, 2002, at 5 (same). As a direct response to *White*, the Pennsylvania Supreme Court amended former Canon 7(B)(1)(c) on November 21, 2002 to conform with the current ABA Model Code. See Blumenthal, *supra* note 15, at 1 (discussing amendments to Pennsylvania's announce clause in light of *White*). According to Pennsylvania Supreme Court Chief Justice Emeritus Stephen Zappala, the amendments to Pennsylvania's announce clause sought to strike a balance between judicial impartiality and "practical considerations attending campaigns." See *id.* (discussing purposes of amendment to Pennsylvania's judicial code). Due to the uncertainty with which Pennsylvania's judicial candidates were left, it was quite likely that the state supreme court would act to rectify the situation. Cf. *generally Cucchi v. Rollins Protective Servs. Co.*, 574 A.2d 565 (Pa. 1990) (applying U.C.C. Article 2 to leases by analogy where Pennsylvania's State Legislature had not yet adopted U.C.C. Article 2A, which explicitly deals with leases).

C. *The First Amendment in State Public Office Elections*

Under the First Amendment, free political speech is a “core” right traditionally regarded as the centerpiece of our Republican form of government.⁵³ There are, however, limited exceptions to the “core” right of free political expression.⁵⁴ Nonetheless, the Supreme Court has generally characterized free and open debate on candidates’ qualifications for public office as a similarly essential component of our government.⁵⁵ Thus, the courts apply First Amendment protections broadly to statements made

53. See *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222-23 (1989) (examining state restriction against political parties endorsing candidates in primary elections). The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.” U.S. CONST. amend. I. Zealously regarded by the Framers as essential to citizens making informed decisions when they vote, free campaign speech has become deeply engrained within our political and social culture. See Snyder, *supra* note 2, at 216 (explaining that free speech strengthens and holds government accountable). Thomas Jefferson acknowledged free speech in his inaugural address by inviting those opposing the government to speak and to be left “undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it.” *Id.* at 216 n.46.

54. See *Schenck v. United States*, 249 U.S. 47, 47-52 (1919) (determining that government may regulate speech creating “clear and present danger”); see also *Craig v. Harney*, 331 U.S. 367, 376 (1947) (mandating that “clear and present danger” of regulated speech be imminent and not merely probable). Judicial and legislative candidates do not create a “clear and present danger” by expressing their opinions on issues of disputed legal or political significance. See Snyder, *supra* note 2, at 222 (discussing impropriety of wedging political speech into traditional First Amendment exceptions). State governments may, however, enact limitations on a government civil service employee’s ability to participate in political campaigns to prevent undue pressure from their superiors. See *United States Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 564-65 (1973) (finding such restriction under Hatch Act necessary to help government employees administer state law according to legislative intent, not partisan interpretation); *Broadrick v. Okla.*, 413 U.S. 601, 601 (1973) (same); *United Pub. Workers v. Mitchell*, 330 U.S. 75, 99 (1947) (upholding constitutionality of Hatch Act to promote government efficiency). For a discussion of Supreme Court decisions regarding libel law, see *infra* notes 55-56 and accompanying text. Interestingly, the Supreme Court has upheld state ethical provisions modeled after the ABA Model Rules of Professional Conduct prohibiting attorneys from making comments that are likely to “materially prejudic[e] . . . an adjudicatory proceeding.” *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1074 (1991) (balancing state interest in fair trials with attorneys’ First Amendment Rights). Justice Ginsburg would likely agree that judicial candidates’ campaign statements concerning disputed legal and political issues would have the same effect as the attorneys’ comments at issue in *Gentile*. See *White*, 122 S. Ct. at 2551 (Ginsburg, J., dissenting) (describing distinction between judicial and legislative elections).

55. See *Eu*, 489 U.S. at 223 (stating that open debate on candidates’ qualifications is essential to our political system). The Supreme Court has further facilitated public discussion and criticism of candidates and public officials by requiring that such individuals demonstrate actual malice before damages may be awarded in a state libel action under the First and Fourteenth Amendments. See *N.Y. Times v. Sullivan*, 376 U.S. 254, 280 (1964) (invalidating jury award to local police commissioner because New York Times did not evince actual malice in printing full-page advertisement criticizing police response to non-violent student demonstra-

by candidates for public office.⁵⁶ This broad application requires courts to examine state electoral restrictions directly implicating candidates' First Amendment rights under strict scrutiny.⁵⁷ States must therefore narrowly tailor their electoral restrictions to serve a compelling state interest under the First Amendment.⁵⁸

State electoral restrictions that directly burden First Amendment rights can occur in a variety of ways, from restrictions against political parties endorsing candidates in primary elections to proscriptions against compensating petition circulators.⁵⁹ In *Eu v. San Francisco County Democratic Central Committee*,⁶⁰ for example, the Supreme Court examined a "highly paternalistic approach" under California election law prohibiting political parties from endorsing candidates in primary elections.⁶¹ The

tion); *see also* *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) (extending rule in *Sullivan* to candidates running for public office).

56. *Cf. Roy*, 401 U.S. at 272 (requiring candidates to demonstrate actual malice before they can recover damages in state libel suits under First and Fourteenth Amendments). The *Roy* court stated that the First Amendment facilitates a "marketplace of ideas" essential to the general public in holding government accountable. *See id.* ("[C]onstitutional guarantee of free speech has its fullest and most urgent application precisely to . . . conduct of campaigns for political office."). A candidate must "put[] before the voters every conceivable aspect of his public and private life that he thinks may lead the electorate to gain a good impression of him." *Id.* at 274.

57. *See Eu*, 489 U.S. at 222 (stating that state restriction against political parties endorsing candidates in primary elections must be narrowly tailored to serve compelling state interest to be constitutional). Courts will not always apply strict scrutiny to state electoral restrictions under the First Amendment. *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992) ("The rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights."). Strict scrutiny therefore only applies to state electoral restrictions that "severely" impose upon First and Fourteenth Amendment rights. *See id.* (describing need for strict scrutiny analysis where electoral restrictions impose upon fundamental interests). Thus, states must show that such restrictions are narrowly tailored by demonstrating that they do not "unnecessarily circumscribe protected expression." *See Brown v. Hartlage*, 456 U.S. 45, 54 (1982) (applying strict scrutiny to invalidated county election due to candidates' mistaken pledge to reduce their salary if elected).

58. *See Eu*, 489 U.S. at 222 (emphasizing that state power to regulate time, place and manner of elections does not diminish its responsibility to observe candidates' First Amendment rights).

59. *See id.* (examining state restriction against political parties endorsing candidates in state primary elections); *Meyer v. Grant*, 486 U.S. 414, 420-27 (1988) (examining state prohibition against paying petition circulators).

60. 489 U.S. 214 (1989).

61. *See id.* at 223 (stating explicitly that state electoral restrictions arbitrarily limiting candidates' ability to apprise voters of their views is "generally suspect"). In *Eu*, various political entities (parties) sued California Secretary of State March Fong Eu, as well as other state officials in federal court. *See id.* at 219 (describing facts giving rise to dispute). The parties alleged that California's restrictions on political party primary campaign conduct, the selection and removal of political committee members, the size of state central committees, the term of the state central committee's chairperson (chairperson), the chairperson's residency, the time and place of committee meetings and dues imposed upon party members all

Court found that despite California's interest in a "stable political system," banning primary candidate endorsements could not promote political stability because voters could potentially elect candidates with "antithetical" party views.⁶² Thus, because California's restriction against political parties endorsing primary election candidates unnecessarily curtailed political speech, it violated the First Amendment.⁶³

The First Amendment even protects inaccurate campaign statements.⁶⁴ In *Brown v. Hartlage*,⁶⁵ the Supreme Court reviewed a county commissioner election that was invalidated under the Kentucky Corrupt Practices Act (KCPA), due to a candidate's mistaken pledge to reduce county commissioners' salaries while in office; Kentucky County Commissioners at that time, however, could not legally reduce their salaries while in office.⁶⁶ Emphasizing the "special vitality" of free speech during election campaigns, the Court examined the KCPA's relevant provisions under strict scrutiny.⁶⁷ The Court found that the KCPA's provisions were not

violated the First Amendment. *See id.* at 217-19 (providing various provisions of California electoral law challenged by parties).

62. *See id.* at 224-26 (rejecting argument behind state's asserted compelling interest). To assert a compelling interest in regulating speech, the government must show more than the mere assertion that a restriction serves a compelling interest, and, furthermore, that the regulated conduct or speech vitiates a compelling interest. *See Landmark Communications, Inc. v. Va.*, 435 U.S. 829, 841 (1978) (invalidating state criminal statute punishing disclosure of judicial ethics board proceedings because state could not demonstrate that such sanctions preserve fair administration of justice by mere conjecture).

63. *See Eu*, 489 U.S. at 229 (invalidating California's ban on political parties endorsing political candidates in state primary elections).

64. For a discussion of the First Amendment's protection of inaccurate campaign speech, see *infra* notes 65-69 and accompanying text.

65. 456 U.S. 45 (1982).

66. *See id.* (discussing prohibition against officials changing their salary while in office). In 1979, Carl Brown ran against Earl Hartlage for a county commissioner seat in Jefferson County, Kentucky's "C" District. *See id.* at 47 (discussing facts in *Brown*). During his campaign, Brown and a fellow party member remarked that if elected, they would reduce their respective salaries by \$3000 every year to save taxpayer money. *See id.* at 48 (providing disputed promise in full). After making these statements, Brown learned that they likely violated the KCPA prohibiting candidates from making any sort of pecuniary pledge to voters. *See id.* (discussing facts of *Brown*). Brown retracted his pledge and subsequently won the election, however, Hartlage brought an action under the KCPA to have the election nullified. *See id.* at 49 (describing procedural history in *Brown*). The act stated, "[n]o candidate for nomination or election to any . . . county . . . office shall . . . promise . . . or become pecuniarily liable in any way for money or other thing of value, either directly or indirectly, to any person in consideration of the vote . . . of that person." KY. REV. STAT. ANN. § 121.055 (Michie 1982). Thus, the Supreme Court essentially reviewed a state restriction against erroneous candidate statements during campaigns. *See Hartlage*, 456 U.S. at 52 (framing relevant analysis for First Amendment purposes).

67. *See id.* at 54 (noting that KCPA directly circumscribed candidates' speech to voters). The Court conceded that Kentucky had a compelling interest in maintaining fair and honest elections. *See id.* ("No body politic worthy of being called a democracy entrusts . . . [its] selection of leaders to . . . process[es] of auction or

“narrowly tailored” because the state had essentially pre-determined what voters may or may not hear in the way of campaign speech.⁶⁸ Moreover, because inaccurate speech is inevitable in any system emphasizing free political expression, the Court stated that the potential “chilling effect” of imposing total liability for such misstatements violated the First Amendment.⁶⁹

Thus, our government cannot function under the First Amendment unless the electorate hears both sides of any issue.⁷⁰ In *Wood v. Georgia*,⁷¹ the Court reviewed a county sheriff’s state contempt convictions for criticizing a grand jury investigation into racial bloc voting that allegedly occurred in a local primary election.⁷² The Court first determined that the

barter.”). Although electoral restrictions that prohibit candidates from promising money in return for electoral support is noble, the KCPA’s practical effects were not so clearly defined. *See id.* at 55 (conceding difficulty in distinguishing “hazy line” between legal and illegal campaign promises). Kentucky also asserted an interest in allowing electoral access to candidates with less money and preventing erroneous statements to the public. *See id.* at 54 (discussing Kentucky’s claims of compelling interests). The Court ultimately found, however, that Brown’s statement did not warrant overturning the election because it was made in front of voters subject to their praise and criticism. *See id.* at 57 (emphasizing lack of constitutional basis to equate Brown’s statements as electoral bribery).

68. *See id.* at 60 (emphasizing Framers’ trust in free exchange of ideas for voters to decide veritable speech from false rhetoric during general elections). The Court further stated that because voters could potentially make a bad choice in voting for individuals who make questionable pledges during their campaigns, such eventualities do not empower state governments to curtail speech. *See id.* (stating priority of free speech over paternalistic political restrictions).

69. *See id.* at 61 (“[W]e depend for . . . correction not on the conscience of judges and juries but on the competition of other ideas.”). For prohibitions like the KCPA to be consistent with the principles of “robust political debate” contemplated by the First Amendment, it must give political speech the necessary room for misstatements to be met with further speech that rectifies such erroneous remarks. *See id.* at 61-62 (finding Kentucky state interest in erroneous public statements not compelling enough to justify authority to curtail First Amendment rights).

70. *See id.* at 60 (noting necessity for electorate to view both sides of important issues).

71. 370 U.S. 375 (1962).

72. *See id.* at 376 (discussing facts of *Wood*). A superior court judge in Bibb County, Georgia issued a charge to the grand jury to investigate the alleged bloc voting by African-American voters in a primary election. *See id.* at 376-79 (summarizing facts). To publicize this impending investigation, the judge personally summoned the local press to be present when the charge was issued. *See id.* at 378-79 (discussing background of *Wood*). According to the charge, African-American voters had pledged their support to one candidate, but bloc voted for the opposition who had allegedly offered a large sum of money. *See id.* at 377-78 n.2 (setting forth original charge in full). In response, the local sheriff issued a written statement to the press criticizing the judge’s actions as “race agitation” and an abuse of power to intimidate minority voters and inflame local politics. *See id.* at 379-80 (quoting sheriff as stating, “[i]f anyone in the community [should] be free of racial prejudice, it should be our Judges. It is shocking to find a Judge charging a Grand Jury in the style and language of a race baiting candidate for political office.”). The sheriff was subsequently charged and convicted of three counts of contempt

sheriff had a personal stake in the primary election under investigation.⁷³ Reiterating that the First Amendment guarantees free expression, not censorship, of both sides of every issue in order to arrive at the ultimate truth, the Court determined that the sheriff was unconstitutionally sanctioned for his comments.⁷⁴ Thus, because the sheriff was an elected official affected by the outcome of the primary election under investigation, he was certainly free to criticize the Grand Jury's charge.⁷⁵

Reviewing the First Amendment's general application to state elections reveals a fundamental distinction between electing judges and legislators.⁷⁶ While legislators appeal to broad constituencies, judges must exude independence in the face of popular demand.⁷⁷ To further illustrate this distinction, courts generally uphold judicial campaign proscrip-

for his written press release; he was sentenced to concurrent sentences of twenty days incarceration and separate fines of two hundred dollars for each count. *See id.* at 382-83 (discussing procedural history of *Wood*).

73. *See id.* at 382 (noting sheriff's personal interest in outcome of primary election because he faced winner in general election following year). Thus, *Wood* addressed campaign speech under the First Amendment because the sheriff criticized legal wrangling taking place in response to a primary election that would affect his campaign the following year. *See id.* (finding First Amendment's application to case at bar).

74. *See id.* at 388-89 (noting that free speech must be available to both sides of every issue before society can make informed decisions as to proper courses of action). The State argued that the sheriff's statement created a "clear and present danger" to the fair administration of justice within the state. *See id.* at 387 (noting bald assertions contained in trial and appellate record could not support such assertion). The Court disagreed, admonishing that "counterargument and education" should be used to counteract valid as well as erroneous statements that criticize the fair administration of justice. *See id.* at 389 (stating expressly that state governments cannot limit critical speech in order to avoid potential harm that could result from such speech).

75. *See id.* at 395 ("The role elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance.").

76. *See* *Republican Party of Minn. v. White*, 122 S. Ct. 2528, 2539 (2002) (explaining that First Amendment does not require judicial campaigns to sound like legislative campaigns); *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 228 (7th Cir. 1993) ("Judges remain different from legislators and executive officials, even when all are elected, in ways that bear on the strength of the state's interest in restricting their freedom of speech."). It should be noted that it is speculative for the electorate to vote for judicial candidates based upon their political or legal ideology for two reasons: (1) state judges' jurisdiction over policy is limited, and does not increase much as one moves up appellate court levels; (2) in appellate and trial courts, it is impossible for a voter to predict with exact certainty which judge or judges will be assigned to adjudicate a controversy to which the voter has an interest in the outcome. *See* Croley, *supra* note 4, at 731-32 (stating that voters in legislative elections participate to acknowledge their citizenship and ideology, while voters in judicial elections often have little incentive to vote).

77. *See White*, 122 S. Ct. at 2550 (Ginsburg, J., dissenting) (citing *Plaut v. Spendthrift Farm Inc.*, 514 U.S. 211, 266 (1995) (Stevens, J., dissenting)) (noting role of judges "is to decide 'individual cases and controversies' on individual records," free of influence from constituencies); *see also* Justice De Muniz, *supra* note 7, at 387 (discussing common, but erroneous belief that judicial elections

tions against endorsing other candidates and personally raising campaign money; such conduct is generally essential to legislative elections.⁷⁸ Commentators have even argued that judicial candidates should not directly solicit votes.⁷⁹ Thus, the distinction between judicial and legislative elections impacts any constitutional analysis regarding judicial campaign restrictions.⁸⁰ It should also be noted that the majority of relevant cases concern legislative election restrictions.⁸¹

should run similarly to other “constituency-driven political arm[s] of government”).

78. *See* *Stretton v. Disciplinary Bd. of Sup. Ct. of Pa.*, 944 F.2d 137, 144 (3d Cir. 1991) (upholding constitutionality of Pennsylvania restriction on judicial candidates personally soliciting campaign funds and announcing their views on disputed legal and political issues); *In re Code of Judicial Conduct*, 603 So. 2d 494, 498-99 (Fla. 1992) (upholding Florida policy of restricting judicial candidates from endorsing other candidates for public office); *see also* *Haffey v. Taft*, 803 F. Supp. 121, 125-26 (S.D. Ohio 1992) (allowing state prohibition of judicial candidates from identifying political party affiliation); *cf.* *Buckley v. Valeo*, 424 U.S. 1, 57 (1976) (“First Amendment . . . [rights deny] government the power to determine . . . [campaign] spending to promote one’s political views.”); C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1, 11 (1998) (discussing campaign expenditure restrictions in light of recent Supreme Court rulings). *But see* *Suster v. Marshall*, 149 F.3d 523, 535 (6th Cir. 1998) (affirming district court’s grant of preliminary injunction against state enforcing judicial canon prescribing campaign spending limits).

79. *See* *Chisolm v. Roemer*, 501 U.S. 380, 400-01 (1991) (extending amendment to 1962 Voting Rights Act to judicial elections, while acknowledging fundamental differences in judicial and legislative elections). In *Chisolm*, Justice Stevens espoused his disagreement with state judicial elections stating that, “[t]he fundamental tension between the ideal character of the judicial office and the real world of electoral politics cannot be resolved by crediting judges with total indifference to the popular will while simultaneously requiring them to run for elected office.” *Id.* (footnote omitted). Justice Stevens believed it would be “unseemly” for judicial candidates and incumbents to engage in the normal activities of general elections such as name identification and soliciting votes. *See id.* at 401 n.29 (expressing concern over gradual deterioration of judicial elections in America); *see also* *White*, 122 S. Ct. at 2546-49 (Stevens, J., dissenting) (reiterating disagreement with state judicial elections).

80. *See, e.g.,* *Buckley*, 997 F.2d at 228 (acknowledging difference between judges and other elected public officials in both function and selection).

81. *See* *White*, 122 S. Ct. at 2539 (discussing Court’s reliance on cases involving free speech in legislative elections to illustrate misguided adherence to notion that First Amendment protections are less urgent during elections). This Note acknowledges the arguably questionable propriety of relying upon cases involving free speech in legislative elections to analyze similar issues in judicial elections, however, the overwhelming bulk of First Amendment precedent concerning elections involves legislative contests, and the *White* Court relied heavily upon such cases; thus, they are discussed in this Note. *But see* Robert M. O’Neil, *National Symposium on Judicial Campaign Conduct and the First Amendment: The Canons in the Courts: Recent First Amendment Rulings*, 35 IND. L. REV. 701, 717 (2002) (discussing impropriety of courts’ reliance upon cases involving free speech in legislative elections to decide similar issues in judicial elections).

Before *Republican Party of Minnesota v. White*,⁸² the courts were generally divided regarding whether states could constitutionally prohibit judicial candidates from discussing disputed legal and political issues.⁸³ Judicial candidates challenged state provisions that prevented them from commenting on divisive issues such as abortion, gun control and tort reform as being overbroad, vague and invalid under strict scrutiny.⁸⁴ In examining the constitutionality of state versions of the announce clause, the courts have all initially recognized the fundamental distinction between judicial and legislative elections.⁸⁵ Moreover, insofar as such provisions must be analyzed under strict scrutiny, the courts have generally recognized the states' compelling interest in an impartial judiciary and a reliable election process.⁸⁶ While the courts have generally examined state proscriptions against judicial candidates' remarks on disputed issues

82. 122 S. Ct. 2528, 2542 (2002) (finding Minnesota judicial ethics' prohibition of candidates and incumbents announcing their views on disputed legal and political issues unconstitutional).

83. Compare *Stretton*, 944 F.2d at 146 (upholding constitutionality of Pennsylvania prohibition against judicial candidates and incumbents announcing their views on disputed legal and political issues), with *Buckley*, 997 F.2d at 231 (finding same exact prohibition in Illinois unconstitutional), and *ACLU v. The Fla. Bar*, 744 F. Supp. 1094, 1099 (N.D. Fla. 1990) (same).

84. See *Republican Party of N.C. v. Martin*, 980 F.2d 943, 959-61 (4th Cir. 1992) (finding no overbreadth claim where state would not impose criminal or civil sanctions on candidates commenting on disputed legal and political issues); *Beshear v. Butt*, 863 F. Supp. 913, 917 (E.D. Ark. 1994) (finding Arkansas prohibition of judicial candidates and incumbents announcing their views on disputed political and legal issues vague); *Ackerson v. Ky. Judicial Retirement & Removal Comm'n*, 776 F. Supp. 309, 315 (W.D. Ky. 1991) (granting restraining order against commission's bringing charges, despite finding Kentucky prohibition of judicial candidates and incumbents committing or appearing to commit to cases by their campaign statements not vague); *Republican Party of Minn. v. Kelly*, 63 F. Supp. 2d 967, 974-86 (D. Minn. 1999) (deciding challenge to Minnesota prohibition of judicial candidates and incumbents from announcing their views on disputed legal and political issues under strict scrutiny standard).

85. See, e.g., *Buckley*, 997 F.2d at 228 (concluding that judicial candidates should be treated differently than legislative candidates during campaigns). In order to reach the appellant's claims that the Illinois version of the announce clause violated his First Amendment rights, the Seventh Circuit first had to determine whether it had jurisdiction to hear such claims. See *id.* at 226 (determining that issues concerning standing and applicability of *Rooker-Feldman* Doctrine must be addressed before turning to substantive claims). The court first determined that plaintiffs did indeed have standing given the brevity of judicial elections and the likelihood that the provision would be enforced against future candidates. See *id.* (citing *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969)) (discussing standing issue). Second, the court determined that *Buckley's* claim was not barred by the *Rooker-Feldman* Doctrine, which prevents federal district courts from exercising appellate jurisdiction over state-court judgments, because he had merely sought a determination that the announce clause was unconstitutional and had not asked the court to set aside the state's administrative findings. See *id.* at 227 (noting additionally that although *res judicata* might apply it had not been plead).

86. See, e.g., *Stretton*, 944 F.2d at 142 (acknowledging state's "deep concern" in fair and honest electoral process, while recognizing compelling interest in impartial judges).

under strict scrutiny, some cases have resulted in such provisions being invalidated for other constitutional reasons.⁸⁷

Although courts are generally in agreement concerning the interests at stake and the appropriate level of scrutiny, the results from their application of strict scrutiny are split.⁸⁸ For example, the United States Court of Appeals for the Third Circuit holds that the states' interest in preventing judges from "pre-judging" cases is fundamental, thus, the announce clause maintains the concept of impartial justice.⁸⁹ The United States Court of Appeals for the Seventh Circuit, however, holds that despite the states' asserted interest in administering impartial justice, such regulation must comport with the First Amendment.⁹⁰ Thus, states cannot conduct

87. Compare *Ackerson*, 776 F. Supp. at 313 (applying strict scrutiny to Kentucky prohibition against controversial judicial campaign speech), with *Beshear*, 863 F. Supp. at 913 (determining whether Arkansas's proscription against judicial candidates announcing their views on disputed legal and political issues was vague).

88. For an example of divergent decisions regarding state proscriptions of judicial candidates and incumbents announcing their views on disputed legal and political issues, see *supra* note 83 and accompanying text.

89. See *Stretton*, 944 F.2d at 142 (emphasizing marked difference between judicial and legislative functions in holding Pennsylvania's announce clause narrowly tailored to serve compelling state interest). It is important to note that the Third Circuit discussed how the Pennsylvania Judicial Inquiry and Review Board (PJIRB) had adopted a "narrow interpretation" of the announce clause so that it would only apply to statements made concerning issues that were likely to come before a candidate's respective court. See *id.* at 142-43 (noting that because PJIRB had adopted certain interpretations during prior litigation, it was prohibited from adopting different interpretations in subsequent litigation). The Third Circuit relied upon this limited reading of Pennsylvania's announce clause to bring itself within the prudential rule that constitutional difficulties should be avoided in interpreting statutes and documents. See *id.* at 144 (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). But see *Buckley*, 997 F.2d at 229 ("There is almost no legal or political issue that is unlikely to come before . . . judge[s] of . . . American court[s], state or federal, of general jurisdiction."). It should also be noted that the Pennsylvania Supreme Court's recent amendments to Pennsylvania's announce clause likely render *Stretton* a moot case. See Blumenthal, *supra* note 15, at 1 (discussing amendments to Pennsylvania's announce clause).

90. See *Buckley*, 997 F.2d at 231 ("[T]he principle of impartial justice under law is strong enough to entitle government to restrict the freedom of speech of participants in the judicial process . . . but not so strong as to place that process completely outside the scope of the constitutional guarantee of freedom of speech."). In *Laird v. Tatum*, respondents moved *nunc pro tunc* for Justice Rehnquist to recuse himself from the case because he had previously testified before Congress on related legal matters while working for the Justice Department. See 409 U.S. 824, 824-28 (1972) (memorandum opinion) (discussing facts giving rise to opinion). Justice Rehnquist responded with a memorandum opinion denying respondent's motion and defending his impartiality. See *id.* at 824 n.1 (memorandum opinion) (detailing that such written opinion was appropriate because respondent's motion incorrectly interpreted relevant statutes). In discussing his capacity to impartially hear the case, Justice Rehnquist asserted that it would be impossible to find judges or justices that had not at least formed some "tentative notions" regarding the law before their appointment or election to the bench. See *id.* at 835 (memorandum opinion) (noting additionally that such notions often come to public light entirely by "happenstance"). Moreover, even if such individu-

truly democratic judicial elections while repressing the candidates' constitutional rights simply because they are judicial candidates.⁹¹ This disagreement over strict scrutiny's application, as well as the proper distinction between judicial and legislative elections, led the Supreme Court to resolve this conflict.⁹²

III. FACTS AND PROCEDURAL HISTORY OF *White*

In 1996, an attorney named Gregory Wersal (Wersal) ran for the Minnesota Supreme Court with the help of his family and a small campaign committee.⁹³ As part of his campaign, Wersal spoke at numerous political functions, identifying himself as both a Republican and a "strict-constructionist."⁹⁴ The Wersal Campaign also handed out literature criticizing the Minnesota Supreme Court's prior decisions concerning abortion, crime and welfare.⁹⁵

als who did not have any opinions regarding legal issues really existed, such a lack of legal preconceptions would evince a lack of qualifications to the bench, rather than impartiality. *See id.* (memorandum opinion) (noting lack of predisposition on constitutional issues does not necessarily entail judicial impartiality).

Judges are not fungible; they cover the constitutional spectrum; and a particular judge's emphasis may make a world of difference when it comes to rulings on evidence, the temper of the courtroom, the tolerance for the proffered defense, and the like. Lawyers recognize this when they talk about shopping for a judge; Senators recognize this when they are asked to give their advice and consent to judicial appointments; laymen recognize this when they appraise the quality and image of the judiciary in their own community.

Id. (quoting *Chandler v. Judicial Council*, 398 U.S. 74, 137 (1970) (Douglas, J., dissenting)).

91. *See Buckley*, 997 F.2d at 230-31 (distinguishing *Stretton*, although "precariously," insofar as it relied upon limited interpretation linking statements governed by announce clause to those governed by prohibitions against making campaign pledges); *see also* *ACLU v. The Fla. Bar*, 744 F. Supp. 1094, 1097 (N.D. Fla. 1990) (ruling that judicial candidates and incumbents do not relinquish First Amendment rights merely by their involvement in such elections).

92. *See Republican Party of Minn. v. Kelly*, 534 U.S. 1054, 1054 (2001) (limiting certiorari to issue of whether Minnesota's announce clause violates judicial candidates' First Amendment rights).

93. *See Republican Party of Minn. v. Kelly*, 996 F. Supp. 875, 876 (D. Minn. 1998) (discussing relevant facts). Cheryl L. Wersal (wife) and Mark Wersal (brother) took part in both Wersal's 1996 and 1998 campaigns, and were also parties to the ensuing litigation over Wersal's conduct during the course of those campaigns. *See id.* (describing parties to case at bar). Wersal's campaign committee was cleverly named Campaign For Justice. *See id.* (recounting facts of case). Wersal, his family and campaign committee will hereinafter collectively be referred to as the "Wersal Campaign" where appropriate.

94. *See id.* (discussing 1996 campaign).

95. *See Republican Party of Minn. v. Kelly*, 247 F.3d 854, 858 (8th Cir. 2001) (discussing criticisms of Minnesota Supreme Court). According to Wersal, the Minnesota Supreme Court's past decisions were "marked by their disregard for the legislature and lack of common sense." *Id.* Wersal's campaign members and family members also spoke at these political gatherings to bolster support in what

In May 1996, the Minnesota Office of Lawyers Professional Responsibility (Lawyers Board) received a complaint against Wersal alleging that his attendance at partisan political events and solicitations for political party endorsements violated the Minnesota Code of Judicial Conduct.⁹⁶ The complaint was subsequently dismissed, however, Wersal ultimately withdrew from the 1996 election, fearing that further complaints would imperil his professional license.⁹⁷

In January 1997, Wersal announced his candidacy for a Minnesota Supreme Court seat opening in 1998, and resumed campaigning as he had in the 1996 election.⁹⁸ This time, however, Wersal faced new restrictions upon his campaign conduct, as well as administrative difficulty in obtaining advisory opinions from the Lawyers Board concerning the ethical propriety of his campaign conduct.⁹⁹ As a result, Wersal filed a com-

amounted to an unsuccessful bid for the Republican Party's endorsement. *See id.* (discussing background behind claim).

96. *See id.* (describing complaint); *see also* MINN. CODE OF JUDICIAL CONDUCT Canon 5 (2002) (proscribing inappropriate political conduct by judicial candidates). The Minnesota Office of Lawyers Professional Responsibility operates under the direction of the Minnesota Lawyers Professional Responsibility Board, and is the administrative body charged with investigating and sanctioning ethical violations committed by judicial candidates. *See Kelly*, 247 F.3d at 858 (describing function of Minnesota Office of Lawyers Professional Responsibility). Because the Eighth Circuit and the Supreme Court both collectively referred to these administrative entities as simply the "Lawyers Board," this Note will hereinafter collectively refer to them as the "Lawyers Board" as well. *See* Republican Party of Minn. v. White, 122 S. Ct. 2528, 2532 n.1 (2002), *rev'g Kelly*, 247 F.3d 854 (8th Cir. 2001) (noting Minnesota Office of Lawyers Professional Responsibility and Minnesota Lawyers Professional Responsibility Board referred to collectively as "Lawyers Board"). Interestingly, it was a delegate to a Republican district convention that filed the initial complaint against Wersal. *See Kelly*, 247 F.3d at 858 (noting Republican delegate filed complaint against Wersal).

97. *See Kelly*, 247 F.3d at 858-59 (noting complaint against Wersal dismissed by Lawyers Board Director). The Director's written determination concluded that it was unclear whether judicial candidates were barred from addressing political functions in light of the Minnesota Supreme Court's amendments to the judicial code in 1996; committee members, however, could seek political support. *See id.* (delineating reasons for dismissal). Furthermore, the Director doubted that Minnesota's announce clause could be applied to Wersal's campaign statements, pointing out decisions from other jurisdictions either invalidating the clause or limiting its applicability. *See id.* at 859 (discussing applicability of announce clause to Wersal's campaign statements).

98. *See id.* (tracing Wersal's campaign activity from 1996 through 1998). The Minnesota Board of Judicial Standards soon after petitioned the Minnesota Supreme Court to amend the Code of Judicial Conduct's Canon Five to prevent judicial candidates from speaking at political gatherings, as well as identifying with any particular political parties. *See id.* (noting that Board of Judicial Standards was state administrative entity charged with enforcing Minnesota's judicial code against sitting judges). The Minnesota Supreme Court subsequently adopted every one of the Minnesota Board of Judicial Standard's recommendations in an effort to clarify the non-partisan underpinnings of Canon Five in the state judicial code. *See id.* (stating that these amendments took effect January 1, 1998).

99. For a discussion of the Minnesota Board of Judicial Standards reaction to the Wersal Campaign's conduct, as well as the Minnesota Supreme Court's revision

plaint in federal court seeking declaratory and injunctive relief from the Minnesota Code of Judicial Conduct's broad restrictions upon judicial campaign conduct.¹⁰⁰ The district court, however, granted summary judgment to the Lawyers Board, narrowly construing the announce clause in order to maintain its constitutionality.¹⁰¹

of the state judicial code to prevent inappropriate partisan political activity, see *supra* note 98 and accompanying text. In February 1998, Wersal initially requested an advisory opinion from the Lawyers Board concerning the potentiality that he would be sanctioned for ethical violations by speaking at political gatherings and attempting to garner support with an endorsement by the Republican Party. See *Kelly*, 247 F.3d at 859 (discussing background of case at bar). The Director's response opined that Wersal would be sanctioned for speaking at political functions and soliciting political parties' endorsements, however, because Wersal had not provided specific examples of disputed legal and political issues that he wished to discuss, the Director could not comment on the announce clause's potential enforcement. See *id.* (discussing response of Lawyers Board Director to Wersal's advisory opinion request regarding legality of his campaign statements). But, the Director did convey the Lawyers Board's concern that the announce clause could not survive a "facial challenge to its Constitutionality," stating that such a provision would not apply to statements unless they violated other provisions of the Minnesota Code of Judicial Conduct. See *id.* (discussing relevant facts). According to the Supreme Court, Wersal attempted a second time to obtain an advisory opinion concerning the announce clause's applicability, this time providing specific, concrete examples of statements he wished to make. See *White*, 122 S. Ct. at 2532 n.2 (discussing Lawyers Board's advisory opinion denial). Citing Wersal's pending suit against the Lawyers Board, the Director declined to answer Wersal's request for an advisory opinion at that time. See *id.* (discussing Wersal's denial). Interestingly, the Eighth Circuit did not mention this alleged second request in its recitation of the facts of this case. See *Kelly*, 247 F.3d at 857-61 (describing facts and background of case).

100. See *Kelly*, 247 F.3d at 859-60 (describing complaint). Wersal, joined by other political entities and individuals, filed his initial complaint under 42 U.S.C. § 1983 (2002), alleging that Canon Five, including its version of the announce clause, violated free speech and association under the First Amendment and denied him equal protection under the law in violation of the Fourteenth Amendment. See *id.* (discussing Wersal's legal claims for relief). In addition to the plaintiff's constitutional claims, they moved for a temporary restraining order or a preliminary injunction to prevent Canon Five's enforcement during Wersal's campaign. See *id.* at 860 (describing Wersal's claims). The district court denied this motion, and that order was affirmed. See *Republican Party of Minn. v. Kelly*, 996 F. Supp. 875, 880 (D. Minn. 1998) (denying plaintiffs' motion to temporarily enjoin Minnesota Lawyers Board from enforcing Canon Five during Wersal's 1998 campaign), *aff'd*, No. 98-1625, 1998 U.S. App. LEXIS 27946 (8th Cir. Nov. 2, 1998).

101. See *Republican Party of Minn. v. Kelly*, 63 F. Supp. 2d 967, 985 (D. Minn. 1999) (noting that Minnesota Supreme Court construes statutes narrowly to avoid constitutional difficulties). The district court found that the Minnesota Judicial Code's provisions, including the announce clause, only applied to issues that were likely to come before the court. See *id.* ("[T]he announce rule does not prohibit judicial candidates from discussing or stating their views as to matters relating to judicial organization and administration, or to other issues involving the character of candidates, their background and experience."). The district court also held that Canon Five's prohibition of partisan political activity was narrowly tailored to serve the compelling state interest in an impartial judiciary. See *id.* at 980 (upholding Minnesota Judicial Code's Canon 5). Furthermore, the court held that the Minnesota Code of Judicial Conduct's ban on judicial candidates personally solicit-

On appeal, the Eighth Circuit emphasized Minnesota's interest in eliminating judicial campaign speech that could potentially impair candidates' ability to impartially administer the law as a sitting judge.¹⁰² Thus, because the announce clause was narrowly tailored to serve a compelling state interest, the Eighth Circuit affirmed the district court's grant of summary judgment.¹⁰³ In the interest of clarity, the Minnesota Supreme Court adopted the Eighth Circuit's interpretation of the Minnesota announce clause.¹⁰⁴ The United States Supreme Court granted certiorari to resolve the issue of whether the announce clause violated the First Amendment.¹⁰⁵

ing funds was perfectly legitimate. *See id.* at 982-83 (citing *Stretton v. Disciplinary Bd.*, 944 F.2d 137, 146 (3d Cir. 1991)).

102. *See Kelly*, 247 F.3d at 877 (pointing out that Minnesota's announce clause prohibits statements regarding judicial candidates' views on state legislation's constitutionality as well as statements concerning how unsettled legal issues should be resolved). The Eighth Circuit stated that judicial candidates who make campaign statements announcing their views on disputed legal and political issues put themselves into an entirely untenable position when they are called upon to render impartial judgments when these issues come before them as sitting judges. *See id.* at 878 (discussing apparent tension created by judicial campaign speech).

103. *See id.* at 879-83 (distinguishing cases like *Buckley* that struck down similar announce clause versions because those states allowed broader ranges of judicial campaign speech than Minnesota). Wersal alleged that the Lawyers Board had not met its burden of proof in regards to demonstrating a compelling state interest served by a narrowly tailored provision. *See id.* at 878-79 (discussing relevant claims). The Eighth Circuit rejected this contention, however, pointing out that the Lawyers Board had introduced an overwhelming consensus among commentators that judicial campaign speech should be limited to avoid statements that allow inferences of impropriety on the bench. *See id.* at 879 (expressing hesitancy to allow too much leniency in judicial campaign speech). Thus, because an impartial, or at least allegedly impartial judiciary was an obvious compelling state interest, and the announce clause only prohibits statements concerning issues that may come before the courts, the Eighth Circuit upheld the announce clause's constitutionality. *See id.* at 883 (upholding Minnesota's announce clause). Conversely, the dissent emphasized that no matter how compelling a state's interest in maintaining an impartial judiciary, such an interest cannot justify trampling upon "constitutionally-enshrined" rights. *See id.* at 891-92 (Beam, J., dissenting) (emphasizing federal courts' obligation to guard against state infringements upon constitutional guarantees). Although states may ban statements making illegal or corrupt promises, the announce clause bans all types of campaign speech on disputed legal and political issues. *See id.* at 894 (Beam, J., dissenting) ("I cannot fathom 'disputed legal issues' more likely to come before a court than the proper role of stare decisis, narrow or strict construction, original intent and substantive due process.").

104. *See In re Code of Judicial Conduct*, 639 N.W.2d 55, 55 (Minn. 2002) (ordering enforcement of Minnesota announce clause consistent with Eighth Circuit's interpretation in *Kelly*).

105. *See Republican Party of Minn. v. Kelly*, 534 U.S. 1054 (2001) (granting certiorari only to issue of whether Minnesota's announce clause is constitutional under First Amendment). Suzanne White subsequently succeeded Verna Kelly as Chairperson of the Minnesota Board of Judicial Standards, thus changing the case's styling. *See Republican Party of Minn. v. White*, 122 S. Ct. 1229, 1229 (2002) (denying petitioner's motion for divided argument). The Supreme Court received sixteen amicus briefs, six in support of reversal, nine in support of affirmance and one supporting neither side. *See generally* Br. of Amici Curiae Am. Ctr. for Law and

IV. CASE ANALYSIS

In addition to the majority opinion rendered in *White*, there were two concurring opinions and two dissenting opinions; Part IV discusses these various opinions. Part IV.A analyzes Justice Scalia's majority opinion, while Parts IV.B.1 and IV.B.2 respectively discuss Justices O'Connor's and Kennedy's concurring opinions. Parts IV.C.1 and IV.C.2 respectively address Justices Stevens's and Ginsburg's dissenting opinions.

A. *Justice Scalia's Majority Opinion*

Justice Scalia, delivering the majority opinion in *White*, began by summarizing the evolutions of Minnesota's judicial elections and the announce clause.¹⁰⁶ The Court pointed out that Wersal had sought a second advisory opinion from the Lawyers Board, which was subsequently

Justice, Republican Party of Minn. v. White, 122 S. Ct. 2528 (2002) (No. 01-521) (supporting reversal); Br. of Amici Curiae Am. Civil Liberties Union, Inc., Republican Party of Minn. v. White, 122 S. Ct. 2528 (2002) (No. 01-521) (same); Br. of Amici Curiae Chamber of Commerce of the United States, Republican Party of Minn. v. White, 122 S. Ct. 2528 (2002) (No. 01-521) (same); Br. of Amici Curiae Pub. Citizen Litig. Group, Republican Party of Minn. v. White, 122 S. Ct. 2528 (2002) (No. 01-521) (same); Br. of Amici Curiae State Sup. Ct. Justices, Republican Party of Minn. v. White, 122 S. Ct. 2528 (2002) (No. 01-521) (same); Br. of Amici Curiae Minn. State Representative Phillip Krinkie & Eighteen Other Similarly Situated Legislators, Republican Party of Minn. v. White, 122 S. Ct. 2528 (2002) (No. 01-521) (same); Br. of Amici Curiae Conference of Chief Judges, Republican Party of Minn. v. White, 122 S. Ct. 2528 (2002) (No. 01-521) (supporting affirmance); Br. of Amici Curiae Ad Hoc Comm. of Former Justices and Friends Dedicated to an Indep. Judiciary, Republican Party of Minn. v. White, 122 S. Ct. 2528 (2002) (No. 01-521) (same); Br. of Amici Curiae Brennan Center for Justice at NYU Law Sch., et al., Republican Party of Minn. v. White, 122 S. Ct. 2528 (2002) (No. 01-521) (same); Br. of Amici Curiae Cal., et al., Republican Party of Minn. v. White, 122 S. Ct. 2528 (2002) (No. 01-521) (same); Br. of Amici Curiae Minn. State Bar Ass'n, Republican Party of Minn. v. White, 122 S. Ct. 2528 (2002) (No. 01-521) (same); Br. of Amici Curiae Mo. Bar, Republican Party of Minn. v. White, 122 S. Ct. 2528 (2002) (No. 01-521) (same); Br. of Amici Curiae Nat'l Assoc. of Crim. Def. Law., Republican Party of Minn. v. White, 122 S. Ct. 2528 (2002) (No. 01-521) (same); Br. of Amici Curiae Pennsylvanians For Modern Cts., Republican Party of Minn. v. White, 122 S. Ct. 2528 (2002) (No. 01-521) (same); Br. of Amici Curiae Am. Bar Ass'n, Republican Party of Minn. v. White, 122 S. Ct. 2528 (2002) (No. 01-521) (same); Br. of Amici Curiae Idaho Conservation League, et al., Republican Party of Minn. v. White, 122 S. Ct. 2528 (2002) (No. 01-521) (supporting neither side). It was not surprising that the ACLU filed an amicus brief due to its commitment to civil liberties. See generally *Kyllo v. United States*, 533 U.S. 27 (2001) (deciding propriety of government surveillance using new technology with ACLU on amicus brief). For a discussion of certain parties being bound to certain issues, see *infra* notes 183-85 and accompanying text.

106. See Republican Party of Minn. v. White, 122 S. Ct. 2528, 2531-32 (2002) (providing various provisions of state law under which judicial candidates and incumbents may be sanctioned for violating Minnesota's announce clause). For a discussion on Minnesota's judicial elections as well as the announce clause, see *supra* notes 40-41, 50, 52 and accompanying text.

denied.¹⁰⁷ Interestingly, the lower courts' opinions did not mention Wersal's second attempt.¹⁰⁸

In its analysis, the Court first sought to clarify the Minnesota announce clause's true meaning before undertaking its constitutional examination.¹⁰⁹ The Court determined that Minnesota's announce clause prohibits candidates from expressing their current position on disputed issues, while a separate provision prevents candidates from promising to decide issues a certain way.¹¹⁰ Despite this concrete distinction between Minnesota's announce clause and its "improper pledges" clause, the Court maintained that certain campaign restrictions under the announce clause were not so obvious from its language.¹¹¹ For example, the announce clause prevents candidates from criticizing past court decisions if the can-

107. See *White*, 122 S. Ct. at 2532 n.2 (addressing dissent's concern that petitioners had not suffered any actual constitutional harm).

108. See *Republican Party of Minn. v. Kelly*, 996 F. Supp. 875, 876 (D. Minn. 1998) (including Wersal's first request for advisory opinion concerning application of Minnesota announce clause, but not second request), *aff'd*, No. 98-1625, 1998 U.S. App. LEXIS 27946, at **2-3 (8th Cir. Nov. 2, 1998) (same); see also *Republican Party of Minn. v. Kelly*, 63 F. Supp. 2d 967, 972-74 (D. Minn. 1999) (same), *aff'd*, 247 F.3d 854, 857-60 (8th Cir. 2001) (same). This is not to imply that the lower courts were disingenuous by not stating that Wersal had sought a second advisory opinion providing concrete examples of statements. In fact, the lower courts may not have known that Wersal sought a second advisory opinion concerning the announce clause's scope because the request allegedly occurred after Wersal filed suit. See *White*, 122 S. Ct. at 2532 n.2 (providing director's response: "[T]here is pending litigation over the [announce clause's] constitutionality [in which] [y]ou are a plaintiff . . . and you have sued . . . me as Director [d]ue to . . . [which], I will not be answering your request for an advisory opinion at this time."). Nonetheless, this is an important fact, which was only mentioned in the majority opinion in *White*. See *id.* at 2531-32 (discussing relevant facts).

109. See *White*, 122 S. Ct. at 2532 (interpreting announce clause as prohibiting judicial candidates from stating views on disputed issues and promising to decide these issues in certain ways).

110. See *id.* (noting that announce clause proscribes candidates' statements concerning their current views on disputed legal and political issues even if candidates do not adhere to those views as sitting judges); see also MINN. CODE OF JUDICIAL CONDUCT Canon 5(a)(3)(d)(i) (2002) (providing Minnesota announce clause). Thus, Minnesota's announce clause operates independently of, and is not a mere restatement of Minnesota's ban on judicial candidates and incumbents pledging to rule a certain way on particular issues. See *White*, 122 S. Ct. at 2532 (stating unequivocally that Minnesota campaign pledges clause separately prohibits candidates from making such statements rather than Minnesota's announce clause); compare MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2002) (announce clause), with MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2002) (pledges clause).

111. See *White*, 122 S. Ct. at 2532-33 (discussing Wersal Campaign literature's various statements touching upon disputed legal and political issues that Minnesota's Lawyers Board decided did not fall within ambit of announce clause). The Court's apparent reason for listing examples of Wersal's campaign literature that did not violate the announce clause was to further illustrate other limitations of the announce clause that are not so apparent. See *id.* (discussing legal bounds of Minnesota's announce clause).

didate further states that he or she would not adhere to *stare decisis*.¹¹² The Court found that the announce clause's limited application to issues "likely to come before the court" could not properly circumscribe such a provision's application, and, furthermore, that permitting "general" discussions of judicial philosophy in campaign elections is no help to the electorate.¹¹³

Having identified the Minnesota announce clause's scope, the Court next examined the viability of free speech in light of the clause's limitations upon judicial campaign speech.¹¹⁴ Minnesota's announce clause had to be "narrowly tailored, to serve a compelling state interest" in order to withstand strict scrutiny.¹¹⁵ The Eighth Circuit's decision relied heavily upon Minnesota's compelling interest in an impartial judiciary, as well as the appearance of an impartial judiciary.¹¹⁶ Finding impartiality to mean either a lack of bias toward parties or legal views or general "open-minded-

112. *See id.* at 2533 ("[C]andidates must choose between stating their views critical of past decisions and stating their views in opposition to *stare decisis*."). Justice Ginsburg, in her dissenting opinion, argued that the announce clause does not in fact prohibit candidates from stating their views on past court decisions within the context of *stare decisis* under the Eighth Circuit's construction of that provision. *See id.* at 2552-53 (Ginsburg, J., dissenting) (arguing that majority should not accept counsel's response to spontaneous questions during oral argument as conclusive application of announce clause). The majority addressed this criticism by pointing out that the Eighth Circuit never addressed the announce clause's application to candidates' statements of past court decisions within the context of *stare decisis*. *See id.* at 2533 n.4 ("Silence is hardly inconsistent with what respondents conceded at oral argument.").

113. *See id.* (citing *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 229 (7th Cir. 1993) (stating that there are hardly any issues that are unlikely to come before courts of general jurisdiction)). At oral argument, the Lawyers Board asserted that the Eighth Circuit's narrow interpretation of the announce clause prevents it from being applied any more broadly than the clause's 1990 amended version. *See White* 122 S. Ct. at 2534 n.5 (discussing Minnesota announce clause's application in light of *Kelly*); *see also* MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (1990) (replacing broad prohibition against candidates announcing their views on disputed legal and political issues with narrow prohibition against statements that appear to commit candidates with respect to issues likely to come before them as judges). The Court rejected this argument because the Minnesota Supreme Court did not amend Minnesota's announce clause to conform with the ABA's 1990 code. *See White*, 122 S. Ct. at 2534 n.5 (noting that ABA agrees with Lawyers Board's arguments despite amending its code to avoid constitutional problems).

114. *See White*, 122 S. Ct. at 2534 (noting announce clause's limitations on judicial campaign speech and examining its effect on First Amendment right to free speech). It should be noted that the Lawyers Board argued that the announce clause still permitted candidates to discuss such topics as allowing cameras in courtrooms as well as "character, education and work habits." *See id.* (discussing scope of Minnesota's announce clause).

115. *See id.* (citing *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989)) (identifying strict scrutiny as proper constitutional analysis for state election proscriptions bearing directly upon campaign speech). For a discussion of the Supreme Court's analysis of campaign speech restrictions under strict scrutiny, *see supra* notes 57-58, 62-63, 67-69, 84, 86-88 and accompanying text.

116. *See White*, 122 S. Ct. at 2535 (concluding that interest in impartial judges as well as judges appearing impartial was indeed sufficiently compelling).

ness,” the Supreme Court considered these asserted state interests in its strict scrutiny analysis.¹¹⁷

The Court first applied strict scrutiny by defining the compelling interest of impartiality as a “lack of bias for or against either *party* to . . . [a] proceeding.”¹¹⁸ Because Minnesota’s announce clause prohibits judicial candidates from stating their views for or against certain issues, the Court concluded that it was not narrowly tailored to prevent bias toward certain litigants.¹¹⁹ Judges who had previously announced their views on certain disputed issues would thus likely rule against any party taking the opposite position.¹²⁰

Next, the Court applied strict scrutiny by defining the compelling interest of impartiality as an unbiased disposition towards particular issues.¹²¹ The Court asserted that selecting judicial candidates who lacked any predisposition toward disputed legal and political issues was neither attainable, nor desirable.¹²² In fact, a judicial candidate lacking any tentative conclusions concerning disputed legal and political issues would be

117. *See id.* (emphasizing that impartiality’s meaning must be clarified to analyze Minnesota’s announce clause under strict scrutiny). Neither the Eighth Circuit, the parties’ briefs nor the ABA and Minnesota Codes of Judicial Conduct defined impartiality, despite its categorization as a compelling state interest. *See id.* (discussing “impartiality’s” lack of meaning). The Lawyers Board argued that an impartial judiciary is essential to preserving litigants’ due process guarantees, while the appearance of an impartial judiciary maintains public confidence in the judicial and legal system. *See id.* (discussing relevant arguments).

118. *Id.* (defining lack of bias for or against parties as judges “apply[ing] the law to . . . [them] in the same way . . . [they] appl[y] . . . it to any other party”). The Court also cited various cases illustrating the supposedly inextricable nexus between impartial judges and due process. *See id.* (citing *Tumey v. Ohio*, 273 U.S. 510, 523, 531-34 (1927)) (finding due process violation where judge presided over case in which it was in his financial interest to find against one party).

119. *See White*, 122 S. Ct. at 2535 (emphasizing that Minnesota’s announce clause solely restricts speech concerning political and legal issues, rather than speech concerning prospective parties). Justice Scalia addressed the dissent’s assertion that the Minnesota announce clause preserves the state’s interest in an impartial judiciary to various litigants. *See id.* at 2536 n.7 (noting some speech prohibited by announce clause may exhibit bias against parties). Although the Court did not deny that Minnesota’s announce clause prohibits speech that could present a potential bias against certain parties, nonetheless, the provision was not narrowly tailored to serve such an interest. *See id.* at 2535-36 (noting that strict scrutiny is not concerned with whether state prohibitions serve compelling state interests “at all,” but rather whether such prohibitions are narrowly tailored to achieve such ends).

120. *See id.* (noting that such judges would be impartially administering justice as they believe it to be).

121. *See id.* at 2536 (“This sort of impartiality would be concerned, not with guaranteeing litigants equal application [under] the law, but rather with guaranteeing them an equal chance to persuade the court on the legal points in their case.”).

122. *See id.* (emphasizing that it would be “virtually impossible” to find judicial candidates who had never even thought about divisive issues that could potentially come before courts). Justice Scalia quoted Chief Justice Rehnquist’s observation that,

less qualified for the bench than a candidate whom the Minnesota announce clause would deem “biased.”¹²³ Thus, the futility in pretending that judicial candidates could or should not have any views on disputed legal and political issues aptly demonstrated that the announce clause could not serve a compelling interest to that end.¹²⁴

Lastly, the Court discussed impartiality, defined as “open-mindedness,” as a compelling state interest under strict scrutiny.¹²⁵ The Lawyers Board argued that open-mindedness prevents judges from feeling pressured to rule consistently with prior statements they may have made during a campaign.¹²⁶ The Court, however, rejected this argument because judges’ campaign statements only constitute minimal commitments to legal positions, and, furthermore, judges have often committed themselves to a position on these issues prior to the elections anyway.¹²⁷ Moreover,

[s]ince most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers.

Id. (quoting *Laird v. Tatum*, 409 U.S. 824, 835 (1972) (memorandum opinion)).

123. *See White*, 122 S. Ct. at 2536 (citing *Laird*, 409 U.S. at 835) (noting that lack of opinions or views on constitutional issues indicate judges’ lack of qualification, not lack of bias). The Court noted that Minnesota’s Constitution actually forbids electing judicial candidates that do not have any views on the law, because it requires that all state judges be “learned in the law.” *See id.* (citing MINN. CONST. art. VI, § 5).

124. *See White*, 122 S. Ct. at 2536 (dismissing notion that announce clause serves compelling state interest).

125. *See id.* (defining judges’ open-mindedness as their willingness to consider legal views in opposition to their own). The Court emphasized that open-mindedness exists to afford litigants only *some* chance of winning the legal points of their case as opposed to an equal chance. *See id.* (defining open-mindedness for purposes of impartiality).

126. *See id.* at 2536-37 (asserting interest in “open-mindedness”).

127. *See id.* at 2537 (citing *Laird*, 409 U.S. at 831-33) (illustrating former Justice Black’s participation in cases determining constitutionality of Fair Labor and Standards Act when he wrote such legislation, as well as former Chief Justice Hughes’s opinion overruling one prior decision that he had criticized in his book written before his nomination to Supreme Court). The Court pointed out that judicial candidates and incumbents have often already expressed their views on disputed legal and political issues either in past opinions, books or even course lectures. *See White*, 122 S. Ct. at 2537 (noting that Minnesota and ABA judicial codes both encourage judges to engage in teaching, giving speeches and writing books concerning legal issues when time permits). Justice Stevens, however, argued that judges would feel enormous pressure not to contradict prior campaign statements in their subsequent rulings. *See id.* at 2547-48 (Stevens, J., dissenting) (expressing concerns over unlimited judicial campaign speech). Justice Scalia addressed this argument by distinguishing the pressure judges feel not to contradict prior campaign statements from campaign *promises*. *See id.* at 2537 (“[O]ne would be naïve not to recognize that campaign promises are—by long democratic tradition—the least binding form of human commitment.”). Nonetheless, any pressure judges might feel not to rule inconsistently with a prior campaign statement cer-

because the announce clause attempted to pursue the compelling interest of open-mindedness solely during judicial elections, it was “woefully under-inclusive.”¹²⁸

Finding that Minnesota’s announce clause was not narrowly tailored to serve these asserted state interests, the Court explicitly rejected the notion that judicial elections were an exception that would allow for circumscribed First Amendment rights.¹²⁹ Additionally, the Court rejected the Eighth Circuit’s assertion that prohibiting judicial candidates’ speech on disputed legal and political issues was a longstanding tradition.¹³⁰ Having

tainly cannot compare with the pressure not to rule inconsistently with a prior principled opinion that has been thoroughly researched. *See id.* at 2537-38 (defending free judicial campaign speech’s effect upon judicial impartiality).

128. *See id.* at 2537 (citing *City of Ladue v. Gilleo*, 512 U.S. 43, 52-53 (1994)) (finding inference of unconstitutionality from government’s underinclusive attempt to ban all signs and messages within city limits to avoid “visual clutter”). The Court further noted that the Lawyers Board failed to carry their burden of proof that campaign statements present a danger to judicial candidates’ open-mindedness. *See White*, 122 S. Ct. at 2538 (citing *Landmark Communications, Inc. v. Va.*, 435 U.S. 829, 841 (1978)) (requiring more than state’s bald assertions that criminal sanctions for publishing judicial conduct board’s proceedings are necessary to preserve public confidence in state judiciary).

129. *See White*, 122 S. Ct. at 2538 (citing *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222-23 (1989)) (reiterating that free and open debate on candidates’ qualifications remains essential to American electoral process). Justice Ginsburg emphasized that judges would feel pressured not to rule inconsistently with their prior campaign statements because they could very likely not be re-elected, losing their salary and emoluments. *See White*, 122 S. Ct. at 2556-57 (Ginsburg, J., dissenting) (stating that judges deciding cases in ways that could increase their prospects for re-election violates due process). Justice Scalia addressed this argument asserting that judges *always* face the prospect of not getting re-elected, therefore, the announce clause, standing alone, could not ameliorate such a dilemma. *See id.* at 2538-39 (stating syllogism that if judges that hear cases in which ruling for one side could increase their chances for re-election violates due process, then judicial elections themselves violate due process). Justice Scalia subsequently addressed the remainder of Justice Ginsburg’s arguments, stating that they criticized arguments that the majority did not purport to make. *See id.* at 2539 (asserting that majority opinion does not stand for proposition that First Amendment requires judicial and legislative elections to be conducted similarly). Justice Scalia argued that even if judicial elections were constitutionally subject to greater regulation, the announce clause still could not withstand a strict scrutiny analysis. *See id.* (refuting assertion that Minnesota’s announce clause passed constitutional muster). Justice Scalia stated:

[w]e rely on the cases involving speech during elections, only to make the obvious point that this underinclusiveness cannot be explained by resort to the notion that the First Amendment provides less protection during an election campaign than at other times.

Id. (citation and footnote omitted). Furthermore, the dissent had “exaggerated” the difference between judicial and legislative elections because state judges have far-reaching power not only to “make common-law,” but to interpret and influence state constitutions as well. *See id.* at 2539-40 (citing *Baker v. State*, 744 A.2d 864 (Vt. 1999)) (interpreting Vermont constitution to afford same-sex couples similar statutory benefits and protections extended to married, heterosexual couples).

130. *See White*, 122 S. Ct. at 2540 (emphasizing that practice of proscribing judicial candidates’ and incumbent’s speech on disputed legal and political issues

determined that the announce clause removes speech of interest to voters outside the judicial campaign arena, the Court found that it was in conflict with the Minnesota Constitution's provisions for general elections.¹³¹ Thus, Minnesota had an interest in an impartial judiciary, however, the state could not serve such an interest by impermissibly restricting judicial candidates' First Amendment rights.¹³²

B. *The Concurring Opinions*

1. *Justice O'Connor's Concurring Opinion*

Justice O'Connor concurred in the judgment, but expressed concern over the propriety of judicial elections.¹³³ Justice O'Connor argued that public confidence in judicial impartiality was severely undermined by the fact that judges could not humanly ignore election implications when hearing high-profile cases.¹³⁴ The evils allegedly prevented by the announce clause also paled in comparison to the problems raised by fundraising in judicial elections.¹³⁵ Nonetheless, because Minnesota consciously chose to elect its judiciary, the state itself had concurrently

is "neither long nor universal"). The Court noted that states have still not unanimously adopted either the 1972 or 1990 ABA Model Code's version of the announce clause. *See id.* at 2541 (stating that relatively recent practice of proscribing judicial campaign speech on disputed issues cannot be harmonized with constitutional prohibitions of long-standing tradition).

131. *See id.* (noting that disparity between announce clause and notion of democratic elections is attributable to ABA's opposition to judicial elections). For a discussion of the debate over whether judges should ideally be elected or appointed, see *supra* notes 3-10, 27-35 and accompanying text.

132. *See White*, 122 S. Ct. at 2541-42 (providing that states who utilize democratic processes to elect public officials must provide their candidates sufficient constitutional leeway to fully effectuate such democratic endeavors).

133. *See id.* at 2542 (O'Connor, J., concurring) (expressing concern that judicial elections themselves could potentially undermine state interest in selecting impartial judges).

134. *See id.* (O'Connor, J., concurring) (arguing that public confidence in judiciary would be low if judges suppressed their awareness of consequences their decisions have on elections). According to former California Supreme Court Justice Otto Kaus, ignoring the political consequences of highly publicized decisions is "like ignoring a crocodile in your bathtub." *See id.* (O'Connor, J., concurring) (citing Julian N. Eule, *Ira C. Rothgerber, Jr. Conference on Constitutional Law: Guaranteeing a Republican Form of Government: Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. COLO. L. REV. 733, 739 (1994)) (expressing concern of judicial impartiality in face of elections).

135. *See White*, 122 S. Ct. at 2542 (O'Connor, J., concurring) (arguing that judicial candidates' reliance upon campaign donations in order to be elected causes judges to be indebted to certain parties or potential litigants). Even if judges were completely independent from their financial supporters upon being elected, the possibility that judges could be persuaded by campaign contributions does little to preserve public confidence in the judiciary. *See id.* (citing Kate Thomas, *Are Justices in Texas Getting Bought?*, NAT'L L.J., Mar. 16, 1998, at A8) (discussing Texas Supreme Court campaign contributions made by parties associated with current litigants).

generated the conflict between judicial candidates' free speech rights and the state's interest in an impartial judiciary.¹³⁶

2. Justice Kennedy's Concurring Opinion

Concurring in the judgment, Justice Kennedy argued that because the announce clause was a content-based speech restriction that prohibited speech typically protected under the First Amendment, it was facially invalid.¹³⁷ Minnesota's announce clause prohibits speech alone, and not traditional exceptions to First Amendment protections such as obscenity, defamation or inciting dangerous and criminal acts.¹³⁸ Thus, because the announce clause prohibited speech at the "heart of the First Amendment," Minnesota was not constitutionally permitted to impose such a direct restriction.¹³⁹ Furthermore, despite Minnesota's apparent interest in maintaining an impartial judiciary, the state could not maintain a truly democratic election process in which candidates were effectively gagged.¹⁴⁰ Interestingly, Justice Kennedy pointed out that the Court was not addressing the issue of whether states may generally restrict judicial speech by prohibiting judges from commenting on disputed issues *at all*

136. *See White*, 122 S. Ct. at 2544 (O'Connor, J., concurring) (stating that Minnesota's choice of popular elections over appointive system demonstrates its voluntary undertaking of risk of judicial bias).

137. *See id.* (Kennedy, J., concurring) (emphasizing that Minnesota's announce clause prohibited speech that could not be categorized within traditional First Amendment exceptions such as obscenity, defamatory speech and speech inciting lawless action).

138. *See id.* (Kennedy, J., concurring) (citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124 (1991) (Kennedy, J., concurring)) (stating that no further analysis is required where state restrictions simply proscribe non-exceptional speech based upon its content).

139. *See White*, 122 S. Ct. at 2544 (Kennedy, J., concurring) (stating that direct restrictions placed on content of candidates' speech is beyond government's power).

140. *See id.* at 2545 (Kennedy, J., concurring) ("[S]tate[s] cannot opt for . . . elected judicial[ies] and then assert that [their] democracy, in order to work as desired, compels the abridgment of speech."). Justice Kennedy maintained, similarly to the majority, that even if judicial campaign speech could be misused or evinced certain biases, then other candidates, the media and interest groups should exercise their free speech rights to point out these candidates' deficiencies. *See id.* (Kennedy, J., concurring) (asserting that combining free speech with elections can advance public understanding of law as well as adhere to its lofty endeavors). Such considerations could thus only lead to a conclusion that the announce clause is unconstitutional on its face. *See id.* at 2546 (Kennedy, J., concurring) ("By abridging speech based on its content, Minnesota impeaches its own system of free and open elections."). It should be noted that Justice Kennedy was very careful to caution against criticizing various states' decisions to maintain an elected judiciary. *See id.* 2545-46 (Kennedy, J., concurring) (expressing hesitancy to criticize state judicial selection methodology). If the Supreme Court were to condemn systems of elected judiciaries in any manner, the Court would also implicitly impugn many learned state judges who are beyond any such reproach. *See id.* at 2546 (Kennedy, J., concurring) (reiterating need for deference to state judicial selection methods).

times.¹⁴¹ Whether this distinction will prompt states with elected judiciaries to enact such measures, thus generating further litigation and administrative wrangling, remains open.

C. *The Dissenting Opinions*

1. *Justice Stevens's Dissenting Opinion*

Concerned with the potential impact that the Court's reasoning could have, Justice Stevens's dissent began by emphasizing the *White* decision's limited reach.¹⁴² The Lawyers Board could still inform voters of a judicial candidate's impropriety in discussing disputed issues even if it could not prevent that candidate from making such statements.¹⁴³ Nonetheless, Justice Stevens's main contention was that the Court had not only underestimated judicial impartiality as a compelling state interest, but also erroneously assumed that judicial candidates are entitled to the same campaign speech rights as legislative candidates.¹⁴⁴

141. *See id.* (Kennedy, J., concurring) (citing *Connick v. Myers*, 461 U.S. 138 (1983)) (questioning outcome when speech restrictions are placed on sitting judges, whether campaigning or not). The rationale behind an attempt at proscribing judicial speech concerning disputed legal and political issues all the time, not just during elections, would be to promote "the efficient administration of justice." *See White*, 122 S. Ct. at 2546 (Kennedy, J., concurring) (describing methods of First Amendment compliance).

142. *See id.* (Stevens, J., dissenting) ("[I] find the Court's reasoning more troubling than its holding.").

143. *See id.* (Stevens, J., dissenting) (noting that majority's reasoning caused more concern than its actual holding). Agreeing with the majority's caveat that more speech could be the only constitutional solution to abusive campaign speech, Justice Stevens was nonetheless troubled by the Court's alleged effort to blur the lines between legislative and judicial elections. *See id.* at 2546-47 (Stevens, J., dissenting) (reiterating difference between judicial and legislative elections).

144. *See id.* (Stevens, J., dissenting) (emphasizing that notwithstanding apparent difficulties that elected judges face as opposed to appointed judges, state judges must adhere to higher principles no matter how they are selected). Justice Stevens illustrated the critical distinction between legislative and judicial work insofar as legislators determine policy based upon popular sentiment, while judges must interpret the law in the face of and often against popular demand. *See id.* at 2547 (Stevens, J., dissenting) ("[C]ountless judges in countless cases routinely make rulings that are unpopular and surely disliked by at least 50 percent of the litigants who appear before them."). Conversely, judges also must enforce rules and regulations that they do not agree with, thus, opinions that they may have held before being elected cannot automatically impeach them because, "every good judge is fully aware of the distinction between the law and a personal point of view." *Id.* (Stevens, J., dissenting). Justice Stevens further argued that the Court did not mention that most state judicial elections are not for state Supreme Court seats but for lower court positions. *See id.* at 2547-48 n.2 (Stevens, J., dissenting) (discussing misleading effect of allowing unregulated judicial campaign speech). As such, judicial candidates discussing disputed legal and political issues not only impugn the lofty station in which they seek, but mislead the electorate because judges are bound to follow the law regardless of personal ideology. *See id.* (Stevens, J., dissenting) (stating concern over unregulated judicial campaign speech).

Justice Stevens also disagreed with the Court's strict scrutiny analysis.¹⁴⁵ As a lack of bias against litigants, Minnesota's interest in judicial impartiality was served by the announce clause because certain litigants are usually relegated to certain positions on certain issues.¹⁴⁶ Moreover, insofar as impartiality denotes a judicial candidate's open-mindedness, the announce clause prevents statements that directly indicate a candidate's foregone conclusions regarding certain disputed issues.¹⁴⁷ Thus, Justice Stevens found that the Court had ignored prior decisions affirming an impartial judiciary's essential nature, and, furthermore, that the Court's decision was fundamentally flawed because it would permit judicial campaigns to be conducted similarly to legislative campaigns.¹⁴⁸

2. Justice Ginsburg's Dissenting Opinion

Justice Ginsburg echoed Justice Stevens's argument concerning the fundamental distinction between judges and legislators.¹⁴⁹ Judges func-

145. *See id.* at 2548 (Stevens, J., dissenting) (arguing that states should not be forced "to an all or nothing choice of abandoning judicial elections or having elections in which anything goes").

146. *See id.* (Stevens, J., dissenting) (finding compelling state interest in judicial impartiality). A hypothetical candidate who expressed his or her consistent record of affirming rape convictions would in fact express a bias against certain litigants. *See id.* (Stevens, J., dissenting) (hypothesizing). In rape cases on appeal, prosecutors are usually seeking such favored affirmance, while defendants seek to have their convictions overturned, something Justice Stevens's hypothetical candidate is decidedly against. *See id.* (Stevens, J., dissenting) (disputing majority's assertion that Minnesota's announce clause cannot maintain impartiality). For a discussion of certain litigants being linked to certain positions on legal issues, see *infra* notes 182-84 and accompanying text.

147. *See id.* at 2549 (Stevens, J., dissenting) (contending that lawyers who write articles advocating certain views do not commit themselves to such views to same degree as judicial candidates espousing certain views in their campaign speech). Campaign statements concerning disputed legal and political issues further mislead voters that candidates' qualifications in judicial elections should be similar to those in legislative elections. *See id.* at 2549 n.4 (Stevens, J., dissenting) (criticizing Justice Kennedy's assertion that content-based restrictions are per se invalid because such rule would preclude states from preventing judicial candidates from making improper pledges).

148. *See id.* at 2549 (Stevens, J., dissenting) (criticizing majority for forgetting its prior determination that maintaining public confidence in disinterested judges is compelling). Justice Stevens reiterated that public confidence in the judiciary could only be enhanced by its impartiality, something that "may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action." *Id.* (Stevens, J., dissenting) (quoting *Mistretta v. United States*, 488 U.S. 361, 407 (1989)) (concluding that participation of federal judges on Federal Sentencing Commission did not undermine judicial impartiality).

149. *See White*, 122 S. Ct. at 2550 (Ginsburg, J., dissenting) (stating "[j]udges perform a function fundamentally different from that of the people's elected representatives"). Without an impartial judiciary, Justice Ginsburg believes that the rights and privileges under law "would amount to nothing." *Id.* (Ginsburg, J., dissenting) (quoting *THE FEDERALIST* No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). In discussing Minnesota's system of an elected judiciary, Justice Ginsburg emphasized that the state opted for non-partisan elections because

tion solely to interpret the common law and constitutions, therefore, such a confined role cannot respond to the whims of popular sentiment.¹⁵⁰ According to Justice Ginsburg, the Court erroneously relied upon cases involving legislative elections.¹⁵¹ Although the Court recognized a conflict between the announce clause and an elected judiciary, Justice Ginsburg argued that its ruling relied upon the misguided assertion that Minnesota's departure from an appointive judicial selection system concurrently departed from the relevant criteria in that system.¹⁵²

the participation of political parties could undermine the judicial role. *See White*, 122 S. Ct. at 2550 (Ginsburg J., dissenting) (citing *Peterson v. Stafford*, 490 N.W.2d 418, 425 (Minn. 1992)).

150. *See White*, 122 S. Ct. at 2551 (Ginsburg, J., dissenting) ("Judges . . . are not political actors.")

151. *See id.* at 2551-52 (Ginsburg, J., dissenting) (arguing that public's ability to choose elected representatives necessitating free speech does not extend to judicial elections). Justice Ginsburg thus rejected the majority's reliance upon cases such as *Brown v. Hartlage* to support its proposition that free speech is essential to any election. *See id.* at 2551 (Ginsburg, J., dissenting) (quoting O'Neil, *supra* note 81, at 717) ("[H]ow any thoughtful judge could derive from . . . [*Brown v. Hartlage*] any possible guidance for cases that involve judicial campaign speech seems baffling.") For a discussion of Justice Scalia's rationalizing the Court's reliance upon cases involving legislative elections, see *supra* note 129 and accompanying text. Minnesota should have thus been able to restrict Wersal's campaign speech by methods that would otherwise be unconstitutional in legislative elections. *See White*, 122 S. Ct. at 2552 (Ginsburg, J., dissenting) (emphasizing difference between judicial and legislative elections).

152. *See White*, 122 S. Ct. at 2552 (Ginsburg, J., dissenting) (discussing how information on "subjects of interests to the voter" are relevant to informed judicial selections). Within the context of federal judicial nominations and confirmations, especially for Supreme Court positions, nominees traditionally draw the line in answering questions that would intimate their position on issues and how they would potentially rule in certain cases. *See id.* at 2552 n.1 (Ginsburg, J., dissenting) (noting that majority's rationale would characterize federal judicial nominees' decisions not to answer such questions as depriving political branches of valuable information to aid in confirmation). The federal tradition of judicial nominees declining to espouse their views on such issues demonstrates the fact that there is nothing inherently wrong in our democracy with not disclosing certain information regarding candidate qualifications to those charged with selecting such candidates. *See id.* (Ginsburg, J., dissenting) (disputing propriety of judicial campaign speech). Justice Ginsburg pointed out that during Justice Scalia's confirmation hearings, then-Judge Scalia declined to comment on whether he would overrule certain cases saying,

I think it is quite a thing to be arguing to somebody who you know has made a representation in the course of his confirmation hearings, and that is, by way of condition to his being confirmed, that he will do this or do that. I think I would be in a very bad position to adjudicate the case without being accused of having a less than impartial view of the matter.

Id. at 2558 n.4 (Ginsburg, J., dissenting) (quoting ROY M. MERSKY & J. MYRON JACOBSTEIN, *THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE, 1916-1986* 131 (1989)). Justice Scalia addressed Justice Ginsburg's example of his Senate confirmation hearing by asserting that the Court was not holding that candidates could be compelled to announce their views on disputed issues; because candidates can voluntarily decline to answer such questions, it follows that coercion to answer cannot be legitimate. *See White*, 122 S. Ct.

Justice Ginsburg next asserted that the Court had “distorted” the announce clause’s application.¹⁵³ First, the Court did not acknowledge the fact that the announce clause merely prohibited candidates from espousing how they would decide issues.¹⁵⁴ The Eighth Circuit allegedly construed the announce clause to permit certain highly informative comments including historical facts such as the number of convictions a candidate might have obtained as a prosecutor.¹⁵⁵ Second, the Court inaccurately described the announce clause’s application to candidates discussing prior court decisions, according to Justice Ginsburg.¹⁵⁶ The Court’s interpretation that judicial candidates cannot discuss prior court decisions if they mention *stare decisis* was improperly gleaned from oral argument rather than the Eighth Circuit’s and Minnesota Supreme Court’s decisions concerning the announce clause.¹⁵⁷ Thus, judicial candidates could discuss and even criticize prior court decisions if they did not intimate how they would rule upon similar issues if they were elected.¹⁵⁸

at 2539 n.11 (citing *Laird v. Tatum*, 409 U.S. 824, 836 (1972) (memorandum opinion)) (defending unregulated judicial campaign speech).

153. *See White*, 122 S. Ct. at 2552 (Ginsburg, J., dissenting) (arguing that proper resolution of cases “requires correction of the court’s distorted construction of the provision”). The majority characterized the announce clause as prohibiting judicial candidates from announcing their views on “any nonfanciful legal question” coming before the court in which they are running unless the candidates are discussing past decisions without declaring whether they would be bound by *stare decisis*. *See id.* (Ginsburg, J., dissenting) (illustrating Court’s supposedly misguided analysis).

154. *See id.* at 2553 (Ginsburg, J., dissenting) (reiterating that Minnesota’s announce clause does not bar candidates from making general statements regarding their legal views).

155. *See id.* (Ginsburg, J., dissenting) (noting that candidates could make qualified statements like, “Judges should use sparingly their discretion to grant lenient sentences to drunk drivers,” and sufficiently general statements like, “Drunk drivers are a threat to the safety of every driver,” without facing sanctions). Justice Ginsburg thus enunciated that only statements that could potentially reveal how a candidate would rule on certain issues are prohibited under the announce clause. *See id.* (Ginsburg, J., dissenting) (using “I think all drunk drivers should receive the maximum sentence permitted by law” to exemplify proscribed comments).

156. *See id.* (Ginsburg, J., dissenting) (stating that Minnesota’s announce clause “does not prohibit candidates from discussing appellate court decisions”).

157. *See id.* (Ginsburg, J., dissenting) (highlighting that “on the spot answers” to hypothetical questions at oral argument are not always accurate legal opinions). According to Justice Ginsburg, the majority should not have relied upon interpretations elicited during oral argument in light of the Eighth Circuit’s researched decision interpreting the announce clause. *See id.* (Ginsburg, J., dissenting) (citing *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 170 (1972)) (“We are loathe to attach conclusive weight to the relatively spontaneous responses of counsel to equally spontaneous questioning . . . during oral argument.”).

158. *See White*, 122 S. Ct. at 2553-54 (Ginsburg, J., dissenting) (arguing that Wersal never suffered any constitutional violations because he was never formally sanctioned).

Justice Ginsburg further argued that the Court did not account for the Minnesota announce clause's interdependence on the state's proscription against judicial campaign pledges and promises.¹⁵⁹ Judicial impartiality is essential in fostering due process because judges who decide cases in which they have a direct or indirect stake in the outcome could potentially deny litigants a fair hearing.¹⁶⁰ Justice Ginsburg further asserted that judges who may be potentially biased could still violate due process.¹⁶¹ The mere semblance of *quid pro quo* between judicial candidates and the electorate can thus only disserve public esteem of the judiciary and its ability to impartially administer the law.¹⁶² Thus, the announce clause was valid under the First Amendment because it preserved a potential litigant's due process rights and maintained public confidence in the judiciary.¹⁶³

V. CRITICAL ANALYSIS

The *White* decision is subject to scrutiny in both its legal analysis and practical implications. Notwithstanding the dissent's arguments, the Court's decision was principled in analyzing the announce clause under

159. *See id.* at 2554 (Ginsburg, J., dissenting) (opining that "the constitutionality of the Announce Clause cannot be resolved without an examination . . . in light of the interests the pledges or promises provision serves").

160. *See id.* at 2555 (Ginsburg, J., dissenting) (providing various cases where sitting judge's interest in each case's outcome caused it to be overruled). In order to determine whether a judge's participation could violate due process, courts look to, "whether the . . . situation is one which would offer a possible temptation to the average man as a judge [that] might lead him not to hold the balance nice, clear, and true." *Id.* (Ginsburg, J., dissenting) (quoting *Ward v. Monroeville*, 409 U.S. 57, 60 (1972)) (invalidating town's collection of fines from defendants where sitting judge was also town's mayor).

161. *See White*, 122 S. Ct. at 2556 (Ginsburg, J., dissenting) (explaining that due process does not require actual showing that judge is biased due to self-interest). According to Justice Ginsburg, past cases involving potential due process violations due to sitting judges' interests have consistently turned upon whether those judges *could* discharge their duties impartially. *See id.* at 2556 n.3 (Ginsburg, J., dissenting) (citing *Johnson v. Miss.*, 403 U.S. 212, 215 (1971) (*per curiam*)) (involving sitting judge who was successfully sued under civil rights guarantees by petitioner).

162. *See White*, 122 S. Ct. at 2557-58 (Ginsburg, J., dissenting) (concluding that by "targeting statements that do not technically constitute pledges or promises," Minnesota's announce clause prevents companion provisions from being circumvented).

163. *See id.* at 2558 (Ginsburg, J., dissenting) (emphasizing that pledges and promises clause would be useless without announce clause). Candidates would be able to "circumvent" state prohibitions of making pledges or promises in judicial campaigns simply by not using phrases such as "I promise." *See id.* (Ginsburg, J., dissenting) ("Semantic sanitizing of the candidate's commitment would not, however, diminish its pernicious effects on actual and perceived judicial impartiality."). Thus, without the announce clause, the non-partisan nature of Minnesota's judicial elections would eventually diminish. *See id.* at 2559 n.5 (Ginsburg, J., dissenting) (expressing concern about alleged ease with which judicial candidates could circumvent Minnesota's improper pledges clause after *White*).

strict scrutiny.¹⁶⁴ The dissent was correct to point out that the majority had relied upon distinguishable cases such as *Brown v. Hartlage*,¹⁶⁵ that dealt with legislative elections.¹⁶⁶ However, the majority relied upon cases such as *Brown* solely to establish the general premise that state campaign speech restrictions must be narrowly tailored to serve a compelling state interest.¹⁶⁷ Thus, one can only direct criticism, if any, toward the Court's analysis of the announce clause under strict scrutiny.

As a compelling state interest, the Court keyed in upon three possible meanings of impartiality: (1) lack of bias toward certain legal views; (2) general open-mindedness toward competing views of the law; and, (3) lack of bias toward potential and actual litigants.¹⁶⁸ The *White* Court's discussion of impartiality as a lack of bias toward certain legal views undoubtedly

164. See *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (determining that strict scrutiny will more likely be applied where state electoral restrictions directly implicate First and Fourteenth Amendment rights). But see *White*, 122 S. Ct. at 2544 (Kennedy, J., concurring) (arguing that courts should not even have to engage in strict scrutiny analysis where electoral restrictions are content-based). Justice Stevens criticized Justice Kennedy's assertion that content-based election restrictions are per se unconstitutional. See *id.* at 2549 n.4 (Stevens, J., dissenting) (asserting that Justice Kennedy's analysis would invalidate Minnesota's improper pledges clause as well). The problem with Justice Stevens's argument is that Justice Kennedy carefully stated that only content-based restrictions that do not qualify as an *exception* under traditional First Amendment jurisprudence should be invalidated without applying strict scrutiny. See *id.* at 2544 (Kennedy, J., concurring) (finding per se invalidity of campaign speech restrictions not traditionally excepted from First Amendment protections).

165. 456 U.S. 45 (1982) (reversing state court's invalidation of county commissioner election results where candidate pledged to reduce his salary upon being elected, although state law did not actually allow county commissioners to modify their salaries while in office). For a discussion of *Brown*, see *supra* notes 64-69 and accompanying text.

166. See, e.g., *White*, 122 S. Ct. at 2551 (Ginsburg, J., dissenting) (citing O'Neil, *supra* note 81, at 717) (arguing that relying upon cases dealing with legislative elections to invalidate state electoral speech restrictions is "grievously misplaced"). Justice Scalia addressed this criticism by claiming that the Court merely relied upon cases such as *Brown* to illustrate the fact that the announce clause was under-inclusive because it only restricted speech during judicial elections, and that such a deficiency could not be reconciled by claims that speech restrictions were more justified within the context of judicial elections. See *White*, 122 S. Ct. at 2539 (defending judicial campaign speech).

167. See *id.* at 2535 (citing *Brown* to reiterate that states must show that restrictions do not "unnecessarily circumscribe protected expression" to be characterized as "narrowly tailored"). For a discussion of Justice Scalia's defending the Court's reliance upon cases dealing with legislative elections, see *supra* note 129 and accompanying text.

168. See *White*, 122 S. Ct. at 2535 (stating possible meanings of "impartiality"). It should be noted that Justice Scalia was sure to point out that impartiality was not defined in any judicial ethical codes or the Eighth Circuit's opinion on the issue, despite the fact that all of these sources mention the term quite frequently. See *id.* ("Clarity on . . . [impartiality's definition] is essential before we can decide whether impartiality is indeed a compelling state interest, and, if so, whether the announce clause is narrowly tailored to achieve it.").

took a very realistic approach.¹⁶⁹ No person, especially one who would endeavor to be considered a learned member of the bench, can honestly claim to never have considered or even taken a position on divisive political and legal issues.¹⁷⁰ Individual opinions upon divisive issues such as abortion, welfare and crime are often based in deeply held idiosyncratic values. Practically speaking, a judicial candidate professing absolutely no position on such issues would certainly evince a lack of qualifications for the bench because “judges represent the law.”¹⁷¹ Thus, the Court correctly asserted that Minnesota’s interest in maintaining a judiciary free from preconceived notions regarding disputed issues, something truly impossible to accomplish, was not a compelling state interest.¹⁷²

It is well settled that judges should be open-minded to both sides of any dispute in order to fairly administer justice.¹⁷³ The *White* Court concluded that campaign statements represent a small portion of actual public commitments to legal positions that judges make.¹⁷⁴ However, this conclusion does not account for the fact that even if campaign statements, in fact, represent diminutive commitments by judicial candidates, such candidates did not formerly have the sort of latitude in making campaign statements as they would after *White*.¹⁷⁵ This is not to mean that judicial candidates will definitely conduct their campaigns similarly to legislative candidates as a result of *White*, however, it does remain to be seen exactly what changes will occur in state judicial elections.¹⁷⁶ Furthermore, these arguments are moot in light of the fact that the announce clause is too underinclusive to ever achieve any such open-mindedness because judicial

169. *See id.* at 2536 (“A judge’s lack of predisposition regarding the relevant issues in a case has never been thought a necessary component of equal justice . . . it is virtually impossible to find a judge who does not have preconceptions about the law.”).

170. *See id.* (“[I]t is virtually impossible to find a judge who does not have preconceptions about the law.”).

171. *Id.* at 2550 (Ginsburg, J., dissenting) (quoting *Chisolm v. Roemer*, 501 U.S. 380, 411 (1991) (Scalia, J., dissenting)); *see also* *Laird v. Tatum*, 409 U.S. 824, 835 (1972) (“Proof that a Justice’s mind . . . [when] he joined the Court was a complete *tabula rasa* . . . [concerning] constitutional adjudication would be evidence of lack of qualification, not lack of bias.”).

172. *See White*, 122 S. Ct. at 2536 (discussing how judges obviously come to bench with years of experience that have shaped and influenced their views on legal and political issues).

173. *See id.* at 2536-37 (finding, however, that it was unlikely that Minnesota’s announce clause was enacted solely for such purpose). The Court determined that open-mindedness merely guarantees litigants *some* chance of persuading judges to rule in their favor rather than an equal chance. *See id.* at 2536 (defining impartiality).

174. *See id.* at 2537 (addressing arguments that announce clause preserves open-mindedness by removing pressure that judges may feel to rule certain ways after publicly commenting upon such issues during their campaign).

175. *See id.* (“[S]tatements in election campaigns are such an infinitesimal portion . . . [of judges’ actual commitments to post-election conduct].”).

176. For a discussion of *White*’s potential effects upon Pennsylvania judicial elections, see *infra* notes 188-206 and accompanying text.

candidates are only prohibited from commenting on disputed issues during their campaigns.¹⁷⁷

Notwithstanding its analytical inconsistency, the Court correctly determined that the announce clause was underinclusive because it sought to maintain impartiality solely within the context of judicial elections.¹⁷⁸ One cannot truly expect to preserve public confidence in judicial impartiality when judges are prohibited from announcing their views on divisive issues solely during election campaigns.¹⁷⁹ For example, a judge proclaiming his or her allegiance to a certain political party after dismissing an equal protection challenge to a state's legislative redistricting plan is no less biased than a judicial candidate proclaiming such allegiance during an election.

Finally, the *White* Court's discussion concerning judicial impartiality defined as a lack of bias against parties was flawed.¹⁸⁰ The Court defined this subspecies of impartiality as judges' ability to apply the law equally to all parties coming before them.¹⁸¹ Because the announce clause prevents actual or perceived bias against certain issues rather than parties, the Court found it was not narrowly tailored to prevent bias against parties.¹⁸² The Court's conclusion, however, does not acknowledge the fact that certain parties are inevitably going to take certain positions on certain issues.¹⁸³ For example, potential litigants such as criminal defendants, the

177. *See White*, 122 S. Ct. at 2537 (noting that most candidates have already made up their minds regarding disputed issues through past judicial opinions or in articles written on such subjects).

178. *See id.* (citing *City of Ladue v. Gilleo*, 512 U.S. 43, 52-53 (1994)) (finding local ordinance that prohibited signs in order to avoid visual clutter violated First Amendment because that method of achieving government interest in maintaining character of area did not prohibit any other potential eye sores).

179. *See White*, 122 S. Ct. at 2537-38 (discussing how judges have already formed, and many times espoused their legal and political views prior to becoming judges, thus making state prohibitions against such speech solely during elections ineffective).

180. *See id.* at 2535-36 (discussing how judges' views on specific issues may indicate bias against particular parties' arguments in litigation, thus impacting parties themselves who make those arguments).

181. *See id.* at 2535 (stating that cases cited by respondents and *amici* define impartiality similarly to illustrate proposition that impartial judges are essential to due process).

182. *See id.* at 2535-36. Justice Scalia announced the distinction between bias against issues and parties as,

when a case arises that turns on a legal issue on which the judge (as a candidate) had taken a particular stand, the party taking the opposite stand is likely to lose. But not because of any bias against that party, or favoritism toward the other party. Any party taking that position is just as likely to lose. The judge is applying the law (as he sees it) evenhandedly.

Id. (footnote omitted) (emphasis in original).

183. *See id.* at 2548 (Stevens, J., dissenting) (criticizing majority's assertion that judges' bias against particular legal views cannot also apply to litigants themselves). Justice Stevens alluded to this dilemma stating, "[e]xpressions that stress a candidate's unbroken record of affirming convictions for rape, for example, imply

American Civil Liberties Union and the United States Justice Department each have traditionally been inextricably bound to certain positions on issues concerning civil liberties.¹⁸⁴ Thus, parties who have taken an opposite stance to views espoused by a judge within the context of campaign speech could potentially suffer due process violations if that judge was to hear their case. Practically speaking, this concern will not always be as great a threat as the *White* dissenters purport, because “every good judge is fully aware of the distinction between the law and a personal point of view.”¹⁸⁵ Furthermore, such potential issues of impartiality do not change the fact that Minnesota chose to prevent such problems by effectively gagging judicial candidates within the context of a popular election.¹⁸⁶

The Court’s decision in *White* should also be analyzed for its practical implications upon state judicial elections. Part V focuses on Pennsylvania, a state that formerly had an identical announce clause to Minnesota’s, to discuss *White*’s practical effects.¹⁸⁷

VI. *WHITE*’S POTENTIAL EFFECTS UPON PENNSYLVANIA’S JUDICIAL ELECTIONS

Pennsylvania’s next judicial elections will take place later this year.¹⁸⁸ It should be noted that judicial candidates in Pennsylvania still may not be able to announce their views on disputed legal or political issues, depending upon how the amendments to Pennsylvania’s former announce clause are interpreted.¹⁸⁹ After *White*, a mere formal filing was all that prevented

a bias in favor of a particular litigant (the prosecutor) and against a class of litigants (defendants in rape cases).” *Id.* (Stevens, J., dissenting) (footnote omitted).

184. See generally *Kyllo v. United States*, 533 U.S. 27 (2001) (deciding Fourth Amendment issue in which ACLU, in amicus brief, argued for reversal due to government’s use of thermal imaging to gather evidence from inside defendant’s home). Tangentially, the ACLU filed an amicus brief in *White* arguing reversal due to the announce clause’s implications upon First Amendment rights. See Br. of Amici Curiae Am. Civil Liberties Union, Inc., Republican Party of Minn. v. *White*, 122 S. Ct. 2528 (2002) (No. 01-521) (supporting reversal).

185. *White*, 122 S. Ct. at 2547 (Stevens, J., dissenting).

186. See *id.* at 2528 (“The Minnesota Supreme Court has adopted a canon . . . that prohibits a candidate from announcing his or her views on disputed legal or political issues.”).

187. See PA. CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(c) (2002) (“A candidate, including an incumbent judge, for a judicial office, that is filled . . . by public election . . . should not . . . announce his views on disputed legal or political issues.”). This Note simply seeks to identify and briefly discuss the immediate and potential changes that could take place during subsequent judicial elections in Pennsylvania in the wake of *White*.

188. See Walsh, *supra* note 52, at A15 (commenting on what impact, if any, *White* will have on Pennsylvania’s upcoming judicial elections).

189. See PA. CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(c) (2002) (providing former announce clause); see also Blumenthal, *supra* note 15, at 1 (“[C]hange[s] to Canon 7B(1)(c) and Rule 15D(3) involve[] adding a provision in conformance with the American Bar Association’s Model Code of Judicial Conduct.”). Before the Pennsylvania Supreme Court took action, the former Pennsylvania announce clause still stood, despite the ruling in *White*. See Walsh, *supra* note 52, at A15

Pennsylvania's former announce clause from being invalidated.¹⁹⁰ Thus, there was never a question of whether *White* would affect Pennsylvania's judicial elections, but how.

The one potential effect that has come to fruition was that the state supreme court would amend Pennsylvania's judicial code to track the ABA's 1990 Model Code.¹⁹¹ Despite the Pennsylvania Supreme Court's timely action to rectify the situation, it remains to be seen whether the amendments to Pennsylvania's former announce clause will generate further litigation concerning what types of statements actually appear to precommit candidates to a particular side of an issue.¹⁹² Any such litigation

("[*White*] will not affect judicial elections in Pennsylvania unless and until someone challenges the current law, or . . . [Pennsylvania's] Supreme Court takes action."). It is currently unknown how the amendments to Canon 7(B)(1)(c) will be enforced. See Blumenthal, *supra* note 15, at 1 (discussing uncertainty of ABA Model Code's provision replacing Pennsylvania's former announce clause).

190. See Walsh, *supra* note 52, at A15 (stating that ruling in *White* will not impact Pennsylvania "unless and until someone challenges the current law").

191. See Blumenthal, *supra*, note 15, at 1 (discussing amendments to Pennsylvania's former announce clause); see also MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (1990) ("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."). Given the tenuous situation with which Pennsylvania judicial candidates were left after *White*, it seemed quite likely that the state supreme court would take action. Cf. *Cucchi v. Rollins Protective Servs. Co.*, 574 A.2d 565, 579 (Pa. 1990) (Cappy, J., dissenting) ("History has shown that there are occasions in which judicial activism is appropriate and even mandated by the judiciary's inherent responsibility to protect the citizens of this Commonwealth . . . [but] this power is easily abused and should be sparingly utilized only in matters of extraordinary social importance."). It should also be noted that the ABA's 1990 Model Code separately retains the 1972 Model Code's prohibition against making promises or pledges of conduct in office other than impartially administering the law. See MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (1990) (providing improper pledges clause). It thus seems that the ABA perhaps sought to modify the announce clause so as to turn it into an extension of its prohibition against improper campaign promises to prevent statements that *sub silentio* indicate how judicial candidates would rule upon certain issues. Cf. *White*, 122 S. Ct. at 2554-56 (Ginsburg, J., dissenting) (arguing that Minnesota's announce clause must be examined in light of other provisions proscribing judicial campaign promises and pledges other than to impartially administer justice).

192. For a discussion of Pennsylvania's former and current announce clause and the implications of *White*, see *supra* notes 50, 52 and accompanying text. According to public sentiment, the likelihood of judicial candidates and their supporters filing formal complaints with the Pennsylvania Judicial Inquiry and Review Board is quite high given that sixty-nine percent of those surveyed in a recent poll believe that the "conduct and tone" of state judicial elections is gradually declining. See *Reasonable Doubt; Judges Are Right to Worry About Campaigns*, PITT. POST-GAZETTE, Feb. 19, 2002, at A8 [hereinafter *Reasonable Doubt*] (discussing public perception of judicial elections in Pennsylvania). For example, during the 2001 Pennsylvania Supreme Court race, Republican candidate Michael Eakin, then a superior court judge, and Democratic candidate Kate Ford Elliott, also a superior court judge, became embroiled in numerous debates over each other's campaign tactics. See Dennis B. Roddy, *Supreme Court Race a Debate on Tactics; Eakin, Elliott Battle over Campaign Ads*, PITT. POST-GAZETTE, Nov. 4, 2001, at C9 (discussing vari-

will undoubtedly be public, taking place during an election, and it could perhaps further adversely affect the public's perception of judicial campaigns.¹⁹³

Another potential change in Pennsylvania judicial elections, though an unlikely one, would be one in which judicial candidates would attempt to exercise self-restraint in order to preserve public confidence in the judiciary.¹⁹⁴ This potential change is unlikely because judicial candidates may not always have total control over the tone of their supporters, and, furthermore, the realities of modern races for public office often dictate otherwise.¹⁹⁵ Nonetheless, this begs the question of whether more or less speech should exist in judicial elections.¹⁹⁶ Opponents of *White*, along with its dissenting opinions, often resort to a slippery slope argument in which judicial candidates become the mirror images of legislative candidates.¹⁹⁷ One may or may not accept the majority's conclusion in *White* that free speech is actually a safeguard against judicial candidates abusing their campaign speech rights, however, the abusive speech dilemma envisioned by *White*'s dissenters has yet to occur.¹⁹⁸ Additionally, if judicial candidates were to police themselves without any official guidance regarding the recent amendments to Pennsylvania's former announce clause, such a situation could potentially lead to self-censorship.¹⁹⁹

ous instances of legal wrangling between judicial candidates). One such instance caused supporters for Judge Kate Ford Elliot to sue in order to have a Virginia-based group withdraw television ads that "attacked" Judge Ford Elliott. *See id.* (describing legal wrangling that took place). Supporters for then-Judge Eakin also went to court to have a television ad made on behalf of Judge Ford Elliott taken off the air. *See id.* (describing campaign conflict). Thus, judicial candidates and their supporters would more than likely file complaints over ambiguous campaign statements, in which the Judicial Inquiry and Review Board, the Supreme Court's Disciplinary Board and courts would likely have to engage in factual inquiries to determine whether these statements appear to commit candidates in advance to cases.

193. *See, e.g.*, Roddy, *supra* note 192, at C9 (describing heated Pennsylvania Supreme Court judicial race between then-Judge Michael Eakin and Judge Kate Ford Elliott).

194. *See id.* (exemplifying that despite candidates' best intentions, campaigns for public office often become contentious and bitter in tone).

195. *See id.* (discussing legal action taken by both candidates in Pennsylvania's 2001 Supreme Court race against supporters of their opponent).

196. *See* Walsh, *supra* note 52, A15 (discussing issue of judicial candidate speech after *White*).

197. *See, e.g.*, Republican Party of Minn. v. White, 122 S. Ct. 2528, 2555 (2002) (Ginsburg, J., dissenting) (arguing that allowing judicial candidates to conduct campaign speech similarly to legislative candidates will impeach judicial impartiality and create potential due process violations). For a discussion of Justice Ginsburg's dissent, see *supra* notes 149-63 and accompanying text.

198. *But see White*, 122 S. Ct. at 2555 (Ginsburg, J., dissenting) (discussing fears that judicial candidates will destroy their legitimacy by exercising broad free speech rights after *White*).

199. *See* Broadrick v. Okla., 413 U.S. 601, 611 (1973) (stating that "First Amendment [rights] need breathing space"). This concern that individuals could potentially restrain themselves from exercising otherwise protected speech and

Finally, a third potential impact that *White* could have upon Pennsylvania's judicial elections is to cause a complete reevaluation of the state's judicial selection system.²⁰⁰ After all, questions of judicial impartiality within the context of judicial elections ultimately lead to questions regarding how a state should select its judges in order to preserve their public esteem.²⁰¹ The Pennsylvania Supreme Court has, albeit in vain, already appointed committees to examine judicial campaign contribution reforms.²⁰² Thus, the fallout from *White* could provide enough justification for Pennsylvania to amend its constitution to provide for an appointive judicial selection system.²⁰³ The problem with simply ridding Pennsylvania of judicial elections, however, is that appointive systems are just as inherently abusive.²⁰⁴

VII. CONCLUSION

White brought a dilemma that was lurking in the background of state judicial selections systems for over 200 years into specific relief. Can a state judicial selection system respect candidates' First Amendment rights, while maintaining the essentially impartial nature of the judiciary?

challenging statutes has also given rise to many constitutional challenges to state statutes as being overbroad. See ERWIN CHEREMINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 11.2.2 (1997) (collecting cases).

200. See *Reasonable Doubt*, *supra* note 192, at A8 (discussing recommendation by Pennsylvania Judicial Council to begin appointing state judges).

201. See *id.* (stating that surveyed judges are concerned about deterioration of state judicial elections).

202. See *Throw Out the Baby*, *supra* note 37, at A8 (discussing various state remedies to Pennsylvania's judicial selection problems). The Pennsylvania Supreme Court appointed a commission to appraise the state's judicial elections in 1998 that concluded the state should limit campaign spending and contributions. See *id.* (describing disappointing state of Pennsylvania's judicial elections). Unless judicial candidates request public campaign funding, however, they have a constitutional right to raise and spend as much money as they deem necessary. See, e.g., Buckley v. Valeo, 424 U.S. 1, 143 (1976) ("The First Amendment denies the government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise."). Recently, then-Chief Justice John P. Flaherty requested a Judicial Council ad-hoc committee to review other possible solutions to the judicial campaign funding dilemma; the committee concluded that Pennsylvania should adopt an appointive selection system to resolve the presently flawed system. See *Throw Out the Baby*, *supra* note 37, at A8 (arguing that Pennsylvania's judges should be appointed like federal judges).

203. See *Reasonable Doubt*, *supra* note 192, at A8 (arguing that Pennsylvania judges should be selected by appointment by Pennsylvania's Governor, with Senate confirmation).

204. For a discussion of appointive and elective systems of selecting judges, see *supra* notes 25-35 and accompanying text. This Note recognizes the fact that one could easily write a book about the election/appointment debate alone. Thus, this Note simply seeks to illustrate the arguments of both sides to this ongoing debate as well as its relevance to *White's* immediate and potential effects upon Pennsylvania's future judicial elections.

To conclude, *White* has the potential to affect judicial elections, especially Pennsylvania's in a number of ways. Although no one will know just what will happen until the 2003 elections begin, the Pennsylvania Supreme Court currently has seized the opportunity to administratively remedy the situation.²⁰⁵ Furthermore, the issue of judicial candidate speech unfortunately points to a much larger problem looming in the background of how to equitably select our judges.²⁰⁶ Thus, time will only tell whether *White* has presented new problems for Pennsylvania's judicial elections, and, if so, whether the solution lies in Pennsylvania's Supreme Court or in the Pennsylvania State Legislature.

S. Graham Simmons III

205. For a discussion of judicial elections in Pennsylvania and the impact of *White*, see *supra* notes 188-206 and accompanying text.

206. See *Throw Out the Baby*, *supra* note 37, at A8 (citing Pennsylvania Judicial Council Committee as being convinced "that the present system of electing judges . . . is seriously flawed and cannot be adequately reformed by part-way measures").

