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Impacts of White


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IMPACTS OF *WHITE*

*Roy Schotland**

I. SOURCES AND SHAPE OF THE NEW CHALLENGES

Changes in judicial elections stem from four identifiable causes. First, court decisions involve increasingly higher stakes and more serious consequences.¹ The U.S. Senate confirmation battles also reflect this cause. Second, non-candidate groups, many from out of state, bring in enormous sums of money which often leads to ugly, even damaging, campaigns. Third, the first two causes are making judicial campaigns more like *non-judicial* campaigns, bringing new elements to judicial campaigns: campaign consultants and a win-at-any-cost approach. California's highly regarded Joe Cerrell began judicial campaign consulting in 1978, but today, consultants like those in Florida, are far different.²

* Professor of Law, Georgetown University Law Center; A.B. Columbia University, 1954; LL.B., Harvard University 1960. Professor Schotland also serves as Senior Adviser to the National Center for State Courts. This is an excerpt from a background paper, *New Challenges to States' Judicial Selection* for the O'Connor-Breyer Conference: Fair and Independent Courts: A Conference on the State of the Judiciary, September 28–29, 2006, at the Georgetown Law Center (forthcoming, Georgetown University Law Journal).

1. The importance of judicial decisions is indispensable to the rule of law, at least in America.

2. Today, Miami-Dade County in Florida has the most active consultants for judicial campaigns, even specializing along ethnic lines. Potential challengers will often hire a consultant, and remain as "floaters" until moments before the filing deadline in order to see which incumbents have no challenger, or at least no strong challenger. Potential challengers in Cook County, Illinois, use this same practice. The consultant will assure any potential incumbent client that none of his existing floater clients will run against him.

In Texas, campaign consultants were important in the legislation regarding judicial selection during the 2003–2004 session. The senate had passed a bill to change most judgeships from elective to appointive positions and the house was about to vote on this measure when the proposed change encountered two potential problems. First, substantial elements of the GOP grass roots movement believed they would have less of an impact under an appointment system. Second, house members were contacted by their own campaign consultants (many of whom also worked on or

The fourth cause is found in federal court decisions, starting with *Republican Party of Minnesota v. White*.³ This cause is both different from the others and important, but too new to have had any notable impact so far. In a 5-4 decision, *White* held unconstitutional Minnesota's canon barring a judicial candidate from "announc[ing] his or her views on disputed legal or political issues."⁴ Justice Scalia's majority opinion included explicit limitations, which we set aside here because the lower courts have since read *White* to strike down much more of the widespread regulation of judicial campaign conduct—and it is worth noting a few prominent decisions.⁵

First, an activist panel of the Eleventh Circuit struck down *sua sponte* a canon utilized by thirty-four states requiring that campaign funds be raised by a campaign committee, not by judicial candidates personally.⁶ The panel did this despite the fact that the provision regarding campaign contributions had not been challenged by the plaintiff nor argued at trial or on appeal.⁷ The panel, ignoring the limitations set forth in Scalia's *White* opinion, stated: "[T]he distinction between judicial elections and other types of elections has been greatly exaggerated, and we do not believe that the distinction, if there truly is one, justifies greater restrictions on speech during judicial campaigns than during other types of campaigns."⁸ Further, the court simply ignored three contrary Supreme Court decisions and wrongly applied strict scrutiny in reaching this decision.⁹

Most recently, in the remand of *White* in the Eighth Circuit,¹⁰ an 11-3

hoped to work on judicial campaigns) who indicated that if the member voted for the bill, he or she was likely to have opposition in the upcoming primary. As a result, the house did not bring the bill up for a vote.

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

4. *Id.* at 768 (quoting MINN. CODE OF JUDICIAL CONDUCT, Canon 5(A)(3)(d)(i) (2000)). The "announce" clause was used only by nine states, as about twenty-five others had repealed this restriction after 1990 when the ABA deleted it from the Model Code because of concerns over its constitutionality. Interestingly, the canon had never been enforced.

5. *See, e.g., Weaver v. Bonner*, 309 F.3d 1312, 1322 (11th Cir. 2002) (holding that a Georgia law prohibiting judicial candidates from personally soliciting campaign contributions did not meet strict scrutiny because it was not narrowly tailored to serve the state's compelling interest of judicial impartiality).

6. *Id.*

7. *See id.* at 1318.

8. *Id.* at 1321.

9. *Id.* at 1319.

10. *Republican Party of Minn. v. White*, 416 F.3d 738, 766 (8th Cir. 2005) (en banc), *cert. denied*, 126 S. Ct. 1165 (2006).

en banc decision struck down Minnesota's limit on partisan conduct by judicial candidates (which was similar to laws in nineteen other states), and narrowed the limitation on candidates' personal solicitation of campaign funds (which was the same as laws in nearly thirty other states).¹¹

Federal courts in Alaska,¹² Kansas,¹³ Kentucky,¹⁴ and North Dakota¹⁵ have also recently rejected the widespread limitations on candidates making "pledges or promises" and "commitments."¹⁶

The response to *White* by state courts has varied dramatically. In many states the canons have been amended and the ABA is vigorously working to revise the Model Code.¹⁷ But at the same time the remaining sanctions against campaign misconduct have been strongly enforced.¹⁸

11. *Id.*

12. Alaska Right to Life Political Action Comm. v. Feldman, 380 F. Supp. 2d 1080, 1083 (D. Alaska 2005) (appeal pending).

13. Kan. Judicial Watch v. Stout, 440 F. Supp. 2d 1209, 1240 (D. Kan. 2006) (appeal pending).

14. Family Trust Found. of Ky., Inc. v. Wolnitzek, 345 F. Supp. 2d 672, 711 (E.D. Ky. 2004).

15. N.D. Family Alliance, Inc. v. Bader, 361 F. Supp. 2d 1021, 1044 (D.N.D. 2005).

16. After this Article was written, two similar decisions were handed down taking essentially the same position as the Eighth Circuit decision (n.10 above), and one contrary decision. See Carey v. Wolnitzek, C.A. No. 3:06-36-KKC, 2006 WL 2916814, at *1 (E.D. Ky. Oct. 10, 2006); see also Ind. Right to Life, Inc., v. Shepard, 463 F. Supp. 2d 879 (N.D. Ind. 2006). *Contra* Duwe v. Alexander, 2007 WL 840121 (W.D. Wis. 2007). In a challenge in Pennsylvania, plaintiffs were held to lack standing. Pa. Family Inst. v. Black, No. Civ. 105CV2172, 2005 WL 2931825, at *7 (M.D. Pa. Nov. 4, 2005) (appeal pending).

Representing plaintiffs in most of these cases was James Bopp, Jr. He represented plaintiffs in *White* from the Supreme Court stage on. For his work in *White*, Bopp's firm was awarded more than \$867,000 of the almost \$1,375,000 awarded to plaintiffs' various counsel. Republican Party of Minn. v. White, 456 F.3d 912, 922 (8th Cir. 2006).

17. MODEL CODE OF JUDICIAL CONDUCT (2007). The ABA House of Delegates approved a revision of the Judicial Code on February 12, 2007. ABA Joint Comm. to Evaluate the Model Code of Judicial Conduct, ABA Model Code of Judicial Conduct, February 2007, http://www.abanet.org/judicialethics/approved_MCJC.html (last visited Apr. 1, 2007).

18. See *In re Angel*, 867 So. 2d 379, 383 (Fla. 2004); *In re Kinsey*, 842 So. 2d 77, 87 (Fla. 2003); *In re Watson*, 794 N.E.2d 1, 8 (N.Y. 2003); *In re Raab*, 793 N.E.2d 1287, 1293 (N.Y. 2003); see also *Court Publicly Reprimands Judge Angel*, FLA. B. NEWS, July 1, 2004, at 12 (detailing Judge Angel's public reprimand by the Florida Supreme Court, in which the court states that "Every judicial election presents both a great opportunity and a great risk.").

There are two essential perspectives to be drawn from these federal court decisions. First, the decisions have drawn a great deal of commentary, with supporters taking a strong position that an election is just that, an election, and political speech is the core of the First Amendment. Opponents argue that judicial elections are different because a judge's job is notably different from the work of other elected officials, and that public confidence in the judiciary depends on protecting that difference.

But thus far, very few candidates have taken advantage of *White*, although some observers argue to the contrary, particularly regarding a Pennsylvania Supreme Court victory in 2003 by a candidate who spoke out in support of abortion rights, gun control, and the death penalty.¹⁹ The losing candidate, who did not speak out, was Pennsylvania's first Republican judicial candidate to lose in eighteen races.²⁰ However, as a leading local judicial reformer said, "It was turnout, turnout, turnout."²¹ Philadelphia voters swarmed the polls for two reasons that had nothing to do with this race: (1) the FBI had wire-tapped their mayor's phones while he was up for re-election; and (2) America Coming Together (one of the first and largest of the Democratic 527s) chose Philadelphia for their first get-out-the-vote drive, producing remarkable numbers in both new voter registration and turnout.²²

Typical is the following discussion concerning Florida, written by a leader of one judicial campaign. Rebecca Mae Salokar claims: "[*White*] had surprisingly little impact . . . in the six contested judicial elections in Miami-Dade County, Florida, held during the summer of 2004."²³ Salokar further argues that judges do not embrace free speech on the campaign trail because "the legal and civic culture in Miami-Dade County explicitly

19. Dennis B. Roddy, *Baer Wins Court Race, Democrats See Sweep in Statewide Contests*, PITTSBURGH POST-GAZETTE, Nov. 5, 2003, at C-1.

20. *Id.*; Bernard Harris, *Courts Are Latest Cultural Battleground, Kansas Senator Tells County Republicans*, LANCASTER NEW ERA, Oct. 28, 2003, at B-1.

21. Carrie Budoff, *Democrats Statewide Ride Big Turnout Wave*, PHILA. INQUIRER, Nov. 6, 2003, at A1 (quoting Lynn Marks, Executive Director, Pennsylvanians for Modern Courts).

22. Harold Meyerson, *Judging Terry*, THE AM. PROSPECT, Dec. 2003, at 28; see also Shira J. Goodman & Lynn A. Marks, *Lessons from an Unusual Retention Election*, CT. REV., Fall/Winter 2006, at 6, 10 (discussing pay raises that were an unexpected election issue relating to voter turnout in Pennsylvania retention elections); Roddy, *supra* note 19, at C-1 (discussing the 2003 Pennsylvania Supreme Court election).

23. Rebecca Mae Salokar, *From the Benches and Trenches After White: An Insider's Thoughts on Judicial Campaign Speech*, 26 JUST. SYS. J. 149, 149 (2005).

and implicitly discourages candidates from engaging in issue-oriented speech,” and that “given the nature of Miami-Dade’s electorate, a campaign strategy focusing on legal experience and judicial temperament is preferred by the candidates over one that emphasizes politically divisive issues.”²⁴ Salokar believes that “[e]ven those who knew or should have known that candidates had a bit more freedom to discuss their personal views were unwilling to break with tradition” and in the end, “[m]any judicial candidates will likely choose not to enjoy the freedom granted by *White* [because] [t]raditions die hard.”²⁵

So far, the largest impact of *White* has been the increase in questionnaires sent to candidates by interest groups. In some states, few or no judges or candidates have replied, in other states, however, many may have replied to these requests for information.²⁶ Traditional norms, however, are bound to loosen, as evidenced in two Arkansas high court campaigns in 2006, and perhaps also in Alabama’s primary election for chief justice. One day after the Supreme Court denied review of the Eighth Circuit’s en banc decision narrowing the Minnesota canons (found in almost all states with judicial elections) which barred candidates from *personally* soliciting campaign funds, an Arkansas judicial candidate took advantage of that decision.²⁷ Shortly thereafter, another Arkansas candidate relied on *White* to speak out about an unpopular pending case on school funding, a step that almost certainly backfired.²⁸

24. *Id.*

25. *Id.* at 160.

26. For example, in Tennessee this past June it was noted:

Of 64 Tennessee judges who received questionnaires [from an interest group], 25 sent letters declining to respond (some citing Chief Justice John Roberts, and almost all giving biographic information), 35 did not respond, and 3 gave limited responses (*e.g.*, that Reagan and Rehnquist best represent their political or judicial philosophy among the listed Presidents and Justices).

NAT’L CTR. FOR STATE CTS., NAT’L AD HOC ADVISORY COMM. ON JUD. CAMPAIGN OVERSIGHT, HOW SHOULD JUDICIAL CANDIDATES RESPOND TO QUESTIONNAIRES? (2006), http://www.judicialcampaignconduct.org/Advice_on_Questionnaires-Final.pdf.

27. *Simes v. Ark. Judicial Discipline & Disability Comm’n*, No. 06-725, 2007 WL 184801 (Jan. 25, 2007).

28. In January 2006, the day after the Court denied review of the Eighth Circuit decision in the *White* remand, intermediate appellate Judge Wendell Griffen personally sent emails soliciting funds to support his campaign for an open seat on the Arkansas Supreme Court. An Arkansas canon barred judicial candidates from personally soliciting funds, but the Eighth Circuit has held it unconstitutional to bar large group solicitation or solicitation by letter. Whether Griffen’s emails were protected solicitation is at issue in one of two pending Arkansas Judicial Discipline and

The second perspective on *White* is that we must avoid a “good old days” view of pre-*White* judicial campaigns. First, candidates do not need to inflame the voting public, it is done for them. For example, in 2000:

Disability Commission proceedings in which Griffen is involved. According to the Eighth Circuit, there is no reason to bar allowing “the candidate’s personal signature . . . at the foot of the letter.” *Republican Party of Minn. v. White*, 416 F.3d 738, 765 n.16 (8th Cir. 2005). But the court assumed that any such letter would be sent by the candidate’s committee—the “letter will not magically endow him or her with a power to divine . . . to whom that letter was sent.” *Id.* at 765.

For years, Griffen has been very outspoken and has been the subject of eleven disciplinary matters. A minister himself, he has called James Dobson, Jerry Falwell, and Pat Robertson “pimps of piety,” publicly supported abortion rights, and “targeted President Bush, Vice President Cheney, the ‘Christian right,’ Supreme Court Justice Clarence Thomas, the late President Reagan and others.” Debra Hale-Shelton, *In NAACP Speech, Judge Blasts Storm Response*, ARK. DEMOCRAT-GAZETTE, Sept. 11, 2005, at 25. The only time Griffen was sanctioned (for attacking the University of Arkansas about their firing a black basketball coach), a 4-3 majority of the Arkansas Supreme Court held that the canon that had been relied upon was unconstitutionally vague. *Griffen v. Ark. Judicial Discipline & Disability Comm’n*, 130 S.W.3d 524, 536 (Ark. 2003). When Griffen ran for chief justice in 2004, he lost, only receiving thirty-eight percent of the vote. Jake Bleed, *Danielson, Corbin Win in Election as Justices*, ARK. DEMOCRAT-GAZETTE, May 24, 2006, at 1. Griffen ran again in 2006 for an open seat, but lost after obtaining only forty-three percent of the vote. See Jake Bleed, *Griffen Concedes to Danielson*, ARK. DEMOCRAT GAZETTE, May 26, 2006, at 15.

When review of the Eighth Circuit decision was refused, Griffen said that “judicial candidates should not discuss cases that are pending, or likely to come before a judge’s court.” Jake Bleed, *Political-Speech Rules for Judges Get Knotty*, ARK. DEMOCRAT-GAZETTE, Jan. 22, 2006, at 1. Regardless of whether Griffen was any more outspoken in the campaign because of *White*, another candidate—running against an incumbent justice who was identified with an unpopular school funding decision—spoke out, attacking the still-pending decision. That justice (like Griffen’s opponent for the open seat) took a strong position against commenting on specific issues and won with sixty-three percent of the vote. Thoughtful local observers believe that the candidate who spoke out on the pending case was unlikely to win in any event but was hurt badly (and lastingly) by doing so. See Debra Hale-Shelton, *supra* note 28, at 25.

In Alabama, Justice Tom Parker, challenging the chief justice, advocated independence from U.S. Supreme Court rulings, a position which surely could have been taken before *White*. When Parker’s advocacy was made the subject of a formal complaint, the Judicial Inquiry Commission ruled that Parker was protected (ironically) by *White*. However, that same result could have rested on a pre-*White* Alabama Supreme Court decision that narrowed the applicable canon. See *Butler v. Ala. Judicial Inquiry Comm’n*, 802 So. 2d 207, 218 (Ala. 2001).

Both Parker and the chief justice spoke often of “family values.” See Cheryl Sabel, *Seeking to Criminalize Abortion*, MOBILE REG., Feb. 12, 2006, at D1. Thoughtful local observers believe that without *White*, the chief justice (who won overwhelmingly) would have been more restrained in his campaign.

In Michigan, Democratic Party ads featured animated trees shuddering about the incumbent justices as a voice-over said the court “ruled against families and for corporations 82% of the time.” A Detroit Free Press review of that analysis found that it “borders on the bogus.” For example, in fourteen of the forty-three “anti-family” cases, the Democratic justices agreed with the result. “State party officials said [that] defining a family or corporate entity [is not] an exact science.” On the other side, a GOP ad attacked a challenger (an intermediate appellate judge) for having joined in upholding a light sentence for a pedophile. In the ad, “[t]he word ‘pedophile’ in huge type flashes close to the judge’s name.” The GOP’s reply was, “[w]e don’t call him (a pedophile).”²⁹

As for ads by candidates, consider the following:

“Maximum Marion” Bloss—“You do the crime, you do the time.” (Texas, 1998)

....

“Mike Burns is a tough, no-nonsense Prosecutor who believes in law and order. If elected, Mike understands his duty to uphold the law regardless of his personal views.” (Florida, 1998)

....

“Sent more criminals—rapists, murderers, felons—to prison than any other judge in Contra Costa County history.”

“Over 90% Convicted Criminals Sentenced. . . . Prison Commitment Rate is More Than Twice the State Average.”³⁰

One of our wisest judges summarized the scene in the following statement: “Every judge’s campaign slogan, in advertisements and on billboards, is some variation of ‘tough on crime.’ The liberal candidate is the one who advertises: ‘Tough but fair.’ Television campaigns have

29. Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 3 L. REV. M.S.U.-D.C.L. 849, 871–72 (2001) (footnotes omitted).

30. Task Force on Selecting State Ct. Judges, Citizens for Indep. Cts., *Choosing Justice: Reforming the Selection of State Judges*, in UNCERTAIN JUSTICE: POLITICS AND AMERICA’S COURTS 77, 101–02 (2000).

featured judges in their robes slamming shut a prison cell door.”³¹

In 1996, a Nevada Supreme Court justice campaigned for re-election by advertising that he had a “record of fighting crime,” which included voting to uphold the death penalty seventy-six times.³² As one of his colleagues wrote after that election, dissenting from the court’s refusal to require the justice’s withdrawal from a subsequent capital case: “Judges are supposed to be *judging* crime not fighting it.”³³

But the post-*White* regime was bound to show newly unrestrained campaigning, and 2006 brought the first clear example in Kentucky,³⁴ where Judge Rick Johnson of Kentucky made “his third bid for the Kentucky Supreme Court.”³⁵ He was sitting on an intermediate appellate court and in 2003 had written a long article about the *White* decision.³⁶ Subsequently, Johnson gave a speech declaring his positions on several disputed issues.³⁷

Johnson’s stump speech “quite deliberately push[es] the boundaries of what many observers fear may be the future of judicial campaigns, not just in Kentucky but in the 38 other states where there is some form of judicial elections as well.” In his speech, Johnson stated:

“I want you, the voters, to know that I oppose abortion . . . I support having the Ten Commandments in our schools and courthouses. . . . I support the Second Amendment right to bear arms. . . . I believe marriage is between only one man and one woman.

I live a life of traditional western Kentucky values . . . I think the way you think.”

....

31. Hans A. Linde, Comment, *Elective Judges: Some Comparative Comments*, 61 S. CAL. L. REV. 1995, 2000 (1988).

32. *Nevius v. Warden*, Nev. State Prison, 944 P.2d 858, 860 (Nev. 1997) (Springer, J., dissenting).

33. *Id.*

34. T.R. Goldman, *In Kentucky Supreme Court Races, Judges Get out Their Soapboxes*, LEGAL TIMES, Nov. 6, 2006, at 14. While there may have been others, the author’s inquiries to knowledgeable sources in all relevant states have not found any additional examples.

35. *Id.*

36. See Rick A. Johnson, *Judicial Campaign Speech in Kentucky After Republican Party of Minnesota v. White*, 30 N. KY. L. REV. 347 (2003).

37. *Id.*

As Johnson told the crowd at the Franklin candidates' forum: "The rules have changed. I agree with the new rule because I believe the old system kept the voters in the dark and was arbitrary and elitist."

That, of course, is not the opinion of everyone, including Johnson's opponent, Circuit Judge Bill Cunningham, who has been sharply critical of Johnson's pronouncements.

"It's not just important that our court system be just; it must appear to be just. That's just as important," says Cunningham . . .

....

And it's hard to argue, at least among the audience at the Franklin forum, that it's a bad thing for a judicial candidate to give his opinion on hot-button issues. Although Johnson's remarks might have stood out to the conscientious listener, it was tough to find anyone at the forum who found them objectionable.

....

[F]or many people Johnson's remarks on abortion and gun control provided information they wanted to know about a candidate to the Kentucky Supreme Court—or any other court.³⁸

One man listening to Johnson's speech at the forum noted: "You can get an idea of whether he's one of those bleeding hearts or not, . . . in fact . . . he's more suspicious of judicial candidates who claim their fealty to impartiality prevents them from telling people what they think. A lot of these folks enjoy using this as an excuse not to answer any questions."³⁹

Another woman who attended the forum said: "We elect a judge mainly on moralistic issues. So it's hard to vote for a judge if you don't know what he stands for. I appreciate his honesty; . . . I think it's refreshing."⁴⁰

Kentucky Chief Justice Joseph Lambert, who has been re-elected three times, noted:

"It's the classic dilemma Any time there's an election, voters

38. Goldman, *supra* note 34, at 14.

39. *Id.*

40. *Id.*

have a right to know what a particular candidate thinks about some issue that the voters think is important.

But it seems to me that publicly articulating a view is qualitatively different than merely having a privately held view. When it's just a privately held view, when faced with a legal issue, you don't have to backpedal to reach a different conclusion."⁴¹

Notably, the trial judge running for Johnson's seat on the appellate court, speaking after him at the same forum, only "rattl[ed] off details of his background" and told the crowd: "I was asked at the law school at Paducah whether I believe *Roe v. Wade* was correctly decided And I told them, 'What difference does it make? I'm bound to follow the U.S. Supreme Court and Kentucky Supreme Court precedents.'"⁴²

Johnson lost, 38.70% to 61.30%, and one cannot say whether with a different campaign, he would have won.⁴³ Unfortunately for Johnson, his statements did "not [go] down well at all with the Kentucky legal establishment."⁴⁴ A few weeks before the election, the unofficial Kentucky Judicial Campaign Conduct Committee said the following about Johnson: "Judicial candidates who publicly state their views on disputed issues inevitably create the impression that such views would affect how they would rule from the bench, and that runs counter to the principle of judicial independence We think Judge Johnson's view of judicial campaigns . . . is off the mark."⁴⁵

The same article reporting the Kentucky race also noted a judicial race in Illinois, although it was not as unrestrained as Johnson's campaign. Steve McGlynn was a recently appointed intermediate appellate judge who ran for a full term in southern Illinois.⁴⁶ The 2004 Illinois campaign race set a national record for spending in a state judicial contest with more than \$9.3 million raised by two candidates in a sharply partisan race.⁴⁷ Both

41. *Id.*

42. *Id.* at 15.

43. JUSTICE AT STAKE CAMPAIGN, 2006 STATE SUPREME COURT ELECTION RESULTS 1 (2006), <http://www.justiceatstake.org/files/2006ElectionResults.pdf>.

44. Goldman, *supra* note 34, at 18.

45. *Id.* ("The 21-member group, made up mostly of lawyers, academics and former judges, is an independent committee aimed at encouraging ethical campaign behavior.").

46. *Id.* at 15.

47. Zach Patton, *Robe Warriors: If You Think Judges Should Be Above Petty Politics, Try Not to Watch Them Campaign This Year*, GOVERNING, Mar. 2006, at 34,

political parties actively participated.⁴⁸ The organizations contributing to and interested in the campaign fell into two categories, one focusing on social issues and the other centered on tort liability.⁴⁹ Not surprisingly, the McGlynn appellate court contest in 2006 involved extraordinary spending, probably setting another record. The candidates spent over \$3 million, and on each side, the parties and interest groups repeated their 2004 battle.⁵⁰

A McGlynn radio ad included this: “Dangerous predators let out of jail to prey on children Thankfully, Judge Steve McGlynn is cracking down on predators He wrote the court decision to keep a dangerous predator locked up and off the streets. Elect Steve McGlynn: He’s keeping dangerous criminals locked up where they belong.”⁵¹ But “tough on crime” has long been standard fare for many judicial candidates, so it is questionable how much *White* mattered in that race. Here, too, the winner—a trial judge who secured fifty-three percent of the vote—had campaigned traditionally. But again, one cannot say whether a different McGlynn campaign would have changed the result.⁵²

Writing prior to the 2006 election, I predicted that traditional norms

36.

48. *Id.*

49. *Id.*

50. Goldman, *supra* note 34, at 16.

51. *Id.* at 15.

52. Additional post-*White* campaign statements are noted in an amicus brief for the Conference of Chief Justices in a pending 7th Circuit appeal seeking reversal of a decision striking down Indiana’s canons. *Indiana Right to Life Inc. v. Shepard*, No. 06-4333, at 4–5.

“Put a real prosecutor on the bench.” *In re Watson*, 794 N.E.2d 1, 15–16 (N.Y. 2003).

“[My opponent is] a puppet of the plaintiff’s bar.” “[My opponent] wants Georgians to forget about her liberal judicial activism on the court, including her decisions to put criminals back on the street to murder and rape again.” Amy Peters, *Temperament, Conflict Mark Debate*, DAILY REPORT, Nov. 1, 2006, at A1.

“Non-elected judges should not be making major policy decisions when not required to do so under the plain words of the Constitution. *Roe v. Wade* essentially said that people of the respective states . . . could not protect the unborn. That’s a policy decision. There was nothing in the Constitution that mandated that.” Eric Fleischauer, *Nabers Touts His Leadership Abilities*, DECATUR DAILY, Oct. 24, 2006, available at 2006 WLNR 18418200.

are bound to loosen. But how soon and how severely will the norms weaken as some candidates—either out of conviction or as a campaign tactic—abandon traditional restraint? No one should be surprised by the reactions to Johnson’s campaign statements reported above. The question is not whether we elect a judge mainly on moralistic issues (and there can be no doubt that moralistic issues constitute a microscopic proportion of these judges’ dockets), but how the public views judges and what judges do.

Judges are different from other elected officials. Judicial campaigns should therefore be different from other campaigns. If too few members of the public share that belief, however, then any dispute about *White* will become a passing quibble and we will see less-regulated judicial campaigns in the future.⁵³

53. See James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Do “New-Style” Judicial Campaigns Undermine Judicial Legitimacy?* (Unpublished manuscript, available from author, jgibson@wustl.edu) (answering “no,” based on a new survey of public opinion in Kentucky in 2006).