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Preserving the Legacy: A Tribute to Chief Justice Harry L. Carrico, One Who Exalted Judcial Independence - Part Two: The Good, the Bad, and the [Very, Very] Ugly and (Its Postscript), a Fistful of Dollars

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PART TWO:[43] "THE GOOD, THE BAD, AND THE [VERY, VERY] UGLY" AND (ITS POSTSCRIPT), "A FISTFUL OF DOLLARS"[44]

MUSINGS ON *WHITE*

I. INTRODUCTION

I am no lover of westerns, Clint Eastwood, or Sergio Leone, the Italian film maker who is credited by virtue of the movies used in the title with ushering in a new genre of westerns. But as I try to come to terms with *Republican Party of Minnesota v. White*,[45] the titles seem all too fitting not to use. The first film mentioned in the title, *The Good, the Bad, and the Ugly*, takes place in a "harsh

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43. I wish to acknowledge the assistance of Todd Reutzel, a student at the University of Tennessee College of Law, who assisted in the research for this article and Michael Haworth, who provided insight for the title.

44. The quotations in the title are Sergio Leone movies from the 1960s that launched the career of actor Clint Eastwood. In reality, *A Fistful of Dollars* was the first of three movies, referred to as the "Dollars" or "Man with No Name" trilogy, with *The Good, the Bad, and the Ugly*, being the last made of the three, but actually a prequel. Wedged between the two is another, with a title that is equally appropriate for these thoughts, *For a Few Dollars More*, which I avoided using so as not to be viewed as overly contrived. *See* Yuri German, A FISTFUL OF DOLLARS, Plot Synopsis, *at* http://www.allmovie.com (last visited Jan. 22, 2004); Brendon Hanley, A FISTFUL OF DOLLARS, Review, *at* http://www.allmovie.com (last visited Jan. 22, 2004).

45. 536 U.S. 765 (2002). The original lawsuit filed in the district court listed the following plaintiffs: the Republican Party of Minnesota; the Indian Asian American Republicans of Minnesota; the Republican Seniors; the Young Republican League of Minnesota; the Minnesota College Republicans; Gregory F. Wersal; Cheryl L. Wersal; Mark E. Wersal; Corwin C. Hulbert; the Campaign for Justice; Minnesota African American Republican Council; the Muslim Republicans; Michael Maxim; and Kevin Kolosky. Republican Party of Minn. v. Kelly, 63 F. Supp. 2d 967 (D. Minn. 1999). The defendants were: Verna Kelly, in her capacity as Chairperson of the Minnesota Board of Judicial Standards, or her successor; Charles E. Lundberg, in his capacity as Chair of the Minnesota Lawyers Professional Responsibility Board, or his successor; and Edward J. Clearly, in his capacity as Director of the Minnesota Office of Lawyers Professional Responsibility, or his successor. *Id.* Thus, it was referred to in the federal district and appellate courts and in the Petition for Certiorari as *Republican Party of Minnesota v. Kelly*. *Id.*, *aff'd*, 247 F.3d 854 (8th Cir. 2001), *and cert. granted*, 534 U.S. 1054 (2001). Suzanne White, the successor to Verna Kelly, Chairperson of the Minnesota Board of Judicial Standards, was substituted in the case before the Supreme Court released its decision. Justice at Stake Campaign, Reaction to U.S. Supreme Court's *White* Decision, *Top Legal Organizations Express Concern About Impact of Supreme Court's* White *Decision on Fair and Impartial Courts*, *at* http://www.justiceatstake.org/ (last visited Jan. 22, 2004).

environment," complete with "chaotic" intrusions[46]—a phrase that might aptly describe conditions faced by state court judges in the aftermath of *White*.[47] The plot ostensibly pits the "good" against rivals "bad" and "ugly," but in the end, the director claims, "everything depends on chance, and not the best wins . . . ."[48] Indeed, the lines between good and bad seem permanently blurred, another fitting parallel to judicial ethics after *White*. The second film title is no less relevant. *A Fistful of Dollars* is about deceit and cynicism, casting Eastwood, the deceiver and the cynic, as an "anti-hero . . . at the heart of the new amorality."[49] Melodramatic? It is, perhaps, but it is also just as likely a stark reality that will accompany the politicalization and requisite financing of judicial campaigns.

The title also provides an organizational structure to this part of the article. First, the article discusses a bit of the "good"[50] brought about by the decisions in *White* and offers a dialogue about the importance of preserving the independence and the impartiality of the judiciary in American state courts. Second, the article discusses the "bad," which includes the undesirable aspects of the *White* decision. Third, the article details the "ugly" judicial, political, and practical reactions, some real and some an-

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46. Lucia Bozzola, THE GOOD, THE BAD, AND THE UGLY, Review, *at* http://www.allmovie.com (last visited Jan. 22, 2004).

47. Dozens of others have written about the decision from numerous viewpoints. *See, e.g.*, Erwin Chemerinsky, *Judicial Elections and the First Amendment*, TRIAL, Nov. 2000, at 78; Dale A. Riedel, *Losing Faith in the System: Unfettered Political Speech of Judicial Candidates Fails to Assure an Openminded Judiciary After* Republican Party of Minnesota v. White, 28 U. DAYTON L. REV. 421 (2003); Ronald D. Rotunda, *Judicial Elections, Campaign Financing, and Free Speech*, 2 ELECTION L. J. 79 (2003); Ronald D. Rotunda, *Judicial Campaigns in the Shadow of* Republican Party of Minnesota v. White, 14 PROF. LAW. 2 (2002). My personal favorite article, and one I commend for anyone really interested in reading the judicial perspective on this decision, was written by Judge Robert H. Alsdorf. Robert H. Alsdorf, *The Sound of Silence: Thoughts of a Sitting Judge on the Problem of Free Speech and the Judiciary in a Democracy*, 30 HASTINGS CONST. L. Q. 197 (2003).

48. Yuri German, THE GOOD, THE BAD, AND THE UGLY, Plot Synopsis, *at* http://www.allmovie.com (last visited Jan. 3, 2004).

49. Hanley, *supra* note 44.

50. To avoid criticism that these labels are judgmental (which, of course, they are), "rather vague," or that I have not "bother[ed] to define" the terms, *White*, 536 U.S. at 775, I include the following clarification: I use the term "good" to mean "having desirable or positive qualities," "valuable or useful"; "bad," on the other hand, I use to mean "having undesirable or negative qualities," "capable of harming" or "below standard or expectations"; "ugly," an admittedly inferior term, is used to mean "displeasing," "revolting," and "threatening or foreshadowing evil or tragic developments." WEBSTER'S ONLINE DICTIONARY, *at* http://www.websters-dictionary-online.org (last visited Jan. 22, 2004).

ticipated, to the *White* decision. As a postscript, the article talks about perhaps the greatest threat—the buying of the state judiciary.

II. THE "GOOD": PRESERVING JUDICIAL INDEPENDENCE AND INTEGRITY

One of the best outcomes of the *White* decision is its prompting of a more urgent dialogue about the independence and integrity of the American judiciary. Dialogue often leads to understanding, and perhaps even to appreciation of topics previously misunderstood or taken for granted. All of the federal judges who considered Gregory Wersal's[51] First Amendment challenge[52] to the Min-

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51. Gregory Wersal, a Minnesota lawyer, sought election to the Minnesota Supreme Court on three occasions. *See White*, 536 U.S. at 768–69; *see also* Plymouth Nelson, Comment, *Don't Rock the Boat: Minnesota's Canon 5 Keeps Incumbents High and Dry While Voters Flounder in a Sea of Ignorance*, 28 WM. MITCHELL L. REV. 1607, 1611 n.23 (2002). In his 1996 bid for an associate justice position, Wersal, according to his sworn statement:

- attended numerous gatherings of the Republican Party of Minnesota and its Affiliated Associations[;]
- distributed campaign literature at gatherings of the Republican Party of Minnesota and its Affiliated Associations[;]
- spoke at numerous gatherings of the Republican Party of Minnesota and its Affiliated Associations[; and]
- sought endorsements from the Republican Party of Minnesota and its Affiliated Associations[.]

Affidavit of Gregory F. Wersal (filed Feb. 27, 1998), Joint Appendix to Petition for Writ of Certiorari, Vol. 1 at 4a, Republican Party of Minn. v. White, 536 U.S. 765 (2002) (No. 01-521), *available at* 2002 WL 32102962 [hereinafter Joint Appendix]. These activities prompted someone to file an ethics complaint against Mr. Wersal. *White*, 536 U.S. at 765, 768–69; Joint Appendix at 4a. The complainant noted that "[t]he reason for this complaint is my direct observation of the personal campaign activities of Mr. Greg Wersal . . . from attendance at a political gathering, and from correspondence . . . which his committee sent . . . ." Joint Appendix at 13a (Ex. C to Wersal Aff.). The complaint further alleged that Wersal sought endorsement from the Republican party in campaign materials and in his appearance at Republican gatherings. *Id.* Finally, the complainant stated, "I have not commented on Mr. Wersal's addressing of issues which may come before the Court to which he seeks election, but I feel those are inappropriate as well." *Id.* at 14a. According to Wersal, he withdrew from the race for associate justice "as a result of the Complaint filed . . . and the risk that further Complaints would be filed . . . and thereby jeopardize" his career. *Id.* at 4a–5a. Ultimately, however, the Office of Lawyers Professional Responsibility for the State of Minnesota determined that discipline was not warranted against Mr. Wersal. *Id.* at 16a–21a.

In 1998, Wersal again sought the office. *White*, 536 U.S. at 769. In February of that year, Wersal wrote the Director of the Office of Lawyers Professional Responsibility expressing discontent with recent changes in the Minnesota Code of Judicial Conduct and requesting notice as to whether the Office intended to enforce the provisions. Joint Appendix at 24a–26a. Specifically, Wersal suggested that changes in Canon 5 prohibiting judicial candidates "from speaking to political party organizations and prohibiting their cam-

nesota Code of Judicial Conduct[53] discussed the principle of judi-

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paign committees from seeking, accepting, or using political party endorsements . . . [were] unconstitutional violations [of] the candidate's right to free speech and the campaign committee's right to freedom of association." *Id.* at 24a. While Wersal's complaints about the revisions focused primarily upon the restrictions on partisan activity and endorsements, Wersal also asked the Director whether the Office "intend[ed] to enforce the prohibition against a judicial candidate announcing his or her views on disputed legal or political issues." *Id.* at 26a.

In the Office's previous decision that Wersal's 1996 campaign conduct did not warrant disciplinary sanctions, a former director of the Office, Marcia Johnson, expressed her "doubts about the constitutionality of the current Minnesota Canon [5(A)(3)(d)(i), which prohibited a candidate from announcing his or her view on disputed political or legal issues] and its application to [Wersal's previous campaign] statements." *Id.* at 19a–21a. In 1998, the Office, under a different director, answered Wersal's question as follows:

> [T]he Director's Office continues to have significant doubts as to whether or not this provision would survive a facial challenge to its constitutionality . . . . Therefore, our policy has not changed and unless the speech at issue violates other prohibitions . . . it is our belief that this section is not, as written, constitutionally enforceable.

Id. at 32a.

In 1998, Wersal was defeated in the primary. Republican Party of Minn. v. Kelly, 247 F.3d 854, 860 (8th Cir. 2001). Again in 2000, Wersal sought the office, and again he was defeated, this time in the general election. Nelson, *supra*, at 1611 n.23.

52. Four days after receiving the 1996 response from Director Marcia Johnson at the Office of Lawyers Professional Responsibility, *see supra* note 51, Wersal filed the first of three lawsuits in the United States District Court for the District of Minnesota seeking to enjoin enforcement of several provisions of the Minnesota Code of Judicial Conduct. *See* Republican Party of Minn. v. Kelly, 996 F. Supp. 875, 875–76 (D. Minn. 1998). The lawsuit alleged five separate constitutional claims. Republican Party of Minn. v. Kelly, 63 F. Supp. 2d 967, 974 (D. Minn. 1999). The first claim asserted that the Code's prohibitions related to attendance by candidates and their families at political gatherings violated freedom of speech, freedom of association, and equal protection. *Id.* The second claim alleged "that the ban on judicial candidates from announcing their views on disputed legal or political issues . . . violate[d] the individual plaintiffs' freedom of speech." *Id.* The third and fourth claims asserted similar violations based on the Code's prohibition of party identification and endorsement. *Id.* The fifth claim challenged the Code's ban on personal solicitation of campaign contributions. *Id.* Count two of plaintiff's complaint, and the first of three issues listed in the Petition for Writ of Certiorari, Pet. for Writ of Cert. at *i, Republican Party of Minn. v. White, 536 U.S. 765 (2002) (No. 01-521), *available at* 2001 WL 34092019 [hereinafter Pet. for Writ of Cert.], were the only issues upon which the Supreme Court granted certiorari. *See* Republican Party of Minn. v. Kelly, 247 F.3d 854 (2001), *cert. granted*, 534 U.S. 1054 (2001) (No. 01-521).

The district court denied Wersal's motion for a temporary restraining order. *Kelly*, 996 F. Supp. at 880. The Eighth Circuit Court of Appeals affirmed without publishing an opinion. *See* Republican Party v. Kelly, 163 F.3d 602 (8th Cir. 1998). Thereafter, the defendants moved for and were granted summary judgment. *Kelly*, 63 F. Supp. 2d at 986. The grant of summary judgment was likewise affirmed by the Eighth Circuit, with one judge dissenting. *Kelly*, 247 F.3d at 885.

53. *See infra* text accompanying notes 127–41. Judges in Minnesota have been subject to ethical codes since at least 1950. *Kelly*, 247 F.3d at 857. Originally, the Minnesota judges adopted the 1924 version of the ABA Canons of Judicial Ethics, but in 1974 the Minnesota Supreme Court adopted a more modern version based largely on the ABA's 1972 Model Code of Judicial Conduct. *Id.* While that Code has likewise been altered by the

cial independence and its importance to the American judiciary.[54] Similarly, many of those who have commented about the decision, favorably and unfavorably, have discussed the concept.[55] This dialogue, inside and outside of the legal profession, will likely prompt a long overdue public discussion about judges and judging, a byproduct of which will hopefully be enhanced understanding and appreciation of the American justice system.

While all of the federal judges who heard Wersal's challenges discussed the principles of judicial independence and integrity, some embraced its significance more readily and openly than others. That lack of unanimity is, of course, not extraordinary, and is demonstrative of the principles themselves. One cannot say, for example, with absolute certainty that the Supreme Court majority found the state's interest in judicial independence and integrity to be compelling.[56]

Conversely, both of the lower courts made their positions on this point abundantly clear and took pains to explain the interest at stake. The trial court, the United States District Court for the District of Minnesota, co-opted the defendants' articulation of the state interest, and then concluded that the articulated interests were indeed compelling:

Minnesota Supreme Court on numerous occasions, the provision regulating a candidate's announcement of his or her views remained as written in the 1972 ABA Code. *See Kelly*, 63 F. Supp. 2d at 973. An Advisory Committee appointed to study the 1990 Model Code of Judicial Conduct and make recommendations to the Minnesota Supreme Court had recommended that Minnesota adopt the later version, but the court had declined to do so. *See id.*

54. *See White*, 536 U.S. at 775–76; *id.* at 788 (O'Connor, J., concurring); *id.* at 795 (Kennedy, J., concurring); *id.* at 798 (Stevens, J., dissenting); *id.* at 804 (Ginsburg, J., dissenting); *see also Kelly*, 247 F.3d at 867; *id.* at 886 (Beam, J., dissenting); *Kelly*, 63 F. Supp. 2d at 977–80; *Kelly*, 996 F. Supp. 875, 878–79.

55. *See, e.g.*, Michael R. Dimino, *Pay No Attention to that Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians*, 21 YALE L. & POL. REV. 301, 315–20 (2003); Alan B. Morrison, *The Judge Has No Robes: Keeping the Electorate in the Dark About What Judges Think About the Issues*, 36 IND. L. REV. 719, 723–26 (2003); Brian K. Pinaire, *A Funny Thing Happened on the Way to the Market: The Supreme Court and Political Speech in the Electoral Process*, 17 J.L. & POL. 489, 513–14 (2002).

56. The majority accepted the Eighth Circuit's conclusion, unchallenged by the parties, "that the proper test to be applied to determine the constitutionality of such a restriction is . . . strict scrutiny . . . , [requiring respondents] to prove that the announce clause is (1) narrowly tailored, to serve (2) a compelling state interest." *White*, 536 U.S. at 774–75. The Court then addressed whether the clause was narrowly tailored to the two state interests that were asserted in the briefs: "preserving the impartiality of the state judiciary and preserving the appearance of the impartiality of the state judiciary." *Id.* at 775, 775 n.6.

> [The provisions of the Canons] were enacted because of the long recognized principle that politics can interfere with the actual and apparent integrity and independence of the judiciary. Defendants further assert that [the restrictions] are narrowly tailored to serve several compelling state interests: preventing bias or the appearance of bias in favor of the judge's political party or against members of a rival party; preventing bias or the appearance of bias in judge's [sic] decisions of particular cases that involve party positions; promoting judicial independence by helping to ensure judges owe their jobs to no one but the general electorate.[57]

Thus, the district court held "that the State of Minnesota has a compelling interest in maintaining the actual and apparent integrity and independence of its judiciary."[58]

Similarly, the Eighth Circuit majority characterized the state's interest as "undeniably compelling":

> [T]he restrictions are necessary to guarantee the independence of the Minnesota judiciary, which in turn is crucial to preserve the justice of its courts of law and its citizens' faith in those courts. There is simply no question but that a judge's ability to apply the law neutrally is a compelling governmental interest of the highest order.[59]

Judge Beam, the dissenting Eighth Circuit judge, agreed in principle that judicial independence was an important state interest, *"once the [judicial] selection process [was] over,"* but doubted that Minnesota had either actually or lawfully adopted judicial independence as a state interest.[60] Further, the dissent characterized judicial independence as a "policy notion" that

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57. *Kelly*, 63 F. Supp. 2d at 975.

58. *Id.* at 980.

59. *Kelly*, 247 F.3d at 864. The court continued:

> Judges should decide cases in accordance with law rather than with any express or implied commitments that they may have made to their campaign supporters or to others. . . . Justice under law is as fundamental a part of the Western political tradition as democratic self-government and is historically more deeply rooted . . . .

Id. (quoting Buckley v. Ill. Judicial Inquiry Bd., 997 F.2d 224, 227 (7th Cir. 1993).

60. *Id.* at 886 n.26 (Beam, J., dissenting). Judge Beam derived his conclusions from a review of the history of judicial elections in Minnesota. *See id.* at 887–91 (Beam, J., dissenting). Because Minnesotans have consistently desired to elect, rather than appoint their judges (or have them appointed for them, as was the case in the original Northwest territories), Judge Beam declared that *"the policy adopted by the people of Minnesota"* is the public control of the judiciary. *See id.* at 889 (Beam, J., dissenting). Moreover, he concluded that the assertion of popular control over the selection of the judiciary is incompatible with the assertion of judicial independence as a compelling state interest. *Id.* at 903 (Beam, J., dissenting). *See infra* text accompanying note 66 for a discussion of the validity of this argument.

could not "trump constitutionally-enshrined rights."[61] This characterization dismissed, or at least discounted, the constitutional underpinnings of judicial independence, and notably declined to view the case as one raising the issue of accommodating competing constitutional rights.[62]

Few who have studied the American judiciary, state or federal, would characterize judicial independence as a "policy notion." Most have recognized it as a constitutional demand—"an essential bulwark of constitutional government, a constant guardian of the rule of law."[63] Without judicial independence, the constitutionally-enshrined rights which the dissent sought to protect, indeed, all rights and privileges, "would amount to nothing."[64] Thus, the legitimate inquiry should not have been whether a policy notion should "bow before [the Constitution's] restraints,"[65] but rather whether an individual's constitutional right to free speech should be absolute when it has inhibited another equally important constitutional right.

Judge Beam did not stand alone in declining to emphasize the compelling nature of the state interest at stake. Justice Scalia, in writing for the Supreme Court majority, gave only general reference to the significance of the asserted state interest,[66] choosing instead to uniquely reframe the issue. Latching upon the term "impartiality," which he suggested was used interchangeably with "independence,"[67] Justice Scalia was able to engage in a self-

61. *Kelly*, 247 F.3d at 891 (Beam, J., dissenting).

62. In numerous cases, the Supreme Court has balanced competing constitutional rights, and has at times recognized that the First Amendment becomes less absolute when its application inhibits other important constitutional rights. *See, e.g.*, Sheppard v. Maxwell, 384 U.S. 333 (1966); Rideau v. Louisiana, 373 U.S. 723 (1963); Irvin v. Dowd, 366 U.S. 717 (1961). *But see* Chandler v. Florida, 449 U.S. 560 (1981).

63. *White*, 536 U.S. at 804 (Ginsburg, J., dissenting).

64. THE FEDERALIST NO. 78, at 524 (Jacob E. Cooke ed., 1961) (Alexander Hamilton).

65. *Kelly*, 247 F.3d at 892 (Beam, J., dissenting).

66. *See White*, 536 U.S. at 775 (citing the Eighth Circuit's rationale in *Kelly*, 247 F.3d at 867). The Eighth Circuit actually framed the state interest as follows: "The Boards contend that the restrictions are necessary to guarantee the independence of the Minnesota judiciary, which in turn is crucial to preserve the justice of its courts of law and its citizens' faith in those courts." *Kelly*, 247 F.3d at 864. The portion of the Eighth Circuit opinion cited by Justice Scalia characterizes the interests as "[t]he governmental interest in an independent and impartial judiciary" and "in preserving public confidence in that independence and impartiality." *Id.* at 867.

67. *White*, 536 U.S. at 775 n.6. Justice Scalia rephrased the interest because it "appear[ed]" that the Eighth Circuit and the defendants had used the term "independence" as interchangeable with "impartiality." *Id.*

debate over the meaning and application of the word "impartiality,"[68] and then, based upon the definition that he found most likely, to conclude that the announce clause of the Minnesota Code of Judicial Conduct was not narrowly tailored. [69]

While the majority opinion adds little substance to the dialogue on judicial independence, the concurring and dissenting opinions do.[70] Justice Kennedy, for example, took care to caution:

> Nothing in the Court's opinion should be read to cast doubt on the vital importance of [maintaining the integrity of the judiciary].
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> . . . Explicit standards of judicial conduct provide essential guidance for judges in the proper discharge of their duties and the honorable conduct of their office. The . . . bodies . . . that promulgate those standards perform a vital public service."[71]

Ironically, Justice Kennedy had begun this educational dialogue with the American public in 1998, when he and Justice Breyer spoke passionately to the ABA in Philadelphia about the threat that political and financial pressures placed on the independence of the judiciary.[72]

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68. *Id.* at 775–81. Justice Scalia articulated three possible definitions of "impartiality." *Id.* First, he discussed impartiality as the "lack of bias for or against either *party* to the proceeding." *Id.* at 775. Justice Scalia focused on this definition, and instead of the dictionary definition that he cited. *See id.* at 776 (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY 1247 (2d ed. 1950)). As a result, Justice Scalia then concluded that the announce clause was not narrowly tailored to serve the interest of prohibiting bias against or in favor of a party. *Id.* A second definition, impartiality as a "lack of preconception in favor of or against a particular *legal view*," was found not to be a compelling state interest. *Id.* at 777. This was because, in Justice Scalia's view, "[a] judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice." *Id.* Because judges in Minnesota were required to be "'learned in the law,'" the Minnesota Constitution forbade the election "of judges who [are] impartial in the sense of having no views on the law." *Id.* at 778 (citing MINN. CONST. art. VI, § 5). A third definition of impartiality, "open mindedness," was disregarded since, in the majority's opinion, "[it did] not believe the Minnesota Supreme Court adopted the announce clause for that purpose." *Id.*

69. *Id.* at 776.

70. *See id.* at 793 (Kennedy, J., concurring); *id.* at 814–15 (Ginsburg, J., dissenting).

71. *Id.* at 793–94 (Kennedy, J., concurring).

72. *See* Interview by Bill Moyers with Justices Stephen Breyer & Anthony Kennedy, Associate Justices of the Supreme Court of the United States (1999), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/justice/interviews/supremo.html (last visited Jan. 22, 2004) (broadcast by PBS on the program "Frontline" as part of the "Justice for Sale" Series) [hereinafter Frontline Interview]. In the PBS Frontline interview, Justice Kennedy commented:

Another valuable dialogue sparked by the *White* decision is the discussion of judicial selection methods. Like Judge Beam, Justice Scalia and the majority placed extreme significance on the fact that Minnesota had chosen to elect its judges.[73] Justice O'Connor concurred with the majority but wrote separately "to express [her] concerns about judicial elections generally."[74] Her separate opinion may be summarized as telling Minnesota—"*you get what you ask for*":

> Minnesota has chosen to select its judges through contested popular elections instead of through an appointment system or a combined appointment and retention election system . . . . In doing so the State has voluntarily taken on the risks to judicial bias described above. . . . If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.[75]

While they joined on the decision to invalidate the ethical provision at issue, Justice Kennedy and Justice O'Connor parted company on the subject of judicial elections:

> [W]e should refrain from criticism of the State's choice to use open elections to select those persons most likely to achieve judicial excellence. States are free to choose this mechanism . . . . By condemning judicial elections across the board, we implicitly condemn countless elected state judges and without warrant. . . . We should not, even by inadvertence, "impute to judges a lack of firmness, wisdom, or honor."[76]

> We have a special point of view to present. The judiciary as an institution is faced with a new threat. Democracy is something that you must learn each generation. It has to be taught. And we must have a national civics lesson about judicial independence . . . .
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> . . . There must be both the perception and the reality that in defending these values [of the rule of law, equal treatment, and enduring human rights], the judge is not affected by improper influences or improper restraints. . . .
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> . . . [Y]ou must have a judge who is detached, who is independent, who is fair, who is committed only to those principles, and not public pressures of other sort.

Id. Justice Breyer added, "Independence doesn't mean you decide the way you want. Independence means you decide according to the law and the facts." *Id.*

73. *See White*, 536 U.S. at 768; *Kelly*, 247 F.3d at 886–891 (Beam, J., dissenting).

74. *White*, 536 U.S. at 788 (O'Connor, J., concurring). Judge Beam similarly seemed to labor under the misconception that judicial retention elections remove judges from the difficulties occasioned by elections: "[Minnesota's] citizens . . . have rejected appointment and retention systems that would have curtailed or eliminated popular control." *Kelly*, 247 F.3d at 890 (Beam, J., dissenting).

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

76. *Id.* at 795–96 (Kennedy, J., concurring) (quoting Bridges v. California, 314 U.S.

III. THE "BAD": PERSPECTIVES ON THE MAJORITY OPINION

While opening dialogue and beginning a much-needed education about the American judicial process is beneficial, some of the discussion in the *White* opinions, and some reactions to it, create undesirable, harmful impressions and expectations. This section of the article will discuss some of those undesirable effects.

Much of what I am characterizing as "undesirable or negative qualities,"[77] of the opinion itself arise out of a refusal to view judges as different from other political candidates. *Harvard Law Review* has referred to this approach by the Court as anti-functionalism.[78] In effect, the majority opinion takes an absolute textual approach to the First Amendment, setting aside completely the context in which the speech at issue occurs.[79] The dis-

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252, 273 (1941)). Justice Kennedy was perhaps less complimentary of the election process in his Frontline interview. There, he commented that "when you carry over the political dynamic to the election, fair takes on a different meaning. In the political context fair means somebody that will vote for the unions or for the business. It can't mean that in the judicial context or we're in real trouble." Frontline Interview, *supra* note 72. When asked whether "this is a critical moment for examining judicial elections," Justice Kennedy returned to his education theme:

> I do sense that there is a growing misunderstanding, a growing lack of comprehension, of the necessity of independent judges. . . . There must be a rededication to the constitution in every generation. And every generation faces a different challenge. . . . Money in elections presents us with a tremendous challenge, a tremendous problem and we are remiss if we don't at once address it and correct it.

Id.

77. *See supra* note 50.

78. *The Supreme Court: Leading Cases*, 116 HARV. L. REV. 200, 272–74 (2002). The article predicts "that there is a majority for an antifunctionalist approach to free speech analysis on the Court, which could bode well for challengers to recently enacted campaign finance regulations." *Id.* at 272. At least eight of the briefs filed with the Court in pending cases challenging the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2 U.S.C.), cite *White* as favoring their position that the Act is an unconstitutional abridgement of free speech. The briefs filed in these cases are available at http://conlaw.usatoday.findlaw.com/supreme_court/docket/2003/september.html (last visited Jan. 22, 2004). *See* Brief of Amici Curiae The Cato Institute and the Institute for Justice at 17–18, McConnell v. Fed. Election Comm'n (No. 02–1674); Brief of AFL-CIO Appellants/Cross-Appellees at 15, AFL-CIO v. Fed. Election Comm'n (No. 02–1755); Brief for Appellants The National Rifle Association, et al. at 24–25, Nat'l Rifle Ass'n v. Fed. Election Comm'n (No. 02–1675); Brief of Plaintiffs-Appellants/Cross-Appellees National Right to Life Committee, et al. at 41–42, Nat'l Right to Life Comm., Inc., et al. v. Fed. Election Comm'n (No. 02–1733); Brief of the Political Parties at 96, Republican Nat'l Comm. v. Fed. Election Comm'n (Nos. 02–1727, 02–1733, 02–1753); Brief for Appellants/Cross-Appellees Senator Mitch McConnell, et al. at 35–36, 39, McConnell v. Fed. Election Comm'n (No. 02–1674).

79. *See White*, 536 U.S. at 770–82.

senter's protestations that judicial elections are unique and that "judges perform a function fundamentally different from that of the people's elected representatives"[80] was met consistently with one response: this is an election, elections involve political speech, and political speech may not be restrained.[81]

In numerous previous cases, the Court has recognized that the First Amendment is not absolute. Its guarantees must give way to, for example, such significant objectives as the protection of a democratic form of government and such insignificant ones as governmental efficiency and orderly management of personnel. In these cases, the Court by necessity looked beyond the absolute terms of the First Amendment to the setting and context in which the speech was rendered in order to determine whether restrictions on speech were valid.[82] Similarly, the Court has frequently recognized that the context in which the speech arose was an important consideration in the balance,[83] and has therefore accepted, without question, that the government interest in restricting speech was affected by the nature of the speaker[84] and the nature of the speech.[85]

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80. *Id.* at 803 (Ginsburg, J., dissenting).

81. *See id.* at 783, 788.

82. Thus, for example, in *United Public Workers of America v. Mitchell*, 330 U.S. 75 (1947), in affirming a restriction on governmental employees free speech and association rights, the Court recognized that it was required to "balance the extent of the guarantees of freedom against a congressional enactment to protect a democratic society against the supposed evil of political partisanship." *Id.* at 96. "The essential rights of the First Amendment in some instances are subject to the elemental need for order without which the guarantees of civil rights to others would be a mockery." *Id.* at 95. Similarly, in *United States Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973), the Court reaffirmed the *Mitchell* holding in a related context, emphasizing that the restrictions of the Hatch Act at issue were essential to serving the "great end of Government—the impartial execution of the laws." *Id.* at 565. The Court noted that forbidding federal employees from engaging in partisan political participation would not only keep them from exerting actual political influence, but would also remove the appearance of political influence. *Id.* Both were viewed as necessary to assure that "confidence in the system of representative Government is not to be eroded to a disastrous extent." *Id.*

83. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) ("The problem . . . is to arrive at a balance between the interests of the [citizen and the government.]").

84. *See id.* (stating that the states interests in regulating employee speech "differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general").

85. *See* Connick v. Myers, 461 U.S. 138, 148–49 (1983) (examining whether Myers's speech "[fell] under the rubric of matters of 'public concern'").

A. *Confusing the Public About the Role of the Judge*

Treating judges just like other elected officials, because some states choose to allow the public a say-so in who their judges are, will further confuse the public about the appropriate role of the state court judge. In a number of ways the *White* majority will further this confusion and misunderstanding.

1. "Legally Trained" Means "Legally Predisposed"

In its discussion of whether the announce clause could be upheld because it served to preserve the impartiality and the appearance of impartiality of the state judiciary, the majority outlined three possible definitions of "impartiality."[86] The second definition discussed was the "lack of preconception in favor of or against a particular *legal view.*"[87] The Court discounted this interest because, in Justice Scalia's view, "[a] judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice."[88] Because judges in Minnesota are required to be "learned in the law,"[89] he concluded, the Minnesota Constitution forbids the election of a judge "who [is] impartial in the sense of having no views on the law."[90]

The majority asserts that statements in election campaigns are "an infinitesimal portion of the public commitments to legal positions that judges . . . undertake" and that "[b]efore they arrive on the bench . . . judges have often committed themselves on legal issues that they must later rule upon."[91] The requisite syllogism seems indefensible: *You must be a lawyer to be a judge in Minnesota. If you are a lawyer you have developed legal views. Since you have developed legal views as a lawyer, those views are preconceived, will follow you to the bench, and will render you biased toward those views, ultimately disqualifying you from being a judge.*

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86. *See supra* note 68.
87. *White*, 536 U.S. at 777.
88. *Id.*
89. MINN. CONST. art. VI, § 5.
90. *White*, 536 U.S. at 778.
91. *Id.* at 779.

The unjustified jump—that practicing law and developing views makes you biased toward those views—misconstrues the role of judges and lawyers.

This position suggests a legal profession far different from the one in which most of us have practiced. The fact that a lawyer has argued a legal position for a client has never been accepted as suggesting that the lawyer is personally committed to that view. Few lawyers would survive financially if they represented only those clients whose legal views they shared. The assertion that one who represents clients in a certain area of the law becomes predisposed to the legal views held by those clients is a false premise. Its inaccuracy is compounded by the additional false premise that lawyers who become judges act upon the legal views of their previous clients, a premise that is at complete odds with the ideal of the American justice system.

2. Legal Rulings, Scholarly Writings, and Continuing Judicial Education Constitute a Predisposition

A similar befuddlement is presented by the majority's contention that because incumbent judges who rule, teach, and write have expressed viewpoints, the nonincumbent judges have a right to do likewise.[92] The majority compares election statements to statements made in opinions or holdings in order to support its conclusion that the announce clause is underinclusive to meet its claimed purpose.[93] In the majority's view, "judges have often committed themselves on legal issues that they must later rule upon"[94] either by "confronting a legal issue on which [they have] expressed an opinion while on the bench,"[95] or by "stat[ing] their

92. *See id.*

93. *See id.* at 779–80.

94. *Id.* at 779.

95. *Id.* The majority seems to overemphasize the public's ability and desire to access prior judicial decisions. Most of the public garners their information about court decisions from the media, not from reading a judge's opinion or from attending court and hearing the judge's ruling. *See, e.g.*, ELLIOT E. SLOTNICK & JENNIFER A. SEGAL, TELEVISION NEWS AND THE SUPREME COURT: ALL THE NEWS THAT'S FIT TO AIR? 7–9 (1998) (suggesting that the public gains most of its knowledge about the Supreme Court through the media); Lawrence H. Averill, Jr., *Observations on the Wyoming Experience with Merit Selection of Judges: A Model for Arkansas*, 17 U. ARK. LITTLE ROCK L. REV. 281, 297–98 (1994) (noting that in judicial elections, most voters make decisions based on meritless considerations including the recommendations of the media). While stressing the number of decisions

views . . . in classes that they conduct, and in books and speeches."[96]

This analysis presents an unrealistic view of the judiciary and of the public. When a judge issues an opinion or a holding in a case, the judge is not stating an extracontextual, generalized legal view. Instead, the judge is saying: "Based on facts, proved by the applicable legal standard, in accordance with the requisite rules of evidence and procedure, and based on the application of this law, I find as follows . . . ."[97] That hardly binds the judge to find identically on another occasion, based on different facts with different evidence or a different applicable statute. If such were the case, judges would be nonessential.

Suggesting that judges become predisposed to a viewpoint because of a prior opinion misconstrues the function of most judges, whose duty it is to apply the law to the facts, or to guide the jury in doing so.[98] It also suggests that the judge makes decisions in a vacuum, unmoved by counsel's argument and unpersuaded by credible or incredible witnesses.

Perhaps those who sit on the highest court of the land establish preconceived, predicable viewpoints as a result of ruling on a case, but that is untrue of most judges, whose cases do not involve construing the constitutionality of statutes or making national policy.[99] A judicial opinion is not "one size fits all." It is an expres-

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that judges make, the Court ignores the fact that most of the public cannot readily access the proportionately small number of those decisions that are written and probably have little interest or motivation to do so if they could.

96. *White*, 536 U.S. at 779. Justice Scalia uses as examples Justice Black, who he asserts ruled upon "the constitutionality of the Fair Labor Standards Act, even though as a Senator he had been one of its principal authors," and Chief Justice Hughes, who had criticized a case in a book that he later overruled. *Id.* (citing Laird v. Tatum, 409 U.S. 824, 831–33 (1972)).

97. In her dissent, Justice Ginsburg distinguished between generalized legal views and a judge's opinion in a particular case. *See id.* at 809–11 (Ginsburg, J., dissenting). A judicial candidate's generalized statement about his or her legal opinion is equivalent to "declar[ing] how [he or she] would decide an issue, without regard to the particular context in which it is presented, *sans* briefs, oral argument, and, as to an appellate bench, the benefit of one's colleagues' analyses." *Id.* at 811 (Ginsburg, J., dissenting).

98. *See* Stephen N. Subrin, *Uniformity in Procedural Rules and the Attributes of a Sound Procedural System: The Case for Presumptive Limits*, 49 ALA. L. REV. 79, 87 (1997) (noting that, traditionally, "judges were to participate in the system by applying law at motions sessions, supervising trials before juries, instructing jurors, or applying law to fact themselves in equity and jury-waived law suits").

99. The vast majority of judges in the United States are judges in state courts of general or limited jurisdiction, and thus do not have the opportunities to make policy or make

sion about the application of the law to a given set of facts at a particular time. It is not, and should not be, read as either an expression of the judge's personal viewpoint (which is, of course, completely irrelevant) or an expression of a static preconception applicable to all sets of facts.

Similarly, the notion that a judge who teaches or speaks has expressed viewpoints in their teaching and writing that are tantamount to viewpoints expressed by political candidates during campaigns is inaccurate. Most judges who teach and write use those opportunities to educate, not to pontificate personal viewpoints or predispositions. Judges who speak and teach are not offering their comments for the purpose of soliciting votes. If a judge offers a seminar at which he or she discusses the nuances of the hearsay rule, the audience hardly expects that the judge has made a statement about how he or she will rule on the next hearsay objection raised in court. But, when a judge, during a campaign rally, tells a group of citizens that he or she thinks that the state's three-strike law is constitutional, they expect, perhaps rightfully so, that when the issue presents itself, that judge will rule to uphold the three-strike law.

3. Because They Are Elected, Make Law, and Devise Policy, Judges Are the Same as Other Elected Officials

Perhaps one of the most harmful aspects of the majority opinion is its comparison of judges with other elected officials, who we are reminded must discuss issues so that the electorate may cast their vote in an informed manner.[100] While in many states all of these office holders are selected by election,[101] the similarities end there.

The majority denied that it is making this comparison—"we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legis-

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rulings on the constitutionality of statutes. *See* DAVID B. ROTTMAN ET AL., U.S. DEP'T OF JUSTICE, STATE COURT ORGANIZATION 1998, at 13–18, tbl. 2, 3 (2000).

100. *See White*, 536 U.S. at 781–82.

101. *See* Katherine A. Moerke, *Must More Speech Be the Solution to Harmful Speech? Judicial Elections After* Republican Party of Minnesota v. White, 48 S.D. L. REV. 262, 264 (2003) (noting that twenty-one states initially select all of their judges by popular election and a total of thirty-one states initially select at least some of their judges by popular election).

lative office"[102]—but then hastily adds that "Justice Ginsburg greatly exaggerates the difference between judicial and legislative elections."[103]

Chiding Justice Ginsburg, who distinguished judges from representative officials who "act at [the] behest" of those who elect them,[104] the majority asserted:

> This complete separation of the judiciary from the enterprise of "representative government" might have some truth in those countries where judges neither make law themselves nor set aside the laws enacted by the legislature. It is not a true picture of the American system. Not only do state-court judges possess the power to "make" common law, but they have the immense power to shape the States' constitutions as well.[105]

The assertion that judges "make" law is terribly misleading. The overwhelming majority of state court judges do not make law, and they likewise are rarely called upon to set aside laws.[106] Discussing state court judges as lawmakers and policy formulators misinforms the public, because it fails to acknowledge that the vast majority of state court judges neither make law nor policy, but follow precedent and analyze legislative and executive directives as their oath of office and ethical precepts require them to do.

The public does not have a full appreciation of the differences between trial and appellate courts, and between state and federal judges.[107] Melding them all into a homogenous group with similar "powers," as the majority does, will further the confusion. As is often true, examples speak louder than abstract narration. In my

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102. *White*, 536 U.S. at 783.

103. *Id.* at 784.

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

105. *Id.* at 784.

106. *See* Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 18–19 (1995) (asserting that statutes are now the primary source of law and that "statutory interpretation is likely the principal task engaged in by state courts"); Ellen Ash Peters, *Common Law Judging in a Statutory World: An Address*, 43 U. PITT. L. REV. 995, 997 (1982) (noting that the eruption of legislative lawmaking "casts a considerable shadow on innovation in common law growth and development"). Regarding the infrequency with which state courts resolve issues under state constitutions, see James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 780–81 (1991).

107. *See* ABA DIV. FOR PUB. EDUC., GUIDE TO EDUCATING THE PUBLIC ABOUT THE COURTS 12 (1994) ("The very structure of the court system—federal vs. state, trial vs. appellate, criminal vs. civil—is a mystery to many people.").

home state, several death sentences have been set aside by a federal district judge as a result of petitions for writs of habeas corpus. Some of the decisions have resulted in new trials being granted decades after the crime, which has prompted public anger. In one of my campaigns, which unfortunately followed close on the heels of one such grant of habeas corpus (and remand for a new trial), many voters demanded to know why I had "set a killer free." My efforts to explain that I was not "that judge" frequently went unheard, even when I pointed out that the case in question had been tried before I completed elementary school.

B. *Creating Unjustified and Undesirable Expectations*

The *White* majority opinion created an expectation that candidates for judicial office perhaps should discuss and state their opinions on contested legal and political issues.[108] While the decision certainly does not dictate candidate conduct, its tenor suggests that the public should expect that judges will discuss their views, and that these discussions should be specific.

In Minnesota, candidates for judicial office could discuss their job qualifications, their work habits, their educational background, their prior work experience, and their character.[109] They could comment on court efficiency, administrative duties, and other matters of judicial concern; such as cameras in the courtroom, caseload management, and ethnic and gender fairness.[110] Like most jurisdictions in which judges are either popularly elected or selected for retention, these topics were believed to give the electorate the information necessary to select judges.[111]

The *White* majority was highly critical of the list of questions which judicial candidates could answer in Minnesota. Despite the recognition that candidates could comment not only on their personal qualifications, but also could generally discuss case law and

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108. *See White*, 536 U.S. at 781–82.

109. *Id.* at 774.

110. *Id.*

111. The ABA has created a list of performance guidelines for judges that sets forth some traits believed to be of importance in judicial selection and retention. *See* ABA SPECIAL COMM. ON EVALUATION OF JUDICIAL PERFORMANCE, GUIDELINES FOR THE EVALUATION OF JUDICIAL PERFORMANCE, at ix–xiv (1985). For a discussion of how the use of these factors can assure an independent and accountable judiciary, see *Judging Judges*, *supra* note 4, at 1067–76.

judicial philosophy, the majority commented that "'general' discussions of case law and judicial philosophy turns out to be of little help in an election campaign."[112] In the majority's opinion, the public is entitled to specific opinions from judicial candidates and to examples of how their philosophy would likely affect their decisions:

> [M]ost . . . philosophical generalities[] [have] little meaningful content for the electorate unless [they are] exemplified by application to a particular issue of construction likely to come before a court—for example, whether a particular statute runs afoul of any provision of the Constitution. . . . Without such application to real-life issues, all candidates can claim [a particular judicial philosophy] with equal (and unhelpful) plausibility.[113]

Suggesting that judicial candidates should discuss their philosophy in context, by offering specific examples of how they might rule, confuses the role of the judge. The vast majority of judges who are selected by the electorate are required to apply well-settled law to various facts that are proved by the parties to the court.[114] A judge cannot, in advance of hearing the facts, explain how he or she will rule on a case.[115]

Abstract narration on this point cannot accomplish what anecdote can. On three occasions I sought judicial office in the state of Tennessee. The first position I sought was elected, albeit in a nonpartisan contest.[116] My campaign slogan was "The Qualified

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112. *White*, 536 U.S. at 773.

113. *Id.*

114. *See supra* note 99.

115. Here, it seems that Justice Stevens's observations are particularly poignant. If a candidate for judicial office campaigns based upon specific explanations of his or her judicial philosophy, as suggested by the *White* majority, the candidate is either: (1) stating a position that the candidate intends to follow for the purpose of securing votes; or (2) stating a position that the candidate does not intend to follow for the purpose of deceiving voters, while still luring the votes. The candidate who states a position, intending to follow that position regardless of the facts, does not have the basic qualifications for judicial office; the candidate who states a position in order to convince the voters to believe he or she will always rule in accord with that position does not have the requisite character for judicial office. *See White*, 536 U.S. at 800–03 (Stevens, J., dissenting).

116. While Tennessee had no law disallowing partisan judicial elections in the trial courts at the time, the tradition in my location, the First Judicial District, was for judges to run nonpartisan. Despite this tradition, my opponent sought the support and endorsement of the dominant political party. "Officially" he was unsuccessful, but the party allowed him to speak at its gatherings and attempted to bar me. Moreover, his campaign was largely orchestrated by the popular local Congressman, the ranking member of the party. In subsequent years, others would follow suit and actually seek political nomination

Candidate"—a point I emphasized by detailing my educational and professional background, and by counting the number of cases in which I had represented parties in local courts in the previous five years and the number of different judges before whom I had appeared. My opponent, blessed with two attractive children and a large family van, ran on an altogether different platform. He was the "Traditional Family Values" candidate.[117]

As I traveled a mostly rural 1200 mile district asking people to vote for me, they often asked what I "believed in." A student of ethics even then, I committed myself to hard work, fairness, and the faithful and impartial discharge of my duties. When pressed, I would tell them about my background—my working class family and being the first college graduate. Sometimes the voter would press: "Do you believe in abortion? Should a woman always get custody of the children? What do you think about prayer in the schools?" What occurred to me most often when those questions were asked was the obvious need to explain the function of the job I sought. Much of my campaign time was spent, one on one, or in small civic groups, explaining that the job of a judge was to apply the law as written by the legislature and the Congress. My personal views were no more significant than were theirs on the issue of for whom they should vote. They should select a judge with integrity and patience, who would be fair, and who was reasonably intelligent—not one who shared their political views. More than once I explained to a potential supporter that if we discussed their views and I committed to rule in accord with them, that I would then be required by law to recuse myself should their case actually come before me. In my opinion, by and large, the good people of east Tennessee embraced the importance of what I was telling them.

Six years later I faced a much different situation. I was seeking retention as an Associate Justice of the Tennessee Supreme Court.[118] A controversial decision by our court[119] had prompted a

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via a primary election. In any event, in 1990, when I ran for Circuit Judge in Tennessee's First Judicial District, the "taste" of a partisan judicial race was still too rank.

117. The absence of children in my life and the audacity I displayed by retaining my father's last name, rather than taking my husband's, seemed to be the primary planks of this platform.

118. My point does not require a full description or discussion of my failure to be retained as a justice in Tennessee. Others have written about it in detail—some, even accurately. *See, e.g.*, Anthony Champagne, *Interest Groups and Judicial Elections*, 34 LOY. L.A. L. REV. 1391, 1400–01 (2001); Stephen B. Bright, *Political Attacks on the Judiciary: Can*

landslide of opposition by special interest groups, police officers, and victims' rights associations.[120] The opponent was not an individual, or even a declared group, but a concept—"tough on crime, soft on capital punishment."[121] The case that prompted the outcry remained pending, on a motion to rehear, until after my defeat, triggering the application of another ethics rule not at issue in *White*.[122]

Many sought my comments on the case; most, however, even if framing their question ostensibly in terms of the decision, sought my commitment to the death penalty. No conscious adult faced with an identical situation, asked the same questions by the same questioners with the same demeanor and tone of voice, could have concluded anything but that the desire was to gain a commitment to future universal enforcement of the death penalty. And what about those who were not asking, but would have heard any response I gave. They, too, would have heard a commitment to uphold the death penalty, a commitment made without benefit of the first shred of evidence.

I chose not to comment, believing my ethical duties and oath of office more important than the retention of my job. Had I commented, even with somewhat ambiguous words that I deemed noncommittal, the audience that heard me would have had ample ammunition, in my opinion, to attempt to confine me to what they had interpreted as a commitment. Having experienced this reality, I have serious doubts that any view announced by a judicial candidate will in reality be understood as anything but a promise of future conduct.

Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?, 72 N.Y.U. L. REV. 308, 310–15 (1997).

119. State v. Odom, 928 S.W.2d 18 (Tenn. 1996).

120. *See* Champagne, *supra* note 118, at 1401.

121. Professor Schotland is correct: "The leading troublemaking campaign pitch by judicial candidates is '[t]ough on crime.' And we have it in all forms. We have it in not all states, but an awful lot." Symposium, *Judicial Elections and Campaign Finance Reform*, 33 U. TOL. L. REV. 335, 350 (2002).

122. The rule in effect in Tennessee at the time prohibited a judge from commenting on a pending or impending case. The rule has since been amended by the supreme court to allow comment when it is not likely to affect the outcome of the case. *See* TENN. CODE OF JUDICIAL CONDUCT Canon 3(B)(9) (2003). This new provision is in accord with the 1990 Model Code of Judicial Conduct parallel provision found in Canon 3(B)(9). *See* MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(9) (1990). Some judges have already asserted the unconstitutionality of these "comment provisions" as a basis for defending charges of judicial misconduct. *See generally* Cynthia Gray, *Disqualification Based on Comments to the Media in a Pending Case*, JUD. CONDUCT REP., Summer 2001, at 1.

IV. THE "UGLY": ATTEMPTS TO EXPAND *WHITE*

After *White,* judges and judicial candidates in civil actions and in disciplinary actions have argued for the extension of *White*'s rationale to other parts of the Model Code of Judicial Conduct and to other state ethics rules.[123] Some of these arguments have been successful, resulting in the invalidation of other important ethics provisions. Some states, rather than await a feared onslaught of litigation, have significantly modified their judicial ethics rules to allow judges to engage in various types of political conduct.[124] Even the ABA, predicting that other parts of the Model Code of Judicial Conduct would not withstand First Amendment scrutiny, proposed a change in the Code at its annual meeting in August 2003.[125] This section discusses the issues raised by those urging an expansive reading and application of *White*, after a brief introduction to the "at-risk" ethical rules. At-risk ethics rules include those that restrict speech and those that restrict campaign conduct, including campaign fundraising.

A. *Ethics Rules Affecting Judicial Speech*

1. Announcement Clause

The ethics rule invalidated by the Supreme Court in *White*, a part of the Minnesota Code of Judicial Conduct, was actually a

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123. *See infra* notes 209–41 and accompanying text.

124. *See generally* Eileen Gallagher, *Judicial Ethics and the First Amendment: A Survey of States*, JUDGES' J., Spring 2003, at 26.

125. *See id.* at 27–28. The amendments, which were approved by the House of Delegates in August 2003, included changes to several canons. *See* ABA, MODEL CODE OF JUDICIAL CONDUCT AMENDMENTS 2–5 (2003), *available at* http://www.abanet.org/judind/judicialethics/amendmentsrevision.pdf (last visited Jan. 30, 2004). The premises behind the changes were that restrictions on judicial speech would survive a constitutional attack if: (1) a definition of impartiality was added to the Code; (2) each restriction was narrowly drawn to further a compelling state interest; and (3) the restrictions applied to all of the judge's official duties, in order to avoid a claim on underinclusiveness. *Id.* at 10. In addition to these modifications, the Standing Committee on Judicial Independence has undertaken a comprehensive review of the 1990 Model Code of Judicial Conduct, to be completed and submitted for possible adoption by early 2005. *See* Press Release, American Bar Association, Joint ABA Commission to Evaluate Model Code of Judicial Conduct (Sept. 23, 2003), *available at* http://www.abanet.org/media/sep03/092303.html (last visited Jan. 30, 2004). President Dennis Archer described the undertaking as being necessitated by the "growing pressures [faced by judges] from interest groups participating in the judicial election process and initiatives in Congress that would restrict judicial independence." *Id.*

part of the 1972 Model Code of Judicial Conduct.[126] Judges in Minnesota had been subject to ethical codes for at least a half of a century.[127] The Minnesota judges originally adopted the 1924 version of the ABA Canons of Judicial Ethics, but in 1974 the Minnesota Supreme Court adopted a more modern version based largely on the 1972 Model Code of Judicial Conduct.[128] The provisions of the Minnesota Judicial Code were altered on numerous occasions, but the provision regarding a candidate's announcement of his or her views remained as written in the 1972 ABA Code.[129]

The 1972 Model Code of Judicial Conduct contains seven canons. Canon 7 states that "a judge should refrain from political activity inappropriate to his judicial office."[130] Subsection (B)(1)(c) of Canon 7 provides the following:

> (1) A candidate, including an incumbent judge, for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system election . . .
>
> . . . .
>
> (c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact.[131]

When the ABA proposed changes to the ABA Model Code of Judicial Conduct in 1990,[132] it retained some of Canon 7, but not

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126. Canon 5(A)(3)(d)(i) of the Minnesota Code of Judicial Conduct provides that "[a] candidate for a judicial office, including an incumbent judge . . . shall not . . . announce his or her views on disputed legal or political issues." MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (West Supp. 2003). This provision is based on Canon 7(B) of the ABA 1972 Model Code of Judicial Conduct. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(C) (1972) (repealed 1990).

127. *See* Republican Party of Minn. v. Kelly, 247 F.3d 854, 857 (8th Cir. 2001).

128. *Id.*

129. *See id.* at 857–58.

130. MODEL CODE OF JUDICIAL CONDUCT Canon 7 (1972) (repealed 1990).

131. *Id.* Canon 7(B)(1)(c).

132. A comprehensive review of the 1972 Model Code of Judicial Conduct was undertaken in part because of "a 1986 survey by the Committee of authorities in the field of judicial ethics." LISA L. MILORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE 3 (1992). In revising the Code, the Subcommittee on the Code of Judicial Conduct sought input from state judicial conduct organizations, the ABA Judicial Administration Division Conference, the American Judicature Society, and other groups and organizations. *Id.* at 4–5. It also reviewed judicial conduct literature and opinions, and submitted nearly 5,000 copies of a discussion draft to various groups and individuals. *Id.* at 5. Ultimately, the Subcom-

all of it.[133] The revised provisions, relocated in Canon 5A(3)(d)(i) and (ii) provide:

> (3) A candidate for a judicial office
>
> . . . .
>
> (d) shall not:
>
> (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;
>
> (ii) 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;[134]
>
> . . . .

The Commentary[135] explains that "a candidate should emphasize in any public statement the candidate's duty to uphold the law regardless of his or her personal views. . . . Section 5A(3)(d) does not prohibit a candidate from making pledges or promises respecting improvements in court administration."[136]

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mittee presented the proposal to the ABA House of Delegates in December 1989. *Id.* Following deferral and amendments, the proposal was resubmitted and adopted, after debate, on August 7, 1990. *Id.* at 5–6.

133. Lisa Milord's notes on the revised Canon 5 state that "[t]his part of the Code has seen perhaps more change than any other, due to the continuing evolution of the judicial selection process." *Id.* at 44. Further, it is noted that:

> The 1990 Code Committee decided to revise Canon 7 because it failed to provide adequate guidance regarding the political conduct of judges and candidates, both of whom are subject to varying methods of judicial selection in the jurisdictions. Reinforcing the Committee's decision was the observation by a number of commentators that Canon 7 was less widely adopted than the other Canons of the 1972 Code, and that even where adopted it was often ignored.
>
> The challenge . . . was to devise a Canon that addressed adequately the issues unique to the various selection methods, without diminishing the force of the rules that ought to be universally applicable.

Id. at 46.

134. MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i)–(ii) (1990).

135. The 1972 Code included broad statements of ethical standards, referred to as Canons, and specific rules set forth in sections under each Canon followed by commentary. The Preface to the 1972 Code noted that "[t]he canons and text establish mandatory standards unless otherwise indicated." MODEL CODE OF JUDICIAL CONDUCT Preface (1972) (repealed 1990). While the 1990 Model Code of Judicial Conduct retained this format, the Subcommittee took note of the suggestion "that a judicious expansion of the Commentary would be helpful . . . so long as the Commentary was limited in function to explaining the meaning of the text and illustrating its application." MILORD, *supra* note 132, at 7. Thus, a Preamble was added to the 1990 Model Code to, among other things, "describe the relationship between text and Commentary." *Id.* That Preamble refers to the Canons and rules as "authoritative" and limits the purpose of the Commentary following each section to "provid[ing] guidance," not stating "additional rules." MODEL CODE OF JUDICIAL CONDUCT Preamble (1990).

136. MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d) cmt. (1990).

In explaining what it called the "substantial revision" of this Canon,[137] Lisa Milord noted that "[t]he Committee believed its revised rule to be more in line with constitutional guarantees of free speech, while preventing the harm that can come from statements damaging the appearance of judicial integrity and impartiality."[138] The 1990 provision removes the prohibition against announcing political or legal views (the "announce" clause), but retains the prohibition against making pledges and promises of conduct in office (the "pledges and promises" clause).[139] In place of the announce clause, the 1990 Model Code adds a new prohibition against "mak[ing] statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court" (the "commitment" clause).[140]

The Minnesota Supreme Court had been urged to follow the ABA's lead and to replace its announce clause with a commitment clause, but had declined to do so.[141] Nonetheless, the defendants in the *White* case,[142] and the two district courts that ruled on the

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137. MILORD, *supra* note 132, at 49.

138. *Id.* at 50.

139. *Compare* MODEL CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(c) (1972), *with* MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d) (1990).

140. MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (1990). The Committee originally proposed a "prohibition against 'stat[ing] personal views on issues thay [sic] may come before the court,'" but replaced that version with the "commitment" prohibition. MILORD, *supra* note 132, at 50 (alteration in original).

141. Joint Appendix, *supra* note 51, at 19a. In its "Determination that Discipline Is Not Warranted" issued to Gregory F. Wersal on June 13, 1996, the Office of Lawyers Professional Responsibility noted that the Minnesota Supreme Court had been asked to adopt the 1990 version by an Advisory Committee who studied the 1990 Model Code of Judicial Conduct and made recommendations to the state supreme court. *Id.* Evidently, other significant groups in Minnesota recommended against the adoption. *See* Republican Party of Minn. v. Kelly, 247 F.3d 880, 854 (8th Cir. 2001) (noting "that the Minnesota Bar Association, District Judges Association, and the Conference of Chief Judges recently recommended against the adoption of the less-restrictive 1990 ABA commitment canon because of concerns that liberalizing Canon 5's speech restrictions would politicize judicial elections").

142. The defendants included the directors of the Minnesota Board of Judicial Standards, the Minnesota Lawyers Professional Responsibility Board, and the Minnesota Office of Lawyers Professional Responsibility. The defendants had committed themselves to this interpretation in advance of the legal action. *See id.* at 881.

During his 1996 bid for an associate justice position, Wersal had, according to his sworn statement, "attended numerous gatherings of the Republican Party of Minnesota and its Affiliated Associations," "distributed campaign literature at gatherings of the Republican Party of Minnesota and its Affiliated Associations," "spoke at numerous gatherings of the Republican Party of Minnesota and its Affiliated Associations," and "sought endorsements from the Republican Party of Minnesota and its Affiliated Associations." Affidavit of Gregory F. Wersal (filed Feb. 27, 1998), Joint Appendix, *supra* note 51, at 4a. As a result, an

matter before the Supreme Court of the United States, construed the announce clause as if it were synonymous with the commitment clause.[143]

Counsel for the defendants struggled during oral argument to force the Supreme Court to adopt the narrowed construction of the announce clause, which would in effect have allowed the Court to rule upon the constitutionality of the commitment

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ethics complaint was filed against Wersal charging him with inappropriate personal campaign activities, including attendance at party gatherings and seeking party endorsements. Exhibit C to Affidavit of Gregory F. Wersal, Joint Appendix, *supra* note 51, at 12a–15a. In addition, the complainant stated that "I have not commented on Mr. Wersal's addressing of issues which may come before the Court to which he seeks election, but I feel those are inappropriate as well." *Id.* at 14a. According to Wersal, he withdrew from the race for associate justice "as a result of the Complaint filed . . . and the risk that further Complaints would be filed . . . thereby jeopardiz[ing]" his career. Joint Appendix, *supra* note 51, at 4a–5a. Ultimately, the Office of Lawyers Professional Responsibility for the State of Minnesota determined that discipline was not warranted against Wersal, expressing "doubts about the constitutionality of . . . [the announce clause] and its application to [Wersal's] statements." Determination that Discipline is Not Warranted, Joint Appendix, *supra* note 51, at 16a–21a.

In 1998, when Wersal again decided to seek the office of justice, he wrote a letter to the Director of the Office of Lawyers Professional Responsibility expressing his discontent with recent changes in Minnesota's Code of Judicial Conduct. Joint Appendix, *supra* note 51, at 24a–26a. Specifically, Wersal suggested that changes in Canon 5 "prohibit[ing] judicial candidates from speaking to political party organizations and prohibitting their campaign committees from seeking, accepting, or using political party endorsements . . . are unconstitutional violations [of] the candidate's right to free speech and the campaign committee's right to freedom of association." *Id.* at 24a. Wersal directly asked the office whether it "intend[ed] to enforce the prohibition against a judicial candidate announcing his or her views on disputed legal or political issues?" *Id.* at 26a. The Office advised: "[O]ur policy has not changed and unless the speech at issue violates other prohibitions . . . it is our belief that this section is not, as written, constitutionally enforceable." *Id.* at 32a.

143. The district court followed a longstanding rule of statutory construction which requires a reviewing court to construe a challenged statute so as to uphold constitutionality, if possible. Republican Party of Minn. v. Kelly, 63 F. Supp. 2d 967, 985 (D. Minn. 1999) (quoting Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) ("'The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'"). The application of this rule was consistent with the approach generally used by the Minnesota courts, *see id.*, and by the Minnesota Supreme Court's interpretation of the announce clause specifically. *In re* Code of Judicial Conduct, 639 N.W.2d 55, 55 (Minn. 2002) (officially announcing that the Minnesota Supreme Court was adopting the interpretation of the announce clause as construed by the district court and the Eighth Circuit). Thus, the district court interpreted the "announce clause as only prohibiting discussion of a judicial candidate's predisposition to issues likely to come before the court." *Kelly*, 63 F. Supp. 2d at 986. The Eighth Circuit noted that none of the plaintiffs initially challenged this restrictive interpretation, but found the interpretation appropriate nonetheless, citing among other factors "the Judicial Board's endorsement of the narrowed construction." Republican Party of Minn. v. Kelly, 247 F.3d 854, 881 (8th Cir. 2001).

clause.[144] At the beginning of his argument, counsel for the defendants asserted that the prohibition at issue:

> only restrict[ed] judicial candidates from publicly making known how they would decide issues likely to come before them as judges. That is the narrow construction of this Eighth Circuit opinion. That is the construction that's being applied by the two boards that I represent, and that is the construction that has been incorporated in an authoritative order by the Minnesota Supreme Court.[145]

Despite counsel's efforts to force the Court to address the announce clause as narrowly construed into a commitment clause, the justices resisted, grappling instead with numerous hypotheticals urged upon counsel demonstrating the similarities, differences, and ambiguities raised by the two provisions. Despite counsel's attempts to provide clear definitional distinctions, the Court's members, many of whom had years of practice with the socratic method,[146] tossed out hypotheticals that not only confused the distinctions, but that evidently amused the audience:

> *Mr. Gilbert*: [T]he candidate can . . . criticize a prior decision of the Court. . . . What the candidate cannot do is say that, "If I'm elected, I'm going to overturn that decision."
> *Question*: Does that dichotomy make any sense at all?
> . . . .
> *Question*: So a candidate says, "This is the worst decision that's come down since *Dred Scott*, it's a plague on our people, it's an insult to the system, but I'm not telling you how I'll vote."
> (Laughter)
> . . . .
> *Question*: May he also, at the same time as they criticized the decision, say, "I do not believe in stare decisis"?
> *Mr. Gilbert*: Yes . . . .

144. At one point counsel stated the point with unmistakable clarity, "[y]our Honor, our position is, just as the ABA indicated, that our rule is the functional equivalent of a commitment clause." Oral Argument at 38, Republican Party of Minn. v. White, 536 U.S. 765 (2002) (No. 01-521), *available at* 2002 WL 492692 [hereinafter Oral Argument].

145. *Id.* at 27–28.

146. *See* 5 THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 1692, 1716, 1732, 1863, 1879 (Leon Friedman & Fred L. Israel eds., 1997). The Court's current members include five former full-time law professors. Justice John Paul Stevens taught at Northwestern University School of Law and the University of Chicago Law School. *Id.* at 1692. Justice Antonin Scalia taught at the University of Chicago Law School and the University of Virginia School of Law. *Id.* at 1716. Justice Anthony Kennedy taught at the McGeorge School of Law. *Id.* at 1732. Justice Ruth Bader Ginsburg taught at Rutgers University School of Law and Columbia Law School. *Id.* at 1863. Justice Stephen Breyer taught at Harvard Law School. *Id.* at 1879.

> *Question*: Well, then isn't he saying how he's going to rule on the case then?
> *Mr. Gilbert*: Well, Your Honor—it might be, Your Honor. People might be able to imply from it, but it's still—the distinction is—
> *Question*: Might be able to imply that I don't believe in stare decisis and I think this case is wrong.
> (Laughter.)
> *Question*: Pretty clear, I think.[147]

In the end, the majority seemingly rejected the narrowed construction[148] and interpreted the clause based strictly on its literal language.[149] The decision, therefore, strikes only the announce clause as violative of the First Amendment, and does not directly affect either the commitment clause[150] or the separate pledges and promises clause.[151]

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147. Oral Argument, *supra* note 144, at 30–33.

148. *See White*, 536 U.S. at 770.

> Before considering the constitutionality of the announce clause, we must be clear about its meaning. Its text says that a candidate for judicial office shall not "announce his or her views on disputed legal or political issues."
>
> We know that "announc[ing] . . . views" on an issue covers much more than *promising* to decide an issue a particular way. The prohibition extends to the candidate's mere statement of his current position, even if he does not bind himself to maintain that position after election. All the parties agree this is the case, because the Minnesota Code contains a so-called "pledges or promises" clause, which *separately* prohibits judicial candidates from making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office[ ]" . . . .

Id. (citations omitted). The source of the majority's claim that "[a]ll the parties agree" with this proposition is unknown and uncited, and, respectfully, is unlikely given the statements made in oral argument. *Id.*; *see also supra* text accompanying note 69.

149. *See White*, 536 U.S. at 771–72. While the majority acknowledged the limited interpretation of the United States District Court for Minnesota, the Court of Appeals for the Eight Circuit, and the Minnesota Supreme Court, *id.* at 771–72, it discounted them, categorizing them as "not all that they appear to be." *Id.* at 772.

150. Much of the questioning at oral argument, if read as predictive, would indicate a distaste for the commitment clause as well:

> *Question*: . . . I, frankly, am absolutely befuddled by the fact that Minnesota wants its judges elected . . . and then enacts statutory provisions that are intended to prevent the electorate from knowing, even by implication, how these candidates are going to behave when they get on the bench.

Oral Argument, *supra* note 144, at 40–41.

151. The majority specifically noted that the pledges and promises clause is "not challenged" and not addressed. *See White*, 536 U.S. at 770.

2. Commitment Clause and Pledges and Promises Clause

While clearly not addressed by the Supreme Court in *White,* states have reacted differently as they try to predict the effects of *White* on both the commitment clause and the pledges and promises clause in place in most states' judicial ethics codes.[152] The Supreme Court of Florida, close on the heels of *White,* was required to interpret its commitment clause.[153] Judge Patricia Kinsey was charged with twelve ethical violations arising out of her 1998 campaign for the office of County Judge in Escambia County.[154] In defense of her conduct, Kinsey argued that her campaign conduct was protected by the First Amendment.[155]

At issue was the Florida ethics rule that provided that

> [a] candidate for judicial office . . . shall not: (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; [or] (ii) make statements that

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152. Other statement provisions, also susceptible to challenge, include the following: (1) the "comment clause," found in Canon 3(B)(9) of the Model Code of Judicial Conduct; (2) the "public hearing clause" found in Canon 4(C)(1); and (3) the "endorsement and political speeches clause" found in Canon 5(A)(1)(b)–(c). MODEL CODE OF JUDICIAL CONDUCT Canons 3(B)(9), 4(C)(1), 5(A)(1)(b)–(c) (1999).

153. *In re* Kinsey, 842 So. 2d 77 (Fla. 2003).

154. *Id.* at 79–80. Each of the charges are recited, along with the recommendation made by the Judicial Qualifications Commission, in the supreme court's opinion. *Id.* at 80–85. In summary, the charges, which were primarily proven by the introduction of campaign brochures and radio excerpts, alleged that Kinsey either promised or pledged certain conduct or made statements of commitment on certain rulings. *See id.* at 80–84.

Kinsey's campaign was a traditional "law and order" campaign. *See id.* at 87–88. Her campaign materials included a full-page picture of herself with ten uniformed, armed police officers, in which she asked, "Who do these guys count on to back them up?" *Id.* at 87. She asserted, for example, that she was "[t]he [u]nanimous [c]hoice of [l]aw [e]nforcement"; that "police officers expect judges to take their testimony seriously and to help law enforcement by putting criminals where they belong . . . behind bars;" that criminals probably would not want to read her campaign literature; that judges "must support hard-working law enforcement officers by putting criminals behind bars"; that she would "*bend over backward* to ensure that honest, law-abiding citizens [were] not victimized a second time by the legal system that is supposed to protect them;" and that she "[*a*]*bove all else* . . . identifie[d] with the victims of crime." *Id.* at 80–82. Kinsey characterized her opponent as a "liberal," noting that the incumbent judge, a former criminal defense lawyer, was "*still in that defense mode*" and characterized an accused as a "punk." *Id.* at 81–83. Kinsey misrepresented facts about judicial hearings, including claiming that her opponent had failed to revoke bond in a case, thereby showing "a shocking lack of compassion for the victims"; and used the nickname "'Let 'em Go' Green" for the judge. *Id.* at 82–84. Kinsey described "her responsibility as a judge to be 'absolutely a reflection of what the community wants.'" *Id.* at 87 n.6. She was ultimately found guilty or partially guilty of over eight ethical violations. *Id.* at 92.

155. *Id.* at 85.

> commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.[156]

Acknowledging that some of her conduct violated the terms of the rules, Kinsey pushed the Supreme Court of Florida to extend *White's* rationale to the Florida commitment clause and pledges and promises clause.[157]

In addressing her claims, the Supreme Court of Florida put Kinsey's method in context, rather than following the *White* method of analyzing only the text of the rule:

> Judge Kinsey was running on a platform which stressed her allegiance to police officers . . . [including] implicit pledges that if elected to office, [she] would help law enforcement. . . . [She] fostered the distinct impression that she harbored a prosecutor's bias and police officers could expect more favorable treatment from her . . . . She also made pledges to victims of crime . . . thus giving the appearance that she was already committed to according them more favorable treatment than other parties appearing before her. . . . [I]n the campaign literature at issue Judge Kinsey pledged her support and promised favorable treatment for certain *parties and witnesses* who would be appearing before her . . . .[158]

The court declined to find that these pledges, promises, and statements of commitment were protected by the First Amendment.[159] Ultimately, Kinsey was publicly reprimanded and fined.[160]

The *Kinsey* matter generated five opinions among the seven justices of the Supreme Court of Florida.[161] Notably, the major disagreement was not about whether Kinsey was right in her assertions of First Amendment protection for her campaign conduct, but rather about how significantly she should be disciplined.[162] At

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156. FLA. CODE OF JUDICIAL CONDUCT Canon 7(A)(3)(d)(i), (ii) (2003).

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

158. *Id.* at 88–89.

159. *Id.* at 89.

160. *See id.* at 92–93. The Supreme Court of Florida adopted the recommendation of the Judicial Qualification Commission and ordered Kinsey to pay a $50,000 fine, the costs of the proceedings, and "to appear before this Court for the administration of a public reprimand." *Id.*

161. *Id.* at 93 (Anstead, C.J., concurring); *id.* at 94 (Pariente, J., concurring); *id.* at 97 (Lewis, J., concurring in part and dissenting in part); *id.* at 100 (Wells, J., dissenting).

162. The majority opinion was per curiam. *Id.* at 79. Chief Justice Anstead concurred specially, noting that "[w]hile the issue of discipline [was] close," he was joining the majority, primarily as a result of compelling testimony offered by a federal district judge. *Id.* at

least three of the justices were troubled by the implications of *White*, however.[163]

Two justices believed that *White* dictated a First Amendment defense, as asserted by the disciplined judge. Justice Wells, in his dissent, contended that six of the charges sustained against Judge Kinsey, by both the Judicial Qualification Commission and the majority, were based upon an announcement of position, not a pledge or commitment, and thus ran "directly contrary to the United States Supreme Court decision by which we are bound."[164] This interpretation of the candidate's campaign conduct was clearly a minority view.

Justice Lewis, in his concurring opinion, expressed a different concern about the effect that *White* had on the case. Describing the unethical conduct as "repeated, intentional, direct action with a designed purpose which cast aspersions and doubt onto the heart of the judicial system and the elected judicial office sought,"[165] Justice Lewis feared that the majority, in imposing a substantial fine, was "'split[ting] the baby'. . . . [T]he conduct here is either protected speech deserving no discipline, or egregious non-protected conduct and promises of future conduct deserving of removal from the bench."[166]

If the majority of the Supreme Court of Florida feared a review or reversal of their decision by the Supreme Court of the United States, the per curiam decision did not reflect it. With the exception of a recognition of the defense's reliance on the case, a factual

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94 (Anstead, C.J., concurring). Justice Pariente likewise concurred, and noted that, as a sitting judge, Kinsey had not behaved herself. *Id.* (Pareinte, J., concurring). Justice Lewis concurred in part and dissented in part, expressing the opinion that "the only rational conclusion would be the removal of Judge Kinsey from the position secured through inappropriate pledges and promises." *Id.* at 99 (Lewis, J., concurring in part and dissenting in part). Justice Wells, quite in contrast to the other members of the court, would have found Kinsey guilty of only two charges, finding the determination of guilt on the other charges to be inconsistent with the decision in *White*. *Id.* at 100 (Wells, J., dissenting). Justice Quince concurred with Justice Wells's dissent. *Id.*

163. While a fourth justice, Justice Pariente, specifically references *White*, she did so incorrectly, asserting that *White* found a "pledge and promise" clause to be unconstitutional. *Id.* at 94 (Pariente, J., concurring) ("Indeed, since our Code was amended in 1994 to remove the 'pledge and promise' clause—the very clause found to be unconstitutional in *Republican Party of Minnesota v. White*—hundreds of candidates campaigning for judgeships have successfully balanced the competing interests inherent in judicial elections . . . ." (citations omitted)).

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

165. *Id.* at 97 (Lewis, J., concurring in part and dissenting in part).

166. *Id.*

description of it, and some quotes from the majority opinion, the Supreme Court of Florida's per curiam decision does little to justify its holding. Rather it approaches the issue before it curtly, announcing that its canon is "more narrow" and that the "compelling state interest in preserving the integrity of [the] judiciary and maintaining the public's confidence in an impartial judiciary" is "beyond dispute."[167] Ultimately, the undefended assertions were enough—the Supreme Court of the United States denied Judge Kinsey's Petition for Certiorari on October 6, 2003.[168]

In a similar case arising in New York, another successful judicial candidate found himself before a Commission on Judicial Conduct facing charges that grew out of his campaign conduct.[169] Judge William Watson, a City Court Judge in Lockport, New York, defeated two incumbent city judges in a primary election in 1999, and ultimately won the general election to take office in January 2000.[170] Like Judge Kinsey, Judge Watson locked onto the "law and order" platform as a means for securing votes for election.[171] After the complaints were filed, the judge admitted that his comments had violated the ethics rules and apologized.[172]

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167. *Id.* at 87; *see also* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 848 (1978) (Stewart, J., concurring in the judgment); Cox v. Louisiana, 379 U.S. 559, 565 (1965); Morial v. Judiciary Comm'n of the State of Louisiana, 565 F.2d 295, 302 (5th Cir. 1977); *In re* Code of Judicial Conduct, 603 So. 2d 494, 497 (Fla. 1992).

The conclusion of the majority of the Supreme Court of Florida was "that the restraints are narrowly tailored to protect the state's compelling interests without unnecessarily prohibiting protected speech. As is clear from the canons and related commentary, a candidate may state his or her personal views, even on disputed issues." *In re* Kinsey, 842 So. 2d at 87. The remainder of the opinion discusses the charges and whether adequate proof of violation exists. *See id.* at 87–93.

168. 72 U.S.L.W. 3236 (U.S. Oct. 6, 2003) (No. 02-1855).

169. *See In re* Watson, 794 N.E.2d 1 (N.Y. 2003).

170. *Id.* at 2.

171. Watson wrote a letter to law enforcement personnel asking for their votes in order to "'put a real prosecutor on the bench.'" *Id.* Watson also stated in the letter that the city needed a judge who would "'work with the police, not against them'" and who would "'assist our law enforcement officers as they aggressively work towards cleaning up our city streets.'" *Id.* Watson also wrote letters to the editor commending his work as a prosecutor and asking voters to elect him so that the city could send a similar message, presumably by his presence on the bench. *Id.* at 2–3. His newspaper ads focused on his "'proven experience in the war against crime.'" *Id.* at 3. He also insinuated that the incumbent judges were responsible for soaring arrests in the local community. *Id.*

172. *Id.* at 8.

Nonetheless, his removal from office was recommended by the Commission.[173]

Before the Commission had ruled on Judge Watson's case, the Supreme Court issued the *White* decision. Additionally, the New York Court of Appeals rendered a decision finding that a judge who used the phrase "'law and order candidate'" was not guilty of campaign misconduct.[174] Based on these developments the Commission entertained further argument from Watson, but ultimately sustained the charges against him and imposed the sanction of censure.[175]

Consistent with the approach adopted by the Supreme Court of Florida, the New York Court of Appeals noted that the "statements must be reviewed in their totality and in the context of the campaign as a whole to determine whether the candidate has unequivocally articulated a pledge or promise of future conduct or decisionmaking that compromises the faithful and impartial performance of judicial duties."[176] When viewed contextually, the statements violated the pledges and promises prohibition of the New York ethics code.[177]

The New York Court of Appeals took a more disciplined look at the implications of *White*, which were raised by the judge in defense, than had its Florida counterpart. Noting the obvious first—that they were not faced with an application of an announce clause—the court concluded that "*White* does not compel a particular result here."[178] Proceeding as had the Supreme Court, the New York Court of Appeals declined to debate which level of scrutiny applied and tested its rule under the most exacting standard,

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173. *See id.*

174. *In re* Shanley, 774 N.E.2d 735, 736 (N.Y. 2002).

175. *Watson*, 794 N.E.2d at 8.

176. *Id.* at 4.

177. *Id.* The New York provision is found in the Rules Governing Judicial Conduct, section 100.5(A)(4)(d)(i), and prohibits a judge from "mak[ing] pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office." N.Y. STANDARDS & ADMIN. POLICIES LAW § 100.5(A)(4)(d)(i) (Consol. 2003). New York also has a commitment clause, set forth in section 100.5(A)(4)(d)(ii), prohibiting the judge or judicial candidate from "mak[ing] statements that commit or appear to commit the [judge] with respect to cases, controversies or issues that are likely to come before the court." *Id.* § 100.5(A)(4)(d)(ii) (Consol. 2003).

178. *Watson*, 794 N.E.2d at 6.

strict scrutiny.[179] The court concluded:

> [The pledges or promises clause] furthers the State's interest in preventing actual or apparent party bias and promoting openmindedness[180] because it prohibits a judicial candidate from making promises that compromise the candidate's ability to behave impartially, or to be perceived as unbiased and open-minded by the public, once on the bench.
>
> . . . .
>
> . . . New York's pledges or promises clause not only is sufficiently narrow to withstand strict scrutiny analysis but also effectively and appropriately balances the interests of litigants and the rights of judicial candidates and voters.
>
> . . . The rule precludes only those statements of intention that single out a party or class of litigants for special treatment, be it favorable or unfavorable, or convey that the candidate will behave in a manner inconsistent with the faithful and impartial performance of judicial duties if elected.[181]

Both the New York and Florida courts analyzed the commitment and pledges clauses jointly. Both states had ethics rules that prohibited statements that "commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court."[182] In both cases, the commitment clause was allegedly violated,[183] yet neither court addressed whether that clause would withstand First Amendment scrutiny, limiting their decisions instead to a review of the pledges clause. Other states, outside actual legal controversies, have concluded that it would not withstand such scrutiny, at least insofar as the clause prohibits statements that "appear to commit" the candidate.[184]

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179. *Id.*

180. "Openmindedness" was rejected by Justice Scalia as the third possible definition of "impartiality" as having not been intended in Minnesota. *See supra* note 68. It was asserted, however, by the New York State Commission on Judicial Conduct and the Attorney General in its definition of "impartiality." *Watson*, 794 N.E.2d at 6. These parties defined the term to include "preventing party bias and the appearance of party bias, as well as furthering openmindedness and the appearance of open-mindedness in the state judiciary." *Id.*

181. *Watson*, 794 N.E.2d at 7.

182. FLA. CODE OF JUDICIAL CONDUCT Canon 7(A)(3)(d)(ii) (West 2003); N.Y. STANDARDS & ADMIN. POLICIES LAW § 100.5(A)(4)(d)(ii) (Consol. 2003).

183. *In re* Kinsey, 842 So. 2d 77, 88 (Fla. 2003); *Watson*, 794 N.E.2d at 2.

184. On June 18, 2003, the Supreme Court of California amended an unrelated provision of the California Code of Judicial Ethics and circulated amendments proposed by the

Despite displeasing arguments, the two state supreme courts that have ruled have refused to extend the reasoning in *White* to clauses other than the announce clause provision of the 1972 Model Code of Judicial Conduct. In some states, while the courts have not ruled in an actual legal controversy, appropriate bodies have given their opinions on the *White* ramifications. In Indiana, for example, the Indiana Commission on Judicial Qualifications issued a preliminary advisory opinion on the topic.[185] Indiana, like Florida and New York, does not have an announce clause, but does have both a commitment clause and a pledges or promises clause.[186] In an effort to clarify the future application of those clauses, the Indiana Commission offered this advice:

> Candidates have a constitutional right to state their views . . . to characterize themselves . . . or to express themselves on any number of other philosophies or perspectives.
>
> . . . .
>
> As a judicial candidate makes more specific campaign statements relating to issues which may come before the court . . . the candidate incurs the risk of violating the "commitment" clause and/or the "promises" clause . . . [or to] invite future recusal requests . . . .
>
> Clearly, a statement indicating that a candidate will rule in a par-

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Supreme Court Advisory Committee, including a proposed amendment to the California commitment clause. *See* Press Release, Judicial Council of California, Supreme Court Takes Action on California Code of Judicial Ethics (June 18, 2003), *available at* http://www.courtinfo.ca.gov/presscenter/newsreleases/NR37-03.HTM (last visited Jan. 31, 2004). According to the court's press release, "the committee concluded that the term 'or appear to commit' . . . may be unconstitutionally vague, and recommended that the phrase be deleted and explanatory commentary be added." *Id.* The added explanatory comment states that "[t]he phrase 'appear to commit' has been deleted to clarify that judicial candidates cannot promise to take a particular position on cases, controversies, or issues prior to taking the bench and presiding over individual cases." *Id.*

Conversely, Pennsylvania amended its similar campaign conduct provision on November 21, 2002, effective immediately and without notice of the proposed rulemaking because immediate action was deemed "to be required in the interest of justice and the efficient administration." 32 Pa. Bull. 5951 (Dec. 6, 2002), *available at* http://www.pabulletin.com/secure/data/vol32/32-49/2165.html (last visited Jan. 31, 2004). Despite the seeming ease with which the amendment was accomplished, Pennsylvania chose to only delete the phrase "announce his views on disputed legal or political issues," from its Canon 7(B)(1)(c), leaving in the prohibition on "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." *Id.* The added commentary stated succinctly that the eliminated provision was found to violate the First Amendment. *Id.*

185. Preliminary Advisory Opinion # 1-02, Ind. Comm'n on Judicial Qualifications, *available at* http://www.in.gov/judiciary/admin/judqual/opinions.html (last visited Jan. 31, 2004).

186. *See id.* (explaining that Indiana eliminated the announce clause in 1993).

> ticular way violates the "commitment" clause and the "promises" clause.
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> . . . .
>
> Finally, [the promises clause], which states that a candidate may not make pledges or promises of conduct in office other than the fair and impartial performance of the duties of the office does not limit the candidate to that simple pledge. Any number of specific promises relating to court administration or the improvement of the judicial system are appropriate.[187]

In a similar effort to provide guidance and advice, the Supreme Court of Ohio requested the Board of Commissioners on Grievances and Discipline in that state to comment on *White*'s implications for Ohio's judicial ethics.[188] What resulted was a list of guidelines, addressing among other rules, Ohio's promises clause.[189] Relevant to the promises clause, the Ohio guideline states that "[p]romising or pledging conduct in office (other than faithful and impartial performance of judicial duties) is not permitted."[190] In a straightforward fashion, the informal opinion distinguished between announcing views and making pledges or promises, and used examples as well as prior Ohio case law, to illustrate the difference:

> "An affirmative declaration can be . . . a pledge or promise. A philosophical viewpoint . . . is unlikely to rise to a pledge or promise as reasonable persons would define them."
>
> An example of a pledge or promise is the affirmative declaration "I will imprison all convicted felons." An example of expressing a philosophical view is the statement "I believe incarceration is an appropriate sentencing tool in some cases."[191]

North Carolina has perhaps garnered the most attention. The Supreme Court of North Carolina, presumably believing that *White* required it, has removed its prohibition on promises and pledges.[192] A North Carolina law professor expected the results to be "disastrous," including acrimonious campaigns, an "influx of money from special interests," and an erosion of public confidence

187. *Id.* at 2–5.

188. Bd. of Comm'rs on Grievances and Discipline, Opinion, No. 2002-8 (Aug. 9, 2002), *available at* http://www.sconet.state.oh.us/BOC/Advisory_Opinions/2002/op_02-008.doc (last visited Jan. 31, 2004).

189. *Id.* at 1–2.

190. *Id.* at 1.

191. *Id.* at 10–11 (citations omitted).

192. *See* William Marshall, *A Bow to Reality in Judicial Elections*, NEWS & OBSERVER (Raleigh), Oct. 20, 2003, at A13.

in the courts.[193] He nonetheless defends the changes as being mandated by *White*.[194]

Other states have been more cautious in their post-*White* advice.[195] New Mexico, for example, posted a notice entitled "Important Notice on Political Campaign Ethics Rules."[196] Explaining that the "implications for New Mexico's campaign ethics rules are not immediately clear," the notice only stated with confidence that *White* did not address the pledges or promises clause contained in the New Mexico rules.[197] As to its other two provisions, a commitment clause and a stricter "announce clause,"[198] the notice simply advised that "we may have to wait for further judicial interpretations to know exactly what the effect is."[199]

In a somewhat different approach, the Supreme Court of Missouri drew a distinction between the ethical obligations of elected judges and retention judges who are actively opposed, and those who are not opposed. In an Order entered on July 18, 2002, the court ordered that in light of *White*

> that portion of Rule 2.03, Canon 5.B.(1)(c), that states, "A candidate, including an incumbent judge, for a judicial office shall not announce views on disputed legal issues," shall not be enforced against candidates for judicial office that is filled:
>
> (1) By public election[200] between competing candidates; or
>
> (2) By candidates appointed to or retained in office [in accor-

193. *Id.*

194. *See id.* "All of these effects, however, are inherent in any system based upon judicial selection by popular election." *Id.*

195. Many states had ongoing judicial elections when the *White* decision was released. North Dakota, for example, through its Judicial Ethics Advisory Committee, sent a letter to all candidates for judicial office. Letter from Ronald E. Goodman, Judicial Ethics Advisory Committee Chair, to the Candidates (Aug. 22, 2002), *available at* http://www.court.state.nd.us/Court/Committees/jud_ethc/canlet.htm (last visited Jan. 31, 2004). In a cautious approach, the Committee advised candidates that the decision did not address the relevant provisions of the North Dakota Code of Judicial Conduct and that candidates should continue to look to the Code for guidance in their campaigns. *Id.*

196. Important Notice on Political Campaign Ethics Rules [hereinafter Notice], *available at* http://jec.unm.edu/campaigning_Whitedecision.pdf (last visited Jan. 31, 2004).

197. *Id.*

198. The New Mexico announce clause prohibits judicial candidates from "announc[ing] how the candidate would rule on any case or issue that may come before the court." N.M. RULES ANN. § 21-700(B)(4)(c) (2003). This differs significantly from the Minnesota rule that prohibited candidates from announcing "views on disputed legal or political issues." MINN. CODE OF JUDICIAL CONDUCT, Canon 5(A)(3)(d)(i) (West Supp. 2003).

199. Notice, *supra* note 196.

200. Yes, even in Missouri, namesake of the so-called Merit Selection Missouri Plan, some judges are popularly elected.

> dance with certain provisions of the state constitution], but *only* when their candidacy has drawn active opposition. [The Canon][201] . . . shall otherwise remain in full force and effect.[202]

Thus, the formal and informal reaction of the states to *White* has been varied. Despite an opportunity to address some of the many issues now occupying the time of state courts of last resort, judicial boards, and lawyers' conduct commissions, the Supreme Court does not appear poised to revisit the issue, at least in regard to campaign conduct. Nonetheless, the reactions of many states have already drastically altered the nature of judicial ethics and judicial elections.[203] More changes are likely to occur.

3. False and Misleading Public Communication

The states have, for the most part, applied and interpreted *White* strictly and have declined to read it as a mandate for the proposition that those who seek judicial office may campaign just as those who seek more traditionally political office.[204] There is, however, a notable exception. Candidates for judicial office in Georgia are bound by the Georgia Code of Judicial Conduct[205] and the Rules of the Judicial Qualification Commission.[206] Among the provisions is a prohibition on the use of any form of public communication

> which the candidate knows or reasonably should know is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation of fact or law or omits a fact necessary to make the communication considered as a whole not materially misleading or which is likely to create an unjustified expectation about results the candidate can achieve.[207]

George Weaver challenged Justice Leah Sears, a member of the

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201. The Canon also includes a "pledges or promises clause" and a prohibition on misrepresentation of qualifications or other facts. MO. SUP. CT. R. 2.03, Canon 5(B)(1)(c) (2003).

202. Order, Supreme Court of Missouri, Enforcement of Rule 2.03, Canon 5(B)(1)(c) (July 18, 2002), *available at* http://www.osca.state.mo.us/sup/index.nsf (last visited Jan. 31, 2004).

203. *See generally* Cynthia Gray, *The States' Response to* Republican Party of Minnesota v. White, 86 JUDICATURE 163 (2002).

204. *See supra* notes 153–203 and accompanying text.

205. *See* Weaver v. Bonner, 309 F.3d 1312, 1315 & nn.2–3 (11th Cir. 2002).

206. *See id.* at 1315–16 & nn.3–4.

207. *Id.* at 1315 (quoting GA. CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(d)).

Supreme Court of Georgia, in a 1998 election.[208] Weaver's conduct was the subject of several ethics complaints filed, and ultimately resolved, against him through the Georgia Judicial Qualifications Commission.[209] Weaver sued, alleging that the applicable judicial canons violated his rights under the First Amendment.[210]

Notwithstanding the lack of a clear mandate in the *White* decision, the United States Court of Appeals for the Eleventh Circuit struck down the ethics rule, holding that to pass constitutional muster the prohibited statements "must be limited to false statements that are made with knowledge of falsity or with reckless disregard as to whether the statement is false."[211] This part of the Eleventh Circuit's opinion may be of little moment, since few states utilize the false statement language in their ethics provisions.[212] What may be of concern, however, is the court's broad attribution to the *White* majority that "the standard for judicial elections should be the same as the standard for legislative and executive elections."[213] Such an expansive reading of the *White* decision, particularly in light of the separate concurring

208. *See id.* at 1316.

209. *Id.* at 1316–17. As is often the case, this Commission, through a committee, monitors judicial campaigns and enforces the judicial ethics rules pertaining to campaigns. *Id.* at 1315.

210. *Id.* at 1317. Most of the complaints against Weaver arose out of statements that he made regarding Justice Sears. These statements claimed that Justice Sears "stood for" same sex marriage, questioned laws that prohibited sex with children under fourteen, and referred to the electric chair as "silly." *Id.* Weaver's lawsuit challenged Canon 7(B)(1)(d). *Id.* More relevant to the discussion in this section, however, was Weaver's challenge to Canon 7(B)(2), which prohibits judicial candidates from personally soliciting campaign funds or publicly stated support, requiring instead that the candidate establish an election committee who may undertake such solicitation on behalf of the candidate. *Id.* at 1315.

211. *Id.* at 1319. Thus, statements that were false, but made negligently, were protected by the First Amendment. *See id.* at 1319–20.

212. At one time, Alabama and Michigan had similar ethics provisions. *See* Butler v. Ala. Judicial Inquiry Comm'n, 802 So. 2d 207, 211 (Ala. 2001); *In re* Chmura, 608 N.W.2d 31, 33 n.1 & 40–41 (Mich. 2000). Alabama altered the language of its provision to prohibit only knowing or reckless false statements during the pendency of an appeal before the Eleventh Circuit on that provision's constitutionality. *See Butler,* 802 So. 2d at 218. Michigan struck down its provision. *Chmura,* 608 N.W.2d at 40.

213. *Weaver,* 309 F.3d at 1321. In support of this attribution, the Eleventh Circuit quoted Justice Scalia's remark that the differences between judicial and legislative elections had been "'greatly exaggerate[d].'" *Id.* (quoting Republican Party of Minn. v. White, 536 U.S. 765, 784 (2002)) (alteration in original). It ignored, however, that Justice O'Connor, the necessary fifth vote for the majority, wrote separately to express her concern about judicial elections. *See White,* 536 U.S. at 788–92 (O'Connor, J., concurring). A student of her concurrence would be hard pressed to conclude that Justice O'Connor would hold, as the Eleventh Circuit suggested, that legislative, executive, and judicial elections should all be guided by the same standards.

opinion of Justice O'Connor, who provided the fifth vote for the majority, does not seem merited.

2. Campaign Conduct

The Eleventh Circuit announced an additional threatening outcome in the *Weaver* case as part of its expansive reading of the *White* decision. Despite the fact that Weaver had not mounted a challenge to Canon 7(B)(2) of the Georgia Code of Judicial Conduct, the Eleventh Circuit invalidated the provision *sua sponte*.[214] That provision, in effect in thirty-five states, prohibited candidates for judicial office from "'themselves solicit[ing] campaign funds, or . . . publicly stated support,'"[215] providing instead that the candidate could utilize committees to do so.[216] While the *Weaver* decision does not detail whether a violation of this Canon was even before the panel, the court concluded that "candidates are completely chilled from speaking to potential contributors and endorsers about their potential contributions and endorsements."[217] These conclusions by the Eleventh Circuit were not ac-

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214. *See Weaver*, 309 F.3d at 1322–23. According to judicial elections expert Professor Roy Schotland, the Eleventh Circuit decision shows "how reckless a federal court can be . . . hold[ing] unconstitutional a provision that had not been challenged by plaintiff, nor argued nor briefed at trial or on appeal." Howard A. Levine & Roy A. Schotland, *Judicial Campaign Rules*, N.Y. L.J., Aug. 13, 2003, at 2.

215. *Weaver*, 309 F.3d at 1315 (quoting GA. CODE OF JUDICIAL CONDUCT Canon 7(B)(2)).

216. *See id.* at 1315. The parallel provision of the 1990 Model Code of Judicial Conduct found in Canon 5(C)(2) provides that

> [a] candidate shall not personally solicit or accept campaign contributions or personally solicit publicly stated support. A candidate may, however, establish committees of responsible persons to conduct campaigns for the candidate . . . . Such committees may solicit and accept reasonable campaign contributions . . . and obtain public statements of support for his or her candidacy.

MODEL CODE OF JUDICIAL CONDUCT Canon 5(C)(2) (1990).

217. *Weaver*, 309 F.3d at 1322. In its new ethics rules, the Supreme Court of North Carolina has removed its prohibition against candidates personally soliciting campaign donations. *See supra* text accompanying notes 192–94. The change is defended on the basis that there is little difference between self-solicitation and committee solicitation. *See* Matthew Eisley, *High Court Defends New Judges' Code*, NEWS & OBSERVER (Raleigh), Oct. 16, 2003, at B1. The spokesperson for the court, Chief Justice I. Beverly Lake, Jr., reportedly ruled in a 1998 case that granted $799 million in tax refunds to thousands of retirees who later received fundraising letters from his committee asking them to "'look back and recall what Justice Lake's wisdom and demeanor have meant to each one of us.'" Michael Scherer, *State Lines: Is Justice Undermined By Campaign Contributions?*, CAP. EYE, (Center for Responsive Politics, Wash., D.C.), Summer 2001, *available at* http://www.open

companied by citation to any authority other than Justice O'Connor's concurrence in *White*.[218] In fact, the opinion sounded quite similar to Justice O'Connor's "you get what you asked for" lament.[219]

At the time of the Eleventh Circuit's decision, two courts had recently considered constitutional attacks to similar judicial ethics provisions, but had found the restrictions on political activity and personal solicitation of contributions to be constitutional.[220] Both the United States District Court for the District of Minnesota and the United States Court of Appeals for the Eighth Circuit, in the case that ultimately reached the Supreme Court, had upheld provisions of the Minnesota Code of Judicial Conduct pertaining to campaign finance and partisan activity.[221]

In reality, challenges to the partisan activity and solicitations prohibitions of the Minnesota Code of Judicial Conduct had been the heart of Gregory Wersal's lawsuits. When the original ethics complaints were filed against Wersal, it was his attendance at partisan political gatherings and his seeking of endorsements and support that formed the basis of the complaints.[222] When Wersal filed suit, he alleged five separate constitutional claims.[223] The first claim asserted that the Code's prohibitions relating to attendance by candidates and their families at political gatherings violated freedom of speech, freedom of association, and equal protec-

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secrets.org/newsletter/ce76/statelines.asp (last visited Jan. 31, 2004).

218. *See Weaver*, 309 F.3d at 1322. For a succinct synopsis of cases that had previously raised similar issues, see Lisa Milord, *Associative Political Conduct of Judges and Judicial Candidates*, JUD. CONDUCT REP., Fall 1992, at 2–3 (discussing courts that have considered the issue of a judicial candidate's endorsement by political parties).

219. Justice O'Connor has lectured: "If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges." *White*, 536 U.S. at 792 (O'Connor, J., concurring). The Eleventh Circuit mimicked this lecture: "The impartiality concerns, if any, are created by the State's decision to elect judges publicly." *Weaver*, 309 F.3d at 1322. For one Minnesota judge's reaction to Justice O'Connor's chiding, see Stephen C. Aldrich, *Minnesota Judicial Elections: Better than the "Missouri Plan,"* BENCH & BAR OF MINN., Oct. 2002, at 27, 28 n.3 ("Justice O'Connor served as a judge of the Arizona trial courts and a justice of the Arizona Supreme Court. Perhaps the partisan elections there have affected her view.").

220. Two other courts had previously ruled against provisions prohibiting party endorsements. Cal. Democratic Party v. Lungren, 919 F. Supp. 1397, 1405 (N.D. Cal. 1996); Concerned Democrats of Fla. v. Reno, 458 F. Supp. 60, 65 (S.D. Fla. 1978).

221. *See* Republican Party of Minn. v. Kelly, 63 F. Supp. 2d 967, 983 (D. Minn. 1999); Republican Party of Minn. v. Kelly, 247 F.3d 854, 876 (8th Cir. 2001).

222. *See supra* note 51.

223. *Kelly*, 63 F. Supp. 2d at 974.

tion.[224] The third and fourth claims asserted similar violations based on the Code's prohibition of party identification and endorsement.[225] The fifth claim challenged the Code's ban on personal solicitation of campaign contributions.[226]

After the Eighth Circuit affirmed the district court's grant of summary judgment, Wersal petitioned for a writ of certiorari on three issues.[227] The first question presented, the viability of the announce clause, was the only issue upon which the Supreme Court of the United States granted certiorari.[228] The second issue questioned the restrictions on party endorsement.[229] The third issue raised by Wersal challenged the Code's ban on attending and speaking at political gatherings.[230] Thus, Wersal did not challenge the lower court's holding that "the state has a compelling interest in preventing the undue influence, and the appearance of undue influence, that may result in a judicial candidate personally soliciting campaign funds."[231]

Not long after the Eleventh Circuit struck down the restrictions on campaign activity and solicitations in *Weaver*[232]—the same restrictions left intact by the Eighth Circuit in *White*—a New York District Court followed the Eleventh Circuit's lead. In *Spargo v. New York State Commission on Judicial Conduct*,[233] the United States District Court for the Northern District of New York enjoined the enforcement of certain provisions of the New York Code of Judicial Conduct related to political activity, despite

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224. *Id.*

225. *Id.*

226. *Id.*

227. Pet. for Writ of Cert., *supra* note 52, at *i, 1–2.

228. *See* Republican Party of Minn. v. Kelly, 247 F.3d 854 (8th Cir. 2001), *cert. granted*, 534 U.S. 1054 (2001).

229. *See* Pet. for Writ of Cert., *supra* note 52, at *i, *1–2. Specifically, the second question presented read:

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

Id.

230. *Id.* at *i.

231. Republican Party of Minn. v. Kelly, 63 F. Supp. 2d 967, 983 (D. Minn. 1999).

232. *See* Weaver v. Bonner, 309 F.3d 1312, 1325 (11th Cir. 2002). No petition for certiorari was filed by either party.

233. 244 F. Supp. 2d 72 (N.D.N.Y. 2003).

a pending state disciplinary proceeding.[234]

The *Spargo* court agreed with the plaintiff, a state court judge who was disciplined for inappropriate political activity, that the relevant provisions[235] were not narrowly tailored to serve the compelling state interest of judicial independence.[236] Utilizing *White* as its base, the court found that the prohibitions at issue were

> even broader than prohibiting specific speech, such as views on legal or political issues as in *White*. . . . [H]ere judges and judicial candidates are essentially precluded from participating in politics at all except to participate in their own election campaigns. Moreover, a wholesale prohibition on participating in political activity for fear of influencing a judge ignores the fact that a judicial candidate must have at one time participated in politics or would not find him or herself in the position of a candidate.[237]

The district court found that the challenged provisions were "void as impermissible prior restraints" upon a judicial candidate's free speech rights.[238] The decision invalidated the following New York ethical rules:

> (1) Neither a sitting judge nor a candidate for public election to judicial office shall directly or indirectly engage in any political activity . . . includ[ing]:

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234. *Id.* at 92.

235. *See id.* at 81–82. The rules under attack prohibited candidates from engaging in partisan political activity for others, including allowing use of the judge's name in the campaign, giving speeches for others, attending political gatherings, and endorsing or opposing any candidate. *See id.*

236. *See id.* at 90. The district court uses *White* as a template, beginning the opinion by struggling to define judicial independence, noting, as Justice Scalia had about impartiality, that "defendants do not suggest what they mean by 'independent judiciary.'" *Id.* at 87.

237. *Id.* at 88. Thus, the age-old riddle: "How do you get to be a judge? Befriend a senator."

238. *Id.* at 90. In a separate, particularly disconcerting holding the court found other portions of the ethics code to be void because of vagueness. Although Section 100.1 provides only that a "'judge *should* participate in establishing, maintaining, and enforcing high standards of conduct, and [] personally observe those standards so that the integrity and independence of the judiciary will be preserved,'" *id.* (quoting N.Y. STANDARDS & ADMIN. POLICIES LAW § 100.1 (Consol. 2003)) (emphasis added), the district judge concluded that the rule "provides no reasonable opportunity for a person of any level of intelligence to know what conduct would be prohibited." *Id.* The problem with this analysis is that the particular provision does not prohibit any conduct, and it does not mandate any conduct—it simply outlines desirable conduct. In fact, the relevant commentary states that "[a]lthough judges *should* be independent, they *must* comply with the law." MODEL CODE OF JUDICIAL CONDUCT Canon 1 cmt. (1990) (emphasis added).

> . . . .
>
> (c) engaging in any partisan political activity [except for participation in the judge's own campaign] . . . ;
> (d) participating in any political campaign for any office or permitting his or her name to be used in connection with any activity of a political organization;
> (e) publicly endorsing or publicly opposing (other than by running against) another candidate for public office;
> (f) making speeches on behalf of a political organization or another candidate;
> (g) attending political gatherings;
>
> . . . .
>
> (4) A judge . . .
>
> (a) shall maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary . . . .[239]

The defendants appealed to the United States Court of Appeals for the Second Circuit, which heard arguments in late September 2003. Despite the conflicting views of various court observers,[240] members of the profession confirm that an affirmance by the Second Circuit will call into question the very foundation of the premise that judges are not, and should not be, politicians.[241] The decision will undoubtedly prompt the losing side to give the Supreme Court another opportunity to revisit judicial ethics—this time in the broader context of campaign activities.

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239. *Spargo,* 244 F. Supp. 2d at 81–82 (quoting N.Y. STANDARDS & ADMIN. POLICIES LAW § 100.5 (Consol. 2003)).

240. New York officials had urged the United States District Court for the Northern District of New York to abstain from the case on the basis of "'strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances.'" *Spargo,* 244 F. Supp. 2d at 82 (quoting Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 431 (1982)). Because two of the plaintiffs were nonjudges who asserted claims as voters or party office holders, the court denied abstention. *See id.* at 82–83. At the oral argument in the Second Circuit, the appellate panel expressed great interest in the application of the abstention doctrine, seemingly "inclined to think that the state Court of Appeals was the proper venue for Justice Spargo's claims . . .," at least according to Tom Perrotta of the New York Law Journal. Tom Perrotta, *Spargo's Suit Meets Stiff Resistance From Second Circuit Panel,* N.Y. L.J., Sept. 30, 2003, at 1. Perrotta described the panel as skeptical and described one judge as "not necessarily impressed with the substance of the judge's arguments." *Id.* Another observer, however, described the oral argument "as a dispassionate, scholarly discussion . . .[about] a hotly emerging area of federal constitutional law . . . ." Bernard J. Malone, Jr., *Spargo Oral Argument: Another Point of View,* N.Y. L.J., Oct. 1, 2003, at 2.

241. *See* Levine & Schotland, *supra* note 214.

IV. AND A "FISTFUL OF DOLLARS"

In addition to expressing her general concern about judicial elections in her concurring opinion in *White*, Justice O'Connor discussed the connection between elections and fund raising:

> Moreover, contested elections generally entail campaigning. And campaigning for a judicial post today can require substantial funds. . . . Unless the pool of judicial candidates is limited to those wealthy enough to independently fund their campaigns, a limitation unrelated to judicial skill, the cost of campaigning requires judicial candidates to engage in fundraising. Yet relying on campaign donations may leave judges feeling indebted to certain parties or interest groups.[242]

As the public puts more demands on judges to announce their views in judicial elections, elections will undoubtedly become more contentious and more expensive. The 2000 judicial races in the United States have been described as "far more costly than ever."[243] State supreme court candidates, for example, raised more than $45 million, an increase of sixty-one percent over the amount raised in 1998.[244] Unfortunately, the rising costs are not limited to races for state supreme court seats, with candidates for the trial bench also spending record amounts.[245]

While lawyers and lawyers' groups continue to be fertile ground to plow for campaign dollars,[246] some candidates for judi-

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242. Republican Party of Minn. v. White, 536 U.S. 765, 789–90 (2002) (O'Connor, J., concurring) (citations omitted) (citing numerous examples of the rising costs of judicial elections).

243. Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 3 L. REV. M.S.U.-D.C.L. 849, 850 (2001).

244. *Id.* Professor Schotland comments that records for campaign spending were set in ten of the twenty states that held judicial elections in 2000. *Id.* The average spent per seat was just shy of one million dollars, up from just over one-half million for the years of 1990 to 1999. *Id.* at 850 n.6. Interestingly, the most money ever spent in a judicial campaign was not recently, but in 1986 when California voters unseated Chief Justice Rose Bird and Justices Cruz Reynoso and Joseph Godin with the inflation-adjusted total of almost eighteen million dollars. *Id.* at 861 & n.53.

245. *See* Anthony Champagne, *Interest Groups and Judicial Elections*, 34 LOY. L.A. L. REV. 1391, 1403 (2001).

246. When judicial elections were less expensive, individual lawyers and law firms were primary targets of a judge's campaign committees. In some jurisdictions, for example, only donations above a certain dollar amount were publicly reported. A lawyer who wanted to openly support a candidate would give an amount in excess of the reportable amount, while others might give an amount just under it. In my 1990 race, a lawyer who had hedged his bets and given to both candidates was shocked to learn that the reportable amount was not $100 as he had thought, but $99. Much to his chagrin, he was reported in

cial office have sought political and financial support from special interest groups, who are attractive and anxious contributors.[247] According to one scholar who has studied interest groups and their agendas:

> Interest groups today often draw no distinction between achieving their goals through the courts or through the political process. The result can be an unhealthy dependence between judicial candidates and interest groups where interest groups back judicial candidates to secure their political agendas and candidates rely on interest group backing to achieve and to retain judicial office.[248]

For example, most recently the United States Chamber of Commerce spent in excess of $7 million to unseat judges in five states who did not, in their opinion, share the Chamber's agenda.[249] The National Rifle Association, the American Trial Lawyers Association, the American Medical Association, and various unions have all become big financiers of judicial campaigns.[250]

Spending money on judicial campaigns is not an inherent evil. The implications are, of course, that the money is well spent because judges cater to those who financed their ascension to the bench. The reality is that the harm[251] is the same whether judges

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the newspaper as having contributed to *both* candidate's campaigns.

247. *See* JEFFREY M. BERRY, THE INTEREST GROUP SOCIETY 22 (3d ed. 1997). Special interest groups are on the rise, and have the attraction of pooled resources. *See id. See generally* Champagne, *supra* note 245 (discussing the role of interest groups in judicial elections).

248. Champagne, *supra* note 245, at 1393.

249. *See* Schotland, *supra* note 243, at 863–64 & n.58. The United States Chamber of Commerce began its foray into judicial elections in 1997, when it targeted eight states. *Id.* at 864 n.59. The Chamber's motivation was tort reform, and particularly, reform in product liability litigation. *Id.*

250. In Texas and Alabama, for example, judicial elections are financed intermittently by either business and insurance interests or plaintiffs' tort lawyers. According to one report, between 1986 and 1996, as the "winner" traded turns, the costs of seeking a seat on the Alabama Supreme Court rose 776 percent. *See* Sheila Kaplan, *The Very Best Judges That Money Can Buy*, U.S. NEWS & WORLD REP., Nov. 29, 1999, at 35; *see also* Anthony Champagne, *Judicial Reform in Texas*, 72 JUDICATURE 146, 149 (1988).

251. One resulting harm is that qualified candidates may be discouraged from seeking the bench because of the political and financial realities. A survey conducted for the American Bar Association found that sixty-three percent of candidates for judicial office believe that campaign costs have a significant effect on discouraging qualified candidates from running. *Testimony on Public Financing for Judicial Elections Submitted to the American Bar Association's Commission on the 21st Century Judiciary*, at 4, Oct. 1, 2002, *available at* http://www.capc.umd.edu/rpts/judicial_elections.pdf (last visited Jan. 31, 2004).

are actually influenced by contributions or merely appear to have been influenced.[252]

Statistics on the subject abound. One poll shows, for example, that seventy-eight percent of Americans believe that elected judges are influenced by campaign fundraising.[253] In Texas, about that same number *of lawyers* believe that money influences the bench.[254] What is more startling is that forty-eight percent of the *judges* agree.[255] Another poll, cited by the American Bar Association in an August 2002 Recommendation from the Standing Committee on Judicial Independence and the Standing Committee on Election Law, suggests an even higher percentage: eighty-four percent of voters are concerned about the influence that special interest groups are asserting in judicial elections.[256]

Many of those who would use their financial influence to undermine the integrity of the bench have more than a "fistful of dollars." They may view the Supreme Court's decision in *White* as a significant inroad, placing them in the position of almost demanding that candidates for judicial office express their viewpoints during an election.[257] Even candidates who would not ordi-

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252. The Supreme Court of the United States has held that preventing election corruption and the appearance of election corruption is a compelling state interest that may support narrowly tailored limits on the size of campaign contributions. *See* Buckley v. Valeo, 424 U.S. 1, 81 (1976).

253. Champagne, *supra* note 245, at 1408.

254. *Public Financing of Judicial Campaigns*, 2002 A.B.A COMM'N ON PUB. FIN. OF JUDICIAL CAMPAIGNS 23, *available at* http://www.abanet.org/judind/pdf/comissionreport4-03.pdf (last visited Jan. 31, 2004).

255. *Id.* Ninety percent of Ohio voters, eighty-eight percent of Pennsylvania voters, and eighty-three percent of Texas voters believe that judicial decisions are influenced by campaign contributions. Champagne, *supra* note 245, at 1408. Notably, the Supreme Court of Ohio has filed, for comment, proposed amendments to the Code of Judicial Conduct. Supreme Court of Ohio, Proposed Amendments: Code of Judicial Conduct and Rules for the Government of the Judiciary of Ohio, *available at* http://www.sconet.state.ch.us/judicial_candidates/prop_amend.pdf (last visited Jan. 31, 2004). The proposed amendments specifically address campaign solicitations and funds, specifically altering the rules related to personal contributions. *Id.* at 1. The Ohio State Bar predicts that twenty-five to thirty million dollars will be spent in the 2004 Supreme Court of Ohio races. Steve Hoffman, *Taking Justice off the Market*, BEACON J., Oct. 23, 2003, at B2.

256. *Recommendation*, A.B.A. Standing Comm. on Judicial Independence, Standing Comm. on Election Law, and State and Local Gov't Law Section (Aug. 2002), *available at* http://www.abanet.org/leadership/recommendations02/113.pdf (last visited Jan. 31, 2004).

257. In the past, judges who received questionnaires asking for their views on issues would often decline to respond, politely informing the sender of the restrictions on speech for judicial candidates. Some organizations had ceased the practice of sending out questionnaires but have reinstituted it in light of *White*. The Pennsylvania Catholic Confer-

narily be inclined to campaign on issues may now feel pressured to do so.

Any widening of the *White* chasm will only further undermine the independence and integrity of the American justice system. Judges may now "announce" their personal views, irrelevant as they seem; perhaps they even should, in the interest of informing the electorate. But judges should not commit themselves on issues that they will judge, regardless of the size of the check that may follow. Judges should not promise or pledge, even implicitly, in order to attract support. The Supreme Court's decision to elevate First Amendment rights of judicial candidates over the state's interest in preserving the integrity and independence of its judiciary will hopefully be strictly interpreted.

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ence, for example, sent a survey to candidates in the supreme court and the superior court primaries in 2003. *See* Pennsylvania Catholic Conference, *Pennsylvania Supreme Court/Superior Court Survey: Primary Election 2003, available at* http://www.pacatholic.org/election%20archive/pri03.htm (last visited Jan. 31, 2004). In reporting the results to its members, the Conference explained:

> The Pennsylvania Catholic Conference has resumed submitting election questionnaires to candidates for judicial office following the 2002 U.S. Supreme Court ruling in *Minnesota v. White*, which led to a change in Pennsylvania's Code of Judicial Conduct.
>
> . . . .
>
> Since those changes, made in November 2002, some judicial candidates have begun to freely talk about public policy issues that may be of interest to Catholic voters. Even so, as you will notice among the responses below, some candidates are still hesitant to speak regarding certain issues. . . . The PCC . . . respects the concerns raised by candidates who did not fully respond and is grateful to those who did take the time to respond, even in a limited way, to its invitation.

Id. Among the questions asked were:

> What is your position on restricting the performance of abortion?
>
> . . . .
>
> What is your position on the cloning of human beings for medical research?
>
> . . . .
>
> What is your position on the death penalty?
>
> . . . .
>
> What is your position on the mandating of domestic partners benefits for employers that provide health benefits to their employees?

Id. The current Pennsylvania elections have proved very different with candidates speaking out, and not always politely. *See* Editorial, *Baer for the Supreme Court: A Pro-Choice Candidate Who Speaks His Mind*, PHILA. DAILY NEWS, Oct. 23, 2003, at 17; Carrie Budoff, *Pa. Court Candidates Speak with New Political Candor*, PHILA. INQUIRER, Oct. 1, 2003, at A1; Mark Scolforo, *Election of Judges in Penna. Criticized*, PHILA. INQUIRER, Oct. 13, 2003, at B1.

VI. CONCLUSION

In a good Sergio Leone western, Eastwood would appear about now, confident and poised, and armed with the necessary weapons to take down the culprit. The culprits facing the state justice system loom large. They are many. But the system is armed with the necessary weapons to emerge victorious. What are those weapons? The men and women who hold the title of "Your Honor" in our state courts.

Most of those judges[258] realize that taking the bench is an honor of the highest magnitude; they realize that becoming a judge means foregoing opportunities and accepting restrictions on their freedoms. They do not view those limitations as deficiencies, however, for they know that, in exchange for that small concession of rights, they have been given the opportunity and have accepted the challenge of assuring justice. No sacrifice is too great for that honor.

258. As a member of the National Judicial College faculty and a frequent speaker at state judicial conferences, I draw these emotional conclusions from first-hand knowledge.

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