ARTICLES

JUDICIAL IMPARTIALITY AND THE REGULATION OF JUDICIAL ELECTION CAMPAIGNS

Ofer Raban

I. INTRODUCTION ................................................... 206
II. EXPLAINING REPUBLICAN PARTY OF MINNESOTA V. WHITE .... 208
III. THREE DEFINITIONS OF JUDICIAL IMPARTIALITY ............. 210
IV. WHAT’S WRONG WITH REPUBLICAN PARTY OF
    MINNESOTA V. WHITE ........................................... 212
V. WHAT IS AT STAKE? ................................................. 220
VI. JUDICIAL CAMPAIGN REGULATIONS AFTER REPUBLICAN
    PARTY OF MINNESOTA V. WHITE ............................. 222
VII. SUBSTITUTING THE ANNOUNCE CLAUSE ....................... 225
VIII. CONCLUSION ..................................................... 228

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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.¹

[W]e do not have to put States to an all or nothing choice of abandoning judicial elections or having elections in which anything goes.²

I. INTRODUCTION

The classic American statement in favor of an independent judiciary is found in The Federalist No. 78, in which Alexander Hamilton asserts the importance of making the judicial branch “truly distinct from both the legislature and the executive.”³ It would be unwise, says Hamilton, to place the appointment power exclusively within the legislative or within the executive branches because “there would be danger of an improper complaisance [by the judicial branch] to the branch which possessed it.”⁴ Less famously, Hamilton also asserts the wisdom of making the judiciary independent of the popular will. He says that the cause of judicial independence would be ill served if the power of selecting judges were placed with the people, for then there would be “too great a disposition to consult popularity.”⁵ The selection of federal judges is therefore the joint prerogative of the President and the Senate, with no role for popular choice.⁶

But the American states have taken a different path. While following the federal model during the first half century of American independence, by the 1840s many states began selecting their judges through popular elections. Thus,

every state entering the Union from 1846 to 1900 instituted popular election of judges, and many existing states abandoned legislative or executive appointment. Indeed, in the fourteen years after the influential Iowa and New York constitutions of 1846 instituted popular election of judges, twenty states moved from appointment

² Id. at 799-800 (Stevens, J., dissenting).
⁴ Id. at 471.
⁵ Id.
⁶ See U.S. Const. art. II, § 2, cl. 2.
to election for some or all of their judges; so that by 1861, twenty-four of the thirty-four states selected judges by election rather than by appointment.\textsuperscript{7}

Today, approximately eighty percent of state trial and appellate court judges are selected at least in part by either contested or retention election.\textsuperscript{8}

But states have also chosen to structure judicial elections in a manner aimed at reducing their political character. At least since 1924, when the American Bar Association promulgated its first Model Code of Judicial Conduct, judicial candidates have been subjected to considerable restrictions on their ability to pronounce their opinions on controversial issues of popular concern, or the actions they intend to take with respect to those issues. Indeed, until the recent rise of highly contentious and expensive judicial elections in a number of states, a judicial campaign was typically “a low budget affair where the judicial candidate spoke to any group willing to hear a dull speech about improving the judiciary or about judicial qualifications.”\textsuperscript{9} The principle at work here is that allowing judicial candidates to engage in freewheeling discussions of controversial issues, and especially allowing them to make express or implied promises as to how they will address these issues when deciding cases, clashes in the most direct way with the idea of judicial impartiality.

In 2002, the U.S. Supreme Court held that one of the regulations with which Minnesota limited the political character of its judicial elections was unconstitutional. In Republican Party of Minnesota v. White, a 5-4 majority of the Court found that prohibiting a judicial candidate from “announc[ing] his or her views on disputed legal or political issues” is a violation of the First Amendment.\textsuperscript{10} Although states are free to do away with popular election as a means of judicial selection, this

greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance. If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the

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\textsuperscript{7} G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 122 (1998).


\textsuperscript{10} Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002).
\end{flushright}
participants in that process . . . the First Amendment rights that attach to their roles.\textsuperscript{11}

\textit{White}’s impact may extend well beyond the eight states with a canon identical to Minnesota’s “Announce Clause,” which is based on a provision of the 1972 ABA Model Code of Judicial Conduct.\textsuperscript{12} As we shall see, many consider \textit{White} a landmark decision whose scope reaches a wide range of rules regulating the conduct of elected judges and judicial candidates, both during their election campaigns and while holding office. This being the case, and given that no state currently holding judicial elections is likely to do away with them in the near future, citizens and officials concerned with both the appearance and reality of impartial state judiciaries would be well served by a careful examination of \textit{White}.

The following Article is divided into six sections: Section II is a broad overview of the U.S. Supreme Court’s decision in \textit{White}; Section III offers a detailed analysis of the opinion; Section IV attempts to explain why the opinion, and its underlying philosophy, are wrong; Section V is an exposition of the stakes involved in \textit{White}; Section VI reviews the legal landscape following \textit{White}; and Section VII proposes an alternative to the canon invalidated in \textit{White}.

\section*{II. Explaining Republican Party of Minnesota v. \textit{White}}

The canon invalidated in \textit{White} prohibited a candidate for judicial office from “announce[ing] his or her views on disputed legal or political issues.”\textsuperscript{13} The U.S. Supreme Court, following the Eighth Circuit, treated the canon as a content-based regulation of speech warranting strict constitutional scrutiny.\textsuperscript{14} Both parties stipulated to this standard of review.\textsuperscript{15}

The content-based doctrine emerged in its clearest form during the Vietnam war and the civil rights movement protests, where it came as a response to mounting legislative efforts to silence these sources of social unrest. The basic idea underlying the distinction was succinctly expressed in \textit{Police Department of Chicago v. Mosley}, where the Court stated that “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter,

\begin{itemize}
\item \textsuperscript{11} \textit{Id.} (quoting Renne v. Geary, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)).
\item \textsuperscript{12} \textit{See ABA MODEL CODE OF JUDICIAL CONDUCT Canon 7(B) (1972).}
\item \textsuperscript{13} \textit{White}, 536 U.S. at 775.
\item \textsuperscript{14} \textit{Id.} at 774-75.
\item \textsuperscript{15} \textit{Id.}
\end{itemize}
Content-based regulations of speech define the category of regulated speech by reference to the speech’s content. Content-based regulations include, inter alia, regulations burdening sexual speech, regulations burdening speech describing criminal activity, and, in *White*, regulations burdening speech dealing with “disputed legal or political issues.”

In principle, content-based regulations are subjected to “strict constitutional scrutiny,” which meant that Minnesota’s Board of Judicial Standards had to show that the Announce Clause was “narrowly tailored, to serve . . . a compelling state interest.” In other words, the Board had to show that Minnesota’s canon advanced an important purpose, and that that purpose could not “be achieved through means significantly less restrictive” to the freedom of speech.

Minnesota’s Board of Judicial Standards argued that the canon served two compelling state interests: 1) the preservation of the impartiality of the state judiciary, and 2) the preservation of the appearance of impartiality of the state judiciary. In response, the Supreme Court asserted that although the term “impartiality” was “used throughout the Eighth Circuit’s opinion, the briefs, the Minnesota Code of Judicial Conduct, and the ABA Codes of Judicial Conduct, none of these sources bothers to define it.” The Court then embarked on an exposition of the notion of judicial impartiality, against which it examined the constitutionality of the challenged clause. The Court’s analysis followed several steps. First, the Court proposed a definition of judicial impartiality; next, it examined whether the Announce Clause served that type of impartiality, and whether serving that impartiality was a “compelling state interest”; finally, assuming the Announce Clause did serve that impartiality and serving that impartiality was indeed a “compelling state interest,” the Court examined whether Minnesota’s canon was “narrowly tailored” to serve it.

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18. *White*, 536 U.S. at 774-75. One exception to this rule is the doctrine of “secondary effects,” which pertains to regulations of speech that burden speech by reference to its content but are not aimed at suppressing speech. Rather, such regulations are aimed at some “secondary effects” which accompany the communicative content but are not caused by it.
21. *Id.* at 775.
The opinion, written by Justice Scalia, proposed three different definitions of judicial impartiality, none of which allowed the canon to pass constitutional muster. Under the first definition the Announce Clause was insufficiently narrowly tailored; under the second definition the Announce Clause did not involve a “compelling state interest”; and the third definition was simply not served by the Announce Clause.22

### III. THREE DEFINITIONS OF JUDICIAL IMPARTIALITY

The Court’s first proposed definition of impartiality pertained to the “lack of bias for or against a party to a dispute.” Here judicial impartiality “guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party.”23 But, said the Court, if this is what Minnesota means by impartiality then the challenged clause “is not narrowly tailored to serve impartiality. . . . Indeed, the clause is barely tailored to serve that interest at all, inasmuch as it does not restrict speech for or against particular parties, but rather speech for or against particular issues.”24

The second definition of judicial impartiality pertained to the “lack of a bias for or against particular issues,” or as the Court put it, the “lack of preconception in favor of or against a particular legal view.”25 But if this is the sort of impartiality the Announce Clause means to protect, then the canon fails strict scrutiny because preserving such impartiality is not a compelling state interest:

For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law. . . . [But] even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so. . . . And since avoiding judicial preconceptions on legal issues is neither possible nor desirable, pretending otherwise by attempting to preserve the “appearance” of that type of impartiality can hardly be a compelling state interest either.26

The third definition of judicial impartiality pertained to “open-mindedness”: “This quality in a judge demands, not that he have no

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22. *Id.* at 775-84.
23. *Id.* at 776.
24. *Id.*
26. *Id.*
preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case.”  

However, the Court stated, “we do not believe the Minnesota Supreme Court adopted the announce clause for that purpose. . . . [S]tates in election campaigns are such an infinitesimal portion of the public commitments to legal positions that judges (or judges-to-be) undertake, that this object of the prohibition is implausible.”  

After all, people commit themselves to legal positions by writing articles, giving lectures, participating in drafting legislation, or simply deciding cases as sitting judges. The Court concluded:

The short of the matter is this: In Minnesota, a candidate for judicial office may not say “I think it is constitutional for the legislature to prohibit same-sex marriages.” He may say the very same thing, however, up until the very day before he declares himself a candidate, and may say it repeatedly (until litigation is pending) after he is elected. As a means of pursuing the objective of open-mindedness that respondents now articulate, the announce clause is so woefully underinclusive as to render belief in that purpose a challenge to the credulous.

The philosophy underlying the opinion is essentially this: some states choose to allow voters to select the bench. Yet, this canon of judicial conduct (promulgated by the Supreme Court of Minnesota, not by the legislature) eviscerates that entire exercise. Citizens need information in order to cast a meaningful vote, and the prohibition deprives them of much of the information they may consider most important for their choice.

Moreover, prohibiting judges from making controversial legal or political announcements would not solve the fundamental problem with judicial elections: namely, judges making determinations that are influenced by popular opinion in violation of the duty of judicial impartiality. This danger, as the Court points out, is certainly not eliminated by the Announce Clause, since elected judges who make unpopular decisions always stand the risk of being voted out of office. They have the sword
of popular opinion hanging over their necks whether or not they can make controversial public announcements during their campaigns. The result is a highly questionable benefit to judicial impartiality, but an unquestionable detriment to the freedom of speech and the process of judicial elections.

IV. What’s Wrong with Republican Party of Minnesota v. White

The fundamental flaw in the White opinion is its overly simplistic analysis of the notion of judicial impartiality. As an initial matter, the Court’s distinction between the lack of a bias for or against “a party” and the lack of a bias for or against “a legal issue” is incomprehensible. A judge who states that “malpractice liability is construed too narrowly” expresses a bias regarding a certain legal issue, but also a bias for or against certain parties — those suing and those sued for malpractice liability. Similarly, a woman in a child custody battle standing before a judge who declared in his election campaign that “men get too many raw deals in custody rulings” would not be reassured by the thought that this is “a bias against an issue.”

Put differently, everything depends on the way in which one defines the relevant party: the party may be Jane Doe, but Jane Doe may also be an immigrant, a welfare recipient, an environmentalist, an anti-abortion campaigner, a union organizer, a mother suing for custody, or a doctor sued for malpractice. Controversial biases for or against parties and controversial biases for or against legal issues are two sides of the same coin.32 Thus there is little justification for the Court’s assertion that the Announce Clause “barely” serves to preserve the lack of a bias for or against parties because the Clause “only restricts speech for or against issues.”33

31. But elected judges — regardless of whether they have announced any views beforehand — always face the pressure of an electorate who might disagree with their rulings and therefore vote them off the bench. Surely the judge who frees Timothy McVeigh places his job much more at risk than the judge who (horror of horrors!) reconsiders his previously announced view on a disputed legal issue.

Id. at 782.

32. Justice Ginsburg cites in her dissenting opinion an Alabama Supreme Court case reversed by the U.S. Supreme Court because one of the sitting judges had a financial interest in the particular legal resolution of the case. Id. at 814-15 (Ginsburg, J., dissenting) (citing Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986)). Was this not a case of a bias against a party?

33. See id. at 776.
The Court seemed to concede, in a footnote, that its analysis here is oversimplified, saying “[s]ome of the speech prohibited by the announce clause may well exhibit a bias against parties.” 34 But, it quickly added, “[t]he question under our strict scrutiny test, however, is not whether the announce clause serves this interest [of preserving impartiality or appearance of impartiality for or against parties] at all, but whether it is narrowly tailored to serve this interest. It is not.” 35 This response is highly unsatisfactory, for, as noted, it is hard to think of any bias for or against a “disputed legal issue” that is not also a bias for or against possible parties to a dispute.

This point underscores the difficulty with the Court’s discussion of the second definition of impartiality, where the Court asserted that, so far as impartiality is conceived as the lack of a bias for or against disputed legal issues, the state has no compelling interest in preserving it. 36 There is a paradoxical air to the Court’s discussion of this point. It begins by defining judicial impartiality — clearly something to aspire for — as the absence of a judge’s disputed preconception regarding a particular legal issue. But it then immediately proceeds to declare — with a certain iconoclastic flare often found in Justice Scalia’s opinions — that “avoiding judicial preconceptions on legal issues is neither possible nor desirable.” 37 There is some welcomed realism in the recognition that legitimate judicial determinations are often a function of controversial preconceptions, but there is much clumsiness of thought in the consequent dismissal of the entire concern over such preconceptions. After all, if such preconceptions (say, a controversial preference for a narrow reading of manufacturers’ product liability) can also be seen as a bias for or against parties to a dispute (the sued manufacturer, the suing consumer) then, by the Court’s own admission, some compelling state interest may be implicated here.

The Court, however, claimed that Minnesota’s interest under this definition of impartiality was either the elimination of judicial preconceptions or the concealment of these preconceptions from the public. 38 These suggestions are not serious: a more realistic hypothesis is that Minnesota sought to curb the potentially harmful influence of election campaigns upon judges’ legal preconceptions. Indeed it is precisely the

34. Id. at 777 n.7.
35. White, 536 U.S. at 777 n.7 (emphasis in original).
36. Id. at 778.
37. Id.
38. “[S]ince avoiding judicial preconceptions on legal issues is neither possible nor desirable, pretending otherwise by attempting to preserve the ‘appearance’ of that type of impartiality can hardly be a compelling state interest either.” Id. at 778.
fact that such disputed preconceptions often play an indispensable role in judicial determinations that makes attending to them a compelling state interest.

The danger is obvious: officials running for office often adjust their positions so as to align them with popular opinion with the aim of increasing their chances of getting elected. This may cause several problems which can be brought, for simplicity’s sake, under two broad categories of judicial duty: the faithful application of the law, and judicial legislation. First, judges may adopt preconceptions which are popular but entirely unreasonable given the established law. Opinions which electioneering legislators are free to express and then to try to act upon may be totally out of bounds for elected judges and a threat to their duties of office. Judges who declare that “the Constitution not only allows the banning of abortions: it requires it,” or “I believe that the First Amendment does not protect speech promoting radical Islam,” or “I believe that different evidentiary rules apply to accused child molesters than to other defendants,” may all be expressing popular opinions; but their declarations are a challenge to the integrity of the legal system and a powerful incentive to violate that integrity. Legislative candidates may make such declarations and then try to make them a reality without violating their duties of office; judges may not.

Secondly, as the Court put it, “state-court judges possess the power to ‘make’ common law” and “the immense power to shape the States’ constitutions.” But even here, where the White philosophy appears at its most justified, the issue is far more complicated. After all, judges may “legislate,” but they are not legislators. In a typical legislature there are dozens or even hundreds of representatives. This allows for a wide representation and divergence of opinions, as well as for the political give-and-take of negotiated legislative compromises, which is so important in cases where a minority of legislators feel more strongly about a subject than an opposing majority. The judge, on the other hand, is often a sole decision-maker, or at best a member of a very small panel, and is often elected to much longer terms of office than the ordinary two or four years. In such circumstances, politicized judicial elections may bring about rather radical judicial “legislation.” This is a problem that afflicts judicial legislation in general; but it may become particularly virulent were judicial elections turned into a freewheeling politicized affair resembling legislative elections. Judges running on divisive political or legal platforms

39. Note that the following problems remain whether candidates amend their opinions in accordance with popular opinion, or whether they agree with popular opinion to begin with.

40. White, 536 U.S. at 784.
may put in place legal rules and doctrines that would never have passed a proper legislative vote. For example, legislatures may fail to come to an agreement about even minimal gun control regulations; but a judge running on a gun control platform (“I believe that existing legal doctrine allows the imposition of huge liabilities on gun manufacturers whose weapons end up in the wrong hands and then cause injury or death”) may put in place legal doctrines which would amount to a tight regulation of the industry. These doctrines may be perfectly legitimate “judicial legislation” so far as existing doctrine is concerned, and in this case may even appear laudable; but they may still constitute an unwanted revolution in our constitutional separation of powers. Driven by highly politicized campaigns, “judicial legislation” may become far more assertive for a second reason: nonpolitical judges who see themselves as accountable to the population at large, free of obligations to any political or ideological sub-section, would tend to look for more centrist and widely acceptable solutions. But judges who feel accountable to an ideologically or politically well-defined group of voters would tend to make decisions of a more polarizing nature.

The point is this: Minnesota’s interest in judicial impartiality, conceived as the lack of judicial preconceptions, need not consist of the wish to eliminate those preconceptions, nor of the wish to hide them from the public. It may consist of the wish to regulate the forces which may mold and influence the legal preconceptions of judges, and the incentives judges may have for adopting and acting upon these preconceptions. That “avoiding judicial preconceptions on legal issues is neither possible nor desirable”\(^{41}\) is only the beginning of the analysis, not its end.

The Court’s inability to recognize the nuanced difficulties with judicial impartiality also affects its treatment of the third and last proposed definition. Here judicial impartiality is defined as open-mindedness, i.e., the judge’s susceptibility to persuasion by the arguments put forth by the parties.\(^{42}\) The Court claims that this sense of impartiality cannot be served by the Announce Clause because the clause prohibits only a tiny fraction of the possible public commitments to controversial legal or political issues (commitments which may be made with impunity both before and after election campaigns through law review articles, lectures, even judicial opinions).\(^{43}\) But as both Justice Stevens’ and Justice Ginsburg’s dissenting opinions point out, this claim fails to take note of the important distinction between statements made in the course of an election campaign

\(^{41}\) Id. at 778.

\(^{42}\) Id.

\(^{43}\) Id. at 778-79.
and statements made in law review articles or in judicial opinions.\textsuperscript{44} Election campaigns offer a particularly dangerous forum for the making of public commitments. As an initial matter, most voters perk up their ears for judicial candidates’ declarations only during their election campaigns, thereby creating a powerful incentive to cater to popular opinion, which may hardly exist in different times or contexts. But election campaigns also open a unique channel of communication between a candidate and the voting public. It is essentially only there that the candidate comes before the public and explicitly says: “This is why you should vote for me.” Thus, it is only there that the candidate assumes an obligation vis-à-vis the public. A candidate expressing her opinion on controversial issues in a law review article, a judicial opinion, or a public lecture does not assume such an obligation. There is nothing here of the give-and-take with the voter that is inherent to electoral campaign declarations articulating the candidate’s controversial legal or political views.

The Court responds to this point in two ways. First, it contends that it “might be plausible” to claim that campaign speech poses a special threat if it comes in the form of campaign promises.\textsuperscript{45} However, a different Minnesota canon prohibits campaigning judicial candidates from making campaign promises, thereby removing this threat:\textsuperscript{46}

\begin{quotation}
It is only by failing to recognize the distinction, clearly stated by then-Justice Rehnquist, between statements made during a campaign or confirmation hearing and those made before announcing one’s candidacy, that the Court is able to conclude [that no compelling state interest is involved here].” \textit{Id}. at 800 (Stevens, J., dissenting).
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\textsuperscript{44} “It is only by failing to recognize the distinction, clearly stated by then-Justice Rehnquist, between statements made during a campaign or confirmation hearing and those made before announcing one’s candidacy, that the Court is able to conclude [that no compelling state interest is involved here].” \textit{Id}. at 800 (Stevens, J., dissenting).
\end{quotation}

\begin{quotation}
\textsuperscript{45} This canon was adopted by a number of states. Before \textit{White}, it was upheld in a number of cases. \textit{See In re Spencer}, 759 N.E. 2d 1064, 1065 (Ind. 2001) (a candidate whose advertisement said: “When Judge Spencer ran for judge of the Circuit Court, he promised to send more child molesters to jail . . . burglars to jail . . . drug dealers to jail . . . He’s kept his promise. Let’s keep Judge Spencer.”); \textit{In re Haan}, 676 N.E. 2d 740 (Ind. 1997) (a judicial candidate who vowed to “stop suspending sentences” and to “stop putting criminals on probation”); \textit{Summe v. Judicial Ret. & Removal Comm’n}, 947 S.W.2d 42, 47 (Ky. 1997) (a candidate whose advertisement, which was harshly critical of an incumbent’s purported record of sentencing child abusers to probation, concluded with an exhortation to elect a judge who “will let no one walk away before justice is
A candidate who says “If elected, I will vote to uphold the legislature’s power to prohibit same-sex marriages” will positively be breaking his word if he does not do so (although one would be naïve not to recognize that campaign promises are — by long democratic tradition — the least binding form of human commitment). But, as noted earlier, the Minnesota Supreme Court has adopted a separate prohibition on campaign “pledges or promises,” which is not challenged here.47

Second, the Court asserts that so far as nonpromissory statements are concerned, there is no good reason to think that campaign speech poses greater danger to judicial impartiality than many other forms of speech which are perfectly allowed:

The proposition that judges feel significantly greater compulsion, or appear to feel significantly greater compulsion, to maintain consistency with nonpromissory statements made during a judicial campaign than with such statements made before or after the campaign is not self-evidently true. It seems to us quite likely, in fact, that in many cases the opposite is true. We doubt, for example, that a mere statement of position enunciated during the pendency of an election will be regarded by a judge as more binding — or as more likely to subject him to popular disfavor if reconsidered — than a carefully considered holding that the judge set forth in an earlier opinion denying some individual’s claim to justice.48

Since Minnesota failed to establish that campaign commitments “are uniquely destructive of open-mindedness,” and since campaign commitments “are such an infinitesimal portion of the public commitments to legal positions that judges (or judges-to-be) undertake,” the Court concluded that the Announce Clause was not aimed at protecting open-mindedness.49

There are more obvious and less obvious flaws in this response. First, as Justice Ginsburg points out, given the way in which the Court conceptualizes the distinction between promissory and non-promissory

[132x191]served.”); In re Burick, 705 N.E.2d 422, 425 (Ohio Comm’n of Judges 1999) (a judicial candidate who told voters that she “will be a tough Judge that [sic] supports the death penalty and isn’t afraid to use it.”).
47. White, 536 U.S. at 780.
48. Id. at 780-81 (emphasis omitted).
49. Id. at 779, 781.
statements, that distinction is vacuous. The Court seems to think that campaign promises must be stated as explicit promises, so that a candidate who says “I believe it is constitutional for the legislature to prohibit same-sex marriages” is saying something fundamentally different than a candidate who says “I will uphold the constitutionality of the legislature’s power to prohibit same-sex marriages.” According to the Court, only the latter is a campaign promise. This distinction is devoid of any practical import. Candidates will simply formulate all their campaign pledges in non-promissory language. So the canon prohibiting campaign promises, at least in the way the White opinion appears to envision its operation, does nothing to alleviate our special concern with campaign speech.

Secondly, the Court’s assertion that judges would not feel greater compulsion to respect nonpromissory campaign statements than they would other public statements they make (for instance in law review articles) is both wrong and beside the point. In a campaign speech the candidate essentially says: “you should vote for me because this is what I think about this matter.” Judges may prove unfaithful to any publicly

50. See id. at 819-21 (Ginsburg, J., dissenting).

[T]he ban on pledges or promises is easily circumvented. By prefacing a campaign commitment with the caveat, “although I cannot promise anything,” or by simply avoiding the language of promises or pledges altogether, a candidate could declare with impunity how she would decide specific issues. Semantic sanitizing of the candidate’s commitment would not, however, diminish its pernicious effects on actual and perceived judicial impartiality. To use the Court’s example, a candidate who campaigns by saying, “If elected, I will vote to uphold the legislature’s power to prohibit same-sex marriages,” (citation omitted) will feel scarcely more pressure to honor that statement than the candidate who stands behind a podium and tells a throng of cheering supporters: “I think it is constitutional for the legislature to prohibit same-sex marriages.” (citation omitted). Made during a campaign both statements contemplate a quid pro quo between candidate and voter.

Id. at 819-20 (Ginsburg, J., dissenting) (citations omitted).

51. Id. at 779-80.

In Minnesota, a candidate for judicial office may not say “I think it is constitutional for the legislature to prohibit same-sex marriages.” He may say the very same thing, however, up until the very day before he declares himself a candidate, and may say it repeatedly (until litigation is pending) after he is elected.

Id. So according to the Court, such a declaration is protected by the Constitution. And since the Court also asserts that the prohibition against campaign promises may well be constitutional, the obvious implication is that this declaration is not a promise in the eye of the Court. Id.
taken position. Yet a judge facing the choice of faithfulness to her campaign statements is bound not only by her wish to save face or to appear consistent — that is, not only by a wish to protect her reputation — but also by an elected official’s duty to the people who voted for her. This certainly does create a “greater compulsion” so far as judicial decision-making is concerned. 52

But even if campaign statements create no greater obligation than a law review article, campaign speech still retains its unique dangers. Once campaigning judicial candidates are free to express their controversial legal and political positions, these positions are bound to become the pivot of judicial election campaigns. Indeed, no candidate could afford to remain silent on issues upon which his opponent had expressed herself: such silence would court retaliation from both sides to the dispute. This phenomenon is easily seen in any legislative or executive campaign. The result would be a series of commitments regarding controversial public issues which may not have even existed otherwise. Thus there would be “greater compulsion” at least so far as there would be many more commitments made by campaigning judges.

The truth of the matter is this: the White opinion is a badly reasoned and highly diffident opinion. The number of references to the convincing dissents is quite astonishing. The opinion draws meaningless distinctions, ignores meaningful ones, and offers an analysis of judicial impartiality that is oversimplified to the point of irrelevance. The entire opinion appears to be based on the rather limited idea that prohibiting judicial candidates from expressing their controversial political views is inimical to the very essence of free elections. 53 But legislative elections and judicial elections

52. See White, 536 U.S. at 781.
53. Id. at 782.

We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election. Justice Ginsburg would do so — and much of her dissent confirms rather than refutes our conclusion that the purpose behind the announce clause is not openmindedness in the judiciary, but the undermining of judicial elections.

Id. In fact, what Justice Ginsburg actually says is that judicial candidates’ controversial political views are irrelevant to their qualifications for office, and she seeks to demonstrate this point by pointing out that all sitting judges on the Supreme Court have refused to answer questions about their controversial political views during their confirmation hearings in the Senate. Id. at 807 n.1, 819 n.4. The Court responds to this charge by missing, once again, the entire point: “Nor do we assert that candidates for judicial office should be compelled to announce their views on disputed legal issues. Thus, Justice Ginsburg’s repeated invocation of instances in which nominees to this Court declined to announce such views during Senate confirmation hearings is pointless.” Id. at 783
are not the same thing. In legislative elections the candidate’s controversial political views are indeed the crux of the matter; in judicial elections they are not and should not be. The public recognizes this truism. In an extensive national survey of public attitudes toward state courts, seventy-six percent of respondents said that judges should be elected.\textsuperscript{54} When asked which of the following statements came closer to their own view: (1) “Courts are unique institutions of government that should be free of political and public pressure”; or (2) “Courts are just like other institutions of government and should not be free of political and public pressure,” seventy-eight percent chose the first statement.\textsuperscript{55} These citizens understand a simple truth that eludes five justices of the Supreme Court: we may choose to elect rather than appoint judges for reasons having nothing to do with determining the political ideologies of sitting judges, or their acquiescence to popular public opinion. Judicial elections seek to guarantee the integrity, competency, and diversity of the bench, and these qualities are independent of the ideologies or the politics of the elected judges.

V. What is at Stake?

What is at stake in \textit{White} is the very character of our legal culture. Highly politicized judicial elections, where judges campaign and get elected by reference to their controversial ideological agendas, would obligate and empower judges to inject these ideologies into their judicial decisions. Where judges are positioned vis-à-vis the public as ideally neutral adjudicators standing above the fray of day-to-day political and social disputes, their role is very different than the role of a judge who occupies the bench solely by virtue of her legal or political views on a range of controversial social issues. It is of course true that ideological or political preferences play a role in proper judicial decision-making; but that role is highly circumscribed in proper judicial practice. Judicial interpretation must follow a certain “form” which greatly constrains the occasions and the impact of ideological or political preferences on judicial decision-making.

I said before that the problem with politicized judicial campaigns can be analyzed in regard to the faithful application of the law and in regard

\textsuperscript{n.11} What Ginsburg claims is that such opinions are irrelevant to one’s qualification for judicial office — whether one announces them voluntarily or not.


\textsuperscript{55} \textit{Id.}
to judicial legislation; but this statement was something of an oversimplification. It may be heuristically helpful to draw a distinction between following predetermined legal rules and between writing new rules, but such a distinction does not exist in actual judicial practice. Every statute, however seemingly applicable, must still be adjudged suitable for the given case before it is applied, while every judicially made rule is highly constrained by the legal materials surrounding the case. Judges never just follow predetermined rules, and they never blaze trails in uncharted territory. Proper adjudication does not obey legislation and precedent; it respects it. Thus, perhaps in contradiction with the idea prevailing in the popular mind, judges never simply follow rules which define in advance the conditions for their own applicability; those conditions may be present where a legal rule is inapplicable, or absent where it is. Yet legal decision-making is never like the decision-making of a legislator who decides, all things considered, on the best course of action.

This is not the place for a detailed elaboration of the constraints of legal interpretation and the special form of the legal discourse. But, it should not come as a surprise to anyone that these constraints incorporate a distinction between legal resolutions which are merely disagreeable and legal resolutions which are unreasonable. In other words, the distinction is between resolutions that a judge dislikes but is obligated to accept and resolutions that a judge dislikes and must not allow. Judges must constantly make such distinctions, and in making them they are never wholly non-ideological: they always have their potentially controversial opinions with which they identify what is or is not a reasonable course of action. But neither are they wholly ideological: judges are often compelled to make decisions which conflict with their preferred ideology. Proper adjudication encompasses a commitment to a perspective that is not totally “neutral,” but is not partisan either.

White is a threat to this perspective. Politicized judicial elections will produce judges who are bound to give less credence to opposing ideologies and more credence to their own. After all, a judge elected on a controversial ideological platform presumably has the public duty to advance that platform. Judges elected by nonpolitical campaigns are bound to have a more inclusive view of reasonable and unreasonable courses of action than judges who occupy the bench by virtue of their controversial

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political views. What is at stake in White are the fundamental principles of our judicial culture.

VI. JUDICIAL CAMPAIGN REGULATIONS AFTER REPUBLICAN PARTY OF MINNESOTA V. WHITE

Some courts have been unwilling to follow the logic of White, while others have enthusiastically embraced it. Some of those courts have begun dismantling the existing regulation of judicial campaigns, and even the regulation of judges’ conduct in office. In Weaver v. Bonner, the Eleventh Circuit, relying on White, struck down a canon of the Georgia Code of Judicial Conduct providing that candidates for judicial office shall not use any any statement which the candidate “knows or reasonably should know is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation of fact or law . . . .” The opinion stated: “we believe that the Supreme Court’s decision in White suggests that the standard for judicial elections should be the same as the standard for legislative and executive elections.” In Smith v. Phillips, the U.S. District Court of the Western District of Texas declared unconstitutional a canon prohibiting judges, as well as judicial candidates, from making statements that indicate an opinion on any issue that may be subject to judicial interpretation by the office which is being sought or held, except that discussion of an individuals’ judicial philosophy is appropriate if conducted in a manner which does not suggest to a reasonable person a probable decision on any particular case.

57. See generally White, 536 U.S. at 768-88; see, e.g., In re William Watson, 100 N.Y.2d 290, 296, 299 (N.Y. 2003) (a judicial candidate whose election campaign declared that “[w]e are in desperate need of a [j]udge who will work with the police, not against them. We need a judge who will assist our law enforcement” violated New York canons of judicial conduct) (emphasis omitted); In re Kinsey, 842 So. 2d 77, 79-80 (Fla. 2003) (a judicial candidate whose election campaign declared that “judges must support hard working law enforcement officers by putting criminals behind bars, not back on our streets” violated Florida’s canons of judicial conduct).


59. See generally Weaver v. Bonner, 309 F.3d 1312 (11th Cir. 2002).

60. See id.; GA. CODE OF JUDICIAL CONDUCT, Canon 7(B)(1)(d) (1994).

61. Weaver, 309 F.3d at 1321.


63. Id. at *1; see also TEX. CODE OF JUDICIAL CONDUCT, Canon 5(1) (2002).
In *Spargo v. N.Y. State Commission on Judicial Conduct*, a U.S. District Court examined the constitutionality of four New York rules of judicial conduct which required judges to act impartially and avoid partisan political activities. 64 The district court concluded that all four were facially unconstitutional under *White*. 65

In *Griffen v. Arkansas Judicial Discipline and Disability Commission*, 66 the Arkansas Supreme Court invalidated the application of a canon which held that “[a] judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice.” 67 The judge in question called on Arkansas legislators to engage in economic retaliation against the University of Arkansas following accusations that a coach at the University had been fired because of his race. 68 The court’s First Amendment analysis began with the statement: “With its decision in *Republican Party of Minnesota v. White*, the U.S. Supreme Court changed the landscape for judicial ethics, at least with respect to political campaigns.” 69 A furious dissent responded:

In the not-too-distant future, it appears almost certain that the United States Supreme Court will render a decision which will effectively eviscerate any state government system that now provides for the election of judges. See *Republican Party of Minnesota v. White* . . . (citations omitted). It is a chilling and sickening thought that the majority of the Supreme Court will, all in the name of free speech, countenance and empower elected judges to take their strong personal biases and use the authority of the judgeship to render decisions based on personal beliefs,

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64. 22 N.Y.C.R.R. § 100.1, which directs judges to maintain “high standards of conduct” and to preserve “the integrity and independence of the judiciary”; § 100.2(A), which instructs judges to avoid the appearance of impropriety by “act[ing] at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary”; and sections 100.5(A)(1)(c)-(g) and 100.5(A)(4)(a), which prohibit incumbent judges and judicial candidates from engaging in partisan political activities that are unrelated to their own campaign for judicial office, and which require all judicial candidates to “maintain the dignity appropriate to judicial office.”

65. *Spargo v. N.Y. State Comm’n on Jud. Conduct*, 244 F. Supp. 2d 72 (N.D.N.Y. 2003). This decision has been recently reversed by the Second Circuit on grounds that the district court improperly exercised jurisdiction over the case since the plaintiffs had not yet exhausted their state remedies. *Spargo v. N.Y. State Comm’n on Jud. Conduct*, 351 F.3d 65, 81 (2d Cir. 2003).


69. Id. at *9.
irrespective of how the law should or does read. . . . As long as the Supreme Court majority holds on to such fallacious thoughts and ideas as those expressed by Justice O’Connor above, it is likely that Court’s majority will soon author an opinion which will make judges political in all respects.’’

Some courts did not bother waiting. The North Carolina Supreme Court has recently amended Canon 7(B) of North Carolina’s Judicial Conduct so as to allow judges to “attend, preside over, and speak at any political party gathering.”

Griffin’s blistering dissent is no overreaction. Constitutional or not, the fact remains that the Announce Clause applied only to judicial candidates. But judicial candidates are by no means the only parties that communicate with the voters during judicial elections; political parties and interest groups habitually do so. And whatever restrictions upon the First Amendment rights of judicial candidates the courts will allow, there are virtually no restrictions upon what others are allowed to say in elections, even judicial elections. Indeed, when states tried to ensure that nonpartisan elections will remain thoroughly nonpartisan by forbidding political parties from endorsing candidates, some courts have found these regulations to be inconsistent with the First Amendment. States may possibly forbid judicial candidates from accepting the endorsement of a political party, or from announcing their membership in a party, but they cannot forbid these parties, or any other organizations or individual, from speaking. All this means that restricting judicial candidates’ own speech

70. Id. at *15 (Glaze, J., dissenting, joined by Corbin & Hannah, J.J.).
73. White did not review the U.S. Court of Appeals’ upholding of such prohibitions. Republican Party of Minn. v. Kelly, 247 F.3d 854, 886 (8th Cir. 2001), cert. granted in part, 122 S. Ct. 643 (2001). The Court of Appeals held that it was wholly proper “to prevent judicial candidates from incurring, or seeming to incur, debts to political parties that could compromise their independence,” and it stated that “because political parties have comprehensive platforms, obligation to a party has a great likelihood of compromising a judge’s independence on a wide array of issues.” Id. at 872, 876. It has been argued that nonpartisan elections are unwise because, given pervasive voter ignorance in regards to judicial elections, not allowing judicial candidates to associate themselves with a political party and its platform leaves interest groups with too great a capacity to praise or demean judicial candidates without challenge. That is, nonpartisan elections “may produce situations in which judges are particularly vulnerable to electoral challenges based on narrow issues that arouse particular interest groups rather than the broad quality of their performance on the bench.” Charles H. Franklin, Behavioral Factors Affecting Judicial
is of the utmost importance for keeping judicial campaigns from becoming full-fledged partisan political affairs; and it also means that the right of the public to be informed of its candidates is not as restricted as the *White* opinion implied. Absent such restrictions, judicial campaigns are poised to deteriorate into highly politicized contests destined to change the culture of the judicial office, and with it the existing relations of power between the different branches of government. Judges elected on divisive political platforms are bound to perceive their roles, and perhaps justifiably so, quite differently than judges running socially or politically neutral campaigns. In short, a constitutionally valid regulation that would replace the canon invalidated in *White* is essential for maintaining the very possibility of judicial impartiality, and certainly its appearance.

VII. **Substituting the Announce Clause**

Minnesota’s Announce Clause was declared unconstitutional for the wrong reasons, but it did suffer from some serious constitutional weaknesses. For one thing, it was a content-based regulation of speech. This meant that the Clause had to be subjected to a constitutional strict scrutiny. But there was little reason to appeal to the legal or political content of the speech: the problem with the sort of campaign declarations the Announce Clause prohibited is that they purport to take sides on cases that might come before the court. Thus, there was no point in insisting that these issues be political or legal since the relevant statement could engage any subject matter. An alternative to the Announce Clause which avoids this content-based classification was offered by the ABA’s Model Code of Judicial Conduct in 1990. The ABA’s revised canon prohibits judicial candidates from making “statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.”

This content-neutral formulation means that the

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74. ABA MODEL CODE OF JUD. CONDUCT, Canon 5(A)(3)(d)(ii) (2000). It may be worth noting that, in response to the claim by Minnesota (in its attempt to defend the Announce Clause) that the Announce Clause and this 1990 canon were identical, the Court said:

This argument is somewhat curious because, based on the same constitutional concerns that had motivated the ABA, the Minnesota Supreme Court was urged to replace the announce clause with the new ABA language, but, unlike other jurisdictions, declined. . . . We do not know whether the announce clause (as interpreted by state authorities) and the 1990 ABA canon are one and the same. No aspect of our constitutional analysis turns on this question.
new canon may not be subjected to strict scrutiny. Yet, admittedly, the chances for this are not very high. Several Supreme Court cases have identified the sort of speech that the ABA Canon restricts as a “central concern[] in our First Amendment jurisprudence”. 75 “Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.” 76

Still, the new canon has other advantages over the invalidated Announce Clause which may allow it to pass a constitutional scrutiny. For one thing, the canon refers more or less directly to the interest it seeks to protect: unlike the Announce Clause, it does not simply prohibit certain forms of speech but instead prohibits “commitments with respect to cases.” This explicitness makes the state interest underlying the regulation clear, thereby making it less susceptible to the wrong attribution of interest found in White. 77 Referring directly to the “commitments” of candidates also sits well with the Court’s admission that campaign “pledges” or “promises” (i.e. “commitments”) may indeed pose a special threat to judicial impartiality.

One unnecessary danger here is the canon’s reference to “issues likely to come before a court.” There is no need to prohibit candidates’ commitments with respect to “issues” so long as commitments “with respect to cases or controversies” are covered. Indeed, the reference to the vaguer term “issues,” rather than to the more concrete “cases and controversies,” may be read as an extension of the canon’s reach bringing it dangerously close to what the Supreme Court considered an illegitimate concern with impartiality. (As we saw above, the Court refused to recognize judges’ commitments in regards to “issues” as involving a compelling state interest.) Whatever the merit of the Court’s position, it would be wise to simply eliminate the reference to “issues.” Nothing important will be lost.

A different danger is that White’s apparent construal of the “pledges and promises” clause as pertaining only to explicit promises would drain any significance out of this canon as well. Thus candidates who simply frame all their commitments in nonpromissory terms (“I believe that gun manufacturers have tortious liability for injuries caused by illegally owned guns”) may be able to avoid the canon’s operation. The canon must therefore be amended so as to explicitly include all those nonpromissory

76. Id. (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)).
77. See infra, Part III.
campaign statements which are, for all intents and purposes, “commitments with respect to cases or controversies.” The most obvious way of effecting the change is to build this concern straight into the canon: the canon can prohibit judicial candidates from making “statements that commit or appear to commit the candidate with respect to the resolution of cases or controversies that are likely to come before the court, whether or not they appear in the form of explicit promises.”

Admittedly, the resulting formulation of this canon is not airtight. It is not entirely clear what nonpromissory declarations count as commitments and what do not. But this can only be decided in concrete fact situations. It seems rather clear, for example, that the statement “I am a staunch conservative who believes in strong family values” is too general to commit its speaker to any side in a case or a controversy. The decision by New York’s highest court that a judicial candidate’s self-description as the “law and order candidate” did not violate the state’s ban on promissory statements is in line with this understanding, because the statement does not appear to commit the candidate to any specific side in a possible controversy. 78 On the other hand, statements like, “I believe that marital infidelity is an indication of unsuitability for child custody,” or, “I believe that no man accused of child abuse should be out on bail,” are clear commitments despite their nonpromissory formulations. What lies in between is more indeterminate, but indeterminacy, for better or worse, is the share of many regulations.

One can hardly overestimate the importance of a canon which would seek to do, in a constitutionally permissible manner, what the Announce Clause sought to do in an impermissible way. Some “disputed legal or political” statements by judicial candidates should certainly be permitted, but many should not.

Some version of the ABA’s proposed substitution of the Announce Clause is one reasonable candidate for this important job. There is little doubt that the new canon is an improvement over the Announce Clause so far as constitutional doctrine is concerned, and the canon can be improved even further in light of the White opinion. In any case, a constitutional invalidation of this new canon would appear rather preposterous: the canon, unlike its deceased predecessor, prohibits speech which directly threatens an uncontroversial duty of judicial practice — the duty to reach a legal conclusion only after hearing and considering the arguments put forth by both parties to a dispute.

78. In re Shanley, 93 N.Y.2d 310, 312 (2002).
VIII. CONCLUSION

The philosophy underlying the U.S. Supreme Court’s decision in Republican Party of Minnesota v. White is straightforward: we all know (at least those of us who are familiar with legal practice and are honest about it) that controversial ideologies often play a decisive role in judicial determinations. From this there seems to be but a small step to the conclusion that judicial elections are aimed, in large part, at allowing the public to determine those ideologies. Thus, the Announce Clause obstructed voters from effecting the very purpose of judicial elections.

This reasoning, as believable as it may appear on first blush, is a serious oversimplification of the issues involved. Controversial ideologies enter judicial determinations through a highly constrained decision-making process, where they play a role much more subtle than the role they play in legislative or executive determinations. The Announce Clause, far from obstructing the purpose of judicial elections, was aimed at enabling such elections to proceed without corrupting the judicial decision-making process. Allowing judicial elections to become full-fledged political affairs would not simply result in the public determining those ideologies which influence judicial determinations; it would result, among other things, in an unwanted revolution in the manner in which judges make these determinations. This Article has sought to demonstrate why this is so, and to call for the preservation of some regulation aimed at preventing such eventuality.