

*MINNESOTA REPUBLICAN PARTY V. WHITE* AND THE  
FUTURE OF STATE JUDICIAL SELECTION

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Judicial selection is a historically sleepy affair for many states. Once characterized as “about as exciting as a game of checkers . . . [p]layed by mail,”<sup>1</sup> non-partisan judicial elections involving unopposed incumbents seeking reelection seldom attracted much attention either from the media or voters.<sup>2</sup> With limits in many states on what candidates could say, as a result of judicial or legal canons, voters knew little about those running for office.<sup>3</sup> The result was elections often devoid of debate or information that may be instructive to voters.<sup>4</sup> In a handful of states, however, including Texas, judicial selection is partisan, raucous, expensive, and hotly contested.<sup>5</sup> For those fearing the worst of what a politicized state court system could be, Texas is an anomalous nightmare . . . or is it?

As a result of two court decisions in *Republican Party of Minnesota v. White*—the first by the United States Supreme Court (hereinafter *White*),<sup>6</sup> and the second by the Eighth Circuit Court of Appeals (hereinafter *Republican Party of Minnesota*)<sup>7</sup>—the next round of state judicial elections in Minnesota, New York, and elsewhere could include not just candidates seeking party endorsements but also soliciting contributions and announcing positions.<sup>8</sup> As a result, the future of many sleepy judicial elections may look increasingly more nightmarish like Texas.

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<sup>1</sup> Roy A. Schotland, *To the Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 WILLAMETTE L. REV. 1397, 1405 (2003).

<sup>2</sup> *Id.* at 1405 n.36.

<sup>3</sup> *See id.* at 1409.

<sup>4</sup> *Id.* at 1405 n.36, 1409.

<sup>5</sup> *See generally* KYLE CHEEK & ANTHONY CHAMPAGNE, *JUDICIAL POLITICS IN TEXAS: PARTISANSHIP, MONEY, AND POLITICS IN STATE COURTS* (2005) (describing the emerging partisanship of Texas judicial elections that began in the 1980s).

<sup>6</sup> 536 U.S. 765 (2002).

<sup>7</sup> 416 F.3d 738 (8th Cir. 2005), *cert. denied*, *Dimick v. Republican Party of Minn.* 126 S. Ct. 1165 (2006).

<sup>8</sup> *White*, 536 U.S. at 788; *Republican Party of Minn.*, 416 F.3d at 766.

This article examines the future of state judicial selection in light of the two *Republican Party of Minnesota v. White* decisions. Specifically, it explores what options states, especially those having non-partisan judicial races, now have to promote judicial independence whether they wish to stick with an elected court system or move towards another means of selecting judges. Part I of this article examines the politics of judicial selection. Specifically, it examines the different types of state judicial selection methods and assesses whether they make a difference in terms of who sits on the bench and how cases are decided. Part I also examines the experiences that states have had with partisan elections. It concludes by examining the reasons for recent trends towards the politicization of state judicial campaigns.

Part II shifts to an examination of the two *Republican Party of Minnesota v. White* decisions. This section attempts to first describe judicial selection in Minnesota prior to the *White* decisions and set the context for the litigation in the cases. The remainder of Part II provides a detailed analysis of the two decisions.

Part III of the article shifts to exploring what options states have for judicial selection in light of the two *White* opinions. The first part of this section will ask whether the *White* opinions should be read narrowly as only prohibiting some types of regulation of judicial campaigning and speech or whether they should be read more expansively signaling that judicial elections and campaign speech should be seen as no different than other races for competitive office. To help clarify the impact of the *White* opinions, examination of their treatment in subsequent disputes by other courts shall be examined. Finally, this part of the paper concludes with what options there are to “fix” judicial selection—be it with elections or an appointment process—in light of the *White* opinions.

Overall, the argument of this article is that the two *White* opinions should be read broadly as significantly offering judicial campaign speech the same First Amendment protection as afforded rhetoric in other competitive races. If states fear that competitive judicial campaigns where candidates announce their positions affiliate with political parties and other groups or solicit political contributions are a threat to judicial independence, then there is little they can do so long as elections are used to select judges. Instead, as both the Supreme Court and the Eighth Circuit declared, the turn to elections to select judges forfeits judicial independence for public accountability. This leaves states with few,

if any, options short of moving towards an appointment system for judges if they wish to preserve an independent judiciary.

## I. THE POLITICS OF STATE JUDICIAL SELECTION

Four points emerge when examining state judicial selection methods. First, states display a variety of judicial selection methods. Second, judicial selection methods matter. Third, the experience of states with partisan elections has not necessarily been good. Finally, courts are major policy players in states, continuing the political battles fought out at either the federal level or in capitols across the country.

### A. *Judicial Selection Methods*

The twin poles of judicial independence and public accountability have dominated state judicial selection since the early days of the republic.<sup>9</sup> As a result, efforts to ensure that judges are independent and not indebted to political parties, special interests, or otherwise biased has been one goal which has influenced judicial selection methods.<sup>10</sup> Yet at the same time, worries that judges would become corrupt, out of touch, or lack accountability if left too independent have also influenced the choice of judicial selection methods. Examination of state judicial selection methods over time reveals this effort to balance independence with accountability.<sup>11</sup>

Over time, states have displayed a variety of ways of selecting their judges. Until 1812, states used an appointment process to select their judges.<sup>12</sup> In that year, Georgia became the first state to use elections as a method of choosing at least some of its judges.<sup>13</sup> Georgia was soon followed by Indiana and Mississippi<sup>14</sup> and by the end of the Civil War, the spirit of Jacksonian populism yielded twenty-four of the thirty-four states using elections to select

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<sup>9</sup> Christopher Rapp, Note, *The Will of the People, the Independence of the Judiciary, and Free Speech in Judicial Elections After Republican Party of Minnesota v. White*, 21 J.L. & POL. 103, 107 (2005).

<sup>10</sup> *Id.* at 108.

<sup>11</sup> *Id.* at 110–18.

<sup>12</sup> Larry C. Berkson, *Judicial Selection in the United States: A Special Report*, AM. JUDICATURE SOC'Y 1 (2004), available at [http://www.ajs.org/js/berkson\\_2005.pdf](http://www.ajs.org/js/berkson_2005.pdf) (last visited Aug. 13, 2006).

<sup>13</sup> *Id.*; Rachel Paine Caufield, *In the Wake of White: How States are Responding to Republican Party of Minnesota v. White and How Judicial Elections Are Changing*, 38 AKRON L. REV. 625, 626 (2005).

<sup>14</sup> Caufield, *supra* note 13, at 626–27.

judges.<sup>15</sup> Every other state subsequently admitted to the union opted for judicial elections.<sup>16</sup> By 1927, fears that judges were corrupted by party politics led twelve states to adopt non-partisan judicial races<sup>17</sup> and concern that judicial elections were not producing the most qualified judges ushered in the advent of merit selection systems.<sup>18</sup> Merit plans, otherwise called or referred to as the Missouri Plan because it was the first state to adopt this method in 1940,<sup>19</sup> involved the creation of a judicial commission that screens and then recommends qualified judicial candidates to the governor who then selects from that slate. Subsequently, after one or more years, there is a non-competitive retention election that lets the voters decide if they wish to keep that judge on the bench.<sup>20</sup>

In 2002, states offered a variety of judicial selection methods. Fourteen states used the Missouri Plan to select judges.<sup>21</sup> Four states—California, Maine, New Hampshire, and New Jersey—used gubernatorial appointments while South Carolina and Virginia legislatures selected their judges.<sup>22</sup> Thirteen states including Minnesota, Wisconsin, and Washington used non-partisan elections<sup>23</sup> while eight states including Texas, Pennsylvania, Ohio, and Illinois allowed for partisan elections.<sup>24</sup> Finally, nine states including New York employed hybrid or mixed methods to pick judges often mixing elections with merit plan systems.<sup>25</sup>

In addition to utilizing several methods to control judicial selection, states also imposed varying limits on what judicial candidates could say or discuss. Starting in 1924, the American Bar Association (ABA) issued a model code of judicial conduct suggesting that judicial candidates “should not announce in advance [their] conclusions of law on disputed issues to secure class support.”<sup>26</sup> The ABA produced Canon 7B(1)(c) of the Model Code in 1972 which urged judicial candidates not to “make pledges or

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<sup>15</sup> *Id.* at 627. See also Schotland, *supra* note 1, at 1400; Rapp, *supra* note 9, at 107–09 (arguing that Jacksonian populism initiated the movement towards elected state judges in the early nineteenth century).

<sup>16</sup> Caulfield, *supra* note 13, at 627.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Berkson, *supra* note 12, at 4–5.

<sup>20</sup> *Id.* at 5.

<sup>21</sup> Caulfield, *supra* note 13, at 628.

<sup>22</sup> Berkson, *supra* note 12, at 6–7.

<sup>23</sup> *Id.* at 6; Caulfield, *supra* note 13, at 628 n.26.

<sup>24</sup> Berkson, *supra* note 12, at 6; Caulfield, *supra* note 13, at 628 n.25.

<sup>25</sup> Caulfield, *supra* note 13, at 628 n.27.

<sup>26</sup> CANONS OF JUDICIAL ETHICS Canon 30 (1924).

promises of conduct in office other than the faithful and impartial performance of the duties of the office” or “announce [their] views on disputed legal or political issues.”<sup>27</sup> Subsequent 1990 revisions of this “announce clause” led to the creation of Canon 5A(d)(ii) which prohibits “statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.”<sup>28</sup> Twelve states (in 2002) including Minnesota limited judicial speech based upon the 1972 language while another twenty-five drew upon the 1990 language with five other states using either the 1924 language (Montana) or other sources to define limits to judicial speech.<sup>29</sup>

### *B. Impact of Selection Methods*

Do selection methods matter? In his study of different presidential appointment processes for federal judges, Elliot Slotnick found that they did not produce different demographic results.<sup>30</sup> However, other studies reached different conclusions.

Evidence suggests that different selection processes produce different results in terms of rulings and who serves. Flango and Ducat compared five selection methods—partisan and non-partisan elections, gubernatorial and legislative appointment, and the Missouri Plan—to see if process made a difference.<sup>31</sup> Without reaching any conclusions, the authors suggested that researchers should look to see how selection process affected who was placed on the bench (demographic differences) and the type of decisions (output) of the courts.<sup>32</sup> Richard Watson and Rondal Downing found that different methods affect the quality of judges who serve<sup>33</sup> but that varying selection processes such as appointing judges did not

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<sup>27</sup> CODE OF JUDICIAL CONDUCT Canon 7B(1)(c) (1972).

<sup>28</sup> Brennan Center for Justice, *Republican Party of Minnesota v. White (formerly known as Kelly): What Does the Decision Mean for the Future of State Judicial Elections?*, [http://www.brennancenter.org/programs/dem\\_fc\\_lit\\_white\\_kellymemo.html](http://www.brennancenter.org/programs/dem_fc_lit_white_kellymemo.html) (last visited Aug. 13, 2006).

<sup>29</sup> *Id.*

<sup>30</sup> See HARRY P. STUMPF & JOHN H. CULVER, *THE POLITICS OF STATE COURTS* 48–49 (1992) (questioning whether judicial selection systems make a difference). See generally Elliot E. Slotnick, *Judicial Selection Systems and Nomination Outcomes: Does the Process Make a Difference?*, 12 AM. POL. Q. 225 (1984).

<sup>31</sup> Victor Eugene Flango & Craig R. Ducat, *What Difference Does Method of Judicial Selection Make?: Selection Procedures in State Courts of Last Resort*, 5 JUST. SYS. J. 25, 29 (1979).

<sup>32</sup> *Id.* at 37, 39.

<sup>33</sup> RICHARD A. WATSON & RONDAL G. DOWNING, *THE POLITICS OF THE BENCH AND THE BAR: JUDICIAL SELECTION UNDER THE MISSOURI NONPARTISAN COURT PLAN* 282–308 (1969).

depoliticize the selection process.<sup>34</sup> Instead, each process had its own politics and organized interests adapted to these different methods.<sup>35</sup>

Daniel R. Pinello found that appointed judges are more likely to respond to a wider variety of groups and interests than elected judges.<sup>36</sup> Similarly, appointed judges seem more disposed to support individual rights than elected judges.<sup>37</sup> Thus, overall, how judges are selected may impact how they rule, with elected individuals feeling less autonomy to innovate and step back from voters than appointed judges.

### *C. State Experiences with Partisan Judicial Elections*

Recent state experiences with partisan judicial elections reveal that the selection of judges has followed the path of other campaigns and elections—they have become more expensive and acrimonious.

In many ways, the politicization of judicial elections begins in California in 1978 when Los Angeles County attorneys advertised to find judicial candidates to challenge incumbents<sup>38</sup> whom they believed were “soft on crime.”<sup>39</sup> This politicization continued into the 1986 retention election when three of California’s Supreme Court Justices including Chief Justice Rose Bird were defeated because of their opposition to the death penalty and the perception that they were soft on crime.<sup>40</sup> In their retention elections, several groups spent heavily on political ads to defeat them.<sup>41</sup>

In Ohio, interest groups are heavily involved in partisan campaigns and some races have cost millions of dollars.<sup>42</sup> In one Ohio case involving potential punitive damages of \$25,000,000, plaintiffs made political contributions to two of the state’s Supreme Court Justices who were up for reelection and scheduled to hear the case.<sup>43</sup> Over objections of the defendant, the justices did not recuse

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<sup>34</sup> *Id.* at 330–32.

<sup>35</sup> *Id.* at 75, 123–26, 163–68.

<sup>36</sup> DANIEL R. PINELLO, *THE IMPACT OF JUDICIAL-SELECTION METHOD ON STATE-SUPREME-COURT POLICY* 130–31 (1995).

<sup>37</sup> *Id.* at 131.

<sup>38</sup> Schotland, *supra* note 1, at 1405.

<sup>39</sup> Anthony Champagne, *Interest Groups and Judicial Elections*, 34 *LOY. L.A. L. REV.* 1391, 1394 (2001).

<sup>40</sup> Schotland, *supra* note 1, at 1406. *See also* Champagne, *supra* note 39, at 1395.

<sup>41</sup> Champagne, *supra* note 39, at 1395; *see* CHEEK & CHAMPAGNE, *supra* note 5, at 24; Schotland, *supra* note 1, at 1406.

<sup>42</sup> Champagne, *supra* note 39, at 1397–98.

<sup>43</sup> CHEEK & CHAMPAGNE, *supra* note 5, at 119–120.

themselves and eventually ruled in favor of the plaintiffs.<sup>44</sup>

In Alabama, Illinois, Michigan, Mississippi, and Ohio, the average contest for the Supreme Court in 2000 was \$2,000,000 with \$45,000,000 raised by state supreme court candidates around the country.<sup>45</sup> In Ohio, non-candidate independent expenditures topped \$8,000,000, and in Michigan, one campaign ad described a judge as soft on crime because he upheld a minimum sentence for a child molester.<sup>46</sup> In the television ad, the word “pedophile” was blazed across a picture of the judge implying that he was the child molester.<sup>47</sup> In North Carolina, a judicial candidate openly described himself as pro-life, and in Alabama, the opposing candidate was depicted as a skunk.<sup>48</sup>

But Texas has been held out to be in a class of its own. Until the mid-1980s the Texas Supreme Court was dominated by the Democratic Party.<sup>49</sup> Anger with its decision to change school funding in the state and perceptions by business groups that it was pro tort-plaintiff, however, led to multi-million dollar spending by the political parties and interest groups to change the courts.<sup>50</sup> The result? Heavily partisan and costly races often with negative attack ads more typical of those found in legislative races.<sup>51</sup> Studies have demonstrated that the investments by interest groups have paid off with evidence suggesting that the outcomes of these campaigns have altered public perceptions and decisions of the Texas courts.<sup>52</sup>

#### *D. Why Politicize the Courts?*

Why would anyone want to politicize the courts and turn judicial races into partisan, issue-driven, and money dominated events? The answer is similar to the one Willie Sutton once gave when asked why he robbed banks—“because that is where the money is.” Across the country, state courts are no longer seen, in the words of Alexander Hamilton, as the “least dangerous” branch of the

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<sup>44</sup> *Id.* at 120.

<sup>45</sup> *Id.* at 121; Schotland, *supra* note 1, at 1405.

<sup>46</sup> CHEEK & CHAMPAGNE, *supra* note 5, at 124.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 119.

<sup>49</sup> Kyle D. Cheek & Anthony Champagne, *Partisan Judicial Elections: Lessons From a Bellwether State*, 39 WILLAMETTE L. REV. 1357, 1366 (2003).

<sup>50</sup> *Id.* at 1367–68.

<sup>51</sup> See CHEEK & CHAMPAGNE, *supra* note 5, at 6 (describing the changing nature and rising costs of judicial campaigns).

<sup>52</sup> *Id.* at 37–40, 55–59.

government without either control over “the sword or the purse” and possessing “neither Force nor Will, but merely judgment.”<sup>53</sup> Instead, state courts are major policy players. This has not always been the case, and this role is not accepted by everyone.

Until the 1970s, the federal courts, especially the Supreme Court under Chief Justice Earl Warren, were where the action was when it came to issues such as reapportionment, voting rights, criminal due process, and a host of other issues.<sup>54</sup> But beginning in the 1970s, state courts became new and active players in protecting individual rights and settling policy disputes. In part because he saw the Burger Supreme Court as retreating from the liberal activism of the Earl Warren era, Justice Brennan in 1977 urged state courts to use their own constitutions and authority to protect individual rights.<sup>55</sup> It is from this article that the “new judicial federalism” developed.<sup>56</sup>

Using their own state constitutions, state courts have often decided cases differently from those reached by the federal courts often providing more constitutional protection for rights than found at the federal level.<sup>57</sup> For example, the Minnesota Supreme Court has found that a right to privacy protects a woman’s right to terminate a pregnancy and to receive public funding for an abortion if on public assistance.<sup>58</sup> The Minnesota courts have also invalidated laws proscribing consensual same-sex sodomy,<sup>59</sup> a conceal and carry gun law,<sup>60</sup> and, as the 2005 legislative session revealed, the state judiciary was a major player in the budget process with the authority to order spending for essential state functions after the state legislature deadlocked and was unable to pass a budget.<sup>61</sup> Similar patterns demonstrating the important role of courts in other states in addressing important issues also confirm

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<sup>53</sup> THE FEDERALIST NO. 78, at 522–23 (Alexander Hamilton) (Jacob E. Cooke ed., Wesleyan University Press 1961).

<sup>54</sup> See, e.g., JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 73–74 (1980); BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY (1983) (discussing the impact and importance of the Warren Court on American politics).

<sup>55</sup> William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

<sup>56</sup> G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 161 (1998).

<sup>57</sup> See generally *id.* at 161–72 (discussing how states have constructed more rights or protections than those found under the Federal Constitution).

<sup>58</sup> *Women of the State of Minn. v. Gomez*, 542 N.W.2d 17, 30–31 (Minn. 1995).

<sup>59</sup> *Doe v. Ventura*, No. MC 01-489, 2001 WL 543734, at \*9 (Minn. Dist. Ct. May 15, 2001).

<sup>60</sup> *Unity Church of St. Paul v. Minn.*, 694 N.W.2d 585, 600 (Minn. Ct. App. 2005).

<sup>61</sup> *In re Temp. Funding of Core Functions of the Exec. Branch of the State of Minn.*, No. C0-05-5928, at \*8–10 (Minn. Dist. Ct. June 23, 2005).



that the Minnesota experience is not *sui generis*.<sup>62</sup>

In addition, many groups have come to recognize the importance of state courts across a range of issues. Business interests concerned about tort liability have sought to influence the composition of state courts.<sup>63</sup> Similarly, insurance defense attorneys, the medical field, and the plaintiffs' bar have come to realize how important the composition of the state bench is to their livelihood.<sup>64</sup> In addition, as social issues such as gay rights or same-sex marriage are being litigated at the state level, state supreme courts have become important decision-makers drawing significant attention in the cultural wars.<sup>65</sup> Finally, political parties also have come to recognize state courts as important players in addressing reapportionment of state legislatures and congressional seats.<sup>66</sup>

Overall, state courts are major political and policy players in the state and not confined as Justice Roberts stated during his confirmation to simply calling "balls and strikes"; the courts appear also to be pitching and batting.<sup>67</sup>

While one can argue over whether state courts have exactly the same constitutional role in the state as the federal courts do under the United States Constitution,<sup>68</sup> there is no question that many individuals disagree either with the policy-making role or the policies of the state courts. For example, many individuals do not support abortion or gay rights or believe that individuals should be

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<sup>62</sup> An exhaustive list of state court decisions departing from federal constitutional standards would be impossible to list. *See, e.g.*, *Commonwealth v. Wasson*, 842 S.W.2d 487, 501–02 (Ky. 1992) (finding that the Kentucky Constitution includes a right to privacy that protects consensual homosexual sodomy despite what the Supreme Court ruled in *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986)); *Robinson v. Cahill*, 303 A.2d 273, 294 (N.J. 1973) (ruling that there is a right to education that is "thorough and efficient" such that funding disparities across districts violates the state constitution despite what the Supreme Court ruled in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 55 (1973)).

<sup>63</sup> *See* CHEEK & CHAMPAGNE, *supra* note 5, at 106.

<sup>64</sup> *Id.* at 106–07.

<sup>65</sup> *See, e.g.*, *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969–70 (Mass. 2003) (striking down the Massachusetts ban on same-sex marriages on state constitutional grounds); *Hernandez v. Robles*, 2006 WL 1835429 (N.Y. July 6, 2006) (upholding the New York law limiting marriage to couples of the opposite sex).

<sup>66</sup> *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1243 (Colo. 2003) (holding that the second redistricting after the 2000 census violated the state constitution).

<sup>67</sup> John G. Roberts, Opening Statement to the Senate Judiciary Committee (Sept. 12, 2005) available at <http://www.americanrhetoric.com/speeches/johnrobertsenatejudiciaryaddress.htm> (last visited Aug. 13, 2006).

<sup>68</sup> *See generally* JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM 121–42 (2005) (discussing "State Constitutions in the Federal Scheme" and arguing for a functional role of state courts and constitutional interpretation to protect states and correct mistakes).

allowed to carry their own guns. In addition, some even contest the very role of the courts in our society. For some, Congress and other elected bodies such as state legislatures should make policy and not the courts.<sup>69</sup> Judges should defer to the majority except in a narrow set of circumstances because when they do not, they act in a “counter-majoritarian” and unprincipled fashion.<sup>70</sup> Conversely, some argue that the job of the courts is to protect minority rights against majority rule or to police the political process to ensure that it does not break down and close out the powerless.<sup>71</sup>

Whatever one’s policy perspective or view on the role of the courts, there is no doubt that state judges are players thereby creating incentives to affect who is on the bench.

### *E. Summary*

Judicial selection processes matter. How state judges are selected affects who sits and that in turn influences what is decided and how. As state courts have become more important players in addressing controversial issues in American society, influencing how judges are selected has become a more heated and important issue. Given this, there are powerful reasons to want to know the opinions and views of potential judicial candidates and to seek a variety of ways to influence the outcome of judicial elections. Thus, partisan elections are the answer to promoting judicial accountability.

But for those who fear partisan judicial elections, if judges could announce positions, they would pander to special interests. If judges could solicit contributions, they would shake down attorneys who appear before them or lawyers would be compelled to give because they fear not being competitive in court. Finally, there is the fear that judges might lose their judicial independence as they become beholden to special interests and political parties for financial support.

In *Minnesota Republican Party of Minnesota v. White*, these competing demands of judicial accountability versus maintaining

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<sup>69</sup> See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 21 (Yale Univ. Press 1986) (1962) (stating that “judicial review . . . weaken[s] the democratic process”).

<sup>70</sup> *Id.* at 16–23 (observing that judicial review is a “counter-majoritarian force in our system”).

<sup>71</sup> See, e.g., ELY, *supra* note 54, at 81 (recognizing the majority’s potential to advantage itself at the expense of the minority).

judicial neutrality came into conflict.

## II. *REPUBLICAN PARTY OF MINNESOTA V. WHITE*

In separate decisions, the United States Supreme Court and the Eighth Circuit Court of Appeals reviewed and declared several provisions of Minnesota's canons of judicial conduct regulating the speech and conduct of judicial candidates unconstitutional.<sup>72</sup>

### A. *Minnesota Judicial Selection Prior to White*

Two provisions of the state constitution controlled judicial selection in Minnesota. Article VI, section 7 of the Minnesota Constitution provides for the election of judges and justices to six year terms.<sup>73</sup> Conversely, section 8 provides for gubernatorial appointment of judges and justices to fill out a remaining term when there is a judicial vacancy.<sup>74</sup> Ever since the first state constitution in 1858, judicial elections have been the official way judges are supposed to be selected with appointment to fill vacancies being the exception.

Judicial election in Minnesota contrasts in several critical ways to selection for state legislators and constitutional officers. For example, candidates for the state legislature may seek party endorsements, personally solicit political contributions, and announce their political positions, ideology, or preferences whereas judicial candidates in Minnesota have been prohibited from doing this.

Since 1912, state judicial races have been designated as non-partisan,<sup>75</sup> and since 1974, Canon 5 of the *Minnesota Code of Judicial Conduct* has imposed additional restrictions on judicial candidates. Specifically, the *Code* prohibits judicial candidates from announcing their views on disputed legal or political issues,<sup>76</sup> affiliating themselves with political parties,<sup>77</sup> or personally soliciting or accepting campaign contributions.<sup>78</sup> These rules, based upon the

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<sup>72</sup> *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002); *Republican Party of Minn. v. White*, 416 F.3d 738, 765 (8th Cir. 2005).

<sup>73</sup> MINN. CONST. art. VI, § 7.

<sup>74</sup> *Id.* § 8.

<sup>75</sup> MINN. CODE OF JUDICIAL CONDUCT, Canon 5(A) (2006) (citing MINN. STAT. § 204B.06 subdiv. 6 (2006) (justices shall hold non-partisan offices)).

<sup>76</sup> *Id.* Canon 5(A)(3)(d)(i) [hereinafter "announce" clause].

<sup>77</sup> *Id.* Canon 5(A)(1) [hereinafter "partisan-affiliation" clause].

<sup>78</sup> *Id.* 5(B)(2) [hereinafter "solicitation" clause].

1972 ABA *Model Code of Judicial Conduct*, are meant to promote the integrity of judges and to encourage an independent judiciary. The belief behind such restrictions, in part, is that judicial candidates who announce their views on topics that would come before them later as judges might be seen as biased or lacking impartiality. Hence, while elections are to be held for judges, they are to be run as non-partisan affairs where voters select candidates based on their perceived judicial character and integrity and not their political views, party affiliation, or ability to raise and spend campaign money.

While the Canon 5 rules are laudable, they have not necessarily produced better judicial elections. For one, the reality of judicial selection in Minnesota is that the state actually has a dual selection system with gubernatorial appointment more the norm than the exception. In 1993, of the then 297 judges and justices on the bench in Minnesota, ninety-one percent of them initially were appointed.<sup>79</sup> This included six of the seven then-sitting Supreme Court justices.<sup>80</sup> In many cases, sitting judges resign early before their term expires so that the governor can fill the vacancy inspired in part because of their dislike for campaigning.<sup>81</sup>

Second, most judicial races in the state were uncontested. For example, in 2004, there were twenty-three judicial races in Ramsey County (Second Judicial District) with a total of twenty-seven candidates. Of those twenty-three races, nineteen of them (83%) were uncontested. Similarly, in the Second District in 2002, there were twelve races involving fifteen candidates with nine races (75%) uncontested. For voters, judicial races come at the bottom of the ballot.<sup>82</sup>

Between this placement on the bottom of the ballot and the lack of information about the plethora of candidates, there is “voter fatigue” in choosing judges with twenty-eight percent of voters not selecting a judicial candidate and thirty-one percent voting “on the basis of gender or ethnicity (Scandinavian last name).”<sup>83</sup>

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<sup>79</sup> Pam Louwagie, *Star Tribune Special Report; Handpicked Justice; Bypassing Voter Judgment; Despite Elections, Public Rarely Decides Who Takes Bench*, STAR TRIB. (Minneapolis, MN), Aug. 3, 2003, at 1A.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* (observing that only seventeen out of over 100 judges that left office let their term run out in the last seventeen years).

<sup>82</sup> David A. Schultz, *Judicial Selection in Minnesota: Options After Republican Party v. White*, 62 BENCH & B. MINN. 18 (2005).

<sup>83</sup> *Id.* See also Keri E. Hieneman, Note, *Women in the Judiciary: Kentucky's Need for Change*, 42 BRANDEIS L.J. 447, 456–57 (2003) (discussing the problem of voter drop-off when

Overall, it would be hard to conclude that judicial elections have been shining successes. Given the limits on the ability of candidates to challenge incumbents or to raise the resources and support to run a successful campaign for judge, some argued that the current Canon 5 rules made a mockery of judicial elections and also violate their constitutional rights. One of those individuals was Gregory Wersal.

*B. Republican Party of Minnesota v. White: Round One*

In 1996, Gregory Wersal ran for associate justice of the Minnesota Supreme Court. While campaigning, he criticized several Minnesota Supreme Court decisions on issues such as crime, welfare, and abortion.<sup>84</sup> A complaint against Wersal was filed with the Office of Professional Responsibility (hereinafter “Office”) charging that he violated the announce clause of Canon 5.<sup>85</sup> Even though the Office dismissed the complaint because it thought the rule was ambiguous and unconstitutional, Wersal abandoned his campaign for fear of receiving other ethical complaints against him.<sup>86</sup> Again in 1998, he ran for the Supreme Court and this time sought an advisory opinion from the Office to determine whether it would enforce the announce clause.<sup>87</sup> The Office responded that it would enforce the announce clause in at least some circumstances prompting Wersal, who was joined by the Republican Party of Minnesota, to challenge the announce clause in federal court as a violation of his First Amendment free speech rights.<sup>88</sup> The district court upheld the announce clause,<sup>89</sup> and the decision was affirmed by the Eighth Circuit.<sup>90</sup> The Supreme Court granted certiorari reversing and remanding back to the district court in a 5–4 decision.<sup>91</sup>

Writing for the majority, Justice Scalia first sought to clarify the meaning of the announce clause of Canon 5.<sup>92</sup> He noted that the

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selecting judicial candidates).

<sup>84</sup> Republican Party of Minn. v. Kelly, 63 F. Supp. 2d 967, 972 (D. Minn. 1999).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 973–74.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 970.

<sup>89</sup> *Id.* at 986.

<sup>90</sup> Republican Party of Minn. v. Kelly, 247 F.3d 854, 885 (8th Cir. 2001).

<sup>91</sup> Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002).

<sup>92</sup> *Id.* at 770–72.

clause did not preclude criticism of past judicial opinions<sup>93</sup> but only disputed ones that would likely come before the court if one were elected as judge.<sup>94</sup> However, he indicated that criticism of past decisions would be sanctioned under Canon 5 if the candidate also stated opposition to stare decisis.<sup>95</sup> But Justice Scalia contended that the announce clause was vague in terms of what it prohibited.<sup>96</sup> For example, there would be no violation if criticism came in terms of general philosophical discussion or was limited to disputed issues not likely to come before the Court.<sup>97</sup> What exactly general philosophical discussion meant or what constituted a disputed issue were not clear according to Scalia.

Second, the Scalia majority concurred with the Eighth Circuit that the announce clause imposed a content-based restriction on the First Amendment that necessitated strict scrutiny.<sup>98</sup> This scrutiny necessitated that the state show that the announce clause was narrowly tailored and that it served a compelling state interest.<sup>99</sup> In upholding the clause, the Eighth Circuit saw the clause as serving the compelling interest of promoting judicial impartiality or its appearance.<sup>100</sup>

After reviewing three different possible definitions of impartiality including lack of bias, lack of preconceived ideas, and lack of open mindedness,<sup>101</sup> Scalia rejected all three of these efforts as constitutionally compelling justifications for the announce clause, in part because of their under-inclusiveness.<sup>102</sup> Specifically, Scalia attacked the artificial line drawn between what a judicial candidate and non-candidate could say:

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

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<sup>93</sup> *Id.* at 771.

<sup>94</sup> *Id.* at 771–72.

<sup>95</sup> *Id.* at 772.

<sup>96</sup> *See id.* at 775 (noting the ambiguity of Minnesota’s interest in preserving the impartiality of the state judiciary).

<sup>97</sup> *Id.* at 771–72.

<sup>98</sup> *Id.* at 774.

<sup>99</sup> *Id.* at 774–75.

<sup>100</sup> *Id.* at 775.

<sup>101</sup> *Id.* at 775–79.

<sup>102</sup> *Id.* at 776–81.

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.<sup>103</sup>

Moreover, Scalia asserted that efforts to regulate the content of judicial elections are recent and therefore not deserving of judicial respect because of their longevity.<sup>104</sup> Finally, the Scalia majority argued that trying to hold elections while limiting the content and what can be discussed prevents candidates from discussing what elections are about.<sup>105</sup> For all of these reasons, the Court ruled that the announce clause violated the First Amendment and remanded the case to the lower courts.<sup>106</sup>

### C. Republican Party of Minnesota v. White: *Round Two*

On remand, the Eighth Circuit en banc declared unconstitutional not only the announce clause but also the partisan-activities and solicitation clauses.<sup>107</sup> In ruling as it did, the en banc opinion voided all three clauses on First Amendment grounds. Fascinating, though, in the opinion were contrasting views by the majority and dissenting opinions regarding what constitutes threats to an impartial judiciary and what remedies are appropriate to abating those threats.

For the majority, they closely followed the Scalia opinion in the Supreme Court's *Republican Party of Minnesota* decision declaring that the three clauses of Canon 5 limit judicial candidate speech thereby demanding strict scrutiny analysis.<sup>108</sup> As with the Supreme Court opinion, the majority here first sought to identify the compelling governmental interests supporting Canon 5.<sup>109</sup> They argued that Minnesota (after the Supreme Court's opinion in *White*) continued to assert that it was the promotion of judicial independence and impartiality that was compelling because "a judge must be independent of and [be] free from outside influences

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<sup>103</sup> *Id.* at 779–80.

<sup>104</sup> *Id.* at 785–86. See generally David Schultz, *Scalia on Democratic Decision Making and Long Standing Traditions: How Rights Always Lose*, 31 SUFFOLK U. L. REV. 319 (1997) (discussing the deference Scalia offers to long-standing practices at the expense of Bill of Rights protections).

<sup>105</sup> *White*, 536 U.S. at 787–88.

<sup>106</sup> *Id.* at 788.

<sup>107</sup> *Republican Party of Minn. v. White*, 416 F.3d 738, 744 (8th Cir. 2005).

<sup>108</sup> *Id.* at 748–49.

<sup>109</sup> *Id.* at 751, 753–54.

in order to remain impartial and to be so perceived.”<sup>110</sup> The court also noted how the Minnesota Supreme Court, after the United States Supreme Court opinion in this matter, refused to modify Canon 5 contending that a separation of powers rationale—the need to extricate the judiciary from the partisan politics that affect the executive and legislative branches—also constituted a compelling interest.<sup>111</sup> Accepting the rationale that protecting litigants from biased judges due to threats to independence or impartiality was a compelling interest, the majority then asked if the partisan-activities and the solicitation clauses were narrowly tailored.<sup>112</sup>

In terms of the partisan-activities clause, the court stated that Canon 5 was “barely tailored at all.”<sup>113</sup> This was the case because there is no evidence that membership or affiliation with a specific party can cause a bias that cannot be remedied with the least restrictive recusal option if that party is before a judge who is a member.<sup>114</sup> Moreover, and more importantly, the court stated that the Canon 5 partisan-activities clause is underinclusive in that it assumes that only political parties and not other organizations such as the NRA or the NAACP are a source of bias or threat to judicial independence.<sup>115</sup> Canon 5 is also underinclusive in that it permits affiliating with a party only up to the point when one becomes a judicial candidate and then such association is prohibited because it is corrupting.<sup>116</sup>

The en banc majority also ruled that the solicitation clause was a content and viewpoint-based restriction on speech because it prohibited judicial candidates from speaking to others about a particular subject—e.g., contributing money to their campaign.<sup>117</sup> As with the partisan-activities clause, the court found that the solicitation clause was not narrowly tailored in that a mere signature on a fundraising letter would not necessarily indicate bias or an inability to be open-minded in a case.<sup>118</sup> As with the partisan-activities clause, the solicitation clause was not narrowly tailored to

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<sup>110</sup> *Id.* at 751.

<sup>111</sup> *Id.* at 752 n.7.

<sup>112</sup> *Id.* at 753–54, 764.

<sup>113</sup> *Id.* at 755–56.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 759–60.

<sup>116</sup> *Id.* at 758; *cf.* *Republican Party of Minn. v. White*, 536 U.S. 765, 779–80 (2002) (where the Court makes the same point in respect to the announce clause).

<sup>117</sup> *White*, 416 F.3d at 763–64.

<sup>118</sup> *Id.* at 766.



deal with specific instances of bias<sup>119</sup> which can be best addressed with recusal.

In contrast to the majority who seemed to be focusing on how the Canon 5 clauses constitutionally failed to address mostly internal biases of judges, the dissent emphasized the external threats to judicial independence.<sup>120</sup> Specifically, they stated that the “threat to open-mindedness at which the partisan activities and solicitation clauses aim comes not from within the candidates, but from without and consists of the candidates placing themselves in debt to powerful and wide-reaching political organizations that can make or break them in each election.”<sup>121</sup>

Drawing upon case law in the areas of campaign finance and money and politics, the dissent stated that the threat Canon 5 aims to address is the corruption that comes from the undue influence that outside groups can have on public officials including judicial candidates and judges, especially when they make political contributions that could rise to the appearance or reality of quid pro quo corruption.<sup>122</sup> The dissent indicated how the Supreme Court, in its recently decided *McConnell v. FEC*<sup>123</sup> permitted the singling out of political parties from other political groups in terms of regulations to prevent corruption and that such a rationale could also support the Canon 5 restriction on partisan-affiliation.<sup>124</sup> Overall, for the dissent, clear concern about the external threats to judicial independence and neutrality associated with “participation of judges who have been allowed or forced to make themselves dependent on party largesse for their continued tenure affects the state’s ability to provide neutral judges and the public’s perception of such neutrality” and therefore the “state has a compelling interest in keeping its judges free from the odor of self-interest or partisanship.”<sup>125</sup> Given these concerns, the dissent would have upheld the partisan-activities and solicitation clauses.

#### *D. Summary*

The two *White* opinions eviscerated most of Minnesota’s Canon 5

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 768 (Gibson, J., dissenting).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 769–70 (citing *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 389 (2000); U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers, 413 U.S. 548, 564–65 (1973)).

<sup>123</sup> 540 U.S. 93 (2003).

<sup>124</sup> *White*, 416 F.3d at 778–79 (Gibson, J., dissenting).

<sup>125</sup> *Id.* at 771.

restrictions. While the Supreme and Eighth Circuit Courts recognized the important and compelling governmental interests in maintaining judicial independence and impartial judges, the announce, solicitation, and affiliation clauses were unconstitutional restrictions on the First Amendment rights of candidates. These two decisions seemed to recognize that elections are elections—whether they be for judges or legislators—and if candidates are going to run for office, there is no reason not to afford them the same opportunities to announce their positions, solicit money for campaigns, or affiliate with a party for the purpose of informing voters and getting elected.

### III. JUDICIAL SELECTION AFTER *WHITE*

The two *Republican Party of Minnesota v. White* decisions invalidated the announce, solicitation, and affiliation provisions that regulated Minnesota judicial candidate speech. How broadly should these decisions be read and what options do they leave for states in terms of the future of judicial selection? This section of the article contends that the holdings of these two cases should be read broadly and not narrowly, finding that most regulation of judicial campaign speech is unconstitutional.

#### A. *How to Read the Two White Opinions*

How should the two *White* opinions be read? One option is simply to read the opinions narrowly with the two opinions only voiding the restrictions at issue in the case. This would imply several things. First, in terms of the announce clause, judicial candidates could not be precluded from criticizing precedent or discussing disputed issues likely to come before the Court. It also appears that even statements such as “I think it is constitutional for the legislature to prohibit same-sex marriages”<sup>126</sup> cannot necessarily be prohibited. Instead, the remedy for making such a statement is not a sanction from the Lawyers’ Board of Professional Responsibility but instead recusal.

Second, one of the decisions struck down the affiliation clause.<sup>127</sup> After the two *White* opinions, it does not appear that Minnesota could bar candidates from seeking party endorsements or parties

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<sup>126</sup> *Republican Party of Minn. v. White*, 536 U.S. 765, 779 (2002).

<sup>127</sup> *White*, 416 F.3d at 766.

from endorsing candidates. Nonetheless, the two opinions do seem to void bans on party affiliation but may be read as silent on other forms of endorsement (such as by labor unions, interest groups, etc.).

Finally, the solicitation clause only barred a candidate from placing a signature on a fundraising letter mailed out by her political committee when the names of the contributors would remain anonymous to the candidate.<sup>128</sup> This narrow holding would seem to permit regulations barring candidates from doing personal, one-on-one solicitations or fundraising where the identity of the candidates is known. Read narrowly, there is still ample room to regulate much judicial candidate solicitation.

However, there is a legitimate reading of the two *White* opinions that might lead to an even broader ban or regulation on Canon 5 type restrictions.<sup>129</sup> For example, it is not clear that the Supreme Court necessarily accepted preserving judicial impartiality as a compelling government interest.<sup>130</sup> Yet even if it did, Scalia's rejection of the three efforts to define impartiality—including lack of bias, lack of preconceived ideas, and lack of open mindedness—were rejected as constitutionally compelling justifications because of their under-inclusiveness.<sup>131</sup> Moreover, given the Court's statement that limiting what can be discussed prevents candidates from discussing what elections are about,<sup>132</sup> one could argue that what Scalia was saying was that judicial candidates should be permitted to say *anything* they want during an election and the only remedy is that once elected, one would have to show a real bias or reason to exclude a judge from hearing a case.<sup>133</sup> In addition, in her concurrence, O'Connor stated that "[i]f 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."<sup>134</sup> For

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<sup>128</sup> *Id.* at 764–65.

<sup>129</sup> 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'Y REV. 301, 318 (2003) (contending that "while the holding of the case was narrow, there is language in *White* to suggest that the First Amendment provides candidates and voters with much broader protections in judicial elections than those required by the holding alone").

<sup>130</sup> *White*, 536 U.S. at 777.

<sup>131</sup> *Id.* at 775–80.

<sup>132</sup> *Id.* at 788.

<sup>133</sup> See, e.g., Dimino, *supra* note 129, at 303 (arguing that the "governmental interests in maintaining an independent, impartial judiciary and in protecting the appearance of the judiciary as independent and impartial can[not] provide justification for the suppression of speech, where such suppression would be held impermissible in elections for other offices").

<sup>134</sup> *White*, 536 U.S. at 792 (O'Connor, J., concurring).

O'Connor, the State of Minnesota abdicated judicial impartiality as a compelling interest when it opted for elections. Finally, even Justice Kennedy in concurrence stated bluntly that "direct restrictions on the content of candidate speech are simply beyond the power of government to impose."<sup>135</sup> Read this way, *White* may very well stand for the proposition that no restrictions on judicial candidate speech are permitted.<sup>136</sup> This suggests that judicial candidates could even comment on specific cases before the court or which they might hear subject to removal for real bias if the case did come before them.

Second, the affiliation ban probably cannot be limited to political parties. A rule barring all affiliations or endorsements such as from pro-life or pro-choice groups would either be overinclusive in terms of the speech it would infringe or it would constitute a content-based restriction on with whom a candidate may choose to affiliate or associate.<sup>137</sup> Thus, no restrictions on affiliation or endorsement seem likely.

Finally, a broad reading of the two *White* opinions would not seem to be limited to anonymous solicitation of candidates by way of a signature on a fundraising letter. Could one enforce a rule preventing members of a candidate's committee from informing the candidate who contributed to her campaign? Such a rule would be a content-based restriction on speech that should fail on First Amendment grounds much in the same way the candidate letter solicitation did. What about candidates directly soliciting one-on-one or speaking at a fundraiser? Barring the speaking to groups at fundraising events would be a content-based restriction that would be underinclusive of the variety of events that could compromise judicial independence or impartiality and therefore would be unconstitutional. In terms of one-on-one candidate solicitations, could time, manner, and place restrictions justify barring one from raising money in a court house or in chambers but could one bar

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<sup>135</sup> *Id.* at 793 (Kennedy, J., concurring).

<sup>136</sup> Dimino, *supra* note 129, at 318–19.

<sup>137</sup> *See, e.g.,* *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 216 (1989) (declaring unconstitutional a state law prohibiting political parties from endorsing candidates). *See also* *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 210–11 (1986) (invalidating on First Amendment grounds state laws regulating whom political parties could invite to vote in their primaries); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 586 (2000) (same). Given these decisions, there seems to be real questions regarding whether states can impose any limits on endorsements or affiliation in any campaign. *But see* *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 370 (1997) (sustaining limits on political party activity); *Clingman v. Beaver*, 125 S. Ct. 2029, 2034 (2005) (same).

fundraising by candidates, especially challengers, so long as no specific promises were made that exchanged contributions for political favors? Perhaps not. Thus, unless one can show real corruption—criminal bribery or extortion—judicial candidates should be as free to raise money as legislative or other candidates.

Which, then, is a better reading of the two *White* opinions and what they hold for future regulations? Despite the Court stating that its decision did not “assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office,”<sup>138</sup> the language of the two *White* opinions suggests a broader reading of the holding than one confined to the narrow facts. Instead, it suggests a reading of judicial speech, affiliation, and fundraising no different than similar restrictions on other elective offices.

### B. *Post-White Decisions*

A broad reading of *White* can also be confirmed by examination of lower court decisions after the Supreme Court’s opinion. While some state regulations of judicial speech were invalidated prior to the Supreme Court’s *White* opinion,<sup>139</sup> decisions after it seem to reinforce the claim that its holding should be read broadly. The New York Court of Appeals in *In re Shanley*<sup>140</sup> ruled that an individual who claimed to be a “law and order” candidate could not be disciplined under its rules governing judicial conduct.<sup>141</sup> However, this case did not cite *White* and the decision did not rest on First Amendment grounds. In *Spargo v. New York State Commission on Judicial Conduct*,<sup>142</sup> the state ban on judges engaging in political activity in order to promote judicial independence was invalidated. Here, though, the Court cited

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<sup>138</sup> *White*, 536 U.S. at 783.

<sup>139</sup> See, e.g., *Suster v. Marshall*, 149 F.3d 523, 525, 533 (6th Cir. 1998) (affirming a district court holding that the plaintiff was likely to succeed on the merits on an argument that an expenditure limit on judicial campaigns violated the First Amendment); *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 225, 231 (7th Cir. 1993) (ruling unconstitutional an announce clause similar to the one invalidated in *White*); *ACLU of Fla., Inc. v. Fla. Bar*, 744 F. Supp. 1094, 1096, 1099 (N.D. Fla. 1990) (granting a preliminary injunction because the plaintiff’s claim that the state’s announce clause violated the First Amendment was “likely to succeed on the merits”).

<sup>140</sup> 774 N.E.2d 735 (N.Y. 2002) (per curiam).

<sup>141</sup> *Id.* at 736–37; see also N.Y. COMP. CODES R. & REGS. tit. 22, § 100.5(A)(4)(d)(i)–(ii) (2001).

<sup>142</sup> 244 F. Supp. 2d 72 (N.D.N.Y. 2003), *vacated*, 351 F.3d 65 (2d Cir. 2003), *cert. denied*, 541 U.S. 1085 (2004).

Stevens' dissent in *White* noting how judicial elections may be different from other campaigns.<sup>143</sup>

However, in *Weaver v. Bonner*, the Eleventh Circuit invalidated a Georgia rule prohibiting judicial candidates from making false or misleading campaign statements.<sup>144</sup> Citing *White*, the court asserted 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."<sup>145</sup> Finally, in *Lopez Torres v. New York State Board of Elections*, a federal district court issued a preliminary injunction declaring the State's use of judicial conventions to select Supreme Court justice candidates to be unconstitutional.<sup>146</sup> In issuing the injunction the court cited *White*, stating:

[T]he Constitution of the United States does not impose upon the State of New York an obligation to select its judges by popular election. If, however, the State of New York "chooses to tap the energy and legitimizing power of the democratic process" in selecting its Supreme Court Justices, "it must accord the participants in that process . . . the First Amendment rights that attach to their roles."<sup>147</sup>

In *Lopez Torres*, the court ruled that a complex judicial convention process controlled by the state's major political parties violated the First Amendment rights of voters and potential judicial candidates.<sup>148</sup>

The above cases, although few in number, indicate that the Supreme Court decision in *White* may have a broader application than to the facts of the case. Since that decision, the Eighth Circuit has cited the Supreme Court's decision in *White* to strike Minnesota's solicitation and affiliation clauses, and the Supreme Court has denied certiorari.<sup>149</sup> While it is problematic to read anything into a denial of certiorari, one could make the argument that it, along with the Eighth Circuit opinion, reinforce and broaden the original holding and logic of *White* thereby strengthening the claim that the Constitution is increasingly drawing less and less

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<sup>143</sup> *Id.* at 86.

<sup>144</sup> 309 F.3d 1312, 1323 (11th Cir. 2002).

<sup>145</sup> *Id.* at 1321 (rejecting the argument that a different level of scrutiny should apply to judicial as opposed to other forms of political or candidate speech).

<sup>146</sup> 411 F. Supp. 2d 212, 256 (E.D.N.Y. 2006).

<sup>147</sup> *Id.* at 242-43 (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002)).

<sup>148</sup> *Id.* at 256.

<sup>149</sup> *Republican Party of Minn. v. White*, 416 F.3d 738, 766 (8th Cir. 2005), *cert. denied*, *Dimick v. Republican Party of Minn.*, 126 S. Ct. 1165, 1165-66 (2006).

differences between regulation of judicial and non-judicial campaign speech and activity.

### *C. Fixing Judicial Elections?*

How should states respond to the two *White* decisions? There are several policy options. First, states could opt to do nothing. By that, with the announce, solicitation, and partisan-activities clauses invalidated, states such as Minnesota could proceed with judicial elections without Canon 5 restrictions and wait and see what might happen. Perhaps partisan judicial elections might not emerge where they have not existed or maybe they would bring new and healthy light to the selection of judges. Armed with more specific information about candidates, their positions, and party affiliation, competitive issue-driven judicial elections might actually encourage more interest in these races reversing the ballot drop-off phenomena characteristic of voting patterns presently in Minnesota and other states.

In addition, the *White* decisions might encourage a greater diversity of candidates to run for office, highlight the important policy and political role the judiciary has in a specific state, and bring needed accountability to the courts. In this light, the *White* decisions could be seen as a healthy and important injection of democracy.

Another option is simply to do nothing and hope for the best. Here, the *White* decisions are not seen as good, but the reform tactic is simply to hope that what has happened in Texas will not occur elsewhere or at least if it does, maybe Minnesotans or New Yorkers, for example, will have less tolerance for candidates, parties, or interest groups that would seek to politicize the courts. Maybe the political culture and sensibility of other states is different from that of Texas. Yet the examples of Greg Wersal and the Republican Party in Minnesota suggest that some are ready for more wide-open judicial elections and others will follow suit across the country. After all, the fuel driving competitive elections in Texas and elsewhere no doubt exists across the country. In addition, given the important role that state courts have had in the last few years in terms of addressing issues already noted such as in abortion, gay rights, and tort liability, it seems unlikely that no one will want to move in a more partisan direction.

Another suggestion by some is that perhaps state bar associations should assume a more active role in elections.<sup>150</sup> Perhaps lawyers need to do more public education or maybe issue suggested campaign code guidelines and then publicly admonish candidates who violate these voluntary codes. While interesting, such a position is arrogant and elitist and bound to fail. It is arrogant and elitist in the sense that it assumes that in a democracy only lawyers know what is best in terms of who should be judges and what issues should be discussed. It also seems to assume that the people themselves cannot make good choices and that it is the task of attorneys to educate the masses to what is really important and how to vote. Finally, given the public reputation of lawyers in our culture, will public condemnations of judicial candidates by bar associations be heard or carry any weight? If anything, such pronouncements might backfire.

What about public financing for judicial candidates? Providing public funding for candidates might address the solicitation concerns but really would not deal with either the announce or the partisan-affiliation concerns unless one tied the voluntary acceptance of public money to accepting Canon 5 type restrictions. Such a tie in is constitutionally permissible.<sup>151</sup> However, judicial candidates cannot constitutionally be compelled to accept public financing, and it is probable that those individuals and parties most interested in more partisan races would be unlikely to go the public finance route and adhere to new restrictions.

Even if candidates did accept public financing, as is the case presently with state constitutional and legislative candidates, nothing would prevent political parties and interest groups from making independent expenditures on their behalf.<sup>152</sup> Thus far, the courts have not supported bans or limits on independent expenditures.

Perhaps the only viable option if the state is to stay with judicial elections is exploring modification of recusal rules. Yet there are constitutional limits to this option as noted above. It seems unlikely that mere announcement of a position will constitute grounds for

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<sup>150</sup> See, e.g., Robert J. Sheran & Douglas K. Amdahl, *Minnesota Judicial System: Twenty-Five Years of Radical Change*, 26 HAMLINE L. REV. 219, 307–08 (2003) (quoting Jean F. Holloway).

<sup>151</sup> *Buckley v. Valeo*, 424 U.S. 1, 58 (1976) (per curiam).

<sup>152</sup> See generally DAVID SCHULTZ, MONEY, POLITICS, AND CAMPAIGN FINANCE REFORM LAW IN THE STATES 273–310 (2002) (discussion and analysis of how groups raise and spend money to influence campaigns and elections in Minnesota).



recusal. Rules that mandated recusal if one announces a position on a disputed legal issue that did come before a judge or mandatory recusal based upon general solicitation or partisan affiliation would no doubt be challenged as no more than simply seeking to sneak back in the Canon 5 type clauses. As such, they would run into the same First Amendment problems that led to their invalidation already. Thus, short of showing real bias or a conflict of interest, enhancing recusal rules has its limits.

In sum, there are clear limits regarding what can be done to modify or mollify the impact of the two *White* opinions if states continue to elect judges.

#### *D. An Appointed Judiciary?*

If the *White* decisions are not seen as good for state judicial independence, perhaps the time is ripe to consider moving towards an appointed judiciary. Justice O'Connor, concurring in the Supreme Court opinion, noted that "the very practice of electing judges undermines [judicial impartiality]"<sup>153</sup> and that "[i]f 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."<sup>154</sup> Similarly, the Eighth Circuit majority stated:

As federal judges, we confess some bias in favor of a system for the appointment of judges. Indeed, there is much to be said for appointing judges instead of electing them, perhaps the chief reason being the avoidance of potential conflict between the selection process and core constitutional protections. In promoting the newly drafted United States Constitution, Hamilton argued in *Federalist No. 78* that if the people were to choose judges through either an election or a process whereby electors chosen by the people would select them, the judges would harbor "too great a disposition to consult popularity to justify a reliance that nothing would be consulted but the Constitution and the laws."<sup>155</sup>

Members of both the Supreme Court and the Eighth Circuit strongly suggested to Minnesota that the appointment route is the way to go if they wish to avoid the potential problems that an elected and partisan judiciary might bring to the courts.

Yet, the reason for turning to an appointed judiciary should not be

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<sup>153</sup> Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002) (O'Connor, J., concurring).

<sup>154</sup> *Id.* at 792.

<sup>155</sup> Republican Party of Minn. v. White, 416 F.3d 738, 746-47 (8th Cir. 2005) (quoting THE FEDERALIST No. 78, at 439 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

premised upon the simple notion that elections are bad in general and worse for the courts because the people can be tricked. Instead, as the Eighth Circuit stated, one needs to defend an appointed judiciary less in terms of how it avoids the ruling in *White* and more in terms of how an appointed judiciary best promotes its independent role in a democracy as serving as a defender of minority rights, often despite majoritarian preferences.<sup>156</sup>

Yet the question is, how to appoint?

Not all appointment processes are good or the same. For example, states could adopt a federal model with gubernatorial appointment, senate confirmation, and either lifetime or long term appointment. However, not everyone is convinced that such a model ensures accountability or that the Senate confirmation process produces sufficient information that allows for proper scrutiny. Another problem with this type of model is that it may not produce a diverse judicial selection pool, instead leaving it open to governors to pick their political pals. Finally, such a process does not guarantee that the appointment and confirmation process will not be any less political than elections as evidenced by recent federal appointments to the federal bench.

One remedy might be to craft a version of the Missouri Plan that requires the governor to select judges from a list submitted by a judicial selection committee.<sup>157</sup> However, if governors are to select candidates from this committee, then they should not also be allowed to select who is on this committee.<sup>158</sup> The concern is to make sure that there is some control and accountability over those who pick the judges.

Finally, another option for judicial selection is some variation of the Missouri Plan. Here, judges are initially appointed to the bench and then after a period of one or two years, they must face the voters in an uncontested retention election. The virtues of a Missouri Plan seem to reside in trying to combine the best of elections and appointment. However, this option also faces two defects. First, what information will voters have to base their decisions upon at the retention election? Second, if one fears interest groups, judges affiliating with parties, announcing their views, or soliciting contributions, the retention election will not

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<sup>156</sup> See *id.*

<sup>157</sup> See Norman L. Greene, *Perspectives on Judicial Selection Reform: The Need to Develop a Model Appointive Selection Plan for Judges in Light of Experience*, 68 ALB. L. REV. 597, 605 (2005).

<sup>158</sup> See *id.*

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eliminate that. Groups, wishing to affect who is on the bench, will be able to spend money in retention races to support or oppose candidates, forcing judges into doing all that Canon 5 sought to prevent.

#### IV. CONCLUSION

*Republican Party of Minnesota v. White* portends to be a watershed decision in states with elected judiciaries. Exactly what the impact will be and whether it prompts a move towards an appointed judiciary are open questions at this time. However, for some, there is fear that the future for states such as Minnesota and New York resides in the experiences of states such as Texas. Whatever the policy responses to this decision are, states need to be cognizant of their consequences because they too could have a big impact on who serves as judges and how they decide cases.