REPUBLICAN PARTY OF MINNESOTA v. WHITE: THE END OF JUDICIAL ELECTION REFORM?

Lindsay E. Lippman †

INTRODUCTION

The modern process of electing state judges is often characterized by hostile campaigns, influential "big money" contributions, and an uninformed voting public.[1] In these respects, judicial campaigns resemble partisan political campaigns. However, campaign tactics that are typically associated with political elections are inconsistent with notions of

† B.A., Cornell University, 2001; candidate for J.D., Cornell Law School, 2004. The author thanks Professor W. Bradley Wendel, Washington & Lee University School of Law, for his invaluable comments and suggestions.

[1] *See generally* NATIONAL CENTER FOR STATE COURTS, CALL TO ACTION: STATEMENT OF THE NATIONAL SUMMIT ON IMPROVING JUDICIAL SELECTION (2001) *available at* http://www.ncsconline.org/WC/publications/Res_JudSel_CallToActionPub.pdf [hereinafter NATIONAL SUMMIT]. "Eighty-seven percent of state appellate and trial judges are selected through direct or retention election." *Id.*

judicial impartiality and independence.[2] Given the unique tenor of the judicial branch of government, a non-political branch, state legislatures must be able to regulate judicial elections, or to use other means to make them more meaningful. Over the past few years, a national movement dedicated to affording state legislators this very power has made strong preliminary advances in bringing about reform to the judicial election system, and continues to combat the ills of excessive campaign financing, inappropriate mudslinging, special interest group endorsement of candidates, and other types of campaign foul play. This movement, however, suffered a setback in June of 2002, when the Supreme Court ruled in *Republican Party of Minnesota v. White* that the "announce clause" of the Minnesota Code of Judicial Conduct–enacted by the state's legislature in 1974 to prohibit judicial candidates from announcing their views on disputed legal or political issues—violated the First Amendment.[3] The Court found that the clause unconstitutionally restricted candidate speech, despite the inherent differences between judicial and political elections, as well as the state's interest in providing judges with freedom from public pressure to commit to particular positions.

White sets a dangerous precedent. The decision threatens the future of judicial election reform, not only casting doubt upon the force of other state provisions aimed at restricting the speech of judicial candidates, but also calling into question the authority of state legislators to monitor or improve judicial elections in other ways. The reality is, however, that *White* is solely a decision on the construction of one provision particular to eight state statutes, and speaks sparingly to the constitutionality of other state ethics provisions. Although Minnesota's attempt to maintain a broad-based limitation on judicial candidates' speech was unsuccessful, more moderate state provisions stand a greater chance of surviving Supreme Court scrutiny. Instead of embracing *White,* there is a real prospect that state legislatures and courts will find ways to limit its scope in the interest of restoring fairness and independence to the judiciary. Taking steps to restrict *White*'s impact would help to protect the function of the judiciary by "de-politicizing" judicial elections, encouraging public confidence in judges, and providing for continued judicial election reform. This note will not enter the long-standing debate weighing the merits of appointing judges against the merits of electing judges, but rather begins on the premise that the election of judges remains an appropriate means of judicial selection.[4] *White* does not represent the beginning of

[2] *See* Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges,* 11 CORNELL J.L. & PUB. POL'Y 273, 277 (2002).

[3] 536 U.S. 765 (2002), *rev'g* Republican Party of Minn. v. Kelly, 247 F.3d 854 (8th Cir. 2001).

[4] Affording people the power to elect state judges fosters democratic accountability. For an argument promoting the adoption of an appointive judicial selection system for state

the end for judicial election reform, but instead represents a call for careful and limited reform.

Part I of this note contends that impartiality is the foundation of a fair and accountable judiciary—a principle which is confirmed by the ethics canons of the Model Code of Judicial Conduct, upon which most states base their ethics codes.[5] Part II identifies present hindrances to the meaningful election of judges, illuminating the disparity between recent candidate conduct and the appropriate candidate behavior the Model Code envisions. Part III recounts the impressive actions various organizations have taken to encourage the decent and principled election of judges, and examines the renewed interest within the legal community regarding the role existing state ethics provisions can play in enforcing ideal candidate speech and behavior. Part IV discusses the Supreme Court's decision striking the announce clause from Minnesota's Code of Judicial Conduct in *Republican Party of Minnesota v. White*. Part V argues that the Court's decision diluted the important distinctions between judicial elections and political elections, weakened the force of state ethics canons, and paid only moderate attention to the relevant constitutional exertions of state authority in the past over judicial elections. Part VI measures the reach of *White*, concluding that, although the decision to some extent frustrates judicial election reform, its effect is limited because only eight other states had an announce clause similar to Minnesota's announce clause at the time of the ruling, and because the clause was broader than the majority of state ethics provisions addressing candidate speech. Part VII characterizes the confusion that has resulted among the states in the aftermath of *White,* with particular reference to the post-*White* decisions of *Weaver v. Bonner*,[6] *In re Kinsey*,[7] and *Spargo v. New York State Commission on Judicial Conduct*.[8] Part VIII examines the responses of various organizations to the *White* decision, characterized by a heightened commitment to restoring the integrity of judicial elections.

court judges, see Behrens and Silverman, *supra* note 2. "'The restraint, temperament and detachment that we rightly demand from our judges is fundamentally incongruous with partisan, statewide political campaigns.'" Id. at 277–78 (quoting Tom Ridge, Director of the United States Office of Homeland Security).

[5] *See generally* MODEL CODE OF JUDICIAL CONDUCT (1990) [hereinafter MODEL CODE].

[6] 309 F.3d 1312 (11th Cir. 2002).

[7] 842 So.2d 77 (Fla. 2003).

[8] 244 F.Supp.2d 72 (N.D.N.Y. 2003).

I. IMPARTIAL JUDICIARY

"States have a compelling interest in courts that are, and appear to be, fair and impartial, regardless of the method of judicial selection."[9] At the most basic level, the due process clause of the Fourteenth Amendment *compels* judicial impartiality.[10] A judge must protect an individual's constitutional right to an impartial tribunal by interpreting the law from a neutral standpoint, unencumbered by any personal stake he may have in the outcome of the trial.[11] In carrying out this "constitutional mandate," a judge must resist any surrounding political pressures, and any other "'direct, personal, substantial, pecuniary interest in reaching a conclusion.'"[12] On this basis, a judge's duties are wholly distinguishable from those of any politician who, as a matter of normal course, formulates opinions associated with controversial issues on the basis of her own leanings or the leanings of others to whom she is partial.[13] Indeed, unlike other elected officials, judges are required to act without bias or the influence of others to ensure the "'proper and fair administration of justice.'"[14]

Lifetime appointments and tenured judgeships speak to the value of a judiciary that is impervious to the political pressures of the changing times—a judge can better fulfill his purpose if he does not "fear . . . [his] livelihood will be impacted solely for making a decision that is right legally and factually but unpopular politically."[15] In addition, it is vital to understand that "[t]he state's interest in guaranteeing due process includes eliminating not only actual bias but also the appearance of bias."[16] Because the public relies on the judiciary to interpret and apply the law, it is important for judges to "demonstrate the ability to rise above the political moment to enforce the rule of law."[17]

9 Brief in Support of Respondents for Amici Curiae Brennan Center for Justice at NYU School of Law et al. at 4, Republican Party of Minn. v. White, 536 U.S. 765 (2002) (No. 01-521) [hereinafter Brennan Center Brief].

10 *Id.* at 5.

11 *Id.*

12 *Id.* (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)).

13 *See id.* at 9.

14 Paul J. De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 38 WILLAMETTE L. REV. 367, 378 (2002) (quoting OFFICIAL VOTERS' PAMPHLET, PRIMARY ELECTION 16 (1950)).

15 *Id.* at 389.

16 Brennan Center Brief, *supra* note 9, at 6.

17 De Muniz, *supra* note 14, at 389; David Hudson, *Can States Ban Judicial Candidates From Speaking on Legal or Political Issues?*, 6 PREVIEW OF THE UNITES STATES SUPREME COURT CASES 331, 334 (2002) (quoting Chief Justice Rehnquist, stating "a judicial nominee should not 'express any but the most general observation about the law' because otherwise it might appear that the nominee was announcing views on particular subjects to 'obtain favorable consideration'").

Beyond the necessity of judicial neutrality in affording individuals due process under the law, the principle of separation of powers—the very foundation of American government—envisions a judiciary that is substantially independent from the legislative and executive branches of government.[18] The independent operation of the courts provides for an adequate check on the other branches of government, thus upholding the separation of powers scheme. Therefore, when politics begin to change the basic fiber of the judiciary, the courts can no longer provide as substantial a check on the other, more political branches of government.

The neutrality of the courts, as shaped by the Constitution and separation of powers theory, is only confirmed by certain judicial ethics canons, often codified in state statutes. The Model Code of Judicial Conduct defines appropriate judicial conduct according to standards agreed upon by the American Bar Association (ABA).[19] While not binding upon the states, most states have adopted standards of judicial conduct that closely resemble the Model Code.[20]

At its 1921 convention, the ABA appointed a committee to formulate standards of judicial ethics.[21] The committee ultimately created the 1924 canons, comprised of thirty-six rules of judicial conduct.[22] The ABA appointed a committee to revise and improve the original canons in 1969, and adopted the ABA Model Code of Judicial Conduct, which consisted of seven canons, in 1972.[23] The ABA subsequently condensed the seven canons into five and adopted the modern version of the Model Code in 1990.[24]

The canons of the Model Code can be summarized fairly succinctly. In short, Canon One requires judges to "uphold the integrity and independence of the judiciary."[25] Under Canon Two, judges must "avoid impropriety and the appearance of impropriety in all of [their] activities."[26] Judges must also "perform the duties of judicial office impartially and diligently," according to Canon Three.[27] Canon Four requires judges to "so conduct [their] extra-judicial activities as to minimize the risk of conflict with judicial obligations."[28] In this respect, Canon Four instructs judges, at a minimum, to "refrain from casting reasonable doubt

18 *Id.* at 373.

19 *See* MODEL CODE, *supra* note 5.

20 Stephanie Cotilla & Amanda Suzanne Veal, Note, *Judicial Balancing Act: The Appearance of Impartiality and the First Amendment*, 15 GEO. J. LEGAL ETHICS 741, 742 (2002).

21 *Id.* at 741.

22 *Id.*

23 *Id.* at 742.

24 *Id.*; MODEL CODE, *supra* note 5.

25 MODEL CODE, *supra* note 5, Canon 1.

26 *Id.* Canon 2.

27 *Id.* Canon 3.

28 *Id.* Canon 4.

on their capacity to act impartially as [judges]" in conducting extra-judicial activities.[29] Finally, Canon Five directs judges to "refrain from inappropriate political activity."[30] Clearly, these canons, at a very basic level, are based on notions of judicial impartiality and integrity, which is free from external political forces.

In particular, Canon Five imposes specific restrictions on the activities of judicial candidates as a means of guarding against "inappropriate political activity" associated with the judiciary.[31] A judicial candidate may inform voters of his or her qualifications for judicial office. However, under Canon 5A(3)(d), a candidate for judicial office may not:

> (i) make *pledges or promises* of conduct in office other than the faithful and impartial performance of the duties of the office;
> (ii) make *statements that commit or appear to commit* the candidate with respect to cases, controversies or issues that are likely to come before the court; or
> (iii) *knowingly misrepresent* the identity, qualifications, present position or other fact concerning the candidate *or an opponent.*[32]

Thus, judicial candidates may not make campaign promises or even committal statements with respect to issues that are likely to come before the court, nor may a candidate lie about an opponent. In addition, Model Code Canon 5C(2) prohibits candidates from committing financially to particular causes by "personally solicit[ing] or accept[ing] campaign contributions or personally solicit[ing] publicly stated support."[33] Although a candidate may not do so personally, he or she may (according to the Model Code) instead establish "committees of responsible persons to conduct campaigns" and "solicit and accept reasonable campaign contributions . . . and public support."[34]

Most states have adopted canons, some closely resembling the ABA's standards, imposing ethical obligations upon judges by which ordinary candidates for *political* office do not have to abide. In fact, political campaigns are often marked by the very tactics the Model Code of Judicial Conduct sets out to forbid—campaign promises, aggressive candidate stances on controversial issues, heavy commitment to interest group positions, and advertisements of questionable accuracy accusing opposing candidates of objectionable conduct—further illustrating the

29 Cotilla & Veal, *supra* note 20, at 745.
30 MODEL CODE, *supra* note 5, Canon 5.
31 *Id.*
32 *Id.* Canon 5A(3)(d) (emphasis added).
33 *Id.* Canon 5C(2).
34 *Id.*

fact that judicial elections are inherently different from political elections. These types of behavior, while perhaps *unbecoming* of political candidates, are expressly *forbidden* among judicial candidates in certain states.[35] In recent years, however, "judicial candidates . . e seem increasingly willing to transgress judicial conduct rules, relying on First Amendment protections, to criticize court rulings or opponents and to either imply or explicitly state how they would rule in cases raising hot button issues in order to gain campaign support."[36]

II. BREAKDOWN OF ETHICS: JUDICIAL ELECTIONS IN DECLINE

Judges in forty-two states stand for partisan, nonpartisan, or retention elections at some point during their judicial careers.[37] In recent years, the "dramatic rise of inappropriate conduct" associated with judicial election campaigns and the increasingly antagonistic nature of these campaigns[38] have undermined judicial ethics canons and have raised questions as to the efficacy of elections as a mode of judicial selection.[39] Even steadfast supporters of judicial elections have expressed "growing concern that judicial campaign races are turning into traditional mudslinging wars of the sort associated with the campaigns for the other two branches of government,"[40] and with good reason. Local party influence over nominations, exorbitant campaign financing, special interest group endorsements, and hostile mudslinging, have subverted the judicial election process in recent years and threatened established standards of judicial campaign ethics. Admittedly, some element of politics inevitably enters into the judicial election process, in both partisan and non-partisan elections.[41] The increased prevalence of such political trends in judicial

35 *See, e.g.*, ALASKA CODE JUD. CONDUCT; ARIZ. CODE JUD. CONDUCT; GA. CODE JUD. CONDUCT; ILL. CODE JUD. CONDUCT; IND. CODE JUD. CONDUCT; KAN. CODE JUD. CONDUCT; KY.eCODEeJUD.eCONDUCT; LA.eCODEeJUD.eCONDUCT; NEV.eCODEeJUD.eCONDUCT; N.Y.eCODE JUD. CONDUCT; N.D. CODE JUD. CONDUCT; OHIO CODE JUD. CONDUCT; OKLA. CODE JUD. CONDUCT; R.I. CODE JUD. CONDUCT; S.C. CODE JUD. CONDUCT; S.D. CODE JUD. CONDUCT; TENN. CODE JUD. CONDUCT; VT. CODE JUD. CONDUCT; WASH. CODE JUD. CONDUCT; W. VA. CODE JUD. CONDUCT; WYO. CODE JUD. CONDUCT.

36 De Muniz, *supra* note 14, at 389.

37 American Bar Association, *Report and Recommendations of the Task Force on Lawyers' Political Contributions: Part II*, at 7 (1998).

38 Jonathan Lippman, *Electing Judges Should Be More Dignified,* N.Y. L.J., Jan. 22, 2002, at SB1.

39 *See* Behrens & Silverman, *supra* note 2, at 275–76.

40 Hudson, *supra* note 17, at 333.

41 *See* W. Bradley Wendel, *The Ideology of Judging and the First Amendment in Judicial Election Campaigns*, 43 S. TEX. L. REV. 73, 108 (2001).

> Even though courts frequently allude to the ideal of neutrality in judging, they nevertheless must grudgingly admit that judges are humans, not machines, and that judges decide cases at least in part on the basis of political presuppositions. The question thus becomes how to draw a line between good and bad, high and low, or unbiased

elections of late, however, demonstrates the importance of the role ethical standards can play in keeping judicial elections under control.[42]

A. LOCAL PARTY CONTROL

In local partisan judicial elections, each political party nominates an individual to run as a candidate for judicial office. When one party overwhelmingly dominates an area, however, that party's nominee is practically ensured victory, due to the fact that voters tend to vote along party lines.[43] In this regard, powerful local parties and party leaders can, for all intents and purposes, *select* individuals to sit on the bench. This type of local party influence distorts judicial elections: (1) because the vote is effectively taken from the public's hands; and (2) because the selection of judges is heavily guided by politics.

Over the past few years, numerous newspaper editorials have openly attacked judicial elections across New York State, particularly with respect to the powerful influence of local political party organizations over the judicial selection process.[44] In her editorial column, which appeared in the New York Times, Dorothy Samuels claimed that "the dominant political clubhouses in each borough [of New York] . . . exercise major control over [judicial nominations]"[45] so that the "nomination of a candidate . . . is often tantamount to election."[46] Thus, "[u]nder the guise of elections . . . judges [in New York] are effectively appointed by

> or biased, political beliefs, so that we can get a sense for what kinds of restrictions on speech are permissible.

Id.

[42] In attempting to limit the influence of local party control, campaign contributions and "noisy" campaigns, one could argue that partisan elections should be abandoned and only non-partisan elections should be held, so as to force voters to focus upon the qualifications of the candidates, as opposed to party concerns, while still preserving notions of democratic accountability. One could also argue that ethics standards are actually *unconstitutional* in the setting of partisan elections—and that ethics standards can only be applied *legally* in non-partisan elections. The distinction between partisan and nonpartisan elections, however, is of little significance, given that politics appear to play some part in all types of elections.

[43] While voters in elections exhibit a tendency to vote according to party, commentators contend that voters in local judicial elections in particular vote along party lines because they are either uninformed or uninterested in such election outcomes. *See* Behrens & Silverman, *supra* note 2, at 291, 294.

[44] *See* Editorial, *New York's Farcical Judicial Elections*, N.Y. TIMES, Nov. 2, 2002, at A16; Editorial, *Politics as Usual; Judicial Nominations Turn on a Power Struggle Unrelated to the Courts,* BUFFALO NEWS, Sept. 26, 2003, at C10; Dorothy Samuels, Editorial, *New York's Long and Sorry Tradition of Judicial Elections*, N.Y. TIMES, Nov. 14, 2002, at A34; Editorial, *That Time of Year Again,* N.Y. DAILY NEWS, Sept. 16, 2003, at 36. *See also Background Paper on Judicial Elections in New York State*, Prepared for the National Summit on Judicial Elections, at 4 (Dec. 8–9, 2003) (on file with author) [hereinafter *Background*] (noting that "[s]ingle party dominance in some areas gives local political organizations and local party leaders a great deal of influence over the judicial selection process).

[45] Samuels, *supra* note 44.

[46] *Background*, *supra* note 44, at 4.

Democratic Party leaders, who get to assign their favorites a spot on the Democratic Party line."[47] Samuels characterized this reality as an "unhealthy nexus between the clubhouse and the courthouse created by the state's system of electing judges."[48] The Republican Party's nominees hold a similar advantage in other counties in New York State.[49] In fact, "throughout much of [the state,] . . . local political parties play an influential role in determining who appears on the ballot and who gets elected to the bench."[50] Strong local party influence is by no means unique to New York State. Rather, what has occurred in that state is representative of what is happening in numerous other partisan judicial elections nationwide. Indeed, party control can expand the presence of politics within the context of judicial elections.

B. EXCESSIVE SPENDING

1. *Campaign Contributions*

The escalation of campaign spending has also contributed to the politicization of judicial elections.[51] Candidate fundraising was three times higher in 2000 than it was in 1990.[52] The total funds judicial candidates raised in 1998 and 2000 alone exceeded the combined funds raised in elections from 1990 to 1996,[53] and this recent rise in candidate fundraising has created a standard that incumbent judges now feel pressured to meet.[54]

Even though private contributions to judges do not technically violate Canon Five of the Model Code, excessive contributions undermine at least the "appearance of neutrality."[55] Contributions provide incentives for judicial candidates to violate their obligation to remain neutral, inducing them to take popular positions. "This is exactly the sort of in-

47 Samuels, *supra* note 44. Samuels refers to New York's judicial elections as "sham elections." *Id.*

48 *Id.* In using the term "unhealthy nexus," Samuels was actually referring to the condition of New York's judicial election system in 1872, but she noted that "little has changed" since then. *Id.*

49 *Background*, *supra* note 44, at 4.

50 *Id.*

51 Brennan Center Brief, *supra* note 9, at 15.

52 *Id.*

53 *Id.*

54 *See id.* at 16. "[E]lected judges cannot ignore the vital role of fund-raising in attaining and retaining judicial office." *Id.*

55 *See* MODEL CODE, *supra* note 5, Canon 5C(2) cmt. The commentary to Canon 5C(2) states that the Model Code "permits a candidate, other than a candidate for appointment, to establish campaign committees to solicit and accept public support and reasonable financial contributions." *Id.* However, the commentary also indicates that "[t]hough not prohibited, campaign contributions of which a judge has knowledge, made by lawyers or others who appear before the judge, may be relevant to 'disqualification under Section 3E." *Id.*

centive toward particular positions that has no place in the judiciary."[56] This is significant because "the public expects justice to be 'blind,' and not influenced by campaign contributions."[57] For it to appear otherwise discourages public confidence in, and respect for, the judiciary. Moreover, "there is at least some empirical evidence" indicating that campaign contributions do influence judicial elections.[58]

2. *Special Interest Group Endorsements*

The increased participation of special interest groups in judicial campaigns over the past few years has only exacerbated the problem of over-spending in judicial elections. Campaigns in the year 2000 "featured an unprecedented infusion of big money, special interest pressure and television advertising."[59] In 2002, the Justice at Stake Campaign, an organization dedicated to maintaining fair and impartial courts, reported that special interest groups funded every attack ad and "82% of the 'contrast' ads praising one candidate and criticizing another" in the early stages of judicial campaigns nationwide.[60] The fact is that candidates typically cannot afford to buy television ads themselves, particularly in the early stages of a campaign.[61] Thus, when a special interest group supports a candidate financially, the candidate becomes, to some extent, dependent upon that interest group's money, creating a tension that is inappropriate in the context of judicial elections.[62] In other words, interest group endorsements create incentives for candidates, if elected, to cater to the causes of the interest groups that supported their campaign. One could argue that a qualified judge could resist the outside political forces that may have driven his election to office. However, even if a judge does not further the goals of his financial backers, the mere influx of money and television ads associated with judicial campaigns, taken as a whole, diminishes the appearance of impartiality in the judiciary.[63] Regardless, examination of the 2002 campaigns has in fact revealed some correlation between television advertising support and the outcome of elections in some states.[64] Voters should select judges based on their qualifications within a non-political sphere, yet "expensive television at-

56 *Id.* at 19.

57 Behrens & Silverman, *supra* note 2, at 280–81 (citing 2001 Texans for Public Justice study suggesting a correlation between lawyer contributions and judicial decisionmaking).

58 *Id.* at 279–80.

59 *Campaign 2002: The National Trends*, EYES ON JUSTICE: THE JUSTICE AT STAKE NEWSLETTER, Oct. 24, 2002 [hereinafter *Campaign 2002*].

60 *Id.*

61 *Id.*

62 Behrens & Silverman, *supra* note 2, at 280–81.

63 *Id.* at 281.

64 Press Release, Brennan Center for Justice, *State Supreme Court Races: Ten Out of Eleven Candidates With the Most TV Advertising Support Also Received the Most Votes* (Nov.

tack ads run by interest groups in judicial elections heighten concerns that justice is for sale."[65]

C. MUDSLINGING AND NOISY CAMPAIGNS

Perhaps the most blatant trend infiltrating judicial elections in recent years is the increasingly hostile nature of campaigns—"judicial elections . . . [are] 'noisier [and] nastier.'"[66] The Conference of Chief Judges submitted an amicus brief in *White*, warning of the need to account for the "political realities" of modern judicial campaigns.[67] These political realities include lying, mud-slinging, and other disreputable campaign tactics. Though such tactics have pervaded political elections for many years, judicial campaigns historically have taken a less combative tone, principally because of the obligations associated with judicial office.[68] Thus, judicial elections "have come increasingly to resemble legislative and executive contests in cost, intensity and style."[69] In this regard, judges have displayed a growing willingness to involve themselves in embittered exchanges with their opponents and publicly address controversial issues likely to come before the court. In fact, public censure and admonishment of sitting judges for taking positions on issues while campaigning has increased.[70] Furthermore, recent judicial elections have received much media attention, centering not upon the qualifications of candidates, but rather examining the inappropriate or hostile nature of certain candidates' campaigns.

In the context of judicial elections, "[a]ll this makes judges appear like ordinary politicians to many voters."[71] The judiciary, however, deserves special protection from political tactics, because the effectiveness of the judicial branch is uniquely hinged upon impartiality and public trust.[72] Historically, states have had the authority to place restrictions on judicial elections to protect against just such political forces and should be able to continue to do so. In this respect, ethics canons prohibiting

20, 2002), *available at* http://www.brennancenter.org/presscenter/releases_2002/pressrelease_2002_1120.html.

65 Brennan Center Brief, *supra* note 9, at 16.

66 Brief of Amicus Curiae Conference of Chief Justices at 26, Republican Party of Minnesota v. Kelly, 247 F.3d 854 (8th Cir. 2001) (No. 99-4021) [hereinafter Chief Justices' Brief] (quoting ABA Task Force Report, citing Richard Woodbury, *Is Texas Justice for Sale?: The State's Top Judge Resigns to Fight for Reform*, TIME, Jan. 11, 1988, at 74).

67 *Id.*

68 *See* NATIONAL SUMMIT, *supra* note 1.

69 Chief Justices' Brief, *supra* note 66, at 26 (citing ABA Task Force Report). Before *White* reached the United States Supreme Court, the case was called, *Republican Party of Minnesota v. Kelly* [hereinafter *Kelly*].

70 *See* Lippman, *supra* note 38.

71 NATIONAL SUMMIT, *supra* note 1.

72 *Id.*

certain behavior by judicial candidates—the same behavior which is permissible (albeit reprehensible) for ordinary politicians—should be both preserved and strengthened.

III. A CALL TO ACTION

The deterioration of principled judicial elections has drawn the attention of many organizations, such as the National Center for State Courts (NCSC).[73] In December 2000, the NCSC sponsored a summit in Chicago to discuss the potential for reform of the judicial selection process.[74] Ninety-five judicial, legislative, and other leaders and representatives from national organizations in favor of judicial election reform attended.[75] At the summit, attendees discussed possible efforts to implement campaign finance reform, increase voter awareness and participation in judicial elections, monitor judicial election campaign conduct, and improve partisan elections.[76] The Summit attendees were also concerned with protecting the free speech of judicial candidates, while promoting fair elections.[77] This conference resulted in a "call to action," which spelled out a number of recommendations for judicial election reform.[78] Some of these recommendations included implementing educational programs on state elections laws complemented by sanctions for violations of state election laws, establishing "hotlines" run by judicial disciplinary bodies to respond to inquiries about campaign conduct, supporting non-governmental monitoring groups that would encourage fair campaigns by offering mediation and arbitration services, staging broadcasted debates between judicial candidates, creating programs to educate the public, and requiring financial disclosure and contribution limits.[79] To follow up on its Chicago summit, in November 2001 the NCSC held its "National Symposium on Judicial Campaign Conduct and the First Amendment" to "provide fresh analyses of the latest . . . constitutional cases, and unveil cutting-edge reform proposals that could soon be introduced in state legislatures and by state appellate courts around the country."[80]

73 Hudson, *supra* note 17, at 333.

74 NATIONAL SUMMIT, *supra* note 1.

75 *Id.* These leaders were "selected by the chief justices in the seventeen most populous states with judicial elections." *Id.*

76 *Id.*

77 *Id.* The tension between the need to safeguard the First Amendment amidst judicial election reform and the prospect of restricting candidate speech is central to this paper's later discussion of *White*.

78 *Id.*

79 *Id.*

80 Press Release, The National Center for State Courts, Experts to Address Increasingly Costly and Bitter Judicial Elections: Do Hard Hitting Campaigns Undermine Fair and Impar-

Since the NCSC summit, several states have taken actions that support the above recommendations. For example, the Administrative Board of the New York State Court System adopted a resolution in March 2001 to respond to the summit's "call to action" by establishing judicial campaign conduct committees, which would address the "substantial threat to public trust and confidence in the integrity of the judicial system" that the current election system poses.[81] Now called "fair campaign practice committees," these committees "resolv[e] candidates' disputes outside the public eye."[82] In addition, in September 2002, the New York State Bar Association issued a pamphlet entitled "The High Road—Rules for Conducting a Judicial Campaign in New York" to both sitting judges and judicial candidates, in an effort to reinforce a "'positive tone for all judicial elections'" and "'ensure respect for the rule of law.'"[83]

The above actions encompass a nationwide movement stemming from the recognition that, in recent years, the judicial election process has become increasingly distorted by the influence of special interests, "big money," and inappropriate campaign conduct. Leaders of this movement advocate preservation of the function and the integrity of the judicial branch and the de-politicization of judicial elections. In summary, the focus of this movement is to make judicial elections more meaningful, rather than attempting to replace judicial elections altogether with a system for the appointment of state judges.[84]

As part of this movement, concerned parties are reconsidering existing state ethics codes to determine how these codes can be improved to better safeguard the credibility of judicial elections. As a result, much debate has ensued concerning the constitutionality of various types of judicial ethics code provisions, including provisions that restrict candidate speech. This debate has led to court scrutiny of state statutes that incorporate ethics canons into their codes of conduct. The "pledges and promises clause" is the least restrictive within this range, in that it is a

tial Courts? (Oct. 22, 2001), *available at* http://www.ncsconline.org/D_Comm/PressRelease/Symposiumfinal.HTML (last visited Aug. 24., 2003).

81 *Resolution of the Administrative Board of the Courts*, New York State Office of Court Administration (Mar. 14, 2001) (photocopy on file with author).

82 Lippman, *supra* note 38.

83 Press Release, New York State Bar Association, Guidelines Issued for Running a Clean Judicial Campaign: Local Bar Associations Set to Closely Monitor This Year's Judges' Races (Sept. 19, 2002) (quoting NYSBA President Lorraine Power Tharp), *available at* http://www.nysba.org/template.cfm/template.cfm?template=pressRelease/PressReleaseDisplay.cfm&PressReleaseDisplay.cfm&PressReleaseID=54 (last visited Aug. 31, 2003).

84 *See* Lippman, *supra* note 38; *see also* NATIONAL SUMMIT, *supra* note 1. Some legal commentators advocate the replacement of the judicial election system with a system of judicial appointment. *See generally* Behrens & Silverman, *supra* note 2.

prohibition solely against making formal promises to voters.[85] The "commit clause" prohibits candidates from "mak[ing] statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court."[86] And finally, the "announce clause," the broadest of the three, prohibits candidates from making even vague statements on general public policy issues.[87] While the first two of these provisions are contained within the ABA Model Code of Judicial Conduct, the ABA has formally rejected the announce clause.[88]

IV. *REPUBLICAN PARTY OF MINNESOTA V. WHITE*

Minnesota's constitution has provided for the selection of states judges by popular election since 1858, and the state's judicial elections have been nonpartisan since 1912.[89] In 1974, the Minnesota Code of Judicial Conduct set forth for the first time a canon prohibiting all candidates for judicial office from "announcing" their views on disputed legal or political issues while campaigning for election.[90] Under the Minnesota Rules of Board on Judicial Standards, incumbent judges who violated the prohibition were subject to "removal, censure, civil penalties, and suspension without pay."[91] This canon, Canon Five, was called the "announce clause," and was based on Canon 7(B) of the 1972 ABA Model Code of Judicial Conduct.[92] The ABA replaced Canon 7(B) with a different provision in 1992, after First Amendment concerns surrounding the canon began to surface.[93] The new provision 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."[94] Though other jurisdictions replaced old canons with the most recent ABA language, the Minnesota Supreme Court declined to do so, and instead sustained the announce clause.[95]

85 *See, e.g.*, MINN. CODE JUD. CONDUCT, Canon 5A(3)(d)(i) (prohibiting judicial candidates from making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office").

86 MODEL CODE, *supra* note 5, Canon 5A(3)(d).

87 *See* Hudson, *supra* note 17, at 333 ("The announce clause goes beyond the pledges and promises clause to prohibit judicial candidates from announcing their opinions on matters of public concern in the legal system.").

88 *Id.* at 332.

89 Republican Party of Minn. v. White, 536 U.S. 765, 768 (2002).

90 *Id.*

91 *Id.*

92 *Id.*

93 *Id.* at 773 n.5.

94 *Id.*

95 *Id.*

Gregory Wersal campaigned for the office of Associate Justice of the Minnesota Supreme Court in 1996, during which he circulated literature disparaging certain past decisions of the Minnesota Supreme Court.[96] The Office of Lawyers Professional Responsibility, an agency of the Minnesota Lawyers Professional Responsibility Board, dismissed a complaint filed against Wersal based on the announce clause, and indicated skepticism as to whether the announce clause was constitutional.[97] Wersal pulled out of the campaign but decided to run again for the same office in 1998.[98] At this time, Wersal sought an advisory opinion from the Board, which refused to give him one because he did not specify any particular "announcements" that he wished to make.[99] He then filed in District Court against the Lawyers Board and the Minnesota Board on Judicial Standards (which enforces the ethics rules applicable to judges), seeking declaratory judgment that the announce clause violated the First Amendment and an injunction against its enforcement.[100] Wersal asserted that, during the 1998 campaign, he had been compelled to refrain from announcing his views on disputed issues because he feared that he might violate the announce clause.[101] The Minnesota Republican Party joined Wersal as a plaintiff, alleging that they were unable to learn the candidate's views and therefore could not support or oppose his candidacy as informed voters.[102] The District Court found for the respondents, upholding the announce clause.[103] The United States Court of Appeals affirmed, and the Supreme Court granted certiorari.[104] On June 27, 2002, the United States Supreme Court invalidated the announce clause in *Republican Party of Minnesota v. White* on the grounds that the clause violated the First Amendment of the Constitution.[105]

Writing for the majority, Justice Scalia considered the meaning and purpose of the announce clause before undertaking the plaintiffs' First Amendment concerns.[106] In a five to four decision, the majority determined that prohibiting a judicial candidate from "announcing his or her views on disputed legal or political issues" is not the equivalent of prohibiting a candidate from promising to decide an issue in a certain way.[107] The majority reasoned that the announce clause should be inter-

96 *Id.* at 768.
97 *Id.* at 768–69.
98 *Id.* at 769.
99 *Id.*
100 *Id.* at 769–70.
101 *Id.* at 770.
102 *Id.*
103 *Id.*
104 *Id.*
105 *Id.* at 788.
106 *Id.* at 770–73.
107 *Id.*

preted more broadly than prohibiting pledges and promises because the Minnesota Code of Judicial Conduct contains a separate "pledges or promises clause."[108] The majority next discounted the analyses of the District Court, the Eighth Circuit, and the Supreme Court of Minnesota with respect to the announce clause.[109] The District Court found that the clause only extends to disputed issues that could come before the judicial candidate if elected.[110] The Eighth Circuit built upon the District Court's reading of the clause, explaining that candidates are in fact entitled to discuss generally both case law and judicial philosophy.[111] The Minnesota Supreme Court adopted the interpretations of the District Court and the Eighth Circuit together.[112] The *White* majority, however, defined the clause uniquely, concluding that the prohibition bars a candidate from "stating his views on any specific nonfanciful legal question within the province of the court for which he is running."[113] The only exception to the rule, as Justice Scalia articulated, is that a candidate may discuss such a legal question in the context of a past decision, unless he has declared that he is not bound by *stare decisis*.[114] In an attempt to characterize the announce clause, the majority indicated that the canon is imprecise and over-inclusive.

Next, the *White* majority opinion tackled the plaintiff's claim that the announce clause is inconsistent with the First Amendment.[115] The court applied strict scrutiny, the same test applied by the Court of Appeals, to determine whether the clause was unconstitutional.[116] Under this test, the respondents were required to show that the prohibition was narrowly tailored to serve a compelling state interest.[117] The Court of Appeals found that the clause served two compelling interests, as shown by the respondents: (1) preserving the impartiality of the state judiciary and (2) preserving the appearance of the impartiality of the state judiciary.[118] While the *White* majority agreed that both interests are compelling, it concluded that the clause was not narrowly tailored to serve those interests.[119]

To this end, Justice Scalia focused on the concept of impartiality, exploring three possible meanings of the word in the judicial context.

[108] *Id.* at 770.
[109] *Id.* at 771–73.
[110] *Id.* at 771.
[111] *Id.* at 772.
[112] *Id.*
[113] *Id.* at 773.
[114] *Id.*
[115] *Id.* at 774.
[116] *Id.* at 775–76.
[117] *Id.*
[118] *Id.*
[119] *Id.* at 776–77.

First, Justice Scalia defined impartiality (in what he deemed to be the traditional sense) as the equal application of the law by a judge to the parties who come before him.[120] While acknowledging that an impartial judiciary, in this sense, is essential to due process, the majority decided that the announce clause was not narrowly tailored to serve impartiality (or the appearance of impartiality) under this definition.[121] The Court noted that "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*."[122] Next, Justice Scalia described impartiality as a "lack of preconception in favor of or against a particular *legal view*."[123] He determined that it is not possible or desirable for a judge to come to the bench without any predispositions and, moreover, that a judge is not required to do so.[124] Finally, Justice Scalia considered impartiality as "open-mindedness" or the appearance of open-mindedness.[125] The respondents argued that the announce clause relieved judges from feeling pressured to rule in a certain way in order to rule consistently with statements they might have made in the past.[126] The majority dismissed this understanding of impartiality as well. Justice Scalia explained that judges often state their views on disputed issues outside of campaigns for election, for example, in books they write or classes they teach.[127] Further, he elaborated, while a candidate in Minnesota cannot say " 'I think it is constitutional for the legislature to prohibit same-sex marriages[,]' . . . [h]e may say the very same thing . . . up until the very day before he declares himself a candidate, and may say it repeatedly . . . after he is elected.'"[128] Further, the justice emphasized that statements made during election campaigns are only a small fraction of the public's commitment to a particular legal issue that a judge has undertaken.[129] In other words, there are other reasons why the public may commit to a particular legal issue that a judge has advocated than that judge's statements during his election campaign. The majority found that respondents did not carry their burden, under the Court's strict scrutiny test, to show that campaign statements are uniquely damaging to judicial open-mindedness.[130]

120 *Id.* at 775–77.
121 *Id.* at 776–77.
122 *Id.* at 776.
123 *Id.* at 777.
124 *Id.* at 777–78.
125 *Id.* at 778.
126 *Id.* at 778–79.
127 *Id.* at 779.
128 *Id.* at 779–80.
129 *Id.* at 779.
130 *Id.* at 781.

The majority concluded that the clause failed under strict scrutiny, "both prohibit[ing] speech based on its content and burden[ing] a category of speech that is at the core of First Amendment freedoms—speech about the qualifications of candidates for public office."[131] On those bases, the court struck down the Minnesota Supreme Court's canon of judicial conduct, reversed the grant of summary judgment to respondents, and remanded the case for further proceedings.[132]

In her concurrence, Justice O'Connor attributed the alleged problems associated with the announce clause to Minnesota's initial determination to have popular elections for judges in that state. The justice perceived "the very practice of electing judges" as being at odds with the concept of judicial impartiality in the first place, regardless of any statements a candidate may make while campaigning.[133] "Even if judges were able to suppress their awareness of the potential electoral consequences of their decisions and refrain from acting on it, the public's confidence in the judiciary could be undermined simply by the possibility that judges would be unable to do so," O'Connor explained.[134] Justice Kennedy wrote a concurrence in which he argued that any content-based restriction of a candidate's speech is flatly prohibited by the First Amendment.[135]

Justices Stevens and Ginsburg wrote separate dissenting opinions, both of which concentrated on the distinction between judicial elections and political elections.[136] Justice Stevens claimed that the majority made two mistakes in reaching its decision. First, he criticized the majority for underestimating the importance of an independent and impartial judiciary to notions of fairness.[137] Second, the justice asserted that the majority inappropriately equated the freedom of expression of judicial candidates with the freedom of expression of other elected officials.[138] Stevens reasoned:

> There is a critical difference between the work of the judge and the work of other public officials. In a democracy, issues of policy are properly decided by majority vote; it is the business of legislators and executives to be popular. But in litigation, issues of law or fact should not

131 *Id.* at 765.
132 *Id.* at 788.
133 *Id.*
134 *Id.* at 789.
135 *Id.* at 792–96
136 *Id.* at 797, 803.
137 *Id.* at 797.
138 *Id.*

> be determined by popular vote; it is the business of judges to be indifferent to unpopularity.[139]

Justice Stevens sought to shift the focus of whether a judge was elected or appointed to the importance of safeguarding the unique role that the judiciary must play in the state. To this end, Justice Stevens recognized, "[e]lected judges, no less than appointed judges, occupy an office of trust that is fundamentally different from that occupied by policymaking officials. . . . [T]hat they must stand for election . . . does not lessen their duty to respect [the] essential attributes of the judicial office."[140] Justice Stevens also found fault with Justice Scalia's failure to distinguish between statements made on the campaign path and statements made in other contexts. The justice argued that the public will most likely construe statements made during elections as campaign promises. In sum, Justice Stevens stated:

> By obscuring the fundamental distinction between campaigns for the judiciary and the political branches, and by failing to recognize the difference between statements made in articles or opinions and those made [while campaigning], the Court defies any sensible notion of the judicial office and the importance of impartiality in that context.[141]

Justice Ginsburg, in her dissenting opinion, articulated principles similar to those Justice Stevens presented. She professed that "the rationale underlying unconstrained speech in elections for political office—that representative government depends on the public's ability to choose agents who will act at its behest" does not apply in the context of judicial elections.[142] The justice reasoned that "[l]egislative and executive officials . . . are agents of the people; their primary function is to advance the interests of their constituencies,"[143] while judges "must strive to do what is legally right, all the more so when the result is not [what] 'the home crowd' wants."[144] Justice Ginsburg defended the state's right to regulate judicial elections. On this point, she argued that once a state makes the threshold decision to elect its judges, the state must be able to establish a judicial election process.[145] The justice noted that the Court's decision undermined Minnesota's integrated system of judicial campaign regula-

139 *Id.* at 798.
140 *Id.* at 797.
141 *Id.* at 797.
142 *Id.* at 806.
143 *Id.* at 805.
144 *Id.* at 806.
145 *Id.* at 805.

tion.[146] According to Justice Ginsburg, the mere fact that judges are selected by popular vote does not mean that judges should receive the same treatment under the First Amendment as politicians.[147] Further, the justice contended that "a litigant is deprived of due process where the judge who hears his case has a 'direct, personal, substantial, and pecuniary' interest in ruling against him,"[148] or where the judge is tempted to rule in any manner other than impartially.[149] Ginsburg also discussed the importance of public confidence in the judiciary and the appearance of the maintenance of due process.[150]

In addition, Ginsburg disagreed with the majority's interpretation of the announce clause, explaining that, although the clause forbade a candidate to reveal publicly how he would ultimately decide a disputed issue, it did not prevent him from discussing the issue.[151] Instead she argued that the clause, "[p]roperly construed, . . . prohibits only a discrete subcategory of the statements the Court's misinterpretation encompasses."[152] Further, Justice Ginsburg concluded that the pledges and promises clause would not be able to work if it were not coupled by the announce clause, because candidates could otherwise easily circumvent the rule by simply avoiding language associated with pledges and promises.[153] She explained that "[s]emantic sanitizing of the candidate's commitment would not . . . diminish its pernicious effects on actual and perceived judicial impartiality."[154] By zeroing in on statements, which are not technically pledges or promises, but still reveal to the public how a judge would rule on a legal issue, "the Announce Clause prevents this end run around the letter and spirit of its companion provision."[155]

V. *WHITE* ON ITS MERITS

The Supreme Court's decision to strike down the announce clause makes good sense if Justice Scalia's interpretation of the provision is accepted at face value. It is certainly possible to understand how a clause that prohibits a judicial candidate from making general remarks regarding any issue of public policy would raise serious First Amendment concerns. In this respect, Justice Scalia argued that the clause prohibited a

146 *Id.* at 812.
147 *Id.* at 821.
148 *Id.* at 815 (quoting Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 824 (1986) (internal quotation marks and alterations omitted)).
149 *Id.* at 815.
150 *Id.* at 817.
151 *Id.* at 810–11.
152 *Id.*
153 *Id.* at 819.
154 *Id.*
155 *Id.* at 820.

candidate from "stating his views on any specific nonfanciful legal question within the province of the court for which he is running."[156] However, Justice Scalia's interpretation of the clause did not go unchallenged. Justice Ginsburg made a compelling argument that the clause did not in fact broadly prohibit candidates from generally discussing public policy issues with voters, but, rather, merely forbade candidates to reveal how they would ultimately decide on disputed legal issues. Ginsburg also forcefully contended that the announce clause was, in actuality, a companion provision to the "pledges and promises clause" of the Minnesota Code of Judicial Conduct, which effectively reduced a candidate's opportunity to circumvent the pledges and promises clause through manipulation of semantics.[157] Accordingly, Ginsburg's interpretation of the clause presents less of an affront to the First Amendment, and would stand a better chance of passing constitutional muster. However, even if one supports Justice Scalia's interpretation of the prohibition, as well as the court's ultimate ruling on it, this note nevertheless takes issue with the way the majority opinion blurs the important distinction between political and judicial elections, and ignores the modern realities of judicial elections.

Justice Scalia's perspective on the nature of judicial elections demeans the importance of an impartial judiciary as an integral component of due process under the Fourteenth Amendment. On this point, Justice Scalia accuses Ginsburg of "greatly exaggerat[ing] the difference between judicial and legislative elections."[158] He also argues that the "complete separation of the judiciary from . . . 'representative government' "[159] does not make sense where "state-court judges possess the power to 'make' common law . . . [and] have the immense power to shape the States' constitutions as well."[160] Essentially, Justice Scalia is claiming that judges are political actors, which is inconsistent with notions of an effective and inherently neutral judiciary, due process, and the principle of separation of powers. In this respect, the *White* majority pays inadequate attention to the interests of the judiciary, regardless of the constitutionality of the actual provision at issue. While it is true that one cannot assume that "anything but the most generic of comments, will erode the public confidence in an impartial system," it is also vital to keep the proper balance between the "[t]wo essential elements of a well-ordered democracy[,] . . . public confidence in the judicial system and the right of all citizens to be able to hold and express political opinions."[161]

156 *Id.* at 773.
157 *Id.* at 819.
158 *Id.* at 784.
159 *Id.*
160 *Id.*
161 Cotilla & Veal, *supra* note 20, at 758.

In balancing these elements, courts must "question whether certain judicial actions will actually impair or improve the integrity of the judicial system."[162]

Further, "[t]he Supreme Court's decision about judicial elections shows how unrealistic five justices can be about what happens in election campaigns."[163] In this regard:

> Having once taken a position on how those issues ought to be handled or resolved, a judge cannot be "wholly disinterested" in the outcome. Nor can judges free themselves from the influence of proclaiming positions to thousands of voters when an individual case presents an opportunity to adhere to, or deviate from, that position. Due process cannot coexist with campaign statements announcing positions on issues likely to come before the court.[164]

Justice Scalia champions First Amendment rights without recognizing that free speech within the context of judicial elections, if not carefully limited, can make a judge's obligations increasingly difficult to fulfill once elected to office.[165]

VI. *WHITE*'S REACH: GAINING PERSPECTIVE

Though the ultimate effect of *White* is still unclear, the Supreme Court's decision was a setback to notions of judicial election reform. In this regard, the *White* decision reflects the limitation of state authority to monitor judicial elections. *White* is dangerous in that the decision opens the door to further court-imposed or other obstacles to the state's authority to regulate judicial elections. However, *White* is technically only a decision on the "announce clause," and does not equate to the end of state reform in the context of judicial elections.[166] In fact, there has been significant backlash to the decision already.[167] The White mandate

162 *Id.*

163 Roy A. Schotland, *Should Judges Be More Like Politicians?*, 39 CT. REV. 8 (2002), *available at* http://aja.ncsc.dni.us/courtrv/review.html (last visited Oct. 5, 2003).

164 Brennan Center Brief, *supra* note 9, at 21.

165 Ironically enough, "[w]here once it was the liberals on the Supreme Court who could be counted on to be consistent champions of the First Amendment, it is now the conservative justices who are often the most protective of free speech." Erwin Chemerinsky, *Judicial Elections and the First Amendment*, 38 TRIAL 78 (2002).

166 *See* Memorandum, Brennan Center for Justice, Republican Party of Minnesota v. White: What Does the Decision Mean for the Future of State Judicial Elections? (2002), *at* http://www.brennancenter.org/programs/prog_ht_kelly_memo.html (last visited Aug. 25, 2003).

167 Press Release, Brennan Center for Justice, *Top Legal Organizations Express Concern About Impact of Supreme Court's White Decision on Fair and Impartial Courts* (Jun. 27,

leaves ample room to reverse the trend towards politicization, and to make elections of states judges more meaningful. Such reform would help to revitalize the fair and open-minded operation of the state courts and the judicial branch.

Beyond the merits of the decision itself, the *White* ruling must be understood for what it did and what it did not do. First, *White* struck down the announce clause. The announce clause was broader than the ABA's "commit clause,"[168] which the Minnesota Supreme Court refused to adopt. In other words, even though the "announce clause" was formally abandoned by the ABA after numerous concerns had arisen, the Minnesota court continued to use the 1972 version of the canon.[169] The *White* majority invalidated only the announce clause, which was arguably too ambitious, but in any event *more* ambitious than the ABA canon and similar canons adopted by other states. Further, the announce clause was only in effect in nine states, out of thirty-nine states that have some sort of judicial elections: Arizona, Colorado, Iowa, Maryland, Minnesota, Mississippi, Missouri, New Mexico, and Pennsylvania.[170] Second, *White* settled a circuit split.[171] The Seventh Circuit's decision in *Buckley v. Illinois Judicial Inquiry Board*,[172] held that the clause extended to limiting judges from announcing even general propositions, such as "I am a strict constructionist," and that the clause therefore violated the First Amendment.[173] However, in *Stretton v. Disciplinary Board*,[174] the Third Circuit held that "[i]f judicial candidates during a campaign prejudge cases that later come before them, the concept of impartial justice becomes a mockery."[175]

While it is true that thirty-nine states have canons limiting what candidates may say in campaigns, it is important to understand that the decision was not a victory over the regulation of judicial campaign elections. The ABA canon and other state canons based on the ABA canon remain intact. The state's authority to regulate judicial elections suffered a real blow in June 2002, but it was not abolished. States have historically implemented measures to preserve the unique role of the judiciary in

2002), *available at* http://www.brennancenter.org/presscenter/releases_2002/pressrelease_2002_1120.html (last visited Nov. 18, 2002) [hereinafter *Top Legal Organizations*].

168 *See* Jan Witold Baron, *Judicial Candidate Speech After Republican Party of Minnesota v. White*, 39 CT. REV. 12, 14 (2002), *available at* http://aja.ncsc.dni.us/courtrv/review.html (last visited Oct. 5, 2003).

169 *See* Republican Party of Minn. v. White, 536 U.S. 765, 771, 773 n.5 (2002).

170 Hudson, *supra* note 17, at 333.

171 *Id.*

172 997 F.2d 224 (7th Cir. 1993).

173 Hudson, *supra* note 17, at 333.

174 944 F.2d 137 (3rd Cir. 1991).

175 *Id.* at 142.

judicial elections, and continue to hold that power.[176] In fact, the Court emphasized that it was "'not saying judicial elections have to sound just like other elections.'"[177] Thus, there is still considerable room for regulation of judicial elections. Universal reaction to the *White* decision appears to recognize the survival of the state's power to regulate judicial elections, as well:

> *White* clearly underscores the applicability of the First Amendment to regulation of campaign speech. But the decision also declines to hold that judicial campaigns may not be subject to regulation, and it leaves alone most of the judicial campaign rules currently in the canons. New analysis of these canons in light of the decision is entirely appropriate. Pell-mell revision of the canons on the media-driven assumption that the Court has held them invalid is unwarranted.[178]

Some have predicted, however, that even though "[t]he *White* Decision will lead many state supreme courts (and other bodies responsible for oversight of judicial election campaigns) to re-examine their canons of campaign conduct,"[179] it will also "no doubt embolden the critics of those canons to bring more constitutional challenges."[180]

VII. THE AFTERMATH

A. ELEVENTH CIRCUIT—*WEAVER V. BONNER*

Though the sting of *White* is not as severe as it initially appears to be, the courts seem to be in a state of confusion in terms of sorting out what exactly amounts to legitimate constitutional regulation of campaign conduct. The Eleventh Circuit's October 2002 decision in *Weaver v. Bonner*[181] succeeded *White* as the next strike against judicial impartiality and judicial election reform. In *Weaver*, the court found that the provision in the Georgia Code of Judicial Conduct prohibiting judicial candidates from "personally soliciting campaign contributions . . . but allow[ing] the candidate's election committee to engage in these activities"[182] was not narrowly tailored to serve Georgia's interest in judicial

176 Chief Justices' Brief, *supra* note 66, at 5-9.

177 Marcia Coyle, *New Suits Foreseen on Judicial Elections,* NAT'L L.J., Jul. 8, 2002, at A1, A9 (quoting Deborah Goldberg, Deputy Director of the Brennan Center for Justice).

178 Statement, National Ad Hoc Advisory Committee on Judicial Election Law, *Republican Party of Minnesota v. White* and the Canons Regulating Judicial Elections 4 (July 12, 2002), *available at* http//:www.judicialcampaigncond.PDF.

179 *Id.*

180 *Id.*

181 309 F.3d 1312 (11th Cir. 2002).

182 *Id.* at 1322.

impartiality and, therefore, violated the First Amendment.[183] The court also found unconstitutionally vague the provision prohibiting a judicial candidate from:

> using or participating "in the use of any form of public communication which the candidate knows or reasonably should know is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation of fact or law or omits a fact necessary to make the communication considered as a whole not materially misleading or which is likely to create an unjustified expectation about results the candidate can achieve."[184]

These provisions are closely modeled after the ABA's Model Code of Judicial Conduct, and the *Weaver* opinion itself practically quotes Justice Scalia's language from *White*.[185] The court "agree[d] that the distinction between judicial elections and other types of elections has been greatly exaggerated," and stated that it "d[id] not believe that the distinction, if there truly is one, justifies greater restrictions on speech during judicial campaigns than during other types of campaigns."[186] The brief of amicus curiae submitted by the Conference of Chief Justices in support of the appellees, however, argues that judicial campaigns across the country will be adversely affected by the Panel's decision, and more specifically it "will make judicial elections . .e. more corrupting for candidates, more coercive for supporters, and more corrosive for public confidence."[187] Personal soliciting by judges creates "an inherent . . e advantage for a *judge*-candidate and undue pressure on the person solicited—so often a lawyer."[188] The brief maintains that "requiring the soliciting to be conducted by the candidate's committee is a key part of the Code of Judicial Conduct to assure that 'judges shall not lend the prestige of judicial office to advance the private interests of the judge.' "[189] The association between campaign contribution limits and limits on free speech has been made in the past, some arguing that because unique restrictions are placed upon judicial candidates in this regard, unique requirements can constitutionally be placed on speech.[190]

183 *Id.*

184 *Commission Petitions for Re-hearing of Campaign Holding*, WKLY. JUD. ETHICS NEWS, Nov. 13, 2002, *at* http://www.ajs.org/ethics/story.asp?content_id=77.

185 309 F.3d at 1321.

186 *Id.*

187 Chief Justices Brief, *supra* note 66, at 3, Weaver v. Bonner, 309 F.3d 1312 (11th Cir. 2002) (No. 00-15158), *available at* http://www.judicialcampaignconduct.org/decisions/WeaverCJAmicus.PDF (last visited Sep. 11, 2003).

188 *Id.* at 5.

189 *Id.* (quoting MODEL CODE Canon 2B).

190 Hudson, *supra* note 17, at 333.

Though the Supreme Court has not addressed the issue involved in *Weaver*, the Eleventh Circuit's opinion presents a challenge to the state's authority to monitor judicial election.

B. FLORIDA SUPREME COURT—*IN RE KINSEY*

In January 2003, the Florida Supreme Court held in *In Re Kinsey*[191] that a judicial canon, barring judicial candidates from making statements that appear to commit the candidate with regard to issues or cases, does not violate the right to free speech.[192] *Kinsey* therefore affirmed the legitimacy of the "commit clause" of the Florida Code of Judicial Conduct. The commit clause is narrower than the announce clause and is based upon the Model Code of Judicial Conduct. The Florida Code includes both a "commit clause" and a "pledges and promises" clause.[193] Additionally, the commentary to the clauses in the state's code explains that "a candidate should emphasize in any public statement the candidate's duty to uphold the law regardless of his or her personal views."[194] The court found that Canon 7A(3)(d)(i)-(ii) was narrowly tailored to serve a compelling state interest—maintaining the integrity of the judiciary and the public's confidence in an impartial judiciary.[195] The court reasoned:

> A judicial candidate should not be encouraged to believe that the candidate can be elected to office by promising to act in a partisan manner by favoring a discrete group or class of citizens. Likewise, it would be inconsistent with our system of government if a judicial candidate could campaign on a platform that he or she would automatically give more credence to the testimony of certain witnesses or rule in a predetermined manner in a case which was heading to court.[196]

Thus, the court concluded that the restrictions do not unduly prohibit speech.[197] The court also made clear that, even though a candidate can state his views on disputed issues, in order to "ensure that the voters

191 842 So.2d 77 (Fla. 2003).

192 *Id.* at 88–89.

193 The Florida Code of Judicial Conduct provides:

> A candidate for a judicial office . . . shall not:
> (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; [or]
> (ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court. . . .

FLA. CODE JUD. CONDUCT, Canon 7A(3)(d)(i)-(ii) (2003).

194 *Id.* at Canon 7A(3)(d)(i)(ii) cmt.

195 *Kinsey*, 842 So.2d at 87.

196 *Id.*

197 *Id.*

understand a judge's duty to uphold the constitution and laws of the state where the law differs from his or her personal belief, the commentary encourages candidates to stress that as judges, they will uphold the law."[198] The decision represents a step away from *White*, and a confirmation that state provisions restricting judicial campaign conduct are valuable, as well as constitutional.

C. FEDERAL DISTRICT COURT, NORTHERN DISTRICT OF NEW YORK—*SPARGO*

Spargo v. New York State Commission on Judicial Conduct[199] serves as the companion case to *Kinsey*, and was clearly decided with much deference to the Supreme Court's holding in *White*.[200] On February 20, 2003, the *Spargo* court declared facially unconstitutional all New York Code of Judicial Conduct provisions aimed at forbidding political activities of candidates campaigning for judicial election.[201] The court's decision, however, likely has much to do with the fact that New York State elections are *partisan* elections, whereas elections in many other states are nonpartisan.

The court reasoned that the New York Code provisions were even broader than the announce clause at issue in *White*, concluding that the provisions precluded judges from "participating in politics at all except to participate in their own election campaigns."[202] The court determined that "a wholesale prohibition on participating in political activity for fear of influencing a judge ignores the fact that a judicial candidate must have at one time participated in politics or would not find him or herself in the position of a candidate."[203] In addition, the court contended that if a judge were actually influenced or biased against a party for political reasons, the proper course of action would be recusal.[204]

Again, the *Spargo* opinion focuses on the partisan nature of New York State judicial elections, and does not speak to the constitutionality of similar provisions in states holding non-partisan elections. Hypothetically then, even if the Supreme Court were to validate *Spargo*, the force of ethics provisions with respect to nonpartisan elections would remain untouched. *Spargo*, in this respect, invites legal commentators supporting the preservation of judicial elections to consider whether replacing partisan judicial elections with nonpartisan elections would resolve the

198 *Id.*
199 244 F. Supp. 2d 72 (2003), *stay pending appeal denied*, No. 1:02 Civ. 1320 (N.D.N.Y. 2003).
200 *Id.*
201 *Id.* at 92.
202 *Id.* at 88.
203 *Id.*
204 *Id.*

constitutional concerns associated with ethics code prohibitions on candidate speech and provide an adequate means by which to restore the integrity of judicial elections. Eliminating partisan elections, however, will not prevent politics from influencing the judicial selection system. Non-partisan elections with active special interest group participation can become just as "politicized" as partisan elections. In other words, partisan elections are not the problem, as strong political forces influence both partisan and non-partisan modern elections. Instead, the solution is to strengthen state controls on the judicial selection system as a whole, including state ethics codes.

The *Spargo* opinion, modeled after *White*, has been met with much criticism in New York State, and has incited backlash in support of the state's ethics restrictions associated with judicial campaigns.[205] New York State judges were told by the Office of Court Administration to continue to follow the state's ethics rules, despite *Spargo,* until the Second Circuit has heard and formally ruled on the *Spargo* appeal.[206] New York Courts have thus continued to censure judicial misconduct.[207] The New York Court of Appeals reaffirmed its commitment to enforcing the state's judicial ethics provisions in *In re Raab*[208] and *In re Watson.*[209] In these cases, the court made clear that is not bound by the Northern District Court's decision in *Spargo* by holding that active judges cannot engage in partisan politics, and that judicial candidates cannot make campaign promises to voters that interfere with the fair and impartial administration of justice.[210]

[205] *See* John Caher, *Former State Bar President Warns of Risks to Judicial Independence in Recent Cases*, N.Y. L.J., June 9, 2003, at 1; John Caher, *Judicial Conduct Commission Under Fire: State Watchdog Group Fights a Multi-Front Battle to Maintain Provisions of Ethics Code*, N.Y. L.J., May 8, 2003, at 1; *see also* John Caher, *Bar Groups File Briefs in 'Spargo' Case: Associations Say Federal Judge Erred In Striking State's Judicial Conduct Code*, N.Y. L.J., June 23, 2003, at 1; John Caher, *Judicial Conduct Commission Fires Back After 'Spargo': Stern Affidavit Cites Adverse Impact of Federal Court Ruling*, N.Y. L.J., April 1, 2003, at 1; John Caher, *New State Bar Leader Plans An Aggressive Agenda*, N.Y. L.J., June 16, 2003, at 1; John Caher, *State Limits on Judicial Speech Survive Constitutional Scrutiny: Restrictions on Campaign Statements Help Assure Judges Are Free of Bias*, N.Y. L.J., June 11, 2003, at 1.

[206] *See* John Caher, *OCA to Judges: Keep Following Stricken Rules*, N.Y. L.J., Mar. 24, 2003, at 1; Owen Moritz, *Nix Politics, Judges Told*, N.Y. DAILY NEWS, Mar. 24, 2003, at 29;

[207] Petitioner's Misconduct Warrants Censure: No. 78—Matter of Honorable William Watson, N.Y. L.J., June 11, 2003, at 19; *Court Accepts Sanction of Censure: No. 91—Matter of the Honorable Ira J. Raab*, N.Y. L.J., June 11, 2003, at 21; John Caher, *Panel Declares It is Not Bound by 'Spargo' Case: Mason Removed From Bench Despite Federal Ruling*, N.Y. L.J., May 2, 2003, at 1; John Caher, *State Limits on Judicial Speech Survive Constitutional Scrutiny: Restrictions on Campaign Statements Help Assure Judges Are Free of Bias*, N.Y. L.J., June 11, 2003, at 1.

[208] 793 N.E.2d 1287 (N.Y. 2003).

[209] 794 N.E.2d 1 (N.Y. 2003).

[210] *See Watson*, 794 N.E.2d at 1; *Raab*, 793 N.E.2d at 1287. One of the main arguments that the Second Circuit will hear on the appeal of *Spargo*, is that the federal court should not

Upon examining *Weaver, Kinsey*, and *Spargo,* as well as the cases reacting to *Spargo*, it is clear that the courts are sending out mixed signals as far as what the *White* decision says about the constitutionality of individual state ethics codes.[211] A clearer picture will only emerge as these cases continue to move through the appeals process.

VIII. CONTINUING REFORM

Since the Supreme Court announced its decision, various prominent national legal organizations have spoken out against *White*, and have jumped to the task of restoring the sanctity of judicial elections and safeguarding the functioning of impartial courts. In this respect, *White* has been the true "call to action." In late 2001, the Justice at Stake Campaign, a nationwide coalition of legal and citizen organizations dedicated to the protecting independence of the judiciary, conducted a series of surveys, which were administered to both judges and randomly selected members of the public.[212] Results of the surveys indicated that the public perceives contemporary judges as political (but considers them "a special kind of politician")[213] and believes that judicial elections have become "nastier" than ever.[214] In response to the *White* decision, the executive director of the Justice at Stake Campaign stated that "'[m]ore candidates will be pressured to resort to politics as usual to become judges.'"[215] In addition, Justice at Stake campaign participant and ABA President, Robert E. Hirshon, stated that "'[*White*] is a bad decision . . . [that] will open a Pandora's box,'"[216] and, consequently, "'[w]e will now have judicial candidates running for office by announcing their positions on particular issues, knowing that voters will evaluate their performance in office on how closely their rulings comport with those

have handled the *Spargo* case before it was appealed to the New York Court of Appeals, particularly in light of *Raab* and *Watson*. In other words, though the District Court Judge in *Spargo* determined that there was no right to appeal to the New York Court of Appeals on the constitutional issue presented, the *Raab* and *Watson* decisions cast doubt on the strength of the *Spargo* decision.

211 *See* John Caher, *'Spargo' Decision Leaves Confusion in its Wake: Scope of Judges Activity in Elections Remains Unsettled*, N.Y. L.J., Feb. 28, 2003, at 1; *see also* Adam Liptak, *Judges Mix with Politics: A New Federal Ruling Breaks Down a Wall,* N.Y. TIMES, Feb. 22, 2003, at B1; James C. McKinley, Jr., *U.S. Ruling Allows Judges to Take Part in Politics,* N.Y. TIMES, Feb. 21, 2003, at B1; *Politicians in Judges' Robes*, N.Y. TIMES, Feb. 26, 2003, at A24.

212 David B. Rottman, *The* White *Decision in the Court of Opinion: Views of Judges and the General Public*, 39 CT. REV. 16 (2002), *available at* http://aja.ncsc.dni.us/courtrv/review.html (last visited Oct. 5, 2003).

213 *Id.* at 18–19.

214 *Id.* at 17.

215 *Top Legal Organizations, supra* note 167 (quoting Geri Palast, Executive Director of Justice at Stake Campaign).

216 *Id.*

positions.'"[217] The ABA is reviewing the Model Code of Judicial Conduct, on which almost all state codes are based, to ensure that its related canons can survive the *White* decision.[218] The ABA has also appointed ethics experts to contemplate the effect of *White* on the Model Code.[219] Finally, the Law Alumni Association and The Brennan Center for Justice at the New York University School of Law sponsored a symposium entitled "Dangerous Times for the Least Dangerous Branch? Judicial Campaigns and Judicial Independence after *White*" in order to facilitate discussion concerning the potentially detrimental impact of the *White* decision on judicial elections.[220] Clearly, reform efforts, in the aftermath of *White*, have not stopped.

CONCLUSION

White set in motion a series of evaluations as to the constitutionality of particular ethics code prohibitions, and individual states must now cope with that reality. In the aftermath of the *White* decision, the courts are trying to determine what form judicial elections should take in the future. The very viability of a free and independent judiciary is at stake. The issues considered in *Weaver*, *Kinsey*, and *Spargo* will undoubtedly reach the Supreme Court, whereupon the constitutionality of prohibitions other than the announce clause will be scrutinized. The potential for needed reform of the election system in the future thus will be determined by the outcome of the court decisions that will follow, as well as the commitment and creativity of the state legislatures in complying with those decisions.

[217] *Id.*
[218] *Id.*
[219] *Id.*
[220] Symposium Materials, New York University School of Law, Dangerous Times for the Least Dangerous Branch? Judicial Campaigns and Judicial Independence After *White* (Apr. 23, 2003) (on file with author).