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## The Increasing Politicization of the American Judiciary: Republican Party of Minnesota v. White and its Effects on Future Judicial Selection in State Courts

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# **THE INCREASING POLITICIZATION OF THE AMERICAN JUDICIARY: *REPUBLICAN PARTY OF MINNESOTA v. WHITE* AND ITS EFFECTS ON FUTURE JUDICIAL SELECTION IN STATE COURTS\***

## **INTRODUCTION**

The Framers of the United States Constitution structured America's federal government intending the judiciary to be the weakest and most impartial of the three branches: it was designed to have little impact on the manner in which the country was run.<sup>1</sup> As time passed, the American judiciary has strayed further and further from that ideal. No longer is it possible to view the judiciary in the way it was conceived. The rise of "judicial activism" has expanded significantly the power of judges. Interpretation is no longer the judge's sole function — the line separating adjudicator and legislator has been blurred. As the relative strength of the branch has increased markedly, judicial selection has become a vital aspect of American politics.

In some states, the line has been blurred even further. Whereas the federal government utilizes the nomination/confirmation process as its method of judicial selection, the majority of states prefer popular election for the selection of at least some levels of judges.<sup>2</sup> This method of selection presents an apparent contradiction by thrusting judges, designed to serve in a position of impartiality, into the role of common politician.

Increasingly, politicians and voters nominate or elect judges based on their ideologies, providing seats with the purpose of fulfilling a political agenda. One cannot imagine that the Framers envisioned judicial candidates campaigning for office or the prospect of citizens voting in partisan elections to select candidates for the bench. The American judiciary has become increasingly politicized in recent decades, and unless the government takes measures to slow this trend, America runs the risk of completely deviating from the initial purpose of the judicial branch.

This Note will examine the increasing politicization of the American judiciary, specifically addressing the selection process and the problems the method of election has presented for state courts and will present in the future. The discussion occurs in the wake of the June 2002 decision of the Supreme Court in *Republican*

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<sup>1</sup> See *infra* notes 7–11 and accompanying text.

<sup>2</sup> See *infra* note 4.

*Party of Minnesota v. White*,<sup>3</sup> which, despite only concerning state judges in a jurisdiction where they are elected officials, promises to have a large impact on the entire judicial system.

This Note begins by providing a brief history of the American judiciary, for the purpose of discussing the Framers' intent with respect to separation of powers. The first section establishes a historical basis from which to compare the legal system as it appears today. The discussion then shifts to a brief survey of contemporary problems, touching on federal selection methods, but concentrating primarily on the issue of judicial selection by election — the process employed for selecting supreme court justices in twenty-one states.<sup>4</sup> Following the background, Part III presents a thorough analysis of the *White* decision and what this decision means for the future of judicial selection. This section argues that the holding in *White* helps to further politicize the judicial selection process. Part IV examines *White*'s aftermath, revealing a trend in the courts toward an expansion of the majority's holding. Part V provides recommendations for changing and improving judicial selection methods for state courts, addressing ways to decrease political influence on the selection process.

By allowing judges to "announce" their political beliefs during judicial election campaigns, the Court in *White* has significantly eroded the credibility of the American judicial process.<sup>5</sup> The granting of increased free-speech rights for candidates threatens the very core of the judiciary. If states continue to elect judges, in the wake of the *White* decision, the judicial system runs the risk of complete compromise. The original purpose of the judicial branch is no longer being served and a slippery slope has begun. Judicial and political elections and offices are fundamentally different and must be treated as such. States must modify their judicial selection procedures to reflect the true role of the judiciary and to lessen the increasing effects of politicization.

## I. BACKGROUND

Judicial independence means that judges are free to decide cases fairly and impartially, relying only on the facts and the law. It means that judges are protected from political pressure, legislative pressure, special interest pressure, media pressure, public pressure, financial pressure or even personal pressure.

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<sup>3</sup> 536 U.S. 765 (2002).

<sup>4</sup> AM. JUDICATURE SOC'Y, JUDICIAL SELECTION METHODS IN THE STATES (2003), at [http://www.ajs.org/selection/sel\\_state-select-map.asp](http://www.ajs.org/selection/sel_state-select-map.asp) [hereinafter JUDICIAL SELECTION METHODS].

<sup>5</sup> See *White*, 536 U.S. at 765.

Judicial independence goes back to the U.S. Constitution. Our country's founders, and each state's founders, worked to protect courts from undue pressure. They knew that it takes fair and impartial decisions to protect our rights — and uphold rule of law.<sup>6</sup>

#### *A. The Framers' View of the Judicial Branch*

In order to advance an argument concerning the flawed nature of the judicial selection process, one must examine how the Framers viewed the structure of the government which they were creating. Examining the *Federalist* papers helps to reveal their intent. Madison wrote:

One of the principal objections inculcated by the more respectable adversaries to the Constitution, is its supposed violation of the political maxim, that the legislative, executive, and judiciary departments ought to be separate and distinct. In the structure of the federal government, no regard, it is said, seems to have been paid to this essential precaution in favor of liberty. The several departments of power are distributed and blended in such a manner as at once to destroy all symmetry and beauty of form, and to expose some of the essential parts of the edifice to the danger of being crushed by the disproportionate weight of other parts. No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that on which the objection is founded.<sup>7</sup>

More importantly for this Note, however, are Alexander Hamilton's words in *The Federalist* 78, discussing the judicial branch and how the Framers viewed its structure and responsibility.<sup>8</sup> Hamilton argued for a system of selection that required appointment and granted judges tenure for life "to secure a steady, upright, and impartial administration of the laws."<sup>9</sup> He stressed that the judiciary is the weakest branch and should have very little impact on the governing of the country:

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<sup>6</sup> JUSTICE AT STAKE CAMPAIGN, WHY JUDICIAL INDEPENDENCE MATTERS (2002), at <http://www.justiceatstake.org/contentViewer.asp?breadcrumb=2>.

<sup>7</sup> THE FEDERALIST NO. 47 (James Madison) (Project Gutenberg ed., 1996), available at [http://memory.loc.gov/const/fed/fed\\_47.html](http://memory.loc.gov/const/fed/fed_47.html).

<sup>8</sup> THE FEDERALIST NO. 78 (Alexander Hamilton) (Project Gutenberg ed., 1996), available at [http://memory.loc.gov/const/fed/fed\\_78.html](http://memory.loc.gov/const/fed/fed_78.html).

<sup>9</sup> *Id.*

The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.<sup>10</sup>

The Framers had no intention of allowing any part of the judiciary to become a political office, nor did they anticipate judges being nominated to satisfy a political agenda. The main principles governing the judicial branch were impartiality and separation from political influence.

As early as the 1830s, however, scholars made observations concerning the American judicial system which revealed signs of political influence. The remarks of Alexis de Toqueville clearly foreshadowed the future of the branch:

What a foreigner understands only with the greatest difficulty in the United States is the judicial organization. There is so to speak no political event in which he does not hear the authority of the judge invoked; and he naturally concludes that in the United States the judge is one of the prime political powers.<sup>11</sup>

### *B. Nomination, Confirmation, and Selection as It Exists Today*

Whereas all federal judges must go through a nomination and confirmation process, states have no uniform method of judicial selection. The issue of state-judge selection procedures is a widely debated one, especially considering that some states choose to fill their judicial offices through popular elections. Twenty-one states elect judges at all levels and eleven others elect their lower court judges.<sup>12</sup>

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

<sup>11</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 93 (Harvey C. Mansfield & Delba Winthrop eds., Univ. of Chi. Press 2000) (1835).

<sup>12</sup> See JUDICIAL SELECTION METHODS, *supra* note 4. The twenty-one states that elect judges at all levels are Alabama, Arkansas, Georgia, Idaho, Illinois, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Texas, Washington, West Virginia, and Wisconsin. The eleven states that have lower court judges elected are Arizona, California, Florida, Indiana, Kansas, Maryland, Missouri, New York, Oklahoma, South Dakota, and Tennessee. States which have appointment procedures for judicial selection commonly have uncontested retention elections after their initial appointments. ONLINE MEDIA KIT, FACT SHEET ON JUDICIAL SELECTION METHODS IN THE STATES (2002), at [http://www.manningproductions.com/ABA245/OMK/fact\\_sheet.html](http://www.manningproductions.com/ABA245/OMK/fact_sheet.html).

Six states have *partisan* elections for judges at all levels,<sup>13</sup> which raises concerns regarding the increasing role of political parties in the judicial system. Regardless of which selection form one examines, there are many critics, and criticism has grown due to the marked increase in power the courts have realized in recent decades. Political influence has greatly impacted the courts at both federal and state levels.

The selection process for federal judges, while conducted via the seemingly innocuous appointment process, appears increasingly politically charged with each passing year. Thomas Jipping argues that the selection process for federal judges is more about securing a politician's legacy than appointing competent judges.<sup>14</sup> His sentiments are echoed by John Ferejohn, who agrees that courts have become politicized, "making judicial decisions appear to be politically motivated and making appointments to the bench matters of partisan contention . . . ."<sup>15</sup> These points are particularly true in the period following Judge Bork's rejection by the Senate. "The Bork proceedings clearly established a firm precedent for ideological inquiries and for the rejection of judicial nominees, at least in some instances, on purely ideological grounds."<sup>16</sup>

While the problems with federal judicial selection methods stem from political influence, the method of judicial election creates the problem of transforming judges into politicians. Nicholas Wallwork, president of the state bar of Arizona, argues that "[e]lection of judges . . . requires judicial electioneering and

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<sup>13</sup> *Id.* (noting that these states are Alabama, Illinois, Louisiana, North Carolina, Pennsylvania, and Texas).

<sup>14</sup> Thomas L. Jipping, *From Least Dangerous Branch to Most Profound Legacy: The High Stakes in Judicial Selection*, 4 TEX. REV. L. & POL. 365 (2000). In this piece, Jipping discusses the reasoning behind the growing politicization of the judiciary, tailoring his argument to address the high number of vacancies in the federal court system. *Id.* He argues that judicial activism and the changing philosophy of judges is the major contributor to this increased politicization. *Id.* In his opinion, a president's "most profound legacy" are his judicial nominees, because increasingly, "judges ignore the law." *Id.* at 458. He goes on to state that the real issue should be judicial philosophy rather than selection; modern judicial philosophy is making the judiciary the most dangerous branch. *Id.* at 382. Jipping ultimately determines that the confirmation process as it exists today is "geared toward confirming nominees no matter what their judicial philosophy might be." *Id.* at 459. His argument should not go unnoticed.

<sup>15</sup> John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 LAW & CONTEMP. PROBS. 41, 66 (2002). Ferejohn is quite critical of the legislative role that judges have undertaken in recent decades. He opines that the judicial selection procedure, combined with life tenure, are concepts fundamentally incompatible with the restraint necessary to have a wholly effective judiciary that adheres to the purpose for which it was designed. *Id.* at 41. He proposes many reforms for judicial selection and the operation of the judicial branch that will be discussed later in this note. See *infra* notes 173–77 and accompanying text.

<sup>16</sup> NORMAND VIEIRA & LEONARD GROSS, SUPREME COURT APPOINTMENTS: JUDGE BORK AND THE POLITICIZATION OF SENATE CONFIRMATIONS 247 (1998).

politicization of courts, giving rise to unseemly impressions of justice for sale.”<sup>17</sup> Judges necessarily perform the same functions as other candidates for elected office. This role does not mesh with the ideals of the judicial branch. “[A] system of elected judges produces outcomes necessarily at odds with the goal of the *ABA Model Code of Judicial Conduct*: an independent judiciary that avoids the appearance of impropriety.”<sup>18</sup>

In recent decades, many scholars, including judges, have begun to realize that many of the issues traditionally left to politicians are now being decided by state supreme court justices. As a result, elections for these offices look no different than elections for other public offices.<sup>19</sup> “Separating the judiciary from the other branches of government means little if judges are then subjected directly to the very same pressures that caused us to mistrust executive and legislative influence in the first place.”<sup>20</sup> Political parties, public interest groups, and the media now have a major influence over who gets elected to an office that was originally created on the basis of at least an appearance of impartiality.<sup>21</sup>

In the wake of increasing politicization of state courts, the financing of judicial election campaigns has also become a major issue. “In 2000, [state] [s]upreme [c]ourt candidates raised more than \$45 million — a 61% increase over 1998, and double the amount raised in 1994. In Mississippi, [in 2002] special interests and candidates spent almost four times as much on TV campaign ads — \$390,000 — as they did in 2000.”<sup>22</sup> In Nevada, judges may even make political contributions to

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<sup>17</sup> Nicholas J. Wallwork, *A Strong, Independent Judiciary*, ARIZ. ATT’Y, Mar. 2002, at 6 (arguing, based on the effectiveness of Arizona’s judicial selection system, that merit selection is a far superior method for achieving a strong, independent judiciary).

<sup>18</sup> John D. Fabian, Note, *The Paradox of Elected Judges: Tension in the American Judicial System*, 15 GEO. J. LEGAL ETHICS 155, 155 (2001) (arguing that judicial elections are incompatible with the concept of an independent judiciary).

<sup>19</sup> Paul J. De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 38 WILLAMETTE L. REV. 367, 368 (2002).

<sup>20</sup> John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 969 (2002).

<sup>21</sup> See Anthony Champagne, *Interest Groups and Judicial Elections*, 34 LOY. L.A. L. REV. 1391, 1393 (2001) (arguing strongly against the increasing role that interest groups are playing in judicial elections and opining that interest group involvement “challenges the appearance of judicial impartiality”); Anthony Champagne, *Political Parties and Judicial Elections*, 34 LOY. L.A. L. REV. 1411, 1426–27 (2001) (stating while political parties perform many necessary functions in judicial elections, partisanship has a negative overall impact on the judicial system by keeping qualified judges out of office and pushing judicial candidates into taking extreme positions on certain issues); Joseph D. Kearney & Howard B. Eisenberg, *The Print Media and Judicial Elections: Some Case Studies From Wisconsin*, 85 MARQ. L. REV. 593 (2002) (focusing on the role of the media in states with judicial election systems).

<sup>22</sup> JUSTICE AT STAKE CAMPAIGN, SENATOR JOHN MCCAIN DECRIES SPECIAL INTEREST INFLUENCE ON JUDICIAL CAMPAIGNS (2002), at <http://faircourts.org/files/McCainPress>

judicial candidates!<sup>23</sup> These findings demonstrate that political parties and special interest groups significantly influence judicial elections. At a minimum, these instances compromise the appearance of impartiality. "According to the poll conducted by *Harris Interactive*, 72 percent of Americans are concerned that the impartiality of judges is compromised by their need to raise campaign money."<sup>24</sup> The increasing influence of interest groups and political parties appears to contradict the ideal of judicial impartiality.

The Supreme Court's holding in *White* appears to have further compounded the problems surrounding judicial elections. *White*, in effect, allows justices running for elected judicial positions to behave like normal politicians by discussing their views on political and legal issues, despite the fact that the judicial branch is predicated upon independence and impartiality. This decision, while directly applying only to states, promises to have widespread effects, which will not only compromise judicial elections, but the entire judicial selection process.

## II. REPUBLICAN PARTY OF MINNESOTA V. WHITE

### A. Facts and Background

In June of 2002, the Supreme Court invalidated a section of the Minnesota Code of Judicial Conduct, known as the "Announce Clause," via a fractured five-to-four decision that produced five separate opinions.<sup>25</sup> A group challenged this statute on First Amendment grounds, arguing that prohibiting candidates from announcing

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<sup>23</sup> Philip W. Bartlett, *Propriety of a Judge Making Political Contributions to Judicial and Non-Judicial Candidates*, NEV. LAWYER, Sept. 2002, at 33 ("No judge or judicial candidate may contribute an amount subject to public disclosure.") However, if the amount is below the threshold for public disclosure, money can be given. *Id.*

<sup>24</sup> ONLINE MEDIA KIT, POLL: CONFIDENCE IN JUDICIARY ERODED BY JUDGES' NEED TO RAISE CAMPAIGN MONEY (2002), at <http://manningproductions.com/ABA245/OMK/release.html>.

<sup>25</sup> *Republican Party of Minn. v. White*, 536 U.S. 765 (2002). In addition to the majority opinion, two concurrences, by Justices Kennedy and O'Connor, and two dissents, by Justices Stevens and Ginsburg, were authored. *Id.* It is noteworthy that the majority opinion makes no attempt to distinguish the "Announce Clause" from another section of the statute known as a "Pledges or Promises" clause, "which separately prohibits judicial candidates from making 'pledges or promises of conduct in office other than the faithful and impartial performance of duties in office.'" *Id.* at 770. As there was no challenge to the Pledges or Promises Clause, since all parties agreed that this clause was within the scope of the government's power, the majority simply did not address the issue. *Id.*



their views on disputed legal and political issues violated their right to free speech.<sup>26</sup> The statute formerly stated:

A candidate for a judicial office, including an incumbent judge . . . shall not . . . make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his or her views on disputed legal or political issues; or misrepresent his or her identity, qualifications, present position or other fact, or those of the opponent . . . .<sup>27</sup>

Minnesota has had elections for judges since the state's admission to the union, but only in the past two decades were candidates bound by the Announce Clause, which carried penalties as harsh as disbarment for violators.<sup>28</sup> The legislature enacted this statute as an attempt to preserve the actual impartiality and the appearance of impartiality of the state judiciary.<sup>29</sup> According to the Supreme Court, however, this justification for the statute's enactment was not compelling enough, as the Court ruled in favor of those seeking to invalidate the statute and held that the Announce Clause violated the First Amendment free-speech rights of judicial candidates.<sup>30</sup>

#### *B. White's Majority Opinion*

In analyzing the case, Justice Scalia, author of the majority opinion, agreed with the court of appeals that the proper test to decide the constitutionality of a statute that burdens First Amendment freedoms was the strict scrutiny test.<sup>31</sup> Under this test, proponents of the statute were required to prove that the Clause was narrowly tailored to serve a compelling state interest.<sup>32</sup> The state's assertion that impartiality was a compelling interest did not meet the heavy burden of strict scrutiny.

Scalia strongly criticized the impartiality argument and attacked it through an examination of various definitions of the term "impartiality." He began by using the traditional definition<sup>33</sup> and reached the conclusion that because the statements the Announce Clause prohibited concern issues and not parties, there was no bias,

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<sup>26</sup> *Id.* at 769–70.

<sup>27</sup> 52 MINN. STAT. ANN., CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(I) (West 1995).

<sup>28</sup> *White*, 536 U.S. at 768.

<sup>29</sup> *Id.* at 735.

<sup>30</sup> *Id.* at 774–76, 788.

<sup>31</sup> *Id.* at 774–75.

<sup>32</sup> *Id.* at 775.

<sup>33</sup> *Id.* at 776. Scalia states that the traditional definition of impartiality in the legal sense is "the lack of bias for or against either *party* to the proceeding." *Id.* at 775.

and thus, no compelling state interest in prohibiting the speech.<sup>34</sup> Justice Scalia admitted that disadvantaged parties who file suit and present an issue on which the judge announced his contrary views while campaigning will probably lose.<sup>35</sup> However, Scalia reasoned that because the judge will apply the law the same way to any party that brings a case on that particular issue, no partiality toward a particular party exists.<sup>36</sup> This appears to be a flawed line of reasoning. If a judge announces his views on a legal issue he clearly does have a bias — a bias against all parties that present cases contrary to that position, regardless of the facts of the case.

Justice Scalia then discussed impartiality by defining it as bias toward a particular legal issue. He quickly discounted this line of rationale as serving a compelling state interest, and therefore failing to meet the burden of strict scrutiny. Scalia explained that while the Announce Clause might serve a state interest, “[a] judge’s lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice . . . it is virtually impossible to find a judge that does not have preconceptions about the law.”<sup>37</sup> While this may be true, it still appears problematic that judges are allowed to campaign on a platform of deciding all relevant cases in the same way.

The majority opinion next discussed the third definition of impartiality — open-mindedness.<sup>38</sup> The Court rejected this definition, however, opining that the Announce Clause was not adopted in pursuit of that ideal.<sup>39</sup> The majority held steadfastly to the idea that all judges have preconceived notions of cases, and communicating those ideas in campaigns is no different than in judicial opinions or authored books.<sup>40</sup> Scalia continued by pointing out that judicial elections are still elections, despite the fact that they are not for political office, and thus voters must have a means of comparing candidates.<sup>41</sup> Justice Scalia devoted the remaining portion of his opinion to challenging the dissent’s assertions in favor of the Announce Clause.

Justice O’Connor, in her concurrence, focused almost entirely on the method that Minnesota, as well as other states, used to select its judges.<sup>42</sup> Interestingly, she pointed out 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

<sup>34</sup> *White*, 536 U.S. at 776.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 776–77.

<sup>37</sup> *Id.* at 777.

<sup>38</sup> *Id.* at 778.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 779.

<sup>41</sup> *Id.* at 781–82.

<sup>42</sup> *Id.* at 788–92 (O’Connor, J., concurring).

judges.”<sup>43</sup> Justice O’Connor appeared to be suggesting that another method of judicial selection might be preferable to the current election-based system espoused by Minnesota.<sup>44</sup>

### C. The White Dissenters

Justice Stevens’s dissent attacked the majority opinion for having “two seriously flawed premises — an inaccurate appraisal of the importance of judicial independence and impartiality, and an assumption that judicial candidates should have the same freedom ‘to express themselves on matters of current public importance’ as do all other elected officials.”<sup>45</sup> Stevens expressed his belief that a judge is quite different from other elected officials in that “issues of law or fact should not be determined by popular vote; it is the business of judges to be indifferent to *unpopularity*.”<sup>46</sup>

Justice Stevens’s opinion appeared more concerned with a dislike for the process of electing judges than it was with the particular facts of the case. To Stevens, the election of judges was fundamentally incompatible with the process of fairly deciding cases. However, if elections were a necessary evil in Minnesota, the Announce Clause was sufficiently narrowly tailored to serve the interest of impartiality because statements made by judicial candidates were statements made against individual parties.<sup>47</sup> Stevens added that the Announce Clause served a compelling state interest because the statements were “uniquely destructive of open-mindedness.”<sup>48</sup> Allowing candidates for judicial office to make politically charged statements in their campaign for office destroys the fundamental fairness of the judiciary. Justice Stevens concluded that “[e]lections to judicial office should not mirror rules governing political elections.”<sup>49</sup>

Justice Ginsburg’s dissent<sup>50</sup> also offered a far more detailed opinion than that of the majority. She argued that “[w]hether state or federal, elected or appointed,

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<sup>43</sup> *Id.* at 792 (O’Connor, J., concurring).

<sup>44</sup> For more arguments concerning appropriate forms of state judicial selection, see Stephen C. Aldrich, *Minnesota Judicial Elections: Better than the “Missouri Plan,”* BENCH & B. MINN., Oct. 2002, at 27; 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 (2002); Federalist Society, *Judicial Selection White Papers: The Case for Judicial Appointments*, 33 U. TOL. L. REV. 353 (2002).

<sup>45</sup> *White*, 536 U.S. at 797 (Stevens, J., dissenting) (quoting language from the majority opinion at 781–82).

<sup>46</sup> *Id.* at 798 (Stevens, J., dissenting).

<sup>47</sup> *Id.* at 800–01 (Stevens, J., dissenting).

<sup>48</sup> *Id.* at 806 (Stevens, J., dissenting) (quoting the majority at 781).

<sup>49</sup> *Id.* at 803 (Stevens, J., dissenting).

<sup>50</sup> Justice Ginsberg also joined in Justice Stevens’s dissent.

judges perform a function fundamentally different from that of people's elected representatives. Legislative and executive officials act on behalf of the voters who placed them in office; 'judge[s] represen[t] the Law.'"<sup>51</sup> Justice Ginsburg was very interested in establishing the difference between the two offices, and she too appeared to take issue with the election of officials for judicial office. If judges are to be elected, however, states do have an interest in preserving judicial integrity through speech restrictions.<sup>52</sup> Statutes similar to Minnesota's Announce Clause were a very effective way in states with an election method of judicial selection, to preserve judicial integrity, which is clearly a compelling state interest.<sup>53</sup>

Justice Ginsburg's dissent first attacked the majority's assertion that the Announce Clause must fail because the process is, by definition, an election. However, elections for political office are vastly different than elections for an office whose goal is to administer justice.<sup>54</sup> Judges do not serve the people in the same way that other politicians do. They, at least by design, should not represent factions or constituencies. Justice Ginsburg stated, "The balance the State sought to achieve — allowing people to elect judges, but safeguarding the process so that the integrity of the judiciary would not be compromised — should encounter no First Amendment shoal."<sup>55</sup>

Justice Ginsburg stressed that the text of the statute included language that limited its scope, making it narrowly tailored.<sup>56</sup> This language did not restrict statements of views on legal questions, but rather only how disputed issues would be decided.<sup>57</sup> Judicial campaign speech can be limited in ways that would not be allowed in elections for political office because of the type of work that judges perform.<sup>58</sup> This statute did not completely limit the speech of a judicial candidate, it only limited the types of speech that would compromise the integrity of the judicial branch.

Justice Ginsburg also discussed the pledges and promises section of the Minnesota statute and the vital state interests that provision served with respect to its interaction with the Announce Clause.<sup>59</sup> Justice Ginsburg stated, "All parties to this case agree that, whatever the validity of the Announce Clause, the State may constitutionally prohibit judicial candidates from pledging or promising certain results . . . [pledges or promises are] inconsistent with 'the judge's obligation to

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<sup>51</sup> *White*, 536 U.S. at 803 (Ginsburg, J., dissenting).

<sup>52</sup> *Id.* at 804–05 (Ginsburg, J., dissenting).

<sup>53</sup> *Id.* at 806 (Ginsburg, J., dissenting).

<sup>54</sup> *Id.* at 805 (Ginsburg, J., dissenting).

<sup>55</sup> *Id.* at 808–09 (Ginsburg, J., dissenting).

<sup>56</sup> *Id.* at 809 (Ginsburg, J., dissenting).

<sup>57</sup> *Id.* (Ginsburg, J., dissenting).

<sup>58</sup> *Id.* at 813 (Ginsburg, J., dissenting).

<sup>59</sup> *Id.* at 812 (Ginsburg, J., dissenting). See *supra* note 25 and accompanying text.

decide cases in accordance with his or her role.”<sup>60</sup> This prohibition was justified through the “State’s interest in preserving public faith in the bench.”<sup>61</sup>

If the Court viewed the pledges and promises Clause as so justified, how then was the Announce Clause different? As Justice Ginsburg explained, “[t]he Announce Clause, however, is equally vital to achieving these compelling ends, for without it, the pledges or promises provision would be feeble, an arid form, a matter of no real importance.”<sup>62</sup> Without the Announce Clause, candidates can completely circumvent the prohibition on pledges or promises. A candidate would still be able to “promise” his constituents how he would decide a certain legal issue, thus revealing a bias toward an entire class of cases.

In her conclusion, Justice Ginsburg addressed the problems posed by the process of electing officials for judicial office. She believed that they could be solved, however, by allowing the state to institute measures to restrict the speech of candidates:

Judges are not politicians, and the First Amendment does not require that they be treated as politicians simply because they are chosen by popular vote. Nor does the First Amendment command States that wish to promote the integrity of their judges in fact and appearance to abandon systems of judicial selection that the people, in the exercise of their sovereign prerogatives, have devised.<sup>63</sup>

Ginsburg thus concluded that the constitutional interests of elected judges and judicial integrity are effectively balanced under the prescriptions of the Announce Clause.

### III. ANALYSIS

#### *A. Free Speech of Judicial Candidates*

Before analyzing the *White* decision and its implications for the judicial selection process and the overall politicization of the judiciary, it is first necessary to address the issue of free speech for judicial candidates generally. Despite the impact the *White* case will have on the judicial system, this case is centered on First Amendment issues. If the state wishes to restrict the speech of these candidates, it must first demonstrate that a compelling reason exists for doing so. In this author’s

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<sup>60</sup> *White*, 536 U.S. at 813 (citation omitted).

<sup>61</sup> *Id.* at 818 (Ginsburg, J., dissenting).

<sup>62</sup> *Id.* at 819 (Ginsburg, J., dissenting).

<sup>63</sup> *Id.* at 821 (Ginsburg, J., dissenting).

opinion, the impartiality of the judiciary is a strong enough justification for speech regulation, but the free-speech rights of judges also must be discussed.

Two vital issues must be addressed when discussing the free-speech rights of judicial candidates. The first — and most problematic for proponents of restrictions on judicial candidate speech — is that judges must be considered elected officials and should be afforded all of the rights of a political candidate in the states using judicial elections. The second issue — and most useful to speech restriction proponents — is that judges perform a function vastly different than those who are elected to other public offices. Judges are not meant to serve their constituents in the same way.

The First Amendment issues raised by judicial elections have been addressed by several scholars. Robert Berness opined, “the very fact that judicial candidates are popularly elected makes the selection process political. One of the First Amendment’s principal functions is to protect political speech, and as a result, any regulation of political speech runs squarely against the First Amendment.”<sup>64</sup> Others have taken an even stronger stance. Professor Erwin Chemerinsky succinctly wrote, “Government-imposed, content-based restrictions on the speech of political candidates, in virtually any circumstance, are unconstitutional.”<sup>65</sup> Professor Chemerinsky argued that these First Amendment issues are a consequence of states using election as the method of choosing judges; if states decide that electing judges is the preferred selection method, they should be prepared to afford the candidates the same political freedoms as those running for political office.<sup>66</sup> While his points are well taken, the problem remains that candidates for judicial office are inherently different than candidates for political office. As such, there should be instances when the government can restrict the speech of judicial candidates in order to protect against the degradation of judicial office to the status of partisan politician.

There are opportunities for the government to circumvent the First Amendment prohibition against speech restrictions. The barrier that must be met, however, is

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<sup>64</sup> Robert C. Berness, Note, *Norms of Judicial Behavior: Understanding Restrictions on Judicial Candidate Speech in the Age of Attack Politics*, 53 RUTGERS L. REV. 1027, 1038 (2001).

<sup>65</sup> Erwin Chemerinsky, *Restrictions on the Speech of Judicial Candidates Are Unconstitutional*, 35 IND. L. REV. 735, 735 (2002).

<sup>66</sup> *Id.* Chemerinsky emphasizes that judicial elections are problematic and that “[t]here is an inherent tension between judicial elections and judicial independence . . .” *Id.* Despite his distaste for judicial elections, he opposes free-speech restrictions on judicial candidates, such as the rule at issue in *White*. Chemerinsky simply argues that if an election is to occur, all rights should be afforded to the candidates. He concludes that “judicial elections make judges and judicial candidates politicians. . . . [T]he First Amendment protects their right to express their views. . . . If this stance is objectionable, the solution should be to reconsider how we elect judges, rather than silencing their voices.” *Id.* at 746. The issue of whether judicial elections are a proper method of judicial selection will be discussed later in this Note.

quite high. Judicial candidate speech may not be restricted unless the restrictions survive the burden of scrutiny afforded political speech.<sup>67</sup> “[T]he government must demonstrate a compelling interest, and that the restriction on speech be narrowly tailored.”<sup>68</sup> Recent cases, including *White*, reveal that even when states show a compelling interest, the vast majority of speech restrictions will fail.<sup>69</sup> In these cases, the courts largely ignore the importance of judicial speech restrictions.

Judicial-candidate speech restrictions are essential as norms of social behavior.<sup>70</sup> These restrictions serve important functions and, without them, the line separating the judiciary and other elected branches of government would be blurred. This was never the intention of the Framers. One commentator explained, “[T]he qualities that differentiate the judiciary from the political branches of government require a stricter set of standards for judicial campaigns than other political campaigns.”<sup>71</sup> This assertion should be of the highest importance when considering speech restrictions for judicial candidates.

The increased hostility toward restriction of judicial-candidate speech is in itself telling of the increased politicization of the American judiciary.<sup>72</sup> When looking at this hostility and the judicial campaigns themselves, it is necessary to keep in mind the function that a victorious candidate would perform. The free-speech rights of the candidate, therefore, are not the only issue requiring consideration. Thus, judges are not typical political candidates and there is far more at stake in a judicial, as compared to a political, election. In judicial elections, “substantially greater emphasis [must be given] to the paramount value of ensuring due process in our system of justice.”<sup>73</sup>

Traditionally, state governments offer far fewer interests in defense of their speech restrictions than are available, overlooking many others that require protection. Arguments should not simply be limited to judicial integrity and public confidence in the judiciary.<sup>74</sup> “[I]n most cases [dealing with judicial election speech] courts have failed to recognize that the goal of the Canon is to protect the

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<sup>67</sup> Berness, *supra* note 64, at 1038.

<sup>68</sup> *Id.* at 1040.

<sup>69</sup> *Id.* at 1040–51 (discussing *In re Chmura*, 608 N.W.2d 31 (2000), *cert. denied*, 531 U.S. 828 (2000), *Weaver v. Bonner*, 114 F. Supp. 2d 1337 (N.D. Ga. 2000), *Butler v. Ala. Judicial Inquiry Comm’n*, 802 So.2d 207 (Ala. 2001)).

<sup>70</sup> *Id.* at 1057.

<sup>71</sup> *Id.* at 1061.

<sup>72</sup> Robert M. O’Neil, *The Canons in the Courts: Recent First Amendment Rulings*, 35 IND. L. REV. 701 (2002).

<sup>73</sup> *Id.* at 702.

<sup>74</sup> *Id.* at 722–23.

right to a fair trial.”<sup>75</sup> This due-process-based claim is a much stronger argument in favor of judicial candidate speech restriction.<sup>76</sup> As one scholar framed the issue, “What is at stake here is no less than the promise of fairness, impartiality, and ultimately of due process for those whose lives and fortunes depend upon judges being selected by means that are not fully subject to the vagaries of American politics.”<sup>77</sup>

### B. White Deconstructed

When broken down, Justice Scalia’s reasoning in the majority’s opinion appears quite similar to Erwin Chemerinsky’s argument in his article, *Restrictions on the Speech of Judicial Candidates Are Unconstitutional*.<sup>78</sup> Scalia’s argument, that there was no compelling interest that can withstand First Amendment strict scrutiny when dealing with restriction of this type of preelection candidate speech — which he deems to be “election-nullifying” — leaves little to be scrutinized.<sup>79</sup> It is a concise and strong opinion, based directly on the text of the First Amendment. This is a stance that is very tough to counter, if one believes that judicial and political elections are in fact similar.

Justice Scalia failed to give credence to the difference in judges’ roles versus those of other government actors, which make speech restrictions necessary if judges are selected through popular election.<sup>80</sup> He did not utilize precedent that specifically addresses the role of judges and the judiciary. Both dissenting opinions, by contrast, used several prior opinions to demonstrate why the Announce Clause is necessary. Scalia’s majority opinion is flawed, and a thorough examination of the dissenting opinions, particularly Justice Ginsburg’s, will reveal why.

Justice Stevens makes a number of points that properly challenge the Court’s holding. Most importantly, he speaks of the popular vote and reelection:

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<sup>75</sup> *Id.* at 716 (quoting Max Mizner, *Gagged but Not Bound: The Ineffectiveness of the Rules Governing Judicial Campaign Speech*, 68 U. OF MO. AT KAN. CITY L. REV. 209, 228 (1999)).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 723.

<sup>78</sup> See Chemerinsky, *supra* note 65, at 735.

<sup>79</sup> *Republican Party of Minn. v. White*, 536 U.S. 765, 782 (2002).

<sup>80</sup> *Id.* Justice Scalia makes a very interesting point when addressing the Ginsburg dissent. He states that “[i]f, as Justice GINSBURG claims, it violates due process for a judge to sit in a case in which ruling one way rather than another increases his prospects for reelection, then — quite simply — the practice of electing judges is itself a violation of due process.” *Id.* He immediately rejects that without properly addressing it. The validity of the election of judges is not a point that should be overlooked when discussing this issue.



The elected . . . judge does not serve a constituency while holding that office. He has a duty to uphold the law and to follow the dictates of the Constitution. . . . [H]e has an obligation to follow the precedent of that court, not his personal views or public opinion polls. He may make common law, but judged on the merits of individual cases, not as a mandate from the voters.<sup>81</sup>

Statements made in order to entice a voting population to elect a judge to office are in direct contrast to the very purpose of that office. Statements made to voters should not dictate the way that the law is decided. It is for this reason that Minnesota has a compelling interest in sanctioning statements that reveal a potential judge's view on a legal issue likely to come before him.<sup>82</sup>

Judges should not reveal closed-mindedness in order to win a seat that is defined by impartiality and objective decision making. In Justice Stevens's words, "the very purpose of most statements prohibited by the Announce Clause is to convey the message that the candidate's mind is not open on a particular issue."<sup>83</sup> Judicial decisions should not be politically influenced. By campaigning on a political platform rather than merit, this ideal is compromised. As Justice Stevens explained, "While the problem of individual bias is usually cured through recusal, no such mechanism can overcome the appearance of institutional partiality that may arise from judiciary involvement in the making of policy. The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."<sup>84</sup> Justice Stevens's comments, while quite important, tend to address the problem of judicial election as much as they address the Announce Clause. For this reason, it is necessary to analyze Justice Ginsburg's dissent to properly counter the majority's argument.

The crux of Justice Ginsburg's argument is the same as previously discussed<sup>85</sup> — that judges perform a vastly different function than those elected in other political races and are not supposed to cater to specific constituencies.<sup>86</sup> Most importantly, the potential judge should never have a personal interest in any of the cases which he is to decide.<sup>87</sup> By stating his views on a certain issue to be decided at a later date, the judge has a personal interest in the outcome: a legitimate concern that he will not be reelected if he contradicts his previously stated views. Justice

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<sup>81</sup> *Id.* at 799 (Stevens, J., dissenting).

<sup>82</sup> *Id.* at 799–801 (Stevens, J., dissenting).

<sup>83</sup> *Id.* at 801 (Stevens, J., dissenting).

<sup>84</sup> *Id.* at 802 (Stevens, J., dissenting) (quoting *Misretta v. United States*, 488 U.S. 361 (1989)).

<sup>85</sup> See *supra* notes 54–61 and accompanying text.

<sup>86</sup> *White*, 536 U.S. at 803–04 (Ginsburg, J., dissenting).

<sup>87</sup> *Id.* at 814.

Ginsburg cited numerous cases in her dissent which support this argument, but the majority completely disregarded these decisions.<sup>88</sup>

In discussing the appropriate role of elected state judges, Justice Ginsburg used the majority opinion in *Chisom v. Roemer*.<sup>89</sup> This case began to shed light on the inherent problem of elected judges, and demonstrated why speech restrictions are necessary. In *Chisom*, the Court stated that "ideally[,] public opinion should be irrelevant to the judge's role because the judge is often called upon to disregard, even to defy, popular sentiment."<sup>90</sup> The Framers understood this and thus sheltered judges by having them appointed rather than elected, and by granting them life terms.<sup>91</sup> However, in a system where judges are elected by popular vote, they do represent a voting population.<sup>92</sup> That is precisely why it is necessary to keep candidates from stating views on disputed political and legal topics. Judges should not feel pressure to decide cases based on statements made during a campaign. Limiting these statements allows judges to at least maintain an aura of impartiality.

The strength of Justice Ginsburg's dissent followed from the aforementioned ideal. If a judge has any interest in the outcome of a case, due process is violated.<sup>93</sup> Many cases have been decided based on this notion,<sup>94</sup> and it is difficult to understand why the majority chose not to give weight to this issue, or recognize that statements made by a judicial candidate on particular legal or political issues could, in some instances, lead to compromised impartiality. An impartial judicial proceeding is one of the major tenets on which our judicial system rests. All litigants have a "powerful and independent constitutional interest in [a] fair adjudicative procedure."<sup>95</sup> This principle uniquely implicates the role of judges: "no man is permitted to try cases where he has an interest in the outcome."<sup>96</sup>

To further define the term "interest" as it applies to judicial proceedings, Justice Ginsburg cited a number of cases, three of which, in particular, warrant examination.<sup>97</sup> In *Tumey v. Ohio*, the majority held that if a judge has "direct pecuniary interest in the outcome" or if he has an "official motive" that is not within

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<sup>88</sup> See, e.g., *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986); *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980); *Ward v. Monroeville*, 409 U.S. 57 (1972); *In Re Murchison*, 349 U.S. 133 (1955); *Tumey v. Ohio*, 273 U.S. 510 (1927).

<sup>89</sup> 501 U.S. 380 (1991).

<sup>90</sup> *Id.* at 400.

<sup>91</sup> *Id.* at 401.

<sup>92</sup> *Id.*

<sup>93</sup> *White*, 536 U.S. at 814 (Ginsburg, J., dissenting).

<sup>94</sup> See, e.g., *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 (1980); *Ward v. Monroeville*, 409 U.S. 57 (1972); *In re Murchison*, 349 U.S. 133, 136 (1955); *Tumey v. Ohio*, 273 U.S. 510 (1927).

<sup>95</sup> *White*, 536 U.S. at 813 (quoting *Marshall*, 446 U.S. at 243).

<sup>96</sup> *Id.* at 814 (citing *Murchison*, 349 U.S. at 136).

<sup>97</sup> See *id.* at 814-17 (discussing *Aetna*, 475 U.S. at 813; *Ward*, 409 U.S. at 57; *Tumey*, 273 U.S. at 510).

the scope of judicial proceedings, the judge must be disqualified.<sup>98</sup> The Court, adhering to the general principle that "officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy . . ."<sup>99</sup> held that if a judge received a stipend only when a defendant was convicted, the proceeding could not be regarded as satisfying the requirement of due process of law.<sup>100</sup>

The test that the Court articulated in *Tumey* is whether the judge is in a situation which would "offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused . . ."<sup>101</sup> This holding was extended in *Ward v. Monroeville*.<sup>102</sup> Based on the test set forth in *Tumey*, the Court held that a judge, who was also the mayor, violated the defendant's due process rights by presiding over a case where the fine collected would go to support the city's finances.<sup>103</sup> While not as direct an interest as in *Tumey*, responsibility for the city's finances was enough of an interest to disqualify the judge because the judge performed "two practically and seriously inconsistent positions, one partisan and the other judicial, [which] necessarily involves a lack of due process . . ."<sup>104</sup>

Most recently, the Court examined the issue of judicial interest in *Aetna Life Insurance Co. v. Lavoie*.<sup>105</sup> Here, a state supreme court justice had a case pending against him in a lower court on a similar legal issue as was being decided in a case that he was adjudicating.<sup>106</sup> As the holding of the state supreme court would be binding on the lower court, the U.S. Supreme Court decided that this judge was acting as "a judge in his own case."<sup>107</sup> His opinion for the court had "the clear and immediate effect of enhancing both the legal status and the settlement value of his own case."<sup>108</sup> *Aetna* is important because it expanded the scope of the term "interest." "It mattered not whether the justice was actually influenced by this interest; '[t]he Due Process Clause,' we observed, 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.'"<sup>109</sup> There appears to be no

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<sup>98</sup> 273 U.S. at 535.

<sup>99</sup> *Id.* at 522.

<sup>100</sup> *Id.* at 531.

<sup>101</sup> *Id.* at 532.

<sup>102</sup> 409 U.S. 57 (1972).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 60.

<sup>105</sup> 475 U.S. 813 (1986).

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

<sup>107</sup> *Id.* at 824.

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

<sup>109</sup> *Republican Party of Minn. v. White*, 536 U.S. 765, 815 (2002) (Ginsburg, J., dissenting) (citation omitted) (quoting *Aetna*, 475 U.S. at 825).

question that the mere appearance of impartiality should be a compelling interest in the restriction of judicial campaign speech, a view supported by precedent.

Justice Ginsburg relied on these decisions as the primary authority to frame her dissenting opinion in *White*. A correlation easily can be drawn between campaign statements and future interest in the outcome of cases. It is difficult to imagine that a judge would not, under any circumstance, have a direct and pecuniary interest in the outcome of a case that was tried on a disputed legal issue about which he spoke during his campaign. In making such a statement, a judicial candidate has effectively gone on the record in support of a particular legal or political position. While a statement in support of a disputed legal or political issue is not technically a promise or pledge, which the states are allowed to regulate through speech restrictions, it does not follow that these types of statements are not construed as such by the voting population.<sup>110</sup> Whether influenced by his future campaign for reelection or motivated to maintain an image of integrity and consistency by adhering to campaign statements, an elected judge will be interested in the outcome of his cases. Based on this reasoning, the state clearly has a compelling interest in restricting the speech of judicial candidates: guarding against the absence of impartiality in judicial decision making.

### *C. Election of Judges: A Viable Method of State Judicial Selection?*

A major issue indirectly raised by the *White* decision and directly addressed by many scholars in the area of judicial selection is the viability of popular elections as a means of judicial selection. This issue has an incredibly large impact on judicial independence. The concept of judicial elections appears fundamentally opposed to the notions of judicial impartiality and independence. Even members of the Supreme Court that sided with the majority in *White* agreed that there is a fundamental tension between the election of judges and the American judiciary.<sup>111</sup> Is the election of judges inappropriate? While it might not be unconstitutional to elect judges, the process poses many problems. If the process cannot be eliminated, it must be changed to preserve the integrity of the American judiciary. "[T]he first two canons of the *Model Code of Judicial Conduct* mandate that a judge should uphold the integrity and independence of the judiciary and avoid impropriety and the appearance of impropriety in all of the judge's activities."<sup>112</sup> However, "[w]ith each passing election, public confidence in the integrity and impartiality of the courts falls lower."<sup>113</sup>

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<sup>110</sup> *Id.* at 820 (Ginsburg, J., dissenting).

<sup>111</sup> *Id.* at 790–91 (O'Connor, J., concurring) (stating that popular election of judges undermines the public confidence in the judiciary).

<sup>112</sup> Fabian, *supra* note 18, at 155 (citation omitted).

<sup>113</sup> Behrens & Silverman, *supra* note 44, at 313.

Public opinion is not the only negative aspect of this trend; there are significant legal concerns as well. "[I]n any state with partisan judicial elections, *stare decisis* can be less significant than implementing a politically-favored policy and reforms sustained are subject to future frustration."<sup>114</sup> Some elected courts, specifically those with partisan election procedures, have sustained even greater criticism. For example, "[t]he Illinois Supreme Court, selected as a result of partisan election, has garnered criticism from [the] left and right alike, for anti-intellectualism, for being an embarrassment, and for producing unpredictable decisions which are rarely cited elsewhere for the force of their logic or the power of their insight."<sup>115</sup>

While scholars are divided on the issue of which method is better, the goal of straying from elections for the purpose of achieving judicial independence is widespread. One commentator noted: "Independent judges are better able to follow the Constitution and the laws in making their decisions, and they face far less pressure to conform their opinions with those of the political majority."<sup>116</sup> While proponents of judicial elections claim that judges elected through that system will do a "good, fair job," some of the justifications behind that system are not consistent with the goals of the judiciary.<sup>117</sup> The idea that "[e]lections make state trial judges more sensitive to how people, including lawyers, are treated in the courts"<sup>118</sup> has never been, nor should it ever be, a guiding principle of the American judiciary, while judicial independence has. It is a fundamental principle that systems other than popular elections provide the best means of ensuring judicial independence.

#### IV. AFTERMATH OF THE *WHITE* DECISION

Undoubtedly, the decision in *White* will have a major impact on the state judicial system, but how far this decision will extend is still unclear. There is some indication, based on recent decisions, that *White* has begun a slippery slope by lessening restrictions on judicial candidate speech. Since the opinion was handed down in June 2002, a number of courts, including the Eleventh Circuit Court of Appeals,<sup>119</sup> district courts in New York<sup>120</sup> and Texas,<sup>121</sup> and the supreme courts of

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<sup>114</sup> Federalist Society, *supra* note 44, at 391-92.

<sup>115</sup> *Id.* at 389 (citations omitted).

<sup>116</sup> Fabian, *supra* note 18, at 175.

<sup>117</sup> Aldrich, *supra* note 44, at 27.

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

<sup>119</sup> *See Weaver v. Bonner*, 309 F.3d 1312 (Ga. 2002).

<sup>120</sup> *See Spargo v. N.Y. State Comm'n on Judicial Conduct*, 244 F. Supp. 2d 72 (N.D. 2003).

<sup>121</sup> *See Smith v. Phillips*, 2002 U.S. Dist. LEXIS 14913 (W.D. Tex. Aug. 5, 2002), *dismissed*.

Florida<sup>122</sup> and Pennsylvania,<sup>123</sup> have followed the decision with little sign of meaningful resistance. The trend toward unlimited judicial candidate speech has begun. "*White* was a ticking time bomb waiting to go off. . . . Now it has."<sup>124</sup>

Two states that currently utilize election as the preferred method of judicial selection have necessarily altered their respective codes of judicial conduct in direct response to the decision. In November of 2002, the Pennsylvania Supreme Court ordered Canon 7B(1)(C) of the Code of Judicial Conduct amended for the purpose of removing a Clause essentially similar to the Announce Clause in *White*.<sup>125</sup> The canon previously included the statement: "A candidate . . . should not . . . announce his views on disputed legal or political issues."<sup>126</sup> It is interesting to note that this court kept the remainder of the canon intact, allowing a prohibition on pledges and promises as well as statements that commit the candidate with respect to cases, narrowly construing the Court's holding and acknowledging the importance of speech restrictions.<sup>127</sup>

Other courts have taken larger steps to remove limitations on judicial candidate speech. A Texas district court struck down an entire section of the Code of Judicial Conduct in that state which read: "[A] . . . judicial candidate shall not make statements that indicate an opinion on any issue that may be subject to judicial interpretation by the office which is being sought or held, except . . . if conducted in a manner which does not suggest . . . a probable decision on any particular case."<sup>128</sup> The Texas court appeared eager to find this provision unconstitutional despite the comparatively less restrictive nature of Texas's Clause.<sup>129</sup> Judge James R. Nowlin held the provision to be analogous to Minnesota's Announce Clause, arriving at this holding with but a paragraph of analysis, and subsequently dismissed the case.<sup>130</sup> Clearly, the Texas judge felt that the Supreme Court had arrived at the correct decision.

The decision in Texas appears to echo the sentiment that is present throughout the federal court system. Two recent federal court opinions from the New York District Court and the Eleventh Circuit Court of Appeals delve far deeper in their analysis of the *White* decision, and both agree that the case was decided correctly. Further, both courts appear to have expanded the holding.

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<sup>122</sup> See *Inquiry Concerning a Judge* (Kinsey), 842 So.2d 77 (Fla. 2003).

<sup>123</sup> See *In re Amendment of Canon 7B(1)(c) of the Code of Judicial Conduct*, 2002 Pa. LEXIS 3194 (Pa. Nov. 21, 2002) [hereinafter *Amendment*].

<sup>124</sup> Adam Lipak, *Judges Mix with Politics*, N.Y. TIMES, Feb. 22, 2003, at B1 (quoting Geri Palast, Executive Director of Justice at Stake).

<sup>125</sup> *Amendment*, *supra* note 123, at 3194.

<sup>126</sup> PA. CODE OF JUDICIAL CONDUCT Canon 7B(1)(c) (2001).

<sup>127</sup> *Id.*

<sup>128</sup> TEX. CODE OF JUDICIAL CONDUCT Canon 5(1) (2002).

<sup>129</sup> *Smith v. Phillips*, 2002 U.S. Dist. LEXIS 14913 (W.D. Tex. Aug. 5, 2002), *dismissed*.

<sup>130</sup> *Id.*

In *Spargo v. New York State Commission on Judicial Conduct*, plaintiff Thomas Spargo filed suit alleging that charges brought against him under certain sections of New York's Code of Judicial Conduct violated his constitutional rights by placing an impermissible prior restraint on free speech and limiting his right to engage in political activity.<sup>131</sup> The charges concerned conduct by Spargo when he campaigned for a judicial election to a town court, while he served on that lower court, and the period during his campaign for the New York Supreme Court seat for the Third Judicial District of New York.<sup>132</sup> It is alleged that while campaigning for the lower court, "Spargo offered items of value to induce votes on his behalf."<sup>133</sup> These items, totaling \$2,000, included "donuts . . . coffee . . . gasoline . . . rounds of drinks," among other things.<sup>134</sup> While serving on the lower court, during the period before he became a candidate for state supreme court, he "participated in a loud and obstructive demonstration against the recount process"<sup>135</sup> in the *Bush v. Gore* election controversy.<sup>136</sup> Additionally, while campaigning for the state supreme court, he attended and was the keynote speaker at the Monroe County Conservative Party Dinner.<sup>137</sup>

Whether Spargo actually performed any of these acts, the court deemed irrelevant; relying heavily on the *White* decision, the court held that the statutes under which the charges were filed were unconstitutional. The statutes in question, sections 100.5(A)(1)(c)–(g) and 100.5(A)(4)(a) of the New York Code of Judicial Conduct generally stated that a candidate for judicial office shall refrain from associating with partisan political activities and organizations.<sup>138</sup> They essentially prohibited a judicial candidate from any political activity save his own campaign.<sup>139</sup> The state claimed an interest in protecting the independence — as distinguished from impartiality — of the judiciary and, while this was accepted as a compelling state interest, the court did not believe that the statutes were narrowly tailored to serve this purpose.<sup>140</sup> The potential threats posed by the strong political participation of judicial candidates, such as bias and the lack of judicial independence, simply did not concern this court. Voluntary recusal was cited as the preferred method of dealing with the harms of political participation.<sup>141</sup> This case indicates what could be a dangerous trend following the *White* decision. If *White*

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<sup>131</sup> 244 F. Supp. 2d 72 (N.D. 2003).

<sup>132</sup> *Id.* at 79–81.

<sup>133</sup> *Id.* at 79.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 80.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 80–81.

<sup>138</sup> N.Y. COMP. CODES R. & REGS. tit. 22, §§ 100.1–100.5 (2003).

<sup>139</sup> *Spargo*, 244 F. Supp. 2d at 88.

<sup>140</sup> *Id.* at 87–88.

<sup>141</sup> *Id.* at 88–89.

continues to be read broadly, the level of political participation and control in the judiciary could reach epidemic status.

While the holding in *Spargo* slightly extended *White*, the court in *Weaver v. Bonner* completely recharacterized the decision.<sup>142</sup> As the discussion below demonstrates, thoughtful reading of *Weaver* suggests that the concept of an impartial and independent judiciary cannot exist if judges remain elected officials. *Weaver* clearly demonstrates the dangers of a liberal reading of the *White* decision, and provides further support for the need to alter state judicial selection procedures in the decision's wake.

George Weaver, a former candidate for the Georgia Supreme Court, brought suit alleging that sections of the Georgia Code of Judicial Conduct unconstitutionally interfered with his right to free speech.<sup>143</sup> The suit was filed after Georgia's Judicial Quality Commission disciplined Weaver for participating in "intentionally deceptive campaign practices."<sup>144</sup> During his campaign, Mr. Weaver distributed pamphlets and appeared in television commercials that attacked his opponent's views on same-sex marriage as well as the death penalty.<sup>145</sup> These advertisements contained false, misleading information that the Judicial Qualifications Commission deemed had been committed "intentionally and blatantly" in violation of statute.<sup>146</sup> At the time, judicial candidates were prohibited by statute from making negligent false statements or misleading or deceptive true statements to the public and soliciting campaign funds.<sup>147</sup> The Eleventh Circuit struck down the statutory prohibitions that regulated both issues.

While the decision to hold these statutes unconstitutional appears problematic, the reasoning behind the Eleventh Circuit's decision is striking. In comparing this case to *White*, the court stated, "[W]e believe that the Supreme Court's decision in *White* suggests that the standard for judicial elections should be the same as a

<sup>142</sup> 309 F.3d 1312 (Ga. 2002).

<sup>143</sup> *Id.* at 1317.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 1316–17.

<sup>146</sup> *Id.* at 1317. Judge Weaver's pamphlets included statements about his opponent such as: "She would require the State to license same-sex marriages;" "She has referred to traditional moral standards as pathetic and disgraceful;" and that "[she] has called the electric chair silly." *Id.* at 1316. His television commercials also contained striking allegations such as: "What does Justice Sears stand for? Same-Sex Marriage" and "She's questioned the constitutionality of laws prohibiting sex with children under fourteen." *Id.* at 1317.

<sup>147</sup> *Id.* at 1315. See GA. CODE OF JUDICIAL CONDUCT Canon 7B(1)(d) (2003) (stating that candidates "shall not use or participate 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"); GA. CODE OF JUDICIAL CONDUCT Canon 7B(2) (2003) (providing that judicial candidates "shall not themselves solicit campaign funds, or solicit publicly stated support").



standard for legislative and executive elections."<sup>148</sup> Building off of that assertion, the court repeatedly cited cases concerning the restriction of speech in pure political election situations to support its holding.<sup>149</sup>

Refusing to differentiate between political and judicial elections allowed this court to draw from a breadth of sources with more stringent requirements for governments seeking to restrict candidate speech. On this basis, the court reasoned that the canon is "facially unconstitutional because it 'chill[ed]' core political speech and violated the overbreadth doctrine prohibiting false statements of fact made without knowledge or reckless disregard for falsity."<sup>150</sup> Because "erroneous statement[s] [are] inevitable in free debate,"<sup>151</sup> "breathing space" is required to protect speech.<sup>152</sup> Now, in addition to pure political campaigning, the misrepresentations of judicial candidates will also be protected! The Eleventh Circuit, at the very least, adopted the comparatively lenient "actual malice standard . . . for regulations of candidate speech during judicial campaigns."<sup>153</sup>

The reasoning behind the court's ruling on the solicitation provision was equally stunning. As impartiality concerns are raised by the entire process of electing judges, preventing candidates from actively soliciting donations did not further serve Georgia's compelling interest.<sup>154</sup> The court opined that "[c]ampaigning for elected office necessarily entails raising campaign funds and seeking endorsements from prominent figures . . . ."<sup>155</sup> The opinion in this case revealed why the decision in *White* is so problematic. If campaign speech for judicial candidates cannot be restricted, the branch necessarily becomes politically charged. The court in *Weaver* refused to recognize this point, stating that the solicitation of "financial support and public endorsements . . . does not suggest that [judges] will be partial if they are elected."<sup>156</sup> If judges desire reelection, however, it is necessary that they serve their supporters. If elections are the preferred method of judicial selection in states, lowering the bar to protect free speech of candidates does nothing more than detract from the credibility of the judicial branch, while running the risk of neglecting impartiality as a legitimate concern.

One state court did show some resistance to *White*, narrowly construing the holding by acknowledging its limitations.<sup>157</sup> County Court Judge Patricia Kinsey

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<sup>148</sup> *Weaver*, 309 F.3d at 1321.

<sup>149</sup> *Id.* at 1321–23 (citing *Brown v. Hartlage*, 456 U.S. 45 (1982); *Butler v. Ala. Judicial Inquiry Comm'n*, 802 So.2d 207 (Ala. 2001); *In re Chmura*, 608 N.W.2d 31 (2000)).

<sup>150</sup> *Id.* at 1318.

<sup>151</sup> *Id.* at 1319.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 1321.

<sup>154</sup> *Id.* at 1322.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *See Inquiry Concerning a Judge (Kinsey)*, 842 So.2d 77 (Fla. 2003).

was charged with eleven violations of the Florida Code of Judicial Conduct, arising from a campaign during which she ran on a platform that stressed a lack of impartiality.<sup>158</sup> Judge Kinsey repeatedly advertised that she would strongly support law enforcement and be tough on crime.<sup>159</sup> These types of statements were regulated by statutory provisions similar to those found in Minnesota's Announce Clause.

Speech restrictions for judicial candidates in Florida are governed by Canon 7A of the Florida Code of Judicial Conduct that states, "[C]andidate[s] for . . . judicial office shall not . . . make pledges or promises . . . [or] make statements that commit . . . the candidate with respect to . . . issues that are likely to come before the court."<sup>160</sup> In deciding this case, the Florida Supreme Court distinguished the wording of the Code provision from the wording in the Announce Clause in *White* and allowed protective speech restrictions enacted by the Florida legislature to remain active.<sup>161</sup> While the Minnesota Announce Clause prohibited speech on particular issues, the Florida Clause prohibits speech that would reveal a bias toward particular parties.<sup>162</sup>

While facially similar, the absence of an express Announce Clause allowed this court to hold that the provisions enacted in Florida comprised a more narrow canon. The court, which clearly supported speech restrictions, had strong opinions concerning the function they serve. "It is beyond dispute that Canon 7A(3)(d)(i)–(ii) serves a compelling state interest in preserving the integrity of the judiciary and maintaining the public's confidence in an impartial judiciary."<sup>163</sup> The court held that Florida's provisions were "narrowly tailored to protect the state's compelling interests . . . ."<sup>164</sup> Clearly, speech that reveals bias toward a particular party compromises the impartiality (or at least the appearance of impartiality) of the judiciary, and must be restricted.

In the end, however, the court's support of the Judicial Code proved toothless. County Court Judge Patricia Kinsey was found guilty of eight violations of the statute, but, while her statements clearly revealed a bias against alleged criminals, she was reprimanded with merely a fine.<sup>165</sup> The Florida Supreme Court took a positive step in upholding the statute; however, speech restrictions on judicial candidates cannot achieve their desired goal unless courts are also willing to

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<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 80–85. Examples of her partial speech include statements such as "police officers expect judges to take their testimony seriously and to help law enforcement by putting criminals where they belong . . . behind bars!" *Id.* at 80.

<sup>160</sup> FLA. CODE OF JUDICIAL CONDUCT Canon 7A(3)(d)(i)–(ii) (2003).

<sup>161</sup> *Kinsey*, 842 So.2d at 80–85.

<sup>162</sup> *Id.* at 86.

<sup>163</sup> *Id.* at 87.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 92–93.

properly punish violators. If restrictions on judicial campaign speech are upheld but not enforced, the restrictions serve no practical purpose; it is the same as having no restrictions at all.

#### V. RECOMMENDATIONS

If the slippery slope continues and the decision in *White* has the effect of erasing the distinction between political and judicial elections, changes must be made. There are recommendations that can be made with respect to the way in which judges are selected at the state level. In the broadest sense, judicial selection procedures must be modified to reflect the true role of the judiciary and to lessen the increasing effects of politicization.

Most importantly, the issue of judicial elections must be thoroughly examined. While the possibility of preventing states from using elections as their method of judicial selection is unclear,<sup>166</sup> changes to the election process can be made to increase judicial independence, and preserve judicial impartiality. Most obviously, partisan judicial elections, the most blatant way in which politics can jeopardize the independence of the judicial branch, must be stopped. Judicial candidates should not be required to raise and provide funding for their own campaigns; this would prevent the influence of political parties and special interest groups. Methods have been suggested that would help to alleviate both of these problems, and states must afford these alternate methods of selection serious consideration.

One viable method of achieving the goals of independence and impartiality is through the process of merit selection, the preferred method of judicial selection of the American Judicature Society.<sup>167</sup> "Merit selection is a way of choosing judges that uses a nonpartisan commission of lawyers and non-lawyers to locate, recruit, investigate and evaluate applicants for judgeships."<sup>168</sup> The commission then selects three candidates for submission to the governor, who has the responsibility of making the final selection.<sup>169</sup> After serving for a predetermined term, the judge retains his seat through an uncontested retention election.<sup>170</sup> This method has the result of placing the most qualified candidates into office while removing the political influence present in judicial elections.<sup>171</sup> Arizona has used this method

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<sup>166</sup> States have the right to select their own method of judicial selection, and have been doing so since 1812. LARRY C. BERKSON & SETH ANDERSON, AM. JUDICATURE SOC'Y, JUDICIAL SELECTION IN THE UNITED STATES: A SPECIAL REPORT (1999), available at <http://www.ajs.org/selection/berkson.pdf>.

<sup>167</sup> AM. JUDICATURE SOC'Y, MERIT SELECTION: THE BEST WAY TO CHOOSE THE BEST JUDGES (2000), available at [http://www.ajs.org/selection/ms\\_descrip.pdf](http://www.ajs.org/selection/ms_descrip.pdf), 2002.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

since 1974 and the "mature solid system for selecting judges" has resulted in a "strong and independent judiciary" in that state.<sup>172</sup>

Regardless of the current method a state uses, it is imperative that states examine alternative methods of judicial selection. Even in states that do not utilize the election method of judicial selection, there are changes that can be made to the nomination/confirmation process that stresses greater bipartisan participation and merit selection. The same problems present in the federal system also plague the states that have selected the method of judicial appointments. The influence of political parties must be lessened in this process as well.

John Ferejohn suggests that a popular European format, "requiring a supermajority in the Senate for appointments and limiting justices to a single nonrenewable term,"<sup>173</sup> might help to lessen the political influence on the judiciary.<sup>174</sup> "It is doubtful that American judges protected by life tenure and chosen in partisan political processes can be relied upon to exercise precisely the kinds of nuanced restraint that would be called for."<sup>175</sup> Removing politics from the appointment process and setting term limits would allow judges to conduct their duties more independently. Additionally, "[t]his would tend to discourage the appointment of ideologically extreme judges,"<sup>176</sup> a problem that currently plagues the appointment process. The appointment of extreme judges lends strength to the argument that the judiciary is increasingly performing a legislative function. Limiting the appointment of these types of judges would promote consensus building, leading to the reestablishment of confidence in the courts.<sup>177</sup> Whereas merit selection (as an alternative to judicial elections) concentrates on removing the political influence on individual judicial candidates, supermajority appointment concentrates on removing the political influence from the process as a whole.

Additionally, judges must take a vested interest in the legitimacy of the branch. Even if judicial speech cannot be restricted through constitutional means, judges campaigning and serving in states where elections govern judicial selection must take it upon themselves, from a normative standpoint, to restrict speech for the purpose of salvaging the appearance of impartiality.<sup>178</sup> Judges must conduct themselves in the manner that the founders intended. The era of politically-motivated judicial activism must end. "If you put on the black sheet, you have withdrawn your right to talk about politics and indeed to think about politics."<sup>179</sup>

<sup>172</sup> Wallwork, *supra* note 17, at 6.

<sup>173</sup> See Ferejohn, *supra* note 15, at 66.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 67.

<sup>177</sup> *Id.*

<sup>178</sup> Berness, *supra* note 64.

<sup>179</sup> Lipak, *supra* note 124 at B1 (quoting Geoffrey C. Hazard, Jr.).

## VI. CONCLUSION

The American judiciary has become increasingly politicized in recent decades and unless states respond by slowing this trend, America runs the risk of completely deviating from the initial purpose of the branch. The Framers created the judiciary as the weakest and most impartial of the three branches, designing it to have little impact on the way that the country was run.<sup>180</sup> However, in past decades and certainly in the wake of the *White* decision, the entire concept of the judiciary, at least in states where election is the method of judicial selection, has changed. Political influence in the judiciary is rapidly increasing with no signs of relent.

In making it more difficult for states to restrict the speech of political candidates, the *White* decision clearly opened the door for an eventual abolishment of all meaningful legislative restrictions. This danger was revealed in *Weaver v. Bonner*, which held that judicial and political elections should be governed by the same principles.<sup>181</sup> Courts no longer recognize that, due to the nature of the office sought, judicial and political elections are fundamentally different and should be treated as such. The *White* ruling reduces judges to common politicians, clearly damaging the appearance of an impartial judiciary. This was not the intention of the Framers!

While the *White* decision and its aftermath are problematic, the fundamental issue might not lie in speech restrictions for judicial candidates, but rather with the decision of states to make judges elected officials. Justice O'Connor, in her concurring opinion in *White*, addressed this point: "If a 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>182</sup> If states continue to select judges through popular election, this ruling allows the system to be completely compromised. States must modify judicial selection procedures to reflect the true role of the judiciary and to lessen the increasing effects of politicization.

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<sup>180</sup> See *supra* notes 7–11 and accompanying text.

<sup>181</sup> 309 F.3d 1312, 1321 (Ga. 2002).

<sup>182</sup> *Republican Party of Minn. v. White*, 536 U.S. 765, 792 (2002) (O'Connor, J., concurring).