

# THE FIRST CHINK IN THE ARMOR? THE CONSTITUTIONALITY OF STATE LAWS BURDENING JUDICIAL CANDIDATES AFTER *REPUBLICAN PARTY OF MINNESOTA V. WHITE*

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## I. INTRODUCTION

Thirty-nine states use some form of popular elections to select judges in their appellate courts, general jurisdiction trial courts, or both.<sup>1</sup> In June of 2002, the Supreme Court handed down its first ruling regarding judicial elections. A 5-4 majority in *Republican Party of Minnesota v. White* held that part of the Minnesota Code of Judicial Conduct was unconstitutional as violating the First Amendment of the U.S. Constitution.<sup>2</sup> The specific clause at issue is known as the “announce clause” and states that “[a] candidate for a judicial office, including an incumbent judge,” shall not “announce his or her views on disputed legal or political issues.”<sup>3</sup> In

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1. See AM. JUDICATURE SOC’Y, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS (2002), at <http://www.ajs.org/js/JudicialSelectionCharts.pdf>. These states include Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin, and Wyoming. *Id.* This list includes states that utilize a system of initial appointment and subsequent retention elections. See *id.*

2. *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002).

3. MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2000), reviewed by *White*, 536 U.S. at 768.

*White*, a judicial candidate alleged that he was forced to refrain from announcing his views on disputed issues during a campaign because of this provision, in violation of the First Amendment.<sup>4</sup> A majority of the Supreme Court agreed and struck down Minnesota's announce clause as unconstitutional.<sup>5</sup>

The *White* decision has the potential to impact all thirty-nine states with elected judiciaries. Eight states besides Minnesota have or had the announce clause language as part of their judicial codes, and those states have either amended or most likely will need to amend their codes.<sup>6</sup> The announce clause, however, is not the only statutory provision restricting judicial candidates. The majority opinion in *White* was clear in noting that its holding applies only to the announce clause,<sup>7</sup> and the Court refused to grant certiorari to challenges of other state provisions affecting judicial speech.<sup>8</sup> Nevertheless, the decision has sent the other thirty states with elected judiciaries scrambling to their codebooks to determine how this decision will affect their statutes and future judicial elections. One thing seems to be certain: Litigation is sure to follow. This Note will explore the potential fallout from the *White* decision by analyzing facial<sup>9</sup> constitutional challenges to various state laws that limit the speech of candidates for judicial office.

This exploration is premised on the assertion that these laws are unique, even though they were enacted to protect the same interests, or use confusingly similar language. Thus, it is critical to examine each law separately, especially the two clauses closely related to the unconstitutional announce clause: the "pledges or promises clause" and the "commit clause." The assertion that the various restrictions on a judicial candidate's speech "may . . . rise or fall together" is incorrect, as each law has a unique history and distinct language.<sup>10</sup>

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4. *White*, 536 U.S. at 770.

5. *Id.* at 788.

6. In addition to Minnesota, eight states retained a version of the announce clause after the American Bar Association ("ABA") revised the Model Code of Judicial Conduct in 1990: Arizona, Colorado, Iowa, Maryland, Mississippi, Missouri, New Mexico, and Pennsylvania.

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

8. See *Republican Party of Minn. v. Kelly*, 534 U.S. 1054, 1054 (2001).

9. A facial challenge to a law challenges the law as it is written and asserts that under no circumstances is the law constitutional. A so-called as applied challenge to a law challenges the application of the law in a certain situation or in a certain manner.

10. See Katherine A. Moerke, *Must More Speech Be the Solution to Harmful Speech? Judicial Elections After Republican Party of Minnesota v. White*, 48 S.D. L. REV. 262, 290-91 (2003).

Part II of this Note provides some background about statutes regarding judicial conduct, as well as a general analysis of such laws. Part III offers an explanation of the *White* decision and focuses on the majority's reasoning for holding that the announce clause violates the Constitution. Part IV examines the constitutionality of various state provisions that are more narrow than Minnesota's, yet still attempt to limit the same type of speech. Part V addresses the constitutional validity of the pledges or promises clause and the commit clause, and discusses a recent case before the Florida Supreme Court in which the court spoke to the constitutionality of these two clauses after *White*. Part VI looks at the challenge to provisions forbidding judicial candidates from announcing their affiliation with a political party during a campaign. Part VII examines the ban on the personal solicitation of campaign funds by judicial candidates, especially a post-*White* Eleventh Circuit case that extends the *White* holding to declare a provision of this sort unconstitutional.

Finally, this Note concludes that it is difficult to strike a balance between preserving the impartiality of courts and upholding the freedoms guaranteed by the Constitution. The *White* decision is the first chink in the armor of the judiciary: If the reasoning of *White* is carried through in full, there will be fewer restrictions left to insulate judicial elections from the typical partisanship and mud-slinging of most campaigns. After this decision, unreasonably broad provisions will not withstand strict scrutiny analysis. It is likely, however, that most of the important speech restrictions will be held constitutional as being a narrow means to the compelling end of preserving the integrity of the judiciary.

## II. BACKGROUND AND CONSTITUTIONAL ANALYSIS

To appreciate the *White* decision and its implications, it is imperative to understand the history of provisions burdening judicial candidates in the United States. The American Bar Association ("ABA") adopted the first Canons of Judicial Ethics in 1924.<sup>11</sup> These Canons were unenforceable and were meant merely as a guide for judicial behavior.<sup>12</sup> In 1972, however, the ABA promulgated the Model Code of Judicial Conduct ("Model Code"), which, unlike its predecessor, specifies a mandatory and

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11. See *White*, 536 U.S. at 786; PATRICK M. MCFADDEN, AM. JUDICATURE SOC'Y, ELECTING JUSTICE: THE LAW AND ETHICS OF JUDICIAL ELECTION CAMPAIGNS 86 (1990); Matthew J. O'Hara, Note, *Restriction of Judicial Election Candidates' Free Speech Rights After Buckley: A Compelling Constitutional Limitation?*, 70 CHI.-KENT L. REV. 197, 211 (1994).

12. See O'Hara, *supra* note 11, at 211.

enforceable standard of conduct and behavior.<sup>13</sup> This Code was meant to aid the states in legislating their own rules of conduct for sitting judges, as well as judicial candidates. Today, most states that have an elected judiciary have approved campaign restrictions based on the Model Code, specifically Canon 5.<sup>14</sup> This Canon was revised in 1990 due to concerns that certain language was unconstitutionally overbroad.<sup>15</sup> Many states updated their legislation accordingly, but some, such as Minnesota, chose not to. Regardless of which version of the Model Code, if any, their laws are based on, all thirty-nine states that have elections for judicial positions have statutory regulations of conduct during campaigns.<sup>16</sup> It must be recognized, however, that these laws are subject to constitutional restraints.

A. THE EQUAL PROTECTION CLAUSE AND PROVISIONS BURDENING  
JUDICIAL CANDIDATES

As an initial matter of concern, laws that restrict the speech of judicial candidates could be challenged as a violation of the Equal Protection Clause of the Constitution. This Clause is implicated when restrictions are placed on candidates for judicial office that are not placed on candidates for legislative or executive offices. Under the Equal Protection Clause, a state may not deny a person the equal protection of the laws.<sup>17</sup> Consequently, similarly situated persons must be treated alike.<sup>18</sup>

Nonetheless, there is a fundamental assumption that judicial elections and judicial candidates are inherently, immutably unique. Most academics agree that an obvious difference exists between judicial and legislative candidates. In his book *Electing Justice: The Law and Ethics of Judicial Election Campaigns*, Patrick McFadden explained:

No state simple-mindedly equates the conduct of judicial candidates with the conduct of other public officials, because judicial candidates are different from other candidates. Likewise, no state simple-mindedly equates the conduct of judicial candidates with the conduct of judges, because electoral politics sometimes require that candidates act in ways that would be inappropriate for sitting judges. Each state's regulatory regime represents a compromise between the acknowledged uniqueness

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13. See *id.*

14. See *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 879–80 (8th Cir. 2001). *Republican Party of Minnesota v. White* was known as *Republican Party of Minnesota v. Kelly* in the federal district and circuit courts.

15. See *White*, 536 U.S. at 773 n.5.

16. See Roy A. Schotland, *Should Judges Be More Like Politicians?*, 39 CT. REV. 8, 8 (2002).

17. See U.S. CONST. amend. XIV, § 1.

18. See, e.g., *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

of the judicial office and the requisites of electoral politics. Most state regimes (as well as the Model Code) reveal this character in the complexity of their constituent provisions.<sup>19</sup>

The ABA's Model Code and its state progeny have taken this notion to its logical conclusion: The Constitution allows the speech and actions of judicial candidates to be more greatly burdened.

Before *White*, courts agreed with this principle across the board.<sup>20</sup> Judge Richard Posner of the Seventh Circuit wrote, "Judges remain different from legislators and executive officials, even when all are elected, in ways that bear on the strength of the state's interest in restricting their freedom of speech."<sup>21</sup> Another court stated that "[a]n evenhanded, unbiased and impartial judiciary is one of the pillars upon which our system of government rests. To the degree appropriate, the conduct of judicial elections . . . may be regulated so as to meet that interest, even if freedom of speech is thereby constrained."<sup>22</sup> Furthermore, the Fifth Circuit remarked, "Because the judicial office is different in key respects from other offices, the state may regulate its judges with the differences in mind."<sup>23</sup> Finally, a district court wrote that "[t]he very purpose of the judicial function makes inappropriate the same kind of particularized pledges and predetermined commitments that mark campaigns for legislative and executive office."<sup>24</sup> Yet the majority opinion in *White* minimizes the difference thought to exist between judicial and legislative candidates. Consequently, the idea that laws that treat judicial candidates differently are constitutional is no longer a foregone conclusion.<sup>25</sup> This Note, however, narrows its inquiry to the constitutionality of these provisions under the First Amendment.

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19. MCFADDEN, *supra* note 11, at 74–75.

20. See, e.g., *Stretton v. Disciplinary Bd. of the Supreme Court*, 944 F.2d 137, 142 (3d Cir. 1991); *ACLU v. Fla. Bar*, 744 F. Supp. 1094, 1097–98 (N.D. Fla. 1990); *Adams v. Supreme Court*, 502 F. Supp. 1282, 1292 (M.D. Pa. 1980); *Clark v. Burleigh*, 841 P.2d 975, 984 (Cal. 1992).

21. *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 228 (7th Cir. 1993).

22. *Ackerson v. Ky. Judicial Ret. & Removal Comm'n*, 776 F. Supp. 309, 313 (W.D. Ky. 1991).

23. *Morial v. Judiciary Comm'n*, 565 F.2d 295, 305 (5th Cir. 1977).

24. *Berger v. Supreme Court of Oh.*, 598 F. Supp. 69, 76 (S.D. Ohio 1984).

25. After *White*, a district court in New York found that, although restrictions placed on judicial candidates did not violate the Equal Protection Clause, the regulations were unconstitutionally vague. See *Spargo v. N.Y. State Comm'n on Judicial Conduct*, 244 F. Supp. 2d 72, 86, 92 (N.D.N.Y. 2003).

## B. THE FIRST AMENDMENT AND PROVISIONS BURDENING JUDICIAL CANDIDATES

To understand the reasoning behind the Supreme Court's decision in *White* and the lower courts' analyses of the other provisions, it is essential to discuss the balancing act that is unique to judicial election laws. On the one hand, the First Amendment of the U.S. Constitution provides that "Congress shall make no law . . . abridging the freedom of speech."<sup>26</sup> This proviso has been incorporated into the Fourteenth Amendment by the Supreme Court, so that it applies to state governments.<sup>27</sup> Furthermore, the Supreme Court "has made it clear that the [F]irst [A]mendment's guarantee of freedom of speech applies with particular force to political campaigns."<sup>28</sup> There has been no reluctance by courts to apply this principle specifically to judicial campaigns and to analyze judicial codes accordingly.<sup>29</sup>

Although freedom of speech is powerful, it is not absolute. First Amendment guarantees must be weighed against the interests of the state—in this case, the interest in securing the impartiality and integrity of its courts, both in reality and in appearance.<sup>30</sup> Courts across the country, including the Supreme Court, have recognized the importance of a state's interest in maintaining the integrity of its judiciary.<sup>31</sup> The drafters of the Model Code assumed as much because the idea that judges should not engage in activities that might call their impartiality into question is central

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26. U.S. CONST. amend. I.

27. See, e.g., *Edwards v. South Carolina*, 372 U.S. 229, 237–38 (1963); *Stromberg v. California*, 283 U.S. 359, 368 (1931).

28. MCFADDEN, *supra* note 11, at 70, 149–50 n.5 (citing such cases as *Brown v. Hartlage*, 456 U.S. 45, 52–54 (1982); *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271–72 (1971); *Mills v. Alabama*, 384 U.S. 214, 218–19 (1966)). The Court has repeatedly emphasized the importance of political speech and debate both on and off the campaign trail. See *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (stating that debate about political candidates is central to our system of government and is clearly protected by the First Amendment); *Cohen v. California*, 403 U.S. 15, 24–25 (1971) (recognizing strength in a "cacophony" of voices); MCFADDEN, *supra* note 11, at 70, 149–50 n.5.

29. MCFADDEN, *supra* note 11, at 70.

30. See, e.g., *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1074 (1991) (stating that "[w]hen a state regulation implicates First Amendment rights, the Court must balance those interests against the State's legitimate interest in regulating the activity in question").

31. See *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 848 (1978) (Stewart, J., concurring) (stating that "[t]here could hardly be a higher governmental interest than a State's interest in the quality of its judiciary"); *Cox v. Louisiana*, 379 U.S. 559, 562 (1965); *Morial v. Judiciary Comm'n*, 565 F.2d 295, 302–03 (5th Cir. 1977); *Ackerson v. Ky. Judicial Ret. & Removal Comm'n*, 776 F. Supp. 309, 313 (W.D. Ky. 1991).

to the Code.<sup>32</sup> The ABA itself has stated, “Since public confidence is essential to deference to the judgments of courts, the appearance of impartiality is essential.”<sup>33</sup> Furthermore, the purpose behind the laws restraining judicial candidates is to preserve the judiciary from political pressure and influence.<sup>34</sup>

It is this goal, or perhaps more specifically the means of pursuing this goal, that has come under fire from scholars, as well as courts. These rules, promulgated by legislators and courts, have encased judicial candidates in an armor that now appears to be too stifling and restrictive. One author has gone so far as to say that “[i]n the course of promoting standards of conduct for members of the bar, the American Bar Association has established an unfortunate record of insensitivity to the constitutional rights of attorneys.”<sup>35</sup> It is possible that the Supreme Court would agree with that statement, as the *White* decision appears to have reduced the weight given to the state’s interest in an impartial and independent judiciary.<sup>36</sup>

The debate surrounding judicial speech restrictions is contentious because both competing interests are so fundamental to our concept of democracy. The beliefs that “[c]andidates for public office should be free to express their views on all matters of interest to the electorate” and that “[j]udges should decide cases in accordance with law rather than with any express or implied commitments that they may have made to their campaign supporters or to others” certainly “lie deep in our constitutional heritage.”<sup>37</sup> It is evident that both of these interests are valid, and consequently, neither should wholly eclipse the other.<sup>38</sup> Lower courts have universally stated that a state cannot require any candidate to surrender his or her first amendment rights.<sup>39</sup> Judge Posner also weighed in on this issue, stating that:

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32. See Lloyd B. Snyder, *The Constitutionality and Consequences of Restrictions on Campaign Speech by Candidates for Judicial Office*, 35 UCLA L. REV. 207, 212 (1987). See also MODEL CODE OF JUDICIAL CONDUCT Canons 1, 2 (2000) (stating that “[a]n independent and honorable judiciary is indispensable to justice in our society,” and that “[a] judge shall . . . act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary”).

33. STANDING COMM. ON JUDICIAL INDEPENDENCE, ABA, STANDARDS ON STATE JUDICIAL SELECTION: REPORT OF THE COMMISSION ON STATE JUDICIAL SELECTION STANDARDS, at ix (2000).

34. See *Republican Party of Minn. v. Kelly*, 63 F. Supp. 2d 967, 975 (D. Minn. 1999) (quoting *Peterson v. R.H. Stafford*, 490 N.W.2d 418, 420 (Minn. 1992)).

35. Snyder, *supra* note 32, at 207–08.

36. See *infra* Part III.

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

38. Judge Richard Posner stated that “only a fanatic would suppose that one of the principles should give way completely to the other.” See *id.*

39. See, e.g., *Ackerson v. Ky. Judicial Ret. & Removal Comm’n*, 776 F. Supp. 309, 313 (W.D. Ky. 1991) (“It is axiomatic that candidates for elected office do not lose the protection of the First

[T]he principle of impartial justice under law is strong enough to entitle government to restrict the freedom of speech of participants in the judicial process, including candidates for judicial office, but not so strong as to place that process completely outside the scope of the constitutional guaranty of freedom of speech.<sup>40</sup>

Courts employ the strict scrutiny test when assessing the constitutionality of a provision burdening the speech of judicial candidates.<sup>41</sup> The state bears the burden of showing that it has an interest compelling enough to justify the restriction of speech and that the restriction in question is narrowly drawn to serve that end. In using strict scrutiny to analyze the constitutionality of the announce clause,<sup>42</sup> the Supreme Court in *White* determined that the First Amendment interests of judicial candidates outweighed the interest of the State in using such a regulation to control judicial campaign speech.<sup>43</sup> As a result of this decision, the propriety of other restrictions on the speech of judicial candidates must be reexamined. A careful study of the *White* decision is necessary to fully understand the issue and competing interests at hand.

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

The State of Minnesota has restricted the speech of judicial candidates for the last century, and in *White*, a judicial candidate challenged these laws. In addressing this challenge, the Supreme Court fundamentally changed the permissible scope of state regulation of judicial elections. The Court maintained that impartiality was a compelling state interest, while completely redefining the meaning of the word in the legal context.

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Amendment when they choose to run in a political race.”); *ACLU v. Fla. Bar*, 744 F. Supp. 1094, 1097 (N.D. Fla. 1990) (“[A] person does not surrender his constitutional right to freedom of speech when he becomes a candidate for judicial office. A state cannot require so much.”).

40. *Buckley*, 997 F.2d at 231.

41. Although some provisions discussed in this Note seem to involve conduct, as opposed to pure speech, the analysis flows from the assumption that the involved conduct is incidental to the speech. For example, stating one is a Democrat and passing out pamphlets stating one is a Democrat will both be analyzed as speech. For a regulation of such speech to withstand strict scrutiny analysis, the state must demonstrate that it adopted a narrowly tailored means necessary to achieve a compelling end. This strict scrutiny analysis differs slightly from the test used to analyze pure (as opposed to expressive) conduct, which requires that the means be reasonably necessary to reach a compelling objective. *See, e.g., In re Kaiser*, 759 P.2d 392, 399 (Wash. 1988).

42. The Supreme Court never explicitly stated that strict scrutiny is the correct test to be applied, but the parties agreed on this test. *See Republican Party of Minn. v. White*, 536 U.S. 765, 774 (2002).

43. *Id.* at 783.

By mandate of its constitution, Minnesota has always selected its state judges by popular election.<sup>44</sup> In 1974, the Minnesota Supreme Court adopted a canon of judicial conduct that prohibited a candidate for judicial office from “announc[ing] his or her views on disputed legal or political issues.”<sup>45</sup> As mentioned above, the ABA revised its Model Code in 1990, modifying Canon 7B because of concerns that the 1972 version was worded so broadly that it would violate the Constitution.<sup>46</sup> Although the adoption of the updated 1990 version of the ABA’s Model Code was proposed to the Minnesota Supreme Court in June of 1994, it declined to take such action.<sup>47</sup>

The statutory repercussions for violating Minnesota’s announce clause were severe. The Supreme Court noted that incumbent judges could be “subject to discipline, including removal, censure, civil penalties, and suspension without pay.”<sup>48</sup> Similarly, lawyers who ran for judicial office were subject to “disbarment, suspension, and probation” if they violated the announce clause.<sup>49</sup>

In 1998, Gregory Wersal, who was running for associate justice of the Minnesota Supreme Court, challenged Minnesota’s announce clause as codified in Minnesota’s Code of Judicial Conduct.<sup>50</sup> During his 1996 campaign, Wersal distributed literature criticizing past Minnesota Supreme Court decisions regarding crime, welfare, and abortion. A complaint that this activity violated Minnesota’s announce clause was filed with the Minnesota Lawyers Professional Responsibility Board.<sup>51</sup> The Board dismissed the complaint and expressed doubt as to the constitutionality of the announce clause.<sup>52</sup> Fearing that continued complaints would harm his legal career, Wersal withdrew from the race.<sup>53</sup>

Wersal ran again for the same office in 1998. This time, he sought guidance from the Minnesota Lawyers Professional Responsibility Board

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44. *Id.* at 768.

45. *Id.* (quoting MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2000)).

46. *See* Republican Party of Minn. v. Kelly, 63 F. Supp. 2d 967, 973 (D. Minn. 1999).

47. *See id.*

48. *White*, 536 U.S. at 768 (citing MINN. RULES OF BD. ON JUDICIAL STANDARDS RS. 4(a)(6), 11(d) (2002)).

49. *Id.* (citing MINN. RULES OF PROF’L CONDUCT RS. 8.2(a)–(b), 8.4(a) (2002); MINN. RULES ON LAWYERS PROF’L RESPONSIBILITY RS. 8–14, 15(a) (2002)).

50. *See id.* at 768–69. The plaintiffs eventually included parties other than Wersal, and they challenged provisions other than the announce clause. The Supreme Court granted certiorari only on the announce clause issue, and as a result, this part limits its discussion to the announce clause.

51. *Id.*

52. *Id.* at 769.

53. *Id.*

on whether it would enforce the announce clause.<sup>54</sup> The Board responded that it was not able to guide him, as he had not submitted a list of the announcements he wished to make, although it again stated that it had constitutional concerns regarding this provision.<sup>55</sup> Wersal then filed a suit with several other plaintiffs in federal district court. He sought an injunction against enforcement of the announce clause and a declaration that the clause violated his First Amendment rights because it forced him to refrain from announcing his views or even answering questions.<sup>56</sup>

The district court dismissed the claims of Wersal and the other plaintiffs and held the announce clause constitutional.<sup>57</sup> The bulk of the opinion focused on challenges regarding restrictions on political party affiliation and the prohibition on personal solicitation of funds.<sup>58</sup> In addressing the announce clause, however, the court noted that the State asserted that “the announce clause serves the compelling state interest of maintaining the actual and apparent impartiality and independence of the judiciary by preventing a candidate from committing himself/herself as to certain issues prior to being faced with a particular case or controversy.”<sup>59</sup> The opinion then noted that other courts, in addressing similar issues, have found the State to have a compelling interest that justifies limiting the First Amendment rights of judicial candidates.<sup>60</sup>

After holding that maintaining the integrity of the judiciary was a legitimately compelling state interest, the court found that the announce clause could survive a facial overbreadth challenge if it was narrowly construed.<sup>61</sup> The court cited to U.S. Supreme Court and Minnesota Supreme Court precedents that require, where possible, statutes to be read in a manner that avoids unconstitutionality.<sup>62</sup> Therefore, the court interpreted the announce clause as “only prohibiting discussion of a judicial candidate’s predisposition to issues likely to come before the court,” and as such found the announce clause to be narrowly tailored to serve a

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54. *Id.*

55. *Id.*

56. *See id.* at 769–70.

57. *See* Republican Party of Minn. v. Kelly, 63 F. Supp. 2d 967, 986 (D. Minn. 1999).

58. *See id.* at 974–83. For a discussion of these issues, see *infra* Parts VI and VII.

59. *Kelly*, 63 F. Supp. 2d at 984.

60. *See id.* (citing several circuit and district court cases).

61. *Id.* at 984–86.

62. *Id.*

compelling state interest.<sup>63</sup> Having survived the strict scrutiny test, the district court held that the announce clause was constitutional.<sup>64</sup>

The Court of Appeals for the Eighth Circuit affirmed the district court's decision.<sup>65</sup> The court noted from the outset that, "although Canon 5 does burden First Amendment rights, the burden is less onerous than it might otherwise be because Canon 5 does not discriminate on the basis of viewpoint and because it governs only judicial elections."<sup>66</sup> Invoking the test of strict scrutiny, the court held that the interest of the State is "undeniably compelling" and specifically disagreed with the argument that Minnesota's decision to elect its judges invalidated its interest in an independent and impartial judiciary.<sup>67</sup> Judge John Gibson wrote for the majority that the announce clause is necessary to further these state interests because it avoids placing a judge in the awkward position of having to preside over a case involving issues on which the judge had previously announced an opinion.<sup>68</sup> Gibson went on to state that the district court's limiting interpretation of the announce clause would ensure that the provision is narrowly tailored. Further, he disagreed with the plaintiffs' contention that upholding this provision would leave little for judicial candidates to discuss during campaigns.<sup>69</sup>

The Supreme Court overruled the Eighth Circuit and the district court. Justice Antonin Scalia wrote the opinion for the majority, and he began the analysis by examining the meaning of the announce clause. Justice Scalia's analysis sets out the agreement by both parties that the announce clause prohibits more than a promise by a candidate to decide an issue in a particular manner.<sup>70</sup> In fact, the announce clause "extends to the candidate's mere statement of his current position, even if he does not bind himself to maintain that position after election."<sup>71</sup> This interpretation must be correct, the majority wrote, as the Minnesota Code of Judicial Conduct also includes the separate pledges or promises clause, which prohibits judicial candidates from making future pledges or promises.<sup>72</sup>

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63. *Id.* at 986.

64. *Id.*

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

66. *Id.* at 863-64.

67. *Id.* at 864-67.

68. *See id.* at 877-78.

69. *See id.* at 881-83.

70. Republican Party of Minn. v. White, 536 U.S. 765, 770 (2002).

71. *Id.*

72. *Id.*

The majority subsequently rejected the interpretation of the provision as proposed by the courts below, which limited the announce clause to applying only to issues likely to come before the court.<sup>73</sup> In doing so, the majority's opinion quotes from a Seventh Circuit opinion by Judge Posner, stating that "[t]here is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction."<sup>74</sup> The majority then wrote:

[I]t is clear that the announce clause prohibits a judicial candidate from stating his views on any specific nonfanciful legal question within the province of the court for which he is running, except in the context of discussing past decisions—and in the latter context as well, if he expresses the view that he is not bound by *stare decisis*.<sup>75</sup>

The opinion then went to the heart of the issue. The majority quoted from the appellate court in explaining the prohibitions of the announce clause, stating that it prohibits speech on the basis of its content and burdens speech on the qualifications of candidates for public office—speech that is at the core of our First Amendment freedoms.<sup>76</sup> Under strict scrutiny,<sup>77</sup> the respondent officials were required to prove that the announce clause was narrowly tailored to serve a compelling state interest, and to be narrowly tailored it must “not ‘unnecessarily circumscrib[e] protected expression.’”<sup>78</sup> The respondents set forth two interests perhaps compelling enough to justify the announce clause: “preserving the impartiality of the state judiciary and preserving the *appearance* of the impartiality of the state judiciary.”<sup>79</sup>

These asserted interests led to the Court's next question: What does “impartiality” mean? The majority opinion set out three possible interpretations to this “vague” term in the judicial context.<sup>80</sup> The purpose

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73. *See id.* at 771–73.

74. *Id.* at 772–73 (quoting *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 229 (7th Cir. 1993)).

75. *Id.* at 773.

76. *Id.* at 774 (quoting *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 861–63 (8th Cir. 2001)).

77. *See id.* *See also supra* note 42 and accompanying text.

78. *White*, 536 U.S. at 775 (alteration in original) (quoting *Brown v. Hartlage*, 456 U.S. 45, 54 (1982)).

79. *Id.* (emphasis added). In criticizing the Court's reasoning in *White*, however, Charles Gardner Geyh notes that “impartiality is not an end in itself. It is an instrumental value designed to preserve a different end altogether: the rule of law.” Charles Gardner Geyh, *Perspectives on Judicial Independence: Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 65 (2003).

80. *White*, 536 U.S. at 775–78. In her dissent, Justice Ruth Ginsburg writes that “[t]o avoid the import of our due process decisions, the Court dissects the concept of judicial ‘impartiality,’ concluding that only one variant of that concept—lack of prejudice against a *party*—is secured by the Fourteenth

of this categorization seems to be preserving the long-held belief that an impartial judiciary is a compelling state interest, while allowing the Court to narrow its scope by parsing out the definition of the term. The first interpretation, and the one the majority subscribed to, is a “lack of bias for or against either *party* to the proceeding.”<sup>81</sup> Impartiality in this sense is the “traditional” way the term is used, and it conveys the meaning that a judge applies the law evenhandedly to all parties before him or her.<sup>82</sup> The Court held that the announce clause is not narrowly tailored, or even tailored at all, to serve the impartiality (or the appearance of impartiality) of judges in this sense of the word.<sup>83</sup> Moreover, the announce clause restricts speech regarding particular issues, not particular parties, and assumes that a judge who had previously announced his or her view on an issue would be biased against *any* party asserting the opposite position.<sup>84</sup> The Supreme Court thus held that this interpretation of impartiality is indeed a compelling interest, but that the announce clause did not satisfy the second part of strict scrutiny because it was not narrowly tailored to serve that interest.<sup>85</sup>

Justice Scalia then discussed the second interpretation of impartiality, first noting that it is not a common one.<sup>86</sup> This usage entails a “lack of preconception in favor of or against a particular *legal view*,” and concerns “guaranteeing [litigants] an equal chance to persuade the court on the legal points in their case.”<sup>87</sup> Although the majority conceded that the announce clause would serve this interest, it held that this interest is not compelling because it is neither desirable nor realistic to have sitting judges who lack preconceived views on the law.<sup>88</sup> Therefore, this meaning does not satisfy the first part of the strict scrutiny test.<sup>89</sup>

The third and final understanding of impartiality was described as “openmindedness,” and again, is not a common usage of the word.<sup>90</sup> This means that the judge will consider views that oppose his or her

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Amendment.” *Id.* at 815 n.3 (Ginsburg, J., dissenting) (internal citations omitted). Another author wrote that Justice Scalia’s argument “employs an impoverished and artificial conception of what judicial impartiality entails.” Mark Kozlowski, *Robed and Running*, N.J. L.J., July 29, 2002.

81. *White*, 536 U.S. at 775. Justice John Paul Stevens, in his dissent, considers this interpretation the narrowest one. *Id.* at 800 (Stevens, J., dissenting).

82. *Id.* at 775–77.

83. *Id.* at 776–77.

84. *Id.*

85. *Id.*

86. *Id.* at 777.

87. *Id.*

88. *Id.* at 777–78.

89. *Id.*

90. *Id.* at 778.

preconceptions, while remaining open to persuasion.<sup>91</sup> Although Justice Scalia wrote that this interest may be desirable, the majority did not examine it, as the Court believed the Minnesota Supreme Court did not adopt the announce clause with this interest in mind.<sup>92</sup> The majority further opined that because a candidate may speak openly on legal issues until declaring a run for office, and again after taking the bench, “[a]s a means of pursuing the objective of openmindedness . . . the announce clause is so woefully underinclusive as to render belief in that purpose a challenge to the credulous.”<sup>93</sup> The opinion did not clarify whether this usage would be a compelling state interest, but the opinion did hold that this third interpretation does not satisfy strict scrutiny because it is not narrowly tailored.

After noting that all three interpretations of impartiality do not satisfy the strict scrutiny test in its entirety, the opinion elaborated on the impropriety of the announce clause. The opinion held that the purpose of the provision does not appear to fulfill any of the interests mentioned above, but instead results in “the undermining of judicial elections.”<sup>94</sup> The majority wrote that “[t]here is an obvious tension between the article of Minnesota’s popularly approved Constitution which provides that judges shall be elected, and the Minnesota Supreme Court’s announce clause which places most subjects of interest to the voters off limits.”<sup>95</sup> Furthermore, the opinion asserted that “the notion that the special context of electioneering justifies an *abridgement* of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head.”<sup>96</sup> Thus, the announce clause, as embodied in Minnesota’s Judicial Code, was found to be unconstitutional.<sup>97</sup>

Justice Anthony Kennedy’s concurring opinion went further than the majority opinion. It broadly stated that “[t]he political speech of candidates

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91. *Id.*

92. *Id.*

93. *Id.* at 779–80.

94. *Id.* at 782.

95. *Id.* at 787.

96. *Id.* at 781.

97. *Id.* at 788. Scholars have vehemently criticized the *White* decision. See James A. Gardner, Commentary, *Forcing States to Be Free: The Emerging Constitutional Guarantee of Radical Democracy*, 35 CONN. L. REV. 1467, 1481 (2003) (stating that this case is exhibitivite of a “growing commitment to a First Amendment regime of radical democracy”); Laurence H. Tribe, *The Unbearable Wrongness of Bush v. Gore*, 19 CONST. COMMENT. 571, 602 (2002) (writing about the *White* opinion and stating that “[i]n essence, states must purchase fairness and integrity and the appearance of both, and thus judicial legitimacy, at the price of excluding the public from direct participation in the process of selecting judges”).

is at the heart of the First Amendment, and direct restrictions on the content of candidate speech are simply beyond the power of government to impose.”<sup>98</sup> It adamantly adhered to the belief that maintaining the integrity of the judiciary is a vitally important state interest,<sup>99</sup> and “[a]rticulated standards of judicial conduct may advance this interest.”<sup>100</sup> Justice Kennedy further stated, however, that “these standards may not be used by the State to abridge the speech of aspiring judges in a judicial campaign.”<sup>101</sup> Justice Kennedy’s concurrence seems to open the door for litigation regarding the other restrictions examined in this Note, as it concludes with the affirmative and succinct statement that “[t]he State may not regulate the content of candidate speech merely because the speakers are candidates.”<sup>102</sup>

Perhaps most interesting of all is the concurring opinion by Justice Sandra Day O’Connor. Justice O’Connor is in a unique position on the Court, as she is the only justice who has been a judicial candidate, being elected as a state judge in Arizona before being appointed to the U.S. Supreme Court.<sup>103</sup> Although she concurred with the majority’s decision, she separately wanted to express her concerns about the election of judges generally.<sup>104</sup> In doing so, she set forth yet another interpretation of impartiality, which she defined as “being free from any personal stake in the outcome of the cases to which [judges] are assigned.”<sup>105</sup> Although Justice O’Connor’s concurrence maintained that, as defined as such, impartiality is a desirable and even compelling governmental interest, she was concerned that “the very practice of electing judges undermines this interest.”<sup>106</sup> Her concurrence concluded by stating that “the State’s claim that it needs to significantly restrict judges’ speech in order to protect judicial impartiality is particularly troubling. If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.”<sup>107</sup>

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98. *White*, 536 U.S. at 793 (Kennedy, J., concurring).

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

100. *Id.* (Kennedy, J., concurring).

101. *Id.* at 794 (Kennedy, J., concurring).

102. *Id.* at 796 (Kennedy, J., concurring).

103. See SUPREME COURT HISTORICAL SOC’Y, SANDRA DAY O’CONNOR, in HISTORY OF THE COURT, at [http://www.supremecourthistory.org/02\\_history/subs\\_current/images\\_b/004.html](http://www.supremecourthistory.org/02_history/subs_current/images_b/004.html) (last visited Jan. 9, 2004).

104. *White*, 536 U.S. at 788 (O’Connor, J., concurring).

105. *Id.* (O’Connor, J., concurring).

106. *Id.* (O’Connor, J., concurring).

107. *Id.* at 792 (O’Connor, J., concurring).

Both the majority and dissenting opinions discussed the similarities and differences between judicial elections and elections for legislative or executive offices. Justices Stevens and Ginsburg adamantly opposed the majority's characterization of judicial campaigns as having limited, if any, differences from legislative or executive campaigns.<sup>108</sup> Stevens's dissent noted the difference between the work of a judge and the work of other public officials, emphasizing that it is essential to a judge's position that he or she be indifferent to unpopularity.<sup>109</sup> His dissent further asserted that if the conflict between electoral politics and the judiciary is recognized, states will not be put to an "all or nothing choice of abandoning judicial elections or having elections in which anything goes."<sup>110</sup> Justice Ginsburg's dissent also voiced a belief that judicial elections are wholly different.<sup>111</sup> Her dissent further maintained that "Minnesota's choice to elect its judges . . . does not preclude the State from installing an election process geared to the judicial office,"<sup>112</sup> and that because of "the magisterial role judges must fill in a system of justice, a role that removes them from the partisan fray, States may limit judicial campaign speech by measures impermissible in elections for political office."<sup>113</sup>

In response to Justice Ginsburg's dissent, Justice Scalia noted that the majority opinion does not assert that "the First Amendment requires campaigns for judicial office to sound the same as those for legislative office."<sup>114</sup> In fact, the majority's opinion took this idea one step further when it made the point that the Court did not answer the question of whether the Constitution allows judicial campaigns to be more greatly burdened than other campaigns.<sup>115</sup> Regardless of the outcome of that inquiry, the majority stated that the announce clause would still fail strict scrutiny because it is underinclusive in that it prohibits announcements by judges (and judicial candidates) only at certain times and in certain forms.<sup>116</sup> The opinion further added that this underinclusiveness cannot be

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108. See *id.* at 797–99 & n.2 (Stevens, J., dissenting); *id.* at 805–09 (Ginsburg, J., dissenting).

109. *Id.* at 798 (Stevens, J., dissenting).

110. *Id.* at 799–800 (Stevens, J., dissenting).

111. *Id.* at 805 (Ginsburg, J., dissenting) (disagreeing with the approach of the majority that an "election is an election").

112. *Id.* (Ginsburg, J., dissenting).

113. *Id.* at 807 (Ginsburg, J., dissenting) (citing *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 228 (7th Cir. 1993)).

114. *Id.* at 783.

115. See *id.* For a discussion of the Equal Protection analysis, see *supra* notes 18–25 and accompanying text.

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

justified on the ground that “the First Amendment provides less protection during an election campaign than at other times.”<sup>117</sup>

Thus, in a 5-4 split, with Justice Scalia writing the opinion in which Chief Justice William Rehnquist and Justice O’Connor, Justice Kennedy, and Justice Clarence Thomas joined, and Justice Stevens, Justice David Souter, Justice Ginsburg, and Justice Stephen Breyer dissented,<sup>118</sup> the Supreme Court overruled the courts below and held Minnesota’s announce clause unconstitutional as violating the First Amendment.<sup>119</sup>

#### IV. THE ANNOUNCE CLAUSE, OR SOMETHING LIKE IT

Minnesota’s announce clause was as broad, and some would say as unreasonable, as the provision could be.<sup>120</sup> The Minnesota clause stated that a judicial candidate “shall not ‘announce his or her views on disputed legal or political issues.’”<sup>121</sup> Many other states have enacted announce clauses that are more constricted, either by using slightly different language or by adding limiting language.

Almost a decade before *White*, the Seventh Circuit analyzed a narrower version of the announce clause that was promulgated by the Illinois Supreme Court. In *Buckley v. Illinois Judicial Inquiry Board*, the constitutionality of Illinois’s version of the announce clause was at issue.<sup>122</sup> The Illinois provision included announce clause language similar to that in Minnesota’s provision, but then, seemingly to prevent overinclusiveness, added the exception “that [the candidate] may announce his views on measures to improve the law, the legal system, or the administration of justice, if, in doing so, he does not cast doubt on his capacity to decide impartially any issue that may come before him.”<sup>123</sup> In deciding whether this provision was in violation of the Constitution, Judge Posner

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117. *Id.*

118. The justices sided with the parties in interesting ways. The conservative majority sided with the free speech claimant, and the liberal dissenters sided with the government. *See id.* at 766. This can be seen as “[a] seemingly surprising lineup, especially when the issue isn’t a traditional left-right question such as campaign finance or religious speech.” *See* Eugene Volokh, *Shift Shows*, National Review Online, at <http://www.nationalreview.com/comment/comment-volokh062802.asp> (June 28, 2002).

119. *White*, 536 U.S. at 788.

120. Jan Witold Baran, *Judicial Candidate Speech After Republican Party of Minnesota v. White*, 39 CT. REV. 12, 12 (2002).

121. *White*, 536 U.S. at 768 (quoting MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2000)).

122. *See Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224 (7th Cir. 1993).

123. *Id.* at 225 (quoting Ill. S.Ct. R. 67(B)(1)(c); Ill. Rev. Stat. ch. 110 A ¶ 67(B)(1)(c)).

commented that “[t]he problem is not only that the proviso carves out only a small subset of disputed legal and political issues, but that what is given with one hand is taken away with the other.”<sup>124</sup> He further elaborated: “Almost anything a judicial candidate might say about ‘improv[ing] the law’ could be taken to cast doubt on his capacity to decide some case impartially, unless he confined himself to the most mundane and technical proposals for law reform.”<sup>125</sup> Consequently, the court found that the modified announce clause was not narrowly tailored, and thus, was unconstitutional.<sup>126</sup>

Although *White* involved the broader announce clause language, the opinion could easily be extended to hold these narrower announce clause provisions unconstitutional. Under strict scrutiny, the analysis begins with a determination of the state interest being asserted and whether it is compelling. Generally, that interest would be preserving the impartiality of the judiciary. Yet the Supreme Court seems to have adopted a narrow interpretation of “impartiality,” defined as a “lack of bias for or against either party to the proceeding.”<sup>127</sup> Consequently, it is this narrow purpose that the provision must be narrowly tailored to serve. The exact language of the provision is critical, so as an example, the Illinois provision at issue in *Buckley* will serve the purpose.

The Illinois language, similar to the Minnesota language, is not narrowly tailored to serve that interest. Justice Scalia, writing for the majority, stated that the standard language is “barely tailored to serve that interest,”<sup>128</sup> and the Illinois provision is only slightly more narrow. The addition of the caveat that the candidate may announce his or her views as long as the candidate “does not cast doubt on his capacity to decide impartially any issue that may come before him”<sup>129</sup> adds to the legitimacy of the provision, in light of the stated interest. Yet, just as the majority stated about the Minnesota language, this modified provision is underinclusive, as it too “prohibit[s] announcements by judges (and would-be judges) only at certain times and in certain forms.”<sup>130</sup> This is perhaps the most persuasive argument against this provision because even if another meaning of impartiality—such as “openmindedness” or Justice O’Connor’s “being free from any personal stake in the outcome of the

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124. *Id.* at 229.

125. *Id.* (alteration in original).

126. *Id.* at 231.

127. See *Republican Party of Minn. v. White*, 536 U.S. 765, 775–76 (2002) (emphasis omitted).

128. *Id.* at 776.

129. *Buckley*, 997 F.2d at 225 (quoting Ill. S.Ct. R. 67(B)(1)(c)).

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

cases to which they are assigned<sup>131</sup>—were held to be compelling, this argument would still be applicable and persuasive.<sup>132</sup>

This clause is also overinclusive as it limits almost all speech that a voter would be interested in to determine how to vote. Laws limiting core First Amendment speech have to be *narrowly* tailored, and just as the petitioner in *White* refrained from speaking to the press for fear that any answer he would give could be seen as an “announcement,” there is not much left to talk about if the candidate’s words cannot cast any doubt on his or her ability to decide impartially. Anything a candidate might say that a voter would be interested in hearing would cast doubt one way or another on that candidate’s ability to be impartial. In essence, the modified language would still create a sort of gag rule and would be unconstitutional.

To illustrate, a district court in Texas examined a provision similar to an announce clause after the *White* decision. The court found that the State’s Canon 5(1) was similar enough to an announce clause to be declared unconstitutional. The language of that clause stated:

[A] judge or 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 that discussion of an individuals’ judicial philosophy is appropriate if conducted in a manner which does not suggest to a reasonable person a probable decision on any particular case.<sup>133</sup>

Although containing greater limitations than the standard announce clause, the district court found “no distinction between Minnesota’s Code of Judicial Conduct 5(A)(3)(d)(i) and Texas’s Code of Judicial Conduct 5(1).”<sup>134</sup> Following the reasoning in *White*, the court found that this Texas law violated the First Amendment and enjoined enforcement of this provision of the Texas Code of Judicial Conduct.<sup>135</sup>

It is likely, therefore, that if a broader announce clause were constitutionally challenged, the Supreme Court would find it unconstitutional, in light of the reasoning in *White*. The majority in *White*

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131. *Id.* at 788 (O’Connor, J., concurring).

132. As held in *City of Ladue v. Gilleo*, 512 U.S. 43, 51–53 (1994), underinclusiveness is not itself an independent means of invalidating a provision, but instead may be evidence of viewpoint or content discrimination and also may call into question the veracity or gravity of the government’s asserted interest in a speech restriction.

133. *Smith v. Phillips*, No. A-02 CV 111, 2002 U.S. Dist. LEXIS 14913, at \*2 (W.D. Tex. Aug. 5, 2002) (quoting TEX. CODE OF JUDICIAL CONDUCT Canon 5(1) (2000)).

134. *Id.* at \*3.

135. *Id.*

emphasized that it is not the government's role to determine which issues should be discussed or debated in a political campaign.<sup>136</sup> After this assertion, any provision that restricts candidates from stating their position or opinion would not survive a constitutional challenge.

#### V. THE PLEDGES OR PROMISES CLAUSE AND THE COMMIT CLAUSE

The announce clause has two closely related counterparts that limit the speech of judicial candidates in a more narrow way. Canon 5 of the Model Code of Judicial Conduct provides that 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;
- (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; . . .<sup>137</sup>

These two clauses are called the "pledges or promises clause" and the "commit clause," respectively.

These two canons have slightly different histories, although they are similar in purpose. The language of the pledges or promises clause was in the original 1972 Model Code and remains unchanged in the Code to this day.<sup>138</sup> The commit clause was proposed by the ABA in its revision of the 1972 Model Code.<sup>139</sup> The language of the commit clause replaced that of the announce clause in the 1990 version of the Model Code because the announce clause was considered too broad a restriction on speech.<sup>140</sup> A number of states have revised their rules in accordance with the commit canon.<sup>141</sup>

The announce clause, the pledges or promises clause, and the commit clause all address the speech of judicial candidates in regard to creating an impression of bias, and, as a result, many courts confuse the three, or neglect to understand their differences and treat them all the same. This

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136. *White*, 536 U.S. at 782 (quoting *Brown v. Hartlage*, 456 U.S. 45, 60 (1982)).

137. MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(i)-(ii) (2000).

138. *See O'Hara*, *supra* note 11, at 198.

139. *See id.*

140. *See id.*

141. *See Republican Party of Minn. v. Kelly*, 247 F.3d 854, 880 n.21 (8th Cir. 2001) (citing examples of Arizona, Arkansas, California, Florida, Georgia, Illinois, Kansas, Kentucky, Louisiana, New York, Ohio, South Dakota, Tennessee, and Washington).

part will first analyze the pledges or promises clause, and then will discuss the commit clause. Some overlap is inevitable, although clarity is not as fleeting as some courts would have us believe.

#### A. THE PLEDGES OR PROMISES CLAUSE

The pledges or promises clause prohibits a candidate for judicial office from “mak[ing] pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.”<sup>142</sup> This clause has historically caused less controversy, exhibited by the ABA’s retention of this provision throughout all revisions of the Model Code.<sup>143</sup> The reasoning behind this rule appears to be that a judicial candidate who makes a commitment or pledge to decide cases a certain way, presumably doing so to attract votes, is then restrained by that promise when such a case comes before the candidate on the bench. This restriction, or the appearance thereof, would “hamper the judge’s ability to make an impartial decision and would undermine the credibility of his decision to the losing litigant and to the community.”<sup>144</sup> In an attempt to predict the future of the pledges or promises clause after *White*, knowledge of past court decisions regarding this proviso is valuable and instructive.

##### 1. Analyzing the Pledges or Promises Clause Before *White*

A federal district court examined this provision in 1984 in *Berger v. Supreme Court of Ohio*.<sup>145</sup> There, the court did not accept a candidate’s argument that the pledges or promises clause restricted his free speech rights.<sup>146</sup> The candidate argued that the clause only permitted him to parrot the language that he will faithfully and impartially perform his duties in office, and thus, had the effect of “chilling” his free speech rights.<sup>147</sup> The court, however, was not convinced of this “restrictive reading,” and instead held that the clause generally “prohibit[s] candidates for judicial office from making pledges or promises which appeal to prejudices or special interests.”<sup>148</sup> More specifically, the plaintiff wanted to pledge to be more involved in court administration and the resolution of cases, by encouraging increased direct dispute resolution among the parties that

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142. See MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(i) (2000).

143. See MCFADDEN, *supra* note 11, at 89.

144. Buckley v. Ill. Judicial Inquiry Bd., 997 F.2d 224, 228 (7th Cir. 1993).

145. Berger v. Supreme Court of Oh., 598 F. Supp. 69 (S.D. Ohio 1984).

146. See *id.* at 72, 75.

147. *Id.* at 72.

148. *Id.* at 75.

would come before him.<sup>149</sup> The court found that these intended pledges “relate[d] to the faithful performance of the duties of judicial office,” and as a result, the restriction did not apply to the statements the plaintiff wished to make, and the plaintiff did not possess a substantial likelihood of prevailing on the merits of his claim.<sup>150</sup>

The Kentucky Supreme Court also ruled on the pledges or promises clause in *J.C.J.D. v. R.J.C.R.*,<sup>151</sup> although the court provided little guidance on the issue. In this case, the judicial candidate allegedly violated the pledges or promises clause as codified in the Kentucky Code of Judicial Conduct by criticizing a Kentucky Supreme Court personal injury decision and his opponent’s vote on the case. In doing so, the candidate’s criticisms amounted to an “indirect pledge or promise of conduct in office other than the faithful and impartial performance of his duties of office.”<sup>152</sup> The canon at issue in this case was Canon 7(B)(1)(c) of the Kentucky Code of Judicial Conduct, which at the time included both the pledges or promises clause and the announce clause.<sup>153</sup> The court held that the Canon “strictly prohibits dialogue on virtually every issue that would be of interest to the voting public,” and as such was unconstitutional as violating the First Amendment.<sup>154</sup> The usefulness of the decision is limited, however, because the court analyzed the entire clause without distinguishing between the pledges or promises clause and the announce clause. In sum, although a technical reading of the case holds the pledges or promises clause unconstitutional, a closer reading leaves the impression that no concrete determination was made as to that provision alone.

The Seventh Circuit specifically took up the pledges or promises clause, along with the announce clause, in 1993 in *Buckley v. Illinois Judicial Inquiry Board*.<sup>155</sup> A candidate for a seat on the Supreme Court of Illinois distributed “campaign literature stating that he had ‘never written an opinion reversing a rape conviction.’”<sup>156</sup> Judge Posner wrote the opinion of the court and, after examining the announce clause, found that “the ‘pledges or promises’ clause . . . is as overbroad as the ‘announce’ clause.”<sup>157</sup> Judge Posner lessened the impact of this statement in

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149. *Id.*

150. *Id.*

151. *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953 (Ky. 1991).

152. *Id.* at 955.

153. *See id.* (quoting KY. CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(c) (2000)).

154. *Id.* at 956.

155. *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224 (7th Cir. 1993).

156. *Id.* at 225–26 (quoting Justice Robert Buckley’s campaign literature).

157. *Id.* at 229.

commenting that “only a fanatic would suppose . . . that the principle of freedom of speech should be held to entitle a candidate for judicial office to promise to vote for one side or another in a particular case or class of cases.”<sup>158</sup> Furthermore, the problem with crafting a rule to limit commitments by the candidate is that the candidate can make either explicit or implicit statements, and it is not difficult to fashion a statement avoiding the particular telling language of a pledge or promise.<sup>159</sup> As a result of this difficulty, Judge Posner wrote that the rule at hand was impermissibly overinclusive because it went beyond limiting speech that committed the candidate to a position or affected his or her impartiality; in practice, the rule actually limited the candidate to silence.<sup>160</sup> Judge Posner wrote that the court was not authorized to revise or “patch up” a rule, and although the provision was within the state’s regulatory power, “[a] statute that forbids, or can fairly be read to forbid, privileged speech is not saved by the fact that it also forbids unprivileged speech and could in application be confined to the latter.”<sup>161</sup> He concluded that the Illinois Supreme Court Rule prohibiting pledges or promises by judicial candidates was unconstitutional.<sup>162</sup>

## 2. The Pledges or Promises Clause and the *White* Decision

The Minnesota Code of Judicial Conduct, besides including the now-invalidated announce clause, also contains the pledges or promises clause.<sup>163</sup> The Supreme Court noted that this clause was not challenged and declined to express a view on it.<sup>164</sup> The majority did note the agreement by both parties that the pledges or promises clause was narrower than the announce clause.<sup>165</sup> The Eighth Circuit, however, mentioned the clause and implied its constitutionality. Prior to being overruled by the

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158. *Id.* at 227.

159. *See id.* at 228.

160. *See id.* at 228–29.

161. *Id.* at 230.

162. *Id.* at 230–31. Judge Posner mentions the tension that this decision causes with the Third Circuit’s decision in *Stretton v. Disciplinary Board of the Supreme Court*, 944 F.2d 137 (3d Cir. 1991), and notes that his reasoning distinguishing the case is precarious. *Id.* at 230. As an example of confusing the issues, however, *Stretton* concentrated on the announce clause language of Pennsylvania, which, unlike the Illinois clause, had not been interpreted or explained by the body in charge of judicial discipline. *See id.* In distinguishing the cases, Judge Posner focused on the understanding by the Third Circuit that the rule only prohibited statements by judicial candidates that conveyed that the issue had been “prejudged,” which, in Judge Posner’s opinion, seemed to “fold the ‘announce’ clause back into the ‘pledges or promises’ clause understood as equivalent to the ABA’s new ‘commitment’ canon.” *Id.*

163. MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2000).

164. *See* Republican Party of Minn. v. White, 536 U.S. 765, 770 (2002).

165. *See id.*

Supreme Court, the Eighth Circuit found the announce clause narrowly tailored because certain state interests would be left “unshielded” if the announce clause were stricken from the books.<sup>166</sup> This was because the pledges or promises provision protected certain state interests, but not all of them, and the court believed that “it does not reach the full range of campaign activity that can undermine the State’s interests in an independent and impartial judiciary.”<sup>167</sup> Implicit in the court’s statements is the propriety and legitimacy of the pledges or promises clause.

As demonstrated, there has certainly been some disagreement by courts as to the propriety of the pledges or promises clause, but the majority opinion in *White* has some clues as to a reconciliation of the lower courts. Again, the first step in any analysis of a provision that restricts core First Amendment speech is a finding of a compelling state interest. The majority narrowed the interest in impartiality, in the context of an impartial and independent judiciary, to a “lack of bias for or against either party to the proceeding.”<sup>168</sup> With that interest determined to be a compelling one by the Supreme Court, the second step in a strict scrutiny analysis is whether the provision is narrowly tailored. Similar to the announce clause analysis in *White*, the pledges or promises clause will not survive strict scrutiny with this particular state interest in mind. It is improbable that a pledge or a promise by a candidate will be made in regard to a particular party, and is more likely to be about a certain issue. As with the announce clause, “[a]ny party taking [the contrary] position is just as likely to lose. The judge is applying the law (as he sees it) evenhandedly.”<sup>169</sup> Although the provision fails under the favored state interest in *White*, that result seems too attenuated and disingenuous.

The state interest behind the pledges or promises clause instead is more likely “openmindedness,” which is the third interpretation of impartiality proposed by Justice Scalia in the majority opinion. Although he dismissed this interpretation in regard to the announce clause, he did so because he “[did] not believe the Minnesota Supreme Court adopted the announce clause for that purpose.”<sup>170</sup> This interpretation of impartiality means that a judge will consider views that differ from the judge’s preconceptions, while remaining open to persuasion, which guarantees each litigant “some chance” of convincing the court of the merits of the

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166. *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 878 (2001).

167. *Id.* at 877.

168. *White*, 536 U.S. at 775 (emphasis omitted).

169. *Id.* at 777.

170. *Id.* at 778.

litigant's legal view.<sup>171</sup> A pledge or promise of a certain outcome or result directly questions the impartiality of the judge in the sense that parties coming before him or her would have a chance at convincing the court as to the merits of their case.

In rejecting the petitioner's argument that the announce clause served the interest of openmindedness, however, the majority in *White* made statements applicable to the provision at issue here. Justice Scalia declared that the problem with this argument is "that statements in election campaigns are such an infinitesimal portion of the public commitments to legal positions that judges (or judges-to-be) undertake, that this object of the prohibition is implausible."<sup>172</sup> Consequently, the pledges and promises clause can also be seen as being "woefully underinclusive."<sup>173</sup> Yet there is an obvious distinction to be noted. Unlike announcements, pledges and promises are unlikely to be made outside of the context of a campaign, which therefore makes this argument moot.

An exchange between Justice Stevens and Justice Scalia indicates that the pledges and promises clause may be constitutional. Justice Stevens argued that statements made in an election campaign particularly threaten openmindedness because once elected, a judge will be reluctant to contradict these statements.<sup>174</sup> Justice Scalia replied that this argument does not apply to announcements, but it may apply to campaign promises.<sup>175</sup> This exchange may not provide a definitive answer to the question of constitutionality; however, in light of the fact that pledges and promises are solely a campaign anomaly, the provision is narrowly drawn to protect the state interest in an openminded judiciary.

Justice Ginsburg elaborated on the pledges and promises clause in her dissenting opinion. She argued that it is necessary to examine the interaction between the two clauses when determining the constitutionality of the announce clause.<sup>176</sup> Ginsburg noted that all parties and amici in the case agreed that the state may constitutionally forbid candidates for judicial office to make pledges and promises of certain results.<sup>177</sup> They agreed that the prohibition serves two compelling state interests: It protects the due process rights of litigants, and it preserves the public's confidence in the

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171. *Id.*

172. *Id.* at 779.

173. *Id.* at 780.

174. *Id.*

175. *Id.*

176. *Id.* at 812-13 (Ginsburg, J., dissenting).

177. *Id.* at 813 (Ginsburg, J., dissenting).

impartiality and integrity of the judiciary by barring even “[t]he perception of unseemly *quid pro quo*.”<sup>178</sup> The constitutionality of this clause was not put in doubt, yet Justice Ginsburg emphasized that without the announce clause, the pledges or promises prohibition can easily be avoided by not using promise-like language.<sup>179</sup> According to Justice Ginsburg, both clauses are constitutional because of the interrelation between them.<sup>180</sup>

### 3. Implications of the *White* Decision on the Pledges or promises Clause

State supreme courts have responded to *White* in regard to the pledges or promises clause. In addition to altering its announce clause, the Texas Supreme Court changed its pledges or promises clause. The former provision stated that “[a] judge or judicial candidate shall not: (i) make pledges or promises of conduct in office regarding judicial duties other than the faithful and impartial performance of the duties of the office, but may state a position regarding the conduct of administrative duties.”<sup>181</sup> The current provision states:

A judge or judicial candidate shall not: (i) make pledges or promises of conduct in office regarding pending or impending cases, specific classes of cases, specific classes of litigants, or specific propositions of law that would suggest to a reasonable person that the judge is predisposed to a probable decision in cases within the scope of the pledge.<sup>182</sup>

Interestingly, one justice on the Texas Supreme Court attached a separate memorandum agreeing with the changes in the Texas Code because immediate action was necessary considering pending elections in the state.<sup>183</sup> At the same time, he expressed doubt that the changes are fully in compliance with the First Amendment and commented that they should be evaluated more in detail.<sup>184</sup> In contrast, the Missouri Supreme Court issued an order stating that its pledges or promises provision will remain in full effect in light of the *White* decision.<sup>185</sup>

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178. *Id.* at 817–19 (Ginsburg, J., dissenting).

179. *Id.* at 819–21 (Ginsburg, J., dissenting).

180. *See id.* at 820–21 (Ginsburg, J., dissenting). Such a determination is, according to Justice Ginsburg, “amply supported.” *Id.* at 819 (Ginsburg, J., dissenting).

181. Approval of Amendments to the Tex. Code of Judicial Conduct, Misc. Docket No. 02-9167 (Tex. Aug. 22, 2002), available at <http://www.supreme.courts.state.tx.us/MiscDocket/02/02916700.pdf>.

182. *Id.*

183. *Id.*

184. *See id.* (statement of Justice Nathan Hecht concurring in the amendments to the Texas Code of Judicial Conduct).

185. *See In re Enforcement of Rule 2.03, Canon 5.B.(1)(c)* (Mo. July 18, 2002), available at <http://www.osca.state.mo.us/sup/index.nsf/0/f1c626db4da8b14086256bfa0073b302?OpenDocument>. *See also* American Judicature Society, *Developments Regarding Judicial Campaign Speech*, at

A recent case has used the reasoning employed in *White* to determine the constitutionality of the pledges or promises clause as enacted in New York. In the case *In re Watson*, a judicial candidate made objectionable statements that he wanted “to ‘work with’ and ‘assist’ police,” and the opinion centered around the constitutionality of the pledges or promises clause in light of *White*.<sup>186</sup> The court initially noted that the words “I promise” need not be included in a candidate’s statement for such a remark to be considered a violation of the clause, and that any statement must be viewed within the totality of the circumstances.<sup>187</sup> The court concluded that the candidate’s statements expressed bias and constituted a pledge in violation of the provision.<sup>188</sup> The opinion found two state interests to be compelling enough to justify this restriction: a lack of party bias, the same interest deemed compelling in *White*, and openmindedness, an interest that the *White* Court found *might* be compelling in regard to the pledges or promises provision.<sup>189</sup> The court thus held New York’s pledges or promises provision constitutional under strict scrutiny analysis.<sup>190</sup>

In sum, a challenge to the pledges or promises clause is certain to be a contentious one. This provision encapsulates the debate between the free speech rights of candidates and the preservation of the impartiality of the bench. Promises made by judicial candidates contradict societies’ beliefs about the judiciary’s impartiality. Yet, as judicial campaigns become increasingly controversial and more similar to other elections, speech restrictions such as this appear to be too binding. As Justice Scalia noted, “[O]ne would be naive not to recognize that campaign promises are—by long democratic tradition—the least binding form of human commitment.”<sup>191</sup> Before *White*, the pledges or promises clause was considered to be constitutional, and even necessary, by all. An analysis of *White* indicates that this will remain unchanged, although it is anything but settled.

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[http://www.ajs.org/ethics/story.asp?content\\_id=45](http://www.ajs.org/ethics/story.asp?content_id=45) (Aug. 21, 2002) (stating that the pledges or promises clauses for Georgia, Florida, and Kentucky will continue to be enforced).

186. *In re Watson*, 794 N.E.2d 1, 4 (N.Y. 2003).

187. *Id.*

188. *Id.* at 4–5.

189. *Id.* at 6.

190. *Id.* at 8.

191. *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002).

## B. THE COMMIT CLAUSE

The commit clause states that a candidate shall not “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.”<sup>192</sup> This clause is thought to be intrinsically constitutional, as its language was promulgated by the ABA in response to constitutional concerns about the announce clause. Unlike the announce clause’s sweepingly broad language, the commit clause’s prohibition is much narrower. Many commentators have compared these two clauses because the commit clause replaced the announce clause language in the Model Code. Patrick McFadden wrote of the commit clause: “[B]y prohibiting only those statements that indicate or appear to indicate a candidate’s pre-judgment of issues, the [commit clause] encourages more discussion of political and legal issues than is permitted under the [announce clause].”<sup>193</sup>

The commit clause has also been criticized by sitting judges as being a disservice to voters, by incorrectly suggesting that the candidate’s personal views are relevant to the candidate’s ability to judge, when in fact they are not.<sup>194</sup> Furthermore, if the judges are wrong and the personal views of the candidates are relevant, then the commit clause is “even more inexplicable, for it would prohibit the discussion of *exactly* those views that *might* be relevant, *i.e.*, those that might indicate how the candidate would vote in particular cases or classes of cases.”<sup>195</sup> The important question is whether the 1990 revision of the announce clause sufficiently narrows the speech restrictions to be deemed constitutional. Again, analyzing past decisions is useful in trying to predict the consequences of future litigation about the commit clause.

### 1. Analyzing the Commit Clause Before *White*

As well as discussing the pledges or promises clause, in *J.C.J.D. v. R.J.C.R.*, the Kentucky Supreme Court made specific mention of the commit clause.<sup>196</sup> Although not incorporated into the Kentucky Code of Judicial Conduct, the commit clause was found meritorious by the court.<sup>197</sup> The opinion noted that the canon at issue—which included the pledges or

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192. MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(ii) (2000).

193. MCFADDEN, *supra* note 11, at 88–89.

194. *See id.* at 89.

195. *Id.*

196. *See J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953, 956 (Ky. 1991).

197. *Id.*

promises clause and the announce clause—could be narrowed to avoid constitutional concerns, as the ABA did with its Model Code when it replaced the announce clause with the commit clause.<sup>198</sup> The court reflected that the commit clause was more narrowly tailored to the interest of prohibiting campaign statements that indicate a predisposition or bias for certain parties,<sup>199</sup> interestingly using the same interpretation of impartiality used by Justice Scalia in *White*. Accordingly, although not specifically at issue in the case, the Kentucky Supreme Court indicated that it would find the commit clause to be constitutional.<sup>200</sup>

Also in 1991, a federal district court in Kentucky held the commit clause to be constitutional in *Ackerson v. Kentucky Judicial Retirement and Removal Commission*.<sup>201</sup> Ackerson, a candidate for the Kentucky Court of Appeals, challenged the provision on the grounds that *any* issue could come before the court and that the likelihood of an issue coming before the court is “difficult to ascertain or predict” by a candidate.<sup>202</sup> The court rejected Ackerson’s assertion that he should be allowed to commit himself to any issue not presently before the court for whose seat he would campaign.<sup>203</sup> Instead, the opinion emphasized that “[a] candidate may fully discuss, debate, *and commit* himself with respect to legal issues which are *unlikely* to come before the court . . . [and] may also fully discuss and debate legal issues which are *likely* to come before the court.”<sup>204</sup> Making commitments on the latter “tends to undermine the fundamental fairness and impartiality of the legal system,” giving rise to a compelling state interest. The court found that the provision was narrowly tailored to that end.<sup>205</sup>

## 2. The Commit Clause and the *White* Decision

The commit clause was not at issue in *White*. Unlike the pledges or promises provision, the commit clause is not mentioned in the Supreme Court’s opinion. The commit clause, however, is similar enough to both the announce clause and the pledges or promises clause for the *White* case to be instructional. An analysis must begin with a determination of a

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198. *Id.*

199. *Id.*

200. *Id.*

201. *Ackerson v. Ky. Judicial Ret. & Removal Comm’n*, 776 F. Supp. 309, 314–15 (W.D. Ky. 1991).

202. *Id.* at 310, 314.

203. *Id.* at 314–15.

204. *Id.* at 315 (emphasis added).

205. *Id.*

compelling state interest to be served by this proviso. As with the pledges or promises provision, the interpretation of impartiality favored by the majority is inappropriate in this context. A commitment by a candidate would most likely not be for or against a certain party, but for or against a broader issue, such as a commitment to being on the side of law enforcement. Although it seems that such a commitment is for or against a certain party, as the majority noted, “Any party taking [the contrary] position is just as likely to lose.”<sup>206</sup>

Consequently, the interpretation of impartiality meaning “openmindedness” again appears to be the interest that is served. A judge may have preconceptions on legal issues, but must be willing to consider views that are in conflict with those presumptions.<sup>207</sup> Although the majority in *White* did not determine whether this is a compelling state interest, it would be hard to find that it is not.<sup>208</sup> Allowing each litigant to have at least some chance of convincing the judge as to the merits of his or her arguments could be seen as the foundation of our adversarial system. Some judges may be more easily swayed than others, yet the possibility of changing a judge’s view should be preserved. It is the interest of the state to make sure that this occurs.

The commit clause is most likely narrowly tailored to that interest. A provision prohibiting judicial candidates from obligating themselves on issues that they will face, if elected to the bench, preserves exactly the interest of an openminded, impartial judiciary. The clause, however, is subject to criticism for being both overinclusive and underinclusive. The provision could be challenged for being overinclusive as there are numerous statements that could be made by a candidate that appear to commit the candidate and yet have no implications for the candidate’s impartiality. Further, the law’s underinclusiveness is an even greater issue. As with the majority’s analysis of the announce clause, the commit clause prohibits candidates from committing themselves only from the day they announce their candidacy to the day they are elected.<sup>209</sup> The clause would thus be “woefully underinclusive.”<sup>210</sup> On the other hand, there are other provisions, at least in the Model Code, that restrict this activity after a

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206. *Republican Party of Minn. v. White*, 536 U.S. 765, 777 (2002).

207. *See id.* at 778–80.

208. *See id.* at 778 (“It may well be that impartiality in this sense, and the appearance of it, are desirable in the judiciary, but we need not pursue that inquiry, since we do not believe the Minnesota Supreme Court adopted the announce clause for that purpose.”).

209. *See id.* at 779–80.

210. *Id.* at 780.

candidate is elected to the bench,<sup>211</sup> making the underinclusive argument less persuasive. Nevertheless, the commit clause was created as a response to the doubts as to the constitutionality of the announce clause. It was not only the response of the ABA, but of the states that adopted the change.

### 3. Implications of the *White* Decision on the Commit Clause

After the *White* decision was handed down, the Supreme Court of Pennsylvania amended its Rule 15D(3) of the Rules Governing Standards of Conduct of District Judges by changing the announce clause language to that of the commit clause.<sup>212</sup> This is the most obvious, and perhaps easiest, change for states that still have the announce clause to make. This alteration reinforces the understanding that the clause is allowed under the First Amendment.

The commit clause is constitutional in the eyes of many scholars, who have considered decisions specifically discussing the commit clause, the implications of the *White* decision, and the fact that at least one state has changed its code to include the commit clause after *White*.<sup>213</sup> The Supreme Court is the ultimate authority on the matter, and it has yet to weigh in on the issue. There is little doubt that the provision is narrowly tailored to the interest of openmindedness, so the Court would have to find openmindedness in the judiciary to be insufficiently compelling to meet the rigorous standards of strict scrutiny for the provision to be unconstitutional.

One court has agreed with this analysis and has found the commit clause to be constitutional.<sup>214</sup> In the case *In re Kinsey*, the Florida Supreme Court commented on the constitutionality of both the pledges or promises clause and the commit clause.<sup>215</sup> The case involved a county court judge who went before the Judicial Qualifications Commission (“JQC”) for numerous ethical violations that occurred during her campaign for that office.<sup>216</sup> These violations included such things as giving the impression that a judge’s role in the criminal system is to combat crime and support police officers instead of being an impartial tribunal, holding herself out to be pro-prosecution and pro-law enforcement, publicizing details of pending

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211. See MODEL CODE OF JUDICIAL CONDUCT Canons 3(B)(5) & (9), 3(E)(1) (2000).

212. See *In re* Amendment of Rule 15D(3) of the Rules Governing Standards of Conduct of District Judges, No. 137 Magisterial Docket, No. 1, Book 2 (Pa. Nov. 21, 2002), available at <http://www.courts.state.pa.us/Index/Aopc/PressReleases/137mag.pdf>.

213. *But see* Moerke, *supra* note 10, at 294 (concluding that the commit clause is most at risk to be found unconstitutional after *White*).

214. See *In re Kinsey*, 842 So. 2d 77, 87 (Fla. 2003).

215. *Id.*

216. *Id.* at 79–80.

cases, and stating that a judge should protect victims' rights.<sup>217</sup> Although the JQC made recommendations regarding the various charges, the Supreme Court of Florida had jurisdiction to review them.<sup>218</sup>

In doing so, the court considered a challenge by the judge that her campaign speech is protected by the First Amendment, where she relied on *White*.<sup>219</sup> There was no announce clause in Florida's Code of Judicial Conduct, as Florida was one of the many states to have changed its judicial canons to conform with the ABA's updated version. Florida's narrower canon includes the pledges or promises clause and the commit clause.<sup>220</sup> The Florida Supreme Court commented on these clauses, and declined to strike them down on the basis of *White*.

The court's decision succinctly stated that "[i]t is beyond dispute that Canon 7A(3)(d)(i)–(ii) serves a compelling state interest in preserving the integrity of our judiciary and maintaining the public's confidence in an impartial judiciary."<sup>221</sup> No mention was made of Justice Scalia's three interpretations of impartiality, or which one the court used in its analysis. By its language, the court was undoubtedly using strict scrutiny, as the *White* Court did with the announce clause, and found these two narrower clauses to be constitutional under such a test.<sup>222</sup> The decision further stated:

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.<sup>223</sup>

In conclusion, the court emphasized that it was specifically looking at a facial constitutional challenge of these provisions under the First Amendment, and stated that "[i]n reviewing the 'narrowly tailored' prong of the test, we conclude that the restraints are narrowly tailored to protect

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217. See *id.* at 79–84 (providing an overview of the charges and the panel's findings).

218. See *id.* at 79 (citing FLA. CONST. art. V, § 12).

219. *Id.* at 85.

220. See FLA. CODE OF JUDICIAL CONDUCT Canon 7A(3)(d)(i)–(ii) (2003); *Kinsey*, 842 So. 2d at 86–87.

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

222. *Id.*

223. *Id.*

the state's compelling interests without unnecessarily prohibiting protected speech."<sup>224</sup>

The concurring opinion by Justice Barbara Pariente confused the issues and noted:

In Florida, the Code of Judicial Conduct attempts to strike a balance between the need to inform the electorate about the qualifications of judicial candidates and the need for judges to maintain the appearance of impartiality. Indeed, since our Code was amended in 1994 to remove the "pledge and promise" clause—the very clause found to be unconstitutional in *Republican Party of Minnesota v. White*—hundreds of candidates campaigning for judgeships have successfully balanced the competing interests inherent in judicial elections.<sup>225</sup>

This statement is incorrect because the *White* decision did not invalidate the pledges or promises clause; rather, it found the announce clause to be unconstitutional, which was removed from the Florida Code. The pledges or promises provision of the Florida Code is still in effect.<sup>226</sup>

The sole justice on the Florida Supreme Court that did not agree with the majority holding was dissenter Justice Charles Wells, who noted:

[T]he JQC's findings of guilt in respect to those charges are in direct conflict with the decision of the United States Supreme Court in *Republican Party of Minnesota v. White*. While I agree with this Court's majority that the Court in *White* did not declare our Code's "pledge or promise" clause unconstitutional, I cannot read the charges for which the JQC found Judge Kinsey guilty . . . as being other than charges based upon Judge Kinsey announcing her position on these matters. The guilty findings run directly contrary to the United States Supreme Court decision by which we are bound.<sup>227</sup>

Justice Wells's dissent raises an interesting point in that perhaps any pledge or promise could be considered an announcement, and therefore, the pledge or promises clause should consequently be declared unconstitutional. Such an interpretation of the pledges or promises clause by the Supreme Court is unlikely, however, as Justice Scalia distinguished between the two clauses and asserted that the announce clause is much broader than the pledges or promises clause.<sup>228</sup>

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224. *Id.*

225. *Id.* at 94 (Pariente, J., concurring) (internal citations omitted).

226. See FLA. CODE OF JUDICIAL CONDUCT Canon 7A(3)(d)(i) (2003).

227. *Kinsey*, 842 So. 2d at 100 (Wells, J., dissenting) (internal citations omitted).

228. See *Republican Party of Minn. v. White*, 536 U.S. 765, 770 (2002).

This recent Florida case corroborates the conclusion of many courts that both the pledges or promises clause and the commit clause are constitutional. Further, this case was decided after the *White* decision, which is an important addendum to this debate. Balancing judiciary propriety and established First Amendment rights will continue to be difficult. In the case of these two provisions, however, it appears that the state interest is so compelling as to warrant an abridgement of the constitutional guarantees for judicial candidates, tipping the scales away from the First Amendment. Yet only further litigation and a grant of certiorari will settle the dispute.

## VI. POLITICAL PARTY AFFILIATION AND ACTIVITY

Twenty states with an elected judiciary have chosen to hold nonpartisan elections for at least some of their judges.<sup>229</sup> As a result, these states limit political affiliation and activity of judicial candidates. As these laws vary among states, it is worth examining the Model Code for the sake of simplicity. Canon 5 of the Model Code generally prohibits a judicial candidate from acting as a leader or holding an office in a political organization, making speeches on behalf of a political organization, attending political gatherings, soliciting funds for or making a contribution to a political organization or candidate, or purchasing tickets for political party dinners or other functions.<sup>230</sup> The commentary to this section of the Model Code states only that “[a] judge or candidate for judicial office retains the right to participate in the political process as a voter.”<sup>231</sup> To clarify, it is worth mentioning that this part discusses the limitations of political activity only for judicial candidates. A distinction exists between restrictions promulgated by states on the speech of political parties and their members, and laws limiting the speech of candidates for judicial office. The Supreme Court and lower courts have handed down decisions that give direction as to the former,<sup>232</sup> but there is little guidance to be found on the latter issue—the issue to be explored here.

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229. See AM. JUDICATURE SOC’Y, *supra* note 1. These states include Arizona, Arkansas, California, Florida, Georgia, Idaho, Indiana, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Washington, and Wisconsin. See *id.* This part analyzes restrictions on political activity and party affiliation for judicial candidates in nonpartisan states.

230. See MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(1)(a), (c)–(e) (2000).

231. *Id.* Canon 5(A)(1) cmt.

232. See *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 229 (1989) (holding that a ban on political parties’ endorsing candidates in primaries burdened their free speech and free association rights, as no compelling interest was shown); *Cal. Democratic Party v. Lungren*, 919

Important justifications exist for this separation of judicial candidates from partisan politics. This separation “helps to prevent bias or the appearance of bias in favor of members of the judge’s political party, or against members of rival parties.”<sup>233</sup> This separation also “helps to prevent bias or the appearance of bias in the judge’s decision of particular cases that involve party positions.”<sup>234</sup> Finally, it “helps to promote judicial independence by helping to ensure that the judges owe their jobs to no one but the general electorate.”<sup>235</sup> Under strict scrutiny, however, the state interest must be compelling, not just persuasive.

#### A. ANALYZING POLITICAL PARTY AFFILIATION CLAUSES BEFORE *WHITE*

The Supreme Court of Washington briefly considered the matter of political party affiliation in the case *In re Kaiser*.<sup>236</sup> A candidate had sent out a letter that did not directly state that he was a Democrat, but instead stated that his family had been lifelong Democrats and that the candidate himself had gone door to door for Democrats in the past.<sup>237</sup> Although much of the opinion dealt with the “as applied” propriety of the provision banning a candidate from identifying membership in a political party, the court did make a determination regarding the clause’s facial constitutionality.<sup>238</sup> The court held that statements of party affiliation do not refer to the qualifications of the candidate, and therefore, are not protected by the First Amendment.<sup>239</sup> Such statements “fall[] squarely within a prohibition of the Canons and [have] a directly detrimental effect on the compelling state interest of preserving the integrity of the judiciary.”<sup>240</sup> Accordingly, the provisions banning party affiliation are considered constitutional in Washington State.<sup>241</sup>

#### B. POLITICAL PARTY AFFILIATION CLAUSES AND THE *WHITE* DECISION

In the suit that led to *Republican Party of Minnesota v. White*, plaintiff Gregory Wersal challenged three provisions regarding political party

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F. Supp. 1397, 1398–99 (N.D. Cal. 1996) (holding unconstitutional a state prohibition of party endorsements of candidates for nonpartisan office).

233. MCFADDEN, *supra* note 11, at 99.

234. *Id.*

235. *Id.*

236. *In re Kaiser*, 759 P.2d 392 (Wash. 1988).

237. *See id.* at 394.

238. *See id.* at 396–400.

239. *See id.* at 400.

240. *Id.*

241. *See id.*

affiliation.<sup>242</sup> In addition to the announce clause, Wersal challenged a prohibition against judicial candidates identifying their political party; a clause that banned seeking, accepting, or using political party endorsements; and a passage forbidding the candidate, the candidate's family, and others acting on the candidate's behalf from attending or speaking at political gatherings.<sup>243</sup>

Although the Supreme Court refused to grant certiorari on this issue, or any other issue besides that of the announce clause,<sup>244</sup> the district court responded to these claims by the plaintiff at length. The opinion first discussed the position of the defendant Judicial Board, which is important to note in light of Justice Scalia's later narrowing of the interests of the state. The Board set forth three interests it deemed compelling, and believed the clause was narrowly tailored to serve

preventing bias or [an] appearance of bias in favor of the judge's political party or against members of a rival party; preventing bias or the appearance of bias in [a] judge's decisions of particular cases that involve party positions; [and] promoting judicial independence by helping to ensure judges owe their jobs to no one but the general electorate.<sup>245</sup>

The first interest noted is within Justice Scalia's most favored interpretation of "impartiality," as set forth in *White*, and would thus be deemed compelling by the Supreme Court. The second interest was not discussed or implied in *White*. As for the third interest, Wersal argued that because Minnesota chose to elect its judges, it did not have an independent judiciary. In response, the court noted that this was an argument that was emphatically struck down by the Third Circuit in *Stretton*.<sup>246</sup>

The district court then wrote that Minnesota precedent has held that the public's confidence in the integrity of its judges and acceptance of judicial decisions is central to the legal system.<sup>247</sup> The court further stated

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242. *Republican Party of Minn. v. Kelly*, 63 F. Supp. 2d 967, 974 (D. Minn. 1999). The named petitioner is the Republican Party of Minnesota because of this provision. The arguments by the third parties that the provisions are unconstitutional as unduly burdening their First Amendment rights are not at issue in this Note, as mentioned above.

243. *See id.*

244. *See Republican Party of Minn. v. Kelly*, 534 U.S. 1054, 1054 (2001).

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

246. *See id.* (quoting *Stretton v. Disciplinary Bd. of the Supreme Court*, 944 F.2d 137, 142 (3d Cir. 1991)). In addition, the Eighth Circuit and Justice Ginsburg later disagreed with this argument. *See Republican Party of Minn. v. White*, 536 U.S. 765, 805-06 (2002) (Ginsburg, J., dissenting); *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 865-67 (8th Cir. 2001).

247. *Kelly*, 63 F. Supp. 2d at 980 (quoting *Complaint Concerning Winton*, 350 N.W.2d 337, 340 (Minn. 1984)).

that when a judge or judicial candidate participates in political activity, it creates a potential for conflicts of interest.<sup>248</sup> In conclusion, the court ruled that the State of Minnesota did indeed have a compelling interest in maintaining the actual and apparent impartiality and independence of the judiciary. Without much analysis, the court then held the provisions to be narrowly tailored to serve that interest.<sup>249</sup> Having applied the strict scrutiny test, the district court found the Minnesota law to be constitutional.<sup>250</sup>

The Court of Appeals for the Eighth Circuit also addressed this particular issue. As with the other clauses, the court found there to be a compelling state interest of independence and impartiality of the judiciary. The court's analysis focused on whether these restraints protect that interest.<sup>251</sup> The opinion noted that the Supreme Court held in a slightly different context that "partisanship of governmental officials created a risk of corruption that justified the restraint of those officials' partisan activities."<sup>252</sup> The court distinguished between different types of campaigns and found that, although partisanship is central to executive and legislative campaigns, a state may prohibit partisanship in judicial campaigns because of the nature of the judicial function.<sup>253</sup> Minnesota's laws affecting political party affiliation by judicial candidates were found to be narrowly tailored and constitutional under the strict scrutiny test.<sup>254</sup>

The state interest served by bans on party affiliation is the interest reflected in Justice Scalia's favored interpretation of impartiality, a "lack of bias for or against either party to the proceeding."<sup>255</sup> Another possible interest is the independence of the state judiciary; however, Justice Scalia does not mention this interest in *White*, and, as a result, it is assumed here that impartiality should be used. Again, Justice Scalia's words preclude finding this clause narrowly tailored. The party affiliation clauses do not "restrict speech for or against particular parties, but rather speech for or against particular issues."<sup>256</sup> This means that *any* litigant subscribing to a position contrary to the judge's, and his or her political party in this context, would be just as likely to lose. According to Justice Scalia, a

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248. *Id.*

249. *Id.*

250. *Id.*

251. *See Kelly*, 247 F.3d at 864, 868–72.

252. *Id.* at 868 (citing with approval *United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 563–64 (1973)).

253. *Id.* at 862.

254. *See id.* at 872–75.

255. *Republican Party of Minn. v. White*, 536 U.S. 765, 775 (2002) (emphasis omitted).

256. *Id.* at 776.

judge who had previously announced his or her view on an issue will be biased against *any* party asserting the opposite position.<sup>257</sup> As for the question of whether the State has an interest in an independent judiciary, and whether that interest is compelling and whether the provisions serving that interest are narrowly tailored, an examination must be made of a recent case in New York.<sup>258</sup>

### C. POLITICAL PARTY AFFILIATION CLAUSES AFTER *WHITE*

A federal district court decided a case post-*White* in regard to the constitutionality of New York's rules disallowing political activity.<sup>259</sup> In *Spargo v. N.Y. State Commission on Judicial Conduct*, the defendants asserted an *independent* judiciary as a compelling state interest and distinguished this interest from an impartial judiciary, as was asserted in *White*.<sup>260</sup> The plaintiff conceded that it was a compelling state interest, and the court determined the meaning of "independence" in this context.<sup>261</sup> The court first turned to *Black's Law Dictionary* and found the word to have three meanings, including "[n]ot subject to control or influence of another," "[n]ot associated with another (often larger) entity," and "[n]ot dependent or contingent on something else."<sup>262</sup> The court also looked to the Preamble to the New York Judicial Rules, which commands that "the Rules 'be construed so as not to impinge on the essential independence of judges in making judicial decisions.'"<sup>263</sup> The court found this language to indicate the first meaning set out by *Black's Law Dictionary* above and rejected the argument that the other two meanings were applicable here.<sup>264</sup> The court concluded that there is indeed a compelling state interest in the maintenance of an independent judiciary, "that is, the ability of judges to make their decisions free of the control or influence of other persons or entities."<sup>265</sup>

The court then turned to whether the New York provisions concerning political activity were narrowly tailored to serve that end. The plaintiff challenged many provisions covering a variety of political activity. The district court summarized these rules as essentially "prohibit[ing] judges

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257. *Id.* at 776-77.

258. *Spargo v. N.Y. State Comm'n on Judicial Conduct*, 244 F. Supp. 2d 72, 87 (N.D.N.Y. 2003).

259. *See id.*

260. *Id.*

261. *See id.* at 87-88.

262. *Id.* at 87 (quoting *BLACK'S LAW DICTIONARY* 774 (7th ed. 1999) (alteration in original)).

263. *Id.* (quoting N.Y. JUD. LAW, CODE OF JUDICIAL CONDUCT Preamble (McKinney 2003)).

264. *See id.* at 87-88.

265. *Id.* at 88.

and judicial candidates from [engaging in] any political activity except their own judicial campaign.”<sup>266</sup> The court found that these provisions were not narrowly tailored<sup>267</sup> and that the “only conceivable connection [to the state interest] would be that engaging in political activity . . . would influence a judge’s decision toward or against the view espoused, whether it be on an issue of law or as to a party to a proceeding.”<sup>268</sup> The prevention of bias through this means did not save the various rules and had only an “attenuated connection” to the compelling state interest.<sup>269</sup>

The court went on to state that the prohibitions embodied in these clauses were even broader than the announce clause’s prohibition of views on legal or political issues at issue in *White*.<sup>270</sup> Furthermore, the court held, even if a judge is biased for or against a party, the correct remedy is recusal, not a preemptive ban on all political activity outside of the candidate’s own campaign.<sup>271</sup> The court did not accept an argument that a long-established tradition existed of prohibiting this kind of activity for judges and judicial candidates, and it rejected the plaintiff’s contention that New York was an exception to the Supreme Court’s conclusion in *White*, that codes of judicial conduct did not develop until the second half of the twentieth century.<sup>272</sup> The court reminded the plaintiff that the Model Code was promulgated by the ABA in 1972, hardly establishing a long and heralded tradition that should be followed.<sup>273</sup> Consequently, the provisions banning political activity by judicial candidates were found to be unconstitutional by the district court in New York.<sup>274</sup>

The Supreme Court of Maine came to the opposite conclusion in a case decided after *White*. In the case *In re Dunleavy*, a judge solicited 150 five-dollar contributions for his campaign for the state senate, which were gathered to qualify for certain public funding under Maine law.<sup>275</sup> The sitting judge argued that because this money did not go to any specific candidate or party, and instead was collected for the Maine Clean Elections Fund, he did not violate the provision.<sup>276</sup> The judge also contested the

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266. *Id.*

267. *See id.* at 89.

268. *Id.* at 88.

269. *See id.*

270. *Id.*

271. *Id.*

272. *Id.* at 89.

273. *See id.* at 89–90.

274. *Id.* at 92.

275. *In re Dunleavy*, 2003 Me. LEXIS 138, \*2 (Me. 2003).

276. *Id.* at \*22–23. Canon 5(A)(1)(e) states that “a judge shall not ‘solicit funds for, pay an assessment to, or make a contribution to a political organization or candidate, or purchase tickets for

law's constitutionality, relying on *White, Weaver v. Bonner*,<sup>277</sup> and *Spargo*.<sup>278</sup> The court's decision began by noting that both *White* and *Weaver* concerned restrictions on judicial candidates in states that elect their judges, whereas Maine does not do so.<sup>279</sup> Specifically noting Justice Scalia's favored meaning of impartiality, the court found a compelling state interest and held that the provision was narrowly tailored to meet that interest, especially because the provision in Maine restricts only sitting judges, not judicial candidates, from soliciting money.<sup>280</sup> The decision also distinguished *Spargo*, as the provision in that case was a broad restriction on all political activity for sitting judges, as well as judicial candidates, unlike the narrowly tailored law at issue here.<sup>281</sup>

This leaves the debate with no ready solution. On the one hand, it would seem that the preservation of the impartiality of the judiciary as a general matter is strictly served by commonly used provisions, at least according to the Supreme Court of Washington and the Court of Appeals for the Eighth Circuit. Yet Justice Scalia's narrow interpretation of this compelling interest puts such analysis and conclusion in doubt. The interpretation of impartiality that he confirmed as compelling indicates that the laws are not narrowly drawn to preserve it, thus implying their unconstitutionality. In addition, the New York district court utilized an innovative interest of an "independent judiciary" to find such a law unconstitutional. In regard to these provisions, the balancing act seems to weigh in favor of the First Amendment. One thing is certain: The asserted state interest will impact the outcome of any constitutional challenge when a determination is made as to how tightly drawn the means are to the end.

## VII. PERSONAL SOLICITATION OF CAMPAIGN FUNDS

Most states that have an elected judiciary prohibit a judicial candidate from soliciting campaign funds personally, and instead allow candidates to solicit campaign funds only through a campaign committee.<sup>282</sup> As the reporter to the Model Code wrote, "The problem of funding a campaign for

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political party dinners or other functions.'" *Id.* at \*1 n.2 (quoting ME. CODE OF JUD. CONDUCT Canon 5(A)(1)(e) (2000)).

277. *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002).

278. *In re Dunleavy*, 2003 Me. LEXIS 138, at \*27-31.

279. *Id.* at \*28. Maine only elects its probate judges, of which the candidate in *Dunleavy* was not one. *Id.* at \*27 n.20.

280. *Id.* at \*31.

281. *Id.* at \*31 n.24.

282. See MODEL CODE OF JUDICIAL CONDUCT Canon 5C(2) (2000); MCFADDEN, *supra* note 11, at 31.

judicial office probably presents the greatest of all conflicts between political necessity and judicial impartiality.”<sup>283</sup> Yet judicial campaigns are increasingly spending more money, and the increase in spending requires increased solicitation of funds.<sup>284</sup> This leads to legitimate concerns about the impartiality of judicial candidates, and explains why, at least in part, the ABA supports the merit selection of judges.<sup>285</sup> Initially, it must be noted that the Supreme Court has previously declared that campaign financing comes within the scope of the First Amendment, and seeking donations for a campaign is considered to be speech and political expression under that Amendment.<sup>286</sup> Courts have analyzed the conflict over whether judicial impartiality or protected speech should prevail in judges’ personal campaign solicitations.

#### A. THE PERSONAL SOLICITATION BAN PRIOR TO *WHITE*

The Supreme Court of Oregon examined this issue in 1990. In the case *In re Fadeley*,<sup>287</sup> the petitioner admitted that he had personally solicited funds, but argued that the canon at issue interfered with his protected political speech under the U.S. Constitution.<sup>288</sup> After noting that the state does have an interest in maintaining the integrity of the judiciary and the appearance of it, the court discussed whether the provision was narrowly tailored to that end.<sup>289</sup> The court wrote that contributions from lawyers to judicial candidates are too important to be forbidden outright, but “the spectacle of lawyers or potential litigants directly handing over money to judicial candidates should be avoided if the public is to have faith in the impartiality of its judiciary.”<sup>290</sup> Thus, a less obtrusive means of collecting money was necessary, and the provision allowing for a committee to do so fulfilled that purpose.<sup>291</sup> The court also reminded the petitioner that the provision forbade only personal solicitation, and that he

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283. E. WAYNE THODE, REPORTER’S NOTES TO CODE OF JUDICIAL CONDUCT 98 (1973).

284. See MCFADDEN, *supra* note 11, at 25–26.

285. See MODEL CODE OF JUDICIAL CONDUCT Canon 5C(2) cmt.; STANDING COMM. ON JUDICIAL INDEPENDENCE, *supra* note 33, at 1.

286. See *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 493 (1985) (“There can be no doubt that the [campaign] expenditures at issue in this case produce speech at the core of the First Amendment.”); *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (holding that limits or ceilings on individual campaign expenditures unconstitutionally burden First Amendment rights).

287. *In re Fadeley*, 802 P.2d 31 (Or. 1990).

288. See *id.* at 33–34, 41.

289. See *id.* at 41.

290. *Id.*

291. *Id.*

was “free to urge his candidacy on anyone in any other way.”<sup>292</sup> Consequently, the court concluded that the provision was constitutional, and stated:

The degree of interference with the First Amendment rights of the judicial candidate is minimal, the state’s interest in protecting the integrity of its judiciary is profound, and the means chosen to carry out the state’s purpose are the least intrusive possible if there is to be any chance to achieve the desired aim.<sup>293</sup>

The personal solicitation ban was also addressed by the Court of Appeals for the Third Circuit in 1991 in *Stretton v. Disciplinary Board of the Supreme Court*.<sup>294</sup> Initially, the court noted that “as a practical matter, so long as a state chooses to select its judges by popular election, it must condone to some extent the collection and expenditure of money for campaigns. Unquestionably, that practice invites abuses that are inconsistent with the ideals of an impartial and incorruptible judiciary.”<sup>295</sup> The candidate argued that because he can indirectly participate in soliciting campaign funds, can learn the names of those who have contributed, can learn the amount contributed by each person, and can let them know the donation is appreciated under the Pennsylvania law, there seemed to be very little served by not personally allowing a candidate to solicit funds.<sup>296</sup> Although the court thought this argument was reasonable, it further stated, “Nevertheless, we cannot say that the state may not draw a line at the point where the coercive effect, or its appearance, is at its most intense—personal solicitation by the candidate.”<sup>297</sup> As such, the court found that, although permissive, the Pennsylvania provision was narrowly tailored to serve a compelling state interest, and thus, was constitutional.<sup>298</sup>

#### B. THE PERSONAL SOLICITATION BAN AND THE *WHITE* DECISION

In *White*, the plaintiff Wersal also asserted in the district court that Canon 5(B)(2), which banned judicial candidates from personally soliciting campaign contributions, violated his right to freedom of speech.<sup>299</sup> Again, although not taken up on a writ of certiorari, the lower courts analyzed this challenge in detail. The proffered state interests asserted by the defendants

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292. *Id.* at 44.

293. *Id.*

294. *Stretton v. Disciplinary Bd. of the Supreme Court*, 944 F.2d 137, 144–46 (3d Cir. 1991).

295. *Id.* at 144 (citing *THODE*, *supra* 283, at 98).

296. *See id.* at 145.

297. *Id.* at 146.

298. *Id.*

299. *Republican Party of Minn. v. Kelly*, 63 F. Supp. 2d 967, 974 (D. Minn. 1999).

included “avoiding ‘unfair pressure on the solicited, potential pressures on the judge to show favoritism, and the appearance of corruption.’”<sup>300</sup> Wersal did not contest that these were compelling interests; instead, he argued that the law was not narrowly tailored to those interests, as other provisions in the Code adequately prevented the undue influence of money on candidates.<sup>301</sup> The court ruled that there was indeed a compelling state interest in preventing undue influence and the appearance of it, and that the law was narrowly tailored to this interest.<sup>302</sup>

The Court of Appeals for the Eighth Circuit agreed. The court held that this provision was necessary, as judges, in particular, risk the appearance that campaign contributors can impermissibly influence the decisionmaking process.<sup>303</sup> The provision prevented this appearance of impropriety.<sup>304</sup> The law struck a balance between the necessity of raising funds during campaigns and the appearance of impropriety by insulating judicial candidates from the direct receipt of funds.<sup>305</sup> The court consequently held this provision to be narrowly tailored to serve a compelling state interest, and, as such, constitutional.<sup>306</sup>

Justice O’Connor did not determine the constitutionality of this provision, yet expressed concern in her concurring opinion in the *White* decision about the propriety of judicial elections as a general matter.<sup>307</sup> Her concurrence asserted that “contested elections generally entail campaigning,”<sup>308</sup> and stated:

Unless the pool of judicial candidates is limited to those wealthy enough to independently fund their campaigns, a limitation unrelated to judicial skill, the cost of campaigning requires judicial candidates to engage in fundraising. Yet relying on campaign donations may leave judges feeling indebted to certain parties or interest groups. Even if judges were able to refrain from favoring donors, the mere possibility that judges’ decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public’s confidence in the judiciary.<sup>309</sup>

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300. *Id.* at 982.

301. *Id.* at 982–83.

302. *Id.* at 983.

303. *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 883 (8th Cir. 2001).

304. *See id.* at 883–84.

305. *See id.* at 884.

306. *Id.* at 885.

307. *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002) (O’Connor, J., concurring).

308. *Id.* at 789 (O’Connor, J., concurring).

309. *Id.* at 789–90 (O’Connor, J., concurring) (internal citations omitted).

### C. THE IMPLICATIONS OF THE *WHITE* DECISION ON THE PERSONAL SOLICITATION BAN

With direction from lower courts and the associated thoughts of Justice O'Connor, this section will analyze the constitutionality of the personal solicitation ban in light of *White*. The analysis of the personal solicitation ban begins with the identification of the compelling state interest from *White*: "the lack of bias for or against either party to the proceeding."<sup>310</sup> The personal solicitation ban serves this interest. The provision is directly concerned with bias regarding parties who have contributed to a judge's campaign and appear before that judge. The interest of preserving the independence of the judiciary is also a legitimate incentive behind such a clause, even though the *White* decision did not specifically examine such an interest. With these two interests in mind, one of which is decidedly compelling and the other that prospectively appears to be, the analysis turns to the fit between the means and the end.

The personal solicitation prohibition is narrowly tailored to both state interests. The ban bars judges from personally handling funds that are donated by lawyers in the community.<sup>311</sup> The general perception of judges would not allow for such a transaction, from a lawyer's hand to a judge's pocket, to take place. As the Eighth Circuit asserted in *Republican Party of Minnesota v. Kelly*, this restriction is narrowly tailored in that instead of disallowing candidates to accept contributions entirely, the law insulates the candidate from direct receipt of such monies.<sup>312</sup> It therefore strikes a balance between the realities of campaigns and the appearance of propriety on the bench. The same argument is true if the interest is preserving the independence of the judiciary. For lawyers to hand judges a check most certainly puts the independence of the judiciary in doubt, both in the eyes of the public and in reality. A committee as the middleperson is a moderate and reasonable resolution.

At least one court has disagreed with this reasoning and determination. The Court of Appeals for the Eleventh Circuit took up a case post-*White* dealing with this issue in particular, if in an unorthodox way. In *Weaver v. Bonner*,<sup>313</sup> the petitioner was a candidate for election to the Georgia

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310. *Id.* at 775 (emphasis omitted).

311. MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(1)(e) (2000) (stating that a judge or judicial candidate shall not "solicit funds for, pay an assessment to or make a contribution to a political organization or candidate, or purchase tickets for political party dinners or other functions").

312. *See* *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 884 (8th Cir. 2001).

313. *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002).

Supreme Court. He distributed literature that characterized the incumbent opponent's positions on same-sex marriage, traditional moral standards, and the electric chair.<sup>314</sup> The JQC found him in violation of a provision of the Georgia Code of Judicial Conduct that prohibited him from making negligent false statements and misleading or deceptive true statements.<sup>315</sup> The Georgia Code contained another provision, Canon 7(B)(2), which prohibited the personal solicitation of campaign funds but allowed for the establishment of an election committee to do the solicitations.<sup>316</sup> Although Weaver was not found in violation of this clause, he challenged the constitutionality of it in his suit, along with the provision that he did violate.<sup>317</sup>

The appellate court agreed to hear the case and addressed the personal solicitation clause at length. The court first noted that the personal solicitation provision "completely chilled [a candidate] from speaking to potential contributors and endorsers about their potential contributions and endorsements."<sup>318</sup> The court found that Canon 7(B)(2) failed the strict scrutiny test because it was not narrowly tailored to serve Georgia's compelling state interest of judicial impartiality.<sup>319</sup> The court subscribed to an argument, which has been criticized by other courts, that those impartiality concerns, if there are any, come about because of Georgia's decision to elect judges. The electoral process necessarily entails candidates raising campaign funds.<sup>320</sup> Yet that does not inherently mean that those candidates will be biased if elected. Even if that were so, Canon 7(B)(2) does not protect the state judiciary from this potential threat.<sup>321</sup> Furthermore, "[s]uccessful candidates will feel beholden to the people who

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314. *Id.* at 1316.

315. *See id.* at 1316–17. Canon 7(B)(1)(d) in the Georgia Code of Judicial Conduct prohibits candidates from making false, fraudulent, or misleading representations. *Id.* It must be noted that this provision and its parallels in other state codes are not taken up in this Note. It is of interest, however, that the Court of Appeals for the Eleventh Circuit in this case held the Georgia provision to be unconstitutional as written. *See Weaver*, 309 F.3d at 1316–17. *See also* *Butler v. Ala. Judicial Inquiry Comm'n*, 802 So. 2d 207, 215 (Ala. 2001) (holding a similar statute in Alabama to be unconstitutional); *In re Chmura*, 608 N.W.2d 31, 43 (Mich. 2000) (holding a similar statute in Michigan to be unconstitutional). For some background reading, see generally Adam R. Long, Note, *Keeping Mud Off the Bench: The First Amendment and Regulation of Candidates' False or Misleading Statements in Judicial Elections*, 51 DUKE L.J. 787, 807–16 (2001).

316. *See* GA. CODE OF JUDICIAL CONDUCT Canon 7(B)(2) (2000).

317. *See Weaver*, 309 F.3d at 1317.

318. *Id.* at 1322.

319. *Id.* at 1322–23.

320. *See id.* at 1322.

321. *See id.* at 1322–23.

helped them get elected regardless of who did the soliciting of support.”<sup>322</sup> The decision of the court was that there is a compelling reason, yet the provision does not advance it at all and so impermissibly burdens political speech.<sup>323</sup>

Although it would seem that the *White* decision would lead to the conclusion that the personal solicitation ban is constitutional, the Eleventh Circuit found otherwise. The Eleventh Circuit opinion, however, utilized a much-criticized argument to achieve that end and relied very little on the precedent of *White*. A closer reading of *White* seems to lead to the opposite determination, yet only a future decision by the Supreme Court will resolve the discrepancy.

### VIII. CONCLUSION

It has been suggested that the Supreme Court took the *White* case because judicial elections are becoming more like other elections, and “the bench is increasingly viewed as a political participant.”<sup>324</sup> Whatever the Court’s reasons for accepting this case, its decision will most certainly generate more challenges to the various laws burdening judicial candidates. The *White* decision found the announce clause to be impermissibly broad and restrictive of the free speech rights of candidates. Yet the Court did not deny that the state has a compelling interest in the impartiality of the judiciary, merely that such an interest is more limited than had been previously thought.

With that newly constricted state interest in mind, other state provisions that limit the speech of candidates during judicial elections must be analyzed. In light of precedent and the reasoning employed in *White*, it is likely that most of these laws will survive strict scrutiny analysis, and judicial candidates will remain, for the most part, encased in the protective armor of the judicial codes. The pledges or promises clause, the commit clause, and the ban on personal solicitation of money by the candidates were enacted to serve a compelling state interest. Furthermore, the provisions are narrowly drawn to maintain such an interest. The *White* decision will likely have a greater impact on the narrower announce clauses and the restrictions on the political party affiliations of candidates. These provisions unduly burden the free speech rights of candidates without being sufficiently tailored to the interest of the state.

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322. *Id.* at 1323.

323. *See id.* at 1322–23.

324. Baran, *supra* note 120, at 13.

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The future of these laws is anything but certain. The decision in *White* has resolved some questions while creating entirely new ones. With almost four-fifths of states electing their judges in some capacity and the laws restricting judicial speech being as varied as the number of states, future litigation is unavoidable. Such litigation will ideally lead to a clear determination about the extent to which constitutional freedoms should be suspended for those who decide to run for judicial office.

