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WALK BEFORE THEY MAKE US RUN: *Republican Party of Minnesota v. White* AND THE NEED FOR JUDICIAL REFORM IN MISSISSIPPI

*David Neil McCarty**

I. INTRODUCTION

Over thirty-one states in the United States, including Mississippi, elect their judges.[1] What judges and judicial candidates may and may not say as they campaign has grown into a frustrating creature for the candidates and their campaigns to tame as they attempt to breach the bench; it's equally frustrating for many citizens who struggle to find a candidate that represents them and their beliefs. An obvious tension arises between the democratic nature of an election and the ethics problems raised by a judicial candidate—who is, of course, alleged by legend and case law to be impartial to all parties and respectful of *stare decisis*.

Like many other states, Minnesota adopted a plan to preserve the integrity of their judiciary: they prohibited judicial candidates from announcing their views on particular issues.[2] The United States Supreme Court dismantled their so-called "announce clause" in *Republican Party of Minnesota v. White*, where it was determined that the First Amendment trumped the Minnesota law.[3] This Note will examine the particular speech at issue, the history of the case in the courts below, and the competing interests of democracy, the First Amendment, and ethics the Court struggled with in levying its opinion. The Analysis will examine the potential fallout on Mississippi's judicial elections that *White* will have and the future shape that the courts of Mississippi should take.

II. FACTS AND PROCEDURAL HISTORY

Gregory Wersal had his fill of the Minnesota Supreme Court. A strong student, he gained an undergraduate degree from St. John's University *summa cum laude*; after being graduated *cum laude* from the University of Minnesota Law School, he was admitted to the Minnesota Bar at the relatively young age of twenty-four.[4] Unhappy with recent decisions issued from the state's highest court, he decided to campaign for associate justice of the Supreme Court of Minnesota in 1996, idealistically titling his effort "the Campaign for Justice."[5] Wersal ran into trouble almost immediately. Minnesota judicial elections are governed by a series of regulations "promulgated by the Minnesota Supreme Court."[6] The so-called "announce clause" of Canon 5 of the Code of Judicial

* The author gratefully acknowledges the influence of the Hon. Frank G. Vollor, the epitome of the democratically- elected judge, and Louis F. Coleman, the epitome of the judicial candidate. Indispensable in the writing of this Note was the support and encouragement of Dr. Mark Modak-Truran and Melody I. McAnally.

1. Republican Party of Minn. v. White, 536 U.S. 765, 786 (2002).
2. *Id.* at 768.
3. *Id.* at 788.
4. Petitioner Wersal's Brief at 3, Republican Party of Minn. v. White, 536 U.S. 765 (2002) (No. 01-521).
5. Republican Party of Minn. v. Kelly, 996 F. Supp. 875, 876 (D. Minn. 1998).
6. *White*, 536 U.S. at 768.

Conduct demands that a candidate for office "shall not . . announce his or her views on disputed legal or political issues."[7] The next six years of Wersal's life would not be spent on the bench of the highest court in his home state, but in a far-ranging battle over the eleven words in the announce clause.

Wersal actively campaigned against the actions of the Minnesota Supreme Court, decrying its decisions in allowing indigent women access to abortions and alleging that they were lenient on criminals.[8] He alleged that he was "in favor of strict construction of the Constitution," with campaign literature proffering that he "believe[d] we need judges who will strictly construe the Constitution and who will not legislate from the bench."[9] Campaign literature also argued that the justices of the state supreme court were "'marked by their disregard for the Legislature and lack of common sense.'"[10]

During the 1996 campaign "Wersal, his wife Cheryl, and members of his campaign committee spoke at Republican Party gatherings."[11] In May of that year, "a delegate to a Republican district convention filed an ethical complaint against Wersal with the Office of Lawyers Professional Responsibility," apparently unnerved with his criticism of state supreme court decisions and suspecting an infringement of the announce clause of Canon 5.[12] It was dismissed by the Director of the Minnesota Lawyers Professional Responsibility Board, whose mission is to "investigate[] and prosecute[] ethical violations of lawyer candidates for judicial office."[13]

There were "doubts about the applicability of the announce clause to Wersal's campaign statements," and even a general doubt "whether the clause was enforceable."[14] Wersal was greatly shaken despite the complete dismissal of the complaint and "withdrew his candidacy for the 1996 race, fearing that further ethical complaints would jeopardize his ability to practice law."[15]

Fright proved fleeting, and Wersal announced only months later that he was running for the bench again in the 1998 elections.[16] He began campaigning in

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7. MINN. CODE OF JUD. CONDUCT, Canon 5(A)(3)(d)(i) (2000). The beginning text of Canon 5(A)(3)(d)(1) provides that a candidate may not "make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office." This "pledges or promises" clause was not challenged in the suit and the Supreme Court did not rule on it. *See White*, 536 U.S. at 770.

8. Petitioner Wersal's Brief at 7. *See* Doe v. Gomez, 542 N.W. 2d 17 (Minn. 1995) (declaring unconstitutional provisions that restricted abortions); State v. Scales, 518 N.W. 2d 587 (Minn. 1994) (declaring that statements made in a custodial interrogation must be electronically recorded or may be suppressed).

9. Petitioner Wersal's Brief at 7.

10. Republican Party of Minn. v. Kelly, 247 F. 3d 854, 858 (8th Cir. 2001).

11. *Id.*

12. *Id.* The complainant also was suspicious of Wersal's presence at Republican Party meetings and solicitation of partisan support; as the Supreme Court did not concern itself with these issues, they are ignored by this Note.

13. *Id.* It is worth mentioning at this point the name change that occurs midway through the case's evolution. Plaintiff Wersal was always named below the Republican Party of Minnesota. The parties wished for declaratory and injunctive relief at the district court level to determine if they could endorse a judicial candidate. The other named parties, Verna Kelly and her successor Suzanne White, acted at various times as the Chairperson of the Minnesota Board of Judicial Standards.

14. *Id.* at 859.

15. *Id.*

16. *Kelly*, 247 F. 3d at 859.

much the same manner as his aborted 1996 effort.[17] "In February 1998, Wersal sought an advisory opinion from the Lawyers Board," attempting to ascertain if "the Board would enforce the provision of Canon 5 restricting candidates from announcing their views on disputed issues."[18] Since he did not detail exactly what views he wished to announce, "the Board could not advise him on the [announce clause] question."[19] The Director of the Board also candidly allowed that she was not sure the announce clause did not violate the First Amendment and "would not enforce the provision unless the speech at issue violated other portions of the judicial ethics code."[20]

A. The District Court

"A few days after he received th[e] advisory opinion, Wersal filed [a] complaint . . . seeking declaratory and injunctive relief from the provisions of Canon 5," and started down the complicated path towards the Supreme Court.[21] In this motion in Minnesota Federal court for either a temporary or preliminary injunction, Wersal argued that the announce clause violated his right to freedom of speech.[22] Weighing the factors considered when granting injunctive relief, the trial court held Wersal had a likelihood of success on the merits of his claim, after having "reviewed the law . . . and *at this time*, find[ing] that those cases holding the 'announce' rule unconstitutionally overbroad are more persuasive."[23] That was the only aspect of the claim the court viewed favorably; Wersal's motion for relief was denied, as the court worried that "no backup rules exist which would protect the state's compelling interests" in having "an independent and impartial judiciary."[24] "With no regulations in place," the trial court reasoned, "judicial candidates will be given the opportunity to essentially turn the non-partisan judicial election process into a partisan one."[25] The trial court issued a much more substantial amended opinion the following year.[26] While the holding was the same as before, the reasoning was clearer: that "[j]udges are or should be elected to interpret the law as they find it without fear or favor."[27] If they were biased, then "the very fount of democracy" would be poisoned.[28] So while endorsing Minnesota's election of judges, the court also found that candidate speech could be greatly restricted while campaigning, since they could still

17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Kelly*, 996 F. Supp. at 878. Wersal also alleged other injuries that were not considered past the Eighth Circuit, including injuries to his right of association, infringement on equal protection, and violation of freedom of speech beyond that of the announce clause.
23. *Id.* at 879.
24. *Id.* at 880.
25. *Id.*
26. Republican Party of Minn. v. Kelly, 63 F. Supp. 2d 967 (D. Minn. 1999).
27. *Id.* at 977 (quoting Moon v. Halverson, 228 N.W. 579, 581-82 (Minn. 1939) (Loring, J., concurring)).
28. *Id.*

"discuss[] or stat[e] their views as to matters relating to judicial organization and administration, or to other issues involving the character of candidates, their background and experience."[29] The district court also dismissed the idea, not raised at the Court of Appeals or Supreme Court, that "there [was] no case or controversy before the Court," since the Board had "not enforced the [announce] clause and d[id] not intend to do so unless the Court f[ound] the clause constitutional."[30]

B. The Eighth Circuit

The case was appealed to the Eight Circuit, which rendered a towering opinion (and a dissent) in 2001.[31] Judge Gibson wrote for the three-judge panel and the court, affirming the lower court's dismissal of Wersal's claim.[32] The Court dissected the free speech issue at length, noting that "[f]reedom of speech reaches its high-water mark in the context of political expression," and that "[d]ebate about the qualification of candidates for public office is at the core of our First Amendment freedoms."[33] The court reckoned that "[t]here are important differences between judicial office, on the one hand, and legislative or executive office, on the other, that affect the nature of the candidate's interest in certain kinds of policy debate."[34] This led it to conclude that "[t]he judicial candidate simply does not have a First Amendment right to promise to abuse his office," which it was apparently worried Wersal and others of his kind would do.[35] Furthermore, they held restrictions on judicial candidate speech "entirely different" than the limitations other candidates face.[36] It did not worry that "Canon 5 . . . burden[ed] First Amendment rights," for that "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."[37] The court wanted the judiciary to "'be, and appear to be, above reproach, like Caesar's wife,'" since "[t]he governmental interest in an independent and impartial judiciary is matched by its equally important interest in preserving public confidence in that independence and impartiality."[38] It recognized "that the prohibition on candidates announcing their views on disputed issues was intended in part to prevent judicial campaigns from becoming routine political contests, thereby jeopardizing the independence and integrity of the State's judiciary."[39]

The Eighth Circuit found even more topics judicial candidates could examine than the trial court did, holding that "nothing in Canon 5 . . . restricts candi-

29. *Id.* at 985 (citing Bundlie v. Christensen, 276 N.W. 2d 69, 72 (Minn. 1979)).

30. *Id.* at 983. While this Note does not address the case or controversy issue, it should be emphasized that there is no evidence the state of Minnesota ever directly restrained the speech of Gregory Wersal.

31. *Kelly*, 247 F. 3d at 854.

32. *Id.* at 885.

33. *Id.* at 861.

34. *Id.* at 862.

35. *Id.*

36. *Id.* at 863.

37. *Kelly*, 247 F.3d at 864.

38. *Id.* at 867 (quoting Reeder v. Kansas City Bd. of Police Comm'rs, 733 F.2d 543, 547 (8th Cir. 1984)).

39. *Id.* at 880.

dates from discussing or publicizing information about their character, fitness, integrity, background . . . education, legal experience, work habits, and abilities."[40] Candidates could also examine how they might "state their views on how they would handle administrative duties if elected," and were not "prohibit[ed] . . . from discussing appellate court decisions" or from "general discussions of case law or a candidate's judicial philosophy."[41] The court also reasoned that a candidate could speak about his or her "judicial philosophy, issues relating to the administration of justice in criminal, juvenile, and domestic violence cases, and the candidate's perception of a judge's role in the judicial system."[42] There was much more to recommend the judicial candidate besides his or her "'name, rank, and serial number,'" or simple "'biographical data'" or "'professional history.'"[43]

Judge Beam issued a staunch and questioning dissent, wondering what the majority meant when it argued that the Minnesota judiciary should be independent: "independent from what?"[44] He was certain that "[t]he Constitution makes strict demands," and that the First Amendment was infringed upon by the announce clause since "Canon 5 sharply curtails, if not outright bans [speech], regardless of how laudable its purpose."[45] That failure led him to believe Canon 5 "must be struck down."[46]

Judge Beam argued "when a state opts to hold an election, it must commit itself to a complete election, replete with free speech and association."[47] The First Amendment respects speech too much to do otherwise.[48] The courts should not believe "that judges are different [from other candidates for office]," because "[i]n the eyes of the First Amendment, they are the same."[49] He concluded that "[j]udges, whatever their differences from other officials, have no more right than others to avoid the rigors of public debate and public elections."[50] Judge Beam's dissent would be justified within the span of two years.

III. HISTORY OF THE LAW

A number of cases have informed the decisions of the Supreme Court and the various Courts of Appeals relating to judicial elections, elections in general, and free speech in the context of elections before *White*. Prominent among the cases involving the First Amendment is *Eu v. San Francisco County Democratic Central Committee*.[51]

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40. *Id.* at 882.
41. *Id.*
42. *Id.*
43. *Kelly*, 247 F.3d at 883 (citations omitted).
44. *Id.* at 886.
45. *Id.* at 891-92.
46. *Id.* at 892.
47. *Id.* at 897.
48. *Id.*
49. *Kelly*, 247 F.3d at 897, 899.
50. *Id.* at 903.
51. Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214 (1989). For a good look at the historical context of *Eu*, see Jeffrey L. Anderson, Note, March Fong Eu v. San Francisco County Democratic Central Committee: *Tension Between Associational Rights of Political Parties and Fair Elections*, 16 J. CONTEMP. L. 381 (1990).

Eu involved a challenge from various political parties against state laws providing for a "ban on primary endorsements and . . . restrictions on internal [political] party governance," alleging that the laws violated the right of free speech.[52] The Court noted that "[a] State's broad power to regulate the time, place, and manner of elections 'does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens.'"[53] The Court also laid out a test "[t]o assess the constitutionality of a state election law."[54] The Court would "first examine whether it burdens rights protected by the First and Fourteenth Amendments."[55] Secondly, "[i]f the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest."[56]

City of Ladue v. Gilleo is the Court's seminal decision on laws that are underinclusive in their restrictions on free speech.[57] The City of Ladue enacted an ordinance "prohibit[ing] homeowners from displaying any signs on their property," and refused to allow the plaintiff to post signs with political speech.[58] The court held that speech can be regulated, but it must be equitable in its restrictions; while "surprising at first glance, the notion that a regulation of speech may be impermissibly *underinclusive* is firmly grounded in basic First Amendment principles."[59] If there is a "general speech restriction," there is a danger that "an exemption from an otherwise permissible regulation of speech may represent a governmental 'attempt to give one side of a debatable public question an advantage in expressing its views to the people.'"[60]

The state must meet a high standard if it is restricting speech in an election. When the loser in a Kentucky County Commissioner race filed a corruption charge against the winner in regards to his campaign promises, the Supreme Court stepped in to determine if the First Amendment was implicated.[61] In *Brown v. Hartlage* the court stated that "[a]t the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed."[62] It was firm in its demand that "[w]hen

52. *Eu*, 489 U.S. at 219. The first named party, March Fong Eu, was the Secretary of State of California at the time of suit and thus responsible for enforcing the contested provisions of the California Code.

53. *Id.* at 222 (quoting Tashjian v. Republican Party of Conn., 479 U.S. 208, 217 (1986)).

54. *Id.* at 214 (quoting *Tashjian*, 479 U.S. at 214).

55. *Id.*

56. *Id.* at 217 (quoting *Tashjian*, 479 U.S. at 217, 222).

57. City of Ladue v. Gilleo, 512 U.S. 43 (1994).

58. *Id.* at 45. Margaret P. Gilleo set a sign in her yard that read "Say No to War in the Persian Gulf, Call Congress Now." *Id.* One detailed analysis of the *City of Ladue* case includes, among other interesting points, how much Ms. Gilleo spent on her legal battle with the city (around $450,000). *See* Stan M. Weber, Note, *Constitutional Law—Freedom of Speech—Homeowner Wins in Battle to Limit City Government's Power to Ban Residential Signs*, 18 U. ARK. LITTLE ROCK L.J. 157 (1995).

59. *City of Ladue*, 512 U.S. at 51.

60. *Id.* (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 785-86 (1978)).

61. Brown v. Hartlage, 456 U.S. 45, 47 (1983). Carl Brown challenged Jefferson County Commissioner Earl Hartlage in 1979, promising to lower the commissioners' salaries if elected. *Id.* at 47-48. He won by 10,151 votes; the defeated incumbent sued, alleging Brown had violated the state's Corrupt Practices Act. *Id.* at 49. While Brown won his case, the record seems to infer he retracted his promise to lower his own salary, since it was impossible for him to do so legally. *Id.* at 49 n.5. For more information, see Peter H. Aranson & Kenneth A. Shepsle, *The Compensation of Public Officials as a Campaign Issue: An Economic Analysis of* Brown v. Hartlage, 2 SUP. CT. ECON. REV. 213 (1983).

62. *Brown*, 456 U.S. at 52.

a State seeks to restrict directly the offer of ideas by a candidate to the voters, the First Amendment surely requires" two things.[63] First, "that the restriction be demonstrably supported by not only a legitimate state interest, but a compelling one"; and secondly, "that the restriction operate without unnecessarily circumscribing protected expression."[64]

It is undeniable that judges, like other political candidates, have opinions and express them publicly. But at what point does that previous speech restrain a judge's ability to perform? The respondents in *Laird v. Tatum* set before the Court a motion for Justice Rehnquist to recuse himself.[65] It was argued that the then-Junior Justice Rehnquist was biased because of an appearance as an expert witness for the Justice Department on the subject matter before the Court.[66] Justice Rehnquist denied the motion, reasoning that it went against common sense: "[p]roof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias."[67] That mental blank slate "would be unusual," and if sitting Supreme Court Justices "had not at least given opinions as to constitutional issues in their previous legal careers," it should be considered "not merely unusual, but extraordinary."[68]

Free speech extends to many arenas, and especially deep into the political sphere. *Wood v. Georgia* concerned a strikingly brave elected sheriff who publicly challenged a court's instruction in a grand jury investigation.[69] He was held in contempt and later convicted, with the court declining to offer findings or reasoning.[70] In reversing the judgment, the Court held forth on free speech and elected officials: "[t]he role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance."[71]

While restrictions on political speech are not favored, sometimes they survive strict scrutiny. *Burson v. Freeman* involved Tennessee statutes that "carved out an election-day 'campaign-free zone'" around polling places on election

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63. *Id.* at 53.

64. *Id.* at 53, 54.

65. Laird v. Tatum, 409 U.S. 824 (1972) (mem. op.). Justice Rehnquist's refusal to recuse himself provoked a host of commentary. One notable and thoroughly researched article criticized "the Tatum memorandum," along with other examples, as "scars too serious for the system to ignore," and noted that Rehnquist's "failure to recuse changed the law and perhaps history as well." Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 666 (1987).

66. *Laird*, 409 U.S. at 824-25.

67. *Id.* at 835.

68. *Id.*

69. Wood v. Georgia, 370 U.S. 375, 376 (1962). In 1960 a Bibb County judge empanelled and authorized a grand jury to investigate "an inane and inexplicable pattern of Negro bloc voting." *Id.* Sheriff Brown published a news release the following day that criticized the court's investigation, arguing that "'Negro people will find little difference in principle between attempted intimidation of their people by [the court system] and attempted intimidation by . . . the K.K.K.'" *Id.* at 379. With great clarity and honesty the sheriff argued that "'[i]f anyone in the community (should) be free of racial prejudice, it should be our Judges'" and that the judge in question was "'employing a practice far more dangerous to free elections than anything [he] want[s] investigated.'" *Id.* at 380 (alteration in original).

70. *Id.* at 381-82.

71. *Id.* at 395.

day.[72] The state was battling "two evils: voter intimidation and election fraud."[73] Since "all 50 states limit access to the areas in or around polling places," the statutes survived strict scrutiny.[74] The Court found "that this widespread and time-tested consensus demonstrates that some restricted zone is necessary in order to serve the States' compelling interests in preventing voter intimidation and election fraud."[75]

A situation where a state law fell to the demands of free speech was *McIntyre v. Ohio Elections Commission*.[76] The case concerned an Ohio statute "prohibit[ing] the distribution of anonymous campaign literature."[77] The "statute's infringement on speech [was] more intrusive" than the Court allowed in the face of "anonymous pamphleteering['s] . . . honorable tradition of advocacy and of dissent."[78] Justice Scalia dissented, and identified what actions should "bear[] a strong presumption of constitutionality": "[a] governmental practice that has become general throughout the United States, and particularly one that has the validation of long, accepted usage."[79]

Buckley v. Illinois Judicial Inquiry Board was the Seventh Circuit's contribution to the judicial speech debate.[80] *Buckley* involved a challenge to the Illinois state rules that regulated the speech of judicial candidates and mirrored Minnesota's announce clause.[81] Judge Posner wrote for the majority in deciding that the Illinois law violated the First Amendment; the court found it naive to think that a judge could not speak about a disputed issue, since "[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."[82] In short, the announce clause failed there because it might woefully "forbid[], or c[ould] . . . be read to forbid, privileged speech."[83] "[O]nly complete silence would comply with a literal . . .

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72. Burson v. Freeman, 504 U.S. 191, 193 (1992). Mary Rebecca Freeman acted as treasurer for the campaign of a Nashville city council candidate. *Id.* at 191. She argued that the laws "limited her ability to communicate with voters." *Id. See also* Richard A. Schurr, Note, Burson v. Freeman: *Where the Right to Vote Intersects with the Freedom to Speak*, 15 WHITTIER L. REV. 869 (1994).

73. *Burson*, 504 U.S. at 206.

74. *Id.*

75. *Id.*

76. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995). Margaret McIntyre opposed a proposed school tax levy, and she, her son, and a friend distributed leaflets at a public meeting detailing her objections. *Id.* at 337. A sample of the text is "VOTE NO . . . ISSUE 19 SCHOOL TAX LEVY . . . [o]ur children's education and welfare must come first." *Id.* at 337 n.2. Some of the handbills were signed, and some were identified as from "CONCERNED PARENTS AND TAX PAYERS." *Id. See also* Amy Constantine, Note, *What's in a Name?* McIntyre v. Ohio Elections Commission: *An Examination of the Protection Afforded to Anonymous Political Speech*, 29 CONN. L. REV. 459 (1996).

77. *McIntyre*, 514 U.S. at 336.

78. *Id.* at 356-57.

79. *Id.* at 375 (Scalia, J., dissenting).

80. Buckley v. Ill. Judicial Inquiry Bd., 997 F. 2d 224 (7th Cir. 1993). *See also* Robert M. Brode, Note, Buckley v. Illinois Judicial Inquiry Board *and* Stretton v. Disciplinary Board of the Supreme Court: *First Amendment Limits on Ethical Restrictions of Judicial Candidates' Speech*, 51 WASH. & LEE L. REV. 1085 (1994).

81. *Buckley*, 997 F.2d at 225.

82. *Id.* at 229. The learned judge even argues that such far-flung subjects as "[t]he civil war in Yugoslavia" could come before an American court, reminding readers that there had been an Illinois case that dealt with a custody battle "involving a child who didn't want to return to the then Soviet Union with his Soviet parents." *Id.*

83. *Id.* at 230.

interpretation of the rule," which is far too damaging to free speech.[84] Finally, the Seventh Circuit held that, while "the 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," it was absolutely "not so strong as to place that process completely outside the scope of the constitutional guaranty of freedom of speech."[85]

IV. INSTANT CASE

Justice Scalia was the author of the majority's opinion in *White,* joined by Chief Justice Rehnquist, Justices O'Connor and Kennedy, and Justice Thomas.[86] Justices O'Connor and Kennedy both filed separate concurring opinions.[87] Justice Stevens wrote a dissenting opinion that Justices Souter and Ginsburg, as well as Justice Breyer, joined—cementing a 5-4 split familiar to scholars of the Court.[88] Finally, Justice Ginsburg wrote a dissent that Justices Stevens, Souter, and Breyer followed.[89]

A. Arguments of the Republican Party and Gregory Wersal

The argument of the Republican Party of Minnesota was concerned with how judges actually think and decide cases, conceding that "[j]udges have public policy preferences and views on what the law is and should be."[90] When they have discretion, judges would probably allow their views to "influence them," but were more often bound by "constitutional provision, statutory enactment, or the *stare decisis* effect of prior court decisions," and would be "expected to follow their oath and apply the law to the case at hand, regardless of their personal views, or recuse themselves."[91]

The Party noted that there was "tension between judicial accountability and independence in any method of judicial selection."[92] It maintained that "judicial impartiality can still be protected, and public perception of that impartiality preserved, by ensuring that judicial candidates in elections do not pledge or promise certain results in particular cases."[93] It studied the questioning the members of the Court underwent by the Senate and concluded that, "just as the members of this Court were free to decline to comment on legal and political issues . . . so Minnesota judicial candidates would be under no compulsion to speak in the absence of the announce clause."[94]

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84. *Id.* at 231.
85. *Id.*
86. *White*, 536 U.S. at 766.
87. *Id.*
88. *Id.*
89. *Id.*
90. Petitioner Republican Party's Reply Brief at 1, Republican Party of Minn. V. White, 536 U.S. 765 (2002) (no. 01-521).
91. *Id.* at 1-2.
92. *Id.* at 5.
93. *Id.* at 6.
94. *Id.* at 10.

Furthermore, the impartiality or unbiased result that was so worried over would never occur, because "[a] judicial candidate who recklessly announces positions on issues to the point where voters sense that he lacks impartiality risks rejection by the voters."[95] Lastly, the voters are not as ignorant as some would assume, for "[t]he American people understand the dual role of judges: to make law when so authorized and to follow the law when required."[96]

Wersal's brief focused less on the theoretical role of judges and more on a candidate's right to free speech.[97] Basically, he alleged that "the Announce Clause violate[d] core First Amendment principals [sic]," not the least of which was restricting voter access to information, the candidate's right to free expression, and an "absolute ban on content based speech in the midst of an election campaign for public office."[98] When applied to political speech, the First Amendment is at its most protective point, and "the announce clause presents an absolute ban on even *truthful* speech by a candidate to public office during an election campaign."[99] For these reasons the Republican Party and Wersal urged the announce clause be declared void.

B. Arguments of Kelly, et al.

In contrast to the arguments of the Republican Party and Wersal that were concerned with a judge's decision-making methodology and the First Amendment, Kelly's brief focused on a states' rights argument.[100] Essentially, the entire argument was that the state had a compelling interest in regulating elections strong enough to override any First Amendment concerns, since "Minnesota has long placed great importance on having an impartial and independent judiciary."[101] In support of her argument that the announce clause was an integral part of the judicial election system, Kelly found support from quotations from every Senate confirmation hearing of every sitting Supreme Court Justice.[102] A distinction that did not arise was that those now-Justices who abstained from speech were doing so voluntarily, and without state laws nipping at their heels.[103]

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95. *Id.* at 10-11.

96. Petitioner Republican Party's Reply Brief at 18 (quoting Williams v. United States, 535 U.S. 911 (2002)).

97. Petitioner Wersal's Brief at i.

98. *Id.* at 12-15.

99. *Id.* at 34 (emphasis added).

100. Respondent Kelly's Brief at I, Republican Party of Minn. V. White, 536 U.S. 765 (2002) (no. 01-521). Note that Kelly was the Chairperson of the Minnesota Board of Judicial Standards at the time the Brief was filed, while White occupied that position at the time the decision was handed down.

101. *Id.* at 16.

102. *Id.* at 15, 17, 21, 24-5, 29-32, 42 (examining the nomination hearings of Justice Kennedy at pages 24 and 42 of the brief; Justice Souter at 25; Justice Stevens at 32; Justice Scalia at 30; Justice Thomas at 29; Justice O'Connor at 21; Justice Ginsburg at 31; Justice Breyer at 15 and 29; and Chief Justice Rehnquist, in his nomination for Associate Justice, at 17).

103. A reasonable observer might also suppose that no member of the Court would particularly delight in having those old transcripts rehashed, especially the idea that what they did or did not say years before might somehow bind them as *stare decisis*.

C. The Majority Opinion

White was handed down shortly after a rigorous oral argument filled with the current Court's penchant for humor and Socratic dissection.[104] Justice Scalia, writing for the Court, focused his energies on how the announce clause might pose the worst possible threat to the First Amendment—by burdening "speech about the qualifications of candidates for public office."[105] This burden necessarily invokes strict scrutiny, meaning that the "respondents have the burden to prove that the announce clause is (1) narrowly tailored, to serve (2) a compelling state interest."[106] He further noted that the Eighth Circuit "had established two interests as sufficiently compelling to justify the announce clause: preserving the impartiality of the state judiciary and preserving the appearance of the impartiality of the state judiciary."[107]

To decode the lower court's opinion, the Court analyzed three possible meanings of the word "impartiality" at length. The "root meaning" of the word means "the lack of bias for or against either *party* to the proceeding," which "assures equal application of the law."[108] A second "possible" meaning of impartiality might "mean lack of preconception in favor of or against a particular *legal view*," but this meaning "is certainly not a common usage."[109] The last possible meaning—as uncommon as the second—"might be described as open-mindedness."[110]

The first meaning of "impartiality" was dismissed, since "the announce clause is not narrowly tailored to serve [it] in this sense," as the speech restricted by the clause is issue based, and not respective of parties.[111] The second meaning fell in short turn, as the "equal chance" guaranteed by that style of "impartiality" "is not a *compelling* state interest, as strict scrutiny requires."[112] The third meaning was discharged since the Court did "not believe the Minnesota Supreme Court adopted the announce clause" to infer that litigants in a case be given "at least *some* chance" of prevailing at trial.[113] Since there was no compelling state interest by Minnesota in an impartial judiciary, the announce clause failed strict scrutiny.

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104. The Justices seemed to particularly enjoy hypothetical situations that the announce clause might create. "QUESTION: So a candidate says, 'This is the worst decision that's come down since Dred Scott, it's a plague on our people, it's an insult to the system, but I'm not telling you how I'll vote.' (Laughter.)" Transcript of Oral Argument at 30-31, *White* (No. 01-521).

105. *White*, 536 U.S. at 774.

106. *Id.* at 774-75.

107. *Id.* at 775.

108. *Id.* at 775-76.

109. *Id.* at 777.

110. *Id.* at 778.

111. *White*, 536 U.S. at 776-77.

112. *Id.* at 777.

113. *Id.* at 778.

The Court also seems to have applied a two-part test to see if the announce clause might be sustained due to a "tradition of prohibiting certain conduct."[114] The practice must be longstanding and adopted by nearly all the states.[115] The Court declared that "[t]he practice of prohibiting speech by judicial candidates on disputed issues . . . is neither long nor universal."[116] The Court declared that the announce clause "violate[d] the First Amendment" and reversed and remanded the case to be examined accordingly.[117]

D. Justice O'Connor's Concurrence

Justice O'Connor was quite blunt in her concurrence, "writ[ing] separately to express [her] concerns about judicial elections generally."[118] The Justice focused primarily on the amounts of monies raised in judicial elections, the history of elected judges in the United States, and the potential problems of public trust of elected judges.[119] She expressed great concern over the latter, especially the possibility that public confidence in the bench could be undermined by "the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors."[120] Since Minnesotans chose to elect their judges, they "voluntarily t[ook] on the risks [of] judicial bias."[121] Consequently, "[i]f the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges."[122]

Justice O'Connor's vehement condemnation of elected judicial officers is perhaps surprising in that she is the only member of the current Court to actually be elected as a judge, serving four years on the Maricopa County Superior Court in Phoenix, Arizona.[123]

E. Justice Kennedy's Concurrence

Justice Kennedy agreed with the majority, but wrote separately for two reasons: to reinforce his personal views on free speech and to honor those states providing for the free election of judges. He argued for a universal rule "that content-based speech restrictions that do not fall within any traditional exception should be invalidated without inquiry into narrow tailoring or compelling government interests."[124] Since "[t]he political speech of candidates is at the heart of the First Amendment . . . direct restrictions on the content of candidate speech are simply beyond the power of government to impose."[125]

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114. *Id.* at 785.
115. *Id.*
116. *Id.*
117. *White*, 536 U.S. at 788.
118. *Id.* (O'Connor, J., concurring).
119. *Id.* at 788-92 (O'Connor, J., concurring).
120. *Id.* at 790 (O'Connor, J., concurring).
121. *Id.* at 792 (O'Connor, J., concurring).
122. *Id.* (O'Connor, J., concurring).
123. BARBARA A. PERRY, "THE SUPREMES" 45 (1999).
124. *White*, 536 U.S. at 793 (Kennedy, J., concurring).
125. *Id.* (Kennedy, J., concurring).

The Justice was adamant that the court system should be trusted explicitly, and that standards were important, since "[j]udicial integrity is . . . a state interest of the highest order."[126] "Minnesota may choose to have an elected judiciary," and in doing so set standards, but "[w]hat Minnesota may not do, however, is censor what the people hear as they undertake to decide for themselves which candidate is most likely to be an exemplary judicial officer."[127] Kennedy argued that "[d]eciding the relevance of candidate speech is the right of the voters, not the State," and that the announce clause violates "the principle that unabridged speech is the foundation of political freedom."[128]

Ultimately, "[i]f Minnesota believes that certain sorts of candidate speech disclose flaws in the candidate's credentials, democracy and free speech are their own correctives."[129]

F. Justice Stevens's Dissent

Justice Stevens argued that the Court based its opinion on "two seriously flawed premises—an inaccurate appraisal of the importance of judicial independence and impartiality, and an assumption that judicial candidates should have the same freedom 'to express themselves on matters of current public importance' as do all other elected officials."[130] The Justice rested his argument on the premise that there was a "critical difference between the work of the judge and the work of other public officials," because "in litigation, issues of law or fact should not be determined by popular vote; it is the business of judges to be indifferent to unpopularity."[131]

The Justice was firm in his belief that all judges, despite election or appointment, should not bow to political pressure, since:

> [T]he elected judge, like the lifetime appointee, does not serve a constituency while holding that office. He has a duty to uphold the law and to follow the dictates of the Constitution. If he is not a judge on the highest court in the State, he has an obligation to follow the precedent of that court, not his personal views or public opinion polls. He may make common law, but judged on the merits of individual cases, not as a mandate from the voters.[132]

Ultimately, Justice Stevens simply believed that the rules for judicial elections should not "mirror the rules applicable to political elections."[133] Furthermore, he worried that "the judicial reputation for impartiality and open-mindedness is compromised by electioneering that emphasizes the candidate's personal predilections rather than his qualifications for judicial office."[134]

126. *Id.* (Kennedy, J., concurring).
127. *Id.* at 794 (Kennedy, J., concurring).
128. *Id.* (Kennedy, J., concurring).
129. *Id.* at 795 (Kennedy, J., concurring).
130. *White*, 536 U.S. at 797 (quoting *White*, 536 U.S. at 781-82) (Stevens, J., dissenting).
131. *Id.* at 798 (Stevens, J., dissenting).
132. *Id.* at 799 (Stevens, J., dissenting).
133. *Id.* at 803 (Stevens, J., dissenting).
134. *Id.* at 802 (Stevens, J., dissenting).

G. Justice Ginsburg's Dissent

In the first sentence of her dissent, Justice Ginsburg cuts to the heart of the debate, arguing that "[w]hether state or federal, elected or appointed, judges perform a function fundamentally different from that of the people's elected representatives."[135] Rather than saying that "'an election is an election,'" Ginsburg would place a restriction on the First Amendment, since she "would differentiate elections for political offices, in which the First Amendment holds full sway, from elections designed to select those whose office it is to administer justice without respect to persons."[136]

Justice Ginsburg chided the majority for "ignor[ing] a crucial limiting construction placed on the Announce Clause by the courts below" and argued that it "misportray[ed] the scope of the Clause as applied to a candidate's discussion of past decisions."[137] She sussed out several statements that she felt would pass the announce clause's provisions, while preserving impartiality of the bench, echoing the sentiments of the Eighth Circuit's opinion.[138] The majority opinion also seemed to "ignore[] the significance of [the announce clause] to the integrated system of judicial campaign regulation Minnesota has developed."[139] Moreover, strict scrutiny should be satisfied, since "[p]rohibiting a judicial candidate from pledging or promising certain results if elected directly promotes the State's interest in preserving public faith in the bench."[140]

She then took her colleague Justice Scalia to task, examined his confirmation hearings before the Senate, and found issues about which he "declined" to speak.[141] The Justice then returned to the subject of Minnesota's interest in regulating the candidates' speech and proffered that the announce clause was "vital to achieving" the state's interest in "promoting public confidence in the State's judges."[142] Without the announce clause, Justice Ginsburg feared, the rest of Minnesota's Judicial Code would be "easily circumvented," leading to harmful and perhaps distorted speech.[143]

V. ANALYSIS

Some commentators may have been surprised when *White* ended with Justice Scalia adopting the position of the American Civil Liberties Union, which filed an *amicus* brief in the case.[144] ACLU president Nadine Strossen

135. *Id.* (Ginsburg, J., dissenting).
136. *White*, 536 U.S. at 805 (Ginsburg, J., dissenting).
137. *Id.* at 809-10 (Ginsburg, J., dissenting).
138. *Id.* at 809-10 (Ginsburg, J., dissenting). Such "highly informative" statements "may include . . . statements of historical fact ('As a prosecutor, I obtained 15 drunk driving convictions'); qualified statements ('Judges should use *sparingly* their discretion to grant lenient sentences to drunk drivers'); and statements framed at a sufficient level of generality ('Drunk drivers are a threat to the safety of every driver')." *Id.* at 809-10 (Ginsburg, J., dissenting).
139. *Id.* at 812 (Ginsburg, J., dissenting).
140. *Id.* at 818 (Ginsburg, J., dissenting).
141. *Id.* at 818 n.4 (Ginsburg, J., dissenting).
142. *White*, 536 U.S. at 819 (Ginsburg, J., dissenting).
143. *Id.* at 819-20 (Ginsburg, J., dissenting).
144. *See* Steven R. Shapiro, *ACLU Summary of the 2001 Supreme Court Term: Major Civil Liberties Decisions*, at 10 (June 28, 2002). The ACLU Report is online at http://archive.aclu.org/court/court_ summary01.pdf (last accessed September 19, 2003). The ACLU's brief is available on Westlaw at 2002 WL 100225.

made an especially ambitious claim about the Supreme Court in its 2001 term—that "[t]his [Court] is the most speech-protective court in history, bar none . . . [a]nd that includes the Warren Court."[145]

Despite many a pundit's disbelief, Scalia is quite vigilant in defending free speech in *White*. That is not out of line with his professed philosophy that:

> the Founders were right when they feared that some (in their view misguided) future generation might wish to abandon liberties that they considered essential, and so sought to protect those liberties in a Bill of Rights. We may *like* the abridgement of property rights and *like* the elimination of the right to bear arms; but let us not pretend that these are not *reductions* of *rights*.[146]

We may then assume that Justice Scalia viewed the situation in *White* analogous to that analogy: Minnesota may *like* the abridgement of freedom of speech, but the state may not pretend that it is a not a *reduction* of the *rights* of judicial candidates.

However, perhaps the Justice is willing to recognize a reduction in rights as long is one is honest about the reduction. Scalia has written that "[a]ll government represents a balance between individual freedom and social order, and it is not true that every alteration of that balance in the direction of greater individual freedom is necessarily good."[147] While the Justice's supporters might disagree, some might argue that is the true key to understanding *White*: that while greater individual freedom is restored to judicial candidates, it works more harm to the bench (and to Minnesota) than it does good.[148]

Despite the length, most of the majority opinion is a lean recitation of facts, notation of a bare handful of cases, a section dismissing the arguments of the dissents, and precious little else. What could have been an eloquent opinion about the majesty of the First Amendment and our rights to political speech is squandered with typical Scalia sarcasm.[149] The majority opinion does make some attempt to ascertaining how judges actually make their decisions, but the

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145. Tony Mauro, *2001-02 High Court Deals First Amendment Wins, Losses*, available at http://www.freedomforum.org/templates/document.asp?documentID=16535 (July 12, 2002).

146. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 43 (Amy Gutmann, ed., 1997). Compare Justice Jackson's majority opinion in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943), where he wrote that "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right . . . to free speech . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

147. Scalia, *supra* note 146, at 42.

148. The Justice, who was nominated for the Court by President Ronald Reagan in 1986, has a large and vocal group of supporters on the internet. The "Cult of Scalia" is available at http://members.aol.com/schwenkler/scalia/.

149. *White*, 536 U.S. at 782, is a perfect example of Scalia's caustic style: "Surely the judge who frees Timothy McVeigh places his job much more at risk than the judge who (horror of horrors!) reconsiders his previously announced view on a disputed legal issue."

dissents seem to show much more interest in the actual process of jurisprudence and the difficulty of maintaining impartiality under the rigors of elections.[150]

Justice Stevens, in articulating the difficulties of the judicial occupation, invokes one of the Court's most eloquent writers. Besides his landmark opinions on the New York Court of Appeals, Justice Benjamin Cardozo struggled mightily with describing the ways in which judges decide cases. Before his elevation to the Court, the learned judge spoke of the choices of judges as "two paths, each open, though leading to different goals...[the judge] must gather his wits, pluck up his courage, go forward one way or the other, and pray that he may be walking, not into ambush, morass, and darkness, but into safety, the open spaces, and the light."[151] How much more tense is the choice between the "two paths" when the friction of an election is introduced?

The career of Cardozo can shed some light on *White*. Cardozo began his illustrious judicial career as an elected judge, on the "major trial court in New York," its Supreme Court.[152] He was not an active campaigner, as "[t]he tradition, in New York as elsewhere in most of the country, was that judges ought not to campaign actively for office and should not take stands on issues about which they might later have to render an impartial judgment."[153] It was not even the standard in that time period to have newspaper advertisements in favor of candidates.[154] Cardozo certainly "cared about [public] opinion," from our knowledge of isolated incidents.[155] In at least one case, it could be argued that the future Justice argued for a statute because of its massive public support, even though "he was opposed to the . . . statute and had voted against it."[156]

Judge Richard Posner, himself an admirer of Cardozo, would say there is no true public pressure on judges to perform a certain way, since "[v]oters don't vote for policies, generally, but for representatives."[157] Voters cannot even "enforce their representatives' electoral promises other than by voting against

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150. An argument might be made that Justice Scalia is ignoring the finer points of jurisprudence because it does not interest him in a larger sense—that he simply applies precedent mechanically, with no need for poetry or subtlety. Professor Ronald Dworkin has proposed that there are three theories of jurisprudence—"conventionalism," "legal pragmatism," and "law as integrity." RONALD DWORKIN, LAW'S EMPIRE 94 (1986). A conventionalist looks to historical decisions and precedent in the decision-making process, as opposed to the student of "law as integrity," who attempts to infuse the process with ideals drawn from equality and the political sphere. For arguments that Scalia follows a conventionalist approach, see Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909, 1029 (1998); Carlos E. Gonzalez, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV. 585, 589 n.14 (1996). A counter-argument might be made that Scalia is a poor conventionalist because he "has been willing to disregard established precedent" when it suits him. Emil A. Kleinhaus, Note, *History as Precedent: The Post-Originalist Problem in Constitutional Law*, 110 YALE L.J. 121, 126 (2000).

151. BENJAMIN N. CARDOZO, GROWTH OF THE LAW 59 (1924).

152. ANDREW L. KAUFMAN, CARDOZO 118 (2000). The highest court in New York is the Court of Appeals.

153. *Id.* at 121 (footnote omitted).

154. *Id.* at 612 n.21.

155. *Id.* at 340.

156. *Id.* (footnote omitted). *See* People v. Westchester Nat'l Bank, 231 N.Y. 465, 483-92 (1921). The majority struck down the statute, which was enacted to issue a bonus to World War I veterans. Cardozo, as well as Judge Cuthbert Pound, dissented. This Note does not intend to infer in any way that Benjamin Cardozo ever waivered from his duties as a counselor or judge or from the high standards of personal conduct for which he is justifiably renowned for.

157. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW, 574 (5th ed. 1998). Judge Posner authored a book studying the remarkable endurance of Cardozo's opinions and thought in modern jurisprudence. *See* RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION (1993).

them at the next election (if they even stand for reelection)."[158] These arguments are all predicated on Posner's belief that economics plays a massive and defining role in how our societies work; thus, he will announce flatly that "voting has little private value, [so] we should not expect people to invest heavily in becoming informed about the candidates and issues."[159]

Furthermore, "judicial independence" is not an absolute creature that can be secured in a certain manner because it "is a matter of degree—and the degree may be related to the benefits that the judiciary confers on the practice of interest group politics."[160] Lastly, any reasons (pecuniary or, it can be inferred, otherwise) for a judge to rule "will usually be so trivial as to be outweighed by the penalties, mild as they are (professional criticism, reversal by a higher court, etc.), for deciding a case in a way perceived to be unsound or biased."[161] Put simply, Posner "den[ies] that self-interest explains particular case outcomes."[162] An interesting problem can be inferred: what if a sitting judge, or a candidate, misapprehends the political situation when advocating or ruling for a certain faction?[163] There is a strong argument that the risks of angering the legislature (who might overrule the judge by statute, thus destroying the decision) or angering the people (who might vote against the judge if a decision is rendered that cannot withstand the storms of public opinion) would dissuade the judge from rendering a purely "political" decision. The potential for loss would outweigh the potential for gain, and a judge (assuming the judge is acting rationally) would not risk the potential loss of position. For "no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today."[164]

However, loss-avoidance by the elected judiciary might falter if the judge performs relative to a somewhat homogenous voting group. There might be a negligible amount of calculation needed to "take the pulse" of a homogenized group with whom, it can be surmised, the judge is already familiar, as she is elected from that group and has already campaigned to it at least once before. This would seem to encourage a type of majoritarian political control over the court system in places where judges are elected from a homogenous group or have a large homogenous base. This danger is possibly tempered by *stare decisis* and appellate review, but it bears examining—especially if the appellate courts of review are drawn from a similarly homogenous group.

Posner's warning of how political suicide can result from poor judgment is not just confined to equations—it is also reflected throughout political history, and nowhere better than in the "Whiskey Speech" of Judge Noah "Soggy" Sweat. Years before election as a judge, Sweat addressed the Mississippi House

158. POSNER, ECONOMIC ANALYSIS OF LAW, *supra* note 157, at 574.
159. *Id.* at 730.
160. *Id.* at 581.
161. *Id.* at 582.
162. *Id.*
163. *Id.* at 581-82 (discussing the maximization of judicial utility). The Republican Party addressed this hypothetical in its brief. Petitioner Republican Party's Brief at 10-11, *White* (No. 01-521).
164. THE FEDERALIST No. 78 (Alexander Hamilton).

in 1952 as a state representative from Corinth. The topic at hand was a debate over legalizing liquor, and Sweat straddled the line spectacularly. He assured his audience that he did "not shun controversy," and would "take a stand on any issue at any time, regardless of how fraught with controversy it might be."[165]

"If when you say whiskey you mean the devil's brew, the poison scourge, the bloody monster," then Judge Sweat was most assuredly "against it."[166] However, "[i]f when you say whiskey you mean the oil of conversation, the philosophic wine, the ale that is consumed when good fellows get together," then the orator was "certainly . . . for it."[167] He concluded firmly by saying:

"This is my stand. I will not retreat from it. I will not compromise."[168]

No other passage has so ably summed up the razor's balance of political doublespeak; for many judicial candidates pre-*White,* it may have seemed even more magnified, for they could not even say they were for or against whiskey. To the confusion of the public and to their own consternation, they had to remain completely silent—political teetotalers.

White takes issue with the very heart of the American judiciary—the thoughts of the women and men who occupy the bench, and the methods by which our elected judiciary reaches its goal. Ultimately, it must be examined if *White* actually has an impact on our society. When politics are involved, the seemingly simple job of the judge, to "examine the truth of the fact, to determine the law arising upon that fact, and, if any injury appears to have been done, to ascertain, and by its officers to apply the remedy," becomes more and more complicated.[169]

A. The Impact of White *on Mississippi*

White seemed as though it might unravel the fabric of many states' judicial elections. Dozens of states had equivalent or analogous statutes to Minnesota's announce clause, but Mississippi seemed to avoid conflict by an amendment to its Code of Judicial Conduct that had passed a little over two months before *White* was handed down.[170] Chief Justice Edwin L. Pittman of the Supreme Court of Mississippi boasted that the recent changes in the Mississippi Code of Judicial Conduct left our laws "untouched" by *White*, and that he was "very proud of the Mississippi Supreme Court in that we carefully drafted a Code of Judicial Conduct that was undisturbed by the Minnesota case."[171] The new pro-

165. City of Clinton v. Smith, 493 So. 2d 331, 336 (Miss. 1986). The entire "Whiskey Speech" is reprinted in that case and is highly enjoyable for any student of politics, especially those of the particularly mercurial Mississippi brand.

166. *Id.*

167. *Id.*

168. *Id.*

169. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND at 627 (George Chase ed., Banks Law Publishing 1914) (1765-69).

170. Mississippi amended its Code of Judicial Conduct on April 4, 2002. *See* Kolberg v. State, 829 So. 2d 29, 89 n.5 (Miss. 2002). As *White* and other cases have exhaustively discussed which state statutes and regulations were possibly affected, this Note will not duplicate that information.

171. *Legal Code OK in Free Speech Ruling*, COMMERCIAL APP., July 11, 2002, at DS7.

vision determined that "[a]ll Judges and Candidates . . . 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."[172]

Other state officials have echoed Chief Justice Pittman's belief that Mississippi was "safe" from *White*. The Executive Director of the Mississippi Commission on Judicial Performance, which is charged by the legislature to oversee the conduct of all state judges, including their activities during campaigning, has noted that *White* will "ha[ve] no effect on Mississippi's Code of Judicial Conduct."[173] Since *White* is "limited to political speech and the announce clause," there should be no "direct impact."[174] However, there might be a secondary impact "if the [Mississippi Supreme] Court . . . applies the reasoning in *White* to other political speech cases and goes beyond the announce clause."[175] Moreover, since "[t]he Code of Judicial Conduct is continually under attack by Respondents in disciplinary cases . . . further challenges to the Code and attempts to expand *White* are inevitable."[176]

At the root of the controversy is the fact that Mississippi elects its judges. In the past years, various commentators have called for a change, often due to fears about growing campaign contributions.[177] When Mississippi adopted its first constitution and joined the Union in 1817, judges were appointed.[178] Five years later the power of appointment was clarified and placed into the general assembly.[179] All judges were to be elected after passage of the new state constitution in 1832.[180] Judges were subject to appointment again after the Civil War.[181] After 1916, and a sprawling series of changes and modifications, all judges in Mississippi were once again elected by the people.[182] The only notable change in Mississippi since then is the abolition of judges running as a member of a political party in 1994.[183]

Much has been written about the massive amounts of money raised by judicial candidates in the past few years—which do not include so-called "soft-money" donations from third parties, or so-called "issue" advertisements not

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172. MISS. CODE JUD. CONDUCT, Canon 5A(3)(d)(ii) (2002). The Commentary detailed that "[a]s a corollary, a candidate should emphasize in any public statement the candidate's duty to uphold the law regardless of the candidate's personal views." It also noted that "[p]hrases such as 'tough on crime,' 'soft on crime,' 'pro-business,' 'anti-business,' 'pro-life,' 'pro-choice,' or in any similar characterizations suggest fixed views on issues which may come before the courts, when applied to the candidate or an opponent, and may be taken as prohibited by Section 5A(3)(D)."

173. Interview with Luther T. (Brant) Brantley, III, Executive Director, Mississippi Commission on Judicial Performance, in Jackson, Miss. (Mar. 5, 2003).

174. *Id.*

175. *Id.*

176. *Id.*

177. *See Candidates Should Answer Issues*, CLARION-LEDGER, June 9, 2002, at 9A.

178. MISS. CONST. of 1817 art. 5, § 2.

179. 1823 REV. CODE MISS. ch. 15, § 1.

180. MISS. CONST. of 1832 art. 4, § 2.

181. MISS. CONST. of 1868 art 6, § 2.

182. 1916 MISS. LAWS ch. 156.

183. 1994 MISS. LAWS ch. 564, (the "Nonpartisan Judicial Election Act"). The law is now codified as MISS. CODE. ANN. § 23-15-976 (2002).

authorized by candidates' campaigns. Mississippi has not been immune to the escalation of finances. In the 2002 race for incumbent Presiding Justice C.R. "Chuck" McRae's seat on the Mississippi Supreme Court, a total of $1,836,114.35 was raised by the three candidates.[184] This surpassed the previous high reached two years earlier, where a total of $1,563,501.79 was amassed in a three-way contest eventually won by Oliver Diaz.[185] Chief Justice Pittman has also written candidly about the escalation, noting that his "first election contest for the Supreme Court in 1988 cost about $33,000," while his 1996 "re-election campaign spending was nearly 10 times higher—almost $300,000."[186]

Mississippi already has laws in place that place a maximum ceiling on contributions and requires disclosure of contributors at a certain point.[187] Despite these safeguards, "[e]ven if big money does not corrupt the candidates, it gives an appearance that is especially troubling in the case of the judiciary."[188]

Despite the confidence of Chief Justice Pittman and others, *White* could potentially create a frustrating result in Mississippi. It has been firmly established that a judicial candidate can "announce" her views. Let us now imagine a candidate publicly announces that homosexuals are "sick" and "belong in a mental institution."[189] The candidate might strenuously assert, as per the Commentary to Canon 5, that she will always uphold the law—despite the fact that she thinks homosexuals are mentally ill. Despite the fact that it is certainly protected speech, it is certainly not conduct becoming of a potential judge, and according to *White*, the state *cannot* regulate it.

Assume further that, even after a media drubbing, the candidate is elected judge. If repeated, the *same speech* most certainly now violates the Code of Judicial Conduct's demands for a judge to display "integrity," to "[a]void

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184. Jess Dickinson won the District 2 election, raising $1,007,380.35. Justice McRae's campaign raised $642,013, while Larry Buffington raised $186,721. See *Mississippi Secretary of State Elections Campaign Finance Reports, at* http://www.sos.state.ms.us/elections/CampFinc/Reports/election.asp.

185. Justice Oliver Diaz's campaign raised a total of $824,180, while opponents Keith Starrett and Billy Joe Landrum raised $373,773.90 and $366,547.89, respectively. It could be argued that the totals were higher in this race due to a runoff held between Justice Diaz and Starrett. See *Mississippi Secretary of State Elections Campaign Finance Reports, at* http://www.sos.state.ms.us/elections/CampFinc/Reports/ election.asp.

186. Edwin Lloyd Pittman, *Observations and Recommendations Regarding Judicial Selection*, 21 MISS. C. L. REV. 195 (2002).

187. MISS. CODE ANN. § 23-15-1021 allows a maximum $2,500 contribution to a "county, circuit or chancery court" judicial campaign, and a maximum of $5,000 towards the campaign "for judge of the Court of Appeals or justice of the Supreme Court." Judicial candidates must also disclose the names of individuals granting them a loan or a line of credit. MISS. CODE ANN. § 23-15-1023. All candidates for office are required to disclose their financing. MISS. CODE ANN. §§ 23-15-805, 807. The origin of any donation whose aggregate meets or exceeds $200 must be disclosed. MISS. CODE ANN. § 23-15-807 (d)(ii)(1)-(2). Most controversial is the recent addition to the Code of Judicial Conduct that provides that "[a] party may file a motion to recuse a judge based on the fact that an opposing party or counsel of record for that party is a major donor to the election campaign of such judge." MISS. CODE JUD. CONDUCT, Canon 3(E)(2) (2002).

188. PATRICK M. MCFADDEN, ELECTING JUSTICE: THE LAW AND ETHICS OF JUDICIAL ELECTION CAMPAIGNS xiii (1990).

189. Sadly, this hypothesis is not pure fiction. Connie Glenn Wilkerson, a George County Justice Court judge, wrote a letter to the editor of the *George County Times*, of Lucedale, Mississippi, in which he stated that "gays and lesbians should be put in some type of mental institute instead of having a law [that accords legal rights] passed for them." Sherri Williams, *Judicial Reprimand Suggested*, CLARION-LEDGER, Dec. 21, 2002, at B2. Charges were brought, and the case is pending at the Mississippi Supreme Court.

[i]mpropriety," and to be "impartial."[190] *White* supposedly did not disturb a state's ability to set standards for sitting judges.

The awkward result comes when that judge begins to campaign again for her second term. At what times is she a candidate and not a judge? Can she now announce her views about homosexuals again? It would seem that she could not, for she is bound to act "at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."[191] However, if she cannot announce her views, is there a *White* free speech violation? And what if she announces her views during the middle of her term, and claims protection under the argument that she is simply "campaigning early"? Such Catch-22 scenarios are easily and quickly imagined—yet not so easily untangled. *White* justifiably protects the First Amendment freedoms of judicial candidates, but there must be a way for a state to protect itself against results that damage the integrity and public perception of the bench. While not written regarding judicial speech, it is still utterly true that "there comes a point where this Court should not be ignorant as judges of what we know as men."[192]

In light of the potential conundrums *White* might create, and with an eye towards spiraling campaign costs, Mississippi must act to safeguard the impartiality and high standards of its judiciary—while safeguarding the critical right of public election. There is a continuing danger that a legislative overreaction due to perceived corruption in the judicial election process will result in an erosion, or elimination, of Mississippians' right to choose their judiciary by popular election. While "Mississippi has experimented with almost every method of judicial selection," there are options remaining.[193] Other systems are weak on public participation: judicial merit and appointment systems completely bypass public election, and retention elections only give face value to democracy by allowing voters to vote for or against an incumbent.

The best way to establish a highly qualified and popularly elected judiciary system in Mississippi is to modify the system our Founding Fathers created for appointing Supreme Court Justices. In that system, the President nominates a candidate, who is then voted on by the entire Senate.[194] It has been imitated in some states with the governor or other authoritative body making the nomination, and the states' respective legislatures voting on the candidate.[195] The most democratic option would be for the governor, or a merit board approved by the legislature, to nominate a candidate, and for there to be a public referendum on

190. *See generally* MISS. CODE JUD. CONDUCT, Canons 1-3 (2002).

191. MISS. CODE JUD. CONDUCT, Canon 2A (2002).

192. Watts v. Indiana, 338 U.S. 49, 52 (1949).

193. Lenore L. Prather, *Judicial Selection–What Is Right for Mississippi?*, 21 MISS. C. L. REV. 199, 205 (2002).

194. U.S. CONST. art. II, § 2, cl. 2. The President "shall nominate . . . by and with the advice and consent of the Senate . . . judges of the Supreme Court."

195. Connecticut's governor nominates a candidate, and the state's general assembly then votes. CONN. CONST. art. 5, § 2. South Carolina has a Judicial Merit Selection Commission that nominates candidates and submits them to a vote of the general assembly. S.C. CODE ANN. §§ 2-19-80, 90 (Supp. 2001). Virginia's judges are simply chosen by its general assembly. VA. CONST. art. VI, § 7.

the candidacy. The classic embodiment of this scheme is the so-called "Missouri Plan."[196]

This approach has all of the benefits of the most impartial systems, while avoiding the anti-democratic elements of some.[197] The amount of democracy it ensures also surpasses that of other states, as it no longer gives the people only "a remote choice" in determining who their judges will be, but a system of direct accountability.[198] It would also completely cure any and all campaign finance problems, since there would be no money directly raised by a candidate's campaign. We would also not have to demand that our "judges should be withdrawn from their bench, whose erroneous biases are leading us to dissolution."[199]

After the candidate is nominated, there would be an appearance before the legislature, who would interrogate the candidate much in the same way that the Senate interrogates proposed Supreme Court Justices. This successfully interjects each candidate's ideas and legal history into the public forum, in a closely monitored manner, so *White* could be as scrupulously honored as the Code of Judicial Conduct. After a period of debate and interrogation—perhaps a week or two, to allow full impact of the candidates to "sink in"—a statewide vote would take place. Mississippi would then have a new justice or judge without all the fears of partisan or special interest group influence.[200]

At the end of the judge's constitutionally mandated term, a retention election would be held. If the judge in question does not muster a majority of those voting, then the governor or merit board finds a new candidate to present to the people. Because the people are already informed about the judge and her views, there is no need for further campaigning—and there would be no friction between *White*-protected candidate speech and state-banned judge speak, as with our hypothetical homophobe above.

To counter any arguments of naiveté, it must be remembered that this manner of nomination and voting has been an element of the United States since the Judiciary Act was ratified in 1789. It has also been argued that, while it may not be the best possible system, and necessarily "depends on fairness and balance at each stage," it does "ha[ve] some hope for success."[201] Merit selection does not

196. *See* Leslie Southwick, *The Least of Evils for Judicial Selection*, 21 MISS. C. L. REV. 209, 212 (2002). Southwick, a judge for the Court of Appeals of Mississippi, examines the major types of judicial selection, including the Missouri Plan, with insight and at length. His article is especially useful in its close examination of the various 2000 Mississippi Supreme Court races. Those races are noteworthy not just for students of Mississippi politics, but also judicial elections and Supreme Court powers: Justice Antonin Scalia of the United State Supreme Court, sitting as Circuit Justice for the Fifth Circuit, lifted three separate temporary restraining ordering in three different state supreme court races. *Id.* at 231, 233.

197. While Judge Southwick was "pessimistic about all [judicial selection] systems," including the Missouri Plan, he did note that "some systems are worse than others." *Id.* at 224. But see his comments at pages 231, 233.

198. THE FEDERALIST No. 39 (James Madison).

199. THOMAS JEFFERSON, *The Autobiography, in* WRITINGS 75 (1984).

200. This Note concedes that this approach only seems cost-efficient and logical for the state supreme court and court of appeals; all other judgeships would remain "fully" open, without the nomination process. It could be argued that his might also drive more attention to the critical local judicial races that are so often ovelooked in the "bigger" statewide or region-wide elections.

201. Southwick, *supra* note 196, at 225. As set forth in that note, Judge Southwick was "pessimistic about all [judicial selection] systems." *Id.* at 224.

completely eliminate the sway of special interest monies over the process—since they may still influence the nominees of the governor or the theoretical board or the questions asked of the nominees—but, conjoined with a ban on so-called "issue ads," it will dilute their power to a great extent. This will ensure Mississippi has the most impartial, fair, and unbiased state judiciary, elected by a well-informed body of voters. It preserves democracy while discarding most of the aspects that may harm our judiciary.

VI. CONCLUSION

While *White* can be considered a blow for the free speech of judicial candidates, the influence it exerts on Mississippi may be negligible. Still, elected judicial systems are in the perilous position of getting information about the candidates to the electorate in an unbiased way. In order for Mississippi to have the best possible elected judiciary, it must change its system, or potentially face a state where the people no longer have a voice in who will be their judges. It will benefit all Mississippians if we change our system of election before clamors for appointed judges hold sway—if we "walk before they make [us] run."[202]

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202. The Rolling Stones, *Before They Make Me Run, on* SOME GIRLS (Virgin Records 1978).