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The Least Dangerous But Most Vulnerable Branch: Judicial Independence and the Rights of Citizens

JUDICIAL INDEPENDENCE IN THE AFTERMATH OF *REPUBLICAN PARTY OF MINNESOTA V. WHITE*

by

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"Putting courts into politics and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the Bench."[1]

Professor Roscoe Pound (1906)

These prophetic words of Dean Pound, uttered more than a century ago, resonate today as America copes with a new strain of threats to judicial independence in the aftermath of *Republican Party of Minnesota v. White.*[2] This paper will address the impact of that decision, its implications for state court judges, and its likely effect on the promise of equal justice under law.

I. Nature of Threats to Judicial Independence Before *White*

Years before Gregory Wersal[3] and a dozen other plaintiffs[4] filed the lawsuit that would result in *Republican Party of Minnesota v. White*, some judges, lawyers, and academics were alarmed about what were then viewed as unprecedented attacks on the independence of the judiciary.[5] Most acknowledged that attacks on judicial independence were neither new nor novel, having existed since the founding of the country.[6] Some suggested that disgruntlement

[1] Tom C. Clark, *A Tribute to Roscoe Pound*, 78 HARV. L. REV. 1, 2 (1964).

[2] 536 U.S. 765 (2002).

[3] Gregory Wersal, a Minnesota lawyer, sought election to the Minnesota Supreme Court on three occasions. *See id.* at, 768-69. He filed the first of three lawsuits seeking to enjoin enforcement of several provisions of the Minnesota Code of Judicial Conduct during his 1996 election bid. *See* Republican Party of Minnesota v. Kelly, 996 F. Supp. 875, 875-76 (D. Minn. 1998).

[4] The original lawsuit which ultimately led to the decision in *Republican Party of Minnesota v. White* was filed in the United States District Court by Gregory Wersal, his wife, and the following additional plaintiffs: the Republican Party of Minnesota; the Indian Asian American Republicans of Minnesota; the Republican Seniors; the Young Republican League of Minnesota; the Minnesota College Republicans; the Campaign for justice; Minnesota African American Republican Council; the Muslim Republicans; Mark Wersal; Corwin Hulbert; Michael Maxim; and Kevin Kolosky. Republican Party of Minnesota v. Kelly, 996 F. Supp. 875, 875-76 (D. Minn. 1998).

[5] *See e.g.,* Anthony Lewis, *The Old Dole*, N.Y. TIMES, April 22, 1996, at A5; Deborah Pines, *Under Fire, Judge Reversed Himself*, NAT'L L.J., April 15, 1996; Neal A. Lewis, *GOP to Challenge Judicial Nominees Who Oppose Death Penalty*, N.Y. Times, Oct. 15, 1993, at A26; *see also* sources cited in note 9 *infra*.

[6] The willingness of one branch of government to attempt to harness the power of another is nothing new. After *Marbury v. Madison*, 5 U.S. (1Cranch) 137 (1803), in which the United States Supreme Court established judicial review of congressional acts, Congress reacted by passing the Judicial Act of 1802 which abolished circuit judgeships created by the Judicial Act of 1801, and in so doing, restored circuit riding by the Supreme Court justices. More importantly, to hold the Court at bay, the Act abolished the 1802 term of Court. Harold R. Burton, "*Marbury v. Madison:* The Cornerstone of Constitutional Law," in THE SUPREME COURT AND ITS JUSTICES 15-18 (Jesse H. Choper ed., 1987). Other examples include the impeachment trial of Justice Samuel Chase for decisions he made as a circuit judge described at the time as the "entering wedge to the compleat (sic) annihilation of our wise and independent Judiciary;" COMMISSION ON THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION, THE SUPREME COURT OF THE UNITED STATES, ITS BEGINNINGS AND ITS JUSTICES 1790-1991 19 (1991); the plank of the Progressive Party in 1912, espoused by Theodore Roosevelt, which advocated the recall of judicial opinions and judges by popular vote; Paul A. Freund, "Storms Over the Supreme Court," in THE SUPREME COURT AND ITS JUSTICES 185 (Jesse H. Choper, ed., 1987); the court packing plan of President Franklin Delano Roosevelt; legislation proposed in 1957 by an Indiana senator which proposed denying courts jurisdiction in a long list of cases including those involving loyalty oaths and subversive activities, *id.* at 186; the 1986 discussion about impeaching three court of appeals judges who voted to overturn a murder conviction on what was termed a technicality, Robert W. Kastenmeier & Michael J. Remington, *Judicial Discipline: A Legislative Perspective*, 76 KY. L. J. 763, 779

with the judiciary, like dissatisfaction with any institution of government,[7] simply ebbed and flowed over time.[8] But during the 1990s, many lamented that the frequency and fervor of the attacks were increasing,[9] causing one Senator to comment that "I think we are close to being able to say this is an unprecedented series of threats toward the independence of our judiciary."[10] The country's largest bar association, the American Bar Association (ABA), agreed, asserting that "[a] new cycle of intense political scrutiny and criticism of the judiciary is now upon us."[11]

This heightened scrutiny of the judiciary was multi-faceted. It involved not only the judiciary as an institution, but individual judges and courts as well.[12] Often the scrutiny resonated as a general dissatisfaction with the judiciary as an institution of government. Sometimes, it was focused upon an issue, such as capital punishment, abortion, or tort reform, that seized media, and consequently, public attention.[13] But not infrequently, the scrutiny was

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(1988); and the 1996 debate over a constitutional amendment which grant Congress absolute authority to override Supreme Court decisions by legislative act. Stanley Mailman, *Cutting Back on Hearings, Judicial Review*, N.Y.L.J., Oct. 28, 1996, at 3.

[7] Annual surveys of public confidence in governmental institutions have demonstrated fairly consistent fluctuation over time. *See generally* NATIONAL CENTER FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS- A 1999 SURVEY, at 10 (which suggests that public confidence in all institutions of government, including the judiciary, increase and decrease repeatedly over time). Entire report can be viewed at www.ncsconline.org/WC/ Publications/Res_AmtPCT_PublicViewCrtsPub.pdf

[8] *Id.*

[9] *See e.g.*, Stephen O. Kline, *Revisiting FDR's Court Packing Plan: Are the Current Attacks on Judicial Independence So Bad?*, 30 MCGEORGE L. REV. (1990) ("Arguably the current array of Congressional challenges to the judiciary are the greatest threat posed to judicial independence since Roosevelt unveiled the ill-fated Court packing plan in 1937."); Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 SO. CAL. L. REV. 315 (1999) ('Concern about judicial independence has been a recurrent feature of American history, as have attacks on courts and their decisions. In recent years, however, such attacks have become more than the expected response of persons who profoundly disagree with those decisions. They have become part of orchestrated strategies of political parties and other groups, empowered by the tools of modern political campaigns and by the ignorance of the electorate, which is the godmother of the single-issue campaign and the godfather of the sound bite."); *Is There a Threat to Judicial Independence in the United States Today?*, Panel Discussion in 26 FORDHAM URBAN L. J. (1998); *Breaking the Most Vulnerable Branch: Do Rising Threats to Judicial Independence Preclude Due Process in Capital Cases?*, Panel Discussion in 31 COLUM. HUMAN RIGHTS L. REV. 137 (Fall 1999).

I was among those worried by what seemed like unprecedented attacks on the judiciary. In 1997, five years before *White*, I questioned "whether our system of justice [will] survive the present efforts to reduce its members to contestants in a tough-man contest." Penny J. White, *If Justice is For All, Who are its Constituents?* 64 TENN. L. REV. 259, 262 (1997). I noted that the "growing trend" toward eliminating independent judges required lawyers to "stave off the attempts to make judicial decisions subject to public polling" and "judicial elections the grand prize for candidates who claim that their constituents are law and order, regardless of the circumstances." *Id.* at 261.

[10] Judicial Activism: Defining the Problem and Its Impact: Hearings on S.J. Res. 26, a Bill Proposing a Constitutional Amendment to Establish Limited Judicial Terms of Office Before the Subcomm. on Constitution, Federalism, and Property Rights of the Comm. on the Judiciary, 105th Cong. 10 (1997).

[11] ABA Report of the Comm. on Separation of Powers and Judicial Independence, July 4, 1997, at ii. The entire report can be viewed at www.abanet.org/govaffairs/judiciary/execsum.html.

[12] Many scholars have divided the issue of judicial independence into two parts. The independence of the judiciary as an institution is generally pegged "institutional independence," while independence of individual judges or courts with regard to decision-making is often referred to as "decisional independence." *See* e.g., John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence,* 72 S. CAL. L. REV. (1999) (distinguishing independence of individual judges from dependence of the judiciary as an institution); Ronald George, *Challenges Facing an Independent Judiciary*, 80 N.Y.U. L. Rev. 1345 (2005).

[13] Drawing on a metaphor used by Justice Otto Kaus of the California Supreme Court, Professor Gerald F. Uelmen, in 1997, described the major issues which threatened judicial independence as "crocodiles in the bathtub." They

brought to bear upon a single judge or court as a result of a judicial decision. When this individual scrutiny resulted in unfair criticisms leveled for the purpose of interfering with the judicial process, judicial independence was potentially undermined.

One notable public attack came in the spring of 1996 from the two men who would vie for president that year. President Bill Clinton and Senator Robert Dole sparred publicly over whether a federal judge should be impeached for suppressing evidence in a single case.[14] Many complained that such an obvious attempt to interfere with judicial independence by intimidation should not come from "responsible" government officials.[15] But in reality, in the six years between the impeachment controversy and the decision in *White,* many threats to judicial independence[16] were levied by federal government officials[17] against federal judges[18] for purely personal political reasons.[19]

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were the death penalty ("the fattest crocodile"), abortion ("the meanest crocodile"), and popular initiatives ("the angriest crocodile"). Gerald F. Uelmen, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in the Era of Judicial Politicalization*, 72 NOTRE DAME L. REV. 1133, 1135, 1144, & 1147 (1997).

[14]Judge Harold Baer, Jr., federal district judge in the Southern District of New York, granted a defense motion to suppress evidence in the case of United States v. Bayless, 913 F.Supp. 232, 234 (S.D.N.Y. 1996), *vacated*, 921 F. Supp. 211, 212 (S.D.N.Y. 1996). The motion alleged that the police did not have reasonable suspicion to stop the car that defendant Bayless was driving and that the subsequent search of the car, which yielded the physical evidence of more than seventy pounds of cocaine and heroin, was therefore the fruit of an illegal stop. The judge granted the motion. *Id.* The ruling prompted more than 200 members of Congress to sign a letter written to President Clinton calling for the President to demand Judge Baer's resignation. Presidential nominee Dole called for Baer's impeachment. *See* Harold Baer, Jr., *Interview: A Unique Perspective on Judicial Independence*, 25 HOFSTRA L. REV. 799 (1997); Jon O. Newman, *The Judge Baer Controversy*, 80 JUDICATURE 156 (1997).

[15]Chief Judge John O. Newman and three prior chief judges for the Court of Appeals for the Second Circuit issued a public statement decrying the attacks on Judge Baer. David S. Broder, *Space for a Judge*, WASH. POST, Apr. 14, 1996, at C7; Don Van Natta, Jr., *Judges Defend a Colleague from Attacks*, N.Y. TIMES, Mar. 29, 1996, at B1, B4 ("We have no quarrel with criticism of any decision rendered by any judge. Informed comment and disagreement from lawyers, academics, and public officials have been hallmarks of the American legal tradition. But there is an important line between legitimate criticism of a decision, and illegitimate attack upon a judge. . . . [These attacks] do a grave disservice to the principle of an independent judiciary, and, more significantly mislead the public as to the role of judges in a constitutional democracy."). Broder, at C7. Similarly, the United States Attorney for the Southern District of New York, Mary Jo White, criticized the attacks, noting that "[t]he independence of the judiciary is ... one of the fundamental cornerstones of our government and democracy. It is indeed that independence that both the Government and defendants rely upon in every case for a fair and just decision on the merits. Louis H. Pollak, *Criticizing Judges*, 79 JUDICATURE 299, 301 (1996). In addition, when Chief Justice Rehnquist commemorated the centennial of American University's Washington College of Law in April, 1996, he described judicial independence as one of the "crown jewels of our system of government." The entirety of Chief Justice Rehnquist's speech is available from the 'Lectric Law Library at www.lectlaw.com/files/jud38.htm.

[16] In addition to criticisms and threats such as those levied at Judge Baer, and a publicized agenda to threaten impeachment in order to intimidate federal judges, *see* notes 14 & 15 *supra* and note 18 *infra*, Congress toyed with legislation eliminating life tenure, *See, e.g.*, S.J. Res. 26, 105th Cong. (1997); H.J. Res. 63, 105th Cong. (1997); H.J. Res. 77, 105th Cong. (1997); H.J. Res. 74, 105th Cong. (1997); passed legislation limiting jurisdiction in litigation brought by prisoners, immigrants, and death row inmates; and attempted to enact legislation disallowing single-judge decisions in cases challenging state initiatives.

[17] Examples include comments by then House Majority Whip ("[a]s part of our conservative efforts against judicial activism, we are going after judges . . . in a big way), Ralph Z. Hallow, *Republicans out to Impeach Activist Jurists*, WASH. TIMES, Mar. 12, 1997, at Al; agreement by then Senate Majority Leader, ("[I]t sounds like a good idea to me."), Morning Edition, Judicial Intimidation (NPR broadcast, Sept. 26, 1997); and an outline by a member of the House ("It is time to begin exploring how and in what way we might take steps to "re-balance" . . . includ[ing] . . . exploring . . . the consequences [of judicial] misbehavior . . . ."), Judicial Misconduct and Discipline Before the House Subcomm. on Courts and Intellectual Property of the Comm. on the Judiciary, 105th Cong. 8 (1977); and a

In the pre-*White* years, it was not unusual for the members of the Executive and Legislative branches to loudly and unfairly criticize the federal judiciary. While Clinton and Dole welcomed the opportunity to capture media attention by bullying a federal judge,[20] it was Congress that identified the intimidation of federal judges and the reduction of judicial power[21] as useful political strategies. A booklet widely circulated among the Republican members of the 104th and 105th Congress urged members to initiate impeachment proceedings against so-called "activist judges." The booklet acknowledged that impeachment was unlikely, but argued:

> Even if it seems that an impeachment conviction against a certain official is unlikely, impeachment should nevertheless be pursued. Why? Because just the process of impeachment serves as a deterrent. A judge, even if he knows that he is facing nothing more than a congressional hearing on his conduct, will usually become more restrained in order to avoid adding "fuel to the fire" and thus giving more evidence to the critics calling for his removal.[22]

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member of the Senate ("Activist, out-of-control judges pose a clear and present danger to constitutional freedom."), John Ascroft, *Symposium*, INSIGHT MAG., Mar.2, 1998, available at 19987 WL 9105346.

[18]Despite Judge Baer's reconsideration, House Majority Whip Tom DeLay identified Judge Baer as an impeachment "target." Ralph Z. Hallow, *Republicans Out to Impeach 'Activist' Jurists*, WASH. TIMES, March 12, 1997, at A1. Other attempts to impeach were efforts directed at Judge Fred Biery for his ruling in an election contest alleging voter fraud, Casarez v. Val Verde County, 957 F. Supp. 847 (W.D. Tex. 1997); Chief Judge Thelton Henderson for his ruling enjoining implementation of a voter-approved affirmative action ban, Coalition for Economic Equity v. Wilson, 1996 WL 699962; 1996 WL 788375 (N.D. Ca. 1996).

[19] In his 1999 article comparing the then-present threats to judicial independence with the Roosevelt court-packing plan, Stephen Kline observes that "[w]hat is particularly odd about these series of attacks on the courts . . . is that the courts have not been expansive or sought to expand their powers. . . . Even the ferociousness of the Great Depression did not excuse or justify the damaging attacks on the courts, and there is no contemporary national emergency which could justify an assault of judicial independence today . . . ." Kline, *supra* note 9, at 953-54.

[20]Judge Baer's decision in *Bayless* I was issued on January 22, 1996. Based on the government's motion to reopen, and a rehearing at which the government presented additional testimonial and documentary evidence, Judge Baer reversed the ruling in *Bayless* II, United States v. Bayless, 921 F. Supp. 211 (S.D.N.Y. 1996), in early April, 1996, on prompting a journalist for *Time* magazine to comment that the judge had proven that he could be "both wrong and arrogant but not stupid." He continued his criticism not only of the judge, but of President Clinton and Senator Dole:

> [Judge Baer] helped the man who appointed him by reversing his ruling, which left the President free to climb back onto the moral high ground. "It's important not to get into the business of characterizing judges based on one decision they make," Clinton said almost immediately after Baer fell on his gavel. Dole, too, accommodated the changed landscape with stunning speed. "I don't suggest we ought to be able to pressure judges, but we ought to be able to criticize [them] when we think they've made a mistake . . . ."
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> The entire episode is a blot on both candidates. One can safely speculate that [the President's press secretary's] threat caused Baer to see the case in a different light. Clinton interfered with the process as surely as if he had flown to New York to demonstrate against the judge's original decision. Dole's post-reversal words appear equally hypocritical. When the leader of the Senate, the body with the power to remove judges, calls for a jurist's impeachment, that's pressure.

Michael Kramer, *Cheap Shots at Judges*, TIME (April 22, 1996).

[21] *See* note 13 *supra*; see also Kline, *supra* note 10, at 867 n. 11 ("[d]uring the 104th and 105th Congresses, at least seven constitutional amendments were introduced which would have eliminated life tenure for federal judges, replacing it with a fixed term of between six and twelve years, and sometimes permitting reappointment.")

[22] DAVID BARTON, IMPEACHMENT! RESTRAINING AN OVERACTIVE JUDICIARY 53 (1996). This book written by Barton in 1996 has been garnering renewed attention. Ralph Neas, president of People for the American way, describes the book as a "handbook on how and why the right should push for impeachment of judges whose

The booklet received some positive attention from Republicans in the House, notably Republican Majority Leader Tom DeLay, who argued that judges should not be impeached for partisan reasons, but for overstepping the bounds of their constitutional authority.[23]

While federal politicians were by far the most aggressive and dominant critics of the judiciary, (and federal judges the most frequent targets), politicians and political organizations at the state level sometimes orchestrated their own attacks[24] against members of the state judiciary.[25] It was not unheard of, prior to *White,*[26] for a state court judge to be targeted,[27] and, occasionally defeated.[28] While these occurrences were unpleasant, they remained fairly isolated through 2002; the overwhelming majority of state court judges retained their positions[29] and most of those who warned about the effect of threats to the independence of the judiciary were focused upon attacks on federal courts.[30]

Not surprisingly, despite all its bravado, Congress did not impeach a single federal judge, though it did continue to insert itself into the workings of the federal courts, sometimes in disturbingly inappropriate ways.[31] Despite this fairly consistent, and sometimes noisy rivalry

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decisions they disagree with on abortion, school desegregation, homosexuality, and other subjects." Mr. Neas' entire letter, sent to Senator Bill Frist to urge his disassociation with Barton, can be viewed on the People for the American Way website at www.pfaw.org/pfaw/general/default.aspx?oId=18519.

[23] *See* Steven W. Fitschen, Impeaching Federal Judges: A Convenantal and Constitutional Response to Judicial Tyranny, __ Reg. L. Rev. ___ (Spring 1998). Some conservatives latched on to the pamphlet and criticized Republican leaders for not following its suggestions more closely. The Phylis Schlafly Report, Congress Must Curb the Imperial Judiciary (Feb. 1997)(can be viewed at http://www.eagleforum.org/psr/1997/feb97/psrfeb97.html)

[24] *See generally* Stephen B. Bright, *Can Judicial Independence be Attained in the South? Overcoming History, Elections, and Misperceptions about the Role of the Judiciary*, 14 GA. STATE UNIV. L. REV. 817, 844-55 (1998)(describing attacks on state court judges); *see also* Stephen B. Bright and Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759 (1995).

[25] Similar to post-*White* attacks, the targets of these attacks are often members of the state appellate courts. It is likely that many local judges were also targeted for attack or defeat, but the information about those incidents is much less readily available.

[26] The most notorious example of a successful effort to remove state court judges, ostensibly because of their judicial philosophies, occurred in 1986 in California, when voters replaced three members of the state supreme court, Chief Justice Rose Bird, Justice Cruz Reynoso and Justice Joseph Grodin, based upon their perceived liberality. Robert Lindsey, *Deukmejian and Cranston Win As 3 Judges Are Ousted*, N.Y. TIMES, Nov. 6, 1986, at A30. In his description of his time on the court, Justice Reynoso comments that "[p]olitics will always be a part of the appointment process, but politics should not intrude after a judge is appointed." Cruz Reynoso, *Brief Remembrances: My Appointment and Service on the California Court of Appeal and Supreme Court 1976- 1987*, 13 BERKELEY LA RAZA L.J. 15, 27 (2002).

[27] *See generally* Bright, *supra* note 24 at 817, 847-51(1998)(describing attacks on Texas, Tennessee, Nevada, Nebraska, and Missouri judges);

[28] *See* Uelmen, *supra* note 13, describing my defeat and the defeat of Justice David Lanier of the Nebraska Supreme Court, both in 1996).

[29] Lawrence Baum, *Judicial Elections and Judicial Independence: The Voter's Perspective*, 64 OHIO STATE L.J. 13, 24 -38 (2003).

[30] *See* Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 SO. CAL. L. REV. 315, 331 (1999)(noting that most scholars and most national studies tend to ignore state courts and state judges).

[31] The most obvious example is the case of Terry Schiavo, a Florida woman whose husband petitioned to remove her feeding tube. The case originated in Florida state courts but the state court decision was altered by Florida and congressional legislation, which was ultimately overturned by federal courts.

between the federal courts and the Congress, most would opine that the courts continue to function as they should, separate from and independent of the attempts to undermine their integrity.

II. The Impact of *Republican Party of Minnesota v. White*

But if these attempts to control the federal courts by intimidation and interference were less than successful, today's efforts to undermine the independence of state courts, spearheaded by special interest groups and catapulted by the Supreme Court's decision in *Republican Party of Minnesota v. White* are much more likely to succeed. Success is likely not because state court judges are weak and malleable, but because the independence of the judiciary is as much a matter of public perception as it is of reality.[32] The contention that "courts derive their legitimacy from their perceived neutrality" is largely true.[33]

State court judges, few of whom hold their positions for life,[34] are being enticed by special interest groups with large coffers and constituencies to compromise their independence in order to maintain their positions. State judicial independence in the aftermath of *White* is at risk of becoming no more than an archived principle.

The Supreme Court decision in *Republican Party of Minnesota v. White* impacted judicial independence in state courts in significant ways. First, the majority's flawed reasoning, in several aspects, has led lower courts, judicial ethics bodies, and state supreme courts to eliminate other restrictions on judicial speech and conduct. The result has been a virtual removal of the distinction between judicial elections and other elections and has led to an increased tendency to view judges as politicians. In addition, the decision created an ideal environment for the exertion of political control over state courts. The environment is not only fertile for control in the thirty-nine states where judges face some form of popular election, but also in states where judges are chosen by so-called merit selection. Even in jurisdictions where judges are initially appointed, they periodically face a retention vote. Special interest groups can dramatically influence those "yes-no" races by their negative portrayals of incumbent judges.

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[32] As Justice O'Connor noted in her concurring opinion in *White*, "[e]ven if judges were able to suppress their awareness of the potential electoral consequences of their decisions and refrain from acting on it, the public's confidence in the judiciary could be undermined simply by the possibility that judges would be unable to do so." 536 U.S. at 765, 789 (O'Connor, J., concurring). Justice O'Connor also cited a 2001 national opinion poll that found that seventy-six percent of registered voters believe that campaign contributions affect judicial decisions and that two-thirds of voters believe that judges give favorable treatment to donors. *Id.* (citing Greenberg Quinlan Rosner Research, Inc. and American Viewpoint, National Public Opinion Survey Frequency Questionnaire 4 (2001)). The survey may be viewed at www.justiceatstake.org/files/JASNationalSurveyResults.pdf.

[33] *Politicians in Judge's Robes,* N.Y. TIMES (Editorial Feb. 26, 2003). This editorial can be viewed at www.nytimes.com/2003/02/26/opinion/26WED2.html.

[34] Judicial appointments are made for life, or until mandatory retirement at age 70, in only three states—New Hampshire, Massachusetts, and Rhode Island. Thirty-nine states conduct elections, which may be partisan, nonpartisan, or uncontested retention elections. As a result, 87 percent of state court judges face some sort of popular election. In the other states, judges are selected and retained by vote of the legislature, executive, or other body. The American Judicature Society's webpage collects the specific information for each state at www.ajs.org/js/JudicialSelectionCharts.pdf.

A. The Effects of Flawed Reasoning

In the *White* decision, several aspects of the majority's flawed reasoning have led lower courts, judicial ethics bodies, and state supreme courts, to eliminate other restrictions on judicial speech and conduct unnecessarily.[35] Even in light of the majority's emphasis on the narrowness of the decision,[36] courts have relied on *White* to strike down pledges or promises,[37] commitment,[38] false statement,[39] and political activity restrictions.[40] State supreme courts have altered their ethics rules[41] to eliminate many restrictions on judicial campaign speech and conduct and softened those that remained. Some courts and judicial ethics bodies have shied away from discipline when adjudicating ethics complaints based on judicial speech and conduct[42] and, wary of lawsuits filed against nonconformists,[43] have altered their advice to judicial candidates.

Arguably, most, if not all of these reactions go beyond what is necessary to effectuate the holding in *White* and flow from the opinion's flawed rationale. First, the opinion discounts the view that judicial elections are, or should be, different from elections for legislative or executive

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[35] *See generally*, Cynthia Gray, *The State's Response to* Republican Party of Minnesota v. White, 86 JUDICATURE 163 (Nov.- Dec. 2002).

[36] Not only did the Court limit its grant of certiorari to one of several issues raised, see Petition for Certiorari, Republican Party of Minnesota v. Kelly, 534 U.S. 1054 (2001), the Court also described the issue narrowly in the opening sentence of the opinion ("whether the First Amendment permits the Minnesota Supreme Court to prohibit candidates for judicial election in that State from announcing their views on disputed legal and political issues"), 536 U.S. at 768, and specifically confined the holding to the Minnesota announce clause ("The Minnesota Code contains a so-called 'pledges or promises' clause, . . . that is not challenged here and on which we express no view."). *Id.* at 770.

[37] *See, e.g.*, Kansas Judicial Watch v. Stout, 440 F.Supp.2d 1209 (D. Kan. 2006); Indiana Right to Life, Inc. v. Shepard, 463 F. Supp.2d 879 (N.D. Ind. 2006); North Dakota Family Alliance, Inc. v. Bader, 361 F. Supp.2d 1021 (D.N.D. 2005); Family Trust Foundation, Inc. v. Wonitzek, 345 F.Supp.2d 672 (E.D. Ky. 2004).

[38] *See, e.g.*, Duwe v. Alexander, 2007 U.S. Dist. Lexis 39066 (W.D. Wis. 2007); Kansas Judicial Watch v. Stout, 440 F.Supp.2d 1209 (D. Kan. 2006); Indiana Right to Life, Inc. v. Shepard, 463 F. Supp.2d 879 (N.D. Ind. 2006); Family Trust Foundation, Inc. v. Wonitzek, 345 F.Supp.2d 672 (E.D. Ky. 2004).

[39] *See* Weaver v. Bonner, 309 F.3d 1312 (11th Cir. 2002).

[40] *Id.*; see also Republican Party of Minnesota v. White, 416 F.3d 738 (11th Cir. 2005), cert denied sub nom. Dimick v. Republican Party of Minnesota, 126 S.Ct. 1165 (2006); O'Neill v. Coughlan, 2004 U.S. Dist. LEXIS 29401(N.D. Ohio 2004).

[41] See discussion of the litigation and discipline inquiry that led the Alabama Supreme Court to withdraw an ethics opinion and alter the ethics requirements in Penny J. White, *A Matter of Perspective*, 3 FIRST AMENDMENT L. REV. 5, 49-52 (2004); See also discussion of this action as well as action by the Arizona Supreme Court, the California Supreme Court, the Georgia Supreme Court, the Iowa Supreme Court, the Missouri Supreme Court, the New Mexico Supreme Court, the North Dakota Supreme Court, the Pennsylvania Supreme Court, the South Dakota Supreme Court, the Tennessee Supreme Court, the Texas Supreme Court, and the Wisconsin Supreme Court in Cynthia Gray, *Developments Following* Republican Party of Minnesota v. White, www.ajs.org/ethics/pdfs/ DevelopmentsafterWhite.pdf.

[42] *See* Inquiry Concerning Former Judge Gray, Decision and Order of Dismissal (Aug. 27, 2002) at cjp.ca.gov/pubdisc.html. A notable exception is Florida who not only severely disciplined Judge Kinsey, see note *supra*, but also more recently removed a judge from office for "flagrant misrepresentations made to the voting public" during a judicial campaign along with other violations. Inquiry Concerning Renke, 933 So.2d 482 (Florida 2006).

[43] Lawsuits in Alaska and Indiana were filed when judicial candidates declined to answer special interest questionnaires based on advice given to them by their state judicial ethics bodies. *See* White, *supra* note 41, at 51-54.

offices.[44] Although the majority denies this basis for their holding,[45] the opinion clearly evinces, as Justice Ginsberg's declares, a "unilocular 'an election is an election' approach."[46] Not only does the majority repetitively refer to the rights of candidates, in general,[47] the opinion unambiguously concludes that the essence of the case is not that it involves judges, but that it involves elections.[48] "If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the **participants** in that process . . . the First Amendment rights that attach to their roles."[49]

By denying the uniqueness of judicial office, the majority confuses and promotes a misunderstanding of the role of a judge. Unlike legislative and executive office holders who are elected to represent their constituents, judges must apply the law. They are not permitted to rule based upon majority viewpoint. Their responsibility is not to those who elect them but to the rule of law. When judges campaign based on personal qualifications for office, voters are made aware of the distinction between judges and other office holders. They may observe that people seeking judicial positions do not make promises or announce views on controversial political issues. They are able to deduce at least that these elections are different and that they are expected to look to the candidate's qualifications and experiences.

The *White* opinion also muddles the role of a judge by asserting a series of false premises about lawyers and judges. The first false premise is that because judges or judicial candidates must be lawyers,[50] they have predisposed legal views. The faulty logic continues as the majority equates predisposition with predetermined judicial opinions.[51] This premise wrongly assumes that to be legally trained is to be legally predisposed. It also incorrectly assumes that lawyers adopt and accept as their own the viewpoint of their clients.[52] This leap-frog reasoning—from

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[44] Academics have explained this view as resulting from the Supreme Court majority's antifunctionalist approach to the free speech. *The Supreme Court: Leading Cases*, 116 HARV. L. REV. 200, 272-74 (2002).

[45] The majority opinion, authored by Justice Scalia, asserts that the dissenting justices, 536 U.S. at 783 n.10, and, particularly, Justice Ginsberg "attack arguments we do not make. For example, despite the number of pages she dedicates to disproving this proposition, we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office." 536 U.S. at 783.

[46] 536 U.S. at 803, 805 (Ginsburg, J., dissenting).

> Whether state or federal, elected or appointed, judges perform a function fundamentally different from that of the people's elected representatives. Legislative and executive officials act on behalf of the voters who placed them in office; 'judges represent the Law. . . . I would differentiate elections for political offices, in which the First Amendment holds full say, from elections designed to select those who office is to administer justice without respect to persons."
> *Id.*

[47] *Id.* at 775 (emphasis added); *id.* at 782, (speech about "the qualifications of **candidates** for public office" is "'at the core of our First Amendment freedoms'"); *id.* at 788.

[48] "[T]he first Amendment does not permit [those who oppose judicial elections] to achieve [their] goal by leaving the principle of elections in place while preventing **candidates** from discussing what the elections are about." *Id.* at 788.

[49] *Id.* at 713 (quoting *Renne v. Geary*, 501 U.S. 312, 349 (1991)(Marshall, J., dissenting)(emphasis added).

[50] *Id.* at 778. "The Minnesota Constitution positively forbids the selection . . . of judges who are impartial in the sense of having no views on the law." (citing Article VI, Section 5 of the Minnesota Constitution which requires that judges be "learned in the law.").

[51] *Id.* at 778-79.

[52] *Id.* at 779. The majority claims that "[b]efore they arrive on the bench . . . judges have committed themselves on legal issues that they must later rule upon." In support of the claim, the majority refers to Justice Black's

legal training to legal practice to legal predisposition to judicial decision-making—misconstrues the role of lawyers and judges.

Equally false, and unfortunate, are the opinion's misassumptions about judges. The majority asserts that when incumbent judges decide cases, teach courses, or write articles, they are expressing viewpoints that will ordain their future rulings.[53] This both misstates and oversimplifies the process of judging. It is a grave misstatement because ethical judges do not express personal viewpoints in judicial opinions. While judges who engage in scholarship and teaching may do so, those personal opinions cannot ethically influence their judicial decisions.[54]

This misassumption oversimplifies the nature of judging because it suggests that a prior ruling determines the outcome of a future case such that the task of judging is simply cubby-holing cases into predefined "holding" compartments. This one-size-fits-all characterization of the process of judging wrongly assumes that all cases are fungible and all principles of law dictatorial.

Ironically, not only does the majority oversimplify the role of judges, the majority overstates the role of *most* judges. To demonstrate that judges are not all that different from other political officials, the Court asserts that "the judges of inferior courts *often* 'make law'. . . ."[55] To advance this denied, but ubiquitous "unilocular" approach, the majority likens all judges to Supreme Court justices and shatters some of the bedrock premises of the American justice system[56] in the process.

These and other false assumptions in the *White* majority opinion coalesced with the holding to create the ideal environment for money, politics, and special interest agendas to gain

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participation in cases construing the Fair Labor Standards Act, notwithstanding his work on the Act as a Senator and Chief Justice Hughes' authorship of an opinion overruling a decision he had criticized in a book.

[53] *Id.* at 779. "[J]udges have often committed themselves on legal issues that they must later rule upon" either by "confrontation a legal issue on which [they have] expressed an opinion while on the bench," or by stat[ing] their views in classes that they conduct, and in books and speeches."

[54] *See generally* Terri Peretti, *Symposium: Perspectives of Judicial Independence: A Normative Appraisal of Social Scientific Knowledge Regarding Judicial Independence,* 64 OHIO ST. L. J.349, 349 (2003);("[j]udges use what freedom they have to decide in accordance with ideological preferences;")(citing and quoting DAVID W. NEUBAUER, JUDICIAL PROCESS: LAW, COURTS, AND POLITICS IN THE UNITED STATES 410 (2d ed. 1997)("judges – particularly appellate court jurists – view cases primarily in terms of the broad political, socioeconomic issues they raise and generally respond to these issues in accordance with their personal values and attitudes"). Peretti describes my claims that judges guarantee individual rights "extravagant." *Id.* at 350 n. 4. (citing Penny J. White, *It's A Wonderful Life, or Is It? America Without Judicial Independence*, 27 U. MEM. L. REV. 1, 8 (1996).

[55] *Id.* at 784 n.12. These judges, according to the majority, "make law" when they issue a decision on a situation in which the state's high court has not ruled and when they issue a decision that is not appealed.

[56] The referenced principles include separation of powers, judicial independence, and *stare decisis.* The majority reasons that a notion of a judiciary separated from representative government "is not a true picture of the American system" in which judges make law, shape state constitutions, and set aside laws. *Id.* at 784. This view of state court judges is ill informed. With regard to the making of law and setting aside of laws, *See, e.g.*, Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Court Reading Statutes and Constitutions*, 70 N.Y.U.L. REV. 1, 18-19 (1995)(asserting that statutes are now the primary source of law); Ellen Ash Peters, *Common Law Judging in a Statutory World: An Address,* 43 U. PITT. L. REV. 995, 997 (1982); with regard to the infrequency with which state courts interpret state constitutions, see James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 780-81(1991). For a view of state court judging from a former state court judge, see Penny J. White, *Some Appeasement for Professor Tushnet*, 71 TENN. L. REV. 275 (Winter 2004).

an unprecedented stronghold in our state courts. The Court endorsed the belief that a candidate's personal views on disputed legal or political issues are relevant qualifications for office. Twice the Court characterized the speech that Minnesota prohibited—a candidates' "announce[ment of] his or her views on disputed legal or political issues"—as speech "about the qualifications of candidates for public office."[57] The Court further strengthened this nexus between a candidate's personal views and qualifications when it expresses discontent with the limited topics traditionally discussed in judicial elections.

By endorsing a nexus between personal views and qualifications for judicial office while discounting the sufficiency of the more traditional subjects of judicial campaigns, the Court created a perfect environment for special interest groups to peddle their judicial questionnaires.[58] If announcing the personal viewpoint is "speech about the qualifications of the candidate for public office," it seems reasonable, from a layperson's perspective, to ask the candidate to respond. Moreover, from that same perspective, it seems unreasonable, evasive, and even arrogant, for a candidate to refuse to respond.[59]

While an announcement is technically only an *announcement,* the *White* majority, by its incorrect characterizations of lawyers, judges, and judging, has supported the conclusion that personal viewpoints not only predispose a candidate, but also predict, and arguably ensure a candidate's rulings. This faulty conclusion buttresses the public's misperception of the judiciary.[60] By an overwhelming majority, the American public wants to elect its judges.[61] This is not only because the public has confidence in their own judgment, but also because the public believes that by elections judges can be held accountable. When a voter hears a judicial candidate "announce" a view, the voter is likely to interpret the view as a commitment. From the voter's perspective, an announcement is meaningful only to the extent that it informs the voter about whether the candidate should be elected. A voter will likely expect adherence to that view, rather than adherence to some abstract notion like the rule of law. And while the majority did cajole the defendants by asserting that "candidates for judicial office [are not] *compelled* to announce their view,"[62] the opinion has undeniably resulted in the expectation that candidates for judicial office will discuss and state their views.[63]

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[57]*Id.* at 774 & 781.

[58] *See* text accompanying notes 128-139 *infra.*

[59] *See* text accompanying note 60 *infra.*

[60] While expressing overall support for the American justice system, the public has an "uneven" view of the system. An ABA study noted that "people have an "uneven" knowledge of the justice system, recognizing some "obscure tenets," but lacking knowledge of more basic ones." The entire report can be viewed at www.abanet.org/media/perception/perception.html.

A 1999 Hearst survey found that while the public claims to understand the concept of judicial independence, more than half think courts should rule in accord with voter's values and that judges who repeatedly ignore voter's values should be impeached. National Center for State Courts, *How The Public Views the State Courts- a 1999 Survey*, at page 10. Entire report can be viewed at www.ncsconline.org/WC/Publications/ Res_AmtPCT_PublicView CrtsPub.pdf

[61]Nearly 65 percent of Americans want to elect those who sit on the bench, according to a national survey by the Annenberg Public Policy Center. *See* www.annenbergpublicpolicycenter.org/NewsDetails.

[62] *Id.* at 783 n.11.

[63] The Court not only refers to candidates' views as qualifications "at the core of our electoral process" but also labels the views as "relevant information." *Id.* at 782.

The *White* decision advances this likelihood as well when it ridicules the suggestion, made by the dissent, that judicial candidates act unethically when they curry favor by stating views that will further their chances of election.[64] Thus, not only did the majority elevate a judicial candidate's First Amendment rights over the citizen's rights to fair and independent courts, they also incentivized judges joining the political fray.

Both the outcome and rationale in *White* have energized special interest groups in their efforts to exert unhealthy influence over state court judges. The decision that a candidate has the right to announce his or her agreement with the special interest agenda of the day has created a new group of political activists for special interests groups who view every state court judge[65] as being a potential on-the-bench advocate for their agendas. This potential is sufficient motivation for special interest groups to invest their considerable resources in the job of stocking state court benches. Once their campaign is mounted,[66] the opposition candidate has little choice[67] but to join the financial arms race. In the end, both the public and the judiciary sense that the system has been soiled.[68]

The increase in costs of judicial campaigns and the heightened involvement of special interest groups will likely produce a new breed of judges—those with money and influence. In addition to an overall decrease in the respect for the judiciary will likely be a corresponding reduction in the prestige of judicial office. Those who have or who are willing to forge connections with well-funded special interest groups will comprise the pool of candidates for judicial office. Some long-time judges will leave the bench rather than become political pawns.[69]

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[64] Justice Stevens commented in his dissent that "[T]o the extent that such statements seek to enhance the popularity of the candidate by indicating how he would rule in specific cases if elected, they evidence a lack of fitness for office." 536 U.S. at 798 (Stevens, J., dissenting). Justice Scalia scoffed at the suggestion, noting that Justice Stevens must "contemplate a federal bench filled with the unfit. He reasoned:

[65] Special interest groups in the 2006 state court elections showed interest in judges "further down the ballot." THE POLITICS OF JUDICIAL ELECTIONS (2006) at 24. In Illinois, special interest groups "quadrupled the state record" in a court of appeals race. Half a million dollars was spent in a trial court race in 2006 in Madison County, Illinois. In Missouri, an out-of-state special interest group spent a large amount of money to unseat an incumbent trial judge. *Id.*

[66] Special interest groups are able to avoid some campaign disclosure and limitation requirements. THE NEW POLITICS OF JUDICIAL ELECTIONS (2000) at 18. By avoiding "magic words," like elect or defeat, the groups can avoid some requirements. *See generally* Buckley v. Valeo, 425 U.S. 946 (1976). Preserving these loopholes has been another agenda item of special interest groups who have brought many challenges to campaign limitation requirements, *See, e.g.*, Federal Election Comm'n v. Wisconsin Right to Life, Inc., No. 06-969 (June 25, 2007) Randall v. Sorrell,126 S.Ct. 2479 (2006); Wisconsin Right to Life Inc. v. FEC, 546 U.S. 410 (2006) (per curiam).

[67] David B. Rottman, *The* White *Decision in the Court of Opinion: Views of Judges and the General Public*, COURT REVIEW 16, 17 (Spring 2002). In this survey, 90 percent of supreme court justices, 82 percent of appellate judges, and 80% of trial judges described themselves as being under a "great deal" or "some" pressure to raise money for elections.

[68] In a very recent study publicized by the Annenberg Public Policy Center, seventy percent of Americans said that the "necessity to raise campaign funds will affect a judge's ruling once in office." More than sixty percent believe that past contributions affect a judge's ability to be fair and impartial. *See* www.annenbergpublicpolicycenter.org/ NewsDetails.

[69] In the spring of 2007, one of the pioneer female supreme court justices announced that she would retire rather than endure another "expensive, divisive" election. Justice Linda Trout, who has served on the Idaho Supreme Court for fifteen years, was Idaho's first female justice and is now the only female member of the court. In 2002, Justice Trout was the target of a negative campaign in 2002 when she was Chief Justice. In announcing her retirement, Justice Trout noted that "[j]udicial elections have turned into bitter, nasty fights [which] tarnish the judiciary." Scott Michels, *Judicial Elections Turn 'Bitter,' Nasty' and Pricey: Attack Ads and Special Interest Groups are Poisoning*

The pool of judicial candidates will likely be not only more political, but also less qualified. As one experienced media consultant has recently observed, "I think the bottom line is that people who are qualified, who have everything going for them . . . end up not being put on a bench [while a] person who is not qualified, who has enough money, who has a real smart political handler, can end up sitting in a judicial seat [with] absolutely no business being there."[70] The end result could likely be not only a state judiciary that lacks independence and integrity, but one that lacks competence as well.

B. The Creation of an Ideal Environment for Control

The holding in *White* has created an ideal environment in which money, politics, and special interests thrive. This environment has produced a new breed of threats, different in kind and degree, leveled specifically at state court judges. While history is replete with examples of conflict[71] between the three branches,[72] often aimed at undermining the judiciary, the post-*White* threats are orchestrated by moneyed groups whose sole objective is to control state courts for the purpose of instilling their social and political agendas. If they succeed, state judges, like legislators, and governors, will represent those with political clout and abundant resources, destroying permanently any prospect of equal justice for all.

1. Judicial Elections Before *White*

Before the decisions in *White* and its progeny,[73] most state court judicial elections were decorous events in which candidates talked about their educational backgrounds, their

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Judicial Campaigns, Critics Say," AP NEWS (June 19, 2007). The article can be viewed at www.abcnews.go.com/TheLaw/story?id=3292991&page=1.

[70] The media consultant, Helen Lavelle, made these comments in an interview with Frontline. The entire interview can be read at www.pbs.org/wgbh/pages/frontline/shows/justice/interviews/lavelle.html.

[71] The positive aspects of the separation of powers and the corresponding checks and balances are described throughout the Federalist Papers. For example, Federalist Paper 51 includes this passage: "It is equally evident, that the members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal." Federalist Paper 78 includes the now-famous description of the judiciary as the "least dangerous" and "weakest" branch: "Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. . . . It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."

[72] Many authors, including myself, have discussed the history of judicial independence. *See, e.g.*, Shirley Abrahamson, *Thorny Issues and Slippery Slopes: Perspectives on Judicial Independence,* 64 OHIO ST. L. J. 3 (2003); Stephen O. Kline, *Revisiting FDR's Court Packing Plan: Are the Current Attacks on Judicial Independence So Bad?,* 30 MCGEORGE L. REV. 863 (1999); J. Clifford Wallace, *An Essay On Independence Of The Judiciary: Independence From What And Why*, 58 N.Y.U. ANN. SURV. AM. L. 241 (2001); Penny J. White, *Judging Judges: Securing Judicial Independence By Use of Judicial Performance Evaluations*, 29 FORDHAM URBAN L. J. 1053 (2002).

[73] The cases that have followed, and largely expanded upon the *White* decision are of two kinds. First, many courts have ruled upon lawsuits seeking to enjoin the enforcement of judicial campaign speech and conduct provisions. Secondly, many courts and administrative bodies have ruled upon First Amendment defenses raised by judges and

professional experiences, and their military and community service. This was the practice in most states for several reasons.[74]

First, judicial ethics rules, though varying from state to state, restricted campaign speech and conduct by judges and candidates for judicial office.[75] The restrictions were undoubtedly

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judicial candidates alleged to have violated similar provisions. *See generally* Penny White, *The Good, The Bad, and the (Very, Very) Ugly, and A Fistful of Dollars*, 38 U. Rich. L. Rev. 626, 653-668 (2004).

[74] I draw this conclusion from several personal experiences including being a candidate in three judicial elections, being a voter in dozens of others, and talking frequently to judges from all around the country about their experiences as candidates for judicial offices. Of course, there are notable exceptions to the generalization made in the text, including judicial races for the Texas and Alabama Supreme Courts. Many cite the 1994 Alabama Supreme Court race, orchestrated by Karl Rove, as the race that shifted judicial campaigns into rancorous mud fights. *See* Joshua Green, *Karl Rove In a Corner*, ATLANTIC MONTHLY (Nov. 2004). The article can be viewed at www.theatlantic.com/doc/20041 1/green.

> [In 1994], judicial races in Alabama were customarily low-key affairs. "Campaigning" tended to entail little more than presenting one's qualifications at a meeting of the bar association, and because the state was so staunchly Democratic, sometimes not even that much was required. It was not uncommon for a judge to step down before the end of his term and handpick a successor, who then ran unopposed. All that changed in 1994. Rove brought to Alabama a formula, honed in Texas, for winning judicial races. It involved demonizing Democrats as pawns of the plaintiffs' bar and stoking populist resentment with tales of outrageous verdicts. At Rove's behest, Hooper and his fellow Republican candidates focused relentlessly on a single case involving an Alabama doctor from the richest part of the state who had sued BMW after discovering that, prior to delivery, his new car had been damaged by acid rain and repainted, diminishing its value. After a trial revealed this practice to be widespread, a jury slapped the automaker with $4 million in punitive damages. "It was the poster-child case of outrageous verdicts," says Bill Smith, a political consultant who got his start working for Rove on these and other Alabama races. "Karl figured out the vocabulary on the BMW case and others like it that point out not just liberal behavior but outrageous decisions that make you mad as hell."
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> Throughout the summer the Republican candidates barnstormed the state, invoking the decision at every stop as an example of "jackpot justice" perpetuated by "wealthy personal-injury trial lawyers"—phrases developed by Rove that have since been widely adopted. To channel anger over such verdicts toward the incumbent Democratic justices, Rove highlighted their long-standing practice of soliciting campaign donations from trial lawyers—just as Republicans (which Rove did not say) solicit them from business interests. One particularly damaging ad run by the Hooper campaign was a fictionalized scene featuring a lawyer receiving an unwanted telephone solicitation from an unseen Chief Justice Hornsby, before whom, viewers were given to understand, the lawyer had a case pending. The ad, and the unseemly practices on which it was based, drew national attention from Tom Brokaw and NBC's Nightly News.
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> The attacks began to have the desired effect. Judicial races that no one had expected to be competitive suddenly narrowed, and media attention—especially to Hooper's race after the "dialing for dollars" ad—became widespread. Then Rove turned up the heat. "There was a whole barrage of negative attacks that came in the last two weeks of our campaign," says Joe Perkins, who managed Hornsby's campaign along with those of the other Democrats Rove was working against. "In our polling I sensed a movement and warned our clients."

Although Rove's candidate lost at the polls, he was eventually declared Chief Justice following over a year of legal wrangling challenging the election. *Id.*

[75] Because the judicial selection methods vary from state to state, so too did the restrictions on campaign speech and conduct with the most liberal provisions being in effect where judges were selected in partisan elections. This article does not differentiate as to the various provisions, but generalizes about speech and conduct restrictions. It is noteworthy that while some originally opined that *White* would have limited applicability in the states with merit selection and retention votes, courts have not drawn that distinction. For example, in *Alaska Right to Life Political Action Committee v. Feldman,* 380 F. Supp.2d 1080(D. Ak. 2005), the court found the difference between Alaska's

exacting. For example, the limitations on campaign speech usually disallowed announcements,[76] pledges and promises,[77] or commitments[78] with regard to issues or performance in office.[79] The conduct restrictions were more detailed and varied, depending on the nature of the judicial selection system,[80] but most included prohibitions on personal solicitation of campaign contributions or of publicly stated support.[81] Many also disallowed candidate involvement in partisan political activities, including attending political gatherings, making speeches on behalf of political candidates or organizations, and holding political office.[82]

Those few candidates who flouted their ethical obligations risked being reported and investigated and subjected to discipline by state supreme courts and judicial ethics bodies.

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retention elections and the partisan elections in effect in Minnesota to be of "little consequence." 380 F. Supp.2d at 1083, n.11.

[76] The "announce" clause, Canon 5(A)(3)(d)(i) of the Minnesota Code of Judicial Conduct in effect at the time of the *White* case was part of the 1972 Model Code of Judicial Conduct. It provided that a "candidate for judicial office, including an incumbent judge, shall not announce his or her views on disputed legal or political issues."

[77] The "pledges and promises" clause, before the recent amendments, provided that a "candidate for judicial office shall not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office." Model Code of Judicial Conduct, Canon 5(A)(3)(d). The amended version provides that a "candidate for judicial office shall not with respect to cases, controversies, or issues that are likely to come before the court, make pledges or promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office."

[78] The "commitments" clause, before the recent amendments, provided that a "candidate for judicial office 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."

[79] A few states, notably Georgia, also had a "false statement" provision that prohibited "false, fraudulent, misleading [or] deceptive" communications by candidates and communications which contain "a material misrepresentation of fact or law or omits a fact necessary to make the communication considered as a whole not materially misleading or which is likely to create an unjustified expectation about results the candidate can achieve." *See* Weaver v. Bonner, 309 F.3d 1312, 1319 (11th Cri. 2002)(quoting Ga. Code of Judicial Conduct Canon 7(B)(1)(d)(1998).

[80] The Code of Judicial Conduct, in Canon 5, includes some provisions that apply to all judges and candidates; some provisions that apply to judges and candidates subject to public election; and some provisions that apply to judges or candidates seeking appointment.

[81] Canon 5(C)(2) provides that a "candidate shall not personally solicit or accept campaign contributions or personally solicit publicly stated support. A candidate may, however, establish committees of responsible persons to conduct campaigns for the candidate . . . . Such committees may solicit and accept reasonable campaign contributions . . . ."

[82] Under versions of the Code in effect in many states at the time of *White*, candidates could not endorse candidates for other public offices, make speeches on their behalf, or engage in partisan political activity other than their own campaign. *See*, for example, Spargo v. New York State Comm'n of Judicial Conduct, 244 F.Supp.2d 72. 81-82 (N.D.N.Y. 2003)(quoting N.Y. Comp. Codes R. & Regs. Tit. 22, §100.5(2003)).

Most states also included a general provision that required that a "candidate, including an incumbent judge for a judicial office . . . . shall maintain the dignity appropriate to judicial office." The revised Code of Judicial Conduct retains this provision, with revision. Now found in Canon 5(A)(3), and applying to all judges and candidates, the rule provides that "[a] candidate for judicial office . . . shall maintain the dignity appropriate to judicial office and act in a manner consistent with the impartiality, integrity and independence of the judiciary . . . ."

The "Terminology" section of the Code now defines "impartiality" to denote "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge." This definition is in response to the *White* majority's befuddlement with the term's meaning. "Respondents are rather vague, however, about what they mean by 'impartiality.' Indeed, although the term is used throughout the Eighth Circuit's opinion, the briefs, the Minnesota Code of Judicial Conduct, and the ABA Code of Judicial Conduct, none of these sources bothers to define it." 536 U.S. at 775.

Sometimes the discipline was harsh.[83] The Florida Supreme Court, for example, publicly reprimanded a Florida judge[84] and fined her one-half of her annual judicial salary for her 1998 campaign which included "implicit promises that if elected to office, [she] would help law enforcement."[85] The New York Commission on Judicial Conduct recommended removal of a judge for campaign conduct which included the judge identifying himself as the "law and order" candidate, but ultimately, the judge was only censured.[86]

It was not only the concern about judicial ethics requirements that motivated most state court judges to conduct modest campaigns. Custom and tradition also dictated banal state judicial campaigns. Although judges had climbed to the bench as a result of their prior political activities and connections, many happily relinquished the demands of political life upon becoming a judge. They routinely declined to voice their personal opinions on legal and political issues,[87] even

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[83] *See generally* Lisa Milord, *Associative Political Conduct of Judges and Judicial Candidates*, 14 JUDICIAL CONDUCT REPORTER 1 (1992).

[84] Judge Patricia Kinsey was charged with twelve ethical violations arising out of her 1998 campaign for the office of County Judge in Escambia County. Kinsey's campaign was a traditional "law and order" campaign. Her campaign materials included a full-page picture of herself with ten uniformed, armed police officers, in which she asked, "Who do these guys count on to back them up?" She asserted, for example, that she was "[t]he [u]nanimous [c]hoice of [l]aw [e]nforcement"; that "police officers expect judges to take their testimony seriously and to help law enforcement by putting criminals where they belong... behind bars;" that criminals probably would not want to read her campaign literature; that judges "must support hard-working law enforcement officers by putting criminals behind bars"; that she would "bend over backward to ensure that honest, law-abiding citizens [were] not victimized a second time by the legal system that is supposed to protect them;" and that she "[a]bove all else... identifie[d] with the victims of crime." Kinsey characterized her opponent as a "liberal," noting that the incumbent judge, a former criminal defense lawyer, was "still in that defense mode" and characterized an accused as a "punk." Kinsey misrepresented facts about judicial hearings, including claiming that her opponent had failed to revoke bond in a case, thereby showing "a shocking lack of compassion for the victims"; and used the nickname "'Let 'em Go' Green" for the judge. Kinsey described "her responsibility as a judge to be 'absolutely a reflection of what the community wants.'" *Id.* at 81-83, 87-88, & 87 n.6.

[85] In re Kinsey, 842 So.2d 77, 89 (Fla. 2003). The case against Judge Kinsey was instituted in 1999 based on her conduct in a 1998 campaign. The administrative hearing was concluded in 2000, but the Florida Supreme Court decided the case six months after *White.* Although Judge Kinsey raised a First Amendment defense, the Florida Supreme Court held that its ethical restriction was "more narrow" and that the "compelling state interest in preserving the integrity of [the] judiciary and maintaining the public's confidence in an impartial judiciary" is "beyond dispute." *Id.* at 87. Ultimately, the Supreme Court of the United States denied Judge Kinsey's Petition for Certiorari. Kinsey v. Florida Judicial Qualifications Com'n, 540 U.S. 825 (2003).

[86] In re Watson, 794 N.E.2d 1 (N.Y. 2003). Watson wrote a letter to law enforcement personnel asking for their votes in order to "'put a real prosecutor on the bench.'" *Id.* Watson also stated in the letter that the city needed a judge who would "'work with the police, not against them'" and who would "'assist our law enforcement officers as they aggressively work towards cleaning up our city streets.'" Watson also wrote letters to the editor commending his work as a prosecutor and asking voters to elect him so that the city could send a similar message, presumably by his presence on the bench. His newspaper ads focused on his "'proven experience in the war against crime.'" He also insinuated that the incumbent judges were responsible for soaring arrests in the local community. *Id.* at 2-3. The New York Court of Appeals upheld the state's pledges and promises provisions because it "further[ed] the State's interest in preventing actual or apparent party bias and promoting openmindedness because it prohibits a judicial candidate from making promises that compromise the candidate's ability to behave impartially, or to be perceived as unbiased and open-minded by the public, once on the bench." *Id.* at 6-8.

[87] Rottman, *supra* note 67 at 18. In a 2001 survey of judges, nearly two-thirds of the judges said that judicial ethics rules, though often preventing them from responding to unfair criticism, contained "the right amount and type" of restrictions.

when asked during a campaign.[88] Many felt a welcomed protection in provisions that restricted their attendance at political gatherings and their contribution to and support of other political candidates. The limitations on political speech and conduct were a safe, and appreciated, haven. Once judges became acclimated to avoiding political activity and speech, they carved out a unique judicial image: a judge was not just a politician dressed in a black robe but a special kind of public servant,[89] one who was uniquely[90] isolated from everyday political bargaining and deal-making.

When running for offices, judges usually talked about their law school education, their military record, their service to church and community, and their practical legal experience. In some jurisdictions, where judicial candidates ran on partisan ballots, the party identification might provide a quasi-platform for the candidates, but in nonpartisan elections, campaign platforms were the exception, not the rule. Most often when they did exist, they typically concerned matters of judicial administration or court improvement, not hot-button political or social issues.

This is not to suggest that before 2002, all judicial races were dignified or all judicial candidates noble. In some notorious cases, judges and their opponents engaged in fairly acrimonious campaigns,[91] including, in perhaps the most vitriolic race of recent memory, candidates for Alabama Chief Justice accusing one another of lying, stealing, and cheating.[92] Occasionally, as already noted, a particular decision would incense the electorate sufficiently to ignite a grass-roots campaign against a judge. But those occurrences stand out not because of their frequency, but because of their rarity.

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[88] *Id.* Ninety-seven percent of judges surveyed "strongly supported" the proposition that "[j]udicial candidates should never make promises during elections about how they will rule in cases that may come before them." In my own experience, the mantra "the Code does not allow me to respond" was so universal that groups hosting candidate forums, such as the League of Women Voters and others, would often announce the limitations or interrupt inquiries to explain a judge's ethical restrictions.

[89] *Id.* at 19. The public also views judges as a "special kind of politician." Eighty-two percent of the public surveyed found the following statement either "very convincing" or "somewhat convincing:"

> Judges should be treated differently than other public officials since they must make independent decisions about what the law says. Judges should not have to raise money like politicians, make campaign promises like politicians, or answer to special interests. We must take concrete steps to ensure that judges can make unpopular decisions based only on the facts and the law.

[90] *Id.* When those surveyed were asked to pick between two statements describing courts, eighty-one percent selected as "more convincing" or "much more convincing" the first of these two statements:

> Courts are unique institutions of government that should be free of political and public pressure.
>
> Courts are just like other institutions of government and should not be free of political and public pressure.

[91] While Alabama may take the lead in acrimonious campaigns, Texas and Illinois are often the leaders in campaign costs. *See generally* Marlene Arnold Nicholson and Norman Nicholson, *Funding Judicial Campaigns in Illinois*, 77 JUDICATURE 294 (1994); Anthony Champagne, *Campaign Contributions in Texas Supreme Court Races,* 17 CRIME & SOCIAL CHANGE 91 (1992); Richard Woodbury, *Is Texas Justice For Sale*?, TIME (Jan. 11, 1988). The article can be viewed at www.time.com/time/magazine/article/0,9171,966426,00.html?promoid=googlep.

[92] Challenger Perry Hooper, who originally trailed Chief Justice Sonny Hornsby in the 1994 election for Alabama's Chief Justice, stated, "We have endured lies in this campaign, but I'll be damned if I will accept outright thievery." *Id.*

2. Judicial Elections from 2000 – 2006: New Environment: More Money, Television, and Special Interests, Less Decorum

In the three election cycles before 2000, a study showed that around one-third of the candidates for judicial office raised no funds at all.[93] Even among those that raised money, the amounts raised and expended were relatively low compared to today's standards. Television advertisements, the costliest part of elections, were rarely used in state judicial races, with many judges relying on newspaper advertisements and direct mail to market their candidacy. When a nonpartisan national partnership identified the year 2000 as a "watershed year for big money, special interest pressure, and TV advertising in state supreme court campaigns,"[94] it seemed apparent that state judicial campaigns had taken a turn for the worse.[95] How drastic a turn could not have been foreseen.

What alarmed observers in 2000 was the dramatic increase in the amount of money raised by candidates for state supreme courts. The more than forty-five million dollars raised by candidates for supreme court seats represented a sixty-one percent increase over the amount raised two years earlier. Perhaps more staggering, the amount was twice as much as that raised in 1994.[96] The top three identified sources[97] of that increased money supply were, in order, lawyers,[98] business interests,[99] and political parties.[100]

It was groups,[101] not candidates or parties, who supplied the funds for the greatest increased expenditure—television advertising, the new "weapon of choice" for judicial candidates.[102] There were ads sponsored by interest groups reflected positions on tort reform, crime control, and family values,[103] while only a few ads focused on traditional themes such as candidate background and qualifications.[104] Another cause of concern was the harsh tone of the

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[93] THE NEW POLITICS OF JUDICIAL ELECTIONS (2000): HOW 2000 WAS A WATERSHED YEAR FOR BIG MONEY, SPECIAL INTEREST PRESSURE, AND TV ADVERTISING IN STATE SUPREME COURT CAMPAIGNS at 8, figure 2) (hereafter THE NEW POLITICS 2000). This report can be viewed in its entirety at www.justiceatstake.org/.
[94] *Id.*
[95] The report summarized that "2000 was a turning point for high-stakes campaigning in Supreme Court elections. In several key states, a flood of spending, TV buys, and negative ads suggests that the good old days may just have ended . . . ." *Id.* at 4.
[96] *Id.* at 4.
[97] The source of twenty-four percent of the contributions could not be identified by interest. *Id.* at 9. The report noted that "researchers face major obstacles in compiling complete and accurate summaries of contributions and expenditures . . . ." *Id.* at 18.
[98] Lawyers accounted for twenty nine percent of the total.
[99] Business interests accounted for almost twenty percent of the total.
[100] Political parties accounted for almost twelve percent of the total. Ideological interests represented the smallest identified source of campaign contributions. Clearly lawyers and businesses are arguably contributors with ideological interests, as is labor, a separate source identified as including political action contributions from all union sources. *Id.* at 9.
[101] The study divided the ads into three groups based on sponsorship: candidate-sponsored, party-sponsored, and group-sponsored ads. *Id.* at 17.
[102] More than ten million dollars was spent on more than 22,000 television airings. *Id.* at 5.
[103] *Id.* at 13.
[104] *Id.*

group-sponsored ads.[105] More than eighty percent of these were negative, in the form of an attack on a judicial candidate.[106]

While there was good reason to be alarmed in 2000 by the infusion of money and venom into state judicial elections, one observation about the source of the money was amplified in importance after the decision in *White*. In attempting to study the 2000 elections, researchers realized that the study was made more difficult by the nondisclosure of finances by special interest groups.[107] Special interest groups, which were more active in judicial than in other political elections, could escape reporting requirements by avoiding the use of "magic words," like "elect" or "defeat" in their advertisements.[108]

The 2000 elections may have been a watershed, but they were undoubtedly the tip of the iceberg as well. What was seen as "skyrocketing fundraising" in the 2000 state supreme court races, would seem trivial by 2004,[109] and miniscule by 2006.[110] By then, the once aberrational high-dollar campaign had become the norm. Not only were more candidates raising and spending more money, but more states now faced a judicial money arms race.[111] The money, once almost evenly supplied by opposition groups such as the plaintiff and defense bars, became largely the one-sided gift of conservative business and special interest groups.[112]

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[105] *Id.* at 17.

[106] *Id.*

[107] *Id.* at 18. "[M]any interest groups that have invested huge sums in judicial elections [but] avoided disclosing their finances."

[108] *Id.* Even before the decision in *White*, judges and the public placed special interest group accountability as the number one reform which could be instituted to improve judicial elections. Rottman, *supra* note 67 at 22.

[109] THE NEW POLITICS OF JUDICIAL ELECTIONS (2004): HOW SPECIAL INTEREST PRESSURE ON OUR COURTS HAS REACHED A "TIPPING POINT"—AND HOW TO KEEP COURTS FAIR AND IMPARTIAL 13 (hereafter THE NEW POLITICS 2004). This report can be viewed in its entirety at www.justiceatstake.org/.

While the overall total nationwide expenditures did not jump drastically in 2004, the state-wide expenditures did. In forty percent of the states with supreme court races, aggregate candidate fundraising records were broken in 2004. *Id.* at 13. In addition, the disparity between the amount of money raised by winners and losers grew, with the average cost of winning increasing forty-five percent since 2002. *Id.*

In Illinois, two candidates for the Illinois Supreme Court raised more than nine million dollars. Business Week magazine reported that this was more than 18 of the 34 candidates for the United States Senate. *Id.* at 18.

[110] THE NEW POLITICS OF JUDICIAL ELECTIONS (2006): HOW 2006 WAS THE MOST THREATENING YEAR YET TO THE FAIRNESS AND IMPARTIALITY OF OUR COURTS – AND HOW AMERICANS ARE FIGHTING BACK 15 (hereafter THE NEW POLITICS 2006). This report can be viewed in its entirety at www.justiceatstake.org/.

[111] *Id.* at 15. Five states broke fundraising records. In addition, some of the races in Illinois (in 2004) and Alabama involved "obscene" amounts of money. In Alabama, for example, two candidates raised over thirteen million dollars. Alabama is the home of the three of the four most expensive court races in American history. The characterization of amounts spent on judicial races as "obscene" is not mine, but that of Justice Karmeier, the successful candidate in the 2004 Illinois Supreme Court race. The comment was not aimed at the Alabama candidates, but the Illinois ones. Ryan Keith, *Spending for Supreme Court Seat Renews Cry for Finance Reform*, AP (Nov. 3, 2004)(quoting Justice Karmeier as saying, "That's obscene for a judicial race. What does it gain people? How can people have faith in the system?")

[112] Whereas in 2000, lawyers donated about ten percent more than business to judicial campaigns, by 2006, business interests donated twice as much as lawyers. THE NEW POLITICS OF JUDICIAL ELECTIONS (2006) at 18. An explanation for the large influx of business money into judicial campaigns was offered by Charles Mathesian in his article, *Bench Press* in the publication *Governing*. Mathesian explained that the reason for business' large investment was to restock courts viewed as "unsympathetic" to business with more "business-friendly" judges. "The business lobby in 'state after state' is tired of seeing legislative gains undermined by 'unsympathetic courts' and will try to 'help business-friendly candidates' with elections to the state's highest courts." Charles Mathesian,

Similarly, the use of television advertisements, seen as an anomaly in 2000, was commonplace by 2002[113] and, for all practical purposes, mandatory by 2006.[114] In judicial races, television advertising is now defined as the "norm," even in primary elections.[115] Beginning in 2002, the word "signal" was used to describe the content of television advertisements: judicial "[c]andidates and special interests . . . craft[ed] ads [to] . . . offer voters clues as to how future cases might be decided if a particular candidate is elected."[116] While previous advertisements had touted qualifications for office, only thirty-six percent of the 2002 advertisements did so.[117]

What the advertisements did peddle in 2002 were candidates' positions on controversial issues that would attract special interest influence.[118] While advertisements were described as a "signal" two years earlier, many of the 2004 advertisements "explicitly state[d] the candidate's opinions on controversial issues.[119] The number of advertisements that promoted a candidate's qualification fell to thirty percent,[120] while those that came painfully close to stating promises were by far the majority.[121]

Attack ads, which declined in 2002 were resurrected in 2004 by special interest groups and political parties.[122] More than half of all advertisements paid for by interest groups and political parties in 2004 were negative ads.[123] The contagion of negative advertising spilled over in 2006 to candidate ads:

Bench Press, GOVERNING (August, 1998). This article can be viewed at www.governing.com/archive/1998/aug/courts.txt.

[113] Television ads were used by judicial candidates in twice as many states in 2002, appearing in 64% of the states with contested races. In 2000, television advertisement was used in less than a quarter of the states. THE NEW POLITICS OF JUDICIAL ELECTIONS (2002) at 4.

[114] Television advertisements were used by judicial candidates in all but one state with contested supreme court races. THE NEW POLITICS OF JUDICIAL ELECTIONS (2006) at 1. The ads were described as "often used to misrepresent or distort facts, and mislead or scare voters." *Id.* at 1.

[115] *Id.* at 6.

[116] THE NEW POLITICS OF JUDICIAL ELECTIONS (2002) at 11 ("today's campaign ads show that . . . candidates and special interests routinely craft ads that will send signals – that is, offer voters clues as to how future cases might be decided if a particular candidate is elected.").

[117] *Id.*

[118] *Id.* at 12-13. An Illinois candidate in 2002 campaigned on the platform that she would "keep fighting because as any crime victim will tell you, there's a lot more to be done." An Alabama candidate said that "I won't be a vote for trial lawyers or big corporations." *Id.* at 12. In 2002 every group advertisement addressed a "divisive topic." *Id.* at 13.

[119] THE NEW POLITICS OF JUDICIAL ELECTIONS (2004) at 9.

[120] *Id.*

[121] In Illinois, a candidate for the Illinois Supreme Court campaigned that he was "tackling the medical malpractice crisis." A Mississippi judge announced that "the words 'under God' belong in our Pledge of Allegiance." A special interest ad proclaimed that he believes the words "'In God We Trust' belong on the walls of every classroom," that he would "protect the sanctity of marriage between man and woman," and that he believed that "no punishment is too harsh for those who prey on the most vulnerable among us." *Id.*

[122] *Id.* at 10.

[123] *Id.* at n. 15. A group called Citizens for Judicial Reform ran an ad claiming that "no woman is safe" with Michigan Justice Stephen Markman on the Michigan Supreme Court because "Markman ruled it was legal for employers to harass women on account of their sex." *Id.* at ll.

> Historically, special interest groups and political parties have proven to be the attack dogs of [state] Supreme Court campaigns. In 2004, special interest groups and political parties sponsored almost nine out of ten negative ads. In 2006, however, it was the candidates themselves who went on the attack, sponsoring 60 percent of all negative ads. [In select states] candidates hurled insults and accusations that would have been unbecoming even in congressional campaigns, much less in campaigns by individuals whose judicial temperament is an important qualification for office.[124]

If special interest groups were changing the tenor of their advertisements, they were not decreasing their involvement in judicial races. What was characterized as increased attention in judicial elections by special interest groups in 2000 would double in 2002, when twice as many special interest groups would advertise for judicial candidates.[125] By 2004, state judicial elections were aptly described as "interest group battlefields" in which special interest groups

> mobilize[d] their money and membership to shape the outcome of state Supreme Court campaigns . . . . Groups on both sides of the culture wars have also accelerated their efforts to elect state high court judges with stated commitments to specific political agendas.
>
> More and more, judicial candidates find themselves pressured to play by a new set of rules.[126]

Moreover, both the public and the judiciary now overwhelmingly recognize that special interest groups are attempting to mold public policy to accomplish their own agenda through involvement in state judicial elections.[127]

3. The Future of Judicial Elections: New Weapons, Battlegrounds, and Personal Choices

If more money, more television, and more special interest negative advertising were the repetitive themes of the 2000-2006 judicial elections, the newcomer in the last two elections would be special interest questionnaires. Replacing television advertisement as the "weapon of

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[124] THE NEW POLITICS OF JUDICIAL ELECTION (2006) at 8. In the Alabama Chief Justice race, the text of an ad sponsored by a candidate included this statement: "Convicted of rape and murder, Renaldo Adams was sentenced to death, but now Adams is off death row thanks to Chief Justice Drayton Nabers and the Alabama Supreme Court." A Georgia ad said that a candidate was "sued by his own mother for taking her money" and implies that the candidate threatened to kill his sister while she was pregnant. In Nevada, a judge challenged her opponent claiming that "[f]irst she took thousands in contributions from two convicted topless club owners. Then she slashed bail for gang bangers who brutalized an MGM employee." *Id.*

[125] Not only did the number of special interest groups doubled, the number of states in which special interest groups ran advertisements doubled as well. THE NEW POLITICS OF JUDICIAL ELECTIONS (2002) at 10.

[126] THE NEW POLITICS OF JUDICIAL ELECTIONS (2004) at 23. In 2004, business groups, including the United States Chamber of Commerce and state counterparts, donated more to judicial campaigns than lawyers. It is reported that more than one dollar out of every three raised by state supreme court candidates came from business interests.

[127] Alexander Wohl, *The Judge on the Stump*, 13 AMERICAN PROSPECT (Aug. 12, 2002)(reporting that eight out of ten judges and nine out of ten citizens believe that special interest groups are mobilizing courts to promote the group's own ends).

choice,"[128] special interest questionnaires are the latest tactic in exerting pressure upon state judicial candidates.

Various special interest groups[129] distribute questionnaires to candidates for judicial office, including judges who are unopposed and seeking retention in office. Often the questionnaires are accompanied by an introduction that advises the candidate as to their legal right to respond.[130] In Indiana, for example, the judges received a letter attached to the questionnaire that advised them that the questionnaire included "only questions with answers protected by the First Amendment."[131] The questionnaires concern "a number of social and political issues such as abortion, gun control, and the role of a judge's religious beliefs in decision making."[132]

Because the special interest group chooses the questions to ask, they are able to collect the views of the candidates on the issues that are most important to the group. Because most of

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[128] Compare THE NEW POLITICS OF JUDICIAL ELECTION (2000) at 5 with THE NEW POLITICS OF JUDICIAL ELECTION (2006) at 30.

[129] Some of the special interest groups that have requested answers to questionnaires include various Right-to-Life organizations, the Christian Coalition, the League of Christian Voters, the Family Institute, the Family Foundation, the Family Alliance, among others.

[130] The candidate sent to Alaska judicial candidates by the Alaska Right-to-Life Committee in 2002 contained this introduction:

> The Alaska Right to Life committee certainly recognizes that judicial candidates should maintain actual and apparent impartiality [and] should not pledge or promise certain results in particular cases that may come before them . . . . This questionnaire is intended to elicit candidates' view on issues of vital interest to the constituents of the Alaska Right to Life Committee without subjecting candidates answering its questions to accusations of impartiality or requiring candidates to recuse themselves in future cases.

[131] This letter was drafted by James Bopp, plaintiff's counsel in *White* and many of the cases that have expanded its holding.

[132] Christian Coalition of Ala. v. Cole, 355 F.3d 1288, 1290 (11th Cir. 2004)(describing the questionnaire sent to Alabama judges by the Christian Coalition of American in 2000).

In recent years, the questionnaires have most frequently sought the candidate's position on same-sex marriage, abortion, and the posting of the Ten Commandments. In North Carolina, the Right to Life asked judicial candidates to agree or disagree with this statement: "I believe that *Roe v. Wade* was wrongly decided." THE NEW POLITICS OF JUDICIAL ELECTIONS (2006) at 30. Kansas judges were asked if they agreed that "[u]nder the Kansas Constitution, a statute defining marriage as between one man and one woman is the prerogative of the Kansas State Legislature, not the Kansas Supreme Court."

In a recent Alabama judicial election, the League of Christian Voters proposed a ten-question list. Their chairman and an attorney in Mobile, Jim Zeigler, said, "You've got ten commandments, you've got ten questions." The questions, listed on the website, include:

> 1. Are you a born-again Christian? Please give your testimony.
> 2. In what church or other Christian ministries are you active? What are your areas of service in each.
> 3. Please describe your family situation.
> 4. What actions did you take regarding the removal of Chief Justice Roy Moore?. . .
> 9. Would you describe yourself as a conservative Christian? What actions have you taken on conservative issues?
> 10. If you are endorsed by the League of Christian Voters, are you willing to have your campaign organization (not you personally) distribute hundreds of marked sample ballots with all the league's endorsed candidates marked, including yourself? If so, how many such fliers would your organization be able to distribute?

The entire questionnaire can be viewed at www.votelaw.com/blog/archives/001250.html.

the special interest groups represent conservative social and political viewpoints, the candidates that they support are those who express conservative social and political values. By identifying and supporting these conservative candidates, the groups hope to elect more judges who espouse personal viewpoints in favor of tort reform and capital punishment, and opposition to same-sex marriage and abortion.[133] Once elected, it is the organization's expectation that these judges will issue rulings consistent with their personal viewpoints, resulting in heightened scrutiny of tort claims, aggressive enforcement of capital punishment, and continued resistance to reproductive freedom and same-sex marriages.[134]

Candidate responses are most often limited to checking the appropriate box on the questionnaire.[135] Thus, it is actually the words of the special interest group, with the candidates' names attached, that are then used in the group's advertisements and mailings. In addition to being included in the group's advertisements, a candidate's response may attract campaign donations or other assistance from members of the special interest group.

Special interest groups do not ignore candidates in retention elections or candidates who do not respond to their questionnaires. Retention candidates whose views are not consistent with the groups may become the target of a "Vote No" campaign. Candidates who do not respond are frequently identified in advertisements as "failing to cooperate." In some cases, the special interest group provides its own characterization of the viewpoints of the nonresponding candidate.[136]

In 2006, most campaign questionnaires were circulated by conservative special interest groups.[137] Not surprisingly, interest groups that are socially and politically conservative are the dominant influences in most state judicial elections. While one reason for their dominance is their resources, their advantage also flows from the marketability of their viewpoints.[138] What began as increased attention to their pet issues in 2000 has become complete domination in 2006. In fact, "[t]elevision spending by interest groups . . . [is] literally entirely one-sided."[139] In only one state did competing special interest groups fund television advertisements.

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[133]These are among the most common topics in questionnaires. THE NEW POLITICS OF JUDICIAL ELECTIONS (2006) at 30.

[134] See Terri Peretti, *Symposium: Perspectives of Judicial Independence: A Normative Appraisal of Social Scientific Knowledge Regarding Judicial Independence,* 64 OHIO ST. L. J.349, 3599 (2003)(stating that "[i]ndependent judges . . .provide valued assistance to a group seeking to stop a policy inimical to its interests. An independent judiciary offers interest groups not only hope, but a real opportunity to win some policy concessions.").

[135] Some have suggested that because special interest groups limit a candidate's response to those provided and disallow narrative comments, they are not only "fram[ing] the question, [but also] fram[ing] the answer." *Id.*

[136] *Id.* at 34.

[137] *Id.* at 30.

[138] Lawrence Baum, *Judicial Election and Judicial Independence*, 64 OHIO ST. L. J. 13, 41 (2003).

> It appears that conservative groups have an advantage in spending money on judicial campaigns because of their business base, though labor unions and trial lawyers also can raise substantial funds. The most powerful advantage for conservative groups is not money; rather, the policy issue most likely to sway voters, criminal justice, is one that favors conservatives. This means that the impact of electoral pressures on judicial decisions, whatever the strength of that impact may be, is primarily in favor of conservative positions on criminal justice.

[139] THE NEW POLITICS OF JUDICIAL ELECTIONS (2006) at 7.

Not only are special interest groups seeking to advance their agendas by electing like-minded judges, they are also working to remove one remaining safeguard of judicial independence. This safeguard, which Justice Kennedy emphasized in his concurring opinion in *White*, is judicial recusal.[140]

State court judges have traditionally been guided by a number of specific recusal provisions, some statutory, based on kinship, relationship, and financial interest, and others articulated in the Code of Judicial Conduct.[141] In addition, most state judges are also bound by a general provision that requires recusal in the event of an "appearance of impropriety."[142] The appearance of impropriety standard is an objective one. The test is "whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired."[143] Some states have also added specific provisions that require recusal based on campaign contributions[144] or responses to special interest questionnaires.[145]

In a series of lawsuits,[146] largely, but not completely, unsuccessful,[147] special interest groups are mounting constitutional challenges to many of the recusal provisions.[148] In addition

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[140] In *White*, Justice Kennedy, in his concurring opinion relied on recusal as a viable answer to the problems that the decision would create. "Explicit standards of judicial conduct provide essential guidance for judges in the proper discharge of the duties and the honorable conduct of their office. Yet these standards may not be used by the State to abridge the speech of aspiring judges in a judicial campaign. . . . [The state] may adopt recusal standards more rigorous than due process requires, and censor judges who violate these standards." 536 U.S. at 794 (Kennedy, J., concurring).

[141] *See generally* Model Code of Judicial Conduct, Canon 3.

[142] *See generally* Model Code of Judicial Conduct, Canon 2.

[143] *Id.* Commentary to Canon 2A.

[144] *Id.* at Canon 3(E)(1)(e). "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where the judge knows or learns by means of a timely motion that a party or a party's lawyer has within the previous []year[s] made aggregate contributions to the judge's campaign in an amount that is greater than [[[$]] for an individual or [$] for an entity]] [is reasonable and appropriate for an individual or an entity.]]" The individual jurisdictions are to insert the applicable time tables and amounts or use the "reasonable and appropriate" language. *Id.* at n. 4.

[145] *Id.* at Canon 3(E)(f). "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where the judge, while a judge or candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to (i) an issue in the proceeding; or (ii) the controversy in the proceeding." Some states are drafting specific recusal provisions that require recusal when the judge answered a questionnaire submitted by an organization that is now a party to a lawsuit.

[146] *See, e.g.*, Family Trust Foundation of Kentucky v. Wolnitzek, 345 F.Supp2d 672 (2004); Indiana Right to Life v. Shepard, 463 F. Supp.2d 879 (N.D. Ind. 2006); Kansas Judicial Watch v. Stout, 440 F.Supp.2d 1209 (D. Kansas 2006); Duwe v. Alexander, 2007 U.S. Dist. LEXIS 39066 (W.D. Wis. 2007).

[147] Of the cases cited in the preceding footnote, only the Wisconsin District Court has been persuaded that the judicial recusal provisions impermissibly chill the judicial candidate's First Amendment rights.

[148] The amended Model Code of Judicial Conduct provides in Canon 3E(1)(f) that "a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where . . . the judge, while a judge or a candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to . . . an issue in the proceeding; or . . . the controversy in the proceeding." The amended Code also requires recusal when campaign contributions exceed a set amount. ABA Model Code of Judicial Conduct, 3E(1)(e).

to general ambiguity and vagueness arguments, the groups argue that requiring recusal of a judge who has announced views during a judicial campaign chills the former candidate's First Amendment rights. Because the candidate had a constitutional right to announce views, the candidate, once elected, has the right to exercise all of the duties of office, including adjudicating those cases that involve issues on which they have expressed personal views. One court has tentatively agreed with the argument, noting that "[a]lthough a candidate would not fear immediate repercussions from the speech, the candidate would be equally dissuaded from speaking by the knowledge that recusal would be mandated in any case raising an issue on which he or she announced a position."[149]

Some of these arguments may have been the impetus behind the ABA's proposal that the appearance of impropriety standard be removed from the Code of Judicial Conduct.[150] When the revised Code was presented to the House of Delegates in early 2007, the appearance of impropriety standard was deleted. This excision inspired heated debate among lawyers and judges, and ultimately journalists and politicians.[151] The ABA reinserted the language, prompting one judge to comment that the standard is the "still, small voice judges hear that reminds them that the people who come before them expect to be treated fairly."[152]

While states may not limit a judicial candidate's free speech rights during a judicial campaign, they must have the authority to require the proper discharge of judicial duties.[153] If courts or judicial ethics bodies cower from a disciplined analysis of the recusal provisions,[154] or extend the decision in *White* to invalidate these provisions as many did in the first round of post-*White* litigation, they will have furthered the destruction of respect for the Bench predicted more than a hundred years ago by Roscoe Pound.[155]

State judges must make difficult personal choices in the post-*White* environment. As candidates, they must choose how they will finance their campaigns, whether they will campaign on traditional qualifications or will announce their views on the issues of the day, and whether

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Some states specifically require recusal when a judge has responded to a questionnaire regarding an issue in the case. In both North Dakota and Alaska, judges were advised by the state judicial ethics body that they might face recusal if they responded to special interest questionnaires.

[149]Duwe v. Alexander, 2007 U.S. Dist. LEXIS 39066 (W.D. Wis. 2007), at 22-23.

[150]Adam Liptak, "The ABA's Judicial Ethics Mess," NEW YORK TIMES Editorial (Feb. 9, 2007).

[151] *Id.* Before the end of the controversy Senator Patrick Leahy wrote ABA President Dennis Archer claiming "dismay" at the original proposal recommending removal of the provision. At the heart of Senator Leahy's concern was what he called "special-interest funded junkets," for federal judges which he ultimately proposed to prohibit through his "Fair and Independent Judiciary Act of 2006." The letter can be viewed at leahy.senate.gov/ press/200404/042104.html. The proposed Act can be viewed at leahy.senate.gov/press/200601/ 012706a.html.

[152] James Podgers, *Judging Judicial Behavior*, ABA JOURNAL (on line version)(Feb. 15, 2007)(quoting California Appellate Court Judge Laurie D. Zelon, a member of the ABA Board of Governors).

[153] 536 U.S. at 794 (Kennedy, J., concurring)(noting that states may "adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards.").

[154] While a "disciplined analysis" of constitutional attacks on recusal provisions is beyond the scope of this article, such an analysis might include viewing the role of a judge after election as different from that of a judicial candidate; viewing the state's interest in impartiality by a judge as more weighty than the state's interest at stake in limiting campaign speech; and taking into account post-*White* indicators of declining public confidence in the courts.

[155] Rottman, *supra* note 67 at 23. Most members of the public "strongly support" a provision that would require that judges recuse themselves in cases in which one side has donated to the judge's campaign.

they will respond to special interest questionnaires. If elected, judges must choose how strictly they will interpret the recusal standards. Questionnaires will likely remain the weapons of choice for special interests groups in their efforts to gain control over state courts. Challenging recusal provisions as unconstitutional will just as likely remain the new battleground. But, in the end, the success of the efforts to control the judiciary depend on the willingness of individual state court judges to be controlled.

In recent elections, some candidates have declined campaign donations; many have refused to respond to questionnaires,[156] and some have attempted to spotlight the impropriety of these practices.[157] But many candidates for judicial office believe that voters have a right to know their personal viewpoints. And many sincerely intend only to communicate their views, not to predict or guarantee their conduct in office. For those judges who choose to announce their view, respond to questionnaires, or accept financial support from special interest groups, the recusal standards provide a meaningful way to assert their independence. By strictly adhering to the appearance of impropriety standard, a judge who has announced his or her views, or accepted significant campaign contributions, can remove any misperception about the purpose of the announcement.

Just as easily, a judge who blindly snubs the standard can create a perception, regardless of the reality, that the judiciary is beholden to special interests. In May 2003, the Supreme Court of Illinois heard oral argument in a state-wide class action against State Farm Mutual Automobile Insurance Company. The appeal stemmed from a class action jury award on behalf of almost five million policy holders in the amount of $456 million. The judge had awarded an additional $730 million in punitive damages. Despite hearing oral argument in the spring of 2003, the insurance company's appeal remained pending for over a year. It was finally decided after the 2004 judicial elections.[158]

Two candidates for the Illinois Supreme Court that year combined to raise over nine million dollars in political contributions, an amount that was almost double the previous national record for any state judicial election. The candidate who ultimately won the election described the fund raising as "obscene."[159] Among his contributions were $350,000 from State Farm employees, lawyers, and others, and an additional one million dollars from larger groups of which State Farm was a member. As a result, plaintiffs in the class action requested that the

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[156] *Id.* at 32. The report discusses the large percentage of judges in Florida, Iowa, and Tennessee who refused to respond to questionnaires, often with harsh words for the groups who sent them. For example, Justice Carol Hunstein is reported to told the Georgia Christian Coalition that "any candidate who expresses a personal viewpoint on an issue in advance of having to decide that issue . . . compromises his or her objectivity with respect to a case that may come before the court." *Id.* at 34 (quoting Alyson M. Palmer, *Justice says no thanks to Christian Coalition*, FULTON COUNTY DAILY REPORT, Aug. 16, 2006).

[157] *Id.* at 33 (including a copy of a letter from Peter D. Webster, First District Court of Appeal in Florida to the Florida Family Policy Council that refers to questionnaires as "ill-conceived" and predicts that "[o]ver the long term, their impact cannot be anything but bad – bad for the judiciary as an institution; bad for the rule of law; and bad for the people of Florida.").

[158] This description of the Illinois Supreme Court race and the *Avery* decision is a composite of news stories including one written by the Brennan Center who filed an amicus brief in the Supreme Court. The article can be viewed at www.brennancenter.org/stack_detail.asp?key=102&subkey=35397.

[159] James Sample, *The Campaign Trail: The True Cost of Expensive Court Seats,*" SLATE (March 6, 2006). This article can be viewed at www.slate.com/id/2137529/.

justice recuse himself from participating in the decision. He refused. Ultimately the Supreme Court overturned the verdict against State Farm, by one vote.[160]

Even the most well-researched and reasoned judicial decision will not be respected if it appears to have been influenced by money or special interests. A court or a decision that is perceived as biased, regardless of whether bias actually exists, will lose its legitimacy. In an atmosphere in which seventy percent of American believe that courts are influenced by campaign fund raising, and nearly that many also believe that pressure from contributors affect judicial impartiality,[161] courts must scrupulously honor the appearance of the impropriety recusal standard.

III. Conclusion

Dean Pound's 1906 warning that politicizing the courts would ultimately destroy respect for the Bench looms ominous in the aftermath of *Republican Party of Minnesota v. White*. More than one hundred years earlier another great lawyer, in an impassioned plea for an independent state judiciary, argued that a great "scourge" to the people would be "an ignorant, a corrupt, or a dependent judiciary."[162] That may ultimately be the gift of *White* unless state court judges, by making difficult personal choices, disavow the efforts to control and politicize the state court judiciary.

[160] Avery v. State Farm Mut. Auto Ins. Co., 835 N.E.2d 801 (Ill. 2005), *cert. denied*, 126 S.Ct. 248 (2006).

[161] In the Annenberg Public Policy Center's 2006 survey, seven of ten polled said that the "necessity to raise campaign funds will affect a judge's rulings once in office. Sixty-three percent believe that pressures from past contributors would affect a judge's fairness and impartiality to a great or moderate extent." *See* www.annenbergpublicpolicycenter.org/NewsDetails.

[162] John Parker, *The Judicial Officer in the United States*, 20 TENN. L. REV. 703, 706 (1949)(quoting John Marshall's statement before the Virginia Constitutional Convention).