How Can the Integrity of Judicial Elections Be Safeguarded After *White*?

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In *Republican Party of Minnesota v. White*,[1] the U.S. Supreme Court held unconstitutional a provision in the Minnesota Code of Judicial Conduct, based on the 1972 ABA Model Code of Judicial Conduct, that prohibited any "candidate for judicial office" from "announc[ing] his or her views on disputed legal or political issues."[2]

The five-to-four ruling, in which the Court's judicial conservatives prevailed, has rekindled the debate about judicial candidates, free speech, and the need for credible information in the selection of competent judges. The debate also reflects a much broader concern: how can the integrity of the process be protected?

After a brief discussion of the evolution of the various judicial canons, this article examines the history of the *White* decision, including the issues that it did not address. After looking at reactions to the decision, the article reviews *Weaver v. Bonner*, the first decision on the constitutionality of judicial campaign regulations to be handed down after *White*. Next, this article examines the scope of *White*, followed by a discussion of campaign finance reform and revision of the judicial canons in light of *White*. It concludes by examining other solutions that could supplement or replace judicial code revisions.

Appointment Versus Election

The issue of whether judges should be appointed or elected dates back to the Founding Fathers, who determined that the president, with the advice and consent of the Senate, should have the power to appoint federal judges. An early proponent of judicial appointment, Alexander Hamilton, believed that appointed judges would be more likely to rule on the basis of law rather than public opinion. Advocates of elections, however, believed that the people should retain the power to select judges.[3] By the early nineteenth century, some states had started the practice of electing judges because of a growing concern that appointed judges were likely to come from the property-owning elite.[4]

Elected judges were viewed as being more responsive to public concerns, but one of the drawbacks to popular election was the potential for corruption. Thus, various judicial codes were adopted with the purpose of ensuring an honest and objective judiciary by prohibiting judicial candidates from discussing legal and political issues during their campaigns. In 1924, the American Bar Association proposed the Model Code of Judicial Conduct, which, among other things, stipulated that a judicial contender "should not announce in advance his conclusions of law on disputed issues of fact to secure class support."[5] The model code has been revised several times during the past eighty years, and only one state (Montana) retains the original 1924 wording of the "announce" provision.

Canon 5(A)(3)(d)(i) of the Minnesota Code of Judicial Conduct—at issue in *White*—was modeled after Canon 7(B)(1)(c) of the 1972 ABA model code, which states that a candidate for judge "should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact." [6] In addition to Minnesota, eight other states, including Arizona, Colorado, Iowa, Maryland, Mississippi, Missouri, New Mexico, and Pennsylvania, have adopted similar provisions.[7] Minnesota enacted Canon 5 to ensure that judges or potential judges refrain from stating in advance their opinions on issues that they may adjudicate.[8]

In 1990, the ABA replaced the 1972 canon with the commitment clause, which prohibits statements that "commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." At least twenty-five states, including Alaska, Arizona, California, Florida, Georgia, Louisiana, Nevada, New York, North Dakota, Ohio, and Texas, have adopted the 1990 commitment clause in their judicial codes.[9] Others have adopted some variation of this language to achieve the same result.[10]

Republican Party of Minnesota v. White

White arose when Minneapolis attorney George Wersal ran unsuccessfully for associate justice of the Minnesota Supreme Court in 1996 and again in 1998. In violation of the state's judicial code, Wersal criticized numerous state supreme court decisions, notably those on crime, welfare, and abortion. On March 9, 1998, the U.S. District Court for the District of Minnesota denied his request for an enjoinment of the rule, which would have prevented state authorities from enforcing it. On September 13, 1999, the district court held that the canon did not violate the First Amendment because it was narrowly tailored and applied only to questions that the court was likely to adjudicate. The Eighth Circuit affirmed the lower court ruling on April 30, 2001.[11]

The U.S. Supreme Court granted certiorari because the Minnesota ban on a judicial candidate's "announcing his or her views on disputed legal or political issues" affected the political and judicial systems of states with comparable rules and because election-related speech is at the core of protected speech under the First Amendment. Traditionally, campaign speech has enjoyed First Amendment protection. Nevertheless, courts have held that certain speech by judicial candidates can be more closely regulated than that of candidates for legislative and executive office because potential judges are supposed to decide cases "fairly and impartially" and not feel compelled to deliver on campaign promises.[12]

On June 27, 2002, the Supreme Court reversed the Eighth Circuit and held that Minnesota's so-called announce clause,

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which prohibited judicial candidates from publicizing their views on disputed legal and political issues, violated the First Amendment. The Court opined that the clause's speech restrictions were "woefully underinclusive" in accomplishing the goal of encouraging "open-mindedness" in elected judges.[13] Moreover, the Court thought that the restriction on judicial speech was too sweeping. The Court remarked that if the State of Minnesota truly wanted to prevent judicial candidates from making campaign promises, the state should have specifically banned judicial contenders from pledging to vote in a certain manner or committing themselves to a particular outcome.[14]

The Court expressed its concern that prohibiting judicial candidates from speaking on disputed legal and political issues would prevent voters from making well-informed decisions. Justice Scalia, writing for the majority, noted that "[t]he greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance."[15] The essential theme of the majority's opinion was that elections are futile if voters do not have access to information about potential candidates. In fact, the majority deemed Minnesota's announce clause to be censorship because it stifled judicial discourse, thereby preventing voters from being informed. The end result, according to critics of judicial gag orders, is low voter turnout in judicial elections.[16]

One deciding factor in *White* appears to have been Minnesota's use of "judicial impartiality" as a compelling interest to justify restricting judicial speech.[17] As a practical matter, Scalia noted that it "is virtually impossible to find a judge who does not have preconceptions about the law."[18]

Nor was the majority persuaded by the argument that judges differ from legislators and that their speech should be restricted because they are "beholden" to the law instead of to the electorate. Justice Scalia remarked that "the notion that the special context of electioneering justifies an abridgement of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head."[19]

Some argue that the *White* decision will dramatically change the political landscape of judicial elections. In a survey conducted during the first week of November 2001, 1,000 respondents were asked how much information they had about judicial candidates in the last election in which they voted for judges. Only 13 percent had "a great deal of information." In comparison, 38 percent had "some information," 35 percent had "just a little information," and 14 percent had "no information at all."[20]

This survey reinforced the prevailing view that the less information voters have about a judicial candidate, the more likely they are to assume that judges are frequently selected for reasons unrelated to their ability to do the job. Some 90 percent of respondents said that judges are seldom elected based on their qualifications. Judges themselves agreed. In a study of Texas state judges, 91 percent expressed concern that "because voters have little information about judicial candidates, judges are often selected for reasons other than their qualifications."[21] In Texas, judicial candidates must be affiliated with a political party, a fact that obviously influences the decisions of many voters.

What *White* Did Not Decide

The *White* decision appears to be far less sweeping than was initially reported. For example, many of the other provisions in Minnesota's Canon 5 were left intact. In pertinent part, Canon 5 provides that a "judge or judicial candidate shall refrain from political activity inappropriate to judicial office." Candidates are instructed to abstain from

1. acting as leaders of a political party or identifying themselves as members of political organizations;
2. publicly endorsing or opposing another candidate for political office, except for the judge they are directly opposing in an election;
3. making speeches on behalf of a political party;
4. attending political gatherings and seeking, accepting, or using party endorsements; and
5. soliciting funds for their campaigns or knowing the names of their donors.[22]

Furthermore, the Court also did not touch upon the Minnesota clause that prohibits judicial candidates from making "pledges or promises" about their future conduct on the bench. On that note, the Court disregarded the possibility that promissory statements by judicial candidates could compromise judicial impartiality but did acknowledge that it might be acceptable to prevent candidates from promising how they would examine cases once on the bench.[23] James Bopp, who represented the Republican Party of Minnesota, conceded that the "state is justified in prohibiting judicial candidates from actually making promises about their conduct in office,"[24] a sentiment that is shared by many judges: 96 percent of state judges in Texas favor a voluntary assurance that "[j]udicial candidates should never make promises during elections about how they will rule in future cases that may come before them."[25]

Among other things, *White* also failed to address

- provisions in the Minnesota judicial code that prohibit candidates from disseminating false information about themselves or their opponents.
- parts of the lower court ruling that upheld other means by which Minnesota, in an effort to protect the integrity of the state's judicial system, regulated the judicial selection process.
- prohibitions on judicial speech about "cases, controversies, or issues that are likely to come before the court."

At the very least, the many unanswered questions in *White* are likely to produce confusion and generate lawsuits as judicial candidates attempt to challenge the decision's boundaries. Attorney Bopp contends that the commitment clause might also be unconstitutional if its scope is similar to that of the "announce clause." He also believes that the "pledges or promises" clause is vulnerable to challenge if it prohibits more than a "pledge or promise" to achieve a particular result in a certain case. Another query is whether disciplinary boards can interpret other canons to target the same conduct that the Supreme Court said was constitutionally protected.[26]

Reaction to the Decision

Prominent members of the legal community have expressed disdain about the decision. Justice Ginsburg's harsh dissent, in which she "would differentiate elections for political offices, in which the First Amendment holds full sway, from elections designed to select those whose office it is to administer

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justice without respect to persons,"[27] echoed the argument posited by the Minnesota Board of Judicial Standards and various legal organizations that contend that judges should not be equated with politicians who routinely make campaign promises as part of the election process.[28]

Geri Palest, executive director of Justice at Stake, noted that "[t]he decision begins a new era for state court elections," adding that "[m]ore candidates will be pressured to resort to politics as usual to become judges."[29] Opponents of judicial elections fear that candidates will use their positions on specific issues to raise money from special interest groups. Reform advocates fear that *White* will only exacerbate the existing situation. Then-ABA President Robert Hirshon called *White*

> a bad decision which will open Pandora's box. We will now have judicial candidates running for office by announcing their positions on particular issues, knowing that voters will evaluate their performance in office on how closely their rulings comport with those positions. It is not the type of justice system the American people want.[30]

Not surprisingly, state judges overwhelmingly support restricting judicial campaign speech. In a survey conducted during the last two months of 2001, 56 percent of state supreme court judges, 55 percent of state appeals court judges, and 52 percent of state lower court judges believed that their state's judicial code contained "the right amount and type" of restrictions on judicial campaign speech. On the other hand, only 14 percent of state supreme court judges, 23 percent of state appeals court judges, and 26 percent of state lower court judges thought that there were already "too many restrictions."[31]

On the other hand, Steven Shapiro, legal director of the American Civil Liberties Union, acknowledged that the ruling might result in a "slightly wider scope of debate in judicial elections around the country, but other than that I'm not sure an enormous amount will change." Heralding the ruling as "the correct decision," Shapiro added that "[w]e shared the concern the court had today that the way to preserve judicial integrity is not to place restraints on candidates' speech."[32]

Interpreting *White*: *Weaver v. Bonner*

Weaver v. Bonner[33] is the first decision about the constitutionality of judicial campaign restrictions after the Supreme Court's ruling in *White*. In *Weaver*, the Eleventh Circuit ruled that the First Amendment was violated by a Georgia ban on misleading judicial campaign speech and the solicitation of campaign funds. The court also held that the Special Committee on Judicial Election Campaign Intervention violated a candidate's First Amendment rights by issuing cease and desist orders. At issue in *Weaver* was Canon 7(B)(1)(d) of Georgia's Code of Judicial Conduct, which proscribed candidates from "participating in the use of any form of public communication which the candidate knows or reasonably should know is false, fraudulent, misleading, deceptive or which is likely to create an unjustified expectation about results the candidate can achieve."[34]

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In his 1998 campaign for the Georgia Supreme Court, George Weaver ran two sets of advertisements in which he allegedly misrepresented the viewpoints of his opponent, Leah Sears. In the initial series, Justice Sears was depicted as declaring that traditional moral standards were "pathetic and disgraceful," that the electric chair was "silly," and that the state should sanction same-sex marriages.[35] After a second set of ads was broadcast, the Special Committee on Judicial Election Campaign Intervention, pursuant to Rule 27(b)(3) of the Judicial Qualification Commission, issued a cease and desist order. In federal district court, Weaver challenged the ban against misleading campaign speech, the prohibition against the solicitation of campaign funds, and last, but not least, Rule 27.

According to Judge Tjoflat, who wrote the *Weaver* majority opinion, *White* suggests that the standard for judicial elections should be the same as that of legislative and executive elections.[36] Thus, judicial campaign speech should not be curtailed merely because judges are elected in most states. The state defendants contended that the judicial campaign speech restrictions were necessary to maintain the integrity, impartiality, and independence of the judiciary—the same argument that was posited by the state defendants and rejected in *White*. The court held that the rule prohibiting misleading judicial campaign speech was too sweeping to be constitutional under the First Amendment. In so holding, the court emphasized that only statements that satisfied the defamation standard of actual malice could be prohibited.[37] To do otherwise would chill political speech. Moreover, the court concluded that the cease and desist order constituted an "impermissible prior restraint on protected expression."[38]

The *Weaver* decision is an expansive interpretation of *White*. The U.S. Supreme Court merely struck down Minnesota's announce clause, but the Eleventh Circuit read *White* broadly and held that provisions preventing misleading judicial campaign speech, proscribing judicial candidates from soliciting campaign funds, and permitting the use of cease and desist orders violate the First Amendment. Although courts have held that certain judicial campaign speech can be regulated because of the need for an impartial judiciary, *White* and *Weaver* suggest a trend toward more open judicial campaign speech.

Scope of *White*

White will have the most direct impact in Minnesota and the five other states that elect some or all of their judges and have adopted the announce clause of the 1972 ABA model code.[39] The impact on the four other states whose regulations differ from the ABA versions, and on the twenty-seven states that proscribe judicial candidates from "commit[ing] or appear[ing] to commit" to a position on issues "likely to come before the court."[40]

White is also likely to affect the thirty-eight states that elect judges for appellate courts, general jurisdiction trial courts, or both. These states elect judges either directly by voters or through "retention" elections.[41] Thirty-one other states use popular elections to select some or all of their appellate and/or general jurisdiction trial court judges, who frequently run for reelec-

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tion. Of these, more than half utilize nonpartisan elections, and the rest employ partisan elections.[42] In eighteen of the thirty-eight states, including Minnesota, competing candidates must stand for contested elections to the state supreme court. In sixteen other states, justices are initially appointed and stand for unchallenged retention elections at the end of their terms. Justices must attain at least a majority of *yes* votes to remain in office. Four other states employ a combination of both systems.[43]

***White* will have the most direct impact in states that elect judges and that have adopted the announce clause of the 1972 ABA model code.**

Overall, 87 percent of all state appellate and trial judges are selected through direct or retention election. This year, state supreme court justices will be elected in twenty-nine of the thirty-eight states where *White* will have a significant impact.[44] *White* played a significant role in Texas, where six seats on the state supreme court were decided by election in the fall of 2002. Moreover, Texas is one of a few states that hold partisan elections for at least some appellate judges.[45] *White* may affect, albeit in more general terms, those states where judges are nominated by the executive branch and confirmed by the legislature.

The *White* decision may have an impact on the process for nominating nonelective judges as well. Circuit judges in Montgomery, Maryland, complain that the nomination process is "arduous" because they must present themselves before five bar associations before meeting with the thirteen-member judicial nominating commission. The nominating commission presents a short list to the governor, who selects a judge. Unsuccessful contenders argue that the process is not necessarily based on merit because the governor has the power to appoint nine of the thirteen commission members and is free to select anyone from the short list.[46]

Further, unlike Minnesota, where the Code of Judicial Conduct applies to judicial candidates, Maryland's Code of Judicial Ethics pertains only to judges. Maryland's Rules of Professional Conduct governs lawyers who are judicial contestants. Given the differences between the two states' codes, Maryland may have to determine which clauses, if any, of its code are unconstitutional.[47]

White and Campaign Finance Reform

The *White* decision and its implications are timely given the ongoing debate over the Bipartisan Campaign Reform Act of 2002.[48] Cynical reform advocates suggest that *White* will only make judicial elections even more contentious because of the influx of special interest money. In the aftermath of the decision, states may feel compelled to adopt campaign finance measures such as mandatory reporting of contributions to and expenditures by independent groups running campaign advertisements.[49]

Judges and candidates for office are as critical of the process as the public. In a recent poll of nearly 2,500 state judges, 55 percent claimed that the tenor and demeanor of judicial elections was deteriorating. In addition, 46 percent felt pressured to spend more campaign money, and 64 percent felt that their state judicial codes prohibited them from adequately responding to unjust or false criticism.[50] In Texas, voters and judges alike appear concerned about special interest groups—84 percent of Texas state judges agreed that "special interests use the courts to shape policy to their own ends,"[51] and 85 percent were troubled that such groups made unfettered use of advertising to influence judicial elections.[52]

Texas is well known for its costly and contentious judicial campaigns. In 1980, its state supreme court campaign was the first in the country to surpass the million dollar mark.[53] By 1994, the election cost nearly $7.5 million (for three seats); in 1998, the price tag for four seats was more than $6.1 million; and the 2000 election (for three seats) was only $1.8 million. Other states are following Texas's lead. According to a recent study, candidates for state supreme courts spent $35 million in 2000, a 61 percent increase over the total spent in 1998.[54]

Reformers have floated a number of proposals to limit the influence of special interest groups and curtail the amount of spending. Before the 2002 general election, some Texas lawyers and other interested parties suggested that the governor nominate (subject to Senate confirmation) candidates for the Texas Supreme Court and the Texas Court of Criminal Appeals, but the proposal quickly died.[55] Others believe that states should limit the amount of campaign contributions. Longer terms of judicial office have been suggested as one way to safeguard judicial integrity. The underlying rationale is that longer terms would result in fewer judicial elections, increased judicial independence, and less opportunity for egregious campaign finance conduct. Proponents also argue that longer judicial terms would make the job more attractive, leading to a larger pool of more qualified and competent judges.

White and the Judicial Canons

In light of *White*, the ABA is reexamining pertinent model code provisions. More states are expected to place limits on the financing of judicial elections. One solution predating *White* advocated voluntary campaign conduct standards in which judicial candidates agreed to refrain from negative campaigns. Some states also established campaign oversight committees to monitor campaign practices, arbitrate complaints from candidates about their opponents' conduct, and censure candidates and others who interfered with a judicial campaign.[56]

Texas is among the first states to appoint a task force to revise its judicial code. Texas State Supreme Court Chief Justice Tom Phillips created an advisory committee of law professors and other experts to suggest modifications that should be made to the state's judicial canons in order to comply with *White.* Although the prohibition in the Minnesota canon is more extensive than that in Texas, the difference may not be significant. Unlike Minnesota, Texas Canon 5(1) prohibits discussion of matters subject to judicial interpretation by the judge or candidate if elected. The disparity might be comparatively minor because Justice Scalia stated that Minnesota's "announcement clause" had been construed by federal and state courts to reach only disputed areas that may appear before candidates if they were elected. Thus, the Court remarked that this was not much of a limitation.

On August 22, 2002, the Texas Supreme Court issued amended provisions of the Texas Code of Judicial

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Conduct, concluding that a clause restricting judicial campaign speech was unconstitutional because it did not comport with the *White* decision. Some of the pertinent modifications include the deletion of Canon 5(1), which prohibited statements representing an opinion "on any issue that may be subject to judicial interpretation" by the position a judge occupies or a judicial contender seeks.[57] Replacing Canon 5(2)(i), Canon 5(1)(i) states that judges and judicial candidates are prohibited from making pledges or promises regarding pending or future cases, certain categories of cases and litigants or propositions of law that a reasonable person might conclude predispose a judge to a likely decision in such cases.[58] Furthermore, Canon 5(1)(iii) prohibits a statement that would violate Canon 3(B)10.[59] Finally, Canon 5 contains an admonition that any campaign statements, even if not covered by Canon 5, that lead to questioning of a judge's impartiality may result in a reprimand.[60]

Canon 3(B)(10), which prohibited public comment on pending proceedings, was also modified.[61] This provision now applies to judicial candidates as well as to judges. Moreover, Canon 3(B)(10) authorizes judges to require that court personnel, subject to their direction and control, refrain from discussing pending or prospective cases. Judges are permitted to make public statements in their official capacities and to explain court procedures for public information.[62] Canon 3(B)(10) does not apply if a judge or judicial candidate is a litigant in a personal capacity.[63]

Debates, Voluntary Pledges, and Other Solutions

Other solutions are also available to address the problems that *White* raises.

Debates

One proposal has been to have debates in order to provide potential judicial candidates with a forum to air their views. The reasoning is that debates would help restrain some of the speech that the *White* decision now permits.[64]

Voluntary pledges

One of the most viable noncontentious solutions would be to have voluntary pledges by judicial contenders to comply with speech guidelines. Justice Scalia seemed to look favorably upon voluntary pledges, noting that "Supreme Court nominees routinely decline comment on cases whose progeny might come before them . . . even though they aren't legally compelled to."[65] The American Judicature Society recommended that judges voluntarily control their speech instead of using the *White* decision "as a license to indulge in the rhetoric, promise-making, and distortion that is used in campaigns for other elective offices but is inconsistent with the role of the judiciary."[66] Moreover, campaign conduct committees can be created to advise candidates and arbitrate complaints.

Structural Reform of Elections

Changing the form of elections could possibly lead to less hostile and fairer contests. Some propose that all judicial elections, including both direct and retention contests, should be nonpartisan. Advocates for judicial election reform have proposed that judges appointed to occupy vacant judicial positions should serve some time in office before their initial election. They contend that after their initial elections, judges should serve a full term before standing for a second election.[67]

Publicly Financed Elections

Various states have introduced legislation seeking publicly financed judicial elections. Last year, the ABA unveiled recommendations of its Commission on Public Financing of Judicial Campaigns, which recommended that contested state elections for state supreme court justices and some appellate judges be publicly funded. Critics of this proposal argue that public funding favors incumbents. Furthermore, they use the public's failure to endorse tax dollars for presidential campaigns to illustrate taxpayer opposition to the public funding of elected officials.[68] Critics also allege that public funding is sometimes associated with prior vote counts or fundraising, thus penalizing new candidates; critics claim that public funding without such associations deflects resources to fringe candidates.[69]

Before the *White* decision, bills providing for public financing in certain judicial elections were introduced in Illinois, North Carolina, and Wisconsin. Wisconsin has been publicly funding judicial elections since 1977. Historically, candidates have not participated in the public funding system. However, no incumbent justice has been defeated in Wisconsin since 1966.[70]

Elimination of Judicial Elections

Another proposed solution has been to abandon judicial elections altogether. Of all the proposals, this one has been the least discussed or attempted.

One alternative to elections is a "merit selection" system, an idea favored by the American Judicature Society.[71] Advocates of merit selection propose that a bipartisan committee could recommend candidates for appointment by the governor, followed by a retention election.[72]

States seeking an alternative to judicial elections might consider heeding Justice O'Connor's advice. She favors the Missouri plan, named after the first state to implement this approach, in which the governor appoints judges from a list of nominees proposed by a nonpartisan commission. Judges must run in unopposed elections in which voters must determine whether the judges should be recalled.[73]

The *White* decision, and especially Justice O'Connor's concurrence, reflects the debate over whether judges should be elected or appointed. Justice O'Connor derisively remarked that "[i]f states have a problem with judicial impartiality, it is largely one [they] brought upon [themselves] by continuing the practice of popularly electing judges."[74] As the only justice on the current Court to have held elected office, Justice O'Connor's opposition to an elected judiciary is presumably based on experience.[75] Using her concurrence as an opportunity to denigrate the practice of electing judges, Justice O'Connor noted that "[e]lected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects."[76]

Conclusion

Fundamentally, *White* reflects the Supreme Court's dual obligation to protect free speech and the integrity and neutrality of the courts.

For now, at least, judicial candidates can speak freely without fear of sanction after *White*. The Supreme Court correctly highlighted the close linkage between judicial autonomy and the selection process rather than the restriction of judicial speech. Moreover, the Court correctly noted that censorship of

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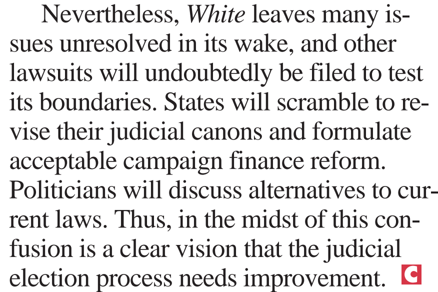

judicial speech prevents voters from obtaining information about candidates, thus rendering judicial elections futile.

Nevertheless, *White* leaves many issues unresolved in its wake, and other lawsuits will undoubtedly be filed to test its boundaries. States will scramble to revise their judicial canons and formulate acceptable campaign finance reform. Politicians will discuss alternatives to current laws. Thus, in the midst of this confusion is a clear vision that the judicial election process needs improvement.

Endnotes

1. 122 S. Ct. 2528 (2002).
2. *Id.* at 2531.
3. Thomas L. Hafemeister, *Can Candidates for Judicial Election Be Banned from Announcing Their Views on Disputed Issues?*, 3 MONITOR ON PSYCHOL. 3 (Mar. 2002), *available at* www.apa.org/monitor/mar02/jn.html.
4. *Does Rule Gag Judicial Candidates' Free Speech?*, DAILY POL'Y DIGEST, Mar. 12, 2002.
5. Brennan Center for Justice, Republican Party of Minnesota v. White: *What Does the Decision Mean for the Future of State Judicial Elections?*, *available at* www.brennancenter.org (visited June 27, 2002).
6. MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(1)(2000).
7. Charles Lane, *Justices Wary of State Judge Election Rules*, WASH. POST, Mar. 27, 2002.
8. Editorial, *Too Much Democracy,* WASH. POST, June 30, 2002.
9. Links to Web-Based State Professional Conduct Materials, *at* www.cardozo.yu.edu (visited Aug. 31, 2002).
10. Marcia Coyle, *New Suits Foreseen on Judicial Elections*, NAT'L L.J., July 8, 2002.
11. Republican Party v. Kelly, 247 F.3d 854 (8th Cir. 2001).
12. JUSTICE AT STAKE CAMPAIGN, A REPORTER'S GUIDE TO REPUBLICAN PARTY OF MINNESOTA V. WHITE, *available at* www.justiceatstake.org (visited Mar. 19, 2002).
13. Republican Party v. White, 122 S. Ct. 2528, 2537 (2002) (Scalia, J.); *see* Edward Walsh, *Curbs on Judicial Hopefuls Lifted*, WASH. POST, June 28, 2002.
14. *See White*, 122 S. Ct. at 2538 (Scalia, J.); *see also* Paul Rosenzweig, *Protecting Speech in Bench Elections,* WASH. TIMES, July 1, 2002.
15. *White*, 122 S. Ct. at 2541 (Scalia, J.) (quoting Renne v. Geary, 501 U.S. 312, 349 (1991)).
16. Larry Eichel, *Court Does the Right Thing: Ungags Judicial Candidates,* PHILADELPHIA INQUIRER, July 5, 2002, *available at* www.philly.com/mld/inquirer/3604646.htm.
17. *White*, 122 S. Ct. at 2535n.6 (Scalia, J.).
18. *Id*. at 2536 (Scalia, J.).
19. *Id*. at 2538 (Scalia, J.); *see also* Editorial, *Speech Rights for Judges Suggest Different Elections,* SEATTLE POST-INTELLIGENCER, July 5, 2002.
20. Justice at Stake Campaign, Justice at Stake Frequency Questionnaire, *available at* www.justiceatstake.org (visited July 22, 2002).
21. *Id.*
22. MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(1) (2002).
23. Greg Snowden, *Supreme Court Ruling Should Impact State's Judicial Races,* CLARION-LEDGER (Jackson, Miss.), July 7, 2002.
24. Tony Mauro, *Court Considers Canon That Keeps Judicial Candidates Quiet*, TEX. LAW., Mar. 25, 2002.
25. Justice at Stake Campaign, National Survey of State Judges: Texas, *available at* www.justiceatstake.org (visited July 22, 2002).
26. Coyle, *supra* note 10.
27. *White*, 122 S. Ct. at 2551 (Ginsburg, J.)
28. Tony Mauro, *High Court Ruling May Take Luster off Judiciary*, *available at* FreedomForum.org (July 1, 2002).
29. Justice at Stake Campaign, *supra* note 12.
30. Brennan Center for Justice, Top Legal Organizations Express Concern About Impact of Supreme Court's *White* Decision on Fair and Impartial Courts, *available at* www.brennancenter.org (June 27, 2002).
31. *Id.*
32. *See* Walsh, *supra* note 13.
33. Weaver v. Bonner, 309 F.3d 1312 (11th Cir. 2002).
34. GA. CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(d) (2002).
35. *Weaver*, 309 F.3d at 1317.
36. *Id.* at 1321.
37. *Id.* at 1319.
38. *Id.* at 1323.
39. Walsh, *supra* note 13.
40. *Id.*
41. Jeff Yoders, *The Campaign to Free Judicial Speech,* MEDILL NEWS SERV., Mar. 2002.
42. Justice at Stake Campaign, *supra* note 12.
43. *Id.*
44. *Id.*
45. *Id.*
46. Manju Subramanya, *Judicial Candidates Wondering How Much They Can Say*, GAZETTE (Andover, Md.), July 3, 2002.
47. Manju Subramanya, *Legal Experts As Divided As High Court on Elections Ruling,* GAZETTE (Andover, Md.), July 12, 2002.
48. Bipartisan Campaign Reform Act, P.L. 107-155, § 1(a), 116 Stat. 81 (codified at 2 U.S.C. § 431 and scattered sections).
49. Brennan Center for Justice, *supra* note 5.
50. Justice at Stake Campaign, *supra* note 12.
51. Justice at Stake Campaign, National Survey of State Judges, *supra* note 22.
52. *Id.*
53. Justice at Stake Campaign, Learn About Your State: Texas, *available at* www.justiceatstake.org (visited July 18, 2002).
54. Walsh, *supra* note 13.
55. *Id.*
56. Brennan Center for Justice, *supra* note 5.
57. TEXAS CODE OF JUDICIAL CONDUCT Canon 5(1) (2002).
58. *Id.* at 5(1)(i).
59. *Id.* at 5(1)(iii).
60. *Id.* at 5.
61. *Id.* at 3(B)(10).
62. *Id.*
63. *Id.*
64. *Id.*
65. Edward Wasserman, *Let Informed Public Elect Judges*, MIAMI HERALD, July 8, 2002.
66. Subramanya, *supra* note 47.
67. National Center for State Courts, *Summit on Improving Judicial Selection*, *available at* www.ncsc.dni.us/SummitCalltoAction.htm (visited July 22, 2002).
68. Robert A. Levy, *Public Funding for Judicial Elections: Forget It*, available at www.cato.org (Aug. 13, 2001).
69. *Id.*
70. Michael DeBow, *Judicial Elections and Campaign Finance Reform*, 22 U. TOL. L. REV. 355 (Winter 2002).
71. *See* American Judicature Society, Merit Selection: The Best Way to Select the Best Judges, *available at* www.ajs.org/selection/ms_descrip.pdf.
72. Editorial, *Who Gets Freer Speech: Candidates or Activists*?, IDAHO STATESMAN, June 29, 2002.
73. Marianne Means, *Judges Who Beg Don't Inspire Public Confidence,* SEATTLE POST-INTELLIGENCER, July 7, 2002.
74. Republican Party of Minnesota v. White, 122 S. Ct. 2528, 2544 (2002) (O'Connor, J., concurring).
75. Sandra Day O'Connor was elected judge of the Maricopa County Superior Court in 1975. *See supra* note 11.
76. *White*, 122 S. Ct. at 2542 (O'Connor, J.).

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