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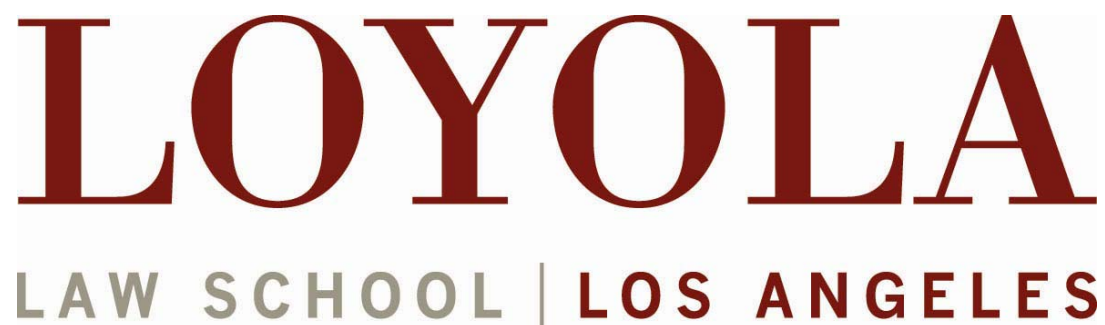
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Chapter 2--First Amendment Limits on Regulating Judicial Campaigns

Richard L. Hasen

In 2002, the United States Supreme Court held that a provision of Minnesota's rules regulating the conduct of judicial elections violated the free speech guarantees contained in the First Amendment to the United States Constitution.¹ By a 5-4 vote, the Court in *Republican Party of Minnesota v. White*² held that Minnesota could not prevent judicial candidates from "announcing" their views on disputed legal or political issues. *White* left open many questions, but some lower federal courts have relied upon it to strike down a host of other judicial campaign regulations, from those that prohibit judicial candidates from making campaign promises to those that bar such candidates from directly soliciting campaign contributions. State courts have read *White* more narrowly and upheld challenged judicial election rules, leading to a great deal of uncertainty over precisely which judicial campaign regulations pass constitutional muster. In addition, some state supreme courts, perhaps in anticipation of legislation, have changed the rules for conducting of judicial elections. The law is in a high state of uncertainty, which is likely to persist at least until the Supreme Court hears another case resolving these issues.

White emerged at a time--perhaps not coincidentally, as we shall see--when judicial campaigns were becoming "nastier, noisier, and costlier,"³ and *White* has the potential to inject judicial candidates more directly into the tumult of these newly-invigorated campaigns. Others in this volume explore how changes in judicial regulations are beginning to affect judicial

campaigns. This chapter considers only the legal question whether, in light of *White*, the most important judicial campaign regulations can survive First Amendment challenge.⁴ The question is important and urgent in the thirty-nine states that select or retain at least some of their judges through elections.

This chapter first lays out the major regulations of judicial conduct in various states. It then summarizes *White*'s holding and reasoning. The remainder of the chapter considers arguments that have been advanced since *White* for and against the constitutionality of the major judicial campaign regulations. The analysis concludes that most of the major regulations are of uncertain constitutionality under *White*. This constitutional analysis must be considered with caution, however. Two of the five Justices in the *White* majority (Chief Justice Rehnquist and Justice O'Connor) have left the Supreme Court, and it is unclear whether the new Roberts Court will follow *White* faithfully or go forward in a moderately or radically different direction. Only time will tell if remaining longstanding special regulations for judicial elections will survive legal challenge.

Judicial Campaign Regulation in the States

Judicial campaign regulations, which vary from state to state in those that conduct judicial elections, trace their roots to the "Canons of Judicial Ethics" promulgated by the American Bar Association (ABA) in 1924.⁵ Among other things, the canons set forth limits on certain speech and political activities by judges, such as soliciting contributions for political parties. Though the ABA first intended the canons simply as ethical guidelines, the canons later became enforceable in many states through adoption of legal rules (promulgated by state supreme courts).

As states began creating their own disciplinary bodies to deal with complaints against judges, the ABA reworked the judicial canons. The ABA adopted the “Model Code of Judicial Conduct” in 1972, and all but three states adopted it for use.⁶ Like the earlier 1924 canons, the 1972 canons regulated judicial speech. In 1990 the ABA substantially revised the Code. “The new code revised the sections providing that a judge should not engage in various actions, replacing these with new provisions declaring what a judge shall not do. This approach was consistent with the perception of the ABA authors that judicial discipline needed to be tougher.”⁷ States varied in how much they adopted their rules to conform with the 1990 Code, and the ABA itself has amended the Code three times since 1990. The ABA is currently considering additional revisions to the Code in part to respond to the Supreme Court’s *White* decision.⁸

The *White* case itself involved the so-called “Announce Clause,” which had existed in various forms in the ABA canons since 1924.⁹ Minnesota’s version, at issue in *White*, was adopted from the 1972 ABA Judicial Code, and provided that “a candidate for judicial office, including an incumbent judge” shall not “announce his or her views on disputed legal issues.”¹⁰ The Announce Clause was dropped from the 1990 Code, and “[b]y the time of *White*, due to constitutional challenges and canon revisions, only nine state canons continued to retain the Announce Clause, and several of these [versions of the Announce Clause] were narrower...than the Clause at issue in *White*.”¹¹

Other canons which have been questioned on constitutional grounds since *White* include the following important provisions:

- *The Pledges or Promises Clause.* The 1972 ABA Judicial Code and the 1990 revision bar judicial candidates from making “pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.”¹² Nearly every state

holding judicial elections had adopted this canon.¹³ In 2003 the ABA modified this language to preclude “pledges, promises or commitments,”¹⁴ removing the separate “Commit or Appear to Commit” clause discussed below.¹⁵

- *The Commit or Appear to Commit Clause.* When the 1972 Code dropped the “Announce Clause,” it replaced it with a new provision barring candidates for judicial office from making “statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.”¹⁶ Twenty-seven states had adopted this canon by the time the Supreme Court decided *White*,¹⁷ though some states no doubt will modify their Codes to meet with the ABA’s 2003 amendment collapsing of this provision with the pledges and promises canon.
- *Partisan Political Activity.* Since 1924, the ABA canons have limited the political activity of judicial candidates. The 1990 Code, as amended, currently prohibits judges and judicial candidates from acting as a leader or holding an office in a political organization,¹⁸ publicly endorsing or publicly opposing another candidate for public office, making speeches on behalf of political organizations, attending political gatherings, soliciting funds, paying an assessment, and making a contribution to a political organization or candidate.¹⁹ Most states with judicial elections have adopted these provisions.²⁰
- *Personal Solicitation of Campaign Funds.* The 1990 Code prohibits judicial candidates from personally accepting or soliciting campaign contributions. To collect campaign funds, the candidate must establish a political committee of responsible persons to solicit and accept contributions on the candidate’s behalf.²¹ Most states with judicial elections ban the direct solicitation of contributions by judicial candidates.²²

- *Misrepresentation Clause*. Building upon the 1972 Code, the 1990 Code prohibits a judicial candidate from “knowingly misrepresent[ing] the identity, qualifications, present position or other fact concerning the candidate or an opponent.”²³ Most states have adopted the 1972 or later versions of this misrepresentation clause.²⁴

As we shall see, the constitutionality of at least part of each of these provisions has been challenged since the Supreme Court’s *White* decision.

Understanding White

In brief,²⁵ *White* concerned a challenge initially brought by Gregory Wersal, a former and would-be judicial candidate, to a number of Minnesota rules for the conduct of judicial elections. He was later joined by other plaintiffs, including the Republican Party of Minnesota. The Eighth Circuit rejected plaintiffs’ arguments that some Minnesota judicial campaign regulations, including the Announce Clause, violated plaintiffs’ First Amendment rights of free speech and association.²⁶ The Supreme Court agreed to hear only the challenge to the Announce Clause, leaving the Eighth Circuit to reexamine the other challenged regulations on remand after the Court’s decision.²⁷

Justice Scalia, writing for a five-Justice majority, began by setting forth the Court’s understanding of the scope of the Announce Clause. Rejecting a narrower interpretation of the Announce Clause accepted by the lower court, the Court construed it as prohibiting a judicial candidate “from stating his views on any specific nonfanciful legal question within the province of the court for which he is running, except in the context of discussing past decisions—and in

the latter context as well, if he expresses the view that he is not bound by *stare decisis*.”²⁸ The Court then judged the constitutionality of the law based upon this understanding of its meaning.

Having defined the meaning of the Announce Clause, the Court then considered the applicable level of scrutiny to apply in the constitutional challenge. This determination is crucially important, because the level of scrutiny usually determines the outcome of constitutional cases: plaintiffs usually (though not always) win First Amendment cases decided under “strict scrutiny” but the government usually (though not always) wins when the Court applies a lower level of scrutiny such as “rational basis” scrutiny. Under strict scrutiny, the state must demonstrate it has a *compelling interest* that justifies infringing on the rights of free speech and association guaranteed by the First Amendment and that the means the state has advanced are *narrowly tailored* to achieve the state’s interest. In contrast, under rational basis review the state need only demonstrate a *legitimate interest* and that the means it has adopted are *rationally related* toward achieving that interest.

Viewing the Announce Clause as a content-based restriction on speech in the midst of an election campaign (where political speech is entitled to great protection from government interference), the Court held that strict scrutiny must apply. It then considered and rejected the state’s argument that the Announce Clause was a narrowly tailored means of achieving Minnesota’s compelling interests.

The lower court had held that the Announce Clause was constitutional under strict scrutiny, serving as a narrowly tailored means of preserving the impartiality or the appearance of impartiality of the state judiciary. The Supreme Court rejected this analysis. It declared that “impartiality” could have three different meanings, and depending upon the meaning attributed to it the Announce Clause was unconstitutional either because the interest was not compelling or

because the Announce Clause was not a narrowly tailored means of achieving a compelling interest.

The Court first considered the meaning of impartiality as “lack of bias for or against any *party* to the proceeding.”²⁹

We think it plain that the announce clause is not narrowly tailored to serve impartiality (or the appearance of impartiality) in this sense. Indeed, the clause is barely tailored to serve that interest *at all*, inasmuch as it does not restrict speech for or against particular *parties*, but rather speech for or against particular *issues*. To be sure, when a case arises that turns on a legal issue on which the judge (as a candidate) has taken a particular stand, the party taking the opposite stand is likely to lose. But not because of any bias against that party or favoritism toward the other party. *Any* party taking that position is just as likely to lose. The judge is applying the law (as he sees it) evenhandedly (emphasis in original).³⁰

The Court then rejected the argument that the law could be justified based upon impartiality as a “lack of preconception in favor of or against a particular *legal view* (emphasis in original).” Though the Announce Clause “may well” serve this interest, the Court rejected the argument that this version of impartiality could constitute a compelling interest. “For one thing it is virtually impossible to find a judge who does not have preconceptions about the law....Indeed, even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so.”³¹

Finally, the Court rejected the argument that impartiality as “openmindedness” could serve as a compelling interest to justify the Announce Clause against First Amendment attack. “This sort of impartiality seeks to guarantee each litigant, not an *equal* chance to win legal points in the case, but at least *some* chance of doing so (emphasis in original).”³² The Court stated that the Minnesota Supreme Court did not enact the Announce Clause with this goal in mind, so it “need not pursue that inquiry.” In the Court’s view, however, even if openmindedness constituted a compelling state interest, the Announce Clause was “woefully inadequate” in pursuing this goal: Judicial candidates could have made the same statements before they were candidates or after they took on the bench, until litigation on the issue is pending. Seeing such “underinclusiveness” in the reach of the canon, the Court rejected the argument that the Announce Clause was narrowly tailored toward serving an interest in openmindedness. In other words, the Court reasoned that preventing judicial candidates from announcing their views only during the limited time period of the judicial campaign would neither keep judges openminded nor create the public perception of openmindedness.

Ultimately, the majority saw the true purpose of the Announce Clause as impermissibly “undermining judicial elections.” Justice O’Connor in her separate concurrence seemed sympathetic to arguments against judicial elections as a whole, and Justice Kennedy in his separate concurrence would have imposed an even stricter First Amendment test than that set forth in Justice Scalia’s opinion; Justice Kennedy would not have even *balanced* state interests against First Amendment rights having found that the state imposed a content-based restriction on protected speech. Nonetheless, these two Justices joined with Justices Scalia, Thomas, and Chief Justice Rehnquist to form a five-member majority endorsing the holding and reasoning of Justice Scalia’s opinion. The majority concluded: “We have never allowed the government to

prohibit candidates from communicating relevant information to voters during an election,”³³ and it certainly did not allow the government to do so in this case.

In addition to the Court’s holding striking down the Announce Clause on First Amendment grounds, the Court offered some significant *dicta* (statements of a court not necessary to the holding) that courts and commentators have latched on to in considering the constitutionality of other judicial campaign regulations. First and foremost, responding to Justice Ginsburg’s dissent accusing the majority of a “unilocular ‘an election is an election’ approach,”³⁴ the majority wrote:

[W]e neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office. What we do assert....is that, *even if* the First Amendment allows greater regulation of judicial election campaigns than legislative election campaigns, the announce clause still fails strict scrutiny because it is woefully underinclusive, prohibiting announcement by judges (and would-be judges) only at certain times and in certain forms (emphasis in original).³⁵

The Court quickly undermined its own point, however, noting that Justice Ginsburg “greatly exaggerates the difference between judicial and legislative elections.”³⁶

The Court also discussed two other judicial campaign regulations. It distinguished the “Pledges and Promises” clause twice. First, the Court noted that the clause was “a prohibition not challenged here and about which we express no view.”³⁷ Second, the Court conceded that the state’s interest in openmindedness might “plausibly” be advanced by the Pledges and Promises

clause, on grounds (as Justice Stevens put forward in his dissent) “that statements made in an election campaign pose a special threat to openmindedness because the candidate, when elected judge, will have a *particular* reluctance to contradict them.”³⁸ But it rejected the argument that limits on *nonpromissory* statements such as those covered by the Announce Clause could be justified by this interest in openmindedness.

The Court also dropped a confusing footnote responding to Minnesota’s argument that the Announce Clause was no broader than the “Commit or Appear to Commit” clause contained in the 1990 ABA canons. The Court failed to reach the question whether the two provisions were the same and noted that “[n]o aspect of our constitutional analysis turns on this question.”³⁹ It is unclear whether the Court meant to cast doubt on the constitutionality of the Commit or Appear to Commit Clause; if it had that intention, it expressed it quite obliquely.

The Constitutionality of Judicial Campaign Regulations After White

The timing of the Supreme Court’s *White* decision--coming alongside the well-documented increase in the politicization of judicial campaigns⁴⁰--is perhaps not coincidental. For many years the canons stood unchallenged as the rules of the game for low-salience judicial elections. With voter interest low, there was little need for judicial candidates (especially incumbents) either to engage in much direct campaigning or to raise significant campaign funds.

As judicial elections gained a higher profile and attracted the attention of more interest groups, a Supreme Court majority endorsed the view that judicial candidates should be freed from constraints on their ability to campaign for office more aggressively. The majority in *White* took the view that as judicial elections started looking more and more like legislative elections,

with interest group and party politics playing an increasingly important role (see chapters 6 and 7) , it was somewhat anomalous that the person at the center of the campaign--the judicial candidate--should be the only person precluded from much campaign activity. For the dissenters, however, the First Amendment costs of special judicial campaign rules that no doubt limited some judicial campaign speech were justified by the special nature of the judicial office. Judicial candidates were not simply running for election; they were poised to serve as impartial arbiters of the law, and not as elected representatives who are accountable to the people for the campaign promises that they make.⁴¹

The rift in *White* looked like a typical conservative-liberal split in the last 9 years of the Rehnquist Court, with perennial swing-voter Justice O'Connor this time siding with the conservatives but expressing sympathy with the position of the dissenters that judicial elections were inconsistent with the proper judicial role. Perhaps Justice O'Connor sided with the majority in the hopes that when judicial elections began to look more like other elections, states would move toward the appointment of judges. So far, however, that has not happened. No state has moved from election to appointment of judges since the *White* decision--indeed, the North Carolina Supreme Court surprisingly acted without any public input to change judicial campaign rules so as to allow for greater political activity by judicial candidates.⁴²

White staked out new territory for the Supreme Court. To its credit, rather than issue broad pronouncements on the scope of judicial campaign rules, the Court began slowly crafting its constitutional rules for judicial campaigns, beginning only with the Announce Clause--recall that the Court refused to hear other challenges to Minnesota's campaign rules, leaving those issues to be resolved by the Eighth Circuit on remand. The post-*White* period gives the Court a

chance to observe how lower courts apply the holding of *White*, and to consider more carefully the precise contours of the Court’s new jurisprudence in this area.⁴³

And there is plenty for the Supreme Court to consider from lower court developments in the few years since the decision. Though the courts have split on the constitutionality of various campaign rules since *White*, the anti-regulation forces scored some major victories, including the recent decision of the Eighth Circuit on remand in the *White* case striking down the partisan activities and solicitation provisions of Minnesota law. The Supreme Court declined to hear the Eighth Circuit case, but other cases are working their way through the appellate system. The remainder of this section considers the constitutional arguments related to the major remaining judicial regulations.

The Pledges or Promises Clause. Any analysis of the constitutionality of the judicial canons should begin with the framework of *White*. Because a ban on pledges or promises by candidates is a direct content-based speech restriction, it is likely that courts will follow *White* in applying strict scrutiny to the analysis. Under strict scrutiny, courts must consider whether the state could assert a compelling interest in impartiality or some other compelling interest and that the Pledges or Promises Clause is narrowly tailored to promote that interest.

Considering the three meanings of “impartiality” in *White*, a ban on campaign pledges or promises to decide certain disputed legal or political issues in a certain way cannot be justified as a means of promoting impartiality of *parties*. As with the Announce Clause, a judge promising to decide an *issue* in a certain way will do so regardless of which *party* is before him raising the issue. Nor could the law be justified as a means of preventing a candidate from expressing a *legal view*, which the *White* Court held was more a sign of incompetence for a judge than a lack of bias.

The biggest question mark for applying the *White* analysis to pledges and promises comes from the analysis of impartiality as openmindedness. A court could hold that openmindedness is not a compelling state interest, an issue left open in *White*. That seems somewhat unlikely, because it is hard to quarrel with openmindedness (as defined by the Court) as a compelling interest in a state's justice system.

More likely a court wishing to strike down the clause could hold that it is "woefully inadequate" to assure openmindedness or the appearance of openmindedness. Now that the *White* Court has held the Announce Clause as unconstitutional, a judge could still signal his views about a particular case through an "announcement" without making a promise or pledge (or commitment for that matter). A statement such as "I believe same sex marriage is unconstitutional" (an example used by the majority in the *White* case) would not violate the Pledges or Promises Clause (while a statement promising to strike down such laws would), but it could still leave litigants and the public questioning the openmindedness of a judge. In this view, the Pledges and Promises Clause stands ready to catch sloppy judicial candidates who fail to speak carefully, but it does little to assure either that candidates remain openminded or that they appear openminded.

Proponents of the Clause will argue against the lack of narrow tailoring, claiming that there is something special about promissory speech in the election context, as Justice Stevens argued in his *White* dissent: if it is indeed true that judges will have a special reluctance to contradict their campaign *promises* when on the bench, the Clause could be found to serve this compelling interest in openmindedness. In addition, if the state has a compelling interest in assuring *public confidence* in the openmindedness of judicial decisionmakers, then the Pledges and Promises Clause could be narrowly tailored. Under this argument, it is worse when judges

make explicit promises as judicial candidates than when they simply announce their positions on disputed issues: promises signal a prejudgment of issues in a way that announcements do not.⁴⁴

It is not clear that the Court would accept that promissory speech is in fact special compared to nonpromissory announcements of disputed positions.⁴⁵ Nor is it clear that the *appearance* of a lack of openmindedness would count as a sufficiently compelling interest even if assuring *actual* openmindedness could do so. In addition, because judges can and should recuse themselves from hearing a case when their impartiality can be reasonably questioned, it might be that recusal rather than a ban on campaign speech is the *more narrowly tailored way* to assure openmindedness on those issues likely to come before the Court.

Finally, the Supreme Court in a 1982 case had already held that campaign promises in legislative elections enjoyed First Amendment protection, and for the Court to distinguish this case would require some notion that judicial elections are special—a point currently unresolved by *White*.⁴⁶

The Commit or Appear to Commit Clause. To some extent, the constitutional analysis of this provision tracks the analysis of the Pledges and Promises Clause. The Commit or Appear to Commit Clause is a content-based restriction of the speech of judicial candidates, triggering strict scrutiny. As in the Pledges and Promises context, the same problem with applying the first two meanings of impartiality applies here as well. But the Commit or Appear to Commit Clause is on shakier legal ground than the Pledges and Promises Clause. First, as Richard Briffault has noted, the “Appear to Commit” portion of the canon raises issues of unconstitutional vagueness.⁴⁷ How would a candidate know when his statement would appear to commit him with respect to cases or controversies likely to come before his court? Consider Briffault’s example of a candidate who labels himself “pro-life” or “tough on crime.” Does this statement

appear to commit a candidate to striking down abortion laws or to imposing criminal sentences that are harsh? It is hard to see the “Appear to Commit Clause” being upheld under strict scrutiny by the *White* Court.

Perhaps because of this vagueness concern, the ABA recently eliminated the “Appear to Commit” portion of the canon and combined “commitments” with “pledges or promises” under the most recent amendments to the canons—the result being a ban on “pledges, promises, or commitments” by judicial candidates.

Even as amended, it is uncertain whether the “commitments” provision alone is constitutional. If “commitments” are understood as simply pledges and promises made without the express words “I promise” or “I pledge,” then the analysis of the constitutionality of this provision would track the Pledges and Promises Clause. If the government can lawfully tell judicial candidates that they cannot say “I promise to strike down a same-sex marriage law under the state constitution,” the government should equally be able to tell judicial candidates that they cannot say “You have my word that I will strike down a same-sex marriage law under the state constitution.” The latter is arguably a “commitment” that lacks the express words of promise, and the presence of “magic words” should not matter for the outcome.⁴⁸ On the other hand, if the Court reads commitments as covering statements somehow *broad*er than the functional equivalent of a promise and closer to statements covered by the Announce Clause, the canon could be in serious constitutional jeopardy.

Partisan Political Activity. No question, the Partisan Political Activities canon interferes with the speech and associational activities of judicial candidates. In states running nonpartisan judicial elections, judicial candidates cannot seek the endorsement of political parties or give speeches to political groups, nor can the candidates associate with political parties in various

ways such as by assuming leadership positions. Such restrictions “do not easily square with a system that uses a partisan ballot for judicial elections” and may be “particularly burdensome for challengers who need to demonstrate their partisan bona fides to win a party nomination.”⁴⁹

Turning to the constitutional analysis, it is hard to see how any of the three versions of impartiality could serve as a compelling interest to justify this canon. As to the first interest, affiliating with political parties in the ways proscribed by the canon could lead observers to believe that in the *small class of cases* (such as redistricting cases) where political parties are parties in a lawsuit, a judge might exhibit bias. A court following *White* could well conclude that *recusal* is a more narrowly tailored solution to the problem of this lack of impartiality,⁵⁰ a solution recently imposed in the case of former Republican House majority leader Tom DeLay accused of criminal campaign finance violations.

Nor does it appear that the state’s interest in (at least the perception of) openmindedness could justify this provision. It might be argued that a judge closely aligned with a party that has a strong a “pro-life” or “pro-choice” position would not be openminded on such an issue. But now--with the Announce Clause eliminated--that a judge can declare himself “pro-life” or “pro-choice,” the force of this argument is quite attenuated.

However, supporters of the Partisan Political Activities clause have begun raising a different potential compelling interest to justify it: a separation of powers between the branches of government. Judges who are beholden to political parties for support or whose interest are too closely aligned with the interests of party bosses might be overly influenced by the wishes of the party leadership. If a state wants to commit to an independent judiciary--that is, a judiciary willing to assert its constitutional power separate and apart from the other branches of government under the control of party leaders--it could well seek to place barriers between

normal partisan activities and the judiciary. As Minnesota put it in its petition for certiorari in the recent *White II* case: “Most courts should have a Chief Judge or Chief Justice. None has, nor should have, a majority whip.”⁵¹ The interest is especially strong in those states that have made a policy decision that judicial elections should be nonpartisan, that is, judicial candidates running without party labels. When the state has made a deliberate decision to insulate the judicial election process from usual party politics, arguably that decision should be subject to some deference.

It remains to be seen if this “separation of powers” argument would gain support on the Supreme Court. In the campaign finance context, a slim majority of the Court has recognized the special dangers that political parties can play in the political process because of their unique role in shaping political competition. But those cases concerned the role of parties as a corrupting influence in area of campaign financing, not in endorsing and supporting candidates for office. The Court has upheld the right of parties to endorse candidates, even in non-partisan elections.⁵²

In addition, at least some courts are dubious of rules that prohibit judicial candidates from associating too closely with political parties but still allow the candidates to associate closely with interest groups such as the NRA or the Sierra Club.⁵³ Once candidates are involved in heavy political activity, there may be less reason to disfavor association *solely* with political parties. Support for the clause depends upon recognizing special dangers from party association.⁵⁴ Still, supporters of the Clause analogize the limit on the partisan activities of judicial candidates to laws (upheld against constitutional challenge by the Supreme Court⁵⁵) limiting the partisan activities of public employees, a somewhat inapt comparison given that these statutes do not apply to policymaking employees like judges.

The Solicitation Clause. The anti-solicitation rules may stand a better chance of being upheld against constitutional challenge, at least in those courts that view the question more as one of campaign finance than of judicial speech. In the campaign finance context, the Supreme Court has repeatedly upheld regulation, from *disclosure* laws to limits on the *amount* that candidates can collect for campaigns to *source limitations*, prohibiting corporations and unions from spending general treasury funds on election-related activity.

The solicitation rules bar some forms of personal solicitation of funds by judges, allowing the judges to set up committees to accomplish the task for the judge. Because judges can still collect contributions, albeit indirectly, a court might apply a more deferential level of scrutiny to the restrictions and uphold them as simply another of many regulations aimed at preventing the corruption or appearance of corruption of elected officials (in this case, elected judges) through limits on how money is collected in the political process. This would be no more remarkable than the Supreme Court's decision in the recent *McConnell* case limiting federal candidates from soliciting money for certain kinds of races or entities.⁵⁶ In the campaign finance contribution context especially, the Supreme Court has shown a great deal of deference to legislative determinations about the need for such regulation. Nothing is a greater threat to openmindedness than the sale of a judicial vote for dollars, and the solicitation rules could be said to sensibly put some distance between judges and the money that gets them (and keeps them) in office--an especially large concern given that many contributions to judicial candidates comes from lawyers who appear before these same judges (**see chapter 5?**).

On the other hand, courts that view the solicitation rules as content-based limits on the free speech of candidates (that is, the judicial candidate cannot say: "Please give me your money for my campaign") will subject the solicitation provisions to strict scrutiny.⁵⁷ Again, defenders

of the law can raise an anti-corruption argument in favor of the law, but it will be harder to justify the law as narrowly tailored to prevent corruption; even under the rules, judges often can learn the identity of campaign contributors (in Minnesota, for example, the information is freely available over the Internet through public disclosure required by Minnesota's campaign finance law) and the public already believes that campaign contributions have too much influence over elected judges even with the solicitation rules in place. According to a 2001 poll, 72 percent reported being concerned that the money raised by judicial candidates compromised the judges' impartiality.⁵⁸ So it might be that the rules are not targeted enough toward preventing corruption or its appearance.

Misrepresentation Rules. The misrepresentation rules perhaps present the most clear-cut case on the question of constitutionality, and the issue turns less on the special nature of *judicial* elections than the ability of states to regulate false campaign speech more generally. Generally speaking, the Supreme Court has held that the First Amendment limits the ability of the state to punish false speech unless such speech is made with knowledge of its falsity or in reckless disregard of the truth. The courts have generally applied the same principles to false campaign speech: speech can be nasty and misleading, but it cannot be punished unless it is false and made with the appropriate intent.⁵⁹

To the extent the 1972 Code allowed for the punishing of negligently made false campaign speeches by judges, it is likely unconstitutional. The 1990 Code stands a greater chance of being upheld against constitutional challenge. Even under strict scrutiny, the government likely has a compelling interest in assuring that voters receive accurate information, and a ban on knowingly false speech appears narrowly tailored toward achieving this goal.⁶⁰

Having said that, it may be that some supporters of the ABA’s misrepresentation rules hope they will achieve a certain level of civility (or at least a lack of mudslinging) in judicial campaigns. But for the clauses to be construed as constitutional, they cannot ban uncivil judicial campaign speech, including inflammatory statements of opinion.⁶¹

Conclusion

Though the Supreme Court in *White* was careful not to declare that judicial election campaigns must be treated the same as other elections in order to comply with the First Amendment, *White* is leading states in that direction. Most of the important judicial campaign canons are subject to at least serious question under *White*, and the post-*White* trend in the lower courts has been discouraging for those who seek to defend the ABA Code.

As judicial campaigns begin to look more like campaigns for legislative and executive offices, states may begin to rethink whether judicial elections continue to make sense. We have not seen that rethinking yet, but another Supreme Court case striking down more judicial canons may leave little choice for states but to either accept judicial elections on the same terms as other elections or to make radical changes in longstanding judicial selection practices.

Endnotes

¹ Thanks to Roy Schotland for his patience and guidance, to Richard Briffault for useful comments, and to Regan Parker for excellent research assistance.

² 536 U.S. 765 (2002).

³ Schotland, “Comment,” p.150.

⁴ After the Supreme Court decided *White*, it remanded the case to the Eighth Circuit to consider issues not reached by the Supreme Court. On remand, the Eighth Circuit, in addition to striking down additional provisions of the Minnesota judicial code on First Amendment grounds, held that the Minnesota Supreme Court was without authority under Minnesota law to promulgate rules regulating judicial elections (*Republican Party v. White*, 416 F.3d 738, 753 n.7 (8th Cir. 2005) (en banc) (*White II*)), cert. denied sub nom. *Dimick v. Republican Party of Minnesota*, 74 U.S.L.W. 3303 (No. 05-566, Jan. 23, 2006). This *ultra vires* argument is beyond the scope of this chapter, but it is certainly an issue that observers of judicial elections will need to watch.

⁵ For a more detailed history, see Shepard, “Campaign Speech,” pp. 1063-67; see also Rapp, “The Will of the People,” pp. 110-116.

⁶ Shepard, Campaign Speech,” p. 1066 n.33.

⁷ *Ibid.*, p. 1066.

⁸ Information about the status of the proposed revisions is available on the ABA website at <<http://www.abanet.org/judicialethics/home.html>>.

⁹ Rapp, “The Will of the People,” p. 112.

¹⁰ *Republican Party of Minnesota v. White*, 536 U.S. at 768 (quoting Minn. Code of Judicial Conduct, Canon 5(A)(3)(d)(i)(2000)).

¹¹ Briffault, “Judicial Campaign Codes,” p. 203.

¹² American Bar Association, Code of Judicial Conduct Canon 7B(1)(c) (1972); Model Code of Judicial Conduct Canon 5A(3)(d)(ii) (1990).

¹³ Briffault, “Judicial Campaign Codes,” p. 209.

¹⁴ American Bar Association, Model Code of Judicial Conduct Canon 5A(3)(d)(i) (2003).

¹⁵ American Bar Association, *Annotated Model Code of Judicial Conduct*, p. 466 (noting 2003 amendment collapsing commit clause and pledges and promises clause “to provide a clearer enumeration of what judicial speech was prohibited and to state more clearly the interest protected by that prohibition.”)

¹⁶ American Bar Association, Model Code of Judicial Conduct Canon 5A(3)(d)(ii) (1990).

¹⁷ Briffault, “Judicial Campaign Codes,” p. 214.

¹⁸ “‘Political organization’ denotes a political party or other group, the principal purpose of which is to further the election or appointment of candidates to political office.” American Bar Association, *Annotated Model Code of Judicial Conduct*, p. 8.

¹⁹ American Bar Association, Model Code of Judicial Conduct Canon 5A(1) (2003). A judge or judicial candidate may not “publicly endorse or publicly oppose other candidates for the same judicial office in a public election in which the judge or judicial candidate is running.” Canon 5C(1)(iv) (2003). In addition, a judge or judicial candidate at any time may not purchase tickets and attend political gatherings, identify himself as a member of a political party, and contribute to a political organization. Canon 5C(1)(a) (2003).

²⁰ Briffault, “Judicial Campaign Codes,” p. 228.

²¹ American Bar Association, Model Code of Judicial Conduct Canon 5C(2) (1990).

²² Schotland, “Myth, Reality, Past and Present, and Judicial Elections,” p. 666.

²³ American Bar Association, Model Code of Judicial Conduct Canon 5A(3)(d)(ii) (1990).

²⁴ Moerke, “Must More Speech Be the Solution to Harmful Speech?,” p. 310.

²⁵ Readers may find a more detailed summary of the case in Briffault, “Judicial Campaign Codes.”

²⁶ *Republican Party v. Kelly*, 247 F.3d 854 (8th Cir. 2001).

²⁷ On remand, the Eighth Circuit, sitting en banc, struck down the solicitation and partisan activities provisions of the Minnesota judicial code. *Republican Party v. White*, 416 F.3d 738 (8th Cir. 2005) (en banc) (*White II*). The Supreme Court then declined to hear the case. See note 4 above.

²⁸ *White*, 536 U.S., p. 788. “*Stare decisis*” is respect for court precedent. The dissent read the Clause more narrowly, as proscribing only “statements that essentially commit the candidate to a position on a specific issue.” *Ibid.*, p. 810 (Ginsburg, J., dissenting).

²⁹ *Ibid.*, p. 775.

³⁰ *Ibid.*, pp. 776-77.

³¹ *Ibid.*, pp. 777-78.

³² *Ibid.*, p. 778.

³³ *Ibid.*, p. 782. The Court also rejected the argument that limits on judicial campaign speech were part of a universal and longstanding tradition, entitled to a strong presumption of constitutionality. *Ibid.*, p. 784.

³⁴ *Ibid.*, p. 805 (Ginsburg, J., dissenting).

³⁵ *Ibid.*, p. 783 (footnote omitted). In the past, the Court had held on at least one occasion that judicial elections could be treated differently from other elections in that there was no need to comply with the generally applicable “one person, one vote” requirements for judicial elections. See *Wells v. Edwards*, 409 U.S. 1095 (1973).

³⁶ *White*, 536 U.S., p. 784.

³⁷ *Ibid.*, p. 770.

³⁸ *Ibid.*, p. 780.

³⁹ *Ibid.*, p. 773 n.5.

⁴⁰ See Schotland, “Financing Judicial Elections.”

⁴¹ Johnson, “Judicial Campaign Speech in Kentucky,” pp. 400-01 (“The difficulty with [*White*] is not that it equates judicial elections for popular representatives. Rather it confuses judicial accountability with a politician’s accountability....Politicians break faith with the people when they abandon their advocacy. Judges break faith with the people when they abandon their neutrality.”).

⁴² The North Carolina Supreme Court made it easier for judges to ask for campaign contributions and to make certain promises on the campaign trail.

⁴³ For an argument in favor of this slow approach in election law cases under the Equal Protection Clause, see Hasen, *The Supreme Court and Election Law*, ch. 2.

⁴⁴ See, e.g., *In re Watson*, 100 N.Y.2d 290, 302-03 (2003).

⁴⁵ See *North Dakota Family Alliance, Inc., v. Bader*, 361 F. Supp. 2d 1021, 1041 (D.N.D. 2005).

The court struck down North Dakota’s Pledges and Promises Clause, noting:

This Court is of the opinion that there is little, if any, distinction between the “announce clause” which was struck down by the United States Supreme Court in *White*, and the “commitment clause” and “pledges and promises clause” contained in Canon 5A(3)(d)(i) and (ii) of the North Dakota Code of Judicial Conduct. All of the clauses sweep constitutionally-protected speech within its scope. All of the clauses forbid the same type of speech the Supreme Court held was constitutionally-protected in *White*, namely, speech announcing a judicial candidate's views on disputed legal, political, or social issues. There is no real distinction between announcing one's views on legal or political issues and

making statements that commit, or “appear to commit,” a judicial candidate with respect to cases, controversies, and issues that are likely to come before the court.

⁴⁶ On this argument, see Briffault 2004, “Judicial Campaign Codes,” p. 210 (citing *Brown v. Hartlage*, 456 U.S. 45 (1982)).

⁴⁷ Briffault, “Judicial Campaign Codes,” pp. 217-18.

⁴⁸ *Ibid.*, p. 216.

⁴⁹ Briffault, “Judicial Campaign Codes,” p. 230.

⁵⁰ *White II*, 416 F.3d, p. 755.

⁵¹ *Dimick v. Republican Party of Minnesota*, No. 05-566, Petition for Writ of Certiorari, pp. 19-20, available at <<http://www2.mnbar.org/committees/judicial-elections/WhiteIIPetition.pdf>>.

⁵² *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989).

⁵³ *White II*, 416 F.3d. at 760 n.13.

⁵⁴ *Ibid.*, p. 778 (Gibson, J., dissenting).

⁵⁵ See *In re Raab*, 793 N.E.2d 1287, 1291 (NY 2003); *U.S. Civil Serv. Commission v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548 (1973). See also *White II*, 416 F.3d, p. 769 (Gibson, J., dissenting).

⁵⁶ *McConnell v. FEC*, 540 U.S. 93 (2003).

⁵⁷ *Weaver v. Bonner*, 309 F.3d 1312, 1322 (11th Cir. 2002); *White II*, 416 F.3d 763.

⁵⁸ Justice at Stake Campaign, “Poll of American Voters.”

⁵⁹ See generally Lowenstein and Hasen, *Election Law*, pp. 582-94.

⁶⁰ See Briffault, “Judicial Campaign Codes,” p. 222.

⁶¹ *Weaver v. Bonner*, 309 F.3d, p. 1321.