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THE CHANGING FACE OF JUDICIAL ELECTIONS

Gerald Stern*

FREE SPEECH IN JUDICIAL CAMPAIGNS AND AN IMPARTIAL JUDICIARY: A CLASH OF VALUES

CONTROLLING CAMPAIGN SPEECH

Judges are elected in thirty-nine states under rules that govern their campaign conduct.¹ In New York, as in other states, judicial candidates may not make campaign pledges or promises to the electorate as to how they would decide matters if elected.² Nor may they make commitments (or appear to do so) on issues likely to come before the court³ or "knowingly make any false statement or misrepresent the identity, qualifications, current position or other fact concerning [either] the candidate or an opponent."⁴ Judicial candidates are also instructed to "maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary."⁵ And since judges must "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary,"⁶ that

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¹ Special Counsel to the Judicial Institute of the New York State Unified Court System and former Administrator, New York State Commission on Judicial Conduct, 1974-2003.


³ See Rules Of The Chief Administrator Of The Courts [hereinafter N.Y. Rules], N.Y. COMP. CODES R. & REGS. tit. 22, § 100.5(A)(4)(d)(i) (2001). The origin of the rules is the American Bar Association’s Model Code of Judicial Conduct, which has been recommended to the states. For purposes of consistency, reference in this article will be to "rules." Most states have adopted the ABA’s Model Code or variations of particular canons in the Code. In New York, the applicable sections are referred to as "rules."

⁴ Id. § 100.5(A)(4)(d)(i).

⁵ Id. § 100.5(A)(4)(d)(ii).

⁶ Id. § 100.5(A)(4)(d)(iii).

⁷ Id. § 100.5(A)(4)(a).

⁸ Id. § 100.2(A).
provision too has been used to enforce high standards during campaigns. Other rules restrict candidates' political activity.\(^7\)

Generally, judicial candidates have conducted their campaigns in line with these rules. Typically, the campaign literature of judicial candidates presents their experience and qualifications without any mention of the candidates' opinions about legal or political issues of interest to voters. Endorsements are listed, including those of right-to-life or pro-choice groups and police unions, which suggest the possible leanings of the candidates. In New York, when judicial candidates occasionally implied how they would decide particular types of cases—usually criminal cases—the Commission on Judicial Conduct, beginning in the mid-1990s, took disciplinary action under the existing rules.\(^8\)

Restrictions on judicial candidates, when they are followed, make for dull campaigns, and critics of existing restrictions argue that voters have no way of distinguishing among candidates, and candidates have no effective way of distinguishing themselves from their competitors. There is logic to the view that elections contemplate rigorous debate and campaign promises, and when the candidates are muzzled, elections are a farce. But there is a price to pay when judicial candidates engage in typical campaign conduct.

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7. See id. § 100.5(A)(1), (2), (5).
8. See In re Hafner, N.Y. COMM’N ON JUDICIAL CONDUCT ANNUAL REPORT [hereinafter N.Y. COMM’N ANN. REP.] 113 (2001) (Admonition) (Candidate ran a print ad that asked voters whether they were “tired of seeing criminals get a ‘slap’ on the wrist,” and then said, “So am I.”); he also approved an ad by the Conservative Party Chair that attacked his opponent’s record of dismissing cases; the ad said: “Soft judges make hard criminals!”); In re Herrick, N.Y. COMM’N ANN. REP. 103, 103-04 (1999) (Admonition) (Candidate told voters in a televised ad that that they needed to know what judges would “be like when they put the robe on,” and stated that when defendants come before him who violated orders of protection, he would send them to jail. One Commission finding was that matters concerning orders of protection would rarely come before him in the court of general jurisdiction.); In re Maislin, N.Y. COMM’N ANN. REP. 113, 113-14 (1999) (Admonition) (Candidate spoke to a reporter about two cases that had been remanded to him from a higher court and stated that he stood by his original ruling. He ran campaign ads that purported to show tough action in criminal cases and assured voters that he would send criminals to jail. He used as his campaign slogan: “Do The Crime—Do The Time.”); In re Polito, N.Y. COMM’N ANN. REP. 129, 129-30 (1999) (Admonition) (Candidate ran TV ads that stated: “Violent crime in our streets” and portrayed a masked man attacking a woman outside her car; the ad urged voters to vote for him and “crack down on crime.” A second ad assured voters that he would stop the “revolving door of justice” and that he would not “experiment with alternative sentences” or “send convicted child molesters home for the weekend”).

In addition to being published in annual reports, the determinations of the N.Y. State Commission on Judicial Conduct are also available on the Commission’s website at http://www.scjc.state.ny.us.
The question is whether there is sufficient justification for the traditional restrictions on judicial campaigns. Should voters know how judicial candidates stand on the “hot-button,” national issues of the day: whether they are opposed to gun control, abortion, same-sex marriages, and equal treatment of homosexuals; whether they would be “tough” on defendants charged with, and, possibly, convicted of, crimes; and whether they would be more sympathetic to landlords or tenants?\(^9\)

The argument in support of the restrictions is that, unlike other public officials, judges play a unique role in deciding issues of fact and law, based on principles of established law. They are not the public’s representatives in the political sense. They do not have—or should not have—constituencies. For the justice system to work, judges must know and apply the law, be impartial, and be perceived to be such. Judges should not decide cases based on what a majority of the public wants to have happen. All parties in civil and criminal proceedings should be assured of a fair hearing by an independent and impartial judge, and when judges have already committed themselves on issues that come before them, the parties on the “wrong” side of the issues cannot be confident that they will receive fair hearings. Moreover, when a judge has given assurances on specific issues to voters, is elected, and then presides over a matter that the judge has addressed, the judge’s subsequent ruling could reasonably raise the question whether the judge was biased.

Judges who campaign against crime portray a favorable image to most voters, but not to the defendants who subsequently appear before them. If a judge has assured voters that she will be “tough” on criminals, it is unlikely that a defendant in a criminal proceeding will be assured that his rights will be protected, including the right to a fair trial and the right to appear before an independent and impartial judge. Furthermore, when a judicial candidate gives even vague assurances to voters that he or she will favor the prosecution, the candidate’s opponents may be pressured to do the same, and the competition among candidates to show which one is the real “law and order” candidate is apt to generate more specific assurances. And the same holds true for other matters of great

\(^9\) There are also local issues that voters might want judicial candidates to address. Are the judicial candidates for or against placing in communities unpopular group homes that the public fears would adversely affect their safety, comfort and property values? What are the candidates’ views on the controversial development of property by large businesses? Do they favor neighborhood preservation or real estate development? The fact that some of these local disputes may be litigated is all the more reason why the voters might want to know how candidates for judicial office feel about these issues.
interest to the public; in a large urban area, such as New York City, where most residents are apartment dwellers, landlords may be regarded only slightly better than defendants in criminal cases; and a clever candidate for civil court might be tempted to appeal to a large voting bloc that might select a judge who identified with tenants.  

In a 1980 campaign for Civil Court of the City of New York, three candidates for the Democratic Party nomination, which in New York City would assure victory in the general election, distributed a joint campaign circular, the front page of which read:

*If you were in court with your landlord...*

*or a company that cheated you...*

*If you were hit by a car... or a mugger...*

*What kind of judge would you want?*

(Ellipses in original.)

In that campaign literature, landlords are listed first among other undesirable minorities: a company that cheats, a driver of a car that hits a pedestrian, and a mugger. The three candidates are portrayed in the literature as the kind of judges whom tenants and others who have been cheated, hit, or mugged should want. Implicit in the literature is that these candidates would make a difference as judges in the situations presented. Of the reasons why such campaigns are inconsistent with a judge’s duty to uphold the integrity, impartiality, and independence of the judiciary, one is that judicial candidates who appeal to voters’ concerns and prejudices may then feel some compulsion to become the

10. See *In re Birnbaum*, N.Y. COMM’N ANN. REP. 73 (1998) (Censure) (Candidate for N.Y.C. Civil Court identified himself as a “tenant” and his opponent as a “landlord” in a brochure, in which he included statements of support that he had solicited from tenants in cases before him, including one case pending at the time).

11. No action was taken in New York against any judges for questionable campaign slogans until the mid-1990s. The prevailing view until that time was that elections give rise to these indiscretions, and campaign rhetoric was regarded as a tolerable price to pay for elections.

12. Disqualification in particular cases would not be an adequate remedy for a judge’s biased views aired during the campaign for judicial office. Disqualification, which shifts a difficult, awkward and expensive burden to parties, would be of little practical use where the judge has taken a position on an entire class of parties who appear regularly before the courts, such as defendants in criminal cases or landlords in civil cases. Moreover, most lawyers are reluctant to ask judges to disqualify themselves for bias.
judge they told voters they would be. Incumbent judges would be particularly vulnerable in elections in which their opponents accused them of being "soft on crime," "soft" on landlords, "soft" on gay rights, or "soft" on whatever class of parties is currently in disfavor. They would be vulnerable to attack even if the criticized rulings were consistent with law.

Voters are apt to elect chief executives and legislators who promise to be tough on those parties for whom the public has no sympathy. That is democracy at work. The courts should be different, in part because the courts must determine whether the political decisions of governors, mayors, and legislators are consistent with constitutional and statutory law, and because a judge who has promised to be "tough" on defendants in criminal cases really should do what the circumstances call for, which sometimes means being "tough" and at other times means being lenient, but at all times means safeguarding the rights of accused defendants. It is elementary that basic, well-established rights are not subject to what a majority of voters want, and a judge's loyalty must be to the law and to abiding by high court interpretations of the law, not to the wishes of voters.

13. Not everyone would agree with this point. One writer expressed a contrary view in a recent law review article. The writer states:

The expansion of First Amendment rights could be a double-edged sword for judicial candidates. While candidates will now be able to voice their opinions on more issues, nothing guarantees that doing so will better their chances of election. Voters are certainly intelligent enough to realize that impartiality is a desirable quality in a judge, and they may turn away from candidates whose behavior suggests that they have prejudged important legal issues. In addition, candidates who announce their views on "hot" legal issues risk having political groups actively opposing their candidacy based on their controversial views.

Jacob McCrea, The First Amendment Allows a Candidate for Judicial Election to Announce His or Her Views on Disputed Legal or Political Issues: Republican Party of Minnesota v. White, 41 DUQ. L. REV. 425, 444-45 (2003). At times, that would be true, in which case the candidate's strategy was poor. Undoubtedly, a carefully selected slogan or description of the candidate such as "law and order" in many areas of the country could do wonders for a challenger's campaign at minimal risk that the good-government groups, defense bar or defendants themselves will rise up in protest. And contrary to the view that the call to retain restrictions shows lack of faith in voters, see Stephen Gillers, Let Judicial Candidates Speak, N.Y. TIMES, Mar. 28, 2002, at A31, the issue does not concern faith in voters. Offensive campaigns in recent years, in which candidates gave assurances to the electorate that they would favor the police and prosecution viewpoint, have been successful. Trusting the judgment of voters on matters they care about is not an appropriate safeguard in dealing with the danger to due process of law. Mr. Gillers, one of the leading experts on legal and judicial ethics, would allow candidates to offer general discussions of legal issues, but not promises of particular rulings. See id. The big gap in the middle should be of concern.

14. See generally, Randall T. Shepard, Campaign Speech: Restraint and Liberty in Judicial Ethics, 9 GEO. J. LEGAL ETHICS 1059 (1996). In his excellent article, Justice Shepard urges that it is
Finally, there are proponents of expanded speech rights who state that because the states have chosen to elect judges, the voters have a right to hear the views of those who run for political office and the candidates have an inherent right to speak freely to the voters.\textsuperscript{15} This point of view does not necessarily support the election of judges. United States Supreme Court Justice Sandra Day O'Connor condemns the election of judges, but believes that when candidates are selected by elections, they should have the same right to campaign as candidates do for other public offices.\textsuperscript{16}

While there is merit to that position, the countervailing view is that in judicial elections, preserving due process of law and an impartial judiciary is more important than letting candidates appeal for votes in any manner they see fit, and, most importantly, that judicial elections are possible only if candidates' speech is regulated.\textsuperscript{17}

This article will examine whether judicial candidates have a First Amendment right to address issues in their campaigns for votes, and, if so, what they are permitted to say. It will also examine whether candidates' political conduct can be regulated more closely in judicial elections. Some court challenges to existing rules have been successful over the past decade, and, recently, the United States Supreme Court in \textit{Republican Party of Minnesota v. White}\textsuperscript{18} struck down a Minnesota rule that prohibited judicial candidates from announcing positions on disputed legal or political issues. The decision in \textit{White} is apt to have a profound effect on what candidates will say to voters and what voters may demand from candidates during judicial elections. \textit{White} also raises the question whether it will be applied beyond announcing positions on disputed issues. Post-\textit{White} decisions have begun to address free speech issues beyond the one covered by the court in \textit{White}.\textsuperscript{19}

\textsuperscript{15}See, e.g., Weaver v. Bonner, 309 F.3d 1312 (11th Cir. 2002).


\textsuperscript{17}See Shepard, supra note 14, at 1090-91.

\textsuperscript{18}536 U.S. 765 (2002).

\textsuperscript{19}See, e.g., Spargo v. N.Y. State Comm'n on Judicial Conduct, 244 F. Supp. 2d (N.D.N.Y. 2003) (addressing partisan political activity in judicial campaigns and First Amendment ramifications), rev'd on other grounds, 351 F.3d 65, 68 (2d Cir. 2003).
In New York, as in other states, the rules governing judicial conduct prohibit political activity of all kinds, except during a defined window period, when candidates are permitted to engage in some political activity in their campaigns for judicial office. So, for example, judges may not attend political functions, except for a period of nine months before any election or primary or nominating convention, which would be a necessary part of running for office, and six months after an election. Judicial candidates in New York may not speak at political fundraisers for other candidates or political parties or clubs or solicit funds for any campaigns, including their own. In short, they are prohibited from engaging in many political activities that are an integral part of running for office. As candidates, they can appoint committees of responsible persons to raise funds, but the candidates cannot participate in direct solicitation of funds.

Restrictions on political activities obviously portray a belief that being a judge does not mix with partisan politics. The rules in New York are strictly enforced. For example, judges have been advised that they may not attend a political debate if it is sponsored by a political organization. One judge was publicly admonished for attending political functions despite his claim that he was present either to accompany or pick up his wife who was active in local politics.

Fifteen years before the White decision, a town justice was removed from office for doing no more than candidates for other public offices do routinely. In In re Maney, a town justice, in preparation for his campaign for re-election nearly eighteen months before his re-election campaign was to start, met with supporters, and planned strategy to replace his party's political leader, who had no intention of supporting
Judge Maney for re-election. Judge Maney knew that his actions were contrary to the rules, which barred political activity, but explained that unless he took steps to defeat the party leader in a caucus arranged by the judge, he would not get the party’s endorsement that he needed to run again. The judge acknowledged his conduct, admitted that it was improper, and asked not to be removed. The Commission staff recommended a censure; the Commission rejected the recommendation and determined that the judge should be removed; on review by the New York State Court of Appeals, the court accepted the Commission’s determination.

Although the content of candidates’ speech is an issue that has attracted most of the First Amendment attention, the decision in White has spurred claims that candidates for election as judges cannot constitutionally be prevented from engaging in other kinds of political activity. One federal appellate court stated that the typical restriction against judicial candidates soliciting funds contravenes their First Amendment right in the light of the recent decision in White. That court, the United States Court of Appeals for the Eleventh Circuit, interpreted White to mean that in all respects “the standard for judicial elections should be the same as the standard for legislative and executive elections.” Obviously, that rationale renders the special rules on judicial campaign conduct to be unenforceable, and if that becomes the norm, judicial campaign practices would be markedly changed.

Whether the courts, in addition to the Eleventh Circuit Court of Appeals, will interpret the First Amendment to permit judicial candidates to engage fully in normal political activity, such as raising funds, supporting other candidates, and, generally, becoming part of the political party process, is yet to be seen. In New York, a candidate’s recent attempt to assert a First Amendment defense against charges that he engaged in prohibited political activity—of the kind that would be acceptable for candidates for other public offices—was rebuffed.

28. See id. at 312.
29. See id. at 313.
31. See Maney, 510 N.E.2d. at 312.
32. See Weaver v. Bonner, 309 F.3d 1312, 1322-23 (11th Cir. 2002).
33. Id. at 1321. The Supreme Court in White did not assert that position, and specifically stated that it was not doing so. See White, 536 U.S. at 783.
34. See In re Raab, 793 N.E.2d 1287 (N.Y. 2003).
CHANGING FACE OF JUDICIAL ELECTIONS

CHALLENGES TO THE ESTABLISHED ORDER

Over the past decade constitutional challenges have been brought against various rules governing judicial campaigns. Courts have struck down some of the standard rules, while other courts have upheld them. The provision against making statements that commit or appear to commit the candidate with respect to matters that are likely to come before the court has been upheld. The Illinois provision against making pledges or promises of conduct in office has been struck down by the Seventh Circuit Court of Appeals since it does not on its face limit the prohibition to pledges or promises to rule a certain way in particular cases.

In 1988, the Supreme Court of Washington held that a judge's campaign statements that he is a "tough, no-nonsense judge" were permissible since such slogans "suggest nothing more than a strict application of the law and do not single out any particular party for special treatment." The same court in the same case held that the more specific pledge, "TOUGH ON DRUNK DRIVING," violated the rule against making a pledge or promise. But the court refused to uphold a charge that the candidate had used false, misleading or deceptive campaign advertising in stating in campaign ads that a majority of his opponent's support came from "drunk driving defense attorneys." The justification for the campaign claim was that of the attorneys who had contributed a total of $7,944, those who either had represented a DWI defendant or said they would if requested to do so had contributed a total of $4,001. The court held that although the campaign speech violated the canon, it was constitutionally protected.

38. See Buckley, 997 F.2d at 228-29.
40. See id. at 395-96.
41. See id. at 397.
42. See id.
43. See id. at 397, 399.
In In re *Chmura*, the Supreme Court of Michigan rejected the Michigan judicial conduct commission’s conclusions that a judge’s campaign claims had been improper and reasoned that it had no “competence” to pass upon “the seemliness” of campaign rhetoric. The court held that “[s]peech that can reasonably be interpreted as communicating ‘rhetorical hyperbole,’ ‘parody,’ or ‘vigorouse epithet’ is constitutionally protected.” The Michigan Supreme Court in *Chmura*, applying an “exacting scrutiny” analysis—because the canon potentially authorized discipline based on the contents of a candidate’s speech—held that the Michigan standards were too broad and that controls on political speech in judicial campaigns must be as limited and as clear as existing standards for defamation against public officials. The Michigan Commission had to prove that the communications involved objectively factual matters, and if inaccurate, the communication—to be subject to discipline—would have to be

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44. 626 N.W.2d 876 (Mich. 2001).
45. *Id.* at 887. Why would the high court of a state not have competence to pass upon the unseemliness of judicial campaign conduct in Michigan, apart from whether the conduct is protected by the First Amendment? If the conduct were not protected by the First Amendment, the Supreme Court of Michigan, the state’s highest court, would be in a unique and excellent position to deter unseemly conduct, just as it does with regard to the conduct of judges generally.
46. *Id.* at 886.
47. *Id.* at 882. For the contents of speech in campaign flyers and the like, the test is whether the restrictions are narrowly tailored to meet a compelling governmental interest. There should be no doubt that there is a compelling state interest that the Code and rules seek to protect. As Justice Stewart stated in his concurring opinion in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978): “There is hardly... a higher governmental interest than a State’s interest in the quality of its judiciary.” *Id.* at 848.
48. *See Chmura*, 626 N.W.2d at 882. The court noted: Political speech is “‘at the core of our electoral process and of the First Amendment freedoms’... an area of public policy where protection of robust discussion is at its zenith.” Because the central purpose of the First Amendment speech clause is to protect core political speech, we determined that political speech may not be regulated in the same manner that commercial speech is regulated.
49. *See id.* at 885. “Thus, we examine defamation case law for guidance in analyzing whether a judicial candidate knowingly, or with reckless disregard, has used or participated in the use of any form of public communication that is false.” *Id.* The Michigan rule barred the use of any form of public communication that the candidate knows or reasonably should know is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading, or which is likely to create an unjustified expectation about results the candidate can achieve.

*MICH. CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(d) (1994).*
shown by the Commission to be false and made with knowledge that it was false or with reckless disregard of the truth.50

Judge Chmura's campaign literature portrayed himself as a fiscally conservative lawyer who participated in anti-taxation causes, a tough judge who took "one criminal after another off our streets,"51 and who prevented the former mayor of Detroit from stealing state tax revenues for use in Detroit schools;52 in fact, the use of those funds had been in line with state law and there was no indication that the former mayor supported the criticized use of tax revenue.53

Judge Chmura had criticized his opponent for the lenient sentences and bail decisions of a court where the opponent had served as a non-judge, court administrator and magistrate.54 Chmura's campaign literature described his opponent, Jim Conrad, as "in charge" of the court,55 which impliedly made him responsible for all controversial decisions of the judges of that court. Another reference to the opponent's connection to that court was the statement that it was "Jim Conrad's Court."56 These claims clearly misrepresented Conrad's responsibility as a court administrator, although the Michigan Supreme Court apparently regarded them as fair campaign commentary. Judge Chmura also made references to a claim that his opponent had sexually harassed a woman,

50. See Chmura, 626 N.W.2d at 896-97. If the candidate's material statements about an opponent were false, the Commission should have an adequate basis to investigate. If the false statements were de minimis, there would be no basis to act. The absence of a good reason why the candidate published false information would seem to justify discipline, which could be private or public depending on the circumstances. That such statements were made with knowledge that they were false is often difficult to establish. It is understandable that errors may be made in a campaign, and a candidate should not be disciplined for every error made. But serious or vicious misstatements should be subject to discipline, and the degree to which the candidate made the false statements, either knowing that they were false or acting with reckless disregard of the truth, should be a matter for the extent of the discipline. The burden should shift to the speaker or writer of the false statement to establish that it was an inadvertent error, and if that defense were successful, it would constitute a strong mitigating factor in the disciplinary proceeding.

51. Id. at 888. If taking "one criminal after another off the streets" is acceptable campaign rhetoric in the future, how will it be possible to have an unbiased judiciary in criminal cases? For a judge to campaign on such a record is not only "unseemly," it is improper. If that is the standard in Michigan, it follows that judicial candidates will boast about how tough on criminals they have been and that should be a substantial boost to their bid to be reelected.

52. See id.

53. The political speech is set forth in part in "Exhibit 1" in the court's decision. See id.

54. See id. at 891-92. The court stated that although the statements could be construed as implying that the opponent as a court administrator had responsibility for sentencing and setting bail, the statements were not clearly false since the opponent was part of the court. Id.

55. Id. at 895.

56. Id. at 892.
but in doing so used a photograph and drawing that might reasonably be regarded as unfair.⁵⁷ Arguably, Judge Chmura had an obligation to note that a court had dismissed most aspects of the sexual harassment claim against his opponent and that no court or other forum had sustained any part of the claim, but the decision of the supreme court, in applying libel standards, held that Judge Chmura’s statements were protected.⁵⁸

Also, pre-White, a United States District Court struck down a Nevada code provision that required a judicial candidate to “‘maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary.’”⁵⁹ This uniform disciplinary rule is perhaps the most vulnerable to constitutional attack if each standard is separately scrutinized.⁶⁰ One of the campaign ads considered by the court referred to the offending candidate’s opponent as a special public defender [who] has spent much of his career trying to keep criminals out of jail! How can he possibly understand the agony victims of violent crime feel when the person accused of hurting them or their loved ones is set free because of legal maneuvering or drafty [sic] tactics?⁶¹

The candidate who had placed the ad added to this attack on his opponent with a television commercial that “depicts supposed criminals cheering at the fact that [his opponent] may become a judge.”⁶² The district court held that Canon 5A(3)(a) of the Nevada Code of Judicial Conduct was unconstitutionally vague because it failed to give notice of the type of speech that would be unprotected.⁶³

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⁵⁷. See id. at 893.
⁵⁸. See id. at 895.
⁵⁹. Mahan v. Judicial Ethics and Election Practices Comm’n, No. CV-S-98-01663-DAE, 2000 WL 33937547, at *5 (D. Nev. Mar. 23, 2000). In the same opinion, the court upheld the constitutionality of another provision that restricted candidates for judicial office from knowingly misrepresenting the identity, qualifications, present position or other fact concerning the candidate or an opponent. See id. at *3-*5.
⁶⁰. Many states have the same rule in force, but its constitutionality is in great doubt. This rule could better survive close analysis when it is joined by the “pledges and promises” rule, assuming the candidate’s campaign rhetoric constitutes a pledge or promise; if not, as in Nevada, it probably would be difficult to uphold the constitutionality of the requirement to maintain the dignity appropriate to judicial office.
⁶². Id. at *2.
⁶³. See id. at *8.
The United States Supreme Court granted certiorari after the United States Court of Appeals for the Eighth Circuit upheld the Minnesota “announce” clause, which prohibited judicial candidates from announcing positions on legal or disputed issues. In a 5-4 decision, the United States Supreme Court reversed. Writing for the majority, Justice Scalia concluded that there were only three possible interests that could be served by the rule: (1) impartiality in the sense of promoting openmindedness, (2) impartiality in the sense of being free of any preconceived ideas on issues, and (3) impartiality in the sense of lacking bias against parties. Justice Scalia reasoned that because the “announce” clause restricts speech only with respect to issues, and since judges do not become partial or biased by taking positions on issues in their adjudications, the “announce” clause by its very form is not narrowly tailored to serve impartiality in its traditional sense—lack of bias for or against a party. The majority limited its holding to the “announce” clause, which restricts a candidate for judicial office from announcing “his or her views on disputed legal or political issues.” The Court took no position on the rule prohibiting “pledges or promises.” Distinguishing between announcing views on issues and making a pledge or promise, Justice Scalia observed that announcing views “covers much more than promising to decide an issue a particular way. The prohibition extends to the candidate’s mere statement of his current position, even if he does not bind himself to maintain that position after election.”

Justice Scalia observed that although the “announce” clause would prevent the discussion of certain issues that reflect bias against a party, it is too broad because it would also include speech on issues that do not reflect such bias. In support of the view that there is no compelling State interest in prohibiting judges from expressing their views on the law (i.e. issues), Justice Scalia observed that judges often express their

64. See Republican Party of Minn. v. White, 536 U.S. 765, 770 (2002).
65. See id. at 788.
66. See id. at 778.
67. See id. at 777.
68. See id. at 775.
69. See id. at 776.
70. See id.
71. See id. at 770.
72. Id. (emphasis in original).
73. See id. at 776-77.
views of the law, and may already be regarded as having fixed views on certain issues.\footnote{See id. at 779.}

There appears to be a big difference between a judge who has earned a reputation based on the judge’s rulings and a judicial candidate who announces his or her position on legal or disputed legal issues, particularly when those issues relate to parties who may eventually be asserting those issues in court. Of course, lawyers who practice criminal law usually know which judges are “tough” and which are lenient, just as lawyers who practice in specialized areas of civil law can identify judges who favor plaintiffs and those who favor defendants. But these informal ratings based on how judges handle cases in court do not justify biased campaign statements relating to parties who might come before the candidates. At stake are the important principles of due process of law and the impartiality of the judiciary.

Campaign promises are also different from judicial statements of law because they offer a pact with the voters. Many of the candidates who assert positions on the law appear to be addressing crime because it is a subject of some concern among voters. At least implicitly the candidate says, “Vote for me because I will take the prosecutor’s side in criminal cases.”\footnote{Apparently no candidate has assured the public that if elected he or she would take the defendant’s side, but if that happened, it would also be improper, and undoubtedly police and prosecutors would not stand for it.} But not all messages to voters are that blunt, and, thus, it is not always easy to establish that the candidate made a pledge or promise. At what point does a personal philosophy become a candidate’s pledge or promise to act in a certain manner? When political literature describes a candidate as believing in “law and order,” for example, there may be a biased message being sent to voters. The “law and order candidate” seems to be saying, “Vote for me and I will be a ‘law and order’ judge,” which is different from a judge who is regarded as a “law and order” judge because of prior judicial decisions. The “law and order” candidate can avoid a disciplinary sanction today, at least in New York, because a recent decision by New York’s highest court held that the term did not constitute a pledge or promise.\footnote{See In re Shanley, 774 N.E.2d 735, 737 (N.Y. 2002).}

Justice Stevens’ dissenting opinion in \textit{White} expressed concern about statements made that would pose a special threat to “openmindedness because the candidate, when elected judge, will have a
particularly reluctance to contradict them.” Justice Scalia conceded that Justice Stevens’ concern “might be plausible” and that might support a rule against campaign promises, “which is not challenged here.” Justice Stevens’ concern might also support a rule against biased references to potential parties where the candidate has not made a pledge or promise.

So it is clear that a rule against announcing positions on disputed legal or political issues is too broad to enforce, in part because it would chill announcements to voters that would not reflect bias against parties. How that will change the judicial-elections scene is not yet clear, especially in those states in which the old traditions of quiet judicial campaigns are still in place.

Candidates’ announcements of their positions on issues will occasionally raise the issue of whether the announcements constitute implied pledges or promises as to how the candidate would rule on matters related to abortions. In one case, the New York Commission publicly admonished a judge who, while seeking political support from the Right To Life Party, identified his strong anti-abortion beliefs; the judge also was quoted in the press calling abortion “murder,” which the Commission stated could be construed as a position that the judge would not comply with the law permitting abortions. The anti-abortion statements led to charges that the judge violated provisions that prohibited making (i) “pledges or promises of conduct in office other

78. Id.
79. See In re La Cava, N.Y. COMM’N ANN. REP. 123 (2000) (Admonition) (Candidate sent a letter to members of the Right-to-Life Party asserting his “commitment to the sanctity of life from the moment of conception,” his “strong moral opposition to the scourge of abortion” and his “outrage” at the “continuation of the murderous and barbaric partial birth abortion procedure in this state,” and in an interview with a reporter, the judge said that abortion is murder, although he advised the Commission that his statement was aimed at partial-birth abortion procedures). In 2002, Judge La Cava, in the aftermath of the United States Supreme Court decision in White, asked the Commission to vacate its admonition of him. See La Cava v. N.Y. State Comm’n on Judicial Conduct, 299 F. Supp. 2d 176, 178 (S.D.N.Y. 2003). The Commission denied his application, and Judge La Cava brought an action in the United States District Court, Southern District, which dismissed the action. See id. at 178-79. Although Judge La Cava sought to pursue the interesting question whether his conduct is permitted by White as nothing more than an announcement of a position on a disputed legal or political issue, the First Amendment issue was not reached since he had consented to the admonition and failed to raise a First Amendment claim at the time. See id. at 180. What he said to the delegates to the Right-To-Life Party—in expressing his views on an issue—may indeed be protected under the rationale of White, but calling abortion murder in a campaign may be deemed to be bias against those who participate in the procedure, and, as the Commission observed in admonishing the judge, suggests that he has difficulty recognizing the legality of abortion. See In re La Cava, N.Y. COMM’N ANN. REP. 123, 124 (2000).
than the faithful and impartial performance of the duties of the office," and (ii) "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court."

Also charged and sustained were two general sections of the rules requiring all judges to uphold the integrity and impartiality of the judiciary.

There is no rule in effect to prohibit an announcement of a candidate's belief that abortions are murder unless the statement implies that the candidate will not abide by the law or constitutes a pledge or promise to take harsh action against the interests of those who have or provide abortions. Whether a candidate's strong condemnation of abortions can be prevented, especially in view of the state of the law permitting abortion, is not clear at this point. But expressing a viewpoint for or against abortions appears to be protected.

With the old order in flux, candidates will probably experiment, and judicial conduct commissions should be receiving more complaints that successful candidates for judicial office made implicit pledges or promises during the election campaign or have committed themselves on matters that are likely to come before their courts. Even well-intentioned candidates will not know how far they and their opponents may go in the exercise of their First Amendment rights.

**POST-WHITE DECISIONS**

In re *Shanley* (New York)

Just a few days after the United States Supreme Court decided *White*, the New York Court of Appeals decided In re *Shanley*, which admonished Judge Shanley for overstating her educational background in campaign circulars, but dismissed a charge that the judge had improperly made a pledge or promise to voters when she described

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81. See id. § 100.5(A)(4)(d)(ii).
82. See id. §§ 100.1, 100.2(A). A United States District Court enjoined the Commission from enforcing the general rules as well as others pertaining to candidates' political activity, but the injunction was stayed pending appeal of the District Court's decision. See Spargo v. N.Y. State Comm'n on Judicial Conduct, 244 F. Supp. 2d 72 (N.D.N.Y. 2003), stay denied, No. 1:02-CV-1320, 2003 U.S. Dist. LEXIS 7073 (N.D.N.Y. Apr. 29, 2003), vacated by, 351 F.3d 65 (2d Cir. 2003). This decision is discussed below.
83. 774 N.E.2d 735 (N.Y. 2002).
herself in campaign circulars as a "law and order candidate." The court's view was not based on a First Amendment claim, since the judge had not raised that issue, but on whether "law and order" constituted a pledge or promise to decide cases with a prosecutorial bent. The court held that the Commission failed to show "that the phrase carries a representation that compromises judicial impartiality. 'Law and order' is a phrase widely and indiscriminately used in everyday parlance and election campaigns. We decline to treat it as a 'commit[ment]' or a 'pledge[] or promise[] of conduct in office.'"

The court's conclusion that "law and order candidate" is neither a commitment or a pledge or promise of conduct in office points to the likely prospect of many New York candidates using that term in the future to describe themselves to voters, and, perhaps, using similar terms. The possible trap for candidates who may start using the "law and order" description is that combining "law and order candidate" with other pro-police or pro-prosecution slogans could tip the balance to being a violation of the rules against pledges or promises and commitments to act in that manner. Clearly, the administration of justice cannot tolerate candidates running as pro-prosecution judges, achieving judgeships on that basis, and then either presiding over criminal cases or being disqualified from such matters.

Weaver v. Bonner (Georgia)

A federal district court in Georgia struck down the provision of the Georgia judicial conduct code that prohibited campaign speech that "the candidate knows or reasonably should know is false, fraudulent, misleading, deceptive, or contains 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." The court held that the provision was overbroad since it went beyond false statements that are knowingly made. A candidate for the Supreme

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84. Id. at 736.
85. See id. at 737.
86. Of course, "law and order" is used frequently, and the Commission tried to show in its brief that it is uniformly used to mean pro-prosecution and pro-police, and when used by a judge to describe himself or herself to voters, could reasonably be viewed as an implicit pledge or promise to act in that manner.
88. See id. at 1342.
Court of Georgia had issued a brochure about the incumbent judge stating that she "would require the State to license same-sex marriages[,]. . . has referred to traditional moral standards as 'pathetic and disgraceful[,]. . . [and] has called the electric chair 'silly.'" The challenger then aired a television advertisement that reiterated some of the same points, and added that the incumbent had "questioned the constitutionality of laws prohibiting sex with children under fourteen." A special committee of the Georgia judicial conduct commission found the statements to be unfair, false, and deceptive.

The challenger brought an action claiming that the special committee publicly condemned the campaign statements without a hearing, and the District Court for the Northern District dismissed his claim while concluding that the rule against making false statements was unconstitutionally broad. The court applied the "exacting scrutiny" standard, holding that the rule can be upheld only if it is "narrowly tailored to serve an overriding state interest." The court held that since the rule went beyond applying to statements knowingly made, in that it applies as well to "(1) misleading, deceptive, and fraudulent statements, (2) statements containing material misrepresentations of fact or law, (3) statements that omit a fact necessary to make the communication considered as a whole not materially misleading, and (4) statements likely to create an unjustified expectation about results the candidate can achieve," and since it applies to these statements whether they are made knowingly or negligently, it chills debate and therefore violates the First Amendment.

The United States Court of Appeals, Eleventh Circuit affirmed, noting that under the broad reach of the rule, candidates may fear addressing issues and "will too often remain silent even when they have a good faith belief that what they would otherwise say is truthful." The court observed that "[n]egligent misstatements must be protected in order to give protected speech the 'breathing space' it requires." The court disagreed with the contention that "speech by judicial candidates is

89. Id. at 1340.
90. Id.
91. See id.
92. See id. at 1341, 1346.
93. Id. at 1341-42.
94. Id. at 42.
95. See id. at 1342-43.
96. Weaver v. Bonner, 309 F.3d 1312, 1320 (11th Cir. 2002).
97. Id.
entitled to less protection than speech by legislative and executive candidates." The court relied on White in holding that the United States Supreme Court suggested that “the standard for judicial elections should be the same as the standard for legislative and executive elections.”

The court added that

the distinction between judicial elections and other types of elections has been greatly exaggerated, and we do not believe that the distinction, if there truly is one, justifies greater restrictions on speech during judicial campaigns than during other types of campaigns. We therefore adopt the actual malice standard . . . for regulations of candidate speech during judicial campaigns.

_Weaver v. Bonner_ went further than any other court in the country in striking down restrictions, both in its decision and rationale. The court held that a rule against judicial candidates directly soliciting funds was unconstitutional, even though the issue had not been briefed and no claim that it was unconstitutional had been made. Moreover, whereas other courts that struck down the “announce” clause or other rules stated that they were not deciding that judicial candidates had the same First Amendment rights as candidates for other public offices, the circuit court’s rationale was that judicial candidates did have the same right under the First Amendment as other candidates.

In re _Kinsey_ (Florida)

The Supreme Court of Florida, in In re _Kinsey_, imposed a post-
White public reprimand and a $50,000 fine on a judge who ran a pro-law enforcement campaign for elective office. The Florida Supreme Court distinguished the “announce” clause from the “commit” clause, which is applicable to Florida judges, and, in upholding its constitutionality concluded that both the “pledges and promises” clause and the “commit” clause serve a compelling state interest “in preserving the integrity of our judiciary and maintaining the public’s confidence in an impartial judiciary.”

A candidate, said the court, should not be elected “by

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98. _Id._ at 1321
99. _Id._
100. _Id._
101. See _id._ at 1322.
102. See _id._ at 1321.
103. 842 So. 2d 77 (Fla. 2003), _cert. denied_, 124 S. Ct. 180 (Oct. 6, 2003) (mem.).
104. See _Kinsey_, 842 So. 2d at 92-93.
105. _Id._ at 87.
promising to act in a partisan manner by favoring a discrete group or class of citizens." Judge Kinsey had distributed campaign literature that referred to herself as the unanimous choice of "Law Enforcement" and stating that "police officers expect judges to take their testimony seriously and to help law enforcement by putting criminals where they belong . . . behind bars." The literature showed a picture of the candidate standing with "ten heavily armed police officers and was captioned: "Who do these guys count on to back them up?" In another brochure, she offered the same message, including the "behind bars!" message, and then declared: "Above all else, Pat Kinsey identifies with the victims of crime." In another brochure she advised voters that she believes, "We must support our hard-working law enforcement officers by putting criminals behind bars, not back on our streets." And in another flyer, she said she would "support our valiant law enforcement officers . . . not make their job harder . . . [and] will bend over backward to ensure that honest, law-abiding citizens are not victimized a second time by the legal system that is supposed to protect them."

In another brochure, entitled, "A Vital Message From Law Enforcement," Judge Kinsey, describing several cases handled by Judge Green, the incumbent judge who was her opponent in the election, and who she identified as, "Let 'em Go' Green," criticized his bail decisions and stated "victims have a right to expect judges to protect them by denying bond to potentially dangerous offenders."

In a radio interview, she compared her background as a prosecutor with the incumbent’s background as a defense attorney and indicated that that is why he dismisses cases and fails to hold criminals accountable. She also accused him of permitting defendants to be released on bond. She added that "it was a judge’s responsibility to be ‘absolutely a reflection of what the community wants.’" The Florida Supreme Court concluded that the judge’s campaign statements “gave

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106. Id.
107. Id. at 87-88 & n.8 (emphasis in original).
108. Id. at 87.
109. Id. at 88.
110. Id.
111. Id.
112. Id. at 88, 90.
113. See id. at 89.
114. See id. at 91.
115. Id. at 89.
the misleading impression that a judge’s role in criminal proceedings is to combat crime and support police officers as opposed to being an impartial tribunal where justice is dispensed without favor or bias.116

Spargo v. Commission on Judicial Conduct (New York)

Background117

Before he became a New York Supreme Court Justice, Thomas J. Spargo was an election lawyer who also was a part-time town justice in upstate New York.118 As such, he was bound by the rules governing judicial conduct, including a strict prohibition against political activity, except limited activity on his own behalf when he was a candidate for elective judicial office.119 In November 1999, he was elected to the position of town justice.120 One year later, as the 2000 Presidential race was in a deadlock, with litigation about to commence to determine which national candidate would win the Presidency, Judge Spargo, at the behest of the New York State Republican Party, went to Florida on behalf of the Bush-Cheney campaign.121 In 2001, Town Justice Spargo sought the nomination for the New York Supreme Court; he had the nomination of the Republican Party, and hoped to obtain the nominations on the Democratic Party and Independence Party lines, which would assure him uncontested success in the next election.122

With respect to all three events—his reelection as town justice, his work for the Republican Party in Florida, and his election to the New York Supreme Court—issues emerged concerning his conduct, and the

116. Id. at 91.
117. The “facts” set forth here are taken from court filings in a lawsuit that Judge Spargo and others have initiated in federal court against the Commission, the Commission’s Chair, and the author of this article, as Administrator of the Commission. New York is one of fifteen states that has closed proceedings while charges are pending. By bringing the lawsuit, Judge Spargo implicitly waived confidentiality as to any materials, including the charges against him, that are part of the court record. At the time the lawsuit was commenced, charges had been filed but no formal hearing had been held and no determination had been rendered as to the facts or as to whether the judge’s conduct was improper.
120. See Spargo, 244 F. Supp. 2d at 74.
121. See id. at 80.
122. See id. at 74.
Commission on Judicial Conduct commenced an investigation and eventually filed disciplinary charges against him.  

Alleged Facts: Pending Charges

While campaigning for reelection for town justice, Judge Spargo, in an effort to introduce himself to potential voters, distributed his business card and coupons that he had purchased that were redeemable for free doughnuts and coffee; on another occasion, Judge Spargo distributed coupons, which he had purchased, that were redeemable for $5 for gasoline, to the first five motorists who drove up to a convenience store-service station; he also went to a local restaurant and purchased a round of drinks for everyone at the bar; on several occasions at the town dump, he distributed fifty half-gallons of cider and doughnuts to town residents who were present; and on several other occasions, he purchased and delivered pizzas for teachers, highway employees, town employees, and private citizens. The total value of the food and coupons was approximately $2,000.

In 2001, seeking the endorsements for supreme court nominations of the Democratic and Independence parties, Judge Spargo allegedly authorized a $5,000 payment to a delegate to the Democratic Party Judicial Nominating Convention who had nominated him to be the Democratic Party candidate and a $5,000 payment to a delegate to the Independence Party Judicial Nominating Convention; both delegates had provided assistance to Judge Spargo’s campaign. The Democratic Party delegate had provided voluntary services, had no expectation of being paid for her services, and did not ask to be paid; the Independence Party delegate had no firm agreement with the Spargo campaign that he would be paid for his services. The Spargo campaign reported the payments in filings with the State Election Board, and as to the date when the Democratic Party delegate earned her $5,000
fee, Judge Spargo’s campaign gave the date of the convention. If the payments were for the delegates’ assistance in obtaining the respective nominations, the conduct would violate state law. Even if state law were not violated, the conduct might still convey the appearance that the payments were to assist in obtaining the nominations, which would also constitute serious judicial misconduct. Or, the Commission might conclude, based on the testimony to be taken at the hearing, that the payments had nothing to do with the nominations.

As a part-time judge, Spargo was not permitted to engage in political activity on behalf of any other candidate or political party. Yet as a lawyer who specialized in election law he provided legal services to candidates. He also provided services of a different kind to the national Republican Party following the vote for President of the United States in 2000. While attending the recount of votes in Miami-Dade County, Broward County and Palm Beach, Florida, and with the apparent aim of disrupting the recount process at the offices of the Miami-Dade County Board of Elections, he allegedly participated in a loud, obstructive demonstration against the recount process. Moreover, he received national attention for having engaged in the demonstration when he testified as a witness in the ensuing litigation, where he described his conduct as “chanting.”

As an election lawyer, Judge Spargo represented the candidate for Albany County District Attorney in the fall of 2000. The District Attorney’s office regularly appears in Judge Spargo’s town court, which is in Albany County. Judge Spargo’s client was successful and owed Judge Spargo $10,000 for his legal fee, a debt reported in the new District Attorney’s filings with the Board of Elections. As the charges allege, Judge Spargo presided over many criminal cases in the following several months in which the District Attorney’s office appeared, while the District Attorney’s campaign owed Judge Spargo $10,000 for his legal fee in connection with the election; moreover, the judge allegedly failed to make disclosure of the potential conflict in every case.

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133. See id.
134. See N.Y. ELEC. LAW § 17-158(3) (McKinney 1998).
135. See Spargo, 244 F. Supp. 2d at 80.
137. See Spargo, 244 F. Supp. 2d at 80.
138. See id.
139. See id.
140. See id.
and made no effort to obtain consent from the defense for him to preside.\textsuperscript{141}

Prior to making an official announcement as a candidate for nomination to supreme court, in May 2001, Judge Spargo gave the keynote address at a Monroe County Conservative Party's annual fundraiser.\textsuperscript{142} Judges may not at any time be featured speakers at political fund-raisers and may not attend political functions except during a defined window period in connection with their own campaigns.\textsuperscript{143} Monroe County (Rochester, New York) is approximately 225 driving miles west of Albany County where Judge Spargo intended to run for judicial office.

The Litigation Initiated by Judge Spargo

The \textit{Spargo} litigation on First Amendment grounds was commenced in the United States District Court, Northern District of New York.\textsuperscript{144} In order to reach its decision on the merits, the district court had to establish federal jurisdiction, which it did by reasoning that the New York State Court of Appeals had neither the legal basis nor the inclination to decide issues of constitutional law, and, further, that if Judge Spargo were removed from office, it is not clear whether the New York State Court of Appeals could decide not to review the matter.\textsuperscript{145} The district court judge was mistaken in both respects,\textsuperscript{146} and made additional flawed findings as well.\textsuperscript{147} The court concluded that because

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\item[141.] See id.
\item[142.] See id. at 80-81.
\item[143.] See N.Y. Rules § 100.5(A)(1), (2) (2001).
\item[144.] See \textit{Spargo}, 244 F. Supp. 2d at 75.
\item[145.] See id. at 83-85.
\item[146.] Although it had been clear that the Court of Appeals had no discretion to deny a disciplined judge the right to a review, and, in fact, heard all seventy-nine cases in which judges sought review from Commission determinations, the Court of Appeals made that crystal clear in two recent decisions—apparently in response to the United States District Court's doubts. See \textit{In re Watson}, 794 N.E.2d 1, 4 (N.Y. 2003) and \textit{In re Raab}, 793 N.E.2d 1287, 1289 (N.Y. 2003). The court in \textit{Raab} stated: "The determination is reviewable as of right, and petitioner now seeks that review." \textit{Id.} at 1289.
\item[147.] Curiously, the district court stated that "the record of the Commission is made in the course of its investigation." \textit{Spargo}, 244 F. Supp. 2d at 84. The New York Court of Appeals reviews post-charge hearing records, not investigative records. The district court mistakenly added: Any hearing is not a trial, and rules of evidence do not apply. The resultant record would necessarily be spare, less than ideal for consideration of a constitutional question of import not only statewide but nationwide as well. Additionally, where, as here, the constitutional challenges are summarily rejected or ignored, without analysis or
only the federal courts could do justice to such constitutional challenges as the one before it, it had jurisdiction to rule on the case and avoid the abstention doctrine. The district court accepted jurisdiction, upheld Judge Spargo's position on the law, struck down the challenged rules, and granted a permanent injunction against the use of such rules in any other case. The court also enjoined use in any case of the general rules that are charged in all formal complaints. The effect of the court's decision was profound.

On appeal, the Second Circuit Court of Appeals stayed the injunction, and after hearing the appeal, the court vacated the injunction and reversed the lower court's decision as to the rules applicable to New York's state judges. The court observed that since the time of the district court's decision the New York State Court of Appeals specifically observed that a judge may seek review as a matter of right and the court would review the Commission's determination. The Second Circuit held that the federal courts are prohibited by the abstention doctrine from making decisions on issues that should first be fully considered in the state system. The disciplinary matter is pending before the Commission. The New York State Court of Appeals would hear any determination adverse to Judge Spargo, on Judge Spargo's application. On September 1, 2004, Judge Spargo filed a petition in Albany County Supreme Court to enjoin the Commission from proceeding with a hearing on the charges against him, including that he solicited donations to a defense fund from attorneys who practice before

_id_. (citations omitted). Ironically, the district court rendered a decision on the skinniest of records since the disciplinary hearing in _Matter of Spargo_ had not been held, and the court decided the complex issues presented without holding a factual hearing, choosing instead to rely on affidavits. One such affidavit claimed that in _In re Shanley_, _supra_ note 76, neither the Commission nor the State Court of Appeals considered a First Amendment claim raised by Judge Shanley. The district court judge relied on that inaccurate affidavit and reasoned that it provided proof of the reluctance of the State Court of Appeals to consider First Amendment issues. In fact, no First Amendment claim had been raised in _Shanley_. See id. at 84-85.

148. See id. at 91.
149. See id. at 91-92.
150. See id. at 92.
151. See Spargo v. N.Y. State Comm'n on Judicial Conduct, 351 F.3d 65, 68 (2d Cir. 2003).
152. See id.
153. See id. at 74-75.
him. Judge Spargo denied the allegation that he personally solicited donations.\textsuperscript{154}

One prior relevant decision of the Commission on Judicial Conduct is In re Therrian,\textsuperscript{155} in which a non-lawyer, town justice was removed from office for distributing $5 bills to prospective voters to cover the cost of their expenses to go to the polls.\textsuperscript{156} The Commission concluded that those payments were to induce voters to vote for a particular candidate and hence were wrong under both the Election Law and the rules applicable then to the conduct of campaigns.\textsuperscript{157} When a candidate distributes $5 bills to voters and introduces himself or herself as a candidate, it may be impossible to avoid the appearance of vote-buying; and in the absence of proof needed in criminal proceedings, a judge should not engage in the appearance of impropriety.

In re Watson (New York)

William J. Watson, an assistant district attorney in Niagara County, New York, decided to run for the office of city judge, Lockport, New York.\textsuperscript{158} As a self-described "tough" prosecutor, he told the voters that they had a real choice between himself and the two incumbent judges, one the Lockport City court judge and the other the acting judge who was also a candidate.\textsuperscript{159} The candidates ran against each other for nominations in five primaries.\textsuperscript{160} Obviously, the winner of the major party primaries would win the subsequent election, so Mr. Watson adopted a tough-on-crime platform\textsuperscript{161} and set out to win all of the primaries. His campaign was effective and smart; he gave the public what the public usually wants to hear—a judicial candidate who finally would give voters assurances about how he would handle criminal cases. That platform was the thrust of his entire campaign.

\textsuperscript{155} N.Y. COMM'N ANN. REP. 141 (1987).
\textsuperscript{156} See id. at 142.
\textsuperscript{157} See id.
\textsuperscript{158} See In re Watson, 794 N.E.2d 1, 2 (N.Y. 2003). Watson advised the Commission on Judicial Conduct that he decided to run for office because the Police Department and the court were not cooperating. Brief for Respondent at *9, In re Watson, 794 N.E.2d 1 (N.Y. 2003) (No. 78), available at 2003 WL 22299491.
\textsuperscript{159} See id.
\textsuperscript{160} See id.
\textsuperscript{161} See id.
The local press had recently reported that because of new police techniques, the number of arrests in several categories had increased.\(^{162}\) Feeding on that major story, Watson linked the increase of arrests with rising crime.\(^{163}\) The logic seemed obvious: more arrests must mean more crime,\(^{164}\) and the public would be told that one candidate, a “Real Prosecutor,” could do something about the problem. He reiterated the “arrests” theme, converted questions asked by the press to his anti-crime theme, and advertised among police department personnel that they should tell their friends, neighbors and relatives to “Put a Real Prosecutor on The Bench,” one who would work with the police to clean up the city’s streets.\(^{165}\) The story he told the public was that because of the decisions being made by the incumbent judges—and he referred specifically to bail and sentencing decisions\(^{166}\)—criminals from other municipalities had decided that Lockport was the place to visit to commit their crimes, and the implication was they were telling each other about Lockport.\(^{167}\) Only one candidate could or would stop this vicious cycle: he described himself as the “real prosecutor” among the candidates.\(^{168}\) He would make it “unattractive” for those who were “flocking” to the city from other areas.\(^{169}\)

Although there is no practical way to measure the actual effect of his campaign on the voters, other than his success in all of the primaries except the Liberal Party primary, it is not far-fetched to believe that his campaign would be seen as a refreshing change from the dull judicial campaigns the voters were used to. Here was a judicial candidate who told the voters what they wanted to hear: as the next judge, he would use the tools at hand, including the decisions to set bail and render sentences in misdemeanor cases, to stop the intolerable increase in arrests! The

\(^{162}\) See id. at *18.
\(^{163}\) See id.
\(^{164}\) See id. at *15. Of course, it is totally illogical, especially by an experienced prosecutor who would be expected to know that arrests can increase without a corresponding increase in crime. In fact, even if crime remains constant, the public should want arrests to increase if it means solving a higher percentage of the crimes that occurred.
\(^{165}\) See id. at *15-*16. He also said that the court “should not be a revolving door, where criminals are caught and released day after day,” and he urged voters to “put an end to this now.” Id.
\(^{166}\) See id. at *10-*11. Ironically, he maintained at the hearing that his real purpose was to set forth administrative changes he would implement, but he believed he was ethically obligated not to address those concerns—the kind of speech that would be protected. See id. at *11.
\(^{167}\) See id. at *10. The factual basis he had for the statement that criminals were “flocking” to the city was that it was “generally known.” See id. at *15.
\(^{168}\) See id. at *15.
\(^{169}\) See id.
police believed that arrests had increased because they were more efficient and had deployed their resources better than they had in the past, but candidate Watson told the voters that the increase in the carefully selected crime categories revealed a serious problem to their health and safety. Of the categories in which arrests either declined or remained the same, including rape, driving while intoxicated and grand larceny, candidate Watson decided not to refer to them at all. Did he win the election? Of course he won, and so would many other challengers if they could run such unethical campaigns, especially when the incumbents follow the existing rules.

Watson’s successful primary campaigns adversely affected the integrity of the judiciary by assuring the voters time and again that the two incumbent judges should be held responsible for an increase in arrests in certain crime categories (carefully selected by candidate Watson) and, implicitly, that if he were elected, he could reverse that course. Yet, at the disciplinary hearing he acknowledged that arrests can increase for numerous reasons completely unrelated to the operation of the courts, including better funding for the police and better training.

Because his campaign attributed the increase of arrests to the conduct of the incumbents, and because he implied to the public that arrests were indicative of an increase in crime, Watson was charged with violating the rule that a candidate for judicial office should not “knowingly make any false statement or misrepresent the identity, qualifications, current position or other fact concerning the candidate or an opponent.” In censuring Judge Watson, the Court of Appeals decided that his campaign had made improper pledges and promises, but it was unnecessary to determine whether he violated the other charged provisions of the rules.

Most importantly, the court held: “New York’s pledges or promises clause—essential to maintaining impartiality and the appearance of impartiality in the state judiciary—is sufficiently circumscribed to withstand exacting scrutiny under the First Amendment.” The court noted that the “pledges and promises” rule is not a blanket ban on pledges or promises since a judicial candidate “may promise future

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170. See id. at *19.
171. See id.
172. N.Y. Rules § 100.5(A)(4)(d)(iii); In re Watson, 794 N.E.2d 1, 2 (N.Y. 2003).
173. See Watson, 794 N.E.2d at 4, 8.
174. Id.
conduct provided such conduct is not inconsistent with the faithful and impartial performance of judicial duties.”

The court observed that the State has set forth two compelling interests in support of the pledges or promises rule, “both related to the preservation of impartiality and the appearance of impartiality in the judicial branch.” The court noted that both the Commission and the Attorney General in an amicus brief had contended “that the rule promotes the State’s interest in preventing party bias and the appearance of bias, as well as furthering openmindedness . . . in the state judiciary.” The court observed that Judge Watson “does not dispute that such interests are compelling—nor could he reasonably do so.”

The court rejected the Judicial Conduct Commission’s determination that the judge be removed from office; in New York, a determination for public discipline is subject to review by the Court of Appeals at the judge’s request. The Commission’s theory was that the judge had achieved his judgeship by running an improper campaign, and he should be denied the fruits of his misconduct. The Commission had stated:

Respondent’s intentionally misleading use of arrest statistics and his intentional effort to blame the incumbents for an increase in crime . . . demonstrate that he is unfit to serve as a judge. Moreover, to allow respondent to retain his judgeship would be to reward him for intentional misconduct and might encourage other judicial candidates, knowing that they may reap the fruits of their misconduct, to ignore the rules applicable to judicial elections.

175. Id. at 6. This is a particularly important interpretation of the rule, which bars pledges or promises “other than the faithful and impartial performance of the duties of the office.” N.Y. Rules § 100.5(A)(4)(d)(i). The judge’s position that the rule as written permits only a statement that the candidate will carry out the faithful and impartial performance of the duties of judicial office was rejected by the court. See Watson, 794 N.E.2d at 7.


177. Id. This observation appears to be in response to the rationale used by Justice Scalia in the White decision. See id. at 5. The New York State Court of Appeals has identified two strong compelling interests to justify the “pledges or promises” rule. Interestingly, the Court left open the question whether the test to determine constitutionality had to be “exacting scrutiny,” the strictest of the tests and the one most likely to lead to a conclusion that a rule is unconstitutional. The Court said that it “need not decide the question” in this case, since the rule is constitutional even under an exacting scrutiny test. Id. at 6.

178. Id. at 6.

179. See id. at 8.

180. See N.Y. CONST. art. VI, § 22(a).


182. Id.
The Court of Appeals disagreed, finding that the judge has not "irredeemably damaged public confidence in his own impartiality or that of the state judiciary as a whole." The court noted that the judge expressed remorse for his campaign conduct and that there was no indication that he acted inappropriately on the bench following his election.

If campaigns like the ones Judge Watson and Judge Kinsey (in Florida) ran are as certain to elevate a candidate's chances as it appears they are, why would a candidate in the future not tell the public what it may want to hear, get elected, and then deal with the judicial conduct commission on misconduct allegations? The Court of Appeals apparently considered this problem and stated in Watson that removal might be a possibility in future cases.

The court addressed squarely the issue raised by the judge whether his statements could be construed as pledges or promises in the absence of his advising the voters that he pledged or promised to take action consistent with his campaign rhetoric. Expressing a "viewpoint" is proper, said the court, if it does not constitute a promise of future conduct. The court made the important observation that a candidate could violate the rule against making pledges or promises without explicitly promising to take action. "A candidate's statements must be reviewed in their totality and in the context of the campaign as a whole to determine whether the candidate has unequivocally articulated a pledge or promise of future conduct or decisionmaking that compromises the faithful and impartial performance of judicial duties." In determining whether the comments had been pledges or promises, the court considered the totality of the judge's remarks as a candidate. The State's compelling interest for the rules is "preventing actual or apparent party bias and promoting open-mindedness because it prohibits a judicial candidate from making promises that compromise the candidate's ability to behave impartially, or to be perceived as

183. Watson, 794 N.E.2d at 8.
184. See id.
185. See id. The court warned: "[O]ur decision in this case should not be interpreted to suggest that violation of the campaign rules can never rise to a level warranting removal." Id.
186. See id. at 4.
187. See id.
188. Id.
189. See id. at 5.
unbiased and open-minded by the public, once on the bench.”190 Even unkept promises “damage the judicial system because the newly elected judge will have created a perception that will be difficult to dispel in the public mind.”191 Litigants and lawyers should not have to be concerned that the judge’s earlier campaign statements will prevent the judge from considering the issues with an open mind, said the court.192

The court stated that campaign pledges also miseducate voters about the role of the judiciary. “Judges must apply the law faithfully and impartially—they are not elected to aid particular groups, be it the police, the prosecution or the defense bar. Campaign promises that suggest otherwise gravely risk distorting public perception of the judicial role.”193

The court distinguished its decision in Shanley (pertaining to use of the term “law and order candidate,” which it said was not a pledge or promise) to make it clear that the “pledges and promises” rule should not be used to limit statements that do not constitute actual pledges or promises. “The rule precludes only those statements of intention that single out a party or class of litigants for special treatment, be it favorable or unfavorable, or convey that the candidate will behave in a manner inconsistent with the faithful and impartial performance of judicial duties if elected.”194

In re Raab (New York)

Ira J. Raab was a district court judge who ran for supreme court in November 2000 after getting the nomination of the Democratic Party.195 Five years earlier, he had run on the Democratic Party line and lost.196 After obtaining the Democratic Party nomination at that time, he paid the county Democratic Party $10,000 to cover the Party’s expenses in promoting its candidates.197 Such payments are improper because they do not constitute reimbursement for expenses incurred for that

190. Id. at 7.
191. Id.
192. See id.
193. Id.
194. Id.
196. See id. at 1288.
197. See id.
candidate's own campaign. They constitute contributions by judges, which are prohibited.

In the spring of 2000, before his nomination, but during a period when he could be considered to be a candidate, he participated in a screening meeting of candidates who were seeking the nomination of a minor political party for judicial and non-judicial office. It was unclear from the record why he was even present, and the evidence was that he asked each candidate whether they would publicize the party's endorsement on their campaign literature. His reason for doing so was that if he later obtained the nomination of that party, he would be helped by any publicity the other candidates gave to the party. Although there is some logic to that position, he should not have been present and certainly should not have participated in the interviews. His question to each candidate is the kind of question that a political boss would ask in an effort to obtain a pledge to advertise the party's backing of the candidate.

In March 2000, during a special election to fill a vacancy in the county legislature, the minor political party, whose nomination Judge Raab coveted, operated a telephone bank on behalf of a candidate endorsed by that party. Those on the phone bank called registered voters to ask them to vote for the candidate in the special election. Judge Raab made calls for the candidate for approximately one hour. Judge Raab's conduct constituted political activity on behalf of another candidate and was specifically prohibited by the rules.

Judge Raab made no improper campaign speeches, and funded his own campaign because he believed it was inappropriate to seek financial support from attorneys who would appear before him. The Commission censured Judge Raab for both his improper political activity and a single incident of extreme rudeness as a judge.

Judge Raab had argued before the Court of Appeals that the charges pertaining to his political activity violated the First Amendment because

198. See id. at 1288, 1293.
199. See id.
200. See id. at 1288.
201. See id.
202. See id.
203. See id.
205. See Raab, 793 N.E.2d at 1288, 1292.
207. See Raab, 793 N.E.2d at 1289, 1293.
the rules “are not sufficiently narrow in scope to serve a compelling state objective and therefore do not withstand strict scrutiny analysis.” rejecting that argument, the court found that the rules were narrowly tailored to further compelling state interests, “including preserving the impartiality and independence of our state judiciary and maintaining public confidence in New York state’s court system.”

Commenting further on the need for rules restricting payments of money to political parties, the court noted that prohibiting candidates’ contributions to political parties ensures that political parties cannot “extract” payments from potential nominees “in exchange for a party endorsement.” It prevents candidates from trying “to buy” and political parties from trying “to sell” judicial office, and it “diminishes the likelihood” that such payments would be perceived by the public as being the purchase of a judgeship. “Needless to say, the State’s interest in ensuring that judgeships are not—and do not appear to be—‘for sale’ is beyond compelling. The public would justifiably lose confidence in the court system were it otherwise and, without public confidence, the judicial branch could not function.”

Because judge raab gave the political party that endorsed him the sum of $10,000, “in the absence of proof of the nature and amount of the specific expenditures,” the payment “amounted to an improper contribution.” The court applied the exacting scrutiny test without holding that in all such cases that test had to be applied:

In sum, sections 100.5(A)(1) and 100.5(A) (1)(c), (d), (e), (f), (g), and (h) survive petitioner’s constitutional challenge because they are narrowly constructed to address the interests at stake, including the State’s compelling interest in preventing political bias or corruption, or the appearance of political bias or corruption, in its judiciary.

In re Farrell (New York)

In 1999, mark g. farrell, a town justice, was a candidate for nomination by the Erie County Democratic Party for state Supreme
Court. During his campaign, he made a financial contribution to the Erie County Democratic Committee and, at the request of the Chairman of the Erie County Democratic Committee, he made telephone calls to members of his town's Democratic Committee to solicit support for the Chairman's reelection. Controlled on the law by the Court of Appeals decision in Raab, Judge Farrell agreed with the decision that he should be publicly disciplined.

Surprisingly, three members of the judicial conduct commission joined in a concurring opinion that criticized the decision in Raab and predicted that the section of the rules applicable to political activity will be struck down by "a federal court." The thrust of the opinion is that although New York should appoint judges and keep them removed from politics, selecting judges by election means that candidates have the right under the First Amendment to engage in political activity, including making political contributions and soliciting votes for other candidates. Adopting the rationale in White, the concurring members stated that only conduct that shows bias against future parties would justify a restriction on campaign conduct. They were constrained to concur in recognition of the state's high court's decision in Raab. Applying White, which concerns campaign oratory, to a candidate's political activity such as making political contributions and soliciting votes for a political leader is interesting although controversial.

CONCLUSION

Too Much Free Speech Can Be Detrimental to the Administration of Justice

Although the Eleventh Circuit Court of Appeals in Weaver v. Bonner extended White in striking down traditional restrictions on judicial campaigns, both Judge Raab and Judge Watson failed to convince the New York State Court of Appeals that White should be extended beyond its narrow holding. Judge Spargo had no difficulty in convincing the federal district court in northern New York to extend White, even to the point of striking down several key rules that control judicial candidates' conduct during elections, having nothing to do with

216. See Weaver v. Bonner, 309 F.3d 1312, 1322-23 (11th Cir. 2002).
the contents of their speech. The Second Circuit Court of Appeals reversed, but not on the merits.

Time will tell whether either the Second Circuit Court of Appeals or the United States Supreme Court will disagree with the New York State Court of Appeals on the principles set forth in *Watson* and *Raab*. The Supreme Court recently had a prime opportunity in the Florida *Kinsey* case to extend *White* to cover pledges and promises to be tough on crime, but declined to do so.²¹⁷

With respect to campaign rhetoric and campaign discussion of disputed legal and political issues, traditional campaigns for judicial office could change dramatically in the near future as candidates realize that they can express their views of the law. It is possible that candidates’ expressions of their personal views will be benign, the voters will learn more about the candidates, and no damage will be done to the administration of justice or to the independence of the judiciary. More likely, there will be some questionable statements and possibly others that go over the line.

Considering the campaign statements in some of the cases that led to the court challenges of existing rules, campaign rhetoric that appeals for votes could raise serious questions about the impartiality of the judiciary and could do great damage to parties’ right to due process of law. If Judges Chmura and Weaver can avoid being disciplined for their respective conduct, for example, there is nothing that prevents any candidate in Michigan and Georgia, unless new rules are devised, from unfairly attacking incumbent judges and damaging the rights of classes of parties whose interests are addressed in such statements. And unless campaign conduct of the kind engaged in by Judges Watson and Kinsey results in removal from office, candidates are certain to take the risk of public discipline to achieve a judgeship. They may well conclude that it is a risk worth taking, and anti-crime slogans that suggest pro-police and pro-prosecution bias should attract votes.²¹⁸


²¹⁸. One commentator argues for no discipline under any circumstances for campaign speech, including pledges and promises of specific rulings. See Alan B. Morrison, *The Judge Has No Robes: Keeping the Electorate in the Dark About What Judges Think About the Issues*, 36 IND. L. REV. 719 (2003). Arguing against disciplining judges for such misconduct, Mr. Morrison notes:

We are, after all, not dealing with someone charged with inflicting either physical or financial harm on anyone else. At worst, the candidate will have said something that might be seen as pledging to decide a case in a particular way, for which there is the existing remedy of recusal should that situation ever arise.
If judicial elections were to resemble elections for other public offices, the judiciary would eventually consist of judges who promised to trample the rights of minorities and unpopular parties, which would both change the face of elections and diminish the quality of the judiciary.

Another casualty of expanded free speech in judicial elections will be the defeat of incumbent judges for rendering unpopular, but correct, decisions. Although some commentators optimistically rely on voters’ sound judgment, the success of some candidates who based their campaigns on assuring voters of their bias for law enforcement justifies the view expressed here that more is needed than blind faith in the electorate. A campaign is not the right forum to educate voters on the overriding need to safeguard the independence and impartiality of the judiciary. The stakes are too great.

Another Restriction Is Needed
That Appears to Meet the Standards of White

To keep the system free of these abuses, more than the rule against “pledges and promises” is needed.219 In New York, judges can now run

Id. at 741. One can logically come to that conclusion by minimizing the harm resulting from such conduct. The harm to the administration of justice and to parties’ due process rights may be more substantial than inflicting physical or financial harm on a party. Additionally, recusal often will not be an adequate remedy when the candidate-judge has pledged to take tough action against an entire class of parties, such as defendants in criminal proceedings. Nor does recusal deal with the problem of a candidate who runs on a “tough on crime” platform but who is not apt to preside over criminal cases. Judges should maintain the independence and impartiality of the judiciary by avoiding such conduct, and if they fail in that obligation, they should face disciplinary measures that are commensurate with the damage their campaign rhetoric has inflicted.

219. In August 2003, the American Bar Association amended the Model Code of Judicial Conduct in response to White. In many states, including New York, candidates are not permitted to make pledges or promises of future action (other than faithful and impartial performance of duties) or make statements that commit or appear to commit the candidate with respect to matters that are likely to come before the court. Under the changes adopted by the American Bar Association, which constitute recommendations to the states, pledges, promises and commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office would be improper if they are made “with respect to cases, controversies, or issues that are likely to come before the court . . . .” MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3) (1990) (amended 2003). One apparent effect of the changes is to make pledges and promises subject to discipline only if they relate to matters that are likely to come before the candidate’s court. That would make it difficult, perhaps impossible, to discipline a judge seeking a civil court position for making pledges or promises to take harsh action against defendants in criminal proceedings. Judges running for civil positions would probably get favorable voter attention by campaigning against crime. See supra notes 8-9 and accompanying text. Thus, one effect of the change in the Model Code might be to
as “law and order candidates” as long as other campaign statements do not amplify that description to the point of it becoming a “pledge or promise.” It appears likely that similar statements of tough-judge philosophy will be used in campaign literature and in television ads. That may not be a good development.

The “pledges or promises” rule may be inadequate for campaign language that suggests, but does not specifically state, how the candidate will rule on cases. Only the strongest suggestions may be subject to discipline as a pledge or promise. The majority opinion in \textit{White} discussed a hypothetical situation raised in Justice Stevens’ dissenting opinion of an appellate judge who, in a reelection campaign, states that he or she has an “unbroken record of affirming rape convictions.”\textsuperscript{220} Would the rules proscribe such a truthful but biased campaign statement? If the statement is considered a pledge or promise to continue that streak, it could be the basis for a disciplinary sanction. If it is not a pledge or promise, it would be permitted under the rules notwithstanding its biased undertones. Justice Scalia stated that the biased comment could not be covered by a rule such as the “announce” clause because the “announce” clause covers so much more.\textsuperscript{221}

Justice Scalia’s response to Justice Stevens’ hypothetical opens the door to the promulgation of a narrowly-tailored rule against campaign speech that reflects bias against a party or parties. There is a wide gap between announcing views on issues and making pledges or promises—one that needs to be filled. Protecting the independence and impartiality of the judiciary requires more than the rule against “pledges or promises” since, in appealing for votes, candidates might make biased comments—that would not constitute pledges or promises—against a class of individuals who appear in that court. The rules governing the conduct of judicial candidates should prohibit campaign statements that reflect bias against a party or parties who come before the courts.

Biased statements about parties or about issues that directly prejudice parties should be prohibited even when such campaign statements do not constitute “pledges or promises” of future conduct. Bias against parties may be implied pledges or promises to rule against those parties, and that should be a sufficient basis to make the conduct subject to discipline. A narrowly tailored rule against such campaign
statements should pass the exacting scrutiny test based on Justice Scalia's rationale on behalf of the majority in *White*.

Another Solution

There is a long-term solution as well. In her concurring opinion in *White*, Justice O'Connor expressed why "the very practice of electing judges" undermines the governmental interests in an impartial and independent judiciary.\(^{222}\) As Justice O'Connor said, judges facing elections "are likely to feel that they have at least some personal stake in the outcome of every publicized case. Elected 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."\(^ {223}\)

Justice O'Connor acknowledged statistics indicating that judges facing election are more likely than others to overrule a jury's verdict of life imprisonment and impose the death penalty.\(^ {224}\) Campaign financing is an additional serious problem as judicial candidates rely on the financial contributions of lawyers who will be appearing before them if they are successful. Justice O'Connor cited recent judicial elections where more than one million dollars was expended on individual campaigns.\(^ {225}\) Justice O'Connor added that "relying on campaign donations may leave judges feeling indebted to certain parties or interest groups . . . [and] the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary."\(^ {226}\) Because of concerns raised at the turn of the twentieth century, "some States adopted a modified system of judicial selection that became known as the Missouri Plan."\(^ {227}\) Judges are appointed by a chief executive from a short list of nominees put together by a nonpartisan nominating commission, and the judges "then subsequently stand for unopposed retention elections in which voters are asked whether the judges should be recalled."\(^ {228}\)

Justice O'Connor noted that the Missouri Plan "reduces threats to judicial impartiality, even if it does not eliminate all popular pressure on

\(^{222}\) *Id.* at 788.

\(^{223}\) *Id.* at 788-89.

\(^{224}\) *Id.* at 789.

\(^{225}\) See *id.* at 790.

\(^{226}\) *Id.*

\(^{227}\) *Id.* at 791.

\(^{228}\) *Id.*
Indeed it does not eliminate the possibility that judges would be punished in recall elections for rendering unpopular decisions. Nor does it eliminate politics entirely, since governors and mayors are part of the political process and would still be influenced by the political support that the candidates for appointment muster. But pandering for votes would be eliminated; raising funds for campaign expenses would be eliminated; and the person making the appointments, from a list of candidates screened and nominated by a nonpartisan panel representing a cross section of the community, would be an elected official who is responsible to the voters for his or her choices. Most importantly, there is a far greater chance under the Missouri Plan (or "merit selection" as it is also called) for qualified applicants who lack political influence to be considered than under a partisan elective system. The Missouri Plan would not be perfect, but it is better than having partisan elections, in which political leaders exercise the power to designate judges. In some jurisdictions, designation as the nominee of a particular party assures victory. Where a political party or party chief decides who gets elected, the public’s power to elect their judges is illusory. Moreover, too often, political leaders who wield enormous influence over who become judges do not choose candidates for the best of motives.

As more candidates for the judiciary demonstrate their charisma by announcing their views on disputed legal or political issues, and as voters choose judges based on discussions of those issues, due process of law will be sacrificed. In the final analysis, when expanded free-speech rights adversely affect the administration of justice, and the trend is in that direction, it is likely that greater consideration will be given to reforming the system of selecting judges, which makes sense for other reasons as well.

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229. *Id.*

230. There is a better way to select judges. The argument that many fine judges have emerged through the political system (i.e. elections), while true, is misplaced since these same judges would emerge if judges were appointed as part of a merit selection system. The election of judges as part of a partisan political system places far too much power in the hands of political leaders in choosing judges and limits judgeships only to those who have chosen to engage in party politics and succeeded in that regard. Thus, in states like New York, where most judges are elected in partisan elections, with some exceptions, lawyers who would be fine judges are essentially ineligible if they have not taken an active role in party politics, or chose to do so with the party not in power. Since campaigning must be restricted to ensure that parties are afforded due process of law, which is the subject of this article, campaigns for elected judicial office fail to give guidance to voters to make their votes meaningful.
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