THE JUDGE HAS NO ROBES: KEEPING THE ELECTORATE IN THE DARK ABOUT WHAT JUDGES THINK ABOUT THE ISSUES

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On June 27, 2002, the Supreme Court ruled in *Republican Party of Minnesota v. White*[1] that state rules that forbid candidates for elected judicial office from "announcing" their views on "disputed legal and political issues" that might come before them as judges, violate the First Amendment. The 5-4 decision, written by Justice Antonin Scalia, and joined by the four other "conservative" justices, will mean that similar restrictions in twenty-six of the thirty-one states that elect some or all of their judges must be reconsidered.[2] Some see the decision as a frontal attack on the judicial system, much the same way that the High Court's 5-4 decision in Bates v. State Bar of Arizona,[3] holding that blanket bans on lawyer advertising violated the First Amendment, was viewed a quarter of a century ago.[4]

Although *White* is a First Amendment case, and I agree with the majority's conclusion, this essay will discuss the question of the advisability of restrictions on the speech of candidates for judicial office as if the vote had gone the other way and the issue was to be decided as a matter of policy, not constitutional law. My thesis is that, in addition to the First Amendment flaws identified by the *White* majority, states should relax restrictions on judicial candidates' speech because the benefits that flow from the public knowing more about a candidate's views on issues, especially for a state's highest court, far outweigh the possible negative effects of permitting those views to be expressed during an election campaign. In addition, states should get out of the business of "enforcing" whatever rules they have governing judicial elections. That function should be transferred to a non-governmental entity that would have the power to issue public advisory opinions on whether judicial candidates were complying with the

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1. 122 S. Ct. 2528 (2002). The author was co-counsel on an amicus brief submitted in support of the petitioners in *White*.

2. *See id.*

3. 433 U.S. 350 (1977).

4. The brief of the Minnesota State Bar at 25-28, quoted by Justice Ginsburg in her dissent, 122 S. Ct. at 2558 n.5, predicted that "the entire fabric of Minnesota's non[p]artisan elections hangs by the Announce clause thread," just as the dissenters in *Bates* claimed that *Bates* would produce "profound changes in the practice of law." 433 U.S. at 386. It is more than a little ironic that Justice Stevens, who was in the majority in *Bates*, dissented in *White*, and the only other Justice who sat in both cases, now Chief Justice Rehnquist, dissented on the First Amendment issue in *Bates*, and shifted to the other side of the First Amendment controversy in *White*.

applicable rules, but it could not impose any formal sanctions. This approach would be a partial answer to the intractable problem of line-drawing, and it would allow states to have rules of the kind that were set aside in *White*, so long as the state did not penalize anyone for violating them.[5]

I. WHY HAVE A JUDICIAL ELECTION—AND WHY NOT

Although *White* involved an election to an appellate court, the vast majority of elected judges in the United States are trial court judges.[6] As Paul Carrington has pointed out, the rationale for electing trial judges is quite different from that for electing appellate judges; moreover, there are important differences between state intermediate courts and state supreme courts that might affect a state's decision on whether to elect or appoint the members of the two types of courts.[7] Whatever the rationales, elections do happen regularly, and states try to regulate what candidates can and cannot say during the election races.

Another important fact about judicial elections is that judges often leave the bench during their term of office, and many states permit the governor to fill a vacancy until the next election.[8] This is often seen as giving incumbents advantages, but it also means that they will have actual judicial records that can be examined at election time. The result is that, like many other elections, judicial races generally involve an incumbent running against a challenger, although it is quite common for the incumbent to be running in a judicial election for the first time.[9]

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5. A National Symposium on Judicial Campaign Conduct and the First Amendment, organized by the National Center for State Courts, was held on November 9-10, 2001, before the Supreme Court had granted review in *White*. The short summary of the major lessons from the symposium, together with the papers presented at it, have been published by the Indiana University School of Law—Indianapolis, beginning at 35 IND. L. REV. 649 (2002). Some of them support the positions taken here, while others oppose them, but in the interest of limiting citations, this essay will not refer to those papers simply to confirm that another author agreed or disagreed with the points made here. For those interested in the topic, the symposium papers are worth reading, in part because they cover topics not discussed in this essay.

6. Approximately eighty-seven percent of state trial judges must run for some type of election, while eighty-two percent of state appellate judges must run for election. *See* Elizabeth A. Larkin, *Judicial Selection Methods: Judicial Independence and Popular Democracy*, 79 DENV. U. L. REV. 65, 76 (2001).

7. *See* Paul D. Carrington, *Judicial Independence and Democratic Accountability in the Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 87 (1998).

8. *See, e.g.*, American Judicature Society, *Judicial Selection Methods in the States*, *at* http://www.ajs.org/selection/sel_state-select-map.asp [hereinafter Judicial Selection Chart] (last modified Oct. 2002).

9. *But see* Lawrence H. Averill, Jr., *Observations on the Wyoming Experience with Merit Selection of Judges: A Model for Arkansas*, 17 U. ARK. LITTLE ROCK. L.J. 281, 299-300 (1995) (noting that incumbent judges are likely to run unopposed).

confirmation—is the exception, although a number of states nominate and confirm some of their judges.[10] On the surface, the differences between an elected and appointed process seem very significant to the issues raised by *White*, but there are substantial reasons to be concerned about the same problems of prejudgment that formed the heart of the dissent in *White*, no matter how the judge is chosen. Those problems have been largely submerged, and this essay will only mention them briefly.[11]

The first question that should be, but rarely is, asked about judicial elections is, why have them in the first place? At one level, the answer is quite clear: elections were preferred to appointments because citizens wanted more accountability in their judges, and elections were a ready means of obtaining it.[12] The next question, on which the answer is much less clear, is what those elections are supposed to be about? Again, on one level there is agreement: the candidate should be competent, honest, have judicial temperament and the experience required for the position.[13] The trouble with those qualifications is that in most cases they are not very helpful in choosing among the candidates.

Consider competence. Obviously, if one candidate was admitted to practice three years ago, and the other had thirty years of experience, that would be of considerable significance, but it would also be extremely rare to find such disparities. In the much more common situation, both candidates have had substantial legal careers, and there are no obvious benchmarks that favor one or the other. Thus, even lawyers might have difficulty deciding which candidate is better qualified, and that assumes that there is agreement on how much familiarity a candidate should have with the particular court and/or areas of law under its jurisdiction. To be sure, lawyers vying for the position of probate judge should have a background in that field, but most courts are courts of general jurisdiction, including both civil and criminal dockets, and many, if not most, litigators tend to work in one area to the exclusive of the other. While most trial judges have had substantial litigation experience, that is not always the case, and for appellate judges, prior litigation experience is even less obviously a pre-

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10. *See* Judicial Selection Chart, *supra* note 8.

11. *See infra* notes 54, 85 and accompanying text.

12. Historically, state judicial elections were implemented to give citizens democratic control over the judiciary—an institution that was often perceived as anti-democratic and unresponsive to the interests of average citizens. *See, e.g.*, Samuel Latham Grimes, *"Without Favor or Delay": Will North Carolina Finally Adopt the Merit Selection of Judges?*, 76 N.C. L. REV. 2266, 2272-73 (1998) (citing ALLAN ASHMAN & JAMES J. ALFINI, THE KEY TO JUDICIAL MERIT SELECTION: THE NOMINATING PROCESS 9 (1974)); *see also* Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 979 (2001) (implying that judicial elections were originally motivated by "judicial accountability and public participation—the Jacksonian populist era ideals"); Kelly Armitage, *Denial Ain't Just a River in Egypt: A Thorough Review of Judicial Elections, Merit Selection and the Role of State Judges in Society*, 29 CAP. U. L. REV. 625 (2002).

13. Respondents in *White* included as relevant factors "a candidate's 'character,' 'education,' 'work habits' and 'how [he] would handle administrative duties if elected." 122 S. Ct. at 2534 (quoting Brief for Respondent at 35-36).

requisite. Based on my completely unscientific and unrecorded survey of my own personal experiences, I have encountered some very good and some very mediocre judges, for which there is no obvious correlation between their ability on the bench and the extent of their prior litigation practice.[14]

Nor are issues related to honesty or judicial temperament likely to shed much light on an election race. The problem is not that there are no dishonest lawyers or judges, or that some judges are ill suited to serve in a fair and impartial manner; rather, it is that these traits are almost never revealed until it is too late. Of course, if a sitting judge has a consistent bias in his or her rulings, or is generally nasty in the courtroom to lawyers, witnesses, and jurors, that may be the basis for a negative vote at re-election time, but those traits are rarely revealed until a person dons judicial robes.

One way to ask why we have judicial elections is to examine what is agreed such elections should *not* be about. Unlike races for positions such as governor, attorney general, or legislator, those running for a judgeship are not expected to have platforms that they promise to deliver to the voters if elected. Such promises are often broken by those chosen for the executive and legislative branches,[15] but the rules are clear—and they were not challenged in *White*—that candidates for judicial office may not make pledges or promises with respect to cases or issues that may come before them if elected.[16] In Part II, this article will examine the reasons behind what I will refer to as the "no pledge" rule as a means of understanding why other rules, such as the "no announce" rule struck down in *White*, are unwise, or at least too broad, in part for the reasons stated and/or intimated at in that decision.

Briefly stated, my argument is as follows: no announce rules are largely fig leaves because their coverage is extremely limited, and hence they do very little to protect the public from electing judges who are in fact biased or have pre-commitments on some key issues that will come before them.[17] The rules are also much too broad since they deny the electorate valuable information that is and should be directly relevant to voters in deciding which judicial candidate to support.[18] Because, as currently written, those rules give very little protection at the very high cost of denying relevant information, the substantive standards governing what candidates may and may not say should be changed. Finally, the current means of state enforcement of the rules governing speech by judicial candidates is fraught with problems, regardless of the substantive rules governing

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14. Once, during a private conversation with the author, a judge who was then sitting in the United States District Court for the District of Columbia commented negatively on the lack of prior trial experience of the judges of the Court of Appeals for the D.C. Circuit, referring to them as "a bunch of school teachers," even though only a few of them had come to the court directly from law teaching.

15. Justice Scalia referred to campaign promises generally as "by long democratic tradition—the least binding form of human commitment." 122 S. Ct. at 2537.

16. *See* Minn. Canon 5(A)(3)(d)(I) (2002).

17. *See* discussion *infra* Part III.

18. *See* discussion *infra* Part IV.

judicial election speech, and therefore the state enforcement mechanism should be replaced by a private body, with only moral and not legal authority, as the preferred means of reigning in inappropriate speech in judicial elections.[19]

II. JUDGES SHOULD BE IMPARTIAL

In deciding what qualities judges should have, the terms "independence" and "impartiality" are often linked together as desirable, if not necessary, traits.[20] In the context of judicial elections, lack of independence—for example, through control by some other person—does not appear to be a serious problem. The issue of independence often refers to freedom from control by another branch of government, as exemplified by such provisions in the U.S. Constitution as Article III, which gives judges life tenure during good behavior and prohibits salary reductions, [21] and the Speech or Debate Clause in Article I, which precludes review in any other forum of statements made by members of Congress in their legislative work.[22] Independence also has been used to describe whether a person serving in the executive branch is removable at will or only for cause.[23] But none of those usages would accurately describe the impact on a judge of the fact that she or he was elected to that office rather than appointed. Perhaps lack of independence is the right term to apply to a judge who has had to raise substantial amounts of money to finance his election, and if the money came from those with an interest in the results of the court on which the judge will be serving, especially if the judge has some inclination to run again. The independence, or at least the impartiality of such a judge, might well be questioned, but none of the speech control rules applicable to judicial elections is directed at that problem.[24]

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19. *See* discussion *infra* Part V. The plaintiffs in *White* also challenged the Minnesota rule that, in essence, requires judicial candidates to stay completely clear of political parties, but the Court of Appeals rejected that claim and the Supreme Court declined to hear it. *See* Republican Party of Minn. v. Kelly, 247 F.3d 854 (8th Cir.), *cert. granted*, 534 U.S. 1054 (2001). This essay will discuss only the no pledge and no announce rules, but the analysis would apply to other speech-controlling rules, and the proposal for ending state enforcement in this area would cover all of these rules, not just those discussed in this essay.

20. *See, e.g.*, Brief of Amicus Curiae American Bar Association at 12, Republican Party of Minn. v. White, 122 S. Ct. 2528 (2002) (No. 01-521) (arguing that states have a "compelling interest in maintaining judicial independence and impartiality").

21. U.S. CONST. art. III.

22. U.S. CONST. art. I, § 6, cl. 1.

23. *See* Alan B. Morrison, *How Independent Are Independent Regulatory Agencies*, 1988 DUKE L.J. 252.

24. *See* Public Citizen v Bomer, 274 F.3d 212 (5th Cir. 2002) (discussing the financing of judicial elections and the due process problems caused by the absence of recusal rules and the resulting the appearance of partiality). *But cf.* Pierce v. Pierce, 39 P.3d 791 (Okla. 2001) (disqualification required where trial judge's election was financed to significant degree by counsel for one side); *White*, 122 S. Ct. at 2535, 2538-39 (discussing due process problems that result from

Some may argue that a candidate who is known to support certain positions on issues, such tort reform, the death penalty or constitutional interpretation, either in prior judicial opinions, writings, or public statements made before the election race began, is, for that reason, not independent of the electorate, at least with respect to those issues. Others would describe that situation not as lack of independence, but as one of accountability that is not only inevitable but desirable in a system with judicial elections.[25] On that theory, the electorate should be able to rely on judges to do in the future what they say they have done in the past. Similarly, it may be unfortunate if a judge is swayed by public opinion to take one position rather than another, but it cannot reasonably be described as caused by a lack of independence, save perhaps in those jurisdictions where the term of judicial office is very short. Thus, as long as there is no legal authority to remove a judge from office (other than for criminal conduct or something very close to it), the concern is not one of independence, but of something else.

The problem is more appropriately described as one of prejudgment, whether through bias, partiality, general preferences, or any other reason that results in a judge already committing him or herself on a particular issue and therefore being unable to perform the basic function of the office—to judge each case based on the facts and law presented, not on his or her personal views. Why this should be so, and what the ramifications are of this postulate for speech in judicial elections, are explained below. Assuming it is correct, however, it can reasonably support a standard under which a judge would be forbidden to pledge to decide a case a certain way if elected, because that kind of promise or commitment would violate the most fundamental of judicial obligations.

Although no one has challenged the no pledge rule, it is worth considering why there is agreement about it, and why the no pledge rule is worth maintaining. First, ours is an adversary system in which each side makes the best factual and legal arguments in an effort to persuade the decisionmaker (here the judge) on the issues. A judge who has promised to decide an issue one way has, in effect, said "No matter what facts are presented, and no matter what legal arguments are raised (even if I have never considered them before), I will not change my mind." If any judicial candidate were so ill advised as to make such a statement, and still did not recuse himself from the case in which that issue arose, that would be a denial of the due process right to a neutral decisionmaker guaranteed by the

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private financing of judicial elections); *id.* at 2555-58 (Ginsburg, J., dissenting).

25. In the words of Wisconsin Chief Justice Shirley S. Abrahamson:

> The people are the sole legitimate source of power. Judges should be accountable to the people because judges make decisions that affect the community. The people should have the power to get rid of bad judges even if the criteria for the removal of judges may be different from the criteria for removing legislators and governors. Citizens should be encouraged to participate as fully as possible in civic life. Electing judges is citizen participation. Elections legitimize the judicial authority.

Abrahamson, *supra* note 12, at 979-80.

Constitution.[26] Similar reasons, perhaps not reaching constitutional dimensions, counsel judges not to include too much dicta in their opinions, lest they deny the next party, not represented in the current case, the opportunity to persuade the judge that the position previously taken was not correct.

Second, judges, like others, change their minds, even when strongly disposed to their prior views.[27] The most dramatic examples occur when a judge alters his position on a rehearing of the same case, sometimes because facts are called to his attention that he had overlooked before, sometimes because the impact of the initial decision on other situations is called to the judge's attention, and others because, on further reflection, the arguments of the losing side seem more persuasive.[28] And even when a judge does not change the basic thrust of a prior ruling, different facts may enable the judge to distinguish the prior case, and new legal arguments may alter the rationale for the decision, which may result in a different application in other circumstances. The extent to which a judge or judicial candidate has firmly staked out a position may determine the willingness or even the practical ability of a judge to make such changes should the opportunity present itself. Some prejudgments of this kind are inevitable in opinion writing because a judge must at least think through the implications of his decision for those cases that will follow it. But there is nothing inevitable in the nature of the campaign process that requires a judicial candidate to make a firm pledge to rule one way or the other on an issue.

Third, sometimes, even when we think we know the views of Supreme Court Justices on particular issues, they fool us. Just this past term, the Chief Justice, who almost always sides with the government in criminal cases, voted with the majority to support a prisoner's habeas corpus claim that the state courts had failed to provide a proper state law justification for avoiding the federal constitutional issues.[29] Similarly, Justice Scalia, who also rarely supports criminal defendants and who is known for interpreting the Constitution as it was meant to be read in 1789, wrote the 2001 opinion in which the Court held that a heat-detecting device, used to determine whether indoor lamps were helping a defendant grow marijuana inside his home, violated the Fourth Amendment even though the technology was not invented until two centuries after it was enacted.[30] Or in the famous flag-burning case, Justice Stevens, a noted supporter of the First

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26. *See* Aetna Life Ins. v. Lavoie, 475 U.S. 813 (1986) (holding that in certain situations judges who are not recused can violate a party's due process right by sitting on a trial where the judge may not be able to be impartial); *see also supra* note 24.

27. *Compare* Moldea v. New York Times Co.,15 F.3d 1137 (D.C. Cir. 1994) (on initial hearing reversing the district court), *with* Moldea v. New York Times Co., 22 F.3d 310 (D.C. Cir. 1994) (on reconsideration, Judge Edwards reversed his prior decision in *Moldea I* and affirmed the district court). Judge Edwards admitted to having initially made a "mistake of judgment" and he wrote an opinion correcting that "mistake." 22 F.3d at 311.

28. *See, e.g.*, Largent v. Largent, 643 S.W.2d 261 (Ky. 1982) (discussing the Kentucky Court of Appeals decision to reverse itself after rehearing the case).

29. Lee v. Kemna, 534 U.S. 362 (2002).

30. Kyllo v. United States, 533 U.S. 27 (2001).

Amendment, sided with the prosecutors, and Justice Scalia voted with the flag burner.[31] Thus, even though a person may generally hold certain views on certain issues, this does not necessarily show how he or she will vote in specific cases. If a judicial candidate does not pledge to support a specific outcome, he or she will be more likely to retain an open mind if he or she becomes a judge and to decide the case on the applicable facts and law.

It is also true that even politicians do not always vote the party line, and judges do so even less often, especially if they have not agreed to tow that line if a case came before them. Even when politicians make specific pledges as candidates—see George H. W. Bush, "Read my lips; no new taxes"[32]—they do not always follow them, and sometimes they pay a price for not doing so.[33] Nonetheless, the rules governing judicial elections are surely sensible and in all likelihood constitutional, in at least discouraging, if not banning, promises to decide particular issues in particular ways.

Of course, few if any judicial candidates would make an outright pledge, even without a rule forbidding it. Hence, the question is, what sort of less explicit statements should also be out of bounds? What should be done with the candidate who says, "The court has been letting off too many criminals on illegal searches. That has got to stop. Of course, I will keep an open mind in each case, but the defendant will have to have a very strong claim to prevail." Under the law of contracts, that may not create a binding promise, even if accepted by the electorate, but it is about as close to prejudgment as one can come with violating the prohibition. If statements like that are not treated like prejudgments, then there is no point in having a no pledge rule. But the no announce rule goes further—indeed, that is the whole point of it—and the question to which I now turn is whether such an extension is justified by the inappropriate speech that it prevents, offset in comparison to the value of the speech that it suppresses.

III. PROBLEMS WITH THE NO ANNOUNCE RULE

Before examining the core functioning of the no announce rule, it is important to understand its extended reach. Most of what judges do is decide cases, but that is not all they do. State supreme courts in particular perform a number of other important functions on which the expression of prior views or even pledges would not be improper.[34] One of the most significant is their role as regulator of the legal profession, which includes issuing rules governing the conduct of lawyers and in deciding whether persons who are not members of the

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31. Texas v. Johnson, 491 U.S. 397 (1989).

32. Charles M. Madigan, *Republicans Lose a Favorite Election Theme*, CHI. TRIB., June 27, 1990, at C1.

33. *See, e.g.*, Steve Daley, *A House Divided, GOP Wonders How to Reunify*, CHI. TRIB., May 1, 1994, at C1 (noting "most blame [President Bush's 1992 defeat on his] decision to renege on his 'Read my lips: No new taxes' campaign pledge.").

34. *See, e.g.*, James P. White, *State Supreme Courts as Regulators of the Profession*, 72 NOTRE DAME L REV. 1155 (1997).

bar can perform certain services without engaging in the unauthorized practice of law. Suppose a candidate for the Minnesota Supreme Court believed that many of the current bar rules were outmoded and that lawyers should perform more public service. Since there are many more non-lawyers than lawyers, the hypothetical candidate might decide to run on such a platform, yet Minnesota's no announce rule would prohibit her from expressing those views because those issues might well come before the Minnesota Supreme Court.[35] Indeed, in some states, no other governmental body would have the authority to pass on some or all of those issues.[36]

There are a number of other similar issues that come before courts on which the candidate's views would also be of interest and would not raise due process concerns of prejudgment, even if the views expressed were quite firm. Statements such as "I support (oppose) cameras in the courtroom and will fight for my position if elected," would seem entirely innocuous (except perhaps to other judges), as would pledges such as "I will vote to change the rules on class actions to make it harder (or easier) for plaintiffs to bring such cases," or "I will reform the jury selection system to be sure that every eligible voter is called to serve on a fair and regular basis, and eliminate all the blanket exclusions now in the court's rules." The difference is that, when making decisions on such issues, the court would not be adjudicating a controversy between opposing parties, where bias or prejudgment could raise due process problems, but would be acting more like a legislature or an administrative agency, where the lack of a neutral decisionmaker does not give rise to due process objections. Nonetheless, it is possible that an issue that the court might handle through rulemaking might also arise in a litigated case, and even then, there is *some* danger of a judicial candidate expressing her views too explicitly.[37] In any event, there is no reason why any rule on statements of judicial candidates should sweep beyond the area of adjudication into rulemaking functions such as these, which, while arguably substantive and surely not mere administrative issues, do not involve case-specific decisions between opposing litigants.[38]

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35. *See* Minn. Canon 5(A)(3)(d)(I) (2002).

36. *See, e.g.*, Bailey v. Utah State Bar, 846 P.2d, 1278, 1281 (Utah 1993) (discussing an Amendment to the Utah State Constitution that explicitly delegated legal regulatory authority to the state's judiciary).

37. This problem is similar to that faced by the United States Supreme Court when it decides cases involving the Federal Rules of Civil Procedure. *See* Order Amending the Federal Rules of Civil Procedure**,** Statements by the Justices, 123 L. Ed. 2d lxii (1993) (Scalia, J., dissenting).

38. The Minnesota rule, as written, was not limited to issues likely to come before the court to which the candidate was seeking election, but the Eighth Circuit and subsequently the Minnesota Supreme Court "construed" it to include such a condition. *See* Republican Party of Minn. v. Kelly, 247 F.3d 854, 857 (8th Cir.), *cert. granted*, 534 U.S. 1054 (2001); *In re* Code of Judicial Conduct, 639 N.W.2d 55 (Minn. 2002). In light of Toqueville's observation that "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question," 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 280 (1948 ed.) (1835), that limitation does little to save the rule.

Aside from extending its reach too broadly, the no announce rule also is woefully underinclusive in what it prohibits, or perhaps more accurately, in the time frame in which it operates, because of one exception that is implied if not stated. The rule applies only to statements made while a judicial race is ongoing.[39] Thus, no matter how many pledges a candidate has made before declaring himself as a candidate for judicial office, he has not broken the rule so long as he does not repeat them during the campaign, although nothing would prevent his supporters from doing so, as long as the candidate does not cooperate in those efforts.[40] There is, of course, no realistic, let alone constitutional, way in which that "loophole" could be closed since a rule forbidding anyone who might ever want to become a judge from expressing his or her views on matters that might come before a hypothetical court to which that person might be elected at some time in the future would never be passed or upheld in a First Amendment challenge.

There is a similar problem, probably of greater concern on the issue of possible prejudgment than any that arise from statements made as part of a judicial campaign. One group of candidates already expresses their views on issues that actually come before the courts—sitting judges. Not only do they express their current views on legal issues, but the doctrine of stare decisis provides a very strong impetus to follow those announced views in future cases. And the fact that such views are enshrined in formal opinions increases the likelihood that they will be followed by the author (and others who joined her) in future cases, especially when contrasted to views announced on the judicial campaign trail, which may be offered without full opportunity for reflection, not to mention briefing and oral argument. Not only do sitting judges make such announcements before a campaign starts, but they are almost certain to continue to do so while the race is on-going. Of course, some judges may choose to postpone such announcements until the election is over, if that seems more politically advantageous, even if they have already made up their minds on how they will decide the case.

Once again, no one is proposing that judges who are considering running for re-election neither write opinions on recurring issues, nor write any opinions at all while their re-election race is on. That being so, it raises serious questions about whether the no announce prohibition can be defended in light of these gaping exceptions. If it is wrong to express one's views on issues that may come before the court, how can it matter whether they were expressed the day before the candidate declared for office, the day after, or whether they were contained in a judicial opinion or in response to a question from a voter?[41] Even oral statements can be recorded or at least repeated by friend or foe, and hence *any* prior expression of views on legal issues should be on an equal footing, regardless of when or where the statements were made.

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39. *See* Minn. Canon 5(A)(3)(d) (2002); Code of Judicial Conduct Canon 7 (2002).

40. *See* Minn. Canon 5(A)(3)(d) (2002); Code of Judicial Conduct Canon 7 (2002).

41. *See* Republican Party of Minn. v. White, 122 S. Ct. 2528, 2537-39 (2002) (noting that time frames makes the no announce clause "woefully underinclusive").

Finally, there is the problem of uncertainty of the application of the rule, not because the candidate is attempting to come close to the line and not violate it, but because the rule itself inevitably creates problems of interpretation. Clearly, the no announce rule includes more than outright pledges and statements that attempt to come close to the line, but not cross it; otherwise there would be no purpose for having it. Although the majority did not decide *White* on this ground, and the dissent did not comment on it, there is a serious problem of line drawing between the permissible and the forbidden under the no announce rule, which is a further reason to doubt its wisdom.

There will always be uncertainty whenever words are used to describe specific conduct.[42] However, vagueness and overbreadth are of particular concern in the First Amendment context and are often grounds for striking down a law where either problem exists.[43] Where, as here, the penalty for having overstepped the line could include loss of a license to practice law, or removal from judicial office, the need for a precise line is especially strong. However, in *White* the State vacillated on what could and could not be said, not simply because those defending the rule could not agree on the boundaries, but because, in the real world, other than an ironclad promise to decide an issue one way or the other, there are a wide variety of ways along a more or less continuous spectrum, to express the certainty of one's views on a legal issue. The difficulty is in deciding which ones go too far.

Consider the plight of the judicial candidate for the trial court in the Washington case of *In re Kaiser*.[44] After much debate, the majority held that his statement "I will be a no-nonsense judge" was acceptable,[45] but his assertion that "I will be tough on drunk drivers" went too far.[46] It is possible to create a rationale to defend that distinction, but it is equally possible to argue for one that runs the other way, one that condemns both, or excuses both. And that, of course, is the problem, since candidates may be asked questions about their views on certain issues and will have to decide whether to respond at all, and if so, how to word the answer to be as responsive as possible, without stepping over the line. That would be hard enough to do if all the questions were propounded in writing with an opportunity to consult counsel before answering; but that is not the way elections work, even when the race is for a judgeship.

Take two issues that were mentioned in *White* that illustrate the difficulty of line drawing. It appears that no one seemed troubled by "I am a strict

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42. For a recent and thoughtful discussion of the problem of translating concepts into words in the patent context, see *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 122 S. Ct. 1831 (2002).

43. *See* Smith v. Goguen, 415 U.S. 556 (1974) (holding that a statute that is "void for vagueness" cannot be constitutionally used to obtain a conviction); *see also* Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980) (invalidating an Illinois municipal ordinance on the grounds of overbreadth).

44. 759 P. 2d 392 (Wash. 1988).

45. *Id.* at 396.

46. *Id.* at 395-96.

constructionist," perhaps because in the abstract it is almost meaningless, unless applied to a specific issue, in which case it would be forbidden by the no announce rule.[47] But what if the statement were made in the context of a discussion of whether the courts have gone too far in protecting the rights of criminal defendants? Would that same statement be taken as an implicit promise to rule more for the government than has been done in the past, and should it be taken that way? The same question could also be asked about discussing a subject that was apparently also not off limits—the candidate's judicial philosophy.[48] That phrase can mean anything from the general—"I follow the law and not my personal preferences"—to a quite detailed explication of how the candidate interprets statutes and the constitution, which a student of the court could use to gain a fairly good idea of how the candidate is likely to rule in many cases. Should any or all of those statements be out-of-bounds, and why should some and not others cross the line?

Another area that the defenders of the rule in *White* claimed was acceptable for discussion was prior decisions of the court to which the candidate was seeking election, including criticisms of decisions with which he or she disagreed.[49] However, if the candidate said that he or she would vote to overturn them if elected, or if he or she acknowledged the power of the court to do so—which any lawyer and many non-lawyers would know without the candidate saying so—that would go too far.[50] Again, the question is not simply whether these lines are correct or even defensible, but whether a rule governing election conduct that cannot avoid these difficult questions is a sensible one. Moreover, the problem is greatly magnified because of the serious adverse consequences of overstepping the line for a judicial candidate.[51] Thus, at the very least, any no announce-type rule would have to be very carefully drafted and provide clear safe harbors in order to be fair and not suppress too much speech.

IV. THE BENEFITS OF ALLOWING CANDIDATE SPEECH

Imagine if the no announce and no pledge rules could constitutionally be applied to candidates for other elected offices. Elections would be based on the candidates' qualifications, but not their views. Experience, energy, and intelligence are always valuable assets, but no one would think that what a candidate for a state legislature thinks about taxes, crime, health care, schools, or the environment is irrelevant. Therefore, why should the supporters of the no

47. Republican Party of Minn. v. White, 122 S. Ct. 2528, 2533-34 (2002).

48. *Id.*

49. *See, e.g.*, Brief of Amicus Curiae Minnesota State Bar Association at 25-28, Republican Party of Minn. v. Kelly, 247 F.3d 854 (8th Cir.), *cert. granted*, 534 U.S. 1054 (2001) (No. 01-521).

50. *See* Minn. Canon 5(A)(3)(d)(I) (2002).

51. Incumbent judges in Minnesota who violate the no announce rule are subject to a range of sanctions including "removal, censure, civil penalties, and suspension without pay," whereas lawyers who run for judicial office are subject to "disbarment, suspension, and probation." Republican Party of Minn. v. White, 122 S. Ct. 2528, 2531 (2002).

announce rule think that the views of potential judges on the issues that are likely to come before them are irrelevant? Or is there some other valid reason for denying the electorate that information?

The first answer is that judges are different.[52] They are not politicians, and they should not act like them. In one sense that is plainly correct. If a legislator opposes taxes, he or she can vote to reduce them, but a judge who believes that taxes are too high cannot refuse to enforce the tax laws, any more than he or she could decline to abide by decisions rendering evidence inadmissible under the Fourth Amendment. Judges must follow the law, not negate it, regardless of their personal views of its wisdom.

Accepting that premise does not support the no announce rule, although it may well support the no pledge rule because judges are supposed to be willing to listen to arguments from both sides and not be committed to any outcome in advance. It may also support the decisions of individual voters not to support judicial candidates who act like ordinary politicians because their conduct during their election race suggests that they would behave like politicians, not judges, on the bench. But the fact that a person has views on a subject does not mean that he or she will not follow the law where following the law, not making it, is a judge's responsibility.[53] Just because judges are different from governors, attorney generals, and legislators does not justify a rule banning judicial candidates from expressing their general views on issues of interest to voters even if the would-be judge may end up having those issues come before the court.

If judicial elections are inherently so corrupting that they make judges no different from legislators, then the solution is to ban judicial elections, not to reduce the elections to shams.[54] As Justice Scalia observed in *White*, "much of [Justice Ginsburg's] dissent confirms rather than refutes our conclusion that the

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52. This rationale is frequently by supporters of the no announce rule. *See, e.g.*, Brief of Amicus Curiae National Association of Criminal Defense Lawyers at 4, *Kelly*, 247 F.3d 854 (No. 01-521) ("Judges are fundamentally different"); Brief of Amici Curiae Brennan Center for Justice at NYU School of Law et al. at 9, *Kelly*, 247 F.3d 854 (No. 01-521) ("Judges differ from other elected officials both in what they do and in how they do it. These differences justify prohibiting judicial candidates from announcing in advance their positions on issues that are likely to come before them").

53. In fact, many judges have written opinions noting that they disagree with a particular law, and yet upholding and applying that law in spite of their personal preferences. *See, e.g.*, *White*, 122 S. Ct. at 2547 (Stevens, J., dissenting) ("it is equally common for [judges] to enforce rules that they think unwise, or that are contrary to their personal predilections").

54. Although banning elections would make judicial elections less political, banning elections would not entirely remove politics from the judicial selection process. After all, federal judges are not subject to election, but only the hopelessly naïve would contend that the selection of federal judges is an apolitical process. *See* Laura E. Little, *The ABA's Role in Prescreening Federal Judicial Candidates: Are we Ready to Give up on Lawyers?*, 10 WM. & MARY BILL RTS. J. 37, 48-51 (2001) (noting that the selection of federal judges is an inherently political process); *see also infra* note 85.

purpose behind the announce clause is not open-mindedness in the judiciary, but the undermining of judicial elections."[55]

Second, recognizing that the obligation to follow the law is an essential element of the due process right to a fair hearing does not support a no announce rule. In part, that is because in many cases the law is not clear, as most vividly demonstrated by dissents, reversals, and rehearings. Yet even with this uncertainty, it is a fundamental premise of the law that judges are expected to decide cases under the law as they understand it.

Sometimes the uncertainty is the result of conflicting lines of authorities that have yet to be reconciled, and other times the legislature has, deliberately or otherwise, left a significant ambiguity in a statute with conflicting clues as to how to resolve it. Other situations involve such open-ended constitutional phrases as due process, equal protection, or freedom of speech. While the Supreme Court is most frequently called upon to resolve these questions, state courts, especially the highest court in each state, also decide difficult cases under their statutes, constitutions, and common law. In doing so, these courts sometimes overturn their own prior rulings, disagree with the results in other states, reverse decisions of their own lower courts, and have dissents of their own. As any law student who has completed her first semester will know, a major reason why there are such differences in outcomes is that precedent, logic, and reasoning do not always (some would say do not even often) produce an indisputably correct answer.

How do judges decide these in-between cases when precedents, history, and logic do not provide an answer? Or, perhaps more precisely, how do they examine the conflicting tools and evidence in order to resolve an uncertainty? Like everyone else, they go back to their basic values, principles, and preferences, not to the exclusion of everything else, but more as a prism through which to view the relevant authorities when the answer to the question using the ordinary legal tools remains in doubt. To be sure, some judges find ambiguity more easily than others. However, the point of doubt is eventually reached for everyone, and when that happens, the judge has to reach for something else. Even those judicial candidates who have fairly well-defined approaches to the law have not thought about all, nor perhaps even many, of the issues that might come before them. They also do not have fixed ideas of how they would decide all cases—even in areas where their thinking is quite advanced.

In theory, a judge might have no personal judicial philosophy, no preferences, and no general approach to resolving ambiguities, but we should hope that there are very few judges like that. As Justice Rehnquist observed about the background of Supreme Court Justices in *Laird v. Tatum*,[56]

> it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one

55. 122 S. Ct. at 2538.

56. 409 U.S. 824 (1972) (Rehnquist, J., mem.).

> another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers.[57]

As recounted by John Dean in his fascinating book, *The Rehnquist Choice*,[58] President Nixon came quite close to nominating Arkansas bond lawyer Hershel Friday who had given so little thought to issues heard by the Supreme Court that he had to be prompted to react to perhaps the most significant criminal law decision of the Warren Court, *Miranda v. Arizona*.[59] When then Judge and now Justice Clarence Thomas was asked in his confirmation hearing about his reaction to *Roe v. Wade*,[60] and he claimed not to have ever seriously discussed the matter.[61] It was unclear whether it was more harmful to his cause if he was less than truthful, or if his statement was accurate and represented a genuine lack of interest in a legal issue of such great importance.[62]

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57. *Id.* at 835.

58. JOHN W. DEAN, THE REHNQUIST CHOICE 170 (2001).

59. 384 U.S. 436 (1966).

60. 410 U.S. 113 (1973).

61. *Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 102d Cong. 222 (1991).

> Judge Thomas: Because I was a married student and I worked, I did not spend a lot of time around the law school doing what the other students enjoyed so much, and that is debating all the current cases and all of the slip opinions. My schedule was such that I went to classes and generally went to work and went home.
>
> Senator Leahy: Judge Thomas, I was a married law student who also worked, but I also found, at least between classes, that we did discuss some of the law, and I am sure you are not suggesting that there wasn't any discussion at any time of *Roe v. Wade*?
>
> Judge Thomas: Senator, I cannot remember personally engaging in those discussions.
>
> Senator Leahy: OK.
>
> Judge Thomas: The groups that I met with at that time during my years in law school were small study groups.
>
> Senator Leahy: Have you ever had discussion of *Roe v. Wade*, other than in this room, in the 17 or 18 years it has been there?
>
> Judge Thomas. Only, I guess, Senator, in the fact in the most general sense that other individuals express concerns one way or the other, and you listen and you try to be thoughtful. If you are asking me whether or not I have debated the contents of it, that answer to that is no, Senator.

Id.

62. *See* Gary J. Simson, *Thomas's Supreme Unfitness—A Letter to the Senate on Advise and*

However much we should worry about judges having strong views on issues that may come before them, it is in some senses more troubling to find a judicial candidate who has given little or no thought to those questions. Surely, no President would nominate someone for the Supreme Court or even a court of appeals if the would-be judge had no views on any significant legal issues, not only because such a *tabula rasa* candidate might well produce decisions of which the President strongly disapproved—as President Eisenhower did of the rulings of his appointees Chief Justice Warren and Justice Brennan[63]—but because a person who has reached middle age and who does not have some significant views about legal issues of importance is probably not the kind of person who can be expected to bring the required wisdom to his or her work on the bench. Assuming that it is possible to elect lawyers with few or no views on important legal issues, "it would hardly be desirable to do so. 'Proof that a Justice's mind at the time he joined was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of a lack of qualification, not lack of bias.'"[64] Yet, the no announce rule has prevented the electorate from finding out whether a judicial candidate even has any views on any issues that might come before the court, let alone what they are. Unless one thinks that keeping the public in the dark about the fact that a judicial candidate is a *tabula rasa* on important issues is a positive benefit in a judicial election, the no announce rule is problematic for that reason, as well as others.

The vast majority of judicial candidates, and probably every sitting judge running for re-election, has views on many legal issues covered by the no announce rule. The most important question is, what to do about that fact? The current, albeit unstated, approach taken by the no announce rule is one of "pretending otherwise,"[65] and asking the electorate to act as if those covered by the rule have no views. The rule, of course, does not preclude candidates from having views, or even from having expressed them before the judicial election race began; it only prevents them from telling the electorate what those views are while the election campaign is underway. Thus, the principal impact of the rule is not to assure that candidates don't have views on disputed legal issues, but to prevent the electorate from finding out whether they hold views on particular issues and what those views might be.[66]

Consent, 78 CORNELL L. REV. 619, 631-32, 643-44 (1993).

63. When asked if he had made any mistakes as President, Eisenhower replied, "[y]es, two and they are sitting on the Supreme Court." Laura E. Little, *Loyalty, Gratitude, and the Federal Judiciary*, 44 AM. U. L. REV. 699, 727 n.141 (1995) (citing HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS 266-67 (3d ed. 1992)). President Eisenhower was referring to Chief Justice Warren and Justice Brennan. *Id.*

64. Republican Party of Minn. v. White, 122 S. Ct. 2528, 2536 (2002) (quoting Laird v. Tatum, 409 U.S. 824, 835 (1972)).

65. *Id.*

66. The no pledge rule could be criticized on the same ground, but it is probably saved because it serves the important purpose of attempting to assure that judges at least remain (or appear to remain) open-minded, even if they have views on disputed legal issues.

The supporters of the no announce rule have never announced that they are engaging in a game of "let's pretend," because it would make them look silly to say either that judicial candidates don't have any views, or that the views that they have don't matter, at least so long as they don't tell anyone what they are.[67] It is the discovery of the falsity of the "it doesn't matter" proposition that may be what the proponents of the no announce rule fear most because it would unveil the fact that judges do not simply apply law in a mechanical fashion and grind out decisions that ineluctably flow from prior precedents and the plain meaning of statutes and constitutions. Those who deal with the law already know that truth, and many others surely suspect it. But even if most citizens were to learn that the law is not all logic and reason, that alone could hardly undermine our collective belief in the rule of law. The American people have been exposed to far more damaging truths about our democracy than that there is a personal aspect to judicial decisionmaking, and our system of government has still survived. States have another option, and that is to acknowledge that most judges have views, opinions, preferences, and biases—whether called judicial philosophies or something else—and to admit that, in some close cases, those views do matter in how the case is decided. Such a frank acknowledgment might also convey to voters that they are generally better off to know those views before they cast their ballots, rather than being surprised when those views begin to appear in judicial opinions.

Consider some of the issues that could well arise in state appellate courts and how knowing the views of the judicial candidates might affect a voter's choice. The business community is making a major effort in the courts and in the legislatures to reduce their potential liabilities in a variety of ways. Even if the no announce rule permitted candidates to do so, no judicial candidate would say, "I favor eliminating lawsuits for personal injuries," but instead he would talk about "tort reform" which can mean a variety of things in different contexts. But the real issues on tort reform on which the voters would like to have the views of the candidates are the role of the jury versus that of the judge, whether courts should take an aggressive stand in policing punitive damages awards, and what the role of the court is under the state's constitution in reviewing legislation intended to help defendants and make lawsuits more difficult for plaintiffs.

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67. Many defenders of the no announce rule did argue that states have a "compelling interest in protecting the *appearance*" of judicial impartiality and/or judicial integrity. Brief of Amicus Curiae National Association of Criminal Defense Lawyers at 17, Republican Party of Minn. v. Kelly, 247 F.3d 854 (8th Cir.), *cert. granted*, 534 U.S. 1054 (2001) (No. 01-521) (emphasis added); *see* Brief of Amici Curiae Brennan Center for Justice at New York University School of Law et al. at 28, *Kelly*, 247 F.3d 854 (No. 01-521); Brief of Amicus Curiae Minnesota State Bar Association, at 4, 12-16, *Kelly*, 247 F.3d 854 (No. 01-521). This argument has some merit if its proponents believe the judiciary actually is impartial and unlimited speech in judicial elections may create a misconception to the contrary. However, since all judges are not always impartial, it is much harder to justify covering this fact up from the public. In our system of government, there can be little justification for mandating silence in order to prevent the people from learning the truth about some part of a branch of their government.

Sometimes it is possible to make an educated guess about a candidate's views based on what types of cases the lawyer has handled and whether his clients are generally on one side of a controversy rather than another. But there is no reason why candidates who wish to give more complete explanations of their views on such important issues should not have the right to do so.

Criminal law is another area of vital concern to many voters in elections for appellate court judges.[68] Issues include the death penalty and how it is administered,[69] whether state constitutional protections should be read more broadly than those in the Constitution,[70] and should the court step in to assure that indigent defendants have access to effective assistance of counsel when the legislature has ducked its responsibilities.[71] Even at the trial level, where judges have fewer opportunities to "make law," their views and attitudes make a difference, particularly on matters relating to sentencing. To mention just a few, should repeat drunk drivers receive sentences at the high end of the permitted range?, should husbands who physically abuse their wives be sent to jail?, and how harshly should those found to be in possession of small amounts of marijuana be treated? Does allowing a candidate to say that he will be a "no-nonsense judge," but not more, convey any meaningful information, or should the candidate be allowed, and perhaps even directly requested, to explain what he means by that phrase, in specific contexts? If the voting public is to make reasoned choices, it should have more rather than less information than the permitted code words and stock phrases now provide.[72]

There are several sets of objections to this approach, to which there are at least partial answers. One claim is that if candidates were permitted to express their views (but not to make pledges), they would feel compelled to do so, even if they would prefer to remain silent.[73] There are several responses to this challenge. In the eyes of many voters, silence may be a virtue not a vice, especially if explained by the sensible rationale of not wanting to express a

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68. *See* Charles D. Clausen, *The Long and Winding Road: Political and Campaign Ethics Rules for Wisconsin Judges*, 83 MARQ. L. REV. 1, 49 (1999) (noting that "[c]rime is still at or near the top of voters' concerns" in judicial elections).

69. Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 760 (1995).

70. Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 S. CAL. L. REV. 2007, 2054-56 (1988).

71. Ronald J. Tabak, *Capital Punishment: Is There Any Habeas Left in This Corpus?*, 27 LOY. U. CHI. L.J. 523, 531 (1996).

72. As Thomas Jefferson once observed, "I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion." Abrahamson, *supra* note 12, at 993 (quoting Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820) (citing JOHN BARTLETT, FAMOUS QUOTATIONS 344-45 (Justin Kaplan ed., 16th ed. 1992))).

73. *See* Max Minzner, *Gagged but Not Bound: The Ineffectiveness of the Rules Governing Judicial Campaign Speech*, 68 U. MO. KAN. CITY L. REV. 209, 230 (1999).

position on an issue without benefit of full briefing or argument. Although a candidate may be reluctant to speak out on some, or even a substantial number of issues, if he or she says nothing on *any* issue, the electorate could reasonably assume that either he was hiding something or never gave any of the issues a thought, either of which would be legitimate grounds for voting for someone else. Nor is expressing one's views an all-or-nothing proposition. A candidate could reasonably decide that she will express her views only on those issues to which she has given thought and attention, and there is no reason to think that voters will not appreciate that kind of line drawing.

First, it is sometimes suggested that, in the absence of a no announce rule, candidates will feel compelled to take positions, when they really do not have any views on an issue, or to stake out their position much more definitely that their actual views would support.[74] That claim assumes a level of political involvement and pressure in judicial campaigns that does not, except in rare cases, seem borne out by experience and is contradicted by the fact that judicial races are often near the bottom of the ballot and command very little media attention.[75] It also assumes that candidates for judgeships lack backbone and will bend to every request for a position on any issue. It also assumes that voters will not accept a candidate's explained reluctance to express a view, or her statement that "in general I support that position, but I have not thought through how it would apply in every case, and so would want to leave open the question in cases other than those we have just discussed." By and large, voters know that judges are different, they are aware of the dangers of pre-commitment, and they will refuse to vote for judges who are not open to reasoned argument on legal issues.[76]

Second, if candidates are allowed to express their views, it is argued that sitting judges will be forced to engage in the unseemly act of defending their opinions.[77] That, in turn, may lead them to add inappropriate qualifications or

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74. *See* Neil K. Sethi, *The Elusive Middle Ground: A Proposed Constitutional Speech Restriction for Judicial Selection*, 145 U. PA. L. REV. 711, 711-22 (1997).

75. This is not true in all elections, nor is it true with all voters—but voters in judicial elections are generally less passionate and less informed than voters in other elections. *See* Pamela S. Karlan, *Two Concepts of Judicial Independence*, 72 S. CAL. L. REV. 535, 541 (1990) ("Judicial elections are usually deracinated, low-salience affairs."); Nicholas P. Lovrich et al., *Citizen Knowledge and Voting in Judicial Elections*, 73 JUDICATURE 28 (1989); Nicholas P. Lovrich, Jr. & Charles H. Sheldon, *Voters in Judicial Elections: An Attentive Public or an Uninformed Electorate?*, 9 JUST. SYS. J. 23 (1984); Charles H. Sheldon & Nicholas P. Lovrich, Jr., *Knowledge and Judicial Voting: The Oregon and Washington Experience*, 67 JUDICATURE 234 (1983).

76. Texan voters' reaction to Judge Jack Hampton provides a particularly poignant example of the electorate rejecting a judge who refused to apply legal reasoning and instead rendered decisions based on his preconceived opinions. Judge Hampton gave an unusually light sentence to a defendant who murdered two gay men and explained his decision by stating "I put prostitutes and gays at about the same level. And I'd be hard put to give somebody life for killing a prostitute." Karlan, *supra* note 75, at 542. The Texas electorate responded by not retaining Judge Hampton. *See id.*

77. *See* Stephen J. Fortunato, Jr., *On a Judge's Duty to Speak Extrajudicially: Rethinking the*

amplifications, without benefit of full briefing and argument. Of course, judges would not be required to answer questions or charges, but at least they would have the opportunity to offer whatever explanation they deem proper under the circumstances. Indeed, one of the objections that sitting judges have to elections is that their record is attacked by their opponents or by interest groups opposing them (often on the basis of a single issue).[78] Under current practice, judges are not allowed to respond, which would no longer be a problem if rules like the no announce rule were eliminated. And even if some judges might make inappropriate comments about a prior opinion during an election race (rather than before or after it), that does not justify muzzling all judges or all candidates, and such comments are unlikely to increase the problem of prejudgment to any significant degree.

Third, some candidates will cater to what they perceive to be the wishes of the voters,[79] with the death penalty often given as the most prominent example.[80] The first and most definitive answer is that candidates in any election will feel pressure to say what they believe the voters want to hear. Having decided to elect judges, it is hardly a defense to a no announce rule to claim that voters will want to hear what the candidates have to say on issues that voters think are relevant, especially where the failure to allow such discussion is likely to cause frustration on the part of voters and/or candidates. Moreover, even if candidates are forbidden to announce their views, nothing can or does stop their supporters from doing so on their behalf, and it is surely better to have the candidates explain their positions directly, rather than through code words or using surrogates, and hence be responsible for the impressions that reach the voters. [81] This objection also assumes that voters will not be able to detect pandering and/or will be favorably disposed toward judicial candidates who act like ordinary politicians.[82] With the no announce rule eliminated, it is more likely

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Strategy of Silence, 12 GEO. J. LEGAL ETHICS 679, 705-06 (1999) (noting some of the problems created when judges have to publicly defend case rulings).

78. *See* Grimes, *supra* note 12, at 2321 (noting that judicial elections usually "focus on hot-button issues like the death penalty or abortion").

79. *See, e.g.*, John D. Fabian, *The Paradox of Elected Judges: Tension in the American Judicial System*, 15 GEO. J. LEGAL ETHICS 155 (2001).

80. *See id.* at 156-59, 161-73 (discussing and giving numerous examples of the death penalty affecting both the behavior of judges facing election and the outcome of judicial elections).

81. Both the Minnesota Canon and the Model Rules contain prohibitions against judges knowingly using supporters to circumvent the no announce rule. *See* Minn. Canon 5(A)(3)(c) (2002) (" [forbidding judges from] authoriz[ing] or knowingly permit[ting] any other person to do for the candidate what the candidate is prohibited from doing under the Sections of this Canon"); Model Code of Judicial Conduct Canon 7(B)(1)(b) (2002) (stating that a candidate "should not allow any other person to do for him what he is prohibited from doing under this canon"). Requiring proof of knowledge makes the rules essentially unenforceable.

82. Wisconsin Chief Justice Shirley Abrahamson, with whom I generally agree, has a different view: "Good judging is good politics. I am persuaded that the bar and the public will support judges whom they perceive as independent even if they do not agree with particular

that there will be full debates on the issues, at which candor, not pander, would be the key to success.

Fourth, there is a concern that the demise of the no announce rule will encourage candidates to speak out in order to attract the money they need to get elected. In states like Texas and Ohio, where judicial races for the state's highest court now cost millions of dollars,[83] a great many donors are already figuring out what positions at least one of the candidates is likely to take on issues that matter to them. Those contributions, running into tens of thousands of dollars in some cases,[84] are surely not being made in the interest of securing a neutral and effective judiciary. Thus, it is hard to see how the no announce rule has lessened the money race. Those with the money and the greatest self-interest in how a candidate is likely to rule on issues of importance to them are able to learn a candidate's position by examining which kinds of clients she represents, in which kinds of cases, and by talking with friends and perhaps clients who know the candidate's views from pre-election discussions and who are not barred from repeating those views to others who wish to learn them. And in some cases, the candidate may have written articles or given speeches before becoming a candidate (or in the case of a sitting judge, written opinions on subjects of interest), and nothing prevents his supporters from using those to raise money for his election. There is no doubt that private financing of judicial races produces very serious due process issues, especially with very limited recusals based on such contributions, but the marginal harm, if any, in this area caused by abolishing the no announce rule would seem to be between slim and none.

When states decide to elect their judges, those elections are not simply about who has the best resume or who has the highest reputation for integrity and fairness, although those factors are relevant. Anyone familiar with how courts decide cases knows that judges differ in their approaches to deciding cases and that all judges don't follow the same approach in all types of cases that come before them. And it cannot be seriously disputed that those differences matter in at least some cases, often some of the most significant ones, because those are the cases where the basic tools of judicial decisionmaking do not lead to a single right answer.

The no announce rule pretends that judges do not have views on issues that will come before them, and that if they have them, that is of no proper concern to the voters. Both of those premises are without basis, and to the extent that there is any truth to them, they would not support the no announce rule. Thus, even if there were some reason to believe that the no announce rule prevented some serious harms beyond those covered by the no pledge rule, the current rule

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decisions." Abrahamson, *supra* note 12, at 986.

83. *See* Republican Party of Minn. v. White, 122 S. Ct. 2558, 2542-43 (2002) (O'Connor, J., concurring).

84. For example, "[t]he contribution limit for a Texas Supreme Court justice . . . is a maximum of $5,000 from an individual and $30,000 from a law firm." David Barnhizer, *"On the Make": Campaign Funding and the Corrupting of the American Judiciary*, 50 CATH. U. L. REV. 361, 418 (2001).

is underinclusive, because it reaches only those announcements made during the election (and even then does not cover the opinions of sitting judges), and its boundaries are impossible to police as a practical matter without discouraging candidates from saying anything at all of interest to the electorate. It is time to discard the no announce rule and others like it and to recognize that the electorate should be given vital information about the views of judicial candidates, just as they receive it about candidates for other elected offices. Covering up the reality of how judges make decisions may make some people feel better, by pretending that deciding a legal issue never involves the personal views of a judge, but it doesn't comport with the real world of judging. It's time to remove the fig leaf that the no announce rule provides.[85]

V. ENFORCEMENT ISSUES

There are two major problems relating to enforcement of the rules on candidate speech during elections that should be addressed regardless of the substance of what the rules prohibit. First, the rules are enforced, like other disciplinary rules, by an arm of the state, which means, as *White* demonstrated, that the First Amendment heavily influences what can and cannot be proscribed.

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85. The same need for information about the views of judicial candidates applies when judges are appointed as well as when they are elected. Indeed, many state court judges who are eventually elected to office, first become judges through an appointment process that fills a mid-term vacancy. The main difference is that the context in which the would-be judge might make his/her "announcements" is changed. In the appointment context, any "announcement" would occur either in the private process by which the appointing authority and his/her staff decide whether the candidate's views are compatible with the appointer, or in the public hearing at which a legislative body determines whether the appointment should be approved. Indeed, this difference in context eliminates some of the objections to abandoning the no announcement rule, such as the fears of pandering to the electorate and needing to take positions to raise campaign money. But if the goal of these rules is to prevent conduct during the period before a person becomes a judge from affecting the judge's performance after being sworn in, the method of judicial selection should be irrelevant because the role of the judge once she dons her robe is the same. And, insofar as the rules prevent those responsible for making the judicial selection from learning the views of potential judges, the objection to them applies to appointed judges as well, and, in the context of a lifetime appointment to federal courts, may take on even greater significance.

A major problem with the current system is that nominees often decline to tell the confirming body their views on issues on the grounds that by doing so they might be seen as committing themselves to a position without knowing all the facts and hearing all the legal arguments. That position—essentially a no pledge defense—seems perfectly reasonable with one exception: if nominees announce their views on an issue to the appointing authority or to those who are advising him/her, they should not be allowed to withhold similar information from the confirmation body. If that information is relevant and does not amount to prejudgment before a nomination is made, it is equally relevant and non-judgmental afterwards. Otherwise, the confirmation process breaks down and does not serve as the check that it was created to be. *See* Alan B. Morrison, *Time for a Bigger Audience*, LEGAL TIMES, Mar. 3, 2003, at 46.

This problem is magnified because of the potential penalties that can be imposed, ranging from admonitions to removal for a sitting judge, [86] and from a reprimand to disbarment for a lawyer.[87] That does not mean that the most severe punishment is likely to be imposed, but even a remote threat of it will cause all but the most fearless to hold back. Second, there is a special problem when judges have to pass judgment on fellow judges, either those who sit on their own courts or those whose decisions they review. In either case, there are potential pitfalls that should be avoided if at all possible. As I explain below, if a private body is established, with no power other than moral suasion that it can bring to bear, both of these problems will disappear.

Given these potential problems with enforcement by an arm of the state, the first inquiry should be, is there a real need for the state to gear up its enforcement mechanism and be prepared to impose stiff penalties in this situation? 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. While in theory a candidate could make so many promises during a campaign as to require wholesale recusals, there is no reason to believe that the voters would ever elect such a person to serve as a judge. Surely, that remote possibility cannot justify using the state's enforcement mechanism in every case where someone is charged with crossing a very difficult-to-locate line.

Without a state enforcement scheme, including state-imposed penalties for violating the rules, the very serious line drawing problems largely vanish. The only "penalty" would be a public determination by a group of private citizens that it believes the candidate has crossed the line. If a candidate is concerned that a statement that she intends to make might go beyond the accepted norms, the fact that there are only very limited "sanctions," if they can even be called that, drastically reduces the chill from the uncertainty, even if the determination is made public during the campaign. Moreover, as the dissent of Justice Ginsburg in *White* observes,[88] it is not difficult for a candidate to avoid making a pledge, but still provide a very strong indication of which way he is likely to vote. That observation, as well as the concluding portion of that dissent, also underscores the uncertainty of where a pledge ends and an announcement begins. Line drawing can never be eliminated, but ending state enforcement can greatly diminish the consequences of overstepping the inherently imprecise boundaries

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86. *See In re* Disciplinary Proceeding v. Kaiser, 759 P.2d 392, 400-01 (1988).

87. *See* Jennifer L. Brunner, *Separation of Power as a Basis for Restraint on a Free Speaking Judiciary and the Implementation of Canon 7 of the Code of Judicial Conduct in Ohio as a Model for Other States*, 1999 L. REV. MICH. ST. U.-DETROIT C.L. 729, 729 n.63 (1999) (noting that lawyers can be disbarred for failing to abide by speech regulations when campaigning for judicial office); Elizabeth I. Kiovsky, *First Amendment Rights of Attorneys and Judges in Judicial Election Campaigns*, 47 OHIO ST. L. J. 201, 203 (1986) (noting that violations can be punished with "reprimand, suspension, or disbarment") (citations omitted).

88. *See White*, 122 S. Ct. at 2558 (Ginsburg, J., dissenting).

in this area.

The problem of judges enforcing these rules against a practicing lawyer is serious enough (especially if the lawyer ran against a sitting judge), but when it is a sitting judge who has been charged, it becomes even worse, particularly if the judge is on the same court as those who are judging him.[89] In such a situation, will it ever be possible for those sitting in judgment to divorce the question of whether the rule was violated from whether they would or would not have done something similar when they were running for office? And will some judges feel more or less inclined to impose a sanction based on whether the accused votes with or against them? And think about the relationships between the accused and the rest of his court while the disciplinary proceedings are underway, including the possible perception that votes on substantive issues may be traded for votes in the disciplinary process. One need not doubt the wisdom of the decision to assign the disciplinary duty to the state's highest court when there are serious charges of wrongdoing made against a judge, but that does not mean that the court should also be in the business of policing charges (often made by an election opponent) that a judge has crossed the line by a statement made during an election race.

As a recent report by the Constitution Project recognizes,[90] these problems can be largely eliminated by ending the state enforcement of whatever rules are in place and leaving the job of deciding whether the rules have been violated to a private, volunteer body, composed of lawyers (including possibly some retired judges) and non-lawyers who are concerned with judicial elections. Such a body would have no powers of enforcement; it could do no more than announce its conclusions about whether the conduct at issue fell on one side of the line or the other. It might need some staff, at least during election season, which could probably be funded by the state without making the actions of the body the actions of the state, at least as long as those who decided these claims were not appointed by the state, and were not state officials for any other purpose.

Such a body would act based on complaints submitted to it or on its own if it learned of a candidate who may have gone too far. It would have to have some ability to investigate, and it should be obligated to provide the candidate an opportunity to submit evidence and/or be heard in person, but it should not have subpoena power. Since its only power would be to decide whether a candidate for judicial office had complied with an applicable rule and then to make that decision public, it would have to be able to act quickly so that the candidate could both explain his position with respect to any conclusion that the body reached, and the electorate could take into account both views of the challenged

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89. *See* Patrick D. McCalla, *Judicial Disciplining of Federal Judges is Constitutional*, 62 S. CAL. L. REV. 1263, 1283 (1989) (discussing the dangers of sitting judges being subject to judgment by their colleagues).

90. THE CONSTITUTION PROJECT, UNCERTAIN JUSTICE: POLITICS & AMERICAN'S COURTS 101-04 (2000), *available at* http://www.constitutionproject.org/ci/reports/uncertain_justice.pdf. The report also correctly observes that other related issues involving the conduct of judicial campaigns could also be handled by such a body. *See id.*

conduct in deciding how to vote. And, unlike the current system, which only operates long after an election is over, and the candidate is either a sitting judge or not, a private system would provide useful and timely information to the people who most need it—the voters.

A number of states are now experimenting with taking enforcement of judicial election rules out of the hands of the judiciary.[91] Some of the bodies are clearly official governmental entities, even though they include private persons; others may be governmental, but their status as state actors is either unclear or may depend on what they are doing; and others seem to fall on the private side of the line and not be subject to the restrictions of the Fourteenth Amendment.[92] Their use is a fairly recent phenomenon and is very much in the experimental stage, not only over what functions should be assigned to such a body, but how its members should be chosen and from what different constituencies and/or professions.[93] Moreover, given the differences between local elections for trial judges and broader geographic elections for appellate judges, as well as differences among the states where judicial elections are held, this is clearly an area where one size does not fit all, and where there is much to be learned about whether the theory of using private bodies will work in practice.[94]

Although many details would have to be worked out, the principle of taking the job of watching over judicial elections from the state and assigning it to a non-governmental body would go a long way toward reducing, if not eliminating, the problems with the current enforcement system. And once the state was no longer doing the "enforcing," the First Amendment would no longer have to be considered in designing rules for judicial election campaigns.

Another way to "enforce" the no pledge rule and whatever rules may follow *White* is to provide more teeth into the requirements for recusals, in particular by making it clear that they apply where a judge makes a statement that a reasonable person would construe as amounting to prejudgment of an issue in a case pending before the judge.[95] Justice Rehnquist in *Laird v. Tatum*[96] specifically recognized that some prior statements by judges could provide a proper basis for recusal, although he concluded that his expression of prior views in that situation were

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91. *See* Barbara Reed & Roy A. Schotland, *Judicial Campaign Conduct Committees*, 35 IND. L. REV. 781 (2002).

92. *Id.*

93. *See id.*

94. *See* Steven Lubet, *Judicial Campaign Conduct Committees: Some Reservations About an Elegant Solution*, 35 IND. L. REV. 807 (2002).

95. The insufficient nature of some state recusal laws is poignantly illustrated in the case of *State v. Kinder*, 942 S.W.2d 313, 321-22 (Mo. 1996), where the Missouri Supreme Court refused to disqualify a judge who issued an arguably racist campaign release six days before presiding over a capital case involving an African-American defendant, even though the judge sentenced the defendant to death. The majority of the Missouri Supreme Court did not find a due process problem.

96. Laird v. Tatum, 409 U.S. 824, 835 (1972) (Rehnquist, J., mem.).

not disqualifying.[97]

If a campaign statement were a possible basis for recusal, that would reintroduce the First Amendment into the matter, but with a number of significant differences. First, there would be little if any impact on what was said during an election because the consequence of straying over the line would not be subject to discipline of any kind. The possibility of removal from a case should the issue on which the judge (and never just a candidate) had spoken actually comes before that judge is unlikely to deter any statements short of an outright pledge. Second, instead of considering the judge's statement in the abstract, which means considering the theoretical impact it might have, it would be viewed in the context of a particular case, thereby making the connection between statement and litigation much less speculative. Third, the only "punishment" a judge would receive would be disqualification from a case, a very different result from possible removal from the bench or a public sanction for a judge, or suspension or a public reprimand for a lawyer-candidate.

There is also the question of how to phrase the recusal requirement to prevent both excessive and parsimonious reactions from the judiciary. Given the lack of experience on this issue due to the recent demise of the no announce rule, it would be best to proceed cautiously. Thus, a quite modest change, doing no more than reminding judges of the possibility that their campaign statements might be a ground for recusal, would seem to be an appropriate starting point. For example, if something like the basic federal recusal statute[98] were used by a state having judicial elections, it could be amended to make this point by adding the italicized words: "Any justice, judge, or magistrate . . . of the United States shall disqualify himself [sic] in any proceeding in which his impartiality might reasonably be questioned,"[99] *including questions based on statements made by him in connection with a judicial election*. In time that may not prove strong enough, or perhaps too strong, but it would seem to be about right for a start.

CONCLUSION

One of the principal problems for those who have been writing rules for judicial elections is that they fail to come to grips with what should be the most basic question: If we are having an election, what is the election supposed to be about? In part, that failure may be due to the fact there is a real reluctance on the part of lawyers and judges to admit publicly that the personal views of judges do matter in at least a fair number of significant cases. As a result, the existing rules attempt to cover up those views and, in effect, pretend that the candidates either do not have any views or that the ones that they have don't matter. This essay tries to explain why the attempted cover-up will not, and should not, be allowed to prevent the public from learning at least some of those views and that, more importantly, the public and the judicial system would be better off if the

97. *See id.*

98. 28 U.S.C. § 455 (a) (2002).

99. *Id.*

candidate's views were known by more of the voters before elections, and not just afterwards.

This essay also recognizes that the rule forbidding pledges or promises on how the candidate would vote on specific issues promotes the important public purpose of assuring that judges retain an open mind on questions that may come before them. While that rule, narrowly construed, is a sensible means of achieving that goal, the no announce rule goes far beyond it by suppressing valuable, relevant speech during the time when the public is most concerned about the issues. Thus, even if the First Amendment did not compel the states to eliminate the no announce rule, and to re-evaluate other rules limiting judicial campaign speech, the rationales supporting those rules fall far short of offsetting the benefits that would be derived from eliminating all but the no pledge rule.

The difficulties with all of these rules is compounded by the fact that they are enforced by the state, with potentially very severe sanctions in situations where it will often be difficult to determine in advance on which side of the line the challenged speech falls. Taking enforcement authority from the state, and substituting a private body that would have only the power of persuasion—to inform voters that a neutral body believes that a candidate overstepped the line—would be a positive change, regardless of what the substantive rules might be. But if a state attempts to continue to have rules like the no announce rule that suppress relevant speech during judicial elections, state enforcement and the First Amendment will, and should, make it almost impossible to sustain them.