The Sound of Silence: Thoughts of a Sitting Judge on the Problem of Free Speech and the Judiciary in a Democracy

by ROBERT H. ALSDORF*

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* Judge, Superior Court for the State of Washington, King County Courthouse, Seattle, WA 98104. Formerly Chief Civil Judge for the Superior Court of the State of Washington in King County, Washington; Elected Member, American Law Institute; Outstanding Judge Award, King County Bar Association (2002); Judge of the Year, Washington State Trial Lawyers Association (2001); Judge of the Year, American Board of Trial Advocates, Seattle Chapter (2000); Vanguard Award winner, Washington Women Lawyers (2000); Yale University, J.D., 1973, M.A. (American History), 1973.

I thank the American Bar Association's Central and East European Law Initiative ("CEELI") for the opportunity to teach constitutional law and the rule of law to judges, lawyers and law students of the newly independent republics of Kazakhstan and Kyrgyzstan in the fall of 1995, during which time I began to develop the metaphor for judging I have used in this essay. I am grateful to the Commonwealth Lawyers Association for their invitation to discuss the accountability of democratically elected judges in a workshop for Commonwealth judges held in Kuala Lumpur, Malaysia, in the spring of 2002. Thanks are also due to the members of the Ninth Circuit Committee on Public Information and Community Outreach and the State-Federal Judicial Council for the State of Washington for the opportunity they provided in the fall of 2002 to present views of elected state judges on the case of *Republican Party of Minnesota v. White*. For helpful comments on prior drafts of this essay, I am indebted to Judge William Downing; Leonard Schroeter, Esq.; Hugh Spitzer, Esq.; Justice Robert Utter (ret.); and Judge Hiller Zobel (ret.). I thank Rita Kaiser of the King County Law Library, and Claire Gilchrist, Esq., my law clerk bailiff, for research support. I have written this piece in keeping with Canon 4 of the Code of Judicial Conduct in the State of Washington, which permits judges to "speak, write, lecture, teach, and participate in other activities concerning the law, the legal system and the administration of justice" so long as the judges do not, in so doing, "cast doubt on their capacity to decide impartially any issue that may come before them." The ideas expressed in this essay are solely those of this author, and are not presented on behalf of any of the entities, organizations or individuals identified above.

I. Introduction

Judging, properly performed, resembles pornography.

This point is serious.

Good judging *is* like pornography: It's hard to define, and most people believe they know it when they see it.

The Supreme Court in *Republican Party of Minnesota v. White* was recently presented with the opportunity to define judging when it agreed to rule on the constitutionality of ethical restraints placed by many states on the speech of candidates for judicial office.[1]

One would think that when addressing states' attempts to promote

1. 536 U.S. 765 (2002).

ethical conduct appropriate to the judiciary's assigned role in a democracy, the Supreme Court would indeed have proceeded to define that role. The Court did not do so.

Although it might seem surprising, the Court's failure is in fact quite understandable. The difficulty of defining a judge's role does not differ significantly from the trouble each of us faces as a legal professional when defining what we mean by "fair" or what we mean when employing such critical but elusive concepts as "proof beyond a reasonable doubt." The onerous nature of this task calls to mind Justice Stewart's famed comments on his inability to arrive at a definition for obscenity.[2]

Yet when we fail to define difficult or elusive concepts, human nature leads us to fall back on making assumptions that tend to support our personal predilections. In the absence of a definition of a judge's *role* in *White*, the Court majority's attention to the judge's method of *selection* became the key to its decision. The Court in effect assumed that the method of *selection* of a judge alters his or her *function*; that elections transform the judge into a politician.

Treating elected judges as politicians permitted the Court to assign lesser weight to judicial ethics than to a judicial candidate's personal right of free speech when weighing both on the scales of justice. This led to a near-absolute rule of free speech for judicial candidates. The Court then used this rule to strike down various states' ethical restraints which had, up to that date, prevented judicial candidates from announcing their personal beliefs on disputed political and legal issues in the course of campaigns for judicial office.

Free speech is generally a good thing, as is the right of the public to know what a politician thinks. Nonetheless, the Court's ruling causes this writer great concern about where we are going with judicial "free speech."

Why? I am one of those elected state court judges *White* addresses. I have been through four election cycles as a trial judge. But contrary to what one might expect, my concerns about *White* are not about keeping my job. I have had far greater threats to my personal judicial tenure than are posed by *White*, one of which I will explain in more detail below.

No, it is not my job I am worried about. The people of my state do not owe me a job. And if I am unable to convince them to vote for me, I do not

2. Justice Stewart described his problem as:

> trying to define what is indefinable. I have reached the conclusion . . . that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . . .

Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (citations omitted).

deserve to keep it.

My concern is what *White* threatens to do to the entire concept of the judiciary's role in a democracy. Because of its failure to analyze the judicial role in any considered fashion, the Court's decision in *White* is likely to have serious and as yet largely unappreciated impacts. I am an ardent believer in the rule of law. But I do not want to be governed by the law of unintended consequences.

In order to explain why I am so worried about the impact of *White* on the institution of judging, I must make several fundamental points.

First, this article will explain in functional terms what a judge does in a democracy. I will do that by reference to a metaphor I have found useful in the past when describing our judiciary to legal professionals and non-professionals alike.

Second, I want to look at certain fundamental truths of our democracy, truths that all of us accept and that apply with particular force to the judiciary. Our democracy is not perfect, but over the years it has worked well. It is because of a certain irreducible tension, one that can never fully be resolved, that it has been flexible enough to deal with many threats to its health over the past two centuries. Unless we acknowledge this tension, unless we address it in our democratic institutions, we are likely to do great damage to our polity.

Third, after we have completed those preliminary matters, we will have the tools necessary to return to *White* for a closer look and address what I believe are significant errors of analysis. I will also address what I believe are practical problems that the Court's ruling could cause.

Fourth, I will propose a model for addressing the matter of judges and speech in order to help develop an alternative to the analysis currently employed by the Court. I will also explore how such a model would work in the face of pressures placed on elected judges.

Finally, although I would prefer to see the Court reconsider and even reverse its decision in *White*, I will propose a manner in which the Court can address future judicial speech cases that is consistent with its current holding, but would not permit the further erosion of the canons of judicial ethics.

Let us begin with the metaphor.

II. A Model for Judging

In the past thirty years, first as a trial attorney and then as a judge, I have spent a great deal of time working with the American Bar Association and other organizations to promote the concept of the rule of law and to

assist legal reform movements outside the United States. These projects have brought me into contact with legal professionals and others from republics in the former Soviet Union, as well as from countries in Africa, Asia, the Middle East and Central America.

In all of these settings, the idea that a judiciary can be independent, neutral and not corrupt is often viewed with astonishment and not a little disbelief. I have regularly been called upon to describe America's democratic concept of judges and to explain why it seems to work.

The first task is to convince foreign listeners that our judges are not placed in office simply to enforce political directives of higher elected officials or of other powers. Many of them also struggle with the concept that a judge in the United States is to be neither inquisitor nor advocate, a role often familiar to them, but instead to act as a neutral arbiter.

I generally start with one particular metaphor. I have found that this metaphor moves foreign observers away from their own assumptions and preconceptions, and I believe it can similarly untether each of us from our own strongly held philosophical preferences and prejudices. This is critical when dealing with topics as central to an American's self-image as the concepts of "free speech" and "the right to know."

What is the picture I use? It is in fact a rather pedestrian image. I liken the traditional role of an American judge to the role of a referee on the athletic field. Most commonly, I speak of a referee in the game of soccer, a game known to most of the world as football, but the metaphor works equally well for virtually any sport.

Let us explore the referee metaphor.

A. The Basic Metaphor

Whatever the sport, when we think of a good referee, we think of one who calls a close game, keeps all players under control, avoids fouls and unnecessary roughness, and does not favor either team. Virtually everybody from any culture and any political system would agree not only that this is what makes a good referee, but also that this is necessary for the fair conduct of any sport.

The referee metaphor posits a person who in the truest sense is in control of all that happens but nonetheless does not prepare, coach, strategize for or lead any of the teams or players. This neutral but controlling role in sports closely parallels that played by the judge in the American adversarial system.

Now let me go deeper into this metaphor, so we can see how it might apply to the issue of free speech for judges.

Ponder for a moment who would want to be a referee or an umpire. These are people who most likely love the sport over which they have

chosen to officiate. Do these individuals have opinions about the players? About their skill? About who plays a bit rough? About who tries to get away with rule violations? About which team deserves to win a national or international championship? Don't such people have teams whose style of play they admire over others?

Of course they do.

Referees are not blank slates. They have passions. They have preferences. They have frustrations. There are probably even some players or coaches who annoy them and whom they would like to see lose.

Nonetheless, while we all experience occasional dissatisfaction with the particular call of an individual official in a big game, by and large we do expect referees and umpires to be neutral and to set aside their personal opinions and preferences when they call a game, big or small. And, by and large, they succeed in being neutral. A sport will not long prosper if neutrality is absent from the refereeing.

Now let us also think about how we deal with referees. We see and hear all sorts of interviews of players, coaches and pundits before big games. Yet we virtually never hear any interview of referees or umpires, except about the most bland of topics. But why shouldn't we ask umpires to explain their concept of a strike zone? Or ask basketball referees how they call (or, more likely, don't call) traveling on Michael Jordan? Or ask soccer referees whether they will overlook a high kick or a little rough play in the final minutes of a championship match? Wouldn't that help us understand what is going on in that key match? Wouldn't that knowledge help us to be sure each referee will be fair?

The present practice does not contemplate such interviews. To fully appreciate the impact of such silence, and how it applies to the judicial context, we need now to revise the metaphor.

B. The Metaphor, Modified

Let us change the scenario in two ways. Suppose first that we could interview referee candidates about their personal likes and dislikes, their most admired players, the teams whose ground play or air game they like best, and any number of other questions. Second, suppose that having conducted these interviews we could then vote on which referees would officiate in our community for a season or a series or some other period of time.

Merely interviewing the referee would change our expectations not only for the referee but also for the game itself. How so?

Let's think about it. If we cared enough to vote for referees, and we knew the referee's thoughts and philosophies of the game, would we really have the moral backbone to vote only for the most neutral professional?

Or, to be honest, would we be tempted to vote for the person we thought would call the game or series in a way most beneficial to our home team or to some other team we favor? It would seem to be an obvious aspect of human nature that those who cared enough about sports to vote would at least be tempted to look for somebody who would help their preferred team win.

And could we really claim to be surprised if during such pre-game or pre-series interviews a referee candidate should decide to drop hints about certain preferences most likely to win that candidate the votes of the team with the largest following? And would voters not feel betrayed if this referee later did not carry through at the big game on what he or she had represented to be a personal preference, even if the candidate had studiously avoided any pledge and avoided naming specific preferred or disfavored teams?

Interviewing and electing referees would be a structural change in the sports world. It would alter the entire game. No longer would voting sports fans focus on common rules, common standards, applied without bias or prejudice. Everything would be about winning. When at the end of the campaign period but before the start of the competition somebody else's preferred referee should happen to be elected, the unsuccessful voters would lose faith that the ensuing game or games would be fair. We would no longer be in a competition where we expected all to have an equal chance when the game was being played.

While it might seem that this is an argument against voting for referees or judges, it is not. All these negative and unintended consequences could easily flow merely from interviewing referees, whether or not we continued to elect them.

How so? Let us modify the metaphor one more time.

C. The Metaphor, Final Revision

For this final scenario, let's withdraw one of the first two changes. Let us continue to assume that we could vote on who would referee the next series of games and championships. Perhaps it is the case that we have organized the league to allow fans to vote in order to prevent some cabal of owners from manipulating the competition by controlling the selection of their own preferred referees. We might even call this league the League of Jacksonian Democrats.

Whatever the reason for allowing the vote, the fact is that in this last scenario, we have the right to vote on referees. However, assume now that we were required to vote *without* being able to interview any referee candidate about any of the foregoing types of detailed and personal philosophical questions. Except for their conduct on the field, candidates

are, essentially, silent.

In this situation, where there is an absence of referee interviews, we would have little choice but to vote on incomplete and imperfect information. The best we could do would be to vote for the person who has the best reputation for fairness, for calling a close game without favoring either side. Or, if he or she is a new candidate for the post of referee, we would look for the person who has the best reputation for even-handedness in the sport's respective farm leagues. We would have no other way to vote even semi-intelligently.

It seems odd to argue that having imperfect information about a class of candidates is a good thing, but I believe that very proposition to be true, counter-intuitive though it may be.

When our information is imperfect, when our information is limited, all we can do is vote on the candidate's record, his or her professional reputation as an existing referee or judge or in the respective "farm leagues" as a referee-in-training or as a professor or a trial attorney. When we vote, our decision will be restricted to those factors that seem to show that a person will or will not be honest and ethical, will or will not act as a neutral controller of the field or as an officer of the court, a professional, a fair representative or arbiter, regardless of his or her personal opinions.

The less we know about a candidate's private words or thoughts, the more we have to rely on that which is observable: the candidate's actual past behavior, which is in turn the only reliable indicator of the essential judicial attributes of fair and impartial conduct.

III. American Democratic Traditions and a Definition for the Judiciary

Not only must we establish a model for neutral and impartial judging in order to be able to appreciate the implications of the *White* decision, but we also must examine the American philosophical and historical heritage.

A. American Political Heritage: Two Fundamental Philosophical Tenets

Americans high and low have long professed to hold two ideals for all of our elected officials. We hold these beliefs no matter how ordinary or how abstruse our philosophy or form of expression may be.

The first ideal is found in the mantra that Americans have "a government of the people, by the people, and for the people."[3]

3. I want to acknowledge New York University Law School Professor William E. Nelson's inspired use of these familiar phrases in his article, Marbury v. Madison *and the Establishment of*

The second is that we have "a government of laws, not of men."[4]

The first is an expression of the popular democratic ideal.

The second is an expression of the constitutional democratic ideal.

The first concept reflects the will of majority and embraces majority rule.

The second operates in favor of the minority on any given issue. It allows dissenters to breathe freely, without which protection there is no true democracy.

Both of these ideals exist in the judiciary just as they do elsewhere in our government.[5] Because these two democratic ideals are in constant tension and because this tension is never fully resolved,[6] American democracy has a flexibility that allows it to work.

B. American Courts Embody Both Ideals

All levels of our state and federal judiciary reflect these two ideals.

At the trial court level, each is readily apparent in both the federal and the state judiciaries. Judges not only give voice to the law as established by their respective appellate and supreme courts, but also facilitate the jury's democratic role of determining the community's answers to many difficult questions raised in civil and criminal cases.

Moving up the judicial hierarchy to the intermediate and the final courts of appeal, some contrasts begin to appear between federal and state court systems. These arise not from varying core philosophies, but from the slightly differing structure of the two judiciaries. The principal structural difference is tenure. Federal judges have life tenure.[7] Some state judges also have life tenure, but most are elected.[8] Elected state judges

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Judicial Autonomy, 27 J. SUP. CT. HIST, (3) 240 (2002). In that piece, he used precisely these two oft-repeated sayings to help illustrate that the contributions of Justice Marshall to our legal system can be found not only in the commonly recognized role played by *Marbury v. Madison* in establishing the principle of judicial review, but also in the dynamic balance his analysis achieved between these two perennially competing aspects of our constitutional democracy. *Id.*

4. *Id.*

5. *Id.*

6. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA 139-140 (1990) ("The freedom of the majority to govern and the freedom of the individual not to be governed remain forever in tension. The resolution of the dilemma must be achieved anew in every case and is therefore a never ending search for the correct balance.").

7. *See e.g.* U.S. CONST. art. III, § 1, cl. 2 (tenure for Supreme Court justices); 28 U.S.C. § 44 (West 2002) (tenure for appellate justices); 28 U.S.C. § 134 (tenure for district court judges).

8. For more on the selection and terms of state judges, refer to STATE COURT ORGANIZATION 1998 (Office of Justice Programs, U.S. Department of Justice, 1998), 21-25 tbl.4 (*Selection of Appellate Court Judges*), 26-29 tbl. 5 (*Terms of Appellate Court Judges*), 34-49 tbl.7 (*Selection and Terms of Trial Court Judges*).

generally have terms of six to eight years, though some, as in my state of Washington, have terms of only four.[9]

Those who have life tenure are more immune to the whims of the current majority and are better able to interpret and apply the Constitution without fear of being removed from office. Their personal job security contributes to the stability of our constitutional democracy.

In a very real sense, the federal judiciary is able to express the concept of a "government of laws, not of men" more easily than can the state judiciary. Historically, the federal judiciary has been more able to protect the philosophical foundation of our democracy, that people are free to think and do what they wish, and assure that unpopular beliefs are not stifled. In short, to fulfill Madisonian counter-majoritarian theories.[10]

It is rather obvious that elected state judges face real world pressures very different from those placed on the federal judiciary. We who are subject to election and reelection know that we can be voted out if we disappoint either the majority of the electorate or a particularly active or vocal interest group.

As an elected trial judge, it discomfits me merely to have the thought cross my mind that I could lose my job if I rule in a certain fashion on some case that comes before me. I believe I am usually successful in pushing that thought out of my mind and proceeding to rule simply on the merits of a given case. But the fact is that such thoughts naturally intrude on my consciousness and on that of all elected judges.

Even if all we elected judges do in response to such thoughts is to temper the form of our ruling to make it appear more palatable to the public, we have been affected by the public mood.

Thus, an elected state judiciary is structurally forced to function more in keeping with the concept of a "government of the people, by the people and for the people" than the federal bench. The state judiciary is necessarily more attentive to the citizenry, particularly when ruling contrary to the current majority's sentiments.

These two judiciaries, state and federal, fulfill complementary functions in our democracy, although each ostensibly bears equal allegiance to the two somewhat conflicting democratic ideals. We citizens of the United States have, first, the relative stability of the federal judiciary. We have, second, the inherently more "responsive" state judiciary.

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9. *Id.*

10. For an excellent summary of Madison's ideas at the time the Constitution was drafted, see JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION ch. 3 (1996). In this chapter, entitled *The Madisonian Moment*, Professor Rakove explores Madison's goal of avoiding tyranny of the majority. *Id.* at 45-52.

This structure was not the result of some single overarching theory seeking to reconcile these two concepts, but rather the end result of competing theories and differing conditions at the time the Constitution was drafted and the various dates on which additional states entered the union.[11]

As a judge who has to stand for election every four years, and who as a personal matter would of course prefer to have lifetime tenure, I am nonetheless firmly convinced that American democracy would not long tolerate having both the state and the federal judiciary, the entire third branch of our government, tenured for life. Particularly in states like Washington, with strong populist traditions, having what could be perceived to be a permanent and unelected "elite" resolve all the difficult legal and political questions of our society would simply be unacceptable.

As unplanned as this agglomeration of judicial entities may be, the two benches' slightly inconsistent and conflicting natures actually permit them to function in a complementary fashion which lends to the health of the American democracy by giving full voice to each of our competing fundamental theories.

C. American History: Elements of the Founders' Understanding of Judging

In order to understand what it is that judges are expected to do in our American democracy, and to determine whether there are indeed any differences in the core functions of state and federal judiciaries, we should examine the plans that were made for our judiciary at the time of the founding of our country.

When our Founding Fathers and the citizenry were contemplating the Constitution's adoption, Alexander Hamilton wrote at length about the courts. In the Federalist Papers, he described the Founders' desire for an independent and learned judiciary:

> To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them.[12]

11. *See* note 17 *infra* and accompanying text concerning the many different styles of state judiciaries.

12. THE FEDERALIST NO. 78, at 399 (Alexander Hamilton) (Bantam Classics, 1982).

Hamilton was describing a system that would be based on the study of and reliance on precedent, and that would establish its foundation on an independent body of law, rather than on the preferences of the individual judicial officer or the authority that put him in office.

Hamilton did not posit this learned role only for federal courts and eschew it for the state courts. He did not express an opinion that state courts should simply implement majority opinion or otherwise serve a role different from that of the federal courts. Instead, he reaffirmed that the plan for the new union was for *all* the courts to be centered on the Constitution and not to be overcome by the laws or other directives of the current majority:

> I admit however, that the constitution ought to be the standard of construction for the laws, and that wherever there is an evident opposition, the laws ought to give place to the constitution. But this doctrine is not deducible from any circumstance peculiar to the plan of the convention; but from the general theory of a limited constitution; and as far as it is true, *it is equally applicable to most, if not all the state governments.*[13]

As expressed by Hamilton in The Federalist Papers, the "original intent" of the Framers did not contemplate a state judiciary whose function was altered solely by virtue of the fact that it was not a federal court.

Hamilton also explored the question of whether any of the matters over which the Constitution's Article III federal courts had jurisdiction could also be addressed in state courts. He argued in the Federalist Papers for concurrent jurisdiction of state and federal courts: "I hold that the states will have concurrent jurisdiction with the subordinate federal judicatories, in many cases of federal cognizance . . . ."[14]

He explained that his conclusions about concurrent jurisdiction had arisen from the nature of judicial power itself, from something that is peculiar to the third branch, the judicial branch, of our democratic government:

> This I infer from the nature of judiciary power, and from the general genius of the system. The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction though the causes of dispute are relative to the laws of

13. *Id.*, NO. 81, at 409 (Alexander Hamilton) (emphasis added).

14. *Id.* at 416 n.1.

> the most distant part of the globe. Those of Japan not less than of New-York may furnish the objects of legal discussion to our courts. When in addition to this, we consider the state governments and the national governments as they truly are, in the light of kindred systems and as parts of ONE WHOLE, the inference seems to be conclusive that the state courts would have a concurrent jurisdiction in all cases arising under the laws of the union, where it was not expressly prohibited.[15]

All our courts were to search for and be guided by law. Hamilton did not treat state and federal courts as being different in this purpose or charge. He continued:

> Agreeably to the remark already made, the national and state systems are to be regarded as ONE WHOLE. The courts of the latter will of course be natural auxiliaries to the execution of the laws of the union, and an appeal from them will as naturally lie to that tribunal, which is destined to unite and assimilate the principles of national justice and the rules of national decisions.[16]

If the Founders anticipated that our actions as state judges would be more in the nature of following a plebiscite than of ascertaining a neutral and impartial application of law, then it is unlikely that we would have been given concurrent jurisdiction over questions of national constitutional law. Instead, Hamilton would likely have limned the differing nature of their inquiries. If there is to be concurrent jurisdiction, the conclusion must be that the state and federal judiciaries would be performing essentially the same judicial function.[17]

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15. THE FEDERALIST NO. 82, at 419 (Alexander Hamilton) (emphasis in original).

16. *Id.* at 419-20 (emphasis in original).

17. There were both elected and appointed state judges at the time the Constitution was adopted, although the early number of elected judges was small. As the majority notes in *Republican Party of Minn. v. White*, 536 U.S. 765, 785 (2002), only Vermont elected any of its judges at the time the union was first formed. It was followed by Georgia, which began to elect judges in 1812. By the time Jacksonian democracy had passed and the Civil War had begun, a great majority of the states elected their judges. What is important for this issue is that neither at the founding, nor at any time in those early decades, was the constitutional grant of concurrent jurisdiction either withdrawn from elected state judges or otherwise limited to appointed state judges. The reasons for the increasing popularity of electing judges are varied and not entirely clear. For an excellent and detailed discussion of the differing and less than consistent rationales employed as states chose to elect their judges, see Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 714-25 (1995), particularly nn. 82, 84 & 86. Even if it could be argued that the movement toward elected courts was motivated by the desire of Jacksonian citizens to wrest control of the court from what they may have perceived to be control by the railroads or other moneyed interests, *see, e.g.*, LOUIS BOUDIN, GOVERNMENT BY JUDICIARY Ch. XIII (Russell & Russell 1968) (1931), a desire to keep judges

The Constitution seems to reflect a similar assumption. Article VI of the Constitution provides that the Constitution and all laws made thereunder are the "supreme law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Law of any State to the Contrary notwithstanding."[18]

This conclusion that federal and state judicial rulings are to be governed by the same standards of law – and that subservience to popularly expressed will is not the standard of decision even for state courts – is further reinforced by reference to Section 25 of the 1789 Judiciary Act.[19] In Section 25, Congress provided that state court rulings on federal constitutional and statutory law would be subject to review by the Supreme Court.[20] State courts were then and are now constitutionally bound to follow the same law and employ the same analytical principles as the federal courts, on pain of being reversed by them.

D. The Definitional Problem

Even though in the preceding portions of the Federalist Papers Hamilton had addressed various judicial duties of the third branch of the new government, Hamilton himself did not define the judge's role in a formal and comprehensive fashion. Instead, he selected certain attributes of judging to address in his writings and appears simply to have assumed that state and federal judges would perform largely the same functions. Constitution drafters of this era did not include details as to how courts would operate, on the apparent assumption that the customary practices were satisfactory.[21]

It is clearly difficult to arrive at a precise and complete definition of the judicial role. James Madison directly referenced this difficulty when, also writing in the Federalist Papers, he discussed the problem of how to achieve a separation of powers in the yet-to-be-formed federal government:

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or referees from being manipulated by what some then believed to be moneyed cabals is logically not the same as a desire to do away with impartial judging.

18. U.S. CONST. art. VI, § 1, cl. 2.

19. 1 Stat. 85 (1789).

20. See the general discussion of the significance of concurrent jurisdiction and the significance of Chapter 25 of the 1789 Judiciary Act in CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM 119-123 (1997). Professor Black notes that it was not until 1875 that Congress expanded the general jurisdiction of federal courts to include cases arising under the nation's Constitution and laws. For nearly a century, that duty had been left to the state courts. *Id.* Professor Black is not alone in his recognition of the significance of this point. *See, e.g.* Robert Utter, *Swimming in the Jaws of the Crocodile*, 63 TEX. L. REV. 1025, 1041 n.107 (1985).

21. STEWART JAY, MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES 65 (1997).

> Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces – the legislative, executive, and judiciary; or even the privileges and powers of the different legislative branches. Questions daily occur in the course of practice, which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science.[22]

The difficulty of defining what it is that a fair judge should do is not a problem unique to the Founding Fathers of our country. Judge Richard A. Posner traced the problem back to even earlier times when he wrote:

> [F]or more than two millennia, the field of jurisprudence has been fought over by two distinct though variegated groups. One contends that law is more than politics and in the hands of skillful judges yields - at least at certain times, in stable conditions - correct answers to even the most difficult legal questions. The other contends that law is politics through and through and that judges exercise broad discretionary authority.[23]

Alexander Hamilton had recognized this distinction between "law" as the realm of judgment and "politics" as the realm of will or personal preference.[24] In all his writings, he contemplated that both state and federal judges would work in a manner closer to the law and farther from politics, the latter being the domain of the remaining two branches of our government.

When courts fail to be clear about their charge and do not carefully observe this distinction between politics and law, they may lose their way. Judge Posner noted, when criticizing what he apparently believed was the inadequacy of Professor Ronald Dworkin's ostensibly flexible theories of jurisprudential interpretation:

> The irony of Dworkin's project is that the more broadly law is defined, the less rather than the more secure the 'rule of law' becomes. Law loses distinctness - merging first with morals, and then, when it is recognized that society is morally diverse, with politics and hence no-law. If law includes a broad swatch of political principles, then judges can do politics and say with a good conscience that they are doing law. 'Right' and 'wrong' become

22. THE FEDERALIST, NO. 37, at 179 (James Madison) (Bantam Classics, 1982). For an excellent discussion of the Founders' deliberations upon separation of powers and related topics, see RAKOVE, *supra* note 10, at 53, 157.

23. RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 24-25 (1990).

24. THE FEDERALIST, No. 78, at 392-99 (Alexander Hamilton) (Bantam Classics, 1982).

> epithets bestowed on the legal analyst's political friends and enemies.[25]

With all due respect, I would suggest that the Court's ruling in *White* is a result of our society's continuing failure to deal adequately with the difference between the law and politics.

It is time now that we turn to the Supreme Court's opinion in *White*.

IV. The Supreme Court in *White* Fails to Acknowledge the Unique Nature of the Judicial Role

The case of *Republican Party of Minnesota v. White* addressed a judicial candidate's challenge to certain portions of the Code of Judicial Conduct adopted by the Supreme Court of the State of Minnesota.[26] That Code governed the conduct of judges and judicial candidates alike. When a person chose to run for a judicial office, Canon 5(A)(3)(d)(i) required that the candidate not "announce his or her views on disputed legal or political issues."[27]

A. The Supreme Court's Central Assumption

The Court's opinion in *White* is straightforward. The Court opened by framing the question to be decided as follows: "[W]hether the First Amendment permits the Minnesota Supreme Court to prohibit candidates for judicial election in that State from announcing their views on disputed legal and political issues."[28]

The Court in Section I of its analysis recited that Minnesota elects its judges and summarized the principal petitioner's complaint about the manner in which his speech had been restricted when he ran for a seat on the Supreme Court of Minnesota.[29] He had withdrawn from the campaign because of these restrictions.

In Section II, the Court identified the particular Canon in the Minnesota Code of Judicial Conduct the petitioner was challenging, Canon 5(A)(3)(d)(i), and analyzed how it was applied.[30]

Section III formed the heart of its ruling. The Court commenced its analysis by stating that the case involved "speech about the qualifications

25. POSNER, *supra* note 23, at 22-23.

26. 536 U.S. 765 (2002).

27. MINN. CODE OF JUDICIAL CONDUCT, Canon 5(A)(3)(d)(i) (2002).

28. 536 U.S. at 768.

29. *Id.* at 768-70.

30. *Id.* at 770-74.

of candidates for public office."[31] Thus, from its very framing of the question, the Court viewed the case first and foremost as one involving First Amendment speech and a generically identified "public office."

The Court did not pose the question as one raising any fundamental issues of the nature of judging or of the separation of powers, of checks and balances, of constitutional concerns arising from Article III or Article VI, or of the manner in which concurrent jurisdiction was granted to state courts shortly after the Constitution was adopted.

Nor did the Court in Section III engage in a significant debate *whether* traditional political speech rules apply to judicial elections. The majority appears to have considered the electoral process to be always political, regardless of the office involved.[32] The Court dismissed Justice Ginsburg's argument in dissent that the judicial branch should be treated differently from the other two branches of our government.[33] In order to reject her position, the majority put forth the proposition that because state judges

31. *Id.* at 773.

32. The majority did not explicitly so hold. In fact, the majority even denied that it was treating judicial and legislative elections similarly: "[W]e neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office." *Id.* at 782. This denial does not square with a logical inference that may reasonably be drawn from the sentence immediately following that denial. In that next sentence the Court used the following language to offer an alternative rationale for its ruling: "*[E]ven if* the First Amendment allows greater regulation of judicial election campaigns than legislative election campaigns, the announce clause still fails strict scrutiny . . . ." *Id.* (emphasis in original). The expression of this rationale as an alternative (i.e., 'even if judicial campaigns were different, the ethical rules *still* fail. . .') could fairly be read to imply that the Court had to that point in its analysis been addressing legislative and judicial elections under the same standards and had not yet found a reason to treat them differently. In any event, in explaining the reasoning behind its rationale, the Court committed what I suggest is clear error. The Court stated that it would violate Equal Protection to restrict candidate speech because sitting judges may speak freely on legal topics, citing Minnesota's Code of Judicial Conduct Canon 4(B). *Id.* at 779, 782. What the Court overlooked is that sitting judges are *not* free to speak, even under Canon 4.

In Minnesota, Canon 4 expressly limits the speech of sitting judges in the same manner as Canon 5. Minnesota's Canon 4(A), entitled "Extra-judicial Activities in General," states in pertinent part: "*A judge shall conduct all extra-judicial activities so that they do not*: (1) *cast reasonable doubt on the judge's capacity to act impartially as a judge*; (2) demean the judicial office; (3) interfere with the proper performance of judicial duties." MINN. CODE OF JUDICIAL CONDUCT, Canon 4(A) (2000) (emphasis added). Canon 4(B), entitled "Advocational Activities," states in pertinent part: "*A judge may write, lecture, teach, speak and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice . . . subject to the requirements of this code.*" MINN. CODE OF JUDICIAL CONDUCT, Canon 4(B) (emphasis added).

Because Minnesota places parallel limitations on candidates' and judges' speech, there could not be an Equal Protection violation. Thus, because the majority's Equal Protection argument is factually misplaced, the Court's ruling can logically remain founded only upon its initial apparent assumption that legislative and judicial campaigns present the same issues when it comes to speech.

33. *White*, 536 U.S. at 783.

have the power to make common law in our democracy and the power to interpret and thereby to shape state constitutions, they simply could not be separated from the "enterprise of 'representative government.'"[34]

I would suggest that the nature of such a connection to the "enterprise of 'representative government'" cannot be sufficient to explain the Court's ultimate holding. If it is indeed the judicial power to make common law in a democracy that renders judges inseparable from the enterprise of representative government and that thereby gives rise to a public right to know and a corresponding judicial right to speak, that principle applies with at least equal force, and probably more force, to the federal judiciary, particularly to the United States Supreme Court itself. The members of the Supreme Court had not prior to the date of that ruling considered their power to make federal constitutional and common law, standing alone, as a factor that required candidates for the federal bench to eschew impartiality and to speak openly during confirmation hearings.

As Justice Ginsburg noted in her dissent, all members of the Court had been reticent to make substantive statements in their confirmation hearings.[35] Justice Ginsburg quoted the following statement made by Justice Scalia at his confirmation hearing when he refused to disclose whether he would be likely to overrule a certain precedent:

> Let us assume that I have people arguing before me to do it or not to do it. I think it is quite a thing to be arguing to somebody who you know has made a representation in the course of his confirmation hearings, and that is, by way of condition to his being confirmed, that he will do this or do that. I think I would be in a very bad position to adjudicate the case without being accused of having a less than impartial view of the matter.[36]

I do not cite these statements of Justice Scalia to criticize him. In my opinion, he was correct. Despite his awareness of the power of Supreme Court Justices to make federal constitutional and common law for the entire nation, he found it to be his duty not to engage in substantive discussion with the democratic representatives who would vote on his candidacy, but to attempt to remain impartial. His reticence was proper. I submit that there is no reason to apply different ethical standards to those of us who are subject to direct election.

It is not realistic to conclude that the power to make common or

34. *Id.* at 784.

35. *Id.* at 807 n.1 (Ginsburg, J., dissenting).

36. *Id.* at 818 n.4.

constitutional law could have been the central motivation for the majority's holding. Instead, the majority's continuing references to the fact of elections appear to reflect that the Court's analysis actually turned on the method of a judge's selection rather than on some judicial function peculiar to state judiciaries. Justice O'Connor put the point explicitly in her concurrence: "If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges."[37]

The majority echoed this point in its penultimate paragraph: "There is an obvious tension between the article of Minnesota's popularly approved Constitution which provides that judges shall be elected, and the Minnesota Supreme Court's announce clause which places most subjects of interest to the voters off limits."[38]

The simple fact is that the Court as a whole, both the majority and the dissenters, never adopted and apparently never attempted a common definition of the judicial charge. Each side took a single aspect of the democratic judge's charge, the majority focusing on the democratic aspect flowing from the holding of public elections and the dissenters on our accepted duty as judges to follow the law.[39] In the absence of a common definition, both sides then fell back on their own predilections.

Both sides were right, of course, at least in part. Both sides had a piece of the puzzle. And for that very same reason, both sides ended up being wrong. Neither the majority nor the dissenters fully acknowledged the dual and permanently conflicting nature of the mandate given to the judiciary in our democracy.

Having structured the issue as one involving political speech, the majority needed only to determine whether the State of Minnesota's Canon could pass the strict scrutiny test traditionally applied to attempted limitations on political speech. This required the Court to answer one simple question: was the Minnesota Canon of Judicial Conduct, which had been designed to promote impartiality, sufficiently narrowly tailored to pass constitutional muster?[40]

The Court decreed that "clarity" in the meaning of the word

37. *Id.* at 792.

38. *Id.* at 787.

39. The holding of elections should not be sufficient to differentiate state judges from federal, inasmuch as federal judges are also openly chosen by a democratic process. Their nominations are voted on by those of our elected representatives who sit in the United States Senate.

40. *White*, 536 U.S. at 774.

"impartiality" was necessary for the state to be able to meet that standard.[41] As a matter of simple logic, as we have already noted, even defining what is "fair" to any degree of precision is probably an impossible task. That is also the case for the nearly synonymous word "impartial," which the Court promptly demonstrated in its discussion of the multiple, necessarily broad and even fluid meanings of that word.[42]

As a result, striking down the challenged canon in favor of the First Amendment became virtually unavoidable.

B. Two Key Factors Developed in the Court's Analysis

The foundation of the Court's majority opinion was its characterization of elected judges as inherently political actors. The Court built on that foundation by working with two additional and very basic propositions.

The first proposition the Court developed was that judges personally have a First Amendment right to speak in judicial campaigns, an idea that naturally flowed from its decision not to differentiate judicial campaigns from political campaigns for the legislative and executive branches.[43]

The second proposition was that the public has a right to know what judicial candidates think about controversial policy issues and disputed propositions of law,[44] which also flows from the Court's characterization of elected judges as primarily political actors.

On the surface both of these propositions might seem unexceptionable.

I am firmly convinced that both are wrong, even if we were to agree that judicial campaigns are necessarily to be treated as political campaigns.

I will deal with each proposition in turn.

C. The First Proposition: Free Speech

In the State of Washington, the constitution provides a basic description of a judge's sworn duties when, at Article IV, Section 28, it requires each judge to swear an oath:

> Every judge of the supreme court, and every judge of a superior court shall, before entering upon the duties of his office, take and subscribe an oath that he will support the Constitution of the United States and the Constitution of the State of Washington, and will

41. *Id.* at 775.

42. *Id.* at 775-77.

43. *Id.* at 781-82.

44. *Id.* at 788.

> faithfully and impartially discharge the duties of judge to the best of his ability, which oath shall be filed in the office of the secretary of state.[45]

No such requirement is so explicitly placed by our state constitution on the state's executive or legislative officers.

We judges in the State of Washington are sworn not only to uphold the constitution, but also to deliver justice in a faithful and impartial manner.

What does that mean?

We are sworn, not to deliver on our own personal opinions, but to enforce the constitutions of the nation and of our State.

We are sworn, not to implement the will of the majority, but to act impartially.

These two portions of our oath mesh perfectly with Hamilton's description of state and federal courts and with Article VI of the United States Constitution. It bears noting that we Washington judges are required to swear this oath even though Washington entered the Union a century after Hamilton wrote his words, and even though Washington was and remains a manifestly populist state which holds open elections for all its judicial posts.

Let us consider how a duty to others can affect a personal right of free expression. Two rudimentary examples will suffice. A doctor has no First Amendment or free speech right to share with the public his or her thoughts about a patient's medical conditions, possible treatment regimes and possible prognoses, even if the doctor should happen to be working in a publicly funded clinic. An attorney has no First Amendment or free speech right to share with the public his or her thoughts about the client's attorney-client confidences or about possible holes in the client's defenses, even if the attorney is publicly funded.

Doctor-patient and attorney-client evidentiary privileges arise, and restrictions are placed on each professional, because he or she is in a position of trust.

It is a general rule of every trust relationship that no personal right of the trustee can overcome the trustee's duties to the beneficiaries or to the wards.[46] When a trustee's personal desires or interests conflict with those duties, either the personal matters must be set aside or the trustee must

45. WASH. CONST. art. IV, § 28.

46. Trustees have "a duty to exercise their powers in good faith and without concern for their own personal interests or for those of third parties. See Bogert, *Trusts and Trustees,* Sec, 543 (2d Ed. 1978)." MCA v. United States, 685 F.2d 1099, 1103 (9th Cir. 1982).

resign.[47]

We judges take an oath. We have assumed certain obligations. We are indeed trustees. Thus, when it comes to the question of how judges should talk, act and otherwise behave, it is contrary to long-accepted law to say that a *personal* right, even an otherwise unrestricted constitutional right, can overcome our duties as trustees.

Our sworn duty to deliver justice impartially to all is a *public trust* we undertake, as to which our personal interests must rank second.

That basic principle should not be in doubt.

The more justifiable argument in support of the holding in *White* is that of the public's right to know. That, after all, is what the Supreme Court's analysis was logically based on – the right of the people to know about political candidates in the course of a democratic election. Let us examine that proposition next.

D. The Second Proposition: the Public's Right to Know

There are certain fundamental problems in the majority's analysis in *White* of a public right to know.

i. What is it that the Public has a Right to Know?

Every judge I know has said at one point or another, "I didn't like ruling that way, but I had to. It was what the law required." We all know there is something other than our own personal opinions. There is a body of law; there are often neutral rules of decision.

The majority in *White* proposed that judicial candidates be free to talk to the public during our campaigns about our opinions on disputed issues of law so that the voters will have some idea how we are likely to rule. Yet even as it made this declaration the Court discounted the possibility that judges would feel compelled to act in conformity with these same campaign pronouncements. The Court stated:

> The proposition that judges feel significantly greater compulsion, or appear to feel significantly greater compulsion, to maintain consistency with *nonpromissory* statements made during a judicial campaign than with such statements made before or after the campaign is not self-evidently true.[48]

Personally, I believe that most state judges have the integrity not to

47. *See* In re Guardianship of Eisenberg, 719 P.2d 187, 191-92 (Wash. Ct. App. 1986), (citing Tucker v. Brown, 150 P.2d 604, 769 (Wash. 1944) (en banc)).

48. Republican Party of Minn. v. White, 536 U.S. 765, 780 (2002) (emphasis in original).

say one thing and do another. Most of us who are elected as judges believe that it is important that we, of all public officials, be consistent in word and deed and that we embody honesty and consistency.

But let me assume for a moment that the Court is right that we judges will act like stereotypical politicians and that upon election we can and will easily deviate from our campaign pronouncements. If our statements do not bind us and do not show how we will act, why does the public need to hear them? If it is not intended or expected that we adhere to our statements, they will not reveal how we will act. On the other hand, if they are meant to operate in such a way that they will reveal how we are likely to act, we have then either committed or appeared to commit ourselves and have thereby necessarily cast doubt on our impartiality.

I suggest that it is illogical to argue that as long as the judge's "announcement" of a view on a disputed issue is not a contractually binding promise to make or refrain from making a certain ruling, it does not commit a judge to do something once placed in office. The entire rational basis for disclosure is that it will help the public decide how to vote on judicial candidates because it will tell them something relevant about how we will act once we become judges.

I concede that judges are human. Sometimes we do act on personal beliefs. A pure and unalloyed allegiance to the law is something of a fiction, but it is the aspiration, the attempt to find the law that is crucial, however hobbled or imperfect our efforts may sometimes be.

The disclosure contemplated by *White* removes the aspirational goal of allegiance to something higher than oneself.

We should be trying to embody the best of our impulses. That was the original goal of the rules of ethics in Minnesota, in Washington, and in other states, rules which the Supreme Court has now cast into doubt.

While American judges, both state and federal, are indisputably part of a democratic government, none of us is hired to enact into law our personal preferences. Nor are we to impose the evanescent will of the current majority. To the extent that such mandates may exist in a democracy, they are assigned to the legislative and the executive branches and not to us.

ii. What Happens to Elected Courts When the Judge Speaks?

I do not quarrel with the right to know.

The public has a right to know.

I agree wholeheartedly with that proposition. Of course the public has that right. This is a democracy.

That does not dispose of the issue. The question is not just what it is that the public should know, but *how* should the public get to know it? The

way in which the public learns can directly impact that about which it is learning.

The public should investigate and observe the judicial candidates, interview those who have worked with them, interview those who know them and obtain copies of and carefully analyze the nature and quality of their prior professional legal and judicial work product.

It is not information itself or knowledge that is bad. Instead, it is the act of having the judge speak publicly on personal views that is inherently un-judicial. Such speech is a distortion of how a judge is to act when he or she is on the bench.

When the judge or candidate is called upon to give a personal opinion, he or she is not being asked to formally address all opposing or countervailing facts, laws and theories, but to take a position before knowing all the facts. In effect, the judge or candidate is asked not only to give an advisory ruling but also to do so in a vacuum, and in contravention of the fact that, starting shortly after the founding of our country and continuing to the present time, it has been well accepted that it is not proper for judges to give advisory rulings.[49]

When we are called upon to speak off the bench we are not speaking as judges but as individuals. Substantive public oratory on disputed political and legal issues gives the public the wrong impression of who we are, of what a judge is, and of how we are to execute our duties as judges. We are necessarily being made into advocates of our personal views. The essential question for evaluation of federal and state judicial candidates is not what our initial personal thoughts may be, but how we as professionals have in the past dealt with differing or opposing points of view.

When we are acting as judges, we are engaged in a search for law and not just personal or popular will. This search for the law requires that judges engage in the impartial evaluation of alternative propositions. The method of selection should not magnify that which promotes personal or political will alone, and should not focus on that one-sidedness which naturally functions to impede impartiality.

In a phenomenon that would make Heisenberg proud, it is the act of being observed as we utter our personal feelings that alters the person observed. We judges are transformed into not-judges, into that which the Court in *White* seems to tell us we cannot be distinguished from, politicians.

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49. *See* JAY, *supra* note 21, at 2 (explaining in detail how our courts immediately took the position that advisory rulings were not appropriate). Federal courts are restricted to ruling on actual "cases" and "controversies," Flast v. Cohen, 392 U.S. 83, 94 (1968), and may not issue advisory rulings in hypothetical or removed disputes. Warth v. Seldin, 422 U.S. 490, 498 (1975).

The Court in *White* tells us that it is proper to utter whatever we want because it is our personal right to do so, because it doesn't really bind us and because it therefore doesn't matter.

If our words do not matter, they need not be uttered.

If our words do not matter and they are also counterproductive to the judicial role, we should not utter them.

If our words do matter, it is only because they signal or appear to signal our future actions. In that event as well, they should not be uttered because they then detract from our proper impartial role.

If electing judges changes anything, it is not to make judicial speech necessary. On the contrary, it makes judicial speech even more dangerous for the democratic ideal and for the separation of powers. Judicial speech causes the public to expect us to advocate and pursue particular substantive policies. It causes judges to perform as if they were activists.

Can courts be entirely removed from politics? Of course not. But the fact that they cannot be entirely wiped clean does not mean that they should be fully immersed in political combat and partisanship.

Curiously, it is precisely when we wave the flag of democracy in the guise of supporting the public's right to know a judicial candidate's personal thoughts on disputed issues that we actually lose sight of democracy.

When we facilitate the election only of those with popularly approved views, expressed in advance, we also facilitate the imposition of ideological unity or purity on our courts, and we necessarily lose the ideal of the courts as neutral arbiters. The original democratic ideal was to promote the freedom of all citizens to act, believe and speak as they wish, without censorship, and without central control.

It is not truly a democracy if we act so as to enable the will of the majority to wipe out dissenting views. Ideological uniformity, whether at any given moment it happens to be of the left, center, right or libertarian variety, is not healthy for a court. A court whose members all think alike doesn't think.

To be sure, there are a few states whose judiciaries today seem to be infused with partisan politics. The fact that some states have chosen a partisan judiciary does not mean that *all* states choosing to have elections desire to have partisan or political control of the courts and to give up on the idea of a neutral judiciary. Even if it could be argued that citizens in certain states have wanted their judges to be mere instruments of the majority, there seems to be no reason why citizens of other states should be prohibited from choosing to act in a different way, one that is entirely consistent with the goals the Framers expressed for the federal and state judiciaries.

As Justice Scalia has observed elsewhere, selecting among federal judicial candidates based on substantive views they have expressed in advance of confirmation would, by subjecting constitutional standards to the potentially fickle desires of the majority, be likely in the end to destroy the Constitution. More specifically, he stated:

> The American people have been converted to belief in The Living Constitution, a 'morphing' document that means, from age to age, what it ought to mean. And with that conversion has inevitably come the new phenomenon of selecting and confirming federal judges, at all levels, on the basis of their views regarding a whole series of proposals for constitutional evolution. If the courts are free to write the Constitution anew, they will, by God, write it the way the majority wants; the appointment and confirmation process will see to that. This, of course, is the end of the Bill of Rights, whose meaning will be committed to the very body it was meant to protect against: the majority. By trying to make the Constitution do everything that needs doing from age to age, we shall have caused it to do nothing at all.[50]

Let us assume the accuracy of his description of the practical consequences that flow from federal judicial candidates ascertaining, speaking about and then appearing to be ready to act on the public will on constitutional issues. Federal judges are subjected to the selection process only once. Logic seems to dictate that the deleterious impact on the constitutional ideal will be still greater for those state judiciaries that would under *White* be repeatedly subject to campaign statements and electioneering.

The more that judicial candidates speak, whether during Senate confirmation hearings or during elections, the more thoroughly politicized our courts become. We ought to do what we can in our democracy to assure that the selection process, whether by Presidential nomination and Senatorial consent or by the ballot box, not interfere with the essential function of the courts.

It can be done.

It was being done, at least for elected state courts, before *White*. States had been making efforts to impose ethical constraints to prevent judicial candidates from impairing, or seeming to impair, their neutrality and objectivity in the course of their election campaigns.

By announcing this new rule of judicial free speech, the Supreme

50. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 47 (1997).

Court has eliminated prior safeguards and has imposed a standard of behavior that threatens to do great damage to the state court system.

iii. Money, Politics and the Right to Know

After *White* had been argued but before it was decided, I became greatly concerned that if the ethical limitations on speech were removed in the guise of promoting the public right to know, it would unintentionally increase the corrupting force of money in campaigns.[51]

I believed that judicial candidates who announced their views on disputed issues of politics and law, even without making promises and explicit commitments, would naturally become the recipients of donations from interest groups those statements pleased. Any judge who declined to give detailed personal statements on all manner of contested issues would accordingly receive no contributions from those with a particular agenda. Judicial candidates would then increasingly feel compelled to make statements that he or she could argue were not commitments but that voters would view as binding.

Money would naturally assume a progressively more significant role in every state in which judges are elected. In our State of Washington, the impact of money could become very great because our election cycle is not long. For trial judges, it is a mere four years.

I had hoped that the Supreme Court would be aware that the public at large is disgusted with politicians in general for having their hands out, for being beholden to donors and in particular to the moneyed special interests. I believed then and believe today that courts will not escape the same ire and distrust if we too were to begin to walk about with our hands out for money.

The unintentional injection of money into the process is what I had feared. I had hoped to be proved wrong. Unfortunately, there has been a recent ruling that makes me think that my fears were, if anything, understated. In *Weaver v. Bonner*,[52] the Court of Appeals for the Eleventh Circuit addressed Canon 7(B)(2) of Georgia's Code of Judicial Conduct. That Canon prohibits judicial candidates from personally soliciting campaign contributions and from personally soliciting publicly-stated support, yet allows the candidate's election committee to engage in such activities.[53]

The Eleventh Circuit Court of Appeals ruled in *Weaver* that the Canon

51. Robert Alsdorf, *Please Make Me Shut Up*, SEATTLE POST INTELLIGENCER, May 1, 2002, *available at* http://seattlepi.nwsource.com/opinion/68553_judgeop.shtml.

52. 309 F.3d 1312 (11th Cir. 2002).

53. GA CODE OF JUDICIAL CONDUCT, Canon 7(B)(2) (2002).

"fails strict scrutiny because it is not narrowly tailored to serve Georgia's compelling interest in judicial impartiality."[54] Like the majority in *White*, that court found the fact of election to be central to its ruling:

> The impartiality concerns, if any, are created by the State's decision to elect judges publicly. Campaigning for elected office necessarily entails raising campaign funds and seeking endorsements from prominent figures and groups in the community .... The fact that judicial candidates require financial support and public endorsements to run successful campaigns does not suggest that they will be partial if they are elected. Furthermore, even if there is a risk that judges will be tempted to rule a particular way because of contributions or endorsements, this risk is not significantly reduced by allowing the candidate's agent to seek these contributions and endorsements on the candidate's behalf rather than the candidate seeking them himself. Successful candidates will feel beholden to the people who helped them get elected regardless of who did the soliciting of support. Canon 7(B)(2) thus fails strict scrutiny because it completely chills a candidate's speech on these topics while hardly advancing the state's interest in judicial impartiality at all.[55]

The Supreme Court in *White* failed to define the judicial role, and allowed the simple fact of elections to transform us into politicians. The *Weaver* court not only followed suit, it opened the political door still wider and allowed money to have direct access to judicial officers.

Even more recently, a federal district court applied *White* in such a way as to allow New York's state judges to participate fully in partisan politics.[56] In *Spargo v. New York State Commission on Judicial Conduct*, Thomas Spargo, a state court trial judge, had been charged with engaging in a series of partisan actions forbidden under New York's Code of Judicial Conduct. He sought an injunction to halt the disciplinary proceedings that had been commenced on those charges. Although the United States District Court for the Northern District of New York opined early in its ruling that it would not violate constitutional Equal Protection standards to treat judicial candidates differently from candidates for other public office,[57] it failed in the end to make such a differentiation. Echoing *White* and *Weaver*, the court considered the holding of elections to be fatal to broad swaths of existing ethical codes. In granting the requested injunctive

54. *Weaver*, 309 F.3d at 1322.

55. *Id.* at 1322-23 (citations omitted).

56. Spargo v. N.Y. State Comm'n on Judicial Conduct, 244 F. Supp. 2d 72 (N.D. N.Y. 2003).

57. *Id.* at 86.

relief, it ruled:

> [A] rule prohibiting an elected judge or judicial candidate from participating in politics is not narrowly tailored to serve the state's interest in an independent judiciary. This is particularly true in light of the political process by which judges are elected. *See generally* [*White*, 536 U.S. at 788-792] (O'Connor, J., concurring) (criticizing the elective method of selecting judges.)[58]

V. The Day-to-Day Operation of an Alternative Model

The failure to acknowledge that all courts in our democracy must necessarily attend to both elements of this dual mandate has led the Supreme Court, then the Court of Appeals for the Eleventh Circuit, and now the United States District Court for the Northern District of New York to squeeze elected state judges into a single and essentially political role that is inconsistent with the delivery of impartial justice.

White, *Weaver* and *Spargo* treat those of us who are elected as simply one more category of politicians with agendas. All three threaten to move the directly elected judiciary so far toward the "democratic" portion of its mandate as to destroy its independent and equally important constitutional mandate.

If state courts are bound to express and implement the will of the majority, they are not neutral arbiters open to all. I believe that it is therefore essential that we confirm a definition of the judicial role in order to incorporate and preserve our dual charge.

If we can define it, then we can more easily detect those portions of the judicial charge that need protection and further identify those elements of that charge which may indeed constitute a compelling state interest justifying codes of ethics and canons of conduct that might be unacceptable to and inappropriate for other citizens and officials in our democracy.[59]

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58. *Id.* at 89.

59. In two decisions issued on June 10, 2003, New York's own highest court appears not to have accepted *Spargo*'s analysis but instead to be trying to develop a more nuanced description of the judicial role. *See* In Re Raab, __ N.Y.2d __, 2003 WL 21321183, 2003 N.Y. LEXIS 1411 (distinguishing *White* and upholding censure for political activity, holding at * 8-9 that the rights of judicial candidates and voters are not the only interests the state must consider, and that "litigants have a right guaranteed under the Due Process Clause to a fair and impartial magistrate and the State, as the steward of the judicial system, has the obligation to create such a forum and prevent corruption and the appearance of corruption, including political bias or favoritism" (citations omitted)). *See also* In Re Watson, __ N.Y.2d __, 2003 WL 21321435, 2003 N.Y. LEXIS 1415 (further distinguishing *White*, imposing censure for remarks that were not formal promises and holding at *11 that the "pledges and promises clause is significantly different from the announce clause" and withstands strict scrutiny).

On the other hand, if we are unable to define the judicial charge with precision and clarity, perhaps that too will tell us something about the unique nature of judging and why the judicial branch should not be treated as identical to the other two branches, the thoroughly political legislative and executive branches.

Now, assume for a moment that certain segments of our society or the legal profession choose to undertake the task of defining what it is that a judge does. Assume further that whatever the precise wording of this definition, we can ultimately agree that acting as a neutral referee and refusing to speak publicly as the advocate of any single point of view are deemed essential to protect the core of the constitutional judicial charge to be fair and impartial. If such a model were – as I propose – adopted for a judge's behavior, what would it mean for judicial speech? Would it really be bad for democracy, as the majority seems to suggest in *White*?

A. The Substance of Permissible Judicial Speech: A Brief Personal Case Study

I do not argue that judges should always have their mouths firmly clamped shut.

I do not ask that we be removed from the populace that elected us.

I do not advocate that we judges retire to an ivory tower.

We should speak. It is just that, except in the course of publicly issuing our rulings, we should speak publicly only about the nature and function of the courts and of the legal process.

When we are speaking outside the courtroom, we should not try to argue or justify the substance of our past rulings or try to signal or predict our future rulings. Even the fairest out-of-court exposition of a substantive ruling constitutes a deviation from the neutral role of a judge because it either is defensive in form or seems to be pursuing a particular agenda.

This does not require us to be as silent as sphinxes, or to arrogantly pronounce our rulings and then say or imply: "This is it. If you don't like my ruling, that's too bad." Even when we manage to stay away from the substance of disputed legal issues in our public comments before or after a ruling, there is still a great deal we can say that will help the public absorb whatever we have done.

Let me give a real-life example of speech in a hotly contested case, one which involved legal and political issues and arose in a judicial campaign year.

In early 2000, two years before *White* was announced, I was assigned a case in which I ultimately concluded that I had to issue a ruling that a state tax revolt initiative that had been approved by roughly a million voters was unconstitutional. The public obviously had great interest in how

and why I would issue such a ruling. I personally had a great interest in the same topic if for no other reason than the fact that I was to stand for election that same year.

When I issued the ruling,[60] it was no surprise that it was met with a firestorm of protest. Many voters were saying, "How can one man overrule the votes of a million people?" Newspaper headlines predicted legal and judicial fallout with obvious implications for my future.[61]

In consultation with the leadership of my court, I agreed to make myself available to all members of the press. We were operating under pre-*White* rules. These are the same rules I suggest should remain in place today.

When I announced my willingness to speak to the media, I informed them that I would answer any questions they had, personal, legal and otherwise, *except* those that related to the substance of my ruling. Canon 3 of the State of Washington's Code of Judicial Conduct stated then, as it does now:

> The judicial duties of judges should take precedence over all other activities . . . . In the performance of these duties, the following standards apply:
>
> (A) Adjudicative Responsibilities.
>
> ***
>
> (7) Judges shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness . . . . This section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court . . . .

Speaking with the press in this manner, two years before *White*, was permitted not only under Canon 3 but also under Canon 4, which states:

> Judges, subject to the proper performance of their judicial duties, may engage in the following quasi-judicial activities, if in so doing they do not cast doubt on their capacity to decide impartially any

60. Decisions of Washington State trial courts are not generally published. However, given the public interest in the issues, the Supreme Court published this ruling on its website, and it was then published on Westlaw. Amalgamated Transit Union, Local 587 v. State, 2000 WL 276126 (King County Super. Ct., Mar. 14, 2000).

61. Robert Gavin, *Initiative 695 Cut Down, Judge Says Tax-Cutting Measure Violates the State Constitution; Ruling Certain to Have Judicial, Legislative, and Political Fallout; Sponsor Tim Eyman Rips the Decision as Despicable*, SEATTLE POST-INTELLIGENCER, March 15, 2000, at A1.

issue that may come before them:

> (A) They may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

I believed that this approach, speaking about the judicial process, would properly address many of the public's concerns about my ruling, and would give the press and the public critical information to help them accept the specific ruling by understanding how the court works.

I had the following exchange with one television interviewer:

> Question: "Because of your ruling, some people have said that their vote doesn't count. Do you feel like you were in a no-win situation?"
>
> Answer: "Not at all. I mean, this is a very reasonable question for people to ask: 'What is one man doing? We had a million people voting in the following fashion . . . .'
>
> "I think the best way to explain that is to say that if I am doing my job right, I'm not the voice of one man.
>
> "When I do a case like this, I study the Initiative, I study the Constitution, I study a hundred years of decisions by our elected Supreme Court Justices.
>
> "So I think, properly viewed, my decision is not *my* decision. This is not the voice of a man speaking, but really if I have done my job right, it is the voice of the law developed over a hundred years."[62]

The same interviewer also asked whether I was worried about the possibility of being reversed by our state's Supreme Court. I explained to her:

> Well, as a human, I think that's always there to some extent, but you make your decision and then you move on to the next case. You try not to take it personally. If you take these things personally, like 'This is my victory or my loss,' you're not doing your job right. We'll have nine highly trained legal minds who will take a look and decide if I am right.[63]

My intent was to illustrate the judicial process. I wanted to make it

62. KCTS CONNECTS, #106, (KCTS Television Broadcast, Mar. 23, 2000).

63. *Id.*

clear that "my" ruling was the fulfillment neither of a personal agenda nor the agenda of campaign contributors. Instead, the ruling was the result of careful study of the law as developed over a lengthy period of time by other democratically elected judges and justices.

It was important for the public to understand that if the decision I had issued was considered on appellate review to be the voice of one man rather than the voice of the law, I would be – and should be – reversed by our Supreme Court.[64]

Had I argued the merits of the ruling instead, that point would have been obscured or even lost entirely.

This need to explain the judicial process would have been no different if I had upheld the statute's constitutionality. I would have then had to impress upon that portion of the public that disagreed with my decision that my ruling upholding the statute was not made out of fear of being voted out of my job, but was the expression of what the law itself required.

It is important that we judges make it clear that we have carefully considered all arguments, but we should not *advocate* our ruling outside the courtroom.

The issuance of a ruling is a verbal act which effects the resolution of a dispute and constitutes the fulfillment of our judicial function. This is manifestly not the case when a judge or judicial candidate presents legal argument in a general public forum.

B. The Appearance of Impartiality

In a recent ruling, a sitting federal judge received a severe and very public reprimand. The judge in question, the Honorable Thomas Penfield Jackson, had presided over a complex and lengthy antitrust trial against Microsoft. During the trial, the judge met secretly with reporters and discussed his ongoing reactions to the evidence and to various witnesses. His remarks strongly hinted at the final result long before all the evidence was in. At the end of the trial, his comments were made public. Among other things, the judge had criticized Bill Gates for "hubris" and a lack of ethics, and compared Microsoft to a donkey that needed to be hit with a large piece of wood to get its attention.

The Court of Appeals condemned his conduct and removed him from any further role in the case, characterizing his violations of judicial ethics as "deliberate, repeated, egregious, and flagrant."[65] The court ruled that his private remarks to the press constituted unrestrained conduct and gave the

64. The Washington Supreme Court's final ruling on the case may be found at Amalgamated Transit Union, Local 587 v. State of Washington, 11 P.3d 762 (Wash. 2000).

65. United States v. Microsoft Corp., 253 F.3d 34, 107 (D.C. Cir. 2001).

appearance of an intemperate mind, of a judge whose mind was closed and who was unable to be fair: "Discreet and limited public comments may not compromise a judge's apparent impartiality, but we have little doubt that the District Judge's conduct had that effect. Appearance may be all there is, but that is enough to invoke the Canons [of the Code of Judicial Conduct]."[66]

The *Microsoft* ruling demonstrates that the duty to address the public's concerns is not limited to elected judges. Whether we sit at the federal or at the state level, all judges in a democracy have a profound duty to be sure that the public understands that all points of view have been heard and are being fairly addressed, that it understands what we are doing and why.

The reasons we judges must pay attention to appearance are not limited to the question of intemperate behavior so resoundingly addressed in the *Microsoft* case. We do not expect simply that judges not behave badly. Our expectation is far more profound.

When we issue our rulings the most important constituency for us to address is those persons who would perceive themselves to be aggrieved by the judge's ruling – that is, the losing party and all who would agree with the losing party's position. Frankly, the winners don't care that much about what a judge says. After all, they "knew" they were right and that they deserved to win.

Perhaps we state judges are more aware of this need because we are subject to election. Whether it is for that or for any other reason, I find that when I come to a substantive ruling, I will often spend as much time trying to anticipate and respond not only to the legal but also to the personal and emotional arguments that the losers in a legal battle might raise. I should be able to explain to them in plain English not only why their legal position was insufficient, but also why the personal or emotional arguments in their case were heard and understood but were not legally relevant or sufficient. If I am unable to do that, I should reconsider my ruling.

A legal system's validity is largely determined by the respect it engenders from those who have lost in their particular proceeding.

As a fallible human, I am not displeased when a winning party's attorney hints at a compliment on the judge's wisdom, but no winner's compliment or attempt to curry favor can begin to match the satisfaction I feel when I learn – preferably indirectly – that the losing party believes he had a fair trial and a fair hearing.

This appearance of impartiality is essential to the delivery of justice.

In the spirit of that goal, all of us as judges should keep a civil tongue.

66. *Id.* at 115.

Rants and raves to or about the losing party or advocate, and to or about others who differ from the holding of the court, however justified they may otherwise be as a point of logic, demean both the speaker and the person to whom the comment is addressed. Such comments detract from our judicial duty to act as dispassionate and neutral arbiters.

When the manner of judicial discourse peremptorily dismisses the contrary view, when it aims or functions to stifle dissent, it is profoundly undemocratic. Perhaps the best expression of a fully democratic mind-set, one that I believe should be adopted by American courts, was first uttered long ago by Judge Learned Hand. Judge Hand stated that the true spirit of liberty is "the spirit which is not too sure that it is right."[67] If courts are to be truly democratic even while they are the guardians of the law, courts must act on the fundamental tenet that democratic courts are open to the presentation of all points of view.[68]

C. The Essence of a Democratic Model

If a court is not loyal to the idea of government of, by and for the people, it is not democratic.

If a court is not loyal to the rule of law, it is not a judiciary.

Appointing a judge for life does not remove the first ideal, and electing a judge to a limited term does not obviate the second.

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67. Learned Hand uttered these famous words on May 21, 1944, in a speech he gave entitled "The Spirit of Liberty." It is reprinted in LEARNED HAND, THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND (Irving Dilliard ed., Alfred A. Knopf 1953) at pp. 189-91. In his speech, Learned Hand stated:

> Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it. And what is this liberty which must lie in the hearts of men and women? It is not the ruthless, the unbridled will; it is not freedom to do as one likes. That is the denial of liberty, and leads straight to its overthrow. A society in which men recognize no check upon their freedom soon becomes a society where freedom is the possession of only a savage few; as we have learned to our sorrow.
>
> What then is the spirit of liberty? I cannot define it; I can only tell you my own faith. The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests along side its own without bias . . . .

Justice Lewis F. Powell, Jr., references this particular statement in his foreword to GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE (1994) at xiii.

68. Professor Louis Michael Seidman of Georgetown University has proposed an intriguing theory that "the function of constitutional law is not to settle disputes but to unsettle any resolution reached by the political branches" and that "[j]udges have the potential to play a special role [in our democracy], not because they can settle our disputes but because they stand astride a series of contradictions that can unsettle any resolution of them." LOUIS M. SEIDMAN, OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW 8-9 (2001).

Requiring that judges hold their tongues, as this referee model would do, reflects this dual mandate of our courts.

Reticence and restraint serve to remind the judge that he or she is not placed into office to act on personal whim or to implement the passing will of a majority. Our silence likewise reminds the public that we judges are neither politicians nor sages, but individuals whose task it is to be as impartial as humanly possible, to listen more than we talk, and to uphold the constitution for the benefit of every citizen, no matter how unpopular that citizen or his views may be.

State and federal courts fulfill the same functions and serve the same purposes in our democracy. The election of state trial or appellate judges does not change their role, merely their method of selection. The President's nomination of federal judges, followed by the vote of our democratically elected Senators, does not cause them to be removed from our democracy. The same expectations of neutrality and impartiality do and must exist for all federal and state courts.

VI. A Proposal for Living with White

Where do we go now?

If we elected trial judges have unlimited judicial speech, it is perhaps inevitable that we will see more and more state-level judicial candidates acting as the politicians we should not be: announcing opinions that happen to favor those campaign contributors from whom we have directly solicited funds under the *Weaver* case.[69] Too many may be tempted to speak in such a way as to make it appear that state judges can or should turn first to personal opinion or political preference rather than to the law.

Justice Kennedy, who joined the majority in *White*, seems to recognize the possibility that the Court's ruling could have negative impacts. He suggests that in the future, recusal of judges be rigorously enforced in order to remedy any judicial speech that might reasonably threaten impartiality.[70] I welcome Justice Kennedy's suggestion, but with some trepidation. It is true that recusal could help lessen damage, but it would do so only in the individual case. Recusal simply would not address the systemic damage that unlimited judicial free speech could cause to the appearance of the judiciary as an impartial and objective body.

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69. *See supra* part IV(D)(iii) and associated notes.

70. "Minnesota may choose to have an elected judiciary. It may strive to define those characteristics that exemplify judicial excellence. It may enshrine its definitions in a code of judicial conduct. It may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards." Republican Party of Minn. v. White, 536 U.S. 767, 794 (2002) (Kennedy, J., concurring).

With all due respect, I would also suggest that it might not be logical to propose recusal as a remedy. If the judge's personal right to announce opinions and the public's right to know them are as immune to limitation under the First Amendment as Justice Kennedy suggests ("[t]he political speech of candidates is at the heart of the First Amendment, and direct restrictions on the content of candidate speech are simply beyond the power of the government to impose."[71]), then a fair argument could be made that it is unconstitutional to sanction judges who refuse to recuse themselves after exercising those rights.[72]

There is one more problem with recusal. The thrust of the Supreme Court's ruling, its very foundation, seems to be its embrace of the public's right to know how a judge is likely to rule. If the canons of ethics require us to recuse ourselves from future cases on which we have expressed opinions, our disclosure will have done little good for the voters. It will have eliminated any meaningful exercise of the right to know. Yet if the rules of ethics either do not, or legally cannot, any longer require us to recuse ourselves when we have expressed opinions,[73] great damage will instead be done to the concept of an impartial judiciary.

We will likely have to address this problem in the near future. It is not unreasonable to expect that our courts will soon have to deal with judicial discipline cases addressing judicial speech in the following context: statements that commit or appear to commit a judicial candidate, statements that are pledges or promises of specific conduct, and/or statements in nonpromissory form which are uttered as we personally ask for and receive cash from contributors.

Recusal is simply not a sufficient answer to the larger systemic problem caused by judicial "free speech." But in the absence of recusal, how can we both comply with the holding in *White* and avoid the detrimental effects of judicial free speech?

There is a way. It is simple. It arises from the manner in which the majority issued its ruling. It issued its decision in the manner of every

71. *Id.* at 792.

72. *See* William A. Herbert, *Balancing Test and Other Factors Assess Ability of Public Employees to Exercise Free Speech Rights*, 74 N.Y.ST. B.J. 24 (Sept. 2002) (giving a clear picture of the less than consistent standards that may be employed in judging the propriety of speech by public employees). The extent to which these or similar standards would be applied to elected judges, about whom the Court in *White* proclaimed the primacy of a public right to know, is not as clear.

73. In his dissent, Justice Stevens argued that Justice Kennedy's concurring position that no content-based restrictions at all may be enforced would, if ultimately adopted by the full Court, preclude ethical prohibitions even on "pledges and promises." *White*, 536 U.S. at 802 n.4; *see also infra* note 79.

responsible court. The Supreme Court was careful to make a formal ruling *only* on the "announce" clause. And because there is a fundamental distinction between holding and dicta, the Supreme Court could decide when it hears the next case only to take *White* as far as its formal holding required.

The "announce" clause, Canon 5(A)(3)(d)(i) of Minnesota's ethical code, stated that a candidate for judicial office shall not "announce his or her views on disputed legal or political issues." It was adopted in Minnesota in 1972 based on the ABA's 1972 proposed Model Canon. That specific Model Canon was revised by the American Bar Association in 1990. The revision was adopted in many states, but not Minnesota. The revised language of 1990 prohibited not the mere announcing of opinions, but instead the making of "statements that *commit or appear to commit* the candidate with respect to cases, controversies or issues that are likely to come before the court."[74] As to this 1990 modification, the Court in *White* stated: "We do not know whether the announce clause (as interpreted by state authorities) and the 1990 ABA canon are one and the same. *No aspect of our constitutional analysis turns on this question.*"[75]

The Court also ruled that the challenged "announce" clause failed constitutional muster in part because of its overbreadth, explaining that "'announcing . . . views' on an issue covers much more than *promising* to decide an issue a particular way."[76] The Court distinguished the "announce" clause from the separate "pledges and promises" clause, which prohibits "judicial candidates from making 'pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.'"[77] The Court stated that the pledges and promises clause was "a prohibition *that is not challenged here and on which we express no view.*"[78]

In sum, the Supreme Court has in *White* issued a holding which explicitly strikes down only the ethical prohibitions on candidates choosing to "announce" their views on a legal or political issue. The majority declined on the face of their ruling to rule either on "statements that commit or appear to commit the candidate" or on "pledges or promises of conduct."

The broad language employed by the majority as it reached its decision in *White* could be interpreted in such a way as to cause additional

74. ABA MODEL CODE OF JUDICIAL CONDUCT, Canon 5(A)(3)(d)(ii) (1998) (emphasis added).

75. *White*, 536 U.S. at 773, n.5.

76. *Id.* at 770.

77. *Id.* (citing MINN. CODE OF JUDICIAL CONDUCT, Canon 5(A)(3)(d)(i) (2002)).

78. *Id.* (emphasis added).

ethical restraints to fall afoul of the First Amendment.[79] That is a possible result. It is not the necessary result.

The Court could instead hold that all it permitted and all it intended to permit were statements that were announcements of opinion, statements general in form and largely innocuous, and that it had no intention of permitting judges to commit or appear to commit themselves on disputed issues, let alone pledge or promise future courses of conduct. Not only would that be a possible subsequent holding, it would be a reasonable holding.

It is well accepted in the law that the binding precedential value of a case is *only* in its formal holding. Dicta have no power. Limiting the future application of this holding to this one canon which the Court found to be overbroad and vague is a remedy that could avoid systemic damage to our traditions of an impartial judiciary.

VII. Conclusion

It is perhaps ironic that I am speaking and writing so vigorously when the core of my beliefs is that judges should respect the sound of silence and not engage in public substantive speech outside the courtroom.

Yet here I am, having announced certain thoughts about these issues.

I have not committed myself as to how I will rule on any specific set of facts. I have made no pledges or promises. But I have uttered my words publicly and they have been reduced to print.

Now let me ask you a question. If you are a believer in unfettered judicial free speech, would you want me to decide a case which addresses the enforceability of various restraints on speech, such as one which deals with the propriety of judicial speech outside the context of a judicial campaign?

If it would even give you pause to have me decide your case, then perhaps you see my point: announcement of even some of a judge's personal views can act as an implied commitment.

I like to think that I am impartial and will follow the law in any case regardless of my personal opinion. I believe I have done so in the past. But having expressed myself so publicly on judicial speech, the fact is that

79. *See* Erwin Chemerinksy, *Judicial Elections and the First Amendment*, 38 TRIAL 78 (2002):

> The Court's decision in White will dramatically change the nature of speech in judicial elections. The ruling also will lead to immediate challenges to laws in other states, such as those that bar 'pledges' or 'promises' in judicial campaigns and forbid candidates to make statements that appear to commit them to specific conduct once they are in office.

See also supra note 73.

in any future case raising that issue I will no longer be able to start my judicial query with an analysis of the law. Instead, I will have to ask myself, "How can I rule 'y' if I previously said 'x'?" Expressing oneself publicly, even without a formal commitment, pledge or promise, structurally affects the judge's task. It operates to alter and even restrict the judge's future action both as to intellectual starting point and as to final conclusion. And it has done so even before that judge learns of the specific facts and law that may be applicable to a particular case.

For that reason, I think it best that I now commit to recuse myself in the future should I ever be assigned a case in which judicial speech is at issue. That will take care of any personal ethical problem. But this limited individual recusal will do nothing to redress the larger systemic problem which will arise if we have unrestricted judicial "free speech."

I urge the Supreme Court in any future case to go no further than its specific holding in *White*. Any broader allowance of judicial speech than the limited ruling already announced by the Court will permit judges and judicial candidates to commit or appear to commit themselves, and even to pledge or promise certain conduct, any of which would be antithetical to impartiality.

If we come to a point where we no longer try to pick impartial judges, where we no longer ask judges to aspire to impartiality, our justice system will not be worthy of the name. We would then have judges with an agenda, a judiciary with attitude. Activist judges. Is that really where we want to go?