2004

Through the Lens of Diversity: The Fight for Judicial Elections After Republic Party of Minnesota V. White

Sherrilyn A. Ifill
University of Maryland School of Law

Follow this and additional works at: https://repository.law.umich.edu/mjrl
Part of the Judges Commons, Law and Race Commons, Law and Society Commons, and the Supreme Court of the United States Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mjrl/vol10/iss1/3
THROUGH THE LENS OF DIVERSITY: THE FIGHT FOR JUDICIAL ELECTIONS AFTER REPUBLICAN PARTY OF MINNESOTA V. WHITE

Sherrilyn A. Ifill*

INTRODUCTION ............................................................................................................. 56

I. THE ANNOUNCE CLAUSE AND THE SUPREME COURT’S DECISION IN REPUBLICAN PARTY OF MINNESOTA V. WHITE ........................................................................... 59
   A. The Announce Clause ......................................................................................... 59
   B. Justice Scalia’s Majority Opinion ........................................................................ 61
   C. Justice O’Connor’s Concurrence ......................................................................... 66

II. THE COURT’S EMERGING HOSTILITY TO JUDICIAL ELECTIONS ................................................................. 66
   A. The 1991 Judges Cases ..................................................................................... 67
   B. Contrasting Justice O’Connor’s Opinion in White with Her Stance in Grutter and McConnell ................................................................................................................. 74
   C. Recent Challenges to the Impartiality of Article III Judges ............................... 77

III. SEEING THE PROBLEM OF JUDICIAL ELECTIONS THROUGH THE LENS OF DIVERSITY: THE IMPORTANCE OF STRUCTURAL IMPARTIALITY TO DUE PROCESS ................................................................. 80
   A. The Potential Effects of Electoral Changes on Diversity ................................. 84
      1. Switching from Election to Appointment ....................................................... 84
      2. Removing Campaign Speech Restrictions .................................................... 90
   B. Re-Imagining Judicial Elections ........................................................................ 91
      1. Define Impartiality ......................................................................................... 92
      2. Adopt Public Financing of Judicial Elections ................................................. 93
      3. Adopt Cumulative Voting ............................................................................. 96
      4. Launch a Public Education Campaign ........................................................ 98

CONCLUSION .................................................................................................................. 99

---

* Associate Professor of Law, University of Maryland School of Law; J.D., New York University School of Law. I wish to thank Deborah Goldberg and Kele Williams at the Brennan Center for Justice at NYU School of Law for hosting the first conference on judicial diversity and impartiality, as well as my colleagues at the University of Maryland School of Law who have provided helpful suggestions to me in my study of this subject over the years. I wish also to thank Judge James Wynn of the North Carolina Court of Appeals for his always helpful insight into the real world of judicial elections. I am grateful as well for the support of legal assistant Gynene Sullivan, research librarian Maxine Grosshans, and library research fellow Susan McCarty at the University of Maryland School of Law.
INTRODUCTION

On the last day of the 2002 Term, the United States Supreme Court quietly opened fire on state judicial elections. In *Republican Party of Minnesota v. White*, a sharply divided Court struck down a portion of the Minnesota Code of Judicial Conduct ("Minnesota Code" or "Code") that prohibited a judicial candidate from "'announc[ing] his or her views on disputed legal or political issues.'" In a majority opinion authored by Justice Scalia, and in a strongly-worded concurring opinion by Justice O'Connor, the Court denounced the practice of electing judges and suggested that the election of judges cannot be reconciled with a state's asserted interest in maintaining the appearance of judicial impartiality.

The decision resulted in imminent changes to the American Bar Association Model Code of Judicial Conduct and the judicial conduct codes of several states. Lower courts have relied on the decision to relax restrictions on candidate speech in judicial elections. Interest groups are seeking to further abolish candidate speech restrictions in a number of states. Moreover, some states have viewed the Court's decision in *White* as a call to abandon judicial elections in favor of judicial appointments.

This Article is directed at the ongoing discussion taking place in many states and among members of the bench and bar about whether states that elect judges should switch to appointment in light of *White*. I

---

2. *Id.* at 770 (quoting *MINN. CODE OF JUDICIAL CONDUCT* Canon 5(a)(3)(d)(i) (2004)).
3. *Id.* at 787.
5. In one particularly alarming example, the North Carolina Supreme Court in 2003 made changes to that state's code of judicial conduct, which now permits judges to: (1) "preside over, and speak at any political party gathering, meeting or other convocation, including a fund-raising function for himself"; (2) "endorse any individual seeking election to any office or conduct a joint campaign with and endorse other individuals seeking election to judicial office"; and (3) "personally solicit campaign funds and request public support from anyone for his own campaign." *N.C. CODE OF JUDICIAL CONDUCT* Canon 7(B)(1), (2), (4) (2003). The changes in North Carolina's Code seem particularly unwarranted because North Carolina did not even have the equivalent of an "Announce Clause" at the time of the *White* decision. See *infra* Part I.A.
6. See, e.g., *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002) (striking down on First Amendment grounds a section of the Georgia Code of Judicial Conduct that prohibited judicial candidates from negligently misrepresenting the record of opposing candidates, and holding that only actual *malice* may be prohibited by the Code).
argue that states should resist what I regard as the Court's heavy-handed dicta denouncing judicial elections in *White*. Rather than accede to the pressure to shift from an elective to an appointive system—pressure that I understand is being felt in several states—I contend that states should regard the *White* decision as an opportunity to engage in a thorough and far-reaching review of judicial selection. Before presuming that judicial elections *ipso facto* cannot be reconciled with the ideal of judges as independent, impartial decision-makers, states should seek ways to improve their methods of judicial selection in order to improve judicial decision-making. States with judicial elections should be prepared to drastically transform the way judges are elected to address what I concede are significant failings in most judicial election systems. Principal among these deficiencies, in my view, is the failure of judicial elections to adequately address the lack of racial diversity on the nation's courts.

Indeed, in this Article I take the explicit and unapologetic view that the diversity question is a central one to resolving the controversy surrounding whether to elect or appoint judges. I adopt this stance for four reasons. First, as I have argued in earlier articles, the interaction of diverse viewpoints and perspectives is essential to impartial, legitimate, and fully informed judicial decision-making. As such, I have argued that racial diversity is an essential ingredient for the judiciary to guarantee both structural and individual impartiality. I continue to press that case here.

Second, conversations among reform-minded, good-government, and bar groups about whether or how to elect judges generally do not include diversity as a central issue. Instead, the question of how electing or appointing judges may affect racial diversity on the bench is often an "add-on" issue. It is my contention that states taking up proposals to shift from electing to appointing judges are giving insufficient attention to the matter of diversity.

Third, shifting from electing to appointing judges in many southern jurisdictions will remove oversight of judicial selection from coverage under the Voting Rights Act. Currently, states and jurisdictions covered by Section 4 of the Voting Rights Act need preclearance from the Justice Department before they may shift from electing to appointing judges. Preclearance is denied when the Justice Department determines that switching from election to appointment would diminish the ability of minority voters to participate equally in the selection of candidates of

---


10. See *42 U.S.C. § 1973c* (1982) (setting out the required process of administrative or judicial preclearance for so-called "covered" jurisdictions seeking to make changes to voting practices or procedures).
their choice to the bench. For this reason, how the shift from an elective to an appointive system will affect diversity on the bench must be grappled with in jurisdictions covered by Section 4.

Fourth, I direct attention to the diversity question because I find that the lens of diversity necessarily focuses the analysis on several key issues that bear on the question of how best to select judges. These issues include defining what "impartiality" means in the context of judging, addressing head-on how or whether judges can be "representatives," and exploring whether and how elected or appointed judges can be "accountable" to the public. It is the failure of states and the bar, including the ABA, to adequately address these questions that permitted the Court in White to articulate and impose its own conception of the judicial function on states.

In Part I of this Article, I review the issues raised in Republican Party of Minnesota v. White, looking both at the specific controversy in that case and at the broader controversy surrounding candidate speech in state judicial elections. I focus particularly on Justice Scalia's attempt to define judicial impartiality in White. I regard his conception of impartiality in the context of judging as unnecessarily cramped and rigid. I further contend that Justice Scalia's definition of judicial impartiality undermines the Court's long-held view that the appearance as well as the fact of bias may violate the Due Process Clause. I focus as well on Justice O'Connor's harsh denunciation of judicial elections in White. Her concurring opinion, in both tone and substance, signals a sea change in the Court's traditional deference to states in regulating how judges are selected and how judicial elections are conducted.

In Part II of this Article, I question why the Court uses White to take such a hard and overreaching position against judicial elections. I contend that White does not line up squarely with the Court's earlier jurisprudence reviewing judicial elections, nor is it consistent with the Court's more recent instances of deference to state or congressional interest in promoting the appearance of legitimacy for political leaders and representatives. I begin by framing White within the context of a trio of cases related to judicial selection decided by the Court in the early 1990s. In those cases, the Court—including both Justices Scalia and O'Connor—although articulating a preference for the appointment of judges, nevertheless gave a strong measure of deference to the decisions of states to elect their judges. The Court recognized that even when judges are elected, the judicial function remains distinct in important ways from that of other elected officers. Next, moving to the Court's more recent

11. I have argued that members of the Supreme Court, including Justice Scalia, have failed to properly apply the "appearance of impartiality" standard in their own recusal practice. See, e.g., Sherrilyn A. Ifill, Do Appearances Matter?: Judicial Impartiality and the Supreme Court in Bush v. Gore, 61 MD. L. REV. 606 (2002) [hereinafter Ifill, Do Appearances Matter?]; Sherrilyn A. Ifill, Can He Be Recused?, LEGAL TIMES, Apr. 26, 2004, at 60.
Through the Lens of Diversity

jurisprudence, I note that Justice O'Connor's stance in White is at odds with her position in two other high-profile cases involving First Amendment issues—Grutter v. Bollinger\(^\text{12}\) and McConnell v. Federal Elections Commission.\(^\text{13}\)

Ultimately I conclude that the Court's newly vehement and open hostility to judicial elections coincides with the political challenges to the impartiality of federal judges and judicial nominees that have emerged over the past decade. In essence, I detect in the Court's aggressive stance against state judicial elections a deeply self-conscious concern with maintaining the ideal of judicial impartiality—an ideal that the Court regards as embodied in the distinct qualities of the appointed federal judiciary.

In Part III, I press the case that given the Court's per se and perhaps self-conscious hostility toward judicial elections, states should resist the Court's coercive attempt to impose judicial appointments. Instead, while states and the bar should use White as an opportunity to examine and reform deeply flawed judicial election systems, they should resist the lure of appointing judges as a panacea. I caution states to examine closely how switching to appointing judges might negatively affect racial diversity on the bench.

I conclude by proposing several initiatives that I contend will greatly advance the reformation of judicial election systems in ways that will promote both impartiality and diversity on the bench. These initiatives are: (1) defining impartiality in the ABA Code of Judicial Conduct and state codes with an emphasis on the appearance of impartiality and the importance of structural impartiality as due process concerns; (2) public financing of judicial elections; (3) exploring the use of cumulative voting for the election of judges; and (4) creating a partnership between the bench, the bar, and public policy groups to develop an education campaign about the judicial function. The last proposal would involve an ongoing program designed to educate voters about the judicial function as well as mandatory and regularized educational programs for judges about the meaning of impartiality.

I. The Announce Clause and the Supreme Court's Decision in Republican Party of Minnesota v. White

A. The Announce Clause

The Announce Clause in the Minnesota Code of Judicial Conduct prohibited "a candidate for judicial office, including an incumbent judge," from "announc[ing] his or her views on disputed legal or political

---

Minnesota's Lawyer Professional Responsibility Board ("Board") had primary responsibility for addressing alleged violations of the Code. Although the Code contemplated that the Board could impose sanctions for violations of the Announce Clause, including censure, civil penalties, disbarment, or removal for incumbent judges, there was no evidence that the Board ever imposed these penalties on a judicial candidate or judge for violations of the Announce Clause. Gregory Wersal, the candidate at issue in White, sought an advisory opinion from the Board regarding statements he wished to make during a campaign for a seat on the Minnesota Supreme Court. The Board refused to issue the opinion on the ground that Wersal had already filed suit against the Minnesota Board of Judicial Standards challenging its ability to enforce the Announce Clause. The state's Republican Party joined Wersal's suit against the Board of Judicial Standards and argued that the Announce Clause prevented party members from learning Wersal's views on important issues.

The Minnesota Announce Clause was promulgated in 1974 and modeled on a similar provision of the 1972 American Bar Association Model Code of Judicial Conduct ("ABA Model Code"). Although the 1990 ABA Model Code does not contain an Announce Clause, Minnesota continued to use an Announce Clause modeled on the earlier ABA provision.

Both the 1990 ABA Model Code and the Minnesota Code include another important clause that reinforces the rationale behind the Announce Clause. This provision, sometimes called the Pledges and Promises Clause or the Commit Clause, prohibits a candidate from making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of office." Together the Announce and the Pledges and Promises Clauses in the Minnesota Code were designed to restrain judicial aspirants from making statements that would undermine both the reality and the appearance of impartiality on the state bench. A majority of the states that elect judges have adopted either an

15. White, 536 U.S. at 799 n.2 (Stevens J., dissenting).
16. Id. at 769 n.2. The Minnesota Board of Judicial Standards, along with the Lawyers' Board, "enforces the ethical rules applicable to judges." Id. at 770 n.3.
17. Id. at 770.
18. The ABA removed the Announce Clause from the 1990 Model Code of Judicial Conduct, allegedly because of concerns that the Clause was vulnerable to a First Amendment challenge. See id. at 773 n.5.
19. In the ABA Model Code, the so-called "Commit Clause" prevents candidates from, "with respect to cases, controversies, or issues that are likely to come before the court, making pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of office." ABA MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2003).
Announce Clause or a Pledges and Promises Clause,\(^1\) reflecting a strong and prevailing interest among states in imposing some restrictions on candidate speech in judicial elections to promote public confidence in the impartiality of the bench.

The importance of impartiality to the legitimacy of the judiciary cannot be overstated.\(^2\) The right to an impartial tribunal is guaranteed by the Fourteenth Amendment’s Due Process Clause.\(^3\) The Supreme Court has held that even the appearance of bias may violate the due process rights of litigants.\(^4\) As the Court eloquently stated fifty years ago, “justice must satisfy the appearance of justice.”\(^5\) Federal and state recusal statutes provide that litigants may seek the recusal of a judge from a case in which it appears that her impartiality might “reasonably be questioned.”\(^6\) Thus the Announce Clause and other restrictions on judicial candidate speech can be understood as part of an effort by states in which judges are elected to ensure that the impartiality of the bench—in both fact and appearance—is not compromised by the conduct of judicial aspirants on the campaign trail.

B. Justice Scalia’s Majority Opinion

Writing for the majority, Justice Scalia ruled in White that the Minnesota Announce Clause violates the First Amendment rights of judicial candidates.\(^7\) The Court held that the Announce Clause is not narrowly tailored to serve the State’s articulated interest in preserving the impartiality of the bench. In fact, Justice Scalia found that the Announce Clause “is barely tailored to serve that interest at all.”\(^8\)

The substance of the opinion turns on Justice Scalia’s definition of impartiality and his conclusion that the Minnesota Announce Clause cannot be justified by the State’s articulated interest in impartiality. At the outset, Justice Scalia noted an important and startling fact: despite the use of the term impartiality throughout the Eighth Circuit’s White opinion, the Minnesota Code of Judicial Conduct, and the American Bar Association’s Code of Judicial Conduct, “none of these sources bothers to define

\(^{21}\) Id. at 786.
\(^{22}\) See Randall T. Shepard, Campaign Speech: Restraint and Liberty in Judicial Ethics, 9 Geo. J. Legal Ethics 1059, 1084 (1996) (“The association between impartiality and due process is as old as the judicial system itself.”).
\(^{25}\) Id.
\(^{27}\) The Court was careful to “express no view” on the Pledges and Promises or Commit Clause, which was not challenged by the Republican Party. Republican Party of Minn. v. White, 536 U.S. 765, 770 (2002).
\(^{28}\) Id. at 776.
Thus Justice Scalia undertook the task of defining impartiality with a more or less blank slate.\textsuperscript{30}

Justice Scalia proffered three possible definitions of judicial impartiality. First, he determined that impartiality may be defined as a “lack of bias for or against either party to the proceeding.”\textsuperscript{31} But according to Justice Scalia, the Minnesota Announce Clause was not narrowly tailored to serve this definition of impartiality.\textsuperscript{32} The Announce Clause, reasoned Justice Scalia, restricts speech “for or against particular issues” rather than for or against parties.\textsuperscript{33} The Clause, therefore, could not be tailored to address bias for or against parties.\textsuperscript{34}

The second definition of judicial impartiality recognized by Justice Scalia is a “lack of preconception in favor of or against a particular legal view.”\textsuperscript{35} Justice Scalia found that promoting this kind of impartiality is not a compelling state interest. According to Justice Scalia, such an interest cannot be compelling because “[a] judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice.”\textsuperscript{36} This contention is debatable. The confirmation process for federal judges and Supreme Court Justices in particular regularly centers on whether a nominee has staked out a position on a variety of legal issues. Arguably, at least part of the motivation for this line of inquiry is to determine whether the nominee, if confirmed, would be able to impartially decide cases raising certain legal issues. Justice Scalia himself declined to answer such questions about whether he would vote to overrule a particular case at his own confirmation hearing, stating, “‘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 ... I would be in a very bad position to adjudicate the case without being accused of

\textsuperscript{29} Id. at 775. This important point shows the failure of the state code and the ABA Model Code to define perhaps the most central element of a legitimate judiciary. It speaks volumes about the impoverished nature of the ongoing discussion about judicial elections and impartiality at the state and national bar levels.

\textsuperscript{30} Id. at 775–78 (identifying three possible ways to define judicial impartiality, with Justice Scalia using Webster's New International Dictionary and his own sense of how this term can plausibly be defined as his sources).

\textsuperscript{31} Id. at 775 (emphasis omitted).

\textsuperscript{32} Id. at 776.

\textsuperscript{33} Id. (emphasis omitted).

\textsuperscript{34} Justice Scalia apparently saw no potential connection between issues about which a judicial candidate might express his views and classes of parties like civil rights plaintiffs or criminal defendants who routinely raise those very issues in litigation. These classes might appear before an elected judge who had previously announced his views as a “pro-death penalty” or “anti-affirmative action” candidate.

\textsuperscript{35} White, 536 U.S. at 777 (emphasis omitted in part).

\textsuperscript{36} Id.
having a less than impartial view of the matter.'” In essence, Justice Scalia found his interest in maintaining judicial impartiality sufficiently compelling to refrain from making representations at his confirmation hearing—the federal judicial equivalent of a state judge's campaign—but refused to credit that interest when it was articulated by the state of Minnesota.

The final definition of impartiality identified by Justice Scalia is “openmindedness.” Justice Scalia did not expound on the merits of this form of impartiality for the simple reason that he found that the Minnesota Supreme Court did not adopt the Announce Clause to further this form of impartiality.

As Justice Ginsburg discussed in her dissent, Justice Scalia's analysis of judicial impartiality is deficient in a number of ways. First, it fails to account for ways that judges may be biased against classes of parties rather than just individual litigants. For example, a judge who, on the campaign trail, says, “I don't believe that every time someone gets injured by a product, she should sue a manufacturer for millions of dollars,” expresses a bias against products liability plaintiffs rather than against a particular named party. A plaintiff suing a manufacturer for an injury in a product liability suit whose case is assigned to this judge has reason to believe that this judge will not hear her case impartially.

The potential connection between a judge's stated views on a disputed issue and his bias for or against a particular party is exemplified ironically by Justice Scalia's own decision in 2004 to recuse himself from *Elk Grove Unified School District v. Newdow,* a case involving a challenge to a compulsory, school-led pledge of allegiance. In the year prior to the case's arrival at the Supreme Court, Justice Scalia had publicly denounced challenges to the compulsory pledge of allegiance in schools. When *Newdow* made its way to the High Court months later, Justice Scalia


38. *Id.* at 778.

39. *Id.* It is interesting that Justice Scalia gave “openmindedness”—the definition of impartiality that embodies the highest aspirational role for judges—the least consideration. I regard this as a blessing in disguise in that it leaves the bar and states open to embrace “openmindedness” as a key component of impartiality without the taint of what would likely have been Justice Scalia's cynical and cramped conception of this ideal.

40. *Id.* at 814–16 (Ginsburg, J., dissenting).

41. For example, a judge might be ideologically biased against civil rights plaintiffs or criminal defendants.

42. 124 S. Ct. 2301 (2004).

wisely decided to recuse himself from hearing the case. If Justice Scalia had been running in a judicial election in Minnesota, the Minnesota Announce Clause would have prevented him from announcing his views about pledge of allegiance cases on the campaign trail.

The obvious rejoinder is that the Minnesota Announce Clause is not narrowly tailored to address this circumstance because a less restrictive alternative—recusal—exists to address the potential conflict. Indeed it is possible that in such a case a judge might recuse himself just as Justice Scalia voluntarily withdrew from hearing Newdow. But this argument differs from that offered by Justice Scalia in White, which ignores the connection between speech for or against particular issues and speech for or against particular parties.

Second, Justice Scalia's definition of impartiality reads the importance of the appearance of impartiality out of the due process impartial judge mandate. Although he did not expressly contradict the Supreme Court's 1954 admonition that "justice must satisfy the appearance of justice," his failure to recognize perception as a critical part of impartiality suggests that he gave it little weight. This is particularly striking because the State of Minnesota specifically identified "preserving the appearance of the impartiality of the state judiciary" as one of the interests the Announce Clause was designed to serve.

Justice Scalia's opinion is also remarkable for its apparent ignorance of and disregard for the on-the-ground reality of state judicial elections. In rejecting the argument that the Announce Clause serves the State's interest in preserving the openmindedness of judges, Justice Scalia reasoned that because "statements in election campaigns are . . . an infinitesimal portion of the public commitments to legal positions that judges (or judges-to-be) undertake . . . [that] object of the [Announce Clause] prohibition is just implausible." As examples, he cited the participation of Supreme Court Justice Black in cases construing the Fair Labor Standards Act, which he had helped to write, and "Chief Justice Hughes' authorship of the opinion overruling Adkins v. Children's Hospital in 1923" when he had previously criticized the case in a book.

Justice Scalia's reliance on the experiences of federal judges—indeed Supreme Court Justices—to support his argument regarding state judges speaks volumes. Justice Scalia seems blissfully unaware of the openly partisan and contentious nature of many state judicial elections. The use of

44. See White, 536 U.S at 817–18 (Ginsburg, J., dissenting).
46. For a discussion of the Supreme Court's failure to develop meaningful and uniform standards for deciding "appearance" questions in the context of recusal, see Ifill, Do Appearances Matter?, supra note 11, at 606–51.
47. White, 536 U.S. at 775 (citations omitted).
48. Id. at 779.
49. Id. (citations omitted).
inflammatory slogans and tag lines by judicial candidates and groups that support or oppose them characterizes most contested judicial races. A 2002 study of state supreme court elections found that in most election contests, the judicial candidates who aired the greatest number of television ads won their elections and that:

only 36% of Supreme Court candidate advertisements focused on the traditional theme of candidate qualifications. Instead, most candidate ads invoked hot-button issues like crime, health care, tort liability, and special interest influence. And the candidates’ carefully scripted language made it clear that the era of stressing qualifications, already under siege, appears to be on its way out.  

Likewise, when Justice Scalia suggested in *White* that judges often have already announced their views on disputed legal issues “in classes that they conduct, and in books and speeches,”51 he seemed woefully unaware that most state court judges—particularly at the trial court level—are not drawn from the ranks of law professors and authors but are more likely to be former trial lawyers or prosecutors. Moreover, as Justice Stevens noted in his dissent, Justice Scalia “largely ignores the fact that judicial elections are not limited to races for the highest court in the State.”52 The dangers inherent when candidates announce their views, according to Justice Stevens, may be particularly great for state trial judges, who decide cases alone and whose decisions regarding evidence, witnesses, and the conduct of trial receive great deference on appeal. But as Justice Stevens remarked, the majority opinion in *White* “has a hypothetical quality to it.”53 It perhaps reflects the myopia of Supreme Court Justices, whose only judicial experiences are within the rarefied world of the federal judiciary and who are nevertheless stubbornly unwilling to defer to the state’s determination of how candidate announcements may threaten judicial impartiality in state judicial elections.


52. Id. at 799 n.2 (Stevens, J., dissenting).

53. Id. (Stevens, J., dissenting).
C. Justice O'Connor's Concurrence

Because Justice O'Connor was once an elected state court judge, and because her opinion in White was so harshly derisive of judicial elections, her concurrence warrants particular attention. From the first line of her concurrence, Justice O'Connor was candid about the reasons for writing her three-page dicta: "I ... write separately to express my concerns about judicial elections generally."\(^{54}\) Her opinion said little about the Announce Clause but focused instead on what she saw as the folly of states that continue to use contested elections for judges—a practice that she deemed to be at odds with judicial impartiality. In Justice O'Connor's view, "[e]lected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their re-election prospects."\(^{55}\) Justice O'Connor never explained why this is a pressure felt only by elected judges.\(^{56}\)

A significant portion of Justice O'Connor's concurrence was devoted to extolling the virtues of the Missouri Plan for selecting judges.\(^{57}\) Under this system, which has been adopted by fifteen states, judges are selected first by an executive from a list provided by a nominating commission. Thereafter, judges run in periodic retention elections. Justice O'Connor found this far superior to contested elections because "[t]his system obviously reduces threats to judicial impartiality."\(^{58}\)

Justice O'Connor's concurrence ended as bluntly as it began. She concluded with a shockingly facile summation of the problem the State of Minnesota faces in White: "[i]f 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."\(^{59}\)

II. The Court's Emerging Hostility to Judicial Elections

Justice Scalia's opinion and Justice O'Connor's concurrence started a flurry of debate among judicial watch-dog groups, ethical experts, the American Bar Association, and state supreme courts,\(^{60}\) even in states that

---

54. Id. at 788 (O'Connor J., concurring).
55. Id. at 789 (O'Connor J., concurring).
56. Id. In fact, appointed judges who wish to be elevated someday to a seat on an appellate or supreme court likely feel similar pressure. See Richard A. Posner, What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does), 3 SUP. CT. ECON. REV. 1, 5 (1993) (acknowledging that aspiring to the Supreme Court may influence the decision-making of some federal appellate judges).
57. White, 536 U.S. at 791-92 (O'Connor J., concurring).
58. Id. at 791 (O'Connor J., concurring).
59. Id. at 792 (O'Connor J., concurring).
60. See, e.g., Terry Carter, Limit on Judicial Speech Thrown Out, ABA E-JOURNAL REP., June 28, 2002 (reporting concern of the American Bar Association’s president that the
did not have the equivalent of an Announce Clause. Were states and the ABA compelled to adopt Justice Scalia's definition of impartiality? Did the overall thrust of the decision ultimately mean that electing judges is truly incompatible with an impartial judiciary? Did the Court's opinion effectively undermine elections as a legislative means of selecting judges by removing virtually all meaningful barriers to candidate speech and inviting a disorderly free-for-all in judicial campaigns? The impact of *White* was heightened by the fact that at the time of the decision, judges and public policy groups had grown increasingly concerned about the negative tone of many judicial election contests and the rising power of third-party interest groups in influencing the tenor and outcome of judicial campaigns.

The meaning of *White* is perhaps best understood by examining the decision within the context of the Court's rich jurisprudence in a remarkably illuminating line of earlier cases involving judicial election issues. An examination of *White* in this context suggests that the decision may reflect the Court's recent and increased sensitivity to the public's overall skepticism about the impartiality of judges. In fact, *White* constitutes a marked departure from both the Court's approach to other cases involving judicial elections, and the Court's recent stance in cases raising First Amendment issues where the state or federal government's interest in preserving the appearance of legitimacy for public leaders was at issue. Read in the context of the Court's decisions in these cases, *White* should be regarded quite cautiously by states and members of the bar who contemplate whether to abolish judicial elections.

A. The 1991 Judges Cases

During the 1991 Term, the Supreme Court faced three cases that raised questions about the tension between judicial impartiality and the

---


61. For example, North Carolina overhauled its Model Code ostensibly in response to *White*, even though it had no Announce Clause in its Code. N.C. CODE OF JUDICIAL CONDUCT Canon 7(B)(1),(2),(4) (2003).

method of or qualifications for judicial selection. In those cases involving judicial selection decided more than a decade earlier, the Court appeared to take a more measured view of judicial elections and a more deferential position towards states' articulated interests in how judicial officers are selected than the view expressed in *White*. In each of the 1991 cases, a majority of the Court articulated two important themes: (1) states must be accorded deference in their determinations of the qualifications and means of selecting their judges; and (2) although judges share important similarities with officials from the policymaking branches of government, the judicial function differs fundamentally from that of elected representatives or executive officials.

In the first case, *Gregory v. Ashcroft*, Justice O'Connor wrote the majority opinion that upheld a lower court's determination that a state law mandating a retirement age for judges was not in conflict with the Age Discrimination in Employment Act ("ADEA") because appointed state judges are not "employees" as defined by the ADEA.

The Court found that in enacting the ADEA, Congress did not intend to intrude on the states' long-held authority to proscribe the qualifications of office for their governmental officials. Indeed this authority, said Justice O'Connor, "lies at the heart of representative government." Not only does this state power survive statutes enacted by Congress pursuant to its power under the Commerce Clause, but the Court further held that the power of states to "define the qualifications of their officeholders has force even against the proscriptions of the Fourteenth Amendment." So long as the proscription is rational, the Court found that Congress cannot intrude upon this sovereign power reserved to the states.

Thus, the Court determined that Missouri's mandatory retirement age of seventy for judges is a rational exercise of state authority. The Court conceded, however, that Missouri's mandatory retirement age law "is founded on a generalization about the mental ability of elderly

---

68. *Id.* at 463 (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)).
69. *Id.* at 468.
70. *Id.* at 470.
71. *Id.* at 472–73.
judges.”72 At the time of the Gregory decision, four members of the Court were themselves well over age seventy.73 Perhaps not surprisingly, the majority stated that “[i]t is far from true that all judges suffer significant deterioration in performance at age 70. It is probably not true that most do. It may not be true at all.”74 Nevertheless, the Court deferred to the State’s determination that judicial officers could be compelled to step down after age seventy.

The Court even upheld the rationality of Missouri’s retirement law despite the fact that the law singled out judges—not legislators or executive officials—for retirement at age seventy without any evidence that judges over age seventy are likely to be more incapable than other public officials of performing their jobs. This kind of unequal targeting of a group goes to the heart of whether a law has been enacted for a discriminatory purpose.75 Yet the Court in Gregory deferred to the State’s unproven determination that “the threat of deterioration at age seventy is sufficiently great” to justify the imposition of retirement on judges of a certain age.76

In addition, the Court in Gregory grappled—albeit in a limited fashion—with how to define the judicial function, cautiously approaching the question of whether judges are policymakers. The key language in the statute at issue in Gregory lay in the definition of “employee” under the ADEA, which excluded from coverage under the Act “‘appointee[s] on the policymaking level.’”77 Judges in Missouri are first appointed by the Governor and then subjected to periodic retention elections.78 The Supreme Court rejected the argument made by Missouri judges challenging the state retirement law that judges are not policymakers. Quoting Justice Holmes’ view that the decisions of common law judges are “‘traceable to views of public policy in the last analysis’,”79 the Court concluded that

72. Id. at 473.
74. Gregory, 501 U.S. at 473.
75. See id. at 456.
76. Id. at 473.
77. Id. at 465 (quoting 29 U.S.C. § 630(f) (1990)).
79. Gregory, 501 U.S. at 466 (quoting O. HOLMES, THE COMMON LAW 35–36 (1881)).
"[i]t is at least ambiguous whether a state judge is an 'appointee on the policymaking level.' In sum, Gregory stands for the proposition that a state’s determination of the qualifications for its judicial officers is to be accorded great deference and cannot, in the absence of specific congressional intent, be intruded upon by laws enacted pursuant to either the Fourteenth Amendment or the Commerce Clause. In addition, Gregory signals the Court’s willingness to recognize the policymaking dimension of common law judging.

These two themes are present also in two companion cases from the 1991 Term, Chisom v. Roemer and Houston Lawyers’ Association v. Attorney General of Texas. In both of these cases, the question at issue was whether state judicial elections are subject to Section 2 of the Voting Rights Act of 1965 ("the Act"). Section 2 of the Act, as amended by Congress in 1982, protects racial minority voters against election “practices and procedures that result in the denial or abridgment of the right to vote” and the right to participate in the political process. Unlike voting challenges brought under the Constitution, which require proof of intentional discrimination to prove a violation, the Act is violated even in the absence of proof of discriminatory intent. Thus the Voting Rights Act is a potent tool in the hands of minority voters to eliminate both blatant and subtle forms of electoral discrimination.

The Voting Rights Act protects the ability of minority groups to elect representatives of their choice. Chisom involved elections for the Louisiana Supreme Court, while elections for Texas trial judges were the focus of the litigation in Houston Lawyers’. The distinction between the application of the Voting Rights Act to appellate rather than trial court elections had been an important one in the Fifth Circuit Court of Appeals, the court from which both of these cases were appealed. Chisom and Houston Lawyers’, therefore, presented two issues: whether judges may properly be conceived of as representatives whose elections are covered by the Act, and in the case of Houston Lawyers’, whether a single trial judge can ever “represent” voters.

In majority opinions authored by Justice Stevens, the Court in Chisom and Houston Lawyers’ upheld the application of section 2 of the Voting Rights Act to both appellate and trial level elected judges. Like the ADEA in Gregory, the question of coverage of the Act turned on the definitions of key terms. But unlike in Gregory, the Court in Chisom and Houston

80. Id. at 467.
84. Chisom, 501 U.S. at 383–84 & n.2.
85. See id. at 383.
86. Id. at 384.
87. 501 U.S. at 421.
Lawyers' found that the language of the Voting Rights Act covered judicial elections. The Court held that unless Congress expressly excluded judges from the strictures of the Voting Rights Act, the Court would not do so.  

On the question of whether elected judges are representatives, the Court found that judges who are elected are representatives in the sense contemplated by Congress when it amended the Voting Rights Act in 1982. The Court recognized the "tension between the ideal character of the judicial office and the real world of electoral politics" and suggested that the federal model of appointed judges with life tenure best promotes the creation of an impartial judiciary. The Court noted that "Louisiana, however, has chosen a different course" by deciding to elect candidates for its Supreme Court in contested elections. The majority did not remark on the wisdom or foolhardiness of the State of Louisiana's decision to elect its judges. The Court was respectful of the state's choice, even though it did not hold up the model as ideal. Finally, citing its decision in Gregory, the majority pointed out that the Supreme Court "has recently recognized that judges do engage in policymaking at some level." In holding that elected judges are representatives as that term is defined in the Voting Rights Act, the Court held in Chisom and Houston Lawyers' that where judges are elected, those elections must be conducted in accordance with the Act to give minority voters an equal opportunity to participate in the political process and elect candidates of their choice.

Although the Court found that the Voting Rights Act covers judicial elections, the Court in Houston Lawyers'—the trial judges case—re-emphasized the importance of the state's interest in how judicial elections are conducted because of the importance of promoting judicial impartiality. First, the Court specifically noted the long-standing tradition of electing state court judges; Texas has elected state judges since 1861. The Court then recognized Texas' interest in maintaining an at-large county-wide system for electing trial judges. The State argued that county-wide as opposed to single-member district-based elections for county judges served its interest in linking the jurisdiction and elective base for trial

88. See Chisom, 501 U.S. at 380; see also Houston Lawyers', 501 U.S. at 428.
89. Section 2(b) of the Voting Rights Act states that the rights of minority groups are violated if election procedures or practices used by a subdivision afford minorities "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." Chisom, 501 U.S. at 395 (quoting 42 U.S.C. § 2 (1973)).
90. Id. at 400.
91. Id.
92. Id.
93. See id.
94. See id. at 399 n.27 (citing Gregory v. Ashcroft, 501 U.S. 452 (1991)).
95. See id. at 399 n.26.
judges because at-large elections would promote judicial impartiality and accountability. The Court credited this interest as a factor to be considered by the lower court on remand in determining whether the Texas election system violated the Voting Rights Act. In fact, on remand the Fifth Circuit Court of Appeals held that this interest articulated by the State outweighed the plaintiffs' vote dilution claim.

Chisom and Houston Lawyers' articulated principles remarkably similar to those articulated by the Court in Gregory: (1) states have an important interest in determining how judges are selected for office; and (2) the judicial function is not limited solely to that of impartial, neutral legal interpretation. In Gregory, the Court recognized the policy-making function of judges, and in Chisom and Houston Lawyers', the Court recognized that elected judges can exercise a representative function.

Yet the Court's decision in White stands in stark contrast, in both tone and substance, to the Court's 1991 stance in Gregory, Chisom, and Houston Lawyers'. Justice Scalia, who sided with the majority in Gregory to uphold the importance of the state's sovereign power in determining the qualifications of judicial officers, accorded only the slightest deference to Minnesota's Announce Clause rationale of preserving the impartiality of the bench. His narrow definition of impartiality in the context of judging fails to take account of the policy-making function of common law judges that the Court acknowledged in Gregory. Minnesota's concern with preserving the core function of judges as neutral interpreters of the law while acknowledging the policymaking dimension of common law judging was disregarded by the majority in White. But it is Minnesota's attempt to mediate these two aspects of the judicial function that justifies its imposition of restrictions on candidate speech in judicial elections.

Justice O'Connor's views appear to have undergone the most dramatic transformation between the 1991 Term and White. Justice O'Connor, who authored the majority opinion in Gregory and joined the majority in both Chisom and Houston Lawyers', explicitly scorned the State in White for its decision to elect judges. This is a particularly peculiar posture for Justice O'Connor, who was herself an elected state judge in Arizona, first on a trial court from 1975–1979 and later on the Arizona Court of Appeals from 1979–1981. Her opinion in Gregory, like that of the majority opinions she joined in Chisom and Houston Lawyers', developed a nuanced and careful discussion about the role of judges as policymakers and appeared to reflect her personal knowledge of the complexity of common law judging. Her participation in the majority opinions in Chisom and Houston Lawyers' reflected a deep respect for the
determination of state voters about how best to select their judicial officers. Yet in White, Justice O'Connor's strident concurrence reflects none of this sensitivity and thoughtfulness.

Although most states originally provided for the appointment of their judges, by the mid-1800s, state voters were influenced by principles of Jacksonian democracy and sought to make judges more accountable to and representative of the people. Thus the move to select judges by election rather than by appointment was a "highly self-conscious choice of [state] policy." By the outbreak of the Civil War, twenty-two states had adopted partisan elections as the method of selecting their judges. Yet Justice O'Connor, who in Gregory deferred to what she acknowledged is Missouri's likely incorrect generalization about the fitness of judges to serve in office after age seventy, disparaged Minnesota's attempt to maintain its 150-year history of electing judges while protecting the legitimacy and impartiality of the bench in White. Minnesota's attempt to balance these interests is not the curious project of a rogue state. It is a task undertaken by the majority of states that have adopted either Announce or Pledges and Promises Clauses and by the ABA in its Model Code. The importance of reconciling these two interests animates much of the ABA Model Code's Canon 5, which sets standards for the campaigns and political activities of judges. Yet to Justice O'Connor, the problem in White was a simple one: "If the State [of Minnesota] has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges."

Ultimately Justice Ginsburg reminded the Court of its own jurisprudence from the 1991 Term and admonished:

This Court has recognized in the past, as Justice O'Connor does today, . . . a "fundamental tension between the ideal character of the judicial office and the real world of electoral politics." We have no warrant to resolve that tension, however, by forcing States to choose one pole or the other. Judges are not politicians, and the First Amendment does not require that they be treated as politicians simply because they are chosen by popular vote.

105. Id. at 821 (Ginsburg, J., dissenting) (citations omitted).
Crediting the long-standing tradition of state judicial elections, Justice Ginsberg noted:

For more than three-quarters of a century, States like Minnesota have endeavored, through experiment tested by experience, to balance the constitutional interests in judicial integrity and free expression within the unique setting of an elected judiciary. The Announce Clause, borne of this long effort, "comes to this Court bearing a weighty title of respect."\(^{106}\)

### B. Contrasting Justice O'Connor's Opinion in White with Her Stance in Grutter and McConnell

Justice O'Connor's metamorphosis between the 1991 judges cases and her posture in *White* in 2001 is made even more curious by Justice O'Connor's reputation as a mediating and pragmatic voice on the Court. Her willingness to accord deference to state interests was solidified a year after *White*, when the Court decided the highly contentious affirmative action cases involving the admissions practices of the University of Michigan and the University of Michigan Law School ("Law School").

Justice O'Connor's majority opinion in *Grutter v. Bollinger*\(^ {107}\) stands in stark contrast to her posture in *White*. In *Grutter*, Justice O'Connor accorded great deference to the state's articulated interest in racial diversity, finding it sufficiently compelling to outweigh the Fourteenth Amendment claims brought by white\(^ {108}\) students seeking admission to the University of Michigan Law School.\(^ {109}\) Specifically Justice O'Connor deferred "to the Law School's judgment that such diversity is essential to its educational mission."\(^ {110}\) Justice O'Connor deemed the state's interest, "ground[ed] ... in the academic freedom that 'long has been viewed as special concern of the First Amendment,'"\(^ {111}\) to be sufficiently compelling to trump the white applicants' equality concerns.\(^ {112}\)

Justice O'Connor's reasons for finding the State's interest compelling were highly pragmatic ones. She cited the briefs of Fortune 500 CEOs

---

106. Id. (Ginsburg, J., dissenting) (citations omitted).
108. At the author's request and contrary to the *Journals* policy, the terms white and black are not capitalized. African American and Caucasian, where they appear, are capitalized.
109. 539 U.S. at 343.
110. Id. at 328.
111. Id. at 324 (quoting Univ. of Cal. Regents v. Bakke, 438 U.S. 265, 312 (1979) (opinion of Powell, J.)).
112. Id. at 325 (stating that "today we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions").
who argued that globalization has made a diverse workforce critically important and the briefs of retired military officers who described the importance of a diverse military to “‘fulfill its principle [sic] mission to provide national security.’” Justice O’Connor also recognized that elite institutions like the University of Michigan “represent the training ground for a large number of our Nation’s leaders.” She reasoned that racial diversity among the students at these institutions is essential “[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry.”

Taken together, the basis on which Justice O’Connor finds the Law School’s interest in diversity compelling is a highly pragmatic sense of the real-world consequences of a racially exclusive system of higher education. This same pragmatism and deference to a state’s “judgment” and regard for the appearance of legitimacy among the nation’s leaders are absent from Justice O’Connor’s concurrence in White, where the state of Minnesota articulated its interest in fostering the legitimacy of the bench in the eyes of the public as its rationale for the Announce Clause.

Moreover, in Grutter, Justice O’Connor deferred to the Law School’s use of Law School Admissions Test (“LSAT”) scores as a core part of its admissions process—a practice that arguably, like the election of judges in Minnesota, creates the problem that the Law School seeks to correct. But Justice O’Connor did not merely conclude that the University of Michigan Law School’s problem with diversity is one of its own making because it continues to use LSAT scores as a core admissions indicator. Nor did she conclude that the Law School should solve the problem of insufficient diversity by simply giving up its interest in being an elite institution. Instead, Justice O’Connor thought that the Law School need not “choose between maintaining a reputation for excellence” and achieving diversity. Yet it is precisely this kind of choice that Justice O’Connor forces on states in White when she asserts that if a state elects its judges, it cannot impose meaningful restrictions on candidate speech in order to protect the impartiality of the bench.

Justice O’Connor’s 2003 co-authored majority opinion in McConnell v. Federal Election Commission drew an even more disturbing comparison to her opinion in White. In McConnell, Justice O’Connor

---

113. Id. at 330.
114. Id. at 331 (citations omitted).
115. Id. at 332.
116. Id.
117. Id. at 328 (deferring to the law school’s “educational judgment”).
118. The University of Michigan Law School “must consider the race of applicants because a critical mass of underrepresented minority students could not be enrolled if admissions decisions were based primarily on undergraduate GPAs and LSAT scores.” Id. at 318 (citation omitted).
119. Id. at 339.
120. 540 U.S. 93 (2003).
deferred to Congress’ determination that campaign spending limits are necessary in order to protect against the appearance of corruption and illegitimacy in federal elections. Although these limits go “to the heart of” First Amendment rights, Justice O’Connor found that Congress’ concern was sufficient to overcome the free speech rights of potential contributors. This balance is precisely the kind that states like Minnesota have attempted to strike between the First Amendment rights of judicial candidates and the legitimacy of the bench in the eyes of voters. Yet Justice O’Connor failed to credit this interest in *White* while deferring to the very same articulated interest in *McConnell*.

Justice O’Connor’s position in *White*, contrasted with *McConnell*, is particularly troubling because the State of Minnesota specifically advanced the importance of fostering the “public’s confidence in the integrity and impartiality of the judiciary” as one of the compelling state interests supporting the Announce Clause. Concern with the perception of impartiality is particularly compelling in the context of judicial elections because the Supreme Court has held and Congress has agreed that the mere appearance of bias may violate the due process rights of litigants. In fact a majority of the Court that included Justice O’Connor determined in 1989 that “[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship.” Moreover, in *McConnell*, which concerned the election of legislators and executive officers, Congress was not bound by the constitutional obligation of impartiality that binds states in determining how to select their judges. Yet in *McConnell*, Justice O’Connor recognized the importance of preventing “‘both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption.’”

Even more than the substance, the language and tone of Justice O’Connor’s opinions in *McConnell* and *Grutter* contrast disturbingly with her tone in *White*. In *McConnell* and *Grutter*, Justice O’Connor struck a pragmatic and compromising tone, deferring to Congress’ attempt to balance the free speech rights of candidates and contributors against the importance of promoting the legitimacy of the political process in the

121. Id.
122. Id. at 248 (Scalia, J., concurring in part and dissenting in part).
eyes of voters. She was both respectful and conciliatory when describing the interests of both Congress and the State of Michigan. By contrast, in *White* her tone was scolding and dismissive of the State's attempt to balance its tradition of electing judges with preserving the appearance of impartiality on the bench—an appearance that is compelled by the Due Process Clause. How do we account for this metamorphosis in Justice O'Connor's approach in *White*?

C. Recent Challenges to the Impartiality of Article III Judges

Perhaps underlying the open hostility toward judicial elections expressed by a majority of the Justices on the Court is their own frustration at the recent public challenges to the impartiality of federal judges who, because they are appointed for life, have traditionally been regarded as the most independent and impartial judges in the world. In *White*, the majority described the system of appointing life-tenured federal judges as a kind of "gold-standard" of judicial selection conceived by the Framers to maximize the impartiality of the bench.127 Even in the earlier cases of *Chisolm* and *Houston Lawyers*, the Court idealized this method of selecting Article III judges as the one best able to produce an impartial bench in which judges are freed from concerns about public opinion.128

However, increasing and strident public challenges to the impartiality of Article III judges plagued the federal court nomination process during the 1990s. Since 1991, the federal bench has faced increasingly open and ugly challenges to the impartiality of its judges and to the integrity of the federal appointment process. The nomination of Clarence Thomas to the Court in 1992 was among the ugliest and most contentious in the history of Supreme Court nominations.129 Appointments to the federal bench during the tenure of President Clinton were routinely marked by politically and racially divisive battles on Capitol Hill.130 In several instances, decisions by federal judges were publicly labeled as

---

127. *White*, 536 U.S. at 795 (Kennedy, J., concurring) ("There is general consensus that the design of the Federal Constitution, including lifetime tenure and appointment by nomination and confirmation, has preserved the independence of the Federal Judiciary.").

128. See, e.g., *Chisolm* v. *Roemer*, 501 U.S. 380, 400 (1990) ("The Framers of the Constitution ... established that Article III judges would be appointed, rather than elected, and would be sheltered from public opinion by receiving life tenure and salary protection.").

129. For the full transcript of the extraordinary hearings on the Thomas nomination, see *Nomination of Judge Clarence Thomas to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 102d Cong. Parts 1-4 (1991).

"activist," "soft on crime," or "liberal" by politicians and commentators. In at least one instance during a presidential election year, the Speaker of the House of Representatives and the President publicly criticized a federal judge's evidentiary decision in a drug case. Calls for the judge's impeachment were bandied about, and the judge ultimately vacated his own decision. On another occasion, a federal judge on the Third Circuit Court of Appeals cited increasing political scrutiny of judicial decisions as part of the reason for his resignation from the bench.

Throughout this decade of challenges to the impartiality of Article III judges, the Supreme Court maintained a high approval rating among Americans and was widely regarded as the most admired of the three branches of government. But this status was shaken in the winter of 2000-2001 after the Court's notorious decision in the presidential election case, Bush v. Gore. The Court's five to four majority decision was widely criticized by liberal, moderate, and even conservative lawyers. Many deemed it to be outright partisan. Others suggested that it at least gave the appearance of an ideologically driven decision, which some commentators deemed to be just as harmful in the context of the contested presidential election. Justices Scalia, O'Connor, and Thomas were particularly singled out for charges of bias in the case.


See Allison Mitchell, Clinton Pressing Judge to Relent, N.Y. TIMES, Mar. 22, 1996, at A1 (describing firestorm of reaction to decision of Judge Harold Baer to grant defendant's motion to suppress evidence in a drug case).


See MacFarquhar, supra note 131, at B4 (stating Judge H. Lee Sarokin's inability to ignore political attacks as rationale for resignation).


See Posner, supra note 138, at 166-67 (agreeing with the outcome of Bush v. Gore but criticizing Justice Scalia's leadership role in stopping the recount and Scalia's concurrence in the case for creating the impression of partisanship).

See Jeffrey Toobin, Too Close to Call: The Thirty-Six Day Battle to Decide the 2000 Election (2001); Demonport Uges Scalia to Bow Out of Florida Case, Charleston Gazette, Dec. 11, 2000, at 9A; Christopher Marquis, Job of Thomas' Wife
Several Justices who joined the majority in *Bush v. Gore* took pains in the weeks after the decision to defend the impartiality of the Court. The sting of this unusual public censure has likely remained with the Court and was renewed during the 2004 Term when legal commentators and the media questioned for several months whether Justice Scalia should recuse himself from a high-profile case involving Vice President Dick Cheney. Justice Scalia took the unusual step of issuing a twenty-page opinion explaining why he would not recuse himself from a case involving his self-described "friend," Vice President Cheney, with whom he had taken a recent duck-hunting trip. The issuance of the detailed recusal opinion after weeks of negative media coverage evidenced the Court's increasing sensitivity to the public's perception of the Court's impartiality. A few weeks later, Chief Justice Rehnquist agreed to appoint a commission to look at judicial ethics issues for federal courts.

Given the increased public and media scrutiny directed at the Court since *Bush v. Gore*, the Court has little basis for laying the full weight of public concern about the impartiality of judges at the feet of elected state judiciaries. The denunciation of judicial elections by both Justices Scalia and O'Connor as irreconcilable with judicial impartiality in *White* may in fact reflect the Court's own deeply self-conscious concern about the public's growing lack of confidence in the impartiality of judges overall. Certainly Chief Justice Rehnquist in his 2004 Year-End Report recognized that the impartiality of the federal bench has been threatened by negative public reaction to decisions by federal judges. By setting up a simple dichotomy between appointing and electing judges—one method guaranteeing impartiality and the other creating biased judges—the Court in *White* embraces a narrow and misleading conception of impartiality.

---

143. *See Joan Biskupic, Election Still Splits Court*, USA TODAY, Jan. 22, 2001, at 1A.
147. It is no surprise then to read Justice Scalia's 2004 decision on the question of recusal in *Cheney* and to discover that Justice Scalia cannot conceive of how a reasonable
III. SEEING THE PROBLEM OF JUDICIAL ELECTIONS THROUGH THE LENS OF DIVERSITY: THE IMPORTANCE OF STRUCTURAL IMPARTIALITY TO DUE PROCESS

_White_ has strengthened the hand of advocates of an appointed state judiciary, and even those who disagree with the decision itself believe that the removal of restrictions on candidate speech will turn judicial elections into a virtual free-for-all that will threaten impartiality.\(^{146}\) Special interest groups favoring unlimited judicial candidate speech have been invigorated by the decision.\(^ {149}\) Overbroad interpretations of the case have led some states to remove virtually all restrictions on judicial candidate speech.\(^ {150}\) Even the American Bar Association directed a Working Group on the First Amendment and Judicial Campaigns to evaluate sections of the ABA Model Code of Judicial Conduct to ensure its consistency with _White_.\(^ {151}\)

Yet as states and the American Bar Association grapple with how to respond to _White_, the question of how methods of judicial selection affect racial diversity is a little-studied issue. However, the question of diversity is a vital one that speaks directly to the issue of impartiality.

Racial minorities continue to be underrepresented in state judiciaries. Blacks constitute only 4.4% of the state judiciary.\(^ {152}\) Latinos, reportedly the largest minority group in the country,\(^ {153}\) comprise only 3.0% of the state bench.\(^ {154}\) Even in states where blacks constitute nearly or more than 30% of the population, such as Louisiana, Mississippi, and South Carolina, the percentage of blacks on the judiciary has remained disturbingly low.

---


150. See N.C. CODE OF JUDICIAL CONDUCT Canon 7(B)(1), (2), (4) (2003).


154. Graham, _supra_ note 152, at 184 tbl.2.
small. In New York, which has the second largest Latino population in the country, Latinos make up only 1.6% of state court judges and 2.9% of federal judges. Moreover, racial and gender bias in the court system continues to be a reality.

I have argued in earlier articles that judicial impartiality requires more than the lack of bias of individual judges. Impartiality has a structural dimension as well that implicates the bench as a whole and that is directly connected to diversity. When describing structural impartiality, I refer to the overall composition of the bench in a jurisdiction. In my work, I have argued that the Due Process Clause entitles litigants to appear not only before an individual judge who is not biased but also before a judge selected from a structurally impartial bench. I analogize here to the jury. Thirty years ago the Supreme Court held that the due process rights of litigants are violated when a system for selecting jury venires results in the exclusion of racial minorities or women. In Peters v. Kiff, Justice Marshall explained why jury decision-making suffers when racial minorities are excluded: "When any large and identifiable segment of the

155. See id. at 173–74 & 185–86 tbl.3 (2004) (finding that Louisiana, Mississippi, and South Carolina rank amongst the worst states in black population/black judge disparity ratios).


157. Id.

158. See, e.g., Ind. Supreme Court Comm’n on Race and Gender Fairness, Executive Report and Recommendations 5–6 (2002) (finding that over one third of respondents report observing “courtroom harassment and disparagement on the basis of gender, ethnicity or race, including by judicial officers”); Select Committee on Gender Equality, Retrospective Report 5 (Oct. 2001) (finding that 56% of minority court employees in Maryland say that racial and ethnic bias had either increased or stayed the same in the previous five years); Committee on Racial and Gender Bias in the Justice System, Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System 129 (2001) (finding that “after controlling for legally prescribed factors and mode of conviction . . . race, ethnicity, gender, and age definitely affect sentencing outcomes of all kinds”); Press Release, Mississippi Administrative Office of the Courts, Court Gender Fairness Task Force Issues Findings and Recommendations (Nov. 27, 2002) (concluding that “gender bias is not a widespread problem,” although two-thirds of Mississippi judges, lawyers, and court personnel believe that there is unfairness towards women in the court, and nearly half of female attorneys believe that they are treated in a less dignified or unequal manner than their male counterparts). All of these sources are available at National Center for State Courts, Race and Gender Fairness in the Courts: Task Force, Commission, and Committee Reports, at http://www.ncsconline.org/wc/Publications/KIS_RaceEthStLnks.pdf (last visited Feb. 28, 2005).

159. See Ifill, Judging the Judges, supra note 8; Ifill, Beyond Role Models, supra note 8.

160. See Taylor v. Louisiana, 419 U.S. 522, 537 (1975) (holding that the Sixth Amendment affords a defendant the opportunity to have women on his or her jury); see also Peters v. Kiff, 407 U.S. 493, 504 (1972) (holding that “whatever his race, a criminal defendant has standing to challenge the system used to select his . . . jury, on the ground that it arbitrarily excludes from service the members of any race and thereby denies him due process of law”).
community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.\textsuperscript{161}

The Court was careful to distinguish the venire from the petit jury. Litigants are not entitled to have members of a particular race or gender on their juries, but the pool from which their jurors are selected—the venire—must reflect the diversity of the community.\textsuperscript{162} The Court based this not only on the Sixth Amendment "fair cross-section" requirement for the selection of juries but also on the Fourteenth Amendment due process right of litigants to appear before an impartial tribunal.\textsuperscript{163}

I argue that the Due Process Clause compels a similar result for the judiciary. As with a petit jury, litigants do not have the right to appear before a judge of a particular race or gender. But the bench itself—the pool from which a litigant's particular judge is selected—must include qualified members from a cross-section of the community. In other words, structural impartiality is required for the judicial bench, just as it is required for the jury venire. Diversity produces structural impartiality. Judicial selection systems that do not produce this structural impartiality or diversity run afoul of the due process impartial tribunal mandate.

Moreover, racial and gender diversity help ensure that judicial decision-making includes the variety of competing perspectives and viewpoints that exist in the community. As Justice Marshall suggested in the context of jury decision-making,\textsuperscript{164} judicial decision-making that fails to include racial minorities and women is impoverished by the absence of the kind of diverse perspectives and viewpoints that enhance informed legal decision-making. In this regard, diversity should be viewed by the bench and bar as an imperative required to fulfill the due process impartial judge mandate and as critically important to enhance the legitimacy of judicial decision-making.

One need not assume that a particular minority judge will be in a position to represent these "outsider" views and perspectives. Not every minority judicial candidate will be a "diversity" candidate. In some instances, a white judge may satisfy the need for diversity by considering outsider perspectives or viewpoints in his decision-making that would otherwise be excluded from judicial deliberations.\textsuperscript{165} An important dimension of the diversity question for the judiciary is whether a particular

\textsuperscript{161} Peters, 407 U.S. at 503.

\textsuperscript{162} Id. at 503–04.


\textsuperscript{164} Peters, 407 U.S. at 503.

\textsuperscript{165} For an example of how a white judge can, in his decision-making, "represent" the perspective of a minority community, see Ifill, Beyond Role Models, supra note 8, at 488–95.
judicial candidate can represent the views of marginalized or outsider groups, not simply whether the judge himself belongs to a minority group. In order to gain the benefits of diversity, one must look both to the race of the judge and to his ability and willingness to bring otherwise un- or underrepresented perspectives to the bench. To assume that every black candidate brings perspective diversity to the bench essentializes black judicial candidates and creates opportunities for cynical manipulation of the diversity ideal. This phenomenon is perhaps best exemplified by the appointment of Justice Clarence Thomas to the Supreme Court. Even though his views on important legal issues do not reflect those of the vast majority of blacks, he was appointed as a “diversity” judge. I have called this kind of diversity cosmetic, rather than substantive. To suggest that blacks are represented on the Supreme Court in any substantive way by Justice Thomas subverts the very idea of diversity.

Recognizing that judges can and do perform a representative function without compromising their impartiality is an important analytical step in solving the diversity crisis. Diversity provides the bench with judges who can bring to their deliberations the broad range of perspectives and viewpoints that exist in the community. Diversity does not guarantee or require that minority judges favor minority litigants any more than the current lack of diversity begets an expectation that white judges will favor white litigants. Nor does the race or gender of a judge predict the outcome of a case. Instead diversity provides a more limited, but nevertheless important, contribution to judicial decision-making. It affords an opportunity for alternative or “outsider” perspectives to be included in the process of judicial decision-making and in the courthouse. For minority communities that are increasingly overrepresented among the population of criminal defendants and incarcerated persons, the

---

166. For a more complete discussion of cosmetic diversity as it relates to judges and representation, see id. at 479–95.

167. For a more in-depth discussion of the ways that judges—especially trial judges—function as “representatives,” see Ifill, Judging the Judges, supra note 8, at 134–48. Also, for a discussion of how the representative function of judging can be reconciled with the obligation to be impartial, see Ifill, Beyond Role Models, supra note 8, at 465–79.


importance of including these perspectives in judicial decision-making goes to the very heart of both the perception and the reality of the legitimacy of the legal system.

As a number of jurisdictions begin to rethink their models of electing judges after White, structural impartiality and diversity should be central parts of the discussion. In most jurisdictions, I fear they are not. Even where diversity is discussed and considered, it is rarely regarded as essential to either the impartiality or the integrity of the bench.173

A. The Potential Effects of Electoral Changes on Diversity

1. Switching from Election to Appointment

The view that appointing judges, or so-called “merit selection,” is a far superior alternative to electing judges has remained largely unchallenged. The American Bar Association has for years recommended the Missouri Plan as the preferred method for state judicial selection.171 In addition, Justice O’Connor devoted a good portion of her concurrence in White to explaining how the Missouri Plan for selecting judges operates.172 Under this system, which has been adopted by thirty-eight states, an executive—usually the governor—appoints judges who then face periodic retention elections.173 But the wholesale embrace of the Missouri Plan as a cure-all for potential impartiality issues raised by head-to-head judicial contests ignores the number of instances in which retention elections have been characterized by the same kind of contentious,


170. Instead racial diversity is mostly advocated as important for preserving public confidence in the judiciary. See, e.g., Justice in Jeopardy, supra note 168, at 60.


173. Id. at 788–92 (O’Connor, J., concurring); Hill, supra note 102, at 353.
ideologically-driven politics as contested judicial elections.\textsuperscript{174} Perhaps the most famous of these retention elections is that of Justice Rose Bird, who lost her seat on the California Supreme Court after well-funded pro-death penalty interest groups launched a bitter and negative campaign against her.\textsuperscript{175} The Bird retention election still stands as one of the most bitterly divisive and political judicial races in the nation.

Studies that have examined the effect of appointment versus election of judges on diversity have produced conflicting results.\textsuperscript{176} These studies, which rely exclusively on counting the number of black or minority judges on a court as the appropriate benchmark for measuring diversity, may fail to address the issue of structural impartiality. Diversity cannot be measured solely by counting black or brown faces on the bench. To get beyond cosmetic diversity, we must examine as well whether diverse perspectives are represented on the bench, and whether black judges appointed to the bench are those who would be endorsed by the black community.

The standards used to assess vote dilution claims under the Voting Rights Act are instructive on this point. Judicial elections, when conducted in compliance with the Voting Rights Act, must give minority voters an equal opportunity to participate in the political process and to elect candidates of their choice.\textsuperscript{177} An elective system that adds black faces to the bench, but not those that would be the candidates of choice of minority communities, frustrates the ability of blacks to participate equally in the political process. The same is true if an appointive system yields more black judges who are not those endorsed by the black community.\textsuperscript{178}


\textsuperscript{178} Indeed black judicial nominees may be selected to advance an agenda that is directly at odds with the interests of black communities. See Peter Beinart, No Appeal, NEW REPUBLIC, May 28, 2001 (arguing that the Bush Administration has realized that its right-wing judges had better be minority or female). For this reason, the ability and willingness of appointed judicial candidates to represent traditionally unrepresented or "outsider" perspectives is a critically important part of the larger diversity inquiry. Race and gender often correlate with precisely the kind of "outsider" perspectives and viewpoints that can enrich judicial decision-making. Nevertheless, one cannot assume that the race or gender
In fact, shifting the power of initial judicial selection to a jurisdiction's executive—whether mayor or governor—may further dilute the electoral power of minority voters. Blacks constitute a majority of the voting population in only a handful of major American cities, and blacks do not constitute the majority of the voting population of any state. This means that in most instances white voters, particularly at the state level, control who will be elected to executive office. In most states, the candidate of choice of most white voters in gubernatorial elections is not the same as the candidate of choice of most black voters.

In those states, black voters under a Missouri Plan system are simply further removed from meaningful participation in the selection of the state's judges.

In addition, strong evidence suggests that racially polarized voting continues to exist in judicial elections. In several counties in Maryland, for example, white voters consistently refuse to vote for incumbent black judges who have been appointed by the state's governor. In some instances, white voters selected white lawyers with no judicial experience over highly qualified black incumbents. In Baltimore County, a majority white county in Maryland where 20% of the electorate is African Ameri-
can, voters retained a sitting black circuit court judge for the first time in 2004, but only after two years in which county leaders and commentators publicly highlighted the shameful record of racially polarized voting in the county.\textsuperscript{185} Direct racial appeals still occur in some judicial races. In Mississippi in 2004, supporters of a white circuit court judge who sought to unseat a black supreme court justice in that state distributed posters supporting the white challenger with the slogan: “He’s One of Us.”\textsuperscript{186}

There is no reason to believe that racially polarized voting and racial campaign appeals might not also infect retention election contests. Black incumbent judges may face strong and organized efforts to remove them from office in retention elections, just as black incumbent judges in contested judicial election systems often face regular and well-financed challengers in majority white jurisdictions.\textsuperscript{187} Thus, diversity may be thwarted even when nominating commissions or governors first appoint black judicial candidates because of racially polarized voting in retention elections.

In addition, an appointive system may mask ways in which the benefits of diversity may be undermined even though minority judges have been appointed to the bench. For example, a governor may appoint a black judicial candidate who is also the candidate of choice of a majority of black voters, only to see that judge turned out of office when he faces a majority white electorate in his retention election. Such a governor may simply decide to appoint yet another black candidate to fill that same seat who also will likely be voted out of office at a retention election. The governor may then reappoint the defeated black judge to another court or to the same seat.\textsuperscript{188} Thus black judges under a Missouri


\textsuperscript{188}. After African American judge Alexander Wright Jr., the first black circuit court judge in Baltimore County, was defeated by a white challenger in 2000, Governor Parris Glendening appointed him to yet another circuit court seat in the County. Judge Wright was turned out of office again by majority white voters in Baltimore County in 2002 in
Plan system may be turned out of office regularly in retention elections. With a governor's commitment to reappointing a minority judge, the number of minority judges on the bench in the jurisdiction may remain unchanged, giving the impression that the bench has achieved commendable levels of diversity. But many of the potential benefits of diversity are lost when individual black judges are unable to remain in office for long periods of time. They are unable to build the kind of seniority that leads to influential administrative positions within the state judiciary and to advancement to higher courts, and they are unable to influence the important patronage opportunities within the courthouse. A study that looks only at the number of black judges serving but that does not analyze how long minority judges stay in office and whether they advance to higher courts at the same rate as their white counterparts fails to reflect accurately whether appointing judges increases diversity on the bench.

For jurisdictions covered by the preclearance provisions of the Voting Rights Act, the question of how a shift from electing to appointing judges will affect diversity is one that will have to be addressed before appointive systems may be adopted. Section 5 of the Voting Rights Act requires that jurisdictions listed in Section 4 of the Act—including at least parts of most southern states—submit voting changes to either the Department of Justice or the District Court for the District of Columbia for preclearance before they may be adopted. The test for granting preclearance is whether a voting change will result in a “retrogression” of minority voting power. Therefore any jurisdiction covered by Section 4 of the Act that seeks to change its practices or procedures for the election of judges will need to prove to either the Justice Department or the District Court for the District of Columbia that the change to appointing judges will not adversely affect diversity on the bench.

Finally, the federal bench may be the best example of the dubious potential of appointing judges to promote diversity. Blacks constitute favor of yet another white challenger with no judicial experience. Jonathan D. Rockoff & Stephanie Hanes, Judge's Loss Spurs Questions of Racism: In Baltimore County, Some Say Wright's Race a Factor; Others Note Ballot Order, BALTIMORE SUN, Nov. 7, 2002, at 1B.

Anna Borgman, Voters' Rejection of Black Judge is Discouraging to Many People, WASH. POST, Nov. 7, 1996, at C8. This revolving door of black judges is demoralizing for both the black judges and the voters who support them.

189. I have described how the exercise of patronage and employment decisions by judges presents opportunities for diversity on the bench to improve the judicial system. See Ifill, Judging the Judges, supra note 8, at 139 (maintaining that an increase in minority and women judges often leads to an increase in the appointment of minority and female judicial clerks, secretaries, and other court personnel). In sum, a diverse bench often leads to a more diverse courthouse.

190. See 28 C.F.R. § 51 (appendix) (2003) (table of jurisdictions covered under § 4(b) of the Voting Rights Act, as amended). But coverage is not limited to the south. Three of the boroughs of New York City are covered by the preclearance provisions as well. Id.

10.3% of all Article III federal court judges. But this deceptively high number masks some important facts. States with large black populations are often the jurisdictions with the fewest black federal judges, and blacks appointed to the federal bench often may not be candidates supported by the African American community. Moreover, blacks are even more underrepresented on the federal appeals courts. Of the 179 judges on federal courts of appeals, only fourteen are black and eleven are Latino. Nor does the federal appointive system augur well for the likelihood that appointing judges will depoliticize the judiciary. Not only has the federal nominations process become increasingly and openly political, but as the bench becomes more ideologically split, judges on federal courts increasingly have descended into open and public political battles.


194. See, e.g., Experts Say Alabama Needs More Black Federal Judges, GADSDEN TIMES (Gadsden, Ala.), Dec. 24, 2002. Until President Clinton appointed a black judge to the Fourth Circuit Court of Appeals as a recess appointment in the final days of his administration in 2000, that Court remained all white, despite the fact that the percentage of blacks living in the states of the Fourth Circuit (Maryland, North Carolina, South Carolina, and Virginia) is among the highest of any federal circuit. See Mark Murray, Stayed from the Bench, NAT’L J., Nov. 21, 1998, at 2799 (stating blacks make up 22% of residents living in the Fourth Circuit). There are now two black judges sitting on the Fourth Circuit bench. It has been twenty years since a black candidate was nominated and confirmed to sit on the federal district court bench in Mississippi, yet the black population of that state is over 30%. Currently only one black judge (who was nominated by President Reagan) sits on the Mississippi federal district court bench. See Federal Judicial Center, History of the Federal Judiciary, at http://www.fjc.gov/history/home.nsf (last visited Feb. 28, 2005).


197. See, e.g., Grutter v. Bollinger, 288 F.3d 732, 811 (6th Cir. 2002) (Boggs, J., dissenting); Charles Lane, Disorder in the Court: Judges Squabble Over Proceedings Surrounding Ohio Man’s Stay of Execution, WASH. POST, Nov. 12, 2001, at A3 (describing dispute between Sixth Circuit judges over stay of execution for death row convict); Adam Liptak, Federal Judge is Scolded for Attack, N.Y. TIMES, Nov. 5, 2002, at A18 (stating that the Eighth Circuit Court of Appeals strongly denounced an accusation by a black federal district judge that the appellate court’s reversal of his opinion was racially motivated).
Clearly the question of how diversity will be affected when judges are appointed rather than elected is a complex one. Difficult as it may be to measure and tease out these complex and sensitive issues, they must be addressed forthrightly by jurisdictions contemplating changes to their judicial election systems. The need for structural diversity and its relationship to impartiality should compel jurisdictions to recognize the diversity question as one of constitutional dimension.

2. Removing Campaign Speech Restrictions

Removing campaign speech restrictions may disadvantage black judicial candidates, who may be more vulnerable to distortions of their public statements than white judicial candidates. The reality is that black judicial candidates often face a steep uphill battle in majority white jurisdictions. Racially polarized voting continues to be a fact of life in many jurisdictions. Black incumbent judges may disproportionately face charges of bias, with recusal motions often explicitly predicated on the black judge’s assumed racial allegiance to a litigant. Although black judges, particularly at the federal level, have ably answered these charges of bias, the records of black judges may be more readily distorted to satisfy a stereotypical and racist mindset. Thus a black judge may, despite a record to the contrary, be deemed “soft on crime,” "unqualified," or "liberal."


200. Judge Constance Baker Motley was perhaps the most eloquent when, in denying a recusal motion filed by a defendant law firm in a gender-based employment discrimination case, she observed:

Indeed, if background or sex or race of each judge were, by definition, sufficient grounds for removal, no judge on this court could hear this case, or many others, by virtue of the fact that all of them were attorneys, of a sex, often with distinguished law firm or public service backgrounds.


201. The nomination of Missouri Supreme Court Justice Ronnie White to the federal district court in Missouri was scuttled when he was described as “pro-criminal” by then-Senator John Ashcroft. Tim Bryant, Judge White Says Senate’s Rejection of His Appointment Could Have A ‘Chilling Effect’, ST. LOUIS POST-DISPATCH, Sept. 22, 2000, at A6.

202. Calling into question the competence or professionalism of black judges often plays to deeply embedded racial stereotypes. See, e.g., Ed Garvey, Milwaukee Media Do Hatchet Job on Higginbotham, CAPITAL TIMES (Madison, Wisc.), Feb. 4, 2003, at 9A (arguing that opponents of a black judicial candidate in a race for a seat on the Wisconsin Supreme Court played to racial stereotypes in suggesting that the candidate is “lazy”).

203. It was widely perceived that the decision by the lawyers of then-candidate George H.W. Bush to seek the recusal of black Judge Nikki Clark from hearing one of the
Given this reality, the removal of candidate speech restrictions may effectively result in robust First Amendment privileges for white judges but not for minority judges, who may understandably fear that their impartiality may be questioned more aggressively than that of their white counterparts. What a minority judge says on the campaign trail may be subject to greater scrutiny and used to trigger latent racial impulses in a majority white electorate.\textsuperscript{204}

B. Re-Imagining Judicial Elections

As I have argued throughout this Article, electing judges in and of itself does not threaten the impartiality of the bench. Judges—whether appointed or elected, federal or state—face increasing scrutiny by an often cynical and misinformed public. Reforming the judicial selection process is more complex than Justices Scalia and O’Connor suggest in \textit{White} and than the position taken by some states. \textit{White} has created an opportunity for states and their bars to re-examine how best to educate and inform the public about the role of judges in our democracy. It also provides an opportunity to educate judges and judicial aspirants about the nature of impartiality, its structural and individual dimensions, and how judges can strike a balance between representation and impartiality. Judicial elections should not be abandoned simply because the Supreme Court thinks they are a bad idea. Federalism concerns alone should encourage states to resist the Court’s heavy-handed dismissal of a state’s interest in electing judges. Instead, states as well as the bar should view post-\textit{White} judicial selection reforms as providing an opportunity to grapple with some of the difficult and complex questions discussed above. Below are several initiatives that

---

\textsuperscript{204} Even when a minority judge is not campaigning, his statements may expose him to disproportionate admonishment or a disproportionate number of recusal motions. See, \textit{e.g.}, Adam Liptak, \textit{Arkansas Judge Sues a Disciplinary Panel Over Free Speech}, N.Y.TIMES, Dec. 18, 2002 (reporting on a black Arkansas appellate court judge’s decision to fight the action taken by the state judicial disciplinary commission to admonish the judge for statements made before a group of legislators about a lack of diversity at the University of Arkansas); \textit{see also} Pennsylvania v. Local Union 542, Int’l Union of Operating Eng’rs, 388 F Supp. 155 (E.D. Pa. 1974) (denying recusal motion of white litigant who alleged judge’s lack of impartiality based on judge’s use of the word “we” when referring to blacks in speech).
should be considered by states that elect judges and supported by advocates of judicial impartiality.

1. Define Impartiality

At a minimum, both the American Bar Association and the states should set about defining impartiality in their respective Codes of Judicial Conduct. The ABA in particular should take a leadership role, as so many states base provisions in their codes on the ABA Model Code. Changes to the ABA Model Code of Judicial Conduct could include language that identifies structural impartiality as an important part of judicial impartiality. I have proposed two language amendments to the Commentary Section of Canon 1 to the ABA Commission on the Model Code of Judicial Conduct, which is currently reviewing the Model Code of Judicial Conduct. These amendments reflect the Code's important role in articulating the highest aspirational standards for our nation's courts. Canon 1 states:

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.

In section 4 of the Commentary to Canon 1, the text currently defines “a judiciary of integrity” as “one in which judges are known for their probity, fairness, honesty, uprightness, and soundness of character.” It further defines “an independent judiciary” as “one free of inappropriate outside influences” and explains that “[p]ublic confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility.” I contend that the following language should be added to this commentary:

Impartiality in the context of judges denotes an open mind and the absence of bias in favor of, or against, individual parties or classes of parties. An impartial judiciary is one in which

208. Id.
judges are selected by means that are fair and equitable and that result in a qualified and diverse bench.

In my view, this description of impartiality addresses both the individual and structural components of this important element of due process.209

2. Adopt Public Financing of Judicial Elections

In addition, all states that hold judicial elections—retention or otherwise—should adopt a system of public financing for judicial elections. There are few more urgently-needed reforms to the current method of electing judges in most states than campaign finance reform. The need for judicial candidates in most states to raise huge war chests to run for judicial office undermines both diversity and impartiality on the bench. Skyrocketing campaign expenditures for judicial candidates are relatively new. The mid-1980s saw the first and then-unprecedented one million dollar supreme court judicial races.210 Since then, money has arguably become the most accurate predictor of the outcome of supreme court judicial races,211 and the cost of judicial races has risen "as fast as that of... Congressional races [and] presidential campaigns."212

The effect of money in judicial races threatens judicial impartiality. Major donors—principally businesses, corporations, and lawyers213—may regard candidate beneficiaries as "their" judges.214 More disturbingly, some evidence suggests that campaign donations may affect judicial decision-making.215 The very essence of impartiality is compromised by a judge's sense that she owes allegiance to a donor community. In any case, strong evidence suggests that to a significant majority of the public, the

209. The Code may be amended by the ABA to reflect changes in the definition of impartiality by the time this Article goes to print.
211. See Goldberg & Sanchez, supra note 50, at 15 (analyzing rising cost of state supreme court races and concluding that "[w]ith few exceptions, money means victory" for supreme court judicial candidates).
213. See Goldberg & Sanchez, supra note 50, at 17 (finding that according to a recent study "two-thirds of all donations to [state] Supreme Court candidates came from lawyers and business interests").
215. See T.C. Brown, Majority of Court Rulings Favor Campaign Donors, Plain Dealer (Cleveland), Feb. 15, 2000, at 1A; 60 Minutes: Justice for Sale? (CBS News television broadcast, Nov. 1, 1998) (transcript available at Lexis, CBS News Transcripts); see also, James Gill, Influencing Louisiana's Judiciary, New Orleans Times-Picayune, Dec. 3, 1999 (describing claims that Louisiana Supreme Court Justice Pascal Colgro succumbed to pressure from corporate campaign donors).
appearance of impartiality among judges has been severely compromised by unfettered campaign donations from private donors.\textsuperscript{216}

Moreover, the presence of big money in judicial campaigns compromises structural impartiality by undermining diversity on the bench. Because blacks control fewer financial resources, they are less likely than their white counterparts to make campaign contributions.\textsuperscript{217} Ironically, campaign finance "reforms" that lower caps on individual contributions may work against black candidates who run in majority white jurisdictions and who may be able to obtain the financial support of one or two wealthy contributors but lack the more broad-based financial support among members of the bar enjoyed by white candidates.\textsuperscript{218} This severely disadvantages black candidates in majority white jurisdictions.

Judicial elections should be fully funded by public money. Some states have adopted modified public financing schemes for judicial races.\textsuperscript{219} States that choose to elect their judges should formally adopt a public financing scheme that makes funds available to judicial candidates who obtain enough signatures to suggest that they have significant electoral support in the community. Television ads have become standard and essential forms of judicial campaigning in many states.\textsuperscript{220} Public money should finance a limited number of candidate television commercials for the highest judicial offices. Trial judges should receive money for travel, campaign literature, signs, and radio ads. States should fund at least one non-partisan judicial candidate forum, at which the public has an opportunity to meet and learn more about the candidates running for judicial office.

More often than not, third-party interest groups are responsible for airing the most misleading and nasty television ads in judicial races. The

\begin{itemize}
\item \textsuperscript{216} See, e.g., John Caher, \textit{Forum Explores Judicial Election Funding Reform}, N.Y. L.J., Dec. 8, 1999; Keller, \textit{supra} note 214.
\item \textsuperscript{218} I thank Laura W. Murphy, Director of the Washington Legal Office of the American Civil Liberties Union, for sharing this perspective with me. Ms. Murphy's father, the Honorable William H. Murphy Sr., was one of the first elected black judges in Maryland.
\item \textsuperscript{220} See GOLDBERG & SANCHEZ, \textit{supra} note 50, at 7.
\end{itemize}
vast majority of these ads eschew focusing on a candidate's qualifications for office and are directed instead at suggesting how a judicial candidate would decide a hot-button issue like abortion or the imposition of the death penalty. It has been estimated that these interest groups spent more than $2.2 million on television ads for judicial races in 2002. In the state of Michigan, one interest group—the state Chamber of Commerce—"spent more on airtime than all the candidates combined." Third party individuals and interest groups have a right to political expression covered by the First Amendment. But as the Court's decision in *McConnell* demonstrates, that right is not entirely unfettered. The state can and should impose some restrictions on these ads, leveling penalties for airing ads that recklessly misrepresent a candidate's record.

Judicial candidates should also be compelled to address ads aired on their behalf. States should require at a minimum that judicial candidates either endorse or disavow third-party ads supporting them. The candidate's endorsement or disavowal should be stated both at the beginning and at the end of the advertisement. In other words, the onus should be on judicial candidates to affirmatively separate themselves from advertisements aired on their behalf that threaten the appearance and reality of impartiality by purporting to predict how a judicial candidate would decide legal issues if elected. The decision of a judicial candidate to ally herself with advertisements that undermine the core value of judicial impartiality should constitute a valid ground, within the context of the campaign, upon which to assert that candidate's unfitness for judicial office. The message may be driven home by the local and state bar associations in their candidate review and endorsement process and by local media in the preparation of their editorial endorsements prior to election day. Judicial campaign conduct committees, which have sprung up in many states since the *White* decision, can and increasingly will play a critical role in educating the public about the boundaries of appropriate conduct in judicial campaigns.

221. *Id.* at 11-12.
222. *Id.* at 11.
223. *Id.*
As states consider moving to a Missouri Plan system, they should also consider the possibility of using cumulative voting for the election of judges. Cumulative voting is an alternative voting method in which candidates continue to run “at-large” rather than by district, but voters may cast as many votes as there are open seats. Thus if there are three judicial seats available in a jurisdiction, each voter receives three votes. Voters may cast all three votes for one candidate or may disperse one or more of their votes among the available candidates. Corporations often use cumulative voting to elect directors and to promote the interest of minority shareholders. It has also been used in Chilton County, Alabama; Sisseton, South Dakota; and Alamogordo, New Mexico to enhance the ability of minority voters to elect candidates of their choice to city councils and school boards.

Because voters are free to cast more than one vote for a candidate, cumulative voting enables voters to vote with greater passion and to vote more strategically. Cumulative voting enables minority voters to elect candidates of their choice to office in majority white jurisdictions, even in the face of racially polarized voting. Moreover, cumulative voting may even be superior to a single-member district system in promoting racial diversity on the bench. In a district system in which districts are either majority white or majority black, the candidates of choice of black voters will only run in majority black districts. Thus white voters who wish to vote for black candidates who are also the candidates of choice of black voters must live in majority black jurisdictions. By contrast, cumulative voting promotes voting across racial lines, because voters are not placed into majority black or majority white districts. White voters who wish to...
support black candidates who are the candidates of choice of black voters need not live in black neighborhoods or districts in order to vote for those candidates. Politically cohesive but geographically disparate communities of black and Latino voters who wish to support minority judicial candidates are likewise able to elect candidates of their choice by using cumulative voting. In sum, cumulative voting systems more effectively express transracial political coalitions than do single-member majority-minority electoral districts.

Cumulative voting may be ideally suited for judicial elections because judicial elections are low-salience elections, contests in which the electorate generally knows very little about the candidates for office. For example, a voter may know some, but not all, six judicial candidates running for office in a particular jurisdiction. Cumulative voting permits such a voter to put all of her votes toward the one candidate she knows or split her votes evenly between the two rather than vote blindly or straight-ticket for candidates about whom she has no information. In addition, judicial candidates need not appeal to the entire electorate in order to be elected. Each judicial candidate needs only a percentage of voters who are knowledgeable and passionate about that particular candidate—and willing to give three or four of their six votes to that candidate. For minority candidates running for office in a majority white jurisdiction, cumulative voting may be a boon. Black voters can pool their votes for one or two candidates, perhaps in coalition with like-minded whites, and find that they are able to elect a candidate of their choice to the bench. Finally, cumulative voting reduces the need for huge campaign war chests, as candidates need not knock on every door or campaign in every neighborhood in a county.

Some argue that cumulative voting permits fringe candidates to be elected. I suspect that this possibility has already increasingly become a reality as third-party interest groups have taken over the rhetoric of judicial campaigns, promoting and bankrolling candidates who share their often extreme views. Even in the absence of third-party interest groups, many extreme judicial candidates have been elected to the bench over the past twenty years. Regardless, the abolition of Announce Clauses is

---

231. Guinier, supra note 230.

232. See, e.g., Ann LoLordo, Ten Commandments Play Campaign Role, BALTIMORE SUN, June 6, 2000, at 1A (describing the candidacy of Judge Roy S. Moore for a seat on the Alabama Supreme Court). Judge Moore, who infamously rose to Alabama’s Supreme Court in large part because of his battle to keep his own hand-carved wooden tablets containing the Ten Commandments on the bench, began as an elected county circuit court judge. He later won the election and served on the Alabama Supreme Court, where he ordered a monument of the Ten Commandments to be placed in the rotunda of the courthouse in defiance of a federal court order. See Jeffrey Gettleman, Judge Suspended for Defying Court on Ten Commandments, N.Y. TIMES, Aug. 23, 2003, available at http://www.newyorktimes.com/2003/08/23/national/23JUDG.html; see also Editorial, Judicial Minstrels, NEW ORLEANS TIMES-PICAYUNE, Nov. 11, 2003 (criticizing a white Louisiana trial judge who wore
likely to unleash a new wave of extremist candidates who will manipulate the electorate by using inflammatory rhetoric and distorting the records of their opponents without fear of retribution.

Cumulative voting may not be an appropriate method for electing judges in every state. Jurisdictions should experiment with selection systems to determine what will best promote diversity and impartiality in their particular states. These methods may vary from state to state depending on the geographic location of minority populations, the size of the minority population, the willingness of white voters to support minority candidates, the integration of the local bar, and the prominence of blacks and other minorities in the mainstream bar and on state nominating commissions. States should not be encouraged to participate in a uniform national system of selecting judges. Instead states should respond to the uniquely local nature of the legal culture, the political reality, and the demography of their respective jurisdictions in shaping their judicial selection systems.

4. Launch a Public Education Campaign

Finally and most importantly, the bar, the bench, and judicial activists should embark on an education campaign designed to inform the public about the nature of the judicial function. Perhaps the only thing more dangerous to a legitimate justice system than judges who have pre-judged issues and cases is an electorate that expects its judges to have done so. Thus the most important task facing states and public policy advocates may be the struggle to educate the public about the ideal character of judging. This education may be accomplished by the use of coordinated opinion-editorials, informative voter guides, public service announcements, local cable and radio programming, and public school education. Educating judges is also warranted in this regard. New judges should not

---

233. See, e.g., Rick Bundrett, Nomination Process Thwarts Black Judicial Candidates, STATE (Columbia, S.C.), May 24, 2004; Pamela Hamilton, Jackson: Election of Two White Men to Bench a Step Backward, STATE (Columbia, S.C.), May 31, 2004 (describing Rev. Jesse Jackson's recommendation that South Carolina abandon an appointive system for judges and switch to contested elections after successive appointments of white judges to bench); see also Kyle Wingfield, Associated Press, Senate to Consider Assigning Supreme Court Justices to Districts, TUSCALOOSA NEWS, Apr. 7, 2004 (describing bill in Alabama Senate that would move from statewide election of Alabama Supreme Court justices to district-based election in part to "ensur[e] that black candidates have access to the state's highest court").
merely be educated about docket control and other administrative matters but also be compelled to attend mandatory seminars on impartiality and bias. Judicial candidates should be asked specific questions about their openmindedness and their understanding of what impartiality means as part of any local bar association candidate review process.

Following the White decision, the National Center for State Courts created an Ad Hoc Advisory Committee on Judicial Campaign Conduct, which recently published a Handbook on Judicial Campaign Conduct. The Handbook advocates the development of state-based public education campaigns directed at both the public and at judges. The Handbook also recommends that state campaign conduct committees monitor and encourage appropriate judicial campaign conduct and criticize inappropriate campaign conduct. The recommendations in this Handbook are an excellent starting place for state education efforts in this area.

CONCLUSION

If Republican Party of Minnesota v. White provokes the kind of robust review of judicial selection and judicial decision-making that I argue is long overdue, it may, despite its substantive deficiencies, prove to be an important catalyst for change in how we conceive of and conduct judicial elections. It is my hope that states will resist the more heavy-handed aspects of White and instead use the decision to begin a dialogue about judging, diversity, and impartiality that will enrich state and federal judicial systems throughout the country.

234. Nat'l Ad Hoc Advisory Comm. on Judicial Campaign Conduct, supra note 225. I served as a member of the National Center for State Courts' Ad Hoc Committee on Judicial Campaign Conduct and participated in early deliberations around the creation of this handbook.