The End of Nonpartisan Judicial Elections and the Rise of the Politiciary: The Eighth Circuit Strikes down Judicial Campaign Regulations in Republican Party of Minnesota v. White

Ross G. Currie

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Notes


"[T]he Judiciary is beyond comparison the weakest of the three departments of power .... [T]he general liberty of the People can never be endangered from that quarter .... so long as the Judiciary remains truly distinct from both the Legislature and Executive." 1

I. INTRODUCTION

In the eyes of Alexander Hamilton, the success of the United States Constitution hinged, at least in part, on the independence of the new nation's judicial branch. 2 According to Hamilton, maintaining the independence of the judiciary required appointment of judges to life tenures. 3 Hamilton's judiciary was independent in two ways: It was separated from the executive and legislative branches of the government, 4 and it was separated from the political accountability of removal from office that the executive and legislative branches were subject. 5 Hamilton's concerns, as expressed in The Federalist Nos. 78 and 79, were addressed in the Constitution and early federal statutes that mandated life-term appointment for judges.

1. THE FEDERALIST No. 78 (Alexander Hamilton).
2. See id. ("The complete independence of the Courts of justice is peculiarly essential in a limited Constitution."). The "limited Constitution" that Hamilton referred to is one in which there are limits and exceptions to the legislature's authority. See id. (describing characteristics of "limited Constitution"). James Madison shared Hamilton's concern, and wrote, "The accumulation of all powers Legislative, Executive, and Judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." THE FEDERALIST No. 46 (James Madison).
3. See THE FEDERALIST No. 78 (Alexander Hamilton) (discussing judicial branch of proposed United States government and arguing that life tenure was necessary to preserve independence of judiciary from other branches of government).
4. See id. (quoting BARON DE MONTESQUIEU, SPIRIT OF LAWS, VOL. I 152 (Thomas Nugent trans., Colonial Press 1899) (1748)) ("[I] agree, that 'there is no liberty, if the power of judging be not separated from the Legislative and Executive powers.'").
5. See THE FEDERALIST No. 79 (Alexander Hamilton) (explaining that there should be no provision for removing tenured judges "on account of inability" because "[a]n attempt to fix the boundary between the regions of ability and inability, would much oftener give scope to personal and party attachments and enmities, than advance the interests of justice, or the public good").

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federal judges. In the states, however, a variety of methods of judicial selection were devised and are used today.

Since joining the United States, Minnesota has selected its judiciary through popular election. Furthermore, since 1912, Minnesota’s judicial elections have been nonpartisan—candidates’ party affiliations do not appear on ballots. Minnesota’s Code of Judicial Conduct, which is based on the American Bar Association’s Model Code of Judicial Conduct, regulates a judicial candidate’s activities in those nonpartisan elections.

Recently, a candidate for the Minnesota Supreme Court challenged several provisions of Canon 5 of Minnesota’s Code of Judicial Conduct. In Republican Party of Minnesota v. White (“White I”), the United States Supreme Court struck down the so-called “announce” clause of the Code of Judicial Conduct. In August 2005, the Eighth Circuit struck down two other provisions, the “partisan activities” clause and the “solicitation”

6. See U.S. Const., art. II, § 2, cl. 2 (declaring that selection of Supreme Court Justices shall be by presidential appointment); id. art. III, § 1 (declaring that federal judges shall retain their offices “during good [b]ehavior” and that salaries of federal judges shall not be decreased during their terms); 28 U.S.C. § 44(a)-(b) (1997) (declaring that selection of federal circuit court judges shall be by presidential appointment with senatorial consent and that federal circuit court judges shall hold their offices during good behavior); id. § 133(a) (2003) (declaring that selection of federal district court judges shall be by Presidential appointment with Senatorial consent); id. § 134(a) (1996) (declaring that federal district court judges shall hold their offices during good behavior).

7. See Standards on State Judicial Selection app. 1 (2000) (setting forth chart of various methods of judicial selection used by states). Sixteen states and the District of Columbia select their judges by merit selection; three use gubernatorial appointment; one uses legislative appointment; eight use partisan election; thirteen use nonpartisan election; and nine use a combination of approaches. See id. (same). “Merit selection” is a process whereby candidates are nominated by an independent committee based on their experience and credentials; judges selected by this method are then subject to retention elections. See id. app. 2, at 32 (describing merit selection).

8. See Minn. Const. art. VI, § 7 (directing that Minnesota’s judges be elected every six years); see also State ex rel. La Jesse v. Meisinger, 103 N.W.2d 864, 866 (Minn. 1960) (“Since the adoption of the Minnesota constitution in 1857, there has been a constitutional requirement that judges be elected by the people . . . .”).


10. For a discussion of Minnesota’s Code of Judicial Conduct, see infra notes 21-27 and accompanying text.

11. For a discussion of the challenge to particular provisions of the Code of Judicial Conduct, see infra notes 59-67 and accompanying text.


clause, of Minnesota's *Code of Judicial Conduct* in Republican Party of Minnesota v. White ("White II").

This Note addresses the Eighth Circuit's analysis of the partisan activities and solicitation clauses in *White II* and argues that *White II* may lead to the disintegration of nonpartisan judicial elections in many states, thereby eroding the independence of the judiciary. Part II summarizes Minnesota's *Code of Judicial Conduct* and relevant case law leading up to the Eighth Circuit decision in *White II*. Part III discusses the facts and procedural history of *White II*. Part IV summarizes the Eighth Circuit's rationale in *White II*. Part IV also summarizes the rationale of the dissenting members of the Eighth Circuit in *White II*. Part V critiques the analysis of the Eighth Circuit in *White II*. Finally, Part VI addresses *White II*'s implications for future judicial elections and concludes that *White II* effectively ends the practice of nonpartisan judicial elections in the Eighth Circuit and, if adopted in other jurisdictions, will also end nonpartisan judicial elections in numerous states, thus eroding the independence of the judiciary in those states.

II. BACKGROUND

A. Minnesota's Code of Judicial Conduct


14. 416 F.3d 738 (8th Cir. 2005) (en banc) ("White II"). For a discussion of the Eighth Circuit's holding in *White II*, see infra notes 82-96 and accompanying text.

15. For a discussion of Minnesota's Code of Judicial Conduct and the case law leading up to *White II*, see infra notes 21-67 and accompanying text.

16. For a discussion of the relevant facts and procedural history of *White II*, see infra notes 68-80 and accompanying text.

17. For a discussion of the Eighth Circuit's analysis in *White II*, see infra notes 82-96 and accompanying text.

18. For a discussion of the dissenting analysis of the Eighth Circuit in *White II*, see infra notes 97-137 and accompanying text.

19. For a critique of the opinions rendered in *White II*, see infra notes 138-60 and accompanying text.

20. For a discussion of *White II*'s potential effect on judicial independence in jurisdictions that elect their judges, see infra notes 161-68 and accompanying text.

21. See 52 MINN. STAT. ANN., CODE OF JUDICIAL CONDUCT pmbl. (West 1995) ("This Code of Judicial Conduct establishes standards for the ethical conduct of judges to reflect the responsibilities of the judicial office as a public trust and to promote confidence in [Minnesota's] legal system."); see also id. Canon 1 ("An independent and honorable judiciary is indispensable to justice in our society . . . . The provisions of this Code should be construed and applied to further that objective."). In addition to the actual impartiality of judges, the Code aimed to promote public confidence in the judiciary. See id. cmt. Canon 1 ("Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to [the Code]. Conversely, violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law.").
provided rules for sitting judges and candidates for judicial office.\(^2\) \(^2\) Canon 5 of the Code imposed restrictions on the political activities of judges and judicial candidates.\(^2\) Among these restrictions were (1) the “announce” clause, which prohibited judges and judicial candidates from commenting on their positions regarding cases or controversies likely to come before the court;\(^2\) (2) the “partisan activities” clause, which prohibited judges and judicial candidates from being actively involved with a political organization\(^2\) or identifying themselves as members of a political organization;\(^2\) and (3) the “solicitation” clause, which prohibited judges and judicial candidates from personally soliciting or accepting campaign contributions or publicly-stated support.\(^2\)


24. See id. Canon 5(A)(3)(d)(i) (prohibiting candidates from announcing views or making pledges regarding contentious legal issues that were “inconsistent with the impartial performance of the adjudicative duties of the office [of judge]”).

25. See id. Canon 5(D) (defining “political organization” as “an association of individuals under whose name a candidate files for partisan office”).

26. See id. Canon 5(A)(1) (prohibiting candidates from holding offices in any political organization, publicly endorsing or opposing candidates except for themselves and their opponents in judicial elections and making speeches on behalf of any political organization).

27. See id. Canon 5(B)(2) (permitting candidates to establish campaign committees to solicit and accept contributions and publicly campaign for candidates). These committees, however, were not permitted to accept or use political organization endorsements. See id. (prohibiting committees from accepting and using endorsements from political organizations).
B. The Supreme Court's Decision in White I

In 2001, a sharply divided United States Supreme Court held that the announce clause of Canon 5 violated the First Amendment.28 In so holding, the Court applied the strict scrutiny test.29 The compelling state interest asserted by Minnesota was the preservation of the actual and perceived impartiality of the state judiciary.30 Neither the parties nor the


29. See White I, 536 U.S. at 774-75 (noting that parties did not dispute that strict scrutiny was appropriate standard for present case). The strict scrutiny test applied to this case because the court found the heart of the case to be political speech, the abridgement of which must survive strict scrutiny. See White II, 416 F.3d 738, 748-49 (8th Cir. 2005) (en banc) (citing McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 347 (1995)) (holding that “Canon 5’s restrictions . . . directly limit judicial candidates’ political speech” and applying strict scrutiny because strict scrutiny is applied to any regulation that limits political speech). The partisan activities clause implicates the First Amendment right of political association, which is protected under the same standard as political speech. See Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984) (“[I]mplicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”) (citations omitted). Under strict scrutiny, the contested regulation must be (1) narrowly tailored to (2) serve a compelling state interest. See White I, 536 U.S. at 774-75 (citing Eu v. S.F. County Democratic Cent. Comm., 489 U.S. 214, 222 (1989)) (setting forth elements of strict scrutiny test); White II, 416 F.3d at 749 (“The strict scrutiny test requires the state to show that the law that burdens the protected right advances a compelling state interest and is narrowly tailored to serve that interest.”) (citing United States v. Playboy Entm’t Group, Inc., 529 U.S. 803, 816 (2000); Eu, 489 U.S. at 222)). In order for regulations such as those in Canon 5 to be narrowly tailored, they must operate without “unnecessarily circumscri[ing] protected expression.” Brown v. Hartlage, 456 U.S. 45, 54 (1982), quoted in White I, 536 U.S. at 775. There is no clear-cut test for whether a state interest is compelling, as “the Court’s treatment of governmental interests has become largely intuitive, a kind of ‘know it when I see it’” style of analysis. Stephen E. Gottlieb, Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication, 68 B.U. L. REV. 917, 937 (1988).

Justice Kennedy’s concurring opinion argued that any content-based speech restriction that did not fall within any traditional exception to the First Amendment should be invalidated without strict scrutiny analysis. See White I, 536 U.S. at 793 (Kennedy, J., concurring) (arguing that content-based speech restrictions must fall under traditional exception to First Amendment to be valid and that strict scrutiny analysis is unnecessary to this inquiry). Because Justice Kennedy’s concurrence does not touch upon the issues central to this Note, it shall not be further discussed herein.

30. See White I, 536 U.S. at 775 (citing Republican Party of Minn. v. Kelly, 247 F.3d 854, 867 (8th Cir. 2001) (noting that court of appeals found compelling interests to be “preserving the impartiality of the state judiciary and preserving the appearance of the impartiality of the state judiciary” and that Minnesota reasserted those interests to Supreme Court).
Court considered the state's interest in judicial independence distinct from the state's interest in impartiality. In order to determine whether judicial impartiality was a compelling state interest, the Court first defined "impartiality."

Justice Scalia set forth three possible definitions of impartiality. First, he defined impartiality as a lack of bias for or against either party in a proceeding. The Court did not state whether this interest was sufficiently compelling because it found that the announce clause failed to advance an interest in unbiased judges. Second, Justice Scalia defined impartiality as a lack of bias for or against a particular legal view. The Court held that this definition of impartiality was not a compelling state interest. Third, Justice Scalia defined impartiality as openmindedness, or a willingness to consider opposing views on legal issues and remain open to persuasion when those issues arise in cases. The Court noted that openmindedness is a desirable quality for judges to have, but held that the announce clause was not adopted to protect this definition of impartiality, thereby sidestepping a determination of whether judicial openmindedness was a compelling state interest.

31. See id. at 775 n.6 (noting that Kelly court "referred to the compelling interest in an 'independent judiciary'" but that Eighth Circuit and parties "appear to use that term . . . as interchangeable with 'impartial'" (citing Kelly, 247 F.3d at 864-68)).

32. See id. at 775 (noting that "impartiality" is vague term and that it must be defined in order to decide whether it is compelling state interest).

33. For a discussion of Justice Scalia's definitions of impartiality, see infra notes 34-39 and accompanying text.

34. See White I, 536 U.S. at 776 ("One meaning of 'impartiality' in the judicial context . . . is the lack of bias for or against either party to the proceeding.") (emphasis omitted).

35. See id. at 776 (holding that announce clause did not advance interest in unbiased judges because announce clause "[did] not restrict speech for or against particular parties, but rather speech for or against particular issues"). Although the Court did not specifically state that this definition of impartiality would be a compelling state interest, its language seems to indicate that it would. See id. at 775-76 (noting that impartiality defined as lack of bias for or against party to proceeding "assures equal application of the law" and "guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party," thus ensuring parties' due process and equal protection rights).

36. See id. at 777 (defining impartiality as "lack of preconception in favor of or against a particular legal view") (emphasis omitted).

37. See id. at 777-78 (holding that this type of impartiality may be state interest, but "is not a compelling state interest" because "it is virtually impossible to find a judge who does not have preconceptions about the law" and that "even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so").

38. See id. at 778 (setting forth "openmindedness" definition of impartiality).

39. See id. (finding that openmindedness may be desirable in judiciary but that announce clause was not adopted to protect it). The Court held that Minnesota's argument that the announce clause protected openmindedness failed because history is ripe with examples of cases in which judges ruled on issues they were committed on before ruling. See id. at 779 (noting that "judges have often
Of primary concern to the Court in ascertaining whether the announce clause served a compelling government interest was the clause's breadth; the language of the announce clause did not simply restrict campaign promises, but prohibited "[a] candidate's mere statement of his current position, even if he does not bind himself to maintain that position after election." The Court found that candidates who declare their position on an issue are not prevented from later changing that position, nor are parties to litigation prevented from having their respective positions heard and fully considered. Therefore, the announce clause did not serve a compelling government interest in impartiality, however defined, and was invalidated for failing to pass strict scrutiny.

Justice O'Connor joined in the judgment of the Court but wrote separately to express concern about electing judges generally. In Justice O'Connor's view, elected judges necessarily feel pressure to render decisions committed themselves on legal issues" before rising to bench and citing examples thereof). Indeed, sitting judges will often confront legal issues that they have expressed an opinion about in previous rulings of their own. See id. (discussing judges ruling on issues that have previously come before them). In addition, the Code and the ABA Model Code of Judicial Conduct permit judges to "write, lecture, teach, speak and participate in other extra-judicial activities concerning the law" as long as doing so does not cast doubt on the judge's capacity to act impartially or interfere with the proper performance of judicial duties. See 52 MINN. STAT. ANN., CODE OF JUDICIAL CONDUCT Canon 4(A)(1), (A)(3), (B) (West 1995) (setting forth regulations regarding judges extra-judicial activities).

40. See White I, 536 U.S. at 770 (noting that Code "contain[ed] a so-called "pledges or promises" clause, which separately prohibits judicial candidates from making 'pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office'") (emphasis added) (citation omitted). The Supreme Court declined to express a view on the constitutionality of the pledges or promises clause. See id. (noting that "pledges or promises" clause was not challenged in this proceeding and declining to express view on that clause). The Florida Supreme Court and New York Court of Appeals, however, have each held that its version of the pledges or promises clause did not violate the First Amendment. See In re Kinsey, 842 So. 2d 77, 87 (Fla. 2003) (per curiam) (holding that Florida's pledges or promises clause withstands strict scrutiny analysis and is constitutionally valid); In re Watson, 794 N.E.2d 1, 8 (N.Y. 2003) (per curiam) (holding that "New York's pledges or promises clause—essential to maintaining impartiality and the appearance of impartiality in the state judiciary—is sufficiently circumscribed to withstand exacting scrutiny under the First Amendment").

41. See White I, 536 U.S. at 775 (defining impartiality as lack of bias for or against either party in case); id. at 777 (defining impartiality as lack of bias for or against particular legal view); id. at 778-79 (defining impartiality as “openmindedness,” or judges' willingness to consider views that oppose their preconceptions, thus ensuring each litigant's opportunity to persuade judge of their position, even if it is one that judge disagrees with).

42. See id. at 774-81 (analyzing announce clause and holding that it failed to pass strict scrutiny analysis).

43. See id. at 788 (O'Connor, J., concurring) (expressing concern that selecting judges by popular election undermines state interest in impartial and independent judiciary).
She also expressed concern over judicial candidates soliciting funds for election campaigns. Although
the rest of the Court did not address the solicitation clause in White I, Justice O'Connor was wary of judicial candidates engaging in fundraising. She argued that judges who had participated in soliciting funds would not be impartial, but rather would be indebted to certain organizations. Justice O'Connor believed that, at the very least, the public's perception of judges as impartial and open-minded would be undermined by the judges' participation in fundraising.

Justice Stevens's dissent argued that the Court's analysis was flawed because it failed to recognize the importance of judicial independence and impartiality. Justice Stevens believed judges—even elected ones—occupy a fundamentally distinct and uniquely important place in the governmental structure. In Justice Stevens's view, the independent nature of the judiciary justified the restriction of judicial candidates' speech rights.

44. See id. at 788-89 (noting that when judges have to face reelection, there are corresponding effects on their impartiality).

45. For discussion of Justice O'Connor's concerns about solicitation of funds by judicial candidates, see infra notes 46-48 and accompanying text.

46. See White I, 536 U.S. at 789-90 (O'Connor, J., concurring) (discussing dangers inherent in allowing potential judges to participate in fundraising).

47. See id. at 790 ("[R]elying on campaign donations may leave judges feeling indebted to certain parties or interest groups."); see also Buckley v. Valeo, 424 U.S. 1, 26-27 (1976) (discussing undermining effects of campaign contributions on integrity of government).

48. See White I, 536 U.S. at 790 (O'Connor, J., concurring) ("Even if judges were able to refrain from favoring donors, the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary."); see also Buckley, 424 U.S. at 26-27 (discussing concern that public perception of governmental integrity will be harmed because of appearance of corruption even if no actual corruption exists).

49. See White I, 536 U.S. at 797 (Stevens, J., dissenting) (arguing that majority's analysis relied on "an inaccurate appraisal of the importance of judicial independence and impartiality"). Justice Ginsburg's dissenting analysis was specific to the announce clause; it is therefore not central to the issues in this Note and, as such, is not discussed herein.

50. See id. at 797-98 (Stevens, J., dissenting) (arguing that judges, whether elected or appointed, are fundamentally different from members of executive and legislative branches). For a discussion of additional arguments on whether the judiciary is, and should be, fundamentally different from the executive and legislative branches, see supra notes 1-5 and 48 and accompanying text.

51. See White I, 536 U.S. at 797 (Stevens, J., dissenting) (arguing that Supreme Court majority erroneously assumed that "judicial candidates should have the same freedom to express themselves on matters of current public importance" as candidates for other elected offices) (internal quotations omitted).
C. Precursors to White II

After the Supreme Court handed down the White I decision, three cases arose that foreshadowed the Eighth Circuit's decision in White II. Weaver v. Bonner addressed the constitutionality of a solicitation clause in light of the White I decision. Spargo v. New York State Commission on Judicial Conduct and In re Raab involved constitutional inquiries into New York's version of the partisan activities clause. These cases are significant because the contested judicial campaign regulations resemble those at issue in White II, helping to illustrate the potentially far-reaching effects of the White II decision.

1. Weaver v. Bonner

In Weaver, the Eleventh Circuit considered Georgia's version of the solicitation clause and held that it failed to pass constitutional muster. The court determined that, in light of the Supreme Court's decision in White I, judicial elections should be regulated in the same manner as those of the executive and legislative branches. In fact, the Weaver court doubted whether there were any differences between judicial elections and elections for other public offices that justified additional regulation of judicial candidates.

52. For a further discussion of these cases, see infra notes 53-67 and accompanying text.
53. 309 F.3d 1312 (11th Cir. 2002).
54. For a further discussion of Weaver's constitutional analysis, see infra notes 59-61 and accompanying text.
55. 244 F. Supp. 2d 72 (N.D.N.Y. 2003), vacated, 351 F.3d 65 (2d Cir. 2003).
57. For a further discussion of the Spargo and Raab cases, see infra notes 62-67 and accompanying text.
58. For a further discussion of the potential extent of White II's effects, see infra notes 161-65 and accompanying text.
59. See Weaver v. Bonner, 309 F.3d 1312, 1315-16 (11th Cir. 2002) (discussing solicitation clause of Georgia Code of Judicial Conduct); id. at 1322 (holding that solicitation clause failed strict scrutiny). The Weaver court also analyzed the so-called "misrepresentations" clause, which was also at issue in that case. See id. at 1315 (discussing misrepresentations clause).
60. See id. at 1321 ("[W]e believe that the Supreme Court's decision in White[I] suggests that the standard [of regulation] for judicial elections should be the same as the standard for legislative and executive elections.").
61. See id. ("[T]he distinction between judicial elections and other types of elections has been greatly exaggerated, and we do not believe that the distinction, if there truly is one, justifies greater restrictions on speech during judicial campaigns than during other types of campaigns."). But see Buckley v. Ill. Judicial Inquiry Bd., 997 F.2d 224, 228 (7th Cir. 1993) ("[J]udges remain different from legislators and executive officials, even when all are elected, in ways that bear on the strength of the state's interest in restricting their freedom of speech."), quoted with disagreement in Weaver, 309 F.3d at 1321.
2. Spargo & Raab

In Spargo, a sitting judge challenged several provisions of New York’s Code of Judicial Conduct.\(^62\) Relying on White I, Spargo successfully argued to the district judge that New York’s prohibition on judges’ participation in “inappropriate political activity” violated the First Amendment.\(^63\) The circuit court vacated the district court’s ruling on jurisdictional grounds, so it did not reach Spargo’s constitutional claims.\(^64\)

In re Raab also dealt with New York’s version of the partisan activities clause, including a provision that acts as a “reverse” solicitation clause, whereby judges were prohibited from contributing money to political organizations.\(^65\) Raab, like Spargo, challenged the constitutionality of the government’s restrictions under the First Amendment.\(^66\) The New York Court of Appeals held that, while strict scrutiny applied, the political activities clauses were distinct from the announce clause and satisfied strict scrutiny.\(^67\)

III. White II: The Facts

Gregory Wersal, a 1996 candidate for associate justice of the Minnesota Supreme Court, challenged the announce, political activities and solicitation clauses of Minnesota’s Canon 5.\(^68\) During his campaign, Wersal identified himself as a member of Minnesota’s Republican Party, spoke at party functions, sought the party’s endorsement for his candidacy and per-


\(^63\) See id. at 88-92 (analyzing clause of New York Code of Judicial Conduct prohibiting judges from participating in “inappropriate political activity” and holding that, in light of White I, clause violated First Amendment). The Spargo court held that the political activity clause at issue failed strict scrutiny because it was not narrowly tailored. See id. at 87 (noting that White I struck down Minnesota’s announce clause for failure to be narrowly tailored and holding that political activity clause was even broader than announce clause, thus surely failing strict scrutiny).

\(^64\) See Spargo, 351 F.3d. at 73, 85 (vacating district court holding on jurisdictional grounds but declining to comment on substantive merits of Spargo’s constitutional claims).

\(^65\) See N.Y. Comp. Codes R. & Regs. tit. 22, § 100.5(A)(1)(c)-(d), (h) (2004) (prohibiting judges or candidates for judicial office from engaging in partisan political activity, participating in any political campaign other than his or her own or contributing money to any political organization or candidate).


\(^67\) See id. at 1290, 1293 (holding that announce clause struck down in White I was not analogous to political activity clauses where such clauses are narrowly tailored to advance compelling state interest).

\(^68\) See White II, 416 F.3d 738, 746 (8th Cir. 2005) (en banc) (outlining factual history of case).
sonally solicited campaign contributions. After a complaint was lodged with the Minnesota Lawyers Professional Responsibility Board alleging that Wersal violated the Code, Wersal withdrew his candidacy for the Minnesota Supreme Court position.

In 1997 and 1998, Wersal asked the Office of Lawyers Professional Responsibility (OLPR) for advisory opinions regarding the partisan activities and solicitation clauses. The OLPR stated that it would not issue an opinion regarding the solicitation clause because of proposed amendments to the Canon and that it would enforce the partisan activities clause. Subsequently, Wersal commenced litigation challenging Canon 5's announce, partisan activities and solicitation clauses as violating the First Amendment. The United States District Court for the District of Minnesota granted the state's motion for summary judgment, holding that the Canon did not violate the First Amendment. A divided panel of the Eighth Circuit Court of Appeals affirmed the District Court's holding.

Wersal appealed the Eighth Circuit's decision to the United States Supreme Court. The Supreme Court granted certiorari, but limited the

69. See id. (describing Wersal's activities during his candidacy for seat on Minnesota Supreme Court).

70. See id. (explaining that complaint against Wersal was eventually dismissed by Minnesota Office of Lawyers Professional Responsibility (OLPR)).

71. See id. (explaining Wersal's request for advisory opinions regarding Code).

72. See id. (explaining OLPR's response to Wersal's request for advisory opinion).


74. See Republican Party of Minn. v. Kelly, 63 F. Supp. 2d 967, 983-86 (D. Minn. 1999) (discussing announce clause of Canon 5 at length and holding that "the announce clause serve[d] the state's compelling interest in maintaining the actual and apparent integrity and independence of its judiciary, while not unnecessarily curtailing protected speech"). This holding is fairly narrow. See id. at 986 (limiting holding of district court to "discussion of a judicial candidate's predisposition to issues likely to come before the court").

75. See Republican Party of Minn. v. Kelly, 247 F.3d 854, 862 (8th Cir. 2001) (recognizing judiciary as different kind of entity from legislative and executive branches of government and noting that state may therefore limit political speech of judicial candidates in ways that it may not regulate speech of candidates for other political offices). The Eighth Circuit further stated, "[w]hereas affiliation with a partisan program is ... at the heart of executive and legislative campaigns, a State may conclude that it has no role in judicial campaigns because of the neutral, decision-making nature of the judicial function." Id. The court further recognized that Minnesota's decision to elect its judges did not eliminate this distinction. See id. at 867 (citing decisions from other courts that acknowledged distinction between judiciary and other government officials, even when judiciary was elected). The Kelly court held that Minnesota's restriction did not run afoul of the First Amendment because the Canon was viewpoint-neutral. See id. at 863 ("[T]he restriction in this case avoids discriminating against a particular viewpoint, which is the most serious threat to First Amendment rights." (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 387-90 (1992))).

scope of its review to whether the announce clause violated the First Amendment.\textsuperscript{77} In a 5-4 decision, the Supreme Court held that the announce clause violated the First Amendment.\textsuperscript{78} In light of the Supreme Court’s decision in \textit{White I}, the Eighth Circuit reconsidered the partisan activities clause and the solicitation clause on remand.\textsuperscript{79} A divided panel of the Eighth Circuit upheld the partisan activities and solicitation clauses.\textsuperscript{80} The Eighth Circuit then heard the case en banc and found that the partisan activities and solicitation clauses violated the First Amendment.\textsuperscript{81}

IV. \textit{White II}: \textbf{The End of Nonpartisan Judicial Elections}

A. \textbf{The Majority}

The Eighth Circuit followed the Supreme Court’s lead and analyzed Canon 5 under the strict scrutiny test.\textsuperscript{82} Applying this test, the majority found that Minnesota’s purported state interest, maintaining the independence and impartiality of the state’s judiciary, may or may not have been compelling, depending on the definition of impartiality.\textsuperscript{83} Nevertheless, the \textit{White II} court held that even if maintaining the independence and

\textsuperscript{77} See \textit{White I}, 536 U.S. at 768 ("The question presented in this case is whether the First Amendment permits the Minnesota Supreme Court to prohibit candidates for judicial election . . . from announcing their views on disputed legal and political issues."); Republican Party of Minn. v. Kelly, 534 U.S. 1054, 1054 (2001) (granting certiorari to consider whether announce clause, but not partisan activities or solicitation clause, violated First Amendment).

\textsuperscript{78} See \textit{White I}, 536 U.S. at 788 (reversing Eighth Circuit’s grant of summary judgment and remanding case for further proceedings). For a discussion of the Supreme Court’s holding in \textit{White I}, see \textit{supra} notes 28-51 and accompanying text.

\textsuperscript{79} See Republican Party of Minn. v. White, 361 F.3d 1035, 1041-49 (8th Cir. 2004) ("White Remand") (considering partisan activities clause and solicitation clause in light of Supreme Court’s decision in \textit{White I}), vacated, 416 F.3d 738 (8th Cir. 2005) (en banc).

\textsuperscript{80} See \textit{White Remand}, 361 F.3d at 1049 (remanding to district court with instructions to enter summary judgment for plaintiffs-appellants as to announce clause, summary judgment for defendants-appellees as to solicitation clause and instructing district court to hear more evidence as to necessity of partisan activities clause).

\textsuperscript{81} See \textit{White II}, 416 F.3d 738, 744 (8th Cir. 2005) (en banc) ("We granted Appellants’ request for en banc review, vacating the panel opinion. Today, we find that the partisan-activities and solicitation clauses . . . violate the First Amendment.").

\textsuperscript{82} See id. at 749 (setting forth strict scrutiny framework under which political speech regulations are examined). For a discussion of the strict scrutiny test, see \textit{supra} note 29.

\textsuperscript{83} See \textit{White II}, 416 F.3d at 753-54 (summarizing Justice Scalia’s three definitions of impartiality as stated in \textit{White I} and reiterating that two definitions—lack of bias for or against either party to proceeding and openmindedness—provided bases for finding compelling state interest while one—lack of preconception regarding any legal view—did not).
impartiality of the judiciary was a compelling state interest, the contested provisions of Canon 5 were not narrowly tailored to serve that interest.84

1. The Partisan Activities Clause

In striking down the partisan activities clause, the majority viewed the partisan activities clause as being closely related to—although still distinct from—the announce clause that was struck down in White I.85 After that initial determination, the majority analyzed the partisan activities clause using “openmindedness” as the definition of impartiality.86 Like the Supreme Court in White I, the Eighth Circuit did not determine whether judicial openmindedness was a compelling state interest because it found that the partisan activities clause was “woefully underinclusive.”87 The

84. See id. at 754-56 (discussing partisan activities clause and holding that clause was not narrowly tailored, thus failing strict scrutiny test); id. at 763-66 (discussing solicitation clause and holding that clause was not narrowly tailored, thus failing strict scrutiny test).

85. See id. at 754 (“In one sense, the underlying rationale for the partisan-activities clause—that associating with a particular group will destroy a judge’s impartiality—differs only in form from that which purportedly supports the announce clause—that expressing one’s self on particular issues will destroy a judge’s impartiality.”) (emphasis omitted and added). The court reasoned that the partisan activities clause really sought to keep judges from aligning with particular views on issues by keeping them from aligning with a particular political party. See id. (noting that Minnesota had argued that “a party label is nothing more than shorthand for the views a judicial candidate holds,” and that therefore partisan activities clause did not really serve interest of impartiality). The court recognized a fundamental distinction between the announce clause and the partisan activities clause: the partisan activities clause required the aligning of oneself with other individuals in a political party, whereas the announce clause required no such association. See id. at 755 (noting “the difference between the direct expression of views under the announce clause and expressing a viewpoint under the partisan-activities clause through association”). The natural consequence of an association with a political party is that a judge may then have a connection to potential litigants and carry a bias in their favor. See id. (“Political parties are, of course potential litigants . . . . Thus, in a case where a political party comes before a judge who has substantially associated himself or herself with that same party, a question could conceivably arise about the potential for bias in favor of that litigant.”). The majority, however, dismissed this concern, saying that any associational activities carried out by a judicial candidate were simply a reflection of that candidate’s stances on various issues. See id. (“[T]he associational activities restricted by Canon 5 are . . . part-and-parcel of a candidate’s speech for or against particular issues embraced by the political party.”) (emphasis omitted). In the majority’s view, this mere association, without more, was insufficient to warrant the restriction of a candidate’s political activities in order to prevent bias. See id. (stating that restrictions such as those in Canon 5 “do not serve the due process rights of the parties” to case, and that partisan activities clause therefore “[d]id not advance an interest in impartiality toward litigants in a case where, without more, . . . a like-minded political party . . . is one of the litigants”) (emphasis omitted).

86. See id. at 756-63 (analyzing partisan activities clause as it applies to preserving judicial openmindedness).

87. See id. at 756 (observing that Supreme Court did not fully discuss issue of whether openmindedness was sufficiently compelling state interest because announce clause was “woefully underinclusive,” belying purported purpose of ad-
court reasoned that the partisan activities clause, despite purporting to further the state interest in judicial independence and impartiality, failed to restrict a candidate's association with interest groups.88 The court found that the underinclusiveness of the partisan activities clause was fatal and not reflective of a legitimate policy choice by the state.89

vancing judicial openmindedness and holding that partisan activities clause was likewise underinclusive). In the majority's view, the underinclusiveness of the partisan activities clause showed that the clause was not truly meant to protect judicial openmindedness. See id. (speculating that "the partisan-activities clause was not adopted for the purpose of protecting judicial openmindedness" in light of its underinclusiveness); id. at 757-58 (discussing failure of partisan activities clause to preserve judicial openmindedness because regulation only came into effect when individuals declared themselves candidates for judicial office). The court also opined that the clause's underinclusiveness showed that judicial openmindedness was not, in fact, a compelling interest. See id. at 756 ("[U]nder a compelling interest analysis, the clause's underinclusiveness causes [the court] to doubt that the interest it purportedly serves is sufficiently compelling to abridge core First Amendment rights."); id. at 759 ("[T]he underinclusiveness of Canon 5's partisan activities clause clearly establishes that the answer [to the question of whether judicial openmindedness is sufficiently compelling to abridge core First Amendment rights] would be no."). But see Landmark Commc'ns v. Virginia, 435 U.S. 829, 848 (1978) (Stewart, J., concurring) ("There could hardly be a higher governmental interest than a State's interest in the quality of its judiciary."); In re Watson, 794 N.E.2d 1, 7 (N.Y. 2003) (holding that judicial openmindedness is compelling state interest because "it ensures that each litigant appearing in court has a genuine—as opposed to illusory—opportunity to be heard"), quoted in White II, 416 F.3d at 767 (Gibson, J., dissenting); Richardson v. State Comm'n on Judicial Conduct, 409 N.E.2d 818, 822 (N.Y. 1980) ("There can be no doubt that the State has an overriding interest in the integrity and impartiality of the judiciary.").

88. See White II, 416 F.3d at 759 (explaining Minnesota's concerns). The court stated:

Minnesota worries that a judicial candidate's consorting with a political party will damage that individual's impartiality or appearance of impartiality as a judge, apparently because she is seen as aligning herself with that party's policies or procedural goals. But that would be no less so when a judge as a judicial candidate aligns herself with the . . . beliefs of . . . any number of . . . political interest groups.

Id.

89. See id. at 760-63 (examining relative threats posed by interest groups and political parties and holding (1) that power and influence of interest groups was sufficiently great to warrant coverage by partisan activities clause and (2) that failure of partisan activities clause to prohibit engaging in activities with interest groups was not indicative of legitimate government policy choice). The majority opined that, in fact, the state may have had even more cause to be concerned with a judicial candidate's involvement with interest groups than political parties. See id. at 760 ("[A]ssociating with an interest group, which by design is usually more narrowly focused on particular issues, conveys a much stronger message of alignment with particular political views and outcomes [than does associating with a political party]."). If the state wished to argue that the partisan activities clause was tailored to address the most significant threat to judicial openmindedness, the court felt that it would be necessary to weigh the comparative threats posed by political parties and interest groups. See id. at 761 (noting that Eighth Circuit panel that considered this case in Kelly did not discuss "any . . . danger advanced by association with special interest groups, despite ample record evidence that suggests the influence of these special groups is at least as great as any posed by political parties");
2. *The Solicitation Clause*

In striking down Minnesota’s solicitation clause, the majority applied strict scrutiny because it found that the clause constituted a restraint on political speech. The court found that the solicitation clause struck at the heart of the First Amendment by limiting the amount of money judicial candidates could spend on their election campaigns. In analyzing the solicitation clause, the majority again reasoned that impartiality was the state interest that Canon 5—and specifically the solicitation clause—was meant to further.

The court held that, regardless of how impartiality is defined, the solicitation clause did not pass strict scrutiny. The court noted that the solicitation clause did not further impartiality when impartiality was de-

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*see also* id. at 761 n.13 (setting forth testimony regarding proposal to expand partisan activities clause to include interest groups because of their influence). Because the partisan activities clause did not remedy that threat to judicial openmindedness, the court found that openmindedness was therefore not a compelling state interest. *See id.* at 760 (“[T]he partisan-activities clause . . . leaves appreciable damage to the supposedly vital interest of judicial openmindedness unprohibited, and thus Minnesota’s argument that [the clause] protects an interest of the highest order fails.”); *see also* id. at 763 (quoting *White I*, 536 U.S. 765, 780 (2002)). The court reasoned:

> [T]he evidence in this case, and common sense, show that association with political interest groups poses the same threat . . . to judicial openmindedness as that posed by political parties. This, coupled with the [Supreme] Court’s view . . . that a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited compels [the court] to find that the underinclusiveness of the partisan-activities clause is not indicative of a legitimate policy choice on the part of Minnesota.

*Id.* (internal quotations omitted).

90. *See* Buckley v. Valeo, 424 U.S. 1, 19 (1976) (per curiam) (holding that restriction on amount of money candidate or group can spend on political communication is restriction on political speech); *White II*, 416 F.3d at 764 (holding that “the very nature of the speech that the solicitation clause affects invokes strict scrutiny” because “the clause applies to requests for funds to be used in promoting a political message”).

91. *See* *White II*, 416 F.3d at 764 (describing need for funding in order to promote political message and stating that “the solicitation clause restricts the amount of funds a judicial candidate is able to expend on his or her political message”); *see also* *White I*, 536 U.S. at 789-90 (O’Connor, J., concurring) (“[T]he cost of campaigning requires judicial candidates to engage in fundraising.

92. *See* *White II*, 416 F.3d at 765-66 (analyzing solicitation clause as advancing Minnesota’s interest in ensuring judiciary was unbiased and/or openminded).

93. *See* id. at 766 (holding that solicitation clause did not advance interest in impartiality, meaning lack of bias for or against party to any case); *id.* (holding that solicitation clause did not pass strict scrutiny when applied to state interest of impartiality, defined as openmindedness). For an example of a case in which a solicitation clause did pass strict scrutiny, see *Stretton v. Disciplinary Bd. of Sup. Ct. of Pa.*, 944 F.2d 137, 144-46 (3d Cir. 1991) (analyzing and upholding as valid under First Amendment prohibition on personal solicitation of funds by candidate).
fined as a lack of bias.\textsuperscript{94} Similarly, the court found that the solicitation clause did not further impartiality when it was defined as judicial openmindedness.\textsuperscript{95} Thus, the court held that the challenged provisions of Canon 5 violated the First Amendment and remanded the case to the district court with instructions to enter summary judgment for the Republican Party of Minnesota.\textsuperscript{96}

\textsuperscript{94} See White II, 416 F.3d at 765-66 ("[T]he solicitation clause's proscriptions . . . does [sic] not advance any interest in impartiality articulated as a lack of bias for or against a party to a case."). While the Republican Party of Minnesota did not challenge the campaign committee system of the solicitation clause, it did challenge the provisions that prohibited a judicial candidate from personally soliciting funds from individuals and large groups and personally signing solicitation letters. See id. at 764-65 ("[The Republican Party of Minnesota and co-Appellants] challenge only the fact that they cannot solicit contributions from large groups and cannot . . . transmit solicitation messages above their personal signatures. They do not challenge the campaign committee system that Canon 5 provides . . . ."); see also 52 MINN. STAT. ANN., CODE OF JUDICIAL CONDUCT Canon 5(B)(2) (West 2004) ("A candidate may . . . establish committees to conduct campaigns for the candidate . . . . Such committees may solicit and accept campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy."). The majority reasoned that the committee system was a sufficient safeguard of the interest in maintaining an unbiased judiciary because contributions are made to the committees and not the judges or candidates, and the committees are prohibited from revealing the identities of contributors and non-contributors to the candidates. See White II, 416 F.3d at 765 (noting that "Canon 5 provides specifically that all contributions are to be made to the candidate's committee (citing 52 MINN. STAT. ANN., CODE OF JUDICIAL CONDUCT Canon 5(B)(2)); id. (discussing Canon 5's prohibition against campaign committees disclosing identities of individuals who contributed or declined to contribute to candidate's campaign).

\textsuperscript{95} See White II, 416 F.3d at 766 ("[T]he solicitation clause seems barely tailored to in any way affect the openmindedness of a judge."). The court found that personally signing solicitation letters and soliciting contributions from large groups would not affect the candidates' willingness to consider views that oppose their own when such issues arose in a case. See id. (answering negatively question of whether, if judicial candidate solicited contributions or signed solicitation letters, candidate would be unable to be open-minded when contentious issues arose at trial). Because the solicitation clause did not advance an interest in judicial openmindedness, it failed the "narrowly tailored" prong of the strict scrutiny test. See id. ("[T]he solicitation clause seems barely tailored to in any way affect the openmindedness of a judge. Accordingly, the solicitation clause . . . cannot pass strict scrutiny when applied to a state interest in impartiality articulated as openmindedness."); see also Weaver v. Bonner, 309 F.3d 1312, 1322 (11th Cir. 2002) (holding that Georgia regulation similar to solicitation clause here was unconstitutional because it was not narrowly tailored to serve state's interest in judicial impartiality).

\textsuperscript{96} See White II, 416 F.3d at 766 ("Upon further consideration of the partisan activities and solicitation clauses . . . we hold that they . . . do not survive strict scrutiny and thus violate the First Amendment. We therefore reverse the district court, and remand with instructions to enter summary judgment for [the Republican Party of Minnesota].").
B. The Dissent

Judge Gibson's dissent expressed disagreement with several elements of the majority opinion. First, the dissent opined that the state interest in maintaining judicial independence and impartiality was a compelling interest in strict scrutiny analysis. Second, the dissent argued that the majority utilized an overly severe standard in its strict scrutiny analysis and, in doing so, created a test that no state regulation could pass.

1. Judicial Impartiality and Independence as a Compelling State Interest

The dissent began by arguing that the contested provisions of Canon 5 protected a compelling state interest—namely, the independence and impartiality of the judiciary. The dissent noted that, in the time between White I and the present decision, Canon 5 was amended to include a definition of impartiality. The amended definition stated that judges must be unbiased and must maintain "an open mind in considering issues that may come before" them, echoing Justice Scalia's "openmindedness" definition of impartiality. The dissent argued that judicial openmindedness was really a breed of an anti-corruption interest.

97. See id. at 766-87 (Gibson, J., dissenting) (setting forth dissenters' disagreements with majority's analysis and holding).

98. See id. at 766 ("Preserving the integrity of a state's courts and those courts' reputation for integrity is an interest that lies at the very heart of a state's ability to provide an effective government for its people. The word 'compelling' is hardly vivid enough to convey its importance."). The dissent also felt that the issues in this case contained factual elements that the court should not have decided on summary judgment. See id. (opining that questions of whether partisan judicial election campaigns and personal solicitation of campaign contributions and of whether Canon 5 was crafted to address only most serious threats to judicial independence and impartiality were in part factual questions that appellate court should not have decided on summary judgment). Because that argument is not central to the discussion of constitutional law issues raised by this holding, it shall not be addressed herein.

99. See id. at 767 ("[T]he court today adopts an approach to strict scrutiny that would deny the states the ability to defend their compelling interests, no matter how urgent the threat.").

100. See id. ("The partisan activities clauses and the solicitation restriction each serve an interest that is and has been recognized as compelling—protecting the judicial process from extraneous coercion."). For discussions of the majority's doubts regarding whether the state's interest in this case was compelling, see supra notes 83, 87 and accompanying text.

101. See White II, 416 F.3d at 767 (explaining Minnesota's actions following Supreme Court's decision in White I).

102. See 52 MINN. STAT. ANN., CODE OF JUDICIAL CONDUCT Canon 5(E) (West 2005) (setting forth definition of impartiality); see also White II, 416 F.3d at 767 (Gibson, J., dissenting) (discussing amendments to Code). For a discussion of Justice Scalia's definitions of "impartiality," see supra notes 34-38 and accompanying text.

103. See White II, 416 F.3d at 769 (Gibson, J., dissenting) ("'Openmindedness'... is in reality simply a facet of the anti-corruption interest that was recognized in Buckley v. Valeo... ").
ruption interest was not limited to the payment of money, but also included dangers posed by partisan allegiances. The dissent argued that allowing judges' impartiality to be compromised by way of indebtedness—financial or otherwise—to a political party would interfere with the due process rights of litigants. Because judicial impartiality, whether it is defined as lack of bias or openmindedness, is a vital interest, the dissent would have held that the state's interest in this case was compelling.

The dissent also argued that the majority's discussion of openmindedness only addressed half of the real issue and purpose of the partisan activities and solicitation clauses. In the dissent's view, the partisan activities and solicitation clauses were distinct from the announce clause struck down by the Supreme Court in White I because the two clauses at issue here were intended to affect the candidate's relationship with people and organizations, not with issues. This distinction was significant; if the majority had taken the same view on this issue as the dissent, the temporal

104. See id. at 769-70 (arguing that although present case differs from campaign finance cases because partisan activities clause does not involve monetary transactions, partisan allegiances nonetheless pose threat to judicial neutrality).

105. See id. at 770 ("Where the [political] office requires impartial execution of the laws, partisan entanglements can be inconsistent with the demands of the office.") (internal quotations omitted); id. ("The need for neutrality . . . is even more important for the judicial branch than the executive.") (internal quotations omitted).

106. See id. at 770-72 (discussing cases that have held that neutrality is essential element of due process and that both appearance and fact of neutrality are interests that may justify restrictions on expressive conduct); id. at 772 ("[T]he goal of an impartial judiciary is compelled by the due process rights of the litigants. Due process requires decisionmakers who are fair, unbiased, and impartial, and importantly, decision makers who are perceived as such by the litigants who appear before them." (quoting In re Amendment of the Code of Judicial Conduct, No. C4-85-697, slip op. at 4-5 (Minn. Sept. 14, 2004))).

107. Accord In re Raab, 793 N.E.2d 1287, 1292 (N.Y. 2003) ("Not only must the State respect the First Amendment rights of judicial candidates . . . but also it must simultaneously ensure that the judicial system is fair and impartial for all litigants, free of the taint of political bias or corruption, or even the appearance of such bias or corruption."); see White II, 416 F.3d at 772 (Gibson, J., dissenting) (opining that goal of impartial judiciary is compelling state interest). The New York Court of Appeals went on to find that the state's political activity clauses were narrowly tailored to serve the compelling state interest in an independent and impartial judiciary. See id. at 1291-92 (discussing New York's political activities clauses and finding that they were narrowly tailored to serve New York's compelling state interest).

108. See White II, 416 F.3d at 768 (Gibson, J., dissenting) ("[T]he court answers the easy question but ignores the hard one."). For a discussion of the dissent's view on issues the majority failed to address, see infra notes 112-17 and accompanying text.

109. See White II, 416 F.3d at 768 (Gibson, J., dissenting) (arguing that partisan activities and solicitation clauses are concerned with candidate's potential indebtedness to powerful organizations that can "make" or "break" candidate, as distinct from concern of announce clause). Judge Gibson further stated, "the partisan activities and solicitation clauses regulate how certain speech affects a judicial
limitation of Canon 5 to the campaign period would have been justifiable. Viewing the partisan activities and solicitation clauses as regulating the candidate's relations with people, the dissent argued that the provisions were a valid way of minimizing the threat of a judicial candidate's indebtedness to an organization.

The dissent disagreed with the majority's lack of concern about the potential for a judicial candidate's bias in litigation where a political party is a litigant. The real concern addressed by the contested clauses, the dissent argued, was that the judges would owe their position to the party. The dissent feared that, in time, all judges would be politically indebted, so that no judge could fairly adjudicate a case involving a political party.

Additionally, the dissent argued that the court should have given weight to the Minnesota Supreme Court's decision not to amend the partisan activities clause in light of the separation of powers doctrine. The candidate's relations with people, and organizations of people, not the candidate's relations with issues." Id. (emphasis added).

110. See id. (arguing that majority’s “concern with temporal under inclusiveness” is misplaced because candidates may “incur obligations during a campaign that can affect their performance in office,” which would not occur prior to campaign period).

111. See id. (“Once a person becomes a candidate, the significance of his [or her] relations with the [political] party changes radically, as the party becomes empowered to play the role of judge-maker.”). Judge Gibson argued that the regulation was properly in effect only during the campaign period because it was “tailored to address the threat [to judicial independence and impartiality] in the timeframe in which the threat is most overt.” Id.

112. See id. (arguing that majority was mistaken in finding that “the only relevant link between the judge and the party is that both have espoused similar positions on ‘particular issues embraced by the political party’”) (emphasis omitted).

113. See id. (arguing that threat to unbiased judges posed by judicial candidates engaging in political activity is that, as judge, individual “may owe his or her accession to the bench to the litigant before the bar and may be similarly dependent on the litigant for any hope in future elections”). Judge Gibson further argued that “the participation of judges who have been allowed or forced to make themselves dependent on party largesse for their continued tenure affects the state’s ability to provide neutral judges and the public’s perception of such neutrality.” Id. at 771.

114. See id. at 768-69 (speculating that when clauses are removed, all judicial candidates will become engaged in partisan activities, and “recusal would be pointless, since all judges would be similarly compromised”). An example of the difficulties that would be created by the removal of the partisan activities and solicitation clauses is the series of challenges to judges in former House of Representatives Majority Leader Tom DeLay’s criminal proceedings in Texas, which uses partisan elections as its method of judicial selection. See Ralph Blumenthal, DeLay Case Turns Spotlight on Texas Judicial System, New York Times, Nov. 8, 2005, at A17 (detailing challenges to judges in criminal case because judges made contributions to political candidates from one party or another).

115. See White II, 416 F.3d at 772-73 (Gibson, J., dissenting) (“Although . . . Justice Scalia observed that the parties and this Court appeared to make no distinction between the concepts of judicial ‘independence’ and ‘impartiality,’ . . . the Minnesota Supreme Court explained its decision not to amend the partisan activi-
separation of powers, or judicial "independence," interest is distinct from impartiality and is a compelling state interest in and of itself. Thus, the dissent would find a compelling interest in either judicial impartiality, however defined, and/or judicial independence.

2. The Problem of Underinclusiveness

The dissent argued that the majority further erred in holding that the underinclusiveness of the contested regulations led to the conclusion that judicial openmindedness was not a compelling state interest. The dissent argued that, while underinclusiveness may show that the government's asserted interest is not compelling if that interest had not previously been recognized as compelling, the present case is different because the interest at stake had been so recognized. The fact that Canon 5 did not fully protect that interest did not make the interest any less compelling.

116. See id. at 773 (arguing that separation of powers interest is distinct from impartiality interest, and that preserving separation of powers within government is compelling state interest); see also Richard Briffault, Judicial Campaign Codes After Republican Party of Minnesota v. White, 153 U. Pa. L. Rev. 181, 199 (2004) (arguing that while judicial impartiality and independence are linked, judicial independence is distinct and rooted in separation of powers concerns); Geoffrey P. Miller, Bad Judges, 83 Tex. L. Rev. 431, 456-57 (2004) ("Judicial Independence requires that judges be insulated from oversight and control by parties outside of the judicial branch."); Weiser, supra note 22, at 666 ("Whereas the interest in impartiality is rooted in the due process rights of litigants, the interest in judicial independence is rooted in the principle of separation of powers."). But see White I, 536 U.S. 765, 775 n.6 (2002) (noting that parties in this case, and hence Supreme Court, used term "independence" interchangeably with "impartiality," meaning those terms were synonymous).

117. See White II, 416 F.3d at 767 (Gibson, J., dissenting) (opining that contested clauses "each serve an interest that is and has been recognized as compelling").

118. See id. at 775 (noting that part of majority's reasoning for finding that Minnesota's state interest may not be compelling was underinclusiveness of Canon 5's provisions in addressing potential threats to interest). For a discussion of the majority's view of the legal effect of Canon 5's underinclusiveness, see supra 87-89 and accompanying text.

119. See White II, 416 F.3d at 775 (Gibson, J., dissenting) (arguing that underinclusiveness is relevant consideration "where the asserted interest is novel or questionable," but that in present case state's interest in judicial independence and impartiality has already been recognized as compelling). For a discussion of the recognition of judicial independence and impartiality as a compelling state interest, see supra note 87 and infra note 120 and accompanying text.

120. See White I, 536 U.S. at 793 (Kennedy, J., concurring) (stating that Supreme Court's holding in White II should not be read to undermine validity of state's interest in maintaining judicial integrity and asserting that "[j]udicial integrity is . . . a state interest of the highest order"). The dissent in White II argued: [P]rotecting the integrity of the states' courts has long been recognized as compelling, and by the same reasoning, that interest cannot be negated simply because a particular measure may not protect it fully. . . . It
The dissent did not overlook the underinclusiveness of Canon 5; rather, the dissent opined that Canon 5's underinclusiveness raised an issue of motive, not the importance of the state's interest. When the question as to whether a regulation's underinclusiveness belied some impermissible aim, the Supreme Court upheld regulations that addressed only the most critical threats to the state interest while leaving other threats unguarded. As long as the state could show that there was a difference between the speech that was regulated and the speech that was not, the regulation should be upheld. The Supreme Court held that there were significant differences between political parties and interest groups, including the power of political parties to select slates of candidates for elections, determine who serves on legislative committees, select congressional leadership and exert influence and power in the legislature far beyond that of interest groups. The dissent felt these differences should have been recognized in the present case.

According to the dissent, one of the major reasons that regulation of political parties is justified—even if interest groups are not regulated—is that Minnesota has a tradition of non-partisan elections. Allowing political parties to influence elections would effectively end that tradition and

is a misreading of the Supreme Court's underinclusiveness discussions, and, most significantly, a nonsequitur as well, to say that the interest in judicial integrity could be reduced to insignificance because Canon 5 does not go far enough to protect it.

416 F.3d at 775-76 (Gibson, J., dissenting).

121. See White II, 416 F.3d at 776 (Gibson, J., dissenting) ("Though the Court today errs in holding that underinclusiveness of a regulation can negate the importance of the state's interest in the integrity of its judiciary, underinclusiveness does indeed point to a different problem—it raises an inference of pretext.").

122. See id. at 776-77 (discussing Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990), and McConnell v. FEC, 540 U.S. 93 (2003), in which regulations were attacked as underinclusive but upheld under strict scrutiny because they protected state interests against most serious threats, even when less serious threats were not covered).

123. See id. at 778 (citing Austin, 494 U.S. at 666; Erznoznik v. City of Jacksonville, 422 U.S. 205, 215 (1975)) (stating that, under Austin, if there was "crucial difference" between threat posed by regulated speech and threat posed by unregulated speech and if government could show that regulated speech posed more serious threat to state interest than unregulated speech, inference of pretext was rebutted).

124. See McConnell, 540 U.S. at 188 (discussing important differences between political parties and interest groups, including extent of influence and power of organizations, which justified regulation of political parties while leaving interest groups unregulated).

125. See White II, 416 F.3d at 778 (Gibson, J., dissenting) (discussing differences noted in McConnell). For a discussion of the differences between political parties and interest groups discussed in McConnell, see supra note 124 and accompanying text.

126. See White II, 416 F.3d at 778-81 (Gibson, J., dissenting) (discussing Minnesota's tradition of non-partisan elections).
create a partisan election system for the judiciary. If there might be any concern regarding the exclusion of interest groups from regulation, the dissent asserted that remand for further evidence on the matter would be more appropriate than a grant of summary judgment.

3. The Deference That Should Have Been, but Was Not, Afforded to State Decisionmakers

The dissent’s final disagreement with the majority’s holding was that the strict scrutiny standard failed to allow states any discretion to address

127. See id. at 781 (discussing testimony of DePaul Willette at hearing before Minnesota Supreme Court regarding Amendment to Canon 5, wherein, Willette stated that failure to regulate political parties in judicial elections would effectively make all judicial elections partisan).

128. See id. (discussing reasons for interest groups not being included in Canon 5’s regulations and arguing that “remand for further evidence on the issue of pretext would be more appropriate than for [the court] to order summary judgment on a record with evidence supporting both sides of the question”). The dissent argued that there were also still unresolved questions of fact as to the extent and severity of the threat that partisan activities and solicitation of campaign contributions pose to judicial independence and impartiality. See id. at 773 (“The extent and severity of the threat to the state’s interests are factual questions that must be proven empirically.” (citing Nixon v. Shrink Mo. Gov’t PAC, 528 U.S. 377, 390-94 (2000))). According to the dissent, summary judgment was particularly inappropriate in this case because of the Minnesota Supreme Court’s reconsideration of Canon 5, which included gathering evidence on the effects the activities that Canon 5 sought to regulate. See id. (noting importance of fact that Minnesota Supreme Court had recently reconsidered contested provisions of Canon 5). The dissent argued that the majority erred in not considering the effects of the Minnesota Supreme Court’s reconsideration of the provisions of Canon 5. See id. at 775 (“The Court today errs grievously in issuing a ruling that strikes the provisions based on the 1997 factual record without considering the September 2004 record before the Minnesota Supreme Court.”). The dissent further argued that “[t]he Supreme Court . . . has made clear that we must consider on appeal any change, either in fact or in law, which has supervened since the judgment was entered.” See id. at 773-74 (arguing that majority erred). The advisory committee established by the Minnesota Supreme Court recommended against removing Canon 5’s regulations in order to preserve the appearance and the fact of an independent judiciary. See id. at 774-75 (discussing recommendations of Minnesota Supreme Court’s Advisory Committee and setting forth statistical evidence gathered by committee to show that public perception of judiciary in jurisdictions that hold partisan judicial elections is that judiciary is not independent from political machine and that partisan politics influence judges’ decisionmaking). The dissent worried that the court’s failure to consider these factors would ultimately render the present ruling moot. See id. at 773 (“[F]ailure to consider the effect of [the Minnesota Supreme Court’s reconsideration] may well cause this Court’s opinion to be moot from its inception.”). One troubling element the dissent alluded to but did not fully discuss was the consequence of the perhaps erroneous application of the present ruling to the amended Canon 5. See id. at 775 (noting majority ruling is based on 1997 factual record). The dissent reasoned:

Since the holding is based on a factual record that antedates the most recent version of Canon 5, one must question whether the Court’s holding today even applies to the current version of Canon 5, based as it is, on a 2004 factual determination which the Court does not take into account.

Id.
threats to the stability and integrity of their governments.\textsuperscript{129} While traditional strict scrutiny review does not require deference, the dissent felt that the circumstances of this particular case called for some degree of deference.\textsuperscript{130} The dissent noted that Minnesota had to draw a line somewhere in order to prevent its regulations from becoming overinclusive.\textsuperscript{131} The dissent further noted that deference was necessary in this case to preserve a balance between competing constitutional interests.\textsuperscript{132} The final element of this case that called for a degree of deference, in the dissent's view, was the fact that the threat to judicial independence was "not from unambiguously evil conduct, but from behavior that form[ed] part of a continuum with desired behavior-attempts of the citizenry to make their voices heard in their government."\textsuperscript{133} The dissent argued that without giving some deference to the state to set regulations that, although imperfect, protect its interests, the state would be wholly unable to protect itself from threats to the independence of its government.

\textsuperscript{129} See id. at 782-83 (arguing that strict scrutiny test applied by majority "simply cannot work when applied to real cases because it does not take into account the need for limited deference to the state's attempt to solve the problems that besiege it").

\textsuperscript{130} See id. at 783 ("Deference is not a word we associate with strict scrutiny review, but there is indeed a place for limited deference . . . ." (citing Grutter v. Bollinger, 539 U.S. 306, 328 (2003))) (internal quotations omitted).

\textsuperscript{131} See id. (discussing potential problem that, without deference, regulations might always be either underinclusive or overinclusive, and that no regulation would then be able to pass constitutional muster).

\textsuperscript{132} See id. at 784 ("[T]his is a case of competing constitutional interests, so that whatever protection is afforded First Amendment interests comes at the expense of due process and separation of powers interests."). The dissent further noted that because there were constitutional concerns on both sides of Canon 5, regulation may have only been partly effective because such choices were necessary to accommodate competing concerns. See id. (citing Nixon, 528 U.S. at 400 (Breyer, J., concurring)) (arguing that partially-effective regulation was unavoidable in response to constitutional concerns on both sides of argument over regulation).

\textsuperscript{133} See id. (arguing that point at which judicial candidate would feel indebted to political party or donor would vary among candidates, and so regulation was necessarily imperfect, as it had to address many variables). In McConnell v. FEC, the Supreme Court dealt with a similar issue in the context of political campaigns. See 540 U.S. 93, 150 (2003) (establishing that government's anti-corruption interest "extend[ed] beyond preventing simple cash-for-votes corruption to curbing undue influence on an officeholder's judgment") (internal quotations omitted). The dissent in the present case argued that the majority should have allowed Minnesota some deference because of the difficulty of regulating an ambiguous concept such as "undue influence." See White II, 416 F.3d at 785 (Gibson, J., dissenting). Judge Gibson argued:

When Congress grapples with such a protean concept as "undue influence on an officeholder," the Supreme Court applies strict scrutiny in such a way as to acknowledge that Congress' task requires exercise of some judgment. In contrast to the Supreme Court's approach, our Court today takes a bludgeon to a state's attempt to solve a delicate problem.

\textit{Id.}
of its judiciary. 134 The majority’s version of strict scrutiny would strike down any regulation requiring such review. 135 The dissent argued that strict scrutiny should be an exacting test, but one that should allow room for deference in deserving circumstances. 136 The dissent’s concerns regarding the application of the strict scrutiny standard, together with its concerns regarding Minnesota’s state interest, the appropriateness of summary judgment and whether the underinclusiveness of Canon 5 was fatal to its constitutionality, formed the basis of the opinion. 137

V. THE END OF THE INDEPENDENT JUDICIARY?

A. What Happened to Separation of Powers?

The Eighth Circuit majority misidentified the threat that Canon 5 was meant to address. 138 While the majority might have properly viewed the

134. See White II, 416 F.3d at 786 (Gibson, J., dissenting) (noting need for some deference when applying strict scrutiny). Judge Gibson opined:
[T]hough strict scrutiny must, of course, be strict, it must... be applied with limited deference to the decisionmaker’s exercise of judgment. If we pretend that it is otherwise, we adopt a model for strict scrutiny under which no state’s attempt to deal with certain problems can survive, and so very real and dangerous problems must be left unaddressed.

Id.

135. See id. (arguing that majority’s version of strict scrutiny would cause every conceivable regulation to fail because for any exercise of discretion in setting regulatory boundaries, it would always have been possible to draw line somewhere else).

136. See id. Judge Gibson argued:
[W]here the states or other branches [of government] draw the line in a place which the governmental actor can defend, with convincing evidence, as the place where the threat to its interest becomes the most acute, the measure should pass strict scrutiny, though it might have been possible for another hypothetical decisionmaker to have moved the line an inch in one direction or another.

Id.

137. See id. at 786-87 (summarizing reasons for dissent’s disagreement with majority).

138. See id. at 768 (“The partisan activities and solicitation clauses regulate how certain speech affects a judicial candidate’s relations with people, and organizations of people, not the candidate’s relations with issues.”). But see id. at 754-56 (majority opinion) (holding that partisan activities clause was meant to prevent judicial candidates from aligning themselves with particular views on issues). For an argument that the clauses at issue in White II are meant to affect the candidate’s relation with people and organizations, and not issues, see Weiser, supra note 22, at 688 (arguing that partisan activities and solicitation clauses protect judicial independence). Weiser asserted:
[T]he political activity restrictions in Canon 5(A)(1) serve the states’ interests in promoting judicial independence. In the most direct sense, the political activity canons ensure that prospective judges are not entangled in the same political machinery as the political branches. This has two important consequences. First, it reduces the extent to which judges are beholden to the political branches themselves, and second, it prevents judges from being constrained by the political agendas of the parties,
announce clause as affecting a candidate's relation with issues,\textsuperscript{139} the partisan activities and solicitation clauses certainly target the candidate's relation with people and groups of people.\textsuperscript{140} The root of this error may well have been the majority's adoption of the view that "impartiality" and "independence" are synonymous and interchangeable.\textsuperscript{141}

Viewing judicial independence as distinct from impartiality, separation of powers is the relevant compelling state interest that the court should have considered in its analysis.\textsuperscript{142} Although the majority referenced this issue, it ultimately concluded that the state's interest in preserving the independence of the judiciary in the separation of powers context was not sufficiently compelling to abridge core First Amendment rights.\textsuperscript{143}

thus freeing them to base their rulings on legal rather than political considerations.

\textit{Id.}


\textsuperscript{140} For a discussion of the argument that the partisan activities and solicitation clauses are meant to regulate judicial candidates' relations with people and organizations, see \textit{supra} notes 108-11 and accompanying text. See also \textit{Ctr. for Prof'l Responsibility, Am. Bar Ass'n, Annotated Model Code of Judicial Conduct} 386 (2004) (explaining that as per Canon 5(C)(2), one purpose of solicitation clause is "if a contribution is made, the contributor will not appear to have 'purchased' the candidate's favor") (emphasis added); Vincent R. Johnson, \textit{The Ethical Foundations of American Judicial Independence}, 29 \textit{FORDHAM URB. L.J.} 1007, 1021-22 (2002) (stating that restrictions on political activities are meant to separate judges and candidates from pressures of politics, including entanglement with political parties).

\textsuperscript{141} See \textit{White II}, 416 F.3d at 751 (discussing view that independence and impartiality are interchangeable). \textit{But see In re Amendment of the Code of Judicial Conduct, No. C4-85-697, slip op. at 4-5 (Minn. Sept. 14, 2004) (discussing impartiality as distinct issue from judicial independence), quoted in \textit{White II}, 416 F.3d at 773, 774 (Gibson, J., dissenting).} Minnesota attempted to argue that independence and impartiality are distinct from one another but the court held that the partisan activities and solicitation clauses would still fail for underinclusiveness because they did not cover special interest groups. \textit{See \textit{White II}, 416 F.3d at 751 n.7 (discussing Minnesota's argument and rejecting it).


\textsuperscript{143} See \textit{White II}, 416 F.3d at 752 n.7 (noting that "neither the Supreme Court, nor any other court... has ever determined that a state's interest in maintaining a separation of powers is sufficiently compelling to abridge core First Amendment freedoms"). The court, however, failed to cite any Supreme Court or other court opinion holding that separation of powers is not a compelling state interest for strict scrutiny purposes. \textit{See generally id.} (lacking precedent for assertion that state interest in separation of powers is not compelling interest).
Much support exists, however, for the position that preserving the separation of powers is a compelling state interest.144

B. The Campaign Finance Analogy

The majority, as noted by Judge Gibson, failed to recognize that the "openmindedness" interest advanced by Minnesota was "a facet of the anti-corruption interest that was recognized in Buckley v. Valeo145 and subsequent campaign finance cases."146 Because the solicitation clause deals precisely with the kind of money payments at issue in Buckley and other campaign finance cases, those precedents should have been applied to the solicitation clause, even if not applicable to the partisan activities clause.147 The majority's dismissal of the campaign finance cases as irrelevant is erroneous because the majority never discussed the possible applicability of those cases to the solicitation clause.148

The campaign finance cases should apply to the solicitation clause because those cases dealt with the undue influence donors could exert over the elected officials.149 Justice O'Connor emphasized this concern in her concurrence in White I.150 The contribution of funds certainly has an impact on the integrity of the government, and maintaining both integrity and the appearance thereof in the government is surely a compelling state interest.151 Despite the majority's argument that the solicitation clause's committee provision adequately protected the state interest in maintain-

144. For a list of sources arguing that separation of powers is a distinct and compelling state interest, see supra note 142.
146. White II, 416 F.3d at 769 (Gibson, J., dissenting) (citing FEC v. Nat'l Conservative PAC, 470 U.S. 480, 496-97 (1985)); see also Nicholson v. State Comm'n on Judicial Conduct, 409 N.E.2d 818, 822 (N.Y. 1980) ("Charged with administering the law, []udges may not actually or appear to make the dispensation of justice turn on political concerns . . . .").
147. See White II, 416 F.3d at 769 (Gibson, J., dissenting) (noting that although solicitation clause involves payment of money, partisan activities clause does not); id. (discussing campaign finance cases and importance of campaign finance restrictions as methods of minimizing risk of corruption).
148. See id. at 756-57 n.8 (holding that campaign finance cases are inapplicable to present case because they deal with "the regulation of political contributions" and not "direct suppression of core political speech and association at issue in this case"). For a critique of the majority's failure to apply the campaign finance cases to the solicitation clause, see infra notes 149-55 and accompanying text.
149. See Briffault, supra note 116, at 225 (noting that Supreme Court, in Buckley and McConnell, used concern about corruption, "defined as candidates too compliant with the wishes of their donors," and appearance of corruption to justify limiting campaign contributions and applying that logic to solicitation of contributions).
150. For a discussion of Justice O'Connor's concerns regarding judicial candidates' participation in fundraising, see supra notes 45-48.
151. See Buckley v. Valeo, 424 U.S. 1, 26-27 (1976) (per curiam) (commenting on damaging effect of large contributions to secure political quid pro quo on integrity of government and holding that appearance of such arrangements is "[o]f almost equal concern as the danger of actual quid pro quo arrangements").
ing an unbiased judiciary, the majority never addressed the threat posed by any personal relationships that might be formed between the candidate and potential donors in the solicitation process itself, independent of the actual contribution. The threat to judicial independence protected by the solicitation clause was "qualitatively greater when the candidate solicit[ed] the contribution personally." The majority's failure to consider the campaign finance cases in its analysis of Canon 5 seriously destabilizes the future integrity of the judiciary.

C. Guidance (or Lack Thereof) for Future Regulations

While the Eighth Circuit majority stated that its holding in this case would not "doom" any future attempts by Minnesota to regulate judicial elections, it offered no guidance as to what regulations might be able to pass their strict scrutiny test. While such guidance may have been "flirt[ing] with rendering an advisory opinion," the absence of such guidance amounts to a subversion of Minnesota's legislative choice to distinguish judicial elections from executive and legislative elections. The Eighth Circuit, in effect, adopts the same position as that adopted by the Eleventh Circuit in \textit{Weaver}: elections for judicial office should be conducted subject to the same regulations (or lack thereof) as elections for

152. For a discussion of the majority's opinion that campaign committee system adequately protected the state's interest in maintaining an unbiased judiciary, see \textit{supra} note 94.

153. See \textit{Briffault}, \textit{supra} note 116, at 227 (noting dangers involved in candidates personally soliciting contributions because such solicitations often involve personal meetings "with a handshake and the opportunity for [the candidate and potential donor] to look the other in the eye while the candidate makes his pitch" or telephone conversations that "heighten the sense of direct contact between the candidate and the donor," resulting in candidate having relationship with donor, or at least public appearance of such relationship).

154. See id. at 226-27 (same).

155. For a discussion of the dangers posed by the majority's failure to fully consider the implications of striking down the partisan activities and solicitation clauses, see \textit{infra} notes 161-68 and accompanying text.

156. See \textit{White II}, 416 F.3d 738, 763 n.14 (8th Cir. 2005) (en banc) (stating that majority opinion does not prohibit "all future attempts by Minnesota to adopt judicial election regulations that will pass strict scrutiny," but declining to specify how such regulations should be structured because doing so "would flirt with rendering an advisory opinion, or stepping into the legislative arena . . . ."). \textit{But see Weiser}, \textit{supra} note 22, at 652-54 (noting problems arising from Supreme Court's failure to provide guidance to states on how to balance candidates' First Amendment rights against states' interest in impartial and independent judiciary).

157. \textit{White II}, 416 F.3d at 763 n.14 (explaining court's reasoning for not providing guidance on how to regulate judicial elections in such way as would pass strict scrutiny).

158. See \textit{Peterson v. Stafford}, 490 N.W.2d 418, 423 (Minn. 1992) (noting Minnesota's "legislative prerogative of distinguishing judicial elections in manner and form from those legislative and executive elections conducted in the traditional partisan sense").
political office. Without an example of a regulation that would pass the
majority’s strict scrutiny test, it is impossible to address the concerns that
led to the adoption of nonpartisan judicial elections in the first place.

VI. Fallout: The Rise of the Politiciary

In the wake of the Eighth Circuit’s decision in White II, similar judicial
election regulations in numerous states could fail. The invalidation of
these clauses threatens the independence of the judiciary in any state that
elects its judges. A state’s choice to elect its judges does not compro-
mise its interest in having an independent judiciary. Minnesota is not
the only state with its judicial independence at risk following the White II
decision; Arkansas and North Dakota fall under the Eighth Circuit’s juris-
diction, and their judicial campaign regulations will also fail if and when
they are challenged in court. If other circuits adopt the Eighth Cir-
cuit’s reasoning, then nonpartisan judicial elections will essentially cease
to exist, turning elected judges into politicians and the judiciary into the
politiciary.

As we await the fallout from White II, legislatures, courts and scholars
in jurisdictions that elect their judges search for new ways to improve their

159. For a discussion of the position advanced by the Eleventh Circuit in
Weaver v. Bonner, see supra notes 59-61 and accompanying text. While the Eighth
Circuit does not explicitly state that judicial elections must be conducted in the
same fashion as elections for other public offices, the holdings of the two cases are
essentially the same.

160. See Caufield, supra note 22, at 627 (noting that nonpartisan judicial elec-
tions were generally adopted in response to concerns that elected judges “were
generally thought to be inept, corrupt, and securely in the pocket of the ruling
political machine”); Weiser, supra note 22, at 670 (“To counter the threat partisan
elections pose to ‘the judicial impartiality required to decide cases free from politi-
cal maneuvering,’ Minnesota required . . . elections for judicial office to be non-
partisan.” (quoting Peterson, 490 N.W.2d at 422)).

161. See Weiser, supra note 22, at 651 (noting that Minnesota’s judicial regula-
tions, like those of many other states, were modeled after American Bar Association’s
Model Code of Judicial Conduct).

162. See White I, 536 U.S. 765, 799-800 (2002) (Stevens, J., dissenting) (argu-
ing that stripping states of their ability to regulate judicial elections creates unjust
zero-sum game wherein states must choose between abandoning judicial elections or
sacrificing judicial impartiality and independence); id. at 821 (Ginsburg, J., dis-
senting) (same); see also Briffault, supra note 116, at 187-93, 195-202 (arguing that
additional regulation of judicial elections is justified because judiciary is distinct
from executive and legislative branches).

163. See Weiser, supra note 22, at 668-72 (arguing that Minnesota did not sac-
rifice its interest in independent judiciary by choosing election as its method of
selecting judges).

164. See Ark. Code of Judicial Conduct Canon 5 (1993) (setting forth Ar-
kanas’s judicial election/appointment regulations); N.D. Code of Judicial Con-
duct Canon 5 (1994) (setting forth North Dakota’s judicial election/appointment
regulations).

165. For a list of states that use nonpartisan judicial elections, and whose cam-
paign regulations could fall if the rationale of White II is widely adopted, see supra
note 22.
judicial elections.166 Perhaps White II will put states that wish to preserve an independent judiciary in a situation where they must do away with judicial elections altogether.167 White II, however, reaches beyond the future feasibility of judicial elections: if judges are political players in the same manner as executive or legislative officials, justice shall truly become “[a] commodity which in a more or less adulterated condition the State sells to the citizen as a reward for his allegiance . . . and personal service.”168

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166. See, e.g., Patrick Emery Longan, Judicial Professionalism in a New Era of Judicial Selection, 56 MERCER L. REV. 913, 931-42 (2005) (suggesting various mechanisms for improving judicial elections). In the wake of White II, Minnesota may experience a positive injection of democracy into its judicial campaigns, or it may have to modify its elections procedures or recusal rules. See David A. Schultz, Judicial Selection in Minnesota: Options After Republican Party v. White, BENCH & BAR OF MINN., Nov. 2005, at 17 (2005) (discussing possible practical effects of White II).

167. See Longan, supra note 166, at 942-44 (commenting on possibility of eliminating elections as methods of judicial selection); Schultz, supra note 166, at 20-21 (discussing Minnesota’s option of moving to some form of appointment procedure for judicial selection). But see generally Michael R. Dimino, Sr., The Worst Way of Selecting Judges—Except All the Others That Have Been Tried, 32 N. KY. L. REV. 267 (2005) (arguing that election, though imperfect, is best method of judicial selection).
