

## ASSURING DUE PROCESS THROUGH MERIT SELECTION OF JUDGES

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Because of recent developments in election campaigns for judicial office, I maintain merit selection systems are a better way to choose judges than popular elections. To understand why, I ask the reader to examine the topic from the viewpoint of a future litigant.<sup>1</sup> Imagine yourself in court for some reason: perhaps a plaintiff in a personal injury case or a collection case; a divorcing husband or wife; or for another reason altogether.

Now that you are in court, what do you want from the judge? To win? Perhaps. But I think, upon reflection, what we really want from the judge is not so much to win but to receive a fair and impartial adjudication of our claim or defense. In point of fact, the United States Constitution—specifically our constitutional right to “due process of law”—guarantees us a fair and impartial judge.<sup>2</sup>

The topic of selecting judges who will render fair and impartial justice is inextricably linked with the subject of holding them accountable when they fail to uphold this standard. Suppose the judge in our case rules against us. Should the judge be disciplined or otherwise held accountable? That depends. If the judge rendered a fair and impartial judgment, the judge should not be disciplined just because we disagree with the result. Conversely, if the judge did not render a fair and impartial judgment, the judge has violated our constitutional rights and probably should be held accountable. Let me use two examples to illustrate.

My first example is from Shakespeare. It’s a rather coarse story, but by using Shakespeare, I avoid speaking ill of any judge who has been alive during the last four centuries. The play is *Measure for Measure*, which is not one of Shakespeare’s best-known works.<sup>3</sup> In it, Angelo, a judge in Vienna, sentences

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This Article is dedicated to Randall T. Shepard, Chief Justice of Indiana from 1987 to 2012. His keen observations and broad wisdom on judicial selection matters infuse this entire Article. This Article is based upon remarks first delivered at the Saint John’s University Eugene McCarthy Center For Public Policy & Civic Engagement, Collegeville, Minnesota, on January 31, 2011. I thank Thomas Joyce, Tom Read, and the McCarthy Center for their and its hospitality on that occasion. I owe particular thanks to my law clerk, Aaron Craft, for his assistance on this project.

1. This viewpoint was inspired by the insight in a debate over the free speech rights of judicial candidates; the competing constitutional interest is the due process rights of future litigants. Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059, 1083-92 (1996).

2. See U.S. CONST. amends. V, XIV, § 1; *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876-81 (2009); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 819-25 (1986); *Ward v. Vill. of Monroeville*, 409 U.S. 57, 59-60 (1972); *In re Murchison*, 349 U.S. 133, 135-36 (1955); *Tumey v. Ohio*, 273 U.S. 510, 522-23 (1927).

3. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*.

a young man, Claudio, to death for violating a law against immorality.<sup>4</sup> When Claudio's sister seeks mercy, Judge Angelo offers to pardon Claudio on the condition that she have an affair with him.<sup>5</sup>

Could there be a greater insult to fairness and impartiality than this? A judge is essentially soliciting a carnal bribe for rendering judgment in a particular way. Such a judge should be held accountable for violating Due Process and punished accordingly.

My second example is completely different. It is a true story. In 1931, nine African-American teenaged males were arrested and jailed in Scottsboro, Alabama, for allegedly raping two young white women.<sup>6</sup> Twelve days later, eight of them were convicted and sentenced to death.<sup>7</sup> After the United States Supreme Court reversed the convictions in 1932,<sup>8</sup> a new trial was convened for one of the nine, Haywood Patterson, before a new judge, Judge James E. Horton, Jr.<sup>9</sup> The jury voted to convict and sentence Patterson to death.<sup>10</sup> Judge Horton found the evidence insufficient and set both the verdict and death sentence aside.<sup>11</sup> Judge Horton was defeated in the next election.<sup>12</sup> Here was a judge who provided a litigant due process of law but was punished for it.

Our constitutional right to due process of law guarantees us a fair and impartial adjudication of our case.<sup>13</sup> The stories of Judge Angelo and Judge Horton teach us, first, that a judge who does not behave fairly and impartially should be held appropriately accountable. Secondly, a judge should not be punished, at the ballot box or otherwise, for a fair and impartial decision simply because it is politically unpopular.

This Article is both about selecting judges who will render fair and impartial decisions and about holding them accountable when they do not. The electorate holds elected judges accountable through the ballot box. Alternatively, state codes of judicial conduct<sup>14</sup> and a periodic "retention" vote<sup>15</sup> hold merit-selected

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4. *Id.* act 1, scs. 2, 4.

5. *Id.* act 2, sc. 4.

6. JAMES GOODMAN, STORIES OF SCOTTSBORO 4-5 (1994).

7. *Id.* at 6.

8. *Powell v. Alabama*, 287 U.S. 45, 71-73 (1932).

9. GOODMAN, *supra* note 6, at 118, 125-35.

10. *Id.* at 136-46.

11. *Id.* at 173-82.

12. *Id.* at 207. Of further historical note, the Attorney General of Alabama, Thomas E. Knight, Jr., who led the prosecution, was elected to the office of Lieutenant Governor in the same election in which Judge Horton was defeated. *Id.* at 111, 243.

13. U.S. CONST. amends. V, XIV.

14. The state court of last resort enforces the provisions of the code against judges by means of a special disciplinary process. In Indiana, the state constitution establishes an Indiana Commission on Judicial Qualifications ("Commission") consisting of three lawyers selected by the lawyers of the state and three non-lawyers appointed by the governor and chaired by the Chief Justice of Indiana. IND. CONST. art. VII, § 9. Allegations of violations of the code of judicial conduct are investigated by the Commission. IND. ADMISSION & DISC. R. 25(VIII)(E). The

judges accountable.

As a statistical matter, thirty-six states—including my own state of Indiana—select at least some of their judges at the ballot box.<sup>16</sup> The ballot box is, as Judge Horton’s case sadly shows, one method of accountability.

In addition, each state has a code of judicial conduct, promulgated by that state’s highest court.<sup>17</sup> The use of codes of judicial conduct has at least two major advantages over the ballot box as a judicial accountability measure: enforcing conduct codes provides a far more calibrated method for punishing judges who are not fair or impartial than do elections, and conduct codes cannot be used to punish judges for making unpopular decisions. Thus, under an accountability system utilizing a judicial code of conduct, Judge Angelo would likely be removed from office for his misconduct; whereas, Judge Horton, who committed no misconduct, would not be subject to discipline.

#### I. ANNOUNCING DISPUTED LEGAL OR POLITICAL ISSUES

Most states’ codes of judicial conduct are based upon a model national code of judicial conduct set forth by the American Bar Association, with substantial input from judges, lawyers, and academic experts from around the country.<sup>18</sup> In 1972, the ABA set forth the following rule in its model code: “A candidate, including an incumbent judge, for a judicial office . . . should not . . . announce his [or her] views on disputed legal or political issues . . . .”<sup>19</sup>

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investigation can result in the Commission filing formal charges against the judge, *id.* Rule 25(VIII)(E)(7)(a), and the case proceeding to a hearing with witnesses and evidence, *id.* Rule 25(VIII)(K). The results of the hearing are presented to the Supreme Court for a final determination as to whether the judge is guilty of violating the code of judicial conduct, *id.* Rule 25(VIII)(N), and, if so, what discipline is appropriate, *id.* Rule 25(IV).

15. “Retention” elections operate as follows: when a sitting judge’s term expires, the judge, who desires to remain on the bench, is placed on the ballot in the general election for “retention,” a “yes” or “no” vote. This occurs for Indiana Supreme Court justices and Court of Appeals judges at the first statewide election that occurs two full years following their appointment and every ten years thereafter. IND. CONST. art VII, § 11.

16. *See generally* AM. JUDICATURE SOC’Y, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS (2010), available at [http://www.judicialselection.us/uploads/documents/Judicial\\_Selection\\_Charts\\_1196376173077.pdf](http://www.judicialselection.us/uploads/documents/Judicial_Selection_Charts_1196376173077.pdf) (summarizing the judicial selection methods, retention requirements, and term lengths of all fifty states). According to the American Judicature Society, fourteen states and the District of Columbia use merit selection for the initial selection of all judges; five use gubernatorial or legislative appointment; eight use partisan elections; fourteen use nonpartisan elections; and nine use a combination of methods. *Id.*

17. JAMES J. ALFINI ET AL., JUDICIAL CONDUCT AND ETHICS § 1.03 & nn.17-21 (4th ed. 2007).

18. *Id.* (“Montana remains as the only non-Code state, although it does have a set of rules of judicial conduct that bear some degree of similarity to the Model Codes.”).

19. MODEL CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(c) (1972); *see* E. WAYNE THODE, REPORTER’S NOTES TO CODE OF JUDICIAL CONDUCT 29-30 (1973).

Minnesota adopted this rule in 1974;<sup>20</sup> starting in 1974, any lawyer or incumbent judge seeking election to judicial office was prohibited from “announc[ing] his or her views on disputed legal or political issues.”<sup>21</sup> For purposes of the discussion to follow, I will call this the “Announce Clause.”

Prohibiting a judge from announcing disputed legal or political issues is one thing, but prohibiting a candidate in an election campaign from announcing disputed legal or political issues keeps a candidate from doing precisely what elections and campaigning are all about. There is an exceptional tension between holding a judge accountable under a judicial conduct code’s Announce Clause and a candidate’s ability to campaign for judge.

In 1998, a Minnesota lawyer named Gregory Wersal, who was running for a seat on the Minnesota Supreme Court, filed a lawsuit contending that the Announce Clause violated his First Amendment right to freedom of speech.<sup>22</sup> Specifically, Mr. Wersal alleged that he was forced to refrain from announcing his views on disputed issues during the 1998 campaign, to the point where he declined response to questions put to him by the press and public, out of concern that he might run afoul of the announce clause.<sup>23</sup> Wersal was joined in his lawsuit by the Minnesota Republican Party, which contended that the Announce Clause kept Wersal from expressing his views, the party was unable to learn his views and determine whether to “support or oppose his candidacy.”<sup>24</sup>

The freedom of speech provided by the First Amendment is, of course, one of our most cherished freedoms as Americans. Certainly, at its very core, freedom of speech protects political speech.<sup>25</sup> Because freedom of speech is so critical to the very essence of our democracy, the law provides that any content-based government regulation restricting freedom of speech is subject to “strict scrutiny:”<sup>26</sup> an exacting review to see whether the restriction “is (1) narrowly tailored, to serve (2) a compelling state interest.”<sup>27</sup>

Let’s assume Wersal’s freedom of speech was restricted (but I treat this only as an assumption because Minnesota never sought to discipline him for violating the Announce Clause). Was there a compelling state interest that justified this restriction?

Minnesota argued that there was a double-barreled, compelling state interest

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20. *Republican Party of Minn. v. White*, 536 U.S. 765, 768 (2002).

21. *Id.* (quoting MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2000) (internal quotation marks omitted)).

22. *Id.* at 769-70.

23. *Id.* at 770.

24. *Id.*

25. *E.g.*, *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 346-47 (1995); *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 222-23 (1989); *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988); *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) (per curiam).

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

27. *Id.* at 775; *accord* *United States v. Alvarez*, 132 S. Ct. 2537, 2551-52 (2012) (plurality opinion); *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2738 (2011); *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 813 (2000).

justifying the Announce Clause.<sup>28</sup> First, the Announce Clause preserved the impartiality of the Minnesota judiciary, thus protecting the rights of litigants to a fair and impartial adjudication of their disputes.<sup>29</sup> Second, the Announce Clause preserved the appearance of the impartiality of the Minnesota judiciary, thus instilling public confidence that Minnesota courts were fair and impartial.<sup>30</sup>

It is a long-standing tenet of judicial ethics that “no man can be a judge in his own case.”<sup>31</sup> This begins with the idea that a judge cannot preside over a case in which he or she has a personal financial interest.<sup>32</sup> In one case, the United States Supreme Court held that this principle prohibited a judge from receiving a portion of the fines collected from defendants whom he found guilty.<sup>33</sup> Why? The Supreme Court explained that such an arrangement gave the judge a “direct, personal, substantial[, and] pecuniary interest in reaching a conclusion against [the defendant] in his case,”<sup>34</sup> and thereby denied the defendant his right to an impartial judge.

The justification for the Announce Clause follows from this principle:

When a judicial candidate promises to rule a certain way on an issue that may later reach the courts, the potential for [impartiality and fairness being disregarded] is grave and manifest. . . . If the judge fails to honor [his or] her campaign promises, [he or] she will not only face abandonment by supporters of [his or] her professed views; [he or] she will also “ris[k] being assailed as a dissembler,” willing to say one thing to win an election and to do the opposite once in office.<sup>35</sup>

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28. *White*, 536 U.S. at 775.

29. *Id.*

30. *Id.*

31. *In re Murchison*, 349 U.S. 133, 136 (1955) (Black, J.); *accord* *Am. Gen. Ins. Co. v. FTC*, 589 F.2d 462, 463-64 (9th Cir. 1979). This principle was articulated more than 400 years ago by Lord Chief Justice Coke who said, “The censors cannot be judges, ministers, and parties; . . . *quia aliquis non debet esse Judex in propria causa, imo iniquum est aliquem suæ rei esse judicem*; and one cannot be judge and attorney for any of the parties.” *Dr. Bonham’s Case*, (1610) 8 Co. Rep. 114a, 118a (citations omitted). Similarly, Sir William Blackstone wrote that

if an act of parliament gives a man power to try all causes, that arise within his manor of Dale; yet, if a cause should arise in which he himself is party, the act is construed not to extend to that; because it is unreasonable that any man should determine his own quarrel.

1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 91 (Oxford, Clarendon Press 1765).

32. U.S. COURTS, CODE OF CONDUCT FOR UNITED STATES JUDGES Canon(3)(c)(1)(c), available at [www.uscourts.gov/RulesAndPolicies/CodesOfConduct/CodeConductUnitedStatesJudges.aspx](http://www.uscourts.gov/RulesAndPolicies/CodesOfConduct/CodeConductUnitedStatesJudges.aspx).

33. *Tumey v. Ohio*, 273 U.S. 510, 531-34 (1927).

34. *Id.* at 523.

35. *White*, 536 U.S. at 816 (Ginsburg, J., dissenting) (last alteration in original) (internal citation omitted).

Indeed, the argument continued,

A judge in this position therefore may be thought to have a “direct, personal, substantial, [and] pecuniary interest” in ruling against certain litigants, for [he or] she may be voted off the bench and thereby lose [his or] her salary and emoluments unless [he or] she honors the pledge that secured [his or] her election.<sup>36</sup>

Former Chief Justice Randall T. Shepard made this point more bluntly: “[A] campaign promise [may be characterized as] a bribe offered to voters, paid with rulings consistent with that promise, in return for continued employment as a judge.”<sup>37</sup>

In short, Minnesota argued the possibility that campaign promises will prevent a judge from ruling impartially on an issue that later reaches the judge’s court so interferes with litigants’ constitutional due process rights as to outweigh the judge’s constitutional right to freedom of speech.<sup>38</sup>

Minnesota’s second justification for the Announce Clause was that it preserved the appearance of the impartiality of the Minnesota judiciary, thereby instilling confidence in the public that Minnesota courts were fair and impartial.<sup>39</sup> Minnesota argued as follows: Unlike the executive and legislative branches of government, courts have little in the way of financial or police powers;<sup>40</sup> if courts’ rulings are to be respected and obeyed, the public must have faith in their judges.<sup>41</sup> As the United States Supreme Court once said, “The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship.”<sup>42</sup> Yet,

[w]hen a candidate makes . . . a promise during a campaign, the public will no doubt perceive that [he or] she is doing so in the hope of garnering votes. And the public will in turn likely conclude that when the candidate decides an issue in accord with that promise, [he or] she does so at least in part to discharge [his or] her undertaking to the voters in the previous election and to prevent voter abandonment in the next. The perception of that unseemly *quid pro quo*—a judicial candidate’s

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36. *Id.* (first alteration in original) (citations omitted).

37. Shepard, *supra* note 1, at 1088, *quoted in White*, 536 U.S. at 816-17 (Ginsburg, J., dissenting).

38. *White*, 536 U.S. at 773, 775, 778-79.

39. *Id.* at 775 (majority opinion).

40. *See id.* at 817-18 (Ginsburg, J., dissenting) (“Because courts control neither the purse nor the sword, their authority ultimately rests on public faith in those who don the robe.” (citation omitted)); *accord* Bauer v. Shepard, 620 F.3d 704, 712 (7th Cir. 2010) (Easterbrook, C.J.) (“The judicial system depends on its reputation for impartiality; it is public acceptance, rather than the sword or the purse, that leads decisions to be obeyed and averts vigilantism and civil strife.”), *cert. denied*, 131 S. Ct. 2872 (2011).

41. *White*, 536 U.S. at 818 (Ginsburg, J., dissenting).

42. *Mistretta v. United States*, 488 U.S. 361, 407 (1989), *cited in White*, 536 U.S. at 818.

promises on issues in return for the electorate's votes at the polls—inevitably diminishes the public's faith in the ability of judges to administer the law without regard to personal or political self-interest.<sup>43</sup>

However, these arguments were rejected by a five-justice majority of the United States Supreme Court, which, in its 2002 *Republican Party of Minnesota v. White* decision, held Minnesota's Announce Clause to be unconstitutional.<sup>44</sup>

The Court did not take a specific position on whether campaign promises to rule a certain way violated due process of law.<sup>45</sup> Rather, the majority said that the Announce Clause went well beyond a ban on campaign promises and commitments.<sup>46</sup> The Announce Clause prohibited a candidate for judicial office from announcing his or her views on “disputed legal or political issues,” which includes statements beyond promises.<sup>47</sup> The Court reasoned,

The proposition that judges feel significantly greater compulsion, or appear to feel significantly greater compulsion, to maintain consistency with *nonpromissory* statements made during a judicial campaign than with such statements made before or after the campaign is not self-evidently true. It seems to us quite likely, in fact, that in many cases the opposite is true. We doubt, for example, that a mere statement of position enunciated during the pendency of an election will be regarded by a judge as more binding—or as more likely to subject him to popular disfavor if reconsidered—than a carefully considered holding that the judge set forth in an earlier opinion denying some individual's claim to justice.<sup>48</sup>

Further, because freedom of speech is such a critically important constitutional right, any unit of government attempting to restrict free speech must prove that the restriction is “(1) narrowly tailored, to serve (2) a compelling state interest.”<sup>49</sup> The Court ultimately concluded that Minnesota had not met its burden of proving that campaign statements that did no more than announce a judge's views precluded them from being fair and impartial.<sup>50</sup>

The Court went on to conclude that Minnesota was really complaining about the fact that judges had to stand for election at all because any judge who makes a politically controversial decision runs the risk of being voted out of office regardless of whether the decision was consistent with a “previously announced

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43. *White*, 536 U.S. at 818 (Ginsburg, J., dissenting).

44. *Id.* at 788 (majority opinion).

45. *Id.* at 770.

46. *Id.* at 775-84.

47. *Id.* at 768 (quoting MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2000) (internal quotation marks omitted)).

48. *Id.* at 780-81.

49. *Id.* at 775 (citing *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989)).

50. *Id.* at 781.

view on a disputed legal issue.”<sup>51</sup>

The Court illustrated this last point with an odd analogy. “Surely,” the Court wrote, “the judge who frees Timothy McVeigh places his job much more at risk than the judge who (horror of horrors!) reconsiders his previously announced view on a disputed legal issue.”<sup>52</sup> Of course, no judge ever freed Timothy McVeigh. Second, Timothy McVeigh was tried in federal court where judges are not subject to election anyway.

The point could have been made with a lot more force by invoking Judge Horton’s case. He was voted out of office, not for acting inconsistently with a campaign promise, but for providing Haywood Patterson due process.<sup>53</sup>

## II. COMMITMENTS INCONSISTENT WITH IMPARTIAL ADJUDICATION

After *White*,<sup>54</sup> states were no longer able to enforce Announce Clauses in their codes of judicial conduct.<sup>55</sup> But this did not (yet) mean that future litigants risked facing judges who, by remaining true to their announced views on disputed legal issues, would not be fair and impartial in cases involving those issues.

The Supreme Court took only a particular point of disagreement with Minnesota’s justification for the Announce Clause—it went well beyond prohibiting promises to rule in a particular way.<sup>56</sup> Would a more narrowly drawn provision, one that prohibited only campaign promises to rule in a particular way, also violate freedom of speech? If not, perhaps future litigants would not risk facing judges who would not be fair and impartial in their cases after all. This question has not yet been decided by the Supreme Court.

Now, I will shift focus from Minnesota to Indiana. Although there was no Announce Clause in the Indiana Code of Judicial Conduct at the time of the *White* decision, state judicial ethics rules have been modified somewhat since then. Indiana now prohibits judges and candidates for judicial office, “in connection with cases, controversies, or issues that are likely to come before the court,” from making “pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.”<sup>57</sup> This has become known as the “Commits Clause.”<sup>58</sup> The Commits Clause is a

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51. *Id.* at 782.

52. *Id.*

53. GOODMAN, *supra* note 6, at 206-07.

54. 536 U.S. at 775-84.

55. See Jan W. Baran, *Judicial Candidate Speech After Republican Party of Minnesota v. White*, 39 CT. REV. 12, 13 (2002).

56. *White*, 536 U.S. at 775-84.

57. IND. CODE OF JUDICIAL CONDUCT Rule 4.1(A)(13) (2012); see IND. CODE OF JUDICIAL CONDUCT Terminology (2012) (“[Impartial means] absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge.”).

58. *Bauer v. Shepard*, 620 F.3d 704, 707 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 2872



much narrower restriction than the Announce Clause.<sup>59</sup> Candidates are only prohibited from making pledges, promises, or commitments that are inconsistent with impartial adjudication.<sup>60</sup>

The constitutionality of Indiana's Commits Clause was challenged by an Indiana-based interest group and two judicial candidates in *Bauer v. Shepard*<sup>61</sup> (Yes, that Shepard.<sup>62</sup>). The interest group, Indiana Right-to-Life, Inc., contended that the Commits Clause has the effect of prohibiting candidates for judicial office from answering its questionnaire on a variety of abortion-related issues, such as whether a given candidate believes "the right to life of human beings should be respected at every stage of their biological development" or "whether they agree with *Roe v. Wade*."<sup>63</sup> When a judicial candidate does not answer these questions, Right-to-Life argued, it does not know whether to support or oppose the candidate.<sup>64</sup> For their part, the two judicial candidates said that they would have liked to answer Right-to-Life's questionnaire but feared that they would be punished by the Indiana Supreme Court for violating the Commits Clause.<sup>65</sup>

The district court found that the Commits Clause did not violate the candidates' freedom of speech.<sup>66</sup> The decision of the United States Court of Appeals for the Seventh Circuit was written by Chief Judge Frank Easterbrook, a very well-known figure in American law.<sup>67</sup> Chief Judge Easterbrook reached the same conclusion as had the district court—that the Commits Clause did not violate the candidates' freedom of speech.<sup>68</sup>

In fact, he wrote that, on the surface, the plaintiffs' arguments seemed far-fetched: "How could it be permissible to 'make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office'?"<sup>69</sup> Quoting other court decisions, Chief

(2011).

59. *Bauer v. Shepard*, 634 F. Supp. 2d 912, 944-48 (N.D. Ind. 2009), *aff'd*, 620 F.3d 704 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 2872 (2011).

60. *Id.* at 946.

61. *Bauer*, 620 F.3d at 707.

62. Chief Justice Shepard was sued in his capacity as Chair of the Indiana Judicial Qualifications Commission, not in his role as the Chief Justice. *Id.*; *see supra* note 14 and accompanying text.

63. *Bauer*, 620 F.3d at 706-07 (internal quotation marks omitted).

64. *See id.* at 707 ("Most recipients have either ignored this questionnaire or told Indiana Right to Life that they fear giving answers could jeopardize their judicial careers because of provisions in the state's Code of Judicial Conduct.").

65. *Id.*

66. *Bauer v. Shepard*, 634 F. Supp. 2d 912, 948 (N.D. Ind. 2009), *aff'd*, 620 F.3d 704 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 2872 (2011).

67. *Bauer*, 620 F.3d at 706; *President Chopp's Charge to Frank H. Easterbrook '70*, SWARTHMORE COLLEGE COMMENCEMENT 2012, <http://www.swarthmore.edu/commencement-2012/frank-easterbrook-70.xml> (last visited Nov. 30, 2012).

68. *Bauer*, 620 F.3d at 713-17.

69. *Id.* at 714 (quoting *Carey v. Woinitzek*, 614 F.3d 189, 218 app. C (6th Cir. 2010)).

Judge Easterbrook wrote, “A [C]ommits [C]ause ‘secures a basic objective of the judiciary, one so basic that due process requires it: that litigants have a right to air their disputes before judges who have not committed to rule against them before the opening brief is read;’”<sup>70</sup> “[j]udges must decide on the basis of the law and the case’s facts, not on ‘express . . . commitments that they may have made to their campaign supporters or to others.’”<sup>71</sup>

Chief Judge Easterbrook continued,

Although the [Supreme] Court held in *White I* that judges may state their views on contestable and controversial subjects[,] . . . it did not hold that judges may make commitments or promises about behavior in office. Imagine a judge or judicial candidate who said: “I will issue a search warrant every time the police ask me to.” That speaker is promising to defy the judicial oath of office. Or imagine the statement: “I will always rule in favor of the litigant whose income is lower, so that wealth can be redistributed according to the principles of communism.” (More plausibly, a candidate might say that he [or she] will award damages against drug companies, whether or not the drug has been negligently designed or tested, because they charge “too much” for their products.). Again that person is promising to disobey the law and disregard the litigants’ entitlements. Nothing in *White I* deals with statements of this flavor, or any other promise to act on the bench as a partisan of a political agenda.<sup>72</sup>

This is music to the ears of supporters of the Commits Clause (of whom I am one). (Remember that the Commits Clause is part of the Indiana Code of Judicial Conduct promulgated by the Indiana Supreme Court when I was a member—I voted for it.) But I would be the first to acknowledge that things are not quite as simple as Chief Judge Easterbrook proposes.

Chief Judge Easterbrook himself acknowledged the plaintiffs’ point that a good deal of what makes the Commits Clause constitutional is the phrase “inconsistent with the impartial performance of the adjudicative duties of judicial office.”<sup>73</sup> Indeed, the plaintiffs contended that this phrase is too vague to permit the regulation to stand: “[W]hat promises *are* ‘inconsistent with the impartial performance of the adjudicative duties of judicial office’? Neither the [C]ommits [C]lauses nor the Code’s definitions pin the meaning down.”<sup>74</sup> They argued that “the Supreme Court of Indiana may treat as ‘inconsistent with the impartial performance of the adjudicative duties of judicial office’ even the sort of statements that are squarely protected by [the Supreme Court’s decision in]

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70. *Id.* at 715 (quoting *Carey*, 614 F.3d at 207).

71. *Id.* (quoting *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 227 (7th Cir. 1993)) (alteration in original).

72. *Id.*

73. *Id.* at 713, 714, 716 (internal quotation marks omitted).

74. *Id.* at 716.

*White*.<sup>75</sup>

Chief Judge Easterbrook, however, was unwilling to declare the Commits Clause unconstitutional on these grounds. Rather, he said,

The best way to find out is to wait and see. . . . Plaintiffs want us to deem the law vague by identifying situations in which state officials *might* take an untenably broad reading of the [C]ommits [C]lauses, and then predicting that they *will* do so. It is far preferable, however, and more respectful of our judicial colleagues in Indiana, to assume that they will act sensibly and resolve the open questions in a way that honors candidates' rights under the [F]irst [A]mendment.<sup>76</sup>

As a result of *White* and *Bauer*, a candidate for judicial office in Indiana is free to *announce* views on disputed legal or political issues but cannot make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.<sup>77</sup> A judicial candidate *can announce but cannot commit*.

### III. BIG-MONEY INFLUENCE IN JUDICIAL ELECTIONS AFTER *WHITE*

What does this say about our principal concern—the due process rights of future litigants? Won't a judicial candidate, if elected, be able to rule fairly and impartially as long as the candidate cannot “commit” (even if the candidate can “announce”)?

That, of course, is the theory behind the Commits Clause. And in point of fact, our discussion thus far has been mostly theoretical. While some of the plaintiffs in *White* and *Bauer* were real candidates for judicial office, neither Minnesota nor Indiana had or has attempted to discipline them. We have been talking a lot more about abstract principles of law than nitty-gritty politics. However, there is nothing theoretical or abstract about what has been happening in judicial elections around the country since the Supreme Court's decision in *White*. Here are just a few stories from states close to Indiana.

In 2004—two years after *White* was decided—two candidates in Illinois, Judge Gordon Maag and Judge Lloyd Karmeier, spent more than \$9.3 million during a state supreme court race.<sup>78</sup> The Democratic Party of Illinois contributed

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75. *Id.*

76. *Id.*

77. Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002); Bauer v. Shepard, 634 F. Supp. 2d 912, 946-47 (N.D. Ind. 2009), *aff'd*, 620 F.3d 704 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 2872 (2011).

78. DEBORAH GOLDBERG ET AL., JUSTICE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS 2004, at 18-19 (2005), available at [http://www.justiceatstake.org/media/cms/NewPoliticsReport2004\\_83BBFBD7C43A3.pdf](http://www.justiceatstake.org/media/cms/NewPoliticsReport2004_83BBFBD7C43A3.pdf); see Paul Hampel, *Big-Money Race Sets Record for a U.S. Judicial Contest*, ST. LOUIS POST-DISPATCH, Nov. 1, 2004, at A1; Abdon M. Pallasch, *Cash Pours in to Heated Downstate Judicial Battle; Each Side Accuses the Other of Leniency Against Child Molester*, CHI. SUN-TIMES, Nov. 1, 2004, at 18.

about \$2.8 million to the campaign of Maag, much of it contributed to the Party by plaintiff personal injury lawyers.<sup>79</sup> Maag received another \$1.2 million from a political-action committee (“PAC”) consisting of trial lawyers and labor leaders.<sup>80</sup> Meanwhile, the U.S. Chamber of Commerce contributed \$2.3 million to Karmeier’s campaign through the Illinois Republican Party, the Illinois Chamber of Commerce, and a PAC supporting tort reform that also received \$415,000 from a national tort reform group.<sup>81</sup>

While this campaign was underway, a multi-million dollar jury verdict against State Farm Insurance was pending before the Illinois Supreme Court.<sup>82</sup> “[O]ver \$350,000 of the direct donations to Justice Karmeier’s campaign could be *directly traced* to State Farm’s employees, lawyers, or amicus and lawyers representing amicus in this case.”<sup>83</sup> After the election, the case was decided in favor of State Farm by a 4-3 vote with the deciding vote cast by newly elected Justice Karmeier.<sup>84</sup>

In Ohio, candidates for the Ohio Supreme Court raised more than \$21.2 million between 2000 through 2009.<sup>85</sup> During this period of time, “[a]n examination of the Ohio Supreme Court by *The New York Times* found that its justices routinely sat on cases after receiving campaign contributions from the parties involved or from groups that filed supporting briefs. On average, they voted in favor of contributors [seventy] percent of the time.”<sup>86</sup>

In Michigan, the political parties nominate candidates for the state supreme court, but the candidates appear on the ballot without partisan affiliation.<sup>87</sup>

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79. GOLDBERG ET AL., *supra* note 78, at 19.

80. *Id.*

81. *Id.*

82. *Avery v. State Farm Mut. Auto Ins. Co.*, 835 N.E.2d 801, 810-11 (Ill. 2005).

83. Petition for a Writ of Certiorari at \*8, *Avery v. State Farm Mut. Auto Ins. Co.*, 547 U.S. 1003 (2006) (No. 05-842).

84. *Avery*, 835 N.E.2d at 801; see *Avery v. State Farm Automobile Ins. Co.*, BRENNAN CTR. FOR JUST. (Feb. 3, 2006), [www.brennancenter.org/content/resource/avery\\_v\\_state\\_farm\\_automobile\\_ins\\_co/](http://www.brennancenter.org/content/resource/avery_v_state_farm_automobile_ins_co/); Eric Herman, *Justice Rips Majority’s Decision in State Farm Class-Action Ruling*, CHI. SUN-TIMES, Aug. 22, 2005, at 68.

85. JAMES SAMPLE ET AL., JUSTICE AT STAKE CAMPAIGN, BRENNAN CTR. FOR JUSTICE & NAT’L INST. ON MONEY IN STATE POLITICS, THE NEW POLITICS OF JUDICIAL ELECTIONS 2000-2009: DECADE OF CHANGE 82 app. 1 (2010), available at [http://brennan.3cdn.net/d091de911bd67ff73b\\_09m6yv\\_pgv.pdf](http://brennan.3cdn.net/d091de911bd67ff73b_09m6yv_pgv.pdf).

86. Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court’s Rulings*, N.Y. TIMES, Oct. 1, 2006, [http://www.nytimes.com/2006/10/01/us/01judges.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2006/10/01/us/01judges.html?pagewanted=all&_r=0) (italics added).

87. See Charles Crumm, *Michigan Supreme Court Candidates Want to Change How They’re Nominated*, NEWS-HERALD, Nov. 5, 2012, <http://www.thenewsherald.com/articles/2012/11/05/news/doc50958b260379a634434709.txt?viewmode=default>; see also Pat Shellenbarger, *Lawyers Weigh Supreme Court Fallout After Chief Justice Taylor Loses Election*, GRAND RAPIDS PRESS (Nov. 6, 2008, 11:28 AM), [http://www.mlive.com/news/grand-rapids/index.SSF/2008/11/lawyers\\_weigh\\_supreme\\_court\\_fa.html](http://www.mlive.com/news/grand-rapids/index.SSF/2008/11/lawyers_weigh_supreme_court_fa.html).

However, in a 2008 race between a (Republican) incumbent chief justice and a (Democratic) challenger, in which spending on television ads was four-and-a-half times higher than two years earlier, the political parties took sides.<sup>88</sup> Television ads run by the incumbent's supporters described his opponent as soft on terrorists and sexual predators,<sup>89</sup> while the ads aired on behalf of the challenger depicted the sitting chief justice as a pawn for big business who literally slept on the job.<sup>90</sup> The incumbent raised \$1.9 million; the challenger raised \$750,000.<sup>91</sup> Political parties and special interests paid for nearly three-fourths of the television ads in this campaign.<sup>92</sup>

West Virginia offers perhaps the worst story of all. In 1998, Harman Coal Company ("Harman") sued Massey Coal Company ("Massey") claiming that Massey had used fraudulent business practices to destroy Harman.<sup>93</sup> In 2002, a West Virginia jury agreed and awarded Harman \$50 million.<sup>94</sup> Then, in 2004, while the case was on appeal, Massey's CEO Don Blankenship spent \$3 million on an independent campaign to elect lawyer Brent D. Benjamin to the West Virginia Supreme Court of Appeals.<sup>95</sup> This "was three times the amount spent by Benjamin's own campaign."<sup>96</sup> After Benjamin was elected, he cast the deciding vote in a 3-2 decision to overturn the jury verdict and the \$50 million judgment.<sup>97</sup>

The previous four stories are part of a national trend over the past decade from which I draw two related inferences. First, interest groups believe that it is worth a substantial investment in campaign contributions to support particular candidates for judicial office. Second, and more subtly, the efforts of state supreme courts, such as Minnesota's and Indiana's, to protect the fairness and impartiality of judges by prohibiting them from making pledges, promises, or commitments do not appear to be working. I will concede for purposes of argument that the Supreme Court was correct in *White* that a judicial candidate's announcing views on disputed legal or political issues alone does not violate due process. But I contend that when a judicial candidate makes such pronouncements on the campaign trail, the judge-to-be signals courtroom rulings in a way that generates significant campaign contributions and other support. Further, it is these substantial campaign contributions and other support that

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88. SAMPLE ET AL., *supra* note 85, at 30.

89. *Id.* at 35.

90. *Id.* at 30, 35.

91. MICH. CAMPAIGN FIN. NETWORK, MICHIGAN SUPREME COURT CAMPAIGN FINANCE SUMMARY (2008), [http://www.mcfn.org/pdfs/reports/MS\\_C\\_08.pdf](http://www.mcfn.org/pdfs/reports/MS_C_08.pdf).

92. *Id.*; SAMPLE ET AL., *supra* note 85, at 30-31.

93. *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223, 232-33 (W. Va. 2008), *rev'd*, 556 U.S. 868 (2009).

94. *Id.* at 233.

95. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 873 (2009).

96. SAMPLE ET AL., *supra* note 85, at 56.

97. *Caperton*, 556 U.S. at 874-75.

gives the judge the “direct, personal, substantial, [and] pecuniary interest”<sup>98</sup> in the outcome of future litigations that violates due process.

The campaign funding involved in each of these four stories predates the Supreme Court’s decision in *Citizens United v. Federal Election Commission*.<sup>99</sup> In *Citizens United*, the Court overruled prior precedent and held that the First Amendment prohibits the government from suppressing political speech on the basis of the speaker’s corporate identity.<sup>100</sup> Consequently, a federal statute prohibiting independent corporate expenditures for electioneering communications was held unconstitutional.<sup>101</sup> Some commentators have argued that *Citizens United* will exacerbate the problem of corporate contributions to candidates for judicial office and expenditures for communications favoring particular candidates.<sup>102</sup>

#### IV. LITIGATION INVOLVING DISPROPORTIONATELY INFLUENTIAL CONTRIBUTORS

I maintain that this post-*White* explosion in campaign contributions from parties interested in the outcome of litigation was, in fact, caused by *White* itself. That is, once the Announce Clause was held unconstitutional, the genie was out of the bottle. Judicial candidates could signal how they would decide cases even if they could not “commit[.]”<sup>103</sup> For example, even Chief Judge Easterbrook, in upholding the Commits Clause in *Bauer*, said that state supreme courts couldn’t prohibit judicial campaign statements such as, “[J]udges have been too ready to find antitrust problems with mergers,’ or ‘mandatory minimum sentences are unjust, and I will read those statutes narrowly.’”<sup>104</sup> Statements like this provide enough information from which a big contributor can infer that their financial support of the candidate would be a good investment in the outcome of future litigation.

Notwithstanding *Bauer* and the Commits Clauses, will judges who are

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98. *Republican Party of Minn. v. White*, 536 U.S. 765, 782 (2002) (internal quotation marks omitted).

99. 130 S. Ct. 876 (2010).

100. *Id.* at 896-913 (overruling *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990); overruling *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003)); see *Am. Tradition P’ship v. Bullock*, 132 S. Ct. 2490, 2491-92 (2012) (per curiam) (invalidating, in a two-paragraph opinion, a Montana statute similar to federal statute struck down in *Citizens United*).

101. *Id.*

102. See SAMPLE ET AL., *supra* note 85, at 9, 62-65, 76; ADAM SKAGGS, BRENNAN CTR. FOR JUSTICE, *BUYING JUSTICE: THE IMPACT OF CITIZENS UNITED ON JUDICIAL ELECTIONS* 2, 8 (2010), available at <http://www.brennancenter.org/page/-/publications/BCReportBuyingJustice.pdf?nocdn=/>; Editorial, *North Carolina, Meet Citizens United*, N.Y. TIMES, June 6, 2012, available at <http://www.nytimes.com/2012/06/06/opinion/north-carolina-meet-citizens-united.html>.

103. *Bauer v. Shepard*, 620 F.3d 704, 715-16 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 2872 (2011).

104. *Id.* at 716.

elected based on substantial contributions connected to their announced views on disputed legal issues be able to be fair and impartial in cases involving those issues? I answer this question by returning to the Massey Coal Company case from West Virginia, *Caperton v. A.T. Massey Coal Co.*<sup>105</sup>

When the West Virginia Supreme Court of Appeals vacated the \$50 million verdict against Massey Coal,<sup>106</sup> the plaintiffs in the case asked the United States Supreme Court to reinstate the verdict.<sup>107</sup> Not every decision made by a state supreme court is subject to review by the United States Supreme Court; it is only when a state supreme court rules contrary to federal law, as opposed to the state's own law, that the United States Supreme Court can overturn the decision.<sup>108</sup>

The plaintiffs suing Massey Coal, therefore, had to contend that West Virginia's high court had acted contrary to federal law in overturning the \$50 million judgment.<sup>109</sup> Their argument was the same as a central theme of this Article—the plaintiffs contended that their constitutional right to due process of law had been violated because a “[t]rial before an ‘unbiased judge’ is essential to due process.”<sup>110</sup> They argued that Justice Benjamin should not have acted as a judge over their case, and he should have disqualified or “recuse[d]” himself.<sup>111</sup>

Generally, the Supreme Court has left to state statutes and judicial codes of conduct the question of whether a judge should be disqualified from hearing a case because of bias or prejudice.<sup>112</sup> But at least as long ago as 1975, the Supreme Court concluded that there are circumstances in which “the probability of actual bias on the part of the judge . . . is too high to be constitutionally tolerable.”<sup>113</sup> The question to be answered by the Supreme Court was whether Justice Benjamin's participation in *Caperton* was such a circumstance.<sup>114</sup>

The Supreme Court's analysis was quite interesting. First, the Court noted that Justice Benjamin reported that he had “conducted a probing search into his actual motives and inclinations” and had concluded that he could decide the *Caperton* case impartially and fairly.<sup>115</sup> To this point, the Supreme Court said that it did “not question [Justice Benjamin's] subjective findings of impartiality and propriety.”<sup>116</sup> Nor, for that matter, did the Supreme Court “determine

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105. 679 S.E.2d 223 (W. Va. 2008), *rev'd*, 556 U.S. 868 (2009).

106. *Id.* at 264.

107. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 873-74 (2009).

108. *See, e.g.*, 28 U.S.C. § 1257(a) (2006); *Martinez v. Ryan*, 132 S. Ct. 1309, 1316 (2012); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Murdock v. City of Memphis*, 87 U.S. 590, 633-36 (1875).

109. *Caperton*, 556 U.S. at 874.

110. Petition for a Writ of Certiorari, *supra* note 83, at \*21 (quoting *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971)), *Caperton*, 556 U.S. 868 (No. 08-22).

111. *Id.* at \*\*16-17.

112. *Caperton*, 556 U.S. at 876-77; *see Tumey v. Ohio*, 273 U.S. 510, 523 (1927).

113. *Caperton*, 556 U.S. at 872 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

114. *Id.* at 876.

115. *Id.* at 882.

116. *Id.*

whether there was actual bias” on Justice Benjamin’s part.<sup>117</sup> Instead, the Supreme Court said that “[t]he difficulties of inquiring into actual bias . . . simply underscore the need for objective rules.”<sup>118</sup>

The rule promulgated by the Supreme Court in the *Caperton* case was as follows:

[T]here is a serious risk of actual bias . . . when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.<sup>119</sup>

The Supreme Court applied this standard and concluded that there had been a serious, objective risk of actual bias, which indicated that Justice Benjamin should not have participated in the case.<sup>120</sup>

#### V. ASSURING JUDICIAL FAIRNESS AND IMPARTIALITY IN THE POST-*WHITE*/POST-*CAPERTON* ERA

In *White*, the Supreme Court held that it does not violate due process for a judicial candidate to announce his or her views on disputed legal and political issues.<sup>121</sup> But in *Caperton*, the Supreme Court ruled that it does violate due process for a judge to rule in a case involving a disproportionately influential campaign contributor.<sup>122</sup> Judicial candidates can announce their views, but if they receive disproportionately influential campaign support, they cannot later preside over the cases of parties providing that support, which might well include cases involving their announced views.

I contend that disproportionately influential campaign contributions will only be made to a judicial candidate if the candidate’s announced views signal how the candidate, if elected, would vote in litigation of interest to the contributor. Judicial candidates, to repeat, can signal how they would decide cases as long as they do not “commit[.]”<sup>123</sup> But does *Caperton* solve this problem? Theoretically, under *Caperton*, if a candidate is elected and presented with a case involving a party that provided disproportionately influential campaign contribution, the judge cannot participate, and *Caperton*’s objective standard removes the threat to fairness and impartiality.

Even before *Caperton*, there was a groundswell of support for the notion that more stringent recusal rules could eliminate the threat to fairness and impartiality of judges ruling on cases involving disputed legal issues on which they had

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117. *Id.*

118. *Id.* at 883.

119. *Id.* at 884.

120. *Id.*

121. *Republican Party of Minn. v. White*, 536 U.S. 765, 787-88 (2002).

122. *Caperton*, 556 U.S. at 885-86.

123. *Bauer v. Shepard*, 620 F.3d 704, 715-16 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 2872 (2011).



announced their views.<sup>124</sup> The American Bar Association,<sup>125</sup> the Justice O'Connor Project at Georgetown Law School,<sup>126</sup> and prominent law school Dean Erwin Chemerinsky<sup>127</sup> have advocated the proposition that strong recusal rules are an antidote to unfettered judicial campaign speech and the campaign support it appears to generate.

Although I, too, support robust recusal rules, I do not think such rules solve the problem. First, as former Chief Justice Shepard wrote well before *White*, the notion of recusal as the solution to bias from campaign speech is disingenuous because it “disconnect[s] free and unfettered campaign promises from any possibility they will be carried out.”<sup>128</sup> Advocates of recusal reform, such as Professor Charles Geyh of the Indiana University Maurer School of Law, believe that tough recusal requirements will prevent judges from announcing their views during campaigns because they will not want to be precluded from participating in cases once elected.<sup>129</sup> Admittedly, some judicial candidates might engage in that calculus, but I think this is unlikely. It seems to me far more likely that a candidate's priority during the campaign will be to get elected, rather than to avoid behavior that might require the candidate's recusal after the election, if elected at all.

Finally, there may well be free speech limits to recusal rules. Could a state re-write its Announce Clause to provide that a candidate for judicial office cannot be punished for expressing views on disputed legal issues but must recuse in any future case involving those issues? Even after *Caperton*, that question remains open.<sup>130</sup>

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124. See Dmitry Bam, *Making Appearances Matter: Recusal and the Appearance of Bias*, 2011 BYU L. REV. 943, 948, 953-54, 972.

125. STANDING COMM. ON JUDICIAL INDEPENDENCE, A.B.A. REPORT TO THE HOUSE OF DELEGATES: RES. NO. 107, at 2 (2011), available at [http://www.americanbar.org/content/dam/aba/directories/policy/2011\\_am\\_107.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/directories/policy/2011_am_107.authcheckdam.pdf).

126. SANDRA DAY O'CONNOR PROJECT ON THE STATE OF THE JUDICIARY, GEORGETOWN LAW, REPORT OF THE CORPORATE TASK FORCE 1-2 (2009). The Justice O'Connor Project also advocates for merit selection. *Id.* at 4.

127. Erwin Chemerinsky & James J. Sample, Op-Ed., *You Get the Judges You Pay For*, N.Y. TIMES, Apr. 18, 2011, at A23, available at <http://www.nytimes.com/2011/04/18/opinion/18sample.html> (arguing that merit selection is unlikely to displace judicial elections and that, as a result, reform initiatives should focus more on strong recusal rules and limiting spending in judicial elections). *But see* Norman L. Greene, Letter to the Editor, *Ending Judicial Elections*, N.Y. TIMES, Apr. 20, 2011, at A22, available at <http://www.nytimes.com/2011/04/20/opinion/120judges.html> (criticizing Chemerinsky and Sample and arguing that “[e]liminating all judicial elections . . . is hardly a luxury but rather the means most likely to achieve overall judicial reform”).

128. Shepard, *supra* note 1, at 1083.

129. See generally Charles Gardner Geyh, *Why Judicial Disqualification Matters. Again.*, 30 REV. LITIG. 671 (2011) (discussing the replacement options for the current “regime” of judicial disqualification at the state and federal levels).

130. See, e.g., *Nev. Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343 (2011). In this case, a city council member was censured for violating a state conflict-of-interest statute by voting in favor of

Ultimately, the efforts to bolster recusal will not solve the threats to due process caused by *White* and big-money influence on judicial elections. I maintain that the best way to assure judicial fairness and impartiality in the post-*White*/post-*Caperton* era is to use properly structured merit selection systems<sup>131</sup> to select judges instead of popular elections.<sup>132</sup> In point of fact, this is the view of the American Bar Association<sup>133</sup> and the American Judicature Society.<sup>134</sup>

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a casino project. *Id.* at 2346-47. A long-time friend and campaign manager of the council member worked as a paid consultant for the company that had proposed the project and would have benefitted from its approval. *Id.* at 2347. The council member argued the restriction on his right to vote impermissibly burdened his constitutional free speech rights. *Id.* However, the Court held that restrictions on legislators' voting rights are not restrictions on their protected speech, stating, "The legislative power . . . is not personal to the legislator but belongs to the people; the legislator has no personal right to it." *Id.* at 2350.

In its discussion, the Court alluded to the fact that rules requiring judges to recuse in the face of conflicts-of-interest are also constitutional but noted "that restrictions on judges' speech during elections are a different matter." *Id.* at 2349 n.3. In a concurring opinion, Justice Kennedy emphasized that the case did not address whether the statute imposed any burdens "on the First Amendment speech rights of legislators and constituents apart from an asserted right to engage in the act of casting a vote." *Id.* at 2352 (Kennedy, J., concurring). Justice Kennedy acknowledged,

The constitutionality of a law prohibiting a legislative or executive official from voting on matters advanced by or associated with a political supporter is therefore a most serious matter from the standpoint of the logical and inevitable burden on speech and association that preceded the vote. The restriction may impose a significant burden on activities protected by the First Amendment.

*Id.* at 2353. It is true that Justice Kennedy, citing *Caperton*, limited this observation to legislative and executive recusal, but other members of the Court might well not impose the same limitation. *Id.* at 2354.

131. For examples of such merit selection systems, see Ruth V. McGregor, *Arizona's Merit Selection System: Improving Public Participation and Increasing Transparency*, 59 SYRACUSE L. REV. 383, 384-86 (2009); AM. JUDICATURE SOC'Y, *Model Judicial Section Provisions* (2008), available at [http://www.ajs.org/selection/docs/MJSP\\_web.pdf](http://www.ajs.org/selection/docs/MJSP_web.pdf); A.B.A. STANDING COMM. ON JUDICIAL INDEPENDENCE, STANDARDS ON STATE JUDICIAL SELECTION 1-2 (2000), available at <http://www.wvohio.org/assets/attachments/file/Standards%20on%20State%20Judiciary%20Selection.pdf>.

132. See *Republican Party of Minn. v. White*, 536 U.S. 765, 788-89 (2002) (O'Connor, J., concurring) ("[I]f judges are subject to regular elections they are likely to feel that they have at least some personal stake in the outcome of every publicized case. Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects.").

133. See, e.g., A.B.A. REPORT TO THE HOUSE OF DELEGATES: RES. NO. 123 (1999) (affirming the ABA's "commitment to the merit selection of judges, and urg[ing] all jurisdictions to enact constitutional provisions setting out procedures for the merit selection and either appointment or retention election of their judges") [hereinafter RESOLUTION 123].

134. See, e.g., Brief for Am. Judicature Soc'y, Amicus Curiae, in Support of Appellees at 1, *Kirk v. Carpeneti*, 623 F.3d 889 (9th Cir. 2010) (No. 09-35860).

The American Bar Association first addressed this issue in 1937, when its House of Delegates adopted a policy in favor of the merit selection of judges.<sup>135</sup> That position has been reaffirmed by the ABA in many ways during the succeeding seventy-five years.<sup>136</sup> ABA President Laurel Bellows said earlier this year, “The ABA strongly supports merit selection of state court judges for many reasons, not the least of which is that the administration of justice should not turn on a popularity contest or be subject to the corrosive influence of money.”<sup>137</sup>

Additionally, the American Judicature Society, which has consistently supported merit selection since its founding in 1913,<sup>138</sup> recently said,

An independent judiciary is one of the hallmarks of American democracy. For our judicial system to function independently and effectively, it is imperative that qualified judges be free to make appropriate decisions under the law. To achieve the goal of an independent and highly qualified judiciary, states have tried different methods of selecting judges. These methods range from executive or legislative appointments to partisan or non-partisan elections. Over the past seventy years, the trend among the states, and to a certain degree in the federal system, for ensuring a qualified and independent judiciary is to have some form of merit-based selection in which a non-partisan commission screens judicial applicants and recommends the best qualified candidates for appointment.<sup>139</sup>

In Indiana, we have a merit selection system—in place since 1970—to select members of our appellate courts and hold them accountable that does not utilize partisan elections.<sup>140</sup> When there is a vacancy on the Indiana Supreme Court or the Indiana Court of Appeals, interested lawyers and judges submit applications to the Indiana Judicial Nominating Commission. The Commission is a seven-member body that consists of three lawyers elected by the lawyers of the state; three non-lawyers appointed by the Governor; and the Chief Justice of Indiana, who chairs the Commission.<sup>141</sup> Following the completion of interviews and background checks, the Commission selects the three applicants it considers best and submits those three names to the Governor.<sup>142</sup> The Governor must select the

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135. See Luke Bierman, *Beyond Merit Selection*, 29 FORDHAM URB. L.J. 851, 855 (2002).

136. See RESOLUTION 123, *supra* note 133.

137. *February 2012 Bar Watch Update: Interview with ABA President-Elect*, FEDERALIST SOC’Y FOR L. & PUB. POL’Y STUD. (Feb. 3, 2012), [www.fed-soc.org/publications/detail/february-2012-bar-watch-update](http://www.fed-soc.org/publications/detail/february-2012-bar-watch-update).

138. Brief for Am. Judicature Soc’y, *supra* note 134, at 1 (Albert M. Kales, one of the founders of the American Judicature Society and others “developed the first commission-based and merit-focused judicial selection process. This became known as the ‘Missouri Plan,’ after the first state to adopt it.”).

139. *Id.* at \*3.

140. See AM. JUDICATURE SOC’Y, *supra* note 16, at 3, 6.

141. IND. CONST. art. VII, § 9.

142. IND. CONST. art. VII, § 10.

appointee from among those three applicants within sixty days of receiving the list.<sup>143</sup> After the new judge takes his or her seat, the judge serves for two full years before standing for a statewide retention vote at the next statewide general election.<sup>144</sup> If retained, the judge must stand for a retention election every ten years thereafter until age seventy-five or earlier resignation.<sup>145</sup>

For many reasons, this method of judicial selection and accountability system assures fair and impartial decision-making more than election systems:

- The involvement of the Chief Justice and Commission lawyers, as well as the public nature of the process, help assure that people of integrity, impartiality, and intelligence are appointed;
- The involvement of the Governor and non-lawyer Commission members, along with periodic retention votes, help assure accountability;
- The absence of contested elections helps alleviate the perception that justice in Indiana is for sale—there can be no perception that lawsuits are decided in response to party or interest-group contributions; and
- Judicial misconduct is punished, while unpopular decisions are not.

The State of Iowa has a system quite similar to this.<sup>146</sup> Yet, in 2010, three members of the Iowa Supreme Court stood for retention vote and received a majority of negative votes<sup>147</sup> because they voted for a decision holding the state's ban on gay marriage violated the Iowa Constitution.<sup>148</sup>

This result was unwarranted and regrettable—the retention vote process is meant to provide an additional measure of accountability, not to be used to remove judges for rendering decisions that are politically unpopular. Despite this unfortunate result, I still believe that the merit selection-retention vote system of judicial selection and accountability is superior to contested elections. The fate suffered by the Iowa justices would have been possible under a contested election system, as Judge Horton's unfortunate experience demonstrates.<sup>149</sup> But the new justices who took their place were selected on the basis of their merit, not on the basis of their ability to win votes after announcing their views on disputed legal and political issues, their ability to raise or attract substantial campaign contributions, or their use of negative attack advertising.<sup>150</sup>

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143. *Id.*

144. *Id.* § 11.

145. *Id.*; IND. CODE ANN. § 33-38-13-8 (West 2012).

146. *See* AM. JUDICATURE SOC'Y, *supra* note 16, at 3, 6.

147. ADAM SKAGGS ET AL., JUSTICE AT STAKE CAMPAIGN, BRENNAN CTR. FOR JUSTICE & NAT'L INST. ON MONEY IN STATE POLITICS, THE NEW POLITICS OF JUDICIAL ELECTIONS 2009-10: HOW SPECIAL INTEREST "SUPER SPENDERS" THREATENED IMPARTIAL JUSTICE AND EMBOLDENED UNPRECEDENTED LEGISLATIVE ATTACKS ON AMERICA'S COURTS 8, 9 (2011), *available at* <http://newpoliticsreport.org/site/wp-content/uploads/2011/10/JAS-NewPolitics2010-Online-Imaged.pdf>.

148. *See* Varnum v. Brien, 763 N.W.2d 862, 872 (Iowa 2009).

149. *See* GOODMAN, *supra* note 6, at 207.

150. *See, e.g.,* Republican Party of Minn. v. White, 536 U.S. 765 (2002); Liptak & Roberts, *supra* note 86; SAMPLE ET AL., *supra* note 85, at 30, 35.

Indiana's system, which has been in place for more than forty years, has served the State well. I believe it is the best solution to the threat to due process presented by judicial candidates announcing their views on disputed legal and political issues and leveraging those announced views to attract substantial campaign contributions for themselves and negative attack advertising against their opponents.

#### CONCLUSION

None of us knows for sure when we might find ourselves in court, seeking to vindicate our legal rights or to protect our nearest and dearest interests. The United States Constitution guarantees that when we do so, we will have the right to due process of law, including a fair and impartial judge. As citizens, we must all think about how we can assure that due process of law is available to us and to others in times of need. In this Article, I have discussed how the systems set in place by the highest courts of every state to assure judicial fairness and impartiality by enforcing codes of judicial conduct have run afoul of judicial candidates' freedom of speech in contested elections. We have seen that the current state of the law, while allowing judicial candidates to announce their views on contested legal and political issues, has not been extended to permit judicial candidates to make pledges, promises, or commitments as to how they will vote in particular cases. But we have also seen that, at least concomitant with, if not caused by, the Supreme Court's decision in *White*, huge sums of special interest money have poured into judicial elections, some in such significant ways as to require judicial recusal. While some have suggested that a robust recusal regime is the antidote for judicial campaign practices that impinge upon fairness and impartiality, I advocate a movement away from elected systems altogether and towards a merit selection system like Indiana's.