

Part VII steps back from specific subtopics in election law and takes a broader look at how a phenomenon known as “remedial deterrence”¹⁸ may affect the outcome of election law cases. After briefly discussing the concept of remedial deterrence — a scenario in which the difficulty of imposing a proper remedy incentivizes judges to find that there has been no substantive violation of legal rights — the Part explains why judges deciding election administration cases are especially vulnerable to remedial deterrence. The Part then substantiates this claim by analyzing a variety of recent election law cases to demonstrate that remedial deterrence may play a significant role in explaining their outcomes. The Part concludes with recommendations for litigants seeking to avoid the problem of remedial deterrence.

The topics covered by this Development are only a subset of the many issues raised by recent happenings in the law of voting and democracy. Nevertheless, they provide helpful analytical insights into a changing area of the law.

II. JUDICIAL ELECTIONS AND FREE SPEECH

In 2002, the Supreme Court injected a new urgency into a very old debate: whether the practice of electing judges is antithetical to judicial impartiality and independence.¹ In *Republican Party of Minnesota v. White*,² the Court struck down the “announce clause” of Minnesota’s Code of Judicial Conduct, a rule that had prohibited judicial candidates from announcing their views on disputed legal or political issues during their campaigns.³ Minnesota argued that the announce clause protected due process by preserving the real and perceived impartiality of its judiciary.⁴ In a 5–4 decision, the Court found that the clause violated the First Amendment because it was a poorly tailored,

¹⁸ See Daryl J. Levinson, *Constitutional Rights Essentialism and Remedial Equilibrium*, 99 COLUM. L. REV. 857, 889–99 (1999).

¹ See Rachel Paine Caufield, *In the Wake of White: How States Are Responding to Republican Party of Minnesota v. White and How Judicial Elections Are Changing*, 38 AKRON L. REV. 625, 626 (2005).

² 536 U.S. 765 (2002).

³ See *id.* at 768, 788. Such codes of conduct have the force of law in most states. Generally, the power to promulgate and enforce the codes is vested in state supreme courts and oversight commissions. See, e.g., *id.* at 787 n.15; *Weaver v. Bonner*, 309 F.3d 1312, 1315 (11th Cir. 2002). Penalties for candidates violating the codes include “disbarment, suspension, and probation” and, in the case of incumbent judges, “removal, censure, civil penalties, and suspension without pay.” *White*, 536 U.S. at 768.

⁴ Brief and Appendix for Respondents, *White*, 536 U.S. 765 (2002) (No. 01-521), 2002 WL 264727, at *9–10.

content-based restriction that impermissibly burdened protected political speech.⁵

White perplexed courts (and candidates) across the nation. The Court's reasoning left unclear whether *any* restrictions on judicial campaign speech — restrictions that remain on the books in nearly every state⁶ — are still viable.⁷ This Part describes the state of play in the courts' ongoing attempts to clarify the status of those rules and, more broadly, the constitutionality of restricting the political speech of judicial candidates. As discussed below, the future looks bleak for proponents of speech restrictions. Lower federal courts have relied on *White* to invalidate a wide range of limits on candidate speech and conduct, and will almost certainly continue to do so. This remarkable intervention⁸ is likely to have major effects on the balance of power among judicial candidates, interest groups, and political parties.

Section A surveys the current landscape of judicial elections, paying special attention to the *White* decision and the most significant post-*White* cases. Section B identifies and discusses several of the most important unresolved issues. Finally, section C concludes with some predictions about future developments.

A. *The Current Landscape*

1. *Before White*. — Judicial elections in the states have been commonplace since the mid-nineteenth century.⁹ Today, thirty-nine states elect some or all of their judges,¹⁰ and most state judges face an elec-

⁵ *White*, 536 U.S. at 788. Restrictions on “core political speech” are not necessarily unconstitutional under the First Amendment, but they must be narrowly tailored and serve a compelling state interest. *See, e.g.*, *Brown v. Hartlage*, 456 U.S. 45, 53–54 (1982).

⁶ *See* *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 879–80 & nn.21–22 (8th Cir. 2001), *rev'd sub nom. White*, 536 U.S. 765.

⁷ *See, e.g.*, Richard Briffault, *Judicial Campaign Codes After Republican Party of Minnesota v. White*, 153 U. PA. L. REV. 181, 183 (2004) (“[*White*] casts a shadow of unconstitutionality over the entire project of judicial election campaign regulation.”).

⁸ Few of these courts have addressed the federalism concerns raised by federal judges revising state election regulations. *But see* *Brown v. Doe*, 2 F.3d 1236, 1249 (2d Cir. 1993) (“We have no warrant here to reform according to our lights the electoral system for state judges.”).

⁹ Between 1846 and 1856, fifteen of the twenty-nine existing states amended their constitutions to provide for judicial elections, and all states that joined the Union after 1846 chose to elect some or all of their judges. *See, e.g.*, EVAN HAYNES, *THE SELECTION AND TENURE OF JUDGES* 99–135 (1944); Larry C. Berkson, *Judicial Selection in the United States: A Special Report*, 64 JUDICATURE 176, 176 (1980).

¹⁰ *See* AM. JUDICATURE SOC'Y, *JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS* (2004), available at <http://www.ajs.org/js/JudicialSelectionCharts.pdf> (summarizing states' selection methods in tabular form). This figure includes states that elect judges by partisan and nonpartisan ballots and those that employ retention elections. It does not include states that elect only “lower echelon judges, such as probate court judges.” Michael R. Dimino, *Pay No Attention to that Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians*, 21 YALE L. & POL'Y REV. 301, 310 n.55 (2003).

tion at some point in their careers.¹¹ But from the inception of judicial elections, opponents have assailed what they see as a tension between the core function of judging — deciding cases according to the law, even when the law compels unpopular decisions — and judicial elections, which make judges' jobs contingent on public approval.¹²

From the end of World War II until the 1990s, an uneasy *détente* prevailed between proponents and opponents of judicial elections. Elections remained the dominant selection method, but most states regulated campaign speech and behavior¹³ to insulate judges from the “prejudice and corruption” associated with “unseemly political strife” and to preserve public confidence in the impartiality of the judiciary.¹⁴

2. *The White Decision.* — The status quo began to fray in the mid-1990s, when speech restrictions for judicial candidates increasingly came under constitutional scrutiny in both state and federal

¹¹ See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, STATE COURT ORGANIZATION 1998, at 19 (1998) (estimating that 48% of state general jurisdiction judges stand for election for initial terms, and about 84% stand for election for subsequent terms).

¹² See, e.g., Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 716–29 (1995) (discussing historical and contemporary objections to elective judiciaries).

¹³ States usually based these regulations, or codes of conduct, on the American Bar Association's Model Code of Judicial Conduct. Almost every state that elects judges eventually adopted some form of these provisions, which the ABA first promulgated in 1924 and updated in 1972 and 1990. See Stephanie Cotilla & Amanda Suzanne Veal, Current Development, *Judicial Balancing Act: The Appearance of Impartiality and the First Amendment*, 15 GEO. J. LEGAL ETHICS 741, 742 (2002). Among other things, the current version of the Model Code bars candidates from promising or committing to any course of action but the impartial discharge of judicial duties, see MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2004) (“promise” and “commit” clauses), attending or speaking to political party gatherings, see *id.* Canon 5(A)(1)(a)–(e) (“partisan activities” clauses), or directly soliciting campaign funds, see *id.* Canon 5(C)(2) (“solicitation” clause). Notably, the current Model Code does not include an announce clause. The ABA removed the clause when it last revised the Model Code in 1990 due to fears that it was unconstitutionally broad. See LISA L. MILORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE 50 (1992). Most states adopted this change, but nine states, including Minnesota, retained an announce clause. See Alexandra Haskell Young, *The First Chink in the Armor? The Constitutionality of State Laws Burdening Judicial Candidates After Republican Party of Minnesota v. White*, 77 S. CAL. L. REV. 433, 434 & n.6 (2004).

¹⁴ Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059, 1067 (1996).

courts.¹⁵ Despite these rumblings from the bench, however, few were prepared for the Supreme Court's ruling in *White*.¹⁶

Writing for a narrow majority,¹⁷ Justice Scalia found that Minnesota's announce clause¹⁸ was a content-based restriction on core political speech and was therefore subject to strict scrutiny.¹⁹ (The Court did not express a view on the constitutionality of two other provisions — Minnesota's partisan activities and solicitation clauses — which were also upheld in the court below.²⁰) Under the strict scrutiny standard, Minnesota was required to show that the announce clause served a compelling state interest and was narrowly tailored to that interest.²¹

The Court began its analysis of the announce clause by defining and evaluating the state's asserted interest in protecting due process by preserving judicial impartiality. The Court appeared to accept the lower court's conclusion that preserving judicial impartiality was a compelling state interest, provided "impartiality" was understood to mean "lack of bias for or against any *party* to the proceeding."²² The announce clause, however, was not narrowly tailored to protect against this sort of bias.²³ In fact, because the announce clause prohibited announcements about *issues*, not *parties*, it was barely tailored to its asserted purpose at all.²⁴

¹⁵ See, e.g., *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224 (7th Cir. 1993) (invalidating an announce clause); *ACLU of Fla., Inc. v. Fla. Bar*, 744 F. Supp. 1094 (N.D. Fla. 1990) (enjoining enforcement of an announce clause); *In re Chmura*, 608 N.W.2d 31 (Mich. 2000) (holding a misrepresentation clause facially unconstitutional).

¹⁶ The case began when Gregory Wersal, an unsuccessful candidate for the Minnesota Supreme Court, brought suit arguing that the announce clause violated the First Amendment. See *Republican Party of Minn. v. White*, 536 U.S. 765, 768–70 (2002).

¹⁷ Justice Scalia was joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas. Justices O'Connor and Kennedy filed concurring opinions. Justices Stevens and Ginsburg wrote dissenting opinions and joined each others' opinions. Justices Souter and Breyer joined both dissenting opinions.

¹⁸ The clause prohibited a candidate — including an incumbent judge — from "announc[ing] his or her views on disputed legal or political issues." MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2004).

¹⁹ *White*, 536 U.S. at 774. The *White* Court did not explicitly find that strict scrutiny was the proper standard of review. It accepted the determination of the Court of Appeals that strict scrutiny was appropriate, noting that the parties did not dispute this conclusion. See *id.* at 774. *But see infra* note 54.

²⁰ Instead, the Court instructed the Eighth Circuit to reconsider, on remand, the constitutionality of those two clauses in light of *White*. See *White*, 536 U.S. at 788; *Republican Party of Minn. v. White*, 416 F.3d 738, 744–45 (8th Cir. 2005) (en banc), *petition for cert. filed*, 74 U.S.L.W. 3303 (U.S. Oct. 31, 2005) (No. 05-566).

²¹ *White*, 536 U.S. at 774–75.

²² *Id.* at 775–77. The Court implied that the state had a compelling interest in preserving the real and perceived impartiality of judges in this sense. See *id.*

²³ *Id.* at 776.

²⁴ *Id.*

The Court suggested that “impartiality” defined as “openmindedness” might qualify as a compelling state interest as well.²⁵ Still, the Court declined to address that issue because it was a “challenge to the credulous” to believe that the announce clause was directed at that goal.²⁶ Rather, the Court read it as an attempt to “undermin[e] . . . judicial elections”²⁷ via “state-imposed voter ignorance.”²⁸

Justices Ginsburg and Stevens dissented. In her opinion — the more substantial of the two — Justice Ginsburg objected to the majority’s holding on three grounds. First, she took issue with the majority’s reliance on cases dealing with speech restrictions in legislative or executive races. Justice Ginsburg argued that judges and legislators have different roles in the constitutional order and that those differences allow for differences in election regulations.²⁹

Second, Justice Ginsburg argued that the announce clause was part and parcel of Minnesota’s comprehensive system for preserving due process by preventing the politicization of the judiciary. She pointed out that all parties agreed that Minnesota’s promise clause was constitutional because when a “judicial candidate promises to rule a certain way on an issue that may later reach the courts, the potential for due process violations is grave and manifest.”³⁰ But without the announce clause, warned Justice Ginsburg, the promise clause was “an arid form” easily circumvented by promises framed in terms of announcements.³¹

²⁵ *Id.* at 778 (“This quality in a judge demands . . . that he be willing to consider views that oppose his preconceptions, and remain open to persuasion . . .”). The Court rejected, however, a third possible meaning of judicial impartiality — “lack of preconception in favor of or against a particular *legal view*,” *id.* at 777 — as undesirable and nearly impossible to achieve.

²⁶ *Id.* at 780. The Court also argued that, even if openmindedness was a compelling interest, Minnesota had not demonstrated that campaign announcements — as opposed to other forms of candidate speech, such as judicial decisions and law review articles — “are uniquely destructive of openmindedness.” *Id.* at 781. The majority did suggest, however, that restricting campaign promises might be a more defensible way of protecting openmindedness than restricting “non-promissory” announcements. *Id.* at 780–81. Perhaps this means the Court would tolerate a regime that distinguishes the free speech interests of judicial candidates from those of other candidates, provided the distinction was narrowly focused on promises. For example, the Court might reason that the First Amendment’s demands vary across contexts and that prohibiting campaign promises is a narrowly tailored means of preserving due process without unduly infringing free speech in the special case of judicial elections. *Cf.* Shepard, *supra* note 14, at 1089–95. Alternatively, the Court might conclude that promissory statements are not “core political speech” in the judicial election context and thus apply a lower level of scrutiny to restrictions on campaign promises.

²⁷ *White*, 536 U.S. at 782.

²⁸ *Id.* at 788.

²⁹ *Id.* at 805–07 (Ginsburg, J., dissenting).

³⁰ *Id.* at 816.

³¹ *Id.* at 819.

Third, Justice Ginsburg accused the majority of circumventing due process concerns by “dissect[ing] the concept of judicial ‘impartiality.’”³² According to Justice Ginsburg, the majority’s narrow definition of impartiality obscured how the Court’s “Due Process Clause cases do not focus solely on bias against a particular party, but rather inquire more broadly into whether the surrounding circumstances and incentives compromise the judge’s ability faithfully to discharge her assigned duties.”³³ Thus, the Court’s decision threatened to “install a corps of political actors on the bench,” thereby inviting routine violations of due process.³⁴

To these concerns Justice Scalia replied that the sky would not fall. *White*’s reasoning, he insisted, “neither assert[ed] nor [implied] that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office.”³⁵

3. *After White*. — What does Justice Scalia’s cryptic remark mean? Commentators remain divided; there is little consensus as to the scope of *White* and its implications for other restrictions.³⁶ Courts have been less conflicted. In the past several years, they have applied *White* to invalidate, enjoin, or narrow a wide range of speech restrictions for judicial candidates. For example, just months after the *White* decision, the Eleventh Circuit observed that “*White* suggests that the [free speech] standard for judicial elections should be the same as the standard for legislative and executive elections.”³⁷ Thus, the court applied strict scrutiny to Georgia’s misrepresentation and solicitation clauses and found that both clauses violated the First Amendment.³⁸

One year after *White*, in *Spargo v. New York State Commission on Judicial Conduct*,³⁹ a federal court held unconstitutional New York’s canon barring judicial candidates from engaging in partisan activities.⁴⁰ The court reasoned that prohibiting judges or judicial candidates from engaging in political activity outside their own campaigns was a poorly tailored means of furthering the state’s interest in impar-

³² *Id.* at 815 n.3.

³³ *Id.*

³⁴ *Id.* at 804.

³⁵ *Id.* at 783 (majority opinion).

³⁶ Compare Young, *supra* note 13, at 434–35, 466 (arguing that some restrictions remain constitutional after *White*), with Erwin Chemerinsky, *Restrictions on the Speech of Judicial Candidates Are Unconstitutional*, 35 IND. L. REV. 735, 735 (2002) (arguing that no restrictions are constitutional).

³⁷ *Weaver v. Bonner*, 309 F.3d 1312, 1321 (11th Cir. 2002).

³⁸ *Id.* at 1319–23. Specifically, the *Weaver* court found that the distinction between judicial elections and other elections, “if there truly is one,” did not justify greater abridgments of candidate speech. *Id.* at 1321.

³⁹ 244 F. Supp. 2d 72 (N.D.N.Y.), *rev’d on other grounds*, 351 F.3d 65 (2d Cir. 2003).

⁴⁰ See *id.* at 92.

tiality, especially since the state's judges are elected in partisan elections.⁴¹

More recently, in *Family Trust Foundation of Kentucky v. Wolnitzek*,⁴² a federal court issued an injunction barring the enforcement of Kentucky's promise and commit clauses on the ground that the state's application of the clauses prohibited speech protected under *White*. In the court's opinion, Kentucky was "simply using the promises and commit clauses as a *de facto* announce clause."⁴³ Similarly, in *North Dakota Family Alliance, Inc. v. Bader*,⁴⁴ the district court held that North Dakota's promise and commit clauses were unconstitutional because they "forb[ade] the same type of speech that was found to be constitutionally-protected in *White*."⁴⁵ And in *Alaska Right to Life Political Action Committee v. Feldman*,⁴⁶ Alaska's versions of the same clauses were struck down on similar grounds.⁴⁷

Lastly, in *Republican Party of Minnesota v. White (White II)*,⁴⁸ the Eighth Circuit reconsidered the constitutionality of Minnesota's partisan activities and solicitation clauses on remand. Applying *White*, the court overturned its previous opinion and held that these two clauses violated the First Amendment.⁴⁹ Notably, the Eighth Circuit concluded that the clauses were unconstitutional whether one defined impartiality as "lack of bias" or "openmindedness."⁵⁰ The rules were so poorly tailored that they could not further impartiality in either sense of the term, and in fact their multiple infirmities suggested an impermissible motive: namely, to benefit incumbents and lawyers' groups and to burden challengers and political parties.⁵¹

⁴¹ See *id.* at 88–89.

⁴² 345 F. Supp. 2d 672 (E.D. Ky. 2004).

⁴³ *Id.* at 699.

⁴⁴ 361 F. Supp. 2d 1021 (D.N.D. 2005).

⁴⁵ *Id.* at 1039.

⁴⁶ 380 F. Supp. 2d 1080 (D. Alaska 2005).

⁴⁷ See *id.* at 1083. *Wolnitzek*, *Bader*, and *Feldman* appear to be part of a coordinated, multi-state effort on the part of conservative interest groups to deregulate judicial candidate speech. See Emily Heller, *Judicial Races Get Meaner*, NAT'L L.J., Oct. 25, 2004, <http://www.law.com/jsp/article.jsp?id=1098217051328>.

⁴⁸ 416 F.3d 738 (8th Cir. 2005) (en banc), *petition for cert. filed*, 74 U.S.L.W. 3303 (U.S. Oct. 31, 2005) (No. 05-566).

⁴⁹ *Id.* at 766.

⁵⁰ See *id.* at 754–63 (partisan activities clause); *id.* at 763–66 (solicitation clause).

⁵¹ See *id.* at 758–60 & nn.9–10 (discussing the provisions' "remarkably pro-incumbent character"); *id.* at 752 n.7 ("[T]reating political parties differently than interest groups lies at the heart of . . . this case."). If the Supreme Court grants certiorari and affirms *White II*, that decision will have a much broader effect than *White*. See Marcia Coyle, *High Court May Review Judicial Elections*, NAT'L L.J., Nov. 17, 2005, <http://www.law.com/jsp/article.jsp?id=1132144711487> (noting that announce clauses similar to the one at issue in *White* existed in fewer than ten states, whereas nineteen states limit partisan conduct and twenty-eight states limit personal solicitation).

B. Doctrinal Issues, Emerging Trends

The *White* line of cases has reopened major questions of institutional design that once seemed settled. States have pared back candidate speech restrictions, political parties and interest groups have entered the fray as never before, and judicial candidates have shown a new willingness to engage in campaign strategies like attack advertising that were once largely confined to legislative and executive races.⁵² Thus, doctrinal developments will affect more than just the long-running — and perhaps insoluble — debate about the proper balance of democratic accountability and judicial impartiality. They will also play a large role in distributing power among groups vying for influence in judicial elections. The next few sections discuss some of the more important and challenging issues with which courts will have to grapple in the future.

1. *The Application of Strict Scrutiny.* — Many courts and commentators argue that *White* stands for a simple proposition: most judicial speech restrictions are subject to strict scrutiny and thus are “not long for this world.”⁵³ It is unclear, however, whether *White* actually adopted strict scrutiny for the purpose of evaluating Minnesota’s announce clause or merely applied strict scrutiny because the parties agreed it was the appropriate standard.⁵⁴ Furthermore, even if *White* did adopt strict scrutiny for Minnesota’s announce clause, it is far from certain that the Court will apply an equally searching standard to other judicial speech restrictions. Lastly, assuming that *White* does require strict scrutiny for all or most judicial speech restrictions, it is difficult to predict which (if any) will survive future challenges.

2. *The Definition of “Impartiality.”* — Much will turn on how courts define judicial “impartiality” because broader definitions will support more speech restrictions. In *White*, the majority implied that

⁵² See, e.g., Bill Kenworthy, First Amendment Ctr., Overview — Judicial Campaign Speech, http://www.firstamendmentcenter.org/speech/campaignfinance/topic.aspx?topic=judicial_speech (last visited Jan. 15, 2006) (describing states’ swift regulatory reactions to *White* and its progeny); cf. DEBORAH GOLDBERG ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2004, at vi–viii (2004), available at <http://www.justiceatstake.org/files/NewPoliticsReport2004.pdf> (describing steep increases in television advertising, attack ads, political party participation, and interest group funding in recent judicial elections).

⁵³ N.D. Family Alliance v. Bader, 361 F. Supp. 2d 1021, 1039 (D.N.D. 2005) (referring specifically to states’ promise and commit clauses).

⁵⁴ See Republican Party of Minn. v. White, 536 U.S. 765, 774–75 (2002). Compare Weaver v. Bonner, 309 F.3d 1312, 1321 (11th Cir. 2002) (“*White* suggests that the standard for judicial elections should be the same as the standard for legislative and executive elections.”), with *In re Watson*, 794 N.E.2d 1, 6 (N.Y. 2003) (“[T]he Supreme Court did not decide what level of review was applicable to the First Amendment claim in *White*, but applied strict scrutiny because the parties agreed on that standard.”). The *Watson* court makes a colorable argument, but the *White* Court hinted strongly that strict scrutiny was the proper standard. See *White*, 536 U.S. at 774.

impartiality defined as a lack of bias for or against parties to a case is a compelling state interest, but declined to answer the question of whether impartiality defined more broadly as “openmindedness” constitutes such an interest.⁵⁵ Despite its semantic overtones, this issue goes to the heart of the debate over speech restrictions in judicial elections. Nobody disputes that due process is a compelling interest, nor that due process requires an impartial judge. Thus, to suggest a model of “impartiality” is, indirectly, to suggest a model of due process — or at least a valuation of due process interests relative to free speech interests. In a sense, then, the struggle over the definition of impartiality is a proxy for a deeper struggle over whether, in the context of judicial elections, a broad view of First Amendment freedoms should limit due process rights or a broad view of due process rights should limit First Amendment freedoms.⁵⁶ Almost all federal courts have adopted the former view. Curiously, state courts have been more willing to adopt broader definitions of impartiality and, implicitly, to assume the primacy of due process rights.⁵⁷

3. *Recusal as a Remedy.* — Although *White* may have left speech restrictions on shaky constitutional ground, Justice Kennedy’s concurrence explicitly endorsed stricter recusal standards as an acceptable means of preserving impartiality.⁵⁸ Several courts and commentators have echoed this sentiment.⁵⁹ But it is far from clear that recusal alone can strike an appropriate balance between free speech and due process, no matter how one defines “impartiality.” On one hand, those

⁵⁵ *White*, 536 U.S. at 778.

⁵⁶ This dynamic is nicely illustrated by Justice Scalia’s and Justice Ginsburg’s opinions in *White*. Justice Scalia’s majority opinion, like many post-*White* opinions, presumed that “announcements” by judicial candidates are core political speech that deserve the highest level of protection, even in *judicial* elections; this solicitude to speech demanded a relatively narrow definition of the “impartiality” that due process requires. See *id.* at 781–83. Justice Ginsburg, on the other hand, defined impartiality broadly because she presumed the primacy of due process rights, even in the context of *judicial elections*; this definition required a correspondingly narrow view of candidates’ speech rights. See *id.* at 805 (Ginsburg, J., dissenting); cf. Michael R. Dimino, *Counter-Majoritarian Power and Judges’ Political Speech*, 58 FLA. L. REV. (forthcoming 2006) (arguing that the fate of judicial speech restrictions depends on courts’ valuations of free speech interests and due process interests in the judicial election context).

⁵⁷ See, e.g., *In re Kinsey*, 842 So. 2d 77, 87 (Fla. 2003) (upholding a promise clause); *Summe v. Judicial Ret. & Removal Comm’n*, 947 S.W.2d 42 (Ky. 1997) (affirming discipline of a judge for committing to a position on a legal issue); *In re Raab*, 793 N.E.2d 1287, 1293 (N.Y. 2003) (per curiam) (upholding a partisan activities clause).

⁵⁸ *White*, 536 U.S. at 794 (Kennedy, J., concurring).

⁵⁹ See, e.g., *Alaska Right to Life Political Action Comm. v. Feldman*, 380 F. Supp. 2d 1080, 1083–84 (D. Alaska 2005); *Family Trust Found. of Ky. v. Wolnitzek*, 345 F. Supp. 2d 672, 702 (E.D. Ky. 2004); cf. Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 COLUM. L. REV. 563, 568–70 (2004) (arguing that recusal “could be precisely targeted to preventing due process problems . . . without restricting campaign speech at all”).

who believe that due process encompasses more than a lack of bias have good reasons to worry that recusal will be underenforced from their point of view because it will likely tolerate a good deal of election-related bias on the bench.⁶⁰ On the other hand, those who define impartiality more narrowly have good reasons to worry that states will take Justice Kennedy's dictum to heart and enact recusal standards "more rigorous than due process requires."⁶¹ After all, routine disqualifications of judges for campaign speech or conduct — especially speech or conduct that does not necessarily threaten due process — would have a dramatic chilling effect on candidate speech.⁶²

Most importantly, recusal as a remedy for bias suffers from a deep manageability problem. At what point does a candidate's campaign speech indicate an impermissible interest in the outcome of a case, or the appearance of such an interest? The difficulty of drawing this line led one state judge to declare that there should be a "regime of blanket disqualification" for judges with any electoral connection to any litigant.⁶³ This may be an extreme view, but it illustrates the difficulty of making principled distinctions between partial and impartial partisans.⁶⁴

⁶⁰ See, e.g., Shepard, *supra* note 14, at 1079–81 (arguing that recusal is ill-equipped to protect litigants from election-related bias).

⁶¹ *White*, 536 U.S. at 794 (Kennedy, J., concurring).

⁶² See Dimino, *supra* note 10, at 332 n.208, 343 n.267; cf. Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction, *Wolmitzek*, 345 F. Supp. 2d 672 (No. 6:04-CV-473 DCR), 2004 WL 3098416, at *18–22. Perhaps Justice Kennedy's response to this argument would be as follows: however much core speech campaign-sensitive recusal rules might chill, they remain the "least restrictive means" of accomplishing the government's compelling goal of preserving judicial impartiality and due process. Thus, such rules might survive *White*-style strict scrutiny despite restricting, in absolute terms, a great deal of political speech. But this response seems inconsistent with Justice Kennedy's general hostility to content-based speech restrictions. Why are *indirect* restrictions (such as liberal recusal rules) more acceptable than *direct* restrictions (such as announce clauses) if both chill speech?

⁶³ *Braynen v. State*, 895 So. 2d 1169, 1170 (Fla. Dist. Ct. App. 2005) (Farmer, C.J., concurring).

⁶⁴ The *White* Court implied that the "issue/party" distinction is a solution to this manageability problem: that is, that a judge is permissibly biased if circumstances — including, presumably, her campaign speech and conduct — indicate that she has prejudged *issues*, but impermissibly biased if she has prejudged *parties*. See *White*, 536 U.S. at 775–76. But the issue/party distinction is not as clear as it seems. Cf. Dimino, *supra* note 10, at 340 n.248 ("Admittedly, the line between parties and issues may become blurry."). Imagine a judge who has prejudged an issue (such as the social value of "dirty" movies or nude dancing). Her prejudgment on this issue probably implies a prejudgment about individual claims of certain classes of litigants (such as litigants seeking to screen dirty movies or engage in nude dancing). If her prejudgment on this issue is strong and unequivocal, it may prevent her from properly considering the specific facts and circumstances of individual cases. Thus, prejudging issues may be the functional equivalent of being biased for or against specific parties.

C. No More Mr. Nice Judge?

In all likelihood, lower courts will continue to deregulate judicial election speech; few trends point in the other direction.⁶⁵ It is more difficult to predict the direction of the Supreme Court because of the death of Chief Justice Rehnquist and the retirement of Justice O'Connor; both were in the majority in *White*. But perhaps the most interesting developments in the near future will be nondecisional, as various parties scramble to maximize their power in the post-*White* environment. Interest groups, political parties, and donors are investing in judicial elections like never before,⁶⁶ while other groups are attempting to discourage candidates from engaging in races to the ethical bottom.⁶⁷ Meanwhile, professional organizations and advocacy groups are renewing calls for judicial election reform, encouraging states to replace elections with appointment systems.⁶⁸

Thus the optimists and the pessimists are probably both right. Deregulation does indeed upset the status quo, mainly by allowing previously disfavored groups, like political parties, to participate more fully in judicial elections. But deregulation also encourages previously favored groups to find ways to maintain their influence and limit the influence of the newly empowered groups. This fluid state of affairs will undoubtedly have good and bad effects: it will make some elections

⁶⁵ *But see* Pa. Family Inst. v. Black, No. Civ. 105CV2172, 2005 WL 2931825 (M.D. Pa. Nov. 4, 2005) (dismissing a challenge to judicial speech restrictions on standing and ripeness grounds).

⁶⁶ This phenomenon actually preceded *White*, but *White* probably accelerated the trend. Compare DEBORAH GOLDBERG ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2000, at 7 (2000), available at <http://www.justiceatstake.org/files/JASMoneyReport.pdf> (noting a 61% increase in spending by state supreme court candidates between 1998 and 2000), with GOLDBERG ET AL., *supra* note 52, at vii (observing that state supreme court candidates spent \$24.4 million for television ads in 2004, “obliterating the previous record of \$10.6 million set in 2000,” and that “nine states broke candidate fundraising records in the 2003–2004 cycle”).

⁶⁷ Popular strategies for countering the perceived politicization of judicial elections include sunshine laws (greater campaign finance disclosure), voter guides detailing candidates' views and political affiliations, citizen education initiatives, and campaign conduct committees that monitor judicial campaigns and provide ethical guidance to candidates. *See, e.g.*, GOLDBERG ET AL., *supra* note 52, at 35–42.

⁶⁸ *See, e.g.*, COMM. FOR ECON. DEV., JUSTICE FOR HIRE: IMPROVING JUDICIAL SELECTION 4 (2002), available at http://www.ced.org/docs/report/report_judicial.pdf. Generally speaking, these calls are not being answered. Despite the rising tide of money and partisanship and Justice O'Connor's not-too-subtle hint that states concerned about due process should reconsider the practice of judicial elections, *see White*, 536 U.S. at 792 (O'Connor, J., concurring), there is no indication of a movement in states toward appointment systems or “hybrid” systems that combine initial appointments with retention elections. *See* GOLDBERG ET AL., *supra* note 52, at 37. Of course, many commentators argue that appointment systems are no less political than election systems and therefore no more likely to produce qualified, impartial judges. *See, e.g.*, Lloyd B. Snyder, *The Constitutionality and Consequences of Restrictions on Campaign Speech by Candidates for Judicial Office*, 35 UCLA L. REV. 207, 261–62 (1987).

more open, substantive, and competitive,⁶⁹ while making others merely “nastier, noisier, and costlier.”⁷⁰ This result is consistent with *White*’s libertarian impulses. Whether it is good or bad for judges, litigants, and voters remains to be seen.

III. VOTER IDENTIFICATION LAWS

Of the various electoral procedure laws passed in the fifty states since the 2000 and 2004 presidential elections and those still being debated in state legislatures and local media, few arouse more potent partisan feelings than voter identification laws. Vanishing are the days of honor-system voting: in response to growing concerns about evident and potential voter fraud, states have begun to adopt stricter requirements for identification of voters. Seven states have tightened such restrictions to permit only photographic identification, and other states continue to debate similar restrictions.¹ Although the photographic identification requirement might curtail voter fraud, the cost to voters could be prohibitively high, threatening to disenfranchise racial minorities, immigrants, the poor, the elderly, and the disabled. Ultimately, as Democratic and Republican legislators battle over these antifraud provisions,² it will fall to the courts to balance the concerns regarding effective election administration against the potential burdens on disadvantaged voters. This Part argues that, absent clear empirical evidence demonstrating widespread individual voter fraud, legislatures need to fashion narrowly tailored voter identification provisions with an eye toward the inevitable and well-grounded con-

⁶⁹ Cf. Dimino, *supra* note 10, at 301–02.

⁷⁰ Roy A. Schotland, Comment, LAW & CONTEMP. PROBS., Summer 1998, at 149, 150.

¹ See Nat’l Conference of State Legislatures, State Requirements for Voter ID, <http://www.ncsl.org/programs/legman/elect/taskfc/VoterIDReq.htm> (last updated Oct. 11, 2005). The states requiring photographic identification at the polls are Florida, Georgia, Hawaii, Indiana, Louisiana, South Carolina, and South Dakota. *Id.*; see also [electionline.org](http://www.electionline.org), Voter ID Legislation, <http://www.electionline.org/Default.aspx?tabid=473> (last visited Jan. 15, 2006) (surveying pending legislation to enact new identification requirements).

² For a discussion of partisan divisions in attitudes toward the electoral process, see JOHN FUND, STEALING ELECTIONS: HOW VOTER FRAUD THREATENS OUR DEMOCRACY 16–17 (2004), which describes a 2004 Rasmussen Research poll asking individuals whether they were more concerned by voting by ineligible participants or by disenfranchisement of eligible voters. Sixty-two percent of Kerry supporters and eighteen percent of Bush supporters worried more about disenfranchisement; fifty-nine percent of Bush supporters and nineteen percent of Kerry supporters were more concerned with voter fraud. See also *Common Cause/Ga. v. Billups*, No. 4:05-CV-201-HLM, at 10 (N.D. Ga. Oct. 18, 2005) (order granting preliminary injunction), available at <http://www.acluga.org/briefs/voterID/condensed.pdf> (noting that a committee report presented to the Georgia House of Representatives concerning a bill requiring photographic identification at the polls was approved by eighty-nine Republicans and two Democrats and opposed by seventy-two Democrats and three Republicans), *stay of preliminary injunction denied*, No. 05-15784-G (11th Cir. Oct. 27, 2005), available at <http://www.votingrights.org/news/downloads/Order%20Denying%20Stay.pdf>.