

# COUNTER-MAJORITARIAN POWER AND JUDGES' POLITICAL SPEECH

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## INTRODUCTION

Judges and judicial candidates are regularly restricted in their political speech and association by two categories of ethical canons that have only recently come under constitutional examination: those that restrict the ways judges conduct their own campaigns<sup>1</sup> and those that restrict judges' participation in other aspects of politics, including non-judicial campaigns. The first category includes, among other prohibitions, bans on soliciting campaign contributions<sup>2</sup> or making "pledges, promises or commitments" of on-the-bench conduct, while the second includes such restrictions as taking positions of leadership with parties,<sup>3</sup> contributing to others' campaigns,<sup>4</sup> and publicly indicating support for (or opposition to) a candidate for non-judicial office.<sup>5</sup> Whether any of these restrictions on political activity survives review in future cases will depend on a judicial assessment of the importance of the interests they serve – advancing judicial independence and the confidence of the public in blind justice – and the weighing of those interests against judges' rights of free expression.<sup>6</sup>

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<sup>1</sup> Judges in thirty-nine states, comprising eighty-seven percent of all judges in the United States, are elected. See THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 209-11 (2002); NATIONAL CENTER FOR STATE COURTS, CALL TO ACTION: STATEMENT OF THE NATIONAL SUMMIT ON IMPROVING JUDICIAL SELECTION 7 (2002).

<sup>2</sup> See MODEL CODE OF JUDICIAL CONDUCT Canon 5C(2).

<sup>3</sup> See *id.* Canon 5A(1)(a).

<sup>4</sup> See *id.* Canon 5A(1)(e).

<sup>5</sup> See *id.* Canon 5A(1)(b).

<sup>6</sup> Not even political speech enjoys absolute protection from regulation so long as the speech limitations satisfy strict scrutiny by advancing a "compelling state interest" in a "narrowly tailored" fashion. See *Burson v. Freeman*, 504 U.S. 191, 199-200, 206-11 (1992) (plurality opinion); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990); *Brown v. Hartlage*, 456 U.S. 45, 53-54 (1982) (allowing the possibility that restrictions on campaign speech may be constitutional if "supported by not only a legitimate state interest, but a compelling one, and [if] the restriction operate[s] without unnecessarily circumscribing protected expression"); EUGENE VOLOKH, THE FIRST AMENDMENT AND RELATED STATUTES: PROBLEMS, CASES AND POLICY ARGUMENTS 224 (2d ed. 2005) ("[A]t least in theory even the most important kinds of speech can be restricted if the government has a really good reason for restricting them, and enacts a law that's sufficiently carefully crafted."). Justice Kennedy has argued that content-based restrictions on speech, not within traditional exceptions to First Amendment, should be held unconstitutional without regard to compelling interests or narrow tailoring. See *Republican Party v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124-28 (1991) (Kennedy, J., concurring in judgment); see also *infra* notes 18-20 and accompanying text. Though it applied strict scrutiny, *White* itself did not hold that that standard, as opposed to Justice Kennedy's more absolutist vision of the First Amendment, must be used. Instead, it noted that

In its first case raising a challenge to a judicial-campaign restriction, *Republican Party v. White*,<sup>7</sup> the Supreme Court held that Minnesota violated the First Amendment<sup>8</sup> by forbidding a judicial candidate from “announc[ing] his . . . views on disputed legal or political issues.”<sup>9</sup> Though the 5-4 split in *White* was a familiar one, with the five most conservative Justices in the majority and the four most liberal dissenting, that split was unusual for free-speech cases, and suggested that the Justices were motivated by something other than their solicitude for the place of free expression in American society.

This Article argues that rather than reflecting differing positions on the value of free speech, the divide between the majority and dissenting opinions in *White* reflects vastly different approaches to the counter-majoritarian difficulty,<sup>10</sup> and to the Canons<sup>11</sup> that seek to enable counter-majoritarian decision-making by permitting judges the freedom to decide cases irrespective of public pressure. The dissenters understood judicial independence as essential to upholding the rule of law, believing that “[e]ven when they develop common law or give concrete meaning to constitutional text, judges act only in the context of individual cases, the outcome of which cannot depend on the will of the public.”<sup>12</sup> Such independence, however, insulates not only the judges who always faithfully seek to apply the law, but also those judges who use their unaccountability to shape the law in favor of their own preferred policies. The *White* majority, apparently suspicious of that potential outcome, sought to make the counter-majoritarian difficulty less difficult by making the judiciary less counter-majoritarian.

Part I begins by analyzing the arguments in *White* and other judicial-free-speech cases, arguing that pro-speech decisions are supported by two different grounds: promoting democratic self-governance and encouraging individual self-expression, while anti-speech decisions tend to focus on

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neither party had challenged the use of strict scrutiny in that case. See *White*, 536 U.S. at 774. See also *In re Watson*, 794 N.E.2d 1, 6 (N.Y. 2003) (per curiam) (observing that the Supreme Court did not decide which standard was appropriate, but apparently viewing strict scrutiny as the most speech-protective option available).

<sup>7</sup> 536 U.S. 765 (2002).

<sup>8</sup> “Congress shall make no law . . . abridging the freedom of speech . . .” U.S. CONST. amend. I. The First Amendment has been incorporated through the Fourteenth Amendment’s Due Process Clause against state infringement, see *Fiske v. Kansas*, 274 U.S. 380, 386-87 (1927); *Gitlow v. New York*, 268 U.S. 652, 666 (1925), and the remainder of this Article refers to the First Amendment, even when the governmental action in question is undertaken by a state.

<sup>9</sup> MINN. CODE OF JUDICIAL CONDUCT, Canon 5(A)(3)(d)(i) (2000). This is known as the “announce clause.”

<sup>10</sup> See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962).

<sup>11</sup> Most states’ canons of judicial ethics are based on the American Bar Association’s Model Code of Judicial Conduct. See Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge’s Impartiality “Might Reasonably Be Questioned,”* 14 GEO. J. LEGAL ETHICS 55, 55 (2000) (contending that forty-nine states have adopted some form of the ABA Model Code). Throughout this Article I refer to state codes of judicial conduct collectively as the “Canons” and quote from the ABA Model Code except where indicated.

<sup>12</sup> *White*, 536 U.S. at 806 (Ginsburg, J., dissenting). *Accord id.* at 799 (Stevens, J., dissenting) (“[A judge] may make common law, but judges on the merits of individual cases, not as a mandate from the voters.”).

concerns of institutional legitimacy. Some decisions supporting free speech in judicial elections have looked at the policy-making capability of courts, and have reasoned that the people are entitled to affect the course of judicially made policy in states where judges are elected. Others may be considered more straightforward applications of traditional First Amendment principles under an individual-rights paradigm (as opposed to an approach under which the courts broadly oversee the democratic process), reasoning that because the speech at issue is political, and the restriction is a content-based law designed to discourage the political speech, the regulation must fail.

In Part II, I examine the Justices' voting patterns, discovering that the votes in *White* are unusual in light of the Justices' past behavior in free-speech cases. I then analyze other potential explanations for the Justices' votes in *White*, and suggest that their views on criminal procedure and judicial power may color their views on judicial free speech.

Part III discusses the restrictions states place on the political activity of their judges, both as to the ways elected judges may conduct their own campaigns and the ways judges may involve themselves in political parties or other candidates' campaigns. I analyze the interests supporting the restrictions and the restraint placed on free expression by each type of regulation, concluding that while restrictions on the conduct of *judicial* campaigns are largely in place – and criticized – because the writers and enforcers of the Canons do not want the judiciary influenced by public opinion, restrictions on judicial participation in *non-judicial* campaigns promote the appearance of an apolitical judiciary so as to increase courts' legitimacy and power. Despite this apparent difference, however, both types of restrictions maximize the courts' capacity to issue counter-majoritarian decisions – one by discouraging the public from seeing law as a series of policy choices and the other by limiting the chance of electoral defeat as reprimand for judges who make choices with which the voters disagree. I argue that *White* struck down the announce clause because it facilitated counter-majoritarian judicial policy-making – a result the Justices in the *White* majority found troublesome. The dissenters, far more accepting of independent judicial policy-making, voted to uphold the clause for the same reason.

Part IV explores the implications, both in terms of *White*'s realism and the hypothesized link between counter-majoritarian power and judicial free speech, for cases challenging restrictions on judicial involvement in non-judicial politics. *White* reveals four potential paths the Court could take as new cases are argued and new Justices are appointed, ranging from Justice Kennedy's protection of "unabridged speech [a]s the foundation of political

freedom,”<sup>13</sup> to Justice Scalia’s protection of speech to promote democratic self-governance, to Justice Stevens and Justice Ginsburg’s refusal to protect speech when it would impair judicial power. The future of judicial free speech depends on which of these paths the members of the Court choose to pursue.

### I. *WHITE* AND THE RHETORIC OF JUDGING JUDICIAL POLITICS

This section analyzes the rhetoric of cases and commentary on judicial free speech. I find that pro-speech arguments center on two different themes: the autonomy of the speaker and the rights of voters to affect the policy made by judges. Pro-restriction arguments, by contrast, focus on the risks if the public is permitted to influence judicial policy.

#### A. *The Basics and Breakdown of White*

Like other restrictions on judicial campaigning, Minnesota’s announce clause attempted to protect the courts from public influence by making it harder for the public to learn information about judicial candidates. If a candidate cannot run an issue-based campaign, voters are inhibited from casting votes based on the candidates’ positions on those issues and using elections to alter judicial policy. Thus, while *Republican Party v. White* was a First Amendment challenge to a restriction of campaign speech, the purposes served by the restrictions may have led some Justices to view the case in terms of the appropriate role of the courts in limiting majority rule.<sup>14</sup>

Minnesota defended the announce clause as necessary to promote the impartiality and independence of the judiciary, as well as the appearance of independence and impartiality, but the *White* Court, in an opinion by Justice Scalia, found the justifications wanting. The Court rejected the idea that states could have a compelling interest in filling their courts with judges who had no opinions about disputed legal or political issues,<sup>15</sup> and held that even if the clause encouraged judges to keep an open mind about such issues,<sup>16</sup> the clause was not narrowly tailored to that end and was therefore unconstitutional.<sup>17</sup>

Justice Kennedy went even further in his concurrence, concluding that because the announce clause was a content-based restriction on speech, and because no traditional exception (such as fighting words, obscenity, and the like) applied,<sup>18</sup> the restrictions were unconstitutional.<sup>19</sup> Because Justice

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<sup>13</sup> *Republican Party v. White*, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring).

<sup>14</sup> See generally, e.g., RICHARD D. PARKER, “HERE, THE PEOPLE RULE”: A CONSTITUTIONAL POPULIST MANIFESTO (1994).

<sup>15</sup> *White*, 536 U.S. at 777-78.

<sup>16</sup> The Court did not decide whether judicial open-mindedness was a compelling interest. See *id.* at 778.

<sup>17</sup> See *id.* at 778-80.

<sup>18</sup> See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any

Kennedy rejected the strict-scrutiny formula, he found little need to assess the importance of the justifications Minnesota offered for the announce clause.<sup>20</sup>

The four dissenters, in opinions by Justices Stevens and Ginsburg, countered that open-minded judges were essential to providing due process for litigants,<sup>21</sup> and that the very nature of law requires that judges apply rules in ways the majority of the electorate dislikes.<sup>22</sup> If judges were permitted to campaign on issues, feared the dissenters, judges would be unable to protect the rights of the unpopular because voters would elect only those judges whose decisions would be acceptable to the majority.

Justice Scalia responded with skepticism that such a danger would materialize from stating one's views on the issues of the day,<sup>23</sup> but importantly implied that bringing the judiciary more in line with public attitudes might not be so bad after all. Judges make policy by "shap[ing]"<sup>24</sup> constitutions and "'mak[ing]"<sup>25</sup> common law, the Court reminded us, and elections were instituted in part because judicial decisions had strayed too far from majority preferences.<sup>26</sup>

### B. Viewing Speech Restrictions as Protections of Counter-Majoritarian Power

As Alexander Hamilton noted in *The Federalist*, the judiciary must "depend upon the aid of the executive arm even for the efficacy of its judgments."<sup>27</sup> And yet since *Marbury v. Madison*<sup>28</sup> the Supreme Court has used its power of judicial review to make great changes in American

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Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words . . .") (footnote omitted).

<sup>19</sup> See *White*, 536 U.S. at 793 (Kennedy, J., concurring). Justice Kennedy did suggest, however, that a different approach might be appropriate when a state "restrict[s] the speech of judges because they are judges – for example, as part of a code of judicial conduct" rather than when a state restricts judges' speech because the judges are candidates. *Id.* at 796.

<sup>20</sup> *Id.* at 793.

<sup>21</sup> See *id.* at 814-17 (Ginsburg, J., dissenting).

<sup>22</sup> See *id.* at 798 (Stevens, J., dissenting), 806 (Ginsburg, J., dissenting).

<sup>23</sup> See *id.* at 780-81.

<sup>24</sup> *Id.* at 784 (opinion of the Court).

<sup>25</sup> *Id.*

<sup>26</sup> See *id.* There is some dispute as to the extent to which popular control over the judiciary drove the movement for judicial elections, but there appears to be rough agreement that disagreement with judicial decisions under an appointive regime was at least a substantial cause. See 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, 310-14 (2003); Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-1860* 45 THE HISTORIAN 337, 341-50 (1983); Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 205-19 (1993). But see Roy A. Schotland, *To the Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 WILLAMETTE L. REV. 1397, 1399-1400 (2003) (hereinafter Schotland, *To the Endangered Species List*) (arguing that judicial elections were motivated by a desire to raise the quality of the bench, rather than as a way to alter policy); Roy A. Schotland, *Myth, Reality Past and Present, and Judicial Elections*, 35 IND. L. REV. 659, 661-62 (2002) (hereinafter Schotland, *Myth, Reality*) (using extended quotation to same effect).

<sup>27</sup> THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>28</sup> 5 U.S. (1 Cranch) 137 (1803).

society, even as much of the country opposed its decisions.<sup>29</sup> How can the Court be so powerful in practice when its authority on paper seems so minimal?

The consensus holds that public acceptance of judicial authority allows courts to hold policy-making power without the purse or the sword. Courts have legitimacy, in other words, even though their members are largely unaccountable and even as the public disagrees with individual decisions.<sup>30</sup> Scholars have found “diffuse support” among the public for the institutional judiciary, which gives it the independence to act contrary to the public’s desires.<sup>31</sup> Thus, paradoxically, the Court relies on public sentiment to enable it to oppose the public sentiment.<sup>32</sup> The result is a third branch that is powerful in individual cases and yet consciously dependent on others for its continued influence.<sup>33</sup>

At least since *Carolene Products* gave voice to the principle that courts have a special role to play in the defense of individual rights,<sup>34</sup> and in all

<sup>29</sup> See, e.g., Lino A. Graglia, *Revitalizing Democracy*, 24 HARV. J.L. & PUB. POL’Y 165, 171 (2000) (“It would be incredible, if it were not true, that for the past four or five decades virtually every change in basic issues of domestic social policy has come not from state or federal legislatures but from the U.S. Supreme Court.”).

<sup>30</sup> See Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2614-20 (2003). Interestingly, members of the public who know more about the courts are less likely to support the Supreme Court if it issues decisions with which those members of the public disagree. See *id.* at 2617-20 (citing David Adamany & Joel B. Grossman, *Support for the Supreme Court as a National Policy Maker*, 5 L. & POL’Y Q. 405 (1983); Gregory A. Caldeira & James Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635 (1992); and Charles H. Franklin & Liane C. Kosaki, *Media, Knowledge, and Public Evaluations of the Supreme Court*, in CONTEMPLATING COURTS 352 (Lee Epstein ed., 1995)).

<sup>31</sup> See Caldeira & Gibson, *supra* note 30.

<sup>32</sup> But the nature of its public support requires that the Court not oppose the public will too much. Justice Scalia has charged his colleagues with shading their legal interpretations to make them more palatable to the public and therefore less likely to trigger a movement to curtail the Court’s power. See *McCreary County v. ACLU*, 545 U.S. \_\_\_, \_\_ (2005) (Scalia, J., dissenting) (slip op. at 9) (suggesting that the Court would invalidate more religious practices under the Establishment Clause were it not for “the instinct for self-preservation, and the recognition that the Court . . . cannot . . . contradict[] both historical fact and current practice without losing all that sustains it: The willingness of the people to accept its interpretation of the Constitution as definitive. . .”); *Lawrence v. Texas*, 539 U.S. 558, 604-05 (2003) (Scalia, J., dissenting) (suggesting that the principles adopted by the majority required farther-reaching policy effects than the Court was willing to acknowledge). And of course the standard interpretation of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), stresses that *Marbury* “had to lose,” so that the political branches would not restrict the Court’s power. Michael Stokes Paulsen, *Marbury’s Wrongness*, 20 CONST. COMMENT. 343, 357 (2003) (arguing that if Chief Justice Marshall deliberately decided the case so as to avoid antagonizing the Jefferson administration, his opinion stands for the proposition that “a judge properly may refuse to do justice under the law in order to advance his own personal power and that of other judges.”). See generally, e.g., Michael W. McConnell, *The Story of Marbury v. Madison: Making Defeat Look Like Victory*, in CONSTITUTIONAL LAW STORIES 13 (Michael C. Dorf ed., 2004).

<sup>33</sup> See, e.g., DAVID M. O’BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 304-07, 327-34 (7th ed. 2005). See generally John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353 (1999).

In the video that greets visitors to the Supreme Court, Justice Souter points to the fragility of the Court’s authority: “The power of the Court is the power of trust earned – the trust of the American people.” York Associates Television, Inc., *The Supreme Court of the United States* (1997) (quoted in BARBARA A. PERRY, *THE PRIESTLY TRIBE: THE SUPREME COURT’S IMAGE IN THE AMERICAN MIND* 5 (1999)); see also, e.g., EUGENE W. HICKOK & GARY L. MCDOWELL, *JUSTICE VS. LAW: COURTS AND POLITICS IN AMERICAN SOCIETY* xi (1993); RICHARD L. PACELLE, JR., *THE ROLE OF THE SUPREME COURT IN AMERICAN POLITICS: THE LEAST DANGEROUS BRANCH?* 56 (2002) (“The Court’s power rests on its legitimacy. . .”).

<sup>34</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); see also JESSE CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980).

likelihood since the Founding,<sup>35</sup> the American legal culture has recognized the benefits of having an independent judiciary protect the people from excesses of the government and the tyranny of the majority.<sup>36</sup> Rash, bigoted, and ignorant majorities have a sorry history in America and elsewhere of tyrannizing the unpopular, and courts should have the capacity to prevent majorities from abusing their power.<sup>37</sup> But a judiciary with the power to check abusive governments also has the power to define the “abuses,”<sup>38</sup> and in so doing it risks becoming the proverbial fox guarding the henhouse.<sup>39</sup> Just as some fear overreaching and tyranny by legislative and popular majorities, others fear overreaching and tyranny by an unaccountable judiciary; if judges follow their own preferences instead of the law, judicial independence is destructive not only of democracy but of the rule of law.<sup>40</sup> Thus American judicial power is emblematic of

<sup>35</sup> See Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 318-20 (1999).

<sup>36</sup> See, e.g., *Chisom v. Roemer*, 501 U.S. 380, 400 (1991) (opinion of the Court by Stevens, J.); *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (“The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.”); Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 83-87 (1989). See also *Barnette*, 319 U.S. at 665 (Frankfurter, J., dissenting) (“The Court has no reason for existence if it merely reflects the pressures of the day.”); Robert H. Bork, *Our Judicial Oligarchy*, FIRST THINGS, Nov. 1996, at 21-24, reprinted in *THE END OF DEMOCRACY?: THE JUDICIAL USURPATION OF POLITICS* 10, 13 (Mitchell S. Muncy ed., 1997) (“The Justices are not inscribing current preferences of our society into the Constitution, for those preferences can easily be placed in statutes by legislatures.”).

<sup>37</sup> See generally Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995).

<sup>38</sup> See Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 828 (1982) (“The Supreme Court is our society’s device for deciding that certain choices are out of bounds. This implies that the Justices themselves are not constrained by an out-of-bounds rule and ought not to be.”).

<sup>39</sup> See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 6 (1977) (“. . . I liked it no better when the Court read my predilections into the Constitution than when the Four Horsemen read in theirs.”); Lewis A. Kornhauser, *Is Judicial Independence a Useful Concept?*, in *JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH* 45, 51 (Stephen B. Burbank & Barry Friedman eds., 2002); Lino A. Graglia, *It’s Not Constitutionalism, It’s Judicial Activism*, 19 HARV. J.L. & PUB. POL’Y 293 (1996). Professor Suzanna Sherry has noted that judges from colonial times to the present have implemented their will despite conflicting statutory or constitutional text. See Suzanna Sherry, *Independent Judges and Independent Justice*, 61 L. & CONTEMP. PROBS. 15 (1998). She argues, however, that the independence to exercise independent judgment has “been vindicated by history,” in that we have come to accept the judicial rulings in such areas as rights of slaves, desegregation, natural rights of property, etc., unpopular at the time, as correct. *Id.* at 19. It seems to me questionable whether in fact history has vindicated every exercise of power she mentions, as even today we dispute whether a court can halt a taking of property undertaken for a “private” purpose. See *id.* at 17 (citing *In re: Albany Street*, 11 Wend. 149, 151 (N.Y. Sup. Ct. 1834)); *Kelo v. City of New London*, 545 U.S. \_\_\_ (2005). As even Professor Sherry recognizes, judicial independence has enabled tyranny as well as constitutionalism, by permitting judges to render such decisions as *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), which she mentions, see Sherry, *supra*, at 18, and scores of others, including *Lochner v. New York*, 198 U.S. 45 (1905), which she does not.

<sup>40</sup> See, e.g., MATTHEW J. FRANCK, *AGAINST THE IMPERIAL JUDICIARY: THE SUPREME COURT VS. THE SOVEREIGNTY OF THE PEOPLE* (1996); CHARLES GARDNER GEYH, *WHEN COURTS AND CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA’S JUDICIAL SYSTEM* (provisional page 260) (forthcoming 2006) (“Judicial independence is defensible only insofar as independent judges follow the law.”); Pamela S. Karlan, *Two Concepts of Judicial Independence*, 72 S. CAL. L. REV. 535, 548-58 (1999); Kim Lane Scheppele, *Declarations of Independence: Judicial Reactions to Political Pressure*, in *JUDICIAL INDEPENDENCE AT THE CROSSROADS*, *supra* note 39, at 227, 228 (“[J]udges can (and some judges often) bend the positive law to a judicial conception of what

governmental power generally and exemplifies the quandary James Madison identified in framing the Constitution: “what is government itself but the greatest of all reflections on human nature? . . . [T]he great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”<sup>41</sup>

*White* is central in this debate because the motivation behind restrictions on judicial speech is the promotion of judicial legitimacy, and as a result, judicial power.<sup>42</sup> Public acquiescence in judicial decisions<sup>43</sup> is possible only where courts hold legitimacy,<sup>44</sup> and countless symbolic references – from the Justices’ robes to the marble palace from which they issue their

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the law should be, thereby challenging the political branches for the final word on what counts as law in the first place.”). Scheppelle, however, is more accepting of this kind of judicial independence than the quote might indicate. Cf. Charles Gardner Geyh, *Highlighting a Low Point on a High Court: Some Thoughts on the Removal of Pennsylvania Supreme Court Justice Rolf Larsen and the Limits of Judicial Self-Regulation*, 68 *TEMPLE L. REV.* 1041 (1995) (arguing for some legislative oversight of the judiciary).

I place process-based theorists in the majoritarian category, for they see a role for courts in overseeing the legislative process only so that the majority’s desires are effected, rather than as a way of imposing particular substantive values. See generally, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980). Both they and those scholars who more generally disfavor judicial oversight object to judges who reject the public’s view of good policy when it conflicts with their own, and would therefore approve of increased public input into judicial selection.

<sup>41</sup> THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961). See also RICHARD H. FALLON, JR., *THE DYNAMIC CONSTITUTION: AN INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW* 204 (2004) (noting that efforts to influence judicial policy through the appointments process “diminish[] the risk of a runaway judiciary . . . [but] a judiciary that tends to share prevailing cultural norms, and thus to decide cases in light of them, is not likely to be a very robust guarantor of minority rights . . .”); TIMOTHY R. JOHNSON, *ORAL ARGUMENTS AND DECISION MAKING ON THE UNITED STATES SUPREME COURT* 131 (2004) (“[T]he Court is viewed either as the quintessential antidemocratic institution or as an appropriate check on the other branches of government.”); Charles Gardner Geyh, *Customary Independence*, in *JUDICIAL INDEPENDENCE AT THE CROSSROADS*, *supra* note 39, at 160, 160-61 (arguing that while light beer may taste great and be less filling, courts cannot be both independent and accountable); David Goldberger, *The Power of Special Interest Groups to Overwhelm Judicial Election Campaigns: The Troublesome Interaction Between the Code of Judicial Conduct, Campaign Finance Laws, and the First Amendment*, 72 *U. CIN. L. REV.* 1, 1 (2003) (“[W]e fear that, if [judges] are too insulated from the political process, they will take advantage of their independence and exercise arbitrary power. On the other hand, we want our judges to decide each case based on its individual merits rather than based on acquiescence to political pressure.”); John M. Walker, Jr., *Politics and the Confirmation Process: The Importance of Congressional Restraint in Safeguarding Judicial Independence*, 55 *SYRACUSE L. REV.* 1, 1 (2004) (“[A] dilemma . . . lies at the heart of our constitutional framework: how do we maintain an independent judiciary to protect democratic institutions and values and, at the same time, avoid unchecked judicial power that would destroy those institutions and values?”).

<sup>42</sup> See MODEL CODE OF JUDICIAL CONDUCT Canon 1 (Commentary) (“Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges.”). The Model Code contains several references to the importance of maintaining “public confidence” in the judiciary, see, e.g., *id.* Canon 2A, making clear that it values legitimacy as necessary to the effective exercise of judicial power.

<sup>43</sup> See *In re: Chmura*, 608 N.W.2d 31, 40 (Mich. 2000) (citing Lloyd B. Snyder, *The Constitutionality and Consequences of Restrictions on Campaign Speech by Candidates for Judicial Office*, 35 *UCLA L. REV.* 207, 239-40 (1987)).

<sup>44</sup> See *id.* Canon 1 (Commentary). See also, e.g., O’BRIEN, *supra* note 33, at xvi (“[The Court’s] political power . . . truly rests, in Chief Justice Edward White’s words, ‘solely upon the approval of a free people.’”); *Planned Parenthood v. Casey*, 505 U.S. 833, 864-69 (1992) (stressing the damage to the Court’s legitimacy were it to overrule *Roe v. Wade*, 410 U.S. 113 (1973), and stating that “[t]he Court’s power lies . . . in its legitimacy,” including “[t]he need for principled action to be perceived as such”); *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986) (noting the Court’s concern with being “vulnerable and com[ing] near[] to illegitimacy” in expounding substantive-due-process doctrine); *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) (citing the need for “sustained public confidence in [the Court’s] moral sanction”); THE FEDERALIST NO. 78 at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that the judiciary would be the “least dangerous” branch because it lacked both the power of the purse and of the sword).

pronouncements – are designed to inspire awe and unquestioning obedience from the public.<sup>45</sup> But the wisdom of inculcating public deference and respect for the judiciary has been questioned, most notably by some Justices,<sup>46</sup> who view unmediated democracy as occasionally or often preferable to oligarchical rule by unelected judges.<sup>47</sup>

Stated differently, courts' legitimacy is of varying importance to different judges, depending on their judicial philosophies. Those who believe that popular majorities pose less of a threat to the law than do unaccountable judges have an incentive to make judges as responsive to political desires as possible, and to remove any façade of judicial omnipotence that inhibits the public from questioning judicial decisions. If policy is going to be made by judges rather than by legislatures, this philosophy – which I refer to as “majoritarianism” – argues that voters should at least be able to select judges who share their policy views. Majoritarians are skeptical of a “compelling interest” in creating the public appearance of “neutral” justice, because judges are policy-makers with social and political views that often preordain their constitutional, statutory, and common-law interpretations. If those views are to determine the content of the Constitution and other laws, majoritarians would prefer that judges have the political views of the median voter, and may therefore be expected to take a dim view of judicial speech restrictions that embolden the judiciary to take unpopular positions.<sup>48</sup>

Those who view courts more as bulwarks against majoritarian excess, however, have more to fear from an accountable judiciary than do those who criticize courts for being undemocratic. Accordingly, these counter-majoritarians are more receptive to the forced separation of judges from politics. For them, the judiciary, drawn from the country's “natural

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<sup>45</sup> See PERRY, *supra* note 33.

<sup>46</sup> See GEYH, *supra* note 40, at (provisional pages 270-71).

<sup>47</sup> See *Roper v. Simmons*, 125 S. Ct. 1183, 1217-25 (2005) (Scalia, J., dissenting); *Lawrence v. Texas*, 539 U.S. 558, 602-05 (2003); *Atkins v. Virginia*, 536 U.S. 304, 348-49 (2002) (Scalia, J., dissenting); *Stenberg v. Carhart*, 530 U.S. 914, 955-56 (2000) (Scalia, J., dissenting), and at 980-81 (Thomas, J., dissenting) (quoting *Thornburgh v. Am. College of Obstetricians and Gynecologists*, 476 U.S. 747, 794 (1986) (White, J., dissenting)); *Romer v. Evans*, 517 U.S. 620, 651-53 (1996) (Scalia, J., dissenting); *Lee v. Weisman*, 505 U.S. 577, 632, 636, 645-46 (1992) (Scalia, J., dissenting); *Planned Parenthood v. Casey*, 505 U.S. 833, 999-1001 (1992) (Scalia, J., dissenting). See also ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 117 (1996); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); Lino A. Graglia, *Judicial Review: Wrong in Principle, a Disaster in Practice*, 21 MISS. C. L. REV. 243 (2002) (hereinafter Graglia, *Judicial Review*); Lino A. Graglia, *Constitutional Law: A Ruse for Government by an Intellectual Elite*, 14 GA. ST. U. L. REV. 767, 770 (1998) (“To the extent that our judges exercise [substantial policymaking] power today, we can be sure that something has gone wrong and the constitutional scheme is not being implemented, but perverted.”).

<sup>48</sup> Not coincidentally, judicial decisions portrayed as activist were the impetus for the modern push for judicial accountability. See Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 L. & CONTEMP. PROBS. 79, 99-107 (1998). See also Hans A. Linde, *The Judge as Political Candidate*, 40 CLEVE. ST. L. REV. 1, 14 (1991) (“Courts give up their defense against the charge that law is nothing more than politics when they explain their decisions as a choice of social policy with little effort to attribute that choice to any law.”); Stephen Markman, *The Debate over the Judiciary*, 35 SUFFOLK L. REV. 443, 451 (2001).

aristocracy,”<sup>49</sup> is a moderating force on democracy, and indeed the need for a judiciary – and indeed the Constitution itself – stems from the fear that the public will abuse the power of majority rule unless checked.<sup>50</sup>

Note that this dichotomy between majoritarians and anti-majoritarians does not necessarily lead to a liberal/conservative split as in *White*.<sup>51</sup>

<sup>49</sup> Edmund Burke, *An Appeal from the New to the Old Whigs* (1791), in BURKE'S POLITICS 397-98 (Ross J.S. Hoffman & Paul Levack eds., 1949) (arguing that voters should choose representatives of superior judgment, and then leave the representatives to exercise that judgment in governing).

<sup>50</sup> See generally LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* (1994).

<sup>51</sup> It may seem odd that majoritarian judges would be more likely to strike down a Canon than would an anti-majoritarian. Nevertheless, there are several reasons majoritarians would not exhibit deference to decisions to restrict judges' rights of political participation. First, the Canons prohibiting judicial speech are often passed not by democratically elected majorities in legislatures, but by the very judicial institutions benefited by the legitimacy that comes from limiting discussion about them. See *Republican Party v. White*, No. 99-4021, 2005 U.S. App. LEXIS 15864, at \*43 n.9 (8th Cir. Aug. 2, 2005) (en banc) (“[T]he fruits of Canon 5 appear to bear witness to its remarkably pro-incumbent character.”); Dimino, *supra* note 27, at 811 & n.34. Cf. generally ELY, *supra* note 40, at 120 (“We cannot trust the ins to decide who stays out[.]”). Second, insofar as politically responsible institutions fashion the rules of judicial conduct, judges who are challenging bans on their political involvement have been prohibited from participating in the process that led to the adoption of the rule. Under such circumstances, any deference to the state statute is misplaced. Cf. *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 644 n.9 (1996) (Thomas, J., concurring in judgment in part and dissenting in part) (arguing that deference is inappropriate in campaign-finance cases because legislators can use campaign-finance rules to entrench themselves in power); *Kramer v. Union Free Sch. Dist. Number 15*, 395 U.S. 621, 627-28 (1969) (refusing to defer in cases challenging an exclusion from voting). Third, because the right to engage in political activity is fundamental, strict scrutiny applies. The question is whether the interest asserted by the state is compelling and whether the means adopted are narrowly tailored to serve the interest. Majoritarian judges are less likely to see state interests in enabling counter-majoritarian decisions as compelling, or depriving the public of information as a narrowly tailored means to the end, because both serve the interests of an elite minority at the expense of the majority. Thus, while it might seem ironic for majoritarian judges to be more likely to strike down the speech restrictions, the reason they would do so is the protection of the majority from a politically influential minority.

While a judge who adopts questionable statutory or constitutional interpretations – either conservative or liberal – because he believes he can improve on the original language is acting in a counter-majoritarian fashion, see, e.g., *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941 (Mass. 2003) (opinion of the Court by Marshall, C.J.) (requiring Massachusetts to recognize same-sex marriages); *Alison D. v. Virginia M.*, 572 N.E.2d 27, 30-33 (N.Y. 1991) (Kaye, J., dissenting) (arguing that “parent” should mean something other than “biological or adoptive mother or father” (i.e., could include the homosexual partner of a child’s parent) when an alternative meaning would be in the child’s best interest); GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982); Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1 (1995) (arguing that courts versed in the common law should take an active role in “mak[ing] law” and policy when engaged in statutory and constitutional interpretation), a judge who adopts the same interpretation because of public-choice (or other) concerns about the legislature’s unrepresentativeness would be approaching interpretation from a majoritarian perspective. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 562, 565 (1964) (“Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. . . . [I]t would seem reasonable that a majority of the people of a State could elect a majority of that State’s legislators.”); Friedman, *supra* note 30, at 2605 (“[D]uly enacted laws do not always carry with them popular support.”); Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287 (2004) (arguing that judicial review is not always countermajoritarian, in that legislation does not always reflect the “majority’s” desires). The power of the first judge, much more than the second, would be threatened by a loss of judicial legitimacy. See Judith S. Kaye, *Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts*, 25 HOFSTRA L. REV. 703 (1997) (arguing against what Chief Judge Kaye termed “irresponsible” (chiefly meaning “uninformed”) criticism of judicial decisions, and arguing that lawyers have a duty to maintain public confidence in the judiciary); *id.* at 722 (“. . . I personally enjoy the swashbuckling, romantic notion that judges are impervious “to the winds of public opinion . . . [and that they are people] of fortitude, able to thrive in a hardy climate.”) (alteration in original) (quoting *Craig v. Harney*, 331 U.S. 367, 376 (1947)); Raphael Lewis & Jonathan Saltzman, *SJC Chief Justice Counters ‘Judicial Activism’ Charge*, BOSTON GLOBE, Oct. 20, 2004, at A1 (reporting that Massachusetts Chief Justice Marshall “dismissed what she called ‘attack politics’ that sometimes ensnares judges,” preferring to characterize what others have termed “activist

Indeed, in theory all judges benefit from the political insulation to decide cases against public desires. In practice, however, a judge whose counter-majoritarian preferences would not command a court<sup>52</sup> receives no benefit from the insulation, because the policy that results from the court decision is not counter-majoritarian. Thus, the only judges for whom independence is vital are those who hold preferences that are counter to those of the public *and* who find agreement among other judges on the court.

Rather than reflecting overall liberal or conservative philosophy, the split is between judges who agree with the public, by and large in particularly salient cases,<sup>53</sup> and those who do not.<sup>54</sup> In the *Lochner* era,<sup>55</sup> when the Supreme Court used the Due Process Clause to invalidate restrictions on economic liberty, it was in conservatives' interest to increase judicial legitimacy (by convincing the public that liberty of contract was "law," not "politics"),<sup>56</sup> and it was in liberals' interest to deprive the Court

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judges" as merely "doing their constitutional duty").

<sup>52</sup> This analysis raises the question whether judges on multi-member courts would be more likely to exhibit the tendency discussed here than would be trial-court judges. If trial-court judges are more interested in judicial independence than are appellate judges, there could be a variety of causes which might form the subject of future research. The trial judges may not need to concern themselves with attaining the agreement of the rest of their court for a particular counter-majoritarian opinion, so they may benefit from independence in that independence would enable the judge not only to state an unpopular position but implement it. On the other hand, judges' concerns may not be with their own ability to implement their preferred policies, but with the Supreme Court's ability to implement policy on a national scale. For trial judges with that attitude, support for judicial independence should vary according to their agreement with the countermajoritarian decisions of the Supreme Court. Another factor likely to be important in trial judges' attitudes toward judicial independence is their perception of whether they face the brunt of public criticism. If a trial judge is more likely to suffer defeat for an unpopular decision than is an appellate judge, the trial judge might place a higher value on judicial independence. If, however, trial-court elections are uncontested and defeat is not a realistic possibility, *see generally* Michael E. Solimine, *The Future of Parity*, 46 WM. & MARY L. REV. 1457, 1491-92 (2005), then those judges may be more accepting of allowing the public to influence other judges.

<sup>53</sup> Cf. Roy B. Fleming & B. Dan Wood, *The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods*, 41 AM. J. POL. SCI. 468, 489-90 (1997) (hypothesizing that "the relative salience of the different issue domains determines the relative responsiveness of the justices to mood").

<sup>54</sup> One may refer to the distinction as being between activist and restraintist judges or between interventionist and non-interventionist ones. *See* EARL M. MALTZ, *RETHINKING CONSTITUTIONAL LAW: ORIGINALISM, INTERVENTIONISM, AND THE POLITICS OF JUDICIAL REVIEW passim* (1994). I prefer not to use the term "judicial activist" because its meaning is disputed and the phrase is used as more often as an epithet than a descriptive moniker. *See* Randy E. Barnett, *Is the Rehnquist Court an "Activist" Court?: The Commerce Clause Cases*, 73 U. COLO. L. REV. 1275, 1275 (2002); Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401, 1401 (2002) (opining that "judicial activism" has been appropriated by adherents of so many conflicting philosophies as to mean only "Judges Behaving Badly – and each person fills in a different definition of 'badly.'"); Keenan D. Kmiec, Comment, *The Origin and Current Meanings of "Judicial Activism"*, 92 CAL. L. REV. 1441 (2004) (surveying the different meanings of the term but arguing that, when properly defined, "judicial activism" can be a useful term for analyses of judicial decision-making). *See generally* Bradley C. Canon, *Defining the Dimensions of Judicial Activism*, 66 JUDICATURE 236 (1983). For me, a "judicial activist" is one who reads his own policy preferences into the law under the guise of "interpretation." *See* Laurence H. Silberman, *Will Lawyering Strangle Democratic Capitalism: A Retrospective*, 21 HARV. J.L. & PUB. POL'Y 607, 618 (1998). My point has less to do with whether a particular decision is based on a judge's policy preferences or the Constitution's, though, and more with whether the decision supports or opposes the policy preference seen as popular by the public. To avoid the further risk of confusion, I do not use the term "democratic" to refer to a conception of judging solicitous of public desires. I prefer the terms "majoritarian" and "counter-majoritarian" to refer to those judges who validate popular measures and those who oppose them, respectively.

<sup>55</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>56</sup> *See, e.g., id.* at 56-57 ("This is not a question of substituting the judgment of the court for that of the

of any legitimacy that came from the invoking the Constitution to conceal a policy choice.<sup>57</sup> Likewise, if the most salient constitutional issue for the Court was the Contracts Clause, the minimal enforcement of which does not seem to trouble the public at all,<sup>58</sup> then conservatives would be in a position to fear the decrease in legitimacy that comes from appearing to decide cases both on the basis of politics<sup>59</sup> and inconsistent with majority preferences.<sup>60</sup>

At this point in our constitutional history, however, conservative “counter-majoritarian”<sup>61</sup> decisions typically are not well covered by the media and often invalidate statutes the public was not aware existed<sup>62</sup> and that are not “of particular concern to Congress.”<sup>63</sup> As a result, decisions like *Seminole Tribe v. Florida*,<sup>64</sup> *New York v. United States*,<sup>65</sup> and even *United States v. Lopez*<sup>66</sup> and *United States v. Morrison*<sup>67</sup> are unlikely to provoke any great public outcry.<sup>68</sup> Moreover, on the rare occasions “when Congress does respond to the Court, it [i.e., Congress] has been compliant. It has treated Court rulings as final and authoritative – a precedent to deal with, not to overrule.”<sup>69</sup>

By contrast, liberal counter-majoritarian decisions in such “politically

legislature. If the act be within the power of the State it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the State? and that question must be answered by the court.”)

<sup>57</sup> See, e.g., *id.* at 76 (Holmes, J., dissenting) (“[T]he accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.”).

<sup>58</sup> See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 43 (Amy Gutmann ed., 1997) (“The [constitutional] provision prohibiting impairment of the obligation of contracts . . . has been gutted. I am sure We the People agree with that development; we value property rights less than the Founders did.”).

<sup>59</sup> See, e.g., O’BRIEN, *supra* note 33, at 330 (“The Court’s prestige rests on preserving the public’s view that justices base their decisions on interpretations of the law, rather than on their personal policy preferences.”); James L. Gibson, et al., *Why Do People Accept Public Policies They Oppose?: Testing Legitimacy Theory with a Survey-Based Experiment*, 58 POL. RES. Q. 187, 192 (2005).

<sup>60</sup> See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 855-56 (1989) (arguing that originalism operates to preserve liberty where protected in the Constitution, citing the Confrontation Clause of the Sixth Amendment and the Contracts Clause, U.S. CONST. art. I, § 10, cl. 1, as provisions the Court has insufficiently protected when public opinion has viewed those liberties as undesirable).

<sup>61</sup> The federalism cases may not be counter-majoritarian at all, though they involve the invalidation of statutes. See Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257, 1299 (2004).

<sup>62</sup> See generally Friedman, *supra* note 30 at 2621-23; Charles H. Franklin & Liane C. Kosaki, *Media, Knowledge, and Public Evaluations of the Supreme Court*, in CONTEMPLATING COURTS 352 (Lee Epstein ed., 1995) (demonstrating the effect of media coverage on public knowledge of Supreme Court decisions).

<sup>63</sup> Neal Devins, *The Majoritarian Rehnquist Court?*, 67 L. & CONTEMP. PROBS. 63, 72 (2004); see also Barry Friedman & Anna Harvey, *Electing the Supreme Court*, 78 IND. L.J. 123 (2003).

<sup>64</sup> 517 U.S. 44 (1997).

<sup>65</sup> 505 U.S. 144 (1992).

<sup>66</sup> 514 U.S. 549 (1995).

<sup>67</sup> 529 U.S. 598 (2000).

<sup>68</sup> See Devins, *supra* note 63, at 66-69 (arguing that the public’s lack of interest in federalism means that the Court can strike down legislation in that area without being significantly anti-majoritarian); see also Ilya Somin, *Political Ignorance and the Counter-majoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1333-36 (2004).

<sup>69</sup> Devins, *supra* note 63, at 73.

costly, divisive social issues”<sup>70</sup> as gay rights,<sup>71</sup> religion<sup>72</sup> and the death penalty<sup>73</sup> are much more likely to provoke opposition from the public because they are easier to understand and trigger more emotional reactions than does, for example, the extent of sovereign immunity under the Eleventh Amendment.<sup>74</sup> Thus, while conservatives strike down some laws supported by majorities of the voting public, the relative lack of salience for issues of federalism means that they have less to fear if courts' legitimacy were undermined than do judges who invoke the ideal of a “living Constitution” to expand individual rights beyond those the majority wishes to accept.

Accordingly, if limitations on political involvement are designed to insulate judges from criticism and protect counter-majoritarian decisions, the judges we can expect to support those limitations are the judges who issue decisions at odds with public preferences in salient cases. They have the most to lose. If the public refuses to follow a judicial decree – either by adopting a constitutional amendment, attempting to put judges with opposing views on the bench, encouraging resistance by other branches of government, or otherwise – then the judge's preferred decision will have reduced effect.

Conversely, those judges who decide cases consistent with public views will likely be the ones least supportive of limitations that increase judicial legitimacy, for if the judiciary is seen as illegitimate and people lose respect for the courts, a majoritarian judge has not lost much. Indeed, if the majoritarian judge has dissented from a counter-majoritarian decision, and the court's legitimacy is questioned, the majoritarian judge's preference is advanced.

As Professor Pamela Karlan has stated the balance, “we must measure the claims for judicial freedom against the results judges produce.”<sup>75</sup> And because neither the judiciary, nor the legal community, nor the country has developed a consensus about what makes a judicial decision “correct,” it is impossible to make an argument for or against judicial independence that does not ultimately reduce to expressing a preference for the views of judicial elites or the public.<sup>76</sup> This Article argues that the debate on judicial

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<sup>70</sup> *Id.* at 76 (capitalization deleted).

<sup>71</sup> See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

<sup>72</sup> See *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005); *Newdow v. United States Congress* 328 F.3d 466 (9th Cir. 2002), *rev'd sub nom. Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Engel v. Vitale*, 370 U.S. 421 (1962).

<sup>73</sup> See *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam).

<sup>74</sup> To be sure, the conservative position on social issues is not always consonant with majority public opinion. Nevertheless, with some notable exceptions, see, e.g., *McConnell v. FEC*, 540 U.S. 93 (2003), conservative counter-majoritarianism tends to *sustain* statutes opposed by certain subsets of the public, whereas liberal counter-majoritarianism on social issues *strikes down* popular statutes.

<sup>75</sup> Karlan, *supra* note 40, at 558.

<sup>76</sup> See Michael R. Dimino, *The Futile Quest for a System of Judicial “Merit” Selection*, 67 ALB. L. REV. 803, 810-18 (2004).

politics should be viewed through this lens of result-orientation.

Both rhetoric and empirical data support the proposition that the debate over judicial free speech is more about judicial power than free speech.<sup>77</sup> Those Justices who favor expansions of judicial power and who use that power to make unpopular policy – by, for example, issuing decisions favoring criminal defendants – have supported the speech restrictions, and have used arguments appealing to the courts’ traditional function as a haven for individual-rights claimants against an oppressive majority. By contrast, Justices who favor the more politically popular conservative cause in criminal cases and who favor restricting judicial power have been those voting to strike down the restrictions. And the language *those* Justices have employed, in judicial opinions and elsewhere, has exhibited a realistic understanding of the judicial process, under which extra-legal factors affect judicial decisions and the political process effects policy in part through its selection of judges.<sup>78</sup> The Justices’ positions in free-speech cases – which might be thought to be of the utmost relevance in evaluating a First Amendment challenge to restrictions on political speech – turn out not to be indicative of the Justices’ positions on judicial speech.

*C. Why Protect Judges’ Political Speech?: Instrumentalism, Autonomy, and Realism*

There are at least two reasons to support the right of judges to participate meaningfully in campaigns, and the *White* majority invoked both.<sup>79</sup> First, judges, like other candidates and autonomous members of a free society, should have the right to discuss matters of public interest and to persuade their fellow citizens that a certain policy or set of policies should be adopted.<sup>80</sup> I refer to this as the argument based on “autonomy.” Second, judicial campaign speech assists voters in selecting candidates, and candidate discussions of issues assist voters in using elections to shape the approaches courts will take in addressing those issues. Some critics of speech restrictions use this “instrumentalist” approach to argue that the limitations are bad policy because they promote unaccountable policy-making by judges, and unconstitutional because they make judges less

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<sup>77</sup> Professor Richard Fallon has similarly noted that the Justices’ approaches to questions of commercial speech neatly correlate with their positions on commercial regulation more generally. See FALLON, *supra* note 41, at 49-51.

<sup>78</sup> See generally, e.g., WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* (1964); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002).

<sup>79</sup> These reasons parallel the debate on whether to adopt judicial elections altogether, see *Stretton v. Disciplinary Bd. of the Supreme Court*, 944 F.2d 137, 142 (3d Cir. 1991) (gratuitously commenting that adopting an elective system for selecting judges was “perhaps a decision of questionable wisdom”), providing further support for believing that the fight in these cases is primarily over judicial power and not the marketplace of ideas or self-realization through speech.

<sup>80</sup> See *id.* at 781-82, 788 (opinion of the Court) (arguing that speech during election campaigns deserves particular solicitude from courts).

accountable to the voters by keeping voters uninformed.<sup>81</sup>

The autonomy rationale is orthodoxy, “dominat[ing] the Supreme Court’s First Amendment jurisprudence,”<sup>82</sup> and *White*’s use of the standard references to the importance of speech in a democracy and the particular dangers of allowing governmental restriction of electoral speech<sup>83</sup> is therefore unsurprising.<sup>84</sup> Nevertheless, speech-as-individual-self-expression did not figure especially prominently in the majority opinion.<sup>85</sup> Though Justice Scalia’s majority opinion contains some language supportive of the rights of candidates to speak without restriction,<sup>86</sup> it quite clearly leaves open the possibility that a limitation on campaign speech would be upheld if the interest supporting the limitation was compelling enough.<sup>87</sup> Indeed, the Court disclaimed a broad reading of the passages invoking the fundamental First Amendment right to participate in politics, saying that “[w]e rely on the cases involving speech during elections . . . only to make the obvious point that . . . the First Amendment [does not] provide[] less protection during an election campaign than at other times.”<sup>88</sup>

The second, instrumentalist rationale for protecting judicial campaigning is more controversial. Because courts are less representative than the political branches, but also make important policy choices, liberalization of restraints on judicial speech helps members of the public affect judicially crafted policy.<sup>89</sup> That is, if judicial candidates can and do

<sup>81</sup> Cf. 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 518 (1996) (Thomas, J., concurring in part and concurring in judgment).

<sup>82</sup> Geoffrey R. Stone, *Autonomy and Distrust*, 64 U. COLO. L. REV. 1171, 1171 (1993).

<sup>83</sup> See *Republican Party v. White*, 536 U.S. 765, 774, 781-82 (2002).

<sup>84</sup> Just as Justice Kennedy’s approach in *White* appeared to be centered on rights of free expression, so too some lower courts approach some judicial-free-speech cases as standard applications of First Amendment doctrine. See, e.g., *Butler v. Ala. Judicial Inquiry Comm’n*, 802 So. 2d 207, 213-19 (Ala. 2001); *In re: Chmura*, 608 N.W.2d 31, 40-43 (Mich. 2000) (applying lessons from *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), but also noting that elections and electoral speech allow the public to influence judicial policy).

<sup>85</sup> Justice O’Connor’s opinion is difficult to classify under this scheme, for her argument was that judicial elections necessarily create problems of judicial impartiality, and should therefore be re-thought. Of course, such a conclusion only begs the question why a state should have to accept issue-based campaigns and/or private financing of campaigns if it institutes elections. See Schotland, *Myth, Reality, supra* note 26, at 663 (“‘An Election Is an Election Is an Election’: The Mantra That Passed for Analysis in the Decisions Limiting Canon Provisions”). Though Justice O’Connor never directly provided an answer, she appears to view restrictions suspiciously when they impinge on the ability of voters to educate themselves. Cf. *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 775-76 (1978) (noting that the First Amendment protects interests served by the free exchange of ideas beyond the speaker’s interests). By implying that a state could rid itself of the problems caused by campaigns if it eliminated elections, she seems to reject the view that speech should be protected because of the interests of the speaker. See *White*, 536 U.S. at 792 (O’Connor, J., concurring) (“If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.”). Thus, while Justice O’Connor appears lukewarm about the autonomy rationale from a speaker’s perspective, she accepts it from a listener’s.

<sup>86</sup> See, e.g., *id.* at 782 (“‘It is simply not the function of government to select which issues are worth discussing or debating in a political campaign.’ . . . We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election.”) (quoting *Brown v. Hartlage*, 456 U.S. 45, 60 (1982)).

<sup>87</sup> See, e.g., *id.* at 774-75 (stating the strict-scrutiny test); 783 (“[W]e neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office.”)

<sup>88</sup> *Id.* at 783.

<sup>89</sup> See *White*, 536 U.S. at 784, 787-88 (opinion of the Court) (noting the similarity in policy-making authority

discuss issues, then voters can elect candidates with whom they agree, judicial decisions implementing policy will be more likely to be consonant with public opinion, and the courts will be acting in a less counter-majoritarian fashion.<sup>90</sup> Furthermore, to the extent that the public begins to see judges as part of the political process,<sup>91</sup> judicial decisions will be evaluated as part of that process as well.<sup>92</sup>

As a consequence of politicizing or demystifying the courts, the power of the judiciary will be reduced, for the public may be less willing to respect and obey the decisions of judges whom they believe to be policy-makers.<sup>93</sup> And that potential for altering the power of the courts defines the opposing camps in the instrumentalist debate over the constitutionality of the Canons.<sup>94</sup> For those who fear the counter-majoritarian exercise of judicial review – perhaps particularly when untethered to specific constitutional language – the abandonment of Canons such as the one in *White* is attractive because the Canons were adopted to protect judicial independence and foster acquiescence to judicial power. They use free electoral speech instrumentally, as a means of discouraging courts from behaving in a counter-majoritarian fashion. Those supportive of judicial power and policy-making, on the other hand, support the Canons because they enable the exercise of that power.

Judges supporting speech restrictions proclaim the importance of the independence of courts, though they rarely acknowledge the costs of such independence in terms of judicial unaccountability.<sup>95</sup> They, like opponents of judicial elections, maintain a Langdellian view of judging, where the law – even the common law – is supposed to develop independent of the public will<sup>96</sup> . . . or at least the public is supposed to think so.<sup>97</sup> Though the

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between the judiciary and the legislature, and calling attention to the “obvious tension” between judicial elections and campaign speech restrictions).

<sup>90</sup> See, e.g., Dimino, *supra* note 76, at 817 n.55 (“Insofar as the common law pronounced by unelected courts is reflective of the personal policy views of the judges, . . . it appears wholly oligarchical to subject the populace to judges’ policy ideals without imposing an electoral check on judicial decisions.”); Dimino, *supra* note 26, at 376-78.

<sup>91</sup> See generally RICHARD DAVIS, ELECTING JUSTICE: FIXING THE SUPREME COURT NOMINATION PROCESS (2005) (arguing that the process of staffing the Supreme Court has come to involve an electoral process, complete with the involvement of interest groups, the media, and the public).

<sup>92</sup> See generally TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT (1999) (advocating such a result).

<sup>93</sup> See Gibson, et al., *supra* note 59.

<sup>94</sup> Cf. Burt Neuborne, *Free Expression and the Rehnquist Court*, in THE REHNQUIST COURT: A RETROSPECTIVE 15, 24 (Martin H. Belsky ed., 2002) (noting that the Rehnquist Court’s approach to First Amendment cases has lacked any “normative theory”; rather, it views voting “solely as an instrumental exercise,” a method of choosing leaders and shaping policy rather than as a tool for expression).

<sup>95</sup> While most decisions and commentary fall quite clearly into either the free-speech or pro-restriction camps, some try to find a middle approach. The best example is *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 227-28 (7th Cir. 1993), where Judge Posner argued in dicta that judicial candidates must be granted some freedom to speak, but need not be granted as much protection as candidates for legislative office.

<sup>96</sup> See *Republican Party v. White*, 536 U.S. 765, 799 (2002) (Stevens, J., dissenting); *id.* at 806 (Ginsburg, J., dissenting). Political science is, to say the least, skeptical of this argument. Research has demonstrated that the Justices’ policy views are far more predictive of their votes than are legal factors. See, e.g., SEGAL & SPAETH,

dissenters in *White* and others who defend the restrictions repeatedly claim that judges do not implement their preferred policies as law, they make no attempt to demonstrate this dubious claim. Pro-restriction decisions rarely acknowledge the role public opinion<sup>98</sup> and personal preference<sup>99</sup> play in judicial decisions,<sup>100</sup> and instead rely on the worn protestations that judges “shall not be swayed by partisan interests, public clamor, or fear of criticism.”<sup>101</sup>

The contrasting realism of pro-speech decisions, as in *White*, consists of two revelations (or admissions): judges make policy,<sup>102</sup> and that policy is influenced by the philosophies of the judges.<sup>103</sup> Thus while supporters of speech restrictions take pains to demonstrate the calamity of adjusting the law to accommodate public desires, opponents welcome the possibility: “[T]he fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages . . . can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view.”<sup>104</sup> For proponents

*supra* note 78. Cf. Ward Farnsworth, *Realism, Pragmatism, and John Paul Stevens*, in REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC 157, 177 (Earl M. Maltz ed., 2003) (reporting Justice Douglas’s recounting of a conversation with Chief Justice Hughes, the substance of which Douglas found to be “true,” in which Douglas was told, “At the constitutional level where we work, ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections.”).

<sup>97</sup> See *In re: Raab*, 793 N.E.2d 1287, 1291 (N.Y. 2003) (per curiam).

<sup>98</sup> See Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957) (“[T]he policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States.”); Michael R. Dimino, Sr., *The Worst Way of Selecting Judges – Except All the Others That Have Been Tried*, 32 N. KY. L. REV. 267, 271-72 nn. 24-25 (2005) (citing studies discussing the relationship between public opinion and court decisions); Kevin McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. POLS. 1018 (2004). See generally William N. Eskridge, Jr., *Channelling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419 (2001); Robert C. Post, *The Supreme Court, 2002 Term – Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003).

<sup>99</sup> See generally, e.g., SEGAL & SPAETH, *supra* note 78; Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28 (1997) (accepting that Justices occasionally act strategically, taking account of other actors’ preferences, but arguing that such strategic action is rarely necessary because of the difficulty other branches face in overturning Court decisions). Other analysts argue that Justices vote strategically, tempering their policy preferences as necessary to obtain majorities within the Court and to avoid retribution from the other branches. See generally, e.g., LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998); MURPHY, *supra* note 78; Lee Epstein et al., *The Supreme Court as a Strategic National Policy-Maker*, 50 EMORY L.J. 583, 592 (2001); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 372-89 (1991); William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 641-64 (1991).

<sup>100</sup> See *Stretton*, 944 F.2d at 142 (speculating the disasters that might befall the judicial system if judicial candidates were to prejudice cases during campaigns).

<sup>101</sup> *In re Kinsey*, 842 So. 2d 77, 89 (Fla. 2003) (quoting FLA. CODE OF JUDICIAL CONDUCT, Canon 3B(2)).

<sup>102</sup> See *Republican Party v. White*, No. 99-4021, 2005 U.S. App. LEXIS 15864, at \*10-\*15 (8th Cir. Aug. 2, 2005) (en banc) (plurality opinion) (citing Dimino, *supra* note 26, and Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 30 CAP. U. L. REV. 583, 594 (2002)).

<sup>103</sup> See *Weaver v. Bonner*, 309 F.3d 1312, 1321 (11th Cir. 2002) (“We agree that the distinction between judicial elections and other types of elections has been greatly exaggerated . . .”); *Geary v. Renne*, 911 F.2d 280, 294 (Reinhardt, J., concurring) (“One would have to be exceedingly naive not to be aware that a judge’s judicial philosophy may influence his or her votes on important public issues. . .”).

<sup>104</sup> *Geary*, 911 F.2d at 284 (opinion of the court) (quoting *Fed’l Election Comm’n v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 498 (1985) (ellipsis in *Geary*; opening capitalization added)).

of judicial free speech, campaigns and elections are opportunities for the sovereign people to exert control over their government.<sup>105</sup> For proponents of speech restrictions, campaigns are chances for sleazy, opportunistic, deceptive “politicians” (shudder) to manipulate the voters or exploit their prejudices.<sup>106</sup>

These restrictions on political speech and conduct are in place, the ABA tells us, so that “the dignity appropriate to judicial office” and “the impartiality, integrity and independence of the judiciary” will be protected.<sup>107</sup> “Integrity” may be the most direct expression of the legal profession’s attempt to cloak the courts in prestige and denigrate the other branches. As Professor Bradley Wendel noted, judges “debas[e] the democratic process” “as if they might get their robes dirty among the hoi-polloi.”<sup>108</sup> Thus, supporters of restrictions in judicial campaigns contend that “[a] judge’s ability to render a reasoned decision should not be clouded by the fear that a challenger can twist words or allege distorted facts in an election campaign,” but other governmental officials must tolerate precisely that risk.<sup>109</sup> Judges must be “set . . . aside from the hurly-burly of sometimes unseemly political strife.”<sup>110</sup> And so on. By prescribing that judges not engage in politics and justifying that prohibition with an appeal to “integrity,” the unmistakable implication is that the “political branches” lack the integrity that courts should have. Indeed, the chief fear among proponents of judicial speech and political-participation restrictions is that judges will be seen by the public to be politicians, little different from officials in other branches.<sup>111</sup>

<sup>105</sup> See *Republican Party v. White*, No. 99-4021, 2005 U.S. App. LEXIS 15864, at \*14 (8th Cir. Aug. 2, 2005) (en banc) (plurality opinion) (“[C]ourts are involved in the policy process to an extent that makes election of judges a reasonable alternative to appointment.”); *id.* at \*17 (quoting *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) (per curiam)); *In re: Chmura*, 608 N.W.2d 31, 42-43 (Mich. 2000). As a matter of fact, the ignorance of voters in judicial elections makes it difficult for elections to exert much influence on the direction of judicial policy. See generally, e.g., Michael E. Solimine, *The False Promise of Judicial Elections in Ohio*, 30 CAP. U. L. REV. 559, 562-66 (2002). The solution to this problem, however, may be to provide voters with more information by loosening restrictions on judicial campaigning. See, e.g., Anca Cornis-Pop, *Republican Party of Minnesota v. White and the Announce Clause in Light of Theories of Judge and Voter Decisionmaking: With Strategic Judges and Rational Voters, the Supreme Court Was Right to Strike Down the Clause*, 40 WILLAMETTE L. REV. 123 (2004); Dimino, *supra* note 98, at 299-300. One effect of *White*, therefore, may be to make judicial elections more meaningful opportunities for voters to influence the judiciary, for better (if one is a majoritarian) or worse (if one is a counter-majoritarian).

<sup>106</sup> See, e.g., *Butler v. Ala. Judicial Inquiry Comm’n*, 802 So. 2d 207, 224 (Ala. 2001) (Houston, J., dissenting) (arguing that “[c]ore political speech in the 1994 and 1996 Alabama judicial elections had run amok.”).

<sup>107</sup> ABA MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(a) (1990).

<sup>108</sup> W. Bradley Wendel, *The Ideology of Judging and the First Amendment in Judicial Election Campaigns*, 43 S. TEX. L. REV. 73, 105 (2001).

<sup>109</sup> *In re Donohoe*, 580 P.2d 1093, 1097 (Wash. 1978).

<sup>110</sup> Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059, 1067 (1996).

<sup>111</sup> See, e.g., *Stretton v. Disciplinary Bd. of the Supreme Court*, 944 F.2d 137, 142 (3d Cir. 1991); *In re: Amendment of the Code of Judicial Conduct*, No. C4-85-697, slip. op. at 4 (Minn. Sept. 14, 2004). Cf. Monroe H. Freedman, *The Threat to Judicial Independence by Criticism of Judges – A Proposed Solution to the Real Problem*, 25 HOFSTRA L. REV. 729, 737 (1997) (“Much of the judicial hand-wringing about criticism of judges

Integrity is not an end in itself, however; the restrictions on political activity are in place not to make judges feel that they are better people or are part of a better profession for refraining from politics. Instead, the goal is power or, as one scholar put it, “the judiciary’s moral and political authority”<sup>112</sup>; instilling confidence among the members of the public, so that they will accept judicial rulings as both the embodiments and applications of “law.” The people will vest courts with this undemocratic power only if judges look like they will exercise it wisely.<sup>113</sup>

Relatedly, the rhetoric of judges upholding restrictions on judicial politics is often elitist, evincing contempt for the ignorance of the public or at least a patronizing dismissal of their concerns. The message is clear: “You don’t understand what courts do or how important we are; you’re just focused on results and locking up criminals. Luckily, you have us to look after you and protect your rights.”<sup>114</sup> Accordingly, pro-restriction judges and commentators often emphasize the need for “voter education” efforts, through which the public is supposed to learn<sup>115</sup> “the importance of an impartial and independent judiciary.”<sup>116</sup>

Similarly, instrumentalist critics of the restrictions rely on the idea that the law is manipulable by policy-driven human judges, because the instrumental movement is designed to allow the law to change based on the public’s desires.<sup>117</sup> Judges formulate policy, said the Court, and in a

has more to do with judicial vanity than with judicial independence.”).

<sup>112</sup> Aman McLeod, *If at First You Don’t Succeed: A Critical Evaluation of Judicial Selection Reform Efforts*, 107 W. VA. L. REV. 499, 509 (2005).

<sup>113</sup> See, e.g., *In re: Kaiser*, 759 P.2d 392, 399-400 (Wash. 1988).

<sup>114</sup> See *Cox v. Louisiana*, 379 U.S. 559, 565 (1965) (“A state may also properly protect the judicial process from being misjudged in the minds of the public.”); *In re: Watson*, 794 N.E.2d 1, 7 (N.Y. 2003) (“A campaign pledge to favor one group over another if elected has the additional deleterious effect of miseducating voters about the role of the judiciary. . . Campaign promises that suggest [that judges can aid particular groups] gravely risk distorting public perception of the judicial role.”). Cf. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 636 (1974) (Stewart, J., dissenting) (“A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve.”).

<sup>115</sup> Cf. *United States v. Ballard*, 322 U.S. 78, 94 (1944) (Jackson, J., dissenting) (noting the “mental reservations one has in teaching of Santa Claus or Uncle Sam or Easter bunnies or dispassionate judges.”).

<sup>116</sup> Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 994-95 (2001) (“Public outreach efforts promote judicial independence, because they enable citizens to evaluate critical attacks on judges and to value judicial independence . . . Judicial elections can and should serve to educate the public about . . . the core value of decisional independence.”). See also Phyllis Williams Kotey, *Public Financing for Non-Partisan Judicial Campaigns: Protecting Judicial Independence While Ensuring Judicial Impartiality*, 38 AKRON L. REV. 597, 615, 619-20 (2005). Interestingly, Judge Kotay’s prescription recognizes that any such education program must be “balanced,” but does not see the program itself as unbalanced in promoting judicial independence. Interest groups have also taken to using “voter education” programs, whose balance is questionable. See Emily Heller, *Judicial Races Get Meaner*, NAT’L L.J., Oct. 25, 2004, at 1 (describing the efforts of the U.S. Chamber of Commerce in educating voters about the need to elect tort-reform-minded judges).

<sup>117</sup> Cf. *Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (“[A]n agency . . . may . . . properly rely upon the incumbent administration’s views of wise policy to inform its judgments [as to the meaning of statutes]”); Gregg D. Polsky, *Can Treasury Overrule the Supreme Court?*, 84 B.U. L. REV. 185, 194 (2004) (“*Chevron* gives agencies the flexibility to change and adapt their policies to reflect the current state of affairs and political attitudes.”); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2129 (2002) (arguing that *Chevron* “allows the content of an act of Congress to change with the changing

democracy the voters<sup>118</sup> should have a role to play in influencing the policy-makers.<sup>119</sup>

To illustrate the immense counter-majoritarian power possessed by courts in the interpretation of common and constitutional law, Justice Scalia cited *Baker v. State*,<sup>120</sup> in which the Vermont Supreme Court required that state to provide marriage-like benefits to same-sex couples.<sup>121</sup> By pointing to the policy-making power of courts and invoking a decision taking sides in one of the most divisive issues of the day, Justice Scalia not only invited the public to look at the authority of the courts, but to look at the basis on which judges decide cases. The majority opinion explicitly compared the judiciary to the other branches, saying that they are part of the states' "representative government"<sup>122</sup> and opining that the dissenters "exaggerate[d] the difference between judicial and legislative elections."<sup>123</sup> Citing *Baker* in the context of that discussion says to the country what Justice Scalia has been saying for years in dissenting opinions:<sup>124</sup> court decisions are judicially imposed policy often lacking much connection to the law being "interpreted," little different from the actions of legislatures.<sup>125</sup>

Recognizing that courts have policy-making power and that they use that power to advance their visions of justice requires looking beneath the veneer of "judicial impartiality." If judges' personal views do not matter to the decision of cases, or if judges lack the power to make policy, then voters have little interest in knowing what judges' views are. But *White* acknowledges that judges' personal views *do* matter,<sup>126</sup> and argues from that fact that voters should have access to that information, if the candidates

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policy views of the executive branch."); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2103 (1990) (noting that under *Chevron* changes in executive-branch preferences can alter the law).

<sup>118</sup> Of course this argument does not go so far as to require states to elect judges; rather, it requires them to accord rights of free speech "[i]f the State chooses to tap the energy and the legitimizing power of the democratic process. . ." *White*, 536 U.S. at 788.

<sup>119</sup> *See id.* at 784 ("Not only do state-court judges possess the power to 'make' common law, but they have the power to shape the States' constitutions as well. . . . Which is precisely why the election of state judges became popular."). *See also id.* at 787-88 (noting the "obvious tension" between the announce clause and an elected judiciary).

<sup>120</sup> 744 A.2d 864 (Vt. 1999).

<sup>121</sup> *White*, 536 U.S. at 784; *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), though providing an even greater illustration of Justice Scalia's point by interpreting the Massachusetts Constitution to require that state to grant marriage licenses to same-sex couples, was not decided at the time *White* was. The point is not just that liberal courts are policy-makers, but that courts possess counter-majoritarian policy-making power and they invoke that power based on their own feelings about what the law should be.

<sup>122</sup> *White*, 536 U.S. at 784.

<sup>123</sup> *Id.*

<sup>124</sup> *See infra* notes 211-21 and accompanying text.

<sup>125</sup> The Court's comparison between the approaches of courts and legislatures, *see also* BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 113-15 (1921), might suggest that the same freedom of speech that prevails in legislative campaigns, *see* *Brown v. Hartlage*, 456 U.S. 45 (1982); *Bond v. Floyd*, 385 U.S. 116, 132-37 (1966), is applicable to judicial ones. *See* *Weaver v. Bonner*, 309 F.3d 1312, 1320-22 (11th Cir. 2002).

<sup>126</sup> *See White*, 536 U.S. at 784 n.12.

are inclined to share it.<sup>127</sup> The dissenters saw judges as the human embodiments of law and understood public involvement in the judicial process as threatening to that ideal precisely because, as fallible government officials, judges might not always hew to the law when their electoral fortunes rest in the balance. Thus, both the majority and the dissents appeared to recognize that the exercise of First Amendment rights by candidates and voters could affect the administration of justice.<sup>128</sup>

Nevertheless, in their rhetoric about the legal process, supporters of speech restrictions at most grudgingly acknowledge legal realism, stressing that judges must be *perceived* as being bound by external law and deciding cases without an agenda,<sup>129</sup> even if that is inaccurate.<sup>130</sup> Some pro-

<sup>127</sup> See *id.* at 783-84 & n.11, 787-88.

<sup>128</sup> The realism supporting both the autonomy and self-government approaches to *White* suggests that judges are not "employees" of the government whose speech can be restricted as a condition of employment. Cf. *United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989); William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968). It would be anomalous to permit the government-as-employer to restrict an elected official's speech when (after *White*) he may be in office precisely because of his ability to speak his views on disputed issues. How much harm can it do to the judiciary to know that a judge who campaigned based on his views on certain issues continues to believe them?

<sup>129</sup> See *Bush v. Gore*, 531 U.S. 98, 128-29 (Stevens, J., dissenting), 157-58 (Breyer, J., dissenting); *In re: Raab*, 793 N.E.2d 1287, 1292-93 (N.Y. 2003) (per curiam) ("[W]ithout public confidence, the judicial branch could not function."); *In re: Watson*, 794 N.E.2d 1, 6 (N.Y. 2003) (per curiam) ("[T]he perception of impartiality is as important as actual impartiality.") (quoting *In re: Duckman*, 699 N.E.2d 872, 878 (N.Y. 1998) (per curiam)). There is some indication that the public maintains an unrealistic perception of the judiciary. See SEGAL & SPAETH, *supra* note 78, at 8 ("[T]he fairy tale of a discretionless judiciary survives. . . [T]he bulk of the public simply will not allow themselves to be confused by the fact of judicial policy making."). Recent wrangling over Senate confirmation of judges, though, may be either the cause or the effect of an increased public awareness of discretionary judicial policy-making. See *Planned Parenthood v. Casey*, 505 U.S. 833, 943 (1992) (Blackmun, J., concurring in part, concurring in judgment in part, and dissenting in part), 999-1001 (Scalia, J., concurring in judgment in part and dissenting in part); Edith H. Jones, *Foreword to Symposium: The Ethics of Judicial Selection*, 43 S. TEX. L. REV. 1, 6-7 (2001). Cf. Pew Research Center for the People and the Press, *Supreme Court's Image Declines as Nomination Battle Looms: Court Critics Now on Both Left and Right*, at <<http://people-press.org/reports/display.php3?ReportID=247>> (June 15, 2005). More likely, it is interest groups, rather than the disaggregated public, that have figured out both the game and the stakes. See generally MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 219 (rev. ed. 2003) (noting that although interest groups have played an increased role in the appointment process, "individual citizens have rarely wielded direct influence over the process"); ROBERT A. KATZMANN, *COURTS AND CONGRESS 18-19* (1997); Gregory A. Caldeira et al., *The Lobbying Activities of Organized Interests in Federal Judicial Nominations*, 62 J. POLS. 51 (2000); Gregory A. Caldeira & John R. Wright, *Lobbying for Justice: Organized Interests, Supreme Court Nominations, and the United States Senate*, 42 AM. J. POL. SCI. 499 (1998); Christine DeGregorio & Jack E. Rossotti, *Campaigning for the Court: Interest Group Participation in the Bork and Thomas Confirmation Processes*, in *INTEREST GROUP POLITICS* 215 (Allan J. Cigler & Burdett A. Loomis eds., 4th ed. 1995); Jeffrey A. Segal et al., *A Spatial Model of Roll Call Voting: Senators, Constituents, Presidents, and Interest Groups in Supreme Court Confirmations*, 36 AM. J. POL. SCI. 96, 105-06 (1992); Peter Schuck, *Against (and for) Madison: An Essay in Praise of Factions*, 15 YALE L. & POL'Y REV. 553 (1997).

<sup>130</sup> Compare, e.g., *Geary v. Renne*, 911 F.2d at 290-91 (Reinhardt, J., concurring) (noting the multitude of interest groups that seek to influence judges, and arguing that the influence of parties is therefore unexceptional), with *id.* at 311-14 (Alarcon, J., dissenting) (claiming that the influence of parties threatens judicial independence). See Robert H. Alsdorf, *The Sound of Silence: Thoughts of a Sitting Judge on the Problem of Free Speech and the Judiciary in a Democracy*, 30 HASTINGS CONST. L.Q. 197, 219 (2003) ("I concede that judges are human. Sometimes we do act on personal beliefs. A pure and unalloyed allegiance to the law is something of a fiction, but it is the aspiration, the attempt to find the law that is crucial, however hobbled or imperfect our efforts may sometimes be."); James C. Foster, *The Interplay of Legitimacy, Elections, and Crocodiles in the Bathtub: Making Sense of Politicization of Oregon's Appellate Courts*, 39 WILLAMETTE L. REV. 1313, 1316-17 (2003) (arguing that the popular perception of judges and law as separate from politics "has the singularly unfortunate consequence of making judicial independence wholly contingent upon a profound social misperception of the

restriction writings explicitly tie public perceptions to judicial power,<sup>131</sup> arguing that public respect for judges is necessary to support “the justice system upon which the public relies to resolve all manner of controversy, civil and criminal.”<sup>132</sup> And because nobody knows with any certainty what might cause public esteem for the courts to suffer, supporters of restrictions can claim that the Canons are narrowly tailored to avoid the “appearance” of impropriety,<sup>133</sup> even if detractors can refute claims that independence or integrity is actually threatened by loosening the restrictions.<sup>134</sup>

Only by claiming that judges enforce the law – not their policy preferences<sup>135</sup> – can supporters of restrictions avoid the counter-majoritarian critique and the concomitant pressure to make the courts more accountable.<sup>136</sup> Speech-restriction supporters are therefore willing to employ “a normative, idealized view of judges as apolitical dispute-resolvers,” while opponents of the restrictions are more comfortable using “a descriptive, post-realist recognition that in practice the judiciary exercises significant policymaking functions.”<sup>137</sup> Within an instrumentalist

judicial role.”). See also Farnsworth, *supra* note 96, at 177-78 (arguing that Justice Stevens’s frequent rejection of legal realism in his opinions stands in marked contrast to the results in those opinions, which are the applications of his “values” rather than law).

<sup>131</sup> See, e.g., *In re: McCormick*, 639 N.W.2d 12, 15 (Iowa 2002) (“The strength of our judicial system is due in large part to its independence and neutrality . . . [which] promote public respect and confidence in our system of justice.”). See also *White*, 536 U.S. at 797 (Stevens, J., dissenting) (“[Judges] occupy an office of trust that is fundamentally different from that occupied by policymaking officials.”); 798 (“[I]t is the business of legislators and executives to be popular. . . . it is the business of judges to be indifferent to popularity.”); 802 (“[T]he standards for the election of political candidates [should not] apply equally to candidates for judicial office.”); 802 n.4 (“[T]he same standards should not apply to speech in campaigns for judicial and legislative office.”); 803 (arguing that different criteria should apply to the election to judicial and political office); *Bush v. Gore*, 531 U.S. 98, 128-29 (2000) (Stevens, J., dissenting) (arguing that the Court’s implicit criticism of the Florida Supreme Court would unwisely damage public confidence in the judiciary).

<sup>132</sup> *Watson*, 794 N.E.2d at 7 (quoting *In re: Mazzei*, 618 N.E.2d 123, 125 (N.Y. 1993) (per curiam)). *Mazzei* continued, in even more specific language: “A society that empowers Judges to decide the fate of human beings and the disposition of property has the right to insist upon the highest level of judicial honesty and integrity. A Judge’s conduct that departs from this high standard erodes the public confidence in our justice system so vital to its effective functioning.”)

<sup>133</sup> See, e.g., *In re: Raab*, 793 N.E.2d 1287, 1292-93 (N.Y. 2003) (per curiam).

<sup>134</sup> See *In re: Campbell*, 2004 Annual Report \_\_ (N.Y. Comm’n on Judicial Conduct Nov. 12, 2004) (Emery, C., concurring) (“[M]y colleagues[’] . . . statement that the Rule is ‘narrowly drawn’ because it prohibits political activity ‘with certain defined exceptions during a judge’s own campaign for election’ is tautological and fails to consider the overinclusiveness and underinclusiveness of the Rule.”); *In re: Farrell*, 2004 Annual Report \_\_ (N.Y. Comm’n on Judicial Conduct June 24, 2004) (Emery, C., concurring).

<sup>135</sup> See, e.g., *White*, 536 U.S. at 797 (Stevens, J., dissenting) (“Elected judges, no less than appointed judges, occupy an office of trust that is fundamentally different from that occupied by policymaking officials.”).

<sup>136</sup> See, e.g., Thomas L. Jipping, *From Least Dangerous Branch to Most Profound Legacy: The High Stakes in Judicial Selection*, 4 TEX. REV. L. & POL’Y 365, 458 (2000) (“[By inviting judges] to change the law they apply[, judicial activism] is inconsistent with self-government and ordered liberty because it takes the lawmaking power away from the people and their elected representatives and makes the judiciary more powerful than the other branches of government.”).

<sup>137</sup> Michael Herz, *Choosing Between Normative and Descriptive Versions of the Judicial Role*, 75 MARQ. L. REV. 725, 726 (1992); see also JEROME FRANK, *LAW AND THE MODERN MIND* 244 (1930) (“Myth-making and fatherly lies must be abandoned . . . We must stop telling stork fibs about how a law is born and cease even hinting that perhaps there is still some truth in Peter Pan legends of a juristic happy hunting ground in a land of legal absolutes.”); JEFFREY A. SEGAL, ET AL., *THE SUPREME COURT IN THE AMERICAN LEGAL SYSTEM* 156 (2005):

framework, then, one can reach either a speech-protective or a speech-restrictive result, depending on “whether we look to judges as they are or as they are supposed to be.”<sup>138</sup>

Nowhere is this difference in approaches more apparent than in the Court’s discussions of the meaning of judicial “impartiality.” The *White* dissenters, like other supporters of judicial-speech restrictions,<sup>139</sup> repeatedly invoked the need for impartiality, and argued that a judge who had announced his intention to decide an issue one way or another would violate due process by sitting in a case involving that issue.<sup>140</sup> The Court rejected this due-process argument – an unexceptional result in itself, as no prior Supreme Court case as much as implied that judges must refrain from developing positions about legal issues<sup>141</sup> – but importantly it did so relying upon a realistic vision of who judges are and how they go about deciding cases.<sup>142</sup> The Court flatly rejected the idea (though something of a straw

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Contrasted with the majority [in *White*], the minority made disingenuous arguments demeaning the intelligence of even the most vapid citizen. Reverting to the myth of an objective, dispassionate, and impartial judiciary, the dissent averred that judicial campaigns fundamentally differ from those for policy-making offices; that judges occupy a special position of trust not possessed by other officials; and that if they do not adhere to what they said once in office, judicial independence and impartiality would be compromised and undermined.

Professor Herz notes that Justice Scalia, the author of *White*, is one of the Justices typically willing to indulge the fiction that judges do not make law. See *id.* at 765. Nevertheless, Justice Scalia uses the myth of law-finding for a different purpose than do anti-majoritarians. Rather than arguing that the public must perceive courts as law-finders so that courts are better respected, Justice Scalia argues that courts should act as if they are law-finders, because that properly constrains their discretion. See *id.* at 763 (discussing *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in judgment)); Larry Kramer, *Judicial Asceticism*, 12 CARDOZO L. REV. 1789, 1797 (1991). Indeed, where a law-finder vision of courts impedes his ability to achieve what he views as the correct result, Justice Scalia rejects it for a more realistic vision. See Herz, *supra*, at 754 (discussing *Payne v. Tennessee*, 501 U.S. 808, 834 (1991) (Scalia, J., concurring)). Thus, while Justice Scalia uses traditional imagery of judicial omniscience, he does so with a wink and a nod, and for the purpose of constraining courts rather than emboldening them.

<sup>138</sup> Herz, *supra* note 137, at 744. Cf. NIXON, (Hollywood Pictures 1995) (Nixon, addressing a portrait of President Kennedy: “When they look at you, they see what they want to be. When they look at me, they see what they are.”).

<sup>139</sup> See *Republican Party v. White*, No. 99-4021, 2005 U.S. App. LEXIS 15864, at \*75-\*82 (8th Cir. Aug. 2, 2005) (en banc) (Gibson, J., dissenting); *Geary v. Renne*, 911 F.2d 280, 313 n.5 (9th Cir. 1990) (en banc) (Alarcon, J., dissenting); *In re: Bybee*, 716 N.E.2d 957, 959-60 (Ind. 1999) (per curiam); *In re: Raab*, 793 N.E.2d 1287, 1290-91 (N.Y. 2003) (per curiam) (“[T]he rights of judicial candidates and voters are not the only interests the State must consider . . .”); *Watson*, 794 N.E.2d at 6-7; Schotland, *Myth, Reality*, *supra* note 26, at 665-66; Shepard, *supra* note 110; see also MINNESOTA CODE OF JUDICIAL CONDUCT Canon 5E (“‘Impartiality’ or ‘impartial’ denotes absence of bias or prejudice . . . as well as maintaining an open mind in considering issues that may come before the judge.”); WISCONSIN CODE OF JUDICIAL CONDUCT, Supreme Court Rule 60.01 (7m) (2004) (same).

<sup>140</sup> See *Republican Party v. White*, 536 U.S. 765, 800-02 (2002) (Stevens, J., dissenting); *id.* at 813-19 (Ginsburg, J., dissenting).

<sup>141</sup> See Dimino, *supra* note 26, at 338-46 (arguing that there is no due-process right to have a judge who approaches each issue without preconception). But see *Watson v. State Comm’n on Judicial Conduct*, 794 N.E.2d 1, 6-7 (N.Y. 2003) (per curiam) (opining that “openmindedness” of judges is a requirement of due process); *In re Bybee*, 716 N.E.2d 957, 959-60 (Ind. 1999) (per curiam) (dictum) (citing “due process and due course of law” as constitutional rights “threat[ened]” by allowing judicial candidates to run unregulated campaigns).

<sup>142</sup> *White* opined that it is perfectly consistent with due process to have a judge elected who knows that his job may depend on deciding a particular case one way or another. See *Republican Party v. White*, 536 U.S. 765, 782-83 (2002). Some defenders of restrictions argue that due process requires an “openminded” judge, and *White*

man) that states would be served by having judges come to each case with a mind completely devoid of preconceptions about how an issue in the case should be decided.<sup>143</sup> On the contrary, the Court noted the beneficial aspects of having experienced judges and lawyers – persons whose careers would necessarily predispose them to certain views on issues – running for the bench. It was unwise, in the Court’s view, for a state to use speech restrictions to limit judgeships to those lawyers who have such limited experience as not to have required them to take positions on legal issues.<sup>144</sup> Accordingly, the Court, in evaluating the justifications for judicial speech restrictions, has taken a realistic view of the judicial selection process, and understands that judges have careers that affect the way they see legal problems once on the bench. This lesson may be translated quite easily into the context of party involvement and extra-judicial campaign activity: It would hardly escape the Court’s notice that judges have often been active in politics before their appointments,<sup>145</sup> and judges are often well connected to important players in the political branches.<sup>146</sup>

The autonomy and instrumentality rationales supporting the result in *White* may not always argue for invalidating restrictions on political conduct, even for those who used instrumentalism as a way of undermining judicial power. Restrictions on political activity that do not hinder voters’ ability to obtain information and affect judicial policy are not impediments to self-governance, and therefore may not be opposed by majoritarian instrumentalists. As a result, the constitutionality of some restrictions on judges’ political activity could depend on the analytical paradigm the Court chooses to employ: the systemic, instrumental use of free speech to promote self-government or advancement of free speech as a tool for libertarian self-realization.<sup>147</sup> While an autonomy theory of the First Amendment might call for the invalidation of all content-based restrictions on judicial speech, the instrumental theory might uphold restrictions that serve other goals.

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left open the possibility that openmindedness was a “desirable” trait for the judiciary, *id.* at 778, but the Court then noted that judges regularly make commitments outside of election campaigns that do not raise any due-process concerns. *See id.* at 779-81.

<sup>143</sup> *See id.* at 777-78.

<sup>144</sup> *See id.* (citing *Laird v. Tatum*, 409 U.S. 824, 835 (1972) (memorandum of Rehnquist, J., respecting recusal)).

<sup>145</sup> *See* *Republican Party v. White*, No. 99-4021, 2005 U.S. App. LEXIS 15864, at \*41-\*42 (8th Cir. Aug. 2, 2005) (en banc). *See generally, e.g.*, HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON* (rev. ed. 1999); SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* (1997); *The Justices of the Supreme Court*, available at <<http://www.supremecourtus.gov/about/biographiescurrent.pdf>> (last visited Sept. 23, 2004).

<sup>146</sup> *See* *Cheney v. United States Dist. Court*, 541 U.S. 913, 916-17 (2004) (memorandum of Scalia, J., respecting recusal).

<sup>147</sup> *See* Adam Winkler, Note, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 339-40 (1993) (distinguishing between two justifications for protecting free speech: the “instrumentalist” justification, which “views the freedom of speech as a tool for achieving certain societal objectives,” and the justification “focuse[d] on the constitutive value of speech,” which argues for protecting speech “because it is essential to one’s dignity or self-fulfillment, vital aspects of one’s identity”).

Perhaps, however, the *White* Court's realism may indicate that speech restrictions will continue to be struck down if their defense rests upon an inaccurate, romanticized vision of judging.

Few courts have directly confronted these issues since *White*, and the cases that have been decided have reached widely varying results. While the Eleventh Circuit interpreted *White* to mean that judges and other elected officials are protected by the First Amendment to the same degree,<sup>148</sup> some courts have upheld restrictions on judicial speech that would be "unthinkable"<sup>149</sup> were they applied to officials in the political branches.<sup>150</sup> What, then, motivates those courts and commentators maintaining that the judiciary is simply different, and the First Amendment need not mean precisely the same wide-open debate in the judicial arena as it does elsewhere? The difference in approach, I argue, is the felt need to ensure that courts retain a mystery, an awe-inspiring quality inducing unquestioning adherence to judicial decrees.

## II. EXPLAINING THE VOTES

On first inspection, it appears peculiar that the four most liberal Justices voted in *White* to uphold a restriction on speech, while the five most conservative voted to strike it down. One might have thought that if *White* were to break down on ideological lines, the breakdown would be precisely the opposite of what occurred, with the conservatives supporting an exercise of government power and the liberals favoring the individual's exercise of a fundamental civil liberty. Simplistic visions of liberalism and conservatism therefore fail to explain the votes in *White*, and something else is driving the Justices' positions on judicial free speech.

### A. *White as a Free-Speech Case*

In free-speech cases,<sup>151</sup> "conservatives" on the Rehnquist Court are not a monolithic bloc<sup>152</sup> in favor of government power at the expense of the

<sup>148</sup> See *Weaver v. Bonner*, 309 F.3d 1312, 1321 (11th Cir. 2002); see also *White*, 2005 U.S. App. LEXIS 15864 (8th Cir. Aug. 2, 2005); *Spargo v. N.Y. State Comm'n on Judicial Conduct*, 244 F. Supp. 2d 72 (N.D.N.Y.), vacated on abstention grounds, 351 F.3d 65 (2d Cir. 2003), cert. denied, 124 S. Ct. 2812 (2004).

<sup>149</sup> Schotland, *To the Endangered Species List*, supra note 26, at 1400.

<sup>150</sup> See *In re Kinsey*, 842 So. 2d 77 (Fla. 2003); *In re Dunleavy*, 838 A.2d 338, 347-51 (Me. 2003), cert. denied 124 S. Ct. 1722 (2004); *In re: Raab*, 793 N.E.2d 1287 (N.Y. 2003) (per curiam); *In re: Watson*, 794 N.E.2d 1 (N.Y. 2003) (per curiam).

<sup>151</sup> See Burt Neuborne, *Free Expression and the Rehnquist Court*, in *THE REHNQUIST COURT: A RETROSPECTIVE* 15, 15 (Martin H. Belsky, ed. 2002) (arguing that the Rehnquist Court has been very protective of expression despite the efforts of its namesake); Larry D. Kramer, *The Supreme Court, 2000 Term: Forward: We the Court*, 115 HARV. L. REV. 4, 130 (2001); Eugene Volokh, *How the Justices Voted in Free Speech Cases, 1994-2000* 48 UCLA L. REV. 1191 (2001); Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1211 (2002); Keith Werhan, *The Liberalization of Freedom of Speech on a Conservative Court*, 80 IOWA L. REV. 51 (1994).

<sup>152</sup> See TINSLEY E. YARBROUGH, *THE REHNQUIST COURT AND THE CONSTITUTION* 213 (2000) (noting the influence of "shifting majorities" in freedom-of-expression and freedom-of-association cases).

individual.<sup>153</sup> We might therefore anticipate votes based not on a Justice's general tendency to uphold exercises of government power, but rather on a Justice's willingness to tolerate governmental action *in free-speech cases*. Professor Eugene Volokh has documented the Justices' votes in speech cases and has demonstrated that in order of increasing acceptance of free-speech claims, the Justices rank as follows: Breyer, Rehnquist, O'Connor, Scalia, Ginsburg, Stevens, Thomas, Souter, and Kennedy.<sup>154</sup> Under such an analysis, and assuming *White* was to be a 5-4 decision one way or the other, we might expect Justices Kennedy, Thomas, Souter, and Stevens to vote to strike down the Minnesota announce clause, and we might expect Justices Breyer, Rehnquist, O'Connor, and Scalia to uphold it. Justice Ginsburg, being the median Justice in free-speech cases, could vote either way without making her vote surprising relative to the positions of the others.

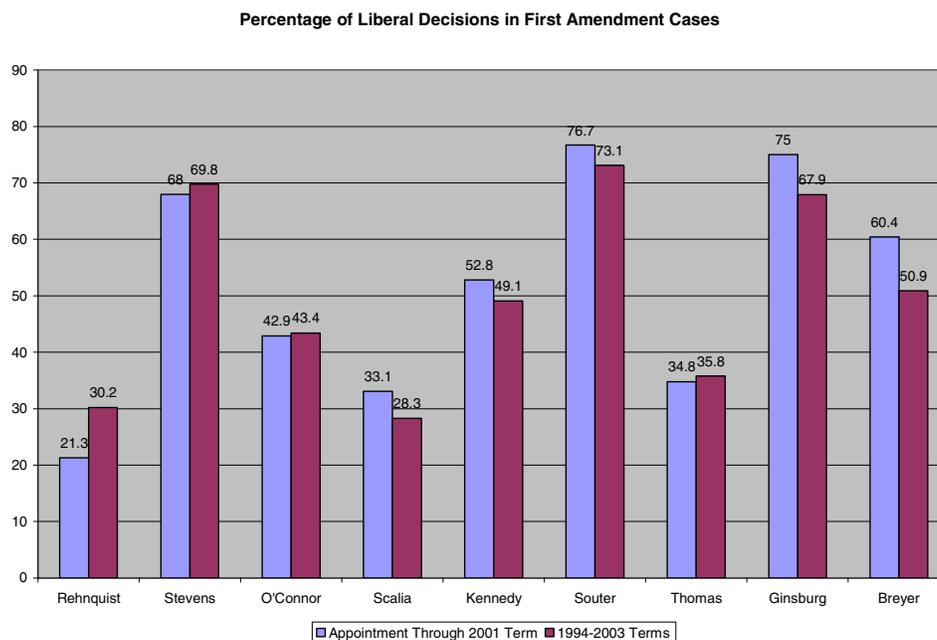
But as it turned out, the majority was one often seen in high-profile constitutional decisions outside of the free-speech context: Chief Justice Rehnquist joined with Justices O'Connor, Scalia, Kennedy, and Thomas to constitute the majority; Justices Stevens, Souter, Ginsburg, and Breyer made an opposing bloc. The votes of Justices Rehnquist, O'Connor, Souter, Stevens, and Scalia in *White* are surprising, if one anticipated a split typically seen in cases involving free-speech claims.

Taking First Amendment cases in total, rather than analyzing just free-speech cases, is no more helpful in explaining *White*:

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<sup>153</sup> See MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW 89, 93-96 (2005) (describing Justice Thomas's natural-law-based libertarianism). Political scientist Richard Brisbin argued that Justice Scalia's jurisprudence was distinctly conservative, despite occasional flashes of libertarianism, as in *Maryland v. Craig*, 497 U.S. 836 (1990), *Texas v. Johnson*, 491 U.S. 397 (1989), *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), and *Arizona v. Hicks*, 480 U.S. 321 (1987). See RICHARD A. BRISBIN, JR., JUSTICE ANTONIN SCALIA AND THE CONSERVATIVE REVIVAL 220-24 (1997).

<sup>154</sup> Justices Souter and Thomas were close enough to be tied, but Professor Volokh's study included *White* itself as a data point. See Volokh, *supra* note 151, appendix (web version), at <<http://www.law.ucla.edu/volokh/howvoted.htm>>. Without that case, Justice Souter would be ranked second-most speech-protective, and Justice Thomas third. In any event, the important point for purposes of my analysis is that both Justices were more protective of speech than were Justice Ginsburg, the median Justice.



As the chart illustrates, the five most conservative Justices on First Amendment Cases, i.e., the five most likely to *reject* an individual's First Amendment claim, are the five who voted to *sustain* such a claim in *White*.<sup>155</sup> The data are consistent whether one uses the total number of First Amendment cases a Justice has heard from his or her appointment through the 2001 Term (the first column)<sup>156</sup> or just those cases decided in the 1994-2003 Terms (the second column).<sup>157</sup>

### *B. Fear of Electoral Chaos*

If one looked at *White* as a case involving the regulation of the democratic process rather than one about free-speech rights,<sup>158</sup> one would

<sup>155</sup> A "liberal" decision was one supporting the rights-claimant. See HAROLD J. SPAETH, *THE ORIGINAL UNITED STATES SUPREME COURT JUDICIAL DATABASE, 1953-2003 TERMS: DOCUMENTATION 58* (2005), at <[http://www.as.uky.edu/polisci/ulmerproject/allcourt\\_codebook.pdf](http://www.as.uky.edu/polisci/ulmerproject/allcourt_codebook.pdf)> (last visited July 29, 2005).

<sup>156</sup> EPSTEIN, ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS* 486-89 (3d ed. 2003).

<sup>157</sup> I gathered this data by using the Supreme Court Judicial Database, limiting the Terms to 1994 and later, the issues to numbers 401-72, excluding memorandum decisions but including per curiam decisions with or without oral argument, and excluding cases where a Justice's vote was other than 0 (conservative) or 1 (liberal). The database is accessible at <<http://www.as.uky.edu/polisci/ulmerproject/sctdata.htm>>. I compiled this data on March 8, 2005. Limiting the data to the 1994-2003 Terms readily permits a comparison between the Justices because, with few exceptions owing to recusals, all the Justices heard the same cases. The third column uses more cases for Justices who have been on the Court longer than Justice Breyer and may therefore yield a more precise picture of the Justices' views, at the cost of using different data sets for each Justice.

<sup>158</sup> Cf. Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28 (2004) (arguing that the Court relies too heavily on an individual-rights paradigm when confronting cases dealing with the regulation of democracy).

have been further confused by the Justices' votes. In electoral-regulation cases, the Justices making the *White* majority have been those Professor Richard Pildes has identified as most fearful of an unrestrained electoral process, and most willing to impose stability on electoral systems.<sup>159</sup> Yet, in *White*, those Justices were willing to overturn a fairly stable system and require states to tolerate campaigns that states feared would upset the role of the state judiciary.

Judicial elections add unpredictability to the law, and restrictions on judicial campaigning are, in part, an effort to limit that unpredictability. Any system of elections threatens to upset expectations about the personnel that staff judicial offices, but issue-based campaigning may upset the stability of the law itself. That is, by encouraging voters to vote for judges based on their outrage over past decisions, campaigns encourage newly elected judges to abandon precedent that is out of favor with the public.<sup>160</sup> To be sure, judicial *appointments* may be based on like considerations, and as a result all public input into the judicial process may be destructive of *stare decisis*.<sup>161</sup> Nevertheless, the frequency and regularity with which elections are held may make it easier to organize campaigns to change a body of law than would be the case if one were forced to wait for the retirement of a life-tenured judge who makes the difference in a particular issue on an appointed court.

By limiting the topics judicial candidates may discuss, and further limiting the specificity with which candidates may discuss legal issues, the Canons limit voters' opportunities to destabilize courts and the law by making both subject to the whims of the populace. As a result, a Justice inclined toward stability would look with favor on speech restrictions. Yet in *White* the five Justices who had in prior cases seen danger in the chaos of public political participation held that the Constitution prohibits states from requiring stability in judicial elections by limiting certain campaign

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<sup>159</sup> See Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695, 697 (2001). Thus in *California Democratic Party v. Jones*, 530 U.S. 567 (2000), Justice Scalia wrote for a majority that included the *White* Court plus Justices Souter and Breyer, holding unconstitutional the use of the "blanket primary," an experiment designed to produce more moderate nominees for office at the cost of taking control away from the party leaders and giving it to ordinary voters. Similarly, in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), the *White* majority plus Justice Breyer allowed Minnesota to ban "fusion" candidacies, which would have supported the viability of third parties at the potential cost of creating confusion and instability. Finally, *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998), again with the concurrence of the same five Justices and Justice Breyer, permitted the exclusion of a candidate from a debate who would have added another perspective but who might have disrupted the order and stability usually prevailing in debates. Based on these cases, one might have expected Chief Justice Rehnquist, along with Justices O'Connor, Scalia, Kennedy, Thomas, and possibly Breyer, to have supported restrictions on judicial elections. Yet all except Justice Breyer voted to strike down the restrictions in *White*. See also Wendel, *supra* note 108, at 105-06.

<sup>160</sup> See Tillman J. Finley, *Judicial Selection in Alaska: Justifications and Proposed Courses of Reform*, 20 ALASKA L. REV. 49, 57 (2003); Elizabeth A. Larkin, *Judicial Selection Methods: Judicial Independence and Popular Democracy*, 79 DENV. U.L. REV. 65, 78-79 (2001); Thomas R. Phillips, *Electoral Accountability and Judicial Independence*, 64 OHIO ST. L.J. 137, 144 (2003).

<sup>161</sup> See Dimino, *supra* note 98, at 285-86.

speech.<sup>162</sup> Treating *White* as a case about controlling the chaotic and confusing aspects of political campaigns therefore fails to explain the Justices' positions.

A refined version of the Pildes critique may carry more explanatory power: Justices and others who support restrictions on judicial politics are not those who would impose stability on an electoral system because of a general fear of democratic chaos. Rather, they do so because of a fear of democracy *infecting the judiciary*. Thus, Justices' beliefs about whether third parties should be tolerated in legislative elections or whether innovative ballot-counting strategies should be viewed skeptically do not predict their approaches to questions of judicial politics. It seems some Justices are quite accepting of chaos and innovation, as long as the courts are stable, while others are content with a justice system as chaotic as the political one. If that is true, it still remains to explain why the Justices would hold such different views. In the following sections I argue that the justices who want to be removed from democracy are guarding the counter-majoritarian policy-making authority they possess when they are unaccountable.

### C. Speech Restrictions Muting Calls for Law and Order

From Richard Nixon's 1968 campaign pledge to appoint "strict constructionists" who would counter the revolving-prison-door policy of the Warren Court to present-day elections for local judicial office,<sup>163</sup> the primary issue in appeals to the public about the judiciary – in particular, the state judiciary, where the vast majority of criminal cases are tried and appealed, and where other controversial issues such as abortion and affirmative action are less frequently litigated – has been criminal justice. Criminal issues have the advantages of being emotionally gripping, appealing to voters' senses of fear, moralism, and outrage, with clear good guys and bad guys, and of allowing the voters to visualize judges as they are often portrayed on television – presiding over criminal trials. It is much tougher to make voters excited about other aspects of a judge's job.<sup>164</sup>

And in criminal cases the public is always on the side of law enforcement, viewing with suspicion judges who release the guilty on "technicalities" or impose less than maximum sentences:<sup>165</sup> "[E]very

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<sup>162</sup> See James A. Gardner, *Forcing States To Be Free: The Emerging Constitutional Guarantee of Radical Democracy*, 35 CONN. L. REV. 1467, 1481-84, 1497 (2003) (arguing that the Court was wrong to force states to tolerate less-regulated judicial campaigns).

<sup>163</sup> See, e.g., *In re Watson*, 794 N.E.2d 1 (N.Y. 2003) (per curiam) (disciplining a judicial candidate for advocating a tough stance on crime); *In re Kinsey*, 842 So. 2d 77 (Fla. 2003) (same).

<sup>164</sup> See Kyle D. Cheek & Anthony Champagne, *Partisan Judicial Elections: Lessons from a Bellwether State*, 39 WILLAMETTE L. REV. 1357, 1365 (2003) (stating that appeals to criminal justice are often financed by advocates for tort reform, because crime has more salience for voters).

<sup>165</sup> See, e.g., Anthony Champagne, *Television Ads in Judicial Campaigns*, 35 IND. L. REV. 669, 684 (2002) ("In the sample of television ads examined for this Paper, judicial candidates battled to outdo one another in their

judge's campaign slogan, in advertisements and on billboards, is some variation of 'tough on crime.' The liberal candidate is the one who advertises: 'Tough but fair.'"<sup>166</sup> Accordingly, the discussion of issues and policy in judicial campaigns will disproportionately favor conservatives. Speech restrictions, then, help liberals by preventing conservatives from tapping the public's law-and-order attitude.

To test the hypothesis that Justices view speech restrictions as a way of encouraging the election of "defense-oriented judges,"<sup>167</sup> I compared the Justices' votes in *White* with their relative positions in criminal procedure decisions. As demonstrated in the following table, the results are quite striking.<sup>168</sup> Each of the dissenting Justices in *White* is a liberal<sup>169</sup> in criminal procedure cases, voting in favor of the criminal defendant in a majority of the cases. In contrast, each Justice who voted in the majority in *White* is a criminal-procedure conservative, voting in favor of the criminal defendant in fewer than 30% of the cases.

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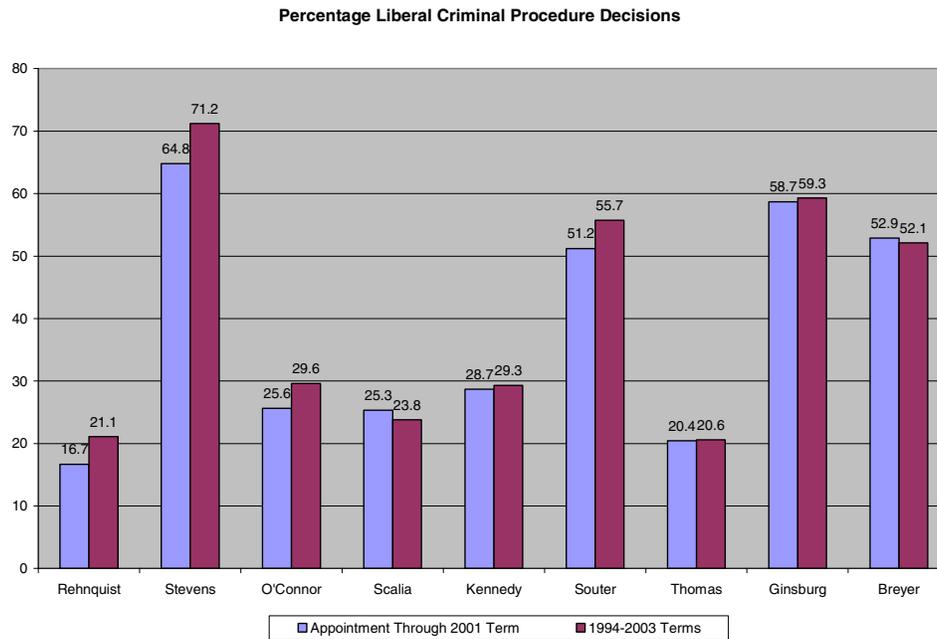
tough-on crime attitudes and their support for and by law enforcement."); Hans A. Linde, *Elective Judges: Some Comparative Comments*, 61 S. CAL. L. REV. 1995, 2000 (1995) ("Every judge's campaign slogan, in advertisements and on billboards, is some variation of 'tough on crime.' The liberal candidate is the one who advertises: 'Tough but fair.'"); Roy A. Schotland, *Campaign Finance in Judicial Elections*, 34 LOY. L.A. L. REV. 1489, 1491 (2001) ("'Tough on crime' is surely the most frequent 'platform' of more than a few judicial candidates, whether explicit or only 'signaled.'"); Abbe Smith, *Defense-Oriented Judges*, 32 HOFSTRA L. REV. 1483, 1504 (2004) ("[J]udges who enforce the Constitution are vulnerable to an anti-crime constituency concerned only about the end result of a ruling. . ."); Penny J. White, *Legal, Political, and Ethical Hurdles to Applying International Human Rights Law in the State Courts of the United States (and Arguments for Scaling Them)*, 71 U. CIN. L. REV. 959 (2003) ("The politically correct, and astute, judicial platform, has long been 'tough on crime.' Candidates compete to see who can amass the toughest record on crime as a means of securing a seat on the bench. Judges at every level have found it advantageous to voice their support for capital punishment."); See also *Baldwin v. Alabama*, 472 U.S. 372, 397-98 (1985) (Stevens, J., dissenting) (arguing that an elected judge might be unduly hesitant to disregard a jury's recommendation of a death sentence); *Spaziano v. Florida*, 468 U.S. 447, 475 n.14 (1984) (Stevens, J., dissenting) (same); Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 760, 785 (1995) ("Opponents criticize judges for a lack of cruelty.");

<sup>166</sup> Hans A. Linde, *Elective Judges: Some Comparative Comments*, 61 S. CAL. L. REV. 1995, 2000 (1995).

<sup>167</sup> See generally Smith, *supra* note 165.

<sup>168</sup> I compiled this data in the second column using the same search criteria I used to analyze the Justices' voting patterns in First Amendment cases, see *supra* note 157, except that here I limited the issues to numbers 13-199. The first column is taken from EPSTEIN, ET AL., *supra* note 156, at 486-89.

<sup>169</sup> In this context, a "liberal" decision is one favoring the person accused of a crime. See SPAETH, *supra* note 155, at 58.



The link between the votes in *White* and the votes in criminal-procedure cases, and particularly the wide gulf between the most liberal conservative (Justice O'Connor or Justice Kennedy, with fewer than 30% liberal criminal-procedure votes) and the most conservative liberal (Justice Souter or Justice Breyer, with more than 50% liberal votes) suggests a relationship between a Justice's views of judicial protection of the rights of the accused and that Justice's views of the free-speech rights of judges. Were the Justices crudely trying to engineer rules of judicial election to support their criminal-justice philosophies, the Justices may have voted exactly as they did in *White*.<sup>170</sup>

Of course, other issue areas besides criminal procedure demonstrate a similar breakdown. Federalism cases, for example, show the five Justices in the *White* majority as the most conservative.<sup>171</sup> But there is no reason to think that judicial-free-speech cases should be correlated with federalism cases.<sup>172</sup> The reason criminal-procedure cases appear particularly likely to

<sup>170</sup> Cf. THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM* 246 (2004) ("The Rehnquist Court's vision of freedom of speech is not a partisan vision – the Court defends the right of liberals as well as conservatives to speak their mind – but it is clearly a conservative vision, as the Court has defended this freedom primarily in those contexts in which liberal legislators have sought to infringe upon it."); Dimino, *supra* note 76, at 819 (arguing that certain judicial-selection systems "represent[] a rigged process to ensure the continued policy influence of elites who cannot justify their decisions to the electorate").

<sup>171</sup> See EPSTEIN, ET AL., *supra* note 156, at 486-89.

<sup>172</sup> Indeed, one might expect a correlation in the opposite direction. Insofar as conservatives in federalism promote the authority of state governments over federal power, one might expect conservatives to support state-enacted speech restrictions over an individual's attempt to invoke the federal Constitution.

influence votes on judicial free-speech is the established connection between judicial campaigns and criminal law, specifically in protecting the power of the judiciary to set free guilty criminals for whom “technicalities” have not been adequately observed.

It is clear that the connection has not escaped the Justices. Both the majority and the dissents referred to elections’ potential effects on the criminal justice system, and the rights of criminal defendants are a persistent concern in pro-restriction writings, in part due to the preeminent focus on criminal justice during judicial campaigns. Justice Scalia’s majority opinion acknowledged the fate likely to befall “the judge who frees Timothy McVeigh,”<sup>173</sup> while Justice Ginsburg repeatedly protested the ways unregulated campaigns could affect the “due process rights”<sup>174</sup> of litigants “in both civil and criminal cases.”<sup>175</sup> Supporters of restrictions worry that judges who campaign on tough-on-crime platforms could give “[c]riminal defendants and criminal defense lawyers . . . a genuine concern that they will not be facing a fair and impartial tribunal.”<sup>176</sup>

More importantly, perhaps, disciplinary cases charging judicial candidates with improper campaigning often involve the candidates’ attempts to broadcast a tough-on-crime image. The candidate whose statements were at issue in *White* itself criticized the Minnesota Supreme Court concerning both criminal and non-criminal issues. Post-*White* decisions in New York<sup>177</sup> and Florida<sup>178</sup> both involved candidates who were sanctioned for advocating a pro-law enforcement “bias.”

A criminal-procedure liberal is far more likely to see the protection of criminal defendants as a “compelling” interest, and might therefore be more likely to uphold a speech restriction designed to serve that interest than would a Justice less inclined to agree with the claims of criminal defendants. It is entirely possible that a Justice’s views on criminal procedure might color his or her views about judicial free speech, therefore, even without directly considering the crass political goal of wanting to elect judges who agree with the criminal-justice positions of the Justice.<sup>179</sup>

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<sup>173</sup> *Republican Party v. White*, 536 U.S. 765, 782 (2002).

<sup>174</sup> *Id.* at 813-19 (Ginsburg, J., dissenting).

<sup>175</sup> *Id.* at 813 (quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980)).

<sup>176</sup> *Kinsey*, 842 So. 2d at 89. Compare the attitude reflected in *Kinsey* with the approach of the Tenth Circuit, stating that generally a judge who states a desire to punish lawbreakers harshly expresses no “bias” justifying recusal: “Judges take an oath to uphold the law; they are expected to disfavor its violation.” *United States v. Cooley*, 1 F.3d 985, 993 n.4 (10th Cir. 1993).

<sup>177</sup> See *In re Watson*, 794 N.E.2d 1 (N.Y. 2003) (sanctioning a judicial candidate for stating that tough judicial decisions were necessary to deter crime in the locality).

<sup>178</sup> See *In re Kinsey*, 842 So. 2d 77 (Fla. 2003) (reprimanding and fining a judicial candidate for arguing that police officers’ testimony should be taken “seriously” and that criminals should be put behind bars).

<sup>179</sup> Data on the state courts that have considered judicial-free-speech issues indicate that a similar relationship may be present there as well. When the Florida Supreme Court considered *In re: Kinsey*, Justice Wells dissented from the court’s imposition of a penalty on Judge Kinsey for her campaign tactics. Justice Wells was identified as a liberal in Professor Langer’s state-court database, but sided with the prosecution in 90.7% of criminal cases in the 2002 and 2003 terms, when the court as a whole ruled for the prosecution in only 73.4% of

In recent years, however, as judicial elections have become opportunities for referenda on the justice system generally, interest groups have used the courts as means for influencing policy in myriad subject areas.<sup>180</sup> Notably, tort liability<sup>181</sup> and the role of religion in society and government<sup>182</sup> have been salient campaign themes. Perhaps liberals can make use of this new opportunity to take the focus off crime;<sup>183</sup> a campaign focused on equality, diversity, abortion, and protecting the disadvantaged might play well in areas that lean Democratic but would elect a Republican to a judgeship if the only available information indicated that the Republican would keep the community safer.<sup>184</sup> Open campaigns might therefore benefit candidates with different ideologies depending on the sentiment of the relevant electorate.

Even if liberals can cut into conservatives' advantages in campaigning, however, it seems that conservatives do benefit overall from involving the public in the process of electing judges. After all, the legal community, including the judiciary, is more liberal than the community as a whole,<sup>185</sup> and for that reason it benefits liberals politically to minimize judicial accountability to the public and to consolidate the power of judicial selection within the bar.<sup>186</sup> Under this analysis, criminal-justice is just a subset of a larger class of cases: those where the power of the judiciary is used to benefit a politically unpopular group.

the cases. A list of cases on which this observation is based is on file at the \_\_ *Law Review*.

<sup>180</sup> See, e.g., Polly Simpson & Sally Weaver, *Judicial Elections: Pollsters Want to Seat Far-Right Ideologues*, ATLANTA JOURNAL-CONSTITUTION, July 16, 2004, at A13 (complaining about the Christian Coalition's use of questionnaires distributed to judicial candidates as a means of publicizing the candidates' views on "such issues as abortion, homosexuality and school prayer").

<sup>181</sup> See generally, e.g., DEBORAH GOLDBERG ET AL., JUSTICE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS 2004: HOW SPECIAL INTEREST PRESSURE ON OUR COURTS HAS REACHED A "TIPPING POINT" – AND HOW TO KEEP OUR COURTS FAIR AND IMPARTIAL 24-25, available at <<http://www.justiceatstake.org/files/NewPoliticsReport2004.pdf>> (last viewed June 28, 2005); Anthony Champagne, *Tort Reform and Judicial Selection*, 38 LOY. L.A. L. REV. (2005); David W. Neubauer, *Issues in Judicial Selection*, 49 LA. B.J. 46, 452 (2002) ; Emily Heller, *Judicial Races Get Meaner*, NAT'L L.J., Oct. 25, 2004, at 1.

<sup>182</sup> See, e.g., GOLDBERG ET AL., *supra* note 181, at 32 (noting the influence of "[t]he politics of social conservatism" in Alabama); Jim Oliphant, *Ruling or Stump Speech?: Anti-Gay Opinion Sparks Debate on Judicial Elections*, LEGAL TIMES, Feb. 25, 2002, at 1.

<sup>183</sup> See Schotland, *To the Endangered Species List*, *supra* note 26, at 1414 (noting that "the label 'Republican' is perceived as 'tough on crime,'" giving candidates of that party an advantage in judicial elections and leading Democrats to propose alternative methods of judicial selection).

<sup>184</sup> As a possible example, Max Baer successfully ran for the Pennsylvania Supreme Court campaigning as a pro-choice, pro-death penalty, anti-tort-reform Democrat. See MacKenzie Carpenter, *Should Justice Be Mute as Well as Blind?: Supreme Court Rivals Disagree on Speaking Out*, PITTSBURGH POST-GAZETTE, Oct. 20, 2003, at A-1.

<sup>185</sup> See Amy E. Black & Stanley Rothman, *Shall We Kill All the Lawyers First?: Insider and Outsider Views of the Legal Profession*, 21 HARV. J.L. & PUB. POL'Y 835, 842-49 (1998) (reporting that lawyers are socially more liberal than the general public, though they are moderately conservative on economic issues); Paul Brest, *Who Decides?*, 58 S. CAL. L. REV. 661, 664-67 (1985) (reporting data found by indicating that members of the "legal elite" are more civil libertarian than both the public and the "opinion elite"); Stephen L. Carter, *Bork Redux, or How the Tempting of America Led the People to Rise and Battle for Justice*, 69 TEX. L. REV. 759, 769-70 (1991) (book review).

<sup>186</sup> See Dimino, *supra* note 76, at 811 (arguing that moves to limit the involvement of the public in judicial selection "favor those interest groups and judges who would lose popular votes").

#### D. Majoritarian Perspectives on the Supreme Court

Insofar as speech restrictions are designed to provide judges with the power to act contrary to the desires of majorities, perhaps the votes in *White* can be explained by reference to the Justices' views of the proper role of judges in interpreting law, and the place of the judiciary as a counter-majoritarian force within a democratic republic. While this claim is related to the partisan motivations discussed above, I believe there to be important differences. First, Justices who promote greater public involvement in the judicial process and fear the excesses of an unaccountable judiciary can be promoting democracy without regard to the political ramifications of such public involvement. And although the majoritarian movement in law is predominantly conservative,<sup>187</sup> it is possible that on some issues public involvement will turn the judiciary to the left, as was the hope of some who championed the idea of judicial elections in the nineteenth century.<sup>188</sup> Second, courts have long been noted as the institution in a position to protect those individuals who lack access to the political process.<sup>189</sup> Thus, Justices wishing to maintain courts as checks on legislative excess may desire more judicial isolation not because the judiciary makes better policy choices, but because it is dangerous to leave the legislature with unchecked power.<sup>190</sup> Thus focusing on judicial power may be a more useful, nuanced way of analyzing attitudes toward judicial free speech than by merely looking at a judge's overall conservatism or liberalism.

Where courts have neither the purse nor the sword, they depend on public acquiescence for their rulings to have any impact.<sup>191</sup> Legitimacy – specifically, the public willingness to acquiesce in the rulings of courts<sup>192</sup> – enables policy-making, and without it the courts are powerless to stand between the majority and their desires. The dissenters' concern with “legitimacy” and “public confidence” thus reflects a jealous guarding of judicial power. The empirical data bear out this interpretation: Justices Stevens, Souter, Ginsburg, and Breyer have, with Justice Kennedy, been the most reliable advocates on the Court for exercising judicial power.<sup>193</sup>

By “majoritarian” I do not mean simply an unwillingness to strike down

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<sup>187</sup> See, e.g., BORK, *supra* note 47, at 117; Graglia, *Judicial Review*, *supra* note 47. But see LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); TUSHNET, *supra* note 47.

<sup>188</sup> See Hall, *supra* note 26, at 341, 345, 348.

<sup>189</sup> See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); ELY, *supra* note 40.

<sup>190</sup> See, e.g., *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (“The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities . . .”).

<sup>191</sup> See, e.g., *McCreary County v. ACLU*, 545 U.S. \_\_\_, 125 S. Ct. 2722, 2752 (2005) (Scalia, J., dissenting).

<sup>192</sup> See Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1828 (2005) (describing “authoritative legitimacy”).

<sup>193</sup> See *infra* notes 202-07 and accompanying text.

laws. Instead, the majoritarian Justice will refrain from striking down those laws that have majority support from the voters. There are several reasons “duly enacted laws do not always carry with them popular support.”<sup>194</sup> Most obviously, most members of the public are unaware of the existence of most laws whose constitutionality is at issue in Supreme Court cases. Fewer still care very much about whether a particular law survives judicial review.<sup>195</sup> A public that is unaware of a law and apathetic about its continued existence is unlikely to oppose a Court decision striking it down, and a majoritarian Justice will not feel very conflicted in joining such a decision.

Furthermore, legislation is often enacted not to placate the majority, but to appeal to minorities who are particularly concerned about an issue. Thus, the process of legislative logrolling yields laws that are opposed mildly by large portions of the public but are actively supported by minorities who use the intensity of their preferences to influence the legislative process. Striking down such legislation is hardly counter-majoritarian.

To the extent, however, that one can isolate instances of judicial review of *popular* legislation, one might be able to assess which Justices are truly counter-majoritarian, and therefore which might have the greatest fear of a popularly influenced judiciary. I attempted to capture this variable by analyzing the cases that have concerned judicial review of direct democracy, i.e., initiatives and referenda. In those cases, where the voting public has already indicated majority support for the measure, a vote to strike down the law indicates a willingness to oppose the expressed will of the people. It should, therefore, be a good indicator of a Justice's counter-majoritarian inclinations.<sup>196</sup> Unfortunately, there are too few Supreme Court decisions involving the constitutionality of initiatives or referenda to be helpful. Since Justice Breyer's 1994 appointment, there have been only three such cases.<sup>197</sup> Chief Justice Rehnquist and Justices Scalia and Thomas voted to strike down only one of the three, making them the most majoritarian Justices on that measure, consistent with the findings in the rest of this Article, but the number of cases is far too small to enable one to make meaningful conclusions.

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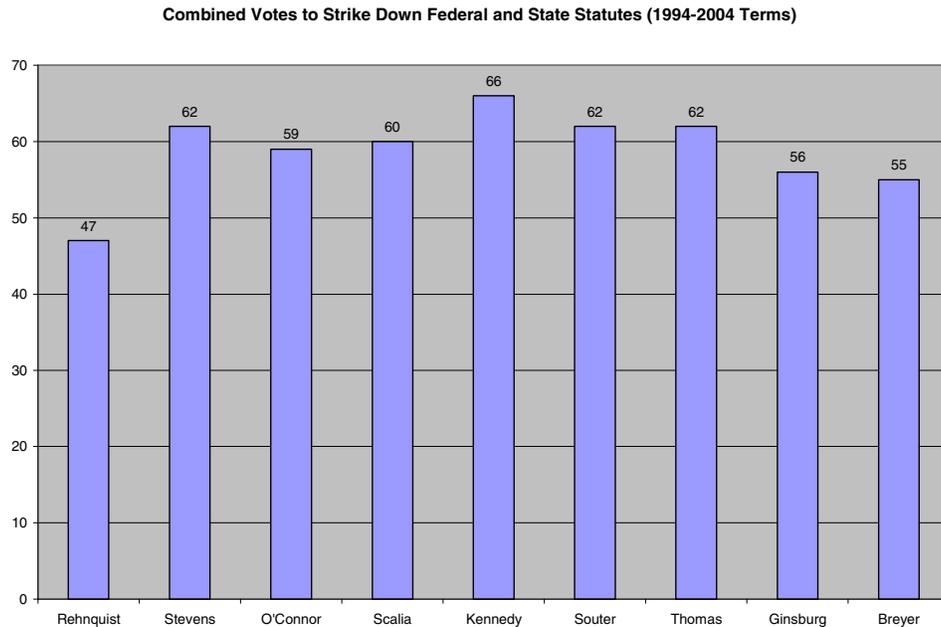
<sup>194</sup> Friedman, *supra* note 30, at 2605. See generally, e.g., WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE (1988).

<sup>195</sup> See Devins, *supra* note 63.

<sup>196</sup> This is not to say, however, that initiatives or referenda that become law necessarily represent the majority's desires. The public may be ill-informed about or uninterested in the matter, and most may not vote at all. See Mihui Pak, *The Counter-Majoritarian Difficulty in Focus: Judicial Review of Initiatives*, 32 COLUM. J.L. & SOC. PROBS. 237, 245-46 (1999); Michael Vitiello & Andrew J. Glendon, *Article III Judges and the Initiative Process: Are Article III Judges Hopelessly Elitist?*, 31 LOY. L.A. L. REV. 1275 (1998). Nevertheless, as compared to republican legislative activity, direct democracy is more majoritarian as a general matter.

<sup>197</sup> *California Democratic Party v. Jones*, 530 U.S. 567 (2000); *Romer v. Evans*, 517 U.S. 620 (1996); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

Of potentially equal value are the Justices' votes in cases raising issues of judicial power. If, as I have argued, the purpose of speech restrictions is to increase the power of the judiciary to act against majority preferences, then those Justices who support judicial power should be inclined to support the constitutionality of speech restrictions. The following graphs use two different measures to capture the Justices' beliefs about judicial power: the number of cases where a Justice votes to strike down a law as tabulated by Professor Lori Ringhand using political scientist Harold Spaeth's Supreme Court database,<sup>198</sup> and my tabulation of the Justices' votes in "judicial power" cases as classified in the same database,<sup>199</sup> which include cases adjudicating issues of standing, justiciability, jurisdiction, and the like.<sup>200</sup> "Pro-judicial-power decisions" are ones which the Justice voted to permit the court to entertain the action.<sup>201</sup>



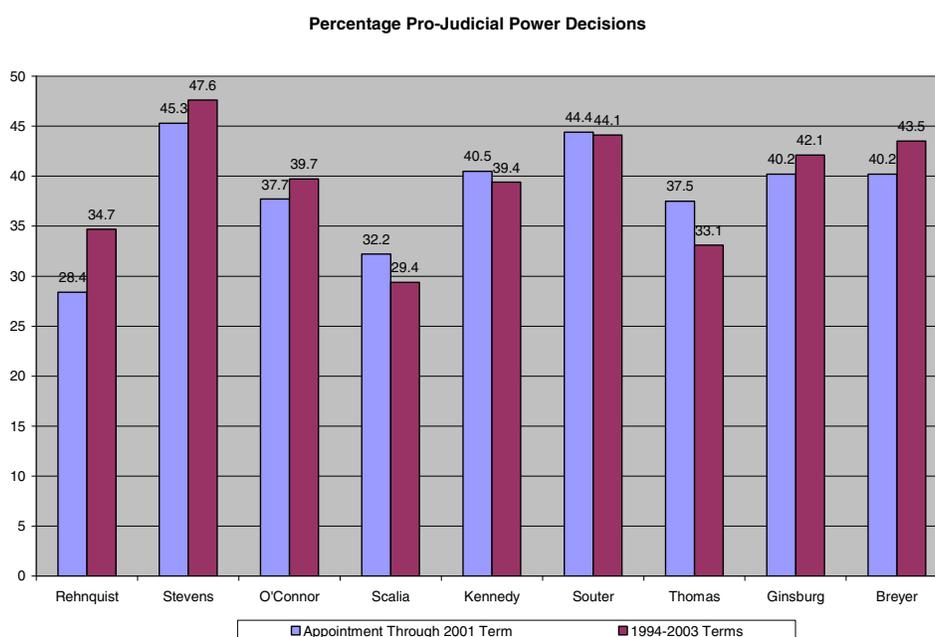
<sup>198</sup> Source: Lori A. Ringhand, *Judicial Activism and the Rehnquist Court 19-20* (Aug. 11, 2005) (forthcoming 2006) (manuscript on file with the \_\_\_\_\_ *Law Review*) (reporting data collected from the Justice-Centered Supreme Court Database, available at <http://www.as.uky.edu/polisci/ulmerproject/sctdata.htm>, and updated through the 2004 Term). Ringhand's dataset is available at <http://uk-law.uky.edu/ringhand/default.aspx>. See also KECK, *supra* note 170, at 251. Cf. EPSTEIN, ET AL., *supra* note 156, at 588-90 (assessing each Justice's agreement with decisions striking down legislation). Justice Kennedy was the Justice most likely to agree with the Court when it struck down a law (93.8%). The other Justices ranked as follows: Stevens (83.3%), Souter (78.6%), O'Connor (75.7%), Thomas (73.8%), Scalia (69.0%), Ginsburg (63.6%), Breyer (59.3%), and Rehnquist (44.0%). See *id.*

<sup>199</sup> The methodology for this tabulation was specified in note 157, *supra*, except that here the issues were restricted to 701-899.

<sup>200</sup> See SPAETH, *supra* note 155, at 54-56.

<sup>201</sup> See *id.* at 59 (stating that decisions were coded on the basis of whether they were "pro-exercise of judicial power," "pro-judicial activism," or "pro-judicial review of administrative action").

The results show no apparent connection between Justices who voted to strike down the restriction in *White* and those who regularly vote to strike down other laws. The Justices most often voting to strike down a law are Justices Kennedy, followed by Justices Stevens, Thomas, and Souter (who votes to strike down sixty-two laws), and Justice Scalia, in that order. Only two of those five, Justice Stevens and Justice Souter, dissented in *White*. Perhaps more important, there is very little variation on this measure between all of the Justices except Chief Justice Rehnquist,<sup>202</sup> suggesting that measuring their counter-majoritarian tendencies by tallying the number of votes to strike down statutes does not capture any distinctions in their jurisprudence.<sup>203</sup>



There is, however, some relationship between the Justices' votes in *White* and their votes in cases raising questions of judicial power. Each of the Justices who have been most supportive of judicial power over the tenure of the current natural Court (that is, beginning with the appointment of Justice Breyer) was in the dissent in *White*. This supports the hypothesis that because judicial campaign restrictions seek to increase judicial power,

<sup>202</sup> Cf. SEGAL & SPAETH, *supra* note 78, at 415-16 (noting the relative deference Chief Justice Rehnquist employs in reviewing both "conservative" and "liberal" statutes, though he is more likely to overturn "liberal laws").

<sup>203</sup> This is not to say, of course, that the Justices exercise judicial review similarly. The Justices strike down different *kinds* of laws, but strike down roughly the same *number* of laws. See Ringhand, *supra* note 198.

the Justices most accepting of the restrictions will be those who are most likely to take an expansive view of that power.

Data taking into account all judicial power cases from each Justice's appointment through the 2001 Term<sup>204</sup> present a similar picture, with the notable exception of Justice Kennedy's position. Using that data, Justice Kennedy is as likely to support claims of judicial power as are Justices Ginsburg and Breyer. This is not surprising, as Justice Kennedy has earned a reputation as a "judicial imperialist,"<sup>205</sup> being both the Justice most likely to vote to strike down statutes and the only Justice more likely than not to vote to strike down statutes<sup>206</sup> whether those challenges are from a conservative or a liberal direction,<sup>207</sup> but it does suggest that the Justices' views on judicial power are not the sole determinant of their positions on judicial free speech. Such a suggestion is consistent with Justice Kennedy's *White* concurrence. The concurrence rests on the autonomy theory of the First Amendment, and is likely to indicate that his views of criminal justice and judicial power may matter less in his analysis of judicial-free-speech issues than such views may matter for other Justices.

Not only have the Justices' votes shown differing visions of the role of courts in society, but the content of their writing has done so as well. The Justices in the *White* majority most opposed to exercising judicial power – Chief Justice Rehnquist and Justices Scalia and Thomas – have been quite willing to criticize the counter-majoritarian nature of judicial review as inconsistent with democratic self-government<sup>208</sup> and have encouraged political oversight of the courts.<sup>209</sup> Chief Justice Rehnquist has gone so far

<sup>204</sup> See EPSTEIN, ET AL., *supra* note 156, at 486-89.

<sup>205</sup> David G. Savage, *Taking a Road Less Traveled in the High Court: Justice Kennedy, Chosen As a Conservative, Has Made Decisions That Echo the Liberal Warren Era*, L.A. TIMES, Mar. 6, 2005, at A33 (quoting an unidentified "former clerk").

<sup>206</sup> See KECK, *supra* note 170, at 250.

<sup>207</sup> See SEGAL & SPAETH, *supra* note 78, at 412-16.

<sup>208</sup> See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (opinion of the Court by Rehnquist, C.J.); *United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) ("The[] [Framers] left us free to change. The same cannot be said of this most illiberal Court, which has embarked on a course of inscribing one after another of the current preferences of the society (and in some cases only the counter-majoritarian preferences of the society's law-trained elite) into our Basic Law."); *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 711 (1996) (Scalia, J., dissenting) ("Day by day, case by case, the Court is busy designing a Constitution for a country I do not recognize."); *Furman v. Georgia*, 408 U.S. 238, 470 (1972) (Rehnquist, J., dissenting) ("While overreaching by the Legislative and Executive Branches may result in the sacrifice of individual protections that the Constitution was designed to secure against the State, judicial overreaching may result in sacrifice of the equally important right of the people to govern themselves."); SUE DAVIS, *JUSTICE REHNQUIST AND THE CONSTITUTION* 25-26 (1989); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 704-06 (1976). See also Edwin Meese, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L.J. 455, 465 (1986).

<sup>209</sup> Chief Justice Rehnquist, having participated in deliberations concerning President Nixon's nominations to the Supreme Court, see JOHN W. DEAN: *THE REHNQUIST CHOICE: THE UNTOLD STORY OF THE NIXON APPOINTMENT THAT REDEFINED THE SUPREME COURT* 15-16, 19, 27-28, 155 (2001), later argued that it was "both normal and desirable" for the President to try to "pack" the courts with judges fitting his (and, by hypothesis, the people's) judicial philosophy. See WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 236 (1987). See also *South Carolina v. Gathers*, 490 U.S. 805, 824 (Scalia, J., dissenting) ("Overrulings of precedent rarely occur without a change in the Court's personnel."); REHNQUIST, *supra*, at 319

as to argue that judges who impose their policy judgments under the guise of constitutional interpretation “either ought to stand for reelection on occasion, or their terms should expire and they should be allowed to continue serving only if reappointed by a popularly elected Chief Executive and confirmed by a popularly elected Senate.”<sup>210</sup>

Further, the Court’s majoritarians have suggested that the views of the people on constitutional matters are as likely to be correct as the views of judges, undercutting the argument that independence is necessary to achieve a proper interpretation of the Constitution.<sup>211</sup> Justice Scalia, the author of the Court’s opinion in *White*, is more explicit than any other member of the Court in charging the judiciary with refusing to be bound by anything other than its own desires.<sup>212</sup> He has given up on the vision of judicial independence as a tool to protect the rule of law, and favors limiting that independence as a second-best alternative to giving courts free rein to do what they may in the name of the law. As the Justice has opined, “I am not happy about the intrusion of politics into the judicial appointment process. Frankly, however, I prefer it to the alternative, which is government by judicial aristocracy.”<sup>213</sup>

Each characteristic example of Justice Scalia’s conservative-populist rhetoric, in which he is often joined by Chief Justice Rehnquist and Justice Thomas, stems from an abiding distrust of the judiciary’s capacity as a law-making body. *Planned Parenthood v. Casey*,<sup>214</sup> *Lee v. Weisman*,<sup>215</sup> *Romer v. Evans*,<sup>216</sup> *Stenberg v. Carhart*,<sup>217</sup> *Atkins v. Virginia*,<sup>218</sup> and *Lawrence v.*

(arguing that the Constitution provides for political input into the composition of Article III courts and the Article V amendment process because the Framers were “wary of unchecked power in the judiciary as in all other branches of government”).

Chief Justice Rehnquist has defended judicial independence, going so far as to refer to it as one of the “crown jewels” of the constitutional structure, William H. Rehnquist, *Keynote Address*, 46 AM. U. L. REV. 263, 274 (1996), but, in his words, “[t]his simply shows that there is a wrong way and a right way to go about putting a popular imprint on the federal judiciary.” *Id.* at 273.

<sup>210</sup> Rehnquist, *supra* note 208, at 698.

<sup>211</sup> *See Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 293 (1990) (Scalia, J., concurring) (“[T]he point at which life becomes ‘worthless,’ and the point at which the means necessary to preserve it become ‘extraordinary’ or ‘inappropriate,’ are neither set forth in the Constitution nor known to the nine Justices of this Court any better than they are known to nine people picked at random from the Kansas City telephone directory.”); REHNQUIST, *supra* note 209, at 317 (arguing that viewing the Court as “the conscience of the country . . . has a considerable potential for mischief” when used to place into law the “personal moral judgments” of “individual judges.”).

<sup>212</sup> *Roper v. Simmons*, 125 S. Ct. 1183, 1217 (2005) (Scalia, J., dissenting) (quoting THE FEDERALIST NO. 78 (Alexander Hamilton), at 465, 471 (Clinton Rossiter ed. 1961)). *See also* *County of Riverside v. McLaughlin*, 500 U.S. 44, 60 (1990) (Scalia, J., dissenting) (“[T]his Court’s constitutional jurisprudence . . . alternately creates rights that the Constitution does not contain and denies rights that it does.”).

<sup>213</sup> *See* Warren Richey, *One Justice’s Vision of Role of the Courts*, CHRISTIAN SCI. MONITOR, Nov. 16, 2004, at 1.

<sup>214</sup> 505 U.S. 833, 996-1001 (1992) (Scalia, J., concurring in judgment in part and dissenting in part).

<sup>215</sup> 505 U.S. 577, 636 (1992) (Scalia, J., dissenting).

<sup>216</sup> 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (“This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected . . .”), 651-53 (arguing that the Court’s decision was an is “an act, not of judicial judgment, but of political will.”).

<sup>217</sup> 530 U.S. 914, 954-55 (2000) (Scalia, J., dissenting).

<sup>218</sup> 536 U.S. 304, 338 (2002) (Scalia, J., dissenting) (“Seldom has an opinion of this Court rested so

*Texas*,<sup>219</sup> to name a few cases, all contain language not merely critical of the Court's conclusions, but critical of the Court's use of its judicial review power.<sup>220</sup> As such, they indicate that those Justices see judicial power as a dangerous in the wrong hands, and that the alternative – relatively unconstrained majoritarianism – may be preferable.<sup>221</sup>

The majoritarian language in Justice Scalia's opinions accompanies his reliance on originalism, which he views as a way of preventing judges from changing the Constitution to suit their own preferences. But majoritarianism – deference to current public majorities – and originalism – enforcement of the policy decisions of past majorities – are sometimes in conflict.<sup>222</sup> Both, however, reflect a distrust of elite judicial policy-making, and it would not therefore be surprising to see majoritarian rhetoric in an originalist argument where the originalist is accusing other judges of making policy decisions supported neither in the Constitution nor in current majority preferences.<sup>223</sup> It is interesting in this context to note that the Justices who believe most fervently in a static conception of law are the ones in *White* who saw no compelling interest in maintaining the insulation of the judiciary. One might expect Justices for whom the law is fixed to relish the ability to apply that fixed constitutional meaning irrespective of

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obviously upon nothing but the personal views of its members.”), 348-52.

<sup>219</sup> 539 U.S. 558, 602-03 (2003) (Scalia, J., dissenting).

<sup>220</sup> See generally KEVIN A. RING, ED., *SCALIA DISSENTS: WRITINGS OF THE SUPREME COURT'S WITTIEST, MOST OUTSPOKEN JUSTICE* (2004); Michael Frost, *Justice Scalia's Rhetoric of Dissent: A Greco-Roman Analysis of Scalia's Advocacy in the VMI Case*, 91 KY. L.J. 167 (2002).

<sup>221</sup> To be sure, there may be alternate explanations for the rhetoric in Justice Scalia's separate opinions. His personality, rather than a majoritarian philosophy, may cause the opinions to be more personal than they would otherwise be. Thus, other Justices' relatively restrained use of such rhetoric may not indicate that Justice Scalia is much more majoritarian than they are. Still, it seems important that Justices O'Connor and Kennedy, who often use judicial power in such a way as to evoke the ire of Justice Scalia, typically decline to join Justice Scalia's separate opinions when he is his most bombastic in criticizing the Court's free-wheeling approach to judicial review, even when they agree with him as to the outcome of the case. Additionally, criticizing the Court is by no means rare in dissenting opinions, though as I stated in the text, I think the majoritarian rhetoric is subtly different from run-of-the-mill dissents.

I attempted to measure empirically the degree of anti-Court rhetoric in Supreme Court opinions, but achieved only inconclusive results. Hypothesizing that the Justices I have identified as most majoritarian would criticize the Court for disregarding the rule of law, see John C. Eastman, *Judicial Review of Unenumerated Rights: Does Marbury's Holding Apply in a Post-Warren Court World?*, 28 HARV. J.L. & PUB. POL'Y 713, 740 (2005) (“A ‘Rule of Law’ that is itself lawless is not the kind of ‘law’ that generates (or deserves) respect.”); Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 985 (1987), and that the counter-majoritarian Justices would hold out the courts as safeguarding the rule of law, see *Bush v. Gore*, 531 U.S. 98, 158 (Breyer, J., dissenting); Farnsworth, *supra* note 96, at 170; Randall T. Shepard, *Judicial Independence: Telephone Justice, Pandering, and Judges Who Speak out of School*, 29 FORDHAM URB. L.J. 811, 811 (2002), I asked my research assistant to collect all the decisions in which one or more Supreme Court opinions used the term “rule of law,” and to categorize the use of the term as pro-court or anti-court. She found twenty-one pro-court uses, and sixteen anti-court ones. We then tallied the Justices who joined each opinion using the term and calculated the percentage or each Justice's uses that were pro-court and anti-court. From most anti-court to most pro-court, the Justices (with pro-court percentages in parentheses) were: Scalia (50%), Thomas (57%), Souter (64%), Stevens, Ginsburg, and Breyer (67%), Rehnquist and O'Connor (75%), and Kennedy (100%). A list of the cases on which this data is based is on file at the \_\_\_ *Law Review*.

<sup>222</sup> See generally KECK, *supra* note 170.

<sup>223</sup> See *McCreary County v. ACLU*, 545 U.S. \_\_\_, \_\_\_, 125 S. Ct. 2722, 2752 (2005) (Scalia, J., dissenting) (criticizing the Court for “contradict[ing] both historical fact and current practice”).

current preferences. Stated differently, Justices who believe that law is unchanging are counter-majoritarians in that they reject current majority preferences in favor of law established by prior generations' majorities.

Yet in spite of originalists' willingness to oppose current majorities, they are willing to tolerate public influence on the law to avoid an even greater harm: judges' policy preferences, rather than the public's, shaping the law's evolving content. *White* therefore suggests that originalists see three possible ways in which adjudication proceeds: (1) Independent courts apply a fixed conception of law, occasionally in opposition to current majority preferences. (2) Accountable courts apply an evolving concept of law, interpreting the law in accordance with public preferences. (3) Independent courts apply an evolving concept of law, interpreting the law in accordance with (other) judges' own preferences. Originalists forsook (1) in *White*, either because they viewed it as unrealistic to hope that judges will faithfully interpret the law without looking to their own policy preferences or because those areas where originalism still holds sway (statutory construction and some separation-of-powers issues, for example) are unlikely to be significant in public discussions of judicial performance. On issues important to the public – crime, capital punishment, abortion, affirmative action, gay rights – originalist arguments are overwhelmingly heard in dissent. It makes sense, therefore, that the originalists would see the effective choice presented in *White* as between judicial and majoritarian policy-making, and that they would prefer the latter.

The *White* dissenters, on the other hand, have praised courts' ability to advance the fortunes of individuals and groups lacking access to the political process.<sup>224</sup> They see courts as agents of change, policy-makers who can improve on the law, pushing the nation to fulfill aspirations of equality and liberty, only if they are unconstrained by the unenlightened public's desires.<sup>225</sup> Justice Ginsburg, for example, accepts moderate, incremental change in policy, but because moderate change will be politically acceptable, rather than because moderation is what she desires.<sup>226</sup>

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<sup>224</sup> Justice Ginsburg has praised the independence of the federal judiciary because it enables the courts to stand in the way of majoritarian desires—to protect those who “are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement.” See Ruth Bader Ginsburg, *Remarks on Judicial Independence*, 20 HAW. L. REV. 603, 608-09 (1998) (quoting *Chambers v. Florida*, 309 U.S. 227, 241 (1940)).

<sup>225</sup> Justice Breyer has argued against using the First Amendment to promote individual self-expression at the expense of other values. See *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 399-405 (Breyer, J., concurring); Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 250-256 (2002). It is therefore not surprising that he would see fit to allow states to restrict speech to promote counter-majoritarian judicial power.

<sup>226</sup> See Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1208 (1992) (“[W]ithout taking giant strides and thereby risking a backlash too forceful to contain, the Court, through constitutional adjudication, can reinforce or signal a green light for a social change.”). Thus, Justice Ginsburg has criticized the Court’s “breathhtaking” decision in *Roe v. Wade*, 410 U.S. 113 (1973), because the forceful way in which the Court articulated the abortion right stalled the legislative process which had been lessening restrictions on abortion until *Roe* provoked “a well-organized and vocal right-to-life movement [which] rallied and succeeded, for a considerable time, in turning the legislative tide in the opposite direction.” Ginsburg, *supra*, at 1198, 1205.

This analysis suggests that though visions of judicial power may motivate most of the Justices' positions on judicial free speech, it apparently does not so influence the Justices in the middle – particularly Justice Kennedy. He holds an expansive conception of judicial power and has refrained from joining (indeed, he is the object of<sup>227</sup>) much of the majoritarian anti-court rhetoric. Moreover, both he and Justice O'Connor joined with Justice Souter in *Casey* to write the most self-conscious plea for legitimacy and power in the Court's history.<sup>228</sup> Thus, the Justices who see the Canons as limiting the public's influence over the judiciary may uphold them or strike them down depending on whether they see that influence as positive or negative; Justices who see the Canons as limiting the search for truth and individual self-expression may strike them down regardless of their views of counter-majoritarian policy-making.

Putting these considerations together, the following hypothesis develops: Judges are willing to grant First Amendment protection to political speech by judges if either they view the claim of free speech through an individual-rights, autonomy-focused paradigm, under which the government is not permitted to limit the freedoms of speech and thought to encourage support for the government, or they view speech restrictions as an undemocratic attempt to enable elite policy-making by the judiciary. Judges are unwilling to grant First Amendment protection to political speech by judges if they view that speech as threatening judicial independence *and* if for the most part they consider independence beneficial in protecting the rights of the unpopular.<sup>229</sup>

### III. THE COMPETING INTERESTS

Restrictions on the political activity of judges and judicial candidates fall into two categories: restrictions on the ways judges conduct their own campaigns, and restrictions on the involvement of judges in politics

<sup>227</sup> See, e.g., *Stenberg v. Carhart*, 530 U.S. 914, 955 (2000) (Scalia, J., dissenting) (“There is no cause for anyone who believes in *Casey* to feel betrayed by this outcome.”), 961 (Kennedy, J., dissenting) (“A review of *Casey* demonstrates the legitimacy of these policies.”); 979 (Kennedy, J., dissenting) (“The Court’s holding stems from . . . misinterpretation of *Casey* . . .”); *Lee v. Weisman*, 505 U.S. 577, 631 (1992) (Scalia, J., dissenting) (arguing that Justice Kennedy’s separate opinion in *County of Allegheny v. ACLU*, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part), “of course” were inconsistent with Justice Kennedy’s majority opinion in *Weisman*), 636 (referring to Justice Kennedy’s “coercion” analysis as “psychology practiced by amateurs” and “not to put too fine a point on it, incoherent”).

<sup>228</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 864-69 (1992). See also *Cooper v. Aaron*, 358 U.S. 1 (1958).

<sup>229</sup> I do not believe, nor do I claim, that this division will predict every vote. As an example of the limitations of this analysis, Judge Reinhardt, considered to be one of the most liberal federal appellate judges, concurred in a decision striking down a law forbidding parties from endorsing candidates in non-partisan races, including judicial ones. See *Geary v. Renne*, 911 F.2d 280 (9th Cir. 1990) (en banc). His opinion contained the traditional First Amendment arguments bespeaking an autonomy approach to the issue, see *id.* at 286, 289-90 (Reinhardt, J., concurring); see also Stephen Reinhardt, *Judicial Speech and the Open Judiciary*, 28 LOY. L.A. L. REV. 805 (1995), as did the majority opinion, see 911 F.2d at 283-86 (opinion of the court), but it also contained reference to the ability of voters to base their votes on the policy positions of judicial candidates, see *id.* at 294-95 (Reinhardt, J., concurring), a surprising rhetorical move for a liberal.

generally or in others' campaigns. The interests served by each type of restriction are somewhat different, and as a result judicial review of one type may not indicate whether all restrictions on political activity are constitutional.

#### A. Restricting Judicial Campaigns and Limiting Public Influence on Judicial Policy

In sharp contrast to the distance most federal judges put between themselves and electoral politics,<sup>230</sup> judges in thirty-nine states stand for some form of popular election,<sup>231</sup> and ten of those states elect judges on partisan ballots.<sup>232</sup> As a result, state-court judges often make less of an effort to separate themselves from politics and parties than do their federal counterparts,<sup>233</sup> and critics charge that the line between law and politics has been blurred by elections that force judges to become politicians.<sup>234</sup> To stem this concern, state canons of judicial ethics have regulated judicial campaigning, resulting in contests that typically have been "boring, low participation, minimally useful affairs."<sup>235</sup>

Until the 1990s, state regulation of the political speech of judges largely went unchallenged, and it was unclear whether judges – even elected judges

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<sup>230</sup> In recent years, blatantly political remarks by a federal judge are quite rare – so much so that when such remarks do occur, they make national news. District Judge Alcee Hastings's numerous comments about the "racism" of President Reagan and advocacy for the Reverend Jesse Jackson, see Talbot D'Alemberte, *Searching for the Limits of Judicial Free Speech*, 61 TULANE L. REV. 611, 611-14 (1987), and Circuit Judge Guido Calabresi's recent statements comparing the selection of President George W. Bush in 2000 to the installations of Adolf Hitler and Benito Mussolini (all the while purporting not to comment on "what some have said is the extraordinary record of incompetence of this administration") have caused stirs precisely because they are so aberrant. See Josh Gerstein, *Audience Gasps as Judge Likens Election of Bush to Rise of Il Duce: 2nd Circuit's Calabresi Also Compares Bush's Rise to That of Hitler*, N.Y. SUN, July 21, 2004, at 1. Calabresi's "remarks were met with rousing applause from the hundreds of lawyers and law students in attendance" at the American Constitution Society event. *Id.*

<sup>231</sup> See THE COUNCIL OF STATE GOVERNMENTS, *supra* note 1, at 209 11.

<sup>232</sup> See *id.* The ten states are Alabama, Arkansas, Illinois, Louisiana, New Mexico, New York, North Carolina, Pennsylvania, Texas, and West Virginia.

<sup>233</sup> See, e.g., O'Neill v. Coughlan, No. 1:04CV1612 (N.D. Ohio Sept. 14, 2004) (discussing a complaint against a judge for disclosing his partisan affiliation in campaign advertisements); Spargo v. N.Y. State Comm'n on Judicial Conduct, 244 F. Supp. 2d 72 (N.D.N.Y.), *vacated on abstention grounds*, 351 F.3d 65 (2d Cir. 2003), *cert. denied*, 124 S. Ct. 2812 (2004) (discussing a state judge's methods of campaigning for himself and participation in rallies for candidate Bush during the 2000 election controversy in Florida); Sam Skolnik, *Outspoken Justice is Ripe Target for Rivals: Some See Bias in Libertarian Leanings of "The Great Dissenter,"* SEATTLE POST-INTELLIGENCER, Sept. 7, 2004, at B1; *Judge Withdraws Decision to Block Nader from Ballot*, available at <<http://www.thenewmexicochannel.com/politics/3744807/detail.html>> (last visited Sept. 20, 2004). New Mexico judge Wendy York, who held that third-party presidential candidate Ralph Nader should be barred from that state's ballot, withdrew her opinion and recused herself owing to controversy generated by her being a financial contributor to the Kerry campaign. She admitted no bias, but withdrew out of a concern that her decision created the appearance of impropriety. See *Judge Withdraws Decision, supra*.

<sup>234</sup> See, e.g., Roscoe Pound, *The Causes of Popular Dis-satisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 748 (1906) (arguing that the involvement of judges with politics diminishes the respect given them); Schotland, *To the Endangered Species List, supra* note 26; Katie Whitehead, *Loose Lips Sink Ships: The Implications of a Liberal Policy Restricting Judicial Speech*, 28 S. ILL. U. L.J. 159, 170 (2003) (bemoaning the injection of "judicial politics" into "the election process"); *Politicians in Judges' Robes*, N.Y. TIMES, Feb. 26, 2003, at A24.

<sup>235</sup> Reynolds Cafferata, Note, *A Proposal for an Empirical Interpretation of Canon 5*, 65 S. CAL. L. REV. 1639, 1674 (1992).

– had *any* First Amendment right to speak on political matters or otherwise participate in politics besides simply appearing on the ballot.<sup>236</sup> *White* changed that by invalidating Minnesota’s crude attempt to prohibit its judicial candidates from discussing any disputed legal or political issues.<sup>237</sup> Far from settling the issue, however, *White* provoked new debate among academics, judges, and states about how best to achieve the goals of judicial independence, accountability, and free speech.<sup>238</sup>

Even after *White*, similar restrictions persist, each of which shapes the scope of permissible debate in judicial elections. Specifically, the ABA Model Code requires that judicial candidates “not . . . make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office”<sup>239</sup> or “knowingly misrepresent the identity, qualifications, present position or other fact

<sup>236</sup> Though the “announce clause” challenged in *White* had not been the subject of a Supreme Court case until 2002, the ABA changed it in 1990 over concerns that it impinged on free speech. See Max Minzner, *Gagged but Not Bound: The Ineffectiveness of the Rules Governing Judicial Campaign Speech*, 68 UMKC L. REV. 209, 214 (1999); Cafferata, *supra* note 235, at 1646-48; Adam R. Long, Note, *Keeping Mud off the Bench: The First Amendment and Regulation of Candidates’ False or Misleading Statements in Judicial Elections*, 51 DUKE L.J. 787, 797 (2001). The current version bars judicial campaign “pledges, promises [and] commitments,” but at least in theory allows some discussion of issues. See *infra* note 239 and accompanying text.

<sup>237</sup> See 536 U.S. at 770-74 (describing the breadth of the prohibition).

<sup>238</sup> I have been privileged to take part in this dialogue. See Dimino, *supra* note 26. Other notable contributions include Alsdorf, *supra* note 130; Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 COLUM. L. REV. 563 (2004); Katherine A. Moerke, *Must More Speech Be the Solution to Harmful Speech?: Judicial Elections After Republican Party of Minnesota v. White*, 48 S.D. L. REV. 262 (2003); and Matthew D. Besser, Note, *May I Be Recused?: The Tension Between Judicial Campaign Speech and Recusal After Republican Party of Minnesota v. White*, 64 OHIO ST. L.J. 1197 (2003). See also *The Way Forward: Lessons from the National Symposium on Judicial Campaign Conduct and the First Amendment*, 35 IND. L. REV. 649 (2002), as well as the individual contributions to that symposium, which was held prior to the Court’s decision in *White*. Missouri quickly changed its ethical Canon to indicate that although judges have the First Amendment right to announce their views, “[r]ecusal, or other remedial action, may . . . be required of any judge in cases that involve an issue about which the judge has announced his or her views. . . .” See *In re: Enforcement of Rule 2.03, Canon 5B(1)(c) Campaign Conduct* (July 18, 2002), available at <http://www.osca.state.mo.us/sup/index.nsf>. The ABA similarly mandates that judges recuse themselves when prior statements have committed them or appeared to commit them with respect to an issue in a case. See CODE OF JUDICIAL CONDUCT Canon 3(E)(1)(f) (2003); Matthew J. Medina, Note, *The Constitutionality of the 2003 Revisions to Canon 3(E) of the Model Code of Judicial Conduct*, 104 COLUM. L. REV. 1072 (2004).

<sup>239</sup> Forty-three states have a limitation prohibiting pledges, promises, commitments, or all three. The states that appear to have no comparable prohibition are Connecticut, Delaware, Hawaii, Massachusetts, New Jersey, North Carolina, and Virginia. Of those states, only North Carolina elects judges.

MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(i). Some states prohibit their judges and judicial candidates from making statements that “appear to commit” them, e.g., FLA. CODE OF JUDICIAL CONDUCT, Canon 7A(3)(d)(ii); Rule of the Supreme Court of Kentucky 4.300, Canon 5B(1)(c); 22 N.Y.C.R.R. § 100.5 (A)(4)(d)(ii), “with respect to cases or controversies that may come before the court[s]” for which they are running. Because the statements permitted by *White* might have appeared to commit a judicial candidate, however, that latter prohibition is almost certainly unconstitutional. As recounted in that case, candidate Gregory Wersal distributed literature in a 1996 race “criticizing several Minnesota Supreme Court decisions on issues such as crime, welfare, and abortion.” *Id.* at 768. One would think that such statements would, at a minimum, appear to commit him not to extend those decisions.

As the Seventh Circuit has noted, very few controversies are unlikely eventually to come before a court of general jurisdiction. See *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 229 (7th Cir. 1993). In practice, then, prohibitions on speech that could be the subject of a case are more universal than would appear on first inspection. Furthermore, as *White* noted, nobody paying attention to a judicial election campaign is likely to care about any issue *other than* those issues that might appear in a case. See 536 U.S. at 772.

concerning the candidate or an opponent.”<sup>240</sup> Judicial candidates “shall not personally solicit or accept campaign contributions or personally solicit publicly stated support,”<sup>241</sup> and the candidate’s campaign committee is limited to soliciting such support only during a specified window surrounding the election.<sup>242</sup> Contributions are limited in amount<sup>243</sup> and must be reported.<sup>244</sup> Finally, the catch-all restriction requires candidates to “maintain the dignity appropriate to judicial office and act in a manner consistent with the impartiality, integrity and independence of the judiciary[.]”<sup>245</sup>

The proffered objective of restricting judicial campaign speech is the promotion of the “independence” and “impartiality” of the judiciary and the “appearance” of both “independence” and “impartiality.”<sup>246</sup> As the *White* majority noted, “independence” and “impartiality” in this context turn out to be the same thing: the isolation of the judiciary from the desires of the public.<sup>247</sup> A judge who knows that his job depends on being acceptable to the median voter will not be able to decide cases independent of public opinion.<sup>248</sup> And a judge who has discussed legal issues in an attempt to win votes will be inclined, all other things equal, to act in accordance with whatever commitments he has made while campaigning.<sup>249</sup> He will therefore not approach every case neutrally; he will be inclined to favor whatever side offers the argument he supported while running for office. Only if judicial electioneering is neutered by prohibiting the discussion of issues can elections coexist with these ideals of “independence” and “impartiality.”

According to the theory behind judicial campaign speech restrictions, a judge who cannot campaign based on issues will not pledge himself to one side of a controversy, and while in office he will be free to exercise independent judgment, not fearing retaliation at the ballot box, so long as his challenger is effectively prevented from criticizing his decisions. Whether in fact impending elections influence judicial decision-making (as empirical data suggest they do),<sup>250</sup> or whether speech restrictions counter

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<sup>240</sup> MODEL CODE OF JUDICIAL CONDUCT, Canon 5A(3)(d)(ii).

<sup>241</sup> *Id.*, Canon 5C(2).

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* Canon 5C(3).

<sup>244</sup> *Id.*, Canon 5C(4).

<sup>245</sup> *Id.*, Canon 5A(3).

<sup>246</sup> *See, e.g.*, *Republican Party v. White*, 536 U.S. 765, 775 (2002).

<sup>247</sup> *Id.* at 775 n.6.

<sup>248</sup> *See, e.g., id.* at 788-89 (O’Connor, J., concurring); William S. Koski, *The Politics of Judicial Decision-Making in Educational Policy Reform Litigation*, 55 HASTINGS L.J. 1077, 1090 (2004).

<sup>249</sup> *See id.* at 800 (Stevens, J., dissenting).

<sup>250</sup> *See* Melinda Gann Hall & Paul Brace, *State Supreme Courts and Their Environments: Avenues to General Theories of Judicial Choice*, in SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 284 (Cornell W. Clayton & Howard Gillman eds., 1999); Melinda Gann Hall, *Justices as Representatives: Elections and Judicial Politics in the American States*, 23 AM. POLS. Q. 485 (1995); Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POLS. 427 (1992); Melinda

this influence (which is unclear),<sup>251</sup> the ethical Canons' goal is to reduce public influence on the making of judicial policy.<sup>252</sup>

The interest in maintaining the *appearance* of independence and impartiality refers to the perception of a judge being immune from public opinion and other factors besides the law, regardless of whether the judge was actually influenced. This interest is important, it is alleged, because if society believes that judges are merely politicians, courts will lose legitimacy and the people will be less inclined to accept judicial decisions unquestioningly.<sup>253</sup> The Canons' concern with maintaining a stately judicial image so as to maintain judicial legitimacy and power, though not a substantial concern in *White*,<sup>254</sup> figures especially prominently in an analysis of restrictions on judges' political activity *outside* their own campaigns.

#### B. Restricting Judicial Participation in Non-Judicial Campaigns and Protecting Public Esteem for the Judiciary

State and federal codes of judicial ethics (as well as the American Bar Association's Model Code of Judicial Conduct) require both elected and appointed judges to refrain from political activity, including matters relating to party politics and campaigns for non-judicial public office. These Canons include requirements that a judge not "act as a leader or hold an office in a political organization,"<sup>255</sup> "publicly endorse or publicly oppose another candidate for public office,"<sup>256</sup> "make speeches on behalf of a political organization,"<sup>257</sup> "attend political gatherings,"<sup>258</sup> or "solicit funds for, pay an assessment to or make a contribution to a political organization

Gann Hall & Paul Brace, *Toward an Integrated Model of Judicial Voting Behavior*, 20 AM. POLS. Q. 147 (1992); Joseph R. Grodin, *Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969, 1980 (1988). But see Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213, 230-31 (1983) (suggesting that judicial elections are unlikely to influence judges).

<sup>251</sup> See Richard L. Hasen, "High Court Wrongly Elected": A Public Choice Model of Judging and Its Implications for the Voting Rights Act, 75 N.C. L. REV. 1305, 1326, 1335 (1997) (noting that because the public rarely can use elections to make judges accountable for unpopular decisions, judges are free to "vote their values, that is, act independently, most of the time, whether they are elected or appointed.") Cf. Larry T. Aspin & William K. Hall, *Retention Elections and Judicial Behavior*, 77 JUDICATURE 306, 313 (1994) (suggesting that judges adjust their behavior in fear of electoral defeat even if defeat is "highly unlikely").

<sup>252</sup> It is for that reason that *White* saw the announce clause as presenting an "obvious tension" with a system of judicial elections. 536 U.S. at 787; see also *id.* at 792 (O'Connor, J., concurring).

<sup>253</sup> See *supra* notes 30-33, 42-45, 191-92 and accompanying text.

<sup>254</sup> *White* acknowledged that one purported interest served by the announce clause was "preserving the appearance of the impartiality of the state judiciary," which was claimed to be compelling because "it preserves public confidence in the judiciary." 536 U.S. at 775. The Court held that the clause was not narrowly tailored to serve any compelling interest in "impartiality," and that protecting the appearance of a non-compelling goal was itself non-compelling. The Court did not explicitly consider whether maintaining public confidence could be a compelling interest apart from a connection to an ill-defined sense of "impartiality."

<sup>255</sup> MODEL CODE OF JUDICIAL CONDUCT, Canon 5A(1)(a).

<sup>256</sup> *Id.*, Canon 5A(1)(b).

<sup>257</sup> *Id.*, Canon 5A(1)(c).

<sup>258</sup> *Id.*, Canon 5A(1)(d).

or candidate.”<sup>259</sup> Furthermore, “[a] judge shall resign from judicial office upon becoming a candidate for a non-judicial office either in a primary or in a general election,”<sup>260</sup> and may not engage in any political activity not expressly authorized by the Canons or law.<sup>261</sup>

Whereas restrictions on judicial campaigns seek to “undermin[e] . . . judicial elections,”<sup>262</sup> by limiting voters’ ability to influence judicial policy through elections, the principal object of restrictions on judges’ participation in others campaigns is different. A judge who wishes to participate in politics is not susceptible to the same pressures as is a would-be judge seeking election. In judicial campaigns, free speech threatens to make judges servants of the majority. In non-judicial ones, the judge already has his job, and he seeks no public approval for his political involvement; he seeks only to persuade his fellow voters and provide support for his personal or ideological allies.

Accordingly, non-judicial campaign restrictions do almost nothing to protect judges from public influence.<sup>263</sup> Instead, they attempt to maintain public esteem for the courts by separating them from the dirty business of politics. Statements by judges that might lead the public to question the non-political nature of the judiciary are condemned; privately expressed sentiment in support or opposition to a politician is not. Holding a party leadership position is prohibited; being a member of a party is not. Endorsing a candidate for executive or legislative office is prohibited; voting for that candidate is not. Each of these restrictions is constitutional only if it is a compelling interest to make the public believe (falsely) that the judiciary is non-political.<sup>264</sup> Particularly after *White* demonstrated a willingness to look realistically at the judiciary and see the human element to judging, such an interest would appear anything but compelling.

The theory behind the Canons is one of appearances: The legitimacy of courts depends on public respect for judges;<sup>265</sup> judicial power depends on legitimacy;<sup>266</sup> and justice often depends on courts having the power to make

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<sup>259</sup> *Id.*, Canon 5A(1)(e).

<sup>260</sup> *Id.*, Canon 5A(2). See *Morial v. Judiciary Comm’n*, 565 F.2d 295 (5th Cir. 1977) (en banc) (upholding the Louisiana version of this provision).

<sup>261</sup> See MODEL CODE OF JUDICIAL CONDUCT, Canon 5D.

<sup>262</sup> *White*, 536 U.S. at 782.

<sup>263</sup> See *In re: Farrell*, 2004 Annual Report \_\_ (N.Y. Comm’n on Judicial Conduct June 24, 2004) (Emery, C., concurring) (“If safeguarding impartiality really is the goal, then there cannot possibly be any principled basis for prohibiting judges from contributing to or campaigning on behalf of others, but allowing them to raise money in this manner and campaign for themselves.”).

<sup>264</sup> Cf. Jeffrey A. Segal & Harold J. Spaeth, *Norms, Dragons, and Stare Decisis: A Response*, 40 AM. J. POL. SCI. 1064, 1080 (1996).

<sup>265</sup> See Nancy Gertner, *To Speak or Not to Speak: Musings on Judicial Silence*, 32 HOFSTRA L. REV. 1147, 1149, 1152 (2004).

<sup>266</sup> See, e.g., Snyder, *supra* note 43, at 239-40. Indeed, judicial power is synonymous with the sense of “legitimacy” that I use in this Article, viz., the extent to which the public acquiesces in a decision it views as wrong. Professor Fallon has termed this “authoritative legitimacy,” and sees it as a subset of “sociological legitimacy,” which is concerned with public obedience to judicial decisions, rather than any more normative

unpopular rulings.<sup>267</sup> If judges lose their neutrality by becoming part of the political machinery that is the antithesis of law, public respect for judicial decisions will diminish (we are warned),<sup>268</sup> and the judiciary will lose its power to enforce law when that law is unpopular.<sup>269</sup>

Left unspecified, however, are the specific consequences feared by proponents of the restrictions. A range of public responses to an “illegitimate” judiciary is possible, from open defiance of court decisions to the election of leaders determined to set the courts on a different path,<sup>270</sup> but in any event the capacity of courts to be policy-makers will be reduced if the public loses respect for judges. Pro-restriction forces benefit from leaving ambiguous exactly what they fear might happen if judges spoke their minds about politics. It may very well be a compelling interest to protect the power of courts to issue decisions and have decrees obeyed. Thus quotes about the importance of the judiciary sometimes suggest that the very survival of the separation of powers is at stake.<sup>271</sup> But such an

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vision of legitimacy under which the important question is whether the decision is in some sense “right.” See Fallon, *supra* note 192, at 1827-33.

<sup>267</sup> See, e.g., Raab, 793 N.E.2d at 1290-93; Sherrilyn A. Ifill, *Do Appearances Matter?: Judicial Impartiality and the Supreme Court in Bush v. Gore*, 61 MD. L. REV. 606, 611 (2002) (arguing that the appearance of favoritism can undermine public confidence in the judiciary); Alfred P. Carlton, Jr., *Preserving Judicial Independence – An Exegesis*, 29 FORDHAM URB. L.J. 835, 839 (2002) (citing the importance of public respect for the law).

<sup>268</sup> Interestingly, there is no evidence that public acquiescence in judicial decisions depends on a perception that judges hold no political views. See Mark Kozlowski, *Should the Regulation of Judicial Candidate Speech Regarding Legal and Political Issues Be Reconsidered?*, 43 S. TEX. L. REV. 161, 172 (2001); Snyder, *supra* note 43, at 241-43; Wendel, *supra* note 108, at 85. There is, however, evidence that judicial decisions are more likely to be obeyed if the public believed them to be arrived at “deliberatively” rather than in a “partisan” manner. See Gibson, et al., *supra* note 59, at 192; Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703 (1994).

As indicated in note 6, *supra*, political speech may be restricted only when the restriction satisfies strict scrutiny. The narrow-tailoring portion of the strict-scrutiny test would appear to require such “empirical support or at least sound reasoning” before political speech is restrained, for without such support the Canons risk suppressing speech without achieving any benefit from the suppression. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994) (plurality opinion) (quoting *Century Communications Corp. v. FCC*, 835 F.2d 292, 304 (D.C. Cir. 1987)); *Suster v. Marshall*, 149 F.3d 523, 529-32 (6th Cir. 1998) (discounting statistical evidence that a majority of the public viewed limits on judicial campaign spending as beneficial in reducing contributors’ influence); Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119, 125 (2004) (“[W]hen the scale and nature of the harm is non-obvious, evidence as to its existence is usually a necessary predicate to regulation of constitutional rights.”). But see *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 391 (2000) (“The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.”); *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (permitting a restriction on speech supported by “[a] long history, a substantial consensus, and simple common sense,” but not empirical data). A speech restriction cannot be a narrowly tailored way of achieving a compelling interest if it does not in fact advance the proffered interest.

<sup>269</sup> See, e.g., *In re Raab*, 793 N.E.2d 1287, 1292 (N.Y. 2003) (per curiam); FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 48 (1849) (“[T]o the judiciary, as to the church, political consequence is moral peril; . . . the moment it canvasses for popular honour or executive favours – that moment the magic of its powers is gone . . . .”); *The Way Forward: Lessons from the National Symposium on Judicial Campaign Conduct and the First Amendment*, 35 IND. L. REV. 649, 657 (2002).

<sup>270</sup> See Fallon, *supra* note 192, at 1832-33.

<sup>271</sup> In this respect, one notes the frequent mentions in the debate on judicial free speech of “telephone justice,” a phenomenon in Communist countries where a political leader telephones a judge and provides instructions for deciding a case. See Shirley S. Abrahamson, *Thorny Issues and Slippery Slopes: Perspectives on*

apocalyptic vision is unlikely to materialize. In spite of the judiciary's extremely limited capacity to force compliance with its decisions, compliance is what it receives. And even after such controversial decisions as *Bush v. Gore*,<sup>272</sup> public respect for the Court is reasonably high.<sup>273</sup> It is therefore difficult to see how squelching judicial speech is narrowly tailored to protect the power of the judiciary to enforce its decisions.

If judicial legitimacy is compromised by actions short of outright disobedience, however, then speech restrictions begin to serve that end more directly. Judicial legitimacy might be threatened whenever the public seeks to challenge judicial authority, even by lawful means. That is, a public movement to use the political process to reverse a trend of court decisions is subversive of judicial power, perhaps as much so as a refusal to abide by a court order. When legitimacy is used in this way, the elections of Franklin Roosevelt, Richard Nixon, and Ronald Reagan, and the ouster of California Chief Justice Rose Bird and two of her colleagues damaged the "legitimacy" of the United States and California Supreme Courts by making it more difficult for those courts to enact policy as they had prior to the elections. Perhaps limitations on judges' political speech seek to enhance judicial legitimacy not in the sense of inducing the public to comply with court orders, but of making it difficult to challenge courts' counter-majoritarian policy-making role.

Speech restrictions, insofar as they encourage the public to envision judges as non-political, may well have the effect of discouraging the public from seeking to alter judicial policy through politics (though I am aware of no data on the issue). Even if there is a narrowly tailored relationship there, however, there remains the compelling interest requirement. It is one thing to claim a compelling interest in enforcing court decisions; it is quite another to claim a compelling interest in protecting the judiciary as an unaccountable policy-maker. If, indeed, the restrictions on judges' speech are in place to sustain the policy-making power of the judiciary, they would seem to be unconstitutional.

Restrictions on judicial participation in non-judicial politics are also justified by a concern for protecting impartiality: Judges should not be so connected to a party or candidate that they cannot fairly adjudicate a dispute involving that party, candidate, or an opponent of either. One need not

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*Judicial Independence*, 64 OHIO ST. L.J. 3, 5-6 (2003); Gerald E. Rosen, *Judicial Independence in an Age of Political and Media Scrutiny*, 14 T.M. COOLEY L. REV. 685, 690 (1997); Shepard, *supra* note 221. Chief Justice Shepard goes so far as to claim that reviewing judges' philosophies when considering them for promotion is a "stealthy form of telephone justice." Shepard, *supra* note 221, at 817. See also Scheppelle, *supra* note 40 (arguing that judicial independence is compromised both by "telephone justice" and by rules of law that constrain judicial discretion).

<sup>272</sup> 531 U.S. 98 (2000).

<sup>273</sup> See Friedman, *supra* note 30, at 2627-29; James L. Gibson et al., *The Supreme Court and the US Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, 33 Brit. J. Pol. Sci. 535, 535, 555 (2003).

quarrel with the contention that establishing or maintaining this kind of judicial impartiality is a compelling state interest.<sup>274</sup> Indeed, public tolerance of judicial review depends on judges being able to dispense justice according to *law*, irrespective of the political influence of the parties or any personal connection between the judge and a party to a case before him.<sup>275</sup> Similarly, restrictions on judicial support (financial and otherwise) for political candidates serve two interests related to this concern about impartiality: First, they ensure that parties and officials not extort political support from judges in return for party nominations and the like. Second, by prohibiting campaign contributions by judges they ensure that the public will not perceive nominations for judicial office as being for sale.<sup>276</sup>

In practical application, however, restrictions on judicial political activity serve the goal of impartiality quite indirectly, if at all. Prohibiting a judge from making contributions does nothing to ensure that a judge's initial nomination was not the result of contributions made in years past as a private citizen.<sup>277</sup> And parties *should* seek to be faithful to long-term supporters by providing them nominations and electoral support. Parties may justifiably believe that long-term supporters are more likely to bring the ideals of the party to the bench than is someone who has never worked on the party's behalf. Additionally, there is a ready remedy for concerns of party abuse of the nomination process that does not limit political speech – hold nonpartisan elections, where candidates need not seek the approval of the party leadership to earn a spot on the ballot. Granted, party endorsement may be important even in a nonpartisan general election,<sup>278</sup> but the interest in limiting party *influence* on an election is far less important than limiting the power of parties to be *gatekeepers*, controlling access to the ballot on the basis of contributions.

Furthermore, if a judge must recuse himself whenever his impartiality “might reasonably be questioned,”<sup>279</sup> then there is little risk of a biased decision resulting from a judge's politicking; a judge will recuse himself whenever his support for a candidate or party makes him unable fairly to

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<sup>274</sup> See, e.g., *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 848 (1978) (Stewart, J., concurring in judgment) (“There could hardly be a higher governmental interest than a State's interest in the quality of its judiciary.”).

<sup>275</sup> See, e.g., Ruth Bader Ginsburg, *Remarks on Judicial Independence*, 20 U. HAW. L. REV. 603 (1998); William H. Rehnquist, Keynote Address, Washington College of Law, 46 AM. U. L. REV. 267, 271-74 (1996); THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>276</sup> See *In re Raab*, 793 N.E.2d 1287, 1292 (N.Y. 2003) (per curiam).

<sup>277</sup> See *Republican Party v. White*, No. 99-4021, 2005 U.S. App. LEXIS 15864, at \*46 n.11 (8th Cir. Aug. 2, 2005) (en banc) (noting that Minnesota Supreme Court Justices “are often, if not always, former partisan office holders or party activists”); see also *id.* at \*41-\*43 (“A regulation requiring a candidate to sweep under the rug his overt association with a political party for a few months during a judicial campaign, after a lifetime of commitment to that party, is similarly underinclusive in the purported pursuit of an interest in judicial openmindedness.”).

<sup>278</sup> See *Geary v. Renne*, 911 F.2d 280, 305-15 (9th Cir. 1990) (en banc) (Alarcon, J., dissenting).

<sup>279</sup> 28 U.S.C. § 455(a).

evaluate a lawsuit.<sup>280</sup> Perhaps there is an interest in ensuring that each judge is eligible to hear the potentially numerous cases involving a public official in the jurisdiction, but stopping a judge from communicating publicly his support for a candidate or party hardly advances that interest.<sup>281</sup> Because most judges can be assumed to have parties and candidates they support,<sup>282</sup> if we infer bias whenever a litigant is connected to a party or candidate supported or opposed by the judge, then no judge would be qualified to rule on any case involving the government.<sup>283</sup> Even under the ABA Canons, political agreement or disagreement with a public official is not enough to raise even a question of bias *unless the public is informed* of that agreement or disagreement. Accordingly, the interest served by preventing judges from *announcing* their political positions is not eliminating bias, but merely convincing the public that no “bias” exists so as to maintain judicial legitimacy and power.

As the Supreme Court pointed out in *Republican Party v. White*, a speech restriction’s underinclusivity raises an inference that the purported rationales for the restriction are not in fact the actual motivations.<sup>284</sup> Here, the Canons fail to restrict much conduct – such as attendance at fundraisers, private campaign fundraising through committees, associations with interest groups,<sup>285</sup> and campaigning generally<sup>286</sup> – that damages “impartiality” and “independence” as much as does the conduct that is restricted.<sup>287</sup> Thus, one is left with the conclusion that the Canons are concerned more with public appearances than with substance,<sup>288</sup> and the only reasons for a concern with appearance are judicial vanity and power.

The restrictions help ensure that “public confidence” in the judiciary not be diminished, for without a public willing to accept judicial decisions, the

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<sup>280</sup> See *Republican Party v. White*, No. 99-4021, 2005 U.S. App. LEXIS 15864, at \*35-\*37 (8th Cir. Aug. 2, 2005) (en banc).

<sup>281</sup> See Dimino, *supra* note 26, at 340-43. Cf. *Cheney v. United States Dist. Court*, 541 U.S. 913, 928-29 (2004) (Scalia, J., respecting recusal) (“The question . . . is whether someone who thought I could decide this case impartially despite my friendship with the Vice President would reasonably believe that I *cannot* decide it impartially because I went hunting with that friend and accepted an invitation to fly there with him on a Government plane.”).

<sup>282</sup> Under appointive systems, to cite only the most obvious example, the public might believe judges maintain some affinity for the officials who appointed them, as well as for the parties of those officials. It would not surprise anyone or raise a claim of bias if we were to learn that Chief Justice Rehnquist regularly votes for Republican candidates and Justice Ginsburg regularly votes for Democrats.

<sup>283</sup> A judge who supports a particular candidate or party is just as “biased” in favor of that candidate or party (and against opponents) whether he keeps his support private or whether he announces his support publicly. And if taken seriously the bias argument proves too much. It would require judges not to have any friends, and not to hold any opinions about any other persons, lest that person be treated unfairly by the judge in some hypothetical future case.

<sup>284</sup> 536 U.S. 765, 780 (2002) (citing *City of Ladue v. Gilleo*, 512 U.S. 43, 52-53 (1994); *Florida Star v. B.J.F.*, 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring in judgment)).

<sup>285</sup> See *Republican Party v. White*, No. 99-4021, 2005 U.S. App. LEXIS 15864, at \*27 n.7, \*44-\*47 (8th Cir. Aug. 2, 2005) (en banc).

<sup>286</sup> See *White*, 536 U.S. at 788, 792 (O’Connor, J., concurring).

<sup>287</sup> See *supra* notes 30-33, 42-45, 191-92, and accompanying text.

<sup>288</sup> See Alex Kozinski, *The Real Issues of Judicial Ethics*, 32 HOFSTRA L. REV. 1095, 1105 (2004).

power of the courts is lost.<sup>289</sup> If judges are considered by the public to be merely one species of politician, then there is little reason for the public to accept the lawmaking of the least-representative, least-accountable branch of government.<sup>290</sup> Accordingly, the Canons seek to maintain and increase judicial power by making the courts appear different from the politicians in the other branches. And one way of accomplishing this is by removing judges from politics – or appearing to do so.

Though judicial legitimacy served is important, the regulations forbid judges' voluntary participation in the political process – a cost of the highest constitutional magnitude.<sup>291</sup> They have less of an impact on voters than do restrictions on judicial campaigns, but their effect on the judges themselves is more severe.<sup>292</sup> As Judge Jon Blue explained, “[p]eriodic campaigns for judicial office . . . occupy only a small portion of an incumbent judge’s life. . . . But canonical ‘political activity’ restrictions intrude, in one way or another, upon the lives of incumbent judges on almost a daily basis.”<sup>293</sup> Only the counter-majoritarian Justices will likely view the interest in judicial legitimacy as sufficiently compelling to allow states to force their judges to bear the cost of that intrusion.

#### IV. CONCLUSION: THE IMPLICATIONS OF *WHITE* FOR RESTRICTIONS ON JUDICIAL SPEECH IN NON-JUDICIAL CAMPAIGNS

What *Republican Party v. White* means for the future of judicial free speech, particularly regarding Canons that restrict judicial participation in non-judicial campaigns, will be determined by cases that will be heard by a Court with a different membership than the Rehnquist Court of 2002. Whether *White* foretells the invalidation of a great many restrictions on judicial politics depends on which philosophy the Court chooses to employ in those future cases. Four alternatives are possible:

First, majoritarians, represented by Justice Scalia’s opinion of the Court,

<sup>289</sup> See, e.g., Snyder, *supra* note 43, at 239-40.

<sup>290</sup> Cf. Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1, 56-57 (1991) (“[I]deology is the most exalted motive that most theories attribute to legislators but the basest motive generally attributed to judges.”).

<sup>291</sup> See, e.g., *Republican Party v. White*, 536 U.S. 765, 774 (2002) (“[S]peech about the qualifications of candidates for public office” occupies “the core of our First Amendment freedoms.”) (quoting the opinion below, *Republican Party v. Kelly*, 247 F.3d 854, 861, 863 (8th Cir. 2001)); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 346 (1995) (opining that campaign speech “occupies the core of the protection afforded by the First Amendment”); *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (“[T]he First Amendment ‘has its fullest and most urgent application’ to speech uttered during a campaign for public office.”) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)); *Connick v. Myers*, 461 U.S. 138, 145 (1983); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Carey v. Brown*, 447 U.S. 455, 466-67 (1980); *Palko v. Connecticut*, 302 U.S. 319, 326-27 (1937) (referring to the “freedom of thought and speech” as “the matrix, the indispensable condition, of nearly every other form of freedom”).

<sup>292</sup> *But see In re: Amendment of Supreme Court Rules: SCR Chapter 60, Code of Judicial Conduct – Campaigns, Elections, Political Activity* (Wisc. 2004) (Abrahamson, C.J., concurring) (slip op. at 10) (referring to the restrictions as “minor inconveniences”).

<sup>293</sup> Jon C. Blue, *A Well-Tuned Cymbal? Extrajudicial Political Activity*, 18 GEO. J. LEGAL ETHICS 1, 3 (2004).

might object to the idealistic vision of courts encouraged by the restrictions because that respect enables the policy-making that majoritarians oppose. Even though voters' rights to control judicially made policy are not directly at issue, as they were in *White*, the Court might conclude that the public should not be made to surrender policy-making authority under the belief that judges are apolitical.

Second, the Justices who saw the announce clause as constitutional and necessary to the enforcement of unpopular laws will continue to support restrictions even when they limit speech in non-judicial campaigns, because they believe those restrictions, too, seek to increase the legitimacy of the judiciary and therefore its power to render counter-majoritarian decisions. Majoritarian Justices are unlikely to find such an interest compelling, but counter-majoritarians are.

Third, the Court might attempt to draw the line at loosening restrictions only for judicial campaigns, reasoning that limits on political speech of sitting judges do not impact voters to the extent that limits on campaign speech do. While this approach would be consistent with the portions of *White* that stressed the importance of making judges accountable to the voters, it would ignore the realism that motivated *White*'s concern with out-of-control courts. The instrumental argument for judicial free speech is powerful not only because judges can act as "representative" policy-makers, affecting policy consistent with constituents' desires, but because judges' own ideological views influence their behavior on the bench. *White* encouraged campaign speech so voters could choose the candidate whose views most matched theirs.<sup>294</sup> Accordingly, squelching speech to promote the idea that judges lack political views ignores *White*'s attempt to point out the obvious: The public already knows that judges have political views, even in states (or the federal system<sup>295</sup>) where judges are appointed. The genie is out of the bottle, brushing his teeth with toothpaste that is out of the tube, riding a horse that has walked through an open barn door, and playing with a cat that is out of the bag.<sup>296</sup>

Fourth, Justices who adopt the approach of Justice Kennedy would be willing to protect political speech, even by judges, because of the expressive benefit it provides to the speaker and his audience rather than because of the effect the Canons will have on judicial policy. For them, restrictions on judges' political involvement are, by and large, unconstitutional, because they rest on a rationale insupportable in a regime of popular sovereignty – that core political speech and association can be limited so the people do not question part of the government.<sup>297</sup> Though Justice Kennedy's approach

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<sup>294</sup> See *Republican Party v. White*, 536 U.S. 765, 784, 787-88 (2002).

<sup>295</sup> See, e.g., CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 7.

<sup>296</sup> Cf. Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1032 (2003).

<sup>297</sup> See, e.g., Dimino, *supra* note 26, at 382.

might be thought to be a standard application of First Amendment principles<sup>298</sup> – after all, Minnesota suppressed speech in an election campaign to immunize elite, undemocratic policy-makers from criticism and electoral defeat – all eight other Justices rejected that view at least for the time being, with four contending that judicial speech was in a different category altogether and four others leaving open the possibility that judicial campaign speech should be given less freedom than other types of speech.

We should not be surprised that restrictions on speech have political consequences;<sup>299</sup> indeed, historically that has often been the point of restricting speech and has been one of the reasons the Supreme Court in the last ninety years has protected it.<sup>300</sup> Neither should we be surprised that a Court that has involved itself in an unprecedented number of political disputes<sup>301</sup> would perceive a First Amendment challenge to campaign speech as a case about political power. And where the political power at issue belongs to the courts, we should not be surprised that the battle is joined between those who want to give the courts enough power to force others to abide by the law and those who want to give others enough power to force the courts to abide by it.

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<sup>298</sup> See, e.g., SEGAL ET AL., *supra* note 137, at 156 (“The majority, strictly on free speech grounds, had the much better of the argument. The state prohibited communication on the basis of its content . . . and exacerbated this factor by applying it to political activity . . .”); see also 2 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 16:32, at 16-85 (2002) (“[P]ledges to the people [to change the law or alter social policy] are at the core of the free expression the First Amendment was designed to secure”).

<sup>299</sup> See *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978) (“[T]he fact that advocacy may persuade the electorate is hardly a reason to suppress it.”). See also *McConnell v. Fed’l Election Comm’n*, 540 U.S. 93, 284 (2003) (Thomas, J., concurring in part and dissenting in part) (arguing that the majority of the Court would permit regulation of the press, and that “[t]here is little doubt that the editorials and commentary they [the media] run can affect elections.”).

<sup>300</sup> See, e.g., *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990) (Scalia, J., dissenting) (“[G]overnment cannot be trusted to ensure, through censorship, the ‘fairness’ of political debate.”); *Kingsley Int’l Pictures Corp. v. Regents of the State University of New York*, 360 U.S. 684, 689 (1959).

<sup>301</sup> See RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* 1-3 (2003). See also Rachel E. Barkow, *More Supreme Than Court?: The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002).