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Judicial Elections

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FOREWORD

JUDICIAL ELECTIONS

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I offer both my thanks and my congratulations to the members of the University of North Carolina's *First Amendment Law Review*. No doubt the sands are shifting, in North Carolina and across the country, in the operation of judicial elections. The intrusion of invigorated notions of free expression, the impact of various attempts at electoral reform, and the necessity for corresponding changes in standards of judicial ethics have dramatically dislodged traditional patterns in judges' campaigns. The future, therefore, is profoundly unclear. It will scarcely resemble the past. So this marvelous symposium could hardly be more timely. Nor could its participants be more knowledgeable and interesting. This volume will add markedly to our unfolding, if contested, understanding of the benefits and pitfalls of judicial selection.

The altered landscape begins, of course, with the United States Supreme Court's notable decision in *Republican Party of Minnesota v. White*.[1] There the Court, by a 5-4 margin, ruled for the first time on the constitutionality of a judicial ethics provision. Applying a robust vision of the First Amendment to judicial elections, the Justices invalidated the "announce clause" of the Minnesota code. Writing for the majority, Justice Antonin Scalia concluded "we have never allowed the government to prohibit candidates from communicating relevant information to voters during an election."[2] Raising perhaps more questions that it resolved, the opinion determined that "if [a] State chooses to tap the energy and the legitimizing power of the democratic process, it

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1. 536 U.S. 765 (2002).
2. 536 U.S. at 782.

must accord the participants in that process the First Amendment rights that attach to their roles."[3]

It is not unlikely that the *White* case will lead to new and broader tensions with the traditional belief that judicial impartiality and independence can be assured by imposing standards of etiquette on judicial candidates. The majority was slim. But the assertions proffered were seemingly far reaching. First, much of *White*'s foundation stemmed from an asserted right of democratic voters to receive core political messages—rather than a candidate's arguably waivable right to speak them. Such central democratic touchstones are not easily marginalized or thrust aside.

Second, Justice Scalia and his colleagues could easily have decided the *White* case on narrower vagueness or overbreadth grounds. They chose, instead, to reach for the heart of a First Amendment collision that could have been avoided. Justices who go so clearly out of their way to make a point won't easily change their minds.

Third, even though *White* was a bare majority decision, and even though I would concede that my own favorite justices appear in the dissenting column, it seems to me unlikely that the Court will reverse the core conclusion that a full-throated version of the First Amendment applies to judicial elections. It might have been possible to stay away from the issue in the first place, leaving the outcome murky. But it is not plausible now to simply step back and say the First Amendment is not a relevant proscription after all.

So, in my view, *White* is not only here, it is likely here to stay. And if the First Amendment raises issues about "announcement," "pledging," and comment, it also likely raises questions about campaign finance, political affiliation, endorsement, and a host of other historical constraints. I don't purport to know what the answers to such vital questions may be. But I'd be very surprised if, in the months and years ahead, they aren't soundly presented. Our high Court's ultimate answer to the challenges of *Republican Party of Minnesota v. White* may be Justice O'Connor's suggestion in concurrence – if states don't like the harsh results of no-holds-barred electoral campaigns, they

3. 536 U.S. at 788.

should stop electing judges altogether.[4]

But in many states like [I fear] North Carolina, a regime of appointed judges is nowhere near the horizon. Given that, the North Carolina Supreme Court has moved fairly aggressively to alter our code of judicial ethics.[5] Sitting judges and candidates for office will now be allowed to commit to controversial substantive positions. They will be permitted to raise campaign funds through direct solicitation and participate more broadly in other political races a well. Though implementing a reasonable reading of *White*'s standards, the court's proffered rule changes sparked immense controversy. As a result, Chief Justice I. Beverly Lake appointed a distinguished advisory committee to explore appropriate standards for political conduct by judges. Answers, once again, have not been easy to come by.

Citizen political reformers also engaged from another direction in North Carolina. Expressing growing concern over the effects of both political partisanship and campaign fundraising on the independence and integrity of judicial decision-making, activists convinced receptive legislators to adopt a new system for the election of appellate judges. Judicial candidates are no longer to be identified by political party on the ballot. And a limited scheme of public funding is available to candidates agreeing to abide by its conditions. Again, our practices will be notably different than before.

Given such complexities, and given such a cast of seemingly inevitable alterations, we are fortunate that the *First Amendment Law Review* has brought together experts, activists, and leaders like James Bopp, Chris Hagearty, Bob Hall, and former justices Penny White and Robert Orr to explore the changing relationships between judicial and political power. I have learned much from their discussions. I think you will as well.

4. 536 U.S. at 792 (O'Connor, J., concurring).

5. North Carolina Code of Judicial Conduct, Canon 7 (2004).