

**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**

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Although most states elect some or all of their judges,<sup>1</sup> judges are not ordinary politicians. Judges do not represent voters in the same way as legislative and executive officials; instead, they must decide cases before them impartially,<sup>2</sup> without bias towards any of the parties. Thus, judicial elections have always been governed by restrictions that do not exist in other American elections. Recently in *Republican Party of Minnesota v. White*, the United States Supreme Court addressed a Minnesota judicial conduct code provision that purported to restrict the topics a judicial candidate could address during her campaign.<sup>3</sup> The portion of the code at issue, popularly called the “announce clause,”<sup>4</sup> states that a judicial candidate should not “announce his or her views on disputed legal or political issues.”<sup>5</sup>

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1. See *infra* text accompanying notes **Error! Bookmark not defined.-Error! Bookmark not defined.**

2. The parties and lower federal courts in *Republican Party of Minnesota v. White*, 536 U.S. 765, 775 n.6 (2002), use the terms “judicial independence” and “judicial impartiality” interchangeably. Nevertheless, this Article uses the term “judicial impartiality” in order to follow the distinction made by some of the scholarly literature between the *independence* of the judiciary as an institution from external pressures (from other branches of government and voters) and the *impartiality* of judges in making decisions in particular cases. See COMM’N ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE, AM. BAR ASS’N, AN INDEPENDENT JUDICIARY § 1, 1 (1997), available at <http://www.abanet.org/govaffairs/judiciary/report.html>; Edmund B. Spaeth, Jr. *How do Judges Decide? A Course for Non-Lawyers*, 106 DICK. L. REV. 773, 790-97 (2002).

3. *White*, 536 U.S. at 768.

4. *Id.*

5. MINN. CODE OF JUDICIAL CONDUCT Canon 5(3)(d)(i) (2003). While the Court ad-

The clause aims to prevent judges from committing themselves to particular outcomes before hearing a case on the merits before them.<sup>6</sup>

The Supreme Court found that the announce clause violated judicial candidates' and voters' First Amendment rights and struck the code down as unconstitutional.<sup>7</sup> The Court's reasoning balanced the First Amendment interests of the participants in judicial elections against the state's asserted interest in maintaining the impartiality of its judges.<sup>8</sup> In so doing, it assumed that judicial elections were different from other American elections<sup>9</sup> because of the state's special interest in preserving prospective judges' impartiality in the cases before the courts.<sup>10</sup> Nevertheless, the Court did not believe that judges were sufficiently different from other elected officials to warrant a restriction as broad as the announce clause. The Court's outcome hinged on its understanding of how judges decide cases: the Court assumed that judges were incapable of being completely impartial on issues that came before them because they come to the bench with a

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dressed only Minnesota's judicial conduct code, the decision has wide implications for other states as the clause replicates the ABA's Model Code of Judicial Conduct, MODEL CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(c) (1972), which had been adopted by most states that hold judicial elections. *See infra* text accompanying note **Error! Bookmark not defined.** *See also* Erwin Chemerinsky, *Judicial Elections and the First Amendment*, 38 TRIAL 78, 79 (2002) (stating that the invalidation of the announce clause in *Republican Party of Minnesota v. White* "will lead to immediate challenges to other types of restrictions on speech by judicial candidates."); Roy A. Schotland, *Republican Party of Minnesota v. White, Should Judges be More Like Politicians?*, 41 JUDGES' J. 7, 7 (2002) (stating that the decision will also impact other state restrictions on speech during judicial elections). In fact, the ABA and certain states have already begun to reconsider the wording of their judicial speech codes. *See* Cynthia Gray, *The States' Response to Republican Party of Minnesota v. White*, 86 JUDICATURE 163 (2003). Other states have asserted that, while they can no longer enforce the announce clause, they will continue to enforce other judicial speech codes. *See id.* Finally, in the aftermath of *White*, some courts have considered other campaign conduct provisions of state judicial conduct codes, producing mixed results. *See, e.g.,* Spargo v. N.Y. State Comm'n on Judicial Conduct, 244 F. Supp. 2d 72, 92 (N.D.N.Y. 2003) (striking down provisions of New York's judicial conduct code as not narrowly tailored and excessively vague); *In re Kinsey*, 842 So. 2d 77, 87 (Fla. 2003), *cert. denied*, No. 02-1855, 2003 WL 21489928 (U.S. Oct. 6, 2003) (upholding Florida's judicial conduct code that prohibits a candidate from making "statements that commit or appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court.") (quoting FLA. CODE OF JUDICIAL CONDUCT Canon 7(A)(3)(d)(i)-(ii) (2002)) (internal quotation marks omitted).

6. E. WAYNE THODE, REPORTER'S NOTES TO THE CODE OF JUDICIAL CONDUCT 98 (1973).

7. *See White*, 536 U.S. at 788.

8. *See id.* at 775-76.

9. *See id.* at 784.

10. *See id.* at 775-76.

set of policy predispositions that they have acquired over a lifetime of study.<sup>11</sup> Thus, in precluding discussion of legal and political issues, the announce clause did not rid judges of their existing views but simply deprived voters of information that was relevant to how judges decide cases.

Whether or not the sweeping language of the announce clause is justified hinges on two variables. The first is an understanding of how judges decide cases that come before them on the bench. If judges put aside personal policy beliefs and adjudicate cases based on the law and facts, the announce clause would be justified because the discussion it precludes would not give voters information relevant to a judicial candidate's qualifications for office.<sup>12</sup> On the other hand, if personal policy preferences do influence how judges vote, the announce clause limits debate about qualities central to a judge's performance.<sup>13</sup> This Article will argue that judges are somewhere in between these two paradigms: they are strategic actors who hold and are motivated by personal preferences, but they remain constrained in their abilities to enact policy. All judges must decide cases on the basis of precedent and through applying judicial opinion-writing norms.<sup>14</sup> Moreover, elected judges are limited by the exigencies of the electoral process—judges must please voters in order to get elected or re-elected.<sup>15</sup>

Thus, the second variable is voter decisionmaking at election time. Announce clause proponents tend to assume that when voters learn about judges' policy preferences, they will vote for or against judges based on those preferences.<sup>16</sup> Voters will seek to hold judges accountable for the decisions they reach in particular cases rather than electing judges based on neutral criteria, such as their legal experience and qualifications. Moreover, announce clause proponents argue that results-oriented voting will only increase in the absence of the announce clause: they claim that public confidence in the judiciary decreases when judges act like politicians and that the less faith the public has in its judges, the less leeway it will give judges and the more it will seek to become involved in the merits of individual

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11. *See id.* at 777-78.

12. *See infra* text accompanying notes 202-206.

13. *See infra* text accompanying notes 214-221.

14. *See infra* text accompanying note 248.

15. *See infra* text accompanying note 250.

16. *See infra* text accompanying note 305.

cases.<sup>17</sup> In fact, there is little evidence to support any of these fears. Voters cast informed votes in judicial elections and, even more importantly, they value judicial impartiality and tend to vote partial judges out of office during judicial elections.<sup>18</sup> In addition, it appears that more, and not less, information is the solution to selecting unbiased decisionmakers.<sup>19</sup>

Assuming a strategic judiciary and a relatively informed electorate, the announce clause goes further than necessary in curtailing judicial speech. Since judges are motivated by their personal policy preferences, the announce clause precludes discussion of issues that are relevant to voters' candidate choices. The strategic judge, however, also takes public opinion into account in rendering decisions. Therefore, the announce clause is useful insofar as it prevents voters from forcing judicial candidates to commit to certain outcomes on disputed legal and political issues during their campaigns. The model of voter decisionmaking then changes the calculus. Because voters can be expected to cast informed votes and to hold judges accountable for rendering impartial decisions, the announce clause may not be necessary. Voters will already refrain from forcing judicial candidates to adopt and then, while on the bench, adhere to certain issue positions. Moreover, the more information voters have about judicial candidates, the more they can be trusted to cast informed ballots and to use their votes to prevent judges from being either overly beholden to their own, or the public's, policy preferences.

Part I of this Article presents a brief history of judicial elections and of the reforms that states have instituted over time to maintain judicial impartiality, including the announce clause. Part II then briefly discusses announce clause jurisprudence and the clause's ultimate fate, as decided in *Republican Party of Minnesota v. White*. Part III attempts to define a desired level of judicial impartiality and to fit the announce clause into the definition adopted. While any concept of judicial impartiality must recognize that judges come to the stand with certain policy predispositions that influence their decisions, impartiality still requires that judges be open minded in listening to the adversarial positions presented by the parties before them in a particular case.

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17. See *infra* text accompanying notes **Error! Bookmark not defined.-Error! Bookmark not defined.**

18. See *infra* Part V.

19. See *infra* text accompanying note **Error! Bookmark not defined.**

Parts IV and V then assess the announce clause in terms of the two variables outlined above—judicial decisionmaking on the bench and voter decisionmaking during judicial elections. Part IV lays out four models of judging—the legal, attitudinal, representative, and strategic—and concludes that the strategic model provides the most likely model for judicial decisionmaking. Finally, Part V enumerates four variables affecting voter behavior during election time. The first two, the amount and quality of information voters have, pertain to the atmosphere and process of judicial elections. The second set of variables, what voters value in judges and how they view judges, look at how voters assess the information that they receive through the electoral process. The Article concludes that, under the models of strategic judicial and voter decisionmaking advanced, the announce clause is not only unnecessary but perhaps counter-productive—it may actually further undermine judicial impartiality.