

DEBATE

FIRST AMENDMENT LIMITS ON THE REGULATION OF JUDICIAL CAMPAIGN SPEECH: DEFINING THE GOVERNMENT'S INTEREST

What does it mean for a judge's campaign speech to be impartial? More importantly, how far may a state go in regulating judicial campaign speech in order to ensure impartiality without violating the First Amendment? In this Debate, Professor Paul E. McGreal, of the Southern Illinois University School of Law, and Dean James J. Alfini, of the South Texas College of Law, explore the permissible limits on judicial campaign speech in light of the Supreme Court's First Amendment campaign speech precedent.

Using the Court's 2002 decision, *Republican Party of Minnesota v. White*, as a starting point, Professor McGreal argues two points: first, that, for First Amendment purposes, impartiality should be limited to mean only that "a judge will make decisions using the accepted methods of legal analysis;" and second, that campaign promises of specific types of performance once elected "do not necessarily compromise judicial impartiality." Politics, in McGreal's view, is a necessary part of judicial elections, and "the First Amendment does not allow the state to "wring[] politics out of the political process." Thus, according to McGreal, as long as a judge's campaign speech expresses an accepted form of legal analysis, that speech may not be regulated without violating the judicial candidate's First Amendment rights.

Dean Alfini, on the other hand, would require a more stringent regulation of campaign speech and would base such restrictions on the ABA's formulation that judges may not "make pledges, promises, or commitments" in their campaign that would compromise their impartiality. McGreal's more permissive rule, Alfini asserts, would "threaten the due process rights of parties who may come before" elected judges, thus potentially "compromis[ing] their duty and ability to uphold the rule of law in our democratic society." The test for impartiality, then, should focus on "the due process rights of parties," and judges should not be granted McGreal's broader First Amendment protections. Campaign restrictions, then, should be "narrowly tailored to prohibit prejudgment promises."

OPENING STATEMENT

*Defining Judicial Impartiality: The
Problem of Campaign Promises*Paul E. McGreal[†]

What does it mean for a judge to be “impartial”? The United States Supreme Court faced this seemingly simple question in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). *White* involved the “announce clause” of the Minnesota Code of Judicial Conduct, which prohibited judicial candidates from announcing their views on issues likely to come before the court for which they were a candidate. The Minnesota announce clause was a fairly typical provision, with thirteen states then having similar prohibitions. Minnesota defended the announce clause as necessary to preserve the impartiality of its judges. The problem, as the Court learned, is that Minnesota—like other states with similar provisions—did not specify what “impartiality” meant. Instead, Minnesota simply identified campaign behavior that it did not like—such as announcements of legal views—and then asserted by ipse dixit that such conduct compromised impartiality.

The Court held that the announce clause violated the First Amendment’s free speech guarantee. While *White*’s holding is limited to the announce clause, the case spurred many states to re-examine how they regulate judicial campaign speech more generally. Not surprisingly, most states revised or repealed their version of the announce clause. Some states, however, chose to retain a more common campaign regulation that was not at issue in *White*: a general prohibition of campaign promises. These states seem confident that such promises compromise judicial impartiality.

This Opening Statement makes two related points. First, for purposes of First Amendment analysis, judicial impartiality should mean simply that a judge will make decisions using the accepted methods of legal analysis. Part II develops this point. Second, candidate promises of performance in office do not necessarily compromise judicial im-

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partiality. Consequently, state rules that ban such promises, like their cousin the announce clause, violate the First Amendment. Part III develops this second point. But first, Part I briefly describes the Court's decision in *White*.

I. *WHITE* AND THE FIRST AMENDMENT FRAMEWORK

Under the First Amendment, the announce clause received strict scrutiny—the most stringent test in constitutional law—because it was a content-based restriction of political speech. Strict scrutiny required Minnesota, first, to identify a compelling interest for banning the announcement of a candidate's views, and, second, to show that the announce clause was narrowly tailored to that interest. Minnesota argued that the announce clause served a compelling interest in preserving judicial impartiality. The problem with this argument was that the meaning of impartiality is not self evident, and Minnesota had not offered a definition. This omission led the Court to hypothesize three possible meanings: party neutrality, issue impartiality, and open-mindedness.

The *White* Court easily dismissed the first two versions of impartiality. First, the Court rejected party impartiality, which means that judges shall not indulge “bias against [a] party, or favoritism toward the other party,” because the announce clause was not narrowly tailored to this interest: the clause proscribed “speech for or against particular *issues*,” not “speech for or against particular *parties*.” *White*, 536 U.S. at 776. Second, the Court rejected issue impartiality, which it took to mean “lack of preconception in favor of or against a particular *legal view*,” as “neither possible nor desirable.” *Id.* at 777-78. It is impossible to find lawyers with no views on the law, and even if we could, we would not want these lawyers as judges.

The third version of impartiality—open-mindedness—means that “a judge [must] be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case.” *Id.* at 778. The Court also described open-mindedness as requiring that a judge be free “from pressure to rule a certain way.” *Id.* The *White* Court concluded that Minnesota's announce clause was not intended to promote open-mindedness, and so it never explained what this version of impartiality entails. Part II uses open-mindedness as a springboard for developing a new definition of impartiality.

II. IMPARTIALITY AND THE JUDICIAL ROLE

The first question is whether impartiality requires a judge to be equally open to all legal arguments. The answer must be “no,” as many legal doctrines and practices *require* a judge to close her mind, in whole or in part, to certain legal arguments. For example, the doctrine of stare decisis requires a lower-court judge to reject arguments to overrule, modify, or ignore existing precedent of a higher court. Similarly, procedure and ethics rules bar lawyers from making—and judges from crediting—frivolous legal arguments. Because judges may properly close their minds to some legal arguments, “open-mindedness” does not helpfully describe what we expect of judges.

A workable definition of impartiality, then, must distinguish between proper and improper influences on judicial decision making. To do so, we must have a conception of how judges ought to behave, including the matters, sources, and arguments that may properly influence a judge’s decision. A judge who stays within this role will be impartial, while a judge who acts outside this role will not.

In defining the judicial role, we must keep in mind the reason for doing so. Recall that our task is to define the state’s compelling interest in judicial impartiality, which will be used in First Amendment free-speech analysis. Because impartiality is rooted in due process, states asserting that interest are invoking a concept of constitutional meaning and origin. For this reason, our analysis should look to the Constitution’s conception of the judicial role.

As I have argued elsewhere, the Constitution assumes that judges should act like lawyers in performing their jobs. See Paul E. McGreal, *Ambition’s Playground*, 68 *FORDHAM L. REV.* 1107, 1143-85 (2000); Paul E. McGreal, *Impeachment as a Remedy for Ethical Violations*, 41 *S. TEX. L. REV.* 1369 (2000). As a professional community, lawyers recognize certain methods of reasoning and thinking as permissible. As judges are expected to come from the legal community, the profession’s norms and practices would limit and control judges’ decision making. To take an extreme example, a judge who decides cases by flipping a coin, or based on litigants’ hair colors, would surely, and rightly, be criticized.

The next question is whether it matters that a judge’s legal analysis is influenced by the pressure of political accountability. For example, suppose that an appellate judge believes there are nonfrivolous legal grounds to rule for either party to an appeal, but that she also believes ruling for the petitioner would be unpopular with the electorate. Assume that the electorate’s opinion influences either the

judge's decision or how the judge writes her opinion. Is such political pressure an improper influence on a judge's decision making?

The answer must be "no" if we are to retain judicial elections. Indeed, a contrary answer ignores the elephant in the room: public accountability certainly influences the behavior of judges who must stand for reelection. The admitted reason for having incumbent judges stand for reelection is to allow voters to turn unsatisfactory judges out of office, with incumbent judges evaluated based on their performance in office. Nothing in law, logic, or experience prevents voters from evaluating a judge's substantive rulings or legal views. Realizing that voters will do so, a judge will at least consider that fact in making judicial rulings. As Justice O'Connor noted in her concurring opinion in *White*, "[e]lected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects." *White*, 536 U.S. at 789 (O'Connor, J., concurring). In short, if impartiality asks us to bar *any* political influence on judicial decision making, we crossed that Rubicon with the adoption of judicial elections.

III. CAMPAIGN PROMISES DO NOT VIOLATE IMPARTIALITY

The preceding discussion has defined a version of impartiality that can serve as a compelling state interest for regulating judicial campaign speech: judges must decide cases through the legally prescribed processes, using the accepted sources and methods of legal analysis. Further, political accountability may permissibly influence the judge's selection or discussion of legal analysis. The last question is whether a campaign promise would violate this understanding of impartiality.

To see how my version of impartiality would apply to campaign promises, consider the hypothetical case of *State v. Smith*. Smith was convicted of child molestation, and his conviction was upheld on direct appeal. While Smith is now within six months of completing his sentence, the state has recently enacted a violent sexual predator law that allows continued civil detention of child molesters who are found beyond a reasonable doubt to constitute a continuing threat to society. The United States Supreme Court has held that such civil detention statutes do not violate the United States Constitution. See *Kansas v. Hendricks*, 521 U.S. 346, 369 (1997). Smith has brought suit in state court arguing that the statute violates the due process provision of the state constitution. Both the state trial court and court of appeals

agreed, striking down the civil detention law. The state has appealed to the state supreme court where the case is now pending.

Assume that a candidate for the state supreme court is asked about the pending appeal in *State v. Smith*, and the candidate says, “I have studied the text, history, and purposes of the state constitution, and if elected, I promise to decide the case against Smith.” This statement, though barred by most state prohibitions of campaign promises, would not violate my version of impartiality. The candidate has promised to make her decision based on accepted legal sources—the State Constitution’s text, structure, and history. The fact that the pressure of political accountability may affect her willingness to depart from that *legal* analysis does not affect the candidate’s impartiality. Thus, banning such a promise would violate the First Amendment because doing so would not serve the state’s interest in preserving judicial impartiality.

A more difficult question arises if the candidate simply says, “I promise to rule against *Smith*.” Because this statement does not explain the basis for the judge’s prospective decision, the statement alone does not indicate whether the candidate’s promise is based on extra legal grounds. Does the First Amendment protect such a naked promise?

The Supreme Court’s decision *Buckley v. Valeo*, 424 U.S. 1 (1975), suggests that the candidate would be protected. There, the Court addressed a federal campaign-finance law that limited a person’s independent campaign expenditures in support of a candidate (i.e., expenditures that support, but are not coordinated with, a candidate). Congress had argued that the limit was needed to prevent bribery, as a person might make independent expenditures in exchange for a candidate’s express or implied promise of action in office. The Court held that a limit on independent expenditures was not narrowly tailored to the prevention of bribery. Because independent expenditures did not raise an unavoidable inference of bribery, existing bribery laws could adequately guard against corruption. A prophylactic measure was only appropriate when the challenged conduct was likely to threaten the government’s interest.

So, does a naked judicial campaign promise raise an unavoidable inference that the candidate will make decisions on extra legal grounds? My tentative answer is “no.” The public knows that the ordinary work of judges includes applying the law, and they likely view judicial campaign promises in that context. Further, under *Buckley* and *White*, the state bears the burden of proving that the electorate would necessarily draw the forbidden inference. My suspicion is that

states possess no relevant evidence at this point, given that most states merely adopted a version of the American Bar Association's Model Judicial Code with little (if any) empirical study.

CONCLUSION

State regulations of judicial campaign speech rest on an unexamined premise: political influence impermissibly interferes with judicial impartiality. Perhaps because this premise fatally undermines the entire enterprise of judicial elections, states have not developed a fully formed definition of impartiality. This Opening Statement attempts to do so and explains how this definition undercuts the constitutionality of a mainstay of current judicial campaign regulations—the prohibition on campaign promises. As long as a candidate's promise of performance in office is based on an express or implied legal analysis, the First Amendment bars states from punishing the candidate's speech.

REBUTTAL

*Judicial Impartiality as a Compelling State Interest:
A Defense of Current Restrictions on
Judicial Campaign Speech*

James J. Alfini[†]

This Rebuttal argues that the basic restriction on judicial campaign speech as enunciated in the current American Bar Association (ABA) Model Code of Judicial Conduct is appropriate on both philosophical and constitutional grounds, particularly in its reliance on the protection of judicial impartiality. The ABA Model Code restriction reads, in pertinent part: “a judicial candidate shall not . . . in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.” MODEL CODE OF JUD. CONDUCT R. 4.1 (2007). The 2007 ABA Model Code defines impartial as the “absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge.” MODEL CODE OF JUD. CONDUCT Terminology (2007). In his Opening Statement, Professor McGreal disagrees with this formulation, arguing for a much more limited definition of judicial impartiality that would preclude most, if not all, restrictions on judicial campaign speech.

The concept of judicial impartiality is at the center of this Debate, as Professor McGreal makes clear in his Opening Statement. He accurately notes that too little attention has been paid to defining judicial impartiality but mistakenly takes a minimalist approach to correcting this problem. Unlike Professor McGreal, I believe that judicial candidates who “make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office” threaten the due process rights of parties who may come before them and compromise their duty and ability to uphold the rule of law in our democratic society. For the sake of consistency,

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this Rebuttal to Professor McGreal's analysis will adopt the structure used in his Opening Statement by addressing the First Amendment framework first, followed by issues relating to the judicial role.

I. *WHITE* AND THE FIRST AMENDMENT FRAMEWORK

At the outset, it should be noted that I agree with the outcome in *Republican Party of Minnesota v. White* that the "announce clause," a provision in the 1972 version of the ABA Model Code of Judicial Conduct, is unconstitutional on First Amendment grounds. Because of concerns over the constitutionality of the "announce clause," the ABA had removed the "announce clause" from its Model Code of Judicial Conduct in 1990. Only nine states, including Minnesota, still had the announce clause in their judicial ethics canons at the time of the decision in *White* in 2002. See Cynthia Gray, *The Good News in Republican Party of Minnesota v. White*, 87 JUDICATURE 271, 271 (2004). In prohibiting announcing one's views on all "disputed legal and political issues," *White*, 536 U.S. at 768, the code restriction sweeps too broadly, prohibiting both protected and unprotected speech, and is thus not narrowly tailored to serve the compelling state interest in an impartial judiciary.

Where Professor McGreal's constitutional analysis goes wrong is in his insistence in lumping the announce clause with the clauses prohibiting "pledges," "promises," and "commitments" in the 1990 and 2007 versions of the ABA Model Code. A careful reading of the *White* decision would lead one to conclude that these campaign speech provisions are still viable. At the time of the *White* decision, the 1990 version of the ABA Model Code of Judicial Conduct had a clause prohibiting "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office" and another clause prohibiting "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." MODEL CODE OF JUD. CONDUCT Canon 5(A)(3)(d) (1990). With regard to the "pledges or promises" clause, Justice Scalia, the author of the five-person majority opinion in *White*, ducked the issue by stating the clause is "a prohibition that is not challenged here and on which we express no view." *White*, 536 U.S. at 770. As to the "commit clause," the Court again avoids the issue by stating, "We do not know whether the announce clause (as interpreted by state authorities) and the 1990 ABA Canon [the commit clause] are one in the same. No aspect of our constitutional analysis turns on this question." *Id.* at 774 n.5.

Professor McGreal would be quick to point out, however, that attempts to conclude that the *White* decision leaves the current Code restrictions intact fails to reckon with certain aspects of the Court's analysis. Although the Court explicitly declined to rule on the constitutionality of the pledges-or-promises and commit clauses, both of these provisions are, like the "announce clause," content-based restrictions on a candidate's speech and would therefore be subject to strict scrutiny if challenged in subsequent cases. That is, defenders of these provisions would have the burden of showing that they are narrowly tailored to serve a compelling state interest. Although the *White* decision rests on the Court's unremarkable conclusion that the "announce clause" is overbroad, Professor McGreal would argue that Justice Scalia's majority opinion brings into question the state's argument that the "announce clause" restriction, or presumably any other content-based speech restriction, is justified because of the state's compelling interest in preserving judicial impartiality and the appearance of impartiality, particularly if one accepts his limited definition of impartiality.

Again, however, Professor McGreal's analysis fails to distinguish between the "announce clause" on the one hand and the pledges, promises, and commitments clauses on the other hand. The distinguishing characteristic is prejudgment. A candidate for judicial office does not prejudge a case when he or she announces his or her views on a disputed legal or political issue. The candidate does prejudge a case when the candidate pledges, promises, or commits to decide a case or class of cases in a particular way. Prejudgment compromises the judge's ability to be impartial, a compelling governmental interest in a representative democracy.

Indeed, Justice Scalia has demonstrated a personal concern over the appearance of prejudgment by recusing himself in a post-*White* case in which his impartiality might reasonably have been questioned. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004). The case involved the constitutionality of the words "under God" in the Pledge of Allegiance. Prior to oral argument before the Supreme Court, Justice Scalia made a speech in which he appeared to criticize the lower-court opinion in the case. He subsequently removed himself from the case because of the appearance of prejudgment.

II. IMPARTIALITY AND THE JUDICIAL ROLE

Professor McGreal's limited definition of impartiality is flawed because it adopts a minimalist conception of the judicial role that is not

in keeping with the notion that the judge is the guardian of the rule of law in our society. Judicial impartiality requires much more of a judge than simply analyzing cases like a lawyer. It requires a commitment to guarantee the due process rights of litigants that come before the judge. Even if we were to adopt the McGreal (analyzing like a lawyer) conception of the judicial role, however, Professor McGreal conveniently forgets that lawyers are also the guardians of the rule of law in our society. Analyzing like a lawyer should also include thinking and acting in a way that advances the rule of law.

Prejudgment is inimical to the rule of law. Again, when a judge makes a pledge, promise, or commitment to rule in a certain way during the course of a judicial election campaign, the judge has effectively prejudged that case or class of cases, compromising his or her ability to be impartial. Proponents of campaign-speech restrictions argue that the need to maintain judicial impartiality is the main factor that distinguishes judicial election campaigns from those of other elected officials. Speaking through Justice Stevens, the four dissenting Justices in *White* added their voices to the impartiality chorus: “By obscuring the fundamental distinction between campaigns for the judiciary and the political branches . . . the Court defies any sensible notion of the judicial office and the importance of impartiality in that context.” *White*, 536 U.S. at 797 (Stevens, J., dissenting).

Although “judicial impartiality” is widely viewed as a core value in the American system of justice, this concept cannot be adequately understood or defined unless one considers the related concepts of “judicial independence” and the “rule of law.” The notion that we are committed to the rule of law is an essential norm in our representative democracy. Judicial independence and judicial impartiality are instrumental values that support and preserve the basic rule-of-law norm. And, indeed, the values of judicial independence and judicial impartiality are inextricably intertwined. Both play essential roles in judicial decision making in a democratic society. Judicial independence calls upon judges to be free of outside influences so that they may decide cases impartially.

In this postrealist era, it would be folly to argue that the values of judicial independence and judicial impartiality can be maintained in their absolute sense. Judges usually come to the bench after legal careers and public involvement that shape their views of the law. However, it is hard to believe that the vast majority of judges, elected or appointed, would abuse their independence or compromise their impartiality by regularly implementing personal or political agendas

rather than adhering to the rule-of-law norm. Even though judges may have certain moral values and political views, these values are informed and tempered by a basic understanding and appreciation of the core democratic values of the rule of law and judicial independence and impartiality. They are keenly aware that bias, prejudice, and prejudgment are inimical to the administration of justice in a representative democracy.

In arguing for a narrow definition of judicial impartiality, Professor McGreal uses the example of a candidate who makes a pledge—explained or “naked”—to rule in a certain way in a case that is pending before the court to which the judge is seeking to be elected. He asks us first to assume a candidate who says that she has studied the case and promises if elected to decide against the defendant. He states that such a promise would not violate his conception of impartiality, because the candidate has used accepted standards of legal analysis to prejudge the case. He then offers a second scenario where the candidate makes a “naked” promise to rule against the defendant. That is, the candidate does not indicate that she has analyzed the case and the promise may therefore have been made on “extra legal grounds.” Although Professor McGreal believes that this second scenario presents “a more difficult question,” he believes the candidate would be protected under *Buckley v. Valeo*. In *Buckley*, the Supreme Court ruled that a limitation on campaign expenditures was not narrowly tailored to accomplish the state’s interest in preventing bribery.

In both McGreal scenarios, the candidate has violated the due process rights of the defendant by prejudging the case. Due process requires that a defendant will have the right to have his or her case heard in an adversarial context by an impartial (open-minded) judge. In both scenarios, the judge has prematurely closed his or her mind and can thus no longer be considered to be impartial. That is, regardless of the arguments presented by the defendant’s lawyers in open court, the judge will rule against the defendant. Therefore, a prohibition against campaign promises would be narrowly tailored to accomplish the compelling state interest in an impartial judiciary. Unlike *Buckley*, where independent expenditures did not necessarily raise an inference of bribery, the inference of prejudgment and judicial partiality in McGreal’s scenarios is inescapable.

Moreover, the McGreal campaign scenarios are highly unlikely. It is unlikely that a case suitable for a campaign promise will conveniently be pending in the judge’s jurisdiction. More likely, is a scenario where a “law and order” candidate who, in his or her zeal to get a tough-on-crime message across, explicitly or implicitly promises to fa-

vor law enforcement agencies in deciding cases, thus prejudging cases brought by those agencies. Similarly, candidates courting sizable campaign contributions from big-business interests on the one hand or the plaintiffs' bar on the other may make statements indicating that the candidates will favor those interests in cases that come before them if elected.

CONCLUSION

Restrictions on judicial campaign speech, anchored in a broad notion of judicial impartiality, are essential to preserve core values such as the rule of law in our representative democracy. Tests to determine the constitutional limits of judicial campaign-speech restrictions should focus on the due process rights of litigants that may come before the judge, not simply whether a judge has employed accepted standards of legal analysis.

CLOSING STATEMENT

“Then Don’t Elect Judges!”

Paul E. McGreal

Dean James Alfini’s response reminded me of an old Henny Youngman joke. A patient goes to a doctor’s office and tells the doctor, “It hurts when I do this.” The doctor looks at the patient and says, “Then don’t do that!”

Like Youngman’s patient, the legal profession has long complained, “Judges aren’t impartial when they are elected.” Like the doctor, our reply ought to be, “Then don’t elect judges!”

Unlike Youngman’s patient, however, the legal profession cannot control the behavior it complains of. A state’s highest court typically establishes the state’s rules of judicial ethics, and the state’s constitution sets forth the process for selecting judges. So while the profession has long opposed judicial elections, most states persist in the practice. Nonetheless, the profession tries its best to subvert judicial elections by severely limiting judicial campaign speech. Justice Scalia made this point in *Republican Party of Minnesota v. White*:

There is an obvious tension between the article of Minnesota’s popularly approved Constitution which provides that judges shall be elected, and the Minnesota Supreme Court’s announce clause which places most subjects of interest to the voters off limits. . . . The disparity is perhaps unsurprising, since the ABA, which originated the announce clause, has long been an opponent of judicial elections. . . . That opposition may be well taken (it certainly had the support of the Founders of the Federal Government), but the First Amendment does not permit it to achieve its goal by leaving the principle of elections in place while preventing candidates from discussing what the elections are about. “[T]he greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance. If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles.”

536 U.S. 765, 787-88 (2002) (citing *Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)). In short, the First Amendment does not allow the profession to undermine judicial elections by wringing politics out of the political process.

Dean Alfini's Rebuttal fails for the same reason that Justice Scalia criticized the ABA. By focusing on political influence, open-mindedness, and judicial independence, he defines impartiality so that the ordinary influence of electoral accountability would make an elected judge not impartial. As long as states may choose to elect their judges, the states' interest in regulating judicial elections must assume—expressly or implicitly—the permissibility of that choice. That is, the state must define impartiality so that an elected judge can be impartial.

To be clear, I do not argue that Dean Alfini engages in the intellectual subterfuge of which Justice Scalia accused the ABA—i.e., using regulation of judicial campaign speech to frustrate judicial elections. Rather, while he aims at taming improper influences on elected judges, his argument, followed to its logical conclusion, would have that effect. The remainder of this Closing Statement develops this point.

I. ALFINI ON IMPARTIALITY

My Opening Statement began with a straightforward question: What does it mean for a judge to be “impartial”? I criticized states for invoking an undefined interest in impartiality because, without a concrete idea of what impartiality means, states cannot identify campaign behavior that compromises judicial impartiality. While Dean Alfini concedes that states have been unhelpful in defining impartiality, his response does not so much define the term as weave together threads of related concepts. In places he describes impartiality as not prejudging a case, in other places as a commitment to the rule of law, and in still other places as judicial independence or open-mindedness.

In divining Dean Alfini's definition of impartiality, a sensible place to start is his quotation of the 2007 ABA Model Code's definition of the term: “absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge.” This definition has two parts: first, bias and prejudice against parties or classes of parties, and, second, open-mindedness. The former is entirely consistent with my definition of impartiality, and the latter does not provide a workable definition of impartiality. The next two Parts explain these points.

II. BIAS AND PREJUDICE

Bias or prejudice against a party or class of parties—what I referred to in my Opening Statement as “party impartiality”—was one of the compelling interests examined in *White*. The Minnesota announce clause did not serve this interest because it barred speech on issues, not parties. My definition of impartiality, which requires judges to make decisions based on the accepted methods of legal reasoning, is consistent with party impartiality. A judge who decides a case based on party bias or prejudice is *not* deciding based on accepted legal analysis, and so would not be impartial. Thus, I agree that states have a compelling interest in banning campaign speech that suggests or promises decisions based on party bias or prejudice.

III. OPEN-MINDEDNESS

The ABA Model Code also defines impartiality to require open-mindedness. While Dean Alfini never specifically explains what judicial open-mindedness entails, his discussion leaves two possibilities: judicial independence and lack of prejudgment. The former is consistent with my definition of impartiality, and the latter is really an attack on judicial elections. The next two sections explain these points.

A. *Open-Mindedness as Judicial Independence*

According to Dean Alfini, “[j]udicial independence calls upon judges to be free of outside influences so that they may decide cases impartially.” My Opening Statement, however, explained that the mere use of judicial elections, and the fact that a judge stands for reelection, necessarily inserts the influence of political accountability into the process of judicial decision making. Elected judges surely realize that voters will scrutinize their decisions at the next election and at least consider that fact in making judicial rulings. And this influence exists regardless of what a candidate says during her campaign.

Dean Alfini acknowledges that we cannot achieve judicial independence in an absolute sense. He notes that a lawyer’s life experiences shape her legal views, and that such influence is permissible. He instead objects to judges “implementing personal or political agendas rather than adhering to the rule-of-law norm.” But my view of impartiality would also reject such influences. This is because a judge who implements a personal or political agenda would not be deciding based on legal analysis.

B. Open-Mindedness as Lack of Prejudgment

Next, consider prejudice, which Dean Alfini considers “inimical to the rule of law.” He uses prejudice to mean that, “regardless of the arguments presented by [a party’s] lawyers in open court, the judge will rule against [that party].” There are three problems with this definition of prejudice. First, it does not accurately describe how campaign promises affect judicial behavior. To see this, consider my hypothetical candidate who promises to rule for the State in the pending appeal of *State v. Smith*. What makes this promise arguably binding is the threat that voters will not reelect a judge who breaks a campaign promise. But voters will not necessarily act in that manner. As Justice Scalia noted in *White*, voters view campaign promises skeptically:

Justice Stevens asserts that statements made in an election campaign pose a special threat to openmindedness because the candidate, when elected judge, will have a *particular* reluctance to contradict them. That might be plausible, perhaps, with regard to campaign *promises*. A candidate who says “If elected, I will vote to uphold the legislature’s power to prohibit same-sex marriages” will positively be breaking his word if he does not do so (although *one would be naïve not to recognize that campaign promises are—by long democratic tradition—the least binding form of human commitment*).

White, 536 U.S. at 780 (citation omitted) (final emphasis added). Under the First Amendment, the state must show that campaign promises lead to prejudice; they cannot merely rest on the “naïve” assumption that promises do so.

Second, we do not expect judges to be free from prejudice of legal issues. For example, consider the issue of the constitutional right to terminate a pregnancy. Do any constitutional lawyers or commentators believe that all nine of the Supreme Court’s current Justices are “open” to arguments for or against the recognition of such a right? Surely not. Indeed, lawyers and commentators speak and act as if several of the Justices will rule one way or the other “regardless of the arguments presented by [a party’s] lawyers in open court.” For example, it is common to refer to a Justice(s) as the Court’s “swing vote(s).” Doing so only makes sense if we have a reliable prediction of how the remaining Justices will vote on a given issue. Nonetheless, we just as surely (and rightly) consider those remaining Justices to be impartial, because their prejudice is based on the law, and not on impermissible, extra legal grounds.

Third, because Dean Alfini does not distinguish permissible and impermissible reasons for prejudgment, he implicitly condemns judicial elections generally. Recall that a campaign promise will influence a judge's behavior (if at all) through the threat of voter backlash if the judge breaks the promise. Thus, anticipated voter reaction—and not the promise itself—influences the judge's behavior. But even absent a campaign promise, the anticipated views of the voters will encourage certain substantive judicial decisions. That is, the pressure for reelection will influence the judge's decision making, and thus cause a degree of prejudgment, regardless of what the judge says during the campaign. Indeed, if public opinion changes so that fulfilling the promise would be unpopular, political accountability would encourage the judge to break the campaign promise. In short, pressure toward prejudgment is inherent in judicial elections.

In the end, prejudgment, standing alone, does not compromise impartiality. Rather, only prejudgment *for impermissible reasons* does so. Dean Alfini's response treats as impermissible the influence exerted by political accountability. This objection, though, is to the entire enterprise of judicial elections. If Dean Alfini accepts the constitutionality of judicial elections, then he must accept the influence inherent in that system.

CONCLUSION

Whether rule of law, judicial independence, open-mindedness, or lack of prejudgment, Dean Alfini's version of impartiality is not as much about judicial campaign speech as it is judicial elections. It may well be that, as some commentators have suggested, judicial elections violate due process. But until the Court so holds, states may choose how to select their judges. Because the approach described in Dean Alfini's response has the latter effect, it cannot inoculate state judicial campaign regulations against First Amendment challenge.

CLOSING STATEMENT

*Prejudgment Promises Have No Place in
Judicial Election Campaigns*

James J. Alfini

In his Closing Statement, Professor McGreal initially shifts the focus from impartiality to judicial elections. This shift is not inappropriate since it is the *White* case, the “announce clause,” and judicial campaign speech that are the catalysts for this debate. In the course of presenting his arguments, Professor McGreal accuses me (implicitly or as a fellow traveler of the ABA) of (1) not liking judicial elections, (2) believing that elected judges cannot be impartial, and (3) using campaign-speech restrictions as a subterfuge to defeat judicial elections. He then returns to the subject of judicial impartiality and quibbles with my definition for not being “workable.” He ends by focusing on my concerns over prejudgment and criticizes me for failing to “distinguish between permissible and impermissible reasons for prejudgment.” I will respond to his concerns in this order and then offer my closing thoughts.

I. JUDICIAL ELECTIONS

As far as Professor McGreal’s suggestion that I don’t like judicial elections is concerned, let me be explicit: I don’t like judicial elections. They typically are low-visibility affairs with voters having little or no knowledge of the qualifications of the candidates, regardless of restrictions on campaign speech. It is doubtful that lifting restrictions on judicial campaign speech would result in greater voter interest in these contests. More important for purposes of this Debate, judicial elections raise concerns over a candidate’s ability to be impartial when he or she takes the bench. The candidate is required to raise money and seek support if he or she has any hope of winning, raising impartiality concerns after he or she takes the bench when individuals or interests that were supportive of the campaign come before him or her. This is exactly why the codes of judicial conduct in elective states impose restrictions such as the use of campaign finance committees to insulate the candidates from contributors and narrowly drawn speech

restrictions to eliminate the temptations of making prejudgment promises.

Professor McGreal's contention that my attitude towards judicial elections means that I don't believe elected judges can be impartial is incorrect. I respect the policy choices that states have made in deciding to elect all or some of their judges. I also respect and support the adjustments that these states have made to support this policy choice and maintain an impartial judiciary. This is more than can be said for Professor McGreal. In criticizing me (and the organized bar) for supporting elective states' attempts to secure an elected judiciary that is impartial and appears to be impartial, Professor McGreal fails to fully consider the consequences of the decision to have an elected judiciary, and thus it is he who fails to give due deference to these states. Instead, he takes Yogi Berra's advice: "when you come to a fork in the road, take it!" If you take Yogi's advice in this case, you can avoid getting on the judicial election road. Instead, you remain at the fork staring into nondecisional space, criticizing those who are seeking to reconcile the decision to have judicial elections and public accountability, with the core democratic values of the rule of law and judicial impartiality.

The states that have chosen the judicial election road have learned in their travels that there are other policy choices that must be made to secure and protect the impartiality of an elected judiciary. All of these states have established judicial disciplinary mechanisms, generally through constitutional amendment, to enforce their codes of judicial conduct. And, they have included provisions in these codes that seek to secure the appearance and the reality of judicial impartiality through restrictions such as prohibiting candidates from prejudging cases during election campaigns. That is, they have created a judicial structure that is different from that prescribed in the Constitution of the United States for the federal judiciary.

Professor McGreal snarls at these policy choices. He quotes dicta in *White*, where Justice Scalia denounces the "announce clause" for creating "conditions of state-imposed voter ignorance" to support the McGreal contention that restrictions on pledges, promises, and commitments also "undermine judicial elections by wringing politics out of the political process." Again, I agree with the outcome in *White*. Prohibiting judicial candidates from announcing their views on all "disputed legal and political issues" would indeed undermine the electoral process. However, the McGreal view that the same can be said for restrictions on campaign pledges misses the basic fact that all this

restriction seeks to accomplish is to wring prejudice out of the political process.

The current restrictions on campaign speech are not a subterfuge to defeat judicial elections. Judicial-election states that have abolished the announce clause post-*White*, but still restrict campaign pledges, should be able to have vibrant judicial campaigns, where issues and matters of interest to the electorate are debated and discussed. Recently, I witnessed an event that would support this notion. South Texas College of Law hosted a “Texas Supreme Court Forum” that brought the three Republican incumbent justices, including the Chief Justice, together with their Democratic challengers. A moderator from the Houston PBS station posed wide-ranging questions to the candidates over a fast-paced hour. The candidates were not only given the opportunity to present their qualifications, but were also asked questions that sought, among other things: their views on trends in high-court decisions, including the greater use of no-evidence determinations to reverse jury verdicts; their analysis as to how they would reconcile their personal opinions when they conflict with legal precedent; their thoughts on when per curiam opinions are appropriate and their effect on Texas jurisprudence; and their feelings as to whether the partisan election system for selecting Texas judges works well or should be changed. At no point during the debate did the candidates make prejudice promises. Yet, both lawyers and nonlawyers in the audience later remarked that they not only learned a great deal about the candidates, but also gained greater insight into the Texas judicial system from attending the debate.

So, in response to the third McGreal concern, far from using campaign-speech restrictions as a subterfuge to defeat elections, these restrictions have been used in Texas to enhance judicial elections by establishing a level of discourse that not only provides voters with the necessary information to make meaningful decisions, but also has the added benefit of educating the electorate about the Texas judiciary. When Professor McGreal and others seek to deny a state like Texas this ability to reconcile judicial accountability with judicial impartiality, they fail to reckon with the fact that the U.S. Constitution guarantees a republican form of government to each state. The “guarantee clause” does not prescribe the form of republican government but leaves that decision to each state. If a state decides on an elected judiciary and imposes prejudice restrictions on that judiciary to maintain its impartiality, those policy choices should be respected.

In some of the post-*White* cases challenging the constitutionality of prejudgment restrictions on campaign speech, federal district courts have failed to pay deference to these policy choices. They have struck down these restrictions, reflexively lumping them with the announce clause and concluding that they were not narrowly drawn to accomplish a compelling state interest. On the other hand, all of the state high courts that have ruled on such restrictions post-*White* have upheld them on constitutional grounds. The difference, of course, is that the state courts have a greater understanding and sensitivity to the need these restrictions serve in securing an impartial judiciary in the judicial-elections regimes chosen for their states.

II. PREJUDGMENT PROMISES DURING JUDICIAL ELECTION CAMPAIGNS

Professor McGreal continues to take issue with the basic premise that campaign restrictions are necessary to secure judicial impartiality in election jurisdictions, and he stubbornly refuses to understand that the “announce clause” restriction declared unconstitutional in *White* is qualitatively different from prejudgment restrictions. Announcing one’s views on disputed legal or political issues is not a narrowly tailored restriction to contain the prejudgment vice. This prohibition would eliminate some speech that does not threaten to prejudge cases that might come before the candidate if elected and thus sweeps much too broadly. In this sense the “announce clause” is like the restrictions declared unconstitutional in *Buckley* because they would do more than contain the vice of bribery. A “pledges, promises, or commitments” restriction, on the other hand, is tailored to contain only the vice of prejudgment. It is thus a narrowly drawn restriction to support the compelling state interest in an impartial judiciary.

Professor McGreal also expresses a concern over my use of the concept of open-mindedness in my (and the ABA’s) definition of impartiality. He says that, if I meant this to connote lack of prejudgment, then it is really an attack on judicial elections. I do believe that “lack of prejudgment” is subsumed in the concept of open-mindedness, but this certainly is not an attack on judicial elections. As I have indicated above, a state with prejudgment restrictions on campaign speech can have vibrant, informative judicial election contests. Apparently, Professor McGreal believes that unless candidates are armed with prejudgment rhetoric, judicial elections will be meaningless exercises. He also adopts Justice Scalia’s cynical view that prejudgment campaign statements do not necessarily pose a threat to open-mindedness: “one would be naive not to recognize that cam-

paigned promises are—by long democratic tradition—the least binding form of human commitment.” *White*, 536 U.S. at 780. Statements like this suggest that McGreal (and Scalia) have little or no respect for the policy choices that states have made in choosing to elect their judges.

Finally, Professor McGreal rejects the notion that prejudgment promises are always a vice. In this respect, he criticizes me for not distinguishing between permissible and impermissible instances of prejudgment. He explains that “only prejudgment *for impermissible reasons*” compromises impartiality. However, he never offers an example of an impermissible reason. Rather, he seems to be saying that any prejudgment promise during a campaign is permissible as long as it is calculated to get the judge elected. He even speculates about how a judge would be justified in breaking a prejudgment promise if public sentiment shifts the other way after the judge is elected. Ultimately, then, Professor McGreal apparently is arguing that prejudgment promises are never a vice so long as they serve the ends of “political accountability.”

Although judicial elections are indeed intended, at least in part, to make judges accountable, Professor McGreal’s analysis translates this into *decisional accountability*. He seems to be saying that elected judges should always make prejudgment campaign promises and decide cases after they are elected with public sentiment in mind. This would turn the concept of the rule of law, a core value in the American democratic tradition, into a meaningless phrase. On the contrary, judges should be held accountable for behaving as the public expects judges to behave—with integrity, impartiality, and independence.

CONCLUSION

The title of Professor McGreal’s Closing Statement facetiously suggests that if we want impartial judges (as impartiality is defined in the ABA Model Code of Judicial Conduct) we should not elect them. By his reckoning, efforts to secure judicial impartiality in elective jurisdictions through restrictions on campaign speech are doomed to be unconstitutional.

A majority of the states disagree with Professor McGreal’s analysis. They have decided to elect all or some of their judges and have imposed campaign restrictions on judicial candidates to secure their impartiality if elected. To the extent that these campaign restrictions are narrowly tailored to prohibit prejudgment promises, they should be upheld. Prejudgment promises compromise a judge’s ability to be

impartial, and judicial impartiality is an important instrumental value in maintaining the rule of law in our representative democracy.

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