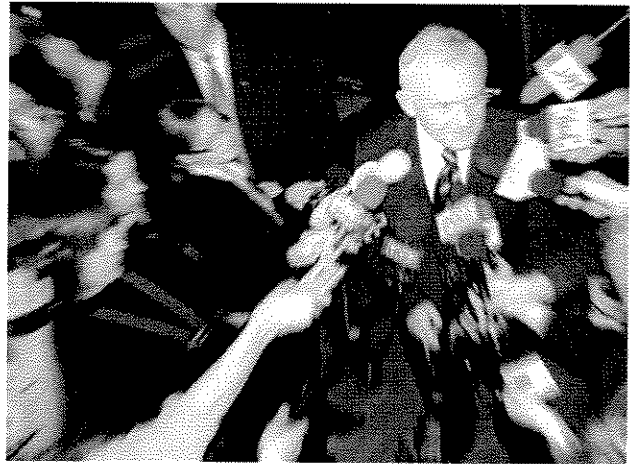


## Part I

# Constitutional Limits on States' Rights to Restrict Advertising in Judicial Election Campaigns

By Norman S. Thayer

*This is the first of a two-part series on New Mexico's restrictions on candidate advertising and commitments in judicial election campaigns. Part I addresses restrictions imposed by enforceable legal sanctions. Part II, to be published March 5, addresses ethical restrictions.*



The decision of the U.S. Supreme Court in *Republican Party of Minnesota v. White*, 536 US 765, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002) leaves unanswered many questions about the power of states to restrict advertising in election campaigns for judicial office. In that case, the Supreme Court of Minnesota had adopted a canon of judicial conduct that prohibited a candidate for judicial office from announcing his or her views on disputed legal or political issues. The Supreme Court held that such a rule involved state restrictions based on the content of speech in a political campaign and could be sustained only if the state could show that the prohibition was narrowly drawn in support of a compelling state interest. Minnesota argued that its interest in preserving the impartiality and the appearance of impartiality of its judiciary was such a compelling interest. This argument was rejected by the U.S. Supreme Court in a 5-4 decision holding that candidates in judicial elections have First

over. Conceding that another meaning of the term "impartiality" could be a bias for or against a legal view, the Court said that such an interest was not compelling in that it was virtually impossible to find a judge without preconceptions about the law (ignoring the difference between a preconception as to the law and a predisposition as to what to decide). Indeed, the Missouri Constitution required judges to be learned in the law. Therefore, because avoiding judicial preconception as to the law is neither possible nor desirable (to the majority), the "appearance" of doing so also was not a compelling interest. As to the question of whether "impartiality" might mean open-mindedness, the Court simply held that it did not believe the Minnesota Supreme Court had that meaning in mind.

The Supreme Court placed its principal reliance on case law prohibiting restrictions on freedom of speech in election campaigns for political office, not judicial office. The Court held "the First Amendment does not permit ... leaving the principle of elections in place while preventing candidates from discussing what the elections were about," which the Court referred to as "state imposed voter ignorance."

Justice John Paul Stevens, in dissent, emphasized the difference between judges and other elected public officials, saying that issues of policy rightly are decided by majority vote, but issues of fact and law in litigation are not determined by popular vote. Even

though judges may make common law, that is not the result of a mandate from the voters, but of judgment on the merits. He wrote that criticism of court rulings and individual judges based solely on political disagreement with the court's decision fundamentally misunderstands judicial office. Judicial office is not just another constituency-driven political arm of the government. A judge's fidelity is to the rule of law regardless of the perceived popular will.

In a dissent by four of the justices, Justice Ruth Bader Ginsburg wrote that politicians represent the voters who put them in office, while judges represent the law, that states should not be required to choose between the polar opposites of elections and free speech,

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Opening the doors to uninhibited advertising in judicial election campaigns will inevitably erode and degrade the nature of judicial office itself.

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Amendment rights of free speech. For a full scholarly treatment of this case and its effect on the New Mexico rules before their 2004 amendment, see Begaye, "Are There Any Limits on Judicial Candidates' Political Speech After *Republican Party of Minnesota v. White*?" 33 N.M.L. Rev. 449 (2003).

The decision in *White* depended on the majority's interpretation of "impartiality." The majority ruled that impartiality referred to a bias for or against parties, whereas the rule was directed at legal issues. The Supreme Court also held that the Minnesota rule was underinclusive in that it did not apply to statements made before the election campaign began or statements made after the election was

and that a state may choose to elect its judges and also protect the office for which they are campaigning by restricting campaigning methods. While legislative and executive officials' primary interest is to advance the interests of their constituents, judges are not political actors and do not represent constituencies. Judge Ginsburg wrote that the First Amendment does not require that judges be treated as politicians just because they are chosen by popular vote. She argued that the outcome of particular cases does not depend on the will of the people nor the outcome of elections and, further, that fundamental rights may not be submitted to a vote. Thus, in her opinion, it was wrong to rely on case law discussing the rights of freedom of speech in political elections with elections for judicial office. She concluded that avoidance of prejudgment corresponds to litigants' rights to due process of law protected by the 14th Amendment, saying that a fair adjudicative procedure is a powerful and independent constitutional interest. Thus, states are justified in barring campaign promises that threaten the actual bias of the judicial officer. What was at stake, in her view, was due process of law itself, not mere impartiality.

Justice Antonin Scalia, for the majority, responded that if due process requires a judge who has not expressed an opinion on the issues, then the election of judges itself is a denial of due process. He observed that even after election, judges always face the pressure of the voters in making their decisions, rejecting the argument that an election campaign promise would put additional pressure on the judge after he assumed office.

The *New Mexico Code of Judicial Conduct*, as it read at the time the *White* case was decided, contained in Rule 21-700 (B)(4) a prohibition against judicial candidates announcing how they would rule on any case or issue that may come before the court. Because the *Code of Judicial Conduct* is promulgated by the New Mexico Supreme Court and enforced by the Court and the Judicial Standards Commission, the rule constitutes state restriction of candidates' speech based on the content of that speech. The decision in *White* indicated that the New Mexico rule was unconstitutional.

In 2003, the American Bar Association promulgated amendments to its model code of judicial conduct. The Code of Judicial Conduct Committee recommended and, in 2004, the N. M. Supreme Court adopted the amendments, so that the pertinent provisions of the existing Rule 21-700 (B) now read as follows:

- (4) shall not:
- (a) with respect to 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 the office.

The constitutional question is whether New Mexico has a compelling interest in enforcing the foregoing restrictions. In this respect, one should refer to the preamble to the New Mexico *Code*, which identifies the objective of the *Code* as:

An independent and honorable judiciary is indispensable to justice in our society. The provisions of this *Code* should be construed and applied to further that objective.

Thus, the compelling state interest that supports the New Mexico rules is nothing less than justice itself, administered by an independent and honorable judiciary. New Mexico has determined that the independence of its judges is fundamental to the provision of justice, just as Justice Ginsburg, in dissent, argued that impartiality was indispensable to due process of law. The term "independent" must include independence from the perceived wishes of the voters and independence from campaign pledges and promises. The term "honorable" includes impartiality and integrity as emphasized in Rules 21-100 and 21-200 of the *Code*.

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**An independent and honorable judiciary is indispensable to justice in our society. The provisions of this Code should be construed and applied to further that objective.**

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If New Mexico's restrictions on campaign statements should be attacked as unconstitutional, it can be argued that they support the compelling state interest in achieving justice. If the administration of justice is not a compelling state interest, query whether there is any interest sufficiently compelling to meet the standards of the U.S. Supreme Court. Opening the doors to uninhibited advertising in judicial election campaigns will inevitably erode and degrade the nature of judicial office itself. Such a result could open judicial election campaigns to the full barrage of partisan, misleading, vitriolic charges and countercharges that unfortunately characterize elections for political offices. If candidates for judicial office know that the best way to get elected is to make campaign commitments that reflect prejudgment of issues that may come before them after the election, they may decide that their tenure in office may be better secured by following the perceived wishes of the voters, and judicial office will become just another constituent-driven branch of government. The independence of the judicial branch will be destroyed. It is preferable to restrict the pre-election statements and advertising of candidates in judicial elections than to subvert the nature of judicial office, particularly where the restrictions are limited to pledges, promises and commitments that prejudice the impartial adjudication of issues that may come before the court after the election.



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