

**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.*

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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 AB



cases.<sup>17</sup> In fact, there is little evidence to support any of these fears.

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.