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THE LIMITS OF PERMISSIBLE JUDICIAL CAMPAIGN SPEECH IN NEW YORK

HON. VITO M. DEStEFANO[†]

INTRODUCTION

In December 2018, New York’s Advisory Committee on Judicial Ethics (“ACJE”), which I proudly served on for ten years, issued Opinion 17-28, concerning an inquiry by a judicial candidate as to whether he or she could respond to a candidate questionnaire prepared by the New York State Right to Life Committee (“RTL questionnaire”).¹ In the RTL questionnaire, the candidate is asked a series of questions concerning the candidate’s *personal* beliefs on abortion, the beginning of life, *Roe v. Wade*,² the definition of personhood, the New York and United States Constitutions, and so on. Each question asking for the candidate’s personal beliefs is preceded by a prefatory acknowledgment of “the judicial obligation to follow binding precedents of higher courts and applicable constitutional and statutory provisions, to honor *stare decisis*, and to decide any future case based on the law and facts of that case.”³

Concluding that the RTL questionnaire, “when viewed as a whole, is clearly designed to elicit a series of implied pledges, promises, and commitments, touching on a wide variety of closely interrelated issues that may come before judges at every level of

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¹ N.Y. Advisory Comm. on Jud. Ethics, Op. 17-28 (Dec. 11, 2018), <https://www.nycourts.gov/ipjudicialethicsopinions/17-28.htm> [<https://perma.cc/56AC-UMLY>].

² 410 U.S. 113 (1973).

³ *Id.* (quoting State Right to Life Comm. Jud. Candidate Questionnaire from N.Y. State Right to Life Comm., Inc., to N.Y. Judicial Candidates at *1–4 [hereinafter Questionnaire] (on file with author)).

the judiciary” and that “a candidate’s impartiality” could “‘reasonably be questioned’ in a wide variety of cases . . . if he/she agreed to the bold-faced statements on the questionnaire,”⁴ the candidate was advised to decline responding to it. As I strongly disagree with the ACJE’s opinion, I write this Article to express my personal views on the subject. Let me emphasize that this Article reflects my attempt to engage in a reasoned analysis of an admittedly difficult topic which, in my opinion, has not been sufficiently explored or discussed by academics, ethics committees, or judges since the Supreme Court of the United States decided *Republican Party of Minnesota v. White* (occasionally abbreviated herein as “*White*”).⁵

State ethics advisory panels and disciplinary bodies in New York and elsewhere have struggled with the contours of permissible judicial campaign speech following *White*, which invalidated Minnesota’s “announce clause” that prohibited judicial candidates from “announcing their views on ‘disputed legal or political issues.’”⁶ However, a review of the opinions of advisory committees in states such as Arizona, Michigan, Nevada, Tennessee, Pennsylvania, and Georgia⁷ concerning candidate questionnaires that seek to elicit candidates’ personal opinions on controversial or disputed legal or political issues reveals no general prohibition against providing responses. There are, instead, restrictions against furnishing answers that appear to bind the candidates upon assuming judicial office or requiring candidates to give assurances about “keep[ing] an open mind” and carrying out judicial duties “faithfully and impartially.”⁸

⁴ *Id.* (quoting 22 N.Y. COMP. RULES & REGS § 100.3(E)(1) (2020)).

⁵ *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).

⁶ *Id.* at 768, 788 (quoting MINN. CODE OF JUD. CONDUCT Canon 5(A)(3)(d)(i) (2000)).

⁷ The judicial ethics canons in Pennsylvania and Georgia were amended to permit responses to questionnaires. *See* PA. CODE JUD. CONDUCT R. 4.1 cmt. 11 (2014); GA. CODE JUD. CONDUCT R. 4.2 cmt. 3 (2016). In 2006, the Kansas Judicial Ethics Advisory Panel advised that a candidate could not answer a questionnaire which sought the judge’s personal opinions on a variety of controversial topics, including the rights of an unborn child, the death penalty, pornography, the right to define marriage, etc. Kan. Jud. Ethics Advisory Panel, Jud. Ethics Op. JE 139 (Apr. 17, 2006). However, the Kansas Commission on Judicial Qualifications rejected the Panel’s conclusion inasmuch as “judges and judicial candidates are allowed to publicly announce their views on legal, political, or other issues.” Kan. Jud. Rev. v. Stout, 196 P.3d 1162, 1173–74 (Kan. 2008).

⁸ PA. CODE JUD. CONDUCT R. 4.1 cmt. 11 (2014); GA. CODE JUD. CONDUCT R. 4.2 cmt. 3 (2016); *see also* Stout, 196 P.3d at 1176.

Interestingly, in 1996, several years prior to the Supreme Court's decision in *White*, New York eliminated its announce clause over concerns that it was unconstitutional.⁹

In light of the *White* decision, and considering the relevant rules, court decisions, and Judicial Conduct determinations and opinions, it is my opinion that a candidate can ethically answer the RTL questionnaire.

I. SUMMARY OF *REPUBLICAN PARTY OF MINNESOTA V. WHITE*

In 1996, Gregory Wersal sought election as associate justice of the Minnesota Supreme Court.¹⁰ While campaigning, he distributed materials that criticized Minnesota Supreme Court decisions on controversial issues like “crime, welfare, and abortion.”¹¹ A complaint was filed against Wersal by the Office of Lawyers Professional Responsibility, an office under the direction of the Minnesota Lawyers Professional Responsibility Board, which “investigates and prosecutes ethical violations of lawyer candidates for judicial office.”¹² The Lawyers Board eventually dismissed the complaint.¹³ In regard to whether Wersal's campaign materials violated the announce clause, the Board expressed that it had doubts as to the clause's constitutionality.¹⁴ Nevertheless, Wersal withdrew from the election, fearing that his legal career would be in jeopardy if he received any additional ethical complaints.¹⁵

In 1998, Wersal, again a candidate for election to judicial office, “sought an advisory opinion from the Lawyers Board” as to “whether it planned to enforce the announce clause.”¹⁶ In response, the Lawyers Board stated that although it had

⁹ N.Y.C. BAR ASS'N GOV'T ETHICS COMM., FIRST AMENDMENT CONSIDERATIONS FOR JUDICIAL CAMPAIGNS: THE IMPACT OF *REPUBLICAN PARTY OF MINNESOTA V. WHITE* ON THE NEW YORK STATE CODE OF JUDICIAL CONDUCT 5 (2004), <https://www.nycbar.org/pdf/report/WHITEREPORTDRAFT12304.pdf> [<https://perma.cc/5X3R-GQ4Y>]. Prior to the elimination of the announce clause in New York, Canon 7(b)(1)(c) of the Code of Judicial Conduct read as follows: a judicial candidate “should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office [or] announce his views on disputed legal or political issues . . .” *New Code of Judicial Conduct is Adopted by the American Bar Association*, 58 A.B.A. J. 1207, 1212 (1972).

¹⁰ *White*, 536 U.S. at 768.

¹¹ *Id.*

¹² *Id.* at 768–69.

¹³ *Id.* at 769.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

“significant doubts” about the clause’s constitutionality, it could not answer his question absent a list of the specific announcements he intended to make.¹⁷

Wersal and other plaintiffs, including the Republican Party of Minnesota, brought suit in federal district court, seeking an injunction against the enforcement of the announce clause, as well as a declaration that the clause violated the First Amendment on its face.¹⁸ To advance this claim, Wersal argued that “he was forced to refrain from announcing his views on disputed issues” while campaigning, even in response to questioning, “out of concern” that he might violate the announce clause.¹⁹ The district court granted defendants’ motion for summary judgment, concluding:

the State had compelling interests in maintaining the actual and apparent integrity and independence of the judiciary and . . . the restrictions on candidates’ political activity and fund solicitation were narrowly tailored to serve those interests. It also upheld the provisions against vagueness and equal protection challenges. In its analysis of the announce clause, the court determined that the critical issue was whether the provision was narrowly tailored to serve the State’s interest in maintaining the integrity and independence of the judiciary. The district court *construed the clause to reach only the discussion of issues likely to come before the court*, having considered that the Judicial Board had argued for a narrow interpretation of the clause and that the Minnesota Supreme Court, when possible, construes laws to prohibit their application to constitutionally protected expression. The court then concluded that the provision [with the limited construction] did not offend the First Amendment.²⁰

The Eighth Circuit affirmed, with one judge dissenting, agreeing with the clause’s limited construction and holding that the clause also permitted “general discussions of case law” and “judicial philosophy.”²¹

The United States Supreme Court reversed, initially noting and rejecting the “limitations . . . placed upon the scope of the

¹⁷ *Id.*

¹⁸ *Id.* at 769–70.

¹⁹ *Id.* at 770.

²⁰ *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 860–61 (8th Cir. 2001) (emphasis added) (citations omitted), *rev’d sub nom.* *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).

²¹ *Id.* at 882, 885.

announce clause” inasmuch as they prohibited “a judicial candidate from stating his views on any specific nonfanciful legal question within the province of the court for which he is running, except in the context of discussing past decisions—and in [that] context as well, if he expresses the view that he is not bound by stare decisis.”²²

The Court then examined the concept of impartiality—identified by the State as a compelling state interest served by the announce clause—and determined that the announce clause did not survive a strict scrutiny analysis, even assuming that impartiality, howsoever it was defined, was a compelling state interest:

One meaning of “impartiality” in the judicial context—and of course its root meaning—is the lack of bias for or against either *party* to the proceeding. Impartiality in this sense assures equal application of the law. That is, it guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party. This is the traditional sense in which the term is used. . . .

We think it plain that the announce clause is not narrowly tailored to serve impartiality (or the appearance of impartiality) in this sense. Indeed, the clause is barely tailored to serve that interest *at all*, inasmuch as it does not restrict speech for or against particular *parties*, but rather speech for or against particular *issues*. To be sure, when a case arises that turns on a legal issue on which the judge (as a candidate) had taken a particular stand, the party taking the opposite stand is likely to lose. But not because of any bias against that party, or favoritism toward the other party. *Any* party taking that position is just as likely to lose. The judge is applying the law (as he sees it) evenhandedly.

* * *

It is perhaps possible to use the term “impartiality” in the judicial context . . . to mean lack of preconception in favor of or against a particular *legal view*. This sort of impartiality would be concerned, not with guaranteeing litigants equal application of the law, but rather with guaranteeing them an equal chance to persuade the court on the legal points in their case. Impartiality in this sense may well be an interest served by the announce clause, but it is not a *compelling* state interest, as strict scrutiny requires. A judge’s lack of predisposition regarding the relevant legal issues in a case has never been thought a

²² *White*, 536 U.S. at 771, 773 (italics omitted).

necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law. . . . Indeed, even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so. "Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias." The Minnesota Constitution positively forbids the selection to courts of general jurisdiction of judges who are impartial in the sense of having no views on the law. And since avoiding judicial preconceptions on legal issues is neither possible nor desirable, pretending otherwise by attempting to preserve the "appearance" of that type of impartiality can hardly be a compelling state interest either.

* * *

A third possible meaning of "impartiality" (again not a common one) might be described as open-mindedness. This quality in a judge demands, not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case. This sort of impartiality seeks to guarantee each litigant, not an *equal* chance to win the legal points in the case, but at least *some* chance of doing so. It may well be that impartiality in this sense, and the appearance of it, are desirable in the judiciary, but we need not pursue that inquiry, since we do not believe the Minnesota Supreme Court adopted the announce clause for that purpose.

Respondents argue that the announce clause serves the interest in openmindedness, or at least in the appearance of openmindedness, because it relieves a judge from pressure to rule a certain way in order to maintain consistency with statements the judge has previously made. The problem is, however, that statements in election campaigns are such an infinitesimal portion of the public commitments to legal positions that judges (or judges-to-be) undertake, that this object of the prohibition is implausible. Before they arrive on the bench (whether by election or otherwise) judges have often committed themselves on legal issues that they must later rule upon. More common still is a judge's confronting a legal issue on which he has expressed an opinion while on the bench. Most frequently, of course, that prior expression will have occurred in ruling on an earlier case. But judges often state their views on disputed legal issues outside the context of adjudication—in classes that they conduct, and in books and speeches. Like the ABA Codes of

Judicial Conduct, the Minnesota Code not only permits but encourages this. That is quite incompatible with the notion that the need for open-mindedness (or for the appearance of open-mindedness) lies behind the prohibition at issue here.

The short of the matter is this: In Minnesota, a candidate for judicial office may not say “I think it is constitutional for the legislature to prohibit same-sex marriages.” He may say the very same thing, however, up until the very day before he declares himself a candidate, and may say it repeatedly (until litigation is pending) after he is elected. As a means of pursuing the objective of open-mindedness that respondents now articulate, the announce clause is so woefully underinclusive as to render belief in that purpose a challenge to the credulous.

Justice Stevens asserts that statements made in an election campaign pose a special threat to open-mindedness 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 naive not to recognize that campaign promises are—by long democratic tradition—the least binding form of human commitment). But, as noted earlier, the Minnesota Supreme Court has adopted a separate prohibition on campaign “pledges or promises,” which is not challenged here. The proposition that judges feel significantly greater compulsion, or appear to feel significantly greater compulsion, to maintain consistency with *nonpromissory* statements made during a judicial campaign than with such statements made before or after the campaign is not self-evidently true. It seems to us quite likely, in fact, that in many cases the opposite is true. We doubt, for example, that a mere statement of position enunciated during the pendency of an election will be regarded by a judge as more binding—or as more likely to subject him to popular disfavor if reconsidered—than a carefully considered holding that the judge set forth in an earlier opinion denying some individual’s claim to justice. In any event, it suffices to say that respondents have not carried the burden imposed by our strict-scrutiny test to establish this proposition (that campaign statements are uniquely destructive of open-mindedness) on which the validity of the announce clause rests.

Moreover, the notion that the special context of electioneering justifies an *abridgment* of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head. “[D]ebate on the qualifications of candidates” is “at the

core of our electoral process and of the First Amendment freedoms," not at the edges. . . . "It is simply not the function of government to select which issues are worth discussing or debating in the course of a political campaign." We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election.²³

In a footnote, the majority acknowledged that:

[T]he announce clause "serves the State's interest in maintaining both the appearance of [a] form of impartiality [in regard to parties to a proceeding] and its actuality." . . . Some of the speech prohibited by the announce clause may well exhibit a bias against parties—including Justice Stevens's example of an election speech stressing the candidate's unbroken record of affirming convictions for rape. That is why we are careful to say that the announce clause is "*barely tailored* to serve that interest" . . . The question under our strict scrutiny test, however, is not whether the announce clause serves this interest *at all*, but whether it is *narrowly tailored* to serve this interest. It is not.²⁴

In dissent, Justice Ginsberg, after discussing the undisputed and continuing vitality of Minnesota's "[no] pledges and promises clause," made the following observations:

The constitutionality of the pledges or promises clause is thus amply supported; the provision not only advances due process of law for litigants in Minnesota courts, it also reinforces the authority of the Minnesota judiciary by promoting public confidence in the State's judges. The Announce Clause, however, is equally vital to achieving these compelling ends, for without it, the pledges or promises provision would be feeble, an arid form, a matter of no real importance.

²³ *Id.* at 775–82 (emphasis omitted) (footnotes omitted) (citations omitted) (first quoting *Laird v. Tatum*, 409 U.S. 824, 835 (1972) (memorandum opinion); then quoting *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 222–23 (1989); and then quoting *Brown v. Hartlage*, 456 U.S. 45, 60 (1982)).

²⁴ *Id.* at 777 n.7 (citations omitted) (first quoting *id.* at 801 (Stevens, J., dissenting); and then quoting *id.* at 776 (majority opinion)). In his concurring opinion, Justice Kennedy observed that Minnesota

may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards. What Minnesota may not do, however, is censor what the people hear as they undertake to decide for themselves which candidate is most likely to be an exemplary judicial officer. Deciding the relevance of candidate speech is the right of the voters, not the State.

Id. at 794 (Kennedy, J., concurring).

Uncoupled from the Announce Clause, the ban on pledges or promises is easily circumvented. By prefacing a campaign commitment with the caveat, “although I cannot promise anything,” or by simply avoiding the language of promises or pledges altogether, a candidate could declare with impunity how she would decide specific issues. Semantic sanitizing of the candidate’s commitment would not, however, diminish its pernicious effects on actual and perceived judicial impartiality. To use the Court’s example, a candidate who campaigns by saying, “If elected, I will vote to uphold the legislature’s power to prohibit same-sex marriages” will feel scarcely more pressure to honor that statement than the candidate who stands behind a podium and tells a throng of cheering supporters: “I think it is constitutional for the legislature to prohibit same-sex marriages.” Made during a campaign, both statements contemplate a *quid pro quo* between candidate and voter. Both effectively “bind [the candidate] to maintain that position after election.” And both convey the impression of a candidate prejudging an issue to win votes. Contrary to the Court’s assertion, the “nonpromissory” statement averts none of the dangers posed by the “promissory” one.

By targeting statements that do not technically constitute pledges or promises but nevertheless “publicly mak[e] known how [the candidate] would decide” legal issues, the Announce Clause prevents this end run around the letter and spirit of its companion provision. No less than the pledges or promises clause itself, the Announce Clause is an indispensable part of Minnesota’s effort to maintain the health of its judiciary, and is therefore constitutional for the same reasons.²⁵

II. AFTER *REPUBLICAN PARTY OF MINNESOTA V. WHITE*

The United States Supreme Court’s decision in *White* has spurred significant commentary and controversy among, *inter alia*, courts, disciplinary bodies, and scholars attempting to balance “the competing goals of informed voter decision making, vigorous competition, and judicial impartiality that together frame the debate over the regulation of judicial election campaigns.”²⁶ For the most part, as noted, “state courts have revised their canons, including provisions not at issue in *White*, to make them less restrictive. . . . [But others] have rejected First Amend-

²⁵ *Id.* at 819–21 (Ginsburg, J., dissenting) (footnote omitted) (citations omitted) (first quoting *id.* at 780 (majority opinion); then quoting *id.* at 779; then quoting *id.* at 770; and then quoting *Kelly*, 247 F.3d at 881–82).

²⁶ Richard Briffault, *Judicial Campaign Codes After Republican Party of Minnesota v. White*, 153 U. PA. L. REV. 181, 187 (2004).

ment challenges to the restrictions on judicial campaign and partisan political activities that the canons impose.”²⁷

In New York, the Court of Appeals has applied the holding of *Republican Party of Minnesota v. White* narrowly, rejecting constitutional attacks on other, related canons.²⁸ An excellent summary of the Court of Appeals’ treatment of permissible and impermissible campaign statements is set forth in a 2013 law review article.²⁹ The aforementioned law review article notes that:

White had a nationwide impact on state judicial conduct codes. . . . In the aftermath of *White*, the New York Court of Appeals decided *Matter of Shanley*. The petitioner sought review of a decision of the New York State Commission on Judicial Conduct (“Commission”) concerning “campaign literature in which she [had] identified herself as a ‘Law and order Candidate.’”

“In the Commission’s view, the phrase created the appearance that petitioner would favor the prosecution, and amounted to an impermissible pledge as to how she would decide cases.” According to widely held perceptions, “the phrase promises stern treatment of criminal defendants.” The Court of Appeals disagreed with the result, finding that the phrase did not compromise judicial impartiality. “‘Law and order’ is a phrase widely and indiscriminately used in everyday parlance and election campaigns. We decline to treat it as a ‘commit[ment]’ or a ‘pledge[] or promise[] of conduct in office.’”

The next year the Court of Appeals decided *Matter of Watson*. In the course of his campaign for judicial office, William Watson sent a letter to law enforcement personnel asking them to “put a real prosecutor on the bench.” Watson indicated in a newspaper advertisement that “he had ‘proven experience in the war against crime.’” Watson also made a statement to a reporter indicating that he would reduce court caseloads by cracking down on crime, causing criminals to go elsewhere.

The Court of Appeals identified tension with *White*, finding the pledges or promises clause at issue in the case “sufficiently circumscribed” to withstand First Amendment scrutiny. The

²⁷ *Id.* at 183 (footnotes omitted).

²⁸ See N.Y. Advisory Comm. on Jud. Ethics, Op. 15-188 (Jan. 28, 2016), <https://www.nycourts.gov/ipjudicialethicsopinions/15-188.htm> [<https://perma.cc/K95M-FYDY>] (“New York State appellate courts have considered, and rejected, claims that certain judicial conduct rules prohibiting partisan political activity impermissibly restrict a judge’s freedom of speech . . . or are unconstitutionally vague.”).

²⁹ Noah Hertz-Bunzl, *Pledge, Promise, or Commit: New York’s Tenuous Limitations on Judicial Campaign Speech*, 29 *TOURO L. REV.* 569, 569 (2013).

clause is limited because it “precludes only those statements of intention that single out a party or class of litigants for special treatment” or convey a candidate will behave inconsistently with their judicial duties, leaving permissible “most statements identifying a point of view.”

[S]tatements that merely express a viewpoint do not amount to promises of future conduct. On the other hand, candidates need not preface campaign statements with the phrase “I promise” before their remarks may reasonably be interpreted by the public as a pledge to act or rule in a particular way if elected. A candidate’s statements must be reviewed in their totality and in the context of the campaign as a whole to determine whether the candidate has unequivocally articulated a pledge or promise of future conduct

Here, Watson violated this rule by expressing a bias in favor of the police and implying he would use his powers to keep certain kinds of defendants out of the city, and did so repeatedly throughout the campaign.

In 2009, the Commission considered charges against [a judge] stemming from her election campaign for New York City Civil Court. [In her campaign, the judge] had released literature advertising a planned lecture that stated, “[she] and Veteran Tenant Attorney Steven DeCastro will show you how to stick up for your rights, beat your landlord, . . . and win in court!”

The Commission identified violations of the pledges, promises, and commitments clauses.

[The candidate’s] literature may have given prospective voters the impression that she would favor tenants over landlords in housing matters, which are often the subject of Civil Court proceedings. By distributing such literature, which appeared to commit herself with respect to issues likely to come before her court, she compromised her impartiality.

* * *

In 2010, the Commission considered written complaints against Rensselaer County Supreme Court Justice Patrick J. McGrath for a letter he sent during his campaign to pistol permit holders. The text of the letter stated the following:

As your County Judge for the past 14 years, I have been responsible for all pistol permits in Rensselaer County. My

pistol permit is very important to me as I know yours is to you. . . .

....

As Supreme Court Justice . . . I will still be responsible for all pistol permits in Rensselaer County.

The Commission found that the statements conveyed bias to favor pistol permit holders and their interests, reinforcing an implied promise that he would look after their interests and thus violated the rule against improper pledges, promises, and commitments. "Campaign statements that single out a particular class of litigants for special treatment are inconsistent with judicial impartiality and the appearance of impartiality"

The Commission made a number of decisions on similar issues prior to *White*. In the following three instances, the Commission found a violation of the "pledges and promises" and "commit or appear to commit" clauses. *Matter of Birnbaum* involved a brochure that "asserted that voters had a 'clear choice' between respondent . . . a tenant, and his opponent . . . a landlord." The "literature gave the unmistakable impression that he would favor tenants over landlords in housing matters."

Matter of Hafner, Jr. involved literature "that stated: 'Are you tired of seeing career criminals get a 'slap' on the wrist? So am I'" and the phrase, referring to an opponent, that "[s]oft judges make hard criminals!" The literature implied respondent "would deal harshly with all such defendants, rather than judge the merits of individual cases." *Matter of LaCava* involved a letter sent to Right-to-Life Party members in which the candidate "asserted his 'commitment to the sanctity of life from the moment of conception'" and an interview with a reporter in which the candidate stated that abortion is murder. This statement "created the appearance" that LaCava "might not follow constitutional and statutory law if called upon to do so."³⁰

³⁰ *Id.* at 572-76 (footnotes omitted) (citations omitted) (first quoting *In re Shanley*, 98 N.Y.2d 310, 311-13 (2002) (per curiam); then quoting *In re Watson*, 100 N.Y.2d 290, 296, 298, 303 (2003) (per curiam); then quoting *In re Chan* (N.Y. Comm'n Jud. Conduct Nov. 17, 2009), 2009 WL 4929370, at *2-3; then quoting *In re McGrath* (N.Y. Comm'n Jud. Conduct Feb. 5, 2010), 2010 WL 597261, at *1, *3; then quoting *In re Birnbaum* (N.Y. Comm'n Jud. Conduct Sept. 29, 1997), 1997 WL 640687, at *1-2; then quoting *In re Hafner* (N.Y. Comm'n Jud. Conduct Dec. 29, 2000), 2000 WL 33172938, at *1-2; and then quoting *In re La Cava* (N.Y. Comm'n Jud. Conduct Sept. 16, 1999), 1999 WL 994135, at *1-2). The article posits that

Ultimately the key distinction in New York is that a statement is unlawful when it favors a single class of litigants. Under this rubric, William Watson and Walter Hafner violated the rule by favoring law enforcement over criminal defendants. [The New York City Civil Court candidate] and Arthur Birnbaum violated the rule by favoring tenants over

The article then summarized the status of pledge, promise, or commit clauses across the nation since *White*:

The vast majority of states that have judicial elections have some form of a pledge, promise, or commit clause in their canons of judicial conduct. The constitutionality of such clauses after *White* has been the subject of litigation in other states. The Supreme Court of Florida has upheld the clauses. Other courts have upheld the clauses with narrow constructions. A number of federal district courts have found the provisions to be unconstitutional, on their face or as applied. Some federal appellate courts have rejected challenges to the clauses based on ripeness or standing grounds. The general consensus among the scholarship is that [even] the promises clauses are on shaky ground after *White*.³¹

The Court of Appeals also upheld the political activity canons in *Matter of Raab*. There, the court distinguished between a candidate's activities on his own behalf, which were permissible, and activities on behalf of other candidates, which were not, and otherwise found the canons narrowly tailored to preserve the impartiality and integrity of the judiciary.³²

In a 2006 article analyzing the impact of *White*, Robert Tembeckjian, Administrator and Counsel to New York's Judicial Conduct Commission, suggested that statements which are permissible during a campaign may *later* require disqualification and that the failure to disqualify might lead to discipline.³³ He also reiterated Justice Ginsburg's suggestion that the exclusion of explicit words of pledge or promise from a statement does not render an otherwise impermissible statement permissible:

As the effects of the U.S. Supreme Court decision in *Republican Party of Minnesota v. White* take hold, and candidates for judicial office speak more freely, will judges more frequently be disqualified from hearing certain cases because their impartiality has been compromised by things they said on the campaign trail?

* * *

landlords. Patrick McGrath violated this rule by favoring the interests of gun-owners over the interests of non gun-owners.

Id. at 582 (footnotes omitted).

³¹ *Id.* at 578.

³² 100 N.Y.2d 305, 315–16 (2003).

³³ Robert H. Tembeckjian, *Campaign Speech and the Administration of Justice*, N.Y.L.J. (Nov. 29, 2006), <https://advance.lexis.com/api/permalink/f2ed6214-ce77-4f81-8a0a-5924c0765ff1/> (login required).

A related code provision, the "disqualification rule," requires a judge to recuse in any case where the judge's impartiality might reasonably be questioned, including where the judge, while a candidate, made a public statement that commits, or appears to commit, the judge with respect to an issue in the proceeding, the controversy itself and, in some jurisdictions, the parties or a class of parties. In his concurring opinion in *White*, Justice Anthony Kennedy noted that the states may adopt disqualification standards more rigorous than due process requires and may discipline judges who violate those standards.

* * *

What is really going on here is not so much a grand constitutional debate as an issue-driven political agenda. Many of the post-*White* federal lawsuits challenging the code have been brought by Right-to-Life organizations, whose goal seems to be to loosen the constraints on judicial candidates so that a more ideologically pure group of candidates would be identified and elected. In Alaska, where a lawsuit challenging the code has been commenced, the judicial council advised judicial candidates not to answer certain issue-driven questionnaires. The Alaska Right to Life organization then sent out a fundraising appeal stating, "Alaska Right to Life is in dire need of PAC funding to accomplish the goals of changing the makeup of the courts by removing bad judges."

What may be a "bad judge" to Alaska Right to Life is probably not what would be a "bad judge" to Alaska abortion rights advocates, but I would be offended by such tactics from either side of the abortion issue. When Right to Life wins one, they simultaneously open the door to Pro-Choice groups using the same tactics to put their people on the bench. What is good for one side will be good for the other. It just won't be good for public confidence in the integrity or impartiality of the judiciary or the administration of justice.

* * *

If a campaigning judge is permitted to make promises with respect to cases or controversies, will that judge's impartiality reasonably be questioned should that case or controversy come before him or her on the bench? In my view, depending on the specifics of the particular situation, the answer will increasingly be "yes," and the judge will have to recuse.

For example, I believe under *White* judicial candidates may say, "I have always believed life begins at conception." But I do not believe *White* permits candidates to say, "If an abortion case comes before me, I will rule in favor of the unborn child." Such

a statement would likely result in discipline under the “pledges or promises” clause. Yet even if there were no such clause, this pledge-making candidate could not preside over an abortion rights case because, under the disqualification rule, he or she would have made a campaign statement that did or appeared to commit to a party or a result. Substitute “pro-choice” for “right to-life” in this example, and you get the same awful result.³⁴

Other campaign statements may not violate the rules so clearly. If that same candidate were to say, “I am right-to-life, and if an abortion case comes before me, you can count on me to do the right thing,” my work as a disciplinary enforcer would be set in motion. Was this a disguised and prohibited “pledge” or “promise”?

If the present trend continues, and federal courts invalidate the “pledges or promises” clause while affirming the disqualification rule, the Right-to-Life groups bringing suit will have created new work for disciplinary enforcers, work we do not want on an issue we would prefer were not there, but work we will be obliged to undertake. We could not let judges off the hook for presiding over cases in which their impartiality might reasonably be questioned. But our factual inquiry would be a complex and delicate balancing act as we try to find the truth without becoming the “thought police.” And we would not be alone. Appellate courts would increasingly be forced to rule on claims that a lower court ruling was tainted by the judge’s lack of impartiality, owing to pledges or promises made during the judge’s campaign.³⁵

³⁴ In Mr. Tembeckjian’s hypothetical example, the candidate would, in any event, be guilty of violating multiple ethics rules: He promised/pledged a result; committed to a “case or controversy”; demonstrated bias in favor of a party; and suggested that he would not follow the law. *Id.* Clearly, therefore, the candidate, after election, would also be disqualified. Mr. Tembeckjian’s otherwise excellent article also asserts that disqualification would be required because the judge, while a candidate, “*appeared to commit* to a party or result.” *Id.* (emphasis added). Significantly, the Rules governing the Conduct of Judges were amended in February 2006 to delete the provision which precluded candidates 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 . . .” 22 N.Y. COMP. RULES & REGS. § 100.5(A)(4)(d)(ii) (2006) (alterations omitted). Mr. Tembeckjian’s article was published in November 2006. Tembeckjian, *supra* note 33. Although Mr. Tembeckjian’s statement is consistent with his earlier reference to Justice Kennedy’s assertion that recusal standards may be more rigorous than due process requires, any reliance on the “appear[s] to commit” language of a defunct rule is problematic.

³⁵ Tembeckjian, *supra* note 33 (footnote omitted).

III. OPINIONS OF THE ACJE AFTER *WHITE*

In Opinion 15-71 of the ACJE, the inquiring judge, a candidate for election/re-election, was invited by a non-profit advocacy group to participate in a screening process to be evaluated for the group's endorsement in the upcoming election.³⁶ Concerned about disclosing a position that might compromise the judge's oath "to be 'unbiased, fair and impartial,'" ³⁷ the inquirer sought advice from the committee, which responded as follows:

[T]he Committee believes the inquiring judicial candidate may express his/her own personal views on matters related to abortion during the interview process with the organization in question, provided the candidate does not make pledges or promises of conduct in office inconsistent with the impartial performance of the adjudicative duties of office, or improper commitments regarding cases, controversies, or issues likely to come before the court. If the inquiring candidate chooses to share his/her views on the subject of abortion in an interview with the advocacy organization, he/she should also make clear that he/she will decide all cases fairly and impartially and in accordance with governing law.

The candidate also may not agree to any unacceptable "conditions" to the endorsement or support, such as a request that the candidate decline endorsement by particular organizations or political parties, or a request to make a pledge or promise of conduct in office inconsistent with the impartial performance of adjudicative duties.

Finally, it is noted that, if the inquiring candidate believes the organization is attempting to pressure him/her into making an improper pledge or promise, the candidate may, if he/she wishes, direct the organization's attention to section 100.3(E)(1)(f), which would require disqualification in certain matters if the candidate acquiesced in the organization's request.³⁸

The ACJE has also added cautionary notes to several opinions decided prior to *White*, noting the absence of an announce clause in New York and indicating that candidates could not articulate their views on legal issues.³⁹

³⁶ N.Y. Advisory Comm. on Jud. Ethics, Op. 15-71 (June 11, 2015), <https://www.nycourts.gov/ipjudicialethicsopinions/15-71.htm> [<https://perma.cc/4LLB-BBRJ>].

³⁷ *Id.*

³⁸ *Id.* (citations omitted); see 22 N.Y. COMP. RULES & REGS. § 100.3(E)(1)(f) (2020).

³⁹ See, e.g., N.Y. Advisory Comm. on Jud. Ethics, Op. 93-99 (Dec. 9, 1993), <https://www.nycourts.gov/ipjudicialethicsopinions/93-99.htm> [<https://perma.cc/4Q56-ED6Q>] (candidate may not answer questions designed to elicit the candidate's views

The ACJE opined that a judicial candidate could not “answer a political party’s questionnaire designed to elicit express and implied commitments that (a) are unrelated to the impartial performance of judicial duties and/or (b) would require him/her to engage in activities prohibited by the Rules Governing Judicial Conduct.”⁴⁰ Some of the questions included:

- “Will you pledge to fight any attempts to roll back the reproductive protections afforded women by *Roe v. Wade*?”
- “Would you commit to supporting state funding for [P]lanned Parenthood services should the federal government no longer allow any federal dollars to be used for its health care services? And would you vocally oppose any federal proposal that cuts federal funding for Planned Parenthood?”
- “Will you oppose any attempts to limit [Social Security and Medicare] to reduce the federal deficit?”
- “Will you fight back any attempts to repeal the [Affordable Care Act]?”⁴¹

The Committee responded as follows:

In general, a judicial candidate may personally participate in his/her own judicial campaign during the designated window period, subject to limitations. For example, the campaign must be conducted consistent with the judiciary’s impartiality, integrity and independence, and all campaign statements must be entirely truthful and not in any way misleading. Also, a judicial candidate may not make pledges or promises of conduct in office at odds with impartial performance of judicial duties nor

or pledges on particular controversial issues or concerning whether the judge would accept the nomination of some other party); N.Y. Advisory Comm. on Jud. Ethics, Op. 93-52 (Oct. 28, 1993), <https://www.nycourts.gov/ipjudicialethicsopinions/93-52.htm> [<https://perma.cc/KL66-MAV8>] (candidate may accept endorsement of Right to Life party but “should not . . . manifest an acceptance of the principles of the party in any other fashion”); N.Y. Advisory Comm. on Jud. Ethics, Op. 90-67 (June 7, 1990), <https://www.nycourts.gov/ipjudicialethicsopinions/90-67.htm> [<https://perma.cc/M367-C4H2>] (a judge running for re-election may, during the campaign, refer to his or her previous decisions, and comment on an opponent’s qualifications, but may not comment on disputed legal or political issues). In some recent opinions, the committee has continued to cite to older opinions that pre-date *White* for the proposition that “accepting a party’s nomination ‘does not necessarily require acceptance of that party’s goals, positions, or platform.’” N.Y. Advisory Comm. on Jud. Ethics, Op. 14-113 (Sept. 4, 2014), <https://www.nycourts.gov/ipjudicialethicsopinions/14-113.htm> [<https://perma.cc/84ED-FDMC>]. Inasmuch as candidates can announce their views, however, the importance of this statement is unclear.

⁴⁰ N.Y. Advisory Comm. on Jud. Ethics, Op. 18-95 (May 10, 2018), <https://www.nycourts.gov/ipjudicialethicsopinions/18-95.htm> [<https://perma.cc/XZ9R-8NFV>].

⁴¹ *Id.* (second and third alterations in original).

make improper promises about controversies, cases, or issues likely to come before the court.

Applying these principles, we have advised that a judicial candidate may not promise to set up and fund a legal scholarship if elected, as this “is a pledge or promise entirely unrelated to the ‘faithful and impartial performance of judicial duties’ and thus impermissible.” Nor may a candidate sign a political organization’s pledge to support and endorse all other candidates endorsed by the organization and to consult with it on any appointments when in public office. We have also advised that a judicial candidate must not promise to abolish the lawful and accepted practice of plea bargaining in criminal cases in his/her court if elected.

Here, too, we conclude that the candidate may not respond to this questionnaire as it seeks commitments that are inconsistent with and/or unrelated to the impartial performance of judicial duties. We note the party’s questionnaire does not in any way acknowledge a judge’s obligation to “decide all cases fairly and impartially and in accordance with governing law” and does not invite candidates to assert any caveats when responding to its yes/no questions.⁴²

The opinion goes on to note “that the candidate, if elected or re-elected, would not be ethically permitted to fulfill many, or perhaps most, of the express and implied promises the questionnaire elicits.”⁴³

⁴² *Id.* (citations omitted) (first quoting N.Y. Advisory Comm. on Jud. Ethics, Op. 03-28 (Aug. 12, 2004), https://www.nycourts.gov/ipjudicialethicsopinions/03-28_.htm [<https://perma.cc/NK3V-REW5>]; and then quoting N.Y. Advisory Comm. on Jud. Ethics, Op. 15-71 (June 11, 2015), <https://www.nycourts.gov/ipjudicialethicsopinions/15-71.htm> [<https://perma.cc/4LLB-BBRJ>]).

⁴³ *Id.* (“For example, although a sitting judge may make recommendations to public and private fund-granting organizations on ‘projects and programs concerning the law, the legal system, and the administration of justice’ (22 NYCRR 100.4(C)(3)(b)(iii)), he/she generally may not publicly support increased or continued funding for other purposes (*compare e.g.* Opinions 12-58 [appropriations for a fire company]; 03-38 [ballot proposition to secure funding for a library]; 00-33 [library bond proposition]; 95-02 [appropriations for a public library] *with* Opinions 18-08 [appropriations for a problem-solving court]; 07-109 [bond measure for a new courthouse]). As another example, while a judge may be able to convey ‘facts personally known’ concerning ‘the fitness of a nominee under consideration for an appointive [federal] judgeship’ to the United States Senate Judiciary Committee (Opinion 93-22), a judge who publicly opposes a U.S. Supreme Court nominee based *solely* on the nominee’s views on abortion or other such controversial policy issues would likely be seen as engaging in partisan political activity (*see* 22 NYCRR 100.5(A)(1) [a judge must not ‘directly or indirectly engage in any political activity’ except as expressly permitted]; *cf.* Opinion 17-38 [a judge may not call a Senate Committee to express an opinion on a pending federal executive branch appointment]). Further, while a judge has an ethical obligation to adjudicate cases and

IV. THE TREATMENT OF SPEECH RESTRICTIONS ON CANDIDATES AS COMPARED WITH JUDGES

In the course of undertaking this analysis, it occurred to me that I had routinely conflated the speech restrictions on judges with the speech restrictions on candidates. Certainly, most of the rules applicable to judges who are *not* candidates are equally applicable to candidates, regardless of whether they are judges.⁴⁴ And some inquiring judges, who were not candidates for election or re-election, have challenged the speech restrictions contained within, or arising out of, the canons relying on *White*.⁴⁵

It will be remembered that *White* dealt with the validity of the announce clause, which was applicable only to candidates for judicial office. However, the majority opinion suggested that under the Minnesota canons, the speech rights of judges not seeking election/re-election, were *greater than* the speech rights of candidates, precisely because the announce clause was applicable to the latter and not to the former, and that this caused an absurd result, to wit, that what the candidate could not properly announce the day *prior* to his election, he could properly announce the day *after* his election.⁴⁶

By parity of reasoning, in New York, where there is no announce clause, an argument could be made that subject to compliance with other rules, and accounting for any variations in the treatment of judges and candidates stemming from the difference in their positions, judicial versus non-judicial, judges and candidates should, under *White*, be treated similarly in their announcement of views. Nevertheless, that has not been the case. In this regard, non-candidate judges in New York must avoid

controversies that are properly before him/her, without being ‘swayed by partisan interests, public clamor or fear of criticism’ (22 NYCRR 100.3(B)(1)), the promise to fight for a particular side of a politically controversial issue is inconsistent with the role of a neutral arbiter and would insert the judge ‘unnecessarily into public controversy’ (Opinion 17-38). Thus, the questionnaire is also impermissible to the extent it purports to require the candidate to engage in activities prohibited by the Rules Governing Judicial Conduct.”)

⁴⁴ For purposes of clarity, “judges” here will be used to refer to judges who are not candidates for election or re-election and “candidates” will refer to judges and non-judge candidates for election or re-election.

⁴⁵ See, e.g., N.Y. Advisory Comm. on Jud. Ethics, Op. 15-188 (Jan. 28, 2016), <https://www.nycourts.gov/ipjudicialethicsopinions/15-188.htm> [<https://perma.cc/K95M-FYDY>]; N.Y. Advisory Comm. on Jud. Ethics, Op. 16-85 (June 16, 2016), <https://www.nycourts.gov/ipjudicialethicsopinions/16-85.htm> [<https://perma.cc/H4SS-FPZX>].

⁴⁶ See *Republican Party of Minn. v. White*, 536 U.S. 765, 779–80 (2002).

speaking on controversial issues; in effect, they are not permitted to announce their views.

Irrespective of whether such a distinction is supportable in law and logic, it will be helpful to examine the specific rules from which the speech restrictions on judges and candidates derive.

A. *Speech Restrictions on Judges and Candidates in New York*

The following is a synopsis of the Rules of the Chief Administrator of the Courts which directly or indirectly imposes speech restrictions on judges and candidates:

- Section 100.2, applicable to judges only, requires *judges* to “avoid impropriety and the appearance of impropriety” and to “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary” and “not lend the prestige of judicial office to advance . . . private interests”⁴⁷
- Section 100.3, applicable to judges only, requires *judges*: to “perform the duties of judicial office impartially and diligently,” “without bias or prejudice” or manifesting bias or prejudice; to refrain from commenting on “pending or impending” cases in the United States or its territories; “disqualify himself or herself” where “the judge has personal knowledge of disputed evidentiary facts” or where the judge, either as candidate or judge, “made a pledge or promise . . . inconsistent with the impartial performance of . . . duties” or a “public statement . . . that commits the judge” with respect to an issue or the parties in a proceeding.⁴⁸
- Section 100.4, applicable to judges only, requires *judges* to conduct extra-judicial activities in a manner that minimizes the risk of conflict with judicial obligations so that judges are not to engage in such activities that “(1) cast reasonable doubt on the judge’s capacity to act impartially as a judge; (2) detract from the dignity of judicial office; or (3) interfere with the proper performance of judicial duties and are not incompatible with judicial office.”⁴⁹
- Section 100.5 governs the political activities of *judges and candidates*, restricting the political rights of judges who are not candidates for office and expanding them only *when* they are running for office. The section also effectively *restricts* the political rights of non-judge candidates running

⁴⁷ 22 N.Y. COMP. RULES & REGS. § 100.2(A), (C) (2020).

⁴⁸ *Id.* § 100.3(B)(4), (8), (E)(1)(a)(ii), (f).

⁴⁹ *Id.* § 100.4(A)(1)–(3).

for judicial office: *Judges and candidates* for judicial office are not, except as permitted by the rules, allowed to engage in any political activity, except in connection with their own campaigns (as provided in this section) or on behalf of “the law, the legal system [and] the administration of justice.”⁵⁰ Although not explicitly stated, presumably, some “political” activities on behalf of the judge’s personal interests, which do not involve use of the judge’s office or title, are also permissible (as the Advisory Committee on Judicial Ethics opinions advise).⁵¹

- Under section 100.5(A)(4)(a), *judges and candidates* are required to “maintain the dignity appropriate to judicial office and act in a manner consistent with the impartiality, integrity and independence of the judiciary” and under section 100.5(A)(4)(d), “shall not: (i) make pledges or promises of conduct in office that are inconsistent with the impartial performance of the adjudicative duties of the office; [or] (ii) with respect to cases, controversies or issues that are likely to come before the court, make commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.”⁵²
- Section 100.5(A)(4)(d)(iii) prohibits *judges and candidates* from “knowingly” making “false statement[s].”⁵³
- Relatedly, section 100.3(E) concerns disqualification and generally requires disqualification where the judge’s impartiality might reasonably be questioned, but more specifically mirrors the above provisions, requiring disqualification where the judge has a “bias or prejudice concerning a party” or has, *while a judge or candidate*, “made a pledge or promise of conduct . . . inconsistent with the impartial performance” of “duties” or a “public statement” committing

⁵⁰ *Id.* § 100.5(A)(1)–(2).

⁵¹ See N.Y. Advisory Comm. on Jud. Ethics, Op. 18-164 (Dec. 11, 2018), <https://www.nycourts.gov/ipjudicialethicsopinions/18-164.htm> [<https://perma.cc/57PN-L4RL>] (permitting “[a] judicial candidate who is part of a political party’s slate” to attend a fundraising event where the judge was a candidate); N.Y. Advisory Comm. on Jud. Ethics, Op. 98-99 (Sept. 10, 1998), <https://www.nycourts.gov/ipjudicialethicsopinions/98-99.htm> [<https://perma.cc/X62G-HYV4>] (holding that “[a] judge may circulate . . . petitions for a slate of candidates from [a] political party only if the judge’s name is also on the petition as a nominee”); N.Y. Advisory Comm. on Jud. Ethics, Op. 89-43 (Apr. 4, 1989), <https://www.nycourts.gov/ipjudicialethicsopinions/89-43.htm> [<https://perma.cc/YMY3-GZY8>] (allowing a town justice to serve as master of ceremonies at a fundraiser for an event held by the judge’s own political party).

⁵² 22 N.Y. COMP. RULES & REGS § 100.5(A)(4)(a), (d)(i)–(ii).

⁵³ *Id.* § 100.5(A)(4)(d)(iii).

“the judge with respect to . . . an issue in the proceeding” or “parties or controversy in the proceeding.”⁵⁴

Accordingly, *judges and candidates* for judicial office are required to: maintain the dignity appropriate to judicial office; act in a manner consistent with the impartiality, integrity, and independence of the judiciary; refrain from making commitments with respect to cases, controversies, or issues that are likely to come before the court; and avoid political activity except for participating in their own campaigns as provided in the rules or on behalf of the law, legal system, or administration of justice. As demonstrated, the only significant differences between the treatment of judges and candidates in the rules concern the restrictions on judges to refrain from commenting on pending or impending cases in the United States and its territories and using the prestige of judicial office to further private interests.⁵⁵

B. Restrictions on Judges from Involvement in Public Controversies

The ACJE has frequently opined that judges should not “enter a public controversy on a matter that goes beyond the judge’s strictly private interest,”⁵⁶ become “associated with matters that

⁵⁴ *Id.* § 100.3(E)(1).

⁵⁵ Section 100.2 requires judges to “avoid impropriety and the appearance of impropriety . . .” *Id.* § 100.2. Underlying this canon is the requirement that judges act in a manner that promotes public confidence in the integrity and impartiality of the judiciary. Section 100.4 requires judges to avoid activities that “cast reasonable doubt on the judge’s capacity to act impartially . . .” *Id.* § 100.4(A)(1). Although there are no identically worded mandates applicable to candidates, the requirement of acting in a manner consistent with the impartiality and integrity of the judiciary is imposed on candidates by Rule 100.5. *See id.* § 100.5(A)(4)(d).

⁵⁶ N.Y. Advisory Comm. on Jud. Ethics, Op. 04-123 (Dec. 2, 2004), https://www.nycourts.gov/ipjudicialethicsopinions/04-123_.htm [<https://perma.cc/AEP3-DZAN>] (“A judge should not write a letter to a public official of the county that states the judge’s position on a legal question growing out of the judge’s former role as a county legislator when the proposed letter, which is likely to become public, relates to a substantial political controversy; and, in addition, the controversy is likely to lead to litigation.”).

are the subject of litigation or public controversy,”⁵⁷ or “insert” him or herself “unnecessarily into public controversy.”⁵⁸

In other opinions, the ACJE has advised against activities of judges that involved joining or being appointed to boards of organizations or

committees that focus on “political or controversial issues,” such as a committee that will recommend revisions to the town code; local school boards; zoning or planning boards; a regional council dealing with the management of policies affecting natural

⁵⁷ N.Y. Advisory Comm. on Jud. Ethics, Op. 17-70 (May 4, 2017), <https://www.nycourts.gov/ipjudicialethicsopinions/17-70.htm> [<https://perma.cc/QF8T-A7D3>] (“A court attorney-referee who is an ordained rabbi may teach, preach, and write on Israel-related issues concerning the law, the legal system or the administration of justice, but not on non-legal matters of substantial public and political controversy, such as the Israeli-Palestinian conflict.”).

⁵⁸ N.Y. Advisory Comm. on Jud. Ethics, Op. 17-38 (Mar. 16, 2017), <https://www.nycourts.gov/ipjudicialethicsopinions/17-38.htm> [<https://perma.cc/C6AB-K789>] (A judge should not participate in the march for science “unless the judge determines (a) the march is not co-sponsored by or affiliated with any political organization; (b) the march does not support or oppose any political party or candidate for election; (c) the judge’s participation will not involve the judge in impermissible political activity; and (d) the judge’s participation will not insert him/her unnecessarily into public controversy.”). As alluded to above, generally, “a judge may publicly express . . . views on a variety of issues that affect him/her personally and directly, in his/her capacity ‘as a private citizen whose personal interests will be affected’ but must avoid public comment on controversial subjects that ‘do not directly affect the judge’s interests.’” N.Y. Advisory Comm. on Jud. Ethics, Op. 13-178 (Dec. 12, 2013), <https://www.nycourts.gov/ipjudicialethicsopinions/13-178.htm> [<https://perma.cc/GUA4-UYFJ>] (first quoting N.Y. Advisory Comm. on Jud. Ethics, Op. 08-33 (Mar. 13, 2008), <https://www.nycourts.gov/ipjudicialethicsopinions/08-33.htm> [<https://perma.cc/EA2T-KRYR>]; and then quoting N.Y. Advisory Comm. on Jud. Ethics, Op. 02-41 (June 7, 2002), <https://www.nycourts.gov/ipjudicialethicsopinions/02-41.htm> [<https://perma.cc/HFU2-XZS7>] (“A judge who owns a home in a multi-unit building may publicly express his/her views on a proposal by building maintenance employees to unionize, provided the judge does so in his/her capacity as a private citizen and does not use judicial stationery or otherwise refer to his/her judicial office.”). The rationale for the committee’s consistent approval of judges’ statements made as “private citizen[s]” on matters that “affect the judge’s interests” is not entirely clear, but it appears to derive from what has been explicitly prohibited by several rules. *See, e.g.*, 22 N.Y. COMP. RULES & REGS § 100.2(C) (“A judge shall not lend the prestige of judicial office to advance the private interests”); *Id.* § 100.4(C)(1) (“A . . . judge shall not appear at public hearing . . . except on matters concerning the law, the legal system or the administration of justice or except when acting *pro se* in a matter involving the judge or the judge’s interests.” (*italics added*)); *Id.* § 100.3(B)(8) (The prohibition against commenting publicly on pending or impending litigation “does not apply to proceedings in which the judge is a litigant in a personal capacity.”). Relatedly, the ancient maxim in law is that “everything which is not forbidden is allowed.”

resources; and a town's Water Advisory Committee where there was a substantial likelihood that the committee would be involved in matters of public controversy.⁵⁹

In Opinion 99-74, the ACJE opined that a "part-time town justice should not accept [an] appointment to the town's Water Advisory Committee if there is a substantial likelihood that the committee will be involved in matters of public controversy."⁶⁰ Likewise, in Opinion 09-56, the committee recommended that, although a judge could continue membership in a local chapter of Shooters' Committee on Political Education, he or she could not serve on its board.⁶¹ Similarly, the ACJE opined that a judge could be a member of Planned Parenthood and the New York Civil Liberties Union "provided that such membership does not involve the judge in litigated matters or publicly associates the judge with organizational positions on matters of public controversy."⁶²

More recently, in Opinion 15-188, the ACJE declined to reconsider prior opinions in which it advised that judges could not "take part in certain public activities regarding redistricting," stating:

Th[e] historical context makes clear that a judge's publicly weighing in on such sharply contested and highly politicized issues would violate the rule barring a judge from directly or indirectly engaging in partisan political activity. Legislative redistricting is not related to "the law, the legal system or the administration of justice" in any conventional sense or meaning those terms have in the judicial ethics field or context. To the contrary, redistricting is generally perceived as an exercise of legislative or political power. Therefore, a judge's voluntary involvement with redistricting would readily create an appearance that he/she was using the prestige of judicial office to

⁵⁹ N.Y. Advisory Comm. on Jud. Ethics, Op. 11-68 (June 16, 2011), <https://www.nycourts.gov/ipjudicialethicsopinions/11-68.htm> [<https://perma.cc/ZH8H-NRFF>] (citations omitted).

⁶⁰ N.Y. Advisory Comm. on Jud. Ethics, Op. 99-74 (Apr. 29, 1999), https://www.nycourts.gov/ipjudicialethicsopinions/99-74_.htm [<https://perma.cc/9SFG-NDXA>].

⁶¹ N.Y. Advisory Comm. on Jud. Ethics, Op. 09-56 (Mar. 12, 2009), <https://www.nycourts.gov/ipjudicialethicsopinions/09-56.htm> [<https://perma.cc/QG2Y-NH2W>].

⁶² N.Y. Advisory Comm. on Jud. Ethics, Op. 98-101 (Sept. 10, 1998), https://www.nycourts.gov/ipjudicialethicsopinions/98-101_.htm [<https://perma.cc/JV6J-A8KP>]; see also N.Y. Advisory Comm. Jud. on Ethics, Op. 98-74 (June 19, 1998), https://www.nycourts.gov/ipjudicialethicsopinions/98-74_.htm [<https://perma.cc/4N8D-5L6M>] (judge should not serve on board of a local Right to Life organization).

advance the private and/or political interests of others and could cast reasonable doubt on the judge's capacity to act impartially as a judge.

As the Court of Appeals stated:

litigants have a right guaranteed under the Due Process Clause to a fair and impartial magistrate and the State, as the steward of the judicial system, has the obligation to create such a forum and prevent corruption and the appearance of corruption, including political bias or favoritism. The importance of these fundamental precepts in maintaining public confidence in the judicial system is firmly established: "the State has an overriding interest in the integrity and impartiality of the judiciary . . ."

These fundamental precepts firmly underlie this Committee's continuing concern over the engagement of judges in partisan political issues or on matters of great public controversy that are likely to raise reasonable questions about a judge's ability to be fair and impartial. This reasoning clearly excludes a judge from advocating for passage of a redistricting amendment, and from moderating or participating in a panel discussion concerning redistricting. Moreover, to the extent redistricting is primarily a legislative function, the Committee believes a judge's public extra-judicial involvement in debates concerning redistricting could raise serious separation-of-powers concerns.⁶³

In sum, in several of the above-referenced opinions, the ACJE recommended against making statements on one or more of the following bases—that the subject matter was controversial or likely to lead to litigation, that the statements would involve the judge in impermissible political activity, would raise questions about the judge's impartiality or use the prestige of judicial

⁶³ N.Y. Advisory Comm. on Jud. Ethics, Op. 15-188, (Jan. 28, 2016), <https://www.nycourts.gov/ipjudicialethicsopinions/15-188.htm> [<https://perma.cc/K95M-FYDY>] (first quoting 22 N.Y. COMP. RULES & REGS. § 100.5(A)(1)(iii); and then quoting *In re Raab*, 100 N.Y.2d 305, 313 (N.Y. 2003)); see also N.Y. COMP. RULES & REGS. § 100.0(S) ("An *independent* judiciary is one free of outside influences or control."); N.Y. Advisory Comm. on Jud. Ethics, Op. 01-127 (Jan. 24, 2002), <https://www.nycourts.gov/ipjudicialethicsopinions/01-127.htm> [<https://perma.cc/FMX4-Q4T9>] (noting that a town judge's exercise of the powers and duties of the town clerk would "raise serious questions concerning the separation of powers and the independence of the judiciary"); N.Y. Advisory Comm. on Jud. Ethics, Op. 01-65 (June 27, 2001), https://www.nycourts.gov/ipjudicialethicsopinions/01-65_.htm [<https://perma.cc/7X9L-HEPH>] (noting that it is inappropriate for a judge to be directly or indirectly involved in "partisan political issues" or "matters of public controversy").

office to further private interests, or were otherwise incompatible with judicial office. The opinions were issued both *before and after* the elimination of New York's announce clause and the Supreme Court's decision in *White*.

As indicated, in support of the prohibition against involvement in public controversy, the ACJE has relied largely on section 100.4(A)(3) of the Rules of the Chief Administrator of the Courts, which forbids extra-judicial conduct that is incompatible with judicial office; section 100.4(A)(1), which forbids conduct that casts reasonable doubt on the judge's capacity to act impartially as a judge; and section 100.4(a)(2), which precludes conduct that detracts from judicial office.⁶⁴ Although section 100.4 is by its terms applicable to judges only, the same essential restrictions are applicable to candidates as set forth in section 100.5's mandates to maintain the dignity appropriate to judicial office and to act in a manner consistent with the impartiality, integrity, and independence of the judiciary.

The point is this: the provisions that the ACJE relies upon to restrict judges' speech—not rules related to political activity, but rules that are essentially identical to rules that are also applicable to candidates where those candidates are free to announce their views—provide ample grounds to question some of the reasoning in opinions restricting the speech rights of judges.⁶⁵

V. THE REQUIREMENT OF IMPARTIALITY IN NEW YORK

One of the significant issues discussed in *White* concerns the meaning of impartiality. Justice Scalia identified three possible definitions of impartiality and concluded that the announce

⁶⁴ See *supra* notes 55–58 and accompanying text.

⁶⁵ It does not appear to me that the voters' "right to know," which was referenced in *White*, can alone support differential treatment between judges and candidates in view of the specific wording of the rules and common sense. Republican Party of Minn. v. Kelly, 247 F.3d 854, 862 (8th Cir. 2001), *rev'd sub nom.* Republican Party of Minn. v. White, 536 U.S. 765 (2002). The following statement of the argument illustrates the problem:

- Judges cannot engage in conduct that is incompatible with judicial office.
- Judges are barred from announcing their views on controversial issues because that is incompatible with judicial office.
- The rules that apply to judges also apply to candidates, so that candidates, like judges, cannot engage in conduct that is incompatible with judicial office.
- Candidates are free to announce their views on controversial issues, despite the fact that it is incompatible with judicial office, because the voters' right to know is paramount.

clause was not narrowly tailored to advance any of them.⁶⁶ He also appears to have adopted, in dicta, a narrow definition of impartiality, limited to a lack of bias for or against a party to a proceeding.⁶⁷ In doing so, he distinguished that definition from “open-mindedness,” which he concluded was not the purpose for which the announce clause was adopted in Minnesota.⁶⁸ This point bears further discussion as it may be possible under the New York Rules to announce one’s views on disputed issues in a way that nevertheless violates other rules, including the rules that mandate impartiality, which are applicable to judges and candidates.⁶⁹

There are fourteen references in the New York Rules Governing the Conduct of Judges to “impartial,” “impartially,” or “impartiality.”⁷⁰ “Impartiality” is defined in the terminology section of the rules as denoting the “absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as *maintaining an open mind in considering issues that may come before the judge*,”⁷¹ which is broader than Justice Scalia’s definition.

Perhaps, it is true that in many cases a judge will not have preconceptions on law, and it is ideal that the judge have no predisposition on the merits of a case, but it is not possible in every conceivable case. Moreover, it is certainly not ideal in *every* case to have a judge with no preconceptions on law; nor is it ideal to have a judge with moral beliefs that are entirely consistent with law.

So, what does impartiality mean? Extrapolating from the definition of impartiality in the New York Rules, it means, in addition to the lack of bias, that despite any preconceptions on law, or having other competing moral beliefs or principles, the judge can lay those aside and rule fairly and impartially. That is,

⁶⁶ *White*, 536 U.S. at 775–78.

⁶⁷ *Id.* at 775–77; see also MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS’ ETHICS 246–47 (Carolina Acad. Press, 5th ed. 2016) (1990).

⁶⁸ *White*, 536 U.S. at 778.

⁶⁹ See FREEDMAN & SMITH, *supra* note 67, at 240–41 (“The best one can say is that a judge’s statement of a position on an issue will not in itself justify an inference of bias for or against a party. However, accompanying circumstances might justify an inference of bias. Such circumstances include, among others, language used by the judge in stating [his or her] position, whether the judge has referred to the specific case, and whether the statement has been addressed to a party in the case.”).

⁷⁰ See generally 22 N.Y. COMP. RULES & REGS §§ 100.0–.5 (2020).

⁷¹ *Id.* § 100.0(R) (emphasis added).

the judge, in performing his or her duties impartially, follows the law and can be swayed by evidence and argument to a position contrary to what he or she preconceived. Stated in yet another way, to be impartial would be to acknowledge the primacy of the adversarial process and the need to adhere to the law. This is true whether the judge is shown that his or her preconceptions or beliefs are wrong, or, more, even if the judge's preconceptions and beliefs are not wrong, that the principle of adherence to the law takes precedence.⁷²

With this foundation in mind, *a lack of impartiality* means that the judge not only has preconceptions of law or fact or other beliefs that conflict with the law, but that he or she cannot, or will not, lay them aside. In short, a non-impartial judge refuses to accept the primacy of the adversarial process and need to adhere to the law when those principles come into conflict with the judge's preconceptions or other beliefs.

VI. PLEDGES AND PROMISES, COMMITMENTS ON CASES LIKELY TO COME BEFORE THE COURT

Other rules unaffected by *White* are restrictions on pledges and promises and making commitments on cases likely to come before the court. As noted, these rules are applicable to judges and candidates.

The specific rules, as set out in section 100.5(A) of the Rules of the Chief Administrator of the Courts, are that a judge or a non-judge candidate running for election to judicial office shall not:

- (i) make pledges or promises of conduct in office that are inconsistent with the impartial performance of the adjudicative duties of the office; [or]
- (ii) with respect to cases, controversies or issues that are likely to come before the court, make commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.⁷³

VII. ANALYZING JUDICIAL CANDIDATE ANNOUNCEMENTS

From the foregoing, it may be concluded that when a judicial candidate announces his or her personal views, that does not necessarily indicate a lack of impartiality, meaning that the

⁷² In the event that the judge, in a particular matter, was unable to follow the law owing to a moral conflict, then the judge could not continue presiding in the matter.

⁷³ *Id.* § 100.5(A)(4)(d).

judge's preconceptions and moral beliefs would prevent the judge from acknowledging and accepting both the primacy of the adversarial process and need to adhere to the law. Nevertheless, it is possible that some announcements of positions, depending upon content and context, and the court to which the candidate/judge aspires, may "cross the line" and reflect an impermissible bias or unchangeable position on an issue "that may come before the judge."⁷⁴ Moreover, some statements may not be curable with a disclaimer, even assuming for the sake of argument that the judge could be impartial in fact. Similarly, an announcement of views could amount to an impermissible pledge or promise,⁷⁵ or a commitment that is inconsistent with the impartial performance of duties on a case, controversy, or issue likely to come before the court.⁷⁶

As noted, Mr. Tembeckjian has suggested that even assuming an announcement is not otherwise impermissible, it may well give rise to a basis for later disqualification and to a disciplinary violation if a judge fails to disqualify himself or herself.⁷⁷ Indeed, the ACJE specifically referenced this possibility in Opinion 17-28.⁷⁸ Suffice it to say, the analysis of any possible conflict between permissible candidate announcements and the rules on disqualification or recusal is esoteric: significantly, permitting candidate announcements—only to later bar the successful candidate from presiding in cases because of those announcements—would arguably "gut" the essential holding of *White*. Nevertheless, unable to envision or contemplate every conceivable statement made by a candidate or case that might come before the judge, I would concede that it is at least possible that some permissible candidate statements could require disqualification later or merit discretionary recusal.

⁷⁴ See *supra* note 71 and accompanying text.

⁷⁵ See 22 N.Y. COMP. RULES & REGS § 100.5(A)(4)(d)(i).

⁷⁶ *Id.* § 100.5(A)(4)(d)(ii); see also Ind. Comm'n on Jud. Qualifications, Preliminary Advisory Op. 1-02 (2002), <https://www.in.gov/judiciary/jud-qual/files/jud-qual-adops-1-02.pdf> [<https://perma.cc/J9TV-SBF2>] ("A statement which appears to constitute a mere expression of fact, such as a candidate's reference to a record of imposing harsh penalties in criminal cases, may be deemed an implied promise of future conduct . . .").

⁷⁷ Tembeckjian, *supra* note 33.

⁷⁸ N.Y. Advisory Comm. on Jud. Ethics, Op. 17-28 (Dec. 11, 2018), <https://www.nycourts.gov/ipjudicialethicsopinions/17-28.htm> [<https://perma.cc/56AC-UMLY>].

A. *Questions to be Considered in Analyzing Judicial Candidate Announcements*

In this Section, I will analyze, and offer my opinion on, various hypothetical announcements, in order to highlight some of the potential problems discussed above. To analyze specific examples of announcements, I have formulated the following questions, all derived from specific rules that directly or indirectly affect candidate speech:

- Does the statement, in the context in which it is made, indicate an unchangeable position or refusal to follow applicable law, on issues that may come before the judge?
- Does the statement, in the context in which it is made, indicate bias or prejudice against or in favor of particular parties or classes of parties?
- Does the statement, in the context in which it is made, contain a pledge or promise which is either express or implied?
- Does the statement, in the context in which it is made, contain a commitment with respect to cases or controversies likely to come before the court?
- Does the statement, in the context in which it is made, contain an express or implied commitment with respect to issues likely to come before the court?
- Is the statement false?

B. *Some Hypothetical Announcements*

Below, I have categorized hypothetical statements into three categories: (1) Statements of Past Activities, (2) Statements of Present Beliefs, and (3) Prospective Statements. Within each of these categories, I analyze the propriety of statements using the six-question analytical framework discussed above. Hopefully, these specific illustrations can shed light on how impartiality principles may be applied in practice, and can, in turn, illustrate the challenges at the heart of analyzing the Right to Life Questionnaire.

1. *Statements of Past Activities*

I worked for NARAL.

I participated in pro-life activities.

I campaigned for pro-choice candidates.

I used to picket at abortion clinics and went to the Right to Life march every January.

All four of these are permissible statements by a candidate under *White* and under the applicable judicial ethics rules in New York. They involve past activities and result in negative answers to each question. It is true that the issue of abortion is *unlikely* to come before the court, making most of the answers to the above questions negative. However, even if the issue of abortion *may* come before the court, the statements would still be permissible.

Of course, the context in which the statements are made could be significant. For example, if statements are made in response to questions which ask, “What would you do in the future?” or “How would you decide?” or “What can we expect from you?”, responses such as “I can’t answer your question, however, I participated in pro-life activities” or “I can’t answer your question but I campaigned only for pro-choice candidates,” could be problematic as they imply a promise or commitment. In that instance, a properly worded disclaimer to the effect that “I must follow binding precedent in all cases,” *might* be sufficient to cure the problem. As stand-alone statements, however, they are permissible.

2. Statements of Present Beliefs

- | | |
|--|---|
| 1. I am pro-abortion/pro-choice. | I am pro-life. |
| 2. I am pro-abortion/pro-choice. However, I acknowledge that I am always required to follow the principle of stare decisis and binding precedent. | I am pro-life. However, I acknowledge that I am always required to follow the principle of stare decisis and binding precedent. |
| 3. I believe that the constitution protects choice. | I believe that the constitution contains no right to abortion. |
| 4. I believe that the constitution protects choice. However, I acknowledge that I am always required to follow the principle of stare decisis and binding precedent. | I believe that the constitution contains no right to abortion. However, I acknowledge that I am always required to follow the principle of stare decisis and binding precedent. |
| 5. I believe that personhood begins at the point of independent viability of the fetus. | I believe that personhood begins at conception. |

- | | |
|--|--|
| <p>6. I believe that personhood begins at the point of independent viability of the fetus. However, I acknowledge that I am always required to follow the principle of stare decisis and binding precedent and decide every case on the facts without regard to my personal opinion.</p> | <p>I believe that personhood begins at conception. However, I acknowledge that I am always required to follow the principle of stare decisis and binding precedent and decide every case on the facts without regard to my personal opinion.</p> |
|--|--|

These are all permissible statements by a candidate under *White* and under the applicable judicial ethics rules in New York.

Although the first set of statements contains no disclaimer, and the second set does, both are permissible. A disclaimer is not necessary, as the answer to all questions would still be negative. Even assuming that the issue of abortion might come before the court, the statements do not necessarily reflect bias or a lack of impartiality, as defined above. Again, a judge can ethically have opinions and preconceptions on law.

The third set of statements is also permissible, without a disclaimer. This issue is unlikely to come before the court, particularly in New York state courts, and the statements contain no pledges or promises, nor do they show bias. Also, even if there was a problem with the third set, the disclaimer in the fourth set would cure that issue.

The fifth set of statements, in theory, could be implicated in cases unrelated to abortion, such as those involving pre-natal or defendants' rights in the civil and criminal context, and, therefore, are more likely to come before some courts than the issue of abortion. Nevertheless, they do not commit the judge to a position, imply a promise or pledge, or indicate an unchangeable position or refusal to follow the law. Although an argument could be made that they present a bias against "particular parties or classes of parties,"⁷⁹ it is a very weak argument. In fact, in the Tembeckjian article, he approved of a similarly worded statement.⁸⁰ Moreover, to the extent that there might be

⁷⁹ Republican Party of Minn. v. White, 416 F.3d 738, 767 (8th Cir. 2005) (en banc) (Gibson, J., dissenting) (citation omitted).

⁸⁰ Tembeckjian, *supra* note 33.

a problem with the statements, the disclaimer in the sixth set of statements should be sufficient to cure them.⁸¹

3. Additional Statements of Present Beliefs

I believe that decisions which placed restrictions on the right to choose were wrongly decided.

I believe that *Roe v. Wade* was wrongly decided.

I believe that decisions which placed restrictions on the right to choose were wrongly decided. However, I acknowledge that if elected, I am required to follow binding precedent.

I believe that *Roe v. Wade* was wrongly decided. However, I acknowledge that if elected, I am required to follow binding precedent.

Both of the above sets of statements should be considered permissible under *White* and under the applicable judicial ethics rules in New York. The disclaimer in the second set of statements may be prudent but should not be necessary as the first statement does not indicate bias or unwillingness to follow the law, nor does it contain a pledge or promise. Moreover, the issue of abortion is not likely to come before the courts in New York.

4. Prospective Statements

I would uphold a woman's right to choose in all cases.

I would strike down the so-called right to choose and overturn *Roe v. Wade*, which was wrongly decided.

I believe that no restrictions can lawfully be placed on abortion.

The first set of statements contains pledges/promises; the second statement arguably contains an implied promise. I would suggest that these are impermissible.

⁸¹ See FREEDMAN & SMITH, *supra* note 67, at 239 (“[T]he disqualification of a judge in such a case could have practical consequences that could not have been intended . . . [given that] any judge who has expressed a position on an issue or a commitment to a cause could be said to have implied a bias for or against particular parties in such cases.”).

| | |
|---|---|
| I believe that doctors who perform abortions are heroes to be honored and celebrated. | I believe that doctors who perform abortions are murderers. |
|---|---|

This set of statements may be problematic because they appear to demonstrate bias in favor of or against particular parties or classes of parties. It is unlikely that a disclaimer—even if true—would cure the problem as in the following two examples:

I believe that doctors are untrustworthy. However, I would treat all litigants who appear before me equally, fairly, and without pre-disposition.

I believe that Italian-Americans are generally “mobbed up.” However, I would treat them equally, fairly, and impartially if they had matters before me. My judicial duties come before my personal beliefs.⁸²

VIII. THE RIGHT TO LIFE QUESTIONNAIRE⁸³

In considering the specific questionnaire that is the subject of the ACJE Opinion 17-28, it must be remembered that the candidate can speak on controversial issues and that there is no restriction against commenting on pending or impending cases. My analysis concerning whether the candidate can answer the questions is contained in the paragraphs after the answer choices.

1. *VALUE OF EARLY HUMAN LIFE*. Recognizing the judicial obligation to follow binding precedents of higher courts and applicable constitutional and statutory provisions, to honor stare decisis, and to decide any future case based on the law and facts of that case, in accord with the position of the New York State Right to Life Committee, *I believe that the unborn child is biologically human and alive and that the right to life of human*

⁸² Permissible or not? Candidate for election to the Supreme Court:

| | |
|--|---|
| I believe that verdicts in personal injury actions have tended to be high, however I recognize that in reviewing personal injury awards, binding precedent must be followed. | I believe that verdicts in personal injury actions are obscenely high, however I recognize that in reviewing personal injury awards, binding precedent in this department must be followed. |
|--|---|

I would argue that the first statement is permissible. The second is problematic and indicates bias. It is not clear that the disclaimer is sufficient because of the descriptive word “obscenely.” In other words, even assuming that the judge could be impartial, the appearance of impartiality has been lost.

⁸³ Questionnaire, *supra* note 3.

beings should be respected at every stage of their biological development.

___ Agree ___ Disagree ___ Undecided ___ Decline⁸⁴

It is my opinion that a candidate can answer this question. It does not concern an issue likely to come before the courts, makes no commitments, does not indicate an unchangeable position or refusal to follow the law on issues that may come before the judge, and does not reflect bias. The use of the disclaimer is likely unnecessary but is sufficient to cure any problems.

2. *LEGAL ABORTION.* The New York State Right to Life Committee believes that unborn children should be protected by law and that abortion should be permitted only when necessary to prevent the death of the mother. Recognizing the judicial obligation to follow binding precedents of higher courts and applicable constitutional and statutory provisions, to honor stare decisis, and to decide any future case based on the law and facts of that case, state your personal view on when, if ever, abortion should be legal.

a. *I believe that abortion should be permitted only to prevent the death of the mother.*

___ Agree ___ Disagree ___ Undecided ___ Decline

b. *I believe that abortion should be permitted only to prevent the mother's death, in cases of incest, and in reported cases of forcible rape.*

___ Agree ___ Disagree ___ Undecided ___ Decline⁸⁵

It is my opinion that a candidate can answer this question. It does not commit the candidate with respect to cases or controversies likely to come before the court, nor does it show bias or prejudice, etc.

3. *FEDERAL CONSTITUTIONAL RIGHT TO ABORTION.* In its 1973 ruling in *Roe v. Wade*, the U.S. Supreme Court found a "right to abortion" under the U.S. Constitution that invalidated the abortion statutes of all 50 states. Recognizing the judicial obligation to follow binding precedents of higher-courts, and applicable constitutional and statutory provisions, to honor

⁸⁴ *Id.* at *1 (footnote omitted). A candidate who declines to answer is indicating that he or she believes in good faith that, under a reasonable construction of applicable Canons of Judicial Conduct or because recusal would subsequently be necessary, declination is required. *Id.* I note that the questionnaire's reference to required "recusal" is likely incorrect; it should read "disqualification."

⁸⁵ *Id.* at *2 (footnotes omitted).

stare decisis, and to decide any future case based on the law and facts of that case, *I believe that Roe v. Wade was wrongly decided.*

___ Agree ___ Disagree ___ Undecided ___ Decline⁸⁶

The candidate can answer this question.

4. *STATE CONSTITUTIONAL RIGHT TO ABORTION.* Aside from the federal constitutional “right to abortion” recognized in *Roe v. Wade*, several *state* courts have held that there is a *state* right to abortion under their *state* constitutions. Thus far, the courts of New York have not recognized a “right to abortion” under our state Constitution. Recognizing the judicial obligation to follow binding precedents of higher courts and applicable constitutional and statutory provisions, to honor stare decisis, and to decide any future case based on the law and facts of that case, *I believe that there is no provision in our current New York State Constitution which is intended to protect a right to abortion.*

___ Agree ___ Disagree ___ Undecided ___ Decline⁸⁷

In my opinion, the candidate can answer the question. It contains no statement of bias or other lack of impartiality (as defined) and makes no commitment, pledge, or promise. I note that it can be deemed a neutral, factual statement, particularly in view of Governor Cuomo’s call for an amendment to the state constitution to protect abortion rights.⁸⁸

I would add that if a statement is objectively false, then the candidate obviously should not make it.

5. *STATE RIGHT TO ABORTION FUNDING.* In several decisions, the U.S. Supreme Court has upheld under the U.S. Constitution the decisions of federal, state, and local governments to prohibit the use of public funds or facilities for abortion when the mother’s life was not at stake. However, several *state* courts have held under *state* constitutions that public funds and facilities must be made available to fund and facilitate abortion when a physician deems abortion “necessary” for any reason. State Supreme Courts in New Jersey and Alaska have held that under state law abortion must be provided in even private non-

⁸⁶ *Id.* (footnote omitted) (citation omitted) (citing *Roe v. Wade*, 410 U.S. 113 (1973)).

⁸⁷ *Id.* (footnote omitted).

⁸⁸ Press Release, New York State Governor, Governor Cuomo Proposes Constitutional Amendment Codifying *Roe v. Wade* into the New York State Constitution (Jan. 30, 2017), <https://www.governor.ny.gov/news/governor-cuomo-proposes-constitutional-amendment-codifying-roe-v-wade-new-york-state> [https://perma.cc/Q7ME-TFYS].

religious facilities that serve the public at large or when abortion would otherwise be unavailable in a locale. Recognizing the judicial obligation to follow binding precedents of higher courts and applicable constitutional and statutory provisions, to honor stare decisis, and to decide any future case based on the law and facts of that case, *I believe that there is no provision of our current New York State Constitution which is intended to require the use of public funds for abortion or to require that public or private health care facilities must provide or permit abortions on their premises.*

Agree Disagree Undecided Decline⁸⁹

It is my opinion that the candidate can answer this question. Again, it contains no pledge, promise, or commitment and does not show bias against any party, etc. As above, if a statement is objectively false, it should not be made.

6. *STATE RIGHT TO ASSISTED SUICIDE.* In *Washington v. Glucksberg*, the U.S. Supreme Court held that there is no right to assisted suicide under the U.S. Constitution. In a companion case, *Vacco v. Quill*, the Supreme Court also held that equal protection of law under U.S. Constitution was not violated by a ban on physician[-]assisted suicide for the terminally ill, although the law permits life-sustaining treatment to be withheld or withdrawn from the terminally ill. The state Supreme Courts of Florida and Alaska have held that their state constitutions do not protect a right to assisted suicide. Recognizing the judicial obligation to follow binding precedents of higher courts and applicable constitutional and statutory provisions, to honor stare decisis, and to decide any future case based on the law and facts of that case, *I believe that there is no provision of our current New York State Constitution which is intended to protect a right to assisted suicide.*

Agree Disagree Undecided Decline⁹⁰

The candidate can answer this question affirmatively. I note that the question was undoubtedly drafted prior to the Court of Appeals' decision in *Myers v. Schneiderman*, wherein the court held that there was no constitutional right to "aid-in-dying."⁹¹ Thus, an affirmative answer is consistent with the law. A negative

⁸⁹ Questionnaire, *supra* note 3, at *3 (footnote omitted).

⁹⁰ *Id.* (footnote omitted) (citations omitted) (citing *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Vacco v. Quill*, 521 U.S. 793 (1997)).

⁹¹ 30 N.Y.3d 1, 13 (N.Y. 2017).

answer to this question is problematic because of the absence of any reference to *Myers*.

Hypothetically, depending upon the wording of the question, a candidate should be able to express disagreement with existing law (as discussed *infra*) provided there is no indication of a willingness to not follow the law. For example, I have had occasion to express to my New York Civil Practice students my intense dislike of *Curry v. MacKenzie*, in which Judge Cardozo first articulated the unpleaded defense rule, and the impact of that case on the quality of pleadings in New York.⁹² Yet, I am, always and ever, bound to follow its mandate.

As above, of course, if a statement is objectively false, it should not be made.

7. *DISPOSITION OF HUMAN BEINGS IN VITRO*. Recognizing the judicial obligation to follow binding precedents of higher courts and applicable constitutional and statutory provisions, to honor stare decisis, and to decide any future case based on the law and facts of that case, *I believe in accord with the position of the New York State Right to Life Committee, that human beings whose lives begin by in vitro fertilization or cloning and who exist outside the body of a woman are not personal property and should be treated in accord with their best interests in any dispute over their disposition.*

___Agree ___Disagree ___Undecided ___Decline⁹³

In my opinion, the candidate can answer this question. Assuming that the law treats fetuses as property, then a negative answer is consistent with the law and is permissible. An affirmative response, at first glance, appears to present a closer question, but again I believe it is permissible. I note that in this question, as in the eighth and ninth questions, use of the word "should" does not indicate that the candidate, as judge, will rule in contravention of law. In this regard, an affirmative response can be recast as follows: "Recognizing the judicial obligation to follow the law, which says that fetuses are to be treated as personal property in any dispute over their disposition, I believe that fetuses should not be treated as personal property in any dispute over their disposition." This statement does not contain a pledge or promise, nor does it suggest that the candidate will

⁹² 239 N.Y. 267, 269-70 (N.Y. 1925).

⁹³ Questionnaire, *supra* note 3, at *3 (footnote omitted).

not follow the law. It is statement of disagreement with the law, which is permissible.

8. *WRONGFUL LIFE*. Suits have been brought in several states by infants born with disabilities through their parents, claiming that those responsible for maternal health care during pregnancy are financially liable for their “wrongful lives” because their mothers were not afforded the opportunity to abort them by being told that they would be born with a disability. Recognizing the judicial obligation to follow binding precedents of higher courts and applicable constitutional and statutory provisions, to honor stare decisis, and to decide any future case based on the law and facts of that case, *I do not believe that a person should be able to sue another because he or she was born alive with a disability rather than aborted.*

Agree Disagree Undecided Decline⁹⁴

The candidate can answer this question. If the answer is affirmative, the candidate is agreeing with established New York law that does not recognize wrongful life causes of action.⁹⁵ If the candidate answers negatively, that is nothing more than expressing disagreement with the law as it exists. In this regard, a negative response can be recast as follows: “Recognizing the judicial obligation to follow the law, which does not recognize lawsuits based on wrongful life, I believe that the law should recognize lawsuits based on wrongful life.” This statement contains no pledge or promise or commitment, etc., and the disclaimer is sufficient to ameliorate any potential problem with its utterance.

9. *WRONGFUL BIRTH*. Suits have been brought in several states by parents of children born with disabilities against maternal health care providers for the care and upkeep of their disabled children because the mothers were not provided the opportunity to have their unborn children tested for disabilities so that a “wrongful birth” could have been avoided by aborting any disabled child. Recognizing the judicial obligation to follow binding precedents of higher courts and applicable constitutional and statutory provisions, to honor stare decisis, and to decide any future case based on the law and facts of that case, *I*

⁹⁴ *Id.* at *4 (footnote omitted).

⁹⁵ *See, e.g.,* *Alquijay v. St. Luke’s-Roosevelt Hosp. Ctr.*, 63 N.Y.2d 978, 979 (N.Y. 1984).

do not believe that parents should be able to sue another because their child was born alive with a disability rather than aborted.

___ Agree ___ Disagree ___ Undecided ___ Decline⁹⁶

The candidate can answer the question. As wrongful birth is a cognizable claim in New York,⁹⁷ a negative answer is a statement consistent with the law as it exists. An affirmative answer is a disagreement with the law, which contains no pledge or promise or commitment, etc. In this regard, an affirmative response can be recast as follows: "Recognizing the judicial obligation to follow the law, which permits wrongful birth lawsuits, I believe that the law should not permit wrongful birth lawsuits. It is a permissible statement."

CONCLUSION

In view of New York's elimination of the announce clause and the Supreme Court's opinion in *White*, and upon a review of the applicable judicial canons and rules as well as the commission determinations, committee opinions, and scholarly commentary, it is my opinion that judicial candidates should be allowed to answer the Right to Life Questionnaire. I strongly disagree with Advisory Committee on Judicial Ethics Opinion 17-28, in which the Committee opined that judges could not ethically answer the questionnaire. I believe that the opinion serves to undermine the holding of *White*, which greatly expanded the speech rights of judicial candidates. That said, and despite my strong disagreement with the Opinion, I will follow its proscription as I feel ethically obliged to do.

⁹⁶ Questionnaire, *supra* note 3, at *4 (footnote omitted).

⁹⁷ See, e.g., *Becker v. Schwartz*, 46 N.Y.2d 401, 410, 412-13 (N.Y. 1978).