CASE COMMENT

APPEARANCE OF IMPARTIALITY IN THE REPUBLICAN PARTY v. WHITE COURT'S OPINION

Gaston de los Reyes

INTRODUCTION

A judge's virtue is in her judgment; the rest is technical. Both judgment and technique are essential to the judicial craft in our republican nation.

This Comment does not presume to evaluate any judgment of the Justices of the Supreme Court of the United States. Rather, this Comment analyzes a product of the judicial craft in light of its technique. The judicial instrument is reason, and this Comment only engages the craft of the Republican Party of Minnesota v. White Court on reason's principles. The Comment's purchase would arrive from aspiring to transparency in judicial opinions.

Judicial opinions justify or explain a court's final judgment. Anglo-American courts do not explain each judgment in isolation from past opinions,

HE has made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries.

—THE DECLARATION OF INDEPENDENCE

INTRODUCTION

A judge's virtue is in her judgment; the rest is technical. Both judgment and technique are essential to the judicial craft in our republican nation.

This Comment does not presume to evaluate any judgment of the Justices of the Supreme Court of the United States. Rather, this Comment analyzes a product of the judicial craft in light of its technique. The judicial instrument is reason, and this Comment only engages the craft of the Republican Party of Minnesota v. White Court on reason's principles. The Comment's purchase would arrive from aspiring to transparency in judicial opinions.

Judicial opinions justify or explain a court's final judgment. Anglo-American courts do not explain each judgment in isolation from past opinions,

* M.A./J.D. Candidate, Boston University, 2003. Thanks to those professors and editors who commented on an earlier draft.

1 122 S. Ct. 2528 (2002).
but rather apply existing doctrines that abstract from the particulars of cases. Implementation of the master doctrine of stare decisis in a world without identical cases entails such abstraction. Doctrines include, among others, a rule of division and a rule of reconstitution. According to its rule of division, a doctrine divides the question presented by a case into distinct and component questions.\(^2\) A court must then respond to these questions independently with judgments that reason alone can weave together according to the doctrine’s rule of reconstitution to arrive at a final judgment that answers the original question presented.

A transparent judicial opinion appears to readers to represent the considerations that controlled the final judgment. An opaque opinion addresses questions whose answers do not reasonably appear to add up to the court’s judgment. Opacity can result from a court’s applying inapt doctrines or reasoning incorrectly. Positing that transparency rather than judgment is at stake with the misapplication of doctrine assumes that judges cannot surrender accountability for their final judgments to doctrine or reason.

The Republican Party v. White case presents the question whether, under our federal Constitution, Minnesota may continue to require persons running for judicial office to abstain from announcing their views on disputed legal and political issues. The Comment’s first task will be to formulate the question according to the doctrines chosen for application by the Court. The central question posed concerns impartiality and the appearance of impartiality, the interests proffered by Minnesota to justify the measure under review. This Comment argues that the Court may have invalidly inferred that the interest in the appearance of impartiality could not support the measure under scrutiny.\(^3\) The apparent invalidity of this inference detracts from the opinion’s transparency.

I. DOCTRINAL SCHEMA OF THE COURT’S OPINION

The Court’s opinion, written by Justice Scalia, takes three steps after a recitation of the facts to conclude that “[t]he Minnesota Supreme Court’s canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violates the First Amendment.”\(^4\)

\(^2\) Doctrines can be applied to divide a question that results from the first division of the question presented by the case, ad infinitum.

\(^3\) See White, 122 S. Ct. at 2546 (Stevens, J., dissenting) (“I find the Court’s reasoning even more troubling than its holding.”).

\(^4\) Id. at 2542. The First Amendment does not apply to states directly, but only through the Fourteenth Amendment, which the Supreme Court has enriched with judgments incorporating selected protections from the Bill of Rights. U.S. Const. amend. I (“Congress shall make no law . . . abridging the freedom of speech.”); Near v. Minnesota, 283 U.S. 697, 707 (1931) (“It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from
The lawsuit under review was filed by Gregory Wersal in Federal District Court under Section 1983 alleging violation of his Fourteenth Amendment right to free speech. Wersal challenged the constitutionality of a section of Canon 5 of Minnesota's Code of Judicial Conduct known as the announce clause. That clause states that "A candidate for judicial office, including an incumbent judge . . . shall not . . . announce his or her views on disputed legal or political issues . . . ." Wersal, a candidate for the Supreme Court of Minnesota, filed suit after the Minnesota Lawyers Professional Board, charged with enforcement of the ethical code for judicial candidates, denied his request for guidance on the enforceability of the announce clause. While expressing doubt as to its constitutional power to enforce the clause, the Lawyer's Board refused to give a legal opinion without concrete examples of announcements Wersal would like to make. That uncertain result prompted Wersal to file his Section 1983 complaint alleging that fear of reprisal prevented him from answering questions during his campaign. The plaintiffs who joined the suit, including the Republican Party of Minnesota, claimed an inability to discover whether they supported Wersal on account of the announce clause. The United States District Court for the District of Minnesota upheld the validity of the announce clause, and the United States Court of Appeals for the Eighth Circuit affirmed.

The Supreme Court framed the question presented as "whether the First Amendment permits the Minnesota Supreme Court to prohibit candidates for judicial election in that State from announcing their views on disputed legal and political issues."

By styling the question in terms of the First Amendment, the Court signals that the same free speech doctrines apply to state and federal governments.

---

6 White, 122 S. Ct. at 2532.
7 Id. at 2531-32.
9 White, 122 S. Ct. at 2531-32.
10 Id. at 2532.
11 Id.
12 Id.
13 Republican Party of Minn. v. Kelly, 247 F.3d 854, 885 (8th Cir. 2001) ("The district court did not err in determining that this restriction is narrowly tailored to further compelling state interests.").
14 White, 122 S. Ct. at 2531. Minnesota's Supreme Court, rather than its legislature, promulgated the rule. That point does no work in the Court's opinion.
15 Id. at 2532.
running, except in the context of discussing past decisions . . . .”

Without explicitly endorsing strict scrutiny as the proper doctrine for the case, the Court begins the next step of the opinion by noting that “[t]he Court of Appeals concluded that the proper test to be applied to determine the constitutionality of such a restriction is what our cases have called strict scrutiny; the parties do not dispute that this is correct.”

Strict scrutiny as a doctrine puts the burden on the respondents to justify the announce clause through an interest, and divides the inquiry into the following questions: (1) Is the justifying interest compelling?; (2) is it credible that the announce clause exists to further that interest?; and (3) is the announce clause narrowly tailored to serve a credible and compelling interest?

Strict scrutiny’s rule of reconstitution is not logically sensitive to the order of the inquiry.

Because the Court does not explicitly hold that strict scrutiny applies, it seems to be reviewing the soundness of the Eighth Circuit’s conclusion that the announce clause withstands strict scrutiny. The point of entry to this review is the meaning of impartiality:

The Court of Appeals concluded that respondents had established two interests as sufficiently compelling to justify the announce clause: preserving the impartiality of the state judiciary and preserving the appearance of the impartiality of the state judiciary. Respondents reassert those two interests before us, arguing that the first is compelling because it protects the due process rights of litigants, and that the second is compelling because it preserves public confidence in the judiciary. Respondents are rather vague, however, about what they mean by “impartiality.” Indeed, although the term is used throughout the Eighth Circuit’s opinion, the briefs, the Minnesota Code of Judicial Conduct, and the ABA Codes of Judicial Conduct, none of these sources bothers to define it. Clarity on this point is essential before we can decide whether impartiality is indeed a compelling state interest, and, if so, whether the announce clause is narrowly tailored to achieve it.

The Court’s opinion proceeds to test three variant definitions of

---

16 Id. at 2534. The opinion qualifies this definition by extending the scope of the prohibition to “the latter context [of past decisions] as well, if he expresses the view that he is not bound by stare decisis.” Id. During oral argument, respondents conceded that for any candidate who rejects the principle of stare decisis, criticism of past opinions becomes unacceptable. Id. at 2533. This Comment does not reach the complications raised by these points, as they are peripheral to the argument.

17 Id. at 2534 (citation omitted).

18 See id. at 2534-35 (“Under the strict scrutiny test, respondents have the burden to prove that the announce clause is (1) narrowly tailored, to serve (2) a compelling state interest.”); id. at 2536 (declining to pursue strict scrutiny of the interests in openmindedness and its appearance because the Court did “not believe the Minnesota Supreme Court adopted the announce clause for that purpose”).

19 Id. at 2534 (citation omitted).
impartiality. In addressing each definition of impartiality, the Court performs strict scrutiny on both the interest in impartiality and the interest in the appearance of impartiality. The form this scrutiny takes is, at first glance, troubling because the Court focuses its attention on the interest in impartiality and then infers, for the three definitions, with little or no argument that the announce clause fails strict scrutiny on the basis of the interest in the appearance of impartiality as well. Absent argumentation or appropriate facts, one cannot assume that, because the announce clause fails strict scrutiny on the basis of the interest in impartiality, it cannot be upheld on the basis of the interest in the appearance of impartiality. The remaining sections of this Comment assess the validity of such inferences in the Court’s opinion.

In the final step of its opinion, the Court considers a distinct doctrinal approach for upholding the announce clause: tradition. As with strict scrutiny, the Court does not explicitly hold that tradition is a dispositive doctrine in the context:

It is true that a “universal and long established” tradition of prohibiting certain conduct creates a “strong presumption” that the prohibition is constitutional: “Principles of liberty fundamental enough to have been embodied within the constitutional guarantees are not readily erased from the Nation’s consciousness.” The practice of prohibiting speech by judicial candidates on disputed issues, however, is neither long nor universal. Because the announce clause cannot stand on its tradition or withstand strict scrutiny, the Court finds the measure incompatible with the Federal Constitution and unenforceable.

II. INTERESTS AND THE ANNOUNCE CLAUSE

A. Content and Purpose in Instrumental Interests

As a general matter, we have both intrinsic and instrumental interests. An instrumental interest has value insomuch as it promotes an intrinsic interest or another instrumental interest fewer steps from an intrinsic interest. An intrinsic interest is valuable and desirable for its own good. With intrinsic interests, the content of the interest—what we have an interest in—and the purpose of the interest—why we value it—are one and the same. Many of us

---

20 Id. at 2535-40.
21 Id. at 2540.
22 Id. at 2542.
24 An interest may have instrumental and intrinsic value. Life has intrinsic value and is also, for example, instrumentally valuable for an infantry’s likelihood of success. See id. at 231 (noting that “intrinsically valuable things are often instrumentally valuable as well”).
value life for life's sake. With instrumental interests, on the contrary, the content and purpose of the interests are distinct. Since a value of water is quenching thirst, we can say that we value the content, water, for the sake of its purpose, quenching thirst. Moreover, whether an instrumental interest is substantial, compelling or even legitimate depends on its purpose. Thus, we may not have a compelling interest in having water insomuch as we use it to wash cars, but insomuch as water serves to quench our thirst, our interest in it is beyond compelling.25

Judicial impartiality and its appearance may be intrinsic interests. Neither the Court nor this Comment treats them that way. As instrumental interests, judicial impartiality and the appearance of judicial impartiality have distinct content and purpose. The Court states that the respondents argued that the interest in impartiality is “compelling because it protects the due process rights of litigants” and the interest in the appearance of impartiality is “compelling because it preserves public confidence in the judiciary.”26 As the Court approaches strict scrutiny with a threshold concern for the meaning of impartiality, it divides its scrutiny into three parts, each dealing with one definition of impartiality. The interest in the appearance of impartiality is likewise defined by the same meaning of impartiality under consideration through incorporation. This incorporation is unobjectionable on its face, but may lead to errors in certain arguments.

Strict scrutiny’s rule of reconstitution demands that a court have considered the relevant interests, their weight and/or their relation to the contested measure. Before considering the first definition of impartiality, the Court reinforces the demands of the rule of reconstitution: “Clarity [on the meaning of impartiality] is essential before we can decide whether impartiality is indeed a compelling state interest and, if so, whether the announce clause is narrowly tailored to achieve it.”27 Determining the meaning of impartiality is, indeed, essential to application of the doctrine. What must be inferred is that the Court will also decide whether the interest in the appearance of impartiality is compelling and, if so, whether the announce clause is narrowly tailored to achieve it. This Comment will analyze how the Court’s opinion represents that this decision was made. As a matter of presentation, the Court’s discussion of the third definition of impartiality will be treated after the first and before the second.

B. Impartiality as Lack of Bias Toward Parties

The Court begins its assessment of impartiality’s meaning with Webster’s

25 This Comment adopts a convention: Instrumental interests will be referred to according to the generic form “purpose interest in content.” With this convention, we can easily distinguish the car-washing interest in water from the thirst-quenching interest in water.
26 White. 122 S. Ct. at 2535.
27 Id.
Dictionary, which defines impartiality as "[n]ot partial; esp., not favoring one more than another; treating all alike; unbiased; equitable; fair; just."\(^{28}\) Notwithstanding that this definition includes arguably diverse elements, the Court takes them to signify the "root meaning" of impartiality: "lack of bias for or against either party to the proceeding."\(^{29}\) In those cases holding that a judge’s partiality violated a litigant’s right to due process, it is this sense of impartiality, the Court indicates, which controls.\(^{30}\)

This first definition comports with the respondent’s argument that impartiality serves the compelling interest of the litigant’s due process rights.\(^{31}\) The respondent’s difficulty is not proving the strength of the state’s interest in preventing party bias, but rather its relationship to the announce clause. The Court “think[s] it plain that the announce clause is not narrowly tailored to serve impartiality (or the appearance of impartiality) in this sense.”\(^{32}\) “Indeed,” the Court continues, “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.”\(^{33}\) The Court’s insight is that the announce clause cannot prevent a judge’s bias against a particular party. A party contesting an issue upon which the judge indicated an opposing view during his campaign might feel that the judge was biased.\(^{34}\) This feeling, however, would not owe to “any bias against that party, or favoritism toward the other party. Any party taking that [legal] position is just as likely to lose. The judge is applying the law (as he sees it) evenhandedly.”\(^{35}\)

The Court’s first definition of impartiality permits the inference, stated in parentheses,\(^{36}\) that the announce clause also fails to advance the interest in the appearance of impartiality in a narrowly tailored fashion. A hypothetical will clarify why. Suppose a candidate announced disfavor for the expansion of products liability. An individual sues a car manufacturer alleging a design defect and damages suffered on account of that defect. Assume the suit raises an unsettled question of law and is before the former candidate, now judge. The Court reasons that since any party arguing for greater products liability is

\(^{28}\) Id. at 2535 (quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY 1247 (2d ed. 1950)). Justice Scalia presumably chose a 1950 edition to be proximate with the ABA’s framing of the announce clause. For an analysis of the Court’s use of dictionaries, see Samuel A. Thumma & Jeffrey L. Kirchmeier, The Lexicon Has Become a Fortress: The United States Supreme Court’s Use of Dictionaries, 47 BUFF. L. REV. 227 (1999).

\(^{29}\) White, 122 S. Ct. at 2535.

\(^{30}\) Id.

\(^{31}\) See supra text accompanying note 26.

\(^{32}\) White, 122 S. Ct. at 2535.

\(^{33}\) Id.

\(^{34}\) For factors justifying the belief, see infra text accompanying notes 77-81.

\(^{35}\) White, 122 S. Ct. at 2535-36. Note the Court’s apparent concession that a judge will likely rule consistently with his campaign announcements.

\(^{36}\) See supra text accompanying note 32.
likely to lose before that judge, there is no bias toward the car manufacturer in this hypothetical of the sort that offends due process. If this hypothetical case cannot offend due process assuming that the judge is, in fact, prejudiced against expansion of manufacturer’s products liability and, in fact, rules accordingly, then, as a matter of law, no offense to the appearance of impartiality so defined can issue from the facts.

Someone claiming to be troubled by the appearance of partiality in such a case would have confused bias against persons advocating a legal position with bias against a particular party. Only the latter falls under the first definition of impartiality. The diverging purposes of impartiality and its appearance are not material to strict scrutiny under this definition because the announce clause does not reach party bias. The Court does not dismiss the possibility that a candidate might announce views in favor or against a particular party, but the announce clause “does not restrict speech for or against particular parties.”37

C. Impartiality as Open-Mindedness

The third meaning the Court considers is impartiality as open-mindedness.38 Impartiality, as open-mindedness, “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.”39 As with the first definition, the purpose of the interest in impartiality continues to be party rights. “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.”40

The Court never reaches the question whether impartiality as open-mindedness counts as a compelling state interest because it does “not believe the Minnesota Supreme Court adopted the announce clause for that purpose.”41 This conclusion is based on the Court’s finding that “the announce clause is so woefully underinclusive as to render belief in that purpose a challenge to the credulous.”42

Underinclusion doctrine as applied disqualifies an interest from consideration under strict scrutiny without having to reach the questions of weight or narrow tailoring to the contested measure.43 The doctrine operates

37 White, 122 S. Ct. at 2535.
38 Id. at 2536.
39 Id.
40 Id.
41 Id.
42 Id. at 2537.
43 See Kenneth W. Simons, Overinclusion and Underinclusion: A New Model, 36 UCLA L. REV. 447, 452-54 (1989) (distinguishing between the Court’s intrinsic and surrogate uses of underinclusion analysis, and speculating that the surrogate use which aims to uncover the real and impermissible purpose behind legislation “might only be relevant if [the underinclusion] were extreme, suggesting a hopelessly implausible purpose”).

HeinOnline -- 83 B.U. L. Rev. 472 2003
by comparing two classes of speech: speech prohibited by the contested measure and unregulated speech which arguably advances the interest at issue. When significant classes of speech that advance the interest at issue are inexplicably unregulated, a court applying underinclusion doctrine disqualifies the interest from consideration. The Court illustrates the analysis with an example:

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.44

Open-mindedness, the Court concludes, is not believably the ground of the announce clause because judges and judicial candidates announce views on disputed legal and political questions in lots of inexplicably unregulated ways.45

The Court’s discussion of the appearance of impartiality under the heading of open-mindedness is brief and problematic. “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.”46 The Court’s underinclusion analysis purports to be predicated on a single purpose; respondents, however, asserted that impartiality was “compelling because it protected the due process rights of litigants,” while the appearance of impartiality was “compelling because it preserves public confidence in the judiciary.”47 The two interests have distinct purposes, so the Court’s statement that the announce clause was not adopted “for that purpose” is ambiguous at best. At worst, this phrasing demonstrates a lack of concern with one of the two purposes, and the context suggests neglect for public confidence in the judiciary.

Take the Court’s reply to Justice Stevens’s “assert[ion] that statements made in an election campaign pose a special threat to openmindedness because the candidate, when elected judge, will have a particular reluctance to contradict them.”48 This assertion represents a challenge to the Court’s finding of underinclusion with respect to the interest in open-mindedness and its appearance. If an elected judge has a particular reluctance to contradict campaign announcements that is distinguishable from whatever reluctance the judge would have to contradict other announcements on disputed legal questions, then a state’s election to prohibit one class of announcements and

44 White, 122 S. Ct. at 2537.
45 Id.
46 Id. at 2536 (emphasis added).
47 Id. at 2535.
48 Id. at 2537.
not the other might be credible. The Court defends against Justice Stevens’s criticism by expressing doubt “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.”

Recall the hypothetical case of a product injury claim before a judge who had announced disfavor for expansion of manufacturer’s liability. Imagine that in one state of affairs, the judge had ruled on the once open question of law presented by the case. This judge will have reluctance to rule differently from the announcement made in a court opinion that comes from our legal system’s regard for the doctrine of stare decisis. In addition, the judge will prefer not to contradict himself. The plaintiff will wish that the judge were more open-minded to rule on the law in her favor. The Court states that “[i]t may well be that impartiality in this sense, and the appearance of it, are desirable in the judiciary.” The plaintiff certainly desires open-mindedness, and our legal system depends for its survival on reconsideration of decided questions.

Now suppose a second state of affairs in which the legal question presented remained open. That judge may feel a reluctance to rule against his campaign announcements. Part of that reluctance owes to the human tendency to consistency. Another part of that reluctance in an elective system could come from the view to reelection. The different sources of pressure need not alter the conclusion that furthering open-mindedness for the sake of litigants’ due process rights requires broader proscriptions for the announce clause to credibly have that aim. The Court’s insight is that judicial close-mindedness can have many causes, and a state intent on fostering open-mindedness for the sake of due process rights must demonstrate comprehensive regulation.

The argument’s shortcoming is its failure to consider the public-confidence-in-the-judiciary interest in the appearance of impartiality separately. The hypothetical litigant above prized open-mindedness whether it would be stymied by precedent or prior campaign announcements. The public, on the other hand, may well take a different view. For the public, furthering the appearance of open-mindedness may plausibly involve a distinction between impediments to open-mindedness like precedent and others like judges’ reelection aspirations. Thus, the inference that the state cannot credibly defend the announce clause on the basis of the interest in the appearance of open-mindedness seems unsupported. But the Court may have found adequate

49 Id. at 2538.
50 See supra text accompanying note 36.
51 White, 122 S. Ct. at 2536.
52 Cf. FRIEDRICH NIETZSCHE, DAYBREAK 228 (R.J. Hollingdale trans., 1982) (“The snake that cannot slough its skin, perishes. Likewise spirits which are prevented from changing their opinions; they cease to be spirits.”).
support for the inference by holding that as a matter of law elective pressures can have no bearing on a judge's judgment. If the Court so held, it made no announcement in its opinion. In responding to the Court's second definition of impartiality, the next section will discuss the traditional view on the question of the bearing of elections on judgment.

D. Impartiality as Lack of Legal Preconceptions

1. Opinion and the Impossibility Thesis

The second definition of impartiality before the Court was impartiality as "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." As with the other two definitions, impartiality continues to further a due process purpose. Unlike the other definitions, impartiality as preconception in favor of a particular legal view fails strict scrutiny because it is not a compelling state interest.

The Court's argument supporting this conclusion is straightforward: "A judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a 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. Moreover, the Minnesota Constitution stipulates that judges "shall be learned in the law." Thus, "avoiding judicial preconceptions is neither possible nor desirable." Whether an interest is compelling must be evaluated relative to its purpose. Impartiality is desirable for the benefit of party due process rights. Any legal preconception a judge has will equally impact any party before him. Thus, without probing the premise, the Court's conclusion, that the due process interest in impartiality defined as lacking legal preconceptions is not compelling, seems correct.

The Court extends this result to the interest in the appearance of impartiality with the most sustained discussion of that interest in the opinion. "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." The reasoning seems to assume that the universe of judicial preconceptions on legal issues cannot be classified. For if that universe could be classified, then the

---

53 White, 122 S. Ct. at 2536.
54 Id.
55 Id.
56 Id.
57 Id. (quoting MINN. CONST. art. VI, § 5).
58 Id.
59 See supra text accompanying notes 34-35.
60 White, 122 S. Ct. at 2536.
announce clause could theoretically target one class of preconceptions without having to pretend to reach the sort of preconceptions which judges must naturally bring into court. The Court’s assumption, that legal preconceptions cannot be avoided at all, and that to the extent they could be, it would not be desirable for public confidence in the judiciary to do so, will be referred to as the “impossibility thesis.” This Comment will examine the impossibility thesis through a consideration of Alexander Hamilton’s argument against periodic election of judges in The Federalist No. 78, “A View of the Constitution of the Judicial Department in Relation to the Tenure of Good Behavior.”

2. Hamiltonian Argument Against a Judiciary of Limited Term

The Framers decided that federal judges would be selected just like other federal officers through the Appointments Clause.61 Unlike other federal officers, though, judges were endowed with life tenure during good behavior.62 Hamilton’s argument against the alternative of periodic selection in The Federalist No. 78 takes aim not at the form of selection, for example, popular election or appointment by a single branch, but rather at a judiciary of limited term:63

Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to [judges’] necessary independence.64 If the power of making them was committed either to the executive or legislature there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity to justify a reliance that nothing would be consulted but the Constitution and the laws.65

While Hamilton levels a single criticism common to any manner of selecting judges of limited term, he spells out the particular ways in which the criticism manifests.

61 U.S. Const. art. II, § 2, cl. 2.
62 Id. art. III, § 1.
63 The Federalist No. 78 does not weigh in against judicial elections per se but rather judicial elections that produce term-appointed judges rather than lifetime judges. Note that at the time of the Constitution’s ratification Vermont had popular elections for some classes of judges who served during good behavior. Evan Haynes, The Selection and Tenure of Judges 98-99 (1944).
64 Hamilton uses both the terms “independence” and “impartiality” in his discussion, seemingly interchangeably. This Comment recommends understanding “independence” as a necessary condition of impartiality and “partiality” as an evil threatened by a lack of independence. See White, 122 S. Ct. at 2535 n.6 (determining that the terms “independence” and “impartiality” as used by the Eighth Circuit and the respondents are “interchangeable”).
The concern with periodic selection—regardless of the body bearing that power—is that judges will not limit the sources of their opinions to the Constitution and the laws. The problem with each manner of periodic selection is that the judge will have incentive to consult the selecting body to the detriment of her impartiality. Joseph Story expresses the general principle:

Does it not follow, that, to enable the judiciary to fulfill its functions, it is indispensable that the judges should not hold their offices at the mere pleasure of those whose acts they are to check, and, if need be, to declare void? Can it be supposed for a moment, that men holding their offices for the short period of two, or four, or even six years, will be generally found firm enough to resist the will of those who appoint them?66

The danger of a popularly-elected judiciary of limited term is the judge’s incentive to consult popular sentiment.

The strain of partiality that concerns Hamilton and Story results from the duty of the judiciary in a republican government to enforce limits on the power of the people and the other branches. Partiality, in this sense, means deciding the law in favor of another branch of government or popularity. Impartiality means lacking legal preconceptions that favor the appointing body. Its threat results from vesting the power of reappointment or reelection in a body that will invariably have legal interests. Thus, it is the bitter fruit of self-interest and the separation of powers. Suppose a popularly elected judge faces the question of the constitutional validity of a statute supported by the majority of the electorate. Will that judge consult only the Constitution or will she consult popularity in deciding the question? Hamilton could not imagine this scenario and at the same time “justify a reliance that nothing would be consulted but the Constitution and the laws.”67

The character of this partiality is not so much episodic, as with party bias, but rather endemic. It is difficult to identify when and to what degree a judge veered or will veer from disciplined focus on the right sources to let in popular sentiment. Furthermore, the evidentiary obstacle of proving a particular case of such partiality could be insurmountable. Nevertheless, our political system contains a propensity to such partiality when judges are of limited term. Thus, this structural concern for impartiality is well characterized as an interest in the

66 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 426-27 (photo. reprint 1994) (Melville M. Bigelow ed., 5th ed. 1891). The quoted passage, strictly speaking, attacks not limited tenure per se but rather short-term tenure. Story was indeed arguing for the Constitution’s lifetime tenure provision, but his words help explain the trend of states that adopted periodic elections for their judges to extend the terms over time. For example, in its 1867 Constitutional Convention, the first after the 1846 Convention in which judicial elections were generally adopted, New York extended the terms of judges (rejecting, though, the proposal for life tenure). See 2 CHARLES Z. LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK 257-58 (1906).

67 THE FEDERALIST NO. 78, at 441.
appearance of impartiality, bolstering the public’s confidence that “neither FORCE NOR WILL but merely judgment . . .” decides cases.\textsuperscript{68} This presents a paradox of the sort basic to our government—that the public’s confidence in the judiciary depends on a judiciary that does not consult the public. The federal response to that paradox is appointing judges for life.

Notwithstanding Hamilton and Story’s difficulty imagining judges’ remaining impartial with limited tenure, states have never been required, for example through the Guarantee Clause,\textsuperscript{69} the Fourteenth Amendment\textsuperscript{70} or by any legislation passed pursuant to Section 5 of the Fourteenth Amendment,\textsuperscript{71} either to award their judges life tenure during good behavior or to select them through an appointments process. That states retain such discretion does not magically dissipate the fears motivating Hamilton to call for lifetime tenure. Rather, one must expect that states with term judges—whether appointed or elected—have greater difficulties sustaining the appearance of impartiality so defined.\textsuperscript{72} Moreover, this risk should ground the reasonableness and constitutionality of at least some measures that states can take to balance the benefits of term appointments, whatever those might be, with the greater risk

\textsuperscript{68} Id. at 437.
\textsuperscript{69} U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government . . . .”). Not only does this clause present possibly intractable problems of justiciability, it has never been decided that a republican government entails an appointed judiciary with life tenure. For the inherent political nature of the clause, see Luther v. Borden, 48 U.S. 1, 42 (1849) (finding that under the Guarantee Clause, “it rests with Congress to decide what government is the established one in a State”).
\textsuperscript{70} See White, 122 S. Ct. at 2539. In Justice Scalia’s words:

[If, as Justice Ginsburg claims, it violates due process for a judge to sit in a case in which ruling one way rather than another increases his prospects for reelection, then—quite simply—the practice of electing judges is itself a violation of due process. It is not difficult to understand how one with these views would approve the election-nullifying effect of the announce clause. They are not, however the views reflected in the Due Process Clause of the Fourteenth Amendment, which has coexisted with the election of judges ever since it was adopted.]

\textsuperscript{71} U.S. CONST. amend. XIV, § 5 (“Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”). As the “article” includes the Fourteenth Amendment Due Process Clause, Congress has colorable power to regulate states’ judicial processes.\textsuperscript{But cf. White, 122 S. Ct. at 2541 (rejecting the proposition that the Fourteenth Amendment Due Process Clause prohibits judicial elections on the basis of their historical coexistence with the Amendment).}

\textsuperscript{72} When New York in its Constitutional Convention of 1846 deliberated over the ultimately adopted proposal to elect judges, delegates in favor of elections mentioned the tight and corrupt grip of the political parties on the appointment of term judges as reason to change. See, e.g., REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF NEW YORK 579 (1846) (“[I]t is not to be denied that nominations as now conducted do not leave to the people that free and unbiased choice they should have, and it is notorious that party conventions and the nominations there made are not unfrequently the fruits of intrigue and selfish manoeuvre.”).
to the appearance of judges’ impartiality.  

3. Reviewing the Impossibility Thesis

What the Court means when it says that avoiding judicial preconceptions on legal issues is neither possible nor desirable is that judges must have such preconceptions to become learned and judges. Hamilton makes clear, though, that not all preconceptions are cut from the same cloth. In a republican government that vests the power of periodic judicial appointment in other branches or in the people, the state is exposed to a special class of troubling legal preconceptions, those that favor the appointing body. An allegedly common manifestation of this bias in states with elected judiciaries favors stiffer sentences for convicts. Whether or not this alleged tendency is true as a matter of fact, it suggests how a particular kind of preconception may ensue in states with elected judiciaries.

The impossibility thesis, then, does not seem to fit our republican government. It is doubtless true that there is little, if any, interest in avoiding judges’ legal preconceptions as a rule, for legal education and practice generate such preconceptions in their course. But the structure of republican government enables the classification of legal preconceptions, and partiality towards the appointing body is a class of legal preconception that a state may have an interest in preventing. This Comment argued that the truth or falsity of the impossibility thesis has no bearing on the Court’s conclusion that the interest in impartiality defined as lack of legal preconceptions is not compelling. However, the impossibility thesis is false before the public-confidence-in-the-judiciary interest in the appearance of impartiality, as long as measures exist that can target an elected judiciary’s tendency to preconceive the law in favor of popular sentiment. If the announce clause is not one such

73 In her concurring opinion in White, Justice O’Connor provides a counter-argument that applies a species of equitable estoppel to disqualify the interests of impartiality and its appearance from consideration (operating like underinclusion doctrine):

Minnesota has chosen to select its judges through contested popular elections . . . . In doing so the State has voluntarily taken on the risks to judicial bias described above. As a result, the State’s claim that it needs to significantly restrict judges’ speech in order to protect judicial impartiality is particularly troubling. If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.

122 S. Ct. at 2544 (O’Connor, J., concurring). Note that the problem Minnesota has “brought upon itself” is the failure to amend its constitution.

74 See, e.g., Stephen B. Bright & Patrick J. Keenan, Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases, 75 B.U. L. REV. 759, 765 (1995) (“When presiding over a highly publicized capital case, a[n elected] judge who declines to hand down a sentence of death, or who insists on upholding the Bill of Rights, may thereby sign his own political death warrant.”).

75 See supra text accompanying notes 56-59.

76 See supra text accompanying note 59.
measure, though, the Court’s announcing the impossibility thesis would have little consequence for the transparency of its judgment.

This Comment’s purpose is not to argue that the Court should have or would have upheld the announce clause. Given the limited objective of determining whether the impossibility thesis yielded opacity, this Comment will just consider how the announce clause might further the interest in the appearance of impartiality without addressing the questions of overbreadth or underinclusion.

To understand how the announce clause can advance the interest in the appearance of impartiality, assume the following: Judges, as a rule, seek reelection, and, even if the electorate does not remember what a judge said in her successful campaign, the judge will remember. The judge will assume that the views announced contributed to, rather than detracted from, her success and that someone, perhaps an opponent, will point out to the electorate the inconsistencies between her announcements and her actual rulings. On these assumptions, consider the following: An elected judge decides a case differently from how she announced to the voters the law was or should be during her candidacy. Suppose that the electorate gives the judge the benefit of the doubt on the judgment and legal opinion issued pursuant to the actual case, meaning that the electorate is not displeased with their substance. Justice Ginsburg, in dissent, explains, consistently with The Federalist, why duty may require a judge to decide a case differently from a prior announcement:

What candidates may not do—simply or with sophistication—is remove themselves from the constraints characteristic of the judicial office and declare how they would decide an issue, without regard to the particular context in which it is presented, sans briefs, oral argument, and, as to an appellate bench, the benefit of one’s colleague’s analyses. If judges disregarded their prior campaign announcements and any popular pressures stimulated by those announcements, then the announce clause would not advance the interest in the appearance of impartiality at all. Hence, as suggested at the end of the last section, the Court may conceive that as a theoretical possibility that the Court’s argument rests on its having held the opposite, that as a matter of law judges do not seek reelection. But had the Court so held, Justice Stevens has a rebutting argument at hand:

[W]e do know that a judicial candidate, who announces his views in the context of a campaign, is effectively telling the electorate: “Vote for me because I believe X, and I will judge cases accordingly.” Once elected, he may feel free to disregard his campaign statements, but that does not change the fact that the judge announced his position on an issue likely to come before him as a reason to vote for him. Minnesota has a compelling interest in sanctioning such statements.

White, 122 S. Ct. at 2548 (Stevens, J., dissenting).

Id. at 2553-54 (Ginsburg, J., dissenting).

See supra text accompanying notes 52-53.
matter of law judges do not consider popular pressures, and thus sustain the soundness of the Court’s argument.

But this last condition is unlikely to always obtain, and barring a holding otherwise, a state should be able to deem it false. One expects that at least some judges are at risk of being influenced by the negative consequences of ruling against a prior campaign announcement. As a matter of fact, a view announced during candidacy, now contradicted by a judicial ruling, undermines that judge’s credibility in the upcoming campaign. Why would the judge have told the electorate when campaigning that the law was, or should be, a certain way when it turns out that upon full and requisite reflection that view was wrong? The Eighth Circuit, upholding the announce clause, explains:

[S]hould the judge reach a conclusion that departs from the opinion expressed during the campaign, the judge risks being assailed as a dissembler. Thus, the judge may hesitate to decide the case in a way that might lose votes at the next election. Certainly, many judges have the fortitude to resist such pressures, but we do not doubt that the potential of supporter abandonment at the next election can weigh heavily on judges who know they were elected based on representations they made during the last campaign.80

This risk of being “assailed as a dissembler” works a feat of alchemy: transubstantiating electoral pressure into skewed legal rulings. This risk channels popular sentiment with its elective force through that issue upon which the judge as candidate opined during her campaign.

Announcing an opinion during a campaign presents two distinct pressures flowing from the people’s elective power. First, a judge has an incentive to rule consistently in order to preserve his credibility, which is essential in the next campaign. Second, the judge has reason to believe, barring radical reversal of popular sentiment in the interim, that the electorate would prefer her to rule according to the substance of the announced view. It is when a judge rules on a question upon which she announced a view during her candidacy that it becomes increasingly difficult to “justify a reliance that nothing would be consulted but the Constitution and laws.”81 And so, the astute position for a state with a term-elected judiciary is not to “justify a reliance” that popularity will not be consulted in cases presenting a question upon which the judge announced a view in candidacy. A state with term-elected judiciaries may take seriously the pressures that can lead a judge to consider her campaign-announced legal positions, effectively consulting popularity in reaching a judgment.

In comparison, when a judge rules on a question upon which he never announced a view publicly, a state can more comfortably assume impartiality

80 Republican Party of Minn. v. Kelly, 247 F.3d 854, 878 (8th Cir. 2001).
vis-à-vis the electorate. Certain legal rulings will undoubtedly be unpopular to the will of the day—else Hamilton’s argument would have little consequence—and that will surely have a bearing on a judge looking forward to reelection. The announce clause cannot help here, but that should not make the public-confidence-in-the-judiciary interest in impartiality an incredible ground for the clause. What the announce clause can do is strip away the substantive channel of influence upon a judge’s future rulings that comes from the incentive a campaign gives a judge to tell the people what they want to hear, or even just to distinguish himself from other candidates on the basis of legal opinions. The announce clause plausibly serves to ward away electoral pressure to an appreciable extent from at least some rulings. Because of the path laid by the impossibility thesis, the Court never addresses these considerations.

Holding sub silentio that, as a matter of law, electoral pressures do not reach judges preserves the soundness of the Court’s argument, but such a holding requires defense to overturn persuasively the traditional view, held by Alexander Hamilton and Joseph Story, that republican government with a judiciary of limited term imparts significant pressures upon judges to preconceive the law in favor of the body with the power of renewing their terms. Such a defense would address precisely those arguments whose consideration the impossibility thesis displaced.

CONCLUSION

Doctrines have strengths, and strengths have weaknesses. Strict scrutiny’s strength consists in its presentation to the judge of a formalized, pre-balanced inquiry. The doctrine reflects a judgment that the federal right in question outweighs the interest behind the contested state measure unless that measure is credibly narrowly tailored to serve a state interest found compelling. Thus, the judge must evaluate the weight of a state interest but need not balance that interest against the federal right. This presents a challenge to the judge who, in a particular case, may agree that the contested measure properly advances a compelling state interest but nonetheless finds the federal right more substantial. Such a judgment explained through strict scrutiny is bound to opacity. The converse challenge is encountered by the judge who fails to find the contested measure properly tailored for strict scrutiny but nonetheless believes the state interest outweighs the federal right sufficiently to uphold the measure.

In his concurring opinion, Justice Kennedy questions strict scrutiny’s doctrinal assumptions as applied to the First Amendment. Justice Kennedy begins to answer the question presented by the White case with his view “that content-based speech restrictions that do not fall within any traditional exception should be invalidated without inquiry into narrow tailoring or compelling government interests.”

Because the announce class does not

---

82 White, 122 S. Ct. at 2544 (Kennedy, J., concurring).
prohibit speech falling under one of the exceptions—indeed, "political speech is at the heart of the First Amendment,"--it is invalid. This view does not call for any balancing of interests. The First Amendment has per se proscriptions, and only its exceptions require a balancing of interests of the sort accomplished with strict scrutiny.

Justice Kennedy recognizes that "judicial integrity is... a state interest of the highest order" and that "thoughtful commentators are concerned[] that judicial campaigns in an age of frenetic fundraising and mass media may foster disrespect for the legal system." So the insurmountable problem with the announce clause does not lie in the weight of a state interest. Rather, "[c]ooler heads have always recognized... that... measures [like the announce clause] abridge the freedom of speech—not because the state interest is insufficiently compelling, but simply because content-based restrictions on political speech are expressly and positively forbidden by" the First Amendment.

Underneath Justice Kennedy’s doctrinal approach, beyond attention to text, may rest a normative principle of the sort articulated by Judge Easterbrook in American Booksellers Ass’n, Inc. v. Hudnut. There the court confronted an anti-pornography statute which the City of “Indianapolis justifie[d]... on the ground that pornography affects thoughts. Men who see women depicted as subordinate are more likely to treat them so.” Judge Easterbrook “accept[ed] the premises of this legislation” as presented by the defendant municipality. But all of the “unhappy effects” alleged and accepted to arise from pornography as speech “depend on mental intermediation.” The First Amendment can protect speech freely because it takes a person to act on speech. “Any other answer leaves the government in control of all the institutions of culture, the great censor of which thoughts are good for us.”

For purposes of doctrinal comparison, Judge Easterbrook and Justice Kennedy’s approach to the First Amendment could be roughly transposed into strict scrutiny doctrine as the conclusion that, as a matter of law, speech has no effects. Thus, strict scrutiny would invalidate any speech restriction that purportedly advances an interest. How could a speech restriction advance an interest if as a matter of law speech has no effects? The White Court may have applied a narrower version of this rule, something like “a judges’ announcements have no effect on him.” But to do so convincingly, the Court would have to address the realities of periodic election, realities anticipated by

83 Id.
84 Id.
85 Id. at 2544-45.
86 Id. at 2545.
87 771 F.2d 323 (1985).
88 Id. at 328.
89 Id.
90 Id. at 329.
91 Id. at 330.
our Framers. Announcing a view in a campaign matches the elective force to specific legal questions. Holding that as a matter of law elective force has no bearing on judges seems too radical a departure from our tradition to silently do work for their opinion. Thus, a reasonable reading of the opinion may find it opaque.

Federal judicial review of state action has played a critical part in our federal system since at least the Civil War. These judgments preserve and establish the separation and balance of power between the federal and state governments. The wisdom of the Supreme Court’s power to interpret the Constitution and set the federal border without check by the Executive or Congress depends on corrections by the people and states organized through amendment.\textsuperscript{92} Transparent judicial opinions at this border serve the compelling interest in the education of the citizenry and its governors on the meaning and consequences of the Constitution so that we may have the doctrinal wherewithal to improve our nation through constitutional amendments and valid legislation.

\textsuperscript{92} See \textit{U.S. CONST.} art. V.