

ESSAY

PREJUDGING JUDGES

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In Republican Party of Minnesota v. White, the Supreme Court held unconstitutional a provision of a state judicial conduct code that precluded judicial candidates from announcing positions on disputed legal issues. The focus of attention after White has been on its effects on judicial elections, with an underlying assumption that appointment processes offer an alternative to elections that does not raise the same problems.

This Essay argues that White should be viewed in a broader context: It is an example of a general trend toward “prejudging judges” that extends to judicial appointment processes. Commentators and the White Justices erroneously assume that this problem is particular to judicial elections. In fact, the problem may be greater for appointment processes, where legislators may force nominees to speak on issues by threatening to withhold votes.

This broader trend warrants refocusing the debate over what the problem is and how to solve it. It reflects a willingness to accept increased politicization of the judicial branch and a shrinking conception of bias. To the extent that prejudging judges contributes to the erroneous perception that the judiciary is politicized, the practice should be limited. If the judiciary is truly politicized, and if a politicized judiciary is undesirable, we should seek ways to minimize it. If the judiciary has always been and is inevitably politicized, and the “problem” is that only now the public perceives it that way, then that perception should be allowed to persist to focus dialogue on the actual politicization that is the real problem.

To the extent that the problem is worse for appointments than it is for elections, the use of at least some judicial elections may actually restrain appointment processes. The voluntary restraints that judicial electoral candidates impose may influence the legislators who question judicial nominees under an appointment system.

INTRODUCTION

In *Republican Party of Minnesota v. White*,¹ the Supreme Court held unconstitutional a provision of the Minnesota Code of Judicial Conduct that purported to preclude judicial candidates from announcing their po-

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1. 536 U.S. 765, 788 (2002).

sitions on “disputed legal or political issues.”² The Court held that the so-called “announce clause” in the judicial conduct code was not tailored sufficiently narrowly to pass muster under the First Amendment’s Free Speech Clause.

In the four years since it was handed down, the *White* decision has generated considerable interest among policymakers, legal reformers, and academics. The primary focus of this interest has been on the effect of *White* on motions to disqualify elected judges, on codes governing judicial speech, and on the propriety or viability of elections for judicial offices. The underlying (if unspoken) assumption has been that the judicial appointment process offers an alternative to judicial elections that does not raise the same problems as judicial elections do.

In this Essay, I argue that the *White* case should be viewed in a broader context. *White*, I contend, should not be seen solely in the context of judicial elections and elected judges. Rather, it is merely one example of a more general phenomenon: a trend toward prejudging judges. I use the phrase “prejudging judges” in two ways. First, the term refers to the trend of deeper examination of prospective judges by those who choose them on the merits of how the judicial candidates will—or at least how they are likely to—rule on particular issues and decide particular cases. Thus, there is a trend toward prejudging those who will be judges. Second, this trend makes it more likely that more people who in fact become judges will have prejudged issues (if not cases)—that there will be more judges who prejudice.

As I shall discuss below, all the Justices in *White* assumed that judicial appointment processes were less susceptible to prejudging of judges than were judicial elections. In taking this position, the Justices implicitly assumed that candidates for elective judicial office would engage—indeed, they would be compelled to engage—in a “race to the bottom,” because of voters’ desire to prejudge judges, in which candidates would speak out on controversial legal issues. They also implicitly assumed that judicial nominees would not fall into a similar race, perhaps because judicial nomination processes are not generally competitive.

In fact, however, the trend toward prejudging judges extends beyond judicial elections to systems in which judges are nominated and confirmed. Those who select and vote to confirm judges—at the federal level, the President and members of the Senate—also have a strong interest in prejudging judges. And, much like judicial candidates, judicial nominees may risk losing their prospective posts by failing to speak out on controversial issues. The failed nominations of Miguel Estrada to the District of Columbia Circuit and of Harriet Miers to the Supreme Court provide two recent examples of this phenomenon. Indeed, I argue below that, perhaps somewhat counterintuitively, judicial nominees may face

2. Minn. Code of Judicial Conduct Canon 5(A)(3)(d)(i) (2002), invalidated by *White*, 536 U.S. 765.

even *more* compelling pressure to speak out on controversial issues than do judicial candidates. Members of the legislature may force nominees to speak on issues by explicitly threatening to withhold favorable votes.

The Court's decision in *White* and the Senate's move toward greater explicit questioning of judicial nominees, as exemplified by the Estrada nomination, suggest a broader trend toward prejudging judges. This trend, in turn, suggests that those in government perceive a greater societal willingness to accept the increased politicization of the judicial branch, as well as a shrinking conception of bias—a greater willingness to accept that prospective judges may have taken broad policy positions without it meaning that they necessarily will decide particular cases in particular ways.

The broader trend toward prejudging judges suggests that the debate over the problems it creates should be refocused. For example, if the problem is an increase in the perception that the judiciary is increasingly politicized and biased, without an accompanying increase in actual politicization or bias, then the question becomes whether the perception of judicial politicization and bias now exceeds or matches actual levels. If it exceeds actual levels, then the perception is problematic, insofar as the perception of a judiciary that is deficient in terms of procedural justice may threaten the legitimacy of the judiciary and the rule of law. On the other hand, if the increased perception of politicization and bias now matches reality, then in effect the underlying problem of judicial politicization and bias has been unmasked. Indeed, the increase in the perception may provide a benefit by focusing needed attention on the underlying problem and perhaps prompting mitigating steps to be developed and implemented.

Additionally, to the extent that the problem of judges speaking out on controversial issues may be more likely to arise in the setting of judicial appointments, the best means to restrain prospective judicial appointees from being compelled to speak out on issues may be by retaining judicial elections, whether for other offices or under other systems. The restraint that judicial candidates impose on themselves may be adopted as a *de facto* standard by the executive and legislative branches in considering judicial appointments.³

The Essay proceeds as follows. First, in Part I, I outline the justification for and drawbacks to prejudging judges. In Part II, I consider the *White* decision and demonstrate that all nine Justices—and, whether explicitly or implicitly, most commentators—essentially agree that judicial elections are potentially more problematic than judicial appointment

3. That is not to say that there are not other reasons to prefer judicial appointment processes over judicial elections. See *infra* text accompanying notes 110–112 (identifying other reasons for this conclusion). My point here is only that fear of prejudging judges is not itself a strong basis for preferring judicial appointment processes over judicial elections and indeed may provide arguments in favor of retaining, at least in some settings, judicial elections.

processes because of the free speech rights of candidates for elective office. In Part III, I turn to consideration of the real potential for prejudging judges to arise and inhere in judicial confirmation processes. I first demonstrate why the problems that the commentators and the Justices in *White* see with judicial elections in fact extend to the setting of judicial nominations, with the Estrada and Miers nomination battles as concrete examples. I then argue that, perhaps somewhat unexpectedly, the judicial confirmation process may actually be more subject to the risk of prejudging judges than are judicial elections. Part IV then argues that these results suggest refocusing the debate on judicial selection methods.

I. THE BENEFITS AND DRAWBACKS OF PREJUDGING JUDGES

Prejudging judges is a practice that lies at the fault line between two competing demands upon the judiciary: judicial independence and judicial accountability. Ideally, judges would function with complete independence of both the other branches of government and the majority public will.⁴ Complete judicial independence, however, precludes any notion of judicial accountability to either the rest of government or the people.⁵ While independence frees judges to make unpopular decisions, lack of accountability may at the same time free them to make erroneous decisions. However, the more we hold judges accountable, whether to the political branches, the public, or both, the less independence judges will enjoy.⁶

The degree to which judicial accountability impairs judicial independence will vary according to what exactly judges are expected to do.⁷ Holding judges accountable substantively—that is, holding them accountable to decide particular cases or issues in particular ways—creates

4. Cf. Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. Pa. L. Rev. 971, 972 (2000) [hereinafter Friedman, *Countermajoritarian Difficulty*] (“We like to imagine that law operates in a world separate and apart from that of politics. . . . [Still,] we recognize that politics influences the selection of judges.”).

5. Additionally, it leaves unclear how exactly judges with absolute independence should be selected.

6. Geoffrey Miller identifies another factor—judicial quality—that is in tension with both judicial independence and judicial accountability. He explains:

A basic tradeoff exists between independence, accountability, and quality. To preserve independence, it is necessary to insulate judges from external controls over their behavior. If judges are protected from external controls, however, they have fewer incentives to provide quality services. To ensure accountability, judges must be subject to democratic processes, but influence and patronage, enemies of good judging, are inevitable when judges are chosen by political means. The challenge is to select, retain, supervise, and remove judges in such a way as to maintain independence and accountability, while not unduly sacrificing quality.

Geoffrey P. Miller, *Bad Judges*, 83 Tex. L. Rev. 431, 431–32 (2004); see also *id.* at 457–58 (elucidating this tradeoff).

7. See Ward Farnsworth, *The Regulation of Turnover on the Supreme Court*, 2005 U. Ill. L. Rev. 407, 418–24 (discussing different conceptions of judicial accountability).

a substantial imposition on independence. In contrast, holding judges accountable to certain procedural norms—that is, holding them accountable to adhere to governing law and court precedent—gives rise to less of an imposition.⁸ Still, even procedural accountability is at odds with independence, insofar as it is difficult to separate procedural from substantive concerns.⁹

There are different ways in which judges may be held directly accountable. Subsequent elections (whether competitive or simply for retention) and impeachment are two such ways. It is also possible, however, to use the judicial selection process as a substitute for holding judges directly accountable. For example, one might seek to bolster procedural accountability by examining prospective judges on their propensity to abide by governing law and precedent when deciding cases. And one might seek to bolster substantive accountability by examining judges on their views on particular issues and by asking them how they would decide particular cases—that is, by prejudging prospective judges.

To see how the practice of prejudging judges provides a substitute for direct judicial accountability, I explicate two types of possible effects of prejudging judges on the judiciary (or on the public perception of the judiciary): effects on the very composition of the judiciary and effects on judges' behavior once they ascend to the bench.

Consider first the possible effects of prejudging judges on the composition of the judiciary (and on perceptions of the composition of the judiciary). First, the hurdle of “prejudging” may encourage (or may be perceived to encourage) some people to seek, and discourage others from seeking, judicial office, whether elected or appointed.¹⁰ Second, even if the same people seek appointment or election, the process of prejudging may produce (or may be perceived to produce) a different final yield of judges.

Moreover, to whatever extent the same people wind up serving as judges, consider how prejudging them may make them act differently (or how it may be perceived that they act differently) once they ascend to the bench.¹¹ Judges may act differently by virtue of either the confirmation process or the election itself, or because of statements they make or an-

8. See Penny J. White, *Judging Judges: Securing Judicial Independence by Use of Judicial Performance Evaluations*, 29 *Fordham Urb. L.J.* 1053, 1060 (2002) (contrasting “accountability to the ‘rule of law’” with “accountability to the citizens or constituents”); Wendell L. Griffen, Comment, *Judicial Accountability and Discipline*, *Law & Contemp. Probs.*, Summer 1998, at 75, 75–76 (distinguishing political accountability, decisional accountability, and behavioral accountability).

9. But cf. Lawrence B. Solum, *Procedural Justice*, 78 *S. Cal. L. Rev.* 181, 305–13 (2004) (describing minimal protections necessary to render systems procedurally just).

10. Cf. Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 347 (1990) (explaining that “the pool of potential nominees is likely to shrink and change in composition” as result of prejudging of judges).

11. See *id.* (“It is quite conceivable that some lower court judges may be affected [by the prejudging of judges] in the decisions they make and in the opinions they write.”).

swers they provide during the confirmation process or election: Judges who have been prejudged may feel some obligation to see that their performance on the bench is consistent with the statements they made during the confirmation process or election campaign, or that their performance on the bench is consistent with some overarching judicial philosophy to which they indicated allegiance during the confirmation process or election campaign. In this sense, prejudging judges provides an incentive for judges to police themselves once they ascend to the bench.

In short, whether because prejudging judges will screen out judges who will (or will not) rule in cases in accordance with certain judicial philosophies, or who will (or will not) resolve issues in particular ways, or because prejudging judges affects how judges rule once they ascend to the bench, the prejudging of judges is a way to hold judges accountable a priori. In other words, prejudging a judge obviates to some extent the need to be able effectively to judge the judge during his or her tenure on the bench.¹² Indeed, on this understanding, the notion that nominated judges face greater compulsion than elected judges to speak out on controversial issues before they assume the bench is justified, at least where appointed judges tend to enjoy life tenure while elected judges do not: It is more important to prejudge appointed judges who will enjoy life tenure than elected judges who, if they do not perform as the electorate would like, can be put out of office in a future election.

The increased judicial accountability that prejudging judges offers is offset by decreases in judicial independence. Having more judges who feel the need to conform to statements made during confirmation hearings or campaigns and having more judges who adhere to particular judicial philosophies may increase the degree to which the judiciary is (or is seen to be) politicized.¹³ And judges who will not violate statements

12. Compare Stephen Carter, *The Confirmation Mess*, 101 *Harv. L. Rev.* 1185, 1198–99 (1988) (arguing against Senate rejection of judicial nominees on basis of disagreements over substantive legal views), with Erwin Chemerinsky, *Ideology and the Selection of Federal Judges*, 36 *U.C. Davis L. Rev.* 619, 630 (2003) (criticizing Carter for “subtly shift[ing] the definition of independence from autonomy while in office to autonomy from scrutiny before taking office” without explaining “why the latter, freedom from evaluation before ascending to the bench, is a prerequisite for judicial independence in the former, far more meaningful sense”).

13. Erwin Chemerinsky disputes this point:

[S]ome suggest that using ideology [to prejudice judges] is undesirable because it will encourage judges to base their rulings on ideology. The argument is that ideology has to be hidden from the process to limit the likelihood that once on the bench judges will base their decisions on ideology. This argument is based on numerous unsupportable assumptions: it assumes that it is possible for judges to decide cases apart from their views and ideology; it assumes that judges do not already often decide cases because of their views and ideology; it assumes that considering ideology in the selection process will increase this in deciding cases. All of these are simply false. Long ago, the Legal Realists exploded the myth of formalistic value-neutral judging. Having the judicial confirmation process

made at confirmation hearings and during campaigns and who prejudge cases may create a judiciary that is (or that is perceived to be) less impartial—a judiciary that prejudices.¹⁴ In other words, while the trend toward prejudging judges before they ascend to the bench generates more judges who prejudge, and while judges who prejudge may effectively be more accountable to those who select them, so too are prejudging judges more likely to be less independent and, indeed, more biased.

Given this tradeoff, the question is how society sees fit to balance accountability and independence.¹⁵ In the next Part, I use the *White* case to demonstrate that the Justices of the Supreme Court believe that judicial independence is more seriously threatened by prejudging judges through elections than it is through appointment processes. In Part III, I argue that in reality the trend toward prejudging judges transcends judicial selection methods.

II. THE *WHITE* CASE AND THE PERCEIVED GULF BETWEEN JUDICIAL ELECTIONS AND APPOINTMENTS

In this Part, I outline the Supreme Court's decision in the *White* case and describe how, despite disagreement over the constitutionality of a provision of the Minnesota Code of Judicial Conduct, all nine Justices

recognize the demise of formalism won't change a thing in how judges behave on the bench.

Chemerinsky, *supra* note 12, at 630–31. To whatever extent Chemerinsky is correct about the inevitable behavior of judges, the increased *perception* of ideological behavior on the part of judges still remains a possibility.

14. There conceivably may be some overlap between bias on the one hand and the tendency of judges to decide cases with an ear to the political on the other. I consider the two as separate by restricting bias to refer to a judge deciding a case based upon a prejudgment of an issue in the case. See Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 *Colum. L. Rev.* 563, 577–604 (2004) (arguing that actual prejudging of cases, not mere prior statements on issues that may arise in cases, constitutes justification for recusal); cf. *infra* note 19 (discussing Justice Scalia's treatment of various definitions of bias in *White*). By contrast, a judge who decides cases with an ear to politics may not decide cases based upon prejudgments, but rather may decide cases as the current political climate demands. See Barry Friedman & Anna L. Harvey, *Electing the Supreme Court*, 78 *Ind. L.J.* 123, 137–38 (2003) (presenting empirical evidence tending to show that Supreme Court decides cases with eye to ideological composition of present Congress, even in resolving constitutional questions).

15. See *Republican Party of Minn. v. White*, 536 U.S. 765, 805–07 (2002) (Ginsburg, J., dissenting) (describing distinctive role judiciary plays in government and importance of selection process in preserving that role); cf. Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 *Ind. L.J.* 153, 160 (2003) (noting that “the judicial independence the Constitution gives to the third branch is counterbalanced by powers the Constitution delegates to the first branch to promote judicial accountability,” but also that this structure “begs the question of where independence properly ends and accountability begins”). See generally Panel Discussion, *Appointment Versus Election: Balancing Independence and Accountability*, 33 *U. Tol. L. Rev.* 287 (2002) (discussing merits of different judicial selection methods).

agreed that judicial elections are more problematic than judicial appointment processes. The Court in *White* held unconstitutional the Minnesota Code of Judicial Conduct's "announce clause," which purported to preclude any candidate for judicial office (including an incumbent judge) from "announc[ing] his or her views on disputed legal or political issues."¹⁶ Writing for a five-Justice majority, Justice Scalia explained that, while the professed justifications for the clause—preserving the impartiality of the state judiciary in order to protect the due process rights of litigants and preserving the appearance of the impartiality of the state judiciary to preserve public confidence in the judiciary¹⁷—could be compelling

16. Minn. Code of Judicial Conduct Canon 5(A)(3)(d)(i) (2002), invalidated by *White*, 536 U.S. 765. This "announce clause" was part of the Minnesota Code of Judicial Conduct and was based upon a similar provision of the American Bar Association's 1972 Model Code of Judicial Conduct. See Model Code of Judicial Conduct Canon 7(B)(1)(c) (1980). Violation of the clause would subject an incumbent judge to "discipline, including removal, censure, civil penalties, and suspension without pay," and a lawyer running for judicial office to potential "disbarment, suspension, and probation." *White*, 536 U.S. at 768.

17. The Court in *White* held open the possibility that the preservation of the appearance of judicial impartiality could constitute a compelling interest. See, e.g., *White*, 536 U.S. at 776 (concluding not that preserving appearance of impartiality could not constitute compelling state interest, but rather that "the announce clause is not narrowly tailored to serve impartiality (*or the appearance of impartiality*)" (emphasis added)); *id.* at 778 (concluding not that preserving appearance of impartiality could never constitute compelling state interest, but rather that, "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" (emphasis added)); *id.* at 779 (maintaining possibility that preserving appearance of impartiality could be compelling state interest, but concluding that fact that "judges often state their views on disputed legal issues outside the context of adjudication—in classes that they conduct, and in books and speeches . . . is quite incompatible with the notion that the need for openmindedness (*or for the appearance of openmindedness*) lies behind the prohibition at issue here" (emphasis added)). Thus, even to the extent that the Court in *White* "rejected the arguments by the Minnesota respondents and the dissenting Justices that the announce clause was justified because it helped preserve the appearance of judicial impartiality and thus public confidence in the judiciary," Friedland, *supra* note 14, at 567 n.21, the *White* opinion does not on its face eliminate the possibility of judicial campaign speech restrictions justified by the preservation of the appearance of judicial impartiality.

Michelle Friedland argues that a showing of particularized bias may be the only interest sufficient to justify content-based judicial campaign speech restrictions in *White's* wake. She reasons:

The Court's reasoning . . . suggests that the only interest compelling enough to justify judicial campaign speech restrictions is the interest in protecting litigants' procedural due process rights. The Court declined to rule out the possibility that the First Amendment might allow "greater regulation of judicial election campaigns than legislative election campaigns." Yet the Court made clear that it believes judicial candidates as speakers, and voters as listeners, have the same type of First Amendment interests in unrestricted campaign speech as candidates and voters in other types of elections. The Court also made clear that assertions of a general need to protect the appearance of judicial impartiality or the reputation of the judiciary will be insufficient to sustain restrictions on judicial campaigning.

state interests, the clause violated the First Amendment's free speech guarantee¹⁸ because it was not narrowly tailored to achieve those goals.¹⁹

While the dissents disagreed over whether the announce clause was constitutional, all of the Justices seem to have agreed that judicial elections are more problematic than judicial appointment processes. The

Putting these aspects of the Court's reasoning together, if stricter regulation of the content of judicial candidates' speech than of legislative candidates' speech is justified, it is because of something other than a desire to protect the general reputation of judges and the courts, but something implicated in judicial but not other elections. It is also something important enough to overcome judicial candidates' First Amendment interests in unrestricted campaigning. I cannot think of any interest that meets these criteria other than the only interest the Court treated as compelling in *White*—the interest in protecting the procedural due process rights of litigants who will come before the judges after they are elected.

Id. at 567–68 (footnotes omitted) (quoting *White*, 536 U.S. at 783).

18. The Free Speech Clause prohibits Congress from passing laws “abridging the freedom of speech.” U.S. Const. amend. I. It has been held applicable to the states as well by virtue of the Fourteenth Amendment. E.g., *Bigelow v. Virginia*, 421 U.S. 809, 811 (1975). Because the announce clause burdened speech at the core of the First Amendment—“speech about the qualifications of candidates for public office”—the Court subjected the clause to strict scrutiny, the most exacting form of First Amendment analysis. *White*, 536 U.S. at 774.

19. See *White*, 536 U.S. at 776. In conducting its analysis, the Court considered three possible definitions of judicial impartiality: “lack of bias for or against either *party* to the proceeding,” “lack of preconception in favor of or against a particular *legal view*,” and “openmindedness.” Id. at 775, 777, 778. The Court made clear that no conception of impartiality could justify the announce clause. First, although it recognized as compelling the goal of ensuring “lack of bias for or against either *party* to the proceeding,” the Court observed that the announce clause precluded “not . . . speech for or against particular *parties*, but rather speech for or against particular *issues*.” Id. at 775–76; cf. John Dewey, *Logical Method and Law*, 10 *Cornell L.Q.* 17, 22 (1924) (“No concrete proposition, that is to say one with material dated in time and placed in space, follows from any general statements or from any connection between them.”); Friedland, *supra* note 14, at 566 (“[T]he [*White*] Court rejected the Langdellian formalist view that judges derive the answers to cases from a system of legal rules so determinate that anyone with sufficient skill would derive the same answer.”). For discussion of a related point—that judges who are in fact biased in favor of or against particular parties and are called upon to decide purportedly pure questions of law can in fact allow that bias to affect the answers to the questions—see Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 *Cornell L. Rev.* 1672, 1743–48 (2003).

The *White* Court was quick to dismiss the notion that “lack of preconception in favor of or against a particular *legal view*” could be a compelling state interest, observing that jurisdictions—including Minnesota—seek experienced attorneys and judges to sit on their benches, and that it is nonsensical to expect experienced attorneys and judges to have no preconception in favor of or against particular legal views. 536 U.S. at 777–78.

Last, the Court avoided the need to determine whether the third conception of impartiality—“openmindedness”—could be a compelling state interest, reasoning that, even assuming that it could, the announce clause was “woefully underinclusive” to serve that interest. Id. at 780. The Court reasoned that, while the announce clause precluded statements by a judicial candidate in a campaign, it did not preclude them “up until the very day before he declares himself a candidate, and . . . (until litigation is pending) after he is elected.” Id. at 779–80.

dissents—by Justices Stevens and Ginsburg—both understand the majority’s holding to curtail severely, if not almost completely to eliminate, acceptable restrictions on judicial campaign speech, meaning in practice that judicial elections will resemble elections for legislative offices.²⁰ Because they consider the notion that legislative and judicial elections resemble one another to be problematic for the judicial function,²¹ both dissents conclude that judicial elections will be inherently inferior to appointment of judges. Indeed, they imply judicial elections may simply be unworkable.²²

Speaking for the majority, Justice Scalia rejected the dissents’ contention that the majority opinion in fact mandated that judicial and legislative elections resemble one another.²³ Nonetheless, Justice Scalia’s

20. See *White*, 536 U.S. at 803 (Stevens, J., dissenting) (describing majority as having resolved case on “the flawed premise that the criteria for the election to judicial office should mirror the rules applicable to political elections”); *id.* at 805 (Ginsburg, J., dissenting) (describing majority as taking “unilocal, ‘an election is an election,’ approach”).

21. See *id.* at 803 (Stevens, J., dissenting) (“The disposition of this case on the flawed premise that the criteria for the election to judicial office should mirror the rules applicable to political elections is profoundly misguided.”); *id.* at 806 (Ginsburg, J., dissenting) (“[T]he rationale underlying unconstrained speech in elections for political office—that representative government depends upon the public’s ability to choose agents who will act at its behest—does not carry over to campaigns for the bench. . . . [T]he Court’s unrelenting reliance on decisions involving [political elections] is . . . out of place.”).

For an argument that the Constitution’s Free Speech Clause allows for the use of different rules to govern different types of elections, see Richard Briffault, *Judicial Campaign Codes After Republican Party of Minnesota v. White*, 153 U. Pa. L. Rev. 181, 187–93 (2004).

22. See *White*, 536 U.S. at 797 (Stevens, J., dissenting) (“Although the fact that [elected judges] must stand for election makes their job more difficult than that of the tenured judge, that fact does not lessen their duty to respect essential attributes of the judicial office that have been embedded in Anglo-American law for centuries.”); *id.* at 803–04 (Ginsburg, J., dissenting) (“Whether . . . elected or appointed, judges perform a function fundamentally different from that of the people’s elected representatives. . . . The ability of the judiciary to discharge its unique role rests to a large degree on the manner in which judges are selected.”).

23. *Id.* at 783 (majority opinion) (“[W]e neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office.”). But see Friedland, *supra* note 14, at 606–12 (arguing that holding in *White* forecloses constitutionality of judicial codes’ “pledge” or “promises” clauses, which purport to “prohibit judicial candidates from making . . . ‘pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office’” (quoting Model Code of Judicial Conduct Canon 5(A)(3)(d)(i) (1990))).

The majority opinion also questions whether it is necessarily problematic for judicial elections to resemble elections for legislative office by emphasizing the role of judges in representative government. See *White*, 536 U.S. at 784 (defending popular election of judges on ground that American system does not have “complete separation of the judiciary from the enterprise of ‘representative government’” insofar as “state-court judges possess the power [not only] to ‘make’ common law, but . . . [also] to shape the States’ constitutions”). In this sense, *White* can be seen as the natural corollary to the Court’s holding in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 79–80 (1938), that state courts, as

opinion suggests, if indirectly, agreement with the dissent that the process of judicial elections is more problematic than the process of judicial nominations. The opinion treats First Amendment rights in judicial elections as somewhat analogous to government-generated liberty and property interests protected by the Due Process Clause. While the Due Process Clause does not require government to create liberty and property interests subject to the Clause's protection, once government chooses to create them, their restriction is constitutionally circumscribed.²⁴ Somewhat analogously, while First Amendment rights need not inhere in the process of selecting judges, once the government opts for election of judges, the government triggers application of constitutional rights to free speech within the context of those elections, and the restriction of those rights is constitutionally circumscribed: "[T]he First Amendment does not permit [the government] to achieve [the] goal [of precluding prospective judges from expressing opinions on issues] by leaving the principle of elections in place while preventing candidates from discussing what the elections are about."²⁵ Implicit in this statement is the notion that other forms of judicial selection—such as judicial appointments—may not give rise to this problem.²⁶

Thus, all nine Justices seem to agree that, in the wake of *White* or otherwise, judicial elections are more problematic than judicial appointment processes. This position can be unpacked to reveal an underlying

much as state legislatures, generate binding state law. (I am grateful to Michael Collins for this point.)

24. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 261–64 (1970) (“[W]hen welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process.”).

25. *White*, 536 U.S. at 788.

26. Justices O'Connor and Kennedy joined the majority opinion, but also wrote separate concurring opinions. Both these opinions echo the majority's treatment of First Amendment rights in judicial elections along lines similar to protected liberty and property interests under the Due Process Clause. See *id.* at 792 (O'Connor, J., concurring) (“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.”); *id.* at 795 (Kennedy, J., concurring) (“The State cannot opt for an elected judiciary and then assert that its democracy, in order to work as desired, compels the abridgment of speech.”).

Both opinions also express skepticism over whether judicial elections are consistent with an unbiased judiciary, but omit analogous expressions of skepticism over judicial appointment processes. See *id.* at 788 (O'Connor, J., concurring) (“I am concerned that, even aside from what judicial candidates may say while campaigning, the very practice of electing judges undermines th[e] interest [in an actual and perceived impartial judiciary].”); *id.* at 796 (Kennedy, J., concurring) (defending independence of elected state court judges “despite the difficulties imposed by the election system”).

Justice Kennedy's opinion seems somewhat more optimistic about elected judges' capacity to carry out their judicial responsibilities independently and ethically: “Many [elected state court judges], despite the difficulties imposed by the election system, have discovered in the law the enlightenment, instruction, and inspiration that make them independent-minded and faithful jurists of real integrity.” *Id.* The same statement makes clear, however, Justice Kennedy's view that, if elected judges are able to act independently, it is only because they are able to do so in the face of strong pressure to act otherwise.

assumption apparently shared by all the Justices: Candidates for judicial office will find themselves under an obligation of some sort to speak out on controversial issues once they are liberated to do so, while nominees for judicial office will not. To see this, consider first the dissenting Justices' belief that *White's* holding will cause judicial elections to resemble legislative elections and that such a result is problematic. The mere fact that, after *White*, candidates for judicial office are free to "announce" positions on controversial issues does not in and of itself mean that most (or even many) judicial candidates will avail themselves of that opportunity.²⁷ It thus seems that the Justices who understand the holding in *White* effectively to morph judicial elections into legislative-style elections must expect the norm for judicial candidates to become "speaking out" on controversial issues. These Justices implicitly must expect the public voting in judicial elections (i) to accept candidates who speak out on controversial issues, (ii) to prefer candidates who speak out on controversial issues to those who do not, and (iii) more likely than not to vote for candidates who announce positions with which they agree. On this account, even candidates for judicial office who would prefer not to speak are subjected to inexorable pressure to speak out. Judicial candidates thus face a situation akin to the prisoner's dilemma:²⁸ Once one candidate chooses to speak out on controversial issues, the others are faced with the option of either defecting and remaining competitive in the election or not defecting and losing it. Assuming the undesirability of having prospective judges "speak out" on controversial issues, a "race to the bottom"²⁹ will ensue among the candidates for judicial office.

This view, moreover, seems to be held as well by the Justices in the majority—even those who do not believe either that *White's* holding will cause judicial elections to resemble legislative elections or that such a result is problematic. The majority as well appears to be of the view that judicial elections are more problematic than judicial confirmation processes. By emphasizing that "the First Amendment does not permit [the government] to achieve [the] goal [of precluding prospective judges from expressing opinions on issues] by leaving the principle of elections in place while preventing candidates from discussing what the elections

27. Indeed, this seems implicitly to be the basis of Justice Scalia's assertion, on behalf of the majority, that "we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office." *Id.* at 783 (majority opinion).

28. For discussion of the prisoner's dilemma and collective action problems in a legal context, see, e.g., Douglas G. Baird, Robert H. Gertner & Randal C. Picker, *Game Theory and the Law* 31–35 (1994).

29. For theoretical discussion and critique of the "race to the bottom" construct, see, e.g., Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 *N.Y.U. L. Rev.* 1210, 1211–13 (1992) (arguing that competition among states "can be expected to produce an efficient allocation of industrial activity among the states" rather than decrease social welfare per conventional wisdom).

are about,”³⁰ the majority seems implicitly to assume that judicial nominees need not be restrained from speaking out on controversial issues. Perhaps the majority believes that, because nominees for judicial office do not “face off against one another” as do judicial candidates, there will be no “race to the bottom” among judicial nominees. Perhaps as well (or as a corollary), the majority Justices believe that those who vote for judicial nominees—that is, in the context of federal judicial appointments, senators—(i) will not accept nominees who speak out on controversial issues, (ii) will prefer nominees who do not speak out on controversial issues to those who do, or (iii) will not be more likely to vote to confirm nominees who announce positions with which they agree.

In sum, it appears that all nine Justices agree that, once they are authorized to do so, most judicial candidates (or at least most successful judicial candidates) will engage in a race to the bottom and speak out on controversial issues. They also seem to agree that judicial nominees can safely navigate the confirmation process without speaking out on controversial issues.³¹ Commentators seem generally to make these assumptions as well, either explicitly or implicitly, by treating *White*’s reach as extending to judicial elections but not confirmations.³² In the next Part, I demonstrate that, even if that assertion ever were true, it is not accurate today.

III. THE SUSCEPTIBILITY OF JUDICIAL APPOINTMENT PROCESSES TO PREJUDGING JUDGES

The impulse to see *White* as describing an effect that will be especially pernicious for judicial elections is but a symptom of a broad tendency to understand the federal judicial structure as having a monopoly on the proper means by which to preserve judicial independence.³³ The

30. *White*, 536 U.S. at 788.

31. It is interesting to consider whether this belief is grounded in the Justices’ personal experience, i.e., the understanding by the Justices that they were able successfully to navigate confirmation processes themselves.

32. See, e.g., Briffault, *supra* note 21, at 183–87 (focusing on propriety of judicial campaign codes post-*White*); Friedland, *supra* note 14, at 627–31 (arguing that judicial elections in post-*White* era can be consistent with protecting individual litigants’ rights); cf. Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 *UCLA L. Rev.* 705, 783–91 (2004) (arguing that *White* incorrectly treated speech subject to regulation as political speech, as opposed to adjudicative speech—which, unlike political speech, is not subject to special protection—but not suggesting that this argument extends to context of judicial appointment processes).

One exception is Geoffrey Hazard, who recognizes that “elective and appointive systems are not as fundamentally different as the *White* decision appeared to assume.” Geoffrey C. Hazard, Jr., “Announcement” by Federal Judicial Nominees, 32 *Hofstra L. Rev.* 1281, 1282 (2004); see also *id.* at 1287–90 (arguing that judicial appointments and judicial decisions are undeniably political in some sense).

33. See Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 *S. Cal. L. Rev.* 315, 331 (1999) (noting “the tendency of most scholars of judicial independence . . . to ignore state courts and state judges”); Frances Kahn Zeman, *The Accountable Judge*:

design of the Federal Constitution—including appointment of federal judges by the President with the advice and consent of the Senate and the provisions ensuring judges life tenure and no reductions in salary³⁴—provides a template of how to strive for judicial independence.³⁵ However, it is only one such template, albeit the one with which most legal academics are most familiar.

The federal judicial appointment design seeks to minimize the influence of politics generally, and of the political—the executive and legislative—branches of government, by creating checks and balances between the political branches. On the other hand, the election of judges may achieve the goal of reducing the influence of the political branches on the judiciary by largely severing the political branches from the process of selecting judges. Indeed, recent historical treatments of the growth of judicial elections in the United States indicate that proponents of elections were motivated at least in part by such a desire and by “distress[]

Guardian of Judicial Independence, 72 S. Cal. L. Rev. 625, 631 (1999) (“Of particular concern is the almost exclusive focus on the federal judiciary in much of the literature on judicial independence.”).

34. See U.S. Const. art. II, § 2, cl. 2; id. art. III, § 1.

35. The connection between judicial independence and the appointments process has deep constitutional roots. See id. art. III, § 1; *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 386–87 (1821) (Marshall, C.J.) (noting “the importance which that constitution attaches to the independence of judges” and contrasting judicial systems of “many States [where] the judges are dependent of office and for salary on the will of the legislature”); *The Federalist* Nos. 78, 79 (Alexander Hamilton) (asserting necessity of life tenure and salary stability to judicial independence); see also Friedman, *Countermajoritarian Difficulty*, supra note 4, at 972 (“Article III’s tenure and salary guarantees for federal judges are the constitutional embodiment of th[e] value of judicial independence from political pressure.”); infra note 82 (discussing relationship between life tenure and judicial independence); cf. *The Federalist* No. 48, at 312 (James Madison) (Clinton Rossiter ed., 1961) (criticizing state of Pennsylvania for varying “[t]he salaries of the judges, which the [state] constitution expressly required to be fixed”); id. No. 81, at 510 (Alexander Hamilton) (“State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws.”). For proposals by legal academics of legislation that would eliminate life tenure for Supreme Court Justices, see Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 *Harv. J.L. & Pub. Pol’y* 769, 822–75 (2006); Paul D. Carrington & Roger C. Cramton, *The Supreme Court Renewal Act: A Return to Basic Principles*, July 5, 2005, at <http://paulcarrington.com/Supreme%20Court%20Renewal%20Act.htm> (on file with the *Columbia Law Review*). For a proposal that would create incentives to encourage judges with life tenure appointments to relinquish voluntarily their positions after a certain number of years, see Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 *Cardozo L. Rev.* 579, 641 (2005) (suggesting modification of judicial pension system to provide significantly better pension benefits to judges who step down from bench relatively quickly); see also Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 *U. Pa. L. Rev.* 1575, 1621–36 (2006) (arguing against life tenure for Chief Justice’s judicial administrative responsibilities). But see Farnsworth, supra note 7, at 424–51 (defending life tenure for Supreme Court Justices).

[over] the level of partisanship in the existing selection systems and [the] belie[f] that the elective system would be less subject to partisan abuse.”³⁶

Despite these motivations, particular concern over judicial elections seems to grow out of the view that judicial elections inevitably conflict to some degree with the notion of judicial independence from the majority will. As the Supreme Court has explained, “ideally public opinion should be irrelevant to the judge’s role because the judge is often called upon to disregard, or even to defy, popular sentiment.”³⁷ There is thus a “fundamental tension between the ideal character of the judicial office and the real world of electoral politics.”³⁸

Along these lines, then, the holding in *White* may be seen to render states unable to prevent judicial elections from resembling legislative elections, and hence judges from resembling legislators. The consequence is that, once judicial candidates are free to announce their positions on various legal issues, voters may choose the candidate for whom they will cast their votes based upon their (arguably strong) impressions—grounded in those statements of positions—of how the candidate will vote or rule in actual cases that come before the court.

Judicial appointment processes are subject to the same danger, however. After all, the judicial appointment process is, at the end of the day, effectively an election, even if—insofar as there is only a single “candidate” after the President has made his or her nomination, and the general public does not vote in the election—some of the trappings of ordinary elections are not present. In this light, it is not surprising that the prejudging of federal judicial nominees is not a new phenomenon: The judicial selection process and the federal judiciary itself both have long histories of politicization.³⁹ But the trend toward having the Senate explicitly judge judicial nominees on the basis of their judicial ideologies

36. Burbank, *supra* note 33, at 332; see also *id.* at 332 & nn.105–106 (“[Proponents] were also intent on reducing the scope of official power in general.”).

37. *Chisom v. Roemer*, 501 U.S. 380, 400 (1991).

38. *Id.*

39. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 154 (1803) (noting “[t]he peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it”); William G. Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890–1937*, at 86–103 (1994) (discussing numerous political and social movements designed to alter judiciary); Friedman, *Counter-majoritarian Difficulty*, *supra* note 4, at 973–75 (discussing Franklin Roosevelt’s ill-fated Court-packing proposal, as well as his success at changing Supreme Court’s jurisprudence by virtue of pressure and judicial appointments).

For a discussion of a somewhat cognate point—the political ambitions of Supreme Court Justices—see Allen Sharp, *Justices Seeking the Presidency*, 29 *J. Sup. Ct. Hist.* 286, 286 (2004). For a discussion and analysis of one aspect of the Chief Justice’s administrative authority, see Theodore W. Ruger, *The Judicial Appointment Power of the Chief Justice*, 7 *U. Pa. J. Const. L.* 341, 367–89 (2004) (analyzing basis for Chief Justice’s administrative appointment powers).

and philosophies is a relatively recent phenomenon.⁴⁰ It grows out of two shifts in the norms governing Senate confirmation hearings over the last century. First, the Senate moved away from a model under which judicial nominees did not testify at confirmation hearings. Prior to Harlan Fiske Stone's hearings in 1925, no Supreme Court nominee appeared before the Senate.⁴¹ Even after that, until the mid-1950s, "[t]he testimony of the few nominees appearing before the Judiciary Committee . . . was limited to questions about the nominee's past actions."⁴² However, since John Marshall Harlan's 1955 hearings, every nominee for the Supreme Court has testified before the Judiciary Committee.⁴³

40. See, e.g., Helen Dewar, *Polarized Politics, Confirmation Chaos: Retribution Appears Evident in Nominations Since the Late 1980s*, *Wash. Post*, May 11, 2003, at A5 ("[The Clinton era] was the first time an entire set of names were treated as problematic. . . . Now retribution is kicking in . . .").

Some commentators argue that ideology has played a role in numerous candidates' Senate confirmation hearings, but that in earlier hearings ideological concerns remained *sub rosa*, with other concerns constructed or exaggerated to receive explicit attention. See, e.g., William G. Ross, *The Functions, Roles, and Duties of the Senate in the Supreme Court Appointment Process*, 28 *Wm. & Mary L. Rev.* 633, 649 (1987) [hereinafter *Ross, The Supreme Court Appointment Process*] ("The hand-wringing in 1916 over Louis Brandeis's alleged lack of judicial temperament . . . appears to have been a rationalization for opposition to his social activism and ideology."); *id.* at 649–50 ("[C]oncern over [Thurgood Marshall's] judicial temperament may have masked deeper problems, especially objections to Marshall's political liberalism."); *id.* at 651 ("The real reasons for [Clement] Haynsworth's defeat . . . may be traced to senatorial hostility toward Nixon and concerns over Haynsworth's judicial conservatism."); *id.* ("[O]pposition to [William] Rehnquist in 1971 and 1986 may have been inspired more by his conservatism than by charges that he intimidated black voters or engaged in other unscrupulous conduct."). At least one former senator, writing in an academic publication while still in office, agrees. See Dennis DeConcini, *Examining the Judicial Nomination Process: The Politics of Advice and Consent*, 34 *Ariz. L. Rev.* 1, 2 (1992) ("Although often shrouded in the guise of other criteria, the Senate throughout history has considered ideology in confirming Supreme Court nominees.").

In any event, the turn toward explicit consideration of judicial philosophy seems to be a recent phenomenon. See Dewar, *supra* ("[T]he [confirmation] fights—which usually were conducted largely behind closed doors—are being waged with a rare if not unprecedented public display of intensity and theatrics."); *cf.* Chemerinsky, *supra* note 12, at 624–26 (arguing that Senate has always considered ideology in evaluating judicial nominees and explaining reason for widespread sense that ideological considerations have increased in recent years).

41. *Ross, The Supreme Court Appointment Process*, *supra* note 40, at 666.

42. *Id.* Indeed, nominee Sherman Minton "declined an invitation to appear." *Id.*

43. *Id.* at 667. On the topic of Senate questioning of nominees for positions on lower federal courts, see William G. Ross, *The Questioning of Lower Federal Court Nominees During the Senate Confirmation Process*, 10 *Wm. & Mary Bill Rts. J.* 119, 119–21 (2001) [hereinafter *Ross, Lower Federal Court Nominees*]; see also Sheldon Goldman, *Unpicking Pickering in 2002: Some Thoughts on the Politics of Lower Federal Court Selection and Confirmation*, 36 *U.C. Davis L. Rev.* 695, 697 (2003) [hereinafter *Goldman, Unpicking Pickering*] (suggesting that Charles Pickering's nomination hearings for seat on Fifth Circuit "[i]n some respects . . . provide[] a model of how confirmation [of lower court judges] ought to work"). On the topic of presidential selection of judicial nominees for lower federal courts, see Sheldon Goldman, *Picking Federal Judges: Lower Court*

Along with the move toward greater in-person testimony by judicial nominees, Senate hearings have shifted toward greater emphasis on explicitly examining nominees' judicial philosophies and ideologies. Beginning again with Justice Harlan's 1955 hearings, "most [Supreme Court nominees] have been questioned about their judicial philosophy and at least some current legal issues."⁴⁴ William Ross identifies Potter Stewart's 1958 confirmation hearings as "the beginning of an era in which conservative senators made adherence to the principles of judicial restraint and *stare decisis* the litmus test for nominees."⁴⁵ Ross explains that southern conservatives continued this trend in their questioning of several nominees during the 1960s but that, with the election of President Richard Nixon in 1968, it was liberal senators "more than any other group [who] queried nominees about their views on fundamental issues."⁴⁶ Thus, as presidential party affiliation shifts, senators of different parties may question judicial nominees more vociferously.⁴⁷

Perhaps due to the trend toward greater emphasis on candidates' judicial ideologies, Senate confirmation hearings have become more contentious in recent years.⁴⁸ As a general matter, nominees have followed

Selection from Roosevelt Through Reagan 708–18 (1997) (finding increasingly more contentious and more public disputes between Senate and President over lower federal court judicial nominees). See generally Nancy Scherer, *Scoring Points: Politicians, Activists, and the Lower Federal Court Appointment Process* 11–46, 108–32, 158–80 (2005) (examining movement of judicial nominee selection from instrument of presidential patronage to instrument of policy and examining impact of external interest groups on selection process and role of judicial selection in presidential campaigns); Carl Tobias, *The Federal Appellate Court Appointments Conundrum*, 2005 *Utah L. Rev.* 743, 749–62 (surveying current state of affairs for lower federal judicial nominees and arguing that delays in filling judgeships result from numerous factors, including increased politicization in both executive and legislative branches).

44. Ross, *The Supreme Court Appointment Process*, *supra* note 40, at 667.

45. *Id.* at 661.

46. *Id.* at 661–62.

47. See, e.g., Jeff Yates & William Gillespie, *Supreme Court Power Play: Assessing the Appropriate Role of the Senate in the Confirmation Process*, 58 *Wash. & Lee L. Rev.* 1053, 1056 (2001) ("Commentators note that both liberals and conservatives alike support the ideological inquiry of nominees by the Senate when they dislike the nominee. Similarly, both liberals and conservatives deem ideological inquiry inappropriate when the nominee has been to their liking").

48. See, e.g., John O. McGinnis & Michael B. Rappaport, *Supermajority Rules and the Judicial Confirmation Process*, 26 *Cardozo L. Rev.* 543, 558 n.40 (2005) (referring to "contentious [judicial confirmation] debates of the last decade"); Yates & Gillespie, *supra* note 47, at 1056 (referring to "previous contentious confirmation proceedings"); see also Bork, *supra* note 10, at 267–343 (describing contentious Bork nomination hearings from nominee's perspective); Richard Davis, *Electing Justice: Fixing the Supreme Court Nomination Process* 105–27 (2005) (describing greater role of outside groups—including interest groups, media, and general public—in Supreme Court nomination process in recent decades); John Massaro, *Supremely Political: The Role of Ideology and Presidential Management in Unsuccessful Supreme Court Nominations* 143–46 (1990) (arguing that good deal of contentiousness in confirmation process is due to mismanagement of nominees by executive branch); Goldman, *Unpicking Pickering*, *supra* note 43, at 697–703 (detailing ideological investigation of potential judicial nominees by Ronald Reagan and

Felix Frankfurter's lead and refused to comment upon issues that might come before the court in the guise of a case.⁴⁹ Indeed, as Justice Ginsburg noted in her dissent in *White*, even Justice Scalia, the author of the majority opinion in *White*, invoked just such an argument at his own confirmation hearings.⁵⁰

Insofar as questioning of judicial nominees (or at least the scope of the nominees' answers) has been understood properly to be restricted to earlier statements and, to the extent that the nominee has previously served as a judge on another court, decisions,⁵¹ there have been some

George H.W. Bush White Houses); David S. Law, *Appointing Federal Judges: The President, the Senate, and the Prisoner's Dilemma*, 26 *Cardozo L. Rev.* 479, 506–11 (2005) (arguing that executive branch has seen expansion of its role in judicial appointments since late 1970s and that shift has contributed to heightened levels of ideological conflict and gridlock over appointment of federal circuit judges); cf. William Burnham, *Introduction to the Law and Legal System of the United States* 190 (1995) ("Recently in reaction to the political controversy over nominations, Presidents have sought to choose nominees who will not cause a political stir."); Mark Silverstein & William Haltom, *You Can't Always Get What You Want: Reflections on the Ginsburg and Breyer Nominations*, 12 *J.L. & Pol.* 459, 468 (1996) (arguing that Clinton Administration's fear of "the disruptive effect of contentious hearings or the reality of a filibuster when the nomination reached the floor of the Senate" gave "friend and foe alike a virtual veto over potential candidates during the [judicial nominee] selection process"). See generally Stephen L. Carter, *The Confirmation Mess: Cleaning Up the Federal Appointments Process* (1994) [hereinafter Carter, *Cleaning Up*] (describing and lamenting current state of federal judicial confirmation process); Scherer, *supra* note 43, at 21–27 (arguing that increased politicization of judicial confirmation process is result of ability of and need for politicians to mobilize elite interest groups).

In addition, consider comparisons between the federal judicial appointment process and "war." See generally *The Judges War: The Senate, Legal Culture, Political Ideology and Judicial Confirmation* (Patrick B. McGuigan & Jeffrey P. O'Connell eds., 1987); Michael J. Gerhardt, *Federal Judicial Selection as War, Part Three: The Role of Ideology*, 15 *Regent U. L. Rev.* 15 (2003) (describing contemporary "wars" over judicial selection as result of nonexistence of institutional norms relating to what role ideology should play in judicial selection); Michael J. Gerhardt, *Judicial Selection as War*, 36 *U.C. Davis L. Rev.* 667 (2003) (making similar argument in generalized context); Michael J. Gerhardt, *Supreme Court Selection as War*, 50 *Drake L. Rev.* 393 (2002) (making similar argument in context of Supreme Court nominations).

49. See Ross, *The Supreme Court Appointment Process*, *supra* note 40, at 666–67 (noting Frankfurter's silence).

50. See *Republican Party of Minn. v. White*, 536 U.S. 765, 818 n.4 (2002) (Ginsburg, J., dissenting) (discussing hearings before Senate Judiciary Committee on nomination of then-Judge Scalia (citing 13 Roy M. Mersky & J. Myron Jacobstein, *The Supreme Court of the United States: Hearings and Reports on Successful and Unsuccessful Nominations of Supreme Court Justices by the Senate Judiciary Committee, 1916–1986*, at 131 (1989))).

51. Judicial nominees with prior judicial experience have traditionally answered questions relating to cases in which they have rendered decisions. Often, however, where the issue in the case is currently controversial, the nominee will state that he or she was simply following governing precedent, thus skirting the issue of how the nominee would decide the issue if left to his or her own devices. The accuracy of such assertions is subject to debate. As William Ross explains:

As lower federal judges are supposedly bound to follow precedent, their ideologies are sometimes said to be less important than those of Supreme Court

attempts by sitting Presidents to nominate so-called “stealth candidates”⁵² by nominating candidates whose prior judicial records and writings are comparatively thin. The hope is that the President can “slip one by” a wary Senate by selecting a candidate whom the President believes will adhere to the desired judicial philosophy while not arming opposition senators with ammunition to oppose the nomination.⁵³

justices, who often encounter issues in which precedent is unclear and who face no embarrassing reversals if they ignore or overturn precedent. Federal judges themselves tend to deny that they have any significant discretion in deciding cases, an opinion echoed routinely by nominees at confirmation hearings. In reality, however, lower federal court judges also often encounter issues on which the law is unclear and therefore have much discretion in fashioning the law in a manner in which their own predilections and philosophies inevitably influence their decisions.

Ross, *Lower Federal Court Nominees*, *supra* note 43, at 134 (footnote omitted); see also Goldman, *Unpicking Pickering*, *supra* note 43, at 700–03 (discussing examinations of judicial records of persons who already held judgeships and who were being considered for appointment to federal bench or elevation within federal system by Ronald Reagan and George H.W. Bush Administrations).

52. See, e.g., Burnham, *supra* note 48, at 190 (“Souter was dubbed the ‘stealth’ candidate by the press, the reference being to the United States warplane that is constructed in such a way as to be undetectable on radar.”); Donald Grier Stephenson Jr., *Campaigns and the Court: The U.S. Supreme Court in Presidential Elections 214* (1999) (“With no paper trail of articles and speeches and with only brief service on the federal bench, [David] Souter . . . was an unknown, the ‘stealth candidate,’ said Alabama’s Senator Howell Heflin.”).

53. See, e.g., Neal Devins, *Congress and the Making of the Second Rehnquist Court*, 47 *St. Louis U. L.J.* 773, 775 n.8 (2003) (“[T]he appointment of stealth nominee David Souter was made, in part, to avoid the controversy surrounding nominees—such as Bork—with a paper trail.”); Mark Tushnet, *Alarmism Versus Moderation in Responding to the Rehnquist Court*, 78 *Ind. L.J.* 47, 66 (2003) [hereinafter Tushnet, *Alarmism Versus Moderation*] (“A reasonably risk-averse President and Senators will strongly prefer bland nominees . . .”). As Robert Bork describes,

A president who wants to avoid a battle like mine, and most presidents would prefer to, is likely to nominate men and women who have not written much People who have thought much about the role proper to judges are likely, however, to have written or spoken on the subject. The tendency, therefore, will be to nominate and confirm persons whose performance once on the bench cannot be accurately, or perhaps even roughly, predicted either by the President or by the Senate.

Bork, *supra* note 10, at 347.

Needless to say, the nomination of a stealth candidate can backfire: Presidents are themselves sometimes frustrated by the performance of judges once they ascend to the bench. See McGinnis & Rappaport, *supra* note 48, at 559 & nn.42–44 (referring to Justices who have “change[d] their minds and disappoint[ed] their patrons” once they have ascended to Supreme Court bench); cf. Mark Tushnet, *Dull and Duller*, *Legal Aff.*, Sept.–Oct. 2004, at 30, 31 (“[P]resident[] [George W. Bush’s] men may find a stealth nominee who seems reliably conservative, but they won’t know for sure whether she is until it’s too late.” (emphasis omitted)).

Moreover, as Mark Tushnet explains, the political benefit of selecting a stealth nominee may be overestimated, even in the context of the confirmation process:

[T]he case of Justice Souter indicates that although stealth nominees may escape substantial challenge from the President’s opponents, they may not be sufficiently

Judicial nominations by President George W. Bush have provoked yet an additional change: the rejection by senators of a judicial nominee on the ground that there was insufficient evidence of the nominee's ideology. Consider, as examples, the nomination of Miguel Estrada for a seat on the United States Court of Appeals for the District of Columbia Circuit⁵⁴ and the nomination of Harriet Miers to the Supreme Court. Senate Democrats asked Estrada to respond to questions about his judicial ideology and his positions on controversial legal issues.⁵⁵ When Estrada refused,⁵⁶ Senate Democrats filibustered Estrada's nomina-

reliable, at least openly so, to satisfy the President's supporters. Even worse, consider the reaction of the opposition party to a stealth nominee: The very fact that the President's supporters are willing to tolerate the nominee after the Souter experience will demonstrate to the opposition that the President's supporters must have enough information to reassure them in the face of a thin public record.

Tushnet, *Alarmism Versus Moderation*, supra, at 66.

President George W. Bush's failed nomination of Harriet Miers to be an Associate Justice of the Supreme Court presented a situation in which a nominee was too much of a stealth nominee even for some in the President's own party. See, e.g., Robin Toner, David D. Kirkpatrick & Anne E. Kornblut, *Steady Erosion in Support Undercut Nomination*, N.Y. Times, Oct. 28, 2005, at A16 ("[C]onservatives were not in the mood for anything less than what Mr. Bush had promised: a justice in the mold of Antonin Scalia or Clarence Thomas."); infra note 60 and accompanying text.

54. Estrada was among the first group of judicial nominees forwarded by President Bush to the Senate in May 2001. See Neil A. Lewis, *Bush Appeals for Peace on His Picks for the Bench*, N.Y. Times, May 10, 2001, at A29; Neil A. Lewis, *Bush to Nominate 11 to Judgeships Today*, N.Y. Times, May 9, 2001, at A24.

55. Some Democratic senators identified Estrada as a "stealth" conservative candidate, that is, a candidate who was likely to hew to a conservative ideology, but without the written materials yet to validate that view. See Neil A. Lewis, *Impasse on Judicial Pick Defies Quick Resolution*, N.Y. Times, Mar. 30, 2003, at A16 [hereinafter *Lewis, Impasse*] ("Senate Democrats have asserted that Mr. Estrada is a 'stealth candidate,' someone chosen precisely because he is a strong and reliable legal conservative but without any record of speeches or writings that could be awkward to explain or justify at a confirmation hearing."); Neil A. Lewis, *Stymied by Democrats in Senate, Bush Court Pick Finally Gives Up*, N.Y. Times, Sept. 5, 2003, at A1 [hereinafter *Lewis, Stymied*] ("[Estrada] has such a scant written record that Democrats complained he was a 'stealth nominee,' whose views were hidden from public view but would come out in his rulings from the bench."); see also Neil A. Lewis, *Battle Brews over a Hispanic Nominee to Appeals Court*, N.Y. Times, Sept. 24, 2002, at A23 ("Mr. Estrada's conservative views are largely presumed rather than known because there is no paper trail of his stands."); Neil A. Lewis, *Bush Judicial Choice Imperiled by Refusal to Release Papers*, N.Y. Times, Sept. 27, 2002, at A28 [hereinafter *Lewis, Judicial Choice Imperiled*] ("White House officials have been openly delighted that Mr. Estrada has written little that could be used against him, unlike the two appeals court nominees the Democrats rejected this year.").

56. The *New York Times* reported:

In his Judiciary Committee hearing last September, Mr. Estrada took what is often called "the judicial fifth," declining to answer many questions by saying that he could not comment on issues that might come before him should he be confirmed. It is a common approach for judicial nominees, but Mr. Estrada was more reticent than most.

Asked to name Supreme Court decisions in the last 40 years with which he found fault, he declined. He said he could not criticize any decision by the

tion.⁵⁷ Republicans were unable to break the Democrats' filibuster,⁵⁸ and Estrada ultimately withdrew his name from consider-

justices because "I haven't been in their shoes in the sense of having had access to all the materials, arguments, research and deliberation that they had."

Lewis, *Impasse*, supra note 55; see also Charles Lane, *Lawmakers Press Nominee*, Wash. Post, Sept. 27, 2002, at A5 ("Estrada declined to answer most questions about his views on issues that might come before him as a judge."); Lewis, *Judicial Choice Imperiled*, supra note 55 ("Mr. Estrada maintained that approach today, resisting questions from committee members about his views on many issues, asserting that it would be improper to provide information as to how he might rule on cases.").

Claiming that more information was needed about the candidate's views, Senate Democrats turned to asking for the release of memoranda that Estrada had written during his tenure as a member of the Justice Department during the Clinton Administration. See *id.*; see also Lewis, *Impasse*, supra note 55 ("The fight over Mr. Estrada's nomination has nominally been over memorandums he wrote from 1992 to 1997 as a lawyer in the office of the solicitor general about pending Supreme Court cases."); Lewis, *Stymied*, supra note 55 ("Senate Democrats had demanded that the administration provide them with legal memorandums that Mr. Estrada had written while he was an assistant solicitor general in the Justice Department."). The Bush Administration declined to release those memoranda. See Lewis, *Impasse*, supra note 55 ("Alberto R. Gonzales, the White House counsel, has refused to release the memorandums, saying that to do so would inhibit government lawyers from giving candid advice. He was supported in that view by several former Justice Department officials, including some prominent Democrats."); Lewis, *Stymied*, supra note 55 ("The White House refused [to release the memoranda], noting that several Democratic solicitors general had said that was inappropriate.").

57. Democratic opposition at first seemed perhaps an insuperable obstacle to Estrada's name emerging from committee with the Democrats in control of the Senate, but, after the 2002 midterm elections shifted senatorial control to Republican hands, see Neil A. Lewis, *A Once-Doomed Nomination Wins Senate Panel Approval*, N.Y. Times, Jan. 31, 2003, at A26 [hereinafter Lewis, *A Once-Doomed Nomination*], a party-line vote of the Judiciary Committee turned consideration of Estrada's nomination over to the entire Senate. See Neil A. Lewis, *Delayed Debate Starts on Judge Picked by Bush*, N.Y. Times, Feb. 6, 2003, at A28. Still, the Democratic opposition remained strong and largely united. Lacking the votes to prevail on an up-or-down vote on Estrada's nomination, the Democrats employed a filibuster to preclude such a vote. See Neil A. Lewis, *Impasse on Judge*, N.Y. Times, Feb. 16, 2003, § 4, at 2 ("Senate Democrats held the floor for three days to block a vote on President Bush's nomination of Miguel Estrada.").

58. The Republicans tried cloture votes to derail the filibuster, but never garnered enough Democratic support to secure the sixty votes necessary to prevail. See Neil A. Lewis, *Estrada Filibuster Holds*, N.Y. Times, Mar. 19, 2003, at A24 ("As in the two previous efforts, Republicans fell five votes short of the 60 they need to end the filibuster blocking Mr. Estrada's nomination to the United States Court of Appeals for the District of Columbia."); Neil A. Lewis, *G.O.P. Seeks to Ease Rules on Filibusters of Judgeships*, N.Y. Times, May 10, 2003, at A15 (reporting Senate Majority Leader Bill Frist's comment that "Republicans had failed six times to break a filibuster on the nomination of Miguel Estrada"); Neil A. Lewis, *Judge Wins Committee Vote, but Confirmation Is Uncertain*, N.Y. Times, May 9, 2003, at A26 ("Republicans failed again to break the filibuster[] that [has] been blocking [the] vote[] on . . . Miguel Estrada . . ."); Neil A. Lewis, *Judicial Nominee Gets a Rare Second Chance*, N.Y. Times, Mar. 14, 2003, at A24 ("As was the case last week, Republicans won only 55 votes, 5 fewer than needed to end the Democratic filibuster."); Neil A. Lewis, *Senate Fails to End Filibuster on Bush Judicial Nominee*, N.Y. Times, Mar. 7, 2003, at A21 ("Senate Republicans lost a crucial test vote today over President Bush's nomination of Miguel Estrada to the federal appeals court in Washington, gaining 55 votes, 5 short of the 60 needed to cut off debate."); see also Neil A. Lewis, *G.O.P. Fails in*

ation.⁵⁹

In the Miers case, it was senators from the President's own party who objected to the nomination. They argued that there was an insufficient basis to conclude that Miers was sufficiently conservative in her judicial philosophy.⁶⁰ Miers ultimately withdrew her nomination.

The actions of Senate Democrats with respect to Estrada and of Senate Republicans with respect to Miers vindicate the notion that silence on important legal issues may be a valid basis for opposing a judicial nominee's confirmation.⁶¹ Moreover, Senate Democrats took matters a step further during the Estrada nomination process, affirmatively acting—by using the filibuster and then by voting against cloture—to vote, effectively, against Estrada on the ground that he refused to respond to many questions put to him by senators.⁶²

Bid to End Filibuster Against Texas Judge, *N.Y. Times*, May 2, 2003, at A30 (“A filibuster blocking a confirmation vote on the nomination of Miguel Estrada, a Washington lawyer, to an appeals court seat in Washington will soon enter its fourth month.”).

59. Estrada withdrew his name from consideration in September 2003, nearly two years after his original nomination. See Lewis, *Stymied*, *supra* note 55.

60. See Toner et al., *supra* note 53 (noting comment by Senator Brownback that “social conservatives were simply not inclined to go on faith that Ms. Miers was a reliable conservative”). There were, in addition to questions about Miers's judicial philosophy, questions raised about Miers's qualifications. See *id.* (describing “individual courtesy calls to senators” as leading to doubt of her “constitutional mastery”).

61. Democratic senators objected to Estrada based upon the White House's refusal to release the memoranda. See Lewis, *Impasse*, *supra* note 55 (“Mr. Schumer and Mr. Leahy have argued that similar memorandums have been made available in the past.”); see also *id.* (“Mr. Estrada gave a hint that what the memorandums might disclose was his impatient manner when he told the committee he might have harshly dismissed some arguments by junior lawyers.”); cf. John W. Dean, *The Rehnquist Choice 266–70* (2001) (raising question of whether 1971 nomination of William Rehnquist to Supreme Court might have been jeopardized if confidential Justice Department memoranda prepared by Rehnquist were available to Senate Democrats). More generally, on the purported basis of lack of adequate information about the candidate's views, see, e.g., Michael M. Gallagher, *Disarming the Confirmation Process*, 50 *Clev. St. L. Rev.* 513, 540 (2002–2003) (“Because of . . . alleged lack of information, Senate Democrats filibustered the Estrada nomination, refusing to bring the nomination up for a vote until they received more information concerning Mr. Estrada's views.”); Lewis, *A Once-Doomed Nomination*, *supra* note 57 (“Mrs. Feinstein said at today's session that she had reviewed the transcript of Mr. Estrada's hearing last September and determined that his refusal to answer many questions about his beliefs persuaded her to vote against him.”). There was never any suggestion that Estrada—who “graduated from Columbia College, became an editor of the *Harvard Law Review*, clerked for Justice Anthony M. Kennedy and went on to argue 15 cases before the Supreme Court,” Lewis, *Impasse*, *supra* note 55, and who “received a unanimous ‘Well Qualified’ rating from the American Bar Association,” Gallagher, *supra*, at 539—was unqualified for a seat on the court in terms of credentials, although “[s]ome Senate Democrats . . . claimed that Mr. Estrada lacked judicial experience.” *Id.* at 539 n.185.

62. The actual and successful use of a filibuster to block Estrada and other Bush judicial nominees from obtaining up-or-down votes in the Senate represented yet another step in the trend toward greater prejudging of judges. For a discussion of uses of filibusters to keep lower court nominees off the bench on ideological grounds, see Scherer, *supra* note 43, at 148–51. Scherer notes that the use of filibusters for this purpose “did not begin until the Reagan presidency.” *Id.* at 148.

One can argue that the filibuster was only nominally over Estrada's failure to respond to questions at the hearings and that the real issue was that most Democratic senators were convinced both that Estrada would espouse a conservative ideology on the bench and that, if confirmed for a seat on the Court of Appeals for the District of Columbia Circuit, the path would be clear for President Bush to nominate Estrada for a seat on the Supreme Court. Still, the point remains that the Senate Democrats effectively presented Estrada with an ultimatum: "Either answer our questions—in which case we may vote against you if the answers confirm your conservative leanings—or we will certainly vote against you." The ultimatum left Estrada with three options: (i) confirm that he would have a conservative judicial ideology and, on that basis, receive negative votes; (ii) dispel the notion that he would have a conservative judicial ideology and perhaps receive positive votes (though perhaps also generate some negative votes from more conservative senators); or (iii) remain silent and receive negative votes. The ultimatum thus confirms the unavailability, at least in this instance, of choosing not to respond to questions.

The demise of the Miers nomination motivated President Bush to abandon the stealth nominee strategy in favor of selecting a nominee—Samuel Alito—whose views on controversial issues were better known and more easily ascertained.⁶³ In this sense, the pendulum may have begun to swing back, away from stealth nominees, as the propensity to prejudge stealth nominees grows. This stands to reason: The President prefers a

In reality, the filibuster employed by the Democrats might better be described as a "filibuster threat" rather than a traditional "filibuster":

The last of the old-time marathon filibusters occurred during the fight for the 1964 Civil Rights Act, said Richard Baker, the Senate historian. When the bill's supporters mustered enough votes to end the 57-day debate, Mr. Baker said, "that broke the back of the all-night filibuster."

. . . .

In modern filibusters like the ones employed against the four Bush judicial nominees, the extended debate is merely threatened and not actually carried out. Neil A. Lewis, *Angered by Filibusters on Nominees, Republicans Stage Their Own Protest*, N.Y. Times, Nov. 13, 2003, at A29.

For discussion of the constitutionality of the filibuster, see generally Michael J. Gerhardt, *The Constitutionality of the Filibuster*, 21 Const. Comment. 445, 482–84 (2004) (concluding filibuster is "disagreeable legislative practice, but it is not unconstitutional"). For an argument that the use of filibusters in the context of judicial nominations will result in more moderate judges, see John O. McGinnis & Michael B. Rappaport, *The Judicial Filibuster, the Median Senator, and the Countermajoritarian Difficulty*, 2005 Sup. Ct. Rev. 257, 258.

63. See Robin Toner & Adam Liptak, *2 Camps, Playing Down Nuances, Stake Out Firm Stands*, N.Y. Times, Nov. 1, 2005, at A25 (noting that, despite opposition to Alito's nomination by some, "[t]here was agreement" that Alito "was not a 'stealth' nominee with no paper trail on abortion"); see also David D. Kirkpatrick, *After Miers, the Right Is Expecting More*, N.Y. Times, Oct. 30, 2005, at 24 ("[Prominent conservatives] argued that the reaction against the nomination of Harriet E. Miers had proven the perils of such an approach, even though some also acknowledged that the failure of the Miers nomination may have weakened the president if the next nominee sets off a battle.").

stealth nominee who stands a chance of confirmation, despite the risk that the stealth nominee may, if confirmed, prove not to live up to the President's expectations, over a nominee whose known views may foil the nominee's confirmation. To the extent, however, that the stealth nominee may be prejudged, then the benefits of that choice dissipate, such that the President may prefer the nominee whose views are known.

The wave of the future may be what might be called the "quasi-stealth" nominee, of which John Roberts seems an example.⁶⁴ At the time of his nomination by President Bush to the Supreme Court, Roberts did not have an extensive paper trail. Yet the nominee's organizational affiliations and broad statements left sufficiently little doubt in the minds of opponents and supporters alike of his likely jurisprudential approach once he ascended from the federal court of appeals to the Supreme Court.⁶⁵

The salient point in terms of the prejudging of judges is that prejudging may occur in respect of all three categories of nominees. Nonstealth nominees may be judged on the basis of actual statements made and positions taken. Quasi-stealth nominees may be judged on the inference that they possess an ideology that squares with the organizations to which they belong and the general statements they have made. Finally, stealth nominees may be assumed to possess a particular ideology unless they in fact speak out expressly, either to confirm or dispel that assumption.

A second important point bears on the similarity between judicial nominations and judicial elections. I do not seek here to judge the political merit of either the President's nominations of Estrada and Miers, of senators' opposition to the nominees, or of the Senate's action in filibustering Estrada's nomination. My point is simply to highlight an important similarity between these nomination processes and the *White* case. In *White*, the Court validated the right of a judicial candidate to speak out freely on legal issues, even those that conceivably might arise in cases before the court for a seat on which the candidate is running.⁶⁶ It also implicitly recognized the resulting likelihood of the public to demand that judicial candidates speak out on issues once they are authorized to

64. I am grateful to Rafael Pardo for this classification and terminology.

65. See, e.g., Linda Greenhouse, A Judge Anchored in Modern Law, *N.Y. Times*, July 20, 2005, at A1 ("[Roberts's] network of associations suggest a firm identification on the conservative side of the legal spectrum . . ."); Robin Toner, Cold Paper Trail Leads Some to Scrutinize Nominee's Past Words on Abortion, *N.Y. Times*, July 21, 2005, at A22 (noting abortion rights groups' opposition to Roberts nomination based on his past legal writings on abortion and his closeness with social conservative groups); see also Editorial, The President's Stealth Nominee, *N.Y. Times*, Oct. 4, 2005, at A26 ("While this page complained about the lack of information available about John Roberts, the new chief justice was a veritable font of background records compared with this new nominee [Harriet Miers].").

66. See *Republican Party of Minn. v. White*, 536 U.S. 765, 776 (2002).

do so.⁶⁷ In considering the Estrada and Miers nominations, senators effectively exercised a power to require judicial nominees to opine on legal issues, even those that conceivably might arise in cases before the court for a seat on which the candidate had been nominated. In both cases, in other words, the trend is toward prejudging judges.⁶⁸ Put another way, there is not just a “fundamental tension between the ideal character of the judicial office and the real world of electoral politics;”⁶⁹ there is, more generally and across judicial selection systems, a tension between judicial independence and judicial accountability.⁷⁰

The Justices in *White*, and commentators thereafter, have recognized the potential danger of political ambition triggering a race to the bottom among judicial electoral candidates announcing positions on controversial issues. However, the discussion above establishes that judicial appointment processes are subject to the same danger. Both types of systems may be infiltrated by politics.⁷¹ The Justices in *White*, and most commentators, are wrong to the extent they believe that the problem of having judges speak out on controversial issues inheres in judicial elections but not in judicial nominations. The Estrada nomination demonstrates that senators may withhold votes from a judicial nominee unless and until he or she opines on certain matters; thus, the Senate may effectively compel judicial nominees to speak out on whatever issues it chooses. To the extent, then, that there is a problem with having prospective judges speak out on such issues, that problem can arise in the setting of judicial nominations as well as the setting of judicial elections.

Indeed, there are two reasons to think that judicial nominations will be even *more likely* than judicial elections to cause prospective judges to speak on controversial legal issues. Consider first the possibility of prophylactic relief to protect prospective judges from having to speak out on controversial issues. *White* leaves open the possibility that restrictions on speech during judicial campaigns might be constitutional in limited circumstances.⁷² Indeed, a literature has emerged on the precise question of how constitutional judicial campaign speech restrictions might be drafted in *White's* wake.⁷³ In some settings, then, the problem of candi-

67. See *supra* notes 28–30 and accompanying text.

68. Cf. Hazard, *supra* note 32, at 1289–90 (identifying Bork nomination as early example of prejudging judicial nominee).

69. *Chisom v. Roemer*, 501 U.S. 380, 400 (1991); see also *supra* note 38 and accompanying text (making this point).

70. See *supra* notes 4–9 and accompanying text (describing this tradeoff).

71. As Pamela Karlan observed years before *White* and the Estrada nomination, “Ironically, given the pervasive focus on judicial elections as a threat to judicial independence, it may be that the political branches’ control of the judicial *appointments* process poses as much of a threat to judicial independence.” Pamela S. Karlan, *Two Concepts of Judicial Independence*, 72 S. Cal. L. Rev. 535, 545 (1999).

72. See *supra* notes 17–19 and accompanying text. Friedland suggests that these circumstances are narrow indeed. See *supra* note 17.

73. See, e.g., Briffault, *supra* note 21, at 193–202 (presenting general framework for evaluating judicial election regulations); Rachel Paine Caufield, *In the Wake of White*:

dates for elected judicial offices speaking out on issues presumably can be avoided.

Such a remedy is far less likely during a judicial confirmation, if it is available at all. While it is possible that the Senate might enact rules restricting questioning of judicial nominees,⁷⁴ such a course of action seems unlikely.⁷⁵ And the Supreme Court has never issued—or ever contemplated issuing—guidelines on what judicial nominees should and should not feel free to state during the confirmation process. Indeed, an attempt to do so would raise separation of powers concerns. In short, even if the First Amendment might allow for the Court to issue such guidelines, other constitutional or prudential concerns might not, and it seems in any event unlikely that the Court would take such a step.

Second, even putting binding speech restrictions to the side, judicial elections may better preserve the option of judicial candidates not to speak. In the judicial election setting, a candidate for a judicial office has the option of eschewing statements about important legal issues.⁷⁶ Such

How States Are Responding to *Republican Party v. White* and How Judicial Elections Are Changing, 38 Akron L. Rev. 625, 639–47 (2005) (discussing post-*White* regulations on judicial elections in various states); Katherine A. Moerke, Must More Speech Be the Solution to Harmful Speech? Judicial Elections After *Republican Party of Minnesota v. White*, 48 S.D. L. Rev. 262, 289–312 (2003) (assessing constitutional viability of common rules regulating judicial elections); Cathy R. Silak & Aaron C. Charrier, The Future of Judicial Elections: A Campaign Conduct Commission Proposal, 39 Idaho L. Rev. 357, 370–75 (2003) (presenting proposal for commission to supervise conduct in Idaho judicial elections); Wendy R. Weiser, Regulating Judges' Political Activities After *White*, 68 Alb. L. Rev. 651, 687–701 (2005) (discussing regulation of political activities of elected judges and judicial candidates); Developments in the Law—Voting and Democracy, 119 Harv. L. Rev. 1127, 1133–44 (2006) (“It is unclear whether *White* actually adopted strict scrutiny for the purpose of evaluating [judicial speech restrictions] [I]t is far from certain that the Court will apply an equally searching standard to other judicial speech restrictions.”).

74. Cf. Gerard N. Magliocca, The Cherokee Removal and the Fourteenth Amendment, 53 Duke L.J. 875, 913 (2003) (describing so-called “gag rule” against congressional debate on slavery,” under which, “[i]n response to the increasing number of antislavery petitions coming from the new abolitionist movement, Congress adopted a rule—at the behest of the Southerners—that all petitions concerning slavery be tabled without discussion” (citing Richard A. Primus, *The American Language of Rights* 139 (1999))).

75. But cf. Richard Klotz, The Nuclear Option for Stopping Filibusters, 37 Pol. Sci. & Pol. 843, 843 (2004) (putting “nuclear option” for eliminating filibusters in historical and political context); Carl Hulse, Clash on Judicial Nominees Could Spill into Lawmaking, N.Y. Times, Mar. 7, 2005, at A14 (describing Republican efforts to change Senate rules to end judicial filibusters and resulting concerted Democratic opposition); Robin Toner, For Frist, Tough Agenda and Conflicting Pressure, N.Y. Times, Feb. 2, 2005, at A14 (“[Senate Majority Leader] Dr. [Bill] Frist is warning that unless Democrats allow all of Mr. Bush’s nominees to go to a floor vote this year, he may seek to change the rules of the Senate to end judicial filibusters.”). Still, a change in voting procedure governing judicial nominations is a far cry from an introduction of a rule that would explicitly limit the scope of questioning of judicial nominees.

76. *Accord Republican Party of Minn. v. White*, 536 U.S. 765, 783 n.11 (2002) (“Nor do we assert that candidates for judicial office should be *compelled* to announce their views on disputed legal issues.”).

a candidate might even go so far as to campaign on the particular ground that, by avoiding comment on issues that might come before her court while her opponents did not, she was demonstrating her greater judicial character and demeanor. While reasonable people might debate whether such a campaign often would be successful,⁷⁷ at the least it cannot be gainsaid that it never would be. There is, in short, at least the possibility that judicial candidates might, whether individually or as a group, choose *not* to opine on important legal issues of the day.⁷⁸

In contrast, a judicial nominee facing demands that she speak out on issues from senators who have enough votes at least potentially to block her confirmation has little recourse. She could try a similar tactic and claim that choosing to answer would demonstrate poor judicial judgment. The senators hold the trump card, however, and, as the Estrada and Miers nominations suggest, the political interests of senators are unlikely to give way to such an argument.⁷⁹ In effect, while *White* recognizes the right—but not the obligation—of candidates for judicial office to speak out on important legal issues, the story of the Estrada nomination suggests that judicial nominees might, in certain circumstances, be *obligated* to speak out if they wish to be confirmed by the Senate.⁸⁰ In short, it can be argued that the President and the Senate, as the group of voters who ultimately select and approve judicial nominees, are more likely to

77. Cf. Gerald Gunther, *Learned Hand: The Man and the Judge* 233–39 (1994) (describing Learned Hand's losing 1913 campaign for Chief Judge of New York Court of Appeals in which Hand, as sitting federal judge, refused to campaign actively).

78. Compare Justice Kennedy's suggestion from his concurrence in *White* that “[m]any [elected state court judges], despite the difficulties imposed by the election system, have discovered in the law the enlightenment, instruction, and inspiration that make them independent-minded and faithful jurists of real integrity.” 536 U.S. at 796 (Kennedy, J., concurring). While this statement expresses moderate optimism about elected state court judges, Justice Kennedy rests his optimism more on elected state judges themselves than on the electorate that selects them.

79. The judicial nominee might try to appeal to individual voters to put pressure on senators to support her decision not to speak out, again on the ground that that course of action reflects greater judicial temperament. However, to whatever extent such an argument might win voters over in a direct election, it seems generally unlikely that such an argument would succeed to such a degree that it would motivate enough voters to contact enough senators such that enough senators would alter their opposition to the nominee's confirmation. Consider in this regard the story of Pennsylvania Republican Senator Arlen Specter, whom special interest groups targeted for defeat because of his treatment of Anita Hill during the Clarence Thomas confirmation hearings. See, e.g., Judith Weinraub, *Arlen Specter's Rude Awakening*, Wash. Post, Oct. 18, 1991, at D1 (reporting on women's groups' targeting of Senator Specter). Senator Specter struggled through, but still won, the next election. See Adam Clymer, *On Clinton's Coattails, Many Democrats Blunt Anti-Incumbent Anger*, N.Y. Times, Nov. 4, 1992, at B1. For delineation of cases in which lower court judicial selections have become a campaign issue, see Scherer, *supra* note 43, at 158–80.

80. Note, in contrast to the assumptions made about most judicial elections, that the mere fact that a nominee does choose to speak does not guarantee that she will in fact receive additional positive votes. The point is that speaking out may be a necessary, but not sufficient, condition for gaining votes.

demand—and indeed to demand successfully—that judicial nominees speak out on issues than are members of the public who vote on judicial candidates in judicial elections.⁸¹

81. Geoffrey Hazard and Elena Kagan suggest that there should be limits on what can be asked of judicial nominees. Neither, however, explains how those limits could or should be enforced.

Hazard suggests that there might be a constitutionally grounded basis upon which federal judicial nominees might refuse to answer particular questions:

Nominees for federal judicial office now have a right to speak their views on issues likely to come before the Court. But they also have a right to refuse to do so. No doubt many of them refuse, relying on their records as a sufficient basis for evaluating their fitness for office. Most of them probably will be successful in this approach. However, they will no longer be able to say they cannot answer, only that they will not answer.

An approach I might counsel, at least for some nominees, is that there be a refusal, based on the ground that it is improper for a nominee to judicial office to answer such questions, and that the ground be justified by reference to American tradition. This would certainly not be unlawful under the *White* decision, nor would it be unethical.

Rather, refusal would simply be on the basis of Constitutional propriety. . . . The refusal would be on much the same basis as Mr. Greenspan would decline to answer questions addressed to future decisions about the interest rate, or Secretary Powell about his discussions with the Israelis and Palestinians. Answering such questions would be profoundly impolitic and therefore improper.

Hazard, *supra* note 32, at 1290–91 (footnotes omitted).

Whatever the attractiveness of Hazard’s proposal, he does not suggest that senators would be obligated to respect a nominee’s invocation of this standard. Indeed, it seems that senators would remain free to vote against a candidate who declined to answer questions on this basis.

Kagan argues in favor of greater examination of judicial nominees on their judicial philosophies and positions on particular legal issues. See Elena Kagan, Confirmation Messes, Old and New, 62 U. Chi. L. Rev. 919, 935–37 (1995) (reviewing Carter, *Cleaning Up*, *supra* note 48). At the same time, she asserts that she does

not mean to argue . . . that the President and Senate may ask, and a nominee (or potential nominee) must answer, any question whatsoever. Some kinds of questions . . . do pose a threat to the integrity of the judiciary. Suppose, for example, that a senator asked a nominee to commit herself to voting a certain way on a case that the Court had accepted for argument. We would object—and we would be right to object—to this question, on the ground that any commitment of this kind, even though unenforceable, would place pressure on the judge (independent of the merits of the case) to rule in a certain manner. This would impede the judge’s ability to make a free and considered decision in the case, as well as undermine the credibility of the decision in the eyes of litigants and the public.

Id. at 939.

Kagan may be right that a particular question may be objectionable, but she does not explain how, even if “we would be right to object,” we will object successfully—that is, in a way that either stops the question from being asked or protects the nominee’s refusal to answer. Indeed, Kagan offers no explanation of who “we” are. Other authors have also considered the problem but have failed to present solutions. See Dawn E. Johnsen, *Should Ideology Matter in Selecting Federal Judges?: Ground Rules for the Debate*, 26 *Cardozo L. Rev.* 463, 465 (2005) (advancing “ground rules” that she argues should govern debates over judicial nominee’s ideology, but offering no explanation of how these rules might be

One might argue that the problem of having judges speak on controversial issues is more serious in the context of judicial elections because elected judges run the risk of not being reelected if they do not hew to their campaign promises. On reflection, the argument rests on unstated assumptions. It assumes that elected judges will serve only for a limited time before coming up for reelection; it also assumes, by contrast, that appointed judges will enjoy life tenure and that life tenure affords those judges greater judicial independence. These assumptions need not reflect reality, however. First, one can question the degree to which life tenure in fact secures for judges a larger measure of judicial independence.⁸² Indeed, it can be argued that even federal judges with life tenure may have incentives to decide cases and write opinions in particular ways if they have aspirations to rise to a higher judicial office (or other political office),⁸³ and maybe

enforced); John M. Walker, Jr., *Politics and the Confirmation Process: The Importance of Congressional Restraint in Safeguarding Judicial Independence*, 55 *Syracuse L. Rev.* 1, 2 (2004) (arguing to similar effect).

82. Compare, e.g., *White*, 536 U.S. at 795 (Kennedy, J., concurring) (“There is general consensus that the design of the Federal Constitution, including lifetime tenure and appointment by nomination and confirmation, has preserved the independence of the Federal Judiciary.”), and Richard A. Posner, *The Federal Courts: Challenge and Reform* 277 (1996) (“Lifetime tenure . . . increases judicial independence in three ways: directly, by protecting the judges from retribution for unpopular decisions; indirectly, because allowing them to remain fully employed until death makes alternative employment less attractive; and also indirectly by enabling the recruitment of people of above-average ability and character.”), and Gordon Bermant & Russell R. Wheeler, *Federal Judges and the Judicial Branch: Their Independence and Accountability*, 46 *Mercer L. Rev.* 835, 839 (1995) (“The salary and tenure protections of the Constitution were intended to secure decisional independence.”), with Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* 237, 240–41 (2004) (disputing that Supreme Court is immune from political influences), and Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 *U. Cin. L. Rev.* 1257, 1273–82 (2004) (arguing that Supreme Court Justices decide cases with ears attuned to public opinions and political concerns, and elucidating political science literature to this effect); compare Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 *Va. L. Rev.* 1717, 1766–67 (1997) (arguing that ideologies of judges sitting on court of appeals panels affects outcomes), and Richard L. Revesz, *Ideology, Collegiality, and the D.C. Circuit: A Reply to Chief Judge Harry T. Edwards*, 85 *Va. L. Rev.* 805, 807–08 (1999) (same), with Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 *Va. L. Rev.* 1335, 1358–62 (1998) (arguing to contrary).

On the topic of judicial independence, see generally *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (Stephen B. Burbank & Barry Friedman eds., 2002); *Federal Judicial Independence Symposium*, 46 *Mercer L. Rev.* 637 (1995); *Judicial Independence and Accountability Symposium*, 72 *S. Cal. L. Rev.* 311 (1999); McNollgast, *Conditions for Judicial Independence*, 15 *J. Contemp. Legal Issues* 105 (forthcoming 2006) (modeling judicial independence as equilibrium outcome of game among judiciary, legislature, and executive); *Perspectives, Judicial Elections Versus Merit Selection*, 67 *Alb. L. Rev.* 763 (2004); *Symposium, Perspectives on Judicial Independence: Elections and the Challenge to Judicial Autonomy*, 64 *Ohio St. L.J.* 1 (2003).

83. See Karlan, *supra* note 71, at 540 (“Many sitting judges have aspirations for elevation to higher courts.”); *id.* at 545 (“[J]udges who want to be ‘promoted’—either to the courts of appeal or the Supreme Court—have to toe the popular line or at least a line

also if they wish to avoid the specter of impeachment,⁸⁴ public chastise-

acceptable to the Senate Judiciary Committee.” (footnote omitted)); cf. Bork, *supra* note 10, at 347 (“It is quite conceivable that some lower court judges may be affected in the decisions they make and in the opinions they write.”). Such incentives in theory could erode even to sitting Supreme Court Associate Justices who may dream one day of becoming Chief Justice.

In this sense, a low possibility of promotion can be seen to promote judicial independence. See, e.g., Daniel Klerman, Commentary, Nonpromotion and Judicial Independence, 72 S. Cal. L. Rev. 455, 456, 459 (1999) (“Promotion was very uncommon in eighteenth-century England, and contemporaries regarded nonpromotion as a safeguard of judicial independence.”). By contrast, a high probability of promotion can be seen to erode some measure of judicial independence. See, e.g., J. Mark Ramseyer & Eric B. Rasmusen, Judicial Independence in a Civil Law Regime: The Evidence from Japan, 13 J.L. Econ. & Org. 259, 282 (1997) (presenting empirical evidence that Japanese judges who render rulings unfavorable to government receive less attractive jobs).

The degree to which the possibility of promotion may pose a threat to judicial independence under the federal judicial system is the subject of some debate. Empirical evidence indicates that the possibility of promotion has had some influence on judicial decisionmaking. See, e.g., Mark A. Cohen, Explaining Judicial Behavior or What’s “Unconstitutional” About the Sentencing Commission?, 7 J.L. Econ. & Org. 183, 193, 195 (1991) (presenting empirical evidence that lower federal court judges with higher probability of promotion to higher court were more likely to find U.S. Sentencing Guidelines constitutional); Gregory C. Sisk, Michael Heise & Andrew P. Morris, Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning, 73 N.Y.U. L. Rev. 1377, 1487–93 (1998) (expanding upon Cohen’s findings to analyze differences stemming from party affiliation). Further, “[w]hile aspirations for the Supreme Court may be foolish fancy for all but a select few, forty percent of circuit judges are promoted from the ranks of district judges.” *Id.* at 1488 (footnotes omitted); see also Klerman, *supra*, at 460 (presenting data on promotion rate of federal judges and noting that, over most of past hundred years, “between forty and sixty percent of those appointed to the courts of appeals had previously served as federal district court judges”). Still, as Klerman notes, “while promotion has been common, the probability of promotion has been relatively low because of the pyramidal structure of the federal judiciary.” *Id.* at 461. At the same time, “[w]hile the average probability of promotion is relatively low, particular judges may perceive it as higher.” *Id.* at 463.

84. Judicial impeachments have been, and continue to be, rare occurrences usually reserved for situations in which there are allegations of affirmative wrongdoing on the part of a judge. See, e.g., John Ferejohn, Independent Judges, Dependent Judiciary: Explaining Judicial Independence, 72 S. Cal. L. Rev. 353, 358 (1999) (“[J]udicial impeachments historically have been relatively rare and remain so today.”); Linda Greenhouse, Rehnquist Joins Fray on Rulings, *Defending Judicial Independence*, N.Y. Times, Apr. 10, 1996, at A1 (quoting from speech by Chief Justice William Rehnquist that “the ‘guiding principle of the House of Representatives and the Senate’ from the earliest years has been that impeachment and removal of judges should be reserved for criminal conduct and not judicial acts”). Still, as John Ferejohn notes, “[t]he only real barriers to the frequent resort to impeachment are . . . political.” Ferejohn, *supra*, at 358. Indeed, to the extent that the Estrada nomination saga represents a political shift toward the use of the filibuster in response to a nominee’s silence, one might envision a similar shift toward greater use of impeachment as well. Cf. Patrick O’Connor, Impeachment of Judge Mulled by Judiciary, Hill (Wash., D.C.), Feb. 16, 2005, at <http://www.hillnews.com/thehill/export/TheHill/News/Frontpage/021605/impeachment.html> (on file with the *Columbia Law Review*) (describing petition by Republican state legislators from Connecticut asking House Judiciary Committee to consider initiating impeachment proceedings against Connecticut federal district judge based upon his rulings in death penalty case). But see

ment,⁸⁵ or even “overruling” by a legislature that disagrees with a holding.⁸⁶ While life tenure surely provides greater independence—judges without life tenure face similar incentives to decide cases or issues in particular ways, plus other incentives to boot—the fact remains that life tenure does not provide absolute insulation against all incentives.

Second, even assuming that life tenure affords judges substantially greater independence, the dichotomy between elected judges serving for limited terms and appointed judges enjoying life tenure is an artificial one. There is no reason that citizens cannot elect judges to terms with life or some otherwise lengthy tenure.⁸⁷ Nor must appointed judges en-

Geyh, *supra* note 15, at 209 (explaining how calls for impeachment of Supreme Court Chief Justice Earl Warren and Associate Justice William O. Douglas “failed miserably” because “[n]orms against resort to the impeachment process as a remedy for unpopular decisions had become so engrained that cries of ‘impeachment’ amounted to little more than expletives intended to display the depths of the speaker’s dissatisfaction”); *id.* at 211–12 (arguing that judicial confirmation process is quite different from impeachment process and that it is understandable why norms of congressional restraint have been incorporated in latter setting but not in former); Linda Greenhouse, *Rehnquist Resumes His Call for Judicial Independence*, *N.Y. Times*, Jan. 1, 2005, at A10 (quoting Chief Justice Rehnquist’s year-end report on judiciary as saying, since early in U.S. history, “it had been clear . . . that ‘a judge’s judicial acts may not serve as a basis for impeachment’” and that “[a]ny other rule . . . would destroy judicial independence,” since ‘judges would be concerned about inflaming any group that might be able to muster the votes in Congress to impeach and convict them’”).

For a discussion of the historical evolution of the bases for removing judges, see generally Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 *Yale L.J.* 72 (2006).

85. The reality of impeachment may not hold as large a stick as the implicit threat of impeachment, or even mere public chastisement. See generally Zemans, *supra* note 33, at 636–53 (discussing phenomenon and effects of political and media scrutiny of judiciary). Consider, for example, the story of Harold Baer, a judge on the United States District Court for the Southern District of New York, and his decision to reconsider a controversial decision to suppress evidence in the case of *United States v. Bayless*, 913 F. Supp. 232 (S.D.N.Y.), vacated on reconsideration, 921 F. Supp. 211 (S.D.N.Y. 1996). See Zemans, *supra* note 33, at 626 (identifying saga as “[t]he lightning rod for the current frenzy over judicial independence”).

Threats to bodily safety may also imperil judicial independence. See, e.g., Karlan, *supra* note 71, at 537 (“Justice Blackmun . . . was the target of repeated death threats for having written the opinion in *Roe v. Wade*.”).

86. See Friedman & Harvey, *supra* note 14, at 126–27 (arguing that Supreme Court Justices may decide cases, even constitutional cases, with eye to ideological composition of current Congress in order to minimize chances of legislative reversal); *id.* at 138, 151 tbl.7 (presenting empirical evidence in support of that claim).

87. Indeed, in many states voters initially elect a judge to the state high court, after which that judge must only stand for one additional “retention election.” The judge faces no opponent in the retention election; the electorate is called upon solely to approve, or disapprove, of the judge’s continued tenure. If the judge wins the retention election, he or she generally remains in office until retirement, mandatory or otherwise. See generally Larry T. Aspin & William K. Hall, *Retention Elections and Judicial Behavior*, 77 *Judicature* 306, 306 (1994) (describing retention plans as “a practical compromise between the goals of judicial independence and public accountability” and reporting findings of ten state “survey of judges who experienced retention elections”); Joseph R. Grodin, *Developing a*

joy life tenure.⁸⁸ In other words, if the problem is more serious for elected judges who face reelection, that is because they face reelection,⁸⁹ not because they are elected in the first instance. The issue is one of tenure, not method of selection.⁹⁰

The third problem with the argument that judicial confirmation processes are less problematic is perhaps the most troubling. If the argument is that the problem is more serious in the context of judicial elections because elected judges run the risk of not being reelected if they do not hew to their campaign promises, then it must be the case that it is less of a problem for appointed judges because (since they need not seek reappointment) they have greater freedom *not* to hew to statements made during confirmation hearings. It is indeed a strange defense of the judicial appointment process that rests upon the freedom of judges *not* to adhere to statements made purportedly under oath.⁹¹

Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections, 61 S. Cal. L. Rev. 1969, 1979 (1988) (discussing problems arising under judicial retention elections because of "peculiar and delicate relationship [that] exists between the judicial function and the democratic process").

Moreover, as Stephen Burbank explains, "no matter how they came to the bench initially and no matter how long the prescribed term between elections, judges in states with elective systems may serve as long [as] or longer than judges appointed to serve during good behavior." Burbank, *supra* note 33, at 332.

88. Indeed, federal tax court judges, magistrate judges, and bankruptcy judges do not. See Judith Resnik, *Judicial Independence and Article III: Too Little and Too Much*, 72 S. Cal. L. Rev. 657, 658–59 (1999) ("In terms of sheer numbers, the docket of the non-tenured judges far exceeds that of the life-tenured judges."). While magistrate judges and bankruptcy judges do not require Senate confirmation votes, tax court judges do. See 26 U.S.C. § 7443(b) (2000) (providing for appointment of federal tax judges "by the President [and] by and with the advice and consent of the Senate"); 28 U.S.C. §§ 152(a)(1), 631(a) (2000) (providing for appointment of bankruptcy judges and federal magistrate judges by circuit courts and district courts, respectively).

89. Cf. *Republican Party of Minn. v. White*, 536 U.S. 765, 782 (2002) ("[E]lected judges—regardless of whether they have announced any views beforehand—*always* face the pressure of an electorate who might disagree with their rulings and therefore vote them off the bench."); *id.* at 789 (O'Connor, J., concurring) ("Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects."); *id.* at 799 (Stevens, J., dissenting) ("Of course, any judge who faces reelection may believe that he retains his office only so long as his decisions are popular.").

90. See Richard L. Hasen, "High Court Wrongly Elected": A Public Choice Model of Judging and Its Implications for the Voting Rights Act, 75 N.C. L. Rev. 1305, 1330–35 (1997) (arguing that it is length of tenure, not whether or not judge initially stands for election, that affects judicial independence); cf. Karlan, *supra* note 71, at 540 ("Most judges want to keep their jobs."). But cf. Jason J. Czarnezki, *Voting and Electoral Politics in the Wisconsin Supreme Court*, 87 Marq. L. Rev. 323, 338–39 (2003) (presenting empirical study that does not support hypothesis that proximity to election affects elected judge's responsiveness to constituents in terms of voting).

91. Cf. Friedland, *supra* note 14, at 602–03 (arguing that judicial code's "promises clause" that prohibits judicial candidates from making promises to rule in certain way on particular issue is quite similar to "announce clause" in terms of both pressure that judges

IV. REFOCUSING THE DEBATE

In Part II, I used the Justices' opinions in the *White* case to highlight the apparent agreement of the Justices on the underlying point that judicial appointment processes are less problematic than judicial elections. In Part III, I explicated how the appointment process for federal judges may raise, and in fact does raise and may be more likely to raise, concerns similar to the concerns the Justices identified with judicial elections in *White*. In this Part, I argue first that, taken together, Parts II and III are evidence of a broad trend toward prejudging judges. I then turn to a description of how this broad trend calls for refocusing the debate over the selection of judges.

Consider first the strong evidence of a growing trend toward prejudging judges. The holding in *White* suggests that prejudging judges may become more common in the arena of judicial elections. There is a parallel trend, however, in the setting of judicial appointments, as the failed nominations of Miguel Estrada and Harriet Miers exemplify. The proximity of these events, in terms both of time and substance, strongly suggests a political movement toward greater engagement in, and acceptance of, prejudging of judges.

Recognition of the broad trend toward prejudging judges allows for the reconceptualization and refocusing of the debate over the phenomenon. Study of, and debate over, the phenomenon should focus not on *White* as an exercise of judicial interpretation of a constitutional provision, but rather on the broader political embrace of prejudging judges, of which *White* and the Estrada and Miers nominations are but symptoms.⁹² As I observed above, there is not simply a tension between judicial inde-

will feel to adhere to earlier statements once they ascend to bench and in terms of due process analysis each implicates).

92. For arguments that, notwithstanding the nonrepresentative nature of the federal judicial branch, court decisions may represent—and indeed to some degree rely upon for their legitimacy—public sentiment and will, see generally Kramer, *supra* note 82, at 240–41; Barry Friedman, *Mediated Popular Constitutionalism*, 101 *Mich. L. Rev.* 2596 (2003).

Along these lines, one might argue that it is not surprising that the saga of the Estrada nomination came not too long after the Court's decision in *White*. Senators may have understood the *White* decision as one that would soften public opinion against demanding answers on controversial topics from a judicial nominee. More likely is the explanation that the Court's decision in *White* to some degree reflected public opinion on the matter. Cf. *White*, 536 U.S. at 785 (“The practice of prohibiting speech by judicial candidates on disputed issues, however, is neither long nor universal.”); *id.* at 785–87 (arguing that tradition of public acceptance of judicial candidates debating legal issues is long one and that it was curtailed not by shift in public opinion but by action taken by American Bar Association); Friedman, *Countermajoritarian Difficulty*, *supra* note 4, at 979 (arguing that Roosevelt's Court-packing plan failed because of public opposition, but that public opinion made acceptable Court's shift to position generally favoring New Deal). In this sense, senators may have taken *White* not as a decision that might shift public opinion, but rather as a sign that public opinion would accept demands that a judicial nominee respond to questions on controversial legal issues.

pendence and election of judges; there is, more generally and across judicial selection systems, a tension between judicial independence and judicial accountability.⁹³

As an initial matter, consider what the broad trend toward prejudging judges might tell us about the judiciary. Given that judicial accountability and independence tug in opposite directions, the question is how to set the balance between them.⁹⁴ The *White* decision and the recent trend in judicial nominations exemplify a shrinking understanding of bias—whether actual or perceived—in the judicial context.⁹⁵ So, too, do they suggest perhaps an expanding embrace of an increasingly politicized judicial branch.⁹⁶ (One might argue that the judicial branch has always been politicized,⁹⁷ but, if that is so, it seems that there is now at least a growing perception that is in fact the case.⁹⁸)

Consider next how recognition of the broad trend toward prejudging judges allows for clarification and refinement of the search for a solution to the problem of prejudging judges. I first address the problem of prejudging judges broadly, as transcending judicial selection methods. I then consider how the retention of different judicial selection methods might help ameliorate the problem of prejudging judges under all judicial selection methods.

Because commentators generally see the problem in *White* to extend only to judicial election processes, the solution on which they tend to

93. See *supra* notes 69–70 and accompanying text.

94. See *supra* note 15 and accompanying text.

95. See *supra* note 19 (discussing *White* majority opinion's treatment of various conceptions of judicial impartiality); cf. Friedland, *supra* note 14, at 570 (arguing that restrictions on judicial campaign speech can be constructed, consistent with *White*, to protect litigants' procedural due process rights).

96. Erwin Chemerinsky identifies "the demise in a belief in formalism by the general public" as one reason for a heightened focus (or at least the perception of a heightened focus) on ideology. Chemerinsky, *supra* note 12, at 626. He explains:

People increasingly have come to recognize that law is not mechanical, that judges often have great discretion in deciding cases. People realize that how judges rule on questions like abortion and affirmative action and the death penalty and countless other issues is a reflection of the individual jurist's views. *Bush v. Gore* simply reinforced the widespread belief that the political views of judges often determine how they vote in important cases. Thus, Democratic voters want Democratic Senators to block conservative nominees and Republican voters want Republican Senators to block liberal nominees. This creates a political incentive for Senators to do so, and means that they certainly do not risk alienating their core constituency by using ideology in evaluating nominees.

Id. (footnote omitted).

The other reasons Chemerinsky credits for the increased focus on ideology are the division of power between the executive and legislative branches over the past several years and the growth of the "perception of deep ideological divisions over issues likely to be decided by the courts." *Id.*

97. See *infra* note 102 and accompanying text.

98. See Chemerinsky, *supra* note 12, at 625 ("There is a widespread sense that the [Senate's] focus on ideology has increased in recent years.").

fixate is the ability to structure meaningful judicial campaign speech codes consistent with the Court's holding in *White*. At the end of the day, the need for a solution extends as well to the judicial appointment process. Consider, then, the broad phenomenon of prejudging judges and the "problems" that may arise from it: increased politicization of the judiciary, increased judicial bias, and, even if neither of these two in fact increases, perceived increases in politicization of the judiciary, and perceived increases in judicial bias.⁹⁹

If the problem is an increase in the erroneous perception that the judiciary is politicized or the erroneous perception of judicial bias, then it would be desirable to take steps to dispel that perception. The maintenance of the appearance of judicial impartiality is critical to society, as the Court in *White* recognized by acknowledging that it could constitute a compelling state interest.¹⁰⁰ When society views the judicial system as procedurally fair, citizens will be more likely to accept the legitimacy of judicial decisions, even those with which they disagree substantively.¹⁰¹ By contrast, widespread perceptions that the judiciary is procedurally deficient will tend to undermine the legitimacy of the judiciary, the rule of law, and ultimately the government.

However, if the "problem" is a perceived increase in politicization or bias such that now perception matches reality, then the solution ought to address the background politicization and bias that the public only now has come to perceive. The real problem, in other words, is not the increase in perception, but rather the background politicization or bias. If that is so, then the "problem" of increased perception may in fact be a benefit. Increased public perception may help to generate political will to mitigate the background politicization or bias. To the extent that judicial politicization or bias is to some degree intractable—and there are many who adhere to this point of view¹⁰²—at the very least,

99. See *supra* notes 13–14 and accompanying text.

100. See *supra* note 17.

101. See, e.g., Tom R. Tyler, *Why People Obey the Law* 163–66 (1990) (examining extent to which normative factors influence compliance with law). For discussion of the importance of procedural fairness and a suggestion of what protections might render a system procedurally just, see Solum, *supra* note 9, at 305–13.

102. See, e.g., Chemerinsky, *supra* note 12, at 631 (dismissing as "simply false" the "assum[ption] that judges do not already often decide cases because of their views and ideology"); *id.* ("Long ago, the Legal Realists exploded the myth of formalistic value-neutral judging. Having the judicial confirmation process recognize the demise of formalism won't change a thing in how judges behave on the bench."); DeConcini, *supra* note 40, at 2 ("Although often shrouded in the guise of other criteria, the Senate throughout history has considered ideology in confirming Supreme Court nominees."); James C. Foster, *Rethinking Politics and Judicial Selection During Contentious Times*, 67 *Alb. L. Rev.* 821, 822 (2004) ("Scholars almost universally acknowledge that no selection procedure can be devoid of politics."); Hazard, *supra* note 32, at 1287 ("[J]udicial office is political in some undeniable sense. That is true specifically of federal judicial office and particularly the office of Justice of the Supreme Court."); Ross, *Lower Federal Court Nominees*, *supra* note 43, at 133 ("[I]t is absurd to argue that the pungent political aromas

public discourse on the matter could take place on an informed level.¹⁰³

On the other hand, the problem may be a real increase in judicial politicization or bias. At the outset, it is important to note that, to the extent that prejudging judges leads to the increased politicization or bias of the judiciary, that may not be undesirable, at least to some degree.¹⁰⁴ Assuming that is not the case—that, at some level at least, increased politicization or bias of the judiciary is undesirable and that any such increase is not outweighed by increased judicial accountability—there are two possible approaches a solution might entail. First, the solution might address the increase in politicization and bias. Alternatively, the solution might, perhaps somewhat counterintuitively, seek to *increase* the public perception of politicization or bias (as the case may be). As above, increased public awareness of the actual situation may provide a benefit.

that surrounded the nomination process should suddenly vanish into an antiseptic confirmation process.”). Consider in this regard the debate between Justice Scalia and Justice Ginsburg in *White* over the political nature of judiciaries. Compare Republican Party of Minn. v. White, 536 U.S. 763, 785–87 (2002) (highlighting political nature of history of state judiciaries), with *id.* at 806 (Ginsburg, J., dissenting) (“Judges . . . are not political actors.”).

103. Cf. Allan C. Hutchinson, Process to Bring Judicial Politics into Public View, *Law. Wkly. (Canada)*, Sept. 23, 2005, available at <http://www.lawyersweekly.ca/index.php?section=article&articleid=155> (on file with the *Columbia Law Review*). Hutchinson describes the Supreme Court of Canada as being “as political” and as making “decisions as controversial as those of its American counterpart.” *Id.* However, he argues, since “the politics of the public has much more democratic legitimacy than that of the judges,” and since “judges are already and inevitably a thoroughly political group,” he views as beneficial “[a] politically informed and politically-charged process.” *Id.* Such a process “will not contribute to a greater politicization of the judiciary. . . . It will instead bring those politics into public view and render them more available for public scrutiny.” *Id.*

For detailed discussion of the issues of judicial selection and judicial independence from a Canadian perspective, see *Law, Politics and the Judicial Process in Canada* 69–122 (F.L. Morton ed., 3d ed. 2002). For discussions of the politics of judicial appointments in judicial systems in countries throughout the world and to international courts, see generally *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (Kate Malleson & Peter H. Russell eds., 2006).

104. Some would argue that the increased politicization of the judiciary need not necessarily be bad, or at least dispute the level at which that becomes the case. See, e.g., *White*, 536 U.S. at 785–86 (describing nineteenth-century trend among states toward elected judiciaries as part of Jacksonian democracy movement and noting that judicial elections were generally partisan until 1870s); Terri Jennings Perretti, In Defense of a Political Court 77–79 (1999) (arguing that having Supreme Court Justices decide cases based in part upon political motivations is both unavoidable and normatively desirable); Chemerinsky, *supra* note 12, at 627–31 (making normative argument in favor of senatorial consideration of judicial nominees’ ideologies); F. Andrew Hanssen, Learning About Judicial Independence: Institutional Change in the State Courts, 33 *J. Legal Stud.* 431, 440–53 (2004) (describing evolution of various methods employed by states to select judges as attempts to increase judicial independence from state political actors); Kagan, *supra* note 81, at 935–38 (arguing in favor of greater examination of judicial nominees on their judicial philosophies and positions on particular legal issues).

Turning to the possibility of actually curtailing the practice of prejudging judges, it is particularly difficult to see how that can be accomplished systematically under an appointment process. While commentators such as Geoffrey Hazard and Elena Kagan suggest that there ought to be limits on questions that can be asked of judicial nominees—and, as a corollary, limited but acceptable circumstances under which judicial nominees might refuse to answer certain questions—neither offers an explanation of how exactly (or by whom) such limits could be enforced.¹⁰⁵ Indeed, Charles Geyh explicitly distinguishes the judicial confirmation process from other settings in which Congress has implicitly incorporated constitutional norms in restraint of its judicial oversight function.¹⁰⁶ And, while recusal may provide a remedy for any bias that results from prejudging, it is an *ex post* remedy that cannot address any fundamental flaws in the nomination and confirmation process.

In crafting a response to the increase in prejudging judges, the alternative of judicial elections should not be overlooked. This is especially important in light of legal academics' propensity to reject judicial elections as a threat to judicial independence, or at least to overlook them as a viable option.¹⁰⁷ Moreover, to the extent that both systems are subject to the same risks and that the political branches are perceived to be more likely than individual voters to introduce political concerns into the judicial selection process,¹⁰⁸ it may be that judicial elections are preferable to judicial appointments, at least if the goal is to reduce the politicization of the judiciary.¹⁰⁹ Of course, it is possible that judicial elections, even if they in fact contribute somewhat to judicial independence, raise other problems.¹¹⁰ For example, elected judges may be more likely to be bi-

105. See *supra* note 81. This is not to say that it is impossible for the Senate to enact rules that restrict the terms of its own members' questioning of nominees and the terms of debate. See *supra* note 74 (discussing "gag rule" against antislavery petitions). Such a course of action seems highly unlikely in this context, however. Cf. Adrian Vermeule, *Political Constraints on Supreme Court Reform*, 90 *Minn. L. Rev.* 1154, 1154, 1169–72 (2006) (arguing that reforms of Supreme Court generally face large political obstacles and, in particular, that "[t]he very conditions that produce demand for structural reform of the [Supreme] Court also tend to produce counterforces that block the movement for reform" (emphasis omitted)).

106. See Geyh, *supra* note 15, at 211–12.

107. See *supra* note 33 and accompanying text.

108. Cf. *supra* text accompanying notes 71–81 (explaining that judicial candidates have option of remaining silent on controversial issues while judicial nominees may be faced with ultimatum of either speaking out or being voted down).

109. Cf. U.S. Const. amend. XVII (amending Constitution to replace election of U.S. senators by state legislatures with direct election by individual voters).

110. See, e.g., Richard A. Posner, *Judicial Autonomy in a Political Environment*, 38 *Ariz. St. L.J.* 1, 5–6 (2006) (describing problems with judicial election schemes); Dirk Olin, *Op-Ed.*, *Courting the Public*, *N.Y. Times*, Mar. 2, 2005, at A19 (arguing in favor of judicial appointment processes and highlighting problems with judicial elections). Daniel R. Pinello describes the differences among elected and appointed judges as follows:

(1) [P]opularly elected judges will prefer the state over the individual and business when those interests clash, but otherwise individual over business;

ased against out-of-state residents than are nonelected judges.¹¹¹ There is also the possibility that elected judges, because they face expensive campaigns, will be beholden to campaign contributors as well as the potential that the public generally is uninformed about judicial candidates so that either judges are elected for the wrong reasons, political party officials effectively wield inordinate power,¹¹² or both. I do not mean to argue that the benefits of judicial elections necessarily, or indeed most of the time, outweigh the costs; my point is only that we ought not to view judicial appointment processes as some sort of panacea to the problem of judicial independence.

In an odd way, the existence of judicial elections in other systems may provide the best hope for a solution to the problem of prejudging judges in systems that employ an appointment process. If it is difficult to conceive of a truly enforceable limit on questions asked of judicial nominees under an appointment system, then it may well be the case that the best source of a limit is the analogous limit in judicial elections. As noted above, a candidate in a judicial election remains free to renounce speaking out on particular issues, and indeed remains free to campaign on that particular point.¹¹³ Even if the threat of such a campaign remains ephemeral, candidates for elective judicial office presumably abstain from making some statements for fear that those statements would alienate more voters than they would attract. Perhaps awareness of general public sentiment against going beyond some limit in questioning prospective judges can effectively restrain members of the executive and legislative branches. And the best source of that information might be the self-imposed limits or judicial speech codes in place in judicial elections under other judicial systems.

(2) gubernatorially appointed judges will prefer business over the individual and the state, but otherwise the individual over the state; and (3) legislatively selected judges will acquiesce to the policy preferences of other branches of government and generally be as inactive as possible with regard to policy initiation.

Daniel R. Pinello, *The Impact of Judicial-Selection Method on State-Supreme-Court Policy: Innovation, Reaction, and Atrophy* 5–6 (1995).

111. See, e.g., Nash, *supra* note 19, at 1742–43 and authorities cited therein.

112. See, e.g., Leslie Eaton, *Public Funds Sought for Judicial Elections*, N.Y. Times, June 30, 2004, at B4 (“Around [New York] state, investigators have found extensive evidence of [elected] judges giving lucrative court appointments to campaign contributors and party operatives. Critics have linked these problems to a judiciary that is . . . hand-picked by political leaders on the basis of service to the party rather than judicial qualifications.”); Editorial, *Judicial Politics Run Amok*, N.Y. Times, Sept. 19, 2006, at A24 (“Contests for important state judgeships around the country are getting nastier, more partisan and tons more expensive. Monied interests seeking to influence court decisions are spending lavishly to boost preferred candidates, much as they do in campaigns for regular political office.”).

113. See *supra* notes 76–81 and accompanying text.

CONCLUSION

The Court's holding in *White* increased the prospect for prejudged judges to accede to elected judicial office. Missing from the various Justices' opinions and from commentators' analyses is recognition of a broader trend toward prejudging judges, one that extends beyond judicial elections to the realm of judicial nominations. This trend likely results from narrowing conceptions of bias, increased acceptance of a politicized judiciary, or some combination of the two. An understanding of these points should allow policymakers, politicians, and the public to refocus the debate over prejudging judges. In particular, an erroneous perception that the judiciary is politicized is a threat to the legitimacy of the judiciary and the rule of law; thus, to the extent that prejudging judges contributes to that perception, the practice should be reined in. If the judiciary is truly politicized or biased and if a politicized or biased judiciary is undesirable, then we should seek ways to minimize the bias. If, however, the judiciary has always been and is (to a large degree) inevitably politicized and biased, and the "problem" is that only now is the public perceiving it that way, then perhaps we should let the perception persist while the underlying problem festers. Why restore the veneer of the apolitical if the problem of politicization will remain underneath?

Further, the problem may, surprisingly, be worse in the setting of judicial appointments than in the setting of judicial elections. Indeed, the existence of elections for some judicial posts may be the best way to restrain judicial appointment processes, since the restraints that judicial candidates voluntarily impose on themselves may influence members of the political branches who question judicial nominees and prospective nominees under an appointment system.