The Supreme Court's Endorsement of A Politicized Judiciary: A Philosophical Critique.

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The 2002 Supreme Court decision in *Republican Party of Minnesota v. White* was based on a controversial, and generally discredited, legal theory.[1] That theory was a version of legal positivism that had long been repudiated by today's leading legal positivists. This was no blunder on the part of the Court: the obsolete theory upon which it relied was all but identical with textualism, the legal theory whose most famous advocate is Justice Scalia – the author of the *White* opinion. Paradoxically, while both legal positivism and textualism are motivated by an aversion to expansive judicial discretion, both adhere to a conception of legal interpretation that in fact legitimizes fully politicized judicial decision-making. *Republican Party of Minnesota v. White*, which invalidated a regulation of judicial election campaigns, relied on that conception in dismissing concerns over politicized judicial elections.

White invalidated a regulation that forbade judicial candidates running for office from declaring their controversial legal or political opinions during their election campaigns. For example, it forbade candidates from announcing their views on banning same sex marriage, or on abortion, or on affirmative action, or on the proper extent of executive powers – or whatever the legal or political dispute of the day. The Supreme Court held that the regulation violated the First Amendment, stating: "If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process ... the First Amendment rights that attach to

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

their roles" – which included the right to announce their controversial legal or political views.[2]

As this article demonstrates, the Court's conclusion was rooted in a wrongheaded positivist legal theory. This means that the *White* opinion was deficient; but the significance of the analysis goes well beyond the holding in *White*: while *White* was one of those rare cases laying bare the underlying philosophical assumptions of the Court, these assumptions play an important role in innumerable other cases.

Section I examines the *White* decision; Section II examines the theory of legal positivism; Section III shows that *White* was grounded in a positivist conception of judicial decision-making; Section IV shows that that conception is wrong; and Section V recounts legal positivism's own spectacular retreat from that early conception. The article closes with a short summary of *White*'s philosophical errors.

I. *REPUBLICAN PARTY OF MINNESOTA V. WHITE* AND ITS UNDERLYING PHILOSOPHY

Republican Party of Minnesota v. White arose from the judicial election campaign of a Minnesota lawyer named Gregory Wersal. Wersal, who ran for a seat on the Minnesota Supreme Court, had criticized a number of decisions made by the Court in the areas of welfare rights, abortion, and crime. These campaign statements resulted in a formal complaint against Wersal being lodged with Minnesota's Professional Responsibility Board – the body responsible for regulating Minnesota's attorneys. Among other things, the complaint charged Wersal with violating a Minnesota regulation which forbade judicial candidates from announcing their views on "disputed legal or political issues" during their election campaigns. The regulation, known as the "Announce Clause," appeared in the 1972 Model Code of Judicial Conduct[3] and was adopted by the Minnesota Supreme Court pursuant to its authority to regulate the

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[2] *Id.* at 788, *citing Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting).

[3] Model Code of Judicial Conduct Cannon 7(B) (1972).

legal profession. Similar regulations were adopted by numerous other states.[4]

As a result of the complaint Wersal withdrew from the race, citing fears for his ability to practice law. Two years later a second opening came up, and Wersal decided to run again. This time, however, Wersal contacted the Professional Responsibility Board in advance, seeking an advisory opinion as to what he may or may not say during his campaign. There was some back-and-forth between Wersal and the Board, and the result was that Wersal, joined by the Republican Party of Minnesota (of which he was a member), filed suit in federal court claiming that the Announce Clause violated the First Amendment. When the federal district court rejected the claim and the Eighth Circuit affirmed, Wersal petitioned the U.S. Supreme Court for review.[5]

The Supreme Court reversed in a 5-4 decision, holding that the Announce Clause violated the First Amendment to the U.S. Constitution.[6] Although states were free to do away with popular election as a means of judicial selection, this "greater power to dispense with elections altogether [did] not include the lesser power to conduct elections under conditions of state-imposed voter ignorance. If the State chooses to tap the energy and the legitimizing power of the democratic process, said the Court, it must accord the participants in that process . . . the First Amendment rights that attach to their roles."[7]

The majority opinion was written by Justice Scalia, who was joined by Justices Rehnquist, O'Connor, Kennedy, and Thomas. Justice O'Connor and Justice Kennedy also filed concurring opinions.

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[4] At the time *White* was decided eight other states adopted the Announce Clause, and many others had provisions sufficiently similar in purpose and formulation so as to be potentially affected by the decision.

[5] The 8th Circuit, following the district court, upheld the Announce Clause by giving it a limiting construction which restricted its applicability to candidates "making known how they would decide issues likely to come before them as judges." *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 881-882 (8th Cir. 2001).

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

[7] *Id* at 788. (*quoting Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)).

The four dissenters – Justices Stevens, Ginsburg, Breyer, and Souter – joined in the two dissenting opinions by Justices Stevens and Ginsburg. The case produced a total of five opinions.[8]

The majority opinion's principal arguments, including their very structure, appear to have been lifted from an unmentioned 1987 law review article by Professor Snyder of the University of Pennsylvania.[9] The opinion was rather abrasive – as Justice Scalia's opinions tend to be – replete with sarcasm and derisive denunciations of the dissents. Since the Announce Clause was a content-based regulation of speech (it forbade the expression of *legal or political* speech), it was subjected to strict scrutiny. This meant that in order to pass constitutional muster it had to be "narrowly tailored to serve a compelling state interest."[10] The interest claimed by the Minnesota Judicial Responsibility Board was preserving the impartiality, and the appearance of impartiality, of Minnesota's judiciary.

The opinion first noted that although the notion of "impartiality" played a critical role in the litigation, nobody – neither the parties nor the lower courts – bothered to define it. The Court then proposed three different definitions of judicial impartiality, against which it examined the constitutionality of the Announce Clause.

The first defined judicial impartiality as the lack of bias for or against a party to the dispute.[11] Here judicial impartiality embodies the principle that the law applies to all parties in the very same way, be it Rodney King or the Dalai Lama.

The second defined judicial impartiality as the lack of a bias for or against legal *issues* (rather than *parties*) – or, as the Court put it, the lack of a "preconception in favor of or against a particular legal view" (for instance, the lack of a preconception in favor of or against the constitutionality of prohibiting same sex marriage).[12]

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[8] *Id.*

[9] See Lloyd B. Snyder, *The Constitutionality and Consequences of Restrictions on Campaign Speech by Candidates for Judicial Office*, 35 UCLA L. REV. 207 (1987).

[10] *White*, 536 U.S. 765, 774 (2002).

[11] *Id.* at 775.

[12] *Id.* at 777.

The third definition defined impartiality as "open-mindedness": the judge's susceptibility to persuasion.[13] This definition did not require the judge to have no preconceptions, but whatever preconception she has – she must remain amenable to contrary arguments.

The Court held that the Announce Clause could not survive under any of these definitions.

The first definition required that judges treat all parties in the same way. However, the Announce Clause prohibited campaigning judges from speaking about *issues*, not about *parties*, and a judge who announced her opinion regarding a certain *issue* may rule on that issue in the same way whoever the parties are. Hence, said the Court, so far as this sort of impartiality was concerned, the Announce Clause was not "narrowly tailored" to serve the interest in judicial impartiality (if it served it at all).[14]

Under the second definition (the lack of a preconception regarding a particular legal issue) the judge was supposed to approach a case like a *tabula rasa* – a blank slate free from any preconceptions or prejudices regarding the matter in dispute. But this, said the Court, was unrealistic: judges were no spring chickens but seasoned professionals who had been around enough time to form a series of opinions on disputed legal matters. In fact, if they haven't formed such opinions that would evidence "lack of qualification," not "lack of bias".[15] So this second definition of impartiality was entirely unrealistic, and preserving such impartiality was not a compelling state interest.[16]

The problem with the third definition of judicial impartiality ("open-mindedness") was that it was hardly served by the Announce Clause.[17] The Announce Clause could presumably protect open-mindedness by forbidding judicial candidates from publicly

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[13] *Id.* at 778.
[14] *Id.* at 775.
[15] *Id.* at 778.
[16] *White* 536 U.S. at 777.
[17] *Id.* at 778-779.

committing themselves on controversial issues. But the Announce Clause, said the Court, affected only a small fraction of the possible public commitments on controversial issues that judicial candidates could make: the Clause applied only to election campaigns, while judicial candidates could make their opinions known both before and after the campaign with impunity (in public lectures, law review articles, books, or simply by writing judicial opinions – the latter even *during* an election campaign).[18] So the Announce Clause was so ineffective in forbidding such public commitments, said the Court, that it was inconceivable that it was aimed at preserving this sort of impartiality.[19]

In short, the Announce Clause was not narrowly tailored to serve a compelling state interest, and was therefore an unconstitutional burden on the freedom of speech.

There were numerous flaws in this reasoning (at least one scholar called the opinion "hopelessly unpersuasive"[20]).[21] But the opinion was not only unpersuasive – it was also strange: it hardly touched on the chief difficulty in the case – namely, the possible

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[18] *Id.*

[19] *Id.*at 780.

[20] Geyh, *see infra* note 21 at 70.

[21] For one thing, the distinction between impartiality in regard to issues and impartiality in regard to parties is for the most part inconsequential in the context of judicial impartiality. A judge who proclaims that malpractice liability is construed too narrowly, or that accused child molesters should not be out on bail, or that prohibiting same sex marriage is perfectly constitutional, is expressing not only a bias for or against a legal issue, but also a bias for or against parties to such disputes – those suing or sued for malpractice, the prosecutor and the accused child molestation, or those seeking a same-sex marriage license and those who oppose them. *See also*, Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO. ST. L.J. 43, 65 (2003). All turns on how one defines the party: the party's name may be Roberta Falk, but Roberta Falk may also be an injured patient, a homosexual, or a prosecutor. So the claim that bias in regards to parties involved a compelling state interest, but that bias in regard to issues did not, was inconsistent. Equally problematic was the claim that since partiality in regard to issues was unavoidable, it did not implicate a compelling state interest. That such preconceptions are unavoidable says little about the danger of turning them into the principal criterion of judicial elections.

dangers from politicized judicial election campaigns.[22] The opinion never addressed this issue directly, and had failed to acknowledge any possible difficulty with politicized judges. The part that came closest to the issue was the one discussing impartiality as the "lack of preconception in favor of or against a particular *legal view*"; but that discussion rejected this definition of impartiality with a dismissive snort, claiming it did not involve any compelling state interest.[23] That was a rather offhand treatment of a time-honored conception of judicial impartiality. Max Weber, writing a century ago, famously distinguished Western from non-Western judicial decision-making by maintaining that the former conscientiously divorced itself from considerations of politics and ideology; and many of America's most distinguished legal theorists have since expressed similar sentiments.[24] Moreover, the concern over politicized judicial decision-making enjoys wide currency in American political culture. And yet that concern was dismissed in *Republican Party of Minnesota v. White* with a flick of the hand.

What accounted for the Court's glib treatment of this serious concern? The answer is this: legal positivism. When looked at with the conceptual apparatus of legal positivism, politicized judicial elections are simply not a concern.

II. LEGAL POSITIVISM

[22] Indeed the complaints against Gregory Wersal which produced the case included a series of charges regarding Wersal's improper political activities during his campaign.

[23] *White,* 536 U.S. at 777 (2002) (emphasis in original).

[24] *See* MAX WEBER, 2 ECONOMY AND SOCIETY, 654-658 (G. Roth & C. Wittich eds., E. Fischoff trans., Univ. of Cal. Press 1978) (1914). Perhaps the most celebrated school of thought espousing that view is the "legal process" theory. *See, e.g.,* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

The essential claim of legal positivism – the claim which gave it its name[25] – is that it is *not* necessary to engage in any moral evaluation in order to determine what the law requires. This thesis encapsulates legal positivism's *raison d'etre*, for the theory came into being as a challenge to natural law theories – which dominated the legal mind for many centuries, and which claimed that "an unjust law is no law at all" so that establishing legal requirements was a process inseparable from moral evaluation.[26] This "natural law" thesis ("natural" because it postulates a natural moral order – indeed a divine one – which transcends and governs positive law) became the bane of Nineteenth Century jurists, who saw it as a misguided and obsolete impediment to the objectivity of the 'science of law.' At a time when scientific inquiry and the scientific method were reaching ever-higher peaks of prestige, and when the idea of moral pluralism (and its attendant moral relativism) were gaining in popularity, natural law theory threatened to leave legal inquiry in the backwaters of religious and moral philosophizing.[27] The legal positivists were therefore defending the very objectivity – and hence legitimacy – of the legal process when they claimed that "the existence of law is one thing; its merit or demerit is another."[28] Natural law theory, said the positivists,

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[25] The school of "logical positivism", an early 20th Century development of earlier positivist thinking, is succinctly defined by The American Heritage Dictionary as a "school of philosophy that attempted to introduce the methodology and precision of mathematics and the natural sciences into the field of philosophy." THE COLUMBIA ENCYCLOPEDIA (6th ed. 2006). See also THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2004). Legal positivism had the same aspiration for law.

[26] St. Augustine, ON FREE CHOICE OF THE WILL 8 (Thomas Williams trans., Hackett Publ'g Co. 1993) (ca. 395).

[27] Indeed it should come as no surprise that as renowned an exponent of legal positivism as Hans Kelsen was, he believed in moral relativism. HANS KELSEN, GENERAL THEORY OF LAW AND STATE 5-8 (Anders Wedberg trans., Harv. Univ. Press 1961) (1949); Hans Kelsen, PURE THEORY OF LAW 49, 66-67 (Max Knight trans., U. Cal. Press 1990) (1967).

[28] JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 157 (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832). *See generally* H.L.A Hart, *Positivism and the Separation of Law and Morals,* 71 HARV. L. REV. 593 (1958).

erroneously conflated what the law requires and what morality does. There was nothing necessarily moral about legal requirements: legal requirements were simply what legal rules required, be that moral or not. And a rule became a *legal* rule by virtue of a historical fact – by originating from a recognized *authoritative source* (a legislature or a higher court, for the most part[29]). So according to the positivists, establishing legal requirements was a straightforward, fact-based inquiry that necessitated no moral evaluation. Legal rules and moral rules were in principle distinct.

It soon became clear, however, that this barebones thesis required some refinement: after all, once one identifies a rule as a legal rule, it still remains to be determined how that rule applies to particular cases. Couldn't *that* process necessarily require moral evaluation? A proponent of natural law theory might claim that moral evaluation is a necessary part of legal decision-making not because legal rules and moral rules are inseparable, but because the application of legal rules to particular factual circumstances necessarily involves making of moral judgments. Thus, if the positivists were serious about extricating legal analysis from the quagmire of moral philosophy, they had to propose a thesis of legal interpretation that showed it to be independent of moral evaluation.

The resulting positivist thesis was admirably short and straightforward: understanding what legal rules required, said the positivists, was nothing above and beyond understanding what the literal language of legal rules required.[30] Legal interpretation was a matter of following linguistic conventions – not a matter of any moral

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[29] The modern, more subtle but also more vacuous version of legal positivism treats the notion of a "source" very flexibly. *See, e.g.*, John Gardner, *Legal positivism: 5 ½ Myths*, 46 AM. J. JURIS 199, 200 (2001) ("'Source' is to be read broadly such that any intelligible argument for the validity of a norm counts as source-based if it is not merits-based."). This academic refinement is by and large irrelevant to our discussion.

[30] This thesis of legal interpretation is found, *inter alia*, in the writings of H.L.A. Hart, the most renowned legal positivist of the 20th Century. *See, e.g.*, H.L.A. HART, THE CONCEPT OF LAW, 126-129, 135-136 (2d ed. 1994) (1961).

evaluation.[31] This basic thesis remains the heart of legal positivism in its various forms.

The thesis does not claim that the language of legal rules governs *all* legal determinations: the law, alas, does not cover all the instances with which judges or lawyers are confronted. There are "gaps" in the law, cases in regard to which the law does not give one determinate answer. These "gaps" are, for the most part, the result of vagueness or ambiguity in the language of legal rules. Legal rules may use highly vague concepts such as "negligence" or "reasonableness"; or they may be specific and yet ambiguous in the context of particular factual scenarios (for example, a legal rule requires search warrants for the search of homes but not for the search of vehicles, and the case at hand is a recreational vehicle). When a case falls within such a gap, the legal interpreter cannot resolve the case by simply consulting the law (for the law, by hypothesis, requires nothing more nor less than what the literal language requires, and here the literal language does not require one particular solution):[32] instead, the legal interpreter has to go *outside* the law and consider all relevant policy considerations (including moral ones).[33] So although "the life of the law consists to a very large extent in the guidance both of officials and private individuals by determinate rules," there are instances where the rules are not determinate, and where evaluative judgments become inevitable.[34] However, such determinations – insisted the positivists – are not about what the law requires (for in

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[31] *See, e.g.*, Hart, *id.* Some recent scholarship has been dedicated to the questions surrounding the conventionality of language, and the alleged conventionality of legal practice. One notable example is a book challenging the very idea that proper linguistic meaning is conventional by claiming – with the help of much modern philosophical writings – that linguistic conventions can be proven wrong. *See* NICOS STAVROPOULOS, OBJECTIVITY IN LAW (1996).

[32] In such cases, says Hart, "the authoritative general language in which the rule is expressed may guide only in an uncertain way" so that "syllogistic conclusion no longer characterize[s] the nerve of the reasoning involved in determining what is the right thing to do" Hart, *supra* note 31at 126-127.

[33] *Id.*

[34] H.L.A HART, THE CONCEPT OF LAW 135 (2nd ed. 1994) (1961).

such cases the law, as we said, does not require any one determination), but about what the law *should* require.[35]

Hence the notion of "judicial legislation": where the law fails to give a determinative answer to a legal question, judges or lawyers have no choice but to switch to a legislative mode, using the same considerations which guide legislative determinations. Judges, of course, never *openly declare* that they legislate: they always claim that they are merely discovering what pre-existing law requires. Judicial determinations are always put forward as claims about what the law *is* – not about what the law *should* be. But according to the positivists, the claim that judges always "discover" legal requirements is a sham – a little institutional lie that judges keep telling.[36]

Textualism, the theory of statutory interpretation championed by Justice Antonin Scalia, is a straightforward version of legal positivism. Like legal positivism, textualism comes as a solution to the danger of moral or ideological judicial decision-making ("the main danger in judicial interpretation", tells us Scalia, "is that the judges will mistake their own predilections for the law."[37]); and, also like legal positivism, textualism's solution is to bind judicial interpretation to the literal language of statutes or precedents ("words", says Scalia, "do have a limited range of meaning, and no interpretation that goes beyond that range is permissible"[38]). Like legal positivism, textualism limits legal interpretation (where possible) to literal linguistic constraints, and thus, also like legal positivism, textualism distinguishes between two modes of judicial decision-making: on the

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[35] *See, e.g.*, H.L.A Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

[36] John Austin called it "the childish fiction employed by our judges, that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing, I suppose, from eternity, and merely declared from time to time by judges." JOHN AUSTIN, LECTURES ON JURISPRUDENCE, 655 (4th ed. 1879) (delivered 1760s).

[37] Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 863, 849-865 (1989).

[38] ANTONIN SCALIA, MATTER OF INTERPRETATION: FEDERAL COURTS & THE LAW 24 (Amy Gutmann ed., Princeton University Press 1997).

one hand the non-discretionary adherence to the literal language of authoritative legal rules, and, on the other, "the system of making law by judicial opinion."[39] Judges either follow legal rules or else write them; which is precisely why the *White* opinion was not concerned with the danger of politicized judicial decision-making.[40]

III. WHITE AND THE PROBLEM OF POLITICIZED JUDICIAL ELECTIONS

Consider the possible impact of ideological biases in the context of positivism's dual description of the judicial decision-making process – the non-discretionary following of the language of legal rules, and judicial legislation. In the former case, the judge's duty is simply to follow the literal language of the applicable legal rule. A judge's ideological bias can therefore have no proper impact on the decision. (Indeed, as we saw, the entire insistence on adherence to the textual dictates derives from the wish to curb the possible impact of judges' moral or political preferences.) Biased or not, the judge's decision, and her reasoning toward that decision, is the same. Concerns over ideological biases working their way into proper judicial decision-making simply do not exist here: proper decision-making is fully exhausted by the duty to follow the language of the governing rule.

As for the Announce Clause, it offered very little benefits so far as such cases were concerned. It is true that by forbidding

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[39] *Id.* at 9. The principal distinction between legal positivism and textualism is that positivism, in its original version, was a descriptive theory which purported to describe how judges and lawyers actually interpreted the law and applied it. Textualism, on the other hand, is a theory of adjudication which does not necessarily purport to describe how judges decide cases, but how they should decide them. Judges decide cases properly, say the textualists, when they strictly follow the plain language of legal rules; and they legislate from the bench when they do not (though sometimes they may legislate properly, when the vagueness or ambiguity of legal language leave them no choice).

[40] As we shall see below, the claim that this theory applies to actual judicial practice is the one modern positivists retracted.

candidates from announcing their political views during election campaigns, the Announce Clause may have reduced the incentive of elected judges to deviate from the textual legal requirements (a candidate who made campaign statements might feel obligated to follow those statements rather than the text of the law). "But elected 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."[41] Elected judges always have the sword of popular opinion hanging over their heads, whether they can or cannot announce their contentious legal or political opinions. Moreover, the Announce Clause applied only to statements made *during* election campaigns. So even if the Announce Clause did somewhat reduce judges' incentive to deviate from textual requirements, this was an insignificant dent in the always-present incentive to do so. This marginal benefit was easily outweighed by the burden on "a category of speech that is 'at the core of our First Amendment freedoms' – speech about the qualifications of candidates for public office."[42] Where a case is resolvable by the literal language of the governing legal rule, ideological bias is irrelevant to the judge's proper legal reasoning, and the Announce Clause's benefits are negligible.

On the other hand, so far as *judicial legislation* – the second mode of judicial decision-making – is concerned, politicized judicial decision-making is unavoidable, and the Announce Clause is a pure detriment. Indeed, what *is* "judicial legislation" if not the making of value choices?[43] Judicial legislation consists in determining not what the law is, but what the law *should be*; and to determine what the law should be is to engage in value judgments.

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[41] *Republican Party of Minn. v. White*, 536 U.S. at 780-782.

[42] *Id.* at 774 (citations omitted).

[43] In cases where there is no clear and determinate governing rule "judges must legislate and so exercise a creative choice between alternatives...in the light of aims, purposes, and policies..." H.L.A Hart, *Positivism and the Separation of Law and Morals,* 71 HARV. L. REV. 593, 613-614 (1958). This more or less mirrors the job of ideological legislators.

In fact, according to the *White* majority, judicial elections were adopted precisely because of the value judgments made in cases of judicial legislation:

> This complete separation of the judiciary from the enterprise of "representative government" might have some truth in those countries where judges neither make law themselves nor set aside the laws enacted by the legislature. It is not a true picture of the American system... Which is precisely why the election of state judges became popular.[44]

According to the Court, the introduction of judicial elections was a response to the realities of the American judicial system, in which judges make law. This activity allows – nay, necessitates – ideological value judgments, and judicial elections reflected the wish of the American people to have a say in the determination of these ideologies.

Thus, according to the Supreme Court not only is neutrality in regard to disputed issues "neither desirable nor possible," but the entire point of judicial elections is to let the electorate determine these disputed opinions. In which case the Announce Clause subverted the entire purpose of judicial elections, because it prevented citizens from learning the information that was most relevant for their voting choice – namely, candidates' opinions on disputed legal or political issues (the very opinions which play center stage in the campaigns of *bona fide* legislators). Indeed the Court went so far as to accuse the drafters of the Announce Clause (and the dissent) of hostility to the very idea of judicial elections, saying it was unsurprising that the Announce Clause originated with the American Bar Association since that organization has long opposed the practice of judicial elections (a claim which also appeared in the unmentioned article).[45]

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[44] *White*, 536 U.S. at 783-786 (citations omitted).

[45] "There is an obvious tension between the article of Minnesota's popularly approved Constitution which provides that judges shall be elected, and the

Here we see the paradoxical nature of positivism and textualism: while motivated by an idealistic, dreamy-eyed aspiration for a method of judicial decision-making which is completely objective, fact-bound, and ideology-free, both theories end up regarding much judicial practice as "law making." And if you think that much judicial practice is "law making," then you also think, like the Supreme Court did in *White*, that there is little problem in politicized judicial elections, or indeed with politicized judicial decision-making. In short, if adjudication consists either in following legal rules or else in judicial legislation, politicized judges running politically ideological campaigns are simply not a concern: ideological bias is irrelevant in those cases where the judge follows the language of the governing legal rule, or else it is inescapable in cases of judicial legislation. And this means that the Announce Clause exacted a heavy toll (in constitutional terms) while offering precious little in return.

IV. THE JUDICIAL DECISION-MAKING PROCESS

A. THE LANGUAGE OF RULES

In contrast to the positivist thesis, judges never simply follow the texts of legal rules, no matter how plain and clear that text is: judges always determine whether, given the case before them, a legal rule should be followed or not. Nor do judges "legislate" in the sense that legislators do.

Here are two simple examples: a New York statute requires that the prosecution give notice before trial of any observation of the defendant "at the time and place of the commission of the offense...by

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Minnesota Supreme Court's announce clause which places most subjects of interest to the voters off limits... The disparity is perhaps unsurprising, since the ABA, which originated the announce clause, has long been an opponent of judicial elections" *White* 536 U.S. at 787. "So if, as Justice Ginsburg claims, it violates due process for a judge to sit in a case in which ruling one way rather than another increases his prospects for reelection, then--quite simply --the practice of electing judges is itself a violation of due process. It is not difficult to understand how one with these views would approve the election-nullifying effect of the announce clause." *White* 536 U.S. at 783.

a witness who has [later] identified him as such."[46] The statute refers to two viewings of the defendant by a witness – one at the time and place of the crime (the initial observation), the other at a subsequent identification procedure where the witness identifies the defendant as the person observed at the first viewing. So according to the statute the prosecution must give notice of its intention to introduce evidence of an identification procedure where a witness identified a defendant as the person she saw at the scene of the crime. If such advance notice is not given, the statute requires that the evidence be precluded from the trial.[47]

Courts, however, have consistently held that this rule does not apply to cases where the identifying witness is a member of the defendant's immediate family. The courts reasoned that since the rule is aimed at the pre-trial sifting out of unduly suggestive identification procedures – that is procedures where police officers hint or even explicitly indicate to the witness which suspect they expect to be identified – the rule is inapplicable to cases where the identifier is well-acquainted with the defendant and is therefore not susceptible to police suggestiveness.[48]

A different provision of that same statute requires that the prosecution give advance notice of any statements the defendant made "to a public servant" (principally police officers and prosecutors).[49] The idea, again, is to allow the pre-trial sifting-out of statements obtained in violation of a defendant's constitutional rights (for instance, a defendant's right to counsel). By contrast, statements made to witnesses who are not public servants need not be noticed. Yet case law demands notice, under threat of preclusion from trial, of statements made to a person who was *not* a public servant but who elicited the statements at the instigation of the police.[50] The courts

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[46] N.Y. CRIM. PROC. §710.30(1)(b).
[47] N.Y. CRIM. PROC. §710.30(3).
[48] *See, e.g., People v. Collins*, 60 N.Y.2d 214 (1983); *People v. Tas*, 4 N.Y.2d 915 (1980); *People v. Gissendanner*, 48 N.Y.2d 543, 552 (1979).
[49] N.Y. CRIM. PROC. §710.30(1)(a).
[50] *See, e.g., People v. Valesquez*, 68 N.Y.2d 533, 537 (1986); *People v Ferro*, 63

reasoned that although such witnesses are not "public servants," their actions implicate the same concerns that the statute seeks to address.

One obvious lesson to be learned from these examples is that judges do not simply follow the text of legal rules; judges follow that text where it is justified to do so, and they do not follow it where it is not. In the first example, New York courts exempted from the operation of a statute cases that clearly fell within the statutory language; in the second, they brought within the purview of a statute cases that clearly fell outside its language. There is, of course, nothing unusual in these decisions: courts habitually carve exceptions to, or expand on, the literal textual requirements of statutes.

Some positivist thinkers attempt to deal with these common cases by resorting to a thesis which Frederick Schauer named "presumptive positivism" – the idea that judges treat the literal language of legal rules as presumptively binding but that "the rule will be set aside when the result it indicates is egregiously at odds with...morally acceptable set of values".[51] This thesis attempts to save the positivist thesis by claiming that determinate textual dictates are *almost* always what dictates legal outcomes; it is only when those outcomes are 'egregiously immoral' that judges deviate from them (in which case, however, judges may not be following the law).[52] Schauer's thesis misses the point. As an initial matter, the cases where judges deviate from the language of legal rules may have nothing to do with egregiously immoral results. I doubt, for instance, that many judges consider it egregiously immoral to admit into criminal trials perfectly reliable evidence even though a pre-trial notice of its introduction was not given. These judges are concerned not with immoral results, but with effectuating the rule with whose application

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N.Y.2d 316, 322 (1984); *People v. Maerling*, 46 N.Y.2d 289, 303 (1978); *People v. Cardona*, 41 N.Y.2d 333 (1977).

[51] FREDERICK SCHAUER, PLAYING BY THE RULES, 205 (1991) (emphasis added). Schauer goes on to say that the question of whether these set of values can also be called "law" is principally a terminological dispute, and a rhetorical one at that. *See id.* at 205-206.

[52] A similar point was made by H.L.A. Hart. *See infra* note 58.

they were entrusted. Judges deviate from the language of legal rules because their interpretation of the *law* requires that they do – not because morality does. Sure enough, judges often follow the literal textual requirements: indeed the better-considered and better-formulated a legal rule, the more likely it is that judicial resolutions will agree with its literal textual demands. But even the best considered legal rule may be applied in a manner inconsistent with literal textual requirements. Every legal rule is both potentially wider and potentially narrower than its literal language.

B. JUDICIAL LEGISLATION

The positivists claim that when the text does not point to one particular resolution, legal interpreters are forced to legislate. This, at best, is a misleading hyperbole. Legislators who legislate decide what, in their view, is the best course of action regarding a particular matter. Judges do not decide cases that way. Take the New York courts' decisions above: for the positivist, these would be instances of improper judicial legislation ("improper" because the literal text was in fact clear and unambiguous and yet the courts ignored its dictates; "legislation" because the courts did not follow the literal text of the applicable legal rule but instead wrote new law). But in what way were these judges "legislating?" These decisions seem to be determined not by the ideologies of the judges, or by what they consider the best course of action in the case (given their ideologies), but by their understanding of the scope of legal rules handed to them by the legislature. It was determined by the *legislature* that a notice requirement, with its attendant pre-trial suppression hearings and potential preclusion of evidence, was required. The judges then decided whether that requirement, *by its own logic*, applied to identifications by close family members, or to statements made to private citizens operating at the instigation of the police.

Here is another example. Take the New York criminal procedure rule requiring a notice of any viewing of the defendant at an

identification procedure.[53] Line-ups, show-ups, or photo-arrays are clear "identification procedures." But sometimes the police arrive at the scene of a crime, and the victim joins the police for a ride canvassing the area in search of the perpetrator. The question then arises whether a street viewing of a defendant from a cruising police car is an "identification procedure" subject to the notice requirement. This judicial determination is, for the positivist, a paradigmatic instance of "judicial legislation": the language of the authoritative legal rule is ambiguous, it leaves the question unanswered, so that the case is an instance of a "gap" in the law. According to the positivists, the judge must now go beyond the law and look at the matter like a legislator would, consider the pros and cons of the available courses of action, and decide whether the prosecution should or should not give notice of such identifications. Any real constraint is at this point terminated, and, given the availability of contradictory interpretations, the judge effectively operates as a legislator.

But the difference between a legislator considering this matter and a judge is enormous. The judge is responsible for deciding whether an established rule expressing a *given policy choice* applies to the identification of a suspect from a cruising police car. This determination is guided by the reasons supporting that rule (here, concern with police suggestiveness), and by the determination of whether these concerns are implicated in the present case. Unlike a legislator, the judge must follow the logic of policy preferences established by someone else. Moreover, the judge considers the matter in the context of a particular factual scenario, and that scenario is often decisive to the resolution of the case. If a police officer pointed to a suspect she knew and said "that's him, right?" to which the witnesses responded "yes, that's him," then the presence of police suggestiveness would strongly recommend the applicability of the notice requirement. Things might be different if the witness suddenly pointed to one man among many and shouted "There he is!" A judge's decision is guided by the particularities of the case before her,

[53] N.Y. CRIM. PROC. §710.30(1)(b).

whereas legislators are free to make generalities and elect the policies they favor without the constraints of particular factual circumstances. Judges indeed lay down legal rules: in the example above, the judge will lay down a rule regarding the identification of suspects from cruising police cars – at least under certain circumstances. But this judicial rule-writing process is fundamentally different than legislation. Most importantly, political ideologies play a radically different role in these two processes.[54]

In short, the distinction between literalist textualism and judicial legislation, which constitutes the heart of *White*'s reasoning, does not exist in actual judicial practice. All legal determinations look beyond the text of legal rules, and no legal determination is a matter of sheer ideological legislation. Following years of academic debate, this truth is now acknowledged by the legal positivists themselves.

V. THE GREAT POSITIVIST RETREAT

One of the more deplorable aspects of *White* is that its conception of the judicial decision-making process has been

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[54] The Supreme Court's pathetically impoverished understanding of the difference between judicial law-making and legislative law-making appeared in a clear form in a 2001 case, where the Court (in an opinion written by Justice O'Connor, who was part of the White majority) said:

> Petitioner contends that state courts acting in their common law capacity act much like legislatures in the exercise of their lawmaking function, and indeed may in some cases even be subject to the same kinds of political influences and pressures that justify *ex post facto* limitations upon legislatures. Brief for Petitioner 12-18; Reply Brief for Petitioner 15. A court's "opportunity for discrimination," however, "is more limited than [a] legislature's, in that [it] can only act in construing existing law in actual litigation." *James v. United States,* 366 U.S. 213, 247, n. 3, 81 S.Ct. 1052, 6 L.Ed.2d 246 (1961) (Harlan, J., concurring in part and dissenting in part).

Rogers v. Tennessee, 532 U.S. 451, 460-461 (2001).

repudiated by the very school of thought that invented it. Today's legal positivists still believe that there are gaps in the law, and that when a case falls within such a gap its resolution is determined not by what the law requires, but by what it should require. But today's positivists have withdrawn the claim that this thesis has much to say about *judicial decision-making*. Modern positivists do *not* believe that judges decide cases by blindly following the text of legal rules or else by judicial legislation: they concede that judges legitimately examine whether it is justified to follow the text of a given rule before following it;[55] and they also concede that judges do not act as real legislators but are greatly constrained by the legal materials and by their interpretive methodologies.[56] Pushed to the wall by powerful criticism from the likes of Lon Fuller and Ronald Dworkin (consisting of variations to the criticism offered above), legal positivism abandoned the thesis for whose defense it was born – *viz.* that moral evaluation is not necessary in order to decide legal disputes.[57] Today's positivists still claim that moral evaluation is not necessary in order to determine what "the law" requires; but they also claim that judges and lawyers *habitually and legitimately* deviate from what "the law" requires when they decide legal cases, even in those instances where the textual requirements are clear and determinate.

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[55] *See, e.g.*, John Gardner, *Legal positivism: 5 ½ Myths*, 46 AM. J. JURIS 199, 211-214 (2001); MATTHEW H. KRAMER, IN DEFENSE OF LEGAL POSITIVISM: LAW WITHOUT TRIMMING, 149-150 (Oxford University Press 1999); Brain Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, fn 158 (1997); ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY 105 (Hart Publishing 2005); Joseph Raz, *Dworkin: A New Link in the Chain*, 74 CAL. L. REV. 1103, 1107 (1986).

[55] *See, e.g.*, Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823, 843 (1972)

[56] *See, e.g.*, Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823, 843 (1972) ("The thesis of judicial discretion does not entail that in cases where discretion may be exercised everything goes. .... The only claim is that the laws do not determine any decision as the correct one.").

[57] See, e.g., Lon Fuller, *Positivism and Fidelity to Law - A Reply to Professor Hart*, 71 Harvard Law Review 630 (1958); RONALD DWORKIN, LAW'S EMPIRE (Fontana London 1986).

How do the positivists justify this bizarre position? They mince words. Legal positivism, say today's legal positivists, is not a theory about adjudication or legal interpretation; rather, it is a theory about what the "law" is.[58] Thus legal positivism has little to say about how judges or lawyers make arguments or resolve legal disputes. Indeed judges and lawyers habitually make arguments and resolve cases by considering factors external to "the law" – including moral factors. Hence what the positivists call "the law" and what lawyers and judges call "the law" are different things (since judges and lawyers insist – notwithstanding the positivist thesis – that their arguments and determinations do not go "outside the law" but remain fully within it).

With the exception of *normative legal positivism* (explained shortly), today's legal positivism is an irrelevant legal theory. That "the law" requires only what the literal text of legal rules requires is utterly uninteresting if legal practitioners habitually and legitimately identify legal requirements as something quite different than what that literal text requires – a point the positivists now concede. And similarly, that judges engage in "lawmaking" when the literal text of a legal rule is not determinate is utterly uninformative if judges engage in "lawmaking" even when faced with a determinate language, and this "lawmaking" is in fact inherently different, and much more

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[58] *See, e.g.*, Leslie Green, *The Concept of Law Revisited*, 94 MICH. L. REV. 1687, 1712 (1996). The modern positivists do not see themselves as *revising* the classical positivist thesis but only as clarifying it. This claim is not only inconsistent with the very *raison d'etre* of legal positivism, but also with the writings of the one figure to which they all pledge their allegiance – the legal philosopher H.L.A. Hart. Hart was clear in believing that judicial duty generally entailed following the language of legal rules where that language was determinate. (*See, e.g.*, H.L.A Hart, *Positivism and the Separation of Law and Morals,* 71 HARV. L. REV. 593, 614 (1958) "the hard core of settled meaning is law in some centrally important sense... If this were not so the notion of rules controlling courts' decisions would be senseless." *See generally, supra* notes 22-26, Hart also believed that in some extreme cases – as with Nazi law, for example – judges should flout the law and decide cases in accordance with morality. Indeed this is a necessary qualification to any modern positivist thesis.) In any case, the debate as to whether modern legal positivism is or is not revisionist is unimportant to the realization of its irrelevance.

constrained, than legislative lawmaking – another point conceded by today's positivists.

A symptom of its decline into irrelevance, legal positivism has recently fractured into three schools of thought. One is "hard legal positivism." Hard positivism presumes to hold on to all the traditional claims of legal positivism, while adding the little proviso, usually found in a footnote (always read the fine print!), that legal positivism is not a theory about the way judges or lawyers resolve cases.[59] A second school of thought is "soft legal positivism." Unlike hard legal positivism, soft positivism does not insist that establishing legal requirements is a process wholly independent of any moral evaluation (as hard positivism does), but only that it *may* be wholly independent of it (that is, it is *possible* that a legal system would be such that legal requirements are established without resort to any moral evaluation).[60] The third school of thought is normative legal positivism, which says that legal positivism may not be a theory about how judges actually decide cases, but it is a theory about how they *should* decide them (a claim resembling that of American textualism).[61] All three schools are incapable of defending the very thesis for whose defense legal positivism was born – *viz.*, that resolving legal cases is for the most part (except in cases of judicial legislation, which are not really about applying the law anyhow) a process that is independent of moral evaluation, so that legal interpretation is not steeped in "subjective" value judgments. Hard legal positivism has withdrawn any claims legal positivism may have had about legal interpretation; soft legal positivism concedes that moral evaluation may very well be an integral part of proper legal interpretation in our legal system (though things are not *necessarily so*); and normative legal positivism

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[59] See JOSEPH RAZ, THE AUTHORITY OF LAW,37, 50-51 (1979) (Clarendon Press 1979); Scott Shapiro, *On Hart's Way Out*, 4 LEGAL THEORY 469, 478-479 (1998); John Gardner, *Legal positivism: 5 ½ Myths*, 46 AM. J. JURIS 199, 201 (2001).

[60] Jules L. Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139 (1982)

[61] *See, e.g.*, TOM CAMPBELL, THE LEGAL THEORY OF ETHICAL POSITIVISM (Ashgate Pub. Co.1996); Neil MacCormick, *A Moralistic Case for A-Moralistic Law*, 20 VAL. U. L. REV. 1, 30 (1985).

advocates a method of legal interpretation that, whatever its virtues, is certainly not ours. (It is also a method of legal interpretation that is dogmatic and impractical, and which is often betrayed by the very people who purport to employ it – the judges of the Michigan Supreme Court for example, but this is a claim for another day). Indeed, with the exception of normative positivism, modern legal positivism has lost its relevance to actual legal practice, and has been delegated to an increasingly esoteric academic discourse. Many of today's positivist writings will find more interested audiences in philosophy departments than in law schools.

V. CONCLUSION

At least in academic circles, it has now been firmly established that legal positivism's strong claims were wrong. Today's leading legal positivists concede that the distinction between following literal textual dictates and judicial legislation is not found in actual judicial practice, which consists in some combination of the two. The upshot is that ideological preferences may play a proper role in many judicial determinations (not only in those where the literal text is unclear or ambiguous), but that their role is constrained by the *modus operandi* of legal interpretation. This recognition illuminates the glaring deficiency of the *White* analysis: *White* started with the proposition that judges sometimes make law, so that ideological preferences play an inevitable role in that process, and concluded that judicial elections serve the legitimate purpose of allowing popular democratic determination of these ideologies. But the move from the recognition that adjudication often involves ideological value judgments to the conclusion that these ideologies are the proper subject of judicial elections (indeed that preventing the electorate from learning of candidates' ideologies is a violation of the First Amendment) is too quick. Once it is acknowledged that judges do not "make law" the way legislators do, and that ideological preferences play a different and more constrained role in adjudication than they do in legislation, the Court's inference becomes unjustified: we must first examine

judicial interpretive constraints, and the impact that fully-politicized judicial elections may have on their operation, before we can say that since judges "make law" they may run political campaigns as other lawmakers do. Since judges are not lawmakers in the same way that legislators are, politicized judicial elections might not simply allow voters to determine those ideologies that *anyhow* play a role in judicial determinations; instead, they may change the very role that political ideologies play in that process. Indeed judges who campaign and get elected on the basis of explicit political platforms are likely to go about the business of deciding cases in a different way, with a different understanding of the judicial role in mind, than judges who see themselves as ideally separated from the day-to-day fray of political disputes. All this, of course, need not mean that the Announce Clause was constitutional; but it certainly means that the *White* majority failed to grasp the government interests protected by the Announce Clause, and failed to offer a convincing justification for its invalidation.

More importantly, *White* shows a Supreme Court steeped in the conceptions of an obsolete legal theory, where legal interpretation is portrayed as an "all or nothing" affair of mechanical text-bound adjudication or else ideological law-making. This conception, whose most radical followers on the Supreme Court are Justices Scalia and Thomas (and which has numerous other sympathetic followers in the federal courts and otherwise), does damage to proper legal interpretation on both ends of the divide: on the one hand it exhibits undue deference to literal textual dictates to the neglect of proper judicial concerns; on the other it allows excessive politicization of judicial decision-making where literal constraints are inconclusive. There is little doubt that this simplistic and mistaken conception still exerts its noxious influence over the jurisprudence of many judges and courts,[62] and little doubt it is time we kiss it goodbye.

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[62] I have in mind, for example, the Michigan Supreme Court, which has recently adopted a radical textualist jurisprudence. See, e.g., *Cameron v. Auto Club Ins Assn.*, 476 Mich. 55 (2006); *Devillers v. Auto Club Ins Assn.*, 473 Mich 562 (2005); *Kreiner v. Fischer*, 471 Mich 109 (2004); *People v. Chavis*, 468 Mich. 84 (2003).