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The Religious Liberty of Judges

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THE RELIGIOUS LIBERTY OF JUDGES

Daniel R. Suhr*

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In a pluralistic society, judges can enrich their communities and their own lives by participation in those civic, charitable, and avocational activities best suited to their talents, interests, and backgrounds. A judge can preserve the integrity of the judicial office without undergoing complete isolation from community life.¹

—*U.S. Judicial Conference, Committee on Codes of Conduct, Advisory Opinion No. 80*

Too often drafters of ethical standards fail to scrutinize a proposed restriction on a judge’s off-bench activities against the specific rationale supporting the government’s right to interfere with the political, social, charitable and other personal undertakings of a judge. Instead, a “gut-feeling” as to the propriety or impropriety, prudence or imprudence, of a particular extrajudicial act is substituted for a “restriction vs. rationale” analysis. It is especially important to conduct this analysis before concluding that a judge’s civic or charitable involvement

* L.L.M., Georgetown University; J.D., B.A., Marquette University. The author owes a significant debt to Judge Raymond J. McKoski, whose article on charitable fund-raising by judges prompted this article, and who was a constant source of help and encouragement throughout the research and writing process. He further wishes to thank Professor Paul Secunda, Jud Campbell, and Matt Fernholz for their helpful comments on earlier drafts of this Article. This Article was completed and accepted for publication before the author’s current employment began, and does not represent the views of his current or former employers.

¹ U.S. Judicial Conference Comm. on Codes of Conduct, Op. 80 (2009), available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02B-Ch02.pdf>.

does “measurable damage” to the judiciary because, unlike purely personal pursuits, philanthropic activities benefit the judiciary, the legal profession, and the community at large.²

—*Judge Raymond J. McKoski, Vice Chair,
Illinois Judicial Ethics Committee*

INTRODUCTION

Just a block from the dragon archway marking the entrance to the Chinatown neighborhood of Washington, D.C., stands historic Calvary Baptist Church. Like many buildings in the nation’s capital city, its facade is adorned by a small, weather-worn bronze plaque near the entrance: “In this building on May 16–17, 1907 the Northern Baptist Convention was formed and the Hon. Charles Evans Hughes elected its first president.”³ At the time, Hughes was governor of New York—he would later serve as Secretary of State, an associate justice of the U.S. Supreme Court, and Chief Justice of the United States.⁴ He stayed involved in the Convention and Baptist affairs throughout his long career at the pinnacle of the legal profession.⁵

Chief Justice Hughes was hardly alone in pursuing both a career on the bench and an avocational lay leadership role in his church. Justice Bushrod Washington, a John Adams appointee, was a founding vice president of the American Bible Society (ABS), along with former Chief Justice John Jay and future Justice Smith Thompson, who was at the time chief justice of the State of New York.⁶ Thompson continued with the ABS once he became a member of the U.S. Supreme Court, and was eventually joined in both institutions by Chief Justice John Marshall.⁷ Justice John McLean⁸ and Chief Justice Salmon P. Chase also served as ABS vice presidents while on the Court.⁹

Similarly, the American Sunday School Union (ASSU) counted Justice Washington among its slate of vice presidents.¹⁰ Several years later, Chief Justice Marshall

² Raymond J. McKoski, *Charitable Fund-Raising by Judges: The Give and Take of the 2007 ABA Model Code of Judicial Conduct*, 2008 MICH. ST. L. REV. 769, 783 (2008).

³ As observed by author at 755 Eighth Street, NW, Washington, DC 20001.

⁴ Aaron Weaver, *The Church-State Jurisprudence and Contributions of Charles Evans Hughes*, 28 AM. BAPTIST Q. 180 (1980).

⁵ See generally *id.* at 180.

⁶ 1 ANNUAL REPORTS OF THE AMERICAN BIBLE SOCIETY: WITH AN ACCOUNT OF ITS ORGANIZATION; LIST OF OFFICERS AND MANAGERS, OF LIFE DIRECTORS AND LIFE MEMBERS, 249 (1838) [hereinafter ANNUAL REPORTS OF THE AMERICAN BIBLE SOCIETY]. Joining them the next year as vice presidents of the ABS were the chief justices of New Jersey and Pennsylvania. *Id.* at 289.

⁷ *Id.* at 767.

⁸ ANNUAL REPORTS OF THE AMERICAN BIBLE SOCIETY, *supra* note 6, at 885. Also joining that year was Judge Jesse L. Holman of the U.S. Circuit Court, Indiana. *Id.*

⁹ *American Bible Society*, N.Y. TIMES, May 7, 1865, <http://www.nytimes.com/1865/05/07/news/american-bible-society.html>.

¹⁰ THE FIRST ANNUAL REPORT OF THE AMERICAN SUNDAY-SCHOOL UNION 22 (1825). He was joined on the board by Judge James H. Peck of the U.S. District Court, Missouri. *Id.*

and Justice McLean both joined ASSU as vice presidents;¹¹ McLean would later be elected its president.¹²

A year after Justice McLean left the Court, Justice Samuel F. Miller joined it. While he was a justice, he served three years as president of the National Unitarian Conference.¹³ His colleague, Justice William Strong, was president of the National Reform Association (NRA), his era's version of the Christian Coalition.¹⁴ Justice Strong, in turn, served alongside Justice David Josiah Brewer. Born abroad during his father's service as an evangelist, Justice Brewer served as an officer of the American Missionary Association for many years.¹⁵ A lifelong and devoted Presbyterian, Brewer's friend, Justice John Marshall Harlan served as a trustee, president of the board of trustees, and ruling elder of his local congregation, the New York Avenue Presbyterian Church.¹⁶ He also served as trustee of Murray Bay Church, near where his family spent summers in Quebec.¹⁷ In addition to his involvement at the local level, Justice Harlan led his denomination both as part of a committee to study the construction of a national Presbyterian cathedral in Washington, D.C., and as vice moderator of the national Presbyterian Church.¹⁸

Appointed with significant support from America's Catholic hierarchy, Justice Pierce Butler served on the Catholic University of America's Board of Trustees for eight years¹⁹—the president of the university described him as “a tower of strength to the whole movement” during a capital fund-raising campaign.²⁰

At one point, Washington labeled himself a “faithful friend and admirer” of the Union, and he expressed his hope “[t]hat heaven may prosper the benevolent work in which the Sunday-school Union are engaged, so honourable to them, and so beneficial to our country[.]” THE FIFTH REPORT OF THE AMERICAN SUNDAY-SCHOOL UNION 31 (1829) (quoting Letter from Bushrod Washington, Supreme Court Justice, to the American Sunday School Union's Committee on Publication (Apr. 27, 1829)).

¹¹ THE SIXTH REPORT OF THE AMERICAN SUNDAY-SCHOOL UNION 18 (1830) (listing Marshall and McLean as vice presidents). McLean continued to serve many years after Marshall.

¹² THE TWENTY-FIFTH ANNUAL REPORT OF THE AMERICAN SUNDAY-SCHOOL UNION 80–81 (1849) (reporting McLean's unanimous election as president).

¹³ JAY ALAN SEKULOW, WITNESSING THEIR FAITH: RELIGIOUS INFLUENCE ON SUPREME COURT JUSTICES AND THEIR OPINIONS 66 (2006).

¹⁴ *Id.* at 126. The NRA pushed for an amendment to the Preamble to the U.S. Constitution to acknowledge America's Christian heritage.

¹⁵ J. Gordon Hylton, *The Judge Who Abstained in Plessy v. Ferguson: Justice David Brewer and the Problem of Race*, 61 MISS. L.J. 315, 318 (1991).

¹⁶ James W. Gordon, *Religion and the First Justice Harlan: A Case Study in Late Nineteenth Century Presbyterian Constitutionalism*, 85 MARQ. L. REV. 317, 334 (2001).

¹⁷ *Id.* at 335.

¹⁸ LOREN P. BETH, JOHN MARSHALL HARLAN: THE LAST WHIG JUSTICE 171, 187 (1992).

¹⁹ John T. Noonan, Jr., *The Catholic Justices of the United States Supreme Court*, 67 CATH. HIST. REV. 369, 376 n.25 (1981).

²⁰ C. JOSEPH NUESSE, THE CATHOLIC UNIVERSITY OF AMERICA: A CENTENNIAL HISTORY 277 (1990).

What a different world Chief Justice Hughes and his brother Justices would find in 2011, thanks to the advent of judicial ethics rules. Though he could be a member of the Northern Baptist Convention, he could not serve as president²¹ or treasurer.²² Though he could deliver a speech at the opening of a new church, he could not give a sermon every week from the same pulpit as a part-time pastor.²³ In those speeches, he could urge the audience to embrace faith, hope, and love, but not charity.²⁴ Though he could appear as the guest of honor at a fund-raising dinner for the law school at a church-affiliated university, he could not do the same for its seminary.²⁵ He could invite friends to join the American Bar Association, but not the Gideons or Knights of Columbus.²⁶ All of these restrictions, and more, stem from the American Bar Association (ABA)'s 2007 Model Code of Judicial Conduct and official interpretations of state versions of that code.

Many, if not all, of these limitations could not survive constitutional scrutiny. Admittedly, the government, as employer, may legally restrict the personal speech and expressive association of its employees.²⁷ But taking a government job is not a total abdication of all constitutional rights, particularly those exercised outside the workplace. The U.S. Supreme Court has repeatedly held that government employees retain constitutional protections and that the government must justify its intrusions on employee rights.²⁸

This Article begins by reviewing the government employee line of cases, starting with *United Public Workers v. Mitchell* in 1947.²⁹ The first section concludes that the modified *Pickering* balancing test set forth in *United States v. National Treasury Employees Union (NTEU)*³⁰ is the appropriate level of scrutiny for judicial conduct rules. The body of this Article reviews ways in which the four canons of the ABA

²¹ Fla. Comm. on Standards of Conduct Governing Judges, Op. 85/4 (1985), available at <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jecopinions/eighty5/85-04.html>.

²² Md. Judicial Ethics Comm., Op. 1975-10 (1975), available at <http://www.courts.state.md.us/ethics/opinions/1970s/1975-10.pdf>.

²³ Va. Judicial Ethics Advisory Comm., Op. 08-1 (2008) (withdrawn, Feb. 17, 2010); Kan. Judicial Ethics Advisory Panel, Op. JE-25 (1988), available at <http://www.kscourts.org/pdf/ClerkCt/JE25.pdf>.

²⁴ MODEL CODE OF JUDICIAL CONDUCT, R. 3.7(A)(3) (2007) (prohibiting judges from soliciting contributions for religious organizations from persons outside the judge's family).

²⁵ *Id.* at 3.7(A)(4) (permitting judges to speak at fund-raising dinners only for organizations that "concern[] the law, the legal system, or the administration of justice[.]").

²⁶ *Id.* at 3.7(A)(3) (permitting judges to solicit membership only for organizations that are "concerned with the law, the legal system, or the administration of justice[.]").

²⁷ *See, e.g.*, *United Pub. Workers v. Mitchell*, 330 U.S. 75, 102 (1947).

²⁸ *See, e.g.*, *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). In fact, one might turn the proposition to the affirmative and say that "conspicuously unlike a private employer, [the Government] must respect its employees' First Amendment rights[.]" *Locurto v. Giuliani*, 447 F.3d 159, 163 (2d Cir. 2006).

²⁹ 330 U.S. at 103 (upholding the Hatch Act).

³⁰ 513 U.S. 454, 468 (1995) (citing *Pickering*, 391 U.S. at 571).

Model Code of Judicial Ethics and official interpretations of and rulings regarding them limit the religious activities of judges. I conclude that numerous applications of the Model Code are unconstitutional infringements on judges' First Amendment rights to free speech, free association, and free exercise of religion.

I. CONSTITUTIONAL PROTECTIONS FOR GOVERNMENT EMPLOYEES

The codes of judicial conduct should be interpreted in line with the U.S. Constitution. In defining its scope the ABA Model Code notes that "The Rules of the Model Code of Judicial Conduct are rules of reason that should be applied consistent with constitutional requirements, statutes, other court rules, and decisional law[.]"³¹ In the wake of *Republican Party of Minnesota v. White*,³² much of the constitutional litigation regarding judicial ethics codes has focused on restrictions on campaign activity by judicial candidates.³³ However, this should not excuse judicial conduct panels, when issuing advisory opinions, from considering the constitutional rights of sitting judges. As Judge Howland Abramson, past chairman of Pennsylvania's judicial ethics committee, has written, "[J]udicial ethics advisory committees should be mindful of the United States Constitution in rendering their advice and, at the very least, should adhere to binding constitutional precedents. However, to properly fulfill their duties, they should consider all constitutional precedents, such as those from other jurisdictions. . . ."³⁴ Judge Abramson has it right. Judicial conduct panels should

³¹ MODEL CODE OF JUDICIAL CONDUCT, Scope (2007). I should note at the start that I focus on the ABA's Model Code because it "comes with a presumption of authority, and state and federal courts are likely to adopt it." Ronald D. Rotunda, *Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Judicial Code*, 34 HOFSTRA L. REV. 1337, 1359 (2006); see also Jon C. Blue, *A Well-Tuned Cymbal? Extrajudicial Political Activity*, 18 GEO. J. LEGAL ETHICS 1, 5–6 (2004) (referring to the Model Code as the "current 'gold standard' canonical text."). I do not cover the history of the Code because it has been so thoroughly recounted elsewhere. See, e.g., Andrew J. Lievens & Avern Cohn, *The Federal Judiciary and the ABA Model Code: The Parting of the Ways*, 28 JUST. SYS. J. 271 (2007).

³² 536 U.S. 765 (2002).

³³ Ctr. for Judicial Ethics, *Case-law Following Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), AM. JUDICATURE SOC'Y (May 2, 2011), <http://www.ajs.org/ethics/pdfs/CaselawafterWhite.pdf>.

³⁴ Howland W. Abramson & Gary Lee, *Judicial Ethics Advisory Committees Should Render Opinions Which Adhere to Binding United States Constitutional Precedents*, 41 DUQ. L. REV. 269, 305 (2003); see *In re Hey*, 452 S.E.2d 24, 29 (W.Va. 1994) ("Unquestionably, it is within this Court's power to discipline judges. . . . But in doing so, we have a corresponding duty not to ignore judges' constitutionally protected rights." (internal citations omitted)). But see Ark. Judicial Ethics Advisory Comm., Op. 2006-02 (2006), available at http://www.state.ar.us/jeac/opinions/advisory_2006_02.pdf (declining, based on the committee's mandate, to consider whether a challenged judicial conduct rule was constitutional); Kan. Judicial Ethics Advisory Panel, Op. JE 139 (2006), available at <http://www.kscourts.org/pdf/ClerkCt/JE139.pdf> (same).

incorporate relevant constitutional law when considering inquiries from judges who wish to engage in religious activities and expression.

A. Identifying the Correct Constitutional Standard

As in any case involving a question of constitutional law, the first step is to identify the relevant constitutional text(s). The First Amendment guarantees that Congress shall pass no law “prohibiting the free exercise” of religion, or “abridging the freedom of speech” or “the right of the people peaceably to assemble,”³⁵ which also includes a right to private association.³⁶ The Fourteenth Amendment incorporates these rights against the state governments, which administer the judicial ethics codes governing state judges.³⁷

The real challenge, of course, is to determine from the Court’s precedents the appropriate doctrine or line of cases for this particular issue. Here, the public employee line of cases fits best. These regulations do not limit the activities of judges as candidates for election or retention, so *Republican Party of Minnesota v. White* is not the right standard.³⁸ Moreover, because public employees do not enjoy the same level of rights protection as regular citizens, the hybrid-claim analysis for free exercise based on *Employment Division v. Smith* does not fit.³⁹ Instead, as the U.S. Court of Appeals

³⁵ U.S. CONST. amend. I.

³⁶ See, e.g., *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) (explaining that “[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech”).

³⁷ *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (incorporating the free exercise clause); *DeJonge v. Oregon*, 299 U.S. 353, 364 (1937) (incorporating the assembly clause and freedom of association); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating the freedom of speech clause).

³⁸ 536 U.S. 765, 788 (2002) (striking down a state judicial ethics canon which limited the free speech of judicial candidates). The Court, in an opinion written by Justice Scalia, applied strict scrutiny to the canon, asking whether it was narrowly tailored to achieve a compelling government interest. *Id.* at 774–75. After an extensive discussion of judicial impartiality, the Court concluded that it failed this test, and struck the regulation down. *Id.* at 788. However, the Court treated the regulation as one on judicial candidates, not one on judges proper. *Id.* at 768 (referring to “candidates for judicial election”). Justice Kennedy, in his concurrence, specifically noted and set aside the public employee cases. *Id.* at 796 (Kennedy, J., concurring) (“Whether the rationale of *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, and *Connick v. Myers* could be extended to allow a general speech restriction on sitting judges—regardless of whether they are campaigning—in order to promote the efficient administration of justice, is not an issue raised here.”) (internal citations omitted).

³⁹ *Ex parte Curtis*, 106 U.S. 371, 375 (1882) (upholding a federal statute that made it unlawful for federal employees, other than presidential appointees, to request, give, or receive from any other government officer any money for political purposes). Since *Curtis*, the Court has consistently held that activities that the government can not restrict if done by citizens,

for the Seventh Circuit has twice stated, the public employee cases provide the best framework to analyze the judicial canons which govern the activities of judges unconnected to their own election or retention.⁴⁰ Several other decisions and scholarly articles have also approached questions under the judicial ethics code through the framework of the public employee cases.⁴¹ It is to those cases that I now turn.

B. *The Pickering/NTEU Test*

The first modern case presenting a question about the constitutional rights of public employees was *United Public Workers v. Mitchell* in 1947.⁴² In *United Public Workers*, a union representing public employees challenged a provision of the Hatch Act that prohibited civil service employees from taking “any active part in political management or in political campaigns.”⁴³ The Court gave tremendous deference to the government as an employer, stating that the justices would uphold regulation of any “act reasonably deemed by Congress to interfere with the efficiency of the public service.”⁴⁴ This very low threshold permitted Congress to regulate a wide variety of activities by public employees in the name of ensuring integrity and efficiency in government,⁴⁵ and was grounded in a vision of government employment as a privilege and a choice. Justice Holmes memorably expressed this sentiment in a decision of the Massachusetts Supreme Judicial Court: “The petitioner may have a constitutional right to talk politics

may generally be restricted if done by public employees. *See, e.g., United Pub. Workers v. Mitchell*, 330 U.S. 75, 102 (1947) (upholding the Hatch Act’s restrictions on free speech and electioneering by federal employees). Because judges are public employees, the traditional First Amendment analysis for free exercise claims, articulated in *Employment Division v. Smith*, 494 U.S. 872, 876–82 (1990), does not apply.

⁴⁰ *Siefert v. Alexander*, 608 F.3d 974, 981, 985, 988 (7th Cir.), *reh’gen banc denied*, 619 F.3d 776 (7th Cir. 2010) (analyzing the party affiliation clause under *White*, the endorsement clause under *Pickering*, and the solicitation clause under *Buckley v. Valeo*); *Bauer v. Shepard*, 620 F.3d 704, 711 (7th Cir. 2010) (following *Siefert* by using *Pickering* to analyze a political party leadership clause).

⁴¹ *In re Hey*, 452 S.E.2d 24, 30–31 (W. Va. 1994); *In re Schenck*, 870 P.2d 185, 204 (Or. 1994); Blue, *supra* note 31, at 10; Leonard E. Gross, *Judicial Speech: Discipline and the First Amendment*, 36 SYRACUSE L. REV. 1181, 1190 (1986); Leita Walker, Note, *Protecting Judges from White’s Aftermath: How the Public-Employee Speech Doctrine Might Help Judges and the Courts in Which They Work*, 20 GEO. J. LEGAL ETHICS 371 (2007).

⁴² 330 U.S. 75 (1947).

⁴³ *Id.* at 78 (citing 18 U.S.C. § 61(h)).

⁴⁴ *Id.* at 101.

⁴⁵ *See Adler v. Bd. of Educ.*, 342 U.S. 485, 492 (1952) (“If [public employees] do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere.”); Paul M. Secunda, *Neoformalism and the Reemergence of the Rights/Privilege Distinction in Public Employment Law*, 48 SAN DIEGO L. REV. — (forthcoming 2011), available at http://works.bepress.com/paul_secunda/8; Note, *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1738–56 (1984).

but he has no constitutional right to be a policeman.”⁴⁶ Just as an individual has a choice whether to accept government employment, so too does the government have latitude to manage its employees, including restricting their liberties when necessary.

The next major public employee case is *Pickering v. Board of Education*, which concerned the rights of a teacher who wrote a letter to the editor of a local newspaper criticizing the Board of Education’s budget allocations.⁴⁷ The teacher was dismissed and subsequently sued the Board. The Court concluded that the teacher’s First Amendment rights had been violated, and announced a test to determine when such discipline is unconstitutional: “The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”⁴⁸ This case created a higher test than the

⁴⁶ *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892).

⁴⁷ See Paul M. Secunda, *The Story of Pickering v. Bd. of Education: Unconstitutional Conditions and Public Employment*, in RICHARD GARNETT & ANDREW KOPPELMAN, EDs., *FIRST AMENDMENT LAW STORIES 6–11* (forthcoming 2011), available at <http://ssrn.com/abstract=1567221>.

⁴⁸ 391 U.S. 563, 568 (1968). Embedded in this test is the particular requirement that the speech must be about a “matter[] of public concern.” *Id.* When a court hears a challenge in this area, it

must first determine whether the speech at issue can ‘be fairly characterized as constituting speech on a matter of public concern,’ which is defined as speech ‘relating to any matter of political, social, or other concern to the community’ The ‘content, form, and context of a given statement, as revealed by the whole record’ determines whether an employee’s speech addresses a matter of public concern.

Marinoff v. City College of N.Y., 357 F. Supp. 2d 672, 682 (S.D.N.Y. 2005) (quoting *Connick v. Myers*, 461 U.S. 138, 146–48 (1983)); see also *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006); Richard Hiers, *Public Employees’ Free Speech: An Endangered Species of First Amendment Rights in Supreme Court and Eleventh Circuit Jurisprudence*, 5 U. FLA. J.L. & PUB. POL’Y 169, 202–07 (1993) (identifying some cases where the “matter of public concern” test was either ignored or treated to a cursory review, but concluding that the test remains an important part of the public employee jurisprudence); Edward L. Velazquez, Note, *Waters v. Churchill: Government-Employer Efficiency, Judicial Deference, and the Abandonment of Public-Employee Free Speech by the Supreme Court*, 61 BROOK. L. REV. 1055, 1102–03 (1995) (reviewing *Connick* and other cases to conclude that the “matter of public concern” test is a threshold that must be proven by the employee before the court reaches the balancing test). But see Pengtian Ma, *Public Employee Speech and Public Concern: A Critique of the U.S. Supreme Court’s Threshold Approach to Public Employee Speech Cases*, 30 J. MARSHALL L. REV. 121 (1996).

In the case of speech concerning religious matters, the subject of this article, there can be no doubt that it is a matter of public concern. *Scarborough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 257 (6th Cir. 2006) (“Scarborough’s intended speech on his religious views . . . are matters of public concern”); *Tucker v. Cal. Dep’t of Educ.*, 97 F.3d 1204, 1210 (9th Cir. 1996) (stating that religious speech is “obviously of public concern.”); cf. *Latino Officers Ass’n.*

rational basis scrutiny (though the Court did not use that phrase) that characterized the *United Public Workers* decision,⁴⁹ and ended the era when the Court treated government employment as purely a matter of privilege without any corresponding protection for rights.⁵⁰

Though there were several intervening public employee decisions, the next major case for our purposes is *United States v. National Treasury Employees Union (NTEU)*, concerning the 1993 amendments to the Hatch Act.⁵¹ On behalf of its members, the union challenged the Ethics in Government Act's prohibition on federal employees' receipt of honoraria for speeches and articles "largely unrelated to their Government employment."⁵² The Court distinguished this case from *Pickering*, which involved "a *post hoc* analysis of one employee's speech and its impact on that employee's public responsibilities."⁵³ In *NTEU*, by contrast, the Court dealt with "Congress' [*ex ante*] wholesale deterrent to a broad category of expression by a massive number of potential speakers."⁵⁴ To deal with this sort of situation, the Court announced a new test:

[T]he Government's burden is greater with respect to this statutory restriction on expression than with respect to an isolated disciplinary action. The Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are

v. New York, 196 F.3d 458, 466 (2d Cir. 1999) (finding that participation in an ethnic pride parade is a matter of public concern).

Finally, in a recent *per curiam* opinion, the U.S. Supreme Court suggested that the "matter of public concern" test does not apply when the speech at issue was not connected to the employee's work, as in *NTEU*. *San Diego v. Roe*, 543 U.S. 77, 80–82 (2004); see *Locurto v. Giuliani*, 447 F.3d 159, 174 (2d Cir. 2006) ("Some courts, including both our Court and the Supreme Court, have questioned the extent to which the public concern test applies to off-duty speech on topics unrelated to employment."). *But see* *Piscottano v. Murphy*, No. 3:04CV682(MRK), 2005 WL 1424394, at *4–6 (D. Conn. June 9, 2005) (holding that *City of San Diego* did not set aside the "matter of public concern" test for speech unconnected to the employee's work), *aff'd*, 511 F.3d 247 (2d Cir. 2007). Thus, though I am confident courts would find that speech about religion "relat[es] to any matter of . . . social or other concern to the community," *Connick v. Myers*, 461 U.S. 138, 146 (1982), such an inquiry may not be necessary if the public employee speaks in a private capacity.

⁴⁹ Anthony T. Kovalchick, *Ending the Suppression: Why the Hatch Act Cannot Withstand Meaningful Constitutional Scrutiny*, 30 W. NEW ENG. L. REV. 419, 431 (2008).

⁵⁰ Paul M. Secunda, *The Most Important Public Employment Law Case: Pickering v. Board of Education*, 391 U.S. 563 (1968), MARQUETTE UNIVERSITY LAW SCHOOL FACULTY BLOG (Oct. 25, 2010), <http://law.marquette.edu/facultyblog/2010/10/25/the-most-important-public-employment-law-case-pickering-v-board-of-education-391-u-s-563-1968>.

⁵¹ 513 U.S. 454 (1995).

⁵² *Id.* at 466.

⁵³ *Id.* at 466–67.

⁵⁴ *Id.* at 467.

outweighed by that expression's 'necessary impact on the actual operation' of the Government.⁵⁵

One commentator characterized this as a "heavy burden of justification placed on public employers[.]"⁵⁶

This is the test that should be used to evaluate state judicial codes restricting judges' First Amendment rights to free speech, free association, and the free exercise of religion.⁵⁷ There are two key requirements to qualify for the higher scrutiny afforded by *NTEU*. First, the case must arise from an *ex ante* broad-based rule or policy which stifles speech or association of an entire class of employees; it cannot involve a *post hoc* disciplinary decision in an individual case.⁵⁸ Obviously, that criterion is met here; each state code and the official interpretation of it is a policy promulgated to cover all magistrates in that state.

Second, the public employees' activities must be "largely unrelated to their Government employment."⁵⁹ Here, all of the religious speech and association described takes place outside the government workplace.⁶⁰ Moreover, service on church bodies or speeches at religious events need not involve opining on pending litigation or legal issues. In fact, the Court has previously listed "sermons" alongside "fictional writings, and athletic competitions"⁶¹ as types of "performances and writings that would normally appear to have no nexus with an employee's job."⁶² Yet, some judicial ethics

⁵⁵ *Id.* at 468 (quoting, in part, from *Pickering v. Bd. of Educ.*, 391 U.S. 563, 571 (1968)).

⁵⁶ Charles W. Hemingway, *A Closer Look at Waters v. Churchill and United States v. National Treasury Employees Union: Constitutional Tensions Between the Government as Employer and the Citizen as Federal Employee*, 44 AM. U. L. REV. 2231, 2267 (1995); *see NTEU*, 513 U.S. at 466 ("The sweep of § 501(b) makes the Government's burden heavy.").

⁵⁷ Though the public employee cases generally deal with free speech, they also provide the appropriate mode of analysis for other First Amendment claims like free exercise and freedom of association. *Piscottano v. Murphy*, 511 F.3d 247, 273–74 (2d Cir. 2007); *Scarborough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 260 (6th Cir. 2006); *Melzer v. Bd. of Educ.*, 336 F.3d 185, 195–96 (2d Cir. 2003).

⁵⁸ Though the ban in *NTEU* covered the entire federal workforce, it is not necessary for a restriction to cover a workforce as large as the federal government's for the *NTEU* analysis to apply. *Crue v. Aiken* 370 F.3d 668, 684 (7th Cir. 2004); *Swartzwelder v. McNeilly*, 297 F.3d 228, 237 (3d Cir. 2002) (Alito, J.); *Latino Officers Ass'n v. New York*, 196 F.3d 458, 464 (2d Cir. 1999).

⁵⁹ *NTEU*, 513 U.S. at 466; *see also Roberts v. Ward*, 468 F.3d 963, 968 (6th Cir. 2006) ("Where the speech is unrelated to the job of the employee and involves a matter of public concern, it appears to be entitled to greater protection, as it is less likely to disrupt the efficient functioning of the workplace.").

⁶⁰ Different concerns apply for religious expression in the government workplace, and may lead to a different determination. *See Berry v. Dep't of Social Servs.*, 447 F.3d 642, 645–46 (9th Cir. 2006).

⁶¹ *NTEU*, 513 U.S. at 476.

⁶² *Id.*

policies prohibit judges from delivering sermons. It is to analyzing these restrictions that I now turn.

II. CONSTITUTIONAL AND UNCONSTITUTIONAL LIMITS ON EXTRAJUDICIAL INVOLVEMENT IN RELIGIOUS ACTIVITIES

It should be said at the outset that many ethics advisory opinions appreciate the important role that judges can play as community leaders through religious organizations, and understand the desire of judges to serve their religious communities as volunteers.⁶³ As the U.S. Judicial Conference's Committee on the Codes of Conduct

⁶³ See, e.g., Ala. Judicial Inquiry Comm'n, Op. 82-158 (1982), *available at* <http://www.alalinc.net/jic/opinions/ao82-158.htm> (permitting a judge to serve on a church's bond committee); Ariz. Judicial Ethics Advisory Comm., Op. 96-13 (1996), *available at* http://www.azcourts.gov/Portals/37/ethics_opinions/1996/96-13.pdf (permitting a judge to serve as an usher in church); Ariz. Judicial Ethics Advisory Comm., Op. 93-01 (1993), *available at* http://www.azcourts.gov/Portals/37/ethics_opinions/1993/93-01.pdf (permitting a judge to serve as an officer of a church or to "play a prominent role in a religious ceremony or service"); Del. Judicial Proprieties Comm., Op. 1987-1 (1987), *available at* <http://courts.delaware.gov/jeac/opns/87-1.pdf> (permitting a judge to serve as a trustee of a regional church body and chairman of the administrative board of his congregation); Fla. Judicial Ethics Advisory Comm., Op. 2009-12 (2009), *available at* <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2009/2009-12.html> (permitting a judge to serve on a synagogue committee that permits reductions in membership dues); Fla. Judicial Ethics Advisory Comm., Op. 2005-02 (2005), *available at* <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2005/2005-02.html> (permitting a judge to speak at a Knights of Columbus dinner that would "break even" through tickets and sponsorships); Fla. Comm. on Standards of Conduct Governing Judges, Op. 97-26 (1997), *available at* <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/ninet7/97-26.html> (permitting a judge to teach a leadership or a church law course at a religious university); Fla. Comm. on Standards of Conduct Governing Judges, Op. 85-11 (1985), *available at* <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/eighty5/85-11.html> (permitting a judge to serve as National Youth Commissioner of B'Nai B'rith Youth); Ga. Judicial Qualifications Comm'n, Op. 89 (1986) (permitting a judge to serve as an advisory board member for a local unit of the Salvation Army); Ga. Judicial Qualifications Comm'n, Op. 81 (1986) (permitting a judge to buy a ticket to attend a dinner of B'Nai B'rith); Ill. Judicial Ethics Comm., Op. 01-06 (2001), *available at* <http://ija.org/ethicsop/opinions/01-06.htm> (permitting a judge to speak on parenting and family issues at a church service); Ill. Judicial Ethics Comm., Op. 96-7 (1996), *available at* <http://ija.org/ethicsop/opinions/96-7.htm> (permitting a judge to serve on a parish school board); Ill. Judicial Ethics Comm., Op. 96-4 (1996), *available at* <http://ija.org/ethicsop/opinions/96-4.htm> (permitting a judge to serve as the president of his synagogue); Kan. Judicial Ethics Advisory Panel, Op. JE 112 (2003), *available at* <http://www.kscourts.org/pdf/ClerkCt/JE112.pdf> (permitting a judge to volunteer at a church-operated soup kitchen); Md. Judicial Ethics Comm., Op. 1980-10 (1980), *available at* <http://mdcourts.gov/ethics/opinions/1980s/1980-10.pdf> (permitting a judge to serve as a vestryman [church council member] for his church); Md. Judicial Ethics Comm., Op. 1977-09 (1977), *available at* <http://mdcourts.gov/ethics/opinions/1970s/1977-09.pdf> (permitting a

noted in the opinion quoted as the epigram to this article, judges can and should play a vital role as leaders in their communities.⁶⁴ However, numerous judicial ethics panels place significant restrictions on the religious liberty of judges. Restrictions on extra-judicial involvement in religious activities can generally be grouped into two categories: restrictions based on the fund-raising clause, and restrictions based on concerns about politics and partiality.⁶⁵ Many of these restrictions cannot be sufficiently justified to

judge to serve as a trustee or officer of a religious foundation); Neb. Judicial Ethics Comm., Op. 05-3 (2005) *available at* <http://supremecourt.ne.gov/professional-ethics/judges/ethics-committee/pdf/05-3.pdf> (permitting a judge to serve as a director of a non-profit religious foundation); N.Y. Judicial Ethics Comm., Op. 09-146 (2009), *available at* <http://www.nycourts.gov/ip/judicialethics/opinions/09-146.htm> (permitting a judge to belong to a religiously-affiliated motorcycle club); N.Y. Judicial Ethics Comm., Op. 07-213 (2008), *available at* <http://www.nycourts.gov/ip/judicialethics/opinions/07-213.htm> (permitting a judge to display a religious emblem on his car); N.Y. Judicial Ethics Comm., Op. 06-10 (2006), *available at* <http://www.nycourts.gov/ip/judicialethics/opinions/06-10.htm> (permitting a judge to serve as parliamentarian for a religious organization); N.Y. Judicial Ethics Comm., Joint Op. 89-83, 89-84 (1989), *available at* <http://www.nycourts.gov/ip/judicialethics/opinions/89-83%20&%2089-84.htm> (permitting a judge to serve as an usher during a religious service); N.Y. Judicial Ethics Comm., Op. 88-06 (1988), *available at* <http://www.nycourts.gov/ip/judicialethics/opinions/88-06.htm> (permitting a judge to serve as chair of the regional chapter of a religious “crusade”); Okla. Judicial Ethics Advisory Panel, Op. 2007-4 (2007), *available at* <http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=449053> (permitting a judge to serve as president of the board of directors of a private Christian secondary school); S.C. Advisory Comm. on Standards of Judicial Conduct, Op. 4-2008 (2008), *available at* <http://www.judicial.state.sc.us/advisoryOpinions/displayadvopin.cfm?advOpinNo=04-2008> (permitting a full-time magistrate to also serve as a part-time church pastor); S.C. Advisory Comm. on Standards of Judicial Conduct, Op. 28-2006 (2006), *available at* <http://www.judicial.state.sc.us/advisoryOpinions/displayadvopin.cfm?advOpinNo=28-2006> (permitting a judge to serve as chairman of the board of trustees of his church); Wash. Ethics Advisory Comm., Op. 06-06 (2006), *available at* http://www.courts.wa.gov/programs_orgs/pos_ethics/index.cfm?fa=pos_ethics.dispopin&mode=0606 (permitting a judge to serve as an advisory committee member for a Christian prayer breakfast); Wash. Ethics Advisory Comm., Op. 93-29 (1993), *available at* http://www.courts.wa.gov/programs_orgs/pos_ethics/index.cfm?fa=pos_ethics.dispopin&mode=9329 (permitting a judge to serve on the church financial commission which examines the church budget); Wis. Judicial Conduct Advisory Comm., Op. 99-2 (1999), *available at* <http://www.wicourts.gov/sc/judcond/DisplayDocument.pdf?content=pdf&seqNo=883> (permitting a judge to perform in an ecumenical Easter theater production); Wis. Judicial Conduct Advisory Comm., 98-8 (1998), *available at* <http://www.wicourts.gov/sc/judcond/DisplayDocument.pdf?content=pdf&seqNo=891> (permitting judges to wear their robes in church at a St. Thomas More Lawyers Society “Red Mass”); *see also* ABA Comm. on Prof'l Responsibility and Ethics, Informal Op. 1070 (1969) (permitting a judge to serve as chairman of a church board).

⁶⁴ U.S. Judicial Conference Comm. on Codes of Conduct, Advisory Op. No. 80 (2009) *available at* <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02B-Ch02.pdf>.

⁶⁵ Some restrictions stemming from other provisions of the Code are legitimate. *See, e.g.*, N.Y. Judicial Ethics Comm., Op. 03-75 (2003), *available at* <http://www.nycourts.gov/ip>

pass the constitutional scrutiny required by *NTEU*. In this Section of the Article, I collect all of the rules and policies restricting religious activity by judges, and evaluate whether they pass constitutional muster.⁶⁶

A. The Fund-Raising Ban

The vast majority of the limits placed on judicial engagement in religious activity stem from the ban on fund-raising activity. The ABA Model Code provides:

[A] judge may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit, including but not limited to the following activities: . . .

(2) soliciting contributions for such an organization or entity, but only from members of the judge's family, or from judges over whom the judge does not exercise supervisory or appellate authority;

(3) soliciting membership for such an organization or entity, even though the membership dues or fees generated may be used to support the objectives of the organization or entity, but only if the organization or entity is concerned with the law, the legal system, or the administration of justice;

/judicialethics/opinions/03-75.htm (opining that a full-time judge should not serve on an advisory panel of a religious order that reviews and considers procedures for handling allegations of sexual misconduct by members of the order). The committee relied on the rule against judges' involvement in matters that may come before them in litigation and the rule against lending the prestige of the judicial office to serve private interests. *Id.*; see also Ill. Judicial Ethics Comm., Op. 96-16 (1996), available at <http://ija.org/ethicsop/opinions/96-16.htm> (opining that a judge may not act as a rabbi's advocate during contract negotiations between the rabbi and the synagogue board, based on a rule against using the judge's position to benefit private interests and the rule against judges practicing law).

⁶⁶ These rules rarely receive constitutional scrutiny because of the structure of the ethics system. If a judge requests an advisory ethics opinion, it is always easiest for the panel to say "no" and err on the side of a broad interpretation. Plus, these committees often have citizen members and lack an adversarial process, so they are ill-equipped to resolve constitutional questions. Yet there is no appeal mechanism; a disappointed judge's only option is to go forward with the activity. If the judicial discipline commission follows the advisory committee, the judge can finally make his constitutional argument to the state's high court which imposes final discipline after an adversarial process. But this is a huge risk for the judge and still incurs negative news stories and other ill effects. Consequently, very few judges challenge these rules because of the high costs imposed by the current ethics structure.

- (4) appearing or speaking at, receiving an award or other recognition at, being featured on the program of, and permitting his or her title to be used in connection with an event of such an organization or entity, but if the event serves a fund-raising purpose, the judge may participate only if the event concerns the law, the legal system, or the administration of justice;
- (5) making recommendations to such a public or private fund-granting organization or entity in connection with its programs and activities, but only if the organization or entity is concerned with the law, the legal system, or the administration of justice; . . .⁶⁷

Most limits on judicial involvement in religious activities stem from these clauses, although sometimes the “prestige of the judicial office” clause is also mentioned in the same breath.⁶⁸

The everyday effect of this ban is precisely what it says: judges are not permitted to ask their fellow citizens, including their fellow believers, to support charitable and religious causes. No ethics opinion is needed to explain that ban. Sometimes, however, judges pose questions that test the limits of the ban, and they consistently meet rejection.⁶⁹ For instance, when a Texas judge asked if he could solicit funds for a religious organization if he was not introduced as a judge, and if he did so outside the

⁶⁷ MODEL CODE OF JUDICIAL CONDUCT, R. 3.7 (2007). To “personally solicit” is defined elsewhere in the Code as “a direct request made by a judge or a judicial candidate for financial support or in-kind services, whether made by letter, telephone, or any other means of communication.” *Id.*, Terminology.

⁶⁸ MODEL CODE OF JUDICIAL CONDUCT, R. 1.3 (2007) (“A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others . . .”).

⁶⁹ *See, e.g.*, Ark. Judicial Ethics Advisory Comm., Op. 94-03 (1994), available at http://www.arkansas.gov/jecac/opinions/94_03.html (stating that a judge may not be a banquet speaker at a church’s annual scholarship fund-raising dinner); Md. Judicial Ethics Comm., Op. 1975-03 (1975), available at <http://mdcourts.gov/ethics/opinions/1970s/1975-03.pdf> (stating that a judge may not contribute to his temple’s “services auction”); Md. Judicial Ethics Comm., Op. 1975-01 (1975), available at <http://mdcourts.gov/ethics/opinions/1970s/1975-01.pdf> (stating that the judge may not be the guest of honor at a fund-raising luncheon for a religious organization); N.Y. Judicial Ethics Comm., Op. 89-11 (1989), available at <http://www.nycourts.gov/ip/judicialethics/opinions/89-11.htm> (stating that a judge may not act as co-chairman of an annual fund-raising dinner for a religious organization); Wash. Ethics Advisory Comm., Op. 06-11 (2006), available at http://www.courts.wa.gov/programs_orgs/pos_ethics/index.cfm?fa=pos_ethics.dispopin&mode=0611 (stating that a judge may not, as a member of the board of directors of a seminary, travel the state speaking to church members and parishes to raise funds for the seminary); *see also* U.S. Judicial Conference Comm. on Codes of Conduct, Advisory Op. 42 (2009) available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02B-Ch02.pdf> (stating that a judge may not “tak[e] part in the every-member canvass” of his church beyond making a personal contribution); ABA Comm. on Ethics & Prof’l Responsibility, Informal Op. 603 (1962) (stating that judges may not engage in solicitation for charitable, philanthropic, civic, or ecclesiastical enterprises).

territorial jurisdiction of his court, he was told no.⁷⁰ A South Carolina judge asked if he could write a letter “to encourage the congregation to pray for the church and its stewardship mission and would not involve the direct solicitation of money.”⁷¹ The Committee found that such a letter “is closely related to the solicitation of funds and uses the prestige of the judge’s office to solicit funds.”⁷² Another South Carolina judge asked whether she could appear in “a church video that encourages parishioners to become active in the church and its fund-raising activities.”⁷³ Again, the Committee answered no, finding that “the person solicited will feel [sic] obligated to respond favorably to the solicitor.”⁷⁴ When judges in Georgia and Michigan asked if they could chair fund-raising committees for their churches as long as they did not personally ask for money, both were told no.⁷⁵

At its most extreme, the ban is interpreted to prevent judges from holding positions that traditionally, though not necessarily, involve fund-raising. Kansas does not allow full-time judges to serve as part-time pastors, in part because “[i]nherent among the duties of a pastor is participating in the financial affairs of his church.”⁷⁶ In Maryland, a judge was instructed not to serve as church treasurer because it “might well support the notion that the prestige of the judicial office was being used to promote the financial welfare of the church.”⁷⁷ Finally, a Florida opinion barred a judge from serving as a regional president, national youth commissioner, or vice chairman of the fund-raising cabinet for a national Jewish organization, B’Nai B’rith.⁷⁸ Although the judge said that he would not personally solicit funds, the Committee felt he would “nonetheless be appearing at fund-raising functions and lending the prestige of the judicial office to

⁷⁰ Tex. Comm. on Judicial Ethics, Op. 165 (1993), *available at* <http://www.courts.state.tx.us/judethics/161-170.htm>; *see also* McKoski, *supra* note 2, at 812 (citing two opinions that judges may not solicit donations outside their jurisdictions).

⁷¹ S.C. Advisory Comm. on Standards of Judicial Conduct, Op. 16-1995 (1995), *available at* <http://www.judicial.state.sc.us/advisoryOpinions/displayadvopin.cfm?advOpinNo=16-1995>.

⁷² *Id.*

⁷³ S.C. Advisory Comm. on Standards of Judicial Conduct, Op. 26-2000 (2000), *available at* <http://www.judicial.state.sc.us/advisoryOpinions/displayadvopin.cfm?advOpinNo=26-2000>.

⁷⁴ *Id.*

⁷⁵ Ga. Judicial Qualifications Comm’n, Op. 17 (1977); Mich. Judicial Tenure Comm., Op. CI-641 (1981), *available at* http://michbar.org/opinions/ethics/numbered_opinions/ci-641.html.

⁷⁶ Kan. Judicial Ethics Advisory Panel, Op. JE-25 (1988), *available at* <http://www.kscourts.org/pdf/ClerkCt/JE25.pdf>.

⁷⁷ Md. Judicial Ethics Comm., Op. 1975-10 (1975), *available at* <http://mdcourts.gov/ethics/opinions/1970s/1975-10.pdf>.

⁷⁸ Fla. Comm. on Standards of Conduct Governing Judges, Op. 85-4 (1985), *available at* <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/eighty5/85-04.html>. *But see* Fla. Comm. on Standards of Conduct Governing Judges, Op. 85-11 (1985), *available at* <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/eighty5/85-11.html> (reversing the Committee’s previous position as to national youth commissioner after receiving further information on the nature of the post).

those activities.”⁷⁹ A Texas judge encountered a similar rationale when he was denied permission to serve on the development committee for a new parish school.⁸⁰

In virtually all cases, the ban on solicitation is an unconstitutional restriction on the religious liberty of judges for two main reasons: (1) the strict interpretation of the rule does not serve the purposes behind the rule;⁸¹ and (2) permitting judges to fund-raise for law-related, non-profit organizations or their own election campaigns, but preventing them from fund-raising for other non-profits, does not stand up to scrutiny.

The ban on charitable solicitation arises from two reasonable concerns: “that potential donors either may be intimidated into making contributions when solicited by a judge, or that they may expect future favors in return for their largesse.”⁸² However, as the Indiana Commission on Judicial Qualifications has concluded, in practice, the ban on charitable solicitation is “overly restrictive and unrelated to the dangers the rule is meant to address.”⁸³ This is also the considered judgment of the authors of the leading treatise in this area:

The advisory opinions evince a strong consensus in favor of a strict interpretation of the anti-solicitation rule In none of these or dozens of similar cases, does there appear to be a realistic possibility that the proposed activity actually would have exerted undue influence over potential donors. A judge who appeared on a telethon simply would have no way of knowing who had or hadn't . . . contributed to the cause; the same may be said of a national mail campaign to erect a memorial to John Marshall. In both of these instances the ‘solicitation’ would be made under circumstances sufficiently anonymous as to preclude any hint of retribution or reward. Conversely, in the church canvass and Boy Scout board situation, the solicitations would have been made not to the general public, but to a small number of like-minded people who had

⁷⁹ See Fla. Comm. on Standards of Conduct Governing Judges, Op. 85-4 (1985), available at <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jecopinions/eighty5/85-04.html>.

⁸⁰ Tex. Comm. on Judicial Ethics, Op. 25 (1977), available at <http://www.courts.state.tx.us/judethics/21-30.htm>.

⁸¹ See Int'l Ass'n of Firefighters, Local 3233 v. Frenchtown Charter Twp., 246 F. Supp. 2d 734, 743 (E.D. Mich. 2003) (“[N]ot only does Frenchtown fail to show that its interests would be compromised without its restrictions, but the poor fit between its restrictions and its asserted interests put in doubt the justificatory force those interests provide for the restrictions.”).

⁸² STEVEN LUBET, BEYOND REPROACH: ETHICAL RESTRICTIONS ON THE EXTRAJUDICIAL ACTIVITIES OF STATE AND FEDERAL JUDGES 29 (1984); see McKoski, *supra* note 2, at 781–82 nn.59–62 (collecting authorities). A tertiary concern is the public's perception of the judiciary, but this too is not served by a restrictive rule against fund-raising. *Id.* at 818.

⁸³ Ind. Comm'n on Judicial Qualification, Op. 1-96 (1996).

already indicated their willingness to support the particular cause. These are not situations in which the judicial office is likely to play a determining role in the decision to contribute, but solicitation was nonetheless considered improper.⁸⁴

As this passage indicates, the anti-solicitation rule has been consistently applied in circumstances where the concerns that motivated the rule's passage are not operative.⁸⁵ Judge Jeff Sutton's statement for the U.S. Court of Appeals for the Sixth Circuit, regarding a ban on personal campaign fund-raising by judges, rings just as true for charitable fund-raising:

[T]he canon prohibits a range of other solicitations, including speeches to large groups and signed mass mailings. Such indirect methods of solicitation present little or no risk of undue pressure or the appearance of a quid pro quo. No one could reasonably believe that a failure to respond to a signed mass mailing asking for donations would result in unfair treatment in future dealings with the judge. Nor would a speech requesting donations from a large gathering have a 'coercive effect' on reasonable attendees.⁸⁶

Though it is certainly the prerogative of legislative bodies to pass laws that are sometimes overinclusive, as a general matter, they may not pass laws whose overinclusivity infringes on constitutional rights.⁸⁷

Just as the rule is overinclusive by banning speech that is unconnected to the concerns that motivate the rule, the code is underinclusive because it permits other types of fund-raising.⁸⁸ Judges are allowed to engage in more fund-raising for law-related organizations than they are for other types of charities, including religious ones.⁸⁹

⁸⁴ JAMES ALFINI ET AL., *JUDICIAL CONDUCT AND ETHICS* § 9.04A (4th ed. 2007).

⁸⁵ See McKoski, *supra* note 2, at 792 ("Overall, however, the new Code persists in retaining fund-raising restrictions that do not advance the state's interest in preventing the collateral misuse of judicial power and prestige.").

⁸⁶ Carey v. Wolnitzek, 614 F.3d 189, 205 (6th Cir. 2010).

⁸⁷ See Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2422 (1996) ("No Overinclusiveness: A law is not narrowly tailored if it restricts a significant amount of speech that doesn't implicate the government interest. The theory here is that if the government can serve the interest while burdening less speech, it should.") (emphasis omitted) (citing *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 120–21 (1991); *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 500–01 (1985); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 794 (1978)).

⁸⁸ MODEL CODE OF JUDICIAL CONDUCT, R. 3.7 (2007).

⁸⁹ *Id.*; see Ala. Judicial Inquiry Comm'n, Op. 09-899 (2009), available at <http://www.alalinc.net/jic/opinions/ao09-899.htm> (permitting a judge to donate art to a State Bar auction);

Moreover, state judges who are elected are also permitted to raise funds for their campaigns, either directly or through campaign committees.⁹⁰

Compared to the 1990 Code, the 2007 ABA Model Rules “dramatically enlarg[ed] the permissible scope of a judge’s role in fund-raising activities sponsored by law-related groups.”⁹¹ At the same time, however, the 2007 Rules impose greater restrictions on judges’ ability to support non-legal non-profit organizations: “[T]he 1990 Code permitted a judge to solicit non-judges to join law-related and non-law-related groups so long as the solicitation was not coercive, not primarily a fund-raising mechanism, and the person solicited was not likely to appear before the judge.”⁹² Under the 2007 Rules, however, judges are allowed to recruit new members to only law-related organizations.⁹³

The Alabama Judicial Inquiry Commission, summarizing the Reporters’ Notes to the 2009 code, argues that

a judge’s solicitation of membership in law-related organizations, such as a bar association, would be perceived by the public as more natural or more appropriate than solicitation of membership in nonlaw-related organizations, such as an opera society or a charity; only in the latter context does the judge’s solicitation constitute coercion and an abuse of the prestige of the office[.]⁹⁴

This statement does not explain *why* a judge’s solicitation of membership in the bar association is any less coercive than membership in an opera society. In fact, it may be *more* coercive, because lawyers and law firms are far more likely to appear before the judge than the judge’s friends and neighbors.⁹⁵ Second, it ignores the fact that bar

Nev. Standing Comm. on Judicial Ethics and Election Practices, Amended Op. JE00-004 (2000), available at <http://judicial.state.nv.us/je000043new.htm> (stating that the Nevada Code “has been amended to allow a judge to assist a law-related organization in fund-raising”).

⁹⁰ MODEL CODE OF JUDICIAL CONDUCT, R. 4.4 (2007).

⁹¹ McKoski, *supra* note 2, at 794.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Ala. Judicial Inquiry Comm’n, Op. 09-899 (2009), available at <http://www.alalinc.net/jic/opinions/ao09-899.htm> (summarizing CHARLES E. GEYH & W. WILLIAM HODES, REPORTERS’ NOTES TO THE CODE OF JUDICIAL CONDUCT 69–70 (2009)).

⁹⁵ McKoski, *supra* note 2, at 819:

The first task in assessing the legitimacy of the distinction between law-related and all other types of charitable fund-raisers is to determine in which type of event it is more likely that a judge could—in actuality or in perception—misuse the prestige of judicial office, to intimidate, coerce, or influence a potential donor. Is it a bar association or other law-related gathering where the targeted donors are often almost exclusively attorneys, many of whom have appeared or may appear before the judge? Or is it the event of an organization like a church, college, or cause-driven

associations often take very controversial positions on matters of public policy, such as the right to abortion, the right to same-sex marriage, and the war on terror.⁹⁶ Soliciting attorneys to join a bar association that takes strong and divisive stands on such matters may be more of an abuse of the prestige of the judicial office than soliciting a friend or neighbor to join a cultural organization, like the opera.⁹⁷

In addition to permitting judges to solicit memberships for law-related organizations, the Code also permits a judge's campaign committee to raise money to benefit the judge's campaign.⁹⁸ Though the rules bar the judge from making a personal appeal for funds, this current system is under significant attack because it does not achieve the two motivations of such rules.⁹⁹ First, most lay people do not distinguish between the judge's campaign committee and the judge.¹⁰⁰ Second, the judge can find out who is supporting his campaign by reading the committee's campaign finance

charity where few potential ticket purchasers are lawyers and most contributors have very little likelihood of coming before the judge? Of course, the greatest pressure is on attorneys whose livelihood may depend on their success in court.

⁹⁶ Dennis Jacobs, *The Secret Life of Judges*, 75 *FORDHAM L. REV.* 2855, 2860 (2007) (“[B]ar groups are highly political. The ABA has formally adopted and announced hundreds of positions on virtually every issue in political dispute.”); Josh Gerstein, *Right Sees Law Group Tilting Left*, *POLITICO* (Sept. 25, 2010 6:14 PM), <http://www.politico.com/news/stories/0910/42709.html> (reporting that the ABA adopted a position in favor of same-sex marriage and filed an amicus brief in opposition to Arizona's immigration law); *cf.* U.S. Judicial Conference Comm. on Codes of Conduct, Advisory Op. No. 82 (2009), *available at* <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02B-Ch02.pdf> (“The judge should not join an organization if the judge perceives there is any other ethical obligation that would preclude such membership. For example, if the organization takes public positions on controversial topics, association with the group might raise a reasonable question regarding the judge's impartiality.”).

⁹⁷ Incidentally, federal judges are permitted by the Code of Conduct for U.S. judges to solicit memberships (but not funds) for non-profit organizations whether or not they are related to the law. U.S. Judicial Conference Comm. on Codes of Conduct, Advisory Op. 35 (2009), *available at* <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02B-Ch02.pdf>, *citing* Canon 4C (“A judge should not personally participate in a membership solicitation if the solicitation might reasonably be perceived as coercive or is essentially a fund-raising mechanism.”). Moreover, several states do not make a distinction between legal and non-legal groups in permitting judges to speak or receive awards from a non-profit at a fund-raising dinner. McKoski, *supra* note 2, at 820 (citing rules in California, Illinois, Indiana, Ohio, and Texas).

⁹⁸ MODEL CODE OF JUDICIAL CONDUCT, R. 4.4 (2007) (regarding campaign committees); *id.* at R. 4.1(A)(8) (2007) (barring judges from personally soliciting contributions to support their campaign committees).

⁹⁹ *See* LUBET, *supra* note 82; McKoski, *supra* note 2, at 781–82 (identifying the two motives).

¹⁰⁰ McKoski, *supra* note 2, at 772, (citing Charles F. Scott, *Reconciling Conflicts in Illinois Judicial Ethics*, 19 *LOY. U. CHI. L.J.* 1067, 1072 (1987)).

reports, and donors may give assuming the judge reads his committee's reports.¹⁰¹ Increasingly, judges are permitted to directly solicit campaign funds.¹⁰² If judges can personally recruit members for law-related organizations and can personally raise funds for their campaigns, then they should also be able to recruit members and raise funds for charitable causes.¹⁰³

Finally, it may be that reform of the solicitation rules would lead to *greater* public confidence in the judiciary. People respect judges when they see them involved in the community, supporting worthy causes. If judges are allowed to take a more active part in the religious life of their communities, it may result in a higher level of esteem for judges as leaders who care about people.

Because this current broad ban on solicitation infringes on the constitutional rights of judges, it prompts the obvious question: what should the rule be instead? I suggest

¹⁰¹ Richard Briffault, *Judicial Campaign Codes after Republican Party of Minnesota v. White*, 153 U. PA. L. REV. 181, 226–27 (2004).

¹⁰² This is due, in large part, to court decisions stating that they have a constitutional right to do so. *See* Wersal v. Sexton, 613 F.3d 821, 838–41 (8th Cir. 2010) (striking down Minnesota's solicitation clause, which was amended following the 2005 en banc *White II* decision); *Carey v. Wolnitzek*, 614 F.3d 189, 204–07 (6th Cir. 2010); *Republican Party of Minn. v. White*, 416 F.3d 738, 763–66 (8th Cir. 2005) (en banc); *Weaver v. Bonner*, 309 F.3d 1312, 1322–23 (11th Cir. 2002); *Yost v. Stout*, No. 06-4122-JAR, 2008 U.S. Dist. LEXIS 107557, at * 36–37 (D. Kan., Nov. 16, 2008), *appeal dismissed on jurisdictional grounds*, 607 F.3d 1239 (10th Cir. 2010); *see also* Siefert v. Alexander, 597 F. Supp. 2d 860, 886–89 (W.D. Wis. 2009), *rev'd*, 608 F.3d 974, 988–90 (7th Cir. 2010) (district court struck down a solicitation clause); N.C. Code of Judicial Conduct Canon 7B(4), *available at* <http://www.nccourts.org/Courts/CRS/Councils/JudicialStandards/Documents/Amendments-NCJudicialCode.pdf> (2004) (permitting personal solicitation); Mark Spottswood, *Free Speech and Due Process Problems in the Regulation and Financing of Judicial Election Campaigns*, 101 NW. U. L. REV. 331, 350–53 (2007) (arguing that bans on personal solicitation are unconstitutional); Nat Stern, *The Looming Collapse of Restrictions on Judicial Campaign Speech*, 38 SETON HALL L. REV. 63, 128–29 (2008) (same). *But see* *Bauer v. Shepard*, 620 F.3d 704, 709–10 (7th Cir. 2010) (upholding a solicitation clause); *Siefert v. Alexander*, 608 F.3d 974, 988–90 (7th Cir. 2010); *Republican Party of Minn. v. White*, 361 F.3d 1035, 1048–49 (8th Cir. 2004), *rev'd en banc*, 416 F.3d 738, 763–66 (8th Cir. 2005) (panel opinion upheld solicitation clause); *Stretton v. Disciplinary Bd. of the Sup. Ct. of Pa.*, 944 F.2d 137, 144–46 (3d Cir. 1991) (upholding a solicitation clause pre-*White I*); *Winnig v. Sellen*, No. 10-cv-362-wmc, 2010 WL 4116977 at *3 (W.D. Wis., Oct. 19, 2010); *In re Dunleavy*, 838 A.2d 338, 349–51 (Me. 2003), *cert. denied*, 541 U.S. 960 (2004); *In re Fadeley*, 802 P.2d 31, 41–44 (Or. 1990); Alexandra Haskell Young, Note, *The First Chink in the Armor? The Constitutionality of State Laws Burdening Judicial Candidates after Republican Party of Minnesota v. White*, 77 S. CAL. L. REV. 433, 476–78 (2004) (arguing that a solicitation clause is constitutional).

¹⁰³ Admittedly, campaign fund-raising is subject to strict scrutiny under *White*, while charitable fund-raising is subject to the test from *NTEU*. *See supra* text accompanying notes 55–62. However, as I explain later, the *NTEU* test sets a heavy burden for the government. *See infra* text accompanying notes 185–96. In fact, one circuit has characterized *NTEU* as setting a strict scrutiny test. *Crue v. Aiken*, 370 F.3d 668 (7th Cir. 2004). Moreover, campaign fund-raising is much more likely than charitable fund-raising to undermine the public's confidence in the judiciary because it benefits the judge personally rather than the community-at-large.

that another provision of the ABA's Model Code provides a good starting point.¹⁰⁴ The ABA Model Code allows judges to accept a number of gifts without reporting such acceptance, from items with little intrinsic value to books and journals provided on a complimentary basis.¹⁰⁵ The Rules also permit judges to accept "gifts, loans, bequest, benefits, or other things of value, if the source is a party or other person, including a lawyer, who has come or is likely to come before the judge, or whose interests have come or are likely to come before the judge."¹⁰⁶ In such cases, judges are required annually to publicly report these gifts to the clerk of the court.¹⁰⁷

A similar formulation could work well in the charitable solicitation realm. Judges could engage in personal solicitation of charitable contributions from any person or entity that is not before, or is not likely to come before, the judge, or whose interests are not before, or are not likely to come before, the judge. Such a limit, if preceded by a general admonition against soliciting charitable contributions in a manner that undermines the integrity or public reputation of the judiciary, would achieve the two goals of the rule while allowing judges freedom to otherwise act as leaders in their communities. It would, in other words, "give the members of the judiciary every reasonable degree of latitude, barring activities only where they do measurable damage to the Court's dignity . . . or appearance of impartiality."¹⁰⁸

B. Politics and Partiality

Though the rule regarding fund-raising solicitation and abuse of the judicial office is the primary source of limitations on judicial religious activity, other rules have also been interpreted to limit a judge's opportunities to live out his faith.¹⁰⁹ This Section

¹⁰⁴ Here, I am picking up on an observation made by Judge McKoski. *See* McKoski, *supra* note 2, at 773 n.21 (contrasting the Model Code rule on gifts with the rule on charitable solicitation).

¹⁰⁵ MODEL CODE OF JUDICIAL CONDUCT, R. 3.13(B) (2007).

¹⁰⁶ *Id.* at R. 3.13(C)(3). Judicial reception of gifts is still limited by a general ban on gifts which "would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality." *Id.* at R. 3.13(A).

¹⁰⁷ *Id.* at R. 3.15.

¹⁰⁸ ALFINI, ET AL., *supra* note 84, at § 10.03D. Another way to deal with this could be a dollar amount threshold for fund-raising, equivalent to the contribution limit for statewide judicial office for instance.

¹⁰⁹ For instance, Maryland initially barred judges from serving as officers in ecclesiastical proceedings, such as annulments of marriage under canon law. Md. Judicial Ethics Comm., Op. 1986-08 (1986) (citing Md. Judicial Ethics Comm., Op. 1973-08 (1973)), *available at* <http://www.courts.state.md.us/ethics/opinions/1980s/1986-08.pdf>. More than a decade later, that opinion was withdrawn, and Maryland now permits its judges to engage in an "ecclesiastical proceeding [because it] is totally independent of the civil proceeding" for divorce. Md. Judicial Ethics Comm., Op. 1986-08 (1986), *available at* <http://www.courts.state.md.us/ethics/opinions/1980s/1986-08.pdf>. The only other opinion on the matter has also concluded that judges may participate in proceedings under ecclesiastical law. Ala. Judicial Inquiry Comm'n, Op. 91-412

focuses on two areas of judicial ethics that have justified limits on religious activity in the past: politics and partiality.

One line that all state judges must tread carefully lies between the judicial role and partisan politics and public issues.¹¹⁰ Some state judges are appointed on a theoretically non-partisan merit basis, while others are elected statewide on a non-partisan or partisan ballot.¹¹¹ Yet given this reality, judicial ethics codes generally prohibit judges from engaging in “political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary.”¹¹² This has been extended to also limit the ability of judges to speak publicly on issues under judicial consideration; a judge shall not, “in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.”¹¹³

Some judicial ethics opinions have cautioned judges against involvement in religious organizations that also take positions on public policy issues.¹¹⁴ An opinion of the Delaware Judicial Ethics Committee, for instance, permitted a judge to serve as a church trustee, but “cautioned [judges] about service on boards of organizations which may make policy decisions that could have political significance or imply commitment to causes that may come before the courts for adjudication.”¹¹⁵ Similarly, the

(1991), *available at* <http://www.alalinc.net/jic/opinions/ao91-412.htm> (finding that a judge’s service on the Synod Permanent Judicial Committee of the Presbyterian Church (USA) is permitted because the Committee does not “concern any secular legal issues”).

¹¹⁰ See MODEL CODE OF JUDICIAL CONDUCT, Canon 4 (2007).

¹¹¹ See *Initial Selection: Courts of Last Resort*, AMERICAN JUDICATURE SOCIETY, http://www.judicialselection.us/uploads/documents/LastResort_1196092722031.pdf (last visited Oct. 10, 2011).

¹¹² MODEL CODE OF JUDICIAL CONDUCT, Canon 4 (2007).

¹¹³ *Id.* at R. 4.1(13).

¹¹⁴ See U.S. Judicial Conference Comm. on Codes of Conduct, Op. 2 (2009), *available at* <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02B-Ch02.pdf> (“The judge should not serve on the board of a nonprofit organization if the judge perceives there is any other ethical obligation that would preclude such service. For example, if the organization takes public positions on controversial topics, association with the group might raise a reasonable question regarding the judge’s impartiality.”); U.S. Judicial Conference Comm. on Codes of Conduct, Op. 82 (2009), *available at* <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02B-Ch02.pdf> (referring to membership in such organizations); Va. Judicial Ethics Advisory Comm., Op. 08-1 (2008) (withdrawn, Feb. 17, 2010), *available at* <http://worldcat.org/arcviewer/2/LEGAL/2009/12/15/H1260908502256/viewer/file1.html> (“Religious organizations are far different from other organizations in which judges might become involved, such as neighborhood associations, softball leagues or youth organizations, in the sense that many religious organizations either publicly expound upon, or are publicly associated with, certain positions on controversial issues. . . . Those issues may include, for example, abortion, appropriate child placement environment, and criminal sentencing considerations.”).

¹¹⁵ Del. Judicial Ethics Comm., Op. 1987-1 (1987), *available at* <http://courts.delaware.gov/jec/opns/87-1.pdf>.

New York committee permitted a judge to serve as an officer of the Jewish Attorneys Society, but the members reminded the judge of the code provision requiring him to “regulate his extra-judicial activities to minimize the risk of conflict with his judicial duties, especially those relating to political or quasi-political activities or issues.”¹¹⁶ In an opinion for the Florida advisory committee, two members *sua sponte* cautioned a judge who was active in the Jewish organization B’Nai B’rith that there was a potential problem with “possible political implications of your activities.”¹¹⁷ In two additional Florida cases concerning B’Nai B’rith, a concurring and a dissenting opinion argued that the judges should decline leadership positions in the organization due to its political activities.¹¹⁸ A Pennsylvania opinion stated that a judge could not be an officer in a religious organization that issued a public statement opposing abortion.¹¹⁹ The opinion further stated that the judge could only be a member of the organization by having the public statement list those who agreed, excluding the judge, or list the judge as having not participated in the decision to make the statement.¹²⁰ Likewise, an Illinois opinion stated that a judge could not serve as president of a prison ministry organization because it “takes a clear political stand by opposing the death penalty and demonstrating against its imposition by holding prayer vigils.”¹²¹ One of the committee’s rationales was that “judges swear they shall uphold state laws,” and that demonstrating or speaking against the death penalty law “would breach . . . the Code of Judicial Conduct, which requires a judge to ‘respect and comply with the law’ and act ‘at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.’”¹²² Under this reasoning, judges would be barred from leading *any* organization, religious or not, which publicly supports *any* change to existing state law.

¹¹⁶ N.Y. Judicial Ethics Comm., Op. 88-18 (1988), *available at* <http://www.nycourts.gov/ip/judicialethics/opinions/88-18.htm>.

¹¹⁷ Fla. Comm. on Standards of Conduct Governing Judges, Op. 85/11 (1985), *available at* <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/eighty5/85-11.html>.

¹¹⁸ One Florida opinion concerned a judge who wished to serve as chairman of the Anti-Defamation League of B’Nai B’rith’s Florida regional board. One member dissented because he believed the ADL “has a national image for political activism.” Fla. Comm. on Standards of Conduct Governing Judges, Op. 75-26 (1975), *available at* <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/svnt5/75-26.html>. The second Florida opinion concerned a judge who wished to serve as Southeastern U.S. regional president of B’Nai B’rith. One member of the ethics panel opined that the judge should decline to serve “based on the difficulty of separating your distinguished status as judge from the . . . political activities of that organization.” Fla. Comm. on Standards of Conduct Governing Judges, Op. 85-4 (1985), *available at* <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/eighty5/85-04.html>.

¹¹⁹ Pa. Judicial Ethics Comm., Informal Op. 12/3/99 (1999).

¹²⁰ *Id.*

¹²¹ Ill. Judicial Ethics Comm., Op. 93-7 (1993), *available at* <http://www.ija.org/ethicsop/opinions/93-7.htm>.

¹²² *Id.*

Though these sorts of concerns have been limited thus far to a few states, the potential impact of such an interpretation could be significant. Many churches are active where religious and moral convictions intersect with public policy, from peace and poverty to abortion and marriage. This sort of position-taking by churches is protected speech and free exercise under the First Amendment.¹²³ Thus, if the ethics rules prohibit judges from being members of churches or denominations that take positions on public policy, virtually every church in America would be off-limits.

Before reaching the constitutional issue, the first question to ask in these instances is whether the judges have actually violated the ethics rules or whether “the ethics establishment” has interpreted the rules more broadly than the text justifies.¹²⁴ Canon 4 of the Model Code of Judicial Conduct prohibits “political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary.”¹²⁵ That canon, however, is not legally binding; it is merely an “overarching principle” that should guide interpretation of the rules.¹²⁶ There is a binding rule against being a “leader” or “hold[ing] an office” in a “political organization.”¹²⁷ A “political organization” is defined by the Code as “a political party or other group sponsored by or affiliated with a political party or candidate, the principal purpose of which is to further the election or appointment of candidates for political office.”¹²⁸ None of the organizations discussed in the judicial ethics opinions above are “political organizations” under this definition.

Thus, other than general admonition against the appearance of impropriety, all that is left is the rule that “a judge . . . shall not . . . in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.”¹²⁹ If this rule is constitutional,¹³⁰ then it is only so when narrowly

¹²³ *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 670 (1969) (“Adherents of particular faiths and individual churches frequently take strong positions on public issues including, as this case reveals in the several briefs *amici*, vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right.”).

¹²⁴ The phrase “the ethics establishment” and the idea of an overzealous, self-righteous, and often self-appointed class of ethics enforcers comes from PETER W. MORGAN & GLENN H. REYNOLDS, *THE APPEARANCE OF IMPROPRIETY: HOW THE ETHICS WARS HAVE UNDERMINED AMERICAN GOVERNMENT, BUSINESS AND SOCIETY* (1997).

¹²⁵ MODEL CODE OF JUDICIAL CONDUCT, Canon 4 (2007).

¹²⁶ *Id.* at Scope [2].

¹²⁷ *Id.* at R. 4.1(A)(1).

¹²⁸ *Id.* at Terminology.

¹²⁹ *Id.* at R. 4.1(A)(13).

¹³⁰ Two federal district courts believe it is not. *N.D. Family Alliance v. Bader*, 361 F. Supp. 2d 1021, 1044 (D.N.D. 2005); *Family Trust Found. of Ky. v. Wolnitzek*, 345 F. Supp. 2d 672, 711 (E.D. Ky. 2004); *see also In re Hey*, 452 S.E.2d 24, 33 (W.Va. 1994) (“It is difficult to comprehend how truthful remarks or statements of opinion by a judge about a matter . . . unrelated to a matter before him, or likely to come before him, and which is not otherwise specifically prohibited can ever create the appearance of impropriety.”).

construed.¹³¹ Certainly, there are some instances where a judge's participation in a religious organization may commit him on an issue, for instance, if a state deputy of the Knights of Columbus were quoted in a press release on the anniversary of *Roe v. Wade*. Even then, though, such a commitment may not be "inconsistent with the impartial performance of the adjudicative duties of judicial office."¹³² In cases where such a judge could feel that he would be violating the rule, in virtually every instance there is an accommodation that would allow the judge to hold the post without committing a violation. To continue my example, this could be achieved by having a different state-wide officer of the Knights of Columbus quoted in the press release.¹³³ Such a case-by-case accommodation is far preferable to having an ethics board force the judge out of the leadership post entirely.

Another way that judges' activity may be limited is a ruling that the judge's religious affiliation or activity may give the appearance of partiality towards litigants. Only one opinion, from the Judicial Ethics Advisory Panel of Kansas, has drawn on this rationale to limit a judge's religious activities.¹³⁴ A candidate for magistrate judge asked whether he may be the "regularly employed weekend pastor of a church."¹³⁵ In that position, he would preach on weekends and perform occasional pastoral duties, such as visiting hospitalized parishioners.¹³⁶ The panel decided that the magistrate could not serve as a weekend minister for three primary reasons.¹³⁷ The panel members' first reason for that decision was based on the fear that "the appearance to a litigant or lawyer member of a denomination other than that of the minister-judge could well

¹³¹ *Bauer v. Shepard*, 620 F.3d 704, 715 (7th Cir. 2010); *Pa. Family Inst. v. Celluci*, 521 F. Supp. 2d 351, 372 (E.D. Pa. 2007); *Duwe v. Alexander*, 490 F. Supp. 2d 968, 975 (W.D. Wis. 2007).

¹³² MODEL CODE OF JUDICIAL CONDUCT, R. 4.1(A)(13) (2007). By comparison, judges announce how they would rule in future cases in opinions from time to time. *See, e.g.*, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 944 (1992) (Rehnquist, C.J., dissenting) ("We believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases."); *see also* *Republican Party of Minn. v. White*, 536 U.S. 765, 777–78 (2002) ("A judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law. . . . Indeed, even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so.").

¹³³ *See* Ill. Judicial Ethics Comm., Op. 96-4 (1996), *available at* <http://ija.org/ethicsop/opinions/96-4.htm> (permitting a judge to serve as president of a church, temple, or mosque, provided that another member of the church will make the request for donations even though that is traditionally the job of the president).

¹³⁴ Kan. Judicial Ethics Advisory Panel, Op. JE-25 (1988), *available at* <http://www.kscourts.org/pdf/ClerkCt/JE25.pdf>.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

create a feeling of being disadvantaged.”¹³⁸ On these and other grounds,¹³⁹ the panel denied the judge’s request.¹⁴⁰ This opinion is an outlier among the relevant opinions, as only one other opinion has cautioned judges against religious activity based on the appearance of partiality towards members of the judge’s church or against those who do not belong to the judge’s church.¹⁴¹ An extensive literature has discussed the duty

¹³⁸ *Id.*

¹³⁹ The panel gave two additional reasons. First, “[i]nherent [in] the duties of a pastor is participating in the financial affairs of his church,” and this would collide with the ban on solicitation. *Id.* Second, they felt that there would be an “inevitable” conflict for “time and loyalty” between “his duties as a pastor and his duties as a judge.” *Id.* Setting aside the arguments given above against application of the solicitation ban, a church can arrange its internal affairs so that members and leaders other than the pastor/judge can discuss stewardship and request tithes and offerings. See Ill. Judicial Ethics Comm., Op. 96-4 (1996) (permitting a judge to serve as president of a church, temple, or mosque, provided that another member of the church will make the request for donations even though that is traditionally the job of the president). Moreover, it is not inevitable that there will be a conflict over the judge’s time—plenty of judges engage in a wide variety of weekend activities without neglecting their judicial day job. The committee should have allowed the judge to go forward with his weekend activities, and his fellow judges, or others, could raise the question if it, in fact, began to interfere with his day job. See S.C. Advisory Comm. on Standards of Judicial Conduct, Op. 4-2008 (2008), available at <http://www.judicial.state.sc.us/advisoryOpinions/displayadvopin.cfm?advOpinNo=04-2008> (permitting a full-time magistrate to serve as a part-time pastor, so long as it does not “require significant time away from the magistrate’s judicial duties”).

¹⁴⁰ Kan. Judicial Ethics Advisory Panel, Op. JE-25 (1988), available at <http://www.kscourts.org/pdf/ClerkCt/JE25.pdf>.

¹⁴¹ Wis. Judicial Conduct Advisory Comm., Op. 99-2 (1999), available at <http://www.wicourts.gov/sc/judcond/DisplayDocument.pdf?content=pdf&seqNo=883> (“The committee recognizes that the judge’s participation in a Christian oriented production may be seen as indicative of bias or prejudice on religious issues. This is a factor that a judge should carefully consider before engaging in religious oriented conduct that may be observed by the public.”). One additional opinion that has since been withdrawn also took this tack. Va. Judicial Ethics Advisory Comm., Op. 08-1 (2008) (withdrawn, Feb. 17, 2010) (“[T]he judge scrupulously [should] avoid situations . . . that create the reasonable impression that the judge will be less than totally impartial when dealing with anyone who might appear before him in a judicial capacity, no matter that person’s religious affiliation or lack thereof.”). Were it not withdrawn, this Virginia opinion would replace the Kansas opinion as the extreme outlier for restrictions on the religious liberty of judges. It prohibits the judge from serving as a speaker or guest of honor at a religious service that takes a special collection for the building fund or calls for participants “to pledge future contributions of a certain level,” as is done on an annual “Stewardship Sunday” when tithing is discussed. *Id.* It cautions judges against giving public testimony that urges a large gathering “to become a Christian or a member of a particular local church body” *Id.* (quoting the opinion request). It prohibits a judge from acting as a pastor or minister at a regular church service, and it contains general words of caution against any public activity that may “create the reasonable impression that the judge will be less than totally impartial.” *Id.* The opinion was adopted on a 5-4 vote by the Committee, and was withdrawn less than two years after its issuance. *Id.* According to the Committee’s web page, the members are “considering whether

of judges to set aside religious sentiments on the bench,¹⁴² and though this usually focuses on the issues contested in a case, it also includes the religious affiliations of the parties before the judge.¹⁴³

In addition to these explicitly religious cases, the intersection of the Boy Scouts of America with the judicial ethics establishment provides a cautionary tale to churches about the way these clauses can be used. Generally, judicial membership in organizations is governed by Rule 3.6 of the ABA's Model Code of Judicial Conduct, which provides, "[a] judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation."¹⁴⁴ The Commentary to the Rule specifically states that "[a] judge's membership in a religious organization as a lawful exercise of the freedom of religion is not a violation of this Rule."¹⁴⁵ Based on this specific exemption, one would normally conclude that judges may fully participate in religious organizations that reserve leadership positions for only men, or that condemn homosexuality on moral grounds and refuse to extend leadership positions or marriage rites to actively homosexual persons.

This guarantee in the Commentary, however, may not be sufficient protection, as the Boy Scouts have learned the hard way. Just as religious organizations have a specific exemption, no ethics opinion has found that the Boy Scouts engage in invidious discrimination on the basis of sexual orientation.¹⁴⁶ Two opinions, however, have gone

to issue a revised opinion." Va. Judicial Ethics Advisory Comm. Ops., available at <http://www.courts.state.va.us/agencies/jirc/opinions.html> (last visited Oct. 10, 2011).

¹⁴² See, e.g., Scott Idleman, *Private Conscience, Public Duties: The Unavoidable Conflicts Facing a Catholic Judge*, 4 ST. THOMAS L. REV. 312, 313 nn.5–6 (2006) (citing articles discussing faith and judicial duty); Diarmuid F. O'Scannlain, *Must a Faithful Judge Be a Faithless Judge?*, 4 ST. THOMAS L. REV. 157, 158 (2006); Antonin Scalia, *God's Justice and Ours*, FIRST THINGS (May 2002), available at <http://www.firstthings.com/article/2007/01/gods-justice-and-ours-32>.

¹⁴³ See e.g., Carl Zollman, *Religious Liberty in the American Law, II.*, 17 MICH. L. REV. 456, 463 (1919).

¹⁴⁴ MODEL CODE OF JUDICIAL CONDUCT, R. 3.6 (A) (2007).

¹⁴⁵ *Id.* at R. 3.6 Comment [4].

¹⁴⁶ Ariz. Judicial Ethics Advisory Comm., Op. 00-05 (2000), available at http://www.azcourts.gov/portals/37/ethics_opinions/2000/00-05-A.pdf (stating that involvement in the Boy Scouts is not proscribed by the invidious discrimination clause); Ariz. Judicial Ethics Advisory Comm., Op. 94-07 (1994), available at http://www.azcourts.gov/portals/37/ethics_opinions/1994/94-07.pdf; Del. Judicial Ethics Advisory Comm., Op. 2006-4 (2006), available at <http://courts.delaware.gov/jeac/opns/06-4.pdf>; Ind. Comm'n on Judicial Qualifications, Op. 1-94 (1994), available at <http://www.in.gov/judiciary/jud-qual/docs/adops/1-94.pdf>; Mass. Comm. on Judicial Ethics, Op. 01-1 (2001), available at <http://www.mass.gov/courts/sjc/cje/2001-1h.html>; Wash. Ethics Advisory Comm., Op. 04-01 (2004), available at http://www.courts.wa.gov/programs_orgs/pos_ethics/index. Texas' code does not have an invidious discrimination clause, but its ethics committee has held that membership in the Boy Scouts does not violate its impartiality clause. See Tex. Comm. on Judicial Ethics, Op. 158 (1993),

one step further, distinguishing membership in the Boy Scouts (governed by the invidious discrimination clause) and leadership (governed by the catch-all judicial impartiality clauses¹⁴⁷).¹⁴⁸ These opinions have barred judges from holding certain leadership positions in the Boy Scouts. Additionally, several authorities have said that mere membership, though not barred by the invidious discrimination clause, may require recusal in certain cases under the impartiality clause.¹⁴⁹ The distinction between leadership and membership and the use of recusal may be exploited in the future to limit the religious liberty of judges.

available at http://www.courts.state.tx.us/judethics/ISH60htmcfm?fa=pos_ethics_dispopin&mode=0401. *But see* Leslie W. Abramson, *Canon 2 of the Code of Judicial Conduct*, 79 MARQ. L. REV. 949, 987–88 (1996) (suggesting that the Boy Scouts may operate in violation of the Code as to gender); Jeff Bleich, *Fairness required on and off Bench*, CAL. BAR J. (March 2003), *available at* <http://archive.calbar.ca.gov/Archive.aspx?articleId=46230&categoryId=41219&month=3&year=2003> (stating that the Boy Scouts operate in violation of the invidious discrimination clause); *cf.* Ariz. Judicial Ethics Advisory Comm., Op. 94-13 (1994), *available at* http://www.azcourts.gov/portals/37/ethics_opinions/1994/94-13.pdf (stating that the committee was not presented with sufficient information to determine if the Tucson Arizona Boys Chorus or the Junior League of Tucson engaged in invidious discrimination in violation of the Code); Vt. Judicial Ethics Comm., Op. 2 (1997), *available at* <http://www.vermontjudiciary.org/JC/SharedDocuments/Opinion2.pdf> (stating that the committee was not presented with sufficient information to determine if the Boy Scouts engaged in invidious discrimination in violation of the Code).

¹⁴⁷ MODEL CODE OF JUDICIAL CONDUCT, R. 1.2 (2007) (“A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary.”); *id.* at R. 3.1(C) (“[W]hen engaging in extrajudicial activities, a judge shall not . . . participate in activities that would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality.”).

¹⁴⁸ Del. Judicial Ethics Advisory Comm., Op. 2006-4 (2006), *available at* <http://courts.delaware.gov/jeac/opns/06-4.pdf>; Wash. Ethics Advisory Comm., Op. 04-01 (2004), *available at* http://www.courts.wa.gov/programs_orgs/pos_ethics/index.cfm?fa=pos_ethics.dispopin&mode=0401. *But see* Mass. Comm. on Judicial Ethics, Op. 2001-1 (2001), *available at* <http://www.mass.gov/courts/sjc/cje/2001-1h.html> (stating that BSA membership is not barred by the invidious discrimination clause, and refusing to go “beyond our mandate to interpret another section of the Code of Judicial Conduct [namely, the impartiality clause] to mandate what the Court itself quite deliberately appears to have chosen not to do” when it did not list sexual orientation as a protected category in the invidious discrimination clause).

¹⁴⁹ Mass. Comm. on Judicial Ethics, 2000-7 (2000), *available at* <http://www.mass.gov/courts/sjc/cje/00-7h.html>; Wash. Ethics Advisory Comm., Op. 04-01 (2004), *available at* http://www.courts.wa.gov/programs_orgs/pos_ethics/index.cfm?fa=pos_ethics.dispopin&mode=0401; Press Release No. 37, Judicial Council of California, Supreme Court Takes Action on California Code Of Judicial Ethics (June 18, 2003), <http://www.courts.ca.gov/news2003-50.htm>. *But see* Del. Judicial Ethics Advisory Comm., Op. 2006-4 (2006), *available at* <http://courts.delaware.gov/jeac/opns/06-4.pdf> (deciding that judges do not need to disclose their membership in the Boy Scouts in cases where homosexual persons are present as parties or lawyers).

In a 2004 opinion, a bare four-vote majority of the State of Washington's Ethics Advisory Committee ordered that judges could not hold positions of leadership involved in policy and planning for the Boy Scouts.¹⁵⁰ The majority opinion first interpreted the state's invidious discrimination canon, which bars "membership in any organization practicing discrimination prohibited by law."¹⁵¹ Several municipalities in Washington bar discrimination based on sexual orientation, and the Committee said it expects judges to "conform their associations with organizations to the requirements of these local laws."¹⁵²

The Committee continued, however, and said that "[t]hese considerations do not end the inquiry."¹⁵³ It turned to Canon 2(A), which states that judges should "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary" and Canon 5(B), which provides that judges should not engage in civic and charitable activities that "reflect adversely upon their impartiality."¹⁵⁴ Based on these canons, the Committee barred judges from "a leadership role" in the regional council of the Scouts, which supervises activities at numerous troops in the area.¹⁵⁵ The Committee permitted judges to participate as leaders at the local troop level, where they would "not [be] actively involved in planning and implementing the national organization's policy excluding members based on their sexual orientation."¹⁵⁶ Even then, however, the inquiring judge was instructed to disqualify himself from cases "when doing so is appropriate" and to disclose his participation to the lawyers in any particular case where the parties "may consider it relevant."¹⁵⁷ Three members of the Committee dissented, although they also said that judges should disclose their affiliation and offer to withdraw from any cases where the parties may deem this information relevant.¹⁵⁸

Two years later, the Delaware Judicial Ethics Advisory Committee followed a very similar path in its opinion on this subject.¹⁵⁹ Like Washington, Delaware's Code barred judicial membership in organizations that engage in "any invidiously discriminatory membership practices prohibited by applicable law."¹⁶⁰ Because the U.S.

¹⁵⁰ Wash. Ethics Advisory Comm., Op. 04-01 (2004), available at http://www.courts.wa.gov/programs_orgs/pos_ethics/index.cfm?fa=pos_ethics.dispopin&mode=0401.

¹⁵¹ *Id.* (citing WASH. CODE OF JUDICIAL CONDUCT, Canon 2(C)).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*; WASH. CODE OF JUDICIAL CONDUCT, Canon 2(A), 5(B); cf. MODEL CODE OF JUDICIAL CONDUCT, R. 1.2, 3.1(C) (2007).

¹⁵⁵ Wash. Ethics Advisory Comm., Op. 04-01 (2004), available at http://www.courts.wa.gov/programs_orgs/pos_ethics/index.cfm?fa=pos_ethics.dispopin&mode=0401.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ Del. Judicial Ethics Advisory Comm., Op. 2006-4, 12 (2006), available at <http://courts.delaware.gov/jecac/opns/06-4.pdf>.

¹⁶⁰ *Id.* at 6 (citing DEL. JUDGES' CODE OF JUDICIAL CONDUCT, Canon 2C cmt.) (emphasis in original).

Supreme Court concluded in *Boy Scouts of America v. Dale*¹⁶¹ that the Scouts had a First Amendment right to set standards for their leaders, the Committee concluded that the practice was “not ‘prohibited by applicable law.’”¹⁶²

The Delaware Committee proceeded to ask whether the judge’s involvement “would cause a reasonable person to believe that the judge is biased or prejudiced” in violation of the general impartiality clauses.¹⁶³ The Committee adopted what it described as the “middle ground . . . because it offers the flexibility to consider each individual case.”¹⁶⁴ The Committee said that the judge who submitted the inquiry could participate as a member of both his troop and council committee, because “[i]t . . . appears unlikely that the Council will be asked to enforce the policy in the future.”¹⁶⁵ However, the Committee further stated that if a situation arose where the judge was “called upon to be involved directly or indirectly with enforcing the BSA’s policy of prohibiting homosexual membership, the Committee suggests that [the judge] consider either resigning [the judge’s] leadership positions at that time or, at the very least, recusing [himself] from any discussion or involvement regarding the BSA policy.”¹⁶⁶ In short, Delaware’s Judicial Ethics Committee interpreted its rules to permit the judge to serve as a leader only so long as he had no involvement in the BSA’s policy on leadership standards.¹⁶⁷

Though some have suggested that all judicial participation in the Boy Scouts should be barred by the invidious discrimination clause,¹⁶⁸ thus far Washington’s opinion barring judges from holding leadership positions in the Scouts is the most extreme policy in the nation. Delaware follows with its opinion permitting judicial involvement, so long as BSA’s policy on homosexuality does not come before a committee on which the judge sits.¹⁶⁹ Moreover, two ethics advisory panels and one state supreme court have stated that any involvement with the Boy Scouts, whether as a leader or a member, though not banned by the Code, may require recusal from cases involving homosexual litigants.¹⁷⁰ Though the Washington Committee split 4-3 on the question of whether a judge may be a member of the local BSA council,

¹⁶¹ 530 U.S. 640 (2000).

¹⁶² Del. Judicial Ethics Advisory Comm., Op. 2006-4, 7 (2006), *available at* <http://courts.delaware.gov/jec/opns/06-4.pdf>.

¹⁶³ *Id.* at 8.

¹⁶⁴ *Id.* at 11.

¹⁶⁵ *Id.* at 12.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Bleich, *supra* note 146.

¹⁶⁹ Del. Judicial Ethics Advisory Comm., Op. 2006-4, 12 (2006), *available at* <http://courts.delaware.gov/jec/opns/06-4.pdf>.

¹⁷⁰ CAL. CODE OF JUDICIAL ETHICS, Canon 3 (E) cmt.; Mass. Comm. on Judicial Ethics, Op. 2000-7 (2000), *available at* <http://www.mass.gov/courts/sjc/cje/00-7h.html>; Wash. Ethics Advisory Comm., Op. 04-01 (2004), *available at* http://www.courts.wa.gov/programs_orgs/pos_ethics/index.cfm?fa=pos_ethics.dispopin&mode=0401.

the Committee was unanimous in stating that “[t]he judicial officer should disclose the association in any proceeding in which the judicial officer believes the parties or their lawyer might consider this information relevant to the question of disqualification and the judicial officer should also offer to withdraw from the case.”¹⁷¹ When presented with a question about a judge’s attendance at a fund-raiser for the Boy Scouts, the Massachusetts Committee on Judicial Ethics went out of its way to opine that “your attendance at this event may conceivably form the basis of a recusal motion in a case involving gay litigants or lawyers. If presented with such a motion, you will have to make your own judgment as to whether recusal is required under the guiding principles”¹⁷²

The California Code of Judicial Ethics specifically exempts “membership in a non-profit youth organization” such as the Boy Scouts from the invidious discrimination clause.¹⁷³ In 2000 and 2003, several local bar associations and attorneys petitioned the California Supreme Court to remove the exemption due to the Boy Scouts’ policy on homosexual leaders.¹⁷⁴ In 2000, the Court maintained the status quo, but in 2003 the Court added new language to the commentary on Canon 3(E), which governs disqualification (a.k.a. recusal).¹⁷⁵ The new comment provides, in whole:

In some instances, membership in certain organizations may have the potential to give an appearance of partiality, although membership in the organization generally may not be barred by Canon 2C, Canon 4, or any other specific canon. A judge holding membership in an organization should disqualify himself or herself whenever doing so would be appropriate in accordance with Canon 3E(1), 3E(4), or 3E(5) or statutory requirements. In addition, in some circumstances, the parties or their lawyers may consider a judge’s membership in an organization relevant to the question of disqualification, even if the judge believes there is no actual basis for disqualification. In accordance with this Canon, a judge should disclose to the parties his or her membership in an organization, in any proceeding in which that information is reasonably relevant

¹⁷¹ Wash. Ethics Advisory Comm., Op. 04-01 (2004) (minority opinion), *available at* http://www.courts.wa.gov/programs_orgs/pos_ethics/index.cfm?fa=pos_ethics.dispopin&mode=0401.

¹⁷² Mass. Comm. on Judicial Ethics, Op. 2000-7 (2000), *available at* <http://www.mass.gov/courts/sjc/cje/00-7h.html>; *see* Mass. Comm. on Judicial Ethics, Op. 2001-1 (2001), *available at* <http://www.mass.gov/courts/sjc/cje/2001-1h.html> (stating that although BSA membership does not violate the invidious discrimination clause, “[t]he foregoing [conclusion] is not to say that there are no conceivable circumstances under which you might be required . . . to recuse yourself from cases because of your Boy Scout membership.”) (citations omitted).

¹⁷³ CAL. CODE OF JUDICIAL ETHICS, Canon 2 (C).

¹⁷⁴ Press Release No. 37, Judicial Council of California, *supra* note 149.

¹⁷⁵ *Id.*

to the question of disqualification under Code of Civil Procedure section 170.1, even if the judge concludes there is no actual basis for disqualification.¹⁷⁶

In a *Los Angeles Times* story following the Court's adoption of the commentary, Ms. Angela Bradstreet, a former president of the San Francisco Bar Association, said, "If the attorneys are openly gay and the litigants are openly gay, this could be potentially an issue, and the judge under the amendment would have a duty to disclose his membership."¹⁷⁷ The reporter also wrote that Ms. Bradstreet believed "the amendment will force judges to step down in cases involving gay lawyers, gay adoptions and anti-gay discrimination."¹⁷⁸ Thus, in California, mere membership in the Boy Scouts may force judges to recuse themselves from a wide range of cases, and this may encourage litigants to engage in strategic selection of counsel and judge shopping.

These precedents regarding the Boy Scouts prompt a compelling concern for the religious liberty of judges, because the governing provisions are the same, and the similarity between the BSA's moral stance towards homosexuality and the moral stance of many religious organizations is so great. Based on the Washington and Delaware opinions, an ethics panel could order that while judges could be members of, for example, Southern Baptist churches, they may not be delegates to annual state or national conventions, or lay members of state or national executive committees, because those positions may include votes on the nature of marriage as between one man and one woman. Based on the Washington opinion and California commentary, Catholic judges may have to disclose their parish membership in cases involving homosexual lawyers or litigants, and potentially withdraw if the parties requested it.¹⁷⁹ The logic of these Boy Scout opinions may lead to significant restrictions on the religious liberty of judges.

In sum, these concerns about possible partiality take two tacks: bias for or against particular litigants because of their moral or religious beliefs, and bias for or against legal propositions which may comport or conflict with religious beliefs held by the judge. How should such concerns be treated by judges and the ethics panels that advise and govern them?¹⁸⁰

¹⁷⁶ CAL. CODE OF JUDICIAL ETHICS, Canon 3 (E) cmt., available at http://www.courts.ca.gov/xbcr/cc/ca_code_judicial_ethics.pdf.

¹⁷⁷ Maura Dolan, *Judges in Boy Scouts Could Face Conflict*, L.A. TIMES, June 19, 2003, available at <http://articles.latimes.com/2003/jun/19/local/me-scouts19>.

¹⁷⁸ *Id.*

¹⁷⁹ Cf. Rebekah L. Osborn, Note, *Beliefs on the Bench: Recusal for Religious Reasons and the Model Code of Judicial Conduct*, 19 GEO. J. LEGAL ETHICS 895, 902–05 (2006).

¹⁸⁰ Recall the test from *NTEU*: "The Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government." *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 468 (1994) (quoting in part *Pickering v. Bd. of Educ.*, 391 U.S. 563, 571 (1968)).

These concerns should be taken seriously. Litigants in individual cases, and the American people, expect “a fair, independent, and impartial judiciary—and one that appears to be such.”¹⁸¹ Public confidence in public employees is generally an important value in a republic based on the rule of law, and the Court has held in the past that this can justify restrictions on employee speech.¹⁸² These concerns are particularly pronounced in the area of the judiciary because “[p]ublic opinion plays an important role in determining how court decisions are enforced. Loss of confidence in the judiciary could negatively affect the enforcement of court decisions.”¹⁸³ Moreover, the reality remains that some citizens may not be able to separate the public duties of a judge from his unofficial activities; they assume the one spills over into the other.¹⁸⁴ Thus, the government has a significant interest at stake when these questions arise.

That said, judges and religious organizations also have significant interests at stake. The congregants have a strong interest in both hearing the judge speak—if they have invited him to talk about a particular topic—and in his leadership—if they have

¹⁸¹ *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2267 (2009) (Roberts, C.J., dissenting).

¹⁸² *San Diego v. Roe*, 543 U.S. 77, 83–84 (2004); *Rankin v. McPherson*, 483 U.S. 378, 389 (1987) (stating that the damage was less because the plaintiff “had [not] discredited the office by making her statement in public.”); *id.* at 400 (Scalia, J., dissenting) (“A public employer has a strong interest in preserving its reputation with the public.”); *Locurto v. Giuliani*, 447 F.3d 159, 179 (2d Cir. 2006) (“Where a Government employee’s job quintessentially involves public contact, the Government may take into account the public’s perception of that employee’s expressive acts in determining whether those acts are disruptive to the Government’s operations.”).

¹⁸³ *Gross*, *supra* note 41, at 1205–06; *see also* *Melzer v. Bd. of Educ.*, 336 F.3d 185, 198–99 (2d Cir. 2003); *Pappas v. Giuliani*, 290 F.3d 143, 146–47 (2d Cir. 2002) (holding that a teacher’s unique position of public respect and trust in the community weighs in favor of the government’s interest in policing the speech of its teachers).

¹⁸⁴ *Miss. Comm’n on Judicial Performance v. Wilkerson*, 876 So.2d 1006, 1019 (Miss. 2004) (Carlson, J., dissenting) (“A judge cannot wear one face as a judicial officer and another as a private citizen, since the citizenry will always appraise the integrity, independence and impartiality of the judiciary by what they see in all public and private activities of our judges.”); *see* Helen Norton, *Constraining Public Employee Speech: Government’s Control of Its Workers’ Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 6 (2009) (“These decisions reflect courts’ intuition that the public will inevitably associate public employees’ off-duty expression with their governmental employers[.]”); *id.* at 52 (positing that police officers and firefighters “can never shed their roles as employees because ‘part of their job is to safeguard the public’s opinion of them’—a job duty that binds them at all times. Indeed, law enforcement agencies have uniquely strong expressive interests among government entities because of their reliance upon public trust and cooperation for their effectiveness.”). However, I believe most citizens can understand that judges do retain some personal ability to participate in community life as individuals. *Gross*, *supra* note 41, at 1262 (“[T]he public is less likely to believe the judge is acting in a judicial capacity when speaking out-of-court. Therefore, his speech is less likely to affect adversely the public’s perception of the judge and the judiciary.”); *cf.* *Latino Officers Ass’n v. New York*, 196 F.3d 458, 468 (2d Cir. 1999) (rejecting an argument that “the public is likely to believe that the NYPD itself is speaking” when a number of officers use vacation time to march, in uniform and behind an LOA banner, in an ethnic pride parade).

selected him for a position of responsibility in the church.¹⁸⁵ The judge, moreover, has an exceptionally strong interest in engaging in religious speech and association. Religion places a uniquely strong call on the lives and actions of adherents, and believers respond to these demands with faith and fidelity.¹⁸⁶ Moreover, the interests of both the congregants and the judge are at the core of the First Amendment.¹⁸⁷ As Justice Douglas wrote in his dissent in *National Association of Letter Carriers*, another key public employee rights case, political speech is “as deeply embedded in the First Amendment as proselytizing a religious cause.”¹⁸⁸ Both religious and political speech lie at “the core of the freedoms the First Amendment was designed to protect.”¹⁸⁹ The interests that the government must overcome are very strong.

How, then, should judges and ethics boards resolve this potential conflict? For three reasons, I believe that the precedent suggests that in virtually every case, the tie goes to the judge and to religious liberty. First, courts are generally skeptical of ex ante prior restraint. Cases characterize it as a “particularly heavy [burden for] . . . a blanket policy designed to restrict expression by a large number of potential speakers.”¹⁹⁰ Moreover, one factor makes the government’s burden of justification even heavier to bear in the case of religious activity. In *NTEU*, addressing a ban on honoraria, the Court held that “prohibition on compensation unquestionably imposes a significant burden on expressive activity.”¹⁹¹ In the case of the ethics codes discussed above, the

¹⁸⁵ *NTEU*, 513 U.S. at 470 (“The large-scale disincentive to Government employees’ expression also imposes a significant burden on the public’s right to read and hear what the employees would otherwise have written and said. We have no way to measure the true cost of that burden, but we cannot ignore the risk that it might deprive us of the work of a future [Hughes, Washington, Thompson, Marshall, McLean, Miller, Strong, Brewer, Harlan, or Butler].”) (internal citations omitted).

¹⁸⁶ Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1496–97 (1990).

¹⁸⁷ Since *NTEU*, the U.S. Court of Appeals for the Second Circuit has suggested this as an additional consideration: “The more speech touches on matters of public concern, the greater the level of disruption the government must show.” *Melzer*, 336 F.3d at 197; see *Lewis v. Cowen*, 165 F.3d 154, 162 (2d Cir. 1999); *Jeffries v. Harleston*, 52 F.3d 9, 13 (2d Cir. 1995). This too weighs in favor of the religious expression of judges. See *supra* note 48 and accompanying text.

¹⁸⁸ *U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 598 (1973) (Douglas, J., dissenting).

¹⁸⁹ See *Harman v. New York*, 140 F.3d 111, 118 (2d Cir. 1998).

¹⁹⁰ *Id.*; see also *Crue v. Aiken*, 370 F.3d 668, 682 (7th Cir. 2004) (characterizing *NTEU* as a strict scrutiny test); *Sanjour v. EPA*, 56 F.3d 85, 98 (D.C. Cir. 1995) (“[W]e believe that the extraordinary reach of the challenged regulations places a heavy justificatory burden on the government—or put another way, the great quantity of speech affected by the regulatory scheme weighs heavily on the side of the employees.”); *In re Sanders*, 955 P.2d 369, 370 (Wash. 1998) (“[T]he constitutional concern weighs more heavily in that balance, requiring clear and convincing evidence of speech or conduct that casts doubt on a judge’s integrity, independence, or impartiality in order to justify placing a restriction on that right [to free speech].”).

¹⁹¹ *United States v. Nat’l Treasury Emps. Union*, 513 U.S., 454, 468 (1994); see *Sanjour*, 56 F.3d at 94 (holding that denial of travel reimbursement is a “greater impediment” to the speech of employees than the honoraria ban in *NTEU*); see also *Crue*, 370 F.3d at 682 (“The

restrictions are placed directly on free exercise, speech, and association, without any intermediary consideration.

Second, the decisions in the public employee cases are especially hesitant to regulate speech that occurs outside the governmental workplace and on topics “largely unrelated to their Government employment.”¹⁹² In *NTEU*, Chief Justice Rehnquist’s dissent acknowledged that “the Government’s interests are at their lowest ebb” where the speech is off-duty and unrelated to the employee’s work.¹⁹³ This is the case with religious speech or activity that occurs outside the workplace and which concerns religious topics.

Third, the cases take a very dim view of generalized assertions about how people might possibly feel in various situations. The government cannot “simply ‘posit the existence of the disease sought to be cured.’”¹⁹⁴ It may not “deter[] an enormous quantity of speech before it is uttered, based only on speculation that the speech might threaten the Government’s interests.”¹⁹⁵ Rather, the government “must demonstrate that the recited harms are real, not merely conjectural.”¹⁹⁶ The government cannot bear this burden; as in *NTEU* and *Republican Party of Minnesota v. White*, generalized concerns about the “appearance of impropriety” and perceived “bias” are insufficient.¹⁹⁷

distinction between a relatively mild preclearance directive and a broad general prohibition on speech in the employment context—i.e., a full-fledged prior restraint—is significant.”); *Weaver v. U.S. Info. Agency*, 87 F.3d 1429, 1431–32 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1251 (1997) (holding that a prepublication clearance requirement is a lesser, and acceptable, burden on employees of USIA).

¹⁹² *NTEU*, 513 U.S. at 466; *see San Diego v. Roe*, 543 U.S. 77, 80 (2004) (“[W]hen government employees speak or write on their own time on topics unrelated to their employment, the speech can have First Amendment protection, absent some governmental justification ‘far stronger than mere speculation’ in regulating it.”) (citing *NTEU*, 513 U.S. at 465, 475); *Eberhardt v. O’Malley*, 17 F.3d 1023, 1026–27 (7th Cir. 1994) (“This is true even if—indeed, especially if—the protected expression has nothing to do with the employee’s job or with the public interest in the operation of his office. The less his speech has to do with the office, the less justification the office is likely to have to regulate it.”) (internal citation omitted); *cf. Wolfe v. Barnhart*, 446 F.3d 1096, 1098 (10th Cir. 2006) (upholding a restriction on an administrative law judge publishing an academic textbook regarding the subject area of his job).

¹⁹³ *NTEU*, 513 U.S. at 494 (Rehnquist, C.J., dissenting).

¹⁹⁴ *Id.* at 475 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994)).

¹⁹⁵ *Id.* at 467 n.11.

¹⁹⁶ *Id.* at 475; *see Harman v. New York*, 140 F.3d 111, 122 (1998) (“Where the predictions of harm are proscriptive, the government cannot rely on assertions, but must show a basis in fact for its concerns.”); Ian H. Morrison, Note, *The Case for Minimal Regulation of Public Employee Free Speech: A Critical Analysis of the Federal Honoraria Ban Controversy*, 48 WASH. U. J. URB. & CONTEMP. L. 141, 178 (1995) (“One of the major reasons that the Honoraria Ban crumbled under constitutional scrutiny was that it targeted nonexistent problems.”). *But see Locurto v. Giuliani*, 447 F.3d 159, 179 (2d Cir. 2006) (“[T]he disruption need not be actual; the Government may legitimately respond to a reasonable prediction of disruption.”).

¹⁹⁷ *Republican Party of Minn. v. White*, 536 U.S. 765, 775 (2002); *NTEU*, 513 U.S. at 472 (“The Government’s underlying concern is that federal officials not misuse or appear to

An analogous case arose in *Navab-Safavi v. Broadcasting Board of Governors*.¹⁹⁸ An employee of the Broadcasting Board of Governors (BBG) participated in the production of an anti-war video outside of work.¹⁹⁹ The BBG could not justify firing her based on an immediate workplace disruption because the activity took place outside the workplace.²⁰⁰ Moreover, the agency also could not justify firing her under the “workplace harmony” rationale because the BBG did not demonstrate that such relationships were necessary for the agency’s operations, and there was no evidence the video harmed those relationships.²⁰¹ Therefore, the agency was left with, in its words, a general “interest in protecting the journalistic integrity and credibility of Voice of America programming.”²⁰² The court rejected BBG’s rationale, concluding, “[w]here a government agency cannot show that an employee’s speech caused any ‘concrete harm’ to the ‘public’s confidence’ in the agency’s performance of its services, the mere assertion of an otherwise legitimate governmental concern cannot outweigh the employee’s ‘interest’”²⁰³ This case is a concrete application of the general principle in *NTEU* and *White* that generalized assertions of “bias” or an “appearance of impropriety” that supposedly “undermine public confidence” are not sufficient to justify significant ex ante governmental restraint on speech and association. This conclusion should lead ethics regulators to give the religious liberty of judges greater respect when cases arise.

CONCLUSION

Reviewing all these considerations, it is clear that the vast majority of restrictions on the religious expression of judges are unconstitutional. Judges, like all other public employees, give up some degree of constitutional rights when they choose public employment. However, though the government may legitimately intrude on their rights, it may not do so haphazardly. Rather, particularly when dealing with a core First Amendment right like religious expression, the government must meet a heavy

misuse power by accepting compensation for their unofficial and nonpolitical writing and speaking activities.”); *id.* at 476 (referring to congressional concerns about “appearances of impropriety.”); *see also* *Scott v. Flowers*, 910 F.2d 201, 213 (5th Cir. 1990) (stating that the judicial discipline commission failed “to explain precisely how Scott’s public criticisms would impede the goals of promoting an efficient and impartial judiciary.”). *But see* *Kirchgessner v. Wilentz*, 884 F. Supp. 901, 913 (D.N.J. 1995), *aff’d*, 92 F.3d 1171 (3d Cir. 1996), *cert. denied*, 519 U.S. 1108 (1997) (holding that notions of judicial impartiality were sufficiently “real” and “not merely conjectural” to permit a rule that prohibited probation officers from joining state police unions).

¹⁹⁸ 650 F. Supp. 2d 40 (D.D.C. 2009), *aff’d*, 637 F.3d 311 (D.C. Cir. 2011).

¹⁹⁹ *Id.* at 48.

²⁰⁰ *Id.* at 57.

²⁰¹ *Id.* at 57–58.

²⁰² *Id.* at 58.

²⁰³ *Id.* at 60 (internal citations omitted).

burden of justification when it promulgates a regulation that preemptively proscribes such expression. This is particularly true when, as here, the speech takes place off-duty and concerns topics unrelated to the employee's official duties. Unfortunately, all states have judicial ethics codes that abridge the religious activity of judges.²⁰⁴ Numerous judicial ethics commissions have issued official interpretations that further curb these rights.²⁰⁵ Analyzing such restrictions under the relevant precedents, it is clear that many of these constitute unconstitutional infringements on the rights of judges.

In *United Public Workers*, Justice Stanley Reed wrote for the Court: "Appellants urge that federal employees are protected by the Bill of Rights and that Congress may not 'enact a regulation providing that . . . no federal employee shall attend Mass or take any active part in missionary work.' None would deny such limitations on congressional power."²⁰⁶ In the spirit of Justice Reed's statement, virtually all of the rules and advisory opinions discussed in this Article should be modified or withdrawn to respect the religious liberty of judges.

²⁰⁴ See *supra* Part II for a discussion of state judicial ethics codes.

²⁰⁵ See *supra* Part II.

²⁰⁶ *United Pub. Workers v. Mitchell*, 330 U.S. 75, 100 (1947); see also *Ex parte Curtis*, 106 U.S. 371, 377 (1882) (Bradley, J., dissenting) ("Congress might just as well, so far as the power is concerned, impose, as a condition of taking any employment under the government, entire silence on political subjects, and a prohibition of all conversation thereon between government employes [sic]. Nay, it might as well prohibit the discussion of religious questions, or the mutual contribution of funds for missionary or other religious purposes.").

A final pair of sources that was helpful to the entire topic of this Article but was not cited elsewhere are Thomas C. Berg & William G. Ross, *Some Religiously Devout Justices: Historical Notes and Comments*, 81 MARQ. L. REV. 383 (1998) and Peter Alan Bell, *Extrajudicial Activity of Supreme Court Justices*, 22 STAN. L. REV. 587 (1970).