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# STOP RESTRICTING SPEECH AND EDUCATE THE PUBLIC: A REVIEW OF THE ABA'S PROPOSED CAMPAIGN ACTIVITY CANON OF THE MODEL CODE OF JUDICIAL CONDUCT

Tiffany L. Carwile\*

## INTRODUCTION

Imagine a candidate in an election for county judge. As part of his campaign, the candidate decides to attend local events to which he has been invited. The candidate attends both Republican and Democratic events in the neighborhood. In addition, his daughter makes appearances and speeches on his behalf at other local events sponsored by both political parties. For some reason, the sponsors do not invite his opponent, but the candidate still attends to further his campaign because he would like to win the election. The candidate wins the election, but ethical charges are filed against him. Apparently, attending campaign events while running for election is a violation of the state's Code of Judicial Conduct if the events are political. As a consequence, the judge receives a public reprimand for taking steps that would aid him in his campaign.

The previous scenario occurred in Florida during the 2002 election, and the Florida Supreme Court upheld the Judicial Qualifications Commission's recommendation for a public reprimand.<sup>1</sup> The judge was sanctioned for doing what the election required—explaining to the public why it should vote him into office. That information usually includes the candidate's position on current issues and promises for the future. Without this information, the public is left to choose candidates based on nothing but “personal appearances.”<sup>2</sup> However, a problem seems to arise when the sought-after office is that of a judge. Although all federal judges are appointed, judicial elections are a popular way of selecting state judges, with thirty states choosing this method over an appointment or merit selection system.<sup>3</sup> Differing from other officials, judges “are expected to refrain from catering to particular constituencies” and are expected

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<sup>1</sup> See *In re Angel*, 867 So. 2d 379 (Fla. 2004).

<sup>2</sup> *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953, 956 (Ky. 1991), *cert. denied*, 502 U.S. 816 (1991).

<sup>3</sup> ROBERT A. CARPETAL., *JUDICIAL PROCESS IN AMERICA* 101 (6th ed. 2004). Partisan elections are held in Alabama, Arkansas, Illinois, Indiana, New Mexico, New York, Pennsylvania, Tennessee, Texas, and West Virginia; nonpartisan elections are held in Arizona, California, Florida, Georgia, Idaho, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Washington, and Wisconsin. *Id.*

to be “independent” and “impartial.”<sup>4</sup> A judicial candidate who gives his position on current issues may threaten “this appearance of impartiality.”<sup>5</sup>

Trying to tend to the problem between informing voters and maintaining impartiality, the American Bar Association (ABA) created a code to restrict campaign speech and behavior.<sup>6</sup> The 1924 Canons of Judicial Ethics lasted almost fifty years, but in 1972, the ABA made changes to the rules and adopted the Model Code of Judicial Conduct.<sup>7</sup> The ABA subsequently revised the Code in 1990. Since 1972, almost every state has adopted a variation of the Code.<sup>8</sup> The state codes include sanctions for candidates who violate the provisions. Some of the various violations of which candidates have been accused seem trivial, but others are quite serious.<sup>9</sup>

The current codes, in the states and the Model Code, usually have five or seven canons. In the Model Code, Canon 5 pertains to judicial campaign activities, with the first clause being the “political activity” clause, which regulates candidate conduct in and for political organizations.<sup>10</sup> The subsequent clauses are similar and regulate a candidate’s speech. They are the “pledges or promises” clause and the “commit” clause, and they apply to statements the candidate is not allowed to make while campaigning.<sup>11</sup> The 1972 Code contained an “announce” clause, which also applied to

<sup>4</sup> Republican Party of Minn. v. White (*White I*), 536 U.S. 765, 803–04 (2002) (Ginsburg, J., dissenting).

<sup>5</sup> Julie Schvering Schuetz, Comment, *Judicial Campaign Speech Restrictions in Light of Republican Party of Minnesota v. White*, 24 N. ILL. U. L. REV. 295, 296 (2004).

<sup>6</sup> Christopher Rapp, Note, *The Will of the People, the Independence of the Judiciary, and Free Speech in Judicial Elections After Republican Party of Minnesota v. White*, 21 J.L. & POL. 103, 105 (2005).

<sup>7</sup> MODEL CODE OF JUDICIAL CONDUCT (1972), reprinted in LISA L. MILORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE 109 (1992).

<sup>8</sup> Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059, 1066 (1996).

<sup>9</sup> In Florida, the Judicial Qualifications Commission sanctioned a judge for: attend[ing] a “Grass Roots BBQ” sponsored by the Marion County Republican Party to which [his] opponent was not invited, with [his] wife and daughter where [he] and they campaigned for [his] election[,] . . . campaign[ing] for [his] election at a “Salute to Labor Picnic and Democratic Candidate Rally[,]” . . . [and] knowingly permitt[ing] one of [his] daughters to attend, speak and campaign at a meeting of the Palm Bay Democratic in Marion County, Florida to which [his] opponent was not invited.

*In re Angel*, 867 So. 2d 379, 381 (Fla. 2004). A case arose in Georgia dealing with more serious allegations; the candidate produced a brochure claiming that his opponent “would require the State to license same-sex marriages, . . . referred to traditional moral standards as ‘pathetic and disgraceful,’ . . . [and] called the electric chair ‘silly.’” *Weaver v. Bonner*, 114 F. Supp. 2d 1337, 1340 (N.D. Ga. 2000), *aff’d in part and rev’d in part*, 309 F.3d 1312 (11th Cir. 2002).

<sup>10</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 5A(1) (1990).

<sup>11</sup> *Id.* Canon 5A(3)(d).

campaign speech.<sup>12</sup> This clause, however, was later found to be unconstitutional by the U.S. Supreme Court and has since been removed from the modern version of the Code.<sup>13</sup> Today's codes also contain a "misrepresent" clause. This clause prohibits candidates from misrepresenting information regarding either themselves or their opponents.<sup>14</sup> The last significant provision is the "solicitation" clause, which controls a candidate's fundraising and solicitation.<sup>15</sup>

Although the Code was meant to "alleviate the tensions between the judge's role and the reality of political campaigns," some courts have started to view the restrictions "with increasing skepticism."<sup>16</sup> The most influential decision was the Supreme Court's ruling in *Republican Party of Minnesota v. White* ("White I"), which declared that Minnesota's announce clause violated the First Amendment.<sup>17</sup> Since the *White I* decision in 2002, many lower courts have heard challenges to judicial campaign restrictions and have provided mixed rulings.<sup>18</sup> In response, the ABA is revising its Model Code of Judicial Conduct and has held hearings on the proposed revisions.<sup>19</sup> The revisions pertinent to this Note regard the campaign activity canons, which the proposed Code would move from Canon 5 to Canon 4.<sup>20</sup>

This Note analyzes the new Canon 4 of the proposed Code in light of *White I* and its progeny. The ABA Joint Commission to Evaluate the Model Code of Judicial Conduct (the "Commission") has proposed many changes to the Code—some of which are quite substantial—in hopes that it will meet First Amendment standards.<sup>21</sup> However, the latest draft does not appear to take into account the concerns of recent court decisions—most significantly, the Eighth Circuit's decision in "*White II*" that Minnesota's partisan-activities and solicitation clauses are unconstitutional.<sup>22</sup> Unfortunately, the draft does not effectively address the First Amendment concerns and does not follow the clear trend of the federal courts. In light of recent court decisions, the ABA should change its approach from restricting speech to educating the public regarding the importance of an impartial and independent judiciary.

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<sup>12</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 7B(1)(c) (1972), *reprinted in* MILORD, *supra* note 7, at 128.

<sup>13</sup> *White I*, 536 U.S. 765 (2002).

<sup>14</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(iii) (1990).

<sup>15</sup> *Id.* Canon 5C(2).

<sup>16</sup> Rapp, *supra* note 6, at 105.

<sup>17</sup> 536 U.S. 765.

<sup>18</sup> *See infra* Part IV.

<sup>19</sup> ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, <http://www.abanet.org/judicialethics> (last visited Feb. 17, 2007).

<sup>20</sup> Proposed MODEL CODE OF JUDICIAL CONDUCT Canon 4, *in* ABA JOINT COMM'N TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, REPORT TO THE ABA HOUSE OF DELEGATES 149–80 (2006), [http://www.abanet.org/judicialethics/house\\_report.pdf](http://www.abanet.org/judicialethics/house_report.pdf) [hereinafter ABA REPORT].

<sup>21</sup> *Compare id.*, with MODEL CODE OF JUDICIAL CONDUCT Canon 5 (1990).

<sup>22</sup> *Republican Party of Minn. v. White (White II)*, 416 F.3d 738, 745 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 1165 (2006).

Part I of this Note introduces the history of the Model Code of Judicial Conduct, describing the background for its adoption and reasons for changes. Part II discusses the Supreme Court's decision in *White I* and gives a detailed description of the scope of the restrictions. Part III then looks at the *White II* decision on remand to the Eighth Circuit and its conclusions regarding the partisan-activities and solicitation clauses. Part IV reviews other decisions involving state codes of judicial conduct. Some of these decisions uphold the restrictions while others say they are unconstitutional. Part V analyzes the proposed code in light of the recent decisions and discusses the problems in some of the provisions. The last section, Part VI, gives recommendations regarding the provisions and other measures that can help preserve the impartiality and independence of the judiciary. The section reviews state provisions that differ from the Model Code in an effort to find the best approach to the problem.

### I. HISTORY OF THE MODEL CODE OF JUDICIAL CONDUCT

The ABA completed the Canons of Professional Ethics for Lawyers in 1908. A few years later, in 1921, the ABA confronted a problem regarding the activities of a federal judge who refused to step down from the bench while serving as Commissioner of Major League Baseball.<sup>23</sup> After this incident, the ABA drafted and accepted the Canons of Judicial Ethics in 1924.<sup>24</sup> The Canons were merely guidelines and not strict rules,<sup>25</sup> but many states passed legislation to make the Canons law with sanctions for violations.<sup>26</sup> Canon 30 related directly to candidates and included a promises clause and an announce clause.<sup>27</sup> Canon 28 prohibited judges from engaging in political party activities, but the ABA later amended it to allow some activities when the judge was a candidate in an election.<sup>28</sup>

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<sup>23</sup> Rapp, *supra* note 6, at 111.

<sup>24</sup> *Id.*

<sup>25</sup> Shepard, *supra* note 8, at 1065 n.26.

<sup>26</sup> Schuetz, *supra* note 5, at 300.

<sup>27</sup> *Id.* at 301. Canon 30 provided that a candidate "should not make . . . promises of conduct . . . [and] should not announce in advance his conclusions of law on disputed issues to secure class support." *Id.*

<sup>28</sup> MILORD, *supra* note 7, at 45. Canon 28 provided that a judge "should avoid making political speeches, making or soliciting payment of assessments or contributions to party funds, the public endorsement of candidates for political office and participation in party conventions." ABA CANONS OF JUDICIAL ETHICS Canon 28 (1924), *reprinted in* MILORD, *supra* note 7, at 140. The 1950 amendment added the following sentence:

Where, however, it is necessary for judges to be nominated and elected as candidates of a political party, nothing herein contained shall prevent the judge from attending or speaking at political gatherings, or from making contributions to the campaign funds of the party that has nominated him and seeks his election or re-election.

*Id.*, *reprinted in* MILORD, *supra* note 7, at 139-40 & n.2.

By the late 1960s, the “Canons seemed increasingly anachronistic.”<sup>29</sup> Some controversies resulting from the activities of Justices Fortas and Douglas while on the Supreme Court alerted the ABA to the need for a new code.<sup>30</sup> The result was the 1972 Code of Judicial Conduct. Unlike the 1924 Canons, the states were to use the revised Code as a model to adopt new regulations in their jurisdictions.<sup>31</sup> The Code contained seven Canons, with the subject of Canon 7 being political and campaign conduct.<sup>32</sup> Section A provided “general standards of political conduct for all judges and all candidates,” whereas section B “set[] the campaign standards.”<sup>33</sup> The drafters wanted to make clear the difference between “general political conduct and campaign conduct.”<sup>34</sup> Section B contained the pledges-or-promises, announce, misrepresent, and solicitation clauses.<sup>35</sup>

Believing that the Code needed stronger standards, the ABA issued the 1990 Code of Judicial Conduct.<sup>36</sup> The revised Code contained significant changes from the 1972 version, the most significant of which was “tightening up the hortatory language.”<sup>37</sup> The 1990 version used “shall” instead of “should” in its regulations of judicial conduct.<sup>38</sup> The ABA believed that “judicial discipline needed to be tougher in an era when legal institutions were generally under wider attack on ethical issues.”<sup>39</sup>

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<sup>29</sup> Shepard, *supra* note 8, at 1065.

<sup>30</sup> Schuetz, *supra* note 5, at 302. Justice Abe Fortas served three years on the Supreme Court as an associate justice; when President Lyndon B. Johnson nominated him for Chief Justice, the Senate refused to confirm him over “charges of ethical impropriety.” DAVID W. NEUBAUER & STEPHEN S. MEINHOLD, *JUDICIAL PROCESS: LAW, COURTS, AND POLITICS IN THE UNITED STATES* 507 (3d ed. 2004). The Senate then threatened impeachment over Fortas’s “financial dealings with a convicted felon,” causing Fortas to resign from the Court. *Id.*

<sup>31</sup> Schuetz, *supra* note 5, at 302. Only Montana, Rhode Island, and Wisconsin failed to adopt the new code. Shepard, *supra* note 8, at 1066 n.34 (citing JEFFREY M. SHAMAN ET AL., *JUDICIAL CONDUCT AND ETHICS CURRICULUM, Directions to Instructors* 3 (1993)).

<sup>32</sup> MODEL CODE OF JUDICIAL CONDUCT (1972), *reprinted in* MILORD, *supra* note 7, at 127–29.

<sup>33</sup> E. WAYNE THODE, REPORTER’S NOTES TO CODE OF JUDICIAL CONDUCT 95 (1973).

<sup>34</sup> *Id.*

<sup>35</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(c), (2) (1972), *reprinted in* MILORD, *supra* note 7, at 128. The relevant provisions provide that a judge:

(1)(c) should not make pledges or promises of conduct in office . . . ; announce his views . . . ; or misrepresent his identity, qualifications, present position, or other fact.

(2) . . . should not himself solicit or accept campaign funds, or solicit publicly stated support, but he may establish committees of responsible persons to secure and manage the expenditure of funds for his campaign and to obtain public statements of support for his candidacy.

*Id.*, *reprinted in* MILORD, *supra* note 7, at 128.

<sup>36</sup> Rapp, *supra* note 6, at 113.

<sup>37</sup> Shepard, *supra* note 8, at 1066.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* (citations omitted).

The campaign speech regulations of the 1990 Code are contained in Canon 5. One major change was the announce clause, which the ABA did not incorporate into the new version.<sup>40</sup> In addition, the ABA added a “knowing requirement for the misrepresent provision.”<sup>41</sup> A preamble accompanies the 1990 version, which states that the system is based on “an independent, fair and competent judiciary” and that judges must “strive to enhance and maintain confidence in our legal system.”<sup>42</sup> The ABA amended the Code in 1999 to add regulations regarding “contribution limits and disclosure standards” and a provision requiring “judges to disqualify themselves from hearing cases in which parties or their lawyers contributed more than the allowed amounts.”<sup>43</sup>

## II. *REPUBLICAN PARTY OF MINNESOTA V. WHITE* (“WHITE I”)—BEFORE THE U.S. SUPREME COURT

Throughout its history, Minnesota has selected all judges through popular election, with the election becoming nonpartisan in 1912.<sup>44</sup> In 1974, Minnesota adopted an “announce clause,” which stated that a “‘candidate for a judicial office, including an incumbent judge,’ shall not ‘announce his or her views on disputed legal or political issues.’”<sup>45</sup> If a candidate violated the clause, he was subject to disciplinary action. For incumbent judges, the penalties included “removal, censure, civil penalties, and suspension without pay;”<sup>46</sup> for lawyers, the penalties included “disbarment, suspension, and probation.”<sup>47</sup>

### A. *Case Facts and Background*

Gregory Wersal ran for the Minnesota Supreme Court in 1996.<sup>48</sup> As part of his campaign, Wersal criticized the court for its decisions regarding “crime, welfare, and

<sup>40</sup> Schuetz, *supra* note 5, at 304. Instead, the clause reads:

(3) A candidate for a judicial office:

(d) shall not:

(i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;

(ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court . . . .

MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(i)–(ii) (1990).

<sup>41</sup> Schuetz, *supra* note 5, at 304. The clause states that candidates “shall not . . . knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent.” MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(iii) (1990).

<sup>42</sup> MODEL CODE OF JUDICIAL CONDUCT pmbl. (1990).

<sup>43</sup> Schuetz, *supra* note 5, at 305.

<sup>44</sup> *White I*, 536 U.S. 765, 768 (2002).

<sup>45</sup> *Id.* (quoting MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(I) (2000)).

<sup>46</sup> *Id.* (citing MINN. R. BD. ON JUD. STANDARDS 11(d) (2002)).

<sup>47</sup> *Id.* (citing MINN. R. LAW. PROF’L RESPONSIBILITY 15(a) (2002)).

<sup>48</sup> *Id.*

abortion.”<sup>49</sup> During the course of the campaign, an individual filed a complaint against Wersal with the Office of Lawyers Professional Responsibility, alleging a violation of Minnesota’s “announce” clause; the Minnesota Lawyers Professional Responsibility Board (the “Board”) dismissed the complaint, however, “express[ing] doubt whether the clause could constitutionally be enforced.”<sup>50</sup> Even though the Board took no action, Wersal withdrew from the election “fearing that further ethical complaints would jeopardize his ability to practice law.”<sup>51</sup>

He decided to run again in 1998 and asked the Board to state whether it would enforce the announce clause.<sup>52</sup> Because Wersal had not submitted a list of the announcements he wanted to make, the Board declined to answer his question.<sup>53</sup> He then filed suit in federal court seeking “a declaration that the announce clause violate[d] the First Amendment and an injunction against its enforcement.”<sup>54</sup> Upholding the announce clause, the district court found no First Amendment violation.<sup>55</sup> On appeal, the U.S. Court of Appeals for the Eighth Circuit affirmed.<sup>56</sup> The Republican Party appealed to the U.S. Supreme Court, which granted a writ of certiorari and agreed to hear the case on March 26, 2002.<sup>57</sup>

### *B. The Court’s Opinion*

Joined by Chief Justice Rehnquist and Justice Thomas, Justice Scalia delivered the opinion for the Court, with concurring opinions by Justices O’Connor and Kennedy.<sup>58</sup> Justices Stevens, Ginsburg, Souter, and Breyer dissented.<sup>59</sup> The Court focused, first,

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 768–69.

<sup>51</sup> *Id.* at 769.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 769–70.

<sup>55</sup> *Republican Party of Minn. v. Kelly*, 63 F. Supp. 2d 967 (D. Minn. 1999).

<sup>56</sup> *Republican Party of Minn. v. Kelly*, 247 F.3d 854 (8th Cir. 2001).

<sup>57</sup> *Republican Party of Minn. v. Kelly*, 534 U.S. 1054 (2001).

<sup>58</sup> Justice O’Connor believed that judicial elections undermined the interest of impartiality and the state “voluntarily” risked a partial judiciary by having elections. *White I*, 536 U.S. at 788–92 (O’Connor, J., concurring). Justice Kennedy said the state does not have the power to enact “direct restrictions” on campaign speech because this speech “is at the heart of the First Amendment”; he would not have inquired into “narrow tailoring or compelling government interests.” *Id.* at 793 (Kennedy, J., concurring). He then suggested that the states have strict recusal policies to handle the problem of impartiality. *Id.* at 794.

<sup>59</sup> According to Justice Stevens, the Court did not give enough weight to the state’s interest of impartiality and assumed judicial candidates had the same rights of expression as other elected officials. *Id.* at 797 (Stevens, J., dissenting). Justice Ginsburg argued that judicial elections were different from other elections and should not receive the same First Amendment protections. *Id.* at 821 (Ginsburg, J., dissenting).



on the meaning of the announce clause. It stated that the clause “covers much more than *promising* to decide an issue a particular way. The prohibition extends to the candidate’s mere statement of his current position, even if he does not bind himself to maintain that position after election.”<sup>60</sup> The Court noted some limitations to the clause, but then said that these “are not all that they appear to be.”<sup>61</sup> A candidate may criticize past court decisions, but he must also declare his adherence to *stare decisis*.<sup>62</sup> Furthermore, although the scope of the clause is limited only to issues the candidate will likely hear, the Court found that this was “not much of a limitation at all.”<sup>63</sup> It stated that “there is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction.”<sup>64</sup>

Justice Scalia agreed with the Eighth Circuit that “the announce clause both prohibits speech on the basis of its content and burdens a category of speech that is ‘at the core of our First Amendment freedoms’—speech about the qualifications of candidates for public office.”<sup>65</sup> Because of these prohibitions, strict scrutiny was the correct standard in determining the constitutionality of the clause. Under strict scrutiny, the clause had to be “narrowly tailored, to serve . . . a compelling state interest.”<sup>66</sup>

The Eighth Circuit found two interests to be “sufficiently compelling to justify the announce clause: preserving the impartiality of the state judiciary and preserving the appearance of the impartiality of the state judiciary.”<sup>67</sup> Respondents argued that the first interest was compelling because “it protect[ed] the due process rights of litigants,” and the second because “it preserve[d] public confidence in the judiciary.”<sup>68</sup> In determining whether these were actually compelling interests, Justice Scalia looked at the different meanings of “impartiality.”

The first meaning he analyzed was “the lack of bias for or against either *party* to the proceeding,”<sup>69</sup> which was the one the respondents cited in their briefs.<sup>70</sup> However,

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<sup>60</sup> *Id.* at 770.

<sup>61</sup> *Id.* at 772.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 772–73 (quoting *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 229 (7th Cir. 1993)).

<sup>65</sup> *Id.* at 774 (citation omitted).

<sup>66</sup> *Id.* at 774–75. *But see* Mark D. Rosen, *Institutional Context in Constitutional Law: A Critical Examination of Term Limits, Judicial Campaign Codes, and Anti-Pornography Ordinances*, 21 J.L. & POL. 223, 231–32 (2005) (noting that the law on which the Court relied to support the use of strict scrutiny dealt with legislative or executive elections and that it may be “plausible to draw a constitutional distinction between the context of judicial elections . . . and legislative and executive elections”).

<sup>67</sup> *White I*, 536 U.S. at 775 (citing *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 867 (8th Cir. 2001)).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 775–76.

he thought “it plain that the announce clause [was] not narrowly tailored to serve impartiality (or the appearance of impartiality) in this sense.”<sup>71</sup> This analysis rested on the fact that the clause restricts speech regarding issues, not parties. Justice Scalia reasoned that *any* party holding a different belief than the one stated by the judge is just as likely to lose; thus, “[t]he judge is applying the law (as he sees it) evenhandedly.”<sup>72</sup>

The second meaning given by Justice Scalia for “impartiality” was a “lack of preconception in favor of or against a particular *legal view*.”<sup>73</sup> This concept is not a “compelling” interest and would not be even a favorable interest.<sup>74</sup> “Proof that a Justice’s mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.”<sup>75</sup> He noted that Minnesota mandates that state judges “‘shall be learned in the law,’” so the judges would have views regarding the law.<sup>76</sup> If “avoiding judicial preconceptions” is not desirable, then this “type of impartiality can hardly be a compelling state interest.”<sup>77</sup>

The third possible meaning was open-mindedness, which requires a judge to “be willing to consider views that oppose his preconceptions, and remain open to persuasion.”<sup>78</sup> According to the respondents, the announce clause “relieves a judge from pressure to rule a certain way in order to maintain consistency with statements the judge has previously made.”<sup>79</sup> Justice Scalia did not believe this meaning was

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<sup>71</sup> *Id.* at 776. In an article, Erwin Chemerinsky explained this point further:

All judges come on to the bench with views about important issues, whether or not these have been expressed during the election campaign or the confirmation process. The key question is whether a judge is more likely to follow these views if they have been expressed. If the judge would do the same thing whether or not the views have been expressed, then the speech does not make the judge less impartial. The judge has exactly the same biases; the only difference is whether people know them in advance. Antonin Scalia would vote to overrule *Roe v. Wade* whether he expressed this in his confirmation hearings or not.

Erwin Chemerinsky, *Restrictions on the Speech of Judicial Candidates Are Unconstitutional*, 35 IND. L. REV. 735, 744 (2002) (citation omitted).

<sup>72</sup> *White I*, 536 U.S. at 777.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 778 (quoting *Laird v. Tatum*, 409 U.S. 824, 835 (1972)); *see also* NEUBAUER & MEINHOLD, *supra* note 30, at 196 (“[T]he Court’s decision strikes ‘a blow against calculated ignorance that should well serve both those who seek court seats and those who decide to fill them’ by ending the ‘intellectual fiction . . . that middle-aged adults have not formed opinions about the law.’” (quoting Editorial, *Truth in Judicial Packaging*, PLAIN DEALER (Cleveland, Ohio), June 30, 2002, at H2)).

<sup>76</sup> *White I*, 536 U.S. at 778 (quoting MINN. CONST. art. VI, § 5).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 778–79.

compelling enough to overcome strict scrutiny. He noted that Minnesota encouraged its judges to give speeches or write books, and in so doing, the judges would “announce” their views on legal issues.<sup>80</sup>

Ultimately, the Court concluded that the announce clause was “woefully underinclusive” as it prohibited speech during an election but not before or after the election.<sup>81</sup> Justice Scalia recognized the tension between electing judges and the announce clause, which “places most subjects of interest to the voters off limits.”<sup>82</sup> He said that this tension was not surprising because the ABA opposes judicial elections and prefers merit selection; however, “the First Amendment does not permit it to achieve its goal by leaving the principle of elections in place while preventing candidates from discussing what the elections are about.”<sup>83</sup> The Court ruled that the announce clause violated the First Amendment.<sup>84</sup>

### III. *REPUBLICAN PARTY OF MINNESOTA V. WHITE* (“WHITE II”)—ON REMAND TO THE EIGHTH CIRCUIT

The Supreme Court remanded the case to the Eighth Circuit to consider the remaining issues for which the Court had not granted certiorari. The two issues were the partisan-activities clause and the solicitation clause.<sup>85</sup> The partisan-activities clause stated: “Except as authorized in Section 5B(1), a judge or a candidate for election to judicial office shall not: (a) identify themselves as members of a political organization, except as necessary to vote in an election; . . . (d) attend political gatherings; or seek, accept or use endorsements from a political organization.”<sup>86</sup> The solicitation clause prohibited candidates from “personally solicit[ing] or accept[ing] campaign contributions.”<sup>87</sup> Candidates could “establish committees to conduct campaigns . . . [and] [s]uch committees may solicit and accept campaign contributions”; however, a committee was not allowed to disclose the identity of donors to the candidate.<sup>88</sup>

On remand, the panel for the Eighth Circuit upheld the solicitation clause and remanded the partisan-activities clause to the district court for reconsideration.<sup>89</sup> The panel’s decision was appealed, and the Eighth Circuit granted the request for en banc

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 780.

<sup>82</sup> *Id.* at 787.

<sup>83</sup> *Id.* at 787–88.

<sup>84</sup> *Id.* at 788.

<sup>85</sup> *White II*, 416 F.3d 738, 744–45 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 1165 (2006).

<sup>86</sup> *Id.* at 745 (quoting MINN. CODE OF JUDICIAL CONDUCT Canon 5A(1)(a), (d) (2004)).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 744.

review. Upon review, the court held that both clauses violated the First Amendment.<sup>90</sup> In deciding whether the clauses were invalid, the court determined that the clauses infringed on a candidate's free speech and were subject to strict scrutiny.<sup>91</sup> After reviewing the three possible meanings of "impartiality" that the Supreme Court discussed, the Eighth Circuit applied these meanings to the partisan-activities and solicitation clauses.

Regarding the partisan-activities clause and the interest in having unbiased judges, the court believed the Supreme Court's analysis of the announce clause was applicable.<sup>92</sup> "Minnesota argue[d] that a party label is nothing more than shorthand for the views a judicial candidate holds."<sup>93</sup> Whether by announcing or aligning through political parties, a judge will favor one position over another regardless of the parties involved; he would not be biased against any particular party, just the position the party takes in the case.<sup>94</sup> Under the open-mindedness meaning of impartiality, the clause was "woefully underinclusive."<sup>95</sup> Like the announce clause, the partisan-activities clause only bars activities during the campaign; therefore, a candidate could have a long history with a political party prior to and after a campaign.<sup>96</sup> The court concluded that the clause could not withstand strict scrutiny and thus was unconstitutional.<sup>97</sup>

After deciding the partisan-activities clause issue, the court turned to the solicitation clause. It found that "Minnesota assert[ed] that keeping judicial candidates from personally soliciting campaign funds serve[d] its interest . . . by preventing any undue influence flowing from financial support."<sup>98</sup> With regard to the interest of an unbiased judge, the court found the clause to be "barely tailored."<sup>99</sup> If all contributions were donated through the candidate's committee, as the Canon mandates, a candidate would not know who donated and could not be biased for or against a party at trial.<sup>100</sup> The court then asked whether the clause serves the interest of open-mindedness. Asking for contributions would not damage the judge's willingness to "remain open to persuasion," and therefore, the clause could not pass the strict scrutiny standard.<sup>101</sup> Because the clause did not survive strict scrutiny, the court concluded that it violated the First Amendment.<sup>102</sup>

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 749.

<sup>92</sup> *Id.* at 754.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 758.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 766.

<sup>98</sup> *Id.* at 764.

<sup>99</sup> *Id.* at 765.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 766.

<sup>102</sup> *Id.*

IV. THE AFTERMATH OF *WHITE I*A. *Decisions Holding Judicial Campaign Speech Restrictions Unconstitutional*1. *Weaver v. Bonner*

Shortly after the Supreme Court's decision in *White I*, the Eleventh Circuit decided a case involving the Georgia Code of Judicial Conduct. In *Weaver v. Bonner*, the codes in question stated that candidates:

shall not use or participate in the use of any form of public communication which the candidate knows or reasonably should know is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation of fact or law or omits a fact necessary to make the communication considered as a whole not materially misleading or which is likely to create an unjustified expectation about results the candidate can achieve.<sup>103</sup>

It also stated that candidates “shall not themselves solicit campaign funds, or solicit publicly stated support.”<sup>104</sup>

George Weaver ran for the Georgia Supreme Court in 1998, and as part of his campaign he distributed a brochure stating his opponent's views on “same-sex marriage, traditional moral standards, and the electric chair.”<sup>105</sup> Two complaints were filed, and the Judicial Qualifications Commission (JQC) determined that the statements were “false, misleading, and deceptive.”<sup>106</sup> The JQC issued a cease and desist order, causing Weaver to revise the brochure.<sup>107</sup> Subsequently, Weaver produced a television advertisement that included the same issues as the first brochure.<sup>108</sup> Upon receiving three complaints, the JQC concluded that the advertisement violated the cease and desist order and issued a public statement that Weaver “engaged in ‘unethical, unfair, false and intentionally deceptive’ campaign practices.”<sup>109</sup>

Following the public statement, Weaver filed suit against the JQC alleging that Canons 7(B)(1)(d) and 7(B)(2) were unconstitutional.<sup>110</sup> The district court upheld

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<sup>103</sup> *Weaver v. Bonner*, 309 F.3d 1312, 1315 (11th Cir. 2002) (quoting GA. CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(d)).

<sup>104</sup> *Id.* (quoting GA. CODE OF JUDICIAL CONDUCT Canon 7(B)(2)).

<sup>105</sup> *Id.* at 1316.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 1317.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

Canon 7(B)(2) but ruled Canon 7(B)(1)(d) violated the First Amendment.<sup>111</sup> On appeal, the Eleventh Circuit held that Canon 7(B)(1)(d) was not narrowly tailored to serve a compelling interest.<sup>112</sup> Although false statements do not receive the same level of First Amendment protection, “breathing space” must be allowed for “false statements negligently made and true statements that are misleading or deceptive.”<sup>113</sup> The court concluded that “to be narrowly tailored, restrictions on candidate speech . . . must be limited to false statements that are made with knowledge of falsity or with reckless disregard.”<sup>114</sup>

Disagreeing with the district court, the Eleventh Circuit also held that Canon 7(B)(2) failed strict scrutiny and thus was unconstitutional.<sup>115</sup> The court noted that candidates were “completely chilled” from speaking to voters about donations, which are necessary to run an effective campaign.<sup>116</sup> A candidate could not personally solicit funds, but a committee was allowed to solicit.<sup>117</sup> However, this arrangement did not significantly reduce the risk “that judges will be tempted to rule a particular way.”<sup>118</sup> If judges would be biased towards people who contributed, then impartiality would result “regardless of who did the soliciting.”<sup>119</sup> Therefore, the court held that the clause violated the First Amendment.<sup>120</sup>

## 2. *Family Trust Foundation of Kentucky, Inc. v. Wolnitzek*

During the 2004 judicial elections in Kentucky, the Family Foundation distributed questionnaires to the judicial candidates entitled “2004 Kentucky Candidate Information Survey.”<sup>121</sup> Most candidates declined to answer citing the Kentucky Code of Judicial Conduct as disallowing them to respond to the questions.<sup>122</sup> The relevant section of the code stated:

(1) A judge or candidate for election to judicial office:

. . . .

(c) shall not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the

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<sup>111</sup> *Id.* at 1318.

<sup>112</sup> *Id.* at 1319.

<sup>113</sup> *Id.* (citing *Brown v. Hartlage*, 456 U.S. 45, 61 (1982)).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 1322.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 1323.

<sup>120</sup> *Id.*

<sup>121</sup> *Family Trust Found. of Ky., Inc. v. Wolnitzek*, 345 F. Supp. 2d 672, 677 (E.D. Ky. 2004), *stay denied sub nom.* *Family Trust Found. of Ky., Inc. v. Ky. Judicial Conduct Comm’n*, 388 F.3d 224 (6th Cir. 2004).

<sup>122</sup> *Id.* at 680–82.

office; shall not make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; and shall not misrepresent any candidate's identity, qualifications, present position, or other facts.<sup>123</sup>

The commentary stated that this section "prohibits campaigning on issues in a manner designed solely to appeal to public social bias in order to gain a political advantage."<sup>124</sup>

In determining whether Canon 5B(1)(c) violated the First Amendment, the court reviewed three previous cases dealing with the Kentucky code. Prior to 1991, Kentucky had an announce clause similar to the one struck down in *White I*, which the Kentucky Supreme Court held to be unconstitutional in *J.C.J.D. v. R.J.C.R.*<sup>125</sup> According to the court, the clause left voters to choose candidates solely on "personal appearances."<sup>126</sup> After this decision, the state dropped the announce clause and added the commit clause to the code.<sup>127</sup>

The second case involved a candidate's advertisements that read: "Jed Deters is a Pro-Life Candidate."<sup>128</sup> The Judicial Retirement & Removal Commission received a complaint and upon reviewing the materials, concluded that the statement equated to committing or appearing to commit on an issue in violation of Canon 5B(1)(c).<sup>129</sup> Deters appealed to the Kentucky Supreme Court, but the court determined that the statements undermined the impartiality of the courts.<sup>130</sup>

The third case involved a letter that read, "it is time to judge our judges," "stop the abuse instead of treating it," and "[p]lease join me in stopping the abuse and vote for a person who will let no one walk away before justice is served."<sup>131</sup> The letter referenced the opponent's decision to sentence a child abuser to five years in jail and then later suspend the sentence.<sup>132</sup> The court thought these statements, viewed "in the context of the . . . judicial campaign," represented a "commitment to prevent the probation of child abusers."<sup>133</sup> The court cited *Deters* to dismiss the First Amendment claim, and it said that *J.C.J.D.* involved the announce clause, which was no longer a part of the judicial canon.<sup>134</sup>

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<sup>123</sup> *Id.* at 676 (citing KY. CODE OF JUDICIAL CONDUCT Canon 5B(1)(c)). A clause such as the second in this subsection is commonly referred to as a "commit" clause.

<sup>124</sup> *Id.*

<sup>125</sup> 803 S.W.2d 953, 956 (Ky. 1991), *cert. denied*, 502 U.S. 816 (1991).

<sup>126</sup> *Id.*

<sup>127</sup> *Wolnitzek*, 345 F. Supp. 2d at 691.

<sup>128</sup> *Deters v. Judicial Ret. & Removal Comm'n*, 873 S.W.2d 200, 201 (Ky. 1994), *cert. denied*, 513 U.S. 871 (1994).

<sup>129</sup> *Id.* at 201-02.

<sup>130</sup> *Id.* at 205.

<sup>131</sup> *Summe v. Judicial Ret. & Removal Comm'n*, 947 S.W.2d 42, 46 (Ky. 1997).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 47.

<sup>134</sup> *Id.*

In determining whether Kentucky's promise and commit clauses violated the First Amendment in *Wolnitzek*, the district court used the Supreme Court's decision in *White I* as a guideline.<sup>135</sup> The court concluded that preventing candidates from promising to decide a particular way was a compelling state interest.<sup>136</sup> However, the court noted that the clauses were not limited to promises and commitments and "thus apply to a broad swath of promises that are not protected by any compelling government interest."<sup>137</sup> According to the court, the clauses were actually a "general prohibition against promises," which were "merely announcements of legal views," and therefore protected.<sup>138</sup>

Furthermore, the court looked at how the state had applied the promise and commit clauses. Reviewing *Deters* and *Summe*, the court determined that the state had applied the clauses to more than promises or commitments.<sup>139</sup> It concluded that the clauses "encompass[ed] vast categories of speech that the Supreme Court concluded were protected in *White*."<sup>140</sup> The state had used the clauses "as a *de facto* announce clause," and therefore, the clauses did not meet the standards set forth in *White I*.<sup>141</sup>

## *B. Decisions Upholding Judicial Campaign Speech Restrictions*

### *1. In re Raab—Court of Appeals of New York*

The Commission on Judicial Conduct in New York charged Raab with violating the political activity restrictions of the Rules Governing Judicial Conduct.<sup>142</sup> Raab argued that *White I* should govern the case, and "that the distinction drawn in the rules between the political activities . . . [for] their own campaigns . . . and the activities . . . on behalf of political parties or other candidates is constitutionally flawed."<sup>143</sup> The court disagreed that *White* would require a conclusion that the clause was "constitutionally flawed."<sup>144</sup>

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<sup>135</sup> *Family Trust Found. of Ky., Inc. v. Wolnitzek*, 345 F. Supp. 2d 672, 694 (E.D. Ky. 2004), *stay denied sub nom.* *Family Trust Found of Ky., Inc. v. Ky. Judicial Conduct Comm'n*, 388 F.3d 224 (6th Cir. 2004).

<sup>136</sup> *Id.* at 695.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 697.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 698.

<sup>141</sup> *Id.* at 699. On appeal to the Sixth Circuit, the court affirmed the district court's ruling that the clauses were "a *de facto* announce clause" and that they violated *White I*. *Family Trust Found. of Ky., Inc. v. Ky. Judicial Conduct Comm'n*, 388 F.3d 224, 227 (6th Cir. 2004).

<sup>142</sup> *In re Raab*, 793 N.E.2d 1287, 1289 (N.Y. 2003). The prohibitions included involvement in partisan politics, campaigning for another political candidate, allowing his name to be associated with a political organization, attending political functions, and soliciting funds for a political organization. N.Y. COMP. CODES R. & REGS. tit. 22, §§ 100.5(A)(1)(c)–(h) (1996).

<sup>143</sup> *Raab*, 793 N.E.2d at 1290.

<sup>144</sup> *Id.*



The court used strict scrutiny and determined that the clause was “narrowly tailored to further a number of compelling state interests, including . . . impartiality and independence of [the] state judiciary.”<sup>145</sup> The court noted that “[t]he State’s interest is not limited solely to preventing actual corruption through contributor-candidate arrangements. Of equal import is the prevention of the appearance of corruption,” which is a compelling state interest.<sup>146</sup> Furthermore, the rules were narrowly tailored because they “distinguish between conduct integral to a judicial candidate’s own campaign and activity in support of other candidates or party objectives.”<sup>147</sup> The court upheld both the clauses and the Commission’s sanction against Raab.<sup>148</sup>

## 2. *In re Watson*—Court of Appeals of New York

This case involved New York’s pledges and promises clause.<sup>149</sup> Watson presented himself as pro-law enforcement through letters to the police and the newspapers.<sup>150</sup> The Commission on Judicial Conduct found that Watson’s statements “‘created the appearance that he would not be impartial . . . and would be biased against criminal defendants.’”<sup>151</sup> On appeal, the court held that Watson had promised to “aid law enforcement,” which is “significantly different” from announcing one’s views.<sup>152</sup> It cited impartiality and appearance of impartiality as compelling state interests, which the rule promoted by “preventing party bias.”<sup>153</sup> The court concluded that the clause was narrowly tailored and therefore constitutional.<sup>154</sup>

## V. WHAT DO THESE CASES MEAN FOR THE PROPOSED CODE?

Because judicial campaign speech is “‘at the core of our First Amendment freedoms,’” the Supreme Court determined that courts should analyze restrictions of this speech under the strict scrutiny standard of the First Amendment.<sup>155</sup> Only one of the restrictions in Canon 4 of the proposed Model Code of Judicial Conduct falls into an exception to the Amendment. The recognized exceptions are speech that is obscene, is defamatory, is criminal, is likely to cause imminent harm, incites lawlessness, or

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<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 1291 (quoting *Nicholson v. State Comm’n of Judicial Conduct*, 409 N.E.2d 818, 822 (N.Y. 1980)).

<sup>147</sup> *Id.* at 1292.

<sup>148</sup> *Id.* at 1293.

<sup>149</sup> *In re Watson*, 794 N.E.2d 1, 2 (N.Y. 2003).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 3 (citation omitted).

<sup>152</sup> *Id.* at 5, 6.

<sup>153</sup> *Id.* at 6.

<sup>154</sup> *Id.* at 7.

<sup>155</sup> *White I*, 536 U.S. 765, 774 (2002) (citation omitted).

impairs another's constitutional right.<sup>156</sup> The only provision in Canon 4 that meets an exception is the misrepresent clause, and the Eleventh Circuit noted this in its analysis.<sup>157</sup> The other restrictions must pass the strict scrutiny standard of a compelling governmental interest that is narrowly tailored to fulfill that interest.<sup>158</sup>

The lower court cases, along with the Supreme Court's decision in *White I*, help determine whether the speech restrictions in the ABA's proposed draft meet the standards of strict scrutiny. After *White I*, the announce clause is no longer a valid restriction;<sup>159</sup> however, this does not directly impact the Code because it no longer contains an announce clause.<sup>160</sup> Nevertheless, the lower courts have used *White I* to strike down other provisions that are in the Code.<sup>161</sup> Those provisions include the pledges-or-promises, commit or appear-to-commit, misrepresent, solicitation, and political-activities clauses.<sup>162</sup> An analysis of the relevant cases shows that the ABA is ignoring the standards set forth in the *White* line of cases by proposing provisions that do not meet strict scrutiny.

#### A. The "Partisan-Activities" Clause

The proposed draft makes a few additions to the partisan-activities clause. The relevant portion of the draft reads as follows:

- (A) . . . a judge or a judicial candidate shall not:
  - (1) act as a leader in, or hold an office in, a political organization;
  - (2) make speeches on behalf of a political organization;
  - (3) publicly endorse or oppose a candidate for any public office;
  - (4) solicit funds for, pay an assessment to, or make a contribution to a political organization or a candidate for public office;
  - (5) attend or purchase tickets for dinners or other events sponsored by a political organization or a candidate for public office;
  - (6) publicly identify himself or herself as a candidate of a political organization;
  - (7) seek, accept, or use endorsements from a political organization . . . .<sup>163</sup>

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<sup>156</sup> *Id.* at 793 (Kennedy, J., concurring).

<sup>157</sup> *Weaver v. Bonner*, 309 F.3d 1312, 1319 (11th Cir. 2002).

<sup>158</sup> *White I*, 536 U.S. at 774–75.

<sup>159</sup> *Id.* at 788.

<sup>160</sup> See MODEL CODE OF JUDICIAL CONDUCT Canon 5 (1990) (omitting the announce clause).

<sup>161</sup> See *supra* Parts III–IV.

<sup>162</sup> *Id.*

<sup>163</sup> ABA MODEL CODE OF JUDICIAL CONDUCT Canon 4, Rule 4.1(A)(1)–(7), in ABA REPORT, *supra* note 20, at 151.

The Code has some exceptions for judicial candidates, which differ depending on whether the election is partisan or non-partisan.<sup>164</sup> However, none of the exceptions allow candidates to make speeches, hold office, or solicit funds for political organizations.<sup>165</sup>

Between federal and state courts, the case law regarding this clause is inconsistent. Using the *White I* analysis, the Eighth Circuit held that the clause did not satisfy strict scrutiny.<sup>166</sup> In addition, federal district courts also have held the clause to be unconstitutional.<sup>167</sup> The district court in *Spargo* noted that the candidates had previously participated in politics; otherwise, they would not be “in the position of a candidate.”<sup>168</sup> Because of this reality, the clause was not narrowly tailored.<sup>169</sup> The case, however, is not binding because the Second Circuit vacated the decision for procedural reasons.<sup>170</sup> Because the decision was vacated, the New York Court of Appeals was not bound by the decision and upheld the clause.<sup>171</sup>

Supporters of the clause produce numerous reasons for the prohibitions. The two primary reasons are judicial independence and unbiased judges, which were the reasons given in *White II* and *Raab*.<sup>172</sup> With regard to judicial independence, a “special relationship” forms between the candidate and the party.<sup>173</sup> When a judge is active in a political party, the relationship can cause the judge to “conform [his] judicial decisions to the party line.”<sup>174</sup> If the judge does conform his views, then the party is leading the judiciary instead of the law, which diminishes judicial independence. Similarly, states have an interest in maintaining an impartial or unbiased judiciary. This interest is important because it “assures equal application of the law,” which is “essential to due process.”<sup>175</sup> The bias appears in two forms: bias towards a party in court and bias towards a position.<sup>176</sup>

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<sup>164</sup> *Id.* Canon 4, Rule 4.2, in ABA REPORT, *supra* note 20, at 162–63.

<sup>165</sup> *Id.*

<sup>166</sup> *White II*, 416 F.3d 738 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 1165 (2006).

<sup>167</sup> See *O'Neill v. Coughlan*, No. 1:04-CV-1612, 2007 U.S. Dist. LEXIS 5760 (N.D. Ohio Jan. 26, 2007) (enjoining enforcement of Canon 7(B)(3)(b) of the Ohio Code of Judicial Conduct, which prohibited candidates from identifying with a political party); *Spargo v. N.Y. State Comm'n on Judicial Conduct*, 244 F. Supp. 2d 72 (N.D.N.Y. 2003).

<sup>168</sup> *Spargo*, 244 F. Supp. 2d at 88.

<sup>169</sup> *Id.* at 89.

<sup>170</sup> *Spargo v. N.Y. State Comm'n on Judicial Conduct*, 351 F.3d 65 (2d Cir. 2003) (holding that the district court should have allowed the case to proceed through the state disciplinary process), *cert. denied*, 541 U.S. 1085 (2004).

<sup>171</sup> See *In re Raab*, 793 N.E.2d 1287 (N.Y. 2003).

<sup>172</sup> *White II*, 416 F.3d 738, 751 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 1165 (2006); *Raab*, 793 N.E.2d at 1290.

<sup>173</sup> Richard Briffault, *Judicial Campaign Codes After Republican Party of Minnesota v. White*, 153 U. PA. L. REV. 181, 232 (2004).

<sup>174</sup> *Id.*

<sup>175</sup> *White I*, 536 U.S. 765, 776 (2002).

<sup>176</sup> Catherine Ava Begaye, *Are There Any Limits on Judicial Candidates' Political Speech*

Regarding bias towards a party, the litigants could be active members of the political party or be the political party. If a judge, who publicly aligns himself with that political party, hears the case, the public would likely question whether the judge was impartial and unbiased. However, this situation would occur in just a “handful of cases,” so recusal is a sufficient option.<sup>177</sup>

Bias against a litigant who holds a different political view is tied into bias towards a particular position.<sup>178</sup> By participating in political activities, a judge could give the “appearance of a bias against [a] political ideology” that was different from his party, which then can be inferred into “a bias against those parties not in accord with the judge’s political point of view.”<sup>179</sup> In addition, the public may believe that a political party is influencing a judge’s decision if that judge engages in political activities.<sup>180</sup> The appearance of impartiality would then be harmed. In the end, supporters argue that “[s]uch political activity turns judges into politicians and gives the public the impression that judicial candidates will allow their political views to factor into how they will decide cases once on the bench.”<sup>181</sup>

One argument from the opponents of the partisan-activities clause is that judges are associated with political parties before becoming candidates. The court in *Spargo* made note of this concern:

[A] wholesale prohibition on participating in political activity for fear of influencing a judge ignores the fact that a judicial candidate must have at one time participated in politics or would not find him or herself in the position of a candidate. . . . There is no support for the proposition that one-time participation in political activity impedes the making of independent judgments any less than current participation in some political activity might.<sup>182</sup>

If voters follow judicial campaigns and research the candidates, they would most likely find the candidate’s party affiliation. Just because the public knows to which party a candidate belongs does not mean the public will perceive the candidate as biased.

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*After Republican Party of Minnesota v. White?*, 33 N.M. L. REV. 449, 468 (2003).

<sup>177</sup> Briffault, *supra* note 173, at 230.

<sup>178</sup> Begaye, *supra* note 176, at 468.

<sup>179</sup> *Id.*

<sup>180</sup> Briffault, *supra* note 173, at 232.

<sup>181</sup> Jessica Conser, Comment, *Achievement of Judicial Effectiveness Through Limits on Judicial Independence: A Comparative Approach*, 31 N.C.J. INT’L L. & COM. REG. 255, 299 (2005).

<sup>182</sup> *Spargo v. N.Y. State Comm’n on Judicial Conduct*, 244 F. Supp. 2d 72, 88 (N.D.N.Y. 2003). The Eighth Circuit made the same argument when overturning the clause. *White II*, 416 F.3d 738, 758 (8th Cir. 2005) (“The few months a candidate is ostensibly purged of his association with a political party can hardly be expected to suddenly open the mind of a candidate who has engaged in years of prior political activity.”), *cert. denied*, 126 S. Ct. 1165 (2006).

Some supporters of the clause believe the election period is different. The period is “quite distinctive,” and statements have a “special significance.”<sup>183</sup> However, this position does not fit with the Supreme Court’s opinion in *White I*. The Court noted that election statements were only a small portion of public speech on legal issues and that judges “have often committed themselves on legal issues.”<sup>184</sup> Because the Court did not see a difference in pre-election statements and election statements, it probably would not see a difference between involvement in political activities before an election and during an election.

The other argument against the political-activities clause is that it is both under-inclusive and over-inclusive. It is under-inclusive because it does not include interest groups. These groups can demonstrate a candidate’s view more easily than a political party and can be just as large.<sup>185</sup> Religious beliefs can be more important than political views and can even influence one’s political views. Interest groups are “more narrowly focused” and “convey[] a much stronger message of alignment with particular political views and outcomes.”<sup>186</sup> Yet, the Model Code does not prohibit participation in interest group activities. In addition, the clause is over-inclusive. The canons “intrude . . . upon the lives of incumbent judges on almost a daily basis.”<sup>187</sup> The other clauses prohibit activity only during a specific time, but the political-activities clause regulates judges until they leave the bench. The “interest in judicial legitimacy” is not “sufficiently compelling to allow states to force their judges to bear the cost of that intrusion.”<sup>188</sup>

Both sides have legitimate points, and reviewing courts have come to different conclusions on the clause. One useful means to determine the constitutionality of the proposed political-activities clause is to ask whether it targets issue or party bias. The Court in *White I* drew “a distinction between issue-neutrality and party-neutrality when applying its constitutional analysis to provisions of the *Model Code*.”<sup>189</sup> Proponents claim that impartiality is a compelling state interest. When defining impartiality, the Court “focuses on the ability of the judge to remain neutral between parties,”<sup>190</sup> and it has stated that “avoiding judicial preconceptions on legal issues is neither possible nor desirable.”<sup>191</sup> Because political involvement is “a good indicator of the

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<sup>183</sup> Briffault, *supra* note 173, at 233.

<sup>184</sup> *White I*, 536 U.S. 765, 779 (2002).

<sup>185</sup> *White II*, 416 F.3d at 760.

<sup>186</sup> *Id.*

<sup>187</sup> Michael Richard Dimino, Sr., *Counter-Majoritarian Power and Judges’ Political Speech*, 58 FLA. L. REV. 53, 116 (2006) (citation omitted).

<sup>188</sup> *Id.*

<sup>189</sup> Joe Cutler, *Oops! I Said It Again: Judicial Codes of Conduct, the First Amendment, and the Definition of Impartiality*, 17 GEO. J. LEGAL ETHICS 733, 734 (2004).

<sup>190</sup> *Id.* at 740 (citing *White I*, 536 U.S. 765, 775–76 (2002) (“Impartiality in this sense assures equal application of the law. That is, it guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party.”)).

<sup>191</sup> *White I*, 536 U.S. at 778.

[candidate's] values,"<sup>192</sup> the clause shields people from knowing a candidate's position on "issues."<sup>193</sup> In *White II*, Minnesota made this argument to the Eighth Circuit, saying that party affiliation was "shorthand" for the candidate's views.<sup>194</sup> When reviewing this argument, the court held that the clause was "'barely tailored'" to the interest of impartiality towards a party.<sup>195</sup>

The political-activities clause in the proposed draft fails strict scrutiny. If impartiality means open-mindedness, then the clause is "woefully underinclusive," as it does not prohibit party association before becoming a candidate and does not prohibit interest group affiliation.<sup>196</sup> Moreover, the clause is not limited to party bias. As admitted by its proponents, the clause is meant to prohibit a candidate from aligning himself with the views of a political party.<sup>197</sup> The Supreme Court expressly held that candidates can communicate their views to the electorate.<sup>198</sup> Views are the same whether expressed directly by the candidate or indirectly through party affiliation. For these reasons, the clause fails strict scrutiny and violates the First Amendment.

### *B. Pledges-or-Promises Clause*

The proposed draft does not significantly change the pledges-or-promises clause. The provision states that "a judge or a judicial candidate shall not . . . in connection with cases, controversies, or issues that are likely to come before the court, make pledges [or] promises . . . that are inconsistent with the impartial performance of the adjudicative duties of the office."<sup>199</sup> The comments following the rule note that candidates are allowed to announce their views on legal issues, but they should make clear the "obligation to apply and uphold the law, without regard to his or her personal views."<sup>200</sup>

Since the *White I* decision, two cases have reviewed the pledges-or-promises clause but reached different conclusions. The New York Court of Appeals upheld the clause in *In re Watson*.<sup>201</sup> In contrast, the Sixth Circuit held unconstitutional the Kentucky pledges-or-promises clause.<sup>202</sup> Looking at the difference between the two cases can help alleviate the problem of these two differing opinions. In Kentucky,

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<sup>192</sup> Begaye, *supra* note 176, at 470.

<sup>193</sup> Cutler, *supra* note 189, at 752.

<sup>194</sup> *White II*, 416 F.3d 738, 754 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 1165 (2006).

<sup>195</sup> *Id.* (quoting *White I*, 536 U.S. at 776).

<sup>196</sup> *Id.* at 758, 760.

<sup>197</sup> See *supra* note 194 and accompanying text.

<sup>198</sup> *White I*, 536 U.S. 765.

<sup>199</sup> Proposed MODEL CODE OF JUDICIAL CONDUCT Canon 4, Rule 4.1(A)(13), in ABA REPORT, *supra* note 20, at 151.

<sup>200</sup> *Id.* cmt. 13, in ABA REPORT, *supra* note 20, at 154.

<sup>201</sup> 794 N.E.2d 1 (N.Y. 2003).

<sup>202</sup> Family Trust Found. of Ky., Inc. v. Ky. Judicial Conduct Comm'n, 388 F.3d 224 (6th Cir. 2004).

the courts had construed the pledges-or-promises clause so broadly that in essence it was an announce clause.<sup>203</sup> The Sixth Circuit found that Kentucky was limiting more than promises or pledges to rule a certain way.<sup>204</sup> In contrast, the court in *Watson* believed the statements to be a *promise* to “aid law enforcement.”<sup>205</sup> The difference between the holdings suggests that the clause may be valid if it only restricts actual pledges or promises.

The compelling state interest is the same as for the announce clause—impartiality and the appearance of impartiality. For the pledges-or-promises clause, however, “the implications for impartiality and the appearance of impartiality are more pronounced.”<sup>206</sup> A candidate’s promise to be tough on all drug dealers “would imply an overt bias” against persons being tried for drug dealing.<sup>207</sup> This overt bias does not give the appearance of impartiality. Analysis of issue- and party-neutrality is helpful in this circumstance. Announcing one’s view shows the candidate’s “general approach to particular legal questions.”<sup>208</sup> Making a promise is the candidate’s pledge to a particular party. Thus, the interest would be that of party neutrality,<sup>209</sup> which would be compelling.

Another view of impartiality is that of open-mindedness. This meaning requires judges to be “open to persuasion” regarding issues that come before the court.<sup>210</sup> Although the Supreme Court did not determine whether this interest was compelling, one can make the argument that prohibiting a judge from promising a particular decision protects judicial impartiality.<sup>211</sup> A difference exists between having a prior view before hearing a case and having made a promise to decide the case in a particular way. “Due Process requires that the judge’s mind must be ‘open enough to allow reasonable consideration of the legal and factual issues presented.’”<sup>212</sup>

Even if a compelling interest exists, *White I* requires the regulation to be narrowly tailored to achieve that interest.<sup>213</sup> The Court in *White I* held that the announce clause was not narrowly tailored partly because the candidate could make announcements before and after he ran for office.<sup>214</sup> Arguably, this analysis does not work as well for the pledges-or-promises clause. The purpose of giving the promise, which would be

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<sup>203</sup> *Family Trust Found. of Ky., Inc. v. Wolnitzek*, 345 F. Supp 2d 672, 697 (E.D. Ky. 2004), *stay denied sub nom. Ky. Judicial Conduct Comm’n*, 388 F.3d 224.

<sup>204</sup> *Ky. Judicial Conduct Comm’n*, 388 F.3d at 227.

<sup>205</sup> *Watson*, 794 N.E.2d at 5.

<sup>206</sup> Begaye, *supra* note 176, at 472.

<sup>207</sup> *Id.*

<sup>208</sup> Briffault, *supra* note 173, at 213.

<sup>209</sup> Cutler, *supra* note 189, at 744.

<sup>210</sup> *White I*, 536 U.S. 765, 778 (2002).

<sup>211</sup> Briffault, *supra* note 173, at 211.

<sup>212</sup> *Id.* (quoting *In re Watson*, 794 N.E.2d 1, 7 (N.Y. 2003)).

<sup>213</sup> *White I*, 536 U.S. 765.

<sup>214</sup> *Id.* at 779.

given during the campaign, is to be elected; thus, a restriction applying only to campaign promises seems reasonable.<sup>215</sup>

Furthermore, pledges and promises are different from announcements in another way. Candidates, if elected, “will have a *particular* reluctance to contradict” campaign promises.<sup>216</sup> The candidate “will positively be breaking his word” if he rules in a way opposite from his campaign promise.<sup>217</sup> Opponents to the rule note that candidates do not feel committed to campaign promises.<sup>218</sup> Justice Scalia even commented that campaign promises are not necessarily binding commitments.<sup>219</sup> This assertion may be true; however, promises “can lead the litigants who appear before [the judge] to believe that [he] will act in a way consistent with [his] campaign behavior rather than consistent with due process and due course of law.”<sup>220</sup> This belief, whether true or not, would effect the appearance of impartiality. Moreover, voters may take the promise seriously and “take action” in the next election according to whether the candidate upheld his promise.<sup>221</sup>

While the clause restricts only promises and pledges, it would probably meet the standards of strict scrutiny. The proposed draft allows candidates to announce their views on legal issues, which is essential to upholding the clause.<sup>222</sup> The actual difference between an announcement and a promise “may be thin,” but a promise signals that the candidate has prejudged a case.<sup>223</sup> This prejudgment is in direct conflict with judicial impartiality and open-mindedness.<sup>224</sup> Preventing such bias is a compelling state interest, and the clause appears to be narrowly tailored to meet this interest. For these reasons, the pledges-or-promises clause should be constitutional.

### C. Commit Clause

The drafters of the Model Code have changed the format of the commit clause. The 1990 Code prohibited speech that “appear[ed] to commit” the candidate.<sup>225</sup> Not only does the proposed draft drop that language, it incorporates the commit clause into the pledges-or-promises clause.<sup>226</sup> The section states that candidates “shall not . . .

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<sup>215</sup> Begaye, *supra* note 176, at 473.

<sup>216</sup> *White I*, 536 U.S. at 780.

<sup>217</sup> *Id.*

<sup>218</sup> Briffault, *supra* note 173, at 212.

<sup>219</sup> *White I*, 536 U.S. at 780 (“[O]ne would be naive not to recognize that campaign promises are—by long democratic tradition—the least binding form of human commitment.”).

<sup>220</sup> Briffault, *supra* note 173, at 212 (quotation marks and citation omitted).

<sup>221</sup> *Id.*

<sup>222</sup> See *Family Trust Found. of Ky., Inc. v. Ky. Judicial Conduct Comm’n*, 388 F.3d 224, 227 (6th Cir. 2004).

<sup>223</sup> Briffault, *supra* note 173, at 213.

<sup>224</sup> *Id.*

<sup>225</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (1990).

<sup>226</sup> Proposed MODEL CODE OF JUDICIAL CONDUCT Canon 4, Rule 4.1(A)(13), in ABA REPORT, *supra* note 20, at 157.



in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments.”<sup>227</sup> The change may save the clause, but its constitutionality is still questionable.<sup>228</sup>

The one case to implicate the commit clause is from the Sixth Circuit, which overturned the clause because the state was using it as an announce clause.<sup>229</sup> The comment in the draft allows the candidate to announce his views, which would indicate that committing and announcing are different.<sup>230</sup> However, the ABA’s amicus curiae brief for the *White I* decision said that the Minnesota announce clause had “the same scope as the corresponding provision in the 1990 ABA Model Code of Judicial Conduct.”<sup>231</sup> Two points caution against rushing to the conclusion that the clause is therefore unconstitutional. First, in the *White I* opinion, “the Court made clear that it did not know whether the announce clause, as construed, and the commit clause mean[t] the same thing,” and it noted that Minnesota had both an announce clause and a commit clause.<sup>232</sup> Second, the ABA amended the clause in 2003 by taking out the “appear[s] to commit” language and merging the clause with the pledges-or-promises clause.<sup>233</sup> Arguably, the clause no longer has the same scope as the previous announce clause.

Even with the revision, the clause’s constitutionality is still doubtful. The *White I* decision gave three definitions of impartiality, the last one being open-mindedness.<sup>234</sup> The announce clause did not meet this definition, and one could argue that the commit clause’s “purpose [was] to restrict judicial candidates’ speech that might improperly influence how the electorate votes,” which would be “essentially the same” as the announce clause.<sup>235</sup> On the other hand, the clause could be limited in application. Minnesota had limited its announce clause to “issues likely to come before a court”; however, the Court did not believe this to be a limitation because “[t]here is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction.”<sup>236</sup> Currently, the commit clause applies to “cases, controversies or issues that are likely to come before the court.”<sup>237</sup>

<sup>227</sup> *Id.*

<sup>228</sup> Briffault, *supra* note 173, at 216–17 (noting that the commit clause does not add much to the pledges-or-promises clause, that the two clauses should be merged, and that the “appear to commit” language is troubling).

<sup>229</sup> Family Trust Found. of Ky., Inc. v. Ky. Judicial Conduct Comm’n, 388 F.3d 224 (6th Cir. 2004).

<sup>230</sup> Proposed MODEL CODE OF JUDICIAL CONDUCT Canon 4, Rule 4.1, cmt. 13, in ABA REPORT, *supra* note 20, at 154.

<sup>231</sup> Brief for American Bar Association as Amici Curiae at 1, *White I*, 536 U.S. 765 (2002) (No. 01-521).

<sup>232</sup> Katherine A. Moerke, *Must More Speech Be the Solution to Harmful Speech? Judicial Elections After Republican Party of Minnesota v. White*, 48 S.D. L. REV. 262, 295 (2003).

<sup>233</sup> See MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(I) (2004).

<sup>234</sup> *White I*, 536 U.S. at 775–78.

<sup>235</sup> Begaye, *supra* note 176, at 466–67.

<sup>236</sup> *White I*, 536 U.S. at 772 (citation omitted).

<sup>237</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(ii) (1990).

Opponents argue that the commit clause is similar to the announce clause. According to some, the commit clause is “aimed at restricting a candidate from voicing his or her opinion about legal *issues*, rather than aiming the prohibition squarely against *parties*.”<sup>238</sup> By using “commit” instead of “announce,” the clause could be focused on party neutrality.<sup>239</sup> However, the pledges-or-promises clause already covers party neutrality. By having both clauses, the Code “naturally embod[ies] an issue/party distinction; a person commits to issues but makes pledges to parties.”<sup>240</sup> In addition, the clause specifically prohibits making commitments to “issues that are likely to come before the court.”<sup>241</sup> Therefore, the clause cannot be limited to bias against a particular party, and limiting the scope to issues likely to come before the court does not change the designation from issue-to party-neutrality. The Supreme Court held that this limit is “not much of a limitation at all” because judges can hear almost any legal or political issue.<sup>242</sup> Precluding commitments to issues is not narrowly tailoring the clause.

Some proponents argue that the commit clause is closer to the pledges-or-promises clause than the announce clause. Statements that would fall under the commit clause “are likely to resemble pledges and promises in both content and effect.”<sup>243</sup> The commit clause ensures that statements with the same effect as promises and pledges are restricted even if the statement does not contain the words “promise” or “pledge.”<sup>244</sup> If the commit clause was merely a catch-all clause, then the pledges-or-promises clause’s focus on party neutrality would also apply to the commit clause. This argument is strengthened by the fact that the clause is now incorporated into the pledges-or-promises clause.

Another argument against the clause is the interest in having an informed voter. The *White I* Court recognized this interest and noted that it had “never allowed the government to prohibit candidates from communicating relevant information to voters during an election.”<sup>245</sup> Elected officials play an important role in society, and they should give their views on public concerns.<sup>246</sup> Many people argue that judges are “fundamentally different” from other elected officials, and their elections should have different standards.<sup>247</sup> Even if judges are different, the reality is that judges do make

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<sup>238</sup> Begaye, *supra* note 176, at 466.

<sup>239</sup> Cutler, *supra* note 189, at 744.

<sup>240</sup> *Id.* at 745.

<sup>241</sup> Proposed MODEL CODE OF JUDICIAL CONDUCT Canon 4, Rule 4.1(A)(13), in ABA REPORT, *supra* note 20, at 151.

<sup>242</sup> *White I*, 536 U.S. 765, 772 (2002).

<sup>243</sup> Briffault, *supra* note 173, at 215.

<sup>244</sup> *Id.* at 216.

<sup>245</sup> *White I*, 536 U.S. at 782.

<sup>246</sup> *Id.* at 781–82.

<sup>247</sup> *Id.* at 803 (Ginsburg, J., dissenting). *But see* Chemerinsky, *supra* note 71, at 746 (“[A]lthough judges are different from other elected officials in many ways, in other more crucial ways they are identical. Judges, like all elected officials, must make decisions and

policy.<sup>248</sup> “[S]tate courts are deeply involved not just in interpreting but in making the law”<sup>249</sup> and “are seen as major policy players.”<sup>250</sup> In Minnesota, for example, the courts have found a right to public funding for abortion, have overturned sodomy and conceal-and-carry laws, and have given orders to the legislature regarding the state budget.<sup>251</sup> Although some people acknowledge that judges make policy, they believe the decision comes only from the law and facts.<sup>252</sup> Many courts, however, are coming to the realization that “policy is influenced by the philosophies of the judges.”<sup>253</sup> If judges make policy based on their views, then the public needs to be aware of these views so that it can make an educated decision when voting.

The future of the commit clause is uncertain. Because it applies to “issues,” the commit clause has the same problem as the announce clause and could be unconstitutional. If the clause was limited to cases and controversies, it would have a better chance of surviving a constitutional challenge because it would be similar to a promise.<sup>254</sup> The crucial point is whether the clause is more analogous to the announce clause or the pledges-or-promises clause.<sup>255</sup> If the courts view it as closer to an announce clause, then it will be unconstitutional.<sup>256</sup> The changes to the clause since *White I* appear to bring the clause more in line with the pledges-or-promises clause. However, as long as the commit clause applies to issues, it will be unconstitutional because it has the same narrowing problems as the announce clause.

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frequently have discretion in choosing. Judges, like all elected officials, come to their role with views that are likely to affect their decisions. Voters in judicial elections, like all elections, should evaluate candidates based on their views, as well as their professional qualifications, experience, and suitability for the role. All of these similarities justify treating the speech of judicial candidates like that of all other politicians.”).

<sup>248</sup> Some even argue that the codes are protecting judicial policy. See, e.g., Lino A. Graglia, *Restrictions on Judicial Election Campaign Speech: Silencing Criticism of Liberal Activism*, in FREEDOM OF SPEECH 148, 156 (Ellen Frankel Paul et al. eds., 2004) (“Put forth in the name of protecting judicial independence, impartiality, and the appearance of impartiality, the actual purpose and effect of the codes is to protect judicial policymaking power, which almost always means in practice the power to enact liberal social policies by rulings of unconstitutionality.”).

<sup>249</sup> Brendan J. Doherty, *Stifled Speech and Judicial Campaigns: An Analysis of a Conflicted Legal Culture in Republican Party of Minnesota v. White*, 32 N. KY. L. REV. 305, 317 (2005).

<sup>250</sup> David A. Schultz, *Judicial Selection in Minnesota: Options After Republican Party v. White*, 62 BENCH & B. MINN. 17, 19 (2005), available at [http://www2.mnbar.org/benchandbar/2005/nov05/judicial\\_selection.htm](http://www2.mnbar.org/benchandbar/2005/nov05/judicial_selection.htm).

<sup>251</sup> *Id.*

<sup>252</sup> See Shirley S. Abrahamson, *Judicial Independence as a Campaign Platform: The Importance of Fair and Impartial Courts*, 84 MICH. B.J. 40, 41 (2005) (“Judges base their decisions on the facts and law presented in each individual case, not on their personal viewpoints on policy issues.”).

<sup>253</sup> Dimino, *supra* note 187, at 74.

<sup>254</sup> Moerke, *supra* note 232, at 297–98.

<sup>255</sup> Cutler, *supra* note 189, at 745.

<sup>256</sup> *Id.*

*D. Misrepresent Clause*

In the proposed draft, the ABA has made slight changes to the misrepresent clause. The draft adds “with reckless disregard” and takes out specific information that cannot be misrepresented.<sup>257</sup> The clause states that “a judge or a judicial candidate shall not . . . knowingly, or with reckless disregard for the truth, make any false or misleading statement.”<sup>258</sup> Although the rule says “knowingly,” the comment merely states that a candidate must “refrain from making statements that are false or misleading.”<sup>259</sup> If a state interprets this difference broadly to sanction more than knowing falsehoods, the clause would be unconstitutional.<sup>260</sup>

The misrepresent clause is different from the pledges-or-promises and commit clauses in that it “is aimed at *false*, rather than some type of promissory, speech.”<sup>261</sup> The Court has given only minimal protection to false speech. Under First Amendment jurisprudence, the state can proscribe speech that is false and made with “actual malice,” which is “knowledge that it was false or with reckless disregard of whether it was false.”<sup>262</sup> If the scope of the misrepresent clause is confined to this standard, then no problem exists regarding its constitutionality.

On the other hand, if the scope is broader, then a challenge is possible. The Georgia Code of Judicial Conduct prohibited speech that was “false, fraudulent, misleading, deceptive, or which contain[ed] a material misrepresentation of fact.”<sup>263</sup> The Eleventh Circuit declared this to be unconstitutional.<sup>264</sup> The court held that the restriction “must be limited to false statements that are made with knowledge of falsity or with reckless disregard.”<sup>265</sup> This is the same standard as the one stated in *New York Times*.<sup>266</sup> Although states that have a broad clause or broadly construe the clause will have problems meeting the standard in *White I*, the narrower clause of the Model Code is constitutional.

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<sup>257</sup> Compare Proposed MODEL CODE OF JUDICIAL CONDUCT Canon 4, Rule 4.1(A)(11), in ABA REPORT, *supra* note 20, at 151, with MODEL CODE OF JUDICIAL CONDUCT Canon 5, Rule 5(A)(3)(d)(ii) (1990).

<sup>258</sup> Proposed MODEL CODE OF JUDICIAL CONDUCT Canon 4, Rule 4.1(A)(11), in ABA REPORT, *supra* note 20, at 151.

<sup>259</sup> *Id.* Canon 4, Rule 4.1, cmt. 7, in ABA REPORT, *supra* note 20, at 153.

<sup>260</sup> See *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002).

<sup>261</sup> Moerke, *supra* note 232, at 311.

<sup>262</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

<sup>263</sup> *Weaver*, 309 F.3d at 1315.

<sup>264</sup> *Id.* at 1325.

<sup>265</sup> *Id.* at 1319.

<sup>266</sup> See generally *New York Times Co.*, 376 U.S. 254.

*E. Solicitation Clause*

The solicitation clause does not allow a candidate to “personally solicit or accept campaign contributions.”<sup>267</sup> However, the proposed draft allows the candidate to establish a campaign committee that will solicit donations on the candidate’s behalf.<sup>268</sup> In addition, the proposed draft establishes contribution limits and charges the committee to accept only “reasonable” contributions.<sup>269</sup>

This prohibition against personal solicitations conflicts with decisions from two U.S. Courts of Appeals. Both the Eighth and Eleventh Circuits have ruled the prohibition to be unconstitutional.<sup>270</sup> A difference in the questioned clauses does exist, but it should not change the analysis. The Minnesota Code forbade the committee from disclosing to the candidate the identity of donors or those who declined to donate.<sup>271</sup> The Georgia Code, on the other hand, did not preclude candidates from obtaining this information.<sup>272</sup> The drafters of the proposed Model Code have adopted the latter approach.<sup>273</sup>

Proponents of the solicitation clause believe the clause is essential to maintaining judicial impartiality. According to a national survey, sixty-seven percent of voters agree that “[i]ndividuals or groups who give money to judicial candidates often get favorable treatment.”<sup>274</sup> When voters perceive that a judge is biased towards one party, the appearance of judicial impartiality is damaged. However, the poll question does not distinguish between personally-solicited and committee-solicited contributions.

The real question is not whether campaign contributions damage judicial impartiality but whether personal solicitation increases the danger. Proponents argue that the solicitation clause focuses on party neutrality.<sup>275</sup> Personal solicitation creates a “relationship between the donor and the candidate” and can “turn donors into constituents,” who are “potential litigants.”<sup>276</sup> The relationship can involve personal meetings with “the opportunity for each to look the other in the eye” or a phone call with a “heighten[ed] . . . sense of direct contact.”<sup>277</sup> With these personal contacts, the

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<sup>267</sup> Proposed MODEL CODE OF JUDICIAL CONDUCT Canon 4, Rule 4.1(A)(8), in ABA REPORT, *supra* note 20, at 151.

<sup>268</sup> *Id.* Canon 4, Rule 4.4(A)–(B), in ABA REPORT, *supra* note 20, at 173.

<sup>269</sup> *Id.* Canon 4, Rule 4.4(B)(1), in ABA REPORT, *supra* note 20, at 173.

<sup>270</sup> See *White II*, 416 F.3d 738 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 1165 (2006); *Weaver*, 309 F.3d 1312.

<sup>271</sup> *White II*, 416 F.3d at 765.

<sup>272</sup> *Weaver*, 309 F.3d at 1315.

<sup>273</sup> Proposed MODEL CODE OF JUDICIAL CONDUCT Canon 4, Rule 4.4(A)–(B), in ABA REPORT, *supra* note 20, at 173.

<sup>274</sup> Justice at Stake Campaign, National Poll of American Voters (2001), Q.50, <http://www.justiceatstake.org/files/JASNationalSurveyResults.pdf> [hereinafter JAS Survey].

<sup>275</sup> Cutler, *supra* note 189, at 748.

<sup>276</sup> *Id.*

<sup>277</sup> Briffault, *supra* note 173, at 227.

candidate may have a “heightened sense of gratitude” and “sympathy for the donor’s interests.”<sup>278</sup> The public may view the personal solicitation as increasing the risk of bias towards a litigant who contributed to the candidate’s campaign.<sup>279</sup> The added appearance of bias can damage the public’s confidence in an impartial judiciary.

Another point made by proponents is that the judicial branch is different from the legislature and the executive. Although bias could arise in the other branches from personal solicitations, “legislators and executives regularly meet with individuals . . . in private, one-sided sessions in which those individuals . . . are free to advocate their concerns and seek support.”<sup>280</sup> Judges, on the other hand, do not regularly meet in private with individuals who have matters before the court; in fact, judicial standards preclude such meetings.<sup>281</sup> Allowing a judicial candidate to hold private meetings to solicit funds threatens the appearance of impartiality.<sup>282</sup> Furthermore, many of the donations come from lawyers and their clients, who regularly have business before the court; allowing judges to personally solicit these individuals “exacerbates” the threat to impartiality.<sup>283</sup>

The argument that personal solicitations heighten the danger to judicial impartiality may seem persuasive, but the Eleventh Circuit expressly discarded the argument. According to the court, “the risk is not significantly reduced by allowing the candidate’s agent to seek these contributions . . . rather than the candidate seeking them himself.”<sup>284</sup> Candidates who are inclined to favor donors will be biased “regardless of who did the soliciting of support.”<sup>285</sup> If the candidate knows who donated, then the potential for bias is present. Moreover, keeping the names of donors from candidates does not save the clause. Under this situation, the clause is not narrowly tailored because a judge cannot be biased towards contributors if he does not know their identities.<sup>286</sup>

Having an election means candidates need to gather funds and endorsements from people in the community.<sup>287</sup> Lawyers, as part of the community, contribute to judicial campaigns. The concern that lawyers’ contributions will harm the appearance of judicial impartiality is not too strong when looking at the proposed code. First, the drafters expressly mention lawyers’ ability to contribute funds.<sup>288</sup> The comment mentions a heightened level of care needed when handling contributions from lawyers because

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<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at 227–28.

<sup>281</sup> *Id.* at 228.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Weaver v. Bonner*, 309 F.3d 1312, 1322–23 (11th Cir. 2002).

<sup>285</sup> *Id.* at 1323.

<sup>286</sup> *White II*, 416 F.3d 738, 765 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 1165 (2006).

<sup>287</sup> *Weaver*, 309 F.3d at 1322.

<sup>288</sup> Proposed MODEL CODE OF JUDICIAL CONDUCT Canon 4, Rule 4.4, cmt. 3, in ABA REPORT, *supra* note 20, at 174.

they could “create grounds for disqualification.”<sup>289</sup> However, if the threat to impartiality would lead to “disqualification,” then the code expressly says that recusal is sufficient to handle any problem the situation might present.<sup>290</sup> The stricter rule regarding personal solicitations, therefore, is not necessary under this concern.

The other reason why lawyers’ contributions do not pose a significant risk has to do with the proposed code’s contribution limits. The proposed code does not give a specific amount but says individuals and groups should not exceed an amount that will be determined by the state.<sup>291</sup> Candidates would never receive more than the limited amount from any one donor. “A campaign contribution base with more contributors of smaller amounts undermines the appearance and reality of an improper influence created by fewer contributors of larger amounts.”<sup>292</sup> A judge would feel less pressure to act favorably toward a donor, if the donor gave an amount that many other individuals gave. The contribution limits, therefore, reduce the risk of biased judges and help preserve the appearance of impartiality. With these limits, the restriction on personal solicitations is not narrowly tailored.

#### VI. POSSIBLE SOLUTIONS THAT SATISFY *WHITE* AND THE NEED FOR JUDICIAL INDEPENDENCE

Even if some of the clauses are unconstitutional, the ABA and states are not without alternatives. Since *White I*, many people have put forth suggestions, and some states have revised their codes of judicial conduct. One possible solution is to have no restrictions and allow partisan elections. As one article mentions, having partisan elections would give voters more information on the candidates, and this “might actually encourage more interest in these races reversing the ballot drop-off phenomena characteristic of voting patterns presently in Minnesota and other states.”<sup>293</sup> However, this possibility seems unlikely with the ABA’s dislike of partisan judicial elections, which is evidenced by its proposed code and recent statements from the chair of the commission.<sup>294</sup> A better solution might be to educate the public regarding the importance of judicial independence and impartiality. Such education might include: “What is

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<sup>289</sup> *Id.*

<sup>290</sup> *Id.* Canon 2, Rule 2.11, in ABA REPORT, *supra* note 20, at 74–75.

<sup>291</sup> *Id.* Canon 4, Rule 4.4(B)(2), in ABA REPORT, *supra* note 20, at 173.

<sup>292</sup> Phyllis Williams Kotey, *Public Financing for Non-Partisan Judicial Campaigns: Protecting Judicial Independence While Ensuring Judicial Impartiality*, 38 AKRON L. REV. 597, 612 (2005).

<sup>293</sup> David Schultz, *Minnesota Republican Party v. White and the Future of State Judicial Selection*, 69 ALB. L. REV. 985, 1007 (2006).

<sup>294</sup> Statement of Mark Harrison, Comm’n Chair, ABA Joint Comm’n to Evaluate the Model Code of Judicial Conduct (Oct. 2006), available at <http://www.abanet.org/judicialethics> (“We have endeavored to adhere to and apply [independence, integrity, and impartiality] throughout the Code, firm in the belief that they are indispensable to preservation of the public trust in our judiciary and confidence in our legal system.”).

judicial independence? Why is judicial independence important to you, the citizen? What are the threats to judicial independence? How can judicial independence be protected?”<sup>295</sup> These points will help “citizens to evaluate critical attacks on judges and to value judicial independence.”<sup>296</sup>

In addition to educating the public, states could ask candidates to voluntarily submit to campaign restrictions. Of course, the candidates “most interested in more partisan races would be unlikely to . . . adhere[] to new restrictions.”<sup>297</sup> However, an educated public would be able to determine which values—partisan interests or judicial independence—were more important to them. After learning and realizing the importance of judicial impartiality and independence, an individual might determine that these are more important than the current political issues. He then could vote for the candidate who was acting in accord with judicial independence. Even if an informed individual votes in favor of particular issues, the appearance of impartiality is not harmed. If the voter thought a campaign harmed the appearance of impartiality, he could vote for the other candidate. By voting for a more partisan candidate, the voter shows that impartiality is not damaged. With education and information, the voters can make the best decision for themselves and their community.

In addition to education, some states have amended their codes. North Carolina recently revised its code to allow candidates more freedom. Under the code, candidates are allowed to attend political gatherings, to endorse other judicial candidates, and to identify themselves with a political party.<sup>298</sup> In order to “strike a balance” between judicial impartiality and candidates’ rights, the code contains some limitations on political activities.<sup>299</sup> Candidates are not allowed to endorse non-judicial candidates, solicit money for such candidates, or financially contribute to other candidates.<sup>300</sup>

Even with these restrictions, some people believe the measures are “so permissive that the public confidence in the judiciary can only decline.”<sup>301</sup> However, this concern is not in alignment with a national survey conducted in 2001 by the Justice at Stake Campaign. In the survey, when asked how well the word “political” defined judges, seventy-six percent answered “well.”<sup>302</sup> The same percentage felt that “fair” also described judges well.<sup>303</sup> These statistics show that the public can view judges both as fair or impartial and as political. The determination whether a judge is fair would affect the public’s confidence in the judiciary. Unfair judges would make confidence decline. However, according to the statistics, political judges can also be fair judges,

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<sup>295</sup> Abrahamson, *supra* note 252, at 41.

<sup>296</sup> *Id.*

<sup>297</sup> Schultz, *supra* note 250, at 20.

<sup>298</sup> N.C. CODE OF JUDICIAL CONDUCT Canon 7(B)(1)–(3) (2006), *available at* <http://www.aoc.state.nc.us/www/public/aoc/Amendments-NCJudicialCode.pdf>.

<sup>299</sup> *Id.* Canon 7 pmbl.

<sup>300</sup> *Id.* Canon 7(B)(1)–(3).

<sup>301</sup> Conser, *supra* note 181, at 297.

<sup>302</sup> JAS Survey, *supra* note 274, Q.33.

<sup>303</sup> *Id.* Q.28.



so increasing the amount of political activity in which a judge can participate would not necessarily make public confidence in the judiciary decline.

Regarding the pledges-or-promises and commit clauses, the states have formulated different approaches. At one extreme, North Carolina has eliminated both clauses.<sup>304</sup> Alabama prohibits candidates from making “any promise of conduct” or announcement of “conclusions of law on pending litigation.”<sup>305</sup> The provision eliminates the “issues” prohibition and focuses squarely on the problem: bias against a particular party. Minnesota, after the *White* decisions, no longer has a commit clause, opting instead for only the pledges-or-promises clause.<sup>306</sup> North Carolina’s approach does not address the concern of judicial impartiality via party bias stemming from campaign promises. The last two approaches address the concern of judicial impartiality, but by limiting the clause only to promises and excluding issues, these clauses are more narrowly tailored than the ABA’s proposed draft.

The solicitation clause is more difficult. Alabama, Georgia, Nevada, and North Carolina allow candidates to personally solicit contributions, but they also highly encourage candidates to establish committees to handle the soliciting.<sup>307</sup> Although the committees are no longer mandatory, an effective voter education program would give them a strong incentive to use the committees. The candidates would want to avoid any perceived bias of which the voters now were aware. Moreover, unlike political activities and announcements, personal solicitations do not inform voters of a candidate’s position on issues. The choice for voters would not be between two competing values, impartiality or a particular issue. Instead, impartiality would be the only issue with personal solicitations, and a candidate would be risking votes by not forming a committee if the public was aware of the importance of impartiality.

## CONCLUSION

The tension between candidates’ First Amendment rights and society’s interest in an impartial and independent judiciary is hard to alleviate. As Justice O’Connor

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<sup>304</sup> N.C. CODE OF JUDICIAL CONDUCT Canon 7 (2006), available at <http://www.aoc.state.nc.us/www/public/aoc/Amendments-NCJudicialCode.pdf>.

<sup>305</sup> Ala. Canons of Judicial Ethics Canon 7(B)(1)(c) (2001), available at <http://www.alalinc.net/jic/docs/cans2000.pdf>; see also OHIO CODE OF JUDICIAL CONDUCT Canon 7(B)(2)(d) (1997), available at <http://www.sconet.state.oh.us/rules/conduct> (applying the commit clause only to “cases or controversies”).

<sup>306</sup> MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2006), available at <http://www.bjs.state.mn.us/canon2.html>.

<sup>307</sup> See ALA. CANONS OF JUDICIAL CONDUCT Canon 7(B)(4) (2001), available at <http://www.alalinc.net/jic/docs/cans2000.pdf>; GA. CODE OF JUDICIAL CONDUCT Canon 7(B)(2) & cmt. (1998), available at [http://www.gabar.org/handbook/georgia\\_code\\_of\\_judicial\\_conduct](http://www.gabar.org/handbook/georgia_code_of_judicial_conduct); NEV. CODE OF JUDICIAL CONDUCT Canon 5(C)(2) (2007), available at <http://judicial.state.nv.us/nevcodejudicialconduct3new.htm>; N.C. CODE OF JUDICIAL CONDUCT Canon 7(B)(4) (2006), available at <http://www.aoc.state.nc.us/www/public/aoc/amendments-NCJudicialCode.pdf>.

noted, states have caused the problem by deciding to elect their judges.<sup>308</sup> However, states are not likely to switch to an appointment system. In an ABA survey, “[s]eventy-five percent of [Americans] polled . . . said that their confidence is greater in judges they elect than in judges who are appointed.”<sup>309</sup> Following these statistics, the public would be reluctant to change the method of selecting judges. Because judicial elections are still popular, states will need to find a way to balance the competing interests while maintaining the elections.

In some of the proposed provisions, the ABA has failed to find the correct balance between the respective interests. The misrepresent clause is constitutional, as long as it keeps the “knowing” requirement. Combining the pledges-or-promises and commit clauses may save them from being unconstitutional; however, the inclusion of “issues” raises serious concerns for the commit clause. If the state construed issues to be more than party bias, the clause would not be narrowly tailored or meet a compelling interest and would therefore violate the First Amendment. In addition, the political activities and solicitation clauses likely would not fair well. All federal courts to decide on the clauses have declared both unconstitutional because they are not narrowly tailored to meet a compelling state interest.

In revising its draft, the ABA should look to states that have recently changed their codes. Allowing political activities and personal solicitation may not be desirable, but disallowing such activity does not meet the First Amendment strict scrutiny standard. The best solution is to educate the public regarding the importance of judicial impartiality and independence. If the public becomes concerned with having an impartial judiciary, it is more likely to vote for candidates who will uphold this value. The ABA needs to stress the importance of judicial impartiality and then let the public resolve the tension between that and the desire to express political views during elections.

#### POST SCRIPT

On February 12, 2007, the ABA House of Delegates approved the *ABA Report*.<sup>310</sup> The House of Delegates made no changes to the *ABA Report*.<sup>311</sup> The proposed draft for the campaign activity clause is now Model Code of Judicial Conduct Canon 4 (2007).<sup>312</sup>

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<sup>308</sup> *White I*, 536 U.S. 765, 792 (2002) (O'Connor, J., concurring).

<sup>309</sup> See Roger J. Miner, *Judicial Ethics in the Twenty-First Century: Tracing the Trends*, 32 HOFSTRA L. REV. 1107, 1110 (2004).

<sup>310</sup> *ABA Model Code of Judicial Conduct, February 2007*, ABA Joint Comm'n to Evaluate the Model Code of Judicial Conduct, [http://www.abanet.org/judiciaethics/approved\\_MCJC.html](http://www.abanet.org/judiciaethics/approved_MCJC.html).

<sup>311</sup> *Id.*

<sup>312</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 4 (2007), available at [http://www.abanet.org/judiciaethics/approved\\_MCJC.html](http://www.abanet.org/judiciaethics/approved_MCJC.html)