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# Judicial Campaign Codes after *Republican Party of Minnesota V. White*

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JUDICIAL CAMPAIGN CODES AFTER *REPUBLICAN  
PARTY OF MINNESOTA V. WHITE*

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# NEW ISSUES IN THE LAW OF DEMOCRACY

## JUDICIAL CAMPAIGN CODES AFTER *REPUBLICAN PARTY OF MINNESOTA V. WHITE*

RICHARD BRIFFAULT<sup>†</sup>

### INTRODUCTION

The vast majority of judicial offices in the United States are subject to election. The votes of the people select or retain at least some judges in thirty-nine states, and all judges are elected in twenty-one states.<sup>1</sup> By one count, 87% of the state and local judges in the United States have to face the voters at some point if they want to win or remain in office.<sup>2</sup> Judicial elections, however, differ from elections for legislative or executive offices in a number of significant ways. In nineteen states, most judges are initially appointed but must later go before the voters in a so-called retention election—in which there is no competing candidate but voters are asked simply whether they approve of the incumbent—in order to keep their positions.<sup>3</sup> In twenty of the states that provide for electoral contests between competing judicial candidates, some or all judicial elections are nonpartisan, even though candidates for other state offices are elected on party lines.<sup>4</sup> Most strikingly, virtually all states that provide for judicial elections also impose campaign codes that restrict the election-related activities of judicial candi-

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<sup>1</sup> See AM. JUDICATURE SOC'Y, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS 3, 7-14 (2004) (charting the methods of judicial selection and retention for all fifty states), available at <http://www.ajs.org/js/JudicialSelectionCharts.pdf> (last accessed Oct. 7, 2004).

<sup>2</sup> Robert C. Berness, Note, *Norms of Judicial Behavior: Understanding Restrictions on Judicial Candidate Speech in the Age of Attack Politics*, 53 RUTGERS L. REV. 1027, 1028 (2001).

<sup>3</sup> AM. JUDICATURE SOC'Y, *supra* note 1, at 7-14 (noting the use of retention elections in Alaska, Arizona, California, Colorado, Florida, Illinois, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, New Mexico, Oklahoma, Pennsylvania, South Dakota, Tennessee, Utah, and Wyoming). In addition, unopposed judges run for retention in Montana. *Id.* at 10.

<sup>4</sup> *Id.*

dates to a far greater extent than these states regulate the campaigns of executive and legislative candidates. Generally adopted by rule of the state's highest court rather than by statute, these codes, inter alia, limit what judicial candidates may say in their campaigns, restrict how they raise campaign contributions, and curtail their ability to engage in partisan political activities other than support for their own candidacies.

In 2002, the United States Supreme Court sharply called into question the constitutionality of state judicial campaign restrictions. In *Republican Party of Minnesota v. White*,<sup>5</sup> a closely divided Supreme Court invalidated the provision of the Minnesota Code of Judicial Conduct that precluded judicial candidates from “announcing” their views concerning disputed legal and political questions. *White* found that the First Amendment applies to a judicial campaign code and, therefore, the code's restriction on campaign speech should be subject to strict judicial scrutiny. The Court cast doubt on the primary rationale for the campaign canons—preserving the impartiality and the appearance of impartiality of the state judiciary<sup>6</sup>—and expressed skepticism with regard to the notion that even if judicial impartiality is a compelling state interest, that interest may be advanced by campaign speech restrictions.<sup>7</sup> Moreover, the Court emphasized the positive value of enabling judicial candidates to express themselves on disputed political and legal questions. As the Court stated, those are “what the elections are about.”<sup>8</sup>

Although Justice Scalia's majority opinion observed that “we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office,” the Court also pointedly declined to find that the First Amendment allows greater regulation of judicial election campaigns than of other elections.<sup>9</sup> Rather, noting the important lawmaking role of American courts, the majority concluded that the dissenters “greatly exaggerate[d] the difference between judicial and legislative elections.”<sup>10</sup> *White*'s treatment of the judicial impartiality rationale and its application of the narrow tailoring requirement raise questions about whether *any* judicial campaign restriction could pass strict scrutiny. The decision casts a shadow of unconstitutionality over the entire project of judicial election campaign regulation.

In the eighteen months since *White*, federal courts have held unconstitutional a number of state judicial campaign restrictions that were not at issue

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<sup>5</sup> 536 U.S. 765 (2002).

<sup>6</sup> *Id.* at 775-78.

<sup>7</sup> *Id.* at 779-83.

<sup>8</sup> *Id.* at 788.

<sup>9</sup> *Id.* at 783.

<sup>10</sup> *Id.* at 784.

in *White*.<sup>11</sup> Similarly, a number of state courts have revised their canons, including provisions not at issue in *White*, to make them less restrictive.<sup>12</sup> To be sure, many state courts have retained their canons and have rejected First Amendment challenges to the restrictions on judicial campaign and partisan political activities that the canons impose.<sup>13</sup> But the constitutionality of the state canons that subject judicial campaigns to greater regulation than legislative or executive campaigns remains uncertain.

In this Article, I will consider three questions raised by *White*. First, does the Constitution require that all elections be run according to the same set of rules? That is certainly the implication of those judges and commentators who have argued that, having chosen to select or retain judges by election, the states must abide by the constitutional requirements that apply to elections.<sup>14</sup> However, as I will discuss in Part I, the Supreme Court has repeatedly upheld variations in the constitutional norms that govern a number of the fundamental features of elections. Indeed, the constitutional rules of elections may differ according to what is at stake in the election. If campaign practices that are unexceptionable (or even constitutionally protected)

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<sup>11</sup> *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002); *Spargo v. N.Y. State Comm'n on Judicial Conduct*, 244 F. Supp. 2d 72 (N.D.N.Y. 2003), *vacated on other grounds*, 351 F.3d 65 (2d Cir. 2003).

<sup>12</sup> See, e.g., CAL. CODE OF JUDICIAL ETHICS Canon 5B(1) (amended Dec. 22, 2003) (prohibiting judicial candidates from making statements "that commit the candidate with respect to cases, controversies, or issues that could come before the courts" but no longer prohibiting statements that "appear to commit" the candidate). Compare GA. CODE OF JUDICIAL CONDUCT Canon 7B (amended Jan. 7, 2004) (removing the prohibitions against both "pledges or promises" by candidates and the personal solicitation of campaign contributions), and N.C. CODE OF JUDICIAL CONDUCT Canon 7 (amended Apr. 2, 2003) (deleting prohibitions against judicial candidates' "pledges or promises" and personal solicitation of campaign funds), with GA. CODE OF JUDICIAL CONDUCT Canon 7B (2000), and N.C. CODE OF JUDICIAL CONDUCT Canon 7 (1998).

<sup>13</sup> See, e.g., *In re Kinsey*, 842 So. 2d 77, 87 (Fla. 2003) (per curiam) (finding that the state's canons were sufficiently narrowly tailored to pass strict scrutiny), *cert. denied*, 124 S. Ct. 180 (2003); *In re Dunleavy*, 838 A.2d 338, 350 (Me. 2003) (concluding that canon restricting speech was "narrowly tailored" to serve a compelling state interest), *cert. denied*, 124 S. Ct. 1722 (2004); *In re Raab*, 793 N.E.2d 1287, 1290 (N.Y. 2003) (per curiam) (finding the rules restricting judicial political activity "narrowly tailored to further a number of compelling state interests"); *In re Watson*, 794 N.E.2d 1, 8 (N.Y. 2003) (per curiam) (holding "New York's pledges or promises clause—essential to maintaining impartiality and the appearance of impartiality in the state judiciary—is sufficiently circumscribed to withstand exacting scrutiny under the First Amendment").

<sup>14</sup> See, e.g., *Weaver*, 309 F.3d at 1321 ("*White* suggests that the standard for judicial elections should be the same as the standard for legislative and executive elections." (emphasis added)); Ronald D. Rotunda, *Judicial Campaigns in the Shadow of Republican Party of Minnesota v. White*, PROF. LAW., Fall 2002, at 2, 22-23 (Fall 2002) ("The First Amendment . . . does not allow judges to impose restrictive rules that try to take the politics out of political campaign speech. If states choose to elect judges instead of appointing them, that choice limits the subsequent power of the state to regulate the judicial elections.").

in the context of legislative or executive elections have a distinct and harmful impact on the judicial function, then they can be restricted in judicial election campaigns.

Second, even if it is theoretically legitimate to apply rules to judicial campaigns that are more restrictive than those that govern executive and legislative elections, are the specific rules in the state judicial conduct codes constitutional? These canons preclude judicial candidates from making “pledges or promises” or other statements that “commit or appear to commit” candidates with respect to cases or legal issues;<sup>15</sup> penalize misrepresentations and misleading statements;<sup>16</sup> bar judges and judicial candidates from personally soliciting campaign contributions;<sup>17</sup> and restrict partisan political behavior.<sup>18</sup> Although *White* noted that Minnesota’s “pledges or promises”

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<sup>15</sup> See, e.g., *Ackerson v. Ky. Judicial Ret. & Removal Comm’n*, 776 F. Supp. 309, 313 (W.D. Ky. 1991) (“The canon . . . prohibits, in broad language, pledges and promises of conduct in office and commitments with respect to issues likely to come before the court.”); *In re Kinsey*, 842 So. 2d at 88 (“Each of the charges . . . involved implicit pledges that if elected to office, Judge Kinsey would help law enforcement.”); *Deters v. Judicial Ret. & Removal Comm’n*, 873 S.W.2d 200, 203 (Ky. 1994) (charging judicial candidate with violating the Kentucky’s Commit Clause because he promoted himself as a pro-life candidate); *In re Watson*, 794 N.E.2d at 5 (“[P]etitioner’s campaign effectively promised that, if elected, he would aid law enforcement rather than apply the law neutrally and impartially in criminal cases.”).

<sup>16</sup> See, e.g., *Weaver*, 309 F.3d at 1316 (finding a misleading campaign brochure in violation of Canon 7(B)(1)(d)); *Butler v. Ala. Judicial Inquiry Comm’n*, 802 So. 2d 207, 211 (Ala. 2001) (charging a judicial candidate with distributing “false information” about his opponent); *In re Bybee*, 716 N.E.2d 957, 958 (Ind. 1999) (per curiam) (“Respondent made knowing misrepresentation about the incumbent judge’s judicial record during the course of her candidacy for office.”); *Summe v. Judicial Ret. & Removal Comm’n*, 947 S.W.2d 42, 43 (Ky. 1997) (determining that a judicial candidate misrepresented campaign literature as an independent endorsement by a newspaper); *In re Chmura*, 608 N.W.2d 31, 33 (Mich. 2000) (“[The court] narrow[s] the canon to prohibit a candidate from either knowingly or recklessly using forms of public communication that are false.”); *In re Miller*, 759 A.2d 455, 457 (Pa. Ct. Jud. Disc. 2000) (“[H]e is charged with disseminating information in the course of his campaign for election as judge . . . which, allegedly, misrepresented his position and qualifications in violation of Canon 7 of the Code of Judicial Conduct.”).

<sup>17</sup> See, e.g., *Weaver*, 309 F.3d at 1322-23 (“[C]andidates are completely chilled from speaking to potential contributors . . . .”); *Stretton v. Disciplinary Bd. of the Supreme Court*, 944 F.2d 137, 144 (3d Cir. 1991) (“Canon 7 . . . prohibits personal solicitation of campaign funds by a candidate for judicial office.”); *In re Dunleavy*, 838 A.2d at 348 (“[W]e sought to prevent the appearance of, or the ultimate corruption of, the judicial process by preventing judges from soliciting contributions in support of their own political ambitions.”); *In re Fadeley*, 802 P.2d 31, 32 (Or. 1990) (per curiam) (“Personal solicitation of campaign funds by a candidate for judicial office is forbidden by Canons 7 B(7) and 7 D of the Code of Judicial Conduct . . . .”); cf. *Zeller v. Fla. Bar*, 909 F. Supp. 1518, 1527-28 (N.D. Fla. 1995) (holding unconstitutional a time limitation on period for solicitation and a restriction on contributions to judicial candidate campaigns).

<sup>18</sup> See, e.g., *Spargo v. N.Y. State Comm’n on Judicial Conduct*, 244 F. Supp. 2d 72, 80 (N.D.N.Y. 2003) (charging judicial candidate who served as keynote speaker at partisan political function with violating provisions of New York’s Code of Judicial Conduct); *Suster v.*

clause was not at issue in that case,<sup>19</sup> two decades earlier the Court had held in a nonjudicial election that the First Amendment protects the freedom of candidates to make campaign promises.<sup>20</sup> Moreover, even before *White*, the lower federal courts and state courts had been troubled by the canons' penalties for misrepresentations.<sup>21</sup> Since *White*, two courts have invalidated restrictions on personal solicitation and partisan political behavior.<sup>22</sup>

In Part II, I will sketch out a general framework for thinking about the regulation of election campaigns and, more specifically, of judicial election campaigns. I will indicate that the Supreme Court has repeatedly upheld campaign regulations, even those that trench on the free speech rights of

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Marshall, 951 F. Supp. 693, 704 (N.D. Ohio 1996) (holding as constitutional a canon forbidding a judicial candidate from using funds raised for a campaign for a different elected position); *In re Raab*, 793 N.E.2d at 1292 (distinguishing between furthering one's own campaign and engaging in partisan activity in support of other candidates).

<sup>19</sup> *Republican Party of Minn. v. White*, 536 U.S. 765, 770 (2002).

<sup>20</sup> *Brown v. Hartlage*, 456 U.S. 45 (1982).

<sup>21</sup> See, e.g., *Butler*, 802 So. 2d at 218 (suggesting the canon chills judicial speech by punishing unintentionally mistaken rather than intentionally false statements); *In re Chmura*, 608 N.W.2d at 42 (expressing concern that the more broadly drawn canon encourages judicial candidates to be silent on key issues rather than risk making unintentionally misleading remarks); *In re Miller*, 759 A.2d at 471 (opining that a broad interpretation of First Amendment rights and a narrower reading of the canon protects the judiciary's "image and integrity").

<sup>22</sup> *Weaver*, 309 F.3d at 1321-22; *Spargo*, 244 F. Supp. 2d at 90. The personal solicitation and partisan behavior restrictions had also been at issue in the *White* litigation. The plaintiffs in *White* had challenged the Minnesota canons that dealt with judicial candidates' partisan activities and personal solicitation of funds, as well as the state's Announce Clause. On the parties' cross-motions for summary judgment, the district court granted summary judgment to the state defendants and upheld both the personal solicitation and partisan activity canons. *Republican Party of Minn. v. Kelly*, 63 F. Supp. 2d 967, 986 (D. Minn. 1999). The Eighth Circuit affirmed. 247 F.3d 854, 885 (8th Cir. 2001). Plaintiffs sought certiorari to review the Eighth Circuit's decision upholding the partisan activity and the Announce Clause canons (but not review of the decision upholding the anti-personal solicitation canon), but the Supreme Court granted certiorari only as to the Announce Clause. 534 U.S. 1054, 1054 (2001). Upon holding that the Minnesota Announce Clause violated the First Amendment, the Supreme Court reversed the grant of summary judgment to respondents and remanded the case for further proceedings. *White*, 536 U.S. at 788. On remand, a divided Eighth Circuit panel adhered to the appellate court's prior position upholding the anti-personal solicitation canon, 361 F.3d 1035, 1048-49 (8th Cir. 2004), but reversed the summary judgment for the defendants and remanded for trial on the challenge to the partisan activity restrictions, *id.* at 1043-48. The dissenter would have entered summary judgment for the plaintiffs on both issues. *Id.* at 1049. The panel's treatment of the personal solicitation issue is discussed at *infra* text accompanying note 180, and its consideration of the restrictions on partisan political activities is considered at *infra* text accompanying notes 207-11. Two months after the panel decision, the Eighth Circuit voted to grant rehearing en banc and to vacate the panel's opinion and judgment. *Republican Party of Minn. v. Kelly*, No. 99-4021/4025/4029, 2004 U.S. App. LEXIS 10232, at \*4 (8th Cir. May 25, 2004). As of the printing of this Article, oral argument of the rehearing en banc was scheduled for October 20, 2004. *Notice to All Counsel: October 18-24, 2004*, United States Court of Appeals for the 8th Circuit at 4, at <http://www.ca8.uscourts.gov/webcal/print/oct04stp.pdf> (rev. Oct. 1, 2004).

candidates and their supporters, when those regulations promote other important values, such as improving the quality of the electoral process or enhancing the integrity of government. I will suggest that the special nature of the judicial function can justify restrictions on campaign conduct that would not be constitutional in the nonjudicial setting.

In Part III, I consider some of the specific campaign conduct canons that have been subject to legal challenge in recent years. I will argue that restrictions on campaign “pledges or promises” and “commitments” are constitutional, even though comparable restrictions on legislative and executive candidates would be unconstitutional. To be sure, some current versions of these restrictions are subject to challenge as vague or overly broad. But the basic idea that judicial candidates can be precluded from making statements that indicate that they have prejudged cases or issues that are likely to come before them as judges is sound.

The canon dealing with misrepresentations presents a different question. It is difficult to see what in the nature of judging requires judges to be held to a higher standard of honesty than other public officials. But it may be that properly defined restrictions on misrepresentations would be constitutional with respect to candidates for *any* elected office, even if in practice such restrictions are aimed primarily at judicial candidates.

Restrictions on candidates’ personal solicitation of campaign contributions and partisan political activity also ought to be treated as constitutional. These restrictions advance the compelling public interest in judicial impartiality and independence. Moreover, these rules affect only campaign behavior. They do not affect the content of candidates’ campaign statements and, thus, cut less deeply into the candidates’ freedom of expression while also avoiding the reduction in voter information that might result from restrictions on campaign statements. As a result, these restrictions ought to be upheld as constitutional, *White* notwithstanding.

Finally, even if these canons are constitutional, the question remains whether they are likely to be effective in reconciling the competing goals of informed voter decision making, vigorous competition, and judicial impartiality that together frame the debate over the regulation of judicial election campaigns. My sense is that the benefits of the canons are modest at best. Other forces, including the growing costs of judicial election campaigns and the increasing involvement of interest groups in judicial elections,<sup>23</sup> are

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<sup>23</sup> See generally DEBORAH GOLDBERG & SAMANTHA SANCHEZ, *THE NEW POLITICS OF JUDICIAL ELECTIONS 2002: HOW THE THREAT TO FAIR AND IMPARTIAL COURTS SPREAD TO MORE STATES IN 2002* (2004) (arguing that special interest groups pressure state supreme court candidates to sacrifice impartiality once elected), *available at*

likely to swamp the effects of continued enforcement of the canons. As I will discuss in the Conclusion, the quality of judicial elections and the impartiality of judicial decision making might be better advanced through other devices, particularly public funding of judicial elections and the exclusion of judges from cases where their campaign statements indicate they have prejudged the outcome.

#### I. ALL ELECTIONS ARE NOT ALIKE: THE VARIATION IN ELECTION RULES ACCORDING TO THE PURPOSE OF THE ELECTION

One strand in the debate over judicial campaign rules essentially relies on the argument that, although there is no requirement that judges be elected, when a state “opt[s] for an elected judiciary,”<sup>24</sup> the state thereby also agrees to submit to a package of constitutional constraints that apply to all elections. But there is a surprising degree of variability in the constitutional rules that govern elections. On more than one occasion, the Supreme Court has distinguished among elections for different types of public offices, between elections for office and elections concerning ballot propositions, and even among different types of ballot issues. These distinctions affect who may vote, how votes may be weighted, and how campaign finances may be regulated. As a result, the standard constitutional requirements of universal suffrage and equally weighted votes do not apply to all elections. Similarly, the constitutionality of campaign contribution restrictions turns on the nature of the election. Rather than requiring a uniform set of election rules, the Court has held that requirements may vary in light of the government actions affected by the election, the differential impact of the election on different constituencies, and the differences in the dangers posed by the regulated behavior on the public offices or issues determined by the election.

Thus, the Supreme Court has exempted certain elections from the requirements of universal suffrage and one person, one vote. In the special district cases involving referenda in or the election of members to the boards of directors of highly specialized government bodies engaged in irrigation, water storage, and flood control, the Court held that due to the special limited purposes of the districts and the disproportionate impact of the districts’ activities on a discrete constituency—landowners—the franchise could be limited to landowners, and, indeed, votes could be allocated according to

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[http://www.soros.org/initiatives/justice/articles\\_publications/publications/justiceatstake\\_20040506/b\\_new\\_politics\\_report.pdf](http://www.soros.org/initiatives/justice/articles_publications/publications/justiceatstake_20040506/b_new_politics_report.pdf) (last accessed Oct. 7, 2004).

<sup>24</sup> *White*, 536 U.S. at 795 (Kennedy, J., dissenting in part).

assessed valuation.<sup>25</sup> The Court determined that the districts engaged in a very limited range of activities and did not exercise core governmental powers like taxation, lawmaking, or the provision of basic public services.<sup>26</sup> Moreover, the Court found that landowners bore financial responsibility for the districts' expenses and bond obligations, and were the primary focus of the districts' activities. Indeed, the states had established these districts for the benefit of the landowners. As a result, the Court concluded that the districts were not subject to the rules of universal suffrage and equally weighted voting applicable to most federal, state, and local elections. The Court held that states could limit the electoral constituency and allocate voting power in accordance with the special purposes of the districts. The lower federal courts have extended the special district exception to districts whose focuses include the core functions of government not found in the special district cases—including education, street maintenance, and sanitation—when the districts in question have limited powers, may be characterized as advisory or supplemental, and do not wield significant governing authority.<sup>27</sup>

Similarly, the Supreme Court has held that certain bond issue elections need not be subject to the rule of equal voting power. In *Gordon v. Lance*,<sup>28</sup> the Court upheld a West Virginia constitutional provision that conditioned the approval of state and local bond issues on the affirmative votes of 60% of the voters in a referendum.<sup>29</sup> Such a rule permits a minority of voters to block a majority-approved bond issue and, thus, gives those minority voters voting power disproportionate to their numbers.<sup>30</sup> The Supreme Court, however, found that, due in part to the nature of the issue, the state could condition approval of the bond issue on an electoral supermajority: "It must

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<sup>25</sup> See, e.g., *Ball v. James*, 451 U.S. 355, 371 (1981) ("[T]he State could rationally limit the vote to landowners."); *Associated Enters. v. Toltec Watershed Improvement Dist.*, 410 U.S. 743, 745 (1973) (holding that since landowners are the ones primarily burdened and benefited by the watershed development, votes on the project can be allocated accordingly); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 730-31 (1973) (ruling that non-landowning residents may be excluded from the franchise regarding the watershed district).

<sup>26</sup> *Ball*, 451 U.S. at 366.

<sup>27</sup> See, e.g., *Kessler v. Grand Cent. Dist. Mgmt. Ass'n*, 158 F.3d 92, 93-94 (2d Cir. 1998) (affirming finding that a business improvement district is a special, limited-purpose entity that is not subject to the requirement of one person, one vote); *Pittman v. Chicago Bd. of Educ.*, 64 F.3d 1098, 1101-02 (7th Cir. 1995) (noting that Chicago school councils are special-purpose governmental bodies that do not need to adhere to the one person, one vote principle).

<sup>28</sup> 403 U.S. 1 (1971).

<sup>29</sup> *Id.* at 7-8.

<sup>30</sup> The West Virginia Supreme Court of Appeals so found and invalidated the state constitutional provision. *Lance v. Bd. of Educ.*, 170 S.E.2d 783, 791 (W. Va. 1969).

be remembered that in voting to issue bonds voters are committing, in part, the credit of infants and of generations yet unborn, and some restriction on such commitment is not an unreasonable demand.”<sup>31</sup>

To be sure, *Gordon* relied on a second consideration: that West Virginia’s supermajority requirement did not privilege or burden any specific group or issue. Any minority greater than 40% of the vote could block any majority less than 60% on any bond issue.<sup>32</sup> But the importance of that consideration may have been reduced—and the significance of the purpose of the election increased—a few years later by *Town of Lockport v. Citizens for Community Action at the Local Level, Inc.*<sup>33</sup> In this case, the Court upheld a provision of the New York Constitution that conditioned the reorganization of county government on approval, in a referendum, of concurrent majorities of city and non-city voters within a county. As a result, a narrow majority of non-city voters in Niagara County was able to block a county government reorganization favored by both the city voters and an aggregate majority of all of Niagara’s voters.<sup>34</sup> Unlike the voting rule in *Gordon*, the New York requirement did provide special recognition to a distinct constituency within the county, and the concurrent majority requirement was limited to a particular issue. The Supreme Court, however, found that this was constitutional because of the nature of the question put to the voters. The referendum was a “single-shot” vote which would transform county government, change the powers of county subunits, and alter the relationships between subunits and the county.<sup>35</sup> Such a change could have different consequences for the urban and nonurban parts of the county. Looking to the special-district cases, the Court found that “the different county constituent units” would be “directly and differentially affected by the restructuring of county government”<sup>36</sup> and, thus, the state could require the separate consent of each of the affected groups—even though, under *Avery v. Midland County*,<sup>37</sup> it would have been unconstitutional to give non-city voters a comparably disproportionate power in the ongoing governance of the county.

The constitutionality of campaign finance practices as well as voting rules may vary according to the nature of the election. Although the Supreme Court has repeatedly upheld limitations on the dollar amounts that

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<sup>31</sup> *Gordon*, 403 U.S. at 6.

<sup>32</sup> *Id.* at 4-5.

<sup>33</sup> 430 U.S. 259 (1977).

<sup>34</sup> *Id.* at 262.

<sup>35</sup> *Id.* at 266.

<sup>36</sup> *Id.* at 272.

<sup>37</sup> 390 U.S. 474 (1968).

may be contributed to candidates, political parties, and political committees in connection with elections for office, the Court has held that it is unconstitutional to limit the amount of money that may be contributed to a political committee that supports or opposes a ballot proposition.<sup>38</sup> Contributions to candidates, and to parties and committees that contribute to or otherwise support candidates for office, raise the dangers of the corruption or the appearance of corruption of officeholders. Due to their dependence on donations for their campaigns, officeholders may be “too compliant with the wishes of large contributors.”<sup>39</sup> Moreover, even the appearance of improper influence resulting from large contributions to candidates for elective office could undermine confidence in the system of representative government to a disastrous extent.<sup>40</sup> But “[r]eferenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue.”<sup>41</sup> As a result, the prevention of corruption could not justify limiting contributions to committees that spend money in ballot proposition elections. Due to the differences in the nature of candidate and ballot proposition elections and in the implications of campaign finance practices for government, the First Amendment permits the limitation of contributions in candidate elections but not in ballot proposition elections.<sup>42</sup>

Of course, the notion that different constitutional rules apply to different types of elections is hardly news in the context of judicial elections. Three decades ago in *Wells v. Edwards* the Supreme Court upheld without opinion a lower court finding that judicial elections are not subject to one person, one vote.<sup>43</sup> The lower court predicated its decision on what it saw as the distinctive nature of the judicial office, determining that judges “are not representatives in the same sense as are legislators . . . .” Thus, the rationale behind the one-man, one-vote principle, which evolved out of efforts to preserve a truly representative form of government, is simply not relevant

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<sup>38</sup> *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 296-97 (1981).

<sup>39</sup> *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 389 (2000).

<sup>40</sup> *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976) (per curiam).

<sup>41</sup> *Citizens Against Rent Control*, 454 U.S. at 298 (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978) (citations omitted)).

<sup>42</sup> The Court has drawn a similar distinction with respect to the regulation of campaign expenditures by corporations—corporate spending in ballot proposition elections is constitutionally protected. *First Nat'l Bank*, 435 U.S. at 795. But the expenditure of corporate treasury funds to promote or oppose the election of a candidate may be barred. *McConnell v. FEC*, 540 U.S. 93, 124 S. Ct. 619, 666-68 (2003); *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 654 (1990).

<sup>43</sup> *Wells v. Edwards*, 409 U.S. 1095 (1973), *aff'g* 347 F. Supp. 453 (M.D. La. 1972).

to the makeup of the judiciary.”<sup>44</sup> To be sure, *Wells* has arguably been undermined by the Court’s subsequent decision in *Chisom v. Roemer*,<sup>45</sup> which held that the Voting Rights Act applies to judicial elections. *Chisom* interpreted the provision of section 2 of the Act, which refers to the opportunity of citizens protected by the Act “to participate in the political process and to elect *representatives* of their choice,”<sup>46</sup> to include the election of judges. But *Chisom* based its decision on the intent of Congress, denied that the case presented a constitutional claim, and distinguished and thereby preserved *Wells*<sup>47</sup>—even though *Chisom*’s recognition that courts “engage in policymaking at some level”<sup>48</sup> and that the concept of representativeness is implicated by a state’s decision to select its judges by popular election<sup>49</sup> is plainly in tension with the reasoning that animated *Wells*.

In short, the Supreme Court has repeatedly indicated that the constitutional norms governing elections—such as the scope of suffrage, the allocation of voting power, and the power to restrict campaign finance practices—may vary according to the subject of the election, including the nature of the issue put before the voters or the powers and responsibilities of the office to be filled. This has affected both judicial elections and, as the campaign contribution cases indicate, the rules governing the conduct of election campaigns. Requiring that a judicial office be filled by election does not automatically trigger a uniform set of constitutional restrictions and requirements dealing with elections, because no such uniform set exists.

Of course, saying that the constitutional rules that govern elections may vary in light of the issue resolved or the office filled by the election merely opens the door to the consideration of the constitutionality of judicial campaign conduct codes; it does not assume that the more restrictive rules are constitutional. Much turns on the nature of the judicial function and how it differs from legislative and executive offices, as well as on how well the restrictive rules reflect those differences. As the tension between the holdings

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<sup>44</sup> *Wells*, 347 F. Supp. at 455 (quoting *Stokes v. Fortson*, 234 F. Supp. 575, 577 (N.D. Ga. 1964) (per curiam)).

<sup>45</sup> 501 U.S. 380, 404 (1991); see also *Houston Lawyers’ Ass’n v. Attorney Gen.*, 501 U.S. 419, 421 (1991) (upholding application of section 2 of the Voting Rights Act to elections for trial judges); *Clark v. Roemer*, 500 U.S. 646, 652 (1991) (reviewing application of section 5 of the Voting Rights Act to judicial elections).

<sup>46</sup> 42 U.S.C. § 1973(b) (2000) (emphasis added).

<sup>47</sup> *Chisom*, 501 U.S. at 402-03.

<sup>48</sup> *Id.* at 399 n.27.

<sup>49</sup> See *id.* at 401 (“When each of several members of a court must be a resident of a separate district, and must be elected by the voters of that district, it seems both reasonable and realistic to characterize the winners as representatives of that district.”).

in *Wells* and *Chisom* indicate, the nature of the judicial function,<sup>50</sup> the extent to which elected judges ought to be considered representatives of the voters who elect them, and the very meaning of representation in the judicial context perplexed and divided the Court in both the equal protection and voting rights settings.<sup>51</sup> It is not surprising that the application of the First Amendment to these codes is difficult as well.

## II. THE REGULATION OF ELECTION CAMPAIGNS

### A. General Considerations

Any restriction on the speech or conduct of election campaign participants implicates at least three interrelated values: (i) the expressive and participatory rights of candidates, their supporters, and other campaign participants; (ii) the interests of voters in obtaining sufficient information to enable them to make an intelligent choice on election day; and (iii) the systemic interest in competitive elections.

Elections are our central form of collective political decision making and, thus, they are our most important mechanism for securing democratically accountable government. The very legitimacy of our system of elections requires that candidates be able to participate in the electoral process and to make their cases to the voters. A free election assumes that candidates are free not simply to place their names on the ballot but to contest the election vigorously. A vigorous contest includes the freedom to communicate with the voters to attempt to persuade them to cast their ballots for a particular candidate.

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<sup>50</sup> This question has come up not just in the context of judicial elections but also with respect to appointed judges. In *Gregory v. Ashcroft*, 501 U.S. 452 (1991), the Court found that appointed state judges fell within the statutory exemption from the Age Discrimination in Employment Act for “appointees ‘on the policymaking level,’” noting then-Governor Ashcroft’s contention that, in Missouri, judges exercise policymaking responsibilities, declining to find that judges are “policymakers in the same sense as the executive or legislature,” but concluding that it was sufficient for the statutory exemption that an appointed judge “is in a position requiring the exercise of discretion concerning issues of public importance.” *Id.* at 466-67.

<sup>51</sup> Both *Wells* and *Chisom* were 6-3 decisions. Justices White and Marshall, who dissented in *Wells*, were in the majority in *Chisom*. Then-Justice Rehnquist, who was in the majority in *Wells*, dissented in *Chisom*. The only member of the Court in the majority in both cases was Justice Blackmun. Strikingly, in light of his role as author of the majority opinion in *White*, Justice Scalia also authored the dissent in *Chisom*, observing that “representative” means not just one who is “elected by the people, but who also, at a minimum, acts on behalf of the people. Judges do that in a sense—but not in the ordinary sense. . . . [W]e do not ordinarily conceive of judges as representatives [in that sense].” *Chisom*, 501 U.S. at 410-11 (Scalia, J., dissenting).

The legitimacy of the election also turns on the ability of voters to receive the information they need in order to cast informed votes. This is not simply a matter of enabling each voter to make a choice consistent with her interests or beliefs. Citizens as voters are making choices that bind the polity as a whole and set the course of official decision making for the term of the elected official. There is, thus, a collective interest in increasing the amount of relevant information available to the voters in the hope of improving the quality of voter decision making.

Elections may also be seen as a key way for voters to check the government and to make it accountable to them. The opportunity to deny reelection to incumbents, and the possibility that in any given election the people may exercise their authority to vote out current officeholders, is perhaps the ultimate security of popular control over government. This requires competitive elections. Challengers must be able to get on the ballot and make their case to the voters not just as a matter of the challengers' rights but to vindicate the systemic interest in using competitive elections to hold elected officials accountable.

Political participation, voter information, and electoral competitiveness may all be burdened by restraints on campaign speech and conduct. Yet, the Supreme Court has repeatedly held that candidates and other campaign participants may be subject to some form of regulation:

Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."<sup>52</sup>

Some of these regulations are designed to improve the quality of the electoral process. Contribution disclosure requirements, for example, have been upheld, even though they may chill the activities of certain donors who would prefer anonymity and thus indirectly hurt the campaigns of those candidates the putative donors would have supported. Nevertheless, disclosure has been held to confer important benefits on the electoral process because it provides the voters with useful information concerning the sources of a candidate's financial support and thus "allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches."<sup>53</sup> Similarly, some restrictions on the ability of candidates to place their names on the ballot have

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<sup>52</sup> *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

<sup>53</sup> *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (per curiam).

been justified as preventing “ballot overcrowding” and “voter confusion.”<sup>54</sup> So, too, restrictions on electioneering near polling places “serve the States’ compelling interests in preventing voter intimidation and election fraud.”<sup>55</sup>

More commonly, election restrictions are justified in terms of their impact on government. Restrictions on minor parties, write-in voters, and sore-loser candidates, who bolt their parties after losing a primary and then run as independents, have been upheld as reducing factionalism and promoting the two-party system, with the asserted benefits of facilitating majority rule and protecting government stability.<sup>56</sup> So, too, restrictions on campaign contributions have been upheld, notwithstanding their impact on political expression and association, because such limits alleviate the corruption danger of officeholders “too compliant with the wishes of large contributors”<sup>57</sup> and address the appearance of corruption that can demoralize the public and undermine belief in government integrity. In short, the values of free speech, voter information, and unfettered competitiveness may have to give way when electioneering practices threaten to undermine other public values.

### B. *Regulating Judicial Elections*

The special restrictions on judicial candidates plainly limit their ability to participate in their own campaigns and to persuade voters to vote for them. By restricting pledges, promises, and other statements with respect to disputed political and legal issues, the canons deny candidates the opportunity to speak about some of the questions that may be most salient to their candidacies. The ban on misstatements may further cause candidates to be cautious about what they say. The ban on personal solicitation may limit the ability of candidates to raise the money necessary to fund their campaigns. The restrictions on other political activity may curtail a judicial candidate’s ability to associate with her political party and build the party’s support for her candidacy.

These restrictions concomitantly threaten the systemic interest in competitive elections. If candidates cannot speak freely about contested legal issues, work with their parties, and raise money personally, their ability to campaign effectively may be undermined. This is particularly true in judi-

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<sup>54</sup> *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986).

<sup>55</sup> *Burson v. Freeman*, 504 U.S. 191, 206 (1992).

<sup>56</sup> *See, e.g., Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 379-80 (1997) (upholding constitutionality of a Minnesota election regulation that had the effect of favoring a two-party system).

<sup>57</sup> *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 389 (2000).

cial elections, which have traditionally been low-salience events, with low public interest, very low free media coverage, and, as a result, low voter turnout.<sup>58</sup> These restrictions may make it more difficult to get the public interested in judicial campaigns. This burden weighs particularly heavily on challengers, who are likely to lack even the limited name recognition that the incumbents enjoy. The less the candidates can say or do, the less competitive the elections are likely to be.

Candidate speech restrictions also, by definition, limit voter information. With the free media providing limited or no coverage to judicial elections, voters obtain virtually all their information about judicial candidates from the candidates themselves or from other electoral actors, such as special interest organizations that undertake independent expenditure efforts. The canons, however, would limit candidates to discussing their resumes and personalities and the resumes and personalities of their opponents, and would bar them from discussing the kinds of legal issues that could come before their courts. This surely limits the information available to the voters concerning how the candidates might address the cases that they are called upon to adjudicate. Moreover, not only would the voters have less information, but any information they do obtain concerning candidate views of legal issues would likely come from interest groups—which are not subject to the judicial canons—rather than the candidates themselves.

To be sure, some proponents of the judicial canons appear to have their doubts about both the value of competitive elections and the benefits of informing voters about candidate views concerning legal issues. Many appear to treat competitive elections as a threat to the independence of the judiciary, as judges facing an upcoming reelection may find themselves tailoring their decisions in light of the electorate's anticipated reaction.<sup>59</sup> So, too, defenders of the canons appear to assume that candidate views about legal issues are not actually relevant to the questions of which of two competing candidates should be elected or whether an incumbent judge should be retained. For some defenders of the canons, educational and professional attainments, experience, character, and temperament, rather than views, are the only information that voters should need to make their decisions.

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<sup>58</sup> See Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. REV. M.S.U.-D.C.L. 849, 855 (2001) (“Polls over many years show a startling voter unawareness of even the names of even the most visible judicial candidates. Judicial races almost never draw press coverage . . .”) (footnote omitted).

<sup>59</sup> See, e.g., Lillian R. BeVier, *A Commentary on Public Funds or Publicly Funded Benefits and the Regulation of Judicial Campaigns*, 35 IND. L. REV. 845, 848 (2001) (arguing that judges “are not supposed to be ‘accountable’ for their decisions to public opinion”).

The concern about competition seems antithetical to the very idea of having elections. Indeed, it is inconsistent with anything other than life tenure for judges, since even appointed judges who serve for terms have to secure the approval of political decision makers if they want to continue in office after the conclusion of their terms. The challenge to independence, then, comes not so much from the election but from the limited term.<sup>60</sup> The real issue is what considerations ought to go into the thinking of the appointing officials—or the voters—in deciding whether to select or retain a judge, which leads directly to the second question of what information ought those decision makers to have.

This requires some consideration of the nature of judging. If judging were simply a matter of the mechanical application of precise rules to canned facts, then there would be a lot to be said for limiting judicial election campaigns to a comparison of educational attainments, professional qualifications, and other evidence of the candidates' technical skills, and for excluding as extraneous the candidates' views on legal and political issues. But this description misses much of the nature of the judicial function and of the laws that judges interpret and apply. Judges find disputed facts, apply loosely defined legal rules, and shape the development of legal doctrine.<sup>61</sup> Their decisions are inescapably affected by their own views and beliefs about law and public policy. Information about those views is, thus, deeply relevant to the decisions of the appointing, and reappointing, authority, whether a governor or the voters. As the Michigan Supreme Court recently observed, a judicial election provides the opportunity for “meaningful debate . . . concerning the overall direction of the courts and the role of individual judges in contributing to that direction.”<sup>62</sup> That meaningful debate cannot take place unless judges and judicial candidates are free to participate in it.

With the interests in electoral competition and voter information as strong in the judicial setting as in the executive and legislative arenas, the issue in considering the constitutionality of judicial campaign codes is

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<sup>60</sup> Cf. Richard L. Hasen, “*High Court Wrongly Elected*”: *A Public Choice Model of Judging and Its Implications for the Voting Rights Act*, 75 N.C. L. REV. 1305, 1330-35 (1997) (arguing that length of judicial term is the primary determinant of degree of judicial independence).

<sup>61</sup> See, e.g., Pamela S. Karlan, *Two Concepts of Judicial Independence*, 72 S. CAL. L. REV. 535, 542-43 (1999) (demonstrating that where there is not a clear legal rule or judges have discretion to pronounce general legal rules, judges' viewpoints affect their decisions); W. Bradley Wendel, *The Ideology of Judging and the First Amendment in Judicial Election Campaigns*, 43 S. TEX. L. REV. 73, 109 (2001) (“Applicable legal principles may be plural and conflicting.”).

<sup>62</sup> *In re Chmura*, 608 N.W.2d 31, 42 (Mich. 2000).

whether there are aspects of the judicial office that support greater regulation of judicial elections than elections for the legislative and executive branches. Defenders of the canons point to three interrelated concerns: judicial impartiality, judicial independence, and a more amorphous sense that judges must be set “aside from the hurly-burly of sometimes unseemly political strife.”<sup>63</sup>

Judicial impartiality refers to the constitutional imperative that judges treat all parties before them fairly and equally and decide cases according to the evidence and the law. Like the statue of blindfolded Justice who presides over so many courthouses, judges are supposed to do their work while remaining indifferent to the identities of the parties and lawyers before them, without a preference for one side or a bias against the other. As Chief Justice Randall T. Shepard of Indiana has argued, the duty of judicial impartiality and the rules protecting it “have their foundations in due process.”<sup>64</sup>

The duty of impartiality distinguishes judges from executives and legislators. Executive and legislative officeholders are free to favor one set of interests over another, to make decisions after hearing just one side of the argument, and to dig in their heels in support of one position. And certainly executive and legislative candidates are free to emphasize their biases, prejudices, and commitments in their campaigns. As one circuit court has noted, campaign promises “are desirable so that voters may make a choice between proposed agendas that affect the public.”<sup>65</sup> Similar campaign statements by judicial candidates, however, can threaten judicial impartiality if they indicate that the candidate has predetermined how she will act on the bench and suggest that the judge will not treat all cases and parties evenhandedly. So, too, judicial candidates can make statements that undermine the appearance of judicial impartiality and, thus, the public’s confidence in the fairness of the courts.

Judicial independence is linked to impartiality since only a judge independent of outside pressures can impartially apply the law to all the parties who appear before her. But independence also implicates the separation of powers and the freedom of the courts from the other branches of government. To be sure, separation-of-powers concerns apply to the executive and the legislature as well, and constitutional law has been used to upset even consensual agreements between those branches. But independence has been

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<sup>63</sup> Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059, 1067 (1996); accord Robert F. Bauer, *Thoughts on the Democratic Basis for Restrictions on Judicial Campaign Speech*, 35 IND. L. REV. 747, 749-51 (2001) (discussing the “judge-politician divide”).

<sup>64</sup> Shepard, *supra* note 63, at 1060.

<sup>65</sup> *Stretton v. Disciplinary Bd.*, 944 F.2d 137, 142 (3d Cir. 1991).

treated as particularly important for the courts, as it enables judges to pursue their special role in protecting the constitutional rights of minorities and vindicating the rule of law even for unpopular parties.<sup>66</sup> The executive and legislative branches have to work together in order for government to function as a whole. But the independence of the courts from the assertedly more political branches is essential if the courts are to apply the rule of law and protect minorities. As a result, although we celebrate the role of political parties in linking up the separate houses of a bicameral legislature, the legislature with the executive, and the different levels of our federal system to facilitate more effective governance, if the parties were comparably effective in coordinating the actions of the courts with the other branches, the capacity of the courts to carry out their duties could be seriously undermined.

The third argument for the canons looks not so much to the operational separation of the judicial from the political as to the asserted distinctiveness of judicial and political behavior. It reflects the view that in order for judges to take their role seriously and apply the law impartially, protect rights, and defend minorities, they need to enjoy a special degree of public respect—a respect that would be impaired if judges campaigned like ordinary politicians. As one jurist has observed, “[w]e place courts and judges on a higher plateau.”<sup>67</sup> This requires that judicial candidates abide by higher standards of civility and decorum, as judicial-candidate “mudslinging” poses a “threat to judicial integrity and public confidence in the judiciary.”<sup>68</sup>

This “higher plateau” argument for the special nature of the judiciary is perhaps the weakest of the three, as even some defenders of the canons have acknowledged.<sup>69</sup> It may be hard to see why judges are more demeaned by

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<sup>66</sup> See Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 726-29 (1995) (warning that an elective judiciary may compromise the rights of unpopular minorities).

<sup>67</sup> Shepard, *supra* note 63, at 1067.

<sup>68</sup> Adam R. Long, *Keeping Mud Off the Bench: The First Amendment and Regulation of Candidates' False or Misleading Statements in Judicial Elections*, 51 DUKE L.J. 787, 803 (2001); see also *Berger v. Supreme Court*, 598 F. Supp. 69, 75 (S.D. Ohio 1984) (ruling that restrictions on judicial candidate misrepresentations are necessary “so as not to damage the actual and perceived integrity” of the judiciary), *aff'd mem.*, 861 F.2d 719 (6th Cir. 1988); cf. *ACLU of Fla., Inc. v. Fla. Bar*, 744 F. Supp. 1094, 1097 (N.D. Fla. 1990) (“[A] state may require [judicial] candidates to maintain a higher standard of conduct than can be expected of candidates in other types of elective contests.”).

<sup>69</sup> See, e.g., Robert M. O’Neil, *The Canons in the Courts: Recent First Amendment Rulings*, 35 IND. L. REV. 701, 715 (2002) (referring to “occasional slighting references to a nostalgic desire for ‘civility in judicial campaigns’” while contending that the major case for the canons is protection of judicial impartiality (quoting *In re Chmura*, 608 N.W.2d 31, 40, 43 (Mich. 2000))).

the “hurly-burly” of campaigning than are gubernatorial or legislative candidates. So, too, the provision for judicial elections means that state judges, like other elected officials, can command respect and legitimacy from their popular mandate and do not need to present themselves as above politics. Moreover, governors and legislators, no less than judges, must on occasion make unpopular decisions and try to lead rather than follow public opinion if they are to pursue the long-term public interest. Still, there may be something to the argument that elected judges need the greater respectability that might come from higher-toned campaigns in order to bring off the delicate balancing act of reconciling their public accountability with their constitutional obligation to the rule of law.

Ultimately, the argument for the constitutionality of the special regulation of judicial elections requires the determination that judging, although informed by the legal and political viewpoints of the judges, requires special protection from the political consequences of election campaigns. To some extent, the question recapitulates the ongoing and increasingly intense debate over the factors that ought to go into the appointment and confirmation of life-tenured federal judges. Surely, a candidate’s judicial philosophy, views of past cases and current legal controversies, and political beliefs are relevant to how she will exercise the discretion intrinsic to judging. Yet, we still want judges, as they decide individual cases, to consider only the evidence and the law before them, to give a fair hearing to all the parties, and to make decisions independent of precommitments and external pressures. Judging is political, but it still must be undertaken apart from politics. The judicial campaign canons, and the debate over the constitutionality of the canons, must walk the very elusive and possibly illusory line of permitting judicial candidates to engage vigorously in the political and legal debates relevant to their role while barring them from undermining the impartiality and independence the courts should display, and the respect judges should receive, if the judicial system is to provide evenhanded justice, protect constitutional rights, and enjoy public confidence.

In a sense, the battle over the constitutionality of the canons resembles the conflict over the constitutionality of campaign finance reform. In both situations, regulations would restrict the ability of campaign participants to make their views known to the electorate, thereby limiting both the campaigners’ rights and the information the public needs in order to cast an intelligent vote. In both situations, the regulations are vindicated in terms of the impact of unrestricted campaign practices on the interelection performance of government. Much as judicial campaign conduct restrictions are justified primarily in terms of judicial impartiality and independence, contribution restrictions have been justified as preventing corruption and the

appearance of corruption.<sup>70</sup> Indeed, judicial partiality and the loss of judicial independence may be said to constitute corruption of the judicial function.

As in the campaign finance setting, the meaning of judicial impartiality, like the meaning of corruption, has proven to be difficult to determine. The Supreme Court has defined corruption as the situation that results when elected officials are “too compliant with the wishes of large contributors.”<sup>71</sup> Yet, surely the willingness of elected officials to respond to the requests of their supporters is often appropriate and may indeed be politically desirable. As Justice Kennedy, dissenting in part in the recent *McConnell* decision, observed, “democracy is premised on responsiveness.”<sup>72</sup> Basing the constitutionality of campaign finance regulation on the prevention of corruption requires a theory that can “distinguish good political responsiveness from bad.”<sup>73</sup> In *McConnell*, the Supreme Court found that the “special access”<sup>74</sup> or “preferential access”<sup>75</sup> that large donors obtain in exchange for their contributions is the distinctive “bad responsiveness”<sup>76</sup> that can justify campaign finance regulation. Indeed, the Court was surprisingly deferential to Congress’s findings concerning the kind of campaign finance practices that raise the danger of special access for donors.<sup>77</sup>

It remains to be seen if, after *White*, there is a theory, and concomitant campaign speech and conduct restrictions, that can “distinguish good political responsiveness from bad”<sup>78</sup> in the judicial setting, too. But the campaign finance cases in general and *McConnell* in particular provide strong support for the constitutionality of restrictions on judicial campaign practices that can be seen as threatening to corrupt the judicial function or as creating the appearance that the judicial function has been corrupted.

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<sup>70</sup> See *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam) (finding that anticorruption concerns justify restrictions on the size of campaign contributions).

<sup>71</sup> *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 389 (2000).

<sup>72</sup> *McConnell v. FEC*, 124 S. Ct. 619, 748 (2003) (Kennedy, J., dissenting in part).

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

<sup>74</sup> *Id.* at 686.

<sup>75</sup> *Id.* at 668.

<sup>76</sup> *Id.* at 748. (Kennedy, J., dissenting in part).

<sup>77</sup> See Richard Briffault, *McConnell v. FEC and the Transformation of Campaign Finance Law*, 3 ELECTION L.J. 147, 165-67 (2004) (explaining that the Court relied primarily on general assertions about the pervasive effects of contributions on the political process rather than on evidence of the impact of particular donations on specific government actions).

<sup>78</sup> *McConnell*, 124 S. Ct. at 748 (Kennedy, J., dissenting in part).

III. THE CONSTITUTION AND THE CANONS AFTER *REPUBLICAN PARTY OF MINNESOTA V. WHITE*

A. *White and the Announce Clause*

*White* considered and invalidated the Minnesota Code of Judicial Conduct's Announce Clause, which stated that a judicial candidate should not "announce his or her views on disputed legal or political issues."<sup>79</sup> Promulgated by the Minnesota Supreme Court in 1974, the Announce Clause was based squarely on Canon 7B of the Code of Judicial Conduct adopted by the American Bar Association (ABA) in 1972. The ABA has profoundly shaped the development and content of state judicial campaign regulation. The ABA first sought to address judicial campaign behavior in 1924 when it adopted its Canons of Judicial Ethics. Canon 30 provided, inter alia, that a judicial candidate "should not announce in advance his conclusions of law on disputed issues to secure class support."<sup>80</sup> Although "[f]orty-three states adopted some version of the 1924 Canons,"<sup>81</sup> the 1924 Canons were hortatory and "not intended to be a basis for disciplinary action."<sup>82</sup> In 1972 the ABA promulgated the Code of Judicial Conduct, which included the language subsequently adopted by Minnesota.<sup>83</sup> With minor variations, the 1972 Code was adopted by some forty-seven states.<sup>84</sup>

Even prior to the *White* decision, the Announce Clause was on shaky constitutional ground. When the ABA revised the Model Code in 1990, it dropped the Announce Clause. The Note accompanying the legislative draft explained that the ABA's Committee on Ethics and Professional Responsibility believed the Announce Clause was "an overly broad restriction on speech."<sup>85</sup> The Announce Clause was replaced by language prohibiting a candidate from making "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court."<sup>86</sup> The ABA's concern about the overly broad nature of the Announce Clause was echoed in a series of court decisions dur-

<sup>79</sup> See *Republican Party of Minn. v. White*, 536 U.S. 765, 768 (2002) (quoting MINN. CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(i) (2000)).

<sup>80</sup> CANONS OF JUDICIAL ETHICS Canon 30 (1924).

<sup>81</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, 266 (2003).

<sup>82</sup> Rick A. Johnson, *Judicial Campaign Speech in Kentucky After Republican Party of Minnesota v. White*, 30 N. KY. L. REV. 347, 353 (2003).

<sup>83</sup> CODE OF JUDICIAL CONDUCT Canon 7B(1)(c) (1972).

<sup>84</sup> Moerke, *supra* note 81, at 267.

<sup>85</sup> MODEL CODE OF JUDICIAL CONDUCT AS SUBMITTED FOR CONSIDERATION AT THE 1990 ANNUAL MEETING OF THE HOUSE OF DELEGATES OF THE ABA app. C, at 72 (1990).

<sup>86</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(ii) (1990).

ing the early 1990s narrowing or invalidating the Announce Clause in states that had not modified their canons.<sup>87</sup> By the time of *White*, due to constitutional challenges and canon revisions, only nine state canons continued to retain the Announce Clause, and several of these were narrower, by their terms or as a result of judicial interpretation, than the Clause at issue in *White*.<sup>88</sup>

As the Court noted, one of the primary arguments asserted in defense of the Announce Clause was that it “preserv[ed] the impartiality of the state judiciary.”<sup>89</sup> Justice Scalia’s opinion parsed the concept of impartiality, finding that it could be used in any of three possible senses: (i) the avoidance of bias for or against a specific party in a judicial proceeding; (ii) the “lack of preconception in favor of or against a particular *legal view*”; or (iii) open-mindedness, in the sense of being “open to persuasion.”<sup>90</sup>

The Court appeared to accept the compelling nature of the first sense of impartiality—avoiding bias against a party—but concluded that the Announce Clause did little to advance that interest since the Clause referred only to statements about legal issues, not parties.<sup>91</sup> Moreover, the Announce Clause was far broader than an anti-party-bias rule, and hence not narrowly tailored to serve the interest in preventing bias against parties.<sup>92</sup>

The Court sharply rejected the second definition of impartiality. Although at one point the Court suggested there is a public interest in prevent-

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<sup>87</sup> See, e.g., *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 231 (7th Cir. 1993) (finding Illinois’ Announce Clause unconstitutionally overbroad); *Beshear v. Butt*, 863 F. Supp. 913, 918 (E.D. Ark. 1994) (finding Arkansas Announce Clause unconstitutionally overbroad); *ACLU of Fla. v. Fla. Bar*, 744 F. Supp. 1094, 1099 (N.D. Fla. 1990) (concluding that plaintiffs are likely to succeed in their constitutional challenge to Florida’s Announce Clause); *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953, 956 (Ky. 1991) (finding Kentucky’s Announce Clause unconstitutionally overbroad); cf. *Stretton v. Disciplinary Bd.*, 944 F.2d 137, 144 (3d Cir. 1991) (subjecting Pennsylvania’s Announce Clause to narrowing interpretation and upholding it as narrowed). *Stretton* narrowed the Announce Clause by holding that it applied only to issues “likely” to come before the court. The Seventh Circuit, in *Buckley*, treated that as an illusory limitation, reasoning that almost any issue could come before a court. 997 F.2d at 229-30; see also *Berger v. Supreme Court*, 598 F. Supp. 69, 75 (S.D. Ohio 1984) (interpreting Ohio’s Announce Clause as not applying to the announcement of views concerning questions of judicial administration), *aff’d mem.*, 861 F.2d 719 (6th Cir. 1988).

<sup>88</sup> Moerke, *supra* note 81, at 267-68 & n.54.

<sup>89</sup> *Republican Party of Minn. v. White*, 536 U.S. 765, 775 (2002). The Court noted that the Eighth Circuit had also referred to a compelling government interest in an independent judiciary but found that both the lower court and respondents had used the concepts of impartiality and independence interchangeably. *Id.* at 775 n.6. As a result, the Court did not separately consider whether the interest in judicial independence was compelling or whether the Announce Clause was narrowly tailored to promote that interest.

<sup>90</sup> *Id.* at 775-78.

<sup>91</sup> *Id.* at 776.

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

ing judicial preconceptions but that such interest is not constitutionally compelling,<sup>93</sup> the thrust of Justice Scalia's opinion was to deny any value to this version of impartiality at all. In the Court's view, not only do most judges come to the bench with at least some preconceptions about the law, so that the goal of the Announce Clause is impossible to attain, but avoiding judicial preconceptions would not even be desirable. As Justice Scalia observed, quoting an earlier statement of then-Justice Rehnquist, "[p]roof 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>94</sup>

The Court then turned to impartiality-as-open-mindedness:

This quality in a judge demands, not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case. This sort of impartiality seeks to guarantee each litigant, not an *equal* chance to win the legal points in the case, but at least *some* chance of doing so.<sup>95</sup>

But the Court declined to determine whether impartiality-as-open-mindedness is a compelling state interest, "since we do not believe the Minnesota Supreme Court adopted the announce clause for that purpose."<sup>96</sup> Moreover, the Court concluded that by regulating only statements in election campaigns the Announce Clause was fatally under-inclusive. Even if, as respondents contended, campaign statements about disputed legal and political issues could create undue pressure for judges to adhere to certain positions in subsequent cases, "statements in election campaigns are such an infinitesimal portion of the public commitments to legal positions that judges (or judges-to-be) undertake" that it was "implausible" to believe that an Announce Clause aimed solely at campaign statements could alleviate those pressures.<sup>97</sup> Judges and candidates could have aired their views in published opinions, books, speeches, or in the course of other political activities before they went on the bench.<sup>98</sup> "As a means of pursuing the objective of open-mindedness that respondents now articulate, the announce clause is so woefully underinclusive as to render belief in that purpose a challenge to the credulous."<sup>99</sup>

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<sup>93</sup> *Id.* at 777.

<sup>94</sup> *Id.* at 778 (quoting *Laird v. Tatum*, 409 U.S. 824, 835 (1972) (Rehnquist, J., mem.)).

<sup>95</sup> *Id.* at 778.

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

<sup>97</sup> *Id.* at 779.

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

<sup>99</sup> *Id.* at 780.

The Court was right to invalidate the Announce Clause. As even the ABA had previously recognized, the Clause cut deeply into judicial election speech, denying voters a wide range of information relevant to their electoral decisions. The Clause burdened challengers, who, in low-salience judicial elections, have a special need to get their views on disputed legal and political issues to the voters so that there can be some voter interest in the election and some basis for evaluating the differences between a challenger and the incumbent. Yet, the Clause could also be unfair to an incumbent, who, if attacked for an unpopular ruling, might be barred by the Clause from defending the legal reasoning that required the decision. Most importantly, the Announce Clause has the paradoxical effect of taking the discussion of significant election-related issues away from the candidates and handing it over to the high-spending interest groups who have been so criticized for politicizing, if not debasing, judicial election campaigns.<sup>100</sup> After all, the canons regulate only incumbent judges and candidates for judicial office; they do not and cannot regulate the television advertising of the business groups, labor unions, trial lawyers, and other interest groups who loom so large in contemporary judicial elections. Under the Announce Clause, political and legal issues would surely be discussed during judicial election campaigns, but the candidates—and only the candidates—would be muzzled.<sup>101</sup>

With respect to the role of the Announce Clause in protecting judicial impartiality, the Court was correct in its conclusion that the Clause was poorly aimed at the prevention of bias against parties and, more importantly, that impartiality cannot be equated with an absence of preconceptions about legal issues. Surely, any candidate with significant experience in law has some preconceptions about legal issues. All the Announce Clause could do was preclude candidates from telling the electorate about their preconceptions. And if the articulation of views concerning legal issues is treated as an absence of impartiality, many veteran judges with consistent jurisprudential approaches in certain types of cases would be barred from hearing those cases in the future.

The Court's treatment of the argument of impartiality-as-open-mindedness, however, had two troubling features that raise questions for some of the other canons dealing with judicial campaign activity. First, the

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<sup>100</sup> On the large and growing role of interest groups in judicial elections, see generally Anthony Champagne, *Interest Groups and Judicial Elections*, 34 LOY. L.A. L. REV. 1391 (2001) (discussing the increasingly sophisticated techniques used by interest groups to influence judicial politics).

<sup>101</sup> *But cf.* GOLDBERG & SANCHEZ, *supra* note 23, at 23-25 (contending that *White* emboldened interest groups to press candidates for statements of their positions on issues).

Court declined to find—or to reject—that the preservation of impartiality-as-open-mindedness is a compelling state interest. The Court declined to “pursue that inquiry” since it concluded that the Minnesota Supreme Court had not adopted the Announce Clause for that purpose.<sup>102</sup> It is not clear why the *purpose* of the Minnesota Supreme Court, as opposed to the text and effect of the Clause, was crucial. Plainly the Court considered the Clause to be too loosely tailored to be justified by the interest in protecting open-mindedness. Indeed, it is far from clear why a statement by a judge-as-candidate about her general views on a legal issue would be subsequently treated by the candidate-as-judge as a precommitment. Yet, the protection of impartiality-as-open-mindedness could be a compelling interest even though the Announce Clause was inadequately tailored to promoting that goal.<sup>103</sup> Given that the prevention of precommitments is the central goal animating the Pledge or Promise and the Commit or Appear to Commit Clauses, it would have been useful for the Court to have resolved the question of whether there is a compelling governmental interest in preventing prejudgments. Perhaps the Court’s careful hedging was simply an instance of the general norm of avoiding unnecessary constitutional adjudication. On the other hand, given the inevitability of challenges to those other clauses, the Court’s refusal to support the essential premises of those clauses suggests that they may be in trouble.

Second, the Court’s conclusion that the Announce Clause was “woefully underinclusive” because it was limited only to statements made during election campaigns<sup>104</sup> erred in missing the special significance of campaign statements. Such statements differ by their timing, their targeting, their mode of dissemination, and their precise content from other statements made by judges and candidates about legal issues. “[C]ampaign speech, more than other political speech, is instrumental in character, molded tactically to accomplish political goals, such as building or sustaining a voting majority . . . . There is a reason why politicians employ speechwriters and prepare with agonizing care for debates and public appearances . . . .”<sup>105</sup> Moreover, not only is campaign speech aimed especially at the voters to influence their decisions, it is far more likely to be heard and considered by

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<sup>102</sup> *White*, 536 U.S. at 778.

<sup>103</sup> In August 2003, the ABA amended the “terminology” section of the Model Code of Judicial Conduct to adopt a definition of “impartiality” that includes both “absence of bias or prejudice in favor of, or against, particular parties or classes of parties”—that is, *White*’s first definition—and “maintaining an open mind in considering issues that may come before the judge,” which is the third, and judicially undetermined, definition of impartiality discussed in *White*. MODEL CODE OF JUDICIAL CONDUCT Terminology (amended Aug. 2003).

<sup>104</sup> *White*, 536 U.S. at 779-80.

<sup>105</sup> Bauer, *supra* note 63, at 750.

the voters than statements in a candidate's books, memoranda, or even judicial opinions. Indeed, shortly after *White*, the Court in *McConnell* upheld the provisions of the Bipartisan Campaign Reform Act (BCRA) that provide for restrictive regulation of "electioneering communications" defined as, inter alia, communications concerning candidates made within sixty days before a general election or thirty days before a primary election.<sup>106</sup> The Court's jurisprudence, as well as political common sense, supports the conclusion that campaign statements are different from other political speech and may be regulated accordingly.<sup>107</sup>

The logic that restrictions aimed only at campaign statements are under-inclusive could doom all canons restricting campaign statements. A ban on only campaign promises or commitments is arguably as under-inclusive as restrictions on the campaign-period announcement of political views, and this form of underinclusiveness cannot be easily corrected, since a general ban on promises and commitments in published statements would surely be unconstitutional. To be sure, the Court left open the possibility that a restriction on campaign promises might not be underinclusive. But the Court said no more than that it is "plausible" that campaign commitments might be treated by judges as limiting their discretion.<sup>108</sup> This provides an uncertain basis for limiting the scope of the Court's ruling to the Announce Clause.

*White* dealt only with Minnesota's Announce Clause,<sup>109</sup> but effectively rendered the comparable provisions in other state judicial conduct codes unenforceable. The Missouri Supreme Court so concluded when it dropped its

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<sup>106</sup> *McConnell v. FEC*, 124 S. Ct. 619, 686-89 (2003). Similarly, in rejecting constitutional challenges to BCRA's political party soft money restrictions, *McConnell* additionally upheld the statute's definition of state and local political party "federal election activity," which also contains a temporal component: the treatment of voter registration activity during the 120 days preceding a regularly scheduled federal election as "federal election activity." *Id.* at 671-75.

<sup>107</sup> See also Dennis F. Thompson, *Election Time: Normative Implications of Temporal Properties of the Electoral Process in the United States*, 98 AM. POL. SCI. REV. 51, 61 (2004) (arguing that campaign speech differs from other political speech and may be more strictly regulated).

<sup>108</sup> *White*, 536 U.S. at 780.

<sup>109</sup> Technically, all the *White* Court did was reverse the lower court's grant of summary judgment in favor of the defendants and remand to the Eighth Circuit for further consideration. *Id.* at 788. The Eighth Circuit subsequently remanded the case to the district court with directions to enter judgment for the plaintiffs on their motion for summary judgment on the Announce Clause issue, declaring Minnesota's Announce Clause invalid. 361 F.3d 1035 (8th Cir. 2004), *vacated and reh'g, en banc, granted sub nom.* Republican Party of Minn. v. Kelly, No. 99-4021/4025/4029, 2004 U.S. App. LEXIS 10232, at \*4 (8th Cir. May 25, 2004).

Announce Clause one month after *White* was decided,<sup>110</sup> and a federal district court invalidated the Texas Announce Clause one month after that.<sup>111</sup> The fate of the other canons restricting judicial campaign speech, however, is far less clear.

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

Nearly all states that conduct judicial elections provide that a candidate for judicial office “should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.”<sup>112</sup> Like the Announce Clause, the Pledges or Promises Clause grew out of the ABA’s 1972 Code of Judicial Conduct.<sup>113</sup> But unlike the Announce Clause, it emerged unscathed from the 1990 revisions.<sup>114</sup> Moreover, even some of the lower courts that were troubled by the Announce Clause have either upheld the Pledges or Promises Clause or have indicated that they believe a ban on campaign pledges and promises concerning conduct in office is constitutional.<sup>115</sup> And whereas the Announce Clause was rarely invoked prior to *White*—most of the cases dealing with the Announce Clause involved facial challenges to its enforceability<sup>116</sup>—the Pledges or Promises Clause has in recent years been repeatedly enforced by the courts.<sup>117</sup> *White*

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<sup>110</sup> Order Enforcing Rule 2.03, Canon 5.B(1)(c) Campaign Conduct (Mo. July 18, 2002) (en banc), available at <http://www.osca.state.mo.us/sup/index.nsf/0/f1c626db4da8b14086256bfa0073b302?> (last accessed Oct. 7, 2004).

<sup>111</sup> *Smith v. Phillips*, No. CIV.A.A-02CV111JRN, 2002 WL 1870038, at \*1 (W.D. Tex. Aug. 6, 2002).

<sup>112</sup> Moerke, *supra* note 81, at 266-67 (quoting CODE OF JUDICIAL CONDUCT Canon 7B(1)(c) (1972)).

<sup>113</sup> CODE OF JUDICIAL CONDUCT Canon 7B(1)(c) (1972).

<sup>114</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(ii) (1990).

<sup>115</sup> See, e.g., *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 229 (7th Cir. 1993) (observing that the Pledges or Promises Clause is as unconstitutionally overbroad as the Announce Clause); *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953, 956 (Ky. 1991) (“[J]udicial candidates [cannot] be allowed to make promises or predispositions of cases or issues that are likely to come before the courts that might reflect upon a judge’s impartiality.”); see also Order Enforcing Rule 2.03, Canon 5.B(1)(c) Campaign Conduct (Mo. July 18, 2002) (en banc) (stating that the Missouri “pledges or promises” clause “shall otherwise remain in full force and effect,” though the order provides that the Announce Clause will no longer be enforced), available at <http://www.osca.state.mo.us/sup/index.nsf/0/f1c626db4da8b14086256bfa0073b302?> (last accessed Oct. 7, 2004).

<sup>116</sup> See cases cited *supra* note 87 (presenting a series of cases challenging Announce Clauses).

<sup>117</sup> See, e.g., *In re Kinsey*, 842 So. 2d 77, 88-89 (Fla. 2003) (per curiam) (enforcing the Pledges or Promises Clause with respect to statements made in a radio interview), *cert. denied*, 124 S. Ct. 180 (2003); *In re McMillan*, 797 So. 2d 560, 566, 572 (Fla. 2001) (per curiam) (enforcing the Pledges or Promises Clause with respect to statements in a letter); *In re Spencer*, 759 N.E.2d 1064, 1065 (Ind. 2001) (per curiam) (enforcing the Pledges or Promises

carefully tiptoed around the Pledges or Promises Clause, although, as previously indicated, its uncertain treatment of the definition of impartiality and of the regulation of only campaign statements calls this Clause into question, too.

Another difficulty for the Pledges or Promises Clause comes from the interplay of *White* and *Brown v. Hartlage*.<sup>118</sup> In *Brown*, the Supreme Court held that a Kentucky law prohibiting any candidate for office from making a “promise, agree[ment] or . . . contract with any person to vote for or support any particular individual, thing or measure, in consideration for the vote . . . of that person”<sup>119</sup> could not, consistent with the First Amendment, be applied to a candidate’s pledge to take less than the statutory salary of the office he was seeking.<sup>120</sup> The Court found that the Constitution protects at least some campaign promises because such candidate statements can reinforce the ability of the people to control their government: “Candidate commitments enhance the accountability of government officials to the people whom they represent, and assist voters in predicting the effect of their vote.”<sup>121</sup> Nor was it a problem that some of the voters might benefit if the candidate, upon election, carried out his pledge:

[O]ur tradition of political pluralism is partly predicated on the expectation that voters will pursue their individual good through the political process . . . . So long as the hoped-for personal benefit is to be achieved through the normal processes of government, and not through some private arrangement, it has always been, and remains, a reputable basis upon which to cast one’s ballot.<sup>122</sup>

*Brown* and *White* together indicate that not only are restrictions on judicial candidate speech subject to strict scrutiny, but also that, outside the judicial election setting at least, candidates’ pledges and promises enjoy constitutional protection.

But *Brown* does not establish that a candidate has an unlimited constitutional right to make campaign promises. The Court noted that “*some* kinds of promises made by a candidate to voters, and *some* kinds of promises elicited by voters from candidates, may be declared illegal without constitutional

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Clause with respect to statements made as part of a television advertisement); *In re Bybee*, 716 N.E.2d 957, 960 (Ind. 1999) (per curiam) (discussing the risks of judicial pledges); *In re Haan*, 676 N.E.2d 740, 741 (Ind. 1997) (per curiam) (enforcing the Pledges or Promises Clause with respect to “campaign materials”); *In re Watson*, 794 N.E.2d 1, 4 (N.Y. 2003) (per curiam) (enforcing the Pledges or Promises Clause with respect to statements that appeared in a letter and newspaper article).

<sup>118</sup> 456 U.S. 45 (1982).

<sup>119</sup> *Id.* at 49 (quoting KY. REV. STAT. ANN. § 121.055 (Michie 1982)).

<sup>120</sup> *Id.* at 62.

<sup>121</sup> *Id.* at 55-56.

<sup>122</sup> *Id.* at 56.

difficulty.”<sup>123</sup> Indeed, some kinds of promises by public officials may be treated as inconsistent with the nature of public office. As the Court indicated, in the legislative and executive settings, promises of private benefits to individuals may be treated as “corrupt.”<sup>124</sup> In the judicial setting, pledges or promises to decide certain cases or issues a certain way may be treated as inconsistent with the nature of the judicial office and, thus, as the judicial equivalent of corruption.

A judge’s commitment to decide a particular case or issue in a particular way would violate the duty of the judge to decide cases “in accordance with the law and the evidence.”<sup>125</sup> Such a precommitment is inconsistent with the value of impartiality-as-open-mindedness that *White* alluded to but did not determine. Although the Supreme Court did not squarely so find, surely the protection of impartiality-as-open-mindedness is a compelling state interest.<sup>126</sup> As the New York Court of Appeals recently put it, “open-mindedness is central to the judicial function for it ensures that each litigant appearing in court has a genuine—as opposed to illusory—opportunity to be heard.”<sup>127</sup> A judge may enter a case with prior views about the issues presented, but Due Process requires that the judge’s mind must be “open enough to allow reasonable consideration of the legal and factual issues presented.”<sup>128</sup> Although preconceptions may be impossible to avoid, when preconceptions harden into prejudgments, the judicial function itself is subverted.

Even if the prevention of judicial precommitments is a compelling state interest, does the Pledges or Promises Clause advance that end? In other words, do campaign pledges and promises raise the danger of precommitments? The Fifth Circuit once observed that

the contours of the judicial function make inappropriate the same kind of particularized pledges of conduct in office that are the very stuff of campaigns for most non-judicial offices. . . . [T]he candidate for judicial office . . . cannot, consistent with the proper exercise of his judicial powers, bind himself to decide particular cases in order to achieve a given programmatic result.<sup>129</sup>

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<sup>123</sup> *Id.* at 55.

<sup>124</sup> *Id.* at 58.

<sup>125</sup> *In re Haan*, 676 N.E.2d 740, 741 (Ind. 1997) (per curiam).

<sup>126</sup> In the aftermath of *White*, the ABA adopted, and inserted into the Model Code of Judicial Conduct, a definition of “impartiality” that includes “maintaining an open mind in considering issues that may come before the judge.” MODEL CODE OF JUDICIAL CONDUCT, Terminology (amended Aug. 2003).

<sup>127</sup> *In re Watson*, 794 N.E.2d 1, 7 (N.Y. 2003) (per curiam).

<sup>128</sup> *Id.*

<sup>129</sup> *Morial v. Judiciary Comm’n*, 565 F.2d 295, 305 (5th Cir. 1977).

But, of course, campaign pledges are not binding or legally enforceable. Critics of the canons note that politicians do not consistently treat themselves as committed to their campaign promises once in office.<sup>130</sup> Nevertheless, a campaign promise, as opposed to a less specific statement of views, can solidify the candidate's predisposition into a commitment, can impose some moral pressure on the judge to honor the campaign pledge when she is presiding over a case or issue presenting the subject of the pledge, and can lead the litigants who appear before her to "believe that the judge[] will act in a way consistent with [her] campaign behavior rather than consistent with due process and due course of law."<sup>131</sup> The fact that the pledge is made during a campaign means it is more likely that the candidate intends it to be taken seriously as a basis for voter decision making. So, too, making the pledge during the campaign makes it more likely that the voters will in fact take it seriously and, in a subsequent election, take action if the candidate has not lived up to the pledge.

Litigants are also more likely to be aware of campaign-period pledges and to take them into account in their legal strategies, their arguments to the court, and their assessments of the fairness of a court's decision. Even if such pledges are not always honored, the very fact that the pledge is made undercuts the value of judicial impartiality and the appearance of impartiality. By making such a pledge or promise, the judicial candidate is telling the voters that, once on the bench, she will feel free to make decisions in cases that she hears based on her campaign statements, rather than the evidence before her, the arguments of the parties, or the legal rules applicable to the case at hand. This is in tension with the judicial oath of office, "has the additional deleterious effect of miseducating voters about the role of the judiciary,"<sup>132</sup> and can foster a public climate in which judicial impartiality itself is devalued.<sup>133</sup>

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<sup>130</sup> See, e.g., Wendel, *supra* note 61, at 98 ("[T]he experience with political candidates for other offices does not reveal a strong tendency of candidates to stick to their campaign positions."); cf. Erwin Chemerinsky, *Restrictions on the Speech of Judicial Candidates Are Unconstitutional*, 35 IND. L. REV. 735, 744 (2002) ("A judge who is trying, consciously or unconsciously, to please the voters will take the politically popular approach, whether or not it was expressed previously.")

<sup>131</sup> *In re Bybee*, 716 N.E.2d 957, 960 (Ind. 1999) (per curiam); see also *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 228 (7th Cir. 1993) ("[A candidate] would be under pressure to honor [a pre-commitment] if he won . . . and such a case later came before him. This commitment . . . would hamper the judge's ability to make an impartial decision and would undermine the credibility of his decision to the losing litigant and to the community.")

<sup>132</sup> *In re Watson*, 794 N.E.2d at 7.

<sup>133</sup> Cf. *In re Kinsey*, 842 So. 2d 77, 89 (Fla. 2003) (per curiam) (finding that a judicial candidate's statement that she would be "absolutely a reflection of what the community wants" violates the canons), *cert. denied*, 124 S. Ct. 180 (2003).

Campaign pledges and promises, thus, at the very least threaten the appearance of judicial impartiality in much the same way that the Supreme Court has found that large campaign contributions create the appearance of corruption.<sup>134</sup> Much as large donations create a reasonable fear that public officials will place private benefits over the public interest in making decisions, campaign pledges and promises create a reasonable fear that the judge will not make decisions based on the facts of the case, the evidence before her, and the rule of law. Like large contributions, judicial campaign promises undermine the legitimacy of government. Much as government can act to limit the undue influence and the appearance of undue influence of large contributions on elected representatives, so, too, government can act to protect public confidence that judges will properly discharge their judicial function.<sup>135</sup>

The Pledges or Promises Clause is properly tailored to the prevention of pre-commitments. The Clause focuses on language that pledges the candidate to pursue a certain course of action. If honored, such a pledge would preclude a judge from having an open mind. But the Clause does *not* prevent a candidate from announcing his views on an issue and informing the voters about his general approach to particular legal questions. To be sure, the difference in practice between the announcement of views and the making of a pledge may be thin. Certainly, many voters will hear announcements of views as commitments to future decisions, and candidates may very well intend voters to hear just that. But the language of pledge or promise signals not simply that a candidate has views on an issue but that he has pre-judged *future* cases in which that issue will arise. The extra moral obligation that may arise from promissory language and the direct challenge to the norm of open-mindedness that results from a pledge make these statements significantly different from the mere announcement of views. The Pledges or Promises Clause is narrowly tailored to preclude the harm to the judicial function created by promissory language without interfering with the bene-

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<sup>134</sup> *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (per curiam).

<sup>135</sup> Indeed, in a recent survey, 95% of state judges strongly supported the statement that “[j]udicial candidates should never make promises during elections about how they will rule in cases that may come before them.” Greenberg Quinlan Rosner Res. Inc., *Justice at Stake Campaign, Justice at Stake—State Judges Frequency Questionnaire* question 34, at 12 (Nov. 5, 2001-Jan. 2, 2002), available at <http://www.greenbergresearch.com/publications/reports/fqjJASjudges.pdf> (last accessed Oct. 7, 2004).

fits of free expression, voter information, and competitive elections that arise out of the freedom of candidates to tell voters their views.<sup>136</sup>

### C. *The Commit or Appear to Commit Clause*

As previously noted, in 1990 the ABA dropped the Announce Clause from its Model Code of Judicial Conduct and replaced it with a provision that a judicial candidate 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.”<sup>137</sup> By the time of the *White* decision, twenty-seven states had adopted canons tracking the ABA’s language.<sup>138</sup> Prior to *White*, a handful of courts that had invalidated the Announce Clause had also upheld the Commit Clause.<sup>139</sup> Because Minnesota had not adopted the Commit Clause, *White* did not address its constitutionality, although the Court’s treatment of the meaning of impartiality and the problems of focusing on campaign statements raises the same uncertainties for the Commit Clause that it does for the Pledges or Promises Clause.

To be sure, one sentence in one of *White*’s footnotes constitutes a more direct, albeit highly ambiguous, challenge to the constitutionality of the Commit Clause. As the Court explained, at oral argument respondents contended that the Minnesota Supreme Court’s narrowing construction of the Announce Clause rendered its scope “no broader than” the Commit Clause.<sup>140</sup> The Court labeled that argument “somewhat curious,” as the Minnesota Supreme Court had rejected a proposal to replace the Announce Clause with the Commit Clause.<sup>141</sup> The Court then stated: “We do not know whether the announce clause (as interpreted by state authorities) and the 1990 ABA canon [that is, the Commit Clause,] are one and the same. No aspect of our constitutional analysis turns on this question.”<sup>142</sup> Certainly one plausible reading of this delphic statement is that even if the Announce

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<sup>136</sup> Cf. Alan B. Morrison, *The Judge Has No Robes: Keeping the Electorate in the Dark About What Judges Think About the Issues*, 36 IND. L. REV. 719, 724-26 (2003) (condemning the Announce Clause but arguing that the Pledges or Promises Clause is constitutional).

<sup>137</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(ii) (1990).

<sup>138</sup> Moerke, *supra* note 81, at 268.

<sup>139</sup> See, e.g., *Ackerson v. Ky. Judicial Ret. & Removal Comm’n*, 776 F. Supp. 309, 315 (W.D. Ky. 1991) (finding that the Commit Clause passes strict scrutiny and does not violate a candidate’s free speech rights); *Deters v. Judicial Ret. & Removal Comm’n*, 873 S.W.2d 200, 205 (Ky. 1994) (stating that “there is a compelling state interest in so limiting judicial campaign speech, because the making of campaign commitments on issues likely to come before the court tends to undermine the fundamental fairness and impartiality of the legal system”).

<sup>140</sup> *Republican Party of Minn. v. White*, 536 U.S. 765, 773 n.5 (2002).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 774 n.5.

Clause were the equivalent of the Commit Clause, it would still have been unconstitutional. That would surely spell the doom of the Commit Clause. However, it is unlikely that the Court's statement was intended to resolve the constitutionality of the Commit Clause. The *White* respondents had sought to import only the "likely to come before the court"<sup>143</sup> language of the Commit Clause into the Announce Clause in order to narrow the latter clause's very broad proscription of the announcement of "views on disputed legal or political issues."<sup>144</sup> Two courts of appeals, including the Eighth Circuit in *White*, had previously narrowed and upheld the Announce Clause by reading in "likely to come before the court."<sup>145</sup> The Court's statement indicates that even if the Announce Clause had been limited to announcements concerning legal and political issues "likely to come before the court" it still would have failed to pass constitutional muster because it still would not have been properly aimed at promoting the interest in impartiality-as-open-mindedness (assuming that impartiality-as-open-mindedness is a compelling governmental interest). But there is nothing in the case to suggest that the lower court or the respondents thought that the Announce Clause's proscription of the "announcing" of views reached no further than statements of commitment. It is highly implausible to suggest that "announce" and "commit" mean the same thing.

Rather, statements committing a candidate with respect to a case, controversy, or issue are likely to resemble pledges and promises in both content and effect. So, too, like the Pledges or Promises Clause, the proscription of candidate commitments with respect to cases, controversies, or issues promotes the interests in protecting judicial impartiality-as-open-mindedness and the appearance of such impartiality—interests that ought to be constitutionally compelling. As the Kentucky Supreme Court observed in upholding the enforcement of that state's Commit Clause, "[j]ustice can hardly be blind if the judge has made a pre-election commitment or pre-judgment which causes him or her to apply the blindfold only as to one side of an issue."<sup>146</sup>

Indeed, the concept of commitment is sufficiently similar to the notion of pledge or promise that it is not completely clear what the Commit Clause adds to the Pledges or Promises Clause. Perhaps it has the benefit of assuring that the regulation is not limited to campaign statements that use the

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<sup>143</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(ii) (1990).

<sup>144</sup> *White*, 536 U.S. at 768 (quoting MINN. CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(i) (2000)).

<sup>145</sup> *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 881-82 (8th Cir. 2001); *Stretton v. Disciplinary Bd.*, 944 F.2d 137, 144 (3d Cir. 1991).

<sup>146</sup> *Deters v. Ky. Judicial Ret. & Removal Comm'n*, 873 S.W.2d 200, 205 (Ky. 1994).

magic words of “pledge” or “promise.” If so, the effect would be similar to Congress’s recent action in the campaign finance area of adopting restrictions on “electioneering communication” in order to undo the effect of court decisions that had narrowly limited the prior statutory term “expenditure” to so-called “express advocacy.”<sup>147</sup> In that case, it would be the Pledges or Promises Clause, which would cover a subset of the pre-commitments that fall within the Commit Clause, rather than the Commit Clause that is redundant.

The history of the Commit Clause suggests that it was derived from the Announce Clause and was intended to approach the Pledges or Promises Clause. But other than indicating that it is the *concept* of pre-commitment that is being regulated, rather than specific linguistic forms, it is not clear what particular work the Commit Clause does, and probably the Pledges or Promises Clause and the Commit Clause ought to be merged. Indeed, in its latest amendments to the Model Code of Judicial Conduct, the ABA has done precisely that by proposing language that in a single clause prohibits judicial candidates from making “pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.”<sup>148</sup>

The Commit Clause goes beyond the Pledges or Promises Clause in one significant but troubling respect. The canon precludes not just commitments but statements that “appear to commit” a candidate to a specific course of judicial action.<sup>149</sup> That would be unexceptionable if the only effect of the phrase were to indicate that the Commit Clause is not limited to statements that use the magic word “commit” but extends to any statement that, in context, would be treated by the reasonable listener as making a commitment rather than merely expressing a viewpoint, regardless of the precise words used. The danger, however, is that statements of judicial philosophy or political belief could be treated by a state supreme court or a state judicial conduct commission as appearing to make a commitment even

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<sup>147</sup> See *McConnell v. FEC*, 124 S. Ct. 619, 650–54 (2003) (describing the wordplay involved in statutory construction around campaign finance reform).

<sup>148</sup> MODEL CODE OF JUDICIAL CONDUCT, Canon 5A(3)(d) (amended Aug. 2003). Similarly, some state supreme courts have revised their canons to subsume the prohibition on pledges and promises into the broader Commit Clause. Thus, Canon 5B of the California Code of Judicial Ethics (amended Dec. 22, 2003) states: “A candidate for election or appointment to judicial office shall not (1) make statements to the electorate or the appointing authority that commit the candidate with respect to cases, controversies, or issues that could come before the courts . . . .” Canon 7B(1)(b) of the Georgia Code of Judicial Conduct (amended Jan. 7, 2004) provides simply that a candidate for “any judicial office that is filled by public election between competing candidates . . . shall not make statements that commit the candidate with respect to issues likely to come before the court.”

<sup>149</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(ii) (1990).

if the language used by the candidate did not state that the candidate viewed himself bound to a specific decision.

Thus, the Kentucky Supreme Court sanctioned a candidate who labeled himself a “pro-life candidate,” finding that self-description “appeared to commit him to a position not only on abortion matters, but also on other controversies.”<sup>150</sup> Yet, surely a judge could consider himself pro-life as a matter of personal philosophy without feeling bound to reach a particular result in a case involving right-to-life issues if the evidence and the law pointed in the other direction. Similarly, the New York State Judicial Conduct Commission found that a candidate who identified herself as a “[l]aw and order [c]andidate” had “committed, or appeared to commit, [herself] to a pro-prosecution bias in criminal cases.”<sup>151</sup> Again, announcing that one is a “law and order” judge does not commit a judge to resolve all issues against defendants. Indeed, the New York Court of Appeals, which has vigorously defended the constitutionality of the canons, concluded that “simply using the phrase ‘law and order’ in judicial campaign literature does not amount to misconduct” since the phrase does not “compromise[] judicial impartiality.”<sup>152</sup> In another case, the Washington Supreme Court held that a candidate who proclaimed himself “toughest on drunk driving” violated the Appear to Commit Clause by suggesting a precommitment in DWI cases, but that the same judge’s statement that he was a “tough, no-nonsense judge” was permissible since the claim “suggest[s] nothing more than a strict application of the law.”<sup>153</sup> These cases illustrate the vagueness and potential breadth of the Appear to Commit prohibition.

The Commit Clause, like the Pledges or Promises Clause, can be constitutionally applied only to statements which go beyond the expression of views concerning legal and political issues and use language—not limited to the specific words “pledge,” “promise,” or “commit”—indicating that the candidate will, while on the bench, render decisions according to the commitment without due regard to the facts or law in a particular case. However, as the Kentucky, New York, and Washington cases indicate, the restriction on statements that “appear to commit” a candidate is vague and, if applied to such non-promissory phrases as “right to life” or “law and order candidate,” goes too far in restricting candidate language that expresses a viewpoint but does not indicate an intention to limit the judge’s freedom of action. It is, thus, of doubtful constitutionality. Indeed, two state courts that recently revised their canons, California and Georgia, retained the pre-*White*

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<sup>150</sup> *Deters*, 873 S.W.2d at 203.

<sup>151</sup> *In re Shanley*, 774 N.E.2d 735, 736 (N.Y. 2002) (per curiam).

<sup>152</sup> *Id.* at 736-37.

<sup>153</sup> *In re Kaiser*, 759 P.2d 392, 396 (Wash. 1988) (emphasis omitted).

prohibition on commitments but dropped the restriction on statements that “appear to commit” a candidate.<sup>154</sup> The California Advisory Committee specifically noted that “the phrase ‘appear to commit’ has been deleted because . . . the phrase may have been overinclusive.”<sup>155</sup> Similarly, in August 2003 the ABA amended its Model Code of Judicial Conduct to eliminate the proscription of statements that merely “appear” to commit the candidate.<sup>156</sup>

#### D. *Misrepresentations Clause*

The most frequently challenged provision of the state judicial campaign canons appears to be the restriction on false and misleading statements. The 1972 ABA Code stated that a candidate for judicial office “should not . . . misrepresent his identity, qualifications, present position, or other fact.”<sup>157</sup> The 1990 Model Code significantly modified the canon to provide that a judicial candidate may not “knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent.”<sup>158</sup> As one commentator recently noted, “[m]ost states with elected judges have adopted one of these versions of the misrepresent clause.”<sup>159</sup>

In recent cases, courts have repeatedly invalidated the 1972 version of the Misrepresentations Clause, while indicating that the 1990 version would pass constitutional muster.<sup>160</sup> These courts have indicated that a requirement of intentional falsity—and the exclusion of innocent or negligent misstatements—is an essential predicate for regulation. Relying on *White*’s application of strict scrutiny to judicial campaign codes, the Eleventh Circuit recently determined that “[n]egligent misstatements must be protected in

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<sup>154</sup> CAL. CODE OF JUDICIAL ETHICS Canon 5B(1) (amended Dec. 22, 2003); GA. CODE OF JUDICIAL CONDUCT Canon 7B(1)(b) (amended Jan. 7, 2004).

<sup>155</sup> CAL. CODE OF JUDICIAL ETHICS Canon 5B Advisory Comm. Cmt. (amended Dec. 22, 2003).

<sup>156</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d) (1990). As amended, the canon now provides that a judicial candidate shall not, “with respect to cases, controversies, or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.” MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(i) (amended Aug. 2003).

<sup>157</sup> CODE OF JUDICIAL CONDUCT Canon 7B(1)(c) (1972).

<sup>158</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(iii) (1990).

<sup>159</sup> Moerke, *supra* note 81, at 310.

<sup>160</sup> *See, e.g.*, *Weaver v. Bonner*, 309 F.3d 1312, 1322 (11th Cir. 2002) (narrowing Georgia’s canon to forbid only intentional dissemination of misrepresentations); *Butler v. Ala. Judicial Inquiry Comm’n*, 802 So. 2d 207, 218 (Ala. 2001) (narrowing the Alabama canon to forbid only dissemination of demonstrable falsehoods with actual malice); *In re Chmura*, 608 N.W.2d 31, 43 (Mich. 2000) (narrowing the Michigan canon to prohibit only knowing or reckless misrepresentations).

order to give protected speech the ‘breathing space’ it requires.”<sup>161</sup> The Michigan Supreme Court similarly reasoned that the “debate” concerning the “overall direction of the courts” that should take place during a judicial election would be “impossible if judicial candidates are overly fearful of potential discipline for what they say” and, accordingly, held that the prohibition of misrepresentations had to be limited to knowing or reckless falsehoods.<sup>162</sup> As a result of these and similar decisions, most state judicial campaign codes now prohibit only intentional or reckless falsehoods.<sup>163</sup>

Even as so limited, is such a restriction on judicial campaign speech constitutional? Misrepresentations, even intentional ones, do not threaten the compelling interest in impartiality-as-open-mindedness that ought to save the Pledges or Promises Clause and the Commit Clause. Most of the courts that have considered challenges to the Misrepresentations Clause have focused on the relatively amorphous interest in “judicial integrity,” finding that the ban on misrepresentations is necessary “so as not to damage the actual and perceived integrity” of the courts.<sup>164</sup> In this view, uncivil, undignified “mudslinging” by judicial candidates—language normal to, if not expected of, executive and legislative candidates who operate in the rough and tumble world of politics—is considered to be a “threat to judicial integrity and public confidence in the judiciary.”<sup>165</sup>

It is not clear if the interest in integrity is unique to the judiciary, or whether the integrity of the judiciary is more threatened by candidate misrepresentations than the integrity of elected executives and legislators. Surely, there is a public interest in the honesty of all elected officials and in the public’s confidence in the honesty of all those in power. Nor is it clear that the reputation of the judiciary is more fragile and more subject to the loss of public confidence than the reputations of the other branches of government, so that a special restriction on judicial candidate speech in the name of integrity is justified. The canon limits the speech of judicial candidates who, if elected, can claim the same public mandate and legitimacy as

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<sup>161</sup> *Weaver*, 309 F.3d at 1320.

<sup>162</sup> *In re Chmura*, 608 N.W.2d at 42-43.

<sup>163</sup> Following the Eleventh Circuit’s decision in *Weaver*, the Georgia Supreme Court revised its Code of Judicial Conduct to narrow the ban on misrepresentation to apply only to candidates’ publishing “a false statement of fact concerning themselves or their candidacies, or concerning any opposing candidate or candidacy, with knowledge of the statement’s falsity or with reckless disregard for the statement’s truth or falsity.” GA. CODE OF JUDICIAL CONDUCT Canon 7B(1)(c) (amended Jan. 7, 2004).

<sup>164</sup> *Berger v. Supreme Court*, 598 F. Supp. 69, 75 (S.D. Ohio 1984); *accord Butler*, 802 So. 2d at 215 (protecting the “reputation and integrity of the judiciary is a compelling state interest”).

<sup>165</sup> Long, *supra* note 68, at 803.

all other elected officials. It is not obvious why they, unlike their appointed counterparts, need the special mantle of being outside or above the hurly-burly of politics. Moreover, it is not clear how well a ban on misrepresentations limited to knowing falsehoods actually promotes the image of judicial “civility and dignity”<sup>166</sup> that defenders of the canons consider necessary to preserve the public’s belief in the integrity of the judiciary. As so circumscribed, the Misrepresentations Clause permits “hyperbole, parody, epithet[s]” and “vehement, caustic, and sometimes unpleasantly sharp attacks.”<sup>167</sup> These can be as nasty as any statements in legislative and executive elections and far more in tension with the goal of civil and dignified judicial elections than low-key, calmly expressed falsehoods.<sup>168</sup>

Perhaps the better defense of the Misrepresentations Clause is not that it promotes judicial integrity but that it advances the public interest in informed judicial elections. Candidate falsehoods are inconsistent with the goal of an informed electorate advanced by the application of strict scrutiny to judicial campaign codes. In recent cases involving sanctions for misrepresentations, candidates have been found to have lied about their qualifications and the qualifications of their opponents,<sup>169</sup> about an opponent’s judicial record,<sup>170</sup> and about the content or nature of the endorsements they had received.<sup>171</sup> Such misrepresentations actually make it harder for the public to get the information it needs to make an accurate and educated assessment of judicial candidates. The ban on misrepresentations thus serves the interest in the integrity of the electoral process by “protecting the political proc-

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<sup>166</sup> Peter D. Webster, *Selection and Retention of Judges: Is There One “Best” Method?*, 23 FLA. ST. U. L. REV. 1, 19 (1995).

<sup>167</sup> *In re Chmura*, 626 N.W.2d at 886.

<sup>168</sup> See Mark Kozlowski, *Should the Regulation of Judicial Candidate Speech Regarding Legal and Political Issues Be Reconsidered?*, 43 S. TEX. L. REV. 161, 167 (2001) (predicting that recent decisions limiting the Misrepresentations Clause to knowing falsehoods will “encourage the use of the underhanded allegation and the cheap shot that may be said to fall short of being outright falsehoods”).

<sup>169</sup> See, e.g., *In re Alley*, 699 So. 2d 1369, 1369 (Fla. 1997) (per curiam) (determining that a judicial candidate had misrepresented her qualifications); *In re Shanley*, 774 N.E.2d 735, 737 (N.Y. 2002) (per curiam) (“[P]etitioner misrepresented her educational background.”).

<sup>170</sup> See, e.g., *In re Bybee*, 716 N.E.2d 957, 962 (Ind. 1999) (per curiam) (“Respondent’s . . . purpose was to create an impression that Judge Clem was causing needless delays and holding a large number of cases under advisement when there was contrary evidence before her . . .”).

<sup>171</sup> See, e.g., *Summe v. Judicial Ret. & Removal Comm’n*, 947 S.W.2d 42, 44-45 (Ky. 1997) (finding that candidate promulgated campaign literature that looked like a newspaper’s independent endorsement of her candidacy); *In re Burick*, 705 N.E.2d 422, 426, 428 (Ohio 1999) (fining and reprimanding candidate for misleading endorsements).

ess from distortions caused by false or inaccurate statements” at least as much as it promotes dignity and civility in judicial elections.<sup>172</sup> By limiting the restriction to knowing falsehoods, the Misrepresentations Clause minimizes interference with robust political debate while still barring statements that actually make it harder for the public to make an informed decision.

The 1990 version of the Misrepresentations Clause ought to pass constitutional muster. Because it regulates only knowing falsehoods, it is not even certain whether the clause would trigger strict judicial scrutiny, as the Supreme Court has indicated in other settings that knowing falsehoods can be penalized.<sup>173</sup> Even if the Misrepresentations Clause does trigger strict scrutiny, the interest in informed electoral decision making is a compelling one and ought to justify such a restriction on candidate speech.

Unlike the issues raised by the Pledges or Promises and the Commit Clause, it is not clear whether the fate of the Misrepresentations Clause ought to turn on the distinct character of the judicial function or the special nature of judicial elections. The same concern over informed voter decision making ought to provide the compelling interest that would support a *general* prohibition on candidates’ knowingly making false statements in elections. Indeed, one study in 2001 found that seventeen states prohibit false speech concerning political candidates.<sup>174</sup> It is probably the case that the belief that judicial elections are special, and that judicial candidates should be held to higher standards of civility, dignity, and integrity, explains why the Misrepresentations Clause was initially adopted and continues to be retained. But its constitutionality is better supported by the compelling interest in informed voter decision making, an interest just as applicable to legislative and executive elections as to judicial elections.<sup>175</sup>

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<sup>172</sup> *In re Chmura*, 608 N.W.2d at 40.

<sup>173</sup> See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345-46 (1974) (“States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual.”); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (allowing public officials to recover damages only if a newspaper knowingly or recklessly publishes false items about them); see also *Garrison v. Louisiana* 379 U.S. 64, 75 (1964) (“[T]he use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected.”).

<sup>174</sup> Becky Kruse, Comment, *The Truth in Masquerade: Regulating False Ballot Proposition Ads Through State Anti-False Speech Statutes*, 89 CAL. L. REV. 129, 132 (2001). Ten of those states, plus one other state, also prohibit false speech concerning ballot propositions. *Id.*

<sup>175</sup> There is little case law on whether states can prohibit falsehoods by campaign participants outside the context of judicial elections. Two federal district courts have held that barring knowingly false statements in political campaigns could be constitutional, but found the particular statutes before them flawed on procedural grounds. In *Vanasco v. Schwartz*, 401 F. Supp. 87, 93-95 (S.D.N.Y. 1975), *aff’d mem.*, 423 U.S. 1041 (1976), the court agreed

### E. *Personal Solicitation of Campaign Contributions*

Canon 5C(2) of the ABA Model Code provides that a judicial candidate “shall not personally solicit or accept campaign contributions.”<sup>176</sup> Instead, the candidate is authorized to establish “committees of responsible persons” that may “solicit and accept” campaign contributions.<sup>177</sup> Virtually all states that conduct judicial elections have adopted the ban on judicial candidates’ personal solicitation of campaign contributions.<sup>178</sup> Prior to *White*, this ban, unlike the Announce and Misrepresentations Clauses, had been consistently validated and enforced in the courts.<sup>179</sup>

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that campaign statements made with “actual malice,” that is, with the knowledge that they are false or with reckless disregard of whether they are false, are unprotected by the First Amendment, but concluded that the New York law penalizing campaign misrepresentations was unconstitutionally overbroad because of its failure to include an actual malice requirement. The court also found that the statute’s enforcement mechanism—an administrative proceeding brought by the state board of elections, without judicial review—provided an unconstitutional and inadequate method for protecting the free speech rights at stake. *Id.* at 99-100. In *Pestrak v. Ohio Elections Commission*, 670 F. Supp. 1368, 1370, 1375 (S.D. Ohio 1987), the court found that the statute prohibiting the making of campaign falsehoods “knowingly and with intent to affect the outcome of such campaign” properly criminalized speech “not entitled to the protection of the First Amendment,” but, as in *Vanasco*, concluded that the administrative procedure for enforcing the ban was unconstitutional. The Sixth Circuit subsequently agreed that Ohio could prohibit knowingly false campaign statements. *Pestrak v. Ohio Elections Comm’n*, 926 F.2d 573, 577 (6th Cir. 1991).

One state court has invalidated a state law prohibiting political advertisements that include intentional falsehoods concerning material facts. In *State ex rel. Public Disclosure Commission v. 119 Vote No! Committee*, 957 P.2d 691, 696-97 (Wash. 1998), a narrow majority of the Washington Supreme Court determined that even malicious campaign falsehoods must receive full First Amendment protection. *119 Vote No! Committee* dealt primarily with the statute’s application to ballot proposition campaigns, but the court’s ruling invalidated the application of the anti-false-statement law to candidate campaigns as well. *Id.* at 697-98. Washington subsequently adopted a law penalizing political advertising made with actual malice “that contains a false statement of material fact about a candidate for public office,” but exempted “statements made by a candidate or the candidate’s agent about the candidate himself or herself.” WASH. REV. CODE ANN. § 42.17.530(1)(a) (West 2000).

More recently, in *McKimm v. Ohio Elections Commission*, 729 N.E.2d 364, 375 (Ohio 2000), *cert. denied*, 531 U.S. 1078 (2001), the Ohio Supreme Court, after full review of the First Amendment issues, enforced an Ohio law prohibiting the dissemination with actual malice of a false statement concerning a candidate that is designed to promote the election or defeat of the candidate.

<sup>176</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 5C(2) (1990).

<sup>177</sup> *Id.*

<sup>178</sup> See Roy A. Schotland, *Myth, Reality Past and Present, and Judicial Elections*, 35 IND. L. REV. 659, 666 (2002) (noting that thirty-five of the thirty-nine states that have judicial elections ban candidates’ personal solicitations of contributions).

<sup>179</sup> See, e.g., *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 883-85 (8th Cir. 2001) (enforcing a ban on personal solicitation of campaign funds); *Stretton v. Disciplinary Bd.*, 944 F.2d 137, 146 (3d Cir. 1991) (allowing the states to prohibit personal solicitation by candidate in order to avoid the appearance of coercion); *In re Fadeley*, 802 P.2d 31, 44 (Or. 1990) (per

In *Weaver v. Bonner*, however, the Eleventh Circuit, relying on *White*, determined that Georgia's ban on the personal solicitation of campaign funds by judicial candidates was unconstitutional.<sup>180</sup> *Weaver* determined that the ban failed strict scrutiny because it was "not narrowly tailored to serve Georgia's compelling interest in judicial impartiality."<sup>181</sup> Strict scrutiny applied because the ban "chilled" judicial candidates "from speaking to potential contributors" about their potential contributions.<sup>182</sup> Apparently assuming that the prevention of impartiality—in this case, bias in favor of the donor—is a compelling state interest, the Eleventh Circuit determined that the ban did not promote that interest since "the fact that judicial candidates require financial support" to run successful campaigns "does not suggest that they will be partial if they are elected."<sup>183</sup> On the other hand, "even if there is a risk that judges will be tempted to rule a particular way because of contributions or endorsements, this risk is not significantly reduced" by requiring that the candidate seek contributions through a committee rather than personally.<sup>184</sup> "Successful candidates will feel beholden to the people who helped them get elected regardless of who did the soliciting of support."<sup>185</sup>

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curiam) (upholding the constitutionality of a ban on personal solicitation); *In re Tennant*, 516 S.E.2d 496 (W. Va. 1999) (enforcing a ban on personal solicitation of funds as necessary to reduce potential pressure on lawyers to contribute to a particular campaign); cf. *Suster v. Marshall*, 951 F. Supp. 693, 701 (N.D. Ohio 1996) (upholding a prohibition on a judicial candidate from spending money raised in connection with a campaign for non-judicial office, in part in order to backstop the ban on personal solicitation of judicial campaign funds).

One of the plaintiffs in *White* did challenge the Minnesota canon barring a candidate's personal solicitation of campaign contributions. The plaintiff acknowledged that the ban served the compelling state interest of preventing a threat to judicial impartiality and preventing the appearance of judicial impropriety. *Kelly*, 247 F.3d at 883-84. However, he argued that the ban was not narrowly tailored since the prevention of impropriety and the appearance of impropriety could be advanced by permitting a judicial candidate to make solicitations to large groups and to send out letters requesting money but requiring that contributions be sent to a campaign committee that would be barred from disclosing the identity of contributors to the candidate. *Id.* at 884. The Eighth Circuit, however, concluded that the plaintiff's alternative would not obviate the appearance of impropriety that results from personal solicitation and the "appearance, accurate or not, that 'justice is for sale' and the expectation of impermissible favoritism." *Id.* The plaintiffs in *White* did not include a question relating to the personal solicitation restriction in their petition for certiorari. *Republican Party of Minn. v. White*, 361 F.3d 1035, 1040 (8th Cir. 2004). Consequently, the issue did not come before the Supreme Court.

<sup>180</sup> 309 F.3d 1312, 1322 (11th Cir. 2002).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 1322-23.

<sup>185</sup> *Id.* at 1323.

Perhaps influenced by the *Weaver* decision, the North Carolina Supreme Court revised its Code of Judicial Conduct in 2003 to expressly permit a judicial candidate to “personally solicit campaign funds.”<sup>186</sup> The Maine Supreme Court, however, was unpersuaded by the Eleventh Circuit’s reasoning, holding that the ban on personal solicitation was justified because “[i]t is exactly this activity that potentially creates a bias, or at least the appearance of bias, for or against a party to a proceeding.”<sup>187</sup> Similarly, the Eighth Circuit panel, in its reconsideration of *White* on remand from the Supreme Court, agreed that the ban on personal solicitation promotes “a kind of open-mindedness—keeping candidates free from obligations that would hamper their ability to decide the law according to their own judgment rather than in accordance with implicit obligations to their financial benefactors.”<sup>188</sup>

The Eleventh Circuit’s opinion is not simply internally contradictory; it is unpersuasive. The Supreme Court, in cases from *Buckley* through *McConnell*, has repeatedly held that campaign contributions raise the dangers of corruption—defined as candidates too compliant with the wishes of their donors—and appearance of corruption and that, accordingly, contributions to candidates may be limited. Surely, solicitation—the act of asking for a contribution—raises the same dangers of undue influence and the appearance of impropriety as the contribution itself. Indeed, personal solicitation highlights the dangers of abuse by focusing on the potentially coercive nature of the request for contributions aimed at a potential donor who has or is likely to have business before the judge seeking the contribution. Personal solicitation, thus, particularly threatens the appearance of impropriety and undermines the appearance of evenhanded treatment essential to the judicial role.

The Supreme Court has held that restrictions on contributions are not subject to strict scrutiny.<sup>189</sup> Contribution limits, the Court has determined, “entail[] only a marginal restriction upon the contributor’s ability to engage

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<sup>186</sup> N.C. CODE OF JUDICIAL CONDUCT Canon 7B(4) (amended Apr. 2, 2004). The court’s decision has been criticized by district court judges and trial lawyers in the state. See, e.g., Matthew Eisley, *Election Rules Relaxed for Judges: Permission to Solicit Lawyers for Money Brings a Fear of ‘Shakedowns,’* NAT’L L.J., Oct. 13, 2003, at 7 (citing several attorneys’ fears regarding personal solicitation of campaign funds).

<sup>187</sup> *In re Dunleavy*, 838 A.2d 338, 351 (Me. 2003), cert. denied, 124 S. Ct. 1722 (2004).

<sup>188</sup> *Republican Party of Minn. v. White*, 361 F.3d 1035, 1048 (2004). This opinion was subsequently vacated when the Eighth Circuit determined to grant rehearing en banc. *Republican Party of Minn. v. Kelly*, No. 99-4021/4025/4029, 2004 U.S. App. LEXIS 10232, at \*4 (8th Cir. May 25, 2004).

<sup>189</sup> *McConnell v. FEC*, 124 S. Ct. 619, 656-57 (2003); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 386-88 (2000).

in free communication.”<sup>190</sup> The restriction on donors is marginal because a donor who has hit the contribution ceiling can continue to participate in the campaign through independent expenditures or other forms of political expression. The only significant constitutional concern raised by a contribution limitation is whether it would “prevent[] candidates and political committees from amassing the resources necessary for effective advocacy.”<sup>191</sup>

The restriction on personal solicitation by a candidate should be subject to the same less rigorous standard of review as the restriction on contributions. The ban on personal solicitation does not interfere with the candidate’s freedom to speak in support of her candidacy since it does not restrict any speech by the candidate about his campaign other than the pitch for a donation. Nor does the ban restrict the ability of potential supporters to donate to the judicial candidate’s campaign. In that sense, the ban on personal solicitation of contributions is less restrictive than the contribution ceilings that the Court has repeatedly upheld. The only constitutional issue is whether prohibiting personal solicitation, and requiring the candidate instead to rely on her campaign committee to solicit donations, fatally undermines the ability of candidates to wage financially viable campaigns.<sup>192</sup> With more and more money being poured into judicial election campaigns, it would be difficult to find that the ban on personal solicitation has interfered with the ability of judicial candidates to amass the necessary campaign resources.<sup>193</sup>

In some states the ban on personal solicitation might arguably be unconstitutional because of its limited reach. Although the ABA canon bans personal solicitation, it does not prohibit the judicial candidate from learning the identities of her financial supporters. The Georgia ban was similarly limited, a fact relied upon by the Eleventh Circuit in *Weaver v. Bonner*.<sup>194</sup>

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<sup>190</sup> *Buckley v. Valeo*, 424 U.S. 1, 20-21 (1976) (per curiam).

<sup>191</sup> *Id.* at 21; accord *McConnell*, 124 S. Ct. at 655-57; *Nixon*, 528 U.S. at 395-97.

<sup>192</sup> A ban on personal solicitation that continues to permit solicitation through agents is distinguishable from the restriction on solicitation subject to strict judicial scrutiny. See *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 801 (1988) (subjecting the speech of professional fundraisers to strict scrutiny).

<sup>193</sup> See, e.g., Schotland, *supra* note 58, at 850 (stating that in the 2000 elections, state supreme court candidates raised \$45.5 million, a 61% increase over the previous peak in 1998, and set fundraising records in ten of the twenty states that held such elections); GOLDBERG & SANCHEZ, *supra* note 23, at 15-16 (noting that in 2000 and 2001 ten state supreme court candidates raised more than \$1 million apiece for their campaigns; in Ohio, the four candidates for state supreme court together raised more than \$6.2 million; and in Texas, the ten candidates together raised more than \$5.8 million).

<sup>194</sup> 309 F.3d 1312, 1322 (11th Cir. 2002). Not all state versions of the ban on personal solicitations are so limited. The Minnesota canon considered by the Eighth Circuit panels in *Kelly* and in *White*, on remand from the Supreme Court, includes a provision prohibiting the

Is the threat to judicial impartiality and to the appearance of impartiality—as well as the potential coercion of donors—qualitatively greater when the candidate solicits the contribution personally? The answer should be “Yes.” Personal solicitation can easily involve a personal meeting between candidate and donor, with a handshake and the opportunity for each to look the other in the eye while the candidate makes his pitch. Similarly, a personal telephone call can heighten the sense of direct contact between the candidate and the donor. Even without language of pledge or promise the candidate is likely to have a heightened sense of gratitude to the donor and subsequent sympathy for the donor’s interests if the candidate, when in office, is ever called upon to make a decision involving that donor’s interest. Moreover, the candidate’s personal solicitation makes it that much harder for the potential donor to say “No,” because the donor knows that the *candidate* knows that the donor has been directly asked for a contribution; the failure to contribute may be treated as a matter of hostility rather than indifference. From the public’s perspective, the appearance of the possibility of special treatment is likely to be much greater if it is known that the candidate personally solicited a contribution from someone who later had a matter before the candidate-as-judge.

These concerns about the heightened potential for favoritism, coercion, and the appearance of special treatment arising from personal solicitation are applicable to all elections and conceivably might be used to justify a comparable restriction in other settings.<sup>195</sup> But two factors distinctive to the judicial setting strengthen the case for the canon. First, whereas legislators and executives regularly meet with individuals and the representatives of interest groups in private, one-sided sessions in which those individuals or interest groups are free to advocate their concerns and seek support, the nature of the judicial function ordinarily precludes private or *ex parte* contacts between a judge and a party who has an interest before the judge. Personal

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candidate’s campaign committee from disclosing to the candidate either the identity of campaign contributors or the identity of those who were solicited for contributions but declined to contribute. *Republican Party of Minn. v. White*, 361 F.3d 1035, 1049 (8th Cir. 2004), *vacated and reh’g, en banc, granted sub nom. Republican Party of Minn. v. Kelly*, No. 99-4021/4025/4029, 2004 U.S. App. LEXIS 10232, at \*4 (8th Cir. May 25, 2004).

<sup>195</sup> Cf. BRUCE ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE* 25-44, 93-110 (2002) (proposing a system of anonymous donations in which campaign contributors give to candidates through a blind trust). Like the ban on personal solicitations, the Ackerman and Ayres proposal for anonymous donations seeks to sever the tie between donors and candidates without limiting the size of contributions. The Ackerman and Ayres proposal would permit candidates to personally solicit contributions, but candidates would be unable to know whether and how much these solicited donors contributed. In making their proposal, Ackerman and Ayres they rely in part on the state canons that prohibit judicial candidates from learning the identities of their donors. *Id.* at 109.

meetings or other contacts by judges with donors and potential donors would thus pose a greater threat to the appearance of impartiality and to impartiality itself than would meetings of other elected officials with donors. Second, a disproportionate fraction of contributions to judicial candidates comes from two discrete interest groups: lawyers who are likely to appear before the judges and clients who have regular interests before the courts.<sup>196</sup> This exacerbates the sense that personal solicitation undermines impartiality and the appearance of impartiality, as well as underscores the concern that personal solicitations raise the danger of coercion.<sup>197</sup> Thus, whether or not a ban on personal solicitation of campaign contributions could be enforced against legislative and executive candidates, it ought to be constitutional in the special context of judicial elections.

#### F. Restrictions on Partisan Political Activity

The ABA Model Code includes provisions, which most states have adopted, precluding judges from participating in a range of partisan political activity other than support for their own campaigns. These forbidden activities typically include holding office in a political party, publicly endorsing or opposing another candidate for public office, making speeches for a political party, or soliciting funds for or making contributions to a political party.<sup>198</sup> Even states that provide for partisan judicial elections may adopt restraints on the partisan political activities of judicial candidates.

*White* did not address the constitutionality of restrictions on partisan behavior. Although the Minnesota Code of Judicial Conduct's limits on partisan activities were challenged by the plaintiffs, upheld by the Eighth Circuit,<sup>199</sup> and raised in the plaintiff's petition for certiorari, the Supreme

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<sup>196</sup> GOLDBERG & SANCHEZ, *supra* note 23, at 17-18. *But cf.* Schotland, *supra* note 58, at 856 (“[W]hile many judicial campaigns are funded significantly by lawyers’ contributions, by no means is that a prevailing pattern.”).

<sup>197</sup> See *In re Fadeley*, 802 P.2d 31, 41 (Or. 1990) (per curiam) (“[T]he spectacle of lawyers or potential litigants directly handing over money to judicial candidates should be avoided if the public is to have faith in the impartiality of its judiciary.”).

<sup>198</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 5B (1990). For recent cases applying these and similar prohibitions, see *In re McCormick*, 639 N.W.2d 12, 15 (Iowa 2002) (stating that “a judge may not publicly endorse a candidate for public office”); *Shake v. Ethics Committee of the Kentucky Judiciary*, 122 S.W.3d 577, 579 (Ky. 2003) (holding that “a judge or judicial candidate may not make a contribution in order to attend a political fundraiser”); *In re Shea*, 815 So. 2d 813, 817-18 (La. 2002) (per curiam) (censuring a judge for even a “good faith” violation of the prohibition on “contributions to other candidates”); see also *Suster v. Marshall*, 951 F. Supp. 693, 698 (N.D. Ohio 1996) (citing examples of state regulation of partisan activity by judges), *aff’d*, 149 F.3d 523 (6th Cir. 1998).

<sup>199</sup> *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 868-76 (8th Cir. 2001).

Court limited its review to the Announce Clause.<sup>200</sup> After *White*, the constitutionality of restrictions on the political activities of judges and judicial candidates was sharply called into question in *Spargo v. New York State Commission on Judicial Conduct*,<sup>201</sup> a federal district court decision involving a New York town justice and state supreme court judicial candidate who attended a Conservative Party fundraising dinner and served as keynote speaker at the event.<sup>202</sup> Relying on *White*, the court subjected the restrictions on partisan political activity to strict judicial scrutiny and concluded that they were not narrowly tailored to promote the state's interests in judicial impartiality and independence.<sup>203</sup> Moreover, the court's opinion suggested that even a more modest restriction on the political activity of judges would not pass muster so long as the state continued to elect judges in partisan elections:

[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. . . . [A] rule prohibiting an elected judge or judicial candidate from participating in politics is not narrowly tailored to serve the state's interest in an independent judiciary. This is particularly true in light of the political process by which judges are elected.<sup>204</sup>

A few months later, however, the New York Court of Appeals strongly affirmed the constitutionality of the state's restrictions on judicial candidate political behavior. *In re Raab*<sup>205</sup> involved a disciplinary proceeding against a state supreme court justice who had taken part in a Working Families Party (WFP) phone bank and attended a WFP screening meeting at which the endorsements of candidates for both judicial and nonjudicial offices were considered.<sup>206</sup> The court of appeals held that the restrictions promoted the compelling interests in judicial impartiality and independence, and public confidence in the judiciary. Rejecting the approach taken by the federal district court, the state court of appeals concluded that

[p]recisely because the State has chosen election as one means of selecting judges, there is a heightened risk that the public, including litigants and the bar,

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<sup>200</sup> Republican Party of Minn. v. White, 361 F.3d 1035, 1040 (2002).

<sup>201</sup> 244 F. Supp. 2d 72, 74, 80-81 (N.D.N.Y. 2003). The Second Circuit vacated the decision on grounds that the district court should have abstained from exercising jurisdiction due to an ongoing state disciplinary proceeding, as per *Younger v. Harris*, 401 U.S. 37 (1971). 351 F.3d 65, 68 (2d Cir. 2003), *cert. denied*, 124 S. Ct. 2812 (2004).

<sup>202</sup> *Spargo*, 244 F. Supp. 2d at 74, 80-81.

<sup>203</sup> *Id.* at 91-92.

<sup>204</sup> *Id.* at 88-89.

<sup>205</sup> 793 N.E.2d 1287 (N.Y. 2003) (per curiam).

<sup>206</sup> *Id.* at 1288.

might perceive judges as beholden to a particular leader or party after they assume judicial duties. The political activity rules are carefully designed to alleviate this concern by limiting the degree of involvement of judicial candidates . . . without unduly burdening the candidates' ability to participate in their own campaigns.<sup>207</sup>

The *Spargo* court correctly noted the close connection between partisan activity and judicial campaigns in states with partisan judicial elections.<sup>208</sup> Spargo, a politically active lawyer, no doubt owed at least some of the party support he received in his successful elections to the bench to his work with the party. Similarly, Judge Raab testified, in the case brought against him, that he had volunteered to work for the WFP in order to win what he considered to be a crucial endorsement in what he expected would be an uphill race.<sup>209</sup> As these cases suggest, the limitations on partisan activity by judicial candidates do not easily square with a system that uses a partisan ballot for judicial elections. These restrictions may be particularly burdensome for challengers who need to demonstrate their partisan bona fides in order to win a party nomination—and, thus, a place on the ballot—and key endorsements. In addition to burdening the political participatory rights of the candidates, these restrictions may also curb judicial electoral competitiveness. The *Spargo* court was also correct in suggesting that the sweeping ban on partisan activities is far broader than would be necessary to prevent impartiality-as-bias. Surely, active involvement in a party would result in actual bias in just the relative handful of cases in which party leaders, party activists, or the political party itself are lawyers or litigants. As *Spargo* contended, recusal would be sufficient under those circumstances.<sup>210</sup> Nor does partisan political activism constitute a pledge or precommitment to a particular course of action in a particular case. Rather, political activity is, at most, akin to the announcement of views or a general statement of philosophy.

However, *Spargo* significantly understates the potential of partisan activity to undermine judicial independence. Political parties constitute a crucial structural mechanism linking up elected officials within a legislative chamber, between chambers in the same legislature, between separate branches of government, and even between different levels of government. Parties can play an important role in the formulation of shared policies across different political institutions and in persuading members of the same party to go along with a common policy. The Eighth Circuit put it well in

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<sup>207</sup> *Id.* at 1292-93.

<sup>208</sup> *Spargo*, 244 F. Supp. 2d at 88-89.

<sup>209</sup> *In re Raab*, 793 N.E.2d at 1288.

<sup>210</sup> *Spargo*, 244 F. Supp. 2d at 88-89.

its pre-*White* decision upholding Minnesota's restrictions on partisan judicial activity:

Political parties specialize in the business of electing candidates and have a powerful machinery for achieving that end, including large membership and fund-raising organizations. Those parties are simply in a better position than other organizations to hold a candidate in thrall. Moreover, because political parties have comprehensive platforms, obligation to a party has a great likelihood of compromising a judge's independence on a wide array of issues. Finally, legislatures are bodies in which, for the most part, the members owe allegiance to a political party, not only for financial support and endorsement in their campaigns for office, but also for political support within the legislative process itself. . . . [T]he sharing of common partisan affiliation plays an integral role in enactment of legislation. If the judiciary is then expected to review such legislation neutrally, a State may conclude that it is crucial that the judges not be beholden to a party responsible for enactment of the legislation, or to one that opposed it.<sup>211</sup>

Indeed, in *McConnell v. FEC* the Supreme Court recently emphasized the particular dangers to government integrity posed by the "special relationship and unity of interest" between a political party and the elected officeholders belonging to the party.<sup>212</sup> *McConnell* upheld new federal statutory restrictions on donations to political parties, including donations that were neither solicited by candidates nor used by the party to aid specific candidates. The Court recognized that due to the "close ties that candidates and officeholders have with their parties," large donations to the parties run the risk of unduly influencing the decisions of elected officials who belong to those parties and of creating the appearance of such undue influence.<sup>213</sup>

The "special relationship" between parties and officeholders that the Court recognized in *McConnell* can also threaten judicial independence by too closely linking judges to party leaders and the preferences of those leaders, even in cases in which neither the party leaders nor the party itself are participating. Judges who are politically active within their parties can come under pressure to conform their judicial decisions to the party line. So, too, judges who endorse party candidates, speak at party conventions, or solicit funds for party causes are likely to be perceived by the public as subject to partisan influences and, thus, unlikely to provide impartial justice in cases where party positions are implicated.

This can undermine public confidence in the independence of the judiciary as well. In its reconsideration of Minnesota's ban on partisan political

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<sup>211</sup> *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 876 (8th Cir. 2001).

<sup>212</sup> 124 S. Ct. 619, 661 (2003).

<sup>213</sup> *Id.* at 665.

activities, on remand from the Supreme Court after *White*, the Eighth Circuit panel reiterated its prior analysis that the canon's special restrictions on partisan activities "are aimed at forms of obligation which are more subtle than outright corruption, but which the state still has a compelling interest in avoiding in its judiciary."<sup>214</sup> However, the panel expressed concern that the argument raised by the Supreme Court—that the Announce Clause was unconstitutional in part because it was underinclusive as it applied only to election campaign statements and not to earlier announcements of political views—might also call into question the constitutionality of some of the partisan activity restrictions, such as those dealing with attendance at party gatherings and public statements of identification with the party, which apply only during the campaign period.<sup>215</sup> As a result, the panel remanded the question of the constitutionality of the partisan activity restrictions to the district court for further consideration.<sup>216</sup> Ten weeks later, this decision, as well as the panel's decision upholding the anti-personal solicitation canon, was vacated by the Eighth Circuit, which voted to rehear both issues en banc.<sup>217</sup>

As I have suggested earlier, *White*'s argument—that restrictions on judicial statements or activity that apply only during the pre-election period are constitutionally suspect as underinclusive—makes little sense, because the pre-election period is quite distinctive, and statements made during that period have a special significance. So, too, the fact that a judge may have been politically active before she ascended to the bench does not render partisan activity restrictions on sitting judges underinclusive. We have a long tradition of partisan political figures becoming distinguished nonpartisan judges. Restrictions targeting judicial candidates and sitting judges appropriately distinguish between partisan figures and judges who are expected to separate themselves, while on the bench, from partisan politics.

Restrictions on partisan political activity should be constitutional whether or not the state runs its judicial elections on partisan lines. Indeed, partisan judicial elections do not ameliorate the threat to judicial independ-

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<sup>214</sup> *Republican Party of Minn. v. White*, 361 F.3d 1035, 1044 (8th Cir. 2004), *vacated and reh'g, en banc, granted sub nom. Republican Party of Minn. v. Kelly*, No. 99-4021/4025/4029, 2004 U.S. App. LEXIS 10232, at \*4 (8th Cir. May 25, 2004).

<sup>215</sup> *White*, 361 F.3d at 1048. The court saw no underinclusiveness problem in restricting endorsements during campaigns since "[t]he endorsement clause only makes sense during the time-frame of an election." *Id.*

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

<sup>217</sup> *Republican Party of Minn. v. Kelly*, No. 99-4021/4025/4029, 2004 U.S. App. LEXIS 10232, at \*4 (8th Cir. May 25, 2004). As of the printing of this Article, oral argument of the rehearing en banc was scheduled for October 20, 2004. *Notice to All Counsel: October 18-24, 2004, supra* note 22, at 4.

ence; they heighten it. Although there is a tension between providing for partisan elections while restricting the partisan political activities of candidates, the two positions are not contradictory. The partisan ballot line, like the announcement of views on disputed political and legal issues, provides the voter with a general sense of where the candidate stands and how the candidate may differ from the candidates of other parties. In low-salience judicial elections, where, typically, voters will have little other information about the candidates, this information can be vital. But greater political activism links the candidate-judge ever more tightly to the party. This may lead party leaders to treat judges as comparable to other party-elected officeholders and may undermine the ability of politically active judges to distance themselves from their parties when performing their judicial function. By forcing a measure of party-candidate distance, the political activity canons reinforce the separation of powers and emphasize the significance of judicial independence.<sup>218</sup>

#### CONCLUSION: BEYOND THE CANONS

Notwithstanding *White*, most of the canons regulating judicial campaign activities should be able to pass constitutional muster. As Part I points out, we do not have one uniform set of constitutional standards that govern all elections. Rather, the rules governing such fundamental issues as the composition of the electorate, the weighting of votes, and restrictions on campaign funding can vary according to the nature of the decision to be made or the office to be determined by the election. Given our mixed set of electoral rules, *White*'s unsurprising determination that the First Amendment applies to judicial elections does not require that judicial elections be governed by the same set of campaign speech and conduct provisions as applies to elections for legislative and executive office.

The nature of the judicial function justifies some restrictions on campaign practices that would be invalid in the context of elections for legislative or executive office. With respect to the canons that have been the primary targets of constitutional challenges in recent years, the goals of protecting judicial impartiality-as-open-mindedness and judicial independence ought to provide compelling justifications for prohibitions on candidate pledges and promises; for enforcement of a properly drafted ban on

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<sup>218</sup> The constitutional case for these canons becomes stronger if, as *In re Raab* found, the precedents upholding statutes that limit the partisan political activities of public employees apply. *In re Raab*, 793 N.E.2d 1287, 1291 (N.Y. 2003) (per curiam) (citing *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973)); see also *United Public Workers v. Mitchell*, 330 U.S. 75, 93 (1947) (upholding the constitutionality of restrictions on the political activities of civil service employees).

statements that make commitments; and for restrictions on the candidate's personal solicitation of contributions and the candidate's partisan political activities. The canon against knowing misrepresentations would probably be valid even when applied to nonjudicial elections and can certainly be enforced in judicial elections.

Yet, it is unclear what difference the continuing constitutionality of the canons would make. Many judicial election campaigns are likely to remain largely low-salience noncompetitive contests, with voters receiving inadequate information. Judges will be subject to structural pressures to consider whether to abide by public opinion in high visibility cases, as well as to take into account the concerns of their contributors and their parties. The difference between the announcement of views and the making of commitments is an important point for constitutional purposes, but it is a highly subtle one that may be lost on voters, litigants, and judges alike in heated campaigns. Moreover, once the canons are applied not simply to specific words of pledge or promise but to the general sense of whether campaign statements amount to a prejudgment, the distinction between announcements and commitments may be difficult to draw in particular cases. That may make some candidates uncertain as to exactly what they can say and also give rise to dangers of arbitrary or partisan enforcement.

Two other steps, either supplementing or supplanting the canons, might be useful in increasing the information available to voters, reducing the campaign-based pressures on judges, and facilitating robust campaign debate. First, states could provide public funding for judicial candidates. The need for campaign contributions can be as great a threat to judicial impartiality as statements concerning contested cases or issues. Recent opinion polls have found that few people think that judicial decisions are affected by the content of campaign statements but that roughly three-quarters of those surveyed think that campaign contributions affect judicial outcomes.<sup>219</sup> Far more than the ban on personal solicitation, public funding, by providing judicial candidates with a disinterested source of funds, could alleviate the danger that campaign contributions will bias decisions. Further, by assuring candidates funding above the amounts the candidates can raise from private donors, public funding would increase the ability of judicial candidates to present themselves to the voters. So, too, public funding can reduce the burdens of fundraising and increase the funds available to challengers,

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<sup>219</sup> See, e.g., Thomas R. Phillips, *Electoral Accountability and Judicial Independence*, 64 OHIO ST. L.J. 137, 144-45 (2003) (“[A]bout three-fourths of Americans believe that judicial outcomes are affected by campaign contributions.”); cf. Kozlowski, *supra* note 168, at 172 (suggesting that these polls show massive public distrust of the judiciary).

thereby generally increasing electoral competitiveness.<sup>220</sup> Indeed, better than any other regulatory tool, public funding could simultaneously advance the multiple goals of unfettered political expression, voter information, competitive elections, *and* judicial impartiality and independence.<sup>221</sup>

North Carolina recently took a dramatic step in reconsidering its regulation of judicial elections by providing for public funding for judicial elections while drastically cutting back its regulation of judicial campaign conduct.<sup>222</sup> The Tarheel State now prohibits only a candidate's solicitation of funds on behalf of a political party or candidate for office, endorsement of a candidate for nonjudicial public office, or intentionally and knowingly misrepresenting her identity or qualifications. North Carolina no longer prohibits pledges, promises, commitments, personal solicitations, or other forms of partisan political activity.<sup>223</sup> The new North Carolina approach, thus, focuses on promoting political expression and voter information through public funding and the elimination of some speech restrictions, while freeing judicial candidates from dependence on large donors and defending the autonomy of the courts from partisan executive and legislative politics. To be sure, the new canons permit the kinds of pledges and promises that may be inconsistent with the judicial function. But the combination of public funding and less restrictive canons almost certainly provides greater protection for both judicial independence and informed elections than does the usual pattern in most states of more restrictive canons without public funding.<sup>224</sup>

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<sup>220</sup> The current private funding system leads to considerable funding imbalances, with the better funded candidate usually prevailing against a less well-funded opponent. *See* GOLDBERG & SANCHEZ, *supra* note 23, at 15 (“[T]he top fundraiser almost always wins at the polls.”).

<sup>221</sup> *See generally* Richard Briffault, *Public Funding and Democratic Elections*, 148 U. PA. L. REV. 563 (1999) (discussing the benefits that public funding would have for elections and government). A less dramatic but still useful way of aiding less well-funded candidates and increasing voter information would be through the government dissemination of voter guides that contain brief statements by and about the candidates. *See, e.g.*, Cynthia Canary, *Know Before You Go: A Case for Publicly Funded Voters' Guides*, 64 OHIO ST. L.J. 81, 83 (2003) (promoting state-funded voters' guides as a means of facilitating an informed electorate).

<sup>222</sup> North Carolina Public Campaign Fund Financing Act, N.C. GEN. STAT. § 163-278.61 (2002) (effective 2004).

<sup>223</sup> N.C. CODE OF JUDICIAL CONDUCT Canon 7C (amended Apr. 2, 2004).

<sup>224</sup> *See* Phillips, *supra* note 219, at 146-47 (calling for public funding of judicial elections, and citing surveys finding that judges in Ohio and Texas support public funding of judicial races); *see also* N.Y. STATE UNIFIED COURT SYS. COMM'N TO PROMOTE PUB. CONFIDENCE IN JUDICIAL ELECTIONS, WITHOUT PUBLIC CONFIDENCE, THE JUDICIAL BRANCH COULD NOT FUNCTION 8-9 (June 28, 2004) (presenting the findings of the special commission appointed by New York's Chief Justice Judith Kaye to promote confidence in judicial elections, including a recommendation for a public financing program for judicial elections),

Second, state supreme courts, or other bodies responsible for the implementation of campaign codes, should consider shifting the enforcement of the pledge, promise, and commitment bans from sanctions for campaign statements that violate the canons to the requirement that judges recuse themselves from cases involving litigants or raising issues that were the subjects of a campaign pledge, promise, or commitment. This approach was suggested by the Missouri Supreme Court, when, in the aftermath of *White*, it issued an order that revised its canons to eliminate the Announce Clause but then added that “[r]ecusal, or other remedial action, may nonetheless be required of any judge in cases that involve an issue about which the judge has announced his or her views as otherwise may be appropriate under the Code of Judicial Conduct.”<sup>225</sup>

Although requiring recusal in cases in which a judge has merely announced views may be too strong, recusal would be a desirable way to enforce many of the restrictions on campaign speech. Given the uncertain scope of the canons’ restrictions, an approach that focuses on recusal would better protect robust debate and avoid the dangers of arbitrary or partisan enforcement by assuring candidates that speech within the gray areas would not be subject to sanction. This would probably benefit challengers—and hence competitive elections generally—as they may be less familiar with the rules and may also feel the need to make sharper, more dramatic statements in order to get the attention of the voters. It would also focus enforcement on the value threatened by certain campaign statements: impartiality.

Intervention by way of mandatory recusal would be most appropriate when it appears that a campaign statement threatens to undermine the fair and evenhanded application of the law in a specific case. There may be less need for the state supreme court or judicial conduct body to take action against a candidate if a judge’s strong words during a campaign are not subsequently implicated in specific cases or are not followed up by biased behavior while on the bench.<sup>226</sup> To be sure, more liberal recusal has its limita-

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available at <http://www.courts.state.ny.us/reports/JudicialElectionsReport.pdf>.

<sup>225</sup> Order Enforcing Rule 2.03, Canon 5.B(1)(c) Campaign Conduct (Mo. July 18, 2002) (en banc), available at <http://www.osca.state.mo.us/sup/index.nsf/0/flc626db4da8b14086256bfa0073b302?> (last accessed Oct. 7, 2004).

<sup>226</sup> Cf. *In re Kinsey*, 842 So. 2d 77, 96-97 (Fla. 2003) (per curiam) (Pariente, J., concurring) (finding that six months’ suspension, rather than removal, was an appropriate penalty for violations of campaign canons where in the four years following the election the judge had conducted herself in an impartial manner on the bench), *cert. denied*, 124 S. Ct. 180 (2003).

tions and its critics, too.<sup>227</sup> But it may be the most appropriate way of reconciling judicial elections with judicial impartiality.

That, indeed, is the dilemma for the regulation of judicial elections: to protect and enhance the free speech, voter information, and electoral competitiveness essential to elections while also preserving judicial impartiality-as-open-mindedness and the courts' structural independence of the other branches of government. Judicial elections do not need to be run according to the same rules that apply to all other elections. Indeed, some aspects of the judicial function provide strong support for special regulations appropriate to the judicial setting. *White* notwithstanding, most of the traditional judicial campaign canons ought to pass constitutional muster.

But restrictions on campaign speech and political expression trench on constitutional values and pose considerable line-drawing difficulties, and enforcement may unduly involve election commissions, judicial conduct bodies, or courts in heated election disputes. Other mechanisms, such as public funding and recusal, might do a better job of holding together the competing concerns that structure the judicial campaign conduct problem without raising the particular difficulties posed by prohibiting or penalizing campaign statements or actions that would be protected in other electoral settings.

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<sup>227</sup> See Roy A. Schotland, *To the Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 WILLAMETTE L. REV. 1397, 1420 (2003) (noting that recusal only helps the litigant who is aware of the judge's past statements and who can bear the costs of litigating recusal); Shepard, *supra* note 63, at 1081-83 (detailing the costs of recusal); see also Morrison, *supra* note 136, at 743-44 (tentatively presenting recusal as an enforcement option).