

## ARTICLES

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# ARTICLES

## THE POLITICAL ACTIVITIES OF JUDGES: HISTORICAL, CONSTITUTIONAL, AND SELF- PRESERVATION PERSPECTIVES

Raymond J. McKoski\*

### INTRODUCTION

Judges are political creatures. Their bent toward politics is partly driven by necessity—90% of state judges compete in public elections to obtain or retain office.<sup>1</sup> But necessity does not fully explain the judiciary's affection for politics. Throughout the centuries, judges have been politically engaged before and after securing judicial office. Examples abound. John Jay twice ran for governor of New York while serving as the first Chief Justice of the United States Supreme Court.<sup>2</sup> In the next century, Illinois Circuit Judge David Davis recessed court to personally organize and lead the floor fight to secure the Republican presidential nomination for Abraham Lincoln.<sup>3</sup> In 1955, Chief Justice Earl Warren led in three of four Gallup Republican

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<sup>1</sup> Michael S. Kang & Joanna M. Shepherd, *Judging Judicial Elections*, 114 MICH. L. REV. 929, 929 (2016) (reviewing MELINDA GANN HALL, *ATTACKING JUDGES: HOW CAMPAIGN ADVERTISING INFLUENCES STATE SUPREME COURT ELECTIONS* (2015)).

<sup>2</sup> 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 275 (1922).

<sup>3</sup> See Raymond J. McKoski, *Reestablishing Actual Impartiality as the Fundamental Value of Judicial Ethics: Lessons from "Big Judge Davis,"* 99 KY. L.J. 259, 270 (2011).

presidential preference polls.<sup>4</sup> Seven years later, Chief Justice Warren explained he switched party affiliation from Republican to Democrat, “to do everything I could to ensure California’s future as my father visualized it. Richard Nixon does not have that vision.”<sup>5</sup> And in 2016, taking a page from Chief Justice Warren’s political playbook, Justice Ruth Bader Ginsburg publicly stated her opposition to then Republican presidential candidate Donald Trump, calling him a “faker,”<sup>6</sup> and asserting, “I can’t imagine what this place would be—I can’t imagine what the country would be—with Donald Trump as our president.”<sup>7</sup>

Notwithstanding three-quarters of voters favor an elected judiciary<sup>8</sup> and thirty-nine states elect or retain all or some of their judges through the public election process,<sup>9</sup> the American Bar Association (ABA) has steadfastly opposed judicial elections and political engagement by judges.<sup>10</sup> The ABA’s first model code of judicial conduct, adopted in 1924 (“1924 Canons”), warned that a “suspicion of being warped by political bias” would inevitably attach to a judge involved in political activities.<sup>11</sup> The most recent version of the ABA Model Code of Judicial Conduct (“2007 Code”) cautions that to protect public confidence in the impartiality

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<sup>4</sup> WALTER F. MURPHY, CONGRESS AND THE COURT 264 (1962) (explaining that the poll surveyed Republicans for their preference for a presidential candidate if President Eisenhower did not run for reelection in 1956). Chief Justice Warren also led four similar polls of independent voters. *Id.*

<sup>5</sup> ED CRAY, THE CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 398 (1997). Richard Nixon was the Republican candidate for governor of California in 1962. *Id.*

<sup>6</sup> Joan Biskupic, *Justice Ruth Bader Ginsburg Calls Trump a ‘Faker,’ He Says She Should Resign*, CNN POLITICS (July 13, 2016), <https://www.cnn.com/2016/07/12/politics/justice-ruth-bader-ginsburg-donald-trump-faker/index.html>.

<sup>7</sup> Adam Liptak, *Ruth Bader Ginsburg, No Fan of Donald Trump, Critiques Latest Term*, N.Y. TIMES (July 10, 2016), <https://www.nytimes.com/2016/07/11/us/politics/ruth-bader-ginsburg-no-fan-of-donald-trump-critiques-latest-term.html?mcubz=1> (“I can’t imagine what this place would be—I can’t imagine what the country would be—with Donald Trump as our president,” she said. “For the country, it could be four years. For the court, it could be—I don’t even want to contemplate that.”).

<sup>8</sup> Raymond J. McKoski, *Living with Judicial Elections*, 39 U. ARK. LITTLE ROCK L. REV. 491, 494 (2017) (“A national survey conducted by Justice at Stake found that 76% of voters favored the election of judges while 20% supported judicial appointments.”) (citing Justice at Stake Campaign, Justice at Stake Frequency Questionnaire 7 (2001)), [http://www.justiceatstake.org/media/cms/JASNationalSurveyResults\\_6F537F99272D4.pdf](http://www.justiceatstake.org/media/cms/JASNationalSurveyResults_6F537F99272D4.pdf).

<sup>9</sup> Kang & Shepherd, *supra* note 1, at 932.

<sup>10</sup> See *Republican Party of Minn. v. White*, 536 U.S. 765, 787 (2002) (stating that the ABA “has long been an opponent of judicial elections”).

<sup>11</sup> CANONS OF JUDICIAL ETHICS Canon 28 (AM. BAR ASS’N 1924).

of the judiciary, “judges and judicial candidates must, to the greatest extent possible, be free and appear to be free from political influence and political pressure.”<sup>12</sup> To prevent the erosion of public trust, the 2007 Code establishes “a broad universe of activities prohibited to both judges and candidates for judicial office.”<sup>13</sup> Depending on a particular state’s method of judicial selection, these “broad” prohibitions bar judges and judicial candidates from publicly endorsing other candidates; holding office or acting as a leader in a political organization; speaking on behalf of a political organization or candidate; soliciting funds for a candidate or political group; donating funds to a candidate or political group; attending political events; publicly identifying themselves as candidates of a political organization; seeking or accepting endorsements from a political party;<sup>14</sup> and publicly supporting the candidacy of a family member.<sup>15</sup> When the ABA speaks on matters of judicial ethics, the states listen;<sup>16</sup> thus, most state judicial codes reflect the restrictions found in the ABA’s most recent model code.<sup>17</sup>

It took judges some time to accept the restrictions placed on their previously unfettered political activities.<sup>18</sup> But as the political conduct restrictions became increasingly specific in subsequent versions of the *ABA Model Codes of Judicial*

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<sup>12</sup> MODEL CODE OF JUDICIAL CONDUCT r. 4.1 cmt. 1 (AM. BAR ASS’N 2007).

<sup>13</sup> CHARLES GEYH & W. WILLIAM HODES, REPORTERS’ NOTES TO THE MODEL CODE OF JUDICIAL CONDUCT 97 (2009).

<sup>14</sup> MODEL CODE OF JUDICIAL CONDUCT r. 4.1(A) (AM. BAR ASS’N 2007) (listing the general restrictions on the political activities of judges and judicial candidates).

<sup>15</sup> *See id.* at r. 4.1 cmt. 5 (stating that neither a judge nor candidate for judicial office may “become involved in, or publicly associated with, a family member’s political activity or campaign for public office”).

<sup>16</sup> *See* Ronald D. Rotunda, *Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Judicial Code*, 34 HOFSTRA L. REV. 1337, 1359 (2006) (stating that an ABA Model Code of Judicial Conduct “comes with a presumption of authority, and state and federal courts are likely to adopt it”).

<sup>17</sup> The type of political activity in which state judges are permitted to engage depends to some extent on whether the particular state’s judiciary is chosen by partisan elections, non-partisan elections, or appointment. *See* MODEL CODE OF JUDICIAL CONDUCT r. 4.2 (AM. BAR ASS’N 2007). For a comparison of various state rules governing political activity with the 2007 ABA Model Code rules, see *Comparison of ABA Model Code of Judicial Conduct and State Variations*, ABA, [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/canon\\_4.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/canon_4.pdf) (last visited Oct. 15, 2018) (summarizing differences in permitted campaign activity among states adopting the 2007 ABA Model Code).

<sup>18</sup> *See infra* Part I.C.2.

*Conduct*, judges learned to live with limited participation in the political process.<sup>19</sup> Then, seventy-eight years after the inaugural ABA model judicial code, the U.S. Supreme Court, for the first time, considered the constitutionality of a restriction on a judge's political activity.<sup>20</sup> In *Republican Party of Minnesota v. White*, the Court used strict scrutiny to invalidate a state rule prohibiting judicial candidates from announcing their views on legal and political issues.<sup>21</sup> Because it is rare that a restriction survives strict scrutiny,<sup>22</sup> post-*White* courts began to strike down judicial code restrictions on judicial candidates.<sup>23</sup> Indeed, on remand in *White*, the Eighth Circuit Court of Appeals invalidated Minnesota's rules barring judicial candidates from attending political events, endorsing candidates, and announcing their party affiliations.<sup>24</sup> In *White*'s wake, it appeared judges might be headed back to earlier days of full political engagement.<sup>25</sup>

But consistency is not one of the law's strengths, especially in matters of legal and judicial ethics.<sup>26</sup> Nine years after *White*, in *Williams-Yulee v. Florida Bar*, the Court upheld a Florida regulation prohibiting a judicial candidate from personally soliciting campaign funds.<sup>27</sup> To do so, the Court applied what some would call a watered-down version of strict scrutiny.<sup>28</sup> It did not take the lower courts long to sense a shift in the Court's interpretation and application of strict scrutiny in judicial speech cases. Lower courts began to apply "strict scrutiny light" to uphold speech restrictions on judicial candidates even though the same courts admitted the restrictions would not survive the traditional strict scrutiny analysis announced in

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<sup>19</sup> See *infra* Part I.C.3.

<sup>20</sup> *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002).

<sup>21</sup> *Id.*

<sup>22</sup> *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1666 (2015).

<sup>23</sup> See, e.g., *Carey v. Wolnitzek*, 614 F.3d 189, 199–200 (6th Cir. 2010) (rejecting intermediate scrutiny as the proper test for restrictions on a judge's political speech).

<sup>24</sup> *Republican Party of Minn. v. White*, 416 F.3d 738, 748–49, 755–56 (8th Cir. 2005) (en banc).

<sup>25</sup> See Nat Stern, *The Looming Collapse of Restrictions on Judicial Campaign Speech*, 38 SETON HALL L. REV. 63, 64 (2008).

<sup>26</sup> Cf. *Holland v. Florida*, 560 U.S. 631, 670 (2010) (Scalia, J., dissenting) (describing legal ethics as the "least analytically rigorous and hence most subjective of law-school subjects").

<sup>27</sup> *Williams-Yulee*, 135 S. Ct. at 1672.

<sup>28</sup> See *infra* Part II.A.3.

*White*.<sup>29</sup> Because of the apparently differing applications of strict scrutiny in *White* and *Williams-Yulee*, it is uncertain which speech restrictions on judges will withstand a First Amendment attack. If the traditional strict scrutiny test of *White* prevails, most restrictions will fall. If, *Williams-Yulee*'s interpretation of the "highest level of scrutiny" carries the day, then many restrictions on judges and judicial candidates may continue. However, in assessing the future political speech of judges and judicial candidates in campaign and non-campaign settings, it must be remembered that nothing prohibits states from removing or relaxing current speech restrictions.<sup>30</sup> Just because the Court has found a compelling state interest, for example, in a state prohibition against the personal solicitation of campaign funds, does not mean the Constitution mandates that prohibition.<sup>31</sup> In fact, some states permit judicial candidates to personally solicit campaign funds.<sup>32</sup>

This Article proceeds in two Parts. Part I describes the mostly uninterrupted history of political activity by judges during the first 200 years of the country's history. Part I also traces the efforts of the ABA to curtail the political engagement of judges through the adoption of model codes of judicial conduct in 1924, 1972, 1990, and 2007. Part II interprets the Court's pronouncements in the area of political speech by judicial candidates and concludes that (1) under traditional strict scrutiny, many current speech restrictions will fall; and (2) several restrictions imposed by the states cannot withstand even a watered-down version of strict scrutiny. In addition, Part II predicts an effort by the judiciary to relax political activity restrictions so judges may defend the courts from unwarranted partisan attacks.

## I. THE HISTORY OF POLITICAL ACTIVITY BY JUDGES AND THE ABA'S RESPONSE

Until the final quarter of the twentieth century, judges freely engaged in political activities. Early attempts by the ABA in its 1924 Canons to convince judges to steer clear of partisan political activity for the sake of judicial impartiality, moved

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<sup>29</sup> See, e.g., *French v. Jones*, 876 F.3d 1228 (9th Cir. 2017); *infra* Part II.A.3.

<sup>30</sup> *But see Siefert v. Alexander*, 608 F.3d 974, 984 (7th Cir. 2010) (stating that restrictions on judicial speech may sometimes be required by the Due Process Clause).

<sup>31</sup> In *William-Yulee*, the Court held that the First Amendment "permits" Florida's prohibition against judicial candidates personally soliciting campaign contributions. *Williams-Yulee*, 135 S. Ct. at 1667. The Court did not find that the Constitution mandated a prohibition against personal solicitations. Indeed, the Court recognized that "[t]he vast majority of elected judges in States that allow personal solicitation serve with fairness and honor." *Id.*

<sup>32</sup> See, e.g., CAL. CODE OF JUDICIAL ETHICS Canon 5A(3) (2018).

few judges to an apolitical life.<sup>33</sup> Even the mandatory restrictions on political activity inspired by the Watergate scandal, and included in the 1972 ABA Model Code, were largely ignored.<sup>34</sup> Not until state judicial disciplinary commissions became operational in the late 1970s and early 1980s, and informed judges that political activity restrictions were to be taken seriously, did judges moderate their participation in politics.<sup>35</sup>

### A. *The Eighteenth Century*

At the time of the drafting and ratification of the Constitution, political activity by judges was common and accepted.<sup>36</sup> Indeed, two of the three Connecticut delegates to the federal Constitutional Convention were state court judges.<sup>37</sup> Sitting judges often ran for executive and legislative office. United States Supreme Court Chief Justice John Jay unsuccessfully campaigned for governor of New York in 1792, and resigned his judicial office when elected to the governorship in 1795.<sup>38</sup> Supreme Court Justice William Cushing ran for governor of Massachusetts in 1794.<sup>39</sup> While Chief Justice of Massachusetts, Cushing also served as Vice President of the Massachusetts convention that narrowly ratified the United States

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<sup>33</sup> See *infra* Part I.C.

<sup>34</sup> See *infra* notes 164–67 and accompanying text.

<sup>35</sup> See *infra* Part I.C.2.

<sup>36</sup> WARREN, *supra* note 2, at 276 (stating that during the late eighteenth century “mere political activity had not been regarded as unfitting a Judge for his position”).

<sup>37</sup> Roger Sherman and Oliver Ellsworth were Connecticut superior court judges. See Ellen A. Peters, *Capacity and Respect: A Perspective on the Historic Role of the State Courts in the Federal System*, 73 N.Y.U. L. REV. 1065, 1073–74 (1998) (“In Connecticut, in the years from 1786 to 1788, the five person [superior court] bench included Oliver Ellsworth and Roger Sherman. During those same years, the call of the state court calendar apparently did not prevent Sherman and Ellsworth from serving as delegates to the Constitutional Convention in Philadelphia.”).

<sup>38</sup> WARREN, *supra* note 2, at 123.

<sup>39</sup> *Id.*

Constitution.<sup>40</sup> Another state supreme court justice, Francis Dana, sat as a delegate in the Massachusetts ratifying convention.<sup>41</sup>

At the start of the nineteenth century, judges continued to campaign for other candidates for elective office. Supreme Court Justice Busrod Washington actively participated in the 1800 contest in support of presidential candidate Charles C. Pinkney.<sup>42</sup> In the same election, Justice Samuel Chase took time off from his Supreme Court duties to tour urban areas of Maryland to speak on behalf of federalist candidates including President John Adams and Chase's cousin, Jeremiah Chase, who was running for elector of Maryland.<sup>43</sup> Justice Chase also electioneered against opposition candidates; on one occasion, he presented a two-hour rebuttal to state representative candidate, John Francis Mercer's four-hour campaign speech.<sup>44</sup> Sometimes stump speeches delivered by judges were thinly disguised as grand jury charges. For example, Pennsylvania judge Alexander Addison gave a "fiery" charge to the grand jury in support of President John Adams<sup>45</sup> and Massachusetts judge Francis Dana denounced Thomas Jefferson and his followers as "apostles of atheism and anarchy, bloodshed and plunder."<sup>46</sup>

### B. *The Nineteenth Century*

Political partisanship was of little public concern in the 1800s as judges from every level of court freely engaged in political activity. For example, the people of Salem, Massachusetts elected U.S. Supreme Court Justice Joseph Story to the state's constitutional convention in 1820.<sup>47</sup> Massachusetts state court Chief Justice Isaac Parker and Justice Story competed for the position of presiding officer of the

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<sup>40</sup> Arthur P. Rugg, *William Cushing*, 30 YALE L.J. 128, 136 (1920) ("Chief Justice Cushing was a member of the convention which framed the Massachusetts Constitution of 1780. He was vice-president of the convention which ratified the Constitution of the United States in 1788, and presided at most of the sessions because of the illness of John Hancock who was president.").

<sup>41</sup> JEFFREY ST. JOHN, *A CHILD OF FORTUNE* 121 (1990) (describing Judge Dana's vehement objection to nondelegate Elbridge Gerry addressing the convention).

<sup>42</sup> WARREN, *supra* note 2, at 275; see Leslie B. Dubeck, *Understanding "Judicial Lockjaw": The Debate over Extrajudicial Activity*, 82 N.Y.U. L. REV. 569, 591 (2007).

<sup>43</sup> JANE SHAFFER ELSMERE, *JUSTICE SAMUEL CHASE* 128–29 (1980).

<sup>44</sup> *Id.*

<sup>45</sup> WARREN, *supra* note 2, at 275–76; Norman L. Rosenberg, *Alexander Addison and the Pennsylvania Origins of Federalist First Amendment Thought*, 108 PA. MAG. HIST. & BIOGRAPHY 399, 399–400 (1984).

<sup>46</sup> WARREN, *supra* note 2, at 275.

<sup>47</sup> GERALD T. DUNNE, *JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT* 203 (1970).

convention.<sup>48</sup> The prestige of the Supreme Court not being what it is today, Judge Parker garnered 60% of the delegates' vote and was installed as the convention's presiding officer.<sup>49</sup>

The only Supreme Court Justice to abstain from "extrajudicial electoral activity" in the 1828 presidential election was Justice Gabriel DuVall, and his absence from the campaign was due to the "infirmity of age," rather than an aversion to politics.<sup>50</sup> That year, Justice Smith Thompson ran for governor of New York "with the avowed purpose of carrying the [John Quincy] Adams ticket to victory."<sup>51</sup> Justice Busrod Washington openly participated in the convention of Adams' supporters in Virginia,<sup>52</sup> and Justice Joseph Story authored a "powerful pro-Adams polemic in the form of a book review."<sup>53</sup> Justice William Johnson supported Andrew Jackson.<sup>54</sup> Even Chief Justice John Marshall who had not voted in twenty years, in a "well-publicized action," cast his vote for John Quincy Adams.<sup>55</sup>

Later in the century, Justice John McLean actively sought the presidential nomination five times during his thirty-two years on the Court.<sup>56</sup> Salmon Chase campaigned for the nomination twice while Chief Justice.<sup>57</sup> Chase's successor as Chief Justice in 1874, Morrison R. Waite, "was a strong, unabashed Republican partisan."<sup>58</sup> While on the Court, Justice Stephen Field entered the presidential fray

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<sup>48</sup> *Id.* at 205.

<sup>49</sup> *Id.* (reporting that the vote was 195 delegates for Parker and 130 delegates for Story).

<sup>50</sup> *Id.* at 282.

<sup>51</sup> *Id.* at 281.

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

<sup>53</sup> *Id.* at 272.

<sup>54</sup> *Id.* at 282.

<sup>55</sup> *Id.* at 281.

<sup>56</sup> Peter Alan Bell, *Extrajudicial Activity of Supreme Court Justices*, 22 STAN. L. REV. 587, 593 n.41 (1970).

<sup>57</sup> *Id.* (stating that Salmon Chase campaigned for the nomination four times including in 1868 while serving as Chief Justice of the United States Supreme Court); JOHN NIVEN, SALMON P. CHASE: A BIOGRAPHY 428-32 (1995) (describing Chief Justice Chase's quest for the presidential nomination in 1872).

<sup>58</sup> MORTON KELLER, AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA 365 (1977).

in 1880 and 1884.<sup>59</sup> In the 1880 campaign, Field published a campaign pamphlet, personally solicited the support of the California delegates to the Democratic National Convention, and approved, or at least did not object to, “an enormous expenditure of money” in his effort to secure the nomination.<sup>60</sup> In 1872, Associate Justice David Davis, declined the presidential nomination of the Labor Reform Party.<sup>61</sup>

Lower court judges routinely engaged in politics in the nineteenth century. For example, in 1855, Brooklyn Municipal Court Judge Erastus Dean Culver, “one of the best stump speakers of the time,” gave the principal address at a joint meeting of Republican and Whig delegates convened to “weld” the Whig and Republican parties.<sup>62</sup> Judge Culver also shared the dais with Abraham Lincoln during Lincoln’s famous Cooper Union speech and addressed the gathering after Lincoln.<sup>63</sup> Because “there were no legal or ethical constraints in the nineteenth century on political activity by judges,” New York judge William Robertson remained deeply embedded in politics while serving as a judge in Westchester County from 1855 until 1867.<sup>64</sup> He supported Lincoln’s candidacies in 1860 and 1864, voted for Lincoln as a member of the Electoral College in 1860, and led the Republicans Party in Westchester County.<sup>65</sup> In neighboring New Jersey, judges participated directly in politics by making donations and campaign speeches.<sup>66</sup>

Throughout his career, Abraham Lincoln’s “strongest political backer” was Judge David Davis.<sup>67</sup> While a state court judge in Illinois, Davis recruited delegates

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<sup>59</sup> *Id.*

<sup>60</sup> JOHN P. FRANK, *MARBLE PALACE: THE SUPREME COURT IN AMERICAN LIFE* 274, 288–89 (1958); CARL BRENT SWISHER, STEPHEN J. FIELD: *CRAFTSMAN OF THE LAW* 285–86, 289 (1930) (“In spite of the fact that Field was a relatively poor man his managers showed evidence of having plenty of money to spend.”).

<sup>61</sup> WILLARD L. KING, *LINCOLN’S MANAGER: DAVID DAVIS* 262 (1960).

<sup>62</sup> *Origin of the Republican Party*, 27 *PROTECTIONIST* 387, 388 (1915).

<sup>63</sup> HAROLD HOLZER, *LINCOLN AT COOPER UNION* 106, 146–47 (2006).

<sup>64</sup> Kenneth H. Lange, *Our First President Judge William H. Robertson the “Bismarck of Katonah,”* 35 *WESTCHESTER B.J.* 29, 32 (2008).

<sup>65</sup> *Id.*

<sup>66</sup> *In re Gaulkin*, 351 A.2d 740, 743–44 (N.J. 1976) (explaining that the New Jersey Supreme Court did not adopt the 1924 ABA Canons of Judicial Ethics until 1948).

<sup>67</sup> DAVID HERBERT DONALD, *LINCOLN* 242 (1995).

for the future president at the Illinois State Republican Convention in May 1860.<sup>68</sup> Later that month, Davis adjourned court to serve as a Lincoln delegate at the Republican National Convention in Chicago.<sup>69</sup> Upon arriving in Chicago, the judge rented hotel rooms at his own expense as Lincoln's convention headquarters, mapped-out a strategy, and headed an organization that secured the nomination for Lincoln.<sup>70</sup> Davis's campaign activities did not diminish during the general election campaign.<sup>71</sup> In the pivotal states of Illinois, Indiana, Pennsylvania, and New York, Davis solicited campaign funds, conducted polling, obtained surrogate speakers for Lincoln, consulted with state officials and party leaders, and advised Lincoln on campaign strategy.<sup>72</sup> As the presidential nominating process of 1864 neared, Davis, now an Associate Justice of the Supreme Court, resumed his role as campaign manager.<sup>73</sup> Lincoln asked Davis to attend the National Convention of the Union Party (a coalition of Republicans and war Democrats) in June 1864, in Maryland.<sup>74</sup> Davis kept close tabs on delegate counts, and when the New York and Ohio delegations received instructions to vote for the President, Davis knew Lincoln would be re-nominated and decided not attend the convention.<sup>75</sup> If a "speck of opposition" had appeared, Justice Davis would have, again, personally directed convention efforts.<sup>76</sup>

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<sup>68</sup> ALBERT A. WOLDMAN, *LAWYER LINCOLN* 264 (1936) (stating that Judge Davis "devoted all his time to lining up the Illinois delegates at the Republican State Convention at Decatur, May 9 and 10, 1860").

<sup>69</sup> Letter from David Davis to Abraham Lincoln, President, U.S. (Aug. 30, 1860) (stating that Davis "adjourned the court for the Chicago convention").

<sup>70</sup> KING, *supra* note 61, at 135–42.

<sup>71</sup> *Id.* at 152–54, 157.

<sup>72</sup> *Id.*; see also BRUCE CHADWICK, *LINCOLN FOR PRESIDENT: AN UNLIKELY CANDIDATE, AN AUDACIOUS STRATEGY, AND THE VICTORY NO ONE SAW COMING* 179–205 (2009) (discussing Davis' campaign activity during the general election of 1860).

<sup>73</sup> McKoski, *supra* note 3, at 272.

<sup>74</sup> KING, *supra* note 61, at 213–17.

<sup>75</sup> See McKoski, *supra* note 3, at 269–74 (expanding the summary of Judge Davis's campaign activities on behalf of Lincoln).

<sup>76</sup> Letter from David Davis, Associate Justice, U.S. Supreme Court, to Abraham Lincoln, President, U.S. (June 4, 1864) ("I [Davis] had intended going to the Baltimore convention, but since the New York and Ohio conventions, the necessity for doing so is foreclosed.").

In the 1860 election, Federal District Court Judge Ogden Hoffman supported the presidential bid of John Bell.<sup>77</sup> Judge Hoffman authored a letter to the chairman of the national committee to elect Bell and his running mate, Edward Everett, vouching for the character of the members of the Constitutional Union party in California and supporting a request by the state central committee for campaign funds.<sup>78</sup>

In 1896, New York state judge William J. Gaynor publicly supported William Jennings Bryan for President.<sup>79</sup> Gaynor also presided over a meeting of the Democratic Committee of Kings County, New York in 1896 that doubled as a campaign event for William Jennings Bryan.<sup>80</sup>

### C. *The Twentieth Century*

The twentieth century began where the preceding century left off. Judge William Gaynor again supported William Jennings Bryan for president in 1900 and publicly outlined his reasons for supporting the Democratic nominee at a Bryan campaign event.<sup>81</sup> Never “troubled with political timidity,”<sup>82</sup> Judge Gaynor provided political counsel to the Democratic National Committee and to candidate Bryan.<sup>83</sup> In 1908, Gaynor was Bryan’s personal choice for the vice-presidential nomination.<sup>84</sup> Gaynor prepared an acceptance speech that went unused.<sup>85</sup> In September 1909, Gaynor formed a committee to circulate petitions to place himself on the New York mayoral ballot as an independent candidate.<sup>86</sup> Ultimately, however, he accepted the

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<sup>77</sup> CHRISTIAN G. FRITZ, *FEDERAL JUSTICE IN CALIFORNIA: THE COURT OF OGDEN HOFFMAN, 1851–1891*, at 24 (1991).

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

<sup>79</sup> *Bryan Night in Brooklyn*, *BROOKLYN DAILY EAGLE*, Sept. 24, 1896, at 3.

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

<sup>81</sup> *Gaynor Will Preside at Big Bryan Meeting*, *BROOKLYN DAILY EAGLE*, Oct. 20, 1900, at 1.

<sup>82</sup> DE ALVA STANWOOD ALEXANDER, *A POLITICAL HISTORY OF THE STATE OF NEW YORK: VOL. IV, 1882–1905*, at 217 (1923).

<sup>83</sup> *See* THOMAS LATELY, *THE MAYOR WHO MASTERED NEW YORK* 130–31 (1969).

<sup>84</sup> *Id.* at 131.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 154.

Democratic nomination for the office.<sup>87</sup> He resigned from the bench in order to campaign only after eliminating the backlog of cases pending in his court.<sup>88</sup>

The 1904 Democratic presidential nominee was the Chief Judge of the New York Court of Appeals, Alton B. Parker.<sup>89</sup> Parker permitted delegates to place his name in nomination only after testing the electoral waters with a speaking tour of the South in 1903.<sup>90</sup> Not to be out-manned or out-judged, the Republicans nominated Associate Supreme Court Justice Charles Evans Hughes for president in 1916.<sup>91</sup> A few years later, the ABA initiated its efforts to eliminate the participation of judges in politics.<sup>92</sup>

### 1. The ABA Canons of Judicial Ethics (1924)

The ABA's attempt to halt the judiciary's tradition of political activity began in earnest with the adoption of the ABA Canons of Judicial Ethics in 1924.<sup>93</sup> Chief Justice William H. Taft chaired the drafting committee.<sup>94</sup> The Canons incorporated Taft's public position that "a judge should keep out of politics and out of any diversion or avocation which may involve him in politics."<sup>95</sup> Thus, Canon 28 of the 1924 Canons provided that "it is inevitable that suspicion of being warped by political bias will attach to a judge who becomes the active promoter of the interests of one political party as against another."<sup>96</sup> The Canon specifically suggested that judges refrain from making political speeches, making or soliciting contributions for political parties, publicly endorsing candidates, and participating in party

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<sup>87</sup> *Id.* at 157–58.

<sup>88</sup> *Id.* at 158, 163.

<sup>89</sup> Jon C. Blue, *A Well-Tuned Cymbal? Extrajudicial Political Activity*, 18 GEO. J. LEGAL ETHICS 1, 41 n.212 (2004).

<sup>90</sup> Robert C. Kennedy, *Citizen Parker*, HARPER'S WKLY. (Aug. 20, 1904), <http://www.nytimes.com/learning/general/onthisday/harp/0820.html>.

<sup>91</sup> MERLO J. PUSEY, CHARLES EVANS HUGHES 315–29 (1951).

<sup>92</sup> See CANONS OF JUDICIAL ETHICS (AM. BAR ASS'N 1924).

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

<sup>94</sup> *Final Report and Proposed Canons of Judicial Ethics*, 9 A.B.A. J. 449, 449 (1923).

<sup>95</sup> Julius M. Mayer, *Lawyer and the Judge*, 8 A.B.A. J. 441, 443 (1992) (quoting a letter authored by Taft on July 13, 1921).

<sup>96</sup> CANONS OF JUDICIAL ETHICS Canon 28 (AM. BAR ASS'N 1924).

conventions.<sup>97</sup> In 1933, the ABA expanded Canon 28 to bar a judge from “generally engaging in partisan activities.”<sup>98</sup> Also in 1933, the ABA amended Canon 30 to require that a judge resign before becoming an active candidate for non-judicial office.<sup>99</sup> Most significantly, until 1950, Canon 28 made no exception for the many judges who obtained office in public elections.<sup>100</sup> But, the ABA’s adoption of the 1924 Canons did little to reduce the political activities of judges.

First, Taft himself “rode roughshod over the Canons’ injunction against political activity.”<sup>101</sup> Politics was never off-limits for Chief Justice Taft as he played a partisan political role unmatched by any Chief Justice since Salmon P. Chase.<sup>102</sup> While acting as Chief Justice, Taft: (1) lobbied a newspaper editor to editorialize against legislative changes to Coolidge’s tax plan to influence the vote of Connecticut senators;<sup>103</sup> (2) “bluntly” instructed the Executive Committee of the 1924 Republican Convention to pack the Resolutions Committee with supporters of the proposed world court;<sup>104</sup> (3) wrote to the *New York Times* praising the nomination of Calvin Coolidge for President;<sup>105</sup> and (4) continuously “exerted enormous influence on legislators, presidents, cabinet members, editors, lawyers, and friends.”<sup>106</sup>

Second, the ABA Canons were slow to catch on. By the end of World War II, only eleven states had enacted the Canons.<sup>107</sup> Thus, for example, Pennsylvania Republican gubernatorial candidate, Arthur H. James, remained a judge of the

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<sup>97</sup> *Id.*; see LISA L. MILORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE 139 n.2 (1992).

<sup>98</sup> MILORD, *supra* note 97, at 45.

<sup>99</sup> CANONS OF JUDICIAL ETHICS Canon 30 (AM. BAR ASS’N 1924) (amended 1933); see MILORD, *supra* note 97, at 140 n.3.

<sup>100</sup> CANONS OF JUDICIAL ETHICS Canon 28 (AM. BAR. ASS’N 1950) (authorizing judges from states with elected judiciaries to attend and speak at political events, contribute money to a political party, and engage in the other necessary partisan campaign activities); see MILORD, *supra* note 97, at 45.

<sup>101</sup> See JOHN P. MCKENZIE, THE APPEARANCE OF JUSTICE 16 (1974).

<sup>102</sup> ALPHEUS THOMAS MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 279, 283 (1965).

<sup>103</sup> *Id.* at 279–80.

<sup>104</sup> *Id.* at 281.

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

<sup>106</sup> *Id.* at 287.

<sup>107</sup> Susan A. Henderson, *The Origin and Adoption of the American Bar Association’s Canons of Judicial Ethics*, 52 JUDICATURE 387, 388 (1969).

superior court during his primary and general election campaign in 1938.<sup>108</sup> He violated no state rule of judicial conduct by doing so because Pennsylvania did not adopt the 1924 Canons until 1949.<sup>109</sup> His opponents, and the National Lawyers Guild, criticized James for failing to comply with the ABA's resign to run rule.<sup>110</sup> Apparently, the voting public saw no conflict. James won the primary by a two-to-one margin and prevailed in the general election with 53% of the vote.<sup>111</sup> He resigned from the court on the day of his inauguration as governor.<sup>112</sup>

Both elected and appointed judges ignored the 1924 Canons' limitations on political activity to such an extent that in 1939 the ABA Committee on Professional Ethics and Grievances felt compelled to issue an advisory opinion threatening disciplinary action if judges continued to engage in politics.<sup>113</sup>

So many instances of their [Canons 28 and 30] violation in greater or lesser degree by members of the [ABA] have been brought to the attention of this committee that it may be doubted that the judiciary of the country is fully conversant with their true interpretation and their rigid requirements.

One purpose of this opinion is to bring such Canons forcibly to the attention of the members of the judiciary . . . to the end that their requirements may be clearly understood and with the expectation that they shall be adhered to in the future. We believe that such an opinion will accomplish a more constructive result than would any disciplinary action taken against those who have violated these Canons. But it should not be understood that disciplinary action will not be recommended should violations occur in the future.<sup>114</sup>

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<sup>108</sup> *G.O.P. Candidate for Governor Slams Pecora*, CHI. DAILY TRIB., Sept. 27, 1938, at 11.

<sup>109</sup> See *In re Dandridge*, 337 A.2d 885, 889 (Pa. 1975) (stating that the Pennsylvania Bar Association adopted the 1924 ABA Canons in 1949, and that the Pennsylvania Supreme Court did not adopt the 1924 Canons until 1965).

<sup>110</sup> *G.O.P. Candidate for Governor Slams Pecora*, *supra* note 108; Alfred L. Morgan, *The Significance of the Pennsylvania 1938 Election*, 102 PA. MAG. HIST. & BIOGRAPHY 184, 201 (1978).

<sup>111</sup> Morgan, *supra* note 110, at 202, 207 n.74 (reciting the general election vote percentages as 53% for James and 46% for his Democratic opponent).

<sup>112</sup> *Id.* at 201.

<sup>113</sup> ABA Comm'n on Prof'l Ethics & Grievances, Formal Op. 193 (1939).

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

The sharp warning of the ABA Committee on Professional Ethics and Grievances changed nothing. New York Supreme Court Judge Jonah J. Goldstein received the Republican and Liberal Party nominations for mayor of New York in 1945.<sup>115</sup> Many reformers resented Goldstein's nomination, not because he ran for mayor while remaining on the bench, but because he was a Democrat at heart and initially pursued the Democratic nomination for mayor.<sup>116</sup> A rough and tumble campaign ensued with Judge Goldstein charging his opponent with ties to the underworld.<sup>117</sup> In the end, neither Goldstein's charges nor his judicial prestige swayed the voters and Goldstein lost the mayoral election garnering only 22% of the vote.<sup>118</sup>

In 1946, Wisconsin Circuit Court Judge Joseph McCarthy ran for a United States Senate seat without resigning from judicial office.<sup>119</sup> The failure to resign appeared to violate the Wisconsin Constitution and Canon 30 of the state's ABA-based Canons of Judicial Ethics.<sup>120</sup> Nevertheless, the Wisconsin Supreme Court refused to sanction Judge McCarthy, in part because Canon 30 was intended to be aspirational and not an enforceable rule of judicial conduct.<sup>121</sup> In evaluating the effect of McCarthy's candidacy on public confidence in the judiciary, the supreme court noted that McCarthy's run for the senate while remaining a judge did not cause "condemnation of a majority of the voters,"<sup>122</sup> because in the general election McCarthy carried seventy of seventy-three counties and beat his opponent by almost two-to-one.<sup>123</sup>

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<sup>115</sup> CHARLES GARNETT, *THE LA GUARDIA YEARS* 294 (1961).

<sup>116</sup> *Id.* at 295.

<sup>117</sup> *Id.* at 297; Arthur Evans, *N.Y. Rivals Get Busy: Link Each Other to Gangs*, CHI. DAILY TRIB., Oct. 27, 1945, at 6; Arthur Evans, *N.Y. Vote Fight Has New Faces, But Old Issues*, CHI. DAILY TRIB., Nov. 1, 1945, at 16 (reporting Goldstein's charges that his opponent had "underworld support").

<sup>118</sup> *O'Dwyer Coasts to Easy Victory in N.Y. Voting*, CHI. DAILY TRIB., Nov. 7, 1945, at 6.

<sup>119</sup> *See State v. McCarthy*, 38 N.W.2d 679, 681 (Wis. 1949).

<sup>120</sup> *See id.* at 685–86.

<sup>121</sup> *Id.* at 685 ("While it is true that the canons of ethics, both those governing the conduct of lawyers and of judges, set up standards which should be faithfully observed by those to whom they are applicable they do not amount to rules of conduct for which a lawyer or a judge may be punished as for a misdemeanor or a crime.").

<sup>122</sup> *Id.* at 687.

<sup>123</sup> DAVID M. OSHINSKY, *A CONSPIRACY SO IMMENSE: THE WORLD OF JOE MCCARTHY* 52 (1983).

In 1948, Reva Beck Bosone, the first woman judge in Utah, ran for Congress on the Harry S. Truman ticket.<sup>124</sup> Because judicial duties came first, her campaign speech making was confined to noontime, evenings, and weekends.<sup>125</sup> She introduced President Truman to large crowds while he campaigned in Utah and she passed the hat for contributions.<sup>126</sup> Sensitive to the impropriety of comingling personal and campaign funds, Judge Bosone designated the center compartment of her handbag for campaign contributions.<sup>127</sup> In the spirit of transparency, when asked during the campaign how much she had raised, Judge Bosone would dump out the contents of the center compartment for all to see.<sup>128</sup> The month after her election to Congress, Judge Bosone could still be found “issuing edicts from the bench to the tune of a hundred per day.”<sup>129</sup>

In 1955, members of the Georgia Court of Appeals actively campaigned for the reelection of one of the court’s members who was opposed in the primary.<sup>130</sup> In May 1959, every common pleas judge in Washington County, Pennsylvania, signed a political advertisement urging the reelection of the district attorney.<sup>131</sup> Judges in Kansas attended political dinners and, on occasion, provided the entertainment at political rallies.<sup>132</sup> A month before the 1958 California gubernatorial election, the wife of Municipal Court Judge David W. Williams announced her husband’s support for gubernatorial candidate Edmund “Pat” Brown at the candidate’s reception, because the judge arrived too late to make the announcement himself.<sup>133</sup> Similarly, Chief Justice Earl Warren of the United States Supreme Court showed little respect

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<sup>124</sup> BEVERLY B. CLOPTON, *HER HONOR, THE JUDGE: THE STORY OF REVA BECK BOSONE* 131–33 (1980).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 133–34.

<sup>127</sup> *Id.* at 134.

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

<sup>129</sup> *Id.*

<sup>130</sup> William B. Spann, Jr., *Standards of Judicial Conduct—A Progress Report*, 54 *JUDICATURE* 428, 429 (1971).

<sup>131</sup> See *Linsenmeyer v. Straits*, 166 A.2d 18, 24 (Pa. 1960) (describing the judges’ endorsement as a “flagrant and inexcusable” violation of Canon 28).

<sup>132</sup> See, e.g., *Final GOP Rally Saturday Night at Auditorium*, *KAN. AM.*, Nov. 3, 1950, at 1 (announcing that Judge Beryl M. Johnson would sing at the Shawnee County Republican rally); *Republican Leader Will Speak in Topeka Today at \$25 Dinner Meeting*, *PLAINDEALER* (Kansas City, Kansas), Nov. 13, 1953, at 1 (announcing that Judge A.B. Howard would attend the State Republican Committee Dinner).

<sup>133</sup> *Brown for Civil Rights Ahead of Dixie Vote in '60*, *L.A. TRIB.*, Oct. 3, 1958, at 1.

for ABA Canon 28—fearing that Richard Nixon would run again for governor of California in 1962, Warren posed for a news photograph with Democratic Governor Jerry Brown.<sup>134</sup> Both Warren and Brown were well aware of the political implications of this unspoken endorsement.<sup>135</sup> The Chief Justice also justified switching party affiliation from Republican to Democrat “to do everything I could to ensure California’s future as my father visualized it. Richard Nixon does not have that vision.”<sup>136</sup>

The failure of judges in the 1950s and 1960s to comply with prohibitions on political conduct is best illustrated by the New Jersey judiciary. In 1948, the New Jersey Supreme Court adopted the 1924 ABA Canons.<sup>137</sup> Apparently, compliance with the rules prohibiting political activity was so lacking that, eight years later, the Administrative Director of the New Jersey courts felt compelled to send the following notice to state judges and magistrates, advising that attendance at political events must cease:

The Supreme Court has recently had called to its attention several instances of judges attending functions of a political nature. So that there may be no misunderstanding on the subject, the Supreme Court has requested me to call the attention of each judge to Canon 28 of the Canons of Judicial Ethics. The Supreme Court, moreover, would like me to state that this Canon is to be broadly interpreted and that in its opinion it extends to and prohibits participation in or attendance at all political or quasi-political functions, meetings and dinners including testimonials in honor of persons who are politically active, since invariably in the public mind such occasions are considered political in nature.

If in any situation a judge should be in doubt as to the propriety of his engaging in a particular activity or attending a particular function, the Supreme Court would strongly suggest that the doubt be resolved by refraining from participation or attendance.<sup>138</sup>

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<sup>134</sup> CRAY, *supra* note 5, at 397.

<sup>135</sup> *Id.* at 398.

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

<sup>137</sup> Henderson, *supra* note 107, at 389 (providing an “Adoption Timetable” for the forty-one states that had adopted the 1924 Canons).

<sup>138</sup> *In re Pagliughi*, 189 A.2d 218, 222 (N.J. 1963).

Despite the tenor of the Administrator's directive, and the fact that Canon 28 clearly required judges to "avoid making . . . contributions to party funds," in 1959, members of the New Jersey judiciary requested an opinion from the New Jersey Chief Justice as to whether judges could contribute to political parties.<sup>139</sup> While sympathetic to the judiciary's desire to financially support political parties, the Chief Justice reiterated that such contributions violated Canon 28.<sup>140</sup> In 1963, the New Jersey Supreme Court heard the state's first case involving a violation of Canon 28 and disciplined a judge who had freely engaged in political activity from 1952 until 1961.<sup>141</sup>

In 1964, the ABA made still another valiant effort to convince the nation's judges to refrain from political activity. Believing that judges persisted in politics not out of ignorance or disagreement with the rules, but rather because of the ambiguity of Canons 28 and 30, the ABA decided to definitively itemize acceptable and prohibited political behavior. In ABA Formal Opinion 312, the ABA Committee on Professional Ethics explained that Canons 28 and 30 prohibited appointed and elected judges from:

- serving as a party leader or party committee member;
- speaking on behalf of political organizations;
- engaging generally in partisan activities;
- endorsing candidates for political office;
- soliciting contributions for a political party;
- creating, or permitting others to create the impression that the power or prestige of judicial office was used to promote a candidate or party;
- promoting the interests of one political party over another;
- creating the impression that the judge "will administer his office with bias, partiality, or improper discrimination";
- making promises which "appeal to the cupidity or prejudice of the appointing or electing power"; and

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<sup>139</sup> *Id.* at 219, 222.

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

<sup>141</sup> *Id.* at 223 (describing Judge Pagliughi's political activities to include serving as a ward leader, and later as a de facto ward leader, an active Republican club member, and attending a political meeting in 1961).

- becoming a candidate for a non-judicial elective office without first resigning his judicial office.<sup>142</sup>

ABA Formal Opinion 312 further provided that, except in states in which judicial candidates were nominated or elected as a candidate of a political party, judges should not: (1) make political speeches; (2) appear at political affairs; or (3) attend party conventions.<sup>143</sup> In states with elected judiciaries, judicial candidates could engage in these three activities, but only in connection with the candidate's own nomination or election, and only during the campaign period.<sup>144</sup> Once the election was over, the justification for any political activity ended.<sup>145</sup> But no ABA ethics opinion could change the fact that the ABA intended the 1924 Canons to be aspirational,<sup>146</sup> and consistent with that intention, many adopting states refused to treat the Canons or ABA Formal Opinion 312 as enforceable rules of judicial conduct. For example, in 1966, the Oklahoma Supreme Court refused to discipline a judge who remained on the bench while running for state attorney general.<sup>147</sup> Although the judge's conduct was a clear violation of Canon 30 of the state's Canons of Judicial Ethics, the court found that Canon 30 was hortatory and not mandatory.<sup>148</sup>

With more states adopting some version of the 1924 Canons, a greater sensitivity to the propriety of political conduct by judges developed as the twentieth century progressed. However, sensitivity to the problem did not necessarily translate into abstention from political activity. For example, until the adoption of a mandatory code of judicial conduct in 1972, Massachusetts judges were free to engage in political activity without fear of discipline; between 1964 and 1972 state court judge Jerome P. Troy was busy attending campaign strategy meetings, other political

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<sup>142</sup> ABA Comm'n on Prof'l Ethics & Grievances, Formal Op. 312 (1964).

<sup>143</sup> *Id.*

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

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

<sup>146</sup> McKoski, *supra* note 3, at 285 ("Although some states adopted the 1924 Canons as enforceable disciplinary rules, they were intended only to serve as aspirational guidelines.").

<sup>147</sup> Nix v. Standing Comm. on Judicial Performance, 422 P.2d 203, 203 (Okla. 1966).

<sup>148</sup> *Id.* at 205.

gatherings and events, and served as toastmaster for a “friendship” dinner honoring the lieutenant governor of Massachusetts.<sup>149</sup>

## 2. The ABA Code of Judicial Conduct (1972): Mandatory and Enforceable Rules

The freedom of judges to engage in political endeavors without disciplinary consequence changed in 1972. In that year, the ABA converted the aspirational 1924 Canons into a mandatory and enforceable Code of Judicial Conduct.<sup>150</sup> The new ABA model code transformed the political activity guidelines set forth in ABA Formal Opinion 312 into binding rules.<sup>151</sup> The ABA hoped the state and federal judiciaries would adopt the 1972 Code, and by doing so finally render the political activity restrictions enforceable nationwide.<sup>152</sup>

Canon 7 of the 1972 Code attempted to clarify the ambiguities of the 1924 Canons. To that end, Canon 7(A): (1) distinguished between general standards of political conduct governing all judges at all times, and the less restrictive rules governing a judge’s political undertakings while campaigning for judicial office; (2) addressed the tension between judicial impartiality in fact and appearance, and the realities of election campaigns; (3) established a structure by which elected judges could solicit public support and raise funds; and (4) sought to accommodate variations in state methods of judicial election and retention.<sup>153</sup>

Canon 7 prohibited judges and judicial candidates from acting as leaders or holding office in a political organization, making speeches for a political organization, publicly endorsing a candidate for public office, or soliciting funds for a political party.<sup>154</sup> Judges were required to resign their office upon becoming a candidate for an elected, non-judicial office, except when running for election as a

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<sup>149</sup> See *In re Troy*, 306 N.E.2d 203, 231–32 (Mass. 1972). Judge Troy was disciplined for personally soliciting campaign contributions for a gubernatorial candidate from lawyers who practiced before him. *Id.* at 232.

<sup>150</sup> CODE OF JUDICIAL CONDUCT Preface (AM. BAR ASS’N 1972) (“The canons and text establish mandatory standards unless otherwise indicated.”); see E. WAYNE THODE, REPORTER’S NOTES TO THE CODE OF JUDICIAL CONDUCT 43 (1973) (explaining that the 1972 Code established mandatory rules of judicial conduct).

<sup>151</sup> See CODE OF JUDICIAL CONDUCT Canon 7 (AM. BAR ASS’N 1972).

<sup>152</sup> *Id.* Preface.

<sup>153</sup> See THODE, *supra* note 150, at 95–99.

<sup>154</sup> CODE OF JUDICIAL CONDUCT Canon 7A(1) (AM. BAR ASS’N 1972).

delegate to a state constitutional convention.<sup>155</sup> Special allowances were granted to judges holding office filled by public election and candidates for such offices.<sup>156</sup> Judges and candidates falling within that category could: (1) attend and speak at political gatherings on their own behalf; (2) identify themselves as members of a political party; and (3) contribute money to a political organization.<sup>157</sup> The 1972 Code required dignified campaigns, directed candidates to refrain from promising anything other than the “faithful and impartial performance of the duties of office,” and required candidates to refrain from announcing views on disputed legal or political issues.<sup>158</sup> Misrepresentations concerning a candidate’s identity, employment, or qualifications for office were proscribed.<sup>159</sup> The new Code also prohibited judges and judicial candidates from personally soliciting or accepting public endorsements or campaign funds.<sup>160</sup> Instead, a judge facing a contested election or retention could establish a committee of “responsible persons” to solicit public support and to solicit and manage campaign funds.<sup>161</sup> Canon 7 recommended that the campaign committee not solicit funds earlier than ninety days before, or later than ninety days after, an election, but left the precise timing up to the individual states.<sup>162</sup> Finally, both elected and appointed judges could engage in unspecified political activities on behalf of measures “to improve the law, the legal system, or the administration of justice.”<sup>163</sup>

Due in large part to the renewed interest in governmental ethics generated by the Watergate scandal, states adopted the 1972 Code much more quickly than the 1924 Canons.<sup>164</sup> The new mandatory Code put judicial ethics on the map and caused

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<sup>155</sup> *Id.* Canon 7A(3).

<sup>156</sup> *Id.* Canon 7A(2).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* Canon 7B(7).

<sup>159</sup> *Id.* Canon 7B(1)(c).

<sup>160</sup> *Id.* Canon 7B(2).

<sup>161</sup> *Id.*

<sup>162</sup> *See id.* Canon 7B(2) cmt. (“Each jurisdiction adopting this Code should proscribe a time limit on soliciting campaign funds that is appropriate to the elective process therein.”).

<sup>163</sup> *Id.* Canon 7A(4).

<sup>164</sup> *See* Raymond J. McKoski, *Disqualifying Judges When Their Impartiality Might Reasonably be Questioned: Moving Beyond a Failed Standard*, 56 ARIZ. L. REV. 411, 414 (2014) (“It is not surprising that in the aftermath of the Watergate scandal’s devastating effect on public confidence in elected and appointed government officials, virtually every state adopted the 1972 Code . . .”).

the judiciary as a whole, for the first time, to take the issue of political engagement seriously.<sup>165</sup> It also provided a basis upon which the newly created state judicial disciplinary commissions could discipline judges for political activity that was previously ignored or accepted.<sup>166</sup> But because of the divergence of judicial selection methods, and the long history of political engagement by judges, “Canon 7 was less widely adopted than the other Canons of the 1972 Code,” and “even where adopted it was often ignored.”<sup>167</sup> In an attempt to understand the new and enforceable rules, judges inundated state judicial ethics advisory committees with inquiries seeking clarification of Canon 7’s provisions regarding membership in political organizations, attendance at political events, contributions to parties and candidates, and campaigning on their own behalf and on the behalf of others.<sup>168</sup> Illustrating the

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<sup>165</sup> Cf. Stephanie Cotilla & Amanda Suzanne Veal, *Judicial Balancing Act: The Appearance of Impartiality and the First Amendment*, 15 GEO. J. LEGAL ETHICS 741, 748 (2002) (observing that judges have generally accepted restrictions on their political activities).

<sup>166</sup> California established the first permanent judicial disciplinary commission in 1960. Edward J. Shoenbaum, *A Historical Look at Judicial Discipline*, 54 CHI.-KENT L. REV. 1, 20 (1977). But the majority of states created full-time judicial investigatory and disciplinary bodies during the 1970s. *Id.* at 24–27. By 1977, disciplinary commissions existed in forty-seven states and the District of Columbia. *Id.* at 22.

<sup>167</sup> MILORD, *supra* note 97, at 46; see Vivi L. Dilweg, *New Rules to Live By*, JUDGES J. 8, 43 (1991) (“The old Canon 7 [of the 1972 Code] was widely ignored by judges who faced election.”).

<sup>168</sup> See, e.g., Fla. Judicial Ethics Advisory Comm., Opinions of the Committee on Standards of Conduct Governing Judges at 74-2 (1974) (judges attending political party functions); *id.* at 74-3 (judges speaking at political functions); *id.* at 74-11 (judge attending political “fair”); *id.* at 75-25 (1975) (judge speaking at political party meeting); *id.* at 76-2 (1976) (judge’s proposed campaign conduct); *id.* at 76-6 (judge attending legislative appreciation event); *id.* at 76-11 (resign to run law); *id.* at 76-15 (accepting campaign contributions); *id.* at 76-16 (judge speaking in favor of proposed constitutional amendment); *id.* at 77-5 (1977) (disposition of unexpended campaign funds); *id.* at 77-15 (attendance at political functions); *id.* at 77-20 (attendance at testimonial dinner for county commissioner); *id.* at 77-21 (proposed campaign activity); *id.* at 77-22 (sending signed thank you notes to campaign contributors); *id.* at 78-1 (1978) (proposed candidacy announcement); *id.* at 78-6 (attending political meetings); *id.* at 78-7 (proposed campaign statements); *id.* at 78-11 (accepting campaign contributions); *id.* at 78-13 (propriety of judicial candidates’ debate); *id.* at 78-15 (candidate commenting on disputed legal issues); *id.* at 79-10 (1979) (attending political meetings); *id.* at 80-9 (1980) (accepting campaign contributions); *id.* at 80-10 (use of photo in campaign literature); *id.* at 80-11 (membership on political committee); *id.* at 80-13 (responding to interest group’s candidate questionnaire); see also Md. Judicial Ethics Comm., Opinion Letter 1972-01 (1972) (contributions to campaign funds); *id.* at 1973-06 (1973) (participation in political gatherings); *id.* at 1974-01 (use of photographs in campaign literature); *id.* at 1974-03 (1974) (campaigning with other judges); *id.* at 1974-05 (1974) (running unopposed); *id.* at 1975-08 (1975) (attending fundraisers); *id.* at 1976-04 (1976) (campaign contributions); *id.* at 1976-05 (speaking at political gatherings); *id.* at 1978-02 (1978) (promoting the candidacy of others); *id.* at 1978-07 (campaign contributions); *id.* at 1979-01 (1979) (attending political events). During 1976, 1977, and 1978 the Arizona Judicial Ethics Advisory Committee issued six advisory opinions, five of which concerned political activities. See Ariz. Judicial Ethics

confusion created by the new rules, the administrator of the Pennsylvania courts sent three memoranda to the state's judges and justices of the peace between March 3, 1976, and March 18, 1977, reminding judicial officers and their staffs to "remain free from political activity."<sup>169</sup>

For several reasons, the 1972 Code's pronouncement that improper political activities would subject offending judges to discipline did not immediately reduce judges' engagement in politics. First, while some states adopted the new Code quickly, other states delayed adoption for years. For example, Minnesota adopted the Code in 1974,<sup>170</sup> Kentucky in 1978,<sup>171</sup> and Georgia in 1984.<sup>172</sup> Wisconsin never adopted the 1972 Code.<sup>173</sup> In addition, most permanent state judicial disciplinary commission were just beginning in the 1970s. New York's permanent State Commission on Judicial Conduct, for example, was created by constitutional amendment in 1976.<sup>174</sup> Third, the political activity limitations found in Canon 7 of the 1972 Code and the variations adopted by the states were new, ambiguous, and confusing. As such, disciplinary bodies hesitated to discipline judges for previously permissible conduct. The experience of the New York Commission on Judicial Conduct serves as a case in point.

In 1978, the New York Commission on Judicial Conduct considered eighteen complaints against judges alleging improper political activity.<sup>175</sup> The complaints in sixteen of the cases were dismissed with private cautions to the judges.<sup>176</sup> The

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Advisory Comm., Advisory Opinion at 76-01 (1976); *id.* at 76-02; *id.* at 76-03; *id.* at 78-01 (1978); *id.* at 78-02.

<sup>169</sup> *In re* Prohibition of Political Activities by Court-Appointed Emps., 375 A.2d 1257, 1259 (Pa. 1977).

<sup>170</sup> MINN. CODE OF JUDICIAL CONDUCT (1974).

<sup>171</sup> Rick A. Johnson, *Judicial Campaign Speech in Kentucky After Republican Party of Minnesota v. White*, 30 N. KY. L. REV. 347, 353 (2003) ("Kentucky did not adopt the ABA's 1972 Model Code of Judicial Conduct until a new Rule of the Supreme Court became effective on January 1, 1978.").

<sup>172</sup> GA. CODE OF JUDICIAL CONDUCT (1984).

<sup>173</sup> Lisa L. Milord, *Adoption of the 1990 ABA Model Code of Judicial Conduct: A Progress Report*, in JUD. CONDUCT REP. 1, 1 (1992).

<sup>174</sup> *Mandate and History*, N.Y. COMM'N ON JUDICIAL CONDUCT (Apr. 11, 2018), <http://www.scje.state.ny.us/General.Information/Gen.Info.Pages/mandate&history.htm>.

<sup>175</sup> N.Y. COMM'N ON JUDICIAL CONDUCT, ANNUAL REPORT 55-56 (1979).

<sup>176</sup> *Id.* In the dismissed cases, the judges had made small contributions to political parties or attended political events. In one case, the judge contributed to his brother's campaign for nonjudicial office. *Id.* at 56.

Commission formally admonished two judges for supporting candidates for elective office.<sup>177</sup> Part of the Commission's hesitancy to discipline judges for violating political restrictions was the lack of clarity in the New York rules governing political activities. In its 1980 Annual Report, the Commission urged that the ethics rules be amended to answer such basic questions as whether a judge may attend his own fundraising event and whether a judge may purchase a ticket to a political dinner if the cost of the ticket exceeded the cost of the meal.<sup>178</sup> The Commission noted the debate among judicial candidates on these issues.<sup>179</sup> The Commission members also acknowledged that "[t]he necessities of raising funds and assembling a campaign organization may raise problems in adhering to the applicable Rules."<sup>180</sup> In 1980, the New York Commission received complaints against judges for such things as attending political caucuses, picnics, and planning sessions; purchasing tickets to political dinners; and requesting a supporter to display the judge's campaign sign.<sup>181</sup> These complaints were addressed by cautioning the judges to abide by the rules governing political activity.<sup>182</sup> The Commission did not impose any public discipline for improper political activity in 1980. In its 1982 Annual Report, the Commission again urged a clarification of the political activity standards, especially in the area of contributions and fundraising.<sup>183</sup>

In its 1985 Annual Report, the New York Commission took the bull by the horns by including a "special section" titled, "Political Activity by Judges: Clearer Rules are Needed."<sup>184</sup> The Commission devoted thirteen pages of its report to explaining the confusing and contradictory provisions of the rules governing political activities, concluding with a plea for clarification.<sup>185</sup> The Commission expressed "frustration"<sup>186</sup> that some of the rules were so vague and confusing that "they cannot

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<sup>177</sup> *Id.* at 55–56.

<sup>178</sup> N.Y. COMM'N ON JUDICIAL CONDUCT, ANNUAL REPORT 74 (1980).

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

<sup>180</sup> *Id.* at 75.

<sup>181</sup> N.Y. COMM'N ON JUDICIAL CONDUCT, ANNUAL REPORT 55–56 (1981) [hereinafter 1981 ANNUAL REPORT].

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

<sup>183</sup> N.Y. COMM'N ON JUDICIAL CONDUCT, ANNUAL REPORT 39 (1982).

<sup>184</sup> N.Y. COMM'N ON JUDICIAL CONDUCT, ANNUAL REPORT 69 (1985).

<sup>185</sup> *Id.* at 75–87.

<sup>186</sup> *Id.* at 88.

be enforced.”<sup>187</sup> The next year, the Commissioners lamented that their call for clarification of the rules had been ignored.<sup>188</sup> Finally, in 1986, the Chief Administrative Judge of the New York Courts amended section 100.7 of the Rules Governing Judicial Conduct to clarify the restrictions on political activity.<sup>189</sup> After the amendments, the Commission’s “frustration” eased and formal proceedings were initiated against judges who violated the rules governing political behavior.<sup>190</sup> Whether due to ignorance,<sup>191</sup> refusal to accept the clarified rules, or because, in the minds of some judges, “political realities required sidestepping the prohibitions,”<sup>192</sup> improper political activity by judges continued to be a problem.<sup>193</sup> But by the end of the 1980s, state judges in New York and across the country began to restrict their political activities to conform to mandatory ethics rules enforceable by state disciplinary bodies.

### 3. The Model Code of Judicial Conduct (1990)

Although certainly an improvement over the 1924 Canons, the ABA recognized that Canon 7 of the 1972 ABA Code failed judges and judicial candidates in two respects. First, it did not provide sufficient guidance in identifying impermissible political activities.<sup>194</sup> Second, Canon 7 neglected to account for the various methods of judicial selection employed by the states.<sup>195</sup> The drafters of the

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<sup>187</sup> *Id.*; see also 1981 ANNUAL REPORT, *supra* note 181, at 56 (“The pressures of political activity, and inconsistencies in the various regulations and guidelines pertaining to the election of judges, make some violations of the applicable laws and rules difficult to avoid.”).

<sup>188</sup> N.Y. COMM’N ON JUDICIAL CONDUCT, ANNUAL REPORT 37 (1986).

<sup>189</sup> N.Y. COMM’N ON JUDICIAL CONDUCT, ANNUAL REPORT 44–45 (1987).

<sup>190</sup> *Id.*; see *In re Maney*, 510 N.E.2d 312 (N.Y. 1987); *In re Laurino* (N.Y. Comm’n on Judicial Conduct Mar. 25, 1988); *In re Gloss* (N.Y. Comm’n on Judicial Conduct Dec. 21, 1988); *In re Harris* (N.Y. Comm’n on Judicial Conduct Jan. 22, 1988).

<sup>191</sup> See, e.g., N.Y. COMM’N ON JUDICIAL CONDUCT, ANNUAL REPORT 26 (1998) (explaining that the judge’s violation of political restrictions was due to the “judge’s unfamiliarity with the Rule and with relevant Advisory Opinions”).

<sup>192</sup> *In re Maney*, 510 N.E.2d at 312 (“Nor can we accept petitioner’s attempts to justify his partisan involvement on the ground that it was necessitated by the political realities that face elected Judges.”).

<sup>193</sup> N.Y. COMM’N ON JUDICIAL CONDUCT, ANNUAL REPORT 102 (1988); N.Y. COMM’N ON JUDICIAL CONDUCT, ANNUAL REPORT 47 (1990); N.Y. COMM’N ON JUDICIAL CONDUCT, ANNUAL REPORT 29 (2000) (“In this Annual Report, we attempt a more comprehensive review of those aspects of political activity that persist and continue to cause concerns.”).

<sup>194</sup> MILORD, *supra* note 97, at 46.

<sup>195</sup> *Id.*

1990 ABA Model Code attempted to remedy these deficiencies by dividing the new political activity canon, Canon 5, into four separate and distinct sections.

Canon 5(A) enumerated prohibited activities for all appointed and elected judges and candidates for judicial office.<sup>196</sup> Unless specifically authorized by subsequent provisions of Canon 5, judges and candidates could not: (1) act as leaders or hold offices in political organizations; (2) publicly endorse or oppose another candidate for public office; (3) speak on behalf of political organizations; (4) attend political gatherings; (5) solicit funds for, pay an assessment to, or contribute to a political organization or candidate; or (6) purchase tickets for political functions.<sup>197</sup> These same general prohibitions appeared in the 1972 Code, except Canon 5(A) of the new Model Code prohibited opposing as well as endorsing candidates.<sup>198</sup>

Canon 5(A) also continued the 1972 Code requirement that a judge resign from office upon becoming a candidate for a non-judicial office except the office of delegate to a state constitutional convention.<sup>199</sup> Both the 1972 and 1990 Codes required a dignified campaign in which candidates refrained from (1) pledges or promises other than the faithful and impartial performance of judicial duties and (2) knowingly misrepresenting facts about themselves during the campaign.<sup>200</sup> The 1990 Code also prohibited misrepresentations about an election opponent.<sup>201</sup> Foreseeing a First Amendment problem with the 1972 Code's provision barring a candidate from "announc[ing] his views on disputed legal or political issues,"<sup>202</sup> that language was replaced in the 1990 Code with a narrower standard demanding abstention from 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>203</sup> In 2003, the ABA further refined this speech restriction by eliminating the

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<sup>196</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 5A (AM. BAR ASS'N 1990).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* Canon 5A(1)(b); CODE OF JUDICIAL CONDUCT Canon 7A(1) (AM. BAR ASS'N 1972).

<sup>199</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 5A(2) (AM. BAR ASS'N 1990); CODE OF JUDICIAL CONDUCT Canon 7A(3) (AM. BAR ASS'N 1972).

<sup>200</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 5A(2) (AM. BAR ASS'N 1990); CODE OF JUDICIAL CONDUCT Canon 7B(7)(c) (AM. BAR ASS'N 1972).

<sup>201</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(iii) (AM. BAR ASS'N 1990).

<sup>202</sup> CODE OF JUDICIAL CONDUCT Canon 7B(1)(c) (AM. BAR ASS'N 1972).

<sup>203</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(ii) (AM. BAR ASS'N 1990); *see* MILORD, *supra* note 97, at 50.

prohibition against making statements that *appear* to commit the candidate.<sup>204</sup> Amended Canon 5(A)(d)(i) provided 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 office.”<sup>205</sup>

Canon 5B included special rules governing a candidate seeking appointment to a judicial office, or a judge seeking appointment to a nonjudicial office.<sup>206</sup> Canon 5B(2)(b) permitted non-judge candidates for appointment to judicial office to attend political gatherings, retain an office in a political organization, and make monetary contributions to a party or candidate.<sup>207</sup>

Canon 5C took on the important task of eliminating the ambiguity in Canon 7 of the 1972 Code regarding what political activities were permissible for elected judges and when the judges could engage in those activities.<sup>208</sup> Thus, under Canon 5C(1)(a) a judge or other candidate for a publicly elected judicial office could “at any time”: (1) purchase tickets and attend political functions; (2) identify as a member of a political party, and (3) contribute funds to political organizations.<sup>209</sup> That meant, for example, a judge elected to a ten-year term on the appellate court could, for the ten years before the reelection or retention campaign, identify herself as a Republican or Democrat, contribute to either or both parties, and purchase tickets and attend political functions.<sup>210</sup> Canon 5C also permitted additional political activities but only during the period in which an individual was a declared candidate.<sup>211</sup> Those activities included: (1) speaking to gatherings in the candidate’s own behalf; (2) publicly endorsing or opposing candidates for the same judicial

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<sup>204</sup> See MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(ii) (AM. BAR ASS’N 1990).

<sup>205</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(i) (1990) (AM. BAR ASS’N, amended 2003).

<sup>206</sup> See *id.* Canon 5B.

<sup>207</sup> *Id.* Canon 5B(2)(b).

<sup>208</sup> See MILORD, *supra* note 97, at 53 (“A Committee Amendment revised Section 5C(1) to distinguish the political activities permitted at all times to a judge subject to public election, or to a candidate for such election, from those political activities permitted only during candidacy for public election.”).

<sup>209</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 5C(1)(a) (AM. BAR ASS’N 1990).

<sup>210</sup> See *id.* Canon 5C(1)(a).

<sup>211</sup> *Id.* Canon 5C(7)(b).

office in the election in which the judge or candidate was running; and (3) promoting his or her own candidacy by promotional campaign materials and advertisements.<sup>212</sup>

Canon 5D served two purposes. First, it reminded judges that they were forbidden from engaging in any political activity not expressly permitted by a jurisdiction's laws or code of judicial conduct.<sup>213</sup> Second, it permitted judges to engage in political activity "on behalf of measures to improve the law, the legal system or the administration of justice."<sup>214</sup> This last provision reinforced Canon 4B's acknowledgement of the important role judges play in initiating and implementing legal reform.<sup>215</sup>

In recognition of the realities of campaigning, and the safeguards of the First Amendment, the 1990 Code expanded the scope of permissible campaign activity in several ways. Under the 1990 Code, a candidate's campaign committee could begin fund-raising one year before the election, instead of the ninety-day limit imposed by the 1972 Code.<sup>216</sup> For the first time, the 1990 Code authorized candidates to: (1) publicly endorse or oppose judicial candidates running in the same election;<sup>217</sup> and (2) defend themselves from attacks.<sup>218</sup> The 1990 Code expressly permitted judges to privately express their views on candidates for judicial and nonjudicial

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<sup>212</sup> *Id.* In another concession to the realities of electioneering, Canon 5C(3) permitted a judicial candidate's name to appear on election materials such as a sample ballot, with candidates for judicial and non-judicial office running on the same ticket. *Id.* Canon 5C(3).

<sup>213</sup> *Id.* Canon 5D.

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

<sup>215</sup> See THODE, *supra* note 150, at 97.

<sup>216</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 5C(2) (AM. BAR ASS'N 1990); CODE OF JUDICIAL CONDUCT Canon 7B(2) (AM. BAR ASS'N 1972). In August 1999, the ABA added a section to Canon 5(C) providing: "A candidate shall instruct his or her campaign committee(s) at the start of the campaign not to accept campaign contributions for any election that exceed, in the aggregate\*, [\$] from an individual or [\$] from an entity." The amendment allowed the individual states to set the maximum contribution amount. MODEL CODE OF JUDICIAL CONDUCT Canon 5C(3) (1990) (AM. BAR ASS'N, amended 1999).

<sup>217</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 5C(1)(b)(iv) (AM. BAR ASS'N 1990). While not expressly stated in the 1972 Code, Canon 7A(1)(b) of the 1972 Code was intended to permit judges to privately express views on candidates. See MILORD, *supra* note 97, at 48.

<sup>218</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(e) (AM. BAR ASS'N 1990).

office.<sup>219</sup> And judges no longer had to wait for their retention candidacy to draw “active opposition” before they could engage in campaign activities.<sup>220</sup>

Ten years after the ABA issued the 1990 Code, twenty-two states and the District of Columbia had adopted the 1990 Code, and at least two states (New York and Georgia) had adopted a combination of the 1972 and 1990 Codes.<sup>221</sup> The remaining states continued with their versions of the 1972 ABA Code. Most judges accepted the fact that under the 1972 and 1990 Codes, certain political activity was no longer permissible or tolerated and conformed their conduct to the new rules. Other judges learned more slowly through public or private admonishments by now fully operational judicial disciplinary commissions.<sup>222</sup>

#### 4. The Model Code of Judicial Conduct (2007)

The right to engage in specific political activities granted by one ABA Model Code can be unceremoniously taken away by the next ABA Model Code. Canon 4 of the 2007 ABA Model Code replaced Canon 5 of the 1990 Code and tightened the restrictions on political and campaign activities in several respects.<sup>223</sup>

Most significantly, the 2007 Model Code severely limits the period within which judges subject to election may engage in political activities.<sup>224</sup> The 1990 Code specifically authorized judges and candidates subject to public election to “at any time” attend political gatherings, contribute to political organizations and candidates, and identify as a member of a political party.<sup>225</sup> In addition, the 1990 Code declared that candidates could speak on their own behalf, run media campaigns in support of their candidacy, and publicly support or oppose other candidates for the same judicial

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<sup>219</sup> *Id.* Canon 5(A)(1) cmt.

<sup>220</sup> *See* CODE OF JUDICIAL CONDUCT Canon 7B(3) (AM. BAR ASS’N 1972). This provision was not retained in the 1990 Code. *See* MODEL CODE OF JUDICIAL CONDUCT (AM. BAR ASS’N 1990).

<sup>221</sup> JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS § 1.02, at 4 (3d ed. 2000).

<sup>222</sup> *See, e.g.*, N.Y. COMM’N ON JUDICIAL CONDUCT, ANNUAL REPORT 12 (1992) (reporting the private caution of three judges for improper political activity); IND. JUDICIAL NOMINATING COMM’N, REPORT FISCAL YEAR 2001–2002, at 2–3 (indicating one private caution for campaign misconduct). There were spikes in the disciplining and cautioning of judges for improper political activity. *See, e.g.*, N.Y. STATE COMM’N ON JUDICIAL CONDUCT, ANNUAL REPORT 2002, at 10–17 (indicating that in 2001 three judges were publicly admonished for political or campaign activity).

<sup>223</sup> *See* MODEL CODE OF JUDICIAL CONDUCT Canon 4 (AM. BAR ASS’N 2007); *see* MODEL CODE OF JUDICIAL CONDUCT Canon 5 (AM. BAR ASS’N 1990).

<sup>224</sup> MODEL CODE OF JUDICIAL CONDUCT r. 4.2(B)(C) (AM. BAR ASS’N 2007).

<sup>225</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 5C(1)(a) (AM. BAR ASS’N 1990).

office.<sup>226</sup> Rule 4.2(B) of the 2007 Code allows these same political and campaign activities, but only for a finite period immediately preceding the general or primary election in which the judge or judicial candidate is running.<sup>227</sup> Although the precise time period within which political and campaign activities may be conducted is set by the individual states adopting Model Rule 4.2(B), the ABA suggests one year.<sup>228</sup> The ABA imposed this restriction because it believed that permitting a judge elected to a ten-year term, for instance, to immediately declare for retention and attend political events and make political contributions for the next decade would result in “perpetual campaigns” and be inconsistent with judicial independence and impartiality.<sup>229</sup> The drafters of the 2007 Code did not cite any particular difficulties or incidents damaging public confidence in the judiciary during the seventeen-year reign of the more permissive campaign rule embodied in the 1990 Code.<sup>230</sup> Nor did the drafters comment on the possibility that an organized, well-financed campaign to unseat a judge could commence before the one year campaign window permitted by Rule 4.2(B).<sup>231</sup>

Second, the 2007 Code added a provision not found in the 1990 Code preventing judicial candidates, other than individuals running in partisan judicial elections, from publicly identifying themselves as candidates of a political organization.<sup>232</sup> Third, another new rule prohibited judicial candidates from making statements “that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court.”<sup>233</sup> Fourth, the new Code broadened the prohibition against judicial candidates misrepresenting facts during an

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<sup>226</sup> *Id.* Canon 5C(1)(b).

<sup>227</sup> MODEL CODE OF JUDICIAL CONDUCT r. 4.2(B) (AM. BAR ASS’N 2007).

<sup>228</sup> GEYH & HODES, *supra* note 13, at 106.

<sup>229</sup> *See id.* at 106–07.

<sup>230</sup> *See id.* Canon 7 of the 1972 Code was generally interpreted as also permitting judges subject to election to engage in authorized campaign and political activities at any time. *See* Eileen C. Gallagher, *The ABA Revisits the Model Code of Judicial Conduct*, JUDGES J. 7, 12 (2005) (“The [1972] model code allows judges subject to public election to partake in these activities at any time, not just during the campaign period.”).

<sup>231</sup> *See* GEYH & HODES, *supra* note 13, at 106–07.

<sup>232</sup> MODEL CODE OF JUDICIAL CONDUCT r. 4.1(A)(6), 4.2(C) (AM. BAR ASS’N 2007).

<sup>233</sup> *Id.* at r. 4.1(A)(12). This provision complements Rule 2.10(A) of the 2007 Code which bars judges, at any time, from making public statements that could affect the outcome or impair the fairness of a pending or impending matter. *Id.* at r. 2.10(A).

election campaign.<sup>234</sup> The 1990 Code barred candidates from “knowingly misrepresent[ing] the identity, qualifications, present position or other fact concerning the candidate or an opponent.”<sup>235</sup> The 2007 Code expanded the provision to reach statements made with “reckless disregard for the truth.”<sup>236</sup>

On the other hand, Canon 4 of the 2007 Code loosened political and campaign restrictions in two respects.<sup>237</sup> First, the drafters omitted the requirement of the 1990 Code that judicial candidates “maintain the dignity appropriate to judicial office,”<sup>238</sup> because it was too vague and subjective to serve as disciplinary rule.<sup>239</sup> Second, the 1990 Code provision prohibiting a judicial candidate from “personally solicit[ing] publicly stated support”<sup>240</sup> was narrowed to prohibit seeking or accepting the endorsement of a political organization.<sup>241</sup> This change was long overdue because under the 1990 Code judicial candidates committed an ethical misstep every time they sought the endorsement of a newspaper’s editorial board.

Over the past eighty-four years, judges have come to accept restrictions on their political activities. While not totally disappearing, violations of rules governing the political activities of judges are no longer the norm. Today, transgressions tend more toward false, misleading, and other types of inflammatory campaign speech rather than improper endorsements, campaign contributions, or political event attendance.<sup>242</sup> There are indications, of both constitutional and practical dimension,

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<sup>234</sup> *See id.* at r. 4.1(A)(11).

<sup>235</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(iii) (AM. BAR ASS’N 1990).

<sup>236</sup> MODEL CODE OF JUDICIAL CONDUCT r. 4.1(A)(11) (AM. BAR ASS’N 2007) (providing that “a judge or judicial candidate shall not . . . knowingly, or with reckless disregard for the truth, make any false or misleading statement”).

<sup>237</sup> *See id.* Canon 4.

<sup>238</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(a) (AM. BAR ASS’N 1990).

<sup>239</sup> GEYH & HODES, *supra* note 13, at 103.

<sup>240</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 5C(2) (AM. BAR ASS’N 1990).

<sup>241</sup> MODEL CODE OF JUDICIAL CONDUCT r. 4.1(A)(7) (AM. BAR ASS’N 2007); *see* GEYH & HODES, *supra* note 13, at 99.

<sup>242</sup> STATE OF CAL. COMM’N ON JUDICIAL PERFORMANCE, 2017 ANNUAL REPORT 15–16 (describing the campaign misrepresentations of Judge Krep); STATE OF CAL. COMM’N ON JUDICIAL PERFORMANCE, 2015 ANNUAL REPORT 25 (describing advisory letter sent to a judge for misrepresentations in the judge’s campaign materials); Removal Order, *In re Santino* (Fla. July 2, 2018); Removal Order, *In re DuPont* (Fla. June 25, 2018) (removing a judge for false and misleading statements about an election opponent). This is not to say that judges do not continue to violate endorsement and political event attendance rules.

that the pendulum may be swinging back toward a more robust role for judges in the political process.

## II. WILL THE PENDULUM SWING BACK TO A GREATER POLITICAL VOICE FOR JUDGES?

As demonstrated in Part I, during much of our country's history, judges maintained the right to engage freely in political activities including attending political functions, contributing money and services to political organizations and candidates, endorsing and opposing political agendas and candidates, and expressing personal views on the political issues of the day.<sup>243</sup> At the behest of the ABA, the states began to impose significant ethical constraints on the judiciary's engagement in the political affairs of life. At the highpoint of restrictions, even candidates for elective judicial office could not announce views on disputed legal or political issues and could promise the electorate nothing other than the "faithful and impartial performance of the duties of the office."<sup>244</sup> Codes of conduct either prohibited judicial candidates from attending political events or limited attendance to the period in which the judge was a candidate. Judges were barred from personally soliciting campaign contributions and judicial election committees could accept contributions no earlier than ninety days before an election.<sup>245</sup> Recent developments indicate we may be returning to an era in which restrictions on a judge's political activity are relaxed. The most important developments supporting the likely expansion of the judiciary's role in politics include: (1) the Supreme Court's pronouncement that restrictions on the speech of judicial candidates must survive strict scrutiny; and (2) the need for the judiciary to respond to political attacks.

### A. *Strict Scrutiny Applies to a Judicial Candidate's Campaign Speech*

The likelihood that restrictions on the political speech of judges can withstand a First Amendment challenge largely depends on the level of scrutiny applied to a particular restriction. The Supreme Court has applied the most stringent level of scrutiny, strict scrutiny, in the two cases in which the Court examined the

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*See, e.g.,* Public Reprimand, *In re Lopez* (Tex. Comm'n on Judicial Conduct June 6, 2018) (disciplining a judge in part for authorizing the public use of his name to endorse a candidate for public office).

<sup>243</sup> *See infra* Part I.

<sup>244</sup> *See* CODE OF JUDICIAL CONDUCT Canon 7B(1)(c) (AM. BAR ASS'N 1972).

<sup>245</sup> *Id.* Canon 7B(2).

constitutionality of state rules limiting a judicial candidate's content-based campaign speech.<sup>246</sup> To survive the strict scrutiny test, the state must prove that a content-based speech restriction is narrowly tailored to serve a governmental interest that is not merely important or significant, but compelling.<sup>247</sup> Historically, once a court decides to apply the strict scrutiny standard, a speech restriction is almost certainly doomed because it is the "rare case[] in which a speech restriction withstands strict scrutiny."<sup>248</sup> A speech restriction is more likely to survive if a court applies a less demanding level of scrutiny such as intermediate scrutiny<sup>249</sup> or the rational basis test.<sup>250</sup> Based on the Court's pronouncements in *Republican Party of Minnesota v. White*<sup>251</sup> and *Williams-Yulee v. Florida Bar*,<sup>252</sup> there should be no doubt strict scrutiny applies to all content-based restrictions on a judge's political speech, whether the speech is part of the judge's campaign for judicial office or otherwise.<sup>253</sup> But some scholars continue to argue that a specialized form of intermediate scrutiny, often referred to as the *Pickering-Connick* test, should govern the right of a sitting judge to engage in political speech.<sup>254</sup> Employing the lower constitutional standard of *Pickering-Connick* would naturally result in the courts upholding more speech restrictions. A second obstacle arguably stands in the way of employing the traditional construct of strict scrutiny adopted in *White* to protect a judge's political speech.<sup>255</sup> Indications exist that the Court may be willing to water-down the strict

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<sup>246</sup> See *infra* Part II.A.1.

<sup>247</sup> *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 680 (1994) (citing *Boos v. Barry*, 485 U.S. 312, 321 (1988)).

<sup>248</sup> *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1666 (2015); see RAYMOND J. MCKOSKI, *JUDGES IN STREET CLOTHES: ACTING ETHICALLY OFF-THE-BENCH* 202 (2017).

<sup>249</sup> Under intermediate scrutiny, a content neutral speech regulation is constitutional if it "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

<sup>250</sup> To survive the rational basis test, the restriction must "be rationally related to a legitimate state interest." *New Orleans v. Duke*, 427 U.S. 297, 303 (1976).

<sup>251</sup> See *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).

<sup>252</sup> See *Williams-Yulee*, 135 S. Ct. at 1656.

<sup>253</sup> See generally *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983).

<sup>254</sup> See, e.g., Charles Gardner Geyh, *The Jekyll and Hyde of First Amendment Limits on the Regulation of Judicial Campaign Speech*, 68 VAND. L. REV. EN BANC 83, 84-95 (2015).

<sup>255</sup> See generally *Pickering*, 391 U.S. 563; *Connick*, 461 U.S. 138.

scrutiny standard in judicial speech cases in the name of protecting public confidence in the judiciary.

### 1. Traditional Strict Scrutiny

Not until 2001 did the Supreme Court address the right of the government to restrict a judicial candidate's speech.<sup>256</sup> In *Republican Party of Minnesota v. White*, the Court invalidated a Minnesota rule, borrowed from the 1972 ABA Code of Judicial Conduct, that barred a candidate for judicial office from announcing views on disputed legal and political issues.<sup>257</sup> Because Minnesota's "announce clause" was a content-based restriction on a candidate's speech, the Court measured the restriction against the most stringent level of scrutiny—strict scrutiny.<sup>258</sup> Conceding that maintaining judicial impartiality constitutes a compelling state interest, the majority found the campaign speech restriction failed to further that interest.<sup>259</sup> The Court determined that the "root" meaning of impartiality denotes a lack of bias for or against a party and the Minnesota restriction had little to do with insulating parties from bias.<sup>260</sup> Instead, the restriction governed speech on issues, and everyone expects judges to come to the bench with opinions on legal issues.<sup>261</sup> The important point here is that a majority of the members of the *White* Court considered strict scrutiny, as traditionally defined and applied, to be the appropriate standard by which to evaluate a restriction on a judicial candidate's speech.<sup>262</sup>

Thirteen years later, in *Williams-Yulee v. Florida Bar*, the Court reaffirmed strict scrutiny as the appropriate standard by which to judge restrictions on the speech of candidates running for judicial office.<sup>263</sup> In *Williams-Yulee*, the Court upheld Canon 7C(1) of the Florida Code of Judicial Conduct which prohibited judicial

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<sup>256</sup> *White*, 536 U.S. at 765.

<sup>257</sup> *Id.* at 788.

<sup>258</sup> See *Williams-Yulee*, 135 S. Ct. at 1665 (stating that the Court "assumed" that strict scrutiny applied in *White*).

<sup>259</sup> *White*, 536 U.S. at 778.

<sup>260</sup> *Id.* at 775.

<sup>261</sup> *Id.* at 776 (finding that the Minnesota restriction was "barely tailored" to serve the government's interest in maintaining judicial impartiality "inasmuch as it does not restrict speech for or against particular parties, but rather speech for or against particular issues").

<sup>262</sup> See Ronald D. Rotunda, *Constitutionalizing Judicial Ethics: Judicial Elections After Republican Party of Minnesota v. White, Caperton, and Citizens United*, 64 ARK. L. REV. 1, 38–40 (2011).

<sup>263</sup> *Williams-Yulee*, 135 S. Ct. at 1664.

candidates from personally soliciting campaign funds.<sup>264</sup> A plurality of the Court found the restriction narrowly tailored to further a compelling state interest.<sup>265</sup> The Court did not characterize the state interest as protecting judicial impartiality as it did in *White*, but instead described the interest as “safeguarding public confidence in the fairness and integrity of the nation’s elected judges.”<sup>266</sup> Except for Justice Ginsburg,<sup>267</sup> the Justices agreed strict scrutiny applied to the restriction placed on the campaign speech of Williams-Yulee.<sup>268</sup>

Significantly, both *White* and *Williams-Yulee* involved judicial candidates who were not judges.<sup>269</sup> Does the State have a greater right to restrict the political and campaign conduct of sitting judges? According to Justice Kennedy, strict scrutiny governs restrictions placed on judicial candidates’ speech simply because they are candidates.<sup>270</sup> However, in *White*, Justice Kennedy left open the possibility that a state might limit a judge’s speech, not because of the judge’s status as a candidate, but because of the judge’s status as a state employee.<sup>271</sup> Concurring in *White*, Justice Kennedy questioned whether the rationale of *Pickering v. Board of Education* and *Connick v. Myers*, “could be extended to allow a general speech restriction on sitting judges—regardless of whether they are campaigning—in order to promote the efficient administration of justice.”<sup>272</sup>

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<sup>264</sup> *Id.* at 1672.

<sup>265</sup> *Id.* at 1666, 1672.

<sup>266</sup> *Id.* at 1666 (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009)).

<sup>267</sup> *Id.* at 1673. Justice Ginsburg believed that the speech of candidates for judicial election or retention should be limited by its own unique standard that would “balance the constitutional interests in judicial integrity and free expression within the unique setting of an elected judiciary.” *Id.* at 1675 (Ginsburg, J., concurring) (quoting *White*, 536 U.S. at 821 (Ginsburg, J., dissenting)).

<sup>268</sup> *See id.* at 1676 (Scalia, J., dissenting); *id.* at 1685 (Kennedy, J., dissenting); *id.* (Alito, J., dissenting) (The dissenting Justices in *Williams-Yulee* agreed with the majority that strict scrutiny applied.). Justice Thomas joined Justice Scalia’s dissent. *Id.* at 1675.

<sup>269</sup> *See id.* at 1663 (stating that Williams-Yulee lost the primary election to the incumbent judge); *see White*, 536 U.S. at 796 (Kennedy, J., concurring) (“Petitioner Gregory Wersal was not a sitting judge but a challenger[.]”).

<sup>270</sup> *White*, 536 U.S. at 792–93 (Kennedy, J., concurring).

<sup>271</sup> *Id.* at 796.

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

## 2. The *Pickering-Connick* Public Employee Speech Test

Special considerations dictate the First Amendment rights of public employees. “[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”<sup>273</sup> On the other hand, First Amendment protections apply when a public employee speaks, not as a public official, but as a citizen about matters of public concern.<sup>274</sup> But even when speaking in an unofficial capacity, public employees are subject to an employer’s speech restrictions necessary to ensure “the efficiency of the public services it performs through its employees.”<sup>275</sup> In short, under the *Pickering-Connick* test, the First Amendment protects a public employee’s right to speak (1) as a private citizen, (2) about a matter of public concern, (3) unless the government employer demonstrates “adequate justification for treating the employee differently from any other member of the general public.”<sup>276</sup> To meet this burden, the government must demonstrate that the employee’s First Amendment right to free speech is outweighed by the speech’s impact on the “actual operation” of the governmental entity.<sup>277</sup> Importantly, the Supreme Court has never applied the *Pickering-Connick* intermediate scrutiny test to speech by an elected official or the occupant of a constitutionally created office.<sup>278</sup> The Court has also conceded that the applicability of *Pickering-Connick* might depend on the precise nature of a public employee’s job.<sup>279</sup>

Taking Justice Kennedy’s hint, the Seventh Circuit Court of Appeals invoked the *Pickering-Connick* balancing test to uphold a Wisconsin rule that barred judicial

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<sup>273</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

<sup>274</sup> *See id.* at 417.

<sup>275</sup> *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

<sup>276</sup> *Garcetti*, 547 U.S. at 418 (citing *Pickering*, 391 U.S. at 566); *see also* MCKOSKI, *supra* note 248, at 207–09.

<sup>277</sup> *United States v. Nat’l Treasury Emps. Union*, 513 U.S. 454, 468 (1993) (quoting *Pickering*, 391 U.S. at 571).

<sup>278</sup> *See* *Ranga v. Brown*, 566 F.3d 515, 523 (5th Cir. 2009) (“None of the Supreme Court’s public employee speech decisions qualifies or limits the First Amendment’s protection of elected government officials’ speech.”) (footnote omitted); *Siefert v. Alexander*, 608 F.3d 974, 991 (7th Cir. 2010) (Rovner, J., dissenting).

<sup>279</sup> *Garcetti*, 547 U.S. at 424–25.

candidates from publicly endorsing partisan political candidates.<sup>280</sup> In balancing the state's interest in a fair judiciary against a candidate's interest in "bolstering another politician's chances for office," the court easily found that the state's interest prevails.<sup>281</sup> However, the Seventh Circuit admitted that if evaluated under strict scrutiny rather than the *Pickering-Connick* test, Wisconsin's endorsement restriction would most likely fail.<sup>282</sup> In another case, the Seventh Circuit applied the *Pickering-Connick* test to uphold an Indiana rule barring judicial candidates from (1) holding office or leadership positions in a political organization, and (2) making speeches on behalf of political groups.<sup>283</sup>

Notwithstanding the Seventh Circuit's decisions, it is unlikely that the Supreme Court, or many lower courts for that matter, will reject strict scrutiny in favor of the *Pickering-Connick* test when evaluating the constitutionality of restrictions on a judge's political speech.

First, most reviewing courts considering the issue have declined to follow the Seventh Circuit's lead and instead apply strict scrutiny to restrictions on the extrajudicial speech of judges.<sup>284</sup>

Second, the Seventh Circuit's reliance on *United States Civil Service Commission v. National Ass'n of Letter Carriers*<sup>285</sup> to justify application of the *Pickering-Connick* standard in judicial speech cases is simply misplaced. In *Letter Carriers*, the Supreme Court upheld the Hatch Act's prohibition against federal employees taking "an active part in political management or in political

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<sup>280</sup> *Siefert*, 608 F.3d at 983 ("[A] balancing approach, not strict scrutiny, is the appropriate method of evaluating the endorsement rule.").

<sup>281</sup> *Id.* at 985–87.

<sup>282</sup> *Id.* at 987 ("Were we to consider this [endorsement] provision under strict scrutiny, this underinclusiveness could be fatal to the rule's constitutionality.").

<sup>283</sup> *Bauer v. Shepard*, 620 F.3d 704, 710–11 (7th Cir. 2010).

<sup>284</sup> See *Wolfson v. Concannon*, 811 F.3d 1176, 1180 (9th Cir. 2016) (en banc); *Carey v. Wolnitzek*, 614 F.3d 189, 199–200 (6th Cir. 2010) (rejecting intermediate scrutiny as the proper test for restrictions on a judge's political speech); *Jenevein v. Willing*, 493 F.3d 551, 558 (5th Cir. 2007) (footnote omitted) ("We are persuaded that the preferable course ought not draw directly upon the *Pickering-Garcetti* line of cases for sorting the free speech rights of employees elected to state office."); see also Tyler J. Moss, Note, *Siefert v. Alexander: The Seventh Circuit Erroneously Found the Endorsement Clause Constitutional in an Effort to Confront the Ethical Dilemmas of Judicial Elections*, 45 CREIGHTON L. REV. 893, 913 (2012) (footnote omitted) (arguing that *Siefert* erred in applying the *Pickering* test to invalidate a judicial speech regulation).

<sup>285</sup> *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, AFL-CIO, 413 U.S. 548 (1973).

campaigns.”<sup>286</sup> In relying on *Letter Carriers*, the Seventh Circuit all but ignored that the Hatch Act expressly excludes from its terms, elected executive branch officials, namely the President and Vice President of the United States, and other specified individuals in policy-making positions.<sup>287</sup> Further, the Seventh Circuit overlooked the provisions of the Hatch Act permitting federal employees to engage in a wide range of political activity generally forbidden to judges. Protected activities under the Hatch Act include the right to: (1) privately and publicly express opinions on political subjects and candidates; (2) display political pictures, stickers, badges, or buttons; (3) join a political party or other political organization; (4) “[a]ttend a political convention, rally, fund-raising function or other political gathering”; and (5) contribute money to a political party or organization.<sup>288</sup>

Third, under *Pickering-Connick*, the government would merely need to show that a restriction on a judge’s speech furthers “the efficiency of the public services” performed by the courts.<sup>289</sup> That is a very low threshold since the “efficiency” of the judiciary is often defined in vague terms of public perceptions such as the appearance of impartiality, the appearance of justice, or the appearance of impropriety.<sup>290</sup> Arguably, the free-speech protection afforded incarcerated persons is more stringent. In order to restrict the speech of prison inmates, a restriction must be reasonably related to legitimate penological interests, in other words, the rule must “facilitate[] the running of the prison.”<sup>291</sup> In making that determination, a court must consider whether there is: (1) a valid, non-remote connection between a neutral prison regulation and a legitimate government interest; (2) an alternative means for inmates to exercise the right to free speech; and (3) no easy alternative restriction that fully

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<sup>286</sup> *Id.* at 575–79.

<sup>287</sup> *Id.* at 561.

<sup>288</sup> *Id.* at 577 n.21 (quoting 5 C.F.R. § 733).

<sup>289</sup> *Pickering v. Bd. of Ed.*, 391 U.S. 563, 568 (1968); *see also supra* notes 276–79 and accompanying text.

<sup>290</sup> MODEL CODE OF JUDICIAL CONDUCT r. 1.2 cmt. 1 (AM. BAR ASS’N 2007) (“Public confidence in the judiciary is eroded by improper conduct and conduct that creates an appearance of impropriety.”); *id.* cmt. 3 (“Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary.”); *see generally* Raymond J. McKoski, *The Overarching Legal Fiction: “Justice Must Satisfy the Appearance of Justice,”* 4 SAVANNAH L. REV. 51, 51–58 (2017) (reviewing the origin of the “appearance of justice” axiom).

<sup>291</sup> Rylee Sommers-Flanagan, *The Legal Story of Guantanamo North*, 19 U. PA. J. CONST. L. 1169, 1186 (2017) (quoting Sharon Dolovich, *Prison Litigation Reform Act: Forms of Deference in Prison Law*, 24 FED. SENT’G R. 245, 246 (2012)).

accommodates the prisoner's rights at an insignificant cost to valid penological interests.<sup>292</sup> The *Pickering-Connick* test includes no similar set of narrowing factors.

Fourth, selecting the *Pickering-Connick* test to govern the speech of judges running for election or retention would result in different standards to evaluate the propriety of a judicial candidate's campaign activities depending on whether the candidate held judicial office at the time of the campaign. Candidates serving as judges would be subject to campaign restrictions surviving the *Pickering-Connick* version of intermediate scrutiny while the activities of judicial candidates who were not public employees could be restricted only if the restriction survived the highest level of scrutiny. So, for instance, if a state had a rule prohibiting judicial candidates from endorsing other office seekers that rule might very well survive the *Pickering-Connick* test and fail strict scrutiny.<sup>293</sup> If so, a trial judge running for an appellate court vacancy could not endorse other candidates while a non-judge opponent could make such endorsements. "[A]nd it would be strange . . . if the line between government and private speech could be based solely on whether a candidate was already a judge."<sup>294</sup>

Finally, it is again worth noting that *White* and *Williams-Yulee* only speak to First Amendment issues in the context of candidates for elected judicial office. As such, the opinions have no direct application to the political statements or activities of federal judges. If the Court adopts the *Pickering-Connick* standard as the appropriate vehicle to evaluate the speech rights of judges because of their status as public employees, that test will apply to all state and federal judges regardless of selection method.

It is unlikely the Court will choose to apply anything less than the highest level of scrutiny to the content-based, political speech of judges because to apply a lesser standard "would threaten the exercise of rights so vital to the maintenance of democratic institutions."<sup>295</sup> A more likely prospect is that the Court will continue to loudly declare strict scrutiny as the appropriate standard for judicial speech restrictions and then quietly apply a watered-down version of the traditionally "fatal" standard to uphold speech restrictions in the name of protecting public confidence in

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<sup>292</sup> *Turner v. Safley*, 482 U.S. 78, 89–91 (1987).

<sup>293</sup> *Siefert v. Alexander*, 608 F.3d 974, 987 (7th Cir. 2010) (stating that the Wisconsin endorsement clause might fail strict scrutiny due to its underinclusiveness).

<sup>294</sup> *Parker v. Ala. Judicial Inquiry Comm'n*, 295 F. Supp. 3d 1292, 1299 (M.D. Ala. 2018).

<sup>295</sup> *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1665 (2015) (quoting *Schneider v. New Jersey*, 308 U.S. 147, 155 (1939)).

the judiciary.<sup>296</sup> The Court's apparent shift in the interpretation and application of strict scrutiny from *White* to *Williams-Yulee* may foreshadow this approach.

### 3. Strict Scrutiny Light

In *White*, the Court identified judicial impartiality as the government's interest in restricting a judicial candidate's speech.<sup>297</sup> "The Court warned, however, that speaking of the need for an impartial judiciary in general terms would not do; instead, it was necessary to pinpoint the precise meaning of the term 'impartial.'"<sup>298</sup> The precise nature of the government's interest was so important to the *White* Court that Justice Scalia's opinion meticulously examined three possible definitions of impartiality: (1) "the lack of bias for or against either party to the proceeding"; (2) a "lack of preconception in favor of or against a particular legal view"; and (3) "openmindedness."<sup>299</sup> The *White* majority found the first definition of impartiality, a lack of bias for or against a party, to be the root meaning of the state's interest in impartiality.<sup>300</sup> As a result, the Court struck down the "announce clause" of the Minnesota judicial code because it prohibited pronouncements on legal and political issues and had nothing to do with preventing bias for or against a particular litigant.<sup>301</sup> Thirteen years later, when it came to identifying the state's interest in *Williams-Yulee*, the Court ignored the narrowly defined interest of impartiality laboriously identified in *White*, and substituted an expansive, vague interest in "preserving public confidence in the integrity of the judiciary."<sup>302</sup> Reimagining the governmental interest in restricting judicial speech from the strict and narrow definition of impartiality in *White*, to *Williams-Yulee*'s fluid state interest in protecting perceptions of judicial integrity, provided the Court a broader state interest upon which to justify speech restrictions.<sup>303</sup>

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<sup>296</sup> See Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (stating that the highest level of scrutiny is "'strict' in theory and fatal in fact").

<sup>297</sup> See *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).

<sup>298</sup> *French v. Jones*, 876 F.3d 1228, 1232 (9th Cir. 2017) (citing *White*, 536 U.S. at 775 (2002)).

<sup>299</sup> *White*, 536 U.S. at 777–78.

<sup>300</sup> *Id.* at 775–76.

<sup>301</sup> See *id.* at 776–77, 781–82.

<sup>302</sup> *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1666 (2015).

<sup>303</sup> See Clay Hansen & J. Joshua Wheeler, *Free Speech, Elections, and Judicial Integrity in an Age of Exceptionalism*, 31 J.L. & POL. 457, 460–61 (2016).

In the context of judicial campaign speech, the *Williams-Yulee* decision also appears to have relaxed the second requirement of traditional strict scrutiny, namely, that the speech restriction be narrowly tailored to serve the compelling state interest.<sup>304</sup> The narrow tailoring requirement posed a special problem in upholding the campaign solicitation restriction in *Williams-Yulee* because the restriction prohibited a candidate from directly asking anyone for money.<sup>305</sup> Thus, under Florida's absolute rule, a judicial candidate could not ask his mother for a campaign donation.<sup>306</sup> At the same time, however, the Florida Code permitted a candidate to ask her mother for money to buy a house, pay a divorce lawyer's fee, gamble away, or for any purpose other than to support the candidate's campaign for judicial office.<sup>307</sup> Justifying its refusal to distinguish between personal solicitations that compromise public confidence in the judiciary, for instance soliciting lawyers who practice before the judge, and those restrictions that do not affect public trust, for instance soliciting parents,<sup>308</sup> the Court repeated its observation from *Burson v. Freeman*, that a speech restriction only need be narrowly tailored and not "perfectly tailored."<sup>309</sup> *Williams-Yulee* was first decision since *Burson* in which the Court found it necessary to deploy the "perfectly tailored" language to save a speech restriction. As a practical matter, perfect tailoring, and in many ways even narrow tailoring, may simply be impossible when the state's interest "is as intangible as public confidence in the integrity of the judiciary."<sup>310</sup> The intangibility of the interest identified in *Williams-Yulee* apparently permitted increased flexibility in the tailoring process. Some lower courts readily recognized the apparent shift from *White* to *Williams-Yulee* and eagerly interpreted the *Williams-Yulee* opinion as sanctioning a less ridged application of strict scrutiny to restrictions on the First Amendment rights of the judiciary.

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<sup>304</sup> *Williams-Yulee*, 135 U.S. at 1685 (Alito, J., dissenting).

<sup>305</sup> *Id.* at 1679 (Scalia, J., dissenting).

<sup>306</sup> *Id.* ("Williams-Yulee thus may not call up an old friend, a cousin, or even her parents to ask for a donation to her campaign.").

<sup>307</sup> See FLA. CODE OF JUDICIAL CONDUCT Canon 5D(5)(h) (2017) (permitting a judge to receive a "gift, bequest, favor or loan," if the donor's interests will not come before the judge). Judges are disqualified from their mothers' cases. *Id.* Canon 3E(1)(d).

<sup>308</sup> *Williams-Yulee*, 135 S. Ct. at 1671 (declining to "wade into this swamp").

<sup>309</sup> *Id.* (quoting *Burson v. Freeman*, 504 U.S. 191, 209 (1992)).

<sup>310</sup> *Id.* at 1671.

Especially blunt is the Ninth Circuit Court of Appeals' opinion in *French v. Jones*.<sup>311</sup> *French* considered Rule 4.1(A)(7) of the Montana Code of Judicial Conduct which provided that "a judge or judicial candidate shall not . . . seek, accept, or use endorsements from a political organization, or partisan or independent non-judicial office-holder or candidate."<sup>312</sup> The Ninth Circuit agreed with the district court that strict scrutiny governed the constitutionality of the challenged provision, but took pains to acknowledge and examine the "clear shift in favor of state regulation of judicial speech" from *White* to *Williams-Yulee*.<sup>313</sup> Writing for the court, Judge Bybee emphasized that *White* refused to accept the state's overall concern with an impartial judiciary as a compelling state interest.<sup>314</sup> Instead, *White* required a precise definition of impartiality against which to measure the government's speech restriction.<sup>315</sup> But, according to Judge Bybee, in *Williams-Yulee* the Court was more than willing to accept the state's general interest in protecting judicial integrity and public confidence in an impartial judiciary without any attempt to define impartiality or judicial integrity.<sup>316</sup> Dismissing the need to cabin the state's interest, which was absolutely essential in *White* thirteen years earlier, *Williams-Yulee* declared that "[t]he concept of public confidence in judicial integrity does not easily reduce to precise definition, nor does it lend itself to proof by documentary record."<sup>317</sup> Most significantly, the *French* court admitted that although arguments based on the underinclusiveness, overinclusiveness, and lack of narrow tailoring doctrines "might have been persuasive in the pre-*Williams-Yulee* era, they no longer carry the day."<sup>318</sup> Thus, *Williams-Yulee*'s "significant changes" to "[t]he strict First Amendment framework of *White*," permitted the Ninth Circuit to uphold Montana's restriction on

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<sup>311</sup> *French v. Jones*, 876 F.3d 1228 (9th Cir. 2017).

<sup>312</sup> *Id.* at 1230 (citing MONT. CODE OF JUDICIAL CONDUCT r. 4.1(A)(7) (2014)).

<sup>313</sup> *Id.* at 1231.

<sup>314</sup> *See id.* at 1232.

<sup>315</sup> *See id.*

<sup>316</sup> *Id.* at 1234 (quoting *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1666 (2015)) (finding that, in contrast to *White*, the Court in *Williams-Yulee* did not attempt to define the precise meaning of judicial integrity and impartiality).

<sup>317</sup> *Id.* at 1234 (quoting *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1667 (2015)).

<sup>318</sup> *Id.* at 1238.

judicial candidates seeking, accepting, or using political endorsements.<sup>319</sup> The axiom that “[f]ederal, state, and local governments have struggled to meet strict scrutiny when defending speech restrictions,”<sup>320</sup> may no longer be true at least when the speaker holds or seeks judicial office.

*French* overlooked that *Williams-Yulee* can be interpreted in a way that does not result in the wholesale abandonment of traditional strict scrutiny in evaluating the propriety of political speech by judges and judicial candidates.<sup>321</sup> As noted by the Court in *Williams-Yulee*, Canon 7 of the Florida judicial code *restricted* rather than *prohibited* “a narrow slice of speech.”<sup>322</sup> Although a candidate was prohibited from saying, “[p]lease give me money,” the candidate could assemble and direct a campaign committee to make the same request.<sup>323</sup> As a result, a candidate’s solicitation of contributions is not prohibited but merely restricted by requiring the candidate to transfer solicitation efforts to members of a campaign committee. But judicial code provisions limiting other types of political speech do not permit judges or candidates to appoint others as spokespersons.<sup>324</sup> For instance, many states that elect judges in non-partisan elections, prohibit judges from announcing political party support or affiliation. A candidate cannot circumvent this limitation by having a campaign committee announce the support or affiliation for the candidate. Thus, *Williams-Yulee* considered a *restriction* on campaign speech rather than a prohibition on campaign speech, while *White* dealt with a *prohibition* on speech.<sup>325</sup>

Moreover, while *White* upheld a judicial candidate’s right to announce, discuss, and debate political, legal, and other issues of the day, *Williams-Yulee* prohibited a

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<sup>319</sup> *Id.* at 1233; see also *Parker v. Ala. Judicial Inquiry Comm’n*, 295 F. Supp. 3d 1292, 1301 (M.D. Ala. 2018) (quoting *id.* at 1301) (“It is hard to deny that ‘the strict First Amendment framework of *White* underwent significant changes with the Supreme Court’s decision in *Williams-Yulee*.’”).

<sup>320</sup> *Wolfson v. Concannon*, 811 F.3d 1176, 1181 (9th Cir. 2016) (en banc).

<sup>321</sup> *Williams-Yulee*, 135 S. Ct. at 1670.

<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> See MODEL CODE OF JUDICIAL CONDUCT r. 4.1(B) (AM. BAR ASS’N 2007) (requiring judges and judicial candidates to “take reasonable measures to ensure that other persons do not undertake, on behalf of the judge or judicial candidate,” prohibited activities).

<sup>325</sup> See Aimee Priya Ghosh, Comment, *Disrobing Judicial Campaign Contributions: A Case for Using the Buckley Framework to Analyze the Constitutionality of Judicial Solicitation Bans*, 61 AM. U. L. REV. 125, 151–52 (2011) (“[S]olicitation bans do not limit judges and judicial candidates’ speech because they can still ‘ask’ for money via campaign committees.”).

demand or request, namely, “give me money,” that conveys no substantive message. Chief Justice Roberts’s noted the distinction in *Williams-Yulee*:

Canon 7C(1) leaves judicial candidates free to discuss any issue with any person at any time. Candidates can write letters, give speeches, and put up billboards. They can contact potential supporters in person, on the phone, or online. They can promote their campaigns on radio, television, or other media. They cannot say, “Please give me money.”<sup>326</sup>

Not only do contribution requests provide little help to the voter in choosing the best candidate, but soliciting money also creates corruption concerns not present in the political speech at issue in *White*.<sup>327</sup> Asking a lawyer or possible future litigant for money simply involves different dangers than taking a position on a legal or political issue, declaring a party affiliation, or attending a political event. While voters greatly distrust the influence of campaign contributions on impartiality,<sup>328</sup> there is little evidence that voters distrust a judge who expresses personal views, declares a party affiliation, or attends political gatherings.<sup>329</sup>

Another significant difference in the ethical provisions before the Court in *White* and *Williams-Yulee* may help account for the Court’s seemingly different applications of strict scrutiny. The anti-solicitation provision at issue in *Williams-Yulee* encompassed both public and private speech.<sup>330</sup> Other political speech restrictions prohibit only public pronouncements. Rule 4.1 of the 2007 ABA Model Code, for example, prohibits a judge or judicial candidate from publicly endorsing or opposing candidates for public office.<sup>331</sup> Neither Rule 4.1 nor any other provision

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<sup>326</sup> *Williams-Yulee*, 135 S. Ct. at 1670.

<sup>327</sup> *Cf.* Fed. Elec. Comm’n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 260 (1986) (noting “the historical role of contributions in the corruption of the electoral process”).

<sup>328</sup> See Raymond J. McKoski, *Living with Judicial Elections*, 39 U. ARK. LITTLE ROCK L. REV. 491, 508 n.124 (2017) (citing surveys indicating that a majority of the public believes that campaign contributions affect a judge’s rulings).

<sup>329</sup> This may be because a majority Americans self-identify as Republicans or Democrats. Forty-three percent identify as Independents with 77% of Independents stating that they “lean toward” one of the major parties. See Gallup, *Party Affiliation*, <https://news.gallup.com/poll/15370/party-affiliation.aspx>.

<sup>330</sup> *Williams-Yulee*, 135 S. Ct. at 1668–69.

<sup>331</sup> MODEL CODE OF JUDICIAL CONDUCT r. 4.1(A)(3) (AM. BAR ASS’N 2007). Rule 4.2(B)(3) permits judicial candidates to “publicly endorse or oppose candidates for the same judicial office for which he or she is running.” *Id.* at r. 4.2(B)(3).

of the 2007 ABA Model Code prohibits private endorsements or private statements of opposition to a candidate.<sup>332</sup> Similarly, Rule 4.1(A)(6) prohibits a judge or judicial candidate from publicly identifying as a candidate of a political organization, but does not prohibit private self-identification.<sup>333</sup>

The private statement versus public statement dichotomy illustrated by Rule 4.1 of the 2007 ABA Code contradicts the foundational concept that every litigant starts out on equal footing before a judge.<sup>334</sup> Under the 2007 ABA Code, a judge or judicial candidate is free to make private statements that he, for instance, is the candidate of the Republican Party or the Democratic Socialist Party, so long as the statement remains secret. Likewise, a judge or candidate may privately declare that she emphatically supports or opposes President Trump so long as the public does not find out about the private statement. Not only is the “ignorance is bliss” theory of judicial ethics problematic,<sup>335</sup> but the private versus public distinction gives those with private or semi-private access to a judge an advantage over less connected persons. Those most likely to be privy to the judge’s political predilections are friends and acquaintances of the judge who often are lawyers. During conversations at informal lunches, bar association social events, seminars, committee meetings, firm holiday parties, and other gatherings insiders become aware of a judge’s party affiliation, backing, and the judge’s opinions on candidates for office. It is only those outside of the bar association and outside of the judge’s circle of friends and acquaintances who remain uninformed because the judge cannot express publicly what he tells a select few privately. This is especially unfair to pro se litigants, most

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<sup>332</sup> See *Yost v. Stout*, 06-4122-JAR, 2008 WL 8906379, at \*5 (D. Kan. Nov. 16, 2008) (stating that the Kansas endorsement clause, which is identical to the endorsement clause of the 2007 ABA Code, allows for private candidate endorsements); see also MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(1)(b) cmt. (AM. BAR ASS’N 1990) (“[Canon] 5(A)(1)(b) does not prohibit a judge or judicial candidate from privately expressing his or her views on judicial candidates or other candidates for public office.”); Tenn. Judicial Ethics Comm., Op. 98-1 (1998) (advising that a judge may send a letter on private stationery to friends and acquaintances endorsing a judicial candidate); N.M. Advisory Comm. on the Code of Judicial Conduct, Op. 14-08 (2014) (noting that the New Mexico Code of Judicial Conduct permits private endorsements); Ethics Comm. of the Ky. Judiciary, Op. JE-45 (2011) (“The Kentucky Supreme Court, in an informal interpretation, has stated that a sitting judge who is not running for election may privately support a candidate.”).

<sup>333</sup> MODEL CODE OF JUDICIAL CONDUCT r. 4.1(A)(6) (AM. BAR ASS’N 2007).

<sup>334</sup> *Id.*

<sup>335</sup> *Siefert v. Alexander*, 597 F. Supp. 2d 860, 873 (W.D. Wis. 2009), *aff’d in part rev’d in part*, 608 F.3d 974 (7th Cir. 2010), *cert. denied*, 563 U.S. 983 (2011); see also *Miss. Comm’n on Judicial Performance v. Wilkerson*, 876 So. 2d 1006, 1015 (Miss. 2004) (“We find no compelling state interest in requiring a partial judge to keep quiet about his prejudice so that he or she will appear impartial.”).

of whom have no access to the judge outside the courtroom. Thus, private conveyance of otherwise prohibited information defeats transparency which is at the “core of the judicial processes.”<sup>336</sup>

*Williams-Yulee* should not be interpreted as a wholesale redefinition of strict scrutiny when applied to the speech of judicial candidates. *Williams-Yulee* is better viewed as a narrow application of strict scrutiny to the speech *restriction*, “give me money,” which conveys no substantive political, social, legal, economic, or religious message, and which applies to both public and private solicitations. Interpreted in this fashion, traditional strict scrutiny, applied in *White*, will control the constitutionality of other rules *prohibiting* content-based communicative messages made by judges and judicial candidates.

#### 4. Problematic ABA Model Rules Governing Political Activities

Rules found in judicial conduct codes limiting judges and judicial candidates’ political activity may have difficulty surviving a review by the Supreme Court. And that is true regardless of whether the Court applies the *White* formulation of strict scrutiny or the *Williams-Yulee* version of strict scrutiny suggested by the Ninth Circuit in *French*. Two examples will illustrate this point. Rule 4.1(A)(3) of the 2007 ABA Code prohibiting public statements of support or opposition to candidates will be considered first, followed by a review of Rule 4.1(A)(6), which prohibits a judicial candidate from publicly identifying as a candidate of a political organization.

##### a. Publicly Endorsing and Opposing Candidates for Public Office

One prohibition likely to fall under strict scrutiny is the ABA’s 2007 rule prohibiting a judge or judicial candidate from publicly endorsing or opposing another candidate for public office.<sup>337</sup> The 2007 ABA Code creates an exception to this general rule by permitting judges and other candidates for elective judicial office to publicly endorse or oppose candidates simultaneously running “for the same judicial

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<sup>336</sup> Peter A. Winn, *Judicial Information Management in an Electronic Age: Old Standards, New Challenges*, 3 FED. CTS. L. REV. 135, 138 (2009); see also Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality When Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications*, 17 GEO. J. LEGAL ETHICS 423, 437 (2004) (“[T]he needs of transparency align with the needs of justice itself.”).

<sup>337</sup> MODEL CODE OF JUDICIAL CONDUCT r. 4.1(A)(3) (AM. BAR ASS’N 2007).

office.”<sup>338</sup> So, for example, a trial judge running for a vacancy on the state appellate court could publicly endorse or oppose a candidate for another vacancy on the same court to be filled in the same election. As framed by the ABA, the compelling state interest supporting the general prohibition against judges publicly endorsing or opposing non-judicial candidates is the interest in “[preventing judges] from abusing the prestige of judicial office to advance the interests of others.”<sup>339</sup>

While in many contexts, protecting against the misuse of judicial power and prestige is a compelling interest,<sup>340</sup> it does not justify restricting a judge’s speech endorsing or opposing candidates. First, the 2007 ABA Code permits speech endorsing and opposing other judicial candidates running in the same election as the endorsing judge.<sup>341</sup> But an endorsement of another judicial candidate is cloaked in the same judicial prestige as the endorsement of a candidate for nonjudicial office. In the eyes of the voter, a judge’s endorsement of another judge or judicial candidate probably carries more weight and therefore is a greater misuse of prestige than the judge’s endorsement of a candidate for legislative or executive office.

Most importantly, the ABA’s prohibition bars only public statements of support or opposition; judges remain free to privately endorse or oppose any and all candidates for public office.<sup>342</sup> Putting aside the problem of distinguishing private from public endorsements, and the ease with which “private endorsements” can become public,<sup>343</sup> why did the ABA conclude that only public endorsements invoke judicial prestige? Indeed, a private, one-on-one conversation in which a judge endorses a candidate would seem to be more coercive than the judge’s name simply appearing on a list of supporters published in a newspaper. Permitting a judge to privately support or oppose a candidate might avoid the misuse of prestige if the

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<sup>338</sup> *Id.* at r. 4.2(B)(3).

<sup>339</sup> *Id.* at r. 4.1(A) cmt. 4.

<sup>340</sup> See MCKOSKI, *supra* note 248, at 48–50.

<sup>341</sup> MODEL CODE OF JUDICIAL CONDUCT r. 4.2(B)(3) (AM. BAR ASS’N 2007).

<sup>342</sup> *Yost v. Stout*, 06-4122-JAR, 2008 WL 8906379, \*6 (D. Kan. Nov. 16, 2008) (“The endorsement clause, while limiting the judge’s or judicial candidate’s ability to publicly endorse other candidates for political office, still allows for private endorsements . . . .”); ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 505 (AM. BAR ASS’N 2016) (“[The Model Code] does not prohibit a judge or judicial candidate from privately expressing his or her views on judicial candidates or other candidates for public office.”).

<sup>343</sup> N.M. Advisory Comm. on the Code of Judicial Conduct, Op. 14-08 (2014) (“The Committee agrees that the distinction between a public and private endorsement is not always a clear one.”); Ethics Comm. of the Ky. Judiciary, Op. JE-45 (2011).

recipient of the private message were limited to the judge's relatives.<sup>344</sup> But the 2007 ABA Model Code contains no such limitation.

In *Siefert v. Alexander*, the Seventh Circuit Court of Appeals confronted the argument that the misuse of judicial prestige did not support, much less compel, Wisconsin's rule limiting a judge's ability to support or oppose candidates.<sup>345</sup> Wisconsin's endorsement clause, while patterned after the 2007 ABA Model Rule,<sup>346</sup> only prohibited endorsing or opposing a "partisan candidate or platform."<sup>347</sup> A judge or judicial candidate was free to endorse and speak on behalf of nonpartisan candidates and platforms. The Seventh Circuit upheld this limitation but obviously could not base its decision on the misuse of prestige because the use of judicial prestige is present to the same extent whether the endorsed or opposed candidate is running in a partisan or nonpartisan election. So, after paying lip service to the abuse of prestige rationale,<sup>348</sup> the court found that impartiality, in fact and in appearance, was the true state interest upon which the restriction was based.<sup>349</sup> But the impartiality rationale suffers from its own shortcomings. As defined by the Supreme Court in *Republican Party of Minnesota v. White*, the core meaning of impartiality is "the lack of bias for or against either party to the proceeding."<sup>350</sup> Thus, a judge's endorsement of a candidate will create an impartiality question only if the endorsed candidate appears as a party before the judge. If the candidate never appears before the judge, obviously there is no impartiality concern.

Nevertheless, the *Siefert* court worried that if a Milwaukee County judge, for instance, endorsed a successful candidate for Milwaukee County District Attorney, or Milwaukee County Sheriff, that employees of the District Attorney, or Sheriff,

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<sup>344</sup> The misuse of judicial prestige is of little concern when a judge deals with close relatives. *See* Ill. Judicial Ethics Comm., Op. 16-1 (2016) ("[T]he Committee concludes that the ordinary reasonable observer would not find a misuse of judicial prestige when a judge privately recommends matrimonial lawyers to the judge's niece."); N.Y. Advisory Comm. on Judicial Ethics, Op. 15-171 (2015) ("Indeed, if anyone is almost perfectly immune from experiencing any pressure or coercion due to a judge's judicial status, it is surely the judge's closest family members.").

<sup>345</sup> *Siefert v. Alexander*, 608 F.3d 974, 983 (7th Cir. 2010).

<sup>346</sup> *Id.*

<sup>347</sup> *Id.*

<sup>348</sup> *Id.* at 984.

<sup>349</sup> *Id.* at 984–85.

<sup>350</sup> *Republican Party of Minn. v. White*, 536 U.S. 765, 775 (2002).

would likely appear before the judge thereby creating impartiality concerns.<sup>351</sup> Setting aside for the moment that *White* defined impartiality in terms of parties and not in terms of lawyers or witnesses,<sup>352</sup> *Siefert* ignored the possibility that a judge in Milwaukee County might wish to endorse a sheriff or district attorney candidate in one of the other seventy-one counties in Wisconsin. A Milwaukee County judge's endorsement of a candidate for Wausau County District Attorney would not create impartiality concerns since the Wausau county prosecutor does not prosecute cases in Milwaukee County. The compelling nature of the interest in protecting impartiality and its appearance evaporates in situations where the endorsed party is unlikely to appear before the endorsing judge. *Siefert* avoided these and other difficulties by applying *Pickering-Connick* rather than strict scrutiny to the challenged provision.<sup>353</sup> Indeed, the court admitted that the endorsement rule might not stand under the more rigorous test.<sup>354</sup>

Neither the state interest in protecting against the misuse of judicial prestige, nor the state interest in ensuring impartiality, support a blanket rule prohibiting endorsement of, or opposition to, nonjudicial candidates. Further, the rule cannot be considered narrowly tailored without a provision limiting its application to those who are likely to appear before the judge.

b. Identifying as a Candidate of a Political Organization

Rule 4.1(A)(6) of the 2007 ABA Code prohibits judges and judicial candidates from identifying themselves as candidates of political organizations.<sup>355</sup> Rule

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<sup>351</sup> See *Siefert*, 608 F.3d at 986 (“The [Wisconsin Disciplinary] Commission justifies its interest in the [endorsement] ban based on the danger that parties whom the judge has endorsed may appear in the judge’s court.”).

<sup>352</sup> *White*, 536 U.S. at 775.

<sup>353</sup> The *Siefert* court faced another obstacle in finding the Wisconsin endorsement prohibition constitutional. How could the court find that endorsing a non-partisan candidate for mayor, for example, would not impact judicial impartiality while endorsing a candidate running as a Republican or Democrat would adversely impact impartiality? The Seventh Circuit’s answer was simple, if not satisfactory. According to the court, an endorsement in a nonpartisan election “connotes the quality of one candidate among several. In a partisan election, an endorsement can still mean an assessment of the quality of the endorsed candidate, but it also carries implications that the endorsement is given because of party affiliation . . . .” *Siefert*, 608 F.3d at 987.

<sup>354</sup> *Id.* at 987 (“Were we to consider this provision under strict scrutiny, this underinclusiveness could be fatal to the rule’s constitutionality.”).

<sup>355</sup> MODEL CODE OF JUDICIAL CONDUCT r. 4.1(A)(6) (AM. BAR ASS’N 2007).

4.2(C)(1) exempts candidates in partisan public elections from this prohibition for a discrete period immediately preceding the election.<sup>356</sup> Each state that adopts ABA Rule 4.2(C)(1) sets a period in which party affiliation may be disclosed. Indiana, for example, permits a candidate in a partisan judicial race to “identify himself or herself as a candidate of a political organization” not earlier than one year before the election.<sup>357</sup> Consistent with the ABA Model Code, Indiana flatly prohibits candidates in nonpartisan elections from identifying as a political party candidate at any time.<sup>358</sup>

The prohibition is simply an exercise in futility. The rule does not and cannot prevent political organizations from announcing that a judicial candidate is the organization’s candidate. Nor does the rule prohibit a judicial candidate from identifying herself as a political party’s candidate during the entire campaign. Instead, it allows the announcement of party affiliation as the election gets close. And as noted previously, Rule 4.1(A)(6) expressly limits the prohibition to public announcements.<sup>359</sup> Candidates in partisan as well as nonpartisan elections are free at any time to privately disclose backing by a political organization.<sup>360</sup>

In Florida, the rule has taken on a life of its own. Florida judges are required to “avoid conduct which suggests, or appears to suggest, the candidate’s affiliation with, or support of, a political party.”<sup>361</sup> Under this rule, the state supreme court disciplined a judge for identifying the party affiliation of the governor who appointed the judge’s opponent<sup>362</sup> and disciplined another judge for identifying his party affiliation when asked at a campaign stop.<sup>363</sup> The Florida Judicial Ethics Advisory Committee has interpreted the prohibition to preclude a judge from: (1) privately disclosing a party affiliation if asked; (2) listing “extensive” partisan activities in response to a candidate questionnaire; (3) wearing jewelry if the “item would suggest

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<sup>356</sup> *Id.* at r. 4.2(C)(1).

<sup>357</sup> IND. CODE OF JUDICIAL CONDUCT r. 4.2(B)(6) (2018).

<sup>358</sup> *Id.* at r. 4.2(A)(C).

<sup>359</sup> MODEL CODE OF JUDICIAL CONDUCT r. 4.1(A)(6) (AM. BAR ASS’N 2007).

<sup>360</sup> *See* Nev. Standing Comm. on Judicial Ethics and Election Practices, Op. JE98-1 (1998) (explaining that candidates may privately, but not publicly, identify as members of a political party).

<sup>361</sup> Fla. Judicial Ethics Advisory Comm., Op. 12–13 (2012).

<sup>362</sup> *In re Alley*, 699 So. 2d 1369, 1369–70 (Fla. 1997) (reprimanding a judge in part for noting on a campaign mailer the party affiliation of the governor who appointed her opponent).

<sup>363</sup> *In re Angel*, 867 So. 2d 379, 382 n.3 (Fla. 2004).

or even appear to suggest that a political party supported the candidate;<sup>364</sup> and (4) providing campaign literature to partisan political groups.<sup>365</sup>

Canon 5(A)(2) of the Kentucky Code of Judicial Conduct attempted to finesse the issue of private versus public disclosure of party affiliation by “prohibit[ing] judges and candidates from disclosing their party affiliation ‘in any form of advertising, or when speaking to a gathering,’ save in answer to a question by a voter in one-on-one or ‘very small private informal’ settings.”<sup>366</sup> The Sixth Circuit Court of Appeals found several constitutional deficiencies in the Canon including that it violated the *White* holding by “prohibit[ing] candidates from announcing their position on one issue of potential importance to voters: the party they support.”<sup>367</sup> The court also noted that the rule did little to advance the state’s interest in avoiding party influence because party affiliation could be disclosed as long as the candidate did not bring up the topic and, once disclosed, could be broadcast to the world by the press.<sup>368</sup>

After the Sixth Circuit invalidated Kentucky’s limitation on the disclosure of party affiliation, Kentucky rewrote (and renumbered) Canon 5(A)(2) to prohibit judges and judicial candidates from “campaign[ing] as a member of a political organization.”<sup>369</sup> The amended Canon fared no better than its predecessor. The Sixth Circuit again struck the provision as vague and overbroad.<sup>370</sup> Party affiliation restrictions have also fallen under the scrutiny of the Seventh and Eighth Circuit Courts of Appeals.<sup>371</sup>

Courts invalidating political party affiliation bans have done so on the basis that the restrictions are not narrowly tailored to further a compelling state interest.<sup>372</sup> But the existence of a compelling state interest is also questionable considering that

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<sup>364</sup> Fla. Judicial Ethics Advisory Comm., Op. 12–13 (2012).

<sup>365</sup> Fla. Judicial Ethics Advisory Comm., Op. 2018-12 (2018).

<sup>366</sup> *Carey v. Wolnitzek*, 614 F.3d 189, 201 (6th Cir. 2010) (quoting KY. CODE OF JUDICIAL CONDUCT, Canon 5(A)(2)).

<sup>367</sup> *Id.*

<sup>368</sup> *Id.* at 202.

<sup>369</sup> KY. CODE OF JUDICIAL CONDUCT Canon 5(A)(1)(a) (2016).

<sup>370</sup> *Winter v. Wolnitzek*, 834 F.3d 681, 688 (6th Cir. 2016).

<sup>371</sup> *See Siefert v. Alexander*, 608 F.3d 974 (7th Cir. 2010); *Republican Party of Minn. v. White*, 416 F.3d 738 (8th Cir. 2005) (en banc).

<sup>372</sup> *See Siefert*, 608 F.3d at 974.

“states with nominally nonpartisan judicial elections feature judicial races with extensive party involvement.”<sup>373</sup> In 2008, Charlie Hall of the Brennan Center for Justice described one such state’s nonpartisan judicial election: “Wisconsin now has essentially partisan elections with this (nonpartisan) fig leaf attached.”<sup>374</sup> After the election of a state supreme court justice in 2018, the *Milwaukee Journal & Sentinel* described how “the democrats finally found a winning formula for the Supreme Court” by providing their candidate financial assistance, labor union assistance, and endorsements from high profile democrats like Eric Holder.<sup>375</sup> The Republican challenger was endorsed by Governor Scott Walker and funded in part by the state Republican Party.<sup>376</sup> The *Washington Post* described the 2018 Wisconsin Supreme Court judicial election as follows:

Wisconsin Democrats declared victory on Tuesday night after Milwaukee Judge Rebecca Dallet won a bitter race [against Judge Michael Srenock] for a seat on the state’s Supreme Court.

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Both candidates and their supporters turned the race, which is technically nonpartisan, into a political referendum. Dallet ran early ads that accused President Trump of “attack[ing] our civil rights and our values,” while Srenock portrayed himself as a “rule of law” conservative endorsed by the National Rifle Association. By election day, more than \$2.5 million had been spent on TV ads.<sup>377</sup>

Republican and Democratic party members in nonpartisan election states have no problem determining which judicial candidates are favored by their respective

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<sup>373</sup> Michael S. Kang & Joanna M. Shepherd, *The Partisan Foundations of Judicial Campaign Finance*, 86 S. CAL. L. REV. 1239, 1256 (2013).

<sup>374</sup> *Id.* (quoting Dee J. Hall, *Judicial Races More Partisan, Expert Said the State’s High Court Elections Are Nonpartisan in Name Only*, WIS. ST. J., Nov. 18, 2008, at A1).

<sup>375</sup> Daniel Bice, *Walker Among State’s Losers in Five Election Takeaways*, MILWAUKEE J. SENTINEL (Apr. 4, 2018), <https://www.jsonline.com/story/news/2018/04/04/bice-gov-scott-walker-big-loser-among-takeaways-wisconsins-spring-election/484813002/>.

<sup>376</sup> *Id.*

<sup>377</sup> David Weigel, *Democrat Wins a Bitter, Costly Race for Wisconsin Supreme Court*, WASH. POST (Apr. 4, 2018), [https://www.washingtonpost.com/powerpost/wisconsin-judicial-race-becomes-costly-partisan-contest/2018/04/03/5a2adf66-376e-11e8-8fd2-49fe3c675a89\\_story.html?utm\\_term=.1d471651e8c7](https://www.washingtonpost.com/powerpost/wisconsin-judicial-race-becomes-costly-partisan-contest/2018/04/03/5a2adf66-376e-11e8-8fd2-49fe3c675a89_story.html?utm_term=.1d471651e8c7).

parties.<sup>378</sup> That is so, in part, because elected officials and party leaders routinely identify their choices for judicial office and fund their campaigns.<sup>379</sup> Little seems to be gained by having judicial candidates decline to confirm what the public already knows.

*B. Expanding the Political Activities of Judges and Judicial Candidates: The Role of Political Self-Defense*

If applied in its traditional sense, strict scrutiny will be the death-knell for many limitations on a judge's political activity. The vast majority of content-based restrictions on speech simply cannot survive the highest level of scrutiny.<sup>380</sup> In the context of rules limiting judicial campaign speech, this result is illustrated by the numerous speech restrictions that fell when lower courts applied the traditional strict scrutiny test announced in *White*.<sup>381</sup> If the *White* strict scrutiny test prevails, the political activities of judges will increase simply because of the demise of many current restrictions on judges. But even assuming the more forgiving version of strict scrutiny that the Ninth Circuit Court of Appeals found in *Williams-Yulee* carries the day, resulting in courts upholding speech restrictions, the political activity of judges will not decrease.<sup>382</sup> That is a foregone conclusion since "[t]oday, thirty-nine states still elect their trial or appellate judges such that roughly nine out of ten state judges face election to keep their jobs."<sup>383</sup> And campaigning for judicial office spawns a lot of fund-raising, endorsement-seeking, speechmaking, brochure distribution, baby-

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<sup>378</sup> Sid Salter, Opinion, *Noble Intent Defies Reality of Actual Voter Behavior*, MERIDIAN STAR (Meridian, Miss.) (Jan. 18, 2017), [http://www.meridianstar.com/opinion/columns/noble-intent-defies-reality-of-actual-voter-behavior/article\\_801921c1-dc86-5cd8-a728-04a3b20b034d.html](http://www.meridianstar.com/opinion/columns/noble-intent-defies-reality-of-actual-voter-behavior/article_801921c1-dc86-5cd8-a728-04a3b20b034d.html) ("Folks who tend to vote Republican have found a way to learn which judicial candidates are favored by Republicans, and the same has been true for Democrat voters . . . [P]artisans on both sides regularly ignored the law by identifying their choices and funding their campaigns.").

<sup>379</sup> *Id.*

<sup>380</sup> See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 815 (2006) (finding 78% of challenged laws restricting content-based speech failed strict scrutiny).

<sup>381</sup> *French v. Jones*, 876 F.3d 1228, 1232 (9th Cir. 2017) ("In the aftermath of *White I*, few regulations of judicial-campaign speech withstood strict scrutiny."); see, e.g., *Republican Party of Minn. v. White*, 416 F.3d 738, 748–49, 755–56 (8th Cir. 2005) (en banc) (relying on the Court's decision in *White* to invalidate restrictions on attending political events, endorsing candidates, and announcing a party affiliation); *Weaver v. Bonner*, 309 F.3d 1312, 1319–23 (11th Cir. 2002) (declaring unconstitutional the prohibition against the personal solicitation of campaign funds).

<sup>382</sup> See *supra* Part II.A.3.

<sup>383</sup> Kang & Shepherd, *supra* note 1, at 932.

kissing, event attendance, pandering to voters, and attack ads. But more importantly, a factor unrelated to the need for most judges to campaign and unrelated to the constitutionality of speech restrictions will likely cause an increase in the political engagement of judges. That factor is the need for judges to defend themselves and the judiciary from political attacks.

### 1. Political Self-Defense

Judges are experts in politics. Many have a history of political activity before assuming the bench and many have “strong political connections.”<sup>384</sup> Simply put, “[t]he reality is that judges are frequently politically inclined.”<sup>385</sup> The few judges without pre-bench experience in the political process obtain a quick education if they are among the 90% of state judges who must campaign for election or retention.<sup>386</sup> Because of their political and governmental experience, judges are acutely aware that the principal threats to the independence, impartiality, and integrity of the judiciary spring from political sources. Historically, judges have been reluctant to fight back against such attacks.<sup>387</sup> And even when they do fight back, their responses often consists of a milquetoast retort about judicial independence.<sup>388</sup>

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<sup>384</sup> *Hulihan v. Reg'l Transp. Comm'n*, No. 2:09-cv-01096-ECR-RJJ, 2011 WL 5546286, at \*2 (D. Nev. Nov. 14, 2011); *see Sataki v. Broadcasting Bd. of Governors*, 733 F. Supp. 2d 16, 21 (D.C. Cir. 2010) (“Judges generally have political backgrounds to one degree or another . . .”) (quoting *MacDraw, Inc. v. CIT Grp. Equip. Fin., Inc.*, 138 F.3d 33, 38 (2d Cir. 1998)).

<sup>385</sup> Talbot D'Alemberte, *Searching for the Limits of Judicial Free Speech*, 61 TUL. L. REV. 611, 652 (1987).

<sup>386</sup> John F. Kowal, *Judicial Selection for the 21st Century*, BRENNAN CTR. FOR JUST. (June 6, 2016), <https://www.brennancenter.org/publication/judicial-selection-21st-century> (“Eighty-seven percent of state court judges face the voters in elections of one sort or another.”).

<sup>387</sup> *See* John Freeman, *Dealing with Judges' Critics*, S.C. LAW. (Mar. 2008), at 16, 17 (“In the old days . . . neither judges nor the organized Bar were expected to raise their voices in those rare cases when judges came under attack for their decision making.”).

<sup>388</sup> A good example is the Pennsylvania Chief Justice's response to the legislature's threat to impeach four state supreme court justices for declaring the state's congressional map unconstitutional and imposing a new, non-gerrymandered map. The chief justice's response consisted of the following two-sentence statement posted on the court's website:

As Chief Justice of Pennsylvania, I am very concerned by the reported filing of impeachment resolutions against Justices of the Supreme Court of Pennsylvania related to the Court's decision about congressional redistricting. Threats of impeachment directed against Justices because of their decision in a particular case are an attack upon an independent judiciary, which is an essential component of our constitutional plan of government.

But judges are beginning to learn that frequently nothing short of a political response is required to effectively combat threats from partisan forces. As a result, the drafters of judicial codes may find no alternative but to relax restrictions on the political activity of judges. Just because states can limit political activity of judges consistent with the Constitution does not mean those restrictions are required by the Constitution. Political necessity, not strict scrutiny, may be the catalyst for loosening the reins on off-bench judicial speech. The movement has begun.

## 2. Circling the Wagons in California

California provides a timely example of the judiciary's collective move toward self-protection through an expanded role in the political process. The California Code of Judicial Ethics provides judges greater leeway to engage in political activities than the judicial codes of most other jurisdictions. Contrary to the 2007 ABA Model Code, California judges may personally solicit campaign funds for their own campaigns.<sup>389</sup> They may also publicly endorse or oppose other candidates for judicial office regardless of whether the endorsing judge is on the ballot in the same election.<sup>390</sup> California judges may also attend political functions and contribute monetarily to political parties and candidates for public office.<sup>391</sup>

At the behest of the California Supreme Court Advisory Committee on the Code of Judicial Ethics,<sup>392</sup> the California Supreme Court recently amended its judicial code to further expand the ability of judges to aid judicial candidates.<sup>393</sup> The amendment to Canon 5B(4) of the California Code authorizes judges to “solicit

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*PA Supreme Court Chief Justice Reacts to Threats of Impeachment*, UNIFIED JUD. SYS. PA. (Mar. 22, 2018), <http://www.pacourts.us/news-and-statistics/news?Article=961>; see also Stephen J. Fortunato, Jr., *On a Judge's Duty to Speak Extrajudicially: Rethinking the Strategy of Silence*, 12 GEO. J. LEGAL ETHICS 679, 714 (1999) (“For at least a half century, the conventional wisdom regarding the expected behavior of a judge who is attacked in the media, even falsely and maliciously, is that the judge is to remain silent.”).

<sup>389</sup> CAL. CODE OF JUDICIAL ETHICS Canon 5A(3), 5A cmt. (2018).

<sup>390</sup> *Id.* Canon 5A(2), 5A cmt. The 2007 ABA Model Code only permits a judge to publicly endorse or oppose candidates for the same judicial office for which the judge is running. MODEL CODE OF JUDICIAL CONDUCT r. 4.2(B)(3) (AM. BAR ASS'N 2007).

<sup>391</sup> CAL. CODE OF JUDICIAL ETHICS Canon 5A(3) (2018). Canon 5A(3) limits the amount of a judge's contributions to candidates for nonjudicial office. *Id.*

<sup>392</sup> Cal. Supreme Court Advisory Comm. on the Code of Judicial Ethics, *Invitation to Comment* SP 18-08, <http://www.courts.ca.gov/documents/SP18-08.pdf> (proposed Mar. 20, 2018) (to be effective Aug. 1, 2018) (proposing amendments to Canon 5 of the California Code of Judicial Conduct) [hereinafter *Invitation to Comment*].

<sup>393</sup> CAL. CODE OF JUDICIAL ETHICS Canon 5B(4) (amended Oct. 10, 2018).

campaign contributions or endorsements for their own campaigns *or for other judges and attorneys who are candidates for judicial office.*<sup>394</sup> The amendment permits judges to solicit contributions and endorsements “from anyone,” except subordinate judicial officers and court staff.<sup>395</sup> The importance of this new provision cannot be overstated because when a judge seeks funding or endorsements for present or future colleagues, jealously guarded judicial prestige is necessarily invoked. Acknowledging this fact, amended Canon 5B(4) only proscribes the use of judicial prestige in seeking endorsements and funds when used “in manner that would reasonably be perceived as cohesive.”<sup>396</sup> In other words, the California Supreme Court considers the political threat to judicial impartiality and independence severe enough to allow the use of judicial prestige to level the partisan playing field.

What compelled the California Supreme Court Advisory Committee on the Code of Judicial Ethics to seek explicit permission for judges to hit the fund-raising and endorsement trail on behalf of other judicial candidates? The Advisory Committee Report accompanying the proposed amendment states that a greater fund-raising role for judges is essential to combat interest groups commandeering the judicial election process and thereby threatening the independence and impartiality of the courts.<sup>397</sup> According to the Committee:

Contested elections are very expensive and will become even more expensive in the future. Indeed, there is a national trend for well-funded interest groups to politicize state judicial elections and to back certain judicial candidates, thus challenging the independence of the judiciary. In view of these realities and to preserve the independence of the judiciary, the committee concluded that judges should not be hamstrung in their efforts to raise money and solicit endorsements for judicial campaigns, including raising campaign funds and seeking endorsements for other judicial candidates.<sup>398</sup>

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<sup>394</sup> *Id.* (emphasis added).

<sup>395</sup> *Id.*

<sup>396</sup> *Id.* The Commentary to amended Canon 5B(4) cautions judges that soliciting endorsements or contributions for a lawyer seeking judicial office may require disclosure or disqualification if the lawyer appears before the judge. *Id.* Canon 5B(4) cmt.

<sup>397</sup> *Invitation to Comment, supra* note 392, at 4.

<sup>398</sup> *Id.*

But it was not only a general fear of partisan interest groups controlling judicial selection that led the California Advisory Committee to propose the amendment to Canon 5B(4). The first recall attempt of a California judge since 1932, served to personalize and highlight the danger identified by the Committee.<sup>399</sup>

In February 2018, the recall of Judge Allen Persky was placed on the ballot in Santa Clara County. Judge Persky was targeted for what critics claimed was an intolerably lenient sentence of a Stanford University student convicted of sexually assaulting an intoxicated woman after leaving a fraternity party.<sup>400</sup> The recall effort was well-organized and well-funded, and it was supported by numerous public officials, candidates, unions, political organizations, professors, and business, education, literary, entertainment, and community leaders.<sup>401</sup> The “supporters and endorsers” of the removal effort included the National Organization of Women; U.S. Senator Kirsten Gillibrand (NY); Kevin de Leon, California President pro Tempore of State Senate; Laurie Smith, Sheriff of Santa Clara County; Georgia State Senator Jason Carter; South Bay Labor Council (AFL-CIO); California Nurses Association; International Brotherhood of Electrical Workers, Local 332; SEIU Local 521; Eric Bauman, California State Democratic Party Chair; Christine Pelosi, California State Democratic Party Women’s Caucus Chair; Santa Clara County Democratic Club; Donna Brazile, former Chair Democratic National Committee; Jeff Bleich, former President of California Bar Association; former Special Advisor to President Obama, Amanda Renteria; former National Political Director, Hillary for America, Sharon Stone; and Professor Anita F. Hill.<sup>402</sup>

Newspaper editorial boards also supported the recall effort. *The Mercury News* dismissed concerns over judicial independence by declaring “[that] ship has already sailed.”<sup>403</sup> In supporting the recall effort, the *Palo Alto Weekly* editorialized that “[w]hile Judge Persky is regarded as fair and thoughtful in county legal circles and

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<sup>399</sup> Tracey Kaplan, *California’s First Judicial Recall in 86 Years to Appear on Santa Clara County Ballot*, MERCURY NEWS (Feb. 7, 2018), <https://www.mercurynews.com/2018/02/06/5045019>.

<sup>400</sup> *Id.*

<sup>401</sup> *Endorsers and Supporters*, RECALL JUDGE AARON PERSKY, <https://recallaaronpersky.nationbuilder.com/endorsements> (last visited Sept. 20, 2018).

<sup>402</sup> *Id.*

<sup>403</sup> Mercury News & East Bay Times Editorial Boards, *Persky Recall Demands Voters Make Statement on Sexual Assault*, MERCURY NEWS (May 8, 2018), <https://www.mercurynews.com/2018/05/08/editorial-persky-recall-demands-voters-make-a-sexual-assault-statement> (“The argument that recalling Persky will strike a blow against judicial independence is not compelling. That ship already has sailed.”).

should not be vilified for his bad judgment in this case, he is accountable to the voters for betraying the values of our community.”<sup>404</sup>

Judge Persky mounted a defense but it could not compare to the recall effort in organization,<sup>405</sup> supporters,<sup>406</sup> or financial backing. As of a month before the recall election, Judge Persky had raised about \$270,000, and an independent “No Recall” campaign raised another \$137,000,<sup>407</sup> by any measure an enormous amount of money for a trial court election. But the proponents of the recall had raised 1.2 million dollars, paying at least \$350,000 to a “signature gathering company” to obtain the necessary signatures to place the recall initiative on the ballot.<sup>408</sup> Other funds were used to produce and distribute “glossy mailers juxtaposing photos of Persky with President Donald Trump.”<sup>409</sup>

Judge Persky refused to engage personally in the recall debate until one week before the election when he gave an interview to CBS News.<sup>410</sup> Even in that interview, Judge Persky declined to discuss the Stanford case because, as he put it, “based on the code of judicial ethics, I can’t really discuss the details of the case or

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<sup>404</sup> *A Miscarriage of Justice*, PALO ALTO WKLY. (June 10, 2016), <https://www.paloaltoonline.com/news/2016/06/10/editorial-a-miscarriage-of-justice>.

<sup>405</sup> Kaplan, *supra* note 399 (“On Tuesday [February 6, 2018], about 12 members of the loose-knit opposition, which has been far less organized than proponents, gathered publicly for the first time.”).

<sup>406</sup> Jose A. Del Real, *Attempt to Recall Judge has Detractors*, N.Y. TIMES, Feb. 2, 2018, at A8 (stating that twenty retired judges signed a letter opposing the recall effort and that another letter defending Judge Persky was signed by ninety-five law professors).

<sup>407</sup> Elena Kadvany, *As Recall Vote Nears, Judge Defends His Record*, PALO ALTO WKLY. (May 8, 2018), <https://www.mv-voice.com/news/2018/05/08/as-recall-vote-nears-judge-defends-his-record>. Judge Persky also obtained an in-kind legal services contribution and the “No Recall” committee obtained in-kind consulting and advertising services. *Id.*

<sup>408</sup> *Id.*

<sup>409</sup> Paul Elias, *Judge Defends Handling of Rape Case Amid Recall*, CHI. TRIB., May 31, 2018, at 13.

<sup>410</sup> *Judge in Brock Turner Sexual Assault Case Defends His Controversial Sentencing Ahead of Recall Vote*, CBS NEWS (May 29, 2018), <https://www.cbsnews.com/news/judge-aaron-persky-california-speaks-out-brock-turner-sexual-assault-trial-decision>.

my decision making.”<sup>411</sup> The recall effort was successful with 60% of the electorate voting in favor of Persky’s removal.<sup>412</sup>

Adding to the concern of the California judiciary, in 2018, four assistant public defenders challenged sitting judges of the San Francisco Superior Court.<sup>413</sup> In the view of an appellate court judge who came to the defense of the incumbent judges, the attempt to unseat the judges had nothing to do “with either the quality of their work or the measure of their character,” but rested solely on their appointment by a Republican Governor.<sup>414</sup> According to one challenger, “a Schwarzenegger appointee doesn’t reflect the values of our community, it’s that simple.”<sup>415</sup>

Appellate Court Justice J. Anthony Cline authored a letter to the editor in which he denounced the challengers’ “effort to defeat four of the most able, compassionate, and experienced judges in northern California simply because they were appointed by a Republican Governor in an overwhelmingly Democratic county is an unmitigated act of political opportunism.”<sup>416</sup> Justice Cline also emphasized that all the justices on the appellate court having jurisdiction over the trial courts of San Francisco had endorsed the four incumbents, an action that none of the justices had thought necessary in any prior election.<sup>417</sup> Justice Cline concluded his endorsement letter beseeching all lawyers “committed to the high principles of the legal profession” to join the effort to support the court and ward off the attack on the

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<sup>411</sup> *Id.*

<sup>412</sup> Maggie Astor, *California Voters Remove Judge Aaron Persky, Who Gave a 6-Month Sentence for Sexual Assault*, N.Y. TIMES (June 6, 2018), <https://www.nytimes.com/2018/06/06/us/politics/judge-persky-brock-turner-recall.html>.

<sup>413</sup> J. Anthony Kline, *Letter to the Editor: The Politicization of the San Francisco Superior Court*, RECORDER (Mar. 14, 2018, 10:00 AM), <https://www.law.com/therecorder/2018/03/14/letter-to-the-editor-the-politicization-of-the-san-francisco-superior-court>.

<sup>414</sup> *Id.*

<sup>415</sup> *Id.*

<sup>416</sup> *Id.*

<sup>417</sup> *Id.*

court's integrity.<sup>418</sup> The appellate court's endorsement of the trial court judges helped the four incumbent judges win retention by large margins.<sup>419</sup>

Even before the recent amendment to the California Code of Judicial Ethics, California judges enjoyed more freedom to engage in political activity than the average judge. That freedom includes the ability to contribute to political parties and candidates and attend political events regardless of whether a judge is campaigning for office.<sup>420</sup> Other states have joined California in expanding permissible political activities by judges,<sup>421</sup> and others may follow since it no longer can be ignored that politics influences judicial selection, affects judicial budgets, and ferments attacks on judges. California's ethics code provision that permits all judges to endorse or oppose judicial candidates may gain favor with other jurisdictions in light of the increase of partisan attacks on judges similar to those in California.<sup>422</sup> Additionally, the recent authorization of California judges to hit the campaign and fund-raising trail on behalf of judicial candidates may prevail over the ABA's idealized vision of judicial campaign neutrality, especially in jurisdictions lacking other effective means to counter baseless attacks on the judiciary.<sup>423</sup>

One final lesson taught by the California experience is that the judiciary's traditional inclination to remain aloof and refrain from defending itself is a luxury the third branch can no longer afford. Judges in recall and contested retention campaigns who vigorously defend themselves usually prevail.<sup>424</sup> Those, like Judge Persky, who do not defend themselves, usually fail.<sup>425</sup>

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<sup>418</sup> *Id.*

<sup>419</sup> Erin Allday & Bob Egelko, *SF Public Defenders' Challenge to Republican-Appointed Judges Fails*, S.F. CHRON. (June 5, 2018, 11:59 PM), <https://www.sfchronicle.com/bayarea/article/Public-defenders-challenges-to-12970921.php>.

<sup>420</sup> CAL. CODE OF JUDICIAL ETHICS Canon 5A(3) cmt. (2018).

<sup>421</sup> *See, e.g.*, ILL. CODE OF JUDICIAL CONDUCT Canon 7B(1)(a) (2018) (permitting judges to attend political events and contribute to political parties and candidates); NEV. CODE OF JUDICIAL CONDUCT r. 4.1 (2018) (permitting judges to attend political gatherings or attend or purchase tickets to such events, and to contribute to political parties and candidates).

<sup>422</sup> CAL. CODE OF JUDICIAL ETHICS Canon 5A(3) cmt. (2018).

<sup>423</sup> *See* CAL. CODE OF JUDICIAL ETHICS Canon 5B(4) (amended Oct. 10, 2018).

<sup>424</sup> *See infra* notes 432–34 and accompanying text.

<sup>425</sup> *See id.*

### 3. Retention Elections

Attacking judges during their retention bids has become the go-to method of removing judges from office, or at least teaching judges that there is a price to pay for unpopular decisions. In 2010, three Iowa Supreme Court judges were targeted for defeat because they joined in a unanimous decision invalidating a state statute prohibiting same sex marriage.<sup>426</sup> The well-organized opposition to the retention of the justices used \$700,000 contributed by two out of state organizations to fund a “highly visible campaign” including a bus tour, YouTube videos, and television ads.<sup>427</sup> The campaign in support of retaining the justices got off to a slow, unfocused start, was not as well financed as the opposition, and lacked a compelling message.<sup>428</sup> Most significantly, the three justices “were reluctant to speak out on their own behalf and refused to raise money to run a retention campaign.”<sup>429</sup> One of the targeted justices, Justice Marsha K. Ternus, explained:

We [the justices] decided early on not to form campaign committees and not to engage in any fundraising. . . . Judges must be fair and impartial. They cannot be obligated to campaign contributors and just as importantly, they should not be perceived as beholden to campaign contributors. We strongly believed our role as fair and impartial members of the Iowa Supreme Court would have been forever tarnished had we engaged in fundraising and campaigning. We decided we would not contribute to the politicization of the judiciary in Iowa even though we knew this decision might cost us our jobs.<sup>430</sup>

True to their conviction not to ask voters for a “yes” vote on the retention ballot, the justices backed out of a scheduled appearance at the University of Iowa after learning

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<sup>426</sup> *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

<sup>427</sup> Todd E. Pettys, *Letter from Iowa: Same-Sex Marriage and the Ouster of Three Justices*, 59 U. KAN. L. REV. 715, 728 (2011).

<sup>428</sup> *Id.* at 729–33 (describing the deficiencies in the pro-retention campaign); see also Matthew W. Green, Jr. et al., *The Politicization of Judicial Elections and Its Effect on Judicial Independence*, 60 CLEV. ST. L. REV. 461, 484 (2012) (reporting Justice Marsha K. Ternus’ opinion that bar associations and others came to the justices’ defense, “but not with the vigor and money that was required to counteract the emotionally laden and factually inaccurate television ads that ran incessantly for the three months prior to the election”).

<sup>429</sup> Pettys, *supra* note 427, at 732.

<sup>430</sup> Green, *supra* note 428, at 484.

that the event was billed “as a ‘Vote Yes on Retention’ event, rather than an event aimed at educating voters about the operation of the courts.”<sup>431</sup>

Judicial retention election researcher Albert Klumpp blamed the Iowa justices’ failed retention effort largely on the justices’ refusal to campaign.<sup>432</sup> According to Klumpp, “[i]f the Iowa justices had campaigned at all, statistics show they would have improved at least five points and they would have been retained.”<sup>433</sup> Indeed, Klumpp identified a lack of campaigning as the “single biggest factor” common to all supreme court justices who lost retention bids since 1936.<sup>434</sup>

Learning from the defeat of the three Iowa justices, judges targeted in politically motivated anti-retention campaigns in other states have energetically campaigned to keep their jobs. When the retention elections of three Florida Supreme Court justices drew active opposition by the state’s Republican Party and affiliated groups, the justices wasted no time going on the offensive by hiring campaign consultants, establishing fund-raising committees, and hitting the campaign trail.<sup>435</sup> For the first time in Florida history, a tax-exempt political organization was formed to run television ads supporting the judges’ retention.<sup>436</sup> “The justices’ active resistance, along with a strong, unified defense of the court by the organized bar, carried the day” and the justices were retained.<sup>437</sup>

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<sup>431</sup> Pettys, *supra* note 427, at 732.

<sup>432</sup> Professor James Sample agrees with Klumpp’s conclusion. See Lincoln Kaplan, *The Political War Against the Kansas Supreme Court*, NEW YORKER (Feb. 5, 2016), <https://www.newyorker.com/news/news-desk/the-political-war-against-the-kansas-supreme-court> (“In Iowa, the chief justice and two other justices were voted off the State Supreme Court, a year after the court had unanimously struck down a ban on same-sex marriage. That happened in large part, [James] Sample concluded, because, in the face of a fierce, well-funded effort to oust them for making that ruling, the justices chose neither to raise money to defend themselves nor to campaign actively.”).

<sup>433</sup> Mark Curriden, *Judging the Judges: Landmark Iowa Elections Send Tremor Through the Judicial Retention System*, A.B.A. J. (Jan. 2011), [http://www.abajournal.com/magazine/article/landmark\\_iowa\\_elections\\_send\\_tremor\\_through\\_judicial\\_retention\\_system](http://www.abajournal.com/magazine/article/landmark_iowa_elections_send_tremor_through_judicial_retention_system).

<sup>434</sup> *Id.*

<sup>435</sup> See Mary Ellen Klas, *Florida Supreme Court Justices Fight Back to Retain Seats*, TAMPA BAY TIMES (Oct. 7, 2012, 1:17 AM), <http://www.tampabay.com/news/courts/florida-supreme-court-justices-fight-back-to-retain-seats/1255242>.

<sup>436</sup> *Id.*

<sup>437</sup> Barbara J. Pariente & F. James Robinson, Jr., *A New Era for Judicial Retention Elections: The Rise and Defense Against Unfair Political Attacks*, 68 FLA. L. REV. 1529, 1550 (2016).

One reason judges often decline to defend themselves is that ethics codes prohibit judges from discussing pending cases, and it is often a judge's action in a pending case that forms the basis of the opposition to the judge.<sup>438</sup> For example, Judge Persky's late entry in combating the recall effort was further stymied by his belief that the California Code of Judicial Ethics prohibited him from commenting on the sentencing of the Stanford student because the case was pending before the appellate court.<sup>439</sup> And Judge Persky's fears were justified. Canon 3B(9) of the California judicial code flatly bars a judge from making "any public comment about a pending or impending proceeding in any court."<sup>440</sup> As the comments to the rule confirm, the prohibition includes a case pending in a reviewing court.<sup>441</sup>

The 2007 ABA Model Code attempts to aid judges facing an election challenge premised on a ruling in a pending case. Comment 9 to Rule 4.1 of the 2007 Code permits a judicial candidate to respond directly to unfair allegations made during a campaign.<sup>442</sup> The Comment, however, suggests "it is preferable for someone else to respond if the allegations relate to a pending case."<sup>443</sup> But relying on third parties to defend the judiciary creates its own difficulties. Recently, five of the six Connecticut Supreme Court justices resigned from the state bar association due to the association's failure to respond to unfair allegations against a candidate for the state's chief justice.<sup>444</sup>

Another obstacle for judges seeking to rely on ABA Comment 9 in confronting an attack is the Comment's proviso that, in responding to an unfair attack, a judge may not make any statement that "would reasonably be expected to affect the

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<sup>438</sup> John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353, 360 (1999) (noting that judges are often unable to respond to attacks on their decisions without violating their duty to refrain from commenting on pending cases).

<sup>439</sup> CBS NEWS, *supra* note 410 (quoting Judge Aaron Persky) ("Well, let me say again based on the code of judicial ethics, I can't really discuss the details of the case or my decision making.").

<sup>440</sup> CAL. CODE OF JUDICIAL ETHICS Canon 3B(9) (2018).

<sup>441</sup> *Id.* Canon 3B(9) cmt.

<sup>442</sup> MODEL CODE OF JUDICIAL CONDUCT r. 4.1(A) cmt. 9 (AM. BAR ASS'N 2007).

<sup>443</sup> *Id.*

<sup>444</sup> Ken Dixon, *McDonald Fallout; High-Court Justices Quit Judges Association*, CONN. POST (Apr. 25, 2018, 5:03 PM), <https://www.ctpost.com/local/article/High-court-justices-quit-association-12864621.php> (reporting that five of the six members of the Connecticut Supreme Court resigned from the Connecticut Bar Association).

outcome or impair the fairness of a matter pending or impending in any court.”<sup>445</sup> Unfortunately, most any response to an unfair attack concerning a pending case could arguably affect the fairness of the matter and subject the judge to a disciplinary complaint, especially one filed by the opposition for a tactical advantage. The 1990 ABA Code granted broader and less ambiguous authority for a judicial candidate to respond to attacks. Canon 5A(3)(e) of the 1990 Code authorized candidates “to respond to personal attacks on the candidate’s record” provided the response (1) was truthful and (2) did not constitute an improper pledge or promise.<sup>446</sup> Superior to either ABA formulation, states should consider simply permitting a judge to respond to false, misleading or unfair attacks including comments on pending cases, so long as the matter is not pending before the commenting judge. Such a rule would have permitted Judge Persky to discuss the Stanford student sentencing because at the time of the recall effort the case was before the appellate court. It would also allow a chief judge to reassign a pending case so the originally assigned judge could present a defense in a recall or retention election.

#### 4. Responding to Legislative Threats to the Authority and Independence of the Judiciary

The Brennan Center for Justice determined that as of April 4, 2018, “legislators in at least 16 states are considering at least 51 bills that would diminish the role or independence of the judicial branch, or simply make it harder for judges to do their job.”<sup>447</sup> The proposals sought to control court decisions, reduce court funding and judicial compensation, shorten terms of office, override state supreme court rules, gain a partisan advantage in the courts, and subject judges to discipline for exercising independence.<sup>448</sup> Many legislative attempts to intrude on the judicial function are spawned by court decisions unpopular with legislators. For example, Iowa legislators have threatened that if the Iowa Supreme Court enforces its decision to ban guns from courthouses, the courts will be required to pay \$2.00 per square foot in rent for spaces occupied by the courts.<sup>449</sup> In addition, each chief judge would be required to

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<sup>445</sup> MODEL CODE OF JUDICIAL CONDUCT r. 4.1(A)(12) & cmt. 9 (AM. BAR ASS’N 2007).

<sup>446</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(e) (AM. BAR ASS’N 1990).

<sup>447</sup> *Legislative Assaults on State Courts—2018*, BRENNAN CTR. FOR JUST. (Apr. 5, 2018), <https://www.brennancenter.org/analysis/legislative-assaults-state-courts-2018>.

<sup>448</sup> *Id.*

<sup>449</sup> S.B. 87-2044, 87th Gen. Assemb., Reg. Sess. 1 (Iowa 2018).

pay, from his or her salary, the wages of an armed security guard.<sup>450</sup> Another bill would reduce each Iowa Supreme Court justice's yearly salary to that of a member of the general assembly—a reduction from approximately \$178,000 to \$25,000.<sup>451</sup> The sponsor of the salary reduction bill justified the decrease by explaining, “[i]f the Supreme Court wants to act like legislators they need to start getting paid like legislators.”<sup>452</sup> Yet another Iowa proposal would increase the number of state supreme court justices necessary to find a state statute unconstitutional from a simple majority of four to a supermajority of five.<sup>453</sup>

In Washington State, three legislators introduced a bill that would allow the legislature to override a decision of the state supreme court.<sup>454</sup> Under the proposal, a majority vote by the house and senate reversing the court's decision would be “binding on all persons affected by it from the effective date of the act, notwithstanding the opinion of the judiciary.”<sup>455</sup> The Washington state legislators repeated a common refrain in attempts to reduce the status of the judiciary to less than a co-equal branch; according to its sponsors, the bill was necessary:

to restore the balance of powers between and among the branches of government as established by the people in the state Constitution, to ensure that all political power is retained by the people, to protect, maintain, and secure individual rights and the perpetuity of free government, to guarantee the right of self-government, and to establish a process for preserving the independence of the legislative, executive, and judicial departments.<sup>456</sup>

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<sup>450</sup> *Id.*

<sup>451</sup> H.R. 87-2036, 87th Gen. Assemb., Reg. Sess. 1 (Iowa 2018).

<sup>452</sup> Kurt Liske, *Iowa Supreme Court Admits Unconstitutional Behavior & Commits to Continued Judicial Overreach*, IOWA FIREARMS COAL. (Dec. 21, 2017), <http://iowafc.org/blog/2017/12/21/iowa-supreme-court-admits-to-unconstitutional-behavior-commits-to-continued-judicial-overreach>.

<sup>453</sup> *Iowa: Bills Would Require Supermajority of State Supreme Court (5/7) to Declare Laws Unconstitutional; Similar Provisions in Nebraska and North Dakota*, GAVEL TO GAVEL (Feb. 5, 2018), <http://gaveltogavel.us/2018/02/05/iowa-bills-would-require-supermajority-of-state-supreme-court-5-7-to-declare-laws-unconstitutional-similar-provisions-in-nebraska-and-north-dakota>.

<sup>454</sup> H.R. 1072, 65th Leg. Reg. Sess. 1 (Wash. 2017).

<sup>455</sup> *Id.*

<sup>456</sup> *Id.*

Similarly, when Kansas legislators took umbrage at a state supreme court decision concerning the funding of public education, they proposed a constitutional amendment designed to put the judiciary in its place. The proposed amendment provided:

As all political power is inherent in the people, *the legislature shall* determine suitable provision for finance of the educational interests of the state. The determination of the total amount of funding that constitutes suitable provision for finance of the educational interests of the state is exclusively a legislative power . . . . No court, or other tribunal, established by this constitution or otherwise by law shall alter, amend, repeal or otherwise abrogate such power, nor shall such power be exercised by, either directly or indirectly, by any such court or other tribunal.<sup>457</sup>

Attacks such as these on the judicial branch damage public confidence in the judiciary to the same extent as unfounded attacks on individual judges. This is especially true since legislators often design system-wide assaults not so much to pass legislation “reigning in” judges but to intimidate judges and cast the judiciary in bad light before the public.<sup>458</sup>

Just like attacks on individual judges, political branch attacks on the integrity and independence of judiciary usually go unanswered. And while at times silence is golden, when legislators attempt to advance partisan objectives or intimidate the judiciary by introducing blatantly specious legislation, judges have a duty to inform the public of the consequences of the proposal and motives of the sponsors. These “Big Lies,” made by powerful individuals such as legislators “who enjoy[] some stature and credibility, or notoriety, in the community, and who employ[] this position of prominence to gain access to a large audience,” need to be met head on.<sup>459</sup> As observed by Judge Irving Kaufman, one of the drafters of the 1972 ABA Code,

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<sup>457</sup> *Kansas: Senate Leaders Appear to Stop Bill to Increase Funding for Public Schools Until Constitutional Amendment to Strip Courts of K-12 Funding Decisions is Passed*, GAVEL TO GAVEL (Apr. 3, 2018), <http://gaveltogavel.us/2018/04/03/kansas-senate-leaders-appear-to-stop-bill-to-increase-funding-for-public-schools-until-constitutional-amendment-to-strip-courts-of-k-12-funding-decisions-is-passed>.

<sup>458</sup> Many legislative proposals adversely impacting the independence of the judiciary are left pending or reintroduced each year with little further action. *See, e.g.*, H.R. 65-1072, Leg., Reg. Sess. 3 (Wash. 2017) (H.B. 1072 was introduced and given a first reading in January 2017 and then in four consecutive legislative sessions, was “[b]y resolution, reintroduced and retained in present status.”).

<sup>459</sup> Fortunato, *supra* note 388, at 684–85.

“judges should play the role of lions in the policymaking process, rather than lambs who withdraw to the safety and isolation of their chambers.”<sup>460</sup>

Occasionally, judges come out of their chambers to confront threats by legislators, but seldom do they come out as lions. Unhappy with a ruling of the North Carolina Supreme Court, the state’s senate and house leaders issued a joint statement in an attempt to bully the state supreme court justices into reversing a decision.<sup>461</sup> The joint statement concluded:

Judges are not legislators and if these three [state supreme court justices] want to make laws, they should hang up their robes and run for a legislative seat. Their decision to legislate from the bench will have profound consequences, and they should immediately reconvene their panel and reverse their order.<sup>462</sup>

One of the “profound consequences” proposed by the legislative leaders was to require district judges to run for retention every two years instead of every eight years.<sup>463</sup> After seeking and receiving advice from the North Carolina Judicial Standards Commission concerning the ethical ramifications of responding to the attack, Chief Justice Mark Martin quietly issued a brief statement explaining the court’s opposition to the senate bill proposing two-year judicial terms.<sup>464</sup> The statement distinguished the role of judges from the role of legislators and addressed the practicalities of requiring judges to constantly campaign for office.<sup>465</sup> The chief

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<sup>460</sup> Irving R. Kaufman, *Judges Must Speak Out*, N.Y. TIMES (Jan. 30, 1982), <https://www.nytimes.com/1982/01/30/opinion/judges-must-speak-out.html>.

<sup>461</sup> Phil Berger, *Legislative Leaders to Activist Judges: If You Want to Make Laws, Run for the Legislature* (Feb. 7, 2017), [https://www.philberger.org/legislative\\_leaders\\_to\\_activist\\_judges\\_if\\_you\\_want\\_to\\_make\\_laws\\_run\\_for\\_the\\_legislature](https://www.philberger.org/legislative_leaders_to_activist_judges_if_you_want_to_make_laws_run_for_the_legislature).

<sup>462</sup> *Id.*

<sup>463</sup> Capital Broad. Co., *Relentless Partisan Manipulations of State Courts Threatens Justice for All*, WRAL (Apr. 12, 2018), <https://www.wral.com/editorial-relentless-partisan-manipulations-of-state-courts-threatens-justice-for-all/17478252>.

<sup>464</sup> Anne Blythe, *Is NC Lawmakers’ Proposal a Threat to Judges Who Won’t Go Along with Their Agenda?*, NEWS & OBSERVER (Oct. 30, 2017), <https://www.newsobserver.com/news/local/article181684616.html> (“Martin added in the statement that he ran by the Judicial Standards Commission before releasing to make sure he wasn’t violating any ethical standards.”).

<sup>465</sup> Robert Edmunds, *Chief Justice Martin Addresses Senate Bill 698*, N.C. APP. PRAC. BLOG, Oct. 25, 2017, <https://www.ncpb.com/2017/10/25/chief-justice-martin-addresses-senate-bill-698> (reproducing Chief Justice Martin’s statement).

justice directed his eight sentence, one hundred twenty-eight-word reply to court staff without any public fanfare.

Like Chief Justice Martin, many judges may hesitate to defend the judiciary because they are unsure about the ethical parameters of presenting a defense, especially when the attack has political or partisan overtones. That fear is not unfounded. Ethical rules prohibit any response that would appear to compromise judicial impartiality, independence or integrity,<sup>466</sup> fail to promote public confidence in the judiciary,<sup>467</sup> create an appearance of impropriety,<sup>468</sup> appear to misuse judicial power or prestige,<sup>469</sup> appear to constitute an ex parte communication,<sup>470</sup> allow the impression that political interests or relationships influence the judge's conduct,<sup>471</sup> give the impression that any person or organization is in a position to influence a judge,<sup>472</sup> or seems coercive.<sup>473</sup> Constructing a response to a baseless attack within the bounds of these vague and ambiguous constraints is not an easy task, especially for risk-adverse judges.<sup>474</sup>

Another factor adds to a judge's difficulty in responding to attacks against the judicial system. While Comment 9 to Rule 4.1 of the 2007 ABA Code permits judicial candidates to "respond directly to false, misleading, or unfair allegations" during a political campaign,<sup>475</sup> no comparable code provision grants authority to judges, including supervising or chief judges, to defend the judiciary as a whole. Moreover, while Rule 2.10(E) of the 2007 ABA Code gives a judge the right to respond to allegations concerning the judge's conduct in a case<sup>476</sup> no similar provision grants judges the right to defend the courts. Clouding matters further, the

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<sup>466</sup> MODEL CODE OF JUDICIAL CONDUCT r. 1.2 (AM. BAR ASS'N 2007).

<sup>467</sup> *Id.* at r. 1.2 cmt. 6.

<sup>468</sup> *Id.* at r. 1.2 cmt. 1.

<sup>469</sup> *Id.* at r. 1.3.

<sup>470</sup> *Id.* at r. 2.9.

<sup>471</sup> *Id.* at r. 2.4(B)(C).

<sup>472</sup> *Id.*

<sup>473</sup> *Id.* at r. 3.1(D).

<sup>474</sup> See Donald P. Judges, *Of Rocks and Hard Places: The Value of Risk Choice*, 42 EMORY L.J. 1, 82 (1993) ("[J]udges . . . by temperament are likely to be risk-averse . . .").

<sup>475</sup> MODEL CODE OF JUDICIAL CONDUCT r. 4.1 cmt. 9 (AM. BAR ASS'N 2007).

<sup>476</sup> *Id.* at r. 2.10(E).

1972 ABA Code specifically allowed judges to undertake political activity for the purpose of improving the law, the legal system, and the administration of justice.<sup>477</sup> Following suit, the 1990 Code authorized judicial engagement in political activities concerning the law, the legal system, and the administration of justice.<sup>478</sup> The 1972 and 1990 Code provisions were tailor-made to provide judges ethical cover when countering political assaults.<sup>479</sup> But the 2007 ABA Code includes neither the 1972 nor the 1990 Code provision allowing political activity in law-related matters. Some states, sensitive to the need to respond to unjust criticism by political actors, continue to include either the 1972 or 1990 political activity provision in their codes of conduct.<sup>480</sup> Other states, following the ABA's most recent model code, have abandoned the provision.<sup>481</sup>

To assist judges in navigating the ambiguous ethical rules hindering a comprehensive defense of the judiciary, codes of judicial conduct should expressly authorize judges, especially supervising, administrative, and chief judges, to engage in political activities to protect the courts from specious, misleading, false, and partisan attacks by the legislative and executive branches.

## CONCLUSION

“It appears to be an inescapable part of our system of government that judges are drawn primarily from lawyers who have participated in public and political affairs.”<sup>482</sup> And how can it be otherwise when politics is woven into every method of judicial selection.<sup>483</sup> Once on the bench, judges must confront the political realities

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<sup>477</sup> CODE OF JUDICIAL CONDUCT Canon 7A(4) (AM. BAR ASS'N 1972).

<sup>478</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 5D (AM. BAR ASS'N 1990).

<sup>479</sup> See, e.g., S.C. Advisory Comm. on Standards of Judicial Conduct, Op. 12-2009 (2009) (citing the state judicial conduct code's provision permitting political activity to improve the administration of justice as authority for a judges' association to hire a lobbyist).

<sup>480</sup> See, e.g., FLA. CODE OF JUDICIAL CONDUCT Canon 7D (2015) (“A judge shall not engage in any political activity except . . . (ii) on behalf of measures to improve the law . . . .”); N.Y. CODE OF JUDICIAL CONDUCT, 22 NYCRR 100.5(A)(1)(iii) (2007) (“Neither a sitting judge nor a candidate for public election shall directly or indirectly engage in any political activity except . . . (iii) on behalf of measures to improve the law . . . .”).

<sup>481</sup> See, e.g., ARIZ. CODE OF JUDICIAL CONDUCT (2009); see also R.I. CODE OF JUDICIAL CONDUCT (2018).

<sup>482</sup> *United States v. Alabama*, 828 F.2d 1532, 1543 (11th Cir. 1987) (quoting *Curry v. Baker*, No. 86-7639 (11th Cir. Sept. 24, 1986) (Vance, J., mem.)).

<sup>483</sup> See *Home Placement Service, Inc. v. Providence Journal Co.*, 739 F.2d 671, 675 (1st Cir. 1984) (“It is common knowledge, or at least public knowledge, that the first step to the federal bench for most judges is either a history of active partisan politics or strong political connections or . . . both.”); *Methods of*

of reelection by voters or reappointment by partisan officials. Further, they must secure funding for the courts from politically motivated legislators and address partisan challenges to judicial independence and authority from both political branches.

Until introduction of the ABA model judicial codes, judges freely engaged in political and campaign activities on behalf of candidates, parties, and issues. Once the states began to adopt ABA suggested speech restrictions, the political activities of judges were severely curtailed. Seventy-eight years after the first ABA code, the Court reinvigorated judicial candidate speech when it applied strict scrutiny to strike down an ABA provision prohibiting candidates from announcing their views on political and legal issues. There is every reason to believe the Court will apply the highest level of scrutiny to the political speech not only of judicial candidates, but also judges who are not candidates for election or retention. If so, the speech restrictions imposed on judges will be loosened to the same extent as the restrictions placed on judicial candidates.

But regardless of the likelihood of speech restrictions falling under First Amendment attacks, another more practical dynamic—political necessity—portends the expansion of the political activities of judges. Defending the judiciary against partisan attacks often requires political engagement broader than that permitted by most judicial codes. At the forefront of the battle, California permits judges to attend political events, make campaign contributions, and endorse judicial candidates. Recognizing that necessity is the mother of retention campaigns, a recent amendment to the California judicial code expressly permits judges to personally solicit funds and endorsements for colleagues who are subject to partisan recall efforts or unfair retention opposition campaigns. There will not be a return to the days when a judge, like Illinois Circuit Court Judge David Davis, can recess court to personally direct a convention floor fight on behalf of a presidential contender. Rather, a more moderate, but significant, expansion of the political activities of judges through both necessity and constitutional mandate is likely.

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*Judicial Selection*, NATIONAL CENTER FOR STATE COURTS, [http://www.judicialselection.us/judicial\\_selection/methods/selection\\_of\\_judges.cfm?state](http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state) (last visited Oct. 21, 2018) (describing each state's method of judicial selection and retention).