Judicial Correctness Meets Constitutional Correctness: Section 2C of the Code of Judicial Conduct

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"A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin."[1]

Some form of this provision of Section 2C of the Code of Judicial Conduct is the law in 39 states, the District of Columbia, and in the federal courts (except the Supreme Court).[2] It is the thesis of this article that it has been easier to decide that codes governing judicial conduct should express an anti-discrimination principle than it has been to formulate the words that will target the forbidden conduct with sufficient preciseness, that will justify each prohibition, and that will then withstand a constitutional attack based on First Amendment principles. The result of the effort to do so to date has

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[1] American Bar Association, Code of Judicial Conduct, Section 2C. The ABA originally addressed this subject by adding to the Commentary to Section 2 of the 1972 version of the Code of Judicial Conduct language stating that it was "inappropriate" for judges to be members of such organizations. Lisa Milord, The Development of the ABA Judicial Code 15 (1992).

[2] See the very helpful article by Cynthia Gray, "Organizations That Practice Invidious Discrimination" (American Judicature Society pamphlet, 1999 rev.). Anyone who has ever served on an advisory committee on judicial ethics owes a debt of gratitude to Cynthia Gray, Director of the Center for Judicial Ethics of the American Judicature Society, who has organized the materials of judicial ethics and provided insight into their proper interpretation in a wide-ranging series of articles.

The Code of Conduct for United States Judges, adopted by the Judicial Conference of the United States, is not applicable to Justices of the United States Supreme Court.

been language that may prohibit less than it promises and more than it should or, in the language of constitutional law, that is both underinclusive and overinclusive and may, in some of its applications, fall victim to the Supreme Court's current interpretation of the First Amendment.

After setting forth the difficulties with Section 2C as presently worded, this paper considers five alternatives. Of the five, my preference would be to repeal Section 2C entirely, leaving its work to be done by a combination of laws of general applicability, the law of disqualification, the electoral and appointive process, and social pressure. If that solution is politically unpalatable, then I suggest four other possibilities, all of which in my view are preferable to the current Section 2C.

Introduction

In the 1960s the United States Supreme Court, for the first time, began to look at the applicability of the First Amendment to state regulation of the legal profession and the practice of law. In a series of cases beginning with *NAACP v. Button*,[3] the Court held unconstitutional efforts of states to forbid civil rights organizations from soliciting plaintiffs to institute litigation and to inhibit unions from offering plans of group legal services.[4] The Court then considered the effect of the First Amendment on the general professional rules regulating advertising and the solicitation of legal business. For some time, the professional rules had reflected a view that law practice was more than a business. It was a profession, and lawyers should not seek clients by claims that were sensational, extravagant, misleading, or deceptive. That view came into conflict not only with a different conception of law practice and consumer rights but also with an expansion of First Amendment concerns in the days of the Warren Court. The result was that a closely divided Supreme Court first held that state suppression of legal advertising

[3] 371 U.S. 415 (1963).
[4] Brotherhood of Railroad Trainmen v. Virginia State Bar, 377 U.S. 1, rehearing den., 377 U.S. 960 (1964); UMW v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); and United Transp. Union v. State Bar of Michigan, 401 U.S. 576 (1971).

was unconstitutional and then held unconstitutional many, but not all, forms of state regulation of mail and print solicitation of business by lawyers.[5]

With the Supreme Court having interested itself in the constitutional impact of the First Amendment on rules governing the legal profession, it was perhaps inevitable that the Court would become interested in the constitutional impact of the First Amendment on rules governing the judiciary, in particular the various Codes of Judicial Conduct. Finally, in *Republican Party v. White*, the Supreme Court considered the constitutionality of a provision of the Minnesota Code of Judicial Conduct and held unconstitutional its prohibition on candidates for elected judicial office from announcing their views on issues that might come before them.[6] The decision in *White* raises the question of what other provisions of the codes of judicial conduct might raise constitutional questions.

Prime candidates for review, in my opinion, are the provisions in various codes forbidding judges from belonging to a variety of organizations that engage in certain named kinds of discrimination. The current provisions raise a host of issues that need to be resolved long before one reaches any constitutional questions. Many of those issues relate to the very meaning of the recommended Section 2C of the American Bar Association's Model Code of Judicial Conduct, which provides the starting point for the jurisdictions that have enacted membership provisions in their judicial codes. Others are normative issues relating to the substance of that provision.

I. The Categories of Invidious Discrimination

a. Section 2C and state variations

A majority of the states that have chosen to forbid judges from participating in organizations practicing invidious discrimination have done so by adopting substantially the text of the ABA's model Section 2C, although greater variance exists with respect to the states' treatment of the ABA's commentary (e.g., several states have altered or

[5] Bates v. State Bar of Arizona, 433 U.S. 350 (1977); In re Primus, 436 U.S. 412 (1978); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985); and Shapero v. Kentucky State Bar Ass'n, 486 U.S. 466 (1988). But see Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) and Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995).

[6] 536 U.S. 765 (2002).

eliminated the last paragraph dealing with a judge's duty to resign).[7] California, Massachusetts, New York, Oregon, and Vermont have increased the scope of the prohibition to include discrimination based on sexual orientation. In doing so, California and Massachusetts exempted from the prohibition membership in any official military organization. New York and Oregon have added to the prohibition the categories of age, disability, and marital status. Rhode Island included disability. Idaho included invidious discrimination "on any basis, including but not limited to the basis of race, sex, religion or national origin."

Many states have taken a somewhat more restrictive approach: Colorado, Iowa, and Texas prohibit membership based on a judge's "knowledge" of the discriminatory practice, and Maine, Minnesota, North Carolina, Oregon, Texas, and Washington have replaced "invidious" discrimination with language that effectively equals "unlawful" discrimination. The latter formulation restricts the prohibition to legislatively determined prohibitions, such as those limited to places of public accommodation. Finally, many states have attempted to provide more guidance than the ABA's commentary on what constitutes invidious discrimination. Those states have done so either by listing factors to use in assessing whether discrimination has occurred (or whether the organization in question is truly private) or have defined invidious discrimination as that which tends to stigmatize excluded members as inferior. Those that have taken the latter approach have not gone further to explain how to recognize a stigmatizing effect and whose view of the effect is critical.

In considering the impact of Section 2C on the lives of judges, it is important to recognize the unique legislative and judicial situation in which judges subject to the prohibitions of Codes of Judicial Conduct find themselves. The Codes of Judicial Conduct are designed to "establish standards of conduct for judges."[8] Like the codes of professional conduct governing lawyers' conduct, they have their genesis in the recommendations of committees of the American Bar Association. Whatever expertise the ABA may claim with respect to the lawyers' code seems considerably less with respect to codes of judicial conduct, but the ABA has stepped into the legislative drafting

[7] See Cynthia Gray, supra n.2, for a summary of state code provisions and ethics decisions dealing with both the professional and the constitutional issues.
[8] American Bar Association, Model Code of Judicial Conduct, preamble (1990).

void there as well.[9] The state and federal judiciaries acting in their legislative capacities to govern the conduct of judges, have, with some changes, accepted the ABA's product as their governing codes. Indeed, insofar as the governance of judicial conduct is concerned, the judiciary acts in a combined legislative–executive–judicial role.

Once a jurisdiction has adopted a code, however, substantial ambiguity in critical provisions may present a serious problem. Lack of clarity in the rules that govern society, intentional or not, is a fact of life. The need for interpretation, whether by courts, administrative bodies, other government officials, or the public itself, is a necessary part of living in society. The Code of Judicial Conduct, however, presents a special case. Ambiguities in that Code get resolved in a most unsatisfactory fashion. There are three sources of interpretation. Judges may interpret the rules themselves. They may turn to advisory committees, which have been appointed by the courts in more than 40 states to assist judges.[10] Or they may discover the meaning via the judicial discipline process. The first source is not helpful if the judge is in doubt; judges know that interpretation when one has a personal interest in the result is not to be relied on. The second source is useful but one-dimensional. The advice-giving bodies, comprised largely or entirely of judges, are committees that operate informally without the intellectual benefit that comes from adversary presentation. They must generate their own ideas and solutions in the time their members can spare from their regular duties. Moreover, they do not conduct hearings to assess the facts with respect to particular inquiries. They rely on information submitted by the inquiring judge. Thus, it is even theoretically possible that a committee could (not that it ever would) issue contradictory advice under Section 2C about the same organization because different facts were submitted by different inquiring judges. Committees often avoid the issue entirely by stating general principles and then refusing to advise about particular organizations because they are not equipped to engage in fact-finding.[11] The third source may be helpful to judges generally but not to the judge who is the subject of a disciplinary hearing for having engaged in particular conduct.

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[9] I have expressed myself on this subject elsewhere. See Kaufman, "Ethics 2000: Some Heretical Thoughts," The Professional Lawyer, 1, 4–6 (2001 Symposium Issue).

[10] Cynthia Gray, "Advisory Committees Let Judges Look Before They Leap," The Judges' Journal 29 (Spring 2003).

[11] See Cynthia Gray, "Organizations That Practice Invidious Discrimination" 1–2 (American Judicature Society 1999 revision) (citing opinions).

The subject matter of codes of judicial conduct is only rarely an issue in regular litigation — once in a while in a disqualification motion made to the particular judge, perhaps, but even there the number of times such decisions are reviewed is small. And so what we are discussing with respect to codes of judicial conduct is a body of clandestine law, of interest largely to judges themselves, and those who have an academic, or sometimes a media, interest in the particular issues. But the subject is very important for individual judges because occasionally the issues do become very public and are hotly debated. If the codes of conduct are badly drafted and unclear, judges are left to act alone or to advise without much assistance and without the possible clarification that may come from judicial review. That may be a perilous situation. In my opinion, Section 2C leaves judges in just such a situation.

II. Impartiality

A first issue relates to the purpose of Section 2C. The purpose will be relevant in the subsequent discussion of the constitutional issues raised by the prohibition. In discussing the judicial ethics issues regarding Section 2C, I am assuming that the constitutional discussion in *Republican Party v. White* with respect to what kind of impartiality counts as a compelling interest is limited to the election context and is not controlling, at least not yet, with respect to the conduct of sitting judges in their judicial roles.[12] But the purpose behind the prohibition contained in Section 2C is important also in figuring out just what is and what ought to be prohibited to judges in the first place. The Commentary to Section 2C states that purpose quite succinctly: "Membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired."

A moment's reflection, however, raises the question whether impartiality, or at least impartiality by itself, is the only justification. Membership of a judge in many

[12] See Martha Minow, "Stripped Down Like A Runner or Enriched By Experience: Bias and Impartiality of Judges and Jurors," 33 Wm. & Mary L. Rev. 1201 (1992) for the important insight that those involving in judging need a measure of partiality (as she defines it) to go with impartiality (as she defines it).

organizations raises a question as to the judge's impartiality. A judge may belong to a pro-choice or pro-life organization, a pro-death penalty or an anti-death penalty organization. Those memberships also raise questions of impartiality, as much or perhaps even more than the issue dealt with in Section 2C, and yet there is no categorical prohibition of membership in such organizations. Such issues are dealt with under the requirements of Sections 2A and 4A(1) that a judge "shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary" and that all extrajudicial activities must be conducted in a manner that they not "cast reasonable doubt on the judge's capacity to act impartially as a judge." Those prohibitions link the permissibility of the judge's activities off the bench to the requirements of the judge's job on the bench. When those prohibitions have been enforced by advising against membership in particular organizations, it is because the organizations or the causes they advocate are likely to turn up in matters that come before the judge.[13]

Perhaps membership in an issue-related organization is thought to raise different issues from membership in those organizations referred to in Section 2C in the judicial ethics context as well as in the constitutional context. Justice Scalia's opinion for the majority in *Republican Party v. White* distinguished between impartiality with respect to parties, which he viewed as a potential, relevant basis for the restriction on judicial speech in that case, and impartiality with respect to issues, which he thought did not. He stated that a judge's lack of predisposition with respect to relevant legal issues in a case "has never been thought a necessary component of equal justice."[14] Of course there is a difference between "predisposition" and giving vent to public expression of "predisposition" by speaking about issues or by joining issue-oriented organizations. It has become apparent that many of the Justices who are creating new First Amendment

[13] See Opinions 40 (1975, rev. 1998) and 82 (1987, rev. 1998), Judicial Conference of the United States Advisory Committee on Codes of Conduct. The former Opinion, interpreting Section 5B(1) of the Code of Conduct for U.S. Judges, advised that if the Anti-Defamation League of B'nai B'rith, the Sierra Club, and the NAACP "are likely to be engaged in proceedings that will ordinarily come before them or will be regularly engaged in proceedings in any court," the judge should not be an officer, director, or member. The latter Opinion advised more generally that "If the judge believes that his or her personal, direct advocacy of the policy positions advanced by the organization might reasonably be seen as impairing the judge's capacity to decide impartially any issue that may come before the judge, and the affiliation may reasonably be seen as indirect advocacy of those policy positions, the judge should not be a member of the organization."

[14] 536 U.S. at 777.

law in this area feel much freer than their predecessors of fifty and more years ago to lecture publicly about issues more or less closely related to those that may come before their courts.

But despite Justice Scalia's use of the word "never," he was talking about a restriction on judicial speech in the context of a judicial election, where speech about issues was very important, and not in the context of appropriate conduct for a sitting judge. I cannot believe that Justice Scalia — or at least that the Court — would conclude it was unconstitutional for a code of judicial conduct to forbid, for example, a judge from expressing a point of view about a case that was set for argument the next week, or more to the point of Section 2C, for a judge sitting on criminal cases to belong to the local police-sponsored anticrime club.[15] In that context, one might consider that judicial speech about impending legal issues or the organizational associations of a judge could be subject to at least some restriction. Indeed, Justice Scalia recently recused himself without comment from voting on the petition for certiorari in a case in which a "suggestion for recusal" had been made because the Justice had given a speech in which he expressed his views about the lower court's decision.[16]

Moreover, Justice Scalia in *White* agreed that sometimes partiality with respect to issues indicated partiality with respect to parties.[17] In the unlikely event that the Court were to extend its comments about impartiality regarding issues of law to hold that such concern does not justify restrictions on judicial membership in an issue organization, it should be noted that at least some of the current Section 2C membership restrictions relate more to issues than to persons. To the extent that lack of impartiality justifies prohibiting judicial membership in organizations that discriminate on the basis of gender, for example, the justification would not be so much fear that a male judge belonging to such an organization is likely to be biased against a woman as such — most male judges have all kinds of respectful interactions with women — but rather fear that such a male

[15] Justice Kennedy, in his concurring opinion in *White*, reserved the question of permissible restrictions upon judges "because they are judges — for example, as part of a code of judicial conduct . . . ." 536 U.S. at 796. In August 2003, the American Bar Association amended its Model Code of Judicial Conduct by adding a section requiring disqualification if "the judge, while a judge or a candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to (i) an issue in the proceeding; or (ii) the controversy in the proceeding." Canon 3E(1)(f).

[16] Elk Grove Unified School Dist. v. Newdow, No. 02-1624 (2003).

[17] Id. at 2536 n.7.

judge might lack impartiality with respect to the kind of gender issue likely to end up in litigation. Thus, with respect to at least some of the Section 2C prohibitions, Justice Scalia's notions about impartiality would cast doubt upon using lack of impartiality as a justification at all.

It is also possible that administratively there is a difference between questions of lack of impartiality on an issue and lack of impartiality toward a person. If there is a problem of impartiality with respect to an issue, it may be more easily handled administratively by recusal or disqualification in individual cases. The fact that there is a particular issue involved in a case will usually be apparent. Not necessarily so with respect to the identity of an individual. It may be difficult to identify, ex ante, those cases where the membership of a judge may be relevant. If a judge belonged to a club that did not admit Catholics, would a motion for disqualification be granted in every case in which a Catholic was a party? Or only where being a Catholic was relevant to the issues in the case? Would it make a difference if one of the lawyers, but not a party, were Catholic? How would a judge know these facts in advance? Suppose the judge found out in the middle of the case? Perhaps issues like these provide some justification for a prophylactic provision like Section 2C so as to prevent difficult recusal or disqualification issues from arising in individual cases.

On the other hand, one might say if that is a justification for Section 2C, then that Section sweeps the issue under the rug for a judge who would have otherwise have joined the discriminating club. Parties will not learn about the judge's proclivities, and so Section 2C may preserve the appearance of impartiality in some cases by hiding an actuality of partiality.

Moreover, there is a disconnect between the stated purpose of Section 2C and the rules relating to disqualification of judges. Section 2C, insofar as it is based on considerations of impartiality, assumes that it is reasonable for litigants and the general public to believe that judges have a tendency to subscribe to the views of organizations to which they belong. The law of disqualification, however, generally rejects that assumption and seems not to care that litigants or the general public might disagree. Many cases have held that mere membership in an organization may not justify disqualification of a judge on the basis of bias simply because the organization has staked

out a position with respect to an issue.[18] Many Catholic judges, for example, sit in abortion cases, indeed even when they have strong personal views on the immorality of abortion.[19] It is not much of a distinction to say that Section 2C is focused on bias based on a personal characteristic of the individual litigant whereas the abortion example deals with an issue. When the issue is granting permission to a minor to have an abortion in the absence of parental consent, what is at stake is the moral decision of the litigant, her personal identity as it were. Yet the law of disqualification trusts the ability of the judges to put aside any strong personal views they may have and to apply the relevant legal rules. And so we are still left to puzzle out why the lack of impartiality justification is thought to serve as a satisfactory justification for the sweeping prohibitions contained in Section 2C.

There must be other considerations here that the Commentary does not single out. It is important for us to try to understand what they might be because, as we shall see later, impartiality as a justification for state restriction of at least some First Amendment activity of judges has been weakened by the Supreme Court's decision in *Republican Party v. White*.[20]

Possibly, the prohibition is the product of a utilitarian instinct: judges are icons in a system that trumpets neutrality as a core value. Participation of judges in certain discriminatory activity, therefore, has the potential to undermine that value and public confidence in the judiciary, whether or not the judge sits on a case involving that type of discrimination. But of course the same considerations exist in the case of issue conflict.

Another possible justification is a factual distinction between potential bias because of the identity of a person and potential bias arising from an issue in a case. Perhaps the prohibition contained in Section 2C derives from an unexpressed notion that the former type of discrimination presents a greater danger to the administration of justice or to the public perception of the administration of justice than the latter type. It is a perception that is not assuaged by the fact that the legislature may not constitutionally force the organization to cease its discriminatory practices and may not constitutionally prohibit the ordinary citizen from joining the organization.

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[18] See Bryce v. Episcopal Church, 289 F.3d 649 (10th Cir. 2002) and numerous cases cited therein.
[19] Feminist Women's Health Center v. Codispoti, 69 F.3d 399 (9th Cir. 1995) (opinion of Noonan, J.).
[20] 536 U.S. 765 (2002).

The judgment may well be that the potential threat posed by membership in a group that practices the prohibited invidious discrimination is not sufficiently curable by disqualifying the judge in cases where such membership is relevant. And why is that? Perhaps instinctively the drafters and supporters of Section 2C have made the judgment that a judge's membership in an organization that practices invidious discrimination indicates a bias that poses a danger to the judicial process itself because the organization to which the judge belongs is doing something that is morally wrong even if it is constitutionally protected. That would certainly be a much more compelling justification for barring a membership that would be constitutionally protected for the ordinary citizen than potential lack of impartiality should a relevant case ever arise

Such a justification for Section 2C presupposes a serious judgment by a court acting in a legislative capacity not only about the necessity for the prohibition but also about the moral or utilitarian conclusions being reached. It also speaks to the desirability of being quite clear about exactly what it is that is being prohibited and why. I have already suggested that the ABA's recommendation is lacking in setting forth all the reasons constituting the "why." I will now suggest that it is also quite ambiguous with respect to the "what," and that ambiguity makes it difficult to craft a satisfactory explanation of the "why."

III. Section 2C — The Constitutional Link

The biggest definitional problem derives from the terminology of "invidious discrimination."[21] The term was described by the ABA committee that recommended it as "not an unfamiliar one to judges for they have interpreted and applied it in literally hundreds of cases. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Griffin v. Breckinridge*, 403 U.S. 88 (1971); *Fullilove v. Klutznick*, 448 U.S. 448 (1980)."[22] The term, however, has been taken from constitutional law where the issue is usually discrimination by the government and "invidious" seems synonymous with

[21] See Larry Alexander, "What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies," 141 U. Pa. L. Rev. 149 (1992) for one thoughtful analysis of the complex relation between morality and discrimination in ordinary private relations.

[22] ABA Standing Committee on Professional Responsibility, Report No. 120, at 5 (August 1984).

"unconstitutional," i.e., it is the type of discrimination that violates the Equal Protection Clause. Even in *Griffin*, the term was used to indicate the kind of animus that had to be shown to give a constitutional interpretation to a statute that founded a federal cause of action on private conduct depriving individuals of constitutional rights. The concept runs into difficulty, however, when applied to purely private discrimination by organizations because it runs up against notions of our personal right to associate with whom we will, whether expressed as an ordinary right of human beings or as a right protected by a state or federal constitution. The typical public accommodations statute, addressed to private conduct, is worded in terms of "discrimination," not "invidious discrimination."[23]

The Commentary to Section 2C addresses the meaning of "invidious discrimination":

> Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from mere examination of an organization's current membership rolls but rather depends on how the organization selects members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex or national origin persons who would otherwise be admitted to membership. See *New York State Club Ass'n, Inc. v. City of New York*, [487 U.S. 1] (1988); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

[23] For a list of state statutes, see Singer, "No Right to Exclude: Public Accommodations and Private Property," 90 Nw. U. L. Rev. 1283, 1478–1490 (1996).

Those few words raise many questions of interpretation and application, all relating to the general problem of when an organization practices invidious discrimination. Perhaps the first to be faced is whether the reference in the Commentary to organizations whose membership limitations could not be constitutionally prohibited means that the concept of "invidious discrimination" incorporates a notion of lack of constitutional protection, or whether constitutional protection is a separate inquiry to be reached only after concluding that an organization practices invidious discrimination.

The Commentary's language seems to indicate that the former interpretation is correct. How else would one explain the Commentary's effort to exclude from the prohibition membership in an organization that "is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited"? Not all private, intimate organizations are excluded. Only those whose membership limitations could not be constitutionally prohibited are excluded. In the explanation of the Commentary, such organizations are not practicing "invidious discrimination."

If the Commentary correctly concludes that discrimination by small organizations whose membership limitations may not be constitutionally prohibited does not constitute "invidious discrimination," it seems difficult to conclude that similar discrimination by large organizations whose membership limitations also may not be constitutionally prohibited is "invidious." As *Boy Scouts of America v. Dale* indicates, the membership limitations of many organizations, small and large, even including hate organizations like the Ku Klux Klan, are constitutionally protected.[24] That is not to say that the Code could not have been drafted to prohibit judges from membership in organizations that discriminate, whether invidiously in the constitutional sense or not. Many provisions in state judicial codes restrict the exercise of the constitutional rights of judges. But Section 2C does not do that. Its prohibition is tied to the exercise of invidious discrimination by the organization, and invidious discrimination seems tied to the constitutional protection afforded to the organization's membership limitations. That conclusion strongly suggests that the text of Section 2C should be interpreted as precluding a finding of "invidious

[24] 530 U.S. 640 (2000).

discrimination" with respect to all organizations practicing discrimination if their membership policies are constitutionally protected.

Such a conclusion was indeed reached by the Massachusetts Advisory Committee on Judicial Ethics in its Opinion 2002-11. Based on the factual description of the Masons provided by the inquiring judge, the Committee advised that a judge's membership and acceptance of a leadership role in the Masons, which limits its membership to men, would not violate Section 2C because the discrimination was not "invidious."[25] The Massachusetts Opinion relied on two factors concerning the Masons. First, as described by the inquirer, the Masons "seek to promote cultural values of legitimate interest to its members" and "do not seek to stigmatize any excluded group." Second, relying on the reference to constitutional principles in the American Bar Association's commentary to Section 2C, the Committee viewed the discriminatory conduct as beyond the state's regulatory power. It relied on *Donaldson v. Farrakhan*, which held that the state could not penalize the exclusion of women from a meeting of Muslim men:

> To be afforded First Amendment protection, there is no requirement that an association exist for the particular purpose of disseminating a specific message. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655 (2000). It must merely engage in expressive activity that would be impaired by the unwanted inclusion. Id. Here the mosque's men's class was engaging in its religious meeting for men only, expressing concern for the community, and discussing the moral ideology and roles of men in addressing crime and violence in the community. The expression of religious viewpoints specific to men of the faith would have been impaired by the inclusion of women in the meeting. The admittance of male members of the public to an otherwise nonpublic mosque meeting does not bring the event within the scope of the Massachusetts public accommodation law. Holding

[25] Opinion 2002-11, Massachusetts Supreme Judicial Court Advisory Committee on Judicial Ethics. Accord, Committee on Codes of Conduct, Judicial Conference of the United States, U.S. Compendium of Selected Opinions §2.14(b) (1995). I should note that I was a member of the Massachusetts Advisory Committee and took part in some of the discussions of this issue, including an earlier Opinion, 2002-3, which declined to answer the question. However, my term on the committee expired before the decision in Opinion 2002-11 was reached.

> otherwise would impermissibly burden the defendants' freedom of association under the First Amendment. *Boy Scouts v. Dale*, supra at 659.[26]

The Committee, in applying this reasoning to the issue of membership in the Masons, added: "And, although it is not immediately apparent how admission of women would adversely affect the Masons' ability to achieve their expressive goals, the State simply has no business telling the organization how it should do so." Once the Committee concluded that the discrimination practiced by the Masons was not "invidious," then it followed that Section 2C did not prohibit a judge's membership.[27]

I hope that other jurisdictions will find a way to ignore the language in the Commentary about the protected constitutional rights of organizations because its logic would gut the provision completely. The membership limitations of a Ku Klux Klan cell are constitutionally protected, and the Commentary's logic therefore suggests that Section 2C does not prevent a judge from joining such a cell, whether small or large. If Section 2C means anything, it must mean that membership in such an organization is prohibited. Perhaps one can avoid the Massachusetts Committee's interpretation of Section 2C by saying that since such an interpretation would defeat the apparent purpose of the provision, the Commentary's language exempting intimate, private organizations should be ignored, on the plausible argument that it has no foundation in the text and indeed is contrary to it. The text should be read as written, leaving it to individual judges to raise constitutional objections to Section 2C as applied to membership in such organizations and other organizations covered by the text of Canon 2C, a subject that we shall consider later. That interpretation is certainly easiest in jurisdictions that have not adopted the Commentary.

A better way out of this problem is for states that have adopted Section 2C to eliminate the Commentary's language exempting certain described private, intimate organizations. If such organizations are to be exempted, the exemption should be

[26] 436 Mass. 94 (2002).

[27] The Committee went on to suggest, but not to decide, that membership might be forbidden by Section 2A, which provides that a "judge should . . . conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

contained in the text, but without the language relating to constitutional protection.[28] The reason for exempting a small exclusionary men's or women's reading or card-playing group is that the social discrimination, albeit invidious, is de minimis and not because its membership selection process is constitutionally protected. Presumably the exemption exists because of a desire not to forbid judges from belonging to such informal gatherings as a small reading, card-playing, or dinner group whose membership is limited exclusively to men or to women. Perhaps there is also an administrative component to the exemption because there is no reliable means of telling whether the discrimination is in fact invidious as opposed to the result of natural selection. The typical reading, card-playing, or dining group does not have a mission statement or other public declaration of its practices or admission standards. On the other hand, an administrative justification is weak because the purposes of a group are more discoverable when the membership is small. Asking a few people will provide a fairly reliable answer.

IV. Invidious v. Non-invidious Discrimination

a. Not so safe harbors and arbitrariness

There are further difficulties in defining "invidious discrimination" aside from the linguistic link to constitutional law.[29] The commentary provided by the ABA attempts to be helpful, but when applied to organizations other than out-and-out hate organizations, it is susceptible to opposite reasonable conclusions.

The Commentary, already quoted,[30] provides two safe harbors and a residual category. A judge desiring to join an organization would like to avoid the residual test of

[28] That solution has been adopted by the Massachusetts Supreme Judicial Court in its recent revision of its Code of Judicial Conduct, following the recommendations of its Committee to Study the Code of Judicial Conduct. (I should disclose that I was a member of that committee.) See http://www.state.ma.us.courts/rule309eff1000103.pdf.

[29] The Commentary's reference to examination of an organization's current membership rolls is somewhat blind. What is intended is some notion that mere absence of minority members might not be conclusive of invidiousness in the local historical society of a rural town with no minority population while it probably would indicate invidious discrimination in a historical society of a major city.

[30] Pp. 000–000, supra.

arbitrary exclusion by finding one or more of the permitted factors whose presence presumably makes the discrimination non-invidious. The first safe harbor consists of organizations "dedicated to the preservation of the religious, ethnic or cultural values of legitimate common interest to its members." Aside from religious organizations themselves, the various ethnic or religious-based anti-defamation leagues would presumably be an example of what the drafters had in mind. Their purposes are self-protective of defined groups.

The word "legitimate" is left undefined and requires us to answer what an "illegitimate" purpose would be. The drafters have deliberately avoided the word "unlawful" but they have also deliberately avoided providing any examples. Suppose a Ku Klux Klan chapter defined its objectives in religious, ethnic, and cultural terms — i.e., the organization is dedicated to the preservation of what it called "White, Anglo-Saxon, Protestant values," but adopted as its symbol the public burning of crosses on land owned by one of its own members. Would that involve the preservation of values of "illegitimate" common interest, even if lawful? Suppose it expressed its views simply in ordinary speech? Would such expression involve "illegitimate" common interest? Suppose a pacifist religious organization, limited by race or ethnic grouping, expressed its opposition to undertaking a war in Afghanistan or Iraq by burning an American flag before every weekly service? Perhaps the drafters meant to equate "legitimate" with some notion of a consensus view of what is not "hateful" or "immoral," but in the absence of any explanation or even any examples, it is difficult to know what "legitimate common interest" means.

A more pressing example of the difficulty caused by the safe harbor exemption exists in those jurisdictions that have expanded the forbidden areas of discrimination to include the category of sexual orientation. Whatever our personal views on the subject, the status of discrimination on the basis of sexual orientation is legally different from race and gender discrimination. Classification on the basis of race or gender has been held to be sufficiently suspect to warrant strict or intermediate scrutiny. Although the Supreme Court of the United States has overruled its earlier holding that it was not unconstitutional for states to prosecute homosexual conduct,[31] it did so for privacy reasons using rational-

[31] Lawrence v. Texas, 123 S.Ct. 2472 (2003), overruling Bowers v. Hardwick, 478 U.S. 186 (1986).

basis review. More relevantly to Section 2C, the Supreme Court held in *Boy Scouts of America v. Dale* that a state may not make it unlawful for the Boy Scouts of America to refuse membership to homosexuals.[32] Whether we agree or disagree with the reasoning used in *Lawrence* and with the holding in *Dale*, they demonstrate that the legal status of discrimination on the basis of sexual identity is still viewed differently from the other categories of prohibited membership, perhaps even with respect to some areas of "public accommodation" where other kinds of discrimination may lawfully be prohibited.

The prohibition in Section 2C goes well beyond activities in the field of public accommodation. The controversy over the membership policy of the Boy Scouts also indicates that very many citizens hold different views about sexual identity from those of homosexuals and want to be able to associate with others who hold similar views. It is true that many citizens made those same arguments about race two generations ago. Our society has overwhelmingly rejected those views, and I think it is accurate to say that it has reached a consensus — in the sense at least of an overwhelmingly dominant view — that ordinarily membership in a group that excludes on the basis of race is harmful to the purposes of our society and morally wrong. But it is doubtful that our society has yet reached a consensus that membership in a group that wishes to promote a heterosexual lifestyle is morally wrong. Prohibiting discrimination against homosexuals is one thing. Suppressing dissent, at least by judges, in the form of prohibiting membership in an organization that wants to promote a heterosexual lifestyle is another. There is a difference between my saying that I won't join the Boy Scouts because of their discriminatory policies and that I would forbid all judges from doing so. The question for the judges deciding whether to expand Section 2C is whether there is a dominant view on the subject in their jurisdiction and if there is not, whether they wish to legislate on this issue with respect to the private conduct of judges in the absence of such a view concerning the morality of promoting a heterosexual lifestyle.

The constitutional protection of the membership policies of the Boy Scouts is not conclusive of the power of the state to prohibit judges from joining organizations that practice certain kinds of discrimination. On the other hand, there is a difference between

[32] 530 U.S. 640 (2000).

making the judgment that resulted in Goodridge v. Department of Public Health,[33] in which the Massachusetts Supreme Judicial Court found a violation of the state constitution in denial of marriage licenses to same-sex couples and the further judgment that judges should be forbidden from joining an organization that promotes a heterosexual lifestyle. To accomplish the latter requires the additional conclusion that such an organization practices "invidious" discrimination. But the Supreme Court's position may have some bearing on the notion of what constitutes "invidious" discrimination. It is also possible that the Boy Scouts' membership policies could pass muster as not constituting "invidious discrimination" if understood in terms of "we have our values; they have theirs; we don't address the question of whose values are better or who are better people; we just want to promote our values." Indeed, the brief of the Boy Scouts in *Dale* came close to asserting that position: "Official Scouting materials addressed to the boys do not refer to homosexuality or inveigh against homosexual conduct; rather they teach family-oriented values and tolerance of all persons . . . . Boy Scouting does not have an 'anti-gay' policy, it has a morally straight policy."[34]

But how are judges to tell whether that statement is conclusive in the sense of determining the invidiousness of the policy? Must they make a factual determination of the mental state of the Boy Scouts' national or local policymaking group? That seems quite impossible. But all that is left then is the public pronouncements and actions of the affected organization and an estimate of the reasonable public perception of the purposes and activities of the organization in question. Moreover, it is possible that different local troops of the Boy Scouts apply the national policy differently. Indeed, there is the further problem occasioned by the fact that a number of Boy Scout troops have apparently decided not to discriminate in their membership policies and quietly admit gay members in violation of national policy. May a judge be a scoutmaster in such a troop in the jurisdictions that have expanded the coverage of Section 2C to include the category of sexual orientation? There is no literal violation of Section 2C, but the public perception

[33] 798 N.E.2d 941 (Mass. 2003).
[34] Brief for petitioners in Boy Scouts of America v. Dale, *supra*.

of bias would still be the same, especially if the troop and the judge kept quiet about its revised policies.[35]

The Commentary contains yet another safe harbor for judges. Religious organizations, including I assume all kinds of groups organized under the heading of "a religion," are exempt, we are told by the Reporter for the ABA Committee that recommended Section 2C, because "the categories of race, sex, religion and national origin are the only ones that are constitutionally protected."[36] The result of the exclusion is that a judge apparently may be a Boy Scout leader if the troop is sponsored by a church, but not if it is sponsored by a secular group — unless the secular group's discrimination is not regarded as "invidious." But judges who want to join their children in Boy Scout activities would be well advised, under the Commentary's explanation, to have their children join the "almost 65 per cent of Boy Scout troops . . . sponsored by churches or synagogues."[37] That seems to be an odd result and quite defeating of the expressed purpose behind Section 2C.

The argument might be made that there is a difference between church activities and church-sponsored activities. Indeed, in the Establishment Clause context, the Supreme Court has occasionally seemed to adopt such a notion,[38] even though many religious institutions deny the difference. But whatever validity that argument has with respect to education in tying knots fades when the organization seeks to further religious teachings and values on a particular subject.

There is the further problem that if we conclude that there are sufficiently weighty reasons for prohibiting judges from joining such organizations, why should a judge be permitted to join an organization practicing invidious discrimination if it is sponsored by a religion? Why is the effect on public perception of the ability of the judge to perform

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[35] The Massachusetts Advisory Committee that decided that the Masons did not practice invidious discrimination will not have to decide whether to apply the same reasoning to the Boy Scouts. Previously, in the absence of sexual orientation as a prohibited category in its version of Section 2C, it declined to find a prohibition against membership in the general language of Section 2A. See pp. 000–000 infra. Opinion 2001-1. Now, however, the Massachusetts Supreme Judicial Court has added that category to Section 2C. Although the Court has removed the constitutional link from the language of the commentary to Section 2C, the Advisory Committee would still have to decide whether the Boy Scouts' membership policy was stigmatizing or simply promoting "cultural" values and also what it wanted to do about the First Amendment issue.

[36] Lisa Milord, The Development of the ABA Judicial Code 16 (1992).

[37] Ibid.

[38] See Tilton v. Richardson, 403 U.S. 672 (1972).

his or her judicial duty fairly mitigated when the invidious discrimination is practiced by a religious organization? Perhaps some supporters of Section 2C believe that religious sponsorship removes the discrimination from the category of "invidious" or perhaps it would be fairer to characterize the argument as a belief that government ought not to interfere with the way religious organizations wish to conduct their activities. Although *Bob Jones University v. United States* involved primarily a question of statutory construction, it suggested in the context of provision of a government benefit that an exception for a racially discriminatory religious organization is not compelled by the Free Exercise Clause of the First Amendment. In that case, the Supreme Court of the United States was unanimous in holding that denial of tax benefits to a private religious school that discriminated on the basis of race did not violate the Free Exercise Clause of the First Amendment.[39] The government's compelling interest in wiping out racial discrimination in education overrode whatever burden existed on the exercise of religious beliefs.

More importantly, in a situation like membership in the Boy Scouts, where no government benefit is involved, *Employment Division v. Smith*,[40] tells us that the Free Exercise Clause is inapplicable to a neutral, generally applicable law — which Section 2C without an exemption for religion would appear to be. It thus appears that the Free Exercise Clause by itself does not compel the exception set forth in Section 2C. *Smith* tells us that a constitutional weighing of the government interest with a free exercise interest is appropriate only when a hybrid free exercise of religion right is involved, that is, the free exercise interest is combined with the assertion of another constitutional right — such as the freedom of association or free speech rights that are relevant to the application of Sections 2C and 2A to the permissibility of judicial membership in certain organizations. Those constitutional rights will be discussed later in this paper.

The drafters of Section 2C do not have the justification for exempting religious organizations that satisfied the Supreme Court when faced with an equal protection challenge against New York's exemption for "benevolent societies and religious orders" in its anti-discrimination law. In rejecting such a challenge in *New York State Clubs Assn. v. New York*, the Court found justification in the city's explanation that it had excluded

[39] 461 U.S. 574 (1983).
[40] 494 U.S. 872 (1990). *Smith* was decided three months before the ABA adopted Section 2C in its present mandatory form.

benevolent and religious orders because there was no testimony in the record that they were places of business activity. But the purpose of Section 2C is not to eliminate invidious discrimination in places of public accommodation as places of business activity. The stated purpose is to prohibit judges from joining such organizations because of the symbolic effect of such membership on the public perception of impartiality. Excluding religious organizations from the scope of the prohibition cannot reasonably be justified on the basis of a lack of symbolic effect when judges belong to religious organizations that are engaged in invidious discrimination.

Except for the First Amendment questions to be discussed later, the biggest justification for the exception for religious organizations in Section 2C may well be political. The decision to insert an anti-discrimination provision into codes of judicial conduct was an invitation to all groups who believe that they have been subjected to discrimination to seek inclusion among the protected groups. Inclusion signifies judicial recognition that the group has in fact been the subject of discrimination, with a consequential impact on the future substantive law of the jurisdiction. The more groups that are included in Section 2C, the greater the possibility of opposition from religious groups who would not want their membership and their practices — for example, the separation of the sexes in Orthodox Jewish synagogues or the exclusion of women from the priesthood by the Catholic Church — brought under the microscope of judicial disciplinary or ethics committees. But that does not change the fact that these exceptions greatly weaken the force of Section 2C. They even strike at its heart. A judge is not forbidden by the language of Section 2C to join Matthew Hale's World Church of the Creator, even though it qualifies as a core hate group.[41]

Aside from the exceptions for religious organizations, there is the safe harbor exception for an organization that "is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited." I have already discussed the desirability of eliminating the closing limiting phrase and recognizing that the reason for that safe harbor is not that the organization's membership criteria may be constitutionally protected but that allowing discrimination, even if

[41] Hale was ordered to rename his organization because it infringed another organization's trademark, but he refused to comply. Hale v. Committee on Character and Fitness, 335 F.3d 678, 679 n.1 (7th Cir. 2003).

invidious, by a small social group is likely to have both a de minimis and a safety valve effect.

If the "safe harbor" exceptions for membership do not apply, the test of invidiousness is whether the organization "arbitrarily excludes from membership on the basis of race, religion, sex or national origin persons who would otherwise be admitted to membership." It is apparently not enough to conclude that persons are excluded from membership on the basis of race, religion, sex, or national origin because otherwise the word "arbitrarily" would not be necessary. Presumably what is meant is that there is no good reason for the discrimination. As we have seen, the meaning of those terms is not obvious and in the context of a code of judicial conduct, the usual methods of clarifying ambiguous terminology of the sort contained in Section 2C are not available to judges seeking guidance.

b. The "practice" of invidious discrimination

This paper has noted previously that a problem with a prohibition based on the practice of invidious discrimination that is grounded in a policy of promoting impartiality and the appearance of impartiality arises from the failure of Section 2C to address, at least explicitly, the problem of impartiality arising from judges joining issue-oriented organizations. That issue was raised in the context of ascertaining the purpose of Section 2C, but actually the problems of lack of impartiality based on membership in a Section 2C organization and lack of impartiality based on membership in an issue organization are more closely linked than the text of Section 2C recognizes. The prohibition contained in Section 2C is aimed at "membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin." The key words in that definition are "practices invidious discrimination."

What constitutes the "practice" of invidious discrimination? The obvious example is the membership policies of the organization, and most cases and ethics opinions interpreting Section 2C have concerned membership policies. It is easy to find a potential violation if an organization chooses to exclude members of the mentioned categories.

Presumably it would also be easy to find a potential violation if an organization refused to employ workers in the named categories. But suppose an organization said that anyone may belong to our organization, but one of our purposes is to advocate the repeal of laws prohibiting discrimination on the basis of the named categories. Or suppose a Ku Klux Klan chapter said, "We welcome African-Americans, Catholics, and Jews who share our views about such groups." If indeed it could be shown that some Jews, Catholics, or African-Americans were members, would the chapter's advocacy of discrimination constitute the practice of invidious discrimination? I assume that the answer to that question would be yes, because a contrary answer would afford a way for an organization to turn Section 2C into a dead letter by simply moving its discriminatory practices out of its membership policies and into the statement of its goals. Indeed, when the issue involves membership in an organization, issue discrimination is a proxy for discrimination on the basis of one of the categories set forth in Section 2C.

Once one admits that the reach of Section 2C extends to the stated goals of an organization as well as to its membership policies, many other problems appear. If we assume for the moment that Section 2C would be violated by organizations that were limited respectively to men or women, then what would its reach be to, say, a women's bar association, one of whose goals was to advance the interests of women (as opposed to the interests of men) and specifically to urge appointment of women to positions of power in legal organizations and in the judiciary.[42] The organization would argue that it is open to all, to men as well as women. But in fact the organization is open de facto only to those men who favor the goals of the organization and if the goal of the organization is

[42] "The Women's Bar Association of Massachusetts is where women lawyers in Massachusetts come together to build important personal and professional relationships. The WBA is about women helping women. When you join the WBA you can expect leadership opportunities, rewarding work on our committees, a networking forum for business development and more. At the WBA, our vision is to build a strong community of women lawyers who make a difference in the profession and in society at large. . . . " Women's Bar Association of Massachusetts website, http://www.womensbar.org/WBA/AboutWBA.htm (last visited Nov. 26, 2003). The officers and members of the board of directors are all women.

to promote the roles of women, necessarily at the expense of men, would that be a form of prohibited discrimination on the basis of gender?

Such an argument would be met with an assertion that even if those policies might be regarded as discriminatory, they are not "invidious" because they are being urged only in order to achieve equality. Therefore while membership in a men's bar association, open to all but urging appointment of men to positions of power, would be prohibited as involving membership in a organization practicing "invidious discrimination," membership in a women's bar association would not involve a violation. The argument is that in the context of the history of the country, a men's bar association as described above would stigmatize women even if open to women, while a women's bar association open to men would not have a stigmatizing effect with respect to men.[43] The same argument may be made with respect to the National Bar Association, which described itself as an organization of "predominately African-American lawyers and judges" and as serving as "an advocate for the Nation's African-American lawyers."[44] While that argument has force when applied to discrimination in society at large, it does not seem wise to interpret the ambiguous words of Section 2C so as, for example, to prevent male judges from joining a male-oriented organization while permitting female judges to join a female-oriented organization. Judges are a relatively small and collegial group of elite government officials with an institutional role in providing equal justice. Making a distinction of this kind is bound to cause tension and harm collegiality. In my view, the harm of treating male and female, straight and gay, white and African-American judges differently in this regard is greater than the gain.

The issue arises in many different contexts. Under a headline of "'Sisters' Get Their Turn to Bond," the Boston Globe reported as follows[45]:

> For 125 years, the town fathers of [Manchester-By-The-Sea, with a population of 5200] have gathered each July at a park overlooking the

[43] See opinion of Ginsberg, J., concurring in Grutter v. Bollinger, 123 Sup. Ct. 2325, 2347–2348 (2003).
[44] See the website of the National Bar Association, http://www.nationalbar.org/about/index.shtml (last visited Nov. 26, 2003). See also Marcavage v. Board of Trustees of Temple Univ., 2002 U.S. Dist. LEXIS 19397 (E.D. Pa. 2002) (opinion of Tucker, J., refusing to recuse herself in a civil rights case on the basis of active membership and receipt of an award from the local affiliate of the National Bar Association).
[45] Boston Globe, June 22, 2003, p. B1.

> harbor. Their group for older men, the Elder Brethren, is a Manchester institution; their picnic, the one and only meeting of the year.
>
> Chowder is always served. And women are always excluded. . . . Between 80 and 120 men are expected at the July 5 meeting of the Elder Brethren. . . . [A] handful of Manchester women, most in their 70s, started a new group for women only, the Elder Sisters, and yesterday held their first annual chowder picnic for a capacity crowd of 250, two weeks before the men's event is scheduled.

If one assumes that these are "organizations" and that they are engaged in the "practice" of discrimination, is the discrimination "invidious" in terms of Section 2C? For both? For neither? For the men's organization but not the women's? My argument is that in the context of telling judges what organizations they are prohibited from joining, it would be a mistake to conclude that a male judge could not join the Elder Brethren but that a female judge could join the Elder Sisters.

To push the "practice" of discrimination issue one step further, surely membership in an organization that is open to members of all races but that promotes a platform advocating the legalization of white-only clubs would be widely regarded as violating Section 2C. But what about the membership of judges in an organization open to all that advocated the legalization and expansion of affirmative action based purely on race in state-run entitlement programs even though no history of de jure discrimination in the operation of that program existed? The argument would be that while of course the organizations were entitled to free speech, what was being urged was what had already been judicially determined to be constitutionally forbidden discrimination, and hence "invidious."[46]

One could avoid the difficulties posed by hypotheticals such as these — and I am sure that readers will quickly think of many others — with a narrow definition of the "practice of invidious discrimination." Such a definition, however, would seem to afford a potential end-run around the prohibitions of Section 2C.

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[46] See, e.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

c. Some further examples

The discussion to date suggests that it is indeed easier to write language prohibiting membership in organizations that practice "invidious discrimination" than to know what one has prohibited. One might say that every regulation like Section 2C will have difficult problems of interpretation at the edges. Section 2C, however, is likely to operate largely, if not wholly, at the edges. Judges are not likely to want to join the core hate groups that are clearly covered. Consider the following organizations: 1) The Augusta National Golf Club; 2) the board of trustees of a boys-only secondary school; 3) the board of trustees of a girls-only secondary school; 4) the board of trustees of Smith or Wellesley College; 5) The Junior League; 6) The Masons; 7) The Sons of the Confederacy; and 8) any organization that claims it is not discriminating because it has a handful of carefully selected Jews, Catholics, African-Americans, Hispanics, etc.

There are a few "Men Only" golf clubs in this country. The Ladies' Golf Club of Toronto is an old "Women Only" Golf Club just across the border in Canada.[47] In their defense, members of such clubs say such things as: the club is neither business nor social; it is a collection of people who like to play golf; those are the only facilities at the club; and we like to hang around afterwards informally, sometimes in our underwear. It is a place for men to talk guy talk — or for women to talk women talk. When the Augusta National Golf Club does sponsor a public event, the Masters Golf Tournament, it is open to men and women guests alike. I think most advisory committees interpreting Section 2C would say that a golf club does not fit within the "intimate, purely private" safe harbor. My guess is that the drafters of the prohibition would say that the reasons given for excluding women from membership are flimsy and stigmatizing. I also think that some others might well say that social havens for men and women are useful. The federal Committee on Codes of Conduct has concluded that all-male social clubs and a female health club with no business or commercial purpose or advantage were not practicing

[47] USA Today, Oct. 4, 2002, p.1, col. 2.

"invidious discrimination."[48] It is entirely plausible that different jurisdictions might resolve the issue with respect to all of these organizations differently.

Membership on boards of directors of schools that segregate by gender in secondary schools and college is an even more difficult problem. There are three plausible interpretations of Section 2C in this context: A judge may be a director of either an all-male or an all-female school. A judge may be a director of neither. Or a judge may be a director of an all-female, but not an all-male, school. To the extent that "invidious" discrimination has a connection to the idea of unconstitutional discrimination, *Mississippi University for Women v. Hogan* is instructive.[49] A challenge to state exclusion of men from the School of Nursing of this all-women's institution was upheld because the discrimination did not meet the test of being substantially related to achievement of important government objectives. Nor was there any showing that the all-woman School of Nursing represented compensation for past discrimination or that it was necessary to achieve some legitimate governmental objective. One ethics committee has adapted the compensatory remedy test to gender discrimination by private organizations in the following language:

> [T]o satisfy the *Hogan* standards, the organization must demonstrate that (1) there is a sex-based disadvantage suffered by its membership related to its basis of classification; (2) the intention in forming or continuing the organization is to compensate for this disadvantage; (3) the organization's programs and policies are not based upon and do not perpetuate archaic and stereotypical notions of the abilities or roles of the sexes; and 4) it is the organization's single-sex policies and programs that directly and substantially help its members compensate for the previous disadvantages. Feldblum et al., "Legal Challenges to All-Female Organizations," 21 Harv. C.R.-C.L. L. Rev. 171, 220 (1986).[50]

[48] U.S. Compendium of Selected Opinions §2.14(c) (1995).
[49] 458 U.S. 718 (1982).
[50] Opinion 94-13, Arizona Supreme Court Judicial Ethics Advisory Committee.

The Committee adopted that test in the course of deciding that it did not have enough information to decide whether a judge could be a member of the Junior League of Tucson, a community service organization whose membership was all female although its bylaws had been amended to be gender neutral.[51]

If one applies that test to same-sex girls schools, a school could surely show that at one time in the history of this country, there was discrimination against women in public education at both the secondary and the college level and that private single-sex schools for girls and women had been established in response. It would, however, be much more difficult to demonstrate compliance with conditions 3 and 4 today. However, the same Arizona committee indicated another possible justification for single-sex activities in the context of a decision that the discriminatory gender policies of the Boy Scouts and the Girl Scouts had "some justification which, in the absence of harm to the excluded persons, would permit a judge to participate in these organizations." Opinion 94-7, Arizona Supreme Court Judicial Ethics Advisory Committee. The Committee found "some justification" in "the debate among educators, psychologists and social scientists whether educational, social or psychological benefits accrue to children from same-gender group activity."

The committee did not consider the reasonableness of the reaction of a boy or girl excluded on the grounds of his gender that the exclusion was stigmatizing. Its reasoning could be used to support single-sex schools, but a plausible argument could also be made that the justification smacked of the stereotype and also had a stigmatizing aspect. In such a situation, it seems easier to decide whether the discrimination ought to be permitted as a matter of social, political, and educational judgment rather than as a matter of the definition of the word "invidious." In permitting judges to join the Boy Scouts and Girl Scouts despite their gender policies, the Arizona committee implicitly rejected the notion that invidious discrimination should be judged from the perspective of the discriminated group, focusing instead on the reasonable justification that could be advanced for the discrimination. But if educational research has sufficiently demonstrated that (some) boys

[51] Florida's Code of Judicial Conduct, on the other hand, in its Commentary specifically names the Junior League as well as the Masons as permissible organizations for judges to join as examples of the special exemption in its Section 2C for "fraternal" and "sororal" organizations.

and girls flourish better if educated separately, at least at certain developmental stages, then a test that focused more on differences than on discrimination could yield a different analysis for single-sex schools than for single-sex communal or business organizations.

In similar fashion, Massachusetts Advisory Opinion 2002-11, discussed earlier, concluded that membership in the Masons did not violate Section 2C. It seems likely to me that other jurisdictions might reach different conclusions with respect to judicial membership in the Masons and possibly in the Boy Scouts and the Girl Scouts. The ABA Standing Committee on Ethics and Professional Responsibility, which recommended the original non-mandatory Section 2C, set forth its view that the "perspective that is important is not that of judges, but the litigants' and the publics'[*sic*], who see judges belonging to organizations that they cannot join because they are considered inferior."[52] As noted above, when one is dealing with a small, well-defined group of powerful government figures with the mission of equal justice that judges have, it does not seem desirable to draw the line of prohibited organizations between male-oriented and female-oriented organizations. Where judges are concerned, and to the extent that impartiality and the appearance of impartiality are goals, the impact of drawing such a line does not seem neutral.

The issue of what counts as "invidious discrimination" is not easy even in the case of racial discrimination. A current controversy throughout the South involves the use of the Confederate flag as a symbol, both by government organizations and by private organizations. Many of the users justify use of the flag in terms of cultural heritage and pride. Opponents characterize the flag as symbolic of the oppression and crimes committed in the name of slavery. Whose view should prevail in deciding whether Section 2C prohibits a judge from joining, say, the Sons of the Confederacy, which uses the Confederate flag as a symbol and is "open to all male descendants of any veteran who served honorably in the Confederate armed forces"? The answer to that question would be crucial in applying the test used by the Massachusetts Committee.

The last hypothetical raises the stakes considerably for judges. It is one thing for a judge to be forced to make a decision when the exclusionary policy is quite clear. It is another when an organization has responded to legal requirements or public pressure or

[52] Report No 120, reprinted in 109 ABA Rep. 658, 662 (1984).

perception by engaging in tokenism — admitting one or a handful of a formerly excluded group. In deciding whether a change to gender neutrality in the by-laws of the formerly gender-restrictive Junior League of Tucson made its membership policies non-discriminatory, the Arizona Judicial Ethics Advisory Committee in its Opinion 94-13 stated:

> The burden is on each judge to comply with the code, and thus the burden is on each judge to investigate the group's membership practices to determine the extent of the discrimination, if any. "Where a club's by-laws or clear practices do not reveal the discriminatory practice, but the judge has reason to suspect more subtle discrimination, the judge has a duty to become informed on the matter and take appropriate action with 2C." See Indiana Adv. Op. I-94.

The Arizona committee is correct that tokenism should not be sufficient to remove the label of "invidious discrimination," but the committee nevertheless has greatly increased the burden on judges to pierce the often Byzantine admissions procedures of private organizations.[53]

d. Additional difficulties with Section 2C

The previous sections have identified a number of interpretive problems — the relevance of constitutional protection to the meaning of invidious discrimination; what makes discrimination "invidious"; whose viewpoint on that issue is controlling; is discrimination by a minority against a majority "invidious"; what constitutes the "practice" of invidious discrimination. I hope that I have said enough to persuade that the answer to these questions is not obvious from the text of Section 2C or its commentary.

[53] See Borne v. Haverhill Golf & Country Club, 2003 Mass. App. Lexis 642 (Mass. Appeals Ct. 2003) affirming a finding of discrimination against women by a golf club in the application of its rules not only with respect to admission but also with respect to the use of its facilities.

Policies beyond those indicated in the words of the text and commentary will dictate the answers.

The problem of interpreting Section 2C is rather more difficult than an ordinary question of statutory interpretation. Such a matter involves navigating the shoals of "intent" and of the relevance of legislative history. Interpretation of the provisions of the Code of Judicial Conduct requires us to consider the relevance of the "intent" or purpose of the original drafters, an ad hoc committee comprised mostly of private attorneys and selected by the president of the American Bar Association — i.e., not your typical law-giver. The recommendations of that committee were approved by the House of Delegates of the ABA — primarily private attorneys selected by various bar groups — for recommendation to the various state and federal authorities with power to promulgate the recommendations as rules. After the Code was put forth by the ABA, its recommendations were forwarded to state and federal authorities, many of which made changes before adopting them, but many of which did not. The process of adoption was different in each state, but often there was a committee appointed by the relevant state judicial body that considered the suitability of each Rule for adoption in the relevant jurisdiction. Sometimes the committee proposed altered or additional commentary to accompany the Rules. Finally, some judicial authority, usually the highest court of the state, adopted the Code, but often not the commentary, as a governing body of substantive law regulating judicial conduct for its judges. For the federal judiciary, the adopting authority was the Judicial Conference of the United States, whose action regulates the conduct of all judges except justices of the United States Supreme Court.

This varied process of adoption muddles the process of interpretation in any given jurisdiction. Whose intent, whose purpose, whose legislative history is relevant, if those guides are thought important by the interpreting body? Is uniformity an important goal? Perhaps the ambiguities of Section 2C suggest that it is perfectly appropriate for different jurisdictions to weigh the policy considerations differently, given that more than one reasonable interpretation of the Rule exists with respect to all or many of the questions being discussed in this article.

e. Section 2A and Section 4A

The struggle for meaning does not end with the specific provisions of Section 2C. The Codes of Judicial Conduct also have some relevant general provisions. Section 2A provides that judges "shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary," and Section 4A provides that judges shall conduct all their extrajudicial activities "so that they do not: (1) cast reasonable doubt on the judge's capacity to act impartially as a judge." The Commentary to Section 2 makes clear that its general prohibitions have relevance to the issues being discussed. It states:

> a judge's membership in an organization that engages in any discriminatory membership practices prohibited by the law of the jurisdiction also violates Section 2 and Section 2A and gives the appearance of impropriety. In addition, it would be a violation of Section 2 and Section 2A for a judge to arrange a meeting at a club that the judge knows practices invidious discrimination on the basis of race, sex, religion or national origin in its membership or other policies, or for the judge to regularly use such a club. Moreover, public manifestation by a judge of the judge's knowing approval of invidious discrimination on any basis gives the appearance of impropriety under Section 2 and diminishes public confidence in the judiciary, in violation of Section 2A.

One member of the ABA committee that drafted the 1990 version of the Code of Judicial Conduct has expressed the opinion that Section 2A would be violated by a judge who publicly and knowingly belongs to "an organization that engages in invidious membership discrimination practices on the basis of sexual orientation" even in a jurisdiction that had not added that category to the characteristics listed in Section 2C.[54] If that conclusion is correct, then judges need to make rather wide-ranging investigations

[54] Moser, "The 1990 ABA Code of Judicial Conduct: A Model for the Future," 4 Geo. J. Legal Ethics 731, 743 (1991); see Gray, supra n.2, at 10–11.

to discover discriminatory policies in organizations they join that might conceivably be deemed invidious.

But judges' problems may be even more far-reaching. The Massachusetts Advisory Committee on Judicial Ethics that concluded in its Opinion 2002-11 that the Masons did not practice "invidious discrimination" under Section 2C did not give the inquiring judge a green light for continued membership and leadership. It went on to advise that "the provisions of Section 2(A) can be applied to prohibit or discipline membership in an organization that does not 'invidiously' discriminate within the meaning of Section 2(C)."[55] That conclusion, if generally accepted, would make the task of judges desiring to join organizations even more difficult. It is not just the invidiously discriminating organization they would have to worry about but any organization in which membership would raise any question about impartiality, that is, any controversial organization. As we have seen, it may be difficult, or impossible, to obtain an advisory opinion about the permissibility of joining any particular organization.

It is true that Sections 2A and 4A have been interpreted as forbidding membership in organizations other than those that invidiously discriminate. But, as noted previously, the prohibited organizations have been either those that frequently appear in court or those that have a partisan agenda with respect to issues that appear in litigation, like a police-sponsored anticrime organization. That seems to be a quite legitimate use of Canons 2A and 4A because they are linked quite specifically to activities of particular judges in the context of their judicial activity. I believe, however, that it is a mistake to use these generally-worded Sections to add additional per se exclusionary categories to the ones listed in Section 2C. Jurisdictions that have added categories have considered carefully what categories they wish to add, with whatever opportunity for outside input they have chosen to afford, and have given notice of their decisions in the wording of Section 2C that they have chosen. Small advisory committees, with no such input and with no opportunity for review by the judicial body that normally does the "legislating" in this field, should not be adding additional categories of prohibited subjects of invidious discrimination. And certainly judicial conduct commissions should not be adding such categories in the context of discipline cases. For the same reason, I believe it is not wise

[55] See n.22 supra.

for an advisory committee to use a general provision like Section 2A to raise a question about the permissibility of joining organizations that discriminate on the basis of one of the listed categories when the advisory committee has already concluded that the discrimination is not "invidious."[56]

After reviewing federal and state constitutional cases dealing with the powers of government to regulate its employees' expressive activities, the Massachusetts Advisory Committee's Opinion 2002-11 told the inquiring judge that "[t]he determination of Section 2(A)'s permissible applicability . . . turns on balancing the government's interest in promoting the appearance and actuality of an impartial judiciary with your interest in Masons membership, or leadership, and any adverse government impact on the government's interest that flows from your participation in the Masons." But the Committee concluded that it was unable to help the judge:

> The kind of highly fact-sensitive inquiry required to arrive at the appropriate balance simply is impossible in the case at hand without a clearer picture of the variables noted above, including a better understanding of the public assessment of the impact of involvement in the Masons and a richer understanding of the organization and the judge's interest in it. . . . Our inability to render a dispositive opinion stems, in part, from the inherent ambiguity of Sections 2(C) and 2(A). The dearth of developed commentary to guide the committee in answering these important and policy-laden questions is particularly frustrating. The committee hopes that the pending proposed revisions of the Code of Judicial Conduct will offer additional guidance for future cases.

[56] Of course there are other issues that may arise when a judge is contemplating joining an organization, such as whether the organization regularly appears in the courts or whether the organization has a partisan agenda that is relevant to issues that are regularly presented to the courts. Such particular issues were not presented in Opinion 2002-11.

A final footnote about Section 2A is to note that the Commentary states that it would be a violation for a judge "to regularly use such a club." That should constitute a note of warning to golf-loving judges who like to attend the Masters golf tournament at Augusta National every year — unless a golf-loving advisory committee would not define such conduct as a "use" of the club.

The Committee talked about a "highly fact-sensitive inquiry" that would be essential to any final conclusion. It is hard to see how any revision of the commentary would help that very much. Perhaps it would help if a revision forbade the use of Section 2A to add additional per se exclusionary categories. The Committee also referred to the frustrating lack of developed commentary with respect to these policy-laden questions and its hope for future help. The reference is to the fact that at the time it was writing its Opinion, a committee of the Supreme Judicial Court was engaged in a four-year project to rewrite the Massachusetts Code of Judicial Conduct. As a member of that latter committee, I think I violate no confidence when I express my own frustration at its inability to agree on any wording that would relieve the advisory committee's frustration. It was able to agree that Section 2C should be worded as a part of the law of judicial professional responsibility apart from constitutional requirements and it agreed with some other states that the commentary should reflect the notion that "invidious discrimination" included the concept of stigmatization. But efforts to be more specific, to deal with the troublesome definitional issues discussed in this paper, foundered.

The conclusion reached by Opinion 2002-11 that the commentary as written included constitutional limitations on the membership prohibition required the committee to conclude that its answer turned on the balance between the government's interest and the individual's interest, as quoted above. That judgment is essentially the judgment whether state or federal constitutional provisions prevented Section 2A from being applied to prevent the state from forbidding judicial membership in the Masons. That judgment must be made whether or not constitutional principles are written into the definition of "invidious discrimination" in Section 2C or the general definition of Section 2A or Section 4A. Whether advisory committees will give advice about those issues is another matter, but that issue is beyond the scope of this paper except to note that the ability to get advice is of critical importance to a judge seeking the safe harbor that advice affords in some jurisdictions. But it is time now to turn to the constitutional issue that exists in the application of Section 2C to specific organizations.

V. The Constitutional Issue

Up to this point we have been considering the interpretation of Section 2C as involving issues of the law of judicial professional responsibility. But once those questions get sorted out, there is a more fundamental question that needs to be addressed — the effect of the First Amendment of the federal Constitution, and similar state constitutional prohibitions, on the restrictions that Section 2C, however interpreted, and Section 2A place on judges' rights of freedom of association.

a. Association rights of organizations

The thrust of Section 2C is aimed directly at the conduct of judges. But in regulating the conduct of judges, Section 2C also regulates the named organizations by telling them that they may not have a certain class of citizens as members. The organizations' First Amendment rights are thus also implicated. Organizational freedom of association has had a checkered career in the Supreme Court. In a series of cases the Court has upheld state regulations prohibiting discrimination on the basis of race, creed, or gender by organizations operating places of public accommodation and/or found to be predominantly commercial. In *Roberts v. United States Jaycees*, the Court in an opinion by Justice Brennan held that Minnesota did not abridge the freedom of association of the U.S. Jaycees by finding the organization to constitute a place of public accommodation and hence it was required not to discriminate in its membership policies against women.[57] The Jaycees were a nonprofit educational and civic organization formed to advance the interests of young men's civic organizations. Full membership was limited to men between the ages of 18 and 35, although older men and women could be associates. In finding that the state had a compelling interest in preventing invidious discrimination, the Court noted that the Minnesota statute imposed "no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members."

[57] 468 U.S. 609 (1984).

The Court subsequently reaffirmed its holding in *Board of Directors of Rotary International v. Rotary Club of Duarte*[58] and *New York State Club Ass'n v. New York.*[59] The Court analyzed freedom of association as containing two elements: a freedom of intimate association that protected certain human relationships because of their central role in preserving individual freedom, and a freedom of expressive association that saw the right to engage in joint expressive activity as an "indispensable means of preserving other liberties." The Court found that the regulation of the kinds of semipublic clubs involved in the cited cases did not implicate the first kind of freedom of association at all, and did not infringe substantially on the second kind of freedom. Any kind of incidental abridgement was more than outweighed by the compelling interest in preventing "invidious discrimination."

The *New York State Club* litigation involved a facial attack on the statute. The Court had no doubt that many of the private clubs fell within the *Roberts* and *Rotary Club* guidelines and hence held that the attack failed. Justice White did, however, say that it was conceivable that "an association might be able to show that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or those who share the same religion."[60]

The hint that *Roberts* and *Rotary Club* should not be read too broadly came to fruition in two subsequent cases. The first was *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston.*[61] Boston had authorized a veterans' group to conduct a St. Patrick's Day–Evacuation Day parade and that group refused to permit the Irish-American Gay, Lesbian, and Bisexual Group to march. The Massachusetts Supreme Judicial Court held that the veterans' group had violated the state public accommodations law, but the Supreme Court unanimously held that such an interpretation was unconstitutional. Under the First Amendment, the veterans' group had a right to control the content of its own expressive activity, the parade.

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[58] 481 U.S. 537 (1987).
[59] 487 U.S. 1 (1988).
[60] Id. at 12.
[61] 515 U.S. 557 (1995).

The Court expanded on this theme in *Boy Scouts of America v. Dale*.[62] New Jersey's application of its public accommodations law to require the Boy Scouts to reinstate an assistant scoutmaster, dismissed because he was an activist gay, was also held, by a closely-divided Court, to violate the First Amendment's right of association. *Roberts* was distinguished on the ground that state regulation in that case was not seen as placing a "serious burden on the male members' freedom of expressive association." For purposes of this paper we do not need to decide whether the majority or the dissent was correct in its analysis of just what expressive activity of the Boy Scouts was being protected, whether it warranted constitutional protection, and whether *Roberts* was all that different. It is enough to note that the Court went rather far in holding that the First Amendment was a barrier to application of state anti-discrimination laws when application of the statute was thought to interfere with expressive activity of the organization in a substantial way.

This line of cases has a relationship to Section 2C in that the less impact that the First Amendment has on the ability of states to bar organizations themselves from engaging in discriminatory membership policies, the less danger there is to efforts to bar judges from joining such organizations. Conversely, the more impact the First Amendment has, the more it protects discriminatory membership policies, the more the courts recognize the impact that anti-discrimination policies have on impeding the ability of certain organizations to carry on expressive conduct, then the more the First Amendment enables organizations themselves to claim constitutional protection when the state forbids its employees from joining such organizations. It does not follow from cases like *Hurley* and *Dale* that, just because an organization's membership policies are protected by the First Amendment, a state may not prevent its judges from joining it. Additional considerations exist that need to be considered. But *Hurley* and *Dale* are relevant to the issue because they tell us the extent to which the First Amendment is already relevant to the larger issue of accommodating constitutionally protected freedom of association and state anti-discrimination policy.

[62] 530 U.S. 640 (2000).

b. Association rights of government employees

There is a group of Supreme Court cases that addresses more directly the power of government to impose restrictions on the First Amendment association rights of its employees in the name of advancing the purposes of government service. Oliver Wendell Holmes once told us that "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[63] That theory has disappeared — or has it? Section 2C now tells judges, "You may have a constitutional right to join an organization that discriminates invidiously, but you have no constitutional right to be a judge." Seventy-five years after Holmes's opinion, Justice Brennan, writing for the Court in *Keyishian v. Board of Regents*, stated that the State University of New York could not dismiss faculty members who would not sign a certificate that they were not members of the Communist Party: "legislation which sanctions membership unaccompanied by specific intent to further the unlawful goals of the organization or which is not active membership violates constitutional limitations."[64] This language, written in the context of protecting teachers, certainly has relevance for the prohibition of judicial membership in organizations not engaged in unlawful activities.

The application of the First Amendment to the associational rights of government employees has had a mixed history in the Supreme Court. On the one hand, the Court has recognized that government has a significant employment interest that justifies a restriction of employees' First Amendment rights, whether of speech or of association. On the other, it has looked carefully at the nature of the rights being restricted and held in a number of cases that the restriction is too great to stand. In the first category are cases like *United Public Workers v. Mitchell*[65] and *U.S. Civil Service Comm'n v. Letter Carriers*[66] which upheld restrictions on the political activities of federal employees, and *Connick v. Myers*.[67] *Connick* upheld the dismissal of an assistant district attorney for resisting a transfer and for insubordination. In resisting the transfer, she had conducted a

[63] McAuliffe v. Mayor, 155 Mass. 216 (1892).
[64] 385 U.S. 589 (1967).
[65] 330 U.S. 75 (1947).
[66] 413 U.S. 548 (1973).
[67] 461 U.S. 138 (1983).

survey of her colleagues, asking questions about transfer policy, office morale, the need for a grievance committee, confidence in supervisors, and pressure to work in political campaigns. The Court did not adopt an analysis that began with recognition of the employee's First Amendment rights and then looked for a compelling interest of the state in regulating it. It used the analysis of *Pickering v. United States*,[68] which held that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in that case was to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Connick* emphasized the "public concern" language of *Pickering* and held that as a general rule it would not interfere with government personnel decisions when triggered by employee speech unless that speech related to a matter of public concern. The court concluded that most of the survey's questions did not relate to matters of public concern but were rather extensions of the employee's own grievance. Even the question of pressure to participate in political campaigns, while a matter of public concern, was only so to a limited extent, given the relation to her own grievance and the fact that the speech occurred in the office. The reasonable belief that disruption of the office was likely outweighed by what the Court saw as a limited First Amendment interest.

A second category of government employee litigation has used cases like *Keyishian* to reach a different result. *Elrod v. Burns*,[69] *Brant v. Finkel*,[70] and *Rutan v. Republican Party*[71] held that decisions about hiring and firing government employees could not constitutionally be based on whether the employees belonged to or supported the governing political party unless party affiliation was important to carrying out the public office. *Mitchell* and *Letter Carriers* were distinguished on the ground that employees' First Amendment rights in those cases were restricted in order to protect other First Amendment rights, namely, to protect employees' beliefs and associational

[68] 392 U.S. 563 (1968).
[69] 427 U.S. 347 (1976).
[70] 445 U.S. 507 (1980).
[71] 497 U.S. 62 (1990).

rights from political pressure. *Elrod*, *Brant*, and *Rutan* gave constitutional protection to the right of government employees to belong to an organization, there the political party of their choice, or no political party, against an assertion of a strong government interest in promoting the carrying out of public policy declared by the government in power.

And so we come once again to *Republican Party v. White*, in which the Court held unconstitutional the Minnesota Code of Judicial Conduct's prohibition against announcing one's views on disputed legal issues in the course of a judicial election.[72] The Court of Appeals had upheld the provision, finding that it served the compelling state interests of preserving the impartiality and the appearance of impartiality of the judiciary. Justice Scalia, writing for the Court's 5–4 majority, shredded the state's argument that the prohibition was narrowly tailored to preserve a compelling state interest in preserving impartiality and the appearance of impartiality. He also analyzed the concepts of impartiality and the appearance of impartiality in a way that seems relevant to interpretation of Section 2C. In particular, over strong dissent, he suggested that impartiality in the sense of a lack of preconception with respect to a particular legal view, as opposed to lack of bias against a particular party, is not a compelling interest. The Court did not pass on the question whether impartiality in the sense of open-mindedness was a compelling interest because it concluded that that was not the purpose of the announce clause. Under strict scrutiny the state would have had to show that campaign statements were uniquely destructive of open-mindedness and it could not do so in view of the many ways in which judges were permitted to express views about legal issues on and off the bench. It seems doubtful that organization membership is any more destructive of open-mindedness. *Dale* and *White*, read together, represent very forceful, strongly absolutist, readings of the First Amendment that pose a threat to some applications of Section 2C.

c. The First Amendment, Section 2C, the Boy Scouts, and the Masons

Let us think again about the application of Section 2C or Section 2A to membership in the Boy Scouts in those jurisdictions that have added "sexual orientation"

[72] 536 U.S. 765 (2002).

to the list of forbidden categories or that might use Section 2A to achieve the same result or its application to membership in the Masons in a jurisdiction that has concluded that their gender discrimination is "invidious." Would such applications violate the First Amendment?

As to the Boy Scouts, the argument would be that the prohibition of membership was a content-based restriction on expressive activity that violated both the judge's right of intimate association and his right of expressive association. As to the former, a judge who was a scoutmaster of his son's troop would argue that the prohibition abridges his right to join an organization that fosters his view of family values in both its membership policies and in its activities. The judge would argue that the decision with respect to his membership rights ought to apply equally to any attempt to categorically prohibit membership in a gay and lesbian organization. Associating with others favoring a heterosexual or homosexual lifestyle is certainly in the same ballpark with activities discussed by Justice Brennan in *Roberts*: "In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme."[73] Brennan went on to identify some of the "intimate human relationships deemed worthy of protection: we have noted that certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State. . . . The personal affiliations that exemplify these considerations . . . are those that attend the creation and sustenance of a family — marriage . . . childbirth . . . the raising and education of children . . . and cohabitation with one's relatives."

In dealing with the question whether the freedom of intimate association of an organization, the U.S. Jaycees, was involved, the Court in *Roberts* concluded that it was not. Its local chapters were neither small — the ones involved in the case had 400 or more members — nor selective, and many of its central activities involved participation of strangers. The Boy Scouts present a more difficult case. The local troops are relatively

[73] 468 U.S. at 471–472.

small and while not generally selective, their "straight" policy does involve a certain selectiveness. *Dale* was decided on the basis that that policy was important to their mission, and moral straightness is certainly closer to the intimate family values identified in *Roberts* than the policies involved in *Roberts*. The same argument ought to protect membership in LAMBDA. In *Dale*, however, the Boy Scouts argued and prevailed on the ground that it was their expressive freedom of association rights, not their intimate association rights, that were abridged. Presumably, *Dale* would apply to the gender policies of the Boy Scouts as well as to their sexual orientation policy. It might even apply to the Masons.

The California Supreme Court recently addressed the issue of Boy Scouts membership in light of *Dale*. It amended its Section 2C and Commentary. The California Section 2C contains an exception for membership in a "nonprofit youth organization" so long as it does not violate Section 4A,[74] and the Commentary explicitly states that the purpose of the exception is "to accommodate individual rights of intimate association and free expression." The California Supreme Court also amended the disqualification Section and Commentary to provide for disclosure of membership in organizations when "the judge believes the parties or their lawyers might consider this information relevant to the question of disqualification" and to suggest that membership in certain organizations sometimes may have "the potential to give an appearance of partiality" even when membership generally is not prohibited. The Commentary therefore states that judges "should" disqualify themselves whenever appropriate under the Sections or statute.[75]

One interesting feature about the Supreme Court's opinion in *Dale* is that while the Court did note, quoting *Roberts*, that freedom of expressive association "could be overridden 'by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedom.'"[76] The Court distinguished the earlier cases in which it had held that the state had a compelling interest in eliminating discrimination against women on the ground of the organizations' failure in those cases to demonstrate a serious burden

[74] "A judge shall conduct all of the judge's extrajudicial activities so that they do not (1) cast reasonable doubt on the judge's capacity to act impartially; (2) demean the judicial office; or (3) interfere with the proper performance of judicial duties." California Code of Judicial Conduct, Section 4A.
[75] California Code of Judicial Ethics, Section 3E and Advisory Committee Commentary.
[76] 530 U.S. at 648. (2000).

on their expressive purposes. One conceivable interpretation of that way of stating the distinction is that once such a burden is established, the state's compelling interest is irrelevant, that the freedom of association right that was recognized was nearly absolute. But elsewhere in the opinion, the Court did say that "in these cases, the associational interest in freedom of expression has been set on one side of the scale, and the State's interest on the other," but it concluded that the state interests embodied in the public accommodations law "do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association."[77] We are not told why that was so. One factor may well be indicated by language in the Court's discussion of the public accommodations law that its coverage had been pushed very far beyond "places" to membership organizations. A related explanation may involve the absence of the quasi-commercial aspect of *Roberts*. The Court did not say whether the protected purpose of the Boy Scouts, moral straightness, as opposed to the gender discrimination in *Roberts*, also made a difference.

Dale is relevant in assessing the constitutionality of using Sections 2C or 2A to prohibit a judge from joining the Boy Scouts or Masons, but is not controlling because Sections 2C and 2A involve the regulation by government of the conduct of its own employees, and high-ranking employees at that. I assume therefore that the existence of a compelling interest and the narrowness of the remedy will also be important to any constitutional resolution. I have discussed earlier the kind of compelling interests that seem to lie behind Section 2C and the problematic justification of assuring impartiality. It is true that the one type of impartiality justification credited wholeheartedly by Justice Scalia in *Republican Party v. White* was impartiality that consisted of bias against the individual litigant or lawyer. A gay or lesbian man or woman may assert quite reasonably that he or she would fear the lack of impartiality of a judge who belonged to an organization that engaged in discrimination against gays or lesbians or women. But current law would probably require more than that to compel disqualification in a particular case. As noted above, Catholic judges regularly sit in cases involving abortion. A successful disqualification motion normally requires a particularized showing of bias, more than simply membership in an organization, and if such a showing of bias could be

[77] Id. at 658–659.

made by a gay or lesbian party or litigant, then the judge should be disqualified. But in the current state of disqualification law, prohibition of membership in the Boy Scouts or the Masons does not seem like a narrowly tailored remedy for the compelling state interest of assuring an impartial judge. Moreover, as noted above, the blunderbuss remedy also implicates the associational rights of the organizations that were recognized in *Dale*.

The earlier suggestion that more than particularized lack of bias may be used to justify Section 2C has special relevance for the constitutional argument. I have suggested that the prohibition can be understood as a symbol of the strength of the institutional, or even more, the moral principle that lies behind Section 2C. The state is then backing that principle up by forbidding particularly high-level employees, those who administer its law, to have anything to do with organizations that engage in certain kinds of particularly harmful discrimination. The fact that private organizations may not, because of constitutional freedom of association, be prohibited from engaging in the discriminatory conduct does not mean that the state cannot prohibit its judges from being involved, even indirectly through mere membership, with that conduct. Stating Section 2C's goal so broadly demonstrates why recusal or disqualification in individual cases does not fulfill its aim, for recusal or disqualification in individual cases does not dissociate the state's judiciary from the discriminatory conduct.

That formulation sets forth the state's compelling interest in its strongest form. The narrow tailoring argument would be that preventing certain memberships for judges is the only way to express the institutional or moral principle of dissociating the justice system from prohibited discrimination. A counter-argument would note that the state's argument is made in the abstract, without reference to any particular organization. With respect to organizations such as the Boy Scouts and the Masons, the many good works the organizations perform diminish the state's compelling interest because they make it more difficult to tie a judge-member to the discriminatory policy than in the situation where discrimination is the central purpose of the organization — where the organization is in essence a "hate organization." The association of the judiciary with the organization's discriminatory policies through judicial memberships is therefore somewhat attenuated.

Moreover, if the impartiality issue may be handled by recusal or disqualification motions, then the connection between the purpose of the prohibition and the judicial function is also weakened. The symbolic effect would be the same for judges as for any high government official. I do not mean to say that there is *no* symbolic effect. There is. But it is not enhanced by any special quality of the judicial role if one discounts the impartiality function. Second, we should note that elimination of Section 2C would not involve any wholesale rollback of state anti-discrimination policy. When considering the Boy Scouts and the Masons, we are talking only about the area of personal liberty beyond the commercial and quasi-commercial organizations whose membership policies were found regulable in cases like *Roberts* and *Rotary Club* — the area already covered by many state public accommodation laws, except for the small area constitutionally protected by *Dale*.

The Court that decided *White* indicated that political speech implicated core First Amendment values. But that Court also valued the freedom of expressive association very high in *Dale,* and it might well conclude that membership in political parties — which after all did not exist at the time the First Amendment was passed — is no more a core First Amendment value than membership in private expressive associations. Moreover, the prohibitions of Sections 2C and 2A apply to expressive activity outside the workplace whereas *Connick* involved expressive activity in the workplace, where the government interest is stronger, and *Letter Carriers* and *Mitchell* purported at least to protect the workplace values of safeguarding employees from pressure to engage in political activities. The cases that seem closest to the Section 2C and 2A situations are *Elrod*, *Branti*, and *Rutan*, for they held that the strong government interest in furthering the public policies of the governing bureaucracy did not permit it to prohibit certain government employees from joining the opposing political party.[78]

[78] A two-way street interpretation of Section 2C may have an unanticipated bite. If the gender policy of the Boy Scouts does not have First Amendment protection, is there not an equal protection issue if Section 2C is interpreted not to apply to the Girl Scouts? Or to put the issue more narrowly, if the judicial membership policy of Section 2C prohibits male judges from joining the Boy Scouts because of their gender policy, is there not an equal protection problem if Section 2C is interpreted to permit female judges to be scout leaders in the Girl Scouts? We are not in an area where the arguments for dividing discrimination into categories of "invidious" and "benign" are strongest. We are talking about the memberships permitted to a small class of powerful government officials, and it does not seem persuasive to argue that female or gay and lesbian judges should be permitted to join exclusive organizations favoring their interests but that male and straight judges should not be permitted to join exclusive organizations favoring their interests.

My purpose in this section has not been to arrive at a normative theory of the First Amendment that would test the various applications of Section 2C and 2A discussed in this paper. Such a goal would require the rewriting of most of the opinions discussed in this section. My purpose has been to suggest that aside from the ambiguities of language and policy choices and the interpretative difficulty inherent in the language of Sections 2C and 2A, there is also a problem under current Supreme Court doctrine in accommodating the principles of freedom of association with the prohibitions of those Sections, at least in some of their applications. And if the Supreme Court were ever to conclude that Sections 2C and 2A could not constitutionally be applied to judicial membership in the Boy Scouts or Masons, then the further possibility exists for attack on the constitutionality of prohibiting judicial membership in other organizations that do not operate in the area of public accommodations, perhaps even what we would regard as "core" hate groups — leaving it to recusal or the disqualification process in individual cases and to political pressure at the time of nomination, confirmation, or election to deal with the social and political problems at which Section 2C and 2A are aimed.

The existence of that problem presents great difficulty for conscientious judges. Advisory committees will have a hard enough time with the interpretive problems presented by Sections 2C and 2A. Resolution of constitutional issues is not within the jurisdiction of many, most, or all of those committees and even if it were, resolving a difficult constitutional question in an advisory context without adversary presentation before a court used to handling constitutional issues seems a poor way of proceeding. Another alternative, in which judges deliberately subject themselves to judicial discipline that may be reviewed by a court, seems dangerous. It is theoretically possible that a judge with sufficient resources could proceed by way of declaratory judgment, but that seems unlikely. The final alternative of not joining an organization, if there is doubt about the propriety of such action, seems a likely outcome in a great many cases. If a chilling effect on joining controversial organizations is one of the purposes of the adoption of Section 2C and 2A, it is likely to achieve that goal.

Conclusion

Any effort to distinguish among different kinds of discrimination is bound to leave many problems of interpretation. My point, however, has been that the choice of Canon 2C and its Commentary to focus on "invidious" discrimination left considerably more "muddle" than is either necessary or wise. The mistake is compounded by the difficulty for judges who are trying to comply with Section 2C by getting authoritative and helpful advice. There are several ways of resolving the problems with Section 2C and its Commentary as currently written. 1) Leave the language of "invidious discrimination" as it is but resolve all the interpretive problems with detailed commentary; 2) Replace the language of "invidious discrimination" with "unlawful discrimination"; 3) Replace the language of "invidious discrimination" with language that reaches only "hate groups"; 4) Replace the prohibition of organization membership with a requirement of disclosure of membership in all organizations; and 5) Eliminate Section 2C entirely and leave the solution to the law of disqualification and to general legislation applicable to all high government officials. I do not mean in this solution to eliminate the applicability of Canon 2A to situations where joining an organization has a relationship to matters coming before the judge.

Alternative 1): Leave the prohibition as is. The previous discussion indicates that there are several major interpretive problems. Whether the existence of invidious discrimination should be determined by reference to the perception of the alleged victim is a difficult question. While the original drafters wrote in those terms, an explicit statement that that was the guiding principle would likely raise fears of something akin to "the heckler's veto" — that the views of the most sensitive and the most extreme would be likely to control. Single-sex schools and colleges could fall under the ban. On the other hand, any test that does not take account of the victim's perspective will raise other concerns — for example, that the all-male golf club or the Masons will survive such a test. Use of a term like "the reasonable person" is not useful, for it does not tell us whether the reasonable person is a "reasonable victim" or not.

Likewise, any effort to define precisely the "practice of invidious discrimination" is likely to run into similar difficulties. The statement of a rule that (substantial) racial or

religious or ethnic imbalance involves the "practice" of invidious discrimination is likely to raise fears that Section 2C is telling judges that they may join only organizations with ethnic, gender, and religious balances that mirror the demographics of the American public or of the citizenry of their states, thus eliminating one of the distinctive qualities differentiating organizations. Negating that notion invites tokenism. The safe harbors also may create some anomalies, as we have noted especially with respect to religious organizations and private, intimate organizations. It does not work to say that the core meaning is clear and that problems exist, as they always exist with definitions, at the margins. Where Section 2C is concerned, the margins are where the action is. Although I personally favor greater specificity because of the desirability of candor (or, to use a favorite political and academic term, because of the desirability of transparency) and because of the need to give greater guidance to judges, my suspicion is that an effort to resolve the interpretive problems of Section 2C with any greater degree of specificity than at present would dissolve the consensus that currently supports the generalized prohibition.

Alternative 2): Make "unlawful" not "invidious" discrimination the operative language. This is the solution chosen by Maine, Minnesota, North Carolina, Oregon, Texas, and Washington in their versions of Section 2C. That substitution limits the impact of Section 2C to situations where the legislature has already acted with respect to discrimination by named organizations and named categories of discrimination, thus eliminating most of the non-constitutional problems with the language of current Section 2C discussed earlier in this paper. As *Boy Scouts v. Dale* indicates, using the language of "unlawful" discrimination will not eliminate constitutional problems because the application of the statute may be subject to constitutional attack. However, any interpretive problems that remain with respect to the statutes of those states will be dealt with in the course of litigation in which there will be adverse parties presenting diverse views and not in one-sided presentations followed by advisory opinions based on assumed facts. Moreover, legislatures are probably better suited to legislate new categories of prohibited activities attuned to the "moral consensus" of their communities.

One problem with this solution is the commonness of litigation involving unlawful discrimination. Large organizations make dozens or hundreds of personnel

decisions every day, and some of them may lead to claims of unlawful discrimination. Any large organization may have several such suits pending at any given time. Does the pendency of such litigation indicate that the organization may be practicing "unlawful discrimination"? Would judges with knowledge of such litigation be required to investigate and reach a conclusion in order to determine their own status? Suppose that discrimination suits have been settled with a monetary payment, but no admission of guilt? Does practice of unlawful discrimination require a judicial finding? Indeed, what does "practice" mean in this context? Does one successful lawsuit relating to one individual demonstrate "the practice" of invidious discrimination? Or should the Commentary explicitly state that "practice" requires a pattern?

These interpretive problems are alleviated by the fact that Section 4D(3) of the Code of Judicial Conduct forbids judges to be officers, directors, or employees of most business entities. They will thus not be caught up in much of the main source of discrimination litigation. However, judges do serve on the boards of directors of non-profit organizations, and one type of non-profit organization, the educational organization, is a frequent target of discrimination lawsuits, by faculty denied tenure, by employees, and by would-be students. These problems ought to be a source of concern to any judge serving on the board of an educational institution that is the subject of such a suit. Indeed, a judge on the board of any private institution that maintains an affirmative action program that does not comport with the Supreme Court's current view of what would be unconstitutional for a government-run institution ought to be concerned, whether Section 2C is worded in terms of unlawful or invidious discrimination.[79]

This solution chosen by the six states named above does not account for the fact that judges occupy a special place in the community structure so that perhaps special rules are needed to assure public confidence in the judiciary. However, Section 2C seems more directed to the practices of specific organizations rather than to individual judges' beliefs and, as already noted, there is a disconnect between the categorical prohibition of membership contained in Section 2C and the standards for recusal and disqualification,

[79] Gratz v. Bollinger, 123 S.Ct. 2411 (2003) and Grutter v. Bollinger, 123 S.Ct. 2325 (2003) indicate the dimensions of the problem.

which generally refuse to impute organizational missions and practices to their judicial members.

A solution that focuses on an organization's unlawful activities would not need to make any exceptions for favored organizations — cultural heritage and religious organizations and intimate, purely private groups. If their discrimination were "unlawful," then the judge would be forbidden from joining.

Alternative 3): Coverage of "hate groups." Another problem with Alternative 2) is that there are likely to be organizations not covered by existing legislation — perhaps because they do not involve places of "public accommodation" — that are core hate groups. It is not very likely that a judge would belong to such a group — although with elected judges, one can never tell — and perhaps political and public pressure would be sufficient to cause a judge to avoid such an organization, especially if the Sections were amended to require a judge to disclose organizational connections in much the same way as they are now required to disclose financial information. If it were thought desirable, perhaps legislation could be drafted that sufficiently defined a core hate group as an organization that discriminates on the basis of "race, religion, nationality" and any other groups that one wanted to include and then forbade a judge to join such an organization. Perhaps the definition could be restricted by including a link to advocacy or practice of violence. Such a prohibition could either stand by itself as a substitution for Section 2C or it could be added to a prohibition based on "unlawful" discrimination, but drafting an acceptable, constitutional provision wouldn't be easy.

Since the organizations themselves are not being outlawed, the First Amendment problems, while not eliminated, seem diminished when we are talking about the compelling interest of the state in prohibiting a judge from belonging to a core hate group. It seems more persuasive to attribute the views of such an organization to its members. In that case we are talking about the real possibility of lack of impartiality (and indeed partiality too) not just with respect to issues but also with respect to litigants themselves. Perhaps it would be possible to deal with that problem through motions for disqualification in individual cases, but the symbolic effect of judicial membership in such organizations seems great.

The real problem with focusing on core hate groups is that to avoid the possibility that many core hate groups would define their mission in broader terms than simply hate, the prohibition contained in a redrafted Section 2C would likely end up not much different from its present form. We have a recent relevant example in the effort to make the "pledges and promises" prohibition on judicial candidates effective by adding the "announce clause" prohibition. That drafting technique was struck down in *Republican Party v. White*.[80]

Alternative 4): Disclosure requirement. The solution of disclosure, without any prohibition of membership — expanding the California Supreme Court solution beyond the Boy Scouts — derives from two complementary ideas. The first is that Section 2C raises too many problems, leaves too many uncertainties, and potentially is too chilling of judges' associational rights. The second is that the political, social, and media pressures that accompany disclosure will have the desired effect of keeping judges out of undesirable organizations without creating the legal difficulties embodied in current Section 2C. We do rely on disclosure in many areas of our civic life. Securities law, which has a great deal of strict regulation, relies on disclosure to deal with a number of matters of importance to investors. But the effectiveness of disclosure varies widely. There is not a great deal of incentive to monitor closely the activities of judges. Judges already file financial disclosure forms in many jurisdictions. Some forms show a fair amount of variety in the nonjudicial income of judges, but the information revealed does not interest the media or the public very much. I suspect that disclosure with respect to organizations joined by judges will become a matter of public interest only in situations where public attention will serve the interest of particular political and social groups.

The remedy of disclosure, if chosen, is not without its own interpretive problem. The question will arise what to disclose. One issue will be present or past organizational affiliations. If a purpose of disclosure is to give parties and the public a basis for assuring itself of judicial impartiality and the appearance of impartiality, then past organizational memberships, at least for a reasonable time before becoming, or attempting to become, a

[80] Compare In re Watson, 100 N.Y.2d 290 (2003), and In re Raab, 100 N.Y.2d 305 (2003), in which the New York Court of Appeals first upheld the constitutionality of the "pledges and promises" clause in its Code of Judicial Conduct and then upheld the prohibition against various types of political activity by judges apart from their own campaigns for judicial office.

judge will be relevant. A second question will be what constitutes an organization for purposes of disclosure. It may not be enough to use the formalities of organization, such as a charter, by-laws, or mission statement, as a guide. Some fairly nasty organizations in our recent history have operated without such formalities. But too expansive a definition may be quite intrusive and could literally reach to groups of friends that meet regularly. The problem is not a new one. The present Section 2C contains no definition of "organization," although the exception for an "intimate, purely private" organization suggests that some pretty small, informal groups are included within the concept. Requiring disclosure of membership in all such organizations only makes the problem more acute. Indeed, a very broad requirement of disclosure could raise its own constitutional problems.

Alternative 5): Eliminate Section 2C. This solution represents a conclusion that Section 2C and its Commentary are unsatisfactory because they leave so many questions unanswered; because, with no practical mechanism of answering the questions, they end up chilling judges' First Amendment rights; and because if the premises of the Section and its Commentary are correct, there is another, less intrusive, way to achieve many of its objectives. To the extent that membership in an organization that practices stigmatizing discrimination does indeed justify an inference of lack of impartiality, either as a matter of bias toward or against a party or as a matter of lack of sufficient open-mindedness with respect to an issue in the lawsuit, then the law of disqualification of judges ought to supply a remedy. That might well require a change, at least of emphasis, in the law of disqualification as it is currently being enforced in many courts. It seems difficult to understand how a court that has adopted Section 2C could do otherwise than accept the inference of lack of impartiality in particular cases that it has accepted at large. Indeed, the extent to which courts do not currently recognize the inference in particular cases tends to lessen the justification for Section 2C as written. The areas where the inference seems weakest — membership in those organizations at the margins of the prohibition — the ones with which this paper has been most concerned, are precisely the organizations most affected by Section 2C. If, however, "invidious" or "stigmatizing" discrimination is a central reason for the organization's existence, then the inference of

partiality on the party of a judge who is a member seems strong, and a motion for disqualification ought to be granted.

If a motion for disqualification of a judge based on membership in such an organization is granted, that leaves the symbolic effect on the judiciary as the only reason for the categorical prohibition contained in Section 2C. As noted previously,[81] this symbolic effect, while important, is no different for judges than for other high government officials, and if it is to be recognized at all, should be recognized in legislation that applies across the board to all such officials.

To summarize — my personal preference is to adopt Alternative 5 because the ambiguities, the chilling effect, and the constitutional implications of Section 2C are combined with an inadequate interpretive process. I would deal with the matters Section 2C addresses through the law of disqualification and through general legislation. I might add a disclosure option to this alternative if the definitional problems could be satisfactorily resolved. Alternative 5 also eliminates constitutional problems, except to the extent that general legislation may raise them. Alternative 5 is perhaps better understood as an argument for not having adopted Section 2C in the first place. Once adopted, it may be impossible for political and symbolic reasons, to repeal that Section. If that is the case, then any of the other solutions is, in my view, less problematic than retaining Section 2C in its current formulation. At the very least, Alternative 1, which amends the Commentary to address the unresolved problems, needs to be adopted.

The attacks on various rules governing the practice of law and various rules governing the practice of judging stem from somewhat different impulses, but they also share certain characteristics. Among the latter are the use of the powerful, blunt weapon of the First Amendment to "demystify" both lawyering and judging. The Introduction to this paper summarized the use of the First Amendment to remove many of the special rules governing lawyers' practice of law — rules that had been seen as necessary to

[81] See p. 000.

preserve the fiduciary, noncommercial aspects of law practice. To the extent that the per se membership restrictions of Sections 2C and 2A represent a part of the vision of the judiciary as something separate and apart from the rest of the political structure, a successful First Amendment attack on them would advance beyond *Republican Party v. White* and open the way to attack yet other provisions of the Code of Judicial Conduct, which have been justified as necessary to preserve the symbolic and actual impartiality believed necessary to the special role of the judiciary.[82]

Whether the attempt to alter what has been a long-held view about the importance of impartiality and the appearance of impartiality in the conduct of judges will be successful remains to be seen. The use of the First Amendment to cut back on the lawyers' rules came in a period of expansion of the constitutional weapons of the judiciary into large areas of the social and political life of the country where they had not theretofore been used. In so doing, the judiciary made it clear in ways that it had not been apparent to special interest groups before that the judiciary was a place where the social, economic, and political struggle was being played out. Judges therefore came to be seen as much more important players in all aspects of the life of the country than previously. It is not surprising therefore that the judicial selection process, whether by appointment or by election, should become even more of a political event than it had been. But it is also not surprising that efforts should then be made to treat judges more like the other political actors than before. The task of judges is different from the task of other political actors, but to the extent that judges through their substantive decisions and extrajudicial activities edge themselves away from that notion, then to that extent the justification for special rules that limit judges' activities in ways that the activities of other political actors are not limited is diminished.

There is a tension between the judges' regulatory anti-discrimination impulse that has led them to impose Section 2C in its various forms on themselves and the free-swinging use of the First Amendment that could only have been used in the aftermath of

[82] See Weaver v. Bonner, 309 F.3d 1312 (11th Cir. 2002) (Georgia's prohibition of personal solicitation of campaign funds and its broad prohibition of misleading and deceptive statements during a campaign held unconstitutional) and Spargo v. New York State Commission on Judicial Conduct, 24 F.Supp.2d 72 (N.D.N.Y. 2002) (holding unconstitutional provisions of the New York Code of Judicial Conduct prohibiting political activity and those aimed at preserving impartiality and the appearance of impartiality), vacated and remanded with directions to abstain under the so-called Rooker-Feldman doctrine, 2003 U. S. App. LEXIS 24685, 000 F.3d 000 (2d Cir. 2003).

the expansion of judicial constitutional power beginning in the second half of the twentieth century. Judicial correctness has come up against constitutional correctness.