

After *White*: Defending and Amending Canons of Judicial Ethics

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AFTER *WHITE*: DEFENDING AND AMENDING CANONS OF JUDICIAL ETHICS

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Introduction

A member of the North Carolina Supreme Court served as master of ceremonies for a Republican Party fundraising event in July 2002 and spoke in support of the party's candidates. Under the canons of judicial ethics in force at the time in North Carolina and most other states, judges were forbidden to engage in partisan political activity of this kind. The following year, the justice admitted that the state's Judicial Standards Commission had privately admonished him for breaking the rules. Less than two months later, the same justice and his colleagues amended the state's ethical canons to permit judges to "attend,

preside over, and speak at any political party gathering, meeting or other convocation” and engage in other political activity.

What had changed to explain the 180-degree turn? In June 2002, the month before the fundraiser, the United States Supreme Court had decided *Republican Party of Minnesota v. White*,¹ striking down a Minnesota canon prohibiting candidates for judicial office from announcing their views on disputed issues. Although *White* said nothing about restrictions on partisan political activity by sitting judges, some judges have relied on *White* to attack both that ban and a host of other canons. The North Carolina justices, for example, decided to permit judicial candidates to promise voters specific results in particular cases, telling one reporter they “did that to get ahead of a trend in federal court rulings and to avoid lawsuits over the state requirements, although” the reporter noted, *White* “explicitly avoided the issue.”²

Sometimes, as in North Carolina, the attack takes the form of amending the canons; in other cases, specific canons are challenged through litigation. Both forms of attack threaten traditional rules ensuring the independence and impartiality of the courts. This paper is designed to help defenders of the canons ward off the attacks and preserve the right of all litigants to a fair hearing. The paper is divided into three parts: the first describes the kinds of challenges the canons have been facing in different states; the second discusses tactics and arguments that can be used to defend the canons in litigation; and the third deals with the process of amending canons to preserve both their effectiveness and their constitutionality.

There is every reason to expect attacks on the canons to proliferate. If the canons are to survive, their defenders must be prepared.

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536 U.S. 765 (2002).

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Matthew Easley, *Code Loosens Grip on Judges*, Raleigh News & Observer, Sept. 20, 2003, at B1.

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How Have the Canons Been Attacked?

White, 536 U.S. at 788 (quoting *Renne v. Geary*, 501 U.S. 312, 349 (1988)).⁴

Detailed analyses of the *White* decision and its likely effect on judicial elections, along with other documents related to the case, are available at http://www.brennancenter.org/programs/dem_fc_lit_white.html.⁵

Smith v. Phillips, 2002 WL 1870038 (W.D. Tex. Aug. 6, 2002).

White

In *White*, the Supreme Court decided by a 5-4 vote that, under the First Amendment, states cannot prohibit a candidate for judicial office from “announc[ing] his or her views on disputed legal or political issues.” Although states can choose whether to elect judges or appoint them, the

greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance. If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles.³

The philosophy underlying the opinion is essentially this: citizens need information to vote, and the “Announce Clause” deprives them of information they probably consider very important in making up their minds. Further, prohibiting candidates from announcing their positions on controversial issues does not solve the problem Minnesota claimed it was trying to address—the danger of judges deciding cases under the influence of popular opinion. This danger, the Court said, is not alleviated by the Announce Clause: elected judges who make unpopular decisions always stand the risk of being voted out of office. And even if judges’ statements of their views during a campaign might create the appearance that they had prejudged particular cases, so might statements and writings (including judicial opinions) made outside the campaign context, so a canon limited to campaign speech was “woefully underinclusive” in preventing the appearance of impartiality.⁴

Other Litigation Against the Canons

On the heels of *White*, judges and candidates in other states have attacked a range of ethical canons going far beyond the Announce Clause. When *White* was decided, only eight states had some version of the Announce Clause (which was part of the 1972 ABA Model Code of Judicial Conduct). Nonetheless, other restrictions on campaign speech appeared to become ripe targets after *White*. For instance, a federal district court relied on *White* to strike down a Texas regulation forbidding judicial candidates from “mak[ing] statements that indicate an opinion on any issue that may be subject to judicial interpretation . . . except that discussion of an individual’s judicial philosophy is appropriate if conducted in a manner which does not suggest to a reasonable person a probable decision on any particular case.”⁵

More states are likely to consider changes, some in a good-faith

effort to comply with *White*, others in a cynical attempt to exploit *White* by pushing through unnecessarily broad revisions.

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See <http://www.aoc.state.nc.us/www/pub-lic/html/rulesjud.htm>.

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Order amending Ga. Code of Judicial Conduct (Jan. 7, 2004), available at http://www2.state.ga.us/courts/supreme/jqc_%207_27_or.html.

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could be handed down at any time. As the two cases from New York, the remand arguments in *White*, and the controversy in North Carolina demonstrate, rules governing sitting judges' partisan activities are likely to draw increasingly frequent attacks.

Weakening the Canons by Amending

Them

The history in North Carolina also demonstrates that such attacks may come in the guise of “reforms” to the canons. North Carolina not only turned the political activity regulations on their heads—changing the basic canon from “A judge should refrain from political activity inappropriate to his judicial office” to the current “A judge may engage in political activity consistent with his status as a public official”—but also eliminated the Pledge or Promise Clause and the ban on candidates’ personally soliciting campaign contributions. The state Supreme Court did all of this, moreover, without giving the public any notice or opportunity to comment on the changes; an order simply appeared out of the blue on April 2, 2003, announcing the new rules.¹³

Other states have also amended their canons since *White* was decided, though none has done so as drastically as North Carolina. In some cases, these changes may weaken the canons, even if that is not the intention. For example, the Georgia Supreme Court has dropped the Pledge or Promise Clause and the ban on statements that “appear to commit” a candidate under the Commit Clause.¹⁴ The ABA itself is undertaking a comprehensive review of its Model Code of Judicial Conduct, and it has already approved a change that combines the Pledge and Promise Clause and the Commit Clause into one clause, modifying them somewhat in the process. More states are likely to consider changes, some in a good-faith effort to comply with *White*, others in a cynical attempt to exploit *White* by pushing through unnecessarily broad revisions. Defenders of judicial impartiality and independence must encourage their high courts to use an open revision process and be prepared to participate actively during any available comment period.

Defending the Canons in Litigation

Legal Issues That Must Be Addressed in Virtually Every Case

As we have seen, a wide variety of canons has come under attack in litigation. Even so, certain core issues

recur in almost every case. Before turning to suggestions for defending specific kinds of canons, therefore, this paper will consider the most important of these general issues.

First is the level of scrutiny to which the court will subject a particular regulation. The “strict scrutiny” standard, which was used in *White*, requires a regulation to be narrowly tailored to serve a compelling state interest.¹⁵ The aphorism “strict in theory, fatal in fact” summarizes most lawyers’ view of strict scrutiny; once that standard is chosen, the challenged regulation is very likely to fall. Context may be critical to determining whether strict scrutiny applies. *White*, which assumed—but did not decide—that the Announce Clause was subject to strict scrutiny, will tend to lead many other courts to use that standard when campaign-related speech is at issue.¹⁶ But when the challenge involves other activity, such as a judge’s conduct in the courtroom, or partisan political activity unrelated to a judge’s reelection campaign, it is important to emphasize the difference between those situations and electoral campaigns, where, as *White* said, First Amendment protections are at their highest.¹⁷

Even in cases arising from a judge’s or candidate’s own campaign, it may be useful to remind the court that there are constitutional rights at stake other than the judge’s or candidate’s own First Amendment rights—most notably the due process rights of the individuals who will appear before the judge. As Justice Breyer has said in the campaign finance context, “[C]onstitutionally protected interests lie on both sides of the legal equation. For that reason there is no place for a strong presumption against constitutionality, of the sort often thought to accompany the words ‘strict scrutiny.’”¹⁸ Even if the court nonetheless decides that strict scrutiny should apply, it will have been forced to confront from the very outset of its analysis the compelling interests served by the canons.

What, then, are the compelling interests at stake? Although each regula-

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White, 536 U.S. at 765.

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Compare Spargo I, 244

tion has its own function, the canons generally serve three interests of

F. Supp. 2d at 86–87

(stating that *White* requires strict scrutiny), with *Raab*, 793 N.E.2d 1290 (stating that

constitutional magnitude: the right of litigants to impartial courts; the separation of powers; and public confidence in the courts’ fairness. No proper level of scrutiny remains open ques-tion).

See *White*, 536 U.S. at 781.

matter what level of scrutiny is applied, any defense of the canons should¹⁷

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Nixon v. Shrink Mo. Gov’t PAC, 528 U.S.

rely heavily on these three interests, which can be restated as impartiality,

377, 400 (2000)
(Breyer, J., concurring);
also *Raab*, 793
see
N.E.2d at 1292.

before a judge who declared in his election campaign that “men get too many raw deals in custody rulings” cannot be comforted by the thought that this is merely a bias “on an issue.” *White* acknowledged that avoiding bias against parties could be a compelling state interest, but said that avoiding preconceptions on particular issues was not. Therefore, when a candidate challenges a regulation affecting the candidate’s ability to state or imply prejudice in certain kinds of cases—the Commit Clause or the Pledge or Promise Clause, for example—the canons’ function should be understood as preventing the candidate from expressing bias toward a particular class of litigants, rather than a mere preconception on an abstract legal question.

Post-*White* cases upholding the canons have done just that. These cases construe the canons as prohibiting candidates from binding themselves, or appearing to bind themselves, to take action against particular kinds of parties. Thus, a candidate who said he would “assist” law enforcement and “use” bail and sentencing to make his city unattractive to outside criminals “singled out for biased treatment a particular class of defendants—those charged with drug offenses who reside outside the City of Lockport.”²⁴ Similarly, the Florida Supreme Court explained the difference between the announcement of views protected by *White* and the promises of bias barred by the canons:

While our judicial code does not prohibit a candidate from discussing his or her philosophical beliefs, in the campaign literature at issue Judge Kinsey pledged her support and promised favorable treatment for certain *parties and witnesses* who would be appearing before her (i.e., police and victims of crime). Criminal defendants and criminal defense lawyers could have a genuine concern that they will not be facing a fair and impartial tribunal.²⁵

The second way in which the three *White* definitions of “impartiality” can help courts

understand the due process considerations implicated by the canons turns out to be closely related: *White*'s third definition, that of openmindedness, shows how the canons protect litigants' right to a meaningful opportunity to be heard. *White* teaches that a candidate may have views on disputed issues and may announce them. Once elected, however, the judge must be able to listen to the arguments of all litigants and give each due consideration. The state's obligation to provide fair courts means that candidates should not indicate that they will refuse to consider the arguments and evidence of certain litigants or classes of litigants. "[O]penmindedness is central to the judicial function for it ensures that each litigant appearing in court has a genuine—as opposed to illusory—opportunity to be heard."²⁶

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Watson, 794 N.E.2d at 4–5.

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Kinsey, 842 So. 2d at 88–89.

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Watson, 794 N.E.2d at 7.

Defending the Canons in the Context of Election Campaigns

Pledge or Promise Clause. Virtually all states have adopted some variant of the ABA Model Code's ban on "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office." *White* explicitly declined to express a view on the constitutionality of the Pledge or Promise Clause.⁴⁴ No court, to our knowledge, has struck down a Pledge or Promise Clause, though the North Carolina and Georgia Supreme Courts have deleted the clause from their judicial codes.

The first question is what the clause means; courts will want defenders of the canons to offer a meaningful construction that gives judges and candidates fair notice of what is prohibited. Obviously, a candidate would violate the clause by saying: "I promise, if elected, that I will rule in favor of the defendant in the pending case of *Smith v. Jones*." But to have any real force, the clause must cover more than an explicit promise of a particular outcome in a specific case. Justice Ginsburg captured the problem in her dissent in *White*.

[T]he ban on pledges and promises is easily circumvented. By prefacing a campaign commitment with the caveat, 'although I cannot promise anything,' or by simply avoiding the language of promises or pledges altogether, a candidate could declare with impunity how she would decide specific issues. Semantic sanitizing of the candidate's commitment would not, however, diminish its pernicious effects on actual and perceived judicial impartiality. To use the Court's example, a candidate who campaigns by saying, 'If elected, I will vote to uphold the legislature's power to prohibit same-sex marriages,' will feel scarcely more pressure to honor that statement than the candidate who stands behind a podium and tells a throng of cheering supporters: 'I think it is constitutional for the legislature to prohibit same-sex marriages.' Made during a campaign both statements contemplate a *quid pro quo* between candidate and voter.⁴⁵

After *White*, an intelligible line must be drawn between a prohibited *quid pro quo* and a

permissible announcement of views.

Pre-*White* case law can help define that line. First are the easy cases, in which courts have condemned explicit pledges, such as statements that the candidate would “stop suspending sentences” and “stop putting criminals on probation” if elected.⁴⁶ Similarly, a candidate’s statement that she “will be a tough Judge that supports the death penalty and isn’t afraid to use it” was held prejudicial to criminal defendants charged with capital crimes and therefore improper.⁴⁷

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White, 536 U.S. at 770.

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Id. at 819–20 (Ginsburg, J., dissenting)
(citations omitted). 46

See *In re Haan*, 676 N.E.2d 740 (Ind.
1997). 47

See *In re Burdick*, 705 N.E.2d 422 (Ohio Comm’n of Judges 1999).

Is a Pledge or Promise Clause, so defined, constitutional? The rationale for the clause is obvious: promises by judicial candidates “impair the integrity of the court by making the candidate appear to have pre-judged an issue without benefit of argument or counsel, applicable law, and the particular facts presented in each case.”⁵⁶ Even if the candidate breaks the promise and considers each case properly on its merits, “the newly elected judge will have created a perception that will be difficult to dispel in the public mind,” and litigants may wonder whether the judge will approach their cases “without bias or prejudice and with a mind that is open enough to allow reasonable consideration of the legal and factual issues presented.”⁵⁷

The *White* majority, apparently recognizing the strength of these considerations, acknowledged that campaign promises might “pose a special threat to openmindedness.”⁵⁸ That express acknowledgment should undermine any argument that *White* compels striking down the Pledge or Promise Clause. Promises of particular outcomes in particular cases (or classes of cases) are especially pernicious because, at the very least, they create the impression that voters can guarantee those outcomes—no matter what the facts and law require—by choosing a particular candidate. That impression implicates the states’ interest in the appearance of impartiality, whether defined as absence of bias against classes of litigants or as openmindedness. At worst, the candidate will feel a moral or political obligation to fulfill his or her end of the bargain once on the bench, compromising or eliminating the openmindedness and lack of bias towards parties that are essential to judging. That sense of obligation implicates not only impartiality, but also judicial independence.

Commit Clause. Because the Commit Clause replaced the Announce Clause in the ABA’s model canons, and because it is generally viewed as an alternative to the Announce Clause, it is the most obvious target for litigants attempting to extend *White*’s holding. A significant majority of states have some version of the Commit Clause, typically tracking the ABA’s 1990 model language closely: a candidate may not “make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come

before the court.”

One important consideration in defining the boundaries of the Commit Clause is the phrase “appears to commit.” Particularly if a court construes the Pledge or Promise Clause narrowly to apply only to explicit promises, the Commit Clause must cover implied commitments, as well as conduct that voters will reasonably perceive as committing the candidate to deliver specific results once on the bench.

The state interests that justify the Commit Clause are very similar to those that justify the Pledge or Promise Clause. Nonetheless, defending the

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Ackerson v. Ky. Jud. Retirement and Removal Comm’n, 776 F. Supp. 309, 315 (W.D. Ky. 1991).

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Watson, 794 N.E.2d at 7.

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White, 536 U.S. at 780.

between “announcing” a view on an issue and “committing” oneself to a position.⁶⁴ The concept of impartiality can do much of the necessary work, though judicial independence is implicated as well.

If, as we have suggested, independence means that judges must be free to decide cases on the merits, then any campaign speech or conduct that truly “commits” the candidate to particular actions once on the bench by definition compromises judicial independence; a judge with a real obligation to decide a case in a particular way is not independent. Speech or conduct that “appears to commit” the candidate undercuts the appearance of judicial independence for the same reason. But, it may be argued, nothing forces a judge to adhere to campaign commitments, so the judge remains literally independent. Even if this argument could dispel the damage commitments do to independence, it could not explain away their undermining of impartiality. Of course, a judge *can* violate his or her campaign commitments; but that does not alter the facts that most judges will feel some degree of obligation to honor those commitments and that litigants will think the judge owes fidelity to campaign commitments given in exchange for votes. Certainly, bearing in mind the aspect of impartiality that requires openmindedness, it can hardly be denied that a campaign commitment at the very least appears to indicate a closed mind on an issue.

One caveat: *White* suggests that the Commit Clause cannot be saved by its limitation to commitments respecting “cases, controversies or issues that are likely to come before the court.” The Minnesota Supreme Court read a similar limitation into the Announce Clause, but the Supreme Court found it to be “not much of a limitation at all.”⁶⁵ The majority believed that there is “almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction.”⁶⁶

False or misleading statements. Two principal issues arise in defending canons that prohibit false or misleading campaign speech. The first is whether candidates can be disciplined for careless (i.e., negligent) false statements, or whether they must know the

statement is false or act with reckless disregard of the truth. The second is what counts as false: must the statement be literally false, or can the candidate be punished for a statement that is literally true but that, through omission or context, creates a misleading impression?

Even before *White*, courts were beginning to look skeptically at rules that punish negligent misrepresentations about campaign opponents.⁶⁷ After *White*, the Eleventh Circuit continued this trend in *Weaver*.⁶⁸ Any attempt to defend a negligence standard in litigation is likely to be

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As discussed at greater length below, the ABA modified the model Commit Clause in response to *White*.⁶⁵

White, 536 U.S. at 772.

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Id. at 772–73 (quoting *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 229 (7th Cir. 1993)).⁶⁷

See *Butler v. Ala. Judicial Inquiry Comm’n*, 802 So. 2d 207 (Ala. 2001); *In re Chmura*, 608 N.W.2d 31 (Mich. 2000).⁶⁸

Weaver, 309 F.3d at 1319.

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Brown v. Hartlage, 456 U.S. 45, 61 (1982).

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Weaver, 309 F.3d at 1320.

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Chmura, 608 N.W.2d at 42.

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Preliminary Advisory Opinion No. 01-02,
available on Westlaw at 46-FEB Res Gestae
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(2003).

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Kinsey, 842 So. 2d at 90.

futile. However, since only four states failed to adopt the ABA's 1990 revision of the Model Code, which requires that the candidate know the statement to be false, these cases are of little direct consequence in most of the country. The knowledge requirement should be interpreted to include not only actual knowledge of falsity, but also reckless disregard of whether the statement is true or false. That is a well-known constitutional standard used in certain libel cases, and it is also the constitutionally permissible standard in legislative and executive election campaigns.⁶⁹

As for whether a statement must be literally false to be punishable, the law is somewhat more murky. The Eleventh Circuit held that only literally false speech can subject the speaker to discipline,⁷⁰ and the Michigan Supreme Court found that state's canon facially overbroad, in part because it covered "statements that are not false, but, rather, are found misleading or deceptive."⁷¹ On the other hand, Indiana's Judicial Qualifications Commission warned candidates against applying oversimplified labels such as "soft on crime" to opponents, even though such ill-defined terms may not be susceptible of being proven objectively false. Criticism of opponents must be "based on objective facts," and candidates are advised to "avoid broad labels" and instead "state the facts on which the criticism is based."⁷²

There is also post-*White* authority punishing true but misleading statements. *Kinsey* upheld discipline against a successful candidate for her campaign speech, including a misleading brochure.

The brochure described the facts of the case wherein Judge Green [the incumbent] released Johnson on bond after he violated a restraining order by kicking down his wife's front door and attempting to strangle her 'to the point that he was charged with attempted murder.' The pamphlet leaves the clear impression that Johnson had been charged with attempted murder and burglary at the time he appeared at his bond hearing. Contrary to the implication, Johnson was not charged with these crimes until *after* Judge Green ordered his bond set at \$10,000.⁷³

The Florida Supreme Court did not expressly discuss whether literally true statements could be proscribed, but the quoted statement from the brochure appears to have been literally true: Judge Green did release a defendant on bond after the defendant engaged in conduct that *eventually* led to a charge of attempted murder. By omitting the fact that the charge had not yet been filed when Judge Green granted bond, however, the brochure created a false impression in voters' minds.

There are other instances in which the law holds people liable for true statements that, because of omission or context, mislead the listener;

securities fraud is a notable example. Whether courts will continue to apply that standard to judicial campaign speech is uncertain. In defending canons that prohibit both false and misleading speech, discretion may be the better part of valor. The canon is more likely to be found constitutionally sound if its coverage is limited to situations where the misleading nature of the statement is so clear that the candidate's intention to mislead is obvious. The more concrete and well-defined the false "facts" that voters are induced to believe, the more likely a deliberate deception can be punished. In *Kinsey*, the timing of the filing of an attempted murder charge was a simple, uncontroversial fact that the court found the candidate had misrepresented.

Campaign finance. Though generally applicable campaign finance restrictions are found in election statutes and regulations, one rule applicable only to candidates for the bench is commonly found in canons of judicial conduct: all but four states that have judicial elections prohibit candidates from personally soliciting campaign contributions. Instead, candidates must establish campaign committees to solicit and accept contributions. *Weaver* struck down the prohibition on personal solicitation, reasoning that it did not diminish the possibility of *quid pro quo* arrangements between contributors and candidates since candidates can generally find out, from the committee or public records, who has contributed and how much each donor has given. The Third Circuit had previously acknowledged the force of that argument, but upheld Pennsylvania's ban on direct solicitation because "we cannot say that the state may not draw a line at the point where the coercive effect, or its appearance, is at its most intense—personal solicitation by the candidate A state is permitted to take steps, albeit tiny ones, that only partially solve a problem without totally eradicating it."⁷⁴ The Oregon Supreme Court explained that the ban mitigates not only the danger of at least the appearance of *quid pro quo* corruption, but also the prospect of coercion of lawyers and litigants into contributing.⁷⁵

There is not much more to be said on the subject than what the Oregon Supreme Court said

in 1991. *White* should not affect this question, but care should be taken to emphasize the majority's rejection of the suggestion that judicial campaigns cannot be constitutionally distinguished from legislative and executive campaigns. *Weaver* struck down the personal solicitation ban only after erroneously concluding that states generally ⁷⁴ have no broader latitude to regulate in the judicial context. *Ct. of Penn.*, 944 F.2d 137, 146 (3d Cir.

1991); see also *McCormell v. Federal Election Comm'n*, ___ U.S. ___, 124 S. Ct. 619, 697 (2003) (“[R]eform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.”) (quoting *Buckley v. Valeo*, 424 U.S. 1, 105 (1976) (per curiam)). ⁷⁵

In re Fadeley, 802 P.2d 31 (Or. 1991).

If the political-activity canons are not like the clause struck down by *White*, what can they be compared to? There is a long line of cases upholding the federal Hatch Act and the “mini-Hatch Acts” adopted by all 50 states.⁸⁴ These laws restrict the partisan political activity of government employees. The *Raab* court relied on the Supreme Court’s approval of the Hatch Act to uphold restrictions on judges’ political activity.⁸⁵ Similarly, Maine’s Supreme Judicial Court upheld a ban on a probate judge’s accepting campaign contributions in contemplation of his run for the state legislature, saying the ban applied to “sitting judges, as opposed to judicial candidates.” The Maine court also upheld a requirement that the judge resign from the bench before running for non-judicial office, relying heavily on the Hatch Act cases.⁸⁶

The Hatch Act precedents are not only strongly persuasive authority but also help explain the interests served by limitations on judges’ political activity. Here, the watchword is independence, in the sense of disentangling judges from the political branches and the partisan machinery that guides the policy choices made in those branches. “It is a serious accusation to charge a judicial officer with making a politically motivated decision. By contrast, it is to be expected that a legislator will vote with due regard to the views of his constituents.”⁸⁷ The canons also relieve judges of the pressure to use, or even abuse, their offices in service of political parties. Without the political-activity canons, party leaders would be free to press judges to use the prestige and power of their offices to benefit the party and its candidates for political office, with the implied or actual threat of withholding renomination or support for appointment to a higher court.

Finally, attackers continue to rely on a variation of Justice O'Connor's position: what is the harm in allowing judges to continue to engage in political activity once on the bench, considering that they have already been "tainted" by politics during the election? This argument is especially problematic in states where judges run in partisan elections. The answer is that "[p]recisely because the State has chosen election as one means of selecting judges, there is a heightened risk that the public, including litigants and the bar, might perceive judges as beholden to a particular political leader or party after they assume judicial duties."⁸⁸

Judges spend much more time judging than they do running for reelection; in New York, for example, Justice Raab's term of office was 14 years. The public would surely distinguish a judge who is divorced from politics almost all of the time, and then briefly participates in a narrow category of electoral politics related to his or her own reelection campaign, from a judge who is perpetually raising money for a party, promoting its candidates, and appearing at party functions. There is no logical inconsistency in the public's accepting the necessity for aspiring judges to participate in electoral politics,

Without the political-activity canons, party leaders would be free to press judges to use the prestige and power of their offices to benefit the party and its candidates for political office.

See, e.g., U.S. Civ. Serv. v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548 (1973).

See Raab, 793 N.E.2d at 1291.

Dunleavy, 838 A.2d at 347-48, 351.

Clements v. Fashing, 457 U.S. 957, 968 (1982) (plurality opinion). 88

Raab, 793 N.E.2d at 1292-93.

holding public hearings around the country and taking testimony and comments from the public, the academy, the bench, the bar, and other constituencies. States can take advantage of the ABA's effort by waiting until the new Model Code is approved, which is expected to happen in February 2005. Even if a particular state does not wish to wait, interim drafts and public proceedings in the ABA process may provide useful guidance in revising the state's canons.

The Substance of Canon Amendments

Campaign Speech. There are three main areas of canon revision to focus on in the context of judicial election campaigns. First are changes to canons modeled on the Commit Clause and the Pledge or Promise Clause. Second are rules prohibiting false and misleading speech. Finally, canons relating to campaign finance may also be amended.

As noted previously, the Commit and Pledge or Promise Clauses (or whatever clauses replace them) must cover implicit promises and apparent commitments as well as express promises to deliver particular outcomes in particular cases. One way of clarifying such coverage would be to spell it out by stating, for example, that candidates are prohibited from making improper commitments "whether the commitment is explicit or implicit." Retaining the "appear to commit" language is also helpful in this regard. On the other hand, it may be advisable expressly to disclaim prohibition of mere announcements of a candidate's views or beliefs.

The ABA's recent revision to the model Commit and Pledge or Promise Clauses combines them into one clause, as follows:

A candidate for judicial office . . . shall not . . . with respect to cases, controversies or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.⁹³

One advantage of this approach is that it shows that "commitments" are meant to be something similar to "pledges" or "promises." This reduces the danger that the Commit Clause will be seen as tantamount to a forbidden Announce Clause. A disadvantage is immediately apparent, however. By dropping the "appear to commit" language from the previous version, the revised clause becomes silent as to whether it covers implicit promises

or commitments.

Another approach is that of Texas, which amended its code after the old version was struck down. The new clause states:

A judge or judicial candidate shall not make pledges or promises of conduct in office regarding pending or impending cases, specific

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See <http://www.abanet.org/judind/judicial-ethics/amendments.pdf>.
Tex. Code of Judicial Conduct, Canon 5(1)(i) (as amended 2002), at http://www.scjc.state.tx.us/texcode_txt.php.

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classes of cases, specific classes of litigants, or specific propositions of law that would suggest to a reasonable person that a judge is predisposed to a probable decision in cases within the scope of the pledge.⁹⁴

This text fills the gap left by the new ABA clause. By specifically referring to “classes of cases” and “classes of litigants,” it makes clear that impartiality means more than lack of bias against any individual litigant. The “suggest to a reasonable person” standard brings implicit pledges or promises within the scope of the clause. The reference to “specific propositions of law,” may not add much legitimate coverage that is not already included in “specific classes of cases” and “specific classes of litigants,” but even if the “specific propositions of law” language were struck down, it could presumably be severed from the clause, leaving the remaining portions operative.

In the category of false and misleading speech, the “actual malice” standard (knowledge that a statement is false or reckless disregard of whether it is true or false) may be constitutionally required and should be made explicit. As for what statements and conduct are covered, actual falsity should obviously be prohibited. Proscribing material omissions or true but misleading speech is more likely to lead to constitutional challenges, but, as previously discussed, at least one court since *White* has applied its canons to misleading speech. For language prohibiting material omissions and misleading speech, a good starting point may be the state’s consumer fraud and securities fraud statutes. Care should be taken before borrowing language wholesale from those sources, however; because consumer and securities fraud laws regulate commercial speech, they are subject to less stringent First Amendment review than campaign speech restrictions.

Campaign finance reform can be accomplished through either state legislatures or canon revision. There may be some pressure to eliminate the prohibition of personal solicitation of contributions on the basis that it is a “sham” that does not accomplish anything, since the candidate can still appear at a fundraising event, step outside when the checks are actually being written, and come back inside knowing full well who has given to his or her campaign. The answer should be not to eliminate the prohibition, but to strengthen it by prohibiting conduct that enables the candidate to know who has contributed, and to require a campaign committee structure that keeps the information hidden. The loophole that will remain is that,

in most states, campaign contributions above a certain amount must usually be disclosed to the agency in charge of enforcing the campaign finance laws, and such disclosures are generally public records. The fact that unscrupulous candidates may exploit this loophole is not a reason, however, for eliminating protections for ethical judges.

Political Activity. Logically, there should not be as much urgency to change the canons relating to political activity outside the campaign context, because *White* did not address those canons at all. Logic, however, may have little to do with canon revisions, as evidenced by the North Carolina Supreme Court’s use of *White* to justify the virtual elimination of the rules regarding political activity while on the bench.

The tension in drafting or revising restrictions on political activity is between the competing advantages of generality and specificity. If there is only a general rule—“judges shall not engage in partisan political activity,” for example—the rule may be vulnerable to charges of vagueness or overbreadth. Most current rules take the opposite approach, and list very specifically what judges may and may not do, but that sort of list has been criticized as underinclusive; in other words, because some partisan activity may be left off the list, what is the justification for keeping other things on it? That particular criticism should have less force, at least as a constitutional (as opposed to policy) argument, in the wake of the Supreme Court’s recent affirmation that the government may, without violating the First Amendment, regulate activities it views as most harmful, even if similar activities are not regulated.⁹⁵ During the amendment process, defenders of the canons should consider two things. First, the specific rules that already exist should be carefully reviewed to see whether additional activities should be added to the list. Second, a clause should be added, if possible, stating that the specified proscribed activities are examples of the general rule against partisan political activity not substantially connected to a judge’s own campaign, not an exhaustive list.

Other Considerations

Disciplinary rules that are enforced against wayward judges are not the only tools available for protecting the values that the canons represent. Two alternatives are tightened standards for recusal and the adoption of aspirational standards of conduct.

If regulations of campaign conduct are invalidated or limited in the wake of *White*, states may respond by beefing up their recusal standards. Perhaps the government cannot bar candidates from announcing their views on controversial issues, but it can protect litigants’ interests by requiring judges to recuse themselves from cases where their campaign conduct has created reason to doubt their impartiality.

Justice Kennedy, famous as the Court’s First Amendment absolutist, made this clear in his concurrence in *White*. Even as he expressed doubt about the constitutionality of *any* regulation of campaign speech, he said states “may adopt recusal standards more rigorous

than due process requires, and censure judges who violate these standards.”⁹⁶ As an alternative or a complement to censuring judges who refuse to adhere to recusal standards,

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See McConnell, 124 S. Ct. at 697.

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White, 536 U.S. at 794 (Kennedy, J., concurring).

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Model Code of Judicial Conduct, Canon

(3)(E)(1)(f) (as amended 2003). 98

Kinsey, 842 So. 2d at 87; see also Ga. Code of Judicial Conduct, commentary to Canon 7(B)(1)(b) (“This Canon does not prohibit a judge or candidate from publicly stating his or her personal views on disputed issues [citing *White*]. To ensure that voters understand a judge’s duty to uphold the constitution and laws of Georgia where the law differs from his or her personal belief, however, judges and candidates are encouraged to emphasize in any public statement their duty to uphold the law regardless of their personal views.”).

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states could make interlocutory appeal or mandamus review available when recusal motions are denied, although some caution may be in order lest frivolous recusal motions and appeals become tools for delay.

The ABA has proposed tougher rules for disqualification, apparently to counteract the weakening of the Commit Clause in the recent revision. The revised rule requires recusal when:

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 proceeding⁹⁷

Note that this language borrows from the Commit Clause the phrase “appears to commit.” Thus, even if implicit commitments are permitted some time in the future, they will be grounds for mandatory recusal. This not only protects litigants after the campaign is over but reduces the incentive for a candidate to make implicit commitments during the campaign. For instance, a candidate who appears to commit to giving the maximum legal sentence to all defendants convicted of crimes involving guns will disqualify himself or herself from hearing gun cases at all, a fact that opponents can point out to the voters. Similarly, Georgia’s recent canon revisions permit candidates to solicit campaign contributions personally as required by *Weaver*, but commentary to the new rule warns that personal solicitations may create an “appearance of partisanship with respect to issues or the parties which require[s] recusal.”

Another alternative is to draft standards of conduct, either as part of the canons or as a separate document, that are aspirational. That is, they describe standards that judges and candidates should try to comply with, but that they cannot be sanctioned for violating. Some states already have aspirational components to their codes of judicial conduct. In Florida, for example:

[A] candidate may state his or her personal views, even on disputed issues. However, to ensure that the voters understand a judge’s duty to uphold the constitution and laws of the state where the law differs from his or her personal belief, the commentary encourages candidates to stress that as judges, they will uphold the law.⁹⁸

Aspirational statements can be productive in several ways, apart from simply encouraging judges and candidates to behave well. They can be used, for example, to shed light on the meaning of canons that are binding, as in the *Kinsey* case. Private entities, such as bar associations, can publicize candidates’ breaches of aspirational standards, which may be

especially effective if candidates are asked to pledge at the outset of the campaign to abide by such standards voluntarily. In many jurisdictions, there are screening panels that decide whether to label a candidate qualified or not; the panels could take into account breaches of aspirational standards either during the current campaign or in an incumbent judge's prior career. In short, language that advocates may not be able to incorporate in binding regulations, or that is struck down as unconstitutional when used as a basis for discipline, may be worth including as non-binding aspirational standards.

Finally, it may be worth considering a mechanism for judges and candidates to obtain advisory opinions on whether certain conduct or speech would violate the canons. Some states have official bodies within the court administrative system to which judges and candidates can submit questions. In New York, for example, a judge accused of wrongdoing is presumed to have acted properly if, before engaging in the conduct in question, he or she sought an advisory opinion and was told that the conduct would be permissible.⁹⁹ Other judges and candidates can benefit from the publication of advisory opinions (omitting the name and other identifying details of the requester), and the availability of timely advisory opinions can protect regulations from challenges on the grounds of vagueness.¹⁰⁰ Another way to anticipate and defeat vagueness challenges is by including official commentary when amending the canons, explaining the purpose of each regulation and giving examples of prohibited conduct.¹⁰¹

Conclusion

These are challenging times for those who would preserve the distinction between the judiciary and the political branches of government, particularly in states in which judges are elected. But reports of the canons' demise in the wake of *White* have been greatly exaggerated. Through effective defense in litigation, participation in revisions of the canons, and creative use of alternatives, defenders of the canons can protect a vital, impartial, and independent judiciary.

Depending on the state, those who would prefer to weaken the canons may have considerable political strength. Recruiting allies—including the public and the press—should therefore be a high priority. The Brennan Center is one of several organizations offering assistance. Defenders of the canons involved in litigation or canon revision can request help through our website at www.brennancenter.org/programs/dem_fc_canons.html. The site also makes publicly available various resources on the canons, including a regularly updated list of all significant judicial decisions since *White*, with summaries of each decision and links to the opinions. Other sources of information and advice include the National Center for State Courts and its National Ad Hoc Advisory Committee on Judicial Campaign

Conduct. Their websites are at www.ncsconline.org and www.judicialcampaignconduct.org, respectively.

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N.Y. Jud. L. § 212(2)(l)(iv). 100

See Letter Carriers, 413 U.S. at 580; *Arnett*

v. Kennedy, 416 U.S. 134, 160 (1974); *Mason v. Fla. Bar*, 208 F.3d 952, 959 n.4 (11th Cir. 2000); *Martin Tractor Co. v. Fed. Election Comm'n*, 627 F.2d 375, 386 (D.C. Cir. 1980).

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See Griffen II, ___ S.W.3d at ___ (finding a provision too vague to give judge adequate notice that his conduct was prohibited, but “encouraging the Judicial Commission to study the ‘judge’s interests’ exception to Canon 4C(1) and provide its recommendations to this court for a proper amendment or additional commentary, which will set in place a proper standard to govern this conduct”).

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