Judicial Independence Series

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

by J.J. Gass

Brennan Center for Justice at NYU School of Law

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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.

[1] 536 U.S. 765 (2002).

[2] Matthew Eisley, *Code Loosens Grip on Judges*, Raleigh News & Observer, Sept. 20, 2003, at B1.

How Have the Canons Been Attacked?

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]

[3] *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).

Judges have unsuccessfully challenged the "Commit Clause" and "Pledge or Promise Clause" found in the ABA's 1990 Model Code. The Commit Clause prohibits a judicial candidate from making "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." The Pledge or Promise Clause prohibits "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office." At least 25 states have adopted these clauses, with more than a dozen other states adopting variants.[6]

Even farther afield of the Announce Clause struck down in *White* are canons barring false or misleading campaign speech. Yet those canons are also under fire, with the federal Eleventh Circuit Court of Appeals striking down Georgia's version on two grounds. First, it applied to negligent falsehoods, and the court held that the First Amendment permitted regulation only of statements made with actual knowledge that the statement was false or with reckless disregard of whether the statement was true or false (the so-called "actual malice" standard). Second, the ban impermissibly applied to statements that were misleading and omitted critical information, but that were literally true.[7] Florida's Supreme Court upheld that state's ban on false or misleading campaign speech in a somewhat ambiguous opinion that appeared to construe the canon as containing an "actual malice" standard but that also upheld sanctions against statements that were misleading but literally true.[8]

The Eleventh Circuit also struck down a rule, found in almost every state with judicial elections, that prohibited judges from personally soliciting contributions to their campaigns for the bench (rather than using a campaign committee for fundraising).[9] Special campaign finance rules for judicial elections can be regulated by the canons, but generally applicable rules, such as requirements to disclose contributions, may be found in state election statutes and regulations.[10]

Leaving the realm of electoral campaigns altogether, bans on partisan political activity by sitting judges, unrelated to the judges' reelection efforts, have also been challenged in the wake of *White*. Most notably, a federal district judge in New York struck down many of that state's rules on partisan political conduct.[11] After the highest court in New York's state court system disagreed with the federal judge, his decision was vacated by a federal appellate court on procedural grounds.[12] In *White* itself, now on remand to a federal appeals court, the plaintiffs have mounted a challenge to some of Minnesota's restrictions on partisan political conduct—restrictions the appeals court previously upheld before the case went up to the Supreme Court for a ruling on the Announce Clause. The case was argued in December 2002, so a decision

[6] *See Watson v. State Comm'n on Judicial Conduct*, 794 N.E.2d 1 (N.Y. 2003); *In re Kinsey*, 842 So. 2d 77 (Fla.), *cert. denied*, 124 S. Ct. 180 (2003).

[7] *Weaver v. Bonner*, 309 F.3d 1312, 1319–20 (11th Cir. 2002). Pre-*White* decisions had read similar limitations into other states' canons. *See Butler v. Ala. Judicial Inquiry Comm'n*, 802 So. 2d 207 (Ala. 2001); *In re Chmura*, 608 N.W.2d 31 (Mich. 2000).

[8] *Kinsey*, 842 So. 2d at 90.

[9] *Weaver*, 309 F.3d at 1322–23.

[10] Other papers in this series address judicial campaign finance issues. *See, e.g.*, Deborah Goldberg, *Public Funding of Judicial Elections: Financing Campaigns for Fair and Impartial Courts* (2002), available at http://www.brennancenter.org/resources/ji/ji3.pdf.

[11] *Spargo v. N.Y. State Comm'n on Judicial Conduct*, 244 F. Supp. 2d 72 (N.D.N.Y.) (*Spargo I*), *vacated*, 351 F.3d 65 (2d Cir. 2003) (*Spargo II*).

[12] *Raab v. State Comm'n on Judicial Conduct*, 793 N.E.2d 1287 (N.Y. 2003); *Spargo II*.

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.

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.

[13] *See* http://www.aoc.state.nc.us/www/public/html/rulesjud.htm.

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

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 regulation has its own function, the canons generally serve three interests of constitutional magnitude: the right of litigants to impartial courts; the separation of powers; and public confidence in the courts' fairness. No matter what level of scrutiny is applied, any defense of the canons should rely heavily on these three interests, which can be restated as impartiality,

[15] *White*, 536 U.S. at 765.

[16] *Compare Spargo I*, 244 F. Supp. 2d at 86–87 (stating that *White* requires strict scrutiny), with *Raab*, 793 N.E.2d 1290 (stating that proper level of scrutiny remains open question).

[17] *See White*, 536 U.S. at 781.

[18] *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring); *see also Raab*, 793 N.E.2d at 1292.

"Litigants have a right guaranteed under the Due Process Clause to a fair and impartial magistrate and the State, as the steward of the judicial system, has the obligation to create such a forum."

independence, and the appearance of impartiality and independence, respectively.

Impartiality. The need for impartiality flows from litigants' due process rights.[19] The *White* Court noted that although the parties had argued about how well the Announce Clause protected impartiality, neither side had offered the Court a definition of what it meant by "impartiality" in the first place. The failure of the parties to define the term in one case, however, does not mean that "impartiality" is inherently useless in constitutional analysis. A reviewing court should clearly understand that the canons do not reflect mere policy preferences by the state, but are essential to meeting the state's constitutional duties. "[L]itigants have a right guaranteed under the Due Process Clause to a fair and impartial magistrate and the State, as the steward of the judicial system, has the obligation to create such a forum . . . ."[20]

Justice Scalia's majority opinion in *White* offers three possible definitions of "impartiality," none of which alone fully captures the due process rights at stake. The first is the absence of bias for or against a party to a dispute. This kind of impartiality "guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party."[21] The Announce Clause did not foster this kind of impartiality, said the Court, because it prohibited the expression of views about specific *issues*, not specific *parties*. Second is "lack of preconception in favor of or against a particular legal view."[22] This kind of impartiality, the Court believed, was what the Announce Clause was all about; but promoting such a lack of preconception was not a compelling state interest because any competent judge will have preconceptions about many legal questions. The third definition suggested in *White* is openmindedness. "This quality in a judge demands, not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case."[23] Even assuming the state has a compelling interest in having openminded judges, the Court held, the Announce Clause is not narrowly tailored to serve that interest, since judges and candidates can express their close-mindedness on controversial issues in many contexts outside of electoral campaigns, such as law review articles and judicial opinions, that are not subject to the Announce Clause's restrictions.

Though Justice Scalia's three suggested definitions are inadequate standing alone, there are at least two ways in which they can illuminate the relationship between impartiality and due process. The first is to recognize that Justice Scalia's first two definitions—bias against a particular party and bias on particular legal issues—are not as clearly distinct as the *White* opinion makes it seem. A woman in a custody battle standing

[19] For a detailed treatment by a respected state chief justice of the relationship between the canons and due process, *see* Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 Geo. J. Legal Ethics 1059 (1996).

[20] *Raab*, 793 N.E.2d at 1290–91.

[21] *White*, 536 U.S. at 776.

[22] *Id.* at 766.

[23] *Id.* at 778.

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 prejudgment 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]

[24] *Watson*, 794 N.E.2d at 4–5.
[25] *Kinsey*, 842 So. 2d at 88–89.
[26] *Watson*, 794 N.E.2d at 7.

Independence. Another missed opportunity in *White* (at least according to the Court) was the chance to define "judicial independence." The majority pointed out that the parties had used "impartiality" and "independence" interchangeably. The Court therefore assumed that the two words meant the same thing.[27] They do not, and they should not be conflated.

Judicial independence is rooted in the separation of powers, one of the most fundamental principles of the federal Constitution, and of most state constitutions as well. An independent judiciary is: (1) not dominated by or dependent on the other two branches of government; (2) not unduly entangled in the political machinery of the other branches, such as the political party apparatus by which legislators and elected executive officials organize themselves and their supporters; and (3) not actuated in its decision-making process by the same considerations and interests as the other branches. Many state constitutions have express provisions guaranteeing the independence of the three branches from each other.[28] Others contain rules that are clearly designed to protect the judiciary's independence, such as lengthy terms of office for judges as compared to other elected officials.[29] Courts have recognized the importance of the separation of powers in upholding regulations of judges' political activity.[30] In fact, Maine's high court found that the legislature violated the separation of powers by passing legislation intended to override two of the canons' restrictions on political activity by judges; the legislation "does usurp our judicial authority and is therefore unconstitutional."[31]

This conception of judicial independence, which *White* did not address, can be advanced in defense of many challenged regulations. In the context of campaign regulations, independence means that future judges remain free to decide cases on the merits and are not constrained by political agendas. The canons do not, and could not, aim at eliminating all preconceptions candidates may have about legal questions. They aim instead at regulating the forces that may mold and influence those preconceptions and the incentives judges have for acting upon their preconceptions once elected. A gubernatorial or legislative candidate may properly promise to take specified action if elected; but a judge cannot be bound, or even appear to be bound, by the same kind of political commitment.

Judicial independence is an even more important concept in defending regulations on judges' political activities outside of their own campaigns for office. While on the bench, judges cannot be beholden to political parties or specific constituencies in the same way as other elected officials can. Judges "must strive constantly to do what is legally right, all the more so when the result is not the one the Congress, the President, or 'the home crowd' wants."[32] If judges answer to political parties and electoral

[27] *White*, 536 U.S. at 775 n.6.

[28] *E.g.*, Texas Const. art. II, § 1 ("The powers of the Government of the State of Texas shall be divided into three distinct departments . . . and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.").

[29] *See* Brief of *Amicus Curiae* Conference of Chief Justices at 5-8 in *White*, 2002 WL 257559 (Feb. 19, 2002) (citing such measures in various states' constitutions).

[30] *See, e.g., Signorelli v. Evans*, 637 F.2d 853, 861 (2d Cir. 1980); *see also Griffen v. Ark. Judicial Discipline & Disability Comm'n*, __ S.W.3d __, 2003 WL 22725673 (Ark. 2003) (*Griffen II*) ("Judicial independence is a hall-mark of our system of government, and we cannot abide the entanglements between the judicial and other branches of government to which lobbying executive and legislative officials would unquestionably lead. . . . We have no hesitancy in adding that judicial independence is a compelling interest of the state. We cannot and will not countenance a blurring of the judge's role with that of the executive or legislative branches.").

[31] *In re Dunleavy*, 838 A.2d 338, 347 (Me. 2003).

[32] Ruth Bader Ginsburg, *Remarks on Judicial Independence*, 20 Hawaii L. Rev. 603 (1998) (quoting William H. Rehnquist, *Dedicatory Address: Act Well Your Part; Therein All Honor Lies*, 7 Pepperdine L. Rev. 227, 229–30 (1980)).

majorities to the same degree as legislators, the courts risk becoming mere shadow legislatures. They would lose the distinct character necessary for the non-legislative work of judging and for discharging their constitutional duty of judicial review. Chief Justice Rehnquist has described "an independent judiciary with the final authority to interpret a written constitution" as "one of the crown jewels of our system of government today."[33] Preserving that crown jewel means insulating it as much as possible from partisan politics.

The appearance of impartiality and independence. "[W]ithout public confidence, the judicial branch could not function."[34] Courts have long understood that they must not only be fair, but must be seen to be fair, or they will lose the ability to play their dispute-resolving role in our democracy. The courts do not have armies or police at their disposal, though they may have a marshal or two; they cannot compel anyone to respect their judgments without the cooperation of the other branches of government and the support of the public. Thus, the United States Supreme Court has repeatedly recognized that maintaining the public's perception that the courts are fair is a critical requirement of due process, going beyond the requirement that the courts be fair in fact. "The Due Process Clause may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties."[35] The canons promote not only impartiality and independence, but also their appearance. "A State may . . . properly protect the judicial process from being misjudged in the minds of the public."[36]

An issue that will not arise in every case, but that may be common, is that of abstention. The term "abstention" refers to a set of related doctrines under which federal courts will decline to hear cases out of deference to the interests of states. One of these doctrines, called *Younger* abstention, has already come up at least twice in post-*White* challenges to the canons. Under the doctrine, a judge who is subject to a state disciplinary investigation or proceeding may not go to federal court to challenge the constitutionality of the canons, so long as the judge will have an opportunity to raise the constitutional issues before the disciplinary commission or on appeal to the state courts. In *Spargo*, for example, the federal appeals court said that the trial court should not have considered the judge's request for an injunction against imminent state proceedings because the judge could appeal any adverse result to the state's high court.[37] A federal court in Arkansas reached the same conclusion under similar circumstances.[38] Whenever a federal case interferes with state proceedings, the federal court should consider whether abstention is required.

[33] William H. Rehnquist, *Keynote Address at the Washington College of Law Centennial Celebration*, 46 Am. U. L. Rev. 263, 274 (1996).

[34] *Raab*, 793 N.E.2d at 1292.

[35] *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) (internal quotation marks omitted); *see also Mistretta v. United States*, 488 U.S. 361, 407 (1989) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship.").

[36] *Cox v. Louisiana*, 379 U.S. 559, 565 (1965).

[37] *Spargo II*, 351 F.3d at 68 ("[W]e hold that proper deference to New York's paramount interest in regulating its own judicial system mandates the exercise of *Younger* abstention over plaintiffs' claims. Accordingly, we vacate the judgment and injunction of the District Court and remand with instruction to the District Court to abstain from exercising jurisdiction over the plaintiffs' action.").

Pitfalls for the Unwary

Attackers of the canons have tried to shift attention away from the constitutional interests that the canons protect and toward themes that favor their position. Certain canards and oversimplifications seem, at this early date, to be coming up often in post-*White* litigation. They should be firmly and clearly rejected.

The first, drawing upon Justice O'Connor's concurrence in *White*, is the notion that by choosing to elect its judiciary, a state forfeits its interests in impartiality and independence. The fundamental problem with that assertion is that the due process rights of individual litigants are not the state's to forfeit. Indeed, states are required by the Fourteenth Amendment to *guarantee* litigants an impartial court. Well-drafted canons permit candidates for judicial office to engage in the minimum political activity necessary to contest judicial elections meaningfully. That is far different from opening the floodgates to every sort of improper conduct, let alone permitting judges to flout the constitutional rights of those who appear before them. Justice O'Connor's individual views aside, the Supreme Court majority disavowed any implication that by having judicial elections, a state must accept the full panoply of constitutional doctrines applying to legislative and executive elections, and none of the Justices addressed the regulation of sitting judges outside the election context.[39]

The second misconception is that *White* means that judicial election campaigns must be allowed to resemble campaigns for election to the other branches. The Supreme Court made clear that "we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office."[40] Even the *Spargo I* trial court, which struck down several New York canons regulating the partisan political activity of sitting judges, acknowledged that "[j]udicial candidates and candidates for other public office are not similarly situated. Accordingly, treating them differently is constitutionally permissible."[41] Yet states should be aware that there is precedent stating that *White* "suggests that the standard for judicial elections should be the same as the standard for legislative and executive elections."[42] *Weaver* is correct that language in *White* "suggests" similarities between the campaigns, but it seriously overreaches in flatly applying the same legal standard without further discussion. Still, states in the Eleventh Circuit (Florida, Georgia, and Alabama) in particular may find themselves hampered by this decision.

Finally, and most obviously, it must be emphasized that *White* expressly addressed only the Announce Clause. The principles *White* announced are of course binding on other courts, but each challenged regulation must be separately evaluated in light of those principles.[43]

[38] *Griffen v. Ark. Judicial Discipline & Disability Comm'n*, 266 F. Supp. 2d 898, 906-07 (E.D. Ark. 2003) (*Griffen I*).

[39] *See White*, 536 U.S. at 783; Roy A. Schotland, *Should Judges Be More Like Politicians?*, 41 Judges' J. 7, 7 (Summer 2002) ("The majority's opinion reveals that one or more justices are unwilling or at least unready to strike more (or much more) regulation of judicial campaigns . . . .").

[40] *White*, 536 U.S. at 783.

[41] *Spargo I*, 244 F. Supp. 2d at 86.

[42] *Weaver*, 309 F.3d at 1321.

[43] *See Raab*, 793 N.E.2d at 1290.

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]

[44] *White*, 536 U.S. at 770.

[45] *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).

Even without the magic words "I promise," a clear implication that a candidate will deliver particular outcomes, irrespective of the law or facts presented, violates the Pledge or Promise Clause.

But courts have also disciplined judicial candidates who have avoided making their promises explicit. The Indiana Supreme Court, for example, reprimanded an incumbent who advertised his fulfillment of a promise made in a *previous* campaign: "When Judge Spencer ran for judge of the Circuit Court, he promised to send more child molesters to jail . . . burglars to jail . . . drug dealers to jail . . . . He's kept his promise. Let's keep Judge Spencer."[48] The advertisement implied that the judge would continue to live up to his promises if reelected and as such was an improper promise of bias against future criminal defendants. The Kentucky Supreme Court considered a campaign advertisement criticizing an incumbent's purported record of sentencing child abusers to probation. The advertisement concluded with an exhortation to elect a judge who "will let no one walk away before justice is served." The court concluded that this was an improper promise: "While in isolation, a judge who 'will let no one walk away before justice is served' is something to which all should aspire, in the context of the present judicial campaign, it represented appellant's commitment to prevent the probation of child abusers."[49]

These cases show that even without the magic words "I promise," a clear implication that a candidate will deliver particular outcomes, irrespective of the law or facts presented, violates the Pledge or Promise Clause. Post-*White* authorities have continued this interpretation.

> [M]ost statements identifying a point of view will not implicate the 'pledges or promises' prohibition. The rule precludes only those statements of intention that single out a party or class of litigants for special treatment, be it favorable or unfavorable, or convey that the candidate will behave in a manner inconsistent with the faithful and impartial performance of judicial duties if elected.[50]

Applying this standard, the New York Court of Appeals sanctioned a judge who had said during his campaign that he would "assist" law enforcement and "use" bail and sentencing to make the city unattractive to outside criminals; the court found that the candidate had "effectively promised that, if elected, he would aid law enforcement rather than apply the law neutrally and impartially in criminal cases."[51] The Florida Supreme Court reached a similar conclusion on similar facts.[52] Indiana's Judicial Qualifications Commission issued a post-*White* advisory, warning judges that it could enforce the Pledge or Promise clause against a "statement which appears to constitute a mere expression of fact." For example, a candidate who refers to "a record of imposing harsh penalties in criminal cases" may in fact be making "an implied promise of future conduct."[53] On the other hand, "statements that merely express a viewpoint do not amount to promises of future conduct."[54] Nor will broad statements of a candidate's general philosophy, such as describing oneself as a "law and order" candidate.[55]

[48] *In re Spencer*, 759 N.E.2d 1064 (Ind. 2001).

[49] *Summe v. Judicial Retirement and Removal Comm'n*, 947 S.W.2d 42, 47 (Ky. 1997).

[50] *Watson*, 794 N.E.2d at 7.

[51] *Id.* at 4–5.

[52] *Kinsey*, 842 So. 2d at 88.

[53] Preliminary Advisory Opinion No. 01–02, available on Westlaw at 46–FEB Res Gestae 16, 17 (2003).

[54] *Watson*, 794 N.E.2d at 4.

[55] *In re Shanley*, 774 N.E.2d 735 (N.Y. 2002).

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

[56] *Ackerson v. Ky. Jud. Retirement and Removal Comm'n*, 776 F. Supp. 309, 315 (W.D. Ky. 1991).

[57] *Watson*, 794 N.E.2d at 7.

[58] *White*, 536 U.S. at 780.

Commit Clause may raise different problems from those encountered in defending the Pledge or Promise Clause. The first of these is the argument that *White* has already struck down the Commit Clause, at least implicitly. The problem arises because, by the time *White* reached the Supreme Court, the Minnesota Supreme Court had issued a narrowing interpretation of the Announce Clause.[59] The ABA's *amicus* brief to the Supreme Court argued that the scope of Minnesota's Announce Clause was now no broader than that of commit clauses. The Supreme Court chose not to decide "whether the announce clause (as interpreted by state authorities) and the 1990 ABA canon [the Commit Clause] are one and the same." Instead, it delivered a single cryptic sentence: "No aspect of our constitutional analysis turns on this question."[60]

However this sentence is interpreted, it must mean that *White* did not expressly decide the constitutionality of the Commit Clause. The anti-canon argument, however, is that if the Minnesota Supreme Court defined the state's Announce Clause to mean the same thing as the Commit Clause, and the Announce Clause so defined was unconstitutional, then the Commit Clause must be unconstitutional as well. That argument is too facile. If it were as simple as that, the Court would not have taken pains to avoid an explicit holding on the Commit Clause's constitutionality. The error in the syllogism is its major premise: despite the arguments of *amici*, including the ABA and the Brennan Center, the *White* Court deliberately refused to state that the clause it was considering and the Commit Clause were "one and the same."

In spite of the fact that the U.S. Supreme Court was theoretically required to accept the Minnesota Supreme Court's construction of a provision of Minnesota state law, the *White* majority was obviously skeptical of that construction and essentially analyzed the Announce Clause according to its "plain language," rather than under the gloss that the Minnesota court had provided. The opinion (written by the textualist Justice Scalia) archly stated that the Minnesota Supreme Court had put "some limitations . . . upon the scope of the announce clause that are not (to put it politely) immediately apparent from its text."[61] Elsewhere, it finds the argument that the Minnesota clause was equivalent to the Commit Clause "somewhat curious," since Minnesota had declined to replace one with the other to avoid exactly this sort of First Amendment litigation.[62] Therefore, *White* cannot reasonably be read as settling the question of the Commit Clause's constitutionality.

Nonetheless, *White*'s reasoning does present problems for the Commit Clause, even if it does not command the clause's invalidation. Pre-*White* decisions upheld versions of the clause, although often construing them narrowly.[63] In *White*'s aftermath, states must identify some real distinction

[59] *Id*. at 771.

[60] *Id*. at 773 n.5.

[61] *Id*. at 771; see also *id*. at 772 (stating that "the text of the announce clause [is] not all that [it] appear[s] to be").

[62] *Id*. at 773 n.5

[63] *See In re Shanley*, 774 N.E.2d 735 (N.Y. 2002); *In re Spencer*, 759 N.E.2d 1064 (Ind. 2001); *In re Haan*, 676 N.E.2d 740 (Ind. 1997); *Deters v. Judicial Retirement & Removal Comm'n*, 873 S.W.2d 200 (Ky. 1994); *Ackerson v. Ky. Judicial Retirement & Removal Comm'n*, 776 F. Supp. 309 (W.D. Ky. 1991)

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

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

[65] *White*, 536 U.S. at 772.

[66] *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.

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;

[69] *Brown v. Hartlage*, 456 U.S. 45, 61 (1982).

[70] *Weaver*, 309 F.3d at 1320.

[71] *Chmura*, 608 N.W.2d at 42.

[72] Preliminary Advisory Opinion No. 01–02, available on Westlaw at 46–FEB Res Gestae 16, 18 (2003).

[73] *Kinsey*, 842 So. 2d at 90.

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 have no broader latitude to regulate in the judicial context.

[74] *Stretton v. Disciplinary Bd. of the Supreme Ct. of Penn.*, 944 F.2d 137, 146 (3d Cir. 1991); *see also McConnell 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).

Defending Canons That Regulate Judges' Political Activity Unconnected to Their Own Election Campaigns

Although *White* directly addressed limitations on individuals' speech in support of their own candidacies for judicial office, sitting judges have begun to use *White* to attack limitations on their partisan political activity while on the bench, unrelated to the judges' own campaigns. The early results are mixed; after a significant early setback, defenders of the canons have begun faring better in the courts.

Political activity regulations are often very detailed in defining what is and is not permitted, and the rules vary from state to state. The common theme is that while judges may (and should) have led active public lives, they must refrain from partisan activity once on the bench. Judges have been sanctioned for writing a letter to the editor endorsing the election of another judicial candidate,[76] making campaign contributions to other candidates,[77] and acting as a behind-the-scenes advisor to another candidate's campaign.[78] Others violated the rules by participating in a political party's phone bank,[79] putting up a lawn sign supporting another candidate,[80] and even aiding the judge's wife's campaign for judicial office.[81] As these examples suggest, judges need not manifest actual bias toward any litigant in a pending or potential case to violate the political activity regulations.

Rules limiting judges' political activity cannot be properly analyzed if they are lumped together with canons that, like the Announce Clause, regulate candidates' conduct and speech in their campaigns for judicial office. *White* addressed the latter, but said nothing about the former, and much of its reasoning simply cannot logically apply to the political-activity canons.

Because these canons do not involve candidates' speech in their campaigns, there is a strong argument that a lower level of scrutiny should be applied. *White* assumed that strict scrutiny applied not only because the Announce Clause regulated speech on the basis of its content, but also because it "burdens a category of speech that is at the core of our First Amendment freedoms—speech about the qualifications of candidates for public office."[82] The Court went on to note: "We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election."[83] Partisan activity of sitting judges that does not serve the important function of informing voters about their reelection campaigns should not trigger the same kind of constitutional scrutiny, especially when the competing due process interests of litigants are taken into account.

Partisan activity of sitting judges that does not serve the important function of informing voters about their reelection campaigns should not trigger the same kind of constitutional scrutiny, especially when the competing due process interests of litigants are taken into account.

[76] *In re Glickstein*, 620 So. 2d 1000 (Fla. 1993).

[77] *In re Shea*, 815 So. 2d 813 (La. 2002).

[78] *In re DeFoor*, 494 So. 2d 1121 (Fla. 1986).

[79] *Raab*, 793 N.E.2d at 1288.

[80] *In re McCormick*, 639 N.W.2d 12 (Iowa 2002).

[81] *In re Codispoti*, 438 S.E.2d 549 (W. Va. 1993).

[82] *White*, 536 U.S. at 774 (quotation marks omitted).

[83] *Id.* at 782.

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.

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.

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,

[84] *See, e.g., U.S. Civ. Serv. v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973).
[85] *See Raab*, 793 N.E.2d at 1291.
[86] *Dunleavy*, 838 A.2d at 347-48, 351.
[87] *Clements v. Fashing*, 457 U.S. 957, 968 (1982) (plurality opinion).
[88] *Raab*, 793 N.E.2d at 1292–93.

then expecting the winning candidate to behave like a judge, and not a politician, once on the bench. "Because a judgeship is in the nature of a public trust, it is unreasonable to permit a judge to subjugate that trust to her or his personal desire to actively participate in the political process."[89]

If You Can't Defend Them, Amend Them™

Defending the existing canons is only half (and maybe not even half) of the battle. Several states have amended their canons since *White* was decided. More will likely do so before long. The ABA has already revised the Pledge or Promise Clause and the Commit Clause in its Model Code, and it is now embarking on a comprehensive revision of the entire Model Code. Revision may be a welcome opportunity to improve and clarify the canons; but it is also an opportunity for the canons to be watered down far more than *White* could possibly require.

Process Issues

A public, open process is critical in amending the canons. The drastic North Carolina revisions were simply announced as a *fait accompli* via Supreme Court order, with no warning, no opportunity for public comment, and no time to organize any opposition. A few months after the North Carolina amendments, there were rumors that the Georgia Supreme Court was going to adopt changes to its canons without public participation, and the Atlanta legal newspaper reported the concern these rumors were causing among members of the bar. Whether or not the article had anything to do with it, the Georgia Supreme Court shortly thereafter published proposed rule changes and invited public comment over a one-month period.[90] Pressure from the bar, the press, legislators, and judicial disciplinary commissions may help in encouraging an open process and should improve the results.

Pressure may be effective even after the fact. In the months after the North Carolina Supreme Court announced its amendments, editorialists and two organizations of lower-court judges criticized the high court's failure to have a public process.[91] After months of defending his court's actions, the chief justice appointed a 36-member commission to opine on what political conduct should be permissible for judges.[92] Granted, the commission is chaired by the same justice who was admonished for breaking the pre-amendment rules in 2002, but the inclusion of judges, lawyers, elected officials, and private citizens on the commission is a vast improvement over the secretive process the court employed in promulgating the April 2003 amendments.

In this connection, there may be value in putting off canon amendments until the ABA completes its Model Code revision. The ABA has begun

[89] *Dunleavy*, 838 A.2d at 354 (Levy, J., concurring).

[90] *See Supreme Court Invites Public Comment on Proposed Changes to Rules Governing Judicial Elections*, (Pub. Info. Office, Ga. S. Ct. Sept. 15, 2003), at http://www2.state.ga.us/courts/supreme/pr_canon7.htm. *See also* Jonathan Ringel, *JQC Seeks Free Speech in Judicial Campaigns*, Fulton County Daily Report (Sept. 17, 2003).

[91] *See, e.g., N.C. Judges Still Up for Sale*, Wilmington Star News, Jan. 1, 2004, at 6A; Matthew Eisley, *Jurists Deplore Relaxed Rules*, Raleigh News & Observer, Dec. 30, 2003, at B1.

[92] Matthew Eisley, *Judicial Politics Get Look*, Raleigh News & Observer, Jan. 14, 2004, at B5.

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

[93] *See* http://www.abanet.org/judind/judicialethics/amendments.pdf.

> 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 con-

[94]Tex. Code of Judicial Conduct, Canon 5(1)(i) (as amended 2002), at http://www.scjc.state.tx.us/texcode_txt.php.

text, 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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[95] *See McConnell*, 124 S. Ct. at 697.

[96] *White*, 536 U.S. at 794 (Kennedy, J., concurring).

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 proceeding . . . .[97]

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

[97] 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.").

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.

[99] 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).

[101] *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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