FREE SPEECH & TAINTED JUSTICE: RESTORING THE PUBLIC'S CONFIDENCE IN THE JUDICIARY IN THE WAKE OF *REPUBLICAN PARTY OF MINNESOTA V. WHITE*

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INTRODUCTION

In 2002, the United States Supreme Court decided *Republican Party of Minnesota v. White*,[1] placing the First Amendment free speech rights of candidates for judicial office at loggerheads with the due process guarantees of the Fourteenth Amendment. Specifically, the Court held that a Minnesota canon of judicial conduct violated the First Amendment of the United States Constitution by prohibiting candidates for judicial office from announcing their views on disputed legal or political topics, thus restricting a protected form of speech.[2] The Court reasoned that limits on speech during judicial campaigns deprived the electorate of vital information that could potentially influence how votes are cast.[3] Additionally, the Court stated that the canon in question failed its intended purpose—to safeguard the integrity of the judiciary by maintaining actual and perceived impartiality—by neglecting to provide similar speech-related limits for sitting judges and undeclared candidates for judicial office.[4]

While the Court's decision in *White* undoubtedly increases the electorate's ability to learn more about judicial candidates by expanding the scope of permitted campaign speech,[5] it also raises serious concerns re-

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1. Republican Party of Minn. v. White, 536 U.S. 765 (2002).

2. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech."); *see also* MINN. CODE OF JUDICIAL CONDUCT CANON 5A(3)(d)(i) (2000) (abrogated July 1, 2009); White, 536 U.S. at 768.

3. *White*, 536 U.S. at 768, 781 ("Debate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms. . . ."); *see, e.g.*, J.J. GASS, AFTER WHITE: DEFENDING AND AMENDING CANONS OF JUDICIAL ETHICS 2 (2004), *available at* http://brennan.3cdn.net/0b74af850b81d92928_bvm6y5sdf.pdf.

4. *White*, 536 U.S. at 773–777; *see, e.g.*, GASS, *supra* note 3, at 2; *see also* Ofer Raban, *Judicial Impartiality and the Regulation of Judicial Election Campaigns*, 15 U. FLA. J.L & PUB. POL'Y 205, 217 (2004).

5. *See* CITIZENS COMM'N FOR THE PRESERVATION OF AN IMPARTIAL JUDICIARY, FINAL REPORT

garding the preservation of Fourteenth Amendment due process rights. Specifically, the Court's decision in *White* permits judicial candidates to announce their views on controversial issues, which may compromise the judiciary's ability to adjudicate those controversies in an impartial manner should those issues come before the court.[6]

The Fourteenth Amendment to the United States Constitution states that no "[s]tate [shall] deprive any person of life, liberty, or property without due process of law."[7] Preservation of constitutional due process rights entails maintaining both the actual impartiality of the judiciary as well as the appearance of impartiality,[8] both of which are directly affected by comments made by candidates in judicial elections.[9] As such, eliminating canons of judicial conduct that promote judicial impartiality has the potential to universally undermine public confidence in the judiciary.[10]

This Note examines the impact of deregulated speech by judicial candidates on the public's confidence in the judiciary and provides solutions to maintain judicial impartiality. Part I of this Note discusses the historical role played by judicial canons of conduct in preserving due process rights, the dangers associated with their repeal, and their inability to effectively stand alone as the sole regulatory mechanism. Part II discusses the importance of judicial disqualification and recusal in preserving due process rights and the weaknesses associated with the current standards and administrative procedures. Finally, Part III presents solutions intended to preserve the public's confidence in the judiciary by filling the regulatory void created by the Court's decision in *White*.

AND RECOMMENDATIONS, 6, (2007), *available at* http://www.keepmnjusticeimpartial.org/FinalReportAndRecommendation.pdf (average cost of winning a judicial election increased 45% from 2002 to 2004, and nine states had candidates for supreme court justice seats who raised more than one million dollars in the 2006 election cycle); JAMES SAMPLE, LAUREN JONES, & RACHEL WEISS, THE NEW POLITICS OF JUDICIAL ELECTIONS 2006, at 2 (2006), *available at* http://www.faircourts.org/files/NewPoliticsofJudicialElections2006.pdf (2006 candidates for the supreme court ran television commercials in ten of eleven states with supreme court races, up from four of eighteen states in which candidates ran television commercials in 2000).

6. *White*, 536 U.S. at 810 (Ginsburg, J., dissenting) ("What remains within the Announce Clause is the category of statements that essentially commit the candidate to a position on a specific issue, such as 'I think all drunk drivers should receive the maximum sentence permitted by law.' . . . (candidate may not say 'I'm going to decide this particular issue this way in the future.')").

7. U.S. CONST. amend. XIV, § 1.

8. Unites States v. Hollister, 746 F.2d 420, 425-26 (8th Cir. 1984).

9. *See White*, 536 U.S. at 775; s*ee also* JAMES SAMPLE, DAVID POZEN & MICHAEL YOUNG, FAIR COURTS: SETTING RECUSAL STANDARDS 9 (2008), *available at* http://brennan.3cdn.net/1afc0474a5a53df4d0_7tm6brjhd.pdf.

10. SAMPLE, POZEN & YOUNG, *supra* note 9, at 9.

I. JUDICIAL CANONS OF CONDUCT AND DUE PROCESS RIGHTS – PRESERVING CONFIDENCE IN THE JUDICIARY

States enforce canons of judicial conduct to uphold litigants' rights to an impartial trial and to preserve the public's confidence in the courts' fairness.[11] Therefore the canons uphold the Fourteenth Amendment's due process guarantees by establishing a baseline of judicial conduct to head off questions regarding the impartiality and open-mindedness of the judiciary.[12]

The Court's ruling in *White* that Minnesota's Announce Clause canon was an unconstitutional limitation on a protected form of speech was the first time the Court had ever ruled on a judicial ethics provision, and has prompted questions into the constitutionality of other similarly-designed canons.[13] The dispute in *White* stems from a complaint filed against a candidate for associate judge to the Minnesota Supreme Court.[14] The complaint claims that campaign literature distributed by the candidate violated Minnesota's Announce Clause by criticizing previous decisions by the Minnesota Supreme Court and announcing the candidate's own views on those issues decided by the Court.[15] In response to the complaint, the candidate sought an advisory opinion from the Minnesota Lawyers Professional Responsibility Board and ultimately filed a lawsuit in Federal Court challenging the constitutionality of Minnesota's Announce Clause.[16] The United States Supreme Court ultimately sided with the candidate and held Minnesota's Announce Clause unconstitutional because it violated the First Amendment rights of candidates for judicial office.[17]

Subsequent to *White*, where the Court attempted to distinguish the First Amendment rights applicable to judicial elections from those applicable to legislative and executive elections,[18] some commentators have

11. *See* Raab v. State Comm'n on Judicial Conduct, 793 N.E.2d 1287, 1290–91 (N.Y. 2003) ("[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. . . ."); *see also* GASS, *supra* note 3, at 5-6.

12. *See In re* Watson, 794 N.E.2d 1, 7 (N.Y. 2003) ("[O]penmindedness is central to the judicial function for it ensures that each litigant appearing in the court has a genuine—as opposed to illusory—opportunity to be heard."); *see also* GASS, *supra* note 3, at 5.

13. *See* GASS, *supra* note 3, at 2-3.

14. Republican Party of Minn. v. White, 536 U.S. 765, 768–69 (2002).

15. *See id.* ("[The candidate] distributed literature criticizing several Minnesota Supreme Court decisions on issues such as crime, welfare, and abortion.").

16. *See id.* at 769–70.

17. *See id.* at 788.

18. *See id.* at 783 ("[W]e neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office.").

claimed that any restrictions imposed on judicial campaign speech conflict with *White* and are therefore unconstitutional.[19]

The canon at issue in *White* was considered to be a content-based restriction on speech, and therefore subject to the strict scrutiny test requiring the language of the canon to be "(1) narrowly tailored, to serve (2) a compelling state interest."[20] At the time *White* was decided, eight other states enforced canons similar to Minnesota's Announce Clause,[21] which was based on language from the 1972 American Bar Association's Model Code of Judicial Conduct.[22] *White* held that the Announce Clause failed the strict scrutiny test because it restricted the candidate's speech while permitting unfettered speech of judicial candidates-to-be and sitting judges.[23] Specifically, this disparity in treatment between similarly situated groups possessing equivalent capacities to undermine the integrity of the judiciary prompted the Court to hold that the Announce Clause was insufficient to protect the compelling state interest of preserving an impartial judiciary.[24]

While the Court found that Minnesota's Announce Clause was unconstitutional, it specifically did not address similar canons of judicial conduct providing other types of content-based restrictions on judicial campaign speech.[25] Chief among the remaining canons unaddressed by *White* is the Pledge or Promise Clause,[26] which has been thrust into the spotlight by First Amendment advocates and commentators attempting to expand the reach of *White*.[27]

Subsection A of this Part discusses the valuable role played by the Pledge or Promise Clause in preserving the public's confidence in the judiciary through enforcement of reasonable limitations on speech.[28] Subsection B devotes additional discussion to the flurry of challenges mounted against Pledge or Promise Clauses[29] subsequent to the Court's decision in

19. *See* GASS, *supra* note 3, at 1 ("The North Carolina Justices, for example, decided to permit judicial candidates to promise voters specific results in particularly cases . . . to get ahead of a trend in federal court rulings and to avoid lawsuits over the state requirements, although . . . *White* explicitly avoided the issue.").

20. *White*, 536 U.S. at 775.

21. *See* GASS, *supra* note 3, at 2.

22. *White*, 536 U.S. at 768.

23. *See id.* at 775-781.

24. *See id.*

25. *See id.* at 770; *see also In re* Kinsey, 842 So. 2d 77, 86 (Fla. 2003).

26. *See* MODEL CODE OF JUDICIAL CONDUCT R. 2.10 (2007), *available at* http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf.

27. *See* GASS, *supra* note 3, at 2-3; ABA MODEL CODE OF JUDICIAL CONDUCT Canon 1-3, 5, cmt. (2003).

28. *See generally In re* Watson, 794 N.E.2d 1 (N.Y. 2003); *Kinsey*, 842 So. 2d 77.

29. *See* GASS, *supra* note 3, at 2.

White. Finally, Subsection C explores both the importance of safeguarding the Pledge or Promise Clause as well as its inherent regulatory shortcomings that mandate a broader regulatory approach to preserve the public's confidence in the judiciary.

A. Pledge or Promise Clause

Since *White*, the majority of states rely on some variation of the American Bar Association's (ABA) Pledge or Promise Clause to establish a baseline for impartial conduct by the judiciary.[30] The Pledge or Promise Clause, Canon 5A(3)(d)(i) of the ABA's 1990 Model Code of Judicial Conduct, prohibits judicial candidates from "mak[ing] pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office . . . ."[31] The stated purpose of the Pledge or Promise Clause is to prohibit judicial candidates from making promises, in order to avoid "[impairing] 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."[32] Thirty-seven states have adopted the ABA's Pledge or Promise Clause into their canons of judicial conduct in an effort to maintain an impartial judiciary.[33]

Unlike the Announce Clause, which prohibited candidates for judicial office from announcing their views on disputed legal or political issues,[34] the Pledge or Promise Clause takes a more moderate approach by only prohibiting candidates from committing themselves to a case, controversy or issue likely to come before the court.[35] For instance, courts have held

30. *See id.* at 11.

31. ABA MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(i) (1990), *available at* http://www.abanet.org/cpr/mcjc/canon_5.html.

32. *See* Republican Party of Minn. v. White, 536 U.S. 765, 780 (2002) (recognizing that campaign promises "pose a special threat to openmindedness"); *see also* Ackerson v. Ky. Jud. Ret. and Removal Comm'n, 776 F.Supp. 309, 315 (W.D. Ky. 1991); *Watson*, 794 N.E.2d at 7 ("[The promises and pledges clause] furthers the State's interest in preventing actual or apparent party bias and promoting openmindedness because it prohibits a judicial candidate from making promises that compromise the candidate's ability to behave impartially, or to be perceived as unbiased and open-minded by the public, once on the bench. Such promises, even if they are not kept once the candidate is elected, damage the judicial system because the newly elected judge will have created a perception that will be difficult to dispel in the public mind. With all the uncertainties inherent in litigation, litigants and the bar are entitled to be free of the additional burden of wondering whether the judge to whom their case is assigned will adjudicate it without bias or prejudice and with a mind that is open enough to allow reasonable consideration of the legal and factual issues presented.").

33. See GASS, *supra* note 3, at 3.

34. *See White*, 536 U.S. at 768.

35. ABA MODEL CODE OF JUDICIAL CONDUCT R. 2.10 (2007), *available at* http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf.

that pledges made by candidates to "stop suspending sentences" and "stop putting criminals on probation" violate the Pledge or Promise Clause by promising a specific course of action if elected.[36] Likewise, courts have held that comments evincing a prejudicial animus made during judicial campaigns are also prohibited by the Pledge or Promise Clause.[37] Unlike the Announce Clause, the Pledge or Promise Clause allows judicial candidates to declare their views on issues during the campaign, but requires candidates to temper their views to avoid making a pledge or promise about an issue that the court may decide in the future.[38]

B. Challenges to the Pledge or Promise Clause

Despite the increased breadth of permissible campaign speech provided by *White*, judges and interest groups across the country have seized the opportunity to mount numerous attacks on the remaining canons, with their favorite target being the Pledge or Promise Clause.[39] Regardless of *White's* explicit avoidance of addressing the constitutionality of the Pledge or Promise Clause,[40] the impact of *White* has spurred numerous legal challenges directed at expanding judicial candidates' scope of permitted speech by amending or invalidating the remaining canons.[41]

The most far reaching and successful attack on the Pledge or Promise Clause occurred in North Carolina, where the supreme court eliminated the Pledge or Promise Clause from the state's canons and amended another canon to allow a judge to engage in "political activity consistent with his status as a political official."[42] The amendments to North Carolina's canons

36. *In re* Hann, 676 N.E.2d 740, 741 (Ind. 1997).

37. *See In re* Burdick, 705 N.E.2d 422, 429 (Ohio Comm'n of Judges 1999) (candidate stating intent to "be a tough judge that supports the death penalty and isn't afraid to use it" violated promises and pledges clause).

38. *In re Watson*, 794 N.E.2d 1, 4, 7 (N.Y. 2003) ("[S]tatements that merely express a viewpoint do not amount to promises of future conduct. . . [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.").

39. *See generally Watson*, 794 N.E.2d 1; *In re* Kinsey, 842 So.2d 77 (Fla. 2003); Smith v. Phillips, 2002 WL 1870038 (W.D. Tex. 2002).

40. Republican Party of Minn. v. White, 536 U.S. 765, 770 (2002).

41. *See, e.g.*, *Kinsey*, 842 So. 2d at 86–87; *Watson*, 794 N.E.2d at 6; Weaver v. Bonner, 309 F.3d 1312, 1320–21 (11th Cir. 2002).

42. GASS, *supra* note 3, at 4 (noting that North Carolina changed the basic canon from "a judge should refrain from political activity inappropriate to his judicial office" to "a judge may engage in political activity consistent with his status as a public official"); *see also* Raban, *supra* note 4, at 224 ("The North Carolina Supreme Court has recently amended Canon 7(B) of North Carolina's Judicial Conduct so as to allow judges to 'attend, preside over, and speak at any political party gathering.'").

were not prompted by litigation, but rather were accomplished through canon "reform" led by the supreme court and without the benefit of any public input.[43] The unilateral actions[44] taken by the North Carolina Supreme Court have been criticized as a serious threat to a litigant's most basic right to a fair hearing from an independent and impartial judge.[45]

Despite the preemptive actions taken by the North Carolina Supreme Court, the majority of attacks against the canons originate through litigation.[46] For example, in *Smith v. Phillips*, a candidate for a judicial post in Texas challenged a Texas Code of Judicial Conduct Canon that stated:

> a judge or judicial candidate shall not make statements that indicate an opinion on any issue that may be subject to judicial interpretation by the office which is being sought or held, except that discussion of an individuals' judicial philosophy is appropriate if conducted in a manner which does not suggest to a reasonable person a probable decision on any particular case.[47]

The *Smith* court used the decision in *White* as justification for declaring the Texas Canon an unconstitutional limitation on protected speech.[48]

By allowing judicial candidates to sound more like candidates for legislative or executive offices, the deregulatory steps taken by the courts in North Carolina and Texas have the potential to transform judicial campaigns into "highly politicized contests destined to change the culture of the judicial office . . . ."[49] Other courts, however, acknowledge a clear difference between candidates for judicial office and those running for other public offices,[50] thus indicating that certain limitations on speech are acceptable within the context of judicial campaigns.

An example of a canon imposing acceptable limitations on speech can be found in Florida, where a candidate for judicial office unsuccessfully challenged the State's Pledges and Promises Clause, which is substantially similar to the ABA's Pledge or Promise Clause.[51] In that case, a judicial

43. GASS, *supra* note 3, at 4.

44. *See id.* at 4 ("The state Supreme Court did all of this . . . 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.").

45. *Id.*

46. *See generally* Weaver v. Bonner, 309 F.3d 1312 (11th Cir. 2002); Smith v. Phillips, 2002 WL 1870038 (W.D. Tex. 2002); Spargo v. N.Y. State Comm'n on Jud. Conduct, 244 F. Supp. 2d 72 (N.D.N.Y. 2003); *In re* Kinsey, 842 So. 2d 77 (Fla. 2003); *In re* Watson, 794 N.E.2d 1 (N.Y. 2003).

47. Smith v. Phillips, 2002 WL 1870038 at 1.

48. *Id.*

49. Raban, *supra* note 4, at 225.

50. *See* Spargo v. New York State Comm'n on Judicial Conduct, 244 F. Supp. 2d 72, 86 (N.D.N.Y. 2003).

51. *See Kinsey*, 842 So. 2d at 86–87; *see also* MODEL CODE OF JUDICIAL CONDUCT R. 2.10 (2007) (prohibits candidates for judicial office from "mak[ing] pledges, promises or commitments that are

candidate used promises to cultivate the appearance[52] that she "harbored a prosecutor's bias and police officers could expect more favorable treatment from her,"[53] which conflicted with Florida's requirement that candidates provide equal emphasis on their duty to uphold the law if elected.[54] Finding in favor of the State, the court held that the canon in question "serves a compelling state interest in preserving the integrity of our judiciary and maintaining the public's confidence in an impartial judiciary."[55] Additionally, the court held that the candidate's comments violated the canon by causing "[c]riminal defendants and criminal defense lawyers . . . concern that they will not be facing a fair and impartial tribunal."[56]

Another unsuccessful challenge to the Pledge or Promise Clause occurred in New York, where a court upheld the constitutionality of the canon, stating that it "promotes the State's interest in preventing party bias and the appearance of party bias, as well as furthering openmindedness and the appearance of open-mindedness in the state judiciary."[57] In that case, a candidate for city judge made numerous pro-law enforcement promises[58] during his campaign, only to invoke a defense based on *White*, stating that the Court's decision "evidence[d] a strong trend toward permitting open speech in judicial campaigns."[59] In addressing the candidate's argument, the court noted that "the perception of impartiality [in the judiciary] is as important as actual impartiality"[60] and that "[c]ampaign promises . . . gravely risk distorting public perception of the judicial role."[61] Despite the content-based speech limitations presented by the Pledge or Promise Clause, the courts in New York and Florida represent two exam-

inconsistent with the impartial performance of the adjudicative duties of judicial office.").

52. *Kinsey*, 842 So.2d at 87–89. In *Kinsey*, the candidate for judicial office published a flyer stating "Your police officers expect judges to take their testimony seriously and to help law enforcement by putting criminals where they belong . . . *behind bars*!" *Id* at 87–88 (emphasis in original). The candidate also stated "Pat Kinsey will support our valiant law enforcement officers . . . not make their jobs harder" and "victims have a right to expect judges to protect them by denying bond to potentially dangerous offenders." *Id* at 88. The candidate also declared that it was a judge's responsibility to be "absolutely a reflection of what the community wants." *Id*. at 89.

53. *See id.* at 88.

54. *See id.* at 87.

55. *Id.*

56. *Id.* at 89.

57. *In re* Watson, 794 N.E.2d 1, 6 (N.Y. 2003).

58. *See id.* at 2 ("[The candidate urged voters to] 'put a real prosecutor on the bench." [The candidate] asserted in the correspondence that '[w]e are in desperate need of a Judge who will work with the police, not against them. We need a judge who will assist our law enforcement officers as they aggressively work towards cleaning up our streets.'").

59. *Id.* at 4.

60. *Id.* at 6.

61. *Id.* at 7.

ples of courts recognizing the importance of the canons in maintaining the impartiality of the judiciary.[62]

C. Limits on the Effectiveness of the Pledges or Promises Clause

While a court has yet to strike down a Pledge or Promise Clause, there are still limits to its ability to effectively regulate campaign speech.[63] The United States Supreme Court strongly criticized the use of the Pledge or Promise Clause as the sole means of regulating judicial campaign speech, primarily because of the relative ease with which a candidate can avoid using the words "I promise" or, conversely, qualifying each of her positions with the phrase "although I cannot promise anything."[64] A candidate could conceivably sidestep this canon by carefully selecting her words to avoid using the word "promise" while leaving an impression with the electorate that a judicial candidate has in fact made a promise.[65]

Historically, courts have interpreted the Pledge or Promise Clause to extend beyond campaign statements involving the different variants of the word "promise"[66] to promises that are not explicit.[67] In contrast, the Court's discussion of the Pledge or Promise Clause in *White* focuses solely on explicit promises and threatens to supersede historical interpretations of promises being either implicit or explicit.[68] Limiting the applicability of the Pledge or Promise Clause to only explicit promises would seriously impair the ability of such clauses to maintain the integrity of the judiciary by exempting from regulation all statements not including a phrase equal to "I promise."

The Court's decision in *White* elevated the Pledge or Promise Clause to serve as the principal ethical standard distinguishing judicial campaigns from the politicized contests typical of legislative and executive elections.[69] Despite the inherent shortcomings of the Pledge or Promise Clause, the mere fact that it is the subject of constant challenge indicates the important role it serves in preserving judicial integrity by establishing a reasonable baseline for campaign conduct.[70] Eliminating the Promises or Pledges

62. *See generally id*.; *In re* Kinsey, 842 So. 2d 77 (Fla. 2003).

63. *See* GASS, *supra* note 3, at 11.

64. Republican Party of Minn. v. White, 536 U.S. 765, 819 (2002) (Ginsburg, J., dissenting).

65. *Id.*

66. *See Watson*, 794 N.E.2d at 4.

67. *See generally In re* Spencer, 759 N.E.2d 1064 (Ind. 2001); Summe v. Judicial Ret. and Removal Comm'n, 947 S.W.2d 42, 47 (Ky. 1997); *Watson*, 794 N.E.2d 1; *Kinsey*, 842 So.2d 77.

68. *See* Raban, *supra* note 4, at 226.

69. *See* GASS, *supra* note 3, at 13.

70. *See generally* Weaver v. Bonner, 309 F.3d 1312 (11th Cir. 2002); Smith v. Phillips, 2002 WL

Clause would permit an augmented scope of campaign speech from which inferences could easily be drawn that a judge has pre-determined the outcome of a controversy without the benefit of the facts, thus undermining public confidence in the judiciary.[71] The Court's decision in *White* makes preserving the Pledge or Promise Clause vital to winning the public's confidence that a trial before an impartial judiciary is a right and not a privilege.

II. ALTERNATE PATHS TO JUDICIAL IMPARTIALITY: RECUSAL AND DISQUALIFICATION

In addition to canons regulating judicial speech, recusal and disqualification of judges play valuable roles in maintaining an impartial judiciary. Recusal occurs when a judge voluntarily removes himself from a case while disqualification refers to involuntary or mandatory removal of a judge from a case.[72] While recusal and disqualification are technically different terms, they function similarly[73] and are treated as one-in-the-same by this Note. In contrast to canons regulating judicial speech, which maintain judicial integrity by regulating judicial campaign speech, recusal and disqualification protect due process rights after a judge has been elected. Also, recusal and disqualification are generally viewed as more versatile methods to promote judicial impartiality because neither is subject to the same First Amendment speech-limitation scrutiny discussed by the Court in *White*.[74]

Forty-seven states have adopted the ABA's recusal and disqualification standard,[75] which states that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned . . . ."[76] The ABA's recusal and disqualification standards provide a national baseline for appropriate judicial behavior intended to preserve the public's confidence in the judiciary by establishing when it is inappropriate for a judge to hear a case.[77] Despite nearly universal adoption

1870038 (W.D. Tex. 2002); Spargo v. N.Y. State Comm'n on Jud. Conduct, 244 F. Supp. 2d 72 (N.D.N.Y. 2003); *Kinsey*, 842 So. 2d at 87; *Watson*, 794 N.E.2d at 6.

71. *See* Ackerson v. Ky. Jud. Ret. and Removal Comm'n, 776 F. Supp. 309, 315 (W.D. Ky. 1991).

72. *See* MODEL CODE OF JUDICIAL CONDUCT R. 2.11 cmt. 1 (2007), *available at* http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf ("In many jurisdictions, the term 'recusal' is used interchangeably with the term 'disqualification.'"); *see also* SAMPLE, POZEN & YOUNG, *supra* note 9, at 5 ("[D]isqualification functions essentially as recusal.").

73. *See* Sample, Pozen & Young, *supra* note 9, at 5.

74. *Id.* at 25.

75. *Id.* at 17.

76. MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (2007).

77. *Id.*; *see also* SAMPLE, POZEN & YOUNG, *supra* note 9, at 18 ("[A] judge should always recuse herself (or be disqualified) when she is biased against one of the parties, previously served as a lawyer

of the ABA's recusal and disqualification standard, commentators have voiced strong criticism about the clarity of the current standard, which in turn has discouraged enforcement and caused it to be frequently disregarded.[78]

Part II of this Note discusses current recusal and disqualification standards enforced throughout the country. Additional discussion regarding the various methods states employ to administer disqualification is included to highlight the inherent shortcomings of the current methods. Finally, recent examples of disqualification and recusal are explored to illustrate how the current standards and administrative procedures work toward undermining the public's confidence in the judiciary.

A. Current Recusal Standards

The history of the American judicial system is strongly influenced by the judges' "duty to sit"[79] and the "rule of necessity," both of which provide that "when no impartial judge is available, the original judge(s) assigned to the case may take it."[80] Both the duty to sit and rule of necessity place a higher priority on conducting a trial than on ensuring the impartiality of the judge conducting the trial.[81] As a result of the duty to sit and the Rule of Necessity, there is an exceedingly high burden of proof required to remove a judge from a case and an incoherent framework for administering disqualification and recusal.[82] Despite the courts proclivity for conducting trials notwithstanding impartiality, nearly all legal systems throughout time have recognized exceptions[83] to a judges' duty to sit to respect the belief

in the matter in controversy, has an economic interest in the subject matter of greater than de minimis value, is related to a party or lawyer in the proceeding within the third degree of kinship, has personal knowledge of disputed evidentiary facts, or has made improper *ex parte* communications during the course of the proceeding.").

78. *See id.* at 8.

79. Deborah Goldberg, James Sample & David Pozen, *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L.J. 503, 512–13 (2007).

80. *Id.* at 519.

81. *See* Leslie W. Abramson, *Deciding Recusal Motions: Who Judges the Judges?*, 28 VAL. U. L. REV. 543, 545–46 (1994).

82. *See* Goldberg, Sample & Pozen, *supra* note 79, at 519–20.

83. *See id.* at 512 ("Under medieval Jewish law, judges were barred from participating in any case in which a litigant was a friend, kinsman, or someone they disliked. The Roman Code of Justinian went further, permitting parties to remove judges for mere 'suspicion' of bias. While the civil law ultimately incorporated the Justianian template into its system of 'recusation,' still operative in many countries today, the common law took a much more constricted approach: 'a judge was disqualified for direct pecuniary interest and nothing else.' Early English courts distinguished between a judge's interests and his biases, prejudices, or affinities, and categorically rejected the latter as grounds for disqualification.").

that "no man is allowed to be a judge in his own cause."[84] With much of the credit being owed to the American Bar Association,[85] the current trend in the American legal system is to broaden the scope of exceptions to a judges' duty to sit to require disqualification and recusal more frequently in furtherance of an impartial judiciary.[86]

Although governed by an expansive variety of authority,[87] the accepted standard governing disqualification and recusal is Rule 2.11(A) of the ABA's 2007 Model Code, which forty-seven states and the United States Congress have adopted.[88] The ABA's disqualification and recusal standards state that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned . . . ."[89] Widely hailed as "the demise of the duty-to-sit doctrine,"[90] the ABA's disqualification and recusal standard mandates that judges recuse themselves upon even the appearance of compromised impartiality.[91] Also, the ABA standard aims to bring judicial disqualification standards in line with the due process rights of the Fourteenth Amendment by establishing criteria designed to preserve judicial impartiality both in form and substance.[92] Regardless of the ABA's lofty aims, however, the disqualification process is plagued by administrative inconsistencies that work against the due process guarantees of the Fourteenth Amendment.

B. Administering Disqualification

While courts handle motions for disqualification in a variety of ways,[93] the majority of states[94] provide challenged judges with the author-

84. *See* Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252, 2259 (2009).

85. *See* Goldberg, Sample & Pozen, *supra* note 79, at 513–14.

86. *See id.* at 513–14 (disqualification rules have been "steadily liberalized" by increasing the number of disqualifying factors, shifting the evidentiary burden from evidence of actual bias to evidence of the appearance of bias, and requiring judges to evaluate claims objectively rather than subjectively).

87. *See id.* at 516–17 (disqualification law is governed by a variety of instruments including constitutional provisions, statutes, court rules, judge-made doctrine, codes of judicial conduct, ethics board rulings, and administrative directives).

88. *Id.* at 513; SAMPLE, POZEN & YOUNG, *supra* note 9, at 17.

89. MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (2007), *available at* http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf.

90. *See* Goldberg, Sample & Pozen, *supra* note 79, at 514 (internal quotations omitted).

91. *See id.* at 513–14 ("While a judge still may have a duty to sit in cases where he or she is not disqualified, there is an equally strong duty *not* to sit in cases where he or she is disqualified.").

92. *See* Republican Party of Minn. v. White, 536 U.S. 765, 775 (2002); *see also* Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 149–50 (1968); SAMPLE, POZEN & YOUNG, *supra* note 9, at 9.

93. *See* Goldberg, Sample & Pozen, *supra* note 79, at 522.

94. *See* Abramson, *supra* note 81, at 547, ("Twenty-seven states agree that recusal rests within the

ity to grant or deny disqualification motions filed against them.[95] Generally speaking, once a motion for disqualification is filed, courts either: 1) require the challenged judge to transfer the motion to an alternate judge to evaluate the motion; 2) require the challenged judge to transfer the motion to an alternate judge after the challenged judge has evaluated the timeliness and sufficiency of the motion; or 3) allow the challenged judge to decide on the motion.[96]

The majority of states follow the third approach, which is based on the belief that judges are bound by oath to remain impartial and are best suited to determine whether they are able to fulfill their oath of impartiality.[97] A decision made by the challenged judge regarding the sufficiency of the motion may only be overturned on appeal if the moving party can show it was an abuse of discretion.[98]

The remaining states that require the challenged judge to transfer the motion to another judge do so to avoid forcing a litigant to deal with a judge possessing a "bent of mind."[99] Nevertheless, the same weighty abuse of discretion standard for appeal applies to jurisdictions requiring the challenged judge to transfer the motion to another judge.[100]

The varied approaches for handling motions for disqualification are partially attributable to the absence of an ABA Model Code standard addressing how such motions are to be handled.[101] Unlike the ABA standard identifying when recusal and disqualification are required,[102] the ABA provides no recommendation on a preferred method of adjudicating motions for disqualification. The lack of clear direction on how best to administer disqualification directly inhibits the effectiveness of disqualification as a tool to safeguard judicial impartiality.[103]

sound discretion of the challenged judge.").

95. *See id.* at 545.

96. *See* Goldberg, Sample & Pozen, *supra* note 79, at 522–23.

97. *See* Abramson, *supra* note 81, at 545–46.

98. *See id.* at 556, (An appeal will be granted if "it is plain that a fair minded person could not rationally come to [the same] conclusion on the basis of the known facts.").

99. Johnson v. Dist. Ct., 674 P.2d 952, 956 (Colo. 1984).

100. *See* Abramson, *supra* note 81, at 555–56.

101. *See* Goldberg, Sample & Pozen, *supra* note 79, at 522.

102. MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (2007), *available at* http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf.

103. *See* Abramson, *supra* note 81, at 544, ("The [ABA Code] fails to address the method for handling a motion to recuse."); Goldberg, Sample & Pozen, *supra* note 79, at 530, ("The fact that judges . . . decide on their own recusal challenges . . . is one of the most heavily criticized features of United States disqualification law—and for good reason.").

C. Limitations on Effectiveness of Disqualification & Recusal Standards

Mirroring the near-universal applicability of the American Bar Association's recusal and disqualification standard is the level of difficulty associated with removing a judge from a case.[104] Historically, recusal and disqualification are disfavored options based on the need to have a judge preside over a dispute.[105] Impartiality was considered an afterthought during an era with fewer judges and less convenient travel.[106] When presented with the choice of holding a trial with a biased judge or holding no trial at all, courts displayed a clear proclivity for providing some form of justice, no matter how imperfect it may be.[107] Therefore, the burden associated with removing a judge through recusal or disqualification was—and to a great extent still is—extraordinarily onerous.[108]

Specifically, a party seeking to remove a judge for cause must show facts "that would raise significant doubt as to whether justice would be done in the case."[109] This burden is heavy from an evidentiary and political standpoint, requiring attorneys to expend significant resources delving into a judge's background in an attempt to prove bias, only to be rewarded with potential disfavor in the future from the judge the attorney attempted to remove.[110] Likewise, while the evidentiary burden is significantly less in states that permit judges to be removed without showing cause,[111] the same political disincentive remains for attorneys who make their living persuading judges to agree with their point-of-view.[112]

The fundamental difficulty associated with removing a judge is best illustrated by the circumstances surrounding two recent cases: 1) the Illinois Supreme Court's decision in *Avery v. State Farm Mutual Automobile Insurance Co.*,[113] and 2) the West Virginia Supreme Court of Appeal's decision in *Caperton v. A.T. Massey Coal Co., Inc*.[114] Both cases involve newly elected state supreme court justices declining to recuse themselves from proceedings involving campaign contributors as parties, only to have both justices cast the deciding vote clearing each contributing party of liabil-

104. *See* SAMPLE, POZEN & YOUNG, *supra* note 9, at 18.
105. *Id.*
106. *Id.*
107. *See* Abramson, *supra* note 81, at 545–46.
108. *See* SAMPLE, POZEN & YOUNG, *supra* note 9, at 18
109. *See id.*
110. *See id.* at 20.
111. *See id.* at 18 ("one third of states may disqualify a judge without showing cause.").
112. *Id.* at 20.
113. Avery v. State Farm Mut. Ins. Co., 835 N.E.2d 801 (Ill. 2005).
114. Caperton v. A.T. Massey Coal Co., Inc. 679 S.E.2d 223 (W. Va. 2008).

ity.[115] The circumstances surrounding both decisions have rightfully called into question the judiciary's ability to maintain the public's confidence while permitting judges to determine their own impartiality.[116]

1. Avery v. State Farm Mutual Insurance Company

Avery involved a class action suit for breach of contract alleging that an insurance company violated a contractual duty to restore automobiles to their original pre-crash condition because it used automobile parts that were salvaged from other vehicles damaged in automobile accidents.[117] The Illinois Circuit Court of Williamson County held in favor of the plaintiffs and awarded over one billion dollars in damages.[118] After the appellate court affirmed the circuit court's holding, the defendant insurance company appealed the decision to the Illinois Supreme Court, which reversed the lower courts' holdings with a split decision in favor of the insurance company.[119]

Avery was decided shortly after the 2004 election cycle, during which Justice Lloyd Karmeier was elected to the Illinois Supreme Court.[120] During the campaign, which occurred after the United Stated Supreme Court relaxed campaign speech regulations with their decision is *Republican Party of Minnesota v. White*,[121] Justice Karmeier made numerous pro-business statements[122] and received over $350,000.00 in campaign contributions from the insurance company's employees and lawyers.[123] After being elected to the bench, Justice Karmeier declined to recuse himself from *Avery* and personally cast the deciding vote in favor of the insurance company.[124] Counsel for the plaintiffs filed a writ of certiorari with the United States Supreme Court questioning whether the "extreme circum-

115. *See* Goldberg, Sample & Pozen, *supra* note 79, at 510; Brief for the Brennan Center of Justice at NYU School of Law as Amici Curiae Supporting Petitioners, Caperton v. A.T. Massey Coal Co, Inc., 129 S. Ct. 2252 (2009) (No. 08-22), *available at* http://brennan.3cdn.net/7ef37b5cbb848b77e8_b9m6b5zt9.pdf.

116. *See* Goldberg, Sample & Pozen, *supra* note 79, at 510–11; Brief for the Petitioner, *supra* note 115, at 3–4.

117. *See* Avery, 835 N.E.2d at 811.

118. *Id.* at 810.

119. *Id.* at 881.

120. *See* Goldberg, Sample & Pozen, *supra* note 79, at 510.

121. *See* Republican Party of Minn. v. White, 536 U.S. 765, 771 (2002).

122. *See* Goldberg, Sample & Pozen, *supra* note 79, at 510, (Justice Karmeier made comments alluding to "fix[ing] the medical malpractice of phony lawsuits against doctors and hospital.").

123. Brief for 12 Organizations Concerned About the Influence of Money on Judicial Integrity, Impartiality, and Independence as Amici Curiae Supporting Petitioners, Avery v. State Farm Mut. Auto. Ins. Co., 125 S. Ct. 1470 (2006) (No. 05-842).

124. *See* Goldberg, Sample & Pozen, *supra* note 79, at 510.

stances" surrounding Justice Karmeier's refusal to recuse himself constituted a violation of due process rights guaranteed under the United States Constitution, but the Court denied the writ.[125]

Illinois has adopted the ABA recusal standard requiring a judge to "disqualify himself . . . in a proceeding in which the judge's impartiality might reasonably be questioned."[126] Despite Justice Karmeier's pro-business philosophy discussed during the campaign and financial contributions provided by groups that would benefit if the defendant insurance company were cleared of any liability,[127] Justice Karmeier unilaterally determined that his impartiality in *Avery* was not at issue and that the ABA's recusal standard did not apply. Given the comments made by Justice Karmeier during the campaign and his list of financial donors, the mere appearance of a causal relationship raises reasonable concerns regarding Justice Karmeier's ability to administer justice and causes the public's confidence in the judiciary to suffer.[128] Moreover, Justice Karmeier's ability to determine his own capacity for impartiality makes a mockery of the state's disqualification process.[129]

2. Caperton v. A.T. Massey Coal Company

A similar set of circumstances appeared in *Caperton*, where the chief executive officer of an energy company spent three million dollars in support of Justice Brent Benjamin's campaign for a seat on the West Virginia Supreme Court of Appeals.[130] During Justice Benjamin's campaign, the energy company was preparing an appeal to overturn a fifty million dollar verdict against the energy company.[131] Similar to the situation in *Avery*, Justice Benjamin refused to recuse himself from the proceedings involving the energy company and ultimately cast the deciding vote to overturn the fifty million dollar verdict rendered by the lower court.[132]

Justice Benjamin refused to recuse himself from *Caperton* despite the

125. Brief for 12 Organizations, *supra* note 123.

126. *See* MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (2007), *available at* http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf.

127. *See* Goldberg, Sample & Pozen, *supra* note 79, at 510 ("[Justice] Karmeier more than $2 million from the Chamber of Commerce . . . in direct contributions."); *see also* DEBORAH GOLDBERG, THE NEW POLITICS OF JUDICIAL ELECTIONS 2004, at 18 (2005), *available at* http://brennan.3cdn.net/dd00e9b682e3ca2f17_xdm6io68k.pdf (Together both candidates raised $9.3 million in political contributions, a national record for judicial elections.).

128. *See* Goldberg, Sample & Pozen, *supra* note 79, at 510–11.

129. *See id.* at 532, ("The *Avery* case illustrates a problem with recusal procedures . . . .").

130. *See* Brief for the Petitioner, *supra* note 115, at 2–3.

131. *Id.*

132. *Id.*

United States Supreme Court's consistent holding that "[t]rial before an unbiased judge is essential to due process."[133] His decision not to recuse himself was undoubtedly aided by the courts' prior inconsistent interpretations regarding what constitutes "bias."[134] Since 1989, at least five state supreme courts have held that the Due Process Clause requires recusal only in instances involving "actual bias," and that the "appearance of impropriety" is insufficient to mandate recusal.[135] To muddy the waters further, other state courts emphasize the due process dangers associated with the appearance of impropriety and require judges to recuse themselves from cases involving parties who have contributed to the judge's reelection efforts.[136]

The lack of consistency regarding when recusal is necessary provides judges the flexibility to rule on cases involving parties affiliated with the judge, thus undermining the public's confidence in their ability to receive a fair trial.[137] This is best illustrated by Justice Benjamin's determination that the defendant's campaign contribution of three million dollars[138] was insufficient to establish "actual bias," therefore relieving Justice Benjamin of the duty to recuse himself.[139]

The divergence in opinions regarding when a judge must recuse himself and the high potential for perpetuating the situations presented in *Avery* and *Caperton* influenced the United States Supreme Court's decision to grant certiorari for *Caperton* in November of 2008.[140] The Court's decision to hear *Caperton* came at the urging of numerous groups voicing concerns about *Caperton's* impact on due process rights and the public's confidence in the judiciary.[141]

133. *See* Johnson v. Mississippi, 403 U.S. 212, 216 (1971) (internal quotation omitted); *see also* Aiken County v. BSP Div. of Envirotech Corp., 866 F.2d 661, 678 (4th Cir. 1989) ("The [D]ue [P]rocess [C]lause protects not only against express judicial improprieties but also against conduct that threatens the 'appearance of justice.'").

134. *See* Brief for the Petitioner, supra note 115, at 24–26.

135. *See, e.g.*, State v. Canales, 916 A.2d 767, 781 (Conn. 2007); Cowan v. Board of Comm'rs of Freemont County, 148 P.3d 1247, 1260 (Idaho 2006); Allen v. Rutledge, 139 S.W.3d 491, 498 (Ark. 2003); Commonwealth v. Brandenburg, 114 S.W.3d 830, 834 (Ky. 2003); State v. Brown, 776 P.2d 1182, 1188 (Haw. 1989).

136. *See* Pierce v. Pierce, 39 P.3d 791, 799 (Okla. 2001); *See also* MacKenzie v. Super Kids Bargain Store, Inc., 565 So. 2d 1332, 1337 n.4 (Fla. 1990).

137. *See* Brief for the Petitioner, *supra* note 115, at 2–3.

138. *See id.* at 3 (defendant's campaign contributions comprised "more than all other contributions in support of that judge *combined*").

139. *See id.* at 27.

140. *See generally* Caperton v. A.T. Massey Coal Co, Inc., 679 S.E.2d 223 (W.Va. 2008), *cert. granted* 129 S. Ct. 2252 (2008), *available at* http://www.supremecourtus.gov/qp/08-00022qp.pdf.

141. *See, e.g.*, Brief for the Am. Acad. of Appellate Lawyers as Amici Curiae Supporting Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22), *available at* http://www.brennancenter.org/page/-/Democracy/08caperton/090105.caperton.Acad.App.Lawyers.pdf; Brief for the Am. Bar Ass'n as

In a much anticipated opinion issued in June of 2009, the Court held that Justice Benjamin's failure to recuse himself from the proceedings violated the plaintiff's due process rights.[142] Specifically, the Court stated

> there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent.[143]

In so holding, the Court provided a three pronged test focusing on "the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election."[144] While the Court painstakingly emphasizes the narrow applicability of *Caperton* to only "extreme facts,"[145] it also dedicates significant discussion to the invaluable role played by each states' judicial cannons of conduct.[146] Regardless of *Caperton's* seemingly narrow application, the Court has clearly demonstrated that it will intervene to protect due process rights in instances where "the probability of actual bias rises to an unconstitutional level."[147]

Notwithstanding the Court's intervention in *Caperton*, there are many unsettled issues that will give rise to future recusal conflicts. Chief Justice Roberts was joined in dissent by Justices Scalia, Thomas, and Alito,[148] thus calling into question the longevity of *Caperton* based on the Court's narrow majority. Furthermore, from a purely administrative standpoint, the dissent

Amici Curiae Supporting Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22), *available at* http://brennan.3cdn.net/3fdc25645e49e48980_ezm6bnb5s.pdf; Brief for the Comm. for Econ. Dev. as Amici Curiae Supporting Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22), *available at* http://brennan.3cdn.net/2c21a25a061c25740f_dkm6bnptq.; Brief for Twenty-Seven Former Chief Justices and Justices Supporting Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22), *available at* http://brennan.3cdn.net/a3a1b436ec15af1368_20m6bx0ek.pdf.

142. *See Caperton*, 129 S. Ct. at 2267.

143. *Id.* at 2263–64.

144. *Id.* at 2264.

145. *See id at 2265*. The following facts were considered "extreme": Massey's three-million-dollar contribution to Justice Benjamin's campaign exceeded the aggregate of all other contributions to Benjamin and was 300% greater than the total amount spent by Benjamin's own campaign committee. *Id*. at 2264–65.

146. *See id.* at 2266 ("[T]he codes are the principal safeguard against judicial campaign abuses that threaten to imperil public confidence in the fairness and integrity of the nation's elected judges.") (internal quotations omitted).

147. *Id.* at 2265.

148. *Id.* at 2267.

identifies forty "uncertainties" arising from the majority's holding.[149] Relying on a split Court's decision as justification to postpone much-needed state-led efforts to clarify both when recusal is necessary[150] and how it is administered[151] would be a mistake. The importance of recusal reform is even more pressing in light of ongoing attacks against the canons and the ability of recusal standards to mandate judicial integrity without being subject to the type of First Amendment scrutiny seen in *White*.[152] Conversely, the consequences of maintaining the status quo by allowing judges to evaluate the extent of their own bias are no more apparent than in *Avery*[153] and *Caperton*.[154]

III. SOLUTIONS

Despite the Court's decision in *Caperton* to begin to circumscribe judicial conduct that compromises due process rights and, in turn, the public's confidence in the judiciary, the lion's share of the work will fall to the states.[155] Each state is responsible for ensuring that its canons of judicial conduct not only provide reasonable parameters for campaign speech, but also that judges' comments made on the campaign trail are considered when evaluating disqualification. Additionally, each state is responsible for administering the recusal and disqualification processes in a transparent manner that does not allow judges to pass judgment on their own ability to adjudicate matters in an unbiased fashion.

This section offers potential modifications states may make to their canons of judicial conduct, disqualification standards, and administration of the disqualification process to avoid future crises of confidence in the judiciary spurred by the increased politicization of judicial campaigns. Because of the many issues brought to light by the Court's decision in *White*, a wide variety of solutions have already been proposed by different commentators, all of which are concerned with preserving the public's confidence in the judiciary.[156] The solutions offered in this Part are intended to construc-

149. *Id.* at 2269–72 (Roberts, J., dissenting).

150. *See* SAMPLE, POZEN & YOUNG, *supra* note 9, at 8.

151. *See* Goldberg, Sample & Pozen, *supra* note 79, at 522-23.

152. *See* SAMPLE, POZEN & YOUNG, *supra* note 9, at 25.

153. *See generally* Avery v. State Farm Mutual Insurance Co., 835 N.E.2d 801 (Ill. 2005).

154. *See generally* Caperton v. A.T. Massey Coal Co., Inc., 679 S.E.2d 223 (W. Va. 2008).

155. The solutions offered in this Note are by no means exhaustive, but are intended to substantively contribute to the discourse surrounding the many viable solutions previously proposed by others.

156. *See* CITIZENS COMM'N FOR THE PRESERVATION OF AN IMPARTIAL JUDICIARY, FINAL REPORT AND RECOMMENDATIONS, 10, (2007), *available at* http://www.keepmnjusticeimpartial.org/FinalReportAndRecommendation.pdf; *see generally* GASS, *supra* note 3; Abramson, *supra* note 81; Raban, *supra* note 4; Jason J. Czarnezki, *A Call for Change:*

tively add to the abundance of existing solutions.

A. Preserving the Viability of the Canons

As discussed in Part I, canons of judicial conduct play a vital role in maintaining confidence in the judiciary by establishing reasonable parameters governing campaign speech.[157] In the post-*White* world, the canon primarily responsible for maintaining a semblance of separation between traditional legislative campaigns and judicial campaigns is the Pledge or Promise Clause.[158] While the Pledge or Promise Clause safeguards judicial integrity by prohibiting judicial candidates from pledging to rule a certain way, it also suffers from inherent weaknesses exploited by knowledgeable candidates who avoid making explicit promises.[159]

The Court's opinion in *White* unmasked its proclivity to narrowly construe the Pledge or Promise Clause by limiting its applicability to explicit promises made by judicial candidates on the campaign trail.[160] Although a number of lower courts have made decisions subsequent to *White* in which the Pledge or Promise Clause was applied to situations involving implicit promises,[161] the potential danger for the Court to clarify and formalize its narrow view is real. If the Court determined that application of the Pledge or Promise Clause to non-explicit promises represented an unconstitutional limitation on content-based speech, the effectiveness of the Pledge or Promise Clause in preserving the integrity of the judiciary would be nullified.[162] In doing so, the Court would leave the vast majority of judicial campaign speech unregulated and defeat the stated purpose of the Pledge or Promise Clause by permitting candidates to make promises and pledges to the electorate as long as the words "I promise" aren't used.[163]

The most apparent solution to avoid a future ruling on the applicability

Improving Judicial Selection Methods (Marquette University Law School Legal Studies Research Paper Series, Research Paper No. 06-14, 2006), *available at* http://ssrn.com/abstract=759947; W. Bradley Wendel, *The Ideology of Judging and the First Amendment in Judicial Elections* (Washington & Lee Public Law and Legal Theory Research Paper Series, Working Paper No. 02-4, 2002), *available at* http://ssrn.com/abstract_id=306139.

157. *See* discussion *supra* Part I.

158. *See* GASS, *supra* note 3, at 11.

159. *See id.*

160. *See* Raban, *supra* note 4, at 226.

161. *See, e.g.*, *In re* Kinsey, 842 So. 2d 77, 88 (Fla. 2003); *In re* Watson, 794 N.E.2d 1, 7 (N.Y. 2003).

162. *See* Raban, *supra* note 4, at 226; Goldberg, Sample & Pozen, *supra* note 79, at 521.

163. MODEL CODE OF JUDICIAL CONDUCT R. 4.1(A)(13) (2007), *available at* http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf (the promises and pledges clause prohibits candidates from committing themselves to a case, controversy or issue likely to come before the court.).

of the Pledge or Promise Clause is to amend the canon to state that it applies equally to explicit and non-explicit promises.[164] Amending the canon in this manner, however, may actually cause more harm than good by providing its opponents an opportunity to argue that a shift has occurred in the established pattern of interpreting the Pledge or Promise Clause.[165] Both pre- and post-*White* opinions consistently hold that Pledge or Promise Clauses apply to non-explicit promises made during judicial campaigns.[166] Amending the canon to re-state the status quo runs the unnecessary risk of putting too much stock in dictum provided by the Court in *White*, while it was discussing a fundamentally different limitation on speech presented by the Announce Clause. [167] Instead, the more prudent path is to leave the Pledge or Promise Clause unchanged and focus reform efforts on areas outside the reach of First Amendment advocates through reformation of the disqualification and recusal standards and processes.

B. Reforming Disqualification & Recusal Standards

The most broadly accepted recusal and disqualification standard, Rule 2.11(A) of the ABA's 2007 Model Code (ABA Code), requires a judge to remove himself from proceedings "in which the judge's impartiality might reasonably be questioned."[168] As illustrated by both the *Avery* and *Caperton* cases, determining under which circumstances impartiality may be called into question is not a bright line analysis.[169] The varied interpretations of "bias" proffered by state supreme courts, largely prompted by the United States Supreme Court's absence from the discussion before *Caperton*, creates an atmosphere in which judges treat the ABA Code as a porous and malleable recommendation as opposed to a clear, objective rule.[170] Even the guidance provided by the Court in *Caperton* is tempered by the Court's determination to have each state set its own recusal guidelines that

164. *See Kinsey*, 842 So.2d at 87–88 (holding that a judicial candidate's comments indicating support for law enforcement without explicitly stating the words "I promise" violated the Promises and Pledges Clause); Raban, *supra* note 4, at 226.

165. *See generally Kinsey*, 842 So.2d 77 (holding that an implicit promise violated the Promises and Pledges Clause); *In re* Spencer, 759 N.E.2d 1064 (Ind. 2001) (same); Summe v. Jud. Ret. and Removal Comm'n, 947 S.W.2d 42 (Ky. 1997) (same); *Watson*, 794 N.E.2d 1 (same).

166. *See generally Kinsey*, 842 So.2d 77; *In re* Spencer, 759 N.E.2d 1064 (Ind. 2001); *In re* Hann, 676 N.E. 2d 740 (Ind. 1997); Summe v. Jud. Ret. and Removal Comm'n, 947 S.W.2d 42, 47 (Ky. 1997); *Watson*, 794 N.E.2d 1; *In re* Burdick, 705 N.E.2d 422 (Ohio Comm'n of Judges 1999).

167. *See* Republican Party of Minn. v. White, 536 U.S. 765, 770 (2002).

168. MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (2007).

169. *See* Brief for the Petitioner, *supra* note 115, at 24–27; Goldberg, Sample & Pozen, *supra* note 79 at 510–11.

170. *See* Brief for the Petitioner, *supra* note 115, at 26–29.

are more stringent than those mandated by the Due Process Clause.[171] In other words, it appears that the Court would prefer to stay out of the discussion altogether.[172]

The greatest divergence between the states relates to whether "actual bias" is required to remove a judge from a case or if the appearance of bias is sufficient.[173] The subsections and comments accompanying Rule 2.11(A) of the ABA Code provide examples of when a judge's impartiality may be reasonably called into question,[174] but neglect to directly address the threshold issue of the nature of bias necessary to remove a judge from a case. To provide the judiciary with additional clarity regarding what type of bias will reasonably cause a judge's impartiality to be questioned, the ABA Code should be amended to require that a judge remove himself from proceedings "in which the judge's impartiality might reasonably be questioned [*due to the existence or appearance of bias*] . . . ."[175]

By including a specific reference to actual or apparent bias, the ABA Code will fall into lockstep with the Fourteenth Amendment's due process guarantee that trials shall be conducted free of actual or apparent bias.[176] Likewise, such an amendment to the ABA Code and subsequent state adoption would establish a nationwide baseline for acceptable judicial participation, thus reducing the potential for judges to make convenient interpretations based on the varied opinions defining the legal landscape to date.

In addition to amending the ABA Code to clarify the type of bias sufficient to remove a judge, the Court's decision in *Caperton* provides valuable context based on a present-day situation. A subsection of Rule 2.11(A) of the ABA Code states that a removal of a judge is proper based on campaign contributions made to the judge by a party to the lawsuit.[177] While

171. *See* Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252, 2267 (2009).

172. See *id*. ("The Due Process Clause demarks only the outer boundaries of judicial disqualifications. Congress and the states, of course, remain free to impose more rigorous standards for judicial disqualification than those we find mandated here today. . . Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution. Application of the constitutional standard implicated in this case will thus be confined to rare instances.").

173. Brief for the Petitioner, *supra* note 115, at 29.

174. MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (2007), *available at* http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf (examples of when a judge's impartiality may be questioned include when a judge has personal bias concerning a party or party's attorney, when a judge has an economic interest in the subject matter or a party to the proceeding, when a judge has made a public statement committing or appearing to commit the judge to ruling a certain way).

175. *Id*.

176. *See* Hollister, 746 F.2d at 425–26.

177. MODEL CODE OF JUDICIAL CONDUCT, R. 2.11(A) (2007), *available at*

Caperton stops short of identifying a bright-line dollar threshold, the Court provides guidance by establishing a three-step analysis based on 1) the size of contribution in comparison to the total amount of contributions received, 2) the total amount of money spent during the campaign, and 3) the apparent effect of the contribution on the outcome of the election.[178] *Caperton's* contribution of an analytical framework is an important step toward determining the elusive answer to "how much is too much?"

Amending the ABA Code to eliminate ambiguity regarding the type of bias necessary to remove a judge and using *Caperton's* analytical framework represent two significant strides toward promoting increased judicial integrity. Both of these steps have the ability to increase the public's confidence in the judiciary by providing clearly defined parameters in an arena previously characterized by ambiguity. These steps will be insufficient, however, absent additional substantive modification to the way in which the recusal and disqualification process is presently administered.

C. Overhauling Disqualification & Recusal Administration

Currently, states handle motions to disqualify a judge in one of three ways: 1) require the challenged judge to transfer the motion to an alternate judge to evaluate the motion; 2) require the challenged judge to transfer the motion to an alternate judge after the challenged judge has evaluated the timeliness and sufficiency of the motion; or 3) allow the challenged judge to decide on the motion.[179] The latter two methods, both of which involve the challenged judge evaluating the sufficiency of at least a portion of the motion to disqualify, raise substantive concerns regarding the transparency of the decision-making process and the ability of a judge to determine his own impartiality status.[180] The fact that the majority of states allow judges to decide their own disqualification motions [181] makes administering the removal of a judge nearly impossible, absent a strong showing of abuse of

http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf ("A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questions, including but not limited to [when] the judge knows or learns . . . that a party, a party's lawyer, or the law firm of a party's lawyer has within the previous [insert number] year[s] made aggregate contributions to the judge's campaign in an amount that is greater than [$[insert amount] for an individual or $[insert amount] for an entity].").

178. *See* Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252, 2264 (2009).

179. *See* Goldberg, Sample & Pozen, *supra* note 79, at 522–23.

180. *See id.* at 530 ("Allowing judges to decide on their own recusal motions is in tension not only with the guarantee of a neutral decision-maker, but also with our explicit commitment to objectivity in this arena.").

181. *See* Abramson, *supra* note 81, at 545-46.

discretion.[182]

To preserve the public's confidence in the judiciary in the face of increased politicization of judicial campaigns, consideration of motions for disqualification must not be decided by those against whom they are filed. Maintaining the appearance of impartiality demanded by the Fourteenth Amendment's due process guarantee cannot be accomplished when judges are permitted to pass judgment on their own impartiality.[183]

The primary counterpoint raised by opponents of transferring disqualification motions to an alternate judge is based on a decreased judicial efficiency associated with having another judge evaluate the motion.[184] While judicial efficiency is a valid concern, the time and cost associated with adjudicating these motions can be reduced by relying on oral testimony and affidavits instead of traditional trial proceedings.[185] Moreover, concerns regarding the speed in which the judiciary dispenses with its weighty tasks will be viewed as relatively inconsequential should the public lose confidence in the brand of justice being served.[186] Instead, as commentators have correctly urged, all motions for disqualification should be immediately transferred to an alternate judge for a thorough, transparent, and impartial evaluation.[187]

CONCLUSION

The Court's decision in *White* to hold Minnesota's Announce Clause unconstitutional sounded the first shot in an ongoing battle; the outcome of which carries very real implications regarding one's ability to receive a fair trial. *White's* invalidation of Minnesota's longstanding canon of judicial conduct increases the importance of preserving the broad regulatory authority of the remaining canons of judicial conduct, which are relied upon now more than ever to preserve the impartiality of the judiciary.

Dutifully enforcing the high-minded but flawed canons of judicial conduct, however, is insufficient to foster the level of judicial integrity contemplated by the Fourteenth Amendment to the United States Constitution. Instead, the states must strengthen their recusal and disqualification

182. *See* Goldberg, Sample & Pozen, *supra* note 79, at 519-520; *see also* Abramson, *supra* note 81, at 556 (abuse of discretion occurs where "it is plain that a fair minded person could not rationally come to [the same] conclusion on the basis of the known facts.") (internal citation omitted).

183. *See id.* at 561.

184. *See* Goldberg, Sample & Pozen, *supra* note 79, at 531.

185. *See id.*

186. *See id.*

187. *See* Abramson, *supra* note 81, at 561.

standards to eliminate the ambiguity that has produced inconsistent determinations by state courts regarding when recusal is necessary and contributed to the situations discussed in *Avery* and *Caperton*. The need for the states to lead this effort is now more apparent than ever, especially considering the deference provided to the states in *Caperton*.[188]

Finally, the current manner of administering recusal and disqualification flies in the face of the accepted adage that "no man is allowed to be a judge in his own cause."[189] Credibility in the judiciary cannot be realized if judges are permitted to evaluate their own impartiality. The administrative procedures associated with recusal and disqualification must be overhauled to require that a judge other than the one being challenged evaluate and determine all motions regarding judicial impartiality or bias. These modest steps represent additions to the already healthy discourse directed at preserving the public's confidence in the judiciary in the wake of *White's* politicization of the judiciary.

188. Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252, 2267 (2009).
189. *See id.* at 2259.