May I Be Recused? The Tension Between Judicial Campaign Speech and Recusal After *Republican Party of Minnesota v. White*

MATTHEW D. BESSER*

This Note explores the tension between the free speech rights of judicial candidates and the importance of due process and impartiality in the judicial system.. Part II discusses the development of judicial campaign speech restrictions. Part III discusses challenges to those restrictions, culminating in Republican Party of Minnesota v. White. *This Part also discusses the likely effects of that decision. Part IV discusses recusal and its justifications. In Part V, the author determines that a judge need not recuse herself solely as a result of her exercise of the free speech rights recognized in* Republican Party of Minnesota. *However, because the answer to this question is not entirely clear, in Part VI, the author proposes a simple addition to the American Bar Association Model Code of Judicial Conduct in order to clarify this conclusion.*

Two principles are in conflict and must, to the extent possible, be reconciled. Candidates for public office should be free to express their views on all matters of interest to the electorate. Judges should decide cases in accordance with law rather than with any express or implied commitments that they may have made to their campaign supporters or to others.[1]

I. INTRODUCTION

As is often inevitably the case, by resolving one debate, the Supreme Court launched two others. In 2002, the Supreme Court ruled in *Republican Party of Minnesota v. White* that a restriction on the speech of judicial candidates contained in Minnesota's *Code of Judicial Conduct*—the "announce clause"[2]—violated the free speech rights of those judicial candidates.[3] By so doing, the Court answered a decade-long debate about the constitutionality of similar restrictions contained in the Codes of Judicial Conduct of various other states. However, by the time this debate began—and perhaps the impetus for it—the American Bar Association had amended its own *Code of Judicial Conduct*, replacing its announce clause with what it believed to be a less restrictive

* J.D., The Ohio State University Moritz College of Law, 2004 (expected). I wish to thank James H. Cannon and Anne French for their guidance in the development of this note. I also owe a debt of gratitude to Professor Edward P. Foley for his support and guidance throughout my law school years. More importantly, however, I must recognize my parents—Howard and Barbara—who showed me the path, but never forced me to go down it.

[1] Buckley v. Illinois Judicial Inquiry Bd., 997 F.2d 224, 227 (7th Cir. 1993) (emphasis added).

[2] *See infra* Part II.

[3] 536 U.S. 765, 788 (2002).

alternative.[4] Unfortunately the Court's decision in *Republican Party of Minnesota* did not tell us how this alternative restriction on judicial campaign speech—the "commit clause"[5]—is any different than its predecessor.

A second and potentially more significant problem stemming from this newfound freedom of speech for judicial candidates is what occurs when a judge is confronted with a case involving issues about which she spoke during her campaign. Might electoral pressures cause her to unconsciously favor her previously-expressed views in a way that violates the due process rights of the litigants? Does the prospect of such an outcome destroy the appearance of impartiality of the court? If the response is yes to either of these questions, should a judge be required to recuse herself?

The purpose of this Note is to shed light on the tension between the free speech rights of judicial candidates and the importance of due process and impartiality in the judicial system. This Note determines that a judge need not recuse herself solely as a result of her exercise of the free speech rights recognized in *Republican Party of Minnesota* and proposes a simple addition to the American Bar Association *Model Code of Judicial Conduct* in order to clarify this conclusion. Part II discusses the history of restrictions upon judicial campaign speech. Part III discusses recent challenges to canons restricting judicial campaign speech contained in various states' Codes of Judicial Conduct, including the challenge involved in *Republican Party of Minnesota*. This Part also discussed how the Court's recent pronouncement might affect judicial campaign speech in the future. Part IV discusses recusal and its justifications. Part V asks whether recusal is required if legal issues come before a judge about which she announced her views during her campaign and concludes it is not. Because, however, the answer to the question proposed in Part V is not self-evident, Part VI concludes with a proposal for a simple addition to the *Model Code of Judicial Conduct* that will provide guidance to judges in this situation.

II. HISTORY OF THE REGULATION OF JUDICIAL CAMPAIGN SPEECH

By amending its constitution in 1812, Georgia became the first state to provide for popular election of inferior judges.[6] When Indiana entered the Union four years later, its constitution required the election of associate judges for its circuit court.[7] In 1832, Mississippi became the first state to popularly elect all of its judges.[8] Currently, thirty-nine states hold some type of popular elections for

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[4] *See infra* Part III.B.

[5] *See infra* Part II.

[6] Larry C. Berkson, *Judicial Selection in the United States: A Special Report*, Am. Judicature Soc'y (last updated Feb. 1999), *at* http://ajs.org/js/berkson.pdf, at 1.

[7] *Id.*

[8] *Id.*

their judges.[9] That fact notwithstanding, "the combination of schemes used to select judges is almost endless. Almost no two states are alike, and few employ the same method for choosing judges at all levels of their judiciary."[10]

Nearly all states have adopted standards of judicial election conduct—most of them modeled closely after the *Model Code of Judicial Conduct*—that restrict the campaign speech of candidates for judicial office and judges running for reelection.[11] These restrictions represent a policy choice by states that it is necessary to place some limits on the speech of judicial candidates in order to

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[9] Am. Judicature Soc'y, *Judicial Selection in the States: Appellate and General Jurisdiction Courts*, http://www.ajs.org/js/JudicialSelectionCharts.pdf, at 1. The eleven states that hold no type of elections for their judges at any level are: Connecticut; Delaware; Hawaii; Maine; Massachusetts; New Hampshire; New Jersey; Rhode Island; South Carolina; Vermont; and Virginia. *Id.* This Note does not seek to resolve the long-standing debate over whether popular election is an appropriate method of judicial selection. Nevertheless, the author agrees with those who suggest that merit appointment is a preferable method of selecting judges than popular election. *See* Republican Party of Minn. v. White, 536 U.S. 765, 788–92 (2002) (O'Connor, J., concurring); MODEL CODE OF JUDICIAL CONDUCT Canon 5(C)(2), cmt. (2000) ("[M]erit selection of judges is a preferable manner in which to select the judiciary."); Erwin Chemerinsky, *Restrictions on the Speech of Judicial Candidates are Unconstitutional*, 35 IND. L. REV. 735, 735–36 (2002) (noting that because of a lack of voter information and political pressure on judges, "the idea of judicial elections [is] problematic"); Am. Judicature Soc'y, *Merit Selection: The Best Way to Choose the Best Judges*, http://ajs.org/js/ms.descrip.pdf (noting that merit selection protects against the compromising effects of fundraising and campaigning, searches out the most qualified candidates for the bench, and emphasizes professional credentials not political connections). *But cf.* Roy A. Schotland, *Myth, Reality, Past and Present, and Judicial Elections*, 35 IND. L. REV. 659, 659–60 (2002) (noting that the original impetus for judicial elections was to increase popular control of the judiciary, free it from domination by the other branches of government, and to enhance the caliber of the bench); Jan Witold Baran, *Judicial Candidate Speech After* Republican Party of Minnesota v. White, 39 CT. REV. 12, 12 (2002) (noting that "[t]he people want to elect judges"); Chemerinsky, *supra*, at 736 ("The vast majority of states have judicial elections because of a belief that judges as government officials should be accountable to their constituents.").

Recently, Justice O'Connor penned a concurring opinion in *Republican Party of Minnesota* in which she expressed concerns about judicial elections in general. 536 U.S. at 788 (O'Connor, J., concurring). She noted that judges who are subject to regular elections may be distracted by fear of adverse political consequences in high profile cases. *Id.* Justice O'Connor also articulated concerns regarding the pitfalls of judicial fundraising. Since contested judicial elections require campaigning—which in turn requires fundraising—judges may feel "indebted to certain parties or interest groups" contributing to the judge's campaign. *Id.* at 790. Furthermore, even if they are able to refrain from favoring donors, "the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary." *Id.* For a more extensive discussion of the importance of the public confidence in judicial impartiality, see *infra* Part V.

[10] Berkson, *supra* note 6, at 2.

[11] *See, e.g.*, Stephanie Cotilla & Amanda Suzanne Veal, Note, *Judicial Balancing Act: The Appearance of Impartiality and the First Amendment*, 15 GEO. J. LEGAL ETHICS 741, 742 (2002).

preserve an "impartial judiciary, and to prevent the erosion of public confidence in the judicial system."[12] They are binding on judges and candidates for judge and violations thereof may result in disciplinary action.[13]

In 1921, the American Bar Association appointed a committee, chaired by Chief Justice William Howard Taft, to create model standards of judicial ethics.[14] The product of this committee was the 1924 ABA *Canons of Judicial Ethics* (the "1924 Canons"), which were adopted by most states.[15] Canon thirty governed "Candidacy for Office" and provided in relevant part:

> A candidate for judicial position should not make or suffer others to make for him, promises of conduct in office . . .; he should not announce in advance his conclusions of law on disputed issues . . . and he should do nothing while a candidate to create the impression that if chosen, he will administer his office with bias, partiality or improper discrimination.[16]

Public reaction to the 1924 Canons was favorable[17] and they served as the ABA's model standards of judicial conduct for nearly fifty years.[18]

In 1969, the ABA convened a committee—headed this time by California Supreme Court Justice Roger Traynor—to revise the 1924 Canons, resulting in the modern rules of judicial ethics.[19] Adopted in 1972, the new ABA *Code of Judicial Conduct* (the "1972 Code") regulated the speech of judicial candidates through Canon 7(B)(1)(c), which stated in relevant part that a judicial candidate: "should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office [or] *announce his views on disputed legal or political issues* . . . ."[20] The latter prohibition will be referred to as the "announce clause" and the former as the "pledges clause."

In 1990, the ABA amended the 1972 Code, resulting in the current ABA *Model Code of Judicial Conduct* (the "1990 Code").[21] The announce clause was eliminated in the 1990 Code and replaced with the admonition that candidates for judicial office shall not "make statements that *commit or appear to commit* the candidate with respect to cases, controversies or issues that are likely to come

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[12] *Id.* at 744. See *infra* Part V for a discussion of the importance of judicial impartiality and public confidence in the judiciary.

[13] MODEL CODE OF JUDICIAL CONDUCT Pmbl. (1990).

[14] Cotilla & Veal, *supra* note 11, at 741.

[15] *See id.* at 741–42; RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION 42 (1996).

[16] CANONS OF JUDICIAL ETHICS Canon 30 (1924).

[17] *See, e.g.*, Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059, 1064 (1996).

[18] Cotilla & Veal, *supra* note 11, at 742.

[19] *E.g.*, *id.*

[20] CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(C) (1972) (emphasis added).

[21] *E.g.*, Cotilla & Veal, *supra* note 11, at 742.

before the court."[22] This prohibition will be referred to as the "commit clause." The ABA made the change because it believed that the announce clause "could not be practically applied in its literal terms," and that the commit clause is less restrictive of the First Amendment rights of judicial candidates and thus "more in line with constitutional guarantees of free speech."[23]

In response to the Court's decision in *Republican Party of Minnesot* and other challenges to the ethical restrictions on judicial campaign speech, in August 2003 the ABA once again amended its *Model Code of Judicial Conduct*.[24] Among other changes, the pledges and commit clauses were collapsed into one section, which now states that "with respect to cases, controversies, or issues that are likely to come before the court . . . [judges and judicial candidates shall not] make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office."[25]

III. CHALLENGES TO THE CANONS ON JUDICIAL CAMPAIGN SPEECH HAVE CLEARED THE WAY FOR MORE EXTENSIVE JUDICIAL CAMPAIGN SPEECH

In the past decade, there has been a great deal of scholarly debate regarding the propriety of restricting judicial campaign speech.[26] Those who support restrictions on judicial candidate speech do so on the grounds that such restrictions are necessary in order to protect the due process rights of litigants and ensure that judges appear impartial, thus preserving public faith in the courts.[27]

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[22] MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(ii) (1990) (emphasis added). The commentary to the commit clause states that no matter what a judicial candidate publicly says on an issue, the candidate "should emphasize in any public statement the candidate's duty to uphold the law regardless of his or her personal views." Canon 5A(3)(d) cmt.

[23] LISA L. MILORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE 50 (1992). For a more in depth analysis of the differences between the announce clause and the commit clause, see *infra* Part III.B.

[24] *See* MODEL CODE OF JUDICIAL CONDUCT (2003), *available at* http://www.abanet.org/cpr/mcjc/code_rev_hod.pdf; *see also* Report to the House of Delegates, Am. Bar Ass'n Standing Comms. on Ethics and Prof'l Responsibility, Judicial Independence, and Fed. Judicial Improvements, at 8 (on file with author).

[25] MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(i) (2003). Other relevant August 2003 amendments to the *Model Code* will be discussed, *infra* Parts III.A.2 and IV.

[26] This Note does not seek to resolve the debate, but instead points out its general contours in order to provide background information for the reader.

[27] *See generally* Shepard, *supra* note 17, at 1059 (arguing it is fundamental to any judicial system that judges rule impartially and that the public have faith in the courts); Robert M. O'Neil, *The Canons in the Courts: Recent First Amendment Rulings*, 35 IND. L. REV. 701, 723 (2002) (arguing that fairness, impartiality and due process concerns are all implicated by the manner in which judicial elections are regulated); Robert F. Bauer, *Thoughts on the Democratic Basis for Restrictions on Judicial Campaign Speech*, 35 IND. L. REV. 747, 748–49 (2002) (arguing that the function of the courts makes it critical that they are viewed as impartial). The

This argument is premised on the notion that judicial candidates are qualitatively different than candidates for executive or legislative office because the judge's role is to interpret the law impartially, not to implement new policy or advocate causes on behalf of a constituency.[28] Those who oppose restricting the speech of judicial candidates argue that the restrictions violate the First Amendment rights of judicial candidates. This argument is grounded in the fundamental precept that "political speech is at the very core of what is constitutionally protected [by the First Amendment]."[29] Accordingly, if states are going to require judges to act like politicians by running for office, "then these individuals should have the same basic right to free speech as all others standing for election."[30] Furthermore, the argument goes, the vagueness of the prohibitions in the canons runs the risk of chilling constitutionally protected political speech.[31] Opponents of the restrictions also argue that by limiting what judicial candidates may say, states impede the ability of the electorate to appropriately choose judges.[32]

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tension between a judicial candidate's free speech rights and a litigant's due process rights coupled with the appearance of impartiality will be discussed, *infra* Part V.

[28] *Cf.* Brief in Support of Respondents for *Amici Curiae* Brennan Center for Justice at New York University School of Law at 6–7, Republican Party of Minn. v. White, 536 U.S. 765 (2002) (No. 01-521) (arguing in support of the announce clause Minnesota's Code of Judicial Conduct); Morial v. Judiciary Comm'n, 565 F.2d 295, 305 (5th Cir. 1977) (noting that states may regulate judicial candidates differently than candidates for other political offices). In *Morial*, the Fifth Circuit explained that the differences between judges and other elected officials justify some special regulation of judicial campaign conduct:

> [T]he contours of the judicial function make inappropriate the same kind of particularized pledges of conduct in office that are the very stuff of campaigns for most non-judicial offices. A candidate for the mayoralty can and often should announce his determination to effect some program, to reach a particular result on some question of city policy, or to advance the interests of a particular group. It is expected that his decisions in office may be predetermined by campaign commitment. Not so the candidate for judicial office. He cannot, consistent with the proper exercise of his judicial powers, bind himself to decide particular cases in order to achieve a given programmatic result.

Morial, 565 F.2d at 305.

[29] Chemerinsky, *supra* note 9, at 735; *see, e.g.*, Republican Party of Minn. v. White, 536 U.S. 765, 781 (2002); Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 222–23 (1989) (noting that debate regarding the electoral process is at the core of the First Amendment); Mills v. Alabama, 384 U.S. 214, 218–19 (1966) (noting that a major purpose of the First Amendment is to "protect the free discussion of governmental affairs, [including] discussions of candidates").

[30] Chemerinsky, *supra* note 9, at 735.

[31] *See, e.g.*, *id.* at 740.

[32] *See, e.g.*, Stephen Gillers, *"If Elected, I Promise _____"—What Should Judicial Candidates Be Allowed to Say?*, 35 IND. L. REV. 725, 725 (2002) (arguing that "[w]e cannot give voters the job of picking judges and then deny them the kind of detail that a responsible person would want to have to fulfill the assignment conscientiously").

A. *Recent Developments in the Law Regarding the Constitutionality of Restrictions on Judicial Campaign Speech Have Generally Favored the Free Speech Rights of Judicial Candidates*

This Part will detail the main cases examining challenges to various announce clauses up to and including *Republican Party of Minnesota*. Although the precise bounds of permissible judicial candidate speech remain unclear, this Part will attempt to shed light on the effects of these challenges—specifically *Republican Party of Minnesota*—on judicial campaign speech.

1. *Challenges to Various Announce Clauses Prior to* Republican Party of Minnesota

Until recently, the validity of canons of judicial conduct restricting judicial campaign speech went largely unchallenged.[33] Then, in 1990, on behalf of a candidate for judicial office in Citrus County, Florida, the American Civil Liberties Union sued to enjoin the enforcement of the announce clause in Florida's *Code of Judicial Conduct*, claiming that the clause violated the First Amendment.[34] The candidate, who filed the suit anonymously, wished to criticize the incumbent judge, which he felt would necessarily entail him "announcing his views on disputed legal and political issues"—a practice prohibited by Florida's announce clause.[35]

A Federal District Court sitting in the Northern District of Florida held that, while a state need not treat judicial candidates exactly the same as candidates for other elected offices, "a person does not surrender his constitutional right to freedom of speech when he becomes a candidate for judicial office."[36] The court—without providing the reasoning for doing so—then applied the test of strict scrutiny to the announce clause.[37] Although, according to the court, protecting the integrity of the judiciary was a compelling state interest, the announce clause's prohibition of all discussion of disputed legal and political

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[33] *See* O'Neil, *supra* note 27, at 701.

[34] ACLU v. Florida Bar, 744 F. Supp. 1094 (N.D. Fla. 1990). Florida's Code of Judicial Conduct contained a prohibition identical to the announce clause in Canon 7(B)(1)(c) of the 1972 ABA Code. *Id.*

[35] *Id.* at 1096.

[36] *Id.* at 1097.

[37] *Id.* at 1097–98. The announce clause, the commit clause, and likely any other canon regarding judicial campaign speech, restrict speech on the basis of content and furthermore are restrictions on core political speech. *See supra* note 29 and accompanying text. Thus, the proper test to measure their validity is strict scrutiny. *E.g.*, Republican Party of Minn. v. White, 536 U.S. 765, 774–75 (2002) (noting that since the announce clause prohibits speech on the basis of content and burdens core political speech, the appropriate test to determine its constitutionality is strict scrutiny).

issues was not the most narrowly tailored way to achieve that goal.[38] The court noted that the announce clause gagged "announcements on almost every issue that might be of interest to the public and the candidates in a judicial race."[39] Thus, because Florida's announce clause could not pass strict scrutiny, the court held that the clause violated the First Amendment and enjoined its enforcement.

In 1991, two more courts struck down the announce clauses in their respective state Codes of Judicial Conduct. In *Beshear v. Butt*, the Federal District Court for the Eastern District of Arkansas enjoined the enforcement of Arkansas' announce clause against a judicial candidate who promised voters that he would not allow plea bargaining if elected.[40] In *J.C.J.D. v. R.J.C.R.*, the Kentucky Supreme Court, also on First Amendment grounds, refused to enforce Kentucky's announce clause against a judge recently elected to that court.[41] The judge in that case challenged disciplinary action taken against him as a result of a Disciplinary Committee finding that his conduct during the campaign resulted in seven separate violations of Kentucky's *Code of Judicial Conduct*. One of the allegations was that the judge violated Kentucky's announce clause by criticizing the "fireman's rule," laws against felons carrying handguns, and the standard of review for workers' compensation cases.[42] In holding that the announce clause violated the First Amendment, the court stated, "'[t]he candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election.'"[43] Without

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[38] *ACLU*, 744 F. Supp. at 1098.

[39] *Id.*

[40] 773 F. Supp. 1229 (E.D. Ark. 1991).

[41] 803 S.W.2d 953 (Ky. 1991).

[42] *Id.* at 953–54

[43] *Id.* at 954–55 (quoting Buckley v. Valeo, 424 U.S. 1, 52 (1976)). This argument, however, seems to neglect the intrinsic differences between elected judges and other types of elected officials. For instance, the Fifth Circuit has noted the judicial function makes it inappropriate for judges to make the types of specific promises of conduct during a campaign that we would expect other elected officials to make. Morial v. Judiciary Comm'n., 565 F.2d 295, 305 (5th Cir. 1977). Others have stressed the difference between judges and non-judicial politicians. As Justice Stevens recently pointed out:

> There is a critical difference between the work of the judge and the work of other public officials. In a democracy, issues of policy are properly decided by majority vote; it is the business of legislators and executives to be popular. But in litigation, issues of law or fact should not be determined by popular vote; it is the business of judges to be indifferent to unpopularity.

Republican Party of Minn. v. White, 536 U.S. 765, 798 (2002) (Stevens, J., dissenting); *see also id.* at 803 (Ginsburg, J., dissenting) (noting that "[l]egislative and executive officials act on behalf of the voters who placed them in office" whereas judges serve no constituency, and arguing that for First Amendment purposes, judicial elections should be treated differently than other elections); *cf.* Bauer, *supra* note 27, at 749–50 (noting that judges are isolated from contact with the public in a way that most elected officials are not and arguing that forcing

explaining why, the court also noted, "[w]e further believe candidates for judicial office can announce their views on legal and political issues without jeopardizing the integrity and independence of the legal system or undermining the impartiality of the judiciary."[44]

Not all challenges to the announce clause have been successful. In *Stretton v. Disciplinary Board*, the United States Court of Appeals for the Third Circuit upheld Pennsylvania's announce clause in the face of a First Amendment challenge from a judicial candidate.[45] In that case, a lawyer running for trial judge sought to enjoin enforcement of the announce clause, claiming that it impeded his ability to announce his view that the court needed "activist" judges willing to look at social changes when ruling on challenges to existing law.[46] Denying an injunction, the Third Circuit found a compelling state interest in preserving the "integrity of the judiciary" and that the announce clause was narrowly tailored to serve that interest.[47] The court—unlike previous courts analyzing challenges to various states' announce clauses—found that the needs of the judicial system outweighed the First Amendment rights of the candidate, stating that "[t]aking a position in advance of litigation would inhibit the judge's ability to consider the matter impartially."[48]

In 1993, the United States Court of Appeals for the Seventh Circuit declined to adopt the reasoning of the Third Circuit in *Stretton* when a candidate for Illinois Supreme Court Justice challenged Illinois' announce clause. In *Buckley v. Illinois Judicial Inquiry Board*, the candidate circulated campaign literature stating that he had "never written an opinion reversing a rape conviction."[49] As a

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judges to campaign for election improperly obliterates the distinction between judges and other elected officials); O'Neil, *supra* note 27, at 716 (noting that judicial candidates are uniquely restrained regarding campaign fundraising in a way that other elected officials are not). Thus, while it must be conceded that judicial candidates have a First Amendment right to advocate their own election, a court analyzing the validity of any restrictions on judicial campaign speech or activity should not lose sight of the fact that there are fundamental differences between judges and other elected officials.

[44] *J.C.J.D.*, 803 S.W.2d at 956.

[45] 944 F.2d 137 (3rd Cir. 1991).

[46] *Id.* at 139. The candidate also wanted to discuss: criminal sentencing and victims rights; how he would apply the "reasonable doubt" standard; the need to more closely scrutinize the work of trial court judges; the need for changes in the system of jury selection in order to more accurately reflect the county's racial composition; increased hiring of minorities in the judicial system; his qualifications; and the importance of the right to privacy under the constitution. *Id.*

[47] *Id.* at 142.

[48] *Id.* at 144. The court noted that even if the judge rendered the correct decision in a given case, by taking a position before litigation would give the public the impression that the case was not properly adjudged. *Id.*

[49] 997 F.2d 224, 226 (7th Cir. 1993). The case was actually a consolidated appeal with another judicial candidate who claimed that the fear of sanction deterred him from speaking out on campaign issues he believed to be important to the voters such as capital punishment,

result, the Illinois Judicial Inquiry Board filed charges against him; yet even though the Illinois Courts Commission found he violated the announce clause, no sanction was handed down.[50] Upon challenge to the announce clause by the candidate, the Seventh Circuit began its analysis by noting that the debate over the constitutionality of the announce clause essentially revolves around two competing principles: First, candidates for public office should be able to engage in core political speech and second, judges should decide cases impartially rather than with any prior commitments to the public in mind.[51] Pragmatically, the court explained, "only a fanatic would suppose that one of the principles should give way completely to the other."[52] Unlike the Third Circuit in *Stretton*, however, the court sided with the free speech rights of judges, holding that the announce clause unconstitutionally "gags the judicial candidate. He can say nothing in public about his judicial philosophy; he cannot, for example, pledge himself to be a strict constructionist, or for that matter a legal realist."[53] According to the court, such a prohibition was not narrowly tailored to serve any compelling state interest because it "reaches far beyond speech that could reasonably be interpreted as committing the candidate in a way that would compromise his impartiality should he be successful in the election."[54]

2. *The Challenge to Minnesota's Announce Clause in* Republican Party of Minnesota

Although a majority of the recent First Amendment challenges to various states' announce clauses have been successful in both federal and state courts, it was not until 2002 that the Supreme Court finally rang the death knell for the announce clause. In *Republican Party of Minnesota v. White*, the Court held that

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abortion, the state's budget, and public school education. *Id.*

[50] *Id.*

[51] *Id.* at 227.

[52] *Id.*

[53] *Id.* at 228. The court went on to note the seemingly limitless scope of legal topics that that various advisory bodies on legal ethics have suggested are off limits for discussion under the announce clause. For example, a judicial candidate might violate her state's announce clause by discussing her views on any of the following:

> pretrial release, plea bargaining, criminal sentencing, capital punishment, abortion, gun control, the equal rights amendment, drug laws, gambling laws, liquor licensing, dram shop legislation, labor laws, property tax exemptions, the regulation of condominiums, court rules, prior court decisions (both of other courts and of the candidate's court), specific legal questions, and hypothetical legal questions.

Id. at 230 (citing PATRICK M. MCFADDEN, ELECTING JUSTICE: THE LAW AND ETHICS OF JUDICIAL ELECTION CAMPAIGNS 86–87 (1990)).

[54] *Buckley*, 997 F.2d at 228.

Minnesota's announce clause violated the First Amendment.[55]

In 1996, Gregory Wersal ran for associate justice of the Minnesota Supreme Court and while doing so distributed literature critical of several of that court's decisions on crime, welfare, and abortion.[56] When a complaint was filed with the Office of Lawyers Professional Responsibility regarding the literature, Wersal withdrew from the race, fearing that further ethical complaints would jeopardize his ability to practice law.[57] Wersal ran again for the Minnesota Supreme Court in 1998, this time filing suit in federal court seeking a declaration that Minnesota's announce clause violated his First Amendment rights.[58]

Like its counterpart in the 1972 Code, Minnesota's announce clause stated that a candidate for judicial office shall not "announce his or her views on disputed legal or political issues."[59] The Court explained that such a prohibition is broader than a prohibition on promising to decide an issue a particular way—as is prohibited in the ABA's pledges clause—but rather "extends to the candidate's mere statement of his current position, even if he does not bind himself to maintain that position after [the] election."[60] Because this restriction is imposed on the basis of content, the Court held that it must withstand strict scrutiny to be valid under the First Amendment,[61] a test the Court held the announce clause did not meet.[62] One particular reason why the Court held the clause unconstitutional

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[55] 536 U.S. 765 (2002).

[56] *Id.* at 768.

[57] *Id.* at 768–69. Wersal withdrew even though the Minnesota Lawyers Professional Responsibility Board had already dismissed the complaint against him. *Id.*

[58] *Id.* at 769–70.

[59] MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2002).

[60] *Republican Party*, 536 U.S. at 770. Perhaps this is the difference between the announce clause and the commit clause. Presumably, the commit clause is violated when a judicial candidate *does* bind herself or appears to bind herself to maintain her current position. The Court did not seek to resolve the difference, stating "[w]e do not know whether the announce clause (as interpreted by state authorities) and the 1990 ABA [commitments] canon are one and the same. No aspect of our constitutional analysis turns on this question." *Id.* at 773 n.5. Regardless of any distinction between the two, in 1994 Minnesota's Supreme Court declined to replace the announce clause with the commit clause. The differences between the announce and commit clauses will be discussed, *infra* Part III.B.

[61] *Republican Party*, 536 U.S. at 774–75.

[62] *Id.* at 775–84. The Court recognized two asserted interests to justify the announce clause: preserving the impartiality of the judiciary and preserving the appearance of impartiality of the judiciary. *Id.* at 775. Although these interests seem clear enough as argued by Respondent Minnesota Board of Judicial Standards—the first protects the due process rights of litigants and the second, public confidence in the judiciary—writing for the Court, Justice Scalia nonetheless questioned the precise meaning of "impartiality." *Id.* He rejected the notion that the announce clause was narrowly tailored to serve impartiality if the term is defined to prohibit bias in favor of or against a particular *party* because the clause regulates announcing views on *issues*, not parties. *Id.* at 775–76. Justice Scalia also stated that the announce clause would not

was that the clause was "woefully underinclusive, prohibiting announcements by judges (and would-be judges) only at certain times and in certain forms."[63] Striking down Minnesota's announce clause—and in effect any announce clause contained in other state Codes of Judicial Conduct[64]—the Court held "'[t]he greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance.'"[65]

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pass strict scrutiny if impartiality were defined to preclude judges from having preconceptions about the law, noting, "[a] judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice [in part because] it is virtually impossible to find a judge who does not have preconceptions about the law." *Id.* at 777; *see infra* notes 129–30 and accompanying text. Finally, Justice Scalia dismissed a definition of impartiality as meaning open-mindedness, stating the Court did not believe such a meaning was what the announce clause encompassed. *Republican Party*, 536 U.S. at 778–79.

In response to the Court's analysis of "impartiality," the ABA, in its August 2003 amendments to the *Model Code of Judicial Conduct* included a definition of the term. "Impartiality" is now defined by the *Model Code* as "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge." MODEL CODE OF JUDICIAL CONDUCT Terminology (2003). The definition tracks the Court's analysis by explicitly framing "impartiality" in terms of bias towards parties and open-mindedness on issues, thus attempting to ensure that the concept of judicial impartiality could be used during a strict scrutiny analysis to protect any clauses in the *Model Code* in which the term is used. *See* Report to the House of Delegates, *supra* note 24, at 10.

[63] *Republican Party*, 536 U.S. at 783. The Court explained the announce clause's underinclusiveness as follows: a judicial candidate may not say "'I think it is constitutional for the legislature to prohibit same-sex marriages.' He may say the very same thing, however, up until the very day before he declares himself a candidate, and may say it repeatedly (until litigation is pending) after he is elected." *Id.* at 779–80. Thus, the announce clause prohibits speech that is potentially harmful to judicial impartiality only at certain times, while leaving that same speech unregulated if it occurs at other times, even if it is equally harmful.

[64] At the time of the *Republican Party of Minnesota* case, seven states had prohibitions substantially similar to the 1972 ABA announce clause: Arizona; Iowa; Maryland; Minnesota; Mississippi; Missouri; and Pennsylvania. *See* ARIZ. CODE OF JUDICIAL CONDUCT Canon 5B(1)(d)(iv) (2001); IOWA CODE OF JUDICIAL CONDUCT Canon 7B(1)(c) (2001); MD. CODE OF JUDICIAL CONDUCT Canon 5B(5) (2001); MINN. CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(i) (2001); MISS. CODE OF JUDICIAL CONDUCT Canon 7B(1)(c) (2001); MO. CODE OF JUDICIAL CONDUCT Canon 5B(1)(c) (2001); PA. CODE OF JUDICIAL CONDUCT Canon 7B(1)(c) (2001). As of the June 2003, only Mississippi and Pennsylvania had responded to the Court's decision in *Republican Party of Minnesota* by deleting the announce clause from their respective Codes of Judicial Conduct and replacing them with the commit clause. *See* MISS. CODE OF JUDICIAL CONDUCT Canon 5A(3)(a)(ii) (2002); PA. CODE OF JUDICIAL CONDUCT Canon 7B(1)(c) (2001 & Supp. 2003). Likewise, the Supreme Court of Missouri issued an order that its announce clause would not be enforced. *See* Order, *Re: Enforcement of Rule 2.03, Canon 5B(1)(c) Campaign Conduct* (July 18, 2002), *available at* http://www.osca.state.mo.us sup/index.nsf. The other states—Arizona, Iowa, and Maryland—which have yet to follow suit need to do so in the near future in accordance with the Court's decision.

[65] *Republican Party*, 536 U.S. at 788 (quoting Renne v. Geary, 501 U.S. 312, 349 (1991)

Four Justices dissented. Justice Stevens wrote a dissent in which Justices Souter, Ginsburg, and Breyer joined. He explained that a candidate who announces his views during a campaign is effectively telling the electorate: "Vote for me because I believe X, and I will judge cases accordingly."[66] According to Justice Stevens, the state has a compelling interest in sanctioning such statements.[67] Justice Ginsburg wrote the other dissent, which was joined by the other three dissenting Justices. She explained that allowing judges to make promises to the electorate runs the risk of violating the due process rights of litigants and since the announce clause helps prevent against this danger by preventing implied promises, it should be upheld.[68]

B. *What Can Judicial Candidates Say During a Campaign After* Republican Party of Minnesota?

In 1990, the ABA amended its *Code of Judicial Conduct*, replacing the announce clause with what it believed to be a narrower constraint on the free speech rights of judicial candidates: the commit clause.[69] The change resulted from the ABA's belief that the announce clause may not have been "in line" with the First Amendment and was too difficult to apply in its literal terms.[70] According to five Justices in *Republican Party of Minnesota*, the ABA was right to be concerned about the constitutionality of the announce clause. Whether the commit clause is more practical than its predecessor—or even constitutional—remains to be seen.

For the time being—at least until courts say otherwise or the ABA does away with it—the commit clause appears to be a constitutional replacement for the announce clause. It is not at all clear, however, how courts should apply the commit clause or how it differs in practice from the announce clause. The Court in *Republican Party of Minnesota* noted the existence of the commit clause, but because its constitutionality was not at issue, declined to analyze it or distinguish it from the announce clause.[71] Although it is true that resolution of the case did not require an analysis of the commit clause, the Court's treatment of it

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(Marshall, J., dissenting)).

[66] *Id.* at 800 (Stevens, J., dissenting).

[67] *Id.*

[68] *Id.* at 813–21 (Ginsburg, J., dissenting). These due process concerns will be discussed, *infra* Part V.A.

[69] MILORD, *supra* note 23, at 50 (explaining that the commit clause "replaces the broad prohibition against a candidate's announcing the candidate's views on disputed legal or political issues with the narrower one against making statements that appear improperly to commit the candidate with respect to matters likely to come before the candidate's court").

[70] *Id.*

[71] *Republican Party*, 536 U.S. at 773 n.5.

nevertheless was unfortunately "'not a model of clarity.'"[72]

One possible hint of the difference between the commit clause and the announce clause that can be gleaned from the decision comes from the majority's statement that the announce clause prohibited candidates from stating their current position on an issue even if they did not bind themselves to retain that position once elected.[73] A logical understanding of the commit clause, on the other hand, would not seem to extend to statements regarding a current position on an issue, but rather only to statements in which the candidate binds herself or appears to bind herself to maintain that position once elected. Whatever the distinction between the two clauses may be, as emerging case law demonstrates, courts have not yet provided clarity as to the precise scope of the commit clause.

1. *Case Law Interpreting Various States' Commit Clauses Will Likely Cause Confusion Regarding Its Proper Scope*

In 1991, Jed Deters, a candidate for judge in Kenton County, Kentucky placed ads in two newspapers, which stated in bold print, "Jed Deters is a Pro-Life Candidate."[74] For placing the ads, Kentucky's Judicial Retirement and Removal Commission found him in violation of Kentucky's commit clause and ordered a public censure.[75] Deters challenged the censure on several grounds, in particular claiming that the commit clause violated his free speech rights.[76] Rejecting his First Amendment challenge, the Kentucky supreme court held that the commit clause is narrowly tailored to achieve the compelling state interest of preserving the fundamental fairness and impartiality of the legal system.[77]

Although the court upheld the commit clause, its application to the candidate's statement in *Deters* is perplexing. According to the court, Deters's statement that he is a "Pro-Life Candidate" violated the commit clause because he

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[72] Roy A. Schotland, *Should Judges be More Like Politicians?*, 39 COURT REVIEW 8, 8 (2002) [hereinafter, Schotland, *Politicians*] (quoting memo from Nat'l Center for State Courts, Ad Hoc Comm. on Judicial Election Law (July 12, 2002) (analyzing *Republican Party of Minnesota v. White*)).

[73] *Republican Party*, 536 U.S. at 770. *Contra* Lloyd B. Snyder, *The Constitutionality and Consequences of Restrictions on Campaign Speech by Candidates for Judicial Office*, 35 UCLA L. REV. 207, 228 (1987) (stating that announcing one's views on an issue indicates that the candidate has *fixed* views on the issue).

[74] Deters v. Jud. Ret. & Removal Comm'n, 873 S.W.2d 200, 201 (Ky. 1994).

[75] *Id.* This was not the first complaint against Deters. Earlier in the campaign Deters accepted a public reprimand from the Commission stemming from a complaint that he had identified himself as a member of a particular political party in violation of Canon 7A(2) of Kentucky's *Code of Judicial Conduct*. *Id.*

[76] *Id.* at 203.

[77] *Id.* at 204–05 (citing Ackerson v. Ky. Jud. Ret. & Removal Comm'n., 776 F. Supp. 309, 315 (W.D. Ky. 1991)).

"publicly *announced* his view on the abortion issue for the admitted purpose of obtaining support from voters interested in that issue."[78] While it specifically stated his position on abortion, his expression of that position to the voters was rather general. Regardless of whether one thinks judicial candidates should seek votes by stating their positions on such a hotly-contested issue, Deters's advertisement did not explicitly bind him to maintain his position if elected, and even if it implicitly bound him to remain "Pro-Life," it did not bind him to resolve any particular cases involving a related issue one way or another.

Under the Kentucky supreme court's analysis, however, the judicial candidate's mere announcement of a position on an issue equates to a violation of the commit clause. Such an interpretation is at odds with the purpose of the commit clause to be less restrictive of the First Amendment rights of judicial candidates than the announce clause, while still upholding the appearance of impartiality in the courts.[79] Indeed, if the Kentucky supreme court's analysis were correct, there would be no difference between the two clauses and thus the commit clause would likely be unconstitutional for the same reasons that doomed the announce clause in *Republican Party of Minnesota*.[80]

In two recent cases, the Indiana supreme court interpreted its commit clause to apply to statements that would have been more appropriately punished under Indiana's pledges clause. In 2001, Indiana trial court judge Fredrick R. Spencer accepted a public reprimand from the Indiana supreme court because of a television commercial he ran during his reelection campaign.[81] The commercial listed various types of crimes for which he promised during his initial election campaign that he would imprison offenders, along with a picture of a cell door slamming shut after each enumerated crime.[82] The commercial then stated that Judge Spencer had kept his promise and suggested that he should be reelected.[83] Four years earlier, William D. Haan, a candidate for trial judge, was publicly reprimanded by the same court for distributing campaign materials in which he pledged to "stop suspending sentences" and to "stop putting criminals on probation" if elected.[84]

According to the Indiana supreme court, Spencer's commercial violated both

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[78] *Deters*, 873 S.W.2d at 202 (emphasis added).

[79] *See supra* notes 69–70 and accompanying text.

[80] Of course since the Supreme Court has not addressed the constitutionality of the commit clause, we do not know whether it would ultimately withstand a First Amendment challenge at that level.

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

[82] *Id.* at 1065. The commercial, which ran approximately 128 times during the campaign had the following narration: "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 . . . ." *Id.*

[83] *Id.*

[84] *In re* Haan, 676 N.E.2d 740, 741 (Ind. 1997).

Indiana's pledges and commit clauses.[85] His commercial made no explicit pledges of conduct nor did it bind him to maintain his advertised position on harsh treatment of criminals. In fact, the commercial made no reference to future conduct at all, but rather asked support for reelection because of what Judge Spencer had done in the past.[86] Perhaps implicit in the commercial, however, is the idea that Spencer's past performance establishes a pattern that voters could expect him to follow in the future, thus resulting in a violation of the pledges clause because the advertisement is one in which he implicitly promises to continue harsh sentencing of convicted criminals. Haan's literature was punished only under Indiana's commit clause.[87] His statements were more explicit than Spencer's, but because of that fact they could have easily been punished under the pledges clause. Likewise with Spencer's commercial, the pledges clause seems to be more easily applicable.

By reprimanding Spencer for violations of both clauses, and by reprimanding Haan only for violating the commit clause, the Indiana supreme court blurred rather than clarified the distinction between the pledges clause and the commit clause, an interpretation that would render one of the two unnecessary.[88] If courts are going to punish pledges of conduct under the commit clause, then there is no reason for the pledges clause. Yet when the ABA amended its *Code of Judicial Conduct* in 1990, it did not eliminate the pledges clause nor did it suggest in any way that the commit clause was meant to supercede the pledges clause.[89] Moreover, because the pledges and commit clauses now coexist in one prohibition after the August 2003 amendments, it is clear that the purpose of the commit clause is to be a separate restriction on judicial candidates.[90] However, when a judicial candidate considers the interpretations of the commit clause by the supreme courts of Indiana and Kentucky[91]—and the current silence from the Supreme Court—the candidate has no way of knowing exactly what statements might constitute an improper commitment that could result in discipline.

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[85] *In re* Spencer, 759 N.E.2d at 1065.

[86] *Id.*

[87] *In re* Haan, 676 N.E.2d at 741.

[88] *Compare In re* Spencer, 759 N.E.2d 1064 (Ind. 2001) (reprimanding Spencer for violations of both clauses), *with In re Haan*, 676 N.E.2d 740 (Ind. 1997) (reprimanding Haan for a violation of only the commit clause).

[89] *See* Model Code of Judicial Conduct Canon 5A(3)(d)(i) (1990).

[90] *See* Model Code of Judicial Conduct Canon 3B(10) (2003).

[91] *In re* Spencer, 759 N.E.2d 1064 (Ind. 2001); Deters v. Jud. Ret. & Removal Comm'n 873 S.W.2d 200 (Ky. 1994).

2. *Uncertainty Regarding the Scope of the Commit Clause Will Have a Chilling Effect on Judicial Campaign Speech But Will Not Chill All Such Speech*

Confusion regarding the reach of the canons regulating judicial campaign speech has chilled and will continue to chill judicial candidates from engaging in campaign speech,[92] which is at the core of the First Amendment. Unfortunately, this confusion and the resulting suppression of speech form a vicious cycle because the chilling effect results in fewer opportunities for courts to clarify the canons through interpretation, which in turn deters candidates from speaking. It has been suggested that, "[t]he reason why there are so few enforcement cases under the announce clause [and its replacement, the commit clause] is the in terrorem effect of broad or ambiguous interpretations. Candidates . . . succumb to the 'rule of silence' rather than risk complaints and the resulting damage to their careers."[93] Given that judicial candidates have a constitutional right to discuss political and legal issues and the chilling effect caused by confusion regarding exactly what speech might subject a judicial candidate to discipline, state supreme courts will need to try to interpret the commit clause more clearly or else it may encounter the same fate that met its predecessor.[94]

The chilling effect, however, may not be as significant as it would seem to be at first glance. Although one explanation for the relative lack of cases interpreting the commit clause—and previously the announce clause—is their chilling effect on speech, another is that they have not been consistently enforced. Justice Stevens, in his dissent in *Republican Party of Minnesota*, noted that at the time the case arrived at the Court, no judicial candidate, including Wersal himself, had ever been sanctioned for violating Minnesota's announce clause.[95] Indeed, there

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[92] *See* Baran, *supra* note 9, at 12; *Cf.* Shepard, *supra* note 17, at 1059–60 (stating that continual challenges to the constitutionality of the canons causes this confusion among judges as to what is appropriate behavior).

A national survey of 2,500 state court judges, taken shortly before the Court's decision in *Republican Party of Minnesota*, discovered that eighty-nine percent of judges who had been criticized during a campaign said that they "held back or felt restrained" from responding, with seventy-three percent stating the cause of that restraint was their state's respective Codes of Judicial Conduct. David B. Rottman, *The White Decision in the Court of Opinion: Views of Judges and the General Public*, 39 COURT REVIEW 16, 18 (2002). Nonetheless, sixty-four percent of judges surveyed felt that the existing canons represent an appropriate restriction of judicial campaign speech, with only thirty percent saying the restrictions on speech are too harsh. *Id.*

[93] Baran, *supra* note 9, at 12 n.4.

[94] *Cf. id.* at 13–14 (noting that it will be a "daunting task" to provide candidates with sufficient clarity regarding Canon 5 while balancing the free speech rights of judicial candidates).

[95] Republican Party of Minn. v. White, 536 U.S. 765, 799 n.2 (2002) (Stevens, J., dissenting).

do not seem to be any cases in any state over the past decade in which a judicial candidate was found in violation of the announce clause and in which the clause was not eventually ruled unconstitutional.[96] It is true that this may be attributed to the chilling effect of the canons—there is no way to know for sure. However, for a judicial candidate who is entrenched in a hotly-contested election, the chilling effect might be melted away by the desire for election. In such an election, a judicial candidate determined to win might very well look at the number of successful challenges to the announce clause during the 1990s and decide that on balance, the benefits from stating her views to her chances of success in the campaign outweigh the risk of facing discipline for those statements; and even if charges are brought, the candidate may be able to successfully challenge the constitutionality of applying her state's commit clause to her, although it would of course be costly and time-consuming to do so.

Given the nature of the electoral process, it seems safe to assume—now that the announce clause is a dead letter—that judicial candidates are going to make statements announcing their views on disputed legal or political issues,[97] which would previously have been prohibited by their state's respective Codes of Judicial Conduct, but are now permissible.[98] Once these statements have been made and help result in election, eventually the judge may be called upon to hear a case involving an issue on which she announced her views during the campaign. As Justice Ginsburg has pointed out, in such a case, there exists the possibility of a threat to both a litigant's due process right to have an impartial judge and to the appearance of an impartial judiciary.[99] There are two obvious ways to avoid these dangers: one, restrict judicial campaign speech altogether and two, have a judicial candidate take it upon herself to decline to comment on disputed legal issues during the campaign.[100] The former is unconstitutional[101] and for the reasons

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[96] Schotland, *Politicians*, *supra* note 72, at 8 n.7.

[97] It is interesting to note, however, that contrary to what one might assume, the first judicial elections since *Republican Party of Minnesota* were the most part "toned down" from the 2000 elections. Elizabeth Amon, *Kinder, Gentler Judicial Races? State Campaigns are Less Nasty, but the Cost Remains High*, MIAMI DAILY BUS. REV., November 4, 2002, at A9. This may be attributable to the fact that "'[i]t takes a while for something like [the Court's decision] to work its way into campaign practices.'" *Id.* (quoting ABA President Alfred P. Carlton Jr.).

[98] In accordance with the commentary to the 1990 ABA Code, we have to assume that the commit clause allows some statements that would have been impermissible under the announce clause. *See supra* notes 69–70 and accompanying text (noting that the commit clause "replaces the broad prohibition against a candidate's announcing the candidate's views on disputed legal or political issues with the narrower one against making statements that appear improperly to commit the candidate with respect to matters likely to come before the candidate's court"). Logically, because it is less restrictive than its predecessor, the commit clause permits more speech than that which would have been permissible under the announce clause.

[99] *Republican Party*, 536 U.S. at 813 (Ginsburg, J., dissenting).

[100] *Cf.* Baran, *supra* note 9, at 14 (suggesting that even if a judicial candidate has the

previously discussed, judicial candidates will not always be so restrained to choose the latter. Thus, recusal has been suggested as an alternative approach with which to protect due process and the appearance of impartiality if an issue about which a judge has announced her views during a campaign comes before the court.[102] Whether recusal is required in such a situation, however, is subject to debate.

IV. HISTORY AND RATIONALE BEHIND JUDICIAL RECUSAL

To understand why a judge may on occasion be disqualified from presiding over a particular case, one must understand that judicial "[i]mpartiality, although a difficult goal to achieve with perfection, must be relentlessly pursued in order to insure the rendering of fair, just determinations and to enhance public confidence in the judiciary."[103] Indeed, that judges should perform their duties impartially and without bias is a fundamental principle of our legal system.[104] This lofty goal, however, may sometimes be difficult to apply practically. After all, judges are human beings. They do not live in "ivory towers," isolated from the world and all human contact.[105] They have families, friends, professional acquaintances, and opinions about the law. Of course, most judges genuinely believe that they can put aside all biases and act impartially.[106] Nevertheless, even if well-meaning, a judge with some interest in the outcome of a case before her may have her thought processes unconsciously swayed by that interest more than she would

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freedom to announce her views on an issue, when asked about that view, she should consider responding that she does not believe it would be appropriate to comment).

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

102 Schotland, *Politicians*, *supra* note 72, at 11.

103 *In re* Del Rio, 256 N.W.2d 727, 748 (Mich. 1977); *See, e.g.*, Pau v. Yosemite Park & Curry Co., 928 F.2d 880, 885 (9th Cir. 1991) (noting that "[l]itigants are entitled to a judge who is detached, fair, and impartial"); United States v. Carmichael, 726 F.2d 158, 160 (4th Cir. 1984) (noting that "[e]very litigant is entitled to be heard by an impartial judge"); *In re* Mussman, 302 A.2d 822, 824 (N.H. 1973) (noting that all litigants have the right to have their cases heard "'by judges as impartial as the lot of humanity will admit'"(citation omitted)).

104 JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS 100 (1st ed. 1990); *See, e.g.*, FLAMM, *supra* note 15, at 15 ("Indeed, judicial impartiality has often been considered the sine qua non of the American legal system."); Liteky v. United States, 510 U.S. 540, 558 (1994) (Kennedy, J., concurring in judgment) ("One of the very objects of law is the impartiality of its judges in fact and appearance."); Alexander v. Primerica Holdings, Inc., 10 F.3d 155, 167 (3rd Cir. 1993); Brown v. Doe, 803 F. Supp. 932, 945 (S.D.N.Y. 1992).

105 SHAMAN, *supra* note 104, at 100; *Cf.* FLAMM, *supra* note 15, at 15–16 ("[I]t is becomingly increasingly common . . . to suggest that the concept of absolute judicial impartiality may be a legal fiction."); Edward G. Burg, Comment, *Meeting the Challenge: Rethinking Judicial Disqualification*, 69 CAL. L. REV. 1445, 1485 (1981) (noting that as long as we rely on humans to resolve legal disputes, absolute impartiality will only be an ideal).

106 SHAMAN, *supra* note 104, at 100.

realize.[107] Thus, judges who are not truly detached from a case may need to recuse themselves from presiding over it.

At common law, recusal for judicial bias or prejudice regarding a party was not permitted.[108] According to Blackstone, "'the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea.'"[109] More recently, however, the law has generally viewed recusal more favorably.[110] In 1792, Congress passed a statute requiring federal district judges to recuse themselves whenever they had an interest in the suit before them or had served as counsel to a party in the suit.[111] The grounds for recusal were expanded in 1821 to cover any judicial relationship or connection with a party that the judge felt would make it improper to preside over the case.[112] It was not until 1911, however, that Congress passed a statute requiring district judges to recuse themselves for bias in general.[113]

The modern view of judicial disqualification is exemplified by Canon 3E(1) of the 1990 ABA *Model Code of Judicial Conduct*.[114] The Canon states that as a general matter, "a judge shall disqualify himself or herself in a proceeding *in which the judge's impartiality might reasonably be questioned*," and then lists four specific instances in which a judge must recuse herself.[115] Although the

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[107] *Id.*

[108] Aetna Life Ins. v. Lavoie, 475 U.S. 813, 820 (1986).

[109] *Id.* (quoting 3 W. BLACKSTONE, COMMENTARIES 361).

[110] *See Aetna Life Ins.*, 475 U.S. at 820. In *Aetna*, the Supreme Court held that an insurance company's due process rights were violated when a justice of the Alabama supreme court did not recuse himself from sitting in a case against an insurance company. *Id.* at 825. Because the justice was a plaintiff in an unrelated case against the insurance company and his decision enhanced the chances for success of his own lawsuit, refusing to recuse himself violated the company's due process rights. *Id.* at 823–24.

[111] Liteky v. United States, 510 U.S. 540, 544 (1994). The federal government has adopted the ABA standard for judicial recusal, codifying much of it verbatim in 28 U.S.C. § 455 (2000). SHAMAN, *supra* note 104, at 103. Although federal judges are not subject to election, the practice of the federal court system is discussed here as a general standard used by courts around the nation.

[112] *Liteky*, 510 U.S. at 544.

[113] *Id.*

[114] MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1) (1990); *cf.* SHAMAN, *supra* note 103, at 101 (stating the same regarding Canon 3C of the 1972 ABA *Code of Judicial Conduct*, which was moved to Canon 3E(1) in the 1990 Code).

[115] MODEL CODE OF JUDICIAL CONDUCT Canon 3(E)(1) (1990). It should be noted that as part of the August 2003 amendments to the *Model Code*, the ABA made an addition to the general standard for recusal in Canon 3E(1). MODEL CODE OF JUDICIAL CONDUCT Canon 3(E)(1) (2003). Under the new version of the general standard, a judge must recuse herself in instances where "the judge, while a candidate for judicial office has made a public statement that commits, or appears to commit the judge concerning an issue or controversy in the

drafters of the enumerated specific standards for recusal felt that they would cover most situations, they made it clear that "the general standard should not be overlooked."[116] The test for determining when this general standard applies is an

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proceeding." MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1)(f) (2003). This new section recognizes that there exists an unresolved relationship between judicial campaign speech and recusal. In fact, it "is designed to make the disqualification ramifications of prohibited speech violations explicit." *See* Report to the House of Delegates, *supra* note 24, at 11. It would not, however, be applicable to a situation where issues are presently before a judge about which she previously announced her views during her campaign, because merely announcing one's views is now *protected* speech after *Republican Party of Minnesota v. White* and this new subsection requires recusal only when the judge has violated the commit clause, thus engaging in *prohibited* campaign speech.

Under the enumerated specific instances for recusal, judges must recuse themselves where:

> (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;
>
> (c) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding;
>
> (d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
>
> > (i) is a party to the proceeding, or an officer, director or trustee of a party;
> >
> > (ii) is acting as a lawyer in the proceeding;
> >
> > (iii) is known by the judge to have more than de minimis interest that could be substantially affected by the proceeding;
> >
> > (iv) is to the judge's knowledge likely to be a material witness in the proceeding.

MODEL CODE OF JUDICIAL CONDUCT Canon 3(E)(1) (1990); *see also* 28 U.S.C. § 455 (2000). Subsection (a) would not apply to a candidate who has previously announced her views on a legal issue currently before her because it aims at prejudice concerning *parties*, not the issues they are litigating. For a discussion of why subsection (c) would not apply, see *infra* part V.A. Thus, because none of these specific standards for recusal will likely cover an instance in which a judge permissibly spoke on an issue now before her, during her campaign, the general standard for recusal is the most appropriate test with which to measure the necessity of the judge's recusal. Because it is not self-defining, however, this standard is a difficult one to apply. *See* FLAMM, *supra* note 15, at 154.

[116] SHAMAN, *supra* note 104, at 102 (citing E.WATNE THODE, REPORTER'S NOTES TO THE CODE OF JUDICIAL CONDUCT 60–61 (1973)). The general standard may in fact be the most important recusal provision of all. *See* FLAMM, *supra* note 15, at 48 ("For judicial disqualification purposes, the most significant section of the Code by far is Canon 3E [the general standard for recusal].").

objective one: "whether an objective, disinterested observer fully informed of the relevant facts would entertain a significant doubt that the judge in question was impartial."[117] It has been suggested, however, that there is a high threshold for when this general standard will apply.[118] Moreover, recusal will not be required under any standard if no judge can be found who possesses the requisite amount of impartiality.[119] The next Part will discuss whether a judge who has announced her views on disputed legal or political issues during her campaign must disqualify herself under the general standard for recusal because of that announcement.

V. JUDGES WHO HAVE ENGAGED IN CAMPAIGN SPEECH PERMISSIBLE UNDER THE CODE OF JUDICIAL CONDUCT NEED NOT RECUSE THEMSELVES FROM HEARING CASES INVOLVING ISSUES ON WHICH THEY CAMPAIGNED

After *Republican Party of Minnesota*, judicial candidates have more freedom to speak on issues of interest to the electorate during a campaign. Whether or not the remaining confusion surrounding the restrictions on judicial campaign speech will chill candidates from invoking this freedom remains to be seen. Assuming that judicial candidates are going to speak on issues during their campaigns in ways that do not violate their respective state's Codes of Judicial Conduct, the problem then arises whether they must recuse themselves, once elected, if issues on which they spoke during their campaigns are present before them in a case. The answer is no; judges in this situation need not recuse themselves. Because, however, the ABA *Model Code of Judicial Conduct* is not entirely clear on this point, the answer is not self-evident.

A. *Due Process Concerns Do Not Mandate Recusal*

In her dissent in *Republican Party of Minnesota*, Justice Ginsburg explained that although judicial candidates have an interest in free speech, that interest must

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[117] SHAMAN, *supra* note 104, at 143 (citing PepsiCo, Inc. v. McMillan, 764 F.2d 458, 460 (7th Cir. 1985)).

[118] Liteky v. United States, 510 U.S. 540, 558 (1994) (Kennedy, J., concurring) (stating, "I think all would agree that a high threshold is required to satisfy [the general standard for recusal]").

[119] SHAMAN, *supra* note 104, at 103. This exception is known as the rule of necessity. The rule, which has its roots in the common law, FLAMM, *supra* note 15, at 591 (citing Adkins v. Tell City, 625 N.E.2d 1298, 1304 (Ind. App. 1993)), essentially states that a judge need not recuse herself if no other judge in that jurisdiction is capable of being more impartial. FLAMM, *supra* note 15, at 590. The classic example of the rule's application is a situation in which a particular case's resolution will affect the pay or retirement benefits of judges as a whole. *Id.* at 592. Since all judges would have a similar interest in the resolution of the case, the judge need not withdraw from presiding over it. *Id.*

be reconciled with a competing interest: the due process rights of the litigants before the judge. She explained, "[b]alanced against the candidate's interest in free expression is the litigant's 'powerful and independent constitutional interest in fair adjudicative procedure.'"[120] Indeed, it is hard to deny that the "foremost duty of a legal system is dispensing due process to those who come within its ambit."[121] According to Justice Ginsburg, an important requirement of due process is that each litigant is entitled to a proceeding in which the judge has no interest in a particular outcome.[122] She explained that a litigant is deprived of due process when a judge hearing a case has a "direct, personal, substantial, and pecuniary" interest in its outcome.[123] That interest, furthermore, need not be so direct, but rather may stem from the judge's knowledge that her success and tenure in office are dependent upon certain outcomes in cases she hears.[124]

According to Justice Ginsburg, judges hearing cases involving issues upon which they spoke during their campaigns have a sufficient interest in the outcome such that due process is violated.[125] She explained, a judge who does not hold true to her campaign position on an issue in a case before her risks losing support

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[120] Republican Party of Minn. v. White, 536 U.S. 765, 813 (2002) (Ginsburg, J., dissenting) (quoting Marshall v. Jerrico, Inc., 446 U.S. 238, 243 (1980)).

[121] Shepard, *supra* note 17, at 1099.

[122] *Republican Party*, 536 U.S. at 814 (Ginsburg, J., dissenting) (citing *In re* Murchison, 349 U.S. 133, 136 (1955) ("No man is permitted to try cases where he has an interest in the outcome.")).

[123] *Id.* at 814 (Ginsburg, J., dissenting) (quoting Tumey v. Ohio, 273 U.S. 510, 523 (1927) (holding that due process was violated when a judge received a portion of the fines collected from defendants whom he found guilty)); *see* Max Minzner, *Gagged but Not Bound: The Ineffectiveness of the Rules Governing Judicial Campaign Speech*, 68 UMKC L. REV. 209, 235 (1999) ("Judges who make campaign commitments certainly have a direct interest in the outcome [of a case on that issue].").

[124] *Republican Party*, 536 U.S. at 814 (Ginsburg, J., dissenting) (citing Ward v. Monroeville, 409 U.S. 57 (1972)).

[125] *Id.* at 815 (Ginsburg, J., dissenting); *see* Shepard, *supra* note 17, at 1087 ("One would imagine that a judge's interest in his or her job would [be a sufficiently substantial interest]."); *cf.* Deters v. Judicial Ret. and Removal Comm'n, 873 S.W.2d 200, 205 (Ky. 1994) ("Justice can hardly be blind if the judge has made a pre-election commitment or prejudgment which causes him or her to apply the blindfold only as to one side of an issue."); Stretton v. Disciplinary Board, 944 F.2d 137, 144 (3d Cir. 1991) ("Taking a position in advance of litigation would inhibit the judge's ability to consider the matter impartially."); Gillers, *supra* note 32, at 726 ("A commitment to decide a particular case in a particular way is the antithesis of the judicial process."). Whether the Supreme Court would find a due process violation in the type of case hypothesized by Justice Ginsburg, however, is far from certain. The Court has held that "only in the most extreme of cases would [recusal for a general bias or prejudice concerning a particular type of litigant] be constitutionally required." Aetna Life Ins. v. Lavoie, 475 U.S. 813, 821 (1986); *see also* Shepard, *supra* note 17, at 1089 ("Under present rules of conduct and due process case law, courts are reluctant to find constitutional violations even in fairly tangible situations.").

of those who helped get her elected.[126] Thus, she will have a "direct, personal, substantial, and pecuniary interest"[127] in ruling against certain litigants because she may be voted off the bench and lose her salary and benefits if she does not honor her campaign position on the issue before her—a position for which she presumably received quite a number of votes.[128] Accordingly, if it would violate due process for a judge to preside over cases involving issues about which she spoke during her campaign,[129] then recusal would be the appropriate preventative measure to safeguard the due process rights of litigants.

Before accepting that due process concerns require recusal in the proposed situation, it must first be recognized that "[a]ll judges come on to the bench with views about important issues, whether or not these [views] have been expressed during the election campaign or the confirmation process."[130] It is unrealistic to assume they do not. Yet whether a particular judge's opinion on a legal issue is known because of a campaign statement will depend entirely on chance.[131] Moreover, according to the Court in *Republican Party of Minnesota*, that a judge has no predisposition regarding particular legal issues in a case before her "has never been thought a necessary component of equal justice [in part because] it is virtually impossible to find a judge who does not have preconceptions about the

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[126] *Republican Party*, 536 U.S. at 816 (Ginsburg, J., dissenting). Justice Ginsburg's remarks specifically refer to the pledges clause. She explained, however, that the announce clause serves similar interests by preventing judicial candidates from avoiding the pledges clause through implied promises contained within the candidate's announced views. *Id.* at 819.

[127] *Id.* at 814 (quoting *Tumey*, 273 U.S. at 523) (internal alteration omitted).

[128] *Id.* at 816–17 (Ginsburg, J., dissenting).

[129] In no way does this Note intend to suggest that a judge in this situation would consciously violate the due process rights of litigants out of an improper motive. To the contrary, this Note recognizes that "[j]udges take an oath of office, and their judicial role serves as an incredibly powerful influence over their behavior. Th[is] judicial role is to decide cases as impartially and fairly as possible." Chemerinsky, *supra* note 9, at 744. Nevertheless, 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." *Republican Party*, 536 U.S. at 815 (Ginsburg, J., dissenting) (quoting *Aetna Life Ins.*, 475 U.S. at 825) (internal quotation omitted).

[130] Chemerinsky, *supra* note 9, at 744; Ackerson v. Ky. Judicial Ret. & Removal Comm'n, 776 F. Supp. 309, 315 (W.D. Ky. 1991) ("All candidates for elective office, including judicial candidates, presumably come equipped with opinions and predilections which are the result of their life experiences.").

[131] Laird v. Tatum, 409 U.S. 824, 835 (1972). According to Justice Rehnquist, such a random circumstance by itself is not enough to form a basis for disqualification of a federal judge. *Id.* at 836. In *Laird*, then-Associate Justice Rehnquist declined to recuse himself from a case involving an issue about which he had expressed an opinion prior to coming to the bench. *Id.* at 836–37. Of course, federal judges are not subject to election, so similar popular pressures may not apply to his argument in the context of an elected judge.

law."[132]

Thus, a key question regarding the due process rights of litigants is whether a judge is more likely to rule in accordance with the views she expressed during her campaign.[133] If the judge would act the same whether or not during her campaign she expressed views on an issue in the case presently before her, then the expression of those views does not make her less impartial[134] and recusal would not be required in order to avoid violating due process. In reality, we can only speculate if the judicial candidate's expression of views during the campaign makes her less impartial. If elected, however, the judge will most likely do the same thing regardless of whether or not she expressed her opinions on the issues before her during a campaign.[135] This is so in part because all elected judges once on the bench will feel similar pressure to reach politically popular decisions in order to be reelected, regardless of whether they have made campaign announcements on issues before them. Indeed, a judge concerned with reelection who "is trying, consciously or unconsciously, to please the voters will take the politically popular approach, whether or not it was expressed previously."[136] Thus, a campaign announcement will have little practical effect on a judge's ability to render due process to litigants before her if she does not recuse herself.

B. *The Judiciary's Need to Maintain the Appearance of Impartiality Does Not Mandate Recusal*

The general recusal standard in Canon 3E(1) requires a judge to recuse herself when her impartiality may reasonably be questioned.[137] This does not necessarily mean her impartiality is actually compromised, but rather that it appears to be.[138] Accordingly, even if the due process clause does not command

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[132] *Republican Party*, 536 U.S. at 777; *see also* FLAMM, *supra* note 15, at 295 (stating that because it is extremely difficult to find a judge who judges without views on the law or public policy, if judges were always disqualified from hearing cases because of those views "our judicial system would likely grind to a halt.").

[133] Chemerinsky, *supra* note 9, at 744. It is important to remember that at least for bias concerning a particular type of litigant, recusal will be required only in the most extreme cases. *Aetna Life Ins.*, 475 U.S. at 821. Even in fairly tangible situations, rarely do courts find due process to be violated by a judge's refusal to recuse herself. Shepard, *supra* note 17, at 1089. In the situation presently discussed, a judge's potential bias is premised on the notion that a judge might fear being voted out of office if she does not adhere to views she announced during her campaign. Such a situation does not appear to be extreme and is certainly not very tangible, but rather relies on at least some degree of speculation.

[134] *See* Chemerinsky, *supra* note 9, at 744.

[135] *Id.*

[136] *Id.*

[137] *See* MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1) (1990).

[138] FLAMM, *supra* note 15, at 48.

recusal of a judge who, during her campaign spoke on issues currently before her, the desire for judges to maintain the appearance of impartiality might.

The need for the judiciary to appear impartial is either as important as actual impartiality "or at least a close second."[139] The judiciary, "[p]ossessed of neither the purse nor the sword, it depends primarily on the willingness of members of society to follow its mandates."[140] The authority of the judiciary, therefore, relies upon public faith in the integrity of judges. A widespread belief that the courts are not impartial—resulting in a loss of public faith in the legal system and thus an unwillingness to respect its authority—would destroy the judiciary as quickly as an actual lack of impartiality would,[141] perhaps quicker. Thus, unless we want people to choose less acceptable means of resolving their own disputes, the public and individual litigants must be reassured that the judiciary will decide legal disputes based on the law alone.[142]

The lone case to uphold an announce clause during the 1990s—the Third

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[139] Gillers, *supra* note 32, at 729; *cf. In re* Murchison, 349 U.S. 133, 136 (1955) (noting that "justice must satisfy the appearance of justice") (quoting Offutt v. United States, 348 U.S. 11, 14 (1954)); FLAMM, *supra* note 15, at 148 (noting the need for a judicial system in which the public has unwavering confidence); State *ex rel.* Wesolich v. Goeke, 794 S.W.2d 692, 695 (Mo. App. 1990) (noting the importance of a legal system that is not only fair but also appears to be fair). Canon 2A of the ABA *Code of Judicial Conduct* underscores the importance of the appearance of impartiality in the judiciary. It provides that at all times a judge shall act "in a manner that promotes public confidence in the integrity and impartiality of the judiciary." MODEL CODE OF JUDICIAL CONDUCT Canon 2A (1990). Moreover, the August 2003 Amendments to the *Model Code* included an addition to the commentary of Canon 2A, which provided that the speech restrictions placed upon judges and judicial candidates are "indispensable to the maintenance of the integrity, impartiality, and independence of the judiciary." MODEL CODE OF JUDICIAL CONDUCT Canon 2A cmt. (2003). Nevertheless, for the reasons discussed in this Part, because it does not endanger the appearance of impartiality for a judge to preside over a case involving issues on which she announced her views during her campaign, Canon 2A seems presently inapplicable.

[140] Irving R. Kaufman, *Lions or Jackals: The Function of a Code of Judicial Ethics*, 35 LAW & CONTEMP. PROBS. 3, 5 (1970).

[141] Shepard, *supra* note 17, at 1059; FLAMM, *supra* note 15, at 148 ("Allegations of judicial bias may serve to erode . . . public confidence [in the judiciary]."); State v. Gardner, 789 P.2d 273, 278 (Utah 1989) ("Nothing is more damaging to the public confidence in the legal system than the appearance of bias or prejudice on the part of the judge."). In fact, the ABA *Code of Judicial Conduct* recognizes that violations of the Code could diminish public confidence in the judiciary, thereby damaging the system of government under law. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 1 cmt. (1990).

[142] Dep't of Revenue v. Golder, 322 So. 2d 1, 2, 7 (Fla. 1975) (although he had no actual bias, a Florida supreme court Justice recused himself, on reconsideration, from hearing a case regarding an estate tax—the constitutionality of which he expressed an opinion on as Special Tax Counsel to the Florida House of Representatives prior to coming to the bench—in order to prevent public concern for the integrity of the court's decision). *But see* Laird v. Tatum, 409 U.S. 824, 835 (1972) (then-Associate Justice Rehnquist did not recuse himself on account of the expression of his views—prior to coming onto the bench—on an issue before the Court).

Circuit decision in *Stretton*—recognized that allowing judges to preside over cases regarding issues on which they made campaign announcements could damage the appearance of impartiality in the courts.[143] Even if the judge did not feel pressure to reach a particular outcome, according to the court, the campaign announcement would leave the impression that the case was prejudged rather than properly and impartially adjudicated.[144] If judges are allowed to make such prejudgments, "the concept of impartial justice becomes a mockery,"[145] and thus—whether its fears are well-founded or not—the public will lose faith in the impartiality of the courts.[146]

Accordingly, one could argue that judges should be required to recuse themselves if cases involving issues on which they spoke during the campaign come before them. Requiring recusal in such cases would not only prevent judges from feeling pressure to ensure that certain legal outcomes occur in order to get reelected, but would also help maintain public faith in the judiciary.

It is not at all clear, however, that a judge's mere statement of her views is

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[143] Stretton v. Disciplinary Board, 944 F.2d 137, 144 (3d Cir. 1991).

[144] *Id.*

[145] *Id.* at 142.

[146] *See id.* Another aspect of judicial elections besides judicial candidate speech undoubtedly affects the appearance of impartiality in the courts. "[T]he mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary." Republican Party of Minn. v. White 536 U.S. 765, 790 (2002) (O'Connor, J., concurring); *see, e.g.*, Amon, *supra* note 97, at A9 (quoting Geri Palast, Executive Director of Justice at Stake) ("A large number of Americans are concerned that money and special interests affect the outcome of court verdicts and that undermines the faith in justice."); Erwin Chemerinsky, *Preserving an Independent Judiciary: The Need for Contribution and Expenditure Limits in Judicial Elections*, 74 CHI.-KENT L. REV. 133, 138 (1998) ("There is a grave risk that a judge will be more favorably disposed to those who gave or spent money .... At the very least, the appearance of impropriety is inevitable; litigants and the public will perceive that decisions were influenced by money."); Elizabeth A. Larkin, *Judicial Selection Methods: Judicial Independence and Popular Democracy*, 79 DENV. U. L. REV. 65, 78 (2001) ("Elections create concerns about judicial corruption and impartiality. The view is that current elections and campaign financing create an impression of impropriety, bringing into question a judge's ability to impartially interpret and apply laws and administer justice.") (internal citation omitted); Kurt M. Brauer, *The Role of Campaign Fundraising in Michigan's Supreme Court Elections: Should We Throw the Baby Out With the Bathwater?*, 44 WAYNE L. REV. 367, 374 (1998) (noting that there is a debate whether campaign fundraising calls into question the impartiality of elected judges). Indeed, the impact of fundraising on judicial elections can not be understated. In the 2000 election cycle, state supreme court candidates raised over $45.6 million, a 61% increase from the 1998 elections, with the average candidate raising $430,529. Deborah Goldberg & Craig Holman, *The New Politics of Judicial Elections*, *at* http://faircourts.org/files/JASMoneyReport.pdf. Thus, because of the potentially corrupting effects of money on judicial campaigns, even prohibiting judicial candidates from engaging in campaign speech altogether will not, by itself, preserve the appearance of impartiality thereby ensuring public faith in the courts.

enough to destroy the appearance of impartiality in a given case—even if the judge's likely decision is well-known because of that expression.[147] None could credibly argue that Justice Scalia should recuse himself from hearing abortion cases because of a lack of the appearance of impartiality, even though it is almost certain with which side he will vote.[148] Furthermore, in part because the ABA Code recognizes "the necessity and value of judges' having fixed beliefs about constitutional principles and many other facets of the law,"[149] judges are specifically encouraged to "speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects."[150] It would therefore be strange, if not inconsistent, for a judge to be required to recuse herself simply because during her campaign she announced her views on legal issues that happen to now be present in a case before her, but not because she did so in pre or post-campaign discussion of the law.

More importantly, the existing restrictions placed upon judicial candidates by the ABA *Model Code of Judicial Conduct* already serve to protect against campaign speech hazardous to the appearance of impartiality—while at the same time recognizing that candidates have a First Amendment right to advocate their own election by discussing legal issues.[151] The very reason the canons filter out pledges of conduct in office and statements that commit judicial candidates with respect to legal issues is that such statements make the prospective judge appear less impartial.[152] Logically, one can therefore presume that statements by a

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[147] *Compare Laird*, 409 U.S. at 835 (Associate Justice of the Supreme Court declined to recuse himself from a case involving an issue about which he had expressed an opinion prior to coming to the bench), *with Harriet*, 322 So. 2d. at 1 (Florida Supreme Court Justice recused himself from hearing a case regarding an issue about which he expressed an opinion prior to coming to the bench).

[148] *See* Chemerinsky, *supra* note 9, at 745.

[149] THODE, *supra* note 116, at 61.

[150] MODEL CODE OF JUDICIAL CONDUCT Canon 4B. (1990). The commentary to the canon explains that since judges are specially learned in the law, they are in a unique position to contribute to its improvement, and thus are encouraged to participate in discourse about the law. MODEL CODE OF JUDICIAL CONDUCT Canon 4B cmt. (1990). It cautions, however, that the freedom to participate in extra-judicial legal activities remains subject to the requirements of the Code. *Id.* One such requirement may be Canon 2A, which provides a possible basis for disciplining a judge as a result of engaging in extra-judicial legal activities that undermine public confidence in the integrity and impartiality of the judiciary. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 2A (1990).

[151] *See* THODE, *supra* note 116, at 96 (explaining that Canon 7 of the 1972 Code—now Canon 5 of the 1990 Code—"compromises between political reality and the aim of maintaining the appearance of judicial impartiality").

[152] *See id.* This purpose is further evident from Canon 30 of the original 1924 Canons, in which judicial candidates were admonished to "do nothing while a candidate to create the impression that if chosen, he will administer his office with bias, partiality or improper

judicial candidate not prohibited by the *Model Code of Judicial Conduct*—for instance announcing one's views on disputed legal issues—are not likely to destroy the appearance of impartiality.

C. *Recusal is Not Required for a Judge Who Made Campaign Statements Involving Issues Currently Before Her*

Although there are legitimate concerns about the due process rights of litigants and the appearance of impartiality of the judiciary, that a judicial candidate expresses her views about disputed legal or political issues during her campaign should not require her recusal if those issues come before her as judge.[153] The appearance of impartiality is already protected by existing restrictions on judicial candidate speech and should require recusal only if the judge's views came to light during her campaign, but not, for example if they are known because she has written extensively on a given topic. Nor should due process concerns require her recusal, because any bias the judge might have as a result of reelection concerns creates an incentive to render a politically popular decision, not one that accords with her previous views. Moreover, because all judges come to the bench with views about the law—whether or not they have been publicly expressed—and will all have similar concerns about reelection, solely because a judicial candidate expresses her views during the campaign does not make her any more or less predisposed to reach a certain conclusion of law than any other judge.

VI. PROPOSAL TO THE ABA TO IMPROVE CLARITY REGARDING WHETHER JUDICIAL CAMPAIGN SPEECH REQUIRES RECUSAL

Because it is not entirely clear that a judge who previously made general campaign statements about an issue currently before her need not recuse herself, the ABA *Model Code of Judicial Conduct* should be amended in order to provide guidance to judges that may now face such a situation after *Republican Party of Minnesota*. The answer to this recusal dilemma is unclear because of the inevitable tension between the free speech rights of judicial candidates and the

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discrimination." CANONS OF JUDICIAL ETHICS Canon 30 (1924). It is clear from this directive that the restrictions on judicial candidate speech are intended to preserve the appearance of impartiality.

153 *But see* Missouri Supreme Court, Order, *Re: Enforcement of Rule 2.03, Canon 5B(1)(c) Campaign Conduct* (July 18, 2002), *available at* http://www.osca.state.mo.us/sup /index.nsf (holding that in light of the decision in *Republican Party of Minnesota*, Missouri's announce clause would not be enforced, but noting without explanation that "[r]ecusal, or other remedial action, may nonetheless be required of any judge in cases that involve an issue about which the judge has announced his or her views as otherwise may be appropriate under Missouri's Code of Judicial Conduct").

due process rights of litigants coupled with the judiciary's need to appear impartial—a tension that remains unresolved by the *Model Code of Judicial Conduct*. Indeed, that the ABA felt it necessary to amend Canon 3E(1) of the *Model Code* in August 2003 in order to make explicit that recusal is required of a judge who has engaged in *prohibited* campaign speech on an issue currently before her is evidence that there exists an unexplained relationship between judicial campaign speech and recusal.[154]

On one hand, Canon 4B encourages judges to engage in extra-judicial discourse about the law and—although written in prohibitive terms—judicial candidates are now allowed under Canon 5A(3)(d) to announce their views on legal issues.[155] On the other hand, the *Code* generally stresses the importance of judicial impartiality, and the general standard for recusal contained in Canon 3E(1) instructs a judge to disqualify herself from any case in which her impartiality might reasonably be questioned. A potential conflict arises then because a judicial candidate's exercise of her free speech rights during her campaign might cause her impartiality to be reasonably questioned once on the bench, thereby requiring recusal in a given case under the general standard in Canon 3E(1). For reasons previously discussed, however, recusal is not required.[156] Yet, because the relationship between the general standard for recusal under Canon 3E(1) and the speech restrictions on judicial candidates contained in Canon 5A(3)(d) remains not fully explained by the *Model Code of Judicial Conduct*, this is not self-evident.

A simple addition to the Code would alleviate any confusion as to whether a judge must recuse herself under the general standard in Canon 3E(1) as a result of making permissible campaign statements. The addition should be to the commentary of Canon 3E(1), [157] which contains the general standard for recusal and—after the August 2003 amendments—the admonition that recusal is required as a result of *prohibited* campaign speech, and should provide as follows: "The existing restrictions on judicial campaign speech safeguard against campaign speech that risks undermining the appearance of impartiality in the courts. Thus, campaign statements that do not violate this canon are, by themselves, presumably insufficient to require recusal under the standard set forth in Canon 3E(1) of this Code."[158] This addition would clarify that while the Code's judicial

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[154] *See supra* note 115. What the August 2003 amendments neglected to address, however, is the relationship between recusal and judicial campaign speech that is now *permissible* after *Republican Party of Minnesota*. The proposal contained in this Part seeks to address that yet-unexplained relationship.

[155] *See* MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d) (2003).

[156] *See supra* Part V.C.

[157] *See* MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1) (2003).

[158] Accordingly, since merely announcing one's views on the law during a campaign does not violate the provisions of Canon 5A(3)(d), such statements are not sufficient grounds

campaign speech restrictions permit judicial candidates to exercise their free speech rights, they also prevent speech that undermines the appearance of impartiality in the judiciary itself. If a judicial candidate's statements are not prohibited by the *Model Code of Judicial Conduct*, then they are likely not enough to endanger the appearance of impartiality in the courts. By adding a small amount of commentary, this notion can be articulated and confusion regarding exactly what the *Model Code of Judicial Conduct* requires of judicial candidates can be easily avoided.

VII. CONCLUSION

After the Supreme Court's decision in *Republican Party of Minnesota*, judicial candidates—regardless of whether or not one thinks they should do so—are free to say more about their views on the law than has been previously permitted in many states. It is not clear, however, what should happen when a case comes before a judge involving issues on which she spoke during her campaign. Perhaps she should recuse herself to protect the due process rights of the litigants before her and preserve the appearance of impartiality of the court. Or perhaps she need not because due process is no more affected in this situation than any other situation involving an elected judge and because the appearance of impartiality is already safeguarded by remaining restrictions on judicial candidate speech. Although the correct answer is the latter, this is not expressed clearly enough in the American Bar Association's *Model Code of Judicial Conduct*. In order to clarify its position regarding whether judges in this situation should recuse themselves, the drafters of the ABA Code must provide the legal community with an explanation of the relationship between the restrictions on judicial campaign speech and the general standard for recusal.

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for a judge's impartiality to be reasonably questioned in accordance with the proposed addition and thus do not require recusal under the general standard in Canon 3E(1).