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Zero-Sum Judicial Elections: Balancing Free Speech and Impartiality Through Recusal Reform

While campaigning for a seat on the bench, Wisconsin Supreme Court Justice Louis Butler spoke at a fundraiser for a gay-rights group, gaining the group's endorsement, raising over $21,000 for the group, and earning a favorable editorial in an LGBT publication.[1] Once Butler was in office, a minister brought a defamation suit against the gay-rights group, and Butler cast the deciding vote that dismissed the case, requiring the minister's attorney to pay $87,000 in court costs and fees.[2] Denying a motion requesting the justice's recusal, the Wisconsin Supreme Court held that Butler subjectively determined that he could be impartial and thus satisfied the standard for hearing the case.[3]

States that choose to elect their judges face a constitutional predicament. Judicial elections create a zero-sum game between free speech and due process.[4] In order for there to be an informed electorate, judicial candidates must notify the public about their policies and opinions. Additionally, the judicial candidate has a First Amendment right to declare his positions prior to the election. Without judicial free speech, the electorate cannot accurately choose the best candidate, and the purpose of the election is thwarted. But in stating their opinions, judicial candidates risk losing the appearance of impartiality and threaten due process rights. Regardless of the correctness of the Wisconsin Supreme Court, allowing Justice Butler to hear the case unquestionably threatened the appearance of impartiality. No matter how fair and impartial they actually are, elected judges who criticize and openly oppose a

1. Scott Bauer, *Wisconsin Supreme Court: Appeal Asserts Justice Had Conflict of Interest*, ST. PAUL PIONEER PRESS, July 1, 2008, at B3; David Ziemer, *Wisconsin Supreme Court Rules Butler Had No Duty to Recuse Self From Case*, WIS. L.J., Aug. 4, 2008, *available at* http://www.wislawjournal.com/article.cfm?recid=70949.

2. Bauer, *supra* note 1, at B3. The justice had also accepted four donations from leaders of the gay-rights group involved in the lawsuit. *Id*.

3. Storms v. Action Wis. Inc., 754 N.W.2d 480, 489 (Wis. 2008).

4. A zero-sum game is a conflict where one party's gain must necessarily result in another party's loss, the net result always equaling zero.

litigant's policy position in their campaign lose their ability to appear fair and neutral when such a case is brought before the bench.[5]

In these zero-sum judicial elections, states traditionally side with due process rights, circumventing threats to impartiality through judicial campaign speech restrictions. For example, a "pledge or promise clause" in a state's code of judicial conduct prohibits judicial candidates from promising to rule a certain way on an issue if they are elected. These states feel that such prohibitions limit the damage to the appearance of impartiality that unlimited speech would cause. But in this zero-sum game, with each prohibition that states pass, the electorate becomes less informed about each candidate's positions and the candidate's First Amendment rights are hindered.

In 2002, the United States Supreme Court addressed the quandary between the due process clause and the First Amendment in *Republican Party of Minnesota v. White*.[6] The Court held that one of Minnesota's prohibitions on judicial speech, an "announce clause," violated the First Amendment.[7] Only nine states employed announce clauses, which amorphously stated that judicial candidates could not announce their positions on legal issues.

While the Supreme Court specifically limited the scope of its holding to these announce clauses, lower courts have accepted *White* as a watershed case for striking down most, if not all, of the judicial restrictions on free speech. Many critics say that such interpretation poses a threat to judicial independence. Among these critics is former Justice Sandra Day O'Connor, the swing vote in the 5–4 *White* decision, who has expressed regret over the lower courts' interpretation of *White* since leaving the bench.[8] At a judicial conference, Justice O'Connor told the audience that she does not revisit many of her rulings but was having second thoughts about *White* because it "produced a lot of very disturbing trends in state election of judges."[9] Now, seven years after *White*, such trends have

5. *See* Bauer, *supra* note 1, at B3 ("'I think the facts speak for themselves,' [the losing party] said Monday. 'How can I feel it was impartial in my case when he's got these ties to the opposing party?'").

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

7. *Id.* at 768, 788.

8. *See, e.g.*, Matthew Hirsch, *The Case That Still Nags at Sandra Day*, THE RECORDER, Nov. 7, 2006 (quoting Justice O'Connor as saying, "that *White* case, I confess, does give me pause" and "[s]ometimes we just don't get it right").

9. Linda P. Campbell, *Sitting Ducks on the Judicial Bench*, ST. PAUL PIONEER PRESS, Nov. 24, 2006, at 8B. Justice O'Connor has since defined these trends as the increasing role of

state supreme courts and judicial ethics committees throughout the country still struggling to integrate the *White* decision and its conflicting progeny. States are uncertain how speech restrictions will be treated by the courts and are concerned about how to limit the negative effects of unrestrained judicial election speech while still allowing candidates to speak their minds and inform the public of their positions.

This Comment offers suggestions for recusal reform that will appropriately balance judicial candidates' free speech rights against the need for an impartial judiciary. As a means of alleviating the ills of judicial elections, recusal reform is more efficient and more clearly constitutional than campaign speech restrictions. Part I summarizes the history of judicial elections and outlines the arguments for and against restricting judicial election speech. Part II examines how the Supreme Court's *White* decision has shaped the debate and describes the reaction of lower federal courts who have treated the case as a watershed rather than a limited holding. Based on this trend, it appears that all judicial speech restrictions are doomed for failure and states are thus uncertain how to ensure judicial impartiality. Part III declares that recusal reform offers an effective, constitutional means of solving the dilemma caused by zero-sum judicial elections. By adopting a new model recusal provision, assigning recusal motions to other judges, and lessening the financial burden of litigants, states can stop the threat that judicial elections pose to the judiciary's impartiality without restricting judicial speech. Part IV offers a brief conclusion.

I. ZERO-SUM JUDICIAL ELECTIONS

Judicial elections create a zero-sum game between contradictory forces: (1) the judicial candidate's right to free speech and the need for informed electorates, and (2) the due process rights of litigants and the impartiality of the judicial branch. Policies in favor of one will be to the detriment of the other. This section examines these forces and the arguments for and against limiting speech in such elections.

money and interest groups in judicial elections and the subsequent decrease in public opinion of the judiciary. *See infra* notes 110–11 and accompanying text.

A. Judicial Elections in Perspective

In the eighteenth century, the framers of federal and state constitutions firmly believed in creating a bench sanitized from the democratic whims of the people, and early methods of judicial selection emphasized this principle. Perhaps because they viewed British judges as mere puppets of the King,[10] the Framers of the United States Constitution made judicial independence the bedrock principle of Article III.[11] Alexander Hamilton explained the Framers' design of the judicial branch by writing: "The complete independence of the courts of justice is peculiarly essential in a limited constitution. . . . If the power of [selecting judges was committed] to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity."[12] Hamilton explained that the judiciary should exhibit an "inflexible and uniform adherence to the rights of the [C]onstitution," not to the impulses or urges of political fads.[13] The Founders further believed that the states should mirror this commitment to an independent judiciary,[14] and the earliest states emulated their federal counterpart when designing state judicial selection.[15]

10. The Declaration of Independence complained that King George III "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." THE DECLARATION OF INDEPENDENCE para. 14 (U.S. 1776).

11. *See* U.S. CONST. art. III; *see also* Michael R. Dimino, *Pay No Attention to That Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians*, 21 YALE L. & POL'Y REV. 301, 306 (2003) ("The protection of judicial independence is a foundational principle—perhaps *the* foundational principle—of Article III."). For example, through lifetime appointments and guaranteed salaries, the Constitution seeks to insulate federal judges from presidential or legislative reaction to unpopular rulings. *Id.*

12. THE FEDERALIST NO. 78, at 292, 298 (Alexander Hamilton).

13. *Id.* at 297. Indeed, Hamilton wrote that lifetime appointments were "one of the most valuable of the modern improvements in the practice of government . . . [an] excellent barrier to the encroachments and oppressions of the representative body." *Id.* at 291. Hamilton was hardly alone in his feelings for judicial independence. At the convention in Philadelphia in 1787, the Founders established life tenure for judges and a protected judicial salary with little debate. Dimino, *supra* note 11, at 307. While Anti-Federalists opposed such judicial independence (feeling the judicial branch should be subject to Congress), both groups agreed that electing judges was "dangerously unwise." *Id.* at 308.

14. *See* THE FEDERALIST NO. 81, at 312 (Alexander Hamilton) ("[The] Constitution . . . is equally applicable to most, if not all the state governments.").

15. CHARLES H. SHELDON & LINDA S. MAULE, CHOOSING JUSTICE: THE RECRUITMENT OF STATE AND FEDERAL JUDGES 2–3 (1997). Of the original thirteen colonies,

By the early nineteenth century, however, many states did not view the appointment method for selecting judges as a means to judicial independence, but rather as an aristocratic mistrust of the people. Jacksonian democrats emphasized popular sovereignty, the common man's right to elect his government, and the corruptibility of unchecked government officials.[16] As political power shifted more directly into the hands of the people, many states began to disfavor the concept of an elite and privileged bench.[17] By the middle of the nineteenth century, several states enacted a system to directly elect their judges, and every new state admitted to the Union between 1846 and 1912 selected its judges through elections.[18]

The populist practices of Jacksonian democrats quickly met challenges in the face of partisan politics.[19] By the early twentieth century, strong political parties, exemplified by powerful political machines such as Tammany Hall, effectively appointed state judges through their iron grip on local electorates. As a result, the quality of the judiciary waned, and a progressive movement to depoliticize state judicial elections began.[20] However, rather than return to the appointment process that states had used in the past, reformers schizophrenically attempted both to preserve judicial elections and to remove divisive politics from the process.[21]

For better or worse, judicial elections are ingrained in our system. Today, thirty-nine states still elect judges, and as many as eighty-nine percent of all state and local judges must win or retain their seats through elections.[22] In the last two decades, elections have

eight state legislatures appointed their judges while the remaining five were selected by the governor and a specially-appointed council. *Id.* at 3.

16. PHILIP L. DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY 3 (1980).

17. *Id.*; s*ee also* Robert C. Berness, *Norms of Judicial Behavior: Understanding Restrictions on Judicial Candidate Speech in the Age of Attack Politics*, 53 RUTGERS L. REV. 1027, 1029–30 (Summer 2001).

18. DUBOIS, *supra* note 16, at 3.

19. MARVIN COMISKY & PHILIP C. PATTERSON, THE JUDICIARY—SELECTION, COMPENSATION, ETHICS, AND DISCIPLINE 4, 7 (1987).

20. *Id.*

21. *Id.* States implemented several progressive reforms to avoid outside political influence on judicial candidates, including the removal of party labels from the ballot, the elimination of partisan nominating conventions, and the creation of direct primaries. *Id.*

22. *See* American Judicature Society, *Judicial Selection in the States: Appellate and General Jurisdiction Courts* (2007), http://www.ajs.org/selection/docs/Judicial%20Selection %20Charts.pdf; Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077 (2007). These states vary widely between initial appointments, retention elections, and

become "nastier, noisier, and costlier" than ever.[23] Attack ads, influential interest group donations, and unprecedented spending are now commonplace. In other words, judicial elections are politics as usual.[24]

B. The Cases For and Against Speech Restrictions

Historically, states have attempted to protect impartiality by restricting a judicial candidate's speech. The progressive movement to depoliticize judicial elections included an attempt by the American Bar Association to regulate the political activities of judges. In 1924, the ABA drafted and adopted the Canons of Judicial Ethics, and forty-three states subsequently adopted similar versions.[25] The Canons, later named the Model Code of Judicial Conduct, covered a broad spectrum of behavior including prohibitions on making political speeches, promising certain rulings when on the bench, and announcing legal opinions on disputed issues.[26] These states clearly valued due process and impartiality, but the measures taken to reinforce such principles were implemented at the direct expense of free speech and accurate elections. The following discussion will outline the reasons for and against such judicial speech restrictions.

1. The case for restricting judicial election speech

Most of the modern-day arguments for restricting judicial election speech center on protecting procedural due process. As the Framers emphasized, an independent and impartial judiciary is necessary to protect this core doctrine.[27] Speech restrictions temper the effects that judicial accountability could have on the role of a judge and the appearance of impartiality.

contestable elections (both partisan and non-partisan). States further employ different methods for their different courts, not to mention different term limits and methods of appointment (merit-based or independent).

23. Roy A. Schotland, *Judicial Independence and Accountability*, 61 LAW & CONTEMP. PROBS. 149, 150 (1998).

24. *See* David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 269 (2008) ("[J]udicial elections are not going wild; they are going normal.").

25. COMISKY & PATTERSON, *supra* note 19, at 110.

26. *Id.*

27. *See supra* text accompanying notes 11–13; Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 457 (1986) (stating that due process requires independent, impartial judges).

a. The majoritarian difficulty. Unfettered judicial campaign speech runs contrary to the goal of the judiciary to provide a fair and neutral court. There is a "critical difference" between legislators who represent the people and judges who serve no constituency.[28] While voters expect legislators to make certain promises of how they will act in office, judges must not be bound to specific rulings or outcomes before hearing the evidence in a case. Constitutionalism protects individuals' and minorities' rights against majoritarian will, and judges are often the ones called upon to enforce these rights against the majority.[29] "When those charged with checking the majority are themselves answerable to, and thus influenced by, the majority, the question arises how individual and minority protection is secured."[30]

b. Appearance of impartiality. Even if judges can ignore the electoral consequences of their decisions, "the public's confidence in the judiciary could be undermined simply by the possibility that judges would be unable to do so."[31] Parties who bring suit on an issue that is contrary to the judge's expressed views and lose would likely question whether their case was heard by a fair and impartial judge. Overall, the public would view judges as politicians and not neutral arbiters. Conflicting political interests are acceptable for a legislature, but such conflict destroys public confidence that judges decide each case on its merits. This argument is especially poignant for the judiciary, which having neither "purse nor sword," relies to a large degree on the appearance of impartiality for power.[32] "The

28. Republican Party of Minn. v. White, 536 U.S. 765, 798 (2002) (Stevens, J., dissenting).

29. Erwin Chemerinsky, *Evaluating Judicial Candidates*, 61 S. CAL. L. REV. 1985, 1988 (1988) ("The paramount function of courts is to protect social minorities and individual rights. But judges cannot be expected to perform this countermajoritarian function if their ability to keep their prestigious, highly sought after positions depends on popular approval of their rulings.").

30. Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 694 (1995).

31. *White*, 536 U.S. at 789 (O'Connor, J., concurring).

32. THE FEDERALIST NO. 78 (Alexander Hamilton) ("The judiciary on the contrary has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.").

legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."[33]

2. The case for allowing free judicial election speech

Alternatively, critics of judicial campaign speech restrictions argue that elections cannot function when voters are ignorant, and speech restrictions breach judicial candidates' free speech rights. Despite the legal system's unrealistic ideals that judges should be perfectly neutral, judicial candidates have biases; only unrestricted speech allows the electorate to choose the best candidate.

a. Free speech rights and the marketplace of ideas. Political expression, particularly in the context of debate about candidates for public office, "is at the core of our First Amendment freedoms."[34] Judicial candidates have a constitutional right of free speech, and if states choose "to tap the energy and legitimizing power of the democratic process," they must allow the candidates their First Amendment rights.[35] Further, restricting speech places candidates in an impossible situation—risking either appearing impartial, or appearing evasive and losing to a more outspoken opponent.

Voters cannot elect the best judges while "under conditions of state-imposed voter ignorance."[36] States should trust the electorate to sift through judicial candidates' speech and elect the best candidate. Justice Oliver Wendell Holmes wrote that "the best test of the truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution."[37] In an open marketplace, voters are the ultimate judge of which candidate is the most fair and unbiased.

b. Crocodiles in calm waters. Other critics mock the principle of a dispassionate, neutral judge as mere idealism. Judges are human, each with biases and prejudices. Thomas Jefferson's view that a judge

33. Mistretta v. United States, 488 U.S. 361, 407 (1989).

34. Republican Party of Minn. v. Kelly, 247 F.3d 854, 861 (8th Cir. 2001) (rev'd and remanded, 536 U.S. 765); *see also* Buckley v. Valeo, 424 U.S. 1, 39 (1976) (characterizing "political expression" as standing "'at the core of our electoral process and of the First Amendment freedoms'" (quoting Williams v. Rhodes, 393 U.S. 23, 32 (1968))); Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971) ("[T]he constitutional guarantee [of the First Amendment] has its fullest and most urgent application precisely to the conduct of campaigns for political office.").

35. *White*, 536 U.S. at 788.

36. *Id.* (citation omitted).

37. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

should become "a mere machine" in applying the law[38] has long been discredited. States may not "protect the court as a mystical entity" with judges as "anointed priests set apart from the community and spared the criticism to which in a democracy other public servants are exposed."[39]

A judge's preexisting beliefs will inevitably influence his decisions—"discretion is inherent to judging."[40] Forcing judges to hide personal prejudices presents the appearance of calm waters, while in reality the waters are crocodile-infested.[41] Judicial elections should help voters recognize a judge's biases, or "crocodiles," before it is too late.[42] Restricted speech leads to unsuspecting plaintiffs appearing before biased judges who were forced to hide their views. Alternatively, if a judge's prejudices are apparent, plaintiffs can change their litigation strategy or seek judicial recusal.

c. Judges as policymakers. Common law creates policy. State judges are thus policymakers and should be treated like politicians.[43] The Jacksonian Era created judicial elections not to take the politics out of judicial selection, but merely to change the judge's allegiance to the people rather than the legislative or executive branches.[44] Alternatives to popular elections, such as merit-based selection, are far from being politically immune themselves and encourage partisan

38. Letter from Thomas Jefferson to Edmund Pendleton (Aug. 26, 1776), *in* 1 PAPERS OF THOMAS JEFFERSON 503, 505 (Julian P. Boyd et al. eds., 1950).

39. Bridges v. California, 314 U.S. 252, 292 (1941) (Frankfurter, J., dissenting); *see also* Lloyd B. Snyder, *The Constitutionality and Consequences of Restrictions on Campaign Speech by Candidates for Judicial Office*, 35 UCLA L. REV. 207, 235 (1987) ("The rule does nothing to stop the election of prejudiced judges to the bench. On the contrary, the restriction on campaign speech requires judicial candidates to hide their prejudices behind a facade of forced silence.").

40. Erwin Chemerinsky, *Restrictions on the Speech of Judicial Candidates Are Unconstitutional*, 35 IND. L. REV. 735, 736 (2002).

41. Miss. Comm'n on Judicial Performance v. Wilkerson, 2002-JP-02105-SCT (¶ 43) (Miss. 2004) (quoting the Malayan proverb, "Don't think there are no crocodiles because the water is calm").

42. *Id.*

43. Some research even concludes that elected judges behave like politicians, tailoring their decisions in response to the expected reaction of the electorate. *See, e.g.*, Melinda Gann Hall, *Constituent Influence in State Supreme Courts: Conceptual Notes and a Case Study*, 49 J. POL. 1117, 1123 (1987).

44. See Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 217 (1993) ("[S]upporters of the elective system tended to believe that influences of some sort were inevitable, and that the influence of the whole people was preferable to the influence of smaller groups.").

favoritism. States simply prefer popular accountability to judicial independence.

II. *WHITE* AND ITS AFTERMATH

The Supreme Court's *White* decision weighed in on the debate between free speech and impartiality. In the 1990s, federal courts produced over a dozen rulings on judicial campaign speech restrictions and arrived at various conclusions ranging from blanket approvals to the invalidation of specific restrictions.[45] In 2002, the United States Supreme Court displayed this same spectrum of opinion in *Republican Party of Minnesota v. White*, arriving at a 5–4 decision.[46] While the Eighth Circuit had upheld Minnesota's speech restriction because of judicial independence and impartiality, Justice Scalia's majority opinion reversed the Eighth Circuit and upheld free speech.

A. Republic Party of Minnesota v. White

1. The facts: White *and the Minnesota announce clause*

Ever since Minnesota attained statehood in 1858, the state has selected its judges through popular elections.[47] In 1974, the Minnesota Supreme Court adopted several provisions of the 1972 Model Code of Judicial Conduct, including an "announce clause."[48] This clause mandated that a "candidate for a judicial office, including an incumbent judge . . . [shall not] announce his or her views on disputed legal or political issues."[49] Violating the clause warranted disciplinary action, including "removal, censure, civil penalties, and suspension without pay" for incumbent judges[50] and "disbarment, suspension, and probation" for lawyers.[51] The issue in *Republican*

45. *Compare, e.g.*, Stretton v. Disciplinary Bd. of Sup. Ct. of Pa., 944 F.2d 137, 140–43 (3d Cir. 1991) (upholding state's announce clause), *with* ACLU of Fla. v. Fla. Bar, 744 F. Supp. 1094, 1096–98 (N.D. Fla. 1990) (invalidating state's announce clause).

46. Republican Party of Minn. v. White, 536 U.S. 765, 766 (2002).

47. *Id.* at 768. Minnesota began holding non-partisan judicial elections in 1912. *Id.*

48. *Id.*

49. *Id.* (quoting MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2000)).

50. *Id.* (citing MINN. R. BD. ON JUD. STANDARDS 11(d) (2002)).

51. *Id.* (citing MINN. R. LAW. PROF. RESP. 15(a) (2002)).

Party of Minnesota v. White was whether Minnesota's announce clause violated a judicial candidate's right to free speech.[52]

As part of a 1996 campaign, a judicial candidate, Gregory Wersal, openly criticized the Minnesota Supreme Court's decisions regarding "crime, welfare, and abortion."[53] A complaint was filed against him with the Minnesota Lawyers Professional Responsibility Board, claiming Wersal's criticisms violated the state's announce clause. The Board dismissed the complaint and questioned the constitutionality of the clause. Despite this dismissal, Wersal withdrew from the election, fearing further ethical complaints against him.[54] In 1998, Wersal sought an advisory opinion from the Board on whether it would enforce the announce clause if he campaigned again.[55] The Board refused to comment, claiming Wersal did not submit a list of specific announcements he planned to make.[56] Wersal filed suit in federal district court seeking "a declaration that the announce clause violate[d] the First Amendment and an injunction against its enforcement."[57] The district court upheld the announce clause, finding no First Amendment violation.[58] On appeal, the Eighth Circuit affirmed.[59] The Republican Party of Minnesota joined Wersal's cause and appealed to the United States Supreme Court, which heard the case in March 2002.

2. The test: White *applies strict scrutiny to judicial campaign speech*

The Court subjected the announce clause to strict scrutiny after deciding the clause "prohibits a judicial candidate from stating his views on any specific . . . legal question within the province of the court for which he is running."[60] "[S]peech about the qualifications of candidates for public office" is "at the core of our First

52. *Id.*
53. *Id.* at 768–69.
54. *Id.*
55. *Id.* at 769.
56. *Id.*
57. *Id.* at 769–70.
58. Republican Party of Minn. v. Kelly, 63 F. Supp. 2d 967, 986 (D. Minn. 1999).
59. Republican Party of Minn. v. Kelly, 247 F.3d 854, 857 (8th Cir. 2001).
60. *White*, 536 U.S. at 773–75 (2002). The Court went on to reason that the announce clause prohibits this expression "except in the context of discussing past decisions" if in discussing such decisions the candidate "expresses the view that he is not bound by *stare decisis.*" *Id.* at 773.

Amendment freedoms"[61] and thus worthy of the most stringent standard of review reserved for fundamental rights. To apply strict scrutiny, "respondents have the burden to prove that the announce clause is (1) narrowly tailored, to serve (2) a compelling state interest."[62] Many scholars consider the application of strict scrutiny a death sentence for whatever restriction the court is analyzing—scrutiny that is "'strict' in theory and fatal in fact."[63]

3. The holding: White *and impartiality*

White examined whether impartiality is a compelling state interest. The Eighth Circuit held that two interests were "sufficiently compelling to justify the announce clause: preserving the impartiality . . . [and] the appearance of the impartiality of the state judiciary."[64] The first interest "protect[ed] the due process rights of litigants," and the second "preserve[d] public confidence in the judiciary."[65] Justice Scalia reasoned that impartiality can be interpreted as "the lack of bias for or against either *party* to the proceeding" which "assures equal application of the law."[66] Justice Scalia held that this "party neutrality" definition of impartiality is a compelling state interest and essential to due process.[67] Even so, Scalia strongly rejected the definition of an impartial judge as one who remains neutral to the *issues* involved in a case. All judges hold strong opinions about legal issues because of their years practicing law, experience that should qualify the judge for service, not discredit him.[68] The state has no compelling interest in preserving issue

61. *Id.* at 774 (quoting *Kelly*, 247 F.3d at 861, 863).

62. *Id.* at 774–75.

63. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). *Contra* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 795 (2006) ("[S]trict scrutiny is far from the inevitably deadly test imagined by the Gunther myth.").

64. *White*, 536 U.S. at 775 (citing *Kelly*, 247 F.3d at 867).

65. *Id.*

66. *Id.* at 775–76. Justice Scalia also considered impartiality as open-mindedness, or a "willing[ness] to consider views that oppose [the judge's] preconceptions." *Id.* at 778. But he spent little time analyzing this definition, stating that "we do not believe the Minnesota Supreme Court adopted the announce clause for that purpose." *Id.*

67. *Id.* at 765–66, 776–78.

68. *Id.* at 777–78 ("The Minnesota Constitution positively forbids the selection to courts of general jurisdiction of judges who are impartial in the sense of having no views on the law.").

neutrality which "has never been thought a necessary component of equal justice."[69]

The majority opinion further held that despite "party neutrality" being a compelling state interest, Minnesota's announce clause was not narrowly tailored to meet that interest.[70] To be narrowly tailored, a prohibition must not "unnecessarily circumscrib[e] protected expression."[71] The announce clause first failed this definition by focusing on issue neutrality rather than party neutrality.[72] "[T]he clause . . . [did] not restrict speech for or against particular *parties*, but rather speech for or against particular *issues*."[73] As a result, parties arguing such issues, regardless of who they were, would be likely to lose.[74] Second, the announce clause only limited a candidate's campaign speech, an "infinitesimal" portion of the judge's statements that would create pressure to rule in a certain way.[75] By limiting such a small portion of a judge's speech, the announce clause was a "woefully underinclusive" means of serving impartiality.[76] In sum, according to the majority, the benefit that voters achieve by being informed of the qualifications of the candidates outweighs any concern over judicial impartiality.[77]

4. Noteworthy concurrences

While agreeing with the Court's majority opinion, Justices O'Connor and Kennedy each touched on different themes in their concurrences. Both concurrences stated that judicial independence and the appearance of impartiality are vitally important to the

69. *Id.* at 777 ("[I]t is virtually impossible to find a judge who does not have preconceptions about the law."). Note how Justice Scalia's opinion recognizes key arguments for and against speech restrictions—the need for judicial independence and the myth of perfectly neutral judges. *See supra* Parts I.B.1 and I.B.2.b.

70. *White*, 536 U.S. at 776.

71. *Id.* at 775 (quoting Brown v. Hartlage, 456 U.S. 45, 54 (1982)).

72. *See id.*

73. *Id.* at 776.

74. *Id.*

75. *Id.* at 778–79. A judicial candidate may announce his views "up until the very day before he declares himself a candidate, and may say it repeatedly (until litigation is pending) after he is elected. As a means of pursuing the objective of openmindedness that respondents now articulate, the announce clause is so woefully underinclusive as to render belief in that purpose a challenge to the credulous." *Id.* at 779–80.

76. *Id.* at 780.

77. *See id.* at 781–82 ("We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election.").

judiciary.[78] The Justices also agreed that the goals of the announce clause deserve attention, but should be achieved in a more compelling and narrowly tailored manner.

Justice O'Connor particularly emphasized how "judicial elections generally" are a threat to judicial independence.[79] "[E]ven aside from what judicial candidates may say while campaigning, the very practice of electing judges undermines [an actual and perceived impartial judiciary]."[80] She saw electoral pressure and campaign fundraising as of particular concern.[81] For her, other forms of judicial selection, such as the appointment process or merit selection, did not restrict speech yet still encouraged an impartial judiciary.[82] Despite these alternatives, she concluded that Minnesota chose to elect its judges and "has voluntarily taken on the risks to judicial bias."[83]

Justice Kennedy first emphasized that unless one of the traditional exceptions applies, "direct restrictions on the content of candidate speech are simply beyond the power of government to impose."[84] He then implicitly endorsed a marketplace of ideas theory for why restrictions should not be practiced: "[D]emocracy and free speech are their own correctives."[85] The marketplace works because the legal and political communities "and all interested citizens can use their own First Amendment freedoms to protest statements inconsistent with standards of judicial neutrality and judicial excellence."[86] Of particular interest to this Comment, Justice Kennedy also included adoption of "recusal standards more rigorous than due process requires" as a potential solution to combating the ills of judicial elections.[87]

78. *See id.* at 788 (O'Connor, J., concurring) ("We of course want judges to be impartial, in the sense of being free from any personal stake in the outcome of the cases to which they are assigned."); *id.* at 793 (Kennedy, J., concurring) ("Nothing in the Court's opinion should be read to cast doubt on the vital importance of [maintaining the integrity of its judiciary].").

79. *Id.* at 788 (O'Connor, J., concurring).

80. *Id.*

81. *Id.* at 789–90.

82. *See id.* at 791–92 .

83. *Id.* at 792 .

84. *Id.* at 793 (Kennedy, J., concurring). Examples of traditionally defined exceptions include obscene speech and speech that directly incites violence. *Id.*

85. *Id.*

86. *Id.* at 795.

87. *Id.* at 794; *see infra* Part III.

B. White *as a Watershed*

The *White* decision alone hardly seems remarkable—it affected only one largely outdated restriction, which twenty-five states had already repealed.[88] If lower courts were to hold *White* to its explicit holding, only nine states would have needed to invalidate their announce clauses and judicial elections would not be significantly changed.[89] Further, Justice Scalia explicitly stated that judicial elections do not need to look exactly like legislative elections.[90] However, lower courts have justified striking down or weakening numerous judicial speech regulations through a liberal reading of *White*. But viewing *White* as the beacon of a new era of free speech in judicial elections poses grave threats to judicial independence.

1. Lower courts' expansion of White

Perhaps taking cues from the fate of other restrictions subject to strict scrutiny,[91] lower federal courts have consistently expanded the reasoning of *White* to invalidate other judicial speech restrictions. The *White* case was remanded to the Eighth Circuit where the court struck down two provisions that had not been analyzed by the Supreme Court.[92] Similarly, the Eleventh Circuit invalidated, based on *White*'s reasoning, several sections of the Georgia Code of

88. *See* Schotland, *supra* note 22, at 1095 n.77 ("[The announce clause] was law in only nine states, with about twenty-five others having repealed it after 1990 when the ABA deleted it from the Model Code precisely because of concern about its constitutionality.").

89. *See id.* Justice Scalia's opinion was explicitly limited to a state's announce clause. Other restrictions, such as the Minnesota pledge or promise clause, were not being challenged in the decision, a fact that helped define the parameters of the announce clause. In fact, Justice Scalia determined the extent of the announce clause in part by reasoning that because Minnesota also had a pledge or promise clause, the announce clause "extends to the candidate's mere statement of his current position, even if he does not bind himself to maintain that position after election." *White*, 536 U.S. at 770.

90. *White*, 536 U.S. at 783 ("[W]e neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office.").

91. *See supra* note 63 and accompanying text.

92. Republican Party of Minn. v. White, 416 F.3d 738 (8th Cir. 2005). The court struck down Minnesota's partisan activities clause (which created nonpartisan elections by prohibiting judges from identifying themselves as members of a political party, seeking political endorsements, or attending political gatherings) and solicitation clause (which prohibited candidates from personally soliciting or accepting campaign contributions). *Id.* at 745, 766. The court held that "a party label is nothing more than shorthand for the views a judicial candidate holds." *Id.* at 754. Also, the solicitation clause "completely chill[s]" a candidate's speech to potential contributors and supporters while hardly advancing judicial impartiality at all. *Id.* at 763 (quoting Weaver v. Bonner, 309 F.3d 1312, 1322 (11th Cir. 2002)).

Judicial Conduct[93] including a provision which was never challenged by the plaintiff and was not the issue being argued at trial or on appeal.[94] Additionally, federal courts in Alaska,[95] Kansas,[96] Kentucky,[97] and North Dakota[98] have also struck down state judicial speech restrictions.

In 2007, the Fifth Circuit wrote perhaps the broadest interpretation of *White* thus far by applying the analysis to a judge's speech while not campaigning. A Texas state judge held a televised news conference in his courtroom where, while wearing his robe, he both improperly read a prepared statement displaying his personal feelings regarding an unresolved case and openly criticized the conduct of a participating attorney and his client.[99] Such conduct was in violation of the Texas Code of Judicial Conduct which states that a "judge shall not lend the prestige of judicial office to advance the private interests of the judge or others."[100] Although the judge was not involved in any campaign at the time, the Fifth Circuit applied *White* to the judge's speech. Nonetheless, the press conference was interpreted as an "elected official's speech to his constituency," and consequently, any restriction on the speech

93. *Weaver*, 309 F.3d at 1325. The court struck down Georgia's false and misleading speech clause which stated that a judicial candidate "shall not use or participate in the use of any form of public communication which the candidate knows or reasonably should know is false, fraudulent, misleading, [or] deceptive." GA. CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(d). The court held that the provision was not narrowly tailored to serve a compelling interest because "it prohibits far more speech than necessary to serve Georgia's compelling interests." *Weaver*, 309 F.3d at 1319, 1321. There must be "breathing space" for "false statements negligently made and true statements that are misleading or deceptive." *Id.* at 1319 (citing Brown v. Hartlage, 456 U.S. 45, 61 (1982)).

94. Roy Schotland, *Impacts of* White, 55 DRAKE L. REV. 625, 626 (2007).

95. Alaska Right to Life Political Action Comm. v. Feldman, 380 F. Supp. 2d 1080, 1083 (D. Alaska 2005). On appeal, the 9th Circuit held that the district court should have declined jurisdiction because it was a "preenforcement challenge" with no "concrete factual scenario" to analyze. Alaska Right to Life Political Action Comm. v. Feldman, 504 F.3d 840, 849 (9th Cir. 2007).

96. Kan. Judicial Watch v. Stout, 440 F. Supp. 2d 1209, 1240 (D. Kan. 2006). On appeal, the 10th Circuit reserved judgment until the Kansas Supreme Court answered "important and unsettled questions" regarding the canons. Kan. Judicial Review v. Stout, 519 F.3d 1107, 1111 (10th Cir. 2008).

97. Family Trust Found. of Ky., Inc. v. Wolnitzek, 345 F. Supp. 2d 672, 711–12 (E.D. Ky. 2004).

98. N.D. Family Alliance, Inc. v. Bader, 361 F. Supp. 2d 1021, 1044–45 (D.N.D. 2005).

99. Jenevein v. Willing, 493 F.3d 551, 556 (5th Cir. 2007).

100. TEX. CODE OF JUDICIAL CONDUCT Canon 2B (2006).

would need to meet the strict scrutiny requirements of *White*.[101] Based on this reasoning, "it would appear that elected judges are always campaigning," and that it is "unlikely that sitting judges could ever be subjected to speech restrictions of any sort."[102]

2. States voluntarily over-amend codes

Court challenges are not the only threat to speech restrictions; states have also "reformed" their canons to conform with *White*'s reasoning.[103] Most drastically, North Carolina eliminated nearly all restrictions on judicial free speech. The canon, which once read, "A judge should refrain from political activity inappropriate to his judicial office," now reads, "A judge may engage in political activity consistent with his status as a public official."[104] Judicial elections in North Carolina now have few, if any, limits on judicial candidate speech. While nowhere as extreme as North Carolina, Georgia also amended its canons, dropping the pledge or promise clause.[105] "More states are likely to consider changes, some in a good-faith effort to comply with *White*, others in a cynical attempt to exploit *White* by pushing through unnecessarily broad revisions."[106]

3. Unsolved problems

Based on these trends, it appears that the future of judicial speech restrictions is in jeopardy, if not "overwhelmingly doomed to failure."[107] Courts and states appear to think that if *White* found announce clauses unconstitutional, other state restrictions on judicial campaign speech—anything from fraudulent or misleading speech to solicitation of campaign contributions—must be unconstitutional as well.[108] Most likely, states will continue to deregulate judicial

101. *Jenevein*, 493 F.3d at 558.

102. Steven Lubet, *Judicial Campaign Speech and the Third Law of Motion*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 425, 432–33 (2008).

103. *See* J.J. Gass, *After* White*: Defending and Amending Canons of Judicial Ethics*, *in* JUDICIAL INDEPENDENCE SERIES 4 (2004), *available at* http://brennan.3cdn.net/0b74af850b81d92928_bvm6y5sdf.pdf.

104. *Id.* (citing N.C. CODE OF JUDICIAL CONDUCT Canon 7 (2003)).

105. *Id.*

106. *Id.*

107. Nat Stern, *The Looming Collapse of Restrictions on Judicial Campaign Speech*, 38 SETON HALL L. REV. 63, 65 (2008).

108. *See supra* notes 92–93.

campaign speech and courts will persist on invalidation of speech restrictions.[109] This places states in the same quandary faced by nineteenth-century progressives: how can a state protect the impartiality of the judicial branch in the face of zero-sum judicial elections?

To compound the problem, several trends threaten the judiciary now more than ever. Political parties and special interests are investing more money and resources into judicial elections.[110] With weakened judicial codes of conduct, interest groups are seeking pre-election commitments from judicial candidates. Additionally, both the general public and judges themselves are increasingly criticizing the judiciary, whether elected or appointed.[111] In total, these acts are creating a significant threat to judicial independence and the appearance of impartiality right at the time when states are most unsure of how to combat the problem. Without confidence in the constitutionality of speech restrictions, state supreme courts and judicial ethics committees throughout the country are uncertain how to limit the negative effects of judicial elections while still holding judges accountable to the electorate.

III. RECUSAL REFORM AS THE SOLUTION

A solution to the problem of zero-sum judicial elections lies dormant in each state's judicial rules. States need not overhaul their codes of judicial conduct or wait for the courts to decide the constitutionality of every speech restriction. Three reforms to states' recusal standards would give states the ability to protect impartiality and due process in an efficient, constitutional manner. By adopting a new model recusal provision, assigning recusal motions to other judges, and lessening the financial burden of litigants, states can stop

109. Developments in the Law, *Voting and Democracy*, 119 HARV. L. REV. 1127, 1143 (2006).

110. Sandra Day O'Connor, *Justice for Sale*, WALL ST. J., Nov. 15, 2007, at A25. For example, four candidates for the Pennsylvania Supreme Court raised over $5.4 million in 2007. In total, fourteen states have broken fundraising records since 2004. *Id.*

111. Sandra Day O'Connor, *The Threat to Judicial Independence*, WALL ST. J., Sept. 27, 2006, at A25 ("Directing anger toward judges enjoys a long—if not exactly venerable—tradition in our nation. . . . But while scorn for certain judges is not an altogether new phenomenon, the breadth and intensity of rage currently being leveled at the judiciary may be unmatched in American history."). O'Connor also notes that "[t]roublingly, attacks on the judiciary are now being launched by judges themselves." *Id.*

the threat that judicial elections pose to the judiciary's impartiality without restricting judicial speech.

A. Why Recusal Standards Currently Do Not Work

Recusal is the removal of a judge from presiding over a particular case because of a conflict of interest.[112] A tool "as old as the history of courts,"[113] recusal standards have been gradually expanded by states since adoption from British common law.[114] Recusal provisions vary from state to state and are a mix of constitutional, statutory, and judicially created standards. Forty-seven states base their provisions on the American Bar Association's Model Code of Judicial Conduct which generally states that a judge "shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned."[115] In addition to this general reasonableness standard, the Model Code urges states to adopt a specific provision for recusal based on previous speech—recusal is mandated when a judge or judicial candidate has made a public statement that commits or appears to commit the judge to a particular result.[116] Yet only eleven

112. BLACK'S LAW DICTIONARY 1025 (7th ed. 1999). While there is a technical difference between "recusal" and "disqualification," the two terms are used interchangeably in this Comment, the difference between the two being of little practical significance.

113. RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION § 1.2 (2d ed. 2007).

114. *Id.* Under the common law, a judge was not required to recuse himself for judicial bias; only when the judge had a pecuniary interest in the case was recusal mandated. According to Sir William 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." Aetna Life Ins. v. Lavoie, 475 U.S. 813, 820 (1986) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *361). In 1792, the United States Congress similarly required federal district judges to recuse themselves when they had an interest in the suit. Congress expanded this standard in 1821 to require recusal when the judge had any "judicial relationship or connection with a party that would in the judge's opinion make it improper to sit." Liteky v. United States, 510 U.S. 540, 544 (1994). Finally, in 1911 federal district judges were required by law to recuse themselves for having a general bias toward the case. "[V]irtually every commentator who has critically analyzed the subject of judicial qualification has applauded its expansion." FLAMM, *supra* note 113, § 1.4; *see also* John Leubsdorf, *Theories of Judging and Judicial Disqualification*, 62 N.Y.U. L. REV. 237, 248 (1987) (explaining the approval of expansion as "a shift in society's view of judicial psychology, and of psychology in general, from the Eighteenth Century's economic man, susceptible only to the tug of financial interest, to today's Freudian person, awash in a sea of conscious and unconscious motives").

115. MODEL CODE OF JUDICIAL CONDUCT Canon 2, R. 2.11 (2007).

116. *Id.*

states include this "public statement" provision in their codes of judicial conduct.[117]

Recusal may occur in two ways. First, the judge may decide *sua sponte* to withdraw from a case because of a disqualifying condition.[118] Alternatively, parties may file a motion to disqualify the judge, based on either the judge's own disclosure or the parties' independent knowledge.[119] In most states, the judge hearing the case will decide the motion requesting recusal. Thus, in both methods the system depends heavily on self-recusal by the judge.

This structural emphasis on judicial self-recusal creates a major weakness in existing recusal standards—litigants fear judicial retribution. Parties may be deterred from asking for a recusal because of fear that the request would anger or challenge the honor of the judge hearing the case.[120] If a judge believes that his honor is being challenged, he is more likely to defensively deny the motion. "Judges' natural reactions are to reject having any partiality or prejudice."[121] Additionally, the Model Code's "reasonableness" language that most states have adopted is vaguely defined and unpredictable in practice. Under the Model Code language, if a party requests recusal in a manner that suggests that the judge's "impartiality might reasonably be questioned,"[122] the judge may

117. Thomas R. Phillips & Karlene Dunn Poll, *Free Speech for Judges and Fair Appeals for Litigants: Judicial Recusal in a Post-*White *World*, 55 DRAKE L. REV. 691, 712 (2007). Arizona, Florida, Iowa, Maryland, Minnesota, Nevada, New Hampshire, New Mexico, Oklahoma, South Dakota, and Wisconsin have adopted the public statement provision. *Id.*

118. *See, e.g.*, MODEL CODE OF JUDICIAL CONDUCT Canon 2, R. 2.11 (2007) ("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned.").

119. *See* FLAMM, *supra* note 113, § 19.9.

120. *See* R. Matthew Pearson, Note, *Duck Duck Recuse? Foreign Common Law Guidance & Improving Recusal of Supreme Court Justices*, 62 WASH. & LEE L. REV. 1799, 1833–34 (2005) ("[A]sking a challenged Justice to rule on a motion to recuse puts that Justice in a precarious position. . . . [B]ecause a Justice is expected to recuse himself *sua sponte* if there is a reasonable apprehension of bias, a successful motion to recuse requires the Justice to admit that he failed in the first instance to adhere to statutory and ethical requirements.").

121. Tobin A. Sparling, *Keeping Up Appearances: The Constitutionality of the Model Code of Judicial Conduct's Prohibition of Extrajudicial Speech Creating the Appearance of Bias*, 19 GEO. J. LEGAL ETHICS 441, 480 (2006) ("At worst, some judges may be angered and deny the motion in retribution. Other judges may convince themselves they can rule fairly, unaware that the currents of bias often run deep. Either reaction leaves unprotected the due process rights of the targets of bias.").

122. MODEL CODE OF JUDICIAL CONDUCT Canon 3, R. 3E(1) (1990); s*ee also, e.g.*, United States v. Cherry, 330 F.3d 658, 665 (4th Cir. 2003) (noting that the relevant inquiry is whether a reasonable person would have a reasonable basis for questioning the judge's

deny the motion merely by justifying that such accusations are unreasonable. Given the cost and time of litigation, litigants are discouraged from spending more money to file a motion and delay a potential trial without a predictable result.[123]

A general lack of transparency regarding recusal rulings only worsens the problem. Recusal is typically a parties-only decision closed to the public. Judges frequently take themselves off of cases, but few take the time to issue an opinion regarding that decision.[124] Alternatively, judges who decline a recusal motion often write extensive opinions explaining their action. Consequently, rather than "accurately portraying the full spectrum of judicial disqualification decisions," available opinions instead "reflect 'an accumulating mound' of reasons for denying disqualification" without providing case law to support such action.[125] Judges thus can find a panoply of reasons for denying a recusal motion.[126]

Additionally, appealing the denial of a recusal motion is often a fruitless effort regardless of the merits of the case. Appellate judges dislike investigating and ruling on the integrity of fellow judges and do not look favorably upon litigants who question the integrity of the court.[127] Appellate courts face overloaded dockets and may take a

impartiality, not whether the judge is in fact impartial); United States v. Antar, 53 F.3d 568, 576 (3d Cir. 1995) ("[I]n determining whether a judge had the duty to disqualify . . . our focus must be on the reaction of the reasonable observer.").

123. For a real-life account of an attorney deliberating the pros and cons of filing a recusal motion, see generally Christian C. Mester, *Rescue in Recusal*, TRIAL TECHNIQUES, Oct. 2007, at 39.

124. James Sample, David Pozen & Michael Young, *Fair Courts: Setting Recusal Standards* (2008), at 32, *available at* http://www.brennancenter.org/content/resource/fair_courts_setting_recusal_standards/ (last visited Mar. 5, 2009) ("The failure of many judges to explain their recusal decisions, and the lack of a policy forcing them do so, offends not only a basic tenet of legal process, but also a basic tenet of liberal democracy—that officials must give public reasons for their actions in order for those actions to be legitimate.").

125. FLAMM, *supra* note 113, § 1.5 (citations omitted).

126. While not discussed in this Comment, states have experimented with two solutions to solve this transparency issue, both of which fall far short of success. First, Alaska created a database that tracks the number of recusals for each judge and is available to all parties. But the database does not include the reasons for recusal, and parties must examine the individual case files for the reasons, if they were ever recorded in such files in the first place. *See* Sample, Pozen & Young, *supra* note 124, at 32. Second, California requires that parties receive a copy of any written answer a judge files regarding disqualification. But still no requirement exists requiring judges to explain the reasons for their decision in such a filing. *See id.* at 33.

127. Liljeberg v. Health Servs. Acq'n Corp., 486 U.S. 847, 864–65, 865 n.12 (1988) (exemplifying the typical attitude of appellate judges regarding recusal motion appeals by

conservative approach to recusal appeals to save time and resources.[128] In reviewing the motion, judges act on a strong presumption that the judge is impartial,[129] and courts generally hold that only the most outrageous behavior will justify overturning a recusal denial.[130] Consequently, because there is little recourse available if a party loses the initial recusal motion, there is even less incentive to file the motion.

B. Realistically Reforming State Recusal Standards

Strengthening each state's recusal standards will solve the problem of zero-sum judicial elections. The inherent weaknesses of existing recusal standards hinder their true purpose—to maintain the actuality and appearance of judicial impartiality. Despite Justice Kennedy's implicit endorsement of heightened recusal standards as a less restrictive alternative to speech restrictions,[131] states have "systemically underused and underenforced" recusal provisions to alleviate the problems caused by judicial elections.[132] This Comment offers three reforms that will greatly enhance the effectiveness of any state's recusal standard and will provide a valid alternative to speech restrictions as a means of strengthening judicial impartiality.

1. Promptly adopt the ABA's "public statement" provision

States should promptly adopt the Model Code's "public statement" provision. The 2007 Model Code of Judicial Conduct specifically calls for recusal based on certain instances of judicial speech. The clause states:

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stating that "people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges").

128. John D. Feerick, *Disqualification of Judges (The Sarokin Matter): Is it a Threat to Judicial Independence?*, 58 BROOK. L. REV. 1063, 1069 (1993) ("Conservatism in recusal is particularly required today when federal dockets are overloaded with cases brought under an ever growing federal criminal code.").

129. Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned*," 14 GEO. J. LEGAL ETHICS 55, 70 (2000) (citations and quotations omitted). A typical view of the presumptuous appellate judge is that "a judge would not undertake to preside over a case where his or her impartiality might reasonably be questioned." *Id.*

130. Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059, 1079–81 (1996).

131. *See supra* note 87 and accompanying text.

132. Sample, Pozen & Young, *supra* note 124, at 20.

> A judge shall disqualify himself or herself . . . [when] the judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.[133]

The authors of the provision designed this section "to make the disqualification ramifications of prohibited speech violations explicit."[134]

Adopting the public statement provision addresses two of the weaknesses inherent in current recusal standards by making the analysis of such motions more predictable. First, by creating explicit consequences for judicial speech, the analysis for such motions will focus more on the actual speech that caused the appearance of impartiality and less on the judge's reasonableness or character. Litigants can then more accurately predict how a judge would rule on a recusal motion by examining the efficacy of the public statement the judge made, rather than forecasting whether the judge would agree with a capricious reasonableness argument. A more definite standard creates less reliance on self-recusal. Second, appellate judges find recusal motion appeals less complicated when provided with a substantive definition. With a more precise standard in hand, appellate judges will find the appeal of their colleagues' decisions less repugnant. Explicit standards create a less confrontational situation when overturning a decision.

Critics argue that such a provision would chill speech just as much as actual speech restrictions do.[135] If, due to mandatory recusals, judges are unable to hear the very cases they feel most passionately about, they will be discouraged from declaring such issues in the election. This argument exemplifies the collision that occurs between free speech and judicial impartiality—there cannot be two winners in zero-sum judicial elections. The strength in using recusal reform is not that it solves this tension, but that it allows

133. MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(5) (2007).

134. Matthew D. Besser, *May I Be Recused? The Tension Between Judicial Campaign Speech and Recusal After* Republican Party of Minnesota v. White, 64 OHIO ST. L.J. 1197, 1216 n.115 (2003).

135. *See* Dimino, *supra* note 11, at 331 n.208 ("Though recusal appears superficially to eliminate bias, its effect is to abridge the same free speech rights that are abridged through a speech ban. If judges may discuss cases and voters contribute funds and resources only if the judge they support will be disqualified from hearing cases on the relevant subjects, there is actually a disincentive to speak."); *see also id.* at 343 n.267.

states to choose judicial impartiality over free speech in a *constitutional* manner—a solution that speech restrictions currently fail to accomplish. States can then decide for themselves with which side of the sum-zero debate they wish to align. Additionally, the public statement provision is a practical reform that still allows candidates to give signals of judicial philosophy without declaring specific positions. In short, the public statement provision discourages exactly the speech worth discouraging.

a. The constitutionality of strengthened recusal standards. Recusal standards that include the public statement provision survive constitutional scrutiny.[136] Unlike speech restrictions, recusal policies only incidentally burden campaign speech. While the public statement provision refers to the type of speech that triggers recusal, the provision does not directly limit speech—judges are free to say whatever they please. Government action which does not facially regulate protected speech is subject to a different standard than are restrictions which *directly* burden speech.[137] The standard for such "incidental burdens" is similar to intermediate scrutiny, in part because otherwise nearly every government action would burden some fundamental right.[138] Strict scrutiny does not apply. Rather, these incidental burdens on speech must meet the Supreme Court's *O'Brien* test: (1) the regulation must be "within the constitutional power of the Government"; (2) it must further "an important or substantial governmental interest"; (3) such an interest must be "unrelated to the suppression of free expression"; and (4) "the incidental restriction on alleged First Amendment freedoms [must be] no greater than is essential to the furtherance of that interest."[139]

136. See the following for examples of recusal standards that survived strict scrutiny: Kan. Judicial Watch v. Stout, 440 F. Supp. 2d 1209, 1234 (D. Kan. 2006) ("[The] recusal Canon is narrowly tailored to serve the compelling state interest of judicial impartiality and the appearance of impartiality."); Alaska Right to Life Political Action Comm. v. Feldman, 380 F. Supp. 2d 1080, 1083 (D. Alaska 2005), *vacated in part*, 504 F.3d 840 (9th Cir. 2007); N.D. Family Alliance, Inc. v. Bader, 361 F. Supp. 2d 1021, 1044 (D.N.D. 2005) ("The recusal provisions in Canon 3E(1) serve the state's interest in impartiality and the canon is narrowly drafted to achieve that interest.").

137. United States v. O'Brien, 391 U.S. 367, 376–78 (1968).

138. Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1178 (1996) ("The doctrinal distinction between direct and incidental burdens rests partly on a floodgates concern. Nearly every law will, in some circumstances, impose an incidental burden on *some right*.").

139. *O'Brien*, 391 U.S. at 377.

The first prong of the *O'Brien* test is easily met: states clearly hold the constitutional power to create their own recusal standards. While litigants do not possess a formal right to disqualify a judge, the Due Process Clause gives litigants the right to an impartial trial—litigants thus have an implied right to disqualify an impartial judge.[140] But recusal motions based on due process grounds are rare, in part because federal and state legislatures are free to impose their own recusal standards.[141] In fact, states are free to impose recusal standards that exceed those mandated by the Due Process Clause,[142] and most states have chosen to do so.[143]

Likewise, recusal standards easily pass the third prong of the *O'Brien* test which requires that the challenged regulation be content-neutral. Because incidental burdens are inherently content-neutral and thus by definition do not facially restrict speech, recusal provisions pass the third prong.[144] "[W]hether a statute is content neutral or content based is something that can be determined on the face of it . . . ."[145] Recusal provisions do not facially restrict speech and thus pass the third prong.

The other two prongs can be "distilled" into a test similar to intermediate scrutiny: the regulation must be narrowly tailored to further a substantial government interest.[146] This version of "narrow tailoring" is considerably less demanding than its strict scrutiny counterpart. Rather than the "least restrictive means" to achieving that interest, the narrow tailoring of *O'Brien* simply requires that no alternative "serv[e] the state's interest as efficiently as it is served by

140. *See, e.g.*, Tumey v. Ohio, 273 U.S. 510, 523 (1972); Berger v. United States, 255 U.S. 22, 35–36 (1921).

141. FLAMM, *supra* note 113, § 2.5.2.

142. Republican Party of Minn. v. White, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring) (mentioning that states have the ability to "adopt recusal standards more rigorous than due process requires, and censure judges who violate [those] standards").

143. FLAMM, *supra* note 112, § 2.5.2.

144. Dorf, *supra* note 138, at 1202 ("Prong three merely restates the proposition that the challenged regulation must be content-neutral—which is a precondition for the application of the test in the first instance.").

145. City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 448 (2002) (Kennedy, J., concurring).

146. Dorf, *supra* note 138, at 1202–03.

the regulation under attack."[147] "This approach amounts to no more than a prohibition on gratuitous inhibition of expression."[148]

The Model Code's public statement provision meets this test. The public statement provision, and recusal standards in general, further a substantial governmental interest—judicial impartiality through party neutrality. Recusal provisions "guarantee to litigants that the judge will apply the law to them in the same way" as anyone else[149]—classic party neutrality. Recusal does not occur until an actual issue is before a judge. This limits the effect of the provision to specific parties in specific hearings and avoids the issue-neutrality that Justice Scalia so forcefully rejected.[150] Party neutrality comprises the foundation of judicial impartiality, and the public statement provision ensures that judges who commit, or appear to commit, to a particular result before hearing the case will not preside over such cases. Likewise, the public statement provision meets the narrow tailoring requirement. A judge may speak out during elections, and whatever speech is not attached to an eventual case is not unnecessarily hindered.[151]

b. The practicality of strengthened recusal standards. On a practical note, adopting the public statement provision provides the proper policy balance between free speech and due process. First, if a judge feels so strongly about an issue that she declares her views openly and clamors for the opportunity to sit on such a case, the impartiality of the judge is put in question regarding that issue and for appearance's sake the judge should not hear the case. Judges have a First Amendment right to speak their views freely, not a right to preside over whichever cases they desire.

147. *Id.* (emphasis omitted) (quoting John H. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1484–85 (1975)); *see also id.* at 1202–03 n.113; Ward v. Rock Against Racism, 491 U.S. 781, 797–98 (1989).

148. Dorf, *supra* note 138, at 1203 (citation and quotation omitted).

149. Kan. Judicial Watch v. Stout, 440 F. Supp. 2d 1209, 1234 (D. Kan. 2006).

150. Republican Party of Minn. v. White, 536 U.S. 765, 775–76 (2002).

151. Conversely, the public statement provision is also sufficiently broad to cover a substantial amount of the causes of electoral pressure. The *White* majority found that Minnesota's announce clause failed the narrowly tailored test in part by being limited only to a candidate's campaign speech, such an "infinitesimal" portion of the judge's statements that could create pressure to rule in a certain way. *See supra* note 70 and accompanying text. By not limiting the effects of recusal to campaign speech, but rather applying to any "public statement" made while a judge or judicial candidate, the public statement provision avoids this pitfall as well.

The public statement provision, while discouraging such outright policy declarations, does not hinder broad statements detailing judicial philosophy. For example, judges may still describe themselves as conservatives, liberals, strict constructionists, or believers in the living Constitution without any fear of disqualification from future cases. General declarations would be invaluable to inform the electorate without requiring promises of future rulings.

Furthermore, adopting the public statement provision caters to the "overwhelming majority" of judges who do not want to announce their legal views.[152] These candidates would be given a valid rationale for maintaining their appearance of impartiality without appearing evasive of the issues.

2. Assign recusal motions to other judges

The public statement provision alone will not purge the courts of all the weaknesses inherent to existing recusal standards. If states adopted the public statement provision but made no other changes, the judge whose recusal the litigants seek would still make the final decision regarding the motion, and litigants would continue to fear judicial retribution after denied recusal motions. Furthermore, judges would still bristle at the accusation that their campaign speech was in some way improper, even if a more defined recusal provision existed. This is especially true when the issues at bar involve topics that judges feel passionately enough about to include in their campaign speech.[153]

States could solve this problem by following the example of a handful of states and arranging for other judges to hear recusal motions.[154] Under this scenario, a litigant would file a motion with

152. Professor Roy Schotland explains:

> [A strengthened recusal standard] supports the overwhelming majority of candidates who want to campaign judiciously—they will be able to say "I know what you would like me to say, but if I go into that then I will be unable to sit in just the cases you care about most."

Schotland, *supra* note 22, at 1102. The judge can send signals to the electorate and not thwart the purpose of judicial elections, while still maintaining the appearance of impartiality.

153. *See* Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 COLUM. L. REV. 563, 615 (2004) ("[T]hose might be precisely the issues they care about most.").

154. *See, e.g.*, CAL. CIV. PROC. CODE § 170.3(c) (2005); TEX. R. CIV. PROC. 18a(c) (2007).

the judge of whom disqualification is requested. Rather than deciding the motion herself, the motion would be sent to another judge to decide on the merits. This simple procedure would both lessen litigants' fears of judicial retribution and improve the fairness of rulings by relying less on self-recusal. Furthermore, the natural reaction to reject any accusation of partiality in oneself does not exist when another judge is viewing the matter. While what one may call a "black wall of silence" might still exist, this surely would be a less partial method than judges hearing their own recusal motions. At the very least, the appearance of impartiality would improve and public opinion would increase.

The most obvious critique of this reform is the significant costs to the courts that "arise from the shuffling of such cases between judges and from the effort required" to rule on such motions.[155] While such shuffling could be an administrative challenge, the alternative of holding a litigant's right to an impartial tribunal "hostage to the 'efficiency' of allowing biased judges to decide cases" would break the law's promise of neutrality.[156] Although cost is a legitimate concern of the judiciary, the public statement provision would not make the standard for recusal so low that every party would be seeking to have their judge recused. Because litigants would still face a sizable burden in winning such a motion, recusal motions would not likely be used frivolously.[157] The appearance of impartiality and increase in public trust is worth the cost that the reform might entail.[158]

3. Lessen the financial burden of filing motions

While adopting the public statement provision and assigning recusal motions to other judges would alleviate fears of retribution

155. Shepard, *supra* note 130, at 1081; *see also* Pearson, *supra* note 120, at 1833 ("The single-judge procedure . . . enhances judicial efficiency . . . .").

156. Donald L. Burnett, Jr., *A Cancer on the Republic: The Assault upon Impartiality of State Courts and the Challenge to Judicial Selection*, 34 FORDHAM URB. L.J. 265, 289 (2007).

157. In fact, having a predictable, defined standard could even lower the number of parties that seek recusal—expensive "fishing expeditions" are less likely when a party knows its chances of success.

158. Other critics claim that the original judge has the "best knowledge of the facts." Pearson, *supra* note 120, at 1833. Yet, while the challenged judge may be the most familiar with the facts, "the very biases or conflicts of interest that prompted the challenge in the first place may prevent her from fairly evaluating the import of those facts." Sample, Pozen & Young, *supra* note 124, at 32.

and predictability problems, litigants would still be left with one glaring obstacle—the immense costs involved in litigating such a motion. Parties already face daunting legal bills to simply prepare for trial. To require more hours to research all of a judge's public speech would be tremendously burdensome, if not impossible. States can address this issue through speech disclosure requirements or peremptory recusal policies.

a. Strengthen judicial speech disclosure requirements. States should require judges to disclose their campaign and other public speech.[159] For example, states could mandate that judges file transcripts or copies of all speeches, advertising, and campaign materials. Such filing could then be made available to parties for inspection. While such a policy appears to shift the costs from litigants to the state, most judges already have an ethical obligation to disclose possible grounds for recusal.[160] The ABA Model Code of Judicial Conduct, which many states have followed, declares that judges "should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification."[161] By requiring the judges to disclose their public statements in advance, the state would require what should eventually be made known to parties anyway.[162] A judge's privacy or other constitutional rights would not be threatened since the disclosed statements would have been made in public and would presumably already be available.

Mandatory disclosure would strengthen a currently ineffective method of disclosing past speech. Several states currently require disclosure at the time of possible disqualification. Florida, for example, requires judges to "disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is

159. Sample, Pozen & Young, *supra* note 124, at 27–28.

160. *See* FLAMM, *supra* note 113, § 19.10.2.

161. MODEL CODE OF JUDICIAL CONDUCT R. 2.11, cmt. 5 (2007); *see also* Sample, Pozen & Young, *supra* note 124, at 28 n.101 ("Notice, however, that this stipulation appears only in the Commentary and is phrased in hortatory, not mandatory terms. Legally, litigants cannot require an unwilling judge to disclose facts and opinions." (internal citation and quotation omitted)).

162. The main criticism of this policy would again be the financial burden on courts. For a response to such criticism, see *supra* notes 155–58 and accompanying text.

no real basis for disqualification."[163] Other states merely encourage such disclosure.[164] This takes a step toward informing parties of relevant disclosures and "increases the reputational and professional cost to judges who fail to disclose pertinent information that later emerges through another source."[165] But such procedures still rely heavily on the judge's own honesty and forthrightness, and the frankest of admissions are seldom disclosed.[166] Whether because judges assume such speech lacks relevance or are not willing to bear such costs, past speech is rarely included in such disclosure. Requiring disclosure of all public speech beforehand avoids the self-recusal problems that weaken current recusal standards.

b. Peremptory recusals. Alternatively, states could allow each party one peremptory recusal at the beginning of trial to lessen the financial burden of filing motions. A minority of states have adopted rules permitting litigants to seek recusal of a judge on a peremptory basis.[167] Litigants may strike one judge per proceeding without a showing of unfairness or actual bias.[168] Peremptory recusals would negate some of the costs inherent in assigning recusal motions to other judges. Litigants who in good faith believe their assigned judge is partial could secure an unbiased judge without the cost and risk of filing a recusal motion.

The main argument against peremptory recusal is fear of misuse—that litigants will strike judges without any due process cause, and will thereby create delay and administrative burdens.[169] But procedural safeguards could limit such concerns. States could allow only one peremptory recusal and require its use early in the proceeding. Likewise, some states require the party seeking recusal to show grounds of prejudice or submit an affidavit swearing to a belief

163. FLA. STAT. ANN. CODE OF JUDICIAL CONDUCT Canon 3(E)(1) (2000); *see also* In re Frank, 753 So. 2d 1228, 1239 (Fla. 2000).

164. *See, e.g.*, MICH. CODE OF JUDICIAL CONDUCT 3(C) (2007).

165. Sample, Pozen & Young, *supra* note 124, at 28.

166. *Id.* ("For example, no one will say, 'I am a racist' or 'I feel beholden to the trial lawyers who supported my campaign.'").

167. FLAMM, *supra* note 113, § 3.1.

168. *Id.*

169. Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213, 1254 (2002) ("Opponents of peremptory challenge proposals historically have raised three primary concerns: (1) judge-shopping, (2) delay, and (3) administrative concerns.").

of prejudice.[170] Procedural restraints such as these would omit truly ungrounded claims. As with mandatory disclosure, peremptory recusals would significantly lessen the financial burden on litigants.

C. Applying the Proposed Reforms

To demonstrate how these recusal reforms would operate in practice, consider how they would apply to the example of Justice Louis Butler given in the introduction. Recall that while campaigning for a seat on the bench, Justice Butler spoke at a fundraiser for a gay-rights group, gained the group's endorsement, raised funds for the group, and received complimentary press for the event.[171] Once on the bench, a minister brought a defamation suit against the gay-rights group.

Assume that Justice Butler presides in a state that has adopted all of the recusal reforms recommended above. The state has adopted the public statement provision, created a procedure for other judges to hear recusal motions, and enacted judicial speech disclosure requirements and peremptory recusal policies. Such a state would not have to rely on speech restrictions to assure judicial impartiality.

Because the state does not rely on speech restrictions, Justice Butler has the ability to speak on whatever he chooses. His constitutional rights to express his views during the campaign are not hindered, including his position regarding gay rights. However, the recusal standards provide a disincentive for outright policy declarations. It is more likely that Justice Butler would instead send signals to the group through discussing overall judicial philosophy. By not hindering his speech during the election through speech restrictions, the electorate would hear his expression and make an accurate, informed decision when voting. If Butler loses the election, it would not be because speech restrictions have needlessly limited his speech. By seeing any potential "crocodiles in calm waters," the electorate would choose a judge who best represents their values.

If Justice Butler still chose to speak on his position regarding gay rights, the recusal reforms would then protect judicial impartiality. If elected, Justice Butler would provide disclosure of all public speeches, advertisements, and campaign materials, including his remarks to the gay-rights group, which the state would then make

170. FLAMM, *supra* note 113, § 3.8.

171. *See supra* note 1 and accompanying text.

publicly available. As the minister suing the gay-rights group appears before Justice Butler, the judge would have the opportunity to recuse himself from the case. If Butler were to not self-recuse, the minister could then view the text of the speech by accessing the public database. The burden would be on the litigant minister to file a motion for recusal that cites specific speech demonstrating how Justice Butler committed himself to a particular result in the case. This motion would not go to Butler himself but rather to another judge to decide on the merits. If that judge were to find the motion meritless, the minister would not be left to face the potential judicial retribution of Justice Butler. The minister could still use a peremptory recusal motion to be assigned to another judge. Each of these procedural reforms would guard the appearance of judicial impartiality while still protecting free speech and due process.

IV. CONCLUSION

The predicament that states place themselves in when they hold judicial elections presents a serious threat to judicial independence and impartiality. This is especially true in an era of greater special interest and political influence, weakened ethical codes of conduct, and anger towards the judiciary in general. The creation of judicial elections forced states to choose between judicial free speech and accurate elections or judicial impartiality and due process in a zero-sum game. States have traditionally sided with impartiality and due process by restricting the speech of judicial candidates.

Now that speech restrictions appear constitutionally doomed for defeat, states that desire judicial impartiality should adopt strong recusal provisions. The vast majority of states have inadequate recusal policies to combat the threats to judicial impartiality. Such states should promptly adopt the ABA public statement provision, provide a procedure for other judges to hear recusal motions, and lessen the financial burden of filing such motions. These three reforms would greatly increase any state's public confidence in their judiciary, and provide an efficient, constitutional way of alleviating the ills of judicial elections.

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[*] The author dedicates this Comment to his father, E. Keith Stott, Jr., who devoted his career to judicial ethics in Arizona.