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## When Should the First Amendment Protect Judges from Their Unethical Speech?

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# When Should the First Amendment Protect Judges from Their Unethical Speech?

LYNNE H. RAMBO\*

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## I. INTRODUCTION

In the summer of 2016, some ten days before the start of the Republican National Convention, Supreme Court Justice Ruth Bader Ginsburg granted

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interviews to three media outlets: the Associated Press, the *New York Times*, and CNN.<sup>1</sup> Speaking to an Associated Press reporter in her office, Ginsburg said she presumed that Hillary Clinton would be elected President, and did not “want to think about [the] possibility” of Donald Trump winning.<sup>2</sup> Shortly thereafter, speaking with Adam Liptak of the *Times*, she repeated her discomfort with Trump and went further:

I can't imagine what this place would be . . . with Donald Trump as our president . . . For the country, it could be four years. For the court, it could be—I don't even want to contemplate that.

....

[My husband would have said,] “Now it's time for us to move to New Zealand” . . .<sup>3</sup>

By the time she sat down with CNN early the next week, Ginsburg was ready to be very specific about Trump: “He is a faker[.] . . . He has no consistency about him. He says whatever comes into his head at the moment. He really has an ego.”<sup>4</sup> She also asked, “How has he gotten away with not turning over his tax returns? The press seems to be very gentle with him on that.”<sup>5</sup>

For her candor, Justice Ginsburg was roundly criticized. Donald Trump called upon her to resign.<sup>6</sup> Legal experts deemed her actions “facially unethical”

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<sup>1</sup> Adam Liptak, *Ruth Bader Ginsburg, No Fan of Donald Trump, Critiques Latest Term*, N.Y. TIMES (July 10, 2016), <http://www.nytimes.com/2016/07/11/us/politics/ruth-bader-ginsburg-no-fan-of-donald-trump-critiques-latest-term.html> (on file with *Ohio State Law Journal*); Mark Sherman, *AP Interview: Ginsburg Reflects on Big Cases, Scalia's Death*, AP NEWS (July 8, 2016), <http://bigstory.ap.org/article/0da3a641190742669cc0d01b90cd57fa/ap-interview-ginsburg-reflects-big-cases-scalias-death> [<https://perma.cc/3RD2-BLW5>]; Jeffrey Toobin, *Ruth Bader Ginsburg's Slam of Trump*, CNN (July 13, 2016), <http://www.cnn.com/2016/07/12/opinions/ruth-bader-ginsburg-trump-toobin/index.html> [<https://perma.cc/5TAT-UCCM>].

<sup>2</sup> Sherman, *supra* note 1.

<sup>3</sup> Liptak, *supra* note 1.

<sup>4</sup> Toobin, *supra* note 1.

<sup>5</sup> *Id.*

<sup>6</sup> Doina Chiacu, *Responding to Criticism, Trump Calls on Justice Ginsburg To Resign*, REUTERS (July 13, 2016), <http://www.reuters.com/article/us-usa-election-trump-ginsburg-idUSKCN0ZT1HG> [<https://perma.cc/2AGE-59UM>].

and “jaw-dropping.”<sup>7</sup> Both the *New York Times*<sup>8</sup> and the *Washington Post*<sup>9</sup> wrote admonishing editorials. Ultimately, Justice Ginsburg issued a statement expressing regret that she had spoken so openly about Trump: “Judges should avoid commenting on a candidate for public office,” and so “[i]n the future I will be more circumspect.”<sup>10</sup>

In stark contrast to Justice Ginsburg’s statements stands the behavior of another federal judge, federal district judge Gonzalo Curiel. Judge Curiel

<sup>7</sup> David G. Savage, *The Public Feud of Ginsburg Vs. Trump Casts Harsh Spotlight on Court’s Liberal Lion*, L.A. TIMES (July 13, 2016), <http://www.latimes.com/nation/la-na-ginsburg-trump-feud-20160713-snap-story.html> [<https://perma.cc/C6XF-MYWJ>]; see also Michael Biesecker, *Ginsburg’s Public Trump Critique Raises Ethical Quandaries*, MORNING CALL (July 13, 2016), <http://www.mcall.com/news/local/elections/mc-ginsburg-s-public-trump-critique-raises-ethical-quandaries-20160713-story.html> [<https://perma.cc/KQ4U-EFNE>].

<sup>8</sup> Editorial, *Donald Trump Is Right About Justice Ruth Bader Ginsburg*, N.Y. TIMES (July 13, 2016), [http://www.nytimes.com/2016/07/13/opinion/donald-trump-is-right-about-justice-ruth-bader-ginsburg.html?smid=tw-nytimes&smtyp=cur&\\_r=1&mtrref=undefined&assetType=opinion](http://www.nytimes.com/2016/07/13/opinion/donald-trump-is-right-about-justice-ruth-bader-ginsburg.html?smid=tw-nytimes&smtyp=cur&_r=1&mtrref=undefined&assetType=opinion) (on file with *Ohio State Law Journal*).

<sup>9</sup> Editorial, *Justice Ginsburg’s Inappropriate Comments on Donald Trump*, WASH. POST (July 12, 2016), [https://www.washingtonpost.com/opinions/justice-ginsburgs-inappropriate-comments-on-donald-trump/2016/07/12/981df404-4862-11e6-bdb9-701687974517\\_story.html?hpid=hp\\_no-name\\_opinion-card-c%3Ahomepage%2Fstory&tid=a\\_inl](https://www.washingtonpost.com/opinions/justice-ginsburgs-inappropriate-comments-on-donald-trump/2016/07/12/981df404-4862-11e6-bdb9-701687974517_story.html?hpid=hp_no-name_opinion-card-c%3Ahomepage%2Fstory&tid=a_inl) [<https://perma.cc/4JWJ-7Y2A>].

<sup>10</sup> Amy Howe, *Ginsburg Walks Back Comments on Trump*, SCOTUSBLOG (July 14, 2016), <http://www.scotusblog.com/2016/07/ginsburg-walks-back-comments-on-trump/> [<https://perma.cc/4BT6-7QNV>] (alteration in original). Justice Ginsburg may have become more circumspect about political *candidates*, but not so much about political issues. In an interview just three months later with Katie Couric, Justice Ginsburg called Colin Kaepernick’s National Anthem protests (kneeling, in recognition of race discrimination) “dumb and disrespectful.” Sarah B. Boxer, *Ruth Bader Ginsburg on Trump, Kaepernick and Her Lifelong Love of the Law*, YAHOO! NEWS (Oct. 10, 2016), <https://www.yahoo.com/katie-couric/ruth-bader-ginsburg-on-trump-kaepernick-and-her-lifelong-love-of-the-law-132236633.html> [<https://perma.cc/92E9-QLMC>]. She also declined to answer Couric’s questions about “ban[ning] an entire religious group” from the country, on the ground that it involved an issue that might come before the Court. *Id.* But she went on to say:

All I can say is I am sensitive to discrimination on any basis because I have experienced that upset. . . . I looked at that sign, and I said, “I am a Jew, but I’m an American, and Americans are not supposed to say such things.” . . . America is known as a country that welcomes people to its shores. All kinds of people. The image of the Statue of Liberty with Emma Lazarus’ famous poem. She lifts her lamp and welcomes people to the golden shore, where they will not experience prejudice because of the color of their skin, the religious faith that they follow.

*Id.* (first alteration in original). Four days later, she issued a statement to reporters about her Kaepernick comments: “Barely aware of the incident or its purpose, my comments were inappropriately dismissive and harsh. I should have declined to respond.” Adam Liptak, *Ruth Bader Ginsburg Regrets Speaking Out on Colin Kaepernick*, N.Y. TIMES (Oct. 14, 2016), <https://www.nytimes.com/2016/10/15/us/ruth-bader-ginsburg-colin-kaepernick-national-anthem.html> (on file with *Ohio State Law Journal*).

presided over two class actions in which the plaintiffs complained that Trump University defrauded them.<sup>11</sup> After the judge denied summary judgment,<sup>12</sup> Donald Trump attacked the judge bitterly.<sup>13</sup> Trump described Judge Curiel as “a total disgrace” and “a hater of Donald Trump,” and claimed that Curiel had “an inherent conflict of interest” because of his “Mexican heritage.”<sup>14</sup> Trump asserted that Curiel’s “Mexican heritage”—Curiel was born and reared in Indiana to immigrant parents—made it impossible for him to be fair to Trump given Trump’s plans to build a wall between the United States and Mexico.<sup>15</sup>

In response, Judge Curiel said . . . nothing.<sup>16</sup> And he garnered near universal support. The *National Review*, Newt Gingrich, Governor John Kasich, Speaker of the House Paul Ryan, and Senators Mitch McConnell and Bob Corker all denounced Trump’s comments.<sup>17</sup> Paul Ryan described the comments as the very definition of “racist.”<sup>18</sup> *The Wall Street Journal* called on Trump to apologize.<sup>19</sup>

Both of these episodes raise ethical questions bearing on extrajudicial speech.<sup>20</sup> Justice Ginsburg stepped out of her judicial role and planted her feet squarely in the political arena. Were she a lower federal court judge, she would have violated the Code of Conduct for United States Judges, which says, “A

<sup>11</sup> Michelle Ye Hee Lee, *Sorry, Donald Trump, the Trump University Judge Was Just Following the Law*, WASH. POST (June 7, 2016), [https://www.washingtonpost.com/news/fact-checker/wp/2016/06/07/sorry-donald-trump-the-mexican-judge-was-just-following-the-law/?utm\\_term=.7fbc0173485c](https://www.washingtonpost.com/news/fact-checker/wp/2016/06/07/sorry-donald-trump-the-mexican-judge-was-just-following-the-law/?utm_term=.7fbc0173485c) [<https://perma.cc/DM55-6KG2>].

<sup>12</sup> *Id.*

<sup>13</sup> Brent Kendall, *Trump Says Judge’s Mexican Heritage Presents ‘Absolute Conflict,’* WALL ST. J. (June 3, 2016), <http://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442> (on file with *Ohio State Law Journal*).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* (“An assistant in Judge Curiel’s chambers said he wasn’t commenting on the matter.”).

<sup>17</sup> Brian Freeman, *WSJ: Trump Must Apologize to Judge Curiel*, NEWSMAX (June 6, 2016), <http://www.newsmax.com/Politics/us-trump-apologize-judge-curiel/2016/06/06/id/732483/> [<https://perma.cc/4MTQ-DG2B>]; Nick Gass, *Trump Has Republicans Squirming with ‘Mexican’ Judge Attacks*, POLITICO (June 6, 2016), <https://www.politico.com/story/2016/06/trump-judge-republicans-respond-223942> [<https://perma.cc/3QU3-RX9J>]; *Gingrich, McConnell, Top Republicans Slam Trump’s Remarks on Hispanic Judge*, NEWSMAX (June 5, 2016), <http://www.newsmax.com/Headline/hispanic-judget-trump-gingrich/2016/06/05/id/732376/#ixzz4Ao5a63Jf> [<https://perma.cc/GV4T-UT6G>].

<sup>18</sup> Tim Hains, *Ryan: Trump’s Attack on Judge Curiel “Textbook” Racism*, REALCLEARPOLITICS (June 7, 2016), [http://www.realclearpolitics.com/video/2016/06/07/ryan\\_trumps\\_attack\\_on\\_judge\\_curiel\\_textbook\\_racism.html](http://www.realclearpolitics.com/video/2016/06/07/ryan_trumps_attack_on_judge_curiel_textbook_racism.html) [<https://perma.cc/75P8-F2D8>].

<sup>19</sup> Paul Gigot, *Opinion, Trump and the ‘Mexican’ Judge*, WALL ST. J. (June 5, 2016), <http://www.wsj.com/articles/trump-and-the-mexican-judge-1465167405> (on file with *Ohio State Law Journal*).

<sup>20</sup> The term “extrajudicial speech,” as it will be used in this Article, means speech not in connection with a judge’s judicial duties.

judge should not . . . publicly endorse or oppose a candidate . . .”<sup>21</sup> The members of the Supreme Court, however, are not bound by that code.<sup>22</sup> Their ethics are a matter of self-discipline.<sup>23</sup>

Judge Curiel acted entirely within that code of conduct. Canon 3(A)(6) prohibits a judge from making any comment on a pending or impending case, and so the judge remained silent.<sup>24</sup> And the Federal Code does not allow an exception for a judge to respond to a comment, even when it is directed to him or her personally.<sup>25</sup>

So, these are the answers under the Code. But the *constitutional* principles applicable to extrajudicial speech are not at all clear. Does Justice Ginsburg have a *First Amendment* right to criticize Trump regardless of what any rules say? Does Judge Curiel have a *First Amendment* right to respond when he is challenged by a litigant in the national press?

Surprisingly, most of the state and federal courts deciding judicial discipline cases based on extrajudicial speech have not addressed the constitutionality of the code provisions involved.<sup>26</sup> Nor has the Supreme Court decided what constitutional standard should be applied to the discipline of sitting judges. The Court has issued two important decisions addressing the free speech rights of judicial candidates,<sup>27</sup> but it has not yet reached the question of sitting judges.<sup>28</sup>

<sup>21</sup> JUDICIAL CONFERENCE OF THE UNITED STATES, *Code of Conduct for United States Judges*, in 2A GUIDE TO JUDICIARY POLICY, canon 5(A)(2) [hereinafter *Federal Judicial Code*], [http://www.uscourts.gov/sites/default/files/vol02a-ch02\\_0.pdf](http://www.uscourts.gov/sites/default/files/vol02a-ch02_0.pdf) [<https://perma.cc/VN6Q-VECJ>] (last updated Mar. 20, 2014).

<sup>22</sup> The Code of Conduct for United States Judges, by its terms, applies only to the courts beneath the Supreme Court. *Id.* at 2.

<sup>23</sup> According to Chief Justice Roberts, the members of the Supreme Court treat the Code as a “current and uniform source of guidance,” but are not bound by it. CHIEF JUSTICE ROBERTS, 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 5 (Dec. 2011), <http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf> [<https://perma.cc/SV2Q-HHNZ>].

<sup>24</sup> *Federal Judicial Code*, *supra* note 21, canon 3(A)(6).

<sup>25</sup> The federal Code and the state codes, the latter based on the 2007 Model Code of Judicial Conduct, *see* Thomas E. Hornsby, *The American Bar Association (ABA) 2007 Model Code of Judicial Conduct: What Does it Mean to Juvenile and Family Court Judges?*, 62 JUV. & FAM. CT. J. 67, 69 (2011), differ on this point. The Model Code would permit Judge Curiel to respond. Rule 2.10 provides that “a judge may respond directly or through a third party to allegations in the media or elsewhere concerning the judge’s conduct in a matter,” as long as the statement could not “reasonably be expected to affect the outcome or impair the fairness” of the matter pending. MODEL CODE OF JUDICIAL CONDUCT r. 2.10(A), (E) (AM. BAR ASS’N 2011).

<sup>26</sup> *See infra* note 102 and accompanying text.

<sup>27</sup> *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1659 (2015); *Republican Party of Minn. v. White*, 536 U.S. 765, 768 (2002).

<sup>28</sup> *See White*, 536 U.S. at 796 (Kennedy, J., concurring) (“Whether the rationale of *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 568 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983), could be extended to allow a general speech restriction on sitting judges—regardless of whether they are campaigning—in order to promote the efficient administration of justice, is not an issue raised here.”).

This Article proceeds from the premise that judges harm the judicial institution, and therefore our constitutional government, when they engage in inflammatory or overtly political extrajudicial speech, especially speech in violation of the nation's various ethical codes. As Justice Frankfurter wrote, "[t]he Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction."<sup>29</sup> To the extent that judges enter the public debate with controversial or partisan views, they render it unlikely that citizens will see them as the neutral and contemplative arbiters that justice requires.<sup>30</sup> This would seem especially true, and that much more dangerous, in times like these, when the citizenry is as polarized as it has ever been.<sup>31</sup>

This is certainly not to suggest the silencing of extrajudicial speech. As the Model Code of Judicial Conduct recognizes, judges are encouraged to engage in a variety of extrajudicial activities that do not interfere with the judicial function.<sup>32</sup> Nor is it to suggest that judges go unprotected by the First Amendment when they do choose to speak in violation of ethics codes. It is to advocate instead for a moderated protection.

This Article argues that the free speech rights of sitting judges should be subject to the balancing test applied to public employees in *Pickering v. Board of Education*,<sup>33</sup> albeit with important modifications. Part II describes the attitude toward extrajudicial speech prior to the development of ethical codes. Part III sets forth those portions of state and federal ethical codes that restrict judges' extrajudicial speech and describes for illustration some of the cases that have arisen under those code provisions. Part IV discusses the approaches state and federal courts have taken thus far when applying the First Amendment to ethical code violations. Part V presents the Supreme Court precedent addressing disciplinary actions based on speech: the judicial candidate cases, the lawyer discipline case, and the public employee case law. And Part VI concludes that

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<sup>29</sup> *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).

<sup>30</sup> Dahlia Lithwick & Sonja West, *When Do Supreme Court Justices Need To Just Sit Down and Be Quiet?*, SLATE (Dec. 14, 2010), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2010/12/unplugged.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2010/12/unplugged.html) [<https://perma.cc/PBV3-Y77G>].

<sup>31</sup> *Political Polarization in the American Public*, PEW RES. CTR. (June 12, 2014), <http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/> [<https://perma.cc/6W9Z-GWV6>].

<sup>32</sup> See MODEL CODE OF JUDICIAL CONDUCT, *supra* note 25, r. 3.1 (Extrajudicial Activities in General); *id.* at r. 3.7 (Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities). Indeed, the Justices of the Supreme Court have been very prolific writers. Professor Ronald Collins has compiled a list of 353 books written by Supreme Court Justices. Ronald Collins, *353 Books by Supreme Court Justices*, SCOTUSBLOG, <http://www.scotusblog.com/2012/03/351-books-by-supreme-court-justices/> [<https://perma.cc/NL24-2MAM>] (last updated Nov. 7, 2012). A close count of that list, and the books' publication dates, reveals that forty-five Justices wrote books during their tenure. See *id.*

<sup>33</sup> *Pickering*, 391 U.S. at 568.

the Court would do best to adopt the *Pickering* balancing test to evaluate judicial discipline cases, applying a presumption in favor of the State when the rule narrowly and specifically defines the conduct to be avoided.

## II. EXTRAJUDICIAL SPEECH PRIOR TO THE DEVELOPMENT OF JUDICIAL CODES OF CONDUCT

In the Federalist No. 73, Alexander Hamilton wrote: “It is impossible to keep the judges too distinct from every other avocation than that of expounding the laws.”<sup>34</sup> From the founding, then, there was an ideal of judges removed from the political arena. Of course, whatever the ideal, the judges hardly stayed unto themselves “expounding the laws.”<sup>35</sup> Chief Justice John Jay served as ambassador to Great Britain, and Justice Oliver Ellsworth ambassador to France, while on the Court.<sup>36</sup> Chief Justice Jay and Justice William Cushing ran for governor of their respective states, New York and Massachusetts.<sup>37</sup> Justices Bushrod Washington and Samuel Chase campaigned actively for presidential candidates Charles Pinckney and John Adams during the election of 1800.<sup>38</sup>

Many judges observed no distinction between their judicial duties and their political activities. In 1803, in his position as Associate Justice, Justice Chase delivered a charge to a Maryland grand jury.<sup>39</sup> A Federalist, Justice Chase used the charge to attack both Republican legislation that had abolished circuit courts created by the Adams Administration and the universal suffrage that had been proposed by the new Maryland Constitution.<sup>40</sup> The Federalist press defended his remarks, but the Republican Congress made them the basis of an impeachment charge.<sup>41</sup> The eighth impeachment charge against Chase described his political comments as “conduct highly censurable in any, but peculiarly indecent and unbecoming in a judge of the supreme court of the United States.”<sup>42</sup> Chase was not convicted, but the vote on the eighth charge was nineteen out of thirty-four, the greatest number of votes for conviction on any of the charges.<sup>43</sup>

Chase’s impeachment (and near conviction) seems to have persuaded the judiciary that its grand jury charges, and other judicial appearances, should no

<sup>34</sup> THE FEDERALIST NO. 73 (Alexander Hamilton).

<sup>35</sup> *Id.*

<sup>36</sup> 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 273–76 (rev. ed. 1947); Alan F. Westin, *Out-of-Court Commentary by United States Supreme Court Justices, 1790–1962: Of Free Speech and Judicial Lockjaw*, 62 COLUM. L. REV. 633, 637–38 (1962).

<sup>37</sup> WARREN, *supra* note 36, at 273–76.

<sup>38</sup> Westin, *supra* note 36, at 637–38.

<sup>39</sup> WARREN, *supra* note 36, at 276.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 277 & n.1.

<sup>42</sup> 1 SAMUEL H. SMITH & THOMAS LLOYD, TRIAL OF SAMUEL CHASE 8 (1805).

<sup>43</sup> 2 SAMUEL H. SMITH & THOMAS LLOYD, TRIAL OF SAMUEL CHASE 492–93(1805).



longer include overtly political speeches. The practice of electioneering from the bench largely ceased.<sup>44</sup> As Professor Lawrence Friedman has described it:

There would be no more impeachments, but also no more Chases. What carried the day, in a sense, was the John Marshall solution. The judges would take refuge in professional decorum. It would always be part of their job to make and interpret policy; but policy would be divorced from overt, partisan politics. Principles and policy would flow, at least ostensibly, from the logic of law; they would not follow the naked give and take of the courthouse square. Justice would be blind; and it would wear a poker face.<sup>45</sup>

The government would hopefully become “a government of laws, and not of men.”<sup>46</sup>

Unfortunately, the Chase impeachment did not cause judges to do away with political activities altogether. They may have divorced law and politics while on the bench, but they continued to engage in political activities *extrajudicially*. Judicial scholar and Judge Jon C. Blue has identified more than a dozen instances throughout the nineteenth century in which Supreme Court Justices became deeply immersed in presidential politics or the politics of their home states while they were serving on the Court.<sup>47</sup>

This began to shift—and the judicial role to change once more—in the early part of the twentieth century. The Supreme Court was in a belligerent mode in defense of property, striking federal antitrust legislation in *United States v. E.C. Knight Co.*,<sup>48</sup> and state workplace legislation in *Lochner v. New York*.<sup>49</sup> To justify this countermajoritarian position, the Court emphasized the judiciary’s unique and separate function.<sup>50</sup> No one did this with more power than conservative Republican presidential candidate (and then-Secretary of War) William Howard Taft.<sup>51</sup> In a 1908 campaign speech, he said:

<sup>44</sup> GEORGE LEE HASKINS & HERBERT A. JOHNSON, FOUNDATIONS OF POWER: JOHN MARSHALL, 1801–15, at 245 (1981). An important exception must be noted in Justice Joseph Story. From at least 1815 through 1830, Story, a passionate abolitionist, used grand jury charges to denounce the slave trade coming through New England ports. 1 LIFE AND LETTERS OF JOSEPH STORY 336–48 (William W. Story ed., 1851).

<sup>45</sup> LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 132 (2d ed. 1985).

<sup>46</sup> *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

<sup>47</sup> Jon C. Blue, *A Well-Tuned Cymbal? Extrajudicial Political Activity*, 18 GEO. J. LEGAL ETHICS 1, 39–41 (2004) (describing political activities of Justices Story, McLean, Wayne, Catron, Grier, Nelson, Swayne, Davis, Clifford, Field, Miller, Strong, Bradley, Brewer, Moody, Hughes, and Chief Justices Taney, Chase, and Fuller).

<sup>48</sup> *United States v. E.C. Knight Co.*, 156 U.S. 1, 17–18 (1895).

<sup>49</sup> *Lochner v. New York*, 198 U.S. 45, 64 (1905).

<sup>50</sup> See *id.* at 56–57 (“This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the State it is valid, although the judgment of the court might be totally opposed to the enactment of such a law.”).

<sup>51</sup> See generally *William Howard Taft*, HISTORY, <http://www.history.com/topics/us-presidents/william-howard-taft> [<https://perma.cc/LRN2-9V39>].

[R]easonable persons now recognize the advantage of ceremony—not only in religious worship, but also in the discharge of many other functions analogous to religious worship in their sacred character.

Take the administration of justice. It is well that judges should be clothed in robes, not only, that those who witness the administration of justice should be properly advised that the function performed is one different from, and higher, than that which a man discharges as a citizen in the ordinary walks of life; but also, in order to impress the judge himself with the constant consciousness that he is a high-priest in the temple of justice and is surrounded with obligations of a sacred character that he cannot escape and that require his utmost care, attention and self-suppression.<sup>52</sup>

Taft served only one term in the presidency, but in 1921, he was appointed and confirmed as Chief Justice of the Supreme Court.<sup>53</sup> Within a year, the American Bar Association (ABA) created a Committee on Judicial Ethics and named Chief Justice Taft chair.<sup>54</sup> In 1924, that Committee presented to the ABA House of Delegates the *Canons of Judicial Ethics*.<sup>55</sup>

The Canons included thirty-six “principles.”<sup>56</sup> One of them—Canon 28—clearly drew from Chief Justice Taft’s separatist, nonpolitical vision of the judge’s role. It provided:

While entitled to entertain his personal views of political questions, and while not required to surrender his rights or opinions as a citizen, it is inevitable that suspicion of being warped by political bias will attach to a judge who becomes the active promoter of the interests of one political party as against another. He should avoid making political speeches, making or soliciting payment of assessments or contributions to party funds, the public endorsement of candidates for political office and participation in party conventions.<sup>57</sup>

Thus, the Canons reflected the first commitment to a code of judicial ethics, and Canon 28 the first commitment to limits on judges’ extrajudicial political activity.<sup>58</sup>

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<sup>52</sup> WILLIAM H. TAFT, PRESENT DAY PROBLEMS 63–64 (1908). Taft had served on the Sixth Circuit from 1892–1900, and on the Ohio Superior Court from 1887–1890. ALPHEUS THOMAS MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 12 (1965).

<sup>53</sup> Justices of the Supreme Court During the Time of These Reports, 257 U.S. iii, iii n.2 (1921).

<sup>54</sup> Andrew J. Lievens & Avern Cohn, *The Federal Judiciary and the ABA Model Code: The Parting of the Ways*, 28 JUST. SYS. J. 271, 273 (2007); *The Proposed Canons of Judicial Ethics*, 9 A.B.A. J. 73, 73 (1923).

<sup>55</sup> LISA L. MILORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE 132 (1992).

<sup>56</sup> *Id.* at 132.

<sup>57</sup> *Id.* at 139 n.2.

<sup>58</sup> According to Chief Justice Taft, the canons were intended only as a “guide and reminder to the judiciary.” MODEL CODE OF JUDICIAL CONDUCT, *supra* note 25, at xi (citing Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J.

Over the next decades, the Canons drew criticism that they were not designed to be enforceable, and failed to provide “firm guidance for the solution of difficult questions.”<sup>59</sup> So the ABA convened a Special Committee on Standards of Judicial Conduct under the direction of California Supreme Court Justice Roger Traynor, and in 1972, approved the first Model Code of Judicial Conduct designed to be enforceable.<sup>60</sup> Since then, there have been two major revisions, one in 1990, and one in 2007.<sup>61</sup> Currently, thirty-five states have adopted a version of the 2007 Model Code,<sup>62</sup> and many more appear on their way to doing so.<sup>63</sup>

The federal courts’ Code of Conduct for United States Judges is itself a version of the ABA’s Model Rules,<sup>64</sup> with a few significant differences. First,

LEGAL ETHICS 1059, 1065 n.26 (1996)). Many states, however, not only adopted the canons, but transformed them into law and established sanctions for their violation. *Id.*

<sup>59</sup> Robert B. McKay, *Judges, the Code of Judicial Conduct, and Nonjudicial Activities*, 1972 UTAH L. REV. 391, 391 (1972).

<sup>60</sup> MODEL CODE OF JUDICIAL CONDUCT, *supra* note 25, at xi.

<sup>61</sup> *Id.* at xii–xiii.

<sup>62</sup> *See* AM. BAR ASS’N, STATUS OF STATE REVIEW OF ABA MODEL CODE OF JUDICIAL CONDUCT (2007) (Aug. 2016), [http://www.americanbar.org/groups/professional\\_responsibility/resources/judicial\\_ethics\\_regulation/mcjc.html](http://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation/mcjc.html) [<https://perma.cc/5FUK-36UT>]. This includes Montana, which, prior to 2008, had not adopted any version of the ABA Model Code, but was still adhering to the 1924 Canons of Judicial Ethics. *See In re 2008 Mont. Code of Judicial Conduct*, No. AF 08-0203, 2008 Mont. LEXIS 825, at \*1–3 (Mont. Dec. 12, 2008).

<sup>63</sup> One state has proposed revisions in line with the 2007 Code, and ten states have established committees to review their codes for updating. AM. BAR ASS’N, *supra* note 62, at 1–8. The remaining five states appear to be content for the moment operating under the 1990 version of the Code. *See id.*

<sup>64</sup> The Judicial Conference of the United States is responsible for setting policy for the lower federal courts. 28 U.S.C. § 331 (2012). In June 1969, in the wake of controversies involving Supreme Court Justice Abe Fortas and Tenth Circuit federal district judge Stephen Chandler, Chief Justice Earl Warren convened the Conference for a special session to address judicial ethics, and the Conference resolved to formulate standards of judicial conduct. Lievens & Cohn, *supra* note 54, at 275; *see also* REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, MARCH 13–14, 1969 AND JUNE 10, 1969, at 41–43 (1969),

<http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings/Proceedings.aspx?doc=/uscourts/FederalCourts/judconf/proceedings/1969-03.pdf> [<https://perma.cc/8QVG-FS64>]. Within the same time frame, the ABA created the committee chaired by California Justice Traynor to develop a model code, and asked the Judicial Conference to work with that committee in the review of the 1924 Canons and the drafting of the new code, and the Conference agreed. Lievens & Cohn, *supra* note 54, at 275. This led the Judicial Conference to create its Committee on Codes of Conduct, and so after the ABA approved the 1972 Model Code, it took little time for the Judicial Conference to adopt the Code as well. *Id.* at 276; *see also* REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, APRIL 5–6, 1973, at 10 (1973), <http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings/Proceedings.aspx?doc=/uscourts/FederalCourts/judconf/proceedings/1973-04.pdf> [<https://perma.cc/BH9D-CQLY>].

the Judicial Conference has not adopted the 2007 revisions.<sup>65</sup> Second, in 1992, in the course of reviewing the 1990 proposed revisions, the Conference changed the mandatory word “shall,” throughout, to the permissive “should,”<sup>66</sup> so that the Code itself serves more as a set of guidelines. Third, discipline in the federal system is administered by judicial councils within each circuit, and those councils can discipline Article III judges, but cannot remove them, because the Constitution provides for judicial impeachment by the House of Representatives.<sup>67</sup>

Because so many jurisdictions include provisions similar or identical to the Model Code, the next Part will include in the text only provisions from the 2007 Model Code, and address the Federal Code of Conduct for United States Judges only to the extent it differs materially.

### III. THE MODEL CODE PROVISIONS PERTAINING TO EXTRAJUDICIAL SPEECH

The Model Code includes several provisions that restrict extrajudicial speech. Some of these are very specific, flatly prohibiting certain topics of speech. Others are aimed at specific topics of speech, but prohibit the speech only under certain standards of impact that a disciplinary authority would have to apply. And if none of the specific rules apply, the Code includes a general directive concerning judicial behavior that has been invoked to punish untoward extrajudicial speech.

#### A. *The “Political Activity” Rule*

Canon 4 of the Model Code provides that “[a] judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary.”<sup>68</sup> Rule 4.1,

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<sup>65</sup> See Lievens & Cohn, *supra* note 54, at 271 (“[T]he 2007 ABA Model Code’s forms [are] unlikely to be adopted by the Judicial Conference”); Cynthia Gray, *Adoption and Adaptation*, NAT’L CTR. FOR ST. CTS.: JUD. ETHICS & DISCIPLINE (July 21, 2015), <https://ncscjudicialethicsblog.org/2015/07/21/adoption-and-adaptation/> [<https://perma.cc/CQ75-3WRM>].

<sup>66</sup> Lievens & Cohn, *supra* note 54, at 278; see also REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, SEPTEMBER 22, 1992, at 62 (Sept. 1992), <http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings/Proceedings.aspx?doc=/uscourts/FederalCourts/judconf/proceedings/1992-09.pdf> [<https://perma.cc/M4AF-Q4R3>] (“In August 1990, the American Bar Association approved a New Model Code of Judicial Conduct. In light of this New Model Code, the Committee on the Codes of Conduct conducted a comprehensive review of the Judicial Conference’s Code of Conduct for United States Judges and recommended revisions to the Code.”).

<sup>67</sup> 28 U.S.C. § 354(a)(3)(A) (2012) (“Article III judges.—Under no circumstances may the judicial council order removal from office of any judge appointed to hold office during good behavior.”).

<sup>68</sup> MODEL CODE OF JUDICIAL CONDUCT, *supra* note 25, canon 4.

promulgated under this Canon, sets forth a lengthy list of highly specific prohibitions on speech:

- (A) Except as permitted by law, . . . a judge or a judicial candidate shall not:
- (1) act as a leader in, or hold an office in, a political organization;<sup>69</sup>
  - (2) make speeches on behalf of a political organization;
  - (3) publicly endorse or oppose a candidate for any public office;
  - (4) solicit funds for, pay an assessment to, or make a contribution to a political organization or a candidate for public office;
  - (5) attend or purchase tickets for dinners or other events sponsored by a political organization or a candidate for public office;
  - (6) publicly identify himself or herself as a candidate of a political organization;
  - (7) seek, accept, or use endorsements from a political organization;
  - (8) personally solicit or accept campaign contributions other than through a campaign committee authorized by Rule 4.4;
  - (9) use or permit the use of campaign contributions for the private benefit of the judge, the candidate, or others;
  - (10) use court staff, facilities, or other court resources in a campaign for judicial office;
  - (11) knowingly, or with reckless disregard for the truth, make any false or misleading statement;
  - (12) make any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court; or
  - (13) in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.<sup>70</sup>

The Comment to Rule 4.1 makes clear that it is the nonpolitical nature of judging—in contrast to the political nature of the legislative and executive branches—that supports the rule.<sup>71</sup> Because judges make decisions based on the facts and law of every case, rather than the preferences of the electorate, “judges and judicial candidates must, to the greatest extent possible, be free and appear

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<sup>69</sup> A “political organization” is defined by the Code as “a political party or other group sponsored by or affiliated with a political party or candidate, the principal purpose of which is to further the election or appointment of candidates for political office.” *Id.* at 7.

<sup>70</sup> *Id.* r. 4.1 (references omitted). The federal counterpart of this provision is Canon 5(A), which states that:

A judge should not: (1) act as a leader or hold any office in a political organization; (2) make speeches for a political organization or candidate, or publicly endorse or oppose a candidate for public office; or (3) solicit funds for, pay an assessment to, or make a contribution to a political organization or candidate, or attend or purchase a ticket for a dinner or other event sponsored by a political organization or candidate.

*Federal Judicial Code*, *supra* note 21, canon 5(A).

<sup>71</sup> MODEL CODE OF JUDICIAL CONDUCT, *supra* note 25, r. 4.1 cmts. 1, 3.

to be free from political influence and political pressure.”<sup>72</sup> If they are seen to be subject to political influence, “[p]ublic confidence in the independence and impartiality of the judiciary is eroded.”<sup>73</sup>

Particularly in light of recent events, one case invoking the federal counterpart to this rule merits special attention. In June 2004, Second Circuit Court of Appeals Judge Guido Calabresi attended an American Constitution Society (ACS) convention.<sup>74</sup> There had been a panel discussion entitled, “The Election: What’s at Stake for American Law and Policy,” and Judge Calabresi spoke from the floor.<sup>75</sup>

Okay, I’m a judge and so I’m not allowed to talk politics and so I’m not going to talk about some of the issues which were mentioned or what some have said is the extraordinary record of incompetence of this administration . . . I’m going to talk about . . . the fact that in a way that occurred before but is rare in the United States, that somebody came to power as a result of the illegitimate acts of a legitimate institution that had the right to put somebody in power. That is what the Supreme Court did in *Bush versus Gore*. . . The reason I emphasize that is because that is exactly what happened when Mussolini was put in by the King of Italy, that is, the King of Italy had the right to put Mussolini in though he had not won an election and make him Prime Minister. That is what happened when Hindenburg put Hitler in. I’m not suggesting for a moment that Bush is Hitler. I want to be clear on that, but it is a situation which is extremely unusual. When somebody has come in in that way they sometimes have tried not to exercise much power. In this case, like Mussolini, he has exercised extraordinary power. He has exercised power, claimed power for himself that has not occurred since Franklin Roosevelt.<sup>76</sup>

In a letter written shortly after the incident, the judge apologized to the Chief Judge of the Second Circuit,<sup>77</sup> but five complaints were filed, several of which alleged that the judge had violated the rule prohibiting the public opposition of a candidate for public office.<sup>78</sup> Because Judge Calabresi had admitted as

<sup>72</sup> *Id.* cmt. 1.

<sup>73</sup> *Id.* cmt. 3.

<sup>74</sup> *In re* Charges of Judicial Misconduct, 404 F.3d 688, 691 (2d Cir. Jud. Council 2005).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 691–92. Judge Calabresi wrote:

As you know, I strongly deplore the politicization of the judiciary and firmly believe that judges should not publicly support candidates or take political stands. Although what I was trying to do was make a rather complicated academic argument about the nature of reelections after highly contested original elections, that is not the way my words, understandably, have been taken. I can also see why this occurred, despite my statements at the time that what I was saying should not be construed in a partisan way. For that I am deeply sorry.

*Id.* at 692.

<sup>78</sup> *Id.* at 695. The federal counterpart of Rule 4.1 of the Model Code was, at that time, Canon 7(A)(2). *Id.*

much,<sup>79</sup> the Council decided that his public admonishment by the Chief Judge was sufficient sanction.<sup>80</sup>

### B. *The "Pending Action" Rule*

Model Rule 2.10 imposes another substantial restriction on extrajudicial speech. Under the rule,

- (A) A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.
- (B) A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.<sup>81</sup>

According to the Code, the rule's restrictions "are essential to the maintenance of the independence, integrity, and impartiality of the judiciary."<sup>82</sup> With respect to public comment on pending or impending cases, there are three concerns. When the case is in a judge's own court, the fear is that the judge's comment will leave the impression that the case has been unfairly prejudged.<sup>83</sup> When the case is in another judge's court, the fear is that the public will question why there are differences in the views of different judges,<sup>84</sup> or will believe that the speaking judge is trying to influence the other.<sup>85</sup>

<sup>79</sup> *Id.* at 695–96.

<sup>80</sup> *In re Charges*, 404 F.3d at 697.

<sup>81</sup> MODEL CODE OF JUDICIAL CONDUCT, *supra* note 25, r. 2.10 (references omitted).

<sup>82</sup> *Id.* r. 2.10, cmt. 1.

<sup>83</sup> *Broadman v. Comm'n on Judicial Performance*, 959 P.2d 715, 727 (Cal. 1998) ("[T]he public may perceive the comment as indicating that the judge has prejudged the merits of the controversy or is biased against or in favor of one of the parties."); *In re Benoit*, 523 A.2d 1381, 1383 (Me. 1987) ("[The rule] minimizes the risk that such comments will . . . unfairly prejudice individuals' rights . . ."); *In re Broadbelt*, 683 A.2d 543, 548 (N.J. 1996) (*per curiam*) ("[The rule] thereby minimizes the risk that such comments will either unfairly prejudice individuals' rights or create a public impression that citizens are not being treated fairly because different judges may not agree as to how those citizens' rights should be decided under the law.").

<sup>84</sup> *Benoit*, 523 A.2d at 1383 ("[The rule] minimizes the risk that such comments will . . . create a public impression that citizens are not being treated fairly because different judges may not agree as to how those citizens' rights should be decided under the law."); *Broadbelt*, 683 A.2d at 548 ("By prohibiting judges from commenting on pending cases in any court, we avoid the possibility of undue influence on the judicial process and the threat to public confidence posed by a judge from one jurisdiction criticizing the rulings or technique of a judge from a different jurisdiction.").

<sup>85</sup> *Broadman*, 959 P.2d at 727 ("[T]he public may perceive the comment as an attempt to influence the judge who is charged with deciding the case.").

The public comment part of this rule, its predecessors, and its federal counterpart,<sup>86</sup> has served as the basis for sanctions or disqualification in a number of high-profile cases. In *Broadman v. Commission on Judicial Performance*, the California Supreme Court upheld the public censure of a judge who attached “no pregnancy” conditions to the probation of two defendants, and while the women’s appeals were pending, gave an interview to *Time* magazine.<sup>87</sup> The New Jersey Supreme Court held a judge’s appearances on Court TV and “Geraldo Live” to be improper comment on pending actions, even though the actions were in another jurisdiction.<sup>88</sup> In *White v. National Football League*, the Eighth Circuit found that the district judge’s press interviews did not require his recusal, but that he “would have been well advised not to opine publicly about his role in enforcing an ongoing consent decree.”<sup>89</sup> And in *United States v. Microsoft Corp.*, the D.C. Circuit removed the district judge on remand because the judge’s violations of the public comment rule were “deliberate, repeated, egregious, and flagrant.”<sup>90</sup> The judge had secretly talked to several reporters about his views on the merits of the case just after the evidence had closed but before he had issued his findings of fact.<sup>91</sup>

### C. The “Promoting Confidence” Rule

In addition to the very specific political-activity rule, Rule 4.1, and the pending-action rule, Rule 2.10, one of the Code’s most generalized directives, Rule 1.2, is often used to restrict extrajudicial speech. Rule 1.2 provides very simply that “[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”<sup>92</sup> Because it is so open-ended, it has served as a catchall for any untoward speech not obviously within another rule.

In *Mississippi Commission on Judicial Performance v. Boland*, for example, the judge was working on a drug court project with a number of officials from her county when she went on a tirade.<sup>93</sup> She complained about the intelligence and education of other judges, told two of the officials they could go home, and ultimately said, “all you African–Americans can go to hell.”<sup>94</sup> The court adopted

<sup>86</sup> *Federal Judicial Code*, *supra* note 21, canon 3A(6).

<sup>87</sup> *Broadman*, 959 P.2d at 725–26, 735.

<sup>88</sup> *Broadbelt*, 683 A.2d at 548.

<sup>89</sup> *White v. Nat’l Football League*, 585 F.3d 1129, 1140 (8th Cir. 2009).

<sup>90</sup> *United States v. Microsoft Corp.*, 253 F.3d 34, 107 (D.C. Cir. 2001).

<sup>91</sup> *Id.* at 108.

<sup>92</sup> MODEL CODE OF JUDICIAL CONDUCT, *supra* note 25, r. 1.2 (references omitted).

<sup>93</sup> *Miss. Comm’n on Judicial Performance v. Boland*, 975 So. 2d 882, 884–85 (Miss. 2008).

<sup>94</sup> *Id.* at 885. There is a rule addressed specifically to racial bias—Rule 2.3—but it is limited to the manifestation of such bias “in the performance of judicial duties,” so it would not apply to *extrajudicial* speech that betrays racism, sexism, or other bias. MODEL CODE OF JUDICIAL CONDUCT, *supra* note 25, r. 2.3.



the Commission's finding that she had violated Mississippi's version of Rule 1.2.<sup>95</sup> Similarly, in *In re Lowery*, a parking lot attendant approached the judge and told him that the lot's new management was now charging judges for their spaces.<sup>96</sup> When the attendant asked the judge's name, the judge said, "N\_\_\_\_, can't you f\_\_\_\_ing read?"<sup>97</sup> The review tribunal held that in doing so, the judge had failed to promote confidence in the judiciary: "Judges who freely use racial or other epithets, on or off the bench, create, at the very least, a public perception that they will not fairly decide cases involving minorities."<sup>98</sup>

#### IV. EXISTING FIRST AMENDMENT ANALYSIS OF CODE RESTRICTIONS ON EXTRAJUDICIAL SPEECH

To the extent that state or federal commissions seek to discipline judges for their extrajudicial speech, those actions implicate the First Amendment.<sup>99</sup> And to the extent that judges are disciplined under the Code provisions described above—the political activity, pending action, or promoting confidence rules—the judges are being sanctioned for the content of their speech.<sup>100</sup> This content-based nature of the ethical rules would ordinarily mean that, in the absence of an exception for the speaker or the circumstances, the rules must undergo strict scrutiny to survive the First Amendment.<sup>101</sup>

The commissions and courts hearing discipline cases, however, have not necessarily agreed. For reasons that are not clear, a sizable number of disciplining courts have completely omitted to address the constitutional ramifications of disciplining extrajudicial speech.<sup>102</sup> And as will be shown

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<sup>95</sup> *Boland*, 975 So. 2d at 894–95 (applying Mississippi Canon 2(A)); see also *Miss. Comm'n on Judicial Performance v. Osborne*, 11 So. 3d 107, 114–15 (Miss. 2009) (accepting finding that judge violated Mississippi Canon 2(A), among others, when he said, "White folks don't praise you [African-Americans] unless you're a damn fool. Unless they think they can use you. If you have your own mind and know what you're doing, they don't want you around." (alteration in original)).

<sup>96</sup> *In re Lowery*, 999 S.W.2d 639, 646 (Tex. Review Trib. 1998).

<sup>97</sup> *Id.* (first alteration added).

<sup>98</sup> *Id.* at 656–57.

<sup>99</sup> See *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (stating freedom of speech is not without its limits and does not confer immunity from punishment for all forms of speech).

<sup>100</sup> See *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564 (2011) (stating that certain types of speech content can be disfavored).

<sup>101</sup> *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015) ("A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." (quoting *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993))).

<sup>102</sup> See, e.g., *In re Gridley*, 417 So. 2d 950, 954 (Fla. 1982) (failing to address the judge's free speech argument after finding his conduct did not violate the Code of Judicial Conduct); *In re Bonin*, 378 N.E.2d 669, 684 (Mass. 1978) ("Neither the requirement nor a sanction for the failure raises any serious question under the First or Fourteenth Amendment to the United States Constitution or corresponding provisions of the Constitution of the Commonwealth.");

below, the courts that *have* acknowledged the free-speech implications of judicial discipline have been unable to settle on the level of protection the Amendment offers in this context.

The courts in some cases have applied strict scrutiny to the restrictions imposed by judicial codes.<sup>103</sup> In *In re Sanders*, the Chief Justice of the Washington Supreme Court was charged with “failing to personally observe high standards of judicial conduct and . . . diminishing public confidence in the judiciary,” and “engaging in political activity.”<sup>104</sup> Justice Sanders had attended his own swearing-in ceremony and then walked to an antiabortion rally a few blocks away.<sup>105</sup> Carrying a red rose—the symbol organizers of the rally had asked people to bring—and speaking briefly to the crowd, he said: “Nothing is . . . more fundamental in our legal system than the preservation and protection of innocent human life.”<sup>106</sup>

The court observed that there were “competing interests”: the State’s interest in a “fair and impartial judiciary,” and a judge’s interest in expressing his or her views, especially in an elective judicial system.<sup>107</sup> “To achieve the requisite balance,” the court held, “the state must establish a compelling interest and demonstrate that any restriction is narrowly tailored to serve that interest.”<sup>108</sup> In the *In re Sanders* case, the State had compelling interests in the integrity and appearance of impartiality of the courts, but disciplining the justice would not satisfy strict scrutiny:

[N]othing in the record . . . would permit us to construe Justice Sanders’ conduct as an express or implied promise to decide particular issues in a particular way, or as an indication that he would be unwilling or unable to be impartial and follow the law if faced with a case in which abortion issues were presented.<sup>109</sup>

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*In re Staples*, 719 P.2d 558, 561 & n.1 (Wash. 1986) (declining to decide on the validity of the judge’s constitutional claims).

<sup>103</sup> *In re Harper*, 673 N.E.2d 1253, 1265 (Ohio 1996) (“[A] speaker cannot be punished because of his or her viewpoint or message unless the restriction is necessary to promote a compelling government interest.” (citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 120–21 (1991))); *In re Sanders*, 955 P.2d 369, 375 (Wash. 1998) (“[T]he state must establish a compelling interest and demonstrate that any restriction is narrowly tailored to serve that interest.”); *In re Kaiser*, 759 P.2d 392, 397–98 (Wash. 1988) (“Where political speech is at issue, disciplinary rules are subject to exacting scrutiny under the First Amendment.” (first citing *In re Primus*, 436 U.S. 412, 432 (1978); and then citing *NAACP v. Button*, 371 U.S. 415, 438–39 (1963))).

<sup>104</sup> *Sanders*, 955 P.2d at 372–73.

<sup>105</sup> *Id.* at 370–71.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 374.

<sup>108</sup> *Id.* at 375.

<sup>109</sup> *Id.* at 376.

The New Jersey Supreme Court, in *In re Broadbelt*, imposed a self-described “middle-tier” scrutiny on Code restrictions of extrajudicial speech.<sup>110</sup> The *Broadbelt* court decided that a judge who had appeared on Court TV, CNBC, and the “Geraldo Live” show had violated the Code by commenting on a variety of pending actions across the country.<sup>111</sup> Addressing the judge’s First Amendment defense, the court acknowledged the unsettled state of the law,<sup>112</sup> and ultimately chose to hew closely to the United States Supreme Court’s decision in *Gentile v. State Bar of Nevada*,<sup>113</sup> which addressed state regulation of attorney speech.<sup>114</sup> A judicial regulation can satisfy the First Amendment, the court held in *Broadbelt*, if it “(1) ‘further[s] an important or substantial governmental interest unrelated to the suppression of expression’; and (2) is no more restrictive than necessary to protect the governmental interest.”<sup>115</sup> In the case at hand, the preservation of the independence and integrity of the judiciary, and the maintenance of public confidence in the judiciary, were sufficient to be considered “important” and “substantial,” and the restriction imposed by the pending-action canon was no more restrictive than necessary.<sup>116</sup>

The court in *Scott v. Flowers* adopted a third approach, using the balancing test imposed when public-employee speech is restricted.<sup>117</sup> In *Scott*, a justice of the peace brought suit against the Texas Commission on Judicial Conduct, claiming that the commission’s public reprimand of him violated the First Amendment.<sup>118</sup> Judge Scott had written an “open letter” to county officials complaining of the county court-at-laws’ practice of dismissing appeals from lower courts such as his, and he had been sanctioned for his “insensitivity” in oral and written communications.<sup>119</sup>

The Fifth Circuit treated Judge Scott as if he were simply a public employee.<sup>120</sup> This meant that the Supreme Court’s decision in *Pickering v. Board of Education*<sup>121</sup> applied.<sup>122</sup> So the court of appeals engaged in *Pickering*’s two-step inquiry: asking first whether the speech addressed a “matter of legitimate public concern,”<sup>123</sup> and if it did, “balanc[ing] the employee’s first amendment rights against the governmental employer’s countervailing interest in promoting the efficient performance of its normal

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<sup>110</sup> *In re Broadbelt*, 683 A.2d 543, 552 (N.J. 1996) (per curiam).

<sup>111</sup> *Id.* at 544–45, 550.

<sup>112</sup> *See id.* at 551.

<sup>113</sup> *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991).

<sup>114</sup> *See id.* at 1075–76.

<sup>115</sup> *Broadbelt*, 683 A.2d at 552 (quoting *In re Hinds*, 449 A.2d 483, 488 (N.J. 1982)).

<sup>116</sup> *Id.*

<sup>117</sup> *Scott v. Flowers*, 910 F.2d 201, 210 (5th Cir. 1990).

<sup>118</sup> *Id.* at 204–05.

<sup>119</sup> *Id.* at 204.

<sup>120</sup> *See id.* at 210–11.

<sup>121</sup> *See Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

<sup>122</sup> *Scott*, 910 F.2d at 210.

<sup>123</sup> *Id.* (quoting *Pickering*, 391 U.S. at 571).

functions.”<sup>124</sup> The court concluded that court processes were a matter of public concern and that the commission had not carried its burden to show how Scott’s letter had impaired the courts’ function.<sup>125</sup>

*Scott* was followed by a few courts,<sup>126</sup> but when the Supreme Court handed down *Republican Party of Minnesota v. White* in 2002—a case involving the discipline of a judicial candidate—the Fifth Circuit abandoned *Scott* and applied strict scrutiny just as *White* had.<sup>127</sup> In *Jenevein v. Willing*, the Texas Commission on Judicial Conduct had issued a public censure to a judge for holding a press conference in his courtroom and sending an e-mail to seventy-six people to strike out at baseless allegations made by the plaintiff’s lawyer.<sup>128</sup> The Fifth Circuit held that in light of *White*, strict scrutiny applied, and would not allow the commission to censure the judge solely for defending himself.<sup>129</sup>

As these cases show, the state and lower federal courts are uncertain about the First Amendment analysis that should be applied to the discipline of extrajudicial speech. The Washington court assumed, based on general First Amendment principles, that strict scrutiny should be applied.<sup>130</sup> The New Jersey court relied on *Gentile*, an attorney-discipline case, for a more lenient standard.<sup>131</sup> And the Fifth Circuit relied initially on *Pickering*, a public-employee discipline case, for a balancing test,<sup>132</sup> but later shifted to the strict scrutiny of the judicial-candidate cases.<sup>133</sup> The following Part will explore these lines of cases in order to establish the wisdom of applying *Pickering* in this context.

#### V. DIFFERENT SUPREME COURT APPROACHES TO DISCIPLINE BASED ON SPEECH

The Supreme Court of the last half-century has taken a broad view of First Amendment protection and has shown a reluctance to uphold content-based restrictions. Not only has the Court resisted recognizing new categories of

<sup>124</sup> *Id.* at 211 (citing *Rankin v. McPherson*, 483 U.S. 378, 388 (1987)).

<sup>125</sup> *Id.* at 211–13.

<sup>126</sup> *E.g.*, *In re Schenck*, 870 P.2d 185, 205–06 (Or. 1994); *In re Davis*, 82 S.W.3d 140, 149 (Tex. Spec. Ct. Review 2002).

<sup>127</sup> *Republican Party of Minn. v. White*, 536 U.S. 765, 769–70, 774 (2002).

<sup>128</sup> *Jenevein v. Willing*, 493 F.3d 551, 553–55 (5th Cir. 2007).

<sup>129</sup> *Id.* at 560. Judge Higginbotham wrote: “To leave judges speechless, throttled for publicly addressing abuse of the judicial process by practicing lawyers, ill serves the laudable goal of promoting judicial efficiency and impartiality.” *Id.* The Fifth Circuit did uphold the judge’s censure to the extent that it was directed at his decision to hold a press conference in his courtroom, and his stepping out from behind the bench to address the cameras in full robes. *Id.*

<sup>130</sup> *In re Sanders*, 955 P.2d 369, 375 (Wash. 1998).

<sup>131</sup> *In re Broadbelt*, 683 A.2d 543, 552 (N.J. 1996).

<sup>132</sup> *Scott v. Flowers*, 910 F.2d 201, 210 (5th Cir. 1990).

<sup>133</sup> *Jenevein*, 493 F.3d at 560.

unprotected speech,<sup>134</sup> but it has also held frequently that States have not met the requirements of strict scrutiny.<sup>135</sup> Subpart A—introducing the *White* case—will provide an example of the latter.

With that said, the Court has identified a few contexts in which the State has greater than ordinary authority to restrict speech.<sup>136</sup> The cases covered in Subparts B and C—*Gentile* and *Pickering*—are examples of those.

#### A. *The Judicial Candidate Cases*: Republican Party of Minnesota v. White and Williams-Yulee v. Florida Bar

The Supreme Court has not yet addressed the First Amendment ramifications of restricting the speech of sitting judges, but has twice addressed Code provisions limiting the speech of judicial candidates, in *Republican Party of Minnesota v. White*<sup>137</sup> and *Williams-Yulee v. Florida Bar*.<sup>138</sup> In both cases, the Court applied strict scrutiny.<sup>139</sup>

In *White*, a Republican judicial candidate challenged Minnesota's "announce" clause.<sup>140</sup> The clause, which was based on Canon 7(B) of the 1972 Model Code of Judicial Conduct, stated that a judicial candidate or judge was not to "announce his or her views on disputed legal or political issues."<sup>141</sup> The

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<sup>134</sup> See, e.g., *United States v. Stevens*, 559 U.S. 460, 472 (2010) ("Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. But if so, there is no evidence that 'depictions of animal cruelty' is among them.").

<sup>135</sup> See, e.g., *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011) (holding that California failed to prove a compelling interest—that violent video games turn children violent—and that the statute was narrowly tailored to serve that interest).

<sup>136</sup> See, e.g., *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245–46 (2015) ("[G]overnment statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas." (citing *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 559 (2005))); *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1073 (1991) ("Even in an area far from the courtroom and the pendency of a case, our decisions dealing with a lawyer's right under the First Amendment to solicit business and advertise, contrary to promulgated rules of ethics, have not suggested that lawyers are protected by the First Amendment to the same extent as those engaged in other businesses.").

<sup>137</sup> *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).

<sup>138</sup> *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656 (2015).

<sup>139</sup> *Id.* at 1665; *White*, 536 U.S. at 774. Justice Kennedy recognized that applying Code provisions to sitting judges might call for a different standard. See *White*, 536 U.S. at 796 (Kennedy, J., concurring) ("Whether the rationale of *Pickering v. Board of Ed.* . . . , 391 U.S. 563, 568 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983), could be extended to allow a general speech restriction on sitting judges—regardless of whether they are campaigning—in order to promote the efficient administration of justice, is not an issue raised here.").

<sup>140</sup> *White*, 536 U.S. at 769–70.

<sup>141</sup> *Id.* at 768 (quoting MINN. CODE OF JUDICIAL CONDUCT, canon 5(A)(3)(d)(i) (West 2006)).

parties agreed that strict scrutiny applied.<sup>142</sup> The majority, speaking through Justice Scalia, held that while there were compelling interests in preserving judicial impartiality and the public's perception of that impartiality, the announce clause was not narrowly tailored to advance those interests.<sup>143</sup> The majority did not accept the proposition that a judge could face unacceptable pressure if a politicized judicial campaign forced the candidate to announce stances on issues that were likely to end up before the judge on the bench.<sup>144</sup> Justice Scalia completely rejected the idea that a judicial candidate might be expected to adopt different conduct—depoliticized conduct—solely to honor the profession he or she was seeking to join.<sup>145</sup>

The fact that the restrictions limited information in the context of judicial elections was critically important to the majority.<sup>146</sup> Justice Scalia wrote:

“The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance.” “It is simply not the function of government to select which issues are worth discussing or debating in the course of a political campaign.” We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election.<sup>147</sup>

Justices Stevens, Souter, Ginsburg, and Breyer dissented, and Justices Stevens and Ginsburg each filed opinions joined by all the others.<sup>148</sup> Justice Stevens decried the majority's failure to distinguish judicial and political candidacies.<sup>149</sup> He wrote that “every good judge is fully aware of the distinction between the law and a personal point of view,” and so a judicial candidate had no business encouraging people to vote for him or her on the basis of that

<sup>142</sup> *Id.* at 774.

<sup>143</sup> *Id.* at 775–76.

<sup>144</sup> *See id.* at 781 (“[I]t suffices to say that respondents have not carried the burden imposed by our strict-scrutiny test to establish this proposition (that campaign statements are uniquely destructive of openmindedness) on which the validity of the announce clause rests.”).

<sup>145</sup> *See id.* at 779–80. Justice Scalia wrote:

[A judicial candidate] 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. 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.*

<sup>146</sup> *See White*, 536 U.S. at 781–82.

<sup>147</sup> *Id.* (citations omitted) (first quoting *Wood v. Georgia*, 370 U.S. 375, 395 (1962); and then quoting *Brown v. Hartlage*, 456 U.S. 45, 60 (1982)).

<sup>148</sup> *Id.* at 797 (Stevens, J., dissenting); *id.* at 803 (Ginsburg, J., dissenting).

<sup>149</sup> *Id.* at 797 (Stevens, J., dissenting) (“By obscuring the fundamental distinction between campaigns for the judiciary and the political branches . . . the Court defies any sensible notion of the judicial office and the importance of impartiality in that context.”).

“personal point of view.”<sup>150</sup> Stevens wrote, “to the extent that such statements seek to enhance the popularity of [a] candidate by indicating how he would rule in specific cases if elected, they evidence *a lack of fitness for the office*.”<sup>151</sup>

Justice Ginsburg elaborated on the distinction between the judicial and political roles.<sup>152</sup> She quoted Justice Scalia himself for the proposition that judges are actually supposed to “stand[] up to what is generally supreme in a democracy: the popular will.”<sup>153</sup> Because of this, she wrote, “the Court’s unrelenting reliance on decisions involving contests for legislative and executive posts is manifestly out of place,”<sup>154</sup> and the Court should allow states to limit judicial campaign speech “by measures impermissible in elections for political office.”<sup>155</sup>

<sup>150</sup> *Id.* at 798 (Stevens, J., dissenting).

<sup>151</sup> *Id.* (emphasis added).

<sup>152</sup> *White*, 536 U.S. at 803–09 (Ginsburg, J., dissenting).

<sup>153</sup> *Id.* at 804 (quoting Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180 (1989)).

<sup>154</sup> *Id.* at 806.

<sup>155</sup> *Id.* at 807. Justice Ginsburg challenged Justice Scalia for belittling the distinction between statements made before a judicial candidacy and those made after. She noted that he had drawn precisely such a distinction when he appeared before the Senate in connection with his confirmation. *Id.* at 818 n.4. She quoted then-Judge Scalia as saying:

Let us assume that I have people arguing before me to do it or not to do it. I think it is quite a thing to be arguing to somebody who you know has made a representation in the course of his confirmation hearings, and that is, by way of condition to his being confirmed, that he will do this or do that. I think I would be in a very bad position to adjudicate the case without being accused of having a less than impartial view of the matter.

*Id.* (quoting 13 THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE 1916–1986: ANTONIN SCALIA 37 (Roy M. Mersky & J. Myron Jacobstein eds., 1989)). She also quoted then-Justice Rehnquist acknowledging why judicial nominees should refrain from political statements:

[[O]ne must] distinguish quite sharply between a public statement made prior to nomination for the bench, on the one hand, and a public statement made by a nominee to the bench. For the latter to express any but the most general observation about the law would suggest that, in order to obtain favorable consideration of his nomination, he deliberately was announcing in advance, without benefit of judicial oath, briefs, or argument, how he would decide a particular question that might come before him as a judge.

*Id.* at 819 (quoting *Laird v. Tatum*, 409 U.S. 824, 836 n.5 (1972)).

In *Williams-Yulee*, the Florida Bar imposed sanctions on judicial candidate Yulee<sup>156</sup> after she mailed a letter seeking funds for her judicial campaign.<sup>157</sup> The letter violated Florida's Code of Judicial Conduct Canon 7C(1), which provided that "[a] candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates shall not personally solicit campaign funds."<sup>158</sup> The Florida Supreme Court upheld the Code provision against Yulee's First Amendment challenge, and the Supreme Court affirmed.<sup>159</sup>

The Florida Bar and several amici urged the Court to adopt a standard akin to intermediate scrutiny for evaluating Canon 7C(1).<sup>160</sup> Borrowing from *McConnell v. FEC*,<sup>161</sup> they argued that the bar need only show that Canon 7C(1) was "closely drawn" to match a "sufficiently important interest."<sup>162</sup> Chief Justice Roberts, writing for the majority, rejected the argument with little pause:

As we have long recognized, speech about public issues and the qualifications of candidates for elected office [which the fundraising letter included] commands the highest level of First Amendment protection. Indeed, in our only prior case concerning speech restrictions on a candidate for judicial office, this Court and both parties assumed that strict scrutiny applied.<sup>163</sup>

The Court went on to hold that the Florida rule was "one of the rare cases in which a speech restriction withstands strict scrutiny."<sup>164</sup> Florida's interests in protecting the integrity of the judiciary and maintaining the public's confidence in an impartial judiciary were sufficiently compelling: "public perception of judicial integrity is 'a state interest of the highest order.'"<sup>165</sup> Likewise, the canon was narrowly tailored to advance those interests.<sup>166</sup> By prohibiting personal solicitation, the canon eliminated the appearance of justice for sale.<sup>167</sup> The lawyers and litigants who might feel they had no choice in a personal solicitation could instead choose whether to support a given judge.<sup>168</sup> And the canon

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<sup>156</sup> The Court's opinion states that the Petitioner "refers to herself as" Yulee. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1663 (2015).

<sup>157</sup> *Id.* Yulee was an attorney, and the Florida Bar sanctioned her under Florida Bar Rule 4-8.2(b), which required judicial candidates to comply with the Code of Judicial Conduct. *Id.* at 1663-64.

<sup>158</sup> *Id.* at 1663.

<sup>159</sup> *Id.* at 1664, 1673.

<sup>160</sup> *Id.* at 1665.

<sup>161</sup> *McConnell v. FEC*, 540 U.S. 93, 136 (2003), *overruled in part by* *Citizens United v. FEC*, 558 U.S. 310, 365-66 (2010).

<sup>162</sup> *Williams-Yulee*, 135 S. Ct. at 1665.

<sup>163</sup> *See id.* (first citing *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989); and then citing *Republican Party of Minn. v. White*, 536 U.S. 765, 774 (2002)).

<sup>164</sup> *Id.* at 1666.

<sup>165</sup> *Id.* (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009)).

<sup>166</sup> *Id.*

<sup>167</sup> *See id.*

<sup>168</sup> *Williams-Yulee*, 135 S. Ct. at 1667-68.



allowed judicial candidates to raise money—just through committees rather than by personal solicitation—without otherwise restricting their communications with voters.<sup>169</sup>

### B. *The Attorney Discipline Case: Gentile v. State Bar of Nevada*

The petitioner in *Gentile v. State Bar of Nevada* was a criminal defense attorney who had been disciplined by the Nevada Bar for a press conference he held hours after his client was indicted, during which the attorney suggested that the investigating detective was the actual perpetrator.<sup>170</sup> The attorney was said to have violated Nevada Supreme Court Rule 177(1), which prohibited an attorney from making “an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.”<sup>171</sup> The disciplinary board found that the attorney violated the rule, and the Nevada Supreme Court affirmed.<sup>172</sup>

The Nevada decision was ultimately overturned, when a majority of the Supreme Court found that subsection 3 of the rule, a safe-harbor provision on which the attorney had relied in crafting his statement, was void for vagueness.<sup>173</sup> A different majority, however, went on to address the merits of the state bar’s arguments, and held that rule 177(1) did not violate the First Amendment.<sup>174</sup> The attorney had argued that the rule was unconstitutional insofar as it punished speech that did not present a “clear and present danger” of prejudicing the trial, the only showing that would allow regulation of the press.<sup>175</sup> In an opinion of the Court for that majority, Justice Rehnquist wrote:

The question we must answer in this case is whether a lawyer . . . may insist on the same standard before he is disciplined for public pronouncements about the case, or whether the State instead may penalize that sort of speech upon a lesser showing.

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Even in an area far from the courtroom and the pendency of a case, our decisions dealing with a lawyer’s right under the First Amendment to solicit business and advertise, contrary to promulgated rules of ethics, have not suggested that lawyers are protected by the First Amendment to the same extent as those engaged in other businesses. In each of these cases, we engaged in a

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<sup>169</sup> *Id.* at 1672.

<sup>170</sup> *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1033, 1045 (1991).

<sup>171</sup> *Id.* at 1033.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 1048–49, 1058.

<sup>174</sup> *Id.* at 1075.

<sup>175</sup> *Id.* at 1069.

balancing process, weighing the State's interest in the regulation of a specialized profession against a lawyer's First Amendment interest in the kind of speech that was at issue. . . .

We think that the quoted statements . . . rather plainly indicate that the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press . . . .<sup>176</sup>

### C. *The Public Employee Discipline Cases: Pickering v. Board of Education*

In *Pickering v. Board of Education*, the Supreme Court held expressly that public employees have a First Amendment right to speak on matters of public concern.<sup>177</sup> The Court did not subject the employer's restrictions to strict scrutiny, however.<sup>178</sup> Whether an employee's speech is protected, the Court held, turns on "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."<sup>179</sup>

In the years since *Pickering*, the Court has refined its balancing test in a number of ways. The Court made clear in *Connick v. Myers* that First Amendment protection extended only to employee statements of public concern, not to statements addressing private employment matters.<sup>180</sup> Under *Connick*, government officials enjoy "wide latitude" when "employee expression cannot be fairly considered as relating to any matter of political, social, or other concern."<sup>181</sup> Thus, Myers's office questionnaire—addressing morale, the office transfer policy, the loss of confidence in supervisors, and the need for a grievance committee in the New Orleans district attorney's office—was not protected.<sup>182</sup>

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<sup>176</sup> *Gentile*, 501 U.S. at 1071–74 (first citing *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977); then citing *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91 (1990); then citing *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978); then citing *In re Cohen*, 166 N.E.2d 672, 675 (N.Y. 1960), *cert. granted*, 363 U.S. 810 (1960); then citing *In re Sawyer*, 360 U.S. 622 (1959); and then citing *Sheppard v. Maxwell*, 384 U.S. 333 (1966)).

<sup>177</sup> *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (first citing *Wieman v. Updegraff*, 344 U.S. 183 (1952); then citing *Shelton v. Tucker*, 364 U.S. 479 (1960); and then citing *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967)).

<sup>178</sup> *See id.* ("[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.").

<sup>179</sup> *Id.*

<sup>180</sup> *Connick v. Myers*, 461 U.S. 138, 146 (1983).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 149. The Court held that one of the questions on the questionnaire—that relating to alleged "pressure[] to work in political campaigns"—did address a matter of

The Court also declined to extend protection to statements employees make as a part of their official duties, even if the statements involve matters of public concern. In *Garcetti v. Ceballos*, a deputy district attorney had written two internal memos calling into question a warrant affiant's credibility, and the deputy was fired after a criminal defendant called him to testify about the warrant.<sup>183</sup> Emphasizing its desire not to "constitutionalize the employee grievance,"<sup>184</sup> and *Pickering's* purpose of protecting the employee as *citizen* rather than as employee, the majority held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."<sup>185</sup>

In other cases, the Court elaborated on the two parts of the *Pickering* balancing test: the concept of "public concern" and the factors that should inform a holding of workplace disruption. In *City of San Diego v. Roe*, a San Diego police officer posted online a video of himself stripping off his uniform and masturbating.<sup>186</sup> When he refused to take the video down, he was fired.<sup>187</sup> The Supreme Court held that Roe's video was not even subject to *Pickering* balancing because it did not involve a matter of public concern.<sup>188</sup> To determine whether a statement involves a matter of public concern, the Court wrote:

*Connick* . . . directs courts to examine the 'content, form, and context of a given statement, as revealed by the whole record' in assessing whether an employee's speech addresses a matter of public concern. . . . [T]he standard for determining whether expression is of public concern is the same standard used to determine whether a common-law action for invasion of privacy is present[,]

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public concern, and so it performed *Pickering* balancing with respect to that question. *Id.* at 149–50. The Court found in favor of the employer in the balancing:

When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate. . . . [W]e do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.

*Id.* at 151–52.

<sup>183</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 414–15 (2006).

<sup>184</sup> *Id.* at 420 (quoting *Connick*, 461 U.S. at 154).

<sup>185</sup> *Id.* at 421. The statements that are unprotected are ones that are routinely made in the course of doing one's job. In *Lane v. Franks*, 134 S. Ct. 2369, 2375–76 (2014), the Court addressed the firing of a program director who learned that a state representative was on the program's payroll in name only, fired the representative, and ultimately became a witness in the representative's federal criminal trial. The Court held that the firing violated the First Amendment even though the testimony related to the director's job duties: "The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of the employee's duties, not whether it merely concerns those duties." *Id.* at 2379.

<sup>186</sup> *City of San Diego v. Roe*, 543 U.S. 77, 78 (2004) (per curiam).

<sup>187</sup> *Id.* at 78–79.

<sup>188</sup> *Id.* at 84.

as established in *Cox Broadcasting v. Cohn* and *Time, Inc. v. Hill*. . . . [P]ublic concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication.<sup>189</sup>

In *Rankin v. McPherson*, the Court performed *Pickering* balancing and identified several factors that should be considered with respect to workplace disruption, the employer's side of the scale.<sup>190</sup> The employee in *Rankin* was a nineteen-year-old woman working as a data entry clerk in a back room at the Harris County Constable's office.<sup>191</sup> When the news reported the attempt to assassinate President Reagan, she turned to her coworker (and as it turned out, boyfriend) and said, "[I]f they go for him again, I hope they get him."<sup>192</sup> A deputy reported her, and she was fired.<sup>193</sup>

The *Rankin* majority held that the woman's statement involved a matter of public concern, and thus *Pickering* balancing was appropriate.<sup>194</sup>

In performing the balancing, the statement will not be considered in a vacuum; the manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose. We have previously recognized as pertinent considerations whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise.<sup>195</sup>

Because the woman's statement was made privately, such that no member of the public likely heard her, and there was no evidence that it interfered with the efficient functioning of the office, the Court found that her discharge violated the First Amendment.<sup>196</sup> The Court rejected the constable's argument that she was "not suitable" for a law enforcement job: "We cannot believe that every employee . . . , whether computer operator, electrician, or file clerk, is equally required, on pain of discharge, to avoid any statement susceptible of being interpreted by the Constable as an indication that the employee may be unworthy of employment in his law enforcement agency."<sup>197</sup>

<sup>189</sup> *Id.* at 83–84 (first citing *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975); and then citing *Time, Inc. v. Hill*, 385 U.S. 374 (1967)).

<sup>190</sup> *Rankin v. McPherson*, 483 U.S. 378, 388, 391 (1987).

<sup>191</sup> *Id.* at 380–81.

<sup>192</sup> *Id.* at 381.

<sup>193</sup> *Id.* at 381–82.

<sup>194</sup> *Id.* at 388.

<sup>195</sup> *Id.* (citations omitted) (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 570–73 (1968)).

<sup>196</sup> *Rankin*, 483 U.S. at 392.

<sup>197</sup> *Id.* at 391.

Finally, and importantly for purposes here, in *United States v. National Treasury Employees Union (NTEU)* the Supreme Court addressed a challenge to a statute that prohibited public employees from receiving compensation for non-work-related speeches.<sup>198</sup> The Court considered *Pickering* balancing the appropriate test, but noted that as an *ex ante* restriction, the government's burden was heavier than usual:

The widespread impact of the honoraria ban, however, gives rise to far more serious concerns than could any single supervisory decision. In addition, unlike an adverse action taken in response to actual speech, this ban chills potential speech before it happens. For these reasons, the Government's burden is greater with respect to this statutory restriction on expression than with respect to an isolated disciplinary action.<sup>199</sup>

Ultimately, the Court held that the "speculative benefits" the honoraria ban might provide to the efficiency of the federal workplace were completely inadequate to justify the ban.<sup>200</sup>

## VI. A *PICKERING* ANALYSIS APPROPRIATE TO SITTING JUDGES

In a society with communication devices always within reach, judges have the opportunity more than ever to engage in extrajudicial speech. Several developments suggest that extrajudicial speech may become more common: the prevalence and politicization of judicial elections at the state level,<sup>201</sup> the polarity of the electorate generally,<sup>202</sup> and the ease with which statements may be made on social media or blogs. At the same time, the needs of the judiciary as an institution remain constant. The judicial system continues to depend on independent, impartial judges and the people's collective belief that judges are independent and impartial. Hence, there is a real need for refined, workable ethics codes that protect the judiciary's reputation and yet allow judges the breathing room the First Amendment requires.

### A. *The Inappropriateness of Strict Scrutiny*

In deciding how to analyze extrajudicial speech provisions under the First Amendment, one would turn first to the Supreme Court's decisions in *Republican Party of Minnesota v. White*<sup>203</sup> and *Williams-Yulee v. Florida*

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<sup>198</sup> *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 457 (1995).

<sup>199</sup> *Id.* at 468 (first citing *City of Ladue v. Gilleo*, 512 U.S. 43, 54–55 (1994); and then citing *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931)).

<sup>200</sup> *Id.* at 477.

<sup>201</sup> See Lynne H. Rambo, *High Court Pretense, Lower Court Candor: Judicial Impartiality After Caperton v. Massey Coal Co.*, 13 CARDOZO PUB. L. POL'Y & ETHICS J. 441, 459–69 (2015).

<sup>202</sup> *Political Polarization in the American Public*, *supra* note 31.

<sup>203</sup> *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).

*Bar*.<sup>204</sup> Both cases involved extrajudicial speech provisions drawn from the Model Rules of Judicial Conduct and applied to judicial candidates.<sup>205</sup> In both cases, the State argued that it had interests in preserving impartiality and the appearance of impartiality.<sup>206</sup> In both cases, the Court applied strict scrutiny.<sup>207</sup>

Nonetheless, the precedential value of the cases is limited. First, both involved judicial candidates rather than sitting judges, and there is good reason to treat those two groups separately with respect to Code provisions.<sup>208</sup> A sitting judge has made a conscious decision to accept the ethical constraints placed on her in a way that someone merely running for office has not. Second, in neither case did the Court focus on whether strict scrutiny should be applied to ethical code provisions generally. In *White*, the parties stipulated to the application of strict scrutiny, and the Court simply accepted that level of analysis.<sup>209</sup> In *Williams-Yulee*, the Court emphasized that speech on public issues and candidate qualifications—i.e., electoral speech—deserved the highest protection.<sup>210</sup> In the ordinary discipline of judges, electoral speech is unlikely to be involved.

The approach that the Court took toward practicing lawyers in *Gentile v. State Bar of Nevada* seems more appropriate to the discipline of sitting judges. In the face of *Gentile*'s express argument that the Nevada Bar regulations should be subjected to strict scrutiny—i.e., a clear-and-present-danger test—the Supreme Court opted for a balancing analysis.<sup>211</sup> Ultimately, it held for the State on this point because the State's interest in "regulati[ng] . . . a specialized profession" outweighed the lawyer's interest in speaking.<sup>212</sup>

Indeed, if the State has an interest in regulating the *profession* of lawyers, it has an even greater interest in regulating the *government institution* that is the judiciary. Strict scrutiny is important to apply when the State intermittently restricts the speech of individual citizens, but as the Court said in *Connick v. Myers*, "government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."<sup>213</sup> Requiring that every ethics rule to which a sitting judge is

<sup>204</sup> *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656 (2015).

<sup>205</sup> See *Williams-Yulee*, 135 S. Ct. at 1662–63; *White*, 536 U.S. at 768.

<sup>206</sup> See *Williams-Yulee*, 135 S. Ct. at 1666; *White*, 536 U.S. at 775.

<sup>207</sup> See *Williams-Yulee*, 135 S. Ct. at 1666; *White*, 536 U.S. at 781. These similarities caused the Fifth Circuit to abandon its own precedent and begin applying strict scrutiny to any Code speech provision, whether candidate or sitting judge. *Jenevein v. Willing*, 493 F.3d 551, 558 (5th Cir. 2007).

<sup>208</sup> See *Williams-Yulee*, 135 S. Ct. at 1663; *White*, 536 U.S. at 769.

<sup>209</sup> *White*, 536 U.S. at 774.

<sup>210</sup> *Williams-Yulee*, 135 S. Ct. at 1665 ("As we have long recognized, speech about public issues and the qualifications of candidates for elected office commands the highest level of First Amendment protection." (citing *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989))).

<sup>211</sup> *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1069, 1075 (1991).

<sup>212</sup> *Id.* at 1073–75.

<sup>213</sup> *Connick v. Myers*, 461 U.S. 138, 146 (1983).

subject be narrowly tailored to its end would place an extraordinary burden on the State. Further, it would be incongruous to apply *Gentile*'s balancing test to the ethical rules governing lawyers and yet a different, stricter test to the ethical rules governing judges.

### B. *Adapting the Pickering Framework to the Judicial Discipline Context*

For these reasons—conferring sufficient latitude on the State to manage the judiciary and maintaining consistency with *Gentile*'s balancing approach—it seems most appropriate to adopt the *Pickering* framework for evaluating extrajudicial speech. The *Pickering* doctrine arose in the context of public-employee speech,<sup>214</sup> and although judges are not exactly “rank and file” employees, they are indeed public employees. Moreover, as the summary above shows,<sup>215</sup> the Court has heard so many cases invoking the doctrine that it has developed an extensive framework for addressing different situations.

Under *Pickering*, an employee claiming First Amendment protection faces a threshold burden.<sup>216</sup> An employee disciplined or fired for something the employee said can claim the benefit of the First Amendment only if (1) the speech involved a matter of public concern,<sup>217</sup> and (2) the speech was not the product of a task within the employee's official duties.<sup>218</sup> If both of these are the case, then the court weighs “the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”<sup>219</sup> If the speech does not involve a matter of public concern, then it is unprotected and any discipline decision stands.<sup>220</sup> If the speech is a product of the employee's official duties, it is not the “citizen” speech for which the First Amendment protection was extended, and any discipline decision stands.<sup>221</sup>

These conditions are well-suited to the context of discipline for extrajudicial speech. If First Amendment protection is not extended to extrajudicial speech on matters of private concern, that immediately excludes a substantial portion of the speech for which judges are disciplined, particularly under Rule 1.2: for example, racist and sexist language, and private disputes.<sup>222</sup> Further, with judges, whether their speech was a product of their official duties should be a relatively easy question: the speech was either part of one of their assigned proceedings or it was not.

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<sup>214</sup> See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 564 (1968).

<sup>215</sup> See *supra* notes 177–200 and accompanying text.

<sup>216</sup> See *supra* note 179 and accompanying text.

<sup>217</sup> See *supra* notes 180–82 and accompanying text.

<sup>218</sup> See *supra* notes 183–85 and accompanying text.

<sup>219</sup> *Pickering*, 391 U.S. at 568.

<sup>220</sup> See *supra* notes 180–82 and accompanying text.

<sup>221</sup> See *supra* notes 183–85 and accompanying text.

<sup>222</sup> See *supra* notes 93–98 and accompanying text.

The balancing test also adapts well, although the State's interest side of the scale needs expansion. *Pickering* directs that the courts weigh the speaker's interest—the judge's interest—against the State's interest “in promoting the efficiency of the public services it performs through its employees.”<sup>223</sup> In *Rankin v. McPherson*, the Court expounded upon the State's interest, holding that the court should consider “whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise.”<sup>224</sup> In the judicial setting, these concerns (depending on the interpretation of the last two) are not usually the driving force behind the discipline.<sup>225</sup> Most discipline for extrajudicial speech is levied because the judge has threatened either the actual or the perceived independence, integrity, or impartiality of the court.<sup>226</sup> Hence, in applying *Pickering* balancing to extrajudicial speech, the State's interest should be expanded to include protecting the judicial institution.

Finally, applying *Pickering* in the extrajudicial speech context, where discipline is based on existing ethical codes, requires incorporating the Supreme Court's decision in *NTEU*. The Court there held that an *ex ante* restriction on speech chills employee speech in a way that an ad hoc employment action does not, and so the government's burden in the balancing test is heavier.<sup>227</sup> The ethical codes governing extrajudicial speech are also *ex ante* restrictions, so state and federal disciplinary bodies need to be prepared to carry a substantial burden.

### C. Presumptions for the State

With that said, the *NTEU* Court acknowledged that it would “normally accord a stronger presumption of validity to a congressional judgment than to an individual executive's disciplinary action.”<sup>228</sup> It did not do so, Justice Stevens wrote, because not only was the ban *ex ante*, but it swept so widely that it did not warrant the presumption.<sup>229</sup>

The judicial ethical codes in place around the country differ markedly from the honorarium ban in *NTEU*. The *NTEU* ban was adopted to prevent government employees (primarily members of Congress) from doing the bidding of special interests while being paid for “speeches” and

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<sup>223</sup> *Pickering*, 391 U.S. at 568.

<sup>224</sup> *Rankin v. McPherson*, 483 U.S. 378, 388 (1987) (citing *Pickering*, 391 U.S. at 570–73).

<sup>225</sup> See *supra* notes 68–98 and accompanying text.

<sup>226</sup> See *supra* notes 68–98 and accompanying text.

<sup>227</sup> See *supra* notes 198–200 and accompanying text.

<sup>228</sup> *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 468 (1995) (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 671 & n.2 (1994) (Stevens, J., concurring in part and concurring in judgment)).

<sup>229</sup> *Id.*



“appearances.”<sup>230</sup> Yet the ban was applied to all speeches by all employees, without any evidence that any civil servants under GS-16 (the general base pay schedule for federal public employees) had ever engaged in such misconduct.<sup>231</sup> Little effort was made to distinguish between the speech that triggered the concern and the speech that did not.<sup>232</sup>

In contrast, the judicial codes are the product of decades of thoughtful consideration. The Canons of Judicial Ethics were adopted in 1924, and were followed by versions of the ABA’s Model Code of Judicial Conduct in 1972, 1990, and 2007.<sup>233</sup> Today, every state has adopted one of these versions.<sup>234</sup> With each version, the Committee has made efforts to limit the restraints on judges to only those necessary for judicial “independence, integrity and impartiality.”<sup>235</sup> Because that has been the case, most of the rules give very specific guidance.

Two of the rules with respect to extrajudicial speech are an example. Rule 4.1—the “political activity rule”—has thirteen parts, all of which are very specific about the prohibited activity.<sup>236</sup> (The rule was amended in 2003 to remove the clause stricken in 2002 in *Republican Party of Minnesota v. White*.<sup>237</sup>) Rule 2.10—the “pending action rule”—is likewise well-defined, expressly requiring a causal effect between the extrajudicial speech and the feared outcome.<sup>238</sup>

The exception is Rule 1.2, the “promoting confidence rule.”<sup>239</sup> Rule 1.2 is a generalized principle at the beginning of the Code, and as a disciplinary matter, it operates as a catchall for conduct and speech that does not fit elsewhere.<sup>240</sup> Although the rule is perhaps a necessary evil, it sweeps broadly, gives little notice of what is prohibited, and could be abused by an unscrupulous disciplinary body.<sup>241</sup>

<sup>230</sup> *Id.* at 457–59.

<sup>231</sup> *Id.* at 459, 472.

<sup>232</sup> *See id.* at 472–74.

<sup>233</sup> *See supra* notes 55–61 and accompanying text.

<sup>234</sup> *See supra* notes 61–63 and accompanying text.

<sup>235</sup> *See* CHARLES E. GEYH & W. WILLIAM HODES, AM. BAR ASS’N, REPORTERS’ NOTES TO THE MODEL CODE OF JUDICIAL CONDUCT, at vii–ix (2009) (describing the evolution of the Code from the 1924 Canons to the 2007 version); *id.* at viii (“Over the course of three and one half years, the Commission conducted a comprehensive examination of the standards for the ethical conduct of judges and judicial candidates that promote the independence, integrity and impartiality of the judiciary.”).

<sup>236</sup> *See supra* note 70 and accompanying text.

<sup>237</sup> GEYH & HODES, *supra* note 235, at 92 (“Canon 4 of the 2007 Code is derived from Canon 5 of the 1990 Code, as amended in 1997, 1999, and 2003—the last time in response to the decision of the U.S. Supreme Court in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).” (references omitted)); *see White*, 536 U.S. at 787.

<sup>238</sup> *See supra* note 81 and accompanying text.

<sup>239</sup> MODEL CODE OF JUDICIAL CONDUCT, *supra* note 25, r. 1.2.

<sup>240</sup> *See supra* notes 92–98 and accompanying text.

<sup>241</sup> *See supra* note 92 and accompanying text.

In applying the *Pickering* framework to extrajudicial speech, the courts should accord the presumption of validity acknowledged in *NTEU* to the State's side of the scale when the basis for the discipline is Rule 4.1 or 2.10. The "political activity rule" is refined, specifically defined, and tied to the State's interest in preserving the independence and impartiality of the judiciary and the public's confidence in that independence and impartiality.<sup>242</sup> To the extent that judges engage in the rough and tumble of party politics, it is somewhat less likely that they will be independent and impartial, and substantially less likely that the people will see them that way.<sup>243</sup> The "pending action rule" is similarly specific: judges may not make public comments about any pending or impending action if the comments "might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing."<sup>244</sup> The goal is to avoid any appearance that a case has been prejudged, that judges are trying to influence one another, or that a judge deciding differently is "wrong."<sup>245</sup>

Rule 1.2, the "promoting confidence rule,"<sup>246</sup> should be afforded no such presumption. As was the case in *NTEU*,<sup>247</sup> the rule is an *ex ante* prohibition and sweeps very broadly, thereby acting as a chill to extrajudicial speech and setting up the potential for selective prosecution. When the *Pickering* balance is undertaken, the State should bear a heavy burden to prove that the judge caused confidence in the judiciary to drop.

#### D. A Case Study: Applying the Model Code and *Pickering* to Judge Kopf's Remarks

To understand how the *Pickering* doctrine might be applied to extrajudicial speech, the actions of Senior United States District Judge Richard G. Kopf provide an interesting case study.<sup>248</sup>

##### 1. Judge Kopf's Remarks

Judge Kopf, while still hearing cases regularly, maintained a blog.<sup>249</sup> In one post, he remarked about a woman who regularly appeared before him: "She is

<sup>242</sup> MODEL CODE OF JUDICIAL CONDUCT, *supra* note 25, r. 4.1, cmts. 1, 3.

<sup>243</sup> *See id.*

<sup>244</sup> *Id.* r. 2.10(A).

<sup>245</sup> *See supra* notes 83–85 and accompanying text.

<sup>246</sup> MODEL CODE OF JUDICIAL CONDUCT, *supra* note 25, r. 1.2.

<sup>247</sup> *See United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 468 (1995).

<sup>248</sup> Judge Kopf serves on the United States District Court for the District of Nebraska. *Judges' Information*, U.S. DISTRICT COURT FOR DISTRICT NEB., <http://www.ned.uscourts.gov/attorney/judges-information> [<https://perma.cc/7DZ2-B6WD>].

<sup>249</sup> *See* Richard George Kopf, *The Who, the Why, and the Title of This Blog*, HERCULES & UMPIRE, <https://herculesandtheumpire.com/the-who-and-why-of-this-blog/> [<https://perma>

brilliant, she writes well, she speaks eloquently, she is zealous but not overly so, she is always prepared, she treats others, including her opponents, with civility and respect, she wears very short skirts and shows lots of her ample chest. I especially appreciate the last two attributes.”<sup>250</sup> In another post, the judge complained about the Supreme Court’s decision in *Burwell v. Hobby Lobby Stores, Inc.*<sup>251</sup> He wrote: “the Court is now causing more harm (division) to our democracy than good by deciding hot button cases that the Court has the power to avoid. As the kids say, it is time for the Court to stfu . . .”<sup>252</sup> Most recently,

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.cc/WQY6-4GU8]. Judge Kopf is by no means the only judge to maintain a blog, or even the most famous, or even the only one to make controversial statements. Judge Richard A. Posner of the United States Court of Appeals for the Seventh Circuit operated a blog with fellow University of Chicago economist Gary S. Becker from December 2004 through May 2014, when Professor Becker passed away. See Richard A. Posner, *Farewell*, BECKER-POSNER BLOG (May 10, 2014), <http://www.becker-posner-blog.com/2014/05/index.html> [<https://perma.cc/7KKR-CANP>]. Judge Posner now writes a blog at *The Atlantic*. See Richard A. Posner, ATLANTIC, <https://www.theatlantic.com/author/richard-a-posner/> [<https://perma.cc/RLC5-XY4Z>]. Posner has written thirty-eight books as well, all of them since he took the bench in 1981. See Richard A. Posner, UNIV. CHI., <http://home.uchicago.edu/~rposner/> [<https://perma.cc/JX7D-UHRX>]. One of his books was, quite controversially, about President Bill Clinton’s impeachment. RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON (1999); see Monroe H. Freedman, *Free Speech for Judges: A Commentary on* Lubet et al. v. Posner, CT. REV., Winter 2001, at 4, 4 (responding to arguments that Posner unethically commented on a pending or impending action). One of Judge Posner’s most recent controversial comments is this:

I think the Supreme Court is at a nadir. The justices are far too uniform in background, and I don’t think there are any real stars among them; the last real star, Robert Jackson, died more than 60 years ago. I regard the posthumous encomia for Scalia as absurd. Especially those of Harvard Law School Dean Martha Minow and Justice Elena Kagan.

And on another note about academia and practical law, I see absolutely no value to a judge of spending decades, years, months, weeks, day, hours, minutes, or seconds studying the Constitution, the history of its enactment, its amendments, and its implementation (across the centuries—well, just a little more than two centuries, and of course less for many of the amendments).

Richard A. Posner, *Entry 9: The Academy Is Out of Its Depth*, SLATE: SUP. CT. BREAKFAST TABLE (June 24, 2016), [http://www.slate.com/articles/news\\_and\\_politics/the\\_breakfast\\_table/features/2016/supreme\\_court\\_breakfast\\_table\\_for\\_june\\_2016/law\\_school\\_professors\\_need\\_more\\_practical\\_experience.html](http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2016/supreme_court_breakfast_table_for_june_2016/law_school_professors_need_more_practical_experience.html) [<https://perma.cc/C28A-EMR3>]. For a list of several other judges who blog, see Robert Ambrogi, *A Quick Survey of Blogs Written by Judges*, LAWSITES (May 13, 2013), <http://www.lawsitesblog.com/2013/04/a-quick-survey-of-blogs-written-by-judges.html> [<https://perma.cc/65VY-W2HR>].

<sup>250</sup> RGK, *On Being a Dirty Old Man and How Young Women Lawyers Dress*, HERCULES & UMPIRE (Mar. 25, 2014), <https://herculesandtheumpire.com/2014/03/25/on-being-a-dirty-old-man-and-how-young-women-lawyers-dress/> [<https://perma.cc/QZP8-MKSA>].

<sup>251</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

<sup>252</sup> RGK, *Remembering Alexander Bickel’s Passive Virtues and the Hobby Lobby Cases*, HERCULES & UMPIRE (July 5, 2014), <https://herculesandtheumpire.com/2014/07/05/remembering-alexander-bickel-s-passive-virtues-and-the-hobby-lobby-cases/>.

Judge Kopf declared presidential candidate Senator Ted Cruz “unfit” for office because Cruz called for a constitutional amendment requiring Supreme Court Justices to have retention elections.<sup>253</sup>

## 2. Applying the Model Code to Judge Kopf’s Remarks

If we were to apply the Model Code to Judge Kopf<sup>254</sup>—hypothetically only, of course, because as a federal judge, Judge Kopf is subject only to the Code of Conduct of United States Judges, and it is not mandatory—he could be brought up on charges of several violations. The first statement—the “cleavage remark”—could be seen to violate Rule 1.2, which requires judges to “act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and . . . avoid impropriety and the appearance of impropriety.”<sup>255</sup> Plainly, an extrajudicial, public statement focusing on the physical appearance of a female lawyer who regularly appears before the judge—and so most likely is identifiable—does not promote confidence in the integrity and impartiality of the judiciary, and does not avoid impropriety and the appearance of impropriety. It suggests that women litigants and lawyers will not be taken seriously, and that the judge’s attention may not be on the merits whenever an attractive woman is in the room.

The second statement—the “stfu remark”—could also be seen as violating Rule 1.2, as well as, potentially, Rule 2.10(A), which reads: “A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court . . . .”<sup>256</sup> Again, an extrajudicial public statement that the Supreme Court of the United States—the highest court in the land—should “shut the fuck up” most likely does not promote confidence in the integrity and impartiality of the judiciary or avoid impropriety or the appearance thereof.<sup>257</sup> Further, the judge made the statement in July 2014, only five days after the *Hobby Lobby* decision, while that case and other related cases were pending.<sup>258</sup> It is not very likely,

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4/07/05/remembering-alexander-bickels-passive-virtues-and-the-hobby-lobby-cases/ [https://perma.cc/UP42-ZK4C].

<sup>253</sup> RGK, *Senator Ted Cruz Is Not Fit To Be President*, HERCULES & UMPIRE (July 6, 2015), <https://herculesandtheumpire.com/2015/07/06/senator-ted-cruz-is-not-fit-to-be-president/> [https://perma.cc/NJV3-A9LN].

<sup>254</sup> The Model Code is being used here simply because it is more common among the states.

<sup>255</sup> MODEL CODE OF JUDICIAL CONDUCT, *supra* note 25, r. 1.2 (references omitted).

<sup>256</sup> *Id.* r. 2.10(A) (references omitted).

<sup>257</sup> *See id.* r. 1.2; RGK, *supra* note 252.

<sup>258</sup> There were several cases brought alleging that the accommodation the Department of Health and Human Services offered nonprofit religious organization employers—which required the employers to give notice of their objection to providing contraception coverage—violated the Religious Freedom Restoration Act. *E.g.*, *Zubik v. Burwell*, 136 S. Ct. 1557, 1559 (2016). At the time that *Hobby Lobby* was decided, these cases were in the pipeline in the Third, Fifth, Tenth, and D.C. Circuits. *See id.* at 1560.

however, that a court would find his “stfu” remark “reasonably . . . expected to affect the outcome” of the pending or impending cases.<sup>259</sup>

The third statement—the “unfitness remark”—flatly violates Rule 4.1(3), which forbids a judge to “publicly endorse or oppose a candidate for any public office.”<sup>260</sup> Senator Cruz was a candidate for President.<sup>261</sup> Certainly, Judge Kopf’s description of him as unfit for office would qualify as opposing the Senator’s candidacy.

### 3. *The Pickering Balance*

With these Code violations identified, the next question is whether the judge’s statements were on matters of public concern such that they trigger First Amendment balancing under *Pickering*. (Under this scenario, there is no need to address whether the statements were products of the judge’s official duties. They clearly were not.)

Almost certainly, a court would find that the cleavage remark did not involve a matter of public concern. *San Diego v. Roe* describes a public concern as a topic of “legitimate news interest; that is, a subject of general interest and of value and concern to the public.”<sup>262</sup> The wardrobe and figure of a litigator in Judge Kopf’s courtroom, and his attraction to that, are not a legitimate news interest. And because his comments are not on a matter of public concern, he has no First Amendment protection from discipline under Rule 1.2.

The “stfu” remark most likely does involve a matter of public concern. Judge Kopf’s statement came at the end of a discussion of the Supreme Court’s recent decision in the *Hobby Lobby* case.<sup>263</sup> The judge complained in the post that the *Hobby Lobby* case was highly controversial, and thus the wiser thing would have been for the Court to decline certiorari jurisdiction.<sup>264</sup> Precisely because the decision was so controversial, it would seem to be a matter of public concern.

Under the *Pickering* doctrine, the next step would be to identify Judge Kopf’s interest, “as a citizen,” in commenting on the matter, and weigh it against the interest of the federal courts, as the employer, in “promoting the efficiency of the public services it performs.”<sup>265</sup> *Rankin v. McPherson* directs that the

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<sup>259</sup> See MODEL CODE OF JUDICIAL CONDUCT, *supra* note 25, r. 2.10; RGK, *supra* note 252.

<sup>260</sup> MODEL CODE OF JUDICIAL CONDUCT, *supra* note 25, r. 4.1(A)(3).

<sup>261</sup> RGK, *supra* note 253.

<sup>262</sup> *City of San Diego v. Roe*, 543 U.S. 77, 83–84 (2004) (per curiam).

<sup>263</sup> RGK, *supra* note 252.

<sup>264</sup> *Id.* (“To the average person, the result looks stupid and smells worse. . . . Had the Court sat on the sidelines, I don’t think any significant harm would have occurred. The most likely result is that one or more of the political branches of government would have worked something out.”). There is serious irony in the fact that Judge Kopf spoke publicly in such a questionable fashion while simultaneously criticizing the Supreme Court for leaving such a bad impression on people.

<sup>265</sup> *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

balance not be conducted in a vacuum.<sup>266</sup> On the speaker's side, the court should consider "the manner, time, and place of the . . . expression."<sup>267</sup> On the State's side, the court should consider "whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise."<sup>268</sup> And under the analysis proposed here, the court should consider all of the interests put forth by the Model Code of Judicial Conduct.

Judge Kopf began blogging in February 2013.<sup>269</sup> At that time, he said, "I am very interested in the role of judges and particularly the role of federal trial judges. So, that is what I will write about . . ."<sup>270</sup> His "stfu" remark came two and a half years later, as part of a heartfelt essay objecting that the Supreme Court had unnecessarily been taking on controversial cases, and that that served only to heighten the public's impression that the Court was a political body.<sup>271</sup> Like the letter to the editor written by the schoolteacher in *Pickering*,<sup>272</sup> the judge was commenting on developments in his field, and he presumably hoped to influence the Court by doing so. A court would have to conclude that he had a strong interest as a citizen in commenting as he did.

Were Judge Kopf to face discipline under Rule 1.2, the State would cite its interest in promoting confidence in the integrity and impartiality of the courts.<sup>273</sup> It would argue that the judicial system cannot work unless people trust that the system's outcomes are legally sound even when they do not like them.<sup>274</sup> It would also argue that the judge's remark diminished public confidence in the judiciary—both the Supreme Court and Judge Kopf—because the judge was so willing to speak disrespectfully and profanely.

It is hard to say how a court weighing the competing interests would decide. Judge Kopf undoubtedly has a strong citizen's interest in expressing his

<sup>266</sup> *Rankin v. McPherson*, 483 U.S. 378, 388 (1987).

<sup>267</sup> *Id.* at 388.

<sup>268</sup> *Id.*

<sup>269</sup> See Kopf, *supra* note 249.

<sup>270</sup> *Id.*

<sup>271</sup> RGK, *supra* note 252.

<sup>272</sup> See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572 (1968).

<sup>273</sup> MODEL CODE OF JUDICIAL CONDUCT, *supra* note 25, r. 1.2.

<sup>274</sup> The Court in *Williams-Yulee* had much to say about the importance of the State's interest in public perception:

We have recognized the "vital state interest" in safeguarding "public confidence in the fairness and integrity of the nation's elected judges." . . . The judiciary's authority therefore depends in large measure on the public's willingness to respect and follow its decisions. . . . It follows that public perception of judicial integrity is "a state interest of the highest order."

*Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1666 (2015) (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009)).

displeasure with the Supreme Court. But the State has a strong interest in promoting confidence in the courts that is substantially contravened by the judge's objection. A court might also be affected by the *form* in which Judge Kopf spoke: the message could certainly have been delivered in a different way.<sup>275</sup> Although the issue is a close one, and it is important not to allow the "promoting confidence rule" to be used too broadly, the author would find that the balance tips for the State.<sup>276</sup>

Finally, Judge Kopf's unfitness remark definitely involved a matter of public concern. Judge Kopf was speaking about a candidate for the presidency. Who was to be elected after President Barack Obama left office was one of the most significant, if not *the* most significant news item from mid-2015 through the election in November 2016.<sup>277</sup> Because he spoke on a matter of public concern, Judge Kopf's interest in speaking as a citizen must be weighed against the State's interest in Rule 4.1, prohibiting judges from endorsing or opposing political candidates.<sup>278</sup>

Much as is the case with Judge Kopf's "stfu" remark, the judge had a strong interest as a citizen in making his unfitness remark about Senator Cruz. There are few matters as to which a citizen might want to convince others more than the election of the president. And Judge Kopf devoted an entire blog post to his

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<sup>275</sup> It was not nearly as necessary for Judge Kopf to use the word "fuck" as it was for the defendant in *Cohen v. California*, 403 U.S. 15, 16, 26 (1971) (overturning defendant's conviction for disturbing the peace based on wearing a jacket with "Fuck the Draft" on the back).

<sup>276</sup> The story of how Judge Kopf came to discontinue his blog speaks to the State's interest in maintaining confidence in the courts. According to Judge Kopf himself:

I am pulling the plug because I learned a couple of hours ago about a discussion held at a retreat for our employees. The retreat had to do with honesty in the workplace, especially when dealing with uncomfortable subjects. Chief Judge Smith Camp attended the meeting and was asked a question.

The question was this: Did the Chief Judge feel that *Hercules and the umpire* had become an embarrassment to our Court. She responded that she thought 95[%] of the posts were insightful, entertaining, well-written, and enlightening. Then she asked for a show of hands, inquiring how many of the employees felt the blog had become an embarrassment to our Court. The great majority raised their hands. The Chief then told them that she appreciated their candor, and that she would share with me their sentiments.

RGK, *Some Things Are More Important than Others*, HERCULES & UMPIRE (July 9, 2015), <https://herculesandtheumpire.com/2015/07/> [<https://perma.cc/ZDC7-NV28>]. It would appear that his remarks had caused even the employees not to be confident in the court.

<sup>277</sup> See *Rankin v. McPherson*, 483 U.S. 378, 385–86 (1987) (finding that statement wishing the shooter of President Reagan would "get him" next time, in the context of a conversation about Reagan's policies, was on a matter of public concern).

<sup>278</sup> See MODEL CODE OF JUDICIAL CONDUCT, *supra* note 25, r. 4.1.

difficulties with Senator Cruz, sprinkling throughout his conclusion that Cruz was unfit.<sup>279</sup>

Balanced against his strong interest as a citizen is the State's interest in keeping the judiciary above the political fray. The comments to Rule 4.1 describe the concern: "judges and judicial candidates must, to the greatest extent possible, be free and appear to be free from political influence and political pressure."<sup>280</sup> If they are seen to be subject to political influence, "[p]ublic confidence in the independence and impartiality of the judiciary is eroded."<sup>281</sup> This seems a far stronger interest than the judge making clear his personal opposition to a single presidential candidate. And once again, Judge Kopf's primary objection to Senator Cruz—Cruz's desire that the Supreme Court be subject to retention elections<sup>282</sup>—could easily have been aired as a policy discussion on that point rather than as a diatribe against Cruz.

Further, as has been proposed here, a presumption should run in favor of the State when the State has been specific and limited in its speech prohibitions.<sup>283</sup> That is the case here: Rule 4.1 of the Model Code (and actually, Canon 5A(2) of the federal judicial code) prohibits judges from endorsing or opposing candidates.<sup>284</sup> Thus, under the modified *Pickering* balance here, Judge Kopf is entitled to no First Amendment protection.

All three of his remarks could result in constitutional discipline.

## VII. CONCLUSION

When a judge uses a racial slur, gives in-chambers interviews to the press during a case, campaigns for the governor, comments on a woman's breasts or a man's build, solicits litigators in his or her courtroom for campaign money, or threatens a police officer writing a ticket, that judge knows that he or she has committed an ethical violation. The judge knows that the judicial institution, and the people, expect the judge to be beyond reproach, and that any of those remarks will damage the reputation of the bench. Indeed, the judge has known this since *taking* the bench. The ethical rules were in place.

<sup>279</sup> RGK, *supra* note 253.

<sup>280</sup> MODEL CODE OF JUDICIAL CONDUCT, *supra* note 25, r. 4.1, cmt. 1.

<sup>281</sup> *Id.* r. 4.1, cmt. 3.

<sup>282</sup> RGK, *supra* note 253.

<sup>283</sup> It is important to note that Judge Kopf knew at least generally that he was not supposed to be speaking politically. The blog begins:

As a federal judge, I am duty bound not to play politics. However, when a politician makes an extreme proposal to amend the Constitution and fundamentally alter and harm the federal judiciary and the Supreme Court, I have the right as a federal judge, and dare I say the duty, to respond to the proposal.

*Id.*

<sup>284</sup> MODEL CODE OF JUDICIAL CONDUCT, *supra* note 25, r. 4.1(A)(3); *Federal Judicial Code*, *supra* note 21, canon 5(A)(2).



In the event extrajudicial speech like this is reported and prosecuted, the state commissions or judicial councils imposing discipline should not have to face strict scrutiny for a judge's violation. While we recognize a judge's rights as a citizen, a judge shares with all other employee citizens the duty not to harm the judge's employer by engaging in conduct known to be prohibited from day one. Thus, the balancing test from *Pickering* should be applied and the judge excused only if the reason for the speech, and its public interest value, outweighs the State's interest in the integrity of the bench.