

# SILENCE AT A PRICE? JUDICIAL QUESTIONNAIRES AND THE INDEPENDENCE OF ALASKA'S JUDICIARY

KELLY TAYLOR\*

## ABSTRACT

*The Alaska judiciary is constitutionally designed to be relatively independent of partisan interests: judges are selected through a merit-based process in which they are evaluated based upon their competence and qualifications. In the months before Alaska's 2002 and 2008 judicial retention elections, the anti-abortion organization Alaska Right to Life sent judges questionnaires seeking to pin down their views on controversial legal and political issues. This Note explores the use of partisan judicial questionnaires in the context of Alaska's merit-based system of judicial selection. In doing so, it explores past partisan campaigns against Alaska judges and devotes much attention to Alaska Right to Life Political Action Committee v. Feldman. At issue in Feldman was whether provisions of the Alaska Code of Judicial Conduct prohibited judges from answering Alaska Right to Life's 2002 questionnaire and, if so, whether the provisions thereby violated judges' First Amendment rights.*

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\* The author is a member of the Class of 2009 at Duke University School of Law and received an A.B. from Duke University in 2002. She is grateful to Jan DeYoung, Jeff Feldman, Marla Greenstein, Karen Lewis, and Anita Woudenberg for answering questions about *Alaska Right to Life Political Action Committee v. Feldman* and to Teresa Carns and Larry Cohn for answering questions regarding judicial selection in Alaska and making available information about past campaigns against Alaska judges. She would also like to thank Joshua Haber, James McDonald, and Susan Orlansky for their comments on early drafts of this Note.

The views expressed herein are the author's own. Though she worked at Feldman Orlansky & Sanders as a summer associate and will clerk for Alaska Supreme Court Chief Justice Dana Fabe following graduation from law school, she selected the topic for and wrote the first draft of this Note prior to beginning work at the firm or accepting the clerkship.

### TABLE OF CONTENTS

INTRODUCTION.....	304
I. THE CULTURE OF ALASKA’S JUDICIARY.....	306
A. Judicial Selection According to Merit .....	306
B. Alaska Code of Judicial Conduct.....	309
II. POLITICIZING JUDICIAL RETENTION ELECTIONS AND ALASKA <i>RIGHT TO LIFE POLITICAL ACTION COMMITTEE V. FELDMAN</i> .....	310
A. Previous Organized Attacks on Judges .....	311
B. The Alaska Right to Life Judicial Questionnaire .....	315
C. <i>Alaska Right to Life Political Action Committee v. Feldman</i> .....	318
III. CHALLENGING JUDICIAL CANDIDATE SPEECH RESTRICTIONS ON FIRST AMENDMENT GROUNDS.....	319
A. <i>Republican Party of Minnesota v. White</i> and the Constitutionality of the “Announce Clause” in an Election System of Judicial Selection.....	320
B. Reactions to <i>White</i> .....	323
C. The Nationwide Effort to Politicize Judicial Elections .....	325
IV. CONSTITUTIONALITY OF ALASKA’S RESTRICTIONS ON JUDICIAL CANDIDATE SPEECH AFTER <i>WHITE</i> .....	327
A. Ripeness and Standing Hurdles .....	328
B. Judicial Candidate Speech Restrictions in a Merit-Based System of Judicial Selection.....	330
C. Constitutionality of Alaska’s “Pledges and Promises Clause” and “Commit Clause” .....	332
V. MAINTAINING JUDICIAL INDEPENDENCE IN ALASKA.....	337
A. Culture of the Judiciary and Merit-Based Selection Revisited .....	338
B. Recusal and Judicial Disqualification as Remedies.....	339
CONCLUSION .....	342

### INTRODUCTION

In September 2002 and, again, in September 2008, Alaska judges running for retention received questionnaire packets soliciting their views on disputed legal and political issues. The questionnaires, sent by Alaska Right to Life (AKRTL), sought the judges’ views on issues such as abortion and euthanasia. As AKRTL explained, it planned to publicize the judges’ responses to the questionnaire and, based on those responses, issue recommendations as to whether each judge should be retained.

Of the sixteen judges who received the 2002 questionnaire, only four responded and none answered any of the questions.<sup>1</sup> Blaming the Alaska Code of Judicial Conduct for the judges' demurrals, AKRTL filed a lawsuit in 2004 challenging three of the Code's provisions<sup>2</sup>—the "pledges and promises clause,"<sup>3</sup> the "commit clause,"<sup>4</sup> and the "recusal clause."<sup>5</sup> Basing its claims on *Republican Party of Minnesota v. White*,<sup>6</sup> a United States Supreme Court decision invalidating the "announce clause" of the Minnesota Code of Judicial Conduct on First Amendment grounds, AKRTL argued that provisions of the Alaska Code likewise violated judges' First Amendment rights by forbidding judges to answer the questions contained in its questionnaire.<sup>7</sup> Because the Ninth Circuit eventually dismissed AKRTL's lawsuit on ripeness grounds,<sup>8</sup> it is still an open question whether the relevant provisions of the Alaska Code will survive after *White*. AKRTL's questionnaire and lawsuit also raise a broader issue: when a state has designed its judicial selection system to be as nonpartisan as possible, as Alaska has, how should it handle interest groups' efforts to politicize that system?

This Note explores the issue of judicial questionnaires in Alaska. Part I discusses the culture of the Alaska judiciary. Part II describes past attacks on Alaska judges and, against this background, tells the story of *Alaska Right to Life Political Action Committee v. Feldman*. Part III focuses on the *White* ruling, including lower courts' interpretations of it, and Part IV considers, in light of *White*, the constitutionality of Alaska's judicial speech restrictions. Recognizing that Alaska's judicial speech restrictions could be invalidated, Part V explores ways of maintaining judicial independence and nonpartisanship in Alaska without those restrictions.

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1. The judges who responded explained why they declined to answer the questions. See *infra* Part II.B.

2. *Alaska Right to Life Political Action Comm. v. Feldman*, 380 F. Supp. 2d 1080 (D. Alaska 2005), *vacated*, 504 F.3d 840 (9th Cir. 2007).

3. Alaska Code of Judicial Conduct, Canon 5A(3)(d)(i) (2006) (prohibiting judicial candidates from "mak[ing] pledges or promises of conduct in judicial office other than to faithfully and impartially perform the duties of the office").

4. Alaska Code of Judicial Conduct, Canon 5A(3)(d)(ii) (2006) (prohibiting judicial candidates from "mak[ing] statements that commit or appear to commit the candidate to a particular view or decision with respect to cases, controversies or issues that are likely to come before the court").

5. Alaska Code of Judicial Conduct, Canon 3E(1) (2006) (requiring judges to disqualify themselves from hearing cases where their impartiality could reasonably be questioned).

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

7. *Feldman*, 380 F. Supp. 2d at 1081-82 (D. Alaska 2005).

8. *Alaska Right to Life Political Action Comm. v. Feldman*, 504 F.3d 840, 852-53 (9th Cir. 2007).

## I. THE CULTURE OF ALASKA'S JUDICIARY

Although the Alaska Constitutional Convention briefly discussed possible benefits of electing judges,<sup>9</sup> delegates placed too great an emphasis on judicial independence to adopt an election system of judicial selection. As Judiciary Committee Chairman George McLaughlin warned, the judiciary in an election system is “dictated and controlled by a political machine.”<sup>10</sup> Delegate Edward Davis, citing experiences in Idaho, cautioned that an elected judge is retained or dismissed “completely irrespective of qualifications.”<sup>11</sup> Concerned with minimizing the influence of politics on Alaska's judiciary, the Convention voted by an overwhelming majority to adopt a merit-based system of judicial selection.<sup>12</sup>

### A. Judicial Selection According to Merit

Pursuant to the Alaska Constitution, judicial selection has three steps. First, the Alaska Judicial Council (“Council”)—comprised of three non-attorneys appointed by the governor, three attorneys appointed by the Alaska Bar Association, and the Chief Justice of the Alaska Supreme Court—evaluates judicial candidates and nominates at least two for each vacancy.<sup>13</sup> Second, the governor fills the judicial vacancy by appointing

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9. Alaska Constitutional Convention Minutes Concerning Judicial Selection and Retention, 583-611, available at <http://www.ajc.state.ak.us/General/akccon.htm> (last visited Nov. 12, 2008).

10. *Id.* McLaughlin went on to note that a judge must “secure funds and sometimes excessive and exorbitant funds for the purposes of being elected . . . [and] keep peering over his shoulder to find out whether [a judicial decision] is popular or unpopular.” *Id.* at 584.

11. *Id.* at 598.

12. *Id.* at 610 (rejecting an amendment to strike section of proposed Alaska Constitution that would provide for merit-based system of judicial selection). Also known as the “Missouri Plan,” merit systems of judicial selection combine elements of the election and appointment methods to balance judicial accountability with judicial independence. Mark S. Cady & Jess R. Phelps, *Preserving the Delicate Balance Between Judicial Accountability and Independence: Merit Selection in the Post-White World*, 17 CORNELL J.L. & PUB. POL'Y 343, 352 (2008). Proponents of judicial election often argue that elections alone ensure judicial accountability, while proponents of judicial appointment argue that insulating judges from the electorate promotes judicial independence. Peter D. Webster, *Selection and Retention of Judges: Is There One “Best” Method?*, 23 FLA. ST. U. L. REV. 1, 13-14, 17 (1995).

13. ALASKA CONST. art. IV, §§ 7-8; see also Susie M. Dosik, *Alaska's Merit Selection for Judges*, 21 ALASKA L. REV. 305, 312-16 (2004).

one of the Council's nominees.<sup>14</sup> Finally, Alaska judges stand for retention at the first election held more than two or three years after their initial appointments and, after that, at various intervals depending on the court on which they sit.<sup>15</sup>

The Council's judicial nomination process is intentionally nonpartisan in its information gathering procedures and evaluative criteria.<sup>16</sup> The Council's initial evaluation of each judicial applicant includes background checks, public comment, an extensive interview of each candidate, and surveys of the Alaska Bar Association.<sup>17</sup> Other nonpartisan considerations include the applicant's pro bono and community service; counsel questionnaires, which are completed by attorneys involved in the applicant's most recent cases that have gone to trial; signed bar survey comments; and reference letters.<sup>18</sup> The Council does not consider an applicant's political or religious beliefs.<sup>19</sup>

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14. ALASKA CONST. art. IV, § 5. For a discussion of one Alaska governor's unsuccessful attempt to avoid appointing one of the Council's nominees, see Dosik, *supra* note 13, at 323-24.

15. Elections are held every ten years for supreme court justices, every eight years for court of appeals judges, and every six years for superior court judges. ALASKA CONST. art. IV, § 6 (setting forth retention election guidelines for supreme court justices and superior court judges); ALASKA STAT. § 15.35.053 (2006) (setting forth retention election guidelines for court of appeals judges). Alaska district court judges stand for retention at the first election held more than two years after their initial appointments and, after that, every four years. ALASKA STAT. § 15.35.100 (2006).

16. See Dosik, *supra* note 13, at 312-16. Entrusted to seek the "most qualified" candidates, the Alaska Judicial Council "has never imposed any sort of litmus test to vet a candidate's political views and does not inquire into a candidate's views on controversial political subjects." *Id.* at 315.

17. Selection Procedures, Alaska Judicial Council, available at <http://www.ajc.state.ak.us/Selection/procedur.htm> (last visited Nov. 12, 2008). In its survey of Alaska Bar Association members, the Council asks Bar members to assign judicial applicants ratings between 1.0 and 5.0 in each of five nonpartisan criteria: professional competence, fairness, integrity, temperament, and suitable experience. While high ratings do not guarantee the Council will nominate an applicant, very few applicants with low Bar survey ratings are nominated. Alaska Judicial Council, *Selecting and Evaluating Alaska's Judges, 1984-2007*, at 27 (2008) (providing a detailed breakdown of Bar survey ratings of judicial applicants, judicial nominees, and judicial appointees since 1984). In each of the five criteria, judicial nominees receive bar survey scores that are an average of 0.2 to 0.4 higher than those of the general judicial applicant pool. *Id.* at 28. The Council also surveys attorneys to provide demographical information so it can consider how an applicant is perceived by various groups of attorneys (e.g. by judges, men versus women, or prosecutors versus criminal defense attorneys) and identify where groups of attorneys are voting as a bloc, which may indicate motives other than merit. *Id.* at 25-26.

18. *Id.* at 29.

19. *Id.* at 30. The Council will, however, weigh "whether the applicant's personal beliefs indicate a substantial bias or conflict of interest that could

Based on this information, the Council then evaluates each judicial applicant's qualifications—both on her own merits and relative to other judicial applicants for the same position—using seven nonpartisan criteria of professional competence: communication skills; integrity; fairness; temperament; judgment including common sense; legal and life experience; and demonstrated commitment to public service.<sup>20</sup>

Alaska's retention elections are also designed to insulate judges from most partisan politics.<sup>21</sup> The judges' political affiliations, if any, are not publicized,<sup>22</sup> and judges are usually not permitted to campaign.<sup>23</sup> Alaska's retention elections are also non-adversarial; a judge standing for retention runs against no one and if not retained, his vacancy is filled by a new merit-selection appointee.<sup>24</sup> Rooted in the notion that judges' professional competence and integrity are of paramount importance (and are not correlated with their personal politics), this design encourages voters to weigh judges' qualifications rather than party affiliation. Before each retention election, the Alaska Judicial Council conducts an evaluation of each state judge standing for retention and publicizes that evaluation, along with the Council's recommendation for retention or non-retention, at least sixty days before the election.<sup>25</sup> Like its nominations, the Council's retention evaluations and recommendations are based on nonpartisan criteria related to judges' qualifications and competence.<sup>26</sup>

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impede the proper functioning of the courts or show that the applicant would be unable to apply the law impartially." *Id.*

20. Selection Procedures, Alaska Judicial Council, *supra* note 17.

21. See Dosik, *supra* note 13, at 324-25. Dosik also notes that interest groups have campaigned against judges but have never succeeded in "persuad[ing] the electorate to vote any judges out of office." *Id.* at 325; see also *infra* Part II.a.

22. ALASKA STAT. § 15.15.030 (2006) (setting out ballot preparation guidelines in judicial retention elections).

23. Judges may, however, publicly answer attacks made against them or, if the Council makes a recommendation for non-retention, publicly answer that recommendation. See Alaska Code of Judicial Conduct, Canon 5C (2006); see also Antonia Moras, *A Look at Judicial Selection in Alaska*, ALASKA JUSTICE FORUM, Fall 2004, at 8, available at <http://justice.uaa.alaska.edu/forum/21/3fall2004/213fall04.pdf>.

24. See ALASKA STAT. § 22.05.080 (2006).

25. ALASKA STAT. §§ 22.05.100-150 (2006).

26. Alaska Judicial Council, *Twenty-Third Report: 2005-2006 to the Legislature and Supreme Court*, at Appendix F-1 to F-2 (2007). As part of its evaluation of trial court judges standing for retention, the Council surveys attorneys, peace and probation officers, court employees, jurors, along with social workers, guardians ad litem and volunteer children's case workers, regarding the judges' performance. All those surveyed evaluate the judges' fairness, integrity, diligence, and temperament. Lawyers, who evaluate both trial and appellate court judges, also evaluate the judges' legal ability. Alaska Judicial Council, *Selecting and Evaluating Alaska's Judges, 1984-2007*, at 33 (2008).

## B. Alaska Code of Judicial Conduct

The Alaska Code of Judicial Conduct (“Alaska Code”) establishes the standards for ethical conduct of Alaska judges and, in so doing, aims to maintain judicial integrity and independence.<sup>27</sup> To this end, the Alaska Code contains both a “pledges and promises clause” and a “commit clause” restricting judicial candidates’ speech.<sup>28</sup> Canon 5A(3)(d)(i) and (ii) of the Alaska Code state that judicial candidates “shall not . . . make pledges or promises of conduct in judicial office other than to faithfully and impartially perform the duties of the office” or “make statements that commit or appear to commit the candidate to a particular view or decision with respect to cases, controversies or issues that are likely to come before the court.”<sup>29</sup> Additionally, the Alaska Code’s “recusal” clause requires a judge to disqualify himself from a proceeding “in which the judge’s impartiality might reasonably be questioned.”<sup>30</sup> All three clauses are patterned after the 1990 American Bar Association Model Code of Judicial Conduct.<sup>31</sup>

Judicial speech restrictions like these are an effort to reconcile two democratic values – the impartial role of the judiciary and free political speech.<sup>32</sup> As supporters of such clauses assert, if judges were permitted to promise specific rulings in cases likely to come before the court, “litigants would have the formal opportunity to argue, but those arguments would be for naught where the judge, if intent on keeping a campaign pledge to rule the opposite way, gave them but token consideration.”<sup>33</sup> By promoting judicial impartiality, restrictions on judicial candidate speech likewise promote due process.<sup>34</sup>

Opponents of such clauses argue that restrictions on judicial candidate speech are restrictions on political speech.<sup>35</sup> Restricting speech in this way, they assert, prevents candidates from expressing their views, prevents the electorate from fully informing itself of those views,

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27. See Alaska Code of Judicial Conduct, Canon 1 (2006) (“The provisions of this Code are intended to preserve the integrity and the independence of the judiciary. . .”).

28. Alaska Code of Judicial Conduct, Canon 5A(3)(d)(i) and (ii) (2006).

29. *Id.*

30. Alaska Code of Judicial Conduct, Canon 3E (2006).

31. See Alaska Code of Judicial Conduct, Preamble (2006).

32. See David Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 311–12, 318–24 (2008).

33. Brief for Brennan Center for Justice at NYU Law School as Amicus Curiae Supporting Appellants [hereinafter Brennan Center Brief] at 23, *Kan. Judicial Watch v. Stout*, 519 F.3d 1107 (10th Cir. 2008).

34. *Id.* See also Pozen, *supra* note 32, at 319–21.

35. See, e.g., Erwin Chemerinsky, *Restrictions on the Speech of Judicial Candidates Are Unconstitutional*, 35 IND. L. REV. 735, 736–38 (2002).

and ultimately prevents voters from making an informed choice at the polls.<sup>36</sup>

The drafters of the Alaska Code of Judicial Conduct were aware of the First Amendment implications of judicial candidate speech restrictions. In the Commentary to Canon 5A(3)(d), the Alaska Code references *Buckley v. Illinois Judicial Inquiry Board*,<sup>37</sup> a Seventh Circuit ruling invalidating an Illinois clause restricting judicial campaign speech.<sup>38</sup> Though the Alaska Code, as amended in 1998, did not contain the clause invalidated in *Buckley*,<sup>39</sup> drafters noted that even the pledges and promises clause could, if “read too broadly,” violate the First Amendment.<sup>40</sup> The Commentary to Canon 5A(3)(d) thus concludes: “The Code should be interpreted in a manner that does not infringe First Amendment rights.”<sup>41</sup>

## II. POLITICIZING JUDICIAL RETENTION ELECTIONS AND ALASKA RIGHT TO LIFE POLITICAL ACTION COMMITTEE V. FELDMAN

Despite the steps Alaska has taken to encourage nonpartisanship in its retention elections, elections are still subject to political influence. As one law professor argues, retention elections may be “the worst kind of election[s] to conduct for judges who have been sitting for long enough to acquire a record that can be mischaracterized on major league outfield fences.”<sup>42</sup> In addition to mischaracterizing a judge’s record, political interest groups may encourage voters to retain or not retain a judge

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36. See, e.g., *id.*

37. 997 F.2d 224 (7th Cir. 1993).

38. Alaska Code of Judicial Conduct, Commentary to Canon 5A(3)(d) (2006) (referencing *Buckley*, 997 F.2d at 225). Holding that the clause was overbroad, the Seventh Circuit said it “reach[ed] far beyond speech that could reasonably be interpreted as committing the candidate in a way that would compromise his impartiality should he be successful in the election.” Alaska Code of Judicial Conduct, Commentary to Canon 5A(3)(d) (quoting *Buckley*, 997 F.2d at 228).

39. In *Buckley*, the Seventh Circuit invalidated the announce clause. 997 F.2d at 228. Prior to its 1998 revisions, the Alaska Code of Judicial Conduct also contained an announce clause limiting judicial candidates’ speech. See Alaska Code of Judicial Conduct, Canon 7(B)(1)(c), *rescinded by* Supreme Court Order 1322 (1998). Added in 1973 and amended in 1974, Canon 7(B)(1)(c) prohibited a judicial candidate from “announc[ing] his views on disputed legal or political issues.” *Id.* When Alaska’s Code was revised in 1998, the “commit clause” replaced the “announce clause.” Compare *id.*, with Alaska Code of Judicial Conduct, Canon 5A(3)(d) (2006).

40. Alaska Code of Judicial Conduct, Commentary to Canon 5A(3)(d) (2006).

41. *Id.*

42. Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 107–13, 114 (Summer 1998) (noting how easy it is to harm a candidate with accusations of little substance).



based on his or her decisions in a few select cases rather than viewing the judge's overall record for fairness and competence.

Alaska Right to Life (AKRTL) is a non-profit organization that has, as one of its goals, making sure those in positions of authority within Alaska, including judges, are friendly to its pro-life platform. To that end, AKRTL sometimes cold calls sitting judges or judicial nominees to solicit their opinions on issues like abortion and euthanasia.<sup>43</sup> Another way the organization solicits judges' opinions is by sending judicial candidates questionnaires in the months before retention elections are held.<sup>44</sup> From AKRTL's perspective, judges—regardless of their records for fairness and competence and their decisions in other cases—are unqualified for office if they do not share its views on abortion.<sup>45</sup>

### A. Previous Organized Attacks on Judges

In past decades, partisan individuals and interest groups have targeted several highly competent Alaska judges for their decisions in select cases. While those campaigns have thus far been unsuccessful in persuading a majority of voters to remove the targeted judges,<sup>46</sup> their successes and failures illuminate just how powerful such campaigns could be in the future.

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43. Interview with Karen Lewis, Executive Director, Alaska Right to Life, by phone (Sept. 9, 2008). One way that Lewis has solicited these opinions over the phone is by asking questions such as when the judge believes life begins. Lewis said she does not publicize responses judges give her over the phone or share them with the governor but she does share them with the AKRTL Board of Directors. *Id.*

44. AKRTL likely made the initial decision to send questionnaires to Alaska judges following the 2002 National Right to Life convention. As Lewis explained, that was probably where she first heard about the United States Supreme Court's opinion in *Republican Party of Minnesota v. White* and met attorney James Bopp. *Id.*

45. As the executive director of AKRTL explained, "If a legislator or a judge will not stand up and protect innocent human life in the womb, I do not trust [him] on any other issue." Interview with Karen Lewis, Executive Director, Alaska Right to Life, by phone (Oct. 7, 2008).

46. See Dosik, *supra* note 13, at 325. Voters in Alaska have removed only four judges since statehood. Three of those were recommended for non-retention—two in 1982 and one in 2006—by the Council for performance-related reasons. See Alaska Judicial Council, *Twenty-Third Report: 2005-2006 to the Legislature and Supreme Court*, at Appendix F-5 (2007). The fourth, the only jurist to be removed for political reasons, was an exceptional case. A few years after statehood, in an effort to limit the Alaska Supreme Court's control over Alaska Bar Association activities, the Bar successfully campaigned against retention of Justice H.O. Arend. See Alaska Judicial Council, *Fostering Judicial Excellence: A Profile of Alaska's Judicial Applicants and Judges* 14 n.36 (1999).

In 1980, Alaska Supreme Court Justice Warren Matthews was targeted for being in the majority in several unpopular Supreme Court decisions, including a decision regarding the Alaska Permanent Fund.<sup>47</sup> Despite the Alaska Judicial Council's recommendation that Justice Matthews be retained,<sup>48</sup> a last-minute ad campaign—sponsored by Chuck Imig, himself a candidate for the Alaska House of Representatives—almost cost Justice Matthews his seat on the court.<sup>49</sup> He was ultimately retained by the slimmest margin of any judge running for retention that year—53.5% “yes” votes.<sup>50</sup>

In 1988, Alaska Supreme Court Justice Jay Rabinowitz, who had served on the supreme court bench since 1965,<sup>51</sup> was also targeted for a handful of unpopular decisions.<sup>52</sup> As with the campaign against Justice Matthews, the campaign against Justice Rabinowitz was launched less than a month before his retention election.<sup>53</sup> One of the primary organizers of the campaign, Fritz Pettyjohn, was himself a political official.<sup>54</sup> In response, attorneys Eric Sanders and Jeffrey Feldman registered a group called “Citizens to Retain Jay Rabinowitz” to counter the attacks.<sup>55</sup> They raised nearly \$40,000<sup>56</sup> and launched a print campaign highlighting Justice Rabinowitz's non-partisan characteristics of honesty, integrity, fairness, and dedication, as well as his thirty years

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47. See “Zobel Case” Advertisement, paid for by Chuck Imig, THE ANCHORAGE TIMES, Nov. 3, 1980, at B-5 (on file with Alaska Judicial Council).

48. See Julie Anne Gold, *Justice contemplates close call*, ANCHORAGE DAILY NEWS, Nov. 6, 1980, at A-4. (on file with Alaska Judicial Council).

49. See “Zobel Case,” *supra* note 47; Gold, *supra* note 48.

50. Alaska Judicial Council, *Twenty-Third Report: 2005-2006 to the Legislature and Supreme Court*, at Appendix F-16 (2007). Four judges standing for retention that year were retained by 70% or more of voters, four were retained by 60% to 69% of voters, and five were retained by 50% to 59%. *Id.* at Appendix F-16 to F-20.

51. See *id.* at Appendix E-3.

52. See “Jay B. Mallot” Advertisement, paid for by Alaskans Against Retaining Rabinowitz, ANCHORAGE DAILY NEWS, Nov. 6, 1988, at J-4.

53. See Associated Press, *Groups for, against Rabinowitz ready to turn up heat*, THE ANCHORAGE TIMES, Oct. 30, 1988, at B-2. “Alaskans Against Retaining Rabinowitz” registered with the Alaska Public Offices Commission on October 20, 1988. The retention election was held November 8, 1988. *Id.*

54. See *id.* Pettyjohn was a member of the Alaska House of Representatives. *Id.*

55. Interview with Jeffrey Feldman, Partner, Feldman Orlansky & Sanders, in Anchorage, Alaska (Aug. 21, 2008). See also Associated Press, *Groups for, against Rabinowitz ready to turn up heat*, *supra* note 53.

56. See Sheila Toomey, *Attorney files formal complaint over anti-Rabinowitz donation*, ANCHORAGE DAILY NEWS, Dec. 9, 1988, at C-2. So highly respected a jurist was Justice Rabinowitz within the Alaska legal community, Feldman said, “I’ve never raised so much money so fast.” Interview with Jeffrey Feldman, *supra* note 55.

of service to the Alaska legal community.<sup>57</sup> In 1978, Justice Rabinowitz had been retained with 67.8% “yes” votes; in 1988, despite his counter-campaign, he was retained with only 59% “yes” votes.<sup>58</sup>

Finally, in 2000, abortion rights opponents targeted Alaska Supreme Court Justice Dana Fabe and Superior Court Judge Sen Tan for non-retention. In the years preceding the election, both judges issued decisions in abortion cases.<sup>59</sup> Beginning in August, AKRTL sent mailers to its members and distributed flyers at the state fair asking voters to vote against retaining Justice Fabe and Judge Tan.<sup>60</sup> As the chair of Alaskans for Judicial Reform, Fritz Pettyjohn again got involved in the judicial retention process by sending notices recommending non-retention of Justice Fabe and Judges Tan and Peter Michalski, who issued a decision in a same-sex marriage case.<sup>61</sup> Justice Fabe and Judge Tan both formed groups to support their retention, and their groups—like the one formed on behalf of Justice Rabinowitz—highlighted the

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57. See “Vote YES” Advertisement, paid for by Citizens to Retain Jay Rabinowitz, THE ANCHORAGE TIMES, Nov. 7, 1988, at D-6; “Vote YES” Advertisement, paid for by Citizens to Retain Jay Rabinowitz, ANCHORAGE DAILY NEWS, Nov. 8, 1988, at D-7.

58. See Alaska Judicial Council, *Twenty-Third Report: 2005-2006 to the Legislature and Supreme Court*, at Appendix F-16 (2007).

59. As a superior court judge in 1997, Justice Fabe wrote an order holding a hospital’s policy prohibiting abortions was unconstitutional under the privacy clause of the Alaska Constitution. See *Valley Hosp. Ass’n v. Mat-Su Coalition*, 948 P.2d 963, 966 (Alaska 1997). The Alaska Supreme Court affirmed the ruling. See *id.* In 1998, Judge Tan granted summary judgment and enjoined on equal protection grounds a law requiring most girls under 17 years old to obtain permission from a parent or judge before consenting to an abortion. See *Planned Parenthood of Alaska v. State*, No. 3AN-97-6014 CI, 1998 WL 35170806 (Alaska Super. Ct. Oct. 5, 1998). The Alaska Supreme Court reversed Judge Tan’s summary judgment order, *State v. Planned Parenthood of Alaska*, 35 P.3d 30, 32 (Alaska 2001), but later, in an opinion written by Justice Fabe, struck down the same law as an unconstitutional violation of the privacy clause of the Alaska Constitution, *State v. Planned Parenthood of Alaska*, 171 P.3d 577, 579 (Alaska 2007).

60. See “Out of Control Judges” Mailing, paid for by Alaska Right to Life, sent before 2000 retention election (on file with Alaska Judicial Council) (recommending against retention of Justice Dana Fabe and Judge Sen Tan, as well as Justices Warren Matthews and Alex Bryner and Judge Mary Greene); Baby “Wants You to Help Stop Abortions” Flyer, distributed by Alaska Right to Life (on file with Alaska Judicial Council) (recommending against retention of Justice Dana Fabe and Judge Sen Tan).

61. See “Judicial Retention Ballot Notice” Mailing, paid for by Alaskans for Judicial Reform, sent before 2000 retention election (on file with Alaska Judicial Council). In 1998, before the marriage amendment to the Alaska Constitution passed, Judge Michalski held that the Alaska Marriage Code violated the equal protection clause of the Alaska Constitution by prohibiting same-sex marriage. *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at \*5-6 (Alaska Super. Ct. Feb. 27, 1998).

jurists' non-partisan characteristics.<sup>62</sup> All three judges survived the election: Justice Fabe with 57.1% "yes" votes, Judge Michalski with 56.9% "yes" votes, and Judge Tan with 54.4% "yes" votes.<sup>63</sup> The average percentage of "yes" votes for all other judges running for retention that year was 65.1%.<sup>64</sup>

"If you can eliminate a Justice Rabinowitz or a Justice Fabe—both among the highest ranked and most highly regarded judges the state ever has had—no judge is safe," Feldman said.<sup>65</sup> If a partisan interest group, angry over one or more of a judge's decisions, targets him for non-retention and successfully moves enough voters to vote "no" in a future election, shockwaves would echo through Alaska's judiciary. All Alaska judges would know that they, too, could be targeted for a politically unpopular decision. In this way, seeking to hold judges politically accountable can threaten judicial independence.

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62. See "Fairness" Advertisement, paid for by Alaskans for Justice Dana Fabe, ANCHORAGE DAILY NEWS, Nov. 3, 2000, at B-13; "Dedication" Advertisement, paid for by Alaskans for Justice Dana Fabe, ANCHORAGE DAILY NEWS, Nov. 4, 2000, at A-6; "Integrity" Advertisement, paid for by Alaskans for Justice Dana Fabe, ANCHORAGE DAILY NEWS, Nov. 6, 2000, at A-4; "YES Judge Sen Tan" Advertisement, paid for by Alaskans for Judge Sen Tan, ANCHORAGE DAILY NEWS, Nov. 2000 (quoting delegate to the Alaska Constitutional Convention Seaborn Buckalew saying, "When we wrote the Alaska Constitution, we did our best to keep politics out of the courts. . . . That's why I fully support the retention of Judge Sen Tan. He's honest, fair, and makes decisions based on law, not politics.").

63. Alaska Judicial Council, *Twenty-Third Report: 2005-2006 to the Legislature and Supreme Court*, at Appendix F-16, F-18 (2007).

64. See *id.* at Appendix F-16 to F-20. In terms of measuring the impact of non-retention campaigns on retention votes, this average is, if anything, conservative; it includes the percentage of "yes" votes Superior Court Judges Dale Curda and Mary Greene received—56.3% and 51.9%, respectively—despite some opposition to both judges' retention. *Id.* at Appendix F-20.

65. Interview with Jeffrey Feldman, *supra* note 55.

## B. The Alaska Right to Life Judicial Questionnaire

In October 2002, sixteen<sup>66</sup> state court judges standing for retention in Alaska's November election received a questionnaire from AKRTL.<sup>67</sup> According to Karen Lewis, executive director of AKRTL, its members do not have enough information about judges' personal views on abortion and related issues to make an informed decision at the polls.<sup>68</sup> To obtain that information, the AKRTL questionnaire solicited judges' opinions on several controversial legal and political issues, including abortion and euthanasia.<sup>69</sup> As a letter accompanying the questionnaire stated, AKRTL planned to inform voters of the judges' responses and "advise [its] members to vote for non-retention" in the event a judge chose not to respond.<sup>70</sup>

Following statements about controversial legal and political issues,<sup>71</sup> the questionnaire asked judicial candidates to check "Agree,"

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66. According to election records, sixteen judges stood for retention in 2002. See Alaska Judicial Council, *Twenty-Third Report: 2005-2006 to the Legislature and Supreme Court*, at Appendix F-16 to F-20 (2007); State of Alaska - General Election November 5, 2002 - Official Results, <http://www.elections.alaska.gov/02genr/data/results.htm> (Nov. 5, 2002). Both Alaska Right to Life and the State of Alaska's briefs agreed that all Alaska judges standing for retention received the questionnaire. Brief of Appellants at 5, *Alaska Right to Life Political Action Comm. v. Feldman*, Nos. 05-35902(L), 05-36027 (9th Cir. Sept. 21, 2007); Brief of Appellees/Cross-Appellants at 5, *Alaska Right to Life Political Action Comm. v. Feldman*, Nos. 05-35902(L), 05-36027 (9th Cir. Sept. 21, 2007); Interview with Karen Lewis, *supra* note 43. For these reasons, and despite the fact that the State of Alaska's brief and Ninth Circuit's opinion state that twelve Alaska judges received AKRTL's questionnaire, this Note refers to sixteen judges receiving the questionnaire.

67. *Alaska Right to Life Political Action Comm. v. Feldman*, 504 F.3d 840, 843 (9th Cir. 2007).

68. Interview with Karen Lewis, Executive Director, Alaska Right to Life, by phone (Nov. 11, 2008).

69. *Id.*; see also Verified Complaint for Relief at Exhibit C-1 and Exhibit E-3 to E-6 [hereinafter *Alaska Right to Life Political Action Comm. Complaint*]; *Alaska Right to Life Political Action Comm. v. Feldman*, 380 F. Supp. 2d 1080 (D. Alaska 2005). The questionnaire also addressed disposition of fertilized eggs following in vitro fertilization and causes of action for wrongful life and wrongful birth. *Alaska Right to Life Political Action Comm. Complaint* at Exhibits E-5 to E-6.

70. *Alaska Right to Life Political Action Comm. Complaint*, *supra* note 69, at Exhibit C-1.

71. Issue statements were one paragraph in length and concluded with a final sentence in bold print. *Id.* at Exhibits E-3 to E-6. The concluding statements regarding abortion included: "I believe that the unborn child is biologically human and alive and that the right to life of human beings should be respected at every stage of their biological development," as well as "I believe that *Roe v. Wade* was wrongly decided," and "I believe that there is no provision in our current Alaska Constitution which is intended to protect a right to abortion." *Id.* at Exhibits E-3 to E-4. An issue statement regarding euthanasia read, in part, "I

“Disagree,” “Undecided,” or “Decline.”<sup>72</sup> Next to the “Decline” option, an asterisk directed the questionnaire’s recipient to a statement at the bottom of each page: “This response indicates that I believe in good faith that, under a reasonable construction of applicable Canons of Judicial Conduct or because my recusal would be subsequently required, I must decline to respond to this particular question.”<sup>73</sup> Within a few days of receiving the questionnaire, several judges contacted Marla Greenstein, executive director of the Alaska Commission on Judicial Conduct (the “Commission”), the organization that reviews allegations of judicial misconduct.<sup>74</sup> She conferred with Jeffrey Feldman, then-chairman of the Commission,<sup>75</sup> and they decided that Greenstein would send a letter to AKRTL expressing her personal concerns about the propriety of judges answering the questionnaire and would copy Alaska judges on the letter to provide them informal guidance. She would not, however, ask the Commission to issue a formal advisory opinion.<sup>76</sup> Sending this kind of letter would accomplish two things: first, since it was not a formal advisory opinion, it would preserve a ripeness argument for the legal battle likely to ensue; second, and more importantly, it would protect judges from having to respond by giving them public, albeit informal, guidance.<sup>77</sup>

In her letter, Greenstein noted that *Republican Party of Minnesota v. White*<sup>78</sup> addressed a clause absent from the Alaska Code, that Alaska has a different system than Minnesota of selecting its judges, and that other provisions of the Alaska Code restrict judges’ freedom of expression.<sup>79</sup> “It is my professional opinion,” Greenstein added, “that judges who answer the questions in your questionnaire would be creating situations

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believe that there is no provision of our current Alaska Constitution which is intended to protect a right to assisted suicide.” *Id.* at Exhibit E-5.

72. *Id.* at Exhibits E-3 to E-6.

73. *Id.*

74. Interview with Marla Greenstein, Executive Director, Alaska Commission on Judicial Conduct, in Anchorage, Alaska (Aug. 13, 2008). Judges often contact Greenstein for informal guidance about the appropriate scope of their speeches before groups. *Id.*

75. *Id.*; Interview with Jeffrey Feldman, *supra* note 55.

76. *Id.* Under the Commission’s rules, Feldman, as chair of the Commission, had discretion to decide which matters would be handled informally and which matters to place on the agenda for full Commission consideration. Alaska Judicial Conduct Commission Rules, Rule 1(c)(1); Comment from Jeffrey Feldman, Partner, Feldman Orlansky & Sanders, to Kelly Taylor, Editor-in-Chief, *Alaska Law Review* (Aug. 30, 2008).

77. Interview with Jeffrey Feldman, *supra* note 55 (detailing Feldman’s intent to “give the judges cover”).

78. 536 U.S. 765 (2002); *see* discussion *infra* Part III.A.

79. Alaska Right to Life Political Action Comm. Complaint, *supra* note 69, at Exhibit D-1.

that would require them to be disqualified from sitting on cases involving those issues.”<sup>80</sup> Having received the letter, none of the judges requested a formal advisory opinion.<sup>81</sup>

Of the sixteen judges who received the questionnaire, only four responded and none expressed a view on any of the issues discussed.<sup>82</sup> In lieu of answering the questions, the four judges who responded offered explanations for their decisions not to provide answers.<sup>83</sup> After selecting “Decline”<sup>84</sup> in response to most of the questions, Alaska Supreme Court Justice Walter Carpeneti wrote, “I am not at all certain that responding to your group’s questions is allowed under the Alaska code and that it would not subject me to later recusal.”<sup>85</sup> He then directed AKRTL to three cases in which he participated that he said “rais[ed] some of the issues covered in your questionnaire.”<sup>86</sup> District Court Judge Jane Kauvar also selected “Decline” in response to each question and, in a blank space at the end of the questionnaire, she simply wrote, “Based on advice from Judicial Conduct Commission in my state.”<sup>87</sup> Superior Court Judge Charles Pengilly appeared interested in answering the questionnaire<sup>88</sup> but nonetheless selected “Decline” in response to each question,<sup>89</sup> explaining, “It appears that the appropriate response to your questionnaire under the present circumstances is to decline to answer.”<sup>90</sup> District Court Judge Sigurd Murphy did not return a completed questionnaire but sent a letter to AKRTL declining to

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80. *Id.* at Exhibit D-1 to D-2.

81. Alaska Right to Life Political Action Comm. v. Feldman, 504 F.3d 840, 847 (9th Cir. 2007).

82. *Id.* at 843.

83. *Id.*

84. Alaska Right to Life Political Action Comm. Complaint, *supra* note 69, at Exhibit E-1 to E-2. Justice Carpeneti amended the “Decline” statement at the bottom of each page to say “recusal might be subsequently required” rather than “recusal *would* be subsequently required” (emphasis added). *Id.* at Exhibit E-3 to E-6. He left two questions about whether a constitutional right to abortion exists at the federal and state levels blank. *Id.*

85. *Id.* at Exhibit E-1.

86. *Id.*

87. Alaska Right to Life Political Action Comm. Complaint, *supra* note 69, at Exhibit E-16 to E-19.

88. “Unhappily,” Judge Pengilly wrote, “*White* may have no impact at all on the Alaska Code of Judicial Conduct.” *Id.* at Exhibit E-10. He added, “I agree with your basic premise: that if ‘judicial candidates’ in Alaska are free to discuss these issues, the voters are entitled to know what their views are. I hesitate to answer only because it is far from clear that judges in Alaska have that freedom.” *Id.*

89. Alaska Right to Life Political Action Comm. Complaint, *supra* note 69, at Exhibit E-11 to E-14.

90. *Id.* at Exhibit E-10.

answer the questions “for the reasons set forth in the October 16, 2002 letter addressed to you from the Alaska Commission on Judicial Conduct” and included a copy of his personal “Judge’s Code.”<sup>91</sup> Murphy’s response suggested that answering the questionnaire might not only violate the Alaska Code of Judicial Conduct but his personal sense of judicial ethics as well.<sup>92</sup>

AKRTL did not send questionnaires to judges standing for retention in Alaska’s November 2004 election.<sup>93</sup>

### C. *Alaska Right to Life Political Action Committee v. Feldman*

Two years later, before the 2004 election, AKRTL and Michael Miller, former president of the Alaska State Senate,<sup>94</sup> filed suit in federal court challenging portions of the Alaska Code as unconstitutionally restricting judicial candidates’ speech rights.<sup>95</sup> AKRTL and Miller targeted the Code’s pledges and promises clause, commit clause, and recusal clause.<sup>96</sup> They named as defendants eight members of the Commission, including Feldman, and six members of the Disciplinary Board of the Alaska Bar Association.<sup>97</sup> In August 2005, a federal district court in Alaska upheld the Code’s recusal clause but held the pledges and promises clause and commit clause unconstitutional.<sup>98</sup>

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91. *Id.* at Exhibit E-7 to E-9.

92. As Judge Murphy stated:

Certain members of the public do not fully differentiate between the personal convictions held by a judicial officer from that judicial officer’s responsibility to uphold the law in his or her decisions, irrespective of their personal view. Thus, if I were to emphatically express my view on such topics as abortion, assisted suicide, and euthanasia, the same would suggest to certain members of the public that I have pre-judged those issues that may come before me as a judge and should require my disqualification from sitting on cases involving those issues.

*Id.*

93. *Alaska Right to Life Political Action Comm. v. Feldman*, 504 F.3d 840, 847 (9th Cir. 2007).

94. See Alaska State Legislature (former official website for House and Senate Legislative Majorities) – Senator Mike Miller, <http://www.akrepublicans.org/pastlegs/Miller.htm> (last visited Nov. 10, 2008).

95. *Feldman*, 504 F.3d at 843. Miller was party to the suit as an independent voter who wanted to receive information from AKRTL regarding judges’ responses to its 2002 questionnaire. See *Alaska Right to Life Political Action Comm. Complaint*, *supra* note 69, at 6.

96. *Feldman*, 504 F.3d at 843.

97. *Id.*

98. *Alaska Right to Life Political Action Comm. v. Feldman*, 380 F. Supp. 2d 1080, 1082–84 (D. Alaska 2005) (holding that the pledges and promises and commit clauses infringed the same speech challenged in *White* yet were



In September 2007, the Ninth Circuit vacated the district court's rulings and held that the case was not ripe for review.<sup>99</sup> To survive a ripeness inquiry, the plaintiffs required real threats of investigation from the Commission and of disciplinary action by the Alaska Supreme Court.<sup>100</sup> First, the Ninth Circuit noted that no judge had requested, and the Commission had not issued, a formal advisory opinion.<sup>101</sup> The decision by Greenstein and Feldman not to ask the Commission to consider issuing an advisory opinion regarding the propriety of responding to the questionnaire thus functioned in precisely the way they had hoped.<sup>102</sup> Second, the Ninth Circuit said it "lack[ed] any reason to expect the Alaska Supreme Court to adopt and act upon a [Commission] recommendation that ran afoul of the First Amendment," particularly since the Alaska Supreme Court had never interpreted the challenged provisions.<sup>103</sup> Finally, noting that neither plaintiff was subject to the Alaska Code, the Ninth Circuit said the plaintiffs had not shown they would suffer hardship without preenforcement review and called AKRTL's decision not to send questionnaires in 2004 a result of "futility rather than First Amendment chill."<sup>104</sup> The Ninth Circuit did not reach the issue of standing.<sup>105</sup>

### III. CHALLENGING JUDICIAL CANDIDATE SPEECH RESTRICTIONS ON FIRST AMENDMENT GROUNDS

Alaska Right to Life (AKRTL) based its claims in *Feldman* on *Republican Party of Minnesota v. White*,<sup>106</sup> a 2002 case that defines the current standards for invalidating judicial candidate speech restrictions under the First Amendment. Determining the constitutionality of restrictions on judicial candidate speech requires reconciling two competing principles: "Candidates for public office should be free to express their views on all matters of interest to the electorate. Judges should decide cases in accordance with law rather than with any express

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unnecessary to ensuring judicial impartiality and granting plaintiffs' motion for summary judgment regarding the clauses).

99. *Feldman*, 504 F.3d at 852-53.

100. *Id.* at 849-51.

101. The Ninth Circuit held that Greenstein's letter "at most constituted informal guidance" and therefore had no legal effect. *Id.* at 849-50.

102. *See supra* note 77 and accompanying text.

103. *Feldman*, 504 F.3d at 850 (citing commentary to Canon 5A(3)(d) that stated, "[t]he Code should be interpreted in a manner that does not infringe First Amendment rights").

104. *Id.* at 851.

105. *Id.* at 849.

106. 536 U.S. 765 (2002).

or implied commitments that they may have made to their campaign supporters or to others.”<sup>107</sup> Although *White* was a narrow decision, confined to invalidating a specific speech restriction called the “announce clause,” the holding’s broad reasoning suggests that the United States Supreme Court has reconciled these competing principles to permit judicial candidate speech in all but the narrowest circumstances.

**A. *Republican Party of Minnesota v. White* and the Constitutionality of the “Announce Clause” in an Election System of Judicial Selection**

In *White*, the United States Supreme Court invalidated a provision in the Minnesota Code of Judicial Conduct prohibiting candidates for elected judicial office from announcing their views on disputed legal and political issues.<sup>108</sup> According to the Court, this provision in Minnesota’s code, known as an “announce clause,” violated candidates’ First Amendment rights.<sup>109</sup>

Justice Scalia, writing for a majority of five justices, applied the test of strict scrutiny.<sup>110</sup> “[T]he announce clause,” he wrote, “both prohibits speech on the basis of its content and burdens a category of speech that is ‘at the core of our First Amendment freedoms’—speech about the qualifications of candidates for public office.”<sup>111</sup> To survive strict scrutiny, the clause needed to be (1) narrowly tailored to serve (2) a compelling state interest.<sup>112</sup>

First, the Court considered interests the state alleged were served by the announce clause: preserving the impartiality and appearance of impartiality of the state judiciary. The word “impartiality,” Justice Scalia wrote, can mean “lack of bias for or against either *party* to the proceeding,” “lack of preconception in favor of or against a particular *legal view*,” or open-mindedness.<sup>113</sup> The Court seemed to suggest that impartiality in the first sense, which ensures equal protection under law, is a compelling state interest.<sup>114</sup> Because the announce clause restricted

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107. *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 227 (7th Cir. 1993).

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

109. *Id.*

110. *Id.* at 774. The Eleventh Circuit concluded that strict scrutiny was the appropriate test; none of the parties involved disputed that conclusion. *Id.*

111. *Id.* (quoting *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 861, 863 (8th Cir. 2001)).

112. *Id.* at 774–75.

113. *Id.* at 775–78 (emphasis in original).

114. *Id.* at 775–77.

speech on certain issues rather than parties, however, it was not narrowly tailored to serve a state interest within this first meaning of impartiality.<sup>115</sup> Ensuring a lack of bias for or against a legal view, the Court concluded, is both impossible and undesirable;<sup>116</sup> achieving impartiality or the appearance of impartiality in the second sense, therefore, cannot be a compelling state interest.<sup>117</sup> Finally, skeptical that Minnesota drafted the clause to guarantee judicial open-mindedness, the Court called the announce clause “woefully underinclusive”<sup>118</sup> if meant to achieve that purpose and did not determine whether judicial open-mindedness is a compelling state interest.<sup>119</sup> Having concluded that the announce clause did not survive strict scrutiny under any interpretation of “impartiality,” the Court invalidated it.<sup>120</sup>

The justices in the majority were unsympathetic to the state’s use of judicial speech codes to protect judicial independence within elected judiciaries. As Justice O’Connor stated in her concurring opinion, by opting to select its judges through elections rather than appointments or the merit system, Minnesota “has voluntarily taken on the risks to judicial bias” inherent in election systems.<sup>121</sup> While careful not to

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115. *Id.* at 776–77.

116. *Id.* at 777–78. The Court quoted Justice Rehnquist:

Since most justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. . . . Proof that a justice’s mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.

*Id.* (quoting *Laird v. Tatum*, 409 U.S. 824, 835 (1972) (memorandum opinion)).

117. *Id.*

118. *Id.* at 780. After becoming a candidate but prior to his election, the judicial candidate could not announce his views on disputed legal and political issues; prior to declaring his candidacy and after being elected, however, a judicial candidate was not prohibited from announcing such views. The Court held the announce clause to be underinclusive for the purpose of ensuring judicial open-mindedness because the proposition “that campaign statements are uniquely destructive of open-mindedness” had not been established. *Id.* at 778–81.

119. *Id.* at 780.

120. *Id.* at 788.

121. *Id.* at 792 (O’Connor, J., concurring). Risks to judicial bias in selecting judges through election include judges “likely . . . feel[ing] that they have at least some personal stake in the outcome of every publicized case” and, where judicial candidates have had to fundraise to fund their campaigns, judges “feeling indebted to certain parties or interest groups.” *Id.* at 788–90. Even where judges are able to stifle these feelings, the possibility that they would be unable to do so risks undermining public confidence in the judiciary. *Id.* These are risks

criticize election systems in principle,<sup>122</sup> Justice Kennedy expressed a similar view in his concurring opinion: “The State cannot opt for an elected judiciary and then assert that its democracy, in order to work as desired, compels the abridgment of speech.”<sup>123</sup>

In two dissenting opinions, Justices Stevens, Souter, Ginsburg, and Breyer asserted that judicial campaign speech does not warrant the same level of protection of other political speech. Because different work is required of judges and legislators—it being “the business of judges to be indifferent to unpopularity”—judicial and legislative campaigns have different speech requirements.<sup>124</sup> As Justice Ginsburg wrote, “[T]he rationale underlying unconstrained speech in elections for political office—that representative government depends on the public’s ability to choose agents who will act at its behest—does not carry over to campaigns for the bench.”<sup>125</sup> Justice Ginsburg’s dissent also articulated ways in which the majority had misconstrued the breadth of the announce clause<sup>126</sup> and misunderstood its crucial role in Minnesota’s judicial system.<sup>127</sup>

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Minnesota accepted when it adopted a pure election system for judicial selection, as opposed to an appointment or a merit-based system. *Id.* at 792.

122. *Id.* at 795–96 (Kennedy, J., concurring) (“States are free to choose this mechanism rather than, say, appointment and confirmation. By condemning judicial elections across the board, we implicitly condemn countless elected state judges and without warrant.”).

123. *Id.* at 795 (Kennedy, J., concurring).

124. *Id.* at 797–803 (Stevens, J., dissenting).

125. *Id.* at 806 (Ginsburg, J., dissenting).

126. *Id.* at 809–12 (Ginsburg, J., dissenting) (stating that the announce clause permitted a candidate to discuss general policy views, past judicial decisions, and her concept of the role of a judge, and prevented the candidate only from “publicly making known how [she] would *decide* disputed issues”) (quoting *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 881–82 (8th Cir. 2001)) (emphasis in original).

127. *Id.* at 812–21 (Ginsburg, J., dissenting). As Justice Ginsburg asserts, the announce clause is necessary to prevent judicial candidates from circumventing speech restrictions under the pledges and promises clause. Without the announce clause, candidates could circumvent the pledges and promises clause by making statements that clearly bind them to legal positions by adding, “I cannot promise anything.” Preventing the pledges and promises clause from becoming an overly formalistic restriction, the announce clause is indispensable to Minnesota’s system for “balanc[ing] the constitutional interests in judicial integrity and free expression within the unique setting of an elected judiciary.” *Id.*

## B. Reactions to *White*

After *Republican Party of Minnesota v. White*,<sup>128</sup> one open question is whether other judicial candidate speech restrictions pass constitutional muster. In the years since *White*, most courts have held recusal clauses to be narrowly tailored and therefore constitutional.<sup>129</sup> The pledges and promises clause and commit clause,<sup>130</sup> however, stand on shakier ground. Several federal district courts have reasoned that these clauses function as announce clauses and, thus, likewise violate the First Amendment.<sup>131</sup> The two state courts and single federal district court upholding judicial candidate speech restrictions have done so by construing them narrowly enough to permit a wide spectrum of political speech.<sup>132</sup> Circuit courts, for the most part, have avoided reaching the

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128. 536 U.S. 765 (2002).

129. See Fla. Family Policy Council v. Freeman, No. 4:06cv395-RH/WCS (N.D. Fla. Sept. 11, 2007); Ind. Right to Life, Inc. v. Shepard, 463 F. Supp. 2d 879, 886–87 (N.D. Ind. 2006); Kan. Judicial Watch v. Stout, 440 F. Supp. 2d 1209, 1234–35 (D. Kan. 2006); Alaska Right to Life Political Action Comm. v. Feldman, 380 F. Supp. 2d 1080, 1083–84 (D. Alaska 2005); N.D. Family Alliance, Inc. v. Bader, 361 F. Supp. 2d 1021, 1043–44 (D.N.D. 2005); Family Trust Found., Inc. v. Wolnitzek, 345 F. Supp. 2d 672, 705–11 (E.D. Ky. 2004). *But see* Duwe v. Alexander, 490 F. Supp. 2d 968, 970, 977 (W.D. Wis. 2007) (holding that, like the announce clause, a clause requiring recusal where the judge “has made a public statement that commits, or appears to commit, the judge with respect to . . . an issue in the proceeding [or] the controversy in the proceeding” unconstitutionally chills judicial candidates’ speech).

130. Patterned after the 1990 version of the American Bar Association Model Code of Judicial Conduct and almost identical to Alaska’s clauses, these clauses prohibit judicial candidates from “mak[ing] pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office” and from “mak[ing] statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.” See, e.g., *Bader*, 361 F. Supp. 2d at 1024.

131. *Id.* at 1039, 1044–45; *Wolnitzek*, 345 F. Supp. 2d at 697, 711 (issuing a preliminary injunction against enforcement of the clauses); see also *Shepard*, 463 F. Supp. 2d at 879, *rev’d*, 507 F.3d 545 (7th Cir. 2007); *Feldman*, 380 F. Supp. 2d at 1080, *vacated*, 504 F.3d 840 (9th Cir. 2007).

132. Pa. Family Inst. v. Celluci, 521 F. Supp. 2d 351, 372–88 (E.D. Pa. 2007) (relying on an affidavit by the Chief Counsel of the Judicial Conduct Board and interpreting the Pennsylvania Code to permit “[a]ny speech by a judicial candidate short of a pledge, promise, or commitment to adjudicate a particular result”); *In re Kinsey*, 842 So. 2d 77, 87 (Fla. 2003) (holding that Florida’s pledges and promises and commit clauses barred judicial candidates only from “promising to act in a partisan manner by favoring a discrete group or class of citizens,” not from stating their personal views on disputed issues); *In re Watson*, 100 N.Y. 2d 290, 301 (N.Y. 2003) (holding that, rather than prohibiting all pledges and promises except those promising impartial performance of duty, New York’s pledges and promises clause *allowed* judicial candidates to “promise future conduct provided such conduct is not inconsistent with the faithful and impartial performance of judicial duties”).

merits of these claims; some have dismissed the cases on standing or ripeness grounds,<sup>133</sup> while others, recognizing an important state interest in regulating its judiciary, have invoked abstention doctrines.<sup>134</sup>

The American Bar Association (ABA) also worried that the pledges and promises clause and commit clause were vulnerable to a First Amendment challenge.<sup>135</sup> Those concerns led the ABA to make two interesting, substantive revisions in its newest Model Code.<sup>136</sup> First, the Model Code answers *White's* concerns that the relevant restrictions were underinclusive<sup>137</sup> by applying the relevant restrictions to both judges and judicial candidates.<sup>138</sup> Second, it collapses the pledges and promises clause and commit clause into one narrow restriction prohibiting only promises *inconsistent with judicial impartiality*.<sup>139</sup> The previous approach, which prohibited all promises other than that of judicial

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133. *Ind. Right to Life, Inc. v. Shepard*, 507 F.3d 545, 549-50 (7th Cir. 2007) (holding that the organization had failed to establish the presence of a willing speaker, as required to meet standing requirements); *Alaska Right to Life Political Action Comm. v. Feldman*, 504 F.3d 840, 852-53 (9th Cir. 2007) (holding that plaintiffs had not shown a real threat that the clauses would be enforced); *Pa. Family Inst., Inc. v. Black*, 489 F.3d 156, 169 (3d Cir. 2007) (holding that the organization had failed to establish the presence of a willing speaker, as required to have standing in a "right to listen" First Amendment case, and failed to establish a real threat of enforcement, as required for the case to be ripe).

134. *Kan. Judicial Watch v. Stout*, 519 F.3d 1107, 1118-22 (10th Cir. 2008) (citing the rationale behind the *Pullman* abstention doctrine—that state law underlying the plaintiff's claims was unclear and resolving those issues could obviate or alter the constitutional issues at stake—and certifying five questions related to the meaning of certain canons in the Kansas Code of Judicial Conduct for the Kansas Supreme Court); *Spargo v. N.Y. State Comm'n on Judicial Conduct*, 351 F.3d 65, 67-68 (2d Cir. 2003) (invoking *Younger* abstention and holding it appropriate to abstain from exercising jurisdiction where disciplinary proceedings against the judge had already commenced).

135. Matthew J. Medina, *The Constitutionality of the 2003 Revisions to Canon 3(E) of the Model Code of Judicial Conduct*, 104 COLUM. L. REV. 1072, 1081-82 n.42 (2004) (quoting the Working Group on the First Amendment and Judicial Campaigns, which revised the restrictions, as concluding that both the pledges and promises and commit clauses, like the announce clause, are content-based speech restrictions and would be subject to strict scrutiny analysis); see also Nat Stern, *The Looming Collapse of Restrictions on Judicial Campaign Speech*, 38 SETON HALL L. REV. 63 (2008).

136. Mark Harrison, Chair Message on 2007 ABA Model Code of Judicial Conduct, <http://www.abanet.org/judicialethics> (last accessed Nov. 5, 2008).

137. *Republican Party of Minnesota v. White*, 536 U.S. 765, 779-81 (2002).

138. As the introduction to Canon 4 states, "[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." Model Code of Judicial Conduct, American Bar Association (2007), available at [http://www.abanet.org/judicialethics/ABA\\_MCJC\\_approved.pdf](http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf).

139. See *id.*

impartiality, implicated a wider spectrum of judicial speech.<sup>140</sup> While commentary accompanying the restrictions borrows Justice Ginsburg's theme of judicial independence from political influence,<sup>141</sup> the act of narrowing the restrictions responds to *White's* majority opinion by anticipating the restrictions' relationship to Justice Scalia's three meanings of impartiality. With "impartial performance" left open-ended, the restriction can take on any of the definitions of impartiality *White* deems a compelling state interest. Further, the restriction, prohibiting only that which contravenes impartial judicial performance, could not be narrower.

### C. The Nationwide Effort to Politicize Judicial Elections

The Indiana law firm of Bopp, Coleson & Bostrom has been the driving force behind the majority of cases challenging judicial speech restrictions, and its focus is not only on Alaska but on the nation as a whole. In addition to arguing *White* before the Supreme Court of the United States, James Bopp, Jr.<sup>142</sup> was involved in *Alaska Right to Life Political Action Committee v. Feldman*,<sup>143</sup> at least three other cases that

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140. As Rule 4.1(A)(13) states, "judges and judicial candidates 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." Model Code of Judicial Conduct, American Bar Association (2007), available at [http://www.abanet.org/judicialethics/ABA\\_MCJC\\_approved.pdf](http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf). This mirrors the narrowing constructions some courts have given the restrictions. See, e.g., *In re Watson*, 100 N.Y.2d 290, 310 (N.Y. 2003).

141. As Comment 1 to Rule 4.1 states, the role of a judge, who decides cases on law and facts, is different from the role of a legislator or member of the executive branch, who makes decisions in accordance with the views and preferences of the electorate. Model Code of Judicial Conduct, American Bar Association (2007), available at [http://www.abanet.org/judicialethics/ABA\\_MCJC\\_approved.pdf](http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf). "[I]n furtherance of this interest, judges and judicial candidates must, to the greatest extent possible, be free and appear to be free from political influence and political pressure." *Id.*

142. Among other professional affiliations, Mr. Bopp is General Counsel for the National Right to Life Committee, Special Counsel for Focus on the Family, and General Counsel for the James Madison Center for Free Speech. James Madison Center for Free Speech, Firm Biography, <http://www.jamesmadisoncenter.org/firmbio.html> (last visited Nov. 5, 2008).

143. 504 F.3d 840 (9th Cir. 2007).

went to the circuit court level,<sup>144</sup> and at least six cases that ended at the district court level.<sup>145</sup>

Bopp believes that judges' opinions on controversial issues should be publicized so voters can make informed decisions at the polls. "Anybody who tells you it doesn't matter what judge you get is a fool," Bopp said in an interview. "Judges have discretion," he continued, "[t]heir personal opinions matter and their views matter."<sup>146</sup> As Bopp explains, judges should be free to express their views and then be expected to enforce the law.<sup>147</sup> Critics believe that, rather than fighting for judicial candidates' speech rights, Bopp is using the First Amendment to attack judicial independence and make judges "ideologically accountable."<sup>148</sup>

In the wake of *White*, a number of partisan interest groups, particularly single-issue organizations, have begun soliciting judges' views on hot-button issues prior to their initial or retention elections through judicial candidate questionnaires.<sup>149</sup> The often politically conservative<sup>150</sup> non-profit organizations send judicial candidates

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144. James Bopp served as counsel in *Kansas Judicial Review v. Stout*, 519 F.3d 1107 (10th Cir. 2008), *Indiana Right to Life, Inc. v. Shepard*, 507 F.3d 545 (7th Cir. 2007), and *Pennsylvania Family Institute, Inc. v. Black*, 489 F.3d 156 (3d Cir. 2007).

145. James Bopp served as counsel in both district court cases declaring judicial candidate speech restrictions unconstitutional—*North Dakota Family Alliance, Inc. v. Bader*, 361 F. Supp. 2d 1021 (D.N.D. 2005) and *Family Trust Foundation of Kentucky, Inc. v. Wolnitzek*, 345 F. Supp. 2d 672 (E.D. Ky. 2004)—as well as the district court case upholding judicial candidate speech restrictions—*Pennsylvania Family Institute, Inc. v. Celluci*, 521 F. Supp. 2d 351 (E.D. Pa. 2007). He also served as counsel in a district court case declaring a recusal statute unconstitutional, *Duwe v. Alexander*, 490 F. Supp. 2d 968 (W.D. Wis. 2007); a district court case upholding a recusal statute, *Florida Family Policy Council v. Freeman*, No. 4:06cv395-RH/WCS (N.D. Fla. Sept. 11, 2007); and a district court case dismissing a challenge to provisions of the Arizona Code of Judicial Conduct on ripeness grounds, *Wolfson v. Brammer*, No. CIV 06-2357-PHX-SMM, 2007 WL 2288024 (D. Ariz. August 8, 2007).

146. Terry Carter, *The Big Bopper*, ABA J., Nov. 2006, at 33, available at [http://www.abajournal.com/magazine/the\\_big\\_bopper/](http://www.abajournal.com/magazine/the_big_bopper/); see also Chemerinsky, *supra* note 35, at 736 ("Judges often have discretion in deciding the content of legal rules and in applying them to specific cases . . . . The beliefs and views of a judge inevitably influence how that discretion will be exercised.").

147. Carter, *supra* note 146, at 33.

148. *Id.* at 34. Mark Harrison, Chair of the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct said, "I don't think he'd admit this, but he wants judges who are ideologically accountable, which is inimical to the Constitution." *Id.*

149. See Roy Schotland, *Impacts of White*, 55 DRAKE L. REV. 625, 629 (2006-07).

150. But see Rebecca Mae Salokar, *After White: An Insider's Thoughts on Judicial Campaign Speech*, 26 JUST. SYS. J. 149, 156-57 (2005) (discussing a questionnaire sent to judicial candidates by SAVE Dade, a gay rights organization based in



questionnaires asking their opinions on legal and political issues. While giving candidates the option of declining to answer, many questionnaires, like the one sent by the Alaska Right to Life Political Action Committee, warn candidates that the organization will encourage its members to vote against the election or retention of those who decline. Through these questionnaires, interest groups pressure judicial candidates to make public their views on disputed legal issues; candidates who decline to answer face the groups' opposition as well as criticism that declining to answer is "cowardly."<sup>151</sup>

Further, the option to decline is paired with a pre-drafted reason for declining. This allows the organization to allege in a subsequent lawsuit that judicial candidates declined to answer for fear of being disciplined or forced to recuse themselves. In lawsuits brought nationwide to challenge judicial candidates' speech restrictions, non-profit organizations—rather than the judges whose speech is being restricted—are often the plaintiffs.<sup>152</sup>

#### IV. CONSTITUTIONALITY OF ALASKA'S RESTRICTIONS ON JUDICIAL CANDIDATE SPEECH AFTER *WHITE*

While plaintiffs have been frustrated by circuit courts dismissing their cases on justiciability grounds, future cases, particularly those in which judicial candidates join as plaintiffs and request official advisory opinions, may survive justiciability inquiries.<sup>153</sup> And although *Alaska*

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southern Florida, soliciting judicial candidates' opinions on issues relating to discrimination on the basis of sexual orientation).

151. See Brennan Center Brief, *supra* note 33, at 18 ("Unlike federal court nominees seeking confirmation, state judicial candidates often cannot afford the luxury of refusing to answer the questionnaires.") As a footnote argues, "[F]acial invalidation of the Pledges Clause would almost invariably result in pressure for promises inconsistent with litigants' rights to due process." *Id.* at n.8.

152. See *Kan. Judicial Watch v. Stout*, 519 F.3d 1107 (10th Cir. 2008); *Ind. Right to Life v. Shepard*, 507 F.3d 545 (7th Cir. 2007); *Alaska Right to Life Political Action Comm. v. Feldman*, 504 F.3d 840 (9th Cir. 2007); *Pa. Family Institute v. Black*, 489 F.3d 156 (3d Cir. 2007); *Wolfson v. Brammer*, No. CIV 06-2357-PHX-SMM, 2007 WL 2288024 (D. Ariz. Aug. 8, 2007) (including as plaintiff Alliance Defense Fund Legal Center); *Duwe v. Alexander*, 490 F. Supp. 2d 968 (W.D. Wis. 2007) (including as plaintiff Wisconsin Right to Life); *N.D. Family Alliance, Inc. v. Bader*, 361 F. Supp. 2d 1021 (D.N.D. 2005); *Family Trust Found. of Ky., Inc. v. Wolnitzek*, 345 F. Supp. 2d 672 (E.D. Ky. 2004). *But see Spargo v. N.Y. State Comm'n on Judicial Conduct*, 351 F.3d 65 (2d Cir. 2003) (state judge and two of his political supporters initiated lawsuit); *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002) (judicial candidate and registered voter initiated lawsuit).

153. See, e.g., *Bauer v. Shepard*, No. 3:08-CV-196-TLS, 2008 WL 1994868 (N.D. Ind. May 6, 2008) (including as plaintiffs Indiana Right to Life and two judicial candidates to address standing problems of previous lawsuit).

*Right to Life Political Action Committee v. Feldman* was dismissed, provisions of the Alaska's judicial candidate speech restrictions may be challenged again. Alaska Right to Life sent a second questionnaire to Alaska judges before the 2008 retention election<sup>154</sup> and plans to get involved in Alaska's 2010 judicial retention elections as well.<sup>155</sup>

### A. Ripeness and Standing Hurdles

Any challenge to Alaska's judicial candidate speech restrictions will have to overcome justiciability obstacles. First, the ripeness issue<sup>156</sup> will not disappear. Under Commission rules, only the Commission may issue a formal advisory opinion—a process involving research, collective analysis and deliberation, drafting, and revision that may take months to complete.<sup>157</sup> Though a judge once requested an official advisory opinion from the Commission, the Commission has never issued a formal advisory opinion about the propriety of judges answering AKRTL's questionnaires and currently does not have plans to do so.<sup>158</sup> As long as the Commission does not issue such an opinion, Greenstein says she will continue to provide judges with informal guidance.<sup>159</sup> "If we can provide judges with the guidance they're seeking and avoid litigation, we think that's the more prudent course," she said.<sup>160</sup> Greenstein does not expect any judges to quarrel with that decision; she knows from conversations with judges around Alaska that the vast majority of judges simply do not want to fill out questionnaires like

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154. See Alaska Right to Life Committee Judicial Candidate Questionnaire [hereinafter Alaska Right to Life 2008 Judicial Questionnaire] (mailed to Alaska judges Sept. 2008) (on file with author).

155. Interview with Karen Lewis, *supra* note 68.

156. The Ninth Circuit dismissed *Alaska Right to Life Political Action Committee v. Feldman* on ripeness grounds because it held that plaintiffs had not shown a threat of investigation by the Committee and of disciplinary action by the Alaska Supreme Court. As the Ninth Circuit held, Greenstein's letter to AKRTL and Alaska judges was not a Commission-issued formal advisory opinion. See *supra* Part II.C.

157. Comment from Jeffrey Feldman, *supra* note 76; see also Alaska Court System - 2007-2008 Alaska Judicial Conduct Commission Rules, Commission-Issued Advisory Opinions, <http://www.state.ak.us/courts/jcc.htm#19> (last visited Nov. 10, 2008).

158. Interview with Marla Greenstein, *supra* note 74. Under the Commission's rules, the Commission chair determines which matters will be placed on the agenda for full Commission consideration. Alaska Judicial Conduct Commission Rules, Rule 1(c)(1); see also *supra* note 76 and accompanying text (discussing the decision to handle judges' inquiries about AKRTL's 2002 questionnaire informally).

159. Interview with Marla Greenstein, *supra* note 74.

160. *Id.*

AKRTL's.<sup>161</sup> Without a formal opinion that answering such a questionnaire violates the Alaska Code or evidence that the Commission and Alaska Supreme Court would consider disciplinary action against a judge, a future challenge is unlikely to clear the ripeness hurdle.

Any future plaintiff will also have to meet standing requirements, although the Ninth Circuit has not addressed this issue. In First Amendment law, a willing listener has standing to challenge speech restrictions—but only where a willing speaker is also present.<sup>162</sup> In other words, if AKRTL wants to hear judges' views on controversial legal issues, it has standing to bring a lawsuit if: (1) one or more judges are willing to speak on those issues, and (2) would speak *but for* a speech restriction such as the Alaska Code. If the vast majority of judges are not interested in responding to these partisan questionnaires, it will be hard to show that any judge would do so but for the Code's pledges and promises clause or commit clause.<sup>163</sup> To address some standing problems,<sup>164</sup> AKRTL's 2008 questionnaire provided judges with five possible responses: "Agree," "Disagree," "Undecided," "Decline to Answer," and "Refuse to Answer."<sup>165</sup> The predrafted reasoning for the "Decline to Answer" option was also specifically tied to the pledges and promises clause and commit clause.<sup>166</sup> According to AKRTL, none of the judges who received its 2008 questionnaire responded by checking any of the responses provided.<sup>167</sup>

Nonetheless, despite these justiciability hurdles, even one judge interested in challenging Alaska's judicial speech restrictions would

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161. *Id.*

162. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 756-57 (1976) (holding that where a willing speaker has a right to speak, listeners have a "reciprocal right to receive" that speech); *see also* Pa. Family Inst., Inc. v. Black, 489 F.3d 156, 168-69 (3d Cir. 2007) (dismissing case where plaintiff challenging speech restrictions did not establish the presence of a willing speaker).

163. The "decline" option on AKRTL's questionnaire was tied to predrafted reasoning—that answering is prohibited or would require the judges' later recusal—intended to meet this "but for" requirement. First, this did not tie the judges' demurral to one specific clause but to all restrictions generally. Second, it may be unpersuasive because the judges themselves did not draft it. *See Black*, 489 F.3d at 168-69 (holding that predrafted content of footnote in plaintiffs' questionnaire did not necessarily reflect views of judicial candidates).

164. *See id.* (articulating difficulties demonstrating plaintiff's standing in a similar case).

165. *See* Alaska Right to Life 2008 Judicial Questionnaire, *supra* note 154.

166. *See id.* ("By checking this option, I hereby attest that I would have replied to this question but for the prospect that I may be disciplined for doing so under Alaska Judicial Canon 5A(3)(d) . . ."). The recusal clause, which all but one court has found constitutional, *see supra* Part III.B, was not mentioned. *See id.*

167. Interview with Karen Lewis, *supra* note 68.

have the power to meet justiciability requirements. If AKRTL locates just one judge eager to speak but afraid to violate the Alaska Code, the standing requirement would be met. Further, one judge, upon receiving AKRTL's questionnaire, could issue a written request for a formal advisory opinion from the Commission. If the Commission issued a formal opinion forbidding him to respond to the questionnaire or chose not to issue a formal opinion at all,<sup>168</sup> the judge could file a lawsuit requesting review of the restrictions. He could also opt to answer the questionnaire and file a lawsuit only if sanctioned. Under both scenarios, the judge would likely meet the ripeness requirement.

### **B. Judicial Candidate Speech Restrictions in a Merit-Based System of Judicial Selection**

If AKRTL is able to reach the merits in a future lawsuit, it would still face distinctions between the facts of *White* and the situation in Alaska. The most interesting of these distinctions is judicial selection: while judges in Minnesota are elected, Alaska uses the merit system.

The nature of the judicial election—and possibly the role of voters in the election—may be different in a merit system. In *White*, Minnesota voters were being asked to elect judges from among true judicial candidates. In Alaska, they are given the Council's evaluation of the judges' performance along several nonpartisan criteria and the Council's nonpartisan recommendation for retention or non-retention. A voter can certainly vote to retain or not retain a judge for any reason, including disagreement over that judge's decisions, but a retention election is structured around the hope that voters will weigh a judge's past judicial performance and determine whether he is competent and qualified to remain in office.<sup>169</sup> Along these lines, some commentators argue that voters in a retention election are entitled to different information than voters in a contested judicial election.<sup>170</sup>

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168. In *White*, for example, one of the petitioners, a judicial candidate, sought an advisory opinion from the Minnesota Lawyers Professional Responsibility Board, but the Lawyers Board declined to provide one. *Republican Party of Minn. v. White*, 536 U.S. 765, 769 (2002).

169. Cady & Phelps, *supra* note 12, at 372. While selection commissions evaluate what a judicial candidate would bring to the bench, voters in a retention election also have the benefit of knowing how a judge has performed once placed in the role. *Id.*

170. *See, e.g., id.* at 368. As two commentators, a state court justice and a law clerk, wrote:

[T]he adoption of merit selection is a giant step towards eliminating any need for a retention voter to know the personal views of a judge and, in turn, the need for a judge to exercise the right to express

In addition, a merit system of judicial selection may change the posture of the judge-as-potential-speaker. In Minnesota, he is a true candidate for judicial office; in Alaska, he is already draped in the robes of judicial office.<sup>171</sup> Insofar as partisan speech by a judge, whom society trusts to be impartial, is more unseemly than partisan speech by a candidate who is not yet a judge, this distinction is important.

Justice Scalia's majority opinion in *White* does not seem to leave much room for nuanced differentiation between judicial and legislative elections,<sup>172</sup> much less between different kinds of judicial elections. Justice O'Connor's concurrence, however, specifically links the outcome in the case to Minnesota's adoption of a pure election system.<sup>173</sup> Justice Kennedy's concurrence also creates space to distinguish between election and merit-based systems of judicial selection by emphasizing that *White* does not decide the constitutionality of restricting sitting judges' speech through judicial conduct codes.<sup>174</sup> Although the Alaska

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personal views on political and legal issues. Information relevant to a retention election relates to professional competency and performance on the bench.

*Id.* Other commentators take the opposite position. As Erwin Chemerinsky, law school dean and constitutional law professor, wrote:

A judicial candidate's ideology is an appropriate consideration in any judicial selection process for the obvious reason that it reflects how the person will likely decide cases. This is not to lessen the importance of professional qualifications and judicial temperament; they obviously are always considerations. But they alone are not sufficient for evaluating judicial candidates.

See Chemerinsky, *supra* note 35, at 738.

171. During oral argument in the Ninth Circuit for *Alaska Right to Life Political Action Committee v. Feldman*, 504 F.3d 840 (9th Cir. 2007), one judge on the panel emphasized this distinction. In Alaska, those receiving questionnaires are "being asked to speak *as judges*. It's very different from candidates" (emphasis added) (oral arguments on file with journal).

172. *White*, 536 U.S. at 783-84. While leaving open the possibility that the First Amendment could allow more regulation of campaigns for judicial than legislative office, Justice Scalia argues that, because "state-court judges possess the power to 'make' common law [and] . . . to shape the States' constitutions," judges are not completely separate from the "enterprise of 'representative government.'" *Id.*

173. *Id.* at 789-92 (O'Connor, J., concurring) ("Minnesota has chosen to select its judges through contested popular elections instead of through an appointment system or a combined appointment and retention election system along the lines of the Missouri Plan."); see *supra* note 12 and accompanying text.

174. *White*, 536 U.S. at 796 (Kennedy, J., concurring) ("This case does not present the question whether a State may restrict the speech of judges because they are judges—for example, as part of a code of judicial conduct; the law at issue here regulates judges only when and because they are candidates.").

Code explicitly restricts the speech of any “candidate for judicial office,”<sup>175</sup> retention elections by nature involve sitting judges.

Alaska’s judicial speech restrictions may survive strict scrutiny if courts choose to read these concurrences carefully. Courts could, for example, differentiate between judicial candidate speech restrictions in pure election systems and in merit-based systems. They might also distinguish between restricting the speech of new candidates for judicial office and restricting the speech of sitting judges standing for retention. Along those lines, and further distinguishing its judicial speech restrictions from of Minnesota, Alaska could revise its Code to restrict only the speech of sitting judges.

### C. Constitutionality of Alaska’s “Pledges and Promises Clause” and “Commit Clause”

If a challenge to the pledges and promises clause and commit clause survives ripeness and standing inquiries and courts do not differentiate between speech restrictions in election and merit-based judicial selection systems, the clauses would likely be held unconstitutional. Although Alaska’s pledges and promises clause and commit clause are different from the announce clause at issue in *White*, the broad reasoning in *White*’s majority opinion probably renders this distinction inconsequential.<sup>176</sup>

Government speech restrictions must meet strict scrutiny when they are content-based restrictions.<sup>177</sup> Alaska’s pledges and promises clause and commit clause are content-based speech restrictions because they regulate the topics upon which judicial candidates are permitted to speak.<sup>178</sup> Thus, to be constitutional, the clauses must meet strict scrutiny

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175. Under the Alaska Code, a person becomes a judicial candidate when he “makes a public announcement of candidacy [or] declares or files as a candidate with the election or appointment authority . . .” Alaska Code of Judicial Conduct, Terminology, “Candidate.” This applies to individuals seeking judicial nomination and judges seeking retention. *Id.* at “Candidate for judicial office.”

176. *See, e.g.,* Stern, *supra* note 135, at 81–95, 98–107 (considering the majority opinion’s denial that judicial elections are different from other political elections, its application of strict scrutiny, and its discussion of a judicial role in lawmaking).

177. *See, e.g.,* *Burson v. Freeman*, 504 U.S. 191, 198 (1992); *see also* *Brown v. Hartlage*, 456 U.S. 45, 53–54 (1982) (holding that, unless the regulation meets strict scrutiny, the government may not prohibit candidates for elected office from making campaign promises to conduct that office in a way beneficial to certain voter groups).

178. *See, e.g.,* *Burson*, 504 U.S. at 197 (“This Court has held that the First Amendment’s hostility to content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition of public

by being narrowly tailored to serve a compelling state interest.<sup>179</sup> Under the majority's approach in *White*, judicial impartiality may be a compelling state interest where it refers to a lack of bias for or against a party to a proceeding but is not a compelling state interest where it refers to a lack of bias for or against a particular legal view.<sup>180</sup> It is unclear whether judicial impartiality in the sense of open-mindedness could be a compelling state interest.<sup>181</sup> The majority opinion addressed only state interests in impartiality and the appearance of impartiality;<sup>182</sup> thus it is plausible that other state interests in judicial candidate speech restrictions could be compelling.

Alaska's commit clause<sup>183</sup> does not address bias with respect to parties to a proceeding and therefore does not serve the compelling state interest in *White*. If the commit clause was intended to serve a state interest in judicial open-mindedness, it is under-inclusive because like the announce clause, it only restricts speech by judicial candidates and not sitting judges.<sup>184</sup> More likely, Alaska's commit clause, which explicitly targets statements committing candidates to "a particular view or decision," is also intended to ensure judicial impartiality in terms of a

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discussion of an entire topic."). To be content-neutral, a speech restriction must be both viewpoint neutral, meaning it regulates speech irrespective of the ideology expressed, and subject-matter neutral, meaning it regulates speech irrespective of the topic of speech. *Id.*

179. *See, e.g., White*, 536 U.S. at 774-75.

180. *Id.* at 775-78.

181. *Id.* at 778-80.

182. *Id.* at 775. Though the Eighth Circuit also referred to a state interest in an "independent" judiciary in its decision, the Supreme Court noted that the Eighth Circuit treated the state interest in an "independent" judiciary and in an "impartial" judiciary as one in the same. *Id.* at 775 n.6. It is unclear, then, whether a state's interest in judicial independence could be treated as a separate state interest in the future.

183. The commit clause prohibits judicial candidates from "mak[ing] statements that commit or appear to commit the candidate to a particular *view* or decision with respect to cases, controversies or issues that are likely to come before the court." Alaska Code of Judicial Conduct, Canon 5A(3)(d)(ii) (2006) (emphasis added).

184. The Supreme Court was skeptical that Minnesota sought to promote judicial open-mindedness via its announce clause. As the Court pointed out, "statements in election campaigns are such an infinitesimal portion of the public commitments to legal positions that judges (or judges-to-be)" often express their legal views in books, speeches, and through teaching—activities unrestricted, and in some cases encouraged, by the Minnesota Code. *White*, 536 U.S. at 779-80. This argument suggests that courts could be similarly skeptical of the commit clause as a vehicle for promoting judicial open-mindedness and offers another reason why the commit clause could be found under-inclusive.

lack of bias for or against a particular legal view – a state interest that the *White* court held was not compelling.<sup>185</sup>

Whether commit clauses have narrower restrictions<sup>186</sup> than announce clauses or whether they “are one and the same” is an open question.<sup>187</sup> Nonetheless, commit clauses are vulnerable for several reasons. First, by restricting speech “with respect to cases, controversies or issues that are likely to come before the court,”<sup>188</sup> a commit clause can restrict judicial speech on almost any issue. According to the *White* majority, limiting speech restrictions to issues likely to come before a court “is not much of a limitation at all.”<sup>189</sup> Second, by prohibiting statements that actually commit candidates to particular views and decisions as well as statements that “appear to commit” candidates,<sup>190</sup> a commit clause may be interpreted as broadly as an announce clause. As acknowledged in the Alaska Code Commentary, some listeners might interpret a judicial candidate’s description of his legal philosophy as committing him “to a particular view or decision.”<sup>191</sup> If that is the case, the commit clause may be too broad to meet strict scrutiny.<sup>192</sup> If the commit clause’s “appear to commit” language is not read broadly, however, it is unclear what it would add to the pledges and promises clause.<sup>193</sup> Finally, as stated earlier, Alaska’s commit clause restricts only

185. *Id.* at 777–79.

186. In 1990, the ABA replaced the announce clause with the commit clause because it deemed the announce clause “an overly broad restriction on speech” and the commit clause was intended to be a narrower restriction. See Richard Briffault, *Judicial Campaign Codes After Republican Party of Minnesota v. White*, 153 U. PA. L. REV. 181, 203 (2004).

187. *White*, 536 U.S. at 773 n.5.

188. Alaska Code of Judicial Conduct, Canon 5A(3)(d)(ii) (2006).

189. *White*, 536 U.S. at 772 (Of disputes “that are the proper . . . business of state courts, “[t]here is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction.”) (quoting Buckley v. Ill. Judicial Inquiry Bd., 997 F.2d 224, 229 (7th Cir. 1993)).

190. Alaska Code of Judicial Conduct, Canon 5A(3)(d)(ii) (2006).

191. See Alaska Code of Judicial Conduct, Canon 5A(3)(d) and Commentary to Canon 5A(3)(d) (2006).

192. See Briffault, *supra* note 186, at 217 (observing that the language “appear to commit” may allow state commissions and supreme courts to use the clause against judicial candidates making statements of judicial philosophy or political belief).

193. See Briffault, *supra* note 186, at 216–19 (noting that the concept of committing oneself to a course of action is very similar to the concept of pledging a course of action and that the ABA folded the commit clause into the pledges and promises clause in its amended Model Code).



judicial candidates' speech<sup>194</sup> and is probably under-inclusive for that reason.<sup>195</sup>

The pledges and promises clause<sup>196</sup> seems more narrowly tailored for preventing judicial candidates from committing themselves to future judicial conduct than the commit clause. By requiring the use of promissory language, the clause implies a candidate's intent to bind himself to specific conduct.<sup>197</sup> While the difference between a judicial candidate announcing his views on an issue and making a pledge to rule a particular way may be small, promissory language challenges judicial open-mindedness more than statements of one's judicial perspective.<sup>198</sup> The pledges and promises clause, however, prohibits *all* judicial candidates' pledges and promises "*other than to faithfully and impartially perform the duties of the office.*"<sup>199</sup> This is problematic because many statements could be considered pledges of future conduct. For example, if a judicial candidate makes a pledge to streamline the administrative functions of the court,<sup>200</sup> his statement is prohibited by the text of the pledges and promises clause though it is not a threat to judicial open-mindedness. A court is unlikely to consider such a ban a narrow restriction on judicial candidate speech.<sup>201</sup> Furthermore, both Alaska's pledges and promises clause and commit

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194. Although Alaska's retention elections by nature involve sitting judges, the Alaska Code restricts only the speech of "candidate[s] for judicial office." *See infra* Part IV.B.

195. *See* Republican Party of Minn. v. White, 536 U.S. 765, 779-80 (2002).

196. The pledges and promises clause prohibits judicial candidates from "mak[ing] pledges or promises of conduct in judicial office other than to faithfully and impartially perform the duties of the office." Alaska Code of Judicial Conduct, Canon 5A(3)(d)(i) (2006).

197. In discussing a possible state interest in judicial open-mindedness, Justice Scalia rejected Justice Stevens' argument that judges could be more reluctant to contradict, in a subsequent ruling, campaign statements than statements made at other times. *White*, 536 U.S. at 780. He added, however, that such a situation "might be plausible, perhaps, with regard to campaign promises" and noted that the pledges and promises clause was not under consideration. *Id.*

198. *See* Briffault, *supra* note 186, at 213-14.

199. Alaska Code of Judicial Conduct, Canon 5A(3)(d)(i) (2006) (emphasis added).

200. While "how [he] would handle administrative duties if elected" was on a list of pre-approved topics for judicial candidates in *White*, the Alaska Code provides no such list. *White*, 536 U.S. at 774.

201. *See, e.g.,* Stern, *supra* note 135, at 116-21; Buckley v. Ill. Judicial Inquiry Bd., 997 F.2d 224, 228 (7th Cir. 1993) (finding that the pledges and promises clause restricted potentially problematic judicial campaign speech "in the most comprehensive way possible").

clause may be vulnerable to overbreadth<sup>202</sup> and vagueness<sup>203</sup> challenges.<sup>204</sup>

The Alaska Supreme Court, the final authority on the Alaska Code of Judicial Conduct, could adopt narrow constructions of the pledges and promises clause and commit clause as several other state courts have done.<sup>205</sup> Because the plain texts of the clauses do not support such a narrow interpretation, however, redrafting the clauses and rendering their language and meaning consistent may be a more appropriate remedy.<sup>206</sup>

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202. Overbroad laws are laws that legitimately regulate unprotected speech but may have the effect of discouraging, or chilling, protected speech. *See, e.g., Sec’y of State v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 967–68 (1984). As the Supreme Court has noted, “[P]ersons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.” *Gooding v. Wilson*, 405 U.S. 518, 521 (1972) (invalidating a law prohibiting “opprobrious words or abusive language” for overbreadth where state courts had not narrowly construed the law).

203. Like overbroad laws, vague laws—laws for which a reasonable person cannot distinguish what activity is permissible from what activity is prohibited—may also chill protected speech. *NAACP v. Button*, 371 U.S. 415, 433 (1963) (invalidating a law prohibiting attorneys from soliciting clients). Because of the danger that such laws could chill protected speech, “standards of permissible statutory vagueness are strict in the area of free expression.” *Id.* at 432. *See also* Chemerinsky, *supra* note 35, at 740 (considering vagueness of Model Code pledges and promises and commit clauses).

204. No individual is better positioned to know what the law permits or prohibits than a judge. Several of the judges running for retention in 2002, however, said they did not know whether Alaska’s Code of Judicial Conduct permitted or prohibited responses to AKRTL’s questionnaire. In his response to AKRTL’s questionnaire, Justice Carpeneti wrote that he was “not at all certain that responding to your group’s questions is allowed under the Alaska code.” Alaska Right to Life Political Action Comm. Complaint, *supra* note 69, at Exhibit E-1 to E-2. Judge Pengilly was also unsure of whether his speech was permitted, saying, “[G]iven the uncertainty surrounding the situation, it appears that the appropriate response to your questionnaire under present circumstances is to decline to answer.” *Id.* at E-10. He added, “[I]t is far from clear that judges in Alaska have [the] freedom” to discuss the issues raised in AKRTL’s questionnaire. *Id.* While the judges may have been using the Alaska Code as an excuse not to answer the questionnaire, their statements could also be interpreted as genuine uncertainty.

205. *See In re Kinsey*, 842 So.2d 77, 87 (Fla. 2003); *In re Watson*, 794 N.E. 2d 1, 6 (N.Y. 2003) (construing New York’s pledges and promises clause as allowing all pledges and promises except those inconsistent with the impartial performance of duty).

206. The ABA’s 2007 Model Code of Judicial Conduct offers one possible guide. *See supra* Part III.B.

## V. MAINTAINING JUDICIAL INDEPENDENCE IN ALASKA

Invalidating Alaska's judicial candidate speech restrictions would strip judges of one excuse for not responding to questions like those posed by AKRTL's questionnaire. This would give new license to partisan individuals and interest groups who want to question judges, punish those who decline to answer with non-retention campaigns, and could damage the strong nonpartisan culture and independence of Alaska's judiciary.

When lower courts interpreted *White* to invalidate announce clause restrictions, some observers noted heightened politicization in judicial campaigns.<sup>207</sup> Increased politicization is apparent in states that select judges through partisan judicial elections<sup>208</sup> and, to a lesser extent, in states that utilize nonpartisan elections.<sup>209</sup> "[M]any candidates conclude that they cannot afford to occupy the moral high ground in the heat of a campaign," explained the Brennan Center for Justice in an amicus brief.<sup>210</sup> Recognizing the effect that invalidating Alaska's judicial speech restrictions could have on the independence of Alaska's judiciary, this Part explores ways to combat future partisan attacks on judges in the absence of those restrictions.

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207. See, e.g., Brennan Center Brief, *supra* note 33. Even before *White*, both ideological and business-related interest groups have been involved in judicial elections for some time, and observers had noted their increasing influence. See Anthony Champagne, *Interest Groups and Judicial Elections*, 34 LOY. L.A. L. REV. 1391, 1394-1407 (2001).

208. George W. Soule, *The Threats of Partisanship to Minnesota's Judicial Elections*, 34 WM. MITCHELL L. REV. 701, 716-21 (2008). In Illinois and Alabama, both partisan election states, judicial candidates in recent elections spent millions of dollars campaigning. *Id.* at 716-18. In Alabama, campaigns commonly reference controversial issues; the incumbent chief justice, for example, told voters that "[i]ssues relating to the right to life and the sanctity of marriage are in the soul of Alabamians, and they want a judge who shares their conservative views." *Id.* at 717 (quoting Drew Jubera, *There's Nothing Civil About Alabama Judicial Race*, ATLANTA J. CONST., June 5, 2006, at A2). In Texas, also a partisan election state, the 2006 election saw Democratic judicial candidates defeat Republican judicial candidates in twenty-eight contests. *Id.* at 718. Only five Republican judges, all running unopposed, retained their seats. *Id.* "The voters didn't differentiate between the good and bad Democrats, nor the good and bad Republicans, opting for a wholesale party swap without regard to each candidate's particular qualifications." *Id.* (quoting Matt Pulle, *Accidental Victors*, DALLAS OBSERVER, Nov. 16, 2006).

209. Soule, *supra* note 208, at 718-19. In Wisconsin, a nonpartisan election state, two judicial candidates in a 2007 election were nonetheless identified with the Democrat and Republican parties. *Id.* The race cost \$6 million, and both candidates were disappointed by the overwhelming presence of third parties and the importance of campaign contributions. *Id.* at 719.

210. Brennan Center Brief, *supra* note 33, at 4.

### A. Culture of the Judiciary and Merit-Based Selection Revisited

To maintain the independence and integrity of its judiciary in the face of partisan interest groups' involvement in retention elections, Alaska's most powerful asset is the judicial culture developed by its merit-based selection system. Simply stated, judges do not have to respond to interest groups' questionnaires or phone calls soliciting their views on controversial issues. Judge Murphy's response to AKRTL's questionnaire, declining to answer any questions because doing so would contravene his personal Judge's Code, is evidence that Alaska judges may decline for reasons beyond fear of being disciplined.<sup>211</sup> In the wake of *White*, as one commentator has stated, "traditional norms are bound to loosen,"<sup>212</sup> and judicial candidates may feel increasingly comfortable voicing their viewpoints on controversial legal and political issues when they find it politically advantageous. Merit selection, however, resists this tide by creating an institutional disincentive to judicial engagement in partisan activities and a stronger culture of nonpartisan judicial conduct. As one Alaska judge explained, partisan behavior goes against the grain of the nonpartisan, non-adversarial selection process in which Alaska judges have practiced and have been selected.<sup>213</sup> The vast majority of judges thus view partisan behavior with a "sense of distaste."<sup>214</sup>

In his *White* concurrence, Justice Kennedy discussed the importance of creating a judicial culture that values and promotes impartiality: "Explicit standards of judicial conduct," Justice Kennedy asserted, "provide essential guidance for judges in the proper discharge of their duties and honorable conduct of their office."<sup>215</sup> They also encourage judicial candidates and sitting judges to strive for integrity within their profession.<sup>216</sup> While not restricting judicial campaign speech, such standards may nonetheless dissuade judicial candidates from addressing certain issues in the interest of maintaining the integrity of

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

212. Schotland, *supra* note 149, at 629 (noting that, one day after the Supreme Court denied review of the Eighth Circuit's en banc decision narrowing prohibitions against candidates' personally soliciting campaign funds, a judicial candidate in Arkansas sent emails soliciting funding).

213. A superior court judge shared this sentiment with the author of this Note; to preserve his anonymity, he will remain unnamed.

214. *Id.*

215. *Republican Party of Minn. v. White*, 536 U.S. 763, 794 (2002) (Kennedy, J., concurring).

216. *Id.*

the state judicial system. Other commentators have emphasized the role of public education in maintaining a nonpartisan judicial culture.<sup>217</sup>

To further institutionalize Alaska's nonpartisan judicial tradition, Alaska bar members could also establish an independent organization to assist judges in neutralizing partisan attacks against them. This organization could maintain funds to finance the last-minute counter-campaigns of judges recommended for retention but nonetheless targeted by partisan attacks. It could also assist judges in planning their counter-campaigns.<sup>218</sup>

Finally, if partisan groups choose to contact sitting judges, judicial nominees, or judicial applicants to discern their views on legal and political issues, those organizations should be required to notify the Alaska Commission on Judicial Conduct and the Alaska Judicial Council of their communication with those individuals. If an organization decides to send judges a questionnaire, for example, it would have to send a copy of that questionnaire to the Commission and the Council. Most importantly, this would increase the transparency of partisan groups' interactions with judges. The Commission or the Council could then make a decision about whether to post the questionnaire on a public forum as a way of educating the public about partisan pressures the judges are facing or to simply notify all Alaska judges about the contact so they may be prepared in the event they are likewise contacted.

## B. Recusal and Judicial Disqualification as Remedies

In his *White* concurrence, Justice Kennedy offered strict recusal clauses as an alternative to judicial speech restrictions for ensuring judicial impartiality. Minnesota, he said, "may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards."<sup>219</sup> Commentators also look to recusal clauses as

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217. See Jessica Gall, *Living With Republican Party of Minnesota v. White: The Birth and Death of Judicial Campaign Speech Restrictions*, 13 COMM. L. & POL'Y 97, 123-26 (2008); Cady & Phelps, *supra* note 12, at 369-80.

218. An organization could provide, as models, the print ads published by supporters of Justices Rabinowitz and Fabe and Judge Tan emphasizing the jurists' nonpartisan professional qualifications for the bench. Given the relatively narrow reach of newspapers when compared with television and the Internet, it could also consider those methods of communication tastefully and effectively to support the judge's retention campaign.

219. *White*, 536 U.S. at 794 (Kennedy, J., concurring).

constitutional means of safeguarding the impartiality of state judiciaries.<sup>220</sup>

Alaska's recusal clause, which requires that judges recuse themselves where their "impartiality might reasonably be questioned,"<sup>221</sup> likely meets strict scrutiny. It serves a clearly compelling state interest in providing impartial judges so litigants receive due process<sup>222</sup> and is narrowly tailored to achieve this compelling interest.<sup>223</sup> As a district court in Florida noted in the course of upholding a recusal clause broader than that in the Alaska Code,<sup>224</sup> such a clause

prohibits speech not at all, and burdens speech only a trifle, allowing a judge to keep the same job at the same pay and to perform the same type of work with the same perquisites while giving up only the right to preside over cases (presumably few if any) in which the judge reasonably appears not to have an open mind.<sup>225</sup>

Though designed to prevent judges from sitting on cases where their lack of impartiality or appearance of lack of impartiality threatens litigants due process,<sup>226</sup> critics have suggested that using recusal clauses to fill the void left by vanishing judicial candidate speech restrictions is a solution that "suffers from a deep manageability problem."<sup>227</sup> States,

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220. See *Gall*, *supra* note 217, at 123; see also *Carrington*, *supra* note 42, at 115 (suggesting that a judge should be disqualified from sitting on cases where a large contributor to his campaign is a party or has a significant financial interest).

221. Alaska Code of Judicial Conduct, Canon 3E(1) (2006). The recusal clause also identifies appropriate grounds for recusal, including personal bias concerning a party or party's lawyer as one ground for disqualification. Personal bias concerning an issue is not identified as a ground for disqualification. See Alaska Code of Judicial Conduct, Canon 3E(1)(a) (2006).

222. See *N.D. Family Alliance, Inc. v. Bader*, 361 F. Supp. 2d 1021, 1043 (D. N.D. 2005). Both "[t]he public and individual litigants must be reassured that the judiciary will decide legal disputes based on the law alone rather than on any inherent bias or prejudice of the presiding judge." *Id.* (citing *Family Trust Found. of Ky., Inc. v. Wolnitzek*, 345 F. Supp. 2d 672 (E.D. Ky. 2004)).

223. See *Fla. Family Policy Council v. Freeman*, No. 4:06cv395-RH/WCS (N.D. Fla. Sept. 11, 2007) (upholding clause requiring recusal where a judge "made a public statement that commits, or appears to commit, the judge with respect to . . . an issue in the proceeding [or] a controversy in the proceeding").

224. Upholding a very similar recusal clause, a district court in Kentucky noted that "due process concerns do not necessarily require recusal in every case in which a judge has expressed an opinion," so "recusal is not required in every instance in which a judge has expressed a view - publicly or not - on a certain issue." *Wolnitzek*, 345 F. Supp. 2d at 709.

225. *Freeman*, No. 4:06cv395-RH/WCS at \*8.

226. *Gall*, *supra* note 217, at 121.

227. *Developments in the Law - Voting and Democracy, Judicial Elections and Free Speech*, 119 HARV. L. REV. 1127, 1142 (2006).

they assert, will have difficulty identifying the point at which a judge's speech or conduct, whether during his campaign or while on the bench, indicates he may not be impartial.<sup>228</sup> Further, a recusal remedy ultimately relies upon judges' awareness of their own potential biases and willingness to recuse themselves or upon parties' awareness of judges' biases and willingness to move for recusal.<sup>229</sup>

This criticism overlooks a second benefit of recusal clauses in the context of judicial speech: strict recusal clauses also protect judicial candidates' right *not* to speak about controversial legal and political issues by providing a judicially responsible—and politically excusable—reason to decline response.<sup>230</sup> If judges are not clamoring to respond to partisan interest groups' questionnaires or other means of soliciting their views, the recusal clause may be a very effective remedy.

Another remedy, which few commentators have considered, is peremptory disqualification. Peremptory disqualification may help ensure judicial impartiality while avoiding some of the disadvantages that recusal presents. Unlike disqualification for cause, which suggests a judge may not ethically sit on a case because his or her bias in that matter may be inferred,<sup>231</sup> peremptory disqualification, allows a party to reject a judge for any reason or no reason at all.<sup>232</sup>

Under Alaska Criminal Rule 25(d) and Alaska Civil Rule 42(c), one peremptory challenge per litigant is a matter of right—at least at the trial court level.<sup>233</sup> Parties must file a "Notice of Change of Judge," but they

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228. *Id.*

229. See Mary Eileen Weicher, *The Expansion of the First Amendment in Judicial Elections: Another Cause for Reform*, 38 LOY. U. CHI. L.J. 833, 888 (2007).

230. Roy Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077, 1102 (2007). In response to solicitations for their views on these issues, judicial candidates may say, "I know what you would like me to say, but if I go into that then I will be unable to sit in just the cases you care about most." *Id.* In contested elections, they may also turn the tables on opponents who have already answered the questions for political gain: "My opponent has told you what he thinks you want [to hear], but has not told you that he will not be able to deliver because he will be disqualified from the cases you care about." *Id.*

231. See ALASKA STAT. § 22.20.020 (2006); Marla N. Greenstein, *Judicial Disqualification in Alaska Courts*, 17 ALASKA L. REV. 53, 61-70 (2000). A judge is required to recuse himself from sitting on cases where, for example, he is a party or has a strong financial interest in the outcome. See ALASKA STAT. § 22.20.020(a)(4) (2006). Disqualification for cause is not a discretionary matter, and the presiding judge may order disqualification if a judge asked to disqualify himself does not. See ALASKA STAT. § 22.20.020(c) (2006).

232. Alaska is one of seventeen states allowing peremptory challenges to judges. Schotland, *supra* note 230, at 1102; see also Greenstein, *supra* note 226, at 61-70.

233. ALASKA CRIM. R. 25(d)(1) ("In any criminal case in superior or district court, the prosecution and defense shall each be entitled as a matter of right to

need not submit an affidavit or specify their reasons for exercising the peremptory challenge.<sup>234</sup> In Alaska, peremptory disqualification of a trial court judge is thus easy to obtain. A party may opt to exercise a peremptory challenge against a trial court judge for any reason, rational or irrational, including the belief that the judge may be unfair or partial. This safety net ensures that litigants receive due process because litigants can disqualify trial court judges who may be biased.<sup>235</sup> Moreover, it preserves the unbiased appearance of the judiciary – even if a trial court judge is not biased, he may be disqualified simply because the litigants appearing before him *believe* he is biased.

Knowing this, judicial candidates for trial courts may be less likely to engage in partisan speech that could prompt litigants to question their impartiality. Where a trial court judge does make partisan statements on a controversial issue, litigants appearing before him in a matter related to that issue are empowered by Alaska's peremptory challenge rules to have a different judge hear their case. Importantly, like the recusal clause, peremptory disqualification also gives judicial candidates, at least at the trial court level, a reason for declining to disclose their opinions on disputed legal issues: in responding, they risk prompting future litigants to use peremptory challenges to disqualify them in cases involving those very issues.

### CONCLUSION

In a talk at Fordham Law School given after she stepped down from the Supreme Court, Justice O'Connor emphasized that judicial election, a tradition particular to the United States, requires sacrificing

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one change of judge."); ALASKA CIV. R. 42(c)(1) ("In an action pending in the Superior or District courts, each side shall be entitled as a matter of right to a change of one judge and one master.").

234. ALASKA CRIM. R. 25(d)(2); ALASKA CIV. R. 42(c)(1). Litigants may only disqualify a judge by filing an affidavit "alleging under oath the belief that a fair and impartial trial cannot be obtained." ALASKA STAT. § 22.20.022(a) (2006). As the Alaska Supreme Court held, however, Alaska Criminal Rule 25(d) was intended to jettison the statutory affidavit requirement and, thus, the procedures outlined in Rule 25(d) supersede any inconsistent requirements in section 22.20.022 of the Alaska Statutes. *Gieffels v. State*, 552 P.2d 661, 667–68 (Alaska 1976). Extending this principle to civil proceedings, the Alaska Supreme Court held that Alaska Civil Rule 42(c) procedures similarly supersede inconsistent statutory requirements, including the affidavit requirement. *Tunley v. Municipality of Anchorage School Dist.*, 631 P.2d 67, 70–71 (Alaska 1981).

235. Of course each party receives only one peremptory challenge. Thus, if a party exercises one peremptory challenge and is assigned a new judge, he may not exercise a second peremptory challenge even if he believes the new judge will be biased against him.



judicial impartiality: “No other nation in the world [elects its judges],” she said, “because they realize you’re not going to get fair and impartial judges that way.”<sup>236</sup> Delegates to the Alaska Constitutional Convention came to the same conclusion fifty years ago and adopted a merit-based judicial selection system to guarantee fair and impartial judges.<sup>237</sup>

Rather than encouraging selection of judges based on neutral criteria, partisan groups like Alaska Right to Life aim to make retention elections political. The danger in their judicial questionnaires is in suggesting to the public, and possibly to judges themselves, that a judge’s responsibility is not to be as fair and impartial as possible but, instead, to be responsive to voters’ views on a handful of controversial issues. Judges hearing challenges to state codes of judicial conduct, particularly those brought by such groups, should consider reading *White* narrowly before striking down provisions intended to preserve a culture of judicial impartiality. In the meantime, Alaska judges should refrain from answering questions that risk making them the pawns of partisan interest groups,<sup>238</sup> and Alaska bar members should help qualified and competent judges prepare counter-campaigns in advance of partisan attacks.

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236. Adam Liptak, *Rendering Justice, With One Eye on Re-Election*, N.Y. TIMES, May 25, 2008, at A1.

237. Alaska Constitutional Convention Minutes Concerning Judicial Selection and Retention, 586-87, 611, available at <http://www.ajc.state.ak.us/General/akcon.htm> (Judiciary Committee Chairman George McLaughlin declared that, if the merit-based system proposed were adopted, it would be “the most modern, most liberal, most workable judiciary article of all the constitutions of all the forty-nine states”).

238. *Ind. Right to Life v. Shepard*, 507 F.3d 545, 548 (7th Cir. 2007) (“Viewed somewhat skeptically, the situation is a chess game. Candidates may not want to answer the questions and would perhaps be happy to have the Code as a reason to decline. When that is true, Right to Life, while ostensibly asserting the right of candidates to speak, may, in fact, be acting against what the candidates see as their best interests. And probably much to Right to Life’s dismay, the Commission, by taking no action against candidates, is simply not playing. The voters? One can hope that they can discern when a candidate is ducking a legitimate question and when she is legitimately refusing to become a pawn.”).