

# FREE SPEECH FOR JUDGES AND FAIR APPEALS FOR LITIGANTS: JUDICIAL RECUSAL IN A POST-*WHITE* WORLD

*Thomas R. Phillips\** & *Karlene Dunn Poll\*\**

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Judicial elections, regardless of type, create obvious tension between the free speech rights of both judicial candidates and voters and the state's compelling interest in a judiciary that is, and is perceived as being, unbiased. Traditionally, prudent judicial candidates have been constrained by the provisions of their state's judicial conduct codes, most of which

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\* Partner, Baker Botts LLP; Retired Chief Justice, Supreme Court of Texas; B.A., Baylor University, 1971; J.D., Harvard Law School, 1974.

\*\* Associate, Baker Botts LLP; B.S., University of Houston-Clear Lake, 1996; J.D. South Texas College of Law, 2000.

contained political activity restrictions to preserve the judge's actual and perceived impartiality.<sup>1</sup> In 2002, however, the Supreme Court cast doubt on the validity of such restrictions when it struck down one clause of the Minnesota Code of Judicial Conduct on First Amendment grounds.<sup>2</sup> Subsequent litigation in federal courts has struck down similar provisions in other states.<sup>3</sup> In response, many jurisdictions amended their codes to lift certain restrictions on speech,<sup>4</sup> and the American Bar Association pondered the free speech implications of its pending new Model Code of Judicial Conduct, finally adopted by the House of Delegates in February 2007.

An inevitable result of these developments is that more sitting judges will make campaign statements that may seem to prejudge the result of a particular cases or compromise their impartiality in approaching a wide array of matters. Do the remaining canons, coupled with existing recusal rules, provide an adequate remedy for litigants whose due process rights to an impartial forum may have been compromised by overenthusiastic judicial campaign speech? If not, what should be done and who should do it?

## I. BACKGROUND

Thirty-nine states elect some or all of their judges.<sup>5</sup> Often criticized by academia and the bar, contested judicial elections have been targeted by various reform movements for more than a century.<sup>6</sup> "Ultimately, despite the criticism and reform efforts, the elective system remained—and continues to remain—the dominant method of judicial selection in the

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1. See MODEL CODE OF JUDICIAL CONDUCT Canon 5B (2000).

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

3. See, e.g., Family Trust Found. of Ky., Inc. v. Ky. Judicial Conduct Comm'n, 388 F.3d 224, 228 (6th Cir. 2004); Weaver v. Bonner, 309 F.3d 1312, 1324–25 (11th Cir. 2002) (Georgia); Alaska Right to Life Political Action Comm. v. Feldman, 380 F. Supp. 2d 1080, 1082–83 (D. Alaska 2005); Kan. Judicial Watch v. Stout, 440 F. Supp. 2d 1209, 1230–31 (D. Kan. 2006); N.D. Family Alliance, Inc. v. Bader, 361 F. Supp. 2d 1021, 1042 (D.N.D. 2005); O'Neill v. Coughlan, No. 1:04-CV-1612, 2007 WL 218717, at \*4–5 (N.D. Ohio Jan. 26, 2007).

4. See, e.g., Max B. Baker, *Court Revises Restrictions on Judicial Candidates*, FORT WORTH STAR TELEGRAM, Aug. 23, 2002, at 2 (noting the Texas Supreme Court's new rules for judicial candidates).

5. Richard Briffault, *Judicial Campaign Codes After Republican Party of Minnesota v. White*, 153 U. PA. L. REV. 181, 181 (2004).

6. See, e.g., Matthew J. Medina, Note, *The Constitutionality of the 2003 Revisions to Canon 3(e) of the Model Code of Judicial Conduct*, 104 COLUM. L. REV. 1072, 1078 (2004).

several states.”<sup>7</sup>

Traditionally, judicial campaigns were quiet affairs. Within the past two decades, however, this once-somnolent backwater has transmogrified into a world of code-word slogans and personal attacks that “obscure the underlying importance of finding a qualified candidate who can administer the law fairly and impartially.”<sup>8</sup> Campaign spending in judicial elections, funded primarily by organized interests, has increased dramatically.<sup>9</sup> Special interest groups and wealthy individuals—as diverse as the United States Chamber of Commerce, the Michigan Democratic Party, the Law Enforcement Alliance of America, Citizens for Judicial Reform, the Justice for All Political Action Committee, and an individual energy company CEO—fund independent attack ads, typically focusing on politically unpopular decisions, not qualifications.<sup>10</sup>

Even in the occasional high profile race, judicial candidates adhered to a Marquis of Queensbury series of constraints on their speech and activities.<sup>11</sup> They did so because, until recently, it was simply assumed that

7. *Id.* at 1079.

8. Jason E. Williams, Republican Party of Minnesota v. White *Threatens Judicial Impartiality in Texas*, 41 HOUS. L. REV. 201, 222 (2004).

9. See, e.g., DEBORAH GOLDBERG ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2004: HOW SPECIAL INTEREST PRESSURE ON OUR COURTS HAS REACHED A “TIPPING POINT”—AND HOW TO KEEP OUR COURTS FAIR AND IMPARTIAL 6–9, 24–29 (2004), <http://www.justiceatstake.org/files/NewPoliticsReport2004.pdf> [hereinafter GOLDBERG ET AL., ELECTIONS 2004]; DEBORAH GOLDBERG ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2002: HOW THE THREAT TO FAIR AND IMPARTIAL COURTS SPREAD TO MORE STATES IN 2002 15–21 (2002), <http://faircourts.org/files/NewPoliticsReport2002.pdf> [hereinafter GOLDBERG ET AL., ELECTIONS 2002]; DEBORAH GOLDBERG ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS: HOW 2000 WAS A WATERSHED YEAR FOR BIG MONEY, SPECIAL INTEREST PRESSURE, AND TV ADVERTISING IN STATE SUPREME COURT CAMPAIGNS 7–9, 16 (2000), <http://faircourts.org/files/JASMoneyReport.pdf> [hereinafter GOLDBERG ET AL., ELECTIONS 2000].

10. Carol Morello, *W. Va. Supreme Court Justice Defeated in Rancorous Contest*, WASH. POST, Nov. 4, 2004, at A15; see GOLDBERG ET AL., ELECTIONS 2004, *supra* note 9, at 10–12, 19, 25; GOLDBERG ET AL., ELECTIONS 2000, *supra* note 9, at 13–14; Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. REV. M.S.U.-D.C.L. 849, 871–76 (2001); RACHEL PAINE CAUFIELD, JUDGES UNDER ATTACK: ETHICALLY APPROPRIATE ACTIVITY IN RETENTION ELECTIONS, IOWA JUDGES CONFERENCE 6/24/05, THE FOREBODING NATIONAL TRENDS IN JUDICIAL ELECTIONS 3–4 (2005), [http://www.ajs.org/selection/docs/caufield\\_ia\\_judges\\_conference.pdf](http://www.ajs.org/selection/docs/caufield_ia_judges_conference.pdf).

11. See Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059, 1059 (1996) (“It had once been widely assumed that the public could impose substantial restrictions on the professional and

judicial elections were fundamentally different from executive and legislative elections.<sup>12</sup> Despite the recognition that “the constitutional guarantee [of freedom of speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office,”<sup>13</sup> states justified a different treatment for judicial candidates because the law, not any individual or group, is a judge’s only legitimate constituent.<sup>14</sup>

But within the past decade, that once-settled assumption has been shattered. After a dozen years of sporadic successful challenges in various states to particular applications of discrete code provisions, the real assault on the judicial selection paradigm came with plaintiff Gregory Wersal’s suit, filed in Minnesota in 1998 and ending up in the Supreme Court four years later as *Republican Party of Minnesota v. White*.<sup>15</sup>

## II. THE IMPACT OF *REPUBLICAN PARTY OF MINNESOTA V. WHITE*

The question presented in *White* was “whether the First Amendment permits the Minnesota Supreme Court to prohibit candidates for judicial election in that State from announcing their views on disputed legal and political issues.”<sup>16</sup> Specifically at issue was what has been dubbed the “announce clause,” a judicial canon lifted from the 1972 ABA Model Code of Judicial Conduct that in 2002 remained in effect in nine jurisdictions, even though it had been omitted from the ABA’s 1990 Model Code.<sup>17</sup> Minnesota’s announce clause provided that “a candidate for a judicial office, including an incumbent judge,”<sup>18</sup> shall not “announce his or her views on disputed legal or political issues.”<sup>19</sup>

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personal conduct of its judges.”).

12. *Id.* at 1059–61; *see also* *ACLU v. Fla. Bar*, 744 F. Supp. 1094, 1097 (N.D. Fla. 1990) (describing how courts have no trouble treating judicial elections differently than other elective offices).

13. *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

14. *E.g.*, *Chisom v. Roemer*, 501 U.S. 380, 401 n.29 (1991) (“[I]t is the business of judges to be indifferent to popularity.”) (citation omitted); *Nipper v. Smith*, 39 F.3d 1494, 1534–35 (11th Cir. 1994) (“Trial court judges . . . are neither elected to be responsive to their constituents nor expected to pursue an agenda on behalf of a particular group.”).

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

16. *Id.* at 768.

17. *Id.* at 768, 773 n.5.

18. MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3) (2000).

19. *Id.* Canon 5(A)(3)(d)(i).

### A. *The White Decision*

While running for the Minnesota Supreme Court in 1996, Wersal distributed literature criticizing several of that court's decisions on crime, welfare, and abortion.<sup>20</sup> A complaint filed against him with the Minnesota Lawyers Professional Responsibility Board contended that his campaign literature violated Minnesota's announce clause.<sup>21</sup> The board dismissed the complaint, expressing doubt that the announce clause passed constitutional muster.<sup>22</sup> Wersal nonetheless withdrew from the election.<sup>23</sup>

Wersal ran again in 1998. This time he sought an advisory opinion from the board about whether it intended to enforce the announce clause.<sup>24</sup> When the board refused to provide such an opinion, Wersal filed suit in federal district court "seeking, *inter alia*, a declaration that the announce clause violate[d] the First Amendment."<sup>25</sup> Other plaintiffs, including the Minnesota Republican Party, joined to argue that "because the clause kept Wersal from announcing his views, they were unable to learn those views and support or oppose his candidacy accordingly."<sup>26</sup> The district court ruled for the State,<sup>27</sup> and the Court of Appeals for the Eighth Circuit affirmed.<sup>28</sup> In upholding Minnesota's announce clause, these courts read into the clause some limitations not apparent from the text of the clause. For example, they concluded that as long as candidates do not announce their intention to abandon *stare decisis*, they can criticize past decisions by the court without actually announcing his or her views on disputed legal or political issues.<sup>29</sup> The courts also determined that Minnesota's announce clause would "reach only disputed issues that are likely to come before the candidate if he is elected judge."<sup>30</sup> Despite these judicially-imposed limitations, the Supreme Court granted Wersal's petition for writ of certiorari. In a 5-4 decision, it reversed the lower courts and struck down

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

21. *Id.* at 768-69.

22. *Id.* at 769.

23. *Id.*

24. *Id.*

25. *Id.* at 769-70.

26. *Id.* at 770.

27. Republican Party of Minn. v. Kelly, 63 F. Supp. 2d 967, 986 (D. Minn. 1999).

28. Republican Party of Minn. v. Kelly, 247 F.3d 854, 885 (8th Cir. 2001).

29. *White*, 536 U.S. at 772.

30. *Id.* at 771 (citing *Kelly*, 63 F. Supp. 2d at 986).

the clause.<sup>31</sup>

Justice Scalia's majority opinion applied strict scrutiny review under the First Amendment to reject the board's argument that the announce clause was justified by two compelling interests: (1) "preserving the impartiality of the state judiciary" in order to "protect[] the due process rights of litigants," and (2) "preserving the appearance of the impartiality of the state judiciary" to "preserve[] public confidence in the judiciary."<sup>32</sup> The Court recognized that preserving the impartiality (or the appearance of impartiality) of the state judiciary might be considered compelling, but concluded that the announce clause was not narrowly tailored to meet these interests.<sup>33</sup> The Court also observed that, while it was "neither assert[ing] nor imply[ing] that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office," there was in fact little practical difference between the two since state court judges "possess the power to 'make' common law [and] . . . the immense power to shape the States' constitutions as well."<sup>34</sup>

Justice O'Connor, while joining the Court's opinion, wrote "separately to express [her] concerns about judicial elections generally."<sup>35</sup> She concluded that "[i]f the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges."<sup>36</sup> Justice Kennedy likewise authored a concurring opinion, articulating his view that no strict scrutiny analysis was necessary because "[t]he speech at issue . . . [did] not come within any of the exceptions to the First Amendment."<sup>37</sup> He went on to note, however, that a state's interest in maintaining the integrity of its judiciary is of "vital importance."<sup>38</sup> Thus, according to Justice Kennedy, states should be free to take steps that do not run afoul of the First Amendment to protect judicial integrity, such as "adopt[ing] recusal standards more rigorous than due process requires, and censur[ing] judges who violate these standards."<sup>39</sup>

*White* also produced two dissents. In one, Justice Ginsburg opined that the Court's opinion trivialized the differences between judicial

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31. *Id.* at 788.
  32. *Id.* at 775 (citing *Kelly*, 247 F.3d at 867).
  33. *Id.* at 776.
  34. *Id.* at 783–84.
  35. *Id.* at 788 (O'Connor, J., concurring).
  36. *Id.* at 792.
  37. *Id.* at 793 (Kennedy, J., concurring).
  38. *Id.*
  39. *Id.* at 794.

elections and the elections to other legislative and executive posts.<sup>40</sup> Justice Ginsburg also argued that invalidating the announce clause would have the effect of vitiating many other judicial canons, including the prohibition on making pledges or promises to rule a certain way in a given case.<sup>41</sup> Justice Stevens authored a separate dissent to highlight the flaws he perceived in treating judicial elections as analogous to legislative and executive elections.<sup>42</sup>

### B. *Decisions After White*

Wersal also challenged two other provisions of the Minnesota Code in *White*: (1) the “partisan activities” clause, which prohibited judges or judicial candidates from “identifying themselves as members of a political organization, except . . . to vote,”<sup>43</sup> or from attending political gatherings, or seeking, accepting, or using political endorsements;<sup>44</sup> and (2) the “solicitation” clause, which prohibited candidates from “personally solicit[ing] or accept[ing] campaign contributions or solicit[ing] publicly stated support.”<sup>45</sup> The Supreme Court remanded the case to the Eighth Circuit to consider these challenges.<sup>46</sup> A panel of the Eighth Circuit upheld the solicitation clause, but remanded to the district court for further proceedings on the partisan activities clause.<sup>47</sup> On en banc rehearing, a divided court granted Wersal and the other plaintiffs complete relief.<sup>48</sup> The court struck down the partisan activities clause in its entirety,<sup>49</sup> and struck down the solicitation clause to the extent that it prohibited judges or judicial candidates from personally soliciting campaign funds in front of large groups or transmitting solicitations in writing above their personal

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40. *Id.* at 803–04 (Ginsburg, J., dissenting, joined by Stevens, Souter, and Breyer, J.J.); *id.* at 805 (“I would differentiate elections for political offices, in which the First Amendment holds full sway, from elections designed to select those whose office it is to administer justice without respect to persons.”); *id.* at 806 (“[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.”).

41. *Id.* at 819–20 & n.5.

42. *Id.* at 797–803 (Stevens, J., dissenting, joined by Ginsburg, Souter, and Breyer, J.J.).

43. MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(1)(a) (2000).

44. *Id.* Canon 5(A)(1)(d).

45. *Id.* Canon 5(b)(2).

46. *Republican Party of Minn. v. White*, 361 F.3d 1035, 1039 (8th Cir. 2004).

47. *Id.*

48. *Republican Party of Minn. v. White*, 416 F.3d 738, 744 (8th Cir. 2005).

49. *Id.* at 766.

signatures, which was all the plaintiffs sought.<sup>50</sup> Despite a petition for certiorari supported by ten amici briefs, the Supreme Court surprised many observers by declining further review.<sup>51</sup>

In and of itself, *White I* was hardly a remarkable decision, as it affected only one obsolete provision that seemed patently overbroad. *White II* was a much more serious disruption of a state's authority over the design and operation of its co-equal third branch. The Supreme Court's refusal to hear the case again signaled to many a constitutional mandate for "anything goes" judicial contests.<sup>52</sup>

Since *White*, other suits brought by Wersal's attorney, James Bopp of the James Madison Foundation in Terre Haute, Indiana,<sup>53</sup> have successfully challenged both the pledge-and-promise and commit provisions in

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50. *White*, 416 F.3d at 765–66.

51. *Dimick v. Republican Party of Minn.*, 126 S. Ct. 1165, 1165–66 (2006); see, e.g., Linda Greenhouse, *Justices Curb States' Immunity From Suit*, N.Y. TIMES, at A16 (Jan. 24, 2006) (noting it had "been widely expected that the justices would agree to continue their examination of the issue by accepting Minnesota's latest appeal").

52. See, e.g., Donald L. Burnett, Jr., *A Cancer on the Republic: The Assault Upon Impartiality of State Courts and the Challenge to Judicial Selection*, 34 FORDHAM URB. L.J. 265, 277 (2007) ("The ramifications of the majority's reasoning [in *White*] became manifest when the Court denied a petition for certiorari after the Court of Appeals for the Eighth Circuit . . . determined that the logic of *White* also would require invalidation of Minnesota's prohibition against judicial candidates engaging in specific partisan political acts or personally soliciting money for their campaigns."). Cf. David Schultz, *Minnesota Republican Party v. White and the Future of State Judicial Elections*, 69 ALB. L. REV. 985, 985 (2006) ("As a result [of the Supreme Court and Eighth Circuit's *White* opinions], the future of many sleepy judicial elections may look increasingly more nightmarish . . ."). In a letter to the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, the Chair of the ABA Standing Committee on Judicial Independence candidly lamented the uncertainty created by the Supreme Court's denial of certiorari:

There are some who contend that, in light of *Republican Party of Minnesota v. White*, both I and II, there may be little, if anything, that can be done to rein in what judicial candidates can or cannot say to the point where they may not be any hard or fast rules. . . . The decision by the Supreme Court not to take up *White II* raises serious concerns for the future with regard to fundraising and the extent to which judicial candidates may personally engage in such activities.

Letter from Doreen D. Dodson to Mark I. Harrison commenting on 2007 Code revisions, [http://www.abanet.org/judicialethics/resources/comm\\_rules\\_SCJI\\_031306\\_bw.pdf](http://www.abanet.org/judicialethics/resources/comm_rules_SCJI_031306_bw.pdf).

53. Terry Carter, *The Big Bopper: This Terre Haute Lawyer Is Exploding the Canons of Judicial Campaign Ethics*, 92 ABA JOURNAL 31 (Nov. 2006).



Alaska,<sup>54</sup> Kansas,<sup>55</sup> Kentucky,<sup>56</sup> and North Dakota.<sup>57</sup> Pledge-and-promise clauses typically prohibit judicial candidates generally from making pledges and promises of conduct in office regarding judicial duties other than the faithful and impartial performance of the duties of the office.<sup>58</sup> Commit clauses prohibit statements that commit or appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court.<sup>59</sup> A suit was also brought in Pennsylvania, but was dismissed on standing grounds,<sup>60</sup> and a request for preliminary injunction was denied against Arizona's pledge-and-promise clause.<sup>61</sup> After *Carey v. Woznitsek*, the Kentucky Supreme Court promulgated a narrower commit clause, but this too was stricken.<sup>62</sup> Two of these decisions are currently on appeal—*Alaska Right to Life v. Feldman*,<sup>63</sup> pending in the United States Court of Appeals for the Ninth Circuit, and *Kansas Judicial Watch v. Stout*,<sup>64</sup> pending in the United States Court of Appeals for the Tenth Circuit. The parties in *Woznitsek* may appeal as well. A similar challenge in a federal district court in Indiana is still pending,<sup>65</sup> and suits were recently filed in Wisconsin,<sup>66</sup> and again in Pennsylvania.<sup>67</sup>

In addition to the Eighth Circuit in *White/Dimick* striking down part of Minnesota's solicitation clause, the Eleventh Circuit struck down, on its

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54. *Alaska Right to Life Political Action Comm. v. Feldman*, 380 F. Supp. 2d 1080, 1082–83 (D. Alaska 2005).

55. *Stout*, 440 F. Supp. 2d at 1230–31.

56. *Family Trust Found. of Ky., Inc.*, 345 F. Supp. 2d 672, 711 (E.D. Ky. 2004).

57. *N.D. Family Alliance, Inc. v. Bader*, 361 F. Supp. 2d 1021, 1042 (D.N.D. 2005).

58. *See, e.g.,* Walter M. Weber, *Judicial Campaign Restrictions: Some Litigation Nuts and Bolts*, 68 Albany L. Rev. 635, 635 (2005) (describing common categories of campaign restrictions).

59. *Id.*

60. *Pa. Family Inst. v. Black*, No. Civ. 105CV2172, 2005 WL 2931825, at \*5–6 (M.D. Pa. Nov. 4, 2005).

61. *Wolfson v. Brammer*, No. 3:06-CV-02357 (D. Ariz. Nov. 3, 2006).

62. *Carey v. Woznitsek*, No. 3:06-CV-KKC, 2006 WL 2916814, at \*13 (E.D. Ky. Oct. 10, 2006).

63. *Alaska Right to Life v. Feldman*, No. 05-35902 (9th Cir. filed Sept. 13, 2005), No. 05-36027 (9th Cir. filed Oct. 20, 2005), No. 05-35902 (9th Cir. Jan. 17, 2006) (order consolidating cases 05-35902 and 05-36027).

64. *Kan. Judicial Watch v. Stout*, 455 F. Supp. 2d 1258 (D. Kan. 2006), *appeal docketed*, No. 06-3290 (10th Cir. Aug. 17, 2006).

65. *See* Medina, *supra* note 6, at 1078.

66. *Duwe v. Alexander*, No. 06-C-0766-S (W.D. Wis. Feb. 13, 2007).

67. *Pa. Family Inst. v. Celluci*, No. 2:07-CV-01707-MK (E.D. Pa. July 7, 2007).

own motion, Georgia's ban on personal solicitation of campaign contributions by judges.<sup>68</sup> Federal district courts have struck down similar clauses in Kansas<sup>69</sup> and Kentucky,<sup>70</sup> but one federal district court has declined to do so in Arkansas.<sup>71</sup>

Perhaps because of Justice Kennedy's concurrence,<sup>72</sup> however, no challenge to the disqualification or recusal provisions of a state code, rule, or statute has yet succeeded.<sup>73</sup> Furthermore, state appellate courts have upheld both New York's promise-and-pledge clause<sup>74</sup> and Florida's promise-and-pledge clause and commit clause.<sup>75</sup> The state cases arise as appeals from judicial disciplinary appeals, whereas the federal challenges generally arise as suits for declaratory or injunctive relief by judges, judicial candidates, or interest groups against judicial disciplinary bodies.<sup>76</sup>

### C. *The Effect on Judicial Codes*

After *White*, the American Bar Association House of Delegates amended Canon 5 of the Model Code in 2003 to combine the pledge-and-promise and commit clauses, and to lift the restriction to statements that only "appear" to commit judges to certain conduct.<sup>77</sup> This new version

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68. Weaver v. Bonner, 309 F.3d 1312, 1322–23 (11th Cir. 2002).

69. Kan. Judicial Watch v. Stout, 440 F. Supp. 2d 1209, 1240 (D. Kan. 2006).

70. Carey v. Wolnitzek, No. 3:06-36-KKC, 2006 WL 2916814, at \*18 (E.D. Ky. Oct. 10, 2006).

71. Simes v. Ark. Judicial Discipline & Disciplinary Comm'n, No. 06-725, 2007 WL 184801 (Ark. Jan. 25, 2007).

72. Republican Party of Minn. v. White, 536 U.S. 765, 772 (2002) (Kennedy, J., concurring) (opining that states are free to "adopt recusal standards more rigorous than due process requires, and censure judges who violate those standards").

73. See, e.g., Kan. Judicial Watch v. Stout, 440 F. Supp. 2d 1209, 1234 (D. Kan. 2006) (holding Kansas' "recusal Canon is narrowly tailored to serve the compelling state interest of judicial impartiality and the appearance of impartiality"); Alaska Right to Life Political Action Comm. v. Feldman, 380 F. Supp. 2d 1080, 1083 (D. Alaska 2005) ("Canon 3E(1) of the Alaska Code of Judicial Conduct survives Plaintiffs' constitutional challenge."); N.D. Family Alliance, Inc. v. Bader, 361 F. Supp. 2d 1021, 144 (D.N.D. 2005) ("The recusal provisions in Canon 3E(1) [of the North Dakota Code of Judicial Conduct] serve the state's interest in impartiality and the canon is narrowly drafted to achieve that interest.").

74. *In re Watson*, 794 N.E.2d 1, 5 (N.Y. 2003).

75. *In re Kinsey*, 842 So. 2d 77, 87 (Fla. 2003).

76. E.g., *Stout*, 440 F. Supp. 2d at 1219–20.

77. MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(i) (2003) (removing the word "appear" from subsection (ii) of the 2000 edition and combining subsection (i) and (ii) of the 2000 edition into one subsection).

prohibited, “with respect to cases, controversies, or issues that are likely to come before the court . . . pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.”<sup>78</sup> At the same time, a new section 10 was added to Canon 3B to provide: “A judge shall not, with respect to 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 the office.”<sup>79</sup> These changes have already been adopted, in whole or part, by twelve states: Arizona, Florida, Louisiana, Maryland, Minnesota, Nevada, New Mexico, South Dakota, Iowa, Oklahoma, North Dakota, and Wisconsin.<sup>80</sup>

In all, at least twenty-two state supreme courts have amended their codes in response to *White*.<sup>81</sup> And in at least six states—Alabama, Florida, Michigan, Ohio, South Dakota, and Vermont—judicial ethics advisory committees or disciplinary bodies withdrew or amended earlier positions deemed inconsistent with *White*.<sup>82</sup>

In February, the ABA House of Delegates unanimously approved the 2007 Model Code of Judicial Conduct, replacing the 1990 version last amended in 2003.<sup>83</sup> The 2007 version retains the 2003 amendments to the pledge-and-promise and commit provisions,<sup>84</sup> but added additional comments guiding their application, undoubtedly in response to concerns about running afoul of *White*.<sup>85</sup>

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78. *Id.*

79. *Id.* Canon 3B(10).

80. See CYNTHIA GRAY, AM. JUDICATURE SOC’Y, DEVELOPMENTS FOLLOWING *REPUBLICAN PARTY OF MINNESOTA V. WHITE*, 536 U.S. 765 (2002), <http://www.ajs.org/ethics/pdfs/DevelopmentsafterWhite.pdf> (updated Apr. 5, 2007).

81. *Id.* at 2–22.

82. *Id.*

83. Chair Message, *ABA Joint Commission to Evaluate the Model Code of Judicial Conduct*, <http://www.abanet.org/judiciaethics/home.html> (last visited May 9, 2007).

84. MODEL CODE OF JUDICIAL CONDUCT Canon 2, Rule 2.10(B), Canon 4, Rule 4.1(A)(13) (2007).

85. For example:

[11] The role of a judge is different from that of a legislator or executive branch official, even when the judge is subject to public election. Campaigns for judicial office must be conducted differently from campaigns for other offices. The narrowly drafted restrictions upon political and campaign activities of judicial candidates provided in Canon 4 allow candidates to conduct campaigns that provide voters with sufficient information to permit them to distinguish between candidates and make informed electoral choices.

#### D. *The Effect on Judicial Campaigns*

*White* and its progeny (legitimate or otherwise), together with the resulting code changes, have created a sea change in judicial campaign practices. Special interest groups have participated in judicial campaigns for several decades, but the judicial conduct code provisions allowed the candidates themselves to operate in a parallel universe, with conduct not entirely dissimilar to nominees for officers of a luncheon club. Now, these groups can attempt to directly influence candidates' campaign behavior. Individuals and organizations no longer have to engage in "guesswork" about whether they are channeling their contributions and support to the right candidate. All too often, in fact, support comes in the wake of what can be perceived as issue commitments from candidates. These commitments often come about after personal screening sessions or through answers to questionnaires on issues as diverse as cloning, pornography, homosexual marriage, abortion, public school prayer, tort reform, school vouchers, or display of religious symbols on public property.<sup>86</sup>

While questionnaires touching on such subjects existed long before *White*, candidates generally ignored or evaded them by pointing to the ethical restrictions<sup>87</sup> that *White* and its progeny have eroded.<sup>88</sup> Now

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[13] The making of a pledge, promise, or commitment is not dependent upon, or limited to, the use of any specific words or phrases; instead the totality of the statement must be examined to determine if a reasonable person would believe that the candidate for judicial office has specifically undertaken to reach a particular result. Pledges, promises, or commitments must be contracted with states or announcements of personal views on legal, political, or other issues, which are not prohibited. When making such statements, a judge should acknowledge the overarching judicial obligation to apply and uphold the law, without regard for his or her personal views.

*Id.* Canon 4, cmts.

86. CAUFIELD, *supra* note 10, at 5–6 (citing examples); Julie Kay, *Christian Group's Survey Reveals Judicial Candidates' Opinions*, DAILY BUS. REV., Oct. 28, 2004, <http://www.law.com/jsp/article.jsp?id=1098907051693>.

87. Marcia Coyle, *Judicial Surveys Vex the Bench*, NAT'L L.J., Sept. 8, 2006, <http://www.law.com/jsp/article.jsp?id=1157629870187>.

88. See, e.g., Kay, *supra* note 86 (half of judicial candidates surveyed responded to a survey). This reality prompted a new comment to Canon 4 of the 2007 Model Code:

[15] Judicial candidates may receive questionnaires or requests for interviews from the media and from issue advocacy or other community organizations that seek to learn their views on disputed or controversial legal

interrogators can, as a price for support or at least a lack of opposition, “demand that judicial candidates make general statements coming down on one side or the other on [an] issue without making a promise to rule . . . in a particular way.”<sup>89</sup> The judicial candidate who sits idly by in this tempest may be called many things, but “judge” may not be one of them. Candidates who do not seek and secure important endorsements will lose an invaluable entry into many voting groups. And as judicial campaign

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or political issues. Paragraph (A)(13) does not specifically address judicial responses to such inquires. Depending upon the wording and format of such questionnaires, candidates’ responses might be viewed as pledges, promises, or commitments to perform the adjudicative duties of office other than in an impartial way. To avoid violating paragraph (A)(13), therefore, candidates who respond to media and other inquires should also give assurances that they will keep an open mind and will carry out their adjudicative duties faithfully and impartially if elected. Candidates who do not respond may state their reasons for not responding, such as the danger that answering might be perceived by a reasonable person as undermining a successful candidate’s independence or impartiality, or that it might lead to frequent disqualification, See Rule 2.1.

MODEL CODE OF JUDICIAL CONDUCT Canon 4, Rule 4.1(A)(13) cmt (2007) .

89. Brennan Ctr. for Justice, *Republican Party of Minnesota v. White: What Does the Decision Mean?*, [http://www.brennancenter.org/stack\\_detail.asp?key=348&subkey=35267](http://www.brennancenter.org/stack_detail.asp?key=348&subkey=35267) (last visited Apr. 16, 2007). “Even more troubling, judicial candidates will likely find it difficult to resist such demands because these organizations will likely make campaign contributions contingent upon a favorable response.” *Id.* One prominent example of political pressure on judges centered on social issues is the Texas Republican Party’s reaction to a panel decision by the Fourteenth Court of Appeals striking down Texas’ sodomy statute. *See Lawrence v. State*, No. 14-99-00109-CR, 2000 WL 729417 (Tex. App.—Houston [14th Dist.] June 8, 2000) (opinion withdrawn on rehearing en banc). The Texas Republican Party’s 2000 Platform specifically condemned the two justices joining the opinion, both of whom were elected on the Republican ticket: “We publicly rebuke judges Chief Justice Murphy and Justice John Anderson, who ruled that the 100 year-old Texas sodomy law is unconstitutional, and ask that all members of the Republican Party of Texas oppose their re-election, and activist judges like them, and support non-activist judges as their opponents.” James W. Paulsen, *The Significance of Lawrence v. Texas*, THE Hous. LAW., Jan.–Feb. 2004, at 33 (internal citation omitted). The chair of the Harris County Republican Party distributed a draft letter addressed to the *Lawrence* opinion’s author, Anderson, urging him to either reverse his vote and withdraw his opinion, or step down from his office, although the draft was never sent. *See id.* at 34. Additionally, Murphy’s subsequent resignation (for reasons of age) erroneously fueled public perception that “political pressure had influenced judicial process.” *Id.* When the Fourteenth Court of Appeals of Texas, sitting en banc, reversed the controversial panel opinion, five justices issued a concurring opinion disavowing any suggestion that their decision was politically motivated. *Lawrence v. State*, 41 S.W.3d 349, 363–64 (Tex. App. 2001) (Yates, J., concurring, joined by Hudson, Fowler, Edelman, and Frost, JJ.), *rev’d*, 539 U.S. 558 (2003).

spending reaches unprecedented levels in many states,<sup>90</sup> candidates without the financial backing of organized groups may be hopelessly outgunned. More ominously, candidates who avoid commitments during their campaigns may even come under attack from the media and others for hiding their views.<sup>91</sup>

Moreover, the activities of individuals and groups who do not believe in, or perhaps even desire, an independent judiciary, may undermine the candidate's core message. Sometimes, even "friendly" support from a political party or advocacy group undermines public confidence in the candidate's impartiality. Such support may help drag a candidate to victory because voters find the opponent even more objectionable, but it can backfire against its intended beneficiary.<sup>92</sup> Even more perversely, the primary motivation of some special interest campaigns may not be related to the judiciary at all, but may merely be a means to enhance voter interest and turnout for up-ballot races.<sup>93</sup> In the first post-*White* judicial campaign for a seat on the 2003 Pennsylvania Supreme Court, the Republican candidate declined to reveal her views on particular issues while her Democratic opponent offered candid views on a wide range of issues, illustrated by his response to a survey created by the National Abortion

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90. See, e.g., Jimmie E. Gates, *Out-of-State Funds Emerge as Issue in High-Court Race*, CLARION-LEDGER (Jackson), Oct. 28, 2004, at 1B; Rachel La Corte, *National PAC Brings Big Money to Washington High Court Race*, THE ASSOCIATED PRESS, Sept. 7, 2006, at B2; Eric Velasco, *PACs Fueling Costly Races for State High Court*, BIRMINGHAM NEWS, Oct. 6, 2006, at 1A; Press Release, Brennan Ctr. for Justice, 2006 State Supreme Court Races to Watch (Sept. 7, 2006), available at [http://www.brennancenter.org/press\\_detail.asp?key=100&subkey=37028](http://www.brennancenter.org/press_detail.asp?key=100&subkey=37028).

91. E.g., CAUFIELD, *supra* note 10, at 5–6.

92. For example, in Mississippi in 2000, Chief Justice Lenore Prather "suffer[ed] an upset loss, largely because of U.S. Chamber [of Commerce] ads supporting her (and also hurting their second endorsee)." Schotland, *supra* note 10, at 876. She and another candidate supported by the ads implored the Chamber, to no avail, to halt the ads. *Id.* at 877. Chief Justice Prather was ultimately defeated by a challenger who raised a fraction of the funds. *Id.* at 878.

93. As Chief Justice Randy Shepard of Indiana recently observed:

It's now apparent that many of the assaults on the judiciary in the last election were not really aimed at judges at all. They were actually designed to boost the turnout among various groups of voters whose presence at the polls would help win contests for other offices. Under that kind of arrangement, the judges are merely political roadkill.

Remarks at Conference on Fair and Independent Courts, Georgetown University Law Center, Washington, D.C., September 29, 2006.

and Reproductive Action League.<sup>94</sup> After winning by 86,000 votes, reputedly because of strong party turnout in Philadelphia,<sup>95</sup> the Democrat justice-elect stated, “I think people liked me because I told them the truth.”<sup>96</sup>

Issues-oriented judicial campaigns are not yet the norm across the nation, but they are becoming increasingly commonplace.<sup>97</sup> While there are encouraging examples of elections where voters recoil from aggressive, high-decibel judicial campaigns,<sup>98</sup> there is real danger that the “race to the bottom” will accelerate in coming years. In that event, how judges view themselves, and how others view them, may be fundamentally transformed, with profound implications for the application of the rule of law in our nation.

### III. WHAT ABOUT THE LITIGANT’S RIGHT TO AN IMPARTIAL FORUM?

The focus in recent litigation and code changes has been on candidates’ and voters’ free speech rights. But what about litigants’ rights to an impartial forum? What about the state’s interest in protecting, or at least not further eroding, public confidence in an independent and impartial judiciary? And what about each state’s interest in maintaining its separation of powers so that judges do not act, and are not seen as acting,

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94. *Pennsylvania: Judicial Elections Get a Little Looser*, EYES ON JUSTICE, Dec. 17, 2003, at 2–3, <http://www.faircourts.org/files/EyesonJusticeDec17.pdf>.

95. Carrie Budoff, *Democrats Statewide Ride Big Turnout Wave*, PHILA. INQUIRER, Nov. 6, 2003, at A1; *see also* ROY SCHOTLAND, *NEW CHALLENGES TO STATES’ JUDICIAL SELECTION* (publication forthcoming) (attributing this win to high voter turnout rather than campaign speech).

96. *Pennsylvania: Judicial Elections Get a Little Looser*, EYES ON JUSTICE, *supra* note 94.

97. *See, e.g.*, Jake Bleed, *2 High Court Candidates Declaring Stands on Issues*, ARK. DEMOCRAT-GAZETTE, Apr. 24, 2006, at 1A (reporting the issue stances declared by two candidates for the Arkansas Supreme Court); Marcia Coyle, *Judicial Surveys Vex the Bench*, NAT’L L.J., Sept. 8, 2006, at 1 (discussing the growth, coordination, and complications of questionnaires sent to judicial candidates); Andrew Wolfson, *East Kentucky Race May Alter Divided Supreme Court*, COURIER-JOURNAL (Louisville), Oct. 28, 2004, at A1; Zach Patton, *Robe Warriors: If You Think Judges Should Be Above Petty Politics, Try Not to Watch Them Campaign This Year*, available at <http://66.23.131.98/archive/2006/mar/judges.txt>.

98. *See* Roger Warren, *The Altered Landscape of State Judicial Elections and the Politization of America’s State Courts* (Nov. 1–2, 2006) (discussing the 2006 Republican Primary campaign for Chief Justice of the Alabama Supreme Court) (unpublished manuscript, on file with author); Sandra Day O’Connor, *The Threat to Judicial Independence*, WALL ST. J., Sept. 27, 2006 (same).

like legislators in robes? Of course, individual litigants in both trial and appellate courts can theoretically (and occasionally, viably) challenge the fairness and impartiality of a particular judge or justice on due process grounds. In addition, most jurisdictions provide additional protection through rules providing for disqualification or recusal, at a standard lower than a due process violation, of judges and justices that are, or appear, biased or prejudiced.<sup>99</sup> Are these existing options sufficient to protect litigants? If not, what can be done?

### A. Due Process Challenges

The United States Supreme Court has traditionally recognized that judicial impartiality, and the appearance of impartiality, is a state interest of the highest order. As the Court explained in *Marshall v. Jerrico, Inc.*:

The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process. The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done,' by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.<sup>100</sup>

In short, "[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."<sup>101</sup> Even *White's* author has recognized that the political branches "represent[] 'the People'; the judge represents the Law—which often requires him to rule against the People."<sup>102</sup>

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99. RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES 106 (1996).

100. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring)) (citations omitted).

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

102. *Chisom v. Roemer*, 501 U.S. 380, 411 (1991) (Scalia, J., dissenting).



In theory, a judge's campaign conduct could be so outrageous as to deny a litigant's due process right to a fair trial. The Supreme Court has held that the very presence of a particular judge as the presiding officer in a particular trial or under a particular judicial system may violate due process.<sup>103</sup>

But a litigant's chances of obtaining relief under this remedy remain extremely remote. The Supreme Court has never found a due process violation based on a judge's campaign conduct or political speech. Further, at least one commentator has argued that *White* actually weakens due process arguments based on judicial bias, at least in the criminal law context.<sup>104</sup> This is because if a defendant makes a due process challenge to a particular judge's participation based on a judge's tough-on-crime campaign statements, "the judge can point to *White* as support for denying the motion."<sup>105</sup> Given that the due process hurdle is so high, adoption of stricter recusal rules would be more effective.

### B. The Recusal Option

As noted above, Justice Kennedy's *White* concurrence posited that disqualification and recusal rules are the appropriate means to balance judicial candidates' free speech rights with litigants' due process rights to an impartial forum.<sup>106</sup> This suggestion helped bring recusal to the forefront as a means to resolve the constitutional tension highlighted by the various opinions in *White*. But in most jurisdictions, existing recusal standards are

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103. See, e.g., *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822–23 (1986) (justice could not participate in appeal of bad faith refusal to pay judgment against insurance company when that justice had a similar suit against a different insurance company pending in a lower court); *Ward v. Vill. of Monroeville*, 409 U.S. 57, 59 (1972) (conviction reversed when mayor whose village was financed by fines collected in his court presided at trial); *Johnson v. Mississippi*, 403 U.S. 212, 215–16 (1971) (judge could not try defendant for contempt after losing a suit to defendant); *In re Murchison*, 349 U.S. 133, 138–139 (1955) (judge who indicts defendant cannot also conduct trial); *Offutt v. United States*, 348 U.S. 11, 13–14 (1954) (judge who became personally embroiled with counsel during trial could not preside over contempt proceedings against that attorney); *Tumey v. Ohio*, 273 U.S. 510, 522 (1927) (judge whose salary depends on fines collected upon conviction cannot try defendant).

104. Joanna Cohn Weiss, *Tough on Crime: How Campaigns for State Judiciary Violate Criminal Defendants' Due Process Rights*, 81 N.Y.U. L. REV. 1101, 1122–26 (2006).

105. *Id.* at 1125.

106. *Republican Party of Minn. v. White*, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring) (noting that states are free to "[a]dopt recusal standards more rigorous than due process requires, and censure judges who violate these standards").

too constricted to be effective in attaining an independent and impartial third branch.<sup>107</sup>

Reaction by commentators to reform through stricter recusal rules has been mixed. Some have expressed the view that recusal is a more effective method of balancing the competing compelling interests than stifling candidates' speech through judicial canons.<sup>108</sup> Given that the scope of the vaguer canons (such as the announce clause at issue in *White*) are unclear, "an approach that focuses on recusal would better protect robust debate and avoid the dangers of arbitrary or partisan enforcement by assuring candidates that speech within the gray areas would not be subject to sanction."<sup>109</sup> Moreover, strong speech during a campaign that is "not subsequently implicated in specific cases or not followed up by biased behavior while on the bench" is not unnecessarily squelched, thereby fostering interest in freer public debate by judicial candidates.<sup>110</sup> Finally, permitting candid speech that reveals biases by judicial candidates may actually benefit litigants by putting them on notice about a judge's partiality, and thus, grounds for recusal. The Mississippi Supreme Court recognized as much in holding that a judge could not be sanctioned for exercising his free speech rights to make anti-gay statements to the media, but noting that the judge "will doubtless[ly] face a recusal motion from every gay and lesbian citizen who visits his court."<sup>111</sup>

Whatever state interest the Commission may find in preventing judges from announcing their private views on gay rights would conflict with, and be outweighed by, the more compelling state interest of providing an impartial court for all litigants, including gays and lesbians.

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107. E.g., Tobin A. Sparling, *Keeping Up Appearances: The Constitutionality of the Model Code of Judicial Conduct's Prohibition of Extrajudicial Speech Creating the Appearance of Bias*, 19 GEO. J. LEGAL ETHICS 441, 479–82 (2006) (discussing why existing recusal standards are not an effective remedy for bias).

108. E.g., Briffault, *supra* note 5, at 236 ("[S]tate supreme courts, or other bodies responsible for the implementation of campaign codes, should consider shifting the enforcement of the pledge, promise, and commitment bans from sanctions for campaign statements that violate the canons to the requirement that judges recuse themselves from cases involving litigants or raising issues that were the subjects of a campaign pledge, promise, or commitment."); Weiss, *supra* note 104, at 1127 ("[A] recusal remedy is the best way to balance the need for free, open campaigns with the dangers that arise when judges win votes by declaring their intent to be tough on crime and then hear alleged criminals' cases.").

109. Briffault, *supra* note 5, at 237.

110. *Id.*

111. Miss. Comm'n on Judicial Performance v. Wilkerson, 876 So. 2d 1006, 1015 (Miss. 2004).

Allowing—that is to say, forcing—judges to conceal their prejudice against gays and lesbians would surely lead to trials with unsuspecting gays or lesbians appearing before a partial judge. Unaware of the prejudice and not knowing that they should seek recusal, this surely would not work to provide a fair and impartial court to those litigants.<sup>112</sup>

Finally, the existence of a recusal process will give judicial candidates “cover” to avoid making promises or commitments during campaigns in particular or during the course of their judicial service.<sup>113</sup> As Professor Schotland observed in the context of the Missouri Supreme Court’s reference to recusal in its order amending that state’s judicial code in response to *White*:

That is an inspired step. It supports the overwhelming majority of candidates who want to campaign judiciously. They will be able to say “I know what you’d like me to say, but if I go into that then I’ll be unable to sit in just the cases you care about most.” In addition, the Missouri step enables any candidate whose opponent has stretched the envelope (with some variant of “I’ll hang them all,” or “I believe that anyone convicted of child abuse should receive the maximum sentence allowed by law,” or “I’m a tenant, not a landlord”), to respond with “My opponent has told you what he thinks you want, but has not told you that he will not be able to deliver, he will be disqualified from the cases you care about.”<sup>114</sup>

On the other hand, recusal as a mechanism for protecting the state’s interest in preserving both the impartiality and, possibly more important, the appearance of impartiality of the judiciary, has its limitations and thus critics.<sup>115</sup> Some commentators are skeptical that recusal in any form can serve as an effective counterbalance to the appearance of impartiality caused by much campaign speech.<sup>116</sup> The most obvious problem with relying on recusal is that “seeking recusal because of a judge’s campaign activity is a difficult task for the movant and places an undue burden on

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112. *Id.*

113. *E.g.*, Joseph E. Lambert, *Contestable Judicial Elections: Maintaining Respectability in the Post-White Era*, 94 KY. L.J. 1, 14 (2005) (“The possibility of mandatory recusal . . . provides candidates a legitimate basis for declining to answer questions by which the questioner seeks to obtain a commitment from the candidate.”).

114. Roy A. Schotland, *To the Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 WILLAMETTE L. REV. 1397, 1420 (2003).

115. Briffault, *supra* note 5, at 237 & n.227.

116. *E.g.*, Williams, *supra* note 8, at 225–26.

judges.”<sup>117</sup> Others point to the fact that the “ability of nonparties to move for recusal is either nonexistent or, at best, severely limited.”<sup>118</sup> And, given how difficult it is to succeed with a recusal motion at both the trial and appellate court levels, parties and their attorneys may have legitimate concerns about even seeking recusal.<sup>119</sup>

Two other realities also render recusal an arguably inadequate remedy for litigants. First, seeking recusal for campaign speech or conduct requires both that litigants know about the judge’s or justice’s campaign conduct *and* that litigants have the resources to bear the cost of litigating recusal.<sup>120</sup> In addition, there are costs to the judicial system that “arise from the shuffling of such cases between judges and from the effort required to litigate the determination of which individual cases should be shuffled and which should stay where they are.”<sup>121</sup> Second, while recusal might arguably satisfy the state’s compelling interest in preserving both impartiality and the appearance of impartiality in litigants’ eyes, it does little to preserve confidence in the judiciary in the eyes of the general public as judicial elections become even more politicized.<sup>122</sup>

Obviously to some degree the effectiveness of any new recusal standard depends significantly on the narrowness or broadness of such a rule. Recusal jurisprudence in most states is inadequate to provide

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117. See, e.g., Shepard, *supra* note 11, at 1079 (noting that, at least in federal courts, “[s]eeking recusal on grounds that a judge has made general comments indicating a bias against a class of litigants has seldom been successful”); Williams, *supra* note 8, at 225–26.

118. Sparling, *supra* note 107, at 479.

119. *Id.* at 479–80.

120. See Schotland, *supra* note 114, at 1420. Florida has addressed this first shortcoming by requiring judges to “disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.” FLA. STAT. ANN. CODE OF JUDICIAL CONDUCT Canon 3(E)(1) cmt. (2000); see also *In re Frank*, 753 So. 2d 1228, 1239 (Fla. 2000) (discussing the Canon 3 commentary).

121. Shepard, *supra* note 11, at 1081–82. But see Donald L. Burnett, Jr., *A Cancer on the Republic: The Assault upon Impartiality of State Courts and the Challenge to Judicial Selection*, 34 Fordham. Urb. L.J. 265, 289 (2007) (“[I]f a litigant’s right to an impartial tribunal were . . . held hostage to the ‘efficiency’ of allowing biased judges to decide cases then the law’s promise of neutrality would truly be broken.”).

122. Some commentators suggest that depriving judges of the opportunity to fulfill specific campaign promises, after the law allows them to campaign on issues, is fundamentally wrong. See, e.g., James Layman, *Judicial Campaign Speech Regulation: Integrity or Incentives?*, 19 GEO. J. LEGAL ETHICS 769, 779 (2006) (“To the extent that judges deal with political issues, it is perfectly reasonable that they be expected to state those views so that voters may make informed choices.”).

meaningful assurance that a sitting judge in a particular case will be absolutely impartial. In the well-known *Texaco, Inc. v. Pennzoil, Co.* case, Texaco complained about Pennzoil's lead trial counsel serving on the judge's campaign steering committee and making a \$10,000 contribution to the trial judge's campaign after suit was filed.<sup>123</sup> The Texas First Court of Appeals summarily rejected this argument, reasoning that—despite its allegations—Texaco could not actually prove that the judge was “either biased or prejudiced in any manner or that he was acting as judge in his own case or enjoyed any pecuniary interest in the outcome of the case.”<sup>124</sup> Two members of the Michigan Supreme Court reached the same result recently in declining to recuse themselves in an appellate proceeding involving parties that contributed to their campaigns.<sup>125</sup> These two justices went so far as to hold that, regardless of public perception, campaign contributions to a judge can *never* form the basis of a recusal motion so long as the contribution is within the legal limits.<sup>126</sup>

#### 1. *Adoption of the ABA Disqualification Standard*

One option for states seeking stronger protections for litigants in light of *White* is adoption of the ABA's disqualification standard.<sup>127</sup> It carries more bite than the permissive language of most states' recusal rules, and, unlike most jurisdictions, it specifically speaks to campaign speech as a ground for recusal:

##### Rule 2.11 *Disqualification*

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned,

123. *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768, 842 (Tex. App. – Houston [1st Dist.] 1987, writ ref'd n.r.e.).

124. *Id.* at 845.

125. *See* *Adair v. Dep't of Educ.*, 709 N.W.2d 567, 579–81 (Mich. 2006).

126. *Id.* at 581; *see also* Peter Geier, *Recusal Fight Highlights Judicial Election Concerns: The Appeal of a \$50M Verdict Involving Key Donor Draws Fire*, NAT'L L.J., Apr. 24, 2006, at 6 (discussing two recent cases in which justices on the West Virginia and Illinois supreme courts refused to recuse themselves from cases involving parties that contributed millions to their campaigns). The Supreme Court denied certiorari on a due process claim in the Illinois case. *Avery v. State Farm Mut. Auto. Ins. Co.*, 126 S. Ct. 1470 (2006) (mem.).

127. This provision, enacted in 2007, was taken without substantive change from the 2005 proposed model code. MODEL CODE OF JUDICIAL CONDUCT Canon 3(E)(1) (2005).

including but not limited to the following circumstances:

....

(5)The judge, while a judge or judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

The committee that proposed this addition noted that while the Model Code, like the vast majority of states, already contained disqualification provisions, “‘it was important to include a provision . . . that related directly to judicial campaign speech’ and that was ‘designed to make the disqualification ramifications of prohibited speech violations explicit.’”<sup>128</sup> Following this lead, at least eleven states have since specifically adopted some form of the ABA’s provision specifically aimed at campaign speech.<sup>129</sup>

The ABA provision is mandatory<sup>130</sup> and requires recusal for comments that merely appear to, rather than actually, commit a judicial candidate on an issue.<sup>131</sup> Violation of the ABA’s provision thus can have real consequences—both legal and ethical.<sup>132</sup> “The legal consequence is a reversal of the judge’s decisions; the ethical consequence is the initiation of disciplinary proceedings against the judge, which can result in private

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128. Medina, *supra* note 6, at 1073 (quoting STANDING COMM. ON JUDICIAL INDEPENDENCE ET AL., ABA, REPORT TO THE HOUSE OF DELEGATES 11 (2003)).

129. See, e.g., ARIZ. CODE OF JUDICIAL CONDUCT Canon 3(E)(1)(e); FLA. CODE OF JUDICIAL CONDUCT Canon 3(E)(1)(f); IOWA CODE OF JUDICIAL CONDUCT Canon 3(C)(1)(e); MD. CODE OF JUDICIAL CONDUCT Canon 3(C)(1)(e); MINN. CODE OF JUDICIAL CONDUCT Canon 3(D)(1)(e); NEV. CODE OF JUDICIAL CONDUCT Canon 3(E)(1)(f); N.H. CODE OF JUDICIAL CONDUCT Canon 3(E)(1)(e); N.M. CODE OF JUDICIAL CONDUCT R. 21-400(A)(6); OKLA. CODE OF JUDICIAL CONDUCT Canon 3(E)(1)(e); S.D. CODE OF JUDICIAL CONDUCT Canon 3(E)(1)(e); WIS. CODE OF JUDICIAL CONDUCT R. 60.04(4)(f).

130. A new Comment in the 2007 Code makes the judge’s duty to self-recuse explicit. MODEL CODE OF JUDICIAL CONDUCT Canon 2 cmt. 2 (2005). (“A judge’s obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.”).

131. Howland W. Abramson & Gary Lee, *The ABA Model Code Revisions and Judicial Campaign Speech: Constitutional and Practical Implications*, 20 TOURO L. REV. 729, 737–38 (2004).

132. *Id.*

discipline, public discipline, suspension, or removal from office.”<sup>133</sup> Of course, such results will not follow from an ethics code alone—the ABA standards will need to be adopted via statute or procedural rule to give litigants the benefit of this standard in a pending case, as opposed to the mere emotional satisfaction of seeing a judge disciplined after their case has been lost.

While the ABA provision has been adopted in several jurisdictions, its constitutionality has only been challenged in Florida and North Dakota, where it has thus far survived.<sup>134</sup> In Florida, the Family Policy Council recently filed an emergency appeal of the failure to enjoin the recusal canon to the Eleventh Circuit.<sup>135</sup>

Despite these rulings, some commentators have cautioned that the ABA’s recusal provision may be constitutionally infirm:

[I]n adopting a provision “designed to make the disqualification ramification of prohibited speech violations explicit,” the ABA has exposed the Code to challenges that the new disqualification rule impermissibly chills a candidate’s political speech by raising the possibility that, as a judge, the candidate will be disciplined for the content and the communicative impact of her statements in the form of disqualification. Because the rule appears to “swee[p] too much speech” that is constitutionally protected, the rule is particularly vulnerable to an overbreadth challenge. Moreover, because, as drafted, the rule is unclear as to precisely what speech will cause a candidate’s impartiality to be reasonably questioned and what speech will not, the rule may also be subject to challenges that it is void for vagueness.<sup>136</sup>

Aside from potential constitutional problems, some commentators have opined—perhaps unpersuasively—that the ABA standard is simply unworkable.<sup>137</sup> For example, the provision for disqualification if a candidate “appears to commit” to an issue or controversy could prove

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133. *Id.*

134. *See* Fla. Family Policy Council v. Freeman, No. 4:06-cv-00395-RH-WCS (N.D. Fla. Oct. 10, 2006); N.D. Family Alliance, Inc. v. Bader, 361 F. Supp. 2d 1021, 1043–44 (D.N.D. 2005).

135. Press Release, James Madison Ctr. for Free Speech, Florida Family Policy Council Files Emergency Appeal (Oct. 12, 2006), *available at* <http://www.jamesmadisoncenter.org>.

136. Medina, *supra* note 6, at 1095 (internal citations omitted); *see also* Abramson & Lee, *supra* note 131, at 735–41.

137. *See, e.g.,* Abramson & Lee, *supra* note 131, at 742–44.

problematic for judges who teach because a statement in the classroom that “a particular decision is such a departure from sound policy or past precedent that it ought to be overruled . . . could be interpreted as appearing to commit to a particular legal issue.”<sup>138</sup> Indeed, the argument goes, “it is quite possible that a successful candidate would be required to be disqualified in so many cases that the judge could rarely sit on cases.”<sup>139</sup> This would lead to “a significant burden on court administrators . . . [who] would be required to maintain a list of the types of cases judges would be disqualified from hearing and assign cases accordingly.”<sup>140</sup>

Despite these reservations, at least one commentator has argued that the ABA provision does not go far enough, especially toward protecting criminal defendants appearing before judges who have taken strong pro-prosecution election stands.<sup>141</sup> To truly protect such defendants, the ABA would have to mandate disqualification “in any criminal case that will raise an issue about which the judge promised to be ‘tough.’”<sup>142</sup>

## 2. *California’s Recusal Standards*

California’s mandatory recusal and disqualification provisions are stricter than most jurisdictions. Thus, they have the potential to provide significant protection to litigants who are concerned about judicial campaign speech. California rules and canons, however, lack any specific mention of disqualification related to public statements made by judges or judicial candidates, and offer significantly less protection to litigants in appellate courts.<sup>143</sup>

For trial courts, the rules provide:

Trial court judges must recuse themselves if, for any reason:

- (i) The judge believes his or her recusal would further the interests of justice,
- (ii) The judge believes there is a substantial doubt as to his or her capacity to be impartial, or

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138. *Id.* at 736.

139. *Id.* at 739.

140. *Id.* at 742.

141. *See* Weiss, *supra* note 104, at 1127–28.

142. *Id.* at 1127.

143. *See generally* CAL. CIV. PROC. CODE § 170.1 (2005).



- (iii) A person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial.<sup>144</sup>

If a judge does not disqualify himself or herself when mandated, the rules provide a procedure for requesting the judge to do so, and, if he or she refuses, for the disqualification request to be heard by another judge.<sup>145</sup> In addition, litigants in California have the absolute right to strike one judge upon submission of a timely sworn statement that the party has reason to believe the judge is prejudiced against the party, the party's attorney, or the interest of the party or attorney.<sup>146</sup>

The California Code of Civil Procedure expressly provides that its judicial disqualification and peremptory challenge provisions do not extend to appellate justices.<sup>147</sup> Rather, appellate recusal is governed by the Code of Judicial Conduct where the appellate bias disqualification grounds basically mirror those of the trial court:

- (4) An appellate justice shall disqualify himself or herself in any proceeding if for any reason:
- (a) the justice believes his or her recusal would further the interest of justice; or
  - (b) the justice substantially doubts his or her capacity to be impartial; or
  - (c) the circumstances are such that a reasonable person aware of the facts would doubt the justice's ability to be impartial.<sup>148</sup>

Despite the similarity in the substantive grounds for disqualification in the trial and appellate courts, there are significant practical reasons the appellate litigant has fewer protections.<sup>149</sup> First, unlike in the trial court, there is no mechanism to request an appellate justice recuse himself or herself, or for getting another judge or justice to decide the issue.<sup>150</sup> Second, there is no automatic

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144. *Id.* § 170.1(a)(6)(A).

145. *Id.* § 170.3(c).

146. *Id.* § 170.6.

147. CAL. CIV. PROC. CODE §§ 170.6(a)(1), 170.7.

148. CAL. CODE OF JUDICIAL ETHICS Canon 3E(3) (2005).

149. See, e.g., Ignazio J. Ruvolo, *California's Amendment to Canon 3E of the Code of Judicial Conduct Requiring Self-Recusal of Disqualified Appellate Justices—Will it Be Reversible Error Not to Self-Recuse?*, 25 T. JEFFERSON L. REV. 529, 529–30 (2003).

150. *Id.* at 529.

strike provision applicable to appellate courts.<sup>151</sup> Finally, unlike trial judges, there is no requirement that appellate justices disclose information to litigants and lawyers that might be relevant to disqualification.<sup>152</sup> Thus, while California provides more protection than many jurisdictions for litigants concerned about campaign conduct, it is not a compelling model for other jurisdictions, especially in the appellate arena.

Given the added cost and uncertainty of litigating judicial disqualification, a peremptory challenge option will usually be the most practical solution to address concerns about judicial bias. Of course, neither the judicial disqualification nor the peremptory challenge provisions are helpful if a litigant does not know there is reason, such as positions taken during a campaign, to question a judge's impartiality.<sup>153</sup> This reality is dealt with by California's judicial canons, which provide that "[i]n all trial court proceedings, a judge shall disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no actual basis for disqualification."<sup>154</sup>

### 3. *Adoption of Broader Judicial Peremptory Strike Provisions*

Another option for jurisdictions is the creation of more liberal automatic strike rules that extend to appellate judges and justices.<sup>155</sup> As a general rule, in a majority of states "a party must allege and demonstrate good cause before a judge will be disqualified."<sup>156</sup> In about one-third of the states,<sup>157</sup> "have, by the adoption of statutes or court rules, effectively shifted

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151. *Id.* at 536.

152. *Id.*

153. *See, e.g.,* Gavin Hachiya Wasserman, *Invoking the Procedure for Judicial Disqualification*, L.A. LAW., April 2005, at 10.

154. CAL. CODE JUDICIAL ETHICS Canon 3E(2) (2005).

155. *See* Sparling, *supra* note 107, at 481 (identifying a "peremptory right of recusal" as a solution to some of the shortcomings of discretionary recusal standards as applied to campaign conduct).

156. FLAMM, *supra* note 99, at 59.

157. Deborah Goldberg et al., *The Best Defense: Why Elected Courts Should Lead Recusal Reform* 26 (publication forthcoming); *see, e.g.,* ALASKA STAT. § 22.20.022 (2004); HAW. REV. STAT. § 601-7(b) (1993); IDAHO R. CIV. P. 40(d)(1); ILL. CODE CIV. P. § 2-1001; IND. CODE ANN. § 35-36-5 (LexisNexis 1998); KAN. STAT. ANN. § 20-311d (2006); MINN. STAT. ANN. § 542.16 (West 2000 & Supp. 2007); MO. R. CIV. P. 51.05 (2006); MONT. CODE ANN. § 3-1-804 (2005); N.D. CENT. CODE ANN. § 29-15-21 (2006); N.M. STAT. ANN. § 38-3-9 (West 1998); OR. REV. STAT. Ann. §§ 14.250-14.270 (West 2000); WASH. REV. CODE §§ 4.12.040-4.12.050 (West 2006).

the decision on disqualification from the challenged judge to the challenging litigant.”<sup>158</sup> These are known by various names, i.e., “automatic strikes,” “automatic substitution,” “change-in-judge provisions,” and “peremptory strikes.”<sup>159</sup> What they all have in common is that they provide a litigant the right to remove a judge without proving that the judge is biased or incompetent to sit.<sup>160</sup>

These strike provisions differ in their procedural operations. As one commentator explains: “Some courts require the challenged judge to transfer these motions immediately to a colleague . . . ; some require transfer only after the challenged judge has ensured the motion’s timeliness and sufficiency; the rest let the challenged judge decide on these motions herself.”<sup>161</sup> Moreover, these rules have been created by court rule and by statute, but “[l]egislatively-enacted peremptory challenge procedures have usually been very controversial . . . [and] subject to attack on constitutional grounds.”<sup>162</sup> Early legislative attempts to provide litigants with an automatic strike without regard to prejudice were unsuccessful.<sup>163</sup> For example, in 1977, the Nevada legislature passed a peremptory challenge statute providing that any party who paid one hundred dollars to support the district judges’ travel fund was entitled to a peremptory strike without the necessity of proving disqualification or filing an affidavit of bias or prejudice.<sup>164</sup> The Nevada Supreme Court struck down the statute as violating the separation of powers.<sup>165</sup>

Although other statutory strike systems have fared better,<sup>166</sup> commentators have nonetheless recognized that “the most expedient method of instituting a peremptory challenge procedure is by court-adopted rule.”<sup>167</sup> This is because there can be “no possible violation of the constitutional separation of powers doctrine when the judiciary, and not the legislature, allows for a peremptory substitution of judge without a

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158. FLAMM, *supra* note 99, at 59.

159. *Id.*

160. *Id.* at 59–60.

161. Goldberg, et al., *supra* note 157, at 27.

162. Roger M. Baron, *A Proposal for the Use of a Judicial Peremptory Challenge System in Texas*, 40 BAYLOR L. REV. 49, 54 (1988).

163. *See id.* at 55.

164. *Id.* at 54.

165. *See Johnson v. Goldman*, 575 P.2d 929, 930 (Nev. 1978).

166. *See State v. Holmes*, 315 N.W.2d 703, 721 (Wis. 1982) (upholding Wisconsin’s peremptory strike statute as a constitutional exercise of the legislative power to ensure fair trials).

167. Baron, *supra* note 162, at 56.

supporting affidavit.”<sup>168</sup>

Perhaps the best known statutory strike system is in California, where litigants have the absolute right to strike one judge, but only upon submission of a timely sworn statement that the party has reason to believe the judge is prejudiced against the party, the party’s attorney, or the interest of the party or attorney.<sup>169</sup> However, no similar procedure exists in

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168. *Id.* at 55–56.

169. CAL. CODE OF CIV. PRO. § 170.6 (2002). Prejudice against party, attorney or interest thereof; motion and affidavit; assignment of another judge, court commissioner or referee; number of motions; continuance; cumulative remedy; severability

(a)(1) No judge, court commissioner, or referee of any superior court of the State of California shall try any civil or criminal action or special proceeding of any kind or character nor hear any matter therein that involves a contested issue of law or fact when it shall be established as hereinafter provided that the judge or court commissioner is prejudiced against any party or attorney or the interest of any party or attorney appearing in the action or proceeding.

(2) Any party to or any attorney appearing in any action or proceeding may establish this prejudice by an oral or written motion without notice supported by affidavit or declaration under penalty of perjury or an oral statement under oath that the judge, court commissioner, or referee before whom the action or proceeding is pending or to whom it is assigned is prejudiced against any party or attorney or the interest of the party or attorney so that the party or attorney cannot or believes that he or she cannot have a fair and impartial trial or hearing before the judge, court commissioner, or referee.

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(3) If the motion is duly presented and the affidavit or declaration under penalty of perjury is duly filed or an oral statement under oath is duly made, thereupon and without any further act or proof, the judge supervising the master calendar, if any, shall assign some other judge, court commissioner, or referee to try the cause or hear the matter. In other cases, the trial of the cause or the hearing of the matter shall be assigned or transferred to another judge, court commissioner, or referee of the court in which the trial or matter is pending or, if there is no other judge, court commissioner, or referee of the court in which the trial or matter is pending, the Chair of the Judicial Council shall assign some other judge, court commissioner, or referee to try the cause or hear the matter as promptly as possible. Except as provided in this section, no party or attorney shall be permitted to make more than one such motion in any one action or special proceeding pursuant to this section; and in actions or special proceedings where there may be more than one plaintiff or similar party or more than one defendant or similar party appearing in the action or special proceeding, only one motion for each side may be made in any one

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the appellate courts.

Jurisdictions adopting this system—and extending it to appellate judges and justices—would provide an additional (and arguably more effective) tool for litigants in light of *White* and the resulting canon amendments. Such a system would allow for one timely strike by each party of an appellate judge or justice assigned to a particular case.<sup>170</sup> This would cause minimal disruption in the appellate courts, as they should already have the necessary mechanisms in place for reassigning cases when a particular judge or justice is disqualified or recused.<sup>171</sup>

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action or special proceeding.

....

(5) Any affidavit filed pursuant to this section shall be in substantially the following form:

(Here set forth court and cause)

State of California,            )           PEREMPTORY           CHALLENGE  
County of \_\_\_\_\_        )   ss.

\_\_\_\_\_, being duly sworn, deposes and says: That he or she is a party (or attorney for a party) to the within action (or special proceeding). That \_\_\_\_\_ the judge, court commissioner, or referee before whom the trial of the (or a hearing in the) aforesaid action (or special proceeding) is pending (or to whom it is assigned) is prejudiced against the party (or his or her attorney) or the interest of the party (or his or her attorney) so that affiant cannot or believes that he or she cannot have a fair and impartial trial or hearing before the judge, court commissioner, or referee.

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 2006.

(Clerk or notary public or other officer administering oath)

(6) Any oral statement under oath or declaration under penalty of perjury made pursuant to this section shall include substantially the same contents as the affidavit above.

170. Texas has such a provision in place permitting automatic strikes of an appellate judge or justice, but it is limited to “former, retired, or senior judge[s] or justice[s],” or “a judge or justice who was defeated in the last primary or general election for which the judge or justice was a candidate for the judicial office held by the judge or justice.” TEX. GOV’T CODE ANN. § 75.551 (Vernon 2005).

171. See Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213, 1253 (2002) (stating that federal appellate court cases

The benefit to litigants faced with a judge who may be biased against them is evident. They would avoid the burden, delay, and expense of proving that disqualification or recusal is required. Certainly, the resources that would otherwise be dedicated to briefing by the parties and decision-making by the courts could be better utilized on the merits of a given case. In addition, in those cases where strikes are prompted by campaign conduct, gone would be the debate about whether the candidate's speech crossed the line to a commitment on an issue; also absent would be the question of how much is too much in looking at campaign contributions. Moreover, the number of strikes directed to a particular justice in the course of his or her term would be the ultimate "bar poll"—quite a useful guide to the voters in the next election.

As with all options, a peremptory strike system is subject to manipulation, and thus is not the perfect solution. According to one commentator, California's strike system "has the potential to limit judicial independence in making impartial decisions," because it "can be used to put pressure on a particular judge."<sup>172</sup> Any such campaign to intimidate a judge through use of the strike system, though, could only be effectively instituted by a party appearing in the same court with real frequency, such as the district attorney or public defender's office.<sup>173</sup> Thus, it seems the benefit gained in increasing public and litigants' confidence in the judiciary still makes this the most attractive solution.

#### IV. CONCLUSION

While all the ramifications of *White* and its progeny are not yet known, it seems likely that judges, at least for the near future, will be seen as more human and more political than has been customary in our lifetimes. Those imbued with the world view that judges should be scholar-philosophers pronouncing neutral principles from Olympian heights may have some rude shocks as the rough-and-tumble world of judicial confirmation hearings and judicial election campaigns play out on multiple media outlets. As Justice Kennedy observed, public confidence in the administration of justice may be enhanced by increasing a litigant's ability

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are heard by panels of three judges and, therefore, one of the three judges can be replaced without a "complete change of the judicial arbiter").

172. James Michael Scheppele, *Are We Turning Judges into Politicians?*, 38 LOY. L.A. L. REV. 1517, 1523 (2005).

173. See *id.* at 1523–24 (noting that frequently appearing parties could manipulate judges by filing a judicial challenge in every case heard by a particular judge).

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to select a different judge in a particular case.<sup>174</sup> The bench and bar should try to devise a suitable method for litigants to exercise this opportunity.

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174. Republican Party of Minn. v. White, 536 U.S. 765, 793–94 (2002) (Kennedy, J., concurring).