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Tripping the Rift: Navigating Judicial Speech Fault Lines in the Post-*White* Landscape

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Tripping the Rift: Navigating Judicial Speech Fault Lines in the Post-*White* Landscape

by Barbara E. Reed*

This Article is presented in large part as a synthesis of existing jurisprudence, conventional public policy wisdom, and new approaches to navigating the post-*White* landscape, including recommendations derived from years of collaboration with judges, lawyers, scholars, policy specialists, and other stakeholders. To a greater or lesser degree, much of what is contained herein is thus subjective and should be approached with that in mind. The views herein, and any errors, are mine alone.

I. INTRODUCTION

Two and a half years after the United States Supreme Court's decision in *Republican Party of Minnesota v. White*,[1] the status of the conduct rules governing the third branch remains unstable. It is tempting to regard the *White* decision as a catastrophe of constitutional proportions—as, indeed, a large percentage of scholars, advocates, and members of the bench do.

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1. 536 U.S. 765 (2002).

In truth, however, *White* is better regarded as a relatively small seismic event: one that, despite the force of the initial quake, has now subsided into a constitutional and ethical fault line. The jurisprudence of judicial speech and conduct (especially, although not exclusively, with regard to judicial elections) may now reasonably be divided into categories on either side of the *White* fault: (1) what may be described as the "say nothing" tradition; and (2) what may be termed the new "say anything" practice. Judges and judicial candidates today straddle this line under tremendous pressure from both sides, each of which risks hardening into an all-or-nothing approach that jeopardizes the judiciary's independence and ability to perform its constitutional functions.

However, there is another post-*White* path: A combination of narrow tailoring, a commitment by the bench and bar to the highest aspirational standards, and an assertive campaign of public education, can create a jurisprudence that is sufficiently flexible to expand and contract as required by individual circumstances and constitutional requirements. Such a jurisprudence will prevent what is now a manageable rift from rupturing into an unbreachable chasm.

Under this analysis, *White* may be regarded not as a catastrophe, but rather as an opportunity, and this Article makes the case for such an approach. Part I outlines early judicial-speech jurisprudence and traces the path of these early tremors to *White*. Part II dissects *White* itself, clarifying precisely what the decision holds, and debunking the toxic mythology that has grown up around it. Part III covers post-*White* developments and lays the groundwork for Part IV, which uses judicial candidate questionnaires as a vehicle to demonstrate how *White*'s impact may be transformed into an educational opportunity: how, contrary to popular belief, changes in judicial speech standards may be used not to undermine judicial independence, but rather to build a stronger, more independent judiciary. Such an approach will not be easy, but it will be necessary to preserve a judiciary that is authoritative, autonomous, and accountable in a manner envisioned by our constitutional tradition.

II. PART I: EARLY TREMORS

The American Bar Association ("ABA") first promulgated its contemporary Model Code of Judicial Conduct[2] ("Model Code") in 1972. As with the ABA's other "model" rules and codes, this Model Code was designed

2. MODEL CODE OF JUDICIAL CONDUCT (1972). The ABA's earliest effort in this area was its *Canons of Judicial Ethics of 1924*. CANONS OF JUDICIAL ETHICS (1924), *reprinted in* 9 A.B.A.J. 449 (Jan. 1923). However, the Model Code first appeared in its modern iteration in 1972.

as a template that state judiciaries could adapt to create their own rules governing judicial speech and conduct, both on and off the bench.

This initial version of the Model Code included the now-infamous "announce clause" of what was then Canon 7,[3] under which judges and judicial candidates were not permitted to "announce their views on disputed legal or political issues."[4] Although well-intentioned, the "announce clause" paved the road to today's First Amendment hell in the context of judicial elections. The clause was originally intended to prevent either an actual or an apparent quid pro quo of votes for decisional outcomes. A subsidiary goal was to provide elected judges with a prophylactic against such improper pressures to issue particular decisions.

However, it eventually became apparent that the "announce clause" suffered from those dreaded dual constitutional infirmities of overbreadth and vagueness: The phrase "disputed legal or political issues" was overly broad because it had the potential to ensnare remarks by judges and judicial candidates on topics that could not possibly come before them on the bench.[5] The same flaws responsible for the canon's overbreadth likewise rendered it vague, appearing to encompass everything generally but nothing specifically. Thus, in 1990, the ABA revised the Model Code, scrapping Canon 7's "announce clause" in favor of relying upon the speech restrictions of Canon 5,[6] including the so-called "commit clause" and "pledges or promises clause."[7] Certainly,

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3. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 7B(1)(c). Canon 7 provides: "A judge or judicial candidate shall refrain from inappropriate political activity." The 1990 version of the Model Code relied upon the language of Canon 5: "A judge should refrain from political activity inappropriate to his judicial office." MODEL CODE OF JUDICIAL CONDUCT (1990).

4. MODEL CODE OF JUDICIAL CONDUCT (1972).

5. *Id.*

6. MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i-ii) (1990), which reads, in relevant part:

> A Judge or Judicial Candidate Shall Refrain from Inappropriate Political Activity
>
> (3) A candidate for a judicial office: . . .
>
> (d) shall not: . . .
>
> (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;
>
> (ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.
>
> . . . .

7. This Article uses either term, according to the variation used by the jurisdiction or case under discussion. The post-*White* revisions to the Model Code have combined the two to read, in relevant part:

from 1990 until 2001, no one seriously entertained the idea that a ban on such pledges, promises, or "commitments" would run afoul of the Constitution. During this period, major challenges mounted to such restrictions on judicial speech and conduct were few and far between—so few, in fact, that in practical terms, the most significant case law amounts to three decisions, one from the Michigan Supreme Court and two from the federal courts: *Buckley v. Illinois Judicial Inquiry Board*,[8] *In re Chmura*,[9] and *Butler v. Alabama Judicial Inquiry Commission*.[10]

A. *Buckley v. Illinois Judicial Inquiry Board*

Buckley v. Illinois Judicial Inquiry Board,[11] a 1993 Seventh Circuit decision, turned on facts that now seem quaint by comparison with *White* and its progeny. Incumbent appellate court judge Robert Buckley, eligible for retention, simultaneously ran for a slot on the Illinois Supreme Court.[12] During the course of his campaign, he distributed literature that included the statement that, as an appellate court justice, he had "never written an opinion reversing a rape conviction."[13] Buckley subsequently faced charges before the state judicial disciplinary body, the Illinois Courts Commission ("ICC"), for violating the "announce clause" of the Illinois Code of Judicial Conduct.[14] The ICC found a violation, but declined to impose any sanction. In the meantime, Buckley lost the race for Illinois Supreme Court, but won retention to his position on the appellate court.[15]

Buckley filed suit in federal district court, and his case was consolidated with that of Anthony Young, a lawyer and former state legislator who had just won a circuit court race.[16] Young's suit alleged that the "announce clause" had prevented him from discussing issues that were

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A Judge or Judicial Candidate Shall Refrain from Inappropriate Political Activity

A. All Judges and Candidates . . .

(3) A candidate* for a judicial office: . . .

(d) shall not:

(i) 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 . . . .

8. 997 F.2d 224 (7th Cir. 1993).
9. 626 N.W.2d 876 (Mich. 2001).
10. 802 So. 2d 201 (Ala. 2001).
11. 997 F.2d 224 (7th Cir. 1993).
12. *Id.* at 225-26.
13. *Id.* at 226.
14. ILL. CODE OF JUDICIAL CONDUCT (2000), *reprinted in* ILL. COMP. STAT. (2000).
15. *See In re* Buckley, 3 Ill. Cts. Comm'n 1 (1991).
16. *Buckley*, 997 F.2d at 226.

"important" to Illinois voters in choosing their circuit court judges, including abortion, capital punishment, public education issues, and the state's budget.[17] There was a material difference in the two cases, however: As an incumbent judge, Buckley was subject to the sole jurisdiction and discretion of the ICC, from whose decision there was no appeal. Young, on the other hand, was not yet a judge when he ran for circuit court; had he violated the "announce clause," he would have been disciplined under the Illinois Code of Professional Responsibility[18] for lawyers, and would thus have had a right of appeal to the Illinois Supreme Court.[19]

Buckley sought only to challenge the constitutionality of the ICC's decision, rather than a ruling on the merits of his campaign statement. The district court thus construed the "announce clause" narrowly: as applicable only to issues that were likely to come before the judge in question.[20] On that basis, the district court dismissed the suit, and Buckley appealed to the Seventh Circuit.[21]

Writing for the Seventh Circuit, Judge Richard Posner acknowledged that "judges remain different from legislators and executive officials, even when all are elected, in ways that bear on the strength of the state's interest in restricting their freedom of speech."[22] However, Posner nonetheless found the rule unconstitutional on grounds that both its "announce clause" and its "pledges or promises clause" were overinclusive:[23] The "announce clause" could not reasonably be construed to apply only to cases or controversies likely to come before the court,[24] and the "pledges or promises clause" extended to pledges and promises for all purposes, not merely to reach particular decisions.[25]

B. In re Chmura

In re Chmura[26] was a 2001 case from Michigan, stemming from a 1996 judicial election in Macomb County, a Detroit suburb. Almost as little-noticed as *Buckley* at the time, *Chmura* nevertheless eerily foreshadowed *White* and its progeny. Although the "announce clause" remained on the books in some states, Michigan was not among them.

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17. *See* Buckley v. Ill. Judicial Inquiry Comm'n, 801 F. Supp. 83 (N.D. Ill. 1992).
18. *See supra* note 16.
19. *Buckley*, 997 F.2d at 226.
20. *Id.*
21. *Id.*
22. *Id.* at 230.
23. *Id.* at 228, 230.
24. *Id.* at 228.
25. *See id.* at 229.
26. 626 N.W.2d 876 (Mich. 2001).

Chmura engaged in highly negative campaign advertising, mounting vicious, misleading, and otherwise inappropriate attacks upon his opponent, the incumbent trial judge.[27] Among his campaign advertising was a television commercial that included the following on-screen text: "Murder . . . Rape . . . Dismemberment . . . Innocent Victims . . . Could Jim Conrad's Court have stopped it?"[28] The ad also accused Conrad of having sentenced the defendant in the case at issue to "only a slap on the wrist."[29]

Not content with running ads attacking his opponent, Chmura also mounted a tangential attack on Coleman Young, then the highly controversial mayor of Detroit, in a blatant attempt to boost his candidacy through an appeal to the baser reactions of the electorate.[30] Macomb County is a largely white, reliably conservative district, and one of the counties whose population exploded during the years of "white flight" from the city of Detroit.[31] At the time of the 1990 census, Macomb County's demographics were 97% white, 1% African-American, 1% Asian-American, and 1% a combination of all other ethnic categories.[32] Fairly or unfairly, the county's reputation in the state was one that was regarded as unwelcoming, to say the least, to people of color and immigrants.

Chmura attempted to capitalize on local hatred of Young by distributing a campaign flier showing a caricature of Young in a "Robin Hood" costume.[33] The depiction of Young's face was an exaggerated stereotype of supposedly "African-American" features. The flier was objectionable on two other levels: First, it exploited a controversial political debate over a legislative- and executive-branch tax plan, accusing Young of robbing the people of Macomb County of tax dollars to pay for Detroit spending, despite the fact that as a mayor, Young had no role in or control over the legislation in question. Second, the text implied that, if elected, Chmura would be in a position to "do something about it," namely, by preventing Young from "robbing" Macomb County taxpay-

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27. *See id.* at 884.

28. *Id.* at 891.

29. *Id.*

30. *See id.* at 888-91.

31. *See generally, e.g.*, STANLEY B. GREENBERG, MIDDLE CLASS DREAMS: THE POLITICS AND POWER OF THE NEW AMERICAN MAJORITY (Times Books 1995).

32. *See, e.g.*, Southeastern Michigan Council of Gov'ts. (SEMCOG), *Community Profile for Macomb County: Population by Race and Hispanic Origin, at* http://www.semcog.org (2004). By the 2000 census, Macomb County's white population had dropped to a mere 93%, while the African-American population had jumped to 3%.

33. *In re Chmura*, 626 N.W.2d at 888.

ers—an implication that could only charitably be described as misleading, since Chmura would have no occasion to preside over such a case.[34]

At that time, Canon 7(B)(1)(d) of Michigan's Canons of Judicial Conduct[35] prohibited judicial candidates from engaging in misleading or inaccurate advertising.[36] The Michigan Judicial Tenure Commission ("JTC") leveled four charges against Chmura. A master[37] appointed by the Michigan Supreme Court ruled that the canon was both overbroad and void for vagueness.[38] Instead of upholding either of the usual standards that had customarily been applied in such cases (i.e., either that strict scrutiny was satisfied because the canon was narrowly tailored to preserve the state's compelling interest in protecting judicial independence, or that a lesser standard applied that did not demand strict scrutiny), the master instead substituted the standard used in defamation cases: "actual malice."[39] Ruling that the state "should restrict only public communications that are false or made with reckless disregard for their truth or falsity," the master recommended that the JTC dismiss the charges and invalidate the canon.[40]

The JTC rejected the master's findings.[41] Construing Canon 7(B)(1)-(d) in a more traditional manner, the JTC held that it was neither overbroad nor unconstitutionally vague because it "only applied when a judicial candidate 'has knowledge [that] a communication is false, fraudulent, misleading, or deceptive.'"[42] The JTC justified its recommendation that Chmura be suspended for ninety days without pay on the grounds that, "individually and as a whole, [the advertisements]

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34. *Id.*

35. MICH. CODE OF JUDICIAL CONDUCT (1999).

36. The version of Canon 7(B)(1)(d) in effect at that time read, in relevant part:

> (1) A candidate, including an incumbent judge, for a judicial office: . . .
> (d) should not use or participate in the use of any form of public communication that the candidate knows or reasonably should know is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading, or which is likely to create an unjustified expectation about results the candidate can achieve.

See supra note 35, Canon 7(B)(1)(d); *Chmura*, 626 N.W.2d at 880-81.

37. Michigan's judicial disciplinary procedures were multi-layered: Once charges were filed with the Michigan Judicial Tenure Commission ("JTC"), the Michigan Supreme Court could appoint a master to make findings of fact and issue recommendations to the JTC. The JTC could accept or reject the master's findings. Judges sanctioned by the JTC could appeal to the Michigan Supreme Court.

38. *Chmura*, 626 N.W.2d at 880-81.

39. *Id.* at 881.

40. *Id.*

41. *Id.* at 881-82.

42. *Id.*

revealed a 'conscious effort to use false, fraudulent, misleading, and deceptive statements as part and parcel of his campaign strategy.'"[43]

Chmura appealed to the Michigan Supreme Court, which accepted his argument that, in finding against him and recommending suspension, the JTC had violated his First Amendment rights.[44] The court held that the First Amendment bars sanctions against judicial candidates for making statements that fall into three categories: (1) literally true but misleading; (2) "substantially true" but misleading; and (3) "mere rhetorical hyperbole" that is misleading.[45] Endorsing the recommendation of the master, the court held that the only legitimate grounds for disciplining a judicial candidate for false campaign statements are those that satisfy the "actual malice" standard: false statements made knowingly, or with reckless disregard for their truth or falsity.[46]

C. *Butler v. Alabama Judicial Inquiry Commission*

In *Butler v. Alabama Judicial Inquiry Commission*,[47] during Alabama's 2000 judicial elections, incumbent Alabama Supreme Court Justice Harold See ran against challenger Roy Moore[48] for the Chief Justice's slot. See, who had himself been the target of a particularly nasty ad campaign during the 1996 election, was charged by the Alabama Judicial Inquiry Commission ("JIC") with violating the state's

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43. *Id.* at 884.
44. *See id.* at 897.
45. *Id.*
46. *Id.*
47. 802 So. 2d 201 (Ala. 2001).
48. In one of life's little ironies, Moore himself would undergo the disciplinary process for engaging in questionable conduct. As a trial judge, Moore fought to keep a replica of the Decalogue posted on his bench in the courtroom; during the race for Chief Justice, he campaigned as the "Ten Commandments Judge," regularly making inappropriate public statements with regard to cases that were likely to come before the court. After winning the Chief Justice's position, under cover of night and with no notice to his colleagues, he installed a two-and-a-half-ton granite monument of the Decalogue in the main rotunda of the Alabama Supreme Court. He fought attempts, on grounds that its presence violated the Separation Clause, to have it removed, repeatedly engaging in inappropriate public commentary. The American Civil Liberties Union of Alabama sued in federal district court to compel the monument's removal; the judge held that the First Amendment required that the monument be removed, and issued an order compelling Moore both to remove the monument and to pay for all associated costs. Moore repeatedly refused to comply with the federal district court's order, publicly asserting that his responsibility to "God's law" trumped any such duties to U.S. law. Because of his willful refusal to comply with the law, he was suspended pending disciplinary proceedings and ultimately removed from the bench. *See generally* Glassroth v. Moore, 335 F.3d 1282 (11th Cir. 2003).

canons of judicial conduct for campaign activities arising out of the race against Moore.[49]

The JIC instituted proceedings against See in the Alabama Court of the Judiciary ("COJ"). The charges fell into three major categories: (1) making campaign statements that were knowingly false or made with reckless disregard for their truth or falsity; (2) making campaign statements that were knowingly deceptive and/or misleading; and (3) undermining the integrity of and public confidence in the judiciary.[50] The two Alabama canons at issue were Canon 2(A)[51] and Canon 7(B)(2).[52]

Canon 2(A)[53] was what may be called a "baseline" canon, examples of which are found in one form or another in virtually all jurisdictions. Such canons are designed to hold judges to high standards of conduct even where there may be no affirmative duty of or explicit prohibition on certain types of behavior. Canon 2(A) provided: "A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."[54]

Canon 7(B)(2) was an explicit prohibition on the distribution, either knowingly or recklessly, of false or misleading information about an opponent.[55] The prohibition extended to "true information about a judicial candidate or an opponent that would be deceiving or misleading to a reasonable person."[56]

State law provided for automatic suspension of any judge involved in disciplinary proceedings until the COJ issued a decision. Unwilling to wait for the COJ to rule, See filed suit in federal district court seeking a temporary restraining order ("TRO") enjoining enforcement of the

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49. *See Butler*, 802 So. 2d at 210.
50. *Id.* at 211.
51. ALA. CANONS OF JUDICIAL ETHICS Canon 2(A) (2004).
52. ALA. CANONS OF JUDICIAL ETHICS Canon 7(B)(2) (2004).
53. *See supra* note 51.
54. ALA. CANONS OF JUDICIAL ETHICS Canon 2(A) (2004).
55. *See supra* note 52. The text of Canon 7(B)(2) reads, in relevant part:

> Campaign *Communications*. During the course of any campaign for nomination or election to judicial office, a candidate shall not, by any means, do any of the following:
>
> Post, publish, broadcast, transmit, circulate, or distribute false information concerning a judicial candidate or an opponent, either knowing the information to be false or with reckless disregard of whether the information is false; or post, publish, broadcast, transmit, circulate, or distribute true information about a judicial candidate or an opponent that would be deceiving or misleading to a reasonable person.

56. *See supra* note 51.

suspension, on grounds that the suspension, the COJ proceedings, and even the JIC's charges themselves all constituted violations of his First Amendment rights. The district court agreed and issued the TRO, putting See back on the bench.[57]

The JIC appealed the TRO to the Eleventh Circuit. By the time the Eleventh Circuit considered the appeal, the election was over and See had lost the Chief Justice's position to Roy Moore, but remained on the Court as an associate justice. The nine-member Alabama Supreme Court thus included two members whose status was clouded by ethical questions.[58] Against this backdrop, the Eleventh Circuit punted: Instead of addressing the appeal head-on, it certified three questions[59] to the Alabama Supreme Court on grounds that the questions involved state law that only the state body could interpret.[60] Thus, two of the members of the body interpreting the certified questions had a vested and immediate interest in the outcome.

The court finally issued an answer to the Eleventh Circuit: It determined that two of the questions were moot and declined altogether to answer the third,[61] but did manage to hold that the canons of judicial conduct in question amounted to an unconstitutional infringement of the First Amendment.[62] The Eleventh Circuit agreed, vacating the preliminary injunction granted by the federal district court and remanding the case for dismissal.[63]

The Alabama Supreme Court held that Canon 7(B)(2) was facially unconstitutional on overbreadth grounds.[64] The court conceded that

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57. *Butler*, 802 So. 2d at 211.

58. *Id.* at 212.

59. The certified questions were as follows:

> A. In a proceeding before the Alabama Court of the Judiciary, can a defendant raise and have decided a constitutional challenge to a judicial canon, either at the Court of the Judiciary or through direct review to the Supreme Court or by other means?
>
> B. If so, how do the procedural rules governing the Court of the Judiciary permit a reasonably speedy decision on federal constitutional issues?
>
> C. In a proceeding before the Alabama Court of the Judiciary, can that court or a higher court grant, in that proceeding, a stay of the judge's disqualification pending the outcome of that proceedings or the outcome of the federal constitutional challenge posed in that proceeding?

Id. (quoting Butler v. Alabama Judicial Inquiry Comm'n, 245 F.3d 1257, 1265-66 (11th Cir. 2001)).

60. *Butler*, 802 So. 2d at 212.

61. *Id.* at 213.

62. *Id.* at 215, 219.

63. Butler v. Alabama Judicial Inquiry Comm'n, 261 F.3d 1154, 1160 (2001).

64. *Butler*, 802 So. 2d at 215.

the state of Alabama appeared to have a compelling interest in protecting the judiciary's integrity, but flatly rejected the JIC's argument that the canons in question were narrowly tailored to fulfill that interest, compelling or not.[65] It held that the last clause of Canon 7(B)(2) was "unconstitutionally overbroad because it has the plain effect of chilling legitimate First Amendment rights,"[66] and that Canon 2(A) was simply inapplicable to the charge because

> a candidate's conduct with reference to speech by the candidate or the unrepudiated statement of an aide[FN6] is essentially the candidate's speech and is, therefore, not chargeable under Canon 2A. Hence, Canon 2A. does not apply to any of the matters made the basis of this complaint.[67]
>
> FN6. Canon 7B.(3) of the Alabama Canons of Judicial Ethics makes a candidate accountable for the content of any statement by his campaign.[68]

Ironically, in justifying its decision, the court in *Butler* misrepresented certain facts.[69] The court declared: "In addition to Alabama, only three other states—Michigan, Georgia, and Ohio—have enacted broad restrictions on the kind of statements a judicial candidate may make during an election campaign."[70] This statement was so utterly and demonstrably wrong that it is difficult to regard it as merely a misstatement. By the time the Alabama Supreme Court issued its decision, Minnesota's *White* case was already in the pipeline, and *White*'s very existence was proof that the court's list of three states was incomplete: The canons under attack included the "announce clause," which rendered Minnesota's among the broadest of such "broad restrictions." Indeed, at the time *White* was decided, the canons of eleven states retained some version of the "announce clause," although in all instances, it was construed as a "pledges or promises clause" or a "commit clause." The canons in forty-one states at that time also included both a separate "pledges or promises clause" and a "misrepresent clause."

III. PART II: RUPTURE

By the time *White* was decided, most states had altered their canons of judicial conduct to reflect the ABA Model Code's new "commit clause"

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65. *Id.*
66. *Id.* at 218.
67. *Id.* at 219.
68. *Id.* at 219 n.6.
69. *Id.* at 216.
70. *Id.*

language. However, nine states still retained the "announce clause": Arizona, Colorado, Iowa, Maryland, Minnesota, Mississippi, Missouri, New Mexico, and Pennsylvania. And despite the presence of the old language, each of these nine states construed it as though it were a "commit clause."

As a practical matter, *White*'s holding is very simple—a mere twenty-seven words: "The Minnesota Supreme Court's canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violates the First Amendment."[71] *That* is the sum total of the precedent set by *White*. Indeed, the Court explicitly declined to address the "pledges or promises clause" (or "commit clause"), noting that that question was not before it.[72]

White's dicta, however, are something else entirely. The decision was authored by Justice Antonin Scalia,[73] and is unusual in its reach beyond the facts on the record and the applicable law. Indeed, Justice Scalia analyzed both facts and law in terms of his personal opinions: both as to the possible definitions of legal terms of art and as to his personal evaluation of the credibility of one of the parties—something that, theoretically, is traditionally beyond the scope of appellate review. Justice Scalia's approach in effect thus turned the decision in *White* into an announcement, albeit from the bench, of his own personal opinions on what was, in that particular moment, the most hotly disputed legal and political issue in the country. Any analysis of *White* should thus include a degree of skepticism and a thorough subtextual search.

Justice Scalia effectively asserted that the entire case turned on his own personal definitions of the word "impartiality."[74] He then declared that, for purposes of *White*, there are exactly three possible definitions of the term "impartiality."[75] The first definition, "lack of bias for or against either *party* to the proceeding,"[76] seems fairly straightforward, although reasonable people may disagree as to whether this is the most obvious definition of impartiality. Justice Scalia rejected out of hand the applicability of this definition to *White*.[77] He next conceded that it was "perhaps possible" to define "impartiality" as a "lack of preconception in favor of or against a particular *legal view*."[78] However, arguing that

71. Republican Party of Minnesota v. White, 536 U.S. 765, 788 (2001).
72. *Id.* at 770.
73. *Id.* at 768.
74. *Id.* at 775.
75. *Id.* at 775, 777-78.
76. *Id.* at 775-76.
77. *Id.* at 777.
78. *Id.* at 776-77.

"this is certainly not a common usage," he rejected this definition as well.[79] And again, reasonable people certainly may disagree as to whether such a definition is more than "perhaps possible" or "not a common usage."[80] Justice Scalia finally settled upon his third definition of impartiality, "openmindedness," as the one at issue in *White*,[81] although he described it as "again not a common" usage.[82] He further defined this form of impartiality as a judge's "willing[ness] to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case."[83]

Justice Sandra Day O'Connor's concurrence in White has been widely pilloried in the states as condescending to elected state judges—as a "you made your bed; now lie in it" approach from a federal judge appointed for life who faces none of the pressures of election.[84] Such criticisms are accurate but misplaced: The offender here is not Justice O'Connor, whose matter-of-fact analysis nonetheless reflects her experience in running for elected office, including state judicial office. The real offender on this count is Justce Scalia, who has never run for any elective office, and whose entire experience as a judge has been at the federal level, with appointments for life tenure with good behavior. His opinion in *White* is rife with the influences of his experience—or lack thereof.

The state had argued that judges who take public positions on issues during their campaigns will subsequently feel compelled to rule in accordance with those positions, a conclusion endorsed by the dissent.[85] Justice Scalia described this argument as "implausible," because "statements in election campaigns are such an infinitesimal portion of the public commitments to legal positions that judges (or judges-to-be) undertake."[86] Further, he described campaign promises themselves as an "irrelevance," and "the least binding form of human commitment"[87]—indeed, something that neither candidate nor voter would take seriously. This, he argued, meant that judicial candidates would feel far less pressure to keep campaign promises than to comply with other statements they had made either before declaring or after

79. *Id.* at 777-78.
80. *Id.* at 777.
81. *Id.* at 778.
82. *Id.*
83. *Id.*
84. *Id.* at 792 (O'Connor, J., concurring).
85. *Id.* at 816 (Ginsburg, Stevens, Souter, and Breyer, JJ., dissenting).
86. *Id.* at 779-80.
87. *Id.* at 780.

election.[88] Moreover, he contended that the most likely source of "popular disfavor" would be an unpopular ruling from the bench, not a failure to keep a campaign promise.[89]

Such an analysis is, to put it charitably, ironic: Justice Scalia himself had joined an earlier opinion written by Justice O'Connor that noted: "Most voters never observe state judges in action, nor read judicial opinions."[90] Survey data supports Justice O'Connor's assertion, repeatedly showing that the average citizen is unlikely to be familiar with *any* judicial decisions,[91] making campaign statements the only "public commitments to legal positions" that he or she is likely to encounter. Moreover, judges at all levels of the federal and state judiciary are regularly attacked by other public officials, interest groups, and the media for allegedly contradicting their own former campaign statements or opinions—a practice regularly criticized by Justice Scalia's colleagues.[92]

Justice Scalia's analysis of the Minnesota canon's treatment of incumbent judges and non-judge challengers is also questionable. Using the issue of same-sex marriage as a vehicle for the analysis, he alleged that the canons would have barred a judicial candidate from speaking publicly about his[93] opinion on the issue.[94] According to Justice Scalia, "He may say the very same thing . . . up until the very day before he declares himself a candidate, and may say it repeatedly (until litigation is pending) after he is elected."[95] This misstates the application of Minnesota's canon. While a citizen who was not yet a judge could indeed take a position on the legitimacy of same-sex marriage prior to declaring himself a judicial candidate, the canons were likely to permit

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88. *Id.*

89. *Id.* at 780-81.

90. Gregory v. Ashcroft, 501 U.S. 452, 472 (1991).

91. See, *e.g.*, Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. REV. M.S.U.-D.C.L. 849, 855 (2001).

92. *See generally*, *e.g.*, Honorable Stephen Breyer, Panel Discussion, *Judicial Independence: The Role of Politics and the Rule of Law (Oct. 32, 2004)*, 71 STANFORD LAWYER 15 (Winter 2005) (edited transcript). An edited transcript and video of the panel is available at http://www.law.stanford.edu/events/recordings.html; *Frontline: Justice for Sale* (WGBM Educational Foundation television broadcast, Nov. 23, 1999). A transcript of this episode is available at http://www.pbs.org/wgbh/pages/frontline/shows/justice/etc/script.html.

93. While this Article attempts to use gender-neutral language to the extent possible, Justice Scalia habitually uses the male pronoun to represent any hypothetical or unnamed person, whether male or female. Because quotes from his opinion include the generic "he," I have likewise referred to this hypothetical judicial candidate as male.

94. *White*, 536 U.S. at 779-80.

95. *Id.*

him to "say it repeatedly . . . after he is elected" in only one very limited circumstance: in a ruling from the bench in a case involving the legitimacy of same-sex marriage.[96]

Finally, and perhaps most troubling, was Justice Scalia's assertion, in effect, that Minnesota was not telling the truth when it defined its compelling state interest in preserving the "announce clause" as impartiality, and his substitution of his own judgment as to what that purpose actually was.[97] Indeed, he did not even bother to refer to that interest as "impartiality," which is the term the state used. Rather, he declared, "the purpose behind the announce clause is not openmindedness in the judiciary, but the undermining of judicial elections."[98]

At the time *White* was decided, both sides claimed victory: the plaintiffs, on grounds that the Court overturned the hated "announce clause"; the state, on grounds that the Court declined to extend its ruling beyond a clause whose literal construction the state itself had already abandoned. And since for years no state had construed the "announce clause" as anything broader than a "commit clause," the decision's only real practical effect was to enshrine what was already being done in the states with the sanctity of Supreme Court precedent. On another level, however, the official overturning of the "announce clause" also demolished a psychological barrier: Both judicial candidates and interest groups were now emboldened to push at the barriers of a new array of targets, including prohibitions on false and misleading statements and pledges, promises, or commitments. That push came virtually immediately.

IV. PART III: AFTERSHOCKS

A. *Weaver v. Bonner*

Seeking the Georgia Supreme Court seat of incumbent Leah Sears, challenger George Weaver, in *Weaver v. Bonner*,[99] attacked her record by using false and misleading statements,[100] in contravention of the Georgia Canons of Judicial Conduct.[101] He also engaged in other activities expressly barred by the Canons, including personally soliciting endorsements. His campaign literature included a brochure attacking Sears for particular decisions, with the statements ripped so thoroughly

96. *Id.*
97. *Id.* at 778.
98. *Id.* at 782.
99. 309 F.3d 1312 (11th Cir. 2002).
100. *Id.* at 1316.
101. GA. CODE OF JUDICIAL CONDUCT (2004).

out of context that some were effectively the direct opposite of Sears's actual meaning.[102] Among the statements in Weaver's brochure were the following:

- "She would require the State to license same-sex marriages . . . ."
- "She has referred to traditional moral standards as 'pathetic and disgraceful.'"
- "Justice Sears has called the electric chair 'silly.'"[103]

In a column adjacent to the last sentence, the words "THE DEATH PENALTY" appeared in capital letters.[104]

The brochure's content sparked a complaint to the Georgia Judicial Qualifications Commission ("JQC"), and Weaver submitted the literature to the JQC's Special Committee for review. Finding that the brochure violated Georgia Canon 7(B)(1)(d)'s prohibition on false or misleading statements, the Special Committee issued a confidential cease-and-desist order requiring Weaver to halt distribution of the misleading materials. If Weaver complied, the order would not be made public.[105] Weaver then "altered" his campaign materials to read:

- "She has stated that 'it is not yet a perfect world' because 'lesbian and gay couples in America cannot legally marry.'"
- "When the Supreme Court upheld a traditional moral standard, she said the result was 'pathetic and disgraceful.'"
- "Justice Sears says she supports the death penalty but has called the electric chair 'silly.'"[106]

This "altered" version, however, still represented a gross distortion of Sears's actual statements. At the same time, Weaver's campaign launched a television commercial that included the following:

- Narrator's voice-over: "What does Justice Sears stand for? Same-sex marriage." This statement was accompanied by the words "Same Sex Marriage."
- Narrator's voice-over: "She's questioned the constitutionality of laws prohibiting sex with children under fourteen." This statement

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102. *Weaver*, 309 F.3d at 1316.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 1316-17.

was accompanied by the words "Questioned Laws Protecting Our Children."
• Narrator's voice-over: "And she called the electric chair silly." This statement was accompanied by the words "Called Electric Chair Silly."[107]

After the commercial ran, three separate complaints were lodged with the JQC's Special Committee. After reviewing Weaver's current campaign materials, including the television advertisement and the revised brochure, the Special Committee concluded that both constituted violations of the earlier cease-and-desist order.[108] Because under the terms of the cease-and-desist order, only compliance would ensure that the charges remained confidential, the Special Committee issued a public statement declaring that Weaver had "intentionally and blatantly" violated the order and had conducted an "unethical, unfair, false and intentionally deceptive" campaign.[109] The public statement came six days before the election, which Weaver ultimately lost. Meanwhile, the Special Committee forwarded its findings to the Georgia Bar's grievance committee for possible disciplinary action.[110]

Despite Weaver's contention that the JQC's cease-and-desist order and its public criticism of him cost him the election, he had already begun fighting the JQC's orders even before Election Day. Indeed, he filed suit in federal district court the day after the Special Committee issued its public statement, arguing that the JQC's actions, including both the cease-and-desist order and its subsequent public criticism, violated his First Amendment rights, and demanding a panoply of other remedies, including a court-ordered special election pitting him against Sears, apparently on the theory that, but for the JQC's interference, he would have won.[111]

The district court's decision tracked that in *Butler*, holding that Canon 7(B)(1)(d)[112] was "facially unconstitutional" on overbreadth grounds, chilling "core political speech."[113] Because the court found Canon 7(B)(2)[114] and Rule 27[115] constitutional, and denied his request for

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107. *Id.* at 1317.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* The court flatly denied Weaver's request for this form of extraordinary relief. *Id.* at 1318.
112. GA. CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(d) (2004).
113. *Weaver*, 309 F. 3d at 1318.
114. GA. CODE OF JUDICIAL CONDUCT Canon 7(B)(2) (2004).
115. RULES OF THE JUDICIAL QUALIFICATIONS COMM'N Rule 27 (2004).

a special election, Weaver appealed the decision to the Eleventh Circuit.[116]

The Eleventh Circuit overturned the district court's ruling with regard to Canon 7(B)(2) and Rule 27.[117] It held that, under the First Amendment, the state could not bar judicial candidates from soliciting endorsements and contributions[118] personally or from making statements that were false and/or misleading.[119] The court held the cease-and-desist order was an unconstitutional prior restraint:

> [T]o be narrowly tailored, restrictions on candidate speech during political campaigns must be limited to false statements that are made with knowledge of falsity or with reckless disregard as to whether the statement is false—i.e., an actual malice standard. Restrictions on negligently made false statements are not narrowly tailored under this standard and consequently violate the First Amendment.[120]

It also promulgated its "breathing space" argument:

> For fear of violating these broad prohibitions, candidates will too often remain silent even when they have a good faith belief that what they would otherwise say is truthful. This dramatic chilling effect cannot be justified by Georgia's interest in maintaining judicial impartiality and electoral integrity. Negligent misstatements must be protected in order to give protected speech the "breathing space" it requires. The ability of an opposing candidate to correct negligent misstatements with more speech more than offsets the danger of a misinformed electorate that might result from tolerating negligent misstatements.[121]

Not content with expanding the rights of officers of the court to make false statements, the court adopted the "actual malice" standard by way of an especially shocking assertion: "We agree that the distinction between judicial elections and other types of elections has been greatly exaggerated, and we do not believe that the distinction, if there truly is one, justifies greater restrictions on speech during judicial campaigns than during other types of campaigns."[122]

Even Justice Scalia, writing in *White*, acknowledged that judicial elections were indeed different from other types of elections.[123] The

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116. *Weaver*, 309 F.3d at 1318.
117. *Id.* at 1322-23.
118. *Id.* at 1322.
119. *Id.* at 1319.
120. *Id.* at 1319-20.
121. *Id.* at 1320.
122. *Id.* at 1321.
123. Republican Party of Minnesota v. White, 536 U.S. 765, 783 (2002).

infirmity in *White* was the announce clause's failure to meet strict scrutiny. However, the Eleventh Circuit's assertion that what it clearly believes is at most a slight distinction does not "justif[y] greater restrictions on speech during judicial campaigns," if widely accepted, bodes ill for the "pledges or promises" and "commit" clauses.[124]

B. Spargo v. New York State Commission on Judicial Conduct

In *Spargo v. New York State Commission on Judicial Conduct*,[125] the New York State Commission on Judicial Conduct ("Commission") instituted proceedings against Supreme Court Justice Thomas Spargo, charging him with five violations of the Rules Governing Judicial Conduct,[126] all stemming from his election campaign. While Commission proceedings were pending, Spargo filed suit in federal district court, alleging that the proceedings themselves, and the rules[127] under which they were brought, were unconstitutional. The challenged rules included both "baseline" rules governing the dignity and integrity of the judiciary and rules containing specific restrictions on speech and political activity. Since the Commission had not yet ruled in the case, much less had Spargo appealed any adverse decision to the court of appeals, the

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124. *Weaver*, 309 F.3d at 1321.

125. Spargo v. N.Y. State Comm'n on Judicial Conduct, 244 F. Supp. 2d 72 (N.D.N.Y.) [hereinafter *Spargo I*], *vacated*, 351 F.3d 65 (2d Cir. 2003) [hereinafter *Spargo II*].

126. The five charges against Spargo were as follows: (1) While a candidate for Town Justice, he gave coupons for free doughnuts, free coffee, and $5 worth of free gasoline to potential voters, and bought cider and doughnuts, a round of drinks, and pizza for potential voters, including government employees; (2) after taking office, he did not disclose to the defense in criminal cases that the District Attorney-elect's campaign, which he had represented, still owed him $10,000; (3) while holding judicial office, he participated in the Republican Party's demonstration at the Florida Board of Elections offices to disrupt the recount of votes in the 2000 presidential election; (4) also while holding judicial office, he delivered the keynote speech at a fundraiser for the county Conservative Party; and (5) a "Supplemental Charge" alleged that he had paid political party consultants for services that were supposedly performed on a volunteer basis (i.e., as quid pro quo for the parties' endorsements and support). *See id.* at 80.

127. Rule 100.1 of New York's Rules Governing Judicial Conduct instructs judges to uphold the "integrity and independence" of the judiciary. N.Y. RULES GOVERNING JUDICIAL CONDUCT Rule 100.1 (2003). Rule 100.2(A) provides that judges shall avoid "impropriety and appearance of impropriety," and shall promote public confidence in the "integrity and impartiality" of the judiciary. N.Y. RULES GOVERNING JUDICIAL CONDUCT Rule 100.2(A) (2003). Rule 100.5(A)(1)(c-g) and Rule 100.5(A)(4)(a) bar judges from engaging in "inappropriate political activity" and require them to uphold the "dignity appropriate to judicial office," respectively. N.Y. RULES GOVERNING JUDICIAL CONDUCT Rules 100.5(A)-(1)(c-g), 100.5(A)(4)(a) (2003).

Commission argued that Spargo had failed to exhaust his state remedies, and the district court was thus required to abstain.[128]

Judge David Hurd not only declined to abstain in the case, but issued an opinion notable for its activism. Rather than confining himself to the allegations in Spargo's complaint, or adhering to the jurisprudential tradition of resolving cases and controversies on the narrowest applicable grounds, he ruled, in effect, that Spargo could receive justice in no forum but Judge Hurd's own.[129] It was irrelevant that the Commission had not yet had a chance to rule on the charges, Judge Hurd declared; even if the Commission dismissed all charges, Spargo still would not have obtained justice because his "constitutional challenge would go unheard."[130] Judge Hurd contended that it was not clear that the Commission had the power to resolve constitutional challenges, and that any review by the court of appeals was only discretionary.[131] However, this conclusion contradicts both the language of the rule, which provides that the Court of Appeals "shall review" such appeals,[132] and proof that the Court of Appeals regarded such appeals as mandatory, as evidenced by the fact that, in what was then the Commission's twenty-seven-year existence, the court had reviewed every single appeal of a Commission ruling *as of right*.

Judge Hurd's decision was disturbing in other respects. He accused the state of lying in referring in its brief to New York's "longstanding tradition" of using codes of judicial conduct, declaring that the state had done so only since 1972, when the Commission was founded.[133] This was inaccurate, to put it charitably; as the state's brief made abundantly clear, New York State had utilized codes of judicial conduct in various forms to govern judicial behavior since the early part of the 20th century.[134] In addition, Judge Hurd gave neither the state nor the Commission the opportunity to address any of the alleged constitutional infirmities: Rather than issue a temporary restraining order, he issued an unprecedented permanent injunction overturning Rules 100(5)(A)-(1)(c)-(g) and 100(5)(A)(4)(a), on grounds that they did not meet strict scrutiny and thus constituted a prior restraint,[135] as well as Rules 100.1 and 100.2(A), on grounds that they were void for vagueness.[136]

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128. *Spargo I*, 244 F. Supp. 2d at 82.
129. *Id.* at 85.
130. *Id.* at 83.
131. *Id.*
132. N.Y. JUD. LAW 44 § (9) (McKinney 2004).
133. *Spargo I*, 244 F. Supp. 2d at 76.
134. *See* Defendants' Memorandum at 20, *Spargo I* (2002).
135. *See Spargo I*, 244 F. Supp. 2d at 92.
136. *Id.* at 91.

The state immediately sought—and obtained—leave to appeal to the Second Circuit Court of Appeals. Those proceedings are discussed below at Section E. Meanwhile, the court of appeals took notice of Judge Hurd's decision and began taking affirmative steps to correct it, using the vehicle of two appeals of Commission determinations already on that court's docket.

C. *In re Raab*

In re Raab[137] concerned four charges levied against Nassau County District Court Judge Ira Raab, three involving various forms of political activity and one involving alleged misconduct on the bench.[138]

In addressing the first three charges, the court of appeals distinguished *Raab* from *White* on grounds that the political activity involved was conduct, rather than speech.[139] Nonetheless, the court assumed a strict scrutiny test purposes of a *White* analysis, simultaneously making it clear that it did not concede that strict scrutiny was the requisite standard of review.[140] The court concluded that the rules in question were sufficiently narrowly tailored to satisfy the first prong of the test.[141] With regard to the second prong of the test, whether the rules served a compelling state interest, the court likewise showed no hesitation: It defined the state interest at issue as the need to comply with the Constitution's Due Process Clause[142]—specifically, in this instance, to ensure a litigant's right to a "fair and impartial magistrate," which required a forum that would give effect to such a right.[143]

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137. 793 N.E.2d 1287 (N.Y. 2003).

138. The four charges were as follows: First, that he had paid $10,000 to the Nassau County Democratic Party operation as "his share" of the party machine's overall campaign expenses; second, that, while a sitting judge, he had worked a phone bank on behalf of a legislative candidate running on the ticket of the Working Families Party, allegedly to build goodwill so that he could obtain an endorsement from the party for his own judicial candidacy in a future election; third, that, also while a sitting judge, he took part in a Working Families Party meeting for the purpose of screening local judicial candidates (his role in the screening process included asking those candidates whether they would be willing to publicize any endorsement they received from the Working Families Party); and fourth, that he had issued a temporary restraining order on an ex parte basis, and that after the order was overturned on appeal, he told the attorney who filed the appeal "that he would be on the bench another 11 years, that he had a 'long memory' and would remember the law firm's actions and that it was a 'good thing' the firm did not practice matrimonial law." *See id.* at 1288-89.

139. *Id.* at 1290.

140. *See id.*

141. *Id.* at 1292.

142. *Id.*

143. *Id.* at 1290-91.

Under this analysis, it was thus no great leap for the court to conclude that the Due Process Clause required the state to "create such a forum and prevent corruption and the appearance of corruption, including political bias or favoritism:"[144]

> Not only must the State respect the First Amendment rights of judicial candidates and voters but also it must simultaneously ensure that the judicial system is fair and impartial for all litigants, free of the taint of political bias or corruption, or even the appearance of such bias or corruption. In our view, the rules at issue, when viewed in their totality, are narrowly drawn to achieve these goals.[145]

D. In re Watson

The court of appeals decided another judicial conduct case, *In re Watson*,[146] at the same time. All five charges against Watson stemmed directly from his campaign, during which he made questionable public statements in a variety of contexts.[147] Seeking endorsements and votes, Watson had written a letter to local law-enforcement officers, asking them to "put a real prosecutor on the bench."[148] He also sent letters to the editor of the local newspaper, which included inflammatory and misleading statements[149] regarding allegedly skyrocketing local crime. He also blamed his opponents in the race for this supposed increase in criminal activity: "[M]y opponents have been in office together for the last several years. Arrests have skyrocketed in Lockport

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144. *Id.* at 1291.

145. *Id.* at 1292. The court also determined that, under the New York Rules Governing Judicial Conduct, political activity on behalf of one's own campaign, within certain restraints, is permissible. However, political activity on behalf of others is not permissible. *Id.*

146. 794 N.E.2d 1 (N.Y. 2003).

147. The charges were as follows: (1) failure to maintain high standards of conduct; (2) failure to promote confidence in the integrity and impartiality of the judiciary; (3) failure to maintain the dignity of the office and to act in a manner that was consistent with the judiciary's integrity and independence; (4) committing or appearing to commit to particular actions (pledges or promises); and (5) knowingly making false statements or misrepresentations about himself or his opponent. *See id.* at 2-3.

148. *Id.* at 2. One of the statements in question read: "We are in desperate need of a Judge who will work with the police, not against them. We need a judge who will assist our law enforcement officers as they aggressively work towards cleaning up our city streets." *Id.*

149. *Id.* at 2-3. The letters included the statement that "Lockport is attracting criminals from Rochester, Niagara Falls and Buffalo to come into our city to peddle their drugs and commit their crimes." Arguing that, as a prosecutor, he had "sent a message that this type of conduct will not be tolerated in Niagara County," he urged local voters to elect him "so that the City of Lockport can begin to send this same message." *Id.*

recently, even though crime is down countywide, statewide and nationally."[150] These themes became a common thread in Watson's campaign advertising,[151] which likewise ran in the local newspaper.

Watson was also interviewed by the newspaper, and was quoted in a similar vein: He alleged that the Lockport City Court's caseload was high because "criminals from surrounding communities are flocking into Lockport. Once we gain a reputation for being tough, you'd be surprised how many will go elsewhere, making the caseload much more manageable."[152] In another quote, he argued, "We need a city court judge who will work together with our local police department to help return Lockport to the city it once was."[153] In still another quote, Watson declared that judges should use bail and sentencing to "make it very unattractive for a person to be committing a crime in the City of Lockport."[154]

The court of appeals used the same analysis in *Watson* that it used in *Raab*—i.e., strict scrutiny, but again, for the sake of argument; it seems clear in both cases that the judges did not believe that the Rules were subject to strict scrutiny.[155] From there, the court's analysis tracked that in *Raab* almost exactly: The "pledges or promises clause" at issue was narrowly tailored to serve the state's compelling interest in satisfying its obligation under the Due Process Clause of the Constitution to ensure a litigant's right to a fair and impartial magistrate and a forum that would ensure such a magistrate.[156] Because the court determined, first, that the "pledges or promises clause" was constitutional, and second, that Watson had committed a violation sufficient to uphold the Commission's decision, the court limited its ruling to that

150. *Id.* at 3.

151. *Id.* According to Watson's ads, "arrests tell the story," and he touted his "proven experience in the war against crime." The court of appeals determined that Watson actually "correlated the increase in arrests with the time period the incumbents were in office, indicating that if elected he would take action they had failed to take to deter crime. These statements echoed sentiments he expressed in the correspondence published in the local newspaper." *Id.*

152. *Id.* Among Watson's statements in the interviews: "[T]he court must remain impartial and evenhanded, but the city must establish a reputation for zero tolerance," and voters "must no longer put up with drug dealers and other violent criminals from Rochester, Buffalo and Niagara Falls, who feel that it is acceptable for them to come into the City of Lockport and commit crimes." He also asserted that it was the court's job to "deter criminals before they come into the city." *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 6.

156. *Id.* at 7.

section of the rules, declining to address the other challenged sections.[157]

E. Spargo in the Second Circuit

Perhaps more significant than the court of appeals holding on the merits of *Raab* and *Watson* was its tactical approach. The court clearly treated *Raab* and *Watson* as an opportunity for a preemptive strike in the battle over *Spargo*,[158] via which it could put on the record its opinion that the federal district court erred in even taking the case. Although abstention was not at issue in either Raab or *Watson*, the court of appeals included language in each decision making clear its opinion that the district court should have abstained until Spargo had exhausted all state remedies:[159] It refuted Spargo's argument (not raised in *Raab* or *Watson*) that neither the Commission on Judicial Conduct nor the court of appeals could guarantee adequate remedies where constitutional issues were at stake.[160]

The court of appeals approach was a smashing success. The Second Circuit held:

> [T]here is no reason for this Court to ignore the New York Court of Appeals' subsequent decisions in [*Raab* and *Watson*], both of which unambiguously affirm that the Commission will consider First Amendment arguments and, further, establish that sanctioned judges may seek mandatory review of the Commission's decision before the Court of Appeals.[161]

Spargo's case was thus remanded back to the Commission on Judicial Conduct to undergo proceedings as prescribed under state law.[162] If, as is widely anticipated, he disagrees with the Commission's ruling, he will then be entitled to take his case to the court of appeals as of right. And if, as is equally widely anticipated, Spargo dislikes the court of appeals ruling, he can then return to federal court to contest the merits. This time, Spargo's challenges to the "baseline" Rules, in addition to the speech restrictions, are expected to become a major issue.

Three major factors are now combining to push the "commit clause" to the Supreme Court. First, application of the "commit clause" and

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157. *Id.* at 8.

158. *Spargo II*, 351 F.3d 65 (2d Cir. 2003).

159. *In re* Raab, 783 N.E.2d 1287, 1289 (N.Y. 2003); *In re* Watson, 794 N.E.2d 1, 4 (N.Y. 2003).

160. *Spargo II*, 351 F.3d at 68.

161. *Id.* at 78-79.

162. *See id.* at 85-86. As this Article goes to press, the Commission has not rendered a decision.

interpretations of what *White* requires vary widely between jurisdictions, and a significant split in the circuits is generally expected. Second, finality in two of the major existing cases—one of them *White* itself—is still outstanding on three major groups of issues: the "commit clause," restrictions on solicitation and related political activity, and the baseline canons. Third, the plaintiffs in both *White* and *Spargo* have shown a predisposition to challenge adverse decisions early and often, and are both expected to take future appeals all the way to the Supreme Court.

V. PART IV: TRIPPING THE RIFT

As a practical matter, then, how should judicial candidates learn to speak publicly? It is clear that some judicial candidates, particularly incumbents, believe that because *White* did not address the "commit clause," their obligations with regard to public statements have not changed at all: Such candidates continue to limit their public statements to such basics as professional qualifications. It is equally clear that other judicial candidates, particularly challengers, regard *White* as a license to make virtually any public statement about any topic, regardless of whether they are likely to be faced with such cases or controversies on the bench, or whether such a statement amounts to a commitment to reach particular decisional outcomes.

However, the greatest pressure on judicial candidates with regard to public statements is still likely to come from external sources—i.e., independent interest groups with definite legal and public policy agendas. A favorite tactic of such groups (and, indeed, one that has long been used in legislative- and executive-branch races) is the candidate questionnaire. Indeed, how to handle candidate questionnaires is currently perhaps the single most common question posed—by candidates, by campaign conduct committees, by disciplinary and other bodies—to the members of the National Ad Hoc Advisory Committee on Judicial Campaign Conduct.[163] This section analyzes candidate questionnaires as a vehicle for judicial candidates to straddle the *White* fault line successfully.

This Article thus uses the judicial candidate questionnaire as a vehicle for turning tradition on its head: converting opportunities to undergo the judicial disciplinary process into opportunities for essential public education; converting opportunities to undermine judicial independence into support for a robustly independent yet accountable third branch.

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163. *See generally* National Center for State Courts' National Ad Hoc Advisory Committee on Judicial Campaign Conduct, *at* http://www.judicialcampaignconduct.org/.

A. *Whither Answers?*

Even in today's post-*White* environment, judicial ethics bodies often resort to the traditional "do not answer" approach as a default response. But today's judicial elections, running into millions of dollars in campaign spending and accompanied by the sort of vitriolic third-party advertising that has generally been the province of Congressional and presidential contests, have made such an approach not merely impractical but untenable. The canons of judicial conduct no longer serve their former prophylactic function: The public neither knows nor cares about distinctions between legitimate and inappropriate questions and responses, and agenda-driven interest groups are only too eager to exploit that fact. As a practical matter, judicial candidates must be prepared to deal with these circumstances as they are. Moreover, while there are compelling interests in barring judicial candidates from making pledges, promises, or commitments to particular decisional outcomes, judicial candidates (and sitting judges) also have an affirmative duty to speak on the record about certain types of issues, and to help educate the public about the role and function of the judiciary and the courts. Recognizing this combination of circumstance and duty, it becomes clear that common default approaches are now unworkable: Judicial candidates no longer have the luxury of either categorical refusals or full substantive responses.

Judicial candidates must also remember that, while *White* and its progeny may allow greater latitude in public comments, aspirational considerations carry great weight: It is not only appropriate but an obligation of the judicial office for judicial candidates to hold themselves to higher standards of conduct than what is expected of other citizens—including candidates for other types of offices. The public likewise has a right not only to expect but to demand that those who would serve as their judges do so. This analysis should thus be regarded as only a baseline for judicial candidates: The role and function of the judicial office, and the integrity and impartiality necessary to that function, demand that judicial candidates adhere to standards that exceed those required by law.

This section makes the case for a new, two-pronged approach: (1) to give the public as much information as possible within ethical guidelines, and (2) without making or appearing to make a pledge, promise, or commitment to particular decisional outcomes or otherwise call into question the candidate's impartiality in future cases. Discussed below, within the context of questionnaires, are three major categories of public commentary by judicial candidates: (1) what they should *not* answer, to

inform how they determine, (2) what they *may* answer, and which combined indicate (3) what they *should* answer.

1. What Judicial Candidates Should ***Not*** *Answer*

Under the current jurisprudential framework, there are three primary categories of answers that judicial candidates should not give: (1) those that signal, either directly or covertly, or amount to a pledge, promise, or commitment to, specific case outcomes; (2) those that constitute false attacks on one's opponent; and (3) those that falsely characterize one's own record. The problems of signaling and pledges, promises, or commitments are discussed at length below in Subsection 2. The latter two categories are matters of ethics and judicial integrity, and notwithstanding the Eleventh Circuit's decisions in *Butler* and *Weaver*, it is appropriate to expect those individuals who aspire to interpret, apply, and uphold the nation's laws to hold themselves to higher standards of conduct than what may be minimally required.

2. What Judicial Candidates ***May*** *Answer*

The approach recommended here is counterintuitive: Judicial candidates' default approach should be to respond to questionnaires. However, (properly) responding is not synonymous with providing a substantive answer to the merits of any particular question as it is presented. Rather, judicial candidates should follow a few common-sense steps, each of which is discussed in turn below. The following discussion highlights pitfalls that candidates must keep firmly in mind at every step of the process, with examples drawn from actual judicial candidate questionnaires.

a. Step One: Analyze the Question Closely

No question or answer, however innocuous, cannot be used inappropriately in the service of an interest group's agenda. However, judicial candidates can no longer rationalize a refusal to respond on this basis, since such a refusal will itself be used to further the same agenda, and likely to worse effect. In deciding whether and how to respond, judicial candidates must analyze two basic components of any question: (1) source; and (2) structure, which includes types of questions and what may be termed "response capacity."

(1) Sources

Judicial candidate questionnaires derive from a dizzying array of sources, each with its own viewpoint(s) and agenda(s). Common sources

generally fall into three major categories: (1) screening entities, including official screening bodies used to aid in interim appointments and bar association screening committees that serve a voter education function; (2) the media, including editorial board queries; and (3) interest groups, including (but not limited to) political parties, advocacy organizations, corporations and other business entities, and "good government" groups. Interest group motivations run the gamut, as do the effects their questionnaires produce.

Whether to answer questionnaires in the first category may not be a discretionary decision. Official screening bodies[164] that aid the executive branch in making interim appointments to the bench may have constitutional or statutory authority; responding in full to their queries is likely to be a prerequisite for consideration. Similarly, responding to questionnaires from bar association screening committees may be discretionary more in theory than in fact: In many jurisdictions, particularly at the local level, the work of such committees has become so institutionalized as to make participation virtually mandatory. These committees often report the results of their screening processes to the media and voters, frequently accompanied by ratings such as "qualified," "well-qualified," or "not qualified"; refusal to participate in the screening process often earns a candidate an automatic rating of "not qualified." Since these committees comprise members of the bar, including retired or former judges, a "not qualified" rating may carry enormous weight with voters who have little other information upon which to make an informed voting decision. Moreover, although such questionnaires are generally narrowly drafted to address a candidate's qualifications, experience, judicial temperament, and other issues related directly to fitness for the bench, many of the questions and answers are subject to interpretations and uses that can hinder judicial independence. An example of such a bar screening committee questionnaire is one disseminated by Seattle's King County Bar Association ("KCBA"), discussed below.[165]

The second category, the media, presents serious public relations pitfalls. The media play essential roles within our governmental system, including educating and informing the public, uncovering and deterring inappropriate behavior by public officials, and what may loosely be

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164. Despite the fact that such bodies generally deal only with judicial appointments, in most states with judicial elections, judges initially reach the bench via interim appointment. Thus, answers given to such screening bodies have the potential to become issues in future campaigns.

165. King County Bar Association, *Sample Questions for Judicial Candidates*, *at* http://www.kcba.org/judicial_ratings/pdf/sample_questions_for_candidates.pdf.

termed "truth-seeking" generally. While there is a good argument for making certain types of questions off-limits with regard to judicial candidates, the media's performance of these functions applies no less to judges and judicial candidates than to officials of the other branches of government. And the media are already predisposed to regard judges and the courts as less than forthcoming: Perhaps the single most common complaint of American journalists with regard to the judiciary is their perception that judges "hide behind" the canons to avoid answering legitimate questions on any topic whatsoever.

Moreover, judicial candidates need the press—and they need good relationships with the press. Judicial candidates complain, equally universally, that the voting public knows little and cares less about either their candidacies or the role and function of the judicial branch. Press coverage is often the only way to ensure that the public is made aware of a judicial candidate's campaign, particularly for those candidates unable to raise the kinds of funds that permit them to run sophisticated television advertisements. Those judicial candidates who decline to cultivate relationships with local press are less likely to receive sympathetic coverage—and those who decline to respond to media questionnaires risk media coverage that portrays them as not merely unresponsive to the "needs of voters," but as unaccountable to the public they serve.

However, the most prevalent source of judicial candidate questionnaires is the special interest group. Such groups represent myriad perspectives and agendas, some relatively benign, others openly threatening to judicial independence. A few groups, such as state and local affiliates of the League of Women Voters, disseminate questionnaires that have been carefully drafted (and often vetted by local bar associations or other experts) to serve a voter education function without compromising judicial independence. However, most interest-group questionnaires are designed explicitly for purposes that are antithetical to judicial independence: as "stalking horses" for support of or opposition to particular judicial candidates; to put judicial candidates' opinions on record with regard to issues likely to come before the courts; and to attempt to force candidates to commit to particular decisional outcomes.

Moreover, such interest groups often work to evade campaign finance and public disclosure laws, so that it becomes impossible for the average voter to determine the agenda behind the questionnaire. While many well-known groups, such as the Christian Coalition, Right to Life, and Planned Parenthood of America distribute questionnaires under their own names, it is increasingly common for individual groups or coalitions of organizations to operate under the name of a "shell" group, frequently

christened "Citizens for [insert benevolent-sounding purpose here]."[166] One example is the "First Judicial District Committee for Judicial Transparency," which distributed a judicial candidate questionnaire in Minnesota's 2002 elections. This "Committee" comprised of two Minnesota lawyers whose agenda included overturning the canons of judicial conduct that were challenged in *White*, and who worked hand in glove with *White* plaintiff Gregory Wersal, who designed and drafted the "Committee's" questionnaire.[167]

(2) Structure

As noted above, issues of structure fall into two basic categories: (1) question type; and (2) response capacity. Within each category, judicial candidates must be aware of an array of subsidiary issues, discussed below.

(a) Types of Questions

Question type is rarely, if ever, straightforward. Judicial candidates should look for problems of phrasing; use of prophylactic language; apparent and subtextual purposes; and the agenda served—which, even if the question itself is identical, may differ substantially between sources. Such problems include "question-begging" and "loaded" language; "separation of powers" infirmities; "direct signaling"; and "covert signaling." Judicial candidates should look for and address each of these issues on a question-by-question basis.

i) Loaded Language and "Begging the Question." Judicial questionnaires frequently comprise questions that are logically unsound in a variety of ways. Most often, they are written in a distinctly subjective manner, using "loaded" language to cast the question in terms of a particular perspective or to imply a "correct" answer. A common version of this tendency involves what logicians call "begging the

166. One such example is "Citizens for a Strong Ohio" ("CSO"), which ran particularly nasty and misleading attack ads in the 2000 Ohio Supreme Court race. CSO refused to disclose its membership or funding under state disclosure laws, and remains embroiled in litigation over that issue. However, CSO turned out to be a front group for the U.S. Chamber of Commerce's Institute for Legal Reform, a so-called "tort reform" advocacy group, and the Ohio Chamber of Commerce. *See, e.g.*, *Ad Campaign Fines Put on Hold*, AKRON BEACON J., Nov. 20, 2004, at D5, *available at* http://www.ohio.com/mld/ohio/2004/11/21/news/state/10231376.htm?1c.

167. Examples of problematic questions from this questionnaire are discussed throughout the ensuing subsections.

question": in legal parlance, bootstrapping the desired conclusions into the question's premise(s) in order to obtain a "correct" answer. Minnesota's First Judicial District Committee for Judicial Transparency 2002 questionnaire,[168] discussed above, provides clear examples of this practice:

> 8. **Rights of Business Owner**. Do you agree with the Minnesota Supreme Court decision Lewis v. Cooper (1986), which held that a private business owner does not have a constitutional right to express religious beliefs through non-coercive policies? Yes ___ No ___[169]

In this example, the very title begs the question: It assumes a category of legal "rights" that may not actually exist, at least for purposes of the question's true subject matter. Similarly, the phrase "non-coercive policies" implies the conclusion that such a description is accurate.[170] In actuality, such cases generally uphold the rights of *employees* to be free from religious pressures in the inherently coercive environment of the workplace.[171] In this context, use of words and phrases such as "rights," "constitutional right," and "non-coercive" are chosen specifically for their loaded effect: They are virtually guaranteed to engender certain automatic responses, irrespective of the lack of accuracy with which they are used. Answering "yes" to this question is subject to interpretation as opposition to religious freedom; answering "no" may be an incorrect statement of the candidate's beliefs, and implies an incorrect statement of the law.

A similar example is found in a subsequent question:

> 10. **Voluntary School Prayer**. Do you agree with the U.S. Supreme Court decision in Lee v. Weisman, 505 U.S. 577 (1992), which held a prayer offered by a clergy [sic] at a high school graduation ceremony was unconstitutional? Yes ___ No ___[172]

Again, the heading begs the question by bootstrapping the questioner's conclusion into the premise: It assumes that the prayer described in the

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168. *See* Minnesota Women Lawyers, *Few Responded to Conservative Group's Judicial Questionnaire. Only One 1st District Candidate Answered Controversial Questions on "Judicial Philosophy," available at* http://www.mwlawyers.org/new_page_19.htm. It appears that the "Committee" does not maintain a Web site. However, *Minnesota Women Lawyers* covered the "Committee" and its questionnaire in the publication's September 16, 2002 edition; Minnesota Women Lawyers has helpfully archived the article on the organization's Web site.

169. *Id.*

170. *See id.*

171. *Id.*

172. *Id.*

case was indeed "voluntary," when in actuality, the Court found that such a prayer was precisely the opposite, since it was a formal part of the ceremony in an inherently coercive environment.[173] Again, loaded language is used to induce an instinctive response: "voluntary," "prayer," "clergy." And again, answering "yes" is likely to be interpreted as anti-religion, while answering "no" is unlikely to reflect either the law or the candidate's beliefs accurately.

A third use of loaded language involves unverifiable blanket statements regarding what "the media" "reported," or requests that the candidate indicate agreement or disagreement with opinions masquerading as statements of fact. The following are also taken from the First Judicial District Committee's questionnaire:

> 12. **Gun Control Attitudes.**
>
> D. Prior to passage of the federal 1994 "Assault Rifle" ban, the media repeatedly reported how these weapons were the "preferred weapons of gangs and drug dealers." Once the law took effect, the media reported that still more had to be done because "assault rifles" are rarely used in crime.
>
> Do you believe the above statement is an accurate characterization of media reporting on this topic? Yes ___ No___
>
> . . .
>
> F. Would you agree with the following — That as a practical matter, "gun control" laws (like waiting periods, background checks, gun bans, ammunition bans, registration, licensing, etc.) are ineffectual in there [*sic*] ostensible goal of reducing armed crime and accidental death? Yes ___ No ___[174]

These statements, phrased as factual declarations, not only contain a distinct point of view but imply a "correct" answer. Such questions, here involving passage or defeat of gun-control legislation, are also the province of the legislature, not the judiciary. Such questions also suffer from another flaw, discussed below.

A final example, also from the First Judicial District Committee's questionnaire, involves a particularly misleading use of language. First, the question reproduced an excerpt from a newspaper article quoting a legal scholar's comment on federalism, but omitted a portion of the comment. Next, the question asked the judicial candidate to substitute other words for the material portion of the quote. Finally, it asked the candidate to express support for the new proposition, as phrased with the "replacement" words:

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173. *Id.*
174. *Id.*

> 12. **Gun Control Attitudes.**
>
> E. The Supreme Court struck down the "Gun-Free School Zones Act" in the [*sic*] U.S. v. Lopez (1995). Harvard Law Professor Laurence Tribe was quoted in a Washington Post service article to the American-Statesman saying, "This court takes structural limits more serious than people had thought . . . which liberals and pragmatists find dismaying."
>
> Do you believe Laurence Tribe's use of the words "structural limits" could be replaced with the words "constitutional limits" without changing the meaning of the quote? Yes ___ No ___[175]

Even leaving aside the lack of context presented by the segment of the quote replaced by ellipses, this question is particularly flawed. First, the question's putative topic is "gun control attitudes," although the cited quote's point refers to the Commerce Clause and attendant federalism issues. Second, both the original version and the "replacement" phrase are abstract legal theories subject to varying interpretations. Finally, the question's subtextual agenda is an attempt to establish the candidate's so-called "judicial philosophy." In other words, it uses code language to establish the respondent as either a "strict constructionist" or a "judicial activist"—labels that are themselves code words that signal how the candidate is likely to decide certain types of cases.

ii) "Separation of Powers" Infirmities. Another common fault found in judicial candidate questionnaires may be termed the "separation of powers" problem. Generally, such questions seek to force the candidate to take a position on a controversial issue that is not within the purview of the courts, but rather, is the province of the legislative and/or executive branches. The problem is two-fold: First, and perhaps most obviously, a substantive answer will indicate a judicial candidate's personal proclivities on what may be a highly inflammatory issue, such as abortion or capital punishment, leading voters to believe that the candidate's personal opinion will affect how she rules in particular types of cases. Second, a substantive answer also erroneously implies (even if inadvertently on the part of the candidate) that her election to the bench will place her in a position to address the issue. And while it is true that tangential issues may become subjects of future litigation that might come before the court, this hardly saves the question: Instead, it compounds the threat to judicial independence, first, by erroneously implying that the judge will have the power to affect legislation directly,

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175. *Id.*

and second, by appearing to commit her to particular decisional outcomes on any attenuated issues that may be challenged in the courts.

In 2001, the Planned Parenthood of Western Pennsylvania Action Fund ("PPWPAF") disseminated such a questionnaire.[176] In this instance, the questionnaire was distributed to all candidates, regardless of office. However, questions that are entirely appropriate for candidates for legislative and executive offices are frequently problematic for judicial candidates. The PPWPAF questionnaire was not tailored to apply to the judicial function, nor were judicial candidates given any "opt-out" mechanism or other form of disclaimer. A classic example is the following question:

> **II. Safe, Legal Abortion**
> **C. Medicaid Coverage for Abortion**
>
> The federal Medical Assistance program pays for health care for low-income persons. This program covers abortion only for women whose health or life is threatened by continuing their pregnancy or who are pregnant as a result of rape or incest. Unintended pregnancy is very common among women of all economic classes in the United States. One half of all pregnancies are unintended and half of those end in abortion. For a low-income woman, an unintended pregnancy can prevent her from completing education or job training or from obtaining employment, with the result she and her family remain in poverty. As a result, several states provide Medical Assistance coverage for abortions in order to guarantee that low-income women have the right to choose. Still, it is conservatively estimated that 1 in 5 women on Medicaid is forced to carry to term because she does not receive assistance through her state and cannot afford to pay for an abortion herself.
>
> 7. Do you support the restoration of medical assistance coverage of abortion for low-income women? ___ Support ___ Oppose[177]

This question asks whether the candidate supports or opposes legislation requiring medical coverage for abortion services for low-income patients. Whether a judicial candidate personally supports or opposes such a law—which can be enacted only by the legislative and executive branches—is irrelevant to her duties on the bench. A more accurate predictor of judicial qualifications and temperament is whether, *despite* the candidate's personal support for or opposition to such legislation, she will uphold it—provided, of course, that it passes constitutional muster and suffers from no internal legal conflicts.

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176. *See* Planned Parenthood of Western Pennsylvania Action Fund ("PPWPAF"), *2001 Candidate Questionnaire*, *available at* http://www.ppwp.org/ppwp/vote/Questionnaire.PDF.

177. *Id.*

Many judicial candidates may fall prey to a false sense of security in providing full and substantive responses to such questions, since, regardless of their personal political opinions, such issues remain outside the scope of their jurisdiction. Judicial candidates can—or should—be able to interpret such questions and their answers in light of their irrelevance to the judicial function. The public, however, cannot be expected to make such distinctions, and interest groups will be only too willing to exploit public failure to serve their own ends. As a practical matter, providing substantive responses to such questions may foster the perception that the candidate, if elected, (1) will play a role in ensuring that the legislation in question is (or is not) enacted; (2) will lobby for (or against) it; and/or (3) will adhere to her personal opinions, notwithstanding the law or the facts of the individual case, in upholding or overturning the legislation when it comes before her in a case or controversy.

iii) Direct "Signaling." The problem with judicial candidate questionnaires is not that they are designed to disclose the candidate's personal political views, but rather, that their subtextual purpose is to force judicial candidates to issue decisions in the future that are consistent with their campaign statements. The questionnaire thus becomes a dual-purpose tool: as a means during the campaign to achieve a sympathetic bench, and as a bludgeon to ensure future decisional compliance. The PPWPAF questionnaire, discussed above, and a 2004 primary questionnaire distributed by the Alabama-based League of Christian Voters,[178] provide examples of attempts to secure direct signals of future decisional outcomes.

The PPWPAF questionnaire also provides examples of contemporary issues that are likely to come before the courts:[179]

> **II. Safe, Legal Abortion**
> **D. Pennsylvania's Abortion Control Act**
> Pennsylvania's Abortion Control Act, which was designed to restrict and limit access to abortion, went into effect in March of 1994. In its first year of implementation, women, hospitals, and reproductive health care providers reported an increase in the number of adult and

178. *See The 10 Questions the League of Christian Voters Plans to Ask Candidates*, LEDGER-ENQUIRER, Feb. 9, 2004, at B1, *available at* http://www.ledgerenquirer.com/mld/ledgerenquirer/news/local/7909041.htm. Strangely enough, the LCV does not make its questionnaire available on its Web site. However, The Associated Press reproduced the questionnaire's ten questions; the *Ledger-Enquirer* of Columbus, Georgia picked up the story, and has helpfully archived the article on its Web site.

179. For purposes of this analysis, the fact that PPWPAF authored this particular question is irrelevant; its inverse could just as easily be (and frequently is) asked by anti-abortion groups in the same manner.

> teenaged women who left the state in order to choose abortion; an increase in emergency room visits resulting from self-induced, illegal and unsafe abortions; and an increase in the number of women unable to exercise their right to choose at all. The Journal of the American Medical Association of Mississippi's 24-hour delay law enacted in 1992 also noted these effects in a study.
>
> **Mandatory 24-Hour Delay and State-Mandated Lecture**
>
> Pennsylvania's Abortion Control Act requires a woman to receive a state-mandated lecture and then delay her decision at least 24 hours before having an abortion. There is no public health rationale for these restrictions, which were designed solely to make abortion more difficult to obtain. The mandatory 24-hour delay often causes a wait of up to one week that can result in riskier procedures.
>
> 8. Do you oppose the restrictions that require a mandatory 24-hour delay and a state-mandated lecture prior to having an abortion?
> ___ Yes ___ No[180]

This fact pattern is not only likely to come before the courts, but is likely to comprise virtually identical issues of law. If a judicial candidate responds fully and substantively to the question as presented—i.e., if she limits her response to checking the blank next to the word "Yes" or the word "No"—her impartiality in future cases involving these issues will be doubted by one side or the other. The inevitable result will be charges, on the one hand, of "judicial activism" and "legislating from the bench," or on the other, that she has incorrectly reached for invalid exceptions in order to avoid criticism that she is simply ruling in accordance with her (publicly-declared) personal opinions. Indeed, such a situation is so untenable to the interests of justice that she may simply be forced to recuse herself entirely from all such cases, absurdly nullifying any legal benefit PPWPAF presumably sought in the first place by attempting to force public disclosure of her personal views.

The League of Christian Voters ("LCV") took an unusually unsubtle approach in its offering on the abortion issue:

> 7. What actions have you personally taken on the issue of pro-life [*sic*]?[181]

In a state with a substantial population of religious conservatives, abortion is highly controversial, to say the least. It is an issue that is also likely to come before the courts with some regularity. But despite its somewhat vague wording, this question is actually unusually blunt: It seeks not only to ascertain whether a candidate's political views are

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180. PPWPAF, *supra* note 176.

181. LEDGER-ENQUIRER, *supra* note 178.

what the group terms "pro-life," but to put him on notice that he is expected to take action publicly to support so-called "pro-life" laws and activities. In this case, the demands extend beyond signaling an actual commitment to taking action to ensure a "pro-life" society, which by definition would require the candidate to oppose existing law and precedent. It requires no small leap of logic for voters to assume that a judicial candidate who answers this question as presented (and, presumably, by including examples of what "actions" he has "personally taken on the issue of pro-life") will not uphold *Roe v. Wade*[182] and its progeny. Likewise, a litigant whose case involves her right to an abortion is unlikely to feel that she will receive anything approaching a fair and impartial hearing from such a judge.

A similar problem arises in a subsequent question:

> 8. Do you believe marriage should be defined as a union between one man and one woman? Please discuss. Have you actually done anything on this issue?[183]

Again, this question goes beyond a request for the candidate's personal opinions, seeking examples of actions (or, more accurately, activism) that presumably would demonstrate ideological purity. And again, this issue is one that is likely to come before the courts, since the past two years have seen numerous challenges to laws that prevent gay couples from marrying and the passage of numerous public referenda in an attempt to continue to prevent marriage between gay partners.

Other than these questions' efforts to ensure an activist bench, they are not especially surprising. Certainly, their subject matter comprises issues one would expect from a group that clearly identifies its agenda as encompassing those topics. However, the LCV questionnaire also includes questions that attempt to influence judicial candidates to defy unpopular decisions openly:

> 4. What actions did you take about the display of the Ten Commandments in the Alabama Judicial Building?[184]

This question concerns an especially volatile issue in Alabama: former Chief Justice Roy Moore's unilateral installation, without consulting his colleagues and under cover of night, of a two-and-a-half-ton granite monument representing the Decalogue. What is particularly shocking about this question is that it seeks to force judicial candidates, in answering it, to take two particularly troubling steps: (1) to express

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182. 410 U.S. 113 (1973).
183. LEDGER-ENQUIRER, *supra* note 178.
184. *Id.*

direct opposition to a duly-issued court order, as well as decades of constitutional precedent; and (2) to take action that contravenes such an order.[185]

Again, answering such questions *as presented* is likely to achieve two results, neither of which enhances public confidence in the integrity of the judiciary First, a judge who has provided such answers will find that any decision involving related issues will be regarded by a substantial segment of the population as suspect at best. Second (and, one hopes, more likely) the judge will be forced to recuse himself from any case involving such issues, voiding his election's effect on the interest group's agenda and depriving an overworked court system of the judge's services and expertise.

iv) "Covert" Signaling. Questions that seek to produce "covert" signaling may present a greater problem than those with a more overt approach, if only because such questions may appear, to judicial candidates and voters alike, to be harmless. Frequent topics of such questions are what appear to be merely administrative matters; however, the language and phrasing used may be interpreted by interested parties to constitute commitments to decisional outcomes. Often, they employ "code words" that have a very specific substantive meaning for members of the interest group distributing the questionnaire; these members may interpret the use of such code words as a direct signal of intent to comply with or promote their interests. The LCV's questionnaire again provides an example:

> 5. What actions did you take regarding the removal of Chief Justice Roy Moore?[186]

To a voter who has no particular interest in or opinion of the Decalogue controversy, this question may appear to be simply a query regarding the mechanics of judicial discipline. For members of the LCV, however, who openly opposed Moore's removal and advocated keeping the Decalogue in the courthouse rotunda, this question has a specific and multi-layered agenda. First, it implies that Moore's removal was somehow illegitimate. Second, it invites candidates to take a public position opposing valid court orders and longstanding constitutional

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185. There is a good argument that providing a full and substantive answer to this question as presented (presuming that the answer is consistent with the LCV's positions) puts a judicial candidate in the unfortunate position of having crossed the line from speech to conduct—which is not afforded First Amendment protections, *Butler* and *Weaver* notwithstanding.

186. LEDGER-ENQUIRER, *supra* note 178.

precedent. Third, it implies that some specific course of action existed that *should* have been taken by any judicial candidate. Finally, these implications combine to pressure judicial candidates to take such action, or at least to support the idea of taking it. Worthy of note here is that fact that any such "action" might have risked contravening the orders of the federal district court, the Alabama Court of the Judiciary, and the Alabama Supreme Court.

This topic appeared in various forms throughout the LCV's questionnaire. Another example inquired:

> 6. If the special Supreme Court affirms the Court of the Judiciary's decision to remove Roy Moore as chief justice, will you support efforts to get Gov. Bob Riley to appoint Roy Moore as chief justice? Why or why not? What will you actually do either way?[187]

Again, these might be regarded by otherwise disinterested members of the public as questions of judicial administration, addressing how the candidate would handle a case of judicial discipline and removal. And again, use of such language as "will you support efforts to . . ." will not only obtain an answer that implies a position on the merits of Moore's case, but will pressure candidates to express support for or take specific actions opposing removal and/or supporting reappointment by the governor.

However, some questions that may produce covert signals are neither so obvious nor even intentional—indeed, quite the opposite. The King County Bar Association ("KCBA") questionnaire,[188] vetted by ABA experts and designed to explore a judicial candidate's qualifications for the position in a variety of contexts, is nonetheless a case in point. Two categories of such questions, as classified by the KCBA questionnaire itself, are explored below.

The following questions are taken from the category labeled "Knowledge"[189] by the KCBA:

> 10. What criteria would you use for deciding whether to impose or affirm sentences outside of standard ranges?
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> . . . .

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187. *Id.*

188. King County Bar Association, *Sample Questions for Judicial Candidates*, *available at* http://www.kcba.org/judicial_ratings/pdf/sample_questions_for_candidates.pdf. The questionnaire differs from what the site terms "Questionnaire for Applicants," which is the questionnaire used by the Judicial Screening Committee of the King County Bar Association to evaluate applicants' employment history, professional expertise, and related matters.

189. *Id.*

> 19. Do you feel the War on Drugs has been effective or ineffective?[190]

These two questions involve legitimate issues for public discussion—issues that are important in helping the public understand how judicial decisions are made and why unpopular decisions may nonetheless be required by law. However, they also involve particularly controversial topics in contemporary American jurisprudence: judicial discretion in criminal sentencing and the validity of strict drug laws. Answers to these questions, if not carefully drafted, thus may provide fodder for partisans on either side of these substantive debates. They may also provide interest groups with an opportunity to paint a particular candidate as a "judicial activist" or a "strict constructionist," as tough on crime or as sentencing criminals to the proverbial slap on the hand.

A second category in the KCBA questionnaire is labeled "Effectiveness,"[191] and encompasses case management and judicial philosophy:

> 9. Is it appropriate to impose more restrictions on what cases go to trial? Is there a need for more mandatory mediation and settlement efforts? What specifically do you propose to do about this, if elected?
>
> . . . .
>
> 11. What is your general judicial philosophy?
>
> . . . .
>
> 28. To what extent do you believe that a judge should or should not defer to the actions of a legislature?[192]

The first question addresses court administration matters, including caseload management and allocation of resources. However, the issues listed also appear in so-called "tort reform" arguments. Providing a response that exceeds the basic question or is carelessly drafted may permit partisans on either side of the debate to co-opt the response for inappropriate purposes. Depending on the answer given, litigants in cases involving these issues may not have confidence in the judge's impartiality.

The latter two questions address fundamental constitutional structure. Members of the legal community have traditionally found public discussions of judicial philosophy perfectly acceptable, even under the restrictive clause guidelines. However, there is a substantial difference between a discussion that explains canons of construction or a candidate's approach to handling cases and a discussion that consists of publicly identifying oneself as a "strict constructionist" or "originalist"

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190. *Id.*
191. *Id.*
192. *Id.*

and criticizing "judicial activists."[193] As noted above, these labels are readily identifiable code words that have become identified not only with certain types of cases, but with specific decisions. Thus, identification with such labels may tend to signal how a judicial candidate will decide certain types of cases. In some contexts, use of such labels may extend beyond signaling to be reasonably construed as a pledge, promise, or commitment to particular decisional outcomes.

(3) Response Capacity

"Response capacity" refers to the format provided for answering a questionnaire. Factors include predefined answer options; inclusion and phrasing of a "decline to respond" option or prophylactic language; whether space is provided for explaining answers; time allowed for completion and submission; and public reporting methods. Each is discussed in turn.

Predefined answer options are a common feature of judicial candidate questionnaires. Examples include "yes"/"no," "support"/"oppose," and "agree"/"disagree" formulations; since they accompany questions formulated to serve the distributing group's agenda, neither the questions nor either response is likely to be complete or fully accurate. From an interest group's perspective, however, such limitations have two major virtues: They conveniently force candidates to take what appears to be a clear-cut position on an issue of importance to the group's agenda, and they are easily reducible to sound bites that are useful in promoting or opposing particular candidates (i.e., "Judge X supports same-sex marriage" or "Judge Y opposes abortion").

A related factor in analyzing response capacity concerns "decline to answer" options and other prophylactic language. Along with the usual dichotomous answers, some questionnaires include a third option, which may be labeled "decline to respond"—or, more insidiously, "refuse to respond." On occasion, a questionnaire may include its own "disclaimers": for example, that the answers are provided pursuant to *White*, and thus only to the extent permitted by applicable canons of conduct; or that, because the candidate is committed to rendering decisions based on each case's individual facts and applicable law, no response may be construed as a pledge, promise, or commitment to a particular decisional outcome. As a practical matter, such "disclaimers" are merely additional

193. In the past, I have explained this phenomenon in part by noting that no judicial candidate ever ran for office by promising to be a "judicial activist." It has recently come to my attention that there is one judge, who shall remain nameless, who has indeed done so. Thanks, Judge, for spoiling my best argument here.

examples of question-begging, and regardless of whether they provide the desired prophylactic effect against disciplinary action, they are unlikely to enhance public confidence in the judge's impartiality with regard to such cases.

Such options may appear to provide an easy solution for judicial candidates who feel that responding to particular questions would run afoul of the "commit clause." In actuality, these options usually present the candidate with the classic Hobson's choice: A judicial candidate who inserts a check mark next to one of these options can be sure that, of all of her answers, *that* one will be reported publicly. It is likely to be reported in one of two ways, neither of which is helpful: At best, it will consist of the "refused to respond" label, without further explanation; worse, and perhaps more likely, it will be highlighted as an example of the judicial candidate's alleged refusal to be accountable to the voters.

A third factor is the presence of "white space" for candidates to explain or expand on their answers or to insert their own disclaimers. As noted above, most questions are generally phrased in a way that renders them—and any answer to them—incomplete, inaccurate, or both. A questionnaire that is designed to achieve accuracy rather than partisan sound bites should include plenty of white space for candidates to amplify their answers and so ensure completeness and accuracy. Such space should also be available so that candidates may insert their own disclaimers: for example, a statement limiting an answer to the extent permitted by the canons of judicial conduct; or a statement making clear that, although the answer represents the candidate's personal opinion, the candidate will render decisions based only on the facts and applicable law of each individual case.

Fourth, judicial candidate questionnaires usually include extremely short time frames in which candidates may complete and submit their responses. This tactic serves two opposing but perhaps equally useful objectives: It pressures candidates into either responding quickly, which may induce them to be less circumspect in deciding whether and how to answer, or causes them not to respond at all. Quick but careless responses may, if only inadvertently, signal commitments to particular decisional outcomes; they are thus useful both for supporting or opposing particular candidates and for pressuring a judge, once elected, to rule accordingly. Failure to respond entirely is likely to be reported publicly as a refusal to respond, which permits interest groups to portray candidates they oppose as unresponsive to the needs of voters and unaccountable to the public they serve.

Finally, this practice of public reporting is itself a factor that candidates must consider. For interest groups, no practical purpose is served by disseminating a "confidential" questionnaire. Regardless of

how the group characterizes its plan to use the responses, judicial candidates should assume that they will be reported publicly in some form; in all likelihood, responses will be distributed to the group's members and constituents, the general public, and the media. Such reporting frequently takes the form of a "voter guide" or a "scorecard" rating candidates by how "friendly" they are to the group's agenda; answers that are regarded as especially useful in supporting or opposing particular candidates are likely to be trumpeted in press releases and other media contacts. How judicial candidates should handle issues of response capacity are addressed in the ensuing sections.

b. Step Two: Calibrate the Response Carefully

After evaluating each question in light of the foregoing cautionary measures, judicial candidates must balance completeness of their responses with limitations on pledges, promises, or commitments; aspirational standards of speech and conduct; and the requirements of their oath to uphold the Constitution and the rule of law. Striking the correct balance will often preclude a full and substantive answer to a question as it is presented. However, judicial candidates should not permit this to deter them from submitting any response at all.

In practical terms, judicial candidates may find that accurate responses will nearly always include three elements: (1) a summary of the applicable restrictions on pledges, promises, or commitments; (2) an explanation of the reasons for such restrictions and the compelling interest they serve; and (3) a conversion of the answer into an opportunity for public education. With regard to the third element, PPWPAF's question on mandatory waiting periods for women seeking abortion services provides a case in point. Distilled from its throat-clearing "spin," the question itself consists only of the following:

> Do you oppose the restrictions that require a mandatory 24-hour delay and a state-mandated lecture prior to having an abortion? ___ Yes ___ No[194]

A correctly-balanced response to this question might include an explanation that, under current law, whether to institute such waiting periods is a matter for the legislature; that the function of the courts in such cases will be limited to ensuring that the law is drafted and applied according to the requirements of the Constitution and the rule of law; a plain-English summary of the guidelines judges are required to consider in determining whether laws of this type pass constitutional muster; and

194. PPWPAF, *supra* note 176.

that the candidate's job, if elected, will be to interpret and apply the law accordingly, regardless of personal beliefs.

c. Step Three: Ignore Circumscribed Responses

Regardless of the prescribed format, circumscribed responses are likely to be incomplete or inaccurate, and judicial candidates should not be reluctant to ignore their limitations. Where the format permits nothing more than a check mark next to "Yes" or "No," a candidate should simply strike through the options provided and append a complete answer. If there is insufficient space on the form, he may simply insert the phrase "see attached," or words to like effect, and complete his answer on a separate sheet. While many interest groups will publicly report such an answer as "refused to respond," the candidate who responds in this manner retains two advantages. First, by submitting a thoughtful and careful response, he will be able to avoid criticism or censure for signaling a pledge, promise, or commitment to a particular outcome. Second, despite the fact that his answer is likely to be mischaracterized, he will have proof of his actual answer, which may be released publicly if he is attacked as unresponsive or unaccountable.

d. Step Four: Regard Each Questionnaire as an Opportunity

The final step is perhaps the most difficult, and yet perhaps the most important: Judicial candidates must make the psychological shift viewing questionnaires as threats and regarding them as opportunities. The degree of difficulty should not be underestimated; it counters decades of ethics tradition, as well as a natural reticence on the part of many, if not most, judges in order to avoid compromising the judiciary's impartiality, integrity, and independence. However, such a shift will achieve important short- and long-term results for both the individual candidate and the judiciary as a whole: It will help to reduce the pressures of today's high-stakes judicial elections; and properly used for public education, it will promote both the judicial independence demanded by our system of government and the judicial accountability demanded by the voting public.

3. What Judicial Candidates Should Answer

If judicial candidate questionnaires present an opportunity, they also arguably present an obligation. In these days of sweeping public attacks on individual judges and judicial independence generally, silence has become a luxury that judicial candidates can no longer afford. As noted above, the media already suspect judges of "hiding behind" the canons

of judicial conduct to avoid discussing legitimate issues. Interest groups are only too ready to fill that void. And most members of the public will have little or no contact with judges and the court system, unless they or their loved ones have a case in court, which virtually ensures that their perceptions will be skewed by self-interest.

This lack of public education, coupled with the aggressive and widespread presence of interest-group politics in judicial elections, presents a good argument that judges and judicial candidates have an affirmative duty to engage in certain activities: to help educate the public; to promote judicial independence and accountability; and to set and adhere to high ethical standards of conduct that promote the dignity and integrity of the judiciary and the courts. Many judges are indeed required, either by job description or by circumstance, to engage in public commentary to the extent necessary to set the court system's budget and to lobby for essential resources. Judges also are frequently asked to teach, and to serve on speakers' bureaus for public education programs in the schools, on forums and panels, or in conjunction with Law Day and other law-related education activities. Such public outreach is important, but insufficient.

Traditional approaches to judicial speech restrictions have long permitted judges and judicial candidates to avoid discussing topics that are not only legitimate, but necessary to informed voting decisions and public understanding of the judicial system. Since *White*, much energy has been expended by a few candidates and a great many interest groups in pressuring judicial candidates to discuss issues of debatable legitimacy, but little effort has been made to induce them to discuss those issues that are most fundamental to the proper role and function of the third branch. Indeed, judicial candidates arguably should not wait for these issues to arise in the context of an interest-group questionnaire or a reporter's query, but should raise them *sua sponte* at appropriate opportunities. Following is a list of topics suitable for public discussion by judicial candidates; it is by no means exhaustive, but provides a substantial starting point:

- the role and function of the courts as a separate branch of government, including separation of powers and checks and balances;
- the role and function of the judge, including the standards governing how judges interpret the law, apply rules, and reach decisions;
- the canons of judicial conduct, including their purpose, the function of and rationale for restrictions on speech and conduct, and the differences between judges and other public officials that make such restrictions necessary;

- rules and their purposes, including the rules of evidence and procedure, standing, and standards of review; how and why they may compel unpopular or counterintuitive results, and why judges are bound by them even when they disagree with the result;
- explanation of general substantive law[195] of particular public interest or relevance (such as the criminal law, custody and child support laws, employment law, or the First Amendment and other aspects of constitutional law) and how the Constitution, statutes, court and procedural rules, and administrative regulations differ in force and effect;
- administrative matters, including caseload management; court budgets; court facilities; forms of assistance available for low-income litigants; and the like; and
- as noted above, lobbying and other activities to obtain the resources necessary to permit the judiciary to perform its constitutional functions.

B. Speak From the Bench

Finally, there is one option open to all sitting judges that few seem to recognize: speaking directly from the bench. This solution's obviousness perhaps explains the fact that it is so consistently overlooked. But public comments that would validly raise eyebrows if made as part of a judge's election campaign are often precisely the kinds of statements that would evoke no adverse reaction if simply made from the bench.

Take, for example, the following hypothetical: An incumbent judge presides over a defendant's trial and conviction for drunk driving. Our defendant is a repeat offender, and this incident involved injury to a local child. An interest group, outraged at what it regards as a too-lenient sentence, launches a series of ads attacking the incumbent. What the ads neglect to mention, of course, is that the judge sentenced the defendant to the maximum allowed by law. They likewise neglect to mention that turning the judge out of office will have absolutely no effect on sentences given to future defendants in identical cases, because it is the legislature, not the judge, who must amend the relevant statute to provide for longer terms of incarceration.

Now suppose, in levying that sentence, the judge had made the following statement:

> Your conduct is reprehensible. If I could, I would sentence you to ten years in prison. However, the Legislature sets the terms of sentencing

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195. Such a discussion should, of course, occur outside the context of current or pending cases.

> in these cases, and it has chosen to make two years the maximum sentence for this particular offense. Thus, although I wish I could do more, I am sentencing you to two years, the maximum allowable by law.

Would anyone have been the least bit surprised by such comments? More to the point, would anyone have been troubled by them? It's unlikely, to say the least. And judges confront such situations every day. They must avail themselves of such opportunities for two purposes: to immunize themselves, at least in part, from inappropriate and misleading attacks; and to educate the media and the public, when the law mandates an unpopular result, about the reasons why.

This is not, of course, a recommendation that incumbent judges take such opportunities as license to make any sort of public statement on any issue whatsoever. As with every other aspect of the judicial function, the use of judicial discretion—in both senses of the phrase—is critical. But valid opportunities to speak from the bench do exist. Judges should train themselves to recognize such opportunities when they present themselves, and to take advantage of them in appropriate ways.

VI. CONCLUSION

Of course, as with any issue, the topics and methods outlined above may be discussed in ways that signal pledges, promises, or commitments to particular decisional outcomes, or otherwise violate the canons of judicial conduct. However, making a habit of engaging in careful discussion of such topics will help judicial candidates to become comfortable with speaking publicly—which, in turn, will help them make the psychological shift necessary to confronting and dealing appropriately with external pressures to engage in public commentary. And such a shift is necessary if judicial candidates—and, indeed, the third branch as a whole—are to navigate the fault lines of the post-*White* landscape successfully.

Judicial candidates should also recognize that they are not alone in facing these issues. An array of public and private organizations have the expertise and resources to help judicial candidates navigate these fault lines, and can put advisory opinions, memoranda, guidelines, and handbooks at candidates' disposal. The National Center for State Courts ("NCSC") maintains two entities: the National Ad Hoc Advisory Committee on Judicial Election Law and the National Ad Hoc Advisory Committee on Judicial Campaign Conduct, which provide a variety of such resources. Many state and local bar associations and oversight committees maintain telephone hotlines to field candidate questions and fulfill a rapid-response function to apprise the media and the public of

improper attacks. The American Bar Association provides toolkits to help judicial candidates, and the ABA, the NCSC, and the National Center for Courts and Media all maintain resources that can help judicial candidates learn how to interact comfortably and appropriately with reporters.

As noted at the outset, *White* has largely been regarded as a major rupture in standards of judicial speech and conduct. While the steps recommended here are far from easy, they are necessary if judicial candidates are to adapt successfully to the new, post-*White* jurisprudence. For the moment, *White* appears to have subsided into a rift in the landscape; these steps will go far toward preventing a new and cataclysmic rupture. If, in the process, they lead to a judiciary that is more robustly authoritative, autonomous, and accountable, *White* may someday be regarded not as a catastrophe, but as an evolutionary step.