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KEEPING UP APPEARANCES: THE CONSTITUTIONALITY OF THE MODEL CODE OF JUDICIAL CONDUCT'S PROHIBITION OF EXTRAJUDICIAL SPEECH CREATING THE APPEARANCE OF BIAS

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TABLE OF CONTENTS

*443 I. INTRODUCTION

Nearly all of the nation's judges are subject to some form of the American Bar Association's *Model Code of Judicial Conduct* ("*Judicial Model Code*"), which sets forth the ideals to which judges should aspire and the standards by which their conduct shall be judged. [1] Founded upon the principle that a judge does not divest himself or herself of ethical responsibilities when leaving the courthouse, the *Judicial Model Code* stipulates that the conduct of a judge, inside the courtroom and out, must never cast reasonable doubt on the judge's capacity to serve impartially. [2] Indeed, judges have an obligation to avoid the appearance of bias in their extrajudicial speech and conduct. [3]

In 2002, the United States Supreme Court held in *Republican Party of Minnesota v. White* [4] that a provision of Minnesota's Code of Judicial Conduct, which stated that a "'candidate for judicial office, including an incumbent judge,' shall not 'announce his

or her views on disputed legal or political issues,"' violated the First Amendment right of free speech by prohibiting candidates from announcing their positions on issues of public interest. [5] The Court critically examined a number of common conceptions relating to the nature of the judicial role and the process of judging, [6] many of which serve as the foundation of the *Judicial Model Code*. [7] Although *Republican Party of Minnesota's* holding had limited application in that it addressed a state code provision that no longer appeared in the then-current edition of the *Judicial Model Code*, [8] it nonetheless ***444** opened a "Pandora's box." [9] Since *Republican Party of Minnesota*, various cases have subjected the *Judicial Model Code* to a raking constitutional examination, particularly regarding campaign speech, and frequently have found the *Judicial Model Code* wanting. [10]

While judges and commentators have focused on *Republican Party of Minnesota's* effects upon the *Judicial Model Code's* electoral speech provisions governing judicial candidates, recent state cases have called into question the constitutionality of an even more fundamental cornerstone of the *Judicial Model Code*--the general duty of the sitting judge to avoid the appearance of bias in the judge's extrajudicial activities. Citing *Republican Party of Minnesota*, the Mississippi Supreme Court, in *Mississippi Commission on Judicial Performance v. Wilkerson*, held that a justice of the peace could not be sanctioned for proclaiming in a letter to the editor of his local newspaper that gay people were mentally ill and should be placed in a mental institution. [11] The court asserted that the *Judicial Model Code's* proscription of extrajudicial bias impermissibly abridged the judge's First Amendment right to engage in issue-oriented and religious speech. It declared the state's asserted interest in fostering the appearance of judicial impartiality not to be compelling, noting that motions for recusal or voting at the ballot box were better mechanisms for addressing concerns about the judge's apparent bias toward homosexuals. [12]

Conversely, the same year the Mississippi Supreme Court decided *Wilkerson*, the Louisiana Supreme Court in *In re Ellender* sentenced a district court judge to ***445** a year's removal from office for creating the appearance of bias against African-Americans by donning a prison uniform, handcuffs, Afro wig, and blackface at a Halloween party held at a public restaurant. [13] The difference with which the high courts of contiguous states have treated essentially equivalent manifestations of extrajudicial bias demonstrates the degree to which the appearance of bias standard is currently at issue.

This article critically examines the different responses of courts and commentators to extrajudicial bias. Part II discusses the two prevailing--and opposing--conceptions of judges and judging, which I label "traditionalist" and "revisionist." Part III explores the affinity of the *Judicial Model Code's* anti-bias provisions with the traditionalist conception of the judicial function, while Part IV examines *Republican Party of Minnesota* and its legitimization of the revisionist conception of judging. Part V provides a critical analysis of the holdings in *Wilkerson* and *Ellender* as they relate to the impropriety of extrajudicial bias directed at individuals or groups. Part VI discusses the constitutionality of the appearance of bias standard, followed by the demonstration in Part VII that neither of the proposed alternatives to that standard--recusal or resort to the ballot box--adequately protects litigants' due process rights. Part VIII asserts that both the traditionalist and revisionist conceptions of judging fail to appropriately measure the appearance of impartiality in extrajudicial conduct. This article concludes that the appearance of bias standard as it pertains to extrajudicial conduct remains a beneficial concept that can withstand constitutional scrutiny, albeit with some amendment of the pertinent provisions of the current *Judicial Model Code* and its proposed revision.

II. DIVERGING CONCEPTIONS OF JUDGES AND JUDGING

Underlying the constitutional debate over the appearance of impartiality standard is a larger question of how to conceptualize the role of the judiciary. In response to this larger question, two opposing schools of thought have emerged, which I label traditionalist jurisprudence and revisionist jurisprudence. [14] It is critical to understand both schools because the dispute concerning the appearance of impartiality essentially centers around a skirmish between the traditionalist and revisionist camps.

A. TRADITIONALIST JURISPRUDENCE

Those who espouse the traditionalist conception of jurisprudence are idealists. ***446** [15] The traditionalists' ideal is judicial independence and their guiding light is Alexander Hamilton of *The Federalist*. [16] In Number 78 of *The Federalist Papers*, Hamilton envisioned the judiciary as the bulwark against infringement of the Constitution and the guarantor of individual rights. [17] Two sources threatened the Constitution--the legislature and the people. The judiciary's role was to mediate both, and its effectiveness depended precisely on its independence from either. [18] On the one hand, an independent judiciary assured the people that the legislature's actions remained within constitutional bounds by testing the compliance of statutes with constitutional principles, which the judiciary would also define. [19] On the other hand, that same judiciary could protect individuals from the tyranny of majority action by upholding constitutional principles to mitigate the effects of laws singling out particular classes of people for unfair treatment. [20] The task called for a judiciary "of integrity and moderation," the very qualities that eventually would garner public respect for the judiciary as an institution. [21]

Throughout the nineteenth and early twentieth centuries, a highly mechanical view of the judicial role prevailed, [22] answering Hamilton's call for an independent judiciary dedicated to "inflexible and uniform adherence" [23] to the "fundamental law" of the Constitution. [24] A judge followed the letter of the law, or if necessary, formulated the law in accordance with commonly accepted legal principles. All the while, the judge remained in a state of detachment, not only from the community at large, but also from the judge's inner personal feelings and beliefs. [25]

Today's traditionalists recognize that interpreting and formulating the law is a complex process that draws from a variety of sources, including community ***447** values, common beliefs, and even public policies. [26] They also recognize that the judiciary has an active role to play in the community and, indeed, a duty to educate the public about the law and the judicial process. [27] Yet traditionalists remain true to Hamilton's fundamental conception of the judiciary, believing a judge must rule impartially and follow the law as it applies to each particular case, putting aside any preconceived notions, political agendas, social commitments, and personal biases. [28] They believe that a judge cannot be truly impartial unless the judge also appears impartial. [29] The American Bar Association, a leading proponent of traditionalism, sums up this view on its "How Courts Work" web pages:

Law won't work without independent courts. That means courts that aren't under the thumb of the political powers-that-be. An independent judge can assure that your case will be decided according to the law and the facts--not the vagaries of shifting political currents. [30]

Judges are like umpires in baseball or referees in football or basketball. Their role is to see that the rules of court procedures are followed by both sides. Like the ump, they call 'em as they see 'em, according to the facts and the law--without regard to which side is popular (no home field advantage) without regard to who is "favored," without regard for what the spectators want, and without regard to whether the judge agrees with the law. [31]

Although Hamilton might not have endorsed the American Bar Association's literary style, he would have applauded its message.

B. REVISIONIST JURISPRUDENCE

Those who espouse a revisionist conception of the judiciary conceive of themselves as realists. [32] Revisionists base their conception not so much on theory as on direct observation of what occurs in the courtroom. They strive to look beyond the ideal to actuality. [33] It is not surprising, therefore, that the revisionist ***448** conception has gained force precisely as advances in mass communication have opened courtrooms to inspection as never before.

Revisionists view the traditionalist conception as essentially a "myth." [34] That is not to say that revisionists believe judges should substitute their own beliefs for the rule of law or allow a personal bias against a particular class of persons to determine their treatment of individual litigants because they do not. [35] But revisionists do believe that the traditionalists delude themselves by minimizing the role that a judge's philosophical, religious, political, and personal predilections (or biases) play in judicial decision-making. [36] The revisionists emphasize that no judge comes to the bench as a blank slate. Judges are, after all, human beings like everyone else. Over the course of a lifetime, each judge will have developed a multi-faceted and highly personal ethos that guides how the judge thinks and acts, an ethos that will accompany the judge to the bench and determine to a large degree what the judge perceives the law to be, and if the law requires formulation, what it should be. [37]

Revisionists argue that the traditionalist conception of the judiciary, by de-emphasizing judicial individuality, actually disadvantages litigants. [38] In the revisionist view, the judicial process does not work like refereeing a baseball game at all; it works more like the process a person would employ to persuade a friend to attend the game. Both the inviter and the invitee will be bound to some extent by prevailing social conventions. Within the context of those conventions, the person extending the invitation will tailor the request to best appeal to the friend's personal predilections. As the inviter becomes better aware of those predilections, the better able she will be to craft an invitation that successfully achieves the friend's attendance at the game. And so it is, revisionists argue, with the judicial process. The law (conventions) binds litigants and judges alike; ***449** nonetheless, success will fall to the litigant who better frames the law in accordance with the judge's ethos (predilections). To assure a level playing field, transparency (in terms of what the judge thinks and believes) is key. Revisionists most strenuously object to the traditionalist view's purported lack of transparency. Revisionists assert that, by imposing restrictions upon judicial conduct and speech which create an artificial appearance of judicial impartiality, or at least, mask judicial individuality, the traditionalist conception deprives litigants of the information they need most. [39] These restrictions will not only prevent the litigant from detecting disqualifying judicial bias directed at him, but may also impede him in arguing the case in terms best calculated to capture the judge's attention and produce a successful outcome. [40]

A byproduct of the revisionist conception, albeit one revisionists do not universally embrace, is the notion that an individual's extrajudicial and judicial conduct can be separated one from the other. [41] This stands in sharp contrast to the traditionalist view that the status of "judge" envelops and, indeed, subsumes the private individual. However, just as the latter view comports with the broader traditionalist conception of bias (encompassing impartiality of viewpoint as well as impartiality towards individuals in general), so too does the former notion logically extend the narrower revisionist take on impartiality (focusing upon bias directed at actual litigants). If bias in the courtroom is the touchstone, extrajudicial actions become irrelevant so long as they bear no implication of bias in actual litigation. Under this theory, the judge and private individual become two distinguishable personae, which can be interchanged as the circumstances warrant. [42]

III. THE *MODEL CODE OF JUDICIAL CONDUCT*

Whereas Hamilton conceived an independent judiciary as a bulwark against infringements to the Constitution, the American Bar Association and other traditionalists conceive the *Model Code of Judicial Conduct* as a bulwark against depredations to judicial independence. [43]

***450** The roots of the *Judicial Model Code* go back to 1924, when the American Bar Association adopted the *Canons of Judicial Ethics* ("*Judicial Canons*"). [44] Conceived as a hortatory work, the *Judicial Canons* were, in the purest sense, a model for judges and an indicator of "what the people have a right to expect from them." [45] Canon 14 addressed judicial independence directly; it advised judges to "not be swayed by partisan demands, public clamor or considerations of personal popularity or notoriety, nor be apprehensive of unjust criticism." [46] Canon 20 alluded to the importance of the appearance of an impartial judiciary through its call to serve "with due regard to the integrity of the system of law itself." [47] And Canons 28 and 30 included exhortations to avoid engaging in political speech and to refrain from making campaign promises. [48] Plainly, the traditional principles of judicial independence had begun to clash with the goal of judicial accountability, as manifested by many states' adoption of elected judiciaries. That forty-three states adopted the *Judicial Canons* officially suggests that, even though the *Judicial Canons* carried only an aspirational message, many jurisdictions began to view them as a mediating influence against the political and social pressures inherent in an elected judiciary. [49]

In 1972, the American Bar Association introduced the *Model Code of Judicial Conduct*. [50] Intended to replace the *Canons of Judicial Ethics*, the *Judicial Model* ***451** *Code* was a substantially new work and considerably more statutory in nature. [51] The *Judicial Model Code* seeks to advance the public welfare in two fundamental ways. On the one hand, it continues the work of its predecessor by serving as a guide for judges; while, on the other hand, it sets forth the rules to which judges are expected to abide and by which their conduct will be judged. [52] Substantially revised in 1990, and amended in 1997, 1999, and 2003, [53] the *Judicial Model Code* consists of five general principles called "Canons," which establish the broad outlines of appropriate judicial conduct. Each Canon is explicated by "Rules," which are in turn, illustrated by "Commentary." The Canons and Rules are vested with authority for disciplinary purposes whereas the Commentary is supposed to be only of informational value. [54] Because the *Judicial Model Code* is simply that, a model, no state or jurisdiction is required to adhere to it or to adopt it. To date, however, forty-nine states and the District of Columbia have adopted and follow the *Judicial Model Code* in some iteration, Montana being the single holdout. [55]

Underlying the entire *Judicial Model Code* is the admonition that judicial independence depends upon public confidence in the judicial system, which in turn requires judges to engage at all times in conduct that is and appears to be appropriate and unbiased. Canons 1 and 2 establish this at the very outset. Canon 1 states: "A judge shall uphold the integrity and independence of the judiciary." [56] Canon 2 states: "A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities." [57] Section A of Canon 2 underlines the continuous nature of the foregoing duties, requiring the judge to "act *at all times* in a manner that promotes public confidence in the integrity and impartiality of the judiciary." [58]

Canon 3 calls for the impartial and diligent performance of judicial duties; [59] thereunder, section B(5) specifically proscribes official conduct or speech that exhibits any bias. [60] Section B(10) provides that "a judge shall not, with respect to cases, controversies or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial ***452** performance of the adjudicative duties of the office." [61]

Canon 4 addresses extrajudicial activity directly. It focuses on the judge's duty to engage in conduct outside the courthouse that "minimize[s] the risk of conflict with judicial obligations." [62] Section A, which deals with extrajudicial conduct generally, specifies that such a conflict would result were the judge's activities to: "(1) cast reasonable doubt on the judge's capacity to act impartially as a judge; (2) demean the judicial office; or (3) interfere with the proper performance of judicial duties." [63] The Commentary explains that a reasonable doubt of judicial impartiality may arise from extrajudicial expressions of bias or

prejudice as, for example, demeaning remarks or jokes about a person's "race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status." [64] Although Section B of Canon 4 permits the judge to write, speak, and teach on legal and non-legal matters, it cautions that these activities must not compromise any of the judge's duties specified under the *Code*. [65]

Canon 5, which addresses the appearance of impartiality in the electoral context, applies equally to judges and candidates for judicial office. [66] The Canons and underlying Rules require the avoidance of "inappropriate political activity," [67] including, among other things, assuming a leadership role in or speaking for a political organization, [68] and making pledges, promises, or commitments concerning matters likely to come before the court which are inconsistent with the impartial performance of judicial duties. [69]

In July 2003, the American Bar Association appointed a Joint Commission to evaluate and revise the *Judicial Model Code* within the context of ongoing developments in the law (particularly, *Republican Party of Minnesota* and its progeny) [70] and the increasing politicization of the judicial selection process. The Joint Commission's Final Report, issued on December 14, 2005, is scheduled for presentation at the American Bar Association's meeting in February 2006. [71] Focusing upon *Republican Party of Minnesota's* criticism of ethical provisions that subject candidates for judicial office to more stringent speech and conduct ***453** restrictions than those imposed upon sitting judges, it strives for greater equality of treatment. [72] Thus conceived in part as a defense to *Republican Party of Minnesota*, the revision maintains basic traditionalist principles, although in an altered format. Notably, it retains the core principles and strictures upon which disciplinary actions for extrajudicial bias have been based.

Present Canons 1, 2, and 3 are combined into two canons. Proposed Canon 1 remains a bastion of generality. It lays out the overarching rule that "[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary." [73] Proposed Canon 2 focuses on the duty to "perform the duties of judicial office impartially, competently, and diligently." [74] This includes the duty to apply the law impartially, "without regard to whether the judge personally approves or disapproves of the law in question." [75] Canon 2.02(A) and (B) call for judges to act without bias or prejudice. Newly drafted Comments further define bias: "Examples of manifestations of bias include but are not limited to epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating or hostile acts; suggesting a connection between race, ethnicity or nationality and crime; and irrelevant references to personal characteristics." [76] In addition, Proposed Canon 2 carries forward the obligation to avoid making pledges, promises, or commitments on matters likely to come before the court that might jeopardize impartiality in the performance of judicial duties. [77]

A new Canon 3 prohibits judges from using their positions to advance their personal affairs. [78] Proposed Canon 4 continues to cover extrajudicial conduct, requiring the judge "to minimize the risk of conflict with the obligations of judicial office." [79] As in the present *Code*, Proposed Canon 4 contains a slightly revised general prohibition covering bias against individuals, which requires the conduct of all extrajudicial activities in a manner that neither "interfere[s] with the proper performance of judicial duties" [80] nor "cast[s] reasonable doubt on the judge's ability to perform judicial duties with independence, integrity, and impartiality." [81] However, an amendment to Canon 4 also requires extrajudicial ***454** conduct to accord with other parts of the *Code* as well. [82] The Comments explain that, while judges should not isolate themselves from their communities, [83] they should be mindful that extrajudicial expressions of bias may raise questions about their ability to act impartially as a judge. [84] Proposed Canon 5, relating to political activity, retains the current *Code's* strictures noted above. [85]

The current and proposed versions of the *Judicial Model Code* take a solidly traditionalist position regarding extrajudicial bias. An individual who swears a judicial oath assumes duties and obligations that remain with him or her twenty-four hours a day, seven days a week. Among those is the general obligation to refrain from extrajudicial speech or conduct that creates the appearance of bias. Yet, neither version includes a specific canon or rule proscribing extrajudicial bias against individuals on the basis of their identification with a class. Both relegate their discussion of such bias to the commentary, which carries no disciplinary force. Accordingly, any prosecution of prejudice of this kind, by default, must be founded upon one of the *Judicial Model Code's* more general admonitions against creating the appearance of impropriety or impartiality. As Part IV will demonstrate, the degree to which those general provisions function as "catch-alls" significantly impacts decisions after *Republican Party of Minnesota* concerning the fate of restrictions on extrajudicial speech creating the appearance of bias against certain individuals or groups. [86]

IV. *REPUBLICAN PARTY OF MINNESOTA V. WHITE*

Republican Party of Minnesota v. White [87] is less important for its actual holding than for the fact that it legitimizes the revisionist conception of the judicial function and provides a template for attacking traditionalist precepts that the *Judicial Model Code* enunciates.

In *Republican Party of Minnesota*, the Supreme Court examined the constitutionality of Minnesota's so-called Announce Clause, [88] a speech restriction derived from an old version of the *Judicial Model Code*. The Court held this provision violated the First Amendment right of free speech of candidates for judicial election by prohibiting them from stating their positions on issues of ***455** public interest. [89] On its face, the holding appeared relatively insignificant. Because the then-current edition of the *Judicial Model Code* no longer retained the Announce Clause, *Republican Party of Minnesota* affected only seven states. [90] And the Court very specifically took no position regarding the constitutionality of any of the current *Judicial Model Code's* provisions. [91] In point of fact, though, *Republican Party of Minnesota* created shockwaves. [92] For the first time, the Supreme Court examined critically the relevance and value of an ethical conduct provision in light of the day-to-day realities of judicial practice. By so doing, the Court appeared to be sending a message that the *Judicial Model Code* need not be deemed sacrosanct; that high-mindedness, alone, could not make an ethical rule constitutional; and that what judges actually do, how they actually think, and how they actually interact with others are important considerations when evaluating the efficacy and constitutionality of rules of ethical conduct. [93] Thus, *Republican Party of Minnesota* signifies a revisionist response to the traditionalist ideals. And, in large measure, it is all about the relative importance of maintaining an appearance of impartiality.

Justices Stevens and Ginsburg, in separate but related dissents, laid out the traditionalist principles with which Justice Scalia, writing for the revisionist majority, would do battle. Both dissenters emphasized that, whether judges are appointed or elected, an independent judiciary requires judges to distance themselves from the political fray. Restrictions that would be unconstitutional in an ordinary political election where the goal is to attract supporters, here instead serve a compelling purpose because an independent judiciary by definition serves no constituency. [94] As Justice Ginsburg noted, the distinctions between political and judicial candidates extend as well to the criteria for their selection. Whereas the selection of a candidate in a legislative race is issue-oriented, judicial selection focuses on the candidate's fitness to serve, without regard to the outcome of prospective litigation. Thus, issue speech should play no role in a judicial election contest and, indeed, would undermine public confidence in the integrity of the judiciary. [95] The prospect of a judicial candidate, in fact or appearance, proffering a commitment for a vote would repudiate the very nature ***456** of judicial independence and, in Justice Stevens' view, would indicate an unfitness to serve. [96]

Justice Ginsburg also argued that the Announce Clause protected the appearance of due process. Due process forbids a judge to preside over any case in which the judge has a personal interest. Justice Ginsburg feared the candidate who announced his or her views on particular issues during a campaign for judicial office might feel pressured, out of concern for losing the next election or seeming unprincipled, to conform to the previously announced views if related cases were to come before the judge on the bench. The Announce Clause alleviated the concern that such pressure might amount to a personal interest in the outcomes of cases and thereby forestalled any appearance of impropriety. [97]

Justice Scalia's response is beginning to assume a status in revisionist circles akin to that of *The Federalist Papers* in the traditionalist camp. [98] Although Justice Scalia never repudiates the importance of fairness in the judicial system, he seems to redefine it. As demonstrated below, Justice Scalia directly confronts core traditionalist values with current judicial practices. He then portrays those traditionalist values as being out of touch with reality, as empty theoretical shells that are, at best, ineffective or, at worst, harmful to the people's real interests. [99]

Justice Scalia begins his analysis by defining the nature of the speech at issue, a critical choice that determines the standard of review to which the speech will be subjected. In this instance, the determination was relatively straightforward. Pure campaign speech ranks indisputably among the categories of speech to which the First Amendment accords the greatest protection. [100] As a restriction of “core” First Amendment speech, the Announce Clause became subject to strict scrutiny, requiring the state to prove it was narrowly tailored to serve a compelling state interest. [101] Minnesota asserted the Announce Clause fostered two such interests: preserving the impartiality of the judiciary, which protected litigants' due process rights; and preserving the appearance of an impartial judiciary, which promoted public confidence in the judicial system. [102]

Justice Scalia posited that Minnesota's interest in “impartiality” could be taken to have three different meanings, and he proceeded to apply the strict scrutiny test to each in turn. [103] Justice Scalia considered several factors: whether the interest offered in support of the restriction was, in fact, its intended purpose; if so, whether the restriction was narrowly tailored (as demonstrated by a not ***457** unnecessary circumscription of protected speech); and, finally, whether the restriction served a compelling interest (as indicated, for example, by a lack of under-inclusiveness). [104]

First, Justice Scalia examined the root meaning of impartiality--a lack of bias for either party to the litigation. This advanced the due process interests of the particular litigants by guaranteeing an equal application of the law. Justice Scalia conceded due process would be violated if the judge had a financial or other personal interest to favor one party over another. [105] Yet the Announce Clause, he asserted, barely protected these interests at all. Indeed, it prohibited speech addressing issues in general, not speech directed against any parties to a pending legal action. While a candidate's pronouncement upon an issue could forecast how he or she might ultimately rule in a related case, the loser in that case would lose as a result of the judge's application of the law (which would apply as well to any individual standing in the loser's shoes) rather than as a result of bias directed towards the loser personally. Thus, by this definition, any appearance of impartiality the Announce Clause engendered was misdirected. [106]

Justice Scalia next examined impartiality from the standpoint of “a lack of preconception in favor or against a particular legal view.” [107] He observed that most judicial candidates, having served previously as attorneys or judges in other courts, would have developed at least some general conceptions pertaining to, for example, the scope, reach, and interaction of key Constitutional provisions. In fact, the absence of such preconceptions would indicate more a lack of qualification than a lack of bias. That the Minnesota Constitution required judges to be “learned in the law” demonstrated the state's appreciation of the value of preconceived notions about the law. [108] Accordingly, if the purpose of the Announce Clause was to create the appearance that

judges had no such views, it was severely misguided, as there could be no compelling reason to mitigate qualities that, in fact, enhanced the application of justice. [109]

Finally, Justice Scalia addressed the connotation of impartiality with open-mindedness. As the state argued--and as Justice Ginsberg seconded in her dissent--the Announce Clause served a compelling state interest by promoting this kind of impartiality, which relieved judges of the pressure to make rulings in a manner consistent with prior campaign proclamations. [110] However, Justice Scalia doubted that any such purpose inhered in the Announce Clause. [111] Its ***458** under-inclusiveness fatally undermined this purported rationale, [112] for it left unregulated speech that was equally, if not more, indicative of the candidate's views--the legal opinions of sitting judges written in fulfillment of their judicial duties; writings and speeches made prior to running for office; and the remarks of judges and candidates engaged in the kind of speaking, lecturing, and teaching that the *Model Code of Judicial Conduct*, itself, permitted. Indeed, Minnesota proffered no evidence demonstrating that issue-oriented campaign remarks placed any greater pressure upon judges to conform to those views in subsequent rulings than did these other types of prior statements. [113] As Justice Scalia noted:

The short of the matter is this: In Minnesota, a candidate for judicial office may not say "I think it is constitutional for the legislature to prohibit same-sex marriages." He may say the very same thing, however, up until the very day before he declares himself a candidate, and may say it repeatedly (until litigation is pending) after he is elected. [114]

With all of this other speech left unchecked, the pursuit of the appearance of open-mindedness could neither be credited nor considered a compelling state interest. [115]

Justice Scalia concluded by attacking the dissenters' contention that, given the unique nature of judging, judicial contests demanded different treatment. At its core, a judicial election *is* an election, he proclaimed, and, like every other election, it demands the greatest First Amendment protections. [116] That the candidates aspired to become judges did not alter the central principle that "[i]t is simply not the function of the government ... [and] [w]e have never allowed [it] to prohibit candidates from communicating relevant information to voters during an election." [117] Indeed, the point of an election was to inform voters about the candidates; to keep voters in the dark for the sake of the appearance of impartiality denied them the information they most needed, thereby subverting the very process the people adopted for choosing their judges. [118] As Justice O'Connor noted in a separate concurrence, while many factors inherent in judicial elections might threaten public confidence in the judiciary, states which had chosen such elections had made the beds in which they now lay. The path to judicial independence was not to be achieved by restricting constitutionally-protected campaign speech, but rather by modifying the process by which judges ***459** were chosen. [119]

Justice Kennedy, in a separate concurrence, asserted that the Court should invalidate summarily all abridgments of speech unless they fell into one of the traditional First Amendment exceptions. On that basis, he would have declared the Announce Clause unconstitutional without resort to the strict scrutiny test. [120] He noted that, while ethical codes of judicial conduct provided valuable guidelines for judges generally, the Constitution forbade their use as a tool to restrain the First Amendment right of candidates to speak in judicial elections. [121] "The state cannot opt for an elected judiciary," he stated, "and then assert that democracy, in order to work as desired, compels the abridgment of speech." [122]

Notwithstanding his opposition to candidate speech restrictions, Justice Kennedy affirmed that "[j]udicial integrity is ... a state interest of the highest order." [123] But he emphasized that the prohibitions of speech were not necessary to achieve that goal. A state could draft standards of judicial conduct and enforce them through rules of judicial recusal more stringent than the

demands of due process. Such standards would also provide guidance for all who sought to foster judicial integrity and greater respect for the judicial system. Indeed, advocates for judicial integrity had a duty to speak out, to educate the public about desirable standards of judicial conduct, to protest speech indicative of bias or otherwise inconsistent with excellence, and to use elections, themselves, as tools to assure the appointment of the most worthy candidates. [124]

In *Republican Party of Minnesota*, the majority rejected appearance in favor of reality. Whereas the dissenters viewed the Announce Clause as a transforming device having the power to cleanse the electoral process of impurities harmful to judicial independence, the majority saw it as an illusion. For the majority, the underlying consideration was that the actions of judges, judicial candidates, and the people themselves do not conform to that ideal. And to pretend otherwise, to foster the appearance of an ideal that, in fact, does not exist, creates false expectations about the nature of the judiciary and the judicial system that do more harm than good. Thus, in the majority's view, an understanding of the judicial system as it *is* is more likely to achieve equal treatment under the law than the imposition of artificial restrictions that strive to effect what the system *ought to be*.

Today, judicial speech is much more public and accessible than in Alexander Hamilton's day. Candidates for elected judicial office want to speak about pressing issues and voters want to hear them. Sitting judges are no less likely to ***460** hold their own views on these issues and may, in fact, have already expressed them in rulings from the bench. Incumbents may, and indeed many do, discuss issues of law in extrajudicial settings. By acknowledging these realities, using them as a yardstick in its constitutional analysis, and subjecting longstanding truisms of ethical conduct to searching scrutiny, the majority endorsed an iconoclastic approach to the review of the *Judicial Model Code*, a development that, as the next section demonstrates, puts even the *Code's* prohibition of the appearance of extrajudicial bias into play.

V. CONFLICTING APPROACHES TO THE APPEARANCE OF EXTRAJUDICIAL BIAS

Within the span of a single year, the neighboring supreme courts of Mississippi and Louisiana reached diametrically opposite conclusions in assessing whether a judge might be sanctioned for engaging in extrajudicial conduct creating the appearance of bias toward a class of individuals. These decisions are illuminating for two reasons. First, they demonstrate how *Republican Party of Minnesota* raises questions about the validity of standards of conduct as they are applied in non-electoral contexts. And, second, the decisions of the Mississippi and Louisiana courts are, respectively, paradigmatic examples of revisionist and traditionalist responses to the appearance of this brand of extrajudicial bias.

A. *MISSISSIPPI COMMISSION ON JUDICIAL PERFORMANCE V. WILKERSON*

In *Mississippi Commission on Judicial Performance v. Wilkerson*, the Mississippi Supreme Court considered the *Judicial Model Code's* prohibitions of expressions of extrajudicial bias and cast them down not only as violations of judicial free speech, but also as impediments to due process. [125] Although *Wilkerson* cites *Republican Party of Minnesota* only fleetingly, [126] it stands solidly in *Republican Party of Minnesota's* revisionist mold. Like *Republican Party of Minnesota*, it devalues appearances. Yet it pushes the bounds of revisionism still further, not only by moving beyond the electoral context, but also through its strong inference that judicial integrity is a quality that only the naïve would automatically presume. [127]

In *Wilkerson*, the Mississippi Supreme Court reviewed the determination of the Mississippi Commission on Judicial Performance that Judge Connie Glen Wilkerson had violated Canon 4(A)(1) of the Mississippi Code of Judicial Conduct. Canon 4(A)(1) proscribes extrajudicial conduct which creates reasonable ***461** doubt of the judge's ability to act impartially on the bench. [128]

On March 23, 2002, Judge Wilkerson, a justice of the peace in George County, wrote a letter to the editor of the local newspaper, responding to a story reporting the award by various states of quasi-marital rights to gay couples. The paper published Judge Wilkerson's letter five days later. It read:
March 23, 2002

Dear Editor:

I got sick on my stomach today as I read the (AP) story on the Dog attach [sic] on the front page of THE MISSISSIPPI PRESS and had to respond! AMERICA IS IN TROUBLE!

I never thought that we would see the day when such would be here in America. The last verse of chapter one of the book of Romans in our HOLY BIBLE is my reason for responding and sounding the alarm to this. You need to know as I know that GOD in Heaven is not pleased with this and I am sounding the alarm that I for one am against it and want our Lord to see and here [sic] me say I am against it.

I am sorry the California Legislature enacted a law granting gay partners the same right to sue as spouses or family members. Also that Hawaii and Vermont have enacted such a law too.

In my opinion gays and lesbians should be put in some kind of mental institute instead of having a law like this passed for them.

I don,t [sic] know but I believe if we vote for folks that are for this we will have to stand in thh [the] judgement [sic] of GOD the same as them.

I am thankful for our Legislators and pray for wisdom for them, on such unbelievable legislation as this.

May GOD bless each one of them in JESUS CHRIST NAME I pray!

Thank you for printing this,

Connie Glen Wilkerson

Bro. Connie C. [sic] Wilkerson

***462** [stamped [129]

Judge Wilkerson subsequently reiterated his views in a radio interview, which aired on April 10, 2002. [130]

Lambda Legal Defense and Education Fund, Inc. and Equality Mississippi, two gay rights advocacy groups, filed a formal complaint with the Commission, charging that Judge Wilkerson's written and oral comments violated numerous provisions of the Mississippi Code of Judicial Conduct. [131] The Commission, in turn, filed a formal complaint against the judge. [132] Following the submission of Judge Wilkerson's answer and a hearing at which Judge Wilkerson testified, the Commission found that Judge Wilkerson violated Canon 4A(1) “in allowing his extra-judicial conduct to cast a reasonable doubt on the judge's capacity to act impartially as a judge.” [133] It recommended a public reprimand, a $150 fine, and payment of $450 to cover the costs of the proceedings. [134]

In his brief to the Mississippi Supreme Court, Judge Wilkerson argued that *Republican Party of Minnesota* gave him full reign to express in private his religious and political views about homosexual people. His statements, he asserted, constituted the kind of issue-oriented speech on a matter of public concern to which *Republican Party of Minnesota* accorded the strongest First Amendment protections. [135] Judge Wilkerson invoked the Supreme Court's definition of "impartiality" in *Republican Party of Minnesota*, as "the lack of bias for or against either *party* to the proceeding." [136] Accordingly, he argued that to censure him for apparent partiality when no specific party was before him would "violate his rights to free speech, freedom of the press, and the free exercise of his religion." [137] Moreover, the provisions under which he had been charged were so overbroad and vague as to leave him and all judges in serious doubt as to the kinds of private conduct in which they might permissibly engage. [138]

The Commission, in turn, asserted that Judge Wilkerson deserved sanction for having plainly engaged in conduct prejudicial to the administration of justice and to the appearance of the integrity of the judiciary. [139] In its view, this was a simple case where a judge violated unequivocal strictures of the Mississippi Code of ***463** Judicial Conduct. [140] The Commission argued the First Amendment issues the judge raised were smokescreens and that *Republican Party of Minnesota* had no application outside the electoral context. [141] Indeed, the Commission also asserted that *Republican Party of Minnesota* supported its case, citing Justice Scalia's apparent acquiescence with the proposition that "impartiality of the judiciary is a compelling state interest, if 'impartiality' is defined as 'the lack of bias for or against either party to the proceeding.'" [142]

Thus, both sides used the same point from *Republican Party of Minnesota* as the core of their respective arguments. The issue boiled down to whether judicial "impartiality" applied only to a party in an action in the judge's court or might also encompass prospective parties belonging to a particular class.

Following the model of *Republican Party of Minnesota*, the Mississippi Supreme Court first addressed the nature of the speech at issue. The court apparently took it for granted that Judge Wilkerson's particular statement about the mental incapacity of gays and lesbians was integrated with and part and parcel of the political and religious remarks surrounding it. Indeed, throughout its opinion, the court characterized the speech at issue not as a slur, but rather as social or religious commentary on a topic of heightened public interest. Thus, by bootstrapping the mental illness remark to the surrounding speech, which could be construed more readily as core speech, the court extended to it the highest First Amendment protection--strict scrutiny. [143]

Thus framed, the issue became not whether the state might censure a judge for creating the appearance of partiality by disparaging an entire class of potential litigants, but rather whether the state could demonstrate a compelling interest in "preventing judges from announcing their views on gay rights." [144] And, in this, the court asserted, the state had failed, having mistakenly equated "judicial impartiality" with the "appearance of impartiality of the judiciary." [145] While the due process requirement of a level playing field made the former an indisputably compelling state interest, the court saw no compelling interest in regulations that made judges appear impartial when, in fact, they were not. [146] Indeed, such regulations disadvantaged the very people they most aimed to protect and impeded the goal they sought to achieve.

Allowing--that is to say, forcing--judges to conceal their prejudice against gays and lesbians would surely lead to trials with unsuspecting gays or lesbians ***464** appearing before a partial judge. Unaware of the prejudice and not knowing they should seek recusal, this surely would not work to provide a fair and impartial court to those litigants. [147]

Thus, for litigants, the path to an impartial court lay not in rules of judicial conduct, but rather in the right to seek recusal. And for members of the general public who took offense to extrajudicial conduct, there was the ballot box. [148]

The court concluded by quoting a Malayan proverb: “Don't think there are no crocodiles because the water is calm.” [149] It then observed that the “Commission urges us to ‘calm the waters' when, as the guardians of this state's judicial system, we should be helping our citizens to spot the crocodiles.” [150] This statement constitutes an extraordinary repudiation of a fundamental notion of traditionalism and the *Judicial Model Code* alike--that the public has a right to expect and, indeed, presume that judges will act with integrity and impartiality. [151]

B. *IN RE ELLENDER*

In re Ellender, by contrast, presents a court comfortable with traditionalist ideology and, by extension, the *Judicial Model Code*. The *Ellender* court views the *Judicial Model Code* as a positive role model that stimulates honorable conduct, not as a subterfuge behind which judges with baser motives may hide. It conceives the *Judicial Model Code* as the vehicle that protects, not harms, the people's interest in an impartial judiciary. And it deems maintaining the appearance of impartiality, as enunciated by the *Judicial Model Code*, to be an inherent duty, not a burden that judges may casually cast aside. [152]

In re Ellender required the Louisiana Supreme Court to pass sentence upon District Court Judge Timothy Ellender. The state's Judiciary Commission had previously determined that Judge Ellender had violated Canons 1 and 2A of the Louisiana Code of Judicial Conduct, which call for a judge to uphold the integrity of the judiciary and avoid at all times the appearance of partiality. [153] The action arose after Judge Ellender appeared in public at a Halloween party at a local restaurant wearing an orange prison jumpsuit, black face paint, and an Afro wig, while handcuffed to his wife, who was costumed as a sheriff. Judge Ellender's conduct, which attracted the attention of the local and national news media, led the NAACP and others to file formal complaints with the Commission. Those complaints castigated the judge for engaging in racial stereotyping and portraying ***465** African-Americans as criminals. [154]

By the time the case reached the Louisiana Supreme Court, Judge Ellender had stipulated to the facts, conceding violations of Canons 1 and 2A. He denied, however, having intended to portray African-Americans in a disparaging manner, and refuted allegations that his conduct demeaned African-Americans or that it raised concerns that he would not treat them fairly in court. However, he apologized for his conduct, and his judicial record, upon official examination, revealed no disparity in treatment of African-Americans in his courtroom. [155] The court's task was to determine the sanction Judge Ellender would receive. [156]

The court's opinion is notable for the gravity with which it viewed Judge Ellender's conduct, which was an issue of first impression in the state. [157] The court affirmed that Louisiana's Code of Judicial Conduct both guided judges in and bound them to ethical conduct. Judge Ellender had violated Canons 1 and 2A, which promote public confidence in the judiciary. That the conduct under review might be considered in some sense “private” did not negate the transgression of his duty as a judge to be a symbol of the law. As such, Judge Ellender had a mandate to comply with all laws regulating his conduct on and off the bench. [158] Although conceding that Judge Ellender never meant to do harm, his actions nontheless had cast a “negative shroud” upon all of Louisiana's judiciary. [159]

The court noted that the primary purpose of the Louisiana Code was not to punish judges, but rather to protect the public. It removed Judge Ellender from office for a year without pay, assessed him the costs of the action, and ordered him to complete a course in racial sensitivity. [160] In so doing, the court affirmed a statement of a former chief justice: “All those who minister in the temple of justice, from the highest to the lowest, should be above reproach and suspicion. None should serve at its altar whose conduct is at variance with his obligations.” [161]

As an expression of the importance traditionalists place upon the appearance of impartiality, one could scarcely improve upon the foregoing statement. In fact, reading *Ellender*, one would never know *Republican Party of Minnesota* had come down. The scrutiny of judicial speech restrictions which *Republican Party of Minnesota* seems at a minimum to require is altogether absent in *Ellender*.

Yet, *Ellender* serves as an important indication of traditionalism's strengths relative to the rabid revisionism which *Wilkerson* displays. Whereas in *Ellender*, ***466** the Louisiana Supreme Court believed that encouraging good judicial conduct and disciplining bad conduct levels the playing field, the Mississippi Supreme Court in *Wilkerson* averred that bad conduct is only of consequence if it might actually harm someone. While the Louisiana Supreme Court encourages the public to expect the best of its judiciary, the Mississippi Supreme Court cautions it to fear the worst. Whereas the Louisiana Supreme Court envisions judges as defenders of the people's rights, the Mississippi Supreme Court views judges as potential crocodiles poised to devour them. These respective philosophies represent dramatically different conceptions of how the public should regard the men and women who serve as its judges.

VI. THE CONSTITUTIONALITY OF THE APPEARANCE OF IMPARTIALITY STANDARD

Where *Ellender* presumes the constitutionality of the proscription of extrajudicial speech indicative of bias toward a class of individuals, *Wilkinson* repudiates it. *Republican Party of Minnesota* notwithstanding, we can and should reach a middle ground in resolving whether such restrictions of extrajudicial speech withstand constitutional scrutiny.

Republican Party of Minnesota makes several points plain. Due process, while deserving of protection, is to be balanced against the First Amendment rights of judicial candidates and, by extension, sitting judges. [162] Furthermore, the balance will most likely tip in favor of due process when the judicial speech actually affects the due process rights of actual parties. [163] Taking those points as given, three possible scenarios arise under which extrajudicial speech evincing class bias (as distinguished from party bias) could survive *Republican Party of Minnesota's* strict scrutiny test:
1) Where the nature of the extrajudicial speech is such as to be entitled to little or no First Amendment protection at all;

2) Where the biased speech raises a question of overall judicial fitness affecting the interests of parties currently before the judge; and

3) Where the extrajudicial bias inhibits members of the class from exercising their due process rights when the opportunity to do so arises.

Under these scenarios, non-campaign extrajudicial speech would be entitled to greater deference than *Ellender* presupposes, but less than the *carte blanche* which *Wilkerson* bestows. In fact, it is the dissent in *Wilkerson* that comes closest ***467** to the mark in defining the appropriate parameters of extrajudicial speech. While implicitly acknowledging that *Republican Party of Minnesota* appears to give greater leeway in issue-oriented speech, extending up to the point at which the listener might even feel able to predict how a judge would rule, the dissent asserts that there is, nonetheless, a point where extrajudicial speech can go too far. [164]

Under the first scenario, a judge goes too far when the judge's extrajudicial speech denigrates a class of individuals with constitutionally-unprotected “fighting words.” A judge also would cross the line under the second scenario when it reasonably

appears that his bias toward a class indicates an inclination to abandon the duties of the judicial office by, for example, ignoring the rule of law [165] or foregoing exercise of the deliberative process in regard to individual legal issues when members of the class come before him as parties in a case. [166] Finally, a judge would reach the tipping point under the third scenario when his extrajudicial bias toward a class creates a reasonable perception among class members that the judicial system is stacked against them, causing them to forgo pursuing legal action to which the law entitles them.

A. THE REQUIREMENT OF A COMPELLING INTEREST

1. SCENARIO 1: FIGHTING WORDS

Not all speech is created equal. In *Cantwell v. Connecticut*, the United States Supreme Court recognized that "[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution." [167] Such communication, also referred to as "fighting words," need not even involve words at all. [168] That it receives no constitutionally protected status does not imply that it lacks expressive content; indeed such communication frequently expresses itself very well and may do so in any number of contexts--artistic, religious, and political, to name a few. Rather, the defect lies in the *manner* of the communication, in that the words or conduct "constitute 'no essential part of any exposition of ideas."' [169]

Examples of fighting words include assertions like "all anti-Catholic bigots are ***468** misbegotten," or "all papists are misbegotten." [170] These seem no different in tenor or tone than Judge Wilkerson's statement that "gays and lesbians should be put in a mental institute instead of having a law like this passed for them" [171] or the impression that Judge Ellender's actions conveyed that African-Americans are prone to criminal activity. [172] To be sure, as the Mississippi Supreme Court noted, Judge Wilkerson may have intended to convey a religious and political message. [173] But the examples cited above convey a religious message as well. What the Mississippi Supreme Court failed to grasp is that, as fighting words, Judge Wilkerson's remarks about gays and lesbians added in no significant way to his message. Thus, the words surrounding those fighting words, however religious or political, become irrelevant. The fighting words stand apart from the message and are to be judged alone. Lacking constitutional protection, they may be proscribed even if the words around them may not. [174]

Accordingly, Judge Wilkerson's calling gays and lesbians mentally ill, even though gussied up by an arguably religious and political backdrop, is no different from the tasteless racial slur that Judge Ellender's conduct conveyed. By indulging in fighting words or equivalent conduct, both judges forfeited First Amendment protection. [175] Under the circumstances, the *Judicial Model Code's* extrajudicial bias provisions, as currently written, may be applied to either without constitutional impediment. [176]

2. SCENARIO 2: BIAS INDICATIVE OF IMPAIRMENT OF THE JUDICIAL FUNCTION

Extrajudicial bias toward a class of individuals may also be presumed when judicial speech suggests that a preconceived notion about the class could impair the fulfillment of judicial duties in cases involving class members. [177] This would arise, for example, if a judge indicated that certain people warranted particular ***469** treatment on the basis of their identity as opposed to the rule of law. [178] Likewise, one might also infer bias if extrajudicial remarks created the impression the judge had so strong a predisposition toward a particular outcome in issues involving the class as to preclude the judge's ability to engage in deliberation of the particular facts and arguments of individual cases. [179] In each instance, bias would appear to prevent the judge from carrying out the essential obligations of the judicial office when dealing with certain individuals.

Judge Wilkerson's remark that gay and lesbian people are mentally ill illustrates both of those failings. One could reasonably infer from Judge Wilkerson's blanket diagnosis of mental illness that he would not apply to gays and lesbians the legal tests called for in the adjudication of competency or credibility. And his predetermination of the incompetency of all homosexual persons appears equally to foreclose deliberation of individual questions of competency on a case-by-case basis.

However, unlike the bias that fighting words evince, such speech presumptively retains constitutional protection so long as it does not involve fighting words or some other First Amendment exception. The degree of that protection varies in accordance with the nature of the speech. At one end of the scale, the level of protection decreases as the speech bears greater affinity to fighting words. [180] At the other end of the scale, such biased speech could theoretically be entitled to the greatest protection if characterized as political, public interest, religious, or another variety of "core" speech. [181] Assuming the speech indeed fell within the most protected category, the proscription of it would have to withstand the strict scrutiny required under *Republican Party of Minnesota*. Clearing this hurdle requires as an initial matter the demonstration of a compelling state interest to limit it. [182]

It has been a matter of traditionalist faith that the appearance of impartiality is so compelling that it requires judges to accept restraints of conduct which ordinary citizens might find burdensome. [183] Traditionalists often say that a judge ***470** who refuses to accede to the restraints required of the judicial office is not fit to serve in it, [184] a point that recalls Justice Holmes's assessment of the First Amendment rights of government employees in general: "[A policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." [185] The Supreme Court has rejected Holmes's view, however, in favor of a test that balances the First Amendment rights of the government employee with the needs of the government employer. Accordingly, a government worker may speak freely on matters of public concern so long as the speech does not impair job performance or interfere with the business of the agency for which the employee works. [186] And *Republican Party of Minnesota* strongly implies that a judge has First Amendment rights that are at least equivalent to, if not greater than, those of the bailiff in the judge's courtroom. [187]

It is therefore no longer sufficient merely to *say* the appearance of impartiality constitutes a compelling interest. Nor can one defend restrictions on extrajudicial speech on the ground that (to paraphrase Justice Holmes) a judge may have a constitutional right to talk politics, but he has no constitutional right to be a judge. After *Republican Party of Minnesota*, the restriction of core speech requires a demonstrably compelling reason. [188] And a restriction is more likely to be deemed compelling to the extent it protects the due process rights of actual parties. [189]

Republican Party of Minnesota acknowledges that impartiality or "the lack of bias for or against either *party* to the proceeding" is an essential component of due process. [190] The Court explains that impartiality in this sense "guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party." [191] When a judge's extrajudicial remarks suggest the judge cannot or will not apply the law equally to a particular class of individuals, potential parties within that class obviously feel threatened. However much one may sympathize with their feelings, they will not suffer infringement of any due process right until they actually appear before the judge in the judge's court. Thus, one could argue that the censure of the judicial speech in question is not necessary to protect interests which have not yet ripened. [192]

***471** But disciplinary action is necessary to protect those individuals currently appearing before the judge, whose due process interests have already borne fruit. When a judge indicates a propensity to forsake the obligations of his or her sworn oath of impartiality, all who appear before the judge, whether they belong to the disparaged class or not, have cause to question whether the judge will conduct their own cases fairly. [193] Justice Scalia himself has asserted that "[a] public employer has a

strong interest in preserving its reputation with the public." [194] Indeed, in his view, the First Amendment does not protect even public employee speech addressing a matter of public concern, if such speech tarnishes the public employer's reputation in the public eye. [195] Judicial speech suggesting an inclination to disregard judicial duties is even more egregious; for while it may also diminish the reputation of the judiciary in the public's mind generally, such speech touches every party whose case the judge hears and taints every decision the judge makes with the open question of partiality. [196] Plainly, even under *Republican Party of Minnesota's* narrow definition of impartiality, due process is at stake. Thus, a compelling interest exists to restrict such expressions of extrajudicial bias in order to safeguard the due process interests of the actual parties in the judge's courtroom, if not specifically protecting the interests of the bias's targets themselves. [197]

3. SCENARIO 3: BIAS INHIBITING LEGAL ACTION

Extrajudicial speech indicating bias against a class of individuals can be so harmful as to inhibit members of the class from even exercising their due process ***472** rights. Speech attributing a general negative characteristic to the class would most likely generate this effect because such bias would factor into the widest range of legal determinations. A belief that gays and lesbians are mentally ill, for example, could be a determinative factor not only in a case involving mental capacity *per se*, but also in any case--whether contract, tort, criminal, family law, etc.--where the credibility or character of a party could be an issue. It would not be unreasonable for the targets of such broad-based bias to conclude that such bias might affect most, if not all of their legal rights, causing them at the very least to think twice before seeking to exercise them. [198]

Such biased speech tends to prevent the potential due process interests that compel its proscription from ever coming to fruition. Even though the extrajudicial bias may not immediately implicate the targets' due process rights, it can create a significant chilling effect upon the corresponding right to due process when the time arises. [199] When a state allows speech such as Judge Wilkerson's to go unpunished, the targets of the bias may--and do--infer that the state tolerates or sanctions the ideas potentially biased judges express. [200] In light of the state's silence and the stamp of institutional approval it creates, the targets of bias, understandably, may be reluctant to expend time and resources in a judicial system perceptibly stacked against them on account of who they are. That the targets of bias are likely to be "outsiders" with relatively less power and resources on which to draw than the majority further magnifies the chilling effect and the sense of hopelessness and futility. [201] What results is a classic case in which "justice thwarted is justice denied." Thus, by impeding the exercise of due process, and by extension, due process itself, such speech evinces a compelling reason for its proscription.

Revisionists would respond to such demonstrations of compelling need with the assertion that transparency, not regulation, more effectively cures infringements of due process. [202] But that response, while outwardly appealing, overly simplifies the issue. *Republican Party of Minnesota* clearly articulated the notion that government has no business keeping people in the dark, where the court stated that the fundamental nature of an election required that people have the ***473** means to become fully informed about the candidates. [203] In that case, the regulation chilled speech that otherwise would very likely have been communicated to the voters. In the context of extrajudicial speech, however, the anti-bias provisions of the *Judicial Model Code* create no equivalent effect. To be sure, the Mississippi Supreme Court conceives the *Judicial Model Code* less as a guide to higher conduct to which the conscientious may aspire, and more as a manual of subterfuges behind which the unscrupulous will hide. But even if the court's conception of the *Judicial Model Code's* effects were accurate, the *Code's* elimination would scarcely drive biased judges out into the open. A judge desiring to advance an inappropriate bias will continue to refrain from expressing it publicly when such speech could lead to recusal from the very kinds of cases he or she seeks to influence. [204]

Thus, it will be principally the hapless, the careless, the unthinking, and the ignorant who exhibit their biases so openly. Official disciplinary action in no way dilutes due process. To the contrary, as noted above, it strengthens due process by announcing to the targets of bias and current litigants alike that the judicial system does not tolerate partiality. Nor does disciplinary action make the offense any less transparent than taking no action at all. In fact, the opposite is more likely since official action attracts public notice. Moreover, because a prior disciplinary action does not foreclose a subsequent motion for recusal, an actual litigant will not find him or herself in any worse position. Should a prior disciplinary action confirm the presence or appearance of bias, such discipline may even improve the litigant's chance of successfully achieving recusal.

Disciplinary action also carries other benefits, which the Mississippi Supreme Court ignored. It roots out bad apples and prevents them from doing harm. [205] In this sense, it is no different from the impeachment process to which any errant office holder may be subject. And like impeachment, it assures the public that the standards on which the system is predicated still have meaning. In addition, disciplinary action educates both the public and other judges about the parameters of appropriate conduct and creates, in effect, a common law that may provide guidance to tribunals in future cases. [206] Finally, it provides an opportunity for the education and redemption of basically decent judges whose errors ***474** were unintentional and who show future potential to serve the public faithfully.

B. THE REQUIREMENT OF BEING NARROWLY TAILORED

However compelling the need for a speech prohibition, strict scrutiny also requires states to narrowly tailor any restriction of "core" speech. In other words, the restriction must curtail no more speech than is reasonably necessary to achieve its ends. [207] The *Judicial Model Code's* current and proposed rules pertaining to extrajudicial speech are vulnerable in terms of vagueness and over-breadth.

Nine years before *Republican Party of Minnesota*, the Supreme Court of West Virginia determined that the general admonitions to avoid impropriety or the appearance of impropriety found in Canons 1 and 2 were so "fraught with subjectivity and elasticity" as to raise a serious constitutional impediment to their application to extrajudicial speech on matters of public concern. [208] The defect lay in the inherent vagueness of terms like "impropriety" and "impartiality," which at that time the *Judicial Model Code* left undefined. Because Canons 1 and 2 scarcely delineated their bounds, it was foreseeable a judge might forego engaging in constitutionally protected speech for fear of overstepping. [209] Notably, this was the very argument Judge Wilkerson made to the court. [210]

The *Judicial Model Code* currently defines "impartiality" as "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge." [211] The first half of this definition is readily understandable as the classic definition of "impartiality," meaning a lack of bias for or against any specific individuals. [212] However, less clear is what constitutes "maintaining an open mind in issues that may come before the judge," and the *Code* does not fully explain its parameters. As *Republican Party of Minnesota* noted, to identify *any* issue that might not conceivably come before a court in some form or fashion would be ***475** very difficult. [213] Moreover, on its face, the *Code's* definition does not even specifically limit the issues in question to those that might come before the judge in an official capacity. For these reasons, "maintaining an open mind," as it stands, adds hardly any gloss to the meaning of "impartiality." Because "impartiality" in this context is about as open-ended and undefined as the "impartiality" scrutinized in *Republican Party of Minnesota*, it is subject to many of the same objections. [214] Indeed, the drafters of the revised *Judicial Model Code* apparently recognized that its generality bred vagueness. In the Commentary to an early draft of the revision of Canon 1 discussing "impropriety" which encompasses "impartiality," the drafters noted that "[o]rdinarily when a judge is

disciplined for engaging in conduct that creates an appearance of impropriety, it will be in conjunction with charges that the judge violated some other specific rule under this or another canon." [215]

Unfortunately, Canon 4's current and prospective rules relating specifically to extrajudicial conduct also suffer from vagueness and over-breadth. As noted, Canon 4(A)(1) as currently written prohibits extrajudicial conduct, which "cast[s] reasonable doubt on the judge's capacity to act impartially as a judge." [216] Since this section is directly bootstrapped to the concept of "impartiality," it can only be as narrowly tailored as "impartiality" itself. To be sure, the Commentary to Canon 4, like the definition of "impartiality," specifies that "impartiality" includes bias directed at particular individuals or classes of individuals. Yet, as *Republican Party of Minnesota* observed, the hallmark of narrow tailoring lies not in how well the restriction reaches its target, but in whether it avoids targeting other protected speech as well. [217] The general language of Canon 4(A)(1) fails that test. It is not sufficiently focused to exclude protected speech that *Republican Party of Minnesota* allows.

Canons 4(A)(2)--prohibiting extrajudicial conduct that "demean[s] the judicial office"--and Canon 4(A)(3)--proscribing that which "interfere[s] with the proper performance of judicial duties"--appear to offer more hope. [218] But it is not clear that either relates to biased speech because the Commentary only specifically addresses biased speech in terms of "impartiality." [219]

The proposed revision to Canon 4, like the current version, only addresses ***476** biased speech specifically in the Comments and, again, only in terms of the problematic concept of "impartiality." [220] The failure to draw a direct link between biased speech and the impairment of judicial duties represents a missed opportunity. However, the proposed revision to Canon 4 adds the proviso that all extrajudicial conduct shall "comply with the requirements of this Code." [221] This appears to be a kind of "savings clause" that permits reference to other provisions should the requirement of the appearance of "impartiality" founder on *Republican Party of Minnesota's* rocks.

Looking beyond Canon 4, several other provisions in the proposed revision warrant consideration. Proposed Canon 1, like its predecessor, serves as a catch-all with its emphasis on the duty to avoid impropriety or the appearance of impropriety, [222] which is newly defined as "conduct that compromises the ability of a judge to carry out judicial responsibilities with independence, integrity, and impartiality, or otherwise demeans the judicial office." [223] But its very ability to "catch all" conduct not otherwise enumerated leaves it as vulnerable to charges of vagueness and over-breadth as Canon 4 itself.

Proposed Canon 2.06 provides that "[a] judge shall uphold and apply the law, and decide all cases with impartiality and fairness." [224] However, because this provision relates to conduct on the bench, it is not clear it would apply to extrajudicial speech or conduct that only suggests a proclivity to unduly favor personal views at some future time.

Proposed Canon 2.11(C) stipulates that "[a] judge shall not, with respect to cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office." [225] Extrajudicial speech would fall under the purview of this section, which corresponds to the Pledges and Promises Clause applicable to judicial candidates. In many respects, it resembles the Announce Clause that *Republican Party of Minnesota* repudiated. [226] Its constitutionality hinges on the words "that are inconsistent with the impartial performance of the adjudicative duties of judicial office." To the extent these words refer to "impartiality" in the broad sense of the current *Code*, the section is likely to be struck down for many of the reasons that felled the Announce Clause. On the other hand, should the words be construed to mean "inconsistent with constitutional limitations of judicial speech which protect due ***477** process," the rule is saved; for in that case it would only preclude conduct which in any event may be constitutionally proscribed. Nevertheless, even if the latter interpretation were to prevail, the rule would currently be an ineffective measure of and guide to conduct. It fails utterly to specify exactly what kind of conduct is inappropriate. This poses a real problem because,

as one court has observed, "[t]o say there is considerable uncertainty regarding the scope of the Supreme Court's decision in [*Republican Party of Minnesota*] is an understatement." [227]

The root of the *Judicial Model Code's* problem from the standpoint of narrow tailoring lies substantially in the *Code's* dual purpose as both a model of conduct and a regulatory system. To convey effectively the underlying ideals of judicial conduct, the *Code* must necessarily employ expansive terminology. Yet that same terminology, when applied in a regulatory context, leads to vagueness, over-breadth, and fatal under-inclusiveness. The *Judicial Model Code's* general provision relating to extrajudicial biased speech (in both the current and proposed forms) suffers particularly from the conflation of these two goals. The solution is not to jettison one goal for the other, but rather to distinguish more explicitly text intended as hortatory from that which serves a regulatory function.

Notably, the drafters of the revision to the *Judicial Model Code* initially decided to take this step in connection with Canon 1, and in an early draft of the Commentary plainly delineated the Canon's hortatory role. [228] A similar approach could be taken in regard to Canon 4. Its broad references to "impartiality" are acceptable as an expression of an ideal, but should be designated as such. However, when setting forth the parameters of extrajudicial speech, the open-ended terminology should be abandoned in favor of a more straightforward description, in the form of actual rules, delineating that speech which in fact creates the appearance of partiality. [229] Examples of more specific rules include the following:
A judge shall not engage in extrajudicial conduct or speech that constitutes fighting words directed towards any individual or class of individuals, including but not limited to epithets, slurs, demeaning nicknames, negative stereotyping, attempted humor based on stereotypes, threatening, intimidating or hostile acts, suggesting a connection between race, ethnicity or nationality and crime, and irrelevant references to personal characteristics. [230]

***478** A judge shall not engage in extrajudicial conduct or speech which reasonably suggests an inclination to allow personal beliefs to:
1) supersede the rule of law; or

2) prevent an even-handed application of the law; or

3) foreclose consideration of the specific facts and arguments of individual cases.

A judge may express views on legal issues in an extrajudicial forum but shall make clear those views are tentative and subject to the facts of each specific case, the arguments of counsel, and deliberation. [231]
Such explicit rules better withstand the test of narrow tailoring and have the added advantage of providing greater guidance to the judges to whom they are directed.

In short, extrajudicial speech that reasonably demonstrates an unwillingness to treat certain classes of individuals in accordance with the law or to faithfully deliberate individual cases involving particular issues so impedes due process as to provide a compelling reason for its proscription. The challenge lies with the drafters of the *Judicial Model Code* to draft rules which specifically delineate the offensive conduct. [232] That will require the differentiation of the hortatory ideals from the disciplinary strictures. [233] But it also requires the drafters of the *Judicial Model Code* to come to greater terms with *Republican Party of Minnesota's* broadening of the parameters of acceptable judicial speech.

Revisionism as exemplified in *Wilkerson* goes too far in discounting altogether the importance of the appearance of impartiality. That does not negate the fact, however, that *Republican Party of Minnesota* appears to sanction a degree of judicial plain-speaking at odds with traditionalist doctrine and the *Judicial Model Code*. The drafters of the *Judicial Model Code* do judges and judicial ethics no service if they believe defensive tinkering with generalities will sustain traditionalist ideals from *Republican Party of Minnesota's* axe. [234] As *Wilkerson* shows, the revisionist contempt for over-generalization can lead to the subversion of all traditionalism stands for. The better course is to work affirmatively with *Republican Party of Minnesota*. The appearance of impartiality as a constitutionally viable principle can and should be saved, but doing so will require a greater willingness to examine traditionalist ideals from a more non-traditionalist stance ***479** and to craft specific and limited rules relating to extrajudicial speech.

VII. THE EFFICACY OF OTHER REMEDIES FOR EXTRAJUDICIAL BIAS

A great advantage of narrowly tailored restrictions of extrajudicial bias is the clear message they send to the judiciary and the public alike of the conduct expected of judges. Moreover, they provide a relatively immediate and direct response to appearances of extrajudicial bias, ameliorating its coruscating effects. The same, however, cannot be said of recusal and the ballot box, alternatives which *Wilkerson* touts as superior to judicial discipline.

A. RECUSAL

Recusal is not nearly as effective a remedy for extrajudicial bias as the Mississippi Supreme Court and other revisionists suppose. As noted, the right of recusal becomes purely academic if unregulated prejudicial extrajudicial conduct is viewed as institutional bias by its targets, causing them to forego resort to the judicial system at all. And, in any case, the possibility of recusal is just as likely to induce judges to cover up their biases as is the threat of immediate disciplinary action.

The nature of recusal also reduces its effectiveness as an agent against bias. The ability of nonparties to move for recusal is either nonexistent or, at best, severely limited. [235] Recusal thereby cuts out such interested third parties as advocacy groups who are most likely to have the resources to seek remedial action, and if a minority is a target, are least likely to be cowed by a disapproving majority. Advocacy groups like Lambda (as in *Wilkerson*) and the NAACP (as in *Ellender*) have sophisticated public relations networks to get the message out and create pressure for action. By contrast, in a recusal action, the litigant is generally on his or her own. [236] The vast majority of trials attract little or no public notice, vitiating the opportunity to rally support. Many litigants lack sufficient funds to mount the action for recusal, let alone to initiate and sustain a campaign in its favor. Their attorneys may hesitate to seek recusal for fear of reprisal in subsequent actions before the judge. [237] Some litigants will have court-appointed attorneys who may be reluctant to expend the additional time a recusal motion requires, or who may fear retaliation by judges in whose hands rest future client ***480** appointments. The litigants themselves may hesitate to press for recusal, fearful of angering the judge should their motions be denied. [238] Even if litigants are relatively confident the motion will succeed, the potential for a hostile reaction from the community at large could dissuade litigants from going forward. Finally, recusal would be futile if all other judges on the bench were similarly prejudiced. [239]

Another problem with recusal is that the judge whose recusal is sought typically hears the recusal motion. [240] A recusal may be viewed as a challenge to the judge's honor. [241] As such, it is more likely to evoke a defensive rejoinder than a carefully deliberated response. Judges' natural reactions are to reject having any partiality or prejudice. [242] At worst, some judges may

be angered and deny the motion in retribution. [243] Other judges may convince themselves they can rule fairly, unaware that the currents of bias often run deep. [244] Either reaction leaves unprotected the due process rights of the targets of bias.

Appealing a denial of recusal also presents problems. In general, courts of appeals are disinclined to take recusal seriously. [245] Crowded dockets and a concern for the expeditious handling of cases may engender a conservative approach to the consideration of motions for recusal. [246] Time and again, appellate courts evince an unwillingness to confront ramifications of biased judicial ***481** expression. [247] Even when bias appears openly in the courtroom, courts commonly dismiss it as merely something "better left unsaid." [248] Given the prevalence of appellate decisions dismissing open displays of bias at trial as harmless, [249] extrajudicial bias, particularly if it is far removed in time, is likely to receive little consideration.

Reform of recusal procedures is possible of course. For example, litigants and defendants might receive a peremptory right of recusal or, in the alternative, a different judge could decide recusal motions. [250] Yet, an underlying defect of recusal would still remain. Recusal is typically a non-public action confined to the purview of the parties involved, [251] and recusal actions rarely attract media attention, with the exception of a small number of high-profile cases in which judges failed to recuse themselves from hearing matters involving substantial campaign contributors. [252] Even relatively few people in the legal profession are aware of pending recusal motions, let alone their outcome. Ironically, given the revisionists' advocacy of transparency, recusal actions are perhaps the least transparent method of addressing extrajudicial bias and are certainly less transparent than a disciplinary proceeding.

Wilkerson provides a good example: the judge's comments and the corresponding complaints seeking disciplinary action attracted national attention, and the press reported both the Commission on Judicial Performance's recommendation of disciplinary action, as well as the Mississippi Supreme Court's nullification of it. All made news; all conveyed to the public an impression (whether good or bad) of what a judge in Mississippi may appropriately say about homosexual people. Yet, it is unlikely a subsequent recusal motion by a gay or lesbian litigant against Judge Wilkerson will receive coverage at all. No matter how favorable the outcome to the homosexual litigant, if its message goes unheard, Judge ***482** Wilkerson's expressions of bias, in the public mind at least, will stand unchecked. And that is the problem when recusal stands as the sole remedy to extrajudicial bias. Waiting for recusal allows the bias to fester and grow, to achieve an institutional status, to become the status quo, to stain the members of the judiciary who have chosen to ignore it, and to marginalize the judicial system's value in the eyes of those who have felt the bias's sting.

B. THE BALLOT BOX

In *Wilkerson*, the Mississippi Supreme Court also asserts that action at the ballot box more appropriately rectifies apparent judicial bias than prior restrictions of extrajudicial speech and conduct. [253] In broad respects, this echoes Justice Kennedy's comment in *Republican Party of Minnesota* that the best antidote to inappropriate or harmful speech is more speech. [254] The nature of the responsive speech Justice Kennedy contemplates is different in nature, however, from that which the Mississippi Supreme Court envisions. The speech to which Justice Kennedy refers is process-oriented; it focuses not so much on specific issues as on the propriety of types of conduct in relation to the judicial role and function. Thus, it is quite similar in content to the provisions of the *Judicial Model Code*. The difference lies in that, whereas the *Code's* rules achieve their goal by government fiat, the speech Justice Kennedy promotes triumphs through the power of moral or ethical persuasion. In contrast, the Mississippi Supreme Court appears to endorse more issue-specific speech. This speech resembles classic campaign speech in that it focuses upon the content rather than the propriety of the judge's message. The success of this speech, therefore, depends ultimately

on whether the public agrees or disagrees with the judge's stance. Plainly, process-oriented and issue-specific speech aim for different goals. Neither, however, addresses extrajudicial bias as effectively as prior disciplinary action.

Although process-oriented speech is less problematic in that it affirms the importance of high standards of judicial conduct, that very high-mindedness may also be its greatest defect, at least in the hurly burly of an election contest. Process-oriented speech, to put it bluntly, is unlikely to be as "sexy" as the speech to which it responds: it is more abstract; it may require more explanation to get its point across; and it may seem less immediate or visceral to a public grown accustomed to the catchy sound bites of the special interests that increasingly dominate electoral speech. For these reasons, its voice may not be heard over the opposing voices, which may intentionally play up extrajudicial bias to appeal to a ***483** like-minded audience. [255]

Issue-specific speech, on the other hand, does not directly respond to extrajudicial bias at all, and as noted, may well promote it. Fairness and impartiality are not hallmarks of this speech. Indeed, they are its antithesis, because the goal here is to win favored treatment for one view over another. In the context of winner take all rhetoric, [256] questions of judicial conduct or concern for the judicial function become irrelevant; it is the viewpoint that counts. [257] And where the majority rules, the preservation of the rights of a minority that the majority threatens are likely to receive even less consideration. What Hamilton recognized in *The Federalist Papers* (and the Mississippi Supreme Court failed to consider) is that the rights of a minority and the desires of the majority do not always coincide, and thus, we cannot depend upon the latter to guarantee the former. [258]

Both forms of electoral speech also share a common defect in that speech cannot have any effect if no one raises the issue of bias. Advocates of process-oriented and issue-specific speech each presuppose that the matters subject to redress will be of sufficient general interest to attract public attention. While that may have been true in *Wilkerson* and *Ellender*, instances of extrajudicial bias may not always involve such hot-button topics as sexual orientation or race or may be so case-specific or localized in nature as to fail to attract any notice at all. A related problem concerns timing. Electoral speech, generally, is most effective when it addresses matters currently in the public eye. Yet, extrajudicial bias is not confined to the campaign season. Bias manifested before the onset of a campaign could be deemed water under the bridge or even be forgotten. Thus, electoral speech can, at best, only be a highly selective ***484** remedy to extrajudicial bias.

Finally, recusal and judicial elections could each become grossly distorted if recusal and the ballot box were to become linked in the public mind. Recusal determinations as ballot box issues would undermine individuals' due process rights. Indeed, once due process becomes a right subject to majority approval, it effectively becomes no right at all. And once judicial elections are conceived of as the breeding ground for subsequent recusal motions, special interests might actively encourage opposing candidates to engage in inflammatory or defamatory speech, thereby laying the groundwork for subsequent recusal motions in the event the opponent assumed the bench. [259] This would greatly compromise the civility of judicial campaigns and subvert the likelihood of any meaningful discussion in them. [260]

VIII. CONCLUSION

The appearance of impartiality remains a constitutionally permissible yardstick in the evaluation of extrajudicial conduct. However, neither traditionalism nor revisionism accurately takes its measure.

The standard justification for the appearance of impartiality is that it promotes and sustains public confidence in the judiciary. [261] Revisionism is correct, therefore, insofar as it proposes to ascertain what the public, in fact, expects of its judges. In this regard, two factors wield particular influence: the prevalence of judicial elections and the ready availability of information about the judicial process effectuated by advances in mass communication.

Judicial elections, unavoidably, cast the mantle of the politician over the judicial robe. [262] Like politicians, judicial candidates and incumbents must support their campaigns through fund-raising and communication calculated to attract the public's interest. Both activities bring the world to the judges and the judges to the world, transforming them into public figures. As judicial candidates and incumbents move more into the public eye, public knowledge about a judge's predispositions and biases becomes increasingly important. [263] Indeed, the public increasingly expects those seeking judicial office to speak and to speak plainly about their views on current issues. And, like political candidates in general, not only do the judicial candidates' campaign speeches become fair game for public ***485** scrutiny, but so too do all other aspects of their lives. Thus, judicial elections tend to make judges, once elected, something of an open book. Increasingly, the public knows (or can easily ascertain) who the judges are, where they come from, what they have done previously, and where they presently stand on the issues. This contrasts with the traditionalist conception of the judge as a symbol of neutrality who sacrifices some personal expression to stand beyond the fray of competing interests.

Advances in mass communication have also greatly increased the transparency of the judicial system. Today, a compendium of information about virtually any judge, whether elected or appointed, is just a Google search away. Not only have the Internet, television, radio, and the popular press given the public more access to information about judges, they have also whet the people's appetite to receive it by bringing the courts closer to them. Through today's mass media, the public views court proceedings first-hand and receives up to the minute commentary about the day's events and the actions of the presiding judges. The media widely report major court decisions and their effects on actual people's lives for years following the decisions. [264] The Internet allows individuals or groups to broadcast their views about the judicial system to millions almost instantaneously with little expenditure of time and money. More than ever before, people have a personal impression of how the judicial system works, and accordingly, are less likely to view it in purely abstract terms. Whether due to greater sophistication or to increased cynicism, there is a growing sense that the traditionalist model of the judiciary is in some respects more ideal than reality. [265]

Thus, many people have some conception of judicial practice and recognize it does not comport fully with strict traditionalist notions of judicial neutrality. People recognize that judges have personal views on the law, social issues, and a host of other things. Most accept, and probably also expect, that judges will express those views in their judicial capacity. [266] And few would believe it possible for judges to wipe their minds clean of such views when they enter a courtroom. In fact, many people would like to have at least a rough idea of the judge's personal views.

At the same time, the public *does* expect a fair shake from its judges. It wants a judge to make decisions based upon the rule of law, not upon personal fancies or as the *quid pro quo* for a prior campaign endorsement. While the public understands that the law often requires interpretation that may invoke the judge's ***486** personal frames of reference, it rejects the notion of that judge rubber-stamping entire classes of cases in conformance with preconceived notions. Rather, the public expects a judge to engage in honest deliberation of the facts and arguments of each particular case. The public has not, therefore, forsaken altogether an ideal of judicial comportment, but it has come to accept modified and more limited parameters.

Revisionism falters, particularly in extreme applications as in *Wilkerson*, by failing to acknowledge that, so long as a judicial ideal in some form prevails, appearances do matter to the public at large. Confidence in the judiciary rests on the belief judges will be fair. Extrajudicial speech like Judge Wilkerson's appears to manifest a propensity to judge a particular class of individuals on the basis of their identity rather than in accordance with the rule of law. Such bias violates the standard of fairness the public expects of judges on two counts: it substitutes personal opinion for the law, and it indicates an unwillingness to try each case on its merits. Giving the green light to that kind of speech, as the Mississippi Supreme Court did, devalues the appearance of fairness, and more importantly, the judicial ideal itself. In holding out recusal as preferable to enforcing the ideal, the court effectively told the public that having a crocodile in the backyard is acceptable until it has the opportunity to bite. Yet, few

people would endure the presence of a crocodile in their backyards under *any* circumstances, and almost certainly would not buy a house if one were present. A crocodile on the bench is no different; so long as it remains unchecked, the crocodile will negatively affect people's thinking about the judicial system and undermine their confidence in buying into it.

Whereas revisionism overly discounts the importance of the appearance of impartiality, traditionalism attempts to extend it too far. Traditionalists have not come to terms with the fact that the public no longer fully shares the traditionalist belief that judges' personal views should be kept private. Indeed, the public increasingly wants to know a great deal about its judges and what they think. [267] Even in the absence of such public desire for greater disclosure, the ease with which information may be obtained about practically anyone who runs for or holds an official position makes it harder for judges to keep their private lives private even if that were their desire. By failing to take these factors into greater account, traditionalists leave themselves open to the charge that they seek to keep the people in the dark. And, to some extent, the charge is justified. The public has a more sophisticated understanding of the interplay of personal belief in the judicial decision-making process than traditionalists give it credit for. The public has come to terms with the role personal belief plays, and notwithstanding, ***487** maintains confidence in the judicial system. [268] The public has evolved. While maintaining an appearance of impartiality remains a compelling interest, the public's notion of the parameters of impartiality has changed. [269] Traditionalism must accept this and positively adapt if it is to continue to play a viable role in the context of judicial ethics.

Currently, traditionalism's posture tends to be defensive. Traditionalism stands in reaction to *Republican Party of Minnesota*. To be sure, *Republican Party of Minnesota* fired a shot across traditionalism's bow, which many traditionalists view as an attack. That shot, however, could also be taken as a salutary warning of a changing world. Viewed in this sense, it created not a threat, but rather an opportunity to take a fresh look at traditionalist principles to bring them more in tune with the public's current expectations of its judiciary. The danger is that, by choosing to ignore those expectations, traditionalists invite extreme reactions such as that in *Wilkerson*, which so devalue the importance of the appearance of impartiality as to undermine traditionalism itself. [270]

In sum, the appearance of impartiality in extrajudicial conduct does, indeed, play a vital role in maintaining public confidence in the judiciary and advancing the due process rights of litigants. Unfortunately, however, neither traditionalists nor revisionists have properly taken the measure of its parameters. This joint failure deprives well-meaning judges of adequate guidance and threatens to diminish the stature of the judicial system as an institution.

Footnotes

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1 *See* MODEL CODE OF JUDICIAL CONDUCT pmbl. (2004) [hereinafter JUDICIAL MODEL CODE].

2 JUDICIAL MODEL CODE Canon 2(A) (“A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”); JUDICIAL MODEL CODE Canon 4(A) commentary (“Expressions of bias or prejudice by a judge, even outside the judge's judicial activities, may cast reasonable doubt on the judge's capacity to act as a judge.”).

3 JUDICIAL MODEL CODE Canon 2(A) commentary; *see also* Offut v. United States, 348 U.S. 11, 14 (1954) (“justice must satisfy the appearance of justice”); Leslie W. Abramson, *Canon 2 of the Code of Judicial Conduct*, 79 MARQ. L. REV. 949, 951 (1996); Matthew D. Besser, Note, *May I Be Recused? The Tension Between Judicial Campaign Speech and Recusal After* Republican Party of Minnesota v. White, 64 OHIO ST. L.J. 1197, 1222 (2003) (“The need for the judiciary to appear impartial is either as

important as actual impartiality 'or at least a close second."' (quoting Stephen Gillers, *"If Elected I Promise ___" -- What Should Judicial Candidates Be Allowed To Say?*, 35 IND. L. REV. 725, 727 (2002))); Kiley Marie Corcoran, Note, *Mandamus and Recusal: Promoting Public Confidence in the Judicial Process*, 9 SUFFOLK J. TRIAL & APP. ADVOC. 13, 13 (2004).

4 Republican Party of Minnesota v. White, 536 U.S. 765 (2002).

5 *Id*. at 779-80 (quoting MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2000)).

6 *See id*. at 775-76 (questioning the application of the appearance of impartiality in the context of speech addressing public issues); *id*. at 777-78 (asserting that the appearance of impartiality is not a compelling interest in regard to avoiding the appearance of judicial preconceptions on legal issues).

7 *See generally* JUDICIAL MODEL CODE Canon 2(A) (reiterating the overall importance of avoiding the appearance of impropriety or impartiality).

8 *Republican Party of Minnesota*, 536 U.S. at 773 n.5 (noting that in 1990, First Amendment concerns caused the American Bar Association to replace the Announce Clause with Canon 5(A)(3)(d)(ii), which prohibits "statements that commit or appear to commit the [judicial candidate] with respect to cases, controversies or issues likely to come before the court").

9 Roy Schotland, Professor, Georgetown Univ. Law Ctr., Keynote Address at the National Judicial College Symposium: National Symposium on Judicial Speech -- Post *White* (Feb. 24, 2005), at 34 (quoting ABA President Robert Hirshon) (transcript *available at* http:// www.abanet.org/judicialethics/meetings/transcript_022405_part1.pdf).

10 *See* Weaver v. Bonner, 309 F.3d 1312, 1319-23 (11th Cir. 2002) (invalidating Georgia rules prohibiting judicial candidates from making false or misleading campaign statements and from engaging in the personal solicitation of campaign funds on the grounds that the outright ban on false and misleading speech failed to take into account electoral realities because "erroneous statement is inevitable in free debate" and threatened to chill candidates from speaking forthrightly for fear of censure; bar on solicitation of campaign funds failed to acknowledge that campaigning, by its very nature, entailed the solicitation of funds); N.D. Family Alliance v. Bader, 361 F. Supp. 2d 1021, 1039 (D.N.D. 2005) (invalidating North Dakota's version of the *Judicial Model Code's* restriction of candidate pledges and promises as a violation of First Amendment free speech); Family Trust Found. of Ky., Inc. v. Wolnizek, 345 F. Supp. 2d 672, 705-10 (E.D. Ky. 2004) (same); Spargo v. N. Y. State Comm'n on Judicial Conduct, 244 F. Supp. 2d 72, 88 (N.D.N.Y.) (overturning New York's prohibition of judges engaging in political activity apart from their own elections because it is unrealistic to assume the stature of judges would be diminished by their involvement in political activities, given that they had achieved their judicial status by virtue of participating in such activities), *vacated on other grounds*, 351 F.3d 65 (2d Cir. 2003); Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059, 1059 (1996) (indicating that the debate over rules concerning judicial speech began even before *Republican Party of Minnesota*); Stephanie Cotilla & Amanda Suzanne Veal, Current Development, *Judicial Balancing Act: The Appearance of Impartiality and the First Amendment*, 15 GEO. J. LEGAL ETHICS 741, 741 (2002) (noting considerable debate over the degree to which judicial speech may be restricted).

11 Miss. Comm'n on Judicial Performance v. Wilkerson, 2002-JP-02105-SCT (Miss. 2004), 876 So. 2d 1006.

12 *Id*. ¶¶ 36-45.

13 *In re* Ellender, 04-2123, pp. 11-13 (La. 12/13/04); 889 So. 2d 225, 233-35.

14 Hans A. Linde, *The Judge as Political Candidate*, 40 CLEV. ST. L. REV. 1, 1-4 (1991) (referring to these opposing concepts as the "classic" and "realist" models).

15 Jeffrey M. Shaman, *The Impartial Judge: Detachment or Passion?*, 45 DEPAUL L. REV. 605, 610-17 (1996) (discussing the "ideal of the disinterested judge"); *see* Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 317 (1999) (noting that even if judicial independence were a myth, "it is possible society cannot function without myths that capture its aspirations"); David B. Rottman & Roy A. Schotland, *What Makes Judicial Elections Unique?*, 34 LOY. L.A. L. REV. 1369, 1370 (2001).

16 THE FEDERALIST No. 78 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

17 *Id*. at 469.

18 *Id*. at 467-69.

19 *Id*. at 467.

20 *Id*. at 469-70.

21 *Id*. at 470.

22 Shaman, *supra* note 15, at 614; Michael R. Dimino, *Pay No Attention to That Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians*, 21 YALE L. & POL'Y REV. 301, 359-60 (2003).

23 THE FEDERALIST NO. 78, *supra* note 16, at 470-71.

24 *Id*. at 467.

25 Shaman, *supra* note 15, at 610 (quoting Justice Frankfurter's comment that a judge "must think dispassionately and submerge private feelings on every aspect of a case").

26 *See id*. at 609 (noting the 1990 version of the *Judicial Model Code* acknowledged the importance of greater involvement in the community).

27 *See* JUDICIAL MODEL CODE Canon 4(B) commentary.

28 Burbank, *supra* note 15, at 336; Linde, *supra* note 14, at 3; Rottman & Schotland, *supra* note 15, at 1370.

29 Sherrilyn A. Ifill, *Do Appearances Matter?: Judicial Impartiality and Its Ramifications for the Supreme Court in* Bush v. Gore, 61 MD. L. REV. 606, 613 (2002) (noting the efforts of the federal judiciary to foster the appearance of neutral and "considered and dispassionate decision-making"); Alfred P. Carlton, Jr., *Preserving Judicial Independence -- An Exegesis*, 29 FORDHAM URB. L.J. 835, 838 (2002).

30 ABA Division for Public Education, Courts and Legal Procedure: The Role and Structure of Courts, http://www.abanet.org/publiced/courts/court_ role.html (last visited Feb. 12, 2006).

31 ABA Division for Public Education, Courts and Legal Procedure: The Role of Judges, http://www.abanet.org/publiced/courts/judge_role.html (last visited Feb. 12, 2006).

32 Linde, *supra* note 14, at 4.

33 *See* Burbank, *supra* note 15, at 339 (noting some believe the conception of judging should reflect the view that, in reality, judges and legislators do similar things); *see also* Stephen B. Burbank, *What Do We Mean by Judicial Independence?*, 64 OHIO ST. L.J. 323, 323 (2002) (defining "judicial independence" as requiring an examination of courts at different levels and of "changes in attitudes towards, or in the practical circumstances of, contemporary law and lawmaking"); John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 250 (1987) (noting it has become more evident that judges make policy decisions).

34 *See* Burbank, *supra* note 15, at 317; Dimino, *supra* note 22, at 369; W. Bradley Wendel, *The Ideology of Judging and the First Amendment in Judicial Election Campaigns*, 43 S. TEX. L. REV. 73, 74-75 (2001).

35 Wendel, *supra* note 34, at 78; *see* Michael Stokes Paulsen, *Straightening out the Confirmation Mess*, 105 YALE L.J. 549, 575 (1995) (noting that an "empty head" is not a prerequisite for an open judicial mind).

36 *See* Erwin Chemerinsky, *Restrictions on the Speech of Judicial Candidates Are Unconstitutional*, 35 IND. L. REV. 735, 743-44 (2002) (questioning whether prior speech on issues is necessarily indicative of bias); Leubsdorf, *supra* note 33, at 253, 265 (discussing

how the values of judges shape their rulings); Shaman, *supra* note 15, at 614 (questioning the desirability and possibility of the ideal of the disinterested judge).

37 *See* Chemerinsky, *supra* note 36, at 736-37; Dimino, *supra* note 22, at 358; Leubsdorf, *supra* note 33, at 251 ("Interests, points of view, preferences, are the essence of living."); Linde, *supra* note 14, at 4; Paulsen, *supra* note 35, at 556; Wendel, *supra* note 34, at 77-78; Symposium, *Judicial Elections and Free Speech: Ethics and a Judge's Campaign Rhetoric*, 33 U. TOL. L. REV. 315, 326 (2002) [hereinafter *Judicial Elections and Free Speech*] (remarks of Erik Jaffe).

38 *See, e.g.*, Chemerinsky, *supra* note 36, at 736-37 (noting the desirability of judges' predilections being known).

39 *See* Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 COLUM. L. REV. 563, 612 (2004) (asserting judicial campaign speech regulations seek to maintain appearances by hiding reality); *Judicial Elections and Free Speech*, *supra* note 37, at 328 (remarks of Erik Jaffe asserting the same).

40 Dimino, *supra* note 22, at 345-46.

41 *See, e.g.*, Michael Stokes Paulsen & Steffen N. Johnson, *Scalia's Sermonette*, 72 NOTRE DAME L. REV. 863, 863 (1997) (drawing a distinction between remarks made at a prayer breakfast to "co-religionists" and official opinion-writing).

42 *See* Corcoran, *supra* note 3, at 13-14 (noting Justice Scalia's refusal to recuse himself after attending a duck hunting trip with Vice President Dick Cheney two weeks after the Court had granted certiorari in a case seeking disclosure of documents from an advisory group that Cheney chaired).

43 JUDICIAL MODEL CODE Canon 1. *See generally* National Judicial College Symposium: National Symposium on Judicial Speech -- Post *White* (Feb. 24, 2005) (transcript *available at* http:// www.abanet.org/judicialethics/meetings/transcript_022405_part1.pdf, http:// www.abanet.org/judicialethics/meetings/transcript_022405_part2.pdf, and http:// www.abanet.org/judicialethics/meetings/transcript_022405_part3.pdf).

44 AM. BAR ASS'N, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES, WITH THE CANONS OF PROFESSIONAL ETHICS ANNOTATED, AND THE CANONS OF JUDICIAL ETHICS ANNOTATED, at ix (1947).

45 CANONS OF JUDICIAL ETHICS pmbl. (1924).

46 CANONS OF JUDICIAL ETHICS Canon 14.

47 CANONS OF JUDICIAL ETHICS Canon 20.

48 CANONS OF JUDICIAL ETHICS Canon 28 ("[A judge] should avoid making political speeches, making or soliciting payments of assessments or contributions to party funds, the public endorsement of candidates for political office and participation in party conventions" and "should neither accept nor retain a place on any party committee nor act as party leader, nor engage generally in partisan activities."); CANONS OF JUDICIAL ETHICS Canon 30 ("A candidate for judicial position should not make or suffer others to make for him, promises of conduct in office which appeal to the cupidity or prejudices of the appointing or electing power; he should not announce in advance his conclusions of law on disputed issues to secure class support, and he should do nothing while a candidate to create the impression that if chosen, he will administer his office with bias, partiality or improper discretion.").

49 Katherine A. Moerke, *Must More Speech Be the Solution to Harmful Speech? Judicial Elections After* Republican Party of Minnesota v. White, 48 S.D. L. REV. 262, 266 (2003); Matthew J. Medina, Note, *The Constitutionality of the 2003 Revisions to Canon 3(E) of the Judicial Model Code of Judicial Conduct*, 104 COLUM. L. REV. 1072, 1079 (2004); *see* Robert C. Berness, *Norms of Judicial Behavior: Understanding Restrictions on Judicial Candidate Speech in the Age of Attack Politics*, 53 RUTGERS L. REV. 1027, 1033 (2001) (noting the growing dissatisfaction with the election of judges in the early twentieth century); Shepard, *supra* note 10, at 1064 (quoting an article from the *New York World* inferring widespread abuse from the adoption of the *Judicial Canons*).

50 JUDICIAL MODEL CODE preface.

51 *See* Shaman, *supra* note 15, at 607 (noting that, unlike the 1924 *Canons of Judicial Ethics*, the 1972 *Model Code of Judicial Conduct* was intended to be binding upon judicial conduct and to provide the basis for disciplinary action).

52 *See* JUDICIAL MODEL CODE pmbl.

53 Am. Bar Ass'n, Center for Professional Responsibility, http:// www.abanet.org/cpr/mcjc/mcjc_home.html (last visited Feb. 12, 2006).

54 *See* JUDICIAL MODEL CODE pmbl.

55 Peter A. Joy, *A Professionalism Creed for Judges: Leading by Example*, 52 S.C. L. REV. 667, 692 (2001).

56 JUDICIAL MODEL CODE Canon 1.

57 JUDICIAL MODEL CODE Canon 2.

58 JUDICIAL MODEL CODE Canon 2(A) (emphasis added).

59 JUDICIAL MODEL CODE Canon 3.

60 JUDICIAL MODEL CODE Canon 3(B)(5) (including bias directed at “race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status”).

61 JUDICIAL MODEL CODE Canon 3(B)(10).

62 JUDICIAL MODEL CODE Canon 4.

63 JUDICIAL MODEL CODE Canon 4(A).

64 JUDICIAL MODEL CODE Canon 4(A) commentary.

65 JUDICIAL MODEL CODE Canon 4(B).

66 JUDICIAL MODEL CODE Canon 5.

67 JUDICIAL MODEL CODE Canon 5.

68 JUDICIAL MODEL CODE Canon 5(A)(1)(a), (c).

69 JUDICIAL MODEL CODE Canon 5(A)(3)(d)(i).

70 Am. Bar. Ass'n, Center for Professional Responsibility, ABA Joint Commission To Evaluate the Model Code of Judicial Conduct, http:// www.abanet.org/judicialethics/about/background.html (last visited Feb. 12, 2006).

71 Final Draft Report of the ABA Joint Commission To Evaluate the Model Code of Judicial Conduct, Introductory Report, at 1 (Dec. 2005), *available at* http://www.abanet.org/judicialethics/IntroductoryReportFinal.pdf.

72 Am. Bar Ass'n, Center for Professional Responsibility, ABA Joint Commission To Evaluate the Model Code of Judicial Conduct, http:// www.abanet.org/judicialethics/about/background.html (last visited Feb. 12, 2006).

73 MODEL CODE OF JUDICIAL CONDUCT Canon 1.01 (Final Draft 2005), *available at* http://www.abanet.org/judicialethics/finaldraftreport.html [hereinafter Final Draft].

74 *Id*. Canon 2.

75 *Id*. Canon 2.06 cmt. 2.

76 *Id*. Canon 2.02 cmt. 2.

77 *Id*. Canon 2.11(C).

78 *Id*. Canon 3.

79 *Id*. Canon 4.

80 *Id*. Canon 4.01(A).

81 *Id*. Canon 4.01(C).

82 *Id*. Canon 4.01(E).

83 *Id*. Canon 4.01 cmt. 1.

84 *Id*. Canon 4.01 cmt. 2.

85 *Id*. Canon 5.01(a)-(b), (m); *see supra* text accompanying notes 66-69.

86 Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned*," 14 GEO. J. LEGAL ETHICS 55, 59 (2000) (noting the appearance of partiality provisions function largely as "catch-alls" or "fall-backs" for the prosecution of misconduct which the *Judicial Model Code* does not more explicitly prohibit).

87 536 U.S. 765, 774-88 (2002).

88 MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2004) (providing that a judge shall not "announce his or her views on disputed legal or political issues").

89 *Republican Party of Minnesota*, 536 U.S. at 788.

90 Arizona, Iowa, Maryland, Minnesota, Mississippi, Missouri, and Pennsylvania are the seven states which continued to include the Announce Clause in their codes of judicial ethics. *See* Besser, *supra* note 3, at 1208 n.64.

91 *Republican Party of Minnesota*, 536 U.S. at 773 n.5 (noting that no aspect of the constitutional analysis turns on the question whether the provision correlating to the announce clause in the 1990 edition of the *Judicial Model Code*).

92 *See, e.g.*, Schotland, Keynote Address, *supra* note 9.

93 *See Republican Party of Minnesota*, 536 U.S. at 776-79 (asserting that judges are not neutral in the sense of having no opinions on current issues since they, in fact, may already have taken a stand on them in either their official or private lives and cannot avoid having preconceptions).

94 *Id*. at 799 (Stevens, J., dissenting); *id*. at 803-04, 807 (Ginsburg, J., dissenting).

95 *Id*. at 805-07 (Ginsburg, J., dissenting).

96 *Id*. at 798 (Stevens, J., dissenting).

97 *Id*. at 813-19 (Ginsburg, J., dissenting).

98 *See, e.g.*, Dimino, *supra* note 22, at 340-42 (using *Republican Party of Minnesota* as the basis for the revisionist argument).

99 *See Republican Party of Minnesota*, 536 U.S. at 775-88.

100 *See id*. at 774-75.

101 *Id*.

102 *Id*. at 775.

103 *Id*. at 775-78.

104 *Id*.

105 *See id*. at 776.

106 *Id*. at 776.

107 *Id*. at 777.

108 *Id*. at 778 (quoting MINN. CONST. art. VI, § 5).

109 *See id*.

110 *Id*. at 778-79.

111 *Id*. at 779.

112 *Id*. at 780.

113 *Id*. at 781.

114 *Id*. at 779-80.

115 *Id*. at 780 ("[A] law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited." (quoting Fla. Star v. B.J.F., 491 U.S. 524 (1989) (Scalia, J., concurring))).

116 *See id*. at 780-84.

117 *Id*. at 782.

118 *See id*. at 787-88.

119 *Id*. at 788-92 (O'Connor, J., concurring).

120 *Id*. at 793 (Kennedy, J., concurring).

121 *See id*. at 793-94.

122 *Id*. at 795.

123 *Id*. at 793.

124 *Id*. at 794-95.

125 Miss. Comm'n on Judicial Performance v. Wilkerson, 2002-JP-02105-SCT (¶¶ 36-40) (Miss. 2004), 876 So. 2d 1006, 1014-15.

126 *Id*. ¶ 21.

127 *Id*. ¶ 43 (asserting the public's need to be aware of "crocodiles" in the judiciary).

128 MISS. CODE OF JUDICIAL CONDUCT (2004); *see Wilkerson*, 2002-JP-02105-SCT ¶ 8. In fact, when Judge Wilkerson wrote his letter, Mississippi had not yet adopted Canon 4(A)(1). Accordingly, the Commission should have considered the letter pursuant to Canon 2(A), which requires a judge at all times to engage in conduct that "promotes public confidence in the integrity and impartiality of the judiciary." MISS. CODE OF JUDICIAL CONDUCT (2004). However, Canon 4(A)(1) had taken effect when Judge Wilkerson

substantially repeated his remarks in a radio interview. In any case, the court stated that the differences between the two canons were not material to its strict scrutiny analysis. *See Wilkerson*, 2002-JP-02105-SCT ¶¶ 16-18.

129 *Wilkerson*, 2002-JP-02105-SCT ¶ 61 (Carlson, J., dissenting).

130 *Id*. ¶¶ 4-5 (majority opinion). For a partial transcript of the interview, see *id*. ¶ 32.

131 *Id*. ¶ 6.

132 *Id*.

133 Miss. Comm'n on Judicial Performance, Inquiry Concerning a Judge No. 2002-092, Commission Finding of Fact, Conclusion of Law and Recommendation, at 3-4 (Dec. 13, 2002).

134 *Id*. at 4.

135 Brief of Respondent Connie Glen Wilkerson, Miss. Comm'n on Judicial Performance v. Wilkerson, 2002-JP-02105-SCT (Miss. 2004), 876 So. 2d 1006, 2003 WL 23701492, at *10-16.

136 *Id*. at *15 (quoting Republican Party of Minnesota v. White, 536 U.S. 765, 775-76 (2002)).

137 *Id*. at *7-8, *16-17.

138 *Id*. at *22-24.

139 Brief of the Commission, Miss. Comm'n on Judicial Performance v. Wilkerson, 2002-JP-02105-SCT (Miss. 2004), 876 So. 2d 1006, 2003 WL 23701491, at *5-9, *14-16.

140 *Id*. at *7-8.

141 *Id*. at *6-7, *14-16.

142 *Id*. at *7 (quoting Republican Party of Minnesota v. White, 536 U.S. 765, 775-76 (2002)).

143 Miss. Comm'n on Judicial Performance v. Wilkerson, 2002-JP-02105-SCT (¶¶ 28-33) (Miss. 2004), 876 So. 2d 1006, 1013-14.

144 *Id*. ¶ 38.

145 *Id*.

146 *Id*. ¶ 39.

147 *Id*. ¶ 40.

148 *Id*. ¶ 42.

149 *Id*. ¶ 43.

150 *Id*.

151 JUDICIAL MODEL CODE Canon 1; JUDICIAL MODEL CODE Canon 2; Carlton, *supra* note 29, at 838.

152 *In re* Ellender, 04-2123, pp. 8-10 (La. 12/13/04); 889 So. 2d 225, 231-32.

153 LA. CODE OF JUDICIAL CONDUCT Canon 1 (1996); LA. CODE OF JUDICIAL CONDUCT Canon 2A; *see In re Ellender*, 04-2123, p. 1.

154 *In re Ellender*, 04-2123. pp. 2-4.

155 *Id*. p. 4.

156 *Id*. pp. 8-11.

157 *Id*. pp. 12-13.

158 *Id*. p. 9.

159 *Id*. p. 12.

160 *Id*. pp. 11-12.

161 *Id*. pp. 8-9 (quoting Justice Francois-Xavier Martin).

162 *See* Republican Party of Minnesota v. White, 536 U.S. 765, 774-75 (applying strict scrutiny to weigh the respective interests).

163 *Id*. at 775-76; *see* Friedland, *supra* note 39, at 567 (asserting that *Republican Party of Minnesota* suggests "the only interest compelling enough to justify judicial campaign speech restrictions is the interest in protecting litigants' procedural due process rights").

164 Miss. Comm'n on Judicial Performance v. Wilkerson, 2002-JP-02105-SCT (¶¶ 75-76) (Miss. 2004), 876 So. 2d 1006, 1025 (Carlson, J., dissenting).

165 Dimino, *supra* note 22, at 380-81.

166 *See* Wendel, *supra* note 34, at 112; *Judicial Elections and Free Speech*, *supra* note 37, at 332 (remarks of Erik Jaffe condemning statements that "state or strongly indicate a violation of the judicial oath").

167 Cantwell v. Connecticut, 310 U.S. 296, 309-10 (1940); *see* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1949).

168 *Cf*. R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992) (noting that the First Amendment encompasses expressive conduct as well as speech).

169 *See id*. at 384-86.

170 *Id*. at 391-92. These examples of fighting words are offered by Justice Scalia, the author of the majority opinion.

171 Miss. Comm'n on Judicial Performance v. Wilkerson, 2002-JP-02105-SCT (¶ 61) (Miss. 2004), 876 So. 2d 1006, 1020 (Carlson, J., dissenting).

172 *In re* Ellender, 04-2123, pp. 3-4 (La. 12/13/04); 889 So. 2d 225, 228.

173 Miss. Comm'n on Judicial Performance v. Wilkerson, 2002-JP-02105-SCT (¶ 28) (Miss. 2004), 876 So. 2d 1006, 1013.

174 *See R.A.V.*, 505 U.S. at 386 (noting fighting words are unprotected as "essentially a 'nonspeech' element of communication").

175 *See* Chemerinsky, *supra* note 36, at 746 (noting that First Amendment restrictions applied to others should apply to judges as well). *But see* Stanley Mosk, *Judges Have First Amendment Rights*, CAL. LAW., Oct. 1982, at 30.

176 *See R.A.V.*, 505 U.S. at 385-86 (noting non-protected speech may be proscribed on the basis of one feature of speech so long as the regulation does not restrict the content of the message); *see also* Steven Lubet, *Judicial Ethics and Private Lives*, 79 NW. U. L. REV. 983, 992 (1985) ("There can be no quarrel over the disciplining of judges who engage in demeaning, insulting, or abusive conduct toward members of the public.").

177 *See* Friedland, *supra* note 39, at 585-91.

178 *See id*. at 592-93 (arguing that litigants retain a due process right to the application of established law).

179 *Judicial Elections and Free Speech*, *supra* note 37, at 332 (remarks of Steven Lubet asserting that it is acceptable to restrict judicial speech which undermines the function of judging); Scott D. Wiener, Note, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 HARV. C.R.-C.L. L. REV. 187, 190 (NOTING THAT DUE PROCESS REQUIRES "A NEUTRAL ADJUDICATOR AND AN INDIVIDUALIZED ... OPPORTUNITY TO PARTICIPATE IN ... THE CASE'S RESOLUTION"); *SEE* PANEL, *BREAKING THE MOST VULNERABLE BRANCH: DO RISING THREATS TO JUDICIAL INDEPENDENCE PRECLUDE DUE PROCESS IN CAPITAL CASES?*, 31 Colum. Hum. Rts. L. Rev. 123, 133 (1999) (REMARKS OF CHARLES BAIRD ASSERTING THAT DUE PROCESS REQUIRES DILIGENT CONSIDERATION OF EACH PARTY'S ARGUMENTS).

180 *See* Rankin v. McPherson, 483 U.S. 378, 397-98 (1987) (Scalia, J., dissenting) (noting that speech "lying so near the category of completely unprotected speech cannot fairly be viewed as lying within the 'heart' of the First Amendment's protection").

181 *See id*. at 395; *see also* Republican Party of Minnesota v. White, 536 U.S. 765, 774 (2002).

182 *Republican Party of Minnesota*, 536 U.S. at 774-75.

183 *See* JUDICIAL MODEL CODE Canon 2(A) ("A judge shall ... act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.").

184 *See, e.g.*, *In re* Ellender, 04-2123, pp. 8-9 (La. 12/13/04); 889 So. 2d 225, 231 ("None should serve at its [i.e., the temple of justice's] altar whose conduct is at variance with his obligations."); Shepard, *supra* note 10, at 1064-65 (noting the prevalence of this view in the 1920s).

185 Miss. Comm'n on Judicial Performance v. Wilkerson, 2002-JP-02105-SCT (¶ 26) (Miss. 2004), 876 So. 2d 1006, 1012-13 (quoting McAuliffe v. Mayor of New Bedford, 29 N.E. 517 (Mass. 1892)).

186 *Cf*. Rankin, 483 U.S. at 384, 388-91.

187 *See Republican Party of Minnesota*, 536 U.S. at 774-75 (applying strict scrutiny balancing test to judicial speech, a more stringent standard than that applied to other government workers).

188 *Id*.

189 *See id*.

190 *See id*. at 775-76.

191 *Id*. at 776.

192 *See, e.g.*, Brief of Respondent Connie Glen Wilkerson, *supra* note 135, at *16; Friedland, *supra* note 39, at 613 (no due process problems if the targets of judicial bias do not appear before the judge).

193 *See* Leslie W. Abramson, *A Symposium on Judicial Independence: The Judge's Ethical Duty To Report Misconduct by Other Judges and Lawyers and Its Effect on Judicial Independence*, 25 HOFSTRA L. REV. 751, 752 ("The essence of judicial independence is that any litigant or lawyer appearing before a judge can be certain that the judge will rule according to the applicable rules and precedents without any external influence."); John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303, 346 (1998) (noting that many judges feel bound to uphold the law "when faced with a conflict between moral and legal duties"); *Judicial Elections and Free Speech*, *supra* note 37, at 331 (remarks of Steven Lubet noting the seriousness of "advance notice of disregard for the oath of office"); Nathan S. Heffernan, *Judicial Responsibility, Judicial Independence and the Election of Judges*, 80 MARQ. L. REV. 1031, 1035 (1997) (quoting Chief Justice John Marshall to the effect that a corrupt judiciary is the "scourge of the people"); Nancy B. Pridgen, Note, *Avoiding the Appearance of Judicial Bias: Allowing a Federal Criminal Defendant To Appeal the Denial of a Recusal Motion Even After Entering an Unconditional Guilty Plea*, 53 VAND. L. REV. 983, 984 (2000) ("There must be nothing in [the law's] action that savors of prejudice or favor or even arbitrary whim or fitfulness." (quoting BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 112 (1921))).

194 Rankin v. McPherson, 488 U.S. 378, 400 (1987) (Scalia, J., dissenting).

195 *Id*. at 401.

196 Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 996-97 (2001) (quoting Justice Kennedy: "[T]he law commands allegiance only if it commands respect. It commands respect only if the public thinks the judges are neutral."); Shepard, *supra* note 10, at 1067 (noting respect for the rule of law suffers when losing litigants suspect their cases were heard by biased judges); *id*. at 1076 (arguing that public confidence in the judiciary requires the perception that the "law plays no favorites").

197 *See* Shepard, *supra* note 10, at 1090 (noting litigants expect their cases to be decided purely on the basis of the law and the facts of each case).

198 *See* Shaman, *supra* note 15, at 627 (asserting that bias based on identity "may operate to improperly predetermine the facts of individual cases and deny a litigant the right to have his or her case decided on the evidence presented at trial").

199 *See* Jennifer Gerarda Brown, *Adjudication According to Codes of Judicial Conduct*, 11 AM. U. J. GENDER SOC. POL'Y & L. 67, 68 ("[N]o litigant should have to endure ridicule or humiliation as the price of justice.").

200 *See* Myra C. Selby, *Examining Race and Gender Bias in the Courts: A Legacy of Indifference or Opportunity?*, 32 IND. L. REV. 1167, 1168 (1999) (noting that judicial indifference to individual rights breeds intolerance).

201 *See* Leubsdorf, *supra* note 33, at 252 (observing how attributes of powerfulness often strengthen a witness's credibility, whereas attributes of powerlessness weaken it).

202 *See* Miss. Comm'n on Judicial Performance v. Wilkerson, 2002-JP-02105-SCT (¶ 36) (Miss. 2004), 876 So. 2d 1006, 1014-15.

203 *See* Republican Party of Minnesota v. White, 536 U.S. 765, 781-82 (2002).

204 *See* Shepard, *supra* note 10, at 1082-83 (noting that recusal creates the possibility that a judicial candidate's "unfettered campaign promises" on a particular issue would "prevent him from even hearing the case"). Indeed, special interest groups have also attacked recusal (thus far unsuccessfully) as an unconstitutional abridgment of the First Amendment rights of judicial candidates. *See* Family Trust Found. of Ky., Inc. v. Wolnitzek, 345 F. Supp. 2d 672, 705-10 (E.D. Ky. 2004).

205 *But see* Shaman, *supra* note 15, at 627 ("The goal should not be to prevent or punish [biased] remarks or comments, but rather to eliminate [the underlying] bias and prejudice."). Yet, allowing conduct such as Judge Wilkerson's or Judge Ellender's to go unpunished subverts that goal as well since silence could be taken as state approval of the bias expressed.

206 Berness, *supra* note 49, at 1057 (calling for stronger enforcement of disciplinary rules to establish better understood norms of judicial conduct).

207 Brown v. Hartlage, 456 U.S. 45, 54 (1982) ("[T]he [speech] restriction [must] operate without unnecessarily circumscribing protected expression."); Abrahamson, *supra* note 196, at 1001-02.

208 *In re* Hey, 452 S.E.2d 24, 29-31 (W. Va. 1994). Nor has this been an isolated concern. In other contexts, too, the "appearance of impropriety" standard has drawn fire for its lack of definition and its provision of almost unbridled discretion to disciplinary authorities. *See* Samuel J. Levine, *Taking Ethics Codes Seriously: Broad Ethics Provisions and Unenumerated Ethical Obligations in a Comparative Hermeneutic Framework*, 77 TUL. L. REV. 527, 535-37 (2003) (noting criticism that the rules of conduct governing lawyers are too general and vague to serve a legislative function).

209 *In re Hey*, 452 S.E.2d at 29-31.

210 Brief of Respondent Connie Glen Wilkerson, *supra* note 135, at *7-8, 14-16.

211 JUDICIAL MODEL CODE terminology.

212 *See* Republican Party of Minnesota v. White, 536 U.S. 765, 775-76 (2002) (designating this meaning the "root meaning").

213 *Id*. at 772-73 (quoting Buckley v. Ill. Judicial Inquiry Bd., 997 F.2d 224, 229 (7th Cir. 1993) ("There is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction.")).

214 *See id*. at 778-79 (noting that impartiality defined as "open-mindedness" fails to take into account the fact that any qualified judge will have developed views on legal issues over the course of her legal career and will probably have enunciated them in a variety of contexts).

215 MODEL CODE OF JUDICIAL CONDUCT Canon 1 commentary 2 (Preliminary Draft June 2004), *available at* http://www.abanet.org/judicialethics/redline_ canon1_051104.pdf [hereinafter 2004 Preliminary Draft].

216 JUDICIAL MODEL CODE Canon 4(A)(1).

217 *See Republican Party of Minnesota*, 536 U.S. at 777 n.7.

218 JUDICIAL MODEL CODE Canon 4(A)(2)-(3).

219 JUDICIAL MODEL CODE Canon 4(A) commentary.

220 Final Draft, *supra* note 73, Canon 4.01 cmt. 2.

221 *Id*. Canon 4.01(E).

222 *Id*. Canon 1.02.

223 *Id*. terminology.

224 *Id*. Canon 2.06.

225 *Id*. Canon 2.11(C).

226 *See* N.D. Family Alliance, Inc. v. Bader, 361 F. Supp. 2d 1021, 1039 (D.N.D. 2005) (noting language of the candidate pledges and promises clause is similar to the announce clause and also unconstitutional because it is too broadly tailored).

227 *Id*. at 1041.

228 *See* 2004 Preliminary Draft, *supra* note 215, Canon 1 commentary 2. This commentary was subsequently deleted in the preliminary June 2005 draft. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 1 commentary (Preliminary Draft June 2005), *available at* http://www.abanet.org/judicialethics/Canon1.pdf.

229 *See* Carolyn M. Van Noy, Comment, *The Appearance of Fairness Doctrine: A Conflict in Values*, 61 WASH. L. REV. 533, 535 (1986) (noting that "unclear language in appearance of fairness cases causes uncertainty and confusion"); Robert B. McKay, *Judges, the Code of Judicial Conduct, and Nonjudicial Activities*, 1972 UTAH L. REV. 391, 400 (noting the subjective nature of Canon 4).

230 This rule is partially adapted from the comments to Canon 2.02 of the proposed revision. *See* Final Draft, *supra* note 73, Canon 2.02 cmt. 2; *see also supra* text accompanying note 76.

231 *See* Stephen Gillers, *"If Elected I Promise ___" -- What Should Judicial Candidates Be Allowed To Say?*, 35 IND. L. REV. 725, 733-34 (2002) (proposing the prototype for this rule in regard to the statements of candidates for judicial office).

232 Abramson, *supra* note 3, at 954-56 (noting the subjective nature of Canon 2's generalities); Ifill, *supra* note 29, at 617 (citing the failure of the *Judicial Model Code* to include specific guidelines to aid in the determination of conduct which might reasonably create an appearance of partiality).

233 Abramson, *supra* note 86, at 56 (calling for revision of the 1990 edition of the *Judicial Model Code* to treat the appearance of partiality with greater specificity).

234 Medina, *supra* note 49, at 1076 (characterizing the ABA's previous revisions of the *Judicial Model Code* as an "end-run around [*Republican Party of Minnesota v. White*]").

235 *See, e.g.*, 28 U.S.C. § 144 (2005) (requiring the affidavit of a party to initiate the motion for the recusal of a federal judge); RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 17.4, at 510-13 (1996) (noting that the standing of nonparties to bring a recusal motion "is not entirely clear" and, if permitted at all, generally only extends to nonparties such as witnesses, intervenors, or those with a direct stake in the pending litigation).

236 Rottman & Schotland, *supra* note 15, at 1370.

237 Joy, *supra* note 55, at 682-83; *see* Monroe H. Freedman, *The Threat to Judicial Independence by Criticism of Judges -- A Proposed Solution to a Real Problem*, 25 HOFSTRA L. REV. 729, 729 (1997) (noting the tendency of attorneys to overlook even egregious violations of judicial ethics).

238 Friedland, *supra* note 39, at 614.

239 *See* Ifill, *supra* note 29, at 618 (noting the common law doctrine of necessity).

240 Friedland, *supra* note 39, at 614.

241 *See* Freedman, *supra* note 239, at 737 (asserting that "judicial vanity" plays a large role when judges complain of public criticism).

242 Shaman, *supra* note 15, at 628; *see* John Copeland Nagle, *The Recusal Alternative to Campaign Finance Legislation*, 37 HARV. J. ON LEGIS. 69, 88-89 (2000) (noting that judges are less likely than legal scholars to view campaign contributions as creating a conflict of interest requiring recusal); *Judicial Elections and Free Speech*, *supra* note 37, at 331 (remarks of Sandy Keith noting that judges want to decide cases).

243 *See* Leubsdorf, *supra* note 33, at 245 (asserting that the truly biased judge is most likely to deny the motion for recusal).

244 Jeff Bleich & Kelly Klaus, *Deciding Whether To Decide: Should There Be Standards for Recusal?*, OR. ST. B. BULL., Nov. 2000, at 9, 16 (asserting that United States Supreme Court Justices scarcely ever question their own impartiality); Leubsdorf, *supra* note 33, at 243-44 (discussing ways judges support the denial of recusal); Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 6-7 (1994) (noting that the standards for recusal are not real deterrents because "individuals can almost always find excellent grounds for doing what they want to do"); Michelle L. Bullard, Comment, *Ethics* - Collier v. Griffith - *Determining Whether Tennessee State Court Judges Should Recuse Themselves from Cases Which Involve Attorneys in Leadership Positions in Their Campaigns for Re-election*, 23 MEMPHIS ST. U. L. REV. 741, 742 (1993) ("Even when a judge honestly believes that he can decide ... [a case] impartially, unconscious prejudices may affect the trial.").

245 Abramson, *supra* note 86, at 70 (noting the strong presumption that a challenged judge is impartial); *see* Jason Hutt, Note, *A Wrong Without Remedy: Proposing a Recusal Procedure for Circuit Court Judges*, 22 VT. L. REV. 627, 645-46 (1998) (noting the difficulties attendant to the appeal of the denial of recusal in Vermont).

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

247 *See* Shepard, *supra* note 10, at 1080-81 (reciting seemingly egregious remarks deemed permissible by appellate courts); *id*. at 1088 (noting that, historically, the allegation of simple bias was not grounds for recusal).

248 *See, e.g.*, United States v. Pisani, 773 F.2d 397, 402 (2d Cir. 1985); Riddle v. State, 669 So. 2d 1014, 1019 (Ala. Crim. App. 1995) (finding that judge calling defendant a "thug" not reversible error but would have been "better left unsaid"); People v. Snow, 65

P.3d 749, 771 (Cal. 2003); People v. A.S. Goldmen, Inc., 779 N.Y.S.2d 489, 491-92 (N.Y. App. Div. 2004); *see also* Leubsdorf, *supra* note 33, at 274-75 (noting the limited nature of appellate review); Shaman, *supra* note 15, at 623 (citing extreme behavior passing appellate muster); United States v. Archbold-Newball, 554 F.2d 665, 681 (5th Cir. 1977) (refusing to disqualify judge who characterized defendants' actions as "a large scale conspiracy composed of the most vicious individuals that this court has ever seen"); United States v. Antonelli, 582 F. Supp. 880, 881 (N.D. Ill. 1984) (finding it within acceptable bounds to call defendant "[t]he most viciously antisocial person who has ever come before me").

249 *See* Shaman, *supra* note 15, at 620 (noting acceptability of even seemingly prejudicial comments by the judge on the evidence of a case so long as they are made outside the presence of a jury); *id*. at 622 (stating that even extreme statements by a judge during litigation "are considered a normal aspect of adjudication and are not disqualifying unless they are so egregious as to destroy all semblance of openmindedness").

250 Friedland, *supra* note 39, at 615-16.

251 *See* Rottman & Schotland, *supra* note 15, at 1370 (noting that a litigant often feels very much alone in a court proceeding).

252 Joy, *supra* note 55, at 693.

253 Miss. Comm'n on Judicial Performance v. Wilkerson, 2002-JP-02105-SCT (¶ 42) (Miss. 2004), 876 So. 2d 1006, 1016.

254 *See* Republican Party of Minnesota v. White, 536 U.S. 765, 795 (2002) (Kennedy, J., concurring).

255 Gerald F. Uelmen, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1143 (1997) ("When special interest groups or victim's [sic] rights organizations suggest that their unhappiness with a particular decision should result in removal of the judges who rendered it, the judges are hardly in a position to respond with a spirited defense of judicial integrity and independence."); Judith S. Kaye, *Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts*, 25 HOFSTRA L. REV. 703, 705, 723 (1997) (asserting that it is difficult for sitting judges to respond effectively to controversial decisions). *But see The Way Forward: Lessons from the National Symposium on Judicial Campaign Conduct and the First Amendment*, 35 IND. L. REV. 649, 655 (2002) (calling for the creation of non-official campaign conduct committees to raise the level of discourse during judicial campaigns).

256 *The Way Forward: Lessons from the National Symposium on Judicial Campaign Conduct and the First Amendment*, *supra* note 255, at 655.

257 *See* Leubsdorf, *supra* note 33, at 260-61 (noting the desire of interest groups to seek the adoption of *their* programs); Abrahamson, *supra* note 196, at 984 (noting elected judges must guard against "feed[ing] the crocodile").

258 *See* Abrahamson, *supra* note 196, at 978 (noting the chief focus of judicial independence is to protect the minority); *Judicial Elections and Free Speech*, *supra* note 37, at 323 (remarks of Steven Lubet noting that the rule of law is undermined when a judge allows the will of the majority to control the decision-making process); Berness, *supra* note 49, at 1056 ("[A] judge's ability to provide due process of law can be jeopardized by campaign conduct that is common and accepted in other types of political elections."); Burbank, *supra* note 15, at 317 ("The message that courts are engaged in partisan politics denies the possibility of the rule of law.").

259 *See* Mark White, Practitioner, National Judicial College Symposium: National Symposium on Judicial Speech -- Post *White* (Feb. 24, 2005), at 125 (transcript *available at* http:// www.abanet.org/judicialethics/meetings/transcript_022405_part2.pdf) (noting that after *Republican Party of Minnesota*, lawyers are starting to collect information about judges for the purpose of forum-shopping); Leubsdorf, *supra* note 33, at 260-61 (discussing the danger of mixing recusal with politics); Abramson, *supra* note 86, at 86 (disparaging "judge shopping").

260 *See* Berness, *supra* note 49, at 1028 (noting "[t]he increasing malevolence of judicial campaigns").

261 Abramson, *supra* note 86, at 66.

262 Chemerinsky, *supra* note 36, at 746.

263 *See* Lubet, *supra* note 176, at 989.

264 Kaye, *supra* note 257, at 705 (“Modern technology has shrunk the world and put it into everyone's living room.”). *See generally* Symposium, *Courts and the Mass Media: The Ethical Issues*, 37 SANTA CLARA L. REV. 981 (1997).

265 *See generally* Uelmen, *supra* note 257, at 1134 (deploring the increasing “tabloidization” of the media and its effects in politicizing the justice system).

266 *See* Shepard, *supra* note 10, at 1083 (noting that during elections the public expects that “a veritable Niagara of ideas will flow”).

267 *See* Melissa Nann Burke, *Stealth Candidate? New Rules Gag Hopefuls: Interest Group*, PA. L. WKLY., Nov. 7, 2005, *available at* 28 PLW 1178 (Westlaw) (noting appearance of interest group issue-oriented questionnaires directed to judicial candidates as a response to the belief that “judges' views do matter, and voters want to know whether candidates share their values” (quoting advocacy group attorney James Bopp, Jr.)).

268 Wendel, *supra* note 34, at 86-87.

269 *See* Linde, *supra* note 14, at 14 (noting that judicial decisions are more likely judged on outcomes than premises).

270 *See* Burbank, *supra* note 15, at 330 (noting that the ideals of judging established by the founders “can accommodate evolving views about the nature of law and lawmaking”).