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Disrobing Judicial Campaign Contributions: A Case for Using the Buckley Framework to Analyze the Constitutionality of Judicial Solicitation Bans

Aimee Ghosh

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COMMENTS

DISROBING JUDICIAL CAMPAIGN CONTRIBUTIONS: A CASE FOR USING THE *BUCKLEY* FRAMEWORK TO ANALYZE THE CONSTITUTIONALITY OF JUDICIAL SOLICITATION BANS

AIMEE PRIYA GHOSH*

In the past twenty years, numerous elected judges (and judicial candidates) have argued that state regulations prohibiting them from personally soliciting campaign contributions—even from would be litigants—violate their First Amendment free speech rights and should be struck down.

The constitutionality of these bans hedges on the level of scrutiny used for review. The bans should not be subject to strict scrutiny, but rather, the less rigorous campaign finance framework set out by the Supreme Court in Buckley v. Valeo. *If the* Buckley *framework is employed, the constitutionality of these bans will likely be upheld, and they will continue to serve as an important safeguard of the impartiality and independence of the American judicial system.*

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* Senior Staff Member, *American University Law Review*, Volume 61; J.D. Candidate, May 2012, *American University, Washington College of Law*; B.A. Interdisciplinary: Communications, Legal Institutions, Economics, Government and Political Science, 2007, *American University*. Thank you to Professor Stephen Wermiel for your great advice and the *Law Review* team for your effort and dedication. A special thank you to Mom, Dad, and Neal for your endless support and love.

INTRODUCTION

There is no debate that the hallmark characteristics of the American judicial system should be impartiality and independence. Former Supreme Court Justice Sandra Day O'Connor summed up this sentiment in a 2010 *New York Times* column, noting that "[i]n our system, the judiciary, unlike the legislative and the executive branches, is supposed to answer only to the law and the Constitution. Courts are supposed to be the one safe place where every citizen can receive a fair hearing."[1] In fact, the United States Supreme Court has made clear that litigants have a constitutional right to try their case before "a neutral and detached judge."[2]

Regardless, the independence of the judiciary has been increasingly

1. Sandra Day O'Connor, Editorial, *Take Justice off the Ballot*, N.Y. TIMES, May 23, 2010, at WK9.
2. Ward v. Village of Monroeville, 409 U.S. 57, 62 (1972).

threatened over the last decade by two factors: (1) a dramatic rise in spending in state judicial elections and (2) a systematic weakening of restrictions on the conduct of elected judges and judicial candidates.[3] These trends pose both real and perceived risks to the impartiality and independence of the American judicial system.[4]

These risks are demonstrated by the 2010 retention elections[5] of three Iowa Supreme Court justices. In April 2009, the Iowa Supreme Court struck down a ban on same-sex marriage, allowing same-sex couples to wed in the state.[6] By the 2010 election season, the three Iowa Supreme Court justices seeking reelection in retention elections were targets of an organized effort, paid for mostly by national and out-of-state groups opposed to gay marriage, to oust the justices because of the controversial marriage decision.[7] The three justices did not raise money to respond to the campaign against them.[8] Unsurprisingly, on November 2, 2010, these justices, for the first time in Iowa's history, lost their retention elections and their seats on the court.[9]

The circumstances of this judicial election were not unique to Iowa during the 2010 election cycle. The ugly campaign against the Iowa Supreme Court justices was replayed in states across the country against judges whose opinions on controversial issues upset specific interest groups.[10] The trend of judges being "penalized for a single vote" leads to an obvious question: will elected judges "start looking over their shoulders

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3. *See* MARK KOZLOWSKI & PRAVEEN KRISHNA, FREEING CANDIDATE SPEECH IN JUDICIAL ELECTIONS: OR, HOW SAFE ARE LOOSE CANONS? 3 (2002) (arguing that an influx of campaign contributions and a series of court decisions striking down restrictions on judicial candidate speech have hurt efforts to maintain the integrity of judicial elections).

4. *See infra* notes 10–14 and accompanying text (highlighting examples of the negative effects of increased campaign spending and weakened judicial campaign restrictions, which include volatile judicial campaigns and judges who vote disproportionally in favor of campaign contributors).

5. In a judicial retention election, a sitting judge does not face an opponent; rather, voters decide whether the judge should remain on the bench for another term. *Judicial Retention Elections*, IOWA JUDICIAL BRANCH, http://www.iowacourtsonline.org/Public_Information/About_Judges/Retention/ (last visited Sept. 19, 2011).

6. Monica Davey, *Gay Couples in Iowa Win Right to Wed*, N.Y. TIMES, Apr. 4, 2009, at A1.

7. John Gramlich, *Will Gay Marriage Decision Cost Iowa Justices Their Jobs?*, STATELINE, Sept. 10, 2010, http://www.stateline.org/live/details/story?contentId=511967; A.G. Sulzberger, *In Iowa, Voters Oust Judges Over Marriage Issue*, N.Y. TIMES, Nov. 3, 2010, http://www.nytimes.com/2010/11/03/us/politics/03judges.html.

8. Sulzberger, *supra* note 7.

9. *Id.*

10. *See id.* ("Though the Iowa election was the most prominent, similar ouster campaigns were begun in other states against state supreme court justices running unopposed in retention elections—judges whose rulings on matters involving abortion, taxes, tort reform and health care had upset conservatives.").

when they tackle controversial cases?"[11]

Media reports suggest that the answer to this question is "yes." A *New York Times* investigation of the Ohio Supreme Court, for example, discovered that the state's high court justices habitually ruled on cases in which parties to the case or groups filing supporting briefs were campaign contributors.[12] On average, the justices voted in favor of contributors seventy percent of the time, and one justice, in particular, voted for his contributors ninety-one percent of the time.[13] To add insult to injury, this connection between judicial campaign contributors and decision-making votes in their favor has eroded public confidence in the judicial system.[14]

Rules for judges and judicial candidates intended to preserve the impartiality and independence of the judiciary are one safeguard against the improper influences associated with campaigns.[15] Forty-nine out of fifty states have adopted rules governing the conduct of judges that are based on the American Bar Association's (ABA's) Model Code of Judicial Conduct ("Model Code").[16] The Model Code establishes standards for the ethical conduct of judges and judicial candidates.[17] It not only regulates the conduct of these individuals, but it also regulates speech.[18] Provisions of the Model Code, as adopted by states, have come under fire in recent years after the Supreme Court struck down part of Minnesota's Code of Judicial Conduct because it violated the First Amendment's guarantee of free speech.[19]

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11. Eliza Newlin Carney, *The Perils of Big Money in Judicial Elections*, NAT'L J. (Dec. 16, 2010, 9:46 AM), http://www.nationaljournal.com/columns/rules-of-the-game/the-perils-of-big-money-in-judicial-elections-20101004?mrefid=site_search (internal quotation marks omitted).

12. Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006, at A1.

13. *Id.*

14. *See* ADAM SKAGGS, BUYING JUSTICE: THE IMPACT OF *CITIZENS UNITED* ON JUDICIAL ELECTIONS 4–7 (2010) (compiling the results of nine polls demonstrating that the public at large and judicial campaign contributors believe that campaign spending influences judicial decision making). The report included the results of a 2001 national poll by Greenberg Quinlan Rosner, which found that seventy-six percent of respondents believe that contributions influence a judge's decisions. *Id.* at 5.

15. *See* MODEL CODE OF JUDICIAL CONDUCT pmbl. (2004) (explaining that the Model Code was designed to protect public trust in the judiciary and legal system).

16. Brent Dorner, Comment, *2007 Model Code of Judicial Conduct: Are the Speech Restrictions Necessary?*, 33 J. LEGAL PROF. 341, 341 (2009) (citing JAMES J. ALFINI ET. AL., JUDICIAL CONDUCT AND ETHICS 1–5 (2007)).

17. *See* MODEL CODE OF JUDICIAL CONDUCT pmbl. (2007) (declaring that the Model Code was promulgated to maintain "[a]n independent, fair and impartial judiciary").

18. *See, e.g.*, MODEL CODE OF JUDICIAL CONDUCT R. 4.1(A)(2)–(3) (2011) (prohibiting a judge or judicial candidate from "mak[ing] speeches on behalf of a political organization" or "publicly endors[ing] or oppos[ing] a candidate for any public office").

19. *See* Republican Party of Minn. v. White (*White I*), 536 U.S. 765, 787–88 (2002) (striking down Minnesota's "announce clause," which prohibited judicial candidates from

One provision of the Model Code, a solicitation ban, prohibits judges and judicial candidates from "personally solicit[ing] or accept[ing] campaign contributions other than through a campaign committee."[20] The purpose of the solicitation ban is to address the risks posed by judicial campaign contributions on the independence and impartiality of the judiciary.[21] Like other Model Code provisions dealing with political activities, the solicitation ban has been challenged on the grounds that it violates the Free Speech Clause of the First Amendment.[22] To date, the Supreme Court has not issued an opinion on the constitutionality of state solicitation bans for judges and judicial candidates.

This Comment argues that courts should not assess the constitutionality of state judicial solicitation bans by using strict scrutiny, but rather, that they should employ the less exacting framework of analysis set forth by the Supreme Court in *Buckley v. Valeo*.[23] Furthermore, this Comment reasons that if the *Buckley* framework is employed, judicial solicitation bans will be upheld against First Amendment challenges. Part I of this Comment describes the prevalence of state judicial elections as well as the history of First Amendment challenges to state solicitation bans, concluding with a description on the extant law on the First Amendment and campaign finance regulations.[24] Part II sets forth the arguments against using strict scrutiny to analyze the constitutionality of judicial solicitation bans,[25] and Part III contends that the proper level of judicial scrutiny for solicitation bans is the *Buckley* framework.[26] Furthermore, Part III argues that if the *Buckley* framework is used, then state solicitation bans will likely be upheld against First Amendment challenges.[27] Part IV of this Comment discusses whether solicitation bans are enough to guard the integrity of the American judicial system.[28]

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announcing their views on disputed legal or political issues).

20. MODEL CODE OF JUDICIAL CONDUCT R. 4.1(A)(8) (2011).

21. *See* Alexandrea Haskell Young, Note, *The First Chink in the Armor? The Constitutionality of State Laws Burdening Judicial Candidates After* Republican Party of Minnesota v. White, 77 S. CAL. L. REV. 433, 472–73 (2004) ("As the reporter to the Model Code wrote, '[t]he problem of funding a campaign for judicial office probably presents the greatest of all conflicts between political necessity and judicial impartiality.'" (quoting E. WAYNE THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT 98 (1973))).

22. *See, e.g.*, Stretton v. Disciplinary Bd., 944 F.2d 137, 139 (3d Cir. 1991) (concerning, in part, a First Amendment challenge brought by a judicial candidate to provisions of Pennsylvania's Code of Judicial Conduct that prohibited judicial candidates from personally soliciting campaign funds).

23. 424 U.S. 1 (1976) (per curiam).

24. *See infra* Part I.

25. *See infra* Part II.

26. *See infra* Part III.A–B.

27. *See infra* Part III.C.

28. *See infra* Part IV.

I. BACKGROUND

A. The Landscape of State Judicial Elections

In the United States, the election of state judges is very much the rule, and the appointment of judges, the exception. Thirty-nine out of fifty states use elections to select or retain some or all of the state's judges.[29] The large majority of all state judges either run in elections to join the bench, or in retention elections to keep their seat.[30]

State judicial elections are not only common, they are also expensive. Nationally, between 2000 and 2009, state supreme court candidates raised $206.9 million, a figure more than double the $83.3 million raised between 1990 and 1999.[31] Of the money raised during the last decade, $62,589,165 came from business interests and $59,272,198 came from lawyers and lobbyists.[32] These interests represent "repeat players in high-stakes litigation," and therefore are motivated to support judges who favor their cause.[33] Contributions from these two sectors alone accounted for well over half of all judicial campaign contributions between 2000 and 2009.[34]

Stories of judges favoring major campaign contributors have been widely publicized in the media. For example, in 2009, the *New York Times* and other popular media outlets ran a series of stories about an egregious case of judicial impropriety concerning a West Virginia Supreme Court justice, Brent Benjamin, who voted in favor of the company of a coal-mining executive, Don Blankenship,[35] after Blankenship contributed

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29. *See Methods of Judicial Selection*, AM. JUDICATURE SOC'Y, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state= (last visited Sept. 19, 2011) (compiling the methods of selecting judges in all fifty states); *see also* MD. CONST. art. IV, §§ 3, 5, 5A(c)–(e) (describing the state requirements for judicial general and retention elections); NEV. CONST. art. VI, §§ 3, 5 (calling for the election of state supreme court, appellate court, and district court judges); TENN. CONST. art. VI, §§ 3–4 (mandating that all state supreme court and inferior court judges be elected by qualified voters of the state).

30. *See Judicial Selection and Retention FAQs*, NAT'L CTR. FOR STATE COURTS, http://www.ncsc.org/topics/judicial-officers/judicial-selection-and-retention/faq.aspx# (last visited September 19, 2011) (explaining that nationwide, 1084 out of 1243 state appellate judges, or eighty-seven percent, face some type of election, and that 7378 out of 8489 state trial court judges, or eighty-seven percent, face some type of election).

31. JAMES SAMPLE ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2000–2009, at 8 (2010). To put this spending growth in perspective, the Consumer Price Index increased twenty-five percent between 2000 and 2009. *Id.*

32. *Id.*

33. SKAGGS, *supra* note 14, at 2.

34. *See* SAMPLE ET AL., *supra* note 31, at 8 fig. 3.

35. *See, e.g.*, Adam Liptak, *Case May Alter the Election of Judges*, N.Y. TIMES, Feb. 15, 2009, at A29 (discussing the financial relationship between Benjamin and Blankenship, which ultimately ended in a United States Supreme Court case, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009), over whether Benjamin should have recused himself from Blankenship's case); Barry Meier, *In Long-Running Coal Battle, a New Round in Virginia*,

roughly $3 million to Benjamin's election campaign.[36] But this publicity was hardly a new phenomenon—the concern that judges are influenced by campaign contributions has been addressed by mainstream media outlets for decades.[37] The topic has been further publicized, and probably sensationalized, by fictional works like John Grisham's *The Appeal*.[38]

Thanks in part to media attention on the subject, a hidden cost of escalating spending in judicial elections is the erosion of public confidence in the fairness of the judicial system. A February 2009 *USA Today*/Gallup poll found that eighty-nine percent of respondents believed that the influence of campaign contributions on the decisions of judges was problematic.[39] Similarly, a 2009 Harris Interactive national poll found that eighty percent of Americans believed that judges should not hear cases involving campaign contributors.[40] Approximately a dozen similar polls have been conducted in recent years, showing trepidation among members of the public concerning the effect of campaign spending on the integrity of the judicial system.[41]

B. The Personal Solicitation Ban on State Judges and Judicial Candidates

Regulations on judicial solicitations of campaign funds first appeared in the ABA's 1972 Code of Judicial Conduct, which provided that a judicial candidate "should not himself solicit or accept campaign funds," but could form committees to solicit on his behalf.[42] In 1990, the ABA amended the

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N.Y. TIMES, Nov. 10, 2010, at B3 (chronicling the legal battles of Hugh Caperton, Blankenship's legal opponent whose company was damaged by the court decision in which Benjamin cast a deciding vote in favor of Blankenship); Editorial, *Justice for Sale?*, WASH. POST, Mar. 3, 2009, at A12 (arguing that electing judges is an unpalatable option in light of the case involving Blankenship, Benjamin, and Caperton).

36. Liptak, *supra* note 35, at A29.

37. *See, e.g.*, Richard Woodbury, *Is Texas Justice for Sale?*, TIME, Jan. 11, 1988, http://www.time.com/time/magazine/article/0,9171,966426,00.html (describing how attorneys in a case before the Texas Supreme Court systematically doled out campaign contributions to the justices); *Frontline: Justice for Sale* (PBS television broadcast Nov. 23, 1999) (investigating judicial campaign contributors and how the contributors are "repaid" by the judges they help elect).

38. *See* Janet Maslin, *If You Can't Win the Case, Buy an Election and Get Your Own Judge*, N.Y. TIMES, Jan. 28, 2008, http://www.nytimes.com/2008/01/28/books/28maslin.html (describing the plot of John Grisham's novel, *The Appeal*, in which a big company spends money to elect state supreme court justices to win a favorable judgment in a pending case).

39. SKAGGS, *supra* note 14, at 4.

40. *Id.*

41. *See, e.g.*, *id.* at 5–7 (compiling polling data suggesting that a majority of Americans believe that judges are influenced by campaign contributions).

42. CODE OF JUDICIAL CONDUCT Canon 7(B)(2) (1972).

1972 Code and created the Model Code of Judicial Conduct.[43] The solicitation ban remained substantially the same between the two versions, save a change transforming the rule from an aspirational rule to a mandatory one.[44] The most recent version of the Model Code[45] retains the solicitation ban and makes no substantial changes to this particular provision.[46]

The Model Code does not take legal effect until it is adopted by state statute or by judicial order.[47] Forty-nine states have adopted a variation of either the 1972 Code or 1990 Model Code.[48] Thirty-two states have enacted judicial codes of conduct that prohibit or restrict judges and judicial candidates from personally soliciting campaign contributions.[49]

To assist states with enforcement of the Model Code, the ABA promulgated the Model Rules for Judicial Disciplinary Enforcement.[50] These rules describe the grounds for judicial discipline, which include violations of the Code of Judicial Conduct and willful violations of state high court orders.[51] Thus, in states that have adopted a solicitation ban, a

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43. MODEL CODE OF JUDICIAL CONDUCT (1990).

44. *Compare* CODE OF JUDICIAL CONDUCT Canon 7(B)(2) (1972) (providing that a judicial candidate "should not himself solicit or accept campaign funds," but can form committees to solicit on his behalf), *with* MODEL CODE OF JUDICIAL CONDUCT Canon 5(C)(2) (1990) (providing that a judicial candidate "shall not personally solicit or accept campaign contributions . . . [but may] establish committees . . . to conduct campaigns for the candidate").

45. MODEL CODE OF JUDICIAL CONDUCT (2011).

46. *Compare* MODEL CODE OF JUDICIAL CONDUCT Canon 5(C)(2) (1990) (providing that a judicial candidate "shall not personally solicit or accept campaign contributions . . . [but may] establish committees . . . to conduct campaigns for the candidate"), *with* MODEL CODE OF JUDICIAL CONDUCT R. 4.1(A)(8) (2011) (providing that a judicial candidate may not "personally solicit or accept campaign contributions other than through a campaign committee").

47. Dorner, *supra* note 16, at 342.

48. *Id.* Additionally, Montana has not adopted a version of the ABA guidelines, but has established its own judicial code of conduct. *Id.* at n.13.

49. *See Methods of Judicial Selection*, *supra* note 29 (showing that Alaska, Arizona, Arkansas, Colorado, Connecticut, Florida, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming have adopted by statute or judicial canon a form of solicitation ban).

50. MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT (1994).

51. *Id.* R. 6. The Model Rules prescribe judicial disciplinary proceedings that begin with a complaint filed with the state's judicial disciplinary board. *Id.* R. 17. The proceedings include an investigation and discovery phase, culminating in a hearing; the state judicial disciplinary board then issues its findings and recommendations. *Id.* RR. 22, 24. The Model Rules provide that all public sanctions on a member of the judiciary should come from the state high court. *Id.* R. 25. However, jurisdictions may permit the disciplinary board to impose some disciplinary measures. *Id.* cmt. The Model Code also provides that a complaint against a member of the state's highest court should be adjudicated in much the same way as any other complaint except that a special supreme court should be formed to review the matter. *Id.* R. 26.

violation of the ban would suffice as grounds for judicial discipline.[52]

The methods of enforcing judicial codes of conduct, like the solicitation ban, are typically found in state statutes and constitutions.[53] Violations of the judicial code of conduct must be proven by "clear and convincing evidence" before a sanction may be imposed.[54] Once it is determined that a judge or judicial candidate engaged in misconduct, the court with jurisdiction over the individual bears responsibility for determining the appropriate sanction.[55] As such, disciplinary measures vary by jurisdiction and by the circumstances of judicial misconduct, but may include removal,[56] suspension,[57] censure,[58] limitations on the performance of judicial duties, fines, or any combination of these sanctions.[59]

C. The First Amendment and Campaign Finance Rules

1. Overview of free speech jurisprudence

The Free Speech Clause of the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."[60] The Supreme Court has held that the Due Process Clause of the Fourteenth

52. *See id.* R. 6 (outlining the grounds for judicial discipline, which include violations of the code of judicial conduct and valid orders of the highest court of the jurisdiction).

53. *See, e.g.*, *In re* Hapner, 718 So. 2d 785, 787–88 (Fla. 1998) (per curiam) (holding that the state's constitution provides the state's judicial disciplinary commission with jurisdiction over allegations of judicial misconduct and affirming the commission's finding that the judge in question violated canons of the state's code of judicial conduct).

54. *See, e.g.*, *In re* Drury, 602 N.E.2d 1000, 1002 (Ind. 1992) (per curiam) (noting that the state judicial disciplinary commission has the burden of proving judicial misconduct by clear and convincing evidence).

55. *See, e.g.*, Spruance v. Comm'n on Judicial Qualifications, 532 P.2d 1209, 1212 (Cal. 1975) (en banc) (per curiam) (noting that, as the appellate court of the jurisdiction, the court must make the "ultimate, dispositive decision" on how to sanction the judge before the court).

56. *See, e.g.*, *id.* at 1211 (holding that a judge's "wilful misconduct in office" and "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" warranted removal from office (internal quotation marks omitted)).

57. *See, e.g.*, Disciplinary Counsel v. Parker, 876 N.E.2d 556, 560, 574 (Ohio 2007) (per curiam) (suspending a judge for eighteen months as punishment for twenty-three violations of eight judicial canons and eight violations of three disciplinary rules), *reinstatement granted*, 907 N.E.2d 726 (Ohio 2009).

58. *See, e.g.*, *In re* Allen, 998 So. 2d 557, 564–65 (Fla. 2008) (per curiam) (concluding that since a judge violated three provisions of the state's code of judicial conduct, the state's judicial disciplinary commission's recommendation that the judge be publicly reprimanded was correct).

59. *See, e.g.*, *Drury*, 602 N.E.2d at 1009 ("Upon a finding of judicial misconduct, the Court may impose any of the following professional disciplinary actions: removal, retirement, suspension, discipline as an attorney, limitations or conditions on the performance of judicial duties, reprimand or censure, fine, assessment of costs and expenses, or any combination of the above sanctions.").

60. U.S. CONST. amend. I.

Amendment[61] incorporates the Free Speech Clause and that the Clause applies to the states.[62] The Free Speech Clause protects every citizen's ability to express himself or herself without government suppression.[63] A citizen's right to free speech is broad, but it is not absolute and may be restricted in some circumstances.[64]

Speech restrictions come in two forms: content-based restrictions and content-neutral restrictions.[65] A content-based restriction is enacted because of "hostility—or favoritism—towards the underlying message expressed" by the regulated speech, while a content-neutral restriction poses "no significant danger of idea or viewpoint discrimination."[66] Examples of content-based restrictions include laws banning the hiring of teachers who promote the overthrow of the government by force or banning the display of swastikas.[67] In contrast, examples of content-neutral restrictions include bans on billboards in residential neighborhoods or prohibitions on loud demonstrations near a hospital.[68]

To distinguish content-based restrictions from content-neutral ones, "the 'principal inquiry . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.'"[69] When considering a speech restriction, if the answer to this inquiry is "yes," then the restriction is likely content-based.[70] If the answer

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61. U.S. CONST. amend. XIV.

62. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) ("For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.").

63. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994) ("At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.").

64. *See, e.g.*, Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357, 376 (1997) (upholding a regulation that prohibited protesters from impeding physical access to abortion clinics against a First Amendment challenge because the government interests underlying the prohibition, including public safety, were significant).

65. *See* R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 U. MIAMI L. REV. 333, 333 (2006) (explaining that speech is regulated either on the basis of its content or "on grounds that are neutral toward [its] content").

66. R.A.V. v. City of St. Paul, 505 U.S. 377, 386, 388 (1992) (describing the different types of speech restrictions in the context of a First Amendment challenge to a local ordinance banning bias-motivated disorderly conduct).

67. *See* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 47 (1987) (providing examples of laws that regulate speech or expression on the basis of the message conveyed).

68. *See id.* at 48 (providing examples of restrictions that regulate speech or expression on the basis of factors others than the message conveyed).

69. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

70. *See id.* at 643 (noting that laws that distinguish favored ideas or views from

is "no," then the restriction is likely content-neutral.[71]

The distinction between content-based and content-neutral restrictions is important because this distinction determines the level of judicial scrutiny applied.[72] In general, content-based restrictions are considered more detrimental to the Constitution's guarantee of free speech.[73] As such, the Supreme Court has held that speech that is regulated because of its content is subject to strict judicial scrutiny.[74] This is the most exacting standard of scrutiny and is difficult to meet.[75] To survive strict scrutiny, a law must be "narrowly tailored to serve . . . a compelling state interest."[76] An example of the exacting nature of this standard can be found in *United States v. Playboy Entertainment Group, Inc.*,[77] a Supreme Court case involving a First Amendment challenge to a law that required cable operators to scramble or limit sexually explicit programming during certain hours.[78] The Court reasoned that the restriction was content-based (targeting only sexually explicit programming) and thus subject to strict scrutiny.[79] The Court then held that the law failed to satisfy the strict scrutiny test because the government's interest in protecting children from viewing sexually

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disfavored ones are content-based).

71. *See id.* (observing that "laws that confer benefits" without referring to the ideas or views of the content regulated are "in most instances content neutral").

72. *See* Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297, 304–05 (1997) (explaining that a speech regulation is subject to strict scrutiny if it is "content-based," and an intermediate form of scrutiny if "content-neutral"); *see also* Wright, *supra* note 65, at 333 (discussing the argument of one prominent constitutional law scholar that "today, virtually every free speech case turns on the application of the distinction between content-based and content-neutral laws" (alteration omitted) (internal quotation marks omitted)).

73. *See* Wright, *supra* note 65, at 334–35 (arguing that content-based restrictions are considered "worse" than content-neutral restrictions because they are powerful tools with which to stifle public debate); *see also* City of Ladue v. Gilleo, 512 U.S. 43, 60 (1994) (O'Connor, J., concurring) ("[C]ontent-based speech restrictions are especially likely to be improper attempts to value some forms of speech over others, or are particularly susceptible to being used by the government to distort public debate.").

74. *See* Republican Party of Minn. v. White (*White I*), 536 U.S. 765, 774–75 (2002) (affirming that regulations on speech "about the qualifications of candidates for public office" are subject to strict scrutiny).

75. *See Turner Broad. Sys.*, 512 U.S. at 680 (O'Connor, J., concurring in part and dissenting in part) (explaining that to survive strict scrutiny, "[i]t is not enough that the goals of the law be legitimate, or reasonable, or even praiseworthy . . . [t]here must be some pressing public necessity").

76. *White I*, 536 U.S. at 775. "Narrowly tailored" means that the regulation in question must "operate without unnecessarily circumscribing protected expression." Brown v. Hartlage, 456 U.S. 45, 54 (1982). A "compelling state interest" is a "pervasive, nationwide problem" that must be addressed. United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 823 (2000) (holding that the state failed to show that explicit television programming was so harmful and boundless as to justify a sweeping restriction on such programming).

77. 529 U.S. 803 (2000).

78. *Id.* at 806.

79. *See id.* at 811–13 (observing that the regulation at issue "limited Playboy's market as a penalty for its programming choice").

explicit material was not "sufficiently compelling" to warrant such a far-reaching restriction.[80] In addition, the law was not narrowly tailored because a less restrictive alternative, an "opt-in" for a scrambling service, was available.[81]

Speech regulations that are content-neutral are subject to intermediate judicial scrutiny.[82] Intermediate scrutiny is a less "rigorous" standard than strict scrutiny and therefore more easily met.[83] To pass intermediate scrutiny, the law must further an important government interest that is unrelated to the suppression of free expression and must be no more expansive than essential to further the interest.[84] In *Fraternal Order of Police, North Dakota State Lodge v. Stenehjem*,[85] the United States Court of Appeals for the Eighth Circuit applied intermediate scrutiny in a case involving a First Amendment challenge to a state law that prohibited telephone solicitations by charitable organizations to North Dakota residents who registered with the state's "do-not-call" list.[86] First, the court determined that the law was content-neutral because the state had not enacted the law "because of any disagreement with the message that would be conveyed."[87] After determining that the law was content-neutral, the court applied intermediate scrutiny and determined that the state had a legitimate and significant interest in protecting the "tranquility" and "privacy" of the homes of North Dakotans.[88] Furthermore, the court observed that the law did not burden speech beyond the extent necessary to achieve its goals, as the law only applied to personal residences.[89] Having

80. *Id.* at 825.

81. *See id.* at 822–27 (detailing the alternative of allowing subscribers to voluntarily block content they found offensive). The Court also noted that the government was arguing that the decision or inaction of parents not to block the offending channels was to be superseded by the scrambling regulation. *Id.* at 825.

82. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 661–62 (1994) (concluding that the appropriate standard by which to evaluate the constitutionality of a regulation requiring the inclusion of local television stations is the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech).

83. Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 213 (1997) (explaining that content-neutral regulations do not endanger free expression in the same manner as content-based ones, and "thus are subject to a less rigorous analysis, which affords the Government latitude").

84. *See* Tool Box v. Ogden City Corp., 355 F.3d 1236, 1240 (10th Cir. 2004) (en banc) (describing one four-part test used to assess laws when the state interest in the law is unrelated to the content of the speech: (1) the government must have the power to enact the law; (2) the law must further a government interest; (3) the government interest must not be related to the message the speech expresses; and (4) the restriction is not broader than necessary to further the government interest).

85. 431 F.3d 591 (8th Cir. 2005).

86. *Id.* at 596.

87. *Id.*

88. *Id.* at 597.

89. *Id.* at 598–99.

passed intermediate scrutiny, the court upheld the prohibition on telephone solicitations.[90]

However, the Supreme Court has notably upheld a "narrow class of speech restrictions" that otherwise would not satisfy judicial scrutiny tests "based on an interest in allowing governmental entities to perform their functions."[91] The Court's rationale in upholding this particular type of speech restriction was illustrated by its decision in *United States Civil Service Commission v. National Ass'n of Letter Carriers*.[92] In *Letter Carriers*, the Court upheld the Hatch Act, a law that prohibited federal employees from taking an active role in political management or a political campaign.[93] The Court did not apply the traditional First Amendment standards of review—neither strict nor intermediate scrutiny was utilized.[94] Instead, the Court based its judgment on four important government interests: ensuring that federal employees execute the will of Congress and not their own political parties; ensuring that Americans maintain confidence in the federal government; ensuring that advancement in the federal government is not dependent on political performance; and ensuring that the federal workforce was not employed to create an invincible political machine.[95] The Court emphasized that its decision to uphold the Hatch Act against a First Amendment challenge was buttressed by the nation's long history of ensuring that "federal service . . . depend[s] upon meritorious performance rather than political service."[96]

Following *Letter Carriers*, the Court upheld similar restrictions that burden speech by reasoning that some restrictions are necessary to support

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90. *See id.* at 599 (concluding that the content-neutral statute did not "entirely foreclose any means of communication," and thus was "sufficiently tailored to pass constitutional muster").

91. Citizens United v. FEC, 130 S. Ct. 876, 899 (2010) (discussing a category of speech restrictions not subject to the usual forms of First Amendment scrutiny); *see, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) (upholding speech restrictions imposed by a school board to protect the goals and functions of public education); U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 557 (1973) (ensuring that federal employees are retained based on their performance instead of political service).

92. 413 U.S. 548 (1973).

93. *Id.* at 567. The Hatch Act limits partisan political activities by government employees, such as using their government positions for political gain or performing partisan activities in return for government employment. Hatch Political Activities Act, 18 U.S.C. §§ 594, 595, 598, 600, 601, 604, 605 (2006).

94. *See Letter Carriers*, 413 U.S. at 566–67 (declining to analyze the Hatch Act under a prevailing First Amendment standard of review and instead simply stating that the First Amendment does not invalidate a law barring political activities by government employees).

95. *Id.* at 565–66.

96. *Id.* at 557. The Court went on to chronicle historical decisions by American leaders that demonstrate a dedication to ensuring that politics do not mix with federal service. *Id.* at 557–60.

government operations.[97] For example, in *Parker v. Levy*,[98] the Court confirmed the constitutionality of a military rule that prohibited enlisted soldiers from publicly encouraging fellow soldiers to refuse orders.[99] The Court argued that the obedience and discipline required of military personnel made it acceptable for the military to implement speech restrictions on its service members in a manner that would otherwise be unconstitutional.[100] Similarly, in *Bethel School District No. 403 v. Fraser*,[101] the Court affirmed the constitutionality of a school sanction imposed on a student who used vulgar and offensive language and gestures during a school assembly.[102] The Court reasoned that to fulfill the "role and purpose" of the public school system, limiting "the use of vulgar terms in public discourse" is "a highly appropriate function of public school education."[103] In short, while the constitutionality of speech restrictions is usually contingent on surviving a judicial scrutiny test, *Letter Carriers* and its progeny demonstrate that the Supreme Court will lay strict and intermediate scrutiny aside in the face of a critically important government interest.

2. Overview of campaign finance law

Campaign finance regulations are another subset of the law of free speech. The Supreme Court has held that campaign financing, including the solicitation of campaign donations, is considered "speech" under the First Amendment.[104] In 1976, the Supreme Court decided *Buckley v. Valeo*, a seminal case establishing the framework for assessing the constitutionality of campaign finance regulations.[105] *Buckley* addressed the constitutionality of a federal law, the Federal Election Campaign Act,[106]

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97. *See* Citizens United v. FEC, 130 S. Ct. 876, 899 (2010) (noting that the Supreme Court has upheld speech restrictions because certain governmental functions would cease to function otherwise).

98. 417 U.S. 733 (1974).

99. *Id.* at 736–39, 758–61.

100. *Id.* at 758.

101. 478 U.S. 675 (1986).

102. *Id.* at 677–79, 685 (concluding that the school district was within its authority in sanctioning a student for obscene speech).

103. *Id.* at 681–83.

104. *See* FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 493 (1985) (holding that a law prohibiting some forms of campaign expenditures involved "speech at the core of the First Amendment"); *see also* Buckley v. Valeo, 424 U.S. 1, 14 (1976) (per curiam) (declaring that a law's political "contribution and expenditure limitations operate[d] in an area of the most fundamental First Amendment activities").

105. *See Politics Glossary:* Buckley v. Valeo, WASHINGTONPOST.COM, http://projects.washingtonpost.com/politicsglossary/campaign-finance/Buckley-v-Valeo (last visited Sept. 19, 2011) (calling *Buckley* "[t]he landmark Supreme Court case on campaign finance").

106. The Federal Election Campaign Act was enacted in 1971 in response to a "wave of

that limited federal campaign contributions and expenditures.[107]

Noting that the First Amendment guarantees freedom of expression *and* association, the Court affirmed that both campaign contributions and expenditures are speech and thus protected by these two aspects of the First Amendment.[108] The Court distinguished between contributions and expenditures in the realm of political expression, holding that a limitation on campaign expenditures "represent[s] [a] substantial . . . restraint[] on the quantity and diversity of political speech," whereas a limitation on the amount that a person may contribute "entails only a marginal restriction upon the contributor's ability to engage in free communication."[109] Similarly, the Court held that while limitations on expenditures severely impinge on freedom of association by "preclud[ing] most associations from effectively amplifying the voice of their adherents," the limitation on contributions leaves a contributor "free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates."[110] As a result, the Court held that strict scrutiny must be applied to regulations on expenditures because they encroach on freedoms guaranteed by the First Amendment,[111] while limitations on campaign contributions must only be supported by a "sufficiently

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public sentiment that money was influencing politics on a large scale." Christopher A. McNulty, Note, *Campaign Finance Law & the First Amendment—Can You See the Light?: Illuminating Precedent and Creating a New Tier of Judicial Scrutiny for Campaign Finance Laws.* Randall v. Sorrell, *126 S. Ct. 2479 (2006)*, 30 U. ARK. LITTLE ROCK L. REV. 149, 153 (2007).

107. Buckley v. Valeo, 424 U.S. 1, 15 (1976) (per curiam). A campaign expenditure is money that a person, group, or campaign spends on political communications or activities. *See id.* at 19. A campaign contribution is money that a person or group donates to a campaign. *See id.* at 20–21.

108. *See id.* at 14–18 (explaining that contribution and expenditure limits affect the discussion of public issues and qualifications of political candidates and therefore are subject to First Amendment protections, which include unfettered political expression and political association). The Court considered political expression to be free discussion and exchange of ideas, and it considered political association to be the coming together of individuals and groups for the purpose of advancing a belief or idea. *Id.* at 14–15.

109. *Id.* at 19–20. In explaining why a limitation on campaign expenditures was a "substantial" restriction on speech, the Court explained that:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.

Id. at 19. The Court also noted that contribution limitations are only a "marginal restriction" on speech because a contributor is still free to associate with a political party or directly assist with a candidate's campaign efforts. *Id.* at 20–21.

110. *Id.* at 22.

111. *See id.* at 44–45 (declaring that the "governmental interest in preventing corruption and the appearance of corruption" was inadequate in justifying an intrusion upon political speech).

important" state interest and be "closely drawn to avoid unnecessary abridgement of associational freedoms."[112]

The Court did not classify the *Buckley* framework as a form of intermediate or strict scrutiny.[113] Nevertheless, the Court employed this standard to uphold a limitation on contributions to candidates because it recognized a "sufficiently important" governmental interest in "the prevention of corruption and the appearance of corruption."[114] The Court attributed the constitutionally-sufficient nature of these interests to the American system of public financing in elections and the candidates' need for contributions to campaign.[115] The Court reasoned that, if left unrestrained, contributors could donate large amounts of money to "secure a political *quid pro quo*" and harm the integrity of the American system of government in the process.[116]

After *Buckley*, the Court affirmed the distinction between expenditure and contribution regulations by explicitly declaring that expenditure and contribution limits are controlled by different standards of scrutiny.[117] Furthermore, decisions handed down after *Buckley* helped to clarify its framework.[118] For example, in *Randall v. Sorrell*,[119] the Court noted that it "cannot determine with any degree of exactitude" whether a statute limiting campaign contributions is precisely tailored to meet a state's legitimate objective.[120] Rather, the Court recognized that *Buckley* established the existence of a "lower bound" under which a regulation would be so restrictive as to violate the First Amendment.[121] Specifically, the Court explained that contribution limits that are so low that they impede a

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112. *Id.* at 25.

113. *Compare* Mark Spottswood, Comment, *Free Speech and Due Process Problems in the Regulation and Financing of Judicial Election Campaigns*, 101 NW. U. L. REV. 331, 338 (2007) (identifying the "closely drawn" standard as a form of intermediate scrutiny), *with* McNulty, *supra* note 106, at 175–76 (arguing that the *Buckley* Court created a new form of "semi-strict scrutiny").

114. *See Buckley*, 424 U.S. at 25–27.

115. *Id.* at 26.

116. *Id.* at 26–27.

117. *See* FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 259–60 (1986) ("We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending.").

118. *See, e.g.*, Randall v. Sorrell, 548 U.S. 230, 247–50 (2006) (determining a state contribution limit was "too low and too strict to survive" *Buckley*'s "closely drawn" scrutiny); Cal. Med. Ass'n v. FEC, 453 U.S. 182, 184–85 (1981) (holding that limits on contributions to political action committees are constitutional under the First Amendment).

119. 548 U.S. 230 (2006).

120. *Id.* at 248.

121. *See id.* at 247–48 (explaining that in *Buckley*, the Court recognized that "contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy" (citation omitted) (internal quotation marks omitted)).

candidate's ability to run an effective campaign cannot be upheld under the *Buckley* framework.[122]

In the recently decided case of *Citizens United v. FEC*,[123] the Supreme Court maintained the *Buckley* framework. *Citizens United* involved a federal law that banned corporations and unions from using general treasury funds to make expenditures for "electioneering communication" or to advocate for the election or defeat of a candidate.[124] The Court struck down the law, holding that "the Government may not suppress political speech on the basis of the speaker's corporate identity . . . [because] [n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations."[125] Significantly, the Court left the *Buckley* rules on contributions intact and merely extended *Buckley*'s holding regarding independent expenditures.[126] Therefore, the standard of review used to assess the constitutionality of campaign contribution limitations is the more than thirty-year-old *Buckley* standard: a restriction on campaign contributions will be upheld if it is supported by a "sufficiently important" state interest and is "closely drawn" to avoid impinging on fundamental freedoms.[127]

D. Rulings on the Constitutionality of the Solicitation Ban

The Supreme Court has not directly addressed the constitutionality of a state judicial solicitation ban.[128] However, in 2002, the Supreme Court decided *Republican Party of Minnesota v. White*[129] (*White I*), the leading case involving a challenge to a state judicial code of conduct provision limiting speech.[130] In *White I*, a candidate for judicial office sued

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122. *See id.* at 247–49 (noting that low contribution limits would weaken democratic accountability by discouraging challengers running against incumbent officeholders).

123. 130 S. Ct. 876 (2010).

124. *Id.* at 886 (internal quotation marks omitted).

125. *Id.* at 913.

126. *See id.* at 908 ("The *Buckley* Court . . . sustained limits on direct contributions in order to ensure against the reality or appearance of corruption. That case did not extend this rationale to independent expenditures and the Court does not do so here.").

127. Buckley v. Valeo, 424 U.S. 1, 25 (1976) (per curiam).

128. As discussed in Part I.B of this Comment, the ABA's recommended solicitation ban prohibits a judicial candidate from personally soliciting or accepting campaign funds, but it allows a candidate to form a committee to solicit on his or her behalf. MODEL CODE OF JUDICIAL CONDUCT R. 4.1(A)(8) (2011). To date, thirty-one states have enacted some form of the model solicitation ban. *See Methods of Judicial Selection*, *supra* note 29 (conducting a state-by-state review of judicial campaign conduct rules).

129. 536 U.S. 765 (2002).

130. *See* Richard L. Hasen, *First Amendment Limits on Regulating Judicial Campaigns*, *in* RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS 15, 22–23 (Matthew J. Streb ed., 2007) (noting that *White I* was the first Supreme Court decision on the constitutionality of a canon of the judicial code of conduct).

Minnesota's judicial ethics office, arguing that the state supreme court's canon of judicial conduct prohibiting judicial candidates from announcing their views on disputed legal or political issues violated the First Amendment.[131] The Court interpreted the scope of the canon broadly; thus, the canon was deemed to prohibit a candidate "from stating his views on any specific non-fanciful legal question within the province of the court for which he is running."[132] After defining the meaning of the canon, the Court determined that the announce clause was subject to strict scrutiny because it "both prohibit[ed] speech on the basis of its content and burden[ed] a category of speech that is 'at the core of our First Amendment freedoms'—speech about the qualifications of candidates for public office."[133]

The Court used strict scrutiny to analyze the two state interests supporting the announce clause: "preserving the impartiality of the state judiciary and preserving the appearance of the impartiality of the state judiciary."[134] After assessing the state interests using three different meanings of "impartiality,"[135] the Court dismissed both interests (depending on what definition of "impartiality" it employed) as either not compelling or not narrowly tailored.[136] While the case did not deal with the solicitation ban,[137] the decision is important because it influenced subsequent federal court decisions regarding First Amendment challenges to judicial codes of conduct, including the solicitation ban.[138]

The solicitation ban has been challenged in federal courts both before and after *White I*. The courts that have addressed the issue have used a myriad of approaches to determine the constitutionality of the ban and have arrived at a variety of rulings. In 1991, the United States Court of Appeals for the Third Circuit heard a federal case involving the solicitation ban in

131. *White I*, 536 U.S. at 768–70.

132. *Id.* at 773 (noting that exceptions to the rule include discussing past decisions or expressing the view that a judge is not bound by *stare decisis*).

133. *Id.* at 773–74 (quoting Republican Party of Minn. v. Kelly, 247 F.3d 854, 861, 863 (8th Cir. 2001), *rev'd*, 536 U.S. 765 (2002)).

134. *Id.* at 775.

135. The "root meaning" of "impartiality" is a "lack of bias for or against either *party* to the proceeding." *Id.* Alternative meanings include a "lack of preconception in favor of or against a particular *legal view*," and "open-mindedness." *Id.* at 777–78.

136. *Id.* at 774–83 (discussing each of three possible definitions of "impartiality" and holding that the Minnesota judicial canon was not narrowly-tailored enough to have been aimed at that definition of "impartiality" in judges).

137. *See* Young, *supra* note 21, at 434 (positing that the *White I* Court stated with clarity that "its holding applies only to the announce clause").

138. *See* Carey v. Wolnitzek, 614 F.3d 189, 199 (6th Cir. 2010) (discussing federal circuit decisions that have relied on *White I* to analyze the constitutionality of challenged provisions of state codes of judicial conduct); *see also* Young *supra* note 21, at 434 (commenting that the *White I* decision sent officials from states with elected judiciaries "scrambling to their codebooks to determine how this decision will affect their statutes and future judicial elections").

Stretton v. Disciplinary Board.[139] The Third Circuit decided that a Pennsylvania judicial candidate's challenge to the state's solicitation ban should be analyzed using strict scrutiny.[140] The court upheld the ban, however, concluding that the state's interest in preserving judicial integrity was compelling and that the ban was narrowly tailored to meet this interest.[141]

The *White I* decision was handed down before the next challenge to the solicitation ban was brought before a federal court. Notably, in *Weaver v. Bonner*,[142] the United States Court of Appeals for the Eleventh Circuit struck down a state solicitation ban on free speech grounds.[143] In *Weaver*, a Georgia judicial candidate challenged a state solicitation ban that prohibited elected judges and judicial candidates from personally soliciting campaign funds or public support, while still allowing them to form campaign committees to operate on their behalf.[144] Applying strict scrutiny, the court conceded that Georgia's interests in "preserving the integrity, impartiality, and independence of the judiciary" were compelling.[145] But the court decided that the solicitation ban was not narrowly tailored: the risks to judicial impartiality were not lessened by the ban because candidates could still solicit by proxy through a committee.[146] Reasoning that the solicitation ban did not adequately address the state's interest in impartiality,[147] the court essentially struck down the solicitation ban as underinclusive.[148]

In the 2005 case *Republican Party of Minnesota v. White*[149] (*White II*), the Eighth Circuit joined the Eleventh Circuit in striking down a state

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139. 944 F.2d 137 (3d Cir. 1991).

140. *See id.* at 146 (applying the language of strict scrutiny in requiring a "compelling state interest" that is "narrowly tailored" to determine whether the state's judicial solicitation ban is constitutional).

141. *See id.* (reasoning that Pennsylvania's interest in a judicial solicitation ban is compelling because personal solicitation "lends itself to the appearance of coercion" and narrowly tailored because a "state is permitted to take steps, albeit tiny ones, that only partially solve a problem without totally eradicating it").

142. 309 F.3d 1312 (11th Cir. 2002).

143. *See id.* at 1322–23 (invalidating Georgia's solicitation ban for failure to meet strict scrutiny as applied to limitations on speech).

144. *Id.* at 1315.

145. *Id.* at 1319 (internal quotation marks omitted).

146. *See id.* at 1323 (explaining that restrictions on the source of solicitations do not accomplish the state's interest because "[s]uccessful candidates will feel beholden to the people who helped them get elected regardless of who did the soliciting of support").

147. *See id.* at 1322 (concluding that the solicitation ban failed strict scrutiny).

148. *See* Trans Union Corp. v. FTC, 267 F.3d 1138, 1143 (D.C. Cir. 2001) ("Underinclusiveness analysis 'ensure[s] that the proffered state interest actually underlies the law . . . .'" (quoting Blount v. SEC, 61 F.3d 938, 946 (D.C. Cir. 1995))).

149. 416 F.3d 738 (8th Cir. 2005) (en banc).

solicitation ban.[150] On remand from the Supreme Court in *White I*, the Eighth Circuit in *White II* reheard a challenge to Minnesota's solicitation ban.[151] The court applied strict scrutiny and held that while the state's interest in impartiality was compelling,[152] the solicitation ban was not narrowly tailored as candidates did not learn the identity of contributors because contributions were made to a candidate's campaign committee.[153] Therefore, the candidate could not be biased to contributors while on the bench.[154] By concluding that the solicitation ban's proscription on candidate speech was unnecessary because the use of campaign committees alleviated any risk to judicial impartiality, the court essentially struck down the ban due to its overinclusiveness.[155]

In response to the *White II* decision, Minnesota narrowed its solicitation ban in an attempt to pass a strict scrutiny analysis.[156] The narrowed ban was again challenged in *Wersal v. Sexton*,[157] and once again, the Eighth Circuit applied strict scrutiny to strike down the state's solicitation ban as

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150. *See id.* at 766 ("[T]he . . . solicitation clause[] . . . [does] not survive strict scrutiny and thus violate[s] the First Amendment.").

151. *See id.* at 744–45 (describing the procedural history of the case, culminating in a remand to the Eighth Circuit).

152. *See id.* at 765 (agreeing that the state had a compelling interest in keeping candidates who may be elected to the bench from soliciting contributions from litigants who may come before them).

153. *See id.* (observing that the state's solicitation ban allows contributions to be made directly and only to a candidate's campaign committee, so long as a candidate has no knowledge of donor identity).

154. *See id.* (positing that since the state's solicitation ban ensures that contributions are funneled through a candidate's campaign committee, a candidate would not be able to track who has and has not contributed to the campaign).

155. *See* BLACK'S LAW DICTIONARY 1213 (9th ed. 2009) (defining "overinclusive" as "extending beyond the class of persons intended to be protected or regulated; burdening more persons than necessary to cure the problem"). The use of the term "overinclusive" in this Comment should not be confused with the "overbreadth doctrine." BLACK'S LAW DICTIONARY 1213 (9th ed. 2009) (defining the "overbreadth doctrine" as "[t]he doctrine holding that if a statute is so broadly written that it deters free expression, then it can be struck down on its face because of its chilling effect—even if it also prohibits acts that may legitimately be forbidden").

156. The revised ban allowed judicial candidates to:

> (a) make a general request for campaign contributions when speaking to an audience of twenty or more people;
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> (b) sign letters, for distribution by the candidate's campaign committee, soliciting campaign contributions, if the letters direct contributions to be sent to the address of the candidate's campaign committee and not that of the candidate; and
>
> (c) personally solicit campaign contributions from members of the judge's family, from a person with whom the judge has an intimate relationship, or from judges over whom the judge does not exercise supervisory or appellate authority.

Wersal v. Sexton, 613 F.3d 821, 839 (8th Cir. 2010).

157. 613 F.3d 821 (8th Cir. 2010). Interestingly, the judicial candidate who brought the challenge to the narrowed solicitation ban in *Wersal* was one of the candidates who challenged the announce clause in *White I* and Minnesota's original solicitation ban in *White II*. *See id.* at 826 ("This case has its roots in *Republican Party of Minnesota v. White* . . . .").

not narrowly tailored to meet the government's compelling interest of impartiality.[158] The court observed that the risk to judicial impartiality stemmed from the contribution itself, not the judicial solicitation; therefore, the solicitation ban did not address the state's interest of impartiality.[159] Moreover, the court held that because Minnesota already enacted a less restrictive alternative to prevent candidates from learning the source of campaign contributions, the solicitation ban was not narrowly tailored to meet the state's interest in unbiased judges.[160]

Following *Weaver*, *White II*, and their progeny, it appeared as though the trend was for federal courts to apply strict scrutiny to state solicitation bans and strike down the bans.[161] However, the rationales for invalidating the bans in *Weaver* and *White II* were very different. In *Weaver*, the Third Circuit concluded that the Georgia solicitation ban was underinclusive because it did not go far enough to remedy the problem of improper influence of judges.[162] In contrast, the Eighth Circuit in *White II* struck down the Minnesota ban as overinclusive because less restrictive means of reaching the state's goal existed.[163]

In June 2010, the United States Court of Appeals for the Seventh Circuit bucked the post-*White II* trend of overturning state solicitation bans and upheld a ban on First Amendment grounds.[164] In *Siefert v. Alexander*,[165] an elected judge challenged several provisions of the Wisconsin Code of Judicial Conduct, including a solicitation ban.[166] Unlike the courts in

158. *See id.* at 839–41 (discussing the standard of scrutiny required, settling on strict scrutiny, and invalidating the law as not narrowly tailored).

159. *See id.* at 840 ("[T]he real due process harm comes not from the fundraising itself, but rather from a judicial candidate being able to trace contributions back to individual donors.").

160. *See id.* (considering an existing Minnesota canon, which instructs candidates to take "reasonable measures" to not obtain information about campaign contributors, to be a less restrictive alternative to prevent candidates from learning the source of their campaign funds (citation omitted) (internal quotation marks omitted)).

161. *See supra* notes 144–61 and accompanying text.

162. *See* Weaver v. Bonner, 309 F.3d 1312, 1322–23 (11th Cir. 2002) (arguing that Georgia's judicial solicitation ban was not narrowly tailored since the risks to judicial impartiality were not lessened by the ban as candidates could still solicit by proxy through a committee).

163. *See* Republican Party of Minn. v. White (*White II*), 416 F.3d 738, 765 (8th Cir. 2005) (en banc) (reasoning that Minnesota's judicial solicitation ban unnecessarily proscribes speech because the use of a judicial campaign committee adequately addresses risks of campaign contributions on judicial impartiality).

164. *See* Siefert v. Alexander, 608 F.3d 974, 990 (7th Cir. 2010) (holding that a Wisconsin solicitation ban was constitutional because it was narrowly tailored to promote the state's compelling interest of protecting the integrity of the judiciary), *cert. denied*, 131 S. Ct. 2872 (2011).

165. 608 F.3d 974 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 2872 (2011).

166. *See id.* at 978–79 (noting that the plaintiff challenged three provisions adopted by Wisconsin in 2004, including the political party affiliation ban and partisan intervention

Weaver, *White II*, and *Wersal*, the Seventh Circuit reviewed the ban using the *Buckley* framework, analogizing the effect of the ban to a campaign finance regulation.[167] Under the "less rigorous 'closely drawn' scrutiny" standard, the court held that the ban served the same anti-corruption rationale described in *Buckley* and furthered judicial impartiality.[168] The court went further in discerning that the ban was drawn close enough to the state's interest in an impartial judiciary, despite the fact that judges and candidates could still learn the identities of those who had contributed to their campaigns.[169] Even though the solicitation ban did not completely eradicate the link between judges, candidates, and contributors, the court concluded that the ban still passed constitutional muster under the "closely drawn" standard because the personal solicitation itself presented the greatest danger to judicial impartiality and the appearance of judicial impartiality.[170]

Adding to the smorgasbord of case law concerning state solicitation bans, the United States Court of Appeals for the Sixth Circuit weighed in just a month after the Seventh Circuit decided *Siefert*. In *Carey v. Wolnitzek*,[171] the Sixth Circuit applied strict scrutiny to Kentucky's solicitation ban.[172] Conceding that the state's interest in an impartial judiciary was compelling, the court focused on the narrow tailoring component of the strict scrutiny test.[173] The court observed that the solicitation ban prohibited a range of solicitations, including speeches and mass mailings, which presented little risk to the impartiality of a judge.[174] As such, the court struck down the ban as overreaching.[175]

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ban).

167. *Id.* at 988.

168. *See id.* at 988–89 (concluding that the Wisconsin solicitation ban was not subject to strict scrutiny under *Buckley* and upholding the ban).

169. *See id.* at 990 (observing that the solicitation ban was narrowly tailored to accomplish the state's compelling aims "without impairing more speech than necessary").

170. *See id.* (declaring that there was no narrower alternative to address the problem posed by personal solicitations). After *Siefert*, the constitutionality of judicial solicitation bans was once again challenged in the United States Court of Appeals for the Seventh Circuit. Bauer v. Shepard, 620 F.3d 704, 707 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 2872 (2011). The Seventh Circuit reaffirmed its *Siefert* decision and maintained that *Siefert* is controlling in the jurisdiction. *See id.* at 710 ("[T]here is no reason to depart from the approach taken so recently in this circuit.").

171. 614 F.3d 189 (6th Cir. 2010).

172. *See id.* at 198–99 (reasoning that strict scrutiny applied to the solicitation ban because the ban implicated fundamentally protected speech by stopping candidates from soliciting campaign support).

173. *Id.* at 204.

174. *See id.* at 205 (arguing that it is unreasonable to believe that a potential litigant's failure to respond to a judicial candidate's mass mailing or speech to a large audience requesting contributions would result in negative treatment from a judge).

175. *See id.* at 206–07 (holding that Kentucky's solicitation ban goes beyond prohibiting judges from making "direct, personal solicitations" to litigants who have cases pending in

In total, five federal appellate courts have analyzed state solicitation bans and have arrived at just as many holdings, methods of analysis, and reasoning.[176] The circuit splits over the constitutionality of state solicitation bans on judicial candidates make the issue ripe for Supreme Court review.

II. STRICT SCRUTINY SHOULD NOT BE USED TO ANALYZE JUDICIAL SOLICITATION BANS

Constitutional commentators are quick to categorize solicitation bans as regulating core political speech and thus conclude that they are automatically subject to strict scrutiny.[177] However, as the spectrum of decisions on the constitutionality of the solicitation ban demonstrates, the courts have not reached a consensus on this front. For example, even though *Siefert* and *Carey* were decided just weeks apart,[178] the Seventh Circuit in *Siefert* presumed that the *Buckley* framework should be used to analyze a state solicitation ban,[179] and the Sixth Circuit in *Carey* just as easily determined that strict scrutiny should be applied.[180] This confusion among the courts of appeals indicates that the question of the appropriate level of scrutiny employed for state solicitation bans is unresolved.

There are three arguments against using strict scrutiny in analyzing the constitutionality of judicial solicitation bans. First, the Supreme Court has shied away from subjecting solicitation bans to strict scrutiny.[181] Second, judicial solicitation bans resemble a class of speech restrictions that the Court has historically upheld to keep the government functioning.[182] Third, solicitation bans have been improperly categorized as content-based regulations on political speech when they are content-neutral, and thus not subject to strict scrutiny.[183]

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the judge's court, thus being "overbroad and . . . invalid" (internal quotation marks omitted)).

176. This description does not include the Eighth Circuit's decision in *Wersal* since the *Wersal* court effectively reanalyzed the same statute presented in *White II*.

177. *See* Spottswood, *supra* note 113, at 347 (noting that, as of 2007, every federal court addressing the solicitation ban subjected it to strict scrutiny since the "Solicitation Canon regulates core political speech based on its content").

178. *Siefert* was decided on June 14, 2010, 608 F.3d 974, 974 (7th Cir. 2010), *cert. denied.*, 131 S. Ct. 2872 (2011), and *Carey* was decided on July 13, 2010, 614 F.3d at 189.

179. *See Siefert*, 608 F.3d at 988 (noting that the ban was, at its core, a campaign finance regulation and thus reviewable under the *Buckley* framework).

180. *See Carey*, 614 F.3d at 198 (applying strict scrutiny to the solicitation ban).

181. *See infra* Part II.A.

182. *See infra* Part II.B.

183. *See infra* Part II.C.

A. The Supreme Court Has Declined to Prescribe Strict Scrutiny as the Appropriate Standard for This Type of Speech Restriction

Although it has had the opportunity to do so, the Supreme Court has not prescribed strict scrutiny as the standard of analysis for judicial solicitation bans. Recently, the *Siefert* opinion, which upheld the constitutionality of a state solicitation ban under the *Buckley* framework, was appealed to the Supreme Court.[184] The Court denied certiorari, allowing the *Siefert* decision to stand.[185]

Furthermore, although it has been argued that the Supreme Court's decision in *White I* prescribes strict scrutiny as the standard for judicial codes of conduct,[186] the *White I* decision was anything but clear on this issue. Justice Scalia, writing for the majority, admitted that the Court was "neither assert[ing] nor imply[ing] that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office."[187] This statement suggested that the Court believed the regulations on judicial elections could be different, if not tighter, than those on legislative elections.

In invalidating the announce clause, Justice Scalia explained that the clause was subject to strict scrutiny because it "both prohibits speech on the basis of its content and burdens a category of speech that is 'at the core of our First Amendment freedoms'—speech about the qualifications of candidates for public office."[188] Justice Scalia's description of the announce clause simply does not fit the solicitation ban.

The plain language of the solicitation ban indicates that its purpose is not to prohibit speech on the basis of its content, but rather to prohibit the association of two specific parties: a judge (or judicial candidate) and a campaign contributor.[189] In other words, the solicitation ban does not prohibit the expression of certain ideas or beliefs; instead, it prohibits only a certain, specific type of association.[190] In addition, due to the

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184. *See* Petition for Writ of Certiorari, Siefert v. Alexander, 131 S. Ct. 2872 (2011) (No. 10-405), 2010 WL 3722072.

185. 131 S. Ct. at 2872.

186. *See, e.g.*, Carey v. Wolnitzek, 614 F.3d 189, 198 (6th Cir. 2010) (arguing that *White I* applies strict scrutiny to judicial solicitation bans); Republican Party of Minn. v. White (*White II*), 416 F.3d 738, 766 (8th Cir. 2005) (en banc) ("Upon further consideration of the . . . solicitation [ban] in light of *White*, we hold that [it] likewise [does] not survive strict scrutiny and thus violate[s] the First Amendment.").

187. Republican Party of Minn. v. White (*White I*), 536 U.S. 765, 783 (2002).

188. *Id.* at 774 (quoting Republican Party of Minn. v. Kelly, 247 F.3d 854, 861 (8th Cir. 2001), *rev'd*, 536 U.S. 765 (2002)).

189. *See* MODEL CODE OF JUDICIAL CONDUCT R. 4(A)(8) (2011) ("[A] judge or a judicial candidate shall not . . . personally solicit or accept campaign contributions other than through a campaign committee . . . .").

190. *Id.*

permissibility of campaign committee solicitations and third-party campaign expenditures, solicitation bans do not inhibit a judge or judicial candidate's ability to campaign in the same manner as announce clauses, which prohibit judicial candidates from stating their views.[191] The difference between the announce clause—the subject of *White I*—and the solicitation ban should give pause to automatically applying *White I* to solicitation ban challenges.

Moreover, the Court's rationale for striking down the announce clause under strict scrutiny does not apply to solicitation bans. In *White I*, the Court evaluated different definitions of impartiality[192] to assess whether the state's interest in judicial impartiality was compelling and whether the announce clause was narrowly tailored to meet that interest.[193] The Court dismissed the announce clause as not narrowly tailored to the "root meaning" of impartiality—"the lack of bias for or against either *party* to the proceeding"—because the announce clause restricted speech "for or against particular *issues*."[194] The *White I* reasoning does not extend to solicitation bans because such bans do not restrict speech related to issues. Rather, solicitation bans are designed to address bias for or against either party.[195] The evident disconnect between the reasoning put forth by the Supreme Court in *White I* and the purpose of the solicitation ban indicates that the decision cannot be used like a cookie cutter to analyze constitutional challenges to state solicitation bans.

B. Judicial Solicitation Bans Resemble a Class of Speech Restrictions that are Upheld in the Interest of Keeping the Government Functioning

A second reason why solicitation bans should not be subject to strict scrutiny is that such bans are similar to other speech restrictions that the Court has upheld to keep the government functioning.[196] As demonstrated

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191. *See White I*, 536 U.S. at 773 (discussing the characteristics of announce clauses and the burden they place on judicial candidates).

192. *See supra* note 135 (describing definitions of "impartiality" as lack of bias for or against parties, lack of preconception in favor of a viewpoint, and "openness").

193. *See White I*, 536 U.S. at 775–79 (offering three definitions for "impartiality" and deciding that "the appearance of open-mindedness" lay behind the Minnesota announce clause).

194. *See id.* (reviewing and rejecting varied interpretations of the state interest for lack of narrow tailoring).

195. *See* MODEL CODE OF JUDICIAL CONDUCT R. 4.1(A)(8) (2011) (indicating that the solicitation ban deals with the association between two parties—a judge and a contributor—rather than with any legal or political issues).

196. *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) (upholding speech restrictions to protect the goals and functions of public education); U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 557 (1973) (affirming a government interest in ensuring that federal employees are retained based on their performance instead of political service).

by *Letter Carriers*, the Court may decline to use a First Amendment standard of review and may instead uphold speech restrictions to support a confluence of strong government interests.[197] In *Letter Carriers*, the Court held that multiple interests warranted the existence of the Hatch Act: ensuring that federal employees execute the will of Congress and not that of their own political parties; ensuring that Americans maintain confidence in the federal government; ensuring that advancement in the federal government is not dependent on political performance; and ensuring that the federal workforce was not employed to create an invincible political machine.[198] By upholding the Hatch Act's speech restrictions in favor of the interests set forth in *Letter Carriers*, the Court struck a balance between the interests of government employees in engaging in political speech and the interests of the government in functioning in an impartial and efficient manner.[199]

The same argument can be made for the judicial solicitation ban. The Supreme Court has held that Americans have a constitutional right to litigate cases in an impartial setting.[200] Moreover, impartiality has been deemed by commentators as the most important characteristic of a judge.[201] Judicial impartiality is integral to the functioning of the American judiciary, and the solicitation ban seeks to preserve it.[202] Thus, the Court's reasoning in *Letter Carriers* that the government's interest in maintaining a functioning government outweighs speech restrictions on federal employees[203] is applicable to judicial solicitation bans.

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197. *See Letter Carriers*, 413 U.S. at 566–67 (declining to analyze the constitutionality of the Hatch Act under a traditional First Amendment standard of review); *see also* Steven J. Eberhard, Note, *The Need for the Hatch Act*, 1 HARV. J.L. & PUB. POL'Y 153, 161–62 (1978) (commenting that, in upholding the Hatch Act, the Supreme Court relied on a history of restrictions on political activities in the interest of maintaining an impartial and efficient government).

198. *Letter Carriers*, 413 U.S. at 564–65.

199. *See id.* at 564 (concluding that the goal is "to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public service it performs through its employees" (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968)) (internal quotation marks omitted)).

200. *See* Ward v. Village of Monroeville, 409 U.S. 57, 61–62 (1972) (recognizing a constitutional right to appear before "a neutral and detached judge").

201. *See, e.g.*, KOZLOWSKI & KRISHNA, *supra* note 3, at 2 (calling impartiality the "defining characteristic" of a judge).

202. Commentators have suggested that the judiciary cannot function properly unless judges are impartial because "[a] judge is supposed to decide cases based upon the evidence presented and the applicable law." *Id.*

203. *See Letter Carriers*, 413 U.S. at 564 (holding that the efficiency and effectiveness of the federal government outweighs constitutional challenges to the Hatch Act).

C. Judicial Solicitation Bans Are Not Content-Based Regulations

A third reason that state solicitation bans should not be subject to strict scrutiny is that solicitation bans are not content-based regulations—the purpose of the bans is not to regulate a particular message.[204] A content-neutral speech restriction is one that disregards the ideas or views the speech expresses.[205] According to Supreme Court precedent, a court should look to the face of the regulation to determine whether strict scrutiny or a less exacting form of scrutiny should be applied to regulations challenged under the First Amendment.[206] If the regulation is neutral on its face, then strict scrutiny does not apply.[207]

On its face, a solicitation ban is content-neutral. While it may seem that the solicitation ban is focused on content—regulating whether a judge may ask for contributions—the judicial "ask" is actually left untouched by the regulation.[208] The regulation merely pertains to the method of the "ask" and does not ban the judicial "ask" itself.[209] Under the Model Code, judges and judicial candidates may form campaign committees to "ask" on their behalf.[210] While this may not be the most convenient way to ask for campaign contributions, it does not negate that the content of a judicial solicitation is left untouched by state solicitation bans. Applying the Supreme Court's reasoning in *Buckley*—that limiting campaign contributions does not limit speech because contributors can still support their candidate in other ways[211]—leads to the conclusion that solicitation bans do not limit judges and judicial candidates' speech because they can

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204. *See* THODE, *supra* note 21, at 98 (reporting that the ABA model solicitation ban was designed to mitigate the tension between "political necessity and judicial impartiality"); *see also* MODEL CODE OF JUDICIAL CONDUCT R. 4.1(A)(8) (2011) (demonstrating that the solicitation ban applies regardless of why a contributor may donate to a judge).

205. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642–43 (1994) (recognizing that it is often difficult to distinguish between content-based and content-neutral speech, but offering the general rule that "laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based").

206. *See id.* at 642 (explaining that the classification of a regulation as content-based or content-neutral is "not always a simple task" but that the purpose is often facially evident).

207. *See id.* at 645 (concluding that the constitutionality of regulations on cable providers is dependent on intermediate scrutiny since the regulations are facially neutral as they "distinguish . . . based only upon the manner in which speakers transmit their messages to viewers, and not upon the messages they carry").

208. *See* MODEL CODE OF JUDICIAL CONDUCT R. 4(A)(8) (2011) (leaving judicial candidates free to solicit through campaign committees).

209. *See id.* (indicating that judges may not ask for contributions directly, but may do so through the medium of a committee).

210. *Id.*

211. *See* Buckley v. Valeo, 424 U.S. 1, 21 (1976) (per curiam) (observing that contribution limits are only a marginal burden on contributors because contributors are still able to become members of political associations or assist personally in campaign efforts).

still "ask" for money via campaign committees.[212] For this reason, a less exacting form of scrutiny should be used to assess the constitutionality of state solicitation bans.

III. THE CONSTITUTIONALITY OF JUDICIAL SOLICITATION BANS SHOULD BE ANALYZED USING THE *BUCKLEY* FRAMEWORK

Instead of strict scrutiny, the constitutionality of judicial solicitation bans should be analyzed under the *Buckley* framework. There are two arguments for using the *Buckley* framework: first, because the Supreme Court has recently demonstrated support for its usefulness; and second, because the analytical underpinnings of the *Buckley* framework apply to judicial solicitation bans. Furthermore, if the *Buckley* framework is employed for judicial solicitation bans, the bans should pass constitutional muster.

A. The Supreme Court Recently Demonstrated Support for the Usefulness of the Buckley *Framework*

The Supreme Court recently used the *Buckley* framework in *Randall*, affirming its importance.[213] In *Randall*, the Court specifically noted that it must analyze a contribution limit by "[f]ollowing *Buckley*."[214] The Court went on to assess the contribution limit through the lens of the *Buckley* framework by determining whether it was "closely drawn" or "too low and too strict to survive."[215] Even though the Court used the *Buckley* framework to strike down the contribution limitation,[216] the fact that the Court used the framework affirms that the Court still views the *Buckley* framework as an integral component of campaign finance law.[217]

In addition to affirming *Buckley* in *Randall*, the Supreme Court expressly declined to overrule the *Buckley* campaign finance framework in *Citizens United*.[218] While the Court overturned federal laws limiting third-party

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212. *See* MODEL CODE OF JUDICIAL CONDUCT R. 4.1(A)(8) (2011) (precluding judicial candidates from directly soliciting campaign contributions but leaving them free to solicit through campaign committees).

213. *See* Randall v. Sorrell, 548 U.S. 230, 248 (2006) (using the *Buckley* framework to determine the constitutionality of a Vermont campaign contribution limit).

214. *Id.*

215. *See id.* at 246–48 (noting that the analysis of a contribution limit must "begin with *Buckley*").

216. *See id.* at 262 (concluding that an act limiting campaign expenditures and contributions "violate[s] the First Amendment as interpreted in *Buckley v. Valeo*" by restricting more speech than necessary to meet the public purposes that the restrictions were enacted to meet).

217. *See* McNulty, *supra* note 106, at 150 (arguing that *Randall* reaffirms *Buckley* as the "binding authority for contribution and expenditure limits").

218. Citizens United v. FEC, 130 S. Ct. 876, 908 (2010) (explaining that the *Buckley*

independent campaign expenditures,[219] it maintained the *Buckley* distinction between independent expenditures and campaign contributions.[220] That the Court declined to overrule the *Buckley* framework for analyzing campaign contributions in *Citizens United* is significant. *Citizens United* was a landmark case in which the Court not only struck down portions of the Bipartisan Campaign Reform Act of 2002,[221] but the Court also reversed its own precedent of allowing restrictions on political speech based on the speaker's corporate identity.[222] *Citizens United* represented an upheaval of campaign finance law.[223] If the Court had wanted to overrule *Buckley*, *Citizens United* would have been the vehicle.[224]

B. The Reasons for Using the Buckley *Framework on Contribution Limitations also Apply to Solicitation Bans*

Even though *Buckley* dealt with limitations on *contributions* and not solicitations, the *Buckley* framework is nonetheless applicable to solicitation bans because its reasoning for using "closely drawn" scrutiny applies to both types of restrictions. In *Buckley*, the Supreme Court reasoned that "closely drawn" scrutiny is appropriate for regulations on campaign contributions because limiting the amount of money a person can contribute to a political cause is only a "marginal restriction upon the contributor's ability to engage in free communication" and because a contributor is still "free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates."[225]

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decision "sustained limits on direct contributions" and did not extend its rationale to independent expenditures).

219. *Id.* at 917.

220. *Id.* at 908.

221. The Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 2 and 47 U.S.C.), placed restrictions on a myriad of campaign finance sources, including soft money and independent expenditures. *Campaign Finance Law Quick Reference for Reporters: Major Provisions of the Bipartisan Campaign Finance Reform Act of 2002*, FED. ELECTION COMM'N, http://www.fec.gov/press/bkgnd/bcra_overview.shtml (last visited July 30, 2011).

222. *Citizens United*, 130 S. Ct at 917; *see* Adam Liptak, *Justices, 5–4, Reject Corporate Spending Limit*, N.Y. TIMES, Jan. 22, 2010, at A1, A18 (reporting that the *Citizens United* decision overruled two precedents: a 1990 decision that upheld restrictions on corporate spending and a 2003 decision that upheld the Bipartisan Campaign Reform Act of 2002).

223. *See* Liptak, *supra* note 222, at A1 (reporting that the *Citizens United* ruling represented a "sharp doctrinal shift" that would have a significant impact on elections).

224. *See supra* notes 221–223 and accompanying text (indicating that the *Citizens United* decision overruled large swaths of existing campaign finance law and thus served as an opportunity to also overrule *Buckley*).

225. Buckley v. Valeo, 424 U.S. 1, 20–22 (1976) (per curiam).

The *Buckley* framework should be applied to solicitation bans. Limiting the ways that a judicial candidate can ask for money is a "marginal restriction" on the candidate's ability to communicate because the candidate is still free to communicate through his or her campaign committee.[226] Furthermore, solicitation bans still leave a judicial candidate free to associate with any group that contributes to his campaign.[227] In other words, the solicitation ban does not stop the judge or candidate from ultimately benefiting from a contribution, just from directly asking for it.[228] Therefore, for the same reasons that the Supreme Court used the *Buckley* framework to analyze regulations on *contributions*, reviewing courts should use the framework for regulations on *solicitations for contributions.*

C. Judicial Solicitation Bans Should Pass Constitutional Muster Under the Buckley *Framework*

If the *Buckley* framework is correctly employed, the constitutionality of a state solicitation ban should overcome a First Amendment challenge. To satisfy the framework set forth in *Buckley*, the government must demonstrate that the solicitation ban furthers "a sufficiently important interest" and uses methods that are "closely drawn" to avoid the unnecessary restriction of freedoms.[229] Both the "sufficiently important interest" prong and the "closely drawn" prong of this standard are fulfilled by judicial solicitation bans.

1. Judicial solicitation bans pass constitutional muster under Buckley *because the bans address a "sufficiently important interest"*

The "sufficiently important interest" component of the *Buckley* standard is easily satisfied. In *Buckley*, the Court specifically declared that the state's interest in ensuring that elected officials are not improperly

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226. The ABA's Model Code does not prohibit a judicial candidate from socializing or visiting with any individual or group. *See* MODEL CODE OF JUDICIAL CONDUCT R. 4.1(A)(8) (2011) (precluding a judicial candidate from directly soliciting contributions but leaving the candidate free to campaign via a committee); *see also Buckley*, 424 U.S. at 21–22 (explaining that when a campaign restriction does not infringe on a political actor's ability to discuss candidates and issues, it is a "marginal restriction" on that actor's speech rights).

227. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 4 (2011) (showing that a judicial candidate is not precluded from socializing or visiting with any individual or group); *see also Buckley*, 424 U.S. at 20–21 (indicating that if a campaign prohibition still allows a political actor to join groups and form associations, then that prohibition is a "marginal restriction" on the actor's speech rights).

228. Interestingly, the *Buckley* Court applied similar reasoning to a campaign contribution limitation, arguing that since a campaign contribution limitation does not preclude contributors from assisting a campaign in another fashion, the limitation does not severely burden the contributor's speech rights. *Buckley*, 424 U.S. at 20–22.

229. *Id.* at 25.

influenced by campaign contributions is extremely important.[230] This state interest set forth in *Buckley* is similar to the state interest set forth in challenges to judicial solicitations bans: judicial impartiality. In the challenges to state solicitation bans,[231] a state defending its solicitation ban usually sets forth judicial impartiality, or some synonym thereof, as a government interest furthered by the ban.[232] Interestingly, a state solicitation ban has never been struck down under strict scrutiny because a court failed to find merit in the government's interest in judicial impartiality.[233] Instead, they have been struck down because reviewing courts have found that the solicitation ban is not "narrowly tailored" to the government interest.[234] Thus, any solicitation ban—bolstered by the state's interest in judicial impartiality—can survive the first prong of the *Buckley* standard.

2. *Judicial solicitation bans pass constitutional muster under* Buckley *because the bans are "closely drawn" to a "sufficiently important interest"*

Although fulfilling the second *Buckley* prong is not as easy as the first, judicial solicitation bans are "closely drawn" to the government interest of maintaining an impartial judiciary. Clearly, the "closely drawn" scrutiny standard is less rigorous than the "narrowly tailored" standard of strict scrutiny, but the question is by how much.[235]

The *Buckley* opinion sheds light on the "closely drawn" standard.[236] In

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230. *See id.* at 27 ("Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'" (quoting U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 565 (1973))).

231. *See supra* Part I.D.

232. *See, e.g.*, Wersal v. Sexton, 613 F.3d 821, 833 (8th Cir. 2010) (holding that a state's interest in an impartial judge who lacks bias for or against either party to a proceeding is a compelling state interest); Siefert v. Alexander, 608 F.3d 974, 989 (7th Cir. 2010) (noting that the government interest supporting Wisconsin's judicial solicitation ban was the elimination of bias or the appearance of bias towards lawyers who have been personally solicited by the judge for contributions), *cert. denied*, 131 S. Ct. 2872 (2011); Stretton v. Disciplinary Bd., 944 F.2d 137, 146 (3d Cir. 1991) (reasoning that the State's interest in judicial integrity was compelling).

233. *See, e.g.*, Carey v. Wolnitzek, 614 F.3d 189, 204 (6th Cir. 2010) (declining to "doubt the bona fides" of the Kentucky solicitation clause as meeting the state's compelling interest in judicial impartiality).

234. *See, e.g.*, *id.* at 207 (striking down Kentucky's solicitation ban as not narrowly tailored because it was "overbroad").

235. *See* FEC v. Mass. Citizens for Life, 479 U.S. 238, 259–60 (1986) (establishing that the *Buckley* standard used to analyze the constitutionality of contribution limitations "require[s] less compelling justification" than the strict scrutiny standard used to analyze independent expenditure restrictions).

236. Buckley v. Valeo, 424 U.S. 1, 29 (1976) (per curiam) (discussing the factors that should be considered when analyzing the constitutionality of a contribution limit under the

Buckley, challengers to a $1000 contribution limit to political candidates argued that the law was overbroad because most large contributors do not seek to improperly influence candidates, and a contributor would need to spend much more than $1000 to influence a candidate in his official position.[237] The Court disregarded these arguments, explaining that while Congress could have drafted the limitation differently, the fact that Congress chose a $1000 limit instead of a $2000 limit does not invalidate the legislation as long as Congress deemed some sort of limit necessary.[238] Simply put, under the "closely drawn" standard, the Court seems prepared to uphold a regulation that furthers a government interest, even if the regulation is not finely tuned to accomplish that interest.[239] By reason of implication, the Court, by not requiring "fine tuning," suggested that under "closely drawn" scrutiny, a regulation may be somewhat overinclusive or underinclusive and still pass constitutional muster.[240]

In *Randall*, the Court expounded upon *Buckley*'s description of "closely drawn" scrutiny.[241] The Court explained that the *Buckley* framework allowed contribution limitations so long as the government showed a "sufficiently important interest," but not if those limitations restricted candidates from "amassing the resources necessary for effective advocacy."[242] *Randall* indicated that *Buckley* established a balancing test for courts reviewing contribution limitations—the court must uphold limitations that further an important state interest but must strike down limitations that unduly inhibit the political process.[243]

Under the auspices of this balancing test, the Court has refused to set a minimum contribution threshold where any amount below such a floor could not be regulated by the state.[244] For example, in *Buckley*, the Court

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"closely drawn" standard).

237. *Id.* at 29–30.

238. *See id.* at 30 (observing that, upon a congressional determination that a limit on contributions is necessary, deference to the legislature is appropriate, as "a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000" (citation omitted) (internal quotation marks omitted)).

239. *See id.*

240. *See* McNulty, *supra* note 106, at 176 (noting that cases applying the *Buckley* framework to campaign contribution limitations only require that the limitation not be the lowest in the nation or lower than limits the Court has previously upheld, suggesting that the "closely drawn" standard is not a highly exacting standard).

241. *See* Randall v. Sorrell, 548 U.S. 230, 247–48 (2006) (explaining that "closely drawn" scrutiny requires the courts to determine whether contribution limits are so low that they burden the political process).

242. *Id.* at 247.

243. *See id.* (citations omitted) (internal quotation marks omitted) (explaining that the $1000 contribution limitation in *Buckley* was constitutional because there was "no indication" that the limitation would have "any dramatic adverse effect" on campaigning (citations omitted) (internal quotation marks omitted)).

244. *See, e.g.*, *Buckley*, 424 U.S. at 21 (discussing the contours of a constitutionally

decided that a $1000 contribution limit was constitutional because it discerned "no indication" that the limit would seriously negatively impact funding a campaign.[245] But in *Randall*, the Court struck down limitations that capped donations at $400, $300, or $200 for various state offices because the limits imposed serious restrictions on the ability of state candidates and political parties to wage effective campaigns.[246]

Reviewing courts have commonly held that judicial solicitation bans fail strict scrutiny because they are not "narrowly tailored" to the state's interest in impartiality.[247] These courts have either declared state judicial solicitation bans to be not inclusive enough or overreaching.[248]

Although the solicitation ban would not likely be narrowly tailored under strict scrutiny, depending on which circuit is asked, the judicial solicitation ban passes muster under the less exacting *Buckley* framework. First, the *Buckley* framework does not require that the ban be "finely tuned" to the state's interest. Therefore, while the Eleventh and Sixth Circuits in *Weaver* and *Carey* were right in noting that the solicitation ban is both underinclusive in that it cannot completely prevent judicial candidates from learning the identity of their campaign contributors, and overinclusive in that the ban applies to candidate activities that do not compromise judicial integrity, these considerations are less important under the *Buckley* framework than under strict scrutiny. In fact, *Buckley* does not seem to indicate that any degree of overinclusiveness or underinclusiveness is constitutionally problematic under "closely drawn" scrutiny so long as the state does not regulate to the point that campaign activity is stifled.[249]

The judicial solicitation ban, as provided by the Model Code, passes the

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acceptable contribution limitation without specifying a dollar amount under which a limitation would be unconstitutional).

245. *Id.*

246. *Randall*, 548 U.S. at 238, 253.

247. *See, e.g.*, Republican Party of Minn. v. White (*White II*), 416 F.3d 738, 765–66 (8th Cir. 2005) (en banc) (holding that Minnesota's solicitation ban was not narrowly tailored because there were less restrictive ways to meet the state's interest); Weaver v. Bonner, 309 F.3d 1312, 1322 (11th Cir. 2002) (holding that Georgia's solicitation ban was not narrowly tailored because the ban did not completely prevent judicial candidates from being influenced through contributions).

248. *See, e.g.*, Carey v. Wolnitzek, 614 F.3d 189, 205 (6th Cir. 2010) (striking down Kentucky's solicitation ban as overbroad because the ban prohibited a wide spectrum of solicitation, such as speeches and mass mailings, that did not pose the threat of "undue pressure or . . . quid pro quo" that the state sought to guard against); *White II*, 416 F.3d at 765 (concluding that the judicial solicitation ban proscribed more speech than necessary to meet the state's interest in impartiality); *Weaver*, 309 F.3d at 1322 (holding that the judicial solicitation ban did not adequately address the state's interest in judicial impartiality since candidates could still solicit though committees).

249. *See Buckley*, 424 U.S. at 22 (indicating that contribution limitations are constitutionally sound as long as campaigns and political committees are still able to gather the resources needed to campaign effectively).

balancing test established in *Buckley* because the prohibition does not preclude judicial candidates from fundraising—candidates are able to use campaign committees to solicit on their behalf.[250] Furthermore, judicial candidates are not prevented from accepting contributions through their committees.[251] While judicial solicitation bans alter the method of judicial fundraising, they stop short of crippling the campaign effort; this is illustrated by the drastic increase in the cost of judicial campaigns over the past decade,[252] despite the widespread imposition of judicial solicitation bans.[253]

IV. THE PROBLEM OF SOLICITING VERSUS THE PROBLEM OF NOT SOLICITING

Challenges to the constitutionality of the judicial code of conduct are regularly appealed to the Supreme Court.[254] Given that the constitutionality of judicial solicitation bans has caused a split between the Sixth and Seventh Circuits in just the past year,[255] it is not outlandish to assume that the Supreme Court might hear another case involving judicial codes of conduct in the near future. Such a grant of certiorari may very well include a solicitation ban challenge.[256] The Supreme Court has shown some signs that it will not automatically use strict scrutiny to analyze solicitation bans, so the outcome of such a challenge is unknown.[257]

If the Supreme Court does hear a challenge to a judicial solicitation ban and establishes the *Buckley* framework as the appropriate method of

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250. *See* MODEL CODE OF JUDICIAL CONDUCT R. 4.1(A)(8) (2011).

251. *See id.* (authorizing certain contribution solicitations by a campaign committee, but barring the judicial candidate's personal intervention in such solicitations).

252. *See supra* note 31 and accompanying text.

253. *See Methods of Judicial Selection*, *supra* note 29 (showing that thirty-two states have adopted a form of the model solicitation ban by statute or judicial canon).

254. *See, e.g.*, Spargo v. N.Y. State Comm'n on Judicial Conduct, 351 F.3d 65 (2d Cir. 2003) (deciding a challenge to three New York judicial codes of conduct), *cert. denied*, 541 U.S. 1085 (2004); *In re* Kinsey, 842 So. 2d 77 (Fla. 2003) (per curiam) (rendering judgment on a challenge to a judicial canon that prohibited judicial candidates from making statements that appeared to commit the candidate to a particular side of a contested issue), *cert. denied sub. nom.* Kinsey v. Fla. Judicial Qualifications Comm'n, 540 U.S. 825 (2003).

255. *Compare* Carey v. Wolnitzek, 614 F.3d 189, 207 (6th Cir. 2010) (holding that the judicial solicitation ban fails a strict scrutiny analysis because it is not narrowly tailored to a compelling government interest), *with* Siefiert v. Alexander, 608 F.3d 974, 990 (7th Cir. 2010) (concluding that the judicial solicitation ban passes constitutional muster under the *Buckley* framework because it is "closely drawn" to an important government interest), *cert. denied*, 131 S. Ct. 2872 (2011).

256. The Supreme Court recently denied a writ of certiorari for a case involving a First Amendment challenge to a state judicial solicitation ban. Siefert v. Alexander, 131 S. Ct. 2872 (2011). However, it is possible that the Court may hear a similar case in the near future.

257. *See supra* Part II.

analysis for the ban, then the widely enacted state solicitation bans would likely be upheld against First Amendment challenges.[258] Thus, in states that have enacted the solicitation ban, judges and judicial candidates would continue to be prohibited from directly asking lawyers, business interests, lobbyists, or unions for money.[259] Direct solicitations are an effective way to fundraise; therefore, without this tactic, it may become more difficult for judges and judicial candidates to raise money to campaign.[260] For those concerned primarily with the cost of campaign contributions on judicial impartiality, this may seem like a positive outcome.

However, as demonstrated by the 2010 retention election in Iowa, elected judges can and do become targets of campaigns to oust them based on unpopular decisions.[261] Furthermore, the Supreme Court significantly increased the spending power of corporations that might wish to unseat a judge or defeat a candidate.[262] The result of the Supreme Court's decision in *Citizens United* to invalidate prohibitions on independent corporate expenditures was to remove any floodgate that existed between the funds of corporations and political campaigns.[263] Essentially, the decision made it possible for groups with a lot of money to spend that money against judicial candidates who rule in a way that these groups do not like.[264]

It would be absurd to think that elected judges and judicial candidates do not take note of the fates of their colleagues who have become targets of organized efforts to defeat them.[265] This is especially true since judges themselves have spoken out about the importance of money in a judicial

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258. *See supra* Part III.C (positing that state solicitation bans pass constitutional muster under the *Buckley* framework).

259. *See* MODEL CODE OF JUDICIAL CONDUCT R. 4.1(A)(8) (2011) (providing a model prohibition preventing judicial candidates from directly soliciting contributions from any source).

260. *See, e.g.*, Stretton v. Disciplinary Bd., 944 F.2d 137, 146 (3d Cir. 1991) (describing and rejecting the appellant's contention that direct solicitation "is the most effective means for raising money" and that the state's ban constituted undue interference with the candidate's engagement in the political process).

261. *See* Sulzberger, *supra* note 7 (recounting "an unusually aggressive ouster campaign" in a state judicial retention election that resulted in three justices losing office).

262. Citizens United v. FEC, 130 S. Ct. 876, 913 (2010) (striking down limits on third-party independent expenditures made by corporations).

263. *See id.* at 968 (Stevens, J., dissenting) ("At a time when concerns about the conduct of judicial elections have reached a fever pitch . . . the Court today unleashes the floodgates of corporate and union general treasury spending in these races.").

264. *See* SKAGGS, *supra* note 14, at 2 ("Special interest spending has occurred in judicial elections despite the fact that approximately half the states previously banned or sharply restricted corporations from using treasury funds for campaign advocacy. None of these restrictions [are] permissible after *Citizens United*. The inevitable result will be increased corporate spending in judicial elections . . . .").

265. *See* Brief of the Conference of Chief Justices as *Amicus Curiae* in Support of Neither Party at 9, Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009) (No. 08-22) (discussing the strains that expensive judicial campaigns have placed on judicial behavior).

election. Wallace Jefferson, Chief Justice of the Texas Supreme Court, stated that "[i]n a close race, the judge who solicits the most money from lawyers and their clients has the upper hand."[266] If judges themselves are talking about the influences associated with campaign contributions, then it is quite clear that judges faced with a controversial decision may find themselves influenced by their contributors.

Prohibiting judges and judicial candidates from directly soliciting campaign funds—an effective fundraising method—leaves these judges and candidates vulnerable to interests that seek to punish them for making an unpopular decision.[267] Moreover, prohibiting judges and judicial candidates from directly soliciting campaign funds from all potential contributors makes them reliant on the interests with the cash to fund campaigns, including interests with specific viewpoints on legal issues.[268] Therefore, the irony of the situation is that prohibiting judges and judicial candidates from directly soliciting funds is a threat to judicial impartiality while allowing judges and judicial candidates to directly solicit is also a threat to judicial impartiality.

Over the years, two solutions have been circulated to address this paradox: recusal requirements[269] and widespread judicial appointments instead of elections.[270] Recusal, in the judicial context, means to disqualify oneself from a particular case because of a conflict of interest.[271] Forty-seven states have enacted the recusal rule[272] promulgated by the Model Code of Judicial Conduct.[273] However, commentators argue that recusal is "underused" and "underenforced" for three main reasons[274]: first, motions for disqualification are expensive and uncertain;[275] second, judges typically decide for themselves whether to grant motions for

266. SAMPLE ET AL., *supra* note 31, at 12 (internal quotation marks omitted).

267. *See* Sulzberger, *supra* note 7 (reporting a trend where judges who have issued controversial opinions have become targets of ouster campaigns).

268. *Cf.* SKAGGS, *supra* note 14, at 7 fig. 3 (demonstrating that contributions from lawyers and lobbyists, unarguably entities with a stake in the outcome of court cases, accounted for over half of all judicial campaign contributions between 2000 and 2009).

269. *See* JAMES SAMPLE ET AL., FAIR COURTS: SETTING RECUSAL STANDARDS 16 (2008) (explaining that, in recent years, legal scholars and the ABA have debated recusal rules and that courts and legislatures are expected to take up the issue next).

270. *See, e.g.*, Andrew Cohen, *The Case Against Judicial Elections: Keep Politics Out of the Law*, POLITICS DAILY (June 6, 2010), http://www.politicsdaily.com/2010/06/06/the-case-against-judicial-elections-keep-politics-out-of-the-la/ (arguing that judges should be selected by a committee and subsequently appointed, not elected).

271. BLACK'S LAW DICTIONARY 1390 (9th ed. 2009).

272. SAMPLE ET AL., *supra* note 269, at 17.

273. The recusal rule reads: "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . . ." MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (2011).

274. SAMPLE ET AL., *supra* note 269, at 20.

275. *Id.*

disqualification against them;[276] and finally, bias tends to be unconscious and therefore bias can go unnoticed or be underestimated.[277]

Moreover, the nation's judicial system is already overburdened.[278] If recusal rates spike, it would only serve to overtax an already burdened system.[279] Since recusal runs the risk of being "underused" and "underenforced," and threatens an already overburdened judicial system, recusal requirements are not a viable solution to the problems associated with judicial fundraising.

A second solution is to eliminate judicial elections. As expressed by courts that have struck down solicitation bans, the root risks to judicial impartiality stem from the state decision to choose judges through popular election.[280] As the Sixth Circuit acknowledged, "[j]udicial elections, like most elections, require money—often a lot of it."[281] Simply put, the existence of judicial elections creates the need for judicial fundraising, which creates serious risks to the impartiality of the judiciary.[282]

Aside from the negative aspects of judicial campaigning, commentators have pointed out other serious problems with electing the judiciary. Although a large majority of the electorate favors electing judges, a large majority of the electorate also does not vote in judicial elections.[283] Moreover, a majority of the electorate does not even know the judicial candidates in their jurisdictions.[284]

Recently, a coalition of judges, politicians, and lawyers, led by former

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276. *Id.*

277. *Id.*

278. *See, e.g.*, Anna Gorman, *Too Many Cases, Too Few Judges*, L.A. TIMES, July 21, 2008, at B1, B7 (reporting that the caseload at the Los Angeles Immigration Court has risen substantially in recent years but the number of judges has stayed the same, causing delays); Finis Williams, *With Too Few Judges, Civil Cases Languish*, CONCORD MONITOR, Jan. 27, 2009, http://www.concordmonitor.com/article/with-too-few-judges-civil-cases-languish (lamenting that there are not enough judges in Nashua, New Hampshire to deal with the civil case load at the Hillsborough County Superior Court).

279. *See, e.g.*, Carrie Johnson, *Judge Recusals May Hinder Gulf Oil Spill Lawsuits*, NPR (June 8, 2010), http://www.npr.org/templates/story/story.php?storyID=127560878&ft=1&f=127560878 (reporting that so many judges recused themselves due to conflicts of interest that the litigation has been seriously delayed).

280. *See* Carey v. Wolnitzek, 614 F.3d 189, 204 (6th Cir. 2010) ("Preserving these interests [in judicial legitimacy and integrity], we also acknowledge, grows more complicated when a State exercises its sovereign right to select judges through popular elections.").

281. *Id.*

282. *See supra* Part I.A (discussing the escalating costs of judicial elections and the corresponding drop in public opinion regarding the integrity of the judiciary).

283. *See* Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 53 (2003) (observing that about eighty percent of the electorate does not vote in judicial elections).

284. *See id.* at 54 (noting that approximately eighty percent of the electorate is unaware of the judicial candidates running for office in their jurisdiction).

Supreme Court Justice Sandra Day O'Connor, have begun a campaign to eliminate judicial elections and implement systems that seat judges based on merit.[285] The coalition intends to lobby state lawmakers to implement a merit system, which typically involves a selection commission that nominates a candidate for judicial appointment and retention elections.[286]

While the merit system still includes some voter input through retention elections, it takes much of the politics out of the appointment of new judges. For example, a powerful interest could organize to oust a judge during a retention election, but it could do little to ensure that the judge's replacement favored the interest's views.[287] Furthermore, by eliminating general elections, the merit system does away with much of the need for campaign contributions. By selecting judges through a commission, judicial candidates have no need to collect contributions to run ads, send out mailers, and participate in other campaign activities.[288] If this nation takes the ideal of an impartial and independent judiciary seriously, suggestions to replace the failing judicial election system must also be taken seriously.

CONCLUSION

Over the last decade, millions upon millions of dollars have been spent in state judicial elections,[289] primarily by contributors with an interest in the outcome of litigation.[290] Spending large sums of money on judicial elections is not a new phenomenon, but following the Supreme Court's *Citizens United* decision, the amount spent in these elections will likely increase.[291] Given reported cases of judicial impropriety and public opinion polls indicating a loss of faith in the judiciary, campaign contributions to judges (and candidates) have already taken a toll on the sanctity of the nation's judicial system. Logically, it can be expected that if

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285. John Schwartz, *Effort Begun to Abolish the Election of Judges*, N.Y. TIMES, Dec. 24, 2009, at A12.

286. *Id.*

287. *See id.* (describing the merit-based selection system for judges, which is comprised of a commission that nominates judicial candidates, as opposed to the selection of judges by election); Sulzberger, *supra* note 7 (describing campaigns organized during the 2010 election cycle to oust unpopular judges standing for retention elections).

288. *See* Schwartz, *supra* note 285, at A12 (explaining that the merit-based judicial selection system involves a nomination from a selection commission and appointment by the state's governor, thus negating the need for an electoral campaign).

289. *See* SAMPLE ET AL., *supra* note 31, at 5–8 (explaining that nationally, between 2000 and 2009, state supreme court candidates raised $206.9 million).

290. *Id.* at 9.

291. *See* Citizens United v. FEC, 130 S. Ct. 876, 968 (2010) (Stevens, J., dissenting) (arguing that the *Citizens United* decision "unleashes the floodgates of corporate and union general treasury spending in [election] races").

judicial campaign contributions continue to increase, the damage to the judicial system will grow as well.

While judicial solicitation bans are not a comprehensive solution to the problems associated with judicial campaign contributions,[292] the bans serve as a safeguard against unchecked judicial *quid pro quo* and the appearance of judicial *quid pro quo*. Until our country stamps out the root risks to judicial impartiality and independence that stem from judicial elections, upholding the bans—perhaps by analyzing them under the *Buckley* framework—is an important step toward ensuring that court cases are not won by the parties with the deepest pockets.

292. *See* Weaver v. Bonner, 309 F.3d 1312, 1323 (11th Cir. 2002) (acknowledging that solicitation bans cannot completely guard judicial impartiality because "[s]uccessful candidates will feel beholden to the people who helped them get elected regardless of who did the soliciting of support").