

FREE SPEECH AND DUE PROCESS PROBLEMS IN THE REGULATION AND FINANCING OF JUDICIAL ELECTION CAMPAIGNS

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I. INTRODUCTION

The cost of winning a judicial election has risen dramatically in recent years, to the point that a critical state supreme court race may now cost more than most campaigns for the U.S. Senate.¹ At the same time, interest

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¹ Compare DEBRA GOLDBERG ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2004: HOW SPECIAL INTEREST PRESSURE ON OUR COURTS HAS REACHED A “TIPPING POINT”—AND HOW TO KEEP OUR COURTS FAIR AND IMPARTIAL 14–15 (2005) (describing how one Illinois Supreme Court race cost more than nine million dollars) with Press Release, Federal Election Commission, Congressional Candi-

group attention to these races has soared, as concern over tort reform has lead groups on both sides of the issue to escalate their election advocacy spending.² Although voluminous commentary has addressed both the policy problems and constitutional issues surrounding the regulation of campaign finance in the legislative and executive arenas, comparatively little has been written about the unique problems that arise in the regulation of judicial election fundraising.

The United States is unique among constitutional democracies in that it requires a majority of its judges to stand for election in order to maintain their positions on the bench.³ A majority of both state appellate and state trial judges are elected nationwide.⁴ Currently, thirty-nine states require their judges to submit to some form of elections.⁵

One outgrowth of the states' preference for judicial elections is the requirement that judges and judicial candidates must raise substantial amounts of money in order to attain or retain judicial office.⁶ Dependence upon donor generosity may undermine the impartiality of judges who face future elections, when those judges try cases that involve the donors as parties, or when interests or issues important to the donors are at stake.⁷

The American Bar Association, which has long opposed judicial elections,⁸ has promulgated model regulations of judicial conduct on several occasions; the most recent version is the *Model Code of Judicial Conduct*, first published in 1990.⁹ The *Model Code* seeks, among other goals, to control the bias that flows from the financial relationship between judges and their campaign contributors.¹⁰ One provision of the *Model Code*, known throughout this Comment as the Solicitation Canon, bans judges or judicial candidates from personally soliciting donations to their campaigns.¹¹

The Solicitation Canon states that "a candidate shall not personally solicit or accept campaign contributions or personally solicit publicly stated support."¹² The Canon existed in relatively similar form from its origins in

dates Spend \$1.16 Billion During 2003–2004 (June 9, 2005), available at <http://www.fec.gov/press/press2005/20050609candidate/20050609candidate.html> (average cost of winning a U.S. Senate race in 2004 was approximately \$7.22 million).

² Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 MICH. ST. L. REV. 849, 862–63.

³ Steven Zeidman, *To Elect or Not To Elect: A Case Study of Judicial Selection in New York City 1977–2002*, 37 U. MICH. J.L. REFORM 791, 791 (2004).

⁴ *Id.*

⁵ *Id.*

⁶ *Republican Party of Minn. v. White*, 536 U.S. 765, 789 (2002) (O'Connor, J., concurring).

⁷ *See id.* at 790.

⁸ *Id.* at 787.

⁹ MODEL CODE OF JUDICIAL CONDUCT (2004).

¹⁰ *See id.* at Canon 5(C)(2) cmt.

¹¹ *Id.* at Canon 5(C)(2).

¹² *Id.*

the 1972 *Code of Judicial Conduct* to its present form in the 1990 *Model Code*.¹³ It has been adopted, with minor variations, in the vast majority of states that have judicial elections.¹⁴ During the three decades since its initial promulgation, judicial candidates challenged the Canon's constitutionality under the Free Speech Clause of the First Amendment¹⁵ twice, once in state court and once in federal court, and both times it was upheld.¹⁶

¹³ See *id.* at pmb1.

¹⁴ Out of the thirty-nine states that have judicial elections, thirty-three have enacted some form of the Solicitation Canon. Twenty-four states have enacted solicitation regulations that are substantially similar to the Solicitation Canon in the *Model Code*. See ALASKA CODE OF JUD. CONDUCT Canon 5(C)(3) (2005); ARK. CODE OF JUD. CONDUCT Canon 5(C)(2) (2005); ILL. CODE OF JUD. CONDUCT Canon 7(B)(2) (2005); IND. CODE OF JUD. CONDUCT Canon 5(C)(2) (2005); KAN. CODE OF JUD. CONDUCT Canon 5(C)(2) (2005); LA. CODE OF JUD. CONDUCT Canon 7(D)(1) (2005); ME. CODE OF JUD. CONDUCT Canon 5(C)(3) (2005); MICH. CODE OF JUD. CONDUCT Canon 7(B)(2)(a)–(b) (2006); MISS. CODE OF JUD. CONDUCT Canon 5(C)(2) (2005); MO. CODE OF JUD. CONDUCT Canon 5(B)(2) (2005); NEB. CODE OF JUD. CONDUCT Canon 5(C)(2) (2005); N.Y. CODE OF JUD. CONDUCT Canon 5(A)(5) (2006); N.D. CODE OF JUD. CONDUCT Canon 5(C)(2) (2005); OKLA. CODE OF JUD. CONDUCT Canon 5(C)(2) (2005); PA. CODE OF JUD. CONDUCT Canon 7(B)(2) (2005); S.C. CODE OF JUD. CONDUCT Canon 5(C)(2) (2005); S.D. CODE OF JUD. CONDUCT Canon 5(C)(2) (2005); TENN. CODE OF JUD. CONDUCT Canon 5(C)(2)(a) (2005); UTAH CODE OF JUD. CONDUCT Canon 5(C)(2) (2005); VT. CODE OF JUD. CONDUCT Canon 5(C)(3) (2005); WASH. CODE OF JUD. CONDUCT Canon 7(B)(2) (2006); W. VA. CODE OF JUD. CONDUCT Canon 5(C)(2) (2005); Wisconsin Code of Judicial Conduct, WIS. SUP. CT. R. 60.06(4) (2005); WYO. CODE OF JUD. CONDUCT Canon 5(C)(2) (2005).

Four states have enacted regulations of solicitation that are stronger than those in the *Model Code*. See COLO. R. OF JUD. DISCIPLINE 7(B)(2)(d)–(e) (2005) (also prohibits communicating names of contributors to candidates); IDAHO CODE OF JUD. CONDUCT Canon 5(C)(2) (2001) (same); MINN. CODE OF JUD. CONDUCT Canon 5(B)(2) (2005) (same, although ruled unconstitutional in some applications—see discussion *infra*); OHIO CODE OF JUD. CONDUCT Canon 7(C)(2)(a) (2006) (placing numerous substantive restrictions on who can contribute to the committee). Five states have Solicitation Canons that are weaker than those in the *Model Code*. Four states restrict only solicitation, not acceptance of contributions. See ARIZ. CODE OF JUD. CONDUCT Canon 5(B)(2) (2005); FLA. CODE OF JUD. CONDUCT Canon 7(C)(1) (2005); KY. CODE OF JUD. CONDUCT Canon 5(B)(2) (2006); OR. CODE OF JUD. CONDUCT JR 4-102(D) (2005). Finally, New Mexico's Solicitation Canon applies only against contributions by attorneys or litigants, but applies equally to solicitation or acceptance. See N.M. CODE OF JUD. CONDUCT Rule 21-800 B, F (2006).

By contrast, seventeen states do not prohibit solicitation at all. Three states have an aspirational statement that solicitation is to be avoided, but nevertheless permit it. See ALA. CANONS OF JUD. ETHICS 7(B)(4)(a) (2005); GA. CODE OF JUD. CONDUCT Canon 7(B)(2) (2005); NEV. CODE OF JUD. CONDUCT Canon 5(C)(2) (2005). The remaining fourteen states permit solicitation without restriction or criticism, or else select their judiciaries by appointment, so that a solicitation canon would be meaningless. See CAL. CODE OF JUD. ETHICS Canon 5(B) (2006); CANONS OF JUD. CONDUCT FOR THE COMMW. OF VA. Canon 5 (2005); CONN. CODE OF JUD. CONDUCT Canon 7 (2005); DEL. CODE OF JUD. CONDUCT Canon 7 (2006); HAW. CODE OF JUD. CONDUCT Canon 5 (2005); IOWA CODE OF JUD. CONDUCT Canon 7 (2005); MASS. CODE OF JUD. CONDUCT Canon 5 (2005); R.I. CODE OF JUD. CONDUCT Canon 5 (2005); MD. CODE OF JUD. CONDUCT Canon 5(B) (2005); MONT. CANON OF JUD. ETHICS 30 (2005); N.C. CODE OF JUD. CONDUCT Canon 7(B)(4) (2005); N.H. CODE OF JUD. CONDUCT Canon 5 (2005); N.J. CODE OF JUD. CONDUCT Canon 7 (2006); TEX. CODE OF JUD. CONDUCT Canon 5 (2005).

¹⁵ U.S. CONST. amend. I.

¹⁶ *Stretton v. Disciplinary Bd.*, 944 F.2d 137 (3d Cir. 1991); *In re Fadeley*, 802 P.2d 31 (Or. 1990).

Recently, however, the Solicitation Canon has received intensified attention in the wake of the Supreme Court's decision in *Republican Party of Minnesota v. White*, which struck down various portions of Minnesota's Code of Judicial Conduct on free speech grounds.¹⁷ Since that decision, two courts have held that the Solicitation Canon is unconstitutional: the Eleventh Circuit Court of Appeals in *Weaver v. Bonner*,¹⁸ and the Eighth Circuit on remand in *Republican Party v. White*.¹⁹ To date, however, no legal scholarship has devoted substantial attention to whether the Solicitation Canon violates the First Amendment.²⁰ This is an important question, because thirty-three states currently have provisions that prohibit personal solicitation of funds in judicial elections.²¹ Furthermore, the final draft of the proposed revisions to the *Model Code*, released by the American Bar Association in December 2005, maintains the essential substance of the Solicitation Canon.²² Nor can existing opinions on this question give adequate guidance to the states, as the decisions to date have stated their holdings narrowly and have not offered entirely consistent rationales.²³

This Comment will seek to fill these gaps by providing a more detailed analysis of the Canon's constitutionality, showing that judicial campaign fundraising raises both free speech issues and procedural due process concerns. First, the Comment seeks to demonstrate that any regulation of judicial campaign fund solicitation will violate the First Amendment by unjustifiably regulating the content of core political speech. However, this Comment also seeks to show that unrestricted campaign contributions may

¹⁷ 536 U.S. 765 (2002) (striking down Minnesota's "Announce Clause," formerly MINN. CODE OF JUD. CONDUCT Canon 5(A)(3)(d)(i) (2002)).

¹⁸ 309 F.3d 1312 (11th Cir. 2002).

¹⁹ *White II*, 416 F.3d 738 (8th Cir. 2005) (en banc), cert. denied, 126 S. Ct. 1165 (2006).

²⁰ The only previously published work that addressed the question was a student note that devoted only four pages of analysis to the issue. That note reached a result contrary to the conclusion of this Comment and modern cases. See Alexandra 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, 476 (2004).

²¹ Twenty-four states have enacted solicitation regulations that are substantially similar to the *Model Code*. See sources cited *supra* note 14.

Nine other states have solicitation regulations that are either stronger or weaker than those in the *Model Code*, but still prohibit personal solicitation. See ARIZ. CODE OF JUD. CONDUCT, Canon 5(B)(2) (2005); COLO. R. OF JUD. DISCIPLINE 7(B)(2)(d)-(e) (2005); FLA. CODE OF JUD. CONDUCT Canon 7(C)(1) (2005); IDAHO CODE OF JUD. CONDUCT Canon 5(C)(2) (2001); KY. CODE OF JUD. CONDUCT Canon 5(B)(2) (2006); MINN. CODE OF JUD. CONDUCT Canon 5(B)(2) (2005) (held unconstitutional in some applications—see discussion *infra*); N.M. CODE OF JUD. CONDUCT Rule 21-800 B, F (2006); OHIO CODE OF JUD. CONDUCT Canon 7(C)(2)(a) (2006); OR. CODE OF JUD. CONDUCT JR 4-102(D)(2005).

²² See ABA JOINT COMM'N TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, REPORT 151, 173 (Dec. 20, 2006) [hereinafter ABA JOINT COMM'N REPORT], available at http://abanet.org/judicialethics/house_report.pdf (proposing new Canons 4.1(A)(8) and 4.4); Joint Commission to Evaluate the Model Code of Judicial Conduct, <http://www.abanet.org/judicialethics/home.html> (last visited Feb. 3, 2007).

²³ See discussion of cases *infra* Parts II.B, III.

lead to a separate constitutional difficulty, by violating the due process doctrine of *Tumey v. Ohio*.²⁴ Finally, this Comment will propose ways of protecting the due process interests of litigants without infringing on the speech of judicial candidates. This analysis will provide a better balance between the free speech rights of judicial candidates and the due process interests of litigants than exists at present in most states.

The structure of this Comment is as follows. Part II will provide background on the history of the Solicitation Canon in the *Model Code*, the challenges that have been brought against it under the First Amendment, the due process doctrine of *Tumey*, and the modern world of judicial campaign finance. Part III will analyze the Solicitation Canon under the Free Speech Clause of the First Amendment and argue that the regulation of solicitation in judicial elections violates the First Amendment. Specifically, the Comment will analyze all plausible interests previously asserted to justify the Canon in case law and scholarship, which include the interest in judicial impartiality, the interest in the appearance of that impartiality, and the interest in litigant due process. Applying strict scrutiny, this Comment will conclude that none of these interests can justify the Canon, because the Canon is not narrowly tailored to protect any of them, and because the appearance of impartiality may not be a compelling interest for the purposes of the First Amendment. Part IV will show that the modern world of judicial campaign finance threatens to violate the due process interests of litigants in impartial adjudication. It will show that, although this danger cannot justify the Solicitation Canon, it may be necessary for either the states or the federal judiciary to intervene to protect the rights of litigants in ways that do not infringe on judicial candidate speech. Finally, I will propose alternatives that include abandoning popular elections of state judges, moving to full public financing of state judicial campaigns, strengthening recusal rules, or, as a last resort, federal judicial intervention. All of these proposals protect the due process interests of litigants as well as the Solicitation Canon, with less infringement of speech.

II. BACKGROUND: THE CANON, THE DOCTRINES AND THE LANDSCAPE OF MODERN JUDICIAL CAMPAIGN FINANCE

A. *A Brief History of the Solicitation Canon*

Judicial elections were unknown when the First Amendment was ratified in 1791. Initially, all thirteen original states appointed their judges, with appointment authority variously given to the legislative or executive branches of government.²⁵ However, when Georgia entered the Union in

²⁴ 273 U.S. 510 (1927).

²⁵ LYLE WARRICK, *JUDICIAL SELECTION IN THE UNITED STATES: A COMPENDIUM OF PROVISIONS* 3 (2d ed. 1993).

1812, its constitution provided for the election of trial court judges.²⁶ Over the next fifty years, a revolution took place, so that by the time of the Civil War, more than two thirds of the states elected some or all of their judges.²⁷ Thereafter, nearly every state to enter the union decreed that at least some of its judges would be selected by popular election.²⁸

Despite this broad movement toward elected state judiciaries, dissatisfaction existed with the selection process as the 19th Century waned. Specifically, some felt that elections empowered political machines to choose candidates and failed to eliminate special interest control over the judiciary.²⁹ Many states initiated reforms to address these concerns, including non-partisan elections and the so-called Missouri Plan, consisting of initial appointment by the governor followed by retention elections.³⁰ At present, states employ an “almost endless combination of mechanisms” to select the various levels of judges in state courts.³¹ Currently, thirty-nine states require some or all of their judges to submit to either an initial election or a retention election.³²

When the American Bar Association first promulgated regulations of judicial conduct in 1924, called the *Canons of Judicial Ethics*, these rules did not include any regulation of solicitation of campaign funds.³³ Rather, the ABA included its first model regulation of judicial campaign fundraising in its 1973 *Code of Judicial Conduct*. The 1973 *Code* provided that “a candidate . . . should not himself solicit or accept campaign funds.”³⁴ However, it further provided that candidates could form campaign committees, which could then raise money on their behalf.³⁵

The ABA intended the new Solicitation Canon to address the conflict between “political necessity and judicial impartiality.”³⁶ To further this goal, the Commentary to the Canon forbade campaign committees from informing a judicial candidate of the names of campaign contributors, unless the candidate had a legal requirement to publicly disclose his contributors.³⁷ The driving idea behind the Solicitation Canon was “to insulate the candidate to some extent, and thereby reduce the danger of the appearance of a

²⁶ *Id.*

²⁷ *Id.* The change was largely driven by a Jacksonian-era populist sentiment that viewed the appointed judiciary as excessively controlled by property-owners. *Id.*

²⁸ *Id.*

²⁹ *Id.* at 3–4.

³⁰ *Id.* at 4–5.

³¹ *Id.* at 5.

³² Zeidman, *supra* note 3, at 791; *see also* WARRICK, *supra* note 25, at 19–35 (providing a state-by-state breakdown of the method of judicial selection).

³³ CANONS OF JUD. ETHICS, Canon 30 (1924).

³⁴ CODE OF JUD. CONDUCT Canon 7(B)(2) (1972).

³⁵ *Id.*

³⁶ E. WAYNE THODE, REPORTER’S NOTES TO THE CODE OF JUDICIAL CONDUCT 98 (1973).

³⁷ CODE OF JUD. CONDUCT Canon 7(B)(2) cmt. (1972).

lack of impartiality” toward those persons who either contribute or refuse to do so.³⁸ Thus stood the Canon for its first eighteen years.

In 1990, the ABA substantially revised the 1972 *Code* to create the *Model Code of Judicial Conduct*.³⁹ The Solicitation Canon survived relatively unscathed; it was moved to a new location, and some of its terms were clarified or slightly modified, but the text of the provision itself remained substantially similar.⁴⁰ The only change of significance was to the Commentary to the Canon. The 1972 *Code* had prohibited campaign committees from informing judges of the identity of contributors; the ABA deleted this provision from the Commentary in the new *Model Code*.⁴¹ Regardless, the *Model Code* preserved the remainder of the Solicitation Canon in a substantially similar form. Thus, the Canon arrived at its modern form, which was the subject of the First Amendment challenges detailed in the next section.⁴²

B. *The First Amendment and Judicial Campaign Finance*

This section will begin by sketching a brief outline of the First Amendment doctrine as applied to the Solicitation Canon. It will then describe the holdings to date regarding the Canon’s constitutionality under the First Amendment. Finally, it will conclude by discussing some inadequacies in these legal treatments of the Canon.

The Free Speech Clause of the First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech”⁴³ The Supreme Court has held that the Due Process Clause of the Fourteenth Amendment⁴⁴ incorporates the Free Speech Clause so that it applies against the states as well as the Federal government.⁴⁵ Although the text of the Amendment might appear to be an absolute command, the doctrine has

³⁸ THODE, *supra* note 36, at 99.

³⁹ MODEL CODE OF JUDICIAL CONDUCT (2004); see LISA L. MILORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE 3–6 (1992).

⁴⁰ See MILORD, *supra* note 39, at 53–55; compare MODEL CODE OF JUDICIAL CONDUCT Canon 5(C)(2) (2004) with CODE OF JUD. CONDUCT Canon 7(B)(2) (1972).

⁴¹ MILORD, *supra* note 39, at 55; see MODEL CODE OF JUDICIAL CONDUCT Canon 5(C)(2) cmt. (2004).

⁴² The ABA is currently considering a proposed revision and restructuring of the *Model Code*, including Canon 5. See Joint Commission to Evaluate the Model Code of Judicial Conduct, <http://www.abanet.org/judicialethics/home.html> (last visited Feb. 3, 2007). However, the Report of the Commission has preserved the essence of the Solicitation Canon. ABA JOINT COMM’N REPORT, *supra* note 22, at 151 (proposing new Canon 4.1(A)(8)). Thus, if the ABA moves forward with the Draft as proposed, the application of the reasoning in this Comment would remain unchanged.

⁴³ U.S. CONST. amend. I.

⁴⁴ U.S. CONST. amend. XIV.

⁴⁵ See *Fiske v. Kansas*, 274 U.S. 380, 386–87 (1927); *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

evolved so that there are a variety of levels of scrutiny for restrictions on speech.

The modern doctrine provides that government actions restricting speech based upon its content are presumed to be invalid.⁴⁶ Such restrictions are subject to strict scrutiny, while content-neutral regulations are subject to intermediate scrutiny.⁴⁷ In order to survive strict scrutiny, a law must be “narrowly tailored to serve a compelling state interest”⁴⁸ and must be the least restrictive alternative available to meet that interest.⁴⁹

The landmark case of *Buckley v. Valeo*⁵⁰ established the basic rules applicable to political speech and campaign fundraising. The Court stated in *Buckley* that strict scrutiny applies to cases involving political expression and association, because “the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.”⁵¹ However, *Buckley* held that restrictions on monetary campaign contributions were subject to a lesser standard: they need be only “closely drawn to avoid unnecessary abridgment of associational freedoms,” a form of intermediate scrutiny.⁵²

Litigants have challenged the validity of the Solicitation Canon (or, more precisely, its state-code variants) under the First Amendment four times in reported cases. The first case to consider the question was *In re Fadeley*, decided by the Oregon Supreme Court in 1990.⁵³ In *Fadeley*, a judge appealed his censure for violating Canon 7(B)(7) of the Oregon Code of Judicial Conduct, which prohibited judicial candidates from personally soliciting campaign contributions.⁵⁴ Judge Fadeley argued that the Canon was void because it violated the Free Speech Clause of the First Amendment.⁵⁵ The court upheld the Canon.⁵⁶ It found that the Canon was subject only to closely drawn scrutiny, citing *Buckley*.⁵⁷ Furthermore, it determined

⁴⁶ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

⁴⁷ *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994).

⁴⁸ *Republican Party of Minn. v. White*, 536 U.S. 765, 775 (2002).

⁴⁹ See, e.g., *Rutan v. Republican Party*, 497 U.S. 62, 74 (1990); *Sable Commc'ns v. FCC*, 492 U.S. 115, 126 (1989); *Florida Star v. B.J.F.*, 491 U.S. 524, 538 (1989); Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2422–23 (1996) (collecting cases).

⁵⁰ 424 U.S. 1 (1976).

⁵¹ See *id.* at 44–45 (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)) (applying “exact scrutiny” to expenditure limitations).

⁵² *Id.* at 25.

⁵³ 802 P.2d 31 (Or. 1990).

⁵⁴ *Id.* at 34.

⁵⁵ *Id.* at 41.

⁵⁶ *Id.*

⁵⁷ *Id.*

that the judge's interest in associational freedom was overcome by the State's important interest in the integrity of its judiciary.⁵⁸

Shortly thereafter, the Third Circuit Court of Appeals became the first federal appellate court to decide the same question, in *Stretton v. Disciplinary Board of the Supreme Court of Pennsylvania*.⁵⁹ *Stretton* was a judicial candidate who sued to enjoin enforcement of Pennsylvania's Solicitation Canon.⁶⁰ Pennsylvania's rule was substantially the same as the current Model Rule.⁶¹ The court first determined that the correct analysis for First Amendment purposes was a strict scrutiny analysis.⁶² It then determined that the Pennsylvania Solicitation Canon was narrowly tailored to further a compelling state interest in an impartial judiciary, and therefore upheld the Canon.⁶³

After the Third Circuit spoke on the subject, the Solicitation Canon received no further attention for another decade. However, free speech challenges to judicial campaign restrictions received new energy after the United States Supreme Court decided that a different provision of the Minnesota Code of Judicial Conduct restricting the speech of judicial candidates violated the First Amendment in *Republican Party v. White*.⁶⁴ Subsequent challenges to the Solicitation Canon utilized the language and authority of *White*, and found greater success.

Shortly after the Supreme Court decided *White*, the Eleventh Circuit decided the first successful free speech challenge to the Solicitation Canon in *Weaver v. Bonner*.⁶⁵ In *Weaver*, a free speech challenge was aimed at Georgia's version of the Solicitation Canon.⁶⁶ Georgia's Canon was weaker than the ABA's version; it provided only that judicial candidates could not personally solicit campaign funds, while saying nothing about accepting such funds.⁶⁷ Nevertheless, the court determined both that strict scrutiny applied to the Canon⁶⁸ and that the Canon could not survive that inquiry. This was because the court determined that the Canon was not narrowly tai-

⁵⁸ *Id.* at 44.

⁵⁹ 944 F.2d 137 (1991).

⁶⁰ *Id.* at 139.

⁶¹ PA. CODE OF JUD. CONDUCT Canon 7(B)(2) (1991).

⁶² *Stretton*, 944 F.2d at 141.

⁶³ *Id.* at 146.

⁶⁴ 536 U.S. 765, 788 (2002). Writing for the majority, Justice Scalia struck down the Minnesota Code of Judicial Conduct's "Announce Clause," which prohibited judicial candidates from announcing their views on disputed legal or political issues. *Id.* at 776–77. The case is particularly important in the present context, because Justice Scalia took pains to carefully parse and analyze varying conceptions of the state interest underlying regulation of candidate behavior in judicial elections. *See id.* at 776–85.

⁶⁵ 309 F.3d 1312 (11th Cir. 2002).

⁶⁶ *Id.* at 1315.

⁶⁷ GA. CODE OF JUD. CONDUCT Canon 7(B)(2) (2002) (amended 2003) (modern version has been amended to be hortatory only).

⁶⁸ *Weaver*, 309 F.3d at 1321.

lored to advance the State's interest in impartial judges. Indeed, the court said, the Canon "completely chills a candidate's speech" on the subject of fundraising, while hardly advancing an interest in impartiality "at all."⁶⁹ The court cast doubt on the notion that any bias would flow from campaign contributions, and seemed to view the State's asserted interest as too insignificant to be compelling.⁷⁰

The most recent pronouncement on the constitutionality of the Solicitation Canon occurred in the latest round of proceedings in *Republican Party v. White (White II)*.⁷¹ On remand from the Supreme Court's decision, the Eighth Circuit Court of Appeals was left to consider the constitutionality of several other portions of Minnesota's Code of Judicial Conduct, one of which was the Minnesota Solicitation Canon.⁷² Reversing its own panel, the Eighth Circuit reheard the case en banc. The court agreed that the Solicitation Canon is subject to strict scrutiny analysis. Furthermore, the court determined that the Canon cannot survive this analysis.

First, the court determined that the Canon was not narrowly tailored to protect the State's interest in an impartial judiciary, because less restrictive means were available to the State to achieve that purpose.⁷³ Indeed, it stated that, given other prohibitions placed upon campaign fundraising by Minnesota, the Solicitation Canon was actually superfluous to this purpose.⁷⁴ The court also rejected the argument that the Canon served a compelling state interest in "open-mindedness," again finding that the Canon was not sufficiently narrowly tailored to this interest.⁷⁵ Finally, it should be noted that the *White II* court limited its holding to an as-applied question: whether the candidate could send out form letters seeking funds over his signature.⁷⁶

Thus, the modern trend of the cases has been toward striking down the Solicitation Canon. However the courts have not clearly elaborated the doctrine and policies at stake. The *Weaver* court relied on the absence of additional prohibitions in reaching its decision, while the *White II* court thought that additional protections helped to support a finding that the Canon was invalid. The fact that the *White II* case involved an as-applied challenge limits the strength of its holding. Finally, neither court satisfyingly examined the important interests at stake in the regulation of judicial campaign finance or the spectrum of alternative remedies available to states seeking to protect the impartiality of their judiciaries.

⁶⁹ *Id.* at 1323.

⁷⁰ *Id.* at 1322.

⁷¹ *White II*, 416 F.3d 738 (8th Cir. 2005) (en banc), *cert. denied*, 126 S. Ct. 1165 (2006).

⁷² *Id.* at 744–45. The Minnesota Canon is actually stronger than the ABA version—it prohibits not only personal solicitation, but also any communication of the identity of contributors from a campaign committee to a judicial candidate. See MINN. CODE OF JUD. CONDUCT Canon 5(B)(2) (2005).

⁷³ *White II*, 416 F.3d at 765–66.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 766.

Subsequent sections of this Comment will seek to fill in these gaps, and demonstrate that no version of the Solicitation Canon can survive scrutiny under the First Amendment. Next, however, will be a detour into the realm of the Due Process Clause and its application in the judicial campaign fundraising context. This detour will help lay the groundwork for the conclusion that the current methods of financing judicial elections can lead to due process problems for future litigants.

C. *Tumey v. Ohio and the Due Process Right to an Adjudicator Free from Pecuniary Interest*

The landmark case of *Tumey v. Ohio* established the due process right to have one's case decided by an unbiased judge.⁷⁷ Tumey was arrested for possessing intoxicating liquors in Ohio⁷⁸ pursuant to a warrant issued by Mayor Pugh.⁷⁹ He was brought to trial before the Mayor, convicted, fined \$100, and imprisoned until the fine and costs were paid.⁸⁰ During his trial and throughout his appeals, he maintained that the Mayor could not adjudicate his trial without violating the Due Process Clause of the Fourteenth Amendment.⁸¹

The Due Process Clause provides that “no State ... shall ... deprive any person of life, liberty, or property, without due process of law.”⁸² Tumey alleged that the clause applied in his case, because the Mayor received a portion of all fines collected as compensation for his costs, “in addition to his regular salary.”⁸³ Thus, the Mayor got paid for his services as an adjudicator only when he found defendants guilty.⁸⁴

Tumey argued that for the Mayor to assess a fine under these conditions effectively deprived Tumey of his property without due process of law.⁸⁵ The Supreme Court agreed.⁸⁶ The Court, in an opinion authored by Justice Taft, tied its analysis to ancient rules of the common law of England. It stated that “[t]here was at the common law the greatest sensitiveness over the existence of any pecuniary interest, however small or infinitesimal, in the justices of the peace.”⁸⁷ The Court decided that this an-

⁷⁷ 273 U.S. 510 (1927).

⁷⁸ *Id.* at 516.

⁷⁹ *Id.*

⁸⁰ *Id.* at 515.

⁸¹ *Id.* at 514–15.

⁸² U.S. CONST. amend. XIV, § 1.

⁸³ *Tumey*, 273 U.S. at 519.

⁸⁴ *Id.* at 520.

⁸⁵ *Id.* at 514–15.

⁸⁶ *Id.* at 531.

⁸⁷ *Id.* at 525.

cient practice must control the analysis of what process is “due” under the Fourteenth Amendment.⁸⁸ The Court stated that:

it . . . deprives a defendant in a criminal case of due process of law, to subject his liberty . . . to the judgment of a court the judge of which has a *direct, personal, substantial, pecuniary interest* in reaching a conclusion against him in his case.⁸⁹

The Court then considered whether the Mayor’s interest in the cases being decided was sufficient to be impermissibly biasing, as a constitutional matter.⁹⁰ It should be noted that the Court did not require Tumey to show that the decision was wrong, or that the Mayor was actually biased to decide against him in his case.⁹¹ Rather, “no matter what the evidence was against him, he had the right to have an impartial judge.”⁹²

D. The Cases After Tumey: Defining the Scope of the Doctrine

The *Tumey* decision established that the Due Process Clause affords litigants the right to have their cases tried before a tribunal free from certain biasing conditions, even where no proof was made of actual bias by a judge. However, one unresolved issue was the scope of the doctrine—did a litigant’s *Tumey* protection extend to any condition that created a “possible temptation . . . not to hold the balance nice, clear and true”⁹³ between the parties, or did it merely protect against situations where the judge had a “direct, personal, substantial, pecuniary interest”⁹⁴ in the controversy presented?⁹⁵ The Court has resolved this uncertainty by using both tests as independent bases for requiring reversal. However, the Court has not treated the two interests as being equally likely to present constitutional problems.⁹⁶ Thus, the Court has strictly applied the pecuniary-interest rule even where the alleged interest was quite small in individual cases, but has confined the possible-temptation rule to a few narrow categories.

Although the label “possible temptation” may make that test seem quite broad, cases have only applied the possible-temptation rule in instances not involving a decisionmaker with a pecuniary interest in the matter. There have been only two categories of cases held to be within the

⁸⁸ *Id.* at 526.

⁸⁹ *Id.* at 523 (emphasis added).

⁹⁰ *Id.* at 532.

⁹¹ *Id.* at 535.

⁹² *Id.*

⁹³ *Id.* at 532.

⁹⁴ *Id.* at 523.

⁹⁵ Mark Andrew Grannis, Note, *Safeguarding the Litigant’s Constitutional Right to a Fair and Impartial Forum: A Due Process Approach to Improprieties Arising from Judicial Campaign Contributions from Lawyers*, 86 MICH. L. REV. 382, 393 (1987).

⁹⁶ See *id.* at 394 (arguing that the decisions show a tendency to rely on the pecuniary-interest prong of the doctrine, whenever both arguably apply).

“possible temptation” category: cases presenting direct animosity or pre-judgment between judge and litigant,⁹⁷ and cases involving a role conflict for the judge.⁹⁸ However, neither of these classes is particularly implicated in the campaign contribution context, so they will not be discussed in detail here.

By contrast, even a very small financial interest has been held to be impermissible under the pecuniary-interest test. For instance, in *Connally v. Georgia*, the Court held that issuance of a search warrant violated the Due Process Clause, when the justice of the peace responsible for issuing the warrant received a five dollar fee for issuing a warrant, but nothing for denying one.⁹⁹ In light of the system-wide effects of such a system of contribution, the Court rejected the argument that such an interest was de minimis, stating that the justice of the peace’s “financial welfare . . . is enhanced by positive action, and is not enhanced by negative action.”¹⁰⁰

A decisionmaker can violate the pecuniary-interest rule even when the financial interest in question is relatively remote. For instance, the Supreme Court has affirmed a district court’s judgment that optometry license proceedings adjudicated by a State Board of Optometrists violated due process, because the optometrists on the Board could benefit financially from denying licenses to their potential competitors.¹⁰¹ Likewise, the Fifth Circuit has held that tying payment of judges to their docket size can violate the pecuniary-interest test, because that method of payment can lead judges to favor the interests of filing parties over defending parties, as a way to attract more cases to their courtrooms.¹⁰² The conclusion seems simple: when a judge can benefit financially from deciding a case in a certain way, and when that benefit follows in a reasonably logical fashion from the outcome of the case, requiring a litigant to submit to a decision by that judge deprives the

⁹⁷ See, e.g., *In re Murchison*, 349 U.S. 133, 134–35 (1955).

⁹⁸ See, e.g., *Ward v. Village of Monroeville*, 409 U.S. 57, 57 (1972).

⁹⁹ 429 U.S. 245, 251 (1977).

¹⁰⁰ *Id.* at 250. Although the Court used the possible temptation language in its discussion, as well as the pecuniary interest language, this case probably belongs in the pecuniary category, given its different treatment from non-financial cases where the “temptation” was arguably stronger. Where a pecuniary interest is not at stake, courts will generally require that a conflicting judicial interest be substantial before finding a *Tumey* violation, a requirement not apparently applied to the five dollars at issue in *Connally*. Compare *id.*, with *Alpha Epsilon Phi Tau Chapter Hous. Ass’n v. City of Berkeley*, 114 F.3d 840, 847 (9th Cir. 1997) (rejecting a *Tumey* argument on the basis that a rent-stabilization board’s interest in increasing its own budget by five percent was insufficient to create a *Tumey* violation, and where board-members did not profit financially by having an increased operating budget).

¹⁰¹ *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (addressing an issue which would have affected a large number of optometry licenses, thus redounding to the Board’s benefit by reducing competition).

¹⁰² *Brown v. Vance*, 637 F.2d 272, 283, 285 (5th Cir. 1981) (applying this reasoning to both criminal and civil trials). It should be noted that, once again, the discussion in this case used the “possible temptation” language. However, given that the temptation at issue was entirely financial, this case also belongs in the pecuniary interest category.

litigant of due process of law. Thus, the pecuniary-interest test proves relatively easy to delimit.

E. The Landscape of Modern Judicial Campaign Finance

Even before the recent surge in judicial fundraising amounts, scholarly commentary asserted that campaign contributions in judicial races could raise subsequent problems under the Due Process Clause.¹⁰³ In 1987, one student commentator showed that both judges and the public recognized the pervasive influence of money in judicial elections.¹⁰⁴ Mark Andrew Grannis used this showing as the basis for arguing for strict campaign finance reform in state judicial elections.

Grannis tied his showing to a combination of anecdotal evidence and modest statistics. He showed that some judicial candidates viewed money as an extremely important factor in judicial elections, quoting one California judge as stating: “there is no way . . . that you can do anything effective without a large amount of money, as both electronic media and direct mail are very costly.”¹⁰⁵ Grannis went on to cite information he believed showed a belief by campaign contributors that their contributions could affect case outcomes. He first argued that data from Cook County, Illinois, showing a high rate of donations to trial judges’ retention elections, helped indicate that some judicial campaign contributors believed that donations affect case outcomes.¹⁰⁶ This was because the judges, who were running unopposed, would have few campaign costs, and because the larger contributors in these races were local attorneys. Therefore, the assertion was that only an expectation of improved case outcomes could explain contributing to a candidate who did not need very much money.¹⁰⁷ He further buttressed this conclusion by offering anecdotal evidence from press accounts. These accounts described attorneys who stated that they believed a failure to contribute to a sitting judge could adversely affect their future litigation prospects.¹⁰⁸

What was arguable twenty years ago has become fact today. First, the amount of money spent on judicial campaigns has escalated dramatically over the last twenty years. Professor Schotland noted, in a study of the 2000 judicial election cycle, that yearly increases in campaign expenditures

¹⁰³ See, e.g., Grannis, *supra* note 95, at 396–403.

¹⁰⁴ *Id.* at 398.

¹⁰⁵ *Id.* (citing Roy A. Schotland, *Elective Judges’ Campaign Financing: Are State Judges’ Robes the Emperor’s Clothes of American Democracy?*, 2 J.L. & POL. 57, 155 (1985)).

¹⁰⁶ *Id.* at 402–03 (citing Marlene Arnold Nicholson & Bradley Scott Weiss, *Funding Judicial Campaigns in the Circuit Court of Cook County*, 70 JUDICATURE 17, 20–22 (1986)).

¹⁰⁷ This claim is complicated by the fact that some retention elections have been very expensive. For instance, in one retention election, California Supreme Court Justice Rose Bird spent more than \$1.5 million dollars in 1986. Stuart Banner, Note, *Disqualifying Judges from Cases Involving Campaign Contributors*, 40 STAN. L. REV. 449, 454 (1988).

¹⁰⁸ Grannis, *supra* note 95, at 408.

form a “clear, dramatic trend whether viewed in terms of total dollars, . . . dollars per seat, or percentages.”¹⁰⁹ Schotland noted an increase in campaign funds of nearly 300% from 1990 to 2000, even while excluding from the analysis what he described as an “explosion” of non-candidate spending.¹¹⁰ This nationwide increase was correlated with two issues that have polarized interest groups. The first was the “struggle over tort reform, which has mattered more than any other controversy in state courts.”¹¹¹ The second issue was the trend of highly politicized court battles over redistricting in several states with high expenditures.¹¹²

This trend of rising campaign expenditures has been noted by the American Bar Association¹¹³ and the Justice at Stake Campaign,¹¹⁴ a non-partisan organization dedicated to maintaining the impartiality of the judiciary.¹¹⁵ As Goldberg and others noted in a Justice at Stake publication “if the 2000 election cycle was the turning point . . . 2004 may be remembered as the tipping point: over 40 percent of States . . . that employ contested Supreme Court races broke aggregate campaign fundraising records for this cycle.”¹¹⁶

In addition to the increase in average spending, spending on individual races has skyrocketed in recent years. The rise in contributions has been dramatic. In 1987, Grannis was concerned with individual contributions that exceeded \$5,000.¹¹⁷ In the most recent Ohio election cycle, by contrast, FirstEnergy Corp. distributed \$125,000 among five candidates to the Ohio Supreme Court—an average of \$25,000 per justice, on a seven-member Court.¹¹⁸ Likewise, the U.S. Chamber of Commerce spent \$958,000 in independent expenditures in an effort to affect judicial races in Mississippi in 2000.¹¹⁹ And such rises are part of a larger trend: Goldberg and others noted that for state supreme court elections “in 2004, 17 interest groups in six States spent roughly \$7.4 million on television ads in the largest 100

¹⁰⁹ Schotland, *supra* note 2, at 862.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 865. In a remark with some significance for this article, Schotland noted that the redistricting battle in Illinois turned an Illinois Supreme Court race into a “fierce proxy fight between the Republican leader of the senate and the Democratic leader of the assembly.” *Id.* at 879 (internal quotation marks omitted).

¹¹³ AMERICAN BAR ASSOCIATION STANDING COMM. ON JUDICIAL INDEPENDENCE, REPORT OF THE COMMISSION ON PUBLIC FINANCING OF JUDICIAL CAMPAIGNS 11 (2002) [hereinafter ABA REPORT].

¹¹⁴ GOLDBERG ET AL., *supra* note 1, at 13.

¹¹⁵ See Justice at Stake: About the Campaign, <http://www.justiceatstake.org/contentViewer.asp?breadCrumb=8> (last visited Mar. 10, 2005).

¹¹⁶ GOLDBERG ET AL., *supra* note 1, at 13.

¹¹⁷ Grannis, *supra* note 95, at 408.

¹¹⁸ Editorial, *Too Many Masters: When Judges Owe Their Jobs to Voters and Contributors, How Sure Can Ohioans Be That Justice Is Their First Concern?*, THE PLAIN DEALER, Oct. 3, 2005, at B6 [hereinafter *Too Many Masters*].

¹¹⁹ Schotland, *supra* note 2, at 877. The spending was in support of four judicial candidates. *Id.*

network media markets in the country.”¹²⁰ Furthermore, interest group spending accounted for a larger share of all television advertising in the 2004 judicial election cycle than it had in previous years.¹²¹

The rise in contribution size and independent expenditures was mirrored by larger spending amounts by judicial candidates. In 2000, Schotland noted that, in the most expensive states, spending on Supreme Court races frequently exceeded a million dollars per candidate.¹²² Furthermore, the average cost of winning a state Supreme Court seat has risen significantly, from \$450,689 in 2002 to \$651,586 in 2004—a 45% increase in only two years.¹²³ Finally, the most recent election cycle provides a dramatic example of the rising amounts of money that judicial candidates are prepared to spend. In one downstate Illinois race in 2004, two Supreme Court candidates spent more than \$9.4 million dollars in a contest for a single seat.¹²⁴ This was nearly twice the previous record for a single seat¹²⁵ and cost more than the majority of races for the United States Senate.¹²⁶

Both the public and members of the judiciary view campaign contributions as a source of decision bias. A national survey on the subject of confidence in state judiciaries found that “seventy-six percent of public respondents indicated that they felt that campaign contributions had ‘some influence’ or ‘a great deal of influence’ on the decisions of [state] judges.”¹²⁷ Thus, the vast majority of the public believes that judges, like anyone else, are influenced by those who have power over their careers. Furthermore, a significant number of judges agreed with this sentiment: 26% of judges surveyed agreed that contributions had either “some” or “a great deal” of influence on their decisions.¹²⁸ Thus, one out of every four judges believes that their decisionmaking is affected by a pecuniary interest that has nothing to do with the merits of the litigation before them. Likewise, in one study, a substantial proportion of attorneys, 71%, believed that political contributions affected judges’ decisions.¹²⁹

¹²⁰ GOLDBERG ET AL., *supra* note 1, at 7.

¹²¹ *Id.* at 8.

¹²² Schotland, *supra* note 2, 866–80. Average spending per candidate totaled over \$1 million in Alabama. *Id.* at 866. Michigan also had numerous candidates spending more than \$1 million. *Id.* at 873.

¹²³ GOLDBERG ET AL., *supra* note 1, at 14.

¹²⁴ *Id.* at 14–15.

¹²⁵ *Id.* at 15. The previous record had been set in Alabama in 2000, with \$4.9 million being spent on one Supreme Court seat. *Id.*

¹²⁶ *Id.* at 18.

¹²⁷ Phyllis Williams Kotey, *Public Financing for Non-Partisan Judicial Campaigns: Protecting Judicial Independence While Ensuring Judicial Impartiality*, 38 AKRON L. REV. 597, 608–09 (2005).

¹²⁸ *Id.* at 609.

¹²⁹ Michael W. Bowers, *Public Financing of Judicial Campaigns: Practices and Prospects*, 4 NEV. L.J. 107, 113 (2003).

Finally, the amount of money raised by a judicial candidate is directly tied to that candidate's electoral prospects. One analysis of Texas Supreme Court elections between 1980 and 2002 showed that candidates who raised more money than their opponents gain an "overwhelming advantage."¹³⁰ Candidates who outspent their opponents won their races 85% of the time.¹³¹

Thus, it should be beyond argument that at present, campaign costs are escalating dramatically, and therefore the expenditures of judges and third parties are increasing. Furthermore, we know that the public—most notably attorneys, and some judges—believe that campaign contributions have an impact on judicial decisions. Finally, we know that the ability to effectively raise money has a direct impact on a judicial candidate's prospects of electoral success.

III. THE SOLICITATION CANON AND THE FIRST AMENDMENT

A. *The Constitutional Standard*

Every federal court to consider the constitutionality of the Solicitation Canon has held that it is subject to strict scrutiny under the First Amendment.¹³² This conclusion is not surprising, given that the Solicitation Canon regulates core political speech based on its content.¹³³ As such, it is doubly suspect. Based on these considerations, the remainder of this Comment will treat this question as resolved.¹³⁴

¹³⁰ Kyle D. Check & Anthony Champagne, *Partisan Judicial Elections: Lessons from a Bellwether State*, 39 WILLAMETTE L. REV. 1357, 1376 (2003).

¹³¹ *Id.*

¹³² *Republican Party v. White (White II)*, 416 F.3d 738, 763–64 (8th Cir. 2005) (en banc); *Weaver v. Bonner*, 309 F.3d 1312, 1319, 1322 (11th Cir. 2002); *Stretton v. Disciplinary Bd.*, 944 F.2d 137, 141–42, 146 (3d Cir. 1991).

¹³³ *White II*, 416 F.3d at 763–64.

¹³⁴ Despite the unanimity of the federal courts on this issue, only the Eighth Circuit in *White II* has offered a detailed rationale of its decision to examine the clause under strict scrutiny. *Id.* Furthermore, if this were a question of first impression, it would not be free from doubt; the *White II* Court gave remarkably short shrift to the conclusion of the *Fadeley* Court that the Solicitation Canon is a regulation of campaign contributions, and is thus subject to "closely drawn" scrutiny under *Buckley v. Valeo*. *See id.*; *In re Fadeley*, 802 P.2d 31, 41 (Or. 1990) (applying closely drawn scrutiny to the Solicitation Canon); *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (applying closely drawn scrutiny to contribution caps). Nevertheless, there exists a persuasive response to the *Fadeley* Court, in that *Buckley* dealt with contribution caps, not a total ban on communication between contributor and candidate, and thus has a very different (and arguably lesser) impact on the associational rights of candidates and contributors, than does the Solicitation Canon. A careful analysis of the factors at play would require more space than this Comment can allocate to the question. Nevertheless, it is important to recognize that a careful analysis of this issue, which has not been conducted to date, could very well support the position of the Third, Eighth and Eleventh Circuits.

For a regulation of speech to survive strict scrutiny, it must be narrowly tailored to further a compelling state interest.¹³⁵ Although the inquiry into whether an interest is “compelling” can be vague and somewhat circular, an analysis of the congruence between the interest and the regulation advanced to protect it can help determine when an asserted interest rises to the level of being “compelling.”¹³⁶ Specifically, an underinclusive regulation—one that leaves a large amount of conduct affecting an interest unregulated—is unlikely to be justified by an assertion that the interest is “compelling.”¹³⁷

Once a regulation is shown to further a compelling interest, the next stage of the inquiry is to determine whether it is narrowly tailored to further that purpose. First, to be narrowly tailored, a regulation must actually advance the interest.¹³⁸ Second, it must not be overinclusive: that is, it must not be so overbroad that it restricts a significant amount of speech in a way that does not further a compelling interest.¹³⁹ Finally, it must be the least restrictive available method of furthering the compelling interest. In other words, there must be no alternative regulation that advances the interest as well with less infringement of speech.¹⁴⁰

Thus, for a law restricting speech to survive strict scrutiny, it must actually advance a compelling state interest, it must be neither underinclusive nor overinclusive, and it must be the least restrictive method of promoting that interest.¹⁴¹ Given the exacting nature of strict scrutiny, it is rare for a law to survive a strict scrutiny inquiry.¹⁴² The following sections will apply this inquiry to determine whether the Solicitation Canon violates the Free Speech Clause of the First Amendment.

B. Impartiality as a Compelling Interest

The Solicitation Canon must be struck down under the First Amendment unless it is narrowly tailored to further a compelling state interest. Most courts, and the more recent pronouncement of the American Bar As-

¹³⁵ *Republican Party of Minn. v. White*, 536 U.S. 765, 774–75 (2002). See generally Volokh, *supra* note 49, at 2418–25 (setting forth the modern doctrine of strict scrutiny analysis).

¹³⁶ *White II*, 416 F.3d at 749–51; see *White*, 536 U.S. at 778–80 (rejecting asserted state interest because of serious underinclusiveness, on grounds that lack of congruence indicated that it was not the real purpose of a regulation).

¹³⁷ *White*, 536 U.S. at 778–80.

¹³⁸ *White II*, 416 F.3d at 751; see *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 226, 228–29 (1989).

¹³⁹ *White*, 536 U.S. at 775; *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 121–22 (1991); *White II*, 416 F.3d at 751.

¹⁴⁰ *White II*, 416 F.3d at 751; see *Rutan v. Republican Party*, 497 U.S. 62, 74 (1990); *Sable Commc'ns v. FCC*, 492 U.S. 115, 126 (1989); *Florida Star v. B.J.F.*, 491 U.S. 524, 538 (1989). See generally Volokh, *supra* note 49, at 2422–23 (collecting cases).

¹⁴¹ *White II*, 416 F.3d at 751.

¹⁴² *Id.* at 749.

sociation, take the position that judicial impartiality is the compelling interest that the Solicitation Canon seeks to advance.¹⁴³ This section will analyze whether the Canon is narrowly tailored to further a compelling state interest in impartiality.

Impartiality is the interest almost universally advanced by those who seek to justify the Canon. The Commentary to the Solicitation Canon in the 1990 *Model Code of Judicial Conduct* tied the provision to “the legitimate concern about a judge’s impartiality” when former contributors are either litigants or the attorneys for litigants before a court.¹⁴⁴ More recently, the ABA’s *Annotated Model Code of Judicial Conduct*, published in 2004, further defines “impartiality” as the absence of bias for or against parties or classes of parties, as well as “maintaining an open mind in considering issues that may come before a judge.”¹⁴⁵ Both the *Stretton* and the *Weaver* courts were content to define the interest simply in terms of “impartiality.”¹⁴⁶ Finally, the *White II* court defined the interest protected by the Solicitation Clause as either an interest in “unbiased judges” or else in “open-mindedness,” thus largely tracking the ABA’s most recent definition.¹⁴⁷

Impartiality is undoubtedly an interest that exists at the core of the values embodied in our legal system. However, it turns out not to matter whether or not this interest is compelling, because the answer to that question will not alter the outcome of the First Amendment inquiry. Even if impartiality is a compelling interest, concerned with bias regarding legal issues, and also with bias regarding parties to a case, the Solicitation Canon is not narrowly tailored to further that interest.

In order for a regulation of speech to survive the narrow-tailoring prong of strict scrutiny, it cannot be overinclusive.¹⁴⁸ Thus, even a statute that serves a compelling interest will violate the First Amendment if it sweeps too broadly and prohibits a significant amount of conduct that is unrelated to that interest.¹⁴⁹ Under this standard, no version of the Solicitation Canon as it is currently applied can satisfy the First Amendment.

Professor Friedland has analyzed the impact of potential regulations of judicial speech during election cycles.¹⁵⁰ Analyzing proposed restrictions

¹⁴³ See *id.* at 765–66; *Weaver v. Bonner*, 309 F.3d 1312, 1322 (11th Cir. 2002); *Stretton v. Disciplinary Bd.*, 944 F.2d 137, 145 (3d Cir. 1991); MODEL CODE OF JUD. CONDUCT Canon 5(C)(2) cmt. (2004).

¹⁴⁴ MODEL CODE OF JUD. CONDUCT Canon 5(C)(2) cmt.

¹⁴⁵ *Id.* at Terminology.

¹⁴⁶ See *Weaver*, 309 F.3d at 1322; *Stretton*, 944 F.2d at 145.

¹⁴⁷ *Republican Party of Minn. v. White (White II)*, 416 F.3d 738, 765–66 (8th Cir. 2005) (en banc).

¹⁴⁸ *Id.* at 751.

¹⁴⁹ *Id.* (citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 122 (1991)).

¹⁵⁰ Michelle T. Freidland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 COLUM. L. REV. 563, 613 (2004). Friedland analyzes restrictions on candidates’ ability to publicly state their opinions, but does not discuss the Solicitation Canon. *Id.*

that would quite narrowly control election speech, she nevertheless determined that such restrictions were not narrowly tailored because they were overinclusive to the purpose of protecting litigants from judicial bias.¹⁵¹ That is because, regardless of how carefully the regulations were to restrict only speech that might induce bias, there was no guarantee that all, or even most, of the restricted speech would end up producing bias in a case that actually came before the judge after the election.¹⁵²

This analysis applies equally to the Solicitation Canon. Even if we accept the postulate that solicitation is a behavior uniquely likely to induce bias in a judge, the fact remains that there is no guarantee that any donation given to a judge will produce bias in a case that will come before the court. The inability to anticipate which cases a judge will eventually hear makes it impossible to restrict regulation to only those donations that will prejudice particular litigants. Thus, *any* version of the Solicitation Canon will fail strict scrutiny analysis under the First Amendment, because of this fatal overinclusiveness.¹⁵³

The Solicitation Canon is overbroad in other ways as well. It includes quite small contributions within its reach, even though those contributions are unlikely to produce any bias to future litigants. Furthermore, the Solicitation Canon applies even when, by law or by choice, the judicial candidate remains completely in the dark regarding what contributions he receives.¹⁵⁴ Thus, even if a candidate made it a practice to require all contributions to be made to a committee, and instructed that committee not to inform him of who had contributed to his campaign, the Solicitation Canon would prevent him from sending out a form letter with his signature seeking contributions.¹⁵⁵ Since such a situation would almost never produce bias against future litigants based on the contributions received, it provides another example of the overly broad sweep of the Solicitation Canon.

Second, the Solicitation Canon is not narrowly tailored to promote an interest in impartiality because of the availability of less restrictive alternatives. One such option is ending the practice of electing state judges. As Justice O'Connor has noted, "if the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges."¹⁵⁶ Any bias that flows from campaign

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ It might be possible to save the Solicitation Canon from failure on this point, if it could be shown that a significant majority of contributors end up having their interests at stake before a particular judge. However, this empirical showing has not yet been made in any litigation regarding the Solicitation Canon.

¹⁵⁴ *Republican Party of Minn. v. White (White II)*, 416 F.3d 738, 765 (8th Cir. 2005) (en banc) (stating that Canon is overinclusive because of Minnesota rule prohibiting campaign committees from communicating the receipt or amount of any donation to the candidate).

¹⁵⁵ *Id.*

¹⁵⁶ *Republican Party of Minn. v. White*, 536 U.S. 765, 792 (2002) (O'Connor, concurring).

contributions can be eliminated if states eliminate the need for judges to raise any money to communicate their views to the electorate. Thus, since eliminating judicial elections represents an alternative method of preventing the threat to judicial impartiality brought on by the campaign fundraising process, the Solicitation Canon cannot be narrowly tailored to further the interest of judicial impartiality.

Other less-restrictive alternatives exist as well. States could publicly finance the election communications of judicial candidates. Three states currently employ public finance for their state supreme court elections—Wisconsin, Minnesota and North Carolina.¹⁵⁷ If candidates no longer needed to raise money to attain political office, any threat of bias flowing from indebtedness to past contributors would be effectively eliminated. Such a program might be expensive and would need to effectively match both candidate and third-party expenditures in order to be a meaningful alternative to private fundraising. Nevertheless, since this alternative would protect the interest in impartiality just as effectively as the Solicitation Canon without restricting speech at all, it represents another less-restrictive alternative to the Solicitation Canon.

A third option exists that is less restrictive than the Solicitation Canon: disqualification of judges based upon possible contribution bias. States could amend their Codes of Judicial Conduct to require that judges recuse themselves when a campaign contribution could produce bias in a case that is before them. Such a reform would provide a narrower remedy than the Solicitation Canon. It would only apply in cases where campaign speech led to a possible due process concern in a specific case.¹⁵⁸ And it would not directly prohibit any speech; it would merely require candidates who choose to engage in direct solicitation during elections to consider the impact of their speech on their ability to decide future cases.

Examples of mandatory disqualification exist that target the potential bias arising from campaign contributions. Mississippi provides for such disqualification in its Code of Judicial Conduct.¹⁵⁹ Furthermore, the ABA recently added such a provision to the *Model Code*.¹⁶⁰ New Canon 3(E)(1)(e) provides for disqualification based on a contribution above a stated amount by any party or attorney in a proceeding.¹⁶¹ Since this provision would protect impartiality in state adjudications with less restriction of

¹⁵⁷ Doug Bend, Note, *North Carolina's Public Financing of Judicial Campaigns: A Preliminary Analysis*, 18 GEO. J. LEGAL ETHICS 597, 605–06 (2005).

¹⁵⁸ Thus, such a rule would not require showing of specific bias, but rather that a contribution had created a potential for bias. As such, it could be applied without a subjective probing of the judge's mind, and without the awkward necessity of accusing a sitting judge of actual bias.

¹⁵⁹ MISS. CODE OF JUD. CONDUCT Canon 3(E)(2) (2005).

¹⁶⁰ MODEL CODE OF JUD. CONDUCT Canon 3(E)(1)(e) (2004) (adopted in 1999).

¹⁶¹ *Id.*

speech, the new Canon also provides a more narrowly tailored alternative to preventing judicial bias than does the Solicitation Canon.

Thus, although impartiality may be a compelling state interest, it cannot save the Solicitation Canon from being invalidated by a strict scrutiny inquiry, because the Canon is not narrowly tailored to promote the interest in impartiality. This is so because the Canon is both overbroad and more restrictive than necessary to protect the impartiality interest. The next section will examine an alternative, possibly-compelling interest: the interest in the appearance of impartiality.

C. *The Appearance of Impartiality as a Compelling Interest*

Although the Solicitation Canon cannot be justified by reference to the state interest in impartiality, it would still be possible for the Canon to survive if another interest could adequately justify it. At least one other plausible alternative has been previously asserted: the appearance of impartiality. The following section will argue that the appearance of impartiality cannot be the state interest that justifies the Canon, because that interest is neither compelling, nor is the Canon narrowly tailored to further it.

The appearance of impartiality was the interest identified to justify the Solicitation Canon in its original version in the *1972 Code*.¹⁶² The Reporter to the *1972 Code* wrote that the provision was intended to “reduce the danger of the appearance of a lack of impartiality” flowing from judicial campaign contributions.¹⁶³ The Supreme Court of Oregon, when it considered what interests support the Canon, reached a similar conclusion; Oregon’s Solicitation Canon protected the State interest in “maintaining, not only the integrity of the judiciary, but also the appearance of that integrity.”¹⁶⁴

However, unlike impartiality itself, the Supreme Court did not discuss the appearance of impartiality in *Republican Party v. White*, even though the State of Minnesota offered it as a compelling interest.¹⁶⁵ Thus, it is unclear how the Court would view this interest, except that its neglect of this issue might indicate some disapproval of labeling it as “compelling.”

Indeed, labeling the appearance of impartiality as a compelling state interest is troubling. It is clear enough that a state has an overriding and compelling interest in assuring impartial tribunals to its citizens, as discussed in the previous section. However, the notion that a state has an interest in promoting the “appearance” of such a fact is fatally flawed. If the tribunals are in fact impartial, the state need only demonstrate as much to its citizens, and the interest is met. If they are *not*, however, the state would be deceiving its citizens by trying to portray them as impartial. Given the crucial im-

¹⁶² See THODE, *supra* note 36, at 99.

¹⁶³ *Id.*

¹⁶⁴ *In re Fadeley*, 802 P.2d 31, 41 (Or. 1990).

¹⁶⁵ See 536 U.S. 765, 775–85 (2002) (stating that respondents offered both interests, but only discussing impartiality, not the appearance of impartiality).

portance of impartial judges to the people of a state, there can be no legitimate interest in promulgating an “appearance of impartiality” through any other means than assuring that impartiality is actually present.¹⁶⁶

Furthermore, a court may find that an interest is not compelling enough to justify a proposed speech restriction when the scope of the restriction is severely underinclusive.¹⁶⁷ The Solicitation Canon seems woefully underinclusive as a method of protecting the appearance of impartiality. Other forms of campaign activity by third parties, such as the airing of issue ads, may undermine the public perception of impartiality in the judiciary to a greater degree than a personal solicitation by the candidate.

Indeed, complaints in the press about fundraising and the judiciary have rarely expressed concern with personal solicitation; instead, the focus has been on the basic receipt of substantial sums of money.¹⁶⁸ This accords with common sense, because the size of the contribution seems like a factor that might play a larger role in producing bias than the manner in which it was solicited. A personal solicitation and acceptance of five dollars might make little difference to a judicial campaign, whereas the indirect receipt of thousands of dollars seems just as biasing whether or not it was personally solicited. Finally, some states with strong solicitation regulations nevertheless have terribly low levels of public confidence in the judiciary.¹⁶⁹ When public levels of confidence in the impartiality of judges are as low as they are at present,¹⁷⁰ it seems clear that the states are leaving large amounts of

¹⁶⁶ It is true that courts sometimes treat the appearance of impartiality as an important interest—especially in discussions of recusal decisions. *See, e.g.*, *Liljberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988) (stating a view that judges were usually impartial, but that public perceptions of partiality create a problem). *Liljberg* provides a useful example on this issue—especially because it goes on to discuss sources of potential, *actual* bias by the district court judge, including a direct financial interest in the litigation, although it frames this discussion in the context of the appearance of impartiality. *Id.* at 867; *see also* *Buckley v. Valeo*, 424 U.S. 1, 26–27 (1976) (referring to the appearance of political corruption as compelling interest, but highlighting the actual corruption that could flow from the contributions at issue). Thus, it is quite possible that much of the language in the cases and elsewhere emphasizing the importance of appearance, rather than substance, amounts to a form of institutional politeness—a reluctance to suggest that members of the judiciary are biased. Given the larger theme of this Comment, I would argue that such politeness does more harm than good, by obstructing analysis of judicial bias, and that an inquiry into actual bias is not only proper, but is mandatory under the Due Process Clause. *See* discussion *infra* Part IV.B.

¹⁶⁷ *Republican Party of Minn. v. White (White II)*, 416 F.3d 738, 749–51 (8th Cir. 2005) (en banc); *White*, 536 U.S. at 778–80 (rejecting asserted state interest because of serious underinclusiveness, on grounds that lack of congruence indicated that it was not the real purpose of a regulation).

¹⁶⁸ *See, e.g.*, *Too Many Masters*, *supra* note 118, at B6.

¹⁶⁹ Bradley Link, Note, *Had Enough in Ohio? Time to Reform Ohio’s Judicial Selection Process*, 51 CLEV. ST. L. REV. 123, 124 (2004) (noting that 90% of Ohio citizens believe political contributions affected judicial decisions). Ohio’s rules on solicitation by judicial candidates are significantly more restrictive than the Solicitation Canon of the *Model Code*. Compare OHIO CODE OF JUD. CONDUCT Canon 7(C)(2)(a) (2006), with MODEL CODE OF JUD. CONDUCT Canon 5(C)(2) (2004).

¹⁷⁰ *See* Kotey, *supra* note 127, at 608 (76% of persons surveyed believed campaign contributions had either some influence or a great deal of influence on state judges in a national survey, despite the widespread adoption of the Solicitation Canon).

conduct that affects the appearance of impartiality unregulated, thus leading to an inference that the Canon is not actually intended to promote that interest.¹⁷¹

Even if the appearance of impartiality is a compelling interest, that interest could not sustain the Solicitation Canon, because the Canon is not narrowly tailored to further it. As was the case with the interest in impartiality, a state would place no burden on candidate speech if it stopped selecting judges by popular vote. It would, however, eliminate any threat to the appearance of judicial impartiality posed by campaign fundraising. If there are no elections, there need be no fundraising, and if there is no fundraising, no appearance of impropriety can arise from it.

Therefore, the Solicitation Canon cannot be maintained by an assertion of the appearance of impartiality as a compelling interest, both because it is doubtful that that interest is compelling, and because the Canon is not narrowly tailored to further it. Nor could the interest in impartiality save the Canon. Thus, there is no identifiable interest asserted to date that is both compelling, and which the Canon is narrowly tailored to promote.

Thus, the Solicitation Canon, in its various forms, is void as a violation of the Free Speech Clause. The following section will examine a second constitutional issue at stake in judicial campaign finance: the due process doctrine of *Tumey v. Ohio*.

IV. MODERN JUDICIAL CAMPAIGN FINANCE AND THE DUE PROCESS PROBLEM

A. *Applying Tumey to the Judicial Campaign Contribution Context*

Under *Tumey v. Ohio*, a condition that creates a pecuniary interest in the outcome of litigation in a presiding judge is a violation of due process, even without a showing of any actual prejudice to a litigant.¹⁷² As discussed above,¹⁷³ *Tumey* has been held to apply in three situations: where the judge occupies two conflicting roles,¹⁷⁴ where the judge has displayed hostility or prejudgment toward a litigant,¹⁷⁵ or where the judge has any pecuniary interest in the litigation.¹⁷⁶ The arguments for campaign contributions creating role conflict, hostility or prejudgment are weak—or at least, such situations are probably rare. By contrast, campaign contributions may fre-

¹⁷¹ It is worth noting that the ABA no longer asserts that the appearance of impartiality is a justification for its Solicitation Canon, though it did at first. Compare THODE, *supra* note 36, at 99 (justifying Canon on the basis of the appearance of impartiality in 1972), with MODEL CODE OF JUD. CONDUCT Canon 5(C)(2) cmt. (tying the rule only to impartiality in 1990).

¹⁷² 273 U.S. 510, 523, 535 (1927).

¹⁷³ See discussion *supra* Part II.C.

¹⁷⁴ Ward v. Village of Monroeville, 409 U.S. 57, 59 (1972).

¹⁷⁵ *In re Murchison*, 349 U.S. 133, 134–35 (1955).

¹⁷⁶ Connally v. Georgia, 429 U.S. 245, 247–49 (1977).

quently create a pecuniary interest in the outcome of litigation. Thus, judicial campaign contributions may in some circumstances lead to a violation of future litigants' due process rights.

The pecuniary-interest branch of the *Tumey* doctrine applies to a large class of cases within the reach of the Solicitation Canon. A previous commentator has identified one form of pecuniary interest that a judge may have as a result of a campaign contribution: the interest in deciding a case in favor of a donor-litigant.¹⁷⁷ Because past support will likely indicate future support absent other concerns, a judge may feel that if he decides a case against a litigant or an attorney, he may lose the value of that person's contributions¹⁷⁸ in a future election. This concern is not merely academic. One study found that 75% of cases before the Wisconsin Supreme Court during the 1990s involved a prior campaign contribution from at least one litigant or attorney to a sitting member of the Court.¹⁷⁹ Furthermore, given the strong correlation between outspending a judicial campaign opponent and defeating them,¹⁸⁰ even a small loss of campaign funding may decrease a candidate's chances of success. Thus, there is a direct pecuniary consequence to deciding against litigant-donors—the increased likelihood of losing a future judicial election, and thus losing the compensation associated with the office.

Grannis expressed concern that such a financial consequence might be too “remote” to satisfy the “directness” requirement of *Tumey*.¹⁸¹ However, *Brown v. Vance* found a *Tumey* violation in a similar circumstance.¹⁸² *Vance* held that payment by docket size violates the *Tumey* prohibition on pecuniary interest in the outcome of a lawsuit.¹⁸³ Note that this “interest” involved several intervening steps. First, a judge would have to realize that by favoring filing parties, those parties might be more likely to file in his court. Then, those parties would have to actually realize the judge's tendencies, and file accordingly—on a scale sufficient to bring the judge a significant amount of additional compensation. This is quite similar to the interest asserted here. Judges might easily realize that they may alienate contributors by deciding against them, and the withdrawal of contributions may well make the difference between winning and losing, if the contributions are substantial. Especially given the fact that there is actual evidence

¹⁷⁷ Grannis, *supra* note 95, at 397–98.

¹⁷⁸ Or potentially, those of an organization to which that person belongs, such as a law firm or interest group.

¹⁷⁹ Marie A. Failing, *Can a Good Judge Be a Good Politician? Judicial Elections from a Virtue Ethics Approach*, 70 MO. L. REV. 433, 447 (2005).

¹⁸⁰ See Cheek & Champagne, *supra* note 130, at 1376.

¹⁸¹ Grannis, *supra* note 95, at 398.

¹⁸² 637 F.2d 272, 283, 285 (5th Cir. 1981).

¹⁸³ *Id.*

that many judges and most attorneys believe that contributions affect decisions,¹⁸⁴ this should satisfy the “directness” requirement, after *Vance*.

However, the pecuniary-interest concern extends beyond the specter of the donor-litigant. The doctrine should also extend to the positional-contributor: the donor who contributes not out of a personal affection for the judge or a desire to avoid prejudice in the courtroom, but instead seeks to promote only judges with certain views to the judiciary. Thus, a judge can have a *Tumey* problem even where a donor is not before his court, when a case requires a decision on an issue that is central to the positions of a positional-contributor.

For instance, imagine that a judge must decide a suit to determine whether a state program is constitutional. Further imagine that the plaintiff challenging the program has never contributed to the judge’s election fund, and is unlikely to do so even if he prevails. However, a powerful interest group that has previously contributed large amounts to the judge’s campaign has taken a strong position in favor of the state’s position. Finally, imagine that the judge will soon face a hotly contested campaign season, in which every dollar will count. In such a case, a judge would reasonably fear that deciding against the state will lead to losing the continued support of the interest group, and that without the funds he would expect to receive from the interest group, he will lose his next election, and hence his job and salary. In such a case, the judge has a pecuniary interest in the litigation, even though neither party to the case has ever been a contributor to his campaigns.

In fact, a *Tumey* violation is more likely in this instance. First, denial of future contributions may be more likely to occur with a positional-contributor than a donor-litigant. This is because, as has been noted, “the contributor surely cannot expect to win *every* case before the judge.”¹⁸⁵ Thus, an attorney or friend of the judge will not expect total partiality. In contrast, a single-issue donor may expect considerably greater fidelity on that issue, and may be more willing to punish any deviation.

Furthermore, the probability that a denial of support by a positional-contributor will affect a judge’s reelection prospects is correspondingly greater. First, such contributors are likely to spend more money. Indeed, there are examples of positional-contributors spending nearly a million dollars on court races, on the basis of a single issue.¹⁸⁶ Schotland describes the U.S. Chamber of Commerce’s intervention in races in Mississippi, to the tune of \$958,000.¹⁸⁷ This amounted to an overwhelming majority of all non-candidate spending in that market, and was apparently on the basis of a

¹⁸⁴ Kotey, *supra* note 127, at 608–09.

¹⁸⁵ Grannis, *supra* note 95, at 397.

¹⁸⁶ See Schotland, *supra* note 2, at 876–77.

¹⁸⁷ *Id.*

single issue—the issue of “tort-reform.”¹⁸⁸ Second, issue advocacy groups may be more willing not only to withdraw support, but also to actively work to defeat particular candidates on the basis of judicial decisions.¹⁸⁹ Therefore, issues potentially offensive to positional-contributors may be more likely to produce an impermissible *Tumey* problem than the issues of concern to litigant-donors.

Thus, a judge’s knowledge of past support by either donor-litigants or positional-contributors can produce a pecuniary interest in a case sufficient to violate the Due Process Clause. Furthermore, this problem can arise from either direct contributions to a judicial campaign or via independent expenditures in a race.

B. Due Process as a Compelling Interest for First Amendment Purposes?

The previous section established that campaign contributions in judicial races can lead to violations of future litigants’ due process rights. This conclusion raises a question: is the due process interest a compelling interest that the Solicitation Canon is narrowly tailored to promote? If so, the Solicitation Canon might be constitutional after all. However, this argument fails for much the same reason the broader impartiality interest was found not to justify the Canon. Simply put, the Solicitation Canon is both overbroad to protect the due process interest, and it is not the least restrictive alternative available to do so. Thus, it cannot save the Canon.

Given that the *Tumey* doctrine establishes a constitutional right, the goal of preventing violations of *Tumey* is almost certainly a compelling state interest.¹⁹⁰ However, the Solicitation Canon is certainly not narrowly tailored to advance the *Tumey* interest. In order to be narrowly tailored to

¹⁸⁸ Tort reform has become the focus of a great deal of independent expenditures in state judicial races. See *Tort Reformers Gain in Judicial Elections*, FED. & ST. INS. WEEK, Nov. 13, 2000.

¹⁸⁹ See Schotland, *supra* note 2, at 872 (describing a campaign by the Chamber of Commerce to defeat an Ohio Justice who they believed was too likely to rule in favor of plaintiffs). Interestingly enough, one of the advertisements run by the Chamber supports the theme of this Comment—Justice Resnick was criticized for ruling favorably toward trial lawyers, who had “given her more than \$750,000.” Although the specific claim is surely undermined by the presence of the Chamber’s attempt to spend money to influence the judiciary on the other side of the same issue, the fact that the critique existed to be made supports the thrust of the argument above.

¹⁹⁰ Courts have held that the due process interest, in the form of impartiality, is a compelling interest justifying speech restrictions. See *Morial v. Judiciary Comm’n*, 565 F.2d 295, 302 (5th Cir. 1977) (“The state’s interest in ensuring that judges be . . . neither antagonistic nor beholden to any interest, party, or person is entitled to the greatest respect.”); see also *In re Raab*, 793 N.E.2d 1287, 1290–91, 1293 (N.Y. 2003). However, it is worth noting that the Solicitation Canon is substantially underinclusive as a means of protecting the *Tumey* interest, because it fails to reach the equally biasing problem of independent expenditures, particularly advertising bought by non-candidates in order to indirectly support a judicial candidate. Thus, although the interest might be compelling in the abstract, it might not be considered a compelling interest furthered by the Solicitation Canon. See *Republican Party of Minn. v. White (White II)*, 416 F.3d 738, 749–51 (8th Cir. 2005) (en banc); see also *Republican Party of Minn. v. White*, 536 U.S. 765, 778–80 (2002).

advance a state interest, a regulation must not be overbroad,¹⁹¹ and it must be the least restrictive method available to protect that interest.¹⁹²

First, it is apparent that the Solicitation Canon is overbroad as a means of preventing judges from deciding cases in which they have a pecuniary interest. This is so, because it cannot be guaranteed that all, or even most, campaign contributors will have their interests before that judge in a future litigation. Furthermore, the Solicitation Canon applies equally to contributions large enough to produce a future pecuniary interest based on reelection concerns, and to contributions that are *de minimis* in relation to future electoral prospects. However, only large contributions are likely to make a reasonable judge worry about his reelection prospects, which is the source of the *Tumey* bias. Thus, the Solicitation Canon is doubly overbroad as a method of protecting the due process interest.

Furthermore, the Solicitation Canon is not the least restrictive method of protecting due process rights of future litigants. All of the solutions proposed in the context of the impartiality discussion—ending judicial elections, publicly financing judicial elections, and requiring recusal in cases involving campaign contributions—would prevent judges from sitting on any cases in which they had a pecuniary interest in the outcome, by virtue of a fear of raising sufficient funds to finance a reelection or retention race. If a judge will not be subject to future elections, he will not fear losing his job or his income. If the judge feels confident of his ability to raise funds for a reelection bid, he will not worry about losing contributions in future races. And if a judge must recuse himself, he will never sit on a case regarding which he has a pecuniary interest in the outcome. Nor do any of these alternatives restrict judicial candidate speech.

Thus, the Solicitation Canon is not the least-restrictive alternative available to protect the *Tumey* interest. Furthermore, it is overbroad as a method of protecting that interest. Therefore, the Solicitation Canon will not survive a strict scrutiny analysis by reference to the *Tumey* interest.

Up to this point, this Comment has demonstrated both that the Solicitation Canon violates the First Amendment and that the conduct it governs may bring about violations of the Due Process Clause if left unregulated. The final sections of this Comment will attempt to offer solutions to this quandary, by showing ways that states and the federal judiciary can prevent such violations without infringing on speech interests.

¹⁹¹ *White II*, 416 F.3d at 751; *see White*, 536 U.S. at 775; *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 121–22 (1991).

¹⁹² *White II*, 416 F.3d at 751; *see Rutan v. Republican Party*, 497 U.S. 62, 7574 (1990); *Sable Commc'ns v. FCC*, 492 U.S. 115, 126 (1989); *Florida Star v. B.J.F.*, 491 U.S. 524, 538 (1989); *Volokh*, *supra* note 49, at 2422–23.

C. State-Driven Solutions to the Due Process Problem

The states created the *Tumey* problem by choosing to elect state judges—a practice that was not known when the nation was founded.¹⁹³ At present, thirty-nine states employ judicial elections in some form.¹⁹⁴ Thus, since states have brought this problem upon their litigants, it is appropriate for states to craft solutions to the due process problems arising from their decision to elect their judges. This section will propose several approaches that states could take that would protect this interest without violating the free speech rights of judges.

Fortunately, the above analysis suggests some solutions to the due process problem. One of the Solicitation Canon's constitutional defects was the availability of less-restrictive alternatives to protect litigants from *Tumey*-bias. Since each of these alternatives provides a constitutionally preferable means of protecting due process, each of them can serve as a potential solution.

As argued above, the best, cheapest and simplest solution to the *Tumey* problem occasioned by campaign finance and independent expenditures would be the elimination of judicial elections, or at least the elimination of judicial reelections.¹⁹⁵ Eliminating elections would end entirely the current need for sitting judges to raise substantial amounts of funds in order to retain their seats—the source of the *Tumey* bias identified above.

Furthermore, the elimination of judicial elections may have substantial collateral benefits. It may result in fewer disciplinary violations by judges¹⁹⁶ and may prompt qualified candidates who would be discouraged by the prospect of a contested election and its attendant fundraising to seek judicial office.¹⁹⁷ In fact, many of the alleged benefits of judicial elections have not materialized. Judicial elections have not consistently improved the diversity of the bench,¹⁹⁸ nor do they effectively map the preferences of a majority of the population onto the composition of the judiciary, due to problems of low turnout, low voting rates, and lack of voter information.¹⁹⁹

However, if the states are unwilling to eliminate judicial elections, they may reduce *Tumey* bias in other ways. One alternative would be publicly financing judicial elections. This solution has been recommended by the

¹⁹³ See *White*, 536 U.S. at 790–91 (O'Connor, J., concurring).

¹⁹⁴ *Id.* at 790.

¹⁹⁵ See Freidland, *supra* note 150, at 620–21 (noting that many of the pressures on judicial impartiality arise not from an initial election, but from the need for judges to run for reelection). Instead of a reelection, judges could stand for an initial election, after which retention would be determined by a merit-based review.

¹⁹⁶ See Zeidman, *supra* note 3, at 809–10, 835 (comparing elected and appointed judges in New York City over a 25 year period, and finding that elected judges were more likely to be the subject of disciplinary actions over that period).

¹⁹⁷ *Id.* at 826.

¹⁹⁸ *Id.* at 835.

¹⁹⁹ *Id.* at 819–20, 822–25.

American Bar Association²⁰⁰ and by Justice at Stake.²⁰¹ Furthermore, North Carolina has recently adopted this solution, becoming the third state to have done so.²⁰² This solution is more costly, and indeed, underfunding has marred the history of the public finance solution.²⁰³ Unless states commit to matching not only opponent expenditures, but also independent expenditures by interest groups, judicial candidates may be reluctant to tie themselves to the limitations of most public funding systems. Thus, although public finance represents a currently popular solution to this problem, it may prove expensive, especially if it is to be truly effective as a method of combating *Tumey* bias.

One further alternative remains: the option of strengthening disqualification rules so that *Tumey* bias arising from judicial campaigning is effectively weeded out. Previous proposals for reform in this area have limited their application to disqualifications on the basis of contributions to the sitting judge by a party or a party's attorney.²⁰⁴ The American Bar Association has recently added a provision to the *Model Code* that does exactly that.²⁰⁵ However, as argued above, the *Tumey* interest in due process is implicated by the independent advocacy of third parties and by contributions to a judge's opponents, just as much as by contributions to the individual judge. This is because all these types of election advocacy can form the basis for an inference by a sitting judge that a particular ruling may prejudice his chances for reelection.

Thus, to be effective, a disqualification rule would need to provide for mandatory disqualification on the basis of a significant contribution to the judge's prior campaign, substantial donations to a judge's opponent, or substantial independent advocacy for the judge's election or defeat. However, a state could also soften this rule by permitting waiver by agreement between affected parties and by requiring contributions or expenditures to be substantial before requiring disqualification. Furthermore, a non-movant should be able to defend such a motion by showing that the judge has no knowledge of the contribution or expenditure, presumably based on an inference from campaign practices. Finally, the disqualification decision should be made by a panel of judges other than the judge whose impartiality is at issue, and none of those judges should themselves be subject to a *Tumey* bias in the case.²⁰⁶

²⁰⁰ See ABA REPORT, *supra* note 113, at 30.

²⁰¹ See GOLDBERG ET AL., *supra* note 1, at 37.

²⁰² *Id.* at 38.

²⁰³ *Id.* at 37.

²⁰⁴ See MISS. CODE OF JUD. CONDUCT Canon 3(E)(2) (2005); Banner, *supra* note 107, at 489–90.

²⁰⁵ See MODEL CODE OF JUD. CONDUCT Canon 3(E)(1)(e) (2004). This Canon provides for judicial disqualification where a litigant or a litigant's attorney has made aggregate contributions to the judge beyond a stated amount. *Id.* This provision was added to the *Model Code* in 1999. *Id.* at 1972 Code Comparison.

²⁰⁶ Freidland, *supra* note 150, at 615–16.

Such disqualification may face problems. The prospect of strategic contributions or opposition, made with the goal of securing future disqualifications in anticipated litigation matters, is particularly disturbing.²⁰⁷ Some limitations on the rule might be appropriate, such as a defense to the motion based upon a showing of prior bad faith contributions or expenditures by the movant.²⁰⁸ However, a rule that generally prevents contributors from seeking disqualification of judges they have previously opposed would be unacceptable. Such a rule seems overbroad and risks chilling otherwise appropriate election speech. Furthermore, such a rule would require litigants to submit to a biased tribunal on the basis of previous good faith election advocacy.

Thus, the states have several options to cure the *Tumey* bias that the Solicitation Canon sought to prevent. The best option is ending the practice of electing judges. However, public financing and enhanced disqualification rules may provide other meaningful alternatives, if states remain committed to the dubious practice of electing members of their judiciaries.

D. Available Federal Remedies

This Comment has shown that substantial violations of the *Tumey* doctrine, and hence of the Due Process Clause, may arise out of campaign contributions or independent expenditures during judicial elections. Thus, it is appropriate to look at how the federal courts, with their special responsibility to protect federal constitutional rights,²⁰⁹ may respond to these problems.

First, *Tumey v. Ohio* and subsequent cases establish the authority of the Supreme Court to use its power of review, on writ of certiorari, to vacate or reverse state decisions that were made by tribunals that have a pecuniary interest in litigation.²¹⁰ This power applies whether the violation occurred at the trial level, as in *Tumey*,²¹¹ or at the appellate level.²¹² Thus, litigants with an appropriate showing of bias could appeal to the Court in order to clearly establish a rule requiring appellate reversal based upon significant pecuniary interest flowing from prior campaign contributions or independent expenditures. Such an action by the Court would signal to the state court systems that this is a significant problem, and could lead to state reform.

In addition to appellate relief, it may be possible to gain injunctive relief against continuing state court proceedings under 42 U.S.C. § 1983²¹³ from the lower federal courts. Normally, petitions to enjoin state proceed-

²⁰⁷ See Banner, *supra* note 107, at 488–89.

²⁰⁸ See *id.* (proposing solutions that are similar in some respects).

²⁰⁹ *Steffel v. Thompson*, 415 U.S. 452, 464 (1974).

²¹⁰ *Tumey v. Ohio*, 273 U.S. 510, 516 (1927).

²¹¹ *Id.* at 515.

²¹² *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 817 (1986) (reversing based upon pecuniary interest of Alabama Supreme Court justice).

²¹³ 42 U.S.C. § 1983 (2005).

ings, although proper under §1983,²¹⁴ are almost never granted, under the doctrines of equity and comity as set forth in *Younger v. Harris*.²¹⁵ In *Younger*, Harris, the plaintiff, sued the State of California to enjoin the State from prosecuting him under a law that he alleged violated his rights under the Free Speech Clause.²¹⁶ Harris prevailed at the district court level,²¹⁷ but the Supreme Court reversed, holding that the district court should not enjoin or restrain pending state criminal prosecutions except under extraordinary circumstances.²¹⁸ The Court grounded its ruling in notions of federalism and respect for the role of state courts²¹⁹ on the one hand, and in the doctrine that equity will not intervene unless irreparable harm is threatened,²²⁰ on the other. The doctrine has been elaborated so that it applies to some pending state-court civil litigation,²²¹ as well as most pending criminal prosecutions.

However, an exception has been carved out of *Younger* in situations where a forum is “incompetent by reason of bias to adjudicate the issues pending before it.”²²² In *Gibson v. Berryhill*, the Supreme Court upheld the issuance of an injunction against the proceedings of a State Board of Optometry, when that adjudicator had a pecuniary interest in the litigation because invalidating optometry licenses reduced competition for the Board members.²²³ Therefore, a *Tumey* violation can be the subject of a federal injunction against state-court proceedings.²²⁴

Thus, the federal courts have the authority to reverse decisions rendered in the presence of pecuniary bias arising out of prior campaign contributions, as well as the power to enjoin state court proceedings under the same conditions. Therefore, if the states fail to protect the due process interests of litigants, federal intervention in this arena may be both necessary and appropriate.

V. CONCLUSION

This Comment has undertaken an analysis of the constitutionality of the Solicitation Canon of the *Model Code of Judicial Conduct* and its variants in the state codes, under the Free Speech Clause of the First Amendment. It has concluded that the more recent cases striking down the

²¹⁴ *Mitchum v. Foster*, 407 U.S. 225, 243 (1972).

²¹⁵ 401 U.S. 37, 41–42 (1971).

²¹⁶ *Id.* at 38–39.

²¹⁷ *Id.* at 40.

²¹⁸ *Id.* at 41, 54.

²¹⁹ *See id.* at 43–45.

²²⁰ *See id.* at 46.

²²¹ *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 19–20 (1987).

²²² *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973).

²²³ *Id.* at 564.

²²⁴ *See* Brian Stagner, *Avoiding Abstention: The Younger Exceptions*, 29 TEX. TECH. L. REV. 137, 168 (1998).

Solicitation Canon reached the correct result and has attempted to provide a firmer analytical foundation for their results in order to reconcile their conflicting rationales. In so doing, several proposals have been offered that could replace the Solicitation Canon, better protect the underlying interest of litigant due process, and impose substantially lessened burdens on judicial candidate speech.

There are three proposed options for states seeking to protect litigant due process rights after the invalidation of the Solicitation Canon. States are encouraged to either do away with judicial elections in whole or in part, to put in place robust systems of public finance that can actually remove financial pressures from judicial candidates, or to enact strict disqualification requirements for judges who have a pecuniary interest in litigation as a result of reelection financing issues arising from campaign contributions or independent expenditures.

In the absence of action by the states, there are two proposed solutions that the federal courts can take to rein in due process violations arising from campaign financing. The first is the more traditional approach: review in the United States Supreme Court by writ of certiorari, as seen in the *Tumey* line of cases. The other is more novel: the use of federal injunctive relief under § 1983 against state court proceedings that violate *Tumey*, as seen in *Gibson*.

This Comment is written in the belief that the unconstitutionality of the Solicitation Canon need not be a cause for concern or worry. Rather, the states and the federal courts should use this analysis of the Canon's defects to construct more effective means of controlling judicial bias that are less restrictive of candidate speech. The demise of the Canon, then, should be seen not as a problem, but as an opportunity to improve the quality of justice in the state court systems.

