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NOTE

Mentally Awake, Morally Straight,† and Unfit to Sit?: Judicial Ethics, the First Amendment, and the Boy Scouts of America

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Abstract. The California Supreme Court's recent revisions to California's Code of Judicial Ethics represent one of the latest strikes against the First Amendment freedom of association. These revisions put California in the company of dozens of other states that prohibit judges from membership in the Boy Scouts of America because it is an organization that has invidiously discriminated against people on the basis of sexual orientation. This Note addresses the constitutional challenges that Californian judges could raise against Canon 2C of California's Code of Judicial Ethics. It examines Canon 2C as a policy that impedes judges' free exercise of religion and associational rights, and as a policy that potentially represents a religious test for judicial office. This Note also examines the impact that a recent policy change by the National Executive Board of the Boy Scouts of America—which allows homosexual individuals to serve as adult leaders—will have on the application of Canon 2C.

This Note presents an original First Amendment analysis of Canon 2C and its analogs in twenty-three other states in light of the Supreme Court's recent decision in *Williams-Yulee v. Florida Bar*. It further explains why Canon 2C, as applied to judicial membership in the Boy Scouts, is neither a narrowly tailored policy nor the least restrictive means for maintaining the appearance of an impartial judiciary. This Note concludes by suggesting less restrictive alternatives for dealing with judicial membership in organizations such as the Boy Scouts.

† The Boy Scout Oath: "On my honor I will do my best to do my duty to God and my country and to obey the Scout Law; to help other people at all times; to keep myself physically strong, mentally awake, and morally straight." BOY SCOUTS AM., http://www.scouting.org/scoutsource/BoyScouts.aspx (last visited Apr. 4, 2016) (capitalization altered).

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Table of Contents

Introduction

"*The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow-creatures, and of acting in common with them. I am therefore led to conclude that the right of association is almost as inalienable as the right of personal liberty. No legislator can attack it without impairing the very foundations of society.*"

—Alexis de Tocqueville, *Democracy in America*[1]

Alexis de Tocqueville observed that "[i]n no country in the world has the principle of association been more successfully used . . . than in America."[2] As of January 21, 2016, judges in California have had cause to look wistfully upon de Tocqueville's words and wonder, "What happened?" On that day, California's judges were officially prohibited from belonging to the Boy Scouts of America if they wished to continue serving as judges.[3] The Supreme Court of California voted to remove the "Boy Scout exception" in Canon 2C of California's Code of Judicial Ethics, which allowed judges to belong to nonprofit youth organizations, even if those organizations practice "invidious discrimination" on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation.[4] The California Supreme Court's decision was intended to "prohibit[] judges from being members of or playing a leadership

1. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 196 (Henry Reeve trans., Colonial Press rev. ed. 1900) (1835).

2. *Id.* at 191.

3. For background, the Boy Scouts of America is a values-based development organization that "builds character, trains [young men] in the responsibilities of participating citizenship, and develops personal fitness." *About the BSA*, BOY SCOUTS AM., http://www.scouting.org/About.aspx (last visited Apr. 4, 2016). As of 2013, the various levels of scouting included over 2.6 million young people, served by over 1 million adult volunteers. Boy Scouts of Am., 2013 Year in Review (2014), http://www.scouting.org/filestore/pdf/210-030_WB.pdf. Of those 2.6 million Scouts, over 1.58 million are members of faith-based troops. Boy Scouts of Am., Chartered Organizations and the Boy Scouts of America (2014), http://www.scouting.org/filestore/pdf/210-807.pdf.

   The Boy Scouts of America is "absolutely nonsectarian in its attitude toward . . . religious training," but it does state in its bylaws that "no member can grow into the best kind of citizen without recognizing an obligation to God." CHARTER AND BYLAWS OF THE BOY SCOUTS OF AMERICA art. IX, § 1, cl. 1 (2014), http://www.scouting.org/filestore/pdf/bsa_charter_and_bylaws.pdf. The twelfth point of the Scout law states that "[a] Scout is reverent toward God. He is faithful in his religious duties. He respects the beliefs of others." *Id.* art. IX, § 1, cl. 2.

4. Press Release, Supreme Court of Cal., Supreme Court Eliminates Ethics Exception that Permitted Judges to Belong to Nonprofit Youth Organizations that Discriminate (Jan. 23, 2015), http://www.courts.ca.gov/documents/sc15-Jan_23.pdf.

role in the BSA" in order to "enhance public confidence in the impartiality of the judiciary."[5]

The discussion surrounding the end of the Boy Scout exception has been extremely polarized. On the one hand, supporters of increased antidiscrimination protections have celebrated the revision as a step in the right direction towards greater equality and protection. On the other hand, supporters of the Boy Scouts have claimed that closing the loophole is nothing short of a direct attack on judges' fundamental First Amendment rights to exercise their religion and associate freely.

This Note joins and adds to this discussion by examining each side's arguments and analyzing their claims through the lens of First Amendment doctrine. This Note concludes that legal arguments that Canon 2C unconstitutionally infringes the free exercise rights of judges are likely to fail in light of restrictive case law, while claims that Canon 2C infringes their associational rights are more likely to succeed.

The analysis proceeds in four parts. Part I discusses the history of Canon 2C and the debate surrounding the California Supreme Court's recent revisions. It lays out the various arguments that judges and commentators have raised against Canon 2C. Part II examines the limitations of a free exercise challenge against the application of Canon 2C to judges. It then proposes an alternative religious argument against Canon 2C's Boy Scout prohibition, grounded in the No Religious Test Clause in Article VI of the U.S. Constitution. After Part II's treatment of religious arguments, Part III discusses the development of First Amendment freedom of association doctrine as a general matter. Part III then focuses specifically on public employee speech with an emphasis on cases involving restrictions on judicial speech and association. Part III concludes by discussing the recent Supreme Court decision of *Williams-Yulee v. Florida Bar*, which clearly confirmed that any policy restricting the First Amendment rights of judges must pass strict scrutiny.[6] This Note concludes in Part IV by applying the doctrine discussed in Part III, arguing that Canon 2C, as it currently exists, does not pass strict scrutiny because it is neither narrowly tailored nor the least restrictive means available for preventing bias in California's judiciary.

5. Supreme Court Advisory Comm. on the Code of Judicial Ethics, Invitation to Comment SP14-02, at 4 (2014), http://www.courts.ca.gov/documents/SP14-02.pdf.

6. 135 S. Ct. 1656, 1666 (2015).

I. Revisions to California's Code of Judicial Ethics

A. Reactions

On January 23, 2015, the Supreme Court of California announced that it had voted to remove the California Code of Judicial Ethics (the Code) exception allowing judges to belong to nonprofit youth organizations that practice "invidious discrimination" on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation.[7] Canon 2 of the Code lays out broad rules mandating that judges "shall avoid impropriety and the appearance of impropriety" in all of their activities.[8] Canon 2C specifically addresses judicial membership in organizations. It forbids judges from holding membership in any organization that practices invidious discrimination on the basis of a list of specific characteristics.[9] Before the California Supreme Court's revisions, the text of Canon 2C stated: "this canon does not bar membership in a nonprofit youth organization."[10] The old Advisory Committee commentary to Canon 2C explained that this exception aimed to "accommodate individual rights of intimate association and free expression."[11] The new Advisory Committee commentary issued with the January 2015 revisions simply recognizes that this exception no longer exists.[12] It does not bother to address the important, and constitutionally protected, rights of intimate association and free expression.

The only remaining exception to this rule allows judges to belong to religious organizations that practice invidious discrimination[13] (such as the Catholic Church and Orthodox Judaism, which have exclusively male priests and rabbis, respectively). Judges must comply with the revised rule or they will be deemed unfit to serve as impartial arbiters of the law.[14] This revision places California in the company of the twenty-three other states that prohibit membership in what the ABA Model Code of Judicial Conduct calls "discriminatory organizations" without an explicit exception for nonprofit youth organizations.[15] Many likely controversies will arise when these

7. Press Release, Supreme Court of Cal., *supra* note 4.

8. CAL. CODE OF JUDICIAL ETHICS Canon 2 (2015), http://www.courts.ca.gov/documents/ca_code_judicial_ethics.pdf.

9. *Id.* Canon 2C.

10. CAL. CODE OF JUDICIAL ETHICS Canon 2C (2013) (amended 2015).

11. *Id.* Canon 2C advisory committee cmt.

12. CAL. CODE OF JUDICIAL ETHICS Canon 2C advisory committee cmt. (2015).

13. *Id.* Canon 2C.

14. *See id.* Canons 2 and 2A advisory committee cmt.

15. MODEL CODE OF JUDICIAL CONDUCT r. 3.6 (AM. BAR ASS'N 2011).

The twenty-three other states that prohibit association with groups that invidiously discriminate on the basis of sexual orientation are Arizona, Colorado, Connecticut,

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Hawaii, Indiana, Iowa, Kansas, Maryland, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New York, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Utah, Vermont, Washington, and Wyoming. ARIZ. CODE OF JUDICIAL CONDUCT Canon 3, r. 3.6 (2009); COLO. CODE OF JUDICIAL CONDUCT Canon 3, r. 3.6 (2010); CONN. CODE OF JUDICIAL CONDUCT Canon 3, r. 3.6 (2011); HAW. REVISED CODE OF JUDICIAL CONDUCT Canon 3, r. 3.6 (2008); IND. CODE OF JUDICIAL CONDUCT Canon 3, r. 3.6 (2011); IOWA CODE OF JUDICIAL CONDUCT Canon 3, r. 51:3.6 (2010); KAN. CODE OF JUDICIAL CONDUCT Canon 3, r. 3.6 (2009); MD. CODE OF JUDICIAL CONDUCT § 3, r. 3.6 (2015); MINN. CODE OF JUDICIAL CONDUCT Canon 3, r. 3.6 & cmt. 2 (2009); 2009 MONT. CODE OF JUDICIAL CONDUCT Canon 3, r. 3.6 (2014); NEB. REVISED CODE OF JUDICIAL CONDUCT § 5-303.6 (2011); NEV. CODE OF JUDICIAL CONDUCT Canon 3, r. 3.6 (2010); N.H. CODE OF JUDICIAL CONDUCT Canon 3, r. 3.6 (2011); N.Y. RULES OF JUDICIAL CONDUCT § 100.2(D) (2015); N.D. CODE OF JUDICIAL CONDUCT Canon 3, r. 3.6 (2012); OHIO CODE OF JUDICIAL CONDUCT Canon 3, r. 3.6 (2014); OR. CODE OF JUDICIAL CONDUCT r. 4.4(A) (2013); PA. CODE OF JUDICIAL CONDUCT Canon 3, r. 3.6 (2014); TENN. CODE OF JUDICIAL CONDUCT Canon 3, r. 3.6 (2015); UTAH CODE OF JUDICIAL CONDUCT Canon 3, r. 3.6 (2010); VT. CODE OF JUDICIAL CONDUCT Canon 2C (2012); WASH. CODE OF JUDICIAL CONDUCT Canon 3, r. 3.6 (2011); WYO. CODE OF JUDICIAL CONDUCT Canon 3, r. 3.6 (2009). Delaware also prohibits judges from membership in organizations that discriminate on the basis of sexual orientation. DEL. JUDGES' CODE OF JUDICIAL CONDUCT Canon 3, r. 3.6 (2008). However, the Judicial Ethics Advisory Committee of Delaware has opined that participation in the Boy Scouts does not adversely impact a judge's impartiality. *See* Del. Judicial Ethics Advisory Comm., Op. 2006-4, at 11-15 (2006), http://courts.delaware.gov/forms/download.aspx?id=78168.

Seventeen of the remaining states prohibit judges from membership in organizations that invidiously discriminate on the basis of characteristics that do not explicitly include sexual orientation. They are: Alaska, Arkansas, Florida, Idaho, Kentucky, Louisiana, Michigan, Mississippi, New Jersey, New Mexico, North Carolina, Rhode Island, South Carolina, South Dakota, Virginia, West Virginia, and Wisconsin. ALASKA CODE OF JUDICIAL CONDUCT Canon 2C (2015); ARK. CODE OF JUDICIAL CONDUCT Canon 3, r. 3.6 (2009); FLA. CODE OF JUDICIAL CONDUCT Canon 2C (2014); IDAHO CODE OF JUDICIAL CONDUCT Canon 2C (2012); KY. CODE OF JUDICIAL CONDUCT Canon 2E (2013); LA. CODE OF JUDICIAL CONDUCT Canon 2C (2012); MICH. CODE OF JUDICIAL CONDUCT Canon 2F (2013); MISS. CODE OF JUDICIAL CONDUCT Canon 2C (2002); N.J. CODE OF JUDICIAL CONDUCT Canon 2C (2012); N.M. CODE OF JUDICIAL CONDUCT r. 21-200(C) (2012); N.C. CODE OF JUDICIAL CONDUCT Canon 2C (2015); R.I. CODE OF JUDICIAL CONDUCT Canon 2C (2015); S.C. CODE OF JUDICIAL CONDUCT Canon 2C (2015); S.D. CODE OF JUDICIAL CONDUCT Canon 2C (2011); CANONS OF JUDICIAL CONDUCT FOR THE STATE OF VA. Canon 2C (2015); W. VA. CODE OF JUDICIAL CONDUCT Canon 3, r. 3.6 (2015); WIS. CODE OF JUDICIAL CONDUCT r. 60.03(3) (2014).

Georgia, Maine, Missouri, and Texas also do not explicitly mention membership in organizations that discriminate on the basis of sexual orientation. Georgia's Code of Judicial Conduct defines invidious discrimination as an "action . . . that characterizes some immutable individual trait . . . as odious." GA. CODE OF JUDICIAL CONDUCT pmbl. (2016). This could be interpreted to include sexual orientation, particularly in light of the Supreme Court's recent same-sex marriage decision. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2594 (2015) ("[T]heir *immutable nature* dictates that same-sex marriage is their only real path to this profound commitment." (emphasis added)). Maine's Code of Judicial Conduct prohibits membership in organizations that practice "unlawful discrimination." ME. CODE OF JUDICIAL CONDUCT Canon 3, r. 3.6 (2015). Maine's Human Rights Act makes it unlawful to discriminate on the basis of sexual orientation, though *Boy Scouts of America v. Dale* would prevent application of this law to the Boy Scouts. *See* ME. REV. STAT. ANN. tit. 5, §§ 4591-92 (2015); *see also* Boy Scouts of Am. v. Dale, 530 U.S. 640, 643 (2000) (holding that the First Amendment right to freedom of association

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prohibitions collide with judicial membership in the Boy Scouts of America (BSA).

Reactions to the end of the "Boy Scout loophole"[16] have (predictably) been wide ranging. On one side, Judge Humes of the California Court of Appeal praised the revision, arguing that the exception "incites distrust in judicial impartiality, demeans gay and lesbian judges and is offensive and harmful."[17] On the other side, Judge Kronlund of the San Joaquin County Superior Court argued that the newly revised Code would be an "infringement of [her] right to free exercise of religion as guaranteed by the First Amendment."[18]

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allows the Boy Scouts to exclude people from membership despite state antidiscrimination laws that would require otherwise). Missouri's Code of Judicial Conduct forbids judicial membership "in any organization that practices invidious discriminatory conduct against any person who is protected by law from discrimination." MO. CODE OF JUDICIAL CONDUCT Canon 3, r. 2-3.6 (2012). This would not bar membership in the Boy Scouts because Missouri's Human Rights Act forbids public accommodations from discriminating against any person on the basis of "race, color, religion, national origin, sex, ancestry, or disability." MO. REV. STAT. § 213.065 (2015). The Texas Code of Judicial Conduct states that a judge "shall not knowingly hold membership in any organization that practices discrimination prohibited by law." TEX. CODE OF JUDICIAL CONDUCT Canon 2C (2002). Texas has no public accommodation antidiscrimination law for nondisabled individuals. *See State Public Accommodation Laws*, NAT'L CONF. STATE LEGISLATURES (Mar. 13, 2015), http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx.

Of the remaining states, Alabama and Illinois do not include any language regarding judicial membership in organizations. *See* ALA. CANONS OF JUDICIAL ETHICS Canon 2C (2004) (addressing the need to prevent relationships from influencing judicial conduct or judgment); ILL. CODE OF JUDICIAL CONDUCT r. 63(A)(9)-(10) (2013) (addressing performance of judicial duties, but not group membership). Finally, the most recent versions of the Massachusetts and Oklahoma Codes of Judicial Conduct no longer list bases for invidious discrimination. MASS. CODE OF JUDICIAL CONDUCT Canon 3, r. 3.6 (2015); OKLA. CODE OF JUDICIAL CONDUCT Canon 3, r. 3.6 (2010). Comment 3 to Rule 3.6 in Massachusetts does, however, state that "[b]efore holding membership in any organization, a judge must consider whether membership would appear to undermine the judge's impartiality in the eyes of a reasonable litigant. See Rules 3.1 and 3.7." MASS. CODE OF JUDICIAL CONDUCT Canon 3, r. 3.6 cmt. 3. Comment 3 to Rule 3.1 explains that "actions and expressions of bias or prejudice by a judge" can include "jokes or other remarks that demean individuals based upon their race, color, sex, gender identity or expression, religion, nationality, national origin, ethnicity, citizenship or immigration status, ancestry, disease or disability, age, *sexual orientation*, martial status, socioeconomic status, or political affiliation." *Id.* Canon 3, r. 3.1 cmt. 3 (emphasis added). The reference to Rule 3.1 in the comments to Rule 3.6 suggests that invidious discrimination would still focus on discrimination based on that list of characteristics.

16. *See* Michael McGough, Opinion, *Judges Should Steer Clear of the Boy Scouts*, L.A. TIMES (Jan. 30, 2015, 2:26 PM), http://fw.to/AK3wpMW.

17. Thomas Curwen, *State High Court's Vote Affecting Scout Affiliation Stirs Debate Anew*, L.A. TIMES (Jan. 24, 2015, 8:38 PM), http://fw.to/EikV2yB (quoting comments of Judge Hume).

18. *Some California Judges with Ties to Boy Scouts Question Ban*, SAN JOSE MERCURY NEWS (Jan. 25, 2015, 3:07 PM PST), http://www.mercurynews.com/california/ci_27391021/some-california-judges-ties-boy-scouts-question-ban (quoting comments of Judge Kronlund); *see also* Janet Weaver, Letter to the Editor, *If Judges Can't Join the Boy Scouts,*

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Commentators have also suggested that prohibiting judicial membership in organizations like the Boy Scouts impedes the expressive rights of judges.[19] This Note argues that this latter view—that protections for expressive association should prevail—is the most compelling in light of existing First Amendment doctrine.

B. Canon 2C's Application to Boy Scout Membership

When the California Supreme Court approved the revisions to Canon 2C, the prohibition would have barred judges from affiliation with any Boy Scout troop, as the BSA then maintained a national policy against gay adult Scout leaders.[20] The national policy meant that any local Boy Scout troop (that followed the policy) constituted an organization that practiced invidious discrimination on the basis of sexual orientation. A recent policy change adopted by the BSA's executive board will add an additional step to the inquiry whether a judge, as a member of the Boy Scouts, belongs to a group that practices invidious discrimination. On July 27, 2015, the executive board of the BSA voted to repeal its national policy prohibiting homosexual adult volunteers and scoutmasters.[21] This policy shift was foreshadowed by comments by Robert Gates, the current president of the BSA, who oversaw a similar policy change regarding sexual orientation as Secretary of Defense with the repeal of "don't ask, don't tell."[22]

The new BSA policy is not, however, a global policy change, nor is it a panacea for challenges to judicial impartiality. The July 27 resolution simply removed the *national* prohibition against openly gay adult leaders and

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What About the Mormon Church?, L.A. TIMES (Jan. 28, 2015, 4:30 PM), http://fw.to/IYY5TdB (questioning the logic of the revised Code and its relation to judges' religious exercise).

19. *See, e.g.*, Ryan T. Anderson & Andrew Kloster, Opinion, *California Supreme Court Attempts to Ban State Judges from Volunteering with Boy Scouts*, DAILY SIGNAL (Feb. 2, 2015), http://dailysign.al/1KkiMX9.

20. *See* Annie Z. Yu, *Boy Scouts' Decision on Gays Tests Loyalty of Members*, WASH. TIMES (June 9, 2013), http://www.washingtontimes.com/news/2013/jun/9/boy-scouts-decision-on-gays-tests-loyalty-of-membe.

21. Erik Eckholm, *Boy Scouts End Ban on Gay Leaders, over Protests by Mormon Church*, N.Y. TIMES (July 27, 2015), http://nyti.ms/1JMsnoY.

22. *See* Adam B. Lerner, *Boy Scouts President Calls for End of Ban on Gay Scout Leaders*, POLITICO (May 21, 2015, 2:10 PM EDT), http://www.politico.com/story/2015/05/robert-gates-boy-scouts-ban-gay-scout-leaders-118185.html; *see also Excerpts from Robert Gates' Remarks on Boy Scouts' Ban on Gay Leaders*, L.A. TIMES (May 21, 2015, 1:00 PM), http://fw.to/eZDWYgM ("For me, I support a policy that accepts and respects our different perspectives and beliefs . . . . I truly fear that any other alternative will be the end of us as a national movement.").

employees.[23] All chartered organizations (i.e., the local troops) will still have discretion to select their adult leaders, and religious chartered organizations have explicit permission "to use religious beliefs as criteria for selecting adult leaders, including matters of sexuality."[24] The policy change leaves the door open for discrimination at the local troop level in California;[25] therefore a BSA-affiliated judge could still be considered a member of an organization that practices invidious discrimination on the basis of sexual orientation. The only difference now is that the inquiry will focus on the one troop that the judge is associated with and its specific policies, rather than the national organization and its policies.[26]

The California Code Advisory Committee's commentary provides limited guidance for how this inquiry should be conducted. It discusses the "complex question" of whether an organization practices invidious discrimination and states that the answer depends on the organization's membership practices and "other relevant factors, such as whether the organization is dedicated to the *preservation of religious, ethnic, or cultural values of legitimate common interest to its members, or whether it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited.*"[27] Facially, this language suggests that judges can retain their Boy Scouts memberships. The BSA *is* an organization that seeks to preserve cultural values (for instance,

23. *Boy Scouts of America Amends Adult Leadership Policy*, BOY SCOUTS AM.: NEWSROOM (July 27, 2015), http://scoutingnewsroom.org/blog/boy-scouts-of-america-amends-adult-leadership-policy.

24. *Id.*

25. This open door has given some commentators agita. *See, e.g.*, Michelangelo Signorile, *Why the Boy Scouts' New Policy on Gays Sets a Dangerous Precedent*, HUFFINGTON POST: BLOG (July 28, 2015, 8:48 AM EDT), http://www.huffingtonpost.com/michelangelo-signorile/why-the-boy-scouts-new-po_b_7886206.html (calling the ability of religious chartered organizations to continue discriminating "absurd" and "dangerous"). Some religious organizations were equally displeased with the policy change. So far, the First Associate Reformed Presbyterian Church in Lancaster, South Carolina, and the Roman Catholic Diocese of Bismarck, North Dakota, have officially cut ties and ceased to sponsor troops associated with the Boy Scouts of America. Trudy Ring, *From South Carolina to North Dakota, Churches Cut Ties with Boy Scouts*, ADVOCATE (Aug. 10, 2015, 4:15 PM EDT), http://www.advocate.com/boy-scouts-america/2015/08/10/south-carolina-north-dakota-churches-cut-ties-boy-scouts. The Church of Jesus Christ of Latter-day Saints, the single-largest sponsor of Boy Scout troops, released an official statement that it was "deeply troubled" by the policy change, and that its "century-long association with Scouting will need to be examined." Press Release, Church of Jesus Christ of Latter-day Saints, Church Re-Evaluating Scouting Program (July 27, 2015), http://www.mormonnewsroom.org/article/church-re-evaluating-scouting-program.

26. *See* Greg Toppo, *Boy Scouts of America Ends Ban on Gay Scout Leaders*, USA TODAY (July 27, 2015, 10:55 PM EDT), http://usat.ly/1MSJ6u4 ("The change shields the national organization from lawsuits . . . and shifts questions of discrimination onto local groups.").

27. CAL. CODE OF JUDICIAL ETHICS Canon 2C advisory committee cmt. (2015) (emphasis added).

self-reliance, morality, and citizenship, among others). The BSA is also an organization whose membership limitations could not be constitutionally prohibited, particularly in light of *Boy Scouts of America v. Dale*, which held that the First Amendment right of association allows the Boy Scouts to exclude people from membership despite state antidiscrimination laws that would require otherwise.[28]

However, California's Supreme Court Advisory Committee on the Code has not interpreted this language to cover the Boy Scouts. The Committee explicitly stated that the elimination of the exception was meant to "prohibit[] judges from being members of or playing a leadership role in the BSA" in order to "enhance public confidence in the impartiality of the judiciary."[29] The Supreme Court of California, by adopting the Committee's proposed elimination of the exception, acknowledged that enhancing public confidence in the impartiality of the judiciary by barring membership in the Boy Scouts (and other types of expressive associations) is a state interest that outweighs any burden on religious exercise or associational rights. This Note argues that the state's interest in impartiality likely outweighs any burden on religious exercise[30] but comes up short in the clash with associational rights.[31]

II. Religious Exercise and the Boy Scouts

This Part examines arguments against Canon 2C predicated on the protection of judges' religious beliefs and practices. It first examines the argument that Canon 2C infringes judges' right to the free exercise of religion and explains why such an argument would fail. It then concludes by analyzing the claim that Canon 2C imposes an unconstitutional religious test for judicial office, again explaining why case law suggests that such an argument would fail.

A. Free Exercise

At first glance, the argument that Canon 2C's application against BSA membership impermissibly burdens the religious exercise of judges is compelling. The canon still retains an exception for membership in religious organizations,[32] and the BSA is an important aspect of youth ministry in many

28. 530 U.S. 640, 661 (2000) ("[P]ublic or judicial disapproval of a tenet of an organization's expression does not justify the State's effort to compel the organization to accept members where such acceptance would derogate from the organization's expressive message.").

29. Supreme Court Advisory Comm. on the Code of Judicial Ethics, *supra* note 5, at 4.

30. *See infra* Part II.

31. *See infra* Parts III-IV.

32. *See* CAL. CODE OF JUDICIAL ETHICS Canon 2C (2015).

religions. In fact, 71.5% of all Boy Scout troops are chartered to faith-based organizations.[33] The largest numbers of units and children associated with any group are associated with the Church of Jesus Christ of Latter-day Saints (also known as the LDS or Mormon Church).[34] Boy Scout participation is an integral part of the LDS Church's youth ministry, and the BSA acts as "an extension of the home and Church" for LDS children.[35] Canon 2C's prohibition on membership in the Boy Scouts would certainly inhibit LDS judges' ability to contribute to the religious development of their children and the other children in their church by barring their participation as a leader or volunteer in their church's troop. The large percentage of religious membership in the BSA does not, however, mean that the California Supreme Court would find that the BSA is covered by the religious organization exception. While Canon 2C does not explicitly define "religious organization," that the Code of Judicial Ethics previously had separate exceptions for religious organizations and nonprofit youth organizations (with the latter exception clearly being aimed at the BSA) strongly suggests that the BSA would not be a religious organization under Canon 2C. If BSA membership is not excluded from Canon 2C, the next argument a judge could marshal is that Canon 2C burdens their free exercise of religion. This would likely fail for doctrinal reasons that I will discuss.

The Free Exercise Clause of the First Amendment forbids Congress (and the states by way of the Fourteenth Amendment) from making a law "prohibiting the free exercise [of religion]."[36] For many years, the Supreme Court applied strict scrutiny to government actions that posed even incidental burdens on the free exercise of religion. The *Sherbert-Yoder* test, as it came to be known,[37] stated that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[38] The *Sherbert-Yoder* test was very protective of free exercise rights, but it is no longer applicable to free exercise challenges of state actions.

The current standard, announced in *Employment Division v. Smith*, lowered the level of scrutiny applied to state actions that burden free exercise. The

33. Boy Scouts of Am., *supra* note 3.

34. *Id.*

35. Boy Scouts of Am., *Scouting in the Church of Jesus Christ of Latter-day Saints Community* (2015), http://www.scouting.org/filestore/pdf/210-013.pdf.

36. U.S. CONST. amend. I.

37. *See* Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 201 (2004); Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 289 (1995).

38. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); *see also* Bowen v. Roy, 476 U.S. 693, 728 (1986) (O'Connor, J., concurring in part and dissenting in part) ("Only an especially important governmental interest pursued by narrowly tailored means can justify exacting a sacrifice of First Amendment freedoms . . . .").

Smith test requires only a rational basis for neutral, generally applicable laws that burden free exercise to survive a constitutional challenge.[39] The *Smith* Court did not, however, explain what a neutral, generally applicable law *is* outside of the "across-the-board criminal prohibition on a particular form of conduct" at issue in that case.[40] Three years later, the Court highlighted an instance of when a law is *not* neutral or generally applicable in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[41] In *Lukumi*, the Court stated that when "the object of a law is to infringe upon or restrict practices because of their *religious motivation*, the law is not neutral," and the law must then be a narrowly tailored means of protecting a compelling state interest to survive strict scrutiny.[42] The analytical issue is then determining where a law falls on the spectrum between *Smith* and *Lukumi*.[43]

Unfortunately for judges with children in church-chartered troops, a challenge premised on free exercise would likely fail, as Canon 2C more closely resembles the neutral, generally applicable criminal law in *Smith* than the exception-riddled statute in *Lukumi*. Despite the Code's commentary affirming that the revision aims to specifically bar judicial membership in the Boy Scouts, Canon 2C likely does not violate the Court's explanation of *Smith* in *Lukumi*.[44] Canon 2C has not, in the words of the *Lukumi* Court, "singled out" Boy Scout membership "for discriminatory treatment."[45] Canon 2C now treats Boy Scout membership the same way that it would treat membership in any other organization that is not religious. Treating Boy Scout membership the same as most other organizations does not rise to "discriminatory treatment."

A judge attempting to challenge the law as a burden on his religious exercise could still argue that this burden presents a hybrid situation where his free exercise claim is connected to his parental right to raise children as he chooses (or some other constitutional right), which would trigger strict scrutiny.[46] But such claims only succeed when the additional constitutional

39. *See* Emp't Div. v. Smith, 494 U.S. 872, 884-85, 890 (1990).

40. *Id.* at 884.

41. 508 U.S. 520 (1993).

42. *Id.* at 533 (emphasis added).

43. For further discussion on this point, see Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise:* Smith, Lukumi*, and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 859-60 (2001).

44. 508 U.S. 520.

45. *Id.* at 538; *see also* Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 364-65 (3d Cir. 1999) (Alito, J.).

46. The Court in *Smith* explained:

> The only decisions in which [the Court has] held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved . . . the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press . . . or the right of parents, acknowledged in *Pierce v. Society of Sisters*, to direct the education of their children.

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right at issue would have mandated strict scrutiny anyway.[47] In this case, a judge must convincingly demonstrate that the Code violates another right in order to trigger strict scrutiny through a hybrid rights analysis. The Code and its commentary explicitly state that the rules do not affect the ability of a judge's family members to participate in the Boy Scouts;[48] thus the law is not attempting to regulate the raising of judges' children, a constitutionally protected right.[49]

Because the Code is generally applicable and does not attempt to interfere with parenting in addition to religious exercise (the most clearly applicable of the hybrid rights mentioned in *Smith* to Canon 2C's application to BSA affiliation),[50] the state has no First Amendment obligation to accommodate judges' religious exercise, and the Code need only pass rational basis review.[51] It is extremely likely that Canon 2C would survive rational basis review, so a strong challenge to Canon 2C must be based on some other legal ground.

B. No Religious Test Clause

The preceding Subpart's discussion of free exercise claims may yield a puzzling result considering that the Code has an explicit exception for membership in religious organizations.[52] Why would the state be able to (arguably) impede a judge's free exercise tangentially, but not directly? The answer lies outside the First Amendment. If the Code prohibited judges from

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Smith, 494 U.S. at 881 (citation omitted) (citing Wisconsin v. Yoder, 406 U.S. 205 (1972)).

47. *See* Carol M. Kaplan, Note, *The Devil Is in the Details: Neutral, Generally Applicable Laws and Exceptions from* Smith, 75 N.Y.U. L. REV. 1045, 1068 (2000) ("[H]ybrid claims are commonly restricted to those enumerated in *Smith*, with courts finding for the religious party predominantly in cases where the decision could stand on the independent constitutional right." (footnote omitted)). Courts and commentators have also spent much time and ink discussing the general frivolity of the hybrid rights analysis. *See, e.g.*, *Lukumi*, 508 U.S. at 567 (Souter, J., concurring in part and concurring in the judgment) ("[I]f a . . . litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all."); Knight v. Conn. Dep't of Pub. Health, 275 F.3d 156, 167 (2d Cir. 2001) (describing *Smith*'s hybrid rights analysis as "dicta" and declining to apply the test); Kissinger v. Bd. of Trs. of the Ohio State Univ., 5 F.3d 177, 180 (6th Cir. 1993) (calling the hybrid rights exception "completely illogical"); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1122 (1990) ("[A] legal realist would tell us . . . that the *Smith* Court's notion of 'hybrid' claims was not intended to be taken seriously.").

48. Supreme Court Advisory Comm. on the Code of Judicial Ethics, *supra* note 5, at 4.

49. *See infra* note 68.

50. *See* Emp't Div. v. Smith, 494 U.S. 872, 881 (1990).

51. *See id.* at 881-82, 884-85, 890.

52. *See* CAL. CODE OF JUDICIAL ETHICS Canon 2C (2015).

associating with churches that discriminate in some way, it would necessarily disqualify judges of some denominations, while allowing judges from other denominations to continue serving on the bench. This would amount to a religious test for public office, which is expressly prohibited by the Constitution's aptly named "No Religious Test Clause,"[53] which states that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."[54]

The BSA's new national policy may lead to situations where a judge could make a colorable (though likely unsuccessful) "No Religious Test Clause" challenge to the application of an ethics canon to her membership in a particular troop. For example, if a Catholic judge is a leader of a Boy Scout troop sponsored by a Catholic parish, which chooses its leaders consistent with Catholic teaching on homosexuality, she will be barred from public office, in part because of her religion. In other words, the judge's private actions—spurred by her religious beliefs—would disqualify her altogether from judicial service. A similarly situated judge who leads a troop sponsored by a progressive Episcopal parish would not be disqualified. In these scenarios, each troop's (and thus each judge's) religious affiliation is the ultimate factor that determines whether the judge is impartial. Despite the facial unfairness of this disparate treatment, the Code's application may not rise to the level of a religious test.

Two pre-*Smith* cases that struck down religion-based limitations on holding office did so because the state required explicit affirmation or disavowal of particular religious beliefs or practices. The Court in *Torcaso v. Watkins* struck down a provision of the Maryland Constitution's Declaration of Rights, which "required as a qualification for any office of profit or trust in this State . . . a declaration of belief in the existence of God."[55] Justice Black, writing for the majority, said that there was "no dispute about the purpose or effect" of this clause; "it set[] up *a religious test which was designed to and, if valid, does bar every person* who refuses to declare a belief in God from holding a public 'office of profit or trust' in Maryland."[56] Because California's (and similar states') Code of Judicial Conduct was not designed to bar all judges who hold particular beliefs, *Torcaso*'s precedent would likely not be a winning argument for a judge.

Almost two decades later, the Court decided *McDaniel v. Paty*, which applied the Free Exercise Clause of the First Amendment, rather than the No

53. *See, e.g.*, Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine that Has Gone of Itself*, 37 CASE W. RES. L. REV. 674 (1987).

54. U.S. CONST. art. VI, cl. 3. The state would also not be allowed to require a sitting judge to recuse herself solely because of her religious beliefs. Such a requirement "stands in conflict with the principle embedded in Article VI." Feminist Women's Health Ctr. v. Codispoti, 69 F.3d 399, 400 (9th Cir. 1995).

55. 367 U.S. 488, 489 (1961) (quoting MD. CONST., Declaration of Rights, art. 37).

56. *Id.* at 489-90 (emphasis added).

Religious Test Clause, to a religious restriction.[57] At issue in *McDaniel* was a provision of the Tennessee Constitution, which barred clergy from serving as legislators, and a related statute that barred "'Minister[s] of the Gospel, or priest[s] of any denomination whatever' from serving as delegates to the State's limited constitutional convention."[58] Chief Justice Burger, writing for four Justices, reasoned that *Torcaso* (as a religious test case) did not apply to McDaniel because Tennessee's disqualification operated against McDaniel based on his status as a minister, rather than his beliefs.[59] The Court ultimately struck down the statute, but did so on the grounds that the statute violated the Free Exercise Clause.[60] An argument based on *McDaniel* in the case of a BSA-affiliated judge would also be unlikely to succeed because the outcome of that case turned on the Free Exercise Clause, which as discussed above, is now weak medicine for challenges to state actions.[61]

III. The First Amendment Rights of Intimate and Expressive Association

Despite shortcomings under the clauses governing religion, the state's interest in maintaining the appearance of an impartial judiciary may not pass constitutional muster if Canon 2C is challenged as a violation of the rights to intimate and expressive association. In this Part, I first outline the general legal landscape of intimate and expressive associational rights. I then explore the development of law governing public employee and judicial speech restrictions with a particular focus on the recent Supreme Court decision in *Williams-Yulee v. Florida Bar*, which applied strict scrutiny to a rule in Florida's Code of Judicial Conduct placing a limit on judicial campaign speech.[62]

A. The Right of Association: Intimate, Expressive, or Not

An understanding of the metes and bounds of associational rights will help illustrate how the California Code of Judicial Conduct infringes upon judges'

57. 435 U.S. 618, 620 (1978) (plurality opinion).

58. *Id.* (alterations in original) (quoting TENN. CONST. art. IX, § 1).

59. *Id.* at 626-27.

60. *Id.* at 632 (Brennan, J., concurring in the judgment) ("Because the challenged provision establishes as a condition of office the willingness to eschew certain protected religious practices, *Torcaso v. Watkins* compels the conclusion that it violates the Free Exercise Clause." (citation omitted)); *see also id.* at 626 (plurality opinion) ("[T]o condition the availability of benefits [including access to the ballot] upon this appellant's willingness to violate a cardinal principle of [his] religious faith [by surrendering his religiously impelled ministry] effectively penalizes the free exercise of [his] constitutional liberties." (alterations in original) (quoting Sherbert v. Verner, 374 U.S. 398, 406 (1963))).

61. *See supra* Part II.A.

62. 135 S. Ct. 1656, 1665-66 (2015).

associational rights. This Subpart will first discuss the development of the right to associate. It will then turn to the distinction drawn between expressive and intimate associations, which are protected, and purely social associations, which are not protected.

The freedom to associate has long been recognized as a fundamental right. The Supreme Court in *NAACP v. Alabama ex rel. Patterson* emphatically stated that "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech" because "[e]ffective advocacy of both public and private points of view, *particularly controversial ones*, is undeniably enhanced by group association."[63] This right is not limited to "peaceabl[e] . . . assembl[y]" to "petition the Government for a redress of grievances,"[64] and the Court has noted that "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters."[65]

The right of association is not, however, monolithic or absolute. The distinction between expressive and intimate association was introduced in *Roberts v. United States Jaycees*.[66] The Court in *Roberts* addressed whether the First Amendment protected the Jaycees' (a civic organization) membership practices, which afforded different privileges to men and women, from Minnesota's antidiscrimination laws. Writing for the majority, Justice Brennan began by noting that there are two distinct lines of decisions involving the freedom of association.[67] One line involves the intimate aspects of human relationships protected by the Due Process Clauses of the Fifth and Fourteenth Amendments, like the relationship between a parent and child[68] or the relationship between romantic partners,[69] which are protected as a

63. 357 U.S. 449, 460 (1958) (emphasis added).

64. U.S. CONST. amend. I.

65. *Patterson*, 357 U.S. at 460.

66. 468 U.S. 609, 617-18 (1984).

67. *Id.*

68. *See* Troxel v. Granville, 530 U.S. 57, 65 (2000) (plurality opinion) ("[T]he interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations *the state can neither supply nor hinder*." (emphasis added)); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (holding that parents have the right to educate their children in whatever language they choose because "bring[ing] up children" is a privilege "long recognized at common law as essential to the orderly pursuit of happiness by free men").

69. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015) ("The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality."); Lawrence v. Texas, 539 U.S. 558, 567 (2003) ("When sexuality finds overt expression in intimate conduct with another person, the

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"fundamental element of personal liberty."[70] The other line addresses expressive association, which constitutes "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."[71]

After drawing this distinction between intimate and expressive association, Justice Brennan went on to say that "[t]he right to associate for expressive purposes is not, however, absolute."[72] "Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[73] *Roberts* turned out to be one such case, where the state's interest won out against expressive association. The Court held that there was no basis to conclude that allowing women to be full members of the Jaycees would seriously diminish the organization's ability to express itself on "political, economic, cultural, [or] social affairs," nor would it prevent the organization from engaging in "civic, charitable, lobbying, fundraising, [or] other activities worthy of constitutional protection under the First Amendment."[74] While the language of this opinion does not explicitly say that intimate association is more protected than expressive association, many lower courts have, in practice, applied less-than-strict scrutiny in the expressive association context.[75]

Constitutional protection for the right of association has also not been extended to purely social or commercial associations that would not otherwise be protected by the First Amendment. Just a few years after *Roberts*, the Supreme Court applied the intimate and expressive association dichotomy in *City of Dallas v. Stanglin*.[76] At issue in *Stanglin* was a Dallas ordinance that restricted attendance at certain dance halls to minors between the ages of

conduct can be but one element in a personal bond that is more enduring."); Loving v. Virginia, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.").

70. *Roberts*, 468 U.S. at 618.

71. *Id.*

72. *Id.* at 623.

73. *Id.*

74. *Id.* at 626-27.

75. *See* John D. Inazu, *The Unsettling "Well-Settled" Law of Freedom of Association*, 43 CONN. L. REV. 149, 156 n.25 (2010) (compiling cases). Some commentators have suggested that lower courts have made this distinction based on the different words that Justice Brennan used when discussing intimate and expressive association. *See id.* at 156 n.24; Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 532 n.209 (2001) ("In *Roberts*, Justice Brennan described a range of associations, each deserving of different levels of Constitutional protection. While the right to 'intimate' association . . . is 'intrinsic' and worthy of the highest Constitutional protection, . . . the right of 'expressive' association [is] an instrumental right, and thus accorded less than absolute protection.").

76. 490 U.S. 19 (1989).

fourteen and eighteen.[77] The owner of a roller rink challenged the ordinance as an unconstitutional restriction on the rights of the teenaged skaters to associate with people outside of that age range.[78] The Court first dispensed with the argument that the ordinance violated a right to intimate association, stating that "[i]t is clear beyond cavil that dance-hall patrons, who may number 1,000 on any given night, are not engaged in the sort of 'intimate human relationships' referred to in *Roberts*."[79] It then turned to whether the young patrons were engaged in expressive association. The Court noted that the teenagers who attended the rink on any given night were just "patrons," not members of an organized group or association.[80] Moreover, the teenagers were "strangers to one another," the rink "admit[ted] all who [were] willing to pay the admission fee," and there was nothing to suggest that the customers came together to "take positions on public questions" or other similarly protected activities.[81] The Court ultimately held that these factors suggested that recreational dancing is not expressive association; rather, it is "social association," which is not a right secured by the Constitution.[82]

Courts generally follow this distinction between protected intimate and expressive association on the one hand, and unprotected social/commercial/nonexpressive association on the other.[83] The *Roberts* regime, and its lower level of protection for expressive associations pitted against antidiscrimination laws, remained generally unchanged until 2000, when the Court decided *Boy Scouts of America v. Dale*.[84] The dispute in *Dale* arose after the Boy Scouts revoked the membership of an openly homosexual member (Dale) and removed him from his position as an assistant scoutmaster, stating that the Boy Scouts "specifically forbid[s] membership to homosexuals."[85] Dale sued the Boy

77. *Id.* at 21.

78. *Id.* at 22.

79. *Id.* at 24.

80. *Id.*

81. *Id.* at 25 (quoting Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 548 (1987)).

82. *Id.*

83. *See, e.g.*, Wine & Spirits Retailers, Inc. v. Rhode Island, 418 F.3d 36, 51-52 (1st Cir. 2005); Inazu, *supra* note 75, at 189 n.210 (compiling cases). There are, however, some situations in which patrons who are strangers and pay an admission fee *do* have a right to expressive association. *See* Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cty., 274 F.3d 377, 396 (6th Cir. 2001) (holding that entertainers and patrons in an adult establishment are engaged in expressive association because "[t]hey are certainly engaged in a 'collective effort on behalf of shared goals'" and "[t]he dancers and customers work together as speaker and audience to create an erotic, sexually-charged atmosphere, and although society may not find that a particularly worthy goal, it is a shared one nonetheless" (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984))); Inazu, *supra* note 75, at 189 n.210.

84. 530 U.S. 640 (2000).

85. *Id.* at 645 (quoting Joint Appendix at 137).

Scouts under New Jersey's public accommodations statute, claiming that the Boy Scouts violated the law by discriminating against him on the basis of his sexual orientation.[86] The *Dale* Court, much like the *Roberts* Court, had to determine whether the First Amendment protected an organization from state antidiscrimination laws aimed at their membership practices. In this instance, the Court held that the First Amendment *did* protect the Boy Scouts' membership practices.[87] The Boy Scouts was protected because the organization taught that homosexuality is immoral, and requiring the Boy Scouts to accept a homosexual as a leader in their organization would seriously burden their ability to continue expressing and teaching that belief.[88] The Court also made it clear that it did not matter that the Boy Scouts did not associate for the *purpose* of disseminating the organization's beliefs about homosexuality: "An association must merely engage in expressive activity that could be impaired in order to be entitled to protection."[89]

Equipped with this general background on the rights of association, we can now turn to the lines of cases that address public employee—and specifically judicial—expression.

B. As Applied to Public Employees and Judges

The First Amendment rights of speech and association for public employees can be more limited than those of a layperson, particularly when their speech or association is during the course of their official duties or does not involve a matter of public concern.[90] This Subpart will first address the development of public employee speech and association doctrine as it might apply to Canon 2C. It will then focus on cases involving the rights of sitting judges. Finally, this Subpart will examine the recent Supreme Court decision in *Williams-Yulee v. Florida Bar*,[91] one of the first opinions addressing restraints on

86. *Id.*

87. *Id.* at 656.

88. *Id.* at 652-54, 659.

89. *Id.* at 655.

90. *See* Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 16-18 (2009). Norton discusses the application of public employee speech doctrine to the private speech of public servants, noting that courts have "permit[ted] the firing of government workers for a variety of off-duty speech that makes no reference to the government for fear that the public will nonetheless ascribe this speech to the plaintiff's government employer." *Id.* at 18; *see also* Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) (holding that public employee speech made "pursuant to their official duties" does not receive First Amendment protection); City of San Diego v. Roe, 543 U.S. 77, 81-84 (2004) (per curiam) (rejecting First Amendment challenge to the firing of a police officer who recorded a video of himself performing explicit sex acts in uniform because it was not expression regarding a matter of public concern).

91. 135 S. Ct. 1656 (2015).

judicial speech (in this case, the application of campaign finance restrictions on direct contact with potential donors).

1. History, balancing, and germaneness: *Pickering* and *Letter Carriers*

Public employee speech doctrine involves a mixture of a balancing test and unconstitutional condition analysis (for germaneness).[92] The application of the balancing test to public employee speech is usually traced back to *Pickering v. Board of Education*.[93] The aggrieved public employee in *Pickering* was a high school teacher who was fired after publishing a letter in the local newspaper criticizing the school board for the political failure of a tax proposal intended to raise revenue for the school district.[94] The Court held that "in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."[95] Some have observed that the balancing test applied in *Pickering* was not actually an act of balancing, but rather a germaneness inquiry based on the unconstitutional conditions doctrine.[96] While *Pickering*'s discussion of protection for public employee speech helps to inform my analysis of California's judicial ethics canon, its facts do not make it the best analog for evaluating a policy that restricts *associational* rights. A more useful line of doctrine can be culled from cases regarding public employees' political affiliations and activities, which more closely address the background associations of judges than the speech acts discussed in *Pickering*.

Two distinct lines of cases address limitations on the political affiliations and activities of public employees: the patronage cases[97] and the Hatch Act

92. A germane condition placed on receiving a governmental benefit "serves the same policy ends that are responsible for the existence of the benefit itself." Michael Toth, *Out of Balance: Wrong Turns in Public Employee Speech Law*, 10 U. MASS. L. REV. 346, 355 (2015). For example, a requirement that food stamp recipients demonstrate need would be a germane condition because it would serve the policy end of providing assistance to those in need.

93. 391 U.S. 563, 568 (1968) ("The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."). Many point to *Pickering* as the source of the balancing test in this context despite the test appearing in an earlier First Amendment challenge to the Hatch Act's restrictions on public employee participation in political activities in *United Public Workers v. Mitchell*, 330 U.S. 75, 96 (1947). For a thorough examination of *Pickering* and its predecessors, see Toth, *supra* note 92, at 357-71.

94. *Pickering*, 391 U.S. at 564.

95. *Id.* at 574 (footnote omitted).

96. *See* Toth, *supra* note 92, at 369-70.

97. The patronage cases focus on the germaneness of using political affiliation as a hiring criterion for a given position. *See* Branti v. Finkel, 445 U.S. 507, 518 (1980) (holding that,

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cases.[98] The Hatch Act cases are particularly relevant in examining the constitutionality of Canon 2C because they involve a prohibition on expressive political association. Justice White, writing for the majority in *U.S. Civil Service Commission v. National Ass'n of Letter Carriers*, affirmed an earlier decision, which upheld the constitutionality of the Hatch Act's prohibition against federal employees participating in political campaigns or management.[99] Justice White, applying a *Pickering*-style balancing test, determined that the Hatch Act struck an appropriate balance between the interest of the government in restricting federal employee political activities and the expressive and associational rights of the employees.[100] The Court emphasized that the Hatch Act's restriction on federal employee speech and association aimed "to serve this great end of Government—the impartial execution of the laws"—as well as to maintain the *appearance* of impartial execution of the laws.[101]

But while the Hatch Act permissibly inhibits the expressive rights of federal employees with the goal of maintaining impartiality, it does not follow that the proscriptions of Canon 2C are justified by the reasoning behind the Hatch Act. The Hatch Act takes a more direct approach than Canon 2C in preserving both the impartiality (and the appearance of impartiality) of federal employees tasked with executing the laws. First, to prevent the growth of political machines within bureaucracies, and to avoid any suggestion that public employees need to participate in partisan activities, the Hatch Act forbids political activities by government employees.[102] Partisan political activity within a government bureaucracy raises concerns to those associated

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when evaluating a party affiliation requirement for employment, "the ultimate inquiry . . . is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved"); Elrod v. Burns, 427 U.S. 347, 363 (1976) (plurality opinion) ("[I]f conditioning the retention of public employment on the employee's support of the in-party is to survive constitutional challenge, it must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights.").

98. *See* U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 565 (1973) ("A major thesis of the Hatch Act is that to serve this great end of Government—the impartial execution of the laws—it is essential that federal employees . . . not take formal positions in political parties . . . ."); United Pub. Workers v. Mitchell, 330 U.S. 75, 95-96 (1947) (upholding the Hatch Act after balancing federal employees' rights against the specter of political partisanship within government agencies). The section of the Hatch Act at issue in these cases forbade federal employees from taking "any active part in political management or in political campaigns." Hatch Act, Pub. L. No. 76-252, § 9(a), 53 Stat. 1147, 1148 (1939) (codified as amended at 5 U.S.C. § 7324 (2014)).

99. *Letter Carriers*, 413 U.S. at 556. The earlier decision upheld by the Court was *United Public Workers v. Mitchell*, 330 U.S. 75 (1947).

100. *Letter Carriers*, 413 U.S. at 564.

101. *Id.* at 565.

102. *Id.* at 566-67.

with the appearance of quid pro quo corruption. This offers a weightier governmental interest in regulating said activity than the modest appearance of partiality that employees' association with the Boy Scouts—given their stated apolitical values—might create.[103] Additionally, the Court discussed the historical basis and justification for the Hatch Act's restriction, citing Thomas Jefferson's concern over partisan activities within the executive branch.[104] The Court did give some weight to this historical pedigree in upholding the Hatch Act, though historical pedigree was not by itself dispositive.[105] California's Code of Judicial Ethics has no such historical pedigree, Jeffersonian or otherwise. Because Canon 2C addresses a governmental interest less serious than preventing the appearance of outright corruption, and one that lacks historical justification, *Letter Carriers* does not justify the degree to which Canon 2C infringes the associational rights of California judges. This is particularly true in light of later Supreme Court decisions that subject restrictions on judges' associational rights to a more searching constitutional inquiry.

2. Judicial religious beliefs and political affiliations

While there have been no cases involving a challenge to the kind of restriction of judicial rights presented by Canon 2C, challenges to judges' impartiality based on their religious practices,[106] political affiliation/beliefs,[107] sex,[108] and sexual orientation[109] have all been rejected as inappropriate. These cases usually arise when a party submits a motion to disqualify a judge for a

103. For further discussion of the proper framework for analyzing the appearance of quid pro quo corruption by a judge and an explanation of why preventing quid pro quo corruption presents a weightier governmental interest, see Part III.B.3 below.

104. *Letter Carriers*, 413 U.S. at 557.

105. *See id.* at 556-59, 568-80.

106. *See* Idaho v. Freeman, 507 F. Supp. 706, 729 (D. Idaho 1981).

107. *See* Republican Party of Minn. v. White, 416 F.3d 738, 755 (8th Cir. 2005).

108. *See* Blank v. Sullivan & Cromwell, 418 F. Supp. 1, 4-5 (S.D.N.Y. 1975) (denying motion to disqualify a female judge in a sexual discrimination class action lawsuit because she "identified" with plaintiffs due to her sex).

109. Though not discussed in the body of this Subpart, there is case law that rejects the claim that a homosexual judge has an obligation to recuse himself from a case regarding LGBT rights. In *Perry v. Schwarzenegger*, the Northern District of California held that the previous district court judge had no obligation to recuse himself or disclose his same-sex relationship while presiding over a case challenging California's Proposition 8, a ballot measure that eliminated the right of same-sex couples to marry. 790 F. Supp. 2d 1119, 1121-22 (N.D. Cal. 2011), *aff'd sub nom.* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *vacated on other grounds sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013). The mere fact that the judge was in a same-sex relationship was not sufficient to "imply that the judge must be so interested in marrying that person that he would be unable to exhibit the impartiality which, it is presumed, all federal judges maintain." 790 F. Supp. 2d at 1130-31.

lack of impartiality or moves to vacate a district court judgment pursuant to Federal Rule of Civil Procedure 60(b)[110] after a judge refuses to disqualify herself.[111]

Party challenges to judicial impartiality based on a judge's religious beliefs (and other background associations) fail when they claim that the association creates the appearance of bias without pointing to specific evidence of *personal bias*.[112] For example, in *Idaho v. Freeman*, the plaintiff-intervenors moved to disqualify the judge—and then appealed the denial of their motion—in a case that challenged Idaho's ability to rescind its former ratification of the Equal Rights Amendment.[113] Plaintiffs argued that the judge's membership (and leadership position) in the LDS Church raised serious doubts about his impartiality, as the LDS Church had openly come out against the Equal Rights Amendment.[114] In denying plaintiff's motion, the court stated that "a judge's background associations, which would include his religious affiliations, should not be considered as grounds for disqualification."[115] The Tenth Circuit in a later case cited *Freeman* when it held that the mere fact of a judge's membership in an Episcopal church, with no additional showing of bias, "[did] not create sufficient appearance of bias to require recusal."[116] While Canon 2C has an explicit exception for judicial membership in religious organizations, the prohibition of judicial association with religiously affiliated groups like the

110. Federal Rule of Civil Procedure 60(b)(6) in particular allows a court to relieve a party of a final judgment, order, or proceeding for "any . . . reason that justifies relief." FED. R. CIV. P. 60(b)(6). The possibility that a judgment was entered by a partial judge, in violation of 28 U.S.C. § 455(a), represents an unjust outcome that may be remedied by Rule 60(b)(6). *See* Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 862-64 (1988).

111. Justices, judges, and magistrate judges are required to disqualify themselves from "any proceeding in which [their] impartiality might reasonably be questioned." 28 U.S.C. § 455(a) (2014). This statute "imposes a self-enforcing duty" on judges and does not *require* that a party bring a motion to disqualify the judge, though a party certainly may file a motion. *See* United States v. Conforte, 624 F.2d 869, 880 (9th Cir. 1980) (Kennedy, J.).

112. *See, e.g.*, Bryce v. Episcopal Church, 289 F.3d 648, 660 (10th Cir. 2002) (likening a judge's membership in a church to associational bias cases in which group membership alone did not create the appearance of bias); Feminist Women's Health Ctr. v. Codispoti, 69 F.3d 399, 400-01 (9th Cir. 1995) (holding that the No Religious Test Clause does not allow religious belief to disqualify a judge); Parrish v. Bd. of Comm'rs of Ala. State Bar, 524 F.2d 98, 101 (5th Cir. 1975) (en banc) (holding that an accusation based on a judge's background without specific facts to suggest impartiality does not provide a factual basis to raise an inference of personal bias); Menora v. Ill. High Sch. Ass'n, 527 F. Supp. 632, 633-34 (N.D. Ill. 1981) (holding that, as a matter of law, a judge's religious beliefs are wholly irrelevant for establishing personal bias or prejudice).

113. 507 F. Supp. 706, 709-10 (D. Idaho 1981).

114. *Id.*

115. *Id.* at 729.

116. *Bryce*, 289 F.3d at 660 (citing *Freeman*, 507 F. Supp. at 729).

BSA violates the idea driving the outcomes in *Freeman* and *Bryce*: that a generalization about a judge's impartiality based merely on her associations—absent additional evidence of bias—is insufficient to show that the judge is incapable of performing her duty.

The contention that Canon 2C unconstitutionally restricts the associational rights of judges by assuming bias from mere association alone is supported by Supreme Court precedent addressing judicial speech on political matters. In *Republican Party of Minnesota v. White*, the Supreme Court held that the "announce clause" of Minnesota's Code of Judicial Conduct violated the First Amendment.[117] The announce clause at issue forbade any candidate for judicial office from "announc[ing] his or her views on disputed legal or political issues."[118] Justice Scalia, writing for the majority, held that while the announce clause aimed to maintain impartiality in the sense of a "lack of bias for or against either *party* to the proceeding," it was not narrowly tailored to serve that purpose.[119] Justice Scalia explained that the announce clause was not narrowly tailored because it restricted speech on particular *issues*, rather than speech that was "for or against particular *parties*."[120] While a party pursuing an outcome inapposite to the stated position of a judge on a particular issue was likely to lose, they were not at a disadvantage because of any bias against them on the part of the judge.[121]

On remand, the Eighth Circuit applied the Supreme Court's ruling to invalidate a different section of Minnesota's Code of Judicial Conduct, which forbade judges "from associative activities with a political party during a campaign."[122] The court stated that the partisan activities ban's implication that "*associating with a particular group* will destroy a judge's impartiality—differs only in form from [the rationale] which purportedly supports the announce clause—that *expressing one's self on particular issues* will destroy a judge's impartiality."[123] The Eighth Circuit used the Supreme Court's reasoning to strike down the partisan activities clause as a violation of judges' associational rights.[124] The court rejected the state's interest in prohibiting partisan activities, stating that "any credible claim of bias would have to flow from something more than the bare fact that the judge had associated with that political party."[125]

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117. 536 U.S. 765, 788 (2002).

118. *Id.* at 770 (quoting MINN. CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(i) (2000)).

119. *Id.* at 775-76.

120. *Id.* at 776.

121. *Id.*

122. Republican Party of Minn. v. White, 416 F.3d 738, 758 (8th Cir. 2005), *cert. denied sub nom.* Dimick v. Republican Party of Minn., 546 U.S. 1157 (2006).

123. *Id.* at 754.

124. *Id.*

125. *Id.* at 755.

Proponents of Canon 2C would argue that barring judges from membership in organizations that practice invidious discrimination does, in fact, target explicit bias against parties and is narrowly tailored for the purposes of *White*. There is, however, a fine line between membership in an organization that chooses its leaders based on a belief that homosexuality is immoral and explicit statements or actions by the judge that demonstrate bias against homosexuals. Membership in an organization is more akin to speech on an *issue*. Thus, restraints focusing on this kind of speech would not be narrowly tailored by *White*'s reasoning. On the other hand, statements or actions demonstrating bias are more akin to speech against a *particular party*. Hence, restraints focusing on this kind of speech would be narrowly tailored by *White*'s reasoning. It follows that Canon 2C is not narrowly tailored enough to survive strict scrutiny as applied in *White*.[126] Furthermore, applying the Eighth Circuit's reasoning from *White*'s remand, we see that Canon 2C's infringement of judges' associational rights is impermissible because its justification flows *entirely* from the bare fact that the judge has associated with a particular group.[127]

3. *Williams-Yulee*: strict scrutiny as the applicable standard

While *White* produced some uncertainty as to the appropriate standard of review for a policy restricting judicial speech, the Supreme Court recently held in *Williams-Yulee v. Florida Bar* that strict scrutiny is the applicable standard.[128] At issue in *Williams-Yulee* was a provision of the Code of Judicial Conduct for the State of Florida. The provision prohibited candidates for judicial office from personally soliciting campaign funds, in addition to prohibiting judicial candidates from personally soliciting "publicly stated support" from attorneys.[129] The Supreme Court held that the state restriction on judicial

126. In light of Justice Kennedy's concurring decision as the fifth vote for the majority (and his statement that *Pickering* did not bear on this set of facts), *White* did not affirmatively establish that strict scrutiny was the appropriate test for judging restrictions on judicial speech. *See White*, 536 U.S. at 796 (Kennedy, J., concurring). For further discussion regarding *why* Canon 2C is not narrowly tailored, and why strict scrutiny is the appropriate standard, see Parts III.B.3 and IV.A below.

127. *See supra* notes 122-25 and accompanying text (discussing the Eighth Circuit's ruling on remand in *White*, striking down a section of Minnesota's Code of Judicial Conduct, which forbade judicial association with political parties during elections). While associations may have potential for use as a barometer of personal bias, the Eighth Circuit stated bluntly: "[A]ny credible claim of bias would have to flow from something more than the bare fact that the judge had associated with that political party." *White*, 416 F.3d at 755.

128. 135 S. Ct. 1656, 1665 (2015) ("[W]e hold today what we assumed in *White*: A State may restrict the speech of a judicial candidate only if the restriction is narrowly tailored to serve a compelling interest.").

129. *Id.* at 1663 (quoting FLA. CODE OF JUDICIAL CONDUCT Canon 7C(1) (2014)).

speech served a sufficiently compelling state interest to survive strict scrutiny.[130]

Yulee was a candidate in a judicial primary for a seat as a county judge.[131] She drafted a letter announcing her candidacy, which also asked its recipients for financial support to meet her campaign fundraising goals.[132] Yulee lost her primary, and her only consolation was a bar complaint for violating Canon 7C(1) of Florida's Code of Judicial Conduct.[133] Yulee challenged Canon 7C(1) on the grounds that it impermissibly restricted her First Amendment freedom of speech to solicit campaign funds.[134]

Chief Justice Roberts, writing for four Justices, began by recognizing that Yulee's speech in the letter, discussing her qualifications for office, was core First Amendment speech entitled to the highest degree of protection.[135] A majority of the Court went on to affirm that Florida had a compelling state interest in promulgating rules designed to protect judicial integrity and the appearance of judicial integrity.[136] Yulee argued that Canon 7C(1) failed to protect this compelling state interest in a narrowly tailored manner because it still allowed a judicial campaign committee to solicit funds and judicial candidates to write personal thank you notes to campaign donors.[137] The Court rejected this argument, reasoning that Florida had "reasonably concluded that solicitation by the candidate personally creates a categorically different and more severe risk of undermining public confidence than does solicitation by a campaign committee."[138] The severe risk implicated by direct solicitation is, of course, the appearance that a directly solicited campaign contribution is a quid pro quo exchange for preferential treatment in the future. The Court held that Florida's conclusion that all personal solicitations by judicial candidates undermine public confidence in the integrity of the judiciary, while allowing judicial campaign committees to solicit funds, is a narrowly tailored solution to address the appearance of impropriety, and upheld the constitutionality of Canon 7C(1).[139]

130. *Id.* at 1671-73.

131. *Id.* at 1663.

132. *Id.*

133. *Id.*

134. *Id.* at 1664.

135. *Id.* at 1665 (plurality opinion).

136. *Id.* at 1668 (majority opinion).

137. *Id.*

138. *Id.* at 1669.

139. *Id.* at 1671.

IV. Application to Canon 2C

The previous Part established that strict scrutiny is the appropriate standard by which Canon 2C's restrictions on judges' First Amendment freedom of association must be judged.[140] This Part first examines Canon 2C's breadth and argues that the targeted nature of its prohibition against judicial membership in an organization that practices invidious discrimination is not narrowly tailored to maintaining an impartial judiciary. This Part then argues that Canon 2C's complete prohibition of judicial membership in an organization that practices invidious discrimination is not the least restrictive means available to California for avoiding the appearance (or existence) of judicial bias against interested parties.

A. Narrow Tailoring

While California, as a general matter, has a compelling state interest in establishing rules to ensure the appearance of an impartial judiciary (partially satisfying *Williams-Yulee*), Canon 2C is underinclusive to the point of no longer protecting that compelling interest. The Supreme Court has stated that "underinclusiveness can raise 'doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.'"[141] An underinclusive law or policy is particularly problematic when, as here, the policy represents "a governmental 'attempt to give one side of a debatable public question an advantage in expressing its views to the people'" or "control . . . the search for political truth."[142]

Canon 2C does not forbid judicial membership in advocacy groups that hold views similar to the Boy Scouts regarding the morality of homosexuality, or groups that advocate for improved equality and treatment for members of the LGBTQ community so long as they have neutral membership policies. Judicial membership in such groups, though, could certainly lead homosexual or religious litigants to believe that a judge would be partial for or against them based on their own background associations. It is clear that California, through its Code of Judicial Ethics, is attempting to favor one viewpoint (which it agrees with) by disfavoring membership in groups that hold conflicting

140. For the purposes of this Part, I will concede that California, as a general matter, has a compelling state interest in promulgating rules to protect and maintain an impartial judiciary.

141. *Williams-Yulee*, 135 S. Ct. at 1668 (quoting Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2740 (2011)).

142. City of Ladue v. Gilleo, 512 U.S. 43, 51 (1994) (alteration in original) (first quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 785 (1978); then quoting Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n, 447 U.S. 530, 538 (1980)).

viewpoints. This viewpoint favoritism should raise serious doubts about how well Canon 2C advances a compelling interest.[143]

Additionally, the circumstances and wording of Canon 2C, and its recent revision, indicate that enforcing the canon against judges in the Boy Scouts is not solely aimed at advancing the state's interest in maintaining an impartial judiciary. Canon 2C still exempts membership in religious organizations from its general decree that judges not hold membership in organizations that practice invidious discrimination.[144] While I have already discussed why the Constitution compels this exception,[145] the exception's existence attacks the contention that Canon 2C protects an interest of the highest order because the exception "leaves appreciable damage to that supposedly vital interest unprohibited."[146]

An extreme example demonstrates how the religious exemption from Canon 2C can create serious concerns about a judge's impartiality: there is no real difference in perceived bias against homosexual litigants between a judge who is a member of a Boy Scout troop that does not permit homosexual adult leaders and a judge who is a member of an extreme religious sect, such as the Westboro Baptist Church, which openly preaches hatred of homosexuals.[147] In fact, the above example presents an instance where the Boy Scout-affiliated judge should present much less fear of partiality for or against a party based on his sexual orientation. Yet Canon 2C is written in such a way that serious fear of judicial bias is acceptable, so long as the fear of bias stems from membership in a religious organization. Canon 2C's exception for membership in a religious organization, then, leaves ample room for a judge's organizational membership to raise questions about her impartiality.

"[A] law cannot be regarded as protecting an interest 'of the highest order', and thus as justifying a restriction upon truthful speech [or expressive association], when it leaves appreciable damage to that supposedly vital interest

143. *See id.* Some commentators have suggested that the removal of the Boy Scout loophole is aimed at punishing judges who hold certain views, rather than protecting judicial impartiality. Noah Feldman wrote: "It seems much more likely that the point of the prohibition is not to make the judiciary seem fair, but actually to express our collective moral disapproval of discriminatory organizations." Noah Feldman, *Should California Judges Join the Boy Scouts?*, BLOOMBERG VIEW (Jan. 27, 2015, 8:54 AM EST), http://bv.ms/1CbU9wt.

144. CAL. CODE OF JUDICIAL ETHICS Canon 2C (2015).

145. *See supra* Part II.

146. Fla. Star v. B.J.F. 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring in part and concurring in the judgment).

147. *See* Snyder v. Phelps, 562 U.S. 443, 448 (2011) (describing the Westboro Baptist Church and its belief that "God hates and punishes the United States for its tolerance of homosexuality"); *see also id.* (describing slogans on picket signs wielded by Westboro Baptist Church members at a military funeral, which included "God Hates Fags").

unprohibited."[148] Accordingly, Canon 2C cannot be regarded as protecting an interest of the highest order because it still allows judges to maintain a number of background associations that may create doubts about their impartiality.

B. Least Restrictive Means

Canon 2C's complete disqualification of a judge based entirely on his association with the BSA is also not the least restrictive means available to California to prevent the appearance of judicial bias to parties. This Subpart will discuss two potential regimes that would be less restrictive than Canon 2C.

The Eighth Circuit in *White* recognized that recusal from cases in which a judge's associations create bias or the appearance of bias is the least restrictive means of protecting a state's interest in impartiality without "burn[ing] the house to roast the pig."[149] Justice Kennedy's concurrence in *White* recognized that states are free to "adopt recusal standards more rigorous than due process requires," and to "censure judges who violate these standards."[150] Requiring judges to recuse themselves from cases in which their background associations create an overwhelming appearance of bias would adequately protect California's interest in an impartial judiciary without completely disqualifying judges based on their expressive associations. The rules as they exist now go too far by assuming a judge harbors animus against homosexuals based on their mere affiliation with a Boy Scout troop that does not permit homosexual leaders, when in reality, the judge would like to spend time camping with her child or mentoring children from her church.

Noah Feldman has suggested a different, though perhaps politically unfeasible, solution that is less restrictive than Canon 2C's disqualification: altering/emphasizing the judicial selection process.[151] Feldman argues that states could "rely instead on vigilance and common sense, and choose judges who are actually fair and actually don't discriminate."[152] While I personally disagree with Feldman's implication that judges who belong to the Boy Scouts discriminate, the judicial selection process is certainly a less restrictive alternative that California could use to safeguard the impartiality of its judicial branch. In light of viable, less restrictive means for maintaining the appearance of an impartial judiciary, Canon 2C's prohibition on judicial membership in organizations that practice invidious discrimination is not the least restrictive

148. *Fla. Star*, 491 U.S. at 541-42 (Scalia, J., concurring in part and concurring in the judgment) (quoting Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979)).

149. Republican Party of Minn. v. White, 416 F.3d 738, 755 (8th Cir. 2005) (alteration in original) (quoting Butler v. Michigan, 352 U.S. 380, 383 (1957)).

150. Republican Party of Minn. v. White, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring).

151. Feldman, *supra* note 143.

152. *Id.*

means available to California to further a compelling state interest. Thus, it should not survive strict scrutiny.

Conclusion

This Note has examined one controversy within the national debate regarding how to reconcile individual freedoms, such as the freedom of association or the free exercise of religion, and the societal ills of discrimination. This debate has occurred in state courts when business owners challenged the application of state antidiscrimination laws following their refusal to serve homosexual customers.[153] This debate has also spread to statehouses where legislators and constituents have pitted religious freedom restoration acts (commonly known as RFRAs) against antidiscrimination laws (or a lack thereof).[154] These examples suggest a definite trend towards favoring antidiscrimination principles over individual freedoms, which has played out in the political, judicial, and economic spheres.

The balance between these values should be determined, whenever possible, through the political process. But political actors seeking to create greater protection for disadvantaged groups must consider the weight of the individual freedoms that their policies will curtail. As this Note has argued through its analysis of Canon 2C's restriction of judges' First Amendment rights, policymakers should seriously consider whether their policies truly advance the government's interest in preventing discrimination, or whether they are simply meant to punish or coerce those who disagree with antidiscrimination principles.

153. *See* Elane Photography, LLC v. Willock, 309 P.3d 53, 77 (N.M. 2013) (holding that application of New Mexico's Human Rights Act against a wedding photographer who refused to photograph a same-sex commitment ceremony did not violate free speech guarantees or the Free Exercise Clause of the First Amendment), *cert. denied*, 134 S. Ct. 1787 (2014).

154. One recent controversy over a state religious freedom restoration act potentially opening the door to discrimination based on sexual orientation, which led to revisions to said act, occurred in Indiana. Public outcry and economic pressure from companies planning to move business away from Indiana helped to spur these revisions. Jeff Swiatek, *Indiana RFRA Changes Made; It's Damage Control Time*, USA TODAY (Apr. 3, 2015, 1:57 AM EDT), http://usat.ly/1IXT23T.