Roscoe Pound and the Future of the Good Government Movement

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I. INTRODUCTION

In this, the centennial year of Roscoe Pound’s 1906 address to the American Bar Association (“ABA”), I will first contextualize the Pound speech with an eye toward its role in inaugurating a good government movement spanning the twentieth century that sought to regulate the judiciary with explicit reference to preserving public trust and confidence in the courts. Second, I will describe more recent developments growing out of the civil liberties movement that have put the future of the good government movement in doubt by calling into question the constitutionality of provisions in state codes of judicial conduct that seek to promote public confidence in the courts by prohibiting judicial speech and association that creates the appearance of impropriety or partiality. Third, I will discuss the disqualification regime that some reformers have proposed as an antidote, wherein judges are permitted—and perhaps even encouraged—to speak their minds freely, as long as they disqualify themselves later from hearing cases in which their prior statements call their impartiality into question. I conclude that for a disqualification regime to be effective, we must return to the roots of Roscoe Pound’s good government movement and the informal norms...
that have long discouraged judges from publicly venting their spleens on every hot legal topic of the day. If the judiciary succeeds in conserving the longstanding norms that encourage judges to watch what they say and with whom they associate (even if they have a "right" to do otherwise) to the end of promoting public confidence in the courts—then disqualification is a viable means to remedy isolated deviations from the norm.

II. ROSCOE POUND AND THE GOOD GOVERNMENT MOVEMENT

The progressive era featured a collision between two fundamentally different ways of looking at the world. The progressives were troubled by the impact of industrialization on working-class America. They sought to by-pass the laissez faire penchant of the legal establishment generally, and courts in particular, by circumventing the common law that had regulated workplace relationships as a matter of private contract and electing state legislatures that sought to regulate hours, wages, and working conditions by statute.2

The conservative legal establishment was deeply suspicious of regulation by what it regarded as the rabble and used the due process clause of the Fourteenth Amendment to fight back.3 As emblemized by the United States Supreme Court's decision in Lochner v. New York, conservative judges at the state and federal level closely scrutinized progressive state statutes regulating the workplace and invalidated those that struck them as excessive on the theory that unreasonable interference with the freedom of contract deprived businesses of a property right without due process of law, in violation of the Fourteenth Amendment to the U.S. Constitution.4

Progressives reacted to the Lochner era courts with what William

4. Lochner v. New York, 198 U.S. 45, 52–53 (1905). The Lochner court found that a New York law limiting bakery employees to a sixty-hour work-week was an unconstitutional interference with the right to contract as guaranteed by the Fourteenth Amendment. Id.

Ross characterizes as a "muted fury." Senator George Norris declared that federal judges on the trial and appellate levels "were 'not responsive to the pulsations of humanity [because] the security of a life position and a life salary makes them forget too often the toiling masses who are struggling for an existence.'" Members of Congress railed against judges who interfered with the progressives' legislative agenda. They introduced constitutional amendments to end life tenure for federal judges and to select federal judges by popular election.

They also sought to strip what they regarded as "business-friendly federal courts" of jurisdiction to hear commercial cases.

At the state level, Progressives lobbied for an end to judicial review and for the institution of recall procedures whereby the electorate could remove rogue judges. Illustrative of the depth of feeling that surrounded the Progressive Era assault on the courts was the fracas that arose over Arizona's admission to the Union in 1911. In its petition for statehood, Arizona's draft Constitution included a provision for recall of elected officials, including judges. Conservative President and later Chief Justice William Howard Taft would have none of it: Judicial recall was "so pernicious in its effect, so destructive of independence in the judiciary, so likely to subject the rights of the individual to the possible tyranny of a popular majority, and, therefore, to be so injurious to the cause of free government" that he could not approve of a constitution with such a provision.

Taft successfully blocked Arizona's petition and conditioned its admission to the Union on it excluding judges from the scope of the recall provisions in its proposed constitution. Arizona obliged and was admitted into the Union, whereupon it promptly reinstated judicial recall in 1912.

In short, court-directed anger had reached a high-water mark during the Progressive era. It was in the middle of this political maelstrom that Roscoe Pound appeared on the national stage in 1906.

5. See ROSS, supra note 1, at 2, 20.
8. See id. at 95-96.
9. ROSS, supra note 1, at 48.
11. Id. (quoting 47 CONG. REC. 3964 (1911)).
12. Id.
13. Id. at 106-07.
Pound was a relatively obscure, thirty-seven-year old lawyer turned botanist, who, after an unhappy stint in private practice, found his way onto the faculty of the University of Nebraska Law School in 1899 before becoming the law school’s dean four years later. As luck would have it, the ABA president had heard Dean Pound speak to the Nebraska Bar Association the previous year and extended an invitation for him to address the ABA at its 1906 annual meeting on the subject of the causes of popular dissatisfaction with the administration of justice.

John Wigmore would later characterize Pound’s speech as “[t]he spark that kindled the white flame of progress.” The casual reader, however, who evaluates the address in isolation and through a 21st century lens, can be forgiven for thinking that Wigmore had read the wrong speech or otherwise lost his mind. By 21st century standards, there is nothing special about someone within the ABA standing up and giving a speech on what ails the judiciary; to the contrary, it is business as usual. This one was written in workmanlike but largely uninspiring prose. Pound slogged his way through four causes and twenty-one sub-causes of anti-court sentiment with the zeal of a botanist taxonomizing fungi—hardly the stuff of a riveting keynote address. And the address, while replete with divisions and subdivisions, was nonetheless oddly organized. Causes and sub-causes bled into each other. And of the four primary causes of dissatisfaction Pound identifies, three, he concluded, could not be helped because they were inherent in any legal system, our legal system, or the

17. For example, three recent ABA projects with which I was affiliated, include: AMERICAN BAR ASSOCIATION, AN INDEPENDENT JUDICIARY: REPORT OF THE COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE 46 (1997) (exploring the “potentially serious problems” for judicial independence posed by “a number of departures from the ‘spirit of restraint’ that should dominate the interbranch relationship” between courts and Congress); AMERICAN BAR ASSOCIATION, PUBLIC FINANCING OF JUDICIAL CAMPAIGNS: REPORT OF THE COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE 1 (2002) (characterizing “the nature and cost of running for the bench” as “one of the more pervasive problems” posing “threats to judicial independence,” which has contributed to the “erosion of public trust and confidence” in the judiciary); AMERICAN BAR ASSOCIATION, JUSTICE IN JEOPARDY: REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY 13 (2003) (reporting, as the title implies, that the administration of justice has been jeopardized by recent developments).
current political environment; yet, Pound organized his talk so that the one cause which could be remedied—dissatisfaction with judicial organization and procedure—was addressed third, leaving him to close by discussing problems with the current political environment that he deemed impossible to remedy, thereby ending not with a bang, but a whimper.\textsuperscript{18}

To appreciate the true greatness of Pound’s address to the ABA, the speech must be understood in context. As Barry Friedman observes, “Pound was hardly a firebrand.”\textsuperscript{19} He was a part of the legal establishment that had invited him to Minneapolis in the summer of 1906—the son of a lawyer and judge, and a Harvard educated lawyer, professor and dean in his own right.\textsuperscript{20} He shared the establishment’s distaste for “the crude and unorganized character of American legislation in a period when the growing point of law has drifted to legislation.”\textsuperscript{21} He professed no quarrel with the \textit{Lochner} Court’s dismissive treatment of such legislation: “I do not criticize these decisions,” he declared. “As the law stands, I do not doubt they were rightly determined.”\textsuperscript{22} And he had no patience for progressive proposals to control judges or the substance of judicial decisions.\textsuperscript{23}

In short, Pound was himself an insider speaking to a group of insiders who looked upon the progressives’ ongoing assault on the courts with disdain. Against this backdrop, Pound’s opening statement that “we must not be deceived . . . into overlooking or underrating the real and serious dissatisfaction with courts and lack of respect for law which exists in the United States to-day,” must have landed like a bucket of ice water to the face.\textsuperscript{24} “Courts are distrusted,” he continued, and he attributed the development in part to “public ignorance of the real workings of courts due to ignorant and sensational reports in the press” and to “[p]utting courts into politics,” which “has almost destroyed the traditional respect for the bench.”\textsuperscript{25}

That Pound openly acknowledged widespread disaffection with the judiciary and identified it as a serious problem warranting attention and reform was what mattered. By today’s standards, Pound’s observations seem utterly unremarkable: concern for flagging

\textsuperscript{18} See generally Pound, \textit{supra} note 15, at 729–49.
\textsuperscript{19} Friedman, \textit{supra} note 14.
\textsuperscript{20} \textit{Id}.
\textsuperscript{21} Pound, \textit{supra} note 15, at 748.
\textsuperscript{22} Roscoe Pound, \textit{The Spirit of the Common Law}, 18 \textit{Green Bag} 17, 20 (1906).
\textsuperscript{23} See Fish, \textit{supra} note 6, at 19.
\textsuperscript{24} Pound, \textit{supra} note 15, at 730.
\textsuperscript{25} \textit{Id}. at 729, 734.
public confidence in the courts dominates contemporary discourse on the administration of justice. It bears emphasis, however, that our ongoing obsession with how the courts are perceived or respected by the public at large began with Pound and his era.\(^\text{26}\)

The immediate impact of Pound’s address on his audience, Dean John Wigmore would later report, was stunned irritation and anger.\(^\text{27}\) The long-term impact of Pound’s address on the nation was no less stunning, for it catalyzed the emergence of the modern 20th century judiciary.

Pound’s speech provided an impetus for establishing the American Judicature Society;\(^\text{28}\) it encouraged the proliferation of specialized courts;\(^\text{29}\) it began a century-long movement toward the establishment and encouragement of alternative dispute resolution techniques;\(^\text{30}\) it led to the establishment of the American Law Institute and the Restatements of law;\(^\text{31}\) it fueled the drive for uniform rules of practice and procedure;\(^\text{32}\) it called for structural reforms that culminated in the establishment of judicial councils, judicial conferences, and administrative offices of courts;\(^\text{33}\) and it catalyzed


\(^{27}\) Wigmore, supra note 16, at 52.

\(^{28}\) Norman Krivosha, In Celebration of the 50th Anniversary of Merit Selection, 74 JUDICATURE 128, 128 (1990) (“While that speech alone may not have been sufficient to prompt... [the establishment of] the American Judicature Society... there is no doubt that... [it] played a significant role along with other factors then present.”).

\(^{29}\) Rekha Mirchandani, What’s So Special About Specialized Courts? The State and Social Change in Salt Lake City’s Domestic Violence Court, 39 LAW & SOC’Y REV. 379, 382 (2005) (“As a result [of Pound’s speech], the American Judicature Society began to push for specialized courts.”).

\(^{30}\) Frances E. Zollers, Alternative Dispute Resolution and Product Liability Reform, 26 AM. BUS. L.J. 479, 480 (1988) (“Roscoe Pound was an early proponent of seeking alternatives to full adjudication of disputes.”) (citing Roscoe Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, 29 A.B.A. REP. 395, 395 (1906)).

\(^{31}\) Paul T. Hayden, Putting Ethics to the (National Standardized) Test: Tracing the Origins of the MPRE, 71 FORDHAM L. REV. 1299, 1313 n.94 (2003) (“This particular drive to bring order to perceived chaos in the decisional law [by means of the Restatements] has been traced to Dean Roscoe Pound’s influential speech to the ABA in 1906....”).

\(^{32}\) Jay Tidmarsh, Pound’s Century, and Ours, 81 NOTRE DAME L. REV. 513, 514 n.4 (2006) (noting that the Advisory Committee established by the U.S. Supreme Court under the Rules Enabling Act followed Pound’s recommendation precisely).

\(^{33}\) David S. Clark, Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century, 55 S. CAL. L. REV. 65, 148-49 (1981) (“Roscoe Pound’s speech in 1906... set the tone for the Progressive Era’s structural and administrative reform of the federal courts.”) (citing Pound, supra note 15, at 742 (noting that the court system is archaic and consequently judicial power is wasted)).
projects to develop the canons of professional ethics and later the
каноны судейской этики. Я хочу вернуться к одной из последствий
Понда, которая заслуживает особого упоминания: его акцент на
важности доверия к судам. Доверие - это вопрос внешнего вида или
безусловного восприятия - чтобы сохранить доверие к судам, не
хватает, чтобы судьи вели себя хорошо - общественное восприятие
должно воспринимать их как хорошо поведевших.

Предшествуя речи Понда, вопрос доверия к судам, несмотря на
высокий общественный интерес, в основном, был приоритетным.
Предшествуя 20-му веку, только реальные возможности оценки и
рассмотрения вопросов поведения судей в контексте судебных
процессов: импичмент, законодательное обращение, и автоматическое
отстранение судей при признании виновными в предусмотренных
преступлениях. Их поведение и внешние проблемы не получили adequate
внимание. Понда поднял профиль внешних проблем значительно,
предоставив основанный на проблеме снижения общественного
уважения к судьям и судоуправлению. В этом отношении, речь Понда
обозначила, что я называю "внешний вид внешних впечатлений."
И действительно, речь Понда привела к новому интересу к доверию к
судам, который достиг своего пика в 1924 годах в Канонах судейской<br>этики. Канон 4 утверждал, что судейское поведение должно быть "бесплатно от... внешнего вида недостаточности."
Канон 19, предписывал судьям объяснять основание своих
решений, чтобы "избежать предположения произвола" и "способствовать
доверию к их интеллектуальной целостности."
Канон 24 предписывал судьям избегать обязательств, которые
могут "представлять себя нарушением их обязательств к
быстрому и правильному управлению их официальными
должностями."
Канон 25 предостерегал судей против вызвания "любого
рационального подозрения, что..."

34. Jeffrey Shamah et al., Judicial Conduct and Ethics vi (3d ed. 2000)
("Первое обращение в [20-м] веке к формализации стандартов профессионального
поведения в юридической профессии было в 1906 году в речи Росье Понда 'Источники
установления недовольства правосудием'.")
35. Geyh, supra note 26, at 7-8.
36. Id. at 6-7.
37. See Pound, supra note 15, at 730.
38. Geyh, supra note 26, at 6.
39. See generally CANONS OF JUDICIAL ETHICS (1924); see Geyh, supra note 26, at
10-13.
40. CANONS OF JUDICIAL ETHICS pmbl. (1924).
41. Id. at Canon 19.
42. Id. at Canon 24.
[they are] utilizing the power or prestige of [their] office to [advance private interests].” Canon 26 told judges to avoid relationships that could “arouse the suspicion that such relations warp or bias [their] judgment.” Canon 27 directed judges not to hold fiduciary positions that could “seem to interfere with the proper performance of [their] judicial duties.” Canon 28 told judges to forego political activities that could arouse the “suspicion of being warped by political bias.” Canon 30 warned judicial candidates not “to create the impression that if chosen, [they] will administer [their] office with bias, partiality or improper discrimination.” In Canon 31, which applied where judges were authorized to practice law part-time, stated that judges should not “seem[] to utilize [their] judicial position to further [their] professional success.” In Canon 33, judges were counseled to sidestep conduct that might “awaken the suspicion that [their] social or business relations or friendships, constitute an element in influencing [their] judicial conduct.” Canon 34 declared in sweeping terms that, “[i]n every particular[, a judge’s] conduct should be above reproach.” And Canon 35 observed that broadcasting court proceedings “create[s] misconceptions ... in the mind of the public and should not be permitted.”

The canons of professional ethics remained in place until the 1970s when the Vietnam War and Watergate gave rise to a new crisis of confidence in the institutions of government, and Congressional investigations into the conduct of Justices Abe Fortas and William O. Douglas, coupled with a wave of disenchantment with the Warren Court, moved the ABA to craft a new Code of Judicial Conduct. Whereas the Canons of Judicial Ethics had been hortatory pronouncements that judges were free to follow or not, the 1972 Code’s preamble declared that the Code was intended to establish mandatory standards that new state judicial conduct commissions and

43. Id. at Canon 25.
44. Id. at Canon 26.
45. Id. at Canon 27.
46. Id. at Canon 28.
47. Id. at Canon 30.
48. Id. at Canon 31.
49. Id. at Canon 33.
50. Id. at Canon 34.
52. See Whitney North Seymour, The Code of Judicial Conduct from the Point of View of a Member of the Bar, 1972 UTAH L. REV. 352, 352 (1972).
their respective supreme courts would be charged with enforcing.\textsuperscript{53}

The 1972 Code thus effectively strengthened the commitment to regulating appearances as a means to promote public confidence in the courts by making its rules enforceable. Provisions regulating appearances remained an important part of the 1972 Code. As with Canon 4 of the Canons of Judicial Ethics, Canon 2 of the new Code provided judges “should avoid impropriety and the appearance of impropriety in all [their] activities.”\textsuperscript{54} Canon 2A declared that judges should act “at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”\textsuperscript{55} Canon 2B stated that judges should not “convey the impression” that they are subject to outside influence.\textsuperscript{56} Canon 3C provided that judges should disqualify themselves from hearing cases in which their “impartiality might reasonably be questioned.”\textsuperscript{57} Canon 4 allowed judges to participate in quasi-judicial activities as long as in so doing they did not “cast doubt on [their] capacity to decide [matters] impartially.”\textsuperscript{58} Canon 5A limited extra-judicial activities to those that “do not detract from the dignity” of judicial office.\textsuperscript{59} Canons 5B and 5C(1) limited a judge’s civic, charitable, and financial activities to those that do not “reflect adversely” on the judge’s impartiality.\textsuperscript{60} Canon 6 permitted judges to receive compensation or reimbursement for extrajudicial activities only if it did not “give the appearance of influencing the judge in his judicial duties or otherwise give the appearance of impropriety.”\textsuperscript{61} Last, Canon 7B(1)(a) provided that judicial candidates “should maintain the dignity appropriate to judicial office.”\textsuperscript{62}

In 1990, the ABA revised its Model Code again, and went further still to underscore the mandatory nature of its provisions by replacing the “shoulds” of the 1972 Code with “shall.”\textsuperscript{63} The 1990 Code retained some of the same appearance-promoting provisions as its 1972 predecessor,\textsuperscript{64} but it added others: Canon 2C prohibited judges

\begin{itemize}
\item[53.\quad] MODEL CODE OF JUDICIAL CONDUCT 110 (1972).
\item[54.\quad] Id. at Canon 2.
\item[55.\quad] Id. at Canon 2A.
\item[56.\quad] Id. at Canon 2B.
\item[57.\quad] Id. at Canon 3C.
\item[58.\quad] Id. at Canon 4.
\item[59.\quad] Id. at Canon 5A.
\item[60.\quad] Id. at Canon 5B, 5C(1).
\item[61.\quad] Id. at Canon 6.
\item[62.\quad] Id. at Canon 7B(1)(a).
\item[63.\quad] Compare MODEL CODE OF JUDICIAL CONDUCT (1990), with MODEL CODE OF JUDICIAL CONDUCT (1972).
\item[64.\quad] See, e.g., MODEL CODE OF JUDICIAL CONDUCT Canon 2 (1990). “A judge shall avoid . . . the appearance of impropriety . . . .” Id. at Canon 2. “A judge . . . shall act at all
\end{itemize}
from being members in discriminatory organizations, on the theory
that judges who belong to clubs that exclude, say, women or racial or
etnic minorities, create the perception that they approve of such
policies.\textsuperscript{65} Canon 3B(5) not only instructed judges to perform their
duties without bias or prejudice but also directed them not to
"manifest bias or prejudice" by their words or conduct.\textsuperscript{66} Canon 4D(1)
and 1(a) provided that judges must not engage in business dealings
that "may reasonably be perceived to exploit" their judicial position.\textsuperscript{67}
Canon 4D(5)(b) directed judges to urge family members not to accept
gifts that could "reasonably be perceived as intended to influence the
judge."\textsuperscript{68}

One change implemented in the 1990 Code warrants special
mention. The 1972 Code included the so-called "announce clause,"
which forbade judges qua judicial candidates from "announc[ing their]
views on disputed legal or political issues."\textsuperscript{69} The drafters of the 1990
Code deemed the announce clause to be unnecessarily vague and
replaced it with provisions that barred judges from making
commitments, pledges, or promises.\textsuperscript{70} At first blush, clauses barring
judges from making promises or commitments to decide specific issues
in particular ways would seem calculated to preserve the \textit{reality} of
judicial impartiality, but a closer look reveals that they too are
appearance-promoting. In \textit{reality}, the judge who promises to decide \textit{x}
case in \textit{y} way remains impartial as long as she stands ready to honor
her oath of office and abandon her promise at the point of decision—
even though it \textit{appears} as though the promise has compromised her
impartiality.

\begin{flushright}
\textsuperscript{65} Id. at Canon 2C.
\textsuperscript{66} Id. at Canon 3B(5).
\textsuperscript{67} Id. at Canon 4D(1), 1(a).
\textsuperscript{68} Id. at Canon 4D(5)(b).
\textsuperscript{69} MODEL CODE OF JUDICIAL CONDUCT Canon 7B(1), 1(c) (1972).
\textsuperscript{70} MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d) (1990). Subsection (i)
prohibits "pledges or promises of conduct" and subsection (ii) prohibits "mak[ing]
statements that commit or appear to commit the candidate with respect to cases,
controversies or issues that are likely to come before the court." Id. at Canon 5A(3)(d)(i–ii).
The commentary on this section best highlights the challenges encountered by the
drafters as they sought to balance political free speech and judicial impartiality. Id. at
Canon 5A(3)(d) cmt.
\end{flushright}
III. Republican Party of Minnesota v. White\textsuperscript{71} and the Civil Liberties Movement

The problem with enforcing a code of conduct designed to promote public confidence in the courts by preserving the appearance of judicial propriety is that the appearances a judge creates are often derived from what she says or with whom she associates. The rules thus restrict a judge’s speech. And governmental restrictions on the content of a judge’s speech put the good government movement that Roscoe Pound founded on a collision course with the civil liberties movement that had been growing in strength and size since the middle of the 20th century.

Enter the U.S. Supreme Court in Republican Party of Minnesota v. White, decided in 2002.\textsuperscript{72} White evaluated Minnesota’s version of the 1972 Model Code’s announce clause.\textsuperscript{73} After ruling that state-imposed restrictions on the content of judicial speech are subject to strict scrutiny, the Court invalidated the announce clause and held that judges have a First Amendment right to take positions on issues that may come before them.\textsuperscript{74} In elective systems, the Court reasoned, voters need to know what the election is about, and no legitimate purpose is served by keeping them in the dark.\textsuperscript{75} The argument that the announce clause preserved judicial impartiality was rejected on the grounds that the clause was under-inclusive because it forbade judges from announcing their positions as candidates but not at other times—which led the majority to conclude that the true purpose of the clause was to undermine judicial elections rather than to preserve impartiality.\textsuperscript{76}

White dropped a stone in the regulatory pond, and in the aftermath, academicians and practitioners have studied the ripples without consensus as to when or where they will dissipate.\textsuperscript{77} White arose in the context of a state-imposed restriction on judicial campaign speech, and perhaps its reach will be limited to that context.

\textsuperscript{72} Id.
\textsuperscript{73} Id. at 774–76; Minn. Code of Judicial Conduct Canon 5(A)(3)(d)(i) (2000).
\textsuperscript{74} White, 536 U.S. at 774–76.
\textsuperscript{75} Id. at 788 (“[T]he First Amendment does not permit [the opposition of judicial elections] by leaving the principle of elections in place while preventing candidates from discussing what the elections are about.”).
\textsuperscript{76} Id. at 782.
on the theory that there, and only there, the unfettered right of judges
to utter uniquely political speech, when coupled with the electorate’s
right to receive election-related information, justifies a freedom so
nearly absolute as to trump any state interest in suppression—which
was the point of Justice Kennedy’s concurrence in White.\textsuperscript{78} Consistent
with this view, most of the lower court cases that have invalidated
code of conduct restrictions on judicial speech in the aftermath of
White have concerned judicial campaign speech and association.\textsuperscript{79} If
this view wins the day, then other code-based restrictions on a judge’s
speech and association outside of judicial campaigns may remain
beyond White’s reach.

On the other hand, the implications of White are not necessarily
confined to judicial elections. Any state-imposed restriction on the
content of a judge’s speech is presumably subject to strict scrutiny.
The Court’s skepticism of the state’s justification for suppression of
the speech at issue in White is consistent with its skepticism of
content-based restrictions on speech in other contexts.\textsuperscript{80} White may
represent the tip of an iceberg that will gradually force the
deregulation of judicial speech and association generally. In 2005, the
Supreme Court of Mississippi took a step in this direction.

In Mississippi Commission on Judicial Performance v. Wilkerson,
the Mississippi Supreme Court held that a judge had a First
Amendment right to write a letter to his local paper urging that
homosexuals be institutionalized rather than afforded equal rights.\textsuperscript{81}
The state’s disciplinary commission had ruled that the judge’s letter
violated his obligation under the Code of Conduct to “conduct himself
at all times in a manner that promotes public confidence in the
integrity and impartiality of the judiciary,”\textsuperscript{82} but the court ruled that
after White, such an application of the “act at all times” clause
violated the judge’s First Amendment right to free speech.\textsuperscript{83} The court

\textsuperscript{78} White, 536 U.S. at 796 (Kennedy, J., concurring) (“This case does not present the
question whether a State may restrict the speech of judges because they are judges—for
example, as part of a code of judicial conduct; the law at issue here regulates judges only
when and because they are candidates.”).

\textsuperscript{79} See generally BRENNAN CENTER FOR JUSTICE, SUMMARIES OF RELEVANT
CASES DECIDED SINCE REPUBLICAN PARTY OF MINNESOTA V. WHITE,
www.brennancenter.org/stack_detail.asp?key=348&subkey=35327 (last visited Feb. 1,
2007).

\textsuperscript{80} LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1130 (2d ed. 1988).

\textsuperscript{81} Miss. Comm’n on Judicial Performance v. Wilkerson, 876 So. 2d 1006, 1008, 1014–
15 (Miss. 2004).

\textsuperscript{82} Id. at 1010 (quoting the MISS. CODE OF JUDICIAL CONDUCT Canon 2(A)
(1995)).

\textsuperscript{83} Id. at 1016.
went out of its way to underscore its view that the State had no compelling interest in preserving the appearance of judicial impartiality. To the contrary, the court reasoned, the state had no interest whatsoever in making a biased judge appear impartial: “forcing . . . judges to conceal their prejudice” would simply undermine “the more compelling state interest of providing an impartial court for all litigants” by denying unsuspecting gay and lesbian litigants the information they needed to expose the judge’s bias and formulate a motion to disqualify the judge from hearing their cases.\(^{84}\)

Undeniably, \textit{White} and its progeny are moving the law in a new direction. Just as undeniably, and perhaps even more importantly, they are abandoning the value structure of the good government movement that Pound inaugurated a century ago in favor of the newer value structure of the civil liberties movement. In \textit{Wilkerson} and \textit{White}, the unstated implication was that extrajudicial position taking on issues of the day should not merely be tolerated but celebrated as an important means to inform voters and litigants. The First Amendment operates on the assumption that more speech is better than less, and that little is gained by suppressing speech and forcing the public to remain in the dark. If judges are discourteous, biased, undignified, dependant, or prejudiced, a logical extension of the argument would go, then the First Amendment dictates that it is better for us to know about it than for the state to preserve, through a system of mandatory restrictions on judicial speech and association, the appearance that judges are otherwise. The ultimate paradox, then, may be that reforms aimed at strengthening the Code of Conduct’s commitment to eradicating appearance problems, by making rules against creating such problems more enforceable, have had the opposite effect of exposing those rules to constitutional challenge and thereby weakening them. The net effect, I have argued elsewhere, is the possible disappearance of appearances.\(^{85}\)

**IV. THE DISQUALIFICATION REGIME**

As a fallback remedy, reformers have looked toward disqualification; judges may now have a right to speak or associate as they choose, but if they do so in ways that compromise their apparent impartiality to decide future cases, they can be required to disqualify

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\(^{84}\) \textit{Id.} at 1015.

\(^{85}\) \textit{See} Geyh, \textit{supra} note 26, at 37.
themselves later from hearing those cases. The Code of Conduct has
long provided that judges must disqualify themselves from hearing
cases in which their impartiality might reasonably be questioned, and
more recently, the ABA has added specific new grounds for
disqualification where judges make prior statements that "appear" to
commit them to deciding cases in particular ways or where judges
create appearance problems by accepting campaign contributions
from litigants or lawyers in excess of specified amounts.

And so, the sun may be rising on a brave new world of judicial
speech, in which judges are permitted and perhaps encouraged to vent
their spleens on the issues of the day for the benefit of voters and
litigants. The appearance problems such position taking creates can be
ameliorated, the argument goes, by disqualification. Such a regime
tolerates, if not fosters, the perception that the judiciary is populated
with outspoken, biased judges but seeks to qualify that perception by
assuring litigants that the biases publicly cultivated by the judges they
are assigned will not be germane to the specific issues at stake in their
cases.

The success of a disqualification regime in the brave new world of
judicial speech is by no means assured. There are three potential
impediments, at least the third of which strikes me as serious enough
to warrant rethinking the emerging new world order, of which the
disqualification regime is an integral part.

First, some critics of a disqualification regime argue that White
prohibits the state from punishing judges for taking positions on issues
that could come before them later, regardless of whether such
punishment takes the form of a flat prohibition on position taking or a
directive to disqualify in the aftermath of position taking. Although
firm conclusions must await the outcome of ongoing litigation, I find
this objection uniquely unpersuasive. There is an obvious difference
between telling judges that they may not speak and telling judges that


they may speak, but may need to take corrective action later if their prior speech deprives litigants of a fair forum. Moreover, disqualification is not punitive. The judge who must disqualify herself for making public, extrajudicial statements that call her impartiality into question is not being "punished" any more than the judge who must disqualify herself from a case in which her son appears as counsel or in which she owns stock in one of the corporate parties is being "punished" for having children or making financial investments.

Second, if judges are encouraged to abandon the older, good government paradigm in which they were ever mindful of appearances and kept their views on issues of the day to themselves in favor of the newer civil liberties paradigm in which judges are invited to trumpet their views and biases for the edification of litigants and voters, one might predict the advent of mass-disqualification. The specter of outspoken judges taking public positions on all conceivable issues of the day, thereby calling into question their impartiality to decide everything, forcing recusals en masse, and driving the administration of justice to its knees, is frightening to contemplate in the abstract but unlikely to materialize. Time and again, when disqualification rules have collided with the needs of judicial administration, the former have yielded to the latter. Thus, the "rule of necessity" has trumped disqualification rules when all available judges would otherwise be disqualified; small town trial judges have disqualified themselves less frequently than their urban counterparts when confronted with litigants whom they know personally, given the practical need for rural judges to administer justice in smaller communities where judges often know the parties who come before them; and Supreme Court justices have sometimes expressed reluctance to disqualify themselves given the practical need to avoid decisional stalemates by an equally divided court.

The third impediment to the success of a disqualification regime follows unavoidably from rejection of the second: if judges embrace

89. See generally Annotation, Interest of Judge in an Official or Representative Capacity, or Relationship of Judge to One Who Is a Party in an Official or Representative Capacity, as Disqualification, 10 A.L.R. 1307 (1959) (discussing what is required for judicial disqualifications).
90. 46 AM. JUR. 2D Judges § 84 (2006).
92. Cheney v. U.S. Dist. Court for the Dist. of Colom., 541 U.S. 913, 915-16 (2004) (Scalia, J., mem.) (noting that with one justice disqualified, "[t]he Court proceeds with eight justices, raising the possibility that, by reason of a tie vote, it will find itself unable to resolve the significant legal issue presented by the case.").
the new civil liberties paradigm and become extrajudicial pundits on legal issues, but are loath to compromise the efficient administration of the courts by disqualifying themselves en masse when the issues upon which they have previously opined and apparently committed themselves come before their courts later, their only recourse will be to revisit and dilute the disqualification standards. In other words, the circumstances under which a judge will "appear" to have committed herself with respect to an issue in a future proceeding (thereby necessitating disqualification) will be construed narrowly enough to accommodate the brave new world of judicial speech without compromising judicial administration. The net effect will be the arrival of what I have characterized as "partial impartiality," in which relaxed disqualification standards foster rather than ameliorate appearance problems by authorizing outspoken judges to decide cases involving issues upon which they have previously spoken and, in the public (if not the judicial) mind, apparently committed themselves.

V. REVITALIZING THE GOOD GOVERNMENT MOVEMENT

The problem lies not with a disqualification regime for judges who exercise their right to publicly announce their views in ways that appear to compromise their impartiality; the problem lies with the potential emergence of a new world order that conceptualizes public position taking by judges and judicial candidates as an unqualified good. To avert the advent of partial impartiality, we should return to the origins of the good government movement that Roscoe Pound launched a century ago. White tells us that judges have a constitutional right to take positions on issues that come before them later, but having a right to take positions does not necessarily mean that exercising such a right is prudent. Pound's good government movement operated from the premise that judges should seek to promote public confidence in the judiciary, regardless of whether they have a "right" to do otherwise. Thus, even if judges have a constitutional right to bellow their biases from every hilltop, the good-government judge does not seek to celebrate his prejudices or to immortalize them in the media but struggles to minimize them so as to remain as impartial as possible and thereby preserve public confidence in judges and the courts.

Even if we are ultimately told that the First Amendment bars thirty-year-old codes of judicial conduct from disciplining judges for

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93. Geyh, supra note 26, at 35.
various forms of speech or association, it bears emphasis that the informal norms guiding Pound’s good government movement have been in place for over a century—long before the first enforceable code of conduct was adopted. Those informal norms can and should continue to counsel judges to think twice before they speak out in ways that undermine their apparent impartiality.

Judges can and should demur to voters or interest groups who pressure judges to take firm positions on issues that will come before the judges later by referring to Pound’s public trust and confidence objectives and the emerging disqualification regime. Thus, judges confronted with questionnaires or media inquiries soliciting implicit commitments on specific issues that will arise in litigation should explain why acquiescing to such demands would diminish public confidence in their impartiality and why the only appropriate remedy in such an event would be to disqualify themselves when the issue arose later. In other words, they should explain why announcing their views is not always right to do, even if it is something they have a right to do. If the judiciary as a whole continues to adhere to the norms that have guided its judges for over a century, isolated outlier judges who exercise their right to deviate from those norms by taking public positions that appear to commit them to deciding future cases in particular ways can be disqualified later without creating pressure to dilute disqualification standards as a means to avert mass-recusal.