

# MAY A JUDGE BE A SCOUTMASTER? *DALE, WHITE, AND THE NEW* MODEL CODE OF JUDICIAL CONDUCT

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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. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society.<sup>1</sup>

~Alexis de Tocqueville

## INTRODUCTION

In February 2007, the American Bar Association's House of Delegates approved<sup>2</sup> a revised version of the Model Code of Judicial Conduct—a model set of rules governing judges that has been adopted in some form in the majority of states.<sup>3</sup> Among the provisions approved by the House of Delegates is Rule 3.6, which prohibits judges from belonging to “any organization that practices invidious discrimination on the basis of . . . sexual orientation.”<sup>4</sup> Since the Rule defines “invidious discrimination” in vague, subjective, and

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1. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 196 (Philips Bradley ed., Francis Bowen trans., Alfred A. Knopf 1945) (1835).

2. *See, e.g.*, Charles Toutant, *Appearance-of-Impropriety Standard for Judges Holds Ground in ABA*, 187 N.J.L.J. 547 (2007).

3. *See, e.g.*, Andrew L. Kaufman, *Judicial Correctness Meets Constitutional Correctness: Section 2C of the Code of Judicial Conduct*, 32 HOFSTRA L. REV. 1293, 1293 (2004).

4. MODEL CODE OF JUDICIAL CONDUCT R. 3.6(A) (2007).

rather opaque language,<sup>5</sup> it could easily be construed to prohibit judges from belonging to such groups as the Boy Scouts of America.<sup>6</sup>

This Note argues that, as applied to the Boy Scouts, such a prohibition would conflict with the right to freedom of association articulated in First Amendment jurisprudence—especially in light of recent Supreme Court decisions reaffirming the right of private groups to associational expression<sup>7</sup> and the applicability of First Amendment protections to judges.<sup>8</sup> Even overlooking any constitutional defects, this Note argues that the Rule should be rejected for policy reasons.

Part I of this Note examines the Rule and its purpose. Part II discusses the constitutional right of free association and relevant court decisions, especially as these decisions involve public officers and, more particularly, judges. Part III analyzes the Rule under the constitutional framework provided by these decisions. Part IV briefly examines the Rule from a policy perspective, and Part V addresses potential counter-arguments to the thesis that Rule 3.6 conflicts with the right to freedom of association. This Note concludes with a recommendation that states reject the revised version of the Rule.

## I. BACKGROUND OF RULE 3.6

The American Bar Association (“ABA”) has long been involved in the codification of standards of judicial ethics.<sup>9</sup> In 1924, the ABA published its Canons of Judicial Ethics as guidelines for the states;<sup>10</sup> these hortatory provisions were replaced in 1972 by the Model Code of Judicial Conduct, which was specifically designed to be enforceable.<sup>11</sup> In 1990, after a comprehensive study, the ABA revised

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5. *See id.* cmt. 2 (“Whether an organization practices invidious discrimination is a complex question to which judges should be attentive.”).

6. Both for the sake of brevity and because the group is the most obvious example of an organization that could be affected by the Rule, this Note will focus on the Boy Scouts. *See infra* notes 30–36 and accompanying text. Most of the analysis, however, will apply to any group that expresses a moral objection to homosexual conduct.

7. *See* *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

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

9. ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, *Background Paper*, <http://www.abanet.org/judicialethics/about/background.html> (last visited Mar. 30, 2007).

10. *Id.*

11. *Id.*

the Model Code to address several perceived problems.<sup>12</sup> In 2003, the year after the U.S. Supreme Court invalidated a Model Code-derived rule of judicial conduct on First Amendment grounds,<sup>13</sup> the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct (“Commission”) was formed to rework the rules yet again.<sup>14</sup> The Commission’s deliberations resulted eventually in the revised Model Code, which received the approval of the ABA’s House of Delegates in February 2007.<sup>15</sup> The ABA, of course, does not have the last word; as a model law, the Code is binding only to the extent that a jurisdiction chooses to adopt it.<sup>16</sup>

Section 2C of the 1990 Model Code,<sup>17</sup> which, in some form or another, still governs in most jurisdictions, provides as follows: “A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin.”<sup>18</sup> Like many other sections of the Code, Section 2C has undergone a revision. In its incarnation as Rule 3.6 of the new Code—titled “Affiliation with Discriminatory Organizations”—the provision now reads:

(A) A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation.

(B) A judge shall not use the benefits or facilities of an organization if the judge knows or should know that the organization practices

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12. *Id.*

13. *See White I*, 536 U.S. 765.

14. ABA JOINT COMMISSION TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, REPORT TO THE ABA HOUSE OF DELEGATES 1 (2006), [http://www.abanet.org/judicialethics/house\\_report.pdf](http://www.abanet.org/judicialethics/house_report.pdf).

15. *See, e.g.*, Toutant, *supra* note 2.

16. It is typically a state’s judicial branch that enacts its code of judicial conduct. Kaufman, *supra* note 3, at 1297. The fact that the rules are adopted by state judiciaries rather than legislatures makes judicial review of the rules all the more appropriate; in this context there is no danger that the reviewing courts will “substitute their own pleasure to the constitutional intentions of the legislature.” THE FEDERALIST NO. 78, at 436–37 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

17. For a critical and thought-provoking examination of Section 2C, see Kaufman, *supra* note 3. Professor Kaufman observes some constitutional problems with the provision even in its older form. These defects are aggravated by the revision and accentuated by the Eighth Circuit’s decision in *Republican Party of Minnesota v. White (White II)*, 416 F.3d 738 (8th Cir. 2005) (en banc).

18. MODEL CODE OF JUDICIAL CONDUCT Canon 2(C) (2003).

invidious discrimination on one or more of the bases identified in paragraph (A). A judge's attendance at an event in a facility of an organization that the judge is not permitted to join is not a violation of this Rule when the judge's attendance is an isolated event that could not reasonably be perceived as an endorsement of the organization's practices.<sup>19</sup>

Recognizing the vagueness of the term "invidious discrimination," the official commentary to Rule 3.6 attempts to flesh out its meaning:

An organization is generally said to discriminate invidiously if it *arbitrarily excludes* from membership on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation persons who would otherwise be eligible for admission. Whether an organization practices invidious discrimination is a *complex question* to which judges should be attentive. The answer cannot be determined from a mere examination of an organization's current membership rolls, but rather, depends upon how the organization selects members, as well as 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 an intimate, purely private organization whose membership limitations could not constitutionally be prohibited.<sup>20</sup>

The commentary also explains the rationale for the Rule's prohibitions as centering on judicial impartiality:

A judge's public manifestation of approval of invidious discrimination on any basis gives rise to the appearance of impropriety and diminishes public confidence in the integrity and impartiality of the judiciary. A judge's membership in an organization that practices invidious discrimination creates the perception that the judge's impartiality is impaired.<sup>21</sup>

The comments further provide that "[w]hen a judge learns that an organization to which the judge belongs engages in invidious discrimination, the judge must *resign immediately* from the

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19. MODEL CODE OF JUDICIAL CONDUCT R. 3.6 (2007) (asterisk omitted).

20. *Id.* cmt. 2 (emphasis added).

21. *Id.* cmt. 1.

organization.”<sup>22</sup> Finally, the commentary indicates that “membership in a religious organization as a lawful exercise of the freedom of religion is not a violation of this Rule” and that Rule 3.6 “does not apply to national or state military service.”<sup>23</sup>

As indicated above, Rule 3.6 differs from its predecessor in that it adds the terms “gender,”<sup>24</sup> “ethnicity,” and “sexual orientation” to the list of prohibited bases of discrimination and adds the prohibition against using an organization’s benefits or facilities.<sup>25</sup> What prompted these modifications? Although the Final Draft Report submitted to the House of Delegates is not helpful on this point,<sup>26</sup> Mark Harrison, the chairman of the Commission, has described the purpose as “mak[ing] sure that judges aren’t viewed as bigots.”<sup>27</sup> An Associated Press article described the changes as “energized in part by the Supreme Court’s ruling” in *Lawrence v. Texas*<sup>28</sup> and by the conviction that “[j]udges are on the front line of battles over legal rights for same-sex couples and should never belong to an organization that discriminates against gays.”<sup>29</sup>

Significantly, the same Associated Press article names the Boy Scouts as a group that might fall within the Rule’s scope.<sup>30</sup> The reference is not pure speculation; the Boy Scouts has faced quite a bit

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22. *Id.* cmt. 3 (emphasis added).

23. *Id.* cmts. 4, 5.

24. Oddly, the rule thus lists both “sex” and “gender” as prohibited classifications. Typically, “sex” refers to the biological state of being male or female, while “gender” (originally a grammatical term) is used by feminist theorists to refer to a socially constructed (and thus subjective and malleable) set of social roles. For a discussion of the significance of these terms, see Teresa A. Zakaria, Note, *By Any Other Name: Defining Male and Female in Marriage Statutes*, 3 AVE MARIA L. REV. 349, 349–65 (2005). See also DALE O’LEARY, *THE GENDER AGENDA: REDEFINING EQUALITY* 165–78 (1997).

25. See ABA JOINT COMMISSION TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, FINAL DRAFT REPORT REDLINED TO CURRENT ABA CODE Attachment B: Canon 3 (2005), available at <http://www.abanet.org/judicialethics/redlinetocurrentcode.pdf>.

26. See ABA JOINT COMMISSION TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, REPORT TO THE ABA HOUSE OF DELEGATES 112–13 (2005), available at [http://www.abanet.org/judicialethics/house\\_report.pdf](http://www.abanet.org/judicialethics/house_report.pdf) [hereinafter REPORT TO THE ABA].

27. Gina Holland, *Proposal Would Bar Judges from Groups with Anti-Gay Bias*, ST. LOUIS POST-DISPATCH, Aug. 7, 2004, at 22 (internal quotation marks omitted), available at <http://www.communityrights.org/Newsroom/crcInTheNews/SLPD8-7-04.asp>.

28. 539 U.S. 558 (2003) (declaring unconstitutional a Texas law against homosexual conduct).

29. Holland, *supra* note 27, at 22. Note that the author’s placement of judges “on the front line” implies that they are combatants rather than neutral arbiters.

30. *Id.*

of adverse (one might even say punitive) government action in the past several years.<sup>31</sup> Indeed, the group has arisen so often in discussions of the proposal that the Scouts' counsel sent Harrison a letter expressing its concern and requesting "that the ABA reject the proposed rule or, in the alternative, specifically cite Boy Scouts of America as an example of an organization with which a judge may associate."<sup>32</sup> Obviously, the ABA has taken neither approach, leaving the Boy Scouts—and judges who are members thereof—understandably worried.

As will be discussed in more detail below, none of the possible exemptions mentioned in the Commentary to Rule 3.6 is likely to apply to the Boy Scouts.<sup>33</sup> Although the group adheres to and expresses certain moral beliefs, it is not a religious organization, and it is most likely too large and public to be deemed "an *intimate*, purely private organization whose membership limitations could not constitutionally be prohibited."<sup>34</sup> Finally, "whether the organization is dedicated to the preservation of religious, ethnic, or cultural values of *legitimate* common interest"—which, like the group's intimacy, is only a "factor" in Rule 3.6's application<sup>35</sup>—is simply too vague and uncertain a standard to provide adequate guidance (much less protection) to judges affiliated with the Boy Scouts.<sup>36</sup>

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31. See, e.g., *Barnes-Wallace v. City of San Diego*, 471 F.3d 1038, 1040–41 (9th Cir. 2006) (free exercise challenge to City's leasing of public lands to the Boy Scouts, currently on certification to the California Supreme Court); *Boy Scouts of Am. v. Wyman*, 213 F. Supp. 2d 159, 170 (D. Conn. 2002) (upholding the Boy Scouts' exclusion from participation in a state workplace charitable campaign); *Evans v. City of Berkeley*, 129 P.3d 394, 407–08 (Cal. 2006) (holding that the revocation of a scouting group's free marina berthing privilege (a privilege enjoyed by many other groups) in response to the group's refusal to disavow the Boy Scouts' policies on the admission of homosexuals and atheists did not violate the group's constitutional rights).

32. Letter from David K. Park, Nat'l Legal Counsel, Boy Scouts of America, to Mark I. Harrison, Chair, Joint Comm'n to Evaluate the Model Code of Judicial Conduct (Oct. 11, 2004) (on file with the Ave Maria Law Review).

33. See *infra* Part V: Counter-Argument 4.

34. MODEL CODE OF JUDICIAL CONDUCT R. 3.6 cmt. 2 (2007) (emphasis added). The Commentary seems to be referring to the doctrine of freedom of intimate association, which protects "highly personal relationships" such as marriage and childrearing. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618–620 (1984). Generally, only relationships "distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship" fall within the protection of this doctrine. *Id.* at 620.

35. MODEL CODE OF JUDICIAL CONDUCT R. 3.6 cmt. 2 (2007) (emphasis added).

36. See *infra* Part V: Counter-Argument 4.

## II. FREEDOM OF ASSOCIATION

### A. Generally

Rule 3.6's restriction on the types of associations to which judges may belong raises important constitutional questions. American courts have long recognized freedom of association to be among the rights guaranteed by the First Amendment.<sup>37</sup> Although the concept dates at least as far back as the Constitution itself,<sup>38</sup> it was first explicitly recognized by the United States Supreme Court in the 1958 case of *NAACP v. Alabama ex rel. Patterson*,<sup>39</sup> in which the Court held that the State of Alabama could not constitutionally order the NAACP to produce the names and addresses of all its members and agents in the state.<sup>40</sup> The production order, the Court ruled, "must be regarded as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association."<sup>41</sup> Discussing the nature of this right, the Court explained that it is an essential element of liberty:

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. It 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.<sup>42</sup>

In later opinions, the Supreme Court distinguished between the "freedom of intimate association" and the "freedom of expressive association": the former protects "the formation and preservation of

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37. Whether these cases were correctly decided as original matters is outside the scope of this Note. It is beyond dispute, however, that Americans have long acknowledged the importance of the freedom to form associations with like-minded people. Indeed, Tocqueville wrote in 1835 that "[t]he right of association was imported from England, and it has always existed in America; the exercise of this privilege is now incorporated with the manners and customs of the people." DE TOCQUEVILLE, *supra* note 1, at 194.

38. *Id.*

39. 357 U.S. 449 (1958).

40. *Id.* at 466.

41. *Id.* at 462.

42. *Id.* at 460 (citations omitted).

certain kinds of highly personal relationships,” while the latter—with which this Note is concerned—is an aspect of First Amendment liberties.<sup>43</sup> Describing the freedom of expressive association, the Court has explained that “[a]n individual’s freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.”<sup>44</sup>

In addition to its role in facilitating the exercise of other First Amendment rights, association “is itself an important form of speech.”<sup>45</sup> Numerous precedents, the Supreme Court has noted, “establish that the right of association is a basic constitutional freedom that is closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society.”<sup>46</sup> The right of free association “is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas.”<sup>47</sup>

In *Roberts v. United States Jaycees*,<sup>48</sup> after describing the right of free association in detail, the Court held that a state law requiring the Jaycees to admit women as full members did not violate the group’s association rights.<sup>49</sup> Given that the Jaycees had already allowed women to participate in various ways, the Court found “no basis in the record for concluding that admission of women as full voting members will impede the organization’s ability . . . to disseminate its preferred views.”<sup>50</sup> In other words, requiring the Jaycees to admit women would not force the organization to substantially change its message or “impose[] any serious burdens on the male members’ freedom of expressive association.”<sup>51</sup>

In the 2000 case of *Boy Scouts of America v. Dale*,<sup>52</sup> however, the Court made it clear that anti-discrimination laws do not enjoy a

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43. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–18 (1984).

44. *Id.* at 622. *See also* *Baird v. State Bar of Ariz.*, 401 U.S. 1, 5 (1971).

45. *White II*, 416 F.3d 738, 754 (8th Cir. 2005) (en banc).

46. *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (internal quotation marks omitted).

47. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647–48 (2000).

48. 468 U.S. 609 (1984).

49. *Id.* at 628–29.

50. *Id.* at 627.

51. *Id.* at 626.

52. 530 U.S. 640 (2000).



blanket exemption from the First Amendment.<sup>53</sup> There, the Court held that application of a state law to compel the Boy Scouts to retain an avowed homosexual as a scoutmaster violated the organization's right of expressive association.<sup>54</sup> Looking at the broad range of the Boy Scouts' activities, the Court noted that the organization engaged in expressive activity, including advocacy (both verbal and exemplary) of particular moral values.<sup>55</sup> The Boy Scouts asserted that homosexual conduct was incompatible with those values and that it did "not want to promote homosexual conduct as a legitimate form of behavior" by employing leaders who openly engage in and advocate such conduct.<sup>56</sup>

The Court wrote that it must "give deference to an association's assertions regarding the nature of its expression" and to its "view of what would impair its expression."<sup>57</sup> Thus, in light of the respondent's highly visible involvement in homosexual activism,<sup>58</sup> the Court noted that Dale's "presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."<sup>59</sup> Applying "traditional First Amendment analysis" (rather than the "intermediate standard of review" urged by respondent), the Court held that "[t]he state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association."<sup>60</sup> Responding to the dissent's observation that public perceptions of homosexuality had undergone change, the Court noted that "the fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view."<sup>61</sup>

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53. *Id.* at 644.

54. *Id.*

55. *Id.* at 649–50.

56. *Id.* at 651 (quoting Reply Brief for Petitioners at 5, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699)).

57. *Id.* at 653.

58. In college, Dale served as co-president of the Rutgers University Lesbian/Gay Alliance and was interviewed by a newspaper concerning his advocacy of homosexual role models for teenagers. *Id.* at 645.

59. *Id.* at 653.

60. *Id.* at 659.

61. *Id.* at 660.

For purposes of this Note, it is worth observing that the American Bar Association filed an amicus curiae brief in opposition to the Boy Scouts.<sup>62</sup> Although the ABA professed “a deep professional and philosophical commitment to the principle of freedom of expression,” it argued that a ruling for the Boy Scouts “would have serious and troubling consequences for efforts to combat discrimination of all kinds.”<sup>63</sup>

### B. *Government Officials and Employees*

The Supreme Court has repeatedly and emphatically held that government officials and employees are not excluded from the protections of the First Amendment.<sup>64</sup> A state may not infringe First Amendment rights by conditioning a benefit or privilege (such as public employment) on their waiver.<sup>65</sup> This principle is evident in a series of “loyalty oath” cases decided by the Warren and Burger Courts.<sup>66</sup> In *Elfbrandt v. Russell*,<sup>67</sup> for example, the Court held that a state could not constitutionally require its employees to take an oath that they had not knowingly and willfully become members of an organization dedicated to the violent overthrow of the government.<sup>68</sup> Even though such an objective is obviously illegal, the Court held that state employees could not be prohibited from such membership unless they possessed a “specific intent to further the illegal aims of the organization.”<sup>69</sup>

Likewise, in *Keyishian v. Board of Regents*,<sup>70</sup> the Court held that a state university could not, consistently with the First Amendment, require professors to swear that they were not members of the Communist Party or remove professors for “treasonable or seditious”

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62. Brief of the ABA as *Amicus Curiae* in Support of Respondent, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699).

63. *Id.* at 3, 5.

64. *See, e.g.*, *Connick v. Myers*, 461 U.S. 138, 142 (1983); *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415–16 (1979); *Cole v. Richardson*, 405 U.S. 676, 680 (1972).

65. *See Keyishian v. Bd. of Regents*, 385 U.S. 589, 606 (1967).

66. *See, e.g.*, *Communist Party of Ind. v. Whitcomb*, 414 U.S. 441, 446 (1974); *Baggett v. Bullitt*, 377 U.S. 360, 366 (1964); *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278, 288 (1961).

67. 384 U.S. 11 (1966).

68. *Id.* at 19.

69. *Id.* (internal quotation marks omitted).

70. 385 U.S. 589 (1967).

acts or utterances.<sup>71</sup> The provisions at issue, Justice Brennan's majority opinion held, "sweep overbroadly into association which may not be proscribed."<sup>72</sup> Because "no teacher can know just where the line is drawn between 'seditious' and nonseditious utterances and acts,"<sup>73</sup> professors were "bound to limit their behavior to that which is unquestionably safe."<sup>74</sup> The Court held such vagueness impermissible: "The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed."<sup>75</sup>

The reasoning employed in *Keyishian* applies to admission to a state bar as well as to government employment. In *Baird v. State Bar of Arizona*,<sup>76</sup> the Court held that the First Amendment prevented a state from denying applicants admission to the bar based on their refusal to answer whether they belonged to any organization advocating the forceful or violent overthrow of the government.<sup>77</sup> Justice Black explained that freedom of association protects individuals from persecution based on affiliation or personal beliefs:

The First Amendment's protection of association prohibits a State from excluding a person from a profession or punishing him solely because he is a member of a particular political organization or because he holds certain beliefs. . . .

. . . [A] state may not inquire about a man's views or associations solely for the purpose of withholding a right or benefit because of what he believes.<sup>78</sup>

Although these cases did not deal specifically with judges, their implications for the proposed Rule appear to be quite significant. They set out the proposition that a government may not condition public employment on the exercise of First Amendment rights, even when the exercise in question is membership in an organization dedicated to the violent overthrow of that very same government.

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71. *Id.* at 597, 604.

72. *Id.* at 608.

73. *Id.* at 599.

74. *Id.* at 609.

75. *Id.* at 604.

76. 401 U.S. 1 (1971).

77. *Id.* at 5.

78. *Id.* at 6-7.

One would think that a doctrine broad enough to protect membership in such an organization is also broad enough to protect membership in a group dedicated to instilling moral values in young men. *Elfbrandt* requires that a membership prohibition reach only those members who harbor “the specific intent to further the illegal aims of the organization.”<sup>79</sup> What this would mean in the context of Rule 3.6 is not quite certain, since the “aim” that the Rule apparently seeks to combat is the Boy Scouts’ policy on homosexual conduct—which, far from being “illegal,” is in fact constitutionally protected, as *Dale* clearly established.<sup>80</sup>

### C. Judges

#### 1. *White I*

Recent cases demonstrate that judges are not excluded from the protections of the First Amendment. The most obvious example is *Republican Party of Minnesota v. White*,<sup>81</sup> which involved a state judicial canon prohibiting candidates for judicial office (including incumbent judges) from announcing their “views on disputed legal or political issues.”<sup>82</sup> This “announce clause,” promulgated by the Minnesota Supreme Court, was based on Canon 7(B) of the 1972 ABA Model Code of Judicial Conduct.<sup>83</sup> After examining the text of the clause, other clauses in Minnesota’s Judicial Code, and the limitations placed on the clause by courts, the Supreme Court found that the clause:

[P]rohibit[ed] a judicial candidate from stating his views on any specific nonfanciful legal question within the province of the court for which he is running, except in the context of discussing past decisions—and in the latter context as well, if he expresses the view that he is not bound by *stare decisis*.<sup>84</sup>

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79. *Elfbrandt v. Russell*, 384 U.S. 11, 19 (1966) (internal quotation marks omitted).

80. Perhaps courts would be more receptive to the Boy Scouts’ arguments if the organization amended its mission statement to include a belief in the violent overthrow of the U.S. government.

81. *White I*, 536 U.S. 765 (2002).

82. *Id.* at 768 (citing MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2000)).

83. *Id.*

84. *Id.* at 773.

Because the announce clause prohibited speech on the basis of its content and burdened a category of speech at the core of the First Amendment—“speech about the qualifications of candidates for public office”—the Court applied strict scrutiny.<sup>85</sup> The state accordingly asserted that the clause was narrowly tailored to serve two compelling state interests: “[P]reserving the impartiality of the state judiciary and preserving the *appearance* of the impartiality of the state judiciary.”<sup>86</sup> Because neither the parties nor the court below defined the term “impartiality,” the Court took the task upon itself. Writing for the majority, Justice Scalia discerned three possible meanings of “impartiality”: (1) “lack of bias for or against either *party* to the proceeding;” (2) “lack of preconception in favor of or against a particular *legal view*;” and (3) “openmindedness,” i.e., a judge’s willingness to “remain open to persuasion” regarding his legal views.<sup>87</sup>

Impartiality in the first sense, the Court stated, is a necessary component of due process and thus a compelling state interest.<sup>88</sup> The clause at issue, however, was “barely tailored to serve that interest *at all*, inasmuch as it does not restrict speech for or against particular *parties*, but rather speech for or against particular *issues*.”<sup>89</sup> On the other hand, the Court held that the second sort of impartiality—lack of bias for or against a particular legal view—is *not* a compelling state interest.<sup>90</sup> Every qualified jurist has at least some preconceived notions about most legal issues. Proof that a judge’s mind “was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.”<sup>91</sup>

The Court then turned to the definition of impartiality in the sense of openmindedness: “This quality in a judge demands, not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case.”<sup>92</sup> The Court did

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85. *Id.* at 774 (citing *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 861, 863 (8th Cir. 2001)). The parties did not dispute the application of the strict scrutiny standard. *Id.* at 774.

86. *Id.* at 775 (emphasis added).

87. *Id.* at 775, 777, 778.

88. *Id.* at 776.

89. *Id.*

90. *Id.* at 777.

91. *Id.* at 778 (quoting *Laird v. Tatum*, 409 U.S. 824, 835 (1972) (mem.)).

92. *Id.*

not determine whether such openmindedness could constitute a compelling state interest, since it found the announce clause “woefully underinclusive” with respect to this interest,<sup>93</sup> observing that “statements in election campaigns are such an infinitesimal portion of the public commitments to legal positions that judges (or judges-to-be) undertake, that this object of the prohibition is implausible.”<sup>94</sup> Judges often will have stated their legal views in books, in speeches, in classes they have taught, and (of course) in their previous opinions.<sup>95</sup> By prohibiting only statements made in the course of a judicial campaign while permitting other statements equally corrosive of openmindedness (and the appearance thereof), Minnesota failed to tailor its laws narrowly to the state interest asserted.<sup>96</sup>

Given “the immense power” that state judges have to shape the law, the Court observed, the public has a strong interest in ascertaining judges’ legal philosophies.<sup>97</sup> Moreover, the Court found no universal or long-established tradition of restricting the speech of judicial candidates.<sup>98</sup> Because Minnesota failed to carry its burden to establish that the announce clause had been narrowly tailored to serve a compelling state interest, the Court held that the clause violated the First Amendment and remanded the case.<sup>99</sup>

## 2. *White II*

On remand, the Eighth Circuit addressed the constitutionality of the “partisan-activities” and “solicitation” clauses of the Minnesota Canons of Judicial Conduct. After a divided panel upheld the clauses, the Eighth Circuit agreed to review the case en banc.<sup>100</sup> Most important for purposes of this Note is the court’s examination of the partisan-activities clause, which forbade judges and candidates for

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93. *Id.* at 778–80.

94. *Id.* at 779.

95. *Id.*

96. *Id.* at 781.

97. *Id.* at 784.

98. *Id.* at 785–86.

99. *Id.* at 781, 788.

100. *White II*, 416 F.3d 738 (8th Cir. 2005) (en banc).

judicial election to, *inter alia*, “attend political gatherings” or “seek, accept or use endorsements from a political organization.”<sup>101</sup>

Applying the framework provided by the Supreme Court in *White I*, the Eighth Circuit held that the partisan-activities clause (as well as the solicitations clause) violated the First Amendment.<sup>102</sup> Because the clause infringed upon political speech—“speech at the core of the First Amendment”—the court applied strict scrutiny.<sup>103</sup> As in *White I*, the state asserted judicial impartiality as its compelling interest.<sup>104</sup> And, just as before, the court held that, although lack of bias for or against a particular party is a compelling interest, the partisan-activities clause was “barely tailored” to serve that interest.<sup>105</sup>

“In one sense,” the court observed, “the underlying rationale for the partisan-activities clause—that *associating with a particular group* will destroy a judge’s impartiality—differs only in form from that which purportedly supports the announce clause—that *expressing one’s self on particular issues* will destroy a judge’s impartiality.”<sup>106</sup> The court also noted that “recusal is the least restrictive means of accomplishing the state’s interest in impartiality articulated as a lack of bias for or against the parties to the case.”<sup>107</sup>

Turning to the next definition of impartiality, that of openmindedness, the court found that the clause’s underinclusiveness belied its purported purpose and betrayed the state’s claim of a

101. The relevant portion of the provision read:

Except as authorized in Section 5B(1), a judge or a candidate for election to judicial office shall not:

(a) act as a leader or hold any office in a political organization; identify themselves as members of a political organization, except as necessary to vote in an election.

....

(c) make speeches on behalf of a political organization;

(d) attend political gatherings; or seek, accept or use endorsements from a political organization . . . .

MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(1) (2006). Canon 5(B)(1) provides: “A judge or a candidate for election to judicial office may, except as prohibited by law, (a) speak to gatherings, other than political organization gatherings, on his or her own behalf . . . .” *Id.* A “political organization” is defined as “an association of individuals under whose name a candidate files for partisan office.” *Id.* Canon 5(D).

102. *White II*, 416 F.3d at 744.

103. *Id.* at 749.

104. *Id.* at 752 n.7.

105. *Id.* at 754 (quoting *White I*, 536 U.S. 765, 776 (2002)).

106. *Id.*

107. *Id.* at 755.

compelling interest.<sup>108</sup> This underinclusiveness took two forms. First, the clause prohibited a judicial candidate from associating with political parties only during a campaign; thus, a candidate could be a life-long, active, dyed-in-the-wool party stalwart so long as he ceased his partisan activities the day before he declared his candidacy.<sup>109</sup> “The few months a candidate is ostensibly purged of his association with a political party,” the court noted, “can hardly be expected to suddenly open the mind of a candidate who has engaged in years of prior political activity.”<sup>110</sup> Second, the law was underinclusive in that it prohibited judicial candidates from associating with political *parties*, but not with other political organizations, no matter how ideological.<sup>111</sup> If Minnesota feared that a candidate’s association with the Democratic or Republican Party would compromise his impartiality as a judge, the court reasoned, then it should have been at least as worried about the candidate’s membership in NARAL or the National Right to Life Committee.<sup>112</sup> Yet the provision placed no restriction on a judicial candidate’s affiliation with such interest groups.

The partisan-activities clause thus could not be justified as narrowly tailored to support the state’s interest in judicial impartiality (in either sense) when it permitted “appreciable damage” to that supposedly vital interest.<sup>113</sup> Concluding that “Minnesota has simply not met its heavy burden of showing that association with a political party is so much greater a threat than similar association with interest groups,”<sup>114</sup> the Eighth Circuit declared the clause unconstitutional.<sup>115</sup>

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108. *Id.* at 757–60.

109. *Id.* at 758.

110. *Id.*

111. *Id.* at 759–60.

112. *See id.* at 759 (“[I]f mere association with an organization whose purpose is to advance political and social goals gives Minnesota sufficient grounds to restrict judicial candidates’ activities, it makes little sense for the state to restrict such activity only with political parties.”).

113. *Id.* at 760.

114. *Id.* at 761–62.

115. *Id.* at 766.



### III. CONSTITUTIONAL ANALYSIS OF RULE 3.6

Having outlined the most relevant cases bearing on the right to free association, this Note will now apply the principles articulated therein to Rule 3.6.

#### A. *Burden on First Amendment Rights*

Before addressing the First Amendment inquiry, a preliminary question must be considered: whether Rule 3.6 would burden judges' freedom of association.<sup>116</sup> It is plain that it would. It is difficult to imagine a more clear-cut example of an abridgement of the freedom of association than a law prohibiting a person from belonging to particular organizations.<sup>117</sup> Even the *Roberts* Court agreed that Minnesota's sex-discrimination law infringed upon the Jaycees's right of association by interfering with its internal organization, although it found the infringement to be justified by a compelling state interest.<sup>118</sup>

#### B. *Standard of Scrutiny*

Because of this effect on First Amendment rights, Rule 3.6 would be subject to strict scrutiny: "It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny."<sup>119</sup> Rule 3.6 places a content-based restriction on First Amendment rights—it prohibits membership in certain groups based solely on their membership policies, which necessarily reflect the groups' views<sup>120</sup>—and content-based restrictions on expression are

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116. *See id.* at 748–49.

117. *Cf. Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) ("There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire.").

118. *Id.*

119. *Elrod v. Burns*, 427 U.S. 347, 362 (1976). *See also NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460–61 (1958) ("[S]tate action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.").

120. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000).

subject to strict scrutiny.<sup>121</sup> Even the dissenting judges in *White II* applied strict scrutiny review to similar restrictions on association.<sup>122</sup>

For the Rule to survive strict scrutiny, the government has the burden<sup>123</sup> of proving that the Rule is narrowly tailored to serve a compelling state interest.<sup>124</sup> To be narrowly tailored, the law must neither “unnecessarily circumscribe[] protected expression”<sup>125</sup> nor permit substantial damage to the asserted compelling interest.<sup>126</sup> More simply, the question is “whether the state’s purported interest is important enough to justify the restriction it has placed on the speech in question in pursuit of that interest.”<sup>127</sup> Only in rare cases is the answer “yes.”<sup>128</sup>

### C. *Compelling State Interest*

Since Rule 3.6 has not yet been adopted by any jurisdiction, there is no “state” to argue a compelling state interest. But the ABA’s justification for the Rule is essentially the same as that offered by Minnesota in the *White* cases: impartiality. The words of the official comment to the Rule explain this concern:

A judge’s public manifestation of approval of invidious discrimination on any basis gives rise to the appearance of impropriety and diminishes public confidence in the integrity and *impartiality* of the judiciary. A judge’s membership in an organization that practices invidious discrimination creates the perception that the judge’s *impartiality* is impaired.<sup>129</sup>

Under the *White* cases, only two types of judicial impartiality can qualify as compelling state interests: (1) lack of bias for or against

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121. See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (“Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.”).

122. See *White II*, 416 F.3d 738, 767 (8th Cir. 2005) (en banc) (Gibson, J., dissenting). The parties had previously agreed before the Supreme Court that strict scrutiny applied. *White I*, 536 U.S. 765, 774–75 (2002).

123. *White II*, 416 F.3d at 749.

124. *Id.*

125. *White I*, 536 U.S. at 775 (quoting *Brown v. Hartlage*, 456 U.S. 45, 54 (1982)).

126. *White II*, 416 F.3d at 751.

127. *Id.* at 750.

128. *Id.* at 749.

129. MODEL CODE OF JUDICIAL CONDUCT R. 3.6 cmt. 1 (2007) (emphasis added).

particular parties and (2) “openmindedness.”<sup>130</sup> Following the lead of the Supreme Court and the Eighth Circuit, this Note addresses each type of impartiality in turn.

#### D. *Narrow Tailoring*

##### 1. *Impartiality as Lack of Party Bias*

One might argue that Rule 3.6 serves a compelling state interest in ensuring that judges are not biased against those who are excluded from private organizations to which the judges belong. Inasmuch as these persons are potential litigants, this interest would indeed be compelling under the *White* cases.<sup>131</sup> The question is therefore whether Rule 3.6 is narrowly tailored to serve this interest. In the words of the *White II* court:

A narrowly tailored regulation is one that actually advances the state’s interest (is necessary), does not sweep too broadly (is not overinclusive), does not leave significant influences bearing on the interest unregulated (is not underinclusive), and could be replaced by no other regulation that could advance the interest as well with less infringement of speech (is the least-restrictive alternative).<sup>132</sup>

If the object of Rule 3.6 is to ensure that judges are not biased against particular parties who may appear before them, then its language sweeps both too broadly and too narrowly. It is overinclusive in that it excludes from the bench anyone who is affiliated with a blacklisted group, regardless of his actual views and temperament. But the fact that a judge belongs to an organization that considers homosexual conduct to be immoral does not mean that he will be biased against homosexual litigants—any more than a judge’s membership in People for the Ethical Treatment of Animals means that he will harbor a bias against meat-eating litigants.<sup>133</sup>

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130. *White I*, 536 U.S. at 775–80.

131. *See id.* at 775–77.

132. *White II*, 416 F.3d at 751 (quoting *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989)).

133. “PETA operates under the simple principle that animals are not ours to eat, wear, experiment on, or use for entertainment.” PETA’s History: Compassion in Action, <http://www.peta.org/factsheet/files/FactsheetDisplay.asp?ID=107> (last visited Mar. 30, 2007).

First, a judge who belongs to the Boy Scouts may not even subscribe to the group's stance on homosexual conduct.<sup>134</sup> Even if he does, it does not follow that he will hold a bias against litigants who engage in such conduct; surely most judges are capable of distinguishing between a person and his behavior, and of treating a litigant with respect even if they find his private conduct objectionable. Indeed, in most cases, a judge presumably will have no reason even to know about the sexual proclivities or conduct of the parties before him.

Nor is the Rule's broad sweep necessary to ensure the *appearance* of impartiality. No reasonable litigant would assume that a judge could not impartially apply the law simply because he happened to be a scoutmaster. Indeed, it would seem that few litigants would even *know* whether a judge is affiliated with the Boy Scouts. (After all, how many individuals keep track of judges' organizational affiliations?) In any event, many competent and fair judges have been members of the Boy Scouts.<sup>135</sup> Rule 3.6 sweeps much more broadly than is necessary to secure the government's interest in impartial judges.

The Rule is also *underinclusive* with respect to that interest since the Rule goes only so far as to prohibit judges from belonging to organizations that practice "invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation."<sup>136</sup> It does not prohibit membership in groups that

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134. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655–56 (2000).

135. Supreme Court Justice Stephen Breyer, for example, was a Scout as a youth. TIMOTHY L. HALL, *SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY* 429 (2001). Interestingly, Justice Breyer not only took part in the *Dale* case but also voted against the Boy Scouts' claim, joining Justice Stevens's dissent. *Dale*, 530 U.S. at 663–702 (Stevens, J., dissenting). Evidently, he did not believe that his affiliation with the group impaired his ability to decide the case. Yet Rule 3.6 would likely prohibit those affiliated with the Boy Scouts from deciding any cases at all. A list of Eagle Scouts alone would include former Justice Tom C. Clark, who authored the famous *Abington* opinion invalidating Bible readings in public schools; Hon. Dale V. Sandstrom, Justice of the North Dakota Supreme Court; and Hon. I. Beverly Lake, former Chief Justice of the North Carolina Supreme Court. See Mark W. Lambert, *More Than You Imagined: Sources of History in the Records and Papers of the Federal Courts of Texas*, 75 UMKC L. REV. 81, 93 (2006); Troop 179 Virginia Beach, Virginia, Distinguished Eagle Scouts, <http://members.cox.net/scouting179/Eagle%20Distinguished.htm> (last visited Mar. 30, 2007); North Carolina Court System, Biography of Honorable I. Beverly Lake, Jr., <http://www.nccourts.org/Courts/Appellate/Supreme/Biographies/Biography.asp?Name=Lake> (last visited Mar. 30, 2007). Note that the Model Code does not apply to U.S. Supreme Court Justices. See 28 U.S.C. § 331 (2000).

136. MODEL CODE OF JUDICIAL CONDUCT R. 3.6 (2007).

discriminate on other bases, such as disability, wealth, veteran status, ideology, intelligence, or physical attractiveness. If a judge's membership in an exclusionary organization entails bias toward those excluded, then judges should also be prohibited from membership in, for example, Mensa—a group that excludes the unintelligent (who, after all, are litigants too).<sup>137</sup>

Furthermore, as the discussion of overinclusiveness indicates, Rule 3.6 is not the least restrictive means of promoting the state's interest in judicial impartiality. As the *White II* court pointed out, *recusal* is a much less restrictive way of serving this interest.<sup>138</sup> The Model Judicial Code has long provided for recusal in cases where a judge's impartiality may be compromised.<sup>139</sup> Recusal serves the state's interests in cases where a judge's membership in a certain organization (whether "invidiously discriminatory" or not) might affect his ability to decide the case impartially—without excluding a broad category of judges from the bench altogether.

Thus, Rule 3.6, like the similar provisions invalidated in the *White* cases, is not narrowly tailored to serve impartiality (or the appearance thereof) in the sense of lack of party bias. Given the lack of congruence between this purpose and the scope of the Rule's prohibitions, one might even say it is "barely tailored to serve that interest *at all*."<sup>140</sup>

## 2. *Impartiality as "Openmindedness"*

In *White I*, the Supreme Court discerned another possible definition of impartiality, one it referred to as "openmindedness."<sup>141</sup> This definition requires that a judge "be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case."<sup>142</sup> The Court left open the question whether impartiality in this sense constituted a compelling interest,<sup>143</sup>

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137. See Mensa Information, <http://www.mensa.org/index0.php?page=10> (last visited Mar. 30, 2007) ("Membership in Mensa is open to persons who have attained a score within the upper two percent of the general population on an approved intelligence test that has been properly administered and supervised.")

138. *White II*, 416 F.3d 738, 755 (8th Cir. 2005) (en banc).

139. MODEL CODE OF JUDICIAL CONDUCT R. 2.11 (2007).

140. *White I*, 536 U.S. 765, 776 (2002).

141. *Id.* at 778.

142. *Id.*

143. *Id.*

since it determined that, with respect to Minnesota's interest in judicial openmindedness, the announce clause was "so woefully underinclusive as to render belief in that purpose a challenge to the credulous."<sup>144</sup> Likewise, the *White II* court held that the underinclusiveness of the partisan-activities clause both cast doubt on the genuineness of Minnesota's purported purpose and undermined the state's contention that that purpose was compelling.<sup>145</sup>

The case is similar with Rule 3.6. If the purpose of the Rule is to ensure judicial openmindedness, then it, too, is "woefully underinclusive."<sup>146</sup> The Rule does not prohibit judges from engaging in activities that are much more likely to cloud their objectivity than membership in an organization like the Boy Scouts. For example, the provision does not prohibit judges from belonging to political or ideological advocacy groups so long as they do not practice "invidious discrimination" on any of the seven bases listed in the Rule.<sup>147</sup> But membership in such groups can be at least as destructive of openmindedness as affiliation with the Boy Scouts. For instance, a judge's affiliation with the American Civil Liberties Union, which takes positions on all sorts of controversial legal and political issues,<sup>148</sup> could just as easily affect his ability to "remain open to persuasion"<sup>149</sup> with respect to those issues when they arise in a case. But many prominent judges,<sup>150</sup> including Supreme Court Justice Ruth Bader Ginsburg and former Justice Felix Frankfurter,<sup>151</sup> have (or had) maintained affiliations with the ACLU and similar groups, which appears to be perfectly permissible under the Model Code.

The Rule is also underinclusive in its one-sidedness. For, although the provision will very likely be construed to prohibit

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144. *Id.* at 780.

145. *White II*, 416 F.3d 738, 756 (8th Cir. 2005) (en banc).

146. *White I*, 536 U.S. at 780.

147. MODEL CODE OF JUDICIAL CONDUCT R. 3.6 (2007).

148. See generally DIANE GAREY, DEFENDING EVERYBODY: A HISTORY OF THE AMERICAN CIVIL LIBERTIES UNION (1998) (providing a lengthy analysis of the types of issues the ACLU has litigated).

149. *White I*, 536 U.S. at 778.

150. For example, Judge Stephen Reinhardt of the Ninth Circuit Court of Appeals is married to Ramona Ripston, the executive director of the American Civil Liberties Union of Southern California. See Lorraine Wang, *The Right Thing*, POMONA COLL. MAGAZINE, Winter 2004, at 28, 31.

151. See Franklyn S. Haiman, *The ACLU as Guardian of Liberty*, 1 REV. OF COMM'N 26, 28, 31 (2001).

membership in organizations that oppose homosexual conduct, it surely will not be construed to prohibit membership in organizations that defend or promote such conduct, for example, Human Rights Campaign (“HRC”),<sup>152</sup> thus establishing a double standard based on the content of an organization’s beliefs. Consider a case involving a constitutional challenge to a state law defining marriage as the union of a man and a woman.<sup>153</sup> If the judge is a member of the Boy Scouts (or another organization that expresses objections to homosexual conduct), then he will perhaps be somewhat more likely to sympathize with the government’s defense of the law’s constitutionality. But it is just as likely, if not more so, that he will have sympathies in the opposite direction if he is affiliated with HRC, the ACLU, or any other organization that views homosexual and heterosexual conduct as morally equivalent (and fights to have that view reflected in the law). Indeed, in this situation, the judge would probably be more likely to have trouble remaining open to “views that oppose his preconceptions,”<sup>154</sup> insofar as political and legal advocacy is much more central to the missions of HRC and the ACLU than it is to a group like the Boy Scouts, which focuses on the individual character development of boys.<sup>155</sup>

If the ABA is concerned that judges’ membership in the Boy Scouts will compromise their impartiality, it should be at least as worried about their involvement in a group whose *raison d’être* is advocacy of controversial political and legal positions.<sup>156</sup> Thus, far from promoting judicial impartiality, which is the Rule’s articulated purpose,<sup>157</sup> Rule 3.6 would do much to destroy it, by ensuring that only those affiliated with certain moral beliefs will sit on the bench. As a means of serving a state’s interest in judicial openmindedness, the Rule is far from narrowly tailored.

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152. Like the Boy Scouts, Human Rights Campaign (“HRC”) excludes certain individuals (as is its right). It would never choose a Biblical literalist, for example, as one of its leaders, since Biblical literalism is incompatible with the views HRC chooses to express, and no one is capable of subscribing to both sets of views simultaneously. Yet, in spite of such discrimination on the basis of religion, there appear to be no efforts to bar all HRC members from the judiciary. See Human Rights Campaign, <http://www.hrc.org>.

153. See, e.g., *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003).

154. *White I*, 536 U.S. at 778.

155. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 649 (2000).

156. See *White II*, 416 F.3d 738, 759 (8th Cir. 2005) (en banc).

157. See MODEL CODE OF JUDICIAL CONDUCT R. 3.6 cmt. 1 (2007).

### E. *Vagueness*

Like overinclusiveness and underinclusiveness, vagueness can doom a law's chances of surviving First Amendment scrutiny. As the Supreme Court explained in *Keyishian v. Board of Regents*,<sup>158</sup> "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. . . . When one must guess what conduct or utterance may lose him his position, one necessarily will steer far wider of the unlawful zone. . . ."<sup>159</sup> When a law is vague in its restrictions on association, Justice Brennan noted, "those covered by the statute are bound to limit their behavior to that which is unquestionably safe."<sup>160</sup>

As indicated above, Rule 3.6 prohibits judges from belonging to a group that practices "invidious discrimination," which, "generally," means any group that "arbitrarily excludes . . . persons who would otherwise be eligible for admission," although the answer depends on such factors as "whether the organization is dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members."<sup>161</sup> None of these terms—"invidious," "generally," "arbitrary," "legitimate"—is very precise even when standing alone; put together, they constitute an exceedingly subjective standard. Even judges who have been dealing with such terms for decades often disagree vehemently on their meanings. A judge belonging to a group like the Boy Scouts will have to guess as to how a board of judicial conduct will interpret those nebulous terms.<sup>162</sup> And, given the stakes involved, many judges will

158. 385 U.S. 589 (1967).

159. *Id.* at 604 (internal quotations marks omitted).

160. *Id.* at 609.

161. MODEL CODE OF JUDICIAL CONDUCT R. 3.6 cmt. 2 (2007).

162. Aggravating the vagueness problem is the fact that the term "sexual orientation" is itself left undefined by the Code. What exactly does this term include? Consider one lawyer's comments to the proposed Model Code:

The Terminology section does not define "sexual orientation". This category is notoriously fluid, having once meant heterosexual or homosexual, then expanded to include bisexual, now expanding to include transgender, and in principle open to further expansion to include the universe of possible sexual proclivities. . . .

. . . .

. . . What in this rule prevents its use in contexts where even the ABA's Joint Commission would presumably have qualms, such as orientation toward pederasty, pedophilia, bestiality, etc.? Such concerns cannot be cavalierly dismissed as red herrings unless something of substance in the Model Code provides a basis for such



“limit their behavior to that which is unquestionably safe”<sup>163</sup> and resign from the organization, even if it may later be determined not to fall within the prohibition of Rule 3.6. This “chilling effect” on judges’ free association rights is starkly at odds with established First Amendment principles.<sup>164</sup>

The commentary to Rule 3.6 has been amended to provide that the Rule “does not apply to national or state military service.”<sup>165</sup> Absent this provision, however, would military service fall within the sweep of the Rule’s prohibitions? Does the presence of this exception for the military imply that all other organizations with similar policies are off limits for judges?<sup>166</sup> What about groups that are not religious per se but are religiously affiliated? Many religions teach that homosexual conduct is immoral, and groups subscribing to those teachings require that their members (including their leaders) not engage in such conduct.<sup>167</sup> Does this constitute “invidious discrimination”? Should courts delve into theological arguments in order to determine whether these policies are “arbitrary” or theologically justified? Should the judiciary enter the business of deciding whether religiously affiliated groups are interpreting their own scriptures in a reasonable manner?

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dismissal. Ideas have logical consequences, and the unadorned term “sexual orientation” contains no inherent limiting principle.

Letter from Walter M. Weber, Senior Litigation Counsel, Am. Ctr. for Law and Justice, to Marcia L. Kladder, Program Dir., Ethics and Professionalism, Am. Bar Ass’n (Mar. 7, 2006), *available at* [http://www.abanet.org/judicialethics/resources/comm\\_rules\\_AmericanCenterforLawandJustice\\_030706bw.pdf](http://www.abanet.org/judicialethics/resources/comm_rules_AmericanCenterforLawandJustice_030706bw.pdf).

163. *Keyishian*, 385 U.S. at 609.

164. *See id.* at 604.

165. MODEL CODE OF JUDICIAL CONDUCT R. 3.6 cmt. 5 (2007).

166. The Reporter’s Explanation of Changes does not provide clear answers to these questions, although it states:

Like religious organizations, military organizations often engage in discrimination and sometimes engage in discrimination that would be found to be invidious in other contexts. The Commission concluded, however, that the practical difficulties involved in enforcing a ban on holding membership in military organizations, and the necessity for uniform rules across the military services, justified an interpretation that service in state and national military organizations does not violate this Rule.

REPORT TO THE ABA, *supra* note 26, Reporter’s Explanation of Changes R. 3.6[5].

167. *See, e.g.*, CATECHISM OF THE CATHOLIC CHURCH ¶ 2357 (2d ed. 1997) (stating that homosexual acts are contrary to the natural law and can never be approved).

## F. Conclusion

The foregoing discussion demonstrates the overinclusiveness, underinclusiveness, and vagueness of Rule 3.6 and the availability of less restrictive alternatives. These substantial defects disprove the notion that the Rule is narrowly tailored to serve the government's interest in judicial impartiality, whether that be defined as lack of party bias or as openmindedness. It therefore will fail to survive the strict scrutiny with which courts must review laws that impair the freedom of association.

## IV. POLICY ARGUMENTS

Even absent these constitutional infirmities, Rule 3.6 should be rejected as a matter of policy. The defects that cast doubt on its constitutionality—vagueness, overinclusiveness, underinclusiveness, etc.—also indicate its lack of wisdom. First, as indicated above, the provision is not necessary to secure the state's interest in judicial impartiality; to the extent that this interest can be secured by black-letter law, the Model Code already contains adequate provisions, including the recusal option.<sup>168</sup> Second, the Rule would exclude many competent and fair jurists from the bench. In addition to working a great injustice upon these jurists, such exclusion would be ill-advised in the present era of overflowing court dockets. Third, the Rule's vagueness would discourage judges from participating in community groups like the Boy Scouts for fear of ending up on the wrong side of a very blurry line.<sup>169</sup> Finally, far from bolstering judicial impartiality, the Rule would corrode it, since it would practically guarantee a judiciary biased against the type of beliefs espoused by the Boy Scouts. As one commentator put it: "If an individual judge's membership in a group raises questions about his impartiality, what is forgivably concluded from an institutional *prohibition against membership*?"<sup>170</sup>

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168. MODEL CODE OF JUDICIAL CONDUCT R. 2.11 (2007).

169. See discussion *supra* Part III(A).

170. Justin Katz, *An Invidious Prohibition: Building Bias into the Judiciary*, NAT'L REV. ONLINE, Oct. 4, 2004, <http://www.nationalreview.com/comment/katz200410040858.asp>.

## V. RESPONSES TO COUNTER-ARGUMENTS

The argument outlined in this Note will naturally give rise to objections. This Part addresses some of those objections in a manner that builds upon the reasoning already developed.

**Counter-Argument 1:** *If a judge is a member of a group that practices invidious discrimination, people will lack confidence in his ability to decide cases impartially.*<sup>171</sup>

Few people know of judges' private group affiliations, and few would deem a judge's impartiality to be compromised simply because he belonged to a group like the Boy Scouts. Certainly, there are many who oppose the Boy Scouts' position on homosexual conduct, but almost every association has policies to which some object, often vehemently. The fact that a judge belongs to a group having policies with which a litigant disagrees does not mean that the judge will not be able to treat the litigant fairly and impartially.

If an inference of bias can be drawn from a judge's membership in the Boy Scouts, then such an inference can also be drawn from a judge's membership in, say, the ACLU, which also has policies to which many strongly object.<sup>172</sup> And certainly just as strong an inference of bias can be made from a judge's membership in the Communist Party, which has both highly controversial views and discriminatory membership policies.<sup>173</sup> But the Supreme Court has held that the First Amendment protects the right of a public official to be a member of that party.<sup>174</sup> Surely members of the Boy Scouts deserve the same right.

In any event, judicial impartiality is corroded, not bolstered, when people who hold particular beliefs are excluded from the bench; such

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171. See MODEL CODE OF JUDICIAL CONDUCT R. 3.6 cmt. 1 (2007).

172. For example, the ACLU has represented the North American Man/Boy Love Association ("NAMBLA"), a group that advocates pedophilia. See Onell R. Soto, *FBI Targets Pedophilia Advocates*, SAN DIEGO UNION-TRIBUNE, Feb. 17, 2005, at A1, available at [http://www.signonsandiego.com/uniontrib/20050218/news\\_1n18manboy.html](http://www.signonsandiego.com/uniontrib/20050218/news_1n18manboy.html).

173. The Communist Party discriminates, for example, on the bases of ideology, religion, and occupation. The Party would surely not give a leadership position to an avowed capitalist, or a passionate Christian, or the CEO of an oil corporation, since to do so would undermine its advocacy of socialism and atheism and its opposition to corporate power. Yet it is for precisely this reason—its refusal to give leadership positions to those who act openly in opposition to the beliefs it chooses to express—that the Boy Scouts is under attack.

174. See, e.g., *Elfbrandt v. Russell*, 384 U.S. 11 (1966).

exclusion virtually guarantees that the judiciary will be biased against those beliefs.

**Counter-Argument 2:** *“A judge’s public manifestation of approval of invidious discrimination on any basis . . . diminishes public confidence in the integrity and impartiality of the judiciary.”*<sup>175</sup>

Public confidence in the judiciary certainly has suffered in recent years,<sup>176</sup> but this is hardly due to judges’ membership in groups like the Boy Scouts. On the contrary, public confidence in the judiciary has decreased in large part because of the perception that judges have departed from their constitutionally prescribed role and have become beholden to certain ideologies.<sup>177</sup> Mandating a litmus test for judges with respect to homosexuality would damage, not nurture, the perception that judges apply the law impartially and without respect to ideology. As Justice Scalia argued in his dissent in *Lawrence v. Texas*,<sup>178</sup> the judiciary is already out of touch with the public on many matters of social policy.<sup>179</sup> The new Rule can only deepen that divide and increase public distrust.

**Counter-Argument 3:** *Doesn’t the argument against the inclusion of the phrase “sexual orientation” in the Rule apply equally to the existing Section 2C, which forbids judges to “hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin”?*

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175. MODEL CODE OF JUDICIAL CONDUCT R. 3.6 cmt. 1 (2007).

176. Fifty-six percent of respondents to a 2005 ABA-commissioned survey agreed with the following statement: “Judicial activism . . . seems to have reached a crisis. Judges routinely overrule the will of the people, invent new rights and ignore traditional morality.” Martha Neil, *ABA Activism Survey Alarms Scholars*, MONT. LAWYER, Nov. 2005, at 20.

177. *See id.*

178. 539 U.S. 558, 586–605 (2003).

179. *Id.* at 602–04 (Scalia, J., dissenting). The distinction between judicial and public opinion on homosexuality serves as ample support for Justice Scalia’s observations. Recent decisions involving this subject include *Lawrence*, 539 U.S. at 579 (declaring state sodomy law unconstitutional); *Lewis v. Harris*, 908 A.2d 196, 223 (N.J. 2006) (holding that “every statutory right and benefit conferred to heterosexual couples through civil marriage must be made available to committed same-sex couples”); and *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (holding that state constitution required redefinition of marriage). Contrast these decisions with the resounding success in the 2004 elections of state ballot initiatives reaffirming the traditional definition of marriage, even in states won by Democrat John Kerry. *See* Susan Campbell, *Marriage Lite’: The State of Our Unions [Civil Unions]*, HARTFORD COURANT, Feb. 22, 2007, at D1, available at <http://www.courant.com/features/lifestyle/hc-letsbecivil.artfeb22,0,6977120.story?coll=hc-headlines-life>; Susan Saulny, *Michigan Court Bars a Benefit for Same-Sex Domestic Partners*, N.Y. TIMES, Feb. 3, 2007, at A10.

Some commentators have indeed seen constitutional flaws and interpretive problems with the existing Section 2C. One Harvard professor has suggested replacing the phrase “invidious discrimination” with something more precise, replacing the membership prohibition with a disclosure requirement, or even eliminating the provision altogether, “leaving its work to be done by a combination of laws of general applicability, the law of disqualification, the electoral and appointive process, and social pressure.”<sup>180</sup> Indeed, one could argue that the difficulties and dangers inherent in policing judges’ private affiliations present more cause for concern than the remote possibility of an influx of Klansmen and neo-Nazis to the bench.

But the argument advanced in this Note does not require the wholesale invalidation of Section 2C, any more than the Supreme Court’s decision in *Dale* required the overruling of *Roberts*. The argument rests in large part on *Dale*’s holding that the First Amendment protects the Boy Scouts’ right to express its beliefs about sexual morality and to choose leaders who comport with those beliefs. The Court easily distinguished the sex-discrimination statute involved in *Roberts* as not materially interfering with the Jaycees’ right to express its beliefs.<sup>181</sup> Similarly, the Court has upheld First Amendment challenges to statutes prohibiting discrimination on the basis of race, religion, and national origin.<sup>182</sup>

It is important to note in this regard that “the status of discrimination on the basis of sexual orientation is legally different from race and gender discrimination,” which is subject to heightened scrutiny.<sup>183</sup> Presumably, courts are able to distinguish between indisputably immutable characteristics such as race and sex and the much more controversial (and vague) notion of “sexual orientation,” which necessarily relates to questions of sexual behavior and morality and therefore implicates one’s fundamental religious and moral beliefs—beliefs at the heart of the First Amendment’s protections.

**Counter-Argument 4:** *The provision does not raise the danger that membership in groups like the Boy Scouts will be proscribed, since the official comment exempts religious organizations, organizations*

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180. Kaufman, *supra* note 3, at 1294.

181. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 657–58 (2000).

182. See, e.g., *N.Y. State Club Ass’n v. City of New York*, 487 U.S. 1 (1988).

183. Kaufman, *supra* note 3, at 1309–10.

that are “dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to [their] members,” and “intimate, purely private organization[s] whose membership limitations could not constitutionally be prohibited.”<sup>184</sup>

Although the Boy Scouts adheres to and expresses certain moral beliefs, it is unlikely that membership in the group would qualify as “membership in a religious organization as a lawful exercise of the freedom of religion.”<sup>185</sup> The Boy Scouts did not rely on such a claim in *Dale*; indeed, the Supreme Court described it as simply “a private, not-for-profit organization engaged in instilling its system of values in young people.”<sup>186</sup>

Even if the Boy Scouts were to be deemed a religious organization, it is crucial to point out that the Rule’s exception for such organizations may not be as effectual in practice as it appears on paper, at least if some recent court decisions construing religious exceptions are any guide. One might assume, for example, that Catholic Charities would qualify as a religious organization. But the California Supreme Court decided otherwise in *Catholic Charities of Sacramento, Inc. v. Superior Court*,<sup>187</sup> in which it held that the organization did not fall within the religious-employer exception to a law requiring employers who provide coverage for prescription drugs also to cover prescription contraceptives.<sup>188</sup> If a church-affiliated charity may be forced to pay for its employees’ contraceptives, despite the fact that such an act is directly contrary to the church’s policy<sup>189</sup> and despite the existence of a religious exception, then judges who belong to church-affiliated organizations should not put too much faith in Rule 3.6’s proviso for religious groups.

The other two “exceptions” are really only factors to be considered in applying Rule 3.6. Moreover, the effectiveness of the “common interest” factor depends heavily on the construction given to the very subjective term “legitimate.” Whether a court deems a group like the Boy Scouts to be dedicated to “values of legitimate common interest” will likely hinge on the court’s opinion as to whether disapproval of homosexual conduct is legitimate. If the *Dale*

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184. MODEL CODE OF JUDICIAL CONDUCT R. 3.6 cmt. 2 (2007).

185. *Id.* cmt. 4.

186. *Dale*, 530 U.S. at 644.

187. *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67 (Cal. 2004).

188. *Id.* at 95 (rejecting Catholic Charities’ First Amendment claims).

189. See CATECHISM OF THE CATHOLIC CHURCH, *supra* note 167, ¶ 2370.

case is any guide, it seems likely that many judges (including four Supreme Court justices) would hold that such disapproval is *not* legitimate. Moreover, the very vagueness of the term “legitimate” would have a chilling effect on judges contemplating whether they may belong to groups like the Boy Scouts. As the Supreme Court has pointed out, such uncertainty is impermissible when it impedes the exercise of crucial First Amendment freedoms.<sup>190</sup>

Finally, the language concerning “an *intimate*, purely private organization whose membership limitations could not constitutionally be prohibited”<sup>191</sup> is almost certainly a reference to the doctrine of freedom of intimate association, which protects “highly personal relationships” such as marriage and childrearing.<sup>192</sup> Generally, only relationships “distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship” fall within the protection of this doctrine.<sup>193</sup> In *Dale*, the New Jersey Supreme Court held that the Boy Scouts was too large and public an organization to be deemed an intimate association for constitutional purposes, and the U.S. Supreme Court left that conclusion undisturbed.<sup>194</sup>

**Counter-Argument 5:** *Rule 3.6 simply prohibits judges from belonging to organizations that practice invidious discrimination; it does not interfere with any organization’s beliefs.*

An organization’s membership policies are inextricably linked to its beliefs, as the Supreme Court recognized in *Dale*.<sup>195</sup> Personnel is policy, as the saying goes. Government cannot abridge an expressive association’s ability to choose its members and leaders without impairing the association’s ability to communicate its message.

An organization’s ability to support *X* and oppose *Y* is undoubtedly impaired if it is forced to admit those who denounce *X* and openly engage in *Y*. For example, PETA’s message that eating meat is morally wrong would be effectively suppressed if it were forced to employ avowed carnivores. Likewise, the ACLU’s ability to promote the strict separation of church and state would be impaired if

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190. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967).

191. MODEL CODE OF JUDICIAL CONDUCT R. 3.6 cmt. 2 (2007) (emphasis added).

192. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618–20 (1984).

193. *Id.* at 620.

194. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 646 (2000).

195. *See id.* at 653.

it were required to employ lawyers whose religion precludes that doctrine. In the same way, forcing the Boy Scouts to employ an open and outspoken homosexual “would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.”<sup>196</sup>

To deny an organization’s right to make such choices is not merely to regulate its membership policies; it is to stifle its beliefs. And to forbid someone from belonging to such an organization is to impair his ability to express those beliefs.

### CONCLUSION

The revised Rule 3.6 suffers from both constitutional and prudential weaknesses. As a means of serving the government’s interest in judicial impartiality (and the appearance thereof), the provision is overinclusive, underinclusive, unnecessary, and quite probably counterproductive. In other words, it is not narrowly tailored to serve a compelling state interest, as the courts require of laws that burden the right of free association. Furthermore, the states’ adoption of the Rule’s vague prohibition would constitute bad policy, for several reasons. It is unnecessary; it would exclude many competent and fair jurists from the bench; it would discourage judges from participating in community groups; and, most important, it would corrode judicial impartiality, since it would practically guarantee a judiciary that is institutionally hostile to the beliefs of large numbers of Americans, thus aggravating a cultural divide between the public and the bench. For all these reasons, states should reject the new Rule 3.6 and save judges from having to choose between Scouting and their judicial careers.

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196. *Id.*