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Recent Development

CANON 7 RESTRICTIONS ON THE POLITICAL SPEECH OF JUDICIAL CANDIDATES: JUDGING THOSE WHO WOULD BE JUDGES

I. INTRODUCTION

The United States Court of Appeals for the Third Circuit recently ruled on the constitutionality of Canon 7 of the Pennsylvania Code of Judicial Conduct.\footnote{See Stretton v. Disciplinary Bd., 944 F.2d 137, 144, 146 (3d Cir. 1991) (finding that Canons 7(B)(1)(c) and 7(B)(2) did not violate First Amendment to United States Constitution). For the relevant text of the challenged Canon 7 provisions, see infra note 2 and accompanying text, and note 10.} The Third Circuit narrowly construed the Code's mandate that "[a] candidate . . . for a judicial office . . . should not . . . announce his views on disputed legal or political issues"\footnote{Code of Judicial Conduct, 204 Pa. Code ch. 53, Canon 7(B)(1)(c) (1979). The quoted provision mirrors the language of Canon 7(B)(1)(c) of the American Bar Association (ABA) Code of Judicial Conduct. See CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(c) (1973). For further discussion of the ABA Code, see infra notes 12-22 and accompanying text.} and vacated an injunction granted by the United States District Court for the Eastern District of Pennsylvania which precluded disciplinary action against the plaintiff for violation of Canon 7.\footnote{Stretton, 944 F.2d at 144. For a detailed discussion of the facts, prior history and holding of Stretton, see infra notes 41-66 and accompanying text.}

In Stretton v. Disciplinary Board,\footnote{4. Stretton, 944 F.2d at 144.} the Third Circuit first analyzed the First Amendment issues presented,\footnote{5. For a discussion of the Third Circuit’s First Amendment analysis in Stretton, see infra notes 58-61, 75-89 and accompanying text.} despite its acknowledgement of the United States Supreme Court’s “elementary rule” that courts, wherever possible, should construe statutes so as to avoid a finding of unconstitutionality.\footnote{6. Stretton, 944 F.2d at 144 (quoting Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (quoting Hooper v. California, 155 U.S. 648, 657 (1895))).} The court then predicted that the Pennsylvania Supreme Court would interpret Canon 7’s prohibition of political speech as extending to “only those issues that are likely to come before the court.”\footnote{7. Id. The Stretton court was required to predict the Pennsylvania Supreme Court’s response to the issue, because “[t]he meaning and construction of the Code are matters of state law to be decided ultimately by the state Supreme Court.” Id. at 140. Before finding that the federal court should hear the case, the Third Circuit acknowledged that “[t]he divergent readings by the parties make it rather obvious that an authoritative ruling by [the state’s supreme] court would resolve or substantially narrow the area of conflict.” Id. The court then discussed Hughes v. Lipscher, 906 F.2d 961 (3d Cir. 1990), a New Jersey case}
Using this narrow formulation, the Third Circuit found that the Canon did not unduly infringe the plaintiff's First Amendment right to speak freely on political issues\(^8\) and therefore upheld it as constitutional.\(^9\)

The Third Circuit continued to explore in its opinion the permissibility of state restrictions on the political speech of judicial candidates, finding that Canon 7 could, within the limits set by the Constitution, prohibit the personal solicitation of funds for judicial campaigns.\(^10\) Therefore, the Stretton court affirmed the district court's order denying plaintiff's requested injunction against enforcement of this provision of Canon 7.\(^11\)

II. Background

A. Canon 7 of the Code of Judicial Conduct

"The Code of Judicial Conduct, the product of almost three years of work by the members and staff of the Special Committee on Standards of Judicial Conduct, was adopted by unanimous vote of the House of Delegates of the American Bar Association [ABA] on August 16, previously heard by the Third Circuit and similar to Stretton because it was also a case in which the state supreme court could have mooted or changed the federal analysis by subsequent interpretation of a state law issue. See Stretton, 944 F.2d at 140. Although abstention was appropriate in the Hughes case, "where no real harm resulted from delay," the Stretton court found that its abstention in this case would have resulted in harm to the plaintiff and other judicial candidates, who would have been left without a definitive ruling as to the topics that could be discussed within the ethical boundaries set by the Canon. Id. at 141. The Stretton court stated:

In the absence of a ruling now, some judicial candidates may be unwilling to risk disciplinary action and, instead, choose to impose unnecessarily rigid self-censorship on matters that are legitimate subjects for discussion and appraisal by the electorate. That development would constitute a harm to the public that could not be remedied by a subsequent court decree.

Id.

For further discussion of the Third Circuit's narrow reading of Canon 7(B)(1)(c), see infra notes 57-62 and accompanying text.

8. Stretton, 944 F.2d at 144. The Stretton court opined that the statute did not "unnecessarily curtail protected speech, but [did] serve a compelling state interest." Id. Therefore, the statute was not overbroad, and the plaintiff's First Amendment challenges failed. Id. For a discussion of the Stretton court's First Amendment analysis, see infra notes 58-61, 75-89 and accompanying text.

9. Stretton, 944 F.2d at 142-44.

10. Id. at 146. Canon 7(B)(2) provides, in pertinent part, that "[a] candidate . . . for a judicial office . . . should not himself solicit or accept campaign funds, or solicit publicly stated support . . . ." Code of Judicial Conduct, 204 Pa. Code ch. 33, Canon 7(B)(2) (1979). This language is identical to Canon 7(B)(2) of the ABA Code of Judicial Conduct. See Code of Judicial Conduct Canon 7(B)(2) (1973). For a discussion of the ABA Code, see infra notes 12-22 and accompanying text.

11. Stretton, 944 F.2d at 146.
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The ABA sought "to reconcile the perceived need for an elected judiciary with the general desire for a judiciary of unquestioned integrity, independence, and impartiality" when it developed this code of ethics, particularly Canon 7.15

In its preface to the Code, the ABA noted: "It is hoped that all jurisdictions will adopt this Code and establish effective disciplinary procedures for its enforcement."14 Forty-seven states have substantially adopted the 1972 Code since its promulgation, and all but eleven of these states have adopted Canon 7(B), which deals with the campaign conduct of judges and of lawyers seeking judicial office.15 Pennsylvania adopted all seven Canons of the Code of Judicial Conduct in 1973, and the Code went into effect in Pennsylvania on January 1, 1974.16

The Reporter's Notes to the Code of Judicial Conduct expanded upon the meaning and purpose of Canon 7(B)'s restrictions on the political speech of judicial candidates:

What kind of campaign may the candidate for judicial office conduct? He cannot campaign on a platform of partiality for specific persons or groups, nor can he commit himself in advance on disputed legal issues . . . . The Committee was . . . of the opinion that a candidate should not base his campaign on his view of the solutions to disputed political issues. He can campaign [only] on the basis of his ability, experience, and record.17


13. James J. Alfini & Terrence J. Brooks, Ethical Constraints on Judicial Election Campaigns: A Review and Critique of Canon 7, 77 KY. L.J. 671, 672 (1988-1989). Alfini and Brooks noted that this type of ethical restriction seeks to "control judicial behavior during a political campaign in ways that will assure 1) faithfulness to the electoral process, and 2) judicial impartiality and the appearance of impartiality." Id.


The Pennsylvania Rules of Professional Conduct require that all attorneys comply with the restrictions imposed by Canon 7 of the Code of Judicial Conduct while they are candidates for judicial office. Rules of Professional Conduct, 204 PA. CODE § 81.4, Rule 8.2(c) (1988). This provision echoes the ABA Model Rule which delineates a lawyer's duty to comply with Canon 7. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.2(b) (1983) ("A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.").


17. THODE, supra note 12, at 98. The Committee recognized that in a judi-
The Reporter's Notes also discussed the judicial candidate's need to raise campaign funds, noting that "[t]he problem of funding a campaign for judicial office probably presents the greatest of all conflicts between political necessity and judicial impartiality."\(^{18}\) The Committee chose to prohibit personal solicitation by the candidate, while permitting solicitation by others on his or her behalf, hoping that this system would insulate the candidate from the direct influence of the contributor and stave off the appearance of partiality.\(^{19}\)

The Code seeks to guard against the appearance of personal bias that detracts from the public image of the judge as one who will fairly deliver the laws, because "[p]ublic confidence in the judiciary is a central focus of the Judicial Code."\(^{20}\) One commentator has noted that "[u]nderlying the Judicial Code's restrictions on campaign speech is the view that judges should not engage in any extra-judicial activity that would call into question their independence or impartiality."\(^{21}\) Although he recognizes that public perception of bias is a valid concern, the commentator nevertheless rejects this as a rationale for restricting a candidate's speech, finding that even the goals of judicial independence and impartiality are insufficient justification for an infringement of protected rights:

The stated rationale behind the ABA restriction on speech is that it protects judicial impartiality and enhances the appearance of impartiality of judges. But there is no evidence that free and open campaign debate diminishes judicial impartiality or the appearance of impartiality. The rationale behind the rule does not withstand scrutiny and cannot justify a restriction on the exercise of activities protected by the first amendment.\(^{22}\)

\(^{18}\) Thode, supra note 12, at 98.

\(^{19}\) Id. at 99. The former Canons of Judicial Ethics had not authorized even indirect contributions by lawyers to a judicial candidate's campaign fund. Id.

\(^{20}\) The modern Code of Judicial Conduct requires that solicitation of funds be handled by a committee, places a time limit on the collection of funds, and prohibits the use of these funds for the private benefit of the candidate or the candidate's family. Code of Judicial Conduct Canon 7(B)(2) (1973).

\(^{21}\) See Lloyd B. Snyder, The Constitutionality and Consequences of Restrictions on Campaign Speech by Candidates for Judicial Office, 35 UCLA L. Rev. 207, 212 (1987); cf. Alfini & Brooks, supra note 13, at 671-72 ("Even if a judge is able to maintain his or her integrity and impartiality, will the judge's reputation still be open to question and the public's confidence in the judiciary diminished?").

\(^{22}\) Snyder, supra note 20, at 212. Snyder notes that state courts often uphold disciplinary actions taken by bar agencies against judges whose acts off the bench "reflect poorly on the judiciary. The practice even predates the Judicial Code." Id. at 213 (footnote omitted).

\(^{22}\) Id. at 210 (footnote omitted). Snyder protests that "[i]n the course of
Several courts have considered the application of Canon 7(B)(1)(c), as adapted from the ABA Code of Judicial Conduct, and have found the ABA's restrictions on the political speech of judicial candidates unconstitutional. For example, in ACLU v. Florida Bar, the United States District Court for the Northern District of Florida agreed with a judicial candidate who alleged that Canon 7(B)(1)(c) was "so overbroad and/or vague as to give no notice of the dividing line between fair comment and impermissible speech." The Florida Bar court explained that while promoting standards of conduct for members of the bar, the American Bar Association has established an unfortunate record of insensitivity to the constitutional rights of attorneys. Moreover, the ABA has displayed a similar disregard for the constitutional rights of attorneys and judges who seek elective judicial office." Id. at 207-10 (footnotes omitted). He also notes that Canon 7(B) has "a number of flaws that prevent it from having a positive impact on judicial impartiality." Id. at 229. As examples of the Canon's flaws, Snyder highlights the rule's underinclusiveness, noting its failure to similarly restrict the speech of candidates for appointive judicial office, its limited scope, as it prohibits only one type of public statement, and its failure to consider "numerous other types of public pronouncements that may have equal or greater impact on judicial impartiality." Id. at 229-30. Snyder also points to Canon 7's overbreadth as a flaw, as it restricts too large a category of political speech. Id. at 233.

Additionally, Snyder raises the interesting point that American judges have historically discussed and debated the public issues of the day. Id. at 232. He stresses that "Supreme Court Justices have a long tradition of expressing views on legal and political issues." Id. This view contradicts the "tradition" described by one Newsweek reporter, who suggested that then-Judge Clarence Thomas, nominee to the Supreme Court, should voice the "traditional view that he shouldn't prejudge controversial topics that might come before him on the high court" in order to dodge tough questions at his confirmation hearings. Arik Press with Bob Cohn, Hearing But Not Speaking, Newsweek, Sept. 16, 1991, at 18, 23. Another Newsweek reporter, however, captured the sentiments of many Americans regarding the nominee's anticipated silence on controversial issues, asserting that although the Judge might choose to reveal little, "it is the duty of a justice to take a stand on society's most vexing questions." David A. Kaplan et al., Supreme Mystery, Newsweek, Sept. 16, 1991, at 31 (emphasis added).

23. See, e.g., Beshear v. Butt, 773 F. Supp. 1229, 1233 (E.D. Ark. 1991) (finding Canon 7(B)(1)(c) vague and substantially overbroad on its face and as applied to plaintiff); ACLU v. Florida Bar, 744 F. Supp. 1094, 1098 (N.D. Fla. 1990) (finding Canon 7(B)(1)(c) was not least restrictive means of achieving state interest); J.C.J.D. v. R.J.C.R., 803 S.W.2d 953, 956 (Ky.) (finding Canon 7(B)(1)(c) insufficiently narrowly drawn, cert. denied, 112 S. Ct. 70 (1991). For a discussion of Florida Bar, see infra notes 24-27 and accompanying text. For a discussion of J.C.J.D., see infra notes 28-32 and accompanying text.


25. Id. at 1096; accord Beshear, 773 F. Supp. at 1233 ("[A] judicial candidate striving diligently to conduct a campaign that is consistent with the canon, without the benefit of any specific standards as a guide, would in all likelihood refrain from expressing . . . [even constitutionally protected] views . . .").

A statute will be struck down as overbroad when a court finds that the statute has a real and substantial "chilling" effect on the exercise of a protected right. See Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973). In Broadrick, the Court explained that the overbreadth doctrine permits constitutional challenges to statutes based on "a judicial prediction or assumption that the statute's very
“obedience to the profession’s ethical precepts may require abstention from what in other circumstances would be constitutionally protected behavior. . . . Nevertheless, a person does not surrender his constitutional right to freedom of speech when he becomes a candidate for judicial office. A state cannot require so much.” 26 The court held that the Canon’s prohibitions went too far in restricting speech, and therefore, the presumption of unconstitutionality raised by the Canon’s broad language could not be overcome. 27

In J.C.J.D. v. R.J.C.R., 28 the Kentucky Supreme Court also stressed a judicial candidate’s right to free speech. 29 This case involved a candidate who was “discussing opinions that he had authored, criticizing his opponent’s position on legal issues, and explaining to the public his judicial philosophy.” 30 Although the Kentucky court recognized that the state had a compelling interest in enforcing the Canon, it nevertheless found that the Canon’s prohibitions were overbroad:

There can be no question that the state has a compelling interest to protect and preserve the integrity and objectivity of the judicial system . . . . [J]udicial candidates [cannot] be allowed to make promises or predispositions of cases or issues

existence may cause others not before the court to refrain from constitutionally protected speech or expression.” Id. at 612. The statute at issue in Broadrick was modeled after the Hatch Act, which prohibited political solicitation by civil servants. See id. at 602, 604; Bauers v. Cornett, 865 F.2d 1517, 1522 (8th Cir. 1989). The Hatch Act, however, was subsequently amended by Congress, narrowing its restriction on the political activities of state and local employees and prohibiting civil servants only from running for elective office or using official authority to influence the election process or to coerce other employees. Bauers, 865 F.2d at 1523-24. The United States Court of Appeals for the Eighth Circuit recently interpreted the Hatch Act to apply only to political activity of a partisan nature. Id. at 1524.


27. See id. (“A court must strictly scrutinize such a regulation, requiring the state to bear the burden of showing that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”) (citing Widmar v. Vincent, 454 U.S. 263 (1981)). In Florida Bar, the court found that the Canon did “more than proscribe untruthful or deceptive announcements, or announcements concerning specific cases, or announcements which might be construed as particularized pledges of conduct,” and implied that such lesser restrictions may have fallen within the bounds set by the First Amendment. Id. at 1097-98.


29. See id. at 954-55. In J.C.J.D., the Kentucky court stated: “Freedom of speech extends to a candidate for public office, including judicial offices. ‘The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues . . . .’” Id. (quoting Buckley v. Valeo, 424 U.S. 1 (1976)).

30. Id. at 955-56. The court noted that the Canon “strictly prohibit[ed] dialogue on virtually every issue that would be of interest to the voting public.” Id. at 956.
that are likely to come before the courts that might reflect upon a judge’s impartiality.

However . . . Canon 7(B)(1)(c) is not so narrowly drawn as to limit a candidate’s speech to such specific prohibitions. Instead, the section prohibits all discussion of a judicial candidate’s views on disputed legal or political issues, and thus unnecessarily violates fundamental state and federal constitutional free speech rights of judicial candidates.\footnote{31}{Id. (citation omitted). The J.C.J.D. court also opined that the “rights of the voting public to hear what a candidate has to say” are compelling. \textit{Id.}; see also Snyder, supra note 20, at 215-16. Snyder comments that restrictions on the campaign speech of judicial candidates violates the First Amendment by substantially limiting the availability to the electorate of information about candidates for judicial office. In so doing, the rule violates a central purpose of the first amendment’s protection for speech: to assure the free flow of information about government officials to the voters who select them . . . .

In matters of governmental affairs, free speech is necessary to assure that the public’s business is being conducted properly . . . .

Freedom of speech serves a special function in a system of government in which those who govern are chosen by the electorate. Freedom to express views is necessary if the public is to make fair judgments among the candidates who seek office.

Snyder, supra note 20, at 210, 215-16 (footnotes omitted); cf. Alfini & Brooks, supra note 13, at 719 (as a result of Canon 7, “the electorate has inadequate information to judge the judges”). But cf. Robert S. Thompson, \textit{Judicial Independence, Judicial Accountability, Judicial Elections, and the California Supreme Court: Defining the Terms of the Debate}, 59 S. Cal. L. Rev. 809, 830 (1986) (“[I]mpartiality should be protected against anything which threatens it, including the pressure of an election.”).}

\footnote{32}{J.C.J.D., 803 S.W.2d at 956. The Kentucky court found that “[t]o specifically prohibit . . . campaign conduct [suggesting partiality] and avoid constitutional concerns, this Canon provision can be rewritten in a much narrower scope to outlaw discussion of pending or future litigation.” \textit{Id.} As an illustration, the court discussed a 1990 change in the ABA’s Model Code. \textit{Id.} This modification narrowed the scope of Canon 7(B)(1)(c) to restrict only “stated personal views on issues that may come before the Court,” because the Canon as originally written was an “overly broad restriction on speech.” \textit{Id.} (citing \textit{MODEL CODE OF JUDICIAL CONDUCT} (August 1990)). But see Snyder, supra note 20, at 234. Snyder maintains that even if the ABA prohibition on campaign speech were limited to statements casting doubt on the judge’s impartiality in cases likely to come before her, the rule would be improper. The arguments in favor of judicial campaign restrictions on speech are based upon logic rather than history. There is no historical evidence to support a claim that when judicial candidates have spoken out on disputed issues, their impartiality has suffered.

\textit{Id.}

The United States District Court for the Western District of Kentucky, in a case decided after J.C.J.D., considered a canon provision that prevented a judi-}
fact, a narrower reading of Canon 7(B)(1)(c) has been used by other courts to render the provision constitutional.33

Berger v. Supreme Court of Ohio34 provides an example of a narrower construction of Canon 7(B)(1)(c). In Berger, the United States District Court for the Southern District of Ohio found that the plaintiff’s interpretation of the Canon as forbidding him to criticize the incumbent, pledge judicial reform or “publicly state anything other than that he will faithfully and impartially perform the duties of the office” was incorrect.35 Despite the judicial candidate’s challenge that the uncertain scope of the rule produced a chilling effect on his freedom of speech,

33. See, e.g., Stretton v. Disciplinary Bd., 944 F.2d 137 (3d Cir. 1991) (Canon 7(B)(1)(c) construed to prohibit discussion of only those issues likely to come before court); Berger v. Supreme Court of Ohio, 598 F. Supp. 69 (S.D. Ohio 1984) (state may constitutionally prohibit announcement of “predetermined views on disputed legal or political issues” or promises of specific conduct or programs while in judicial office), aff’d without opinion, 869 F.2d 719 (6th Cir. 1988), cert. denied, 490 U.S. 1108 (1989); see also In re Kaiser, 759 P.2d 392 (Wash. 1988) (en banc) (state may prohibit pledges of specific conduct with regard to particular group of defendants). For a discussion of Stretton, see infra notes 57-66 and accompanying text. For a discussion of Berger, see infra notes 34-36 and accompanying text. For a discussion of Kaiser, see infra notes 37-40 and accompanying text.


35. Id. at 72, 75. The plaintiff in Berger also contended that the Canon’s application solely to the state’s judicial candidates, and not to candidates for legislative or executive positions, made the provision arbitrary and violative of his Fourteenth Amendment right to equal protection under the laws. Id. at 72. The United States District Court for the Southern District of Ohio rejected this challenge, stating that the plaintiff had not demonstrated a substantial likelihood that the Canon’s restriction of only judicial candidates represented a denial of his right to equal protection. Id. at 76. The court found that “[t]he very purpose of the judicial function makes inappropriate the same kind of particularized
the court found that "even under a standard of strict scrutiny, the state's regulation [was] necessary to achieve a compelling state interest."\(^{36}\)

*In re Kaiser\(^{37}\)* provides another example of a court's narrow reading of Canon 7(B)(1)(c). In this 1988 case, the Washington Supreme Court found that the Canon’s restrictions on judicial campaign promises could have met constitutional muster “if they [were] construed to permit a broad range of fair comment on judicial qualifications.”\(^{38}\) In *Kaiser*, the court opined that the judicial candidate was entitled to announce that he would be a “tough, no-nonsense judge,” as part of his qualifications, but the state could constitutionally forbid him from stating that he would be “tough” on a particular group of defendants.\(^{39}\) The court justified Canon 7(B)(1)(c)’s restriction by noting that “[t]he State’s interest in protecting the good reputation of the judiciary is compelling, as every court which considers the issue has recognized.”\(^{40}\)

### B. Stretton v. Disciplinary Board

In 1991, Pennsylvania attorney Samuel C. Stretton, a candidate for judge of the Chester County Court of Common Pleas, filed a civil rights action challenging two provisions of Canon 7 of the Pennsylvania Code of Judicial Conduct as abridging his First Amendment rights to speak out on political issues and personally to raise funds for his campaign.\(^{41}\) In *Stretton v. Disciplinary Board*,\(^{42}\) the United States District Court for the

pledges and predetermined commitments that mark campaigns for legislative and executive office. A judge acts on individual cases, not broad programs.” *Id.* at 75. The *Berger* court continued: “The Court finds that plaintiff has not demonstrated a substantial likelihood that these [compelling state] interests are outweighed by whatever intrusion on the First Amendment is caused by prohibiting judicial candidates from making misleading or fallacious statements or political pledges.” *Id.* at 76. The court used the “substantial likelihood” standard because the plaintiff was seeking preliminary injunctive relief against enforcement of the statute, and a court may not grant such relief unless a “substantial likelihood” exists that the plaintiff’s case will succeed on the merits. *See id.* at 74. As in *Berger*, the plaintiff in *Stretton* was also seeking injunctive relief. *Stretton*, 944 F.2d at 139.

37. 759 P.2d 392 (Wash. 1988) (en banc).
38. *Id.* at 400 (citing *In re Baker*, 542 P.2d 701 (Kan. 1975)).
39. *Id.* at 396. The judge's pledge to be particularly "tough" on drunk drivers revealed a bias that he intended to maintain while sitting on the bench, regardless of the facts of the individual case before him. *Id.* This bias was "exactly the opposite" of the impartiality that Canon 7(B)(1)(c) seeks to safeguard. *Id.*
40. *Id.* at 399. The *Kaiser* court found that because judges "often are called upon to adjudicate cases squarely presenting hotly contested social or political issues[,] [t]he state’s interest in ensuring that judges be and appear to be neither antagonistic nor beholden to any interest, party, or person is entitled to the greatest respect." *Id.* at 399-400 (quoting *Morial v. Judiciary Comm’n*, 565 F.2d 295, 302 (5th Cir. 1977), cert. denied, 435 U.S. 1013 (1978)).
42. *Id.*
Eastern District of Pennsylvania held that Canon 7(B)(1)(c), which prohibits judicial candidates from announcing their views on "disputed" legal or political issues, had an impermissible, "chilling" effect on the speech of the plaintiff and potentially on the speech of other judicial candidates. Furthermore, the court found that the Canon was overbroad and unconstitutionally vague. Therefore, the district court granted the plaintiff’s request for injunctive relief against the Canon’s enforcement. The court, however, found unpersuasive the plaintiff’s argument that Canon 7(B)(2)’s restriction on a judicial candidate’s ability personally to solicit funds for his or her campaign was overbroad, and therefore, the court denied plaintiff’s request for an injunction against enforcement of this provision.

Stretton’s main contention was that the Canon’s prohibition on the discussion of disputed issues in his judicial campaign rendered him “unable to participate meaningfully in the judicial election . . . and [thus,] the public [was] deprived of the means by which to evaluate the ability of competing candidates.” He wanted to address publicly certain legal and political issues, such as the party affiliations of judges, the right to privacy and his own philosophical views on criminal sentencing, the rights of victims and the “reasonable doubt” standard.

43. For the relevant text of Canon 7(B)(1)(c), see supra text accompanying note 2.
44. Stretton, 763 F. Supp. at 130-32. For a discussion of the chilling effect of overbroad legislation on speech, see supra note 25.
45. Stretton, 763 F. Supp. at 139. The district court found that Canon 7(B)(1)(c) gave no notice of what speech was prohibited by the phrase “disputed legal or political issues.” Id. The Code of Judicial Conduct allows judicial candidates “to speak at political gatherings on their own behalf ‘insofar as permitted by law,’ ” but places the burden upon the candidate to discover exactly what the law permits. Id. (quoting Code of Judicial Conduct Canon 7(A)(2) (1973)). Therefore, the court concluded that such “guesswork as to what constitutes permissible campaign speech is simply not permissible in the context of core First Amendment freedoms such as are at issue here.” Id.
46. Id. The district court permanently enjoined enforcement of Canon 7(B)(1)(c), finding that it violated the First Amendment by “den[y]ing judicial candidates the right to engage in debate of issues of great public concern.” Id.
47. Id. at 139-40. The court noted that Canon 7(B)(2) “does not restrict expenditures or contributions, nor does it set a limit on the amount or on who can contribute or receive it.” Id. at 139. Rather, the court found that “it is only the narrowest possible restriction” and stressed that “[t]here is no less restrictive method to remove a judicial candidate from direct influence by the source and the amount of campaign contributions.” Id. at 139-40.
48. Id. at 130.
49. Stretton v. Disciplinary Bd., 944 F.2d 137, 139 (3d Cir. 1991); Stretton, 763 F. Supp. at 131. The Third Circuit characterized the topics plaintiff wished to discuss as follows:
Plaintiff alleged that he wished to protest the fact that currently in the county the Common Pleas judges are all Republicans, a departure from the bipartisan tradition that prevailed until the late 1950s. In addition, he desired to “announce his views” on the following issues:
(a) the need for the election of judges with an “activist” view, and the
At the hearing on the motion for preliminary and permanent injunction, the Chief Counsel for the defendant Disciplinary Board and the Executive Director and General Counsel for the defendant Judicial Inquiry and Review Board testified for the defendants that a judicial candidate’s discussion of the topics delineated by the plaintiff would not violate the Canon as they understood it. According to the Boards, the Canon should be interpreted narrowly, prohibiting discussion of only those issues that might come before the court. The Counselors, however, admitted that their opinions would not bind any current or future Boards. Therefore, the district court opined that the Boards’ statements failed to alleviate the uncertainty facing judicial candidates or the

obligation of judges at every level of the judicial system to look at societal changes when ruling on challenges to existing law;
(b) criminal sentencing and the rights of victims of crime;
(c) “reasonable doubt” and how he would apply that standard as an elected judge;
(d) the need to more closely scrutinize the work of district judges . . . particularly in light of the removal of several such justices in recent years because of improper conduct;
(e) the need for various changes in judicial administration including the jury selection process (so that panels more accurately reflect the county’s racial composition);
(f) the need for greater sensitivity toward hiring minority lawyers and law clerks, especially by the county’s judges and district attorney;
(g) plaintiff’s qualifications and those of his opponents as well as a perceived need for a woman judge; and
(h) the importance of the right to privacy as a basic constitutional right.

Stretton, 944 F.2d at 139.

50. The two hearings were consolidated at the district court level. See Stretton, 944 F.2d at 139.

51. The Disciplinary Board for the Supreme Court of Pennsylvania and the Judicial Inquiry and Review Board are the administrative bodies responsible for enforcing the Pennsylvania Rules of Professional Conduct and the Pennsylvania Code of Judicial Conduct, respectively. Stretton, 763 F. Supp. at 130. The Chief Counsel of the Disciplinary Board, Robert H. Davis, Jr., was also named as a defendant. Id. at 130.

52. Stretton, 944 F.2d at 139.

53. Stretton, 763 F. Supp. at 132. The defendants-appellees requested a construction that “limit[ed] Canon 7’s prohibition to speech that exhibits partiality toward possible future adjudications.” Stretton, 944 F.2d at 140 (citing Appellee Brief at 38). Thus, the defendants attempted to equate the restriction of speech concerning “disputed legal or political issues” with restrictions designed both to avoid prejudging of legal and political issues and to avoid a public perception of promises to support certain policies when cases related to such policies came before the bench. Id. The Eastern District of Pennsylvania court, however, found that the defendants’ construction of the Canon’s language was inconsistent with at least one current investigation that the Disciplinary Board was conducting and stated that this narrow reading of Canon 7(B)(1)(c) was “a strained and tortuous interpretation that is not credible and not one that a judicial candidate can rely upon.” Stretton, 763 F. Supp. at 132-33. But see Stretton, 944 F.2d at 143 (Disciplinary Board’s termination of above-mentioned investigation and subsequent reiteration of narrow construction of Canon 7(B)(1)(c) dispelled inference of inconsistency).

54. Stretton, 944 F.2d at 142-43. The Boards predicted that plaintiff’s pro-
consequent chilling effect on their political speech. The district court further expounded on the lack of adequate guidelines for judicial candidates, stating that

neither . . . Board issues regulations or advisory opinions such that might give assurance to plaintiff that he will not be investigated in the future. . . . Additionally, neither . . . Board is aware of any judicial opinions, administrative guideline, standards, writings or any other authority of any kind supporting the "narrow construction" of the Canon which defendants have urged here.

The Third Circuit, however, was a more receptive audience for the defendants' narrow reading of Canon 7(B)(1)(c) than was the Eastern District of Pennsylvania. The Third Circuit applied United States Supreme Court First Amendment jurisprudence to Stretton, addressing such issues as (1) a state's interest in regulating the speech of judicial candidates, (2) the overbreadth doctrine as it applies to Canon 7(B)(1)(c), and (3) the application of the "narrowly tailored" requirement in this case. Using this First Amendment analysis, the Third Cir-

55. Stretton, 763 F. Supp. at 132; cf. Ackerson v. Kentucky Judicial Retirement & Removal Comm'n, 776 F. Supp. 309, 312 (W.D. Ky. 1991) ("[A judicial candidate] is not required to choose between limiting his campaign speech or taking his chances with [a disciplinary] Commission where . . . a real possibility exists that sanctions will be sought."). The Eastern District of Pennsylvania court noted that the plaintiff's speech had already been chilled by the Canon's vague prohibition, because he had instructed a newspaper not to print his opinion regarding the impact of a Supreme Court decision, in case his comments violated the Canon. Stretton, 763 F. Supp. at 192. The district court indicated that the Board's opinions on the plaintiff's topics would fail to cure this unconstitutional overbreadth for four reasons: 1) the plaintiff had not agreed to limit his speech to those topics the Board had considered; 2) the Board's current Counselors could not bind the Board or their successors to their current interpretation of the Canon; 3) neither Board issued regulations or advisory opinions that could assure the plaintiff that he would not be investigated for his comments in the future; and 4) neither Board could suggest any judicial opinion, administrative guideline or any other authority which supported the narrow construction of Canon 7 proposed by the Boards in Stretton. Id.

57. See Stretton, 944 F.2d at 142-44.
58. For a discussion of the Third Circuit's analysis of a state's interest in regulating the speech of judicial candidates, see infra notes 71-78 and accompanying text.
59. For a discussion of the overbreadth doctrine, see supra note 25. For a discussion of the overbreadth doctrine's application in Stretton, see infra notes 81-89 and accompanying text.
60. Stretton, 944 F.2d at 141-44. For a discussion of the narrowly tailored requirement as applied to Canon 7(B)(1)(c) in Stretton, see infra notes 81-89 and accompanying text.

First Amendment rights, including freedom of speech, are deemed to be in
cuit found that the defendants' narrow construction of Canon 7(B)(1)(c) could be used to bring the Code provision within the constitutional mandate. The Third Circuit then predicted that the Pennsylvania Supreme Court would choose to adopt this constitutional construction of the Canon, rather than striking down the Canon as an overly broad restriction of a judicial candidate's right to speak freely on political issues.

The Third Circuit, however, agreed with the district court's conclusion that Canon 7(B)(2)'s prohibition of the personal solicitation of campaign contributions by judicial candidates was both appropriate and constitutional. The Third Circuit noted that a judicial candidate's personal "preferred position" in relation to other constitutional guarantees. See Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943). Additionally, the Supreme Court has noted that "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation" of our system of government and are afforded the broadest protection under the First Amendment. Buckley v. Valeo, 424 U.S. 1, 14-15 (1975) (citizens must be able to make informed choices among candidates for office so there will be "unfettered interchange of ideas," promoting social and political change) (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

In order to maintain First Amendment rights in their preferred position, the Supreme Court has held that where a state chooses to infringe upon such "fundamental" rights, the government must produce a rule which is "precisely tailored to serve a compelling governmental interest." Plyler v. Doe, 457 U.S. 202, 217 (1982). Additionally, the government must prove that other, less burdensome means of accomplishing its goal are not practical alternatives to the method it has chosen. See Dunn v. Blumstein, 405 U.S. 330, 343 (1972). In other words, the state must prove that the means chosen were "narrowly tailored" to serve the identified state interest. See id.

61. See Stretton, 944 F.2d at 141-44. For a detailed discussion of the Third Circuit's First Amendment analysis, see infra notes 69-80 and accompanying text.

62. See Stretton, 944 F.2d at 144. For a discussion of the Third Circuit's prediction regarding the Pennsylvania Supreme Court's analysis of Canon 7, see infra notes 90-92 and accompanying text.

63. Stretton, 944 F.2d at 146; cf. In re Fadeley, 802 P.2d 31, 40 (Or. 1990). In Fadeley, the Oregon Supreme Court held that a prohibition of personal solicitation was not unconstitutional because the state's interest in judicial integrity and the appearance of judicial integrity outweighs a judicial candidate's right to free expression. Fadeley, 802 F.2d at 40. The state's interest in avoiding the appearance of impropriety was described by the Oregon Supreme Court as follows: "The stake of the public in a judiciary that is both honest in fact and honest in appearance is profound. [O]ur society . . . leaves many of its final decisions, both constitutional and otherwise, to its judiciary [and] is totally dependent on the scrupulous integrity of that judiciary." Id.

In Stretton, the plaintiff maintained that prohibiting him from personally soliciting contributions would drastically reduce his funding by cutting off the "most effective means" of raising campaign funds. Stretton, 944 F.2d at 146. The plaintiff relied on Buckley v. Valeo, 424 U.S. 1 (1975). Id. at 145. In Buckley, the United States Supreme Court found that limitations on campaign contributions imposed "substantial rather than merely theoretical restraints on the quality and diversity of political speech." Buckley, 424 U.S. at 19. The Third Circuit, however, responded to Stretton's argument by finding that the state's interest in preventing a public perception of judges as partial to those who con-
personal role in fundraising would "lend[] itself to the appearance of coercion or expectation of impermissible favoritism." Because Canon 7 provides for alternative methods of raising funds, the Third Circuit found that the provision was narrowly tailored to serve the compelling state interest of prohibiting behavior from which a strong inference of judicial impropriety might arise.

III. Discussion

The Stretton court found that the issue regarding the constitutionality of Canon 7(B)(1)(c) was not moot, despite the Boards' assertion that the topics proposed by the plaintiff for public discussion would not violate the Code provisions. Moreover, although "[t]he meaning and construction of the Code are matters of state law to be decided ultimately by the state Supreme Court," the Third Circuit decided not to abstain from hearing this case, largely because of the "potential impact on the parties caused by delay in obtaining a state ruling." The Third Circuit commenced its First Amendment discussion with an overview of United States Supreme Court decisions regarding the fundamental right to free political speech and permissible governmental restrictions on such speech. The Third Circuit noted that "[s]peech uttered as part of a campaign for public office directly and unmistakably invokes the protection of the First Amendment." The court added, tribute to their campaigns is compelling and that the means used in Canon 7(B)(2) to combat this problem are sufficiently narrowly tailored to survive a strict scrutiny analysis. Stretton, 944 F.2d at 145-46.

64. Stretton, 944 F.2d at 146. For example, in In re Hotchkiss, 327 N.W.2d 312 (Mich. 1982), the Michigan Supreme Court found that a judicial candidate's personal solicitation of a campaign contribution warranted a written public reprimand, even though the candidate for reelection had specifically told the contributing attorney that the aid would have no effect on the outcome of cases currently pending before him. Id. at 312-13.

65. Canon 7 permits a candidate to "establish committees of responsible persons to secure and manage the expenditure of funds for his campaign and to obtain public statements of support for his candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from lawyers." Code of Judicial Conduct, 204 Pa. Code ch. 33, Canon 7(B)(2) (1990).

66. Stretton, 944 F.2d at 146. The Third Circuit implied that personal solicitation by judicial candidates might be the most effective method of fundraising precisely because it creates expectations of favoritism among contributors. See id.

67. Id. at 140. The Third Circuit noted that the Boards were not the final interpreters of the Code and that the overbreadth challenge was sufficient in itself to sustain the litigation. Id.

68. Id. The Third Circuit's abstention analysis in Stretton varied from its previous analysis of a similar issue in Hughes v. Lipscher, 906 F.2d 961 (3d Cir. 1990), where the court abstained from deciding a state law issue. Stretton, 944 F.2d at 140-41. For a comparison of Stretton and Hughes, see supra note 7.

69. Stretton, 944 F.2d at 141-42. For a discussion of the Supreme Court cases considered by the Stretton court, see infra notes 70-72.

70. Stretton, 944 F.2d at 141 (quoting Eu v. San Francisco County Demo-
however, that "freedom of political discussion is not absolute."\footnote{71}

The Stretton court then employed a strict scrutiny test that balanced "the interests of the individual to comment on matters of public interest and the governmental interest."\footnote{72} The court noted that in order to overcome an individual's fundamental right to speak freely on political matters, the government must demonstrate a compelling state interest that is to be served by the restrictions on such speech.\footnote{73} Additionally, the government must prove that the restrictions it has imposed have been narrowly tailored to achieve that state interest, while interfering as little as possible with a citizen's fundamental right.\footnote{74}

The Stretton court commenced its First Amendment analysis with a discussion of the state interest involved in restricting the speech of judicial candidates.\footnote{75} Although the Third Circuit recognized that limits on a state's power to regulate public debate in a political setting exist, it noted that "[t]here can be no question . . . that a state has a compelling interest in the integrity of its judiciary."\footnote{76} Moreover, the court recognized a state interest in protecting the judicial process from being misjudged by the public as unfair or biased.\footnote{77} The court expanded on this

\footnotesize{cratic Cent. Comm., 489 U.S. 214, 223 (1989)). In Eu, the Supreme Court affirmed a Ninth Circuit holding that a California Code provision heavily restricting the speech of political parties was unconstitutional. Eu, 489 U.S. at 216. The challenged code provision restricted the political parties' public activities and internal affairs and violated the Constitution by directly affecting speech "at the core of our electoral process and of the First Amendment freedoms." Id. at 222-23 (quoting Williams v. Rhodes, 393 U.S. 23, 32 (1968)). The Eu Court noted that "the First Amendment has its fullest and most urgent application' to speech uttered during a campaign for political office." Id. at 225 (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)).

71. Stretton, 944 F.2d at 141. The Third Circuit discussed United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973), a case in which the plaintiff sought to invalidate the statutory ban on campaigning by federal employees. See Stretton, 944 F.2d at 141. The Letter Carriers Court explained that the aim of the Hatch Act, which prevented federal employees from playing major roles in political elections, was to preserve confidence in the political system by safeguarding the appearance of a fair and impartial execution of the laws. See Letter Carriers, 413 U.S. at 565. The Court upheld these restrictions on political speech, finding that "[n]either the right to associate nor the right to participate in political activities is absolute in any event . . . . Nor are the management, financing, and conduct of political campaigns wholly free from government regulation." Id. at 567.

72. Stretton, 944 F.2d at 141 (citing United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 564 (1973)). For a discussion of the strict scrutiny test, see supra notes 27 & 60 and cases cited supra note 25. For a discussion of the strict scrutiny test as applied in Stretton, see infra text accompanying notes 75-89.

73. Stretton, 944 F.2d at 141-42 (citing Brown v. Hartlage, 456 U.S. 45, 53 (1982)).

74. Id. (citing Brown v. Hartlage, 456 U.S. 45, 53 (1982)).

75. Id. at 142.

76. Id.

77. Id. (citing Cox v. Louisiana, 379 U.S. 559, 565 (1965)); see also Ackerson
idea, stating that while it is important that governmental employees "in fact avoid practicing political justice . . . it is also critical that they appear to the public to be avoiding it."78 Considering the interest noted above, the Stretton court stated:

It requires no extended discussion to demonstrate that Pennsylvania's canon serves this interest. If judicial candidates during a campaign pre-judge cases that later come before them, the concept of impartial justice becomes a mockery. The ideal of an adjudication reached after a fair hearing . . . no longer would apply and the confidence of the public in the rule of law would be undermined.79

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v. Kentucky Judicial Retirement & Removal Comm'n, 776 F. Supp. 309, 315 (W.D. Ky. 1991) ("[T]here is a compelling state interest in . . . limiting a judicial candidate's speech, because the making of campaign commitments on issues likely to come before the court tends to undermine the fundamental fairness and impartiality of the legal system."). In Cox, the United States Supreme Court held that a state could constitutionally bar picketing outside a courthouse, because the state's interest in averting the appearance of improper influence of judges outweighed the protestors' First Amendment rights. Cox, 379 U.S. at 564-65. The Court opined that "'[a] State may protect against the possibility of a conclusion by the public . . . that a judge's action was in part a product of intimidation [due to picketing] and did not flow only from the fair and orderly working of the judicial process.'" Id. at 565.

78. Stretton, 944 F.2d at 141 (quoting United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 565 (1973)). One commentator has noted that "'[a] fair trial is the foundation of our judicial system and is protected by the United States Constitution's due process provisions. Congress has determined that a trial must be fair in both fact and appearance.'" Ann Marie Janus, Recent Decision, Judicial Disqualification for Appearance of Bias—Jenkins v. Sterlacci, 849 F.2d 627 (D.C. Cir. 1988), 62 TEMP. L. REV. 1075, 1076 (1989) (citation omitted).

79. Stretton, 944 F.2d at 142. The Third Circuit continued:

The functioning of the judicial system differs markedly from those of the executive and legislative. In those areas, the public has the right to know the details of the programs that candidates propose to enact into law and administer. Pledges to follow certain paths are not only expected, but are desirable . . . . By contrast, the judicial system is based on the concept of individualized decisions on challenged conduct and interpretations of law enacted by the other branches of government.

Id.; cf. Ackerson v. Kentucky Judicial Retirement & Removal Comm'n, 776 F. Supp. 309, 313 (W.D. Ky. 1991) ("While candidates for elective judicial office are not without the protection of the First Amendment, their campaign conduct has been regulated to a greater degree than [that of] non-judicial candidates.").

The United States District Court for the Western District of Kentucky recently discussed the appearance of bias and partiality which might arise from unrestricted judicial campaign speech:

All candidates for elective office, including judicial candidates, presumably come equipped with opinions and predilections which are the result of their life experience. A judge, however, must cast these aside, saving only his or her intrinsic notion of fundamental fairness . . . [P]re-election commitments by judicial candidates impair the integrity of the court by making the candidate appear to have pre-judged an is-
Therefore, the court found that Canon 7 served a compelling governmental interest and thus passed the first part of the strict scrutiny test.80

The Third Circuit then examined the Canon's restriction of legal and political speech to determine whether it was narrowly tailored so as to refrain from excessive circumscription of protected speech.81 In Stretton, the parties offered their own interpretations of the disputed Code provision; the defendants' reading of Canon 7(B)(1)(c) would have been sufficiently narrowly tailored to pass the strict scrutiny test, while the plaintiff's interpretation would have rendered the Canon unconstitutional.82

The Boards' interpretation of the Canon was sufficiently narrow to pass constitutional muster, protecting a plaintiff's right to speak on some controversial political and legal issues, while prohibiting discussion of issues likely to come before the bench.83 The district court had rejected this position, finding that the Boards' current interpretation of Canon 7 was not binding on any current or future Boards.84 The Third Circuit, however, found that the Boards' construction was entitled to consideration, because the Boards would be bound by the restrictive interpretation of Canon 7 that they had proposed after offering it in both the district court and the court of appeals.85 Moreover, the Third Circuit found that a Counselor's recommendations could influence the Judge without benefit of argument of counsel, applicable law, and the particular facts in each case.

Acknowledgment, 776 F. Supp. at 315.

80. See Ackerson, 776 F. Supp. at 315. For a discussion of the strict scrutiny test, see supra notes 27 & 60, notes 72-74 and accompanying text, and cases cited supra note 25.

81. Stretton, 944 F.2d at 142. For a discussion of the narrowly tailored requirement, see supra notes 27 & 60, and text accompanying note 74.

82. Stretton, 944 F.2d at 142-43. The Third Circuit noted that the plaintiff presented a broad and literal interpretation of the Canon and therefore requested that it be struck down as overbroad. Id. at 143. In an interesting aside, the Third Circuit noted that "although not unknown, it is a somewhat curious situation when the agency charged with enforcement argues for less authority and its opponent would foist unwanted power on the government." Id.; accord Plumstead Township Civic Ass'n v. Department of Envtl. Resources, 597 A.2d 734, 736 n.7 (Pa. Commw. Ct. 1991) (quoting Stretton). For a detailed discussion of the Boards' interpretation of the Canon, see supra notes 50-53, and infra notes 89-87 and accompanying text.

83. Stretton, 944 F.2d at 142-43. In both the Eastern District of Pennsylvania and the Third Circuit, the Counselors for the Boards maintained that public announcement of the plaintiff's views regarding a proposed list of topics, including his opinions on judicial activism, the rights of crime victims and needed changes in judicial administration, would not violate Canon 7. Id. at 139, 142. For the complete list of plaintiff's proposed topics of discussion, see supra note 49.

84. Stretton, 763 F. Supp. at 132-33. For a discussion of the district court's consideration of the Boards' argument, see supra notes 53-56 and accompanying text.

85. Stretton, 944 F.2d at 143. The Third Circuit explained: "Having adopted the position in litigation that the Canon is to be interpreted narrowly,
dicial Inquiry Review Board, which in turn could recommend actions to the Pennsylvania Supreme Court.\textsuperscript{86} Therefore, the Third Circuit rejected the district court's conclusion and held that the current Boards' interpretation of Canon 7 was entitled to some weight.\textsuperscript{87}

The Third Circuit found that the Boards' narrow construction of Canon 7 was consistent with other provisions of the Code of Judicial Conduct, for example Canon 4, which "permits judges to write and speak about the law, the legal system and the administration of justice."\textsuperscript{88} Additionally, prohibiting a candidate's announcement of his or her opinion on issues truly in dispute (in other words, those likely to be pending in the courts), would reasonably serve the state's interest in avoiding the appearance of partiality and fostering the appearance of open and impartial minds within the judiciary.\textsuperscript{89}

After determining the constitutionally permissible level of state interference with a judicial candidate's political speech, the Stretton court emphasized that courts, wherever possible, should interpret statutes so as to avoid constitutional difficulties.\textsuperscript{90} The Pennsylvania Supreme Court has similarly followed this guideline.\textsuperscript{91} The Third Circuit therefore opined that the Pennsylvania Supreme Court would also have adopted the Boards' restrictive interpretation of Canon 7(B)(1)(c), for that interpretation could create a Code provision that "does not unnec-

the Boards are barred from returning to court and adopting a contrary position."\textsuperscript{92} Id. (citing Delgrossos v. Spang & Co., 903 F.2d 234, 241 (3d Cir. 1990)).

86. Id. The Third Circuit described the recommendation process as follows:

In Pennsylvania the definitive construction of the Canon is that put upon it by the state Supreme Court, but we would be naive not to recognize that the Judicial Inquiry [and] Review Board's position is, at the very least, a straw in the wind indicating the direction that court will go. The role of Counsel to the Judicial Inquiry [and Review] Board is somewhat broader than simply advisory. The General Counsel decides whether to begin an investigation into suspected violations and whether to recommend sanctions to the Board. The state Supreme Court acts only upon recommendation from the Board, although it is free to disagree.

Id.

87. Id.

88. Id. Canon 4 permits a judge to participate in the public debate "if in doing so he does not cast doubt on his capacity to decide impartially any issue that may come before him." Code of Judicial Conduct, 204 Pa. Code ch. 33, Canon 4 (1979).

89. See Stretton, 944 F.2d at 144.

90. Id. (citing Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)); see also United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 571 (1973) ("[O]ur task is not to destroy the [Hatch] Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations.").

essarily curtail protected speech, but does serve a compelling state interest."92 Therefore, the Third Circuit vacated the district court’s injunction against the Canon’s enforcement.93

The Third Circuit also considered plaintiff’s constitutional challenge to Canon 7(B)(2) of the Judicial Code, which prohibits judicial candidates from personally soliciting campaign contributions.94 The court held that the provision was constitutional, because it was narrowly tailored to serve the state’s interest in preventing the appearance of impropriety arising from direct payment of campaign contributions to those who will be responsible for impartially executing the laws.95

IV. Analysis

In Stretton, the Third Circuit acknowledged that if it did not interpret Canon 7, candidates would be left without guidance as to the ethical administration of their judicial campaigns.96 The court opined that its decision would remove any vagueness found in the language of the statute, and thus allow the proper behavior for judicial candidates to appear with constitutional clarity.97 This section will examine the Third

92. Id. The Stretton court acknowledged that the Pennsylvania Supreme Court is the ultimate interpreter of the Code of Judicial Conduct, so that only a finding by the state supreme court could conclusively settle the meaning of the challenged provision. Id. at 140; see In re Cunningham, 538 A.2d 473, 476-77 (Pa.) (Pennsylvania Supreme Court must review recommendations of Judicial Inquiry and Review Board, but may reject them in favor of court’s own independent judgment), appeal dismissed sub nom. White v. Judicial Inquiry & Review Bd., 488 U.S. 805 (1988). Rejecting the district court’s broad reading of the Canon, the Third Circuit concluded:

[W]e predict that the Supreme Court of Pennsylvania would read Canon 7(B)(1)(c) to mean that “disputed legal or political issues” refers only to those issues that are likely to come before the court. Read in this way the restriction is narrowly tailored to serve the state’s compelling interest in an impartial judiciary. Stretton, 944 F.2d at 144.

93. Stretton, 944 F.2d at 144. (finding state’s interest sufficiently compelling and Canon 7(B)(1)(c) sufficiently narrowly drawn to overcome plaintiff’s overbreadth challenges).

94. Id. at 145-46.

95. Id. (provision served compelling state interest by narrowly tailored means and alternative methods of raising funds were available to plaintiff). For a discussion of the Stretton court’s evaluation of Canon 7(B)(2), see supra notes 63-66 and accompanying text.

96. See Stretton, 944 F.2d at 141. The court recognized that Canon 7(B)(1)(c) was likely to have a chilling effect on the political speech of judicial candidates, because the canon did not specify those issues that would be constitutionally permissible topics for campaign speeches. Id. For a discussion of the Stretton court’s analysis of the chilling effect of Canon 7(B)(1)(c) on political speech, see supra note 7. For a discussion of the chilling effect of overbroad legislation on speech, see supra note 25.

97. See Stretton, 944 F.2d at 138, 141 (narrow construction of Canon 7(B)(1)(c) would pass constitutional muster and relieve uncertainty of judicial candidates).
Circuit's interpretation of Canon 7 and evaluate the success of the court's attempt to enunciate a standard for judicial candidates who seek either to express their views on political and legal topics or to solicit campaign contributions personally.

In affirming the constitutionality of Canon 7(B)(2), the Third Circuit endorsed Pennsylvania's prohibition of the personal solicitation of campaign contributions by judicial candidates.\(^98\) Therefore, candidates must confine themselves to campaign activities expressly permitted by the Canon in order to remain within its ethical bounds.\(^99\) Such activities include: 1) organizing a committee to solicit funds; 2) submitting names of potential contributors; 3) reviewing the lists of contributors and the amounts given to the campaign; 4) sending personal letters of appreciation; and 5) attending parties to thank campaign contributors.\(^100\) Additionally, candidates must sign public reports that list all campaign contributions and must obtain certification by state officials that the campaign committee has not violated the state reporting laws.\(^101\)

The impact of the Third Circuit's analysis of Canon 7(B)(1)(c) is more difficult to evaluate. The Stretton court rejected the reasoning of J.C.J.D. and Florida Bar, which had struck down the Code provision, because these courts did not consider the narrow construction used in Stretton.\(^102\) The court stated that it "believe[d] the Supreme Court of Pennsylvania would also find them unconvincing."\(^103\) The Third Circuit then cited favorably to Berger in its discussion of the necessity of using a narrow, constitutional construction of a statute whenever possible.\(^104\) The court noted that Berger recognized the importance of Canon 7 in preventing political pledges, but refrained from imposing an interpretation that would make the Canon an unconstitutional bar on criticism of court administration.\(^105\)

\(^98\) See id. at 146.
\(^99\) See id. at 145-46.
\(^100\) See id. at 145. The court conceded:
Plaintiff is correct that the currently approved practices do involve the candidate deeply, albeit indirectly, in the process. Nevertheless, we cannot say that the state may not draw a line at the point where the coercive effect, or its appearance, is at its most intense—personal solicitation by the candidate.

\(^101\) See id. for a discussion of the importance of avoiding the appearance of a coercive effect produced by personal solicitation of campaign contributions, see supra notes 63-64 and accompanying text.
\(^102\) Id. at 143-44. For a discussion of J.C.J.D., see supra notes 28-32 and accompanying text. For a discussion of Florida Bar, see supra notes 24-27 and accompanying text.
\(^103\) Stretton, 944 F.2d at 144.
\(^104\) See id.
\(^105\) See id. For a discussion of Berger, see supra notes 34-36 and accompanying text.
The Third Circuit’s narrow reading of Canon 7(B)(1)(c) redefined “disputed legal or political issues,” limiting the Canon’s prohibition to discussion of only those topics likely to come before the court.\textsuperscript{106} This construction would allow candidates to discuss matters concerning the court system itself. Permissible subjects of discussion would include administrative issues, such as changes in the jury selection process and closer scrutiny of district judges, as well as more politically charged issues, such as the racial and gender composition of the courts.\textsuperscript{107} This interpretation would also permit discussion of other, more controversial topics on the plaintiff’s proposed list, such as a candidate’s personal views on privacy, criminal sentencing and burdens of proof.

By accepting the Boards’ position that none of the plaintiff’s proposed topics offended Canon 7(B)(1)(c), the Third Circuit also approved the discussion of some issues that might indicate how a candidate will actually perform if he or she is elected. The court agreed that candidates are permitted to discuss their views on judicial activism and to explain how they would permit societal changes to affect their views regarding existing law, as well as to discuss how they would apply a particular burden of proof. Presumably, the Third Circuit would draw the line regarding permissible speech where the \textit{Berger} court drew it—forbidding those statements that appear to be particularized pledges of future conduct.\textsuperscript{108} This construction, however, leaves room for a good faith argument that discussion of a given topic, despite its controversial nature, will not reveal a bias that threatens the public’s perception of judicial impartiality.

\section*{V. Conclusion}

The grounding of the Third Circuit’s analysis in First Amendment jurisprudence is likely to reduce the possibility of disagreement by the Pennsylvania Supreme Court should the issue of Canon 7’s interpretation arise in the future. The \textit{Stretton} court clearly delineated the interpretation necessary for compliance with the United States Constitution, and therefore the Pennsylvania Supreme Court will probably utilize this construction in order to preserve its Canon 7 provisions. In the case of Canon 7(B)(1)(c), the proper construction requires that restrictions imposed upon the political speech of judicial candidates extend only to those issues likely to come before the court, for it is primarily in the

\textsuperscript{106} \textit{Stretton}, 944 F.2d at 144.

\textsuperscript{107} The issues mentioned are from the plaintiff’s list of proposed topics for discussion. For the \textit{Stretton} court’s compilation of plaintiff’s proposed topics, see supra note 49.

\textsuperscript{108} For a discussion of \textit{Berger}, see supra notes 34-36 and accompanying text, and text accompanying notes 104-05.
treatment of those issues that judges may fall prey to challenges of parti-
ality and closed-mindedness.

Kathleen Margaret Sholette