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COLLECTIVE SECURITY AND THE FIGHTING IN THE BALKANS

by Michael R. Fowler* and Jessica Fryrear†

I. INTRODUCTION

Of all the prominent doctrines of international law and politics that have arisen in the last century, collective security has enjoyed perhaps the most remarkable staying power. Many of those disgusted with traditional power politics have fervently hoped that the international community would automatically and systematically take decisive police action to stop aggressive behavior. Collective security is the label for their theoretical doctrine. From its popular conception during World War I to the present, the term has frequently appeared in the rhetoric of leaders, the analyses of academics, and the exhortations of political philosophers.

As is often true of highly politicized terms, collective security has also been employed more loosely as time has passed. In the eyes of many, to call an action collective security seems to endow it with a highly positive connotation. Hence, in the post-World War II era those urging intervention with respect to various crises, including Korea in the early 1950s, Vietnam in the early 1960s, and Kuwait in the early 1990s, attempted to add a measure of respectability or legitimacy to their arguments by citing collective security as the aim of the

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1 See INIS CLAUDE, JR., POWER AND INTERNATIONAL RELATIONS 160 (1962). Claude writes: “Advocates of collective security from Wilson’s day to present, have tended to define and characterize [collective security] in sharp contrast to the balance of power system.” Id. at 111.
2 See INIS L. CLAUDE, JR., AMERICAN APPROACHES TO WORLD AFFAIRS 51 (1986) (discussing how collective security has figured prominently since World War I in both diplomatic and academic discussions of international relations).
3 See INIS L. CLAUDE, JR., SWORDS INTO PLOWSHARES: THE PROBLEMS AND PROGRESS OF INTERNATIONAL ORGANIZATION 247 (4th ed. 1971). Claude writes: “Collective security has been appropriated as an honorific designation for virtually any and all multilateral activities that statesmen or scholars may regard, or wish to have regarded, as conducive to peace and order.” Id.
4 See ARNOLD WOLFERS, DISCORD AND COLLABORATION 167 (1962). In 1950, as the war broke out, Prime Minister Clement Attlee stated, “I am certain that there will be no disagreement after our bitter experience in the past thirty-five years, that the salvation of all is dependent on prompt and effective measures to arrest aggression wherever it may occur.” Geoffrey Goodwin, INTERNATIONAL INSTITUTIONS AND INTERNATIONAL ORDER, in THE BASES OF INTERNATIONAL ORDER, 156, 167 (Alan James ed., 1973).
intervening states.

Most recently, highly influential actors and observers have used the term once again with respect to the fighting in the Balkans in the early- to mid-1990s. Before intervention occurred, Richard Holbrooke, the influential U.S. Assistant Secretary of State for European and Canadian Affairs, termed the situation in Yugoslavia at the time "the greatest collective security failure of the West since the 1930s." In 1997 Robert Gallucci, Dean of the Edmund Walsh School of Foreign Service at Georgetown University, observed: "Many see the outcome in Bosnia as critical to our national security, a test of collective security in the emerging architecture designed to assure European stability in the post-Cold War world." The following year at a conference in Rome United Nations Secretary-General Kofi Annan delivered a major address entitled "The Test Case of Bosnia for Collective Security in the Next Century." At the same conference Dr. Javier Solana, Secretary-General of the North Atlantic Treaty Organization (NATO), delivered a lecture entitled "Collective Security and the post-Cold War World" in which he used the example of Bosnia to extrapolate three propositions regarding "the future of collective security in Europe." Various other officials soon picked up on the collective security theme in speeches and writings.

The purpose of this article is to look beyond the weighty moral and political arguments that favored intervention in the Balkans and analyze whether the actions of the international community at that time in fact amounted to an example of collective security or, as some have put it, a "new collective security." This seems to us to be a worthwhile inquiry for several reasons. Important doctrines of international law and politics ought to be precisely defined

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6 To do justice to the complicated earlier events, we have purposefully omitted analysis of the later crisis in Kosovo.
9 Kofi Annan, The Test Case for Collective Security in the Next Century, Address before the Crisis Management and NATO Reform Conference in Rome (June 5, 1998), at http://web.lexis-nexis.com/universe. Annan declared: "Collective security ... is not just a slogan or a simplistic expression of faith in mutual interests; it is the very condition for national security." Id. He continued: "[L]essons have been brought to bear in NATO's Stabilization Force in Bosnia. But they apply equally to comparable United Nations operations, now and in the future. The pursuit of collective security by the international community must be credible and it must be legitimate." Id.
10 Javier Solana, Collective Security and the Post-Cold War World, Address before the Crisis Management and NATO Reform Conference in Rome (June 15, 1998), at http://web.lexis-nexis.com/universe. Solana introduced the collective security theme, stating: "Today, we do not talk of 'my' security and 'your' security. We talk of our security - our collective security. Over the years, NATO has helped develop principles of collective security - and the instruments necessary to sustain it - for the wider Euro-Atlantic region." Id.
11 For instance, in addressing the Euro-Atlantic Partnership Council in December 1997, a leading Albanian diplomat concluded: "[L]et me express my conviction that we all have a lot to do to strengthen our cooperation and commonly contribute to a comprehensive collective security strategy and reality also in the area of the Balkans." Maqo Lakrori, Statement at the EAPC Foreign Ministers Meeting, at http://web.lexis-nexis.com/universe/document?.
13 Id.
and their implications thoroughly explored.\textsuperscript{14} If one includes as valid examples of collective security every military action undertaken by a group of states in which community interests arguably outweighed narrow national interests, then a wide array of illustrations of collective security would spring to mind. Defining the term so loosely, however, drains it of meaning.\textsuperscript{15} It erodes the distinctive character of collective security.\textsuperscript{16} "[A] conceptual tool used indiscriminately," a respected international relations scholar once noted, "has its analytical edge irreparably dulled."\textsuperscript{17}

If indeed collective security is being inappropriately applied to intervention in the Balkans, such a misuse of the term could have grave future repercussions. Given the largely uninspiring record of collective security through the twentieth century, this might well, in the phrase of British scholar Geoffrey Goodwin, "encourage states to rely on the unreliable."\textsuperscript{18} Above all, when thoughtfully employed, collective security implies that a radical break has occurred with respect to the manner in which business has traditionally been conducted in international affairs.\textsuperscript{19} Has such a break occurred, or might it be upon us now?\textsuperscript{20}

Whether or not the conclusion to "the war of Yugoslav succession"\textsuperscript{21} signals the birth, or rebirth, of collective security for the twenty-first century has significant

\begin{flushright}
\textsuperscript{14}As was once said of the uses and misuses of the term \textit{sovereignty}:
\begin{quote}
Of course, we are free to say 'Sovereignty' while we are thinking full autonomy or right to decide without appeal – as we are free to say 'omnipotence' while...thinking limited power, or 'drum' while...thinking flute. Yet the result for own way of thinking and for intelligible intercommunication would appear questionable.
\end{quote}
\textsuperscript{16}\textit{Id.}
\textsuperscript{17}\textit{Id.}
\textsuperscript{18}Goodwin, supra note 4, at 166.
\textsuperscript{19}See \textit{Wolters}, supra note 4, at 168. In denying that the war in Korea properly constituted an example of collective security, Arnold Wolfers wrote:
\begin{quote}
What exponents of the principle of collective security have in mind is to urge nations to change the customary direction of their defense policy. They call upon them to go beyond aligning themselves with one another only to meet threats emanating from common national enemies and instead to embrace a policy of defense directed against aggression in general or, more precisely, against any aggressor anywhere.
\end{quote}
\textit{Id.}
\textsuperscript{20}See \textit{Wolters}, supra note 4, at 167. We have found that this echoes a point made by Arnold Wolfers in 1954: "[I]t is necessary to investigate dispassionately whether a turning point in world politics was reached when the United Nations flag was unfurled in Korea. On the answer may depend what future policy we and others are entitled to expect of this country." \textit{Id.}
consequences for future policy makers.

In exploring collective security and the fighting in the Balkans, this article thus asks:

- From what historical experiences was the doctrine of collective security derived?
- How is the term collective security used, and what assumptions underlie collective security doctrine?
- What were the principal stages associated with the fighting in the Balkans?
- Did the international response primarily illustrate the possibilities for, or the obstacles to, collective security in the twenty-first century?
- In conclusion, what are the prospects for implementing collective security in the post-Cold War era?

The essence of our argument is that while the international response to the fighting in the Balkans involved collective action, it did not amount to a collective security operation, properly understood. However, the lessons to be drawn from the crisis are centrally relevant to the important issue of whether efforts to manage power in the post-Cold War era ought to focus upon collective security. In particular, the Balkans operation illustrated clearly many of the difficulties inherent in international politics that have long cursed efforts to make collective security plans functional.

II. THE HISTORICAL BACKGROUND TO COLLECTIVE SECURITY DOCTRINE

In international politics, the history of the use of important terms often goes far toward defining them. Although many loosely associate collective security with a community of states standing against an aggressor, one might do well to gain a deeper appreciation for the term by tracing its development through the twentieth century.

A. Emergence of a New Doctrine

In the aftermath of the tremendous destruction of World War I, leaders began to argue that the balance of power idea that had long guided strategists was

22 See Harold Laski, The Foundations of Sovereignty and Other Essays 314 (1921). Political philosopher Harold Laski once observed: "Nothing is today more greatly needed than clarity upon ancient notions. Sovereignty, liberty, authority, personality—these are the words of which we want alike the history and the definition; or rather, we want the history because its substance is in fact the definition." Id.

23 See William C. Bradford, International Legal Regimes and the Incidence of Interstate War in the Twentieth Century, 16 Am. U. Int'l. L. Rev. 647, 689 (2001). The Great War, as it was called, introduced "the deliberate targeting of civilians along with a vast array of theretofore unimaginably destructive technologies such as poison gas, submarines, and combat aircraft." Id.
fundamentally unsound and ought to be replaced. In 1917 President Woodrow Wilson, for one, declared:

The question upon which the whole future peace and policy of the world depends is this: Is the present war a struggle for a just and secure peace, or only for a new balance of power? If it be only a struggle for a new balance of power, who will guarantee, who can guarantee, the stable equilibrium of the new arrangement? Only a tranquil Europe can be a stable Europe. There must be, not a balance of power, but a community of power; not organized rivalries, but an organized common peace.24

In his War Message to Congress, the President distinguished his favored approach for managing international conflict from traditional balance of power thinking by calling for "such a concert of free peoples as shall bring peace and safety to all..."25 Then, in his Fourteen Points speech, Wilson’s culminating point declared: "A general association of nations must be formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike."26

Collective security did not spring full blown from the mind of Woodrow Wilson. Wilson’s ideas built upon those of many others.27 For generations, political philosophers had written of promoting peace through concerted action.28 During the war, advocacy by groups of influential private citizens, such as the American League to Enforce Peace and the British League of Nations Society, joined that of distinguished leaders, such as the South African statesman, Jan Christiaan Smuts, author of The League of Nations: A Practical Suggestion.29 In contemplating the construction of a new world order, many such voices came to suggest that a novel system of international security be implemented – a collective one – in which aggression would be outlawed and opposed by the force of arms, if necessary, contributed by all peace-loving states.30

Implementing such a plan called for fresh thinking, creative statesmanship, and revised standards of behavior. From this intellectual ferment, Woodrow Wilson and like-minded supporters, at home and abroad, drew forth a new and

25 President Woodrow Wilson, For Declaration of War Against Germany (April 2, 1917), in 1 WAR AND PEACE: PRESIDENTIAL MESSAGES, ADDRESSES AND PUBLIC PAPERS (1917-1924) 6, 16 (Ray S. Baker & William E. Dodd eds., 1927).
27 See CLAUDE, supra note 1, at 106-08.
29 CLAUDE, supra note 3, at 42.
30 Id.
interlocking agenda. To harness nationalism toward positive goals, the principle of self-determination should be upheld. That is, each nation would be entitled to its own state. Of course, if honored, such a proposition would create numerous weak young states. To protect them, all should agree that international borders should be sacrosanct and that aggression should be taken by all to be legally and morally reprehensible. Moreover, in light of the recent experience that aggression could easily spread and war could sweep over whole continents and around the globe, any act of aggression would necessarily be a pressing concern for the entire international community. In these ways, the new school of thought contended, states needed to change their customary foreign policies in order to prevent their overarching common fear: the outbreak of another massively destructive world war.

B. Collective Security and the League of Nations

All this pointed, in turn, to the need for a global organization that, among other tasks, might orchestrate responses to aggression. Thus, the League of Nations emerged, and with it a first tentative effort toward installing a collective security regime. In early 1919, President Wilson encouraged support for the League within the United States with these words:

Do you realize how many new nations are going to be set up in the presence of old and powerful nations in Europe and left there, ... if left by us, without a disinterested friend? Do you believe in the Polish cause, as I do? Are you going to set up Poland, immature, inexperienced, as yet unorganized, and leave

31 See CLAUDE, supra note 3, at 42 (discussing how various politicians and academics were developing the framework for the League of Nations before World War I was over).
32 Id. at 52-53. Claude commented: "[S]elf-determination was regarded as the essential means for minimizing the element of conflict in international relations... [T]he elimination of frustrations stemming from denial of legitimate aspirations of national self-determination would ... make international relations reasonably harmonious." Id. at 53.
33 While international lawyers, in particular, have often used nation and state interchangeably, see, e.g., LOUIS HENKIN, HOW NATIONS BEHAVE (2d ed. 1979), the terms are by no means synonymous. A nation is "a group that believes in its own identity and exhibits certain, though not necessarily all, of the following characteristics. It usually desires self-government, speaks a common language, shares customs, possesses some historical continuity, distinguishes itself from other like groups, and believes in its own distinct racial origins." Michael R. Fowler and Julie M. Bunck, The Nation Neglected: The Organization of International Life in the Classical State Sovereignty Period, in INTERNATIONAL LAW AND THE RISE OF NATIONS 38, 55 n.9 (Robert J. Beck & Thomas Ambrosio eds., 2002). Thus, international society includes stateless nations, such as the Kurds and Palestinians, single-nation states, such as Cuba, and multi-nation states, such as India. Id. Furthermore, the boundaries of a nation do not necessarily coincide with the boundaries of a state. Id. Instead, states often include national minorities. Id. In the Balkans context, as Elinor Sloan points out: "Bosnia’s Muslims...regard themselves as a nation in their own right rather than simply a religious group..." SLOAN, supra note 12, at 14.
34 With the bloody conclusion of World War I, the world, especially Europe, realized the vital need to prevent future wars of such magnitude. See CLAUDE, supra note 3, at 44.
35 See generally LEAGUE OF NATIONS COVENANT (laying the framework for the League of Nations).
her with a circle of armies around her? Do you believe in the
aspirations of the Czecho-Slovaks [sic] and Jugo-slavs [sic] as I
do? Do you know how many powers would be quick to pounce
upon them if there were not guarantees of the world behind their
liberty? Have you thought of the sufferings of Armenia? You
poured out your money to help succor Armenians after they
suffered. Now set up your strength so that they shall never
suffer again. Arrangements of the present peace can not stand a
generation unless they are guaranteed by the united forces of the
civilized world.36

In fact, at the Paris Peace Conference, President Wilson himself chaired the
group that drafted the organizational and constitutional document known as the
League Covenant.37

The League represented an attempt to put an international legal regime into
action by setting forth a series of rules based on the principle that states could
only legitimately use force if it was in support of the legal order that the League
embodied. Thus, the Covenant urged disarmament on its members.38 As the
‘conscience of mankind,’ the League of Nations was to investigate international
disputes and resolve them through legal and diplomatic means.39 It declared that
the League would be concerned by any war or threat of war, whether
immediately affecting any of the members or not.40 The League members
undertook not to aggress and to preserve against aggression the territory and
independence of the other members.41

However, the authority of the League of Nations was as vague as it was
broad: “the League shall take any action that may be deemed wise and effectual
to safeguard the peace of nations.”42 In the case of an emergency, the only
tangible action that all agreed upon was that the Secretary-General would
“forthwith summon a meeting of the [League] Council.”43 But, the Council was
not conceived in such a way that it had executive or enforcement powers.44 The
Covenant merely stated: “In case of any such aggression or in case of any threat
or danger of such aggression, the Council shall advise upon the means by which
this obligation shall be fulfilled.”45

Furthermore, any member could stop League action by voting against it,

36 President Woodrow Wilson, Address at Boston on His Return From Europe (Feb. 24, 1919), in 2
37 See CLAUDE, supra note 3, at 43.
38 See LEAGUE OF NATIONS COVENANT art. 8, para. 1.
39 Id. art. 12, 15.
40 Id. art. 11, para. 1.
41 Id. art. 10.
42 Id. art. 11, para. 1.
43 Id.
44 See Beatrice Heuser, Sovereignty, Self-Determination, and Security: New World Orders in the
Twentieth Century, in STATE SOVEREIGNTY: CHANGE AND PERSISTENCE IN INTERNATIONAL
RELATIONS 81, 82 (Sohail H. Hashmi ed., 1998).
45 LEAGUE OF NATIONS COVENANT art. 10.
either in the League Council or in the League Assembly. One diplomat later wrote: "[T]he League of Nations was so respectful of sovereignty that it gave a veto power to every member, large and small." Finally, it was wholly unclear what the League would do about acts of aggression that might occur outside the League’s membership.

In practice, of course, this feint toward collective security failed to realize the hopes of its founders. The United States opted not to join the League but to stand outside it. Instead the US assumed what has usefully been termed an "auxiliary" position, that is, acting only "when and as it thinks necessary to uphold interests and values that concern it, acknowledging no obligation to be systematic about this but treasuring the right to be unpredictable ..." Furthermore, the League members tended to interpret the collective security provisions weakly. For instance, while France attempted to gain international agreement on specific steps that the members would pledge to take to counter aggression, no such formula proved acceptable to all. Thus, the League Council could only recommend courses of actions to the member states, and they could freely exercise discretion to act or refrain from acting.

While the League of Nations did deal successfully with certain minor instances of aggression, such as the 1925 invasion of Bulgaria by Greek troops, it proved ineffectual in 1931 when Japan attacked the Chinese province of Manchuria and in 1934 when Paraguay attacked Bolivia. As for Italy’s 1935 invasion of Ethiopia, while the League did take some positive measures, such as cutting off the flow of strategic materiel and arms to the aggressor (but not the victim), the League powers could not agree to stop oil shipments or to close the Suez Canal to Italian shipping.

A key reason was that Britain and France were already concerned about

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46 See id. art. 5, para. 1. This paragraph states: “Except where otherwise expressly provided in this Covenant or by the terms of the present Treaty, decisions at any meeting of the Assembly or of the Council shall require the agreement of all the Members of the League represented at the meeting.”


49 After World War I, Americans felt that they had paid too high a price in restoring peace to Europe. See DAVID F. TRASK, VICTORY WITHOUT PEACE: AMERICAN FOREIGN RELATIONS IN THE TWENTIETH CENTURY 78-79 (1968), noted in Bradford, supra note 48, at 699. Therefore, America returned to its isolationist ways and rejected League membership, despite the fact that President Wilson was its greatest proponent. Id.

50 See CLAUDE, supra note 2, at 16.

51 Id.

52 See EBAN, supra note 47, at 253.

53 Id. at 247.

54 See Bradford, supra note 48, at 741 n.174 (listing instances where the League of Nations failed to prevent war).

55 Id.

56 See EBAN, supra note 47, at 248-49.
resurgent German nationalistic militarism. They hoped to persuade Italy to join them in resisting Germany, and no one wanted, precipitately, to push Benito Mussolini into the German camp. Had the political will existed to stop aggression, the League might have provided a useful framework for action. But, where no such will existed, the League could not supply it. The US did not want to get irretrievably tangled in a global policing alliance; the French valued their independence of action and history of realpolitik; the British felt, however distasteful it might be, the reality of international life was that one had to deal with dictators. In such a climate, smaller states like Belgium naturally began to eye neutrality as a perhaps the best way to duck war.

C. Collective Security and the United Nations

The downfall of the League and the outbreak of World War II brought renewed calls for an effective global organization that might keep the peace by forcibly opposing aggression. In the eyes of the founders, the success of the United Nations would ultimately hinge on whether it could do a better job of maintaining world peace than its predecessor had. However, the founders had to navigate around prefatory Cold War hostilities between the superpowers and the very real possibility that the Soviet Union would choose to boycott the UN. Hence, the task before the drafters of the Charter was not only to minimize the evident weaknesses in the League's security blueprint, but also to compromise to get what was possible rather than what might have been theoretically ideal.

57 Id.
58 Id.
59 On July 11, 1937 Winston Churchill predicted:

Evidently we are approaching the point where the League of Nations, if properly supported, will have an immense and perhaps decisive part to play in the prevention of a brutal trial of strength. How else are we going to marshal adequate and if possible overwhelming forces against brazen, unprovoked aggression, except by a grand alliance of peace-seeking peoples under the authority of an august international body?

MICHAEL FOWLER, WINSTON S. CHURCHILL: PHILOSOPHER AND STATESMAN 14 (1985), quoting WINSTON S. CHURCHILL, STEP BY STEP 1936-1939 (1939), at 116. After World War II Churchill declared: “[H]ad the League been resolutely sustained and used, it would have saved us all.” Id. at 45, quoting WINSTON S. CHURCHILL, 1 THE COLLECTED WORKS OF SIR WINSTON CHURCHILL (Randolph S. Churchill ed., 1975).

60 See CLAUDE, supra note 3, at 57. Claude wrote:

The total collapse of world order produced not so much a sense of futility and hopelessness of international organization as a vivid awareness of the need for a resolute determination to achieve an improved system of international organization. It became clear that the modern world had developed the habit of responding to catastrophe by intensifying its quest for effective organization.

61 Id. at 60-61.
The first article of the UN Charter stated the purposes of the organization:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

Immediately thereafter, the founders highlighted the transcendent importance of stopping aggression in the language of Articles 2 (4), banning most uses or threats of force, and 2 (5), calling on cooperation from members when enforcement action occurred.

To fulfill these purposes, the founders of the United Nations created the Security Council in Chapter V of the Charter and charged it with determining the existence of acts of aggression, or threats to or breaches of the peace. In what is sometimes called the collective security provisions of Chapter VII, the Security Council was provided with specific authority to take non-forcible measures, including economic and diplomatic sanctions. If these proved inadequate under Article 43, the Security Council could “take such actions by air, sea, or land forces as may be necessary to maintain or restore international peace and security.” Since the UN had no military forces itself, the Charter contemplated the member states contributing armed forces and other assistance to enforce the will of the Security Council, though no provision addressed what might happen if assistance was not forthcoming.

And yet, the founders tempered the ability of the United Nations to resist aggression by equipping the five permanent members of the Security Council...
with a veto over actions concerning all non-procedural issues. Incorporating the veto was thought necessary in order to gain the assent of the major powers to join the UN and hence, avoid the problem of empty chairs that had so plagued the League. Ensuring that the major powers could stop UN action was also thought to be a sensible way to keep a divided Security Council from starting enforcement that it could not finish. Most important, however, no one wanted Security Council enforcement actions to trigger another world war, rather than prevent one. Viewed in this light, the veto amounted to an urgently needed safety valve.

D. The Cold War and Collective Security

While the founders had understood that the veto would stop certain Security Council actions, they had not expected that it would entirely paralyze UN enforcement. During the first decades after World War II, as the Cold War commenced in earnest, a key question was whether states engaged in a bitter ideological dispute could live up to the ideals enshrined in the UN Charter, in particular the principles of non-aggression and non-intervention.

The answer, of course, would be that intervention with force across national

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70 Id. art. 27. The article states that Security Council decisions “on procedural matters shall be made by an affirmative vote of nine members,” Id. para. 2, but decisions “on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members ...” Id. para. 3.

71 In 1944 U.S. Secretary of State Cordell Hull told US Senators that the UN Charter contained a veto “primarily on account of the United States and...our Government would not remain there a day without retaining its veto power.” EBAN, supra note 47, at 261.

72 See ROSEMARY RIGHTER, UTOPIA LOST: THE UNITED NATIONS AND WORLD ORDER 28 (1995). Righter stated that the veto provision was added to the UN Charter in order to prevent the Security Council “from committing the UN to action, that without the economic and military muscle of the major powers, it would be incapable of undertaking.” Id. Another scholar wrote: “[The veto provision provided] a guarantee that whatever action [was] undertaken [it would] be supported by the states which control the bulk of the world’s economic, military, and political power, and that its success [would] therefore be almost a foregone conclusion.” CLAUDE, supra note 3, at 146-47.

73 See CLAUDE, supra note 3, at 159-60. Claude suggests that the importance of the veto power is its consensus building aspect. Id. By implementing the veto power, it forced members of the Security Council to heed the position of the dissenter and then to make pragmatic judgments on what would be the best course of action. Id.

74 The classic treatment of the veto problem in the United Nations remains. See CLAUDE, supra note 3, at 141-62. Elsewhere, Claude analogized about the veto as follows:

[A] fuse in an electrical circuit [is] a deliberately created weak point in the line, designed to break the circuit and interrupt the flow of power whenever circumstances make the continued operation of the circuit dangerous. The philosophy of the fuse is that it is better to have the lights go out than to have the house catch fire.

CLAUDE, supra note 1, at 160.

75 One scholar observed: “The arguments in 1944 and 1945 about the permanent members’ rights of veto were so intense and protracted precisely because the veto was expected to be used.” RIGHTER, supra note 72, at 28.
boundaries did occur, and not only by the superpowers. Diplomat Abba Eban wrote:

Article 43 of the Charter in effect presupposed bilateral American-Soviet cooperation in international conflicts between medium-size and small countries. In fact, there was not cooperation but competition. In almost every conflict ... the superpowers would align themselves on opposite sides ... They would be fighting each other by proxy without involving their own troops.... Thus, there was no reality in the idea of the superpowers moving together against a small or medium-sized country bent on aggression. Nearly all the small or medium-size powers clustered around one or the other of the two giants, like planets around a sun.

He continued:

Article 43 presented a scenario in which the United States and the Soviet Union would courteously invite each other into areas where their forces would not otherwise be. This was wildly improbable. It would soon emerge that a central aim of American and Soviet policy would be for each to exclude the other from any possible extension of its military presence.

During the duration of the Cold War, the UN security regime spelled out by the founders went largely unrealized. Many blamed the stalemate on the Security Council; others pointed to what seemed either a failed, flawed, or illusory collective security system. Whatever the central problem, the United Nations peace enforcement scheme failed to stop the approximately 150 wars that broke out during the latter half of the twentieth century which cost the world some 23 million lives. Few would thus quarrel with the conclusion that, while many states have needed protection, being unable to provide adequately for their security themselves, few have looked with confidence to the United Nations to provide it.

The only collective action the UN took against aggression during the Cold War period occurred in the operation against Korea in 1950 “heralded as the first

76 Among the many possible examples one might point to is the invasion of Uganda by Kenya to topple the Idi Amin regime or the invasion of Cambodia by Vietnam to replace that of Pol Pot.
77 Eban, supra note 47, at 254.
78 Id. at 255.
79 See generally Bradford, supra note 48, at 710-20 (assessing why the UN has failed in preventing the outbreak of military conflict).
80 Id.
81 Id.
experiment in collective security." On June 25, 70,000 North Korean troops, using 100 Soviet-made tanks, invaded the South in hopes of a quick victory without outside intervention that would reunite the Korean peninsula. The Soviet permanent delegate to the UN, who had been boycotting Security Council meetings over the decision to seat the Chinese government in Taiwan rather than in Beijing, missed the Security Council deliberations, thus leading to a Security Council resolution labeling the North Korean invasion as a breach of the peace.

After a UN call to member states “to render every assistance to the United Nations in execution of this resolution,” but before the Security Council had issued any specific authorization, the United States intervened with air and sea combat troops. After the Security Council called for urgent military measures and assistance to repel the attack, the military actions of sixteen states went forward under UN auspices. And, after three long years of fighting that included intervention by Chinese soldiers, the Korean War ended in a stalemate.

Doubts immediately arose as to whether this was in fact a collective security operation. The image of the peace-loving states of the world rising up against an aggressor was difficult to square with the fact that “only 16 countries contributed, even in a small way, to the operations of the UN force ...” The United States clearly brought together the UN forces, and it just as plainly had important interests at stake, chief among them containing communist expansion and proving to allies that those supporting America could successfully resist communist aggression. Among others, Wolfers concluded:

Instead of being a case of nations’ fighting ‘any aggressor anywhere’ and for no other purpose than to punish aggression and deter potential aggressors, intervention in Korea was an act of collective military defense against the recognized number-one enemy of the United States and of all the countries that associated themselves with its action.

As the Cold War played itself out over the next four decades, however, the UN collective security mechanism lay dormant. Many conflicts occurred within states, and the superpowers, each with global interests and followings, were not

83 WOLFERS, supra note 4, at 167.
85 See generally Myres S. McDougal & Richard N. Gardner, The Veto and the Charter: An Interpretation for Survival, in STUD. WORLD PUB. ORDER 718 (1960) (discussing the events leading up to the conflict in North Korea).
86 WOLFERS, supra note 4, at 171.
87 See id. at 171.
88 Id. at 172.
90 See WOLFERS, supra note 4, at 172-76.
91 Id. at 176.
shy to wield their veto power over an array of proposed Security Council actions.\(^\text{92}\)

E. Collective Security in the Post-Cold War Era

With the fall of the Communist bloc and the end of the Cold War, however, many in the international community hoped for a reawakening of the UN and its principle of collective security.\(^\text{93}\) In 1990 President George Bush declared in a speech to the General Assembly that the United Nations ought to be “a center for international collective security” and so “demonstrate that aggression will not be tolerated or rewarded.”\(^\text{94}\) Almost immediately, an excellent test case presented itself, as Iraqi forces invaded and occupied Kuwait, and Saddam Hussein announced his intention to annex Kuwaiti territory. The Bush administration sprang into action, brought together support in the UN, and then led a coalition of more than two-dozen states that succeeded in ejecting the Iraqi army and restoring Kuwaiti sovereignty.\(^\text{95}\)

While this successful collective response to aggression revived hopes that the post-Cold War UN would transform itself into an effective collective security system, careful analysis of the Gulf War raised grave doubts as to whether this was an accurate harbinger of anti-aggression actions to come.\(^\text{96}\) First, Iraqi actions had been so blatant that even its closest friends found it difficult to claim that this was not aggression.\(^\text{97}\) Given its slippery qualities, however, aggression is a charge that usually eludes easy international consensus.\(^\text{98}\) Whether the same

\(^{92}\) See Global Policy Forum, Changing Patterns in the Use of the Veto in the Security Council, at http://globalpolicy.org/security/data/vetotab.htm (last visited Feb. 19, 2003). To date the five permanent members of the Security Council have used their veto power two-hundred and fifty (250) times: China (5), France (18), Britain (32), United States (76), U.S.S.R./Russia (120). Id.

\(^{93}\) See Claude, supra note 5, at 24. Claude wrote:

[T]he ending of the Cold War, creating the expectation of a United Nations Security Council no longer paralyzed by conflict between the superpowers, has inspired the suggestion that the Council can now become what it was presumably intended to be, an agency for the collective enforcement of the ban on aggression.

Id.


\(^{95}\) See Claude, supra note 5, at 25.

\(^{96}\) See generally id. at 26-35 (discussing why the Persian Gulf crisis should not be viewed as an adoption of the collective security doctrine).

\(^{97}\) See Claude, supra note 5, at 26. The aggression by Iraq against Kuwait was blatant and “there was no uncertainty about the identities of the perpetuator and the victim.” Id.

\(^{98}\) See Inis L. Claude, Jr., The Tension Between Principle and Pragmatism in International Relations, 19 Rev. Int’l Studies 215, 221 (1993). Inis Claude noted:

When a government resorts to arms in order to effect change, we do not automatically assume that it is in the wrong, but insist on considering a variety of relevant circumstances. We may conclude that the aggression is justified —
vigorous enforcement actions would follow a more debatable case remained to be seen.

Operation Desert Storm also turned out to be a quick and decisive victory led by a superpower, willing in this case to bear disproportionate military and economic burdens,99 over a foe whose army was largely trapped in the open. Whether support for collective security would survive a longer, costlier, and bloodier conflict, without intense superpower interest and against a more able foe, also remained to be seen.

It is also well worth noting that, given the importance of Kuwaiti oil, the United States saw its own vital interests at stake,100 and other states in the coalition could readily grasp how their interests might be adversely affected if Iraqi aggression were not opposed.101 Whether states would act when their national interests were not implicated, or might even favor support for the aggressor, remained to be seen.

Further, caught in the midst of its profound economic and political transitions, the Soviet Union—long Iraq's most formidable patron—chose to defer to the wishes of the US coalition within the UN, rather than veto military action.102 And, China, caught just after the Tienamen Square massacre, disastrous for international public relations, "was coerced into playing along."103 Whether a collective security operation could be implemented in the face of more determined opposition by a powerful state also remained to be seen.

Finally, even in this "nearly perfect case for the application of collective security doctrine,"104 many dissented from the military action.105 Ironically, though perhaps predictably, the longer the UN waited to see if economic sanctions might work, the more people tended to see George Bush as war-mongering and Saddam Hussein as peace-loving.106 Around the globe, real

in which case we salvage our principles by declining to call it an act of aggression.

Id.


100 One authority noted: "Examination of the interests of the major powers reveals that only the U.S. perceived Iraq's actions as a threat to its vital interests." Richard E. Rupp, Cooperation, International Organizations, and Multilateral Interventions in the Post-Cold War Era: Lessons Learned from the Gulf War, The Balkans, Somalia, and Cambodia, 3 UCLA J. INT'L L. & FOREIGN AFF. 183, 200 (1998).

101 Id.

102 See Heuser, supra note 44, at 92. Heuser stated that at the time of the Gulf War crisis the Soviet Union was "morally defeated." Id.

103 Id. at 92.

104 Claude, supra note 5, at 26.

105 Id.

106 See id. at 28. Claude wrote:

As the UN deadline of January 15, 1991, approached, without evidence that Iraq would have to give up its conquest of Kuwait, the American press began to paint President Bush as the saber-rattler, the one intent on having a war, and
enthusiasm was often lacking, and more often than not arms needed twisting before grudging assistance was provided. In America, many Democrats opposed the action, or supported it reluctantly. Peace movements coalesced in the West. Pope John Paul II declared the Gulf War to be "a grave defeat for international law and the international community." In this light one can see how one scholar concluded: "The Iraqi case ... confirms, demonstrates, and emphasizes most of the problems, uncertainties, and difficulties that have previously been associated with collective security and have contributed to its rejection."

A mere four months after the Persian Gulf War concluded, with its uncertain legacy for collective security in the post-Cold War world, fighting broke out in the Balkans. Before we move to the principal stages of the fighting and what the international community's involvement might reveal about collective security doctrine, it may be useful to supplement the historical record with some thoughts about how the term collective security is used and what assumptions underlie collective security doctrine.

III. THE USAGES AND ASSUMPTIONS OF COLLECTIVE SECURITY

A. A System of Managing Power

Since its conception, collective security has been prone to misuse in two principal ways. Simplifying its meaning in these regards is unfortunate since it raises confusion as to a person's intent whenever the term is employed. Perhaps the most common such misusage is a literal one that ignores its function as a term of art in international relations. That is, people take collective security as one who wanted peace (as he clearly did; no aggressor wishes to be opposed!).

See Rupp, supra note 100, at 200 (1998) ("Evidence indicates that had the U.S. failed to interpret the Iraqi invasion as a threat to its vital national interests, it is highly doubtful that the UN or the states that eventually joined the coalition would have been capable of reversing the Iraqi invasion.").

See CLAUDE, supra note 5, at 26.

See id. at 27. Another scholar asserted, "If the Gulf War is the prime example of collective security and is the trendsetter in international enforcement action for the post-Cold War era, a legitimate question arises as to whether the notion of collective security has not been stretched to such lengths as to render it meaningless." Mohammed Ayoob, Squaring the Circle: Collective Security in a System of States, in COLLECTIVE SECURITY IN A CHANGING WORLD 45, 53 (Thomas G. Weiss ed., 1993).

See generally Fink, supra note 84, at 25-31 (giving a brief history of the conflict in the Balkans).

See generally CLAUDE, supra note 3, at 246-48 (discussing how the term collective security has been used inappropriately).

See id. at 248.

Id. at 247-8.
security to mean, simply, security for a group of states, somewhere in the international system. Thus, where national security would focus on the safety of a single state, collective security would focus on the safety of a collection of states.

At other times, collective security has been used as a phrase synonymous with what the speaker perceives to be an effective alliance.\footnote{Id. at 247.} From the earliest of civilizations, groups have pooled resources against common foes, solemnizing these undertakings through treaties of alliance.\footnote{Id. Claude wrote:}

Nations enter into collective defense arrangements to ward off threats to their national security interests ... [t]he motive behind such arrangements is the conviction that the creation of military strength sufficient to ward off the specific threat would be beyond their national capacity or would prove excessively and unnecessarily costly in view of the opportunities for mutual support and common defense.\footnote{Id. at 183.}

Thus, while an alliance like the North Atlantic Treaty Organization (NATO) is loosely referred to as a collective security organization,\footnote{See generally WOLFERS, supra note 4, at 181-204 (distinguishing collective defense from collective security).} it is, in truth, a collective defense alliance.\footnote{See CLAUDE, supra note 3, at 225.}

In our view, collective security is most accurately conceived of as a system, one of any number of different possible approaches to managing power in international relations. Perhaps the most distinguished theorist of collective security, Inis L. Claude, Jr., wrote:

The doctrine of collective security is a prescription for an institutionalized arrangement to maintain the security of all members of a system of states by guaranteeing that an attack by

\footnote{Id. Indeed, as Wolters pointed out, "[T]he treaty was legally justified by reference to Article 51 of the United Nations Charter, which explicitly permits 'collective self-defense' in cases where the universal collective security provisions of the United Nations fail to protect a victim of aggression." WOLFS, supra note 4, at 167-68. See also CLAUDE, supra note 3, at 243 ("The point should be made clear that NATO is not a collective security system, however often statesmen and commentators insist upon calling it that.").}
any member against another will engender the combined resistance of all the others whose contribution to the common defense may be needed.\textsuperscript{122}

While collective security proponents often picture a lonely aggressor confronting the united might of the international community, they do not necessarily assume that every single state in the system, other than the target of the campaign, will cooperate militarily.\textsuperscript{123} Claude wrote:

Collective security assumes a concert that occasionally becomes a concert-minus-one-or-a-few; it relies upon the expectation that, in any given situation, most states – enough to constitute a preponderant force – will remain loyal to the system and will act upon the belief that their interests require them to join in suppressing a challenge to the order of the system.\textsuperscript{124}

Collective security is plainly a peace-through-war system.\textsuperscript{125} As Woodrow Wilson stated, "We cannot do without force. We cannot establish freedom without force. And the only force you can substitute for an armed mankind is the concerted force of the combined action of mankind through an instrumentality of all the enlightened governments of the world."\textsuperscript{126} The hope of such collective security proponents was that, over time, ambitious and powerful potential aggressors would believe in the awesome military capacity and also the steadfast will to fight wielded by the collective security coalition.\textsuperscript{127} Hence, they would be deterred from breaking the international peace. However, when pressed, the collective security forces must fight, or the deterrent value collapses.\textsuperscript{128}

When used in this manner, it is clear that simply creating a collective security system by no means guarantees that all states will be safe and secure. Just as a balance of power system can succeed and bring about a peaceful equilibrium of

\textsuperscript{122} CLAUDE, supra note 2, at 51.
\textsuperscript{123} See Inis L. Claude, Jr., Comment on 'An Autopsy of Collective Security,' 90 POL. SCI. Q. 715, 716 (1975-76).
\textsuperscript{124} Id.
\textsuperscript{125} See generally CLAUDE, supra note 3, at 249-61 (discussing the theory of collective security).
\textsuperscript{126} EBAN, supra note 47, at 246. Wilson also declared: "Mere agreements may not make peace secure. It will be absolutely necessary that a force be created, so much greater than the force of any nation now engaged or any alliance hitherto formed or projected. No nation, no probable combination of nations could face or withstand it." Id.
\textsuperscript{127} See id. at 252-53.
\textsuperscript{128} Id. Inis Claude wrote:

If the [collective security system] merely warns potential aggressors that they may encounter concerted resistance, it fails to achieve the full effectiveness in its basic function, that of discouraging resort to violence, and if its warning should be revealed as a bluff, it stimulates the contempt for international order which it is intended to eradicate.

\textit{Id.}
power or can break down into violent conflict, so a collective security system can work or it can fail. 129

B. Assumptions Underlying Collective Security

Collective security doctrine operates from a series of assumptions about the nature of the international system, assumptions whose validity ought to be carefully scrutinized before collective security is endorsed as the appropriate scheme to manage power in a post-Cold War world.

1. National Security is Indivisible

First, collective security advocates are in a sense radical and in a sense highly conservative. They are radical in proposing a new and different way of managing power in international relations: a break with traditional power politics. Collective security thought also has radical roots in that support for national self-determination, and all the weak, young states that principle would bring into being was a revolutionary position for established powers to take. 130 When Woodrow Wilson postulated that collective security might protect the interests of weak states, he had strayed far from the traditional dictates of Machiavellian power politics.

Nevertheless, classical collective security advocates are conservative in the sense that they are intent on keeping order in international relations. By its very nature, a collective security scheme is oriented toward maintaining the status quo. 131 Strobe Talbot, Deputy Secretary of State in the Clinton Administration, wrote revealingly of the Gulf War: “The allies were united behind a concept of collective security that had changed little in seventy years. The coalition was dedicated ... to preserving the sanctity of international boundaries established after World War I and the notion of national sovereignty that went back at least 400 years.” 132

In a world that relies upon collective security, those who have problems with the current order are supposed to press for non-violent change, usually gradual and evolutionary, not for violent abrupt change. 133 The status quo may legitimately be altered by peaceful processes of negotiation, but not by the forcible aggressive measures that would bring the weight of the collective security mechanism crashing down. 134

129 As Claude wrote: “The question of results is an empirical one, not to be settled by the labeling of the system.” Ini L. Claude, Jr., Theoretical Approaches to National Security and World Order, in NATIONAL SECURITY LAW 31, 36 (John Norton Moore et al. eds., 1990).
130 See Fowler & Bunck, supra note 33, at 147. The position was revolutionary for the established powers to take because these newly formed states were to be “equal when in so many important respects they [were] manifestly unequal.” Id.
131 See Claude, supra note 5, at 35.
132 Strobe Talbot, Post-Victory Blues, 71 FOREIGN AFF. 53, 59 (1991), quoted in Rupp, supra note 100, at 199.
133 See Claude, supra note 129, at 36.
134 See Claude, supra note 5, at 35.
According to collective security theorists, one gains national security by actively supporting the forces of international order around the globe. The world is so thoroughly interdependent that it is absurd for a state to try to pursue its national security outside of a scheme to protect the national security of all states. In sum, all states will find security when all pledge to lend their assistance to defeating aggression wherever it crops up. Since national security is indivisible, one needs a comprehensive scheme like that offered by a grand collective security system.

2. Aggressors and Peace-lovers

A second key assumption behind collective security doctrine is that aggression can be clearly defined, and the definition can be applied. Hence, the international community can, as a body, identify aggressors, and the peace-loving states of the world can unite against them. As the founders framed the United Nations Charter, they undoubtedly associated aggression with the German actions in Poland or the Japanese actions in China during World War II. Such plain violations of sovereignty were obviously to be resisted in constructing a new world order. Hence, the founders turned to a highly legalistic model. Aggression, conceived most broadly as "the resort to violence in pursuit of change," became a crime against international society – one that peace-loving states needed to oppose and punish.

For many people, however, the Cold War clouded matters. Under the influence of two competing ideological blocs, immediate postwar solidarity rapidly turned to disunity. Consensus gave way to almost constant argument, not least in the United Nations itself, over whether tyranny came from the right or the left or from both ends of the political spectrum. In a world that suddenly looked much more diverse, complex, and pluralist, covert operations and proxy wars largely replaced bold power plays by major states. Further complicating matters, states accused of aggression sometimes claimed that they had turned to force in order either to advance humanitarian purposes or to exercise their right of self-defense in anticipation of an attack upon their own people.

Despite these difficulties, collective security theory steadfastly maintains that states operating through the UN can identify aggression and join to resist it.
3. Opposition to Aggression Anywhere

Another major assumption underlying collective security is that states will be willing to commit to oppose aggression wherever it might occur.\footnote{One scholar wrote: "[All nations] must say in advance what they will do; they must agree to dispense with \textit{ad hoc} national judgments, and bind themselves to a pattern of action from which they will not be at liberty to deviate." \textsc{Claude, supra} note 3, at 253.} A collective-security scheme allows little room for neutrality, for special bonds of friendship or interest that might outweigh principles like non-aggression.\footnote{See \textsc{Wolfers, supra} note 4, at 169. Arnold Wolfers noted the reality of such pressures as follows:}
The fact that the aggression might victimize some other state, but not their own, is something that policymakers must banish from their thought processes as they decide how to respond. As Inis Claude observed: "France must react to an attack upon Bolivia as it would to an attack upon Belgium."\footnote{\textsc{Id.}} Under collective security, all states make every act of aggression their business, and all states have a cardinal responsibility to be involved in supporting the operation of the system.\footnote{\textsc{Id.} at 258.}

That there is more than a whiff of utopianism mixed with the hard-headed militarism in all this is underscored by the fact that few would relish joining an operation against a truly major power, such as China, Russia, or the United States.\footnote{\textsc{Id.} at 258.} One scholar noted: "The protean character of collective security reflects the fact that many who endorse it squirm when the terms are specified or applied to awkward cases."\footnote{\textsc{Betts, supra} note 28, at 6.}

In exhibiting a great faith in the ability of peace-loving leaders to cooperate with one another, collective security proponents are asking states to change the
typical manner of doing business. Abba Eban put it as follows:

In the old balance of power system, action to counter aggression was discretionary and subject to empirical decisions. It could vary from case to case. If the aggressor was your friend, or too powerful to be defied with impunity, or no more reprehensible than his victim, you might decide not to resist him at all. In that case you would probably avoid defining his action as aggression. In contradistinction to this permissive approach, resistance to aggression by an international organization was designed to be automatic, objective, universal, and predictable. It was therefore to have a permanently deterrent effect.

It might also be pointed out, to put a collective security system into operation, leaders might often have to resist their own populations by committing themselves to defend against aggression a state that their people dislike. And, leaders in the collective security regime would have to choose to use their own scarce resources to stimulate their people as well as the larger collective security agency toward stopping acts of aggression. These developments, too, would change the course of traditional foreign policy making.

IV. THE PRINCIPAL STAGES OF THE FIGHTING IN THE BALKANS

Let us turn next to the course of the fighting in the Balkans in an aim to assess the relevance of collective security doctrine to those events. Our thesis is that the Balkans crisis was not a collective security operation, but did illustrate the familiar problems associated with collective security. Indeed, this second post-Cold War experience in international intervention emphatically underscored many of the doubts that remained after the Gulf War as to the future prospects for collective security.

A. Background to Rising Tensions in Yugoslavia

After World War II, a communist regime led by Josip Broz Tito created the Socialist Federal Republic of Yugoslavia (FRY), which included six republics – Bosnia and Herzegovina (Bosnia), Croatia, Macedonia, Montenegro, Serbia, and Slovenia – and via the 1974 Constitution, two autonomous regions: Kosovo and

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147 See generally CLAUDE, supra note 1, at 144-49 (discussing the essential distinctions between the balance of power and collective security).

148 EBAN, supra note 47, at 239-40. In his critique of collective security Geoffrey Goodwin observed: “Friends and allies must be expected to try to excuse each other’s peccadiioes and to arraign their opponents whenever opportunity allows.” Goodwin, supra note 4, at 173.

149 See CLAUDE, supra note 3, at 253-54.

150 Id.
Vojvodina. Fatefully, the Yugoslav government drew the borders of these republics rather arbitrarily, and in any event ethnic groups were already scattered throughout the country. Over their lengthy histories, several of these republics had experienced self-government of one form or another, and each had been governed by a succession of powers. Historical animosities among ethnic groups had their genesis in disputes and atrocities, ancient and modern. To take one instance, during World War II, hundreds of thousands of Orthodox Christians, many of them pro-Serbia, had died after the Nazi puppet government in Croatia had sent them to concentration camps.

In its efforts to create new socialist citizens loyal to the Marxist state, the Tito regime downplayed religion and religious differences. Then, to weld these divided and fractious republics into a communist state, it had to suppress the ethnic nationalism that had long characterized the region, particularly among Serbs and Croats. Through various forms of coercion, the communist government accomplished these goals to some extent.

With declarations of ethnicity officially taboo, over time ethnic identities within the country’s six republics and provinces became increasingly blurred. People moved, and in urban areas intermarriage frequently occurred. Sarajevo, in particular, came to be seen as a model of multi-ethnic tolerance. Indeed, when the International Olympic Committee came to select a host site for the 1984 Winter Olympics, one that could symbolize international peace and unity, Sarajevo seemed an ideal choice. Nonetheless, despite all this apparent stability, Serbia, Croatia, and Bosnia continued to jockey with one another as rival

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152 Ambrosio, supra note 21, at 298.
153 See generally Weller, supra note 151, at 569 (discussing the populations of each of the areas that made up the Federal Republic of Yugoslavia at the time the conflict began).
155 Id. at 194-95 (discussing Tito’s policy towards religion immediately after World War II).
156 See Chester A. Crocker et al., Multiparty Mediation and the Conflict Cycle, in HERDING CATS: MULTIPARTY MEDIATION IN A COMPLEX WORLD 19, 35 (Chester A. Crocker et al. eds., 1999) (stating that in order to build a united nation out of a disparate community, Tito repressed ethnic identification).
157 One authority noted:

Altogether it has been estimated that up to 250,000 people were killed by Tito’s mass shootings, forced death marches and concentration camps in the period 1945-6. Tito’s secret police ... was zealous in rounding up real or imagined political enemies. In Tito’s own words, the purpose of [the secret police] was ‘to strike terror into the bones of those who do not like this kind of Yugoslavia’ — and there were many of them.

MALCOM, supra note 154, at 193.
158 See Daniel Serwer, A Bosnian Federation Memoir, in HERDING CATS: MULTIPARTY MEDIATION IN A COMPLEX WORLD 549, 551 (Chester A. Crocker et al. eds., 1999).
159 Id. at 551. Serwer wrote: “Muslims and Croats ... in fact are all Slavs and mostly irreligious...[M]any considered themselves ‘Yugoslavs’ or had intermarried, making ethnic identity ambiguous, at least for their children.” Id.
political subdivisions of Yugoslavia. One authority noted: "When Bosnian Muslims mobilized in the 1960s and 1970s, they did so as a political force, rather than as a religious grouping, in order to strengthen their position against the larger states of Serbia and Croatia."160

The last two decades of the twentieth century brought profound changes to the Balkans. Tito died in 1980. Soon, ethnic and national fissures within the state reappeared.161 As Mikhail Gorbachev instituted perestroika reforms in the Soviet Union, those who supported and those who opposed liberalizing the regime to allow for opposition viewpoints struggled inside the Yugoslav Communist Party.162 Then, the power vacuum that followed the disintegration of the Soviet bloc brought to the fore momentous constitutional questions as to the future political structure of Yugoslavia: would it be a single federal state, a confederation of independent states, or something different?163 It also brought renewed nationalism, fueled by politicians who revived ancient ethnic animosities to fan their popularity.164

In Serbia, Slobodan Milosevic seized power in a Serbian Communist Party coup in late 1987 and began to champion the goal of reintegrating Kosovo and Vojvodina as integral parts of Serbia.165 In 1990, reacting to events in Serbia, Croatia elected its own nationalist leader, Franjo Tudjman, on a platform that included anti-Serbia, pro-Croatia provisions.166 In Bosnia, the most ethnically diverse of the republics,167 three principal ethnic groups – Orthodox Christians, Catholics, and Muslims – vied for power in a contest complicated by religious differences and the irredentist objectives of Serbians and Croatians outside of Bosnia.168

At this time, the United States and the European Community, deeply troubled at the prospect of letting the genie of secession out of the bottle of state sovereignty,169 publicly favored the continued existence of a single Yugoslav state and urged the peaceful resolution of these ethnic disputes within that

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160 Crocker et al., supra note 156, at 35. See also MALCOLM, supra note 154, at 200 (discussing the mobilization of the Bosnian Muslims as a political force).
161 See SLOAN, supra note 12, at 11.
162 Id. at 11.
163 See Crocker et al., supra note 156, at 35.
164 Id. Sloan traced the rise of ethnic nationalism to a 1981 uprising by ethnic Albanians in Kosovo, protesting economic policies, but she and others have identified as the key event the publication of a Serbian Academy of Arts and Sciences memorandum regarding the 'oppression' of Serbs within Yugoslavia and postulating that all Serbs ought to have the right to live in Serbia. SLOAN, supra note 12, at 12.
165 SLOAN, supra note 12, at 12.
166 Thomas Ambrosio reported, however, that "Tudjman secretly met with Serbian President Slobodan Milosevic in March 1991 in an effort to come to an agreement to divide Bosnia." Ambrosio, supra note 152, at 299 (citing LAURA SILBER and ALLAN LITTLE, YUGOSLAVIA: DEATH OF A NATION 131-32 (1997)).
167 See SLOAN, supra note 12, at 13. Sloan reported that in 1992 the Bosnian population was 44 percent Muslim, 33 percent Serb, and 17 percent Croat. Id.
168 See generally Weller, supra note 151, at 596-603 (discussing the crisis in Bosnia-Hercegovina).
169 See id. at 605.
However, all these extraordinary political developments had the inexorable effect of steadily eroding Yugoslav sovereignty. In particular, Yugoslavia's political institutions proved unable to surmount announcements by the parliaments of Croatia and Slovenia that their laws would take precedence over those of the federal government. On June 25, 1991, after the Serbians refused to recognize a Croat who had succeeded to the supposedly rotating federal presidency, the Croatians and Slovenians asserted their independence. In response, the Serb-dominated Yugoslav People's Army (JNA) attacked the Slovenians, and, by August, the Croatians as well. With the outbreak of fighting, various voices within the international community called upon the United Nations to help return peace to the Balkans.

B. UN Difficulties

In the early stages of the conflict, events on the ground centered on a formidable pro-Serbia military fighting a poorly armed Croat force. Helped by the JNA, Serb militias focused on what became known as ethnic cleansing. In this case, that meant expelling Croats from those parts of Croatia that had majority Serb populations. Eventually, the Serbs held almost a third of Croatian territory. Nevertheless, under the strain of the fighting and accompanying sanctions, the Serbian economy was steadily weakening, and Serbian leaders were finding themselves increasingly isolated internationally.

1. State Collapse, Not Cross-Border Aggression

A central problem, however, was that the UN collective security tool seemed singularly ill-suited to fixing the 1990s version of Balkans problems. Collective security takes the principal challenge to world order to be aggression. In fact, however, future historians may well come to view the post-Cold War era as defined by dire problems within states, and here collective security doctrine is largely silent.

Woodrow Wilson would have instantly recognized, even endorsed, the desire of the different nations within Yugoslavia to have their own states. He would...
doubtlessly have abhorred the tactics employed, but his formulations of collective security do not shed much light on what his policy recommendation would have been in confronting warring nations within a collapsed state.

In any event, unlike the situation in Kuwait, no well-publicized instance of cross-border aggression could galvanize action. Instead, in Yugoslavia diverse factions were contending "to alter administrative boundaries during a period of state collapse ...". Traditional collective security doctrine, focused on international aggression, did not provide guidance. Such circumstances seemed more conducive to United Nations peacemaking, or perhaps peacekeeping, than to the peace enforcement associated with collective security.

2. The Domestic Jurisdiction Problem

In the early fall of 1991, the UN Security Council addressed the spiraling conflict in Bosnia and expressed its concern about the "loss of human life and material damage," the effect the conflict could have on neighboring countries, and the possibility that continued conflict could become "a threat to international peace and security." However, at this time, the international community still recognized Yugoslavia as an independent sovereign state. The UN founders had conceived of their organization's security functions, generally, in terms of sovereign states dealing with their international, not their domestic, problems, and particularly, in terms of stopping aggression by one powerful sovereign state upon another.

Through the Cold War years, albeit with various exceptions, avoidance of entanglement in security problems that might arise within member states had become accepted UN doctrine. For instance, Soviet leaders had regularly championed sovereignty as a vital shield to ward off "imperialist" intrusions, and they had also jealously guarded "the domestic jurisdiction of communist states

Wilson being the League's biggest supporter, promoted self-determination, because the League viewed it as an essential means for minimizing international conflict. See Claude, supra note 5, at 26 (discussing how in the Gulf War there was clearly an aggressor and also a clear victim).

Ambrosio, supra note 21, at 309, n.92. Ambrosio wrote, more generally: "Serbia's deep involvement in Croatia and Bosnia is beyond a doubt. However, there was enough ambiguity surrounding the conflicts to complicate any immediate international resistance to Serbian aggression." Id. at 298.

See CLAUDE, supra note 1, at 110. Claude describes collective security as follows: "The scheme is collective in the fullest sense; it purports to provide security for all states, by the action of all states, against all states which might challenge the existing order by the arbitrary unleashing of their power." Id. Therefore, collective security is meant only to protect states from cross-border aggression and provide guidance when there are interstate and quasi-interstate conflicts. Id.


One such exception involved egregious human rights abuses within a state, though throughout the Cold War the boundaries of acceptable humanitarian intervention were exceedingly murky, to say the least. See MICHAEL R. FOWLER, THINKING ABOUT HUMAN RIGHTS: CONTENDING APPROACHES TO HUMAN RIGHTS IN U.S. FOREIGN POLICY 217-18 (1987). Furthermore, the United Nations did take action with respect to certain civil wars with some external involvement. See LUARD, supra note 89, at 168.
against interference by the United Nations." Hence, in the early stages of the fighting, the Security Council considered the Balkans problems in light of Article 2, Paragraph 7 of the UN Charter, which mandates restraint from intervention in matters which lie solely within the domestic jurisdiction of a state.

The extent to which the initial fighting in the Balkans was an intrastate or an interstate conflict, or more precisely, which elements predominated at what time, remained debatable for quite some months. So long as the state of Yugoslavia continued to exist in the eyes of the international community, then ethnic conflict within its borders would be regarded by many as a domestic problem beyond the proper reach of the Security Council. Only after the former republics had been recognized as sovereign states, could the international community perceive the conflict in the interstate terms that would make it plainly subject to UN intervention.

3. Lack of Leadership

Unlike the situation in Kuwait, the United States did not perceive fighting in the Balkans to threaten its vital interests. Hence, it was neither prepared to weld together an intervention force, nor to accept undue costs. Moreover, Russia had long been allied with the Serbs and was willing to block UN action harmful to its interests. With the collapse of the Soviet Union Russian-American relations were at a particularly delicate stage. Thus, at this point, rather than working through the UN, the United States was content to let the European states take the lead in resolving what seemed on both sides of the Atlantic to be chiefly a European problem. The fact that the Croatians, in particular, badly wanted to integrate into Europe, thereby "gaining entry into Western political, military, and economic institutions" underscored the

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187 See U.N. Charter art. 2, para. 7. The UN Charter states:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

189 Id.
190 See Rupp, supra note 100, at 205.
191 Id.
192 See Heuser, supra note 44, at 92.
193 See Crocker et al., supra note 156, at 35-36.
194 Ambrosio, supra note 152, at 300. Croatian Foreign Minister Mate Granic declared: "[Croatia is] a Central European and Mediterranean country which wishes to pursue its integration into Central European and Euro-Atlantic associations – political, economic and security associations."
geographical dimensions of the problem.

The Security Council – not yet prepared to classify the conflict in the Balkans as threatening international peace and security – confined its actions to imposing, in September 1991, a mandatory arms embargo on all of Yugoslavia.\textsuperscript{195} European Community (EC) diplomatic initiatives, supplemented by the negotiating ability of former US Secretary of State, Cyrus Vance (designated the UN Secretary-General's Personal Envoy to Yugoslavia), did manage to bring about a cease-fire in Croatia.\textsuperscript{196} Then, in November 1991, rather than UN collective security action being taken, the Europeans – in tandem with the Americans – imposed economic sanctions on Yugoslavia.\textsuperscript{197}

4. Initial Hesitation Even at Peacekeeping

In the 1950s, with many blaming the Cold War stalemate for the UN's failure to keep the peace through collective security, Secretary-General Dag Hammarskjold and Prime Minister Lester Pearson of Canada attempted to find something useful for the United Nations to do in promoting peace.\textsuperscript{198} They reasoned that the Cold War had reached the point at which clear spheres of influence existed, but much territory was not firmly in either camp. And here, the superpowers, fearing nuclear holocaust, were not always aggressively vying with one another to extend their influence as far as possible.

This stimulated new attention to peacekeeping, a function of international organization that had been used infrequently in the past.\textsuperscript{199} The original notion was that when the warring sides wanted the UN to step in\textsuperscript{200} – perhaps because of exhaustion or sudden opportunity or increasing danger – neutral peacekeepers would move into a cease-fire, defusing tension and making it more difficult for either side to start fighting, while providing necessary breathing space for peace negotiations to occur.\textsuperscript{201} The introduction of an impartial outside force into

\textit{Id. at 300.}

\textsuperscript{195} S.C. Res. 713 (Sept. 25, 1991), available at http://www.un.org/documents/scres.htm. Since light weapons could be smuggled relatively easily, this had the effect of freezing the levels of heavy weapons, which the Bosnian Serbs had in much greater quantities than the Muslims. \textit{See Sloan, supra} note 12, at 50. Sloan correctly characterizes this as the American viewpoint. \textit{Id.} For detailed background on the Security Council discussions see \textit{Weller, supra} note 151, at 577-80.

\textsuperscript{196} \textit{See generally} Weller, \textit{supra} note 151, at 570-74 (discussing the initial response of the European Community).

\textsuperscript{197} \textit{See generally} Jean-Pierre Pussochet, \textit{The Court of Justice and International Action by the European Community: The Example of the Embargo Against the former Yugoslavia}, 20 FORDHAM \textsc{INT'L L.J.} 1557 (1997).

\textsuperscript{198} \textit{See Claude, supra} note 12, at 51-52.

\textsuperscript{199} \textit{See Goulding, supra} note 99, at 452.

\textsuperscript{200} For more discussion of the key element of consent see Alan James, \textit{Unit Veto Dominance in United Nations Peace-keeping}, in \textit{POLITICS IN THE UNITED NATIONS SYSTEM} 75, 79-80 (Lawrence S. Finkelstein ed., 1988).

\textsuperscript{201} The former UN Under-Secretary-General for Peacekeeping Operations usefully defined traditional peacekeeping as:

\begin{quote}
Field operations by the United Nations, with the consent of the parties concerned, to help control and resolve conflicts between them, under United
conflict situations proved a useful innovation, and peace-keeping was soon stretched in new directions. By the 1990s, UN peacekeepers were being asked to take on more and more new jobs, not simply to monitor cease-fires, but to run elections, disarm fighters, feed war victims, and rebuild shattered states.

Peacekeeping, not collective security, is the form of collective action that has occupied the lion’s share of UN time, resources, and attention. Nevertheless, in November 1991 when Yugoslavia’s Permanent Representative to the United Nations formally requested that the Security Council establish a peacekeeping force in his country, he was turned down. The Security Council reiterated its concerns that while continuing violence in the Balkans could ultimately threaten international security, no true collective security (or Chapter VII) threat was yet evident. At first, the Council would go no farther than to indicate that if the parties complied fully with the negotiated cease-fire, the process for considering the establishment of a peacekeeping operation would move more quickly. In the meantime, Secretary Vance developed a peacekeeping plan that included establishing United Nations Protected Areas (UNPAs) in Croatia. Since the UN typically looks to conclude formal and voluntary peacekeeping agreements with the participants in a conflict, one reason for hesitation was the chaotic situation within the former Yugoslavia where militias and other irregular armed groups operated alongside armies.

C. Conflict Erupts in Bosnia

In the late fall and early winter of 1991, the contending parties within the former Yugoslavia declared and broke various cease-fires, and the Security Council entered the fray, at first in gingerly fashion, sending in fifty military

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Nations command and control, at the expense collectively of the member states, and with military and other personnel and equipment provided voluntarily by them, acting impartially between the parties and using force to the minimum extent necessary.

Goulding, supra note 99, at 455.

202 See id.
203 Id. See also Brian Urquhart, Beyond the ‘Sheriff’s Posse,’ 32 SURVIVAL 196, 202-05 (1990) (discussing the various jobs that the UN peacekeepers were asked to perform).
204 See Weller, supra note 151, at 583. The Security Council turned down the request to establish a peacekeeping force in Yugoslavia because of the parties’ failure to comply with EC and UN brokered cease-fire agreements. Id.
207 See Weller, supra note 151, at 584.
208 See Goulding, supra note 99, at 459.
liaison officials,209 followed by another twenty-five.210

Ultimately, in late February 1992, the Security Council established a peacekeeping force, known as the United Nations Protection Force (UNPROFOR).211 It was deployed to the demilitarized UNPAs in Croatia, but in order to avoid being seen as either pro-Serb or pro-Croat, it was headquartered in Sarajevo, Bosnia.212

Grave problems, however, now afflicted Bosnia. Despite the serious human rights abuses in Croatia and Slovenia, the EC, in January 1992, recognized those countries.213 Fearing rule by Serbs, the Croat and Muslim representatives in the Bosnian Parliament asked the EC to recognize an independent Bosnia in order to help to assure that Bosnia was not subsumed into the Greater Serbia that Milosevic had been touting.214 Bosnian-Serb representatives resisted, threatening to bring Bosnia, together with Serbia and Montenegro, into a new, smaller Yugoslav state.215 In March, a referendum occurred, marked by a Serb boycott and by overwhelming votes by Bosnian Croats and Muslims for independence.216

When Muslim representatives within the Bosnian government used their numerical superiority to declare Bosnian independence, civil war ensued within Bosnia.217 By the yardstick that aggression amounts to the resort to violence in pursuit of change, events in the Balkans certainly qualified.

1. More Difficulties in Formulating a Collective Security Framework

The conflict within Bosnia soon devolved into a tangled mass of different military forces fighting different campaigns against different opponents. Serbs first attacked Croats, just as they had within Croatia, and the Bosnian government, lacking much in the way of military resources, failed to help the Croats.218 One authority noted: "Serb militias, supported by JNA units, including air forces, quickly gained control of significant areas of the territory. President

212 See SLOAN, supra note 12, at 15.
213 See Weller, supra note 151, at 586-88. This reflected serious internal policy disagreement between the Germans, who felt that recognizing Croatia (with which it had longstanding warm ties) would stop Serb aggression, and the other EC members, who felt it would probably exacerbate the problem. Id. Eventually, Germany threatened to recognize Croatia alone, and the other EC states ultimately opted to join them. See SLOAN, supra note 12, at 16.
214 See Weller, supra note 151, at 586-88.
215 Id. It could be argued that the term Bosnian-Serb is oxymoronic in the sense that one is either born in Bosnia, and Bosnian, or born in Serbia, and Serbian. We use the term as a short-hand for pro-Serbia citizens of Bosnia and favor it over such other possible options as Bosnian-Orthodox Christians.
216 Id. at 596.
217 Id. at 596-97.
218 See Serwer, supra note 158, at 551.
Alija Izetbegovic of Bosnia-Hercegovina reportedly addressed an appeal to the European Community, the [Conference on Security and Co-operation in Europe], and the United Nations to prevent aggression in our country.”

At the same time, Bosnian Muslims and Bosnian Croats fought one another for political control throughout central Bosnia, but the fighting was most intense “where control was most uncertain: in those areas where Muslims and Croats were close to equal in population.” US State Department official Daniel Serwer opined:

[The] issues people really cared about - language, education, religious and national symbols - were exploited by nationalist leaderships, which in a bizarre perversion of democratic principles decided they could become a majority and get their way by chasing members of the other “ethnic” group out.... The fighting was exacerbated by Croatian security goals, which included the creation of a band of Croat-dominated territory along the Herzegovinian border of Bosnia with Croatia, and by Muslim nationalists, who aimed for a Bosnia that Muslims would control.

Croatia’s ultimate goal was to annex those parts of Bosnia inhabited primarily by Croats. The Bosnian Croats were fighting and engaging in ethnic cleansing, in order to “avoid being a minority, believing that there could be no worse fate for their national identity.” In the meantime, the Serbs in Bosnia, extensively supplied by the JNA, fought the Bosnian government in Sarajevo, under the predominant control of Bosnian Muslims.

In an effort to topple the government, the Bosnian Serbs surrounded and laid siege to predominantly Muslim cities, most notably, to the seat of government in Sarajevo. Finding itself in the midst of the fighting, in May 1992 the UN withdrew its UNPROFOR headquarters from Bosnia, leaving a staff of 120 behind. As the sole international presence within Bosnia, these UN representatives mediated among the parties and by June had gained an agreement to allow the Sarajevo airport to be opened for the delivery of humanitarian aid.

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219 Weller, supra note 151, at 597.
220 Serwer, supra note 158, at 551.
221 Id. at 551. Serwer concluded: “Fifty-thousand Muslims and one-hundred-and-fifty-thousand Croats were displaced by the Croat-Muslim war.” Id. at 551.
222 See Ambrosio, supra note 152, at 300.
223 Id. at 566.
224 See generally MALCOLM, supra note 154, at 234-52 (giving the history of the war in Bosnia).
225 Id.
226 See Weller, supra note 151, at 601. See also MALCOM, supra note 154, at 242 (stating that on May 16, 1992 most of the UN force already in Sarajevo was withdrawn).
227 See SLOAN, supra note 12, at 46.
2. Threat to Values, Not Interests

As a matter of geopolitics, the international community’s “only real interest [in Bosnia] was the prevention of a wider war, in which outsiders, including Russia, America, and Western Europe but also others, would most probably take differing sides.” And, sparking a wider conflagration appeared an exceedingly slim possibility. One observer commented: “What has happened in Sarajevo in 1992 is tragic, but nobody is convinced that it will inevitably produce the same result as what happened in Sarajevo in 1914.” The terrible bloodshed, in general, and the heinous methods of ethnic cleansing, in particular, touched raw nerves, but most powers, even in Europe, saw such matters as impugning their support for human rights more than threatening their military interests.

While economic interests might have been more seriously implicated were the fighting to lapse into neighboring countries, the western powers remained bitterly divided on policy and exceedingly reluctant to step out front, become deeply involved, and absorb major costs. One scholar wrote:

The war in Bosnia presented the international community with an obvious collective action problem. Policymakers in the West were not oblivious to the central role the Balkans have played in this century’s bloody European wars, and they certainly recognized that large-scale war in the Balkans, potentially involving the Albanians, Macedonians, Greeks, Bulgarians, and Turks, was a general threat to their national interests. But, without one nation — a hegemon — willing to lead the international community and shoulder the disproportionate costs, states defected from the cause of international cooperation.

The consequence of all this was that the Security Council took what might charitably be termed a series of strictly limited steps toward involvement. Cease-fires were regularly declared only to melt away almost immediately. On May 15, 1992, the Security Council once again pleaded with the three competing forces within Bosnia to cease-fire and demanded that forces outside Bosnia declared eleven days before, an undertaking that itself almost immediately broke down. See Weller, supra note 151, at 600.
refrain from interfering. The Security Council also demanded that the JNA and all irregular forces be disbanded and disarmed, and that all "forcible expulsions ... and attempts to change the ethnic composition of the population" end immediately. In August, the Security Council publicly acknowledged the practices of ethnic cleansing being undertaken in Bosnia.

In the meantime, fighting raged within Bosnia, and by the summer of 1992 the better supplied Bosnian Serbs held the upper hand in much of the country. One authority reported: "International conscience was soon struck by reports of severe human rights abuses, including rapes, executions, the setting up of prison camps, and by the mainly Bosnian Serb practice of 'ethnic cleansing' - meaning the expulsion of non-Serbs from Serb-controlled regions of Bosnia."

Needless to say, those who expected the Gulf War to be a harbinger for a new collective security era could find little in this record to evince a dramatic break from the traditional course of international politics. To the contrary, without a clear threat to their interests, the major powers involved seemed to have difficulty cooperating with one another or fashioning coherent and effective policy. Instead, they muddled along, wringing their hands over the human costs but continuing to shy away from undertaking peace enforcement through military action. One scholar wrote: "[In Bosnia ... the West's attempt at limited but impartial involvement abetted slow-motion savagery. The effort

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236 By the summer of 1993 the Serbian army had long been thoroughly entrenched, encircling Sarajevo. See STEVEN L. BURG & PAUL S. SHOUP, THE WAR IN BOSNIA-HERZEGOVINA: ETHNIC CONFLICT AND INTERNATIONAL INTERVENTION 134 (1999). However, it would have been far more advantageous to the Muslims to sign a settlement at this point than to adopt the one they signed three years later. Id.


238 In a later resolution the Security Council went into much greater detail about the vicious atrocities that were occurring:

Continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia and especially in Bosnia and Herzegovina including reports of mass forcible expulsion and deportation of civilians, imprisonment and abuse of civilians in detention centres, deliberate attacks on non-combatants, hospitals and ambulances, impeding the delivery of food and medical supplies to the civilian population, and wanton devastation and destruction of property.


239 SLOAN, supra note 12, at 20.


241 Instead, in May 1992 Croatia and the Republic of Bosnia and Herzegovina (Bosnia) were admitted to the United Nations as new member states, specific note being taken of Bosnia's agreement to comply with the provisions of the UN Charter relating to peaceful settlement of disputes and restraint from the use of aggressive force. See S.C. Res. 755 (May 20, 1992), available at http://www.un.org/documents/scres.htm. Through these actions, the international community underscored the belief of many member-states that the cause of peace would be served in the Balkans if the boundaries of the former republics within communist Yugoslavia were regarded as the boundaries of the newly emerging independent states. See Ambrosio, supra note 152, at 298.
wound up doing things that helped one side, and counterbalancing them by actions that helped the other. This alienated both and enabled them to keep fighting.”

3. Half Steps in Response to Humanitarian Concerns

The international community, through the Security Council, thus opted for a series of wrist slaps and half-steps to try to meet the humanitarian crisis in Bosnia. At this point the former republics of Serbia and Montenegro were still attempting to establish themselves as the successors to the Federal Republic of Yugoslavia (the Republic). On May 30, 1992, in the course of issuing mandatory economic sanctions, the Security Council failed to recognize the Republic as an independent political organization. The Security Council then reprimanded the Republic for its attempts to gain territory through the use of force and for its use of force against the UNPROFOR troops, which hindered the delivery of humanitarian assistance.

In fact, the United Nations High Commission for Refugees had experienced considerable problems with military forces blocking or hijacking aid convoys. In June 1992, another agreement was negotiated to open the Sarajevo airport for humanitarian flights. Two months later, the Security Council authorized UN member states, this time under Chapter VII of the Charter, to take all measures necessary to facilitate the delivery of humanitarian aid. While this amounted to a significant step toward armed collective intervention, it was strictly curtailed in scope. Despite the mounting evidence of atrocities, the Security Council was not prepared to use force to coerce the parties toward peace or even toward a cease-fire.

Instead, in another limited signal of future intentions, the Security Council simply requested that all organizations attempting to provide humanitarian relief begin collecting evidence that could be used when the perpetrators of war crimes, and crimes against humanity were eventually brought to trial. Shortly thereafter, the warring factions agreed to permit humanitarian aid shipments to move through the country -- the “treatment of refugees was to be based on

\[242\] Richard K. Betts, The Delusion of Impartial Intervention, 73 FOREIGN AFF. 20, 24 (1994). He continued: “U.S. and U.N. threats were not just weak and hesitant; by trying to be both forceful and neutral, they worked at cross-purposes.” Id. at 25.

\[243\] See S.C. Res. 757 (May 30, 1992), available at http://www.un.org/documents/scres.htm. Sloan noted: “The objective of the sanctions was to isolate Yugoslavia in the hope that the suffering inflicted on Serbia (and Montenegro) would decrease Serbia’s ability to support the Bosnian Serbs and compel Belgrade to urge its Bosnian Serb allies to cease hostilities and make peace.” SLOAN, supra note 12, at 46.


\[245\] See MALCOLM, supra note 154, at 247.

\[246\] See BURG & SHOUP, supra note 236, at 132. On June 20 the cease fire was broken as both sides battled for control of the territory between the airport and the city. Id.


\[248\] See SLOAN, supra note 12, at 47.

strictly humanitarian, non-political and non-discriminatory criteria.\textsuperscript{250}

In a bid to emphasize what it hoped would be seen as new-found resolve, the Security Council increased the size of the UNPROFOR peacekeeping force and permitted it to use force in self-defense.\textsuperscript{251} The Security Council explicitly noted: "[I]n this context, self-defense is deemed to include situations in which armed persons attempt by force to prevent United Nations troops from carrying out their mandate."\textsuperscript{252} To punish the parties for the continued violence, including hindering the delivery of humanitarian aid, the Security Council further sanctioned Yugoslavia, embargoing Yugoslav products and commodities, and suspending sport, economic, and financial contacts, and cultural, scientific, and technical exchanges.\textsuperscript{253} In July 1992, NATO naval forces in the Adriatic Sea began to monitor compliance with the sanctions regime.\textsuperscript{254}

The difficulty here was plain. As one critic wrote: "Economic sanctions worked against the Serbs, while the arms embargo worked against the Muslims. The rationale was that evenhandedness would encourage a negotiated settlement. The result was not peace or an end to the killing, but years of military stalemate, slow bleeding, and delusionary diplomatic haggling."\textsuperscript{255}

4. The No-Fly Zone (NFZ)

In October 1992, the Security Council banned all military flights in Bosnian airspace, except for those of the UNPROFOR peace-keepers.\textsuperscript{256} Once again, this form of intervention was perhaps not so bold and decisive as it might appear at first glance. The international community perceived a no-fly-zone to be "low-cost, low-risk [action] that did not require the placement of ground forces in Bosnia and would likely not lead to an escalation of involvement."\textsuperscript{257} Indeed, for many months no enforcement of the NFZ occurred, since the British and French believed that if their jets attacked Serbian planes, the Serbs would retaliate against UN peacekeepers which included British and French contingents.\textsuperscript{258} Within four months the UN had recorded more than 400 NFZ violations, although none was deemed of real military significance.\textsuperscript{259}

\textsuperscript{250} Wide-ranging Sanctions Imposed Against Yugoslavia: Largest Refugee Crisis in Europe Since Second World War, UN CHRONICLE, Sept. 1992, at 7.
\textsuperscript{251} See UN DOC. S/25264 (Feb. 10, 1993), para. 9.
\textsuperscript{252} Id. This was another limited step toward intervention. See SLOAN, supra note 12, at 47. As Sloan noted: "The fact that UNPROFOR's September 1992 mandate expansion made no reference to Chapter VII of the UN Charter only underscored that, in the summer of 1992, governments in Europe and America were unable to identify a compelling national interest in Bosnia that would justify intervention." Id.
\textsuperscript{253} See Wide-ranging Sanctions, supra note 250, at 9.
\textsuperscript{254} SLOAN, supra note 12, at 46.
\textsuperscript{255} Betts, supra note 242, at 25.
\textsuperscript{257} Ambrosio, supra note 152, at 299.
\textsuperscript{258} See MALCOLM, supra note 154, at 247. See also Richard Holbrooke, The Road to Sarajevo, in HERDING CATS: MULTIPARTY MEDIATION IN A COMPLEX WORLD 327, 339 (1999) (discussing why no enforcement of the NFZ occurred for many months).
\textsuperscript{259} See SLOAN, supra note 12, at 22 (citing UN DOC. S/25264 (Sept. 10, 1992), at para. 20).
In March 1993, however, the Bosnian Serb air force bombed Muslim villages, prompting the Security Council to authorize member states, under Chapter VII, to take “all necessary measures” in Bosnian airspace to ensure compliance with the NFZ. The Secretary-General then specifically requested that NATO undertake enforcement. One authority later noted: “This was the first time the [Security Council] had authorized armed intervention in the former Yugoslavia, where previously all use of force by the United Nations had been limited to self-defense.”

5. The Safe Areas and More Effective Multilateral Action

In fact, a key reason that the humanitarian crisis in Bosnia continued to worsen was that for a long period the western powers and the international community were unable to cooperate very effectively. Bosnian Serbs increased attacks against Muslim towns, most notoriously, the shelling of Srebrenica. As pressure increased on all the powers to take some significant action, the United States proposed striking a limited number of Bosnian Serb targets and lifting the long-standing arms embargo, so as to allow the Muslims to catch up to the Bosnian Serbs in heavy weapons. The European states strongly disagreed, fearing that it would escalate the violence, and the Americans, not wishing to divide NATO or to antagonize Russia, dropped the idea.

Eventually, in April 1993, the Security Council ordered the parties to respect Srebrenica as a safe area. And, when Bosnian Serb and Bosnian Muslim commanders agreed that the city be demilitarized and a total cease-fire be implemented, the Security Council declared in the following month that five other communities, including Sarajevo, be designated safe havens, that is, protected from any armed attack or hostility. The central problem was that, as its military experts advised, the UN “did not have adequate forces on the ground to protect those areas .... [Thus,] all in such areas were effectively hostages in the broader struggle.”

While unwilling to “paint the country blue” with UN troops sufficient to carry out their tasks, the Security Council did manage to find common ground in a proposal to further strengthen economic sanctions. Among other measures, the
Security Council compelled states to break trade relations with the Federal Republic of Yugoslavia (FRY), freeze its financial assets, and reduce their diplomatic missions to Belgrade.270 The resolution also authorized member states to use necessary means to stop maritime traffic from entering Serbia and Montenegro’s territorial seas.271 As was revealed publicly, the purpose of these sanctions was to “punish Serbia for its actions in Bosnia, and ... weaken its resolve to continue the war by inflicting economic hardship against the country.”272

Furthermore, in June 1993, the Security Council unequivocally transformed the Bosnia operation into a peace enforcement mission.273 This was done by broadening UNPROFOR’s authority to include “deterring attacks against the safe areas, monitoring the cease-fire, promoting the withdrawal of military or paramilitary units other than those of the Bosnian government, and occupying some key points on the ground – in addition to continuing to participate in the delivery of humanitarian aid.”274 The Council authorized all member states and regional organizations to take “all necessary measures,” including the “use of air power,” to protect the safe areas and the UNPROFOR troops.275

Tempering this positive collective action, however, was the fact that the Serbian and Creation forces refrained from attacking only those places deemed of negligible strategic importance.276 In late July 1993, the US proposed to its NATO allies a plan to bomb the Serb positions around Sarajevo.277 An acrimonious debate ensued within NATO as to how narrow or broad a mandate it ought to have: that is, could air strikes include targeting ammunition dumps or air fields, which might materially affect the course of the fighting, or must it be focused only on the Serbian gunners directly threatening a site?278 Early the following month, NATO declared that it would prepare to take stronger measures

271 Id.
272 SLOAN, supra note 12, at 22.
274 SLOAN, supra note 12, at 23-24.
275 S.C. Res. 836 (June 4, 1993), available at http://www.un.org/documents/scres.htm. In emphasizing the importance of the move in the former Yugoslavia from a Chapter VI to a Chapter VII operation under the Charter, a leading United Nations official later wrote:

In political, legal and military terms, and in terms of the survival of one’s own troops, there is, on the one hand, all the difference in the world between being deployed with the consent and cooperation of the parties to help them carry out an agreement they have reached and, on the other hand, being deployed without their consent and with powers to use force to compel them to accept the decisions of the Security Council.

Goulding, supra note 99, at 461.
276 While a May 1993 US proposal for air strikes against offenders brought a temporary pause, more shelling and artillery attacks by Serb forces recommenced when the proposal was shelved. See SLOAN, supra note 12, at 24.
277 See BURG & SHOUP, supra note 236, at 142.
278 See SLOAN, supra note 12, at 26.
against those shelling Bosnian cities. However, even these plans were thoroughly hedged about with restrictions. UNPROFOR commanders would have to request the action; NATO's 16 ambassadors would have to approve it unanimously; and then the Secretary-General would have to grant final authorization.

Moreover, as fighting intensified in central and southern Bosnia, by the spring of 1993, serious problems had developed in what had been a briefly successful UN humanitarian assistance program. The chief problem was that while UNPROFOR had the military resources needed to deter attack on a humanitarian convoy, it could not, in the words of David Owen, "fight a convoy through," something that would have required considerably more troops and weapons. In addition, since the sieges of largely Muslim Bosnian towns were a key component of their military strategy, Serbs saw the UN declaration of safe areas to be protected with force as transforming what had been an impartial international peacekeeping mission into an anti-Serb, pro-Muslim endeavor. The blocking and harassing of humanitarian convoys thus increased, a trend that was not reversed by UN attempts to reassure the Serbs that the peacekeepers would not use force against them.

Similarly, the Bosnian Serbs increased their attacks on the safe areas, including the shelling of civilian targets in Sarajevo. Again, UNPROFOR was outgunned, with neither the numbers of soldiers nor the heavy weapons necessary to enforce the safe-haven mandate. But, western opinion was moving swiftly toward support for a more forceful international approach. Atrocities and the outflow of refugees continued while negotiations had proven unable to bring peace. The Serbs, in particular, seemed utterly contemptuous of the United Nations and its peacekeepers, and NATO appeared divided, frustrated, and impotent.

After Bosnian Serbs fired a mortar round into a Sarajevo market in February 1994, killing 69 civilians and occasioning massive international media coverage, NATO announced that air strikes would be carried out against any heavy

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279 See BURG & SHOUP, supra note 236, at 142.
280 See SLOAN, supra note 12, at 26.
281 One authority noted: "Between November 1992 and January 1993, a total of some 34,600 tons of relief supplies were delivered to an estimated 800,000 beneficiaries in 110 locations throughout Bosnia and Herzegovina." Id. at 27, citing UN Doc. S/25939 (June 14, 1993), para. 6.
282 Id. at 27 (quoting DAVID OWEN, BALKAN ODYSSEY 53 (1995)).
283 A UN official later stated that, while their rules of engagement might permit them to use force against those obstructing their efforts, the commanders of peacekeepers in Bosnia judged "that 'fighting the aid through' [was] not a practicable proposition." Goulding, supra note 99, at 459.
284 See SLOAN, supra note 12, at 28.
285 Id. at 28-29.
286 The shelling of a breadline in Sarajevo on May 27, 1992 opened many eyes in the West and caused more people to call for some type of more forcible intervention. See BURG & SHOUP, supra note 236, at 132.
287 See SLOAN, supra note 12, at 30 ("The commander of UNPROFOR had estimated that in order to ensure full respect for the safe areas, the force would need approximately 34,000 additional troops to obtain deterrence through strength.").
288 See SLOAN, supra note 12, at 56.
weapons found within twenty kilometers of the city. Later that month, NATO jets shot down Serbian warplanes attempting to bomb a Bosnian arms factory. The Serbs responded to this and to NATO air support of UN personnel through renewed offensives, temporary seizure of UN weapons, and, on one occasion, taking more than 200 UN peacekeepers hostage. NATO countered with strikes against Bosnian tanks and air fields, and NATO’s use of air power helped to alleviate pressure on Sarajevo. This was important because Sarajevo was the largest and most important safe area, essential to maintaining the inflow of supplies and outflow of refugees.

6. Diplomatic Initiatives

In the meantime, various notable diplomatic initiatives had occurred, though none had been able to arrive at a mutually satisfactory, comprehensive peace plan for the former Yugoslavia. Late in the summer of 1992 at the London Conference, representatives of outside powers and all of the parties met and agreed to create a permanent negotiating forum known as the International Conference on the Former Yugoslavia (ICFY). One authority observed: “The London Conference united the international community in a strategy of bringing peace to Bosnia through a combination of humanitarian aid, diplomatic peacemaking, and Article 41 measures against the Serbs.” Plainly absent, at this stage, was any inclination to undertake collective enforcement action under Article 43.

In September 1992, when the ICFY opened, Secretary-General Boutros Boutros-Ghali again selected Cyrus Vance as his representative, and the newly formed European Union (EU) designated former British foreign secretary David Owen as its envoy. Their objective was to end the fighting via a peace plan

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289 Id. at 31.
290 Id.
291 One UN official stated:

The international community should understand clearly that the Bosnian Serbs are not only waging war against the Bosnian government in Bihac. They are targeting UNPROFOR; detaining its personnel and denying others essential supplies. This is a deliberately designed, carefully, calculated insult against the United Nations.

BURG & SHOUP, supra note 236, at 160 (quoting Thant Myint-U).
293 See generally BURG & SHOUP, supra note 236, at 211-14 (discussing the formation and the function of the ICFY).
294 SLOAN, supra note 12, at 47.
295 See BURG & SHOUP, supra note 236, at 212. The authors state: “The conference actually signaled to all of the parties that, at least in the short term, outside powers were unlikely to use force to bring the fighting to an end.” Id.
296 Id. at 213.
that all the parties could accept. By January 1, 1993, a Vance-Owen peace plan was on the table. It called for a decentralized and demilitarized confederation, to be comprised of ten autonomous provinces. Each of the ethnic groups would control three provinces, and Sarajevo would be common ground for all. Negotiations began, with this proposal as a basis, though many in the region and the new Clinton Administration expressed great skepticism.

In fact, while the Bosnian Croats accepted almost immediately, and the Bosnian government agreed after minor changes, and despite pressure by Milosevic to sign in order to ease the pain that economic sanctions were causing within Serbia, the Bosnian Serbs rejected the plan in early May. One authority explained:

Militarily superior to the Croats and Muslims, and having already secured control of more than 70 percent of Bosnian territory, the Bosnian Serbs did not feel compelled to lay down their arms and accept a plan that would give them only 43 percent of Bosnian territory and have them abandon their dream of establishing their own state or joining a Greater Serbia.

The Vance-Owen plan thus came to naught, and the fighting continued.

A variety of other diplomatic initiatives fared no better. Most significantly, David Owen and Thorvald Stoltenberg, who had succeeded Vance, devised a plan to divide Bosnia into Muslim, Croat, and Serb mini-states. This time the Croats and Serbs were content, since their territory would abut Croatia and Serbia, respectively, but the Bosnian Muslims objected. The Bosnian Muslims viewed the plan to be economically and militarily unviable, because the mini-states were comprised of “disconnected areas within the Croatian and Serbian

297 See generally id. at 214-50 (discussing the Vance-Owen Plan).
298 Id.
299 See id. at 214-18.
300 Id.
301 See Crocker et al., supra note 156, at 36-37. The US characterized the Vance-Owen plan as “appeasement” in that it gave the Serbs, with 30 percent of the population, 43 percent of the territory. See SLOAN, supra note 12, at 51. Richard Betts wrote:

The desire for impartiality and fairness led outside diplomats to promote territorial compromises that made no strategic sense. The Vance-Owen plan and later proposals mimicked the unrealistic 1947 U.N. partition plan for Palestine: geographic patchworks of noncontiguous territories, vulnerable corridors and supply lines, exposed communities, and indefensible borders. If ever accepted, such plans would create a territorial tinderbox and a perpetual temptation to renew the conflict.

Betts, supra note 242, at 26.
302 See SLOAN, supra note 12, at 48.
303 Id.
304 See generally BURG & SHOUP, supra note 236, at 271-9 (discussing the Owen-Stoltenberg Proposal).
sectors linked by vulnerable corridors and with no access to the sea.\textsuperscript{305}

It may be worth noting that classical collective security doctrine, aimed at repelling and punishing aggressors for breaking the law, would not countenance diplomatic forays aimed at stopping the bloodshed by offering increasingly handsome packages to even the most culpable parties. Furthermore, the diplomatic record indicates, above all else, just how intractable ethnic rivalries in collapsed states can be. If new collective security theory were extended to cover, not simply cross-border aggression, but cases of intrastate violence of the sort found in the wars of Yugoslav succession, one must wonder if a peace imposed by a ‘new collective security’ organization would often survive the departure of the occupying forces.

D. The Approach of Peace

On January 1, 1994, the parties briefly implemented a cease-fire negotiated by former President Jimmy Carter, calling for a separation of forces, weapons prohibitions, and UNPROFOR protection and freedom of movement.\textsuperscript{306} Unfortunately, this ceasefire, like so many before it, soon degenerated into heavier fighting.\textsuperscript{307} Serb forces continued to attack the UN-monitored safe havens.\textsuperscript{308} Furthermore, early in 1994, Croatian forces intervened openly in Bosnia to help Bosnian Croatians, who after early victories had suffered serious setbacks.\textsuperscript{309} The United Nations responded with strong condemnatory statements by the Secretary-General and the Security Council.\textsuperscript{310}

In March 1994, the civil war reached a critical turning point. Croats and Muslims within Bosnia, reluctant to negotiate with the Serbs until they had settled some of their own major differences,\textsuperscript{311} agreed to form the Bosnian Federation, a multiethnic, democratic entity that would repatriate refugees and undertake essential government functions.\textsuperscript{312} The U.S. State Department liaison to the Federation explained:

The Croats wanted to end the fighting because they were losing. The [Croat Defense Council] was not then or later an impressive fighting force, though it was good at frightening civilian populations and ethnic cleansing. The Muslims wanted to end the fighting because they could not win their war against the Serbs while fighting the Croats. There was no love lost between the Croats and the Muslims, but under intense pressure from

\textsuperscript{305} Sloan, \textit{supra} note 12, at 53.
\textsuperscript{306} See Crocker, \textit{supra} note 156, at 37.
\textsuperscript{307} See Ashton, \textit{supra} note 273, at 776.
\textsuperscript{308} See Sloan, \textit{supra} note 12, at 38.
\textsuperscript{309} See Ambrosio, \textit{supra} note 152, at 300.
\textsuperscript{310} Id. at 300 (citing Provisional Verbatim Record of the Three Thousand Three Hundred and Thirty-Three Meeting, U.N. S.C.O.R., 3333 mtg., U.N. Doc. S/PV.3333 (1994)).
\textsuperscript{311} See Burg & Shoup, \textit{supra} note 236, at 292 (discussing the Bosnian Croats and the Bosnian Muslims).
\textsuperscript{312} Id. at 293-94.
Washington – which wanted to simplify the equation before trying to resolve the Serb/Muslim conflict – they agreed to set up the Bosnian Federation. 313

When threatened with US, EU, and UN sanctions paired with lack of support for its integration into the West, Croatia quickly fell into line. 314 Thereafter, the Federation turned into a functioning government that ended up surviving the war. Of more immediate military importance, the Bosnian Federation agreement developed into a functioning alliance, and that development combined with a serious NATO air campaign against the Bosnian Serbs, proved important. 315

In the meantime, however, diplomats made some headway, but more via superpower leadership and a great power consortium than through the United Nations. In the spring of 1994 a negotiating body known as the Contact Group came together with representatives from Britain, France, Germany, Russia, and the United States. 316 This brought “Russia and the United States formally into the Bosnian peacemaking process, thereby enabling the great powers to speak in a unified voice to the Balkan combatants and making it more difficult for them to create divisions among the powers.” 317 The Contact Group’s peace plan featured a division of Bosnia between the Federation, holding 51 percent of the territory, and the Bosnian Serbs, 49 percent. 318 Through lifting or imposing sanctions, it created marked incentives for the contending parties to sign. 319 The Serbs, however, believed their territory to be inadequate, and they rejected the plan. 320

By the spring of 1995, fighting in Bosnia escalated once more. The Bosnian Serbs began to shell Sarajevo again, and when NATO carried through with its threats of air strikes, Serbs again took peacekeepers hostage, using them as human shields to stop the bombing. 321 In mid-July, the Bosnian Serbs took Srebrenica and another Muslim community, Zepa, with the accompanying massacre of thousands of civilians. 322 Later that month, the Croatian army intervened, spearheading an offensive alongside Bosnian Croats that captured much of southwestern Bosnia. 323

Then, late in August, after another mortar attack on a Sarajevo market, NATO undertook heavy bombing against the Serb forces throughout Bosnia. 324

313 Serwer, supra note 158, at 551.
314 See Ambrosio, supra note 152, at 301.
315 See generally Cousens, supra note 240, at 789 (discussing the importance of the Bosnian Federation).
316 See generally BURG & SHOUP, supra note 236, at 298-307 (discussing the formation of the Contact Group).
317 SLOAN, supra note 12, at 59.
318 See BURG & SHOUP, supra note 236, at 301.
319 Id. at 304-05 (discussing the various incentives and disincentives attached to the proposal).
320 Id. at 305.
321 See SLOAN, supra note 12, at 71.
322 See Rupp, supra note 100, at 206.
323 See SLOAN, supra note 12, at 73-74.
324 See BURG & SHOUP, supra note 236, at 164. The shelling of the Markala marketplace in Sarajevo was the “trigger that ... the United States was looking for in order to launch the massive NATO air campaign that helped bring the fighting to an end.” Id.
When the Bosnian Serbs refused to comply with demands to withdraw the heavy weapons that were being used to bombard Sarajevo, the US fired cruise missiles at their antiaircraft bases, and more air strikes were launched. At the same time, the Bosnian government joined with Bosnian Croats and the Croatian army on a successful offensive against the Serbs. With the military equation transformed and the United States demanding a peace conference be convened, all the parties agreed to a cease-fire and then to negotiate a comprehensive settlement at Dayton.

E. The Dayton Peace Accords

In the fall of 1995, representatives of the three warring factions arrived at Wright-Patterson Air Force Base near Dayton, Ohio for the Dayton Proximity Talks. After weeks of difficult negotiations, punctuated by considerable US pressure on the parties, the talks concluded with the initialing of a General Framework for Peace in Bosnia and Herzegovina, later known as the Dayton Peace Accords (Accords).

The agreement divided Bosnia into the Bosnian Federation, controlling 51 percent of the territory, and the Serb Republic, controlling 49 percent. Bosnia’s existence and its borders, along with those of the Serb Republic and Croatia, were recognized. Among other points, the parties agreed to settle their disputes peacefully and refrain from the use of force against one another, and they agreed to cooperate fully with the international police task force and the investigation and prosecution of war crimes. To help the signatories to implement the Accords, the UN developed a framework of international organizations, working under UN oversight with responsibility for state-building tasks, such as relocating refugees, monitoring human rights, and administering elections.

To secure the environment in which these organizations had to operate, the

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325 See BURG & SHOUP, supra note 236, at 352-54 (discussing the NATO air campaign conducted after the shelling of Sarajevo in August).
326 See Crocker et al., supra note 156, at 37.
327 After a great deal of deliberation between the three parties a cease-fire was finally announced on October 5. See BURG & SHOUP, supra note 236, at 359-60.
328 Serwer explained the unlikely choice of Dayton as a negotiating forum: "Holbrooke had chosen the air force base at Dayton in order to isolate the participants and give himself maximum control, both of them and of the press coverage." Serwer, supra note 158, at 573.
330 Serwer, supra note 158, at 552.
331 U.S. Department of State, Summary of the Dayton Peace Agreement on Bosnia-Herzegovina, at http://www1.umn.edu/humanrts/icty/dayton/daytonsum.html (last visited Jan. 1, 2003) (summarizing the terms of the settlement). Such organizations included the Organization for Security and Cooperation in Europe (OSCE), NATO, the Commission on Human Rights, the Commission for Displaced Persons and Refugees, the Commission to Preserve National Monuments, the UN International Police Task Force (IPTF), and various civilian organizations that worked toward “humanitarian aid, economic reconstruction, protection of human rights, and the holding of free elections.” Id.
Security Council also authorized NATO\textsuperscript{332} to create a multinational Implementation Force (IFOR) to oversee the terms relating to the cease-fire, demobilization, and withdrawal of foreign forces within Bosnia.\textsuperscript{333} This force of 60,000 troops, including 32,000 Americans, commenced operations on December 20, 1995,\textsuperscript{334} under NATO command and control, with the parties granting it the right "to carry out its mission vigorously, including the use of force, if necessary ... unimpeded freedom of movement [and] control over airspace ...."\textsuperscript{335} The International Committee of the Red Cross was charged with formulating a plan by which combatants and civilians would be released and transferred.\textsuperscript{336}

IFOR was a new kind of peace-keeping unit. An American general commanded the forces, which were under NATO administration, rather than direct UN authority.\textsuperscript{337} In September 1996, shortly after the Bosnian elections, the NATO Defense Ministers met and concluded more support would be necessary after fulfillment of IFOR's mandate.\textsuperscript{338} The Security Council then authorized\textsuperscript{339} a reduced multilateral military presence of initially 32,000 troops,\textsuperscript{340} known as the Stabilization Force (SFOR).\textsuperscript{341} This body was activated on December 20, 1996, in order to deter hostilities and contribute to a secure environment.\textsuperscript{342}

V. THE PROSPECTS FOR COLLECTIVE SECURITY

A. Collective Action, But Not Collective Security

After reviewing the record of the international response to events in the Balkans, one must be strongly disinclined to characterize the collective action that occurred as a true collective security operation in any proper sense of that phrase. This should not surprise. As Inis Claude once observed: "To paraphrase what someone has said about Christianity, it is not that collective security has been tried and found wanting, but that it has been found difficult and not tried."\textsuperscript{343}

First, had the central motive of the states involved been to take a strong stance against aggression – to send an unmistakable message that aggression will not pay and aggressors will be stopped by the combined will of a peace-loving

\textsuperscript{333} See Cousens, supra note 240, at 798.
\textsuperscript{335} U.S. Department of State, supra note 331.
\textsuperscript{336} Id.
\textsuperscript{337} See Rupp, supra note 100, at 206.
\textsuperscript{338} See NATO, supra note 334.
\textsuperscript{340} The force was scaled back as the security situation improved. See NATO, supra note 334.
\textsuperscript{341} Id.
\textsuperscript{342} Id.
\textsuperscript{343} CLAUDE, supra note 2, at 54.
international community – the tenor of the action and the steps taken would have been entirely different. Instead of opting for the long months, indeed years, of peacemaking and peacekeeping that in fact occurred, the Security Council would have identified and denounced the aggressors in the strongest possible terms and swept in with overwhelming force. Furthermore, instead of proposing one diplomatic initiative after another – which typically provided the Serbs, the very party that many considered most culpable, with more territory than their percentage of the Bosnian population would warrant – the international community would have been intent on meting out punishment to those who had violated the law.

Instead of collective security, the international response to the fighting in the Balkans may be better understood in terms of collective action aimed at finding some resolution to a bitter civil war that would be minimally agreeable to the various contending parties. In a bow to the fact that the world tended to see the fighting in the Balkans as chiefly a European problem, the European states were given the opportunity to exert their leadership. This proved largely ineffectual.

After years of fighting, few could deny that force was necessary to counteract vicious human rights violations and, ultimately, to bring the warring parties to the bargaining table. However, it was not a group of peace-loving states animated by collective security that brought the warring parties to the table. On the contrary, NATO, a collective defense agency, supplied the necessary forces. While Security Council authorization did occur, the key fact was that, in light of the contemptuous behavior displayed by the parties, particularly the Bosnian Serbs, the NATO states had come to feel it imperative to act in order to regain credibility.

One might also re-emphasize that protracted diplomatic efforts have never been associated with collective security operations. When a united peace-loving force is fighting to punish aggression, not only are retreat and surrender taken to be inappropriate, but the collective security agency plans to dictate, not negotiate, the eventual peace terms. Beyond this, the ultimate settlement, recognizing the division of the former Yugoslavia into ethnically based states, owed much to balance of power thinking, also anathema to collective security proponents.

For all of the above reasons, it is highly unlikely that future potential victims of aggression will look back to the Balkans crisis and derive great comfort from the actions of the international community. Leadership for the collective action was often absent, tepid, or grudging. Formulating agreements on effective joint policies proved exceptionally challenging. If this was the best that states could do in the collective military action they did engage in, how much less likely is it that they could coordinate and implement an effective collective security operation?

Even given the tragic history of the rippling repercussions of wars in the Balkans, neither the Security Council, nor the European Union, nor the United

344 See Goodwin, supra note 4, at 174. Goodwin wrote: “The...belief that in any conflict one side must be fighting for the law and the other against...could...mean that the objective that the side upholding the law should triumph becomes more important than...that any opportunity for negotiation should be seized upon.” Id.
States seemed to believe that vital interests were at stake. Consequently, some of the most shocking humanitarian problems imaginable elicited faltering partial solutions from an international community whose fundamental reluctance to be sucked into the conflict was, at critical junctures, all too evident.

B. Illustrating the Obstacles to Collective Security

In our view, the problems associated with the collective action that did take place in the Balkans in the early- to mid-1990s, chiefly illustrate the obstacles to implementing a twenty-first century collective-security scheme.

First, it is difficult to review the historical record and not feel great skepticism about the ability of the international community to mount effective collective security operations absent the type of leadership exhibited by the US when its vital interests were at stake in the Gulf War. For collective security to work, it is insufficient that no one be waving a veto in the Security Council. That is a necessary but not a sufficient condition. Instead, there must be a galvanizing force. In analogizing the veto to a parking brake, Inis Claude wrote:

> An automobile does not climb a hill just because its brake has been released, but requires a battery, fuel, and a driver intent on driving up the hill. So it is with collective security, which requires a motive force supplied by states convinced of the wisdom of, and willing to pay the price of participation in, the universal enforcement of the anti-aggression rule.

The inescapable problem with collective security schemes to date is that states do not typically act as galvanizing forces when their vital interests are not at stake. And, even in an increasingly interdependent world, vital interests will not be at stake every time conflict breaks out. The collective action, well short of collective security, that did take place in the Balkans demonstrates clearly how difficult it is for states to exhibit real leadership. The record of half-baked sanctions, half-hearted reprimands, token peacekeeping, pinprick exertions of force, and divided and contradictory policies is damning evidence of the lack of leadership as well as the profoundly complicated, multilayered set of conflicts with which the international community was trying to deal.

These are the very circumstances that are likely to bedevil policymakers in the future — weak and anarchical states that pull others into their problems, not strong and stable militaristic and adventuristic powers intent on cross-border aggression. Under such circumstances, piecemeal intervention is far more likely to occur than the decisive imposition of force associated with collective security.


346 This assertion directly contradicts collective security theory: "[T]he assumption underlying a collective security system is that the world is so thoroughly interdependent that one cannot conceive of a breach of order anywhere that is irrelevant to the security interests of any state." Claude, supra note 129, at 38.
VI. CONCLUSION

Just before the outbreak of the Korean War, the distinguished American historian Samuel Flagg Bemis declared: “Before the great powers can join in sacrifices of blood and treasure to keep the peace in regions where they have no real interest, ... a great transformation of will must take place among the peoples of the nations.” \(^{347}\) There is little in the record of intervention in the Balkans to suggest that such a great transformation of will has taken place.

The litmus test for collective security remains this: will major states go to war on account of collective security considerations, where if those states had not been devoted to the principle, they would have remained neutral or fought with the aggressor?\(^{348}\) The answer remains that the same longstanding difficulties dog collective security today, whether the theory is dressed up in new or old guises. International leaders ought to stop paying lip service to the virtues of collective security, and the United Nations ought to give up collective security pretensions in favor of wiser theories of power management and tasks that it is better able to accomplish. The fighting in the Balkans ought not be viewed as a prelude to a bold new era of collective security.

\(^{347}\) WOLFERS, supra note 4, at 178.

\(^{348}\) Id. at 169.
JUDICIAL CAMPAIGN SPEECH IN KENTUCKY AFTER
REPUBLICAN PARTY OF MINNESOTA v. WHITE

by Judge Rick A. Johnson*

I. INTRODUCTION

When the United States Supreme Court held in Republican Party of Minnesota v. White,¹ that a canon of Minnesota’s Code of Judicial Conduct, which placed limitations on a judicial candidate’s speech, violated the First Amendment, the decision was seen by some commentators as a setback to attempts to limit the politicizing of judicial campaigns and as an impediment to efforts to ensure an impartial and independent judiciary.² Others contended that White merely struck down an antiquated restriction which had already been repealed by the vast majority of states and rendered ineffective and inconsequential in the remainder³ and still others saw it as a welcome confirmation of the First Amendment right of free speech.⁴ The full impact of this 5-4 decision from a sharply divided Court will not be known for several years; but it can be expected to generate considerable debate in academia, editorial boards, legislatures, judicial ethics committees and disciplinary commissions, and of course, the courts—both in their administrative capacity and through the adjudication of additional constitutional challenges arising from judicial campaigns.⁵ This article will briefly review the history of judicial

¹ Judge, Kentucky Court of Appeals and alternate member, Kentucky Judicial Conduct Commission. B.S., 1976, Western Kentucky University; J.D., 1979, The George Washington University Law School.
elections and codes of judicial conduct, Kentucky case law addressing judicial campaign conduct, and the impact that the Supreme Court’s decision in White may have on the issue of judicial campaign speech in Kentucky.

II. HISTORY OF JUDICIAL ELECTIONS

Many of our nation’s constitutional principles were adopted by the framers of the Constitution from the writings of Montesquieu and Blackstone. Montesquieu believed “an independent” judiciary was necessary to protect the liberty of the citizens, and he advocated the selection of judges by the people. In stressing the importance of an independent judicial power, Blackstone stated:

In this distinct and separate existence of the judicial power . . . consists one main preservative of the public liberty; which cannot subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power.

It has been suggested by Gerhard Casper that the “founding generation was ambivalent about the independence of the judiciary.” This ambivalence was a product of the tension between the competing values of an impartial judiciary which is necessary in order to protect the rights of the people and a truly independent judiciary which would conflict with the principles of majority rule.

The selection of members of the judiciary by popular elections is not firmly rooted in the United States. In fact, until the early 1800’s, the popular election

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7 While Montesquieu and Blackstone were referring primarily to the need for separation of powers in the government, discussion infra will touch on the involvement of the executive and legislative branches in the selection of some judges, the interchangeable use of the terms “impartial” judiciary and “independent” judiciary in some context, and impartiality as an aspect of judicial independence in another context. Professor Steven Lubert wrote in Judicial Discipline and Judicial Independence, 61 Law & Contemp. Prob. 59, 61 (1998) that “the details of independence are fairness, impartiality, and good faith[,] . . . [and that] [an] independent judge presides impartially, free from extraneous influences and immune to outside pressure.” Id.
8 See Muniz, supra note 6, at 370 n.20 (citing David A. J. Richards, Foundations of American Constitutionalism 122 (1989)).
9 Id. (quoting William Blackstone, Commentaries 1:259-60 (1765), in 4 The Founders’ Constitution 132 (Phillip B. Kurland & Ralph Lerner eds., 1987)).
10 Id. at 372 (quoting Gerhard Casper, Separating Power: Essays of the Founding Period 137 (1997)).
11 Id.
of judges was virtually nonexistent. The movement toward electing judges "was one phase of the general swing toward broadened suffrage and broader popular control of public office which Jacksonian Democracy built on the foundation laid by Jefferson." These changes were at least partly due to a belief that too often judges were being selected from the wealthy and privileged few. In 1812 Georgia became the first state to adopt popular elections as the means of selecting its judges.

In Kentucky the judiciary was appointed by the Governor until 1850, when the Constitution was amended to provide for popular elections of judges with fixed terms. When the 1850 Constitutional Convention met, there was considerable distaste for the power of the Governor to appoint judges and other public officials for life tenure since the appointive system had produced many abuses and controversies. During this period of Jacksonian Democracy, there was substantial resentment toward a system which gave appointed, life-tenured judges the power to invalidate popularly enacted legislation. Jacksonian Democracy had firmly taken root in Kentucky and it led to constitutional changes providing for popular elections for all public offices except two.

Kentucky's colorful and significant political history took on a new dimension with the institution of popular election of judges. The judiciary had always

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15 Goldschmidt, supra note 14, at 5 n.9 (quoting Glenn R. Winters, Selection of Judges-An Historical Introduction, 44 TEX. L. REV. 1081, 1082 (1966)).
17 THE KENTUCKY ENCYCLOPEDIA 225 (1992) (explaining that Kentucky has adopted constitutions in 1792, 1799, 1850 and 1891).
18 One major controversy was the "Old Court-New Court Struggle." DR. THOMAS D. CLARK, A HISTORY OF KENTUCKY 145-47, 300 (1988).
20 Much has been written about voter apathy in judicial elections; Michael E. Solimine, The False Promise of Judicial Elections in Ohio, 30 CAP U. L. REV. 559, 560 n.5 (2002); alternative
been affected by the politics of the executive and legislative officeholders, but with the judges now being popularly elected the politics of the judiciary would play an even larger role in Kentucky history. Dr. Thomas D. Clark, Kentucky's highly regarded and richly treasured historian laureate, has observed:

Whether they have operated at precinct, county, or state level, Kentuckians have played politics as a fascinating game. There never entered into Kentucky politics the Pollyanna philosophy that it was not the victory that counted but how well the race was run. Victory was the only end result that counted, and without it a politician was a lost soul. This has been the code, and Kentuckians have always lived politically by the code. They have been dramatically successful not only in wielding an enormous influence over the lives of Kentuckians but have made their greatest impact nationally in the area of political affairs.21

Some 125 years after the reforms of 1850, judicial reform took root again when the General Assembly, in an effort to address problems caused by a "confused patchwork of trial courts with concurrent jurisdiction, uneven justice around the state, as well as a backlog of appellate cases," placed on the ballot "a constitutional amendment that sought to radically reform the court system."22 With the adoption of the Judicial Article23 by the voters at the regular election in November 1975, the constitutional provisions concerning the judiciary were repealed and replaced. In 1976 the General Assembly enacted legislation providing for the nonpartisan election of all judges at all four levels of Kentucky's Court of Justice.24 Dr. Clark wrote in his classic A History of


22 KY. LEGAL RESEARCH MANUAL 2-24 (2002).
23 See KY. CONST. § 117 (Michie 2002). The Complier's Notes state that:

The General Assembly in 1974 proposed (Acts 1974, ch. 84, §§ 1-3) the repeal of sections 109 to 139, 141 and 143 of the Constitution and the substitution in lieu thereof new sections 109-124. This amendment was ratified by the voters at the regular election in November, 1975 and became effective January 1, 1976.

Id.

Kentucky,\textsuperscript{25} that the adoption of the 1975 Judicial Amendment and the 1976 enabling legislation was a revolutionary change since it cut one of the state's major historical ties with English and Virginia legal tradition. While the judicial elections for the new four-tier Court of Justice were now nonpartisan, as will be discussed infra, some of Kentucky's more recent judicial elections have been hotly contested and legally significant in regard to the application of the Code of Judicial Conduct to judicial campaign speech.

III. CODES OF JUDICIAL CONDUCT

Perhaps the most noted rules of judicial conduct were pronounced by Moses when he gave strict instructions to judges in these often-quoted words: "Thou shalt not wrest judgment; thou shalt not respect persons, neither take a gift, for a gift doth blind the eyes of the wise, and pervert the words of the righteous."\textsuperscript{26} Socrates' classic definition of the qualities of a judge provided: "Four things belong to a judge: to hear courteously; to answer wisely; to consider soberly; and to decide impartially."\textsuperscript{27} This standard of conduct was built upon by Cicero who

\begin{itemize}
\item highest courts, intermediate appellate courts and trial courts (all judges in IL and PA run in uncontested retention elections for additional terms after winning a first term through a contested partisan election).
\item WV has partisan elections for its highest court and its trial courts, but it does not have an intermediate appellate court.
\item AR, GA, ID, KY, MI, MN, MS, NC, OH, OR, WA and WI have nonpartisan elections for their highest courts, intermediate appellate courts and trial courts (in MI and OH the general elections are labeled nonpartisan, but political parties are involved with the nomination of candidates, who frequently run with party endorsements).
\item MT, NV and ND have nonpartisan elections for their highest courts and trial courts, but they do not have intermediate appellate courts.
\item AK, CO, IA, NE, NM and UT have uncontested retention elections after initial appointment for their highest courts, intermediate appellate courts and trial courts (in NM all judges are initially appointed, face a contested partisan election for a full term, and then run in uncontested retention elections for additional terms).
\item AZ, IN, KS and MO have uncontested retention elections after initial appointment for their highest courts and intermediate appellate courts, but use different types of elections (partisan, nonpartisan or retention) for trial courts in different counties or judicial districts.
\item CA, FL and OK have uncontested retention elections after initial appointment for their highest courts and intermediate appellate courts, but have nonpartisan elections for their trial courts.
\item SD and WY have uncontested retention elections after initial appointment for their highest courts and they do not have intermediate appellate courts.
\item SD has nonpartisan elections for its trial courts and WY has uncontested retention elections for its trial courts.
\item TN has uncontested retention elections after initial appointment for its highest court and its intermediate appellate court and partisan elections for its trial courts.
\item MD has uncontested retention elections after initial appointment for its highest court, life tenure or reappointment of some type for its intermediate appellate court, and nonpartisan elections for its trial courts.
\item DE, ME, NH, RI and VT grant life tenure or use reappointment of some type for their highest courts, intermediate appellate courts and trial courts.
\item DE, ME, NH, RI and VT grant life tenure or use reappointment of some type for their highest courts, intermediate appellate courts and trial courts, but they do not have intermediate appellate courts.
\item NY grants life tenure or uses reappointment of some type for its highest court and its intermediate appellate court, but has partisan elections for its trial courts.
\end{itemize}

\textsuperscript{25} See CLARK, supra note 18, at 451.

\textsuperscript{26} Deuteronomy 16:19 (King James).

\textsuperscript{27} Handbook for Judges: An Anthology of Inspirational and other Helpful Writings for Members of
identified "three causes of judicial impropriety: favoritism, coercion, and bribery."²⁸

In many medieval legal systems an aggrieved litigant was provided with relief from an abuse of judicial power through collateral attack in the form of judicial liability and appellate review. In the English common law this form of relief ultimately evolved into a type of appellate review.²⁹ Blackstone believed that in order to adequately protect the "life, liberty, and property" of the individual a justice system must ensure that a judge decide a case only on the basis of "fundamental principles of law."³⁰

Toward this end, the American Bar Association (ABA) was formed in 1878 "to improve the administration of justice in the United States."³¹ In 1908 the Canons of Professional Ethics for Lawyers were promulgated by the ABA;³² and at its 1921 convention a committee headed by Chief Justice William Howard Taft was appointed "to propose standards of judicial ethics."³³ The impetus for establishing rules of ethical conduct for judges came when United States District Court Judge Kennesaw Mountain Landis refused to step down from the bench while serving as Commissioner for Major League Baseball.³⁴ The ABA's 1924 Canons of Judicial Ethics consisted of 36 provisions which included both generalized, hortatory admonitions and specific rules of proscribed conduct.³⁵ Canon 28³⁶ of the 1924 Canons "required simply that a judge avoid making political speeches, contributing or soliciting payments for party funds, publicly endorsing candidates for political office, and participating in party conventions."³⁷ Canon 30³⁸ of the 1924 Canons "provided that a candidate for

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²⁸ Shepard, supra note 26, at 1061 n.2 (citing M.H. Hoeflich, Regulation of Judicial Misconduct from Late Antiquity to the Early Middle Ages, 2 LAW & HIST. REV. 79, 82 (1984)).
³⁰ See De Muniz, supra note 6, at 371 (quoting Blackstone, supra note 9, at n.8).
³² Shepard, supra note 26.
³⁶ ABA MODEL CODE OF PROF'L RESPONSIBILITY Canon 28 (1924). Canon 28 provided: "While entitled to entertain his personal views of political questions, and while not required to surrender his rights or opinions as a citizen, it is inevitable that suspicion of being warped by political bias will attach to a judge who becomes the active promoter of the interests of one political party against another. He should avoid making political speeches, making or soliciting payment of assessments or contributions to party funds, the public endorsement of candidates for political office and participation in party conventions." Id.
³⁸ ABA MODEL CODE OF PROF'L RESPONSIBILITY Canon 30 provided in part:
judicial office 'should not announce in advance his conclusions of law on disputed issues to secure class support.'" 39

The 1924 Canons were not intended to be a basis for disciplinary action 40 and the ABA created a committee in 1969, chaired by California Supreme Court Justice Roger Traynor, "to revise and improve the original Canons." 41 In 1972 the ABA adopted the Model Code of Judicial Conduct, which was designed to be enforceable. 42 Kentucky did not adopt the ABA's 1972 Model Code of Judicial Conduct until a new Rule of the Supreme Court became effective on January 1, 1978. 43

Even though the ABA condensed the Model Code from seven canons to five in 1990, it continued to set forth the same basic standards to govern judicial conduct. 44 The first action by the Supreme Court of Kentucky to adopt any provision from the 1990 Model Code occurred on April 4, 1991, when the court amended Canon 7B(1)(c) of its judicial code by replacing the "announce clause" with the "commit clause." 45 This change followed the Supreme Court's decision

A candidate for judicial position should not make or suffer others to make for him promises of conduct in office which appeal to the cupidity or prejudices of the appointing or electing power; he should not announce in advance his conclusions of law on disputed issues to secure class support, and he should do nothing while a candidate to create the impression that if chosen, he will administer his office with bias, partiality or improper discrimination.


40 Plymouth Nelson, Don't Rock the Boat: Minnesota's Canon 5 Keeps Incumbents High and Dry While Voters Flounder in a Sea of Ignorance, 28 WM. MITCHELL L. REV. 1607, 1614 (2002) (citing THEODORE J. BOUTROS, JR., ET AL., STATE JUDICIARIES AND IMPARTIALITY: JUDGING THE JUDGES 121 (Roger Clegg and James D. Miller eds., 1996)).

41 See Cotilla & Veal, supra note 33, at 742 (citing Gillers & Simon, supra note 34).

42 Id. The 1972 Code "greatly curtailed" "the range of acceptable political talk" "by the introduction of wording in the new Canon 7 that candidates could not announce their views on 'disputed political issues.'" Nelson, supra note 40, at 1614 (citing PATRICK M. MCFADDEN, ELECTING JUSTICE: THE LAW AND ETHICS OF JUDICIAL ELECTION CAMPAIGNS 86 (1990)).

43 KY. SUP. CT. R. 4.300 (1978). This action, of course, was in the wake of the adoption of the Judicial Article in 1975.

44 The 1990 Code made two significant linguistic changes to the 1972 Code: (1) gender-neutral language, and (2) in many instances changing "should" to "shall"; and one significant structural change which combined the off-the-bench conduct provisions in the 1972 Code at Canons 4, 5, and 6 into Canon 4. See JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS § 1.02, at 5-6 (1995). Canon 7 of the 1972 Code, which dealt with political activity, then became Canon 5 in the 1990 Code. Id. The 1990 revision also added a preamble, which included a description of the nature of the Code and how it is intended to operate, and a new terminology section. Id.

45 Before the amendment was promulgated, Canon 7B(1)(c) provided that a judicial candidate "should not make pledges or promises of conduct in office other then the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other facts." See J.C.D.C. v. R.J.C.R.,
in 1991 in *J.C.J.D. v. R.J.C.R.*[^46] which held that the "announce clause" of Canon 7B(1)(c) violated the First Amendment of the United States Constitution and Section 8 of the Kentucky Constitution. The ABA had amended its Model Code in 1990 by replacing the "announcement clause" with the "commit clause," which provided that a judicial candidate should not "make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court."[^48] The Supreme Court did not amend its judicial code to substantially adopt the ABA's 1990 Code until January 1, 1999. There have been no substantive changes since those amendments.

### IV. KENTUCKY'S JUDICIAL CONDUCT COMMISSION

Before the states created organizations to regulate judicial conduct, incidents of misconduct were handled "primarily through the traditional procedures of impeachment, address, or recall."[^49] These procedures proved to be ineffective since they were "cumbersome, time-consuming, uncertain in result, and often entangled in partisan politics."[^50] Moreover, they only provided for the drastic sanction of removal. "Due to these deficiencies and also a reluctance to compromise judicial independence, all three procedures were rarely used, and many cases of judicial misconduct were left unattended."[^51]

In 1947 New York and New Jersey attempted to address the issue of judicial misconduct by adopting constitutional amendments. New York created a special Court on the Judiciary, which had the sole function of hearing cases of judicial misconduct or disability, but the court rarely convened. New Jersey authorized a new system for judicial discipline, but it was not implemented by the legislature.

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803 S.W.2d 953, 955 (Ky. 1991) (emphasis added). As amended April 4, 1991, Canon 7B(1)(c) provided that a judicial candidate:

> should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; or misrepresent his identity, qualifications, present position, or other facts.

*Id.* (emphasis added).

[^46]: 803 S.W.2d 953 (Ky. 1991).

[^47]: Chief Justice Stephens was quoted as describing the change to the judicial code as a "filler" amendment. See Staff, *U.S. High Court Rules for Combs on Campaigning-Judicial Candidates Get Freedom to Discuss Issues, Justice Says*, Lexington Herald-Leader, October 8, 1991, at B1. He was also quoted as stating, "It's a little bit more loose. *Id.* It gives the individual a little more decision-making." *Id.* It was further reported that he would appoint an "appropriate" panel next year to review the entire judicial conduct code. *Id.*


[^49]: Supra note 44, at 6 § 1.03 (citing Schoenbaum, *A Historical Look at Judicial Discipline*, 54 CHI.-KENT L. REV. 1, 1-10 (1977)).

[^50]: *Id.*

[^51]: *Id.*
until 1970. The Supreme Court of Michigan adopted rules in 1959 establishing a procedure for disciplining judges; and in 1960 California created the first permanent state commission with the authority to discipline judges. By 1981 "all fifty states and the District of Columbia had established judicial conduct organizations vested with authority to investigate, prosecute, and adjudicate cases of judicial misbehavior, as well as to impose or recommend to a higher body a variety of sanctions ranging from admonishment to removal, where it had been determined that misconduct had occurred." 52

Some commentators were concerned that these judicial conduct organizations would threaten judicial independence. 53 Others were convinced that "the nature of the judicial disciplinary system that has been established poses little threat to judicial independence." 54 Professor Shaman identified three primary reasons for this conclusion: (1) the system operates by way of judicial self-regulation, with judges included on the judicial conduct commissions whose decisions are subject to judicial review; (2) the system has been created to safeguard judicial independence by expressly stating that "the integrity and independence of the judiciary should be preserved, and that the Code should be construed to further that objective[;]" 55 and (3) "[m]odern judicial discipline is directed at the regulation of activities that should not be and traditionally have not been considered within the ambit of judicial independence[,]" since it is used to discipline judges for misconduct such as "willfully and persistently failing to perform the duties of their office, for using the influence of their office to obtain favors for relatives or friends, [and] for hearing cases in which they have a self-interest," but not "for making erroneous or unpopular decisions." 56

Prior to Kentucky's adoption of the Judicial Article in 1975, the Constitution of 1891 greatly limited the authority regarding the administration of the courts. Section 109 limited the number of courts to those established by the Constitution and the "[l]ower courts were not directly subject to administrative supervision by the highest court[.]") 57 The General Assembly attempted to address this concern in the mid-1950's by establishing a Judicial Council 58 and a Judicial Conference. 59 The Judicial Council "was charged with conducting a continuous survey and study of the judicial organizations, their operations, conditions of

52 Id. at 7 (citing I. TESITOR AND D. SINKS, JUDICIAL CONDUCT ORGANIZATIONS 19-27 (2d ed. 1980)).
54 Id. (citing Jeffrey M. Shaman, An Introduction (to special issue on judicial discipline), 69 Judicature 64 (1985)).
56 SHAMAN supra note 44, at 8.
57 LEGISLATIVE RESEARCH COMMISSION, KENTUCKY GOVERNMENT INFORMATIONAL BULLETIN NO. 137 (Reversed), at 111 (Dec. 1994).
58 Id. The Judicial Council consisted of the Chief Justice, four circuit judges, a circuit court clerk appointed by the Chief Justice, three attorneys appointed by the Governor, and the chair of the Judicial Committees of the House and the Senate.
59 Id. The Judicial Conference consisted of the Judges and Commissioners of the court of appeals and all circuit judges; and it was required to meet once a year as called by the Chief Justice.
business practice, and procedures[,]" and making "recommendations on desirable
rule changes, procedures, methods of administration and other matters[,]"60 The
Council was required to report annually to the Judicial Conference and the Court
of Appeals, and biennially to the General Assembly. The Judicial Conference
was "directed by statute to conduct a continuous study of the judicial system and
its administration and to take appropriate action on any reports and
recommendations made by the Judicial Council."61

In 1960 the General Assembly created the Administrative Office of the
Courts (AOC). The AOC was to be staffed by a director and such other
employees as the Court of Appeals chose to appoint. The AOC, under the
supervision of the Court of Appeals, was responsible for various administrative
services for the court including supervising clerical and administrative personnel,
preparing budget estimates, collecting statistical data, maintaining the records of
the court and surveying the business practices and procedures of the state judicial
system.62

With the adoption of the Judicial Article, the Court of Justice was
empowered to operate the judicial system in a more efficient and accountable
manner. In applying the Judicial Article and the statutes and rules implementing
it, the Supreme Court, itself, declared that "[t]he authority to exercise
administrative control of the judicial branch of government is vested in the
Supreme Court of Kentucky."63 Section 12164 of the Kentucky Constitution
established a commission,65 which "[s]ubject to rules of procedure . . .

60 Id.
61 Id.
62 Id.
63 Kentucky Util. Co. v. South East Coal Co., 836 S.W.2d 407, 408 (Ky. 1992) (citing Ex Parte
Auditor of Pub. Accounts, 609 S.W.2d 682, 685 (Ky. 1980), and Ex Parte Farley, 570 S.W.2d 617,
623 (Ky. 1978)).
64 KY. CONST. § 121. This Section provides:
Subject to rules of procedure to be established by the Supreme Court, and after
notice and hearing, any justice of the Supreme Court or judge of the Court of
Appeals, Circuit Court or District Court may be retired for disability or
suspended without pay or removed for good cause by a commission composed
of one judge of the Court of Appeals, selected by that court, one circuit judge
and one district judge selected by a majority vote of the circuit judges and
district judges, respectively, one member of the bar appointed by its governing
body, and two persons, not members of the bench or bar, appointed by the
Governor. The commission shall be a state body whose members shall hold
office for four-year terms. Its actions shall be subject to judicial review by the
Supreme Court.

Id.
65 The commission is:

composed of one judge of the Court of Appeals, selected by that court, one
circuit judge and one district judge selected by a majority vote of the circuit
judges and district judges, respectively, one member of the bar appointed by its
governing body, and two persons, not members of the bench or bar, appointed
by the Governor.
established by the Supreme Court, and after notice and hearing, may cause any justice or judge of the Court of Justice to "be retired for disability or suspended without pay or removed for good cause." A judge who has been removed from office is disqualified "from judicial office for at least the remainder of the current term." This disqualification includes being ineligible to seek the unexpired term for his former seat in a special election and being "prohibited from seeking or holding any other judicial office of the Kentucky Court of Justice during said term." In addition to covering all justices and judges of the Court of Justice, the Judicial Conduct Commission also has jurisdiction over "the disciplining of lawyers seeking judicial office who during their candidacy shall be deemed subject to the jurisdiction and discipline of the Commission."

Kentucky Supreme Court Rule (SCR) 4.020(1)(b) provides the Commission with the authority "[t]o impose the sanctions separately or collectively of (1) admonition, private reprimand, public reprimand or censure; (2) suspension without pay or removal or retirement from judicial office, upon any judge of the Court of Justice or lawyer while a candidate for judicial office, who after notice and hearing the Commission finds guilty of any one or more" of the listed violations. "Under no circumstances should the Judicial Conduct Commission have authority to impose the sanctions separately or collectively of (1) admonition, private reprimand, public reprimand or censure; (2) suspension without pay or removal or retirement from judicial office, upon any judge of the Court of Justice or lawyer while a candidate for judicial office, who after notice and hearing the Commission finds guilty of any one or more" of the listed violations.

KY. CONST. § 121; KY. SUP. CT. R. 4.040, 4.050, 4.060, 4.070. Additionally, KY. SUP. CT. R. 4.075 provides that an alternate member for each court representative and the bar representative "shall serve on the commission during such time as the member disqualifies or is otherwise unable to serve or a vacancy exists."

KY. SUP. CT. R. 4.000 – 4.310. See also KY. REV. STAT. ANN. Chapter 34 (Michie 2002).

""Court of Justice" means the Supreme Court, Court of Appeals, Circuit Court and District Court." KY. SUP. CT. R. 4.010(b).

KY. CONST. § 121. The Supreme Court of Kentucky in Nicholson v. Judicial Retirement & Removal Comm'n, 562 S.W.2d 306, 309 (Ky. 1978), stated that "the language of Section 121 is so similar to the language contained in Article VI, Section 22(a) of the New York Constitution, before its amendment in 1975, that we conclude that the drafters of Section 121 used Section 22(a) as a model." Id.


Id. (This case was decided in a 4-3 decision with two vigorously dissenting opinions. Id.)

The commission became known as the "Judicial Conduct Commission" by a Supreme Court Rule change effective January 1, 1999. The commission was originally known as the "Judicial Retirement and Removal Commission."

KY. SUP. CT. R. 4.000.

"Judge" means any judge or justice of the Court of Justice or other officer of the Court of Justice performing judicial functions." KY. SUP. CT. R. 4.010(c). In McDonald v. Ethics Comm., Ky. Judiciary, 3 S.W.3d 740, 742 (Ky. 1999), the Supreme Court held:

that the Code applies only to special judges [Section 110(5)(b) of the Kentucky Constitution authorizes the Chief Justice to temporarily assign any retired judge "to sit in any court other than the Supreme Court when he deems such assignment necessary for the prompt disposition of causes"]] during the period of time they are performing judicial duties.

Id.

KY. SUP. CT. R. 4.020 provides:

(1) Commission shall have authority:
Commission be used as a campaign tool by candidates or their supporters."

SCR 4.310 provides for the establishment of a Judicial Ethics Committee to

a. To order a temporary or permanent retirement of any judge whom it finds to be suffering from a mental or physical disability that seriously interferes with the performance of his duties, and to suspend temporarily from the performance of his duties, without affecting his pay status, any judge (i) against whom there is pending in any court of the United States an indictment or information charging him with a crime punishable as a felony, or (ii) after notice and an opportunity to be heard, and upon a finding that it will be in the best interest of justice that he be suspended from acting in his official capacity as a judge until final adjudication of the complaint, any judge against whom formal proceedings have been initiated under Rule 4.180.

b. To impose the sanctions separately or collectively of (1) admonition, private reprimand, public reprimand or censure; (2) suspension without pay or removal or retirement from judicial office, upon any judge of the Court of Justice or lawyer while a candidate for judicial office, who after notice and hearing the Commission finds guilty of any one or more of the following:

(i) Misconduct in office.
(ii) Persistent failure to perform his duties.
(iii) Incompetence.
(iv) Habitual intemperance.
(v) Violation of The Code of Judicial Conduct, Rule 4.300.
(vi) Any willful refusal or persistent failure to conform to official policies and directives adopted by the Supreme Court and issued by the Chief Justice in his constitutional capacity as Chief Executive Officer of the Court of Justice.
(vii) Conviction of a crime punishable as a felony.

c. After notice and hearing, to remove a judge whom it finds to lack the constitutional and statutory qualifications for the judgeship in question.

d. To refer any judge of the Court of Justice or lawyer while a candidate for judicial office, after notice and hearing found by the Commission to be guilty of misconduct, to the Kentucky Bar Association for possible suspension or disbarment from the practice of law.

(2) Any erroneous decision made in good faith shall not be subject to the jurisdiction of the Commission.

Id.

75 Doyle v. Judicial Ret. and Removal Comm’n, 885 S.W.2d 917, 919 (Ky. 1994).
76 "The Committee shall consist of "one judge each of the Court of Appeals, the Circuit Court and the District Court and two members of the Kentucky Bar Association[.]" KY. SUP. CT. R. 4.310(1).
issue formal and informal opinions upon the request from any judge "as to the propriety of any act or conduct and the construction or application of any canon."77 While both formal and informal opinions shall be advisory only, the Judicial Conduct Commission and the Supreme Court shall consider reliance by a judge upon an Ethics Committee opinion.78 Any person affected by a formal opinion of the Ethics Committee may obtain a review of the opinion by the Supreme Court.79

In the first published case dealing with the new procedure for disciplining judges, the Supreme Court of Kentucky in Nicholson v. Judicial Retirement and Removal Commission,80 stated:

The purpose of Section 121 of our constitution is the regulation of the conduct of those persons charged with the administration of justice. The aim of proceedings instituted pursuant to this section is to improve the quality of justice administered within the Commonwealth by examining specific complaints of judicial misconduct, determining their relation to a judge's fitness for office and correcting any deficiencies found by taking the least severe action necessary to remedy the situation. The target is not punishment of the judge.81

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77 KY. SUP. CT. R. 4.310(1), (2), (3).
79 KY. SUP. CT. R. 4.310(4). See also In Re Maze, 85 S.W.3d 599 (Ky. 2002); McDonald v. Ethics Comm. of the State Judiciary, 3 S.W.3d 740 (Ky. 1999); Caudill v. Judicial Ethics Comm., 986 S.W.2d 435 (Ky. 1998).
80 562 S.W.2d 306, 308 (Ky. 1978) (explaining that the Commission issued a public censure against Judge Nicholson after finding that he had "so inexpertly handled" a case "as to bring the judicial office into disrepute"). Id. The final order was vacated and the matter was remanded to the Commission for reconsideration based on the supreme court's recently amended rule at KY. SUP. CT. R. 4.020, which provided that: "[a]ny erroneous decision made in good faith shall not be subject to the jurisdiction of the Commission." KY. SUP. CT. R. 4.020. The court stated that "[i]n a state which has an elected judiciary incompetence which is not gross and persistent can be safely left to elimination at the ballot box [and] [e]rror can be adequately corrected by the appellate courts." Nicholson, 562 S.W.2d at 310. The court concluded that "[a]ny other approach to the problem would destroy judicial independence by causing judges to keep one eye on their reversal rate and the other on the Commission." Id. On remand, the Commission found that "substantial and inexcusable errors were made by Judge Nicholson which cannot be regarded as having been made in good faith." Nicholson v. Judicial Retirement and Removal Comm'n, 573 S.W.2d 642, 643 (Ky. 1978). In a 5-2 decision, the supreme court reversed. While the court "agree[d] with the Commission that the handling of the matter by the judge and counsel was thoroughly inept[,"] it was "not persuaded that the evidence was sufficiently 'clear and convincing' that Judge Nicholson acted in bad faith or that the pattern of errors rose to the level of 'gross and persistent incompetence.'" Id. at 644. Cf. Summe v. Judicial Ret. and Removal Comm'n, 947 S.W.2d 42, 48 (Ky. 1997) ("It is obvious that 'erroneous decision' is a term of art which refers to judicial decisions made by judges in the course of their official duties... Certainly, SCR 4.020(2) [previously (d)] does not exclude from the jurisdiction of the Commission campaign violations committed under claims of ignorance of the law or of advice of counsel") (emphasis original).
81 Nicholson, 562 S.W.2d at 308. The court apparently made reference to the discipline not being "punishment of the judge" in rejecting Judge Nicholson's argument that the Commission's actions against him violated the constitutional prohibition against "ex post facto" laws. But see Thomas v.
The Supreme Court also rejected Judge Nicholson's contention "that the mere combination of the investigative and adjudicative functions within the Commission violates his due process right to an unbiased trier of fact." The Supreme Court noted that this position had been rejected in similar cases by numerous courts. The Supreme Court of Kentucky quoted with approval the United States Supreme Court case of Withrow v. Larkin, which involved the disciplining of physicians, where the U.S. Supreme Court rejected "[t]he contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication,

... [because such contention] must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented."

Judge Nicholson also challenged the authority of the Commission to issue a public censure. He argued that since Section 121 of the Kentucky Constitution only sets forth three courses of action, retirement for disability, suspension without pay and removal for cause, the Commission was therefore precluded from imposing lesser sanctions. The Supreme Court rejected this argument and stated that "[i]f the Commission can remove a judge from office, it can certainly impose lesser sanctions in order to achieve the ultimate goal of judicial purification." The court held "that the express grant of authority to retire, suspend or remove judges for good cause contained in Section 121 ... includes by implication the authority to impose the lesser sanctions set forth in [SCR] 4.020(b)."

In Deters v. Judicial Retirement and Removal Commission, the Supreme Court unanimously held that the Commission had jurisdiction over a lawyer it had publicly censured, even though the lawyer had been defeated for judicial

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Judicial Conduct Comm'n, 77 S.W.3d 578, 581-82 (Ky. 2002) (where the supreme court in affirming the Commission's consideration of prior sanctions against Judge Thomas and in determining which sanction to impose stated that "[t]he fact that these prior sanctions did not deter him from committing further violations was an important consideration in determining the appropriate punishment for the current misbehavior").

Nicholson, 562 S.W.2d at 309.

Id.


Nicholson, 562 S.W.2d at 309 (quoting Withrow, 421 U.S. at 47).

Id.

Id.

Id. at 310.

Id.

873 S.W.2d 200 (Ky. 1994).
The Supreme Court found that the Commission's jurisdiction covered the lawyer's improper conduct which had occurred "during the period of his candidacy for judicial office." The Supreme Court also noted that pursuant to its previous decision in *Kentucky Bar Association v. Hardesty*, the Commission did not have "jurisdiction to impose sanctions relating to an individual's right to practice law, i.e., by providing for suspension or disbarment from the practice." Rather, the court held that the imposition of those sanctions required action by the Kentucky Bar Association (KBA) since under Section 121 of the Constitution they were beyond the scope of the Commission. The court observed that the sanctions of suspension and disbarment under the rewritten SCR 4.020(1)(d), are to be referred to the KBA as to judges and lawyers.

The Supreme Court addressed the question regarding the proper procedures to follow in these administrative proceedings by adopting SCR 4.160, which provides that "to the extent applicable and not inconsistent with [SCR 4.000 – 4.310], the Rules of Civil Procedure shall apply to proceedings before the commission, except that the proof shall be by clear and convincing evidence." A factual finding made by the Commission pursuant to the clear and convincing standard of proof will not be disturbed by the Supreme Court unless the finding is "clearly erroneous." It is the responsibility of the Commission, as the finder of fact, to discipline members of the judiciary based upon the facts. "Review by the Supreme Court is available on appeal but [it] must accept the findings and conclusions of the Commission unless they are clearly erroneous; that is to say, unreasonable." For an error which occurred before the Commission to constitute reversible error, the Supreme Court "must determine that the error was prejudicial.

If a judge does not prosecute an appeal from an order of the Commission to the Supreme Court within ten days, the order becomes effective. However, if an appeal is prosecuted, the Commission’s "order is held in suspension, until the appellate process is concluded." The Supreme Court has the "power to affirm, modify or set aside in whole or in part the order of the commission, or to remand..."
the action to the commission for further proceedings." The Supreme Court is "empowered to interpret and enforce" the Commission's orders.

The jurisdiction of the United States District Court for the Western District of Kentucky was invoked in Ackerson v. Kentucky Judicial Retirement and Removal Commission. Jon W. Ackerson, a candidate for election to the office of Judge of the Kentucky Court of Appeals, brought an action against the Commission pursuant to 42 U.S.C. § 1983. Ackerson alleged that his freedom of speech, guaranteed by the First, Fifth and Fourteenth Amendments to the United States Constitution, had been "compromised and chilled by virtue of a canon of the Kentucky Code of Judicial Conduct which regulates campaign conduct of candidates for elective judicial office." As to Ackerson’s standing to maintain the action, the court stated:

Ackerson’s concerns are not merely imaginary, nor are they so speculative as to be unripe. While he has not been threatened with disciplinary action as yet, Ackerson is not required to choose between limiting his campaign speech or taking his chances with the Commission where, as here, a real possibility exists that sanctions will be sought.

The Commission has not stayed its hand before. It has proceeded with vigor to assert its position against judicial candidates. The issues Ackerson raises are new. While the Commission’s counsel has expressed doubts that Ackerson would be disciplined for making statements on court administrative issues, this is of little comfort to him. The issue has never been presented to or ruled upon by the Commission and it is not bound by its counsel’s statements in oral argument. Furthermore, the Commission’s attorney has stated his view that

103 KY. SUP. CT. R. 4.290(5).
106 Id. at 310.
107 Id.
108 Id. at 312-13.
109 Id. at 312 (citing Leverett v. City of Pinellas Park, 775 F.2d 1536 (11th Cir. 1985)).
110 Id. (citing Steffel v. Thompson, 415 U.S. 452 (1974), and Hardwick v. Bowers, 760 F.2d 1202 (11th Cir. 1985)).
no judicial candidate should be permitted to commit on any legal issue, whether it is likely or unlikely to come before the court. Since the canon in issue is more lenient, Ackerson's concerns as to what course the Commission may take against him are legitimate.\footnote{Ackerson, 776 F. Supp. At 312.}


V. KENTUCKY CASE LAW — JUDICIAL CAMPAIGN SPEECH

As noted previously, Kentucky's colorful and significant political history also includes judicial elections. Dr. Clark has observed that "'[p]olitics in Kentucky is essentially a game at which politicians have ever played with vigor and relish. Its rich vein of political folk lore tells abundantly of manipulations, maneuverings and personal triumphs.'"\footnote{CLARK, supra note 18, at 448.} Several recent judicial elections in Kentucky have not only been spirited, but they have been jurisprudentially important.

In 1988 Judge Dan Jack Combs, who was a judge on the Kentucky Court of Appeals, challenged incumbent Supreme Court Justice James B. Stephenson for a seat on the Supreme Court of Kentucky representing the Seventh Supreme Court District.\footnote{Id.} Since the contest involved three candidates, there was a primary election and a general election.\footnote{Lee Mueller, Stephenson, Combs Survive 7th District High Court Runoff, LEXINGTON HERALD LEADER, May 25, 1988, at A1.} Justice Combs was elected by the voters, but not without significant controversy involving his campaign conduct and the disciplinary action taken against him by the Judicial Retirement and Removal Commission.\footnote{Id.}

In \textit{J.C.J.D. v. R.J.C.R.}, the Supreme Court of Kentucky reviewed the sanctions imposed on Justice Combs by the Commission after he was charged by the Commission with seven separate violations of the Code of Judicial


\footnote{803 S.W.2d 953 (Ky. 1991), cert. denied, 502 U.S. 816 (1991).}

\footnote{All seven Justices of the Supreme Court recused from the case and the Governor appointed seven Special Justices. KY. CONST. § 110(3).}
Conduct. Justice Combs denied all of the Commission’s charges claiming that the application of the Code to his campaign conduct violated his federal and state constitutional rights. The Supreme Court’s opinion in the Combs case is arguably the most significant Kentucky judicial decision in the area of judicial campaign speech. A unanimous Supreme Court declared the announce clause unconstitutional by applying much of the same legal analysis as the United States Supreme Court would subsequently use in Republican Party of Minnesota v. White.

The Supreme Court summarized the basis for the charges against Justice Combs as follows:

The focus of the allegations against Justice Combs centers on Canon 7(B)(1) of the Code. These sections provide in pertinent part that a candidate for judicial office:
(a) should maintain the dignity appropriate to judicial office, . . . ;
and
(c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; or announce his views on disputed legal or political issues. . . . SCR 4.300, Canon 7(B)(1).

The Commission found that the statements made by Justice Combs announced his views on conflicting judicial opinions which it termed “disputed issues,” giving him an “unwarranted

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119 J.C.J.D., 803 S.W.2d at 954. The court wrote:

Count I: Justice Combs violated SCR 4.020(1)(b)(i) and Canon 7(B)(1) by announcing his views on disputed legal and political issues by criticizing the “firemen’s rule,” laws against carrying handguns by felons, and the standard for court review of workers’ compensation cases;
Count II: Justice Combs violated SCR 4.020(1)(b)(i) and Canon 7(B)(1)(b) and (c) when he allowed the Jefferson County Sheriff to send a letter on his behalf to sheriffs, police chiefs and fire chiefs in Seventh Judicial District discussing his position on the “firemen’s rule”;
Count III: Justice Combs violated SCR 4.020(1)(b)(i) and Canons 1, 2 and 7(B)(1) when he criticized the Code and the Supreme Court;
Count IV: Justice Combs violated SCR 4.020(1)(b)(i) and Canons 1, 2, and 7(B)(1) by challenging his opponent to a televised debate, and making statements concerning his opponent and the Supreme Court’s ruling in a personal injury case;
Counts V, VI and VII: Justice Combs violated SCR 4.020(1)(b)(i) and Canon 7(B)(1) through statements that appeared in his campaign advertisements.
Counts I, II, III and IV resulted from a written complaint filed with the Commission, and Counts V, VI and VII were initiated by the Commission upon its own motion.

119 J.C.J.D., 803 S.W.2d at 954. The court wrote:

120 Id.
121 Professor Schotland has observed that the Combs case was the last case to address the “announce clause” before White. See Schotland supra note 2, at 8.
and illegal advantage in the election over his primary opponents." It further determined that his criticism of a Supreme Court personal injury decision, and his opponent's vote on the case, was an indirect pledge or promise of conduct in office other than the faithful and impartial performance of his duties of office. Moreover, because Justice Combs had been "explicitly warned" in the Commission's informal conference after the primary election that his campaign conduct may be in violation of the Code, and he subsequently continued to speak out on such issues, the Commission found his actions were "undertaken deliberately and in bad faith, and constituted misconduct in office in violation of SCR 4.020(1)(b)(i)."

The Commission ordered Justice Combs suspended from his newly-elected office of Justice of the Supreme Court of Kentucky and from all judicial duties for a period of three months without pay.

On appeal, the Supreme Court held the findings and order of the Commission as to all violations to be "clearly erroneous" and "in contravention of state and federal law." The court relied upon the guarantees of free speech provided for in the First Amendment to the United States Constitution and Section Eight of the Kentucky Constitution. The Supreme 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 and vigorously and tirelessly to advocate his own election. . . ." This right of free speech is not absolute, however. States have the authority to regulate this conduct within certain limitations if in the public interest. "(A) person

122 J.C.J.D., 803 S.W.2d at 955 (citations omitted) The Commission found that the charges in six of the seven counts were "proved by 'clear and convincing evidence,' and determined Justice Combs' campaign conduct violative of the Code. Count II was dismissed upon motion of counsel for the Commission on the basis that the charge could not be proved." Id. at 954.

123 Id. at 954.

124 Id.

125 "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend I.

126 KY. CONST. § 8. This Section provides:

Printing presses shall be free to every person who undertakes to examine the proceedings of the General Assembly or any branch of government, and no law shall ever be made to restrain the right thereof. Every person may freely and fully speak, write and print on any subject, being responsible for the abuse of that liberty.

127 J.C.J.D., 803 S.W.2d at 954.
does not (however) surrender his constitutional right to freedom of speech when he becomes a candidate for judicial office. A state cannot require so much."

The courts are charged with reviewing state regulations to determine if a regulation is necessary to serve a compelling state interest, and if it has been narrowly written to protect against the evil that the government can control. Where a regulation extends so far as to completely outlaw speech because of the subject matter of its content, there is a strong presumption of its unconstitutionality.

Moreover, restrictions affecting free speech that can result in disciplinary action to the speaker are subject to an even stricter scrutiny. The question then becomes whether the enacted regulation has been so narrowly drafted, and strictly applied, that the compelling state interest is served without unnecessarily burdening the exercise of free speech? 128

The court acknowledged that it is clear that the state has a compelling interest to protect and preserve the integrity and objectivity of the judicial system. 129 The court then set forth specific, fundamental limitations on judicial speech that survived its holding the announce clause unconstitutional:

Untruthful or misleading statements, or pledges of specific judicial conduct on pending cases, cannot be tolerated. 130 Nor can judicial candidates be allowed to make promises or predispositions of cases or issues that are likely to come before the courts that might reflect upon a judge's impartiality. 131

The court held that:

"SCR 4.300 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

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128 Id. at 954-55 (citation omitted).
129 Id. at 956 (citing Morial v. Judiciary Comm' n, 565 F.2d 295 (5th Cir. 1977), cert. denied, 435 U.S. 1013 (1978)) ("The state's interest in ensuring that judges be and appear to be neither antagonistic nor beholden to any interest, party or person in entitled to the greatest respect.").
130 While it cannot be seriously disputed that an untruthful or misleading statement by a judicial candidate is a violation of the Code, Doyle v. Judicial Ret. and Removal Comm'n, 885 S.W.2d 917 (Ky. 1994), demonstrates that reasonable people can disagree over the quantum of proof necessary to constitute clear and convincing evidence of such a violation.
131 J.C.J.D., 803 S.W.2d at 956. As is discussed infra, the application of the new language in Canon 7B(1)(c) that a judicial candidate "shall not make statements that commit or appear to commit the candidate with respect to cases, controversies or issues likely to come before the court" has become the primary legal battleground concerning the "pledges or promises" clause.
views on disputed legal or political issues, and thus necessarily violates fundamental state and federal constitutional free speech rights of judicial candidates."

The court "noted that Kentucky's Constitution provides for the selection of its judiciary by popular election[,]" and the court quoted American Civil Liberties Union v. The Florida Bar, in support of its recognition of the "candidates' right to make campaign speeches and the concomitant right of the public to be informed about the judicial candidates." The court also stated that it was "not persuaded by the Commission's argument that the language of Canon 7(B)(1)(c) prohibiting all discussion of 'disputed legal issues' by judicial candidates is necessary to prevent campaign statements which may indicate a predisposition or bias in favor of one litigant over another." The court opined that "[t]o specifically prohibit this type of campaign conduct and avoid constitutional concerns," the Canon should be written "in a much narrower scope to outlaw discussion of pending or future litigation." The court then quoted from the ABA's Model Code which had been amended in August 1990 to prohibit "judicial candidates from ' . . . mak[ing] statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court, . . .'."


In Ackerson v. Kentucky Judicial Retirement and Removal Commission, the U.S. District Court granted Ackerson partial relief by enjoining the Commission from taking action to discipline him or from otherwise enforcing the canon with respect to any pledges or promises of conduct and statements by a candidate for judicial office committing or appearing to commit the candidate regarding issues related to the administration of the courts. However, the court denied Ackerson relief on his other challenges to the canon on the grounds that

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132 Id. at 956 (referencing KY. SUP. CT. R. 4.300, Canon 7B(1)(c)) (amended 4/4/91 and 1/1/99) (emphasis original).
133 Id.
135 J.C.J.D., 803 S.W.2d at 956.
136 Id.
137 Id.
138 Id.
139 Id.
140 KY. SUP. CT. R. 4.300, Canon 7B(1)(c) (amended 1/1/99). As noted in Section III, the supreme court did not substantially adopt the ABA's 1990 Model Code until January 1, 1999.
141 Ackerson, 776 F. Supp. at 310. See also infra Section IV (discussing Ackerson's standing to bring this action).
142 Id.
143 Id. at 315-16.
the canon was not impermissibly vague, that there was a compelling state interest in limiting a judicial candidate's speech, and that the canon was sufficiently closely drawn so as to avoid unnecessary abridgment of a judicial candidate's speech.\textsuperscript{144} The U.S. District Court in Ackerson stated that the Supreme Court of Kentucky in its decision in \textit{J.C.J.D. v. R.J.C.R.},\textsuperscript{145} which preceded the adoption of the revised Canon 7 (now 5), had "correctly delineated the proper basis for limiting a judicial candidate's speech, that being the state's interest in protecting and preserving the integrity and objectivity of the judicial system."\textsuperscript{146}

As to "Ackerson's desire to make campaign pledges, promises and commitments [on] issues of administration[;]" the court noted that Canon 7B(1)(c)\textsuperscript{147} "does not limit its strictures to substantive matters involving a court's adjudicatory function [but] ... prohibits, in broad language, pledges and promises of conduct in office and commitments with respect to issues likely to come before the court."\textsuperscript{148} The court then concluded that no compelling state interest existed which justified limiting a judicial candidate's speech on court administrative issues.\textsuperscript{149} The court declared that "[t]he state's interest, as was described in \textit{J.C.J.D.}, is in preserving the impartiality of the judiciary [and] [i]mpartiality is an attribute of the exercise of a court's adjudicatory power, not its administrative function."\textsuperscript{150} Thus, the court concluded that the "constraint on

\begin{flushright}
\textbf{CANON 7:} A judge should refrain from political activity inappropriate to his judicial office.
\end{flushright}

\begin{itemize}
\item B. Campaign conduct.
\item (1) A candidate, including an incumbent judge for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system election:
\item (c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; or misrepresent his identity, qualifications, present position, or other facts.
\end{itemize}

\textit{Id.}

\textsuperscript{144} Id. at 315.

\textsuperscript{145} 803 S.W.2d 953 (Ky. 1991).


\textsuperscript{147} Ky. Sup. Ct. R. 4.300 Canon 7B(1)(c) (amended 1/1/99). This Canon provides as follows:

\textsuperscript{148} Id. at 315.

\textsuperscript{149} Id. at 314. While the court noted that counsel for the Commission had "not argued otherwise," that the Commission had "never considered the issue," and that counsel "doubted it would discipline Ackerson on this basis[,]" the court "consider[ed] it necessary to address the matter... since the Commission has not taken any binding action nor is it bound by its counsel's predictions." Id. at 315.

\textsuperscript{150} Id. at 314.
Ackerson's campaign speech on the subject of court administration is an unnecessary abridgement of his First Amendment rights." 151

The court then addressed "Ackerson's desire to make campaign statements committing or appearing to commit him with respect to legal issues which are not presently before the Kentucky Court of Appeals but which are likely to come before that court." 152 The court first rejected Ackerson's challenge to the canon on the basis that its prohibition against campaign statements was so vague that it could put one at risk of discriminatory enforcement. 153 The court concluded that "[t]he canon's proscription of the appearance of a commitment obviously addresses commitments made indirectly as opposed to those made directly [and that] [i]t is axiomatic that if one may not do something directly, one may not do it indirectly." 154

The court then addressed Ackerson's challenge to the canon's prohibition of statements committing the candidate with respect to issues likely to come before the court. 155 "Ackerson argue[d] that any issue may come before the Kentucky Court of Appeals and that the likelihood is difficult to ascertain or predict . . . rendering the canon impermissibly vague." 156 Ackerson additionally argued that regardless of the vagueness, he should have the right pursuant to the First Amendment to address a wide variety of legal issues, with exception to only those which are presently and directly before the Kentucky Court of Appeals. 157

The court rejected Ackerson's contentions and stated:

The canon does not prohibit all speech by a judicial candidate on legal issues. A candidate may fully discuss, debate, and commit himself with respect to legal issues which are unlikely to come before the court. A candidate may also fully discuss and debate legal issues which are likely to come before the court. It is only with respect to the latter that the candidate is prohibited from making direct or indirect commitments.

We find that there is a compelling state interest in so 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. The canon is closely tailored to this end.

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. The canon recognizes

151 Id.
152 Id.
153 Id. (citing Gentile v. State Bar of Nev., 501 U.S. 1030 (1991)).
155 Id.
156 Id. at 314-15.
157 Id. at 315.
that pre-election commitments by judicial candidates impair the integrity of the court by making the candidate appear to have pre-judged an issue without benefit of argument of counsel, applicable law, and the particular facts presented in each case.

It is undoubtedly true that any issue may be presented in court at any time. If a judicial candidate is unable to gauge the likelihood of an issue coming before his court, and is therefore constrained by caution so as to avoid making a pre-election commitment with respect to such an issue, we believe this constraint on First Amendment speech is permissible and proper when balanced against the necessity of maintaining the impartiality of the legal process. This interest is simply too great to allow judicial campaigns to degenerate into a contest of which candidate can make more commitments to the electorate on legal issues likely to come before him or her.

We therefore find that the canon is sufficiently and closely drawn so as to avoid unnecessary abridgment of a judicial candidate's right of free speech during the campaign. We also find the canon is neither vague nor overbroad in this regard.\(^\text{158}\)

The November 1991 election campaign also included the candidacy of attorney Jed K. Deters as one of seven candidates in the special election for the remainder of an unexpired term for a judgeship in the 16th Judicial District, comprising Kenton County.\(^\text{159}\) On November 11, 1991, after Deters lost the special election, a complaint was filed against him with the Commission regarding two newspaper advertisements which had been placed by campaign officials with Deters's knowledge and approval.\(^\text{160}\) The political advertisements, which ran in *The Messenger*, a Catholic newspaper, and in *The Kentucky Post*, a newspaper of general circulation in Northern Kentucky, contained in bold print the statement: "Jed Deters is a Pro-Life Candidate."\(^\text{161}\)

The Commission found that Deters violated SCR 4.020(1)(b)(v) and Canon 7B(1)(c) of the Code of Judicial Conduct twice by authorizing the two political ads.\(^\text{162}\) The Commission publicly censured Deters after it found by clear and convincing evidence that he had,

| \text{publicly announced} | \text{his view on the abortion issue for the admitted purpose of obtaining support from voters interested in that issue. In doing so, he attempted to obtain an unwarranted} |

\(^\text{158}\) *Id.*

\(^\text{159}\) Deters v. Judicial Ret. and Removal Comm'n, 873 S.W.2d 200, 201 (Ky. 1994).

\(^\text{160}\) *Id.* at 201-02.

\(^\text{161}\) *Id.* at 201.

\(^\text{162}\) *Id.*

\(^\text{163}\) It is interesting that the term "announced" was used when the "announce" clause had been struck down by *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953, 956 (Ky. 1991), and Canon 7B(1)(c) had been amended to include the "commit" clause.
and illegal advantage in the election over his opponents. In so acting, he violated Canon 7B(1)(c) by making statements that commit or appear to commit the candidate to a position with respect to cases, controversies or issues that are likely to come before the court.  

In his appeal as a matter of right to the Supreme Court, Deters raised four issues: (1) "that the Commission was without jurisdiction to sanction him",  

(2) "that the abortion issue was not likely to come before the Kenton County District Court";  

(3) "that he had a constitutionally protected right to discuss abortion in the public forum"; and (4) "that the State has no compelling interest in prohibiting 'all forms of a candidate's speech.'" The Supreme Court in a 5-2 decision affirmed the Commission.  

The Supreme Court's opinion in Deters discussed issues three and four together because they were, "in effect, both challenges to the constitutionality of Canon 7B(1)(c)." The court observed that in its decision in J.C.J.D. v. R.J.C.R, the previous Canon 7B(1) was struck down, which resulted in the promulgation of the new canon now under attack. The court noted that:

[t]he former language condemned by the decision prohibited a candidate for judicial office from announcing his views on all 'disputed legal or political issues,' whereas the present canon only prohibits 'statements that commit or appear to commit the
candidate with respect to cases, controversies or issues that are likely to come before the court...\textsuperscript{172}

The court then cited with approval the U.S. District Court's decision in \textit{Ackerson}, which had upheld the language of the present Canon 7B(1)(c) "as having been 'sufficiently and closely drawn so as to avoid unnecessary abridgement of a judicial candidate's right of free speech during the campaign.'"\textsuperscript{173} The court quoted with approval from \textit{Ackerson}, as follows:

\begin{quote}
The canon does not prohibit all speech by a judicial candidate on legal issues. A candidate may fully discuss, debate, and commit himself with respect to legal issues which are unlikely to come before the court. A candidate may also fully discuss and debate legal issues which are likely to come before the court. It is only with respect to the latter that the candidate is prohibited from making direct or indirect commitments.\textsuperscript{174}
\end{quote}

The Supreme Court concluded its opinion in \textit{Deters} by stating "the \textit{Ackerson} opinion holds, as do we, that there is a compelling state interest in so 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."\textsuperscript{175}

Three years after the \textit{Deters} campaign, another judicial campaign speech case arose in Kenton County, Kentucky.\textsuperscript{176} On November 8, 1994, Patricia M. Summey defeated incumbent circuit judge, Frank Trusty, in a special election for circuit judge in the 16th Judicial District, Fourth Division.\textsuperscript{177} Trusty had been appointed by the Governor to fill a vacancy on the bench until the next regular election.\textsuperscript{178}

\textsuperscript{172}Id.  

mistakenly followed the decision in \textit{Ackerson}, which wrongly determined that Canon 7B(1)(c) is narrowly drafted and does not unnecessarily abridge the judicial candidate's right to free speech [since] [t]he court failed to apply properly the second prong of strict scrutiny analysis and neglected to allocate the heavy burden of proof upon the State to prove that its regulation passed constitutional muster.

\textsuperscript{174}Id. at 205 (citing \textit{Ackerson}, 776 F. Supp. at 315).  
\textsuperscript{175}Id.  
\textsuperscript{176}\textit{See} Summey v. Judicial Ret. and Removal Comm'n, 947 S.W.2d 42 (Ky. 1997).  
\textsuperscript{177}Id. at 43.  
\textsuperscript{178}KY. CONST. §§ 118, 152.
In *Summe v. Judicial Retirement and Removal Commission,* the Supreme Court in a 5-2 decision affirmed the Commission’s findings as to two violations of the Code of Judicial Conduct. The Commission found Judge Summe to be in violation of the Code of Judicial Conduct for (1) "depict[ing] the Kenton County Citizen’s Courier as an independent publication of regular or periodic issue for citizens of Kenton County, Kentucky, when it was in fact campaign material, prepared and distributed by [Judge Summe], or on her behalf, solely for the specific purpose of supporting her campaign[;]" and (2) distributing or allowing to be distributed “a letter written by Mary Gregory in support of [Judge Summe’s] 1994 campaign” “to members of the medical profession in Kenton County[.]”

Approximately one week prior to the November general election, the Summe campaign distributed between 5,000 and 6,000 copies of a campaign publication entitled the Kenton County Citizen’s Courier to potential voters. The court noted Judge Summe’s argument “that the distributed material was appropriately identified as being campaign literature[,]” because it “was folded for delivery so

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179 947 S.W.2d 42 (Ky. 1997).
180 Id. at 48. Pursuant to KY. SUP. CT. R. 4.290(5), three justices of the five-justice majority modified Judge Summe’s suspension of thirty days on each of two counts to run concurrently rather than consecutively. Id.
181 Id. at 43.
182 Id. at 44. The court summarized the publication as follows:

The following appears on the front page of the distributed material:

a. The name “Kenton County Citizen’s Courier” with the caption “Today’s News for Concerned Citizens of Kenton County” directly below the name.

b. The designations “Four Pages” and “Oct/Nov 1994”.

c. An article with the lead-in “Through the eyes of a child . . .” which contained a photograph of a young battered child.

d. A bolded “Editor’s Note” at the bottom of the article which reads:

Editor’s Note: The child’s grandmother and legal guardian gave permission to use the photo in this article, explaining that due to excessive bruising and swelling, the child cannot be identified.

e. Another article captioned “Study shows child abuse affects go beyond childhood.”

The following appears on the back page of the document:

a. A column headed “Viewpoint . . . To the editor of the Citizen’s Courier.”

b. A letter purporting to be to the editor, supporting appellant and containing the statement: “I will vote for Patricia M. Summe for Circuit Court Judge because I know Pat Summe is concerned about crime.”

c. A letter to voters from Judge Summe which is inset on the top right half of the back page.

d. A return address of “3384 Madison Pike, Ft. Wright, KY 41017” without any identifying name or organization above it.

*Id.*
that her letter and logo on the back page were clearly visible and would surely inform the voters that this was a campaign advertisement.  \(^{183}\)

The Supreme Court agreed with the "Commission's conclusion that nearly all of the Kenton County Citizen's Courier's features, both individually and collectively, portray the publication as something other than campaign literature."\(^{184}\) The court stated that the format of the publication, which included words and phrases like "Editor's Note," "Viewpoint" and "To the editor of the Citizen's Courier," "could have only been used for one purpose—to mislead voters into believing that the Kenton County Citizen['s] Courier was something other than campaign literature."\(^{185}\) Thus, the Supreme Court affirmed the Commission's finding that the format of the newspaper "was designed to give the impression to voters that an independent organization advocating child abuse issues supported [Judge Summe] in her race for circuit judge and, thus, was a misrepresentation of a fact in violation of Canon 7B(1)(c) of the Code of Judicial Conduct, SCR 4.300."\(^{186}\)

The second violation involved a letter written in support of Judge Summe's candidacy.\(^{187}\) Mary S. Gregory, who was Judge Summe's cousin and supporter, worked as a registered nurse in the emergency room at a local hospital and had witnessed firsthand the suffering of innocent victims of the horrible crime of child abuse.\(^{188}\) Ms. Gregory's experiences and her knowledge of one particular child abuse case motivated her to write a letter to her colleagues, and the letter was mailed by Judge Summe's campaign to some 800 nurses in Kenton County.\(^{189}\) The letter described a specific case of a three-year-old girl who had been seriously beaten by her mother's 41-year-old boyfriend.\(^{190}\) The letter explained that the abuser was sentenced to five years in prison by Judge Trusty even though the prosecutor had asked for ten years, and that Judge Trusty then probated this criminal's sentence, and that the defendant only served 153 days.\(^{191}\) The letter concluded as follows:

As medical professionals who witness abuse daily, it is time to judge our judges. How many times have you filled out abuse forms? How many times have you seen repeat abuse by repeated abusers? It is time to stop the abuse instead of treating it.

Please join me in stopping the abuse and vote for a person who will let no one walk away before justice is served. She has concern for the victim.

\(^{183}\) Id. Judge Summe also asserted that the material "displayed her campaign logo, a 'paid-for' acknowledgement, a return address[,] and...that the wording of her letter...clearly identified the whole mailer as being campaign material." \(^{184}\) Id. at 44-45.

\(^{185}\) Id. at 45.

\(^{186}\) Id. at 43 (referencing KY. SUP. CT. R. 4.300 Canon 7B(1)(c) (amended 1/1/99)).

\(^{187}\) Id. at 46.

\(^{188}\) Id.

\(^{189}\) Id.

\(^{190}\) Id.

\(^{191}\) Id.
Vote for Patricia M. Summe, November 8, 1994 for Circuit Court Judge.

Sincerely,

Mary S. Gregory, R.N., E.R.
St. Elizabeth North

[Caption stating that postage and stationary were paid for by appellant’s campaign committee].

The Commission determined that the statements in the letter from Ms. Gregory to the Kenton County nurses constituted a pre-election commitment regarding probation in child abuse cases in violation of Canon 7B(1)(c).

In her appeal to the Supreme Court, Judge Summe contended that the Commission’s determination was erroneous for two reasons: “(1) it is arbitrary and capricious as not being based on clear and convincing evidence, and (2) it is unconstitutional.” Judge Summe argued that “the Commission’s decision incorrectly holds that criticism alone of an incumbent judge amounts to a pre-election announcement and commitment to the voters regarding [her] position on the issue of probation in child abuse cases.” The Supreme Court rejected this argument and stated that the letter clearly goes beyond criticism of appellant’s opponent and that the obvious crux of the letter was that appellant’s opponent lets child abusers off easy, and that if appellant were elected, she would not.

Chief Justice Stephens then quoted from the treatise Judicial Conduct and Ethics as follows:

Ethics advisory opinions have addressed the propriety of numerous statements and pledges candidates have proposed to use in the course of a campaign. The general sense of these opinions is that anything that could be interpreted as a pledge that the candidate will take a particular approach in deciding cases or a particular class of cases is prohibited.

192 Id.
193 Id. at 43. The supreme court also affirmed the Commission’s conclusion:

that use of both of these documents in the campaign was in violation of SCR 4.300, Canons 1 and 2A, in that appellant failed to observe high standards of conduct in her campaign and failed to conduct herself in a manner that promoted public confidence in the integrity and impartiality of the judiciary.

194 Id. at 44.
195 Id. at 46.
196 Id.
197 Summe, 947 S.W.2d at 46 (quoting Shaman supra note 44, at 372 § 11.09).
This section of the Supreme Court's opinion concluded by stating that "[w]hile in isolation, a judge who 'will let no one walk away before justice is served' is something to which all should aspire, in the context of the present judicial campaign, it represented [Judge Summe's] commitment to prevent the probation of child abusers."\(^{198}\)

VI. REPUBLICAN PARTY OF MINNESOTA V. WHITE\(^{199}\)

The Supreme Court's decision in *Summe* in 1997 was its last decision involving judicial campaign conduct prior to the United States Supreme Court's decision in *Republican Party of Minnesota v. White*.\(^{200}\) When the Supreme Court held in *White* that Minnesota's announce clause\(^{201}\) violated a judicial candidate's First Amendment right to free speech, it determined under the strict-scrutiny test that the announce clause unnecessarily circumscribed protected expression so that it was not narrowly tailored to serve a compelling state interest.\(^{202}\) *White* was the first decision by the Supreme Court to address the issue of free speech in a judicial campaign. In writing for the 5-4 majority, Justice Scalia rejected the arguments that there was a compelling state interest for the announce clause and that the announce clause was narrowly tailored to further such an interest.\(^{203}\) Justice Scalia rebuffed much of the criticism raised by the dissenters in two separate dissenting opinions as attacking arguments the Court did not make.\(^{204}\)

The origin of the *White* case dates to 1996, when Gregory Wersal, one of the petitioners before the Supreme Court, first ran for associate justice of the Minnesota Supreme Court.\(^{205}\) Wersal's distribution of campaign literature criticizing several Minnesota Supreme Court decisions on issues such as crime, welfare, and abortion, resulted in a complaint being filed against him with the

\(^{198}\) Id. at 47.
\(^{199}\) 536 U.S. 765 (2002).
\(^{200}\) Id.
\(^{201}\) MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2002). This Canon provided:

\[
\begin{align*}
(3) & \text{A candidate for a judicial office, including an} \\
& \text{incumbent judge:} \\
& \ldots \\
& (d) \text{shall not:} \\
& (i) \text{make pledges or promises of conduct in} \\
& \text{office other than the faithful and impartial performance of the duties of the} \\
& \text{office; announce his or her views on disputed legal or political issues; or} \\
& \text{misrepresent his or her identity, qualifications, present position or other fact, or} \\
& \text{those of the opponent[.]}
\end{align*}
\]

*Id.* (emphasis added).

\(^{203}\) Id. at 786-88.
\(^{204}\) Id. at 783 (responding to Justice Ginsburg's dissenting opinion).
\(^{205}\) Id. at 768.
"Lawyers Board." The Board dismissed the complaint and expressed doubt whether the announce clause "could constitutionally be enforced." Since Wersal was concerned that further ethical complaints would jeopardize his ability to practice law, he withdrew from the election.

In 1998 Wersal, once again, ran for associate justice of the Minnesota Supreme Court. Early in the 1998 campaign, Wersal sought an advisory opinion from the Board inquiring into whether it planned to enforce the announce clause. The Board initially refused to issue an opinion because Wersal had not submitted a list of the announcements he wished to make and when he subsequently presented such a list, the Board refused to provide an opinion because of the pending litigation.

Shortly after receiving this response, Wersal filed a lawsuit in the United States District Court for the District of Minnesota against the Lawyers Board, the Office of Lawyers Professional Responsibility, and the Minnesota Board of Judicial Standards. Wersal alleged in his complaint that he had been "forced to refrain from announcing his views on disputed issues during the 1998 campaign, to the point where he declined response to questions put to him by the public and press, out of concern that he might run afoul of the announce clause." Wersal sought, "inter alia, a declaration that the announce clause violates the First Amendment and an injunction against its enforcement." Other plaintiffs, including the Minnesota Republican Party, argued that because the clause kept Wersal from announcing his views, they were unable to hear those views and to determine whether to support or to oppose his candidacy accordingly.

The U.S. District Court rejected Wersal's claims in an opinion rendered on September 13, 1999, and held that the announce clause did not violate the First Amendment. In an opinion rendered on April 30, 2001, the United States Court of Appeals for the Eighth Circuit in a 2-1 decision affirmed the District

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206 Id. The complaint "was filed with the Office of Lawyers Professional Responsibility, the agency which under the direction of the Minnesota Lawyers Professional Responsibility Board, investigates and prosecutes ethical violations of lawyer candidates for judicial office." Id.

207 Id. at 765.

208 Id.

209 Id.

210 Id.

211 Id. at 769 n.2. The nature of the pending litigation is not clear from the opinion.

212 Republican Party of Minn. v. Kelly, 63 F. Supp. 2d 967 (D. Minn. 1999). Verna Kelly was the previous chairperson of the Minnesota Board of Judicial Standards. Id. Suzanne White later became its chairperson. Id.

213 White, 536 U.S. at 769.

214 Id.

215 Id.

The United States Supreme Court granted certiorari on December 3, 2001, and oral arguments were heard on March 26, 2002.

In a 5-4 decision rendered on June 27, 2002, Justice Scalia, writing for the majority, declared that "[b]efore considering the constitutionality of the announce clause we must be clear about its meaning." The Court continued:


We know that "announc[ing] ... views" on an issue covers much more than promising to decide an issue a particular way. The prohibition extends to the candidate's mere statement of his current position, even if he does not bind himself to maintain that position after election. All the parties agree this is the case, because the Minnesota Code contains a so-called "pledges or promises" clause, which separately prohibits judicial candidates from making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office," ibid.—a prohibition that is not challenged here and on which we express no view.

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218 Republican Party v. Kelly, 534 U.S. 1054 (2001) (limiting its review to Question I presented by the petition for writ of certiorari). The questions presented in the petition were as follows:

1. Whether the provision of the Minnesota Code of Judicial Conduct that prohibits a candidate for elective judicial office from "announc[ing] his or her views on disputed legal or political issues" unconstitutionally impinges on the freedom of speech as guaranteed by the First and Fourteenth Amendments to the United States Constitution.
2. Whether the severe burdens imposed by various provisions of the Minnesota Code of Judicial Conduct unconstitutionally impinge on the right of political parties to endorse candidates for elective judicial office in violation of the freedom of speech, freedom of association, and equal protection of law as guaranteed by the First and Fourteenth Amendments to the United States Constitution.
3. Whether the provision of the Minnesota Code of Judicial Conduct that forbids a candidate for elective judicial office from attending or speaking at any political party gathering—while permitting such a candidate to attend or speak at gatherings of all other organizations—unconstitutionally impinges on the freedom of speech, freedom of association, and equal protection of the law as guaranteed by the First and Fourteenth Amendments to the United States Constitution.

Republican Party of Minnesota v. Kelly, No. 01-0521, petition for cert. filed (September 24, 2001).
219 White, 536 U.S. at 770.
220 Id. (emphases original).
The Court then reviewed some of the limitations that the Minnesota Supreme Court had placed on the scope of the announce clause that were not immediately apparent from its text. The Court stated "that—like the text of the announce clause itself—these limitations upon the text of the announce clause are not all that they appear to be." The Court concluded:

In any event, it is clear that the announce clause prohibits 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.

The Supreme Court continued its legal analysis by noting that "[a]s the Court of Appeals recognized, the announce clause both prohibits speech on the basis of its content and burdens a category of speech that is 'at the core of our First Amendment freedoms'—speech about the qualifications of candidates for public office." The Court then discussed the applicability of the strict-scrutiny test:

Under the strict-scrutiny test, respondents have the burden to prove that the announce clause is (1) narrowly tailored, to serve (2) a compelling state interest. E.g., Eu v. San Francisco County Democratic Central Comm., 489 U.S. 214, 222, 103 L.Ed.2d 271, 109 S. Ct. 1013 (1989). In order for respondents to show that the announce clause is narrowly tailored, they must demonstrate that it does not 'unnecessarily circumscrib[e] protected expression.' Brown v. Hartlage, 456 U.S. 45, 54, 71 L.Ed.2d 732, 102 S. Ct. 1523 (1982).

The Supreme Court noted that the respondents had asserted, and the Court of Appeals had accepted, "two interests as sufficiently compelling to justify the announce clause: preserving the impartiality of the state judiciary and preserving the appearance of the impartiality of the state judiciary." The respondents argued "that the first is compelling because it protects the due process rights of litigants, and that the second is compelling because it preserves public confidence in the judiciary." The Supreme Court stated that the respondents were "rather
vague, however, about what they mean by ‘impartiality’ [and] indeed, although the term is used throughout the Eighth Circuit’s opinion, the briefs, the Minnesota Code of Judicial Conduct, and the ABA Codes of Judicial Conduct, none of these sources bothers to define it.”

The Supreme Court then declared that clarity on this point was essential before it could decide whether impartiality is indeed a compelling state interest. If so, the next question is whether the announce clause is narrowly tailored to achieve it. The Court then provided three meanings of “impartiality” and explained why under each usage the announce clause was not narrowly tailored to serve impartiality or the appearance of impartiality:

A

One meaning of “impartiality” in the judicial context—and of course its root meaning—is the lack of bias for or against either party to the proceeding. Impartiality in this sense assures equal application of the law. That is, it guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party. This is the traditional sense in which the term is used.

We think it plain that the announce clause is not narrowly tailored to serve impartiality (or the appearance of impartiality) in this sense. Indeed, the clause is 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. To be sure, when a case arises that turns on a legal issue on which the judge (as a candidate) had taken a particular stand, the party taking the opposite stand is likely to lose. But not because of any bias against that party, or favoritism toward the other party. Any party taking that position is just as likely to lose. The judge is applying the law (as he sees it) evenhandedly.

B

It is perhaps possible to use the term “impartiality” in the judicial context (though this is certainly not a common usage) to mean lack of preconception in favor of or against a particular legal view. This sort of impartiality would be concerned, not with guaranteeing litigants equal application of the law, but rather with guaranteeing them an equal chance to persuade the court on

229 Id.
230 Id.
231 Id. at 776-77 (footnote omitted) (emphases original).
the legal points in their case. Impartiality in this sense may well be an interest served by the announce clause, but it is not a compelling state interest, as strict scrutiny requires. A judge’s lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law.

Indeed, even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so. “Proof that a Justice’s mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.”

A third possible meaning of “impartiality” (again not a common one) might be described as open-mindedness. 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. This sort of impartiality seeks to guarantee each litigant, not an equal chance to win the legal points in the case, but at least some chance of doing so. It may well be that impartiality in this sense, and the appearance of it, are desirable in the judiciary, but we need not pursue that inquiry, since we do not believe the Minnesota Supreme Court adopted the announce clause for that purpose.

The short of the matter is this: In Minnesota, a candidate for judicial office may not say “I think it is constitutional for the legislature to prohibit same-sex marriages.” He may say the very same thing, however, up until the very day before he declares himself a candidate, and may say it repeatedly (until litigation is pending) after he is elected. As a means of

\footnote{\textsuperscript{232} Id. at 777-78 (quoting Laird v. Tatum, 409 U.S. 824, 835 (1972)) (emphases original).}
\footnote{\textsuperscript{233} This “until litigation is pending” restriction would not apply to the “commit clause” under}
pursuing the objective of open-mindedness that respondents now articulate, the announce clause is so woefully underinclusive as to render belief in that purpose a challenge to the credulous.234

Justice Scalia concluded the majority opinion by noting that “[t]here is an obvious tension between the article of Minnesota’s popularly approved Constitution which provides that judges shall be elected, and the Minnesota Supreme Court’s announce clause which places most subjects of interest to voters off limits.”235 “[T]he First Amendment does not permit . . . leaving the principles of elections in place while preventing candidates from discussing what the elections are about.”236

VII. APPLICATION OF WHITE

Clearly, the Supreme Court’s decision in White will have a direct impact outside of Minnesota in the other eight states that retained the announce clause in their Codes of Judicial Conduct,237 and most likely it will indirectly impact many other jurisdictions. This section of the article will review some of the changes that have been made to court rules concerning judicial campaign conduct and some of the cases that have been decided in the wake of White.

In Kentucky the Judicial Conduct Commission on August 5, 2002, sent the following Memorandum to all justices, judges and judicial candidates:238

Canon 5B(1)(c) of the 1990 Code since the current Code applies to “cases, controversies or issues that are likely to come before the court[.]” KY. SUP. CT. R. 4.300 Canon 5B(1)(c).

White, 536 U.S. at 778-81 (emphases original). See also City of Ladue v. Gilleo, 512 U.S. 43, 52-53 (1994) (noting that underinclusiveness ‘diminish[es] the credibility of the government’s rationale for restricting speech’); Florida Star v. B.J.F., 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring in judgment) (“[A] law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprotected” (internal quotation marks and citation omitted)).

Id. at 787.

In Georgia Florida issued a similar statement and “Georgia issued a statement that White did not impact provisions of the Georgia Code of Judicial Conduct, [but] it also stated that it would no longer enforce the portions of Canon 7(B)(1)(d) ruled to be overbroad in Weaver [infra, note 262].” Eileen Gallagher, Judicial Ethics and the First Amendment, The Judges’ Journal, Spring 2003, at 26, 28 n.3. Also, the Indiana Commission “issued a preliminary advisory opinion on its code of conduct and permissible speech.” Id. at 26.
The Kentucky Judicial Conduct Commission, on advice of counsel, issues this communication to make it known that the recent decision of the United States Supreme Court in Republican Party of Minnesota v. White, 70 U.S. Law Week 4720 (June 27, 2002), does not affect Kentucky’s canon on judicial campaign statements.

In that case, the Supreme Court struck down on First Amendment free-speech grounds a restriction in the Minnesota Code of Judicial Conduct providing that a candidate for judicial office shall not ‘announce his or her views on disputed legal or political issues.’

The predecessor of Kentucky’s current canon on judicial campaign statements had the same “announce clause” but it was invalidated on free-speech grounds by our state Supreme Court. J.C.J.D. v. R.J.C.R., Ky., 803 S.W.2d 953 (1991) cert. denied sub nom. Jud Ret. & Rem. Comm’n v. Combs, 502 US 816.

After the Combs decision, the Supreme Court of Kentucky amended our canon by replacing the “announce clause” with a provision that a candidate for judicial office “shall not make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.”

Kentucky’s canon, Supreme Court Rule 4.300, Canon 5 (B)(1)(c), now reads:

(1) A judge or candidate for election to judicial office:

(c) shall not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; shall not make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; and shall not misrepresent any candidate’s identity, qualifications, present position, or other facts.

The U.S. Supreme Court in the Minnesota case discussed the pledges or promises clause and the commitment clause in state judicial conduct codes (both of which are in Kentucky’s canon set out above), but
expressed no opinion on them because they were not involved in that case.

Therefore, Canon 5(B)(1)(c) of the Kentucky Code of Judicial Conduct is not affected by the ruling on the Minnesota canon, and remains effective as promulgated by the Supreme Court of Kentucky.

Since White was released, there have been no reported disciplinary actions taken in Kentucky against any judicial candidates nor have any declaratory judgment actions been filed challenging the constitutionality of Kentucky’s rules.

On July 18, 2002, the Supreme Court of Missouri entered an order stating that in consideration of White, the announce clause of Rule 2.03, Canon 5.B.(1)(c) “shall not be enforced against candidates for judicial office that is filled: (1) By public election between competing candidates; or (2) By candidates appointed to or retained in office in the manner prescribed in sections 25(a)-(g) of article V of the state constitution, but only when their candidacy has drawn active opposition. Rule 2.03, Canon 5.B.(1)(c) . . . shall otherwise remain in full force and effect.” The order concluded by stating that “[r]ecusal, or other remedial action, may nonetheless be required of any judge in cases that involve an issue about which the judge has announced his or her views as otherwise may be appropriate under the Code of Judicial Conduct.”

On November 21, 2002, the Supreme Court of Pennsylvania entered an order amending Canon 7(B)(1)(c) of the Code of Judicial Conduct. Like Kentucky’s amendment in 1991, the Pennsylvania amendment replaced the “announce clause” with the “commit clause.” The court cited the Supreme Court’s holding in White as the basis for its order amending its Code and declared that “the immediate amendment of Canon 7(B)(1)(c) of the Code of Judicial Conduct is hereby found to be required in the interest of justice and the efficient administration.” One commentator opined that White “will have a dramatic and direct impact on future judicial elections in Pennsylvania[,]” where the announce clause has been “strictly interpreted.”

In April 2003 the North Carolina Supreme Court amended its Code of Judicial Conduct significantly in the area of political activity. The ban on personal solicitation of campaign contributions was eliminated and the Code was modified to enumerate permissible and prohibited political conduct. The “misrepresent” clause was modified to state: “A judge or candidate should not

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240 Id. (emphasis original).
241 Id.
243 Id.
... intentionally and knowingly misrepresent his identity or qualifications." This amendment eliminated the restriction on misleading statements about a candidate's opponent. The Supreme Court also eliminated its "pledges and promises" clause, which had been the state's only other restriction on candidate speech during judicial campaigns. These major changes to North Carolina's Code of Judicial Conduct, combined with its recent adoption of public financing for judicial election campaigns, places it in the forefront for this type of judicial campaign reform.

In Smith v. Phillips, the United States District Court for the Western District of Texas on August 6, 2002, rendered an opinion wherein it found that there was no distinction between Minnesota's Code of Judicial Conduct 5(A)(3)(d)(i) and Texas's Code of Judicial Conduct 5(1). For the reasons stated in White, the court found that the Texas Code of Judicial Conduct 5(1) violated the First Amendment. Accordingly, the court declared Canon 5(1) unconstitutional and enjoined the defendants from enforcing it.

The full impact of White on provisions in Codes of Judicial Conduct other than the announce clause will probably not be known for several years. The few cases that have applied White to the issue of judicial campaign speech have varied to the extreme.

In a Florida case decided after White, a judge who was disciplined following her successful campaign was unsuccessful in attempting to convince the Supreme Court of Florida that its pledges or promises clause is unconstitutional. In Inquiry Concerning a Judge (Kinsey), a sharply divided Supreme Court of Florida determined that Judge Patricia Kinsey, a successful candidate in the 1998 election for the office of County Court Judge for Escambia County, Florida, had engaged in a pattern of improper conduct which violated Canon 7A(3)(d)(i) and (ii). In concluding that there was clear and convincing evidence in support of

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245 See infra, note 427.
246 Gallagher, supra note 238, at 26-27.
248 TEXAS CODE OF JUDICIAL CONDUCT Canon 5(1). This Canon provided:

[A] judge or judicial candidate shall not make statements that indicate an opinion on any issue that may be subject to judicial interpretation by the office which is being sought or held, except that discussion of an individual's judicial philosophy is appropriate if conducted in a manner which does not suggest to a reasonable person a probable decision on any particular case.

249 Id.
250 See infra, note 427.
251 "The California Commission on Judicial Performance released a statement in August 2002 that it was dismissing its Notice of Formal Proceedings against former Judge Patricia Gray in light of the White decision." Id.
253 Id.
254 Canon 7A(3)(d) provides:

A candidate for judicial office . . . shall not:
most of the Judicial Qualifications Commission’s findings of fact as to the various charges, the court approved the Commission’s disciplinary recommendation and ordered Judge Kinsey to pay a fine of $50,000.00, plus the costs of the proceedings. Judge Kinsey, a local prosecutor, defeated incumbent Judge Bill Green, a former defense attorney, in the 1998 election. The Supreme Court of Florida stated that in her campaign Judge Kinsey had created the impression that she held a prosecutor’s bias and that police officers could expect more favorable treatment from her since she had promised to support the officers and to aid them in putting criminals behind bars. She also had pledged to victims of crime that she would bend over backwards for them and she had stressed the point that she identified with them, thus giving the appearance that she was already committed to giving them more favorable treatment than other parties appearing before her.

In applying the strict-scrutiny test, the court stated:

It is beyond dispute that Canon 7A(3)(d)(i)-(ii) serves a compelling state interest in preserving the integrity of our judiciary and maintaining the public’s confidence in an impartial judiciary. A judicial candidate should not be encouraged to believe that the candidate can be elected to office by promising to act in a partisan manner by favoring a discrete group or class of citizens. Likewise, it would be inconsistent with our system of government if a judicial candidate could campaign on a (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;
(ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.

Judge Kinsey was also found guilty of making material misrepresentations in violation of Canon 7A(3)(d)(iii). Kinsey, 2003 Fla. LEXIS 103, at *1. However, the Supreme Court focused on whether the misrepresentations were established by clear and convincing evidence, and did not discuss a challenge to the constitutionality of the canon prohibiting misrepresentations. Id. at *33.

Representative of the specific conduct that supported these statements were the findings that Judge Kinsey distributed campaign literature which included statements that “police officers expect judges to take their testimony seriously and to help law enforcement by putting criminals where they belong . . . behind bars, [and that] victims have a right to expect judges to protect them by denying bond to potentially dangerous offenders[.]” Id. at *24-25. Also, during an interview on a local radio station, Judge Kinsey stated that she, worked very closely with law enforcement officers as a prosecutor[,] [a]nd they’re left begging for help[,] [a]nd all they see when they come to court is a judge, like Bill Green, who either dismisses a case or minimizes it by not holding the criminals accountable. . . . Somebody has to hold criminals accountable, [a]nd that is why I am here.
platform that he or she would automatically give more credence to the testimony of certain witnesses or rule in a predetermined manner in a case which was heading to court.

In reviewing the “narrowly tailored” prong of the test, we conclude that the restraints are narrowly tailored to protect the state’s compelling interests without unnecessarily prohibiting protected speech. As is clear from the canons and related commentary, a candidate may state his or her personal views, even on disputed issues. However, to ensure that the voters understand a judge’s duty to uphold the constitution and laws of the state where the law differs from his or her personal belief, the commentary encourages candidates to stress that as judges, they will uphold the law. 258

The court noted Judge Kinsey’s reliance upon White in asserting that her campaign speech was protected by the First Amendment, but observed that the U.S. Supreme Court in White had “emphasized that [the] ‘announce clause’ was separate and apart from the ‘pledges or promises clause,’ . . . [and] the Court found that Minnesota did not fulfill its burden in showing that the ‘announce clause’ was narrowly tailored, and hence found that the rule violated the First Amendment.” 259 The court stated that “[i]n contrast to White, Florida does not have an ‘announce clause’ but instead adopted a more narrow canon[].” 260 Thus, the Supreme Court of Florida concluded that Canon 7A(3)(d)(i)-(ii) passed constitutional muster and that White did not impact the disciplinary action taken against Judge Kinsey. 261

However, in Weaver v. Harris, 262 the United States Court of Appeals for the Eleventh Circuit broadly applied White in striking down two major provisions of the Georgia Code of Judicial Conduct as unconstitutional. 263 In 1998 George M. Weaver, a Georgia attorney, ran for Justice of the Georgia Supreme Court. 264 Weaver was defeated by incumbent Supreme Court Justice Leah Sears. 265 During his campaign, Weaver distributed a brochure (“first brochure”) which described Justice Sears’s views on same-sex marriage, traditional moral standards, and the electric chair. 266 Two complaints about Weaver’s first brochure were filed with the Judicial Qualifications Commission. 267 After an investigation, including a

258 Id. (footnote omitted).
259 Id.
260 Id. at *21.
262 309 F.3d 1312 (11th Cir. 2002).
263 Id.
264 Standard 74 of the State Bar of Georgia provides that “[a] lawyer who is a candidate for judicial office that fails to comply with the Code of Judicial Conduct ... may be punished by disbarment.” Id. at 1316 (citing GA. STATE BAR R. 4-102, Std.74).
265 Weaver, 309 F.3d at 1325.
266 Id. at 1316.
267 Id. at 1316-17.
response from Weaver, the Commission through its Special Committee determined that portions of the first brochure violated Canon 7(B)(1)(d) and it issued a confidential cease and desist request.

After Weaver received the confidential cease and desist request, he changed some of the language in the brochure and distributed a second brochure. He also produced and aired a television advertisement. After the Special

268 See GA. RULES OF THE JUDICIAL QUALIFICATIONS COMMISSION Rule 27 (JQC) providing that during a year in which a general election is held the Commission’s Chair shall name three JQC members to the Special Committee “to deal expeditiously with allegations of ethical misconduct in campaigns for judicial office.” The Special Committee has the authority to issue a confidential cease and desist request to a candidate; and if the unethical or unfair campaign practice continues, “the Special Committee is authorized immediately to release to the media a public statement setting out the violations found to exist and the candidate’s failure to honor the cease and desist request.”

269 See GA. CODE OF JUDICIAL CONDUCT CANON 7(B)(1)(d) providing that a candidate for judicial office “shall not use or participate in the use of any form of public communication which the candidate knows or reasonably should know is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation of fact or law or omits a fact necessary to make the communication considered as a whole not materially misleading or which is likely to create an unjustified expectation about results the candidate can achieve.” Id.

270 See Weaver, 309 F.3d at 1316. The court stated that:

Specifically, the Special Committee found the following statements about Justice Sears in Weaver’s first brochure to be false, misleading, and deceptive in violation of Canon 7(B)(1)(d):

(1) “She would require the State to license same-sex marriages. . . .”
(2) “She has referred to traditional moral standards as ‘pathetic and disgraceful.’”
(3) “Justice Sears has called the electric chair ‘silly,'” with the words “THE DEATH PENALTY” in an adjacent column.

Id.

271 Id. at 1316-17. The second brochure read in part:

(1) “She has stated that ‘it is not yet a perfect world’ because ‘lesbian and gay couples in America cannot legally marry.’”
(2) “When the Supreme Court upheld a traditional moral standard, she said the result was ‘pathetic and disgraceful.’”
(3) “Justice Sears says she supports the death penalty but has called the electric chair ‘silly.’”

Id.

272 Id. at 1317. The television advertisement included the following:

(1) “The narrator states: ‘What does Justice Sears stand for? Same sex marriage.’ This statement is made while a graphic shows: ‘Same Sex Marriage.’
(2) The narrator states: ‘She’s questioned the constitutionality of law prohibiting sex with children under fourteen.’ This statement is made while a graphic shows: ‘Questioned Laws Protecting Our Children.’
(3) The narrator states: ‘And she called the electric chair silly.’ This statement is made while a graphic shows: ‘Called Electric Chair Silly.’”

Id.
Committee reviewed three complaints about the television advertisement, it determined that the television advertisement violated its previous cease and desist request regarding the first brochure.\(^{273}\) The Special Committee then issued a public statement to the media stating that Weaver had intentionally and blatantly violated the original cease and desist request and deliberately engaged in "unethical, unfair, false and intentionally deceptive" campaign practices.\(^{274}\) In the election held six days later, Weaver was defeated by Justice Sears.\(^{275}\) Subsequent to the election, the Commission forwarded its materials on Weaver to the State Bar of Georgia for possible disciplinary action.\(^{276}\)

One day after the Special Committee issued its public statement, Weaver and John Traylor, a Georgia voter, filed a lawsuit in the U.S. District Court alleging that "Canons 7(B)(1)(d) and 7(B)(2)\(^{277}\) and Rule 27 unconstitutionally interfere with free speech on their face and as applied to them by the Special Committee, and requested injunctive relief, damages, and a special election."\(^{278}\) In an order entered on August 25, 2000, ruling on the parties' cross-motions for summary judgment, the District Court "concluded that Canon 7(B)(1)(d) is facially unconstitutional because it 'chills' core political speech and violates the overbreadth doctrine by prohibiting false statements of fact made without knowledge or reckless disregard of falsity."\(^{279}\) The District Court, however, determined that Canon 7(B)(2) and Rule 27 did not violate the First Amendment because "both are narrowly tailored to serve the compelling interest of preserving the integrity and independence of Georgia's judiciary."\(^{280}\) Both sides appealed to the United States Court of Appeals for the Eleventh Circuit.\(^{281}\)

In a decision that is sure to be criticized for its broad application of White, the Eleventh Circuit affirmed the District Court's ruling that the restrictions on judicial candidates' campaign speech were not narrowly tailored to serve Georgia's compelling state interests;\(^{282}\) but reversed the District Court on the issues of the constitutionality of the provisions prohibiting a candidate from personally soliciting campaign contributions and publicly-stated support and the

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\(^{273}\) Id. at 1317.

\(^{274}\) Id.

\(^{275}\) Id.

\(^{276}\) Weaver, 309 F.3d at 1317.

\(^{277}\) Ga. Code of Judicial Conduct Canon 7(B)(2). This Canon provides that judicial candidates "shall not themselves solicit campaign funds, or solicit publicly stated support[,]" but that they may establish an election committee to solicit on their behalf. Id.

\(^{278}\) See Weaver, 309 F.3d at 1317. See also Weaver v. Bonner, 114 F. Supp. 2d 1337 (N.D. Ga. 2000) (providing the trial court opinion).

\(^{279}\) See Weaver, 309 F.3d at 1318 (referring to the trial court which held that the ruling's disposition of the "facial" challenge to Canon 7(B)(1)(d) rendered moot the "as applied" challenge).

\(^{280}\) Id.

\(^{281}\) Id.

\(^{282}\) Id. As the Court of Appeals points out, in Butler v. Alabama Judicial Inquiry Commission, 802 So. 2d 207 ( Ala. 2001) and in In Re Chmura, 608 N.W.2d 31 (Mich. 2000), those "respective states' supreme courts relied on the standard announced in Brown to strike down judicial canons that were similar to the one before us." Weaver, 309 F.3d at 1321. The Court of Appeals relied upon language in White that is supportive of this application of Brown. Id.
Commission's cease and desist procedures. The court held that Canons 7(B)(1)(d) and 7(B)(2) failed the strict-scrutiny test because neither was narrowly tailored to serve the compelling state interests of an impartial and independent judiciary; and that the issuance of a cease and desist request under Rule 27 constituted an impermissible prior restraint on protected expression.

The Court of Appeals reviewed significant cases in the area of free speech and election campaigns and cited White for its application of the strict-scrutiny test in determining the constitutionality of restrictions on core political speech. The court also relied heavily on Brown v. Hartlage, in support of its conclusion that Canon 7(B)(1)(d) was not narrowly tailored to serve Georgia's compelling state interests of an impartial and independent judiciary "because, by prohibiting false statements made and true statements that are misleading or deceptive," the canon "does not afford the requisite 'breathing space' to protected speech." The Court of Appeals quoted Brown for the axiom that "erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" The Court of Appeals then quoted Brown for the proposition that "[t]he chilling effect of . . . absolute accountability for factual misstatements in the course of political debate is incompatible with the atmosphere of free discussion contemplated by the First Amendment in the context of political campaigns.

The Court of Appeals held that the restrictions on the judicial candidates' campaign speech were not narrowly tailored because they were not "limited to false statements that are made with knowledge of falsity or with reckless disregard as to whether the statement is false—i.e., an actual malice standard." The Court of Appeals stated:

Canon 7(B)(1)(d) not only prohibits false statements knowingly or recklessly made, it also prohibits false statements negligently made and true statements that are misleading or deceptive or contain a material misrepresentation or omit a material fact or create an unjustified expectation about results. See Ga. Code of

283 Id. at 1325. Since Kentucky does not employ a similar cease and desist procedure, this issue will not be discussed in detail.
284 Id. at 1322.
285 See Weaver, 309 F.3d at 1318-19.
286 456 U.S. 45 (1982). Brown is of particular interest in Kentucky because a unanimous U.S. Supreme Court reversed the Kentucky Court of Appeals and struck down a Kentucky statute prohibiting candidates from offering benefits to voters in exchange for votes as violative of the First Amendment as applied to Carl Brown, a candidate for Jefferson County Commissioner in 1979. Id. Brown had publicly pledged during the campaign to work at a reduced salary even though the commissioner's salary was fixed by law. Id. Brown later retracted this statement after it was learned that his statement may have violated the Kentucky Corrupt Practices Act. Id.
287 See Weaver, 309 F.3d at 1319.
289 See Weaver, 309 F.3d at 1319.
290 Id. (quoting Brown, 456 U.S. at 61).
291 Id.
Judicial Conduct Canon 7(B)(1)(d). For fear of violating these broad prohibitions, candidates will too often remain silent even when they have a good faith belief that what they would otherwise say is truthful. This dramatic chilling effect cannot be justified by Georgia's interest in maintaining judicial impartiality and electoral integrity. Negligent misstatements must be protected in order to give protected speech the "breathing space" it requires. The ability of an opposing candidate to correct negligent misstatements with more speech more than offsets the danger of a misinformed electorate that might result from tolerating negligent misstatements.292

The Court of Appeals further stated that it was "not convinced that Georgia’s interest in judicial impartiality is substantially advanced by Canon 7(B)(1)(d) because the risks Georgia is concerned with are not limited to campaign practices by judicial candidates."293 The court declared that "[i]t is the general practice of electing judges, not the specific practice of judicial campaigning, that gives rise to impartiality concerns because the practice of electing judges creates motivations for sitting judges and prospective judges in election years and non-election years to say and do things that will enhance their chances of being elected."294 The court then rejected the appellee's argument that it "should adopt a lower standard for judicial elections than for other types of elections because speech by judicial candidates is entitled to less protection than speech by legislative and executive candidates."295 The court stated that it "believed that the Supreme Court’s decision in White suggests that the standard for judicial elections should be the same as the standard for legislative and executive elections."296 The court acknowledged that the Supreme Court in reaching its decision in White "was not required to decide whether ‘the First Amendment allows greater regulation of judicial election campaigns than legislative election campaigns’ because, even if this were true, the Minnesota law still failed strict scrutiny."297 The Court of Appeals then pointed out that the Supreme Court "did, however, rely on the standard announced in Brown in reaching its decision, and, in his Majority Opinion, Justice Scalia noted that the difference between judicial and legislative elections has 'greatly exaggerated.'"298 In adopting "the actual malice standard articulated in Brown for regulations of candidate speech during judicial campaigns[,]" the Court of Appeals stated its agreement with the Supreme Court "that the distinction between judicial elections and other types of elections has been greatly exaggerated," and that it did "not believe that the

292 Id. at 1320.
293 Id.
294 Id. at 1320 (citing Justice O'Connor's concurring opinion in White, 536 U.S. at 788).
295 See Weaver, 309 F.3d at 1320-21 (citing Buckley v. Ill. Judicial Inquiry Bd., 997 F.2d 224, 228 (7th Cir. 1993)).
296 Id. at 1321.
297 Id. at 1321. (citing White, 536 U.S. at 785-88).
298 Id. (citing White, 536 U.S. at 784).
distinction, if there truly is one, justifies greater restrictions on speech during judicial campaigns than during other types of campaigns. 299

The Court of Appeals also held that Canon 7(B)(2), which "prohibits judicial candidates from personally soliciting campaign contributions and from personally soliciting publicly stated support, but allows the candidate's election committee to engage in these activities" failed "strict scrutiny because it is not narrowly tailored to serve Georgia's compelling interest in judicial impartiality." 300 This ruling was as brief as it was broad. In only two paragraphs the Court of Appeals noted that "[i]n effect, candidates are completely chilled from speaking to potential contributors and endorsers about their potential contributions and endorsements." 301 The court then opined that "[t]he impartiality concerns, if any, are created by the State's decision to elect judges publicly [since] [c]ampaigning for elected office necessarily entails raising campaign funds and seeking endorsements from prominent figures and groups in the community." 302 The court further opined that "[t]he fact that judicial candidates require financial support and public endorsements to run successful campaigns does not suggest that they will be partial if they are elected." 303 The court also observed that "even if there is a risk that judges will be tempted to rule a particular way because of contributions or endorsements, the risk is not significantly reduced by allowing the candidate's agent to seek these contributions or endorsements on the candidate's behalf rather than the candidate seeking them himself." 304 The court concluded that "Canon 7(B)(2) thus fails strict scrutiny because it completely chills a candidate's speech on these topics while hardly advancing the state's interest in judicial impartiality at all." 305

On February 20, 2003, White was broadly applied once again when United States District Judge David N. Hurd ruled in Spargo v. New York Commission on Judicial Conduct, 306 that New York's version of Canon 1 and Canon 2A and parts of Canon 5 unconstitutionally violated Judge Thomas Spargo's First Amendment rights. 307 While this case is currently pending on appeal before the

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299 Id.
300 Id. at 1322.
301 Id.
302 See Weaver, 309 F.3d at 1322.
303 Id.
304 Id. at 1322-23.
305 Id. at 1323.
307 Id. at 92. The challenged provisions from the New York Rules of Court were as follows:

§100.1 A Judge Shall Uphold the Integrity and Independence of the Judiciary
An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Part 100 are to be construed and applied to further that objective.

§100.2 A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities
United States Court of Appeals for the Second Circuit and its ultimate outcome is uncertain, it nonetheless provides insight into the application of White.\textsuperscript{308} Judge Spargo,\textsuperscript{309} Jane McNally,\textsuperscript{310} and Peter Kermani\textsuperscript{311} filed a complaint pursuant to 42 U.S.C. § 1983 challenging the facial and as applied constitutionality of certain sections of the New York Code of Judicial Conduct and sought declaratory and injunctive relief.\textsuperscript{312} They alleged that certain sections

\begin{enumerate}
\item[(A)] A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary . . . .
\item[§ 100.5] A Judge or Candidate for Elective Judicial Office Shall Refrain From Inappropriate Political Activity
\item[(A)] Incumbent Judges and Others Running for Public Election to Judicial Office.
\item[(1)] Neither a sitting judge nor a candidate for public election to judicial office shall directly or indirectly engage in any political activity except (i) as otherwise authorized by this section or by law, (ii) to vote and to identify himself or herself as a member of a political party, and (iii) on behalf of measures to improve the law, the legal system or the administrative of justice. Prohibited political activity shall include:
\begin{enumerate}
\item[(c)] engaging in any partisan political activity, provided that nothing in this section shall prohibit a judge or candidate from participating in his or her own campaign for elective judicial office or shall restrict a non-judge holder of public office in the exercise of the functions of that office;
\item[(d)] participating in any political campaign for any office or permitting his or her name to be used in connection with any activity of a political organization;
\item[(e)] publicly endorsing or publicly opposing (other than by running against) another candidate for public office;
\item[(f)] making speeches on behalf of a political organization or another candidate;
\item[(g)] attending political gatherings;
\item[(4)] A judge or a non-judge who is a candidate for public election to judicial office:
\item[(a)] shall maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary, and shall encourage members of the candidate's family to adhere to the same standards of political conduct in support of the candidates as apply to the candidate[.]
\end{enumerate}
\end{enumerate}

\textit{Id.} at 81–82.
\textsuperscript{308} Appeal filed 5/13/03, No. 03-7250.
\textsuperscript{309} See Spargo, 244 F. Supp. 2d at 74. Judge Spargo, a Republican, was an attorney in private practice specializing in election law before he was elected to the position of Town Justice for the Town of Berne, in Albany County, New York and took office on January 1, 2000. In 2001 he ran for the office of Supreme Court Justice for the Third Judicial District of the State of New York and took office on January 1, 2002. \textit{Id.}
\textsuperscript{310} \textit{Id.} at 74. McNally, a life-long Democrat, worked with Judge Spargo on his Supreme Court Justice campaign. As a delegate to the Democratic Party nominating convention in 2001, she successfully nominated Judge Spargo for endorsement by the Democratic Party. \textit{Id.}
\textsuperscript{311} \textit{Id.} Kermani, the chairperson of the Albany County Republican Party, also supported Judge Spargo's candidacy for Supreme Court Justice. \textit{Id.} He indicated that he would have invited Judge Spargo or other judicial candidates or judges to speak to the local Republican Party but for the constraints placed on them. \textit{Id.}
\textsuperscript{312} \textit{Id.} at 75.
of the Code infringed upon their free speech, association and equal protection
rights as guaranteed under the First and Fourteenth Amendments to the United
States Constitution.\footnote{Id. The court rejected the equal protection argument and ruled that treating candidates for judicial office differently than candidates for other public offices is "constitutionally permissible" because "[j]udicial candidates and candidates for other public office are not similarly situated[;]" since "[u]nlike other public offices, the judiciary must independently, fairly, and competently interpret and apply the laws of the state." \textit{Id.} at 86.}

The New York State Commission on Judicial Conduct had brought five
charges against Judge Spargo pursuant to the New York Rules of Court.\footnote{Id. at 79. The U.S. District Court noted that whether Judge Spargo actually engaged in the alleged conduct and whether such conduct constituted a violation of the Canons was irrelevant for the purpose of its decision. \textit{Id.}} Charge 1 alleged violations of Sections 100.1, 100.2(A), and 100.5(A)(4)(a), which were summarized in the court's opinion as follows:

\[
\begin{align*}
\text{[Spargo] failed to observe high standards of conduct . . . ; failed to avoid impropriety and the appearance of impropriety, failed to respect and comply with the law and failed to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary . . . ; and, as a candidate for judicial office, failed to maintain the dignity appropriate to judicial office and to act in a manner consistent with the integrity and independence of the judiciary . . . .}
\end{align*}
\]

This charge was based on several events that occurred in 1999 while Judge Spargo was running for Justice to the Berne Town Court, including: (1) Judge Spargo offering items of value to induce votes on his behalf, which included on two occasions handing out coupons that could be redeemed for free donuts and coffee at a local convenience store, on one occasion distributing coupons redeemable for \$5.00 in gasoline to the first five motorists who drove up to a local convenience store, on four or five occasions introducing himself as a candidate for Town Justice and purchasing a round of drinks for everyone at the bar of a local restaurant, on several occasions introducing himself as a candidate for Town Justice and handing out 50 half-gallons of cider and donuts to town residents at the town dump, and on several occasions giving pizzas to teachers at a local school, town highway personnel, town barn personnel, school bus garage personnel, and patrons of a local store.\footnote{Id.} It was estimated that the total value of the items given away was \$2,000.00.\footnote{Id. at 80. Judge Spargo did not challenge the constitutionality of Sections 100.2(c), 100.3(E)(1), and 100.4(D)(1)(a)-(c). \textit{Id.} at 18 n.5.}

Charge 2 alleged violations of Sections 100.1, 100.2(A), 100.2(c), 100.3(E)(1), and 100.4(D)(1)(a)-(c),\footnote{Id. at 80. Judge Spargo did not challenge the constitutionality of Sections 100.2(c), 100.3(E)(1), and 100.4(D)(1)(a)-(c). \textit{Id.} at 18 n.5.} which were summarized in the court's opinion as follows:

\footnote{Id. at 79. The U.S. District Court noted that whether Judge Spargo actually engaged in the alleged conduct and whether such conduct constituted a violation of the Canons was irrelevant for the purpose of its decision. \textit{Id.}}
[Spargo] failed to observe high standards of conduct . . . ; failed to avoid impropriety and the appearance of impropriety, failed to respect and comply with the law and failed to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary . . . ; conveyed the impression that the District Attorney was in a special position to influence the judge . . . ; failed to disqualify himself in proceedings in which the judge’s impartiality might reasonably be questioned . . . ; and engaged in financial and business dealings that may reasonably be perceived to exploit the judge’s judicial position and involve the judge in a continuing business relationship with an attorney likely to come before the court. . . .

This charge was based upon Judge Spargo presiding as Town Justice over criminal cases that were prosecuted by the Albany County District Attorney’s Office without disclosing to the defense that he had represented the campaign of the District Attorney-elect and that the campaign owed him $10,000.00 for legal services rendered.

Charge 3 alleged violations of Sections 100.1, 100.2, and 100.5(A)(1)(c)(d) and (e), which were summarized in the court’s opinion as follows:

[Spargo] failed to observe high standards of conduct . . . ; failed to avoid impropriety and the appearance of impropriety and failed to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary . . . ; engaged in partisan political activity . . . ; participated in a campaign for political office other than his own . . . ; and publicly endorsed other candidates for political office. . . .

This charge was based upon allegations that Judge Spargo, while serving as Town Justice, attended governmental sessions for the recount of presidential votes in Florida as an observer for the Republican Party and the Bush presidential campaign of 2000, and allegedly “with the aim of disrupting the recount process, [ ] participated in a loud and obstructive demonstration against the recount process outside the offices of the Miami-Dade County Board of Elections.”

Charge 4 alleged violations of Sections 100.1, 100.2(A), and 100.5(A)(1)(c),(d),(f) and (g), which were summarized in the court’s opinion as follows:

[Spargo] failed to observe high standards of conduct . . . ; failed to avoid impropriety and the appearance of impropriety and

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319 Id.
320 Id.
321 Id.
322 Id.
failed to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary . . . ; engaged in partisan political activity . . . ; permitted his name to be used in connection with the activities of a political organization . . . ; made a speech on behalf of a political organization . . . ; and attended a political gathering. . . .

This charge was based upon Judge Spargo allegedly attending a fund-raising dinner for the Monroe County Conservative Party and serving as a keynote speaker at that event while he was a Town Justice and a candidate for Supreme Court Justice.324

Charge 5325 alleged violations of Sections 100.1, 100.2(A), and 100.5(A)(4)(a), which were summarized in the court’s opinion as follows:

[Spargo] failed to observe high standards of conduct . . . ; failed to avoid impropriety and the appearance of impropriety and failed to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary . . . ; as a candidate for judicial office, [Spargo] failed to maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary . . . ; and [Spargo] conveyed the appearance that he paid Ms. McNally and Mr. Connolly for their efforts to obtain his nomination for public office, in violation of Section 158(3) of the Election Law. . . .326

This charge was based upon Judge Spargo’s judicial campaign committee allegedly making payments to consultants involved in his campaign for Supreme Court Justice which specifically included a $5,000.00 payment to McNally, who nominated Judge Spargo as the Democratic Party’s candidate for Supreme Court Justice although she had volunteered her services and did not request payment, and a $5,000.00 payment to a consulting firm, the principal of which was chair of the Rensselaer County Independence Party and a delegate to that party’s nominating convention, even though there was no legal obligation to make the payment.327

The U.S. District Court framed the challenges to Sections 100.1 and 100.2(A), which it described as “affirmative directives to judges which are designed to preserve an honorable, independent, and impartial judiciary[,]” as “whether such general guides may form the basis for specific formal charges against a judge.”328 The court quoted Grayned v. City of Rockford,329 for the

323 Id.
324 Id. at 80-81.
325 Id. at 81 (Charge 5 is referred to in the court’s opinion as a Supplemental Charge).
326 Id.
327 Id.
328 Id. at 90.
basic due process principle that “an enactment is void for vagueness if its
prohibitions are not clearly defined.” The court noted that in 
*Grayned* the U.S. Supreme Court stated that (1) “a rule must ‘give the person of ordinary
intelligence a reasonable opportunity to know what is prohibited[,]’” (2) “a
rule must have specific standards so that those who enforce it cannot do so
arbitrarily and discriminatorily,” and (3) “a rule that impedes basic First
Amendment freedoms, if vague, leads those whose conduct is affected to more
severely limit their conduct in order to avoid a violation.”

The U.S. District Court then opined that the language in Section 100.1
requiring a judge to “uphold the integrity and independence of the judiciary” and
stating that a “judge should participate in establishing, maintaining and enforcing
high standards of conduct, and [ ] personally observe those standards so that the
integrity and independence of the judiciary will be preserved” was
unconstitutionally vague because it “provides no reasonable opportunity for a
person of any level of intelligence to know what conduct would be prohibited.”

The court then stated that Section 100.1 “completely lacks specificity” and that
“[t]here is no objective standard upon which to evaluate what conduct violates
the provision, or, for that matter, what conduct is sufficient to meet its directive
of upholding integrity and independence.” The court observed that while it
was easy to “identify conduct that would plainly denigrate the integrity and
independence of the judiciary, for example, murder and mayhem, or bribery…”
that “when faced with conduct short of the extreme, such as handing out donuts,
it is a purely subjective determination by the Commission.” The court then
noted that the Commission had “characterize[d] handing out donuts as ‘unseemly’” and “...different than serving coffee and cake at a reception where a
candidate is introduced.” The court then asked, “How would anyone know that
handing out donuts would constitute a failure to uphold the integrity and
independence of the judiciary while serving cake would not?”

The court concluded as to the third part of the vagueness test that “this broad
directive would tend to lead judges to severely restrict their conduct, lest they be
accused of failing to ‘uphold the integrity and independence of the judiciary.’”

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329 408 U.S. 104 (1972).
330 *Id.* at 108.
331 *Id.* at 105. *Grayned* involved the violation of an “antipicketing ordinance” for which the
violator was arrested, tried, convicted, and fined. *Id.* The U.S. Supreme Court referred to “an
enactment,” “laws” and “lawful and unlawful conduct.” *Id.* The U.S. District Court inserted “rule”
for “law.” *Id.* It is arguable that a Rule of Court such as a Canon of the Code of Judicial Conduct
is not subject to the same constitutional scrutiny as a penal law, but that discussion is beyond the
scope of this article.
332 *Spargo*, 244 F. Supp. 2d at 90 (quoting *Graynard*, 408 U.S. at 108).
333 *Id.*
334 *Id.*
335 *Id.*
336 *Id.*
337 *Spargo*, 244 F. Supp. 2d at 90-91.
338 *Id.*
339 *Id.*
340 *Id.*
Likewise, the court ruled that a person of ordinary intelligence could not know what conduct, short of the extreme, does or does not constitute acting "in a manner that promotes public confidence in the integrity and impartiality of the judiciary" as required by Section 100.2(A). 341

The court declared Sections 100.5(A)(1)(c)-(g) and 100.5(A)(4)(a) unconstitutional as constituting prior restraint on protected speech. 342 The court cited White 343 for the principle that the Commission bears the burden of demonstrating that the prior restraint on protected speech is constitutionally permissible because it is sufficiently narrowly tailored to serve a compelling state interest to the extent that it does not unnecessarily circumscribe protected expression. 344 Unlike White, which recognized the compelling state interest of an impartial judiciary, in Spargo the New York Commission claimed a compelling state interest of an independent judiciary. 345 The U.S. District Court observed that since the "[p]laintiffs seem to consider the articulated purpose of judicial independence as a compelling state interest" that "it will be accepted as such." 346

The court then addressed the questions of "exactly what is meant by judicial independence, and if the challenged sections of the Rules are narrowly tailored to achieve it." 347 The court concluded that "the compelling state interest purportedly served by the Rules is to preserve judicial independence, that is, the ability of judges to make their decisions free of the control or influence of other persons or entities." 348 The court then noted that Section 100.5(A) generally prohibits inappropriate political activity and that "[t]he challenged subdivisions more specifically prohibit engaging in partisan political activity except with regard to the candidate's own campaign, participating in a political campaign or using the judge's name in a campaign, endorsing or opposing any candidate, giving speeches on behalf of political organizations or candidates, and attending political gatherings." 349 The court further noted that Section 100.5(A)(4)(a) provides that a candidate shall "maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary, and encourage members of the candidate's family to adhere to the same standards of political conduct in support of the candidate as apply to the candidate." 350

The court opined that the "only conceivable connection" between "avoiding the delineated 'inappropriate' conduct" and "further[ing] the goal of maintaining the independence of the judiciary" "would be that engaging in political activity, whether partisan or nonpartisan, would influence a judge's decision toward or

341 id.
342 id. at 92. The court stated that it was unnecessary to address the void for vagueness challenge.
343 id. at 91 n.17.
345 Spargo, 244 F. Supp. 2d at 86-87.
346 id. at 88.
347 id. at 87.
348 id. (citing White, 536 U.S. at 765).
349 id. at 88.
350 id.
against the view espoused, whether it be on an issue of law or as to a party to a proceeding." \textsuperscript{351} The court concluded that "[e]ven if this attenuated connection was valid, it does not save the Rules." \textsuperscript{352}

The U.S. District Court then cited the U.S. Supreme Court's holding in White "that a rule prohibiting announcing views on disputed legal or political issues is not narrowly tailored to serve the compelling interest of a judiciary free from bias." \textsuperscript{353} The court next concluded that "[h]ere the prohibitions are even broader than prohibiting specific speech, such as views on legal or political issues as in White." \textsuperscript{354} The court stated that "a wholesale prohibition on participating in political activity for fear of influencing a judge ignores the fact that a judicial candidate must have at one time participated in politics" or he or she would not now be "in the position of a candidate." \textsuperscript{355} The court stated that "[t]here is no support for the proposition that one-time participation in political activity impedes the making of independent judgments any less than current participation in some political activity might." \textsuperscript{356} The court observed that "if a judge were influenced, or biased, against or for a party to a proceeding, for political reasons or otherwise, the proper consequence would be recusal." \textsuperscript{357}

VIII. COMMENTARY ON JUDICIAL CAMPAIGN SPEECH AND THE IMPACT OF WHITE

Even before the Supreme Court's landmark decision in White, Professor Steven Lubet had observed that in recent litigation concerning the scope of judicial campaign speech, the balance had tipped "in favor of speech, although it is possible that a series of excesses might swing the pendulum back toward constraint." \textsuperscript{358} The commentary concerning the Supreme Court's decision in White has ranged from strong support, to sharp criticism, to puzzlement. In describing his legal victory, Gregory Wersal, the lead plaintiff in White, said, "A small group of elite people who wear black robes write these codes. And since they're incumbents, they are happy to shut down the election process. This is a big deal. We have radically changed judicial elections throughout the United States." \textsuperscript{359} Political commentator Larry Eichel wrote:

The high court has done something quite useful with this decision. It's told states that if they want to elect judges, the election has to be a full-fledged affair, in which candidates are

\textsuperscript{351} Id.
\textsuperscript{352} Id.
\textsuperscript{353} Id. (citing White, 536 U.S. 765).
\textsuperscript{354} Id.
\textsuperscript{355} Id. (citing White, 536 U.S. 765).
\textsuperscript{356} Id.
\textsuperscript{357} Id.
\textsuperscript{359} Savage, \textit{supra} note 2, at 32.
free to behave like candidates. And if states don’t like that, if they think it unseemly, they can always scrap the electoral process all together.\textsuperscript{360}

On the other side of the debate, Robert E. Hirshon, who was president of the ABA when \textit{White} was rendered, said, “This is a bad decision. It will open a Pandora’s Box. We are now going to have judicial candidates running for office by announcing their positions on particular issues. That is not impartial justice.”\textsuperscript{361} Current ABA president Alfred P. Carlton Jr. announced at the ABA Annual Meeting in August 2002 the creation of the Commission on the 21st Century Judiciary to find “new and better ways” to elect judges. He said that the problem with judicial elections is that they have become way too costly and partisan. Carlton said that the decision in \textit{White} “raises the ante for judicial candidates who are now forced to become partisan politicians.” He said, “The challenge is to find a way for states that want to continue to elect judges to allow judicial candidates to freely express themselves on political issues in a way that does not compromise their impartiality once they are on the bench.”\textsuperscript{362} Debra Goldberg of the Brennan Center for Justice said, “We will see increasing cost and decreasing civility.”\textsuperscript{363}

Chief Justice Tom Phillips of the Texas Supreme Court stated:

As with many court rulings, it is not absolutely clear how far the ruling goes . . . we’re not clear if it affects the pledges or promises clause which covers at least the more egregious problems of a candidate promising to rule a certain way before considering the facts and the law.\textsuperscript{364}

Chief Justice Margaret H. Marshall of the Massachusetts Supreme Judicial Court stated, “[\textit{White}] raises the issue of judicial campaign speech with urgency and in my judgment has the most serious implications for the principles of judicial independence in the United States.”\textsuperscript{365} The Chief Justice further stated:

No one can predict the \textit{White} decision’s ultimate effect on American judicial elections, but I have no doubt that \textit{White} makes regulation of judicial campaign speech much more difficult, if not, as some already have argued, impossible. Judges will have a much harder time evading the demands of their

\textsuperscript{360} Crompton, \textit{supra} note 244 (citing Eichel, \textit{supra} note 4).
\textsuperscript{361} See Savage, \textit{supra} note 2, at 32; Schotland, \textit{supra} note 2, at 8.
\textsuperscript{363} Crompton, \textit{supra} note 244, at 762.
interest-group funders to take sides on hot-button legal issues. And if attack-dog politics consolidates its sway over judicial elections, if campaign finance needs continue to drive judicial candidates into the arms of targeted interest groups, then due process of law and the American public’s faith in our judiciary—both elected and appointed—are likely to be the decision’s most serious, if unintended, victims.

The danger is real. Scorched-earth judicial electioneering has already begun to erode the American public’s confidence in the judiciary. While most Americans express positive views about the judiciary as the whole, they are increasingly worried that justice is for sale in some states. Judges are equally concerned. In California, where judges are elected, former Supreme Court Justice Otto Kaus famously noted that for an elected judge to ignore the political ramifications of a decision near election time would be “like ignoring a crocodile in your bathtub.” The *White* decision sharpens the crocodile’s teeth. And that is because, in my view, the logic of *White* is insupportable. The difficulty with the opinion is not that it equates judicial elections with elections for popular representatives. Rather, it confuses judicial accountability with a politician’s accountability. We expect, we rely on, our elected representatives to promise specific action to accomplish specific results. Governors, senators, and representatives are partisans; that is why we vote for them. If they renege on their promises, woe be to them at the next election! But judges we expect to adjudicate, not to advocate. Implicit in our constitutional compact is the guarantee that judges will give us a fair hearing, that they will treat each litigant non-preferentially, that they will weigh all the evidence presented in court, and only the evidence presented in court, as if no other universe of facts existed or mattered. The *White* decision ignores an important distinction: Politicians break faith with the people when they abandon their advocacy. Judges break faith with the people with they abandon their neutrality.366

Attorney Jan Witold Baran, who authored an amicus brief filed with the Supreme Court in *White*,367 observed in an article that while *White* brought the dilemmas associated with the popular election of judges into focus, it was not in the best of circumstances.368 Baran pointed out that “the version of Canon 5 used by the Minnesota courts was the broadest and most unreasonable[;]” and the 1972 version of the Model Code used by Minnesota had “long been abandoned

366 Id. at 466-68 (footnotes omitted).
367 The brief was filed on behalf of the Chamber of Commerce of the United States.
368 Baran, supra note 3, at 12.
by the ABA." Baran also opined that "the practice of Minnesota to speak out of both sides of its mouth," caused the announce clause to have a very broad effect. He claimed that "the reason why there are so few enforcement cases under the announce clause is the in terrorem effect of broad or ambiguous interpretations[,] [where] [c]andidates, including Wersal, succumb to the 'rule of silence' rather than risk complaints and the resulting damage to their careers." Baran warned that "it is precisely this Dickensian type of gamesmanship by disciplinary committees that may result in additional First Amendment court decisions striking down 'pledges and promises' provisions."

Baran surmised that perhaps the reason the Supreme Court took the White case "is that judicial elections have become more like all other elections." This observation recognized that "in more and more states, the courts (especially supreme courts) have become lightening rods for dissatisfied constituencies[;]" since the courts "are making big policy decisions that are creating large numbers of dissatisfied citizens who are responding by mobilizing in the elections." As a consequence, "independent interest groups have waded into the breach[;]" judicial candidates "must raise more and more money[;]" and "in those states with partisan elections, the political parties see judicial elections as part of an overall political agenda."

Professor Roy A. Schotland, who coauthored an amicus brief filed with the Supreme Court in White, stated in an article that "the Supreme Court's decision about judicial elections shows how unrealistic five justices can be about what happens in election campaigns[.]") Professor Schotland ominously predicts "the decision will make a change in judicial election campaigns that will downgrade the pool of candidates for the bench, reduce the willingness of good judges to seek reelection, add to the cynical view that judges are merely 'another group of politicians,' and thus directly hurt state courts and indirectly hurt all our courts."

Professor Schotland believes that White will produce more litigation challenges to (1) the facial constitutionality of the "commit clause" and the "pledge or promise clause," and to each clause as it is applied to a particular statement, (2) nonpartisan judicial elections held in states, including

\[^{369}\text{Id.}\]
\[^{370}\text{Id.}\]
\[^{371}\text{Id.}\]
\[^{372}\text{Id. at 13.}\]
\[^{373}\text{Id.}\]
\[^{374}\text{Id.}\]
\[^{375}\text{Baran notes that the ABA is encouraging the creation of civic groups to respond to attacks by third-party organizations. Id. at 14. See e.g., www.abanet.org/leadership/recommendations 02/113.pdf (Aug. 15, 2002). See also Anthony Champagne, Interest Groups and Judicial Elections, 34 Loy. L.A. L. Rev. 1391 (2001).}\]
\[^{376}\text{Baran, supra note 3, at 13. See also Anthony Champagne, Television Ads in Judicial Campaigns, 35 Ind. L. Rev. 669 (2002).}\]
\[^{377}\text{Id. at 13.}\]
\[^{378}\text{The brief was filed on behalf of the Conference of Chief Justices.}\]
\[^{379}\text{Schotland, supra note 2, at 8.}\]
\[^{380}\text{Id. at 9.}\]
Kentucky, which ban party endorsements and candidate-initiated disclosure of party membership, and (3) the limitations barring judicial candidates from personally soliciting campaign funds and limiting the time period for fundraising. Professor Schotland noted that all 50 states have adopted the “pledges or promises” clause; and he complained that “the Court’s treatment of the ['commit clause'] precluding a candidate from making 'statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court' was, unfortunately, not a model of clarity."

Professor Schotland also sees other ramifications from White, such as his prediction that “White will figure, perhaps substantially, in the next U.S. Senate confirmation hearing of any nominee for a federal judgeship who holds back in answering senators’ questions.” He also opined that Justice O’Connor’s call,

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381 Id. at 10, note 22.
382 The attack on the limitations placed on a judicial candidate regarding partisan political parties was rejected by the lower courts in White and excluded by the Supreme Court’s grant of certiorari. Republican Party v. Kelly, 63 F. Supp. 2d 967, 974-83 (D. Minn. 1999); Republican Party v. Kelly, 247 F.3d 854, 867-77 (8th Cir. 2001).
383 KY. SUP. CT. R. 4.300. This Rule provides:

CANON 5: A JUDGE OR JUDICIAL CANDIDATE SHALL REFRAIN FROM INAPPROPRIATE POLITICAL ACTIVITY

A. Political Conduct in General.
   (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;
      (b) make speeches for or against a political organization or candidate or publicly endorse or oppose a candidate for public office;
      (c) solicit funds for or pay an assessment or make a contribution to a political organization or candidate, except as authorized in subsection A(2);
   (2) A judge or a candidate for election to judicial office may purchase tickets to political gatherings for the judge or candidate and one guest, may attend political gatherings and may speak to such gatherings on the judge's or candidate's own behalf. A judge or candidate shall not identify himself or herself as a member of a political party in any form of advertising, or when speaking to a gathering. If not initiated by the judge or candidate for such office, and only in answer to a direct question, the judge or candidate may identify himself or herself as a member of a particular political party.
   (3) A judge shall resign office when the judge becomes a candidate either in a party primary or in a general election for a non-judicial office, except that the judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention, if otherwise permitted by law.
   (4) A judge shall not engage in any other political activity except on behalf of measures to improve the law, the legal system, or the administration of justice, as provided in Canon 2B and C.

Id.
384 Schotland, supra note 2, at 9-10.
385 Id. at 8 (quoting Memorandum from the National Center for State Courts Ad Hoc Committee on Judicial Election Law (July 12, 2002) (on file with Schotland)).
386 Id. at 10. In White, Justice Ginsburg’s dissent noted that “in accord with a longstanding norm, every Member of this Court declined to furnish such information to the Senate, and presumably to
in her separate concurring opinion in *White*, for doing away with judicial elections ignores the reality of the difficulty of ending judicial elections as recently evidenced by votes in Florida and Ohio.\(^{387}\)

In discussing the impact of *White* on Ohio's Canon 7(B)(2)(d), Professor Jonathan L. Entin observed that "Ohio's new Canon 7(B) explicitly limits its prohibition to comments on issues that are likely to come before the court."\(^{388}\) He noted that the Supreme Court of Kentucky in *Deters* had upheld an identical provision against a First Amendment challenge. However, he also noted that Justice Wintersheimer, with a concurrence from now Chief Justice Lambert, had written "a strong dissenting opinion arguing that even this narrower restriction violated the First Amendment."\(^{389}\) Professor Entin then stated that "[t]he problem with limiting the prohibition to statements about matters 'that are likely to come before the court,' as Judge Posner explained in *Buckley*, is that almost any controversial matter could come before a court, so that limitation might not meaningfully confine the scope of the restriction."\(^{390}\) He concluded by stating that "although some language in the majority opinion in *White* suggests that the Supreme Court might reject even the new Canon 7(B)'s narrow limitation on judicial speech; [that] [f]or now, it suffices to say that the constitutionality of the new Canon 7(B) remains unsettled."\(^{391}\)

**IX. PROPOSED CHANGES TO THE CODE OF JUDICIAL CONDUCT**

In an article reviewing the ethics rules and the case law and advisory opinions interpreting them, James J. Alfini and Terrence J. Brooks were of the opinion some 14 years ago that there were "serious questions about the efficacy of Canon 7 [now 5] of the ABA's Model Code of Judicial Conduct."\(^{392}\) The authors concluded "that the Code falls short of achieving the goals of faithfulness to the electoral process and maintenance of the appearance of judicial impartiality[,] [since] Code restrictions on campaign appearances and advocacy have tended to be interpreted in a manner that precludes presentation of

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\(^{389}\) *Id.* at 550 (citing *Deters*, 873 S.W.2d at 205-07). Professor Entin also noted that Justice Graves, who now represents the First Supreme Court District, which was previously represented by Justice Spain, the author of *Deters*, wrote a dissenting opinion in *Summe*, that was joined by Justice Wintersheimer.

\(^{390}\) *Id.* (citing *Buckley*, 997 F.2d at 229).

\(^{391}\) *Id.* (citing *White*, 536 U.S. 765) (expressing skepticism that judges will feel compelled to rule consistently with campaign statements that do not entail promises to vote in a particular way on a particular issue).

meaningful information on judicial candidates to the electorate; and, Code restrictions on campaign financing tend to raise more questions about judicial impartiality and the appearance of impartiality than they answer. The authors suggested that the "[d]rafters of judicial ethics codes and others concerned about the problem of judicial elections might first take note of its polycentric character." The authors observed that "efforts to correct one aspect of the problem are likely to have an adverse effect on others[;]" and they recommended the following:

Because the problem of judicial elections is polycentric, it is more appropriate to deal with it through local direction and control than through the application of state-wide ethics rules. A local program aimed at controlling campaign abuses by establishing local ground rules for individual campaigns and then monitoring these campaigns would appear to be in a much better position to fashion appropriate responses to questions concerning campaign conduct and financing than a state-wide body applying state-wide rules in piecemeal fashion. As we have seen, the latter approach - necessitated by the current wording of Canon 7 [now 5] - has proven woefully inadequate.

Although local programs to control campaign abuses have been established, the experiences of these programs have not been systematically evaluated. Assessments of the experiences of

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393 Id.
394 Id. at 720.
395 Id. at 720-21. In arguing that adjudication is ill-suited for dealing with polycentric problems, Lon Fuller argues that the only adequate methods for handling polycentric problems are managerial direction and contract. See also Lon L. Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353, 398 (1978).
396 Alfini and Brooks, supra note 392, at 721. One example of such a program is the "Fair Election Practices Committee for Judicial Campaigns" of the San Mateo County (California) Bar Association:

The Fair Election Practices Committee for Judicial Campaigns provides a resource and a hearing forum for a candidate who might be the victim of an opponent's false or misleading statements. It also provides a forum for the truthfulness of a candidate's allegations. It is the obligation of the Committee to assist candidates in an advisory capacity. The Committee is constituted in such a fashion that it can act swiftly in the event of untruthful or misleading statements by a candidate as to his qualifications or as to the qualifications of his opponent. The Committee recognizes that a contested election for judicial office is still a political contest and fully embraces the concepts of free speech and fair comment. The Committee also realizes that during the heat of a campaign candidates may be the subject of vicious, untruthful and libelous statements against which they have no adequate remedy except by an immediate reference of a neutral committee, which is then empowered to provide a prompt public response.

SAN MATEO COUNTY (CALIF.) BAR ASSOCIATION, PLAN FOR JUDICIAL CAMPAIGNS (1985).
these programs would be of great assistance to those seeking guidance in dealing with this problem. If these local programs are found to have achieved a measure of success, Canon 7 [now 5] should be revised. The wording of Canon 7 [now 5] might then be limited to (1) offer general guidance to the judge (e.g., a judge should avoid political activity that may give rise to an appearance of bias) and (2) account for, or encourage the establishment of, local plans to monitor and control specific campaign conduct. Localizing Canon 7 [now 5] in this way would increase the likelihood of accomplishing the goals of an impartial judiciary and faithfulness to the electoral process. 397

Prior to the Supreme Court's decision in White, Professor Leslie W. Abramson had called on the ABA and the states to review their Codes of Judicial Conduct in order to: "(1) add ethical duties not currently addressed, such as a black-letter judicial duty to disclose any known disqualifying circumstances to counsel and parties; (2) broaden existing duties like the judge's duty to inform himself or herself about personal and family financial holdings; and (3) consider new disqualifying conditions to reclassify general appearance of partiality situations as specific per se grounds for recusal." 398 He observed that "[t]he ABA and the states are capable of providing additional guidance, whether in the form of new black-letter standards or as added commentary language offered as a relevant analytical tool." 399

The ABA is currently in the process of recommending significant amendments to the Model Code of Judicial Conduct for adoption to the ABA House of Delegates at the Annual Meeting in August 2003. In drafting the suggested changes to the restrictions on judicial speech in the 1990 Code, it was noted that the restrictions should be:

1. supported by a definition of "impartiality," to be added to the terminology section of the Code of Judicial Conduct, that comports with the discussion of impartiality in the majority opinion in White, 400
2. narrowly crafted to further the compelling state interest in judicial impartiality; and
3. imposed on judges in connection with all their judicial duties, in response to the majority's

397 Id. at 721-22.
399 Id.
400 The definition is couched in terms of an absence of bias or prejudice towards individuals and maintaining an open mind on issues. Gallagher, supra note 238, at 28.
criticism that the announce clause restriction was underinclusive.\footnote{Id.}

The proposed amendments have been summarized as follows:

The suggested Canon 5A(3)(d)(i) restriction on judicial campaign speech combines elements of the current pledges or promises and commit clauses and ties them to the compelling state interest in performing the duties of the judicial office impartially. In addition to the inclusion of a definition of impartiality and a more tightly crafted Canon 5 provision on campaign speech, a new Canon 3B(10) has been included to extend these speech restrictions to all of a judge's duties in response to the majority's concern about underinclusiveness. A Canon 3E(1)(f) provision has also been added to make the disqualification ramifications of prohibited speech violations explicit.\footnote{Id.}

An alternative version of the "promises clause" which has been enacted in Wisconsin excludes "issues" from the "commit clause." Wisconsin SCR 60.06(3) provides:

\begin{quote}
(3) Promises. A judge who is a candidate for judicial office shall not make or permit others to make in his or her behalf promises or suggestions of conduct in office which appeal to the cupidity or partisanship of the electing or appointing power.

A judge shall not do or permit others to do in his or her behalf anything which would commit the judge or appear to commit the judge in advance with respect to any particular case or controversy or which suggests that, if elected or chosen, the judge would administer his or her office with partiality, bias or favor.\footnote{Id.}
\end{quote}

It has been argued that by omitting the term "issues" from the "commit clause" that judicial candidates could then be allowed to discuss issues likely to come before the court but not specific "cases or controversies."\footnote{Id.}

Professor Stephen Gillers has described the popular election of judges as an "on the one hand, on the other hand" dilemma:\footnote{Id.}

\begin{quote}
401 Id.
402 Id.
403 Id.
We have here an “on the one hand, on the other hand” dilemma. On the one hand, a popular election means that voters will pick judges. In making those choices, they need information. Traditional resume facts—education and work experience—may be helpful, but only modestly. The same is true for party affiliations. Rational choice requires more. Voters will want to know something about the candidates’ approach to law and their positions on legal issues of concern to the voter. We cannot give voters the job of picking judges and then deny them the kind of detail that a responsible person would want to have to fulfill the assignment conscientiously. It is no answer to say we never desired to give them this job in the first place. We have assumed the popular election of judges and we must now find the right balance between voter information and the values of the judicial process and therefore due process.

But what more information can we give? Or to put it another way, what more should we allow the candidates to tell? This is “the other hand.” Certainly, the candidate cannot say how he or she would vote on a particular case, either a hypothetical case or one that may be headed toward the court for which he or she is a candidate, or any other court for that matter. Professor O’Neil’s due process concern is the strong policy interest, and therefore the constitutionally appropriate state interest, for forbidding such pledges. In his article, Professor Gillers presented an interesting examination of the dilemma by providing realistic hypothetical examples. He considered various suggested rules that would permit less judicial speech and then rejected them in favor of a more permissive rule. Professor Gillers summarized his position by providing four arguments in favor of allowing judicial candidates for popular election to state their likely positions on legal rules:

• One or more candidates may already have staked out positions on those rules in judicial decisions or other written or oral statements and they should be accorded the opportunity to

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explain their position if the issue arises. At the same time, the opponent should be able to give her position on the same rules.

- An opponent can exploit a rule of silence by generally characterizing the decisions of a sitting judge or by pointing out the effects of an unpopular decision without regard to its precedential necessity. A prospective candidate can also circumvent a rule of silence in anticipation of a contest and before the rule can legally be imposed. A sitting judge can do this in opinions, anticipating a later campaign. Dramatic advertisements using symbols but ideas offer a third way to imply a message while saying nothing substantive.

- Third parties, including the press and interest groups, cannot be silenced and will be free to endorse or oppose candidates and characterize a candidate's positions.

- The electorate has a legitimate interest in information that will allow it to cast intelligent votes. Limiting this information to resume facts and general promises ("I will vigorously enforce the law to protect the citizens of this state from vicious criminals") does not invite intelligent choice.

He explained that "the first three arguments say, in effect, that the conversation will go on anyway, accurately or not, so there is little to be gained from denying candidates the ability to join it." The fourth argument states that "the voters’ desire for information" requires that they "be allowed to hear about the candidates’ substantive positions from the candidates themselves[,]" since the existence of "third party dissemination of information about the candidates . . . creates the danger of confusion or misinformation that the candidates are best able to clarify or dispel, directly or through surrogates . . . [and] the voters [have a] need to make an informed choice." 

Professor Gillers expressed his "hope that in the end the First Amendment’s application to campaign speech will be construed to reflect sensible policy." He proposed the following rule to replace the "commit clause":

A candidate for judicial office may state his or her general views on legal issues, but must make it clear that these views are tentative and subject to arguments of counsel and deliberation.
Professor Gillers argued that “[o]ne advantage of this rule is that it permits speech to a point, but requires a disclaimer, which the First Amendment may tolerate more readily than a broader restriction on speech.”414 He explained that he had “tried to state a rule that will honor the values of the judicial system (including due process rights of future litigants) while respecting the voters’ need for information that will permit responsible election choices[,]” which he believes the “commit clause” impedes.415 He suggested that at the least “[d]eleting the reference to ‘issues’” from the commit clause “will go some way toward ameliorating the balance.”416

Baran stated in his article that “due process concerns would not justify restrictions on what third parties might say[;]” and that “[i]n this escalating environment, the question is, what can the candidates themselves say about their own campaigns when more and more other voices are commenting on the race?”417 Since White had struck down Minnesota’s “rule of silence”, Baran queried:

- Where can a line be drawn?
- What are the implications for restricting candidate statements?
- What is the future of judicial campaigns?418

Baran suggested Professor Gillers’s proposed revision to the “commit clause” in Canon 5 as perhaps one answer:

The proposed Gillers rule has the advantage of permitting candidates to speak, but also reinforces to the voters the fact that judges must judge. They cannot prejudge. At the same time the proposed revised rule does not silence candidates. It allows candidates to exercise their prerogative to state their views about legal issues, but requires them to express a commonsense caveat. A rule that requires a candidate to say something, of course, may have its own First Amendment deficiencies.419

In Professor Schotland’s article, he referred to the order entered by the Supreme Court of Missouri following White and suggested that judicial candidates, “who want to campaign judiciously,” should use the recusal provision to their benefit. A candidate could say, “I know what you’d like me to say, but if

414 Id. at 733 (citing Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985)).
415 Id. at 734.
416 Id.
418 Id. at 13.
419 Id.
I go into that then I’ll be unable to sit in just the cases you care about most”; and a candidate could say about his opponent, “My opponent has told you what he thinks you want, but hasn’t told you that he won’t be able to deliver, because he’ll be disqualified from the cases you care about.”

Professor Schotland concluded that “[t]he most important single step to meet the challenges inherent in judicial elections was urged [ ] by Ohio Chief Justice Thomas J. Moyer—lengthen judicial terms to eight or 10 years.” Professor Schotland stated that this “simple step will not only reduce the problems inherent in judicial elections but also go far to enlarge and enrich the pool of people willing to seek to serve as judges, and to induce good judges to continue serving.”

According to the Justice at Stake Campaign web site, there are no less than 38 organizations that have joined forces to participate in “a nonpartisan national campaign working to keep our courts fair and impartial.” The Justice at Stake Campaign states that the “partners and allies have come together to help Americans keep special interests and politics out of the courtroom[;]” and it declares that “[i]t’s time to stand up and:

- Reduce the power of money and special interests in choosing our judges.
- Shield our courts and judges from excessive partisan pressure.
- Give Americans more information so we can work together to safeguard fair, impartial and independent courts.

The Justice at Stake Campaign provides examples of its efforts, which include informing citizens about their courts and judges through public education, voter guides, and judicial evaluation commissions; supporting laws related to campaign contribution disclosure, campaign contribution limits, judicial recusal from contributors’ cases, appointment of judges, and public financing of judicial elections; establishing higher standards for judicial campaign conduct, citizen

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420 Schotland, supra note 2, at 11.
421 Id. See also Solimine, supra note 20, at 579.
422 Id.
423 See www.justiceatstake.org/content (last visited April 15, 2003).
424 Those partner organizations include the ABA, the American Judicature Society, the Association of Trial Lawyers of America, Common Cause, the League of Women Voters, and the National Center for State Courts.
425 See www.justiceatstake.org/content (last visited April 15, 2003).
426 Among the myriad of issues that may arise concerning judicial campaigns is “the extent to which states may compel reporting of information from groups that independently undertake political activities designed to influence judicial elections.” Goldberg & Kozlowski, supra note 17.
427 See North Carolina Adopts Public Financing for Supreme Court and Appellate Judicial Campaigns, at www.justiceatstake.org (last visited April 15, 2003). Among the approaches to address concerns related to the popular election of judges is North Carolina’s recent adoption of public financing for judicial election campaigns. Id. To qualify for funding “[c]andidates for the state’s appellate and Supreme courts must abide by strict spending and fund-raising limits during
monitoring of judicial campaigns, and judicial campaign oversight committees; and addressing concerns related to partisan politics by educating political leaders on the unique role of courts, reaching out to the public and the media, and responding to unfair attacks on courts and judges.428

Some commentators have suggested that judges and litigants should look more often to the canons of judicial conduct which provide for the disqualification of the judge as a means to address the inherent conflicts that will develop from political activity. Canon 3 generally provides that “[a] judge shall perform the duties of judicial office impartially and diligently.” More specifically, Canon 3B(2) provides in part that “[a] judge shall not be swayed by partisan interests . . .”; and Canon 3B(5) provides in part that “[a] judge shall perform judicial duties without bias or prejudice.” A full discussion of the disqualification of a judge due to political conduct is beyond the scope of this article, but suffice it to say that it presents a means to balance the constitutional interests between judicial campaign speech and a party’s right to an impartial judge.429

Baran also noted in his article that regardless of whether a revised announce clause430 is adopted, Canon 5 still contains “the provision that prohibits candidates from making ‘pledges or promises,’ [which] presents problems of its own.”431 Baran stated that the problems arising from the vagueness of the clause “could be compounded by uneven or sweeping enforcement.” He opined that “[i]f judicial commissions apply the pledges and promises clause as broadly as the Minnesota commission interpreted its announce clause, it will suffer a similar constitutional fate.”432 Baran observed that “the state supreme courts will have to grapple with defining the remainder of Canon 5 to give candidates sufficient clarity while acknowledging that candidates have a constitutional right to discuss political and legal issues.” He predicted that this “will be a daunting task.”433

428 See www.justiceatstake.org/content (last visited April 15, 2003).
430 Of course, Professor Gillers was actually proposing a change to the “commit clause” which the ABA, and Kentucky, had already adopted to replace the “announce clause,” but Baran was focusing on the “announce clause” which White struck down.
431 Baran, supra note 3, at 13.
432 Id.
433 Id. at 13-14.
Baran also wrote that "[a]t the same time, candidates must grapple with their new ‘freedom.’" He argued that while candidates "no longer can point to Canon 5 for justification, . . . [j]udicial candidates can adopt the time-honored practice of other politicians by evading direct answers[,] [and that] [u]nlke most politicians, judicial candidates will have a good political reason to evade answers[,] [since] [t]he public has different expectations of judicial candidates[;] They want their judges to be fair, even-handed, and unprejudiced." He observed that "free speech is not compulsory speech and voters expect something from a judge that is not expected of a governor or congressman—fewer press releases and more decorum." Baran also noted Justice O'Connor's implicit call in her separate concurring opinion in White to replace popular elections with judicial selections. Baran called judicial selection "a difficult proposition, but not one to abandon." In summary, Baran observed that while White "creates the opportunity for more debate[,] [t]he quantity of additional debate will increasingly depend on the candidates[,] [and that while] [t]he ‘rule of silence’ has been struck down, [ ] there still may be occasions where silence will be golden—and prudent politics.

X. Conclusion

White is of particular significance not only because it was the Supreme Court’s first decision concerning judicial elections, but because it came, perhaps intentionally, at a time when there was increasing interest in judicial selection issues. The Supreme Court’s close decision in White embodies the polarization that often results in debate involving the issues of free speech and the popular election of judges. Even though the popular election of judges does not have a long history, it has been embraced by about 80 percent of the states and many previous attempts to disenfranchise the voters have been rejected.

434 Id. at 14.
435 Id.
436 See www.supremecourthistory.org/justice/o’connor (last visited April 15, 2003). Justice O’Connor is the only current member of the Supreme Court to have held elective office. Id. After being appointed to the Arizona Senate to fill a vacancy, she was elected to two successive terms. Id. In 1972 she was elected majority leader by her Republican colleagues, becoming the first woman to hold such office in the United States. Id. In 1974 she won a hard-fought election to a state judgeship on the superior court, where she served for five years until the Democratic governor selected her as his first appointee to the Arizona Court of Appeals. Id.
437 Baran, supra note 3, at 14.
438 Id.
440 Chief Justice Marshall said: "The practice of electing state judges is firmly entrenched in the United States . . . and there is little evidence of any public sentiment to do away with it[,] . . . so the solution Justice O’Connor proposes for the judicial campaign excesses she deplores—returning to the appointive system—is no solution at all." In Kentucky the late Chief Justice Robert F. Stephens championed an appointive/retenion judicial selection method in 1990; in 1997 the Governor’s Criminal Justice Response Team recommended amending the constitution to provide for appointment of all 21 appellate judges who would stand for a retention election for a new term; in
The enforcement of Codes of Judicial Conduct through ethics committees, judicial conduct commissions, and the courts is also of relative recentness, but during the last century the public and the legal profession have demonstrated a growing recognition of the important role that judicial codes of conduct play in ensuring a fair and impartial judiciary.

There is an inextricable linkage between the increased activity by organizations concerned with the issue of judicial campaign speech and the decision in White. The inevitable legal and political battles that will follow will be shaped to a large degree by the Supreme Court’s decision in White, and the legal and political actions taken by numerous organizations. While it is impossible to predict the full extent of White’s impact on judicial campaign speech in Kentucky, there can be no doubt that White will serve as a catalyst for action at every juncture along the way of the popular election of judges. As more money is spent by organizations attempting to shape the debate on this issue, there will be more opportunities for under-funded litigants to attract the support of a willing, well-healed suitor. From a legislative committee debating the best method for selecting judges; to a candidate planning his or her campaign strategy for an upcoming election; to an ethics committee, judicial conduct commission or court scrutinizing a judicial candidate’s campaign speech; White and its application by other tribunals will be of great interest to the bench, bar, court-watching organizations and the general public. The proper application of White and its progeny will require considerable and measured thought.

ROGERS v. TENNESSEE:
IS THE JUDICIARY PERMITTED TO VIOLATE THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION?

by Nick J. Kemphaus*

I. INTRODUCTION

The defendant in a recent child abuse case, State v. Miranda, appealed his convictions for first-degree assault to the Connecticut Supreme Court on grounds that the convictions were incorrect under the controlling law. The controlling law permitted conviction for first-degree assault for either committing the assault or providing aid to the perpetrator. The defendant committed neither act; he merely failed to prevent the perpetrator, the child’s mother, from committing the abuse and failed to obtain the needed medical aid for the child following the abuse. The court agreed and ruled that the defendant was wrongfully convicted under the controlling law. However, it did not overturn the convictions. Instead, it affirmed the defendant’s convictions by: (1) creating a new criminal law duty to aid victims of child abuse; (2) extending the first-degree assault

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1 State v. Miranda, 794 A.2d 506, 510-11 (Conn. 2002). Prior to being indicted, the defendant, twenty-one years old, was the live-in boyfriend of a sixteen-year-old mother of two who severely and repeatedly beat her four-month-old daughter. Id. The defendant was not the father or legal guardian of either child; his relations with the children were strictly the result of living with the mother. Id. at 510.

2 Id. at 506. This decision illustrates the unfettered authority of the judiciary, following the United States Supreme Court’s decision in Rogers v. Tennessee, 532 U.S. 451 (2001), to retroactively change the criminal law, despite the fact that such changes are expressly prohibited by the Ex Post Facto Clause of the United States Constitution. Id. It also illustrates the individual injustices caused by such changes in the law. Id.

3 Miranda, 794 A.2d at 510.

4 Id. at 532.

5 Id.

6 Id.

7 See id. at 515-17, 532. The Connecticut Supreme Court did not expressly say that the defendant was wrongfully convicted under the controlling law, but by creating new law for the purpose of sustaining the first-degree assault convictions, it implicitly agreed that the convictions would not have been proper under the controlling law. Id. at 515-17. Additionally, the dissent argued that the defendant could not have been convicted under the controlling law. Id. at 532.

8 Id. at 529.

9 Miranda, 794 A.2d at 515.
statute to include conviction for failure to perform the duty to aid;\textsuperscript{10} and (3) retroactively applying the preceding two legal innovations to the defendant’s case.\textsuperscript{11} In short, the court broadened the first-degree assault statute to include and criminalize the defendant’s otherwise innocent conduct.\textsuperscript{12} As a result, the defendant was convicted on several counts of first-degree assault, which extended his ten-year sentence for risk of injury to a child by thirty years.\textsuperscript{13} What is worse, the mother and perpetrator of the vicious beatings skirted by with a mere seven-year sentence.\textsuperscript{14}

The problem with the Connecticut Supreme Court’s decision in Mir\textsuperscript{15}anda, aside from the fact that the defendant’s sentence offends intuitive notions of justice, is it directly violates the Ex Post Facto Clause\textsuperscript{16} of the United States Constitution.\textsuperscript{17} The Ex Post Facto Clause prohibits retroactive changes in the criminal law.\textsuperscript{18} Generally speaking, retroactive changes in the criminal law are changes that criminalize conduct that was innocent (under the controlling law) at the time it was committed.\textsuperscript{19} Retroactive changes are problematic, because the changes effectuate criminal convictions without providing the individuals affected with prior warning and an opportunity to act differently and avoid punishment.\textsuperscript{20} The defendant in Mir\textsuperscript{16}anda suffered this injustice.\textsuperscript{21} He was convicted of first-degree assault without prior warning that his conduct was punishable under the assault statute, and as a result he was subjected to an additional thirty years in prison.\textsuperscript{22}

Unfortunately, the defendant’s legal injuries were not the result of reversible judicial error by the Connecticut Supreme Court.\textsuperscript{23} Much to the contrary, the defendant’s injuries were authorized by the United States Supreme Court under its ruling in \textit{Rogers v. Tennessee}.\textsuperscript{24} The Supreme Court in \textit{Rogers} held that courts are permitted to make retroactive changes in the criminal law, despite the

\textsuperscript{10} Id. at 516. The Connecticut Supreme Court attached its newly created duty to aid victims of child abuse to the first-degree assault statute to establish a means of sentencing the defendant. \textit{Id.} Otherwise, the new rule would have been without sentencing provisions, preventing the court from punishing the defendant for violating it. \textit{Id.}

\textsuperscript{11} Id. at 518.

\textsuperscript{12} Id.

\textsuperscript{13} Id. at 531. In total, the defendant was sentenced to forty years in prison for his inaction. \textit{Id.}

\textsuperscript{14} Id.

\textsuperscript{15} U.S. CONST. art. I, § 10, cl. 1.

\textsuperscript{16} \textit{Miranda}, 794 A.2d at 531.

\textsuperscript{17} \textit{Calder v. Bull}, 3 U.S. (3 Dall.) 386, 390-91 (1798). The Court used the term “retroactive change,” as does this note, to refer to changes in the law made in the present, but applicable to actions that occurred in the past, as if the changed law was the controlling at the time the actions were committed. \textit{Id.} at 391. Also, the Court ruled that the Ex Post Facto Clause prohibits four specific types of retroactive changes in the criminal law, discussed \textit{infra} part II.A, not all such changes. \textit{Id.} at 390-91.

\textsuperscript{18} Id.


\textsuperscript{20} \textit{Miranda}, 794 A.2d at 515-18, 531.

\textsuperscript{21} Id. at 531.

\textsuperscript{22} Id.

\textsuperscript{23} 532 U.S. 451 (2001)
Ex Post Facto Clause, if there is evidence that the defendant in question had fair warning that the changes were forthcoming.  

This note argues that the holding in Rogers v. Tennessee was improper and that the correct holding would have been to bind the judiciary by the Ex Post Facto Clause. Part II discusses the law employed in the Rogers decision. Part III provides the facts and procedural history of Rogers. Part IV discusses the Court's majority and dissenting opinions. Part V provides four arguments against the validity of the Rogers holding, including: (1) it is an unjustifiable departure from United States Supreme Court precedent; (2) it defines and applies the fair warning rule in a manner that directly contradicts established Supreme Court interpretations of the rule; (3) its rationale, that limiting the judiciary by the Ex Post Facto Clause would destroy its precedent-setting function, is unsubstantiated—it merely limits the judiciary to prospective

24 See Rogers, 532 U.S. at 462. The Court held: "[A] judicial alteration of a common law doctrine of criminal law violates the principle of fair warning, and hence must not be given retroactive effect, only where it is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.'" Id.

25 Id. at 462.

26 See Bouie v. City of Columbia, 378 U.S. 347, 362 (1964) (holding that the Ex Post Facto Clause is binding on the judiciary). See also Marks v. United States, 430 U.S. 188, 191-92 (1977) (reaffirming the holding in Bouie). The Bouie Court’s rationale for binding the judiciary by the Ex Post Facto Clause, despite the rule established in Calder v. Bull, 3 U.S. (3 Dall.) 386, 389 (1798), i.e., the Ex Post Facto Clause only applies to the legislature, is that the judiciary should not be permitted to achieve legal results that are similarly unachievable by the legislature due to the ex post facto limitations on it. See Bouie, 378 U.S. at 362. The preferred holding argued in this note, therefore, is a restatement of the holdings in Bouie and Marks.

27 Rogers, 532 U.S. at 456-67.

28 Id. at 454-56.

29 Id. at 451.

30 Id. The Rogers Court used the fair warning rule in its holding as a minimum standard for permissible retroactive changes in the criminal law by the judiciary. Id.

31 Id. at 462. The Rogers holding departed from prior United States Supreme Court precedent (provided supra note 26 and accompanying text) by exempting the judiciary from the limitations of the Ex Post Facto Clause. Id.

32 See Bouie v. City of Columbia, 378 U.S. 347, 350-54 (1964). The Court defined and applied the fair warning rule to determine the propriety of judicial interpretations of criminal statutes. Id. The Court ruled that interpretations that are within the fair warning rule are in accord with the controlling law and therefore proper. Id. Conversely, it ruled that interpretations that fail the fair warning rule, meaning they are unexpected and indefensible in comparison to the statute's language and prior judicial interpretations of it, amount to changes in the controlling law and therefore are improper. Id. Thus, the Bouie Court used the fair warning rule to ensure judicial application of the controlling law, not as a means for permitting the judiciary to avoid applying the controlling law, as in Rogers, 532 U.S. at 462. Id. See also Marks v. United States, 430 U.S. 188, 191-92, 196 (1977). The Marks Court defined fair warning not as a rule, but as a protected constitutional right of individuals. Id. at 191. It ruled that the United States Constitution guarantees fair warning to individuals of the conduct that will give rise to criminal penalties prior to punishing them for committing it. Id. Furthermore, it ruled that the Ex Post Facto Clause is the constitutional provision that secures the right of fair warning. Id. Finally, it held that the right to fair warning secured by the Ex Post Facto Clause is binding on the judiciary. Id. at 191-92. Therefore, the Marks Court interpreted fair warning to forbid retroactive changes in the criminal law, not as a minimum standard for such changes, as in Rogers, 532 U.S. at 462. Id.
application of criminal precedent; and (4) it is vulnerable to judicial abuse that would subvert constitutional protections of individual liberty. Part V also discusses the preferred holding and provides three rationales in support of it, including: (1) it is a bright-line test that would provide uniformity in judicial decision-making; (2) it is necessary because it limits the judiciary, like the legislature, by the Ex Post Facto Clause, when the judiciary acts in a legislative capacity; and (3) it prevents subversion of constitutional protections of individual liberty. Part VI concludes this article.

II. LAW USED IN ROGERS V. TENNESSEE

The United States Supreme Court considered two legal principles in Rogers v. Tennessee, namely the Ex Post Facto Clause and the common law "year-
and-a-day” rule. Part II.A defines the Ex Post Facto Clause and discusses the United States Supreme Court decisions interpreting it prior to the Rogers decision. Part II.B defines the “year-and-a-day rule” and discusses the status it held in Tennessee prior to the Rogers decision.

A. Ex Post Facto Law

In general terms, ex post facto laws are laws created after the commission of certain actions that make those actions criminally punishable, even though the actions were legal under the controlling law at the time they were committed. Ex post facto laws were first formally recognized and forbidden by the United States Constitution in Article I, Sections 9 and 10. Article I Section 10 mandates, in part, that “[n]o State shall pass... any... ex post facto Law.” According to the Founding Fathers, the purpose of this provision was to protect individual liberty in two ways. First, it forces states to provide individuals with prior warning of the conduct it considers criminal, therefore giving individuals the opportunity to conform their conduct to avoid punishment. Second, it prevents “arbitrary and vindictive” lawmaking. For example, it prevents lawmaking based upon hatred, prejudice, and racism.

Following ratification of the Constitution, the United States Supreme Court defined the scope of the Ex Post Facto Clause in Calder v. Bull. In Calder, the Court held that there are four prohibited ex post facto laws and defined them as follows:

(1) laws that make an action done before the passage of the law,

40 U.S. CONST. Art. I, § 10, cl. 1. See also Calder, 3 U.S. (3 Dall.) at 386 (defining the Ex Post Facto Clause and its scope); Logan, supra note 19, at 1275-77 (discussing the history of the Ex Post Facto Clause).
41 State v. Rogers, 992 S.W.2d 393, 395-01 (Tenn. 1999). The Tennessee Supreme Court extensively analyzed the historical development, modern status and Tennessee status of the year-and-a-day rule. Id.
42 The United States Supreme Court decisions pertinent to this note include: Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) (explaining the foundational elements of the Ex Post Facto Clause); Bouie v. City of Columbia, 378 U.S. 347 (1964) (defining the law applicable in Rogers); Marks v. United States, 430 U.S. 188 (1977) (supporting the argument contained within this note that the Ex Post Facto Clause is binding on the judiciary).
43 Rogers, 992 S.W.2d at 395-99.
44 Id. at 399-01.
45 Logan, supra note 19, at 1275-77 (discussing ex post facto law).
46 Calder, 3 U.S. (3 Dall.) at 388.
47 U.S. CONST. art. I, § 9, cl. 1.
49 Id.
50 Logan, supra note 19, at 1276-77.
51 Id. at 1276.
52 Id at 1276-77.
53 Id.
54 3 U.S. (3 Dall.) 386 (1798).
55 Calder, 3 U.S. (3 Dall.) at 390.
which was legal when done, criminal, and punishes such action, (2) laws that aggravate a crime, or makes it greater than it was, when committed, (3) laws that change the punishment, and inflict a greater punishment, than the law annexed to the crime, when committed, and (4) every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender.\(^{56}\)

In short, the Calder Court ruled that the Ex Post Facto Clause prohibits retroactive changes to substantive criminal laws.\(^{57}\)

The Calder Court also provided two qualifications to its rules against retroactive changes in the criminal law.\(^{58}\) First, it stated that the Ex Post Facto Clause is only applicable to legislative bodies.\(^{59}\) Second, the Court stated that the above rules are most important in the criminal law context, because retroactive changes in the criminal law have the serious consequence of unfairly depriving individual liberty.\(^{60}\)

The next United States Supreme Court decision defining ex post facto law pertinent to Rogers v. Tennessee\(^{61}\) was Bouie v. City of Columbia.\(^{62}\) The issue in Bouie, decided in 1964, was whether the South Carolina Supreme Court violated the defendants' due process rights by maintaining their trespass convictions.\(^{63}\) The defendants, two African-American college students, were convicted of trespass for failure to exit the whites-only section of an Eckerd's drug store at the request of both the store manager and the police.\(^{64}\) The applicable trespass statute required conviction for entry onto the premises of another after receiving notice not to enter.\(^{65}\) It did not, however, provide for conviction for failure to leave another's premises when requested.\(^{66}\) The South Carolina Supreme Court

\(^{56}\) Id.

\(^{57}\) Id.

\(^{58}\) Id.

\(^{59}\) Id.

\(^{60}\) Id.


\(^{64}\) Id. at 348-49. Specifically, the students entered the drug store's restaurant to protest its policy against service of African-Americans—oddly, African-Americans were permitted in the other parts of the store. Id. at 348. Once inside, a restaurant employee posted a no trespass sign impliedly asking the students to leave. Id. The students, however, remained seated prompting the manager to call the police. Id. When the police arrived, the manager twice asked the students to leave followed by a request from the police. Id. The students responded by asking why they had to leave. Id. The police replied that they were breaching the peace and immediately arrested them. Id. Curiously, the students were later prosecuted, not for breach of peace, but for trespass. Id. at 349.


\(^{66}\) Bouie, 378 U.S. at 349. The trespass statute under which the defendants were charged stated:

Entry on the lands of another after notice prohibiting same. Every entry upon the lands of another...after notice from the owner or tenant prohibiting such
nevertheless interpreted the statute to permit conviction for failure to exit another's premises upon request, and affirmed the students' convictions. 67

On appeal, the United States Supreme Court reversed the South Carolina decision in a two-part analysis. 68 First, the Court decided whether the students had fair warning of South Carolina's interpretation of the trespass statute by determining if it was unexpected and indefensible in comparison to the language of the statute and prior interpretations of it. 69 The Court ruled that the students did not have fair warning of the interpretation, 70 and as a result it amounted to a change in the controlling law instead of a proper interpretation of it. 71 Second, the Court ruled that the South Carolina interpretation (effectively a change in the law) could not be retroactively applied against the students, because such an application would violate the Ex Post Facto Clause. 72

The Bouie decision is significant because it establishes the rule that the Ex Post Facto Clause is binding on the judiciary. 73 This is an extension of the rule provided by the Court in Calder, which previously limited application of the Ex Post Facto Clause to legislative bodies. 74

Later, in Marks v. United States, 75 the United States Supreme Court confirmed the Bouie holding. 76 The petitioners in Marks appealed their convictions for transporting pornography on grounds that their due process rights were violated. 77 The convictions resulted from the lower court's application of

entry, shall be a misdemeanor and be punished by a fine....When any owner or tenant of any lands shall post a notice in four conspicuous places on the borders of such land prohibiting entry thereon, a proof of the posting shall be deemed and taken as notice conclusive against the person making entry, as aforesaid for the purpose of trespassing.


67 Bouie, 378 U.S. at 349, 362. The statutory language provided supra note 66 does not provide for punishment for failure to leave another's premises upon request. Id. at 349. If it did, the South Carolina Legislature would not have added a provision to the trespass statute, following the South Carolina Supreme Court decision in Bouie, making failure to leave another's premises upon request a criminal offense. Id. at 361-62.

68 Id. at 350-51.

69 Id. at 354-63.

70 Id. at 362.

71 Id.

72 Id.

73 Bouie, 378 U.S. at 354, 362. Simply stated, the Court made two rulings in Bouie. Id. First, the Court ruled that a judicial interpretation of a criminal statute that is unexpected and indefensible in comparison to the statute's language and prior interpretations of it is effectively a change in the statute, not an interpretation of it. Id. at 354. Second, the Court ruled that the Ex Post Facto Clause is binding on the judiciary. Id. at 362. Therefore, the judiciary is prohibited from making retroactive changes in the criminal law. Id. Together, the two rules acted to bar the South Carolina Supreme Court decision. Id.

74 Id. at 362. But see Rogers v. Tennessee, 532 U.S. 451, 457-62 (2001) (rejecting this note's interpretation of the Bouie holding by referring to the language the interpretation is premised upon as impertinent dicta).


76 Marks, 430 U.S. at 191-92.

77 Id. at 189-91.
the pornography laws that became effective on June 21, 1973, instead of the more lenient laws in effect at the time of the commission of the crime on February 27, 1973.

The United States Supreme Court ruled in favor of the defendants and remanded the case. The Court ordered jury instructions to be given under the old pornography laws, because they were controlling at the time of the petitioners' actions. The Court rejected the lower court's use of the amended pornography laws, because the amended laws became effective after the petitioners acted and therefore would violate the Ex Post Facto Clause if so applied. In support of its decision, the Court cited Bouie for the rule that the Ex Post Facto Clause is binding on the judiciary. In addition, the Court supported its decision by ruling that all individuals have a fundamental constitutional right, secured by the Ex Post Facto Clause (via the Due Process Clause), to fair warning of what constitutes criminal conduct, prior to being punished for committing such conduct. The Court, therefore, held that judicial adherence to the Ex Post Facto Clause is imperative.

B. "Year-and-a-Day" Rule

The year-and-a-day rule originated in Thirteenth Century England as the permissible time period in which a civil suit to recover damages for the murder of a family member or friend, called an "appeal of death," could be brought. Later, in the Nineteenth Century, the rule was eradicated in the civil context and reemployed in criminal law to bar murder convictions if the victim did not die within a year and a day of being attacked. Historically, three reasons have been provided for adopting the year-and-a-day rule into the criminal law. First, it barred the possibility of establishing homicide convictions upon insufficient or questionable medical evidence. Such convictions were otherwise possible due to the fact that late Nineteenth and early Twentieth Century medical science was incapable of definitively establishing causation when the victim died more than a year after being attacked. Second, it prevented juries from rendering unfounded convictions. The risk of such convictions was made possible by the rules of

78 Id. at 189. See also Miller v. California, 413 U.S. 15, 24 (1973) (providing the amended pornography laws).
79 Marks, 430 U.S. at 189. See also Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966) (providing the more lenient pornography laws).
80 Marks, 430 U.S. at 196-97.
81 Id. at 196.
82 Id.
83 Id. at 191-92.
84 Id. at 191.
85 Id. at 192.
86 State v. Rogers, 992 S.W.2d 393, 396 (Tenn. 1999).
87 Id. (citing Louisville, Evansville, & St. Louis R.R. Co. v. Clarke, 152 U.S. 230 (1894)).
88 Id.
89 Id.
90 Id.
91 Id. at 397.
evidence at the time, which prohibited the admission of expert testimony, thereby forcing ordinary jury members to use their personal knowledge to determine causation based upon facts that involved complex medical issues.\(^92\) Third, the year-and-a-day rule tempered the strict common law rule requiring the death penalty for anyone convicted of a homicide, including manslaughter, by forbidding homicide convictions in cases where the victim did not die within a year and a day of the attack.\(^93\)

Over time, however, the three rationales for the year-and-a-day rule were eliminated, which prompted many states to abrogate the rule.\(^94\) The most cited reason was advances in medical science, which permitted causation to be determined when death occurred more than a year after an attack.\(^95\) Tennessee, in contrast, had not abrogated the year-and-a-day rule prior to \textit{Rogers v. Tennessee}.\(^96\)

III. FACTS AND PROCEDURAL HISTORY OF \textit{ROGERS V. TENNESSEE}\(^97\)

This section provides the facts and procedural history of the \textit{Rogers v. Tennessee} decision.\(^98\) Part III.A provides the facts. Part III.B discusses the procedural history, including the Tennessee Court of Criminal Appeals\(^99\) and Tennessee Supreme Court\(^100\) decisions.

A. Facts

On the evening of May 6, 1994, Wilbert K. Rogers played cards and drank beer with friends James Bowdery and Lisa Sledge at Sledge's Memphis, Tennessee apartment.\(^101\) When the evening ended, Sledge retired to her bedroom with Bowdery, leaving Rogers asleep on the couch.\(^102\) Shortly thereafter, Rogers awoke, checked his wallet, and realized he was missing thirteen or fourteen dollars.\(^103\) Angered by his belief that Bowdery stole the money, Rogers obtained a butcher knife, entered Sledge's bedroom, and stabbed Bowdery in the chest.\(^104\) In the meantime, Sledge fled.\(^105\)

After the attack, Rogers also left the scene while Bowdery stumbled to a

\(^{92}\) \textit{Rogers}, 992 S.W.2d at 397.

\(^{93}\) \textit{Id}.

\(^{94}\) \textit{Id.} at 397 n.4.

\(^{95}\) \textit{Id.} at 397-98.

\(^{96}\) \textit{Id.} at 400.


\(^{98}\) \textit{Rogers}, 532 U.S. at 451.


\(^{100}\) \textit{Rogers}, 992 S.W.2d at 394.


\(^{102}\) \textit{Id}.

\(^{103}\) \textit{Id}.

\(^{104}\) \textit{Id}.

\(^{105}\) \textit{Id.} at *1-2.
neighbor’s house for help. On arrival, the neighbor summoned an ambulance to take Bowdery to the hospital, where he underwent surgery to repair a puncture to his heart suffered during the stabbing. While in surgery, Bowdery had a heart attack, which terminated blood and oxygen flow to his brain and ultimately caused brain failure. Bowdery fell into a coma and died fifteen months later on August 7, 1995, due to kidney failure.

B. Procedural History

On August 9, 1994, the Shelby County, Tennessee grand jury charged Rogers with attempted first-degree murder. Following Bowdery’s death, the grand jury upgraded the charge to first-degree murder. At trial, Rogers was convicted of second-degree murder and sentenced to thirty-three years imprisonment.

On appeal to the Tennessee Court of Criminal Appeals, Rogers argued that his second-degree murder conviction was improper under the Tennessee common law, because Bowdery did not die within a year of the attack. The Court of Criminal Appeals rejected this argument and affirmed his conviction, holding that Tennessee’s Criminal Code expressly eliminated all common law defenses, including the year-and-a-day rule.

Rogers next appealed his case to the Tennessee Supreme Court, which affirmed his conviction in a three-part decision. First, the court ruled that the year-and-a-day rule was an element in proving causation, not a common law defense, and was therefore good law in Tennessee.

Second, the court abrogated the year-and-a-day rule, holding that the three rationales which once necessitated it no longer existed. The court ruled that medical science was no longer incapable of proving causation when death ensued more than a year and a day after the attack, expert testimony was then admissible for jury determinations, and the death penalty was no longer applicable to all homicide convictions. Additionally, the court supported its decision by citing the overwhelming trend to abrogate the rule in other jurisdictions.

Third, the Tennessee Supreme Court retroactively applied its elimination of

106 Id. at *2.
108 Id.
109 Id. Bowdery’s kidney failure was a consequence of the stabbing. Id.
111 Id.
112 Id.
114 Id.
115 State v. Rogers, 992 S.W.2d 393, 394 (Tenn. 1999).
116 Id. at 394-95.
117 Id. at 400.
118 Id. at 401.
119 Id.
120 Id. at 397-99.
the year-and-a-day rule to Rogers' case to affirm his conviction. To support its holding, the court read the Bouie decision as permitting the judiciary to make retroactive changes in the criminal law if it could be said that the defendant in question had fair warning that the changes were forthcoming. Furthermore, the court provided four justifications for its finding that Rogers had fair warning that the change was forthcoming, including: (1) the year-and-a-day rule was unnecessary, because it had never been used to decide a case in Tennessee; (2) the Tennessee Criminal Code's abolition of all common law defenses created questions concerning the year-and-a-day rule's continued viability and prompted two appellate courts to hold that it had been abrogated; (3) prior to Rogers' case, every jurisdiction faced with abrogating the rule had done so; and (4) retroactive abrogation of the rule did not permit conviction on less evidence, or for an act which was previously innocent.

Finally, Rogers appealed to the United States Supreme Court arguing that the Tennessee Supreme Court's decision violated the Ex Post Facto Clause. The Supreme Court granted certiorari on May 22, 2000, to decide the ex post facto question.

IV. THE UNITED STATES SUPREME COURT OPINIONS IN ROGERS v. TENNESSEE

This section discusses the majority and dissenting opinions of the United States Supreme Court in Rogers v. Tennessee. Part IV.A discusses Justice O'Connor's majority opinion. Part IV.B discusses the dissenting opinions of Justices Scalia, Stevens and Breyer.

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121 Rogers, 992 S.W.2d at 402-03.
122 Id. at 402.
123 Id.
124 Id.
126 Id. But see Brief for the Petitioner at *30-35, Rogers v. Tennessee, 532 U.S. 451 (2001) (No. 99-6218) (arguing against the Tennessee Supreme Court's retroactive abrogation of the year-and-a-day rule by providing evidence that the great majority of courts that previously abrogated it did so prospectively, often citing Bouie as the precedent forbidding retroactive abrogation).
127 Rogers, 992 S.W.2d at 402. Retroactive abrogation did not permit conviction on less evidence. Id. The prosecution still had to prove causation; the only exception is it was not confined to prove death within one year. Id. Also, retroactive abrogation did not allow conviction for otherwise innocent conduct. Id. Second-degree murder was a well-established criminal offense at the time the conduct was committed. Id.
131 Rogers, 532 U.S. at 451.
132 Id. at 453.
133 Id. at 467-82.
A. The Majority Opinion

Justice O’Connor, joined by Chief Justice Rehnquist and Justices Souter, Kennedy, and Ginsburg, delivered the majority opinion. O’Connor affirmed Rogers’ conviction for second-degree murder in a three-part decision. First, she established Bouie as controlling precedent in Rogers. Second, O’Connor read Bouie, as did the Tennessee Supreme Court, to permit retroactive judicial changes in the criminal law if there is fair warning. In so doing, she discarded language in Bouie binding the judiciary to the Ex Post Facto Clause. O’Connor reasoned that the judiciary should not be bound by the Ex Post Facto Clause, because its limitations interfere with the judiciary’s ability to set precedent.

Third, O’Connor used her definition of the fair warning rule to affirm Rogers’ conviction. She provided three arguments that Rogers had fair warning, including: (1) modern medicine no longer necessitated the year-and-a-day rule; (2) the majority trend was toward complete elimination of the rule; and (3) the rule was only scarcely considered part of Tennessee law.

B. The Dissenting Opinions

Three dissenting opinions were delivered in Rogers. Justice Scalia delivered the primary dissent, joined by Justices Stevens and Thomas and, in part, by Justice Breyer. Scalia provided four objections to the Court’s holding and an additional argument that its decision to affirm Rogers’ conviction was

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134 Id. at 453.
135 Id.
136 Id. at 455-67.
137 See Rogers, 532 U.S. at 456-60.
138 Id. at 462. See also supra note 24 and accompanying text (providing the language of the Court’s holding in Rogers).
139 Rogers, 532 U.S. at 458-59.
140 See id. at 461. But see Bouie v. City of Columbia, 378 U.S. 347, 362 (1964) (holding that binding the judiciary by the Ex Post Facto Clause does not eliminate the judiciary’s precedent-setting function, it merely limits the judiciary to prospective application of precedent that includes a change in the criminal law).
141 Rogers, 532 U.S. at 462-67.
142 Id. at 462-63.
143 Id. at 463-64.
144 Id. at 464-67.
145 Id. at 467-82.
146 Id.
147 Rogers, 532 U.S. at 467-81. Justice Breyer only joined Part II of Justice Scalia’s dissent. Id. at 481-82. In Part I, Scalia rejected the Court’s holding that retroactive changes in the criminal law are permitted where there is fair warning. Id. at 467-78. In Part II, Scalia disagreed with the Court’s application of its holding. Id. at 478-81. He argued that the Court should have reversed the Tennessee Supreme Court’s decision, because the facts were insufficient to satisfy the standard the Court created for retroactive changes in the criminal law. Id. Breyer agreed with the Court’s holding, but disagreed with the Court’s application of it. Id. at 482.
improper under the rule it established. First, Scalia argued that the Boule formulation of the fair warning rule was designed to ensure judicial application of the controlling law, not as a minimum standard for permissible retroactive changes to it as it was used in the Court’s holding. Second, and more importantly, Scalia argued that the Court’s holding, by permitting retroactive changes in the criminal law, directly violated the fundamental premise in Bouie, i.e., that all retroactive changes in the criminal law are forbidden. Third, Scalia scrutinized the rationale for the Court’s holding, that making retroactive changes in the criminal law are part of the judiciary’s precedent-setting function. Scalia disagreed, arguing that the judiciary sets precedent by applying the controlling law to new cases, not by retroactively changing it. Fourth, Scalia objected to the fact that the Court’s holding permits the judiciary to violate the Ex Post Facto Clause. Scalia argued that the Founding Fathers did not expressly bind the judiciary to the Ex Post Facto Clause, because they believed adherence to it was implicit in judiciary’s function of applying the existing law to new cases.

In addition, Scalia provided arguments that Rogers did not have the requisite fair warning under the Court’s holding to sustain his conviction. Scalia argued that Rogers lacked fair warning, because (1) he could not have anticipated that the Tennessee Supreme Court would perform the inherently legislative function of abrogating a criminal law, and (2) it was not possible to foresee that the abrogation would be applied retroactively against him, because the significant majority of jurisdictions that previously abrogated the year-and-a-day rule had done so prospectively instead of retroactively.

Justices Stevens and Breyer submitted the final two dissents. Justice Stevens argued against the Court’s interpretation of the fair warning rule, i.e., permitting retroactive changes in the criminal law, because such changes result in unfair deprivations of individual liberty. Conversely, Justice Breyer concurred with the Court’s interpretation of the fair warning rule, but objected to its decision to affirm Rogers’ conviction. He agreed with Justice Scalia’s arguments that Rogers was not provided with sufficient fair warning to sustain

148 Id.
149 Id. at 469-70.
150 Id. at 470.
151 Id. Justice Scalia stated: “[a]ccording to Bouie, not just ‘unexpected and indefensible’ retroactive changes in the common law of crimes are bad, but all retroactive changes [are bad].” Id.
152 Id. at 471.
153 Rogers, 532 U.S. at 471.
154 Id. at 472-78.
155 Id. at 478.
156 Id. at 478-80.
157 Id.
158 Id. at 479.
159 Rogers, 532 U.S. at 467, 481-82.
160 Id. at 467.
161 Id. at 481-82.
his convictions under the Court's holding.\textsuperscript{162}

V. ANALYSIS

Part V provides four arguments questioning the strength of the \textit{Rogers} Court's holding that retroactive changes to criminal laws are permitted where there is fair warning.\textsuperscript{163} They include: (V.A) the \textit{Rogers} holding is an unjustifiable departure from United States Supreme Court precedent;\textsuperscript{164} (V.B) the \textit{Rogers} definition and application of the fair warning rule contradicts established Supreme Court interpretations of the rule;\textsuperscript{165} (V.C) the rationale for the \textit{Rogers} holding, that limiting the judiciary by Ex Post Facto Clause would destroy its precedent-setting function, is unsubstantiated—it merely limits the judiciary to prospective application of criminal precedent;\textsuperscript{166} and (V.D) the \textit{Rogers} holding is vulnerable to judicial abuse that would subvert constitutional protections of individual liberty.\textsuperscript{167} Additionally, Part V.E argues that the proper holding in \textit{Rogers} would have been to bind the judiciary by the Ex Post Facto Clause.\textsuperscript{168}

A. Rogers Significantly Departs from Precedent\textsuperscript{169}

The first problem with the \textit{Rogers} holding is it significantly departs from precedent established by the United States Supreme Court in \textit{Bouie} and \textit{Marks}.\textsuperscript{170} Those decisions established the rule that the Ex Post Facto Clause is binding on the judiciary.\textsuperscript{171} The rationale being that the judiciary should not be able to use

\begin{itemize}
  \item \textsuperscript{162} Id. at 482.
  \item \textsuperscript{163} See id. at 462.
  \item \textsuperscript{164} See supra note 31 and accompanying text.
  \item \textsuperscript{165} See supra note 32 and accompanying text.
  \item \textsuperscript{166} See supra note 33 and accompanying text.
  \item \textsuperscript{167} See supra note 34 and accompanying text.
  \item \textsuperscript{168} See supra note 26 and accompanying text.
  \item \textsuperscript{169} \textit{Rogers v. Tennessee}, 532 U.S. 451, 462 (2001). \textit{See also The Supreme Court, 2000 Term—Leading Cases}, 115 HARV. L. REV. 306, 316-326 (2001) (arguing that the \textit{Rogers} Court improperly interpreted \textit{Bouie} to permit retroactive changes in the criminal law on proof of fair warning).
  \item \textsuperscript{170} Specifically, the Harvard note stated: "\textit{Rogers} effectively supplanted \textit{Bouie}'s stringent prohibition on retroactive changes in the criminal law with a permissive standard allowing judges considerable discretion in deciding whether a change in the law is 'unexpected and indefensible.'" \textit{Id.} at 322.
  \item \textsuperscript{171} The Harvard note suggests several reasons why the \textit{Rogers} Court abandoned \textit{Bouie}. \textit{Id.} at 323. For example, in \textit{Bouie}, the Court had the opportunity to advance the civil rights movement by reversing the state court's decision to convict two African-Americans for their presence in a whites-only restaurant. \textit{Id.} Conversely, in \textit{Rogers}, the Court had no reason to reverse the state court decision. \textit{Id.} Instead, it was motivated to affirm it to prevent Rogers from escaping a murder conviction. \textit{Id.}
  \item Such considerations, argues the Harvard note, are precisely the reason why the judiciary should be bound by the Ex Post Facto Clause. \textit{Id.}
  \item The Harvard note also makes a plea to state and federal courts to either disregard the \textit{Rogers} precedent in favor of adherence to the Ex Post Facto Clause or to limit its usage to cases where it is absolutely necessary. \textit{Id.} at 326. This note reiterates that plea.
  \item \textsuperscript{170} See supra note 169 and accompanying text.
  \item \textsuperscript{171} See \textit{Bouie} v. City of Columbia, 378 U.S. 347, 353-54 (1964). The Court ruled:
\end{itemize}
its decision-making power to achieve results that the legislature would be unable to accomplish due to the ex post facto limitations on it. The Rogers Court departed from the foregoing precedent by ruling that the language it is premised upon was dicta and therefore not indicative of the true holding in either Bouie or Marks.

The Court’s argument in Rogers that the language of the Bouie and Marks rulings was impertinent dicta is highly questionable for two reasons. First, at the conclusion of the Bouie opinion, the Court applied the rule that the Ex Post Facto Clause is binding on the judiciary to the facts of the case. The Court ruled that the Ex Post Facto Clause would have barred the South Carolina Legislature from retroactively changing the trespass statute to include conviction for failure to leave another’s premises to sustain the students’ convictions. Then, the Court stated that the “same result [is compelled] here,” meaning the South Carolina Supreme Court was barred from reaching the same legal result that the legislature was barred from accomplishing under the Ex Post Facto Clause. It is unlikely that the Bouie Court intended this final statement of the law, applied to the facts of the case, in the paragraph immediately prior to its reversal of the South Carolina Supreme Court’s decision, to be discarded as dicta.

Second, the Court in Marks cited Bouie as support for its statement that the Ex Post Facto Clause is binding on the judiciary. It is unlikely that the language in Bouie would have been cited in Marks to support its statement of the law if that language was impertinent dicta. Furthermore, even if the language

dicta.

Id. See also Marks v. United States, 430 U.S. 188, 192 (1977) (affirming the above language from Bouie). In addition, the Marks Court stated:

The Ex Post Facto Clause is a limitation upon the powers of Legislature...and does not of its own force apply to the Judicial Branch of government. But the principle on which the Clause is based—the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties—is fundamental to our concept of constitutional liberty....As such, that right is protected against judicial action.

Id. at 191-92.

172 See Bouie, 378 U.S. at 362.
173 Rogers, 532 U.S. at 459.
174 Id.
175 Bouie, 378 U.S. at 362.
176 Id.
177 Id.
178 Id.
179 Marks v. United States, 430 U.S. 188, 192 (1977). The Court confirmed its statement of the rule regarding the applicability of the Ex Post Facto Clause to the judiciary, provided supra note 171, by reiterating the rule, also provided supra note 171, established in Bouie. Id.
180 Id.
in *Bouie* could be construed as dicta, the *Marks* Court transformed that dicta into legal precedent by using a recreation of the language in its holding.\(^{181}\)

In sum, the *Bouie* and *Marks* decisions established the rule that the Ex Post Facto Clause is binding on the judiciary.\(^{182}\) Therefore, the *Rogers* Court's reasoning that the rule is without force (because it is premised upon insignificant dicta) is incorrect.\(^{183}\)

**B. The Rogers Court Incorrectly Defined the Fair Warning Rule**\(^{184}\)

The second problem with the *Rogers* holding is that its formulation of the fair warning rule to allow retroactive changes in the criminal law\(^{185}\) is directly contradicted by both the *Bouie* and *Marks* formulations.\(^{186}\) The *Bouie* and *Marks* formulations are discussed in parts V.B.1 and V.B.2, respectively.

1. **Rogers Formulation of the Fair Warning Rule Contradicts *Bouie***\(^{187}\)

In *Bouie*, the Court defined the fair warning rule in two ways.\(^{188}\) The first, which was inapplicable in both the *Bouie* and *Rogers* decisions, stated that statutes written in vague language are invalid under the Due Process Clause, because such language fails to provide the accused with fair warning of the exact conduct that is criminally punishable.\(^{189}\) Second, a judicial interpretation of a criminal statute that is both unexpected and indefensible with respect to the language and prior judicial interpretations of the statute cannot be retroactively applied against the accused, because the interpretation fails to provide fair warning of the punishable conduct.\(^{190}\) Such interpretations can only be applied prospectively.\(^{191}\)

The Court in *Rogers* used the latter statement of the fair warning rule for its...
holding. On its face, the latter statement of the rule may appear to permit the Rogers formulation of the rule as a minimum standard for permissible retroactive changes in the criminal law. However, a closer study suggests the Rogers formulation is unacceptable. The Bouie formulation is a check to ensure judicial application of the controlling law as stated in the criminal statute and in accordance with prior judicial interpretations of the statute. The negative implication of this check is to forbid application of judicial interpretations that are not in accord with controlling law, or otherwise stated, to forbid application of changes in the controlling law. Thus, the Bouie formulation of the fair warning rule demands judicial application of the controlling law and implies that such application prohibits retroactive changes in the criminal law. As a result, the Rogers formulation is directly at odds with Bouie, because it explicitly permits retroactive changes in the criminal law.

Additionally, the Marks decision verified the Bouie formulation of the fair warning rule as one that prevents retroactive changes in the criminal law, further disqualifying the Rogers formulation. In Marks, the Court was faced with a simple choice: apply the controlling law at the time the criminal offense was committed, or apply the law as amended after commission of the offense—a retroactive application of a change in the law. The Court held, “in accordance with Bouie,” that the Ex Post Facto Clause requires the controlling law at the time of commission of the offense to be applied to the defendants, even though it was no longer good law at the time of trial. Therefore, Marks confirms the holding in Bouie that the fair warning rule is designed to ensure judicial application of the controlling law, not as a means of avoiding application of the controlling law.

2. Rogers Formulation of the Fair Warning Rule Contradicts Marks

In Marks, the Court ruled that the fair warning rule protects against violations of the Ex Post Facto Clause. The Court ruled that fair warning of the conduct that will give rise to criminal penalties is a “fundamental” constitutional right of individuals specifically protected by the Ex Post Facto Clause (via the Due Process Clause). Additionally, the Court acknowledged the Calder rule, i.e.,

193 Id. at 462.
194 Id.
195 Cf. Bouie, 378 U.S. at 353-54 (holding thirty-seven years before Rogers that a ruling analogous to the holding in Rogers would violate the Ex Post Facto Clause).
196 Id.
197 Id.
198 Rogers, 532 U.S. at 462.
200 Id. at 189-91.
201 Id. at 196.
202 Id.
203 See supra notes 32, 184 and accompanying text.
204 Marks, 430 U.S. at 191-92.
205 Id.
that the Ex Post Facto Clause is limited to the legislature, but went on to say that because the right to fair warning is fundamental to the Constitution, the Ex Post Facto Clause is also binding on the judiciary. 206

Hence, the Marks formulation of fair warning 207 directly contradicts the Rogers formulation for two reasons. 208 First, the Marks formulation, unlike Rogers, 209 interprets the concept of fair warning not as a standard for retroactively changing the criminal law, but as a constitutional right serviced by adherence to the Ex Post Facto Clause. 210 Second, the Marks formulation 211 protects against retroactive changes in the criminal law while the Rogers formulation permits them. 212

C. The Rogers Holding is Unsupported by its Rationale 213

The third problem with the Rogers holding is that it is unsupported by its rationale. 214 The rationale provided by the Court in Rogers is that its holding is necessary to protect the judiciary’s function of setting precedent. 215 The Court ruled that this function would be eliminated if the judiciary were limited by the Ex Post Facto Clause. 216 However, the Court’s rationale is self-defeating. 217 Limiting the judiciary by the Ex Post Facto Clause would not destroy its precedent-setting function. 218 It would merely limit the judiciary to prospective application of precedent that includes a change in the criminal law. 219

Many state courts preceding Rogers were faced with identical requests to eliminate the year-and-a-day rule 220 and nearly every court chose to abrogate it prospectively. 221 Each of those courts, with the exception of one, recognized its

206 Id.
207 Id.
209 Id.
210 See Marks, 430 U.S. at 191-92.
211 Id.
212 See Rogers, 532 U.S. at 462. The Rogers formulation only forbids retroactive changes in the criminal law that are “unexpected and indefensible by reference to the [controlling] law....” Id. It therefore impliedly permits expected and defensible retroactive changes in the criminal law. Id. Such changes are at odds with Marks, because its formulation is derived from the Ex Post Facto Clause, which forbids all retroactive changes in the criminal law. Marks, 430 U.S. at 191-92.
213 Rogers, 532 U.S. at 461.
214 Id.
215 Id.
216 Id. at 458-59, 461.
217 Id. at 461.
218 See supra note 33 and accompanying text.
219 See supra note 33 and accompanying text.
221 Id. Every court, with the exception of two, prospectively abrogated the year-and-a-day rule. Id. The two that retroactively abrogated the rule had distinguishable grounds for doing so and therefore are poor evidence against the position taken in this note. Id. at *34-35. They include: People v. Snipe, 102 Cal. Rptr. 6 (Cal. Ct. App. 1972) and Commonwealth v. Ladd, 166 A.2d 501 (Pa. 1960). Id. The court in Snipe considered the year-and-a-day rule to be a rule of evidence, not a substantive rule of law, as the Court in Rogers viewed it. Id. at *35. Thus, its decision is distinguishable from and not directly supportive of Rogers. Id. Likewise, the court in Ladd considered the year-and-a-
continued ability to set precedent by abrogating the year-and-a-day rule while at the same time recognizing the limitation set forth in Bouie, i.e., that changes in the criminal law can only be made prospectively.\textsuperscript{222}

D. Vulnerability of Rogers to Judicial Abuse\textsuperscript{223}

The fourth problem with the Rogers holding is its susceptibility to judicial abuse that could result in unjust deprivations of individual liberty.\textsuperscript{224} It risks unfair deprivation of liberty by permitting changes in the criminal law without prior warning to the individuals affected, denying them the opportunity to conform their conduct to the law and avoid punishment (discussed in part IV.D.1).\textsuperscript{225} Also, the holding is open to abuse in the form of arbitrary and vindictive lawmaking, which in itself causes unfair deprivation of individual liberty (discussed in part IV.D.2).\textsuperscript{226}

Before proceeding, it is necessary to note that the Founding Fathers cited the Ex Post Facto Clause as the constitutional provision securing the above two protections.\textsuperscript{227} The Rogers Court, therefore, would be quick to highlight that its holding does not subvert the two protections, because it only applies to the judiciary, which it ruled is not bound by the Ex Post Facto Clause.\textsuperscript{228} However, the Founding Fathers stated that the Constitution is generally designed to secure the two protections to individual liberty.\textsuperscript{229} Thus, the Rogers Court could ignore

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\textsuperscript{222} Id. at *30-34. \textit{See also} State v. Vance, 403 S.E.2d 495, 501 (N.C. 1991) (refusing to retroactively apply its abrogation of the year-and-a-day rule, because it would permit conviction on "less evidence"); State v. Pine, 524 A.2d 1104, 1108 (R.I. 1987) (refusing to retroactively apply its abrogation of the year-and-a-day rule, because doing so would improperly increase the defendant's offense to a greater charge); People v. Stevenson, 331 N.W.2d 143, 148 (Mich. 1982) (refusing to retroactively apply its abrogation of the year-and-a-day rule, because, among other reasons, the Ex Post Facto Clause forbids retroactive increases in criminal punishment); State v. Young, 390 A.2d 556, 560-61 (N.J. 1978) (refusing to retroactively apply its abrogation of the year-and-a-day rule, because doing so would be "fundamentally unfair in a jurisdiction devoted to the rule of law") and would violate Bouie's proscription against judicial decisions that make crimes greater than provided for under the law when the criminal conduct was committed); United States v. Jackson, 528 A.2d 1211, 1220 (D.C. 1987) (abrogating the year-and-a-day rule and holding that the defendant was protected from subjection to the abrogation by the Ex Post Facto Clause); Commonwealth v. Lewis, 409 N.E.2d 771, 775 (Mass. 1980) (holding that the year-and-a-day rule was anachronistic and thereafter prospectively abolishing it). \textit{But see} State v. Gabehart, 836 P.2d 102, 106 (N.M. Ct. App. 1992) (refusing to retroactively apply its abrogation of the year-and-a-day rule but ignoring Bouie as its justification). The Gabehart Court reasoned to do so would "aggravate a crime from a lesser offense to a homicide." \textit{Id.}

\textsuperscript{223} Logan, \textit{supra} note 19, at 1276-77.

\textsuperscript{224} \textit{Id.}

\textsuperscript{225} \textit{Id.} at 1276.

\textsuperscript{226} \textit{Id.}

\textsuperscript{227} \textit{Id.}


\textsuperscript{229} See Logan, \textit{supra} note 19, at 1276.
the two protections in the direct context of the Ex Post Facto Clause, but could not ignore them altogether.

1. Rogers Violates the Right of Prior Warning

The Rogers holding subverts the intention of the Founding Fathers—to prevent unfair deprivation of individual liberty by demanding warning to individuals of what constitutes criminal conduct prior to subjecting individuals to punishment for such conduct. The Rogers Court permits deprivation of individual liberty without prior warning by allowing retroactive changes in the criminal law. Thus, the accused would be forced to suffer punishment for conduct he or she committed without prior warning and an opportunity to avoid it, because the new law becomes applicable only after the conduct is committed.

Furthermore, permitting the judiciary to retroactively change the law places an additional burden on the defense. As part of the preparation for certain trials, the defense, after Rogers, will be forced to produce persuasive arguments against retroactive changes in the law in addition to preparation for trial under the controlling law. The reason for this additional work results from the benefit the Rogers holding provides to the prosecution, i.e., permitting prosecutors to argue for retroactive changes in the law to obtain conviction where the facts are not sufficient to support conviction under the controlling law. As a result, an otherwise innocent man or woman under the controlling law may be deprived of liberty not on the facts of the case, but on arguments of the prosecution that convince the court to retroactively relax the law so that the facts are sufficient for conviction.

2. Rogers Risks Arbitrary and Vindictive Lawmaking

The Founding Fathers also stated that arbitrary and vindictive lawmaking must be prevented to avoid unfair deprivation of individual liberty. The Rogers holding, however, is open to abuse that would allow such lawmaking and its accompanying unjust deprivations of individual liberty. Although the Court provided several reasons to retroactively abrogate the year-and-a-day rule in

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230 See Rogers, 532 U.S. at 458-61.
231 See Logan, supra note 19, at 1276.
232 See Rogers, 532 U.S. at 462.
233 Id.
234 Id.
235 Id.
236 Id.
237 Id.
238 See Rogers, 532 U.S. at 462.
239 Id.
240 See Logan, supra note 19, at 1276.
241 Id.
242 Rogers, 532 U.S. at 462.
Rogers—including its fragile foothold in Tennessee law, developments in medicine that made it unnecessary, and a majority trend in other jurisdictions toward its elimination—the Court did not require all such elements in future adjudications. Instead, it provided the judiciary complete freedom to make retroactive changes in the criminal law on any argument or reasoning it believes provides fair warning. The resultant risk is that changes can be made under the pretext of fair warning to punish the defendant because the judge harbors feelings of hatred, racism, or other prejudice toward the defendant.

E. The Preferred Holding of Rogers v. Tennessee

The preceding analysis of the inherent problems with the Rogers holding evinces the standard preferred by this note. The Ex Post Facto Clause should be binding on the judiciary. The benefits of this standard are threefold. First, it is a bright-line rule that would establish uniformity in judicial decision-making. If the Ex Post Facto Clause would bar the legislature from making a contemplated retroactive change in the criminal law, the judiciary is similarly barred.

Second, the preferred standard is intuitively necessary, because it limits the judiciary, like the legislature, by the Ex Post Facto Clause, when the judiciary acts in a legislative capacity. When the judiciary changes, abrogates, or creates laws, it acts in a legislative capacity and therefore should be held to the same standards as the legislature.

Third, the preferred standard prevents the feared deprivations of individual liberty contemplated by the constitutional Framers—deprivation without prior warning to the accused that his or her acts were criminal, and deprivation as a result of arbitrary and vindictive lawmaking. The Framers intended the Ex Post Facto Clause to eliminate both problems. Thus, because the preferred standard limits the judiciary by the Ex Post Facto Clause, it also is intended to protect against the feared deprivations.
VI. CONCLUSION

This note makes two arguments regarding the United States Supreme Court’s holding in *Rogers v. Tennessee*; that retroactive changes in the criminal law by the judiciary are permitted if it can be proven that the criminally accused had fair warning that the change was forthcoming. First, the note argues that the *Rogers* holding is improper, because it is an unjustifiable departure from United States Supreme Court precedent; it defines and applies the fair warning rule in a manner that directly contradicts established Supreme Court interpretations of the rule; its rationale, that limiting the judiciary by Ex Post Facto Clause would destroy its precedent-setting function, is unsubstantiated—it merely limits the judiciary to prospective application of criminal precedent; and it is vulnerable to judicial abuse that would subvert constitutional protections of individual liberty.

Second, this note argues that the proper holding would have been to bind the judiciary by the Ex Post Facto Clause. The arguments in support of this standard are that it would provide uniformity in judicial decision-making; it would prevent the judiciary, when acting in a legislative capacity, from making decisions barred to the legislature; and it would prevent subversion of the constitutional protections against unfair deprivations of individual liberty.

259 *Rogers*, 532 U.S. at 462.
260 See *supra* note 31 and accompanying text.
261 See *supra* note 32 and accompanying text.
262 See *supra* note 33 and accompanying text.
263 See *supra* note 34 and accompanying text.
264 See *supra* note 26 and accompanying text.
265 See *supra* note 26 and accompanying text.
266 See *supra* note 36 and accompanying text.
267 See Logan, *supra* note 19, at 1276.
WHAT HAPPENED IN OHIO?  
OHIO UM/UIM LITIGATION AFTER SCOTT-PONTZER V.  
LIBERTY MUT. FIRE INS. CO.

by Jason A. Mosbaugh

I. INTRODUCTION

On July 10, 1994, Christopher T. Pontzer was killed in a motor vehicle accident while operating his wife's automobile on personal business in Stark County, Ohio. The cause of the accident was solely the result of the tortfeasor's negligence. Unfortunately, the limits of liability on the motor vehicle coverage held by the tortfeasor were inadequate to fully compensate for the wrongful death of Mr. Pontzer. The estate of Scott-Pontzer brought a claim for underinsured motorist coverage against Scott-Pontzer's employer alleging that the insurance policies insuring his employer were ambiguous and when strictly construed against the insurance company, provided coverage to Scott-Pontzer, while not in a company car and while not on company business.

This casenote examines how the Scott-Pontzer case has changed the practice of uninsured/underinsured motorist litigation throughout the State of Ohio. Section II gives an overview of the automobile insurance industry in Ohio. This section also gives the facts of Scott-Pontzer. Section III discusses the court's reasoning in the case. Section IV contains important issues that practitioners must be aware of when confronting UM/UIM Scott-Pontzer litigation. Section V analyzes the Ohio Supreme Court's decision in this case, the status of Ohio automobile insurance law, and the interests which the Ohio Supreme Court attempted to balance in reaching their decision. Section VI concludes.

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2 Id.
3 Id.
4 Id. at 1117-18.
5 710 N.E.2d 1116 (Ohio 1999).
II. BACKGROUND AND FACTS

A. Overview of Ohio's Automobile Insurance Industry

To fully understand the effect of the Ohio Supreme Court's decision in Scott-Pontzer, a basic understanding of the Ohio automobile insurance industry is necessary. The automobile insurance industry is highly standardized; however, automobile insurance policies are extremely complex and expensive documents to prepare. In the last two decades, many insurance carriers have found it cost effective to obtain their policies from independent third party draftors. To meet these demands, the third parties began preparing form insurance policies. Many of these policies contained identical language and were effectuated simply by plugging in the name of the insured on the Declarations page. In Ohio, many of these form policies were provided by the Insurance Services Office ("ISO") which services insurance companies in the state. As use of the ISO form policies became more prevalent, insurance companies began to use their form Personal Auto Liability policies for their Commercial Auto Liability clients. In so doing, insurers were able to save the expense of drafting a new policy by utilizing a policy already in their possession, which on its face provided almost identical coverage. These policies were again effectuated simply by filling in the name of the insured on the Declarations page. The practice of using form policies for corporations, which had been drafted for individuals, created the ambiguity found by the Ohio Supreme Court in Scott-Pontzer. This confusion, although quickly corrected by the insurance industry, has resulted in one of the most litigated topics in Ohio jurisprudence within the past two decades.

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6 Id.
8 Id.
14 Id.
15 Id.
17 See Kerpasack, supra note 13, at 148-49. The extent of insurance companies liability under the ambiguity found in Scott-Pontzer was quickly curtailed when companies re-drafted the ambiguous language immediately proceeding Scott-Pontzer. Id. While the date of correction may be slightly different for each policy, most policies were corrected by December 1999. Id. As a result of this correction, the number of cases able to be brought under Scott-Pontzer, or some variation thereof, is
While it is certain that with the passage of time Scott-Pontzer litigation will slowly subside, in the more immediate future practitioners may actually notice a resurgence of Scott-Pontzer issues as a result of the 2002 Ohio Supreme Court election. The November election, which resulted in the addition of J. Maureen O’Connor and the re-election of J. Evelyn Stratton to the bench, has also shifted the political composure of the Ohio Supreme Court to a 4-3 conservative majority. This conversion from a liberal to a conservative court will inevitably come to bear in Scott-Pontzer litigation.

B. Facts of Scott-Pontzer

The estate of Scott-Pontzer, after failing to be made whole through the exhaustion of the tortfeasor’s policy limits, named Mr. Pontzer’s employer, Superior Dairy and its insurer, Liberty Mutual Fire Insurance Company, as defendants in a declaratory judgment action, seeking recognition of the existence of coverage for Mr. Pontzer’s death. It was admitted that Mr. Pontzer had not been in an automobile owned by his company nor was he on company business at the time of his accident. Mr. Pontzer’s endeavor at the time of the accident was purely personal in nature. Nevertheless, the plaintiffs contended that the language in two insurance policies issued to Mr. Pontzer’s employer were poorly drafted and that they should be read to effectively insure Mr. Pontzer against underinsured motorists for as long as he is an employee, regardless of what he was doing at the time of the accident. The Uninsured Motorist/Underinsured Motorist (“UM/UIM”) coverage plaintiffs sought was based on two separate policies, a Commercial Auto Liability policy and an Umbrella/Excess Liability policy. The Stark County Court of Common Pleas dismissed finite. Id. No new Scott-Pontzer claimscan be brought; however, claims having vested in the time before Scott-Pontzer (or more accurately the date on which the policy language was modified in light of Scott-Pontzer) still remain a threat to insurance companies. Id. Excusing the effect of Ohio’s tolling and saving statutes, the window for bringing Scott-Pontzer based UM/UIM exists for fifteen-years from the date of the last policy to use Scott-Pontzer language or approximately until December 2014. See Schulz v. Allstate Ins. Co., 244 N.E.2d 546, 549 (Franklin Co. Ct. of C.P. 1968).

18 710 N.E.2d 1116 (Ohio 1999).
19 Scott-Pontzer, 710 N.E.2d at 1117.
20 Id. at 1117-18.
21 Id.
22 Id.
23 Id. at 1117.
24 See also OHIO REV. CODE ANN. § 3937.18 (West 1994) (current version at OHIO REV. CODE ANN. § 3937.18 (West 2001)) (requiring UM/UIM coverage to be provided in Commercial Auto Insurance policies).
25 Scott-Pontzer, 710 N.E.2d at 1117 (citing the determination of the court of appeals that UM/UIM coverage was not offered in compliance with ORC § 3937.18 with respect to the Umbrella/Excess Liability policy). As mandated by the Ohio Revised Code, failure to offer such coverage resulted in attachment by operation-of-law. Id. at 1120. See also OHIO REV. CODE ANN. § 3937.18(A) (West 1994) (current version at OHIO REV. CODE ANN. § 3937.18 (A)(West 2001) (requiring all motor vehicle liability insurance policies issued within the State of Ohio to offer UM/UIM coverage).
plaintiff's claim upon a motion for summary judgment finding that Mr. Pontzer was not a named insured under the Liberty Mutual policy and was not operating a "covered" automobile.\(^{26}\) In so finding, the court held that no coverage need be provided because no "insureds" under the policy had sustained or made a claim to coverage for bodily injury.\(^{27}\)

On appeal, the Ohio Fifth District Court of Appeals\(^{28}\) affirmed the decision of the trial court upon different grounds.\(^{29}\) Specifically, the court of appeals found that the definition of the insureds under the underinsured motorist policy provision was ambiguous and that Scott-Pontzer, as an employee of Superior Dairy, was an insured.\(^{30}\) However, the court determined that Scott-Pontzer was only an insured under his employer's underinsured motorist policy provision while acting within the scope of his employment.\(^{31}\) Since it had been stipulated that at the time of the accident Mr. Pontzer was not within the scope of his employment, the court held that his Superior Dairy's underinsured motorist coverage did not extend to the accident.\(^{32}\)

Subsequently, the Ohio Supreme Court granted certiorari.\(^{33}\) With Justice Douglas writing on behalf of a sharply divided four-three majority, the supreme court held that Mr. Pontzer was an insured within the definition of the Liberty Mutual policy and that he need not be within the scope of his employment for such coverage to extend.\(^{34}\)

### III. THE OHIO SUPREME COURT'S REASONING

"Into the abyss created by Scott-Pontzer we wade."\(^{35}\)

Insofar as the court's holding in the case of Scott-Pontzer was actually the determination of coverage under two separate insurance policies, a bifurcated analysis of the court's reasoning is warranted.\(^{36}\) The court in Scott-Pontzer chose to extend coverage under two separate insurance policies issued to Mr. Pontzer's employer, Superior Dairy.\(^{37}\) The first of these policies was a

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\(^{26}\) *Scott-Pontzer*, 710 N.E.2d at 1117.

\(^{27}\) Id.


\(^{29}\) Id.

\(^{30}\) *Scott-Pontzer*, 710 N.E.2d at 1117-18.

\(^{31}\) Id.

\(^{32}\) Id. at 1118. (reasoning that by definition, a corporate insurance policy only made coverage available to its employees while in the scope of their employment with the corporation).

\(^{33}\) Id.

\(^{34}\) Id. at 1121. Justices Resnick, Sweeney, and Pfeifer concurred in the opinion. Id. at 1121. Justices Cook, Stratton, and Chief Justice Moyer dissented. Id.


\(^{36}\) Id. at 1118-21.

\(^{37}\) See *Scott-Pontzer*, 710 N.E.2d at 1118-21.
Commercial Auto Liability policy issued by Liberty Fire,\textsuperscript{38} and the second was an Umbrella/Excess Liability Insurance policy underwritten by Liberty Mutual.\textsuperscript{39} Coverage under each of these policies was determined by the application of a two-part test.\textsuperscript{40} This test queried: (1) Was the plaintiff an insured under the policy? (2) If the plaintiff was an insured under the policy, was the extension of coverage to insureds contingent upon them acting within the scope of their employment?\textsuperscript{41}

A. The Commercial Auto Liability Policy

Early in the opinion the court recognized that, with respect to both policies under which coverage was alleged, extension or exclusion of such coverage would be centered upon the interpretation of certain words in the policies.\textsuperscript{42} With respect to the Commercial Auto Liability Insurance policy, the ambiguity the appellate court recognized pertained to whom the policy insured.\textsuperscript{43} Clearly, the Declarations page of the Liberty Fire policy listed the named insured as Superior Dairy, Inc.\textsuperscript{44} However, the policy also contained an Ohio Uninsured Motorist Endorsement which defined, for the purpose of the underinsured motorist coverage, the insured as:

Who is an Insured
1. You.
2. If you are an individual, any family member.
3. Anyone else occupying a covered auto or temporary substitute for a covered auto. The covered auto must be out of service because of its breakdown, repair, servicing, loss, or destruction.
4. Anyone for damages he or she is entitled to recover because of bodily injury sustained by another insured.\textsuperscript{45}

The court began its decision under the premise that interpretation of an

\textsuperscript{38} Id. at 1118-19.
\textsuperscript{39} Id. at 1120.
\textsuperscript{40} Id. at 1118.
\textsuperscript{41} Id.
\textsuperscript{42} Id.
\textsuperscript{43} See Scot-Pontzer, 710 N.E.2d at 1118-19.
\textsuperscript{44} Id. at 1118.
\textsuperscript{45} Id. This language is representative of one of the typical definitions of an “insured” found in ISO Personal Auto Liability Insurance policies although each insurer may use slightly different language. Id. See also Spears v. Smith, 690 N.E.2d 557, 559 (Ohio Ct. App. 1996) (mentioning the similarity of language among ISO form policies); Estate of Fox v. Cont'l Ins., No. 1476, 1999 WL 280290, at *2 (Ohio Ct. App. May 7, 1999) (mentioning that form policies drafted by the Insurance Services Office (ISO) contain similar language which is amended as needed from the base policy for use under the insurance laws of different states).
insurance policy is strictly a contractual matter. Therefore, the court recognized that when provisions of an insurance policy are “reasonably susceptible” to multiple interpretations, the ambiguity must be construed in favor of the insured. In finding the definition for the insured in the Liberty Fire policy susceptible to multiple interpretations, the court stated that the term was required to be “construed liberally in favor of the insured and strictly against the insurer.”

The court’s justification for finding the term “you” ambiguous when referring to the insured within the Uninsured Motorists Endorsement, was primarily based upon Ohio Revised Code (“O.R.C.”) § 3937.18(A), the Ohio General Assembly established that UM/UIM coverage must be offered to the insureds within automobile liability insurance policies. The judicially inferred intent of O.R.C. § 3937.18 is that this coverage is designed to protect persons against uninsured motorists. Using

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46 See Scott-Pontzer, 701 N.E.2d at 1119 (citing Nationwide Mut. Ins. Co. v. Marsh, 472 N.E.2d 1061, 1062 (Ohio 1984), which held that “it is a long-standing principle of law that an insurance policy is a contract, and that the relationship between the insurer and the insured is purely contractual”).
47 Id. (citing Faruque v. Provident Life & Accident Ins. Co., 508 N.E.2d 949, 952 (Ohio 1987)). See also King v. Nationwide Ins. Co., 519 N.E.2d 1380, 1383 (Ohio 1988) (stating, “where provisions of contract of insurance are reasonably susceptible of more than one interpretation, they will be construed strictly against the insurer and liberally in favor of the insured”); Knowlton v. Nationwide Mut. Ins. Co., 670 N.E.2d 1071, 1074 (Ohio Ct. App. 1996) (holding that if “the language of an insurance contract is reasonably susceptible of more than one interpretation, it is ambiguous and will be construed in favor of the insured and against the insurer”).
48 See Scott-Pontzer, 710 N.E.2d at 1119. See also Hacker v. Dickman, 661 N.E.2d 1005, 1006 (Ohio 1996) (holding that “it is only when a provision in a policy is susceptible of more than one reasonable interpretation that an ambiguity exists...which...must be resolved in favor of the insured”).
49 See Scott-Pontzer, 710 N.E.2d at 1119.
50 Id. See also OHIO REV. CODE ANN. § 3937.18(A) (West 1994) (current version at OHIO REV. CODE ANN. § 3937.18(A) (West 2001)) which read:

(A) No automobile liability or motor vehicle liability policy of insurance insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall be delivered or issued for delivery in this state unless with respect to any motor vehicle registered or principally garaged in this state unless both of the following coverages are provided to persons insured under the policy for loss due to bodily injury or death suffered by such person:

1) uninsured motorist coverage...
2) underinsured motorist coverage...

Id.
this template, the court held that limiting underinsured coverage to the corporation was not plausible since corporations act only through employees and agents. 2 The court stated:

It would be contrary to previous dictates of this court for us now to interpret the policy language at issue here as providing underinsured motorist insurance protection solely to a corporation without any regard to persons (citation omitted). Rather, it would be reasonable to conclude that 'you,' while referring to Superior Dairy, also includes Superior’s employees, since a corporation can act only by and through real live persons. 3

Then, the court’s reasoning followed that since corporations cannot drive, occupy motor vehicles, or suffer bodily injury, the uninsured motorist coverage the corporation purchased in the Commercial Auto Liability policies must have been intended for the employees, since without such an extension, it was “meaningless.” 4 The court concluded that Mr. Pontzer was an insured under the Liberty Fire policy for the purposes of underinsured motorist coverage at the time of his death. 5

After finding that Mr. Pontzer was an insured within the uninsured motorist provision of the Liberty Fire policy, the court next addressed whether Mr. Pontzer was covered while outside the scope of his employment. 6

In refusing to recognize the reasoning of the appellate court, the Ohio Supreme Court stated that although parties are free to negotiate exceptions, qualifications, or exemptions to the terms set forth within a policy, a general presumption arises that unless specifically excluded, unstated coverage within an insurance policy is assumed to continue in operation. 7 Finding that the Commercial Auto Liability policy did not specifically exclude coverage to its insureds that were outside of the scope of their employment, the court held that Mr. Pontzer was entitled to the uninsured benefits provided under the Liberty tortfeasor’s lack of liability coverage, would otherwise go uncompensated”); Schaefer v. Allstate Ins. Co., 668 N.E.2d 913, 915 (Ohio 1996) (holding that the UM/UIM statute (O.R.C. § 3937.18(A)) “is remedial legislation [and, therefore,] it must be liberally construed in order to effectuate legislative purpose”); Watts v. Gen. Accident Ins. Co. of Am., 657 N.E.2d 320, 323 (Ohio Ct. App. 1995) (holding that UM/UIM coverage once purchased follows the insured and not the vehicle”); Duskin v. Doe, No. C010626, 2002 WL 1009665, at *2 (Ohio Ct. App. May 17, 2002) (holding that “underinsured motorist coverage is secondary insurance affording compensation to persons injured by the negligent acts of uninsured motorists”). 52 See Scott-Pontzer, 710 N.E.2d at 1119.

53 Id.

54 Id.

55 Id.

56 Id. at 1120.

57 See Home Indem. Co. v. Plymouth, 64 N.E.2d 248, 250 (Ohio 1945). See generally King v. Nationwide Ins. Co., 519 N.E.2d 1380, 1383 (Ohio 1988) (holding as a general rule, “where provisions of contract of insurance are reasonably susceptible of more than one interpretation, they will be construed strictly against the insurer and liberally in favor of the insured”).
Fire Policy.58

B. The Umbrella/Excess Liability Policy

The second issue the court addressed was the existence of coverage under an Umbrella/Excess Liability policy issued to Superior Dairy, and underwritten by Liberty Mutual.59 The court determined that such coverage must also extend under the Umbrella/Excess Liability policy.60 This policy did not contain an Uninsured Motorist Endorsement or any language designating coverage against uninsured motorists.61 Applying the prior case of Duriak v. Globe Am. Cas. Co.,62 the court, however, reaffirmed its decision that Umbrella/Excess Liability Insurance policies are required to conform to O.R.C. § 3937.18.63 Liberty Mutual had not made the requisite offer of uninsured motorist coverage as mandated by O.R.C. § 3937.18(A)(1).64 As a result, well-established Ohio case law dictated that such coverage attached by operation of law.65 Furthermore, because the uninsured motorist coverage in the Umbrella/Excess Liability policy attached as a matter of law, it did not incorporate the definition of an “insured” found within the Commercial Auto Liability policy’s Underinsured Motorist Endorsement.66 As a result of the inability to incorporate the definition of an “insured” from the UM/UIM provision into the Commercial Auto Liability policy, the term in the Umbrella/Excess Liability policy was effectively undefined.67

58 See Scott-Pontzer, 710 N.E.2d at 1120.  
59 Id. at 1120.  
60 Id.  
61 Id.  
62 502 N.E.2d 620 (Ohio 1986).  
63 Scott-Pontzer, 710 N.E.2d at 1120 (citing Duriak, 502 N.E.2d at 622-23, for its holding that “excess liability insurance must comport with [O.]R.C. § 3937.18 and thus [UM/UIM] coverage must be tendered”).  
64 Id. See also Insurance Information Institute, What is in a Basic Auto Policy?, at http://www.iii.org/individuals/auto/basic (last visited Jan. 5, 2003) (acknowledging that as the result of extensive use of form insurance policy language, many insurance companies have found themselves not in compliance with the mandatory offers of uninsured motorist coverage within O.R.C. § 3937.18 and as a result, have suffered the application thereof by operation of law); OHIO REV. CODE ANN. § 3937.18(A)(1) (West 1994) (current version at OHIO REV. CODE ANN. § 3937.18(A)(1) (West 2001)) (requiring insurance policies to offer uninsured motorist coverage).  
65 See Scott-Pontzer, 710 N.E.2d at 1120. See also Abate v. Pioneer Mut. Cas. Co., 258 N.E.2d 429, 430 (Ohio 1970) (stating, “Thus, the only way in which the coverage can be eliminated from the insurance contract is by the overt refusal by the insured to accept it. We therefore conclude that unless the insured expressly rejects such protection, the uninsured motorist coverage is provided for him by operation of law”); Gyori v. Johnston Coca-Cola Bottling Group Inc., 669 N.E.2d 824, 826 (Ohio 1996) (holding that “failure to [offer UM coverage]... results in the insured acquiring UM coverage by operation of law”).  
66 See Scott-Pontzer, 710 N.E.2d at 1120.  
67 Id.
IV. SCOTT-PONTZER LITIGATION CONCERNS IN VARIOUS INSURANCE POLICIES

The holding of Scott-Pontzer has been extended to imply coverage in many more instances than the initial decision reveals. After Scott-Pontzer, plaintiffs in pursuit of UM/UIM coverage typically must evaluate five types of insurance policies: Personal Auto Liability Policy, Commercial Auto Liability Policy, Commercial General Liability Policy, Umbrella/Excess Liability Policy, and Homeowners Policy. Furthermore, because UM/UIM coverage is often drafted to extend to the “resident relatives” of the named insured, examination of these five types of policies must be performed upon all relatives living in the insured’s household. Although a number of common issues vest themselves in several different types of policies, a discussion organized by type of policy rather than by issue is most practical for both practitioners and the purposes of this note.

A. The Personal Auto Liability Insurance Policy

The Personal Auto Liability policy is usually a plaintiff’s first consideration in pursuing UM/UIM litigation because it is the primary method by which Ohio motorists satisfy the state’s requirement of financial responsibility. This section includes a variety of issues that a practitioner must consider in regard to UM/UIM litigation, such as offer/rejection of UM/UIM coverage, applicable versions of O.R.C. § 3937.18, subrogation rights of the insurer, and unidentified tortfeasors. Further issues discussed are contractual statutes of limitations, policy stacking, primary v. secondary insurance coverage of claims, and prejudgment interest.

1. Offer/Rejection of UM/UIM Coverage

First, in an analysis of UM/UIM coverage, it must be determined whether the policy expressly provides such coverage or whether it can be implied. In compliance with O.R.C. § 3937.18, all motor vehicle insurance policies that are

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68 An exhaustive listing of all of the extensions of Scott-Pontzer would be too numerous to list for the purposes of this casenote. Instead, this section provides a skeletal outline of some of the most prominent issues that practitioners need to be aware of in such litigation.

69 See Uzhca v. Derham, No. 19106, 2002 WL 506808, at *1 (Ohio Ct. App. Apr. 5, 2002) (discussing whether an injured party would not only be an insured under their own policies, but also could have potential coverage under the policies of relatives living within their household).

70 See generally OHIO REV. CODE ANN. § 4509.01 (West 1998) (defining Ohio’s financial responsibility requirements).

71 See Scott-Pontzer, 710 N.E.2d at 1120.

72 Exactly what was and was not a motor vehicle has been the subject of debate and confusion in Ohio. Compare West Am. Ins. Co. v. Holman, 720 N.E.2d 212, 214-15 (Ohio Ct. App. 1998) (holding that a race car was a motor vehicle within the definition of ORC § 3937.18) with Hutchison v. Erie Ins. Co., No. 95CA0329, 1997 WL 219236, at *2 (Ohio Ct. App. Mar. 17, 1997) (holding that a horse and buggy is not a motor vehicle). The distinction seemingly can only be drawn on a case-by-case basis. Id. Some Ohio case law seems to support a broader than traditional definition of a “motor vehicle.” See Metro. Prop. & Liab. Ins. Co. v. Kott, 403 N.E.2d 985, 986 (Ohio 1980) (holding that a snowmobile was a motor vehicle within the definition of O.R.C. § 3937.18). See also Drake-Lassie v. State Farm Ins. Co., 719 N.E.2d 64, 66-68 (Ohio Ct. App.
issued within the State of Ohio must offer UM/UIM coverage and provide such coverage unless explicitly rejected by the insured. 73 If the coverage is explicitly provided, in conformity with O.R.C. § 3937.18(A), the analysis ends there. 74 In the event that coverage is not explicitly provided, however, any recovery will be contingent upon the ability to imply coverage. The process of offer/rejection of UM/UIM coverage must conform to O.R.C. § 3739.18. 75 Conformity was interpreted in Linko v. Indemnity Insurance Co., to require the offer to include: 1) a written description of the coverage; 2) a written disclosure of the premiums; 3) a written disclosure of the policy limits; and 4) the names of each insured party. 76 Failure to comply with these criteria results in UM/UIM coverage attaching by operation-of-law. 77 In addition, the offer of UM/UIM coverage must equal the

1998) (holding that a forklift was a motor vehicle within the definition of O.R.C. § 3937.18); Lester v. State Farm Mut. Auto. Ins. Co., 580 N.E.2d 793 (Ohio Ct. App. 1989) (holding that a train was not a motor vehicle for the purpose of medical payments coverage). But see Delli Bovi v. Pac. Indem. Co., 708 N.E.2d 693, 695 (Ohio 1999) (holding that a helicopter was not a motor vehicle within the definition of O.R.C. § 3937.18); Haynes v. Lock, 713 N.E.2d 492, 494 (Ohio Ct. App. 1998) (holding that a bicycle was not a motor vehicle within the definition of O.R.C. § 3937.18); Floch v. Farmers Ins. Group of Cos., 646 N.E.2d 902, 904 (Ohio Ct. App. 1995) (holding that "a motorboat is not a 'motor vehicle' for purposes of [O.R.C. §] 3927.18," which incorporates the definition of motor vehicle as "everything on wheels or runners [which is] propelled or drawn by power other than muscular power or power collected from overhead electric trolley wires"). See also Berry v. Motorist Mut. Ins. Co., 468 N.E.2d 922, 924-25 (Ohio Ct. App. 1983) (holding that a backhoe was not a motor vehicle within the definition of O.R.C. § 3937.18). But see Putka v. Parma, 630 N.E.2d 380, 383 (Ohio Ct. App. 1993) (holding that a backhoe may or may not be a motor vehicle depending upon the purpose for which it is being used). OHIO REV. CODE ANN. § 3937.18(A) (West 2001) (including an expansive definition of what is to be considered a motor vehicle in liability insurance policies following its effective date).

73 OHIO REV. CODE ANN. § 3937.18(A) (West 1994) (current version at OHIO REV. CODE ANN. § 3937.18(A) (2001)).

74 Id. See also Holliman v. Allstate Ins. Co., 715 N.E.2d 532, 536 (Ohio 1999) (holding that unambiguous contractual terms need no judicial interpretation).


76 Linko, 739 N.E.2d at 342.

limits of the liability coverage provided. If the insured chooses to reject the UM/UIM coverage included must be a signed rejection of coverage by the insured, received by the insurer prior to the policy's commencement. If the insured is a corporation, signed rejections from all subsidiary corporations are required before its waiver of UM/UIM coverage will be effective. In Ohio, almost every ISO form automobile liability insurance policy that did not expressly provide UM/UIM coverage failed to meet the criteria for proper rejections, and as a result suffered the potential for not expressly provide UM/UIM coverage included must be a signed rejection of coverage before its waiver of UM/UIM coverage will be effective.

In Ohio, the amount of automobile liability insurance coverage provided by an insurer is less than that required by O.R.C. § 4509.20, such insurer has denied coverage within the meaning of O.R.C. § 3937.18(C) with House Bill (“H.B.”) 261, which requirements set forth by the Ohio Supreme Court in Linko.

See Schumacher v. Kreiner, 725 N.E.2d 1138, 1140 (Ohio 2000). See also Ady v. West Am. Ins. Co., 433 N.E.2d 547, 549 (Ohio 1981) (citing Bartlett v. Nationwide Mut. Ins. Co., 294 N.E.2d 665, 668 (Ohio 1973), which held “[p]rivate parties are without power to insert enforceable provisions in their contracts of insurance which would restrict coverage in a manner contrary to the intent of the [O.R.C. § 3937.18]”; Duriak v. Globe Am. Cas. Co., 502 N.E.2d 620, 622-23 (Ohio 1986) (holding that the requirement of O.R.C. § 3937.18 where coverage against losses caused by uninsured motorists be offered applies to excess insurance as well as to primary insurance); Wolverton v. Vigilant Ins. Co., 367 N.E.2d 1197, 1200 (Ohio Ct. App. 1976) (holding that where the amount of automobile liability insurance coverage provided by an insurer is less than that required by O.R.C. § 4509.20, such insurer has denied coverage within the meaning of O.R.C. § 3937.18). But see Paxson v. Shelby Mut. Ins. Co., No. 90C73, 1991 WL 262879, at *3 (Ohio Ct. App. Dec. 12, 1991) (holding, pursuant to O.R.C. § 3937.18, a request for a lesser amount of uninsured motorist coverage is construed as a “rejection” of coverage and must result in a corresponding reduction in the amount of underinsured motorist coverage as well). See Linko, 739 N.E.2d at 342. See also Gyori, 669 N.E.2d at 827 (holding “that the conclusion pursuant to O.R.C. § 3937.18(C) that a written offer of UM coverage...”); Heritage Mut. Ins. Co. v. Stevens, 699 N.E.2d 1005, 1009 (Summit Co. Ct. of C.P. 1996) (holding that “in the absence of an express rejection of the statute...mandated offer, the insured is automatically entitled to [UM]/[UIM] coverage benefits equivalent to the limits of her liability coverage”).

91 See Linko, 739 N.E.2d at 342-43.

92 See Scott-Pontzer, 710 N.E.2d at 1120. See also Abate, 258 N.E.2d at 430 (“Thus, the only way in which the coverage can be eliminated from the insurance contract is by the overt refusal by the insured to accept it. We therefore conclude that unless the insured expressly rejects such protection, the uninsured motorist coverage is provided for him by operation of law.”); Gyori, 669 N.E.2d at 827 (holding that “failure to [offer UM coverage]... results in the insured acquiring UM coverage by operation of law”). See Scott-Pontzer, 710 N.E.2d at 1120 (citing Demetry v. Kim, 595 N.E.2d 997, 1001 (Ohio Ct. App. 1991)).

created a statutory presumption\(^\text{84}\) that a valid offer of UM/UIM coverage was made if a signed letter of rejection is submitted by the insured.\(^\text{85}\) H.B. 261 has been determined to have effectively superseded the effects of Linko.\(^\text{86}\) Through application of H.B. 261, previously defective UM/UIM rejections, under policies alleged to provide coverage for accidents occurring after September 3, 1997, are to be presumed valid.\(^\text{87}\)

2. Applicable Versions of ORC § 3937.18

Another concern in UM/UIM litigation is the numerous amendments to O.R.C. § 3937.18 with differing versions of the statute determining a party’s ability to recover.\(^\text{88}\) Even before Scott-Pontzer, it was clearly established that the law in effect at the time a contract of insurance was created, not the law in effect at the time of injury, governs insurance claims.\(^\text{89}\)

After Scott-Pontzer, insurers immediately began to attempt to remedy the

A named insured’s or applicant’s rejection of both coverages as offered under division (A) of this section, ... shall be in writing and shall be signed by the named insured or applicant. A named insured’s or applicant’s written, signed rejection of both coverages or offered under division (A) of this section, ... shall create a presumption of an offer of coverages consistent with division (A) of this section...


In enacting this act, it is the intent of the General Assembly to do all of the following: ... (B) Express the public policy of the state to: (4) Eliminate any requirement of a written offer, selection, or rejection form for uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages from any transaction for an insurance policy; ... (E) To supersede the holdings of the Ohio Supreme Court in Linko v. Indemnity Ins. Co. of N. America (2000), 90 Ohio St. 3d 445,...


ambiguities in their policies. In addition, the Ohio General Assembly acted to attempt to mitigate the effects of the Scott-Pontzer decision. Thereafter, the ability of either of these entities to usurp the judicial effect of Scott-Pontzer was contested by plaintiffs. Plaintiffs cited O.R.C. § 3937.31, which guarantees that insurance policies cannot be reduced in size within the two-year time period in which the policies are effective. Ohio case law developing shortly thereafter stated that a reduction or modification of UM/UIM coverage is inconsistent within the two-year preservation period guaranteed by O.R.C. § 3937.31. Subsequently, the case of Wolfe v. Wolfe expanded this theme by stating that any modification to an insurance policy, within the two-year freeze, violated the intent of O.R.C. § 3937.31, and therefore is inapplicable. The Wolfe decision limited an insurer’s ability to amend, add, or remove an endorsement to a policy to a small window opening every two years from the date of the policy’s inception. The Wolfe court also stated that each subsequent two-year renewal of a policy constitutes a new contract to which the two-year freeze applies.

The resulting implication is that amendments to O.R.C. § 3937.18(A) modifying the coverage offered in insurance policies, may not come into force on the statute’s effective date, but may be postponed until the policy is renewed. While Wolfe has obvious effects on Personal Auto Liability Insurance policies,
its applicability to commercial policies is not yet determined.  

3. Subrogation Rights of the Insurer

A further issue in Scott-Pontzer litigation involves settlement with the tortfeasor (or the tortfeasor's insurer) that occurs long before the possibility of UM/UIM coverage from additional policies is discovered. This occurrence is exceedingly dangerous in policies containing a "consent clause." Uninsured and underinsured motorists provisions typically include a consent clause requiring the insured to protect the insurer's right to subrogation against the tortfeasor. In order to satisfy the consent clauses of most insurance contracts, an insured must give timely notice of a tentative settlement to a UM/UIM carrier prior to release of the tortfeasor. This gives the UM/UIM carrier an opportunity to preserve its subrogation rights by paying the insured the amount offered. Where an insured fails to protect the subrogation rights of their insurer, the insurer may attempt to subsequently offset its liability under a UM/UIM provision in the amount of the settlement or alternatively, preclude UM/UIM altogether.


101 See supra note 17 and accompanying text (explaining while Scott-Pontzer-type actions are a fairly recent phenomenon, they can theoretically apply to cases 15 years prior, although this is somewhat limited by policy specific statutes of limitations). But see infra note 113 (citing cases involving statutes of limitations).

102 See McDonald v. Republic-Franklin Ins., 543 N.E.2d 456, 460 (Ohio 1989) (citing Klang v. Am. Family Ins. Group, 398 N.W.2d 49, 49 (Minn. Ct. App. 1986) for the rule that "an insured who settles with and releases an underinsured tortfeasor before giving her insurer notice is precluded from bringing an action against the insurer for underinsured motorist benefits").

103 Id. at 459. This language is standard in many ISO form policies and generally all insurance contracts. Id. See also Weiker v. Motorists Mut. Ins. Co., 694 N.E.2d 966, 968 (Ohio 1998) (citing O.R.C. § 3937.18, which states "the inclusion of a subrogation clause in insurance contracts providing underinsured motorist coverage is a valid and enforceable precondition to the duty to provide such coverage"); supra note 45 and accompanying text (discussing ISO form policies).


105 Id. 

106 Id. See also Hines v. State Farm Ins. Co., 765 N.E.2d 414, 418 (Ohio Ct. App. 2001) (holding that "the lack of impairment to an underinsured motorist (UIM) carrier's subrogation claim because of the tortfeasor's knowledge of the subrogation claim is an affirmative defense to the insured's failure to give prior notice to the insurer of the settlement of the tort claim"). But see Oakar v. Farmers Ins. Co., No. 70726, 1997 WL 186782, at *3 (Ohio Ct. App. Apr. 17, 1997) (citing McDonald v. Republic-Franklin Ins., 543 N.E.2d 456, 460 (Ohio 1989) for the rules that "once notice of a possible settlement is given [an insurer must aid its insured in the preservation of its subrogation rights"); McDonald, 543 N.E.2d at 460 (holding insurer waives its subrogation rights if it does not take appropriate action in a reasonable time after it is notified); Ratliff v. Grange Mut.
4. Unidentified Tortfeasors

An additional problem plaintiffs in *Scott-Pontzer* litigation are occasionally faced with is the inability to locate the alleged tortfeasor which forces the insured to pursue a UM/UIM claim. In such instances the issue of liability is paramount. Since the alleged tortfeasor is not present to rebut the testimony of the UM/UIM claimant, courts typically require some form of independent corroborative evidence to prove that the negligence of the unidentified vehicle was the proximate cause of the accident. Many policies require, as proof of proximate cause, some type of physical contact ("hit-and-run") between the insured and the uninsured motorist. Such a limitation has been held per se, not to contravene the aims of O.R.C. § 3937.18. The requirement of independent third-party corroborative evidence can be satisfied by a witness to the accident, passenger in the accident, or an affirmative defense of another named negligent driver.

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Cas. Co., 691 N.E.2d 1136, 1138 (Ohio Ct. App. 1997) (holding that "both the insurer and insured share the burden of preserving the insured's subrogation rights"); State Farm Mut. Auto. Ins. Co. v. Holcomb, 458 N.E.2d 441, 444-45 (Ohio 1993) (holding that "with respect to a claim under an uninsured motorist provision, an insured's failure to cooperate must prejudice the material rights of the insurer before insured's conduct would warrant cancellation of the policy; to constitute a breach of the cooperation requirement, insured's failure must be material and substantial"); Bakos v. Insura Prop. & Cas. Ins. Co., 709 N.E.2d 175, 181 (Ohio Ct. App. 1997) (stating that an insurer's denial of UM/UIM coverage relieves an insured of a policy's consent clause); Aufdenkamp v. Allstate, No. 98CA007269, 2000 WL 59849, at *3 (Ohio Ct. App. Jan. 19, 2000) (reaffirming *Bakos* stating that a UM/UIM carrier waives its consent clause by indicating to the insured that no coverage is available); Bentley v. Grange Mut. Cas. Ins. Co., 694 N.E.2d 526, 529-30 (Ohio Ct. App. 1997) (holding that appellants' settlement with the tortfeasor "did not effect a forfeiture of appellants' contract rights to UM coverage...because appellant consented to the settlement").


See *Girgis* v. State Farm Mut. Auto Ins. Co., 662 N.E.2d 280, 282 (Ohio 1996) (laying out the corroborative evidence test, which "allows the claim [of an insured] if there is independent third-party evidence that the negligence of an unidentified vehicle was a proximate cause of the accident").

See also *Estate of Baxter* v. Grange Mut. Cas. Co., 597 N.E.2d 1157, 1159-60 (Ohio Ct. App. 1992) (finding that a piece of metal from an unidentified truck constitutes a "hit and run" vehicle for purposes of uninsured motorist coverage when it strikes insured's car and kills the driver); Eaton v. Cincinnati Ins. Co., 578 N.E.2d 873, 874 (Ohio Ct. App. 1989) (holding that UM coverage does not extend to collision caused by oil spilled from an unknown vehicle, because there was no physical contact between the two vehicles). Ohio Rev. Code Ann. § 3937.18(B)(3) currently provides the law for this type of coverage.
5. Contractual Statutes of Limitations

Practitioners bringing Scott-Pontzer claims must also be mindful of contractual modifications to negligence/bodily injury statutes of limitation. Uninsured and underinsured motorists claims are unanimously considered by courts to be contractual in nature and therefore are generally subject to a fifteen-year statute of limitations. Policies, however, are free to establish much shorter limitation periods. Policies requiring claims to be filed within one year are not in conflict with either Ohio’s two-year bodily injury statute of limitations, Ohio’s fifteen-year contract statute of limitations, and are not a violation of public policy. In the event the timely notice of a claim is not given to the insurer, coverage may be precluded. Preclusion of coverage for failure to give timely notice of a claim may require the insurer to show that actual prejudice resulted. Also, failure to give timely notice of a claim creates a rebuttable presumption of prejudice to the insurer.

The Ohio Supreme Court recently solidified the liquidity with respect to timely notice of claims in the case of Goodyear Tire & Rubber Co. v. Aetna Casualty & Surety Co. In Goodyear, the court stated that, “[n]otice provisions
in an insurance contract are conditions precedent to coverage, so an insured’s failure to give its insurer notice in a timely fashion bars coverage.” The court’s holding in this case will undoubtedly limit older Scott-Pontzer claims.

6. Policy Stacking

Plaintiffs need to be aware in Scott-Pontzer litigation that the ability to sack policies may have changed for certain instances. The stacking of UM/UIM policy benefits contained within several applicable insurance policies was at one time a method by which plaintiff’s could recover additional funds as the result of a UM/UIM loss. The ability to “stack” such policies now seems to be clearly governed by Senate Bill (“S.B.”) 20, which was passed specifically to supersede Savoie v. Grange Mut. Ins. Co. The supreme court in Savoie read O.R.C. § 3937.18(G) to preclude the ability to stack intrafamily UM/UIM policies, but not interfamily policies and permitted recovery under a stacked

1. When an insurer’s denial of underinsured motorist coverage is premised on the insured’s breach of a prompt-notice provision in a policy of insurance, the insurer is relieved of the obligation to provide coverage if it is prejudiced by the insured’s unreasonable delay in giving notice. An insured’s unreasonable delay in giving notice is presumed prejudicial to the insurer absent evidence to the contrary.

2. When an insurer’s denial of underinsured motorist coverage is premised on the insured’s breach of a consent-to-settle or other subrogation-related provision in a policy of insurance, the insurer is relieved of the obligation to provide coverage if it is prejudiced by the failure to protect its subrogation rights. An insured’s breach of such a provision is presumed prejudicial to the insurer absent evidence to the contrary.

Id.; National Indem. Co. v. Ryerson, Case No. 2002-1206, slip op. at 1 (S.D. Ohio 2003) (certifying similar questions to those of Ferrando which could possibly extend the courts holding with regard to the notice requirement).

122 Id.
123 Id.
124 Id.
125 See infra notes 127-30.

It is the intent of the General Assembly in amending division (G) of section 3937.18 of the Revised Code to supersede the effect of the holding in Savoie v. Grange Mut. Ins. Co. (citation omitted), relative to the stacking of insurance coverages ... to permit any motor vehicle insurance policy that includes uninsured motorist coverage and underinsured motorist coverage to include terms and conditions to preclude any and all stacking of such coverages, including interfamily and intrafamily stacking.”

129 Id.
130 Id.
series of UM/UIM policies. 129

With the passage of S.B. 20, the stacking of UM/UIM policies in any form can be prohibited. 130 However, S.B. 20 is not retroactive so there exists a window of opportunity for plaintiffs attempting to recover for UM/UIM loses falling between October 1, 1993, and October 1, 1995. 131 The statute of limitations being fifteen years for contract claims 132 should for all effective purposes close on October 1, 2010, if not sooner, 133 and terminate this loophole. It is necessary to note that currently there is no legislative prohibition on the stacking of liability coverage, although it may be specifically limited within an individual policy. 134

7. Primary vs. Secondary Insurance Coverage Clauses

Additionally, in reference to UM/UIM claims under Personal Auto Liability Insurance policies, the application of “other insurance clauses” creates a further concern in Scott-Pontzer claims. 135 These clauses essentially state that UM/UIM coverage provided under that policy may only be utilized in excess (secondary) to other policies providing the same coverage (primary). 136 In instances where two or more policies contain other insurance clauses, the clauses essentially cancel each other out and each insurer remains responsible for their pro-rata share of coverage. 137 Such clauses do, however, annunciate the importance of

129 See Savoie, 620 N.E.2d at 814-15. See also Dairyland Ins. Co. v. Finch, 513 N.E.2d 1324, 1330 (Ohio 1987) (holding that “public policy does not prevent the issuance and enforcement of an automobile liability insurance policy containing a reasonable exclusionary clause, within the uninsured motorist provision, prohibiting intrafamilial recovery of damages against the issuer of the policy”).
130 See supra note 127 (quoting the language of S.B. 20). See also Wallace v. Balint, 761 N.E.2d 598, 602 (Ohio 2002) (finding that “[O.]RC. § 3937.18(G)(2) permits insurers to provide anti-stacking language in their policies” and that UM coverage is accessible to each claimant under his or her own personal auto policy without triggering an anti-stacking clause); Lemble, 768 N.E.2d at 1200 (holding that O.R.C. § 3937.18 as amended by S.B. 20 to permit anti-stacking clauses in automobile insurance policies that include UM/UIM coverage and are not against public policy).
131 See generally Ross v. Ins. Grp. of Co., 695 N.E.2d 732, 736 (Ohio 1998) (holding that “when a contract for automobile liability insurance is entered into or renewed, the statutory law in effect at the time of contracting or renewal defines the scope of the [UIM] coverage”).
132 See OHIO REV. CODE ANN. § 2305.06 (West 1993).
133 Id. (adding fifteen years to the last date of the stacking window on October 1, 1995).
135 Id. at *4.
136 Id. at *3. These clauses are often found in all types of form ISO contracts. See Legal Information Institute, Great Northern Insurance Company and Linn Howard Selby v. Mount Vernon Fire Insurance Company, at http://www.law.cornell.edu/ny/ctap/199_0009.htm (last visited Jan. 5, 2003). See also supra note 45 and cases cited therein (discussing language in ISO form policies).

[an] ‘other insurance’ clause of a passenger’s insurance is ineffective to prevent recovery under the passenger’s own uninsured motorist clause, for which coverage he has paid the premium ... the insurance
naming all possible UM/UIM carriers in the suit, since failure to name an indispensable party may result in dismissal of all claims.\textsuperscript{138}

8. Pre-Judgment Interest

A final consideration for practitioners, both plaintiff and defendant, is the possibility of pre-judgment interest. Pre-judgment interest on UM/UIM claims is possible under the Ohio Revised Code\textsuperscript{139} and has been supported generally in cases interpreting the Code.\textsuperscript{140} With respect to pre-judgment interest on UM/UIM claims, some courts have held that such interest should be awarded if the insured's damages exceed the UM/UIM policy limits, but not when the damages alleged by the insured are less than the policy limits. Thereafter it was initially unclear whether contractually, a pre-judgment interest award could force an insurer to pay beyond the policy limits.\textsuperscript{141} This question seems to have been answered affirmatively in the Ohio Supreme Court's decision in \textit{Miller v. Gunckle}, forcing payment in excess of policy limits.\textsuperscript{142}

B. The Commercial Auto Liability Policy

Another means for a plaintiff to pursue UM/UIM litigation is under a Commercial Auto Liability Policy. Issues to be considered under this type of policy include the scope of coverage extended to employees, Sexton based claims/extent of injuries, employers immune from O.R.C. § 3937.18, and choice

providing coverage to the owner, being primary in such instance, and available to all the occupants of the car, should be pro-rated among all the injured occupants according to their loss to the extent of its limits.


\textsuperscript{138} FED. R. CIV. P. 19.

\textsuperscript{139} See OHIO REV. CODE ANN. § 1343.03 (West 2001) (permitting the possibility of pre-judgment interest awards).

\textsuperscript{140} See \textit{Hogg v. Zanesville Canal & Mfg. Co.}, 5 Ohio 410, 424 (1832) (justifying the concept of pre-judgment interest). See also \textit{Royal Elec. Constr. Corp. v. Ohio State Univ.}, 652 N.E.2d 687, 692 (Ohio 1995) (holding pre-judgment interest is necessary to compensate a party for the time it is deprived of money to which it is rightfully entitled). \textit{See generally Moskovitz v. Mount Sinai Med. Ctr.}, 635 N.E.2d 331, 346 (Ohio 1994) (citing cases recognizing a common law right to pre-judgment interest dating back to the 1800s as a way in which to encourage prompt settlement of claims, to prevent prolonged litigation, and generally to make injured parties whole).

\textsuperscript{141} See \textit{Miller v. Gunckle}, 775 N.E.2d 475, 480-81 (Ohio 2002) (juxtaposing the holding of \textit{Bowman} and abrogating it).

\textsuperscript{142} Id. (holding that for the same justification traditionally supporting the award of pre-judgment interest such justification should not be frustrated by policy limits and therefore the insured's award should be set up to the policy limit plus any pre-judgment interest on that award). See also \textit{Myers v. Central Ins. Co.}, 695 N.E.2d 49, 55 (Ohio Ct. App. 1997) (holding that "with regard to awarding prejudgment interest, the coverage owed in a UM case becomes due and payable when it is determined by the court, arbitrator, or by agreement of the parties that such a loss is covered").
of law decisions.

1. Scope of Coverage Extended to Employees

Practitioners must be aware of the possibility that an employee is covered under their employer's policy.\textsuperscript{143} The premise of the argument for alleging employee UM/UIM coverage under an employer's Commercial Auto Liability Insurance policy, arises when the insured corporation is ambiguously defined as "you."\textsuperscript{144} The court in \textit{Scott-Pontzer} stated in this instance that "you" could be construed to mean either the corporation or employees of the corporation, therefore creating an ambiguity that must be resolved in favor of coverage.\textsuperscript{145} In finding employees to be among the "you," subsequent courts extended insured status under the second prong of the "[w]ho is an insured" definition, "your resident relatives," to the family members of the insured living in his/her household.\textsuperscript{146}

Many Commercial Auto Liability Insurance policies explicitly provide UM/UIM coverage.\textsuperscript{147} In the event that they do not, the arguments pertaining to compliance with O.R.C. § 3937.18, the supreme court's decision in \textit{Linko}, and the H.B. 261 amendment arise.\textsuperscript{148}

Commercial Auto Liability Insurance policies may also contain language limiting coverage to employees acting within the scope of their employment.\textsuperscript{149} However, such limiting language is only applicable to the policy language in effect at the time of inception.\textsuperscript{150} Should non-compliance with UM/UIM offer/rejection requirements result in attachment of such coverage by operation of law, this limiting language is rendered ineffective as to such coverage.\textsuperscript{151}

2. Sexton Based Claims/Extent of Injuries

Another concern in \textit{Scott-Pontzer} litigation under this type of policy is the extent of injuries required for a claim. From the supreme court's decision in \textit{Sexton v. State Farm Mut. Auto Ins. Co.},\textsuperscript{152} \textit{Scott-Pontzer} coverage can be

\begin{flushleft}
\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{148} Although this coverage is entirely at the option of the insured, some employers view the small increase in premiums for such coverage as economically sound. Id.
\textsuperscript{149} See discussion supra Part V.1.A.
\textsuperscript{150} See \textit{Scott-Pontzer}, 710 N.E.2d at 1120.
\textsuperscript{151} Id.
\textsuperscript{152} See also Demetry v. Kim, 595 N.E.2d 997, 1000-01 (Ohio Ct. App. 1991) (stating "our review has failed to uncover a case in which liability exclusionary language was imposed upon underinsured coverage implied by law"); Decker v. CNA Ins. Co., 585 N.E.2d 884, 888 (Ohio Ct. App. 1990) (ruling that "it has long been a governing rule of contractual interpretation that what is not clearly excluded from the operation of such contract is included in the operation thereof").
\end{flushleft}
extended one step further by stating that the insureds (resident relatives of the employee of the commercial insurance carrier) under a UM/UIM claim need not suffer from bodily injury, sickness, or disease before they may pursue a claim for UM/UIM coverage. The court held that policy restrictions limiting coverage to insured’s suffering from bodily injury, sickness, or disease were unenforceable because they proposed limitations on UM/UIM recovery contrary to the intent of the General Assembly in O.R.C. § 3937.18(A). At first interpretation, this decision effectively opened the door for all permissible loss of consortium claims by all of the resident relatives of the injured party.

Years after Sexton was decided, the General Assembly amended ORC § 3937.18 in S.B. 20. It was originally thought that S.B. 20 may have overturned the rule established in Sexton, but subsequent case law has demonstrated Sexton’s continued viability. It was determined in Moore v. State Auto. Mut. Ins. Co., that the S.B. 20 amendment to ORC § 3937.18 was ambiguous as to whether bodily injury was a prerequisite to entitlement of UM/UIM coverage. The supreme court determined that it was not the intent of the General Assembly to supersede Sexton with S.B. 20. The issue, however, is still unresolved in that several Ohio courts have ignored the supreme court’s decision in Moore.

See Sexton, 433 N.E.2d at 558-59.
154 Id. at 559. See also OHIO REV. CODE ANN. § 3937.18(A) (West 1994) (current version at OHIO REV. CODE ANN. § 3937.18(A) (West 2001)) This Section read:

Uninsured (1) and underinsured (2) motorist coverage ... shall be in an amount of coverage equivalent to the automobile liability or motor vehicle liability coverage and shall provide protection for ... bodily injury, sickness, or disease, including death, suffered by any person under the policy.

Sexton, 433 N.E.2d at 559-60.
155 Id. at 559-60.
158 Id.
159 Id. at 101.
160 Id.

It is the intent of the General Assembly in amending division (A) of section 3937.18 of the Revised Code to supersede the holdings of the Ohio Supreme Court in Sexton v. State Farm Mut. Auto. Ins. Co. (1982).

Id. S. 267 also made other significant changes to Scott-Pontzer litigation including modifying the two-year renewal period as set forth in Wolfe, modifying the definition of an "uninsured motor vehicle" in O.R.C. § 3937.18(K)(2) to include vehicles furnished for the regular use of the named insured, and tweaking the UM/UIM offer requirements of O.R.C. § 3937.18(C) to permit insurers to avoid re-offering UM/UIM insurance to a policy with continuing coverage. Still other changes, too numerous to list herein were made in S. 267. Practitioners would be well served obtaining a
3. Employers’ Immunity from O.R.C. § 3937.18

When filing Scott-Pontzer claims, practitioners need to be aware that some employers are immune from such litigation. While Linko permits the attachment of UM/UIM coverage by operation-of-law against insurers failing to comply with O.R.C. § 3937.18, certain types of employers are explicitly exempt from the purview of Ohio’s financial responsibility laws. Self-insured employers in compliance with financial responsibility laws or employers satisfying financial responsibility requirements through a financial responsibility bond, are among the exempt employers. Because satisfaction of the financial responsibility requirements through self-insurance, or the purchase of a financial responsibility bond may be beyond the budget capabilities of smaller employers, a much cheaper but equally effective strategy has recently been employed. The use of inexpensive “fronting policies” (policies in which the liability coverage to be provided is equal to the per claim deductible) has become a favorable alternative of smaller employers. Fronting policies require only a minimal premium technically satisfying the financial responsibility requirements, but not exposing the insurer to the real possibility of liability. Fronting policies, despite obviously being a purely evasive scheme, have nevertheless

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163 Id.

164 See Grange Mut. Cas. Co., 487 N.E.2d at 314. See also Tyler v. Kelley, 648 N.E.2d 881, 882, 885 (Ohio Ct. App. 1994) (holding that a self-insured car rental agency, “by offering and extending liability coverage to its customer...brought itself within the requirements of the uninsured motorist statute by engaging in the equivalent conduct of a liability insurer”).

165 See Marshall v. ACE USA, No. CA2001-09-083, 2002 WL 1009470, at *1 (Ohio Ct. App. May 20, 2002). See generally Dalton v. Wilson, No. 01AP-1014, 2002 WL 1813508, at *8-9 (Ohio Ct. App. Aug. 8, 2002) (citing DeWalt v. State Farm Ins. Co., No. 96CV001173 slip op. at 1 (Lake Co. Ct. C.P. 1997), for the ruling that the fronting policy in question, did not shift the risk of loss to the insurer, and...[required the insured to]...assume certain administrative costs...and holding that although there was no case law on the issue of whether entities ‘effectively self-insured’ were required to comply with [O.]R.C. § 3937.18, there was case law holding that entities who had filed certificates of self-insurance (Synder) and entities who had posted financial responsibility bonds (Grange) were not required to comply with O.R.C. § 3937.18...and extended the logic in those two cases ‘one step further’ to conclude that a self-insurer in a practical sense is not required to comply with O.R.C. § 3937.18.


167 Id. Fronting policies are said to create little or no liability because any claim made under this type of policy will be offset to the policy limits by an equally valued claim deductible. Id.
been determined to be beyond the reach of O.R.C. § 3937.18.168

If a plaintiff’s employer is a governmental entity, additional policy analysis must occur.169 Ohio courts have specified that political subdivisions are within the purview of O.R.C. § 3937.18.170 When these organizations engage in what is commonly referred to as a “municipal risk pool” or “multi-county risk sharing,”171 however, courts have determined that no true insurance policy is created and therefore compliance with O.R.C. § 3937.18 is not mandatory.172 Cities and counties are among the organizations commonly participating in risk sharing programs.173

4. Choice-of-law

A final consideration with Scott-Pontzer litigation under Commercial Auto Liability policies is the choice of law decisions. If it is determined that UM/UIM coverage was not offered to the insured, but should have been, and therefore must attach by operation-of-law, it still remains to be seen whether an employee is an insured under his employer’s UM/UIM policy.174 The Scott-Pontzer decision goes a long way in extending this coverage to the employees of Ohio employers.175 The situation may arise, however, where the plaintiff’s employer is an entity not found within Ohio.176 These employers, through their insurance companies, often raise the defense that Ohio law does not govern the plaintiff’s UM/UIM contract claim, and thus Scott-Pontzer is inapplicable.177 As a result, in

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169 See infra notes 172-73 and cases cited therein (explaining that the effectiveness of the decision in Scott-Pontzer in obtaining additional coverage may differ if the employer of the injured party is a government entity).

170 See Jennings v. Dayton, 682 N.E.2d 1070, 1072-74 (Ohio Ct. App. 1996) (holding that self-insurance, including that held by political subdivisions, "is the equivalent of no insurance for the purposes of the distribution of uninsured motorist benefits in accordance with [O.]R.C. § 3937.18").

171 See OHIO REV. CODE ANN. § 2744.081 (West 1994) (setting forth the factors of a qualifying municipal risk sharing program).


174 See Scott-Pontzer v. Liberty Mut. Fire Ins. Co., 710 N.E.2d 1116, 1118-19 (Ohio 1999). See also Mitzen, 770 N.E.2d at 101-02 (holding, pursuant to Scott-Pontzer, that employees of a school district and their family members qualified as insureds under the school’s commercial automobile policy where the policy had the same definition of “insured” found in Scott-Pontzer). But see Nationwide Agribusiness Ins. Co. v. Rosshong, No. 01-4009, 2002 WL 1478572 (Ohio Ct. App. Sept. 5, 2002) (refusing to extend Scott-Pontzer to a school board policy). This issue may shortly be decided definitively in the case of Allen v. Johnson, 775 N.E.2d 863 (Ohio 2002), currently before the Ohio Supreme Court.

175 See Scott-Pontzer, 710 N.E.2d at 1118-19.


177 Id. See also Ohayon v. Safeco Ins. Co., 747 N.E.2d 206, 208 (Ohio 2001) (containing plaintiff’s argument that Pennsylvania law should govern under Ohio’s choice-of-law rules).
the case of out-of-state employers, two jurisdictions may have an interest in the case and therefore a choice-of-law analysis is necessary before coverage can be established. The Ohio Supreme Court recently addressed this issue and found that the Restatement of Conflict of Laws provides the factors necessary to make a choice-of-law determination. The Second Restatement of Conflicts § 188(2) states that:

In the absence of an effective choice of law by the parties...the contacts to be taken into account...to determine the law applicable to an issue include:

1. the place of contracting,
2. the place of negotiation of the contract,
3. the place of performance of the contract,
4. the location of the subject matter of the contract, and
5. the domicile, residence, nationality, place of incorporation and place of business of the parties.

These elements, although not necessarily given equal weight, must be balanced against one another in attempt to find "the state [that] has the most significant relationship to the transaction and the parties." Additionally, with respect to Commercial Auto Liability policies, many of the topics discussed herein regarding Personal Auto Liability policies will also be relevant.

C. Commercial General Liability Policy

Still plaintiffs may be able to bring Scott-Pontzer litigation under Commercial Liability policies, paying close attention to non-coverage of motor vehicles and the exceptions to this rule.

1. Noncoverage for Motor Vehicles

The basis for seeking UM/UIM coverage under Commercial General Liability Insurance policies is that these policies initially exclude liability coverage for "motor vehicles," but then proceed to undefined the term "motor

\[^{178}\text{See Moore, 2002 WL 31418864, at * 2. This analysis is necessary to determine which state's law should be applied so the existence of coverage, if any, can be established.}\]
\[^{179}\text{See Ohayon, 747 N.E.2d at 209 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971)).}\]
\[^{180}\text{RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971).}\]
\[^{181}\text{Id.}\]
\[^{182}\text{See discussion supra Part IV.1.}\]
vehicle" by exempting from exclusion certain classifications of vehicles. In so doing, it is argued that a motor vehicle insurance policy in limited form is created and thus the criteria of O.R.C. § 3937.18(A) must be met or otherwise requires coverage to attach by operation-of-law.

2. Exceptions: Hired/Non-owned/Parked Autos

Practitioners should be concerned about three common ways to be exempt from the exclusion: “non-owned/ hired autos,” “autos while being parked,” or “autos used for transportation of mobile equipment.” It is argued that given these exceptions, an automobile liability insurance policy is created which must conform to O.R.C. § 3937.18(A). The Ohio Supreme Court found merit in this argument and initially established precedent for extension of coverage in these instances. However, H.B. 261 amended ORC § 3937.18(L) to include a definition of a motor vehicle liability insurance policy. Under H.B. 261, insurance policies must serve as proof of financial responsibility and thus must either specifically identify the vehicles covered under the policy or be Umbrella/Excess Liability Insurance policies. In at least one instance since H.B. 261, an Ohio appellate court has held that the “parked auto” exception was not sufficient to create an automobile liability insurance policy within the definition of O.R.C. § 3937.18(L). Post-H.B. 261 litigation has not yet yielded a definitive statement regarding whether these non-owned/hired autos or autos used for transportation of mobile equipment clauses create automobile liability insurance policies in

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184 Id. at 1163-64 (holding “where motor vehicle liability coverage is provided, even in limited form, uninsured/underinsured coverage must be provided”). See also Ohio Rev. Code Ann. § 3937.18(A) (West 1994) (current version at Ohio Rev. Code Ann. § 3937.18(A) (West 2001)); discussion supra Part IV.A.
185 See, e.g., Selander, 709 N.E.2d at 1162-64 (discussing non-owned/hired auto exceptions).
186 See generally Ohio Rev. Code Ann. § 3937.18(A) (West 1997) (requiring all motor vehicle liability insurance policies to offer UM/UIM coverage).
187 See Selander, 709 N.E.2d at 1162-64.
188 Ohio Rev. Code Ann. § 3937.18(L) (West 1997) (current version at Ohio Rev. Code Ann. § 3937.18(L) (West 2001)) which defines a motor vehicle policy as either of the following:

1. Any policy of insurance that serves as proof of financial responsibility, as proof of financial responsibility is defined by division (K) of section 4509.01 of the Revised Code, for owners or operators of the motor vehicles specifically identified in the policy of insurance;
2. Any umbrella liability policy of insurance written as excess over one or more policies described in division ... (1) of this section.

Id. See also H.B. 261, 122d Gen. Assem., Reg. Sess. (Ohio 1997) (explaining how the change affects the new version of the statute).
189 Id.
limited form. Additionally, with respect to Commercial General Liability policies, many of the topics discussed herein regarding Personal Auto Liability and Commercial Auto Liability policies will also be relevant.

D. The Umbrella/Excess Liability Policy

Under Ohio law, "Umbrella [Excess Liability] policies are different from simple excess policies because they ... fill gaps in coverage, both vertically[,] by providing 'additional coverage above the limits of the insured's underlying primary insurance ... [and] ... horizontal[ly] by provid[ing] primary coverage for situations where the underlying insurance provides no coverage at all." Under precedent established in Scott-Pontzer, for the same reasons that ambiguous contractual terms extended coverage to employees of a corporation under the corporation's Commercial Auto Liability policy, such ambiguous contractual terms are alleged to also extend coverage under corporate Umbrella/Excess Liability Insurance policies. Where an Umbrella/Excess Liability policy contains no ambiguous terms, however, Scott-Pontzer does not apply.

Umbrella/Excess Liability Insurance policies are specifically defined by O.R.C. § 3937.18(L) to be included within the definition of a motor vehicle liability insurance policy, and therefore must comply with the UM/UIM offer/rejection requirements. Failure to comply with these requirements result in such provisions attaching by operation-of-law.

Before H.B. 261, the common law treated Umbrella/Excess Liability Insurance policies as motor vehicle liability insurance policies in limited form

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192 See discussion supra Parts IV.1. and IV.2.


197 See Gyori v. Johnston Coca-Cola Bottling Group Inc., 669 N.E.2d 824, 826 (Ohio 1996) (holding "the mandates of [O.]R.C. § 3937.18 apply to providers of excess coverage as well as providers of primary liability coverage").
thereby requiring compliance with O.R.C. § 3937.18(A) and (C). In either instance, such policies were required to comply with the UM/UIM offer/rejection requirements as later laid out in the Linko case. Many Umbrella/Excess Liability Insurance policies included language limiting coverage to employees acting within the scope of their employment. However, such limiting language is only applicable to the policy itself and therefore cannot be extended to additional coverage that has attached by operation-of-law.

Additionally, with respect to Umbrella/Excess Liability policies, many of the topics discussed herein regarding Personal Auto Liability, Commercial Auto Liability, and Commercial General Liability policies will also be relevant.

E. The Homeowners Policy

A final way a practitioner might bring a Scott-Pontzer claim is under a Homeowners Insurance policy. The grounds for seeking UM/UIM coverage under Homeowners Insurance policies are very similar to the argument for establishing coverage under Commercial General Liability policies. It is argued that Homeowners Insurance policies, by specifically excluding coverage of motor vehicles but then undefining the term motor vehicle by exempting from exclusion certain classifications of vehicles, creates a motor vehicle insurance policy in limited form, subject to the UM/UIM requirements of O.R.C. § 3937.18(A). Since it was not anticipated that Homeowners Insurance policies would be classified as motor vehicle liability insurance policies, even in limited form, none of these policies conform with O.R.C. § 3937.18(A), and therefore the potential for exposure to attachment of UM/UIM coverage exists. Such a
problem occurs most frequently with recreational vehicles exceptions, resident employee exceptions, and dual residency.

1. The Recreational Vehicle Exception

Plaintiffs must know that there is potential to obtain coverage through the recreational motor vehicle exception. The original theory in alleging UM/UIM coverage under the "recreational motor vehicle" exception, is that by exempting "recreational motor vehicles" from a policy's general motor vehicle exclusion, a motor vehicle insurance policy was created in limited form. Since this motor vehicle insurance policy did not comply with O.R.C. § 3937.18, UM/UIM coverage was said to attach. While early case law seemed to support this proposition, the Ohio General Assembly enacted H.B. 261 specifically to prevent such coverage from attaching. Furthermore, House Bill 261 amended O.R.C. § 3937.18(L) to include a definition of a motor vehicle liability insurance policy. Under H.B. 261, motor vehicle liability insurance policies must either serve as proof of financial responsibility, specifically identify the vehicles covered under the policy, or be Umbrella/Excess Liability Insurance policies. However, Homeowners Insurance policies have not been construed to be Umbrella/Excess liability policies.

Post-H.B. 261 case law shows that the H.B. 261 amendment forces the presumption that when a Homeowners Insurance policy provides limited liability coverage to vehicles specifically identified as not being subject to motor vehicle registration laws or designed for highway use, such a policy is not deemed to be a motor vehicle liability insurance policy, and thus is not subject to O.R.C. § 3937.18. As a result, the loophole for establishing UM/UIM benefits under the recreational vehicle exception seems to have been closed.

206 See OHIO REV. CODE ANN. § 4501.01(B) (West 1953) (defining a recreational motor vehicle as within the definition of a motor vehicle within the statute). See also supra note 72 and accompanying text (comparing how courts have defined the term "motor vehicle").
208 See Goettenmoeller, 1996 WL 362089, at *4. See also OHIO REV. CODE ANN. § 3937.18(A), (C) (listing requirements for insurance policies to meet for UM/UIM coverage).
211 See OHIO REV. CODE ANN. § 3937.18 (West 1997). See also supra note 189 (quoting the provision).
215 See Davidson, 744 N.E.2d at 718-19.
2. The Resident Employee Exception

The "resident employee" exception is the most recent attempt by plaintiffs to gain access to UM/UIM benefits through Homeowners Insurance policies.\(^{216}\) It is argued that by providing coverage for "resident employees" of the insured's household, these policies create a motor vehicle insurance policy in limited form.\(^{217}\) Under O.R.C. § 3937.18, insurers must comply with the terms therein or suffer UM/UIM attachment by operation-of-law.\(^{218}\) Although effectively terminating the possibility of attachment of UM/UIM coverage by operation-of-law to the "recreational vehicle" exception, the court in Davidson chose not to address this possibility under the "resident employee" exception.\(^{219}\) Post-Davidson case law inconsistently extended coverage in some instances and denied it in others.\(^{220}\) However, on December 13, 2002 the Ohio Supreme Court in a unanimous opinion in the case of Hiler v. State Farm Fire & Cas. Co.\(^{221}\) put to rest the issue by holding that the incidental automobile coverage provided in Homeowners policies as insufficient to trigger any type of entitlement to UM/UIM benefits under O.R.C. § 3937.18.\(^{222}\) Whether Homeowners Insurance policies providing express motor vehicle coverage instead of mere incidental motor vehicle coverage will be bound by O.R.C. § 3937.18 remains to be seen but may be determined shortly in the case of Roeder v. Grange Mut. Cas. Co., currently before the Ohio Supreme Court.\(^{223}\)

\(^{217}\) Id. at *5. See also OHIO REV. CODE ANN. § 3937.18 (West 1994).
\(^{219}\) Davidson, 744 N.E.2d at 716.
\(^{220}\) See Davis v. Shelby Ins. Co., 760 N.E.2d 855, 860 (Ohio Ct. App. 2001) (extending the Davidson reasoning to preclude UM/UIM coverage under the resident employee exception). See also Lemke v. Hall, No. L-01-1436, 2002 WL 737061, at *1 (Ohio Ct. App. Apr. 26, 2002) (holding that a "[H]omeowners [I]nsurance policy did not fit under the definition of "automobile liability or motor vehicle liability policy of insurance" in [O.]R.C. § 3937.18(L) and, thus, there was no UIM coverage available to [insureds]"); Ruiz v. Rygalski, No. L-01-1363, 2002 WL 471707, at *1 (Ohio Ct. App. Mar. 29, 2002) (holding that a homeowners policy that provided an exception to its exclusion of coverage for injuries due to vehicles, for residence employees injured during the course of employment, did not transform the policy into a "motor vehicle liability policy" and therefore did not include UM coverage); Hillyer v. State Farm Fire & Cas. Co., No 2001-1955, 2002 WL31746236, at * 3 (Ohio 2001) (finding that the resident employee exception did not give rise to a motor vehicle policy subject to the UM/UIM requirements of O.R.C. § 3937.18). But see Cincinnati Ins. Co. v. Torok, No. 00-CV-147, slip op. at 1 (Jefferson Co. Ct. C.P. 2001) (finding coverage to extend under the "resident employee" exception).
\(^{221}\) 780 N.E.2d 262 (2002).
\(^{222}\) Id. at 265.
\(^{223}\) 774 N.E.2d 763 (Ohio 2002).
3. Dual Residency

The final issue that may arise with respect to Homeowners Insurance policies, is the concept of dual residency. In certain circumstances, the named insured or resident relatives of the named insured may argue that UM/UIM coverage is available under two separate Homeowners Insurance policies. These issues most frequently arise in cases of either minor children or divorced parents or those serving in the military. Ohio recognizes the concept of dual residency. In so doing, it acknowledges that the term “resident,” does not include any requirement of exclusivity. Therefore, persons can be residents of more than one location and insured under more than one Homeowners Insurance policy. To simplify the determination of dual residency several relevant factors have been developed, including: (1) the individual’s regular return to the household; (2) documents reflecting the address; (3) location of personal possessions; (4) location of financial transactions; (5) the establishment of other addresses; (6) and the amount of time spent at each residence. If dual residency is established, “other insurance” clauses may become relevant.

Additionally, with respect to Homeowners Insurance policies, many of the topics discussed herein regarding Personal Auto Liability, Commercial Auto Liability, Commercial General Liability, and Umbrella/Excess Liability policies will also be relevant.

V. ANALYSIS

Scott-Pontzer and its progeny were the result of finding a contractual term ambiguous. Courts have the authority to determine if a term is ambiguous and

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224 See Farmers Ins. of Columbus, Inc. v. Taylor, 528 N.E.2d 968, 968 (Ohio Ct. App. 1987).
225 Id. at 970. This would be done in attempt to locate possible additional coverage. Id.
228 See Taylor, 528 N.E.2d at 970.
229 Id.
230 Id.
232 See Taylor, 528 N.E.2d at 969-70 (holding that a minor who lives with her mother a majority of the time but spends between 162 and 172 days of the year living with her father may be considered a resident of both households and where the uninsured motorist coverage purchased by the father of the child covers a resident of the household without defining that term, the child residing with her father for regular periods of time is covered).
233 See discussion supra Part IV.1.G.
234 See discussion supra Parts IV.1., IV.2., V.3., and IV.4.
to construe that term against its drafter. On the other hand, courts may not enlarge or diminish the meaning of unambiguous terms.

A primary conflict at issue in the supreme court's holding in Scott-Pontzer is that a party's contractual intent should control contract disputes versus that in the case of ambiguity, especially in the case of adhesion contracts, ambiguous terms should be construed against the drafter. The fiction of an insured's ability to "bargain" over the language of their insurance policies has been recognized by courts in recent years. Thus, in light of the insurance companies' superior bargaining power, it has become clearly accepted and established law to interpret any ambiguities in insurance policies strictly in favor of the insured. This interpretation is to be "made from the standpoint of someone not trained in the law or insurance business." This does not mean that insurance policies must be completely free from error. Punctuation or spelling errors alone have been held insufficient to create an ambiguity.

It is also well-litigated Ohio law that courts, with respect to undefined or ambiguous terms in an insurance policy, generally afford these terms their ordinary and plain meanings consistent with the intent of the parties. It was upon this division where the conflict arose in Scott-Pontzer.

Ultimately, the decision in Scott-Pontzer falls on one side of the fence upon which courts and scholars alike have been sitting. The ultimate question becomes, in situations in which the parties' intent concerning the meaning of an ambiguous term is clear, must the term be construed strictly against its drafter if doing so is contrary to the parties' intent? Scott-Pontzer answered this question in

236 See O'Neill v. German, 97 N.E.2d 8, 11 (Ohio 1951) (holding ambiguous terms in a contract are to be interpreted against the party that drafted the term). See also RESTATEMENT (SECOND) OF CONTRACTS § 206 (1979) (creating the presumption that "in choosing among the reasonable meanings of a promise or agreement or a term thereof, [t]he meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds").


238 See DeMatteis v. American Comty. Mut. Ins. Co., 616 N.E.2d 1208, 1210-11 (Ohio Ct. App. 1992). See also New Amsterdam Cas. Co. v. Johnson, 110 N.E. 475, 475-76 (Ohio 1914) (acknowledging that in the case of ambiguity in insurance policies the terms should be construed against the insurance company but such interpretation should not be "unnatural" and no "forced meaning should be given [to] words and phrases"); Home Indem. Co. v. Plymouth, 64 N.E.2d 248, 250 (Ohio 1945) (holding that "courts universally hold that polices of insurance which are in language selected by the insurer and which are reasonably open to different interpretation, will be construed most favorably to the insured").


240 Id.


242 See, e.g., Randolph v. Fireman's Fund Ins. Co., 124 N.W.2d 528, 531 (Ohio 1963) (holding the insured may not rely upon punctuation alone to create an ambiguity within the policy).

243 Id.

244 S


246 Id.
the affirmative. In Scott-Pontzer, the court admitted that its interpretation of the policies may yield results that the parties may not have bargained for or intended. In fact, the court all but conceded that its construction of the coverage within the two policies was neither bargained for nor intended by either of the parties. The court, however, declined to “guess at the intent” of the parties with respect to ambiguous contractual terms. In Scott-Pontzer, Liberty Mutual/Fire had exclusive control over the language and terms of the insurance policy it issued. With this control, it nevertheless issued an insurance policy to Scott-Pontzer’s employer, Superior Dairy, purporting to provide UM/UIM coverage to Superior Dairy’s spouse and its resident relatives. The absurdity of this proposition in light of the insurer’s absolute control over the policy language is what presumably drove the court to find the policy language ambiguous. It is easy to sympathize with the victims of uninsured and underinsured motorists, who are a growing population. This is due to the failure of Ohio’s minimum insurance liability requirements to keep up with the increasing cost of motor vehicle accidents. Ohio has the fifth lowest requirements for liability insurance in the country. Discrediting the limit in Florida, which has no-fault insurance, Ohio drops to fourth lowest. Of course the flip side to this is that

247 Id. at 1120-21.
248 Id.
249 Id.
250 Id. at 1121.
251 Scott-Pontzer, 710 N.E.2d at 1119-20.
252 Id. at 1118-19.
253 Id. at 1120-21.
254 See Insurance Information Institute, Can I Drive Legally Without Insurance?, at http://www.iii.org/individuals/auto/a/canidrive. (last visited Jan. 5, 2003) (citing Ohio's minimum automobile liability insurance requirements are $12,500 per person for bodily injuries, $25,000 per accident for bodily injuries, and $7,500 for property damage caused as opposed to Kentucky's $25,000 per person for bodily injuries, $50,000 per accident for bodily injuries, and $10,000 per property damage caused).
255 Id. But see Allstate, Auto Coverage Guide, at http://www.allstate.com/tools/CovGuide/Questions.asp (last visited Jan. 5, 2003) (stating that the average motor vehicle bodily injury liability coverage insured Ohioans carry is $100,000.00, the average motor vehicle property damage liability coverage insured Ohioans carry is $50,000.00, and the average amount of uninsured motorist coverage insured Ohioans carry is $100,000.00).
256 Referring to Ohio’s minimum financial responsibility requirements of $12,500/$25,000 per accident. See Insurance Information Institute, Can I Drive Legally Without Insurance?, at http://www.iii.org/individuals/auto/a/canidrive. (last visited Jan. 5, 2003). In this situation Ohio falls behind only Florida, Oklahoma, Louisiana, and Mississippi. Id.
257 See Insurance Information Institute, What are the Driving Laws in My State?, at http://www.iii.org/individuals/auto/a/stateautolaws (last visited Jan 5, 2003). No-Fault Insurance is simply put, an attempt to take the fault out of auto accident liability. Id. The idea is to have accident victims’ medical expenses and wage loss paid by their own insurance companies, regardless of who is to blame for the accident, thereby eliminating the costs and delays of legal actions. Id. Exceptions apply, but generally states adopting no-fault insurance bar some amount of tort liability of the parties to an accident. Id. See also Great Am. Ins. Co. v. Queen, 300 N.W.2d 895 (Mich. 1980) (discussing no-fault insurance in depth). Currently the states subscribing to some variation of No-Fault Automobile Insurance are Hawaii, Kansas, Kentucky, Florida, Massachusetts, Michigan, Minnesota, New Jersey, North Dakota, New York, Pennsylvania, and Utah.
Ohio enjoys a lower premium rate than the nation's average. As a result, automobile accidents involving persons who have not voluntarily elected to carry higher liability limits are likely to leave the victims unable to achieve full compensation. A natural result of this is then to seek additional coverage to supplement the tortfeasor's settlement.

However, insurance companies operating on a budget are likely to pass along the cost of additional coverage for which they did not factor into its premium quote to the insured. The result is ultimately that the burden of the injured party's loss is redistributed to the insured society.

Although the Ohio Supreme Court's decision in Scott-Pontzer is arguably one way in which to interpret the language of the policy contained therein, a few other courts around the country deciding the issue have chosen not to follow such an approach. These courts have held that where strictly construing an ambiguous term against an insurer directly contravenes the intent of the parties with respect to that term, the parties' intent shall control. Indeed, even Ohio's own legislature seems to have rejected the supreme court's Scott-Pontzer decision in its latest amendment to O.R.C. § 3937.18. The Ohio legislature's amendment is a direct attempt to supersede much of the law, which has resulted from Scott-Pontzer and its progeny. The amendments change these statutes to eliminate the requirement of the mandatory offer by insurance companies of uninsured and underinsured motorist coverage and to provide that certain policies may include such UM/UIM coverage; to include an allowable exclusion, under an employer's insurance policy, for an employee who is not acting within the scope of his or her employment; and, most importantly, to include in such uninsured and underinsured policies a three-year statute of limitations after the date of the accident, rather than the usual fifteen-year statute of limitations.

260 See Grayman v. Dept. of Health and Human Res., 498 S.E.2d 12, 15 (W. Va. 1997). Insofar as once the policy limits of the tortfeasor are exhausted that tortfeasor is often rendered judgment proof. Id.
261 This is effectuated through increased premiums to all customers.
262 See Seaco Ins. Co. v. Davis-Irish, 300 F.3d 84, 87-88 (1st Cir. 2002) (rejecting the conclusion reached by the Ohio Supreme Court in the case of Scott-Pontzer in the case of calling the decision an "anomaly" and "the result of a sharply divided court"). See also Gorham v. Guidant Mut. Ins. Co., 80 F. Supp. 2d 540, 543 (D. Md. 2000) (declining to adopt Scott-Pontzer and construe the term "you" strictly against the insurer).
263 See Seaco, 300 F.3d at 87-88.
266 See OHIO REV. CODE ANN. § 3937.18(A).
267 See OHIO REV. CODE ANN. § 3937.18(F)(4).
relative to breach of a written contract.\textsuperscript{268}

\section*{VI. CONCLUSION}

It seems difficult to believe that the Supreme Court could have foreseen the effect its decision in \textit{Scott-Pontzer} would have upon insurance litigation within the State of Ohio. The decision, although highly controversial and possibly politically motivated to some extent, cannot be classified as illogical. On its face it was simply a case of construing ambiguous contractual terms against the drafter.\textsuperscript{269} It was only in combination with extensive use of the ambiguous contractual language throughout the insurance industry, and a statutory provision which fed off this ambiguity and provided coverage where parties did not intend for such coverage to exist, that the decision in \textit{Scott-Pontzer} was able to snowball into what has become one of the most litigated issues in the history of Ohio jurisprudence. Perhaps the most succinct and certainly the most comical opinion pertaining to complex \textit{Scott-Pontzer} litigation was issued by Judge Niehaus of the Hamilton County Court of Common Pleas.\textsuperscript{270} When ruling on a plaintiff's motion for summary judgment against six alleged UM/UIM defendants, the court stated in a one-line opinion, "\textit{[b]y operation-of-law Scott-Pontzer is inescapable by any means.}"\textsuperscript{271}

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\item \textsuperscript{268} See \textsc{Ohio Rev. Code Ann.} \textsection 3937.18(H).
\item \textsuperscript{269} See \textit{Scott-Pontzer v. Liberty Mut. Fire Ins. Co.}, 710 N.E.2d 1116 (Ohio 1999).
\item \textsuperscript{270} See Noble v. Shaw, No. A0105693, slip op. at 1 (Hamilton Co. Ct. C.P. 2002).
\item \textsuperscript{271} Id.
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