

### A TOOL FROM OUR OWN GARAGE: USING ARTICLE I, SECTION 8 OF THE OREGON CONSTITUTION AS A MEANS FOR ADDRESSING THE IMPLICATIONS OF *MINNESOTA REPUBLICAN PARTY V. WHITE*

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#### I. INTRODUCTION

Oregon selects its judiciary through a system of open, competitive judicial elections. Since 1931, those elections have been nonpartisan in the sense that ballots do not indicate a candidate's party affiliation.<sup>1</sup> Like other states with elective systems of judicial selection, Oregon has adopted rules of judicial conduct that regulate the campaign activities of both judges and lawyer-candidates. The validity of Oregon's rules of judicial conduct presents a timely topic in light of the United States Supreme Court's decision in *Republican Party of Minnesota v. White*.<sup>2</sup> Although *White* has provided an opportunity to consider broad issues related to judicial elections, this Comment addresses a more imminent issue existing through state law. Specifically, this Comment examines whether Oregon's present rules of judicial conduct are valid under Article I, section 8 of the Oregon Constitution.<sup>3</sup> In response to that issue, this Comment applies Article I, section 8 to Rules 4-101 and 4-102 of the Oregon Code of Judicial Conduct (the Judicial Code)<sup>4</sup> and suggests possible revisions.

Before proceeding to a more detailed discussion, the context and text of Rules 4-101 and 4-102 deserve introduction. Rules 4-101 and 4-102 directly relate to the manner in which a candidate may express himself or herself during a contest for judicial office. The Rules

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1. 1931 OR. LAWS ch. 347, § 3.

2. 536 U.S. 765 (2002). In *White*, the Court invalidated a Minnesota rule of judicial conduct that prohibited judicial candidates from announcing their views on controversial legal and political issues. The Court applied exacting scrutiny after concluding that the Minnesota rule affected political expression. According to that balancing standard, the Court concluded that general notions of "impartiality" did not represent a governmental interest sufficient to justify the broad prohibition contained in the Minnesota rule. Moreover, the Court concluded that, even if sufficient interests supported application of the rule in some situations, the rule failed for both overbreadth and underinclusiveness. Although limited to the specific Minnesota rule at issue, *White* has raised concern that limitations upon judicial candidates' expressive rights are generally invalid under the First Amendment.

3. One might argue that the Oregon Supreme Court has settled this issue in *In re Fadeley*, 802 P.2d 31 (Or. 1990). As discussed below, this Comment rests on the premise that *In re Fadeley* was wrongly decided.

4. OREGON CODE OF JUDICIAL CONDUCT JR 4-101, 102 (1996, as amended through Aug. 2002), available at [http://www.osbar.org/2practice/rulesregs/cjc.htm#\\_toc525443966](http://www.osbar.org/2practice/rulesregs/cjc.htm#_toc525443966) (last visited June 26, 2003) [hereinafter Judicial Code].

extend to agents, become effective upon commencement of a candidacy, and apply to both incumbent judges and lawyer candidates.<sup>5</sup> As evident from their text, Rules 4-101 and 4-102 reflect the larger purposes of the Judicial Code, including the maintenance of an impartial and independent judiciary.<sup>6</sup> Rule 4-101 provides:

A judge shall not knowingly

- (1) make a public statement in support of the election or defeat of any candidate for a nonjudicial public office or to promote or influence the passage or defeat of laws or regulations at any level of government, or
- (2) contribute or solicit funds, services or property to elect or defeat any candidate for a nonjudicial public office or to promote or influence the passage or defeat of laws or regulations at any level of government, or
- (3) lend the judge's name in support of an action, by any person or group, to elect or defeat any candidate for a nonjudicial public office or to promote or influence the passage or defeat of laws or regulations at any level of government, if, in doing (1), (2) or (3) above, the judge:
  - (A) Creates a reasonable doubt about the judge's impartiality toward persons, organizations or factual issues that would likely come before the court on which the judge serves, including, but not limited to, circumstances that require the judge's disqualification under JR 2-106.
  - (B) Supports in the judge's official capacity, a cause other than one pertaining to the legal system, legal education, the improvement of the law, the integrity of the judicial process, the administration of justice, or court administration, including judicial benefits. This subsection does not limit the ability of a judge to join, pay dues to, and participate in activities of any professional association or organization, which activities may include lobbying for judicial benefits such as salary and retirement.
  - (C) Represents that the judge making the public statement speaks on behalf of the judicial branch of government unless the judge has been authorized to do so.<sup>7</sup>

Rule 4-102 provides:

With respect to any election or appointment for judicial public office, a judicial candidate shall not knowingly:

- (A) Misrepresent a judicial candidate's identity, qualifications, present position, education, experience or other fact.
- (B) Make pledges or promises of conduct in office that could inhibit or compromise the faithful, impartial and diligent performance of the duties of the office.
- (C) Publicly identify the judicial candidate, for the purpose of election, as a member of a political party other than by registering to vote or as allowed by ORS 249.105.
- (D) Personally solicit campaign contributions in money or in kind, but a judicial candidate may establish one or more committees to obtain and manage finances, including contributions, and pay expenses to promote the judicial candidate's election.
- (E) Use or permit the use of campaign contributions for the private benefit of the judicial candidate except as may be specifically authorized by law.<sup>8</sup>

This Comment draws upon the text and context of Rules 4-101 and 4-102 as it examines

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5. Judicial Code, *supra* note 4. The rules apply to agents through Rule 4-103. Under Rule 4-104, a person becomes a candidate upon filing with the Secretary of State, by making a public statement, or, in situations involving appointments, by filing an application with the Governor. *Id.* Through the Oregon Code of Professional Responsibility, Rules 4-101 through 4-104 apply to both incumbent judges and lawyer-candidates. MODEL CODE OF PROF'L RESPONSIBILITY DR 8-103(A) (2003).

6. See Judicial Code, *supra* note 4, at JR-1-101(a) (a judge must observe high standards of conduct to preserve "the integrity, impartiality, and independence" of the judiciary).

7. Judicial Code, *supra* note 4, at JR 4-101.

8. Judicial Code, *supra* note 4, at JR 4-102.

those rules under Article I, section 8 of the Oregon Constitution. The Comment proceeds in three parts. First, it discusses the present standard governing application of Article I, section 8 and the policies underlying that standard. Second, the Comment applies Article I, section 8 to the rules and suggests possible revisions. Third, it explains why an Article I, section 8 analysis satisfies the requirements of the First Amendment, in addition to the requirements of the Oregon Constitution.