Pay No Attention to That Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians*

Michael R. Diminot†

If we fail to meet the challenge that is posed by recent developments in judicial elections, we risk severe erosion of the role of state courts in the American system of justice, and of the rule of law.

—Steering Committee of the National Symposium on Judicial Campaign Conduct and the First Amendment

[T]he evils we experience flow from the excess of democracy.

—Elbridge Gerry, delegate to the Philadelphia Convention in 1787

I. INTRODUCTION

For years, political scientists, historians, pundits, and casual observers.

* The title paraphrases the Wizard of Oz's desperate attempt to conceal his humanity from Dorothy and her fellow travelers. See THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939).
† Law Clerk to the Honorable Laurence H. Silberman, United States Court of Appeals for the District of Columbia Circuit (2003-2004). Harvard Law School, J.D. 2001; State University of New York at Buffalo, B.A. 1998. The views expressed in this Article are those of the author and should not be taken to reflect the views of Judge Silberman. For their helpful comments on earlier drafts, the author wishes to thank Lisa DellAquila, Richard Fallon, Heather Gerken, Joel Gora, Erik Jaffe, Andrew Kaufman, David Markus, Roy Schotland, and Gabriel Torres. Frances Murray and Lisa Bohannon are due great thanks for their patience and generous help in obtaining needed reference materials. Finally, for her love and sacrifices (not to mention her editorial assistance), my wife, Laura, deserves endless devotion.


have decried the degree to which campaigning politicians avoid discussions of “the issues.” Elections for executive and legislative offices have devolved into “personality contests,” in which candidates are concerned primarily with avoiding the alienation of constituencies, rather than with the forceful advocacy of ideas. Voters have reacted negatively to the substantive vacuum in modern campaigning and turnout at the polls has suffered accordingly.

In the context of judicial elections, however, it is not the candidates who are to blame for campaigns devoid of debate on policy issues. Instead, judicial candidates are often merely following the requirements of their states, which make and enforce ethics rules governing the subjects candidates for judicial office are permitted to discuss. These restrictions are often passed to ensure the continued impartiality and independence of the judiciary, protecting the court system from the degradation that comes with politics—particularly partisan politics. The thrust of regulations of judicial campaigns is typically a fear of “too much democracy,” i.e., the involvement of everyday voters in the making of judicial policy. Proponents of limitations on judicial campaigns view voter

6. See, e.g., BOB NEWHART, Abe Lincoln Versus Madison Avenue, on BOB NEWHART BUTTON DOWN CONCERT (Nick at Nite Records 1997) (“[O]ccasionally, you’ll write a routine, and perform a routine, that is more viable thirty years later than it was at the time you wrote it. And I think that’s true of this routine.”). The act, poking fun at the ability of aides to “package” Presidents, was originally performed in 1960. See BOB NEWHART, Abe Lincoln vs. Madison Avenue, on THE BUTTON-DOWN MIND OF BOB NEWHART (Warner Bros. 1960).


10. Scholars, notably political scientist Samuel Huntington, have also questioned the wisdom of allowing everyday voters to select legislative leaders, because those scholars believe voters are incapable of making—or unwilling to make—necessary sacrifices to fund programs. See SAMUEL P. HUNTINGTON, AMERICAN POLITICS: THE PROMISE OF DISHARMONY 102-06 (1981). Huntington
participation (at least insofar as the participation is linked to the voters' views on legal issues) as something to be avoided, lest the judicial candidate feel obligated to decide cases with a view toward the decisions' likely effects on the election returns. Speech restrictions in the name of protecting the polity and the judiciary from themselves, however, raise important First Amendment questions that the Supreme Court has only begun to answer.

At the conclusion of the October 2001 Term, in Republican Party v. White, the Supreme Court held, by a 5-4 vote, that states may not prohibit judicial candidates from announcing their views on disputed legal or political issues. The majority, however, explicitly eschewed the notion that their holding "assert[s] [or implies] that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office." The four dissenting Justices would have drawn a sharp distinction between races for political offices, in which representatives are to serve the interests and desires of the electorate, and races for judicial office, in which, according to their view, the judge's duty is to serve the law independent of political pressures. In the view of the dissenters, the electorate should be privy to a discussion of issues in races for legislative and executive offices, but not for judicial offices, because the voters' positions on the issues are supposed to matter only when electing a "representative."

The question this Article seeks to answer is whether the First Amendment can maintain a distinction between the two types of races. Specifically, I discuss whether the governmental interests in maintaining an independent, impartial judiciary and in protecting the appearance of the judiciary as independent and impartial can provide justification for the suppression of speech, where such suppression would be held impermissible in elections for other offices. I conclude that it cannot. My recommendation, therefore, is to subject restrictions on legislative, executive, and judicial campaign speech to the same exacting scrutiny.

The invalidation of speech restrictions on judicial candidates follows from settled, rudimentary premises of First Amendment law. First, the protections of the First Amendment are at their zenith when the exercise of political speech is abridged, and require the application of strict scrutiny. Second, to survive

---

11. The First Amendment provides that “Congress shall make no law ... abridging the freedom of speech, or of the press.” U.S. CONST. amend. I. The First Amendment has been “incorporated” and is routinely applied against the states through the Due Process Clause of the Fourteenth Amendment. See Fiske v. Kansas, 274 U.S. 380, 386-87 (1927); Gitlow v. New York, 268 U.S. 652, 666 (1925).
13. Id. at 783.
14. See id. at 805-07 (Ginsburg, J., dissenting).
strict scrutiny, restrictions on the fundamental right of free speech must be narrowly tailored to serve a compelling governmental interest. Third, it is the function of voters—not the government—to determine what constitute “issues . . . worth discussing or debating” in political campaigns. Fourth, the proper corrective for speech promoting improper ideas is “more speech” promoting the proper ideas, and not the “enforced silence” of the misguided or misinformed speaker.

From these principles, it is clear that the Supreme Court’s invalidation, in Brown v. Hartlage, of restrictions on speech in state legislative campaigns was correct, and limitations on the speech of political candidates are unconstitutional. All that remains is to apply the same protection to judicial candidates. I attempt to accomplish that goal by establishing that in practice judges behave like politicians, and (under some theories) state court judges should behave like politicians, adjusting the law to suit their policy judgments. As this Article will demonstrate, both groups of elected officials make policy, both are influenced by their personal predispositions, and both mold their decisions to conform to the desires of the electorate. Accordingly, there is no adequate basis on which to deprive judicial candidates of the same First Amendment protection granted to candidates for other offices.

In Part II of this Article, I discuss the history of the independence of the judicial branch.
judiciary in the United States. I discuss the choice made by the Framers of the Constitution for an independent judiciary, and the later choice among some states for a judiciary that is accountable to the electorate. I conclude that the states selecting their judges via popular election have deliberately chosen to avoid the political insulation and independence from the populace that is the hallmark of Article III of the U.S. Constitution. They therefore have accepted the sometimes degrading aspects of political campaigns as the price of exerting electoral control over their judges.

Part III analyzes the treatments given to the First Amendment in judicial elections by courts and commentators, paying particular attention to the governmental interests put forth as justifications for stringent restrictions on the speech rights of the judiciary.

In Part IV I critique those interests. Section A argues that the protection of the independence and impartiality of the judiciary provides an insufficient justification for judicial candidate speech restrictions, as litigants have no right to have their cases adjudicated before judges free of that kind of "bias." Section B argues that protecting the appearance of the judiciary objectively applying fixed rules of law also fails to justify speech restrictions, as it consists of nothing less than an attempt to deceive the voters into believing an empirically false conception of the judiciary. I further argue that the influence of policy considerations on judges' decisions (demonstrated by considerable political science scholarship), or even the mere possibility of such influence, makes it vital for the electorate to be able to determine which candidate is most likely to decide cases in the manner preferred by the voters.

I continue, in Part V, by discussing the judiciary's attempt to increase its legitimacy by decreasing both the content of judicial campaigns and voter participation in judicial elections. I argue that allowing public debate of legal issues in the context of judicial elections promotes popular sovereignty by allowing voters to shape the public policies of their state by selecting judges with whom they agree. I am therefore relatively unsympathetic to claims that elections need to be controlled so that voters may be prevented from promoting any particular vision of justice.

Part VI is a brief conclusion, in which I discuss speech restrictions that are constitutional. Specifically, I note that states can proscribe the advocacy of illegality, and accordingly can punish judges for pledging to refuse to implement governing law. Pledges to refine precedent, or to give governing law one of several reasonable interpretations, however, do not approach illegality, and therefore must be protected under the First Amendment.
II. THE HISTORY OF AMERICAN JUDICIAL INDEPENDENCE AND JUDICIAL ELECTIONS

A. The Founding

The protection of judicial independence is a foundational principle—perhaps the foundational principle—of Article III. By granting judges tenure “during good Behaviour” and providing that their salaries “shall not be diminished during their Continuance in Office,” the Constitution ensures (or attempts to ensure) that federal judges need not consider the congressional or presidential reaction to any particular ruling. By providing for appointment to the federal courts through nomination by the President and confirmation by the Senate, the Constitution guarantees not only that federal judges will be exempt from running for office, but also that the most representative body of the United States government, the House of Representatives, will have no official role in the appointment process. The Constitution thus provides for judicial independence in two ways: independence from other departments of government, and independence from the populace.

The Framers insulated the judiciary in this way for much the same reason that modern judges and scholars resist issue-oriented judicial campaigns: to encourage judges to decide cases based on the facts and law, instead of basing decisions on future job prospects. The dependence of judges on the whim of...
Judges as Politicians

other governmental actors had been the situation in the colonies, and it was one of the problems about which the Declaration of Independence complained. Protested the Declaration, King George III "has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."30

Sentiment was so strong in favor of judicial independence at the Constitutional Convention that life tenure and salary protection for judges were unanimously agreed upon with little debate.31 In the ratification debates, however, there was considerable controversy over the extent to which the federal courts should be independent of the people and the other branches. Alexander Hamilton, in *Federalist* 78, defended the Constitution's choice to insulate judges from political influence. Hamilton thought life tenure for judges to be "indispensable,"32 "one of the most valuable of the modern improvements in the practice of government . . . an excellent barrier to the encroachments and oppressions of the representative body."33 Indeed, "[j]udges who relied on the legislature for appointment and salary were liable to be tossed about by every veering gale of politicks and could hardly possess dignity and independence."34 Such job security was "the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws."35 Thus, in terms echoed through the following centuries, Hamilton celebrated judges' life tenure as vital to the protection of individual rights and the neutral application of the Constitution.37

---

Anti-Federalists, though wary of the Supreme Court's power of judicial review, and therefore desiring that judges and their decisions be subject to review by the Congress, were nonetheless in agreement with Hamilton that judicial election was dangerously unwise. The accountability that the Anti-Federalists desired was indirect accountability, to be effected through the thoughtful judgment of Congress rather than by the hasty and ill-considered actions of the masses.

This indirect accountability was a distinctive feature of the Constitution’s design for choosing members of the Senate and the President. Like judges, both Senators and Presidents were to be selected by officials who were in turn elected by the people. The original Constitution, therefore, did not reserve “decisional” independence for the judiciary, though only judges were given their positions for life. Senators and Presidents were to be independent in like manner and for the same reasons the judiciary was to be independent: the input of the people into the system of governance was seen as destructive. The lengthy six-year senatorial term (with election by the state legislatures), and the electoral college were designed to allow the Senators and Presidents to act without feeling accountable to the people for each of their decisions. Strict accountability in those bodies would defeat the very purpose of separated powers: providing a defense of liberty in the face of a faction’s clamor for action. Similarly, the electoral college, which is charged with selecting the President, is itself independent. The states are powerless to penalize (at least

38. Hamilton’s discourse in The Federalist long foreshadowed the Supreme Court’s decision in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 173-80 (1803). See THE FEDERALIST NO. 78, at 468 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“[W]henever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.”); CLINTON ROSSITER, ALEXANDER HAMILTON AND THE CONSTITUTION 95-98 (1964); see also Wood, supra note 34, at 552 (noting that many, if not all, delegates to the Constitutional Convention believed the Supreme Court would exercise the power of judicial review over the constitutionality of statutes).


40. See THE ANTIFEDERALIST NO. 79, at 225 (“[I]t would be improper that the judicial [department] should be elective, because their business requires . . . that they may maintain firmness and steadiness in their decisions.”).


42. See THE FEDERALIST NO. 47, at 303 (James Madison) (Clinton Rossiter ed., 1961); THE FEDERALIST NO. 62, at 379 (James Madison) (“The necessity of a senate is not less indicated by the propensity of all single and numerous assemblies to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions.”); THE FEDERALIST NO. 63, at 384 (James Madison) (arguing that the Senate would serve “as a defense to the people against their own temporary errors and delusions”).

43. See McPherson, 146 U.S. at 36 (“Doubtless it was supposed that the electors would exercise a reasonable independence and fair judgment in the selection of the Chief Executive, but experience soon demonstrated that . . . they were . . . simply to register the will of the appointing power in respect of a particular candidate.”); THE FEDERALIST NO. 68, at 412 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that the electoral college would be constituted by “men most capable of analyzing the qualities adapted to the station and acting under circumstances favorable to deliberation, and to a
formally) the elector who changes his mind at the meeting of the electors. Nevertheless, the electors have never been forbidden from announcing their views on who should be President, and in practice the electors are pledged to vote for a particular individual. No elector would be given serious consideration today if he refused to answer questions as to his views on politics or as to which candidate he preferred for the presidency, because voters consider the views of the potential electors to be important indicators of the electors’ performance in office.

This short recounting of the political theory behind the Constitution should serve to demonstrate that the prevailing wisdom at the Constitutional Convention called for independence in more than the judiciary. In fact, little can be clearer from the Constitution’s original design and from the Federalist than the Framers’ disdain for democracy. While pure democracy is a mechanism for enacting into law the impulses of the masses (or “the confusion of a multitude”), James Madison extolled the Constitution for controlling those impulses, and in so doing, “the original Constitution reflected a particularly elite conception of democratic politics.” The President and the Senate were also independent of the people and were to govern without

judicious combination of all the reasons and inducements which were proper to govern their choice”).

44. See CONGRESSIONAL QUARTERLY, PRESIDENTIAL ELECTIONS SINCE 1789, at 157 (Carolyn Goldinger ed., 5th ed. 1991). Senator McConnell notes that although many states have statutes purporting to demand electors’ adherence to their pledges, “some do not have penalties attached to that mandate, and it is not quite clear that these requirements, if tested, could meet constitutional muster.” Mitch McConnell, Introduction to SECURING DEMOCRACY: WHY WE HAVE AN ELECTORAL COLLEGE, at xiii, xix (Gary L. Gregg II ed., 2001).

45. See, e.g., ROBERT A. LISTON, POLITICS FROM PRECINCT TO PRESIDENCY 15-16 (1968).


49. See, e.g., The FEDERALIST No. 49, at 316 (James Madison) (“The [members of the judiciary], by the mode of their appointment, as well as by the nature and permanency of it, are too far removed from the people to share much in their prepossessions.”). Federalist 10 is particularly noteworthy for its condemnation of democracy, noting that democratic governments “have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths.” The FEDERALIST No. 10, at 81 (James Madison).

being bound by their desires, yet any restriction on presidential or senatorial candidates' right to speak would have been forcefully condemned by most as inconsistent with the First Amendment. Though electioneering by politicians was viewed at the time of the founding—similar to the way some states today treat issue-oriented campaigning by judges—as a debasement of the dignity of the legislature and a corruption of the freedom and purity of elections, there was never any question that candidates could run that sort of dishonorable campaign if they so chose. It seems clear that the First Amendment would prohibit states from banning speech by potential electors, ostensibly to protect the deliberative process of the electoral college and protect the presidential election from "devolving" into a contest over issues. When voters wish to base their votes on a certain criterion, the government may not instruct them that such a consideration is illegitimate.

B. States' Adoption of Judicial Elections

Despite having the benefit of the Framers' lesson on the importance of limiting governmental—and particularly judicial—accountability, most of the states rejected it. Georgia began electing some of its judges in 1812, and other states soon followed suit. Mississippi's 1832 Constitution required the election of all its judges. From 1846 to 1860, nineteen states adopted constitutions providing for judicial elections. At present, a clear majority of states—thirty-nine—elect some or all of their judges.

51. See The Federalist No. 71, at 432 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("When . . . the interests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardians of those interests to withstand the temporary delusion in order to give them time and opportunity for more cool and sedate reflection."). See generally Hannah Pitkin, The Concept of Representation (1967) (discussing theories of how responsive representatives should be); Edmund Burke, Speech to the Electors of Bristol (Nov. 3, 1774), http://press-pubs.uchicago.edu/founders/documents/v1ch13s7.html (last visited May 5, 2003) ("Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion.").


53. J.R. Pole, Political Representation in England and the Origins of the American Republic 165 (1966); see also id. at 151 ("Issues seldom entered elections, and even when they did it was often agreed that the natural leaders were the best men to entrust with the decisions.").


55. See The Council of State Governments, The Book of the States 137-39 (2000). The figure includes states that elect judges by partisan and nonpartisan ballots, as well as those that use retention elections. It does not include those states that use elections as the means of selecting only lower echelon judges, such as probate court judges.
The adoption of judicial elections from 1846 to 1860, as historian Kermit Hall has demonstrated, was the result of contention between three positions represented at state constitutional conventions. "Conservatives" sought to maintain an appointive judiciary that would be independent of popular influence. In their view, "[p]opular democracy in the selection process... threatened to subject judges to the whim of the people and the manipulation of party leaders, to breed contempt for the judicial process, and to hasten the day when nonlawyers would preside on the bench." It was these conservatives of a century and a half ago that clung to the notion of a judiciary as one that simply discovered and applied law as "a science." Popular election was to be avoided as an interference with the judge's duty to find the law that existed independent of his personal desires and those of the populace.

"Radicals" were incensed with the decisions made by the conservative judiciary of the time and urged the adoption of elections as a way of achieving their favored policy results. The radicals hoped that "by making the judges accountable to the same electorate" that selected the other branches, judicial elections would reverse what they saw as a trend of decisions "to the detriment of debtors and of fugitive slaves and their benefactors, and in favor of vested rights, corporations, and slavery." Radicals thought judicial elections would lessen the power of judges to impose a vision of society different from the people's, and supported elections for that reason.

The third group, the "moderates," did not seek judicial elections as a means of curtailing the judicial power. Quite the contrary. They supported judicial elections as "a means of enhancing rather than subverting judicial power," but "calmed conservative fears by developing constitutional devices that blunted the full impact of popular will on the judiciary." The moderate view, which "prevailed" in the conventions, believed that elections would improve judicial independence by freeing judges from attempting to curry favor with the
appointing authority, and would also increase judicial productivity by making judges accountable for taking undue time disposing of cases.

Even these moderates, however, saw elections as a way of altering the likely decisions of the courts. Elections were believed to cause judges to "take care that their opinions reflect justice and right" because the judges would need periodic approval of the voters to remain in office. Similarly, moderates hoped that popular election would result in the selection of judges more in touch with contemporary society than were appointed judges, and therefore more likely to garner respect for the judiciary.

One later work by Caleb Nelson argued that Hall's explanation underestimated the strength of popular elections' appeal, consistent with ideals of Jacksonian democracy, as a way for the people to take control from elites. Contrary to Professor Hall's view of history, Nelson understood states as "intend[ing] the elective system to insulate the judiciary not from the people, but rather from the branches that it was supposed to restrain." As a result of reformers' distrust of both judges and legislators, elections were supported as a way of making judges more accountable to the people, and independent of only the other branches. Indeed, many felt it was impossible to create a judiciary completely free of influence; they merely believed it better that the influence come from the people than from the legislature.

Regardless of whether one agrees with Hall's tale of a conflict between conservatives, radicals, and moderates, or Nelson's description of the conflict as centering on a dispute between elites and populists, the motivation of the states was not purely disagreement with the decisions of appointive judges, nor was it purely an attempt to increase the objective quality of the state judiciary. By all accounts, both motivations played a role, and policy-based disagreement with the decisions of appointive courts was an important influence in the move to find another system of judicial selection. In general, those who were most

66. See id. at 347, 350.
67. See id. at 343-44.
68. Id. at 347 (citation omitted).
69. See id. at 345-46.
70. See Caleb Nelson, A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America, 37 AM. J. LEGAL HIST. 190 (1993); see also JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 140 (1950) (stating that the adoption of judicial elections "was based on emotion rather than on a deliberate evaluation of experience under the appointive system"); Glenn R. Winters, Selection of Judges—An Historical Introduction, 44 TEX. L. REV. 1081, 1082 (1966) (asserting that the election of judges "was not particularly designed for improving justice but was simply another manifestation of the populism movement").
71. Nelson, supra note 70, at 205.
72. See id. at 207-19.
73. See id. at 217.
judicial elections and the political gamesmanship in the fashioning of elections there).

75. As historian Arthur Schlesinger has noted with regard to criticism of the Supreme Court in the early nineteenth century, whether one referred to “the ‘independence’ or ‘irresponsible’ of the judiciary” depended on nothing grander than one’s view of the decisions. ARTHUR M. SCHLESINGER, JR., THE AGE OF JACKSON 15-16 (1946); see also Richard Delgado, Rodrigo’s Committee Assignment: A Skeptical Look at Judicial Independence, 72 S. CAL. L. REV. 425, 438 (1999) (arguing that support for judicial independence depends on the speaker’s view of the decisions of judges); Kozinski, The Many Faces of Judicial Independence, supra note 28, at 863-64.

76. See Anthony Champagne & Judith Haydel, Introduction to JUDICIAL REFORM IN THE STATES 1, 2 (Anthony Champagne & Judith Haydel eds., 1993) (noting that value and policy choices made by judges result in “systems of judicial selection becom[ing] issues in the interest group struggle. Conflicts over judicial selection systems, if viewed from an interest group perspective, are clearly an important aspect of interest group politics.”); Anthony Champagne & Judith Haydel, Conclusion to JUDICIAL REFORM IN THE STATES, supra, at 183, 183 (“[T]he debate over reform of judicial selection procedures is indeed part of a conflict of interests among competing groups over competing values…. The competing interest groups are those which have a stake in the judicial system.”); cf. SMITH, supra note 7, at 119-20 (arguing that support for campaign finance reform measures depends on which groups are likely to receive relative advantages under the proposed regulations).

77. Schotland, supra note 56, at 660. Elsewhere, though, Professor Schotland has recognized that elevating the judiciary is not the only goal of election systems; “accountability” plays a role as well. See Roy A. Schotland, Comment, 61 LAW & CONTEMP. PROBS. 149, 153 (1998) (remarks at Bulwarks of Judicial Accountability in the American System of Government, Phila., Dec. 1998) [hereinafter, Schotland, Comment] (“Every state, whatever its judicial election system, has one overriding goal: to balance judicial independence and judicial accountability.”).

78. But see Nelson, supra note 70, at 195-96 & nn.42-45 (noting state convention delegates’ argument that voters would elect fair judges, and not politicians).

79. See Hall, supra note 54, at 352. Moderates apparently thought that district elections kept judgeships from falling under the direct control of party leaders in state nominating conventions, afforded differing interests in a state a modicum of representation and protection, forced judges to retain familiarity with legal practices peculiar to sections of their states, and allowed district residents to vote intelligently and, perhaps, along nonpartisan lines based on their familiarity with the candidates. Id.; see also Nelson, supra note 70, at 196-97 (stating that states believed voters would vote on party lines when no other information was present, but where a voter had familiarity with a candidate (which was more likely to occur in a district-based system), then he would vote based on the personal qualities of the candidate).

Aside from the rather obvious point that “represent[ing]” and “protect[ing]” “differing interests” is a result-centered approach designed to enhance, rather than lessen, elected officials’ concern with appeasing the public, there is another, more practical, problem with district elections. Empirically, judges elected from districts are more willing to alter their votes in contemplation of adverse public reaction than are judges who are elected state-wide. See Melinda Gann Hall, Justices as Representatives: Elections and Judicial Politics in the American States, 23 AM. POL. Q. 485, 495-98 (1995) [hereinafter Hall, Justices as Representatives]. This means that implementing a system of district elections did not
the effect of a democratic assault on judicial independence, but their "solutions" were incomplete, and voters used elections as a way of shaping judicial policy. Nowhere in any of this history was there any indication that states thought themselves free to impose limitations on the speech of candidates for judicial office. The first attempt at such a limitation came some seventy years later.

C. The American Bar Association’s Model Canons

The American Bar Association made its first attempt at promulgating rules of judicial conduct in 1924. The ABA’s Committee on Judicial Ethics, with its chairman, Chief Justice William Howard Taft, drafted thirty-four “Canons of Judicial Ethics,” which included a prohibition on making campaign promises. According to the Canon, a judge “should not announce in advance his conclusions of law on disputed issues to secure class support.”

Eventually the 1924 Canon came to be seen as too vague for practical application, and was accordingly revised in 1972. The new version of the speech restriction was Canon 7(B)(1)(c). It prohibited judicial candidates from “mak[ing] pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announc[ing] [their] views on disputed legal or political issues; or misrepresent[ing] [their] identit[ies], qualifications, present position[s], or other fact[s].” The second clause, having been adopted in Minnesota and elsewhere, was held unconstitutional in Republican Party v. White.

Presaging the Supreme Court’s holding, the ABA revised the Canon in 1990 over concerns that the 1972 version unconstitutionally infringed on the free speech rights of judicial candidates. The new Canon backed away from prohibiting all speech relating to disputed legal or political issues, and instead attempted to tailor the restriction to issues reflecting on the impartiality of the judiciary. As a result, the 1990 Canon prohibited only “statements that commit or appear to commit the candidate with respect to cases, controversies, or issues
Judges as Politicians

that are likely to come before the court." 87

Most states today restrict judicial candidate speech with regulations modeled on either the 1972 or the 1990 version of the ABA Canons. Since 1990, these regulations have come under increasing attack as violating the First Amendment. Though White made it clear that prohibitions on the discussion of all disputed legal and political issues are unconstitutional, the fate of more mild restrictions, such as the 1990 Canon and the 1972 Canon’s ban on “pledges or promises” is still uncertain.

III. THE APPROACHES OF COURTS AND COMMENTATORS

A. Case Law

1. Republican Party v. White

The U.S. Supreme Court had not confronted the First Amendment’s applicability in judicial campaigns until Republican Party v. White. 88 In that case, the Court held unconstitutional Minnesota’s “announce clause,” which prohibited a judicial candidate from “announc[ing] his or her views on disputed legal or political issues.” 89 The Court held that states may not choose to have judicial elections and then, under the guise of maintaining “impartiality” and its appearance, completely silence the candidates from discussing any topic that might be relevant to their performance in office. The Court did not decide, however, whether other restrictions would be upheld, or whether “impartiality” vis-à-vis disputed legal issues could ever be an interest sufficiently compelling to justify any speech restriction. Thus, the Court did not express an opinion on the constitutionality of Minnesota’s regulation prohibiting judicial candidates from making “pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office,” 90 and also did not address that state’s prohibition on judicial candidates’ “accept[ance] or use [of] endorsements from a political organization.” 91

---

87. MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (1990). The Seventh Circuit, for one, has commented that restricting speech prohibitions to those subject areas likely to come before a court is really no restriction at all, because nearly every question can present itself in a lawsuit before a court of general jurisdiction. See Buckley v. Ill. Judicial Inquiry Bd., 997 F.2d 224, 229 (7th Cir. 1993).
88. 536 U.S 765.
90. See 536 U.S. at 770.
In assessing Minnesota’s claim that maintaining judicial independence justified the announce clause, the Court first attempted to ascertain the meaning of “impartiality” and “independence” as used by defenders of the restriction.\textsuperscript{92} The Court first discussed the possibility that the announce clause was meant to protect impartiality in the sense of favoritism to one party in litigation. The Court quickly rejected this interpretation, noting that although a judge found to violate the announce clause may have made up his mind on the legal issue presented in a case, his decision would be made irrespective of the party that argued the issue before him.\textsuperscript{93} In other words, litigants have the right to a judge who will apply the law “evenhandedly,”\textsuperscript{94} but there is no guarantee “that each judge will start off from dead center in his willingness or ability to reconcile the opposing arguments of counsel with his understanding of the Constitution and the law.”\textsuperscript{95}

The next possible meaning of impartiality considered by the Court was “lack of preconception in favor of or against a particular legal view.”\textsuperscript{96} The Court found that interest served by the announce clause,\textsuperscript{97} but found impartiality in that sense not to be “desirable,” let alone compelling. Quoting a 1972 memorandum written by then-Justice Rehnquist, the Court opined that “[p]roof 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.”\textsuperscript{98} The Court also found no compelling

\textsuperscript{92} See White, 536 U.S. at 775 n.6 (“Both [the Eighth Circuit] and respondents appear to use [an ‘independent’ judiciary], as applied to the issues involved in this case, as interchangeable with ‘impartial.’”).

\textsuperscript{93} See id. at 777-78.

\textsuperscript{94} Id. at 777.

\textsuperscript{95} Memorandum of Mr. Justice Rehnquist (No. 71-208) (Oct. 10, 1972) (Laird v. Tatum, 409 U.S. 824, 833-34) [hereinafter Rehnquist Memorandum].

\textsuperscript{96} White, 536 U.S. at 777 (emphasis omitted).

\textsuperscript{97} The Court did not address whether the announce clause would have been sufficiently narrowly tailored to achieve the interest constitutionally if the interest itself were seen as compelling. There is a significant problem of underinclusiveness. The announce clause would prohibit prospective judges from announcing their views on disputed issues, but this theory of impartiality requires more than refraining from announcing one’s views; it requires that the judge not have any definitive views on those issues. Both the judge who has made up his mind about an issue but not publicized that fact, and the judge who has made up his mind and announced that he has done so are partial in this sense. See infra Subsection IV.A.1. The response to this argument, made by Justice Stevens in dissent, is that a judge will feel more of a compulsion to maintain his stance if he has made a public announcement, and therefore the announce clause protects judges from unnecessarily solidifying their position to the detriment of litigants. See White, 536 U.S. at 799-800 (Stevens, J., dissenting). Justice Stevens’s view, however, more aptly reflects the third definition of impartiality: open-mindedness. The judge who has made a decision but not said anything about it does not give each litigant the “equal chance to persuade the court” required by the second definition of impartiality. Id. at 777 (opinion of the Court). The only impartiality interest for which the announce clause appears narrowly tailored, when impartiality is used in the sense of eliminating all leanings one way or the other, is in promoting the appearance of impartiality. Touting this appearance, as I discuss later, is of questionable legitimacy when the appearance is deceiving if not outright inaccurate. See infra Subsection IV.B.3.

\textsuperscript{98} White, 536 U.S. at 778 (quoting Rehnquist Memorandum, supra note 95).
Judges as Politicians

interest in promoting the appearance of this form of impartiality, given that the actual achievement of that type of impartiality was not a proper goal for state government. 99

The Court lastly considered a third possibility of the meaning of impartiality: open-mindedness, that is, "not that [a judge] 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." 100 Finding that Minnesota did not adopt the announce clause for that purpose, 101 the Supreme Court declined to consider whether such open-mindedness was a desirable quality in the judiciary, and whether promotion of open-mindedness could constitute a compelling state interest. 102 The Court noted that judges announce their views on disputed legal and political issues in numerous contexts outside of their campaigns, and accordingly the announce clause prohibits "such an infinitesimal portion of the public commitments to legal positions that judges (or judges-to-be) undertake, that this object of the prohibition [i.e., open-mindedness] is implausible." 103 The Court speculated that the real "purpose behind the announce clause is not openmindedness in the judiciary, but the undermining of judicial elections." 104 If Minnesota wished to end its judicial elections, however, it should have done so directly, instead of "leaving the principle of elections in place while ... conduct[ing them] under conditions of state-imposed voter ignorance." 105

The Court declined to decide whether the First Amendment would permit more stringent restrictions on speech in judicial campaigns than in legislative ones. While the Court quoted language from prior cases that stressed the importance of allowing candidates to persuade voters on the issues of the day, and opined that "[i]t is simply not the function of government to select which issues are worth discussing or debating in the course of a political campaign," 106 it then retreated from the force of these arguments and declined to extend them to judicial campaigns:

99. See id.
100. Id.
101. The means employed by the Court to determine the purpose of the Minnesota Supreme Court was essentially an analysis of whether the regulation was a narrowly tailored way to promote open-mindedness on the bench. See id. at 780 ("As a means of pursuing the objective of openmindedness that respondents now articulate, the announce clause is so woefully underinclusive as to render belief in that purpose a challenge to the credulous.").
102. See id. at 778.
103. Id. at 779; see also Morial v. Judiciary Comm’n, 565 F.2d 295, 306 n.12 (5th Cir. 1977) (en banc) (stating that a rule barring, on grounds of judicial impartiality, anyone with prior political exposure from running for judicial office would be “as absurd as it is constitutionally suspect”).
104. White, 536 U.S. at 782; see also id. at 787 (noting the American Bar Association’s origination of the announce clause and its persistent and long-standing opposition to judicial elections).
105. Id. at 788.
106. Id. at 782 (quoting Brown v. Hartlage, 456 U.S. 45, 60 (1982) (internal quotation marks omitted in White)); see also id. at 781-82 (quoting Wood v. Georgia, 370 U.S. 375, 395 (1962)).
[W]e neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office. . . . We rely on the cases involving speech during elections only to make the obvious point that this underinclusiveness cannot be explained by resort to the notion that the First Amendment provides less protection during an election campaign than at other times. 107

Immediately following that language, however, the Court criticized Justice Ginsburg’s dissent for “exaggerat[ing] the difference between judicial and legislative elections,”108 and thereby provided additional justification for treating all elections under the same First Amendment rules. Noting that both judges and legislators have the opportunity to fashion common law and “shape” state constitutions, the Court implied that future cases might protect the ability of voters to select judges and legislators based on the policy differences between candidates in both types of elections.

Thus, while the holding of the case was narrow, there is language in White to suggest that the First Amendment provides candidates and voters with much broader protections in judicial elections than those required by the holding alone. At bottom, Minnesota lost the case because its regulation was not a narrowly tailored response to ensure independence, and because it failed to define independence in a way that constituted a compelling interest. Because the Court chose not to address whether a state has a compelling interest in maintaining an open-minded judiciary, however, there remains the question of whether a speech restriction narrowly tailored to suit that goal—say, a ban on judicial campaign pledges or promises—would survive constitutional scrutiny.

Justice O’Connor wrote a concurring opinion to express her dissatisfaction with elections for judicial office. In her view, elections and the concomitant practice of campaigning, with the inevitable need for soliciting funds to cover campaign expenses, present a risk that the public will view judges as “motivated by the desire to repay campaign contributors.”109 Justice O’Connor, however, thought that by choosing popular elections as the means of selecting judges, the states with judicial elections must assume the accompanying risks of partiality, and cannot quell those risks through speech restrictions:110 “If the

107. Id. at 783 (internal citation omitted). Contrary to the literal language of the Court’s opinion, the First Amendment could not possibly require judicial campaigns to sound the same as legislative ones. See id. at 783-84 n.11 (“[T]he practice of voluntarily demurring does not establish the legitimacy of legal compulsion to demur.”). The question, therefore, is not whether the First Amendment can require the campaigns to be the same, but whether the First Amendment permits them to be the same in the face of a state’s attempt to keep them different.

108. Id. at 784.

109. Id. at 790 (O’Connor, J., concurring).

110. Four months after the White decision, the Eleventh Circuit agreed with Justice O’Connor and struck down Georgia’s prohibition on the personal solicitation of campaign funds by judges, holding that any corrupting influence caused by campaign fundraising is “created by the State’s decision to elect judges publicly.” Weaver v. Bonner, 309 F.3d 1312, 1322 (11th Cir. 2002); see also id. at 1320 (“It is the general practice of electing judges, not the specific practice of judicial campaigning, that gives rise to impartiality concerns . . . .”).
Judges as Politicians

State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges. 111

Justice Kennedy also filed a concurring opinion. Taking a stronger approach than did the Court, 112 Justice Kennedy viewed “direct restrictions on the content of candidate speech [as] simply beyond the power of government to impose.” 113 In his concurrence, he drew an explicit connection between the judiciary and the political branches, 114 suggesting that in neither case could a state “censor what the people hear as they undertake to decide for themselves which candidate is most likely to be an exemplary judicial officer. Deciding the relevance of candidate speech is the right of the voters, not the State.” 115

Justices Stevens and Ginsburg filed dissenting opinions, both of which were joined by each other and Justices Souter and Breyer. In the dissenters’ view, statements made by a would-be judge during a campaign threaten to strip neutrality from the judicial system and present due process concerns for litigants. 116 Recognition that he has “announced his position on an issue likely to come before him as a reason to vote for him” 117 would, according to the dissenters, prevent a judge from reevaluating his past pronouncements “in the light of an adversarial presentation, and . . . apply[ing] the governing rule of law even when inconsistent with those views.” 118 Because a reversal in positions after gaining office would look bad to voters and might result in a defeat at the next election, the dissenters concluded that judges evaluating issues they had discussed in a campaign “may be thought to have a ‘direct, personal, substantial, [and] pecuniary interest’ in ruling against certain litigants,” 119 thus depriving those litigants of due process.

The dissenters would treat judicial elections quite differently from elections to other posts, because “[j]udges . . . are not political actors. They do not sit as representatives of particular persons, communities, or parties; they serve no faction or constituency.” 120 Instead, because judges’ fidelity should be to the

111. White, 536 U.S. at 792 (O’Connor, J., concurring).
112. Justice Stevens referred to Justice Kennedy’s approach as “extreme.” Id. at 802 n.4 (Stevens, J., dissenting).
113. Id. at 793 (Kennedy, J., concurring).
114. See id. at 794-95 (“[F]rom the beginning there have been those who believed that the rough-and-tumble of politics would bring our governmental institutions into ill repute. And some have sought to cure this tendency with governmental restrictions on political speech.”) (citing Sedition Act of 1798, ch. 74, 1 Stat. 596). The reference to “governmental institutions,” without drawing a distinction between types of institutions, bespeaks a willingness to treat all three branches with the same First Amendment analysis.
115. Id. at 794 (citing Brown v. Hartlage, 456 U.S. 45, 60 (1982)).
116. See id. at 812-21 (Ginsburg, J., dissenting).
117. Id. at 800 (Stevens, J., dissenting) (emphasis omitted).
118. Id. at 801.
119. Id. at 816 (Ginsburg, J., dissenting) (alteration in White) (quoting Tumey v. Ohio, 273 U.S. 510, 523 (1927)).
120. Id. at 806; see also THE CONVENTION OF 1846, at 594 (Milo M. Quaife ed., 1919) (quoting a delegate to the Wisconsin constitutional convention of 1846 as stating that the judiciary “represents no
law and not to the desires of the electorate, "the First Amendment does not require that they be treated as politicians simply because they are chosen by popular vote."  

2. Lower Courts' Application of the First Amendment to Judicial Elections

Courts have struggled with the question of whether the need to provide voters with information about candidates applies in judicial campaigns. The District Court for the Northern District of Florida began the recent trend toward granting judges the protections of the First Amendment with its decision in ACLU v. Florida Bar. That case struck down the Florida announce clause, finding a prohibition of discussion concerning all disputed legal and political issues to be an overbroad response to what it conceded was the compelling interest of "protecting the integrity of the judiciary." Despite nodding to free speech, however, the court "ha[d] little trouble concluding that states need not treat candidates for judicial office the same as candidates for other elective offices." The court offered two reasons for this difference. First, although political officials are "expected" to make campaign promises and make decisions in office based on those promises, a judge may not "bind himself to decide particular cases in order to achieve a given programmatic result."
Judges as Politicians

Second, the court maintained that a state could regulate judicial candidates more closely than other candidates because, as “members of a privileged and responsible profession,” judges could be expected to conform to strict ethical guidelines.\(^{128}\)

Four days after the *ACLU* decision, the Ninth Circuit handed down *Geary v. Renne*,\(^{129}\) which struck down California’s prohibition of party endorsement of candidates in nonpartisan elections. Judge Reinhardt, joined by Judge Kozenzski, concurred to address the claims, made by Judge Alarcon in dissent, that forbidding party endorsements was necessary to preserve the independence of the judiciary. Foreshadowing the arguments later made in Justice Kennedy’s *White* concurrence, Judge Reinhardt flatly declared that a state “has no compelling interest in limiting the people’s right to make informed choices or to select candidates for office on whatever basis they deem relevant.”\(^{130}\)

In *Buckley v. Illinois Judicial Inquiry Board*,\(^{131}\) the Seventh Circuit continued the trend of allowing speech in judicial elections, by holding unconstitutional an Illinois regulation, like the Minnesota announce clause struck down in *White*, that prohibited judicial candidates from announcing their views on disputed legal or political issues. Judge Posner’s opinion for a unanimous panel found the prohibition to be vastly overbroad, prohibiting candidates not only from taking positions on issues likely to appear before them as judges, but effectively silencing speech on any issue of political or legal interest.\(^{132}\) The court refused to treat judicial elections like elections for other offices, however, noting that the challengers of the regulation conceded (correctly, in the court’s estimation) that states could regulate judicial campaigns more restrictively than they could regulate other political campaigns.\(^{133}\) Although declining to elaborate, the court found judges to be different from politicians even when both are elected.\(^{134}\) The court further expressed its belief that free speech guarantees should be relaxed when they threaten the ideal that judges should decide cases independently from “any express or implied commitments that they may have made to their campaign

\(^{128}\) *ACLU v. Fla. Bar*, 744 F. Supp. 1094, 1097 (N.D. Fla. 1990). The court did not explain the disconnect between that position and its reliance, two paragraphs later, on the attorney advertising cases, which expressly rejected the idea that attorneys could be restricted in their speech because of the nobility of their profession.

\(^{129}\) 911 F.2d 280 (9th Cir. 1990) (en banc).

\(^{130}\) *Id.* at 288 (Reinhardt, J., concurring); *see also id.* at 293 (“Voters are free to accept or reject endorsements made on the basis of political beliefs, just as they are free to base their ultimate choice on their own view of the judicial candidates’s [sic] political or judicial philosophy.”).

\(^{131}\) 997 F.2d 224 (7th Cir. 1993).

\(^{132}\) *See id.* at 228-29.

\(^{133}\) *See id.* at 227-28.

\(^{134}\) *See id.* at 228.
supporters or to others."135 In the court’s opinion,
only a fanatic would suppose that one of the principles should give way completely
to the other—that the principle of freedom of speech should be held to entitle a
candidate for judicial office to promise to vote for one side or another in a particular
case or class of cases or that the principle of impartial legal justice should be held to
prevent a candidate for such office from furnishing any information or opinion to
the electorate beyond his name, rank, and serial number.

Accordingly, the Seventh Circuit adopted a balancing test under which the
Illinois regulation was struck down as unnecessarily chilling protected speech,
but the court was careful not to call into question other regulations that were
more narrowly tailored to ensure “impartial legal justice.”137

The Third Circuit, in Stretton v. Disciplinary Board of the Supreme Court,138 took a different approach from the Seventh Circuit’s by adopting a
narrow construction of Pennsylvania’s announce clause, and upholding
restrictions written identically to the ones struck down in Buckley and ACLU v.
Florida Bar. In Stretton, the court determined that the Pennsylvania Supreme
Court would interpret its announce clause as prohibiting speech concerning
only those topics likely to come before the candidate should he be elected.139
As such, the court upheld the regulation as necessary to guard against the
possibility that the public would believe cases to be prejudged. Where cases are
prejudged during a campaign, according to the court, “the concept of impartial
justice becomes a mockery... and the confidence of the public in the rule of
law would be undermined.”140

According to the Third Circuit, a state’s decision to elect its judges “does
not signify the abandonment of the ideal of an impartial judiciary carrying out
its duties fairly and thoroughly.”141 The court attempted to distinguish judges
from politicians, in that for the latter group of officials, “the public has the right
to know the details of the programs that candidates propose to enact into law
and administer.”142 Judges, on the other hand, make merely “individualized
decisions on challenged conduct and interpretations of law enacted by the other
branches of government.”143 Having limited the reach of Pennsylvania’s
announce clause to those issues likely to come before courts, the Third Circuit
held that the regulation inhibited only that speech likely to result in judicial

135. Id. at 227.
136. Id.
137. Id.
138. 944 F.2d 137 (3d Cir. 1991).
139. Id. at 143-44. One commentator has noted that the Stretton court “interpret[ed] the 1972 [ABA
Canon 7] gag rule... as meaning what the 1990 version says.” J. David Rowe, Note, A Constitutional
140. Stretton, 944 F.2d at 142.
141. Id.
142. Id.
143. Id.
partiality and was therefore constitutional.\textsuperscript{144}

The Sixth Circuit came closer than did any other circuit before \textit{White} to giving equal treatment under the First Amendment to all candidates for elective office—judicial or otherwise. In \textit{Suster v. Marshall},\textsuperscript{145} the court considered two rules in the Ohio Code of Judicial Conduct that prohibited judicial candidates from spending more than a set dollar figure on a campaign (which figure depended on the office sought),\textsuperscript{146} and barred judicial candidates from using any funds that had been raised in conjunction with a campaign for a non-judicial office.\textsuperscript{147} The unanimous Sixth Circuit panel struck down the first limitation, noting “that an election candidate does not forego his or her First Amendment rights simply because he or she decides to seek a judicial office, rather than a non-judicial one.”\textsuperscript{148}

Yet in examining the Canon forbidding use of money raised in a prior non-judicial campaign, the Sixth Circuit relied on precisely the distinction it appeared to eschew earlier. The court held that states may prohibit judicial candidates from using the other campaign funds because those other funds may have been given so that the candidate would pursue a substantive agenda once in office.

By complying with Canon VII(C)(8), judicial candidates are prevented from using funds which may potentially be “ideas-bought” funds, or funds which came attached to a candidate’s agreement to advance or take on some political issue or cause. Thus, because it is very possible that the funds Suster (or any other candidate) received during his non-judicial campaign \textit{may have resulted from the advancement of a position or the endorsement of some political ideology}, the state’s interest to ward against such corruption or such perceived corruption is indeed compelling.\textsuperscript{149}

The court noted that candidates running for non-judicial office could make use of previously received campaign funds,\textsuperscript{150} but, in the court’s view, that

\begin{itemize}
  \item \textsuperscript{144} The court also upheld Pennsylvania’s prohibition against personal fundraising by judicial candidates, with the acknowledgment that the ban did not eliminate the corrupting influence of campaign contributions. Contributing lawyers might still expect something in return for their contribution, and the candidates themselves were aware of who contributed. The court held, however, that the Constitution does not require the regulation to solve problems completely. Instead, states are permitted to take small steps toward solving a problem, and because the ban addressed a compelling interest (judicial impartiality) and was narrowly tailored, it complied with the First Amendment. See id. at 145-46. On the constitutionality of personal fundraising restrictions, the Eleventh Circuit later came to a different conclusion in \textit{Weaver v. Bonner}, 309 F.3d 1312 (11th Cir. 2002). See infra text accompanying notes 181-184.
  \item \textsuperscript{145} 149 F.3d 523 (6th Cir. 1998).
  \item \textsuperscript{146} See \textit{OHIO CODE OF JUDICIAL CONDUCT} Canon VII(C)(6).
  \item \textsuperscript{147} See id. at Canon VII(C)(8).
  \item \textsuperscript{148} Suster, 149 F.3d at 529; see also id. (“[T]he constitutionality of such [spending] limits was based [in \textit{Buckley v. Valeo}] upon the reasoning that any expenditure limitation—\textit{irrespective of the kind of election involved} (state, federal, judicial, non-judicial, civil penalties, criminal penalties, etc.) \ldots must be narrowly tailored and serve a compelling government interest \ldots”) (emphases added).
  \item \textsuperscript{149} Id. at 534 (emphasis added).
  \item \textsuperscript{150} See id.; see also \textit{Shrink Mo. Gov’t PAC v. Maupin}, 71 F.3d 1422, 1427-29 (8th Cir. 1995) (striking down a law barring candidates from carrying over contributions from one campaign to
distinction between political officials and judicial ones served to show the Canon's narrow tailoring, and therefore its constitutionality.\textsuperscript{151}

State courts, in contrast to some of the federal decisions discussed above, have generally not been sympathetic to claims by their judges that judicial regulations unconstitutionally inhibit the freedom of speech guaranteed by the U.S. Constitution. They have instead focused on the compelling interest of the states in the actuality and appearance of impartiality and independence of their judiciaries.\textsuperscript{152} The Supreme Court of Kentucky, for example, in \textit{Summe v. Judicial Retirement and Removal Commission},\textsuperscript{153} affirmed the discipline of a judge who had mailed a letter that criticized the incumbent judge as lenient on child abusers, and implied that she would be more supportive of abuse victims than the incumbent was.\textsuperscript{154} The court determined that this was an impermissible commitment to a position on a legal issue. Summe’s argument that discipline violated her right to free speech did not long detain the court, as it found a compelling interest in upholding “the fundamental fairness and impartiality of the legal system”\textsuperscript{155} and refused to take steps that would “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.”\textsuperscript{156}

The Supreme Court of Washington likewise took a dim view of a judge’s arguments that the Constitution protected his campaign speech. In \textit{In re Kaiser},\textsuperscript{157} that court censured a judge for campaign tactics that, in the court’s view, called into question the integrity of the judiciary.\textsuperscript{158} In his campaign,
Judges as Politicians

Judge Kaiser attempted to draw public attention to his tough record in DWI cases, and made campaign statements pointing out the support his opponent (a DWI defense attorney) had received from other DWI defense attorneys. The court found that Judge Kaiser’s statements promised harsh treatment of DWI defendants, and thereby violated Code of Judicial Conduct Canon 7(B)(1)(c), which prohibited promises of conduct in office and the announcement of one’s views on disputed legal or political issues. The court also found that Judge Kaiser had improperly called into question the integrity of the judiciary by implying that his opponent’s acceptance of campaign contributions would cause him to rule in favor of drunk drivers. The court censured Judge Kaiser for the statements, finding “[t]he State’s interest in protecting the good reputation of the judiciary [to be] compelling.”

Some state courts have declined to discipline judicial candidates for campaign statements that indicated the candidate’s view of legal matters or that called the current justice system into question, but many of those cases involved relatively innocuous statements. For example, the New York Court of Appeals recently held that its State’s Rules Governing Judicial Conduct did not permit the discipline of a judicial candidate for announcing that she was a “[l]aw and order [c]andidate.” That case, however, did not rest on the First Argument of force in its worst form.” Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring). The regulations permit conduct that praises the judiciary or holds it out as an impartial arbiter of disputes, but prohibits the same form of conduct if it has the effect of calling into question the extent to which judges fit the ideal. Such discrimination is blatantly unconstitutional, see, e.g., Boos v. Barry, 485 U.S. 312 (1988); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992), but even if there were no discrimination of that sort, prohibitions of “public discussion of an entire topic”—here, legal and political issues that capture the interest of voters—are unconstitutional. See Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 537 (1980).

See Kaiser, 759 P.2d at 394-95.
160. See id. at 396. The court also found that Judge Kaiser had improperly disclosed his party affiliation when he sent a letter to party chairmen professing his long-term loyalty to the party. See id. at 395; cf. Haffey v. Taft, 803 F. Supp. 121, 125-26 (S.D. Ohio 1992) (upholding Ohio’s requirement that judicial candidates not disclose their party affiliations on the ballot). But cf. Geary v. Renne, 911 F.2d 280 (9th Cir. 1990) (en banc) (invalidating California’s ban on party endorsement of candidates in nonpartisan elections).
161. See 759 P.2d at 396.
162. Id. at 399.
163. See, e.g., In re Baker, 542 P.2d 701 (Kan. 1975) (per curiam) (holding that a candidate did not violate ethical rules when he indicated that he was in better health than his opponent). Note, however, that innocuous statements do not necessarily insulate a candidate from discipline. In fact, the first case to challenge an announce clause resulted in a federal district court upholding the law, and rejecting the candidate’s plea that he be allowed to state that he would encourage divorcing couples to mediate their disputes without the presence of their attorneys. See Berger v. Supreme Court, 598 F. Supp. 69 (S.D. Ohio 1984), aff’d, 861 F.2d 719 (6th Cir. 1988).
165. In re Stanley, 774 N.E.2d 735, 736-37 (N.Y. 2002) (per curiam). The court concluded that “[l]aw and order” was “a phrase widely and indiscriminately used in everyday parlance and election campaigns,” and therefore could not form the basis of a prohibited pledge or promise of conduct in office. Id. at 737. The court’s conclusion gains support from Oregon Justice Hans Linde’s observation that “[e]very judge’s campaign slogan, in advertisements and on billboards, is some variation of ‘tough on crime.’ The liberal candidate is the one who advertises: ‘Tough but fair.’” Hans A. Linde, Elective
Amendment, and an earlier case made clear that the First Amendment does not provide much protection to judicial candidates in New York. In Nicholson v. State Commission on Judicial Conduct, the court disciplined a candidate for appearing personally at fundraising events and soliciting contributions, as well as for violating other ethical rules. The court was not sympathetic to the argument that the speech and association rights of candidates and voters must be protected most vigilantly during election season: “Misconduct by a Judge or judicial candidate cannot be shielded from scrutiny merely because it takes place in the political forum.”

An exception to the rule of state court validation of speech restrictions is the Michigan Supreme Court case of In re Chmura. That case held unconstitutional a provision in the Michigan Code of Judicial Conduct that prohibited judicial candidates from making any statement “that 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 statement considered as a whole not materially misleading.” Though the campaign literature at issue was “consistently untruthful,” the court found the Canon facially unconstitutional because it was not narrowly tailored “to serve the state’s compelling interest in maintaining the integrity of the election process and ensuring public confidence in the judiciary.” The Canon was overbroad, said the court, because its prohibitions on all misleading or deceptive “statements [and omissions], not just those statements that bear on the impartiality of the judiciary” encouraged candidates to remain silent. Accordingly, the court adopted the actual malice


166. 409 N.E.2d 818 (N.Y. 1980) (per curiam).
167. Id. at 823.
169. See MICHIGAN CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(d). The Canon also prohibited statements that were “likely to create an unjustified expectation about results the candidate can achieve.” Id. The court did not consider the constitutionality of Michigan’s Canon prohibiting “pledges or promises of conduct in office.” See 608 N.W.2d at 42 n.9.
170. 608 N.W.2d at 36.
171. Id. at 38; see also id. at 40 (opining that states have a compelling interest in “preserving the integrity of the judiciary” and “protecting the reputation of the judiciary”). The Chmura court cautioned that judicial elections are different from executive and legislative ones. See id. at 39-40. Though the court did not specify which restrictions would be permitted in judicial campaigns but would be held unconstitutional in other races, the court did express its conclusion that “the state’s interest in preserving the integrity of the judiciary supports the imposition of greater restrictions on a candidate’s speech during a campaign for judicial office than is permissible in other campaigns.” Id. at 42.
172. Id. at 42; see also id. at 43 (“The prohibition on misleading and deceptive statements quells the exchange of ideas because the safest response to the risk of disciplinary action may sometimes be to
Judges as Politicians

standard from the defamation case of *New York Times Co. v. Sullivan*173 and limited the Canon to prohibiting statements that the candidate knew were false or were used by the candidate with reckless disregard for their truth or falsity.174

The Alabama Supreme Court followed Michigan's lead and revised the relevant Alabama Canon to prohibit only demonstrably false statements that were made with knowledge of their falsity or with reckless disregard for whether they were false or not.175 The U.S. District Court for the Northern District of Georgia did the same in striking down Georgia's analogous regulation.176 Those two courts, like the Michigan Supreme Court, concluded that the regulations' beneficial effect of controlling falsehoods was overcome by the chilling effect the regulations would have on protected speech.177

Shortly after the *White* decision, the Eleventh Circuit, in *Weaver v. Bonner*,178 became the first court to hold that the First Amendment treats judicial elections exactly the same as it treats legislative and executive elections.179 Accordingly, the Eleventh Circuit, like the Michigan Supreme Court in *Chmura* and the Alabama Supreme Court in *Butler*, struck down Georgia's rule prohibiting false or misleading campaign statements, and held that rules governing campaign statements must conform to the "actual malice" standard of *New York Times Co. v. Sullivan*.180 The Eleventh Circuit went further, however, and also struck down Georgia's prohibition on the personal solicitation of campaign funds by judicial candidates.181 The court maintained

remain silent.


174. *See Chmura*, 608 N.W.2d at 43.


177. *See Weaver*, 114 F. Supp. 2d at 1341-43; *Butler*, 802 So. 2d at 217-18. The Alabama Supreme Court also concluded that the restriction on conduct degrading the "'public confidence in the integrity and impartiality of the judiciary'" did not apply to political speech. *See* 802 So. 2d at 219.

178. 309 F.3d 1312 (11th Cir. 2002).

179. *See id. at 1321* ("[W]e believe 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."). Judge Beam, dissenting from the Eighth Circuit opinion that was reversed in *White*, offered strong language for treating judges and other officials equally under the First Amendment. Though he agreed "that judges differ from other officials," he argued that "[i]n the eyes of the First Amendment, they are the same." Republican Party v. Kelly, 247 F.3d 854, 897, 899 (8th Cir. 2001) (Beam, J., dissenting), rev'd sub nom. Republican Party v. White, 536 U.S. 765 (2002).

180. *See* 309 F.3d at 1321.

181. *See id. at 1322-23.* Interestingly, the Fifth Circuit recently rejected, on standing grounds, a due process challenge to Texas's system of judicial elections, which does allow judicial candidates to solicit
that there was no reason to believe candidates who solicited funds would be biased, but even if there were cause for such a belief, the prohibition would not serve the interest because the alternative—allowing a campaign committee to solicit funds on the candidate’s behalf—presented virtually the same risk of favoritism. The court therefore concluded that both regulations were unconstitutional, as they suppressed candidate speech “while hardly advancing the state’s interest in judicial impartiality at all.”

New York’s judicial conduct rules have suffered a similar fate to Georgia’s, though the district court in Spargo v. New York State Commission on Judicial Conduct did not decide whether the First Amendment provides the same rights to judicial, legislative, and executive candidates. The Spargo court struck down New York regulations barring judicial candidates from participating in political activity, finding the restrictions unlikely to promote any interest the state might have in the independence of its judiciary. The court also struck down provisions requiring judicial candidates to act in a manner promoting confidence in, and the integrity of, the judiciary, finding those provisions unconstitutionally vague. The court reasoned that it was not possible “for a person of any level of intelligence to know what conduct would be prohibited,” and as a result the restrictions unlawfully threatened to chill the exercise of protected speech.

The Supreme Court of Florida, however, recently undertook quite a different analysis in upholding that state’s speech restrictions against constitutional challenge. The court found a “compelling state interest in preserving the integrity of our judiciary” and in promoting public confidence in that institution, as it proceeded to discipline a judicial candidate for campaigning using a tough-on-crime message. The court determined that the candidate’s statements, which indicated her desire to see criminals behind bars and police officers’ testimony taken “seriously,” pledged a pro-prosecution “bias” and “brought the judiciary into disrepute by conveying the false and

and accept campaign funds. See Public Citizen, Inc. v. Bomer, 274 F.3d 212 (5th Cir. 2001). The court reasoned that the alleged appearance of partiality caused by the system of financing was too abstract a concern to provide the plaintiff with a cognizable injury. See id. at 218-19. As shown by Weaver and Bomer, different litigants have argued that states must allow judicial candidates to solicit funds under the First Amendment, and that states must forbid the practice under the Fourteenth.

182. See Weaver, 309 F.3d at 1322; see also Bomer, 274 F.3d at 215 (citing cases rejecting allegations that solicitations of funds by judicial candidates necessarily result in bias).

183. See Weaver at 1322-23.

184. Id. at 1323.


186. See N.Y. COMP. CODES R. & REGS. tit. 22, §§ 100.5(A)(1)(c)-(g), (4)(a).

187. See Spargo, 244 F. Supp. 2d at 88.

188. Id. at 90.

189. See id. at 91.


191. Id. at *22.
Judges as Politicians

misleading impression of the judge’s role, particularly in the handling of criminal cases."\footnote{192} For making such “promises” and for leading voters to think that the Florida state courts are not “impartial tribunal[s] where justice is dispensed without favor or bias,”\footnote{193} the court subjected the candidate to a public reprimand and a $50,000 fine.\footnote{194}

As shown in the above summary of decisions, most courts, with the notable exception of the Eleventh Circuit in \textit{Weaver}, have been willing to uphold restrictions on judicial campaign speech so long as the restrictions were limited to forbidding commentary on issues a successful candidate would be likely to face on the bench.\footnote{195} Where the restrictions go beyond that limit, and prohibit candidates from discussing all issues of dispute in the legal or political realms, however, courts have been more willing to strike down the offending regulations. The explications of the state interests in limiting campaign speech are almost invariably the same across the cases. Judges must refrain from speaking, say the courts, to prevent the actuality and appearance of prejudging cases. If judges were permitted to speak, then judges would campaign on the basis of their substantive views (just like other elected politicians do), and the voters would select judges by choosing those candidates who would effect the voters’ preferred substantive outcomes (just like voters select other candidates). Because the judiciary is supposed to be independent of the populace, however, and must occasionally rule against the popular will, courts upholding speech restrictions argue that such issue-based elections threaten to undermine the judicial role, i.e., the neutral weighing of argument and the application of law to facts.

B. Commentators

In 1999, Justices Kennedy and Breyer, who ultimately took different sides in \textit{White}, jointly appeared on the PBS television program \textit{Frontline} to discuss the impact of financial contributions on judicial independence. Justice Kennedy

\footnote{192. \textit{Id.} at *34.}
\footnote{193. \textit{Id.}}
\footnote{194. See \textit{id.} at *38.}
\footnote{195. The circuits have split on whether to limit a speech restriction so as to prohibit only the speech that would result in partiality. The Third Circuit adopted such a limiting construction in \textit{Stretton}. See \textit{Stretton} v. \textit{Disciplinary Bd. of the Supreme Court}, 944 F.2d 137, 144 (3d Cir. 1991). The Seventh Circuit declined to adopt such a construction, believing that the result “would be a patchwork job indeed, with the rule itself saying one thing and the judicial gloss on it another.” \textit{Buckley} v. \textit{Ill. Judicial Inquiry Bd.}, 997 F.2d 224, 230 (7th Cir. 1993); see also \textit{Weaver}, 114 F. Supp. 2d at 1343-44 (striking down Georgia’s Canon prohibiting misleading campaign speech, and declining to adopt a narrowing construction). The Supreme Court in \textit{White} held that Minnesota’s announce clause could not be construed to ban solely commitments, because the separate “pledges or promises” clause banned that conduct. The Court’s decision, however, rested on its determination that “announcing” something was different from “pledging.” \textit{Republican Party v. White}, 536 U.S. 765, 770 (2002). It did not expressly address whether a court, interpreting a campaign speech restriction, could limit the number of issues that would come within the literal terms of a prohibition like Pennsylvania’s, Illinois’s, or Minnesota’s.}
explained his view that it was not only campaign financing that was troubling in the context of judicial elections, but "the campaign process itself." Justice Breyer commented on the destructive force that interest group politics could play in the judiciary: "[A clash of political interests is] fine for a legislature. I mean that's one kind of a problem. But if you have that in the court system, you will then destroy confidence that the judges are deciding things on the merits." Justice Kennedy agreed, pointing out his belief that "we should [not] select judges based on a particular philosophy as opposed to temperament, commitment to judicial neutrality and commitment to other more constant values as to which there is a general consensus." Despite his own feelings about the proper considerations in the selection of judges, Justice Kennedy's White concurrence would have permitted voters to make the choices he viewed as abhorrent in the Frontline interview. Voters might decide to vote for a candidate "based on a particular philosophy," even though Justice Kennedy would not, for "[d]eciding the relevance of candidate speech is the right of the voters, not the State."

Justices Kennedy and Breyer are not the only members of the bench who have commented on the problems that elections pose for judicial independence and neutrality. Some members of state courts have also been vocal about the need to control democratic excesses in order to maintain the prestige and dignity of the judiciary. Many have noted the pressures elections place on judges to conform to perceived public desires. For example, former Wisconsin Chief Justice Nathan Heffernan has acknowledged that "[i]t is sometimes difficult for a judge facing election to ignore the momentary popular will, and it is difficult to campaign on 'justice' alone." Because applying the correct rule of law may lead to unpopular results, "[a] 'just' judge is very likely to be politically vulnerable for being legally right." California Supreme Court

197. Id.
198. Id.
199. Id.
201. Heffeman, supra note 8, at 1043.
202. Id.; see also Stephen B. Bright, Political Attacks on the Judiciary, 80 JUDICATURE 165, 171 (1997); Paul J. De Muniz, Politicizing State Judicial Elections: A Threat to Judicial Independence, 38 WILLAMETTE L. REV. 367, 387 (2002) (noting that criticism of court rulings often stems not from thoughtful disagreement with judges' application of law, but from dissatisfaction with the result, "simply as a matter of political judgment"); The Talk of the Town: Notes and Comment, THE NEW YORKER, Oct. 28, 1991, at 31 ("[T]he law is now almost always spoken of popularly in terms of outcomes that are indistinguishable from political ends.").
Judges as Politicians

Justice Otto Kaus famously expressed the same sentiment by analogizing the political impact of a judge’s decisions to “a crocodile in your bathtub when you go in to shave in the morning. You know it’s there, and you try not to think about it, but it’s hard to think about much else while you’re shaving.”

Current Wisconsin Supreme Court Chief Justice Shirley Abrahamson also noted her agreement, but urged judicial candidates to take hold of the opportunity presented by elections to educate voters about the judiciary and its function. According to Chief Justice Abrahamson, “[j]udicial elections can and should serve to educate the public about what judges do on a daily basis, about case management, court powers, the general principles underlying court decisions, and the core value of decisional independence.”

Oregon Supreme Court Justice Hans Linde has echoed concerns about the “appalling” idea of judges campaigning—and behaving—like other elected officials. Justice Linde, however, placed a large portion of the blame for the public’s result-oriented voting on judges’ result-oriented decisions and opinions: “[C]ourts give up their defense against the charge that law is nothing more than politics when they explain their decisions as a choice of social policy with little effort to attribute that choice to any law.” When judges reach decisions on policy grounds and states impose speech restrictions reducing the ability of voters to make decisions based on the judges’ policy preferences, the restrictions run the risk of being perceived as “sacrific[ing] . . . free speech to hypocrisy.” Such restrictions, in Justice Linde’s view, “do[] more harm to

204. See Shirley S. Abrahamson, The Ballot and the Bench, 76 N.Y.U. L. REV. 973 (2001) [hereinafter, Abrahamson, The Ballot and the Bench]; Shirley S. Abrahamson, Courtroom with a View: Building Judicial Independence with Public Participation, 8 WILLAMETTE J. INT’L L. & DISPUTE RES. 13 (2000). Chief Justice Abrahamson’s discussion closely parallels the work of Frances Kahn Zemans, who has warned judges that their esteemed position may make it difficult to interact with the public and educate them about the judicial function. See Zemans, supra note 165, at 637 (“Often judges’ appeals to the public to respect the importance of judicial independence appear arrogant. Also, unwillingness to engage in debate because it is ‘unseemly’ or not in keeping with the ‘dignity’ of the court rings of elitism.”); see also Kevin M. Esterling, Public Outreach: The Cornerstone of Judicial Independence, 82 JUDICATURE 112 (1998) (arguing that programs inviting public involvement can serve to increase judicial independence).
207. Id. at 14; see also Stephen Markman, The Debate over the Judiciary, 35 SUFFOLK L. REV. 443, 451 (2001) (arguing that applying a consistent judicial philosophy—rather than a case-by-case sense of justice—is the best way to achieve the institutional goals sought by speech restrictions); Zemans, supra note 165, at 646 (hypothesizing that ensuring the public benefits from judicial independence might require courts “to avoid terms such as ‘fair’ and ‘good’ unless tempered by reference to restrictions imposed by the written law. The impression that the judge relies on fairness as the standard against which to measure decisions can have dangerous implications that the judge is free to follow her conscience despite the law”); cf. Romer v. Evans, 517 U.S. 620, 639 (1996) (Scalia, J., dissenting) (describing the Court’s opinion as “so long on emotive utterance and so short on relevant legal citation”); id. at 636 (describing the majority “opinion’s heavy reliance upon principles of righteousness rather than judicial holdings”).
208. Linde, supra note 206, at 16. Justice Linde emphasized the importance of keeping a distinction
principles of free speech than any good that the restrictions can accomplish."\textsuperscript{209} Instead, he offered numerous suggestions to maintain judicial independence in a system of judicial elections, notably including a recommendation that judges not engage in lawmaking, that the academy not express enthusiasm for opinions that are legislation under a different title, and that other state officials take the lead in law reform, so that judges do not feel the need to legislate where legislators have failed.\textsuperscript{210}

Indiana Supreme Court Chief Justice Randall Shepard took a somewhat different tack, urging courts and scholars to focus not simply on the conflict between the dignity of the judiciary and the free speech rights of judges and voters, but also to weigh heavily the “due process” rights of future litigants who would be prejudiced by a candidate’s announcement of his views.\textsuperscript{211} According to Chief Justice Shepard, because the impartiality of judges has its “foundations

between legislatures and judges—between politics and law—but disagreed with the movement to accomplish that goal by restricting speech beyond what is “essential to avoid a judge’s disqualification in future cases.” Id. at 17. He did not explore exactly what kinds of commitments would necessarily result in recusal. For discussions on the topic, see generally Leslie W. Abramson, \textit{Appearance of Impropriety: Deciding When a Judge’s Impartiality “Might Reasonably Be Questioned.”} 14 GEO. J. LEGAL ETHICS 55, 98-102 (2000) (discussing disqualification cases); Peter A. Joy, \textit{A Professionalism Creed for Judges: Leading by Example,} 52 S.C. L. REV. 667, 692-95 (2001) (discussing recusal standards); Minzner, \textit{supra} note 81, at 226-27, 235-37 (suggesting recusal for judges who have committed themselves on issues); Symposium, \textit{Judicial Elections and Free Speech: Ethics and a Judge’s Campaign Rhetoric,} 33 U. TOL. L. REV. 315, 330-32 (2002) (same); Stuart Banner, Note, \textit{Disqualifying Elected Judges from Cases Involving Campaign Contributors,} 40 STAN. L. REV. 449 (1988); Mark Andrew Grannis, Note, \textit{Safeguarding the Litigant’s Constitutional Right to a Fair and Impartial Forum: A Due Process Approach to Improprieties Arising from Judicial Campaign Contributions from Lawyers,} 86 MICH. L. REV. 382, 406-10 (1987) (suggesting recusal for judges who have received contributions from attorneys); and Bradley A. Siciliano, Note, \textit{Attorney Contributions in Judicial Campaigns: Creating the Appearance of Impropriety,} 20 HOFSTRA L. REV. 217, 234-39 (1991) (discussing when recusal would be appropriate. Recusal has even been suggested as a possibility for legislators when considering matters that would directly impact campaign contributors. See John Copeland Nagle, \textit{The Recusal Alternative to Campaign Finance Legislation,} 37 HARV. J. ON LEGIS. 69 (2000). Though recusal appears superficially to eliminate bias, its effect is to abridge the same free speech rights that are abridged through a speech ban. If judges may discuss cases and voters contribute funds and resources only if the judge they support will be disqualified from hearing cases on the relevant subjects, there is actually a disincentive to speak. Additionally, a broad disqualification rule is subject to abuse by lawyers who wish to recuse judges inhospitable to their clients' positions. \textit{Cf. In re Palmisano,} 70 F.3d 483, 485-86 (7th Cir. 1995) (relating an attorney's accusations of "almost every judge who had participated in any of his cases"); Standing Comm. on Discipline v. Yagman, 55 F.3d 1430, 1435 (9th Cir. 1995) (noting a judge’s belief that an attorney’s attacks on him were “motivated by [the attorney’s] desire to create a basis for recusing me in any future proceeding”).

\textsuperscript{209} Linde, \textit{supra} note 206, at 17.

\textsuperscript{210} Id. at 16.

Judges as Politicians

in due process," a "policy choice" must be made between protecting those due process rights and protecting the rights of judicial candidates to speak and the rights of voters to hear. Chief Justice Shepard then suggested that, instead of adjudicating facial challenges to ethical canons or announcing blanket rules declaring that either the speech rights or the due process rights should prevail, courts would be better advised to consider each candidate statement individually. The court would evaluate "which of these statements represent a threat to due process and which do not." Although he was unable to cite a single case finding a due process violation where the judge had merely declared opposition to a litigant's position (as opposed to expressing some antagonism
to the litigant personally\textsuperscript{217}), Chief Justice Shepard nevertheless would sharply limit judicial campaign promises, calling them "arguably ... bribe[s] offered to voters, paid with rulings consistent with that promise, in return for continued employment as a judge."\textsuperscript{218}

Professor Roy Schotland has been at the forefront of defending speech restrictions on judicial candidates from constitutional challenge. He has justified restrictions on judicial candidate speech by pointing to distinctions between the positions of judge and legislator. In a recent article, for example, Professor Schotland pointed to such differences as the ban on judges making ex parte contacts with litigants; the prohibition against judges making promises of service in office; the necessity of judges remaining neutral and not acting as "advocates"; constraints on judges' ability to change the law; judges' insulation from the clash of competing, represented interests; the "usual[]" effect of judicial decisions as pertaining only to the parties before the court; and the inability of judges to gain support through casework or by benefitting their communities.\textsuperscript{219} Schotland concludes that these differences allow restrictions on judicial candidate speech to be upheld as constitutional, though it would be

---

\textsuperscript{217} See In re Sch. Asbestos Litig., 977 F.2d 764, 781-82 (3d Cir. 1992) (finding an appearance of impropriety where a judge attended a conference sponsored by a plaintiff in an action before him, and was shown a "Hollywood-style 'pre-screening'" of the plaintiff's expert witness testimony); State ex rel. La Russa v. Himes, 197 So. 762, 762-63 (Fla. 1940) (requiring recusal where the judge's campaign statements disclosed a bias against the defendant). La Russa, a criminal defendant, successfully moved for Judge Himes's recusal due to the judge's earlier campaign speech announcing that "what the people want is a judge who will put people like Philip La Russa and his associates away." 197 So. at 762; see also Republican Party v. White, 536 U.S. 765, 775 (2002) (noting that cases holding that an impartial judge is essential for due process use "impartial" in the sense of "lack of bias for or against either party to the proceeding").

\textsuperscript{218} See Shepard, supra note 211, at 1088. In light of the Supreme Court's holding that a misleading promise by a legislative candidate to reduce government spending (and concomitantly taxes) is not akin to a bribe of voters, see Brown v. Hartlage, 456 U.S. 45, 57-59 (1982), Chief Justice Shepard's claim that a judicial ruling consistent with campaign promises does constitute payment of a bribe is simply incredible. A legislative candidate's promise to lower taxes at least offers the possibility that voters will consider the monetary incentive in voting for the candidate. The possibility of such a reaction happening in judicial races is more remote, even assuming the monetary incentive to be present, because a case must be presented to a judge before he can implement the promised reform.

More directly to the point of this Article, Chief Justice Shepard's analysis turns on his conclusion that there is something unseemly, immoral, and perhaps even criminal, about voting in accordance with campaign promises, even when such a decision is an entirely reasonable application of law. Quite obviously, he provides no support for that conclusion. "A mere promise to change the law or alter social policy is neither a bribe nor unethical in a democracy. Such pledges to the people are at the core of the free expression the First Amendment was designed to secure." 2 Rodney A. Smolla, Smolla and Nimmer on Freedom of Speech § 16:32, at 16-85 (2002). Likewise, Chief Justice Shepard appears to criticize voters who have the audacity to vote consistent with their policy preferences. As I explain in Subsection IV.A.2, however, policy-oriented voting is part of every popular election system, including ones for judicial office.

Judges as Politicians

“inconceivable” to allow such restrictions in races for other offices.220

Professor Lloyd Snyder, on the other hand, has argued that most candidate speech restrictions violate the First Amendment.221 In Snyder’s view, “[t]he rule does nothing to stop the election of prejudiced judges to the bench. On the contrary, the restriction on campaign speech requires judicial candidates to hide their prejudices behind a facade of forced silence.”222

Snyder compared judges to politicians, finding that the differences, though “significant,” are “ultimately . . . a matter of degree rather than kind” and accordingly “do not justify distinctions between the first amendment rights of judicial candidates and candidates for other elected office.”223 Specifically, Snyder noted that both judges and other officials are restrained in the implementation of their policy objectives—legislators because of their service on a multi-member body, executives by their obligation to apply the law irrespective of personal views, and appellate judges by both—and that although judges may be the most restrained of the three branches, that difference is a minuscule reed on which to base a denial of First Amendment freedoms.224

Professor Erwin Chemerinsky has added a more practical dimension to the debate by arguing that judges’ views affect how they exercise their discretion and ultimately how they decide cases.225 He accordingly finds no justification for denying the public access to information about a prospective judge’s views, when it is those views that will play a role in shaping the policy coming from the court.226 Professor Chemerinsky argues that the restrictions fail strict scrutiny, reasoning that a judge who has announced his positions on disputed issues is not “biased” in any way violative of due process,227 and “the appearance of impartiality is [not] a constitutional mandate.”228 He would therefore strike down the restrictions on judicial candidate speech.229

222. Id. at 235; see also id. at 229-33 (arguing that a judge may express an opinion on a disputed legal or political question without jeopardizing his impartiality).
223. Id. at 244.
224. See id. at 245.
226. See id. at 737-38. Professor Chemerinsky notes that where judges are appointed, their ideologies have always played a considerable role in the appointment process. See id. at 738.
227. See id. at 743-45.
228. Id. at 745.
229. Professor Chemerinsky would, however, allow greater restriction of judicial candidates than legislative candidates in areas of campaign finance. See Erwin Chemerinsky, Preserving an Independent Judiciary: The Need for Contribution and Expenditure Limits in Judicial Elections, 74 CHI.-KENT L. REV. 133 (1998); see also Jason Miles Levien & Stacie L. Fatka, Cleaning up Judicial Elections: Examining the First Amendment Limitations on Judicial Campaign Regulation, 2 MICH. L. & POL’Y REV. 71 (1997) (arguing for the constitutionality of judicial campaign finance restrictions).
IV. ASSESSING THE "COMPPELLING" INTERESTS IN LIMITING SPEECH

Perhaps it should come as little surprise that judges view protection of the reputation of the judiciary as a "compelling" interest. Respect for our judicial institutions is invaluable (and in judges' personal and professional self-interest to maintain), permitting courts to make their decisions binding on individuals and entities, including other branches of government.\(^{230}\) And at a time when the political branches are continually maligned as platforms for long-winded, small-minded demagogues,\(^ {231}\) respect for the courts continues to persist.\(^ {232}\) In light of this, why would anyone wish to adopt an interpretation of the First Amendment that could wreck the dignity of the only aspect of American government that the country sees as respectable? My answer is to allow the people of each state to determine whether they wish to maintain an aloof,

---

\(^{230}\) See THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (stating that the judiciary "may truly be said to have neither FORCE nor WILL but merely jurisdiction"). Merely noting the importance of an interest served by an abridgment of speech, however, is not enough to save the abridgment from unconstitutionality. See, e.g., New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (concluding that restraint on publication of the Pentagon Papers would violate the First Amendment, and implicitly rejecting Justice Blackmun's warning, see id. at 762-63 (dissenting opinion), that publication could result in the death of soldiers and geopolitical difficulties of unquestionable severity). In addition to requiring a strong reason for the suppression of speech (made more difficult in the case of judicial campaign restrictions because the reputation of the judiciary as "neutral" is undeserved, see infra Section IV.B), the Constitution requires such suppression to be a narrowly tailored response to that justification—a test campaign restrictions cannot meet. See Bridges v. California, 314 U.S. 252, 270-71 (1941) ("[A]n enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.").

\(^{231}\) See, e.g., David Barnhizer, "On the Make": Campaign Funding and the Corrupting of the American Judiciary, 50 CATH. U. L. REV. 361, 383 (2001) ("Two branches, the legislative and executive, have fallen into such disrepute that they lack any perceived vestiges of integrity."); \(^{232}\) See John M. Scheb II & William Lyons, Public Holds U.S. Supreme Court in High Regard, 77 JUDICATURE 273 (1994). Interestingly, a recent poll commissioned by the American Bar Association indicates that Americans, by a three-to-one margin, have more confidence in judges they elect than in appointed judges. The poll also found that Americans believe that raising money compromises the integrity of the judiciary. Sixty-one percent of those surveyed, however, believe that a judge who voices his opinions can be fair and impartial in a later case. See Harris Interactive, A Study About Judicial Impartiality (Aug. 2-5, 2002), at http://www.abanet.org/media/aug02/shell.ppt (last visited May 5, 2003); see also Stan Greenberg & Linda A. DiVall, "Courts Under Pressure"—A Wake-Up Call from State Judges, JUDGES' J., Summer 2002, at 11 (analyzing survey results indicating that judges and voters believe that money influences judicial campaigns and judicial independence, and that voters lack enough information to make informed choices among candidates); David B. Rottman, The White Decision in the Court of Opinion: Views of Judges and the General Public, 39 COURT REV. 16, 19-22 (2002) (finding the public to be concerned with the effect of campaign funding, but also desirous of retaining judicial elections); Task Force on Selecting State Court Judges, Choosing Justice: Reforming the Selection of State Judges, in TASK FORCES OF CITIZENS FOR INDEPENDENT COURTS, UNCERTAIN JUSTICE: POLITICS AND AMERICA'S COURTS 87 (2000) (noting a growing concern about the independence of elected state court judges, and attributing the concern to the influence of "individuals and special interests that finance [judges'] campaigns").

Judges as Politicians

independent, and relatively unaccountable judiciary, or whether they wish to have a more responsive, accountable, and politically aware bench. When they forbid discussion of a judge’s performance on the bench, campaign restrictions effectively deprive voters of the ability to set the balance between judicial independence and accountability. Voters will have an independent judiciary whether they like it or not, regardless of the state’s previous decision to adopt judicial elections.

Without the restrictions, however, there is still the opportunity for voters to elect dignified candidates. The people can choose to elect only those judicial candidates who refuse to answer questions about judicial philosophy, previously decided cases, and the like, and thereby encourage judges not to give the impression that they have pre-decided legal questions. Alternatively, the voters can decide that they want only those judges who will decide cases in ways consistent with the voters’ beliefs and philosophies. If the voters adopt this second approach, and if judicial candidates see fit to accommodate the desires of the voters, judicial campaigns will become more issue-oriented and courts will likely become more attuned to the concerns of the voting public, for

---

233. See Melinda Gann Hall, Electoral Politics and Strategic Voting in State Supreme Courts, 54 J. Pol. 427, 443 (1992) (“Subjecting justices to electoral processes may produce behavior consistent with the accountability model . . . . Individual states must decide whether such responses are desirable from judicial actors or whether more of an independent role is preferred . . . .”).

234. See Bullock v. Carter, 405 U.S. 134, 143 (1972) ("[T]he rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters.").

235. See Radosevich, supra note 74, at 140 ("Voters cannot make wise choices between candidates unless they know how the candidates differ from each other.").

236. States are, of course, free to repeal their provisions authorizing judicial elections. They may not, however, attempt the same by subterfuge, no more than they could have judicial elections but deny the vote to certain racial groups, or permit candidates to run only if they affiliate with the Independent Judiciary Party. See Renne v. Geary, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting) ("[T]he greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance."); cf. Greater New Orleans Broad. Ass’n v. United States, 527 U.S. 173, 193 (1999) ("[T]he power to prohibit or to regulate particular conduct does not necessarily include the power to prohibit or regulate speech about that conduct."); Stromberg v. California, 283 U.S. 359, 369 (1931) (holding unconstitutional a statute that would prohibit orderly protest against a party in power by another “equally high minded and patriotic” party); Nixon v. Herndon, 273 U.S. 536, 540-41 (1927) (holding that a state may not, consistent with the Fourteenth Amendment, limit party primary participation to whites). The failure of the “greater includes the lesser” argument, pressed by those who claim states need not adopt the side effects of politics when they adopt judicial elections, see Schotland, supra note 56; O’Neil, supra note 220, at 719, is made even more clear when judicial elections are analogized to senatorial and presidential elections. See supra notes 41-45 and accompanying text. Though states remain free to dispense with presidential elections, and were under no obligation, before the Seventeenth Amendment, to conduct senatorial ones, the right of senatorial and presidential candidates to speak on all matters of public concern is unquestioned.

237. This is not simply fanciful theorizing. A recent study found that “89 percent of judicial candidates focused their campaigns on their image or qualifications rather than issues . . . . [and] [o]nly 8 percent of judicial candidates reported that issues were the primary focus of their campaign.” Owen G. Abbe & Paul S. Herrnson, How Judicial Election Campaigns Have Changed, 85 JUDICATURE 286, 292 (2002). To be sure, the study included candidates whose campaigns were governed by speech limitations, but notwithstanding that unavoidable defect, it still should give an analyst pause before predicting that judicial campaigns will immediately become issue-based brawls.
better or worse.

In this Part, I discuss the two preeminent rationales for speech restrictions. I first discuss the category of rationales centered on protecting future litigants. Commentators and courts are promoting this interest when they speak of preserving the independence and impartiality of the judiciary from the influence of the political process. Next I address the more systemic concerns of those who would restrict candidate speech. Those concerns focus on the damage to the judiciary caused by the public's loss of confidence in courts. Restrictions, to serve this interest, must make courts appear to be impartial and independent.

A. Preserving Actual Impartiality and Independence

1. What's Wrong with Closed-Minded Judges? (or, The Myth of Due Process)

Conceding that judicial candidates have an interest in free discussion of ideas during campaigns, some courts and commentators—notably, Indiana Chief Justice Randall Shepard and Professor Roy Schotland—have concluded that the candidates' interest is often outweighed by future litigants' interest in impartial adjudications.238 White held that litigants have no right to judges who have no views on the issues presented in their cases, but it did not address whether litigants have a right to judges who are open-minded. The second formulation, if adopted, would give litigants the right to judges who have not made up their minds on the issues presented in the cases, although judges may have some initial inclinations about those issues.

A proper understanding of the Constitution, however, gives litigants no right even to an open-minded judge. Unquestionably, a judge must be impartial in the sense of being free to decide a case irrespective of the parties before him.239 The Supreme Court has repeatedly held that a judge must disqualify

238. See supra notes 211-214 and accompanying text; In re Bybee, 716 N.E.2d 957, 959-60 (Ind. 1999) (per curiam); Schotland, supra note 56, at 665-66; Shepard, Campaign Speech, supra note 211.

239. This fact may provide a distinction between restrictions on what a judicial candidate may say and restrictions on what a lawyer or litigant may contribute to a judge's campaign. The ABA's Model Code does limit the ways a judge may raise campaign funds, in ways that would almost certainly be unconstitutional if applied to other types of campaigns. See MODEL CODE OF JUDICIAL CONDUCT Canon S(C)(2) (1990) (disallowing personal solicitation or reception of campaign contributions by judicial candidates). In their limitation of a judge's dependence on lawyers or litigants who appear before him, the restrictions may arguably be constitutional as ensuring that the judge not be biased in favor of contributors. On the other hand, the long acceptance of the practice of judges adjudicating cases involving contributors makes it unlikely that judicial disqualification is required as a matter of due process. Additionally, as the Eleventh Circuit held, bans on the personal solicitation of campaign expenditures only marginally, if at all, protect the interest of judicial impartiality, because the indirect method of solicitation that is often used as a substitute presents similar risks of favoritism. See Weaver v. Bonner, 309 F.3d 1312, 1322-23 (11th Cir. 2002). The impact of the First Amendment on judicial campaign contribution restrictions is a subject to be discussed more thoroughly in another article.
Judges as Politicians

himself where he has a demonstrated bias for or against one of the litigants. It is a fundamental tenet of our society—and of the rule of law—that judges may not decide cases in which they have a “direct, personal, substantial, pecuniary interest” in the outcome of the litigation. For that reason, the Supreme Court in *Tumey v. Ohio* held that it violated due process for a magistrate to be paid differing amounts depending on his decision. The Court extended *Tumey* in *Ward v. Village of Monroeville*, concluding that a magistrate’s pecuniary interest in keeping the village’s treasury solvent was enough to violate the due process rights of the litigant who was forced to pay a fine into that treasury. Other cases continued to find constitutional violations where the magistrate had a personal incentive to rule against one of the parties before him.

Cases invoking the Due Process Clause, such as the ones noted above, confirm that a judge who has an interest in the litigation may not preside over it. Where the judge does not have a “direct, personal, substantial, pecuniary interest,” however, but instead has a mere philosophical bias concerning the case, the Supreme Court has been much more reluctant to force disqualification. In *Aetna Life Insurance Co. v. Lavoie*, for example, the Court specifically held that the Due Process Clause did not protect an insurance company from having its case heard by a judge who had expressed prejudice against insurance companies and who sued two insurance companies for bad faith failure to pay a claim. Although the Court left open the possibility that some instances of bias could offend due process, the opinion was quite clear

242. *Id.*
244. See *id.* at 60.
245. See *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824-25 (1986) (holding that a judge’s participation in a case that could increase the settlement value of his own lawsuits deprived the litigant of due process); *Connally v. Georgia*, 429 U.S. 245, 250 (1977) (per curiam) (holding unconstitutional a search warrant issued by a magistrate who was paid for every issued search warrant, but who was not paid if he declined to sign the warrant application); cf. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 859-60 (1988) (holding that a judge personally and pecuniarily interested in a case must be disqualified pursuant to 28 U.S.C. § 445(a), notwithstanding the judge’s ignorance of the interest).
246. See *Lavoie*, 475 U.S. at 820-21. As a matter of statutory law, however, the Court, in *Berger v. United States*, 255 U.S. 22 (1921), enforced Congress’s desire that judges inclined to rule against certain litigants recuse themselves. *Berger* mandated the recusal of Judge (later Commissioner of Baseball) Kenesaw Mountain Landis from a case involving German defendants. In addition to making innumerable other indelicate comments, Judge Landis had said that German-Americans’ “hearts are reeking with disloyalty” and “[i]f anybody has said anything worse about the Germans than I have I would like to know it so I can use it.” *Id.* at 28. Judge Landis also made disparaging comments about the loyalty of “this defendant.” *Id.* at 28-29. The Court held that the applicable provision of the judicial code required Judge Landis’s disqualification, *id.* at 35, because there were “substantial and formidable” allegations of Judge Landis’s bias “toward these defendants.” *Id.* at 34 (emphasis added); see also *In re IBM*, 45 F.3d 641, 644 (2d Cir. 1995) (directing recusal because of the trial judge’s apparent bias against IBM).
that only "the most extreme of cases" would require disqualification, and that the Lavoie judge's comments "fall well below that level." 247

Where a judge is not biased as to the party, but only as to the issue, the Due Process Clause does not require his recusal. 248 While the Supreme Court in White did not specifically decide whether litigants have a right to open-minded judges, such a rule is indefensible in theory and would be impossible to administer in practice. It would create a heretofore unheard of due process right and would disqualify precisely the judges who should decide cases—those who are scholarly enough to take an interest in an area of the law and to study it prior to litigation. The only "impartiality" required by the Due Process Clause is that "[t]he judge... apply[] the law (as he sees it) evenhandedly." 249 As Judge Jerome Frank noted in a case where a litigant alleged bias on the part of a special master, if "'bias' and 'partiality' be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will." 250

If litigants have the right to an open-minded judge as a matter of due process, it is the actuality of open-mindedness, and not the judge's appearance as open-minded, that matters. 251 As such, if open-minded judges are necessary for due process, then any judge who has made up his mind on an issue facing the court (regardless of whether there has been any external manifestation of his "bias") 252 would be precluded from hearing the case. 253 The Supreme Court,

---

247. Lavoie, 475 U.S. at 821.

248. Admittedly, the line between parties and issues may become blurry. For example, a judge who expresses prejudice against "the ACLU" may need to be disqualified from a case brought by that organization. A judge who merely expresses distaste for arguments made by "ACLU-types" may, in contrast, simply be expressing an opinion about over-reaching civil liberties claims. Similarly, a judge who campaigns on a platform of harsh treatment of "criminal defendants" or "child abusers" or "slumlords," but not of a specific individual, see State ex rel. La Russa v. Himes, 197 So. 762, 762-63 (Fla. 1940)), should not be considered biased against individual criminal defendants, or other particular litigants, but rather as legitimately having expressed an opinion about an issue. See United States v. Cooley, 1 F.3d 985, 993 n.4 (10th Cir. 1993) ("Judges take an oath to uphold the law; they are expected to disfavor its violation."). Thus, where a class of litigants is identified precisely because of its stance on a legal or political issue, a comment about that group should, in most cases, be treated as being directed at the issue and not the class itself.


250. In re J.P. Linahan, Inc., 138 F.2d 650, 651 (2d Cir. 1943); see also Shaffer v. Jones, 650 P.2d 918, 921 (Okla. Ct. App. 1982) ("Judges are, and always will be, prejudiced and biased to some extent on occasion. Trial judges are people, too, and share the same cross-section of feelings and human frailties as the rest of us.").


253. Speech restrictions that are concerned only with pomp—ostensibly enacted to protect litigants—fail to protect any interest that litigants value. No litigant who is promised an open-minded
Judges as Politicians

however, wisely has never suggested that open-mindedness is a requirement of the Due Process Clause.

The impact of such a requirement would be astounding. No judge—whether in a state with judicial elections, the federal system, or a state that uses appointments to select its judges—could participate in a decision where he has considered a legal issue and come to a conclusion. This is not the way the legal system works.254 A criminal defendant arguing before the Supreme Court that police violation of Miranda v. Arizona255 requires the Court to suppress his voluntary confession will encounter the closed-minded Justices Scalia and Thomas.256 A litigant arguing before the same Court that Congress lacks the authority to abrogate state sovereign immunity through the exercise of its Article I powers257 will encounter the similarly closed-minded Justices Stevens, Souter, Ginsburg, and Breyer.258 Lastly, a litigant arguing that Congress’s power to legislate allows regulation of state employment in the same manner that Congress is allowed to regulate private employment will encounter the closed-minded opposition of Chief Justice Rehnquist259 and Justice O’Connor.260 All of these examples involve Justices who have decided issues that are likely to recur, and they give no indication of a willingness to reconsider their commitments.

What is more, each of these examples involves the Justices’ decisions to ignore precedent; these are not determined decisions to follow past cases in the face of arguments for overruling them,261 but instead decisions to cast aside those past cases when given the opportunity. A more closed-minded judicial

judge would take comfort in knowing that his judge appears neutral, though the judge has prejudged the case.

254. See generally FLAMM, supra note 251, §§ 10.1-10.11 (noting that expressions of judicial views about law or policy rarely trigger disqualification).


256. See Dickerson v. United States, 530 U.S. 428, 465 (2000) (Scalia, J., joined by Thomas, J., dissenting) ("I dissent from today’s decision, and, until [18 U.S.C.] § 3501 is repealed, will continue to apply it in all cases where there has been a sustainable finding that the defendant’s confession was voluntary.").


258. See Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 97 (2000) (Stevens, J., joined by Souter, Ginsburg, & Breyer, JJ., dissenting) ("Despite my respect for stare decisis, I am unwilling to accept Seminole Tribe as controlling precedent.").


260. See id. at 589 (O’Connor, J., dissenting) (“I share JUSTICE REHNQUIST’s belief that this Court will in time again assume its constitutional responsibility.”).

261. It seems to me that a commitment to follow precedent is as closed-minded as a commitment to overrule precedent. Nevertheless, those who would restrict judicial candidate speech by claiming that judges merely apply existing law could not possibly consider such a commitment improper. To do so would be to admit that the law is fluid, and that the individual judge has a somewhat unconstrained choice to follow precedent or not. See KARL N. LLEWELLYN, THE BRAMBLE BUSH 64-69 (1951) (arguing that judges apply precedent with varying degrees of strength, depending on their agreement with the precedent).
mentality can hardly be imagined, and yet their participation in future cases does not even raise the slightest due process concern.\textsuperscript{262} Furthermore, the very existence of stare decisis is itself a "commitment" by the court and the judicial system as institutions—after all, that is the point of the doctrine.\textsuperscript{263} To the extent that stare decisis commands judges to follow precedent, a judge asked to ignore the precedent will not be "impartial." Proponents of speech restrictions will no doubt respond that a judge applying precedent is simply applying the law, and that he must remain open-minded on the question whether the precedent fits the current case. The fact remains, however, that the precedent will have conclusively decided the legal issue, and assuming the new case to be indistinguishable from the prior one, the decision in the new case for the precedent-adherent is foreordained.

The lesson from this recitation of recent forceful dissents and due process cases is the simple proposition that a judge who has decided a legal issue is fully qualified to sit in judgment of a case that turns on that legal issue.\textsuperscript{264} Thus, despite the claims of Chief Justice Shepard, Professor Schotland, and others that judicial campaign speech restrictions "have their foundations in due

\textsuperscript{262} See Chemerinsky, supra note 225, at 745 ("I cannot imagine a credible argument that it violates due process for Justice Scalia to sit on abortion cases, though it is absolutely clear as to how he will vote."). Need anyone be reminded, he would vote to overrule Planned Parenthood v. Casey, 505 U.S. 833 (1992), and what remains of Roe v. Wade, 410 U.S. 113 (1973). See, e.g., Stenberg v. Carhart, 530 U.S. 914, 955 (2000) (Scalia, J., dissenting) ("[T]hose who believe that a 5-to-4 vote on a policy matter by unelected lawyers should not overcome the judgment of 30 state legislatures have a problem, not with the application of Casey, but with its existence. Casey must be overruled.") (emphases in original). Lest any reader remain the slightest bit uncertain of Justice Scalia's position, he repeated only a single page later that "Casey must be overruled." \textit{Id.} at 956. There is also no credible argument that Justice Scalia should recuse himself from Establishment Clause cases, though church-state separationists have claimed that he lacks the requisite "impartiality." See Tony Mauro, Future High Court Sessions Bring Changes, Concern (Jan. 27, 2003), at http://www.law.com/jsp/article.jsp?id=1042568701360 (last visited May 5, 2003). On the propriety of hearing cases in which a judge has formed an opinion, see also Laurence H. Tribe, \textit{Foreword to Paul Simon, Advice & Consent: Clarence Thomas, Robert Bork and the Intriguing History of the Supreme Court's Nomination Battles 13, 18 (1992)} ("No one would dream of suggesting that sitting Justices must recuse themselves on matters as to which their own prior writings, in Supreme Court opinions or elsewhere, have revealed their initial views.").

Other examples of closed-minded Justices abound. Then-Justice Rehnquist noted several of them in his Laird v. Tatum memorandum, including, \textit{inter alia}, Justice Frankfurter's drafting, and later interpreting, the Norris-LaGuardia Act, see United States v. Hutcheson, 312 U.S. 219 (1941); Chief Justice Hughes's participation in West Coast Hotel v. Parrish, 300 U.S. 379 (1937), which overruled Adkins v. Children's Hospital, 261 U.S. 525 (1923), a case Hughes had earlier criticized in a book; and Justice Black's sponsorship of the Fair Labor Standards Act and later participation in the case that held it constitutional, see United States v. Darby, 312 U.S. 100 (1941). See Rehnquist Memorandum, supra note 95, at 83-34.

\textsuperscript{263} See, e.g., Antonin Scalia, \textit{Response, in Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 129, 139 (Amy Gutmann ed., 1997)} ("The whole function of the doctrine [of stare decisis] is to make us say that what is false under proper analysis must nonetheless be held to be true, all in the interest of stability.").

\textsuperscript{264} See Liteky v. United States, 510 U.S. 540, 554 (1994) (noting that a "view of the law acquired in scholarly reading" will not suffice to make out a claim of judicial bias or prejudice); United States v. Bauer, 84 F.3d 1549, 1560 (9th Cir. 1996) ("A judge's view on legal issues may not serve as the basis for motions to disqualify.") (quoting United States v. Conforte, 624 F.2d 869, 882 (9th Cir. 1980)); United States v. Bonds, 18 F.3d 1327 (6th Cir. 1994).
process," the "impartiality" that is compromised by campaign speech is not a necessary component of constitutional due process. As such, the speech rights of candidates and voters (which are protected by the First Amendment) should, even if the interests are "balanced," trump state desires for heightened due process protections for litigants (which cannot claim the "compelling" interest of complying with the United States Constitution). This is so despite the fact that as a general matter states are permitted to extend their citizens greater due process protections than those provided in the national charter. Those who have used a due process rationale to assail free speech during campaigns have sought to create a heretofore nonexistent constitutional right, and have ironically done so for the purpose of curtailing the right most cherished in the Constitution, upon which democracy depends.

Having a knowledgeable but closed-minded judge on a case is not only

---

265. Shepard, Campaign Speech, supra note 211, at 1060; see also Ackerson v. Ky. Judicial Ret. & Removal Comm'n, 776 F. Supp. 309, 315 (W.D. Ky. 1991) (noting concerns that judicial campaign speech could undermine "fundamental fairness"); In re Bybee, 716 N.E.2d 957, 960 (Ind. 1999) (arguing that due process could be compromised by judicial campaign speech); O'Neil, supra note 220, at 715-16 (same); Schotland, supra note 56, at 665 (same); Wiener, supra note 216 (same).

266. Cf. Gentile v. State Bar, 501 U.S. 1030, 1075 (1991) (permitting restrictions of attorney speech about his pending cases when the speaker knows or should know that his message creates a "substantial likelihood of material prejudice" to an adjudicative proceeding by biasing the jury venire or affecting the outcome of the proceeding); Widmar v. Vincent, 454 U.S. 263, 275-76 (1981) (holding that a state university was required to provide religious groups access to money and facilities equal to the access of sectarian groups, despite the Missouri State Constitution's requirement of the strict separation of church and state). But cf. Witters v. State Comm'n for the Blind, 771 P.2d 1119, 1120, 1123 (Wash. 1989) (holding that the Washington Constitution provides greater separation than does the national Constitution, and that refusing to fund a student who wished to study at a religious institution did not violate his free exercise rights, possibly because of the "compelling" interest of complying with the state constitution's separation requirement). A legislative preference (either at the state or federal level) for the heightened due process standard championed by Chief Justice Shepard and others, even if forthcoming, would therefore appear to be irrelevant because violation of the heightened due process standard would not "prejudice" judicial proceedings in any relevant federal constitutional sense. See Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (striking down New Jersey's public accommodations law as inconsistent with the associational guarantees of the First Amendment); City of Boerne v. Flores, 521 U.S. 507 (1997) (striking down the Religious Freedom Restoration Act (RFRA) as an unconstitutional attempt to enforce the First and Fourteenth Amendments, given that RFRA was not congruent and proportional to the extent of the Free Exercise Clause, as construed by the Supreme Court in Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990)); see also INS v. Chadha, 462 U.S. 919, 941 (1983) ("Congress has plenary authority in all cases in which it has substantive legislative jurisdiction, so long as the exercise of that authority does not offend some other constitutional restriction.") (quoting Buckley v. Valeo, 421 U.S. 1, 132 (1976)) (emphasis added) (citation omitted).

267. See Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 828 (1986); Tumey v. Ohio, 273 U.S. 510, 523 (1927). Justice Kennedy suggested that states may require recusal to protect their heightened due process standards, see Republican Party v. White, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring), and shortly after the White decision, Missouri adopted just such a requirement. See Roy A. Schotland, Republican Party of Minnesota v. White, Should Judges Be More Like Politicians?, JUDGES' J., Summer 2002, at 7. The recusal requirement is also troubling, however, as it penalizes the speech of the candidate by eliminating his authority to serve in cases that matter to him. It also penalizes voters who have elected a judicial candidate precisely because of his views on the issue he will be precluded from adjudicating. These penalties would be justified by the same interests—judicial impartiality and independence—that are insufficient to justify bans on speech, so it is unclear why the recusal rule would necessarily be constitutional. But see Berger v. United States, 255 U.S. 22 (1921) (enforcing higher statutory standards of recusal than constitutionally required).
perfectly constitutional, but often preferable to having an open-minded one. Of course, the litigant who happens to be urging the outcome disfavored by the judge will not be pleased by the judge or his (likely)\textsuperscript{268} decision.\textsuperscript{269} Nevertheless, from the perspective of the judicial system, a judge who knows enough about a subject to have an opinion is more likely to render a thoughtful decision than one who has not thought about the issue until reading the parties' briefs.\textsuperscript{270} Speech restrictions are designed to combat not only the judge who seeks to declare a particular party victorious, but also the judge who seeks to construct a particular view of the law. The restrictions react with hostility to judges who wish to say, “I have studied this issue, and I am convinced that this provision of law should be interpreted to mean $X$.” But what possible reason could there be to cast aside that judge as “biased” or an “ideologue”\textsuperscript{271} and replace him with a judge who says, “Gee, I’ve never thought about that before. I guess I’ll decide the issue when it’s presented to me”?\textsuperscript{272}

In his \textit{Laird v. Tatum} memorandum, then-Justice Rehnquist explained the disadvantages of requiring open-minded judges.

Since most judges come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would not be merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers. \textit{Proof that a Justice's mind at the time he joined the}

\begin{footnotesize}
268. Judges may change their minds upon reflecting on issues during litigation. Perhaps the most famous example of a judge switching sides is Justice Jackson’s contradiction between his opinions as Attorney General, see 39 Op. Att’y Gen. 504 (1940), and as a Justice, see McGrath v. Kristensen, 340 U.S. 162, 176 (1950) (Jackson, J., concurring), on whether an alien taking a temporary, overnight stay in the United States was “residing” here. Justice Jackson explained his switch by quoting Lord Westbury as saying, “I am amazed that a man of my intelligence should have been guilty of giving such an opinion.” \textit{Id.} at 178. For a more recent example, see Ring v. Arizona, 536 U.S. 584, 611 (2002) (Scalia, J., concurring) (“Since \textit{Walton} [v. Arizona, 497 U.S. 639 (1990)], I have acquired new wisdom . . . or, to put it more critically, have discarded old ignorance.”).

269. See Rehnquist Memorandum, \textit{supra} note 95, at 833-34.

270. See Michael Kinsley, \textit{Liar or Boob?}, \textit{THE NEW REPUBLIC}, Oct. 21, 1991, at 4 (discussing the Thomas confirmation hearings and arguing that “someone so heroically unreflective about the Constitution” as to not to have an opinion on \textit{Roe v. Wade}, 410 U.S. 113 (1973), would be unqualified for the Supreme Court); see also Tribe, \textit{Foreword, supra} note 262, at 19 (“A nominee whose record is too pale to read with the naked eye or whose views are shrouded in fog too dense for anything but the klieg lights of national television to pierce is probably ill-suited for a lifetime seat on the Supreme Court in any event.”).

271. Laurence H. Silberman, \textit{The American Bar Association and Judicial Nominations}, 59 GEO. WASH. L. REV. 1092, 1100 (1991). As Judge Silberman explained, “[o]ften judges or prospective judges are criticized for being ideologues because they have a relatively—and I emphasize relatively—coherent view of the law’s role in our society. . . . This so-called ‘ideological’ judge is juxtaposed to . . . the judge who decides each case on its merits. . . . [But] too often ‘merits’ means nonlegal merits.” \textit{Id.}

272. Prospective Supreme Court nominee Herschel Friday apparently responded similarly when questioned by Nixon administration officials about his legal views. According to John Dean, who was then Counsel to the President, “[o]ften, [Friday] didn’t have a clue what we were talking about, and when he did, he didn’t know how he felt about the matter because he’d never thought about it.” \textit{JOHN W. DEAN, THE REHNQUIST CHOICE: THE UNTOLD STORY OF THE NIXON APPOINTMENT THAT REDEFINED THE SUPREME COURT} 159 (2001). Dean further quoted Friday as saying, “John, you’re going to have to tell me what I should say on these issues. I want to be with the president.” \textit{Id.} at 160.
\end{footnotesize}
Judges as Politicians

Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias. 273 Judge Frank earlier expressed the same sentiment: "An 'open mind,' in the sense of a mind containing no preconceptions whatever, would be a mind incapable of learning anything, would be that of an utterly emotionless human being, corresponding roughly to the psychiatrist's descriptions of the feeble-minded." 274

All this assumes that the candidate is confessing ignorance honestly. Surely we can all agree that it would be better to have a judicial candidate who forthrightly states his views than to have one who holds the same views but falsely says he has none. 275 But the effect of candidate speech restrictions is to make all candidates appear not to hold views on legal issues, lessening the possibility that voters will be able to distinguish the truly ignorant candidate from the open-minded candidate, or from the fraud, or from the candidate who would discuss his well-considered legal views if only he were allowed to do so. 276 As one commentator has opined, "[w]e should be wary of a regime of rules that encourages evasiveness and double-talk in public discourse about government affairs." 277

A judge whose thoughts on legal issues are known can be confronted and perhaps convinced by attorneys who can focus on the arguments likely to be relevant to the judge. 278 And where no amount of persuasion will do the trick, perhaps the judge was right all along, and the issue was open-and-shut. To carry the point to its extreme, a judge need not be open-minded on the question whether the President may be elected at age twenty-two. Indeed, it would be far

---

273. Rehnquist Memorandum, supra note 95, at 835 (emphasis added).
275. See Tribe, supra note 262, at 18 ("It hardly fosters fairness to claim that a mind is completely neutral when in fact a lifetime of experiences has unavoidably inclined it one way or the other . . ."); Thomas Penfield Jackson, Don't Gag the Judges, LEGAL TIMES, Oct. 4, 2002, available at http://www.law.com/servlet/ContentServer?pagename=OpenMarket/Xcelerate/View&c=LawArticle&id=1032128672961&t=LawArticle (last visited May 5, 2003) ("[The only genuine determinant of judicial impartiality is the integrity of the judge himself, not appearances, and a reputation for candor is a better gauge of integrity than a reputation for silence."); Kinsley, supra note 270 (arguing that then-Judge Thomas was either being deceptive when he denied discussing Roe v. Wade, thereby rendering him unqualified for the Court as an "outright liar[,]" or he was telling the truth and thereby exhibiting a lack of knowledge about the Constitution that rendered him unqualified). Justice Thomas continues to receive criticism for his allegedly false statements that he had never taken positions on controversial legal issues. See, e.g., ANDREW PEYTON THOMAS, CLARENCE THOMAS: A BIOGRAPHY 355-56, 370-71, 374-75 (2001) (analyzing Justice (then-Judge) Thomas's denials of engaging in discussions concerning abortion, and concluding that the denials were false).
276. See Plymouth Nelson, Note, 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, 1640 (2002) ("[I]sn't there great[,] harm in the candidate in fact harboring partisan feelings of which the voter knows and can know nothing? If a particular partisan candidate wanted to deceptively 'play' independent as an election strategy, he could hide behind Canon 5, citing it as the reason he "can't answer that question.""").
278. See Chemerinsky, supra note 225, at 745.

---
better to select a judge who has actually read the Constitution and discovered the incontrovertible answer to the question. Nothing "guarantees a litigant that each judge will start off from dead center in his willingness or ability to reconcile the opposing arguments of counsel with his understanding of the Constitution and the law." In other words, while there may be no "higher governmental interest than a State's interest in the quality of its judiciary," judicial quality is not impaired (indeed, it is improved) by judges who have given thought to legal issues prior to their ascension to the bench or outside of the narrow context of case adjudication. Accordingly, speech restrictions fail the narrow tailoring test of strict scrutiny.

Because speech restrictions do not root out actual bias, but only outward manifestations of it, a judge with predetermined views on legal issues may be selected to serve in a state with restrictions, just as he might be selected in a state without them, or in one with an entirely appointive judiciary. The difference, then, is that lawyers and litigants in states with restrictions will be unaware of the judge's predilections—the predilections themselves will always be present. The candidate speech restrictions, therefore, insofar as they merely mask preexisting biases, do not even serve the phony due process interest of open-mindedness cited by the restrictions' supporters.

2. "We Want No Judiciary Independent of the People"

The next question in evaluating whether judicial candidate speech restrictions are constitutional is whether the restrictions are narrowly tailored to serve a compelling interest in allowing the candidate to act independently as a judge. There appear to be two forms of independence that speech restrictions

---

279. U.S. Const. art. II, § 1, cl. 5 (providing that the minimum age of the President is thirty-five). This hypothetical assumes away any issues of legitimate dispute, including, for example, a litigant's standing to raise a claim based on the president's immaturity.

280. Rehnquist Memorandum, supra note 95, at 839; see also Chandler v. Judicial Council, 398 U.S. 74, 137 (1970) (Douglas, J., dissenting) ("Judges are not fungible; they cover the constitutional spectrum; and a particular judge's emphasis may make a world of difference . . . ."); Nelson, supra note 276, at 1634 ("Each side's goal is to select a judge who, though fair and impartial, has an underlying value system that more or less represents that side's views and will be used to interpret existing laws.").


282. See United States v. Bonds, 18 F.3d 1327, 1329 (6th Cir. 1994) (denying motion for recusal ("[A] judge's interest or expertise in a given area, or his methods of informing himself as to a given area of the law, do not constitute grounds for recusal unless they come within some other specific grounds for recusal."); John T. Noonan, Jr., The Passengers of Palsgraf, in The Responsible Judge: Readings in Judicial Ethics 22, 33 (John T. Noonan, Jr. & Kenneth I. Winston eds., 1993) ("It is not considered improper for a judge to hear argument about the governing law outside of the interested lawyers' presence, for in hearing others debate the rule applicable in a real case the judge is supposed to be looking at principles larger than particular litigants.").

283. See Chemerinsky, supra note 225, at 744-45.

Judges as Politicians

seek to protect. First, according to the restrictions, judges should feel free to
decline cases according to the law without fear that application of an unpopular
law will cost them their jobs. Second, judges must feel free to decide cases
based on the law, regardless of what they may have said in an earlier campaign.
The second form of independence relates closely to the argument about the
"impartiality" of a judge who has committed himself on an issue. It, therefore,
will not be covered in this section, but will be analyzed later in Subsection
IV.B.2, when the appearance of judicial independence is considered against the
demands of an elected and accountable judiciary.

The first form of judicial independence will be the subject of this section.
Tocqueville, in his classic Democracy in America, recognized judicial elections
as a threat to independence, and predicted that the result would be an "attack[]" on "the democratic republic itself."
Tocqueville and scores of commentators since his time have sought to preserve judicial independence from the fancy of
majority will. Under this traditional view, independence must be ensured
because a judge will not be free to adhere to unpopular laws if an opposing
candidate can attack the judge in a campaign, blaming him for actions that are
required as part of his profession. But states that have adopted judicial elections
have accepted a different paradigm by rejecting single-minded pursuit of
independence in favor of a system forcing judges to be accountable to the
public.

Such a focus on accountability may be entirely appropriate, given the range
of decisions available to judges, and the concomitant ability of judges to exert
influence over policy. By eliminating from campaigns any conflict over cases
or legal issues, speech restrictions seek to insulate judges from criticism and
minimize the extent to which a judge has a choice in deciding cases. Speech
restrictions thus promote the view that judges merely follow the law, and, for
that reason, the choice of judge makes little difference. They also promote the
notion of a judiciary as high-minded and above playing to the electorate. In
short, judicial speech restrictions are justified on the ground that judges are not
politicians, and should not have to justify their substantive decisions the way a
politician should justify his decisions to the voters.

Political science, however, has demonstrated this model of independent
judicial decisionmaking to be false, at least in the high-profile cases that have

285. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 269 (J.P. Mayer & Max Lerner eds.,
286. See Kermit L. Hall, Constitutional Machinery and Judicial Professionalism: The Careers of
Midwestern State Appellate Court Judges, 1861-1899, in THE NEW HIGH PRIESTS: LAWYERS IN POST-
CIVIL WAR AMERICA 29, 34 (Gerald W. Gawalt ed., 1984) ("If the function of appellate judging is
considered essentially technical, then popular election and limited tenure in office thrust unwanted and
undesirable political considerations into the selection process and, ultimately, into the performance of
the judicial role."). If, however, this "technical" conception is rejected for one more realistic, "then
popular election offers a legitimate means of ensuring judicial accountability through the political
process." Id.
been the subject of studies, and has shown that judges in fact often behave like politicians. Scholarship, summarized below, shows that elected judges, just like other politicians, tailor their decisionmaking to the necessities of campaigns, changing their behavior in response to the expected reaction of the electorate. A reasonable response to these studies might be to lengthen judicial tenure and provide more independence to judges. Such a reform would allow judges to make decisions further removed from a specific campaign and specific campaign promises, while still allowing the public to influence judicial policy through their votes. But silencing critics who wish to campaign on legal issues gives voters the false impression that judges are not politicians, or that policy will be unaffected by the results of judicial elections. Moreover, silencing candidates will increase the impact of independent advocates, for whom speech limitations are all but certainly unconstitutional—an effect that may distort voters’ information and ultimately may distort the outcomes of elections.

Political scientist Melinda Gann Hall has shown repeatedly that judges alter their behavior depending on the judicial selection system used for their courts. Professor Hall analyzed state court decisions in four states to determine the conditions under which judges would be willing to express dissent from decisions affirming death sentences. She found that judges who felt the need to appease conservative voters were less likely to dissent than were judges who were more removed from electoral pressures. Specifically, Professor Hall discovered that “voting with the majority in conservative death penalty cases is associated with a district-based electoral system, obtaining a smaller percentage of the vote in the election preceding the decision, being in the last two years of a term, having prior representational experience and having participated in judicial reelection campaigns.” Her additional studies confirmed the force of those factors, and found additionally that judges were more likely to vote to uphold death sentences where they had previous prosecutorial experience, where their states’ murder rates were high, and where their terms were short. Professor Hall’s research provides additional

287. This is not to say that electoral politics is the sole, or even the strongest, factor in judicial decisionmaking. It does, however, influence decisions to a statistically significant degree, as shown by the studies discussed below.

288. See Schotland, Comment, supra note 77, at 153 ("Unduly short terms... do not merely challenge judicial independence—they are inconsistent with it.").


290. State supreme courts (as opposed to individual judges), however, do not appear to vary their decisions to benefit discernible classes of litigants depending on the system of judicial selection employed. See Burton M. Atkins & Henry Glick, Formal Judicial Recruitment and State Supreme Court Decisions, 2 Am. Pol. Q. 427 (1974).


Judges as Politicians

evidence that lengthier terms of office promote judicial independence and may do a better job in achieving that goal than do speech restrictions.

Not only is the act of judging inextricably tied to politics, but the process of selecting judges is inherently political, in the sense that competing interests will understand the impact that a particular judge will have on decisions, and will act accordingly to seat judges with whom they agree and prevent the election or appointment of judges with different views. Particularly as courts increasingly involve themselves in divisive political issues and decline to leave questions of policy to legislatures, every observer knows that a potential judge’s judicial philosophy can impact the lives of everyone under the jurisdiction of the court. For that reason, public involvement in issues confronting courts—particularly state courts, for which their duties are unquestionably to shape the law and not merely interpret it—should be accepted as part of popular sovereignty, not shunned as part of mob rule.

The role of politics in judicial selection is not a new discovery, and even in the federal system, where impartiality and independence are at their apexes, presidents from Washington forward have chosen nominees based on their judicial philosophies. The Senate has confirmed and rejected nominees for
the same reason.\textsuperscript{297} Politics is not excluded from an appointive selection system; it is at the forefront.\textsuperscript{298} As Chief Justice Rehnquist has written, "it is . . . both normal and desirable for presidents to attempt to pack the Court" so that some measure of public input might influence the Court's direction.\textsuperscript{299}

If it is impossible to remove politics from appointive selection systems, it is positively ludicrous to think that politics can be removed from elective systems, even were such a result desirable. As the recitation of history in Part II demonstrated, however, removing politics from the judiciary was not the goal of those who established judicial elections. States adopted judicial elections largely as a way of freeing their judges from dependence on other politicians. Allowing the people of a state, rather than the governor or the legislature, to assess the political acceptability of a potential judge permitted the elected judge to make rulings that were unpopular with mayors, governors, and legislators (though perhaps not with party bosses), confident that he could retain his job without winning over those politicians.\textsuperscript{300} Elections did not eliminate the capacity for influence on a judge's decisions—they merely changed the group most likely to do the influencing from government officials to the electorate.\textsuperscript{301}

With the concept of reelection, however, there was an additional threat to independence that was (and is) absent from the federal system and all systems

\begin{quote}
\textsuperscript{297} See generally John Anthony Maltese, The Selling of Supreme Court Nominees (1995); Mark Silverstein, Judicious Choices: The New Politics of Supreme Court Confirmations 129-59 (1994); Simon, supra note 262; Tribe, supra note 294, at 77-92. Professor Abraham's alteration of the title of his work to Justices, Presidents, and Senators from Justices and Presidents may reflect an increasingly acute recognition of the role of the upper house in the consideration of nominees. See Abraham, supra note 296.


\textsuperscript{299} William H. Rehnquist, The Supreme Court: How It Was, How It Is 236 (1987). Chief Justice Rehnquist himself was appointed to the Court in part due to his philosophy. See Dean, supra note 272; Richard Nixon, RN: The Memoirs of Richard Nixon 424 (1978) (noting Rehnquist's "moderately conservative philosophy" as a factor weighing in Nixon's decision to nominate him to the Court).

\textsuperscript{300} See Nelson, supra note 70, at 205-07.

\textsuperscript{301} See id. at 217 ("[S]upporters of the elective system tended to believe that influences of some sort were inevitable, and that the influence of the whole people was preferable to the influence of smaller groups.").
\end{quote}
Judges as Politicians
giving judges life tenure. The possibility of a reelection challenge meant that judges would be vulnerable if a decision met with public disfavor. A judge was therefore no longer free to make decisions in accordance with his view of the law, if he thought such a decision would cost him his job.302

A similar threat to independence would present itself, however, in an appointive system where judges were subject to periodic reappointment.303 In such a system, there would be the same danger that judges would tailor their decisions to appease the appointing authority304 the same way judges now are feared to tailor their decisions to appease the electorate.305 Thus, the threat to judicial independence, in the sense of subservience to the authority that can remove the judge from the bench, is only marginally more present in a system of judicial elections than in one with appointments.306 The threat to independence is generated primarily by short judicial tenures—not by the selection system or the discussion of legal issues during campaigns—and even tenure “during good Behaviour” can occasionally be an insufficient safeguard of independence from political attacks.307

302. See generally Karlan, supra note 28, at 538-40 (describing the coercive force of threats to a judge’s wealth and job).

303. The presence of an opponent may result in heightened political pressure on a candidate in an election compared to the political pressure on a prospective judge in an appointive system. Additionally, there is the possibility that the public will be more easily fooled by caricatures of (and lies about) a judge’s record than would a legislature or governor making a reappointment. On the other hand, however, members of the public in a state with appointed judges could be inspired by deceptive advertising to contact the legislature or governor, and demand the judge’s retention or rejection, in which case the effect of insulating judges from the direct influence of the electorate would be minimized.

304. See Melinda Gann Hall & Paul Brace, State Supreme Courts and Their Environments: Avenues to General Theories of Judicial Choice, in SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 284 (Cornell W. Clayton & Howard Gillman eds., 1999) (“Judges required to win reappointment pursue strategies to enhance their chances for reappointment, such as not taking on the other branches of government in the game of separation of powers and being far more attentive to elite political preferences than judges selected under different institutional arrangements.”).

305. These fears appear to be well justified. See supra notes 287-292 and accompanying text.

306. In fashioning the Constitution’s plan for presidential selection, the Framers recognized that periodic reappointment constitutes a serious threat to the independence of the appointed official. They therefore considered the idea of having the President initially appointed by the national legislature and reappointed by an electoral college, before they concluded that even that design would make the President too dependent on the will of the legislature. See MCDONALD, supra note 4, at 169.

307. See Gerald N. Rosenberg, Judicial Independence and the Reality of Political Power, 54 REV. POL. 369 (1992) (arguing that the U.S. Supreme Court does not consistently exercise independence when faced with intense congressional opposition). The fiasco surrounding U.S. District Judge Harold Baer, Jr. would appear particularly instructive on the incomplete “independence” of appointed judges. Judge Baer excluded evidence of a criminal defendant’s drug running, concluding that the defendant’s flight from police was reasonable and therefore did not give police sufficient cause to stop the suspect. See United States v. Bayless, 913 F. Supp. 232 (S.D.N.Y. 1996). In part, the ruling was based on Judge Baer’s conclusion that residents in Washington Heights, Manhattan, where the incident occurred, “tended to regard police officers as corrupt, abusive and violent.” Id. at 242. Political reaction was swift and harsh. Legislative leaders called for Judge Baer’s impeachment, and Mike McCurry, President Clinton’s press secretary, suggested that the President might ask for Judge Baer’s resignation. See Alison Mitchell, Clinton Pressing Judge To Relent, N.Y. TIMES, Mar. 22, 1996, at A1. Other judges stood behind Judge Baer, defending the “independence” of the judiciary from this “extraordinary intimidation,” Don Van Natta Jr., Judges Defend a Colleague from Attacks, N.Y. TIMES, Mar. 29, 1996,
In states with judicial elections and periodic reelections, the imposition of judicial “independence” through speech restrictions effectively results in the undermining of the elections themselves. Any system of reelections makes the candidates dependent on the approval of voters, something inconsistent with the political insulation often thought to be synonymous with judicial independence. As demonstrated above, however, reformers were not so hopelessly naïve as to believe that they could replace appointment with election and eliminate, rather than change the recipients of, judicial genuflecting. A substantial portion of the class of reformers pushed for judicial elections expressly for the purpose of making judges accountable to the masses, rather than the political elites, and the others who concurred in the adoption of judicial elections realized that there was the potential for the public to exert political influence through the ballot box. Voters may not constitutionally be limited to voting for or against candidates on the basis of only certain characteristics; judicial elections make judges “accountable for whatever the public bloody well wants.” Accordingly, speech restrictions, inconsistent as they are with

at B1, but Judge Baer reversed his prior decision and decided not to suppress the evidence. See United States v. Bayless, 921 F. Supp. 211 (S.D.N.Y. 1996); Joyce Price & Warren Strobel, Judge Bows to Critics, Reverses Drug Ruling, WASH. TIMES, Apr. 2, 1996, at A1. As the title of the Price and Strobel article suggests, the reversal led many in the country, including counsel for the defendant, to hypothesize that the political pressure facing Judge Baer affected his decision. See, e.g., Price & Strobel, supra (quoting Bayless’s counsel as stating his belief that “[t]he outside pressure . . . influenced him [Judge Baer]”).

Whether anyone—be it the electorate or an appointing authority—should be able to replace a judge, such as Judge Baer, whose decisions are far out-of-step with the preferences of the public, may depend on whether one believes that the political officials were wrong for challenging Judge Baer’s ruling, or whether Judge Baer brought the criticism on himself for delivering such a questionable decision. Compare Stephen B. Bright, Political Attacks on the Judiciary: Can Justice Be Done amid Efforts To Intimidate and Remove Judges from Office for Unpopular Decisions, 72 N.Y.U. L. REV. 308 (1997), and David Broder, Editorial, Politicians Shouldn’t Threaten Judges, SAN ANTONIO EXPRESS-NEWS, Apr. 16, 1996, at B6, with ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 115 (1996) (“It has been the judiciary, and not its critics, that has misled the public as to the role of judges in a constitutional democracy.”), James L. Buckley, The Constitution and the Courts: A Question of Legitimacy, 24 HARV. J.L. & PUB’L POL’Y 189, 190 (criticizing the ABA’s Commission on the Separation of Powers and Judicial Independence for “largely ignor[ing] the part played by judicial overreaching in sparking the court-bashing it decried”), Edwin Meese III & Rhett DeHart, Rein in the Federal Judiciary, 80 JUDICATURE 178 (1997), and William F. Buckley Jr., The Phony Threat to Independence, BUFFALO NEWS, Apr. 17, 1996, at B3; see also supra notes 206-210 and accompanying text. Put more generally, “[t]here may be some difficulty . . . ascertaining whether public confidence in the judiciary eroded because of campaign activity, or whether both the public’s lack of confidence and the campaign activity are responses to the roles judges have been playing.” Federalist Society for Law and Public Policy Studies, House of Delegates Preview: Summary of New Policy Positions To Be Considered in August, ABA WATCH, Aug. 2002, at 3.


309. See supra Part II.

310. Symposium, supra note 208, at 325 (statement of panelist Erik Jaffe); see also id. at 327 (“When the public votes, there is no such thing as bad reasons.”). States with judicial elections have already accepted that irrelevant “reasons” govern a substantial number of votes in judicial elections. Voters rely on information as useless as ballot position and as controversial as ethnic and gender stereotyping when making their selections. If voting for a judge on the basis of race is permitted (one might say encouraged, given the lack of other available data, see Howard A. Scarow, Vote Dilution,
Judges as Politicians

the periodic assessment of judicial performance, cannot stand.

Simply put, states adopting judicial elections have rejected an "independent" judiciary. The superiority of an independent judiciary, championed by policymakers and commentators defending speech restrictions, is a political theory with an impressive pedigree, but the First Amendment protects Americans who wish to evaluate its continued performance. And while an independent judiciary can boast of its protections for minority interests against the sometimes tyrannical majority, such independence is not constitutionally mandated. (If it were, judicial elections would be unconstitutional interferences with that independence, whether accompanied by speech restrictions or not.) Invocation of judicial independence in justification of campaign limitations therefore fails to explain why that independence is a sufficiently grave interest to override claims to engage in political speech.

"[G]overnmental abridgment of liberty is always undertaken with the very best of announced objectives... and often with the very best of genuinely intended objectives." Speech restrictions are undoubtedly enacted with the best intentions of ensuring that courts promote justice for all litigants, but the desirability of an independent judiciary does not allow the government to silence those with an alternate view. Indeed, the very concept of an

---


312. There continues to be criticism of the independence of appointed, life-tenured judges. See, e.g., BORK, supra note 307, at 117; Paul D. Carrington, Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court, 50 ALA. L. REV. 397 (1999).


314. Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 692 (1990) (Scalia, J., dissenting); see also id. ("[D]ictators promise to bring order, not tyranny."); Fla. Bar v. Went For It, Inc., 515 U.S. 618 (1995) (Kennedy, J., dissenting) ("Self-assurance has always been the hallmark of a censor. That is why under the First Amendment the public, not the State, has the right and the power to decide what ideas and information are deserving of their adherence.").

315. See Austin, 494 U.S. at 706 (Kennedy, J., dissenting) ("The suggestion that the government has an interest in shaping the political debate by insulating the electorate from too much exposure to
individual right requires government to allow an individual to exercise that right "even when the majority thinks it would be wrong to do it, and even when the majority would be worse off for having it done."\textsuperscript{316}

For states that reject judicial independence and instead opt for an accountable judiciary, there is no constitutional way for political elites to limit the items of discussion during judicial elections, and thereby ram judicial independence down the throats of an unwilling public and unwilling candidates. Speech restrictions should not be permitted to take away rights necessary to the fulfillment of judicial accountability, where states have chosen accountability as a goal.

From the foregoing discussion, it is clear that issue-based judicial campaigns do not necessarily impinge on a litigant’s constitutional right to an impartial adjudicator, and do not detract from the independence of the judiciary appreciably more than does a system of periodic reappointment. Moreover, issue-based campaigns may benefit future litigants, in that thoughtful and learned judicial candidates would be able to exhibit their knowledge during campaigns and thereby attract votes. Even if issue-based elections do not attract (or result in the selection of) more knowledgeable candidates, litigants arguing before judges will know the inclinations of the judges, and will be able to plan their arguments accordingly. Protecting litigants, therefore, provides an insufficient constitutional justification for limiting the speech of judicial candidates.

As public knowledge of a judge’s predetermined views may impact public esteem for the court system, however, even if those statements do not impact litigants’ rights, I next turn to the question whether speech restrictions can claim a compelling interest in preserving the appearance of judicial impartiality and independence.

certain views is incompatible with the First Amendment.”); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 51 (1988) (“The First Amendment recognizes no such thing as a ‘false’ idea.”); cf. Holder v. Hall, 512 U.S. 874, 891-946 (1994) (Thomas, J., concurring in judgment) (arguing that vote dilution claims under section 2 of the Voting Rights Act have improperly engaged courts in the “hopeless project of weighing questions of political theory” in establishing the baseline effectiveness of an “undiluted” vote). Just as judges should not be in the business of choosing representational structures based on their ideals of political participation, neither should they force states to choose an independent judiciary to maintain fidelity to the judges’ ideals of constraining majority rule.

316. RONALD DWORAKIN, TAKING RIGHTS SERIOUSLY 194 (1977); see also, e.g., Texas v. Johnson, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”).
Judges as Politicians

B. Preserving the Appearance of Independence and Impartiality

Buckley v. Valeo317 recognized a compelling interest in quelling both corruption and the appearance of corruption,318 and the Court has elsewhere recognized that "justice must satisfy the appearance of justice."319 One commentator has suggested that "[b]ecause public confidence is so essential to maintaining the integrity of the bench, even the appearance of bias, parochialism, or favoritism can threaten the judicial function."320 Justice Stevens echoed these sentiments in his Bush v. Gore dissent, stating that "the true backbone of the rule of law" was "confidence in the men and women who administer the judicial system,"321 which he believed was being eroded by calling into question the objectivity of courts.322

Those who would restrict speech in judicial elections have focused intently on the importance of maintaining the appearance of courts as impartial centers for dispute resolution, free of the corrupting influence of "special interests" and their money.323 Mere loss of faith in the independence of the judiciary, they say, even without actual bias, can lead to a rejection of the rule of law, because

318. See id. at 26, 66-67.
320. Sherrilyn A. Ifill, Do Appearances Matter?: Judicial Impartiality and the Supreme Court in Bush v. Gore, 61 MD. L. REV. 606, 611 (2002); see also, e.g., Alfred P. Carlton, Jr., Preserving Judicial Independence—An Exegesis, 29 FORDHAM Urb. L.J. 835, 839 (2002) ("[I]f the public ever perceives that the court bases its decisions on factors other than the evidence, the laws, and the Constitution, it will lose its respect for the law. And when the public loses its respect for the law, we lose the centripetal force that binds us to our nationhood.").
322. See id. at 128-29. The alternative argument is, of course, that the courts issuing result-oriented decisions have called their own objectivity into question, and stifling critics serves only to perpetuate lawless judging. See supra notes 206-210, 307, and accompanying text; Bowers v. Hardwick, 478 U.S. 186, 194 (1986) ("The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."). One need not place the blame on either courts or critics, however, to recognize that the public has lost confidence in judges as pure expositors of the law. Very few observers, for example, saw as the least bit objective the New Jersey Supreme Court’s decision in New Jersey Democratic Party, Inc. v. Samson, 814 A.2d 1028 (N.J.) (allowing the ballot substitution of Democratic candidates for the U.S. Senate under an admittedly "liberal[ ] constru[ction]" of the relevant statute), cert. denied, 123 S. Ct. 673 (2002), or the Florida Supreme Court’s decisions in Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220, 1227 (Fla. 2000) (explicitly eschewing "hyper-technical reliance upon statutory provisions"), vacated sub nom. Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000), and Gore v. Harris, 772 So. 2d 1243 (Fla. 2000), rev’d sub nom. Bush v. Gore, 531 U.S. 98 (2000).
323. See, e.g., In re Kaiser, 759 P.2d 392, 399-400 (Wash. 1988); cf. SMITH, supra note 7, at 52 (noting that "many [campaign finance] reform advocates seem to consider it ‘corruption’ if a lawmaker merely votes in a manner consistent with the desires of those groups or individuals that have contributed to his or her campaign—unless, of course, the reform-minded advocate thinks that the position is correct, in which case it becomes a vote on principle"). Professor David Barnhizer, who favors the abolition of judicial election speech restrictions, would allow free candidate speech so as to minimize the influence of special interests. According to him, the current "muzzling of judicial candidates" favors special interests by denying everyone else relevant information. See Barnhizer, supra note 231, at 420-21.
litigants will settle their disputes in other, less socially desirable fora. Thus have courts and writers cautioned that the sky is falling: “To distrust the judiciary marks the beginning of the end of society.” In my view, however, states that have rejected the federal model of judicial independence have necessarily accepted (if not celebrated) that some level of electoral accountability will play a part in their judges’ decisions. Accordingly, because there is nothing “corrupt” about the functioning of democracy, limiting speech so as to conceal the part that electoral politics does play in judicial decisions cannot be constitutionally justified.

1. Judges as “Representatives” and Policymakers

In her White dissent, Justice Ginsburg drew a sharp distinction between the representative function of politicians and the independent, deliberative role of courts: “Legislative and executive officials act on behalf of the voters who placed them in office; ‘judges represent the Law.’” According to Justice Ginsburg, “[e]ven when they develop common law or give concrete meaning to constitutional text, judges act only in the context of individual cases, the outcome of which cannot depend on the will of the public.” Justice Ginsburg’s ideal of independent judging undergirds the rationale for speech restrictions that insulate judges from the public, but it vastly underestimates the judicial capacity for policymaking and the role played by public opinion in influencing judicial decisions.

In fact, in another context, the Court itself held that judges act as “representatives.” In Chisom v. Romer it was Justice Stevens (a dissenter in White) who authored the opinion of the Court holding that judges were “representatives” for purposes of section 2 of the Voting Rights Act.
Judges as Politicians

According to the Court, “[t]he fundamental tension between the ideal character of the judicial office and the real world of electoral politics cannot be resolved by crediting judges with total indifference to the popular will while simultaneously requiring them to run for elective office.” Justice Scalia, in dissent, protested that “it is the prosecutor who represents ‘the People’; the judge represents the Law—which often requires him to rule against the People.”

Yet in *White* the roles were reversed. Justice Scalia wrote for a Court that included the two other *Chisom* dissenters, and Justice Stevens was in dissent, joined by Justice Souter, who had joined him in the *Chisom* majority. It was Justice Scalia in *White* who criticized the “complete separation of the judiciary from the enterprise of ‘representative government’,” and Justice Stevens who termed the judicial office “fundamentally different from that occupied by policymaking officials.”

Whether judges “represent” constituencies or not, however, a century of scholarship shows there is surely no “fundamental[] differen[ce]” between their position and the position of “policymaking officials.” Nearly forty years ago, famed political scientist Walter Murphy declared that “[a]s long as law remains one of the most common means of formalizing public policy, the judicial office in the United States will involve political, i.e., policy-making power.” In the years since his path-breaking *Elements of Judicial Strategy*, Murphy’s...
statement has been proven correct. Proponents of greater speech restrictions for judicial candidates than would be constitutional in elections for other offices must demonstrate that there are differences between the two types of positions that result in a compelling interest in limiting judicial speech that is absent from legislative and executive races. Judges, in other words, must be unlike politicians, and the difference must be sufficiently weighty to strip judges, but not other office holders, of the right to campaign for office.

But such an idealistic vision of the judicial process is not accurate, and has been recognized as false for decades,\footnote{339. English courts through the mid-fourteenth century did not even purport to be bound by any external force of law, even when they were interpreting statutes. “First, the courts undoubtedly did disregard statutes when they thought fit, and secondly, they expressed no principle of jurisprudence or political theory which would serve as an explanation—still less as a reason—for their attitude.” \textsc{Theodore F.T. Plucknett}, Statutes and Their Interpretation in the First Half of the Fourteenth Century 70 (1922); see also \textsc{Theodore F.T. Plucknett}, A Concise History of the Common Law 296 (2d ed. 1936). Judicial policymaking, relatively unconstrained by external law, therefore has at least a 700-year pedigree.} Proponents of greater speech restrictions for judicial candidates than would be constitutional in elections for other offices must demonstrate that there are differences between the two types of positions that result in a compelling interest in limiting judicial speech that is absent from legislative and executive races. Judges, in other words, must be unlike politicians, and the difference must be sufficiently weighty to strip judges, but not other office holders, of the right to campaign for office.

But such an idealistic vision of the judicial process is not accurate, and has been recognized as false for decades,\footnote{340. \textsc{Carter}, supra note 298, at 19.} Judges do not decide cases solely on dispassionate analyses of the facts and pre-existing rules of law.\footnote{341. Judge Alex Kozinski of the Ninth Circuit has commented that the Warren Court’s activism in certain areas of constitutional law “contributed to the now widespread perception that there really is no such thing as constitutional law, that it’s all a matter of the philosophy of the particular judges who are making the decision.” Alex Kozinski, \textit{Spook of Earl: The Spirit and Specter of the Warren Court}, in \textsc{The Warren Court: A Retrospective} 377, 384 (Bernard Schwartz ed., 1996).} Instead, judges often make their decisions—making the law—based on their own vision of what the law should be\footnote{342. \textit{See, e.g., Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model} (1993). Segal and Spaeth predicted that “if a case on the outcome of a presidential election should reach the Supreme Court, . . . the Court’s decision might well turn on the personal preferences of the justices.” \textit{Id.} at 70. Of course, scholars differ as to whether the Court’s decision in the eventual case—\textit{Bush v. Gore}, 531 U.S. 98 (2000)—was based on more than the Justices’ personal preferences. \textit{See, e.g., Bush v. Gore: The Question of Legitimacy} (Bruce Ackerman ed., 2002) (containing contrasting essays); \textit{The Vote: Bush, Gore and the Supreme Court} (Cass R. Sunstein & Richard A. Epstein eds., 2001) (same).} and what they perceive as the electorate’s vision of what the law should be. Judges are, in short, policymaking politicians operating under a different set of constraints in a different institutional environment from legislators and executives,\footnote{343. Differences in institutions (even from elected court to elected court) affect judges and their willingness to cast votes against the preferences of the electorate. \textit{See Hall & Brace, supra note 304, at 281. An institutionalist approach is helpful in analyzing the factors motivating judicial decisionmaking more generally, as well. See Howard Gillman & Cornell W. Clayton, \textit{Beyond Judicial Attitudes: Institutional Approaches to Supreme Court Decision-Making}, in \textsc{Supreme Court Decision-Making}, \textit{supra} note 304, at 1.} but, where elected, politicians nonetheless.

Contrary to what appears to be Professor Schotland’s implication,\footnote{344. \textit{See supra note 219 and accompanying text.}} judges are not always more constrained in their policymaking than are legislators. Perhaps most importantly, it is in the nature of case adjudication in a common law system that rules announced by courts would be impermissible ex post
Judges as Politicians

facto laws and bills of attainder if enacted by legislatures. Thus, while some aspects of courts' institutional environments should act to constrain judges, many institutional aspects emancipate judges, and allow them to pursue policy goals by “rationally vot[ing] their sincere policy preferences” and applying them to specific favored or disfavored parties.

State supreme courts, though occasionally subject to correction by the United States Supreme Court on issues of federal law, maintain considerable freedom to mold state law. Legislative correction of court decisions is difficult (perhaps even more so in common law issues that are traditionally the province of state courts rather than legislatures), and judges’ relatively insulated electoral position allows them to push for reform with some immunity from electoral challenge. Even if judges were universally more constrained in terms of policymaking than legislators, however, it does not necessarily follow that their campaign speech should be more constrained as well. It goes without saying that speech restrictions of the kind championed by Professor Schotland and others increase the degree to which judges will be free to make law unconstrained by (i.e., independent from) the voters and external manifestations of the law, thus ironically making public involvement in choosing judges more imperative.

In the nineteenth century it was common for judges and lawyers to believe that judges did not make, but rather “found” the law. This formulation was reflected in Blackstone’s Commentaries, but in the ensuing centuries it has

345. See, e.g., Consol. Edison Co. v. Pataki, 292 F.3d 338, 349 (2d Cir.) (holding that a state law forbidding a power company from charging its customers for costs associated with a past power outage was an unconstitutional bill of attainder, and noting that an “indispensable element of a bill of attainder is its retrospective focus: it defines past conduct as wrongdoing and then imposes punishment on that past conduct”), cert. denied, 123 S. Ct. 619 (2002). Additionally, punitive damages awards assessed by courts may be astronomically costly, thus impacting policy to a great degree, without triggering any but the most deferential review under the Due Process Clause. See TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 458 (1993) (plurality opinion) (holding that an award of punitive damages was not so “grossly excessive” as to violate due process, but refusing to formulate a test that would indicate when an award would be “grossly excessive”). But see State Farm Mut. Auto. Ins. Co. v. Campbell, 71 U.S.L.W. 4282 (2003) (striking down a punitive damages award of $145 million as “grossly excessive”).

346. Jeffrey A. Segal, Supreme Court Deference to Congress: An Examination of the Marxist Model, in SUPREME COURT DECISION-MAKING, supra note 304, at 237, 239; see also id. at 237 (“[T]he legal discretion that exists in the type of cases that reaches the Court combines with institutional incentives that favor independence to produce a Court that is capable of acting like ‘single minded seekers of legal policy.’”) (quoting Tracey E. George & Lee Epstein, On the Nature of Supreme Court Decision Making, 86 AM. POL. SCI. REV. 323, 325 (1992)); Jeffrey A. Segal, Separation-of-Powers Games in the Positive Theory of Congress and Courts, 91 AM. POL. SCI. REV. 28 (1997) (arguing that rarely must Supreme Court Justices vote strategically to avoid having their policy judgments overturned by the political branches).

347. See supra Subsection IV.A.2. Professor Schotland is thus in the curious position of continually calling attention to the institutional factors restraining judicial decisionmaking, while pressing for speech restrictions that are designed to increase judicial “independence.”

348. See generally Grey, supra note 58.

349. See 1 WILLIAM BLACKSTONE, COMMENTARIES *69 (stating that courts should not “pronounce a new law, but [] maintain and expound the old one”).
become so thoroughly discredited as to be passé,\textsuperscript{350} even "baffling."\textsuperscript{351} Were it not for the ABA's judicial canons\textsuperscript{352} and the scholarly commentary defending them,\textsuperscript{353} one would be hard pressed to find any knowledgeable observer who believes in the "oracular"\textsuperscript{354} theory that judges discover (and do not make) law.\textsuperscript{355} Nevertheless, because judicial candidate speech restrictions seek to minimize the appearance of the judiciary's capacity for policymaking\textsuperscript{356} (and likewise seek to minimize the extent to which judges are free to impose their policy preferences when deciding cases),\textsuperscript{357} it is necessary to illustrate the

\textsuperscript{350} See, e.g., Richard H. Fallon, Jr., & Daniel J. Meltzer, \textit{New Law, Non-Retroactivity, and Constitutional Remedies}, \textit{104 Harv. L. Rev.} 1733, 1759 (1991) ("It would be only a slight exaggeration to say that there are no more Blackstonians.").

\textsuperscript{351} Grey, supra note 58, at 16.

\textsuperscript{352} See Cafferrera, supra note 8, at 1639, 1642, 1651 (arguing that the ABA's judicial canons reflect a formalist vision of judging that is out-of-step with reality). The ABA's position is reflected in its plea that judges "be faithful to the law." \textit{Model Code of Judicial Conduct} Canon 3(B)(2) (1990). By implying that "a judge does nothing more than sit on a bench and find the appropriate, pre-existing law to apply," Rowe, supra note 139, at 608, the Canons ignore the lawmaking function that judges have been performing for centuries. \textit{See id.} at 608-11.

\textsuperscript{353} See, e.g., Bambizer, supra note 231, at 384 ("Our 'practically wise' judges are best understood as the priests of the Rule of Law.").

\textsuperscript{354} G. Edward White, \textit{The American Judicial Tradition: Profiles of Leading American Judges} \textit{8} (1976); \textit{see also id.} at 196-98 (describing the "demise" of the oracular conception of law in the wake of the Lochner era).

\textsuperscript{355} See Mackey v. United States, 401 U.S. 667, 677 (1971) (Harlan, J., concurring in judgment in part and dissenting in part) ("While I do not subscribe to the Blackstonian theory that the law should be taken to have always been what it is said to mean at a later time, I do believe that whether a new constitutional rule is to be given retroactive ... effect must [not] be determined ... upon considerations that are appropriate enough for a legislative body."). Even Justice Scalia, the veritable personification of the desire to leave legislating to legislators, see Antonin Scalia, \textit{Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws}, in \textit{Scalia}, \textit{A Matter of Interpretation}, supra note 263, at 3, 9 (stating that judicial lawmaking "would be an unqualified good, were it not for a trend in government that has developed in recent centuries, called democracy"). and Justice Frankfurter, the paragon of judicial restraint, have refused to adopt Blackstone's formulation. See James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in judgment) ("I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense 'make' law. But they make it as judges make it, which is to say as though they were 'finding' it ... ."); Felix Frankfurter & James M. Landis, \textit{The Business of the Supreme Court: A Study in the Federal Judicial System} \textit{310} (Johnson Reprint 1972) (1928) (arguing that a judge should "gather meaning not from reading the Constitution but from reading life"); cf. \textit{Am. Trucking Ass'ns v. Smith}, 496 U.S. 167, 201 (1990) (Scalia, J., concurring in judgment) (arguing that deciding whether to apply a decision retroactively "presupposes a view of our decisions as creating the law, as opposed to declaring what the law already is" and arguing that such a view is an incorrect interpretation of "the judicial Power" as granted in Article III of the Constitution). \textit{But see} Simon H. Rifkind, \textit{A Judge's Nonjudicial Behavior}, \textit{38 N.Y. St. B.J.} 22, 22-23 (1966) ("Judges are regarded by the public as the custodians of a special body of knowledge. Like Egyptian priests who held within their bosoms the secret of the Nile, so the judges, it is believed, possess knowledge and modes of reasoning unavailable to the laity.").

\textsuperscript{356} The policymaking effect of U.S. Supreme Court decisions is unquestioned. \textit{See, e.g.,} Lino A. Graglia, \textit{Revitalizing Democracy}, \textit{24 Harv. J.L. & Pub. Pol'y} \textit{165}, 171 (2000) ("It would be incredible, if it were not true, that for the past four or five decades virtually every change in basic issues of domestic social policy has come not from state or federal legislatures but from the U.S. Supreme Court."). Martin Shapiro, \textit{The Supreme Court: From Warren to Burger}, in \textit{The New American Political System} \textit{179} (Anthony King ed., 1978).

\textsuperscript{357} Compare Bruce Fein & Burt Neuborne, \textit{The Case for Independence: Why Should We Care About Independent and Accountable Judges}, \textit{61 Or. St. Bar. Bull.} \textit{8}, 11 (2001) ("In many settings, the
Judges as Politicians

effect of judges—particularly state court judges—on the development of the law.

None of this, however, should be taken to imply that the judicial and legislative branches operate in precisely the same manner. The two have different areas of institutional competence, which argues for the maintenance of a distinction between their functions. Furthermore, all courts are to some extent bound by the pronouncements of other courts and the political branches. To that extent, courts are not entirely free to make law as they see fit. As one noted political scientist put it, “judging is something different from legislating or administering. . . . [T]he judicial function is still interpretation and not independent policy making. It is just as false to argue that judges freely exercise their discretion as to contend they have no policy functions at all.” 358 Nevertheless, because precedent, statutes, and constitutions can often be read in multiple ways (and because courts are the ones to interpret limits on their own power), a judicial choice is often required as to which precedent, or which constitutional or statutory construction, should be followed in a given case. 359 A judicial candidate who feels constrained by external authority from pledging to decide a case consistent with his preferences (or those of the voters) can always cite precedent or statute as tying his hands. But silencing judicial candidates on all subjects treats the entire judicial function as the robotic application of settled law, and that is clearly not an accurate portrayal of the modern American judiciary.

The Supreme Court itself occasionally has admitted that its decisions are sometimes not robotic applications of settled legal principles, but the shaping of those legal principles in accordance with the Justices’ personal policy preferences. 360 In those instances, it is not the law, but “the feelings and


359. See, e.g., Butler v. McKellar, 494 U.S. 407, 415 (1990) (“Courts frequently view their decisions as being ‘controlled’ or ‘governed’ by prior opinions even when aware of reasonable contrary conclusions reached by other courts.”); SEGAL & SPAETH, supra note 342, at 17-18 (“Assertions that judicial decisions are objective, dispassionate, and impartial are obviously belied by the fact that different courts and different judges do not decide the same question or issue the same way . . . .”). Courts may—indeed should—go about answering the question of which authority to follow by using a decidedly judicial method of analysis, that is, by consulting appropriate legal texts and not simply exerting political will. See, e.g., H.L.A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 105-08 (1983). But the fact that some judges exercise their responsibilities honorably does not mean that all do, or that the electorate, if given the choice, would prefer the judicious option.

360. See, e.g., Atkins v. Virginia, 536 U.S. 304, 313 (2002) (quoting Coker v. Georgia, 433 U.S. 584, 597 (1977)) (stating that the Court’s Eighth Amendment jurisprudence should be informed by “our own judgment”); Planned Parenthood v. Casey, 505 U.S. 833, 849 (1992) (arguing that substantive due process claims should be decided by “reasoned judgment,” but maintaining that such a rule does not leave courts “free to invalidate state policy choices with which we disagree”); see also RICHARD A.
intuition of a majority of the Justices that count." Citation to authority or legal principle is often a rationalization for a conclusion already reached, a "game designed to decoy analysts into thinking that the decisions are other than politically motivated and equal in effect, if not in form, to the decisions of legislators. As Professor Lino Graglia put it, "constitutional law is politics by other means."

Policy-oriented decisionmaking is not the exclusive province of the federal courts, and both state appellate and trial courts exercise considerable discretion in the crafting of policy. Lawmaking by courts according to notions of public policy may be entirely appropriate in adjudicating common law cases, and there is even an argument that it should be employed in interpreting statutes

---

POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 355 (1996) ("[M]any Supreme Court opinions are at bottom merely expressions of personal predilection on debatable questions of social policy.").

361. Atkins, 536 U.S. at 348 (Scalia, J., dissenting); see also id. at 338, 122 S. Ct. at 2259 ("Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its Members."); id. at 322 (Rehnquist, C.J., dissenting) ("[T]he Court’s assessment of the current legislative judgment regarding the execution of defendants like petitioner more resembles a post hoc rationalization for the majority’s subjectively preferred result rather than any objective effort to ascertain the content of an evolving standard of decency.").

362. See KARL N. LLEWELLYN, On the Current Recapture of the Grand Tradition, in JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 215, 215-16 (1962) (noting the practice of judges to reach results first and find reasoning to support that conclusion second); Antonin Scalia, Assorted Canards of Contemporary Legal Analysis, 40 CASE W. RES. L. REV. 581, 586 (1990) (arguing that the canon of statutory interpretation requiring remedial statutes to be liberally construed is so "indeterminate, as to both when it applies and what it achieves, that it can be used, or not used, or half-used, almost ad libitum, depending mostly upon whether its use, or nonuse, or half-use, will assist in reaching the result the court wishes to achieve").

363. Atkins, 536 U.S. at 348 (Scalia, J., dissenting).

364. See, e.g., Stenberg v. Carhart, 530 U.S. 914, 955 (2000) (Scalia, J., dissenting) ("The most that we [dissenters] can honestly say is that we disagree with the majority on their policy-judgment-couched-as-law."); BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 113 (1921) ("If you ask how [a judge] is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself."); OLIVER WENDELL HOLMES, JR., THE COMMON LAW 35 (Dover Publications, Inc. 1991) (1881) ("[T]he substance the growth of the law is legislative. And this in a deeper sense than that what the courts declare to have always been the law is in fact new. It is legislative in its grounds."); LLEWELLYN, supra note 362, at 215 (questioning whether judges are "[d]elphic oracles, mere voices with a mission only of accurate transmission [of the law], or whether, in sharpest contrast, you and your brethren are in the nature of better-class politicians deciding cases the way you see fit while you just manipulate the authorities to keep it all looking decent"); Joseph Kobylka, Abingdon School District v. Schempp, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 1, 1 (Kermit L. Hall et al. eds., 1992) (quoting U.S. Representative L. Mendell Rivers as accusing the Supreme Court of "legislating—they never adjudicate—with one eye on the Kremlin and the other on the NAACP").


366. See Scalia, supra note 355, at 18.

Judges as Politicians

(though that argument has not received anything close to universal acceptance\(^{368}\)). Every law student is, of course, aware of the grand debate about whether policy and judges’ views about social justice should drive constitutional interpretation.\(^{369}\) The fact that judges do use their policy preferences to shape the law—properly or not\(^ {370}\)—makes it critical, from a democratic perspective, that the public be aware of the policy orientations of the judges it selects.

If future litigants (as I have argued above) have no compelling interest in muting judges to ensure their “independence” or “impartiality,” the question of the constitutionality of candidate speech restrictions reduces to whether it is a compelling governmental interest to prop-up the judiciary on the pedestal of neutral, objective decisionmaking, when such a model often fails to represent the manner in which judges decide cases.\(^ {371}\) Judges, certainly, often feel the need to cloak their decisions in objective legal language, obscuring the policy determination at the heart of the decisions.\(^ {372}\) This reluctance to admit the judicial role in the policymaking process may indicate that policy-oriented

---

368. See generally, e.g., James M. Landis, *A Note on “Statutory Interpretation,”* 43 Harv. L. Rev. 886, 892 (1930) (“It must be insisted that the legislative purposes and aims are the important guideposts for statutory interpretation, not the desiderata of the judge.”); Scalia, *supra* note 355, at 17-18 (arguing that policy-oriented statutory interpretation results in undemocratic judicial lawmaking and not the faithful application of statutory law).


370. See Ely, *supra* note 7, at 835 (observing the difference between “the observation that judges in fact allow their politics to affect their constitutional interpretations . . . [and] the prescription that that’s what judges should do”).

371. Case decision is the most noteworthy aspect of a judge’s duties, but it is by no means the only one. Policy preferences also play a role in other decisions made by courts, such as decisions whether to grant review in a case, how much bail to require of a criminal defendant, etc. Empirical evidence strongly indicates that in states where judges are subject to contested elections, judges’ decisions whether to grant review in cases are influenced by political considerations, specifically the likely impact on the next election. See Paul Brace et al., *Judicial Choice and the Politics of Abortion: Institutions, Context, and the Autonomy of Courts,* 62 Alb. L. Rev. 1265, 1289-92 (1999). Judges are also influenced when their retention is within the power of political elites, so the effect is not simply confined to systems of popular judicial election. See id. at 1291. For discussions of matters affecting Supreme Court Justices’ decisions other than case outcomes, see generally Lee Epstein & Jack Knight, *The Choices Justices Make* (1998); H.W. Perry, Jr., *Deciding to Decide: Agenda Setting in the United States Supreme Court* (1991) (discussing the Supreme Court’s decisions whether to grant certiorari).

372. See, e.g., John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 3 (1980) ("[T]he Court has always, when plausible, tended to talk an interpretivist line."); Holmes, *supra* note 364, at 35 ("The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned.").
judges view their enterprise "to be of suspect legitimacy," i.e., that judges are supposed to do nothing more than apply the law. If lawmaking is considered an illegitimate activity for judges, however, it is all the more important that voters be able to assess which candidates would live up to the ideal (and also to assess whether they wish to reform the ideal and grant judges more lawmaking power).

Furthermore, all state court judges make policy, and accordingly voters for each court level should be able to listen to a candidate who wishes to tell his judicial philosophy. The policymaking nature of appellate courts is clear, but trial courts also make policy in the way they deal with parties before them. As political scientist Harold Spaeth put it, "[t]he local judge who invariably sends drunken drivers to jail, the judge... who throws the book only at youthful drug offenders, and the judge who... make[s] life miserable for errant spouses who fall behind in their child support and alimony payments—all are making policy." This is made all the more true in an age when courts are not only expected to settle private disputes, but are increasingly asked to settle "grievance[s] about the content or conduct of policy—most often governmental policy." In this age of public law suits, judges—trial judges—are issuing rulings that result in "a direct impact that extends far beyond the immediate parties to the lawsuit."

There can be no real argument that, as a positive matter, judges' personal opinions (or at least their philosophies of judging, both of which are improper subjects for discussion under some states' judicial codes) are not a significant factor in their decisionmaking. Since at least the publication of Holmes's *The Common Law*, and his later work, *The Path of the Law*, scholars have recognized that "[e]very important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of
Judges as Politicians

public policy," and that "intuitions of public policy" and "prejudices" have far more to do with the development of the law than does any theory modeled on the natural sciences. Those conclusions have not been put to serious challenge since the Great Depression, and their effect is to place the function of the judge closer to that of the legislator than had been previously recognized.

In the decades following Holmes, other judges and scholars explicitly accepted that experiential judging was commonplace, and some commended the practice. Most notable among them was Judge Benjamin Cardozo, whom many consider "the outstanding American common law judge." Cardozo’s The Nature of the Judicial Process confronted the question of how a judge (particularly a common law judge) decides cases and, explicitly linking the functions of judges and legislators, answered that a substantial part of the equation was policy. According to Cardozo, “the final principle of selection for judges, as for legislators, is one of fitness to an end," and “the process, being legislative, demands the legislator's wisdom." Despite admitting the parallels between the two branches, Cardozo believed that judges were constrained by many factors—notably precedent—and were considerably less free than were

381. HOLMES, supra note 364, at 35.
382. Id. at 1; see also N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349 (1921) (Holmes, J.) (“[A] page of history is worth a volume of logic.”); Holmes, supra note 380, at 469 (arguing that “[i]t is revolting to have no better reason for a rule than that it was laid down in the time of Henry IV[,] and still more revolting if . . . [its original rationale] ha[s] vanished long since, and the rule simply persists from blind imitation of the past”).
383. See Holmes, supra note 380, at 465, 467 (“Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds . . . Judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage.”).
384. RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 125 (1990) (emphasis added). The reader will recall that Judge Posner is the author of the Seventh Circuit’s opinion in Buckley v. Illinois Judicial Inquiry Board, 997 F.2d 224 (7th Cir. 1993), which struck down Illinois’s version of the announce clause. See supra notes 131-137 and accompanying text.
385. Indeed, Cardozo’s work was “the first systematic effort” at that end, and “also the first serious effort by a judge to articulate a judicial philosophy.” POSNER, supra note 384, at 76-77. Traynor was even more explicit about reshaping the law to bring it into conformity with preferred public policies. See Roger J. Traynor, Reasoning in a Circle of Law, 56 Va. L. Rev. 739, 749 (1970) (opining that policy was not just “for the legislatures to decide. Recurringly it is also for the courts to decide.”); Roger J. Traynor, La Rude Vita, La Dolce Giustizia; or Hard Cases Can Make Good Law, 29 U. Chi. L. Rev. 223, 234 (1962) (advocating a “limited” “result-orientation” designed to achieve “a value judgment as to what the law ought to be”); Roger J. Traynor, No Magic Words Could Do It Justice, 49 Cal. L. Rev. 615, 618 (1961) [hereinafter Traynor, No Magic Words Could Do It Justice] (“Overall, theirs [judges'] is the major responsibility for lawmaking in the basic common-law subjects.”).
386. CARDOZO, supra note 199 (1998) (“He was the first modern judge to tell us how he decided cases, how he made law, and, by implication, how others should do so.”). Holmes’s The Common Law is not an exception; it was largely historical, not prescriptive, and, in any event, was written before he became a judge. See KAUFMAN, supra, at 204-05. Despite Cardozo’s effort, Chief Justice Traynor reported some years later that lawyers were not knowledgeable about appellate judges’ decisionmaking processes. See Roger J. Traynor, Badlands in an Appellate Judge’s Realm of Reason, 7 Utah L. Rev. 157 (1960).
legislators to disregard law. As Judge Posner has commented, however, because the decision whether a judge is within his discretion vel non is the judge's himself, "it is not clear" how constrained judges are by external forces. Quis Custodiet Ipsos Custodes? 

Similarly, although Cardozo's individual views of policy no doubt molded his jurisprudence, The Nature of the Judicial Process stressed that when adapting law to fit ideals of social policy, it was not the judge's ideals, but the community's that should provide the guiding principle. But if it is the community's values which are to guide judicial decisionmaking, then the community must be able to communicate those values to its judges. In an elective system, elections are the natural opportunity for public input. Candidate speech restrictions, therefore, exacerbate the undemocratic character of judicial lawmaking, while failing to achieve any significant increase in impartiality.

The conflict in judging between stability, precedent, and formalism on the one hand, and plasticity, fairness, and contemporary notions of public policy on the other, still presents a quandary for judges. The influence (if not the normative correctness) of the method of decisionmaking described by Holmes and Cardozo, however, is demonstrated by the fact that most judges today still use it, and by the fact that Cardozo is celebrated today (in part) precisely

---

388. See id. at 103; see also id. at 112 ("[I]n the main there shall be adherence to precedent.").

389. POSNER, supra note 384, at 30; see also Gerard V. Bradley, Shall We Ratify the New Constitution?: The Judicial Manifesto in Casey and Lee, in BENCHMARKS: GREAT CONSTITUTIONAL CONTROVERSIES IN THE SUPREME COURT 117, 125 (Terry Eastland ed., 1995) ("The Supreme Court . . . does not actually decide everything . . . But the Court may decide anything, and clearly claims jurisdiction to do so. The justices reserve plenary authority to decide who decides."); Wendel, supra note 277, at 75-76. For contrasting views on whether judges willingly restrain themselves when given the opportunity to make policy, compare Traynor, No Magic Words Could Do It Justice, supra note 384, at 620 ("I find little ground for worry that judges . . . will become zealous to reach out for more responsibility than they now have. Judicial office has a way of deepening caution, not diminishing it.").

390. "Who will oversee the overseers themselves?"; see also Frank H. Easterbrook, Ways of Criticizing the Court, 95 HARV. L. REV. 802, 828-29 (1982) (arguing that the Supreme Court decides what its own constraints are and is therefore itself unconstrained).

391. See KAUFMAN, supra note 385, at 215 (quoting a letter from Cardozo to Judge Learned Hand asking "[w]hy can't you say that when I am doing my will, I am interpreting the common will, a process so much more respectable? I have always professed to be doing this, and now you tell me it was a sham, and maybe it was, though somehow or other there are times when I do feel that I am expressing thoughts and convictions not found in the books and yet not totally my own"); Noonan, Jr., supra note 282, at 22.

392. See CARDOZO, supra note 353, at 108 ("[A] judge, I think, would err if he were to impose upon the community as a rule of life his own idiosyncrasies of conduct or belief . . . . [b]ut he would be under a duty to conform to the accepted standards of the community, the mores of the times."); KAUFMAN, supra note 385, at 209.

393. KAUFMAN, supra note 385, at 200.
Judges as Politicians

because he moved the law in a direction more compatible with twentieth century America.

2. Prior Commitments and Judicial Independence

In addition to independence from the voters, a second form of independence, more directly addressed by the White dissents, urges that judges should be independent from their own past statements. They must feel free to disregard prior "commitments" when convinced that those statements do not represent the best view of the law. This neutrality is sacrificed in a system that permits candidates to make promises, because voters may be disinclined to return to office a judge who retreats from his pledges.

The two theories of independence (as against the electorate and as against prior commitments) are in tension with each other. The basis of the first theory is that the law exists independently of the judge. Following the law and being faithful to one's role in the judicial system often require that a judge make decisions inconsistent with his personal preferences. A judge should not be penalized at the polls, the argument goes, simply for doing his job. The second theory of independence, by contrast, recognizes that judges generally have much room to maneuver in making their decisions. Principles of law are often not controlling, which is precisely the reason we have disagreements within courts as to the proper application of, or indeed the substance of, the law. Judges must follow the law instead of their campaign promises, but rarely is the distinction between the two crystal clear. Indeed, a judge who discards the law will be perceived as doing so only where he really has no discretion. Campaign promises are, in effect, promises about how a judge will exercise his discretion when he is not constrained to do otherwise.

Those who would limit a judge's ability to make promises stress the effect of campaign promises on a judge's willingness to change his mind after the election. But vote-conscious candidates make decisions by calculating votes in the next election, not the last one. If an election-oriented judge's promises continue to reflect the preferences of the voters, the judge will honor them. If, however, it would be more politically expedient for the judge to change course, he "probably would abandon the prior position. Either way, the earlier speech itself makes little difference in the judge's behavior." As for the independent-minded judges unconcerned with a decision's impact on vote

394. See, e.g., SEGAL & SPAETH, supra note 342, at 17-18 ("Assertions that judicial decisions are objective, dispassionate, and impartial are obviously belied by the fact that different courts and different judges do not decide the same question or issue the same way, to say nothing of the fact that appellate court decisions . . . typically contain dissenting votes."); James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 HARV. L. REV. 129, 144 (1893) ("[T]he constitution often admits of different interpretations; . . . there is often a range of choice and judgment.").

395. See Chemerinsky, supra note 225, at 744-45.

396. Id. at 745.
totals, under no circumstances would they discard the law and adhere to a campaign promise that turned out to be in error. An honorable judge who is faced with having made an unwise or ill-considered promise would simply confess his error.\textsuperscript{397} After all, “one would be naive not to recognize that campaign promises are—by long democratic tradition—the least binding form of human commitment.”\textsuperscript{398} Whether the situation involves the honorable, “independent” judge or the more politically sensitive one, therefore, the prior commitment is not likely to affect the judge’s decision.

Admittedly, there is the possibility that a judge who has made a campaign promise will put a thumb on the scale in favor of maintaining consistency, and thereby disregard his obligation to adjudicate cases consistent with his current view of the law. Perhaps a handful of voters would prefer the candidate and judge who decides cases consistently with his prior statements but against the preferences of those voters, compared to the waffling judge who comes to rest on a position the voter substantively likes.\textsuperscript{399} The impact of such a “threat” to “independence,” however, must be considered minute when compared to the effect of other factors on a judge’s chances for reelection. A judge who makes an unpopular, but correct, ruling stands to suffer electoral defeat much more so than the judge who changes his mind and adopts a decision consonant with the preferences of the voters. Few would doubt that most of a judge’s opposition would come from people who disagree with the substantive result of his decision—not from those who object to the fact that the judge had changed his mind.\textsuperscript{400}

3. Emperors’ Clothes and Protecting a False Image of the Courts

Given that judges do not merely apply pre-existing rules of law, and given that they exert substantial policymaking authority, it is illegitimate for the state

\begin{flushright}
397. \textit{See} McGrath v. Kristensen, 340 U.S. 162, 177-78 (1950) (Jackson, J., concurring); Stephen Gillers, “\textit{If Elected, I Promise...}—What Should Judicial Candidates Be Allowed to Say?,” 35 \textit{IND. L. REV.} 725, 727 (2002) (“We know that lawyers and judges are honestly able to approach an issue inclined in one direction and then have their minds changed.”).


399. I assume that all voters prefer the candidate/judge who regularly votes with the voter’s preferences. The relevant comparison, however, is between the candidate with consistency and the one whose decisions match the voters’ preferences. Only a voter who prefers consistency to orthodoxy will induce a candidate to maintain a position simply for the sake of consistency. \textit{See White}, 536 U.S. at 800 (Stevens, J., dissenting) (“Once elected, [a judicial candidate] may feel free to disregard his campaign statements... but that does not change the fact that the judge announced his position on an issue likely to come before him \textit{as a reason to vote for him}.”). A voter who prefers the consistent candidate who supports the voter’s views when compared to the one who inconsistently but frequently makes decisions against the voter’s preferences acts not because of his view of the inconsistent one as a hypocrite. He is more likely making the rational calculation that the consistent one is more likely to act in accordance with the voter’s preferences than is a candidate who has already switched sides.

400. \textit{Cf.} CARTER, supra note 298, at 65 (noting that Senators Thurmond and Kennedy have different views on the Senate’s role in assessing judicial nominees’ ideologies depending on whether an individual nominee is liberal or conservative).
\end{flushright}
to enact speech restrictions that pretend otherwise.\textsuperscript{401} In Justice Linde's words, speech restrictions that pretend that judges do not make policy, or that they do so only as required to by external law, "sacrifice... free speech to hypocrisy."\textsuperscript{402} However uncomfortable it makes us feel about our judicial system, the ideal of a neutral, dispassionate system of courts applying "equal justice under law" irrespective of judges' personal experiences and policy preferences has been discredited as, at best, exaggeration and, at worst, mere myth. "We are a sadder but wiser nation now,"\textsuperscript{403} and speech restrictions must face the impact on campaigns of the subjectivity of judicial decisionmaking.

Even if the image of judges as neutral arbiters were accurate, the government may not silence those who wish to challenge the prevailing wisdom.\textsuperscript{404} States may not "protect the court as a mystical entity or the judges as individuals or as anointed priests set apart from the community and spared the criticism to which in a democracy other public servants are exposed."\textsuperscript{405} "[I]njury to official reputation is an insufficient reason for repressing speech that would otherwise be free."\textsuperscript{406} A fortiori, where the judicial image is at odds

\textsuperscript{401} See Wendel, \textit{supra} note 277, at 75; cf. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 518 (1996) (Thomas, J., concurring in part and concurring in judgment) (arguing that a state's interest in "keep[ing] legal users of a product or service ignorant in order to manipulate their choices in the marketplace" is "per se illegitimate."); KARL N. LLEWELLYN, \textit{THE COMMON LAW TRADITION: DECIDING APPEALS} 191 (1960) ("[B]ut does not the continuance of any such theory-contrary-to-proved-and-known-fact threaten the institution at its very heart?").

\textsuperscript{402} Linde, \textit{supra} note 206, at 16; see also Monroe H. Freedman, \textit{The Threat to Judicial Independence by Criticism of Judges—A Proposed Solution to the Real Problem}, 25 \textit{HOFSTRA L. REV.} 729, 737 (1997) ("Much of the judicial hand-wringing about criticism of judges has more to do with judicial vanity than with judicial independence.").


\textsuperscript{404} See Monitor Patriot Co. v. Roy, 401 U.S. 265, 274 (1971) ("[T]he candidate who vaunts his spotless record and sterling integrity cannot convincingly cry 'Foul!' when an opponent or an industrious reporter attempts to demonstrate the contrary.").

\textsuperscript{405} Bridges v. California, 314 U.S. 252, 292 (1941) (Frankfurter, J., dissenting); see also id. at 270 (opinion of the Court by Black, J.) ("The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind . . . on all public institutions"); Craig v. Harney, 331 U.S. 367, 376 (1947) ("[T]he law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate.").

For cases justifying restrictions on speech by relying on the interest in preserving respect for the judiciary, see, for example, \textit{Standing Comm. on Discipline v. Yagman}, 856 F. Supp. 1384, 1399-1400 (C.D. Cal. 1994), \textit{rev'd}, 55 F.3d 1430 (9th Cir. 1995); \textit{In re Wilkins}, 777 N.E.2d 714, 717-18 (Ind. 2002) (per curiam) (Shepard, C.J., joining the 3-2 majority) (suspending an attorney from the practice of law for suggesting in a petition for appellate review that a court decision against his client was result-driven, reasoning that the attorney's actions threatened "the public's confidence in the administration of justice," and holding that the attorney's exercise of his right to contest the penalty made him worthy of a particularly harsh punishment); \textit{In re Riley}, 691 P.2d 695, 704 (Ariz. 1984) (holding that "[l]awyers who are candidates for judicial office may not impugn the integrity of the judicial system or question the decisions of the judge," and opining that the proper fora for questioning judicial decisions are the appellate and disciplinary processes); \textit{People ex rel. Attorney Gen. v. News-Times Publ'g Co.}, 84 P. 912 (Colo. 1906), \textit{aff'd sub nom.} Patterson v. Colorado ex rel. Attorney Gen., 205 U.S. 454 (1907).

with reality, there is simply no legitimate interest in having a government lie to its citizens and prop up policymaking judges as oracles.\textsuperscript{407}

Applying the familiar strict scrutiny standard, courts must assess whether restrictions on free speech are narrowly tailored responses to serve a compelling governmental interest. There is no dispute that judicial impartiality, in the sense of eliminating favoritism and ensuring the application of the rule of law, is a compelling interest. That interest, however, is not served (at least with the requisite narrow connection) by a speech restriction that prohibits judicial candidates from taking positions on issues. Judicial impartiality, in the sense of open-mindedness, is not constitutionally required, may not even be a beneficial quality, and is certainly not a compelling interest. Independence has been rejected by states with judicial elections, and therefore cannot constitute a compelling interest. Finally, promoting an image of independence and "impartiality," when judges often act inconsistently with those models is not even a legitimate state interest, let alone a compelling one. In sum, the only compelling interest offered to sustain candidate speech restrictions—the maintenance of an impartial judiciary—is served scarcely, if at all, by the restrictions, and therefore the restrictions are unconstitutional.

V. JUDGES AS POLITICIANS: "EACH INDEED IS LEGISLATING WITHIN THE LIMITS OF HIS COMPETENCE"\textsuperscript{408}

A. The Supposed Dangers of Unrestrained Judicial Elections

For those who fear issue-based, ad hominem judicial campaigns, recent

\textsuperscript{407} But see Stephen B. Burbank, The Architecture of Judicial Independence, 72 S. CAL. L. REV. 315, 317 (1999) (suggesting that it might be acceptable to prop up a myth of judicial independence as reality so as to embody "aspirations").

\textsuperscript{408} CARDOZO, supra note 364, at 113 (typescript altered).
trends are discouraging. Money is playing an increasing role in judicial elections, as the cost of reaching voters escalates. In some places, judicial candidates are expected to support political parties financially before the party will give its endorsement to the candidate. In addition, issue-based judicial campaigns seem to be increasing in frequency since the 1986 California elections, in which Chief Justice Rose Bird and two colleagues were denied retention after opposition campaigns challenged their liberal attitudes and decisions involving criminal law and capital punishment. Recent controversial elections involving Tennessee Supreme Court Justice Penny White and Nebraska Supreme Court Justice David Lanphier gained national attention as the interests opposing Justices White and Lanphier focused not on the justices’ qualifications, but on their decisions in high profile cases.

Professor Anthony Champagne has recently concluded a study of four states’ judicial elections in 2000, and the frequency and vitriol of television advertisements are not encouraging for those who wish to maintain the dignity of the judicial profession. The devolution (if that is the proper term) of judicial campaigns into ones that are “nastier, noisier, and costlier” is made vivid through the use of television advertising. As in races for other offices, opposing candidates often take swipes at each other with quotes out of context, absurd over-simplification of candidates’ records, and the packaging of

412. Justice White’s opposition focused on her decision (joining the majority) in State v. Odom, 928 S.W.2d 18 (Tenn. 1996), which vacated a death sentence on the ground that aggravating circumstances had not been proven. Justice Lhadjeri’s opposition was based on criminal justice issues as well as his opinion for the court holding that a term limits initiative had received an insufficient number of signatures to be included on the ballot. See Duggan v. Beermann, 515 N.W.2d 788 (Neb. 1994). See generally B. Michael Dann & Randall M. Hansen, Judicial Retention Elections, 34 LOY. L. & CONT. PROBS. 1429, 1433-36 (2001) (discussing the White and Lhadjeri races); Tracie V. Reid, The Politicization of Retention Elections: Lessons from the Defeat of Justices Lhadjeri and White, 83 JUDICATURE 68, 69-72 (1999) (same); Uelmen, supra note 203, at 1133-34 (same).
414. Schotland, Comment, supra note 77, at 150.
415. See Champagne, Television Ads, supra note 413, at 671-74.
416. See, e.g., Bright, supra note 202, at 167-70. One of the most memorable deceptions of this category is the advertisement for a former law professor at the University of California at Berkeley, which proclaimed that in the forthcoming election, “The Issue is Rape.” The advertisement argued to voters that the candidate “was 30 percent tougher on average in sentencing rapists than other state judges, a statistic [the candidate’s] staff came up with by extrapolating from the five rape or attempted-rape cases he has handled during his tenure on the bench.” PATRICK M. MCFADDEN, ELECTING JUSTICE: THE LAW AND ETHICS OF JUDICIAL ELECTION CAMPAIGNS 70 (1990) (quoting Roy A. Schotland, Elective Judges’ Campaign Financing: Are State Judges’ Robes the Emperor’s Clothes of American Democracy?, 2 J.L. & POL. 57, 80 (1985)).

371
misleading information in a form easily absorbed by voters who lack the time and inclination to analyze the candidates' full records and qualifications. The result is "a game of competitive defamation" where judges, like other politicians, engage in the "mutual destruction" of reputations.

As Professor Champagne's research disclosed, however, the greatest threat to judicial reputations in campaigns comes not from candidates themselves, but from interest groups that make independent expenditures with the hope of encouraging the election of their preferred candidates. In calling voters' attention to candidates' attributes, independent speech can make judicial races seem "nastier," but third party expenditures do allow voters to obtain some information about a candidate's attitudes even if the candidate himself is constrained by strict ethical rules against indicating future rulings, should he be elected. Independent expenditures thus provide voters with tools necessary to make intelligent, issue-based distinctions between candidates. It is precisely that knowledge that makes independent expenditures threatening to a system of judicial elections with speech restrictions, for speech restrictions hope to minimize issue-oriented voting and issue-based conflict between candidates. In any case, independent speech may not be penalized through enforcement of judicial canons (for the organizations are neither judges nor attorneys), and even if a state were to attempt to limit third party organizations from running advertisements in judicial election campaigns, those limitations would almost certainly be struck down as unconstitutional. Thus, even if the deception and issue-orientation of politics were considered an unqualified evil, speech restrictions do nothing to stop the worst offenders.

B. Elections: The Crisis of Legitimacy

Ensuring legitimacy for judicial institutions presents a paradox of sorts. Whereas other institutions gain legitimacy (or so goes the theory) by being open, involving the public, and especially by attracting large numbers of voters to the polls, the judiciary has taken exactly the opposite approach, fearing...
Judges as Politicians

elections as delegitimizing forces. Judicial legitimacy, according to this theory, depends on courts being perceived as above politics and subservient to the law. As a result, courts may fear public inspection as a threat to perceived judicial omniscience. Secrecy and confidentiality are at a premium in the courts, and rarely is an attempt to expose the inner workings of courts greeted with anything but contempt. Some legal theorists question the wisdom of this approach, believing that "too much 'justice behind closed doors' can erode and ultimately destroy the public's faith in the judiciary," or that the secrecy simply is not necessary or is inefficacious, but principles of confidentiality continue to be strictly enforced to protect the deliberative processes of the courts.432

government the consent of its citizens, but concluding that a high turnout is not itself necessarily good or bad for democracy).


427. But see ALPHAEUS T. MASON, THE SUPREME COURT FROM TAFT TO WARREN 203 (1958) (reporting that Chief Justice Hughes believed that if the Supreme Court's deliberations were public knowledge, respect for the Court would continue to be widespread).


430. See LLEWELLYN, supra note 401, at 324 n.308 ("[T]he storied sanctity of the conference room represents to me as pragmatic and nonmystic a phase of appellate judicial work as the handling of the docket.").

431. See Bridges v. California, 314 U.S. 252, 270-71 (1941) ("[A]n enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.").

432. It is axiomatic that secrecy is vital to the functioning of the judiciary just as it is to the functioning of the executive branch. See New York Times Co. v. United States, 403 U.S. 713, 752 n.3 (Burger, C.J., dissenting) (noting that despite the lack of any textual basis for the secrecy of judicial proceedings, there was "little doubt as to the inherent power of the Court to protect the confidentiality of its internal operations by whatever judicial measures may be required."). In both the judiciary and the presidency, secrecy is preserved so that principals and advisors will feel free to be candid and discuss a range of possible actions before one is announced to the public. See Richard M. Nixon, President Nixon's Address to the Nation, Apr. 29, 1974, reprinted in RICHARD NIXON, THE WHITE HOUSE TRANSCRIPTS 11 (1974) ("Unless a President can protect the privacy of the advice he gets, he cannot get the advice he needs."). "Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." United States v. Nixon, 418 U.S. 683, 705 (1974); cf. CHARLES WARREN, THE MAKING OF THE CONSTITUTION 134-39 (1937) (describing the necessity of secrecy in the Constitutional Convention).
One need not seek complete judicial openness, however, to question the wisdom of election speech codes. It is at election time—when the government receives its periodic injection of popular legitimacy—that it is most important for the people to have as much information about the candidates as possible. If judges are to receive the benefit of legitimacy that comes from having periodic elections, it seems that elections should encourage participation by as many eligible voters as possible.

The fact is, however, that judicial elections are the ones most likely to discourage would-be voters from participating, and they are purposely designed that way. Election systems have been revised to discourage the “raucous, hurly-burly, rough-and-tumble” elections that often characterize races for non-judicial posts. Instead, judicial election codes promote campaigns and elections that are docile, gently affirmations of trust and confidence in the incumbent judge that have all the excitement of “a game of checkers played by mail.” These pushes for reform have resulted in use of the nonpartisan ballot and the Missouri Plan, just to name two systems that have met with

433. The terminology is Justice Kennedy’s. See Frontline: Justice for Sale, supra note 196.

434. Because some reforms (notably the Missouri Plan) are designed to reduce electoral competition, those reforms raise troubling concerns of locking-up the political process by entranching certain officials (and their ideas) in power. Cf. Samuel Issacharoff & Richard H. Pildes, Politics as Markets: Partisan Lockups of the Democratic Process, 50 STAN. L. REV. 643 (1998) (advocating stringent review of legislative measures that decrease the possibility of effective challenge to incumbents); Michael J. Klarman, Majoritarian Judicial Review: The Entrenchment Problem, 85 GEO. L.J. 491 (1997) (same). Speech restrictions also have a “lockup” aspect, in that they discourage the candidacies of would-be judges who reject the paradigm of open-mindedness, and may insulate judges whose decisions are popular with officials who write the restrictions, but are unpopular with the public. Additionally, because incumbent state supreme court judges are often the officials who craft or approve speech restrictions, those restrictions allow incumbents to prescribe the subjects about which their challengers may criticize them. Cf. FELKNOR, supra note 419, at 29 (“[W]ithout attention-grabbing, cogent, memorable, negative campaigning, almost no challenger can hope to win unless the incumbent has just been found guilty of a heinous crime.”).


436. Under the Missouri Plan (or, alternatively, the “merit selection” plan), judges are initially appointed by the governor from a list compiled by the state’s judicial vacancy commission. After serving a short initial term, the judges run unopposed in retention elections. If a judge receives a certain portion of the vote in the retention election (usually 50%), he continues in office without having to face an opponent in a general election. See generally, e.g., RICHARD A. WATSON & RONDAL G. DOWNING, THE POLITICS OF THE BENCH AND THE BAR: JUDICIAL SELECTION UNDER THE MISSOURI NONPARTISAN COURT PLAN (1969); Larry Aspin & William K. Hall, Thirty Years of Judicial Retention Elections: An Update, 37 SOC. SCI. J. 1 (2000); Jay A. Daugherty, The Missouri Non-Partisan Court Plan: A Dinosaur on the Edge of Extinction or a Survivor in a Changing Socio-Legal Environment?, 62 MO. L. REV. 315 (1997); Elmo B. Hunter, Revisiting the History and Success of Merit Selection in Missouri and Elsewhere, 60 UMKC L. REV. 69 (1991); Richard A. Watson, Observations on the Missouri Nonpartisan Court Plan, 40 SW. L.J. 1 (1986). The theory behind the system is that it allows some electoral accountability while exempting judges from most of the rigors of campaigning, some of the influence of party leadership, and most of the fears of electoral defeat in retaliation for unpopular decisions. See, e.g., Robert A. Schroeder & Harry A. Hall, Twenty-Five Years’ Experience with Merit Judicial Selection in Missouri, 44 TEX. L. REV. 1088, 1093-97 (1966).

While this may often be true, it appears clear that the Missouri Plan does not eliminate (if it has any effect at all on) the tendency of voters to vote based on their views of a judge’s high-profile decisions.
some acceptance.\textsuperscript{437} The result has been judicial elections with widespread public apathy\textsuperscript{438} and low voter turnout.\textsuperscript{439}

The decline in turn-out is especially severe among the lower classes, who lack the resources to obtain information about judicial candidates and therefore benefit most from the cues provided by party designations on partisan ballots.\textsuperscript{440} Even for more well-off voters, however, non-partisan elections

\textit{See} Dann \& Hansen, \textit{supra} note 412, at 1431; Reid, \textit{supra} note 412, at 77. That is, in deciding whether a judge has done a sufficiently good job to merit retention, a voter will consider the judge’s past decisions. Where those decisions are not in line with the voter’s preferences, the vote will be against retention. As a result, despite the advantages of name recognition and incumbency, a judge under the Missouri Plan may still feel pressured to conform his decisions to the perceived will of the public. The result is that retention elections, like policy-motivated moves for impeachment of federal judges, have “the dubious advantage of confining the susceptibility of federal judges to political intimidation to those cases in which an extremely large portion of the public or government has been angered by judicial decisions.” Martin H. Redish, \textit{Judicial Discipline, Judicial Independence, and the Constitution: A Textual and Structural Analysis}, 72 S. CAL. L. REV. 673, 684 (1999). Because incumbent judges seeking retention may suffer political attack but are constrained by speech restrictions from responding in kind, retention elections have been termed “the most unfair system of all judicial elections.” Gerald F. Uelmen, \textit{Commentary: Are We Reprising a Finale or an Overture?}, 61 S. CAL. L. REV. 2069, 2073 (1988).

437. Their rather widespread acceptance, however, does not mean that they have accomplished their goal of bringing issues and controversy out of judicial elections. In fact, a recent study suggests that they have made the problem worse. The study reports that candidates in nonpartisan judicial elections focus on issues more heavily than do candidates in partisan elections. \textit{See} Abbe \& Herrnson, \textit{supra} note 237, at 292-93. This may be because party designations, when present, can serve as proxies for the candidates’ issue positions. The adoption of the Missouri Plan also fails to alter candidates’ campaign strategies or their use of television to broadcast their messages. \textit{See id.} at 294. More generally, one prominent judicial politics scholar has concluded that “[c]ourt reformers underestimate the extent to which partisan elections have a tangible substantive component and overestimate the extent to which nonpartisan and retention races are insulated from partisan politics and other contextual forces.” Melinda Gann Hall, \textit{State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform}, 95 AM. POL. SCI. REV. 315, 326 (2001).

438. One commentator called judicial elections “boring, low participation, minimally useful affairs” because of the restrictions on the speech of judicial candidates. \textit{See} Cafferata, \textit{supra} note 8, at 1674. For the most part, the only members of the public subjected to “campaigning” have been, until recent years, those “willing to hear a dull speech about improving the judiciary or about judicial qualifications.” Anthony Champagne, \textit{Interest Groups and Judicial Elections}, 34 LOY. L.A. L. REV. 1391, 1393 (2001).

439. \textit{See} Lawrence Baum, \textit{Information and Party Voting in “Semipartisan” Judicial Elections}, 9 POLITICAL BEHAVIOR 62, 63-64, 67-72 (1987); Carol A. Cassel, \textit{The Nonpartisan Ballot in the United States, in ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES} 226, 227-28 (Bernard Grofman \& Arend Lijphart eds., 1986) (noting that non-partisan elections result in depressed voter turnout, particularly when scheduled on dates separate from the dates of state and national elections); Philip L. Dubois, \textit{Voter Turnout in State Judicial Elections: An Analysis of the Tail on the Electoral Kite}, 41 J. POL. 865, 871-76 (1979); Editorial, \textit{How Can Voters Judge?}, PLAIN DEALER (Cleveland), Dec. 5, 2001, at B8 (noting that turnout is unsurprisingly low in judicial races, where candidates can only “smile, and wave, and proclaim themselves to be upright people with children and spouses who love them”); Rottman, \textit{supra} 232, at 20-21 (finding that “don’t know enough about the candidates” was the most common explanation for not voting in judicial elections). Dubois has also noted that states using the “party column ballot,” in which voters can vote a straight party ticket for all offices with a single vote, experience less “roll-off,” a term used to describe voters who cast votes for the offices at the top of the ballot but do not vote for other offices. Dubois, \textit{supra}, at 876-83. The party column ballot is deemed to reduce “voter fatigue” and promote greater involvement by the public in less salient elections. \textit{See generally} Jack L. Walker, \textit{Ballot Forms and Voter Fatigue: An Analysis of the Office Block and Party Column Ballots}, 10 MIDWEST J. POL. SCI. 448 (1966). Thus, the partisanship that is seen by many as a destructive force in judicial elections tends systematically to increase voter participation.

440. \textit{See} Dubois, \textit{supra} note 439, at 872 (“It is also known that voter fatigue takes its greatest toll
deprive them of an important indication of the candidates' philosophies, and give eligible voters less of a reason to vote for (or against) a candidate.\textsuperscript{441} Moreover, in certain states, elections for judges do not coincide with elections for other offices.\textsuperscript{442} This scheduling has the predictable effect on voter turnout.\textsuperscript{443} Because those most likely to be deterred from voting are the "have-nots," those states may have the "benefit" of "a better informed and more interested electorate"\textsuperscript{444} at the cost of involving fewer people in the electoral process.

C. Speech Restrictions and Democratic Theory

Speech restrictions, and those who defend their constitutionality, reflect a conception of democratic government, elections, and the judiciary at odds with the "marketplace of ideas" metaphor that has animated much of First Amendment law. Rather than attempting to invigorate our electoral processes through the participation of competing voices, speech restrictions see those voices as undermining the orderly workings of the judiciary.\textsuperscript{445} Proponents of speech restrictions point to anecdotal evidence of popular elections in which the electorate rejected qualified judges in favor of judges with well-known names\textsuperscript{446} or irrelevant demographic characteristics, and claim that popular election must be restrained to encourage the selection of better candidates and to avoid degrading the candidates and the judicial system. As a solution, states have adopted speech restrictions and the other devices discussed in the previous section as ways of constraining the decisions of voters.\textsuperscript{447} Though the judiciary among less well-educated voters who are more likely to become confused by the variety of ballot choices and thus fail to finish voting\textsuperscript{.\textsuperscript{448}} See generally, e.g., Walker, supra note 439, at 460-61 (describing the phenomenon in non-judicial elections).

\textsuperscript{441} See David Adamy & Philip Dubois, Electing State Judges, 1976 WIS. L. REV. 731, 774-78.


\textsuperscript{443} See Adamy & Dubois, supra note 441, at 742-45; Schotland, supra note 22, at 854.

\textsuperscript{444} See Heffeman, supra note 8, at 1038 (declining to endorse the view of the quotation); see also Nicholas P. Lovrich, Jr. & Charles H. Sheldon, Voters in Judicial Elections: An Attentive Public or an Uninformed Electorate?, 9 JUSTICE SYS. J. 23 (1984) (arguing that the depressed turnout in judicial elections allows the core of informed, interested voters to influence elections, and that such a result may strike an appropriate balance between electoral accountability and independence).

\textsuperscript{445} Cf Richard H. Pildes, Democracy and Disorder, 68 U. CHI. L. REV. 695, 697 (2001) (arguing that Supreme Court Justices' votes in election law cases can be seen as reflecting competing visions of democracy as either flourishing in robust competition or chaotic and in need of imposed stability). Oddly enough, however, the five Justices Pildes identified as most receptive to the stability interest were the ones in the majority in White, which held unconstitutional Minnesota's attempt to impose order, dignity, and stability on the judicial elections process.

\textsuperscript{446} See Schotland, supra note 22, at 855-56.

Judges as Politicians

is chosen by popular election, speech restrictions signal to voters that consideration of a candidate’s philosophy or issue positions is improper. Voters are therefore urged to make choices based solely on prior experience and “qualifications.”

But limiting the scope of political debate follows more from a “cultural” fear of democracy and perception of a fragile judiciary than it does from any empirically provable conclusion that judges chosen in issue-based popular elections are any “worse” (or “partial”) than are appointed judges or judges elected in states with campaign speech restrictions. And while campaigns may result in the loss of respect for candidates-turned-judges, voters seem quite unwilling to restore confidence in the judiciary (if, indeed, any has been lost) at the cost of taking away their ability to choose judges directly. The movement to constrain elections, then, is motivated by the belief—antithetical to the First Amendment—that “an elite cadre of philosopher-kings must limit democracy in order to save the people from themselves.” Such a fear of democracy is particularly dangerous when the ordered, stable system imposed by the state is designed, as in the case of judicial candidate speech restrictions, not simply to allow the conveyance of political ideas in a clear and understandable manner, but to prevent candidates from discussing ideas and philosophies at all.

448. See Pildes, supra note 445, at 710; Wendel, supra note 277, at 107-18. Pildes defines this culture as “the empirical assumptions, historical interpretations, and normative ideals of democracy that seem to inform and influence the current constitutional law of democracy.” Pildes, supra note 434, at 696.


450. See, e.g., Snyder, supra note 221, at 262.

451. See supra note 232.

452. Wendel, supra note 277, at 105.

453. Cf Richard D. Parker, “Here, The People Rule”: A CONSTITUTIONAL POPULIST MANIFESTO 113 (1994) (arguing that government should allow political “liberty to be shared equally among all, not simply by the ‘better’ people”).

454. See Pildes, supra note 445, at 717.


Because courts make so many decisions about the way Americans live their lives, it is unreasonable to expect the public to accept the decisions of courts without attempting to correct wrongheaded decisions through the ballot box. Assuming states have chosen to subject sitting judges to electoral challenge, issue-based campaigns should be welcomed as a way of reigning in the judiciary and preventing judges with anomalous values from affecting the law of a state far into the future. As Justice Scalia wrote,

if . . . our pronouncement of constitutional law rests primarily on value judgments, then a free and intelligent people’s attitude towards us can be expected to be (ought to be) quite different [from the passive response of the people whose judges simply interpret the law]. The people know that their value judgments are quite as good as those taught in any law school—maybe better. If, indeed, the “liberties” protected by the Constitution are, as the Court says, undefined and unbounded, then the people should demonstrate, to protest that we do not implement their values instead of ours. Not only that, but confirmation hearings for new Justices should deteriorate into question-and-answer sessions in which Senators go through a list of their constituents’ most favored and most disfavored alleged constitutional rights, and seek the nominee’s commitment to support or oppose them. Value judgments, after all, should be voted on, not dictated; and if our Constitution has somehow accidentally committed them to the Supreme Court, at least we can have a sort of plebiscite each time a new nominee to that body is put forward.

There is, quite simply, no doubt that judicial decisions have policy consequences, and that the decisions are often the result of judges’ value judgments. There is little doubt that state court decisions, in those areas where courts are charged with making policy, should be made on the basis of value judgments. Accordingly, public involvement by voters in shaping their states’ public policies is a natural (and one would think a welcome) inclination towards democratic self-government.

457. See Michael Stokes Paulsen, Straightening Out The Confirmation Mess, 105 YALE L.J. 549, 579 (1995) (book review) (“So long as the courts wield enormous power, it is implausible, as well as wrong in principle, to insist that the people develop an attitude of respectful indifference to how and by whom that power is exercised.”).

458. Planned Parenthood v. Casey, 505 U.S. 833, 1000-01 (1992) (Scalia, J., concurring in judgment in part and dissenting in part); see also, e.g., John C. Yoo, Criticizing Judges, 1 GREEN BAG 2D 277 (1998) (arguing that the Senate is empowered, through giving advice and consent, to approve and reject nominees on the basis of judicial philosophy, and further arguing that public discussion of nominees is a healthy way “to educate the public about the judicial process”). Justice Scalia’s vision of issue-driven nomination and confirmation processes has, as we all know, come true. See generally, e.g., BORK, supra note 369, at 267-349; CARTER, supra note 298, at 85-118; SILVERSTEIN, supra note 297, at 162-65.

459. Of course, not all observers welcome the move toward democratic control of the judiciary. See, e.g., Kathryn Abrams, Some Realism About Electoralism: Rethinking Judicial Campaign Finance, 72 S. CAL. L. REV. 505 (1999) (concluding that judicial elections should be eliminated because of the threat that judges will see voters as a constituency to be served by decisions consistent with their preferences). Judicial elections, just like every other sort of majoritarian process of selecting officials or public policies, raise the spectre that the chosen officials or policies will be insufficiently protective of (numerical) minority rights. See DANIEL R. PINELLO, THE IMPACT OF JUDICIAL-SELECTION METHOD ON STATE-SUPREME-COURT POLICY: INNOVATION, REACTION, AND ATROPHY (1995); Steven P. Croley, The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law, 62 U. CHI. L. REV. 689 (1995). States could adopt the federal model and attempt to ensure minority protection through protecting

materials within 100 feet of a polling place on election day).
VI. CONCLUSION

Speech restrictions on judicial candidates are designed to inhibit voters from choosing judges based on expectations as to the prospective judges’ future decisions. Even the so-called “narrowly-tailored” 1990 version of the ABA Judicial Canon, which prohibits discussion of only those issues likely to come before the court for which the candidate is running, is designed to forbid speech precisely where it is most likely to indicate to the voters how the candidate expects to discharge the responsibilities of his office. Praising judicial “independence,” ethics codes have banned discussion of issues and promises of conduct on the bench, leaving voters to select candidates on the basis of “objective” “qualifications.” Such manipulation of the voters through the suppression of explicitly political speech is blatantly unconstitutional. Elementary free speech principles dictate that it is the voters, and not any agency of government, that are responsible for deciding what issues are relevant.460 "When men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger."461 A contrary rule would “allow a government the choice of permissible subjects for public debate” and thereby “allow that government control over the search for political truth”462—a result obviously inconsistent with fundamental democratic principles.463

In addition to judicial independence, proponents of speech restrictions cite a second rationale for muzzling judicial candidates: protection of judicial impartiality. Applying that justification, it would be improper for a judge to decide cases on the basis of prior commitments, rather than on the basis of “neutral” research and reflection. Accordingly, to protect this “impartiality,” campaign speech must be limited so as to prevent a commitment to decide an

judicial tenure. Speech restrictions, however, are at best half-measures to serve that goal, as they continue to allow voters to select judges on any basis, but merely hinder the acquisition of information. As shown in Part II and Subsection IV.A.2, states with elections have decided that the advantages of making the judiciary accountable to the voting majority outweigh the potential threats to minority interests posed by such elections. See also Republican Party v. White, 536 U.S. 765, 788-92 (2002) (O'Connor, J., concurring).

By enacting speech restrictions, state officials are able to avoid the political reaction that would result from eliminating judicial elections, while nonetheless making those elections less effective ways of translating voter preferences into law. It is thus both interesting and predictable that elected state courts generally support the constitutionality of speech restrictions: Such decisions entrench elected officials in power by making it disproportionately harder for challengers to campaign against incumbents. Those who wish to exercise free speech rights must appeal to the independence of the judiciary—a value cherished by proponents of the very restrictions that abridge those rights.


461. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26 (1948).


463. See Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (noting that freedom of speech from governmental interference is “indispensable to the discovery and spread of political truth”).
issue one way or another. This rationale falls apart once it is conceded that due process protections for litigants guarantee only that their judge will not be biased in favor of one of the parties, and that it is better to have a judge on the bench who has studied legal issues than it is to have a judge who has an "open mind" because he has not thought about the duties of his office. A judge who has made up his mind concerning an issue presented in a case may decide the case free of any concern that his "bias" has poisoned the proceedings. Because litigants have no right to a judge who has remained silent in his campaign, and because judges and voters do have the First Amendment right to discuss whatever issues seem relevant to them, speech restrictions limiting judicial candidates to certain subjects of debate should be held unconstitutional.

This formulation does not leave judges completely free to say anything they desire, even during a campaign. Judges (just like legislators) may not claim any constitutional privilege for promising to violate their oaths or the law, so a promise to decide a case a certain way regardless of the particular facts or applicable law would not be protected. For this reason, a properly tailored restriction designed to prohibit candidates from advocating violation of the law

464. See Hartlage, 456 U.S. at 55 ("Although agreements to engage in illegal conduct undoubtedly possess some element of association, the State may ban such illegal agreements without trenching on any right of association protected by the First Amendment."). In this way, Hartlage recognizes that candidates are subject to rules banning conspiracies to violate the law, just as are other citizens. See Marc Rohr, Grand Illusion?: The Brandenburg Test and Speech that Encourages or Facilitates Criminal Acts, 38 WILLAMETTE L. REV. 1, 26 (2002). Judges may therefore be prohibited from running on platforms of refusing to implement statutes, the Constitution, or higher court decisions. See Karlan, supra note 28, at 549-57. But see Michael Stokes Paulsen, Accusing Justice: Some Variations on the Themes of Robert M. Cover's Justice Accused, 7 J.L. & RELIGION 33 (1989).

There is, however, considerable tension between Hartlage's accepting of speech restrictions against advocating illegal conduct and the Brandenburg test, which requires the government to prove that a speech restriction is necessary to prevent likely and imminent lawless action. See Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam); Rohr, supra; see also Hess v. Indiana, 441 U.S. 105, 108 (1973) (per curiam) (reversing a disorderly conduct conviction where the defendant's speech "[a]t worst . . . amounted to nothing more than advocacy of illegal action at some indefinite future time"). Distinguishing Brandenburg on the ground that it involved purely private speech, and not campaign conduct, does not seem possible in light of Communist Party v. Whitcomb, 414 U.S. 441, 449 (1974) (declining the adopt such a distinction). And White itself stressed the "obvious point . . . that the First Amendment provides [at least as much] protection during an election campaign than at other times." Republican Party v. White, 536 U.S. 765, 783 (2002). The more promising distinction appears to be between mere "abstract doctrine," id. at 450, about breaking the law, and statements with a likelihood of bringing about that result. Accordingly, unless campaign speech goes beyond abstract teaching and becomes concrete incitement to, or promises of, illegality, First Amendment principles prohibit the state from silencing it—regardless of whether the candidate seeks judicial or other public office.

465. Whether in fact such a promise will be held to violate the law is a question for the states. Both judges and legislators are, occasionally, open about their refusal to follow governing law, but such outspokenness is rare. See generally Williams v. State, 88 S.E.2d 376, 377 (Ga. 1955) (adhering to a prior decision though acknowledging that the U.S. Supreme Court "apparently concluded" that reversal was appropriate); Peter Irons, A People's History of the Supreme Court 191 (1999) (noting legislators' pledges to disregard slavery laws); Heffernan, supra note 8, at 1040 (noting the elected Wisconsin Supreme Court's "nullification" of the U.S. Supreme Court's decision in Ableman v. Booth, 62 U.S. (21 How.) 506 (1858)); Jenni Parrish, The Booth Cases: Final Step to the Civil War, 29 WILLAMETTE L. REV. 237 (1993) (describing the Wisconsin Supreme Court's refusal to comply with the Fugitive Slave Act). If a state punishes campaign advocacy of illegality, Brown v. Hartlage holds that the First Amendment is no impediment.
Judges as Politicians

(for example, by flouting an unpopular U.S. Supreme Court decision) may be constitutional. But where the underlying conduct is perfectly acceptable—distinguishing that unpopular case given an appropriate factual setting, or overruling a decision of the would-be-judge’s own court, for example—then I see no reason why the voters should be kept in the dark as to the candidate’s plans for carrying out his duties, should he be elected.\(^466\)

Similarly, ex parte contacts and speech concerning pending cases may be prohibited (depending on the circumstances\(^467\)), where such speech would betray favoritism for one party involved in a case,\(^468\) and thus impact the rights of litigants.\(^469\) In those cases, however, the compelling interest squelching free

---

\(^466\) In a recent race for Alabama Chief Justice, one candidate, Roy Moore, ran openly on his notoriety for defying federal court orders that he comply with the Establishment Clause and remove a display of the Ten Commandments from his courtroom. See Ann LoLordo, Ten Commandments Play Campaign Role, BALTIMORE SUN, June 6, 2000, at A1. Moore’s opponent, Harold See, attempted to criticize Moore for being soft on drug offenders. See George Lardner, Jr., Speech Rights and Ethics Disputed in Judicial Races, WASHINGTON POST, Oct. 8, 2000, at A13. Moore won the election, and See was charged by the Alabama Judicial Inquiry Commission with violations of judicial ethics. See Butler v. Ala. Judicial Inquiry Comm’n, 802 So. 2d 207 (Ala. 2001). Upon assuming the post of Chief Justice, Moore promptly displayed a 5280 pound granite carving of the Ten Commandments in the courthouse and professed his belief that he could maintain the display regardless of whether a federal judge held the display to violate the Constitution. See Jeffrey Gettleman, Judge’s Biblical Monument Is Ruled Unconstitutional, N.Y. TIMES, Nov. 19, 2002, at A1. It is nothing less than incredible that the Commission considered Chief Justice Moore’s open defiance of binding precedent to be less damaging to the public’s confidence in the judiciary than was Judge See’s attempt to advocate harsher sentences for criminals.

\(^467\) See Liteky v. United States, 510 U.S. 540, 555-56 (1994) (noting that statements during the course of a trial directed at “courtroom administration” will not form the basis of a successful recusal motion); United States v. Grinnell Corp., 384 U.S. 563, 580-83 (1966). The distinction between permitting statements during the trial and forbidding the same statements if made in other settings has been called “unrealistic.” See Jackson, supra note 275.

\(^468\) See Berger v. United States, 255 U.S. 22 (1921) (finding bias against the defendants in the case); United States v. Microsoft Corp., 253 F.3d 34, 107-17 (D.C. Cir.) (admonishing Judge Thomas Penfield Jackson for his comments during the pendency of the antitrust suit against Microsoft that indicated his disfavor for the Microsoft defendants), cert. denied, 534 U.S. 952 (2001); United States v. Cooley, 1 F.3d 985, 995 (10th Cir. 1993) (forcing disqualification when a judge’s comments evinced prejudice against “these defendants”). In such circumstances, the harm is that the judge is in fact prejudiced against one party. The fact that the judge has announced the prejudice merely makes proving the prejudice easier, see supra note 251, and it makes questioning a judge’s impartiality more “reasonable” under the federal disqualification statute. 28 U.S.C. § 455(a) (2003). I do not mean to suggest that the appearance of favoritism by itself triggers a constitutional violation.

\(^469\) A judge’s divulgence of confidential information (including the identity of testifying undercover police officers, personal information about witnesses and parties, and national security information, for example) would likely be unprotected at least where prohibitions on disclosure of that information protect compelling interests. See Gentile v. State Bar, 501 U.S. 1030, 1075-76 (1991); id. at 1036 (opinion of Kennedy, J); In re Sawyer, 360 U.S. 622, 636 (1959) (plurality opinion) (hypothesizing that speech may be proscribed when it “might tend to obstruct the administration of justice”); id. at 647 (Stewart, J., concurring in result) (posing that speech may be proscribed where it was used “to obstruct or prejudice the due administration of justice by interfering with a fair trial”); In re Evans, 801 F.2d 703, 706 (4th Cir. 1986) (holding that an attorney’s letter, written during the pendency of an appeal, questioning a judge’s impartiality was “an attempt to prejudice the administration of justice”); cf. Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 837-38 (1978) (declining to reach the question of whether a participant in a confidential proceeding may be punished for releasing information); United States v. Nixon, 418 U.S. 683, 714-16 (1974) (stressing the care that should be taken to keep in camera material secret unless necessary for the court to execute its functions); Kamasinski v. Judicial Review Council, 44 F.3d 106 (2d Cir. 1994) (holding that the confidentiality of a judicial disciplinary proceeding did not violate the First Amendment).
speech is the protection of constitutional rights. A judge holds his position so that he may ensure due process for litigants, and one whose speech causes him to violate the Constitution should not obtain refuge in another clause of that same document. Where a judge is forbidden from making statements about his judicial philosophy or the way that philosophy would impact future cases, however, with the only countervailing interest a vague desire for open-minded judges or for protecting the image of the judiciary, the restrictions must fail.\(^\text{470}\) In a free society, and particularly in a society committed to the First Amendment, government may not cultivate an image of itself and silence those who would challenge that image.

\(^{470}\) See, e.g., Bridges v. California, 314 U.S. 252, 270-71 (1941) ("[A]n enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect."); supra note 157.