

# LOOSE LIPS SINK SHIPS: THE IMPLICATIONS OF A LIBERAL POLICY RESTRICTING JUDICIAL SPEECH

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## I. INTRODUCTION

Remember the good old days? They were a place in time when things were cheaper, neighborhoods were safer, children respected their elders, and the judiciary was an honorable profession comprised of independent and impartial judges. If you have even an ounce of cynicism coursing through your veins, you might question the existence of such an idealistic fantasyland, but the point is well taken. Times have changed. We live in a day and age where Christmas shopping requires a loan, people have to lock their doors, and judges have to be coached in the game of politics. The transformation of judges from impartial facilitators of justice to seasoned politicians creates doubts about the integrity of our judicial system. The foray of politics into the judiciary rises to the forefront of modern day issues because “[t]here could hardly be a higher governmental interest than a State’s interest in the quality of its judiciary.”<sup>1</sup> These issues have led to the implementation of rules to keep politics out of the judiciary. More specifically, rules are in place restricting the political speech of judges and judicial candidates. This commentary focuses on the battle between these rules and judicial freedom of speech.

Due to a recent United States Supreme Court decision<sup>2</sup> and the monetary increase in campaign contributions,<sup>3</sup> it is necessary to re-evaluate Illinois’ policy on restricting the speech of incumbent judges and judicial candidates. In June 2002, the United States Supreme Court, in *Republican Party of Minnesota v. White*,<sup>4</sup> held a clause in the Minnesota Supreme Court’s Code of Judicial Conduct stating that a candidate for judicial office cannot “announce his or her views on disputed legal or political issues”<sup>5</sup>

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1. *Landmark Communication, Inc. v. Virginia*, 435 U.S. 829, 848 (1978) (Stewart, J., concurring).
2. *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).
3. See William Glaberson, *Fierce Campaigns Signal a New Era for State Courts*, N.Y. TIMES, June 5, 2000, at A1; William Glaberson, *States Steps to Rein in Excesses of Judicial Politicking*, N.Y. TIMES, June 15, 2001, at A1.
4. 536 U.S. at 788.
5. MINN. CODE OF JUD. CONDUCT Canon 5(A)(3)(d)(i) (West Supp. 2003).

violated the First Amendment.<sup>6</sup> As it turns out, Illinois is one step ahead of the United States Supreme Court in invalidating such clauses.

In 1993, the Seventh Circuit of the United States Court of Appeals found the exact same clause unconstitutional in Illinois' Code of Judicial Conduct, in addition to a clause prohibiting "pledges and promises of conduct in office."<sup>7</sup> In August 1993, Illinois amended its Code of Judicial Conduct which now states "[a] candidate for judicial office shall not make statements that commit or appear to commit the candidate with respect to cases, controversies or issues within cases that are likely to come before the court . . . ."<sup>8</sup> Upon these changes, Illinois established itself as a state with a comparably liberal policy on restricting judicial speech.<sup>9</sup>

Additionally, judicial campaign funds are becoming indistinguishable from legislative campaign funds. The Institute for Legal Reform, at the behest of the United States Chamber of Commerce, gave \$10 million to the campaigns of judges who were "pro-business."<sup>10</sup> In Ohio, the campaign funds for a seat on the supreme court increased from \$100,000 in 1980<sup>11</sup> to about \$9 million in 2000.<sup>12</sup> Three judicial candidates in the 2000 Michigan Supreme Court election spent at least \$16 million each.<sup>13</sup> On the Ohio Supreme Court, Justice Resnick received \$1 million in campaign contributions from Ohio trial lawyers.<sup>14</sup> Finally, in 2000, campaign funds for the Illinois Supreme Court election reached an ultimate high at a collective \$5 million.<sup>15</sup>

While campaigning is an expensive prospect, the substantial increase in campaign funds is disconcerting. The public cannot help but question the purpose of, and a judicial candidate's motivation for, such contributions. The

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6. U.S. CONST. AMEND. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."); *White*, 536 U.S. at 788.
  7. *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 225 (7th Cir. 1993).
  8. ILL. SUP. CT. R. 67(A)(3)(d)(i).
  9. Patrick E. McGann, *Ethical Campaign Practices for Illinois Judicial Candidates*, 90 ILL. B.J. 76, 78 (2002).
  10. Jim Vandeltei, *Major Business Lobby Wins Back Its Clout by Dispensing Favors*, WALL ST. J., Sept. 11, 2001, at A1.
  11. William Glaberson, *Fierce Campaigns Signal a New Era for State Courts*, N.Y. TIMES, June 5, 2000, at A1.
  12. William Glaberson, *States Take Steps to Rein in Excesses of Judicial Politicking*, N.Y. TIMES, June 15, 2001, at A1.
  13. *Id.*
  14. Paul Braverman, *Judicial Smackdown*, 12 AM. LAW., Dec. 2002, at 18.
  15. The Constitution Project, *Illinois Summary Report on Judicial Elections*, at <http://www.constitutionproject.org/ci/survey/illinois.htm> (last visited Aug. 30, 2003).

propensity of Illinois and the United States Supreme Court to take liberal stances on judicial speech, compounded by the increased similarity between campaigns of judges and legislators, compromises the integrity of the judiciary. Moreover, the trend decreases the public's confidence in the judicial system in the same downward motion as the public's confidence in the integrity of other branches of the government.<sup>16</sup>

In the battle between judicial freedom of speech and protecting the judiciary from politics, protection should win. To accomplish this goal, the liberalization of restrictions on judicial speech must cease. This comment proposes that Illinois re-establish a strict policy restricting judicial speech by prohibiting a judicial candidate from "announc[ing] his or her views on disputed legal or political issues [hereinafter "announce clause"]."<sup>17</sup> Part II of this comment addresses Illinois' current and past positions on restricting judicial speech, as well as the United States Supreme Court's position. Part III of this comment examines the limitations of clauses other than the "announce clause" in restricting judicial speech. Next, this section examines the fundamental flaw in reasoning of courts finding restrictions on judicial speech unconstitutional. Also, this section suggests an alternative measure to educate voters in an election in which judges are limited in their speech. Finally, this comment proposes amendments to judicial codes to remedy the defects of a liberal policy restricting judicial speech.

## II. BACKGROUND

Judicial impartiality is firmly rooted in the Constitution of the United States.<sup>18</sup> This concept emanates from the provision in Article II giving the President the power, with the advice and consent of the Senate, to appoint judges of the United States Supreme Court.<sup>19</sup> The Founding Fathers possessed enough foresight to discern that appointed judges are less likely to rule according to the views of a particular constituency.<sup>20</sup> State court judges, however, are of a different breed, and by the early nineteenth century, some

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16. Jennifer L. Brunner, Comment, *Separation of Power as a Basis for Restraint on a Free Speaking Judiciary and the Implementation of Canon 7 of the Code of Judicial Conduct in Ohio as a Model for Other States*, 1999 DET. ET. C. L. REV. 729, 748 (1999).

17. ILL. SUP. CT. R. 67(B)(1)(c) (1992) (repealed 1993).

18. See U.S. CONST. art. II, § 2, cl.2.

19. *Id.*

20. Bola Ogunro, *How Can the Integrity of Judicial Elections be Safeguarded After White*, 20 COMM. LAW. 19, 19 (2003).

states began selecting judges through the elective process.<sup>21</sup> Consequently, in recognizing the potential for venality, states created judicial codes to prevent certain political activity and speech by judicial candidates.<sup>22</sup> Although a variation on the “announce clause” was adopted in 1924, the first true “announce clause” was not developed until the 1972 ABA Model Code.<sup>23</sup> The “announce clause” remained unchallenged in any federal court until 1984<sup>24</sup> and in Illinois until 1993.<sup>25</sup>

#### A. Illinois’ Old Rule 67<sup>26</sup>

The original canon in the Illinois Code of Judicial Conduct stated that a judicial candidate “should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office [hereinafter “pledges and promises clause”]; announce his views on disputed legal or political issues; or misrepresent his identity . . . .”<sup>27</sup> The original canon provided an all-encompassing restriction on the political statements of judges.<sup>28</sup> The “pledges and promises clause” prohibited judicial candidates from making promises except to faithfully uphold the letter of the law.<sup>29</sup> To fill any gaps in the restrictions, the “announce clause” prohibited judicial candidates from making a statement of opinion on “disputed legal and political issues.”<sup>30</sup> A list of such issues would likely be endless as “disputed legal and political issues” can be interpreted to include a variety of topics ranging from the Constitution to world affairs.<sup>31</sup>

In realizing these controversies, the Seventh Circuit of the United States Court of Appeals found Illinois Supreme Court Rule 67 unconstitutional.<sup>32</sup> In the 1990 Illinois Supreme Court election, Justice Buckley distributed campaign

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21. *Id.*

22. *Id.*

23. Ogunro, *supra* note 20; MODEL CODE OF JUD. CONDUCT Canon 7(B)(1)(c) (1972).

24. *See* Berger v. Supreme Court of Ohio, 598 F. Supp. 69, 75 (S.D. Ohio 1984) (“announce clause” held constitutional).

25. *See* Buckley v. Ill. Judicial Inquiry Bd., 997 F.2d 224, 231 (7th Cir. 1993) (“announce clause” held unconstitutional).

26. ILL. SUP. CT. R. 67(B)(1)(c) (1992) (repealed 1993).

27. *Id.*

28. Buckley v. Ill. Judicial Inquiry Bd., 997 F.2d 224, 228 (7th Cir. 1993).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 231.

material which stated he had “never written an opinion reversing a rape conviction.”<sup>33</sup> The Illinois Judicial Inquiry Board filed charges against him with the Illinois Courts Commission.<sup>34</sup> Although no penalty was imposed, the commission decided Justice Buckley had violated Rule 67(B)(1)(c) of the Illinois Code of Judicial Conduct.<sup>35</sup>

In 1991, Buckley, along with the Illinois Judge’s Association, filed suit against the Illinois Judicial Inquiry Board.<sup>36</sup> The district court upheld Rule 67(B)(1)(c), but the court of appeals found it violated the First Amendment of the United States Constitution.<sup>37</sup> Citing the lack of guidance from other courts, the Seventh Circuit did not specify what kind of a restriction on judicial speech would pass constitutional scrutiny.<sup>38</sup> It did hold, however, that the state’s interest in restricting judicial candidates from making statements interpreted as promises or commitments is not compelling enough to “circumscribe their freedom of speech by a rule so sweeping that only complete silence would comply with a literal . . . interpretation of the rule.”<sup>39</sup>

#### B. Illinois’ New Rule 67<sup>40</sup>

In August 1993, two months after the decision in *Buckley*, Rule 67 (A)(3)(d)(i) replaced Rule 67 (B)(1)(c).<sup>41</sup> Illinois’ new rule replaced the “announce clause” and “pledges and promises clause” with “a candidate for judicial office shall not make statements that commit or appear to commit the candidate with respect to cases, controversies or issues within cases that are likely to come before the court [hereinafter “commit or appear to commit clause”].”<sup>42</sup>

Illinois, like many other states, adopted the clause from the 1990 ABA Model Code of Judicial Conduct to replace the “announce clause.”<sup>43</sup> Canon 5A(3)(d) states:

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33. *Id.* at 226.

34. *Id.*

35. *Id.*

36. *Id.*

37. U.S. CONST. amend. I; *Buckley*, 997 F.2d at 231.

38. *Buckley*, 997 F.2d at 231.

39. *Id.*

40. ILL. SUP. CT. R. 67(A)(3)(d)(i).

41. *Id.*

42. *Id.*

43. MODEL CODE OF JUD. CONDUCT Canon 7(B)(1)(c) (2000).

[A] candidate for judicial office . . . shall not (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; (ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; or (iii) knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or the opponent . . . .<sup>43</sup>

At least twenty-five states have adopted the “commit or appear to commit clause” modeled after the ABA Code or a variation on the clause that achieves the same meaning.<sup>44</sup> The changes provide a more narrowly tailored restriction than the “announce clause” for First Amendment purposes by prohibiting a judicial candidate from stating views on issues or cases “*likely to come before the court.*”<sup>45</sup> While the amendments might resolve purported constitutional concerns, the expansion of judicial speech fails to serve Illinois’ interest in an independent judiciary.

*C. Republican Party of Minnesota v. White*<sup>46</sup>

A complaint was filed with the Minnesota Lawyers Professional Responsibility Board against a candidate for associate justice of the Minnesota Supreme Court, who circulated material questioning previous decisions by the court on crime, welfare, and abortion.<sup>47</sup> The Lawyers Board dismissed the complaint, but the candidate, uncertain as to what constituted prohibited speech, filed a lawsuit in the federal district court to have the “announce clause” declared unconstitutional.<sup>48</sup> Restrictions on speech pass constitutional muster only if they satisfy the strict scrutiny test.<sup>49</sup> The strict scrutiny standard requires the restriction to serve a compelling state interest and to be narrowly tailored to serve that interest.<sup>50</sup> If both elements are met, then the particular statute or rule enduring scrutiny is constitutional.<sup>51</sup>

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43. *Id.*

44. Ogunro, *supra* note 20.

45. ILL. SUP. CT. R. 67(A)(3)(d)(i) (emphasis added).

46. 536 U.S. 765 (2002).

47. *Id.* at 768–69.

48. *Id.* at 769.

49. *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989).

50. *Id.*

51. *Id.*

The Minnesota clause, which prompted the United States Supreme Court to grant certiorari, stated a judicial candidate

shall not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his or her views on disputed legal or political issues; or misrepresent his or her identity, qualifications, present position or other fact concerning the candidate or the opponent . . . .<sup>52</sup>

The Court interpreted the “announce clause” to prohibit more than making promises about issues; rather the clause restricts any statement by a candidate of his current position on legal or political issues.<sup>53</sup> In its analysis, the Court examined two compelling interests as a basis for the judicial speech restriction, impartiality of the judiciary and the appearance of impartiality.<sup>54</sup>

Justice Scalia, writing for the majority, proposed three definitions of impartiality; however, under his definitions, either the impartiality was not a compelling interest,<sup>55</sup> it was not properly served by a narrowly tailored “announce clause,”<sup>56</sup> or the Minnesota Supreme Court did not adopt the “announce clause” under the purview of the proposed definition.<sup>57</sup> Justice Scalia did not define impartiality in a way that would, in his opinion, constitute a compelling state interest.<sup>58</sup> He simply declared the “announce clause” to be “underinclusive” as to serve any notion of impartiality.<sup>59</sup> Thus, the Court held the “announce clause” violates a judicial candidate’s First Amendment right to free speech.<sup>60</sup>

The inherent criticism thread throughout the *White* and *Buckley* cases is the attenuation between the “announce clause” and judicial impartiality.<sup>61</sup> Courts are reluctant to place restrictions on speech. The hesitancy is understandable when dabbling with First Amendment rights, but an uncertainty abounds from the new status of judicial speech restrictions: Are the “pledges

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52. MINN. CODE OF JUD. CONDUCT Canon 5(A)(3)(d)(i) (West Supp. 2003).

53. *White*, 536 U.S. at 771.

54. *Id.* at 775.

55. *Id.* at 777 (“impartiality” defined as “lack of preconception in favor of or against a particular legal view”).

56. *Id.* at 775 (“impartiality” defined as “lack of bias for or against either party to a proceeding”).

57. *Id.* at 778–79 (“impartiality” defined as “open-mindedness”).

58. *See White*, 536 U.S. 765.

59. *Id.* at 780.

60. U.S. CONST. amend. I; *White*, 536 U.S. at 788.

61. *See Buckley*, 997 F.2d at 228–29; *see also White*, 536 U.S. at 779–80.

and promises clause” and the “commit or appear to commit clause” sufficient to preserve an independent judiciary?

### III. ANALYSIS

#### A. “Pledges and Promises Clause” and “Commit or Appear to Commit Clause”

Without the “announce clause,” the “pledges or promises clause” and the “commit or appear to commit clause” can be easily circumvented.<sup>62</sup> The boundaries of the “announce clause” are much more established than those of the current clauses of choice.<sup>63</sup> In the absence of ambiguous terms such as “pledge,” “promise” and “commit,” the line is much more bright line.<sup>64</sup> In fact, defining the “announce clause” is one issue on which courts tend to reach a consensus; most courts agree the clause prohibits any statement by a candidate of his or her current position on any controverted legal or political issue.<sup>65</sup> However, whether a judicial candidate made a promissory statement or pledged future conduct in office is left to the discretion of the courts.

For example, the Ohio Supreme Court found a judicial candidate’s statement of “I would run a court that views convicted felons from the standpoint that they are going to be incarcerated,”<sup>66</sup> does not violate the state’s “pledges and promises clause.”<sup>67</sup> The court held that the statement is a “philosophical viewpoint” and is “unlikely to rise to a pledge or promise as reasonable persons would define them.”<sup>68</sup> Another court, however, could just as easily decide that a reasonable person would likely define a “promise” in the same way the dictionary does, as “a declaration that one will do or refrain from doing something specified” or “a ground for expectation.”<sup>69</sup> A statement of how one “would run a court”<sup>70</sup> could feasibly be classified as a declaration to

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62. *White*, 536 U.S. at 819 (Ginsberg, J., dissenting).

63. *Id.* at 770–71.

64. *Id.*

65. *White*, 536 U.S. at 770–71; *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 228 (7th Cir. 1993).

66. *In re Judicial Campaign Complaint Against Runyan*, 707 N.E.2d 580, 581 (Ohio Comm’n of Judges 1999).

67. *Id.* at 583.

68. *Id.*

69. WEBSTER’S THIRD NEWINTERNATIONAL DICTIONARY 1815 (3d ed. 1993).

70. *Runyan*, 707 N.E.2d at 581.



do something specified and, most certainly, as a basis for expectation. In any event, the entire problem is obviated in a state with the “announce clause,” because the above statement qualifies as an announcement of a judicial candidate’s view on sentencing convicted felons, and, thus, it violates the “announce clause.”

Another avenue for circumvention is careful articulation of campaign statements. One could refrain from using the words “promise” and “commit” or include disclaimers in every campaign statement.<sup>71</sup> While technically not a violation of the judicial code, the inherent dangers are still present, for “the ‘nonpromissory’ statement averts none of the dangers posed by the ‘promissory’ one.”<sup>72</sup> An “announce clause” prevents the circumvention of promises and commitments by prohibiting the statements of judicial candidates who attempt to inform the public how they would decide certain issues.<sup>73</sup>

In an attempt to soothe the initial impact of *White*, Justice Scalia assures the public that the Court’s invalidation of Minnesota’s Code of Judicial Conduct does not extend to the “pledges or promises clause.”<sup>74</sup> However, the restriction against pledges and promises alone is not sufficient to sustain judicial codes across the country. Promises made by judicial candidates on the campaign trail are easily avoided by eliminating the “I promise” or “I pledge” language.<sup>75</sup> In fact, to cover all points of contention, a judicial candidate could follow up every statement with “although I cannot promise anything.”<sup>76</sup>

One wonders then what Justice Scalia suggests for liberal states, such as Illinois, which have neither the “pledges or promises clause” nor the “announce clause” in their Code of Judicial Conduct.<sup>77</sup> Although Illinois replaced these clauses with a new clause restricting judicial candidates from making statements that “commit or appear to commit the candidate with respect to cases, controversies or issues within cases that are likely to come before the court . . . ,”<sup>78</sup> this provision suffers the same obstacles as the “pledges or promises clause.” Judicial candidates could end their statements with the

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71. *Republican Party of Minn. v. White*, 536 U.S. 765, 819 (2002) (Ginsberg, J., dissenting).

72. *Id.* (Ginsberg, J., dissenting).

73. *Id.* at 820 (Ginsberg, J., dissenting).

74. *Id.* at 780.

75. *Id.* at 819 (Ginsberg, J., dissenting).

76. *Id.* (Ginsberg, J., dissenting).

77. ILL. SUP. CT. R. 67(B)(1)(c) (1992) (repealed 1993).

78. ILL. SUP. CT. R. 67(A)(3)(d)(i).

requisite words “but I am not committing myself”<sup>79</sup> or narrowly define “commit” like some courts define “promise.”<sup>80</sup>

For instance, in New York, a judicial candidate sought review of the decision by the State Commission on Judicial Conduct that the campaign literature she circulated “committed, or appeared to commit” the candidate to favoring the prosecution in criminal cases in violation of the “commit or appear to commit clause” and the “pledges and promises clause.”<sup>81</sup> The offending campaign literature identified the candidate as a “law and order candidate.”<sup>82</sup> In the Commission’s opinion, the statement gave the appearance of bias in favor of the prosecution and a promise to treat criminals with a firm hand.<sup>83</sup> The New York Court of Appeals disagreed with the Commission’s interpretation and found the statement did not amount to a commitment or a promise.<sup>84</sup> The court substantiated its conclusion solely on the basis that the words “law and order” are “widely and indiscriminately used in everyday parlance and election campaigns.”<sup>85</sup> With the relaxation of the rules, courts can twist the interpretation of almost any statement to fall outside the purview of the Code of Judicial Conduct.

## B. Flaws in the White Reasoning

As stated by Justice Stevens, the fundamental flaw of courts in finding the rules prohibiting the speech of judicial candidates unconstitutional is that it is “an inaccurate appraisal of the importance of judicial independence and impartiality, and an assumption that judicial candidates should have the same freedom to express themselves on matters of current public importance as do all other elected officials.”<sup>86</sup> In resolving these two flaws, the “compelling interest” of Illinois and other liberal states in adopting a strict policy on judicial speech is apparent.

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79. *Id.* (McMorrow, J., dissenting).

80. *See, e.g., In re Judicial Campaign Complaint Against Runyan*, 707 N.E.2d 580, 581 (Ohio Comm’n of Judges 1999) (the commission regarded a statement of how one “would run a court” as a “philosophical viewpoint” instead of a “promise”).

81. *In re Shanley*, 774 N.E.2d 735, 736 (N.Y. 2002); *see* 22 N.Y. COMP. CODES R. & REGS. tit. 22, § 100.5 (A)(4)(d)(i),(ii) (2003).

82. *Shanley*, 774 N.E.2d at 736.

83. *Id.* at 736–37.

84. *Id.* at 737.

85. *Id.*

86. *Republican Party of Minn. v. White*, 536 U.S. 765, 797 (2002) (Stevens, J., dissenting).

First, the invalidation of rigid restrictions on judicial speech gives insufficient significance to judicial impartiality.<sup>87</sup> Our judiciary has always recognized due process to encompass a citizen's right to appear before a "neutral and detached judge."<sup>88</sup> An incumbent judge who states his or her position on disputed legal or political issues during the election to satisfy a particular group of constituents feels pressure to decide cases accordingly to stay in the good graces of the voters for the next election.<sup>89</sup> This bias most certainly qualifies as the sort of "direct, personal, substantial, and pecuniary" interest at the core of due process deprivation, the kind of interest that sucks the life out of the Fourteenth Amendment.<sup>90</sup> Simply put, a judge's job is not to operate at the will of the public, but to "follow the precedent of [the] court" and promote justice.<sup>91</sup>

Some critics, such as Justice Scalia, reiterate the common sense notion that judicial independence is not based on a lack of predisposition to the law.<sup>92</sup> Obviously, judges are not just judges; they are human, too, and have preconceived views on disputed issues.<sup>93</sup> However, there is a difference between a naturally occurring predisposition and one existing as a result of judicial politicking.<sup>94</sup> The former is a result of legal experience through education and a career as an attorney or a judge.<sup>95</sup> The latter is a result of a judicial candidate using his or her political statements to secure a seat on the bench.<sup>96</sup> Views based on politics are most likely manifested for campaign purposes.<sup>97</sup> Justice Scalia ignores the distinction between the two types of predispositions, for recognition acknowledges the singular purpose in announcing views: judicial politicking.

In *Buckley*, the Seventh Circuit criticized the Illinois Court Commission for taking issue with Justice Buckley's "innocuous" statement of "never writ[ing] an opinion reversing a rape conviction."<sup>98</sup> Any reasonable person understands the innuendo in circulating campaign materials with that statement included.

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87. *Id.*

88. Mark Kozlowski, *Robed and Running: Striking Prohibitions on Elected Judge's Political Speech Threatens Further Erosion of Public Faith in their Capacity to Act Impartially*, 169 N.J. L. J. 385 (2002).

89. *White*, 536 U.S. at 800 (Stevens, J., dissenting).

90. U.S. CONST. amend. XIV, § 1 (the Due Process clause states "nor shall any State deprive any person of life, liberty, or property without due process of law;"); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824 (1986).

91. *White*, 536 U.S. at 799 (Stevens, J., dissenting).

92. *Id.* at 777-78.

93. *Id.*

94. Kozlowski, *supra* note 88, at 385.

95. *Id.*

96. *White*, 536 U.S. at 800 (Stevens, J., dissenting).

97. Steven Lubet, *Bad Policy Headed for Courtrooms*, CHI. TRIB., July 2, 2002, at 17.

98. *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 230 (7th Cir. 1993).

The only feasible reason a judicial candidate takes the time and spends the money to publicly make known his position on prosecuting rape offenders is to inform and influence the voters. Justice Buckley then feels obligated while on the bench to sustain the conviction of rapists, regardless of the merits of the case, to satisfy the voters and secure their votes for the next election. By announcing views on disputed legal issues, judicial candidates implicitly create guarantees. With these guarantees, judges render decisions based on affiliation rather than on the law and the facts. Due process has no meaning in a justice system of this kind.

Second, the invalidation of rigid restrictions on judicial speech inaccurately rests on the assumption that judges should have the same freedom to speak as other individuals.<sup>99</sup> It would be a daunting task to find someone who does not recognize the importance of free speech as a fundamental right guaranteed by the Constitution, but judges are in a unique position unmatched by any other occupation.<sup>100</sup> They do not operate at the will of their constituents, as do legislators but, rather, at the will of the law.<sup>101</sup> Judges must “stand up to what is generally supreme in democracy: the popular will.”<sup>102</sup> Conversely, legislators by their nature are representative of the American people, a position which requires them to inform the public about their position on political issues so the public can vote accordingly.<sup>103</sup> The state’s interest in rendering justice, without regard to the popular will, eludes the First Amendment<sup>104</sup> and requires a stricter restriction on the speech of judicial candidates than legislative candidates.<sup>105</sup> With comprehensive rules, questions arise as to how voters can make informed choices at the polls; however, there are other ways to educate the public besides allowing judicial politics to taint the election process.

### C. Educating Voters for Elections

Judicial elections and impartiality secured by announce clauses are not mutually exclusive. A judicial candidate’s political, social, and economic views do not determine whether he or she is skilled enough to perform the duties of

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99. *Republican Party of Minn. v. White*, 536 U.S. 765, 797 (2002) (Stevens, J., dissenting).

100. *Id.* at 802 (Stevens, J., dissenting).

101. *Id.*

102. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180 (1989).

103. *White*, 536 U.S. at 805–06 (Ginsberg, J., dissenting).

104. U.S. CONST. amend. I.

105. *See White*, 536 U.S. at 806–07 (Ginsberg, J., dissenting).

the office.<sup>106</sup> It is possible to balance the public's interest in engaging in informed voting with the state's interest in an impartial judiciary.<sup>107</sup> Justice Posner proposes that "only a fanatic" promotes a rule restricting a judicial candidate's speech to the point of only allowing "name, rank, and serial number."<sup>108</sup> However, several decades ago, before judicial politicking and swelling campaign funds, judicial campaigns were based on restricted speech, and voters chose their candidates based on limited knowledge. Still, judges ran successful campaigns by distributing materials absent any statements on "disputed legal or political issues."<sup>109</sup>

For example, in 1962 Donald W. Morthland, Republican candidate for county judge in the Sixth Judicial Circuit of Macon County, Illinois, distributed materials during his campaign.<sup>110</sup> The pamphlets contained general information about his family, education, prior legal experience, and membership in various organizations.<sup>111</sup> Additionally, they expressed his desire to be a part of such an honorable profession and contained the following qualification statement: "I am qualified to render this service by experience, education, disposition and the proved ability to work and co-operate with people."<sup>112</sup> The circulation of this pamphlet was the extent of Judge Morthland's campaigning, yet he was successful in his 1962 campaign and served on the bench for twenty-four years, enjoying the respect and admiration of his peers.<sup>113</sup> His efforts proved a judicial candidate can abide by the strict restrictions in the Code of Judicial Conduct and still have a successful campaign and career.

Judicial campaigns have dramatically changed since 1962. A campaign flyer such as the one above does not exist in today's judicial campaigns full of political statements and innuendos. There is a definitive conflict between restricting campaigns in the interest of judicial impartiality and allowing voters to cast an educated vote, but strict judicial codes do not have to be synonymous with ignorant voting. The proposed amendments do not prevent the circulation of general information to the voting public.<sup>114</sup> If a new Illinois Code of Judicial Conduct is adopted, judges will not be prohibited from

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106. Aaron Chambers, *Buckley Rule Cited as Changing Judicial Campaigns*, 50 CHI. DAILY L. BULL. 1 (2000).

107. *White*, 536 U.S. at 809–11 (Ginsberg, J., dissenting).

108. *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 227 (7th Cir. 1993).

109. ILL. SUP. CT. R. 67(B)(1)(c) (1992) (repealed 1993).

110. Memorandum from Donald W. Morthland, Republican Candidate for County Judge (Nov. 6, 1962) (on file with author).

111. *Id.*

112. *Id.*

113. Ron Ingram, *Judge Remembered as Likable, Mentor*, HERALD & REV., Oct. 1, 2002, at A3.

114. Paul J. DeMuniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 38 WILAMETTE L. REV. 367, 395 (2002).

producing campaign materials giving information on education, experience, and other relevant qualifications. Additionally, the public can evaluate judicial candidates based on observable factors, such as their reputation in the legal community.<sup>115</sup>

#### D. Implementing the “Announce Clause” and the “Pledges or Promises Clause”

Due process requires judicial independence, and judicial impartiality demands that Illinois enact legislation further restricting judicial speech. The ABA Model Code of Judicial Conduct is a starting point for Illinois and other states because it restricts judicial candidates from “mak[ing] pledges or promises of conduct in office other than the faithful and impartial performance of the duties in office,” and “statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.”<sup>116</sup> However, the inherent flaws in these clauses require a more restrictive clause, free of circumvention.

Illinois needs to modify its current Code of Judicial Conduct to mirror its pre-*Buckley* Code, which stated a judicial candidate cannot “make pledges or promises of conduct in office” and “announce his views on disputed legal or political issues.”<sup>117</sup> The “pledges or promises clause” and the “announce clause” protect judicial independence from candidates stating their views or making promises on issues such as privacy, abortion and criminal sentencing in an attempt to persuade voters.<sup>118</sup> Together these two provisions will limit judicial candidates to providing only general information during an election. An additional benefit of the “announce clause” is the insulation of judges from political pressures. The clauses might serve as a protective shield for candidates who feel pressure by special interest groups to take a stance on an issue.<sup>119</sup> They can maintain favor with a particular group of constituents by blaming their silence on the restrictions.<sup>120</sup> For example, in the 2000 Illinois Supreme Court election, Justice Rita Garman claimed submission to the judicial

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115. Robert H. Als Dorf, *The Sound of Silence: Thoughts of a Sitting Judge on the Problem of Free Speech and the Judiciary in a Democracy*, 30 HASTINGS CONST. L.Q. 197, 204 (2003).

116. MODEL CODE OF JUD. CONDUCT Canon 5(A)(3)(d)(i)-(ii) (2000).

117. ILL. SUP. CT. R. 67(B)(1)(c) (1992) (repealed 1993).

118. *Stretton v. Disciplinary Bd. of the Sup. Ct. of Pa.*, 944 F.2d 137, 139 (3d Cir. 1991).

119. Daniel C. Vock, *Candidates Duel Over Canons on Loose Cannons*, 14 CHI. DAILY L. BULL. 1 (2002).

120. *Id.*

code when a Springfield newspaper asked her opinion on gun control laws.<sup>121</sup> She gave a “no comment” response to the newspaper due to the likelihood of the Illinois Supreme Court hearing cases on the controversial issue.<sup>122</sup> In her response, Justice Garman avoided alienating both gun control activists and opponents.

#### IV. CONCLUSION

Courts have routinely sacrificed restrictions on judicial speech for a judicial candidate’s First Amendment right to freedom of speech.<sup>123</sup> However, due to the United States Supreme Court’s decision in *White*<sup>124</sup> and the monetary increase in campaign contributions,<sup>125</sup> it is necessary for Illinois to change its policy restricting the speech of incumbent judges and judicial candidates.

Illinois, in a 1993 amendment, changed its Code of Judicial Conduct, restricting judicial speech with one sweeping statement: “a candidate for judicial office shall not make statements that commit or appear to commit the candidate with respect to cases, controversies or issues within cases that are likely to come before the court.”<sup>126</sup> Illinois took a uniquely liberal position by eliminating both the “pledges or promises clause” and the “announce clause” from its Code, but the amendment does not further the interests of an impartial judiciary.<sup>127</sup> A judicial candidate can easily circumvent the rules with careful wording of campaign statements.<sup>128</sup>

Also, Illinois courts, when reviewing questionable judicial conduct, might follow the trend of other courts by loosely interpreting the statements of judicial candidates and narrowly defining the “commit or appear to commit clause.”<sup>129</sup>

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121. *Id.*

122. *Id.*

123. U.S. CONST. amend. I; see *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224 (7th Cir. 1993), *Beshear v. Butt*, 863 F. Supp. 913 (E.D. Ark. 1994), *In re Judicial Campaign Complaint Against Runyan*, 707 N.E.2d 580 (Ohio Comm’n of Judges 1999), *In re McMillan*, 797 So.2d 560 (Fla. 2001), *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002), and *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).

124. *White*, 536 U.S. 765.

125. See William Glaberson, *Fierce Campaigns Signal a New Era for State Courts*, N.Y. TIMES, June 5, 2000, at A1; William Glaberson, *States Steps to Rein in Excesses of Judicial Politicking*, N.Y. TIMES, June 15, 2001, at A1.

126. ILL. SUP. CT. R. 67(A)(3)(d)(i).

127. McGann, *supra* note 9, at 78.

128. ILL. SUP. CT. R. 67 (McMorrow, J., dissenting).

129. ILL. SUP. CT. R. 67 (McMorrow, J., dissenting); Richard A. Dove, *Judicial Campaign Conduct: Rules, Education, and Enforcement*, 34 LOY. L.A. L. REV. 1447, 1449 (2001);

Subverting the obstacle infringes upon the independence of the judiciary because some judicial candidates will use their unencumbered speech to gain as many votes as possible by committing themselves to disputed legal and political issues.<sup>130</sup> The commitment prevents a judge from deciding a case according to the principles of justice and precedence, thereby impairing a major element of due process, an impartial judiciary.<sup>131</sup>

Due to the magnitude of a state's compelling interest in an independent judiciary and the unique occupational duties of judges, stricter provisions restricting judicial speech are necessary. Therefore, Illinois should amend its current Code of Judicial Conduct to resemble the pre-*Buckley* restrictions by adding clauses prohibiting a judicial candidate from "mak[ing] pledges or promises of conduct in office" and "announc[ing] his views on disputed legal or political issues."<sup>132</sup> While such strict restrictions on judicial speech might seem antithetical to a democracy, voting based on selective information leaves only one choice when comparing candidates: to vote according to the candidate's qualifications and past behavior.<sup>133</sup> Within these confines is the best "judge" of character. After all, actions speak louder than words.

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130. ILL. SUP. CT. R. 67 (McMorrow, J., dissenting).

131. *Kozłowski*, *supra* note 88, at 385.

132. ILL. SUP. CT. R. 67(B)(1)(c) (1992) (repealed 1993).

133. *Als Dorf*, *supra* note 115, at 204.