

“IF ELECTED, I PROMISE [_____]”— WHAT SHOULD JUDICIAL CANDIDATES BE ALLOWED TO SAY?

STEPHEN GILLERS*

Once we step off the curb into the traffic of the popular election of judges, judicial campaign speech presents a challenge of some complexity. I put aside the First Amendment and whatever limits it might impose as a matter of constitutional law, on whatever speech restrictions we might be inclined to impose as a matter of sensible policy. I defer to Professor O’Neil’s excellent analysis on the constitutional issues.¹ I suppose I hope that in the end the First Amendment’s application to campaign speech will be construed to reflect sensible policy. But what is a sensible policy? Oddly, the source of the complexity is simple to identify even if the solutions are not.

In this short Article, I will propose a rule for judicial candidates that balances several competing interests. The rule seeks to honor their First Amendment rights and the voters’ need for information while avoiding a level of specificity that may signal how a judicial candidate would decide a particular case. Along the way, I consider rules that would permit less judicial speech and eventually reject these in favor of a more permissive rule.

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

But what more information can we give? Or to put it another way, what more should we allow the candidates to tell? This is “the other hand.” Certainly, the candidate cannot say how he or she would vote on a particular case, either a hypothetical case or one that may be headed toward the court for which he or she is a candidate, or any other court for that matter. Professor O’Neil’s due process concern is the strong policy interest, and therefore the constitutionally

* Vice Dean and Professor of Law, New York University School of Law. This Paper was prepared specifically for the *Symposium on Judicial Campaign Conduct and the First Amendment*. The views expressed in this Paper are those of the author and do not necessarily reflect the views or opinions of the National Center for State Courts, the Joyce Foundation, or the Open Society Institute. Supported (in part) by a grant from the Program on Law & Society of the Open Society Institute, as well as a grant from the Joyce Foundation.

1. See generally Robert M. O’Neil, *The Canons in the Courts: Recent First Amendment Rulings*, 35 IND. L. REV. 701 (2002).

appropriate state interest, for forbidding such pledges.² Judges decide cases at the end of a formal process that envisions, among other things, rules of evidence, standards of advocacy, opposing arguments, deliberation, and a mind open to persuasion. This is the process litigants are due. A commitment to decide a particular case in a particular way is the antithesis of the judicial process.

No one will take issue with either end of the spectrum. It is rather between them, between the candidates' vitae (allowed) and a promise of a future vote in a particular case should it arise (forbidden), that trouble starts. In examining this problem, let us focus on the criminal law because the criminal law is most likely to win public attention and is therefore the arena where candidates are most likely to try to distinguish themselves. Let me offer you several hypothetical examples which I hope are realistic.

Imagine that in a controversial opinion, a state high court has given state citizens broader protections under a state constitutional provision than are afforded in corresponding provisions of the Federal Constitution. Maybe the state high court has held that to defeat the defendant's privilege against self-incrimination, a prosecutor must offer transactional, not merely testimonial, immunity, making the state constitution more protective than the U.S. Constitution.³ Maybe the state high court has reached that decision in the context of a homicide prosecution that has drawn public attention. And maybe the result of that ruling freed the killer. Tempted to exploit the publicity, can a candidate for a seat on the state high court reveal her doubt about that result, explaining in some scholarly detail why the state high court may have misconstrued the state's privilege against self-incrimination and interpreted it too broadly? Maybe she does this only in response to a reporter's question, which in a heated election is nearly inevitable. Our candidate does not promise to vote to overturn the holding in a future case. Whether in her view *stare decisis* counsels acceptance of it is a different question, which she would decide if and when it is presented and argued. Rather, her public statements are historical. She has read the high court's opinion and wants voters to know she finds it analytically and historically weak. She says that she would have been inclined to reach the opposite result.

If you think of law as a body of rules, you might imagine a case as a syllogism with a major premise, a minor premise, and a conclusion. The major premise is the legal rule. The facts of the particular case constitute the minor premise. The conclusion is the verdict or judgment or the ruling on appeal. In my hypothetical, our candidate says nothing about an actual case as such because she says nothing about facts or a minor premise. She addresses only the major premise, the legal rule. Further, she has not said what her vote would be on that rule should it thereafter come before the court for which she is a candidate in the form of a case, but only what her position on the rule, the major premise, would likely have been were she on the court when the question was actually presented. If the criticism is leveled that the candidate is revealing a view without having

2. *Id.* at 716.

3. *Kastigar v. United States*, 406 U.S. 441 (1972) (the U.S. Constitution requires only testimonial immunity).

been participant to the process that led to it, she might reply that in fact she has read all the briefs, and all sources cited in the briefs, and attended the oral argument. True, she did not participate in the court's deliberation, but what of it? That was not possible because she was not on the court. The public, she will say, is entitled to her views based on the access she could enjoy at the time, and to the extent that her absence from the deliberations somehow makes these views "incomplete" or subject to revision, she will readily agree. The voter will still have more information about her than if she said nothing at all. Our candidate might add that this information is especially important because it addresses a state constitutional provision, where the state high court is often the final voice.

This discussion so far might lead us to the following conclusion:

A candidate for judicial office may state his or her likely views on a rule of law already decided by the court for which he or she is a candidate or by a higher court.

The touchstones for (or limits to) this proposition are, first, that the rule of law has already been decided and, second, that the candidate is addressing only a rule of law, the major premise of the syllogism that defines a case.

But let us test those limits by eliminating the "already decided" requirement. Assume now that our candidate has studied the question and concluded that not only was the state high court wrong to interpret the state's privilege against self-incrimination to require transactional immunity, but she is also inclined to conclude that few if any of the state's constitutional criminal procedure rules should be read more expansively than the protections in the Federal Constitution. We are still talking about rules of law, the major premise, but now some of the rules have yet to be decided by the court the candidate seeks to join. But neither are we talking about cases. Any case can still be decided one way or another depending on the other legal questions it contains.

Let's make the hypothetical even more difficult (or less difficult, depending on what you believe). There is headed to the state high court a notorious criminal case in which one of the arguments advanced by defense counsel is that his client was denied his rights under the state and federal confrontation clauses. If our candidate is permitted to state her likely view that state constitutional provisions should in the main be read as coterminous with their federal counterparts, then she is saying, at the least, how she is likely to vote on that precise issue in the notorious case. I say "likely to vote" because our candidate does not promise to vote one way or the other on the issue, nor has she said whether she believes either confrontation clause was violated. She has merely expressed her doubt about the argument in favor of a broader reading of the state constitutional provisions, while adding that she will keep an open mind on the issue when she reads appeal briefs arguing otherwise. Such a statement is not duplicitous. We know that lawyers and judges are honestly able to approach an issue inclined in one direction and then have their minds changed. (Perhaps you are reading this Article just that way right now.) In our case—and I add this fact just to make the question even more troublesome—assume that the candidate has been a law professor at a law school in the state. One of her courses is a seminar on state constitutional law. Two years ago, she wrote a leading article on the intersection

of state and federal constitutional protections in criminal cases in which she has already expressed the very same views.

We might say that campaign statements like this one cross the line, that they offer too much even if they do not contain a promise to vote in a particular way on a particular legal question. But is that right? If our candidate's scholarship stakes out the same position, if she has, for example, actually written a law review article critical of the methodology of the very court she seeks to join, what is the value of denying her the right to explain the position she has already taken? One might argue that statements the candidate has made as a commentator on the law are in a different category from statements she might make as a candidate for a judicial post because the latter carries the implication of a promise, even if it does not contain a guarantee. I develop this argument below. But let me first take the hypothetical in a different direction to test our intolerance for statements that go beyond commenting on what the court has "already decided," assuming we are prepared to go even that far.

Assume it was the opposing candidate who wrote the court's opinion finding that only transactional immunity can override the assertion of the state's privilege against self-incrimination. In this opinion, he explained the doctrinal and historical basis for a more expansive reading of the state constitutional protection and this explanation is broad enough to apply to other (as yet unconstrued) provisions of the state constitution. So, the opponent's position is public knowledge (including the methodology through which he reached it and which may bear on how he will interpret other state constitutional provisions in the area of criminal procedure, including the state's confrontation clause). There is no doubt about what *he* thinks. Surely, the informed voter who wishes to exercise her vote responsibly will be interested in this record and will also want to know how, if at all, the challenger's position on the same issues (and methodology) may differ. Should we deny the voter that information and the challenger the right to offer it, still limited to what I have been calling the major premise?

Now, consider this final variation. The incumbent did write an opinion on the scope of state constitutional protection and found that protection greater than the national Constitution affords. However, the opinion was a concurrence, not an opinion for the court, and it arose this way:

In the particular case, the appellant alleged that his conviction violated his rights under the federal and state confrontation clauses. A unanimous state high court upheld the challenge in two opinions. Four judges found a violation of the Federal Constitution and did not reach the state claim. Three concurring judges concluded that the Federal Constitution did not afford the claimed protection. They then proceeded to analyze the state constitutional claim and decided, first, that the state confrontation clause afforded greater protection to an accused and, second, that it was violated. The author of that concurrence is now running for re-election against a candidate who disagrees with its reasoning and result. Can the challenger say so and explain why? More is now at stake. Since the opponent's opinion is only a concurrence, it is not a holding of the court and stare decisis is irrelevant. So when the challenger states her view, she is revealing a position that she is free to adopt as a judge without any precedential restriction. In fact, if elected, she may have the opportunity to vote that position

(and persuade a majority to agree) in the same case should the U.S. Supreme Court overturn the state high court's application of the Federal Confrontation Clause and remand the case for further proceedings under state law. Of course, our candidate will say that she will be open to having her view changed if and when the issue is again argued in the high state court. Paradoxically, this may make her vote somewhat less predictable than the vote of the incumbent she opposes, who has already reached the contrary conclusion on the question as a judge in the very case.

These examples might lead us to broaden the rule describing the statements a judicial candidate will be allowed to make:

A candidate may reveal her likely views, without committing herself to a particular vote, on any major legal premise, civil or criminal.

A candidate would have this authority whether or not her opponent has, as a judge, written on the question. Although I just assumed that the opponent has written judicial opinions on the subject, and so the electorate already knows what at least one candidate believes, what difference should that make? An intelligent voter would want to consider both (or all) candidates' positions on these major premises in deciding whom to choose. The assumption that another candidate is a judge who has written on the question is merely a heuristic device to test our tolerance for permissible disclosure. It cannot sensibly be a pre-condition to an opponent's right to reveal her view. It would be an odd rule that said that one candidate could give her view on an issue only if another candidate has already expressed a view on that issue in a judicial capacity.

Now let us consider the arguments against permitting judicial candidates to reveal, even tentatively and generally, their views on a major legal premise. Even a tentative commitment to a major legal premise is inappropriate. While not binding, and often not even a reliable predictor of how a judge will apply that premise to the facts of a particular case (where it will have to be reconciled with other major premises), even a tentative commitment will make it harder for the candidate, as a judge, to change her mind on the particular question. People like to be, and like to appear to be, consistent and reliable. While they may be willing to change their minds on occasion, and acknowledge as much, they will not publicly do so often. Because it is human nature to be, and to endeavor to appear to be, consistent and reliable, when we allow judicial candidates to state their views on legal questions, we run the risk of denying a future litigant a totally open mind. Moreover, even if our judge really would have a totally open mind, and would not be swayed by the ordinary desire to be viewed as consistent and reliable, it may not necessarily appear that way to the public. We all know that the appearance of justice is either as important as justice or at least a close second. Finally, although I have been examining a rule of law and not a case, the resolution of a rule of law one way or another is tantamount to deciding a case that turns only on that rule of law.

So if we give credence to these values, our rule should be:

No judicial candidate may state his or her views on any legal rule that could come before the court for which he or she is a candidate.

This rule of silence, as I will call it, would apply even to a candidate who has already been a judge and has already participated in deciding a case encompassing the particular rule. Our position would have to be that in the context of a campaign, as opposed to the context of adjudicating a case, candidates for judicial positions must not discuss or reveal their views on legal rules that could come before them. While this position is a bit artificial, if one, both, or all candidates have already revealed their views on legal rules in cases they have already decided, or in scholarly articles, the greater goal of insuring the fact and appearance of open-mindedness requires us to accept the artificiality, because there is no comfortable stopping place once we begin to make exceptions.

I promised not to discuss the First Amendment dimensions to a rule of silence, nor will I, but it seems to me that any First Amendment analysis has to take into consideration the practical coherence of a rule of silence. Can it work? It can work in the sense that the candidates can actually be silenced, but will their silence achieve our objective? Perhaps most critically, we have to recognize that the voices in judicial contests are not only those of the candidates. Third parties, including well-funded interest groups, can and will speak to the merits, or perceived demerits, of particular candidates, especially if (for the advocacy groups) the contest is viewed as important to their goals. And of course nothing can be done to prevent third-party speech. We can expect that these other voices will identify and publicize writings and statements of the candidates, whether as judges or otherwise, and will say what these pronouncements “mean” for the resolution of issues deemed important to the speakers and their audience. Of course, these third parties may or may not be right about what the candidates’ pronouncements mean, but the greater point is that they will be characterizing the candidate’s views on particular legal issues. In short, the candidates’ silence will not stop the debate. Are we to say that the candidates must behave as though there were no debate? Perhaps a third party’s characterization of the candidate’s views are wrong. Can the candidate not correct it? Can she do so through a surrogate? Either way, can she do so without violating the rule of silence? If we create an exception to a rule of silence to allow for rebuttal or reply, the exception would devour the rule. True, a different third party might correct, or at least respond to, an alleged mischaracterization. But, does it not seem odd that a public debate will go on about a candidate’s views, presumably of some interest to the electorate, without the voice of the candidate?

Third parties have another cheap and powerful way to influence elections—endorsements. Even if an interest group does not presume to describe a candidate’s views, it may identify the candidates it supports and opposes, perhaps in mailings to members, perhaps more broadly. When voters hear that a group favoring or opposing reproductive freedom, gun control, stringent environmental protection, school prayer, or capital punishment favors a particular candidate, little more needs to be said. The endorsement is a shorthand way of saying to voters:

“We care about this issue. We know this issue. We have made it our business to find out how this person will decide this issue. And we’re

telling you that if you agree with our group's position on this issue, this is the person you want (or don't want) on the bench."

General circulation newspapers are also likely to take an interest in judicial races, certainly those for a state's high court, and profile candidates in news columns—which may describe their presumed judicial "philosophies"—and favor particular candidates in editorials.

In light of these various opportunities for third-party (including press) activity, how can we deny candidates the freedom to speak about legal issues? It is like playing a Bach symphony while limiting the first violinist to a single note. Yet perhaps there remains a rational basis for making this distinction. As stated, an individual candidate's statements create the risk of commitment to a position and the appearance of a commitment, while the same cannot be said of a third party's statement (unless authorized by the candidate). In other words, when the candidate offers his or her view on a legal question, we cross a Rubicon that we avoid when third parties speak, even when those third parties offer the candidate's words, written or uttered before he or she became a candidate.

Whether or not this distinction is persuasive to lawyers and whether or not the electorate will appreciate it, a rule of silence has another problem. It can be used opportunistically by candidates who are not judges to the disadvantage of candidates who are judges running for reelection or election to a higher court. For example, potential candidate John Marshall plans to run for the state supreme court in three years. He knows that once he becomes a candidate, the rule of silence will prevent him from telling voters his position on legal rules that he anticipates will be of interest to them. In the ensuing two and a half years, he publishes various articles in bar journals and the popular press expressing his position on those issues. No one can stop him. Once he declares his candidacy, the rule of silence may forbid him to say anything about the issues, but he does not need to do so. He is already on record. Meanwhile, his opponent, if a sitting judge or a lawyer without Marshall's foresight, can say little or nothing about his own position or critique the Marshall position. Conversely, a sitting judge can, in anticipation of a future election, freight an opinion with statements that the judge as candidate could not make, but which others will then be able to showcase as the judge's "philosophy." I do not suggest that the judge must vote or reason one way or another in order to employ this strategy. The judge need only modulate the voice and phrasing of an opinion for campaign use. These vehicles are malleable enough, regardless of the judge's vote and logic.

A rule of silence can be used opportunistically in another way. If Marshall's opponent is Judge Story, Marshall might review Story's opinions and find a few where the immediate result of a ruling will engender voter alarm even if the rationale for the ruling was compelling. Suppose Story wrote an opinion reversing the conviction of a defendant whose crime was especially heinous. Or perhaps Story wrote an opinion invalidating the state's capital punishment law based on U.S. Supreme Court precedent that experts conclude left Story little or no choice. Nevertheless, campaign sound bites can take these and similar hot button rulings and paint Story in a very bad light. "Story freed murderers." "Story threw out the state's death penalty, emptying death row." "Story favored

criminal rights over victim rights.” Marshall never has to detail his own positions on the legal rules in these cases. With a rule of silence, Story will find it hard or impossible to respond to the charges. Perhaps we will forbid Marshall to run these ads—though I would question the validity of the prohibition if the statements are true—but we cannot stop third parties acting on their own.

A candidate (or his or her supporters) can behave opportunistically in yet a third way. If they can afford it, we can expect advertisements that encourage voters to draw (perhaps unfounded) conclusions about the candidate’s judicial attitudes while scrupulously avoiding mention of an actual position on any issue that may come before the court. We are all familiar, I trust, with the sort of television advertisements in which a prison door slams shut and a voiceover tells us that candidate Story is tough on crime (or words to that effect). While these advertisements can be run whatever the rules—and the capacity to generate variations on them is seemingly endless—a rule of silence will prevent an opponent from responding with an actual discussion of the criminal justice issues the advertisement viscerally suggests. If the opponent can also afford it, of course, we’ll get competing advertisements with slamming prison doors or their equivalent. If the opponent cannot afford it, or if he or she is a sitting judge and finds the strategy inappropriate, the advantage is clear. Either outcome is at odds with the idea that important decisions about governance ought to be based on substance, not image.

To recapitulate: For the following reasons it makes sense to allow judicial candidates for popular election to state their likely positions on legal rules.

- One or more candidates may already have staked out positions on those rules in judicial decisions or other written or oral statements and they should be accorded the opportunity to explain their position if the issue arises. At the same time, the opponent should be able to give her position on the same rules.
- An opponent can exploit a rule of silence by generally characterizing the decisions of a sitting judge or by pointing out the effects of an unpopular decision without regard to its precedential necessity. A prospective candidate can also circumvent a rule of silence in anticipation of a contest and before the rule can legally be imposed. A sitting judge can do this in opinions, anticipating a later campaign. Dramatic advertisements using symbols but no ideas offer a third way to imply a message while saying nothing substantive.
- Third parties, including the press and interest groups, cannot be silenced and will be free to endorse or oppose candidates and characterize a candidate’s positions.
- The electorate has a legitimate interest in information that will allow it to cast intelligent votes. Limiting this information to résumé facts and general promises (“I will vigorously enforce the law to protect the citizens of this state from vicious criminals”) does not invite intelligent choice.

Of these four arguments in favor of allowing judicial candidates freedom to speak about particular legal issues, the first three arguments say, in effect, that the conversation will go on anyway, accurately or not, so there is little to be gained from denying candidates the ability to join it. Little, but not nothing. The argument for drawing the line at candidate speech is that it is especially likely to commit, or appear to commit, a candidate to a position on legal issues that we

wish judges to resolve only in the context of the facts of actual cases and after a legal process constructed to ensure the fact and appearance of fairness. No matter how fierce the public debate, no unauthorized third party can commit a candidate. Excluding the candidate, then, goes part way toward addressing this concern.

Whether or not you find this distinction persuasive, and I do not, we must still address the fourth argument, that is the voters' desire for information. I believe the voter must be allowed to hear about the candidates' substantive positions from the candidates themselves. I say this for two reasons. The lesser reason takes account of third party dissemination of information about the candidates. Although the existence of these sources may not, standing alone, be justification to abandon a rule of silence, their presence creates the danger of confusion or misinformation that the candidates are best able to clarify or dispel, directly or through surrogates. A more cogent, though related, argument in favor of modifying the rule of silence is the voters' need to make an informed choice. It is disingenuous (and perhaps insulting) to ask voters to choose judges and then deny them the minimal information needed to distinguish candidate Marshall from candidate Story.

Absent information about a candidate's views on legal questions that may come before his or her court, voters will have to rely solely on information whose relationship to professional merit is often marginal—party affiliation, advertisements that emphasize symbols and dramatic scenes, the ethnic identity of candidates, and endorsements. I do not suggest that allowing candidates to talk about legal issues will displace these other strategies for encouraging voter allegiance. But a more permissive rule may improve debate about policies and ideas—resulting, one may hope, in an elevated contest and a better educated electorate. We have made the choice to trust voters to pick judges. We must, I think, now trust and encourage them to do so wisely.

These considerations lead me to propose yet another rule:

A candidate for judicial office may state his or her general views on legal issues, but must make it clear that these views are tentative and subject to arguments of counsel and deliberation.

One advantage of this rule is that it permits speech to a point, but requires a disclaimer, which the First Amendment may tolerate more readily than a broader restriction on speech.⁴ By using the word "general," I mean to find a balance between the voters' need for information on one hand and the avoidance of a level of specificity that may signal how the candidate will decide a particular case, on the other. For example, while a candidate could advance a belief,

4. See, e.g., *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), which upheld a state court rule requiring lawyers who advertise contingent fee services to reveal that, in accord with another rule, the client will be responsible for costs even if the client loses the litigation. It is true that this case concerned commercial speech, which enjoys less protection. However, it is plausible that given the state's heightened interest in the integrity of electoral contests, and perhaps judicial contests in particular, the courts will uphold a provision mandating the stated disclaimer.

subject to argument and deliberation, that the state constitution is more protective of certain rights than the Federal Constitution, he or she could not go further and apply a designated state constitutional provision to particular facts, not even hypothetically. To put it another way, a candidate might, with the required disclaimer, advance the belief that the state constitution's prohibition against unreasonable searches is more protective of privacy than the Fourth Amendment to the U.S. Constitution, but the candidate could not describe a particular search and say whether it would violate state law.

In this discussion, I have tried to state a rule that will honor the values of the judicial system (including the due process rights of future litigants) while respecting the voters' need for information that will permit responsible election choices. Canon 5A(3)(d)(ii) of the A.B.A.'s Model Code of Judicial Conduct impedes the latter goal.⁵ It forbids judicial candidates to "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."⁶ This language tilts heavily toward the presumed interests of the justice system. My proposal, impelled by both pragmatism and respect for the needs of voters, tries to reduce that tilt somewhat. Surely, my language can be improved, surely we can tinker with the balance, and surely any rule that addresses this boundary will entail fine distinctions about which we must expect reasonable disagreement. But that is true for all rules of professional conduct cast as standards. Deleting the reference to "issues" from the Code formulation will go some way toward ameliorating the balance.

5. MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(ii) (1978).

6. *Id.*