

# THE CANONS IN THE COURTS: RECENT FIRST AMENDMENT RULINGS

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## INTRODUCTION

The new millennium has not been hospitable to the regulation of judicial campaign speech. Efforts to limit what judges and prospective judges may say during election contests are, of course, hardly new. Since 1924, the Canons of Judicial Ethics have restricted the statements of those who seek to attain or retain a judicial office.<sup>1</sup> Yet until quite recently the rules that govern judicial campaigns went largely unchallenged in the courts. All that has now changed, and assaults on judicial election rules have become a major focus of litigation.

First Amendment assaults on the Canons are largely a product of the 1990s, apparently in response to several forces.<sup>2</sup> First, a major revision of the American Bar Association's Model Code of Judicial Conduct (containing the Canons) occurred in 1990. Widespread revision of state standards soon followed. Moreover, public interest groups have recently shown a heightened concern for the free speech of judges and candidates for the bench.<sup>3</sup> Most important, the more contentious character of judicial campaigns seems to have increased the pressure for regulation; such campaigns have recently, in the words of one commentator, become "nastier, noisier, and costlier."<sup>4</sup> For these reasons, among others, the past few years have brought a dramatic increase in legal challenges to the rules that govern judicial campaigns. The early returns do not bode well

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1. See J. David Rowe, Note, *A Constitutional Alternative to the ABA's Gag Rules on Judicial Campaign Speech*, 73 TEX. L. REV. 597, 599-602 (1995).

2. The earlier landscape, through the mid 1990s, has been admirably charted by Chief Justice Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059 (1996). Central among the earlier judgments were contrasting rulings of two federal courts of appeals; compare *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224 (7th Cir. 1993) (rule prohibiting judicial candidates from making promises regarding conduct in office and announcing views on disputed legal issues violated First Amendment), with *Stretton v. Disciplinary Bd.*, 944 F.2d 137 (3d Cir. 1991) (rule prohibiting judicial candidates speech on disputed legal issues did not violate candidates' free speech rights).

3. Notably the Center for Individual Freedom in Alexandria, Virginia; see the organization's highly informative website, <http://www.cif.org> (last visited Jan. 29, 2002).

4. Roy A. Schotland, Comment, *Judicial Independence and Accountability*, 61 LAW & CONTEMP. PROBS. 149 (1998).

for the cause of regulation, as we shall shortly discover. Just before the millennial divide, Northwestern University Professor Steven Lubet (a close observer of judicial speech) offered his intriguing overview of emerging trends and prospects:

[T]here has been much litigation in recent years over the scope of judges' campaign speech. The clear trend has been toward broadening the range of permitted speech, but some restrictions still remain. There are good arguments on both sides of this issue. Restrictionists want to keep judging out of politics; campaigning judges want to inform the electorate. For the time being, it appears that the balance will tip in favor of speech, although it is possible that a series of excesses might swing the pendulum back toward constraint.<sup>5</sup>

Part I will review a series of decisions within the past half decade, most of which have been unreceptive to efforts to regulate judicial campaign speech. Part II focuses on issues that have been neglected, or inadequately recognized, by courts that have invalidated provisions of the Canons which regulate judicial campaign speech, and suggests a somewhat different balance, giving substantially greater emphasis to the paramount value of ensuring due process in our system of justice.

#### I. WHAT THE COURTS HAVE SAID: RECENT RULINGS ON JUDICIAL CAMPAIGN SPEECH

The tone for this new round of litigation was set in late March, 2000, by the first of two Michigan Supreme Court rulings that involved Judge John Chmura, a sitting district court judge in Warren County. Formal charges were brought against Judge Chmura on the basis of statements he made during an especially intense, and successful, campaign to retain the seat to which he had recently been appointed. The campaign materials were both laudatory of Chmura and disparaging of his challenger, a magistrate who was described in one flier as "facing trial for sexual harassment of a female court employee."<sup>6</sup> Other statements strongly implied that Chmura's opponent (whose prior experience was more administrative than judicial) had been unacceptably soft on crime, warning voters "[t]hat's what happens when you put bureaucrats in charge of a court."<sup>7</sup>

Michigan's Judicial Tenure Commission (JTC)<sup>8</sup> filed charges against Judge Chmura, citing four specific campaign statements. Each statement was alleged to violate Judicial Ethics Canon 7—specifically subsection 7(B)(1)(d), which

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5. Steven Lubet, *Judicial Discipline and Judicial Independence*, 61 LAW & CONTEMP. PROB. 59, 62-63 (1998).

6. *In re Chmura*, 608 N.W.2d 31, 34 (Mich.), cert. denied, 531 U.S. 828 (2000).

7. *Id.*

8. The JTC is Michigan's government agency empowered to investigate charges of judicial impropriety, including those cited during campaigns for judicial office, and to recommend sanctions for misconduct if it finds misconduct to have occurred. See MICH. CONST. art. VI, § 30.

provides in part that a judicial candidate

should not use or participate in the use of any form of public communication 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, or which is likely to create an unjustified expectation about results the candidate can achieve.<sup>9</sup>

Michigan's Supreme Court had adopted this language in 1995, only a year before the election to which it was now being applied. The new provision, which had been proposed by the assembly of the Michigan state bar, substantially amplified and extended a 1974 Canon; the earlier clause had simply cautioned judicial candidates not to "make pledges or promises of conduct in office . . . or misrepresent his identity, qualifications, present position, or other fact."<sup>10</sup> The *Chmura* case now gave the supreme court its first opportunity to interpret and test the new language in the context of a real and highly contested case.

The challenged Canon, in the Michigan court's unanimous judgment, fell far short of acceptable First Amendment standards.<sup>11</sup> To be sure, the interests which the Canon claimed to serve could be deemed "compelling"—notably "preserving the integrity of the judiciary"<sup>12</sup> and, more precisely, "preserving public confidence in the judiciary."<sup>13</sup> Later the court added, almost disparagingly, that such a rule "is intended to promote civility in campaigns for judicial office."<sup>14</sup> Yet the challenged language failed a First Amendment test because it was "not narrowly tailored to further the state's compelling interests."<sup>15</sup>

The starting point for Michigan's high court was the U.S. Supreme Court's 1982 ruling in *Brown v. Hartlage*<sup>16</sup> that states may not, under the First Amendment, broadly restrict the rights of candidates for elective office to make promises to voters and constituents. After barely acknowledging that *Brown* had involved the starkly different context of candidates and campaigns for *non-*

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9. *In re Chmura*, 608 N.W.2d at 36 (quoting MICHIGAN CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(d) (1995)).

10. *Id.* at 36 n.4 (quoting MICHIGAN CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(c) (1974)).

11. *Id.* at 33. Michigan's version of this constraint, like that adopted by several other states, was substantially more restrictive than the language of the ABA Model Code of Judicial Conduct. The ABA Model Code's pertinent provisions declared that judicial candidates shall not "make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office" or "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." MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i)-(ii) (2000).

12. *In re Chmura*, 608 N.W.2d at 40.

13. *Id.*

14. *Id.* at 43.

15. *Id.*

16. 456 U.S. 45 (1982).

judicial office, the Michigan court conceded that states do have a special interest in regulating the speech of those who seek election to the bench.<sup>17</sup> Even so, the challenged portion of Canon 7 swept too broadly: “[It] greatly chills debate regarding the qualifications of candidates for judicial office. It applies to all statements, not merely those statements that bear on the impartiality of the judiciary.”<sup>18</sup> The Canon which proscribed “factual omissions”<sup>19</sup> also had an unacceptably broad reach. Given the grave risks of disciplinary sanctions which a transgression would incur, “a candidate’s safest course may sometimes be to remain silent on many issues.”<sup>20</sup>

The Michigan Supreme Court’s view of the case and the Canons seems to have been shaped in part by a sense that elections for any contested public office are inevitably contentious. Though observing early in the opinion that “judges are different from legislative and executive branch officials,”<sup>21</sup> the court insisted that such distinctions had very limited First Amendment significance: “That the candidate seeks judicial office does not change the nature of the candidate’s speech for First Amendment purposes.”<sup>22</sup> Later in the opinion, the court offered a template of sorts for the regulation of judicial campaign speech:

A rationale for judicial elections is that meaningful debate should periodically take place concerning the overall direction of the courts and the role of individual judges in contributing to that direction. Such debate is impossible if judicial candidates are overly fearful of potential discipline for what they say. By chilling this debate, Canon 7(B)(1)(d) impedes the public’s ability to influence the direction of the courts through the electoral process.<sup>23</sup>

The final disposition in the *Chmura* case was, not surprisingly, a narrowing of the scope of the challenged Canon, followed by a remand for reapplication of the more sparing language, rather than an outright dismissal.<sup>24</sup> Despite the First Amendment concerns that had swept away so much of the new provision, Michigan’s high court conceded there remained ample warrant for curbing judicial campaign statements that were *demonstrably false*, so long as an objective standard of falsehood governed—that is, so long as the charged statements were shown to have been “knowingly false or used with reckless

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17. *In re Chmura*, 608 N.W.2d at 42.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 39.

22. *Id.* at 40.

23. *Id.* at 42-43.

24. *In re Chmura*, 626 N.W.2d 876 (Mich. 2001). In this second round, two justices dissented. Though they fully concurred with the majority on the proper standard by which to review judicial campaign claims, they differed in regard to the application of that standard to one of the candidate’s statements which the JTC had cited.

disregard as to their truth or falsity.”<sup>25</sup> The Michigan court strongly suggested that such a standard might be applicable to Judge Chmura’s statements, since he had ample notice that such a limit might be imposed on his campaign rhetoric. The proper course was, accordingly, to remand the matter to the JTC for further proceedings under what remained of a substantially thinner and weaker Canon 7.<sup>26</sup>

Despite obvious factual variations among judicial campaign cases, *Chmura*’s constitutional premises would soon extend far beyond Michigan. Several months later, in late August, 2000, a federal district judge in Atlanta considered the claims of Georgia Supreme Court challenger George M. Weaver.<sup>27</sup> In an unsuccessful campaign to unseat Justice Leah Sears, Weaver’s campaign made, through television advertising, several accusations about his opponent’s views on such issues as capital punishment and same-sex marriage.<sup>28</sup> The state’s Judicial Qualifications Commission (JQC)<sup>29</sup> was asked to investigate Weaver’s charges as putative violations of Canon 7. A three-member special committee was appointed by the Commission to determine, pursuant to the Commission’s rules, whether the cited campaign statements violated Canon 7; if it found such a violation, the special committee could issue a “cease-and-desist request.”<sup>30</sup> After investigation, the special committee found certain of Weaver’s campaign statements noncompliant with the Canon, and issued a confidential cease and desist request, with which Weaver agreed to comply. He accordingly revised certain language in his campaign brochure, but then repeated much of his criticism of his opponent in a television ad.<sup>31</sup>

The special committee, having been charged to examine the content of the ad, found it to be in violation of the earlier order.<sup>32</sup> Without giving notice to Weaver, the committee released its own public statement—less than a week before the election—declaring that Weaver’s rhetoric breached the Canon since it was “unethical, unfair, false, and intentionally deceptive.”<sup>33</sup> The release added, with specific reference to the cease-and-desist request, that the submitted television ad “was nothing short of an intentional and blatant violation of candidate Weaver’s previous written assurance of his intent to comply with the

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25. *Id.* at 888.

26. *Id.* at 896-97.

27. *Weaver v. Bonner*, 114 F. Supp. 2d 1337 (N.D. Ga. 2000).

28. *Id.* at 1340.

29. The Commission had been created by constitutional amendment in 1972, and was empowered to investigate and make recommendations to the Georgia Supreme Court concerning the ethical conduct of judges and candidates for judicial office, including campaign statements. The Georgia Supreme Court adopted the Georgia Code of Judicial Conduct, formulated by the Commission, and empowered the JQC to enforce that code. *Id.* at 1339.

30. *Id.*

31. *Id.* at 1340.

32. *Id.*

33. *Id.* (quoting committee’s statement).

Committee's original cease and desist request."<sup>34</sup>

Justice Sears was shortly reelected by a narrow majority. Weaver had already filed suit in federal court, between the special committee's release and the election.<sup>35</sup> He now insisted that, but for the Commission's intervention, Sears would not have garnered the requisite majority, and there would necessarily have been a run-off, in which he might well have prevailed.<sup>36</sup> That premise underlay a direct challenge to the constitutionality of Georgia's Canon 7, the language of which was similar in breadth and scope to Michigan's version, and more restrictive than the comparable provisions of most other states.

The district judge ruled substantially in Weaver's favor, relying heavily on the Michigan Supreme Court's First Amendment analysis in *Chmura*.<sup>37</sup> There was, of course, one major difference. While a state court would have been free to narrow—and thus to sustain, as modified—a portion of the challenged language, just as the *Chmura* court had done, a federal judge enjoyed no such flexibility. Moreover, the federal court in Atlanta, though agreeing with *Chmura* that false charges by a judicial candidate could be proscribed if they were proved to be “knowingly or recklessly false,” felt he had no comparable means of adding such protective language to a state's judicial ethics canon.<sup>38</sup>

The only possible source of solace for the Georgia Commission came in the district judge's refusal to eviscerate completely its capacity to intervene in judicial campaigns, as the commission had done in the Weaver saga.<sup>39</sup> While such statutory authority could conceivably enable a state agency to take sides between candidates while voters were sorting out the issues, nothing in the First Amendment convinced this federal judge that “uninhibited, robust, and wide-open debate consists of debate from which the government is excluded, or an uninhibited marketplace of ideas one in which the government's wares cannot be advertised.”<sup>40</sup> While that part of the ruling might seem a pyrrhic victory for the commission, preserving its capacity to intervene during a contested campaign could have value beyond the immediate dispute.

Less than two months after the *Weaver* ruling, several candidates for Alabama judicial offices (and one incumbent judge) went to federal court seeking to enjoin certain regulatory initiatives of the state's Judicial Inquiry Commission

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34. *Id.* (quoting committee's statement).

35. *Id.*

36. *Id.*

37. *Id.* at 1342-43, 1346-47.

38. *Id.* at 1342-43.

39. *Id.* at 1344.

40. *Id.* at 1345 (quoting *Block v. Hase*, 793 F.2d 1303, 1313 (D.C. Cir. 1986)). Such a declaration masks some subtle problems which this court had no need to address. If, for example, the agency empowered to make such statements really were an official organ of state government, serious potential problems of “government speech” could arise from its active intervention in a closely contested campaign, seemingly taking sides between candidates. But the *Weaver* case did not pose such difficulties.

(JIC).<sup>41</sup> This body had promulgated enforcement policies, pursuant to Alabama's Canons of Judicial Ethics.<sup>42</sup> One such provision had been construed to preclude judicial candidates from answering a series of questions which the Christian Coalition of Alabama planned to pose to judicial candidates as the basis for a "voter's guide" to be published during the campaign. The Commission concluded that most, if not all, the proposed questions asked judicial candidates to "make a promise of conduct in office or to announce in advance your conclusions of law on issues you would be called upon to decide as a judge"<sup>43</sup> with the result that a candidate's response would inevitably violate Alabama's Judicial Ethics Canon 7. The plaintiff candidates and the Coalition promptly filed suit in federal court against the Commission, claiming a breach of First Amendment rights.<sup>44</sup>

Much of the district judge's opinion dealt with procedural issues such as standing and justiciability.<sup>45</sup> Despite the "non-binding" nature of the Commission's advisory opinions, the court found the candidates' claims properly before a federal tribunal, and ruled that the plaintiffs did indeed have standing to raise such constitutional challenges.<sup>46</sup> On the merits, the district court found the Commission's posture incompatible with judicial candidates' First Amendment interests: "Here, the Plaintiffs are not only subject to self-censorship, but additionally risk disciplinary action for what might later be deemed entirely ethical conduct."<sup>47</sup> Since the Christian Coalition had proposed substantial changes in the questionnaire, on which the Commission had not yet ruled, the district judge stopped short of deciding the merits.<sup>48</sup> The opinion left little doubt, however, which way the merits would be resolved if the Commission persisted in its view of the application of Canon 7 to such an inquiry and potential candidate responses. Had the court reached the merits, it would presumably have barred the enforcement of the Canon to deny a willing judicial candidate an opportunity to respond to such questions posed by interest groups to those seeking election to the bench.

Alabama would become the venue of another celebrated judicial campaign dispute, in which both federal and state courts eventually ruled. In the summer of 2000, Justice Harold See of the Alabama Supreme Court sought the

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41. *Pittman v. Cole*, 117 F. Supp. 2d 1285, 1288-90 (S.D. Ala. 2000), *vacated by* 267 F.3d 1269 (11th Cir. 2001).

42. The JIC traced its origins to the 1901 Constitution, which empowered the JIC to enforce the Canons of Judicial Ethics and to investigate charges of impropriety. If it found a violation of the Canons, the JIC could file a formal complaint with the Court of the Judiciary, which would adjudicate the charge and "after notice and public hearing" could censure, suspend or remove a judge or fashion a lesser sanction. *Id.* at 1291-92.

43. *Id.* at 1295.

44. *Id.* at 1288.

45. *Id.* at 1295-1307.

46. *Id.* at 1307.

47. *Id.* at 1310.

48. *Id.* at 1311.

Republican Party's nomination for the post of chief justice.<sup>49</sup> During his campaign, See made certain critical public comments about his opponent, Judge Roy Moore.<sup>50</sup> The JIC was asked to determine whether See's statements impugning Moore's (allegedly lenient) disposition of drug offenders violated the canons of judicial ethics.<sup>51</sup> The agency agreed with the complainants, and filed with the Court of the Judiciary a formal complaint against Justice See, citing what it perceived to be false information, uttered with knowledge or in reckless disregard of the truth, and therefore in violation of Canon 7.<sup>52</sup> Pending resolution of the complaint, pursuant to provisions of the Alabama Constitution, Justice See was immediately disqualified from further judicial duties on the supreme court.<sup>53</sup> Meanwhile, a similar complaint had been filed with the Alabama Judicial Campaign Oversight Committee, an unofficial bi-partisan monitoring or watchdog group, which dismissed the charge.

Joined by a fellow judge, and a registered voter named Robert Butler (whose name would caption the case), Justice See filed suit in federal court to overturn the Commission's actions on First Amendment grounds.<sup>54</sup> After a preliminary ruling in the plaintiffs' favor,<sup>55</sup> the case was appealed to the Eleventh Circuit. Rather than reaching the merits, the federal appeals court certified to the Alabama Supreme Court several key questions.<sup>56</sup> The state's highest court issued its response on May 15, 2001, and accepted substantially all of the plaintiffs' claims.<sup>57</sup> As its starting point, the Alabama Supreme Court observed that the state's citizens had long ago "chosen to select their judges in partisan, contested

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49. *Butler v. Ala. Judicial Inquiry Comm'n*, 111 F. Supp. 2d 1224, 1226 (M.D. Ala. 2000).

50. Specifically, in a thirty-second television spot comparing his record on crime to that of his opponent, Justice See's campaign charged that Judge Moore had on at least forty occasions given reduced sentences or probation to convicted drug dealers.

51. *Butler*, 111 F. Supp. at 1227.

52. *Id.*

53. *Id.*

54. *Id.* at 1228.

55. *Butler v. Ala. Judicial Inquiry Comm'n*, 111 F. Supp. 2d 1241 (M.D. Ala. 2000), *vacated by* 261 F.3d 1154 (11th Cir. 2001).

56. *Butler v. Ala. Judicial Inquiry Comm'n*, 245 F.3d 1257 (11th Cir. 2001). The certified questions asked:

A. In a proceeding before the Alabama Court of Judiciary, can a defendant raise and have decided a constitutional challenge to a judicial cannon, either at the Court of the Judiciary or through direct review to the Supreme Court or by other means?

B. If so, how do the procedural rules governing the Court of the Judiciary permit a reasonably speedy decision on federal constitutional issues?

C. In a proceeding before the Alabama Court of Judiciary, can that court or a higher court grant, in that proceeding, a stay of the judge's disqualification pending the outcome of the federal constitutional challenge posed in that proceeding?

*Id.* at 1265-66.

57. *Butler v. Ala. Judicial Inquiry Comm'n*, 802 So. 2d 207 (Ala. 2001).



elections”<sup>58</sup> with the result that “judicial candidates [should] have ‘the unfettered opportunity to make their views known’ so that voters may intelligently evaluate candidates’ positions on issues of vital public importance.”<sup>59</sup>

Acknowledging that a state has a substantial compelling interest in “protecting the integrity of the judiciary,”<sup>60</sup> the court concluded that Alabama’s Canon 7 went well beyond the needs of such an interest. Following the analysis employed by the Michigan Supreme Court, the Alabama Supreme Court found *Chmura* persuasive, even if not (given important factual and procedural differences) quite controlling.<sup>61</sup> The Alabama justices invoked *Chmura* primarily to invalidate on First Amendment grounds the basic constraints of the local Canon 7. They also followed Michigan’s lead in recasting the challenged language, narrowing Alabama’s version of Canon 7 so that it would reach only the knowing or reckless utterance of false statements.<sup>62</sup>

One Alabama justice was unwilling to save the Canon even to this extent; for him, the potentially valid language could simply not be severed from the invalid, and the entire Canon should be declared beyond redemption.<sup>63</sup> The *Butler* case has now presumably returned to the federal courts, though few issues remain in doubt. Whether any further action might be contemplated with respect to Justice See remains an intriguing question. After all, the Alabama JIC (unlike the Michigan JTC) had couched its initial complaint in the very terms—knowing or recklessly false charges—which survived the process of constitutional challenge.

The news thus far in the millennium has been fairly dismal for those who seek to regulate judicial campaign speech. There is, however, one bright spot in the constellation. The Federal Court of Appeals for the Eighth Circuit, a month before the Alabama Supreme Court’s *Butler* ruling, departed sharply from what seemed a chorus of skeptics, and upheld Minnesota’s Judicial Canon 5 (which covers much the same ground as Canon 7 in other states).<sup>64</sup> A group of judicial candidates and others, including the state Republican Party, challenged Minnesota’s non-partisan judicial election system on First Amendment grounds.<sup>65</sup> Specifically, they attacked a Canon which barred judicial candidates from attending and speaking at partisan political gatherings, identifying their

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58. *Id.* at 214.

59. *Id.* at 215.

60. *Id.*

61. *Id.*

62. *Id.* at 215-19.

63. *Id.* at 220 (Johnstone, J., concurring in part and dissenting in part).

64. *Republican Party of Minn. v. Kelly*, 247 F.3d 854 (8th Cir.), *cert. granted*, 122 S. Ct. 643 (2001). On December 3, 2001, the United States Supreme Court granted certiorari, though limiting the scope of its review to the constitutionality of the Minnesota Canon provision which prohibits judicial candidates from “announc[ing] his or her views on disputed legal or political issues,” the so-called announce clause, which the Eighth Circuit had sustained toward the end of its opinion, noting that “the announce clause, as construed by the district court, is narrowly tailored to further compelling governmental interests.” *Id.* at 883.

65. *Id.* at 859-60.

membership in a political party, or authorizing or knowingly permitting others to do so on the candidate's behalf.<sup>66</sup> The district court dismissed the complaint, and the court of appeals affirmed.<sup>67</sup>

The First Amendment claims were substantial, and since the Canons were clearly content-based, they were properly subject to strict scrutiny.<sup>68</sup> Giving substantial deference to Minnesota's history and tradition of conducting its judicial elections on a non-partisan basis, the appeals court found the Canons to be no broader than necessary to serve substantial state interests in an independent, non-partisan judiciary, and preserving public confidence in the courts.<sup>69</sup> All the relevant precedents were fully canvassed and, since many courts had reached starkly different conclusions, most needed to be distinguished.<sup>70</sup>

The *Republican Party of Minnesota* ruling is notable in several respects, apart from its outcome. The opinion is by far the longest and most elaborately reasoned of any of the judgments on these issues. The record developed in the district court substantially documented the nature, extent and importance of the governmental interests to which the Canons were addressed, as well as the inefficacy of less restrictive alternatives.<sup>71</sup> Moreover, the court received a remarkable array of views from myriad amici, including some of the usual suspects (e.g., Campaign for Justice, the Minnesota State Bar Association and the state ACLU), but also from improbable parties such as the Muslim Republicans, Republican Seniors and the Indian-Asian-American Republicans.<sup>72</sup>

The tone of the opinions at both levels differed sharply from the view most other courts have recently taken of judicial campaign speech. The district court was at least willing to find some virtue in the state's electoral policies and structure, and anxious to do whatever a federal court could constitutionally do to save that system.<sup>73</sup> In that spirit, the district judge did construe quite narrowly the canon which bars candidates from "announcing" positions on public issues, ruling that such a curb was means only to cover issues likely to come before the court on which the candidate sought a seat.<sup>74</sup>

Most important, the Eighth Circuit ruling parted company from the other recent cases in crucial ways. First, the court recognized that Minnesota had long ago opted to elect its judges, but found in that historic commitment no imperative that the state and its voters tolerate no-holds-barred campaigns.<sup>75</sup> If a state

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66. *Id.* at 859.

67. *Id.* at 860.

68. *Id.* at 864.

69. *Id.* at 885.

70. *Id.* at 871-72. *Cf.* *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214 (1989) (striking down a state law which barred candidates in primary elections from claiming endorsement by a political party).

71. *See* *Republican Party of Minn. v. Kelly*, 63 F. Supp. 2d 967, 974-80 (D. Minn. 1999).

72. *Id.* at 968-70.

73. *Republican Party of Minn. v. Kelly*, 996 F. Supp. 875, 878-80 (D. Minn. 1998).

74. *Id.*

75. *Republican Part of Minn.*, 247 F.3d at 865-68.

wished to have its judges elected, and insisted they face the electorate, though without party labels or affiliations, that was not an illogical or untenable arrangement.<sup>76</sup> Moreover, the *Republican Party of Minnesota* court refused to accept at face value persistent claims that the challenged Canons were broader than they needed to be in order to serve state interests which every other court had conceded arguendo, but to which few had given comparable deference.<sup>77</sup>

Instead, the Eighth Circuit demanded of the challengers a quality and depth of proof which the record had apparently lacked. At one point, the court chided the plaintiffs: “In contrast to the evidence amassed by the Boards [supporting the Canons], the plaintiffs have not adduced evidence tending to disprove the threat to the integrity and reputation of the judiciary from involvement with partisan politics.”<sup>78</sup> And, with reference to a specific “less restrictive alternative” which the plaintiffs had cited as arguably adequate to meet the state’s needs, the court noted they had failed to show just how “the canon restricting candidates from manifesting bias or prejudice inappropriate to judicial office fully protects the State’s interests.”<sup>79</sup> Thus the burden of proof seemed to fall quite differently in the Eighth Circuit from its locus in other cases; rather than accepting facial challenges with little deference to state interests, *Republican Party of Minnesota* seemed almost to reverse the values.

Nonetheless, in certain respects, the *Republican Party of Minnesota* ruling fell short of expectations one might have had of the only court in recent times to look with any sympathy upon state efforts to restrict judicial campaign rhetoric. The Eighth Circuit gave little deference, for example, to the most basic of interests invoked in support of restraint during judicial elections. Though much had been written about those interests in the mid and late 1990s,<sup>80</sup> the *Republican Party of Minnesota* opinion framed the issue in a curiously insular fashion, almost as a peculiarity of one state’s preferences for how its judges would seek and retain office.<sup>81</sup> Thus the one recent ruling that proponents of reform might cite as a victory turned out to be substantially less than complete.

Before concluding this brief review of recent developments in the courts, several observations may be useful. It is hardly surprising that challenges have succeeded most readily in Michigan, Georgia and Alabama; the *Chmura* court noted that these were three of the four states, along with Ohio, which “impose broad restrictions on a candidate’s speech.”<sup>82</sup> These states had gone beyond the Model Code by adopting language designed to reach judicial campaign claims “that the candidate knows or reasonably should know is false, fraudulent,

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76. *Id.* Cf. *Geary v. Renne*, 880 F.2d 1062 (9th Cir. 1989) (recognizing a state’s interest in impartial and nonpartisan government as a constitutionally valid basis for a ban on printing in ballot materials the party affiliations of candidates for any elective office).

77. *Republican Party of Minn.*, 247 F.3d at 872-75.

78. *Id.* at 870.

79. *Id.* at 878, 902.

80. See *infra* notes 92, 93-97 and accompanying text.

81. *Republican Party of Minn.*, 247 F.3d at 857.

82. *In re Chmura*, 608 N.W.2d 31, 37 n.6 (Mich.), *cert. denied*, 531 U.S. 828 (2000).

misleading . . . or . . . omits a fact necessary to make the statement considered as a whole not materially misleading, or which is likely to create an unjustified expectation about results the candidate can achieve.”<sup>83</sup> Thus the narrowing of the challenged language—to cover only those false statements that were made knowingly or recklessly—essentially brought that portion of the Canons into line with the reach of other states. That narrowing process did invite further review in *Chmura* itself, though it is less clear whether the Alabama proceeding will still go forward under the narrow standard, since the initial charges against Justice See were couched in the terms which the state supreme court eventually found acceptable.<sup>84</sup>

In a different sense, the array of interests that were invoked in most of these cases to support the challenged restrictions seems curiously superficial. Sometimes the state’s claim has been characterized as no more compelling than a civic desire to “maintain civility in judicial elections”<sup>85</sup>—an interest not likely to trump major free speech claims. Even in *Republican Party of Minnesota*, where the Canons prevailed, there was relatively little advanced to support regulation beyond “integrity of the judiciary” and “public confidence in the courts.”<sup>86</sup> As we shall shortly observe, a far stronger case could have been, and in the future could still be, advanced in support of such restrictions—a case which would at least make the balancing process considerably harder than it has been in the recent cases.<sup>87</sup>

Two factors—process and partisanship—may also help to explain the curious hostility of some courts toward regulatory reforms in this area. Recall the fate of Justice See, the principal challenger to the Alabama Canons.<sup>88</sup> The mere filing of charges by a special committee created by the state’s JIC, under Alabama rules then in force, required See’s immediate disqualification from any further service on the state’s highest court. Such a sanction was not part of the Canons, of course, but rather an eccentricity of Alabama’s procedure.<sup>89</sup> In its amicus curiae brief to the Eleventh Circuit, the Center for Individual Freedom expressed understandable alarm over the procedures in the case, warning that “such pre-adjudication punishment based on the mere possibility of having made false or misleading political statements severely burdens the First Amendment rights of [judicial] candidates.”<sup>90</sup>

Whether or not judges ought to enjoy *more* procedural protection than other candidates who are accused of distorting an opponent’s record, there seems little warrant for granting them *less* process. There seems a certain irony in summarily

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83. *Id.* at 36.

84. *Butler v. Ala. Judicial Inquiry Comm’n*, 802 So. 2d 207, 215-19 (Ala. 2001).

85. *See, e.g., In re Chmura*, 608 N.W.2d at 40, 43.

86. *See Republican Party of Minn.*, 247 F.3d at 864.

87. *See infra* notes 104-09 and accompanying text.

88. *Supra* notes 49, 50-63 and accompanying text.

89. ALA. CONST. amend. 328, § 6.19.

90. Brief of Amicus Curiae Center for Individual Freedom, at [www.cfif.org/pdfs/ButlerAmicusFinal.pdf](http://www.cfif.org/pdfs/ButlerAmicusFinal.pdf), *Republican Party of Minn.*, 247 F.3d 854 (8th Cir. 2001) (No. 00-14137-D).

disqualifying a member of the state's highest court at so early a stage. Though nothing in the Alabama court's ruling specifically cited a due process concern, See's fellow jurists could not have been unmindful of its absence.

The role of partisan politics may also have played a negative role in such litigation. The *Butler* case again is illustrative.<sup>91</sup> Though Alabama judges run for office under party labels, the susceptibility of the campaign regulation process to partisan influence and control may have made the defense of that process more difficult. The Center for Individual Freedom, in its amicus brief, was highly critical of the potential for partisanship in the enforcement process, noting that Justice See's plight was the result of "charges . . . brought against a controversial Republican jurist whom the long-dominant Democratic establishment opposed, [and] it was brought by a JIC composed overwhelmingly of Democratic political appointees . . . after a bipartisan Commission failed to find fault with the challenged advertisement."<sup>92</sup> Again, the *Butler* opinion did not expressly reveal any such concern, although the strikingly low level of deference to the state's regulatory interests, and to the enforcement process, might possibly reflect the court's unstated anxiety about partisanship as well as about process.

Balanced against such negative factors is at least one positive element found in the *Republican Party of Minnesota* case, the sole recent victory for the Canons.<sup>93</sup> The Eighth Circuit devoted considerable attention to the long and consistent history of Minnesota's commitment to non-partisan judicial elections.<sup>94</sup> Not only in the recital of the facts, but throughout the opinion, the appeals court could not say enough good things about the clarity and consistency of the state's policies, noting how firm had been the state supreme court's conviction, "[l]ong before the present canons were adopted . . . that merely avoiding party designations on the ballot was insufficient to protect the Minnesota judiciary from the dangers of partisan involvement."<sup>95</sup>

Here a contrast between states again seems helpful. Recall the circumstances of the *Butler* case in Alabama.<sup>96</sup> A bipartisan commission had declined to charge Justice See with violating the canons, after appraising his campaign rhetoric. However, the JIC went full speed ahead, imposing the harshest possible sanction in the very first complaint to be filed under the recently revised Canon 7(B)(2). Such a tortuous course invited the charge—again from the Center for Individual Freedom's brief—that the state's claimed interest in curbing judicial campaign rhetoric "is undercut by Alabama's inconsistent pursuit of that interest."<sup>97</sup> While consistency may seem a virtue more germane to Minnesota's climate and culture than to Alabama's, the lesson should not be lost on proponents of regulation.

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91. *Butler v. Ala. Judicial Inquiry Comm'n*, 245 F.3d 1257 (11th Cir. 2001).

92. Center for Individual Freedom Amicus Curiae Brief, *supra* note 90.

93. *Republican Party of Minn. v. Kelly*, 247 F.3d 854 (8th Cir.), *cert. granted*, 122 S. Ct. 643 (2001).

94. *Id.* at 864-68.

95. *Id.* at 869.

96. *Supra* notes 49, 50-63 and accompanying text.

97. Center for Individual Freedom Amicus Curiae Brief, *supra* note 90.

Finally, the recent cases have revealed a curious disdain for the uniqueness of judicial office, and thus of those special regulatory interests which apply to the conduct of judicial election campaigns. Several courts that have shown such hostility to the Canons have relied on the Supreme Court ruling most closely on point, *Brown v. Hartlage*,<sup>98</sup> almost heedless that the case involved outright promises made by one who was seeking a *legislative* office—surely protected speech when uttered by a county board aspirant, but unthinkable from a judicial candidate.

Typical of such confusion is a 1998 Sixth Circuit case,<sup>99</sup> focused on sanctions appropriate for allegedly excessive campaign expenditures. Along the way, the court rejected in this fashion the claim—advanced by defenders of Ohio's canons—that judges and the way they campaigned were fundamentally different:

Although Defendants cite several cases to support their argument that there is a distinct difference between judicial officers and political officers, this Court finds 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.<sup>100</sup>

Whatever the commonalities among seekers of elective public office, such disdain for crucial differences between judges and others who campaign for votes reveals how great the need is for further education of those who bear the ultimate responsibility for regulating this process.

## II. THE FUTURE OF JUDICIAL CAMPAIGN SPEECH: WHAT THE COURTS HAVE NOT SAID

Before looking to the future, I want to offer a few working premises: First, let us assume that most state judges will continue to be elected, and that any systemic reforms that may be adopted will not diminish the need for attention to the rhetoric of judicial campaigns. Second, the likeliest near-term reforms of the current judicial campaign system—public financing, most notably—will have little impact on the quality of campaign rhetoric, or on the impetus for its regulation.<sup>101</sup> Third, legal challenges to the constitutionality of regulatory measures such as the Canons are almost certain to continue, and indeed to intensify, if only at the behest of new and spirited players in the field, including the Center for Individual Freedom, many of which strongly oppose current curbs on judicial campaign speech.

Fourth, public confidence in the judiciary and its integrity will remain a fragile commodity, not likely to be enhanced by public exposure to intemperate

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98. 456 U.S. 45 (1982).

99. *Suster v. Marshall*, 149 F.3d 523 (6th Cir. 1998).

100. *Id.* at 529.

101. See Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. REV. MICH. ST. U. DET. C.L. 849.

exchanges between contentious candidates for the bench. Finally, the quality of election rhetoric in judicial campaigns will almost certainly get worse before it gets better; recent movement in some states toward the lowest common denominator are unlikely to reverse or abate within the foreseeable future.<sup>102</sup> Thus the challenges on which I focus here are surely not going away, and in several respects are likely to become more acute in the years immediately ahead.

With these assumptions on the table, there seem several promising elements in developing a sounder and more promising approach to the regulation of judicial campaign speech.

*A. Judges Are Different from Other Electoral Candidates in Ways  
the Courts Have Yet to Recognize*

A central irony is that, rather like the proverbial fish who is the last to discover water, it is judges who seem most reticent to proclaim the uniqueness of the judiciary. Thus, the roster of valid and substantial interests which are potentially served by regulating judicial campaign speech has been curiously truncated, in ways that may help explain the disappointing fate of the Canons in recent litigation. Courts on both sides of the issue have largely confined their analysis to such interests as “judicial integrity” or “public confidence in the judiciary,” with occasional slighting references to a nostalgic desire for “civility in judicial campaigns.”<sup>103</sup>

While these interests are hardly insubstantial, they do not adequately cover the field. As Indiana Chief Justice Randall T. Shepard has shown so forcefully, there is much more that needs protecting through regulation of judicial campaign rhetoric than in the control of elections for any other office, and the interest in providing such protection goes very far beyond the image of the bench.<sup>104</sup> The core concern is nothing less than ensuring due process for litigants; Chief Justice Shepard rightly warns that courts which appraise the validity of campaign limits solely in terms of “the appearance of impartiality and the dignity of the legal profession”<sup>105</sup> miss most of the point. He asks, rhetorically, whether a court that reviews a challenge to the Canons should confine its attention to a free speech claim, or “should the judge place more value on the ability of courts to afford litigants due process of law in individual cases, and affirm the canons designed to prevent political speeches that will diminish the courts’ ability to render impartial justice and their ability to be viewed as impartial?”<sup>106</sup> To that question, the proper answer is surely not elusive.

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102. This prospect seems a central premise of the recent report to the House of Delegates of the American Bar Association Commission on Public Funding of Judicial Campaigns, A.B.A. J., September, 2001, p. 21.

103. See, e.g., *In re Chmura*, 608 N.W.2d 31, 40, 43 (Mich.), *cert. denied*, 531 U.S. 828 (2000).

104. See generally Shepard, *supra* note 2.

105. *Id.* at 1090.

106. *Id.* at 1090-91.

Chief Justice Shepard's broader focus is no longer his alone. A very recent article notes, with understandable alarm, that

[i]n most cases [dealing with judicial election speech] courts have failed to recognize that the goal of the Canon is to protect the right to a fair trial. Unless this is seen as a goal, courts will never focus on whether candidate statements indicate a predisposition to a particular litigant.<sup>107</sup>

One federal district judge, a decade ago, got it right: "[T]here is a compelling state interest in so limiting a judicial candidate's speech, because the making of campaign commitments on issues likely to come before the court tends to undermine the fundamental fairness and impartiality of the legal system."<sup>108</sup>

Adding to the judicial campaign speech equation such a concern for due process does not, of course, inevitably alter the outcome when a regulation is challenged. Surely a due process claim in no way blunts the force of a candidate's well stated First Amendment challenge to a broad restriction on campaign rhetoric. Yet express recognition of due process as the most vital of state interests does enhance the case for regulation, and thus ensures greater parity of interests in a balancing process which Judge Richard Posner well described a decade ago:

[T]he principle of impartial justice under law is strong enough to entitle government to restrict the freedom of speech of participants in the judicial process, including candidates for judicial office, but not so strong as to place that process completely outside the scope of the constitutional guaranty of freedom of speech.<sup>109</sup>

Judges are very different from the general run of elected officials in other respects as well. As Professor Roy Schotland has forcefully shown in a recent chapter on judicial campaign finance, we tend often to overlook or devalue distinguishing factors that bear directly on the regulation of campaign rhetoric.<sup>110</sup> Schotland notes these differences as relatively obvious, but readily neglected: fundraising by judges is uniquely constrained; "other elected officials are open to meeting—at any time and openly or privately—their constituents or anyone who may be affected by their action in pending or future matters;" "nonjudicial candidates [are free to] seek support by making promises about how they will perform;" "[o]ther elected officials are advocates, free to cultivate and reward support by working with their supporters to advance shared goals;" "[o]ther elected officials pledge to change law, and if elected they often work unreservedly toward change;" "other elected officials participate in diverse, and usually large multi-member bodies;" other elected incumbents build up support

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107. Max Minzner, *Gagged but Not Bound: The Ineffectiveness of the Rules Governing Judicial Campaign Speech*, 68 UMKC L. REV. 209, 228 (1999).

108. *Ackerson v. Ky. Judicial Ret. & Removal Comm'n*, 776 F. Supp. 309, 315 (W.D. Ky. 1991).

109. *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 231 (7th Cir. 1993).

110. Schotland, *supra* note 101.



through “‘constituent casework,’ patronage, securing benefits for communities, etc.,” and almost all other elected officials face challenges in every election.<sup>111</sup>

So broad an array of vital (if obvious) differences should play a central role in any court challenge to the Canons—and all the more so because those who decide such cases are themselves, as judges, most familiar with the uniqueness of their roles within the public sector. Curiously, such profound differences as these are rarely mentioned as reasons why states might curb judicial campaign rhetoric in exceptional measure. The relative obscurity of such desiderata—indeed, the basic premise that “judges are different”—remains one of the quandaries of this field of litigation.

Recognizing that judges do differ in myriad ways from other elected officials should shape in several ways how courts, whether in deciding cases or promulgating rules of ethics, will approach possible challenges to the Canons. The analogies on which many rulings have relied simply do not fit. For example, reliance on the Supreme Court’s sole seemingly pertinent judgment, *Brown v. Hartlage*,<sup>112</sup> is grievously misplaced. The Court’s concern there was for the campaign speech of a candidate for a county commission, who had been barred from making certain promises to his constituents.<sup>113</sup> Writing for a unanimous Court, Justice Brennan stressed the obvious truth that, in executive and legislative campaigns “some promises are universally acknowledged as legitimate [because] . . . [c]andidate commitments enhance the accountability of government officials to the people whom they represent, and assist the voters in predicting the effect of their vote.”<sup>114</sup>

How any thoughtful judge could derive from that ruling any possible guidance for cases that involve judicial campaign speech seems baffling—yet more than one court considering a challenge to the canons has found in *Brown* a useful analogy, without even noting the stark contrast between one who campaigns to become a county commissioner and one who seeks to become or remain a judge.

Other analogies which lower courts have occasionally invoked seem equally fragile. Some cases have looked to regulation of lawyer advertising, or to curbs on attorneys’ out-of-court comments on pending cases. While the latter analogy might possibly lead a court better to appreciate the due process concern noted earlier, that does not seem to have happened.<sup>115</sup> Moreover, the analogy to curbs on attorney advertising offers substantially less promise, dealing as it does with commercial speech as a less than fully protected form of expression, and in a very different setting. Nor is there much to be gained by the possible analogy, which a few courts have invoked, to the Supreme Court’s deference toward laws

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111. *Id.* at 857-61.

112. 456 U.S. 45 (1982).

113. *Id.* at 47-48.

114. *Id.* at 55-56.

115. See generally Matthew J. O’Hara, Note, *Restriction of Judicial Election Candidates’ Free Speech Rights After Buckley: A Compelling Constitutional Limitation?*, 70 CHI.-KENT L. REV. 197 (1994).

that are designed to keep partisan politics out of the civil service.<sup>116</sup> Not only do such policies apply uniquely to non-elected officials; they are designed to avoid the very exposure to politics that creates the need to regulate the rhetoric of judicial elections. Ironically, the one case (*Republican Party of Minnesota*)<sup>117</sup> that upheld a non-partisan judicial election system and therefore might benefit from such an analogy, did not find it especially useful.

Finally, the law of defamation, to which several courts have looked, is also not very helpful. The interests served by permitting recovery for false statements—protecting and vindicating reputation from the harm that libel or slander imposes—are very different from the rationale for limiting false and misleading claims by judicial candidates. The concern of the Canons is not that a candidate's *reputation* will suffer if false charges go unchecked among judicial candidates, but more basically, the concern is that the integrity of the selection process itself will be impaired, as well as the actual or apparent capacity of the winner to ensure due process for future litigants. The requirement which some courts have imposed that campaign charges not only be false, but that they be made with knowledge of their falsehood or reckless disregard thereof, does borrow a possibly useful analogy. However, this requirement invokes a standard that is applicable here for quite different reasons.

Suffice it to say that, for campaign speech regulation purposes, judges are much more different than virtually all the courts deciding such cases have acknowledged. It might be useful here to recall the eloquent words of Justice Felix Frankfurter, dissenting in *Bridges v. California*:<sup>118</sup>

[J]udges are restrained in their freedom of expression by historic compulsions resting on no other officials of government. They are so circumscribed precisely because judges have in their keeping the enforcement of rights and the protection of liberties which, according to the wisdom of the ages, can only be enforced and protected by observing such methods and traditions.<sup>119</sup>

What seems largely missing in the judgments to date, and seems vital to future litigation about judicial campaign speech, is a recognition by courts and judges themselves of the measure of these differences, and of the bearing they should have upon the balancing process that must be followed in any such case. Had such an expanded approach been part of the recent litigation, a different outcome might or might not have resulted. But at least we would all have a far higher degree of satisfaction than the actual recent cases have created.

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116. *E.g.*, *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 868-69 (8th Cir.), *cert. granted*, 122 S. Ct. 643 (2001).

117. *Id.*

118. 314 U.S. 252 (1941) (Frankfurter, J., dissenting).

119. *Id.* at 283.

*B. Elections Are Different, Especially for Judges*

Curbs on judicial campaign speech have, quite understandably, posed for many courts the specter of broadly curtailing or inhibiting all judicial speech. At a time of unprecedented debate about the extent to which judges should be free to explain to the media how their courts work, or to offer public views on issues remote from their own dockets, the potential link is unavoidable. Professor Stephen Gillers, in a recent *New York Times* column, has clearly stated the larger dilemma of regulating judicial speech:

Free speech for judges brings benefits and dangers. On one hand, judges can increase general understanding of the law and legal institutions. Silencing them would deny the public much wisdom. On the other hand, no asset is more precious to the judiciary than public confidence that judges are above the fray, with no personal stake in how cases are decided. In this contest between speech and keeping the public's trust, judicial conduct codes generally opt to protect trust. They presume that when judges talk to the media about their own cases, they jeopardize that trust, even if their language is measured and restrained.<sup>120</sup>

The critical issue for us is when and how far, if at all, regulation of judicial *campaign* speech necessarily inhibits the ability of judges to speak in ways that offer the beneficial effects of which Professor Gillers writes. Most courts that have been asked to appraise judicial campaign curbs have tended to blur, or even ignore, that distinction. Several seem to have invalidated campaign speech restrictions partly because of a broader perceived threat to general judicial speech. That nexus is wholly understandable, and offers insight into some of the recent rulings. But the case remains to be made that the two areas are fully separable, so that regulation of campaign rhetoric need pose no threat to the free speech of judges at other times.

Several factors argue for treating judicial election campaigns differently both from elections for any other public office, and from other events in the life of a judge. For starters, judges need not be elected, as a small minority of states and Article III of the U.S. Constitution recognize in mandating alternative modes of judicial selection. Nor is it necessary (again with reference to the federal judiciary and Article III) that judges serve limited terms and be re-approved on some periodic basis. While it would be unthinkable for a state to resolve that its governor should be chosen by his or her predecessor, or that, once in office should serve for life (subject only to impeachment), the choice of means and terms for judicial office-holders obviously includes options that would be deemed unacceptably undemocratic in either of the other branches. If judges inherently need not be elected, or subject to periodic reelection, it should follow that a wider array of choice accompanies the commitment of a state to make its judicial offices elective.

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120. Stephen Gillers, *For Justice to Be Blind, Must Judges Be Mute?*, N.Y. TIMES, Mar. 4, 2001, § 4, at 3.

Moreover, the very nature of a judge's or judicial candidate's relationship to the electorate is profoundly different from that of any other public official. The process of communication with a judge is utterly unlike dealing with a legislator or executive officer; anyone who seeks or holds office in the latter two branches is fair game for entreaties of all sorts, as much during election campaigns as at any other time. For judges and those who seek to become judges through popular support, the dynamics are utterly different in myriad ways. To illustrate with one obvious but helpful example: If a candidate for legislative or executive office makes promises during a campaign, voters naturally expect the fulfillment of those promises, or at least a conscientious effort at fulfillment. Consistent and unexplained failure to deliver on campaign pledges marks a dereliction on the part of elected officials. For a judicial candidate, our expectations are precisely the opposite; the most basic reason we do not wish those who seek judicial office to make promises to voters is that their fulfillment by a successful candidate would most clearly compromise the fairness and objectivity of the bench on which our system of justice depends.

Quite as clearly, the incentives on both sides of the political relationship are profoundly different when the office is judicial; were a judge or one who wishes to become a judge able to make promises, or constituents able to invite promises, the delicate balance which must be obtained between a judge and the rest of society would be imperiled beyond recognition. Thus the activities which a judicial candidate is permitted to pursue during a campaign are already circumscribed to a degree, and in ways, that affect no other seekers of public office. As Professor Roy Schotland has noted:

In all but four of the thirty-nine states with judicial elections, a legally binding Canon of Judicial Conduct bars personal fundraising and requires that all fundraising be done by committee . . . . And in at least twenty-four states, the law limits the time period during which fundraising is permitted, both before and after the election.<sup>121</sup>

Such widespread prophylactic policies as these recognize not only that judges and judicial candidates are different in many respects from those who seek other elective offices, but that judicial elections and campaigns are even more distinctly different from other elections and campaigns. Since that contrast has been appropriately recognized for other purposes, drawing a distinct line between judicial speech during a campaign and at other times should not pose an undue challenge.

There is another, concededly more practical, consideration. The interests that underlie restricting campaign speech do not apply, or apply in somewhat attenuated form, to other judicial activity and expression. It is therefore unnecessary to constrain non-campaign judicial speech to nearly the same degree. In cases of the type Professor Gillers mentions,<sup>122</sup> where a judge simply wishes to inform the reading or viewing public about how courts work, or to offer

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121. Schotland, *supra* note 101, at 857.

122. Gillers, *supra* note 120, at 3.

abstract views on legal issues unlikely ever to appear on that judge's docket, the absence of concerns comparable to those that arise during a campaign should be evident.

Take the intriguing case of New Jersey trial judge Evan Broadbelt.<sup>123</sup> Several years ago, the New Jersey Supreme Court insisted that Judge Broadbelt relinquish his immensely popular Court TV commentator role, even though he scrupulously avoided topics on which he might ever have to rule.<sup>124</sup> Such a sanction not only deprived viewers of an invaluable source of insight into the mysterious workings of the judicial system—the O.J. Simpson criminal case or the trial of the Menendez brothers, for example—but, from the judge's perspective, seemed quite remote from those interests that would warrant limits on judicial campaign speech.<sup>125</sup>

Judicial speech cases of another and more controversial type are less readily dismissed. Consider the experience of Justice Richard Sanders of the Washington Supreme Court.<sup>126</sup> Moments after he had sworn the oath of office in 1995, for a six-year term, Sanders addressed a nearby rally sponsored by an anti-abortion group who had been prominent among his supporters. In his brief remarks, he observed: "Nothing is, nor should be, more fundamental in our legal system than the preservation and protection of innocent human life."<sup>127</sup> Later, he added, "I owe my election to many of the people who are here today."<sup>128</sup> In closing, Sanders declared: "Our mutual pursuit of justice requires a lifetime of dedication and courage,"<sup>129</sup> for which he urged his supporters to "keep up the good work."<sup>130</sup>

Charges were brought against Justice Sanders by Washington's Commission on Judicial Conduct, which argued he had violated several Canons of Judicial Ethics, including having engaged in political activity to a degree beyond the bounds of Canon 7.<sup>131</sup> Eventually a group of retired judges, sitting pro tempore as the Washington Supreme Court, rejected the Commission's charges.<sup>132</sup> This court concluded that Sanders's comments had not violated the canons, since nothing he said at the rally amounted to an "express or implied promise to decide particular issues in a particular way, or as an indication that he would be unwilling or unable to be impartial and follow the law if faced with a case in which abortion issues were presented."<sup>133</sup>

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123. *In re Broadbelt*, 683 A.2d 543 (1996), *cert. denied*, 520 U.S. 118 (1997).

124. *Id.* at 544.

125. The present author was counsel to Judge Broadbelt in the United States Supreme Court, and filed a certiorari petition on his behalf.

126. *In re Disciplinary Proceeding Against Sanders*, 955 P.2d 369 (Wash. 1998).

127. *Id.* at 371.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 377.

133. *Id.* at 376. For a thoughtful discussion of judicial speech issues, including both the

Language in the Washington court's opinion might imply that the outcome would have been the same even if Sanders' statements had been made during his election campaign. Any such implication seems dangerous, and misses the crucial distinction between the campaign period and what happens after the election. Had Sanders made the same statements as a candidate, the implied promise to approach abortion and related issues in a certain way should at least evoke grave concern, and quite possibly sanctions for a breach of Canon 7.

Indeed, some who oppose broader latitude for judicial speech are understandably troubled by the *Sanders* ruling, even on its facts. They caution that the statement was not entirely removed from the political/electoral context, and that even a state supreme court justice might not only seek reelection, but might campaign for some other office to which non-election appeals to voter emotions could pose a danger. Nonetheless, the making of such statements after a successful candidate has assumed office poses a different and lower level of risk, albeit close to the line even for an incumbent. Nor should the disposition be different if one assumes that a judge, once having been elected, will probably seek reelection and may aspire to a higher bench; the longer time cycle for the judiciary usually provides greater protection than exists for other elective offices.

Even in cases of the *Sanders* type, tolerating judicial speech outside the election cycle is readily distinguished from regulating statements made by a candidate during a campaign. What a *judge* says to like-minded citizens, wholly outside the campaign cycle, and thus remote from the pressure and incentives that accompany campaigns, even if the subject matter is an issue that could appear on the speaker's docket, does seem to pose a lower level of risk (and therefore concern) than does the same statement made by a *candidate* who is actively seeking electoral support. Accordingly, regulation of judicial campaign speech need not and should not imply any general dilution of judicial speech. The two issues are distinct, if related, and should be kept separate in our analysis.

#### CONCLUSION

The potential for future discussion and regulation of judicial campaign speech seems immense, if largely uncharted. The courts have thus far divided on relatively subordinate or ancillary issues, such as the vagueness or precision of language that restricts judicial campaign speech, or the procedures by which a judicial candidate may be formally taken to task. While these questions are hardly trivial, neither are they central in defining the degree to which government may go in curbing the rhetoric of those who hold or seek judicial office. Whatever may follow, it is past time to recognize the ways in which, and the degree to which, judges and judicial candidates differ from those who seek any other public office. Even within the judicial branch, one must recognize how profoundly different the campaign period is from every other time in a judge's life. Finally, the rationale for restricting judicial rhetoric is no longer (if it ever

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*Broadbelt* and *Sanders* cases, see Stephen J. Fortunato, Jr., *On a Judge's Duty to Speak Extrajudicially: Rethinking the Strategy of Silence*, 12 GEO. J. LEGAL ETHICS 679 (1999).

was) a matter of image or even of public confidence. What is at stake here is no less than the promise of fairness, impartiality, and ultimately of due process for those whose lives and fortunes depend upon judges being selected by means that are not fully subject to the vagaries of American politics.