THOUGHTS ON THE DEMOCRATIC BASIS FOR RESTRICTIONS ON JUDICIAL CAMPAIGN SPEECH

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INTRODUCTION

As I have read the fine papers prepared for the *Symposium on Judicial Campaign Conduct and the First Amendment*, I am struck by how closely the debate over judicial campaign regulation is shadowed, if not molded, by the longstanding argument over legislative campaign finance reform. The latter debate has run on for some time—run, some would say, into the ground—as familiar arguments are traded back and forth about the conflict between "speech" and controls of "corruption" in the regulation of the electoral process. Worse, the campaign finance reform debate is to some degree responsible for a regulatory arrangement which attracts little respect and, in some areas, spotty compliance, and which has not done much for public confidence in the electoral process.[1] The discussion of judicial campaign reform in some of the Symposium papers, not to mention in court decisions, appears to have been largely cast in the same terms; and it seems to assume the same policy choices between more or less regulation, and thus more or less speech. If that discussion is not fundamentally recast, with more attention paid to the particular requirements of judicial rather than legislative campaign regulation, it is likely to be unproductive.

For this reason, Professors BeVier and O'Neil emphasize that judicial candidates are different from candidates for other offices.[2] Drawing on the work of Professor Schotland, Professor O'Neil cites some of the fundamental differences between the missions of judges and legislators.[3] For example, legislative candidates are expected to make specific commitments about their performance in office; judicial candidates are not. Likewise, legislative candidates must, to perform competently as politicians, show preference for friends and allies while in office, and in this way partiality. Conversely, impartiality is the highest calling of the jurist. Legislative candidates may meet

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1. It is telling that a sitting member of the Federal Election Commission recently published a book, carefully argued and well received, calling into question the constitutionality and overall viability of federal campaign finance regulation in its current form. BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM (2001).

2. Lillian R. BeVier, *A Commentary on Public Funds or Publicly Funded Benefits and the Regulation of Judicial Campaigns*, 35 IND. L. REV. 845, 847 (2002); Robert M. O'Neil, *The Canons in the Courts: Recent First Amendment Rulings*, 35 IND. L. REV. 701, 715-18 (2002).

3. O'Neil, *supra* note 2, at 716-17.

with anyone at any time, publicly or privately, to hear their concerns about official matters, while judges are bound by ex parte rules and other norms to avoid informal exchanges with parties and others who have or may have business before them. Therefore, because candidates for judicial office are different kinds of candidates for a different kind of office, the analysis of the affected rights—of the candidate, parties or the public—should be different. With these distinctions in mind, Professor BeVier correctly advances the proposition that "the scope and extent of [judicial candidates'] First Amendment rights . . . ought not in the first instance to be measured by the same yardstick that applies to candidates for legislative or executive office."[4]

I. JUDICIAL POLITICS AND DEMOCRATIC VALUES

Professor BeVier's argument can be taken further still, by examining the implications of judicial campaigning for democratic theory and practice in our time, especially when the courts' role in fashioning social policy has greatly expanded. For a number of reasons, Americans seeking to influence policy turn to the courts at the same time as our "representative" institutions—the legislative and executive branches—suffer from a loss of public confidence, paralyzing interparty and ideological conflict, and the effects of persistent voter apathy. The range of issues courts are called upon to address are almost as broad as the national legislative or political agenda, and include gun control, reproductive rights, affirmative action, regulation of the tobacco industry, and the election of a President.[5] It is fair to say that interest groups furiously spending for one judicial candidate over another are not concerned with influencing the decisions made in routine disputes between neighbors over property lines. As Professor Briffault astutely observes, the present controversy over judicial campaign finance—over concerns such as rising costs and crude campaign tactics—is "a backhanded tribute to the power and discretion of state judges and to the high political stakes in many state judicial elections."[6]

On the face of it, directing attention to the powerful role of the courts might seem to support Professor Gillers' suggestion that voters must make informed choices about powerful officials—in this instance, judges—and that judges must be allowed to present their case as candidates to the voters.[7] Yet I would argue that pervasive judicial power cuts altogether the other way. To the extent that the courts are drawn ever more centrally into core political and social disputes, it will

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4. BeVier, *supra* note 2, at 847.

5. *See e.g.*, Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059, 1078 (1996) (citing range of issues eliciting judicial candidate comment, including consumer rights, abortion and school prayer).

6. Richard Briffault, *Public Funds and the Regulation of Judicial Campaigns*, 35 IND. L. REV. 819, 819 (2002).

7. Stephen Gillers, *"If Elected, I Promise [_____]"—What Should Judicial Candidates Be Allowed to Say?*, 35 IND. L. REV. 725 (2002).

be important to preserve their integrity and their function as "courts" and assure that in all possible ways judges are encouraged to act, reason, and decide their cases as *judges*, and that voters are encouraged to see and evaluate them as such.

Chief Justice Shepard of the Indiana Supreme Court has demonstrated how the due process rights of individual litigants are compromised by the campaign pledges of judicial candidates. He is rightly concerned with the effect of judicial candidates' "particular statements" on "individual cases" in the future.[8] The Chief Justice's perspective is powerful; and I propose to add another dimension to it, by looking beyond the courtroom to consider the harm that judicial campaigning might do to the democratic process as a whole, impacting all citizens. An exclusive concern with First Amendment doctrine, imported from the inapposite context of legislative campaign reform, tends to conceal this harm from view.[9]

II. THE JUDGE-POLITICIAN DIVIDE

The harm addressed here lies essentially in allowing a view of the judge, and allowing the judge to view herself, as little different from the politician-legislator. In this view the judge-as-politician makes commitments, fashions alliances, and in effect bargains with competing interests just as elected representatives must do. But there is a crucial difference: the judge, once elected, operates in splendid isolation from the day-to-day democratic pressures experienced by legislators. For example, a judge is isolated from any informal contact or meeting on court matters with an affected party. Judges do not hold press conferences, or answer constituent mail. They cannot take steps outside the evidence presented and the pleadings submitted to gather, on their own initiative, facts relevant to the case before them. Once a case is submitted, the opinion they issue is the sole explanation required for their significant decisions on process and substance. However, they may make important but less visible decisions—in dealings with counsel, or rulings on objections, or the schedule they set for trial—that are not, or not often, explained publicly, but have enormous impact on the outcome of any given case.

Thus, judges and politicians exercise their powers—and answer for that exercise—in fundamentally different ways. As courts are thrust into the center

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8. Shepard, *supra* note 5, at 1090-91.

9. Professor BeVier seems to make a similar point about the inapposite application of the First Amendment to judicial campaigns. Her attention, however, is more sharply focused on the "due process" harms to litigants and the damage generally to the "rule of law" if judges are free to make political commitments that override their responsibility to "apply" the law. BeVier, *supra* note 2, at 849. As I note below, we have ceded to judges, in some instances openly and with purported theoretical justification, broad authority to "make law," and we must therefore consider with care the impact on democratic values of also allowing them to function, in their roles as candidates, like politicians. In light of the powerful role of the courts, the more judges act like politicians (and the less they act like judges), the greater the danger to the democratic process as a whole.

of our major social and political controversies, respecting and preserving that difference is of pressing importance to democratic life. We are willing to confer on judges remarkable powers we would never willingly cede to politicians, and we accord to judges a respect and consideration for their authority that politicians can only dream of. Right or wrongly, as Jeremy Waldron has remarked, "the processes by which courts reach their decisions are supposed to be special and distinctive, not directly political, but expressive of some underlying spirit of legality."[10] Waldron believes we are wrong to suppose this, while others would say we are right to do so; but the supposition is widespread, as evidenced by the high standing of the judiciary, broad acceptance of the authority of its decisions on highly contested questions of basic rights, and the theoretical work done in academe to justify this state of affairs.

Yet by encouraging judges to act and to be viewed as "candidates" on the representative model, and thereby encouraging or allowing them to campaign with promises and commitments of one kind or another, we obliterate the line between the judge and the legislator-politician. This is frequently justified by two related arguments, both erroneous.

The first argument is made in the name and under the authority of the constitutional importance of "speech" to the judicial candidate and to the voter. As Professor Gillers sees it, voters cannot be offered elections and yet denied the information required to make their choice among candidates.[11] The "speech" in question, however, is as much political activity as it is informative communication. Rather than simply embodying "information," campaign speech, more than other political speech, is instrumental in character, molded tactically to accomplish political goals, such as building or sustaining a voting majority, through careful signaling or nuance, or by outright commitment. There is a reason why politicians employ speechwriters and prepare with agonizing care for debates and public appearances: political speech has broad political consequences beyond whatever "information" it conveys. It works a subtle but significant effect on the role of the judicial candidate and his or her relationship to the voter.[12] Judges who campaign like politicians become, in effect, politicians; their relationship to the audience is transformed into a political relationship.

The second error lies in viewing all elections the same, regardless of the character of the offices to be filled, or the responsibilities to be assumed. By this view, an election to the judiciary is like one to the legislature, and so it cannot be fairly or responsibly conducted without robust and uninhibited candidate "speech." Experience belies this view, however. In many organizations, such as law firms or trade associations, active campaigning for leadership positions is

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10. JEREMY WALDRON, THE DIGNITY OF LEGISLATION 24-25 (1999).

11. Gillers, *supra* note 7.

12. Professor Schotland correctly warns that as the nature of judicial elections change, "we do not yet know how much the rise [in competition] will change the kinds of people who seek to serve—and stay—on the bench." Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. REV. MICH. ST. U. DET. C.L. 849, 859.

considered inappropriate. Candidates are evaluated on the basis of *who they are*, not what they *say*. One sees this approach in associations, for example, that employ nominating committees to discuss potential candidates and then assemble proposed "slates" for election to particular offices. There is no procedure for "campaigning" by the candidates, no information demanded from them about their plans, promises and commitments; and yet the members of these associations still generally regard their governance as "democratic" in character. "Politics" is not the same everywhere, and for all purposes. Hence, a judicial election remains significant, even if it is not conducted on the same model as a legislative election.[13]

III. SOME DEFENSES OF JUDICIAL POLITICS—AND A REPLY

Those urging open, unfettered judicial campaign speech would likely respond in part that if courts are to wield vast powers on those major political and social issues, some measure of political accountability is urgently needed. The judiciary, it would be claimed, cannot have it both ways—to intervene actively on major issues while retreating to chambers, in their robes, to elude accountability. The point, however, is that it is only tolerable (if to some, it is tolerable at all) that courts wield vast influence over these issues if we assure the public *the courts will address such issues as courts, striving to act only as courts*. Legal theorists like Ronald Dworkin have argued, for example, that judges must make political decisions, provided that, as Dworkin would have it, they are decisions based on "political principles" concerned with enforcing basic moral rights between citizens and against the state.[14] This sweeping formulation has a wide following, in academe and the general public, but from the point of view of democratic practice, a critical distinction must at the least be maintained between

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13. Another example is the politics of colonial America. As Joanne Freeman has recently argued, the politicians of the early Republic were preoccupied with the establishment and defense of personal honor and reputation, and with offering leadership based on their personal and social standing. JOANNE B. FREEMAN, AFFAIRS OF HONOR: NATIONAL POLITICS IN THE NEW REPUBLIC (2001). Freeman notes that these concerns gave rise to a "fundamental contradiction of republican politics," namely, "[w]hen both personal reputations and political careers rested on popular approval, what was the distinction between public-minded lawmaking and demagoguery?" *Id.* at 37. Colonial politicians were anxious to advance their political careers while the at the same time avoiding charges, then deemed damaging, of "begging of Votes" or being a "people-pleaser." *Id.* The authors of the Federalist Papers evidenced a still more formal concern with selecting a President from "characters pre-eminent for ability and virtue," and not those with a talent for "the little arts of popularity"; and on this basis, they defended the role they chose for the Electoral College. THE FEDERALIST NO. 68, at 395 (Alexander Hamilton) (Isaac Kramnick ed., 1987). Of course, as the nature of politics in this country changed, these assumptions—and the structure reflecting them—also changed. The point here is that not all elections, or the requirements for their conduct, can be the same, but rather must conform to the perceived nature of the offices and the qualifications of those proposing to occupy them.

14. *See, e.g.*, RONALD DWORKIN, A MATTER OF PRINCIPLE 11 (1985).

decision making on "political" principles, on the one hand, and a politicized decision-making process on the other.[15] The basic judicial role and function must remain nonpolitical, even if particular decisions have broad political effects.

Whatever the view taken of the breadth of responsibility courts assume, we should want judges to exercise this responsibility with the tools of their trade—impartiality, respect for the law, and the application of careful constitutional and legal analysis. Otherwise, their decisions would be more appropriately committed to the legislatures and full-throated popular politics. Nor is the problem of accountability achieved within the framework of democratic practice by the requirement of seeking reelection, when it is beyond dispute that judicial elections favor incumbents who benefit from limited voter interest and low visibility.[16]

One more objection commonly lodged against broad speech restrictions is fairly noted. This argument holds that if "independent" groups, protected by the First Amendment, freely attack candidates, the candidates should be free to respond.[17] There is considerable intuitive power to this position, but it is undermined by a key faulty assumption and minimizes the potential efficacy of nonregulatory solutions that could mitigate perceived inequities.

The questionable assumption is that a regulatory structure is discredited if it is deficient in notable respects—if it has gaps, even large ones. In fact, in this area of regulation, like others, the goal must be to do what can be done. For example, much of the frustration over federal campaign finance laws reflects unrealistic expectations, a tendency (even a compulsion) to belittle its accomplishments and exaggerate its failures.[18] Government regulation is always

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15. This point does not only apply to theorists of the "liberal" stripe like Dworkin. Richard Posner, who does not share Dworkin's political views, claims for "pragmatic" judges the broad duty to look, in making their decisions, beyond "authorities" such as statutes, precedent and constitutional text, which he describes as "sources of information" imposing "limited constraints on his [the judge's] freedom of decision." He would like judges to be concerned broadly with facts and consequences, and thus prepared to make disciplined but flexible use of the "methods of social science and common sense." RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 242, viii (l999). In other words, Posner's judges, like Dworkin's, are powerful, though for different reasons.

16. *See* Shanto Iyengar, *The Effects of Media-Based Campaigns on Candidate and Voter Behavior: Implications for Judicial Elections*, 35 IND. L. REV. 691 (2002). For data showing that from l980 to l995, almost half of incumbent justices were not challenged, see Schotland, *supra* note 12, at 853-54.

17. There is, of course, a lively debate over whether the Constitution would tolerate some compelled disclosure of these groups' sources of financing. Jan Witold Baran, *Compelled Disclosure of Independent Political Speech and Constitutional Limitations*, 35 IND. L. REV. 769 (2002); Deborah Goldberg & Mark Kozlowski, *Constitutional Issues in Disclosure of Interest Group Activities*, 35 IND. L. REV. 755 (2002).

18. For example, the Federal Election Campaign Act has accomplished the most comprehensive, actively enforced disclosure regime in American history, but its relative success in this area is so well accepted that it is barely noticed anymore.

an imperfect undertaking, all the more so where political interests and constitutional concerns are acute. We may need to live with imperfect rules, ones that seem to work some measure of unfairness on judges eager to answer their critics, but imperfect rules are preferable to completely inadequate rules or none at all.

Moreover, judicial elections present an opportunity—and also an urgent need—for organized, effective citizen action to take the place of formal regulation, and to do so with some measure of success. The various jurisdictions experimenting with judicial campaign oversight committees follow varying approaches with apparently different results, but some have shown considerable promise.[19] With time, education, and experience, communities, including their press, may well prove more responsive to this type of collaborative action of citizens and the bar than would have been thought possible—and certainly than would be possible in the area of legislative campaigns. And the reason may be no more and no less than the fundamental, widely shared conviction that judicial elections *are* different.[20]

CONCLUSION

It is a common mistake, so it is said, to wage the present war with the weapons and strategy suitable to the last one. The mistake addressed in this Paper is that of confusing judicial with legislative candidates, and thus employing the same constitutional line of argument familiar from the now stale debate over legislative campaign finance to determine (and thus limit) restrictions on judicial campaign speech. A particular and serious consequence of this mistake is the failure to consider the adverse effect on democratic practice if judicial campaigns are waged like all others. Those affected by a refusal to see the key distinction between judge and politician, and by a refusal to insist that judges act as their social and political role requires, include litigants, to be sure—but also, all of us.

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19. Barbara Reed & Roy A. Schotland, *Judicial Campaign Conduct Committees*, 35 IND. L. REV. 781 (2002). For example, in Alabama in l998, an active committee drew strong editorial praise for encouraging a markedly "nicer" and "cleaner" election. *Id.* at 788-89.

20. It is not, for example, inconceivable that in some states, these committees could pressure broadcast stations into declining to accept independent group advertising. Federal law does not compel stations to accept this kind of editorial advertising, and they are free to adopt blanket policies refusing them in the public interest. In fact, stations have sometimes refused ads in nonjudicial races, and there is a reason to believe that they would more favorably entertain requests to do so in judicial races than in others.