

# RESTRICTIONS ON THE SPEECH OF JUDICIAL CANDIDATES ARE UNCONSTITUTIONAL

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## INTRODUCTION

Although there are many disagreements about the First Amendment, no one denies that political speech is at the very core of what is constitutionally protected. Government-imposed, content-based restrictions on the speech of political candidates, in virtually any circumstance, are unconstitutional. Such speech provides the voters with crucial information to evaluate candidates and thus directly furthers the democratic process.

I have long believed that the Model Code's restrictions on speech by candidates for judicial office<sup>1</sup> are unconstitutional under basic First Amendment principles. The judicial canons represent content-based restrictions on political speech. I therefore applaud recent decisions invalidating these provisions.<sup>2</sup> The government should not prohibit candidates for elected office from discussing issues related to the voter's choice.

I was surprised to read Professor O'Neil's defense of these restrictions.<sup>3</sup> Although I usually agree with his constitutional analysis, here I believe that he underestimates the First Amendment interests of judicial candidates and overestimates the harms of allowing such speech. Simply put, my position is that if states are going to make judges and judicial candidates into politicians by requiring them to run for office or retention, then these individuals should have the same basic right to free speech as all others standing for election.

I always have found the idea of judicial elections problematic. Voters rarely know enough about judicial candidates to make a knowledgeable choice. There is an inherent tension between judicial elections and judicial independence; inevitably judges' decisions might be influenced by the likely impact at the next election. Otto Kaus, a former member of the California Supreme Court, remarked that "deciding controversial cases while facing reelection" is like having an alligator in one's bathtub; it is impossible to forget that it is there.<sup>4</sup>

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1. MODEL CODE OF JUDICIAL CONDUCT Canon 5 (2000).

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

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

4. See Gerald F. Uelman, Symposium: *The Future of State Supreme Courts as Institutions in the Law: Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts*

The need for judicial candidates to raise ever increasing amounts of campaign funds when their primary financial supporters are lawyers and litigants is inimical to judicial independence. I will never forget the words of a highly respected California Superior Court judge describing how judges sit in their lunchroom and talk about which firms are likely to donate the most money only to go back on the bench and hear cases involving lawyers from those very same firms.

Allowing judicial candidates to speak of what they will do on the bench troubles me for all of the reasons Professor O'Neil describes.<sup>5</sup> But to me, this is just one of the problems of turning judges into politicians. If a state chooses to have judges elected or retained by the voters, then the electorate should have the necessary information to make an informed choice.

I agree with Professor O'Neil that judicial elections are here to stay;<sup>6</sup> there is no indication that states with such systems for choosing and retaining judges are likely to abandon them. The vast majority of states have judicial elections because of a belief that judges as government officials should be accountable to their constituents. By making this choice, the states, by definition, are turning judges into politicians. Having done so, states should not be able to keep judges and judicial candidates from speaking about the key issues that are likely to matter to the voters.

In responding to Professor O'Neil's thoughtful Paper, I will identify the major issues in the debate over speech in judicial campaigns. At the very least, my hope is that this will make the areas of agreement and disagreement clearer. Also, I think that this approach will explain why I believe that Professor O'Neil fails to give sufficient protection to the First Amendment interests of candidates and voters in the judicial election process.

#### I. AN INDIVIDUAL'S VIEWS AFFECT HOW HE OR SHE ACTS ON THE BENCH AS A JUDGE

It seems so obvious that it is hardly worth stating; yet, the reality that an individual's views affect how he or she acts on the bench as a judge must be the starting point in discussing judicial selection. Long ago, the legal realists exploded the myth of formalism and mechanical judging. Judges often have discretion in deciding the content of legal rules and in applying them to specific cases. Of course, there are many cases where any judge would arrive at the same conclusion. But that does not deny that discretion is inherent to judging.

The beliefs and views of a judge inevitably influence how that discretion will be exercised. For example, believing that many drug laws are misguided,

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*in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1133 (1997).

5. O'Neil, *supra* note 3. O'Neil argues that the primary reasons for restricting judicial candidate speech are to maintain civility in the judicial election process, *id.* at 712, 715, preserving judicial integrity, *id.* at 715, limiting potential partisanship, *id.* at 713, and ensuring due process for litigants, *id.* at 715.

6. O'Neil, *supra* note 3.

especially those concerning simple possession, as a judge I would use whatever sentencing discretion I possessed to impose minimal punishments for such offenses. But a judge with a different view likely would impose, to the extent allowed by the law, much harsher punishments for the same offenses.

To pick an example from civil litigation, under current law, a state can require parental notice and/or consent for an unmarried minor's abortion, but only if the law provides a judicial bypass procedure where the girl can obtain an abortion by demonstrating to a judge that the abortion is in her best interest or that she is mature enough to decide for herself.<sup>7</sup> If I were a state court judge, I am sure that I would always grant the minor's request when seeking an abortion over her parents' objections by finding that an abortion was in her best interest. Undoubtedly, a judge holding strong anti-abortion views would come to opposite the conclusion in many, if not all, of the cases.

## II. THOSE SELECTING OR EVALUATING A JUDICIAL CANDIDATE SHOULD CONSIDER THE VIEWS OF THE INDIVIDUAL AS THEY RELATE TO LIKELY PERFORMANCE ON THE BENCH

There are three possible models for evaluating judicial candidates. One approach would focus solely on the individual's professional qualifications. The evaluator—be it the President, the Senate, the governor, or the voters—would be limited to looking at the candidate's education and experience. A second possible approach would allow consideration of likely judicial temperament, as well as professional qualifications. A final model would permit consideration of a judicial candidate's views and ideology, as well as professional qualifications and judicial temperament.

Past fights over judicial selection and retention have been implicitly about which model should be followed. In 1986, conservatives seeking to deny retention to California Supreme Court Justices Rose Bird, Joseph Grodin, and Cruz Reynoso urged that they be rejected because of their anti-death penalty views. Opponents of these justices clearly took the third approach and urged their defeat on ideological grounds. In contrast, their supporters argued that judicial independence was endangered by such an approach of judicial candidate evaluation and that the justices should be retained because of their impeccable professional qualifications and unquestioned judicial temperament.

A year later, the ideological roles were reversed. Robert Bork was opposed and ultimately defeated because of his restrictive views about the scope of constitutional rights. His defenders argued that it was inappropriate to use ideology as a basis for evaluating a nominee; they urged his confirmation because of his stellar professional qualifications and abilities.

I engaged in countless public debates during 1986 and 1987 concerning the California retention election and the Bork nomination. I supported Bird, Grodin, and Reynoso; I opposed Bork. Not surprisingly, my opponents in these debates

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7. See, e.g., *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992); *Bellotti v. Baird*, 443 U.S. 622 (1979).

often were the same. It was ironic to hear those opponents who urged rejection of Bird, Grodin, and Reynoso because of their anti-death penalty view argue that Bork's ideology should not be a consideration. The experience caused me to believe that the views of all candidates for judicial office—state or federal—need to be considered in the selection process.

The same irony has been replayed at the federal level in recent years. In 2001, Republicans said that it was inappropriate for Democrats to use ideology as a basis for rejecting President George W. Bush's nominees for the federal bench. But shortly thereafter, Republicans in the Senate did exactly that in evaluating President Bill Clinton's choices.

Presidents have always used ideology as one criteria in selecting judges. Some Presidents care more and some less, but never have judicial candidate or nominee views been irrelevant in the selection process. Likewise, the United States' Senate has always considered a nominee's views as part of the confirmation process. Early in American history, the Senate rejected President George Washington's selection of Supreme Court Justice John Rutledge to replace John Jay as Chief Justice. This was entirely because of the Senate's disagreement with Rutledge's views about an important issue of the time, the country's neutrality as to the war between England and France.<sup>8</sup> About twenty percent of presidential nominees for the Supreme Court have been rejected by the Senate, as have many selections for the lower federal courts.<sup>9</sup> This percentage does not even reflect the individuals who were not nominated because of likely ideological opposition in the Senate.

Nor is this phenomenon any different at the state level. In states where the governor appoints judges, selection often includes consideration of ideology. California Governor Grey Davis has been emphatic in his declaration that he will only select judges who will enforce the death penalty and California's three-strikes law.

A judicial candidate's ideology is an appropriate consideration in any judicial selection process for the obvious reason that it reflects how the person will likely decide cases. This is not to lessen the importance of professional qualifications and judicial temperament; they obviously are always considerations. But they alone are not sufficient for evaluating judicial candidates.

Nor is this situation any different if the selection of a judge is made by the voters instead of a chief executive. For the same reasons that a President or governor looks to a judicial candidate's ideology, the voters—in an election or retention election—are justified in doing so.

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8. See LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT* 79-80 (1985).

9. See *id.* at 78.

### III. THE RESTRICTIONS ON SPEECH IN THE MODEL CODE OF JUDICIAL CONDUCT PREVENT JUDICIAL CANDIDATES FROM EXPRESSING THEIR VIEWS AND THUS VOTERS FROM LEARNING OF THEM

The Model Code regulates the speech of candidates for judicial office. Canon 5(E) is explicit that a successful candidate who violates this rule is “subject to judicial discipline for his or her campaign conduct.”<sup>10</sup> It also provides that “an unsuccessful candidate who is a lawyer is subject to lawyer discipline for his or her campaign conduct.”<sup>11</sup>

The Model Code expressly limits what candidates for judicial office can say. Canon 5(A)(3)(d) says that candidates shall not:

- (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;
- (ii) make statements that commit or appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court; or
- (iii) knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent.<sup>12</sup>

As Professor O’Neil points out, some states go even further in regulating political speech of judicial candidates.<sup>13</sup> The Michigan provision invalidated in *Chmura*, for example, prohibited candidates from making statements that they “should know [are] false, fraudulent, misleading, deceptive or which contains a material misrepresentation of fact or law . . . or which is likely to create an unjustified expectation about results the candidate can achieve.”<sup>14</sup>

By their very terms, these provisions limit what candidates for judicial office can say about their views. For example, a candidate for a state criminal trial court could not say, “I will be tough on drunk drivers,” or “I will not sentence people to prison for simple possession.” A candidate for an appellate court cannot express views about issues likely to come before his or her court.

Perhaps I am reading the words “pledges” or “promises,” and “commit” or “appear to commit” as used in Canon 5A(3) too expansively. Maybe the words could be interpreted to prohibit speech only if the judge expressly issues a “pledge,” “promise,” or “commitment.” The problem is that the provision can be understood as broadly prohibiting any expression by a judicial candidate of intended acts once on the bench. In fact, the commentary to this provision in the Model Code supports an expansive reading. It says: “Section 5A(3)(d) prohibits a candidate for judicial office from making statements that appear to commit the candidate regarding cases, controversies or issues likely to come before the

10. MODEL CODE OF JUDICIAL CONDUCT Canon 5 (2000).

11. *Id.*

12. *Id.* at Canon 5A(3)(d).

13. O’Neil, *supra* note 3, at 703 n.11.

14. *In re Chmura*, 608 N.W.2d 31, 33 n.7 (Mich.), *cert. denied*, 531 U.S. 828 (2000).

court.”<sup>15</sup> In other words, it is not limited to prohibiting “pledges,” “promises,” or “commitments”; it forbids any speech that “appears” to commit the candidate. Any statement by a judicial candidate of intended conduct in office would fall within this category of prohibited speech. Indeed, any statements by a judicial candidate about his or her views on issues likely to come before the court are prohibited. If I understand Professor O’Neil correctly, he would support such a prohibition.

Even if I am incorrect and the provision in the Model Code is meant to have a more limited application restricted to literal pledges or promises, the vagueness in its language is likely to chill speech during election campaigns. At the very least, the provision is unclear about what constitutes a “pledge,” “promise,” or “commitment.” This inherent uncertainty results in the risk of chilling constitutionally protected speech. The Michigan court, in *Chmura*, relied heavily on this concern. It explained:

A rationale for judicial elections is that meaningful debate should periodically take place concerning the overall direction of the courts and the role of the 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, [the provision] impedes the public’s ability to influence the direction of the courts through the electoral process.<sup>16</sup>

#### IV. THE RESTRICTIONS ON SPEECH ARE CONTENT-BASED RESTRICTIONS ON POLITICAL SPEECH

Especially in recent years, the Supreme Court has emphasized that the starting point in free speech analysis is ascertaining whether a law is content-based or content-neutral. In general, content-based restrictions on speech must meet a strict scrutiny standard, while content-neutral laws have to meet only an intermediate scrutiny standard.<sup>17</sup>

The requirement that the government be content-neutral in its regulation of speech means that the government must be both viewpoint neutral and subject-matter neutral.<sup>18</sup> “Viewpoint neutral” means that the government cannot regulate speech based on the ideology of the message.<sup>19</sup> For example, it would be clearly unconstitutional for the government to say that pro-choice demonstrations are allowed in a park, but anti-abortion demonstrations are not allowed. In *Boos v. Barry*, the Court declared unconstitutional a District of Columbia ordinance that prohibited the display of signs critical of foreign governments within 500 feet of

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15. MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d) cmt. (2000).

16. *In re Chmura*, 608 N.W.2d at 42-43.

17. *See, e.g.*, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994).

18. *See, e.g.*, *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45-46 (1983).

19. *See* Amy Sabrin, *Thinking About Content: Can It Play an Appropriate Role in Government Funding of the Arts?*, 102 YALE L.J. 1209, 1220 (1993).

the government's embassy.<sup>20</sup> The law, by its very terms, drew a distinction among speech based on the viewpoint expressed.

Subject matter neutral means that the government cannot regulate speech based on the topic of the speech.<sup>21</sup> A case from two decades ago, *Carey v. Brown*, is illustrative.<sup>22</sup> Chicago adopted an ordinance prohibiting all picketing in residential neighborhoods, except for labor picketing connected to a place of employment. The Supreme Court held this regulation unconstitutional. The Court explained that the law allowed speech if it was about the subject of labor, but not otherwise. The Court said that whenever the government attempts to regulate speech in public places, it must be subject matter neutral.<sup>23</sup>

The provisions in the Model Code are both subject matter and viewpoint restrictions on speech. Candidates are allowed to speak about their qualifications, but are not allowed to speak about what they will do once on the bench. This, by definition, is regulating the topics that can be addressed and thus constitutes a subject matter restriction on speech. Moreover, as described above, candidates cannot express their views about issues likely to come before their courts. This too, by definition, is a viewpoint restriction on speech.

#### V. CONTENT-BASED RESTRICTIONS ON POLITICAL SPEECH MUST MEET STRICT SCRUTINY

The law, of course, is clear that content-based restrictions on speech must meet strict scrutiny.<sup>24</sup> Although there are categorical exceptions to this rule, such as for incitement and obscenity, political speech by judicial candidates does not fit into any such exemption. Quite the contrary, political speech has long been regarded at the very core of the First Amendment.<sup>25</sup> Alexander Meiklejohn wrote that freedom of speech "is a deduction from the basic American agreement that public issues shall be decided by universal suffrage."<sup>26</sup> He argued that "[s]elf-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express."<sup>27</sup>

There is little disagreement that political speech is at the core of that protected by the First Amendment. The Supreme Court has spoken of the ability to criticize government and government officers as "the central meaning of the

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20. 485 U.S. 312 (1988).

21. See Sabrin, *supra* note 19, at 1218-19.

22. 447 U.S. 455 (1980).

23. *Id.* at 471.

24. See, e.g., *United States v. Playboy Entm't Group*, 529 U.S. 803 (2000); *Simon & Schuster v. Members of the N.Y. State Crime Victims Bd., Inc.*, 502 U.S. 105 (1991).

25. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 752 (1997).

26. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 27 (1948).

27. Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255.

First Amendment.”<sup>28</sup> Thus, the restrictions on speech in the Model Code<sup>29</sup> can be upheld only if they are deemed to be necessary to achieve a compelling government interest.

Although I would imagine that Professor O’Neil agrees with this, it is notable that he does not expressly use the language of strict scrutiny or argue that it is met. He speaks of the “roster of valid and substantial interests which are potentially served by regulating judicial campaign speech.”<sup>30</sup> I believe, though, that Professor O’Neil would claim that the interests he identifies—particularly upholding due process—are sufficient to meet strict scrutiny.

#### VI. THE RESTRICTIONS ON POLITICAL SPEECH OF JUDICIAL CANDIDATES FAIL TO MEET STRICT SCRUTINY

This is the place where I think Professor O’Neil and I disagree. I do not believe that the interests he identifies are sufficient to meet strict scrutiny.

Before considering the specific rationales upon which Professor O’Neil relies, I disagree with one of his premises. Professor O’Neil writes that “public confidence in the judiciary and its integrity will remain a fragile commodity, not likely to be enhanced by public exposure to intemperate exchanges between contentious candidates for the bench.”<sup>31</sup> Unlike Professor O’Neil, I do not think that public confidence in the courts is fragile; quite the contrary, it seems resilient and a product of over 200 years of American history.

At a time when other government institutions are often held in disrepute, the Supreme Court’s credibility is high. Professors John M. Scheb and William Lyons set out to measure and determine the extent of this high public opinion in a recent study.<sup>32</sup> They conducted a survey to answer the question: “How do the American people regard the U.S. Supreme Court?”<sup>33</sup> Their conclusion is important:

According to the survey data, Americans collectively render a relatively positive assessment of the U.S. Supreme Court. Not surprisingly, the Court fares considerably better in public opinion than does Congress. The respondents are almost twice as likely to rate the Court’s performance as “good” or “excellent” as they are to give these ratings to Congress. By the same token, they are more than twice as likely to rate Congress’ performance as “poor.”<sup>34</sup>

This survey was done in 1994, before the recent events that likely further

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28. *N.Y. Times v. Sullivan*, 376 U.S. 254, 273 (1964).

29. See MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d) (2000).

30. O’Neil, *supra* note 3, at 715.

31. *Id.* at 714.

32. John M. Scheb II & William Lyons, *Public Holds U.S. Supreme Court in High Regard*, 77 JUDICATURE 273 (1994).

33. *Id.* at 273.

34. *Id.* (footnotes omitted).



damaged Congress' public image.

Strikingly, Scheb and Lyons found that the "Court is fairly well-regarded across lines that usually divide Americans."<sup>35</sup> For example, there are no significant differences between how Democrats and Republicans rate the Court's performance. In short, the Court is a relatively highly regarded institution, more so certainly than Congress or the presidency.

This is not a new phenomenon. Throughout this century, the Court has handed down controversial rulings. Yet the Court has retained its legitimacy and its rulings have not been disregarded. Judge John J. Gibbons remarked that the "historical record suggests that far from being the fragile political institution that scholars like Professor Choper, and . . . Alexander Bickel, have perceived it to be, judicial review is in fact quite robust."<sup>36</sup>

Indeed, the events of December 2000 make me very skeptical about claims concerning the credibility of the courts. The Supreme Court decided the 2000 presidential election in a decision that is likely regarded by the majority of Americans who voted for Al Gore as improper. Yet, there is no indication that the high Court's decision had a measurable effect on confidence in the Court. After *Bush v. Gore*,<sup>37</sup> I repeatedly was asked whether that decision would damage the Supreme Court's credibility. I said that the Court's institutional legitimacy was the product of 200 years of experience and it was unlikely to change based on one, or even several decisions.

I realize that these comments relate to the Supreme Court, and Professor O'Neil is discussing the state courts. Yet, I do not see the fragile state of credibility that Professor O'Neil asserts. And after *Bush v. Gore*,<sup>38</sup> I am skeptical of any concerns about judicial credibility. I am not sure why one would speak of a lack of judicial credibility, measure it, or assess whether it changes, or even why it matters. To the extent that this is a premise for Professor O'Neil's defense of the restrictions on judicial campaign speech, I strongly disagree with him.

Professor O'Neil's primary justification for restricting the speech of judicial candidates is ensuring due process.<sup>39</sup> He notes that most analysis of the issue focuses on "judicial integrity" or "public confidence in the judiciary."<sup>40</sup> He writes: "While these interests are hardly insubstantial, they do not adequately cover the field. . . . The core concern is nothing less than ensuring due process for litigants."<sup>41</sup>

Ensuring due process is certainly a compelling government interest. The key question, though, is whether regulating speech of judicial candidates is necessary

35. Scheb & Lyons, *supra* note 32, at 273-74.

36. John J. Gibbons, *Keynote Address, Constitutional Adjudication and Democratic Theory*, 56 N.Y.U. L. REV. 260, 270-71 (1981).

37. 531 U.S. 98 (2000).

38. *Id.*

39. O'Neil, *supra* note 3, at 715.

40. *Id.*

41. *Id.*

to ensure due process. Professor O'Neil, unfortunately, does not elaborate why this is so. Instead, he devotes most of the rest of his Paper to arguing that judges are different from other elected officials and therefore that judicial elections should be treated differently. Before considering this claim, it is essential to look carefully at the argument that restricting speech in judicial elections is necessary to ensure impartial judges and due process. Only if this is so can the restrictions meet strict scrutiny.

I, of course, do not dispute that impartial judges are a requirement of due process of law. My disagreement with Professor O'Neil is over whether judges who have expressed views should be regarded as impermissibly biased. Though Professor O'Neil apparently assumes this, he does not explain why it is so.

The argument must be that judges who have expressed views will not be open-minded on the bench; they will be likely to decide the issue as they have promised. This assumes that the judge will decide cases based on his or her prior speech rather than the facts and law of the case. I question this assumption. Judges take an oath of office, and their judicial role serves as an incredibly powerful influence over their behavior. The judicial role is to decide cases as impartially and fairly as possible. Indeed, I could imagine that judges who made a promise in their campaign might try to "bend over backwards" to show that they are fair and not simply following their prior speech.

Even if this is not so, the issue of impartiality is much more difficult than Professor O'Neil acknowledges. All judges come on to the bench with views about important issues, whether or not these have been expressed during the election campaign or the confirmation process. The key question is whether a judge is more likely to follow these views if they have been expressed. If the judge would do the same thing whether or not the views have been expressed, then the speech does not make the judge less impartial. The judge has exactly the same biases; the only difference is whether people know them in advance. Antonin Scalia would vote to overrule *Roe v. Wade*<sup>42</sup> whether he expressed this in his confirmation hearings or not.

It is purely speculative whether the judge, having expressed views, is more likely to decide based on them than if the judge has the same views but had not voiced them. Perhaps the public commitment solidifies the views and causes a greater likelihood that they will be the basis for the decision, or, as suggested above, maybe the judicial role will be so powerful that the judge will decide the case strictly on its merits. Or he or she may reach a decision contrary to prior speech in an effort to show impartiality. Most likely the judge usually would do exactly the same thing whether or not there was a prior expression of the position.

If the judge is influenced by the likelihood of a future election, the prior speech is likely to have even less of an effect. A judge who is trying, consciously or unconsciously, to please the voters will take the politically popular approach, whether or not it was expressed previously. If the prior commitment remains politically popular, a judge would likely retain that stance in any event. If times

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42. 410 U.S. 113 (1973).

have changed and political winds have shifted, a judge probably would abandon the prior position. Either way, the earlier speech itself makes little difference in the judge's behavior.

In other words, it is highly questionable whether expressing views makes judges less impartial or more likely to decide the case in a particular direction. The response to this could be that the difference is that expression of views makes the judge *appear* less impartial. However, while impartial judges are clearly a requirement of due process of law, it is more difficult to argue that the appearance of impartiality is a constitutional mandate.

More importantly, it is not at all clear as to what is enough to make a judge impermissibly appear to be biased. Does a judge lack impartiality if the judge has decided several similar cases in a particular direction and it is clear from them how a current case will be resolved? If the judge has written a judicial opinion expressing views on exactly the issue now pending, does that make the judge appear impermissibly partial? If the judge's ideology makes a result highly likely, does that violate the need for the appearance of impartiality? These situations occur all the time, and I never have heard anyone suggest that they violate due process. I cannot imagine a credible argument that it violates due process for Justice Scalia to sit on abortion cases, though it is absolutely clear as to how he will vote.

Indeed, the assumption must be that litigants will perceive the judge differently because of the statements in the election campaign. It is quite possible that other aspects of the judge's behavior—other cases decided, opinions written, overall ideology—would cause the litigants to perceive the judge in exactly the same way.

Finally and quite importantly, this argument assumes that knowing the views of a judge in advance is undesirable. My sense is the opposite: as an attorney or litigant, I would rather know where the judge stands on the issue in advance. As explained above, judges have views that often determine how they decide cases. As such, I think it is better to know judicial views than it is to pretend that judges are blank slates. From this perspective, judges expressing their views does not make them less impartial, it just makes their preexisting positions known. If anything, this helps litigants and advocates because they can deal with the judge as he or she exists, appealing to the views that are there, or trying to persuade the judge to change or modify them.

Professor O'Neil concludes his Paper by arguing that judges are different from legislative or executive candidates.<sup>43</sup> He emphasizes this point to distinguish *Brown v. Hartlage*,<sup>44</sup> which declared unconstitutional a state law that restricted the rights of candidates for elective office to make promises to voters and constituents. Professor O'Neil, of course, is correct that *Brown* did not involve judges.<sup>45</sup> But the question is whether the differences between judges and other elected officials are sufficient to distinguish the case.

43. O'Neil, *supra* note 3, at 720.

44. 456 U.S. 45 (1982).

45. O'Neil, *supra* note 3, at 714.

Unlike Professor O'Neil, I believe that *Brown* should be followed in the area of judicial elections. *Brown* says that restricting campaign speech strikes at the very core of the First Amendment.<sup>46</sup> *Brown* is only distinguishable if strict scrutiny is met in judicial elections, which I dispute above. Moreover, although judges are different from other elected officials in many ways, in other more crucial ways they are identical. Judges, like all elected officials, must make decisions and frequently have discretion in choosing. Judges, like all elected officials, come to their role with views that are likely to affect their decisions. Voters in judicial elections, like all elections, should evaluate candidates based on their views, as well as their professional qualifications, experience, and suitability for the role. All of these similarities justify treating the speech of judicial candidates like that of all other politicians.

This is not to suggest that speech is ever absolute or that there are no limits on what judges can say in election campaigns. The same First Amendment principles should apply to judges that apply to all other political candidates. For example, under defamation law, speech is not constitutionally protected if it is injurious to reputation, is false, and was uttered "with 'actual malice' . . . that is with knowledge that it was false or with reckless disregard" of the truth.<sup>47</sup>

As Professor O'Neil points out, several lower courts have used this test. He objects to it because it is oriented to protecting reputation, not safeguarding the impartiality of courts.<sup>48</sup> As explained above, I disagree with his view that restricting speech is justified to ensure unbiased judges. The defamation standard is appropriate because it marks the well-established line between protected and unprotected political speech. It should be followed in judicial elections, as it is in all others.

#### CONCLUSION

The simple reality is that judicial elections make judges and judicial candidates politicians. As politicians, the First Amendment protects their right to express their views. Voters should be able to hear the views of judicial candidates in deciding how to cast their ballots. If this stance is objectionable, the solution should be to reconsider how we elect judges, rather than silencing their voices.

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46. See 456 U.S. at 52-54.

47. *N.Y. Times v. Sullivan*, 376 U.S. 254, 280 (1964).

48. O'Neil, *supra* note 3, at 718.