

Freeing Candidate Speech in Judicial Elections:

Or,

How Safe Are Loose Canons?

by Mark Kozlowski
and Praveen Krishna

About the Brennan Center

The Brennan Center for Justice at NYU School of Law unites thinkers and advocates in pursuit of a vision of inclusive and effective democracy. Our mission is to develop and implement an innovative, nonpartisan agenda of scholarship, public education and legal action that promotes equality and human dignity, while safeguarding fundamental freedoms. The Center operates programs in the areas of Democracy, Poverty, and Criminal Justice.



About the Judicial Independence Series

The Brennan Center's Judicial Independence Project combats threats to the independence of the judiciary, the ultimate guarantor of liberty in a democratic society. The Project focuses on protecting judges from politically motivated attacks on their rulings, improving judicial selection processes, and fighting improper efforts to constrict jurisdiction. In keeping with the Center's mission, the Project offers public education resources for advocates, state and federal public officials, and journalists who are concerned about judicial independence.

This paper is the second in a series of reports exploring judicial independence issues. The series also includes:

Regulating Interest Group Activity in Judicial Elections
by Mark Kozlowski

For additional resources, visit the Brennan Center's website:
www.brennancenter.org.

About the Authors

Mr. Kozlowski is an Associate Counsel at the Brennan Center and an expert on judicial independence issues. He is the author of *The Myth of the Imperial Judiciary: Why the Right Is Wrong About the Courts* (forthcoming NYU Press 2002). A graduate of Harvard Law School (1991), Mr. Kozlowski holds a Ph.D. in Political Science from Columbia University (1989) and a B.A. from Sarah Lawrence College (1980).

Mr. Krishna is a Research Associate in the Center's Democracy Program. He conducts research for and drafts the highly regarded Court Pester E-lert, a twice-weekly electronic summary of news and opinion pieces about judicial independence issues in the press. Mr. Krishna received a B.A. from Harvard University in 2000.

Acknowledgments

This paper was prepared under the auspices of the Brennan Center's Democracy Program. The Center is grateful for the generous support provided for its Judicial Independence Project by the Deer Creek Foundation and the Open Society Institute.



161 Avenue of the Americas, 12th Floor
New York, NY 10013
tel: 212-998-6730
fax: 212-995-4550
www.brennancenter.org

Freeing Candidate Speech in Judicial Elections:

Or,

How Safe Are
Loose Canons?



by Mark Kozlowski
and Praveen Krishna

Table of Contents

Introduction	1
The Ideal of Judicial Elections	2
The New Politics of Judicial Campaigns: The Rise of Third Party Money and Advertising	4
The New Law of Judicial Elections: Weakening the Prohibition Against Misleading Campaign Speech	5
Restrictions on Judicial Candidate Speech about Legal and Political Issues	7
The Case for Freer Judicial Candidate Speech	8
The Case Against Loose Canons	11
Out of the Impasse and Into Serious Candidate Debates	14

Introduction

There seems to be a paradox in the idea of electing judges. As in any election, voters need information that will allow them to assess how each of the candidates is likely to perform in office. Candidates for legislative or executive office typically provide this information in the form of campaign promises—commitments about what they will do if they win the election. But voters also want courts that are fair and impartial, and judges cannot be unbiased if they have previously made commitments about how they would rule if elected to the bench. To protect our constitutional rights, we therefore have rules that limit what judicial candidates can say in a campaign. Hence the apparent paradox: we want meaningful information from judicial candidates and, at the same time, we don't want them telling us anything that would impair their impartiality as judges.

How do we break out of this impasse? We do permit judicial candidates to talk about their qualifications and to question those of their opponents. Third parties who wish to influence the outcome of judicial elections are also allowed to speak about the candidates. However, as we explain below, judicial candidates and third parties are increasingly turning to vicious and often misleading rhetoric to make their points. To return judiciousness to judicial elections—while giving voters needed information and protecting the impartiality of our courts—we may need to rethink the rules governing candidate speech in campaigns for the bench.

A thoughtful reexamination of those rules is especially important right now because the issue of judicial candidate speech is now before the U.S. Supreme Court. In *Republican Party of Minnesota v. Kelly*, the Court will consider the constitutionality of a rule that forbids a judicial candidate to “announce his or her views on disputed legal or political issues.”¹ The rule has been construed to apply only to issues “likely to come before the candidate if elected into office.”² Because virtually every state with judicial elections has a version of this rule—which is meant to prevent candidates for the bench from compromising their impartiality, and perceived impartiality, as judges—the decision could have national implications. The case will be decided by July 2002.

¹ Minnesota Code of Judicial Conduct Canon 5(A)(3)(d)(i).

² See 247 F.3d 854, 881 (8th Cir.), *cert. granted in part*, 122 S. Ct. 643 (2001). On January 29, 2002, the Minnesota Supreme Court expressly ordered enforcement of the rule in accordance with the Eighth Circuit's interpretation.

Faced with the possibility of upheaval in the canons governing judicial candidate speech, this paper considers the pros and cons of a proposal that would allow judicial candidates to speak more freely about how they intend to approach the work of judging. The proposal includes a possible amendment of the canon under consideration in *Kelly* and a framework for judicial candidate debates under the amended rule. To set the stage, we first describe the traditional vision of judicial elections and two recent developments that undercut that ideal. We offer the proposal not because we unqualifiedly endorse it, but as a means of illuminating some of the hard questions presented by the realities of modern judicial campaigns and as a possible response to a decision in *Kelly* that forecloses the prevailing regulatory system.

The fact that judges must exercise judgment makes it all the more important to create institutional structures that will promote fair and impartial courts.

The Ideal of Judicial Elections

The defining characteristic of a judge is impartiality. Indeed, the U.S. Supreme Court has held that parties in a lawsuit are constitutionally entitled, as a matter of due process, to appear before “a neutral and detached judge.”³ A judge is supposed to decide cases based upon the evidence presented and the applicable law. It is therefore improper for a judicial decision to be in any way based upon the judge’s self-interest or prejudice in favor or against one of the parties.

This is not to say that decision-making is a purely mechanical process. It is not possible to feed the law and facts of every case into a computer and come out with a unique, “correct” decision. Judges must make choices when they interpret vague, ambiguous, or conflicting statutory or constitutional terms; when they decide which witnesses are credible; or when they select a remedy to right a wrong. In each case, the judge’s experience, beliefs, and values will be brought to bear in rendering a decision.

But the fact that judges must exercise judgment makes it all the more important to create institutional structures that will promote fair and impartial courts. Rules that provide for an appeal from a single judge’s ruling, and for majority rule on multi-judge appellate courts, help to ensure that decisions will be principled and well-reasoned. Special codes of judicial conduct establish standards that protect the right to appear before a judge who is disinterested and unbiased to the extent humanly possible and works actively to maintain the integrity of the court.

Judicial elections have historically been structured to preserve the reality and appearance of judicial impartiality. Although, candidates for legislative and executive office are expected to announce their *partiality* toward

³ *Ward v. Monroeville*, 409 U.S. 57, 62 (1972).

the wishes of the voters, judicial candidates have long been barred from compromising their commitment to impartiality in this fashion. In upholding Minnesota's rules governing judicial candidate speech, the Eighth Circuit in *Kelly* made this very point:

[I]t is consistent with the essential nature of campaigns for legislative and executive offices for candidates to detail and make promises about the programs that they intend to enact into law and to administer. For judicial offices, however, a State may determine that this mode of campaigning, insofar as it relates to how judges will decide cases, is fundamentally at odds with the judges' obligation to render impartial decisions based on the law and facts.⁴

Thus, judicial ethics codes generally prevent judicial candidates from making even implied promises as to how they might rule on a case or a class of cases once on the bench.

In addition, judicial campaigns are not supposed to be down-and-dirty politics as usual. We hear many complaints about mudslinging by candidates for legislative or executive office, but we are no longer shocked by campaign tactics that stop just short of defamation. Judicial elections have traditionally been decorous and civil by comparison. Persons claiming to possess the integrity and temperament required of a judge have been expected to meet higher standards of conduct than run-of-the-mill politicians.

Unfortunately, two recent developments—one political and one legal—have undermined state efforts to maintain the special character of elections for the bench. The first has been aptly described as follows: “A rising tide of money flowing into judicial campaigns, matched by raucous, irresponsible campaign rhetoric and advertising in many states, is becoming a major embarrassment to the single branch of government that is supposed to be above politics.”⁵ The second consists of a series of court decisions overturning restrictions on judicial candidate speech about electoral opponents. We shall now consider these trends in turn.

⁴ 247 F.3d at 877.

⁵ Tony Mauro, *Judges Shouldn't Have to Please Voters*, USA TODAY, Oct. 18, 2000, at 17A.

The New Politics of Judicial Campaigns: The Rise of Third-Party Money and Advertising

Anyone who observed the 2000 judicial elections knows that elections in several states involved large amounts of money spent not only by judicial candidates but also by interest groups and political parties.⁶ One could not help but notice these third-party efforts because there are virtually no limits upon what such parties can say, and some of them said very provocative things. As a result, the focus of press coverage, both in national publications and in local papers, was not on the judicial candidates or the legal issues they were likely to face but on the vituperative character of the third-party ads.

The activities of the U.S. Chamber of Commerce and its affiliated state organizations got the most coverage. The Chamber spent heavily in a number of states to elect judges whom it took to be pro-business. Its most notorious attack ads were directed at Ohio Supreme Court Justice Alice Robie Resnick, who wrote that court's 4-3 decision overturning a "tort reform" statute. The Chamber's advertisement depicted piles of paper money being lowered upon one side of the archetypal scales of justice. As Lady Justice lifted her blindfold to watch, the voiceover claimed that Justice Resnick had accepted \$750,000 in campaign contributions from personal injury lawyers and that she ruled in their favor "nearly 70% of the time." The ad then asked: "Is justice for sale?"⁷

Pro-business forces were not alone in trying to influence judicial election outcomes in 2000.⁸ For example, although Michigan's judicial elections are nominally non-partisan—the candidate's party affiliation does not appear on the ballot, but candidates are chosen through party conventions—the state's Democratic Party ran television advertisements depicting three Republican incumbents as literally in the pocket of a business executive. In Alabama, the Democratic Party sponsored ads linking "Firestone tires and Ford Explorers" to the state's "Republican Supreme Court."

There is no reason to believe that third parties seeking to influence judicial elections are going to curb these tactics any time soon. On the contrary, immediately after the 2000 judicial elections, the coordinator of the Chamber's judicial election advertising campaigns announced that the Chamber is "absolutely committed to being involved in judicial races."⁹ And, indeed, the group was active in the 2001 election for an open seat

⁶ See DEBORAH GOLDBERG, ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS: HOW 2000 WAS A WATERSHED YEAR FOR BIG MONEY, SPECIAL INTEREST PRESSURE, AND TV ADVERTISING IN STATE SUPREME COURT CAMPAIGNS 4-5 (2002), at www.justiceatstake.org.

⁷ For a "storyboard" of this ad, showing every four seconds of video and the full audio text, see *id.* at 21.

⁸ Indeed, after the 2000 judicial elections, a Chamber spokesperson declared that the organization got involved in judicial races only to counteract plaintiffs' attorneys, who had been active in these elections: "The legal system has too great an impact on the business community to allow the trial bar to have a monopoly on impacting who's on the bench." Louis Jacobson, *Lobbying for "Justice" in State Courts*, NAT'L J., Nov. 18, 2000, at 3678.

⁹ Katherine Rizzo, *Chamber Ads Failed in Ohio, Worked Elsewhere*, A. P. NEWSWIRE, Nov. 6, 2000.

on the Pennsylvania Supreme Court, distributing a study of dubious validity charging that the Democratic candidate had compiled a 30% “pro-economy” rating in tort cases, while her Republican opponent rated more than twice as high. To make matters worse, as we shall now see, recent court decisions are opening the door to judicial candidates who want to get in on the act.

The New Law of Judicial Elections: Weakening the Prohibition Against Misleading Campaign Speech

In the context of ordinary elections, the Supreme Court has held that candidates for political office must be afforded “the unfettered opportunity to make their views known.”¹⁰ But candidates for judicial office are subject to controls upon what they can say in the course of a campaign. *Kelly* is not the first case to consider whether these rules violate the First Amendment.

The 1990 version of the American Bar Association’s Model Code of Judicial Conduct provides that judicial candidates shall not “knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent.”¹¹ The judicial ethics codes of some states go even farther in limiting judicial campaign statements that are deceptive or misleading. Over the last year and a half, however, there has been a small wave of First Amendment decisions overturning the stronger constraints.

The leading case arose from a 1996 judicial election pitting Michigan incumbent judge John Chmura against challenger James Conrad. By any standard, Chmura ran an aggressive campaign, and he was sanctioned by the Michigan Judicial Tenure Commission (“JTC”). The JTC found that Chmura had violated a state rule prohibiting a judicial candidate from making a statement that “the candidate knows or reasonably should know is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation of fact or law” Chmura appealed the JTC’s ruling to the Michigan Supreme Court.

In a unanimous opinion, the Court held that, construed broadly, the canon Chmura was found to have violated gave inadequate protection to judicial candidates engaged in the core First Amendment activity of campaign speech. The Court concluded that the canon could be saved

¹⁰*Buckley v. Valeo*, 424 U.S. 1, 52 (1976) (*per curiam*).

¹¹ABA Model Code of Judicial Conduct Canon 5A(3)(d)(iii) (1990).

only by severely narrowing it to prohibit candidates from “knowingly or recklessly using or participating in the use of any form of public communication that is false.” Thus, both “misleading” and “deceptive” speech were stricken from the canon’s reach.¹²

After this decision, the JTC held that Chmura was subject to sanction even under the narrowed version of the canon, and the Michigan Supreme Court again reversed. The Court explained:

Speech that can reasonably be interpreted as communicating “rhetorical hyperbole,” “parody,” or “vigorous epithet,” is constitutionally protected. ... We are mindful that in protecting [such speech], some judicial candidates may inevitably engage in “vehement, caustic, and sometimes unpleasantly sharp attacks Indeed, as is arguably true in the present case, even potentially misleading or distorting statements may be protected.¹³

Under this reasoning, the Court held that Chmura could not be sanctioned for a flyer headlined as follows: “Murder ... Rape ... Dismemberment ... Innocent Victims ... Could Jim Conrad’s court have stopped it?” The flyer went on to say that a man who was eventually convicted of serious crimes had repeatedly appeared on lesser charges in the court administered by Conrad and had received only “a slap on the wrist.” What Chmura did not disclose is that Conrad presided over none of the earlier proceedings! Knowing all this, the Michigan Supreme Court responded:

Although we agree with the JTC that this statement could be interpreted as communicating that Conrad was specifically responsible (when he was not) for the subsequent crimes ... the brochure nevertheless is also subject to a more benign interpretation.

It is often the case that affiliation is described by a possessive. In describing an institution as “John Doe’s,” one interpretation might be that John Doe is in charge of, and responsible for, that institution: an alternative interpretation might be that John Doe is merely associated in some manner with the institution.¹⁴

In short, we have the triumph of grammatical analysis over common sense.

The First Amendment reasoning of the Michigan Supreme Court quickly proved persuasive in other courts. During the 2000 judicial elections for the Alabama Supreme Court, a candidate sued to enjoin enforcement of a provision of the Alabama Canons of Judicial Ethics that forbids “distribut[ing] false information concerning a judicial candidate or an opponent” as well as “true information ... that would be deceiving or misleading to a reasonable person.” The Court issued a temporary restraining order, stating that the provision at issue “appears to be more far-reaching than—or at least on the same par with—the canon held unconstitutional in

¹²*In re Chmura*, 608 N.W.2d 31, 43 (Mich. 2000).

¹³*In re Chmura*, 626 N.W.2d 876, 886 (Mich. 2001) (citations omitted).

¹⁴*Id.* at 891-92.

Chmura.¹⁵ Shortly afterward, a federal court in Georgia found unconstitutional a provision of that state's Judicial Conduct Code that forbids the use of "false, fraudulent, misleading, [or] deceptive" speech by judicial candidates. That court explained that it was "persuaded by the reasoning expressed by the Supreme Court of Michigan" even though "the state of Georgia has a sufficient interest in preserving the integrity and independence of its judiciary so as to support some restrictions on judicial campaign speech that are greater than those imposed on other types of campaigns."¹⁶

The new politics of judicial elections interacts dangerously with the newly developing law. The recent court decisions have relaxed the standards for judicial campaign speech at precisely the same time that third party attack ads are creating temptations for candidates to respond in kind. Both trends also provide ammunition to those who claim that the only way to resist this downward slide is by making judicial campaigns less about character and more about issues. But there are limits on what candidates can say about issues.

Restrictions on Judicial Candidate Speech about Legal and Political Issues

There has been a provision governing judicial candidate speech about legal and political issues in the ABA Model Code of Judicial Conduct since 1924. As currently memorialized in the 1990 version of the Code, the prohibition prevents judicial candidates from making "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court."¹⁷ As construed by the lower federal courts and the Minnesota Supreme Court, the rule at issue in *Kelly* is substantially the same.

What is the reason for limiting judicial candidate speech in this manner? A leading case on Pennsylvania's version of the canon explained that any statement by a judicial candidate regarding a disputed legal or political issue could possibly be construed as a promise to rule a certain way on cases that might come before the candidate should he or she be elected to the bench. This, said the court, was impermissibly at odds with the requirements of judicial impartiality:

If judicial candidates during a campaign prejudge cases that later come before them, the concept of impartial justice becomes a mockery. The ideal of an adjudication reached after a fair hearing, giving due consideration to the arguments and evidence produced by all

¹⁵ *Butler v. Alabama Judicial Inquiry Comm'n*, 111 F. Supp. 2d 1224, 1234-35 (M.D. Ala. 2000). The Alabama Supreme Court agreed and narrowed the canon in much the same way as did the Michigan court. See *Butler v. Alabama Judicial Inquiry Comm'n*, 802 So. 2d 207 (Ala. 2001).

¹⁶ *Weaver v. Bonner*, 114 F. Supp. 2d 1337, 1342 (N.D. Ga. 2000).

¹⁷ ABA Model Code of Judicial Conduct Canon 5A(3)(d)(ii) (1990).

parties no longer would apply and the confidence of the public in the rule of law would be undermined.¹⁸

What then is left for judicial candidates to say? In its decision upholding Minnesota’s version of the canon, the Eighth Circuit in *Kelly* declared that they can discuss “their character, fitness, integrity, background ... education, legal experience, work habits and abilities, [as well as] their views on how they would handle administrative duties if elected.”¹⁹ This is not exactly the stuff of scintillating debate. The candidate may also engage in “general discussions of case law and judicial philosophy.”²⁰ These terms are not defined, but judicial candidates are rarely disciplined for broad and essentially contentless statements to the effect that they will be “Tough on Crime” or “Put the People First.” The judicial candidate who brought the *Kelly* case was not investigated, charged, or disciplined for campaign materials describing controversial decisions of the Minnesota Supreme Court and claiming that the Court “legislates from the bench.”

Does this rule make sense? More specifically, does it make sense in the context of how judicial elections are increasingly conducted these days? There are strong arguments on both sides.

The Case for Freer Judicial Candidate Speech

Those who think the rule goes too far maintain that there is little evidence of a threat—real or perceived—to judicial impartiality from too much candidate speech about legal and political issues.²¹ To the contrary, there is widespread *dissatisfaction* with fact that judicial candidates can say so little. Time and again, journalists covering judicial elections complain about the almost farcical quality of campaigns in which candidates may not discuss matters that allow for informed voting.

One editorial, calling upon the Supreme Court to strike down Minnesota’s canon, is instructive:

At election time, judicial candidates seeking office under the protection of such overweening canons ... smile and wave, and proclaim themselves to be upright people with children and spouses who love them. ... Their philosophies of law and justice are kept secret from those who will decide if they are worthy of office. Is it any wonder that far fewer voters bother to cast a ballot in the judicial races than do so in the top-of-the-ticket contests?²²

¹⁸ *Stretton v. Disciplinary Bd.*, 944 F.2d 137, 142 (3d Cir. 1991).

¹⁹ 247 F.3d at 882.

²⁰ *Id.*

²¹ There *is*, on the other hand, a considerable amount of evidence that suggests that the public does perceive a threat to impartiality arising from the influence of campaign contributions on judicial elections—especially when the donors are lawyers or parties who appear in the court in which the successful candidate will sit. Indeed, more than a threat is perceived here. Poll after poll in recent years has demonstrated that the public—and lawyers and judges as well—believe that judges are biased toward parties who have contributed to their campaign. For the results of the most recent national poll, see www.justiceat-stake.org.

²² *How Can Voters Judge?*, THE PLAIN DEALER, Dec. 5, 2001, at B8.

It is not at all uncommon for a sitting judge to write a law review article or to deliver a speech that deals with a controversial topic.

In other words, voters might pay attention to more than attack ads if judges could say something of substance. The negative advertising, which is known to depress voter turnout, and the lack of meaningful information cause many voters to ignore judicial elections.²³

Consider further that the canon barring speech about legal and political issues bears very little relation to existing rules about what makes it improper for a judge to hear a particular case. Recusal statutes generally mandate withdrawal from a case only when a judge has either: (1) a personal bias in favor or against one of the parties, or (2) a personal financial stake in the outcome. Accordingly, claims that a judge should recuse herself because of her announced views regarding a legal or political issue are regularly held to be without merit. In a wholly typical case involving the federal recusal statute, upon which many state statutes are based, the Ninth Circuit brushed off a claim that a trial judge should have removed herself from a marijuana trial because she had been quoted in the press expressing strong opinions about the harmful social effects of the marijuana trade. The court curtly responded: “A judge’s views on legal issues may not serve as the basis for motions to disqualify.”²⁴

Judges are also free to announce their legal and political views outside the context of campaigns. It is not at all uncommon for a sitting judge to write a law review article or to deliver a speech that deals with a controversial topic. For example, Jose Cabranes, a judge on the U.S. Court of Appeals for the Second Circuit, recently co-authored a book that is harshly critical of the Federal Sentencing Guidelines, but no one suggests that he should be disqualified from hearing criminal cases.

A case from Washington also demonstrates the great discretion that judges are afforded in this regard. In that case, a newly elected justice of the Washington Supreme Court appeared at an anti-abortion rally and proclaimed: “I owe my election to many of the people who are here today and I’m here to say thank you very much and good luck.” The Washington Commission on Judicial Conduct issued a reprimand, which was overturned by a unanimous Washington Supreme Court. The Court concluded:

Judges do not forfeit the right to freedom of speech when they assume office Justice Sanders’ brief appearance at the rally to express his belief in the preservation and protection of innocent human life and to thank his supporters ... does not lead to a clear conclusion that he was, as a result, not impartial on the issue as it might present itself to him in his role as a judge.”²⁵

Of course, all judges to a greater or lesser extent make statements about disputed legal and political issues in the rulings that they make. Consider

²³See Jerry Crimmins, *Experts: Negative Ads Erode Confidence in Judges*, CHICAGO DAILY L. BULL., Nov. 9, 2001, at 1; Shanto Iyengar, *The Effects of Media-Based Campaigns on Candidate and Voter Behavior: Implications for Judicial Elections*, 35 IND L. REV. (forthcoming 2002) (citing studies).

²⁴*U.S. v. Bauer*, 84 F.3d 1549, 1560 (9th Cir. 1996).

²⁵*In re Disciplinary Proceeding Against Sanders*, 955 P.2d 369, 371 (Wash. 1998).

but one powerful example. A number of state supreme courts have been asked in recent years to consider state constitutional challenges to public school funding schemes. The Ohio Supreme Court has issued a series of decisions regarding the constitutionality of the state's system of funding its public schools to a great extent by means of local property taxes. But the Court has been badly split on the issue and the disagreement has been expressed in sharply worded opinions. Thus, a slim majority of the Court has ruled in favor of the claim that school funding by means of property taxes produces inequalities among school districts that violate the Ohio Constitution, while dissenting justices have argued that such a position amounts to nothing but the policy preferences of judges clothed in constitutional language. But no one suggests that, once he or she has written or joined an opinion taking one of these two opposite views, an individual justice should be disqualified from hearing any future case regarding school funding. Indeed, a moment's reflection reveals that the broad application of such a recusal principle would pretty much bring the judicial system to a halt.

Last but not least, there are no limits on what third parties can say about judicial candidates' views on disputed legal and political issues. We know from sorry experience that interest groups and political parties have few scruples about misleading voters about what those views are. Wouldn't we rather that candidates have the opportunity to speak for themselves, to set the record straight, and to let the public know what they think is important in the campaign? Why should we have to rely on the press or civic organizations to ferret out and disseminate information that the candidates know first-hand and could easily provide?

In sum, those who would loosen the canon limiting speech about issues likely to come before a court make four main arguments.

- Elections are meaningless without information about the candidates' views on legal and political issues.
- The canon is inconsistent with the law of recusal, which is much narrower.
- If candidates for the bench can announce their views in other contexts, such as scholarly articles or judicial opinions, they should be able to do so in judicial campaigns.
- We are at the mercy of untrustworthy third parties if candidates are not allowed to explain their views for themselves.

Should we be persuaded, or is there something to be said in response?

Wouldn't we rather that candidates have the opportunity to speak for themselves, to set the record straight, and to let the public know what they think is important in the campaign?

The Case Against Loose Canons

Advocates for a limit on judicial candidate pronouncements about issues likely to come before the court on which the candidate seeks a seat believe that proponents of loose canons don't provide the complete picture. Before jumping to any conclusions, some thought should be given to the arguments on the other side.

First, eliminating the canon *might* allow for more substantive campaigns, but given what we know about ordinary politics, there is a distinct possibility that the change would threaten the integrity of judicial races or even remake their character entirely—for the worse. After all, the argument that freer speech will improve judicial elections works only if candidates can be counted on to behave in good faith. But the declining character of judicial elections that opponents of the canon ostensibly seek to combat is due in no small part to the candidates' willingness to besmirch their opponents and mislead the public. Without the limits on pronouncements that appear to commit the candidate to future rulings, there will simply be wider scope for the sensationalism and sloganeering we deplore in elections generally.

More importantly, one of the biggest threats to the independence and legitimacy of the nation's courts, both federal and state, is the increasing prevalence of the view that judges are policy-makers first and impartial adjudicators second. This is not to say that judges, especially high court judges, do not create new law or influence its direction. But the role of judges is different than the role of legislators, and removing the constraints that preserve those differences threatens to blur the distinction and thus to undermine a key safeguard for impartial courts.

Recognizing that distinction helps to answer the charge that judicial elections are paradoxical because voters are asked to make decisions on how they think the candidates will perform, but are denied much of the information necessary to make that choice. We can question the premise of the following editorial, criticizing the canon at issue in *Kelly*:

If the judges rule against the current laws in Minnesota ... and all the other states where judges are elected, everything would change. Judges would be able to tell voters where they stand on the issues, just as other candidates do. And what would be wrong with that? Why shouldn't voters know how judges might rule on such topics as abortion rights, affirmative action and environmental protection? How can voters make informed choices without knowing how judges might vote on at least some significant issues?²⁶

²⁶ *Let Judicial Candidates Explain Positions on Issues*, LANCASTER NEW ERA, Dec. 27, 2001, at A12.

The answer is that we don't want judicial candidates to behave "just as other candidates do." The rhetorical questions betray confusion about the standards properly applied in evaluating judicial candidates. A good judge is not one whose decisions most closely match the political sentiments of the community, but rather an individual with the integrity and courage to make fair, principled—and sometimes enormously unpopular—decisions. Once that is understood, the paradox disappears, and with it the need for freer candidate speech.

With respect to the argument that the canon is inconsistent with recusal law, there is a serious question whether that body of law is the appropriate standard for conduct during a judicial campaign. Large campaign contributions to judicial candidates from parties and law firms are known to cause widespread doubt about the impartiality of the candidates, once elected to the bench. Yet just last year, the Chief Justice of the Idaho Supreme Court did not recuse himself from a term limits case even though he received \$52,000 in campaign contributions from term limits supporters in the prior election.²⁷ Moreover, even if the bar presented by recusal law is not too low, it may help to preserve impartial courts only because the higher standards governing judicial candidates help to guard against other sorts of improper influences before the judge is even elected.

But is there any point to a canon that limits judicial candidates' discussion of issues likely to come before the court, when they may have already published writings or delivered lectures that took strong positions on controversial cases? There may be. Because voters often do not understand that judicial elections are unique, they look to candidates for the bench—as they do to other candidates—for campaign promises. Voters may therefore interpret judicial campaign statements on issues likely to come before the candidate as commitments to rule in a certain way if the candidate wins the election. And pressure may be exerted to hold judges to the perceived commitments, threatening impartial decision-making. In other words, the electoral context matters a lot.²⁸

There are also reasons to believe that judicial scholarship, in particular, poses less of a threat than campaign speech. Good judges typically have a deep intellectual curiosity about the law. Many highly respected jurists, such as Oliver Wendell Holmes and Louis Brandeis, could not have served as judges if scholarly activity precluded a seat on the bench. Law review articles provide a venue for judges and potential judges to explore their ideas in ways that would be inappropriate in the courtroom. Since the articles generally have an extremely limited readership, they are unlikely to represent an effort to curry public favor.

A good judge is not one whose decisions most closely match the political sentiments of the community, but rather an individual with the integrity and courage to make fair, principled—and sometimes enormously unpopular—decisions.

²⁷ See Jim Fisher, *Justice Eismann: What Conflict? What Ethics?*, LEWISTON MORNING TRIB., Oct. 28, 2001, at F1.

²⁸ Even during the selection process, there may be reasons to permit wider latitude to federal court nominees, who are never subject to popular election, than candidates for elective judicial office. The federal confirmation process is not one in which U.S. Senators expect to hear promises. Moreover, federal judges cannot be punished electorally if they fail to fulfill senatorial expectations about how they will rule in particular cases.

There is a risk, of course, that judges who have endorsed specific positions in academic writing or lectures will be unable to act fairly when their view is contested in the courtroom. But judges who take their duties seriously can sometimes subordinate personal intellectual preferences to the rule of law. For example, Richard Posner, Chief Judge of the U.S. Seventh Circuit Court of Appeals and one of the pioneers of the law-and-economics movement, voted to reverse an anti-trust decision consistent with his extra-judicial teachings, because controlling precedent required an outcome at odds with his theory. But that theory persuaded the Supreme Court to change the governing law and to reverse the Seventh Circuit.²⁹ Some might say that the risk to judicial impartiality presented by scholarly endeavors is small when compared with their potential to enrich legal thinking.

Judicial opinions deciding cases are in another category altogether. Because a high level of predictability is essential to any body of law, the rulings of the past *should* have an influence on the decisions of the future. This is what we mean by precedent. Concurring or dissenting opinions, which do not have precedential value, bind a judge no more than other writings. We therefore need evidence of more than a judge's prior opinions from the bench as evidence of unacceptable bias in a new case.

The final argument for letting candidate speak about issues is the most difficult one to answer. Surely, we do not want to leave judicial candidates of high integrity at the mercy of misrepresentations made by unscrupulous third parties. Shouldn't candidates have the right to set the record straight?

Perhaps the best response to this argument is that elected judges are not clamoring for the right to make campaign statements about issues that are likely to come before them on the bench. Indeed, with only two exceptions, the state supreme court justices, current and former, who weighed in as *amici* in the *Kelly* case, offered arguments that support Minnesota's rule as construed by its Supreme Court.³⁰ The rule solves a "prisoner's dilemma" for judicial candidates who care greatly about the dignity and integrity of the judiciary but know that they will be sorely pressed, if the standard is relaxed, to descend to the level of those who care less. In the heat of a campaign, few candidates would impose upon themselves a standard higher than that imposed by the law, even though they would prefer to campaign under the higher standard and would happily adhere to it, if everyone were playing by the same rules. The canon allows judges to maintain high ethical standards without handing over the election to opponents who do not stand on principle. More than a few state Supreme Court candidates have thus voiced gratitude for speech codes that allow them to decline comment on issues.³¹

²⁹The story is recounted in Ashutosh Bhagwat, *Separate But Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the "Judicial Power"*, 80 B.U. L. REV. 967, 968-69 (2000).

³⁰One supreme court justice from Michigan (which does not have any canon relating to speech on issues) and the justice from Washington who was disciplined for statements made at an anti-abortion rally, see *supra* note 25 and accompanying text, submitted an *amicus* brief in support of the challenge to Minnesota's rule. The Conference of Chief Justices (which is composed of the Chief Justices from all 50 states, the District of Columbia, the Commonwealths of Puerto Rico and the Northern Mariana Islands, and the Territories of American Samoa, Guam, and the Virgin Islands) and five former chief justices submitted *amicus* briefs in support of the Minnesota respondents.

³¹See, e.g. Daniel Vock, *Candidates Duel over Canons on Loose Cannons*, CHICAGO DAILY L. BULL., Jan. 21, 2002, at 1; Richard P. Jones, *Sykes, Butler Vow Positive Campaigns for High Court*, MILWAUKEE J. SENTINEL, Jan. 4, 2000, at 1.

Out of the Impasse and Into Serious Candidate Debates

In light of all we have said so far, would it be a good idea to reconsider restrictions upon judicial candidate speech about legal and political issues? If third parties can and do express themselves in judicial elections virtually without restriction, and if courts are giving judicial candidates more leeway to level cheap shots at their opponent's character and qualifications, does it make sense to constrain what the candidates can say about substantive issues? Or do the compelling interests in preserving the appearance and reality of judicial impartiality caution against any move toward freer judicial candidate speech?

Perhaps there is a middle ground to be found between these two positions. We might consider a modification of canons that limit candidate speech on issues likely to come before them without abandoning the constraint altogether. This proposal might also offer food for thought in the event that the decision in *Kelly* does not preserve the option of strict canons.

Consider the following proposed canon, which might be offered as a substitute for the ABA canon forbidding candidates from making "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court."

A judicial candidate shall not make any statement:

- (a) concerning a case or controversy currently pending in the court of which he or she seeks to become a member or in any court over which that court exercises appellate jurisdiction or
- (b) pursuant to which he or she makes or appears to make a commitment to apply a particular rule of decision to a case or class of related cases likely to come before the court to which he or she seeks election.

This proposed canon would bar judicial candidates from making statements about pending cases and from making declarations like "I will never overturn a death sentence" or "I will never find in favor of a tobacco company in a product liability suit." But it would permit candidates to make backward-looking statements on legal and policy issues, provided that the statements did not appear to commit the candidates to rule in a particular way in a case or type of case likely to come before them, if elected to the bench. For example, candidates would be free to make state-

Instead of signaling to voters how they will decide certain cases by uttering declarations such as “I will be tough on crime,” judicial candidates would have to display an ability to apply the law dispassionately to a set of facts and to arrive at a principled decision.

ments such as those published by Judge Cabranes, which were critical of the law but did not appear to commit him to rule in a particular way in a particular case or type of case.

If the proposed canon were adopted, affirmative measures would probably be needed to ensure that it was implemented in a way that actually improved the character of judicial elections. One new program that might be considered, at least for supreme court candidates, is a series of debates—preferably aired on television at a time when the electorate is awake—organized and presided over by prominent members of the bar, respected legal academics, or former judges.³² We envision a discussion between the candidates regarding actual cases decided somewhat recently by the court that they seek to join. The cases would be identified in advance and would be both controversial generally and the subject of dispute between the candidates.

The debate between the candidates would be a discussion of the actual opinion of the court that decided the case—its reasoning, the degree to which it is soundly based in law, its likely effect as precedent, and so on. That is, the debate would be a possibly rarefied, but hopefully still accessible discussion of a legal controversy. It would offer a window upon how the candidates think, offering insight into their intellectual acumen, the values that inform their legal analysis, their ability to listen respectfully to a point of view with which they disagree, and their temperament when under pressure. Instead of signaling to voters how they will decide certain cases by uttering declarations such as “I will be tough on crime,” judicial candidates would have to display an ability to apply the law dispassionately to a set of facts and to arrive at a principled decision. This, after all, is what judging is supposed to be all about.

Of course, the debates would have to be very carefully controlled to serve their fundamental purpose. If candidates could use the forum to issue nothing but sound bites crafted by professional consultants for the television audience, the debates would do nothing to elevate the character of the campaigns. Finding moderators who can enforce the ground rules, especially against a candidate who is an incumbent judge, will be no mean feat.

One might also question whether such debates could help ordinary voters—very few of whom are lawyers—to evaluate the competing candidates in appropriate terms. As long as both candidates are competent attorneys, the public may find it difficult to draw fine lines with respect to the quality of the candidates’ reasoning ability. Both will be able to present cases in support of their positions and offer plausible competing interpretations. If the logic of each position is internally consistent, voters will have to determine which candidate has the more convincing case by assessing the

³²In some states, judicial candidates already participate in debates. Because of the prohibition upon speaking about disputed legal and political issues, however, such debates tend to be rather sorry affairs. A newspaper columnist offered this assessment of a recent debate between two candidates for the Pennsylvania Supreme Court: “For half an hour, the two candidates, Republican Michael Eakin and Democrat Kate Ford Elliott, engaged in a debate of sorts Quickly, inevitably, the conversation degenerated into blather. Why? Because, as Eakin pointed out, ‘I don’t think we’re allowed to talk about what we’d do if elected.’” Larry Eichel, *A Case for Merit Selection of Judges*, THE PHILADELPHIA INQUIRER, Oct. 30, 2001.

premises behind each argument. Lacking legal training to assess those premises, voters might simply look for the candidate with political views closest to their own. Under this scenario, the debates offer little by way of an alternative to judicial elections dominated by politics.

In evaluating the proposal, one must also consider how the revised canon could be abused by candidates outside the debate context. The proposed changes to speech codes would allow candidates to venture into the space between discussions of judicial philosophy and outright promises of future decisions. In addition to the earnest, substantive discussions described above, these changes also allow judicial candidates to say things like, “I disagree with every single one of the High Court’s decisions on school funding” or “If I had been in my opponent’s shoes, I would not have overturned that cop-killer’s death penalty.” Even if such statements do not appear to commit the candidate to a particular rule of decision in the future, they do not inspire confidence in the speaker’s impartiality either. There is no reason to believe that all candidates will sink to such levels, but recent events suggest that some will.

Quite apart from the potential for abuse, the revised canon might lead to more politicized judicial decisions. Wisconsin’s Chief Justice Shirley Abrahamson has identified several factors that prevent judges from courting public opinion with their decisions.³³ The first is respect for the office, a feeling that might be diminished in a judicial candidate who has won election by taking stands on political issues. Chief Justice Abrahamson also contends that efforts to curry favor with the public through judicial decisions will end in frustration because public sentiment is a moving target. Yet, if judicial elections become more and more issue-centered, judges will become more adept at gauging the public mood, and their aim will improve.

Still, one need not be overly optimistic about the likely effect of this proposal to consider it as a promising experiment — especially if the Supreme Court invalidates Minnesota’s rule and, by extension of the Court’s reasoning, the rule’s equivalent in the ABA Model Code. The proposed debates would not attract a huge audience; they might not transform the character of modern campaigns. But they might allow some voters to hear candidates speaking “in a judicial voice,” to borrow a phrase from Justice Ruth Bader Ginsburg, instead of merely mouthing platitudes. Further, they might draw media attention to aspects of judicial elections other than scurrilous attack ads. Although the ads are not likely to disappear and may even increase in the years ahead, implementing this proposal would at least express a determination not wholly to abandon judicial campaigns to their baleful effects.

The proposed changes to speech codes would allow candidates to venture into the space between discussions of judicial philosophy and outright promises of future decisions.

³³ See Shirley Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 984-85 (2001).

Brennan Center for Justice

Board Members and Officers

William J. Brennan, III

Chair

Smith, Stratton, Wise, Heher & Brennan

E. Joshua Rosenkranz

President & CEO

Brennan Center

Nancy Brennan

Executive Director,
Plimoth Plantation

David W. Carpenter

Sidley & Austin

Professor John Ferejohn

NYU School of Law
Stanford University

Peter M. Fishbein

Kaye Scholer

James E. Johnson

Morrison & Foerster

Professor Thomas M. Jorde

University of California
Berkeley School of Law

Professor Larry Kramer

NYU School of Law

Ruth Lazarus

Professor Nancy Morawetz

NYU School of Law

Professor Burt Neuborne

Legal Director, Brennan Center
NYU School of Law

Dwight D. Opperman

Chair, Key Investment, Inc.

Lawrence B. Pedowitz

Wachtell, Lipton, Rosen & Katz

Professor Richard Revesz

NYU School of Law

Daniel A. Reznick

Office of The D.C. Corporation Counsel

John Sexton

President, NYU

Robert Shrum

Shrum, Devine & Donilon

Walter J. Smith, S.J.

President & CEO,
The HealthCare Chaplaincy, Inc.

Clyde A. Szuch

Pitney, Hardin, Kipp, & Szuch

Professor Kim Taylor-Thompson

Academic Director, Brennan Center
NYU School of Law

Professor Adam Winkler

University of Southern California
Law School

Jeannemarie E. Smith

Treasurer

Associate Dean & CFO,
NYU School of Law

Steven A. Reiss

General Counsel

Weil, Gotshal & Manges



BRENNAN CENTER FOR JUSTICE

AT NYU SCHOOL OF LAW

161 Avenue of the Americas, 12th Floor
New York, NY 10013
tel: 212-998-6730
fax: 212-995-4550
www.brennancenter.org