The Expansion of the First Amendment in Judicial Elections: Another Cause for Reform

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By some [states’] constitutions the members of the [judiciary] are elected, and they are even subjected to frequent re-elections. I venture to predict that these innovations will sooner or later be attended with fatal consequences; and that it will be found out at some future period, that the attack which is made upon the judicial power has affected the democratic republic itself.1

I. INTRODUCTION

In order to encourage judicial integrity and foster public respect for the judiciary, all fifty states and the District of Columbia impose ethical and practical restrictions on the political speech and activity of judges and judicial candidates.2 Proponents of these restrictions argue that as a

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1. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 305 (Henry Reeve trans., 1845).

2. Forty-seven states and the District of Columbia have adopted some form of the Model Code of Judicial Conduct. JEFFREY M. SHAMAN, STEVEN LUBET & JAMES J. ALFINI, JUDICIAL
highly visible symbol of government, judicial impropriety damages the public’s trust and confidence in our legal system, whether it occurs via political activity or personal misconduct. Concern for the appearance of judicial impartiality, they argue, justifies otherwise impermissible limits on judges’ personal and political activities. Widely used mechanisms for ensuring judicial independence and impartiality include limiting judges’ political speech and association, limiting judicial campaign contributions, and preventing judges from speaking publicly about issues that may come before the bench.

Constitutional scrutiny of restrictions on judicial conduct has narrowed the scope of the states’ powers to pursue this interest. In 1993, the Seventh Circuit held that a provision in the Illinois Code of Judicial Conduct (“Illinois Code”) prohibiting a judge or candidate from “announcing” his or her views on disputed legal or political issues violated the First Amendment. More recently, in 2002, the United States Supreme Court reached the same conclusion regarding a virtually identical provision in the Minnesota Judicial Code of Conduct.

To the extent that these decisions resolved constitutional issues surrounding judges’ free speech rights, they complicated the task of addressing the states’ interests in judicial independence and impartiality. Some commentators insist that judicial ethical standards are necessary to avert the threat of inappropriate influences on judicial judgment posed by outside pressures. The importance of ethical standards is recognized by the Model Code of Judicial Conduct, which is adopted in almost every state.
standards notwithstanding, the states’ interests in preserving the reality and perception of judicial impartiality must be balanced against the weight of the First Amendment.\(^{11}\)

There are heightened concerns about judicial impartiality and bias where judges campaign in contested elections to win a seat on the bench.\(^{12}\) States with an elected judiciary must somehow reconcile two competing interests.\(^{13}\) On the one hand, the choice to elect the judiciary ostensibly represents a decision to make judges accountable to the people through popular vote.\(^{14}\) On the other hand, many scholars and observers agree that judges should not be responsive to a constituency; rather, due process requires that judges adhere to the rule of law, regardless of public opinion.\(^{15}\) Restrictions on the political speech and activity of judges, during campaigns and while on the bench, intend to strike a balance between these principles, adhering to elective democratic ideals, but insulating the judiciary from the corrupting effects of politics.\(^{16}\)

Some commentators argue that it is impossible to strike this delicate balance.\(^{17}\) They believe that no codified ethical standards can effectively insulate the judiciary from the political process; the very necessity of doing so, they argue, proves that judges do not belong in the political arena.\(^{18}\) Even assuming that ethical restraints can be effective, recent decisional law diluting their substance will ultimately

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\(^{12}\) See infra Part II.A.3 (discussing the fear that election campaigns make judges beholden to campaign contributors or voters’ interests); see also Roy A. Schotland, Myth, Reality Past and Present, and Judicial Elections, 35 IND. L. REV. 659, 665 (2002) (discussing the purposes of judicial elections and the necessity of appropriate regulations to ensure that judicial elections are conducted differently than other elections).

\(^{13}\) See infra note 157 and accompanying text (Illinois Supreme Court Justice Heiple’s statement of these interests).

\(^{14}\) See infra Part II.A.2 (presenting arguments in favor of judicial elections, including judicial accountability).

\(^{15}\) See Penny J. White, Judging Judges: Securing Judicial Independence By Use of Judicial Performance Evaluations, 29 FORDHAM URB. L.J. 1053, 1061 (2002) (arguing that judges should be accountable only to the rule of law); Randall T. Shepard, Campaign Speech: Restraint and Liberty in Judicial Ethics, 9 GEO J. LEGAL ETHICS 1059, 1092 (1996) (arguing that “the rules of judicial conduct are rooted in constitutional due process”).

\(^{16}\) See infra Parts II.B.1, II.B.2, and II.B.4 (analyzing the Illinois Code of Judicial Conduct and the Model Code of Judicial Conduct provisions restricting judicial speech and political activity).

\(^{17}\) See infra Part II.A.3 (discussing the arguments of judicial election opponents).

\(^{18}\) See generally Part II.A.1 (discussing the reasons why states instituted judicial elections in the first place, including the desire to insulate judges from the power of the other branches).
render such restraints useless.19 As a result, some commentators conclude that popular, political elections are the least preferable means of judicial selection.20

The tension between the political aspects of judicial selection, the demands of the First Amendment, and the ideals of judicial integrity, independence, and impartiality is apparent in Illinois, which selects its judiciary in partisan elections. 21 Securing the public’s trust and confidence is a serious challenge facing the Illinois judiciary today.22 A 2006 survey by the Chicago Bar Association reported that only five percent of voters are “very satisfied” with the current judicial selection system in Illinois, and forty-three percent are “somewhat satisfied.”23 In a national survey commissioned by the United States Chamber of Commerce, Illinois’ legal system ranked forty-fifth out of fifty states in 2005 on the issue of “judges’ impartiality.”24 Illinois fared slightly better on the issue of “judges’ competence,” ranking forty-third.25 In the same survey, Cook County was rated “third worst” in the country among cities or counties with “the least fair and reasonable litigation environments.”26 These findings echo the themes of a 1999 national survey of public perception of the courts, which found widespread concerns about a lack of accountability on the part of the judicial branch, poor methods of judicial selection and performance evaluation, and political intrusion.27 The ongoing debate regarding the best means of judicial selection focuses precisely on these concerns.28

20. See infra Part II.A.3 (setting forth the main criticisms of judicial elections).
22. See infra Part III.B (discussing the public perception of the Illinois judiciary).
25. Id. at 27.
26. Id. at 5.
28. Philip L. Dubois, Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections, 40 SW. L.J. 31, 31 (1986) (“[I]t is fairly certain that no single subject has consumed as many pages in law reviews and law-related publications over the past
This Comment argues that the Illinois Code, which places restrictions on the speech and activity of judges and candidates, is an ineffective means of ensuring the independence and impartiality of the judiciary. The Illinois Code’s speech restrictions do not prevent candidates from making express or implied commitments to rule a certain way by announcing their views on issues that are likely to come before them on the bench, thereby implicating due process concerns. Such campaign promises, exorbitant monetary contributions that make the campaigns possible, and pervasive control of political parties over the selection of judicial candidates breed public cynicism and distrust of the courts. Proposed reforms of the election process, such as revision of the ethical canons on judicial conduct, disqualification rules, or public financing of judicial elections, are inadequate to address these concerns. Therefore, this Comment concludes that Illinois should renew efforts to reform the judicial selection process by eliminating judicial elections.

To provide a background for the current debate about judicial elections, Part II of this Comment reviews the history of judicial selection in Illinois and the modern development of ethical canons restricting judicial speech and activity. To assess whether the Illinois Code achieves its objective, Part III discusses the public’s perception of the Illinois judiciary by recounting the controversy surrounding the 2004 Illinois Supreme Court race and reviewing voter surveys and various media sources. Part IV argues that, in light of the demands of the First Amendment and the changing nature of judicial campaigns, the Illinois Code’s restrictions do not safeguard the reality and perception of judicial independence and impartiality. Part IV also discusses proposed reforms of judicial elections that inadequately address these...
II. BACKGROUND

Although Illinois has had an elected judiciary since before it became a state, the structure of the judiciary has changed significantly over time, adapting to increases in population and constitutional revision. This Part begins by presenting the history of the judiciary and judicial selection in Illinois and discussing the arguments supporting and opposing judicial elections. Like most states, Illinois imposed no formal ethical restrictions on judges or judicial candidates until the last century. This Part also describes the development of these restrictions, beginning with the Model Code of Judicial Conduct ("the Model Code") and its adoption as the Illinois Code. Next, this Part examines recent decisional law striking down some of the Code’s restrictions on judicial speech and activity. Finally, this Part examines the Proposed Revisions to the Model Code drafted in response to these decisions.

A. Methods of Judicial Selection

With the exception of a brief period early in Illinois’ history when the legislature possessed the power to appoint judges, Illinois has always elected its judges. However, population growth and political considerations, including revisions to the Illinois Constitution,
significantly affected the judiciary’s structure. In order to present a complete picture of the Illinois judiciary, this Section presents the history of judicial selection in Illinois, including modern efforts to reform the judicial selection process. It then presents arguments supporting and criticizing judicial elections.

1. A Brief History of the Judiciary and Judicial Selection in Illinois

The first elected judiciary in Illinois came into existence when George Rogers Clark claimed Illinois County on behalf of the Republic of Virginia in 1778. Under Clark’s governance, seven men were elected as judges in each of three settlements, with a majority of four necessary for a decision. A year later, in 1779, John Todd was appointed as County Lieutenant and reorganized the court system into three districts with six elected judges each. This system existed until Illinois was admitted as a state in 1818, although disagreements among

46. See infra Part II.A.1 (presenting the various changes in the Illinois judiciary brought about by statute and constitutional revision).
47. See infra Part II.A.1 (presenting the history of judicial selection in Illinois).
48. See infra Part II.A.2 (setting forth the arguments in favor of judicial elections).
49. See infra Part II.A.3 (setting forth the arguments criticizing judicial elections).
50. ELLIOTT ANTHONY, THE CONSTITUTIONAL HISTORY OF ILLINOIS 29–33 (1891). “Illinois was fortunate in the beginning by having for her founders a race of great men. Col. George Rogers Clark, the conqueror of the Illinois country, takes rank next to Hannibal.” Id. at 46.
However, Clark received a disappointing reward for winning the territory from the English and French:

Alone and with the very slenderest means, he had conquered and held a vast and beautiful region, which, but for him, would have formed part of a foreign and hostile empire; he had clothed and paid his soldiers with the spoils of his enemies; he had spent his own fortune as carelessly as he had risked his life, and the only reward that he was destined for many years to receive, was the sword voted him by the Legislature.

Id. at 30. Tradition holds that when the Virginia commissioners offered him the ceremonial sword, “an empty bauble for his services,” he rejected it, saying “that he demanded from Virginia his just rights and promised reward of his services, not an empty compliment.” Id. Later, “[t]he inhabitants of Illinois paid to his shade the posthumous honor of naming a county after him, and the city of Chicago an important street, over which uncounted thousands daily and hourly pass and repass, who never knew of his existence, and never heard of his exploits.” Id.

51. ROLEWICK, supra note 45, at 4. Clark himself acted as the court of appeal. Id. Although the judicial system technically was in effect, because of the delicate situation in Illinois, Clark found it necessary at times to resort to martial law. Id.

52. Id. During that period, the courts applied a revised version of French law (although English common law was becoming influential). Id. Prior to Clark’s victory, the European inhabitants of Illinois were governed by the “Custom of Paris.” Id. at 3. When France ceded the Illinois territory to Great Britain in the Treaty of Paris in 1763, there was a brief attempt to impose the English system. Id. The attempt was largely unsuccessful due to hostility between the French inhabitants and English commanders. Id. Initially in 1778, Clark attempted to impose the English court system, but was unsuccessful for this reason. Id. at 4.
settlements, the Supreme Court of the Territory of Illinois, and the General Assembly caused various minor changes in the judicial system in place.\textsuperscript{53}

The Illinois Constitution of 1818 vested the General Assembly with the power to appoint a Supreme Court of four judges, who rode circuit as an appellate court.\textsuperscript{54} In the following three decades, it became clear that the General Assembly's power to appoint and remove all judges made the judiciary totally dependent on that body.\textsuperscript{55} Namely, partisan changes in the General Assembly caused repeated and disruptive changes in the structure of the judiciary.\textsuperscript{56} It became apparent that an effective judiciary must be independent of the legislative branch.\textsuperscript{57}

\textsuperscript{53} For example, there was disagreement about whether Supreme Court judges should continue to "ride circuit as circuit judges." \textit{Id.} at 6–7.

\textsuperscript{54} \textit{Id.} at 8. The Supreme Court had appellate jurisdiction in all cases "except in cases of revenue, mandamus, habeas corpus, and impeachment." \textit{Id.}

\textsuperscript{55} \textit{Id.} at 10. See \textit{Anthony}, supra note 50, at 44. In fact, the General Assembly had the power to appoint all "officers of the State." \textit{Id.} at 39. Precisely which were officers of the State became the subject of debate; in a short period of time, the members of the General Assembly agreed that the term encompassed a broad category of persons. \textit{Id.} at 44. Considerable political turmoil resulted from this appointment power. In the words of one historian, "Thus 'acquainted,' the Constitution was adopted and 'they all plunged in.' By 'they' we mean the whole army of hungry politicians, who were waiting the day when they could obtain access to the public crib and fatten on its stores." \textit{Id.}

\textsuperscript{56} \textit{Rolewicz}, supra note 45, at 10; See \textit{Anthony}, supra note 50, at 45. The General Assembly's appointment power also negatively affected the relationship of the other two branches:

This constant changing and shifting of powers from one coordinate branch of the government to another, which rendered it impossible for the people to foresee exactly for what purpose either the governor or the Legislature were elected, was one of the worst features of the government. It led to innumerable intrigues and corruptions, and for a long time destroyed the harmony between the executive and legislative departments. \textit{Anthony}, supra note 50, at 45.

\textsuperscript{57} \textit{Rolewicz}, supra note 45, at 10; \textit{Anthony}, supra note 50, at 93–102. Moreover, the legislature exercised the appointment power irresponsibly: three of the four judges first appointed to the Supreme Court of Illinois under the Constitution of 1818 were extraordinarily under-qualified. \textit{Anthony}, supra note 50, at 93–94. The Chief Justice, John Phillips, "appears to have been a lawyer," but came to the State through the army and was primarily involved in politics. \textit{Id.} at 93. Thomas C. Brown was a "large man, affable," generally unqualified to sit as a judge, and was "laughed at and despised by many lawyers." \textit{Id.} John Reynolds had studied law for a few months, had no experience practicing, and "was absolutely without any of the qualifications requisite for [a] judge of the highest court in the State." \textit{Id.} Finally, William P. Foster, who had been in the State about three months, was revealed to be a "consummate scoundrel and swindler." \textit{Id.} He was not a lawyer and had never even studied law. \textit{Id.} Foster remained in Illinois for a year, never acting as a judge but still drawing his salary. \textit{Id.} at 94. See also \textit{Samuel K. Gove & Thomas R. Kitsos, Revision Success: The Sixth Illinois Constitutional Convention 3} (1974) (including "an inadequate judiciary" as one of the failures of the Constitution of 1818); Schotland, supra note 12, at 659–60 (judicial elections were chosen not to increase popular
The Illinois Constitution of 1848 attempted to accomplish this by providing for the popular election of all judges to a Supreme Court, nine circuit courts, and various county courts.\textsuperscript{58} In the following decades, a surge in population led to the reorganization of the judiciary in the Illinois Constitution of 1870.\textsuperscript{59} The 1870 Constitution established a Supreme Court of seven justices, elected from seven newly created districts.\textsuperscript{60} Judges in the Appellate Court, created by the General Assembly in 1877, were appointed by the Supreme Court.\textsuperscript{61} Seventeen circuit courts, each with one elected judge, were created, county courts were established, and probate courts were established in counties with a minimum population size.\textsuperscript{62} The Constitution of 1870 also allowed for the continued service of police magistrates and justices of the peace.\textsuperscript{63} Continuing population growth later resulted in legislation creating a Juvenile Court, a Court of Claims, and the establishment of the Municipal Court of Chicago in the early 1900s.\textsuperscript{64} The General Assembly’s method of creating a court wherever there was a perceived need for judicial resources generated a great deal of confusion; by 1962, Cook County had 208 courts.\textsuperscript{65}
To improve this situation, Illinois amended its Constitution by adopting a Judicial Article establishing a unified, three-tier judiciary.66 The Article was approved by the voters in 1962 and went into effect on January 1, 1964.67 It was later incorporated in the current Illinois Constitution of 1970 as Article VI,68 creating the current system under which all judges are elected by voters in partisan elections after being nominated at primary elections or by petition.69 Judges run unopposed in retention elections and must receive 60% of the vote in order to retain office.70

The continuation of an elected judiciary in 1970 was by no means unopposed.71 Earlier in the twentieth century, the perception that the elective system was overrun by corruption and inappropriate political influence led to nationwide reform efforts to abolish elected judiciaries.72 In Illinois, attempts to reform the elective system began in

66. See generally Fins, supra note 59, at 186–91 (providing a detailed analysis of the Judicial Article); Joint Committee on Judicial Article, Proposed Judicial Article of the Constitution of the State of Illinois, Text and Explanatory Summary with Maps Showing Judicial Districts, 41 CHI. B. REC. 485 (1960) (same); Charles H. Davis, Redistricting the Courts, 50 ILL. B.J. 699 (1962) (setting forth the provisions for redistricting and reorganizing the supreme and appellate courts and advocating for the amendment’s adoption); Gerald C. Snyder, George Looks at the Judicial Article, 51 ILL. B.J. 110 (1962) (highlighting future taxpayer benefits that would result from adoption of the judicial amendment). For a debate on the merits of the Judicial Article, compare Harry G. Fins, Ten Objections to the Proposed Judicial Article of 1961, 42 CHI. B. REC. 261 (1961) (arguing that the proposed Article’s provisions were inconsistent, created double standards, would destroy state administrative agencies, would deprive trial court judges of autonomy in their own courts, and would increase the backlog of cases) with Louis A. Kohn & Charles O. Brizius, The Proposed Judicial Article of 1961, Reply to Objections, 42 CHI. B. REC. 269 (1961) (countering these objections).

67. ROLEWICK, supra note 45, at 19; see generally Fins, supra note 59, at 186–88 (describing efforts throughout the 1950s to create a new Judicial Article, culminating in a successful compromise that was adopted by the House and Senate in 1961).

68. ROLEWICK, supra note 45, at 29; ILL. CONST. art. IV, § 1.

69. ILL. CONST. art. 6, § 12 (a). The number of voter signatures required for petitions is provided by statute. 10 ILL. COMP. STAT. 5/10-3 (West 2006).

70. ILL. CONST. art. 6, § 12(d). The Constitution of 1970 also substantially revised the judicial disciplinary system. ROLEWICK, supra, note 45, at 30. It established the Illinois Judicial Inquiry Board, which is permanently convened to receive and investigate complaints against judges. ILL. CONST. art. 6, § 15 (b), (c). The Board files and prosecutes complaints before the Illinois Courts Commission, a body with the power to remove, suspend, censure, or reprimand a judge for willful misconduct, failure to perform his or her duties, or other conduct that is “prejudicial to the administration of justice or that brings the judicial office into disrepute.” ILL. CONST. art. 6, § 15 (c). For a discussion of the Commission’s purpose, see Wayland B. Cedarquist, The Illinois Judicial Article: The Proposals for a New Courts Commission and Changes for Trial Court Judges and Magistrates, 51 CHI. B. REC. 302 (1970) (discussing the necessity of an independent Courts Commission and its proposed function).

71. See infra notes 72–77 and accompanying text (describing some reform efforts of judicial election opponents).

72. LARRY C. BERKSON, JUDICIAL SELECTION IN THE UNITED STATES: A SPECIAL REPORT 2–
the 1950s and continue to this day. The constitutional convention of 1969 served as a platform for debate over judicial selection. After nearly two decades of advocacy in favor of merit selection on the part of the Illinois State Bar Association and the Chicago Bar Association, two choices were submitted to voters—one called for the continued partisan election of judges and the other called for judicial merit selection. Although merit selection carried in several counties, it was defeated statewide.


73. See Barnabas F. Sears, Judicial Selection – the Horse Before the Cart, 48 ILL. B.J. 272, 277 (1959) (stating, “...[t]he electorate is afforded ‘their God-given right to elect their judges,’ that is to say, elect those who have been selected by the Party on the one hand or the Parties on the other. That such selection saps the foundation of public and private confidence in the courts, engenders a spirit of injustice and breeds universal distrust cannot be gainsaid.”); Cedarquist, supra note 65, at 158–59 (calling for judicial selection reform, asserting that “Changes since the 1800’s...have too often transformed the popular election of judges into the political selection of judges...With the voters not knowing the candidates, and in no position to weigh their qualifications, the task of selecting judges in [the] metropolitan centers has more and more been left to the political parties.” (emphasis in original); Illinois: History of Judicial Selection Reform, AM. JUDICATURE SOC’Y (2006), http://www.ajs.org/js/IL_history.htm (last visited Apr. 1, 2007) [hereinafter Illinois History] (describing the failed reform efforts).

74. Illinois History, supra note 73. See Richard B. Ogilvie, The Crisis in Our Courts, 51 CHI. B. REC. 8, 9–10 (1969) (calling for the non-partisan election of judges to be considered at the convention because the actual selection of judicial candidates falls to political party leaders, not the voters).

75. See Kenneth A. Manaster, The Judicial Article: The Proposal for Merit Selection of Judge in Illinois, 51 CHI. B. REC. 294 (1970). The proposal for merit selection provided for the nomination of judges by independent commissions composed of laymen and lawyers, which would submit three candidates to the Governor for each judicial vacancy. Id. at 295. The Governor would select a judge for each vacancy from among those candidates. Id. Upon completion of their first term in office after the Governor’s appointment, and at the end of every subsequent term, the candidate would run unopposed before the voters for retention. Id. The plan was touted as “the best means for selection of the best possible judges in a manner consistent with our ideals of democracy.” Id.

76. See Wayne W. Whalen, Article VI – The Judicial Article, 52 CHI. B. REC. 88 (1970) (describing the debate between the bar associations, which supported the merit plan, and the political parties, which supported election, and advocating for the merit selection plan).

77. The merit plan carried a majority of 68.817% in Cook County. Robert W. Bergstrom, Judicial Reform in Illinois, 53 CHI. B. REC. 9, 9 (1971). Although the merit plan proposal was defeated statewide, at least one commentator thought “there is a wave of public dissatisfaction with the method of choosing judges.” Id. at 20–21. Other failed reform efforts continued throughout the 1970s until the present. Illinois History, supra note 73. A coalition of civic organizations formed a committee in 1971 in order to sponsor a merit selection resolution in each session of the legislature, which it did from 1973 to 1986. Id. The resolution was put to the floor twice in that period and failed both times. Id. In 1988, Governor Thompson appointed a task force on judicial selection, but the task force’s proposal died in committee. Tim Franklin & Daniel Egler, Status Quo Legislature Set For Calls to Action Few Changes So Far In This Spring’s Session, CHI. TRIB. May 29, 1988, Chicagoland at 1 (reporting the defeat of the merit selection proposal in the Senate Executive Committee); Daniel Egler & Chad Carlton, Judge
Notwithstanding nationwide reform efforts, thirty-one states use judicial elections to choose some or all of their judiciaries. Illinois is one of only nine states that initially elects trial court judges in partisan elections. Illinois joins a smaller group of states, only six, in electing appellate court judges in partisan elections, and joins seven other states in electing judges to the highest court. Other states elect some or all of their judiciaries in non-partisan elections: seventeen states elect trial court judges and thirteen states elect judges to the highest court in non-partisan elections. By contrast, twenty-one states use merit selection or appointment to select trial court judges, and thirty states use merit selection or appointment to select judges of their highest court.

2. Arguments in Favor of Judicial Elections

The fact that about two-thirds of the states elect some or all of their judiciaries demonstrates that many do not see a conflict between the principle of judicial independence and the popular election of judges. Indeed, many judicial election proponents deemphasize judicial independence and stress the importance of judicial accountability to the public. While acknowledging the tension between these two ideals,
some proponents posit that the strain can and should be resolved in the first instance by the voters, allowing them to determine which policy goals to pursue: an independent and relatively unaccountable judiciary, or an accountable and politically aware judiciary.\(^\text{87}\) That is, the choice to elect judges is a choice to make judges accountable to voters.\(^\text{88}\) These proponents argue that state reformers of the judicial selection process who lobbied initially for judicial elections wanted judges to be accountable to the public, not to a group of political elites through an appointive process.\(^\text{89}\) To some of these commentators, strict limitations on judicial speech and activity impede the flow of information to the public necessary to realize this goal.\(^\text{90}\)

Therefore, the choice to elect the judiciary, some would argue, amounts to a choice in favor of transparency and at least a partial rejection of judicial independence.\(^\text{91}\) According to some proponents, the element of transparency inherent in the elective process safeguards the quality and integrity of the judiciary from the potentially corrupting effects of the political process by revealing candidates’ corruption and biases.\(^\text{92}\) Consequently, if the effect of restrictions on judicial speech is to suggest that candidates have no views on salient issues, voters cannot discover which candidates are open-minded, bigoted, ignorant, or unqualified.\(^\text{93}\) An uninhibited judicial campaign, on the other hand, reveals biases, discriminatory prejudices, legal philosophies, and policy preferences, and highlights candidates with good records and superior

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88. Id. at 312.
89. Id. at 311. However, there is debate about this point—other scholars argue that the goal of judicial selection reform in early state constitutional history was directed at creating a judiciary independent from the other branches of government, not a judiciary responsive to popular will. See, e.g., Weiser, supra note 4, at 672–77 (arguing that the institution of judicial elections was intended to increase the power and independence of the courts, not establish popular control; reformers wanted to insulate courts from the partisan politics of the selection process, which operated through the political branches); Carrington, supra note 58, at 90 (“[T]he advocates of judicial elections seldom contended that ‘the people’ would wisely select their judges.”).
90. See Swanson, supra note 11, at 86 (arguing that Minnesota’s “censorship regime” before the United States Supreme Court’s decision in White “effected three anti-democratic results: elections without politics, campaigns without controversy, and candidates without free speech”). Although the author asserts that the purpose of his article is not to argue in favor of judicial elections, Id. at 113, he presents many of the arguments of election proponents. Id. at 97–100, 104–14.
91. Dimino, supra note 87, at 353.
92. Id. at 345 (the effect of candidate speech restrictions is to make it look like candidates do not have views on legal issues, making it difficult for voters to distinguish among candidates).
93. Id.; Swanson, supra note 11, at 110.
In doing so, issue-based campaigns for judgeships may benefit future litigants because thoughtful and qualified candidates can display their knowledge and attract votes. Litigants could even potentially benefit by learning about a particular judge’s opinions on policy matters and planning their arguments accordingly.

In a different approach, some commentators assert that judicial campaigns actually do not damage the independence of the judiciary any more than other selection methods, such as appointive systems. It is unrealistic, and furthermore impossible, they argue, to insist that judges remain completely independent of politics. It has been proven that policy perspectives affect judicial decision-making, and pretending otherwise gives voters the false impression that policy considerations will not affect judicial judgment or vice-versa. They argue that politics will always inform the judicial selection process, even in an appointive system, in the sense that competing interests on the appointing committee will understand the policy effects of choosing a particular judge and will choose accordingly. If political affiliation and philosophy will inevitably be an important factor in judicial selection, why not allow voters to make the political choice?

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94. Dimino, supra note 87, at 345 (discussing the benefits to litigants and attorneys when judges’ views are known).
95. Id. at 354.
96. Id.
97. Id.; The Case for Partisan Judicial Elections, supra note 86, at 397–405 (criticizing merit selection and appointive systems).
98. Vincent Martin Bonventre, Judicial Activism, Judges’ Speech, and Merit Selection: Conventional Wisdom and Nonsense, 68 ALB. L. REV. 557, 560 (2005) (arguing that “political affiliation and philosophy are often, if not always, a primary consideration in judicial selection”). See generally Lubet, supra note 86, at 63 (arguing that even strict limits on campaign speech do not threaten judicial independence as a personal or institutional matter, because restricting speech cannot cause a judge to be “more or less fair and impartial upon taking the bench.”).
99. See Dimino, supra note 87, at 348 (citing Melinda Gann Hall, Constituent Influence in State Supreme Courts: Conceptual Notes and a Case Study, 49 J. POL. 1117, 1123 (1987) (arguing that constituent values deter state supreme court justices from voting in accordance with their preferences where they are perceived as inconsistent with those of constituents) and Melinda Gann Hall, Electoral Politics and Strategic Voting in State Supreme Courts, 54 J. POL. 427, 438–39 (1992) (arguing that state supreme court justices vote with the court majority in order to appease their constituencies, where dissenting would be popular); Jackson Williams, Irreconcilable Principles: Law, Politics, and the Illinois Supreme Court, 18 N. ILL. U. L. REV. 267 (1998) (examining the behavior of Illinois Supreme Court Justices in cases where the electoral and legal systems conflict, and concluding that there is likely an appearance of political influence on the court); Bonventre, supra note 98, at 562 (“A judicial robe is not an ideological lobotomy.”).
100. Dimino, supra note 87, at 348; Bonventre, supra note 98, at 561 (arguing that judges are always political at least in the Aristotelian sense that their decisions affect the body politic).
101. Dimino, supra note 87, at 348–49.
102. Bonventre, supra note 98, at 560; The Case for Partisan Judicial Elections, supra note
Consistent with this argument, election proponents assert that absence of judicial bias is a false ideal. Some posit that speech restrictions do not eliminate actual bias, but only manifestations of it. In reality, they contend, a biased judge could be chosen in an elective state as well as an appointive state; in the elective state, however, voters would know he or she was biased and could respond. If judges make unpopular policy judgments in instances where the law does not compel a certain result, voters should determine which policies are served.

Supporters of judicial elections contend that placing the choice in the hands of voters will preserve, not degrade, the integrity of the judiciary. This assertion rests on the belief that the response of public opinion to unacceptable private speech will discourage unethical behavior on the part of judges and candidates. In other words, proponents of judicial elections trust the democratic process to select able, qualified candidates for the bench.

3. Criticism of Judicial Elections

Critics of judicial elections and supporters of ethical restrictions on judicial conduct insist that there is a compelling state interest in ensuring the independence of the judiciary, and that it should be served either by the enforcement of strict ethical restrictions or by removing

86, at 407 (“[Y]ou cannot take the politics out of decisions about who is going to hold what office, but you can take the people out of the politics.”)


104. Dimino, supra note 87, at 346; Bonventre, supra note 98, at 562 (pointing out that prohibitions on judicial speech and activity do not conceal judges’ ideological leanings, so we cannot avoid those beliefs—what should be avoided, according to the author, is the prejudgment of an issue that is or may come before the judge). Other election proponents trust speech restrictions as a method of ensuring that judicial elections are conducted differently than other elections. See Schotland, supra note 12 (urging states not to limit the safeguards that surround judicial elections, such as regulations on campaigns).

105. Dimino, supra note 87, at 346.

106. See id. at 378 (contending that because judicial decisions have policy consequences, public involvement by voters in shaping their states’ policy is part of democratic self-government).


108. Id. at 112–13 (quoting Justice Kennedy: “The legal profession, the legal academy, the press, voluntary groups, political and civic leaders, and all interested citizens can use their own First Amendment freedoms to protest statements inconsistent with standards of judicial neutrality and judicial excellence.” Republican Party of Minn. v. White, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring)).

109. Swanson, supra note 11, at 113; Schotland, supra note 12, at 662 (asserting that the original goal of judicial selection by popular election was to obtain an “able, respected, and enlightened judiciary,” independent from the legislative branch).
judges from the elective process. 110 Alexander Hamilton viewed the independence of the judiciary as essential to the protection of individual rights and the safety of the Constitution from the encroachment of the other two branches, noting that judicial independence is “peculiarly essential in a limited constitution.” 111 Critics of judicial elections argue that the judiciary should be independent in at least two senses: independent of the other two branches, as well as independent from external influences, including the influences of the political arena. 112 This dichotomy has also been characterized as “decisional” versus “institutional” independence. 113

Independence from the political arena is important to critics of judicial elections because of the perceived power of judges to thwart or validate the will of the voting majority. 114 When a judge’s decisional independence is compromised by fear of losing the next election, the constitutional rights of individuals and minorities are jeopardized and the impartial administration of justice may be compromised. 115 For judges who are up for retention, it may be difficult to vindicate the constitutional rights of individuals or minorities where the will of the

110. See Alfred P. Carlton, Jr., Preserving Judicial Independence – An Exegesis, 29 FORDHAM URB. L.J. 835, 838 (2002) (“Trying to maintain our experiment in self government without a truly independent judiciary is like trying to push a rope. It just won’t work.”).

111. THE FEDERALIST No. 78, at 524 (Alexander Hamilton) (Jacob E. Cooke ed., Wesleyan University Press 1961). Hamilton goes on to write, “Th[e] independence of the judges is equally requisite to guard the constitution and the rights of individuals from the effects of those ill humours which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information and more deliberate reflection, have a tendency in the mean time to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.” Id. at 527.

112. Honorable Clarence Thomas, Address at the Federalist Society’s Annual National Convention Banquet: On Judicial Independence (Nov. 12, 1999) [hereinafter Thomas Address]; see Weiser, supra note 4, at 677 (articulating a “working definition” of judicial independence: An independent judiciary is: (1) not dominated by or dependent on the other two branches of government; (2) not unduly entangled in the political machinery of the other branches, such as the political party apparatus by which legislators and elected executive officials organize themselves and their supporters; and (3) not actuated in its decision-making by the same considerations and interests as the other branches); Lubet, supra note 86, at 61. Lubet concludes that the components of judicial independence are “fairness, impartiality, and good faith.” An independent judge gives every litigant “a full and fair opportunity to be heard,” “presides impartially, free from extraneous influences” and “rules in good faith, determined to follow the law as she understands it, unmindful of possible personal, political, or financial repercussion.” Id.


115. Id. at 726.
majority demands the opposite result. Additionally, more than constitutional interests may be at stake when a judge deems it necessary to consider popular will when making decisions. Electoral pressure may lead judges, for example, to sentence criminal defendants in accordance with popular sentiments rather than the rule of law. Therefore, critics argue, electoral independence is vital to protecting the constitutional rights of individuals and minorities from the will of the majority. Freedom from external pressures safeguards the ability of judges to base their decisions solely on “a good faith interpretation of the laws, the Constitution, and the facts of an individual case.”

Critics of judicial elections point to empirical studies suggesting that elected judges are more likely to be swayed by politics in their decision-making than appointed or merit-selected judges. Elected judges, they assert, are more motivated to vote with political interests because of policy preferences, the desire to maintain harmony with other judges on the court, career objectives, or personal standing and respect in the community. Critics argue that this evidence of bias or the appearance of bias diminishes the Court’s legitimacy in the eyes of the public. Furthermore, critics argue, judicial elections do not operate to make judges more accountable to voters. Where there are restrictions on judicial speech and activity during elections, the flow of information to voters is severely limited. As a result, the voters are apathetic about judicial candidates and either do not vote or rely principally on voting cues like party identification, ethnic surname, or incumbency to choose candidates. Critics contend that the reality of judicial elections,

116. Id. at 727.
117. Id. at 728.
118. Id.
119. Id. at 708. The natural counterargument to this point made by election proponents is that insulating judges from the will of the majority renders them partially or wholly unaccountable to the people, who are the final legitimate source of political power in a democracy. Id. Since judges are the final interpreters of the Constitution, it can and does happen that judges thwart the will of the majority. Id.
120. Carlton, supra note 110, at 839.
121. See supra note 99 (referencing studies examining the various influences and biases that affect judicial decision-making).
123. Id. at 320.
126. Zeidman, supra note 124, at 717–18 (citing the author’s own study of voter participation in the State of New York); Dubois, supra note 125, at 758–59; Anthony Champagne & Kyle
therefore, is that a small number of uninformed, relatively apathetic voters choose the candidate whose name they recognize or the candidate affiliated with the political party they support.\textsuperscript{127} Additionally, low voter turnout in judicial elections means that those who vote do not represent the “average voter.”\textsuperscript{128} Rather, the persons who vote are likely those with narrow interests in the election of particular judges.\textsuperscript{129} The conclusion in either case is that the “will of the people” does not likely prevail in most judicial elections.\textsuperscript{130}

\section*{B. Ethics and Political Activity in Judicial Elections}

Early in the last century, concerns expressed in the debate about judicial elections regarding the effect of political considerations on some judges led to the creation of ethical rules governing judicial conduct.\textsuperscript{131} Although some form of judicial ethics code now exists in every state, states with an elected judiciary are especially dependent on ethical restrictions to mitigate the potentially negative effects of the elective process.\textsuperscript{132} This Section explains the origins of these restrictions in the Model Code,\textsuperscript{133} It then discusses the Illinois Code and the Seventh Circuit’s decision in \textit{Buckley v. Illinois Judicial Inquiry Board}, striking down the “announce clause” of the Illinois Code,\textsuperscript{134} and it sets forth the content of the Illinois Code’s restrictions on judicial political speech and activity.\textsuperscript{135} Next, this Section summarizes the

\textsuperscript{127} Zeidman, supra note 124, at 718 (arguing that the power to select judges is vested with political party leaders).
\textsuperscript{128} Croley, supra note 114, at 733 n.134.
\textsuperscript{129} Professor Croley suggests that two groups come to mind: those who are frequently parties to cases before the elected judges, and those who routinely appear as counsel before the elected judges. \textit{Id.}
\textsuperscript{130} \textit{Id.}
\textsuperscript{131} \textit{See infra} Part II.B.1 (describing the origins of the Model Code of Judicial Conduct).
\textsuperscript{132} \textit{See} Weiser, supra note 4, at 665–70 (arguing that ethics canons restricting judicial speech serve a compelling state interest that deserves deference particularly in the context of judicial elections).
\textsuperscript{133} \textit{See infra} Part II.B.1 (explaining the history and purpose of the Model Code).
\textsuperscript{134} \textit{See infra} Part II.B.1 (summarizing the Seventh Circuit’s opinion in \textit{Buckley v. Ill. Judicial Inquiry Bd.}).
\textsuperscript{135} \textit{See infra} Part II.B.1 (summarizing revisions to the Illinois Code made in light of \textit{Buckley}).
United States Supreme Court’s opinion in Republican Party of Minnesota v. White finding a similar “announce clause” in the Minnesota Judicial Code of Conduct unconstitutional.\textsuperscript{136} It then reviews White’s application to other restrictions on judicial activity in subsequent federal and state decisions.\textsuperscript{137} Lastly, this Section examines proposed revisions to the Model Code, drafted in response to White, and litigation testing the scope of its holding.\textsuperscript{138}

1. The Model Code and Its Development in Illinois

The Model Code restricts the political speech and activity of judges in an effort to safeguard the integrity, impartiality, and independence of the judiciary.\textsuperscript{139} The predecessor to the current Model Code was the Canons of Judicial Ethics, approved by the American Bar Association ("ABA") in 1924 as the first formal attempt to articulate ethical and moral standards for members of the judiciary.\textsuperscript{140} In 1972, the ABA extensively revised the Canons, condensing the original thirty-six into seven and reworking the formerly hortatory language.\textsuperscript{141} The ABA revisited the Code in 1990, reducing seven canons to five by combining the rules relating to off-the-bench conduct and adding a preamble and terminology section.\textsuperscript{142} Since the 1924 Canons of Judicial Ethics, the Model Code evolved from an attempt to inspire judges to comport themselves with dignity and restraint to a detailed code that mixes...
hortatory language with a rubric of acceptable and unacceptable
activity.\footnote{143}

In 1986, the Illinois Supreme Court adopted a modified form of the
Model Code.\footnote{144} The Illinois Code then included certain Model Code
provisions restricting the speech of judicial candidates.\footnote{145} Canon 7,
Rule 67(B)(1)(c) provided that a judicial candidate

\begin{quote}
should not make pledges or promises of conduct in office other than
the faithful and impartial performance of the duties of the office” or
“announce his views on disputed legal or political issues . . . provided,
however, that he may announce his views on measures to improve the
law, the legal system, or the administration of justice, if, in doing so,
he does not cast doubt on his capacity to decide impartially any issue
that may come before him.\footnote{146}
\end{quote}

In 1993, in \textit{Buckley v. Illinois Judicial Inquiry Board}, the Seventh
Circuit held these clauses of Rule 67(B)(1)(c) unconstitutional as
inconsistent with the First Amendment.\footnote{147} Judge Posner, writing for the
court, articulated two principles that must be reconciled: first,
candidates should be free to state their position on issues that are
important to voters;\footnote{148} second, judges should decide cases according to
the law rather than with any express or implied commitments made
during a campaign.\footnote{149} The Illinois Code unconstitutionally favored the
latter principle too strongly by forbidding “\textit{all} pledges or promises
except a promise that the candidate will faithfully and impartially
discharge the duties of his judicial office.”\footnote{150} This language did not
limit the clause to issues likely to come before the court.\footnote{151} Rather, it
reached beyond speech that could reasonably be interpreted as
committing the candidate in a way that would compromise his
impartiality.\footnote{152} Even the “announce clause” was not limited merely to

\begin{footnotes}

\footnote{143}{Id.}
\footnote{144}{ILL. CODE OF JUDICIAL CONDUCT; SUP. CT. R. 61–67 (West 2006).
145}{ILL. CODE OF JUDICIAL CONDUCT Canon 7 (B)(1)(c); SUP. CT. R. 67 (B)(1)(c) (West
2006).}
\footnote{146}{Id.}
\footnote{147}{Buckley v. Ill. Judicial Inquiry Bd., 997 F.2d 224, 231 (7th Cir. 1993).
148}{Id. at 227.}
\footnote{149}{Id. The court stated, “The roots of both principles lie deep in our constitutional heritage .
. . . Whatever their respective pedigrees, only a fanatic would suppose that one of the principles
should give way completely to the other . . . .” Id. Furthermore, the Court did not “understand
the plaintiffs to be arguing that because Illinois has decided to make judicial office mainly
elective rather than (as in the federal system) wholly appointive, it has in effect redefined judges
as legislator or executive branch officials . . . .” Id. at 228.}
\footnote{150}{Id. at 228.}
\footnote{151}{Id.}
\footnote{152}{Id.}
\end{footnotes}
statements about how a candidate intends to rule in particular cases. The court found that under a reasonable construction of the rule, the only safe response was silence. The Court concluded that although the principle of “impartial justice under law” is strong enough to warrant government restrictions on the freedom of judicial speech, it is not so strong as to place that speech entirely outside of the constitutional guarantee of the First Amendment.

The Illinois Supreme Court responded to this decision in 1993 by narrowing the speech restrictions accordingly: “A candidate for judicial office . . . shall not make statements that commit or appear to commit the candidate with respect to cases, controversies, or issues within cases that are likely to come before the court.”

Concurring in the Court’s approval of amendments to the Illinois Code in 1993, Justice Heiple remarked that the Illinois Code attempts to recognize that Illinois has an elective judiciary. As a practical matter, the Illinois judge must involve himself in matters political . . . Realistically speaking, it is not enough for the judge or candidate to merely give name, rank and serial number as though he were a prisoner of war. Rather, the public has a right to know the candidate’s core beliefs on matters of deep conviction and principle . . . . In so doing, however, the judge or judicial candidate ought to refrain from stultifying himself as to his evenhanded participation in future cases.

The current Illinois Code seeks the harmony between informed voters and evenhanded judges that Justice Heiple spoke of by restricting judicial speech through the “commit clause,” stated above, a “misrepresent clause,” and by enumerating permissible and impermissible political activity. The “misrepresent clause” prohibits a judge or candidate from “knowingly misrepresent[ing] the identity, qualifications, present position or other fact concerning the candidate or
an opponent." However, a judge may respond to "personal attacks or attacks on the candidate’s record" provided that his or her response does not violate the “misrepresent” or “commit” clauses.

Under the Illinois Code, a judge or judicial candidate cannot act as a leader or officer in a political organization, publicly endorse or oppose another candidate for public office (except while campaigning for judicial office), make speeches on behalf of a political organization, or solicit funds for, or pay an assessment to, a political organization or candidate. However, a judge or candidate may identify himself as a member of a political party, contribute to a political organization, and purchase tickets for and attend political gatherings.

While campaigning for judicial office, a candidate may speak to gatherings on her own behalf, appear in media advertisements to support her candidacy, distribute promotional literature supporting her candidacy, and publicly endorse or oppose other judicial candidates running in the same election. Despite a candidate’s freedom to conduct a public campaign and attend political gatherings, a candidate may not personally solicit campaign contributions. Instead, all fund raising activities must be conducted by a campaign.

160. Id. Canon 7 (A)(3)(e). Among other objections to the amendments, Justice McMorrow dissented from their adoption on the grounds that "publicly ‘correcting’ what the judge regards as a misstatement of fact in a judicial campaign . . . should continue to be prohibited. Most issues of ‘fact’ in the context of judicial elections are, at best, mixed issues of fact and opinion and at worst pure issues of opinion. Thus, the ‘narrow’ exception anticipated by the draftspersons would, in reality, become a large loophole.” Id. Canon 7 cmt. (McMorrow, J., dissenting, Aug. 6, 1993 amendment, quoting the Report of the Committee on Judicial Performance at 5–6).
161. Id. Canon 7 (A)(1) (a).
162. Id. Canon 7 (A)(1) (b).
163. Id. Canon 7 (A)(1) (c).
164. Id. Canon 7 (A)(1) (d).
165. Id. Canon 7 (B) (1)(a)(i).
166. Id. Canon 7 (B) (1)(a)(ii).
167. Id. Canon 7 (B) (1)(a)(iii).
168. Id. Canon 7 (B) (1)(a)(iv). Justice McMorrow objected that “the new standards of the rule are too permissive with respect to the political activities of judicial candidates. The increased permissiveness in judicial candidates’ political activities fosters a misguided over-politicization of the judicial election process in this State.” Id. Canon 7 cmt. (McMorrow, J., dissenting, Aug. 6, 1993 amendment). She further found that the amendments were “imprudent, unnecessary, and len[1] themselves to abuse.” Id.
169. Id. Canon 7 (B) (1)(b)(i).
170. Id. Canon 7 (B) (1)(b)(ii).
171. Id. Canon 7 (B) (1)(b)(iii).
172. Id. Canon 7 (B)(2).
committee of “responsible persons” who may solicit and accept “reasonable campaign contributions,” manage the campaign, and solicit public support for the candidate.  

2. Republican Party of Minnesota v. White

About ten years after Buckley, the United States Supreme Court considered similar provisions of the Minnesota Code of Judicial Conduct in Republican Party of Minnesota v. White. The Court declared that the states cannot prohibit a judicial candidate from “announc[ing] his or her views on disputed legal or political issues” consistent with the First Amendment. The Court examined the clause under strict scrutiny, analyzing whether the announce clause was narrowly tailored to serve a compelling state interest in preserving the impartiality and appearance of impartiality of the judiciary. 

To decide this question, Justice Scalia discussed three possible meanings of “impartiality.” The traditional sense of the word is “lack of bias” with respect to a party to the proceeding, which guarantees that a judge will apply the law in the same way to every litigant. A second possible meaning of impartiality is “lack of preconception in favor of or against a particular legal view.” The Court found that this meaning of impartiality was not even a compelling state interest because a lack of predisposition with respect to legal issues is not necessary to achieve equal justice for two reasons. First, the Court noted that it is virtually impossible to find a judge without preconceptions about the law. Second, the Court stated that having a

\[173\] Id. The rule further states, “Such committees are not prohibited from soliciting and accepting reasonable campaign contributions and public support from lawyers.” Id.


\[175\] Id. at 788.

\[176\] Id. at 774.

\[177\] Id. at 775–81.

\[178\] Id. at 775–76.

\[179\] Id. at 777 (emphasis in original). This sense of impartiality would be concerned with allowing every litigant “an equal chance to persuade the court on the legal points in their case.” Id.

\[180\] Id.

\[181\] Id. The Court quoted then-Justice Rehnquist stating, Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers.

\[Id. at 777–78 (quoting Laird v. Tatum, 409 U.S. 824, 835 (1972) (Rehnquist, J., memorandum opinion)).\]
judge whose mind was a complete “\textit{tabula rasa}” with respect to constitutional and legal issues would be undesirable as evidence of a “lack of qualification, not a lack of bias.”\textsuperscript{182}

The third possible meaning of impartiality is “open-mindedness.”\textsuperscript{183} This type of impartiality would require a judge to consider views that oppose his preconceptions and remain open to persuasion, guaranteeing each litigant at least some chance of winning legal arguments in the case.\textsuperscript{184} The Court found that impartiality in this sense might be desirable, but that the announce clause was not adopted for that purpose.\textsuperscript{185}

Although the Court found a compelling state interest in the first meaning of impartiality, lack of bias for or against parties to the proceeding, the clause was “barely tailored” to achieve it because it restricted speech for or against particular issues, not parties.\textsuperscript{186} The Court held that the “announce clause” covered more than promises to decide issues in a particular way.\textsuperscript{187} Rather, it extended to a candidate’s mere statement of position with respect to an issue, even if she did not promise to maintain that position after the election.\textsuperscript{188} Thus finding that the clause was not narrowly tailored because it was overinclusive of judicial speech, the Court also found the clause underinclusive insofar as it prohibited announcements only during campaigns.\textsuperscript{189}

The Court also expressed guarded disapproval of judicial elections.\textsuperscript{190} Justice Scalia noted the “obvious tension” between Minnesota’s choice to elect its judiciary and the announce clause, which prohibited candidates from speaking on subjects of interest to voters.\textsuperscript{191} Concurring, Justice O’Connor took the opportunity to openly express her disapproval of judicial elections, stating, “If the State has a problem

\textsuperscript{182} Id. \textit{Tabula rasa} is Latin for “clean slate.”

\textsuperscript{183} Id. at 778.

\textsuperscript{184} Id. The Court stated, “This sort of impartiality seeks to guarantee each litigant, not an \textit{equal} chance to win the legal points in the case, but at least \textit{some} chance of doing so.” Id. (emphasis in original).

\textsuperscript{185} Id.

\textsuperscript{186} Id. at 776.

\textsuperscript{187} Id. at 770.

\textsuperscript{188} Id.

\textsuperscript{189} Id. at 783. The Court stated that “this underinclusiveness cannot be explained by resort to the notion that the First Amendment provides less protection during an election campaign than at other times.” Id.

\textsuperscript{190} Id. at 787, 792.

\textsuperscript{191} Id. at 787. Justice Scalia stated that opposition to judicial elections “may be well taken.” Id. He went on to note, however, that, “If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles.” Id. at 788 (internal citations omitted).
with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.192

3. After White: Determining the Scope of Judges’ First Amendment Freedoms

Most judges and commentators agree that there is a great deal of uncertainty regarding the scope of White’s holding.193 When the case was decided, most states had already eliminated the “announce clause” from their ethics canons.194 Although White restricted its analysis to the “announce” clause, litigation testing the scope of its holding placed other provisions curbing political speech and activity of judges under the strict scrutiny microscope.195

First, on remand from the Supreme Court, the United States Court of Appeals for the Eighth Circuit in White held that the “partisan activities clause” and “solicitation clause” of the Minnesota Code were also unconstitutional.196 Applying strict scrutiny, the Eighth Circuit found that the provisions “chill[ed], even kill[ed]” political speech and associational rights.197

According to the Eighth Circuit, the “partisan activities clause” prohibited judges or candidates from identifying themselves as members of a political organization, except as necessary to vote, and from attending political gatherings.198 It also prohibited seeking, accepting or using endorsements from a political organization.199 The court found that the clause was not narrowly tailored to achieve a compelling state interest in impartiality200 because, in preventing judges from aligning with a particular political party, it tried to prevent judges

192. Id. at 792 (O’Connor, J., concurring).
193. N.D. Family Alliance, Inc. v. Bader, 361 F. Supp. 2d 1021, 1041 (D.N.D. 2005) (“[t]o say there is considerable uncertainty regarding the scope of the Supreme Court’s decision in White is an understatement.”).
196. Republican Party of Minn. v. White, 416 F.3d 738,766 (8th Cir. 2005).
197. Id. at 746.
198. MINN. CODE OF JUDICIAL CONDUCT Canon 5 (A)(1).
199. Id.
200. White, 416 F.3d at 753 (adopting the Supreme Court’s definition of impartiality, lack of bias for or against either party to a proceeding, as the compelling state interest advanced by the state).
from aligning with particular views for or against issues, not parties.  

Like the announce clause invalidated by the Supreme Court, the Eighth Circuit found the partisan activities clause “woefully underinclusive” in its attempt to ensure the third possible meaning of impartiality, open-mindedness.

The “solicitation clause” prohibited a judge or candidate from personally soliciting or accepting campaign contributions or publicly stated support. Candidates could form campaign committees for these purposes, but the committees could not disclose to the candidate the identity of contributors or those who were solicited. The Court found that the state could pursue its interest in judicial impartiality by insulating judges from the influence of donations from individuals who may come before the court. However, Minnesota’s solicitation clause was not narrowly tailored to achieve this interest since it prohibited judges from learning the identity of parties who did or did not contribute in the first place.

A different provision was invalidated in 2002, in Weaver v. Bonner, where the Eleventh Circuit held that a provision of the Georgia Code of Judicial Conduct prohibiting a candidate from negligently making false statements or true statements that are misleading or deceptive did not afford the requisite “breathing space” to judicial speech under White. The provision violated the “overbreadth doctrine” because the “chilling effect of . . . absolute accountability for factual misstatements is incompatible with an atmosphere of free discussion contemplated by the First Amendment.”

The Weaver Court also followed the Eighth Circuit in holding that a prohibition on personally soliciting campaign contributions or publicly

201. Id. at 754.
202. Id. at 756.
203. MINN. CODE OF JUDICIAL CONDUCT Canon 5 (B)(2).
204. Id.
205. White, 416 F.3d at 765.
206. Id.
207. Weaver v. Bonner, 309 F.3d 1312, 1319 (11th Cir. 2002). The provision stated that candidates shall not:

use or participate in the use of any form of public communication which the candidate knows or reasonably should know is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation of fact or law or omits a fact necessary to make the communication considered as a whole not materially misleading or which is likely to create an unjustified expectation about results the candidates can achieve.

GA. CODE OF JUDICIAL CONDUCT Canon 7 (B)(1)(d) (West 2006).
208. Weaver, 309 F.3d at 1319.
stated support was unconstitutional.\(^\text{209}\) The clause failed strict scrutiny because it allowed a candidate’s election committee to engage in the same activities.\(^\text{210}\) Therefore, the rule did not significantly reduce the risk of impartiality, since the election winners would feel beholden to their supporters regardless of who solicited their support.\(^\text{211}\) The Eleventh Circuit interpreted \textit{White} to suggest “that the standard for judicial elections should be the same as the standard for legislative and executive elections.”\(^\text{212}\)

Three more Model Code restrictions were held unconstitutional in 2003 in \textit{Spargo v. State Commission on Judicial Conduct}.\(^\text{213}\) In response to pending disciplinary proceedings,\(^\text{214}\) an elected judge in New York challenged provisions of the New York Code which 1) directed judges to maintain “high standards of conduct” to preserve “the integrity and independence of the judiciary,” 2) instructed judges to avoid the “appearance of impropriety,” and 3) prohibited incumbent judges and candidates from engaging in partisan political activities unrelated to their campaign, and required candidates to “maintain the dignity appropriate to judicial office.”\(^\text{215}\) The District Court found these provisions “void for vagueness” in that the language did not inform “a person of any level of intelligence” what conduct is prohibited.\(^\text{216}\) According to the Court, the clauses lacked specificity and were likely to lead judges and judicial candidates to severely limit their conduct in order to avoid a violation.\(^\text{217}\) The Second Circuit, on abstention grounds, vacated the district court’s judgment holding the New York Code provisions facially unconstitutional.\(^\text{218}\)

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\(^{209}\) \textit{Id.} at 1322.

\(^{210}\) \textit{Id.}

\(^{211}\) \textit{Id.} at 1322–23.

\(^{212}\) \textit{Id.} at 1321.


\(^{214}\) Disciplinary proceedings on the part of the New York State Commission on Judicial Conduct were pending against the judge for, among other activities, providing cider and donuts to attract voters, accepting the District Attorney as a client where the DA’s office regularly appeared before the judge, presiding over criminal cases prosecuted by the DA’s office without disclosing that the judge had previously represented the DA’s campaign committee (which still owed him legal fees), attending sessions during the November 2000 Florida recount of presidential votes, participating in a demonstration against the recount process, and serving as keynote speaker at a fundraiser for the Monroe County Conservative Party. \textit{Id.} at 79–81.

\(^{215}\) \textit{Id.} at 81–82.

\(^{216}\) \textit{Id.} at 92.

\(^{217}\) \textit{Id.} at 90–91. “How would anyone know that handing out donuts would constitute a failure to uphold the integrity and independence of the judiciary while serving cake [at a reception where the candidate is introduced] would not?” \textit{Id.} at 91.

\(^{218}\) \textit{Spargo v. N.Y. State Comm’n on Judicial Conduct}, 351 F.3d 65, 68 (2nd Cir. 2003). Abstention was at issue because state disciplinary proceedings were pending against the plaintiff.
Another challenge to the New York Code of Judicial Conduct upheld its provisions in 2003.\footnote{In re Watson, 794 N.E.2d 1, 8 (N.Y. 2003).} In In re Watson, a judge petitioned for review of the disciplinary commission’s finding of misconduct on the basis of his campaign slogan asking voters to “put a real prosecutor on the bench.”\footnote{Id. at 2.} During his campaign the candidate stated, “[w]e are in desperate need of a Judge who will work with the police, not against them,” and urged voters to elect him so that he could “send a message” that criminal conduct would not be tolerated.\footnote{Id. at 2–3.} The candidate later admitted that he violated the Code, but before the Commission issued a determination, White was decided.\footnote{Id. at 3.} After considering the impact of White, the commission distinguished New York’s “pledges and promise” rule from the “announce clause” invalidated in White and sustained the finding of misconduct.\footnote{Id. at 4.} Finding that White did not “compel” a particular result, the Court declined to hold the “pledges and promises” clause unconstitutional.\footnote{Id. at 6, 8.}

In a similar case in 2003, In re Raab, a New York judge challenged the Code’s restrictions on political activities.\footnote{In re Raab, 793 N.E.2d 1287 (N.Y. 2003).} The Code prohibited New York judges from engaging in “any partisan political activity,” including making speeches on behalf of a political organization or candidate, attending political gatherings, or soliciting funds for or contributing to a political organization.\footnote{Id. at 1285 n.2.} The attorney appealed an ex parte restraining order signed by the judge that was later vacated.\footnote{Raab, 793 N.E.2d at 1288–89.} The judge told the lawyer he would be on the bench another 11 years and had a “long memory,” and that it was a “good thing” the firm did not practice matrimonial law [the division to which the judge was assigned].\footnote{Id.}
noting that *White* did not involve review of political activity restrictions.\(^\text{227}\)

A United States District Court in Kentucky reached an opposite result in *Family Trust Foundation of Kentucky v. Wolnitzek* in 2004 after considering a challenge to the Kentucky Code of Judicial Conduct’s “pledges and promises” clause, “commit” clause, and recusal requirements.\(^\text{228}\) The Court issued a preliminary and permanent injunction barring enforcement of the promises and commitment clauses,\(^\text{229}\) holding that the clauses operated to restrict judicial speech to the same extent as an “announce clause” of the type invalidated in *White*.\(^\text{230}\)

The Kentucky Judicial Conduct Commission and other appellants filed an emergency motion to stay the District Court’s injunction in *Wolnitzek*.\(^\text{231}\) Relying on *White*, the Sixth Circuit denied the motion and upheld the District Court’s finding that the “pledges and promises” and “commit” clauses were likely unconstitutional.\(^\text{232}\) The Court found that the difference between the “promises” and “commit” clauses and the “announce clause” in *White* was a difference in name only, because the State had enforced the promises and commit clauses “as a *de facto* announce clause.”\(^\text{233}\)

The following year, in 2005, a United States District Court followed Kentucky in *North Dakota Family Alliance v. Bader*, holding that the North Dakota Code “pledges and promises” and “commit” clauses were unconstitutional.\(^\text{234}\) The Court found that after *White*, judicial candidates clearly may express their views on current legal and political issues without fear of ethical sanction.\(^\text{235}\) The Court also found that the clauses at issue prohibit the same speech that was constitutionally

\(^{227}\) *Id.* at 1290.

\(^{228}\) *Family Trust Found. of Ky., Inc. v. Wolnitzek*, 345 F. Supp. 2d 672 (E.D. Ky. 2004). The Kentucky Code of Judicial Conduct provided that a judge or candidate must not “make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office” or “make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.” *Id.* at 676. The Kentucky Code’s recusal statute requires a judge to disqualify himself where “his impartiality might reasonably be questioned.” *Id.* at 676–77.

\(^{229}\) *Wolnitzek*, 345 F. Supp. 2d at 711.

\(^{230}\) *Id.* at 695.

\(^{231}\) *Family Trust Found. of Ky., Inc. v. Ky. Judicial Conduct Comm’n*, 388 F.3d 224, 244 (6th Cir. 2004).

\(^{232}\) *Id.* at 228.

\(^{233}\) *Id.* at 227.


\(^{235}\) *Id.* at 1028.
protected under *White*, because there is no real distinction between announcing one’s views on issues and making statements that commit or appear to commit a candidate with respect to those issues.\(^{236}\)

Citing *Bader*, the Court in *Alaska Right to Life Political Action Committee v. Feldman* in 2005 reached the same result.\(^{237}\) The Court held that Alaska’s Code, when viewed as mandatory rather than advisory, could not prohibit judges standing for retention from responding to questionnaires consistent with *White*.\(^{238}\) The Code’s disqualification requirement, however, was found narrowly tailored to serve a compelling state interest in assuring parties that judges will apply the law in the same manner to every litigant, and was therefore constitutional.\(^{239}\)

The principles announced in *White* also impacted the debate surrounding contributions to judicial campaigns. A Florida District Court found that making campaign contributions or serving on a judge’s election committee do not constitute grounds for disqualifying a defendant’s attorney in a criminal prosecution.\(^{240}\) A concurring opinion remarked that the applicable precedents arose “when aspirations for judicial elections were high and professional influences restrained judicial candidates.”\(^{241}\) In contrast, after *White*, the justice stated that judicial elections are no longer distinguishable from elections of other candidates.\(^{242}\) In this new landscape, the justice argued that judicial candidates can and must campaign for office like legislative and executive candidates.\(^{243}\) The justice opined that “[i]f such a regime is too disruptive to the operation of courts, well then maybe we should rethink our dedication to the direct election of judges.”\(^{244}\)

4. The ABA’s Proposed Revisions to the Model Code

In light of *White* and the resulting confusion regarding judicial ethical standards, the ABA concluded it was necessary to comprehensively re-evaluate the Model Code.\(^{245}\) In August 2003, the ABA appointed a Joint Commission to Evaluate the Model Code of Judicial Conduct (the

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236. *Id.* at 1039–42.
238. *Id.* at 1083.
239. *Id.*
241. *Id.* at 1170 (Farmer, J., concurring).
242. *Id.*
243. *Id.*
244. *Id.*
245. *Background paper, supra* note 140, at 4.
Joint Commission). The Joint Commission proposes significant substantive and structural revisions to the Model Code in the Final Draft Report, issued for public comment in 2005. Structurally, the Final Draft Report reorganizes the Model Code by presenting the Canons in a new format. For example, the Model Code states broad principles in “Canons” which are followed by commentary that illustrates the boundaries of permissible and impermissible judicial conduct. In contrast, the Final Draft Report resembles the ABA Model Rules of Professional Conduct—mandatory rules followed by commentary to assist the reader in interpreting and applying the rules.

The Joint Commission’s intention in restructuring and revising Canon 5 of the Model Code on political activity echoes the words of Justice Heiple. It attempts to balance the “political realities of judicial selection” against the principles of “judicial integrity, independence, and impartiality.”

The ABA expresses a clear preference for merit selection as the best method of judicial selection. Nevertheless, both the Model Code and the Final Draft Report state principles that are meant to apply in all states, including those that elect their judiciaries. To achieve this end, the Model Code is divided into different versions. Canon 5 announces principles that are applicable to “All Judges and Candidates,” those that are applicable to judges and candidates seeking appointment, and those applicable to judges and candidates for elective office. The result appears incongruous because it permits
elected judges to engage in activities that are expressly forbidden of “All Judges and Candidates.” The Final Draft Report retains similar distinctions, but further subdivides the ‘elected judge’ category into “Partisan Public Elections,” “Non-partisan Public Elections,” “Retention Elections,” and “Appointive Judicial Office.”

The Final Draft Report both lengthens and restructures the list of prohibited political activities that apply to “All Judges and Candidates.” With respect to partisan political activities, the Final Draft Report declares that judges or candidates cannot publicly identify themselves as members of or hold any leadership position in a political organization. Moreover, judges or candidates cannot make speeches on behalf of, solicit funds for, contribute to, or seek endorsements from a political organization. They cannot publicly endorse or oppose any candidate for any public office. Judges and candidates cannot even attend or purchase tickets for dinners or other events sponsored by a political organization. With respect to campaign activities, judges and candidates are prohibited from personally soliciting or accepting campaign contributions. They may not use any campaign

259. See generally Zeidman, supra note 124, at 719. Zeidman notes the irony that staunch supporters of merit selection or other appointment methods currently appear to be the most influential voices in reforming judicial elections. Id. He suggests that this is because merit selection is not likely to be adopted by any state any time soon. Id. The American Bar Association is a visible example, maintaining a preference of merit selection but participating in the debate about judicial election reform. Id.


261. Id. R. 5.04.

262. Id. R. 5.05.

263. Id. R. 5.01(A).

264. Id. R. 5.01(A)(1). Because “[p]ublic confidence in the independence and impartiality of the judiciary is eroded if judges and candidates for judicial office are perceived to be subject to political influence” judges and candidates “are prohibited . . . from assuming a leadership role in a political organization.” Id. R. 5.01 cmt. ¶ 4.

265. Id. R. 5.01(A)(2), (4), (7).

266. Id. R. 5.01(A)(3). The Final Draft Report intends to prohibit judges from “misusing the prestige of judicial office to advance the interests of others.” Id. R. 5.01 cmt. ¶ 5. However, this provision does not prohibit judges or candidates “from privately expressing their views on candidates for any public office.” Id. R. 5.01 cmt. ¶ 7.

267. Id. R. 5.01(A)(5). However, candidate for judicial office in partisan public elections may attend and may purchase tickets to these events, as long as the ticket “does not include a significant fundraising aspect.” Id. R. 5.01 cmt. ¶ 9.

268. Id. R. 5.01(A)(8).
contributions for private benefit,\textsuperscript{270} or use court staff, facilities, or other court resources in a campaign.\textsuperscript{271}

In light of the \textit{White} decision and the broad interpretations of its principles by various courts, the ABA crafted new language restricting judicial speech.\textsuperscript{272} The resulting language is very similar to the current Illinois Code.\textsuperscript{273} The Final Draft Report permits a judge or candidate to publicly state or announce his or her views on legal, political, or other issues.\textsuperscript{274} In addition, judges and candidates may “engage in political activity in support of measures that concern the law, the legal system, or the administration of justice.”\textsuperscript{275}

A judge or candidate faces disciplinary action for knowingly or recklessly making any false or misleading statements or making any statements that may be expected to affect the outcome or impair the fairness of pending litigation.\textsuperscript{276} The Final Draft Report also retains a restriction similar to the Illinois Code, stating that a judge “shall not, with respect to cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.”\textsuperscript{277}

The Commentary to the Final Draft Report assures that these restrictions do not prohibit meaningful campaign speech that provides voters with information necessary to make informed choices.\textsuperscript{278} For example, it is appropriate for a candidate “to make specific campaign promises with respect to judicial organization, administration, and court operations.”\textsuperscript{279}

\begin{footnotesize}
\begin{enumerate}
\item 270. \textit{Id.} R. 5.01(A)(9).
\item 271. \textit{Id.} R. 5.01(A)(10).
\item 272. \textit{Background paper, supra note 140.}
\item 273. \textit{See Ill. Code of Judicial Conduct Canon 7(A)(3)(d) (containing restrictions on the speech and activity of judges and judicial candidates).}
\item 275. \textit{Id.} R. 5.01 (C). Permission to engage in activities “concerning the law, the legal system and the administration of justice” was formerly included in Canon 4 of the Model Code. \textit{Model Code of Judicial Conduct Canon 4(B) (2003).} The Commentary suggests that “revision of substantive and procedural law and improvement of criminal and juvenile justice” falls into this category. \textit{Id.} Canon 4(B) cmt.
\item 276. \textit{Model Code of Judicial Conduct} R. 5.01(A)(12) (Final Draft Report 2005) \textit{available at} http://www.abanet.org/judicialethics/finaldraftreport.html. “A candidate, or a campaign committee on behalf of a candidate, must not make statements that are false or misleading, or that omit a fact necessary to make the communication considered as a whole not materially misleading.” \textit{Id.} R. 5.01 cmt. ¶ 10.
\item 277. \textit{Id.} R. 5.01(A)(13).
\item 278. \textit{Id.} R. 5.01 cmt. ¶ 16.
\end{enumerate}
\end{footnotesize}
management.” This could include promises to reduce the backlog of cases, start court sessions on time, and avoid favoritism in hiring and appointment.

The Commentary reflects the Court’s opinion in *White* by reaffirming that there is a compelling state interest in judicial impartiality and incorporating all three definitions set forth by Justice Scalia. The Commentary defines impartiality as “keep[ing] an open mind with respect to issues that may come before [a judge]” and also states that a judge must not make promises or commitments with respect to “any case or class of cases” or with respect to “specific litigants or classes of litigants.” The Commentary also reflects the ABA’s opposition to broad interpretations of *White*, asserting, “Campaigns for judicial office must be conducted differently from campaigns for other offices.”

### III. Discussion

In the wake of these federal cases, Illinois and other states were forced to examine their ethical rules to determine whether substantive limits on judicial activity comply with the First Amendment. Various federal courts questioned whether the difference between an “announce” clause and a “commit” clause, when faithfully enforced, is substantive or merely semantic. This Part evaluates the substance of the Illinois Code by assessing its success in protecting public confidence in judicial impartiality and independence. First, this Part

279. *Id.*

280. *Id.* It could also include a “pledge to take action outside the courtroom, such as working toward an improved jury selection system, or lobbying for more funds to improve the physical plant and amenities of the courthouse.” *Id.*

281. *Id.* R. 5.01 cmt. ¶ 14.

282. *Id.*

283. *Id.* R. 5.01 cmt. ¶ 15. The Commentary further states, “Citizens have a due process right to judges who will make decisions based on the evidence, the law, and the arguments of the parties, regardless of the personal views of the judge.” *Id.*

284. See Gray, *supra* note 194 at 163–64 (describing activity in the states in the area of judicial ethics after *White*).

285. See N.D. Family Alliance v. Bader, 361 F. Supp. 2d 1021, 1039–42 (D.N.D. 2005) (finding that there is no real distinction between announcing one’s views on issues and making statements that commit or appear to commit a candidate with respect to those issues). *Contra* Family Trust Found. of Ky., Inc. v. Wolnzteik, 345 F. Supp. 2d 672, 696 (E.D. Ky. 2004) (emphasis in original) (finding that “[i]t is an entirely different matter for a judicial candidate to announce a view on a legal matter than it is for him to promise or commit to rule in a certain way…. [T]he promises clause and the commits clause do not suffer from the same underinclusiveness problem as the announce clause, to the extent that they apply to prohibitions against promises to rule a certain way on issues likely to come before the court.”).

286. See infra Part III.B (gathering evidence of the public’s perception of the Illinois judiciary).
recounts the controversy surrounding the 2004 Illinois Supreme Court race, widely viewed as one of the most expensive judicial campaign battles in history.\textsuperscript{287} Next, this Part examines the public’s perception of the Illinois judiciary by reviewing various survey data about Illinois voters and other media coverage of the judiciary.\textsuperscript{288}

\textbf{A. The 2004 Illinois Supreme Court Race}

The suspicion that unlimited campaign contributions tarnish the integrity of the courts came to the fore recently in a scandal involving Illinois Supreme Court Justice Lloyd A. Karmeier. The 2004 Illinois Supreme Court race between Justice Karmeier and his opponent, Gordon Maag, is touted as one of the most expensive judicial elections in United States history.\textsuperscript{289} Karmeier and Maag were running in the fifth district, located in Madison County, known as “a popular venue for class-action lawsuits around the country”\textsuperscript{290} and a nationally ranked “Judicial Hellhole.”\textsuperscript{291} Justice Karmeier won the seat after a campaign in which each candidate raised over $4 million and participated in a flurry of negative advertising over the issue of tort reform.\textsuperscript{292} Many viewed the race as a symbol of the battle over court reform that traditionally aligns Democrats with trial lawyers and Republicans with business interests.\textsuperscript{293}

\textsuperscript{287} See infra Part III.A (recounting the controversy surrounding the 2004 Illinois Supreme Court race).

\textsuperscript{288} See infra Part III.B (reviewing statistical evidence about Illinois voters and media coverage of the judiciary).

\textsuperscript{289} Edward D. Murnane, Legal Reform Inches Along in Illinois, 21 LEGAL BACKGROUNDER (Wash., D.C.), Sept. 22, 2006 (“Never had a judicial election of any level in the United States generated so much money.”); Charles Sheehan, Groups Urge Inquiry into High Court Justice; State Jurist Rules in Cases of Donors, CHI. TRIB., Feb. 8, 2006, Metro, at 6 (“It was the most expensive judicial race in state history.”); Jim Muir, Maag Lawyer Says Defamation Lawsuit Goes Beyond Court Race, THE SOUTHERN ILLINOISAN, Dec. 22, 2004 (“the most expensive judicial race in the nation’s history”). Others contend that the distinction belongs to the 1994 Texas Supreme Court race, described as an all-out battle between plaintiff trial lawyers and civil defense lawyers. Champagne & Cheek, supra note 126 at 915–16.

\textsuperscript{290} Brian Mackey, Campaign Funding Raises Questions, ST. JOURNAL-REGISTER (Springfield, Ill.), Feb. 11, 2005, at 13.


\textsuperscript{292} Christi Parsons, Judge Sues Over His Failed Campaigning; Maag Says Critics Lied in Ads, Fliers on His Decisions, CHI. TRIB., Dec. 22, 2004, Metro, at 1.

\textsuperscript{293} See, e.g., Sheehan, supra note 289, Metro at 6, stating, “The campaign was viewed nationally as a symbol of the battle over tort reform that has pitted traditionally Democratic-aligned trial lawyers against Republican-friendly business interests.” Id.
Following his election to the Court, Justice Karmeier participated in the review of two class-action cases, *Avery v. State Farm Mutual Automobile Insurance*\(^{294}\) and *Price v. Philip Morris, Inc.*\(^{295}\) despite his having accepted thousands of dollars in campaign contributions from litigants and interest groups that filed amicus briefs with the court in those cases.\(^{296}\) Allegedly, lawyers in *Avery* asked Justice Karmeier to recuse himself, but he refused and later cast the deciding vote favoring the donors’ interests.\(^{297}\) Justice Karmeier was named in a misconduct complaint filed with the Illinois Judicial Inquiry Board in 2006,\(^{298}\) which asserted that State Farm employees contributed to Justice Karmeier’s campaign indirectly by giving to JUSTPAC, a political action committee funded by insurance companies and other lobbies for damage award caps.\(^{299}\) State Farm denied that it had any direct ties to Karmeier’s campaign fund.\(^{300}\) Nonetheless, many saw Justice Karmeier’s action as a favor to “big business” and a violation of the judge’s duty to recuse himself where his impartiality might reasonably be questioned.\(^{301}\)

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296. Mackey, *supra* note 290 (reporting the allegations that the organizations contributed at least $830,000 to the court race without disclosing the source of the money); Editorial, *Ethics? Where Did We Put Those...*, ST. LOUIS POST DISPATCH, Mar, 11, 2006, at A45 [hereinafter *Ethics Editorial*] (reporting the allegation that State Farm contributed over $350,000 to Justice Karmeier’s campaign).

297. Mackey, *supra* note 290 (reporting the allegation that Karmeier refused to recuse himself on the plaintiffs’ request).

298. *Illinois Supreme Court Justice Karmeier Named in Misconduct Complaint Over $2.5 Million Accepted in Donations from Defendants and Their Amici in Pending Cases Involving State Farm and Philip Morris USA*, PR NEWSWIRE US, Feb. 7, 2006 (reporting the allegations of the complaint); *Illinois Judge in Possible Investigation*, UNITED PRESS INT’L, Feb. 7, 2006; *Groups Ask State Board to Investigate Karmeier*, BELLEVILLE NEWS DEMOCRAT (Ill.) Feb. 8, 2006.

299. Sheehan, *supra* note 289, Metro at 6 (reporting that the Illinois Civil Justice League, which runs JUSTPAC, contributed $1.2 million to Karmeier’s campaign).

300. Scott Miller, *State Farm: No Favors Bought*, PANTAGRAPH (Bloomington, Ill.), Feb. 9, 2006, at C1. State Farm contended, “The key issue is that State Farm has a long-standing policy that we don’t [sic] contribute to political campaigns. We don’t [sic] have a political action committee.” Id.

301. Stephanie Potter, *Money Taints Judiciary, Panel Warns*, CHI. DAILY LAW BULL., Feb. 13, 2006, at 1; *Ethics Editorial, supra* note 296, at A45 (“A judge who takes $350,000 in contributions and then rules in his donor’s favor leaves himself wide open to questions about conflict of interest.”); *A Better Way to Choose Judges*, BELLEVILLE NEWS DEMOCRAT (Ill.), Aug. 8, 2006 (asking, “How many costly, ugly judicial races will it take to force this change [to merit
In an ironic development, the losing candidate in the expensive 2004 Supreme Court race, Gordon Maag, filed a defamation suit in Madison County claiming that a campaign flyer funded by the Illinois Coalition for Jobs, Growth, and Prosperity contained lies about his record. The disputed flier stated that the "Wheels of Justice’ have ground to a screeching halt” because of Gordon Maag’s “embarrassing—and dangerous” record on crime. It listed six “questionable decisions,” only one of which was authored by then-Appellate Court Justice Maag, accusing him of reducing criminal sentences when in fact a three judge panel ordered new trials. Maag alleged that the purpose of the negative campaigning was not only to defeat him in the Supreme Court race, but was “a deliberate effort to kick him from the bench.” Maag lost the concurrent retention election for his seat on the Illinois Appellate Court. The suit was dismissed in the circuit court on a finding that the flier did not constitute defamation since it criticized his

302. Muir, supra note 289. The Illinois Chamber of Commerce was also named as a defendant on the basis of its actions supporting Karmeier during the election. Id.

Karmeier is not the most recent judge to have instituted a defamation suit against a member of the media. In 2006, the phrase “a little political shimmy shammy” prompted Illinois Supreme Court Justice Robert Thomas to institute a successful defamation suit against columnist Bill Page, who criticized Justice Thomas’ handling of a disciplinary proceeding involving State’s Attorney Meg Gorecki. Christi Parsons, Chief Justice Doesn’t Just Get Mad, He Sues, CHI. TRIB., June 18, 2006, at 1. Gorecki was sentenced to a four month suspension of her law license after being accused of leaving messages on an answering machine suggesting that a political contribution would help a job applicant secure a position. Id. Page wrote that Justice Thomas was not impartial with respect to Gorecki—that he had originally pushed for a tougher sentence but agreed to the lesser sentence to gain the support of individuals connected to Gorecki for a judicial candidate he favored. Id. Justice Thomas vigorously protested Page’s assertions. Id. In November of 2006, a Kane County jury awarded Thomas $7 million. Abdon M. Pallasch, Libel Suit Appeal Could Be Tricky: Colleagues of Thomas May Have to Hear His Case, CHI. SUN TIMES, Nov. 16, 2006, at 44. The $7 million represents an estimate of Thomas’ future earnings, which he alleged would be hindered or eliminated by the defamatory columns. Tona Kunz, War of Words, A Libel Trial Between the Chief Justice of Illinois’ Supreme Court and a Columnist Comes Down to Who Can Say the Least, CHI. DAILY HERALD, Oct. 22, 2006 at 1.


304. Maag, 858 N.E.2d. at 970.

305. Muir, supra note 289.


308. Id.; Vock, supra note 306, at 1.
record, but did not malign Maag personally. Maag appealed the dismissal in the Fifth District, which affirmed the decision of the trial court. Many members of the media noted the irony of a civil suit of this nature, stemming from alleged wrongs committed during a campaign that had focused on the number and kind of lawsuits filed in Illinois. Some speculated that the 2004 campaign, dramatically culminating in Maag’s defamation suit, could only serve to further damage the public’s perception of the judicial selection process.

B. Public Trust and Confidence in the Illinois Judiciary

Although it is difficult to evaluate whether political campaigning in judicial elections like the 2004 Supreme Court race, or similar occurrences, actually harm the public’s confidence in the judiciary, survey data about Illinois voters’ perception of the judiciary may be illustrative.

The National Center for State Courts conducted a survey in 1999 measuring the public’s confidence in the courts. The survey’s findings generally suggested that the public’s perception of the courts is not good. Although about 80% of respondents agreed that “judges
are generally honest and fair in deciding cases,”316 and 85% agreed that “courts protect defendants’ constitutional rights,” the level of trust and confidence in the courts was low compared to other public institutions.317 For example, the “Courts in Your Community” ranked sixth out of eight institutions examined.318 The survey suggested that a possible basis for this discrepancy is the perception that politics influence judicial decisions.319 Approximately 80% of the respondents agreed that “judges’ decisions are influenced by political considerations.”320 They also agreed that “elected judges are influenced by having to raise campaign funds.”321 A 2001 national survey found that eight out of ten registered voters believe that campaign contributions to judges have a great deal or some influence on judges’ decisions.322

This statistic is reflected among Illinois voters. A 2002 survey by the Illinois Campaign for Political Reform reported that more than 85% of voters believed that campaign contributions influence judicial decisions.323 Another 2001 survey found that 72% of Illinois judges believed that the tone and conduct of judicial campaigns had gotten worse over the preceding five years.324

These findings are paired with reports that voters know very little about the judicial selection process.325 A survey by the Chicago Bar Association revealed that a substantial majority of Illinois voters lack knowledge regarding judicial candidates or even the rules of judicial elections.326 Fewer than 20% of voters surveyed said they have “a great

317. Id. at 32.
318. Rottman & Tomkins, supra note 314, at 28.
319. Id.
320. Id.; 1999 NATIONAL SURVEY, supra note 27, at 41.
321. Rottman & Tomkins, supra note 314, at 28; 1999 NATIONAL SURVEY, supra note 27, at 42.
322. NAT’L CTR. FOR STATE COURTS, CALL TO ACTION: STATEMENT OF THE NATIONAL SUMMIT ON IMPROVING JUDICIAL SELECTION 59 (expanded ed. 2002) available at http://www.ncsconline.org/D_Research/CallToActionCommentary.pdf [hereinafter CALL TO ACTION].
325. See infra notes 326–31 and accompanying text (citing a Chicago Bar Association Survey finding that voters are not well informed about judicial elections).
326. CHI. BAR ASS’N SURVEY, supra note 23. The Chicago Bar Association conducted this telephone survey of 306 Cook County voters in April 1998 to determine whether they voted in the
deal of information” about judicial candidates and separately stated that most of the information available is considered “highly fallible.” 327 Only 20% of voters said they were “very aware” and only 32% “somewhat aware” of the qualifications ratings prepared by lawyers’ organizations that screen judicial candidates. 328 In any case, many voters do not trust the ratings: only 13% considered them “very objective” and 73% said they were “somewhat objective.” 329 Finally, only 5% of voters said they are “very satisfied” with the current judicial selection system in Illinois, while 43% said they are “somewhat satisfied.” 330 Notably, satisfaction with Illinois’ current system is highest among those who say that political experience or party affiliation is extremely important in selecting judges. 331

The Chicago Bar Association survey suggested that Illinois voters may be open to judicial selection reform. 332 Sixty-three percent of voters agreed with a proposal for merit selection that stated “[u]nder the merit system, when a judge position becomes vacant a panel of experts recommends a list of qualified candidates and one of them is appointed to the position.” 333 Support for merit selection is highest among those with personal or family experiences with the court system. 334

In further exploration of the relationship between the political arena and judicial selection, a 2003 study of the judicial election process in Cook County (“Cook County study”) concluded that the link between

1998 Illinois primary and the information they relied upon to cast their votes in the judicial elections. Id.

327. Id. Although there were no Illinois Supreme Court elections in 1998, only 7% say they generally have a great deal of information about those campaigns. Id.

328. Id. The survey commented, “It is a bone chilling observation to note that even though very large numbers who go to the polling booth consider themselves to be nearly, or completely ignorant about judicial candidates, most people vote for judicial candidates anyway.” Id. The survey found that 40% vote for the candidates but say they have “hardly any information” and 9% vote with “no information.” Id.

329. Id. Even among those who were “very aware” of the existence of the ratings, only 30% said the rating are “very objective,” and 61% said they are “somewhat objective.” Id. About 20% of the voters said they rely on the candidates’ campaign materials, but the materials were not perceived as objective. Id.

330. Id. In comparison, 80% or more are usually satisfied with institutions and public services such as fire protection, garbage collection, or street lighting. Id.

331. Id. For those who emphasize other priorities, such as courtroom demeanor or legal experience, the level of satisfaction is lower. Id.

332. Id.

333. Id.

334. Id. The study found that “agreement with the merit system is significantly related to dissatisfaction with the current system.” Id. Support for the merit selection proposal was highest among those who are “very dissatisfied” or “somewhat dissatisfied” with the current system, 81% and 76% respectively. Id.
judicial campaign financing and the political slating process is increasingly important.335 The Cook County study concluded that party slating is considered the primary determinant of election winners.336 It also found a high correlation between candidates’ contributions to political parties and their success at the ballot box: in 2000, 83% of winners of non-retention elections gave money to party organizations.337 In contrast, none of the losers contributed money.338

In Cook County, there are two levels of the judicial system: county-wide circuits and smaller “subcircuit districts.”339 County-wide circuit judges are selected by voters of the whole county, but subcircuit judges must reside within the geographic boundaries of their subcircuit and are elected by the voters within those boundaries.340 According to some, the creation of the subcircuits changed the environment of judicial campaign fundraising.341 The Cook County study found that although party slating and campaign funding were important in subcircuit elections, some observers believe that high-quality, unslated candidates could win if they could raise enough funds.342

Other organizations, arguably self-interested, conducted surveys that cast the Illinois judiciary in an unattractive light. For example, Illinois ranked 45th out of all states in a national survey measuring the

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335. Electing Judges in Cook County: The Role of Money, Political Party, and the Voter, THE CHI. APPLESEED FUND FOR JUSTICE 15, Apr. 2003, available at http://www.chicagoappleseed.org/projects/judicialreform/ReformProposal.pdf [hereinafter Cook County Study]. The study noted, however, that the relationship between money and slating could “take one of two forms: (1) fundraising increases the likelihood of being slated, or (2) slating increases the potential for fundraising.” Id. at 25. In the subcircuits, the causal relationship between money and slating varied—some candidates raised large funds before being slated. Id. Others did not, but there was “an understanding that they would be able to provide significant funding once they were slated.” Id.

336. Id. at 16. The study reports the opinion of “one election law expert” that “The [Democratic] Party presents all of the [Democratic Party slated] candidates together, including judges, knowing the audience will vote for the slates.” Id. at 28.

337. Id. at 26.

338. Id.

339. Id. at 10. The subcircuits were created in 1992 to quell criticisms that county-wide elections made it too difficult for minorities and Republicans to get elected to the bench. Id. at 11.

340. Id. at 10. Once elected, both county-wide and subcircuit judges can be assigned to any division of the Circuit Court and have the same powers. Id.

341. Id. at 11.

342. Id. According to the Cook County study, the small geographic size of the subcircuits allows candidates to distribute campaign information to every voter with a relatively modest amount of money. Id. However, in some instances poorly qualified slated candidates beat highly qualified candidates who could not raise large amounts of campaign funds. Id. Additionally, uncontrollable factors like ballot position and ethnicity of last name continue to play a role in voter decision-making, increasing the uncertainty about the role of campaign financing. Id.
reasonableness and fairness of the court system, according to a study commissioned by the United States Institute for Legal Reform in 2006.\textsuperscript{343} On “judicial impartiality” and “judges’ competence,” Illinois ranked 45th and 43rd, respectively.\textsuperscript{344} In the same survey, Cook County rated “third worst” among cities or counties nationally with “the least fair and reasonable litigation environments,” followed closely by Madison County.\textsuperscript{345} By a wide margin, the number one reason given for this ranking was “biased judgment.”\textsuperscript{346} In a separate national survey from the American Tort Reform Foundation, Cook, Madison, and St. Clair counties all appeared on a six-member list of “Judicial Hellholes” around the entire country.\textsuperscript{347} The results of these surveys were widely reported in the media.\textsuperscript{348}

An assessment of judicial bias by third-party interest groups, which frequently have their own agenda, may not be unimpeachable, in that such groups may depict the judiciary in a particular fashion suitable to their interest.\textsuperscript{349} However, even if the survey results are driven by inaccurate perceptions, perceptions matter; perceptions can influence behavior.\textsuperscript{350} Furthermore, if the public has a view of the courts that inaccurately reflects the judiciary’s performance, it does no good to pretend those views do not exist.\textsuperscript{351}

IV. ANALYSIS

Most judges in Illinois are intelligent, qualified, and ethical; it is not the purpose of this Comment to suggest otherwise. Furthermore, thisComment does not mean to suggest that Illinois’ current method of judicial selection results in more instances of judicial misconduct. Rather, it suggests that survey data and the critical tone of media coverage of the Illinois judiciary\textsuperscript{352} support the assertion that the campaign tactics and political interests that control Illinois judicial

\textsuperscript{343} STATE LIABILITY SYSTEMS RANKING STUDY, supra note 24, at 1.
\textsuperscript{344} Id. at 4.
\textsuperscript{345} Id. at 12.
\textsuperscript{346} Id.
\textsuperscript{347} JUDICIAL HELLHOLES, supra note 291, at 7.
\textsuperscript{349} Cf. Carrington, supra note 58, at 107 (discussing the effect of modern journalism on public cynicism).
\textsuperscript{350} Rottman & Tomkins, supra note 314, at 31.
\textsuperscript{351} Id.
\textsuperscript{352} Supra Part III.B (summarizing survey data that indicates problems with the public’s perception of the Illinois judiciary).
elections threaten the appearance of impartiality. In so doing, they threaten to further erode the public confidence in the integrity of the judiciary. In this climate, the Illinois Code cannot safeguard the judiciary against the threats to judicial independence posed by the combination of free speech and money flowing in from opposing interest groups.

This Part contends that the state of First Amendment jurisprudence, holding restrictions on judicial speech unconstitutional, further weakens the fragile case for judicial elections. Without meaningful restrictions on judicial speech and conduct, campaigns for judicial office will resemble those for executive or legislative office. This is not what the drafters of the 1848 Illinois Constitution hoped to accomplish by instituting the elected judiciary. This Part considers proposed intermediate methods of reforming judicial elections, such as public financing of judicial campaigns, amending ethical rules, and relying on disqualification to ensure judicial impartiality. It concludes that these intermediate reforms are inadequate responses to the problems facing the Illinois judiciary.

A. According Broad First Amendment Freedoms to Judicial Speech Undermines Arguments in Support of Judicial Elections

Current First Amendment jurisprudence further weakens the case for judicial elections. First, it is no longer reasonable to rely on ethical restrictions to regulate inappropriate judicial activity. Second, the perceived influence of third-party interests in judicial elections poses a

353. See Cook County Study, supra note 335 (discussing the importance of campaign funds and slating in achieving success in a Cook County judicial election).
354. See De Muniz, supra note 3, at 764 (noting the debate regarding whether special interest financing of judicial elections threatens judicial impartiality).
355. Cf. Weiser, supra note 4, at 666 (arguing that the United States Supreme Court’s failure to accord deference to the state’s interest in judicial independence has left a “gaping hole” in the constitutionality of ethical canons).
356. See infra Part IV.A (rejecting arguments in support of judicial elections in light of the unconstitutionality of speech restrictions).
357. See infra notes 382–91 and accompanying text (discussing the potential for judicial campaigns to become like other political campaigns).
358. See supra Part II.A.1 (discussing the political situation prior to the institution of the elected judiciary, where the judiciary was completely dependent on the appointment power of the General Assembly).
359. See infra Part IV.A.1, 2, and 3 (considering and rejecting intermediate proposals for the reform of judicial elections).
360. Id.
361. See infra Part IV.A.1 (discussing the impractical nature of judicial speech restrictions).
threat to the public’s confidence in the judiciary. Third, in the resulting climate, Illinois’ interest in judicial independence far outweighs the asserted interest in judicial accountability to the public.

1. The Ineffectiveness of Speech Restrictions

Some interpretations of the Illinois Code illustrate that it can be reasonable and fairly applied, at least with respect to extra-judicial activities and appointments. However, advisory ethics opinions regarding permissible judicial speech illustrate the limited utility of the Illinois Code in resolving the conflict caused by federal rulings on the First Amendment rights of candidates and judges. Neither the Illinois Code nor advisory opinions interpreting it effectively circumscribe the limits of acceptable speech. According to some interpretations, it appears that a judge may speak in almost any forum, on and off the campaign trail, on any conceivable issue, as long as she “takes pains” to ensure that nothing she says casts doubt on her ability

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362. See infra Part IV.A.2 (describing the impact of third-party interests on judicial elections).

363. See infra Part IV.A.3 (arguing that Illinois’ interest in judicial independence outweighs the desire for judicial accountability to the public).

364. Advisory opinions of the Illinois Judicial Elections Committee and the Illinois Judges’ Association demonstrate such reasonable application. Interpreting the rule requiring a candidate to maintain the dignity of judicial office, ILL. JUDICIAL CODE OF CONDUCT Canon 7(A)(3)(a), the Committee found that it is permissible and laudable for a judge to participate in civics functions, such as a children’s parade. Ill. Judicial Ethics Comm., Op. 94-3, 1994 WL 808084 (Jan. 19, 1994). Similarly, a judge may sponsor a little league team and have the judge’s name on the team uniforms, without lessening public confidence in the integrity or impartiality of the judiciary. Ill. Judicial Ethics Comm., Op. 00-3, 2000 WL 776884 (Apr. 18, 2000). However, a judge engages in inappropriate and misleading political campaigning when he or she uses “Judge” in campaign advertising in a way that would make people think he or she already was a judge. Ill. Judges’ Ass’n, Op. No. 98-3 (Apr. 8, 1998), available at http://www.ija.org/ethicsop/opinions/98-03.htm (interpreting ILL. JUDICIAL CODE OF CONDUCT Canon 7(A)(3)(d)(ii), which provides that a candidate for judicial office shall not “knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate”).

With respect to extrajudicial appointments, the Judicial Ethics Committee correctly found that a judge should not serve on an alderman’s advisory committee, where the judge will be asked to advise on an indefinite topical basis regarding matters which the alderman or others might present to the City Council. Ill. Judicial Ethics Comm., Op. 96-14, 1996 WL 407643 (Jul. 16, 1996). Neither may a candidate for judgeship serve as a deputy voter registrar; such patently political activity would violate the Illinois Code, the Election Code, and the Illinois Constitution. Ill. Judicial Ethics Comm., Op. 98-16, 1998 WL 796070 (Nov. 10, 1998).

365. See infra notes 366–77 and accompanying text (noting the difficulty of defining limits of acceptable speech).

366. See Swanson, supra note 11, at 105 (supporting the abandonment of speech restrictions because of the difficulty of enforcing them, since it is “impossible for a candidate to know when his political speech crossed the boundary between permissible and impermissible.”)
to decide issues impartially.\textsuperscript{367} It is difficult, however, to articulate what “taking pains” entails.\textsuperscript{368} Although writing a disclaimer on a scholarly article is sufficient, for example, it is not clear whether and what other actions might be sufficiently painstaking.\textsuperscript{369}

For example, the Illinois Code permits a judge to speak, write, or lecture about any topic concerning “the law, the legal system, and the administration of justice,”\textsuperscript{370} but forbids him to say anything that may

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\item \textsuperscript{367} The Illinois Code states that a judge or a candidate may engage in “law related activities” such as speaking, writing, lecturing, or teaching on topics “concerning the law, the legal system, and the administration of justice,” provided the judge “does not cast doubt on his or her capacity to decide impartially any issue that may come before [the judge].” \textit{ILL. CODE OF JUDICIAL CONDUCT} Canon 4(A); \textit{ILL. SUP. CT. R.} 64(A). Consistent with this principle, the Committee ruled that a judge, then a candidate for a higher judicial office, may publish an essay in a local newspaper about crime and “the gun problem.” \textit{III. Judicial Ethics Comm.}, Op. 94-5, 1994 WL 808086 (Mar. 22, 1994). The essay advocated strict gun control, but contained a disclaimer that “as a member of the judiciary the author is committed to remain impartial with regard to any issue before him as a judge.” \textit{Id.}
\item \textsuperscript{368} Under \textit{Buckley}, gun control may be considered a “general topic” concerning the law, the legal system, and the administration of justice. \textit{Id.} Canon 7(A)(3)(d)(i), amended in accordance with \textit{Buckley}, states that a candidate cannot make “statements that commit or appear to commit the candidate with respect to cases, controversies, or issues within cases that are likely to come before the court.” \textit{ILL. CODE OF JUDICIAL CONDUCT} Canon 7(A)(3)(d)(i)(2006). In finding the Illinois Code’s “announce clause” unconstitutional, the \textit{Buckley} court noted that it unconstitutionally prohibited judges or candidates from discussing topics such as “substantive due process, economic rights, search and seizure, the war on drugs, and the use of excessive force by police, the conditions of prisons, or products liability—or for that matter about laissez-faire economics, race relations, the civil war in Yugoslavia, or the proper direction of health-care reform.” \textit{Buckley v. III. Judicial Inquiry Bd.}, 997 F.2d 224, 231 (7th Cir. 1993). The Commission opined that gun control fits within this list because it is a “general issue of public concern,” but not the type of issue that would commit the judge to rule a particular way. \textit{III. Judicial Ethics Comm.}, Op. 94-5, 1994 WL 808086 (Mar. 22, 1994)
\item In another opinion, the Committee found that judges may create a “Speakers’ Bureau” and inform the public of their availability to speak on issues regarding “the law, the legal system, and the administration of justice.” \textit{III. Judicial Ethics. Comm.} Op. 94-17, 1994 WL 808097 (June 17, 1994). When asked whether specific issues were acceptable for discussion, the Committee opined that judges may speak about abortion, the death penalty, sentencing issues, the competence (or lack thereof) of lawyers generally, the activities and positions of the organized bar, the merit of proposed legislation, and local government issues, like bond issues and tax referendums, jail overcrowding, and plea bargaining. \textit{Id.}
\item There are also apparently few limits regarding the acceptable forum for judicial speech. A judge may be a featured speaker at the dinner of a political party, held after election day, provided that the event is a community gathering, not a political fundraiser, and provided that the speech does not compromise the judge’s independence and integrity. \textit{III. Judicial Ethics Comm.}, Op. 96-19, 1996 WL 557296 (Sept. 16, 1996). The “nature” of the dinner determines whether the judge is speaking on behalf of the political system or on behalf of a political party, the former only constituting acceptable speech. \textit{Id.}
\item \textsuperscript{369} See \textit{Swanson}, \textit{supra} note 11, at 105 (noting that enforcement of the announce clause is unworkable).
\item \textsuperscript{370} See \textit{III. Judicial Ethics Comm.}, Op. 94-5, 1994 WL 808086 (Mar. 22, 1994) (a judge’s disclaimer on a scholarly article about gun control was at least partly sufficient to avoid an ethical violation).
\end{itemize}
cast doubt on his ability to make impartial judgments.\textsuperscript{371} Advisory opinions interpreting this rule understandably contain little guidance as to what constitutes permissible speech since virtually all legal and political issues can be discussed in a manner that suggests partiality.\textsuperscript{372} The death penalty, for example, is precisely the sort of divisive, political issue that a judge should not discuss in a manner suggesting he has already determined how he will rule in a particular case.\textsuperscript{373} That being the case, how is a reasonable judge to know what speech casts doubt on his ability to judge impartially?\textsuperscript{374}

At the same time, speech restrictions do not prevent judges and candidates from signaling their opinions on prohibited issues to voters.\textsuperscript{375} There are a variety of ways candidates can make implied commitments, such as slogans in campaign literature, statements about opponents, emphasis on certain aspects of the candidate’s law experience or judicial records, and, of course, endorsements.\textsuperscript{376} The 2004 Illinois Supreme Court race illustrates the way judicial campaigns can be highly issue-oriented without explicitly violating the Illinois Code.\textsuperscript{377}

Some proponents of judicial elections applaud public speech that lets voters learn about judges’ predilections, arguing that there is no such thing as an impartial judge, a \textit{tabula rasa}, and that voters in a democracy should have freedom to choose judges based on policy considerations.\textsuperscript{378} This argument misconstrues the function of the

\begin{footnotesize}
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\item \textsuperscript{371} Ill. Code of Judicial Conduct Canon 4 (2006).
\item \textsuperscript{372} “Almost anything a judicial candidate might say about ‘improv[ing] the law’ could be taken to cast doubt on his capacity to decide some case impartially, unless he confined himself to the most mundane and technical proposals for law reform.” Buckley v. Ill. Judicial Inquiry Bd., 997 F.2d 224, 229 (7th Cir. 1993).
\item \textsuperscript{373} Id.
\item \textsuperscript{374} Swanson, supra note 11, at 105; see Spargo v. State Comm’n on Judicial Conduct, 244 F. Supp. 2d 72, 81–82 (N.D.N.Y. 2003) (finding provisions of the New York Judicial Code of Conduct vague and lacking specificity).
\item \textsuperscript{375} Minzner, supra note 19, at 210.
\item \textsuperscript{376} Id. at 215–27 (discussing the ways these methods can and have been used to send messages to voters about specific issues that are prohibited by the judicial code).
\item \textsuperscript{377} See supra Part III.A (recounting the 2004 Illinois Supreme Court race, which pitted business interests against the plaintiffs’ bar in an expensive, highly politicized campaign).
\item \textsuperscript{378} See Dimino, supra note 87, at 344–45 (citing Laird v. Tatum, 409 U.S. 824, 835 (1972) (Rehnquist, J., memorandum opinion)) (“Proof that a Justice's mind at the time he joined the Court was a complete \textit{tabula rasa} in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.”).
\end{enumerate}
\end{footnotesize}
judiciary.\textsuperscript{379} When judges have unlimited freedom to discuss divisive issues in a manner implying their intention to rule a certain way, the judiciary appears like a representative branch, where candidates and judges are sought or avoided on the basis of their opinions on policy matters.\textsuperscript{380} This is undesirable because unlike a legislative or executive branch, the judiciary functions as an independent body applying democratically enacted law to facts, regardless of the desires of voters.\textsuperscript{381}

The decisional trend in state and federal courts appears directed at broadening, not limiting, elected judges’ First Amendment freedoms.\textsuperscript{382} Judges and judicial candidates currently enjoy the constitutional right to announce their views on disputed legal and political issues.\textsuperscript{383} Guided by the Court’s decision in \textit{White}, various state courts and federal courts of appeals found other restrictions on judicial speech unconstitutional, including restrictions prohibiting judges from making “pledges or promises” or “commitments” to rule a particular way, and prohibitions against making misrepresentations about an opponent.\textsuperscript{384} It is not patently unreasonable to doubt the practical difference between the “announce” and “commit” clause, since both appear to be drafted with the same intent.\textsuperscript{385} Critics of this trend, however, argue that such an expansive reading of \textit{White} unjustifiably disregards the state’s interest in promoting judicial integrity, impartiality, and independence.\textsuperscript{386}

\begin{itemize}
\item \textsuperscript{379} See \textit{White}, supra note 15, at 1061 (arguing that accountability to voters conflicts with “the essence of our tripartite system of government.”).
\item \textsuperscript{380} Id.
\item \textsuperscript{381} See, e.g., \textsc{Model Code of Judicial Conduct} R. 5.01, cmt. ¶ 15 (Final Draft Report 2005), available at http://www.abanet.org/judiciethics/finaldraftreport.html (“the judicial role is different from the role of legislative or executive branch officials.”); Thomas Address, supra note 112, at 2 (“It is th[e] ability to render judgment without concern for anything but the law that should distinguish judges from members of the legislature or the executive branch.”).
\item \textsuperscript{382} See \textit{De Muniz}, supra note 3, at 764 (arguing that \textit{White} will likely lead to the elimination of most state judicial campaign speech regulations).
\item \textsuperscript{383} \textsc{Republican Party of Minn. v. White}, 536 U.S. 765, 788 (2002).
\item \textsuperscript{384} Weaver v. Bonner, 309 F.3d 1312 (11th Cir. 2002); Spargo v. State Comm’n on Judicial Conduct, 244 F. Supp. 2d 72 (N.D.N.Y. 2003); Family Trust Found. of Ky., Inc. v. Wolnitzek, 345 F. Supp. 2d 672 (E.D. Ky. 2004); Family Trust Found. of Ky., Inc. v. Ky. Judicial Conduct Comm’n, 388 F.3d 224 (6th Cir. 2004); N. D. Family Alliance v. Bader, 361 F. Supp. 2d 1021 (D.N.D. 2005).
\item \textsuperscript{385} See \textit{Bader}, 361 F. Supp. 2d at 1039–42, (finding that there is no real distinction between announcing one’s views on issues and making statements that commit or appear to commit a candidate with respect to those issues).
\item \textsuperscript{386} Gray, \textit{The Limits of White}, supra note 195, at 315; see \textsc{Weiser}, supra note 4 (contending that the Supreme Court’s decision in \textit{White} failed to take into account the compelling state interest in judicial independence).
\end{itemize}
The implications of the Eleventh Circuit’s holding in *Weaver*, finding Georgia’s “misrepresent” clause unconstitutional, resonates in Illinois where campaign tactics like those used against Gordon Maag are not uncommon.\textsuperscript{387} The *Weaver* court found that Georgia’s “misrepresent clause” did not afford enough “breathing space” to judicial speech by prohibiting misleading statements and material misrepresentations of fact or law.\textsuperscript{388} The Illinois Code contains similar restrictions, providing that a judge or candidate may not “knowingly misrepresent the identity, qualifications, present position or other fact concerning [a] candidate or an opponent.”\textsuperscript{389} Maag alleged in his defamation suit that statements about his record in a campaign flier fit this category.\textsuperscript{390} If *White* really eliminates the barriers to nasty campaign tactics prohibited by the “misrepresent” clause, the line between judicial elections and elections for executive and legislative office will be virtually invisible.\textsuperscript{391}

2. Third-Party Influence

Even more disturbing than the application of Illinois’ “misrepresent” clause to Maag’s defamation suit is that the campaign flier at issue was not challenged as a violation of the clause because it applies to judges, not third-party interest groups.\textsuperscript{392} Judicial candidates hardly need First Amendment freedoms to besmirch an opponent’s reputation during a campaign when supportive third parties with resources are willing to exercise their free speech to that end instead.\textsuperscript{393}

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  \item \textsuperscript{387} See Deborah Goldberg et al., Justice at Stake Campaign, The New Politics of Judicial Elections 2004, 10, 17, 18–19 (2004), available at http://www.justiceatstake.org/files/NewPoliticsReport2004.pdf [hereinafter Goldberg] (describing other campaign ads used in the 2004 Illinois Supreme Court race, such as an ad criticizing Justice Karmeier because he “gave probation to kidnappers who tortured and nearly beat a 92-year-old grandmother to death;” an ad criticizing Gordon Maag for voting to “overturn the conviction of a man who sexually assaulted a 6-year-old-girl;” a television commercial blaming “bad judges” and “their trial lawyer friends” for various societal problems; a television commercial accusing Justice Karmeier of “tak[ing] money from the asbestos industry which is responsible for hundreds of thousands of deaths. . . . How can he be on our side if the big corporate interests are on his side?”).
  \item \textsuperscript{388} Weaver, 309 F.3d at 1319.
  \item \textsuperscript{390} See supra, notes 302–11 and accompanying text (recounting Maag’s allegations that the statements in the campaign flier were lies and distorted his record).
  \item \textsuperscript{391} See Renata Olafson Selzer, The Future of Judicial Elections in North Dakota, 82 N.D. L. Rev. 197, 203–04 (2006) (discussing the potential for judicial elections to become “full-blown political campaigns”); Weiser, supra note 4, at 654 (stating that confusion about ethical standards for judges comes at a time when judicial elections look more and more like elections for political office).
  \item \textsuperscript{392} Ill. Judicial Code of Conduct Canon 7(A)(3)(d)(ii) (West 2006).
  \item \textsuperscript{393} See De Muniz, supra note 3, at 764 (noting the debate regarding whether special interest
The influence of money from third-party interest groups in judicial races works current, not prospective, institutional damage on the judiciary. When judicial campaigns are a battleground for opposing political interests, such as occurred in the war over court reforms in the 2004 Illinois Supreme Court race, the public will stop trusting the impartiality of judges who campaign on behalf of those interests. Regardless of whether judges are actually beholden to their contributors, the public will perceive that they are. A 2001 national survey found that eight out of ten registered voters believe that campaign contributions to judges have a great deal of or some influence on judges’ decisions. Noting this statistic, one commentator surmised that the number will surely rise as post-White judicial campaigns combine the rhetoric of special interest groups and speeches by judicial candidates promising certain outcomes with personal solicitations of campaign contributions from lawyers and voters.

Aside from threats to the appearance of impartiality, inappropriate external pressures may in some instances lead to real judicial misconduct. At the very least, there is a palpable risk that campaign contributions jeopardize judicial independence by creating the inference of a judge’s financial obligation to decide cases in a manner favorable to donors’ interests. Because Illinois judges must stand for reelection every four, six, or ten years, the shadow of donors’ interests in the context of the next campaign is always looming.

Combined with an absence of meaningful restrictions on speech, the escalating cost and politicization of Illinois judicial campaigns creates a
climate threatening to the independence and impartiality of the judiciary.\textsuperscript{403} Due to federal decisions allowing candidates to state their views on controversial issues, limitless campaign expenditures, and candidates who are slated by political parties, Illinois judicial elections are increasingly difficult to distinguish from campaigns for legislative or executive office.\textsuperscript{404}

3. The Compelling Interest in Judicial Independence

One standard counterargument to the rhetoric about judicial independence is that the risks to that independence posed by judicial elections are acceptable to ensure judicial accountability to the public.\textsuperscript{405} This argument rests partly on the flawed assumption that the elected judiciary was instituted to give the majority democratic power over judicial decisions.\textsuperscript{406} On the contrary, the movement towards judicial elections stemmed from the negative effects of the legislature’s complete power to appoint judges, which subjected the judicial selection process to disruptive political battles.\textsuperscript{407} Nonetheless, the judicial accountability argument may have been persuasive when the states’ interest in ensuring judicial independence and impartiality could partially be addressed by meaningful regulations on campaign speech and activities.\textsuperscript{408} After \textit{White}, the state’s purview over judicial elections seems to be shrinking in size to match its limited dominion over legislative and executive elections.\textsuperscript{409}

\textsuperscript{403} \textit{Call to Action}, \textit{supra} note 322, at 7; see Selzer, \textit{supra} note 391 (discussing the changing climate of judicial campaigns).

\textsuperscript{404} See Selzer, \textit{supra} note 391, at 203–04 (discussing the potential for judicial elections to become “full-blown political campaigns”).

\textsuperscript{405} \textit{See supra} Part II.A.2 (presenting the arguments in favor of judicial elections).

\textsuperscript{406} \textit{See supra} notes 55–57 and accompanying text (describing the history of judicial selection in Illinois).

\textsuperscript{407} \textit{Id.} Critics of alternate judicial selection methods validly respond to this point by noting that appointive systems or merit selection cannot eliminate political influence from the judicial selection process. Dimino, \textit{supra} note 87, at 348; see generally \textit{Richard A. Watson & Rondal G. Downing, The Politics of the Bench and the Bar} (1969) (one of the first and most comprehensive studies of the merit selection system, finding that merit selection does not entirely eliminate political forces from judicial selection, but also reporting many positive consequences). Although politics cannot be completely eliminated, in the sense that an appointing committee or other body will likely be responsive to political pressures, the most corrosive effects of judicial election campaigning can be minimized. See Jona Goldschmidt, \textit{Merit Selection: Current Status, Procedures, and Issues}, 49 U. Miami L. Rev. 1, 78 (1994) (arguing that although politics has not been eliminated under the merit plan in various states, it has been greatly minimized).

\textsuperscript{408} Cf. Weiser, \textit{supra} note 4, at 664–67 (arguing for deference to restrictions on judicial activity as necessary to serve a compelling state interest).

\textsuperscript{409} See \textit{Braynen v. State of Fla.}, 895 So.2d 1169, 1170 (Fla. Dist. Ct. App. 2005) (Farmer, J., concurring) (opining that “judicial elections can no longer be distinguished on any serious basis from elections of other candidates to office.”).
In this new atmosphere, the risks to judicial independence outweigh any perceived interest in judicial accountability. 410  This is particularly true considering the evidence that Illinois judges are not meaningfully accountable to voters; in reality, they are accountable to political party leaders. 411  Moreover, there is significant data supporting the proposition that voters are apathetic about judicial elections, and rarely vote. 412  When they do, they vote based on limited knowledge that they consider unreliable or based on factors like party identification and ethnicity of last name. 413  Furthermore, judicial candidates cannot get on the ballot or hope to win without the political and monetary support of party leaders. 414  In this context, exercise of the voting franchise does not bring judges in line with public opinion, even assuming that result were desirable. 415

Assuming that judicial accountability to the public is a realistic goal, reliance on the judicial accountability argument is rooted in the false premise that independence and accountability are incompatible. 416  Taking the simplest definition of accountability to be “answerability or responsibility,” to define judicial accountability one must determine to whom judges answer. 417  As discussed, proponents of judicial elections argue that judges should be accountable to the public 418 while

411. See Cook County Study, supra note 335 (asserting that party slating is considered the dominant factor in the outcome of judicial elections in Cook County).
412. See supra Part III.B (presenting survey data about Illinois voters).
413. Id. One recent local illustration of the importance of an ethnic surname involved Chicago attorney Frederick Rhine. Steve Patterson, Failed Candidate Hopes New Name Gets Him Elected, CHI. SUN TIMES, Oct. 17, 2005, at 8. In 2002, Rhine ran for judge in Cook County and was defeated by a candidate named Patrick Michael O’Brien. Id. To bolster his chances in the 2005 election, Rhine changed his name to something more appealing—Patrick Michael O’Brien. Id. Rhine admitted, “It seemed like a very voter-friendly name.” Id. He also said, “I had hoped not to make this terribly public . . . I don’t want to become the poster boy for all that’s wrong with the system.” Id. He added that the campaign tactic was the result of “the unfortunate reality of our system.” Id. According to Rhine, there are three criteria for being a Cook County judge: “A fine Irish name, [whether you are] a slated candidate or [whether you are] the only woman where all the other candidates are male.” Id. Just this year, Gov. Blagojevich signed a bill requiring candidates who changed their names within three years before running for judicial office to include “formerly known as” under their name. Abdon M. Pallasch, Gov OKs Bill Targeting Wannabe Irish Judges, CHI SUN TIMES, Jan. 31, 2007, at 15.
414. See supra Part III.B (presenting survey data about Illinois voters). See supra note 407 for a discussion of the argument that appointive or merit selection systems have the same flaw.
415. See supra notes 124–30 and accompanying text (the “will of the people” does not prevail in most judicial elections).
417. Id. at 1060.
418. See supra Part II.A.2 (presenting arguments in favor of judicial accountability over judicial independence).
opponents frequently argue that judges are accountable only to the “rule of law.” One scholar discusses these two viewpoints and persuasively argues that judicial accountability to the voting public conflicts with the purpose of our tripartite system of government. Asking judges to be accountable to the voting public as constituents begs the question, “What constituents?” How do we identify those groups and what does accountability to them require? Ought judges decide cases with the interests of their constituents in mind? If so, the risks to the due process rights of individual litigants are substantial.

B. Movement Toward Intermediate Remedies

Efforts to reform judicial selection methods by eliminating elections have not proven politically attainable. Despite active efforts of judicial selection reformers, thirty-one states still elect some or all of their judiciaries in contested elections. Recognizing the flaws in this process, Illinois and other states with elected judiciaries are searching for intermediate proposals for reforming the election process that achieve that delicate balance between political reality and judicial integrity.

1. Public Financing

One proposal for mitigating the effects of campaign contributions is public financing for judicial campaigns. Advocates of public financing assert that it will reduce the potential for special interest groups to influence judicial behavior and address the public perception that such influence occurs.

419. White, supra note 15, at 1060.
420. Id. at 1061.
421. Id.
422. Id.
423. Id.
424. See supra notes 114–20 (discussing the way pressures on judges to conform to the majority will threaten the constitutional rights of individuals).
425. Carrington, supra note 58, at 114 (noting that elimination of judicial elections in favor of appointment systems is “not saleable in most states”).
426. BERKSON, supra note 72, at 6.
427. CALL TO ACTION, supra note 322, at 12.
428. See id. at 60 (proposing public financing for at least some judicial elections); GOLDBERG, supra note 387, at 37–39 (same). See generally Richard Briffault, Public Funds and the Regulation of Judicial Campaigns, 35 Ind. L. Rev. 819 (2002) (considering whether public funding for judicial candidates can be made conditional on the candidate’s adherence to an otherwise unconstitutional campaign speech code).
In 2002, North Carolina became the first state to adopt a publicly funded campaign financing system for all levels of the judiciary. Candidates with demonstrated public support who agree to accept strict fundraising and spending limits have access to the Public Campaign Financing Fund. The program is funded in part by revenue from an optional three-dollar tax return check-off, and a fifty-dollar increase in attorney membership fees. Eligible candidates receive lump sum payments to their campaigns and are prohibited from engaging in any further private fund raising. If a candidate is outspent by a privately financed candidate or by third-party expenditures, “rescue” matching funds are available. In the 2004 North Carolina election cycle, fourteen out of sixteen eligible judicial candidates applied to the program; twelve candidates qualified and received funds.

Wisconsin’s experience with voluntary public financing for its Supreme Court races illustrates one potential problem with such a system. Wisconsin supplemented private fund raising in judicial elections for its Supreme Court with a partial public financing system beginning in the 1970s. However, the system was inadequately funded. Wisconsin funded the program with revenues generated by a one-dollar tax return check-off, but taxpayer participation declined sharply in the late 1990s. As the size of the grants diminished, fewer candidates opted to participate.


431. Id. § 163-278.61.
432. Id. § 163-278.63. Other sources of revenue for the fund include previously unspent revenues, civil penalties assessed for violations of the campaign financing statute, and voluntary donations from business entities or other associations. Id. § 163-278.63.
433. Candidates become eligible for funding by limiting private fundraising in the year prior to the race to less than $10,000, filing a declaration of intent, and collecting limited contributions from 350 registered voters. Id. § 163-278.64.
434. Id. § 163-278.65(b).
435. Id. § 163-278.64(d)(3).
436. Id. § 163-278.67(a) and (b). “Rescue Funds” are available when “funds in opposition to a certified candidate or in support of an opponent to that candidate” exceed the “trigger” amount, determined by statute. Id. Rescue matching will provide up to two times the maximum qualifying contributions for the judicial office sought. Id.
438. See Geyh, supra note 429, at 1476–78 (describing the Wisconsin experience).
440. Geyh, supra note 429, at 1477.
441. Id. at 1476.
442. Id.
In Illinois, legislation proposed early in 2006 would create a public financing system similar to North Carolina’s.\textsuperscript{443} It would establish voluntary public financing for eligible candidates\textsuperscript{444} to the Supreme Court and Appellate Court.\textsuperscript{445} Revenue for the fund would be generated by individual taxpayer check-offs, contributions from attorneys, civil penalties, unspent revenues, and voluntary donations.\textsuperscript{446} Like the North Carolina system, the program would provide “rescue funds” if a candidate is outspent by a certain amount.\textsuperscript{447} Participants must agree to abide by strict limits on fund raising and campaign expenditures.\textsuperscript{448}

Public financing in Illinois would not likely resolve the issues that contribute to public cynicism about the courts.\textsuperscript{449} First, candidates must be persuaded that adequate funds will be available to support a candidate opposed by a privately funded candidate.\textsuperscript{450} Second, there is little reason to think that the program would greatly alter the significance of party slating as a determining factor in Illinois’ partisan judicial elections.\textsuperscript{451} Moreover, in many elections, slated candidates have an advantage that can only be overcome by substantial campaign funds; imposing spending limits or other campaign finance reforms might eliminate this leveling agent and further increase the power of slating.\textsuperscript{452}

2. Amending Ethical Rules

Another proposed antidote to politicized judicial campaigns and broad speech restrictions is amending judicial ethics rules.\textsuperscript{453} The Final Draft Report’s proposed revisions to the Model Code aim at this purpose.\textsuperscript{454} As noted above, the proposed revisions are similar to the

\textsuperscript{443} H.B. 4610, 94th Gen. Assem. (Ill. 2006).
\textsuperscript{444} Similar to the North Carolina system, candidates become eligible by filing an application and collecting a limited number of qualifying contributions. \textit{Id.} \textsection 9A-20.
\textsuperscript{445} \textit{Id.} \textsection 9A-5.
\textsuperscript{446} \textit{Id.} \textsection 9A-15(b).
\textsuperscript{447} \textit{Id.} \textsection 9A-35.
\textsuperscript{448} \textit{Id.} \textsection 9A-5.
\textsuperscript{449} See Geyh, supra note 429, at 1478–80 (discussing potential problems with publicly funded judicial elections).
\textsuperscript{450} See id. (discussing the difficulties in finding an adequate source of funding for Wisconsin’s program).
\textsuperscript{451} \textit{Cook County Study}, supra note 335, at 43.
\textsuperscript{452} \textit{Id.}
\textsuperscript{454} The Commission was motivated in part “by issues that continue to arise as a result of the variety of methods utilized in the judicial selection process.” \textit{Id.}
current Illinois Code; the revisions eliminate the “announce clause,” allow judges to speak on measures to improve the law, the legal system, and the administration of justice, and prohibit “commitments” to rule a particular way on an issue likely to come before the court. Therefore, the criticisms leveled at the speech provisions of the Illinois Code apply to the Model Code’s revisions. Ethics rules drafted to accommodate both the First Amendment and the state’s interest in judicial impartiality and independence cannot resolve the tension between inefficacy and unconstitutionality.

3. Reliance on Disqualification Requirements

Finally, some commentators suggest that disqualification rules are an alternative to speech restrictions to serve the state’s interest in judicial impartiality. The decisions in Bader and Feldman reflect the view of judicial election proponents that recusal standards may guarantee that every litigant appear before an impartial judge. Similarly, Justice Kennedy’s concurring opinion in White suggested more stringent recusal standards as an alternative means of safeguarding the appearance of judicial propriety. Ideally, where the state cannot pursue its interest in judicial integrity by the abridgement of speech, disqualification rules could prevent a judge from sitting in cases where his or her impartiality might reasonably be questioned.


456. See supra Part IV.A.1 (arguing that the Illinois Code cannot effectively safeguard the integrity, impartiality, and independence of the judiciary).

457. Id.; cf. De Muniz, supra note 3, at 764 (forecasting the demise of speech restrictions). See also Minzner, supra note 19, at 210 (arguing that speech restrictions notwithstanding, there are a wide variety of methods available to send signals to voters about how a judicial candidate would rule upon reaching the bench).

458. See Carrington, supra note 58, at 115 (suggesting disqualification where a large contributor to a judge’s campaign is a party or has a significant economic stake in the action before the court as one means of mitigating the corrupting effects of politicized judicial elections). See also Family Trust Found. of Ky., Inc. v. Wolmitzek, 345 F. Supp. 2d 672, 706–10 (E.D. Ky. 2004) (upholding Kentucky recusal statutes as narrowly tailored to serve compelling state interests).


460. Republican Party of Minn. v. White, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring) (“Minnesota may choose to have an elected judiciary. It may strive to define those characteristics that exemplify judicial excellence. It may enshrine its definitions in a code of judicial conduct. It may adopt recusal standards more rigorous than due process requires.”).

461. Id.; Carrington, supra note 58, at 115. Cf. 28 U.S.C. § 455(a) et. seq. (setting forth the federal standards for disqualification, that state, “[a]ny justice, judge, or magistrate judge of the
Reliance on disqualification standards as a means of ensuring judicial impartiality in every case, however, is impractical. The difficulties will surely arise in the drafting of a statute adequate to fulfill this function. Defining the activities that implicate recusal and the relationship between those activities and the parties or lawyers before the court are only two potential drafting problems. Furthermore, implementing comprehensive disqualification rules would likely result in administrative problems and substantial costs to the parties interested in bringing motions for recusal.

For other reasons, stringent disqualification standards will not eliminate numerous instances of real or perceived judicial bias. First, the right to recusal becomes theoretical if the public views judicial bias as an institutional problem because parties will consider the remedy futile and forego it entirely. Additionally, motions for recusal are not a transparent method of challenging judicial bias because recusal actions by nature are non-public and rarely attract media attention. The relationship of third parties to the court is also problematic. On the one hand, the right to move for recusal is unavailable to third parties such as interest groups, thereby cutting off those with resources to take action against judicial bias. On the other hand, insofar as disqualification rules limit the influence of substantial contributors on United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

464. Id. Phillips describes his own experience with the Supreme Court of Texas’ consideration of a rule prohibiting judges from sitting where parties or lawyers before the court were substantial contributors, noting some of the difficult questions that arose: the degree of lawyer involvement required before recusal is necessary, the treatment of business entities, defining a “case” before the court that would fall under the ban, and whether the rule should apply to challengers. Id.
465. Carrington, supra note 58, at 115. Professor Carrington considers disqualification rules a “saleable response” to the problem of influential campaign donors and only notes in passing the problem of administrative difficulties and costs to parties. Id.
467. Id. at 479.
468. Id. at 481.
469. Id. at 479.
470. Id.
judges’ impartiality, such rules would not easily reach third-party interest groups in the campaign context; the parties who intend to influence judicial selection by spending money could still spend anonymously.471 In sum, either the recusal mechanism is unsatisfactory because it cuts off third parties with resources from confronting judicial bias, or it is unsatisfactory because it does not prevent third parties from creating judicial bias or its appearance by spending money.

Assuming these problems could be surmounted, the very effectiveness of recusal motions to disqualify partial judges proves a flaw in the mechanism.472 Presuming that current recusal standards are adequate to disqualify judges in appropriate circumstances, every judge who does invoke her First Amendment and campaign solicitation rights will inevitably be disqualified.473 The result would be a transparent, democratically elected judiciary that cannot serve on a myriad of cases because of free speech they engaged in and campaign funding they acquired.474 A less extreme result would jeopardize the due process rights of future litigants by failing to guarantee them an impartial judge.475 Recusal does not protect the “appearance of impartiality” if judges are constantly required to disqualify themselves because of well-known biases and campaign funding practices.476 Stricter disqualification rules may also work at cross purposes with broader First Amendment freedoms; routine disqualifications for campaign speech or conduct that do not necessarily threaten due process could have a silencing effect on candidate speech.477

Because merit selection has not proven politically attainable in many states, judicial selection reformers seem resigned to pursuing other reforms of the judicial election process.478 Although reforming the

471. Carrington, supra note 58, at 115; Champagne & Cheek, supra note 126, at 921 (noting the argument that judges are becoming “captives” of influential interest groups).

472. See Selzer, supra note 391, at 233 (noting that “replacement judges may be hard to find” where discussing controversial political and social issues requires disqualification).

473. See id. (noting that “replacement judges may be hard to find,” where judges are required to disqualify themselves); Kevin McDermott, Recusals By Judges Could Clog the System, ST. LOUIS POST DISPATCH, Feb. 12, 2006, at B1 (suggesting that “a closer look at judicial campaign finance records suggests that such a standard could virtually paralyze Illinois’ court system”).

474. See Sparling, supra note 466, at 480 (noting that “recusal would be futile if all other judges on the bench were similarly prejudiced.”).

475. Cf. Croley, supra note 114, at 726 (arguing that threats to a judge’s decisional independence place the constitutional rights of individuals and minorities in jeopardy).

476. Cf. Selzer, supra note 391, at 233 (discussing the potential problems with relying on recusal as a mechanism to ensure judicial impartiality).

477. Voting and Democracy, supra note 462, at 1142.

478. See, e.g., CALL TO ACTION, supra note 322, at 7 (stating that “[m]any observers have concluded that moving to a wholly appointed judiciary is the best answer to [problems facing
judicial election process is a commendable goal, marginal reforms such as those described in this article do not really address the most apparent problems with judicial elections.479 Those who are serious about judicial selection reform should not settle for less than a comprehensive solution.480

V. PROPOSAL

In light of the inadequacy of the reforms discussed above, this Part contends that judicial elections as they exist are the least preferable means to select the judiciary.481 Without espousing any particular method as a perfect solution, this Part discusses merit selection as an alternative to judicial elections.482
A. The Case for Judicial Selection Reform

Since early in the last century, lawyers and scholars perceived the need to reform the Illinois method of judicial selection. The reasons this movement began still exist: escalating campaign costs, the appearance that candidates are beholden to their campaign contributors, the dominance of party leaders in choosing candidates, the fear that judges make decisions with regard to special interests rather than the law, apathy and lack of information on the part of voters, and public cynicism about the courts as a consequence of these factors.

Modern-day First Amendment jurisprudence, which prevents the State from enforcing meaningful restrictions on speech and campaign conduct, will likely exacerbate these problems. In the current campaign climate, the Illinois Code is an ineffective means of safeguarding the independence and impartiality of the judiciary. If the state’s power to regulate judicial speech and activity is limited to vaguely drafted restrictions, the state is effectively powerless to prevent the judiciary from being transformed into something like a representative branch, where judges announce their policy preferences to gain votes.

Such a transformation would be undesirable because, in our constitutional framework, judges do not “represent” constituents; they make decisions by applying law to the facts of a specific case. The Final Draft Report accurately states, “Citizens have a due process right to judges who will make decisions based on the evidence, the law,

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483. See supra Part II.A.1 (describing the history of judicial selection in Illinois). See also Albert M. Kales, Methods of Selecting and Retiring Judges in a Metropolitan District, 52 ANNALS 1, 12 (1914) (describing many of the problems associated with the election system and first proposing a form of merit selection) [hereinafter Kales I]; Albert M. Kales, Methods of Selecting and Retiring Judges, 11 J. AM. JUDICATURE SOC’Y 133, 134–35 (1928) (urging the adoption of a better method of selection and retirement of judges).

484. See supra Part III.B (examining all these factors through voter surveys and media coverage of the Illinois judiciary).


486. Cf. Selzer, supra note 391, at 203–204, 225 (noting these factors and noting that scholars are “taking a second look” at judicial elections).

487. Cf. Johnson, supra note 10, at 1027–28 (arguing that absent the ethical norms prohibiting ex parte communications, limiting political activities, requiring judges to avoid certain relationships, and mandating recusal in certain circumstances, an independent judiciary cannot exist).

488. See White, supra notes 416–23 and accompanying text (discussing why accountability to the voting public is not a desirable goal in our constitutional system).

489. Id.
and the arguments of the parties, regardless of the personal views of the judge.”490 Citizens also have a due process right to judges who make decisions without regard to the views of constituents—whether they are the voters or the political party leaders that control the ballot.491 More importantly, the existence and integrity of the judiciary depends on citizens’ belief that judges are independent of any constituency.492

B. Reforming the Judicial Selection Process

The purpose of this Comment is to highlight the need for institutional reform of the Illinois judicial selection process. Illinois legislators, lawyers, and voters must debate the merits of the election process and alternative selection methods. This is an ongoing debate in scholarly literature.493 However, in order to effect change, the discussion needs to enter into political debate.

Although perhaps not a comprehensive solution, merit selection is one alternative to judicial election that has proven successful in other states.494 Most merit plans provide for a nominating commission composed of lawyers and non-lawyers, appointed by a panel of state officials, attorneys, and citizens.495 The commission nominates a short list from the group of candidates for each judicial vacancy, from which group the appointing authority, usually the governor, selects.496 Then, the appointed candidate, after serving an initial term, must usually go before the voters in an uncontested retention election.497

491. Croley, supra note 114, at 708.
492. See White, supra note 15, at 1060–61 (explaining why judges cannot be accountable to “constituents”).
493. See supra Part II.A.2–3 (discussing the arguments in favor of and opposing judicial elections).
495. The panel may include the governor of the state, the attorney general, judges of the highest courts, members of the bar association, state legislators, and private citizens. See AM. JUDICATURE SOC’Y (2006), MERIT SELECTION: THE BEST WAY TO CHOOSE THE BEST JUDGES (2006), http://www.ajs.org/js/ms_descrip.pdf.
496. Id.
497. Id. In other states, judges are evaluated by a retention commission. Id. In New York, by contrast, there is no retention election. Daniel Becker & Malia Reddick, Judicial Selection
Although many commentators argue that the merit system does not take politics out of judicial selection, at the very least the merit system may spare judges from involvement in contentious elections, thereby setting them apart from the political process.\(^{498}\) If the State wants to ensure the appearance of impartiality and independence of the judiciary, merit selection could be one way to achieve that goal.\(^{499}\) However, there are a myriad of different ways to implement such a system.\(^{500}\) For example, instituting an alternative system for selecting members of the Supreme Court, rather than the entire judicial selection system, is an intermediate option.\(^{501}\)

VI. CONCLUSION

The First Amendment grants judges their freedom of speech as citizens, whether they are running for elective office or not. It does not require the state to stand aside while the reality and perception of judicial independence is battered in expensive, hotly contested elections, over which voters exercise little control. Without regulating inappropriate political and personal pressures on judges and candidates that are sure to flow from the exercise of First Amendment freedoms in political judicial campaigns, the state cannot prevent harm to the public’s perception of the courts. To fully comply with the demands of the First Amendment, Illinois must choose between increasingly issue-oriented, expensive campaigns and an alternative form of judicial selection.

Certainly, it is undeniable that no judge’s mind is a *tabula rasa* with respect to constitutional, legal, or political issues, that empirical studies demonstrate the ways policy considerations and personal bias influence judges’ decisions, and that attempting to mask these facts does not serve the interests of due process, fairness, or justice. However, to accept these imperfections in the judiciary as “reality” and tolerate a system that intensifies their effects is to condone behavior, mental attitudes, and reapply to the commission at the end of their terms and must be considered along with the other applicants. Id.\(^{498}\) See id. at 25 (arguing that in New York, the merit system has at least achieved the appearance of a judiciary that stands apart from the rest of the political system).

\(^{499}\) See supra Part V.B (proposing merit selection as one possible alternative to judicial elections).

\(^{500}\) See CURRENT STATUS, supra note 494 (setting forth the various characteristics of merit selection systems in different states).

\(^{501}\) For example, twenty-four states use merit selection, four states use gubernatorial appointment, and two states use legislative appointment to initially select judges to courts of last resort. JUDICIAL SELECTION IN THE STATES, supra note 79, at 6.
issue-oriented results that should be discouraged. Rather, the state should seek to encourage judicial evenhandedness and try to insulate judges from the influences of money and political pressure in pursuit of the reality and appearance of judicial impartiality.

Instead, the current nature of judicial elections obliges the state to accept the pressure of these factors on a branch that is supposed to be independent from inappropriate influences and impartial. The fact that such elements are a reality is no reason to applaud their effects as necessary to ensure judicial accountability to a public that rarely votes in judicial elections, and whose impression of the fairness and justice of the courts is diminishing. While recognizing that human imperfections will always threaten the integrity, impartiality, and independence of the judiciary, Illinois should adopt a judicial selection system better-suited to encourage judges to strive for impartiality in every case. The inadequacy of less drastic reforms supports the conclusion that Illinois should renew its efforts to eliminate judicial elections in favor of an alternative method of judicial selection. To date, the best suggestion has been the adoption of some form of merit selection.