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

Mary Eileen Weicher*

Mentored by Jona Goldschmidt**

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. 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.³ Concern for the appearance of judicial impartiality, they argue, justifies otherwise impermissible limits on judges' personal and political activities.⁴ 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.⁵

Constitutional scrutiny of restrictions on judicial conduct has narrowed the scope of the states' powers to pursue this interest.⁶ 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.⁷ 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.⁸

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.⁹ Some commentators insist that judicial ethical standards are necessary to avert the threat of inappropriate influences on judicial judgment posed by outside pressures.¹⁰ The importance of ethical

CONDUCT AND ETHICS 4 (1990) (noting that all but Montana, Rhode Island, and Wisconsin adopted the Model Code of Judicial Conduct). Since that time, Rhode Island and Wisconsin have adopted the 1990 version of the Model Code of Judicial Conduct. R.I. Sup. Ct. Rules, Art. VI, Rule 1 (2007); Wis. Ct. Rules & Proc., Sup. Ct. Rules ch. 60.

3. Paul J. De Muniz, *Eroding the Public's Confidence in Judicial Impartiality: First Amendment Federal Jurisprudence and Special Interest Financing of Judicial Campaigns*, 67 ALB. L. REV. 763, 763 (2004).

4. See Wendy R. Weiser, *Regulating Judges' Political Activity After White*, 68 ALB. L. REV. 651, 665-70 (2005) (arguing that ethics canons restricting judicial speech serve a compelling state interest that deserve deference).

5. See *infra* Part II.B.1 and II.B.2 (discussing the Model Code, a form of which is adopted in almost every state).

6. See De Muniz, *supra* note 3, at 764 (forecasting the "constitutional demise" of states' regulations on judicial speech and activity).

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

8. *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002).

9. See Weiser, *supra* note 4, at 651 (arguing that state regulatory systems designed to promote these interests have been thrown into disarray).

10. See, e.g., Vincent R. Johnson, *The Ethical Foundations of American Judicial Independence*, 29 FORDHAM URB. L.J. 1007, 1028 (2002); Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO J. LEGAL ETHICS 1059, 1067 (1996) (arguing that ethical norms are essential to an independent judiciary).

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

11. See James L. Swanson, *Judicial Elections and the First Amendment: Freeing Political Speech*, 2002 CATO SUP. CT. REV. 85, 110 (2001–2002) (characterizing the *White* decision as a “victory for the First Amendment”).

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

19. See Max Minzner, *Gagged But Not Bound: The Ineffectiveness of the Rules Governing Judicial Campaign Speech*, 68 UMKC L. REV. 209, 215–27 (1999) (discussing the ways judges and candidates navigate the political campaign process, notwithstanding ethical rules).

20. See *infra* Part II.A.3 (setting forth the main criticisms of judicial elections).

21. See ILL. CODE OF JUDICIAL CONDUCT Canon 7 cmt. (West 2006) (Heiple, J. concurring, Aug. 6, 1993 amendment) (noting that the Illinois Code attempts to accommodate these competing interests).

22. See *infra* Part III.B (discussing the public perception of the Illinois judiciary).

23. CHI. BAR ASS'N, JUDICIAL VOTERS SURVEY (2006), available at <http://www.chicagobar.org/public/judicial/survey.asp>. [hereinafter CHI. BAR ASS'N SURVEY].

24. HARRIS INTERACTIVE, INC., U.S. CHAMBER OF COMMERCE INST. FOR LEGAL REFORM, 2006 STATE LIABILITY SYSTEMS RANKING STUDY EXECUTIVE SUMMARY 4 (2006), available at http://www.instituteforlegalreform.com/harris/pdf/2006_FULL_Report_FINAL.pdf. [hereinafter STATE LIABILITY SYSTEMS RANKING STUDY].

25. *Id.* at 27.

26. *Id.* at 5.

27. NAT'L CTR. FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY 1–5 (1999), available at http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicViewCrtsPub.pdf. [hereinafter 1999 NATIONAL SURVEY].

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.²⁹ 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.³⁰ 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.³¹ 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.³² Therefore, this Comment concludes that Illinois should renew efforts to reform the judicial selection process by eliminating judicial elections.³³

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.³⁴ 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.³⁵ 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.³⁶ Part IV also discusses proposed reforms of judicial elections that inadequately address these

fifty years as the subject of judicial selection.”).

29. See *infra* Part IV.A (arguing that current First Amendment jurisprudence, holding many restrictions on judicial speech and activity unconstitutional, renders those restrictions incapable of placing meaningful limits on judicial conduct).

30. See Minzner, *supra* note 19, at 215–27 (discussing the myriad ways judicial candidates signal their views to voters notwithstanding the ethical canons).

31. See *infra* Part III.B (citing various studies and reports finding that public trust and confidence in the courts in Illinois is diminishing).

32. See *infra* Part IV.B (rejecting proposals for reforming judicial elections).

33. See *infra* Part V (proposing that Illinois eliminate judicial elections in favor of another judicial selection method).

34. See *infra* Part II (recounting the history of judicial selection and restrictions on judicial activity in Illinois).

35. See *infra* Parts III.A and III.B (discussing evidence of the public's perception of the Illinois judiciary).

36. See *infra* Part IV.A (arguing that ethical restrictions on judicial conduct cannot guarantee judicial independence and impartiality).

concerns.³⁷ Part V concludes that, in light of the fact that ethical restrictions cannot remedy problems presented by the elective process and considering the inadequacy of more intermediate reforms, Illinois should reform the judicial selection process entirely by eliminating judicial elections.³⁸

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.³⁹ This Part begins by presenting the history of the judiciary and judicial selection in Illinois and discussing the arguments supporting and opposing judicial elections.⁴⁰ Like most states, Illinois imposed no formal ethical restrictions on judges or judicial candidates until the last century.⁴¹ 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.⁴² Next, this Part examines recent decisional law striking down some of the Code’s restrictions on judicial speech and activity.⁴³ Finally, this Part examines the Proposed Revisions to the Model Code drafted in response to these decisions.⁴⁴

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.⁴⁵ However, population growth and political considerations, including revisions to the Illinois Constitution,

37. See *infra* Part IV.B (discussing proposed intermediate methods of reforming the judicial election process).

38. See *infra* Part V (proposing that Illinois eliminate judicial elections).

39. See *infra* Part II.A.1 (relating the history of constitutional revision and related changes in the judiciary).

40. See *infra* Part II.A (presenting the history of judicial selection in Illinois and arguments in favor of and against judicial elections).

41. See *infra* Part II.B.1 (discussing the adoption of the Illinois Code in 1986).

42. See *infra* Parts II.B.1 (describing the Model Code of Judicial Conduct and the Illinois Code of Judicial Conduct).

43. See *infra* Part II.B.3 (reviewing the development of ethics canons on judicial speech and activity).

44. See *infra* Part II.B.4 (analyzing the content of the Proposed Revisions to the Model Code).

45. See DAVID F. ROLEWICK, A SHORT HISTORY OF THE ILLINOIS JUDICIAL SYSTEMS (Admin. Office of the Ill. Court, rev. ed. 1971) (narrating a history of judicial selection in Illinois). From 1818 until 1848, judges were appointed. *Id.* at 8–10. The Illinois Constitution of 1848 first formally created an elected judiciary. *Id.* at 11.

significantly affected the judiciary's structure.⁴⁶ 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.⁴⁷ It then presents arguments supporting⁴⁸ and criticizing judicial elections.⁴⁹

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 1778.⁵⁰ Under Clark's governance, seven men were elected as judges in each of three settlements, with a majority of four necessary for a decision.⁵¹ 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.⁵² 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.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.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.⁵⁵ Namely, partisan changes in the General Assembly caused repeated and disruptive changes in the structure of the judiciary.⁵⁶ It became apparent that an effective judiciary must be independent of the legislative branch.⁵⁷

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

54. *Id.* at 8. The Supreme Court had appellate jurisdiction in all cases "except in cases of revenue, mandamus, habeas corpus, and impeachment." *Id.* Inferior courts were established by the General Assembly. *Id.*

55. *Id.* at 10. See ANTHONY, *supra* note 50, at 44. In fact, the General Assembly had the power to appoint all "officers of the State." *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. *Id.* at 44. Considerable political turmoil resulted from this appointment power. In the words of one historian, "Thus 'accoutered,' 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." *Id.*

56. ROLEWICK, *supra* note 45, at 10; See 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.

ANTHONY, *supra* note 50, at 45.

57. ROLEWICK, *supra* note 45, at 10; 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. 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. *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." *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." *Id.* Finally, William P. Foster, who had been in the State about three months, was revealed to be a "consummate scoundrel and swindler." *Id.* He was not a lawyer and had never even studied law. *Id.* Foster remained in Illinois for a year, never acting as a judge but still drawing his salary. *Id.* at 94. See also 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.⁵⁸ In the following decades, a surge in population led to the reorganization of the judiciary in the Illinois Constitution of 1870.⁵⁹ The 1870 Constitution established a Supreme Court of seven justices, elected from seven newly created districts.⁶⁰ Judges in the Appellate Court, created by the General Assembly in 1877, were appointed by the Supreme Court.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.⁶² The Constitution of 1870 also allowed for the continued service of police magistrates and justices of the peace.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.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.⁶⁵

control, but to free the judiciary from domination by the other branches, and to increase the quality of judges on the bench).

58. ROLEWICK, *supra* note 45, at 11. See generally Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 89–99 (1998) (describing the adoption of judicial election in general in the nineteenth century and subsequent developments in the judicial selection debate).

59. ROLEWICK, *supra* note 45, at 11. See Harry G. Fins, *Analysis of Illinois Judicial Article of 1961 and its Legislative and Judicial Implementation*, 11 DEPAUL L. REV. 185, 188–91 (1962) (describing the judicial structure created by the Constitution of 1870 and comparing it with later reforms).

60. ROLEWICK, *supra* note 45, at 13.

61. *Id.* Four appellate courts were created in 1877, consisting of three judges appointed by the Supreme Court or, in Cook County, by the Superior Court. *Id.* at 13–15.

62. *Id.* at 15–16.

63. *Id.* Justices of the peace courts had been established in each county in 1819. *Id.* at 10. In 1854, the General Assembly had provided for the election of one or more police magistrates in each town and city. *Id.* at 12. The police magistrates had the same jurisdiction as the justices of the peace in their county, plus jurisdiction in their own town or city over all ordinance cases less than \$100. *Id.*

64. *Id.* at 16–17.

65. These were the Circuit Court, Superior Courts, the Family Court, Criminal Court, Probate Court, County Court, Municipal Court of Chicago, twenty-three city, village, town and municipal courts, seventy-five justice of the peace courts, and 103 police magistrate courts. *Id.* at 19. There was no administrative authority to unify them. *Id.* See also Wayland B. Cedarquist, *The Continuing Need for Judicial Reform in Illinois*, 4 DEPAUL L. REV. 153, 155–58 (1955) (describing the confusing and complicated system of trial courts that existed in the 1950s in Illinois).

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 (e). 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.⁷³ The constitutional convention of 1969 served as a platform for debate over judicial selection.⁷⁴ After nearly two decades of advocacy in favor of merit selection⁷⁵ 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.⁷⁶ Although merit selection carried in several counties, it was defeated statewide.⁷⁷

3 (Am. Judicature Soc’y 2004), available at http://www.ajs.org/js/berkson_2005.pdf (finding that elections had not succeeded in freeing the judiciary from control by special interests).

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.⁷⁸ Illinois is one of only nine states that initially elects trial court judges in partisan elections.⁷⁹ 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.⁸⁰ Other states elect some or all of their judiciaries in non-partisan elections: seventeen states elect trial court judges⁸¹ and thirteen states elect judges to the highest court in non-partisan elections.⁸² By contrast, twenty-one states use merit selection or appointment to select trial court judges,⁸³ and thirty states use merit selection or appointment to select judges of their highest court.⁸⁴

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.⁸⁵ Indeed, many judicial election proponents deemphasize judicial independence and stress the importance of judicial accountability to the public.⁸⁶ While acknowledging the tension between these two ideals,

Merit Selection Killed in Committee, CHI. TRIB., Apr. 15, 1988, at 1 (same); Editorial, *More Demerits on Merit Selection*, CHI. TRIB., Apr. 15, 1988, at 10 (criticizing the defeat of the merit selection proposal). In 1996, two judicial selection measures were defeated on the senate floor, one calling for gubernatorial appointment of Supreme Court justices and the other for merit selection of appellate and circuit judges. *Illinois History*, *supra* note 73.

78. BERKSON, *supra* note 72, at 6.

79. AM. JUDICATURE SOC'Y, JUDICIAL SELECTION IN THE STATES, APPELLATE AND GENERAL JURISDICTION COURTS 4 (2004), available at <http://www.ajs.org/jis/JudicialSelectionCharts.pdf> [hereinafter JUDICIAL SELECTION IN THE STATES]. The other states are Alabama, Louisiana, New York, Ohio, Pennsylvania, Tennessee, Texas, and West Virginia. *Id.*

80. *Id.* at 5. The other states that elect judges to the court of last resort are Alabama, Louisiana, Michigan, Ohio, Pennsylvania, Texas, and West Virginia. *Id.* at 6.

81. *Id.* at 4.

82. *Id.* at 4–6.

83. *Id.* at 4.

84. *Id.* at 6.

85. *Id.* at 4–6.

86. See Dubois, *supra* note 28, at 34–40 (resolving the tension between: judicial independence and accountability largely in favor of accountability); *The Case for Partisan Judicial Elections*, 33 U. TOL. L. REV. 393, 404 (2002) (arguing that concurrently scheduled partisan judicial elections allow voters to hold “judicial policymakers” accountable more than nonconcurrent or nonpartisan elections); Steven Lubet, *Judicial Discipline and Judicial Independence*, 61 LAW & CONTEMP. PROBS. 59 (1998) (discussing various aspects of the interplay between judicial accountability and judicial independence and arguing that independence is compromised most by disciplinary action against a judge in response to an unfavorable ruling made in good faith, not by

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.⁸⁷ That is, the choice to elect judges is a choice to make judges accountable to voters.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.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.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.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.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.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

restrictions on judicial speech).

87. Michael R. Dimino, *Pay No Attention to That Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians*, 21 YALE L. & POL'Y REV. 301, 336–37 (2003).

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.

qualifications.⁹⁴ In doing so, issue-based campaigns for judgeships may benefit future litigants because thoughtful and qualified candidates can display their knowledge and attract votes.⁹⁵ Litigants could even potentially benefit by learning about a particular judge's opinions on policy matters and planning their arguments accordingly.⁹⁶

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.⁹⁷ It is unrealistic, and furthermore impossible, they argue, to insist that judges remain completely independent of politics.⁹⁸ It has been proven that policy perspectives affect judicial decision-making,⁹⁹ and pretending otherwise gives voters the false impression that policy considerations will not affect judicial judgment or vice-versa.¹⁰⁰ 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.¹⁰¹ If political affiliation and philosophy will inevitably be an important factor in judicial selection, why not allow voters to make the political choice?¹⁰²

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.¹⁰³ Some posit that speech restrictions do not eliminate actual bias, but only manifestations of it.¹⁰⁴ 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.¹⁰⁵ If judges make unpopular policy judgments in instances where the law does not compel a certain result, voters should determine which policies are served.¹⁰⁶

Supporters of judicial elections contend that placing the choice in the hands of voters will preserve, not degrade, the integrity of the judiciary.¹⁰⁷ 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.¹⁰⁸ In other words, proponents of judicial elections trust the democratic process to select able, qualified candidates for the bench.¹⁰⁹

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.”)

103. See Swanson, *supra* note 11, at 107–08 (discussing “The Myth of the Tabula Rasa Judicial Mind”).

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).

107. Swanson, *supra* note 11, at 112–13.

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.*

113. Johnson, *supra* note 10, at 1012; Frances Kahn Zemas, *The Accountable Judge: Guardian of Judicial Independence*, 72 *S. CAL L. REV.* 625, 628–31 (1999).

114. Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 *U. CHI. L. R.* 689, 708 (1995).

115. *Id.* at 726.

majority demands the opposite result.¹¹⁶ Additionally, more than constitutional interests may be at stake when a judge deems it necessary to consider popular will when making decisions.¹¹⁷ Electoral pressure may lead judges, for example, to sentence criminal defendants in accordance with popular sentiments rather than the rule of law.¹¹⁸ Therefore, critics argue, electoral independence is vital to protecting the constitutional rights of individuals and minorities from the will of the majority.¹¹⁹ 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.”¹²⁰

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.¹²¹ 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.¹²² Critics argue that this evidence of bias or the appearance of bias diminishes the Court’s legitimacy in the eyes of the public.¹²³

Furthermore, critics argue, judicial elections do not operate to make judges more accountable to voters.¹²⁴ Where there are restrictions on judicial speech and activity during elections, the flow of information to voters is severely limited.¹²⁵ 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.¹²⁶ 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).

122. Williams, *supra* note 99, at 319–20.

123. *Id.* at 320.

124. Steven Zeidman, *Judicial Politics: Making the Case for Merit Selection*, 68 ALB. L. REV. 713, 717–18 (2005) (discussing voter apathy with respect to judicial elections in New York).

125. Philip L. Dubois, *Significance of Voting Cues in State Supreme Court Elections*, 13 LAW & SOC’Y REV. 757, 759 (1979).

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.¹²⁷ Additionally, low voter turnout in judicial elections means that those who vote do not represent the “average voter.”¹²⁸ Rather, the persons who vote are likely those with narrow interests in the election of particular judges.¹²⁹ The conclusion in either case is that the “will of the people” does not likely prevail in most judicial elections.¹³⁰

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.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.¹³² This Section explains the origins of these restrictions in the Model Code.¹³³ It then discusses the Illinois Code and the Seventh Circuit’s decision in *Buckley v. Illinois Judicial Inquiry Board*, striking down the “announce clause” of the Illinois Code,¹³⁴ and it sets forth the content of the Illinois Code’s restrictions on judicial political speech and activity.¹³⁵ Next, this Section summarizes the

Cheek, *The Cycle of Judicial Elections: Texas as a Case Study*, 29 *FORDHAM URB. L.J.* 907, 926 (2002) (arguing that voter unfamiliarity with judicial candidates makes party labels important cues); Kyle Cheek, *Reconciling Normative and Empirical Approaches to Judicial Selection Reform: Lessons from a Bellwether State*, 68 *ALB. L. REV.* 577, 580 (2005) (The author cites one example from Texas, where a “political novice” defeated a well known and respected challenger for an open seat on the Texas Supreme Court, allegedly only because he had a familiar name with almost identical spelling and pronunciation to that of a former Texas gubernatorial candidate.).

127. Zeidman, *supra* note 124, at 718 (arguing that the power to select judges is vested with political party leaders).

128. Croley, *supra* note 114, at 733 n.134.

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. *Id.*

130. *Id.*

131. *See infra* Part II.B.1 (describing the origins of the Model Code of Judicial Conduct).

132. *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).

133. *See infra* Part II.B.1 (explaining the history and purpose of the Model Code).

134. *See infra* Part II.B.1 (summarizing the Seventh Circuit’s opinion in *Buckley v. Ill. Judicial Inquiry Bd.*).

135. *See infra* Part II.B.1 (summarizing revisions to the Illinois Code made in light of *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.¹³⁶ It then reviews *White's* application to other restrictions on judicial activity in subsequent federal and state decisions.¹³⁷ Lastly, this Section examines proposed revisions to the Model Code, drafted in response to *White*, and litigation testing the scope of its holding.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.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.¹⁴⁰ In 1972, the ABA extensively revised the Canons, condensing the original thirty-six into seven and reworking the formerly hortatory language.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.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

136. See *infra* Part II.B.2 (summarizing the United States Supreme Court's opinion in *Republican Party of Minn. v. White*).

137. See *infra* Part II.B.3 (examining subsequent decisions applying the principles announced in *White*).

138. See *infra* Part II.B.4 (examining proposed revisions to the Model Code).

139. MODEL CODE OF JUDICIAL CONDUCT Preface (1990).

140. *Background paper about the Joint Commission to Evaluate the Model Code of Judicial Conduct*, AM. BAR ASS'N (2006), <http://www.abanet.org/judicialethics/about/background.html>. [hereinafter *Background Paper*]. The necessity of the Canons of Judicial Ethics became apparent in 1922 when a federal district judge supplemented his \$7,500 federal judicial salary with \$42,500 a year to serve as national commissioner of baseball. *Id.*

141. Eileen Gallagher, *The ABA Revisits the Model Code of Judicial Conduct*, 44 No. 1. JUDGES' J. 7 (2005). For example, Canon 1 of the 1924 Canons, entitled "Relations of the Judiciary" stated, "The assumption of the office of judge casts upon the incumbent duties in respect to his personal conduct which concern his relation to the state and its inhabitants, the litigants before him, the principles of law, the practitioners of law in his court, and the witnesses, jurors, and attendants who aid him in the administration of its functions." LISA L. MILORD, *THE DEVELOPMENT OF THE ABA JUDICIAL CODE* 132 (1992). Canon 6, entitled "Industry," stated, "A judge should exhibit an industry and application commensurate with the duties imposed on him." *Id.* at 133.

142. *Id.*

hortatory language with a rubric of acceptable and unacceptable activity.¹⁴³

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

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.¹⁴⁶

In 1993, in *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.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;¹⁴⁸ second, judges should decide cases according to the law rather than with any express or implied commitments made during a campaign.¹⁴⁹ The Illinois Code unconstitutionally favored the latter principle too strongly by forbidding “all pledges or promises except a promise that the candidate will faithfully and impartially discharge the duties of his judicial office.”¹⁵⁰ This language did not limit the clause to issues likely to come before the court.¹⁵¹ Rather, it reached beyond speech that could reasonably be interpreted as committing the candidate in a way that would compromise his impartiality.¹⁵² Even the “announce clause” was not limited merely to

143. *Id.*

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).

146. *Id.*

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

148. *Id.* at 227.

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.

150. *Id.* at 228.

151. *Id.*

152. *Id.*

statements about how a candidate intends to rule in particular cases.¹⁵³ The court found that under a reasonable construction of the rule, the only safe response was silence.¹⁵⁴ 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.¹⁵⁵

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.”¹⁵⁶

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.¹⁵⁷

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.¹⁵⁸ The “misrepresent clause” prohibits a judge or candidate from “knowingly misrepresent[ing] the identity, qualifications, present position or other fact concerning the candidate or

153. *Id.* Instead, the court found that the candidate “may not announce his views on disputed legal or political issues, period.” *Id.* (internal quotation omitted).

154. *Id.* Although the silence was temporary, because the restrictions only applied during campaigns, the court found that “interference with the marketplace of ideas and opinions is at its zenith when the ‘customers’ are most avid for the market’s ‘product.’” *Id.* at 228–29.

155. *Id.* at 231.

156. ILL. CODE OF JUDICIAL CONDUCT Canon 7 (A)(3)(d)(i); SUP. CT. R. 67 (A)(3)(d)(i) (West 2006).

157. ILL. CODE OF JUDICIAL CONDUCT Canon 7 cmt. (West 2006) (Heiple, J. concurring, Aug. 6, 1993 amendment).

158. ILL. CODE OF JUDICIAL CONDUCT Canon 7 (A)(3)(d)(i); SUP. CT. R. 67 (A)(3)(d)(i) (West 2006); see Hon. Patrick E. McGann, *Ethical Campaign Practices for Illinois Judicial Candidates*, 90 ILL. B.J. 76 (2002) (summarizing permissible and impermissible campaign activities).

an opponent.”¹⁵⁹ 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.¹⁶⁰

Under the Illinois Code, a judge or judicial candidate cannot act as a leader or officer in a political organization,¹⁶¹ publicly endorse or oppose another candidate for public office (except while campaigning for judicial office),¹⁶² make speeches on behalf of a political organization,¹⁶³ or solicit funds for, or pay an assessment to, a political organization or candidate.¹⁶⁴ However, a judge or candidate may identify himself as a member of a political party,¹⁶⁵ contribute to a political organization,¹⁶⁶ and purchase tickets for and attend political gatherings.¹⁶⁷

While campaigning for judicial office, a candidate may speak to gatherings on her own behalf,¹⁶⁸ appear in media advertisements to support her candidacy,¹⁶⁹ distribute promotional literature supporting her candidacy,¹⁷⁰ and publicly endorse or oppose other judicial candidates running in the same election.¹⁷¹ Despite a candidate’s freedom to conduct a public campaign and attend political gatherings, a candidate may not personally solicit campaign contributions.¹⁷² Instead, all fund raising activities must be conducted by a campaign

159. ILL Code Canon 7 (A)(3)(d)(ii).

160. *Id.* Canon 7 (A)(3)(e). Among other objections to the amendments, Justice McMorroo 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. (McMorroo, 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)(ii).

166. *Id.* Canon 7 (B) (1)(a)(iii).

167. *Id.* Canon 7 (B) (1)(a)(i). Justice McMorroo 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. (McMorroo, J., dissenting, Aug. 6, 1993 amendment). She further found that the amendments were “imprudent, unnecessary, and len[t] themselves to abuse.” *Id.*

168. *Id.* Canon 7 (B) (1)(b)(i).

169. *Id.* Canon 7 (B) (1)(b)(ii).

170. *Id.* Canon 7 (B) (1)(b)(iii).

171. *Id.* Canon 7 (B) (1)(b)(iv).

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.¹⁷³

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*.¹⁷⁴ 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.¹⁷⁵ 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.¹⁷⁶

To decide this question, Justice Scalia discussed three possible meanings of “impartiality.”¹⁷⁷ 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.¹⁷⁸ A second possible meaning of impartiality is “lack of preconception in favor of or against a particular *legal view*.”¹⁷⁹ 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.¹⁸⁰ First, the Court noted that it is virtually impossible to find a judge without preconceptions about the law.¹⁸¹ 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.*

174. *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).

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 “*tabula rasa*” with respect to constitutional and legal issues would be undesirable as evidence of a “lack of qualification, not a lack of bias.”¹⁸²

The third possible meaning of impartiality is “open-mindedness.”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.¹⁸⁴ The Court found that impartiality in this sense might be desirable, but that the announce clause was not adopted for that purpose.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.¹⁸⁶ The Court held that the “announce clause” covered more than promises to decide issues in a particular way.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.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.¹⁸⁹

The Court also expressed guarded disapproval of judicial elections.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.¹⁹¹ Concurring, Justice O’Connor took the opportunity to openly express her disapproval of judicial elections, stating, “If the State has a problem

182. *Id.* *Tabula rasa* is Latin for “clean slate.”

183. *Id.* at 778.

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

185. *Id.*

186. *Id.* at 776.

187. *Id.* at 770.

188. *Id.*

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.*

190. *Id.* at 787, 792.

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.”).

194. Cynthia Gray, *The States’ Response to Republican Party of Minnesota v. White*, 86 JUDICATURE 163, 163 (2002).

195. See Cynthia Gray, *Developments Following Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) AM. JUDICATURE SOC’Y (Aug. 29, 2006), <http://www.ajs.org/ethics/pdfs/DevelopmentsafterWhite.pdf> (documenting litigation nationwide interpreting the *White* decision); Cynthia Gray, *The Limits of White*, 89 JUDICATURE 315 (2006) (reviewing the other contexts to which *White* has been applied) [hereinafter Gray, *The Limits of White*].

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.²⁰¹ 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.²⁰²

The “solicitation clause” prohibited a judge or candidate from personally soliciting or accepting campaign contributions or publicly stated support.²⁰³ 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.²⁰⁴ 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.²⁰⁵ 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.²⁰⁶

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*.²⁰⁷ 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.”²⁰⁸

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.²⁰⁹ The clause failed strict scrutiny because it allowed a candidate's election committee to engage in the same activities.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.²¹¹ The Eleventh Circuit interpreted *White* to suggest "that the standard for judicial elections should be the same as the standard for legislative and executive elections."²¹²

Three more Model Code restrictions were held unconstitutional in 2003 in *Spargo v. State Commission on Judicial Conduct*.²¹³ In response to pending disciplinary proceedings,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."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.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.²¹⁷ The Second Circuit, on abstention grounds, vacated the district court's judgment holding the New York Code provisions facially unconstitutional.²¹⁸

209. *Id.* at 1322.

210. *Id.*

211. *Id.* at 1322–23.

212. *Id.* at 1321.

213. *Spargo v. N.Y. State Comm'n on Judicial Conduct*, 244 F. Supp. 2d 72 (N.D.N.Y. 2003).

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. *Id.* at 79–81.

215. *Id.* at 81–82.

216. *Id.* at 92.

217. *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?" *Id.* at 91.

218. *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 2003.²¹⁹ 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."²²⁰ 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.²²¹ The candidate later admitted that he violated the Code, but before the Commission issued a determination, *White* was decided.²²² 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.²²³ Finding that *White* did not "compel" a particular result, the Court declined to hold the "pledges and promises" clause unconstitutional.²²⁴

In a similar case in 2003, *In re Raab*, a New York judge challenged the Code's restrictions on political activities.²²⁵ The judge faced censure for making a lump sum payment by personal check to the Democratic Committee, participating in a "phone bank" on behalf of a legislative candidate, attending a candidate screening for prospective candidates for judicial and non-judicial office, and making statements to a lawyer that could be construed as a threat.²²⁶ The Court declined to extend *White* in order to invalidate the restrictions on political activity,

when the federal suit was filed. *Id.* Two of the judges' political supporters also joined the federal case as plaintiffs. *Id.* at 66. The District Court abstained from exercising jurisdiction over the judge's claim, but decided the political supporters' claims since neither were parties to the disciplinary proceeding. *Id.* at 68. The Second Circuit held that the claims were intertwined, so that "proper deference to New York's paramount interest in regulating its own judicial system mandates the exercise of *Younger* abstention" over the entirety of the action. *Id.*

219. *In re Watson*, 794 N.E.2d 1, 8 (N.Y. 2003).

220. *Id.* at 2.

221. *Id.* at 2–3.

222. *Id.* at 3.

223. *Id.* at 4.

224. *Id.* at 6, 8.

225. *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. *Id.* at 1285 n.2.

226. *Raab*, 793 N.E.2d at 1288–89. The attorney appealed an ex parte restraining order signed by the judge that was later vacated. *Id.* at 1289. 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]. *Id.*

noting that *White* did not involve review of political activity restrictions.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.²²⁸ The Court issued a preliminary and permanent injunction barring enforcement of the promises and commitment clauses,²²⁹ holding that the clauses operated to restrict judicial speech to the same extent as an "announce clause" of the type invalidated in *White*.²³⁰

The Kentucky Judicial Conduct Commission and other appellants filed an emergency motion to stay the District Court's injunction in *Wolnitzek*.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.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."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.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.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.

234. *N.D. Family Alliance v. Bader*, 361 F. Supp. 2d 1021 (D.N.D. 2005).

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

236. *Id.* at 1039–42.

237. *Alaska Right to Life Political Action Comm. v. Feldman*, 380 F. Supp. 2d 1080 (D. Alaska 2005).

238. *Id.* at 1083.

239. *Id.*

240. *Braynen v. State*, 895 So.2d 1169 (Fla. Dist. Ct. App. 2005).

241. *Id.* at 1170 (Farmer, J., concurring).

242. *Id.*

243. *Id.*

244. *Id.*

245. *Background paper, supra* note 140, at 4.

Joint Commission).²⁴⁶ The Joint Commission proposes significant substantive and structural revisions to the Model Code in the Final Draft Report, issued for public comment in 2005.²⁴⁷ Structurally, the Final Draft Report reorganizes the Model Code by presenting the Canons in a new format.²⁴⁸ 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.²⁴⁹ 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.²⁵⁰

The Joint Commission’s intention in restructuring and revising Canon 5 of the Model Code on political activity echoes the words of Justice Heiple.²⁵¹ It attempts to balance the “political realities of judicial selection” against the principles of “judicial integrity, independence, and impartiality.”²⁵²

The ABA expresses a clear preference for merit selection as the best method of judicial selection.²⁵³ 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.²⁵⁴ To achieve this end, the Model Code is divided into different versions.²⁵⁵ Canon 5 announces principles that are applicable to “All Judges and Candidates,”²⁵⁶ those that are applicable to judges and candidates seeking appointment,²⁵⁷ and those applicable to judges and candidates for elective office.²⁵⁸ The result appears incongruous because it permits

246. Gallagher, *supra* note 141, at 7.

247. MODEL CODE OF JUDICIAL CONDUCT Introduction, at 3 (Final Draft Report 2005), available at <http://www.abanet.org/judiciaethics/finaldraftreport.html>.

248. *Id.* at 3.

249. *Id.*

250. *Id.* The Joint Commission believes that this structure will be “more straightforward and user-friendly.” *Id.*

251. See *supra* note 157 and accompanying text (Justice Heiple’s concurrence in the 1993 amendment to the Illinois Code).

252. MODEL CODE OF JUDICIAL CONDUCT Introduction, at 7 (Final Draft Report 2005), available at <http://www.abanet.org/judiciaethics/finaldraftreport.html>.

253. MODEL CODE OF JUDICIAL CONDUCT Canon 5(C)(2) cmt. (2003).

254. See MODEL CODE OF JUDICIAL CONDUCT intro. at 7 (Final Draft Report 2005), available at <http://www.abanet.org/judiciaethics/finaldraftreport.html> (stating that Canon 5 contains principles that apply to “all judges and judicial candidates” as well as “Rules that separately treat each of the various types of judicial selection processes”).

255. MODEL CODE OF JUDICIAL CONDUCT Canon 5 (1990).

256. *Id.* Canon 5(A).

257. *Id.* Canon 5(B).

258. *Id.* Canon 5(C).

elected judges to engage in activities that are expressly forbidden of “All Judges and Candidates.”²⁵⁹ The Final Draft Report retains similar distinctions, but further subdivides the ‘elected judge’ category into “Partisan Public Elections,”²⁶⁰ “Non-partisan Public Elections,”²⁶¹ “Retention Elections,”²⁶² and “Appointive Judicial Office.”²⁶³

The Final Draft Report both lengthens and restructures the list of prohibited political activities that apply to “All Judges and Candidates.”²⁶⁴ 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.²⁶⁵ Moreover, judges or candidates cannot make speeches on behalf of, solicit funds for, contribute to, or seek endorsements from a political organization.²⁶⁶ They cannot publicly endorse or oppose any candidate for any public office.²⁶⁷ Judges and candidates cannot even attend or purchase tickets for dinners or other events sponsored by a political organization.²⁶⁸ With respect to campaign activities, judges and candidates are prohibited from personally soliciting or accepting campaign contributions.²⁶⁹ 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.*

260. MODEL CODE OF JUDICIAL CONDUCT R. 5.02 (Final Draft Report 2005), available at <http://www.abanet.org/judicialethics/finaldraftreport.html>

261. *Id.* R. 5.03.

262. *Id.* R. 5.04.

263. *Id.* R. 5.05.

264. *Id.* R. 5.01(A).

265. *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.

266. *Id.* R. 5.01(A)(2), (4), (7).

267. *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.

268. *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.

269. *Id.* R. 5.01(A)(8).

contributions for private benefit,²⁷⁰ or use court staff, facilities, or other court resources in a campaign.²⁷¹

In light of the *White* decision and the broad interpretations of its principles by various courts, the ABA crafted new language restricting judicial speech.²⁷² The resulting language is very similar to the current Illinois Code.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.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.”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.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.”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.²⁷⁸ For example, it is appropriate for a candidate “to make specific campaign promises with respect to judicial organization, administration, and court

270. *Id.* R. 5.01(A)(9).

271. *Id.* R. 5.01(A)(10).

272. *Background paper, supra* note 140.

273. *See* ILL. CODE OF JUDICIAL CONDUCT Canon 7(A)(3)(d) (containing restrictions on the speech and activity of judges and judicial candidates).

274. MODEL CODE OF JUDICIAL CONDUCT R. 5.01(C)(1) (Final Draft Report 2005), *available at* <http://www.abanet.org/judicialethics/finaldraftreport.html>.

275. *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. 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. *Id.* Canon 4(B) cmt.

276. MODEL CODE OF JUDICIAL CONDUCT R. 5.01(A)(12) (Final Draft Report 2005) *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.” *Id.* R. 5.01 cmt. ¶ 10.

277. *Id.* R. 5.01(A)(13).

278. *Id.* R. 5.01 cmt. ¶ 16.

management.”²⁷⁹ This could include promises to reduce the backlog of cases, start court sessions on time, and avoid favoritism in hiring and appointment.²⁸⁰

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.²⁸¹ 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.”²⁸² 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.”²⁸³

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.²⁸⁴ Various federal courts questioned whether the difference between an “announce” clause and a “commit” clause, when faithfully enforced, is substantive or merely semantic.²⁸⁵ This Part evaluates the substance of the Illinois Code by assessing its success in protecting public confidence in judicial impartiality and independence.²⁸⁶ 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. Wolnitzek*, 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.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.²⁸⁸

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.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”²⁹⁰ and a nationally ranked “Judicial Hellhole.”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.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.²⁹³

287. See *infra* Part III.A (recounting the controversy surrounding the 2004 Illinois Supreme Court race).

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

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.

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

291. AM. TORT REFORM FOUND., JUDICIAL HELLHOLES 2005 7 (2005), available at <http://www.atra.org/reports/hellholes> [hereinafter JUDICIAL HELLHOLES] (ranking Madison County fifth in the nation).

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.

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

294. *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill.2d 100, (2005) (overturning a \$1.05 billion dollar verdict). The United States Supreme Court denied certiorari. *Avery v. State Farm Mut. Auto. Ins. Co.*, 126 S.Ct. 1470 (2006).

295. *Price v. Philip Morris, Inc.*, 219 Ill.2d 182 (2005) (dismissing a \$10.1 million dollar judgment). The United States Supreme Court denied certiorari of the case. *Price v. Philip Morris Inc.*, 127 S.Ct. 685 (2006).

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? Ethics? Now 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.³⁰² 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.³⁰³ It listed six “questionable decisions,”³⁰⁴ only one of which was authored by then-Appellate Court Justice Maag,³⁰⁵ accusing him of reducing criminal sentences when in fact a three judge panel ordered new trials.³⁰⁶ 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.”³⁰⁷ Maag lost the concurrent retention election for his seat on the Illinois Appellate Court.³⁰⁸ The suit was dismissed in the circuit court on a finding that the flier did not constitute defamation since it criticized his

selection]?”). The Illinois State Election Board is investigating the Illinois Coalition for Jobs, Growth and Prosperity and Justice for All Foundation, two organizations that allegedly failed to comply with campaign disclosure laws regarding donations to the 2004 election candidates. Mackey, *supra* note 290, at 13.

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

Karameier 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.

303. ILL. COAL. FOR JOBS, GROWTH AND PROSPERITY, CAMPAIGN FLIER, GORDON MAAG’S RECORD ON THE BENCH, (on file with author). To read the text of the campaign flier, see Maag v. Il. Coal. For Jobs, Growth and Prosperity, 858 N.E.2d. 967, 970–71 (Ill. App. Ct. 2006).

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

305. Muir, *supra* note 289.

306. *Maag*, 858 N.E.2d at 975; Daniel C. Vock, *Maag Sues Groups For Defamation*, CHI. DAILY LAW BULL., Dec. 21, 2004, at 1.

307. Muir, *supra* note 289.

308. *Id.*; Vock, *supra* note 306, at 1.

record, but did not malign Maag personally.³⁰⁹ Maag appealed the dismissal in the Fifth District, which affirmed the decision of the trial court.³¹⁰ 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.³¹¹ 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.³¹²

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.³¹³

The National Center for State Courts conducted a survey in 1999 measuring the public's confidence in the courts.³¹⁴ The survey's findings generally suggested that the public's perception of the courts is not good.³¹⁵ Although about 80% of respondents agreed that "judges

309. *Maag*, 858 N.E.2d at 971; *Defeated Candidate Loses Fight Over Campaign Flier*, CHI. TRIB., June 12, 2005, at Metro, at 3.

310. *Maag v. Il. Coal. For Jobs, Growth and Prosperity*, 858 N.E.2d 967, 976 (Ill. App. Ct. 2006). The Court stated that the "hysterical hyperbole in the flyer is insulting to the judicial and electoral process....The flyer is the product of a mindset that believes voter manipulation can be accomplished by resort to phrases that evoke emotion rather than thought." *Id.* at 973. Nonetheless, the Court found that such "mean-spirited" statements do not necessarily constitute defamation. *Id.*

311. Muir, *supra* note 289; Parsons, *supra* note 292, Metro, at 1 (quoting Ed Murnane, president of the Illinois Civil Justice League, an advocacy group for tort reform that supported Karmeier, "Following an election in which the abuse of the court system clearly was an issue in the minds of many voters, a losing candidate...resorts to a ridiculous lawsuit.").

312. See, e.g., Stephanie Potter, *Money Taints Judiciary, Panel Warns*, 152 CHI. DAILY LAW BULLETIN, Feb. 13, 2006 (reporting one state senator's comment that "he increasingly worries about the public perception that judges are swayed by special interest groups"); Sheehan, *supra* note 289, Metro, at 6 (reporting that "there is increasing unease about money being pumped into judicial campaigns and the influence that may have on the court"); *Ethics Editorial*, *supra* note 296, at A45 ("Judges smiling down from the bench at their campaign contributors mock the public's confidence in even-handed justice.").

313. See *infra* Part III.B.

314. 1999 NATIONAL SURVEY, *supra* note 27; see David B. Rottman & Alan J. Tomkins, *Public Trust and Confidence in the Courts: What Public Opinion Surveys Mean to Judges*, 36 COURT REVIEW 24 (1999), available at http://www.ncsconline.org/WC/Publications/Res_AmtPTC_SurveysMeanToJudgesPub.pdf (presenting a detailed summary of the survey's findings).

315. Rottman & Tomkins, *supra* note 314, at 27.

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

316. 1999 NATIONAL SURVEY, *supra* note 27, at 30.

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].

323. ILL. CAMPAIGN FOR POLITICAL REFORM, 2002 ILLINOIS STATEWIDE SURVEY ON JUDICIAL SELECTION ISSUES 7, available at <http://www.ilcampaign.org/analysis/reports/2002/judicialSurvey.pdf>.

324. Justice at Stake Campaign, Learn About Your State: Illinois, <http://www.justiceatstake.org/contentViewer.asp?breadCrumb=4,124,81> (last visited March 18, 2007).

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

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 2006.³⁴³ On “judicial impartiality” and “judges’ competence,” Illinois ranked 45th and 43rd, respectively.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.³⁴⁵ By a wide margin, the number one reason given for this ranking was “biased judgment.”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.³⁴⁷ The results of these surveys were widely reported in the media.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.³⁴⁹ However, even if the survey results are driven by inaccurate perceptions, perceptions matter; perceptions can influence behavior.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.³⁵¹

IV. ANALYSIS

Most judges in Illinois are intelligent, qualified, and ethical; it is not the purpose of this Comment to suggest otherwise. Furthermore, this Comment 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 judiciary³⁵² support the assertion that the campaign tactics and political interests that control Illinois judicial

343. STATE LIABILITY SYSTEMS RANKING STUDY, *supra* note 24, at 1.

344. *Id.* at 4.

345. *Id.* at 12.

346. *Id.*

347. JUDICIAL HELLHOLES, *supra* note 291, at 7.

348. See, e.g., Jerry Crimmins, *Biz Lawyers Blast Illinois Court Systems*, CHI. DAILY LAW BULLETIN, Mar. 30, 2006; Libby Sander, *Trial Lawyers, Judges Bristle at Biz Groups’ Allegations*, 29 CHI. LAWYER, June 2006. (reporting the survey data).

349. Cf. Carrington, *supra* note 58, at 107 (discussing the effect of modern journalism on public cynicism).

350. Rottman & Tomkins, *supra* note 314, at 31.

351. *Id.*

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.³⁵³ In so doing, they threaten to further erode the public confidence in the integrity of the judiciary.³⁵⁴ 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.³⁵⁵

This Part contends that the state of First Amendment jurisprudence, holding restrictions on judicial speech unconstitutional, further weakens the fragile case for judicial elections.³⁵⁶ Without meaningful restrictions on judicial speech and conduct, campaigns for judicial office will resemble those for executive or legislative office.³⁵⁷ This is not what the drafters of the 1848 Illinois Constitution hoped to accomplish by instituting the elected judiciary.³⁵⁸ 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.³⁵⁹ It concludes that these intermediate reforms are inadequate responses to the problems facing the Illinois judiciary.³⁶⁰

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.³⁶¹ 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.³⁶² Third, in the resulting climate, Illinois' interest in judicial independence far outweighs the asserted interest in judicial accountability to the public.³⁶³

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.³⁶⁴ 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.³⁶⁵ Neither the Illinois Code nor advisory opinions interpreting it effectively circumscribe the limits of acceptable speech.³⁶⁶ 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

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 407843 (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.³⁶⁷ It is difficult, however, to articulate what “taking pains” entails.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.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,”³⁷⁰ but forbids him to say anything that may

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].” ILL. CODE OF JUDICIAL CONDUCT Canon 4(A); 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.” Ill. 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.” *Id.* Under *Buckley*, gun control may be considered a “general topic” concerning the law, the legal system, and the administration of justice. *Id.* Canon 7(A)(3)(d)(i), amended in accordance with *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.” ILL. CODE OF JUDICIAL CONDUCT Canon 7(A)(3)(d)(i)(2006). In finding the Illinois Code’s “announce clause” unconstitutional, the *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.” *Buckley v. Ill. 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. Ill. Judicial Ethics Comm., Op. 94-5, 1994 WL 808086 (Mar. 22, 1994).

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.” Ill. 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. *Id.*

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. Ill. 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. *Id.*

368. See Swanson, *supra* note 11, at 105 (noting that enforcement of the announce clause is unworkable).

369. See Ill. 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).

370. See ILL. CODE OF JUDICIAL CONDUCT Canon 4 (A), ILL. SUP. CT. R 64 (A) (2006)

cast doubt on his ability to make impartial judgments.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.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.³⁷³ That being the case, how is a reasonable judge to know what speech casts doubt on his ability to judge impartially?³⁷⁴

At the same time, speech restrictions do not prevent judges and candidates from signaling their opinions on prohibited issues to voters.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.³⁷⁶ The 2004 Illinois Supreme Court race illustrates the way judicial campaigns can be highly issue-oriented without explicitly violating the Illinois Code.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 *tabula rasa*, and that voters in a democracy should have freedom to choose judges based on policy considerations.³⁷⁸ This argument misconstrues the function of the

(providing that judges may speak, write, lecture, and teach, provided they do not cast doubt on their ability to decide issues impartially); Ill. Judicial Ethics Comm., Op. 94-17, 1994 WL 808097 (June 17, 1994) (judges may form a Speakers' Bureau and be available to address audiences on topics concerning the law, the legal system, and the administration of justice).

371. ILL. CODE OF JUDICIAL CONDUCT Canon 4 (2006).

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).

373. *Id.*

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).

375. Minzner, *supra* note 19, at 210.

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).

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).

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 *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.").

judiciary.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.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.³⁸¹

The decisional trend in state and federal courts appears directed at broadening, not limiting, elected judges' First Amendment freedoms.³⁸² Judges and judicial candidates currently enjoy the constitutional right to announce their views on disputed legal and political issues.³⁸³ Guided by the Court's decision in *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.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.³⁸⁵ Critics of this trend, however, argue that such an expansive reading of *White* unjustifiably disregards the state's interest in promoting judicial integrity, impartiality, and independence.³⁸⁶

379. See *White*, *supra* note 15, at 1061 (arguing that accountability to voters conflicts with "the essence of our tripartite system of government.").

380. *Id.*

381. See, e.g., MODEL CODE OF JUDICIAL CONDUCT R. 5.01, cmt. ¶ 15 (Final Draft Report 2005), available at <http://www.abanet.org/judicialethics/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.").

382. See *De Muniz*, *supra* note 3, at 764 (arguing that *White* will likely lead to the elimination of most state judicial campaign speech regulations).

383. *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002).

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).

385. See *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).

386. *Gray*, *The Limits of White*, *supra* note 195, at 315; see *Weiser*, *supra* note 4 (contending that the Supreme Court's decision in *White* failed to take into account the compelling state interest in judicial independence).

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.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.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."³⁸⁹ Maag alleged in his defamation suit that statements about his record in a campaign flier fit this category.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.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.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.³⁹³

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 Karneier 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 Karneier 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?").

388. *Weaver*, 309 F.3d at 1319.

389. ILL. CODE OF JUDICIAL CONDUCT Canon 7(A)(3)(d)(ii); SUP. CT. RULE 67(A)(3)(d)(ii) (West 2006).

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).

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).

392. ILL. JUDICIAL CODE OF CONDUCT Canon 7(A)(3)(d)(ii) (West 2006).

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.³⁹⁴ 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.³⁹⁵ Regardless of whether judges are actually beholden to their contributors, the public will perceive that they are.³⁹⁶ 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.³⁹⁷ 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.³⁹⁸

Aside from threats to the appearance of impartiality, inappropriate external pressures may in some instances lead to real judicial misconduct.³⁹⁹ 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.⁴⁰⁰ Because Illinois judges must stand for re-election every four, six, or ten years,⁴⁰¹ the shadow of donors' interests in the context of the next campaign is always looming.⁴⁰²

Combined with an absence of meaningful restrictions on speech, the escalating cost and politicization of Illinois judicial campaigns creates a

financing of judicial elections threatens judicial impartiality).

394. Champagne & Cheek, *supra* note 126, at 938 (arguing that, "Texas' expensive judicial races exemplify the deep institutional damage that can result from money's influence").

395. *Id.* at 939; De Muniz, *supra* note 3, at 768. See also Carlton, *supra* note 110, at 846 ("Thus, the 'invisible elephant in the parlor' is money and judicial campaigns. There is nothing so corrosive to the public confidence in the judicial system than the growing amounts of money that are being pumped into judicial races, and the resulting rising tide of judicial politicization.").

396. See *supra* notes 323–24 and accompanying text (discussing the results of voter surveys suggesting that most voters believe judges are influenced by campaign contributions); Carrington, *supra* note 58, at 112–13 ("What is a litigant to think of the disinterestedness and open-mindedness of a court whose members were financed by his or her adversaries? [I]t asks entirely too much of citizens to expect them to believe that there is no connection between who wins and who pays.").

397. CALL TO ACTION, *supra* note 322, at 59.

398. De Muniz, *supra* note 3, at 768.

399. Champagne & Cheek, *supra* note 126, at 939 ("In extreme cases, the new judicial politics may result not just in the appearance of impropriety, but in real judicial misconduct.").

400. Johnson, *supra* note 10, at 1009.

401. ILL. CONST. art. VI § 10.

402. Johnson, *supra* note 10, at 1010.

climate threatening to the independence and impartiality of the judiciary.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.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.⁴⁰⁵ This argument rests partly on the flawed assumption that the elected judiciary was instituted to give the majority democratic power over judicial decisions.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.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.⁴⁰⁸ After *White*, the state's purview over judicial elections seems to be shrinking in size to match its limited dominion over legislative and executive elections.⁴⁰⁹

403. CALL TO ACTION, *supra* note 322, at 7; *see Selzer, supra* note 391 (discussing the changing climate of judicial campaigns).

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

405. *See supra* Part II.A.2 (presenting the arguments in favor of judicial elections).

406. *See supra* notes 55–57 and accompanying text (describing the history of judicial selection in Illinois).

407. *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, *supra* note 87, at 348; *see generally* RICHARD A. WATSON & RONALD 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, *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).

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

409. *See 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 public⁴¹⁸ while

410. Weiser, *supra* note 4, at 665–67.

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).

416. White, *supra* note 15, at 1059.

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.”⁴¹⁹ 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.⁴²⁰ Asking judges to be accountable to the voting public as constituents begs the question, “What constituents?”⁴²¹ How do we identify those groups and what does accountability to them require?⁴²² Ought judges decide cases with the interests of their constituents in mind?⁴²³ If so, the risks to the due process rights of individual litigants are substantial.⁴²⁴

B. Movement Toward Intermediate Remedies

Efforts to reform judicial selection methods by eliminating elections have not proven politically attainable.⁴²⁵ Despite active efforts of judicial selection reformers, thirty-one states still elect some or all of their judiciaries in contested elections.⁴²⁶ 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.⁴²⁷

1. Public Financing

One proposal for mitigating the effects of campaign contributions is public financing for judicial campaigns.⁴²⁸ 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.⁴²⁹

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).

429. Charles Gardner Geyh, *Publicly Financed Judicial Elections: An Overview*, 34 LOY.

In 2002, North Carolina became the first state to adopt a publicly funded campaign financing system for all levels of the judiciary.⁴³⁰ Candidates with demonstrated public support who agree to accept strict fundraising and spending limits have access to the Public Campaign Financing Fund.⁴³¹ 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.⁴³² Eligible candidates⁴³³ receive lump sum payments to their campaigns⁴³⁴ and are prohibited from engaging in any further private fund raising.⁴³⁵ If a candidate is outspent by a privately financed candidate or by third-party expenditures, “rescue” matching funds are available.⁴³⁶ In the 2004 North Carolina election cycle, fourteen out of sixteen eligible judicial candidates applied to the program; twelve candidates qualified and received funds.⁴³⁷

Wisconsin’s experience with voluntary public financing for its Supreme Court races illustrates one potential problem with such a system.⁴³⁸ Wisconsin supplemented private fund raising in judicial elections for its Supreme Court with a partial public financing system beginning in the 1970s.⁴³⁹ However, the system was inadequately funded.⁴⁴⁰ Wisconsin funded the program with revenues generated by a one-dollar tax return check-off, but taxpayer participation declined sharply in the late 1990s.⁴⁴¹ As the size of the grants diminished, fewer candidates opted to participate.⁴⁴²

L.A. L. REV. 1467, 1471 (2001).

430. N.C. GEN. STAT. ANN. §§ 163-278.61 – 163-278.70 (West 2006).

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.*

437. GOLDBERG, *supra* note 387, at 39.

438. See Geyh, *supra* note 429, at 1476–78 (describing the Wisconsin experience).

439. WIS. STAT. ANN. § 11.001 *et seq.* (West 2004).

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.⁴⁴³ It would establish voluntary public financing for eligible candidates⁴⁴⁴ to the Supreme Court and Appellate Court.⁴⁴⁵ Revenue for the fund would be generated by individual taxpayer check-offs, contributions from attorneys, civil penalties, unspent revenues, and voluntary donations.⁴⁴⁶ Like the North Carolina system, the program would provide "rescue funds" if a candidate is outspent by a certain amount.⁴⁴⁷ Participants must agree to abide by strict limits on fund raising and campaign expenditures.⁴⁴⁸

Public financing in Illinois would not likely resolve the issues that contribute to public cynicism about the courts.⁴⁴⁹ First, candidates must be persuaded that adequate funds will be available to support a candidate opposed by a privately funded candidate.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.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.⁴⁵²

2. Amending Ethical Rules

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

443. H.B. 4610, 94th Gen. Assem. (Ill. 2006).

444. Similar to the North Carolina system, candidates become eligible by filing an application and collecting a limited number of qualifying contributions. *Id.* § 9A-20.

445. *Id.* § 9A-5.

446. *Id.* § 9A-15(b).

447. *Id.* § 9A-35.

448. *Id.* § 9A-5.

449. *See* Geyh, *supra* note 429, at 1478–80 (discussing potential problems with publicly funded judicial elections).

450. *See id.* (discussing the difficulties in finding an adequate source of funding for Wisconsin's program).

451. *Cook County Study*, *supra* note 335, at 43.

452. *Id.*

453. *See, e.g.*, MODEL CODE OF JUDICIAL CONDUCT (Final Draft Report 2005), available at <http://www.abanet.org/judicialethics/finaldraftreport.html>.

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." *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.⁴⁵⁵ Therefore, the criticisms leveled at the speech provisions of the Illinois Code apply to the Model Code’s revisions.⁴⁵⁶ 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.⁴⁵⁷

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.⁴⁵⁸ 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.⁴⁵⁹ Similarly, Justice Kennedy’s concurring opinion in *White* suggested more stringent recusal standards as an alternative means of safeguarding the appearance of judicial propriety.⁴⁶⁰ 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.⁴⁶¹

455. MODEL CODE OF JUDICIAL CONDUCT R. 5 (Final Draft Report 2005), available at <http://www.abanet.org/judicialethics/finaldraftreport.html>.

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. Wolnitzek*, 345 F. Supp. 2d 672, 706–10 (E.D. Ky. 2004) (upholding Kentucky recusal statutes as narrowly tailored to serve compelling state interests).

459. *N.D. Family Alliance, Inc. v. Bader*, 361 F. Supp. 2d 1021, 1043–44 (D.N.D. 2005); *Alaska Right to Life Political Action Committee v. Feldman*, 380 F. Supp. 2d 1080, 1084 (D. Alaska 2005) (finding that state recusal statutes are narrowly tailored to serve the compelling state interest in judicial impartiality).

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.⁴⁶² To begin with, difficulties will surely arise in the drafting of a statute adequate to fulfill this function.⁴⁶³ 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.⁴⁶⁴ Furthermore, implementing comprehensive disqualification rules would likely result in administrative problems and substantial costs to the parties interested in bringing motions for recusal.⁴⁶⁵

For other reasons, stringent disqualification standards will not eliminate numerous instances of real or perceived judicial bias.⁴⁶⁶ 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.⁴⁶⁷ 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.⁴⁶⁸

The relationship of third parties to the court is also problematic.⁴⁶⁹ 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.⁴⁷⁰ 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.”).

462. See *Voting and Democracy: Judicial Elections and Free Speech*, 119 HARV. L. REV. 1133, 1141–42 (2006) (arguing that recusal as a remedy for judicial bias “suffers from a deep manageability problem”).

463. Thomas R. Phillips, *Judicial Independence and Accountability*, 61 LAW & CONTEMP. PROBS. 127, 131–32 (1998).

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.*

466. See Tobin A. Sparling, *Keeping Up Appearances: The Constitutionality of the Model Code of Judicial Conduct’s Prohibition of Extrajudicial Speech Creating the Appearance of Bias*, 19 GEO. J. LEGAL ETHICS 441, 445 (2006) (arguing that “neither of the proposed alternatives to [the appearance of bias] standard—recusal or resort to the ballot box—adequately protects litigants’ due process rights.”).

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

elected judiciaries], [b]ut movement away from systems providing for contested elections of judges has not occurred in most states [and] too little attention has been given to incremental changes in the judicial election process to address some of the most serious threats to judicial independence and impartiality, and to appreciably enhance public trust in the courts.”) The American Bar Association, which traditionally has strongly supported merit selection, recently began advocating for various reforms of judicial elections as an alternative. *See* AM. BAR ASS’N, JUSTICE IN JEOPARDY: REPORT OF THE AM. BAR ASS’N COMM’N ON THE TWENTY-FIRST CENTURY JUDICIARY v-vi (2003) (stating that “the preferred system of state court judicial selection is a commission-based appointive system” but offering a list of “alternative recommendations”).

479. *See* Zeidman, *supra* note 124, at 718–19 (arguing that although there is a “sense” that merit selection is not politically attainable, reformers should focus efforts on devising the best system possible, i.e., merit selection, rather than accept lesser reforms).

480. *Id.*

481. *See infra* Part V.A (discussing why Illinois should eliminate judicial elections).

482. *See infra* Part V.B (discussing a possible method of reform). This Comment does not propose to solve the dilemma facing the Illinois judiciary today because discussing the proposed solutions to these issues would span an equal amount of pages. The purpose of this Comment is to challenge complacency and resignation about Illinois’ current system and to argue that, although undoubtedly other judicial selection methods have flaws, Illinois judicial elections are fast becoming the least preferable method of judicial selection. For further reading on merit selection as a judicial selection reform proposal, see Jona Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, 49 U. MIAMI L. REV. 1 (1994) (offering a comprehensive review of the history of merit selection, its current status in the United States, and a description of the structural features of the wide range of existing merit plans); Norman L. Greene, *Perspectives on Judicial Selection*, 56 MERCER L. REV. 949 (2005) (highlighting some aspects of dissatisfaction with judicial selection, and suggesting some remedies, including proposed elements of a merit selection system); Zeidman, *supra* note 124, at 718–20 (arguing that if properly instituted, merit selection is better than judicial elections); Steven Zeidman, *To Elect or Not to Elect: A Case Study of Judicial Selection in New York City 1977–2002*, 37 U. MICH. J. L. REFORM 791 (2004) (reporting the results of a study comparing elected and merit selected judges; finding that merit selection does more to reduce judicial misconduct, promote diversity and independence; and describing the components of a “model merit selection process”).

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.⁴⁸³ 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.⁴⁸⁴ Modern-day First Amendment jurisprudence, which prevents the State from enforcing meaningful restrictions on speech and campaign conduct, will likely exacerbate these problems.⁴⁸⁵ In the current campaign climate, the Illinois Code is an ineffective means of safeguarding the independence and impartiality of the judiciary.⁴⁸⁶ 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.⁴⁸⁷

Such a transformation would be undesirable because, in our constitutional framework, judges do not “represent” constituents,⁴⁸⁸ they make decisions by applying law to the facts of a specific case.⁴⁸⁹ The Final Draft Report accurately states, “Citizens have a due process right to judges who will make decisions based on the evidence, the law,

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).

485. See Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 COL. L. REV. 563, 617 (2004) (arguing that more substantive judicial campaigning is inevitable after *White*).

486. Cf. Selzer, *supra* note 391, at 203–204, 225 (noting these factors and noting that scholars are “tak[ing] 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

490. MODEL CODE OF JUDICIAL CONDUCT R. 5, cmt. ¶ 15 (Final Draft Report 2005), available at <http://www.abanet.org/judicialethics/finaldraftreport.html>.

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).

494. A form of merit selection was first proposed in 1914 by Albert Kales of the American Judicature Society. Kales I, *supra* note 483, at 12. Kales suggested a method whereby a “judicial council” composed of a chief justice and presiding judges of the divisions of the court would create a list of eligible candidates, from which the chief justice would make selections. *Id.* Currently, about two-thirds of the states and the District of Columbia use merit selection to select some or all of their judges. AM. JUDICATURE SOC’Y, JUDICIAL MERIT SELECTION: CURRENT STATUS (2003), available at <http://www.ajs.org/js/JudicialMeritCharts.pdf>. [hereinafter CURRENT STATUS].

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

Reform: Examples from Six States, AM. JUDICATURE SOC'Y 19 (2003), available at <http://www.ajs.org/js/jsreform.pdf>. Instead, judges 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.