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Judicial Elections, Campaign Financing, and Free Speech

RONALD D. ROTUNDA

MOST STATES (39 at last count) choose judges through popular elections.¹ But these elections are often quite unlike ordinary political campaigns. When judges run for reelection, or when lawyers run for judicial office, they are typically subject to rules that limit what they can say in the course of their campaigns.² The incumbent judges issue rules that are both intended to restrict, and in fact do severely restrict, the political speech of judicial candidates running for office. These rules are "law" in the same sense that rules of evidence or rules of civil procedure are law,³ so one should not think of such rules as advisory. They have real bite, and those who violate them are subject to

discipline, which can range up to loss of judicial office (if one is a judge) or disbarment (if one is a lawyer running for judge).

States typically justify these stringent and rigid restrictions on various grounds, all of which are a subset of a general notion that judging is not politics and that, therefore, judges should not campaign like politicians. However, it must be remembered that judges run for office only because the state constitution of the particular jurisdiction mandates political campaigns.⁴ States, if they choose, can avoid the baggage associated with political campaigns for judicial office simply by turning to merit selection of judges.⁵

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¹ AMERICAN JUDICATURE SOCIETY, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS (Apr. 2002).

² ABA MODEL CODE OF JUDICIAL CONDUCT, Canon 5A (1990), reprinted in, THOMAS D. MORGAN AND RONALD D. ROTUNDA, 2002 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY (Foundation Press, 2002), at 758-63.

³ THOMAS D. MORGAN AND RONALD D. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 12 (Foundation Press, 7th Ed. 2000).

⁴ The ABA MODEL CODE OF JUDICIAL CONDUCT purports to apply to both elected and appointed judges. It is interesting that the Federal Judicial Council, which has adopted a version of the ABA Model Code of Judicial Conduct, explicitly did not adopt a provision of Canon 5 that explicitly addresses the solicitation of endorsement for appointment to judicial office. Canon 5B(2) of the ABA Model Code provides that:

"(2) A candidate for appointment to judicial office or a judge seeking other governmental office shall not engage in political activity to secure the appointment except that:

"(a) such persons may:

"(i) communicate with the appointing authority, including any selection or nominating commission or other agency designated to screen candidates;

"(ii) seek support or endorsement for the appoint-

ment from organizations that regularly make recommendations for reappointment or appointment to the office, and from individuals to the extent requested or required by those specified in Section 5B(2)(a); and

"(iii) provide to those specified in Sections 5B(2)(a)(i) and 5B(2)(a)(ii) information as to his or her qualifications for the office."

Although the ABA's proposed Judicial Code seeks to restrict candidates for appointment to judicial office from seeking support from individuals, the drafters of the Code of Conduct for U.S. Judges explicitly excluded this language in the Code that governs federal judges. The CODE OF CONDUCT FOR UNITED STATES JUDGES is reprinted in 175 F.R.D. 364 (1998) and it does not include this portion of the ABA Model Code. See discussion in, RONALD D. ROTUNDA, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 57-2 (ABA, West Group, 2nd ed. 2002).

⁵ Pennsylvania senior state judge Isaac Garb from Bucks County, in commenting on the *White* case discussed below, argued "judges shouldn't be muzzled," but he also favored replacing judicial elections with merit selection. In contrast, another senior judge, Carbon County Judge John Lavelle, argued that judges should not have to "ingratiate themselves to the voting public." Voters should instead rely on a "strong, scrutinizing press to do the homework" about a judicial candidate's qualifications. Charles Meredith, *Judges Differ on Gag Rules for Candidates*, ALLENTOWN (PENN.) MORNING CALL, June 5, 2002 at B1.

The question then is whether the First Amendment (as applied to the states through the Fourteenth Amendment) allows judges to create rules that, in effect, try to take political campaign speech out of political campaigns. States, after all, can choose to appoint judges, to have merit selection instead of elective campaigns. But, once the state chooses an election, can it decide to restrict what the candidates say? Can the state conclude that the voters must decide among the candidates but that the candidates may not tell the voters why they should cast their votes?

The United States Supreme Court answered that question in *Republican Party of Minnesota v. White*.⁶ In that case, a candidate for judicial office as well as various political groups including the Republican Party of Minnesota sued state boards and offices who were responsible for establishing and enforcing judicial ethics. They alleged that the Minnesota Supreme Court's canon of judicial conduct that prohibited candidates for judicial election from announcing their views on disputed legal or political issues violated the First Amendment. The U.S. Supreme Court agreed. In invalidating this restriction on political speech during the course of political campaigns, the Court emphasized that this speech is core political speech and that it will review with strict scrutiny any laws that ban, restrict, or limit such speech.

Campaign speech is normally considered to be well within the essence of the First Amendment. Yet, proponents of restricting such speech typically argue that it is necessary to reform political campaigns by restricting speech in order to "level the playing field" and end corruption or the appearance of corruption. To the extent that argument has merit, it should be strongest in the case of judicial elections because judges are supposed to decide cases on the basis of merit, not on the basis of interest groups, pressure politics, and popular will.

If that argument fails in the case of *judicial* campaign speech—where any state interests in regulating political speech should be at their apex—then *Republican Party v. White* casts a long shadow that should extend far beyond the rules governing judicial elections.⁷ That case applies the strict-scrutiny test with vigor, hold-

ing that those who seek to justify content-based restriction of speech by candidates for public office have the burden to prove that any restriction is (1) narrowly tailored, to serve (2) a compelling state interest.⁸

Oddly enough, the West headnote for *White* on this point argues that there was only a plurality of Justice on this issue.⁹ It seems clear that it was a majority of the Court that held that the proper test is strict scrutiny. The Court opinion says that it is a majority opinion and lists the names of the five justices who joined it. There were two concurring opinions, both labeled "concurring," and not "concurring in part" or "concurring in the result." Justice O'Connor, in her concurring opinion makes clear that—"I join the opinion of the Court. . . ."¹⁰ Justice Kennedy, the only other concurring justice, also makes it quite clear he understands that the Court uses strict scrutiny in this case and that the majority opinion explains "in clear and forceful terms why the Minnesota regulatory scheme fails that test." Right after that he adds, "So I join its opinion."¹¹ In other words, he is

⁶ 122 S.Ct. 2528 (2002).

⁷ See, 4 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.51 (West Group, 3rd ed. 1999).

⁸ "The Court of Appeals concluded that the proper test to be applied to determine the constitutionality of such a restriction is what our cases have called strict scrutiny, id., at 864; the parties do not dispute that this is correct. Under the strict-scrutiny test, respondents have the burden to prove that the announce clause is (1) narrowly tailored, to serve (2) a compelling state interest." 122 S.Ct. 2528, 2534.

⁹ "Under the strict-scrutiny test, party challenging content-based restriction of speech by candidates for public office has the burden to prove that the restriction is (1) narrowly tailored, to serve (2) a compelling state interest. (Per Justice Scalia, with three justices concurring and one concurring in the result)." 122 S.Ct. at 2528, headnote [2].

See also, 122 S.Ct. at 2528, headnote [3]: "In order for party challenging content-based restriction of speech by candidates for public office to show that restriction is narrowly tailored under the strict scrutiny test, party must demonstrate that restriction does not unnecessarily circumscribe protected expression. (Per Justice Scalia, with three justices concurring and one concurring in the result.)" This headnote also incorrectly claims that there is no majority opinion. I have written West Publishing Company about this issue and it may be corrected in future printings.

¹⁰ 122 S.Ct. at 2542.

¹¹ 122 S.Ct. at 2544.

joining the majority *because* it uses strict scrutiny.¹²

This use of strict scrutiny is controversial after *Nixon v. Shrink Missouri Government PAC*.¹³ That case held that *Buckley* is authority for state limits on campaign contributions and that the \$1000 limit does not have to be inflation-adjusted. Instead, the question is whether the contribution limit is "so low as to impede the ability of candidates to 'amass the resources necessary for effective advocacy.'" ¹⁴ The Court in *Shrink* found no evidence that the state restriction had failed this forgiving test.

The *White* Court does not say that it is overruling *Shrink Missouri*, or any of its prior decisions. Yet, in *Shrink Missouri*, Justice Thomas' dissent had specifically complained that the majority there was abandoning strict scrutiny in this line of cases, even though "Political speech is the primary object of the First Amendment."¹⁵ Justice Breyer's concurrence in *Shrink Missouri* notes the dissent's objection and responds that the "mechanical application" of the tests associated with strict scrutiny are inappropriate in this line of cases.¹⁶ Later, thoughtful commentators concluded that *Shrink Missouri* had abandoned strict scrutiny.¹⁷

Yet, the majority in *White* resurrects strict scrutiny. In response the dissent is quite placid and serene. Only Justice Ginsburg's dissent cites *Shrink Missouri*, and she merely quotes from a portion of Justice Breyer's concurring opinion—not the part rejecting strict scrutiny—for the proposition that judges should avoid prejudgment and not make pledges or promises.¹⁸

Now, let us first briefly summarize *Republican Party v. White* and then consider how some of the arguments that proponents of campaign restrictions advance might stack up in light of the active, strict review in which the *White* Court engaged.

THE WHITE DECISION AND SPEECH ABOUT POLITICAL CAMPAIGNS

Republican Party of Minnesota v. White arose in Minnesota. The Minnesota Code of Judicial Conduct, like the ABA Model Code of Judicial

Conduct, places various limits on the candidates' speech when the state selects its judges by election. One rule prohibits a judicial candidate or judge from making "pledges or promises" on how he will rule in a particular case.¹⁹ A second Minnesota rule of judicial ethics prohibits a candidate for judicial office from "announcing" a view on any "disputed legal or political" issue if the issue might come before a court.²⁰ This clause prohibits a candidate's "mere statement" even if he "does not bind himself to maintain that position after election."²¹

The ABA Model Judicial Code does not have the "announce" provision, but the Minnesota state supreme court said that its "announce" provision was intended to be similar to another provision of the ABA Model Judicial Code that prohibits judicial candidates from making "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the

¹² One might read Kennedy's opinion as saying that he agrees that the opinion of the Court has followed the strict scrutiny test in a proper way, and that he joins that opinion in invalidating the law. But, if he had his preferences, he would apply an even stricter test than strict scrutiny; he would apply a per se rule invalidating such campaign restrictions. In the sentence following the one quoted in the text, Justice Kennedy says: "I adhere to my view, however, that content-based speech restrictions that do not fall within any traditional exception should be invalidated without inquiry into narrow tailoring or compelling government interests." 122 S.Ct. at 2544.

¹³ 528 U.S. 377 (2000).

¹⁴ 582 U.S. at 397, quoting *Buckley v. Valeo*, 424 U.S. 1, 21.

¹⁵ 528 U.S. at 410 (Justice Thomas, joined by Justice Scalia, dissenting).

¹⁶ 528 U.S. at 911 (Justice Breyer, concurring, joined by Justice Ginsburg).

¹⁷ Richard L. Hasen, *Shrink Missouri, Campaign Finance, and "The Thing That Wouldn't Leave"*, 17 CONSTITUTIONAL COMMENTARY 483 (2000).

¹⁸ 122 S.Ct. at 2555 (Justice Ginsburg, dissenting).

¹⁹ Minnesota Code of Judicial Conduct, Canon 5A(3)(d)(i1). The corresponding ABA provision is, ABA MODEL CODE OF JUDICIAL CONDUCT, Canon 5A (d)(i).

²⁰ Minnesota Code of Judicial Conduct, Canon 5A(3)(d)(1), which states that judicial candidates may not "make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his or her views on disputed legal or political issues." (emphasis added).

²¹ 122 S.Ct. at 2532.

court."²² Minnesota claimed that its "announce" clause is really the same as the ABA "commit or appear to commit" clause. Thus, the Minnesota Supreme Court places limitations "upon the scope of the announce clause that are not (to put it politely) immediately apparent from its text."²³ Nonetheless the U.S. Supreme Court accepted this remarkable piece of plastic surgery and proceeded to invalidate this clause, even with the newly-discovered limitations on its breadth.

In *White*, Justice Scalia, writing for five members of the Court, held that this second prohibition on judicial candidates violates the First Amendment. In order for the announce clause to be narrowly tailored, it must not "'unnecessarily circumscrib[e] protected expression.'"²⁴ The Minnesota rule did not meet this test.

One common view of "impartiality" is no bias for or against any party to the proceeding. But the clause is not tailored to serve that interest because it does not restrict speech for or against particular parties, but rather speech for or against particular issues. "Impartiality" in the sense of no preconception for or against a particular legal view, is not a compelling state interest, "since it is virtually impossible, and hardly desirable, to find a judge who does not have preconceptions about the law."²⁵ Indeed, the Minnesota Constitution specifically requires judges to be "learned in the law."²⁶

Nor does the prohibition promote impartiality in the sense of "openmindedness" because the announce clause is "woefully underinclusive."²⁷ For example, a judge may confront a legal issue on which he has expressed an opinion while on the bench. "Judges often state their views on disputed legal issues outside the context of adjudication, in classes that they conduct, and in books and speeches. Like the ABA Codes of Judicial Conduct, the Minnesota Code not only permits but encourages this." The Minnesota rule prohibits a judicial candidate from saying, "I think it is constitutional for the legislature to prohibit same-sex marriage." Yet he may say the very same thing, until "the very day before he declares himself a candidate, and may say it repeatedly (until litigation is pending) after he is elected. As a means of pursuing the objective of open-mindedness that respondents now articulate, the announce clause is so

woefully underinclusive as to render belief in that purpose a challenge to the credulous."²⁸

The Court, citing a non-judicial election case, said what Minnesota may not do is to "censor what the people hear as they undertake to decide for themselves which candidate is most likely to be an exemplary judicial officer. Deciding the relevance of candidate speech is the right of the voters, not the State."²⁹

²² ABA Model Code of Judicial Conduct, Canon 5A(3)(d)(ii). The ABA, in the 1972 version of its Model Code, had an "announce clause," but, because of First Amendment concerns, dropped it and replaced it with the "appear to commit" language. See LISA MILORD, *THE DEVELOPMENT OF THE ABA JUDICIAL CODE* 50 (1992). Minnesota refused to adopt the ABA's new formulation, but at oral argument contended that its "announce" clause was really the same as the ABA provision it had specifically refused to adopt:

"At oral argument, respondents argued that the limiting constructions placed upon Minnesota's announce clause by the Eighth Circuit, and adopted by the Minnesota Supreme Court, render the scope of the clause no broader than the ABA's 1990 canon. Tr. of Oral Arg. 38. This argument is somewhat curious because, based on the same constitutional concerns that had motivated the ABA, the Minnesota Supreme Court was urged to replace the announce clause with the new ABA language, but, unlike other jurisdictions, declined. Final Report of the Advisory Committee to Review the ABA Model Code of Judicial Conduct and the Rules of the Minnesota Board on Judicial Standards 5-6 (June 29, 1994), reprinted at App. 367-368. The ABA, however, agrees with respondents' position, Brief for ABA as Amicus Curiae 5. We do not know whether the announce clause (as interpreted by state authorities) and the 1990 ABA canon are one and the same. No aspect of our constitutional analysis turns on this question."

122 S.Ct. at 2534 n.5.

²³ 122 S.Ct. 2528, 2532.

²⁴ 122 S.Ct. at 2534-35, quoting *Brown v. Hartlage*, 456 U.S. 45, 54, 102 S.Ct. 1523, 71 L.Ed.2d 732 (1982).

²⁵ 122 S.Ct. at 2536.

²⁶ Minn. Const., Art. VI, § 5.

²⁷ 122 S.Ct. at 2537.

²⁸ *Id.*

²⁹ 122 S.Ct. at 2545 (Kennedy, J., concurring), citing *Brown v. Hartlage*, 456 U.S. 45, 60, 102 S.Ct. 1523, 71 L.Ed.2d 732 (1982). Justice O'Connor also filed a concurring opinion. Justice Stevens, filed a dissenting opinion, in which Justices Souter, Ginsburg, and Breyer joined. Justice Ginsburg, filed a dissenting opinion, in which Justices Stevens, Souter, and Breyer, joined.

Justice Ginsburg's dissent argued: "In view of the magisterial role judges must fill in a system of justice, a role that removes them from the partisan fray, States may limit judicial campaign speech by measures impermissible in elections for political office." 122 S.Ct. at 2551.

Now, let us consider a few recurring issues involving campaign reform, in light of the strict scrutiny the Court imposed in *White*.

CAMPAIGN FINANCE

First, let us turn to campaign contributions. The *White* decision does not discuss this issue directly, but its aggressive use of strict scrutiny and its imposition of a heavy burden on the proponents of campaign restrictions raise new questions. *White* does not appear to allow proponents of restrictions on campaign expenditures and contributions to satisfy this burden merely by *asserting* that contributions and expenditures raise an appearance of corruption justifying state regulation.

When judges run for office, they need campaign funds. It is often asserted or assumed that judicial campaign fundraising compromises the impartiality of judges. One recent ABA poll, for example, concluded that "72 percent of all Americans are concerned that the impartiality of judges is compromised by their need to raise campaign contributions. More than half of the respondents said they were 'extremely' or 'very' concerned."³⁰ This poll result alone is enough, in the view of the ABA President, to justify substantial changes in the law.

These poll results certainly raise serious concern, for an impartial judiciary is crucial to the rule of law. Yet, do the polls reflect the way things are in fact, or merely the way that many people fear that they may be? The supposition that contributions may corrupt the recipient is not implausible, but what if it is false? As Justice Souter noted in *Shrink Missouri*, "This Court has never accepted mere conjecture as adequate to carry a First Amendment burden . . ." ³¹ If the people's fears are unreasonable, if the empirical evidence does not support the fear of corruption, then perhaps the remedy for the fear should focus more on educating the people.

One would think that the proposition that contributions corrupt should be easy to examine as a statistical matter. While legislators or members of the executive branch deal with many issues and interest groups, judges deal with specific parties involving particular mat-

ters. Hence, if these parties (or their lawyers) give the judges campaign contributions and the judges then rule in favor of these parties (or their lawyers), that does not necessarily mean that judges are corrupt, but it does mean that fear regarding the impartiality of judges merits study.

Unfortunately, there is not a great deal of rigorous empirical work in this area, but what exists is quite interesting and does not support a statistical conclusion that judicial campaign contributions are corrosive. One study has focused on the State of Illinois. Many of the people in that state are concerned that campaign contributions affect judicial decisions.³² Yet, the empirical investigation dealing specifically with this state undermines the voters concern. Let us turn to that analysis.

Over the last three election cycles, 34% of the cases that the Illinois Supreme Court decided involved a case where either a party or the lawyer was a campaign contributor.³³ On the

³⁰ ABA Journal E-report, August 16, 2002, www.abanet.org/journal/ereport/au16conf.html. This poll result is not atypical. For example, a poll by the North Carolina Center for Voter Education showed that 84% of the 600 likely voters surveyed "are concerned about how judges raise money for their elections." Campaign contributions "influence judicial decisions," said 74 percent, even though 81% still "preferred the election of judges over appointment." J. Barlow Herget, Op-ed, *It's Time for Judicial Reform*, CHARLOTTE (N.C.) OBSERVER, May 31, 2002. www.charlotte.com/mld/observer/news/3369889.htm.
³¹ *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 397 (2000).

³² A recent poll showed that more than 85 percent of Illinois voters are concerned that political contributions influence the decisions of judges. Steve Neal, *State Needs Fairer Way to Pick Judges*, Chicago Sun-Times, September 4, 2002.

³³ See Samantha Sanchez, *Illinois Supreme Court: Money in Judicial Elections*, THE NATIONAL INSTITUTE ON MONEY IN STATE POLITICS, www.followthemoney.org/reports/il/20020129/IL.phtml.

THE NATIONAL INSTITUTE ON MONEY IN STATE POLITICS developed the *Money in Judicial Politics Project* to track contributions and spending in Supreme Court elections in a number of states, including Illinois. To compile a complete campaign profile of the court that included at least one election for each of the seven sitting Justices, the Project collected data for three election cycles—1990, 1992 and 1994. In these election cycles, 32 candidates sought one of the seven positions. This study did not include the supreme court races of 2000, in which 12 candidates spent \$7.7 million, because those elected had not yet participated in enough cases to make the process of matching contributors and litigants worthwhile.

other hand, the vast majority of campaign contributors "had no cases before the Court, and most litigants who appeared before the state supreme court had not made any campaign contributions."³⁴

When we look more closely at the cases where a party or lawyer was a contributor, there is less there than meets the eye. Between 1991 and 1999, 34% of the cases that the Illinois Supreme Court heard involved a party, lawyer or organization that made a campaign contribution to a Supreme Court justice in 1990 or 1992, but more than two-thirds of those cases involve public attorneys representing the state. The state's lawyers were giving contributions, but they do not have the same interest in litigation as private lawyers. The state's prosecutors do not work on contingent fees; they do not worry about losing their client.³⁵ Indeed, they should not even worry about losing their cases if they lose for the right reason: "The duty of the prosecutor is to seek justice, not merely to convict."³⁶ The sovereign wins whenever justice is done.³⁷

Fewer than 4% of the lawyers who appeared before the Supreme Court made a contribution to a winning candidate, and one-third of the judicial campaign funds came from an unlikely source of corruption: the candidates themselves or from the political parties who backed the candidates.³⁸ Assuming that the party is not funneling campaign contributions from donors to the particular candidate—assuming, in short, that the party is not "laundering" the contributions but is merely spending money it collects from a great number of individual contributors, then the concept that the political party can "corrupt" the views of its candidates is peculiar, because the candidates are its candidates.³⁹

Let us look specifically as to whether major contributors who had cases before the Illinois Supreme Court were more likely to win. The average contribution was only \$645, but there were 68 contributors who gave \$5,000 or more in the three election cycles that this study investigated. Of these major contributors, only seven out of the 68 even appeared before the Court, and these seven lost as many cases as they had won.⁴⁰

Of course, the fact that there is no statistical

correlation between the major contributors to the campaigns of justices of the Illinois Supreme Court and success before that court—the fact that major contributors were just as

³⁴ The funds contributed by *all* parties appearing before the Illinois Supreme Court amounted to only 40% of the amount that candidates themselves had contributed to their own campaigns from their personal funds. These contributor-litigants gave 6.6% of the money that the candidates raised.

Remember, that the "vast majority of campaign contributors have no cases before the Court." www.followthemoney.org/reports/il/20020129/IL.phtml.

³⁵ See www.followthemoney.org/reports/il/20020129/IL.phtml: "If the publicly employed attorneys are removed from consideration, on the theory that their success before the Court is unlikely to be related to their contributions, just 10.7 percent of cases before the Supreme Court involved a contributor. When those contributors appeared before the Court, they were more often on the losing side than the winning side of the case."

³⁶ ABA STANDARDS RELATING TO THE ADMINISTRATION OF JUSTICE, Standard 3-1.2(c), "The Function of the Prosecutor," (ABA, 3rd ed. Feb. 3, 1992).

³⁷ RONALD D. ROTUNDA, *LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY* § 12-4 (ABA-West Group 2nd ed. 2002).

³⁸ See www.followthemoney.org/reports/il/20020129/IL.phtml.

The Court has rejected restrictions on campaign financing when an anti-corruption rationale is unlikely to exist. See, *Buckley v. Valeo*, 424 U.S.1, 45-47 (1976) (*per curiam*) (invalidating limits on independent expenditures because the "advocacy restricted by the provision does not presently appear to pose dangers of real or apparent corruption"); *Federal Election Commission v. MCFL*, 479 U.S. 238, 263 (1986) (striking limits on campaign expenditures by incorporated political associations because spending by such groups "does not pose [any] threat" of corruption); *Federal Election Commission v. NCPAC*, 470 U.S. 480 (1985) (invalidating limits on independent expenditures by political action committees because, in that context, "a quid pro quo for improper commitments" was only a "hypothetical possibility"); *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 297 (1981) (reaffirming that "*Buckley* does not support limitations on contributions to committees formed to favor or oppose ballot measures " because an anticorruption rationale is inapplicable); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978) (holding that limits on referendum speech by corporations violate First Amendment because "[t]he risk of corruption . . . simply is not present").

³⁹ *Cf.*, *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604, 646-47 (1996) [*Colorado II*], holding that First Amendment prohibits application of Federal Election Campaign Act's party expenditure provision to expenditures that political party has made independently, without coordination with any candidate. A separate opinion of Justice Thomas, joined as to this part by Chief Justice Rehnquist and Jus-

likely to lose cases before these justices⁴¹—does not prove that the contributions were not corruptive. Perhaps, if the contributors had given less, they would have lost even more than half of their cases. Still, the statistical evidence is still relevant because it does demonstrate in this state there is no statistical evidence supporting the assertion of corruption. Yet, that assertion is often repeated as if it had the certainty of a law of physics, just as the night follows the day.

More recently, the Chicago Daily Law Bulletin reported that the "Illinois Supreme Court is not as friendly a venue for plaintiffs as many believe: plaintiffs lost in nearly two-thirds of the tort cases the justices have decided since February 2001." Chief Justice Moses W. Harrison, considered "the court's staunchest ally of the plaintiffs," said, "We're a pretty conservative court [in tort cases], as far as I'm concerned." The Bulletin concluded that there ap-

pears to be no correlation between campaign contributions from plaintiffs' lawyers and favoritism to plaintiffs. Some of the contributors may not be happy with this state of affairs, but that only means that the fact that people may want to buy influence does not mean that they are successful. Chicago personal-injury attorney Joseph A. Power Jr.—whose law firm and its partners have contributed \$63,000 to Illinois Supreme Court candidates in the year 2000—said that the court's record, in his view, was "very disturbing." He added: "Had I known ahead of time that the candidates were going to take two-thirds of the cases and decide them in favor of [the defense], I would have donated the money to a good charity."⁴²

There is a similar thorough study of the Supreme Court of the State of Michigan. It also covered a complete campaign profile of the state supreme court that included at least one election for each of the sitting justices. The in-

tice Scalia, also concluded that the anticorruption rationale justifying campaign restrictions is inapplicable in the context of political parties funding campaigns because there is only a minimal threat of corruption when a party spends to support its candidate or to oppose the competitor to its candidate, whether or not that expenditure is made in concert with the candidate. *Id.* at 631.

Colorado I then remanded for the lower court to consider the political party's broad claim that all limits on a party's congressional campaign expenditures are unconstitutional on their face, and thus unenforceable even as to spending coordinated with a candidate. The district court and the Tenth Circuit agreed with this First Amendment challenge, but the Supreme Court reversed, in *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 421 (2001) [*Colorado II*]. The Court rejected this facial challenge to the restriction. "We hold that a party's coordinated expenditures, unlike expenditures truly independent, may be restricted to minimize circumvention of contribution limits." 533 U.S. at 465.

The majority's analysis places an important caveat on the anticorruption rationale. The majority was concerned that if it gave a party the right to make unlimited coordinated expenditures, that would encourage those people wishing to support a nominee to contribute to that party (to, in effect, launder their contribution) in order to finance coordinated spending for the candidate, thus circumventing the contribution limits. The majority found that the evidence supported this risk, thus entitling the government to prevail in its characterization of party *coordinated spending* as the functional equivalent of *contri-*

butions. For example, while the party claimed that many of the contributions to it were small, the evidence showed substantial individual donations with the party acting as a matchmaker.

It is important to realize that, as the majority pointed out, "all members of the Court agree that circumvention is a valid theory of corruption; the remaining bone of contention is evidentiary." 533 U.S. at 456 (footnote omitted). As a matter of the evidence in that case, the Court was unwilling to invalidate the campaign restriction. This need to look at the empirical evidence should also exist in the case of judicial campaign contributions.

⁴⁰ See www.followthemoney.org/reports/il/20020129/IL.phtml.

⁴¹ The private attorneys who contributed to at least one member of the Illinois Supreme Court and later appeared before that court, in order of funds contributed, are: Jerome Mirza, who gave \$11,264, appeared in three cases and lost all three; Robert A. Clifford, who gave \$9,500, appeared in two cases and lost both; Leonard M. Ring, who gave \$7,750, appeared in two cases, lost one and received a split decision in the second; Philip H. Corboy, who gave \$4,450, appeared in three cases, lost one and had two split decisions; Joseph Curcio, who gave \$4,100 and appeared in one case which he won; and, Patrick A. Salvi who gave \$3,030 and appeared in only one case, filing an amicus brief. Amiel Stephen Cueto gave \$3,000 and appeared in one case, which he lost. And 66 other attorneys who gave less than \$3,000 each and had similar mixed results.

⁴² Daniel C. Vock, Dem Majority Aside, High Court Learns Right, Chicago Daily Law Bulletin, September 3, 2002.

vestigators collected data for an eight-year period, 1990 to 1998.⁴³ The conclusions are comparable.

During this eight-year period covering five election cycles, 89 percent of the cases that the Michigan Supreme Court decided involved a contributor who was either a party or an attorney. Yet, when we look more closely, we find that more than half of those cases involved a state-employed attorney who had made a campaign contribution and who was representing the state, not a private client, before the court.⁴⁴ Lawyers constituted 23% of the contributors, but at least 80% of these lawyers never appeared before the court during the entire time of the study. In Michigan, the judicial candidates contributed only 2% of the total funds raised.

Once again, there is no statistical linkage between contributions and outcomes favorable to those who gave the contributions. For example, one law firm that had contributed the most to judicial candidates over the five election cycles gave a total of \$344,403, from the firm and 53 individual attorneys. However, only \$41,735 (12 percent) of that went to winning candidates who then became Supreme Court justices and the nine lawyers from that firm who actually argued cases before the Court gave just \$4,532 to members of the Court. The law firm was involved in 23 cases during that period, four of them by filing an amicus brief. Of the remaining 19 cases, they won three, lost four times as many (that is, 12) and got split decisions in four.⁴⁵

A similar study covers the State of Wisconsin. This study also examined a lengthy period covering several election cycles, and its results are similar to those for Illinois and Michigan. For example, during a 10-year period under review, there were 95 cases involving attorney discipline. Nine of these cases involved attorneys who had contributed to the justices, and in all nine of these cases, the lawyers lost their appeals. One law firm with only eight lawyers was one of the largest contributors in the state. It contributed a total of \$8,150 to six Justices. That firm argued seven cases before the court, winning only two and losing five. As the study concludes, "while the practice of giving money

to judicial candidates clearly raises questions of potential bias, the data does [sic] not support such an inference."⁴⁶

One robin does not make a spring, and these statistics from three major states may not necessarily represent what we might find in other jurisdictions. In addition, cases that go before appellate courts are often complex, so that it may be difficult to determine if a decision is a complete victory for any party. The plaintiff may win, but the ruling of law may not be exactly what plaintiff desired and might come back to haunt plaintiff (particularly if plaintiff is an institutional litigant often before a court, like a union or a major corporation). In addition, even if a contributor wins a case, one can argue that he or she might have won anyway, so that the contribution was superfluous. Nonetheless, these statistical studies do show that charges of corruption can only be proven by looking at specific situations and motivations, not by painting with a broad brush and assuming that there is a tit for tat between campaign contributions and judicial decisions and that therefore laws restricting campaign contributions are necessary because corruption is inevitable.

⁴³ Samantha Sanchez, *Illinois Supreme Court: Money in Judicial Elections*, THE NATIONAL INSTITUTE ON MONEY IN STATE POLITICS, www.followthemoney.org/reports/mi/20020129/ML.phtml. "Databases were created of all campaign contributions to all winning candidates during the study period, and those contributors' names were matched against a database of the parties and attorneys whose cases were heard by the Supreme Court from 1991 through 1999. During that time, 26 candidates sought one of the seven positions, several of them more than once, and raised a total of \$9,536,710. The 2000 Supreme Court races, where nine candidates spent a total of \$6,352,002 in just one election, are not included in this study because those elected have not yet participated in enough cases to make the process of matching contributors and litigants worthwhile."

⁴⁴ See www.followthemoney.org/reports/mi/20020129/ML.phtml.

⁴⁵ See www.followthemoney.org/reports/mi/20020129/ML.phtml.

⁴⁶ Samantha Sanchez, *Campaign Contributions and the Wisconsin Supreme Court*, THE NATIONAL INSTITUTE ON MONEY IN STATE POLITICS, May 9, 2001, www.followthemoney.org/reports/wi/20010509/WI.phtml.

JUDGES APPOINTING LAWYERS WHO HAVE BEEN CONTRIBUTORS

There is an inherent difficulty in separating campaign contributions that are corrupt from campaign contributions that are perfectly proper, because the distinction is based on the motive of both the donor and recipient. One must look at motive with the precision of a surgeon's scalpel, not a butcher's meat axe.

So too must one deal with precision if there is a suspicion that the judge is rewarding a donor with a plumb judicial appointment instead of a favorable ruling. Judges, for example, may appoint a lawyer as a referee, commissioner, special master, receiver, or guardians, and may appoint relatives of a lawyer as a clerk, secretary or bailiff. In 1999, the ABA focused on this problem when it added a new provision to its Model Code of Judicial Conduct. The new Canon 3C(5) provides:

A judge shall not appoint a lawyer to a position if the judge either knows that the lawyer has contributed more than [\$ ____]⁴⁷ within the prior [____]⁴⁸ years to the judge's election campaign, or learns of such a contribution by means of a timely motion by a party or other person properly interested in the matter, unless

- (a) the position is substantially uncompensated;
- (b) the lawyer has been selected in rotation from a list of qualified and available lawyers compiled without regard to their having made political contributions; or
- (c) the judge or another presiding or administrative judge affirmatively finds that no other lawyer is willing, competent and able to accept the position.⁴⁹

This section corresponds to Rule 7.6 of the ABA Model Rules of Professional Responsibility, dealing with lawyers' efforts to make political contributions in order to obtain government legal engagements or appointments by judges.⁵⁰ Rule 7.6 also does not paint with a broad brush but instead only prohibits law firms or lawyers from accepting a government legal engagement or an appointment from a judge if the law firm

or lawyer made or solicited the political contribution "for the purpose of obtaining or being considered for that type of legal engagement or appointment."⁵¹ When bar disciplinary counsel objected that the new rule, given its motivation component, would be difficult to enforce, the proponents basically agreed and argued that it was only intended to be enforced in "extreme circumstances." Otherwise, it was supposed to be "largely self-enforcing."⁵²

The new judicial rule, like its corresponding rule in the Model Rules of Professional Conduct, reflects the concern that some people have about the appearance of impropriety if lawyers make a political contribution to the judge, and the judge then rewards (or appears to reward) those lawyers by appointing them as special masters, guardians, receivers, or similar positions. Canon 3C(5) provides, in general, that a judge should not appoint a lawyer to a particular position if the judge learns or knows that the appointee has contributed more than a certain amount (the local jurisdiction sets the amount that triggers this prohibition) within a certain period of years (the local jurisdiction also sets the relevant time period). To some extent it reaffirms a more general provision, Canon 3C(4), that instructs judges to exercise their power of appointment on the basis of merit and not on the basis of nepotism.⁵³

Thus, *Supruance v. Commission on Judicial Qualifications*⁵⁴ held that a judge violated Canon 3C(4) when he appointed friends and

⁴⁷ Each jurisdiction adopting this provision is supposed to insert its own specific dollar amount.

⁴⁸ Similarly, each jurisdiction adopting this provision is supposed to pick a number of years to insert.

⁴⁹ RONALD D. ROTUNDA, *LEGAL ETHICS, THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY* § 60-15 at p. 859 (ABA-West Group, 2nd ed. 2002).

⁵⁰ ABA MODEL RULES OF PROFESSIONAL CONDUCT, Rule 7.6, "Political Contributions to Obtain Government Legal Engagements or Appointments by Judges."

⁵¹ ABA MODEL RULE 7.6 (emphasis added).

⁵² House of Delegates Debate of Feb. 12, 2000, quoted in ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT, Current Reports, vol. 16, at 64 (Mar. 1, 2000); Report of the ABA Section of Business Law and other Sections, *Report with Recommendations to the House of Delegates*, Nov. 23, 1999, at 10.

⁵³ ABA MODEL CODE OF JUDICIAL CONDUCT, Canon 3C(4).

⁵⁴ 13 Cal.3d 778, 119 Cal. Rptr. 841, 532 P.2d 1209 (1975).

political supporters to represent indigent defendants in criminal cases. The problem was the judge did not appoint on the basis of merit. Note the necessity of proving that the judge appointed for the wrong reason. Once again, the court recognized the need to show corrupt motive, just as federal bribery laws require a *quid pro quo*. Indeed, in one decision a divided court refused to censure a judge who had appointed his lover as chief cashier, because the lover was "well qualified for the appointment."⁵⁵

Thus, even the simple prohibition of Canon 3C(5) recognizes the need for exceptions, where the appearance of impropriety is not really realistic. For example, if the appointed position is substantially uncompensated, there is no real risk that the judge is favoring a political contributor, for the simple reason that one is not "favored" by being appointed to a job that pays nothing or very little. Similarly, there is no appearance of impropriety if the appointee is selected by rotation from a list created without regard to one having made political contributions. Nor does this rule apply if the judge affirmatively finds that no other lawyer is willing, competent and able to accept the position.

JUDGES MAKING PROMISES

Recall that Minnesota argued that a judicial candidate should not "announce" his or her views in order to preserve the judge's "open-mindedness," an argument that the Supreme Court found "woefully" inadequate.⁵⁶ It was not enough for Minnesota to assert this interest. It had to prove it. While the Court found that Minnesota presented no empirical evidence and that its assertions were mere conjecture,⁵⁷ there are illustrations in history that do exist, and those examples undercut Minnesota's claim.

As Professor Alexander Bickel once remarked, when a President appoints a Justice, he shoots "an arrow into a far-distant future [and] not the man himself can tell you what he will think about some of the problems that he will face."⁵⁸ This simple fact is illustrated by no less a judicial titan than Judge Henry Friendly,

a great judge and prolific author. In one case, when one of the parties cited to him one of his own articles indicating how an issue should be decided, Judge Friendly decided that he disagreed with what he himself had earlier written; the genius of the common law system, he recognized, is that judges must make the decisions in the context of concrete cases, not in the context of law review articles. Judge Friendly dissented,⁵⁹ while the majority relied upon Friendly's law review article.⁶⁰

Judge Friendly did not know how he would rule on the legal issue until he had to decide the legal issue, even though the Judge had thought about the problem and had written an article about it coming to a firm conclusion, a conclusion that he later rejected.

This instance is no judicial orphan. For example, Justice Jackson participated in the decision of one case that raised an issue on which he had earlier written an opinion as Attorney General. Jackson concurred in the opinion of the Court even though it was contrary to his opinion as Attorney General.⁶¹ He recognized his shift of views and quoted Lord Westbury who had earlier stated (when his Lordship repudiated one of his previous opinions): "I can only say that I am amazed that a man of my intelligence should have been guilty of giving such an opinion."⁶²

⁵⁵ *Matter of Delessandro*, 483 Pa. 431, 397 A.2d 743, 759 (1979) (per curiam).

⁵⁶ *Id.*

⁵⁷ 122 S.Ct. at 2437038.

⁵⁸ *Judgment on a Justice*, TIME, May 23, 1969, at 23-24 (quoting Alexander Bickel).

⁵⁹ *Williams v. Adams*, 436 F.2d 30, 35 (2nd Cir. 1970) (Friendly, J., dissenting). Judge Friendly (the Judge, not the author) was vindicated when the Second Circuit, *en banc*, reversed the panel decision, in 441 F.2d 394 (2d Cir. 1971) (per curiam). But the U.S. Supreme Court agreed with Henry Friendly, the author, and not Henry Friendly, the judge, and it reversed the Second Circuit. *Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972).

⁶⁰ *Williams v. Adams*, 436 F.2d 30, 34 n.2 (2nd Cir. 1970), quoting, Henry Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 952 (1965).

⁶¹ *McGrath v. Kristensen*, 340 U.S. 162, (1950). Compare 340 U.S. at 176, 71 S.Ct. at 233, with 39 Op. Atty. Gen. 504 (1940).

⁶² 340 U.S. at 178, 71 S.Ct. at 233.

Over a century earlier, Justice Story, explaining his rejection of his own former opinion, responded as follows: "My own error, however, can furnish no ground for its being adopted by this Court . . ."⁶³ Judges can change their mind, and the genius of the common law system recognizes that statements or principles announced in general may be inapplicable in light of the specific facts of a case.

So too in the case of general campaign reform involving free speech issues, the methodology of the *White* case indicates that proponents of restrictions will have to back up their assertions with examples and empirical studies.

CAMPAIGN RESTRICTIONS AS INCUMBENT PROTECTION LEGISLATION

During the oral argument before the Supreme Court in the *White* case, the justices revealed their concern that the judicial restrictions at issue appeared to be designed to protect incumbent judges from criticism from their challengers. The restrictions on what judicial candidates could say in the course of a political campaign did not, of course, apply to incumbent judges when writing their majority opinions, or concurrences or dissents. They could say whatever they wanted in terms of criticizing their colleagues, explaining how they would have ruled, why their view is correct, and so forth. The Minnesota rule restricting judicial campaign speech did not apply to dictum, even when judges knew that newspapers would likely quote that dictum.

As one justice, in oral argument, said:

And what we end up with at the end of the day is a system where an incumbent judge can express views in written opinions, and perhaps otherwise, as well, and yet a candidate for that office is somehow restricted from discussing the very same thing in the election campaign. That's kind of an odd system, designed to what? Maintain incumbent judges, or what?⁶⁴

The *White* decision and its rationale suggest that the Court will be wary of campaign reform legislation that is disguised as incumbent protection legislation. To the extent that campaigning and electioneering become regulated industries, the Court is signaling that it will not grant the deference to these regulators that it grants in situations not implicating the First Amendment. *White*, in short, casts a net that will catch far more than overly-restrictive judicial campaign restrictions. *White* may be a harbinger of what is to come in any challenges to other laws or proposals that restrict free speech in the context of political campaigns.

CONCLUSION

The First Amendment (as applied to the states through the Fourteenth Amendment) does not allow judges to impose restrictive rules that take political campaign speech out of political campaigns. If states choose to elect judges instead of appointing them, that choice limits the subsequent power of the state to regulate the judicial elections.

White may lead states to reconsider the election of judges and move more to the federal model of merit selection. But the effect of *White* goes beyond that, for the majority opinion adopts a template for analysis of campaign laws that restrict speech—and that template imposes a heavy burden on advancing the restriction.

Judicial campaign speech is different from campaign speech of members of the legislative and executive branches, because judges are supposed to decide cases based on the law and the facts, not based on what is popular at the moment. Politicians are supposed to be responsive to the public will, but judges are not supposed to be politicians.

⁶³ *United States v. Gooding*, 25 U.S. (12 Wheat.) 460, 478, 6 L.Ed. 693 (1827).

⁶⁴ *Republican Party of Minnesota v. Kelly*, 2002 WL 492692, 70 USLW 3612, U.S. Oral Argument, Mar 26, 2002, transcript at pp. 34–35.

Yet, even in the case of *judicial* campaign speech, the Court imposes a heavy burden on those who place barriers and restrictions. If that burden is heavy and difficult to surmount in that case, then *a fortiori* it is exceedingly difficult to surmount in the case of non-judicial campaigns.

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