

PUBLIC CONFIDENCE AND JUDICIAL CAMPAIGNS

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I. INTRODUCTION

In the spring of 2008, I was invited to participate in a panel discussion with Professor Charles Geyh on judicial selection. Professor Geyh had been a frequent and articulate critic of judicial elections,¹ and I had been a skeptical supporter.² But on the day of the discussion, we surprised each other. I had argued in favor of judicial elections based on principles of democracy—judges decide matters of policy based (at least in part) on the judges' policy preferences, and therefore increasing public input into judicial selection makes those policy decisions more reflective of the public will. In my remarks that day, however, I acknowledged that different courts engaged in policy-making to different extents. As a result, I suggested that different methods of selection might be appropriate for different courts, so that the public would be able to exert some influence over the courts that make the most policy unconstrained by existing law, while other courts would be provided with greater independence.³

Professor Geyh similarly moderated his position by rejecting the typical justification offered for judicial independence—that judges merely follow the law and should not be subject to electoral pressures that might encourage them to abandon the law when following it would cost votes. Instead, Professor Geyh recognized that both the law and personal attitudes play a role in judicial decision-making, and that therefore, judicial independence must be defended, if at all, on a ground

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1. See, e.g., Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43 (2003).

2. See, e.g., Michael R. Dimino, Sr., *The Worst Way of Selecting Judges—Except All the Others That Have Been Tried*, 32 N. KY. L. REV. 267 (2005).

3. See Michael R. Dimino, Sr., *Accountability Before the Fact*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 451, 451-52, 467-71 (2008).

other than by pretending that judges do not “make” law or that their personal preferences do not affect case outcomes.⁴

My purpose in this essay is to evaluate one of the alternative grounds suggested by Professor Geyh: that the elimination of judicial elections and limits on judicial candidates’ speech can be defended as means of “preserv[ing] public confidence in the courts.”⁵ Such confidence is necessary, the argument goes, because the people would refuse to “acquiesce[] in the orderly administration of justice” if they believed that judges were deciding cases on the basis of their own preferences (or the electorate’s) rather than on the law.⁶

The argument is not new; courts and commentators have suggested that limitations on judicial campaigning are necessary to preserve the “appearance” of judicial independence and impartiality, and the dissenters in *Republican Party of Minnesota v. White* relied on it to challenge the majority’s holding that judicial candidates could not be prevented from discussing their views on legal or political issues.⁷ Nevertheless, the interest in preserving public confidence in the judiciary takes on a different character once it is conceded that judges’ preferences do matter, and that judges do not simply interpret and implement the policy choices made by others. Such a concession means that the interest in ensuring public confidence in the courts is not in truthfully educating the public about what judges do, but depriving the public of information so as to make them believe a whitewashed version of the judicial function. Professor Geyh suggests this may not matter.⁸

4. See Charles Gardner Geyh, *Straddling the Fence Between Truth and Pretense: The Role of Law and Preference in Judicial Decision Making and the Future of Judicial Independence*, 22 NOTRE DAME J.L. ETHICS & PUB. POL’Y 435, 445-46 (2008).

5. *Id.* at 448.

6. *Id.*; see also *Republican Party of Minn. v. White*, 536 U.S. 765, 817-18 (2002) (Ginsburg, J., dissenting) (“Because courts control neither the purse nor the sword, their authority ultimately rests on public faith in those who don the robe.”). But see James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and “New-Style” Judicial Campaigns*, 102 AM. POL. SCI. REV. 59 (2008) (finding that issue-based judicial campaigns have no effect on judicial legitimacy).

7. *Republican Party of Minn.*, 536 U.S. at 802 (Stevens, J., dissenting); *id.* at 817-19 (Ginsburg, J., dissenting).

8. In fairness to Professor Geyh, he merely suggests this argument. The essay in which he proposes the public-confidence argument is a self-styled “thought piece,” designed to “facilitate finding middle ground in ongoing debates over judicial selection, judicial speech, judicial disqualification, and judicial independence and accountability.” Geyh, *supra* note 4, at 449. I offer this essay in the same spirit. While I disagree that the public-confidence justification is adequate to support a restriction on speech, it may well be sufficiently powerful to affect debates concerning judicial selection and disqualification.

[J]udicial independence preserves public confidence in the capacity of the legal system to encourage the rule of law and eschew the rule of the mob or the politically powerful. . . . [E]ven if the rule of law is an absolute myth, and in reality judges exploit their independence by satiating their political appetites at every turn, it is still an important myth that preserves public confidence in the courts and thereby ensures acquiescence in the orderly administration of justice.⁹

In this essay, I compare limitations on the political speech of judicial candidates to restrictions on commercial advertising. Commercial-speech limitations have come under increasing criticism in recent years, as the Supreme Court has become skeptical of government's claim that it must restrict consumers' access to information to prevent them from making bad choices in the marketplace.¹⁰ Ironically, given that commercial speech receives less constitutional protection than do other types of speech,¹¹ the public-confidence argument offers similar justifications for restricting judicial candidates' political speech—the speech closest to the core of the First Amendment.

I argue that it is unconstitutional to limit political speech for the purpose of shaping public opinion. Such paternalism should be all the more offensive when government seeks to suppress speech so as to encourage the public to believe something that is false or misleading. Worse still are speech restrictions that are designed to give the public a false impression for the purpose of increasing the power of government. When judicial candidates' speech is restricted for the purpose of maintaining public confidence in the courts as institutions that merely apply the law, those restrictions should be held unconstitutional.

II. BACKGROUND CONCERNING JUDICIAL INDEPENDENCE

The debates concerning the most appropriate method of judicial selection and the most appropriate forms of judicial election campaigns are really debates about democracy. The framing-era political theory that produced the Electoral College and indirect election of senators is distrustful of ordinary voters and prefers the judgment of trusted elites to that of the populace. Twentieth-century reforms reflected a vastly different attitude—one that trusts the people to make judgments about

9. *Id.* at 448.

10. See 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 510 (1996); *id.* at 520 (Thomas, J., concurring in part and concurring in the judgment), and cases cited therein.

11. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562-63 (1980).

policy, and one that is deeply skeptical about limitations on the scope of the franchise and its exercise.

Against the historical backdrop of these reforms, the insularity of the judiciary—even elected judiciaries—seems anachronistic, a relic of days when elites openly talked of tempering the “excess[es] of democracy.”¹² And criticisms of judicial elections (and of judicial campaigning) sound the same themes as those used in *The Federalist* to justify limiting the power of the House of Representatives—the sole portion of the national government originally elected directly by the people.¹³

American society has grown increasingly comfortable with democracy since 1789, but an electorally unaccountable judiciary may still be justified, as it was at the Founding, as a restraint on the tyranny of the majority. The power of the public, like the power of government, must be controlled lest it overrun the liberties of minorities, and the judiciary’s insularity enables it to exert some of that control. Accordingly, I have argued that judges’ terms should be lengthy and non-renewable.¹⁴ Such a reform would permit judges to make decisions on the basis of their view of the law, without worrying about the effect a correct, but unpopular, decision would have on their livelihood.

Judicial independence, however, has a downside: it trusts judges with the power to negate the will of the people and minimizes or ignores the effect that judges’ personal views play in their decisions. That is, judicial independence is supposed to allow judges to act according to the law, but society has no guarantee that judicial decisions will be based on the law rather than on the judges’ view of what the law ought to be. Furthermore, even the most conscientious judge will be unable to put his or her personal political views aside. Certain legal doctrines require judges to make their own judgments about, for example, the kind of actions that would be “reasonable” in a given situation or the extent to which society’s “evolving standards of decency” have called into question the constitutionality of certain punishments. In short, judges’ decisions affect public policy, and different judges with different jurisprudential and political philosophies will affect policy in different ways. If the public is

12. FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 202 (1985) (statement of Elbridge Gerry).

13. See *THE FEDERALIST* NO. 62, at 418-22 (James Madison) (Jacob E. Cooke ed. 1961) (praising the Senate for its ability to restrain the House’s tendency toward mob rule); cf. *THE FEDERALIST* NO. 10, at 130 (James Madison) (Howard Mumford Jones ed., 1961) (criticizing democracies as unable to resist “the mischiefs of faction”).

14. See Dimino, *supra* note 3.

cut out of the process for selecting judges, then the public's capacity to govern itself has, to some extent, been undermined.¹⁵

To repeat, there are good reasons to limit democracy through the mechanism of judicial independence, but few commentators acknowledge the conflict between those two fundamental ideals: protecting minorities from the public and protecting the public from the judges. Rather, arguments promoting judicial independence will often minimize the extent to which judges' decisions affect policy, or claim that judges' personal feelings are irrelevant when deciding cases—a claim belied by empirical evidence (particularly as to the Supreme Court) as well as common sense.

Some defenders of judicial independence have conceded that judges do make policy and that their attitudes do affect their decisions. Nevertheless, they cite two additional reasons to eliminate judicial elections or to limit the speech of judicial candidates. First, even if judging is more subjective than calling balls and strikes, it is not exactly politics either. That is, judges make policy, but they make it “as judges make it,” meaning they tend to follow norms that constrain their ability to translate their will into policy. Such norms include limits on the cases that can be heard, the litigants who can bring them, arguments that may be presented in a case, the ability of judges to rest on arguments other than those offered by the litigants, etc. As every lawyer knows, sometimes these limits are not followed especially carefully, and the extent to which the limits are actually constraining is up to the judges themselves. Nevertheless, it remains true that judicial policy-making is not the same as legislative policy-making.

According to this argument, sophisticated observers of the Supreme Court and other courts realize that policy preferences are relevant to judicial decisions but they also realize that “the law” is important too. The general public, however, is not able to appreciate the constraints that judges face. Thus, issue-based judicial campaigns will encourage judges to make policy more overtly—in short, to behave more like politicians—because the public will expect judges, once elected to office, to produce results.

Second, defenders of judicial independence argue that the counter-majoritarian function of the judiciary depends on the public *perceiving* judges as simply applying the law rather than making it. That is, issue-based campaigns would debase the judiciary by making it appear more like the political branches, and the public confidence in the neutrality and

15. This argument is developed at greater length in 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 (2003).

impartiality of judicial decisions would suffer. As a consequence, the public would not give courts the deference they presently receive, and courts would be unable to fulfill their crucial function of stopping the majority when it threatens minority rights. This is a frightening argument. It claims that the public must believe that the judiciary is completely separate from politics, even if that is not true, because if the public came to believe otherwise, judges' power would be threatened.¹⁶ Such paternalism might be sufficient to justify a choice of an appointed judiciary rather than an elected one (because such a choice does not implicate the First Amendment), but not to limit speech—as the following overview of First Amendment principles demonstrates.

III. COMMERCIAL SPEECH AND *CENTRAL HUDSON*

The scope of the First Amendment's protection of the freedom of speech has always been controversial, but "there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."¹⁷ Indeed, whether we view the First Amendment as primarily designed to protect the search for truth in the marketplace of ideas, the functioning of democracy through the political debate, or the furtherance of a broader self-expressive goal, political speech is at the core of what the Amendment was designed to protect.

Accordingly, the Supreme Court has afforded political speech great protection, even where the speech predictably leads to negative consequences. Speech advocating violence, for example, may not be punished unless it is likely to incite imminent lawless action.¹⁸ Flag burning must be tolerated, the Court has held, even though such expressive conduct causes patriots to suffer emotional harm.¹⁹ Parodies of political figures are also protected by the First Amendment despite the damage to the subjects' reputations and psyches.²⁰ The list of examples goes on and on.

Commercial advertising, however, is given only diminished protection under the First Amendment. Under the governing *Central*

16. Cf. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 998-99 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (arguing that judicial legitimacy is an insufficient reason not to overrule wrongly decided precedent).

17. *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

18. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

19. See *Texas v. Johnson*, 491 U.S. 397, 408-09 (1989).

20. See *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988).

Hudson test,²¹ commercial advertising may be regulated if the regulation directly advances a substantial governmental interest and is no more extensive than necessary to serve that interest.²² Furthermore, the Court implied in *Central Hudson* that limiting the public's access to information could satisfy the test if a fully informed public would act in a way injurious to society.

In *Central Hudson*, the New York Public Service Commission prohibited advertising promoting the use of electricity. The commission defended the ban against Central Hudson's First Amendment challenge by pointing to the interest in energy conservation. Advertising, the commission reasoned, would increase the demand for energy. Thus, the commission based its ban on the belief that the public could not be trusted with information—even non-misleading information. If the public were fully informed, a bad result (increased energy consumption) would ensue. Rather than using "more speech" in an attempt to persuade the public to conserve energy, the Commission preferred to suppress the utilities' speech. The Court struck down the advertising ban because the ban was more extensive than necessary—it even reached some advertising that would have resulted in a net reduction of energy consumption.

In its opinion, however, the Court concluded that the interest in energy conservation *was* substantial, and that the advertising ban *did* directly advance that interest.²³ Accordingly, the Court disapproved of the breadth of New York's advertising ban, but it did not object to the principle that the public could be kept in the dark, as it were, if the government did not trust a well informed public to use information wisely.

The Court's acceptance of this paternalistic justification for suppressing commercial speech was controversial when it was announced and remains controversial today. In *Central Hudson*, Justices Brennan, Blackmun, and Stevens dissented, railing against the use of a speech restriction "to manipulate the choices of [a State's] citizens."²⁴ In *44 Liquormart, Inc. v. Rhode Island*,²⁵ Justice Stevens—this time writing for a plurality—again condemned the paternalism that was proffered as a

21. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

22. *Id.* at 566.

23. *See id.* at 568-69.

24. *Id.* at 575 (Blackmun, J., joined by Brennan, J., concurring in the judgment); *see also id.* at 581 (Stevens, J., joined by Brennan, J., concurring in the judgment) ("The justification for the regulation is nothing more than the expressed fear that the audience may find the utility's message persuasive.").

25. 517 U.S. 484 (1996).

justification for another restriction on commercial speech.²⁶ Justice Thomas's separate opinion agreed, and was even more assertive in criticizing the *Central Hudson* test,²⁷ while Justice Scalia (the fifth vote in the case) expressed skepticism concerning *Central Hudson* and paternalistic justifications for limiting commercial speech, but was unwilling to decide the question in that case because the briefs did not address the issue.²⁸ *Central Hudson* survives—for now—but barely.

Despite *Central Hudson*'s weakness in justifying the restriction of commercial speech, which has traditionally enjoyed diminished First Amendment protection, supporters of speech restrictions in judicial campaigns rely on the same kind of paternalism in justifying limitations on political speech, which lies at the core of the First Amendment. However, the Court has repeatedly granted protection to political speech *that is misleading or even false*, despite the risk that public debate and even elections could be affected by such speech.

Most famously, the Court, in a line of cases beginning with *New York Times Co. v. Sullivan*,²⁹ has limited the ability of defamation plaintiffs to recover damages for false statements that damage their reputations. And in a case directly involving electoral campaigns, the Court held in *Brown v. Hartlage* that a candidate could not be disciplined for a campaign promise to take action that, it turned out, was contrary to law.³⁰

It follows that restrictions on speech in judicial campaigns are unconstitutional unless there is a reason to be more suspicious of speech in judicial campaigns than in legislative ones. I am skeptical that any such reason would be powerful enough to justify the suppression of political speech, but if such a reason exists, surely it cannot be that we need to protect public confidence in the courts but not in the other branches. Would the Sedition Act have been constitutional if it were limited to suppressing speech that brought *the judiciary* "into contempt or disrepute, or to excite against [*the courts*] the hatred of the good people of the United States"?³¹

It is true, as Justice Ginsburg noted in *Republican Party of Minnesota v. White*, that courts possess neither the purse nor the sword.³² But, the branch with the sword stands ready to enforce judicial

26. See *id.* at 503-07.

27. *Id.* at 518-34 (Thomas, J., concurring in part and concurring in the judgment).

28. See *id.* at 517-18 (Scalia, J., concurring in part and concurring in the judgment).

29. 376 U.S. 254 (1964).

30. 456 U.S. 45, 61-61 (1982).

31. Sedition Act, ch. 74, §2, 1 Stat. 596 (1798).

32. 536 U.S. 765, 817-18 (2002) (Ginsburg, J., dissenting).

judgments, and the power of the purse does not seem all that potent either unless the executive is willing to force people to pay taxes and to execute laws spending money.

However much we might worry about what might happen if the public collectively told the nation's courts to go fly a kite, we are in no such danger. At the very least, the government should bear a heavy burden of demonstrating the catastrophe that would occur if speech about judicial candidates were unfettered. But, as pointed out earlier, the empirical evidence thus far shows that issue-based judicial campaigns do not diminish the public's esteem for the courts.³³

Moreover, and more fundamentally, it seems to me that the First Amendment requires us to presume that if unfettered political speech causes the public to lose esteem for the judiciary, then the judiciary deserves it. And, I can imagine few things more antithetical to representative democracy than the government's restriction of the people's liberty so as to ensure that its own power remains above question.

IV. CONCLUSION

In the best tradition of academic debate, cautious, respectful, and thoughtful disagreement has illuminated substantial areas of common ground between the apparently irreconcilable devotees of judicial independence and accountability. By acknowledging that judicial decision-making, in practice, is affected by both the law and judges' attitudes, we can continue a productive discussion about the best way of selecting judges and the ways to protect the rule of law once judges are on the bench.

The thesis of this essay has been a small but, I believe, important warning: States are free to select their method or methods of judicial selection based strictly on the ways they choose to balance independence and accountability. Moreover, in setting that balance, it may be entirely appropriate to consider the likely effect the selection process will have on the public's perceptions of the judiciary. Nevertheless, the government may not seek to limit political speech (whether that speech is made by a candidate in a judicial election, a nominee for an appointed judicial office, or an interest group), based on the government's fear that the speech will cause the public to lose respect for the courts. The First Amendment leaves the people with the ability to evaluate their

33. See Gibson, *supra* note 6 and accompanying text.

government; the government may not command respect for itself through forced silence.