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Selection of State Judges Symposium

Transcripts

***315 JUDICIAL ELECTIONS AND FREE SPEECH: ETHICS AND A JUDGE'S CAMPAIGN
RHETORIC**

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Mr. Kaardal [\[FN1\]](#): Greetings. I am one of the attorneys for the plaintiffs in the pending U.S. Supreme Court case, Republican Party of Minnesota v. Kelly, [\[FN2\]](#) which addresses the constitutionality of state bans on political speech of judicial candidates. The Republican Party of Minnesota case presents a constitutional issue of first impression for the U.S. Supreme Court. This panel offers an opportunity to explore the same issues that the U.S. Supreme Court will be addressing in its opinion expected in 2002.

Prior to the conference, I discussed with each of the four panelists some hypotheticals arising from the issues presented in the case. After a round of initial presentations, I will ask the panelists to respond to the hypotheticals and then to questions and answers.

The first panelist who I will introduce is Associate Justice Harold See, an Alabama Supreme Court Justice. He has a Bachelor of Arts from Emporia State University and a J.D. from the University of Iowa.

He practiced law at Sidley and Austin, and was twenty years a professor at the University of Alabama. He was elected an Associate Justice of the Alabama Supreme Court in 1996. Justice See has authored or edited over forty books, chapters, articles and reviews.

Right now, he is a party in an Eleventh Circuit case that is pending regarding his free speech right. Without any ado, Justice See.

Justice See [\[FN3\]](#): I am very grateful to the Litigation Practice Group of the Federalist Society and the University of Toledo College of Law for inviting me to participate in this panel discussion. Because of the limited time, I will make only a couple of observations and try to keep my remarks brief.

I begin by conceding that there are meritorious arguments for an appointed judiciary just as there are meritorious arguments for an elected judiciary. [\[FN4\]](#) My remarks, however, are not directed to the propriety of either system of judicial selection. I believe that is an issue for the public to decide. I am an Associate Justice of the Supreme Court in a state that has an elected judiciary. Thus, for the purpose of this panel discussion, I will focus only on the issue of free campaign speech in judicial elections.

I believe we must presume that a rational and informed public could choose to elect its judiciary because either (1) the public is capable of determining who should ***316** be a judge, or (2) it can determine when a judge is not performing his or her responsibilities according to the public's expectations. From this presumption, the question arises, what are a judicial candidate's First Amendment rights with respect to keeping the public informed through campaign speech in judicial elections?

The First Amendment to the Constitution of the United States provides, among other things, that "Congress shall make no law . . . abridging the freedom of speech," thereby protecting speech whether that speech is popular or not. [\[FN5\]](#) More specifically, at the core of the First Amendment is the right to free, wide-ranging public debate and discussion of political issues. [\[FN6\]](#) If generally unpopular speech is protected under the First Amendment, then campaign speech must also be protected as "core political speech" that the First Amendment was designed to protect.

If state action may have the effect of curtailing the freedom of core political speech, that action is subject to the strictest scrutiny. [\[FN7\]](#) This freedom may be impeded by the state only if the state has a conflicting interest sufficiently compelling to justify the deterrent effect of that impediment on the free exercise of the constitutionally protected right. [\[FN8\]](#) To determine whether the state's invasion of this right is constitutionally permissible, courts balance the state's interest against the deterrent effect on the freedom of speech. [\[FN9\]](#)

The conflicting interests most often asserted as sufficiently compelling to justify restricting free speech in judicial elections are premised on the proposition that judicial elections are different from other political elections. I agree that judicial elections are different from other elections. However, I believe that every type of election is different from every other type. For example, elections for legislators are different from presidential or gubernatorial elections, which, in turn, are different from elections for the Public Service Commission. Therefore, as I will elaborate, I do not believe that the uniqueness of judicial elections supports the restriction of free campaign speech.

***317** One of the most frequent arguments against free campaign speech in judicial elections is the need for public confidence in the judiciary. [\[FN10\]](#) Specifically, the argument is that a judge's campaign speech must be curtailed in order to preserve the public's confidence in the judiciary. [\[FN11\]](#)

I do not see the merit in their argument. First, don't the other two branches of our govern-

ment--of any democratic government--also depend on public confidence? Then why not make the same argument that political speech needs to be curtailed in elections involving the other branches of government? Second, this argument is reminiscent of the ones historically made by dictatorial governments, that speech against the government undermines public confidence in the regime and is therefore contrary to the public interest. I believe we must be cautious of any argument that depends for its strength on a fundamental distrust of the ability of the electorate to act with discernment. If, on the other hand, we have confidence in the public, we must inform it of a candidate's strengths and weaknesses. This principle holds in any election-- executive, legislative, or judicial. If we are to have an educated electorate, able to make informed decisions, I believe we must allow free speech in elections.

Another point I would make about this argument is that it is what I call a “whited sepulcher” argument. It is the argument that we cannot let the electorate know the truth about our judicial system--that is, see the “bones” in the tomb. We do not want the public to know how far behind we are on cases or see the money and the “politics” behind the elections for fear that the public may lose confidence in our judiciary. Yet, the same “bones” are present in a system of judicial appointment as in one of judicial election [\[FN12\]](#); it is just that the tomb has a coat of whitewash on it when judges are appointed, so we are happy. I believe that the more important issue is how we are actually performing in our jobs, regardless of whether we are appointed or elected. Ultimately, the bones in the sepulcher are going to come into public view. So why do we try to hide them? Why shouldn't we instead be forthcoming with the public, recognize the judiciary's shortcomings, and then stand up and strive to make improvements? I believe this can, and should, be accomplished, in part, through the use of campaign speech in judicial elections.

Another frequently asserted argument about the difference between judicial elections and other types of elections is that the public does not know enough about the candidates to make informed decisions. [\[FN13\]](#) Again, I do not see the difference in *318 this aspect of judicial elections from that in elections in the executive or legislative branches of government. For example, can you name the candidates in the last election for State Treasurer or the Public Service Commission?

I agree that this lack of familiarity is a problem with elections in a democratic society. However, I believe that the answer to this problem is increasing the information available during elections through the use of campaign speech, rather than curtailing a judicial candidate's First Amendment rights for fear that the electorate will misunderstand the message as politically motivated or misleading. In short, exercising the First Amendment right to speak freely while campaigning will result in a more informed and rational electorate and better qualified candidates will be elected.

Finally, I have often heard the argument that the public does not understand the judicial function as well as it understands the functions of the other branches of government, and, therefore, the public is ill-suited to select judges. [\[FN14\]](#) First, I question that premise. Having campaigned in Alabama, I find that most of the people I have met do understand the judicial function--I

believe often better than they understand the legislative function. Second, even if we were to accept the premise, it is still not a reason for restricting campaign speech in judicial elections. Instead, I believe this argument further supports a judicial candidate's right to speak freely when campaigning in an election. The more contact judicial candidates have with the electorate, the more familiar and comfortable the public may become with the judicial function.

What I have said addresses campaign speech. There should be no reasonable limitations on how a judge performs his or her job. To do the job of judging, a judge must not pre-judge a case or decide a case based on evidence not before the court. Thus, obviously, a judge must not promise to rule a certain way on a case not yet heard, but that is a matter of job performance, not of campaign speech, and it is a matter eminently understandable to the voter.

Mr. Kaardal: The next speaker is the former Chief Justice of the Minnesota Supreme Court, Sandy Keith. He received a B.A. from Amherst College and an L.L.B. from Yale University Law School. He has served in all three branches of the *319 Minnesota government, serving as a state senator, lieutenant governor, and from 1989, on the Minnesota Supreme Court. He took the office of Chief Justice in 1990, and he retired in 1998.

Justice Keith: Thank you, Erick. He is on the other side of this lawsuit. I am delighted to be here. By the way, Governor Ventura sends his greetings.

(Laughter.)

The most well-known governor in the history of the United States, according to my theory and my observation. Well, I knew this famous Alabama judge was coming, so I read over his case. He would not even be in violation in Minnesota, but --

Justice See: I am not in Alabama either.

(Laughter.)

Justice Keith: As I said, you are wanted in the lower court. Just so you all understand, we have a lawsuit pending now in the Eighth Circuit, which Erik wrote a very intelligent brief, challenging our candidate running for judicial office. And we have not heard from them yet. This suit has been going on for three years. I did not know what they are sitting on it for, but they have had it for a long time.

I teach a class in one of our law schools. And I have had over the--Mr. Warsaw from the Bar Association to argue this case. But we do have a case in Minnesota.

We have had, for twenty-five years, a Code provision which has restricted us from attending or speaking at partisan political gatherings, preventing judicial candidates from announcing his or her views in disputed legal or political issues.

So, this has been part of our culture for a long time. This Code provision came in Minnesota, in 1974. I was on the Court when we amended it. We did not really change a lot, tried to clarify it, and I am not sure we did very well. But we struggled with it a couple of times, in 1996 and 1998.

I have always had reservations, of course, about restrictions on political issues. Even on the Court, we had a great debate about it, and it was interesting internally. Judges hate anything to do with this. They hate to discuss these issues. They know they are going to come up, and they do not want to do it.

Basically, the courts reflect the judges in the system. So, let me just make the argument for this discussion that there is a fundamental difference between running for the Minnesota Senate, which I did and was successful; being a legislator, a wonderful experience of setting a budget for a state, making laws, listening to all the groups; as lieutenant governor, was elected, and supporting the governor's programs, going to the legislature to try to get different things.

I have been accused of everything. My wife has been told that I am having an affair in northern Minnesota. I mean, it is not an easy business.

So, I have been through all of it. And I have also been on a governor's commission. Governor Rudy Perpich was a great, close, personal friend of mine for thirty years. And I sat on his judicial selection for six years, really believed very fundamentally, we won the election, we get the judges.

That is how he felt. That is where he came from. That was his--that was what he believed. And he was governor of the state, and I loved him. He was a great governor.

***320** And so, in any event, I was shocked when I went on the Court. He called me up one night and said, "Tomorrow morning, you're going on that Court." I said, "I don't want to be a judge." "By God, let me talk to your wife."

(Laughter.)

So, he talked to Marion and, honest to God, he talked her into it. She thought it might shut me up a little. I mean, I might have to learn to listen, and she was right. It was a great learning experience.

It is different. The first thing I learned was to keep my mouth shut because I did not know what I was talking about. I had never thought through these constitutional issues. I had never thought about them, even though I had been a criminal defense lawyer, family law--I never thought about most of these issues.

I did not know a damn thing either. But, you know, when you thought about it-- and I listened to all of the arguments and these famous lawyers and so on. So, it was a great learning experience.

rience. I had to learn to shut up. I had to learn to listen. I had to learn to read the law.

When I used to practice law, pretty much give me a few facts and let me go at it, you know? So, I had to learn how to read the law. I had to apply it. All these statutes I did not believe in, I had to uphold them. And I thought they were stupid, but that was not my role.

All of a sudden, my friends were appearing before me. And maybe I have got to be careful what I say and what I do. Maybe there is some merit of not being able to go out and give contributions and so on like I used to. Maybe this is a little different role.

I was very careful about what I said because everything would get interpreted in such a way that maybe would appear as though I was biased, and maybe I would have to recuse myself and so on. So, I had a lot to learn. I am not genius, but I did learn. And I thought there was something to be said for some of the restrictions on speech, which I love, as you can tell.

And so, when I was contested in 1992, I never got endorsed by my political party, the Democratic Party. I never thought about it. I did not think about going to them. I wanted out of it.

I never thought of going to the Republic party. As a matter of fact, I went over to their convention to try to prevent them from endorsing the candidate they did endorse. I actually went to the convention myself and said one of the criticisms is one of my opinions.

“Why, you should have endorsements, you know? I said, “Look, I’m a Democrat. What’s the matter with you people here? You’re endorsing somebody over your own candidate.”

And so, I got into this campaign, and I did not have to raise much money. I spoke all over the state. We talked about cameras in the courtroom. We talked about family law.

What do you think judges do? The guts of a court system are the trial bench. What I did was of very little importance to people, but it is important to have great men and women on that trial bench.

When I walk in a courtroom these days, almost everybody is going to be young, male, often minority, often poor, often without a lawyer. Most lawyers will not take them because they cannot afford it.

***321** You have got to have a remarkable person. It does not have much to do whether you are a Democrat or Republican, or whether you are Catholic or Protestant, Jew or Muslim or whatever. You had better have somebody who can make a decision and handle it with dignity. These are human beings. They are all unique.

We need a system that has fairness in it. It does not always come unless there are some rules. When I heard what happened in Michigan and Ohio, I do not want that to happen in Min-

nesota, and I hope it never does.

So, I am saying there might be some sense in having some restrictions. I do think we need a Board of Standards. We have one in Minnesota. I think the legislature should adopt them because we do get complaints.

Sixty percent of the complaints against my judges in Minnesota were family law matters, toughest cases there are, family law. I did 1,200-1,400 divorces, so I know what it is like. I know what judges go through in these cases. We need somebody that will deal with those complaints, and they should be independent of the judiciary. So, the legislature that set up, so we could recuse. There are other ways of taking care of it. If you are careful, you do not have to recuse very often. But I had a lot of trouble with other judges on the Court not recusing when I thought they should.

If you think judges are easy to govern, they are not, especially elected judges. I had many judges call me up and say, "Sandy, don't tell me what to do. I get elected from the County of Olmsted or Ramsey, or whatever. You're not telling me what to do. I'm here for six years." And I am saying, "No, wait a minute, I've got to get this report done, so get to work, and let's do it." In any event, I just think there perhaps is a compelling state interest in carefully restricting free speech. And I do believe in it.

I think if we are going to have an election of judges, we had better have candidates. And I am willing to look at them. I am not sure the courts ought to set the rules on them. Maybe the candidates ought to be drafted by somebody, lay people, and not judges because we do tend to protect ourselves. And as I said, I think that perhaps these decisions ought to be made by some other body or by the legislature.

In conclusion, I just want to say that being a judge today, I will tell you, is one tough job. We have got to attract the best people we can for this job. It is not easy. And as I said, we have priced ourselves out of the market for almost half of the people that go into court today, even on appellate courts. We have got to make the selection of judges in such a way that we attract great people to take the job. And obviously, if we get bad ones, we have got to get rid of them.

So, it is a tough, tough job, but an important one. And as I said, listening today, I am kind of proud. It is not as bad as I thought it was.

(Laughter.)

Mr. Kaardal: The next panelist is Professor Steven Lubet, a professor at Northwestern University Law School. He got his B.A. from Northwestern, his J.D. at the University of California at Berkeley. He started off at a legal assistance foundation in Chicago. Since 1975, he has been a law school professor.

He is currently director of the law school program on advocacy and professionalism. He teaches courses on legal ethics. He has written over fifty books and articles on this topic and others.

*322 He is a co-author of *Judicial Conduct and Ethics*, [\[FN15\]](#) the nation's leading authority on the subject of judicial ethics. He has consulted with judicial conduct organizations in Washington, Pennsylvania, Wisconsin, and Minnesota regarding judicial ethics.

Professor Lubet: Thanks, Erick. You know, Erick actually slid over a word there, and it is very important to me to correct it. When he said the nation's leading authority on judicial ethics, he was talking about the book, and two-thirds of it was written by my co-authors Jeffrey Shaman and James Alfani. Hearing the previous discussion of whether one is or is not in violation in Minnesota or Alabama, of course, here I come up to the lectern and one question is on everybody's lips: What about judicial ethics in Chicago? I can tell you that it is not an oxymoron. But I do want to tell you a story: I am sitting at my desk. I pick up the telephone. The voice at the other end of the line says, "Professor"--and, you may know, nobody can say "professor" with as much derision as a Chicago alderman.

(Laughter.)

"Professor, I got an ethical question." If you all close your eyes, you can imagine him in an iridescent suit, with a cigar and a diamond pinkie ring. "I've got an ethical question." It is a judge talking. "What's your question?"

He said, "What I want to know is if it is ethical to duke your rabbi." Now, I see you do not understand this. He said, "What I want to know is, is it ethical to duke your rabbi?" And he did not want to show John Wayne movies to a member of the Hebrew clergy.

(Laughter.)

What he wanted to know was whether he could he give \$500 to his political sponsor, which is called "rabbi" in Chicago political lingo.

The judge wanted to go to the home of his ward committeeman, the guy who got him the job, and give him \$500. Now, this is actually a very subtle question because it is not a bribe. It is not money coming to the judge, right? And he has already got the job.

I thought about it for a minute, and then I figured this guy does not really want to discuss teleology or moral phenomenology here. He just wanted an answer.

So, I said, "Forget about it. You're a judge. You can't do it." He said, "Geez, thanks a lot, Professor."

(Laughter.)

It saved him 500 bucks. “Thanks a lot, Professor,” he said. “I always figured that ethics would come in handy some day.”

(Laughter.)

When we look at the question of a campaign speech, the first thing we recognize is that everybody is in favor of freedom of speech, but no one likes it. Everyone is in favor of the principle of freedom of speech. But when we get down to actual speech, everybody dislikes something. That is why it is in the Constitution. If people liked freedom of speech, we would not need to have it in the Constitution. So, that is why it is there.

***323** The second thing we have to recognize is that nobody really believes in free speech for judges. That is, we can talk about it as a principle and say, “Well, you don't lose your First Amendment rights once you take the bench,” but the fact is, nobody really believes that.

I can prove it in three words, “Thomas Penfield Jackson.” He was criticizing Microsoft in the middle of a trial. You know, if I did that, it would be protected. But for the judge to do it, ultimately it is not protected.

So, we all agree, at some level, that there must be limitations on the exercise of speech by judges.

I will give you two more quick examples. The first is political endorsements. Now, whatever you say about the necessity of speaking while you are running as a judge, certainly we would not want a situation where judges were endorsing candidates for representative or senator or President.

Could you imagine how that would delegitimize the judiciary if at the same time they are deciding the presidency, they have actively endorsed and campaigned for candidates?

Now, there is no more core First Amendment right than endorsing a candidate. So, when you say it is core First Amendment speech, we still have to recognize that we believe in restricting core First Amendment speech for judges.

There is not a person in the country, I think, who would disagree with that. On a more mundane level, we have rules against charitable solicitation by judges. Now, that is another protected First Amendment right. Everybody has it, except judges.

So, we recognize, I think, as a baseline, that as much as we favor freedom of speech as a principle, there are pragmatic restrictions attached to the nature of judging that require limitations on the exercise of speech.

I want to address briefly the issue that Justice See raised: Is there something different about judicial elections? I think there is, and let me explain it this way. In legislative or executive elections, the purpose of the election is to identify a person who will exercise the popular will by popular democracy.

Candidates promise to do things, and they are supposed to promise to do things. And if elected, they are supposed to keep their promises. That is the basic understanding of democracy.

The election is held to find the person who will take the actions that most people want. Now, of course, legislators do not always do that. We all know about the famous people who have bucked the popular will.

But the fact is that in legislatures and in the executive branch, what we are looking for is a person who will be a surrogate for public opinion. That is who wins the election: the person who most embodies public opinion.

But that is not the job of a judge. And I am not arguing against judicial elections here. But a judge is not elected to do the things that people want. That would undermine the rule of law.

That is why the Founders listed the control of judges as one of the usurpations of George III in the Declaration of Independence. It was intolerable to have judges who were making decisions based on orders or directions or directives.

***324** We wanted judges who would make decisions on the basis of law and evidence. It is part of the job description of a judge to do unpopular things, to refuse to carry out the popular will.

Now, this is a contradiction, right? We elect judges, but we do not elect them to do what we want. Judges are supposed to be elected, and then to disregard what we want upon taking the bench.

The problem, of course, is what happens when judges start making promises. The judge says, “If you elect me, I will support affirmative action,” or “If you elect me, I will rule against affirmative action.”

That sort of campaign speech undermines the rule of law. It destroys the actual function of judging. And that is certainly a compelling governmental interest.

If you wanted to wipe away everything else that government does, the idea that you can have the recourse to law, to be decided by a neutral and impartial decision-maker, is one thing that differentiates the United States from all the places where none of us want to live.

What I suggest is that restrictions on campaign speech need to exist, but they need to be narrowly limited to pledges or promises, commitments, or to other sorts of speech that tend to

undermine the very function of judging.

I do not think this is a right/left issue. I do not believe liberals think about this one way, and conservatives think about it another way.

But I would be less provocative than I want to be if I did not point out something to you. Both liberal and conservative judges have been charged with speech violations over the last number of years. In my unscientific observation, what I have seen is that when liberal judges get beefed, there is no groundswell of conservative support for them.

Justice Pincham in Illinois or Justice Glickstein in Florida both drew complaints, and there were no conservative organizations that stepped up and said “Free speech for judges.” But when Justice Sanders in Washington State drew a complaint for speaking at a right-to-life rally, he was represented by the American Civil Liberties Union. If people truly believe in freedom of speech, then it would not matter whether it was a judge we liked or a judge we do not like. We would stand up for the principle. And here, I think liberals have done a better job than conservatives.

Getting back to the principle, let me say this. It is easy enough to say, “Okay, judges have to be prohibited or restricted from making promises.” Everybody would agree that if a campaigning judge could say, “You know, I will, if elected, rule to overturn the death penalty,” that would just be wrong. You cannot make a promise like that ahead of time.

What about the tougher situation though, where you could refer to it as signaling or code words? What if the judge discusses “general philosophy,” and we all know what she is talking about?

A judge might say, “I believe in originalism.” A judge might say, “I believe in the right to life.” A judge might say, “I believe that the death penalty has been unfairly used in the past.”

Well, my view on this is that that would be permissible. It should not lead to sanctions, so long as it is not done in the context of a “case or controversy.” That is what judges do; they decide cases in controversy.

***325** When you start talking about cases in controversy in a campaign, you have crossed the line. As long as you are talking in good faith about judicial philosophy, even though that gives a good idea where you are going, the speech is protected and cannot be restricted.

So, when Justice Sanders, for example, in Washington, said, “I believe that human life is the most important goal of a judicial system,” it is protected speech. It does not cross the line.

He went on to say, by the way, “And in order to do this, we ought to elect pro-life legislators.” I think that crosses the line. With that dichotomy and recognizing the time pressure, thank you very much for inviting me.

The Federalist Society is, I think, one of the most open-minded groups in the United States. You always invite people who disagree. It is truly commendable. Although, I notice that I, alone, did not get a name plate.

(Laughter.)

Mr. Kaardal: The next speaker is Erik Jaffe. He is an attorney practicing in Washington, D.C. He received a B.A. from Dartmouth College, a J.D. from Columbia Law School. He, in 1990, clerked for D.C. Circuit Judge Douglas H. Ginsberg, then worked at Williams and Connolly for half a decade, then clerked for Justice Clarence Thomas on the U.S. Supreme Court, and since then has been a solo practitioner specializing in appellate litigation before the U.S. Court of Appeals and U.S. Supreme Court.

Mr. Jaffe: Well, I just want to make a few points today. The core one, perhaps, is that elections change everything. We talk about what it means to be a judge. We talk about the need for neutral judging. We talk about the need for independence and public reception. In my view, it is all a function of our familiarity with the federal court system and the U.S. Constitution.

The compellingness of a judge's role, the way we understand it: aloof, independent, and not subject to political whims, is all a function of the federal Constitution, none of which, I propose, applies in states that have judicial elections. Because in those states, what it means to be a judge is different. It is very different. Now, how is it different?

First of all, judges are accountable to the public. We heard the earlier discussion about the balance back and forth between accountability and independence. Well, when you choose to have an election, you have sacrificed at least some level of independence in order to have accountability.

The question that immediately leaps to mind is accountability for what? Well, it seems to me that when you are putting a judge's job to a public vote, the answer is accountability for whatever the public bloody well wants. That is what.

It is not like you are giving it to an administrative agency with strict instructions that they may only consider the following three criteria about that judge. We are not giving it to the ABA to say you may only consider the following three things, and you may not consider the judge's views.

We are giving it to the public. And at the end of the day, the public votes on what the public wants to vote. And that is the way it should be.

If you are going to ask the public to vote on something, the government, I believe, has no say in what the public chooses to base its vote on. In fact, I think it is prone *326 to be destructive to have the government try to have a say over what the public bases its vote on.

So, when the public is voting, what do we think are the likely things they are going to evaluate a judge on, and what are the things that they would evaluate that we might well agree with? Those things in the state courts are particularly evident in the common law. The notion that judges do not make law is simply bunk. In state courts, they do make law. They are expected to make law. They are asked to make law, and there is absolutely nothing wrong with that.

They make common law. We expect them to do it. They have always done it. Anyone who has read Justice Cardoza's opinions about torts while he was on the New York Court of Appeals understands perfectly well that they generate new legal principles from their own fuzzy, little heads. That is a good thing because sometimes we want them to do that. They are subject to checks, and they are subject to political accountability in the sense that the legislature can always pass a new law and override the common law in many instances. There is nothing wrong with that. But state court judges play a proper role in developing common law that has substantial, overwhelming policy aspects to it. And for that, they should be accountable. They are no different, in that sense, than legislators who develop laws that have policy aspects to it.

Other ways that judges have a choice in exercising policy decision-making that they should be accountable for are also common, in some ways, to the federal courts. So, it is not exclusively about the state courts. For example, there are certain decisions that are delegated to judges. Judges are asked to set sentences, for example. We say, "Oh, the sentence can be between zero and thirty years. You pick."

Now, in the federal system, we have now developed some guidelines that radically constrain that type of discretion. But for a long time we did not. And in state courts, many state courts still convey a considerable amount of discretion on what the proper answer is based upon a variety of policy concerns, not all of which are individualistic.

It seems to me that there are many instances where there are ambiguities in statutes that either require or invite judges to exercise policy discretion. How one resolves an ambiguity is very frequently, and I think very properly, a function of policy judgement. Judges do that with some regularity.

In terms of constitutional values, there are many constitutional terms that, likewise, not only allow, but invite, policy decision-making: reasonable, cruel, unusual. There may be some general, historical meaning to those words, but I propose that in some instances, the historical meaning invites judges to make a policy choice. That is what was expected. That is what was intended. So that if you are going to go back to the Framers' intent, they very well intended there to be some discretion.

All of these things are exercises in policy judgment, and all of these things are proper subjects of accountability, I think, under any type of version of the view of a judicial role. Nothing wrong with that.

To the extent that you want to have elections at all, the public has every right to make its judgements based upon both how a judge does exercise that type of policy discretion and says they will exercise that type of policy discretion.

***327** The last instance is, of course, our general judicial powerline, much of which we discussed earlier. I am a strict constructionist. I am not a strict constructionist.

All of these things are valid debates within the judging community that have two sides and that can properly come out one way or the other. So, if the public thinks it wants strict constructionists, it can certainly elect them. And if the public does not want strict constructionists, they can certainly elect them.

Now, having said that, let me reestablish my federalist perspective and say that there are certain things that are not subject to that kind of discretion. There are certain laws that say, "The sentence will be ten years." Thus, the sentence will be ten years, and there is no ambiguity, and there is no policy motion. In those instances, what judges properly do, it seems to me, is interpret the law, apply the law. There is no exercise of discretion. But those situations do not make up the whole judging. I propose that the other situations, where there is discretion, make up a larger portion of judging than we sometimes give credit for.

That is why, it seems to me, that there is proper accountability. And in order to have that proper accountability, there has to be proper information to the electorate.

The next point I want to make is what is the role of the public in obtaining information about judicial candidates? And what is the role of the judicial candidate in providing that information?

Well, that much follows from the notion that elections change everything. If the role of the public is to give a thumbs-up, thumbs-down for each individual candidate, or you have thumbs-up for one, and thumbs-down for the other five who are running, whatever it is, then, it seems the public has every interest in the world in knowing as much about those candidates as it can possibly get its hands on, to the extent that it cares to know.

The notion that we should stop the public from being fully informed because they might make their choice on a bad reason I think is grossly offensive to the First Amendment. When the public votes, there is no such thing as bad reasons.

We do not ask the voters, "Did you vote on some invidious characteristics?" If a voter wants to vote based on race, based on religion, based on gender, we never ask them, and we do not ask them for a very good reason. It is not our business.

The act of voting is perhaps the most private thing, and, therefore, they should be entitled to do that, even on reasons we find offensive. Because at the end of the day, voting is an exercise of

preference, it is an exercise of desire, not necessarily of logic.

So, their desire has to be reflected in the ballot box. We must recognize that as a necessity of democracy. That is the voter's role, and I think it needs to be unconstrained. And I think that is the function of the First Amendment.

Now, there are all the candidates providing that information. I agree to the extent that I might well agree that there should be some constraint within the context of a concrete case of controversy. If a case is in front of you, you ought to keep your mouth shut and do your writing for your opinions. That bar I agree with.

I am not so sure that I agree that you should not be able to talk about cases in the abstract, so long as one is not pending in front of you. So, when the judge says, "Golly gee, I think *Roe v. Wade* was preposterous, and if the same question came up under our state constitution, I don't see one could ever come to that result, I think that is proper." If that is a legitimate judicial opinion, that is perfectly proper. I do ***328** not see why a citizen would not want to know about that, would not be entitled to know about that, and hence, the judge being the best source of that information, should be entitled to say so.

On the other hand, if a judge said, "I don't care what the law says; I don't care what the Constitution says, I'm going to vote against abortion every time, no matter what, no matter what the law says," well, it seems to me that that is stating a position and making a promise that is illegal.

In many instances, I might well ban a legislator from making such campaign promise. If a legislator says, "I don't care what the law says; I'm going to bribe everyone that I can find to vote for my bill, and I'm going to hand out bribes left and right, if you elect me, to make sure that you guys get what you want," I have got a problem with that, too.

Making illegal promises is quite different from making perfectly valid and perfectly enforceable and perfectly implementable promises. To the extent that judges are merely talking about things that are perfectly within their purview to do as judges, I do not see why the public should not know about that.

So, that is the role that I see of judges in the public. The final point I want to make regarding state interests is the state's interests in speech restriction. At the end of the day, I am startlingly sympathetic to the notion that judges ought to be independent and aloof. I have a preference, in fact, for the federal system, which does that. It does that, and it strives very hard to do that.

But we have to accept that there are elections, because we are talking about campaign speech. Once you have abandoned the ideal of independent and aloof judges, the notion that it is a compelling interest to make them into something they are not, does not work.

At the end of the day, there is a case to be made with an under-inclusiveness argument, that if

you are going to claim a compelling state interest in something, you bloody well better be consistent about. Because if you are not consistent about it, we do not believe you.

We do not believe that you actually value it, even if we might value it. So, if I am looking at judicial elections and somebody says, “Golly, gee, I really want judges to be independent of political pressures,” my simple answer to them is, “Then don't elect them.” Because once you elect them, you are asking them, you are forcing them to be responsive, at some level, to political pressures. Because if they were not being responsive to political pressure, they would be contradicting the very notion of elections.

If you are not going to do what the public asks you to do, if you are going to mislead the public about your behavior to get yourself elected, that is very troubling. That seems to undermine the concept of democracy much more than the notion that there are good reasons for having elected and responsive judges.

I think one can have responsive judges, in many instances, without threatening democracy. I do not think you can have elected representatives ignoring the voters without a much graver threat to democracy.

It seems to me that is what we would have if you try to get judges to not be political when you force them to be political. It is like throwing them in the mud but saying, “You must keep the tip of your nose clean so the public doesn't think *329 you're dirty.” Well, you are throwing them in the mud of politics, for crying out loud. What do you want from them?

So, I will find the interest compelling once the state, itself, has cut the heart out of the interest. That is not to say that I do not find it compelling that you want judges to be independent. I do. But I think those states that have elections perhaps think differently, and only say they want them independent at some degree, but do not necessarily want them that independent; hence, they have the elections.

The last point I want to make about the value of the state interests go to the public perception and public confidence point. I agree with a lot of the arguments made earlier by Justice See that more speech is better; it helps public confidence. Those are sort of functional, utilitarian arguments that would allow us to increase public confidence through more speech. I agree with that.

I want to make a slightly different point, which is to the extent the public will lack confidence by recognizing the judiciary for what it is in their state, i.e., a responsive and accountable judiciary that will make certain policy choices based upon the electorate's preferences on who they ran.

To the extent that we are stopping the public from seeing that--and what we mean by “public confidence” is really a false confidence or a belief that the judiciary is something other than what the state election laws make them--I think that is contrary, in the deepest sense, to the First Amendment.

The notion of masking the reality from the public by manipulating information that goes to them and instilling a false confidence in their elected officials is reminiscent of sedition prohibitions. And I think even where the seditious speech here is a public's lack of confidence by seeing the candidates for what they are as they speak these horrible thoughts, well, if the candidate is going to speak a horrible thought, presumably they were thinking a horrible thought. And to not tell the public that they are thinking that I am not sure makes it any better. They may have more confidence, but that confidence may be unwarranted.

At the end of the day, what we should have is both candidates who want to get up and say, "I want very strict construction because I believe in these policy positions." The public will see what they are. And if that is the kind of judges they want, they will vote for them. If that is not the kind of judges they want, they will not.

And those candidates who hold themselves to a higher calling will say so and say, "I am not going to announce my views because I think that's an inappropriate way to be a judge." Hopefully, the public will pick the candidate who has that higher plain because it would think independence is a good thing. But if the public does not pick that candidate, that does not make them wrong. It just does not. It makes them in disagreement with us, perhaps, but it does not make them wrong.

Because at the end of the day, democracy presupposes that the public is right, over time anyway, when they vote. That is all there is to it. We do not assume an inherently right answer. At the end of the day, if the public wants more responsive judges, the public gets more responsive judges. And that is their choice. It may not be the system that you, or I, or anyone else would rather have. But if we are outnumbered, that is democracy.

***330** Those are my views. Obviously, there is much more to talk about on these, and the question period may elaborate on them. But if you walk away with one thing, it should be that "Elections change everything."

This is not the federal system. To the extent that a state has good reasons for having elections, or bad reasons for having elections, they need to recognize that with elections come free speech.

Mr. Kaardal: Now, I will ask the panelists to respond to some hypotheticals and, then, questions from the audience. The first hypothetical is assume you are an attorney in a state with judicial elections, and you are representing a lawyer candidate running against an incumbent State Supreme Court Justice. The State Supreme Court Justice last year wrote a majority opinion on a watershed, controversial case called *Roe v. Wade*. [\[FN16\]](#)

The State Code of Judicial Conduct, following the 1973 ABA Model Code, bars judicial candidates from both announcing views on disputed legal and political issues and pledging or promising to vote a certain way in a particular case that comes before the Court.

Your client, who opposes this *Roe v. Wade* decision, wants you to advise him with respect to these three statements: One is a pledge or promise, “If elected, I promise to vote to overrule *Roe v. Wade*”; two, this is stating a view on a disputed legal issue, “I agree with the dissent in *Roe v. Wade*.” Three, and this is a pledge or promise on a disputed issue disguised or camouflaged, “Prior to running for office and becoming a judicial candidate, I was a member of a lawyer's club called ‘Overrule *Roe v. Wade*.’”

I would like each of the panelists to respond, starting with Justice See, then Justice Keith, Professor Lubet, and Erik Jaffe.

Justice See: Well, first of all, I think there is a difference between what you should not do and what you should be sanctioned for doing.

I think the judge should not make any of those three statements, although I do not have a problem with judges making a statement about their personal views, as long as they make clear that it is not their personal views that will govern the decisions, but that they will decide in accordance with the law, the way the law is written.

So, that is my general answer to the question. It would seem to me if we look at those three options the way people generally would construe them today, the third option is the one I think most people would say is permissible to do.

The first two raise some question. But I think the question raised is are you someone who is going to decide a case before you have heard it, before the briefs have been submitted and you have heard the arguments?

In all candor, I think I would have to say as to any case, “I can't tell you how I'm going to rule on that case because I haven't read the briefs; I haven't researched the law, and I haven't had that specific issue posed to me the way it's going to come to me when I'm on the Bench.” So, it seems to be foolhardy to give such an answer.

But let us suppose the candidate does make that commitment, and he says, “I will vote to overrule that case when it comes before me.” At that point, you have a question as to what the consequences should be. The consequences could be that the judicial candidate will be sanctioned in some way. Then someone has to decide *331 if that statement is sufficiently close to what the candidate should not have said to merit a particular sanction. Of course, the sanctioning body will have a fair amount of discretion as to what speech will or will not be sanctioned. That is one option.

The other option is simply to say that you may make a promise as to how you will rule. But having done so, you are now required to recuse whenever that matter comes before you. That, it seems to me, shuts a person down pretty effectively. The response is yes, he has promised to rule that way, but I hope you understand he will not do so because he must recuse when that issue

comes before him.

Justice Keith: I think he handled it correctly. I agree with him. There is no problem with that with me. I had a candidate that disagreed with several opinions of mine. My wife has disagreed with several opinions of mine.

(Laughter.)

And so, you know, I have been through all of that. But the real question is sanctions. Should they be sanctioned? I think so. I thought he was a fool to do it because he knew he was going to have to recuse.

We had the case where we had to sit down with a judge and say, "Look, you really did make these statements. It does look like you've made up your mind, and we think it is going to hurt this Court unless you step down." He did not want to leave. We do not like to step down usually. We want to decide it. That is why we are there. So, he did step down. So, I think you are right. I do not have a problem with those issues.

Professor Luby: Well, the problem with signaling like that is that cases do not present themselves as pristine issues of law, as judges all know. When the vehicle for possibly overturning a state version of *Roe v. Wade* comes before the state supreme court, it is going to have all kinds of issues in it: standing, justiciability, appealability. You know, everyone knows how hard it is to get a case up to a supreme court. Was summary judgment properly granted? Were there discovery problems?

And so, promises to rule in a particular way are incredibly corrupting because what you are saying, among many other things, is that "I am going to disregard all the stuff that makes a lawsuit a lawsuit in order to get at a political agenda rather than a legal one."

So, I find this promise not in the ordinary course of electing judges, but something that really borders on advance notice of disregard for the oath of office. And obviously, we take that very seriously.

I also want to say, *Roe v. Wade* is not the problem here. *Roe v. Wade* is not the issue. I would be happy to have an exception for *Roe v. Wade*. I would be happy to have a rule that says, "A judge may not pledge or promise conduct in office except concerning *Roe v. Wade*" --

(Laughter.)

-- because everybody knows how everybody feels about *Roe v. Wade*. And everybody who has ever been in public life has a track record. There are one hundred easy ways to let the electorate know how you feel about *Roe v. Wade*, and I do not think that does any harm.

The damage lies in the family law cases, and the criminal cases, and the drunk driving cases, the ordinary stuff of judging, where judges can be tempted by *332 invitations from editorial boards and pressure groups to commit themselves ahead of time--not just to one ruling, but to a whole series of rulings.

And here, I think the restrictions actually protect the judges in a way that most judges would prefer. When your icon and my bête noir, Antonin Scalia, appeared before the Senate Judiciary Committee seeking confirmation, which was given unanimously by the way, he was asked a series of questions.

He declined to answer every one. And in exasperation, I think, Senator Biden said, “Well, Judge Scalia, will you at least tell us what you think of *Marbury v. Madison*?” [\[FN17\]](#)

And he said, “I cannot ethically answer that question because some day, someone might want to raise it before me, and I can't tell you anything about how I feel about *Marbury v. Madison* because that would compromise my ability to be an open-minded judge”--and we know how open-minded he is.

(Laughter.) So, I respectfully decline to answer your three questions.

Mr. Jaffe: Well, it seems to me that I did not see a tremendous difference between someone saying, “I think *Roe v. Wade* was wrongly decided,” or “I think some other case, or *Marbury*, was wrongly decided,” and a judge writing a dissent saying precisely the same thing.

And we have seen those dissents all over the place that says, “I think the issue was properly raised, and I would rule against it. Therefore, I dissent.”

That signals the view that makes as much of a commitment as any campaign promise makes. We certainly know what will happen in the next case where the issue is properly presented. I see no difference.

And hence, to the expense of the campaign speech of that sort, whether it is a promise, “I will overrule it”; whether it is a statement of agreement, “I think the dissent was right”; or whether it is a historical fact, that does not bother me.

It is the fourth question that bothers me, the “No matter what case comes up, if it involves an abortion, the answer is no.” Because that is Professor Lubet's example of ignoring all the other aspects of what makes a case a case.

But to the extent that we are merely talking about legal questions, that have been presented in the abstract and that recur in the abstract, we should recognize that all of judging is case-specific.

Judges set precedent, and precedent applies to lots of cases. One can discuss it in a higher

plane of abstraction than in the individual case because we know in advance that a number of plaintiffs at the end of the day will force us to decide certain legal questions, which is why we have precedence in the first place.

So, that is my answer. My answer is I have very little difficulty with any of these, so long as they do not state or strongly indicate a violation of the judicial oath, that you will ignore all of those decisions that you will need to make as a proper part of judging merely to reach an issue that you have an opinion on.

Questions & Answers

Mr. Kaardal: Let us open it up to questions. Is there a question? For the audience, the question goes to the issue of to what extent should discussion of ***333** judicial philosophy be allowed in judicial elections. And to the extent that they are restricted, does it affect what information gets to the voting public?

Justice See: I am in favor of more information. I think that the public has a right to ask. And if they have a right to ask, I think they should have the opportunity to learn certainly the judicial philosophy of the candidate.

But I think a lot more goes into that. We could have a list of judicial philosophies, A through Z, and allow the candidate to say which one or more of those categories he or she falls in. But all that does is allow the judge to do the polling and find out what people want and check those boxes--or the candidate. So, if the public is going to get behind that and going to understand what, for instance, judicial philosophy is, I think they need a lot of other information.

Now, no one ever compels a candidate to answer a question. And I can always say, "Well, that's something that I'd rather not talk to you about," and I can say, "That's something that impinges on my ability to be an effective judge, and so I think it's better for me not to answer that question."

But it seems to me I also ought to be in a position where I could answer that question, say something about--well, we had the earlier question to the panel; we had the example of someone saying, "I belong to X organization." Well, we rarely question the right of a judicial candidate to put down the organizations he belongs to.

In fact, I suspect a lot of people would like to know, do you belong to any country clubs? What are their acceptance policies? There are a lot of things that may not be a direct answer to a question of judicial philosophy, but they are relevant to understanding who the person is, how they approach life, how they approach issues.

And I think that candidates ought to be allowed to give that information if they choose when the public asks.

I gave a talk one time. This was in a rural community, and I said, “Now, are there any questions? I'd be happy to answer any questions you have.”

Well, I really should not have said it that way because the first question I got was from someone who said, “Well, I've got a case down there, and I want to know what's going to happen in that case.”

And I was like, “I'm sorry, I can't--I can't answer that question, but any other questions?” And a fellow stood up and he said, “Well, my cousin has this lawsuit,” and I said, “Wait a minute, wait a minute. I can't answer that question.”

Do you remember the father whose son came up to him and said, “Dad, I have a question.” He said, “Okay.” And, “Well, why is the sky blue?” And the father said, “I don't know. I don't know why the sky is blue.”

So, the boy waited a second and said, “Well, Daddy, why do--how is that birds can fly?” The father said, “Son, I really don't know the answer the question. I don't know what it is that makes birds fly.”

“Well, Daddy, how is it that fish can breathe down in the water?” And he said, “Son, I just don't know the answer to the question.” So, the little boy said, “Dad, I hope you're not upset. I hope you don't mind that I'm asking you these questions.”

And the father said, “Well, of course not, son. How else are you going to learn?”

(Laughter.)

Justice Keith: I will pass.

***334** Mr. Kaardal: There is a question back there. In New York State, which is a fusion state, where judicial candidates may run on different party lines on the ballot, would it be unethical for a justice to identify the right-to-life line, in the opinion of the two Justices on the panel?

Justice See: I suppose the proper thing to say is “That's a very good question,” and then sit down.

(Laughter.)

Justice See: Yes. Obviously, I am uncomfortable with the idea. On the other hand and inconsistent with what I just said, you know, I think it is certainly all right for the public to know that someone believes one way or the other on that issue.

What concerns me about it is that if running under that party label does suggest that you intend to do something about it--and so, I guess what I would like to see is once choosing to run under that label, the candidate making clear that although these are the views, he is sympathetic with these views, that he is committed to apply the law, and that he will, in fact, apply the law.

And then, the next question is, is it unethical for him to run under that label? And to me, the answer to that would be no. But I would encourage him to be careful not to mislead people as to what the role of the judiciary is.

Justice Keith: I have nothing to add.

Professor Lubet: Well, I would invoke the Roe v. Wade exception.

(Laughter.)

It is such a subtle part of the landscape that I just would not see a problem with it. Now, if there were a party called the No Bail in Domestic Abuse Cases Party --

(Laughter.)

-- which is taken from an actual example; a judge has said, "I will never allow bail for anybody charged with domestic abuse," or if there was an Increased Benefits for Black Lung Victims Party, that would be a separate question.

Because the name of the party, of course, would be a subterfuge for predicting the outcome of his cases. But with an established political party and the sort of broad issue like that, I would not see a problem either way.

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[FN2]. [122 S. Ct. 643 \(2001\)](#).

[FN3]. Harold F. See is an Associate Justice of the Alabama Supreme Court. This essay is an adaptation of a speech presented at the University of Toledo College of Law on March 30, 2001, during a symposium sponsored by the Litigation Practice Group of the Federalist Society.

[FN4]. See, e.g., Lillian R. BeVier, [Judicial Restraint: An Argument From Institutional Design](#), 17 *Harv. J.L. & Pub. Pol'y* 7 (1994); Hon. Hans A. Linde, [The Judge as Political Candidate](#), 40 *Clev. St. L. Rev.* 1 (1992); The Federalist Society White Paper Task Force, [The Case for Partisan Judicial Elections](#), available at <http://www.fed-soc.org> (Publications/White Papers link) (last visited Jan. 22, 2002), reprinted in [33 U. Tol. L. Rev.](#) 393 (2002).

[FN5]. [U.S. Const. amend. I](#). See also [United States v. Eichman](#), 496 U.S. 310, 317 (1990)

(striking down anti-flag-burning statute because it impermissibly prohibited speech that was “disrespectful” of the flag); [Texas v. Johnson](#), 491 U.S. 397, 397 (1989) (holding that Johnson's conviction for burning the American flag violates the First Amendment); [Brandenburg v. Ohio](#), 395 U.S. 444, 444 (1969) (holding that a Ku Klux Klan leader's conviction for advocating unlawfulness as a means of political reform violates the First Amendment).

[FN6]. See [Buckley v. Am. Constitutional Law Found., Inc.](#), 525 U.S. 182, 208 (1999) (Thomas, J., concurring) (“restrictions on core political speech so plainly impose a ‘severe burden’ that application of strict scrutiny clearly will be necessary”); [McIntyre v. Ohio Elections Comm'n](#), 514 U.S. 334, 347 (1995) (core political speech “is the [essence] of First Amendment expression,” and “[n]o form of speech is entitled to greater constitutional protection”) (holding that Ohio's statutory prohibition against distribution of any anonymous campaign literature violated the First Amendment); [Meyer v. Grant](#), 486 U.S. 414, 421-22, 425 (1988) (striking down Colorado's prohibition of payment for the circulation of ballot-initiative petitions, concluding that petition circulation is “core political speech” for which First Amendment protection is “at its zenith”); [Buckley v. Valeo](#), 424 U.S. 1, 15 (1976) (“[T]he constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.”) (quoting [Monitor Patriot Co. v. Roy](#), 401 U.S. 265, 272 (1971)).

[FN7]. See [Buckley](#), 424 U.S. at 25 (quoting [NAACP v. Alabama](#), 357 U.S. 449, 460 (1958)).

[FN8]. See *id.* See also [NAACP](#), 357 U.S. at 463.

[FN9]. See [Nixon v. Adm'r of Gen. Servs.](#), 433 U.S. 425, 467-68 (1977); [Buckley](#), 424 U.S. at 25; [Königsberg v. State Bar of California](#), 366 U.S. 36, 50-51 (1961); [NAACP v. Alabama](#), 357 U.S. at 463.

[FN10]. See Daniel Burke, [Code of Judicial Conduct Canon 7B\(1\)\(c\): Toward the Proper Regulation of Speech in Judicial Campaigns](#), 7 *Geo. J. Legal Ethics* 181, 183 (1993) (“[P]ledges, promises, or commitments to any constituency inevitably undermine society's confidence in the judiciary”).

[FN11]. See, e.g., Robert M. Brode, [Buckley v. Illinois Judicial Inquiry Board and Stretton v. Disciplinary Board of the Supreme Court: First Amendment Limits on Ethical Restrictions of Judicial Candidates' Speech](#), 51 *Wash. & Lee L. Rev.* 1085, 1111-15 (1994) (discussing the effect on Canon 7 on insuring the impartiality of the judiciary); Burke, *supra* note 8, at 183 (“[P]ledges, promises, or commitments to any constituency inevitably undermine society's confidence in the judiciary”).

[FN12]. We need only recall the tenor of debate on the confirmation of the appointment of Justice Thomas, and the millions of dollars spent to influence that appointment, to understand that politics does not go away when judicial selection is by appointment; it just--usually--goes behind closed doors.

[FN13]. See, e.g., Paula Lee Colman, [Judicial Impartiality and Campaign Speech: The Constitutionality of Canon 7](#), 12 *St. Louis U. Pub. L. Rev.* 209, 219-20 (1993) (discussing [American Civil Liberties Union of Florida v. Florida Bar](#), 744 F. Supp. 1094, 1098 (N.D. Fla. 1990) (“favoring disclosure of information over concealment”).

[FN14]. See Harold F. See, [Comment: Judicial Selection and Decisional Independence](#), 61 *Law & Contemp. Probs.* 141 (1998).

In the final analysis, the question is whether the people--in whose hands all political decisions ultimately lie--appreciate the importance of the rule of law to their freedom and happiness and the function of the judiciary as its guardian. We cannot expect full public appreciation of the judicial function if the judiciary does not fulfill its educational function. Justice Brandeis's clerks report that he often commented on drafts of his opinions, “[t]he opinion is now convincing. What can we do to make it more instructive.” [sic] It is imperatively the duty of the judiciary to assure that the bar and the public understand what judges do, and it is no less the responsibility of lawyers to understand that role, to act consistently with that understanding, and to impart that understanding to the public.

Id. at 146 (citations omitted). See also Federalist Society Symposium: [Panel Four, Relimiting Federal Judicial Power: Should Congress Play a Role?](#), 13 *J.L. & Pol.* 627 (1997).

[FN15]. Jeffrey M. Shaman, Steven Lubet & James J. Alfini, *Judicial Conduct and Ethics* (3d ed. 2000).

[FN16]. [410 U.S. 959 \(1973\)](#).

[FN17]. [5 U.S. 137 \(1803\)](#).

33 U. Tol. L. Rev. 315

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