2002

Public Funds and the Regulation of Judicial Campaigns

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PUBLIC FUNDS AND THE REGULATION OF JUDICIAL CAMPAIGNS

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INTRODUCTION

Recent discussions of judicial election campaigns have been marked by two themes: (i) the growing costs of such campaigns, with concerns over the roles of large contributions and independent spending, the burden of fundraising for candidates, and the implications of campaign finance practices for judicial decision-making; and (ii) the changing nature of campaigning, as elections that were once "low-key affairs, conducted with civility and dignity,"[1] have become increasingly politicized, marked by heated charges and sharp criticisms of the records and decisions of sitting judges. The two developments are surely intertwined, with the more bitter and hard-fought campaigns funded by rapidly growing campaign coffers, and the surge in campaign money, in turn, stimulated by more heated ads and greater attention to hot button issues. Sharply rising costs and more intensive and even ideological campaigning together mark an increased recognition of the significant policy-making role state courts play—a backhanded tribute to the power and discretion of state judges and to the high political stakes in many state judicial elections. Yet the combination of evolving campaign finance practices and more politicized campaigning may call into question the fairness of judicial decision-making and public confidence in the impartiality of the courts.

The changing nature of judicial campaigns is reflected in, and has been bolstered by, recent federal and state court decisions subjecting traditional state judicial campaign codes to First Amendment scrutiny. Several courts have held that code provisions that preclude candidates from "announc[ing]" their "views on disputed legal or political issues" infringe on the free speech rights of campaign participants and on the interest of voters in receiving information relevant to the election.[2] These courts either have held such content restrictions

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1. Peter D. Webster, *Selection and Retention of Judges: Is There One "Best'" Method?*, 23 FLA. ST. U. L. REV. 1, 19 (1995), *quoted in* David B. Rottman & Roy A. Schotland, *What Makes Judicial Elections Unique?*, 34 LOY. L.A. L. REV. 1369, 1372 (2001).

2. These provisions may be traced to the Canons of Judicial Ethics adopted by the American Bar Association in 1924 and the Model Code of Judicial Conduct adopted by the ABA in 1972. *See e.g.*, Republican Party of Minn. v. Kelly, 247 F.3d 854, 864-67 (8th Cir.), *cert. granted*, 122 S. Ct. 643 (2001) (providing history of restrictions on campaign conduct of judicial candidates in

invalid[3] or have sustained them by interpreting the restrictions narrowly to preclude a candidate only from making known her positions on issues "likely to come before" her as a judge.[4] Judge Posner has suggested that even the "likely to come before" standard is overbroad, and that only a prohibition on pledges or promises to rule a certain way would pass constitutional muster.[5]

A second set of cases has dealt with what might be called the tone of judicial campaigning. In an effort to promote campaign civility, a number of states forbid judicial candidates from making false, misleading or deceptive statements.[6] Several courts have recently held that these provisions are overbroad and unduly constrain judicial campaign speech. They have either invalidated the provisions,[7] or saved them by narrowing them to apply only to statements that are either intentionally false or issued with reckless disregard as to their truth or falsity.[8]

One solution for the rising costs of judicial elections is public funding.[9] Public funding could reduce or eliminate the burdens of fundraising, judicial candidates' dependence on private donors, and the concomitant concern that such contributions affect judicial decision-making.[10] The National Summit on Improving Judicial Selection recently recommended public funding as one of a

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Minnesota). *See generally* Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059, 1063-66 (1996).

3. *See, e.g.*, Buckley v. Ill. Jud. Inquiry Bd., 997 F.2d 224 (7th Cir. 1993); Beshear v. Butt, 773 F. Supp. 1229 (E.D. Ark. 1991); ACLU of Fla., Inc. v. Fla. Bar, 744 F. Supp. 1094 (N.D. Fl. 1990); J.C.J.D. v. R.J.C.R., 803 S.W.2d 953 (Ky. 1991).

4. *See, e.g.*, *Republican Party of Minn.*, 247 F.3d at 861; Stretton v. Disciplinary Bd. of the Sup. Ct. of Pa., 944 F.2d 137 (3d Cir. 1991). *See also* Ackerson v. Ky. Jud. Retirement & Removal Comm'n, 776 F. Supp. 309, 315 (W.D. Ky. 1991) (affirming code precluding taking positions on issues "likely to come before the court"); Deters v. Jud. Retirement & Removal Comm'n, 873 S.W.2d 200, 205 (Ky. 1994) (same). The constitutional standard is similar to the 1990 version of the ABA Model Code of Judicial Conduct, which precludes a judicial candidate from "mak[ing] statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(ii) (1990).

5. *Buckley*, 997 F.2d at 229 ("there is almost no legal or political issue that is unlikely to come before the judge of an American court").

6. *See* Richard A. Dove, *Judicial Campaign Conduct: Rules, Education, and Enforcement*, 34 LOY. L.A. L. REV. 1447, 1448-49 (2001).

7. *See, e.g.*, Weaver v. Bonner, 114 F. Supp. 2d 1337 (N.D. Ga. 2000); Butler v. Ala. Jud. Inquiry Comm'n, 111 F. Supp. 2d 1224 (M.D. Ala. 2000).

8. *In re* Chmura, 608 N.W.2d 31 (Mich. 2000). Some courts, however, vigorously enforce rules against misleading or deceptive statements. *See, e.g.*, *In re* Jud. Campaign Complaint Against Hein, 706 N.E.2d 34 (Ohio 1999); *In re* Jud. Campaign Complaint Against Burick, 705 N.E.2d 422 (Ohio 1999).

9. *See, e.g.*, AMERICAN BAR ASS'N, STANDING COMM. ON JUDICIAL INDEPENDENCE, REPORT OF THE COMMISSION ON PUBLIC FINANCING OF JUDICIAL CAMPAIGNS (2001); Charles Gardner Geyh, *Publicly Financed Judicial Elections: An Overview*, 34 LOY. L.A. L. REV. 1467 (2001).

10. *See* Geyh, supra note 9, at 1468-71.

number of steps for reforming judicial elections.[11]

Could public funding also be used to regulate the content of judicial campaigns? Specifically, could a state require, as a condition for the provision of public funds to a judicial candidate, that the candidate agree to adhere to a code of campaign speech broader and more restrictive than one that could be constitutionally imposed on the candidate?

The U.S. Supreme Court has held that although a mandatory limit on the amount of money a candidate can spend in his election campaign is unconstitutional, a grant of public campaign funds to a candidate may be conditioned on the candidate's agreement to limit total campaign expenditures.[12] Arguably, if public funding can be conditioned on a waiver of the constitutional right to engage in unlimited spending, it might also be conditioned on a waiver of the right to engage in certain types of constitutionally protected speech, such as taking positions on political and legal issues or making statements that may be misleading or deceptive.

Part I of this Paper considers whether public funding for a judicial candidate can be made contingent on the candidate's adherence to an otherwise unconstitutional campaign speech code.[13] It first examines the case law concerning the restrictions on campaign spending currently attached to various federal and state public programs, and considers the implications of the constitutionality of the spending limit condition for a speech code condition on public funding. It then turns to the unconstitutional conditions doctrine, which shapes the ability of government to impose conditions on public grants. Under the doctrine, although government may use public funds to promote some activities and not others, it cannot condition the availability of public benefits on the waiver of fundamental rights. As I will indicate, the doctrine is a murky one, and provides no clear answer to the question of whether a campaign speech code could be an unconstitutional condition. Part I concludes by assessing the significance of some of the distinctive features of a judicial candidate speech code—including the impact on the extent of campaign speech, the arguably

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11. *Call to Action: Statement of the National Summit on Improving Judicial Selection*, 34 LOY. L. A. L. REV. 1353, 1358 (2001) [hereinafter *Call to Action*] (recommendation sixteen: "States in which candidates compete for judicial positions should consider adopting public funding for at least some judicial elections.").

12. *See* Buckley v. Valeo, 424 U.S. 1, 57 n.65 (1976). *Accord* Republican Nat'l Comm. v. FEC, 445 U.S. 955 (1980), *aff'g*, 487 F. Supp. 280 (S.D.N.Y. 1980).

13. This Paper does not directly address the question of whether campaign codes that limit judicial candidates' statements on political and legal issues or that preclude "misleading" or "deceptive" or intentionally false statements are unconstitutional. This Paper considers whether campaign speech restrictions that might be unconstitutional could be enforced as conditions attached to a voluntary public funding system. For that purpose, I assume without deciding that some judicial campaign speech constraints are unconstitutional. Indeed, the very reason to consider whether campaign restrictions can be tied to public funding is that the speech restrictions would be unconstitutional, otherwise the restrictions could be imposed directly and would not need to be made a condition of public funding.

distinctive nature of judicial campaigns, and the fact that such a code would be applied only to candidates and not to independent committees—in the determination of the constitutionality of a speech code condition for public funding.

There is no clear answer to the question of whether a campaign speech code could be made a condition of judicial candidate public funding. Although the code would be voluntary in the sense that a candidate would be free to decline the public grant and thereby avoid the speech restriction, the voluntariness of the program may not be enough to save the condition. Such a condition could not be justified in terms of the traditional goals of public funding, such as reducing fundraising burdens, mitigating the potential corrupting effects of contributions, and facilitating candidate communications with the electorate. Rather, the conditions would change the content of campaign statements. The powerful First Amendment interest in unconstrained discussion of political issues and the important role candidate statements play in informing voters—the very factors which have contributed to the growing judicial hostility to traditional judicial campaign codes—might very well lead a court to conclude that making adherence to a restrictive code a prerequisite for the receipt of campaign funds is unconstitutional.

On the other hand, it could be argued that campaign speech codes promote the due process value of judicial impartiality.[14] By reducing the opportunities for judicial candidates to commit themselves on specific issues or make misleading statements, a campaign speech code may increase both the likelihood the parties who appear before elected judges receive impartial justice and the public's confidence in the courts. Although *mandatory* restrictions on judicial candidate statements might violate the First Amendment's proscription of content-based regulation of political speech, the combination of voluntary restrictions and a substantial public interest in assuring the fairness—and the appearance of fairness—of the courts might be enough to save an otherwise unconstitutional speech code.

The operating assumption of this Paper is that the question of the constitutionality of judicial candidate speech codes may be separated from the constitutionality of a speech condition for public funding, but in the end the two issues are closely intertwined. The free speech and due process concerns that frame the debate over whether speech codes are constitutional are also likely to be central to the determination of the constitutionality of a speech code condition on campaign funds—although the weighing and balancing of free speech and due process concerns might come out differently in the context of a voluntarily accepted condition for a public grant.

Part II then briefly considers other mechanisms for using public funds to improve judicial campaigns. Several jurisdictions that provide public funds to candidates for executive or legislative office require candidates who accept such funds to also participate in public debates. There is some argument that in

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14. Indiana Chief Justice Shepard has argued that judicial campaign speech constraints are justified by the due process interest in an impartial judiciary.

debates candidates generally seek to present themselves positively and to avoid the negative campaigning often characteristic of sound-bite ads. Debates, thus, might improve the tone of judicial election campaigns. A debate requirement almost certainly passes constitutional muster, although there are no cases on point. Similarly, a number of jurisdictions provide candidates with the opportunity to place a statement in a government-funded voter pamphlet or voter guide. The state could most likely require that a judicial candidate's statement in a voter pamphlet abide by certain content restrictions. Access to debates and voter pamphlets could not be used to directly regulate the content of judicial campaigning generally, but states may be able to use debate requirements and voter pamphlet rules to affect the tenor of judicial campaigns.

I. PUBLIC FUNDING AND A CAMPAIGN SPEECH CODE

A. Public Funding and the Spending Limit Condition

In *Buckley v. Valeo*,[15] the Supreme Court held that limits on campaign spending burden freedom of speech,[16] must be subject to strict judicial scrutiny,[17] and, to be constitutional, must be narrowly tailored to promote a compelling government interest.[18] The Court held that neither limiting the amount of money spent on campaigns nor equalizing the financial resources available to candidates is a compelling government interest.[19] The Court found that the only compelling interest that might support spending limitations was "the danger of candidate dependence on large contributions," but the Court found that the interest "in alleviating the corrupting influence of large contributions"[20] was served by contribution limits and reporting and disclosure requirements. Thus, a limit on candidate spending could not be justified by the interests in preventing corruption and the appearance of corruption.[21]

In a footnote to its invalidation of the spending limit, however, *Buckley* referred to another section of the opinion that considered the new federal program of providing public funds to presidential candidates. The Court stated briefly that when Congress engages in the public financing of election campaigns, it "may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding."[22]

The portion of *Buckley* concerned with the presidential public funding

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15. 424 U.S. 1 (1976).
16. *Id.* at 19-23.
17. *Id.* at 25.
18. *Id.*
19. *Id.* at 16-17.
20. *Id.* at 56.
21. *Id.* at 55-57.
22. *Id.* at 57 n.65.

system did not directly consider the constitutionality of the spending limit condition. Rather, it dealt with such questions as Congress' authority under the General Welfare Clause to adopt public funding and the equal protection issues raised by the law's differential treatment of major party, minor party, and new party candidates, and by the formula used to fund presidential primary candidates. The Court specifically found that public funding was a valid exercise of Congress' authority "to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising."[23] The Court did note in passing that "one eligibility requirement for matching funds is acceptance of an expenditure ceiling."[24] Apart from the aforementioned footnote in the section of the opinion addressing the constitutionality of spending restrictions generally, *Buckley* did not consider the constitutional question presented by the spending limit condition on public funding.

Four years later, the Supreme Court affirmed without opinion a lower court decision which expressly considered and rejected a challenge to the public funding spending limit condition. In *Republican National Committee (RNC) v. FEC*,[25] the three-judge court took its cue from the *Buckley* footnote's reference to the voluntariness of the spending limit and framed the issue in terms of whether a candidate "is somehow or other forced as a practical matter to accept public funding [with the spending limit] in lieu of unlimited private funding and spending."[26] Noting that candidates could decline public funding and rely on private funds, and that privately funded campaigns could be successful, the court rejected the argument that candidates were coerced into accepting public funding with its attendant spending limit.[27] It then considered whether a spending limitation was an unconstitutional condition on a candidate's voluntary acceptance of public funding.[28] As "Congress may not condition a benefit on the sacrifice of protected rights,"[29] the court looked to whether the spending limitation burdened a protected right and whether, if so, the burden was justified by a compelling state interest.[30]

The *RNC* court doubted whether public funding with a spending limit burdened any protected right as the law simply provided "an additional funding alternative" to the traditional system of private funding without limits: "Since the candidate remains free to choose between funding alternatives, he or she will opt for public funding only if, in the candidate's view, it will enhance the candidate's powers of communication and association."[31] Nevertheless, the court

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23. *Id.* at 91.
24. *Id.* at 107-08.
25. 487 F. Supp. 280 (S.D.N.Y.), *aff'd*, 445 U.S. 955 (1980).
26. *Id.* at 283.
27. *Id.* at 283-84.
28. *Id.* at 284.
29. *Id.*
30. *Id.* at 283-85.
31. *Id.* at 285.

also found that even if it assumed that the limit burdened the candidate's First Amendment rights, the limit could be justified as necessary to effectuate compelling governmental interests. Quoting *Buckley*'s description of the goals of public funding—reducing the influence of large contributions on the political process, facilitating candidate communication, and freeing candidates from the burdens of fundraising—*RNC* found "the statutory scheme is supported by a compelling state interest."[32] Without a spending limit, "the candidates would no longer be relieved of the burdens of soliciting private contributions and of avoiding unhealthy obligations to private contributors."[33] The spending limit was, thus, needed to secure public funding and the interests public funding promotes.

Subsequent lower court cases considering conditions attached to public funding programs have continued to focus on *RNC*'s concerns with voluntariness and the closeness of the connection between the condition and the goals to the public funding program. These cases may be of limited relevance to assessing the constitutionality of a campaign speech constraint attached to public funding since the cases involve conditions that were really incentives to participate in public funding. These conditions arguably burdened *other* candidates and independent committees, not the recipients of public funding. But the analysis may suggest some of the questions a campaign speech code condition will face.

In *Vote Choice, Inc. v. DiStefano*,[34] the First Circuit upheld the provision of Rhode Island's public funding law that permitted individual donors to partially public funded (and spending-limited) candidates to contribute up to twice the amount donors were allowed to give to candidates who did not participate in the public funding program. The court reasoned that the state "need not be completely neutral on the matter of public funding of elections" but may, instead, give incentives to participate in public funding because of public funding's role in freeing candidates from the pressures of fundraising and ameliorating the risk of corruption.[35] The court concluded that the "contribution cap gap" did not create "profound" disparities between public and private funding, and that the different contribution limits appropriately reflected the fact that public funding with spending limits reduced the danger that a large private contribution would have a corrupting effect.[36]

The First, Sixth, and Eighth Circuits have all considered state public funding laws that waive the expenditure limit for a publicly funded candidate and/or

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32. *Id.*

33. *Id.* The court also found that the spending limit, and the limits on private contributions to candidates, did not abridge the rights of supporters. Supporters remained free to engage in uncoordinated expenditures on behalf of their candidates, as well as to provide certain unrestricted voluntary activities. *Id.* at 286-87.

34. 4 F.3d 26 (1st Cir. 1993).

35. *Id.* at 39.

36. *Id.* at 39-40. *But cf.* Wilkinson v. Jones, 876 F. Supp. 916 (W.D. Ky. 1995) (invalidating Kentucky law permitting publicly funded candidates to accept donations five times as large as those made to privately funded candidates).

provide the candidate with additional public funds when the publicly funded candidate is faced with either (i) an opponent who has not accepted public funding and spends over a threshold amount or (ii) an independent committee that spends more than a threshold amount against the publicly funded candidate or in favor of her opponent.[37] These courts have focused on whether the spending limit waiver and/or additional funds unduly coerce candidates' decisions to participate in public funding,[38] and whether the conditions are narrowly tailored to promote the goals of the public funding program.[39] In three cases, the conditions were found to be consistent with voluntariness and to be necessary or narrowly tailored to advance the public funding program (and thus to promote the anti-corruption and fundraising burden reduction goals of public funding). The spending limit waiver and provision of additional funds to respond to high spending opponents and independent committees were legitimate efforts to avert "a powerful disincentive for participation in [a] public financing scheme: namely, a concern of being grossly outspent by a privately financed opponent with no expenditure limit."[40] On the other hand, one Eighth Circuit panel found

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37. *See* Daggett v. Comm'n on Gov't Ethics & Election Practices, 205 F.3d 445 (1st Cir. 2000) (limit waived and more public funds provided based on either opponent or independent spending); Gable v. Patton, 142 F.3d 940, 947-49 (6th Cir. 1998) (limit spending by nonparticipating waived and more public funds provided based on opponent spending); Rosenstiel v. Rodriguez, 101 F.3d 1544, 1550-55 (8th Cir. 1996) (limit waived based on opponent). *But cf.* Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994) (invalidating provision of additional funds to respond to independent spending).

38. *See Rosenstiel*, 101 F.3d at 1550-51, 1555 (spending limit waiver an inducement, not coercive); *Gable*, 142 F.3d at 947-49 (spending limit waiver plus additional public funds provide a "very strong incentive to participate" but are not coercive); *Daggett*, 205 F.3d at 466 (incentives not coercive where there is a "rough proportionality" between benefits and burdens of participation).

39. *Compare Rosenstiel*, 101 F.3d at 1553-54 (spending limit waiver is narrowly tailored to promote the compelling interests advanced by public funding), *with Day*, 34 F.3d at 1359-62 (provision of additional funds to candidates targeted by independent spending not narrowly tailored to promote goals of public funding).

40. *Rosenstiel*, 101 F.3d at 1551. *Accord Daggett*, 205 F.3d at 469 ("candidates would be much less likely to participate because of the obvious likelihood of massive outspending by a non-participating opponent"); *Wilkinson*, 876 F. Supp. at 926-28. Indeed, the Sixth Circuit went so far as to uphold a Kentucky provision that prohibits all gubernatorial candidates from accepting contributions within the twenty-eight days immediately preceding an election. This was held to be justified by Kentucky's interest in effectuating its law providing publicly funded gubernatorial candidates additional funds when faced with an opponent who receives contributions over the threshold amount. The twenty-eight-day window was necessary so that the state could receive campaign finance reports and provide publicly funded candidates with the additional funding in time for the election. *Gable*, 142 F.3d at 949-51. The court, however, struck down the portion of the law barring candidates from contributing their own funds to their campaigns during the twenty-eight-day window. That limit was found inconsistent with *Buckley's* affirmation of a candidate's right to contribute his own funds without limit. *See id.* at 951-53.

unconstitutional an amendment to Minnesota's public funding law that allowed additional grants to publicly funded candidates targeted by independent expenditures because it was not necessary to promote participation in the public funding system. Prior to the provision's enactment nearly all candidates participated in the public funding program so the provision could not be justified as narrowly tailored to advancing the goals of public funding.[41]

B. Implications from the Public Funding Cases for Restrictions on Campaign Speech

The public funding spending limit cases reflect two concerns: (i) that a candidate's acceptance of public funding and its conditions not be coerced, and (ii) that conditions burdening speech be narrowly tailored to promote participation in the public funding system, and, thus, promote public funding's underlying goals.

1. Voluntariness.—A court is unlikely to find that the addition of a campaign speech constraint undermines the voluntariness of a candidate's decision to participate in a public funding program. Indeed, by making the public funding program more burdensome and potentially less attractive to candidates, a campaign speech condition would confirm that a candidate's decision to opt for public funding is voluntary. If the only factor were voluntariness, then a speech restriction condition would surely survive constitutional challenge.

Buckley's only statement concerning the spending limit indicates that voluntariness is critical, but that statement occurs in a footnote, involved minimal analysis, and is arguably dictum.[42] Voluntariness is central, but it is not clear

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41. *Day*, 34 F.3d at 1360-62 (public funding system enjoyed nearly 100% participation before provision for matching independent spending was enacted). *Day* focused on the burden the provision of public funds to match independent spending places on the speech of independent spenders: "To the extent that a candidate's campaign is enhanced . . . , the political speech of the individual or group who made the independent expenditure 'against' her (or in favor of her opponent) is impaired." *Id.* at 1360. It was this burden that could not be justified as narrowly tailored to promote the goals of the public funding system. In a case involving a similar provision in Maine's "clean elections" system, however, the First Circuit rejected the idea that providing additional dollars to respond to independent spending burdens the speech of independent spenders: "We cannot adopt the logic of *Day*, which equates responsive speech with an impairment to the initial speaker." *Daggett*, 205 F.3d at 465. Instead, the First Circuit focused simply on whether the availability of additional funds coerced a *candidate's* choice of whether or not to participate in public funding. The court concluded that the additional matching funds "contributes to any alleged coerciveness in only a minuscule way . . . because it is of such minimal proportion to the other aspects of the system," *id.* at 469, and that it was justified by the state's goals for the public funding system. *Id.* at 470.

42. The three-judge court in *RNC* denied that the *Buckley* footnote was "mere dictum," noting that the Supreme Court relied on the existence of the expenditure limits in rejecting the arguments raised on behalf of minor parties against the presidential public funding system. Republican Nat'l Comm. v. FEC, 487 F. Supp. 280, 284 n.6 (S.D.N.Y. 1980). *Buckley* considered the claim that

whether voluntariness alone is sufficient.

2. Narrow Tailoring.—A second theme is the requirement that conditions attached to public funding promote either participation in the public funding program or public funding's campaign finance goals. The campaign speech condition is unlikely to be found narrowly tailored to promote participation in a public funding program. By constraining campaigning, such a condition is more likely to discourage candidate participation in public funding than to encourage it. Nor can it be said to promote the traditional campaign finance goals of public funding—reducing fundraising burdens and the corrupting effects of contributions and the pursuit of contributions on government decision-making, and facilitating candidate communications with the electorate.

Rather, the purpose of the public funding condition would be to use public funds to secure candidate adherence to a campaign speech code and its underlying goals of more decorous judicial elections and an impartial judiciary. Arguably, like the traditional goals of public funding, these goals are also ultimately addressed to improving the functioning of government and public confidence in government. But they involve direct modification of the content of election statements. Whether a government can use public funds to alter the content of election speech requires greater consideration of the unconstitutional conditions doctrine, which is the subject of the next section.

C. Campaign Speech Constraints and the Unconstitutional Conditions Doctrine

An unconstitutional condition issue arises when a government provides a benefit—such as a subsidy or a tax exemption—that it is not constitutionally obligated to offer, but then conditions the availability of the benefit on the

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public funding was unconstitutional because *inter alia* it provided major party candidates with more public money than candidates of minor parties (defined as those parties which had received between five and twenty-five percent of the vote in the prior presidential election) and provided no public money at all to candidates of new parties (defined as parties that had received less than five percent of the vote in the prior presidential election). The Court defended the distinction, in part, because as a "fact of American life" only the candidates of the major parties were likely to win the election. 424 U.S. 1, 98 (1976). In addition, the Court cited the spending limit to support its finding that the public funding law did not really burden minor parties. The law applies the same spending limit to major and minor parties who accept public funding even though it gives major parties more money. New party candidates who abide by the spending ceiling and receive more than five percent of the vote qualify for a payment of public funds after the election. The effect would be that for major party candidates public funding substitutes for private money, but for minor party candidates public funding supplements private money. *Id.* at 99. As a result, the differences in the provision of public funds did not harm minor and new parties. It is not clear that the spending limit was essential to the Court's determination that the differences in the availability of public funding are constitutional. Nor did the Court expressly consider the constitutionality of the spending limit in the context of the public funding condition. Nevertheless, the spending limit did play a role in the Court's evaluation of the public funding system and the Court did not doubt its constitutionality.

recipient's agreement to forego the exercise of a constitutionally protected liberty. Such a condition may be seen as unduly constraining the constitutional right. The government is free to provide or cancel the benefit, and it may choose to subsidize some activities and not other similar ones, even if an activity not subsidized involves a protected right. But the government "cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise."[43]

Determining whether conditions attached to a government grant are an appropriate means to assure that public funds are used to promote a legitimate government goal or, instead, constitute an interference with protected rights has never been easy. The unconstitutional conditions doctrine is rife with inconsistencies.[44] One leading legal scholar once called the area "too hard"[45] for consistent judicial resolution and another labeled it a "minefield to be traversed gingerly."[46]

In the First Amendment context, the Supreme Court has identified several factors in determining whether a condition attached to a subsidy is merely a permissible element of the definition of the subsidized program or is, instead, an unconstitutional constraint on speech. These include: (i) whether the grant promotes governmental speech or private speech; (ii) whether the condition constitutes viewpoint discrimination; (iii) whether the condition applies to all the grantee's speech or only to speech directly subsidized by the grant; and (iv) whether the grant condition may be said to distort a medium of expression.

1. Governmental or Private Speech.—The Court has looked to whether a subsidy involves the government's use of "private speakers to transmit specific information pertaining to its own program," or whether, instead, the government is seeking to facilitate private speech. If the government is making grants to private parties simply to convey a governmental message, "it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee."[47] It can, thus, use the subsidy to "promote its own policies or to advance a particular idea."[48] But when the subsidy is intended to promote private speech, serious First Amendment concerns are implicated.

This is one aspect of the Supreme Court's explanation of how it reconciled the seemingly disparate results in *Rust v. Sullivan*,[49] which upheld a regulation

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43. Legal Servs. Corp. (LSC) v. Velazquez, 531 U.S. 533, 547 (2001).

44. *Compare LSC*, 531 U.S. at 533 (invalidating restriction on lawyers funded by the Legal Services Corp. which barred them from raising challenges to the validity of existing welfare laws), *with* Rust v. Sullivan, 500 U.S. 173 (1991) (upholding regulation prohibiting doctors who receive federal family planning funds from discussing with patients abortion as a form of family planning).

45. Frederick Schauer, *Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency*, 72 DENV. U. L. REV. 989 (1995).

46. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1416 (1989).

47. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995).

48. Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000).

49. 500 U.S. 173 (1991).

barring recipients of Title X federal family planning funds from counseling their clients concerning abortion as a method of family planning with *Legal Services Corp. (LSC) v. Velazquez*,[50] which held unconstitutional a statute prohibiting LSC-funded lawyers who represent indigent clients seeking welfare benefits from challenging the constitutionality of federal or state welfare laws. *LSC* found that whereas "the counseling activities of the doctors under Title X amounted to governmental speech" with the private doctors in effect carrying out a government program,[51] the LSC-funded lawyer "speaks on behalf of the client in a claim against the government" so that the attorney, not the government, is the speaker.[52]

In the judicial election context, with many of the candidates challenging incumbent judges and all candidates independently undertaking their own campaigns, the subsidized speech is plainly private, not governmental. Thus, the unconstitutional conditions question cannot be avoided.

2. Viewpoint Discrimination.—The Supreme Court has expressed special concern about speech restrictions that may be said to constitute viewpoint discrimination.[53] Thus, the condition in *LSC* did not merely bar the government-funded lawyers from participating in welfare cases. Instead, it prohibited them from raising arguments against the constitutionality of welfare laws and was thus, viewpoint discrimination. Conversely, the Court viewed the regulations in *Rust* as simply making a distinction between the subjects of "family planning" and "abortion," not as suppressing views about abortion.

As *LSC* and *Rust* indicate, determining whether a restriction constitutes viewpoint discrimination is not always easy. Nevertheless, a speech code condition for public funding would probably not constitute viewpoint discrimination. A ban on announcing one's position on legal and political issues generally would not turn on particular views concerning those issues, but on the fact that a statement has a political or legal content. Similarly, a ban on deceptive and misleading communications does not turn on the candidate's views but on whether they contain a deceptive or misleading statement. On the other hand, given the vagueness of the restrictions—particularly the deceptive or misleading prohibition—there might be some concern that these rules could lend themselves to viewpoint discrimination in their administration and enforcement.

The Supreme Court, however, has not limited its concern to viewpoint discrimination. Viewpoint discrimination has been characterized as merely an "egregious form of content discrimination."[54] Regulation based on content, not

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50. 531 U.S. 533 (2001).

51. *Id.* at 541.

52. *Id.* at 542.

53. *Cf.* Burson v Freeman, 504 U.S. 191, 214 (1992) (Scalia, J., concurring) (upholding ban on electioneering near polling place "though content-based . . . it is a reasonable viewpoint-neutral regulation"); Perry Educ. Ass'n v Perry Local Educ. Ass'n, 460 U.S. 36, 55, 59-61 (1983) (Brennan, J., dissenting) (citing cases in which Court had upheld viewpoint-neutral but content-based restrictions on opportunity to engage in speech on government property).

54. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

viewpoint, is often held unconstitutional. Thus, in *FCC v. League of Women Voters of California*,[55] the Court invalidated a section of the Public Broadcasting Act which forbade any noncommercial educational broadcasting station that received a grant from the Corporation for Public Broadcasting from engaging in "editorializing." The ban was not limited to particular viewpoints, but applied to editorializing generally. Nevertheless, the Court emphasized that the "ban is defined solely on the basis of the content of the suppressed speech,"[56] and, quoting an earlier decision, stressed that the "First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic."[57] The Court expressed the concern that even though not viewpoint-based such a ban might still reflect "an impermissible attempt to allow a government [to] control . . . the search for political truth."[58]

3. Extent of the Restriction.—An important factor in determining the constitutionality of a grant condition is whether the condition applies only to activity funded by the grant or whether it applies more broadly to the recipient's privately-funded activity. In *Regan v. Taxation With Representation*[59] the Supreme Court upheld an Internal Revenue Code provision allowing nonprofit organizations to enjoy tax-exempt status only if they refrain from substantial lobbying.[60] The Court noted that the tax-exempt entities were free to establish affiliates that could engage in lobbying.[61] So long as the lobbying affiliate's funds did not come from the tax-exempt entity, an organization could maintain a taxable lobbying arm without jeopardizing its tax-exempt status.[62] The lobbying ban protected the government's interest in assuring that its subsidy was not used for lobbying—an activity the government did not wish to fund—but did not prevent the organization from engaging in constitutionally-protected lobbying.[63] Similarly, in *Rust*, government-funded family planning clinics could not engage in abortion counseling.[64] However, the clinics could still "perform abortions, provide abortion-related services, and engage in abortion advocacy" as long they conducted those activities "through programs that are separate and independent from the project that receives [the restricted] funds."[65]

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55. 468 U.S. 364 (1984).

56. *Id.* at 383.

57. *Id.* at 384.

58. *Id.* (quoting Consolidated Edison Co. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 538 (1980)).

59. 461 U.S. 540 (1983).

60. *Id.* at 546.

61. *Id.*

62. *Id.* at 544.

63. *Id.* at 546.

64. Rust v. Sullivan, 500 U.S. 173, 180 (1991).

65. *Id.* at 196.

By contrast, *FCC v. League of Women Voters*[66] and *LSC*[67] involved conditions that leveraged public funds to broadly restrict constitutionally protected activity. In *League of Women Voters*, the noncommercial educational station received only one percent of its overall income from the restricted grant but was completely barred from editorializing.[68] The Court indicated that if Congress had authorized the station to create a separate account, consisting of privately provided funds, to finance editorializing, then the speech restriction on the funds provided by the federal government would have been valid.[69] Similarly, in *LSC*, the restriction applied to grantees, not programs.[70] As a practical matter, it would have been difficult, if not impossible, to split up a welfare case so that an LSC-funded lawyer would handle the nonconstitutional issues, and a lawyer funded by private charitable contributions would raise any constitutional challenges. Moreover, the restriction also operated to constrain indigent welfare litigants generally by limiting their access to counsel.[71] If an LSC-funded lawyer determined that a critical issue in the case was a constitutional one and, due to the grant restriction, she withdrew from the case so the client could take the matter to an unrestricted lawyer, the indigent client would be "unlikely to find other counsel. . . . Thus, with respect to the litigation services Congress has funded, there is no alternative channel for expression of the advocacy Congress seeks to restrict."[72]

These cases indicate that if the condition attached to public funding applies to all of a candidate's campaign speech—even speech funded by private contributions or the candidate's own resources—it is more likely to be held unconstitutional. If, however, public funds cover only a portion of campaign costs, with candidates raising private funds to cover the rest, and the campaign code constraint applies only to the publicly funded portion of the campaign, the condition might be sustained under *Regan*, *Rust*, and *League of Women Voters*. Thus, in a partially publicly-funded election, if the candidate could finance his campaign through distinct public and private accounts, the speech constraints on the publicly-funded account could pass constitutional muster as long as the candidate remained free to use privately raised funds to pay for communications not subject to the code.[73]

However, even partial public funding will almost certainly be accompanied by a spending limit that applies to total campaign spending. That is the practice in all partial public funding systems today. As a result, unlike the recipients in

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66. 468 U.S. 364 (1984).

67. Legal Servs. Corp. (LSC) v. Velazquez, 531 U.S. 533 (2001).

68. *League of Women Voters*, 468 U.S. at 400.

69. *Id.*

70. 531 U.S. at 536-37.

71. *Id.* at 546-47.

72. *Id.*

73. This may sound administratively burdensome but it could be a lot simpler than the multiple hard and soft money accounts—subject to different fundraising and spending rules—currently maintained by the national political parties.

Regan and *Rust*, who could raise and spend unlimited amounts of private funds to support the activities not subsidized by the federal government, publicly funded judicial candidates would be subject to a spending limit constraint on their ability to use private funds on speech that does not conform to the code. Candidates might voluntarily choose partial public funding with limits because it may still enable them to raise more money overall (while reducing the burdens of fundraising) and to be seen as "clean money" candidates. But while partial public funding might permit an increase in total campaign communications, due to the interplay of the speech constraints and the spending limit, the amount of unconstrained, candidate-determined campaign speech could be reduced. Thus, the unconstitutional conditions problem would remain.

4. Distortion of a Medium of Expression.—In its most recent unconstitutional conditions cases, the Supreme Court has emphasized a factor which is directly relevant to a judicial campaign speech case, albeit perhaps the most difficult factor to apply. In *LSC* the Supreme Court focused on whether the condition attached to a subsidy reflects an effort by the government "to use an existing medium of expression and to control it, in a class of cases, in ways which distort its usual functioning."[74] By limiting the arguments a lawyer could make, the grant restriction "distorts the legal system by altering the traditional role of the attorneys"[75] as independent advocates.[76] Indeed, as judges rely on lawyers to "present all the reasonable and well-grounded arguments necessary for proper resolution of the case,"[77] the restriction distorts the judicial process as well.

LSC also found a similar concern about government-subsidized distortion of a medium of expression in the earlier *League of Women Voters* decision. According to *LSC*, the ban on editorializing by subsidized broadcasters constituted a government effort to use a grant to undermine the "accepted usage" of editorializing in broadcasting and thereby "suppress speech inherent in the nature of the medium."[78] The broadcaster's right to use editorial judgment with respect to the content of station programming was one of the basic "dynamics of the broadcasting system."[79]

It is difficult to determine whether the use of a public subsidy to secure judicial candidates' adherence to a campaign speech code that eschews announcements concerning political or legal issues or misleading or deceptive statements "distorts" a medium of expression. Indeed, the issue is ultimately intertwined with the underlying question of the constitutionality of the speech codes themselves.

The argument that a campaign speech condition would "distort" the judicial election campaign is straightforward. Candidates for judicial office are entitled

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74. 531 U.S. at 543.
75. *Id.* at 544.
76. *Id.* at 544-45.
77. *Id.* at 545.
78. *Id.* at 543.
79. *Id.* (citing Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 676 (1998)).

to speak about political and legal issues.

> The political candidate does not lose the protection of the First Amendment when he declares himself for public office. Quite to the contrary:
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> > "The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election. . . . Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day."[80]

As in any other election campaign, judicial candidates' statements play a crucial role in educating the public about the records and views of the candidates and enable the voters to make an informed choice on election day. The fact that the state has determined that a judicial office is to be filled by popular election suggests a state constitutional judgment that the selection of judges ought, to some degree, reflect the views of the electorate.[81] As for the codes that focus on the tone of judicial campaigning, terms like "misleading" or "deceptive" are inherently vague. Proscribing misleading or deceptive speech will inevitably chill even legitimate campaign statements and unduly narrow the range of information and arguments made available to voters. Moreover, the vagueness of the restrictions opens the door to abuses in administration and enforcement. There is, thus, the danger that elected officials or their appointees will use speech codes to interfere with the campaign process.

Elections are the ultimate "medium of expression"[82] which must operate free of government distortion or control. Government efforts to determine the content of campaign speech arguably undermine the ability of the people to use elections to address matters of public concern and hold government accountable. Government has a critical role in structuring the electoral process but it should not determine the content of election campaigns.[83] Where states have chosen to select their judges through popular election, the election becomes the key means whereby the people hold their judges accountable. Government efforts to determine what should be the focus of an election would be a government

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80. Brown v. Hartlage, 456 U.S. 45, 53 (1982) (quoting Buckley v. Valeo, 424 U.S. 1, 52-53 (1976)).

81. *See* Chisom v. Roemer, 501 U.S. 380 (1991) (stating that judges are "representatives" within the meaning of section 2 of the Voting Rights Act, as amended in 1982).

82. *LSC*, 531 U.S. at 543.

83. *See* Cook v. Gralike, 531 U.S. 510 (2001) (invalidating a Missouri constitutional provision that placed a notation on the ballot indicating whether a candidate for Congress had opposed congressional term limits); *Brown*, 456 U.S. at 62 (finding a Kentucky statute prohibiting candidates from offering material benefits to voters unconstitutional as applied to candidate's pledge to lower his office's salary).

manipulation of an independent medium of expression of the sort condemned by the Supreme Court in *LSC* and *League of Women Voters*.

The argument that judicial candidate speech codes would "reform," not "distort," judicial election campaigns is straightforward as well. The Supreme Court has emphasized that "[t]he free exchange of ideas provides special vitality to the process traditionally at the heart of American constitutional democracy—the political campaign,"[84] but it is questionable whether a judicial election campaign should be equated with other *political* campaigns. Certainly, the judicial office differs in critical respects from executive and legislative positions. Judges are not simply representatives of the voters who elect them. As Indiana Chief Justice Randall Shepard has emphasized, judges have a duty to render impartial justice to the parties who appear before them.[85] They must interpret and apply the law—statutes, and regulations, and common law rules—regardless of their own political and policy views or the preferences of the voters who elect them. A legislator or executive officer may appropriately view himself as merely an agent of the voters.[86] However, a judge must be independent of political commitments, receptive to opposing arguments, and fair to all sides in a case before her—and must be seen by the public to be independent, open-minded and fair if public belief in the impartiality of justice is to be sustained.

The distinctive judicial role has implications for the nature of judicial campaigning. It is appropriate for an executive or legislative candidate to commit himself strongly on an issue of political significance—for example, "no new taxes," no cuts in certain programs, pro-life or pro-choice—as a way of clearly explaining to the public his views on an issue and providing an assurance that he will truly represent the views of those who vote for him if elected. However, such a strong endorsement of a particular position or point of view by a judicial candidate would undermine the judge's ability to impartially consider the arguments raised by both sides in a case involving that position or point of view, and undermine the public's belief that the judge's decision was based on an impartial view of the law. As Chief Justice Shepard has suggested, the kind of political commitment that would enable the electorate to appropriately check and monitor the performance of a legislative representative or executive officer might constitute a due process violation if undertaken by a judicial candidate and adhered to by a judge.[87]

Indeed, for many decades, judicial campaigns were marked by relatively restrictive speech codes and the avoidance of pronouncements on political and

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84. *Brown*, 456 U.S. at 53.

85. *See* Shepard, *supra* note 2, at 1084.

86. This is not to say that legislative or executive officers must view themselves solely as agents of the voters. They may view themselves as Burkean trustees for the people and act based on their view of what is in the public interest, even if that is at odds with the views of those who voted for them. But it also appropriate for legislators and executive officials to make decisions based largely on the preferences of those who voted for them.

87. *See* Shepard, *supra* note 2, at 1069 n.51.

legal issues. Even most of the recent decisions invalidating traditional speech codes recognize the distinctive nature of the judiciary and of judicial campaigning. In striking down broad prohibitions on the discussion of political or legal issues, the courts have generally indicated that more narrowly drawn restrictions on the discussion of political or legal issues "likely to come before" the judge may be sustained.[88] It is inconceivable that such a restriction on campaigning or executive or legislative office would be valid.[89]

The case for the constitutionality of a candidate speech restriction as a condition for public funding would combine a reliance on *Buckley*'s assumption that an otherwise unconstitutional spending limit would become constitutional when made a condition for a voluntary public funding program with an argument based on the substantial constitutional concerns that support the call for judicial candidate speech constraints. The argument would be that even though a judicial candidate speech constraint would be unconstitutional if mandatory, given the state's concerns with assuring judicial fairness and public confidence in the impartial administration of justice, it would be constitutional for a state to seek to recalibrate the First Amendment/Due Process Clause balance by providing a monetary incentive for candidates to voluntarily restrict their campaign statements. Because candidates could remain outside the public funding system and still successfully seek judicial office, the condition arguably would not so much "distort" the judicial electoral process as create a parallel campaign format more consistent with the government's legitimate goal of reducing the politicization of judicial elections.

D. Additional Considerations

1. Comparisons with Buckley.—In deciding whether a judicial candidate speech condition would pass constitutional muster, two further comparisons with *Buckley* may be in order. First, a campaign speech code presents a greater danger of "distorting" the campaign than a campaign spending limit. Campaign spending limits do not alter the heart of a campaign—which is what candidates and other interested individuals and groups have to say about the candidates and issues. Spending limits may restrain the quantity of speech, but not the core of candidate and interest group autonomy concerning the definition of their messages. Moreover, so long as the spending limit is voluntary and attached to the provision of funds, the total package of public-funds-plus-limits does not constrain speech. Presumably, in deciding whether or not to accept public funding, each candidate will make a choice based on which form of funding—public or private—will generate the bigger campaign war chest and, thus, ultimately fund more speech. So long as the choice is voluntary, the existence of the public-funding-with-spending-limit option can only increase the total amount of speech. It cannot reduce the amount of speech, the variety of speech or the candidates' control over what they say.

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88. *Id.* at 1093 (quoting MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(c)(ii) (1990)).

89. *See Brown*, 456 U.S. at 45.

On the other hand, public funding with a campaign code can reduce campaign speech. If public funding expands the candidate's war chest, then the ability to pay for more ads and to avoid the burdens of fundraising provides a powerful incentive for a candidate to accept public funding even with a campaign speech condition. However, with the addition of a speech condition, even though candidates may be able to finance more ads, their ads may be required to say less and to address fewer issues. Moreover, the candidates will have to cede to the state the power to determine the content of their campaign messages. This closely resembles the kind of distortion that troubled the Court in *League of Women Voters* and *LSC*.

The second comparison with *Buckley*, however, may cut the other way. The due process arguments that support restrictions on judicial candidate speech may be more constitutionally compelling than the equality concerns that provided the impetus for limits on campaign spending. In *Buckley*, the Supreme Court famously—or notoriously—rejected as "wholly foreign to the First Amendment" the "concept that government may restrict the speech of some elements of our society in order to advance the relative voice of others."[90] In the Court's view there was no equality case at all for spending limits on either candidates or independent committees.[91] The only constitutional concern that could support spending limits was prevention of corruption and the appearance of corruption; that concern, however, was insufficient because, in the Court's view corruption was adequately addressed by contribution limits.[92]

By contrast, the lower courts that have addressed restrictions on judicial candidate speech have generally agreed that there are legitimate constitutional concerns that justify some limits on candidate speech in order to assure judicial impartiality and the appearance of impartiality. Their conclusion was that certain restrictions went too far and unduly interfered with the constitutionally protected interests of candidates in addressing political and legal issues. They found that the interest in judicial fairness and integrity can be satisfied by more limited restrictions on candidate comments on matters likely to come before the court and knowing falsehoods. It may be that given the legitimacy of the government's underlying concern, a court might accept a state's determination that more restrictive measures are appropriate and would accept the state's provision of public funds to secure candidates' voluntary compliance with a more restrictive speech code.[93]

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90. 424 U.S. 1, 48-49 (1976).

91. *Id.* at 35-36.

92. *See id.* at 12-59.

93. Recent court cases narrowing judicial candidate speech codes in order to protect First Amendment rights are consistent with the 1990 Model Code of Judicial Conduct, which precludes only

> pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office[,] . . . statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court[,] . . . [and] misrepresent[ations of] the identity, qualifications,

Although the Supreme Court's recent decision in *LSC* seems to put new bite into the unconstitutional conditions doctrine, it might also provide some support for the constitutionality of a judicial candidate speech condition. A central concern of the *LSC* Court was protecting an "independent judiciary."[94] The Court was troubled by the restriction on attorney speech because

> [b]y seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power. . . . The restriction imposed by the statute . . . threatens severe impairment of the judicial function.[95]

If the Court were persuaded that judicial candidate announcements concerning either legal and political issues or misleading or deceptive statements similarly threaten to compromise the independence of the judiciary and the appearance of judicial impartiality, the Court might be willing to treat the provision of governmental incentives to avoid such announcements and statements as constitutional.

2. Inability to Restrict Speech of Independent Committees.—An additional factor that may be relevant to the constitutional analysis is that a judicial candidate speech code will not constrain the independent committees and interest groups that are playing an increasingly important role in judicial election campaigns.[96] In the campaign finance context, the Supreme Court has held that even when candidates accept public funding with spending limits, interest groups remain free to spend unlimited sums supporting or opposing spending-limited candidates provided their spending decisions are independent of the candidates.[97] Similarly, candidates' voluntary adherence to a code limiting their statements concerning political and legal issues and precluding them from making deceptive or misleading statements would not limit the ability of independent groups to take out ads that link candidates to political and legal positions or to make deceptive and misleading assertions about the candidates.

It is not clear how this cuts. On the one hand, it could weaken the constitutional case for a candidate speech code restriction. In assessing the constitutionality of restrictions on speech, a court will consider not only whether the restriction is supported by a compelling justification, but also whether the restriction is narrowly tailored to promoting that justification. A speech code limited only to candidates may not be effective in promoting judicial impartiality,

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present position or other fact concerning the candidate or an opponent.

MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d) (1990).

94. 531 U.S. 533, 545 (2001).

95. *Id.* at 545-46.

96. *See* Anthony Champagne, *Interest Groups and Judicial Elections,* 34 LOY. L.A. L. REV. 1391 (2001).

97. *See* FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480 (1985) (holding unconstitutional a statute that limited spending of independent committees with respect to presidential candidate who had accepted public funds).

reducing the politicization of judicial elections, or securing public confidence in the even-handed administration of justice. Independent committees and interest groups remain free to spend large sums of money on heated electioneering efforts that tie judicial candidates to particular political and legal positions. On the other hand, political statements by judicial candidates arguably pose a distinctly greater threat to judicial impartiality and public confidence than statements by third parties. A state could appropriately target its efforts not on politicization of judicial elections in general but on the particular threat to judicial integrity that results from statements by judges and would-be judges. Indeed, it could be argued that the continuing opportunity for unfettered independent committees would mitigate the loss of information and arguments relevant to voter decision-making that might result from constraints on judicial candidates.

II. CANDIDATE DEBATES AND VOTER PAMPHLETS

A. Mandatory Candidate Debates

Even if the provision of public funds to a candidate could not be conditioned on a candidate's adherence to a speech code, public funds might be used to improve the quality of judicial campaign discourse in other ways. At least three states (Arizona,[98] Kentucky,[99] and New Jersey[100]) and two cities (New York[101] and Los Angeles[102]) require candidates who receive public funds to participate in public forums or debates. Debates can provide an opportunity for a fair and open exchange of views among competing candidates. Unlike brief sound-bite ads, debates present the candidates themselves to the voters for sustained periods of discussion. As a result, debate statements are more likely to involve positive assertions by the candidate about his credentials and views rather than negative attacks on an opponent narrated by a faceless voice. Misleading and deceptive statements may be less likely to occur with the opponent present and ready to respond. In a format that emphasizes orderly interchange with a moderator and with each other, the candidates may also have an incentive to emphasize their thoughtful, statesmanlike—or judicial—qualities, rather than engage in the cut-and-thrust of a stump speech. Although it is not clear that debates would depoliticize the content of a judicial campaign—indeed, discussion of political and legal issues might increase—they could improve the tone of the campaign's tone.

There are no cases that consider challenges to the constitutionality of mandatory debates as a condition of public funding. Candidates generally seek the opportunity to participate in debates rather than exclusion from them. Debates sponsored by government or civic organizations will usually be

98. ARIZ. REV. STAT. ANN. § 16-956(A)(2) (Supp. 2001).
99. KY. REV. STAT. ANN. § 121A.100 (Banks-Baldwin 1993).
100. N.J. STAT. ANN. § 19:44A-45 (1999).
101. N.Y.C. ADMIN. CODE § 3-709.5 (2001).
102. L.A. MUN. CODE § 49.7.19.C (1997).

perceived as an additional benefit for candidates rather than as a burden. Nevertheless, if challenged, a debate requirement is likely to pass constitutional muster. It may be enough that the public funding is voluntary, so that the candidate is free to decline to participate in the debate if she is willing to forego public funds. Even if voluntariness is not enough, debates closely serve the legitimate government interest in voter education and information, while the burden on candidate speech is minimal. Although a candidate who is a poor debater might prefer to refrain from debating, nothing in a debate requirement limits the ability of a candidate to campaign in any other way. The debate requirement would neither distort the electoral process nor take over a candidate's campaign, and therefore such a requirement is unlikely to be an unconstitutional condition.

B. Voter Pamphlets

In at least five states and the City of New York, the government produces and distributes to the voters pamphlets or guides that provide information concerning the candidates on the ballot.[103] These can be an important source of voter information, particularly in judicial elections, which are often poorly covered by the media. For many voters, the only statements they will read about a judicial election are contained in the voter pamphlet. Several judicial campaign reform proposals have called for increasing the use of voter guides or voter pamphlets,[104] with one bar association specifically proposing that the content of statements concerning judicial candidates be limited to "biographical data, including professional qualifications," implicitly avoiding statements on political and legal issues.[105]

The California Supreme Court has upheld the constitutionality of a state law which tightly constrained the content of judicial candidate statements in a voter pamphlet. *Clark v. Burleigh*[106] considered a California law limiting the statement of a candidate for nonpartisan office (including judicial offices) to his or her name, age, occupation and a "brief description . . . of the candidate's education and qualifications," and adding specifically for judicial candidates that the statement "shall not in any way make reference to other candidates for judicial

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103. *See* Committee on Government Ethics, *Report on Judicial Campaign Finance Reform*, 56 RECORD OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK 157, 165-66 (2001) [hereinafter *Gov't Ethics Report*]; Roy A. Schotland, *Campaign Finance in Judicial Elections*, 34 LOY. L.A. L. REV. 1489, 1506 (2001); Roy A. Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy*, 2 J.L. & POL. 57, 127-28 (1985) [hereinafter Schotland, *Emperor's Clothes*].

104. *See Call to Action*, *supra* note 11, at 1357 (recommendation nine: "State and local governments should prepare and disseminate judicial candidate voter guides by print and electronic means to all registered voters before any judicial election at no cost to judicial candidates."); *see also Gov't Ethics Report*, *supra* note 103; Schotland, *Emperor's Clothes*, *supra* note 103.

105. *Gov't Ethics Report*, *supra* note 103, at 166.

106. 841 P.2d 975 (Ca. 1992).

office or to another candidate's qualifications, character, or activities."[107] The provision was challenged by a municipal court judge who, in his campaign for a superior court seat, criticized the incumbent by name and listed examples of the incumbent's failure to "get tough with criminals."[108] The candidate claimed, and the intermediate appellate court agreed, that the voter pamphlet was a "limited public forum" for candidates' statements; the state could limit the category of speakers entitled to use the forum to candidates, but content restrictions on their statements would be subject to strict judicial scrutiny.[109]

A unanimous California Supreme Court rejected the public forum claim.[110] The court found that California did not give candidates access to the voter pamphlet to air their views generally but only to provide statements concerning their qualifications.[111] Because the statute that authorized the pamphlet limited both who could include statements and what those statements could say, the pamphlet was not a public forum for First Amendment purposes: "[I]n the statutory candidate's statement the Legislature has created a forum that is limited both as to speakers—nonpartisan candidates for local judicial office—and as to topic—the candidates' own qualifications for the office. There is no unlimited, 'public' component, and hence no designated *public* forum."[112]

As a result, the rational basis test—not strict scrutiny—applied, and the court found that the state could reasonably choose to limit the voter pamphlet statements to biographical information.[113] The voters were unlikely to have such information otherwise, so the pamphlet promoted the state's interest in a more informed electorate.[114] "Attack" statements could undermine the informational purpose: "[T]he statement is necessarily so brief that to the extent a candidate devotes it to attacking others it would convey even less factual information about the candidate's own background and qualifications."[115] Moreover, given that candidates are not allowed to see their opponents' statements until the pamphlets are published, "all such candidates would have an incentive to misuse them by attacking their opponents in order to avoid the possibility of unanswered attacks by others in the same forum."[116] In addition, the limitation in candidates' statements

> restricts only this one channel of communication with the voters; there remain substantial alternative channels open to candidates for judicial office that do not bar criticism of opponents—e.g., advertisements or

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107. *Id.* at 977-78 (citing CAL. ELEC. CODE § 10012).
108. Clark v. Burleigh, 279 Cal. Rptr. 333, 336 (Ct. App. 1991).
109. *Id.* at 337.
110. *Clark*, 841 P.2d at 987-88.
111. *Id.* at 987.
112. *Id.* at 985 (emphasis in original).
113. *Id.* at 987-88.
114. *Id.*
115. *Id.* at 987.
116. *Id.*

> interviews in local newspapers or on local radio and television programs, direct mailings to the community, neighborhood distribution of handbills, and personal appearances at local functions.[117]

The California Supreme Court's public forum analysis is debatable. In an earlier decision involving a content-neutral state requirement that candidates pay a share of the costs of publishing the pamphlet's costs, the Ninth Circuit had held that the voter pamphlet is a limited public forum.[118] A U.S. Supreme Court case concerning ballot pamphlets avoided the issue. That case involved a California law barring political parties from endorsing candidates for nonpartisan office and, *inter alia*, barring mention of such endorsements in candidate voter pamphlet statements. The Court resolved the issue on ripeness grounds and refrained from discussing the constitutional status of the voter pamphlet. In a dissenting opinion, Justices Marshall and Blackmun commented that the public forum status of the voter pamphlet is "unsettled,"[119] while in a separate dissent Justice White concluded the voter pamphlet's "use may be limited to its intended purpose which is to inform voters about *nonpartisan* elections."[120]

Whatever the public forum status of the ballot pamphlet, the California Supreme Court's resolution of the challenge to the limits on the content of candidate statements is consistent with the U.S. Supreme Court's unconstitutional conditions cases. Even with a constraint on candidate statements, the voter pamphlet could be described as a state effort to increase the amount of information available to the voters. The government could decide to promote the dissemination of just biographical information about candidates on the theory that this is the information that government wants to be certain that voters receive. The limitation is viewpoint-neutral and tightly limited to the publicly provided benefit. The restriction would resemble the restrictions sustained in *Regan* and *Rust*. Such a restriction would not reduce the range of arguments candidates can make or deny them control over the content of their campaign messages outside of the voter pamphlet. It would not limit their ability to present other information and arguments to the voters. To be sure, the pamphlet is likely to be a key source of information for many voters. However, this would be an instance of government supplementing existing campaigns with a new medium of information, not a distortion of pre-existing campaign structures.

It would probably be unconstitutional to constrain the opportunity to place a statement in a voter pamphlet on a candidate's agreement to abide by a speech code for all campaign communications. However, both the unconstitutional conditions doctrine and the California Supreme Court's analysis of the public

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117. *Id.*

118. Kaplan v. County of L.A., 894 F.2d 1076, 1080 (9th Cir. 1990). *See also* Gebert v. Patterson, 231 Cal. Rptr. 150 (Ct. App. 1986) (applying limited public forum analysis to invalidate application of fee requirement to indigent proponent of ballot argument).

119. Renne v. Geary, 501 U.S. 312, 345 (1991) (Marshall, J., dissenting).

120. *Id.* at 333 (emphasis in original) (White, J., dissenting).

forum question support a conclusion that a viewpoint-neutral restriction on the content of candidate statements in a voter pamphlet would be constitutional.

CONCLUSION

The central question of this Paper—could an otherwise unconstitutional judicial candidate speech code be made a condition for a candidate's participation in a judicial election public funding program—remains open. *Buckley* provides support for an argument that the voluntariness of the public funding program would be sufficient to justify a speech constraint on publicly funded candidates. However, the unconstitutional conditions doctrine suggests that some conditions that burden the liberties of grant recipients are unconstitutional even though the grantee is free to turn down the grant and the conditions.

The unconstitutional conditions question is ultimately intertwined with the underlying question of the constitutionality of speech codes. As several federal and state courts have recently found, a restrictive campaign speech constraint would burden protected First Amendment rights, while the goals of protecting judicial impartiality, and the appearance thereof, may be adequately served by more limited restraints. A restrictive speech constraint raises the specter of an unconstitutional governmental effort to transform a "medium of expression" by driving discussion of political and legal issues out of an electoral process in which political and legal issues may be central to voter decision-making.[121]

Nevertheless, the goals underlying judicial candidate speech constraints derive from substantial constitutional concerns of assuring due process to litigants and promoting public confidence in the administration of justice. It may be that the undoubted importance of the public goals, coupled with the voluntariness of a speech constraint, would enable a government to use public funds as an incentive to secure judicial candidates' agreement to a more restrictive speech code that would provide greater protection of judicial impartiality and greater security against the politicization of the courts.

Apart from the question of judicial candidate speech codes, states could almost certainly use public funds to secure judicial candidate participation in debates that might elevate the tone of judicial campaigns. So, too, a state could provide judicial candidates the opportunity to submit a statement, subject to content and tone limitations, that would be mailed to all voters. Although these programs would not regulate judicial campaigning outside of the debate or voter pamphlets, they would provide a means of shaping the content and tone of the information voters are most likely to rely upon when they cast their ballots in judicial elections.

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121. The condition might be more likely to survive if it applies only to communications funded by the public grant. Conversely, a condition that applies to all of a candidate's spending, including the portion funded by private contributions, may create a greater constitutional burden.