



Summer 6-1-1994

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Recommended Citation

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 (1994).

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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

I. Introduction

Canon 7B(1)(c) of the 1972 American Bar Association (ABA) Model Code of Judicial Conduct,¹ which seeks to regulate the speech of candidates for judicial office, states:

(1) A candidate, including an incumbent judge, for a judicial office (c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact.²

In 1990, the ABA rewrote Canon 7 and renamed it Canon 5. Canon 5 provides that candidates

shall not: (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; (ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; or (iii) knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent.³

1. MODEL CODE OF JUDICIAL CONDUCT Canon 7B(1)(c) (1972).

2. *Id.*

3. *Id.* Canon 5A(3)(d) (amended 1990); *see also* MODEL CANONS OF JUDICIAL ETHICS Canon 30 (1924) (containing original model canon for judicial campaign speech). Canon 30 states:

A candidate for judicial position should not make or suffer others to make for him, promises of conduct in office which appeal to the cupidity or prejudices of the appointing or electing power; he should not announce in advance his

Although courts have yet to review the constitutionality of Canon 5, several courts have reviewed the constitutionality of Canon 7.⁴ In *Buckley v Illinois Judicial Inquiry Board*,⁵ the United States Court of Appeals for the Seventh Circuit⁶ held that Illinois Supreme Court Rule 67B(1)(c),⁷ which substantially embodied the language of Canon 7,⁸ violated the First Amendment.⁹ Judge Posner wrote for the court that the Rule's overinclusive language impermissibly interfered with the speech "market."¹⁰ The *Buckley* decision conflicts with the United States Court of Appeals for the Third Circuit's interpretation of the constitutionality of Canon 7 in *Stretton v Disciplinary Board of the Supreme Court*.¹¹

conclusions of law on disputed issues to secure class support, and he should do nothing while a candidate to create the impression that if chosen, he will administer his office with bias, partiality or improper discrimination.

Id.

4. See *infra* notes 28-137 and accompanying text (discussing cases that address Canon 7).

5. 997 F.2d 224 (7th Cir. 1993).

6. *Buckley v Illinois Judicial Inquiry Bd.*, 997 F.2d 224 (7th Cir. 1993). Judge Posner wrote the opinion in which the Seventh Circuit reversed the United States District Court for the Northern District of Illinois. *Id.* at 231. District Judge James H. Alesia had upheld Illinois's disciplinary Rule despite potential First Amendment problems. *Buckley v Illinois Judicial Inquiry Bd.*, 801 F Supp. 83, 102 (N.D. Ill. 1992), *rev'd*, 997 F.2d 224 (7th Cir. 1993).

7. ILL. REV STAT. ch. 110A, para. 67B(1)(c) (1993).

8. *Id.* Paragraph 67B(1)(c) states:

(1) A candidate, including an incumbent judge, for a judicial office filled by election or retention (c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact; provided, however, that he may announce his views on measures to improve the law, the legal system, or the administration of justice, if, in doing so, he does not cast doubt on his capacity to decide impartially any issue that may come before him.

Id.

9. See U.S. CONST. amend. I (providing that Congress shall make no law abridging freedom of speech).

10. *Buckley*, 997 F.2d at 229.

11. 944 F.2d 137 (3d Cir. 1991).

In *Stretton*,¹² the Third Circuit construed Canon 7¹³ narrowly to conclude that Canon 7 did not violate judicial candidates' free speech rights.¹⁴ The Third Circuit reasoned that courts should interpret Canon 7 to prohibit candidates from expressing opinions only on issues likely to come before them as judges.¹⁵ Although the *Buckley* court took notice of the *Stretton* decision, the Seventh Circuit chose not to follow *Stretton*¹⁶ and thus created a split in the circuits on the constitutionality of Canon 7.¹⁷ This split has provided the United States Supreme Court with a reason to review the constitutionality of Canon 7.¹⁸ At the same time, the ABA's replacement of Canon 7 in 1990 with a more narrowly worded provision on campaign ethics may have signaled the demise of the 1972 provision, at least in the eyes of the ABA Standing Committee on Ethics and Professional Responsibility.¹⁹ However, the 1990 revisions did not remedy all of the problems that courts, such as the *Buckley* court, discovered in the 1972 Canon.²⁰

In order to give proper background for the *Buckley* and *Stretton* decisions, Part II of this Note reviews the history of court challenges to Canon 7.²¹ After a review of *Stretton* in Part III,²² Part IV analyzes the successful challenge to Canon 7 in *Buckley* and provides a close review of

12. *Stretton v. Disciplinary Bd. of the Supreme Court*, 944 F.2d 137 (3d Cir. 1991).

13. See 204 PA. CODE OF JUDICIAL CONDUCT Canon 7 (1979) (adopting language of Canon 7 of 1972 Model Code).

14. See *Stretton*, 944 F.2d at 143 (upholding Canon 7).

15. *Id.*

16. See *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 230 (7th Cir. 1993) (recognizing tension with *Stretton* decision).

17. *Id.*

18. *Id.*

19. See LISA L. MILORD, AMERICAN BAR ASS'N, THE DEVELOPMENT OF THE ABA JUDICIAL CODE 50-51 (1992) (discussing reasoning behind major changes that Committee made to Canon 7B(1)(c) of 1972 Code in drafting 1990 Code).

20. See *infra* notes 200-14 and accompanying text (explaining that 1990 Code's Canon 5 failed to remedy criticisms of *Buckley* court).

21. See *infra* notes 28-68 and accompanying text (reviewing court challenges to Canon 7).

22. See *infra* notes 69-87 and accompanying text (reviewing *Stretton* decision).

the Seventh Circuit's reasoning and use of authority²³ Part V applies the reasoning in *Buckley* and *Stretton* to a candidate's campaign statements, analyzes the rationales of the two decisions, and concludes that *Buckley* is the better decided of the two cases.²⁴

Next, Part VI turns to a review of the 1990 alterations of Canon 7 and the reasoning that spurred those changes.²⁵ Part VII addresses whether the 1990 Model Code's Canon 5 remedies all of the constitutional shortcomings of Canon 7 that the Seventh Circuit raised in *Buckley*.²⁶ Finally, Part VIII concludes that because the changes in the 1990 Model Code remedied some but not all of the *Buckley* court's constitutional criticisms of Canon 7, the 1990 Model Code requires further revisions.²⁷

II. Court Challenges to Canon 7 of the 1972 Model Code of Judicial Conduct

As of 1990, twenty-five states had adopted verbatim Canon 7B(1)(c) of the 1972 ABA Model Code of Judicial Conduct.²⁸ Several courts have addressed the constitutionality of that Canon.²⁹ In *J.C.J.D. v R.J.C.R.*,³⁰ the Kentucky Supreme Court declared that state's version of

23. See *infra* notes 88-137 and accompanying text (providing in-depth review of *Buckley*).

24. See *infra* notes 138-80 and accompanying text (analyzing *Stretton* and *Buckley* decisions).

25. See *infra* notes 181-99 and accompanying text (discussing changes ABA made to Canon 7 in 1990).

26. See *infra* notes 200-14 and accompanying text (analyzing constitutionality of 1990 Code's Canon 5 under rationale of *Buckley* decision).

27. See *infra* notes 215-21 and accompanying text (concluding that Canon 5 requires further revision).

28. See *Buckley v Illinois Judicial Inquiry Bd.*, 801 F. Supp. 83, 104 n.2 (N.D. Ill. 1992) (citing PATRICK M. MCFADDEN, *ELECTING JUSTICE: THE LAW AND ETHICS OF JUDICIAL ELECTION CAMPAIGNS* 86 (1990)), *rev'd*, 997 F.2d 224 (7th Cir. 1993); JEFFREY M. SHAMAN ET AL., *JUDICIAL CONDUCT AND ETHICS* § 16.01 (1990 & Supp. 1993) (citing Lisa L. Milord, *States Consider Adopting the 1990 Model Code of Judicial Conduct*, 13 JUD. CONDUCT REP., Winter 1992, at 8 for proposition that three states have adopted 1990 Model Code of Judicial Conduct).

29. See SHAMAN ET AL., *supra* note 28, § 11.08 (discussing recent challenges to Canon 7 on First and Fourteenth Amendment grounds).

30. 803 S.W.2d 953 (Ky. 1991).

Canon 7 unconstitutional.³¹ The Judicial Retirement and Removal Commission (Commission), a state disciplinary panel, brought charges against a state supreme court candidate for his conduct during a judicial campaign.³² The Commission alleged that the candidate, Justice Combs, improperly criticized laws prohibiting possession of handguns by felons, the standard of review for workers' compensation cases, and the supreme court.³³ The Commission found Justice Combs guilty of most charges and suspended him from judicial office without pay for three months.³⁴ The Supreme Court of Kentucky held that the Canon 7 restrictions that prohibited all discussion of judicial candidates' views on disputed legal or political issues unnecessarily violated the candidates' free speech rights.³⁵ The court stated that the Kentucky Legislature could rewrite Canon 7, as

31. See *J.C.J.D. v R.J.C.R.*, 803 S.W.2d 953, 956-57 (Ky.) (declaring Canon 7 unconstitutional), *cert. denied*, 112 S. Ct. 70 (1991). In *J.C.J.D.*, the Supreme Court of Kentucky considered the validity of a Judicial Removal and Retirement Commission (Commission) decision suspending a state supreme court justice (Combs) for violations of Canon 7. *Id.* at 953-55. The *J.C.J.D.* court stated that the Constitution guarantees the right of an individual to free expression and that freedom of expression extends to candidates running for judicial office. *Id.* at 954-55. The court further stated that restrictions affecting free speech which can result in disciplinary action are subject to strict scrutiny and that a strong presumption of the unconstitutionality of such restrictions exists. *Id.* at 955. The *J.C.J.D.* court agreed that the state has a compelling interest in preserving the integrity and objectivity of the judicial system. *Id.* at 956. However, the court reasoned that Canon 7 was not narrowly drawn to limit the candidate's speech to specific prohibitions, but instead prohibited all speech. *Id.* The court rejected the Commission's argument that Canon 7 was needed to prevent judges from exhibiting bias and stated that the legislature could rewrite the Canon more narrowly, as the ABA did in 1990, to prohibit candidates from making statements that commit or appear to commit the candidate with respect to cases, controversies, or issues likely to come before the court. *Id.* at 956-57. The *J.C.J.D.* court also refused to accept the Commission's finding that Combs's campaign advertisements constituted an improper pledge of preferential treatment to one class over another. *Id.* at 957. Consequently, the *J.C.J.D.* court held that the Constitution protected Combs's speech and ordered the Commission to dismiss the charges against him. *Id.*

32. See *id.* at 954 (discussing seven separate violations that Commission alleged Justice Combs committed).

33. *Id.*

34. See *id.* (stating that Commission determined that Justice Combs's conduct violated Code).

35. See *id.* at 956 (holding that Canon 7B(1)(c) unnecessarily violates fundamental state and federal constitutional free speech rights of candidates because Canon prohibits all discussion of candidates' views on disputed legal or political issues).

the ABA had in 1990, more narrowly to prevent candidates from discussing pending or future litigation.³⁶

In response to *J.C.J.D.*, the Kentucky Legislature adopted a revised version of Canon 7 that omitted the language that the Kentucky Supreme Court had struck down.³⁷ The legislature replaced the rule that a candidate should not announce his views on disputed legal or political issues with revised Canon 5's clause stating that a candidate should not make statements that commit or appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court.³⁸ Later, in *Ackerson v. Kentucky Judicial Retirement & Removal Commission*,³⁹ a candidate wanted to make statements that would appear to commit the candidate regarding court administrative decisions and general legal matters not then before the court.⁴⁰ The United States District Court for the Western District of Kentucky found that the state could not ban promises about court administration, but upheld the state's revised ban on

36. See *id.* (rejecting Commission's argument that Canon 7's language is necessary to prevent campaign statements that reflect bias in favor of one litigant over another).

37. KY REV STAT. ANN. Rules of the Supreme Court, Rule 4.300, Canon 7B(1)(c) (Michie 1992).

38. *Id.*

39. 776 F Supp. 309 (W.D. Ky 1991).

40. *Ackerson v. Kentucky Judicial Retirement & Removal Comm'n*, 776 F Supp. 309, 311 (W.D. Ky 1991). In *Ackerson*, the United States District Court for the Western District of Kentucky considered whether Canon 7 violated judicial candidates' right to freedom of speech. *Id.* at 313. According to the *Ackerson* court, while the First Amendment applies to judicial candidates, judicial candidates are subject to a greater degree of regulation than nonjudicial candidates. *Id.* However, the *Ackerson* court reasoned that a state-imposed restriction on free speech must further a compelling state interest and be narrowly drafted to avoid unnecessary abridgement of constitutional rights. *Id.* The *Ackerson* court found that Canon 7's broad language covering pledges, promises, and commitments on issues of court administration furthered no compelling state interest. *Id.* at 313-14. At the same time, the *Ackerson* court upheld Kentucky's Canon 7 prohibition on statements by a judicial candidate that commit or appear to commit the candidate with respect to issues likely to come before the court. *Id.* at 314-15. The *Ackerson* court found that the state had a compelling interest in so limiting a judicial candidate's speech because campaign comments on issues likely to come before the court tend to undermine the fundamental fairness and impartiality of the legal system. *Id.* at 315. The legislature, the court thought, narrowly tailored the Canon to this end. *Id.* Consequently, the *Ackerson* court enjoined the Commission from enforcing Canon 7 to discipline candidates who made pledges, promises, or commitments on court administrative issues. *Id.* at 315-16.

statements concerning legal issues likely to come before the court.⁴¹ In sum, the district court concluded that the Commission could not constitutionally use Canon 7 to ban pledges or promises of performance in office concerning administrative matters.⁴²

Other courts likewise have struck down broad readings of Canon 7. For example, in *Beshear v Butt*,⁴³ the Arkansas Judicial Discipline and Disability Commission (Commission) attempted to discipline a candidate for judicial office who stated during his campaign that plea bargaining was not acceptable to him and would not be allowed in his court.⁴⁴ *Beshear* brought suit in the United States District Court for the Eastern District of Arkansas claiming that Canon 7B(1)(c) was unconstitutional both on its face and as applied to him.⁴⁵ The district court held that a federal court may enjoin pending state administrative decisions when the state abridges free expression.⁴⁶ The Commission failed to persuade the court that *Morial v Judiciary Commission*,⁴⁷ which upheld a Louisiana requirement that state

41. See *id.* at 315 (discussing enjoinder of Canon 7).

42. *Id.* at 315-16.

43. 773 F Supp. 1229 (E.D. Ark. 1991).

44. See *Beshear v Butt*, 773 F Supp. 1229, 1234 (E.D. Ark. 1991) (holding Canon 7B(1)(c) unconstitutional), *rev'd on other grounds*, 966 F.2d 1458 (8th Cir. 1992). In *Beshear*, the United States District Court for the Eastern District of Arkansas considered the constitutionality of Canon 7B(1)(c) both facially and as applied to a candidate's statement that plea bargaining was not acceptable to him and would not be allowed in his court. *Id.* at 1231. Despite the Disciplinary Commission's arguments that Canon 7 was necessary to ensure that judges were not beholden to any interest or party, the *Beshear* court reasoned that Canon 7 was substantially overbroad and vague. *Id.* at 1232-33. The *Beshear* court stated that the Disciplinary Commission failed to persuade the court that Arkansas had an interest in utterances that a candidate made in good faith and that were not misleading. *Id.* at 1233. The *Beshear* court distinguished *Morial v Judiciary Comm'n*, 565 F.2d 295 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978), which upheld Louisiana's Canon 7(A)(3) requirement that judges running for nonjudicial office must resign, on the ground that the Louisiana Canon was limited by "narrow specificity." *Beshear*, 773 F Supp. at 1233-34. At the same time, the *Beshear* court noted that Canon 7 revealed its overbreadth in restraining statements about candidates' ideas concerning ways to cope with the increasing crime rate. *Id.* at 1234. Consequently, the district court declared Canon 7B(1)(c) unconstitutional and enjoined defendants from enforcing Canon 7B(1)(c). *Id.*

45. See *Beshear*, 773 F Supp. at 1230-31 (discussing *Beshear's* suit against Commission).

46. *Id.* at 1232.

47. 565 F.2d 295 (5th Cir. 1977).

judges running for nonjudicial elective office must resign,⁴⁸ controlled in the *Beshear* case.⁴⁹ The *Beshear* court stated that the Louisiana statute was drawn more narrowly than Canon 7's broad prohibitions, which encroached upon basic and fundamental speech rights.⁵⁰ Consequently, the court, citing cases such as *ACLU v Florida Bar*,⁵¹ in which the United States District Court for the Northern District of Florida struck down Canon 7, declared Canon 7 unconstitutional on its face.⁵² The *Beshear*

48. See *Morial v Judiciary Comm'n*, 565 F.2d 295, 306 (5th Cir. 1977) (holding that Canon requiring judges to resign before announcing candidacy for nonjudicial office was not violative of First Amendment or equal protection), *cert. denied*, 435 U.S. 1013 (1978). In *Morial*, the United States Court of Appeals for the Fifth Circuit considered the validity of Louisiana Canon 7A(3), which required a judge to resign in order to run for a nonjudicial office. *Id.* at 296. According to the *Morial* court, forcing Judge Morial to resign his seat on the bench in order to run for mayor burdened a fundamental right. *Id.* at 301. However, the *Morial* court found that the Louisiana Canon's limited sphere of operation was not sufficiently grievous to require the strictest constitutional scrutiny. *Id.* at 302. Applying a test that the court called reasonable scrutiny, the *Morial* court determined that the state's resign-to-run rule was reasonably necessary to ensure that judges were not beholden to any interest, person, or party. *Id.* In addition, the court addressed Judge Morial's equal protection claims that judges running for nonjudicial office, as opposed to judges running for judicial office or nonjudicial office holders running for nonjudicial office, were unconstitutionally singled out for disparate treatment. *Id.* at 304. The *Morial* court reasoned that because the judicial office is different in key respects from other offices, the state may regulate the judiciary with those differences in mind. *Id.* at 305. The court concluded that the state legislature was entitled to some leeway in the area of regulation of the judiciary. *Id.* at 306. Consequently, the *Morial* court held the Louisiana Canon constitutional. *Id.*

49. See *Beshear*, 773 F Supp. at 1233-34 (distinguishing *Morial* on ground that Louisiana restriction on judges running for nonjudicial office was limited restriction).

50. See *id.* at 1234 (describing Canon 7B(1)(c) as "overbroad and vague").

51. 744 F Supp. 1094 (N.D. Fla. 1990).

52. *Beshear*, 773 F Supp. at 1234 n.6. The *Beshear* opinion cited three decisions—*Stretton v Disciplinary Bd. of the Supreme Court*, 763 F Supp. 128 (E.D. Pa. 1991), *ACLU v Florida Bar*, 744 F Supp. 1094 (N.D. Fla. 1990), and *J.C.J.D. v R.J.C.R.*, 803 S.W.2d 953 (Ky.), *cert. denied*, 112 S. Ct. 70 (1991)—in which courts found Canon 7B(1)(c) violative of the First Amendment. *Beshear*, 773 F Supp. at 1234 n.6. The *Stretton* case was later overruled by the United States Court of Appeals for the Third Circuit. *Stretton v Disciplinary Bd. of the Supreme Court*, 944 F.2d 137 (3d Cir. 1991). See *infra* notes 69-87 and accompanying text (discussing Third Circuit's decision in *Stretton*); see also *supra* notes 30-36 and accompanying text (discussing *J.C.J.D.*).

court entered declaratory judgment against the defendants and permanently enjoined the defendants from enforcing Canon 7B(1)(c).⁵³

However, not all courts have found Canon 7 unconstitutional. In *Berger v Supreme Court*,⁵⁴ a judicial candidate in Ohio sought an injunction against the state's supreme court and other defendants to prevent enforcement of Canon 7B(1)(c).⁵⁵ The plaintiff wished to criticize what

In *Florida Bar*, the United States District Court for the Northern District of Florida considered an action challenging Florida Canon of Judicial Conduct 7B(1)(c), which provided that candidates could not speak out on disputed legal or political issues. *ACLU v Florida Bar*, 744 F Supp. 1094, 1096 (N.D. Fla. 1990). The plaintiffs claimed that Canon 7 violated their rights under the First and Fourteenth Amendments. *Id.* According to the *Florida Bar* court, the Florida Bar and the Judicial Qualifications Commission had a duty to regulate the conduct of the members of the bar and judiciary. *Id.* at 1097. However, the *Florida Bar* court subjected the Canon to a strict level of scrutiny because the regulation impaired core First Amendment values. *Id.* The *Florida Bar* court recognized that states need not treat judicial candidates the same as other candidates for elective office, but at the same time stated that a state may not restrict a judicial candidate's free speech rights without a compelling state interest. *Id.* Drawing from attorney-advertising cases, the *Florida Bar* court reasoned that disclosure of information is preferable to concealment, and the court further stated that the defendants failed to show that Canon 7 was the least restrictive means for protecting a compelling state interest. *Id.* at 1098-99. Therefore, the *Florida Bar* court preliminarily enjoined defendants from enforcing Canon 7B(1)(c). *Id.* at 1099-1100.

53. See *Beshear*, 773 F Supp. at 1234 (holding Canon 7 unconstitutional and citing additional authority for proposition that Canon is unconstitutional); see also *Florida Bar*, 744 F Supp. at 1099-1100 (enjoining as unconstitutional enforcement of Florida Canon 7B(1)(c), which prohibited discussion of "disputed legal or political issues").

54. 598 F Supp. 69 (S.D. Ohio 1984).

55. *Berger v Supreme Court*, 598 F Supp. 69, 71 (S.D. Ohio 1984), *aff'd mem.*, 861 F.2d 719 (6th Cir. 1988), *cert. denied*, 490 U.S. 1108 (1989). In *Berger*, the United States District Court for the Southern District of Ohio considered whether to enjoin enforcement of the Ohio Code of Judicial Conduct Canon 7 regulating the conduct of candidates for judicial office. *Id.* at 71-72. The court stated that even though Berger, a judicial candidate, had standing, the candidate had to show a substantial likelihood of prevailing on his claim that Canon 7 deprived him of First and Fourteenth Amendment rights to freedom of speech. *Id.* at 74. The *Berger* court did not interpret Canon 7 to prohibit criticism of judicial administrations and incumbents if such criticism was not misleading. *Id.* at 75. The *Berger* court reasoned that the statements Berger wished to make, such as those concerning the increase in a judge's personal involvement in the administration and resolution of court cases, were outside the scope of Canon 7's prohibitions. *Id.* The *Berger* court held that even under a standard of strict scrutiny, Canon 7 was necessary to achieve a compelling state interest. *Id.* at 75-76. The plaintiff also failed to persuade the court that Canon 7

he believed to be deficiencies in the administration of domestic relations in his county.⁵⁶ He alleged that Canon 7 barred this criticism and thus violated his First Amendment right to free speech and his Fourteenth Amendment right to equal protection.⁵⁷ The District Court for the Southern District of Ohio declared that Canon 7 was necessary to achieve a compelling state interest and therefore did not violate the First Amendment.⁵⁸ The court further stated that singling out judges' campaign conduct did not violate the Fourteenth Amendment because the judicial function requires that judges be subject to different standards than legislators and executive officers.⁵⁹ Accordingly, the *Berger* court denied the plaintiff's motion for a preliminary injunction.⁶⁰

Similarly, *In re Kaiser*⁶¹ concerned an incumbent Washington judge whom the Supreme Court of Washington censured under Canon 7.⁶²

violated the Fourteenth Amendment by singling out judges' campaign conduct. *Id.* at 76. The *Berger* court stated that the purpose of the judiciary warranted the application of different rules to judicial candidates than to legislative and executive candidates. *Id.* Consequently, the *Berger* court concluded that the plaintiff had not demonstrated persuasively that he was likely to prevail on the merits on his claim that Canon 7 was facially unconstitutional. *Id.*

56. See *id.* at 72 (listing issues that Berger wished to discuss).

57. *Id.*

58. See *id.* at 75 (noting that state has compelling interest in assuring that state's elected judges are protected from untruthful criticism and that judicial campaigns are run in manner upholding integrity of state judiciary).

59. *Id.* at 76.

60. *Id.*

61. 759 P.2d 392 (Wash. 1988).

62. See *In re Kaiser*, 759 P.2d 392, 400-01 (Wash. 1988) (en banc) (upholding Canon 7 as applied to judge's statements). In *Kaiser*, the Supreme Court of Washington considered whether Judge Kaiser's campaign claims that he would be a "tough no-nonsense judge," that he would be tough on drunk driving, that his opponent's supporters were primarily Driving While Intoxicated defense attorneys, and that he was a Democrat were entitled to First Amendment protection. *Id.* at 394-95. According to the *Kaiser* court, Kaiser's statements that a majority of his opponent's support came from drunk driving defense attorneys violated the strict terms of Canon 7B(1)(d)'s prohibition on false and misleading advertising. *Id.* However, the *Kaiser* court found that Kaiser's statement concerning his opponent's supporters was entitled to First Amendment protection. *Id.* at 397-99. Subjecting Canon 7 to exacting scrutiny under the First Amendment, the court declared that because Kaiser uttered the drunk driving statement without knowledge of its falsity, his statements were entitled to First Amendment protection. *Id.* Concerning

Kaiser had pledged to be tough on drunk driving and claimed that his opponent's supporters were primarily Driving While Intoxicated (DWI) defense attorneys.⁶³ The Supreme Court of Washington, declaring that the First Amendment protects false statements made in good faith, refused to discipline Kaiser for misleading statements concerning his opponent's supporters when no evidence proved Kaiser had actual knowledge of the statement's falsity.⁶⁴ However, the *Kaiser* court, like the *Berger* court, upheld Canon 7 as applied to Kaiser's promise to be tough on DWI offenders.⁶⁵ The *Kaiser* court, citing *Morial*,⁶⁶ reasoned that Kaiser's pledge violated Canon 7 and had a direct detrimental effect on the compelling state interest of preserving the integrity of the judiciary.⁶⁷ Thus, the court concluded that the Canon's provisions were constitutionally valid as applied to Kaiser's pledge to be tough on drunk driving.⁶⁸

Kaiser's other statements, the court reasoned that the state could restrict that speech only if the disciplinary rule served a compelling state interest and if the state applied the rule in a narrowly tailored fashion. *Id.* at 399-400. The *Kaiser* court held that even though Kaiser's other statements affected core First Amendment rights, the state had a compelling interest in upholding the good reputation of its judiciary. *Id.* The court, in weighing the state's interest against the judge's First Amendment rights, concluded that Kaiser's statement that he was a "tough no-nonsense judge" referred only to his qualifications and thus is constitutionally protected speech. *Id.* at 400. On the other hand, Kaiser's statements of party affiliation, statements concerning the motives of his opponent's supporters, and promises to be tough on drunk drivers were not a reflection on Kaiser's or his opponent's qualifications and as such were constitutionally punishable violations of Canon 7. *Id.* Consequently, the court censured Kaiser for making the offending statements. *Id.* at 400-01.

63. *Id.* at 397

64. *See id.* at 398-99 (rejecting as unconstitutional application of Canon 7 to statements concerning opponent's supporters because Kaiser had no actual knowledge of statements' falsity when he made them).

65. *See id.* at 399 (reasoning that state had compelling interest in prohibiting judicial candidates from making certain statements).

66. *See Morial v. Judiciary Comm'n*, 565 F.2d 295, 306 (5th Cir. 1977) (upholding provision that required judge to resign before campaigning for nonjudicial office), *cert. denied*, 435 U.S. 1013 (1978); *supra* notes 47-48 and accompanying text (discussing *Morial*).

67. *See Kaiser*, 759 P.2d at 399-400 (discussing compelling state interest in regulating judicial candidate's speech).

68. *Id.* at 400.

III. Review of Stretton

In *Stretton v Disciplinary Board of the Supreme Court*,⁶⁹ a candidate for state judicial office brought a civil rights action on First Amendment grounds challenging Canon 7 of the Pennsylvania Code of Judicial Conduct.⁷⁰ Pennsylvania had adopted Canon 7B(1)(c) of the 1972 ABA Model Code of Judicial Conduct⁷¹ verbatim.⁷² Claiming that Canon 7 impeded his ability to campaign for judicial office, Stretton sought to enjoin its enforcement.⁷³ In his campaign, Stretton wished to point out that all of the Common Pleas judges were Republicans and wanted to announce his views on activist judges, criminal sentencing, changes in administrative matters, the need for judges to hire more minority law clerks, and other legal and political issues.⁷⁴ The United States District Court for the Eastern District of Pennsylvania held that Canon 7's restrictions on free

69 944 F.2d 137 (3d Cir. 1991).

70. *Stretton v Disciplinary Bd. of the Supreme Court*, 944 F.2d 137, 139 (3d Cir. 1991); see Kathleen M. Sholette, *Canon 7 Restrictions on the Political Speech of Judicial Candidates: Judging Those Who Would Be Judges*, 37 VILL. L. REV 139, 152-60 (1992) (providing discussion of *Stretton* decision).

71. 204 PA. CODE OF JUDICIAL CONDUCT Canon 7 (1979).

72. *Stretton*, 944 F.2d at 139.

73. See *id.* at 138 (explaining basis for Stretton's suit against Disciplinary Board).

74. *Id.* at 139 Stretton wished to protest the fact that county Common Pleas judges were all Republicans. *Id.* In addition, he desired to announce his views on:

- (a) the need for the election of judges with an "activist" view, and the obligation of judges at every level of the judicial system to look at societal changes when ruling on challenges to existing law;
- (b) criminal sentencing and the rights of victims of crime;
- (c) "reasonable doubt" and how he would apply that standard as an elected judge;
- (d) the need to more closely scrutinize the work of district judges (formerly known as justices of the peace), particularly in light of the removal of several justices in recent years because of improper conduct;
- (e) the need for various changes in judicial administration including the jury selection process (so that panels more accurately reflect the county's racial composition);
- (f) the need for greater sensitivity toward hiring minority lawyers and law clerks, especially by the county's judges and district attorney;
- (g) plaintiff's qualifications and those of his opponents as well as a perceived need for a woman judge; and
- (h) the importance of the right to privacy as a basic constitutional right.

Id.

speech were drastically overbroad and in violation of the First Amendment.⁷⁵ Noting that the ABA had adopted a new Model Code in 1990, the district court rejected a narrow construction of Canon 7 and refused to rewrite the Canon to make it constitutional.⁷⁶

The Third Circuit, in reversing the district court, held that barring candidates from announcing their views on disputed legal or political issues did not violate the candidates' free speech rights to the extent that the ban covered only issues that might come before candidates as judges.⁷⁷ Citing *United States Civil Service Commission v. National Ass'n of Letter Carriers*,⁷⁸ a case in which the United States Supreme Court upheld the Hatch Act's prohibition on federal employees' engagement in political activity,⁷⁹ the Third Circuit found that Pennsylvania had a compelling interest in preserving the integrity of its judicial system.⁸⁰ Furthermore,

75. *Stretton v. Disciplinary Bd. of the Supreme Court*, 763 F. Supp. 128, 139 (E.D. Pa. 1991), *rev'd*, 944 F.2d 137 (3d Cir. 1991).

76. *See id.* at 138-39 (declaring Canon 7B(1)(c) unconstitutional).

77. *See Stretton v. Disciplinary Bd. of the Supreme Court*, 944 F.2d 137, 143-44 (3d Cir. 1991) (stating that narrowing construction would be consistent with theory that courts should interpret statutes to avoid constitutional difficulties).

78. 413 U.S. 548 (1973).

79. *See United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 580-81 (1973) (upholding Hatch Act's prohibition on federal employees' campaign activity). In *Letter Carriers*, the Supreme Court considered the validity of the Hatch Act's prohibition against federal employees taking an active part in political campaigns. *See id.* at 554-64 (examining 5 U.S.C. § 7324(a)(2) (1988)). The *Letter Carriers* Court reasoned that Congress has the power to prevent federal employees from engaging in activities such as holding party office, working at the polls, and acting as party paymasters. *Id.* at 556. The Court found that Congress and the country had an important interest in ensuring that federal service should depend on meritorious performance rather than political service. *Id.* at 557. However, the Court sought to arrive at a balance between the interest of the individual in participating in public matters and the interest of the government in promoting the efficiency of public services. *Id.* at 564. The Court found the statute neither overbroad nor unconstitutionally vague. *Id.* at 568. The statute specifically allowed employees to retain the right to vote and to express opinions on political candidates. *Id.* at 575-76. Noting that the Act's restrictions were clearly stated, the Court found that even if some provisions of the act were unconstitutionally overbroad, the remainder of the statute covered constitutionally proscribable conduct. *Id.* at 580-81. Consequently, the Court held that the Hatch Act was not facially unconstitutional. *Id.*

80. *See Stretton*, 944 F.2d at 142 (explaining Pennsylvania's compelling interest in preserving confidence of public in fair hearings).

the *Stretton* court noted that the duties of judges in an impartial judicial system differ from legislative and executive duties.⁸¹ In executive and legislative areas, the public has a right to know the details of programs that candidates propose.⁸² In the judicial arena, however, the state has an interest in insuring that judges provide impartial interpretations of law.⁸³

The Third Circuit reasoned that giving the statute a narrow construction was consistent with the state interest, the Board's interpretation of the Code, and the policy of the Pennsylvania Supreme Court.⁸⁴ Moreover, the Third Circuit stressed the court's duty to interpret the challenged statute to avoid constitutional difficulties.⁸⁵ The *Stretton* court stated that the public has the right to expect that judges will be impartial in the handling of cases and that a judge's taking a position on issues would inhibit, or give the appearance of inhibiting, a judge's ability to consider a matter impartially.⁸⁶ Accordingly, the Third Circuit interpreted Canon 7 narrowly and held that the Canon did not violate the First Amendment.⁸⁷

IV Review of Buckley

In *Buckley v Illinois Judicial Inquiry Board*, the Seventh Circuit declared Canon 7 unconstitutional.⁸⁸ Illinois had adopted the wording of ABA Canon 7, but had added a clause in an attempt to narrow the scope of the Canon.⁸⁹ Illinois's safe harbor clause provided that a candidate could "announce his views on measures to improve the law, the legal system, or

81. *Id.*

82. *Id.*

83. *Id.*

84. *See id.* at 142-43 (discussing narrow interpretation of Canon that prohibits candidate from announcing position on issue that may come before court for resolution).

85. *See id.* at 144 (stating that courts should interpret statutes narrowly to avoid constitutional difficulties).

86. *See id.* (stating that public has right to expect that court will assess facts based on evidence in each case and that law will be applied in manner unaffected by views of judge).

87. *Id.* at 146.

88. *See Buckley v Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 230 (7th Cir. 1993) (deciding that Canon 7 was unconstitutional despite fact that rule prohibited both privileged and unprivileged speech).

89. ILL. REV. STAT. ch. 110A, para. 67B(1)(c) (1993).

the administration of justice, if, in doing so, he does not cast doubt on his capacity to decide impartially any issue that may come before him."⁹⁰

Buckley was a justice of the Appellate Court of Illinois.⁹¹ In 1990, he ran unsuccessfully for a seat on the state's supreme court.⁹² During his campaign Buckley circulated campaign literature stating that "he had never written an opinion reversing a rape conviction."⁹³ The Judicial Inquiry Board filed charges against him with the Illinois Courts Commission (Commission).⁹⁴ After the election, the Commission found that Buckley had violated Illinois Rule 67B(1)(c), but did not sanction him.⁹⁵ Because Buckley had no avenue of appeal within the state court system, he turned to the United States District Court for the Northern District of Illinois.⁹⁶

The district court consolidated Buckley's case with a similar case filed by Anthony Young, who won election to the Circuit Court of Cook County in 1992.⁹⁷ Young claimed that the risk of sanction deterred him from speaking out on important issues.⁹⁸ The district court upheld Rule 67B(1)(c) after narrowly construing the clause that a candidate "should not announce his views on disputed legal or political issues" as limited to statements on issues likely to come before the court.⁹⁹

90. *Id.*

91. *See Buckley*, 997 F.2d at 225 (discussing Buckley's candidacy for judicial office).

92. *Id.*

93. *Id.* at 226.

94. *Id.*

95. *Id.*

96. *See id.* (stating that Illinois Constitution provides that Court Commission's decision is final within state court system).

97. *See Buckley v Illinois Judicial Inquiry Bd.*, 801 F Supp. 83, 86 (N.D. Ill. 1992) (discussing consolidation of suits), *rev'd*, 997 F.2d 224 (7th Cir. 1993).

98. *See id.* at 90-91 (discussing suit of Anthony Young). Young, who was a candidate for the Seventh Subcircuit of the Circuit Court of Cook County, wished to express his views on the following issues: capital punishment, abortion, the state's budget, and public school education. *Id.* at 90. Young also wished to state that he would seek to ensure that everyone was able to understand the judicial proceedings in which they were involved. *Id.* Even though Young had not made such statements, he feared that Rule 67B(1)(c) would subject him to punishment if he were to do so. *Id.*

99. *See id.* at 95-96 (upholding Canon 7 because rule furthered compelling state interest). In *Buckley*, the district court stated that even though a candidate has a First Amendment right to engage in the discussion of public issues, political discussion by a

On appeal before the Seventh Circuit, the Judicial Inquiry Board argued that the Illinois Rule was necessary to prevent judges from committing themselves on certain issues or cases.¹⁰⁰ The Board asserted that if it allowed a judicial candidate to make statements on certain issues, the public might perceive that the candidate, if elected, would be unable to make impartial decisions regarding those issues.¹⁰¹

The Seventh Circuit responded that despite the Board's concern, Rule 67B(1)(c) was unconstitutional because the Rule was overinclusive.¹⁰² The court of appeals explained that the "pledges or promises" clause, instead of applying to specific legal issues, barred all pledges or promises except a promise that a judge, if elected, would faithfully and impartially execute the duties of his office.¹⁰³ Moreover, the Seventh Circuit noted, the "announce" clause prohibited a judge from announcing "his views on disputed legal or political issues," not from announcing how the candidate intends to rule on a particular case or class of cases.¹⁰⁴

candidate is subject to restriction by the state. *Id.* at 92. The district court reasoned that its duty was to balance First Amendment rights against the state's legitimate interest in regulating that activity *Id.* at 93. Noting the special function of the judiciary, the district court adopted the magistrate's findings that the State of Illinois had a compelling interest in regulating the judiciary so as to maintain public confidence in judicial impartiality and integrity *Id.* Rejecting Buckley's reliance on *ACLU v. Florida Bar*, 744 F. Supp. 1098, 1099 (N.D. Fla. 1990), in which the court struck down Canon 7, the district court in *Buckley* noted that Canon 7 could be interpreted narrowly to avoid constitutional difficulties, as was done in *Stretton v. Disciplinary Bd. of the Supreme Court*, 944 F.2d 137, 144 (3d Cir. 1991). *Buckley*, 801 F. Supp. at 94-95. Therefore, the district court in *Buckley* upheld Canon 7 because it was susceptible to a narrowing construction limiting it to issues that were likely to come before the court. *Id.* at 95-96.

100. *See Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 228 (7th Cir. 1993) (discussing Board's concern about impartiality of candidates).

101. *Id.*

102. *Id.*

103. *Id.*

104. *See id.* (explaining scope of Canon 7). Although the Seventh Circuit acknowledged that the Rule served the purpose of preventing judicial candidates from committing themselves on certain issues, the court concluded that in doing so, the Rule impermissibly interfered with judicial candidates' free speech rights. *Id.* The Seventh Circuit stated that the Rule prohibited commentary on almost any issue, whether abortion, race relations, health care reform, or even the civil war in Yugoslavia. *Id.* The *Buckley* court reasoned that the only safe response to the Rule would be silence. *Id.*

The Seventh Circuit added that nothing was wrong per se with an overinclusive rule.¹⁰⁵ But when the overinclusive effects of that rule infringe on the constitutional guarantee of free speech, the rule cannot stand.¹⁰⁶ The court relied on *Secretary of State v Joseph H. Munson Co.*,¹⁰⁷ a case in which the United States Supreme Court held unconstitutional a Maryland statute that barred charitable organizations, in connection with fundraising activities, from paying expenses with more than twenty-five percent of the amount raised.¹⁰⁸ The Seventh Circuit noted that an overinclusive rule that greatly curtails the speech "market" is deeply problematic.¹⁰⁹ The Seventh Circuit recognized that the drafters of Rule 67B(1)(c) sought to narrow Canon 7 by adding a safe harbor clause.¹¹⁰ That clause, however, did not adequately restrict the Rule because it carved

105. See *id.* at 229 (conceding that overinclusiveness is standard method for plugging loopholes).

106. See *id.* at 228 (stating that when overinclusive rule stifles speech, then rule cannot stand).

107 467 U.S. 947 (1984).

108. See *Secretary of State v Joseph H. Munson Co.*, 467 U.S. 947, 964-70 (1984) (declaring statute regulating expenses of charitable organization in connection with fundraising activity unconstitutional). In *Munson*, the Supreme Court considered the validity of a state law that limited charitable organizations from paying as expenses more than 25% of the amount raised in any fundraising activity, but authorized a waiver when the 25% limitation would prevent the organization from raising contributions. *Id.* at 950. According to the *Munson* Court, regardless of the waiver provision, the statute was unconstitutional because organizations with high solicitation costs remained barred from carrying on protected First Amendment activities. *Id.* at 962-68. The Court found it difficult to identify the constitutionally proscribable conduct that the statute prohibited because the statute did not distinguish among different fundraisers that have high costs due to protected activity. *Id.* at 965-66. The Court held that when a statute is so imprecise as to create an unnecessary risk of chilling free speech, the statute is properly subject to facial attack. *Id.* at 967-68. At the same time, the *Munson* Court stated that whether the statute regulates before or after the fundraising is immaterial because the chill on protected activity is the same. *Id.* at 968-69. Moreover, the fact that the statute limited only fundraising expenses and not other expenses did not remedy the statute's imposition on First Amendment rights. *Id.* at 969. Consequently, the *Munson* Court held that Maryland's fundraising statute was unconstitutional. *Id.* at 969-70.

109. See *Buckley*, 997 F.2d at 229 (citing *Munson*, 467 U.S. at 964-68, for proposition that state regulation may not curtail important part of speech "market").

110. See *id.* (discussing drafters' attempt to circumscribe scope of Canon 7); see also text accompanying *supra* note 90 (providing precise wording of safe harbor clause).

out only a small exception.¹¹¹ In addition, almost any statement that a candidate made about improving the law might cast doubt on the candidate's capacity to decide impartially any issue that might come before the candidate.¹¹² Therefore, the Seventh Circuit reasoned, the proviso failed to grant any meaningful limitation to the Rule.¹¹³

The Seventh Circuit recognized that the district court saved the Rule by interpreting it narrowly.¹¹⁴ But the court said that this interpretation did not significantly circumscribe the Rule because it did not address the "pledges or promises" clause, which was as broad as the "announce" clause.¹¹⁵ The Seventh Circuit strained to find any legal or political issue that was unlikely to come before an American court.¹¹⁶ The court mentioned that even the war in Yugoslavia might become relevant in an immigration proceeding.¹¹⁷

The Judicial Inquiry Board had argued that one could read Rule 67B(1)(c) narrowly in several ways.¹¹⁸ First, the Board had suggested that

111. See *Buckley*, 997 F.2d at 229 (explaining how Rule both allows and restricts same speech).

112. See *id.* (explaining Rule's contradictions). The Seventh Circuit stated that under Canon 7:

Almost anything a judicial candidate might say about "improv[ing]" the law could be taken to cast doubt on his capacity to decide some case impartially, unless he confined himself to the most mundane and technical proposals for law reform. If instead he announced boldly that he did not think juries should be used in most civil cases, he could be thought to be casting doubt on his capacity to preside impartially at civil jury trials, to rule on motions for directed verdict in such trials, to conduct a fair voir dire, to administer the rules of evidence in jury trials, and to decide on proposed jury instructions.

Id.

113. *Id.*

114. See *id.* (conceding that district court's interpretation was consistent with policy of Supreme Court of Illinois, which is to interpret statutes, when possible, to sustain their constitutionality); see also *Sherman v. Community Consol. Sch. Dist. 21*, 980 F.2d 437, 442 (7th Cir. 1992) (stating that Supreme Court of Illinois adopts interpretations that save rather than destroy state laws).

115. *Buckley*, 997 F.2d at 229.

116. *Id.*

117. See *id.* (noting that Illinois court system had cases in which Yugoslavs challenged deportation on ground that they faced persecution if court forced them to return to their war-torn country).

118. See *id.* at 229-30 (discussing defendant's suggestions of different ways court could read Rule narrowly).

the Rule had an implicit right of reply.¹¹⁹ For example, if Justice Buckley's opponent had accused him of being "soft" on rapists, the statute would have allowed Buckley to reply that he had never written an opinion reversing a rape conviction.¹²⁰ Second, the Board had stated that the "announce" clause was nothing more than a prohibition against forecasting a future event, not a prohibition against making public statements.¹²¹ In other words, one should interpret "announce" in the same sense as in the phrase "to announce a marriage."¹²² Third, the Board had argued that the Rule meant nothing more than Canon 5 of the ABA's 1990 Model Code of Judicial Conduct, which states that a candidate should not "make statements that commit or appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court."¹²³

The Seventh Circuit responded that the defendant's argument that Canon 7 meant nothing more than the 1990 revisions failed to mesh with the ABA's interpretation of the 1990 revisions.¹²⁴ The ABA believed that the revisions circumscribed Canon 7, which the ABA characterized as an "overly broad restriction on speech."¹²⁵ In addition, the Seventh Circuit stated that the Judicial Inquiry Board was asking the court to rewrite the Illinois Rule so that the court, in effect, would be promulgating the ABA's revisions.¹²⁶ The court, citing a law review comment that advocates a

119. *Id.* at 229.

120. *Id.*

121. *Id.* The *Buckley* defendants argued that a narrow reading of the word "announce" would confine the "announce" clause to statements in which a judicial candidate tells the electorate how the candidate will rule on a particular case or class of cases. *Id.*

122. *Id.*

123. *Id.* at 230.

124. *See id.* (discussing differences that ABA perceived between 1990 Model Code's Canon 5 and 1972 Model Code's Canon 7).

125. *Id.* (quoting MODEL CODE OF JUDICIAL CONDUCT app. C at 72 (Proposed Draft 1990)). The *Buckley* court noted that various advisory bodies on judicial ethics thought that Canon 7 prohibited discussion of topics such as pretrial release, plea bargaining, criminal sentencing, capital punishment, abortion, gun control, the equal rights amendment, drug laws, gambling laws, liquor licensing, dramshop legislation, labor laws, property tax exemptions, the regulation of condominiums, court rules, prior court decisions, specific legal questions, and hypothetical legal questions. *Id.* (citing MCFADDEN, *supra* note 28, at 86-87).

126. *See id.* (stating that "saving" construction would leave Canon 7 stating one thing and judicial gloss on it stating another).

limited role for the judiciary,¹²⁷ stated that it was unwilling to assume such a role.¹²⁸ The fact that one could apply the Rule to unprivileged speech could not save this Rule, which also forbade privileged speech.¹²⁹

The Seventh Circuit noted that the *Buckley* decision created tension with the Third Circuit's opinion in *Stretton*.¹³⁰ The *Buckley* court stated that it could reconcile the cases, although only precariously.¹³¹ After stating that the Third Circuit's reasoning attempted to narrow Canon 7, the *Buckley* court explained that the Third Circuit did not have to deal with a case in which the Board condemned statements that merely expressed a candidate's past record.¹³² Nor did the Third Circuit have to confront the problematic issues of a right to reply or the interpretation that the Board provided for the "announce" clause.¹³³

127 James T. Barry, Comment, *The Council of Revision and the Limits of Judicial Power*, 56 U. CHI. L. REV. 235 (1989). In this Comment, Barry discusses the proper role of judicial power under the Constitution:

In this context, one event often mentioned is the Framers' debate over and rejection of a Council of Revision at the Constitutional Convention of 1787. The proposed Council would have vested the federal veto power in an institution composed of the President and several members of the federal judiciary, presumably the Justices of the Supreme Court. The history of this proposal illustrates how the Framers, faced with a model of judicial involvement in the lawmaking process, chose instead a judiciary that took no part in the creation of laws. In so doing, the Framers effectively chose to preclude the courts from deciding matters of public policy and to create a special place for the courts in the separation of powers scheme.

Id. at 235. Barry concluded that the Framers' decision to reject the Council of Revision should lead courts to take a unique and limited role in the constitutional scheme. *Id.* at 261.

128. See *Buckley*, 997 F.2d at 230 (stating that court was unwilling to take on role of Council of Revision).

129. *Id.* (citing *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 964-68 (1984); *Smith v. Goguen*, 415 U.S. 566 (1974)); see *supra* note 108 (discussing *Munson*).

130. See *Buckley*, 997 F.2d at 230 (attempting to distinguish *Stretton* decision); see also *supra* notes 69-87 and accompanying text (discussing *Stretton* opinion).

131. *Buckley*, 997 F.2d at 230.

132. *Id.*

133. *Id.*

The Seventh Circuit noted that the Kentucky Supreme Court in *J.C.J.D. v. R.J.C.R.* held that a similar rule was unconstitutional.¹³⁴ The *Buckley* court also cited various cases dealing with First Amendment limits on free speech restrictions, but concluded that the cases in general did not provide much guidance on the *Buckley* case.¹³⁵ However, the court stated that the cases do not support the proposition that a state could prohibit any statements by a judicial candidate that one might interpret as a commitment on a legal or political issue.¹³⁶ Therefore, the Seventh Circuit held that the overbroad language of Canon 7 violated the First Amendment.¹³⁷

V Analyzing Buckley and Stretton

The *Buckley* and *Stretton* opinions' differing reasoning¹³⁸ results from each court's views concerning both statutory interpretation¹³⁹ and civil

134. See *id.* at 230-31 (discussing authority for court's decision); see also *supra* notes 30-36 and accompanying text (discussing Kentucky court's review of Canon 7 in *J.C.J.D.*).

135. See *Buckley*, 997 F.2d at 231 (citing decisions on analogous First Amendment issues). See generally *Burson v. Freeman*, 112 S. Ct. 1846 (1992) (upholding ban on campaigning within 100 feet of polling place); *Gentile v. State Bar*, 111 S. Ct. 2720 (1991) (holding that even though Nevada rule, as interpreted by Nevada Supreme Court, was void for vagueness, state may constitutionally limit out-of-court comments by attorney that have substantial likelihood of materially prejudicing pending proceeding); *United States v. Grace*, 461 U.S. 171 (1983) (allowing picketing of United States Supreme Court); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (holding that judge violated right of public to attend trial in closing trial to public without making sufficient findings to support closure); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (invalidating statute that forbade newspapers to publish information concerning confidential proceedings of state judicial disciplinary commission); *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973) (upholding Hatch Act, which forbade civil servants to campaign for political candidates); *Cohen v. California*, 403 U.S. 15 (1971) (forbidding states from preventing ideological statements in courthouse corridors); *In re Kinlem*, 292 A.2d 749 (Md. 1972) (allowing judges to punish with contempt power disruptive and incendiary statements by lawyers).

136. See *Buckley*, 997 F.2d at 231 (concluding that prior cases provided sufficient basis for *Buckley* court's declaring Canon 7 unconstitutional).

137. *Id.*

138. See *id.* at 230 (discussing *Buckley* opinion's tension with Third Circuit's opinion in *Stretton*).

139. See *Stretton v. Disciplinary Bd. of the Supreme Court*, 944 F.2d 137, 143-44 (3d Cir. 1991) (discussing court's duty to interpret statute in way that upholds its constitutionality). The *Stretton* court justified its narrow interpretation of Canon 7 by concluding that the

rights.¹⁴⁰ Applying the two cases' differing perspectives to issues that Anthony Young wished to discuss during his campaign illustrates which of the two opinions contains the preferable approach.¹⁴¹ Young wished to discuss capital punishment, abortion, the state's budget, and public school education.¹⁴² In addition, he wished to "pledge to voters that [he would] try to eliminate delays in the judicial process and that [he would] seek to ensure

state has a compelling interest in restricting what candidates for judicial office say in order to prevent candidates from undermining the judicial system by making statements that affect, or appear to affect, a judge's ability to act impartially. *Id.* Accordingly, the *Stretton* court reasoned that the court had a duty to uphold Canon 7 because the law served a compelling state interest and the court could interpret the law to avoid constitutional difficulties. *Id.*

But see *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 229-30 (7th Cir. 1993) (proclaiming that court is not empowered to make such changes in statute as might be necessary to render it constitutional). The *Buckley* court took a different approach to statutory interpretation by stressing that a court should not act as a council of revision in promulgating a constitutional rule from an unconstitutional rule. *Id.* at 230. The *Buckley* court stated that although the court had a duty to interpret Canon 7 in a way that would uphold its constitutionality, the court was not authorized to take on the duties of a legislative body in attempting to do so. *Id.* Thus, the Seventh Circuit in *Buckley* decided that the court had a duty to avoid rewriting statutes in which the literal interpretation violated the Constitution. *Id.*

140. *See* *Buckley*, 997 F.2d at 227-29 (discussing judicial candidate's First Amendment rights). The *Buckley* court, although realizing that judicial candidates do not enjoy the same free speech rights as legislators or executive officers, stressed that a court should balance the judicial candidate's right to free speech against the state's interest in regulating the candidate. *Id.* Even though the Seventh Circuit agreed that judicial candidates have less expansive constitutional rights than legislative or executive candidates, the court placed great emphasis on a judge's participation in the marketplace of ideas and the importance of the open exchange of ideas in a free society. *Id.*

But see *Stretton*, 944 F.2d at 144 (discussing public's right to expect impartial assessment of law and facts). The *Stretton* court focused on the state's compelling interest in protecting citizens' rights to impartial judges and thereby shifted the issue from rights of judicial candidates to a priority of rights for those who will appear before judges. *Id.* The Third Circuit reasoned that because of judges' special positions as impartial interpreters of the law, society has less of an interest in protecting the free speech rights of judicial candidates. *Id.* at 142. Therefore, the right of citizens to have impartial judges deciding cases buttressed the state's interest in assuring that judges remain, or appear to remain, impartial. *Id.* at 142-44.

141. *See* *Buckley v. Illinois Judicial Inquiry Bd.*, 801 F. Supp. 83, 90-91 (N.D. Ill. 1992) (discussing Young's wish to express his views on capital punishment, abortion, state's budget, and public school education), *rev'd*, 997 F.2d 224 (7th Cir. 1993).

142. *Id.*

that everyone is fully able to understand the judicial proceedings in which they are involved."¹⁴³

Under a literal reading of Canon 7, Young's statement could violate the "pledges or promises" clause in that the candidate was promising to do something other than the faithful and impartial performance of the duties of his office.¹⁴⁴ He was promising to take steps to speed up the judicial process.¹⁴⁵ Moreover, his discussion of various issues such as capital punishment would have violated the provision that a candidate should not announce his views on disputed legal or political issues.¹⁴⁶

Under the *Stretton* dictate that a court should construe Canon 7 narrowly, Young would be unable to determine whether his speech would constitute a violation of Canon 7B(1)(c).¹⁴⁷ On one hand, a judge follow-

143. See *id.* (explaining that Young feared that he would be subject to sanction under Canon 7 for expressing his views).

144. MODEL CODE OF JUDICIAL CONDUCT Canon 7B(1)(c) (1972).

145. See *Buckley*, 801 F. Supp. at 90 (identifying Young's proposal to eliminate delays in judicial process).

146. See E. WAYNE THODE, AMERICAN BAR ASS'N, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT 98 (1973) (discussing limits of candidates' speech under Canon 7). Thode states:

What kind of campaign may the candidate for judicial office conduct? He cannot campaign on a platform of partiality for specific persons or groups, nor can he commit himself in advance on disputed legal issues, nor should he misrepresent himself in any way. The first two prohibitions in subsection B(1)(c) come from old Canon 30; the last one was added because of instances of misrepresentation made known to the Committee. The Committee was also of the opinion that a candidate should not base his campaign on his view of the solutions to disputed political issues. He can campaign on the basis of his ability, experience, and record. Here again the tensions are obvious between the political elective process and the desired ethical standards for the judiciary

Id.

147. See *Stretton v. Disciplinary Bd. of the Supreme Court*, 944 F.2d 137, 144 (3d Cir. 1991) (explaining reasoning behind court's narrowing construction of Canon 7). The Third Circuit stated:

The public has the right to expect that a court will make an assessment of the facts based on the evidence submitted in each case, and that the law will be applied regardless of the personal views of the judge. Taking a position in advance of litigation would inhibit the judge's ability to consider the matter impartially. Even if he or she should reach the correct result in a given case, the campaign announcement would leave the impression that, in fact, if not in actuality, the case was prejudged rather than adjudicated through a proper

ing the *Stretton* decision might allow Young's promise, as the district court did in *Buckley*, because speeding up the docket could be a promise to execute faithfully the duties of office.¹⁴⁸ However, Young could not be certain whether a judge would determine that Young's wish to discuss various issues such as capital punishment and abortion fall within the *Stretton* court's limitation of Canon 7 to issues likely to come before the court for resolution.¹⁴⁹ This uncertainty results because almost no legal or political issue exists that judges might not address in court.¹⁵⁰ Thus, even with the narrowing construction of *Stretton*, a judicial candidate such as Young would have to refrain from almost any discussion of issues because he could not be certain whether a court would determine that the *Stretton* court's narrowing construction would include or exclude the candidate's comments.¹⁵¹ Therefore, the *Stretton* decision's weakness rests not only in the lack of clarity as to how narrowly a court would read the statute, but also in the decision's possibility of curtailing free speech because of a candidate's doubt about what a court would allow a candidate to say.¹⁵²

Conversely, under the rationale of *Buckley*, the state could not restrict a judicial candidate from making a pledge such as the one Young wished to

application of the law to facts impartially determined.

Id.

148. See *Buckley v Illinois Judicial Inquiry Bd.*, 801 F. Supp. 83, 91 (N.D. Ill. 1992) (agreeing with magistrate judge that Young's comments were compatible with "pledges or promises" provision), *rev'd*, 997 F.2d 224 (7th Cir. 1993).

149. See *Buckley v Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 229 (7th Cir. 1993) (stating that narrowing "announce" clause to issues likely to come before court does not circumscribe Canon 7).

150. *Id.*

151. See Ann V. Freely, Comment, *I Speak Therefore I Am: A Voice in Support of Judicial Candidates' Right to Free Speech*, 2 WIDENER J. PUB. L. 671, 692-93 (1993) (discussing narrowing of Canon 7 in *Stretton*).

152. See *id.* at 699 (advocating change of Canon 7). Freely's Comment states:

Candidates should not have to campaign with the apprehension that the next sentence they utter will result in a sanction for violating the Judicial Code of Conduct. By simply upholding the Canon on the Boards' urging that a narrow meaning was intended, the *Stretton* decision has not done enough to put these fears to rest. There should be concern that the Pennsylvania Supreme Court will adopt a broader interpretation.

Id. at 699-700.

make and could not restrict him from discussing issues such as abortion unless Young would compromise or appear to compromise his impartiality in doing so.¹⁵³ Although Young wished to make a pledge or promise, his commitment to a speedy docket would not affect his ability to decide cases without improper bias.¹⁵⁴ Consequently, the rationale of *Buckley* would protect such a statement despite any prohibitions in Canon 7 because the state would not have a compelling interest in prohibiting such a pledge.¹⁵⁵ In addition, the *Buckley* decision would allow Young to discuss issues such as abortion and capital punishment and would permit the state to regulate only those statements that would hinder or appear to hinder his ability to be impartial.¹⁵⁶ Therefore, the refusal of the *Buckley* court to adopt the narrowing construction of *Stretton* at least gives candidates such as Young assurance that they may discuss political issues because the *Buckley* decision in effect shifts the burden to the state to prove that a candidate's statements would affect or appear to affect the candidate's ability to be impartial.¹⁵⁷

The *Buckley* court, by restricting regulation of speech in this fashion, addresses the chilling effect that Canon 7's overbreadth creates.¹⁵⁸ The strength of the *Buckley* decision rests in the court's recognition that Canon 7's vague ban on commentary concerning disputed legal and political issues has the effect of stifling speech even when the state has no compelling interest in banning such speech.¹⁵⁹ Consequently, the *Buckley* court was

153. See *Buckley*, 997 F.2d at 228 (stating that Canon 7 goes far beyond speech that would compromise or appear to compromise candidates' impartiality).

154. *Id.*

155. See *id.* at 231 (stating that prior cases do not support proposition that states may circumscribe speech at slightest danger of judicial candidates' making statements that might be commitments).

156. See *id.* (explaining that states are entitled to restrict speech of participants in judicial process, but that process is not outside constitutional guarantees of free speech).

157. See *id.* at 230 (discussing how narrowing construction of Canon 7 still prohibits privileged speech).

158. See *id.* at 228-29 (discussing how Canon 7 goes far beyond state's interest in regulating speech that might compromise candidates' impartiality).

159. See MCFADDEN, *supra* note 28, at 86-88 (discussing confusion about range of permissible discussion under Model Rules). McFadden notes that Canon 7's prohibition on disputed legal or political issues has the potential to be highly restrictive of what issues a candidate may discuss. *Id.* at 86-87. However, he recognizes that the Rule's scope is unclear because different states permit different levels of discussion. *Id.* at 87. In addition to Canon 7's lack of clarity, Canon 4 creates further confusion by providing that a judge

correct in declaring Canon 7 facially unconstitutional because the statute's speech prohibitions were not narrowly tailored to further the important state interest of preserving the impartiality and integrity of the judiciary.¹⁶⁰

Moreover, Young's proposed topics illustrate the type of issues that a candidate should be able to discuss under the First Amendment.¹⁶¹ The judicial candidate's statement concerning the speed of the judicial process is an issue of which the electorate probably would wish to be aware, and such an issue has minimal chance of affecting or appearing to affect a judge's impartiality.¹⁶² In theory, one could argue that Young, if he

may "speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice." *Id.* McFadden states that opinions are divided over whether the speech that Canon 4 allows must cease when an election begins. *Id.* He offers that one can reconcile the two sections by permitting candidates to discuss improvements in the law so long as the candidates avoid controversies in substantive law. *Id.* However, McFadden admits that so long as Canon 4 and Canon 7 conflict, candidates will remain without guidance in an area in which candidates are concerned about knowing the Model Code's limitations on speech. *Id.* at 88.

160. See *Buckley v Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 228-29 (7th Cir. 1993) (discussing speech "market" and citing *Secretary of State v Joseph H. Munson Co.*, 467 U.S. 947, 964-68 (1984)). But see J. Scott Gary, Comment, *Ethical Conduct in a Judicial Campaign: Is Campaigning an Ethical Activity?*, 57 WASH. L. REV 119, 134 (1981) (stating that candidate's expression of views on disputed legal issue casts doubt on candidate's impartiality should that issue come before candidate if elected). Gary states that by prohibiting statements on disputed legal issues, Canon 7 falls wholly within the state's purposes of maintaining the integrity and impartiality of the judiciary. *Id.*

161. See Lloyd B. Snyder, *The Constitutionality and Consequences of Restrictions on Campaign Speech by Candidates for Judicial Office*, 35 UCLA L. REV 207, 235 (1987) (advocating increased speech by judicial candidates). Snyder states:

Were judicial candidates afforded the right to speak freely about their beliefs on disputed legal and political matters and to make campaign pledges, the public would be able to weed out those candidates whose personal views were incompatible with the duties of judicial office. If candidates who made improper statements were elected, attorneys representing clients who may be injured by partiality would have a basis for seeking disqualification of the judge. The prejudiced judge would be denied the opportunity to harm litigants by his refusal to carry out his judicial obligations. The consequence of the restriction on campaign rhetoric is to shield biased judges from public scrutiny rather than to prevent biased judges from doing harm in office.

Id.

162. See James J. Alfini & Terrence J. Brooks, *Ethical Constraints on Judicial Election Campaigns: A Review and Critique of Canon 7*, 77 KY. L.J. 671, 718-22 (1989) (discussing

makes his promise, may commit himself on the issue of speeding up the docket and thus, for example, might be less likely to rule impartially in a request for a trial extension.¹⁶³ One might also argue that any statements Young makes on issues such as abortion could make him appear impartial in the eyes of the public.¹⁶⁴ However, judicial candidates' rights should

shortcomings of Canon 7). Alfini and Brooks state:

Ethical restrictions on campaign appearances and advocacy severely limit information on judicial candidates that may be presented to the electorate. The Code has been interpreted to prevent public debates between competing candidates, to prohibit statements concerning a candidate's anticipated conduct in office (other than general statements promising the faithful performance of duties), to prevent or curtail responses to questionnaire surveys of candidates' views and to preclude statements concerning the candidate's performance or the performance of the candidate's opponent other than those relating to court administration. In short, the electorate has inadequate information to judge the judges. For these and other reasons, judicial elections have been characterized as "quasi-elections."

Id. at 718-19 (footnotes omitted).

163. See SHAMAN ET AL., *supra* note 28, § 11.09, at 330 (discussing scope of acceptable statements and pledges by judicial candidates according to various advisory opinions). Shaman et al. state:

Ethics advisory opinions have addressed the propriety of numerous statements and pledges candidates have proposed to use in the course of a campaign. The general sense of these opinions is that anything that could be interpreted as a pledge that the candidate will take a particular approach in deciding cases or a particular class of cases is prohibited. It is inappropriate for a candidate to state that he or she could personally throw the switch on anyone convicted of a capital crime. A candidate may not express the view that marijuana should be decriminalized or announce the candidate's views on abortion. A candidate cannot use the slogan "a strict sentencing philosophy," as it gives the impression he or she would act in a biased manner in certain cases. At least one state takes the view that statements by a candidate concerning the use of plea bargaining should be avoided, because they may be seen as a pledge of future conduct, and plea bargaining is a controversial (disputed) issue.

Id. at 330-31 (footnotes omitted).

164. See MCFADDEN, *supra* note 28, at 89. McFadden argues that candidates announcing their views on disputed legal or political issues gives rise to two evils: "1) [I]t misleads the voting public into believing that these views are relevant, and thus a legitimate basis upon which to choose between candidates; and 2) it gives the appearance that the candidates have pre-judged the outcome of particular cases or types of cases." *Id.* McFadden states that the 1990 Model Code's Canon 5 addresses only the second concern.

not depend on whether one can conceive of a way in which candidates might compromise their impartiality¹⁶⁵

An analysis of judicial candidates' First Amendment rights should not focus on whether the state has any conceivable interest in prohibiting judicial candidates from making statements that commit or appear to commit them on certain cases or issues.¹⁶⁶ Rather, courts should allow states to circumscribe judicial candidates' free speech rights only upon proof that a restriction is narrowly tailored to further a compelling state interest.¹⁶⁷

Id. He reasons that Canon 5 fails to address the first evil because voters may believe that candidates' discussion of views are relevant. *Id.*

165. See Snyder, *supra* note 161, at 248 (stating that Canon 7's restrictions on campaign speech are unconstitutional). Snyder argues that even though the Code's restrictions are intended to assure judicial impartiality, restrictions on judicial speech do not further this goal. *Id.* Without clear evidence that commentary on legal or political issues has a deleterious effect on public confidence in the judiciary or on the judiciary's impartiality, a state cannot justify such restrictions. *Id.* Nor is there a compelling governmental interest in regulating candidates for judicial office differently from other office holders. *Id.* Snyder continues that judicial candidates should have the same free speech rights to make improper campaign statements or promises as other candidates for office. *Id.* at 248-49. Despite the risk that a candidate will pander to obtain votes, the framers of the First Amendment preferred full and open discussion of views. *Id.* at 249. Snyder states that unfortunately the drafters of the Code of Judicial Conduct did not follow the framers in relying on the voters not to elect rascals to office. *Id.*

166. See Buckley v Illinois Judicial Inquiry Bd., 997 F.2d 224, 229 (7th Cir. 1993) (discussing candidates' rights to participate in speech "market").

167 *Id.* The Supreme Court often applies a compelling state interest standard in First Amendment challenges to statutes regulating attorney advertising and other court-related speech. See, e.g., Peel v Attorney Registration & Disciplinary Comm'n, 110 S. Ct. 2281, 2287-88 (1990) (asserting that state must prove substantial interest before regulating attorneys' potentially misleading advertising); Seattle Times Co. v Rhinehart, 467 U.S. 20, 34-36 (1984) (upholding court order prohibiting dissemination of discovery material because prohibition was in furtherance of important state interest); Ohralik v Ohio State Bar Ass'n, 436 U.S. 447, 457-59 (1978) (finding important state interest in regulation of attorneys' solicitation conduct); Bates v State Bar, 433 U.S. 350, 383 (1977) (holding state may regulate attorney advertising that is false, deceptive, or misleading).

However, in cases concerning a trial court's regulation of certain newspaper reporting, through the use of the contempt power, the Supreme Court has required the state to demonstrate a "clear and present danger" of "actual prejudice or an imminent threat" before the trial court may impose any discipline. See, e.g., Nebraska Press Ass'n v Stuart, 427 U.S. 539, 571 (1976) (Powell, J., concurring) (stating that court may engage in prior restraint of press only if clear threat to fairness of trial is posed by actual publicity and if no less restrictive means is available); Craig v Harney, 331 U.S. 367, 375-78 (1947)

For example, the United States Supreme Court in *Gentile v State Bar*¹⁶⁸ held that the Nevada Supreme Court's interpretation of a rule regulating lawyers' speech was void for vagueness.¹⁶⁹ The *Gentile* court, however, upheld the "substantial likelihood of material prejudice" test in the rule because Nevada narrowly tailored the rule to achieve the important state

(protecting newspaper publication's attack on trial judge because publication did not constitute clear and present danger to administration of justice); *Pennkamp v Florida*, 328 U.S. 331, 346-50 (1946) (holding that cartoon critical of judge was protected by First Amendment because danger to judicial administration was not clear or immediate); *Bridges v California*, 314 U.S. 252, 262-63 (1941) (stating that court may not punish, using contempt power, publication concerning pending case without showing of clear and present danger).

168. 111 S. Ct. 2720 (1991).

169. See *Gentile v State Bar*, 111 S. Ct. 2720, 2731-45 (1991) (holding that rule restricting attorney's speech, as Nevada Supreme Court interpreted it, was void for vagueness, but that rule's test of "substantial likelihood of material prejudice" satisfied First Amendment). In *Gentile*, the Supreme Court considered the validity of a Nevada court rule which prohibited attorneys from making extrajudicial statements to the press that they knew or reasonably should have known would have a substantial likelihood of materially prejudicing an adjudicative proceeding and which provided that a lawyer may state, without elaboration, the general nature of the defense. *Id.* at 2723. In a divided opinion, the Supreme Court, through Justice Kennedy, stated that the safe harbor provision of the Nevada rule misled *Gentile* into thinking that he could give a press conference without fear of discipline. *Id.* at 2731. Reviewing the press conference that consisted only of *Gentile*'s making a brief opening statement and declining to answer reporters' questions seeking more detailed comments, the Supreme Court found support for *Gentile*'s claim that he thought the safe harbor clause protected his statements. *Id.* at 2731-32. The fact that Nevada found *Gentile* in violation of the rule after *Gentile* made a conscious effort to comply proved that the rule was unclear. *Id.* Consequently, the Supreme Court declared that the rule as the Nevada Supreme Court interpreted it was void for vagueness. *Id.* Chief Justice Rehnquist delivered the opinion of the court concluding that the "substantial likelihood of material prejudice" test applied by Nevada and most other states satisfied the First Amendment. *Id.* at 2745. The Chief Justice stated that lawyers may be regulated under a less demanding standard than the clear and present danger of actual prejudice standard established for regulation of the press during pending proceedings. *Id.* at 2742-44. The Supreme Court balanced the state's interest in regulating lawyers against a lawyer's First Amendment interest in the kind of speech at issue. *Id.* at 2745. The Supreme Court reasoned that the "substantial likelihood of material prejudice" test in the Nevada rule was a permissible balance between the state's interest in preserving the integrity and fairness of a state's judicial system and an attorney's First Amendment rights. *Id.* Therefore, the *Gentile* Court held that the "substantial likelihood of material prejudice" test satisfied the First Amendment because the test was narrowly tailored to achieve the state's objective. *Id.*

objective of preserving impartial trials.¹⁷⁰ In *Brown v Hartlage*,¹⁷¹ a Kentucky statute prohibited a candidate for county commissioner from pledging that he would lower commissioners' salaries if elected.¹⁷² The United States Supreme Court held that the statute violated the First Amendment's requirements that a compelling state interest support a speech restriction and that a restriction operate without unnecessarily circumscribing protected expression.¹⁷³

Even though Canon 7 does further the important state interest of insuring the impartiality of the judiciary, Canon 7 does not further that interest in the narrow fashion that the Constitution requires because, as the previous discussion shows, it has the effect of prohibiting all speech.¹⁷⁴ The *Buckley* court, following a rationale similar to the above cases, therefore, properly struck down Canon 7 because the rule restricted speech unrelated to the state's interest in prohibiting discussion that affected or

170. See *id.* (explaining how "substantial likelihood of material prejudice" test was narrowly tailored to further important state objective).

171. 456 U.S. 45 (1982).

172. See *Brown v Hartlage*, 456 U.S. 45, 62 (1982) (holding Kentucky's use of Corrupt Practices Act to punish candidate for County Commissioner unconstitutional). In *Brown*, the Supreme Court considered the validity of Kentucky's use of the Corrupt Practices Act to punish a candidate's statement that he would lower commissioners' salaries if elected. *Id.* at 47. The Court recognized that the states have a legitimate interest in preserving the integrity of their electoral processes. *Id.* at 52. However, the *Brown* Court stated that the free exchange of ideas in a political campaign is central to the American Constitution. *Id.* at 53. According to the *Brown* Court, when a state seeks to restrict directly a candidate's speech, the First Amendment requires that the state have a compelling interest and that the restriction operate without unnecessarily circumscribing protected speech. *Id.* at 53-54. Even though the statute had some constitutional applications, such as prohibiting bribes, the statute reached further than the First Amendment allowed. *Id.* at 56-57. The *Brown* Court stated that Brown's statement was only his expression of the intention to exercise public power in a way acceptable to some citizens. *Id.* at 57. Even though Brown's statements were false because commissioners' salaries were fixed by law, Brown made the statements in good faith and without knowledge of their falsity. *Id.* Consequently, the *Brown* Court held that Kentucky's nullification of Brown's election victory was inconsistent with the First Amendment's protection of political speech. *Id.* at 62.

173. See *id.* (declaring that Kentucky's Corrupt Practices Act violated First Amendment).

174. See MCFADDEN, *supra* note 28, at 86-87 (describing topics that judicial candidates may not discuss under Canon 7).

appeared to affect a candidate's ability to be impartial.¹⁷⁵ The result the *Buckley* court reached both vindicated the judicial candidate's limited rights under the Constitution and preserved the state's interest in protecting the judiciary's integrity and impartiality.¹⁷⁶

The *Stretton* court's reasoning, by contrast, failed to assess adequately whether Canon 7 narrowly tailored its restriction of the rights of judicial candidates to comment on legal or political issues.¹⁷⁷ This failure stemmed from the undue emphasis that the *Stretton* court placed on the interest of the public in impartial judges.¹⁷⁸ Whether one receives an impartial trial is an important issue, but the *Stretton* court's reclassification of the state's interest into a right of the public sidestepped the issue of balancing judicial candidates' rights against the requirement that state's regulation of candidates' speech be narrowly tailored in furtherance of a compelling state interest.¹⁷⁹ Consequently, even though the *Stretton* court attempted to narrow Canon 7 to avoid declaring the statute unconstitutional, the court's decision failed to remedy Canon 7's tendency to stifle constitutionally protected speech.¹⁸⁰

VI. *Reasons the 1990 Committee Revised Canon 7*

The *Buckley* court decided the constitutionality of only Canon 7.¹⁸¹ Although the Seventh Circuit made references to the ABA's 1990 revisions to Canon 7, the *Buckley* court withheld comment on the constitutionality of

175. See *Buckley v Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 229 (7th Cir. 1993) (explaining how Canon 7's overbreadth has effect of prohibiting constitutionally protected speech, even with narrowing construction).

176. See *id.* at 231 (explaining that states may restrict judicial candidates' speech to preserve impartial justice under law, but that states may not circumscribe free speech at slightest danger of candidate's appearing to make improper commitments).

177. See *Stretton v Disciplinary Bd. of the Supreme Court*, 944 F.2d 137, 142 (3d Cir. 1991) (stating that Pennsylvania established compelling state interest and that court would place narrow construction on Canon 7 to avoid constitutional difficulties).

178. See *id.* at 144 (explaining public's right to have judges apply law impartially).

179. *Id.*

180. See *id.* (stating that court should resort to every reasonable construction of statute to avoid declaring statute unconstitutional).

181. See *Buckley v Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 229-30 (7th Cir. 1993) (refusing to accept argument that Canon 7 means nothing more than Canon 5).

the ABA's new Canon 5.¹⁸² However, before addressing how the *Buckley* court would review Canon 5, a review of the changes that the ABA Standing Committee on Ethics and Professional Responsibility (Committee) made to Canon 7 and the reasoning behind those changes may be helpful in providing some background.¹⁸³

182. See *id.* at 230 (refusing to replace Canon 7 with Canon 5, but withholding analysis of Canon 5's constitutionality). Cf. Reynolds Cafferata, *A Proposal for an Empirical Interpretation of Canon 5*, 65 S. CAL. L. REV 1639, 1666-69 (1992) (proposing interpretation that courts should adopt when applying and reviewing Canon 5). Cafferata proposes that if Canon 5 is to permit candidates to discuss issues, courts should interpret Canon 5 in a way that accepts the view that judges' values and beliefs affect their decisions. *Id.* at 1666. First, he states that courts should interpret Canon 5 to relax Canon 7's restrictions on statements of philosophy. *Id.* For example, a candidate should be able to state under Canon 5 that he has a strict sentencing philosophy because such a statement would provide voters with relevant information about the candidate's outlook. *Id.* at 1666-67. Second, Cafferata proposes that courts should interpret Canon 5 to permit candidates to discuss judicial philosophy. *Id.* at 1667. For example, a candidate should be able to tell voters that the candidate will decide cases on the basis of framers' intent. *Id.* Finally, Cafferata proposes that Canon 5 should allow statements in favor of specific legislation, but that Canon 5 should require judges to clarify that they must impose the law whether they support the law or not. *Id.* at 1667-68. This interpretation will allow voters to vote for candidates on the basis of candidates' judicial philosophies as disclosed through statements on particular issues. *Id.* at 1668. This interpretation should answer the criticism that Canon 7 prevents voters from obtaining relevant information. *Id.* Also, this interpretation, because it allows candidates to reveal more about their judicial philosophies, answers the second criticism that Canon 7 helps hide judicial bias. *Id.* at 1668-69. The third criticism of Canon 7 is that it prevents candidates from being able to challenge each other based on their campaign statements. *Id.* at 1669. Because this proposed interpretation of Canon 5 allows judges to respond to their opponents, the proposed interpretation resolves the third criticism. *Id.* at 1669-70. The final criticism of Canon 7 that Cafferata mentions is that it unconstitutionally chills candidates' speech. *Id.* at 1670. Even though Cafferata admits that Canon 5 has its own "grey zones," he states that because candidates will be able to speak more freely under Canon 5, that rule should have less of a chilling effect on candidates' speech than Canon 7. *Id.*

183. See MILORD, *supra* note 19, at 46 (providing reasoning behind Committee's decision to revise Canon 7). Milord states:

The 1990 Code Committee decided to revise Canon 7 because it failed to provide adequate guidance regarding the political conduct of judges and candidates, both of whom are subject to varying methods of judicial selection in the jurisdictions. Reinforcing the Committee's decision was the observation by a number of commentators that Canon 7 was less widely adopted than the other Canons of the 1972 Code, and that even where adopted it was often

The first major change that the Committee made to Canon 7B(1)(c) was to replace the prohibition against a candidate's announcing views on disputed legal or political issues with a narrower prohibition against making statements that commit or appear to commit the candidate with respect to cases, controversies, or issues likely to come before the court.¹⁸⁴ The Committee altered this provision to align the Canon more closely with the First Amendment's guarantee of free speech.¹⁸⁵ At the same time, the Committee wished to prevent statements that might give the impression that judicial candidates lacked impartiality or integrity.¹⁸⁶ Moreover, the Committee stated that Canon 7 needed revising because a court could not practically apply the broad language of Canon 7 in its literal terms.¹⁸⁷ The Committee, however, still wished to protect candidates from the impropriety of answering questionnaires, opinion polls, or other requests from interested persons seeking responses on specific issues.¹⁸⁸ The Committee specifically included the word "issues" in the revised Canon to prohibit candidates from commenting on issues, as well as cases, likely to come before them.¹⁸⁹

The Committee also changed Canon 7's prohibition against making misrepresentations into a prohibition against knowingly making misrepresentations.¹⁹⁰ The purpose of this change was to indicate that unintention-

ignored.

Id.

184. *See id.* at 50 (discussing changes Committee made in 1990 Model Code). Milord notes that "[t]he Discussion Draft's version of the rule had contained a broader prohibition against 'stat[ing] personal views on issues [that] may come before the court'; this rule was replaced in the Midyear Draft with the current language." *Id.*

185. *See id.* (discussing Committee's concerns with constitutional guarantees of free speech).

186. *Id.*

187. *Id.*

188. *See id.* (explaining practice of improperly questioning candidates in questionnaires and opinion polls).

189. *Id.*

190. *See id.* at 50-51 (explaining change in Canon 7B(1)(c)). The 1990 Model Code's Canon 5 also limited the scope of misrepresentations covered by Canon 7 by no longer making the Canon applicable to all facts. At the same time, Canon 5 extended the scope of the provision by making the Canon applicable to statements about opponents as well as to statements about oneself. *Id.*

al misrepresentations would not constitute a violation of the Code.¹⁹¹ The 1990 Code also included a new section 5A(3)(e) that permitted candidates to respond to attacks as long as those responses did not violate any other provisions of Canon 5.¹⁹² The Committee reasoned that this section was necessary to allow candidates to respond to attacks on their personal and professional lives.¹⁹³ In addition, the Committee added a new paragraph of commentary to explain candidates' duties to avoid making improper comments on cases or controversies likely to come before their respective courts.¹⁹⁴ Other new commentary contains cross-references to Canon 3B(9), the section regarding public comment by judges, and Rule 8.2 of the ABA Model Rules of Professional Conduct, which requires lawyers who are judicial candidates to comply with the Model Code of Judicial Conduct.¹⁹⁵

191. *Id.* at 50; see *In re Kaiser*, 759 P.2d 392, 398-99 (Wash. 1988) (en banc) (explaining that state could not constitutionally regulate misrepresentations that candidate made without knowledge of statements' falsity).

192. MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(e) (amended 1990). Canon 5A(3)(e) states that a candidate "may respond to personal attacks or attacks on the candidate's record as long as the response does not violate Section 5A(3)(d)." *Id.*

193. See MILORD, *supra* note 19, at 51 (explaining reasoning behind addition of Canon 5A(3)(e)).

194. MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d) cmt. (amended 1990). The commentary states:

Section 5A(3)(d) prohibits a candidate for judicial office from making statements that appear to commit the candidate regarding cases, controversies or issues likely to come before the court. As a corollary, a candidate should emphasize in any public statement the candidate's duty to uphold the law regardless of his or her personal views. See also Section 3B(9), the general rule on public comment by judges. Section 5A(3)(d) does not prohibit a candidate from making pledges or promises respecting improvement in court administration. Nor does this Section prohibit an incumbent judge from making private statements to other judges or court personnel in the performance of judicial duties. This Section applies to any statement made in the process of securing judicial office, such as statements to commissions charged with judicial selection and tenure and legislative bodies confirming appointment. See also Rule 8.2 of the ABA Model Rules of Professional Conduct.

Id.

195. See *id.* Canon 3B(9) (explaining adjudicative restrictions of judge's speech). Canon 3B(9) states:

A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially

The Committee did not substantially revise the first part of Canon 7B(1)(c), which bars pledges or promises other than promises to faithfully or impartially perform the duties of the office.¹⁹⁶ The 1990 drafters altered only the phrase "should not make pledges or promises" to "shall not make pledges or promises."¹⁹⁷ The reporter for the 1990 Judicial Code did not explain why this provision was readopted.¹⁹⁸ The failure to revise or to provide explanation for the Committee's retention of the "pledges or promises" clause may be detrimental to the new Canon 5 because courts such as the *Buckley* court have found this section to be unconstitutionally overbroad.¹⁹⁹

VII. *The Constitutionality of the New Canon 5*

According to the *Buckley* court, a literal interpretation of the "pledges or promises" clause restricts judicial candidates from making any promises other than one—that they will perform their judicial duties faithfully.²⁰⁰ Other commentators have expressed similar doubt about the potential scope of this section.²⁰¹ The drafters' minor alterations to this section do not

interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This Section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.

Id., see MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.2 (1993) (requiring lawyers who are judicial candidates to comply with Code of Judicial Conduct).

196. MODEL CODE OF JUDICIAL CONDUCT Canon 7B(1)(c) (1972).

197. *Id.* Canon 5A(3)(d) (amended 1990).

198. See MILORD, *supra* note 19, at 50-51 (noting failure of reporter to provide information about "pledges or promises" clause within Canon 5 discussion).

199. See *Buckley v Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 228 (7th Cir. 1993) (stating that Canon 7 unconstitutionally prohibits all pledges or promises except two); *Ackerson v Kentucky Judicial Retirement & Removal Comm'n*, 776 F Supp. 309, 313-14 (W.D. Ky 1991) (holding "pledges or promises" clause unconstitutional as applied to pledges concerning court administration).

200. See *Buckley*, 997 F.2d at 228 (stating that Canon 7 prohibits all pledges or promises except promise that candidate will faithfully and impartially discharge duties of judicial office).

201. See MCFADDEN, *supra* note 28, at 90 (discussing "pledges or promises" clause). McFadden states:

address complaints of the *Buckley* court or other commentators about the overbreadth of the "pledges or promises" clause.²⁰² In *Buckley*, the Seventh Circuit indicated that a literal construction of this clause infringes upon a judicial candidate's First Amendment rights because it restricts pledges or promises even when the state has no compelling interest in prohibiting that speech.²⁰³ Consequently, the "pledges or promises" clause of the 1990 Code remains unconstitutional under the rationale of the *Buckley* court because the drafters failed to narrow the provision to serve a compelling state interest.²⁰⁴

On the other hand, the Committee's rejection of the ban on discussion of disputed legal or political issues in favor of a rule that candidates shall not make commitments with respect to cases, controversies, or issues likely to come before them²⁰⁵ should pass muster under *Buckley*.²⁰⁶ Because the Canon 7 prohibition encompassed such a wide range of topics, the *Buckley* court declared that the provision violated a judicial candidate's First Amendment rights.²⁰⁷ This portion of the 1990 Code represents one of the major changes to the 1972 Model Code and addresses many of the Seventh Circuit's doubts about the constitutionality

On the other hand, the restriction on promises of conduct in office is not quite so stringent as its language implies. Read literally, the rule prohibits any promise other than the "faithful and impartial performance of the duties of the office." A candidate in Alabama reasonably asked, "*Is nothing else permissible?*" If so, please give examples of what a judicial candidate can say at political rallies." The advisory commission was clear that campaign speeches were not limited to a simple recitation of the code-blessed promise, but refused to give concrete examples of what more is permitted.

Id. (footnotes omitted). But see *In re Baker*, 542 P.2d 701, 705 (Kan. 1975) (holding that various promises made by judicial candidate concerning quality and quantity of work in district court all related to faithful and impartial performance of judicial office).

202. *Buckley*, 997 F.2d at 228.

203. See *id.* (explaining that only safe response to Canon 7 is silence).

204. See *id.* at 228-29 (describing how "pledges or promises" clause violates First Amendment).

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

206. See *Buckley v Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 230 (7th Cir. 1993) (stating that court would not, in effect, rewrite Canon 7 to limit it to Canon 5's scope).

207. See *id.* (describing Canon 7's application to candidates' discussions of broad number of topics).

of the 1972 version of Canon 7B(1)(c).²⁰⁸ The 1990 Code states more accurately the ultimate goal of the ethical restriction on certain campaign speech: to prevent judges from committing themselves on issues likely to come before their courts.²⁰⁹ The *Buckley* court reasoned that Canon 7 failed to achieve a compelling state interest in instances in which the rule prevented judges from commenting on disputed political issues even though those comments did not place in doubt the judges' abilities to decide issues impartially.²¹⁰ Thus, the new provision should be facially constitutional under *Buckley* because the ABA narrowly tailored the 1990 rule to serve a compelling state interest.²¹¹

Although neither the *Buckley* court nor the *Stretton* court addressed the constitutionality of the third clause of subsection B(1)(c), the Washington Supreme Court in *In re Kaiser* stated that a judicial candidate could not constitutionally be disciplined for making statements that the candidate was unaware were false.²¹² Therefore, changing the phrase "misrepresent his identity, qualifications, present position, or other fact" to "knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent" should insulate this section from constitutional attack.²¹³ Moreover, this change improves upon the fairness of Canon 7 because it prevents a disciplinary board from disciplining a judicial candidate for misrepresentations that the candidate mistakenly made.²¹⁴

208. See MILORD, *supra* note 19, at 50-51 (providing reasoning behind changes made to 1972 Model Code's Canon 7 in 1990 Model Code's Canon 5).

209. See Cafferata, *supra* note 182, at 1671 (explaining that first goal of Canon 5 is to maintain impartiality and integrity of judges).

210. See *Buckley*, 997 F.2d at 228 (stating that Canon 7 reaches far beyond speech that would compromise or appear to compromise impartiality of candidate).

211. See *id.* at 231 (providing that state may regulate judicial candidates' speech to ensure impartial justice under law, but process must remain subject to First Amendment guarantee of freedom of speech).

212. See *In re Kaiser*, 759 P.2d 392, 398-99 (Wash. 1988) (en banc) (holding that Commission could not constitutionally punish candidate for statements that candidate reasonably thought were true).

213. See *id.* (discussing constitutional protection of candidate's false statements).

214. See MILORD, *supra* note 19, at 50-51 (stating that Committee thought insertion of knowledge criterion was appropriate to indicate that unintentional misrepresentations would not constitute misconduct).

VIII. Conclusion

While the *Buckley* and *Stretton* decisions represent a split in the federal appellate courts over the constitutionality of Canon 7, the ABA's adoption of Canon 5 in 1990 may usher in a new series of court challenges to the constitutionality of this rule.²¹⁵ Although the drafters of Canon 5 sought to remedy the constitutional problems of Canon 7, Canon 5 does not address all of the concerns of the *Buckley* court.²¹⁶ Therefore, the drafters should further revise the "pledges or promises" clause of Canon 5 so that it will be narrowly tailored to further a compelling state interest.²¹⁷ States wishing to insulate Canon 5 from a successful *Buckley* attack should exclude the "pledges or promises" clause.²¹⁸ A constitutional Canon 5 would read:

A candidate for judicial office shall not (i) make statements that commit or appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court; or (ii) knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent.²¹⁹

Passing this limited version of Canon 5 should not detract from states' abilities to discipline candidates who make improper promises because the state could still discipline those candidates under the prohibition against candidates' committing themselves on issues likely to come before them for resolution.²²⁰ Moreover, this proposed Canon 5 vindicates judicial

215. See *supra* notes 181-99 and accompanying text (discussing adoption of 1990 Model Code's Canon 5).

216. See *supra* notes 200-14 and accompanying text (evaluating constitutionality of Canon 5 under rationale of *Buckley*).

217. See *supra* notes 102-17 and accompanying text (explaining *Buckley* court's criticism of "pledges or promises" clause).

218. See *supra* notes 200-04 and accompanying text (questioning constitutionality of "pledges or promises" clause).

219. MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d) (amended 1990) (omitting subsection (i)).

220. See *supra* notes 205-11 and accompanying text (discussing how Canon 5's prohibiting candidates from committing themselves on issues furthers purpose of restriction).

candidates' First Amendment rights, the exercise of which ensure that voters are able to make informed choices in judicial elections.²²¹

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221. See Cafferata, *supra* note 182, at 1659 (discussing voters obtaining relevant information). Cafferata states:

If Canon 5 is to succeed in its goal to recognize the reality that judges must be elected, it should provide candidates with a means to get relevant information to voters. By allowing candidates to talk about some of the political issues, Canon 5 increases the likelihood that voters will retain information in judicial elections in two ways. First it allows judges to engage in discourse appropriate for a campaign—a discussion of the issues. Voters will assimilate information about judges if it conforms with their maps or expectations about campaigns. Second, the canon will encourage judges to discuss issues that other candidates face. If judges discuss contemporary political issues that nonjudicial candidates are already discussing, this too will facilitate voter retention of information about judicial candidates.

Id. (footnotes omitted).



J. Timothy Philipps

