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Jacob McCrea

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The First Amendment Allows a Candidate For Judicial Election to Announce His or Her Views on Disputed Legal or Political Issues: *Republican Party of Minnesota v. White*

**CONSTITUTIONAL LAW - FIRST AMENDMENT - FREEDOM OF SPEECH - ELECTIONS** - The Supreme Court of the United States held that a statute prohibiting a candidate for judicial office from announcing his or her views on disputed legal or political issues violated the candidate's First Amendment right to freedom of speech.


The Minnesota State Constitution requires that all state judges be selected by popular election. In 1974, the Minnesota Supreme Court adopted “a legal restriction which states that a ‘candidate for a judicial office, including an incumbent judge,’ shall not ‘announce his or her views on disputed legal or political issues.’” The restriction, known as the “announce clause,” was modeled upon Canon 7(B) of the American Bar Association’s 1972 Model Code of Judicial Conduct. The clause applied to lawyers running for judicial office and incumbent judges running for re-election. Lawyers who violated the clause were subject to probation, suspension, and disbarment, while incumbent judges who violated the clause could...
be punished by censure, removal from office, civil penalties, and suspension without pay.  

Petitioner, Gregory Wersal, campaigned for associate justice of the Minnesota Supreme Court in 1996. During his campaign, Wersal distributed literature critical of the Minnesota Supreme Court's past decisions on crime, welfare, and abortion. A complaint challenging the legality of Wersal's campaign literature was filed with the Office of Lawyers Professional Responsibility. Although the complaint was dismissed by the Lawyers Board, Wersal withdrew from the 1996 election due to fears that further complaints would affect his ability to practice law. When Wersal ran for associate justice of the Minnesota Supreme Court again in 1998, he asked the Lawyers Board for an advisory opinion regarding whether the announce clause would be enforced. The Lawyers Board replied that although the clause's constitutionality was doubtful, an advisory opinion could not be given without reviewing a list of his intended announcements.

Wersal promptly filed an action in the United States District Court for the District of Minnesota which sought, inter alia, a declaration of the announce clause's unconstitutionality and an injunction barring its enforcement on the grounds that it violated his First Amendment right to freedom of speech.

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7. Id.
8. Id. "[T]he Office of Lawyers Professional Responsibility [is] the agency which, under the direction of the Minnesota Lawyers Professional Responsibility Board, investigates and prosecutes ethical violations of lawyer candidates for judicial office." Id. Justice Scalia, following the approach taken by the Eighth Circuit in Republican Party of Minnesota v. Kelly, 247 F.3d 854 (8th Cir. 2001), rev'd sub nom. Republican Party of Minnesota v. White, 122 S. Ct. 2528 (2002), collectively referred to the two entities as the "Lawyers Board." Id. at 2531 n.1.
9. White, 122 S. Ct. at 2531. In dismissing the complaint, the Lawyers Board expressed doubts about the clause's constitutionality. Id.
10. Id. at 2531-32.
11. Id. at 2532. Wersal subsequently submitted a list of his intended announcements to the Lawyers Board, which refused to issue an advisory opinion because Wersal had also filed a lawsuit challenging the constitutionality of portions of the Minnesota Code of Judicial Conduct. Id. at 2532 n.2.
12. Id. Wersal also argued that his constitutional rights were infringed by various other provisions of the Minnesota Code of Judicial Conduct. Republican Party of Minnesota v. Kelly, 63 F. Supp. 2d 967, 974 (D. Minn. 1999). The district court ruled that all of the challenged provisions were constitutional. Kelly, 63 F. Supp. 2d at 974. The First Amendment states: "Congress shall make no law respecting an establishment of religion, or
The district court began its analysis of the announce clause by rejecting the defendants' argument that no case or controversy existed because the Lawyers Board and the Office of Professional Responsibility had not enforced the clause and would not do so absent a finding of constitutionality. The district court agreed with the defendants' argument that the announce clause advanced a compelling state interest in maintaining apparent and actual judicial independence and impartiality.

The district court next considered whether the announce clause was narrowly tailored to achieve that state interest. The district court found that the clause's constitutionality could be preserved by interpreting it to only prohibit discussion of a candidate's predisposition toward issues likely to come before the court.

The district court concluded that the announce clause, as interpreted, served a compelling state interest in maintaining the apparent and actual independence of the judiciary without unnecessarily limiting a candidate's freedom of speech. The district court granted summary judgment in favor of the defendants.

Wersal appealed the judgment to the United States Court of Appeals for the Eighth Circuit, which affirmed the district court. The court of appeals endorsed the district court's narrowed interpretation of the scope of the announce clause, and it further interpreted the clause to allow a candidate to discuss case law, as well as his or her own judicial philosophy. The Supreme Court granted certiorari to determine whether the announce clause vio-

prohibiting the free exercise thereof; or abridging the freedom of speech..." U.S. CONST. amend. I.

13. Republican Party of Minnesota v. Kelly, 63 F. Supp. 2d 967, 986 (D. Minn. 1999). The court stated, "[n]onforcement will not be an impairment to finding justiciability where the record does not show that the statute or rule at issue has been commonly and notoriously violated in the past." Id. at 983, citing San Francisco County Democratic Central Committee v. Eu, 826 F.2d 814, 822 (9th Cir. 1987), aff'd, 489 U.S. 214 (1989).


15. Id. at 984-86.

16. Id.

17. Id. at 986.

18. Id. Wersal filed the action against the Chairperson of the Minnesota Board of Judicial Standards, the Chair of the Minnesota Lawyers Professional Responsibility Board, and the Director of the Minnesota Office of Lawyers Professional Responsibility. Id. at 970.

19. White, 122 S. Ct. at 2533; see also Republican Party of Minnesota v. Kelly, 247 F.3d 854 (8th Cir. 2001).


21. Certiorari is "[a] writ issued by an appellate court, at its discretion, directing a lower court to deliver the record in the case for review. The U.S. Supreme Court uses certiorari to review most of the cases that it decides to hear." BLACK'S LAW DICTIONARY 179 (7th ed. 2000). See cert. granted, 534 U.S. 1054 (2001).
lated a judicial candidate's right to freedom of speech under the First Amendment. 22

Justice Scalia, writing for the majority, 23 began his analysis by stating that the announce clause's constitutionality could not be decided without determining its meaning. 24 He noted that announcing one's views encompassed far more than merely promising to decide an issue a certain way.25 Justice Scalia also pointed out that a separate clause in Minnesota's Judicial Code, not at issue in the case, "prohibits judicial candidates from making 'pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office." 26 The Court reasoned that the announce clause, viewed in light of the "pledges and promises" clause, prohibited a judicial candidate from stating his current position on an issue without promising to maintain that position after election. 27

Justice Scalia next reviewed the limitations placed on the scope of the announce clause by the Judicial Board, the district court, the court of appeals, and the Minnesota Supreme Court, and gave examples of campaign statements by Wersal that ostensibly concerned disputed legal or political issues, yet were permitted under the present interpretation of the announce clause. 28 The Court found that these limitations upon the announce clause's meaning did not present a complete picture of what speech was and was not prohibited. 29 Justice Scalia was influenced by a statement made by respondents at oral argument that a candidate may not criticize past judicial decisions if he also states that he is not bound by stare decisis. 30 He also found that limiting the clause to "issues
likely to come before the court" was hardly a limitation in light of the broad range of issues upon which a court might decide.\textsuperscript{31} The Court, noting that the announce clause had been interpreted to allow general discussions of judicial philosophy and case law, observed that allowing such discussions by judicial candidates was of scant value to the electorate.\textsuperscript{32} Justice Scalia concluded that the announce clause restricted a judicial candidate's ability to state "his views on any specific nonfanciful legal question within the province of the court for which he is running, except in the context of discussing past decisions - and in the latter context as well, if he expresses the view that he is not bound by \textit{stare decisis}.\textsuperscript{33}

The Court began its analysis of whether the announce clause, as interpreted, violated the First Amendment by finding that it was a content-based speech restriction that burdened speech regarding the qualifications of candidates for public office.\textsuperscript{34} Because the clause was found to be a content-based restriction, the Court analyzed its constitutionality under a strict scrutiny standard.\textsuperscript{35} The Court noted that the restriction would withstand strict scrutiny only if it were narrowly tailored to serve a compelling state interest.\textsuperscript{36} The respondents asserted that Minnesota had a compelling interest in preserving the actual and apparent impartiality of the state judiciary.\textsuperscript{37} Justice Scalia stated that a clear definition of "impartiality" was necessary before determining whether Minnesota had a compelling interest in maintaining judicial impartial-

\textsuperscript{31} \textit{White}, 122 S. Ct. at 2533.

\textsuperscript{32} \textit{White}, 122 S. Ct. at 2533. Justice Scalia quoted \textit{Buckley v. Illinois Judicial Inquiry Board}, in which the U.S. Court of Appeals for the Seventh Circuit ruled that language identical to the announce clause violated a judicial candidate's First Amendment right to freedom of speech. \textit{Buckley v. Illinois Judicial Inquiry Board}, 997 F.2d 224, 231 (7th Cir. 1993). Judge Posner stated that "[t]here is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction." \textit{Buckley}, 997 F.2d at 229.

\textsuperscript{33} \textit{White}, 122 S. Ct. at 2533-34.

\textsuperscript{34} \textit{Id.} at 2534.

\textsuperscript{35} \textit{Id.} A content-based speech restriction, as opposed to a content-neutral speech restriction, burdens speech based upon the message that it conveys. \textit{See, e.g., Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.}, 502 U.S. 105 (1991) (finding a statute requiring criminals to compensate victims from the proceeds of their works describing their crimes to be an unconstitutional content-based speech restriction).

\textsuperscript{36} \textit{White}, 122 S. Ct. at 2534.

\textsuperscript{37} \textit{Id.} at 2535. Respondents argued that an impartial judiciary serves the compelling state interest in protecting litigants' due process rights, while the appearance of an impartial judiciary serves the compelling state interest in maintaining public confidence in the judiciary. \textit{Id.}
ity, and whether the clause was narrowly tailored to achieve judicial impartiality.\textsuperscript{38}

The Court analyzed Minnesota's interest in maintaining judicial impartiality by considering three possible meanings of "impartiality."\textsuperscript{39} The majority first defined impartiality as a lack of bias for or against parties to a proceeding.\textsuperscript{40} Justice Scalia concluded that the announce clause was barely, rather than narrowly, tailored to achieve this form of judicial impartiality because it restricted speech in terms of issues, rather than for or against parties.\textsuperscript{41}

The Court next defined impartiality as lacking a preconception for or against a particular legal view.\textsuperscript{42} The majority asserted that impartiality in this sense would entail guaranteeing litigants an equal opportunity to persuade a court of the merits of their case.\textsuperscript{43} Justice Scalia conceded that the announce clause may have advanced this interest, but he rejected the idea that this form of impartiality was a compelling state interest because "[a] judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice."\textsuperscript{44}

Justice Scalia considered a third possible meaning of impartiality: open-mindedness, which envisions judges who are open to persuasion and are willing to consider legal views inconsistent with their preconceptions.\textsuperscript{45} The respondents argued that Minnesota had a compelling state interest in maintaining a judiciary that is, or appears to be, open-minded so that judges would not feel obligated to decide cases consistently with their campaign statements.\textsuperscript{46} The Court dismissed this argument on the grounds that judges and aspiring judges make far more commitments to disputed legal issues outside the context of a campaign than while campaigning.\textsuperscript{47} In addition, the Court asserted that judges are more likely to feel constrained by their previous decisions than by their campaign statements.\textsuperscript{48}

\begin{thebibliography}{48}
\bibitem{38} Id.
\bibitem{39} Id. at 2535-37.
\bibitem{40} Id. at 2535.
\bibitem{41} White, 122 S. Ct. at 2535.
\bibitem{42} Id. at 2536.
\bibitem{43} Id.
\bibitem{44} Id.
\bibitem{45} Id. at 2536-37.
\bibitem{46} White, 122 S. Ct. at 2536-37.
\bibitem{47} Id. at 2537.
\bibitem{48} Id.
\end{thebibliography}
Judge Scalia summarized the Court's view of the announce clause by asserting that it was "woefully underinclusive" with respect to maintaining impartiality because a candidate could make statements prohibited by the clause before entering a judicial race, and after being elected, but not while campaigning. The Court found that with regard to advancing Minnesota's interest in open-mindedness, the announce clause was so poorly tailored to advancing that interest that the state's argument could not be taken seriously.

Justice Scalia concluded by observing that abridging the freedom of speech during an election was completely at odds with First Amendment jurisprudence. The Court held that the Minnesota announce clause violated the First Amendment and reversed the district court's grant of summary judgment.

Justice O'Connor authored a concurring opinion in which she expressed her concern that irrespective of judicial candidates' campaign statements, judicial elections inherently undermined an actual and apparently impartial judiciary. She argued that elected judges were likely to perceive that they have a personal stake in the disposition of publicized cases because a dissatisfied electorate could harm their chances of re-election. Justice O'Connor further contended that, even if judges are able to ignore the consequences of unpopular decisions, public confidence in an impartial judiciary could still be harmed by the perception that judges did not act impartially.

She concluded by asserting that because Minnesota had continued to use contested popular elections, rather than an appointment or appointment and retention system for selecting judges, it had as-

49. Id.
50. Id.
51. White, 122 S. Ct. at 2538.
52. Id. at 2542.
53. Id. (O'Connor, J., concurring).
54. Id. (O'Connor, J., concurring).
55. Id. at 2542 (O'Connor, J., concurring).
56. White, 122 S. Ct. at 2542 (O'Connor, J., concurring). Justice O'Connor discussed the high costs of judicial campaigns and asserted that judicial candidates' reliance upon donations may make judges feel indebted to donors. Id. She argued that even if judges do not act partially toward campaign contributors, public confidence in the judiciary may be undermined by the mere possibility of judges ruling in favor of contributors. Id.
sumed the risk of judicial bias arising out of popular judicial elections.\footnote{57} In a concurring opinion, Justice Kennedy agreed with the majority that the announce clause failed a strict scrutiny analysis.\footnote{58} However, Justice Kennedy reiterated his previously-expressed view that content-based prohibitions that are beyond traditional exceptions to the freedom of speech should be held unconstitutional regardless of whether the restriction has been narrowly tailored to serve a compelling state interest.\footnote{59} Justice Kennedy stated that because candidates’ political speech is at the core of First Amendment protections, the government had no power to impose direct content-based restrictions.\footnote{60} However, Justice Kennedy cautioned that the Court’s opinion should not be interpreted to diminish the importance of the state’s interest in maintaining judicial integrity.\footnote{61} Justice Kennedy also expressed his belief that explicit codes of judicial conduct were essential to guiding judges toward achieving judicial integrity.\footnote{62} He pointed out what he perceived to be the inconsistency of Minnesota’s employment of judicial elections and the abridgement of speech that it claimed was necessary to make the democratic process work as intended.\footnote{63} Justice Kennedy also asserted that speech which demonstrates a candidate’s flawed credentials is best countered by democracy and free speech.\footnote{64} He concluded by noting that, although Minnesota has an undoubted interest in maintaining judicial excellence, the regulation was an

\footnotesize{57. Id. at 2544 (O’Connor, J., concurring).
58. Id. (Kennedy, J., concurring).
59. Id. (Kennedy, J., concurring). Justice Kennedy stated:
Here, a law is directed to speech alone where the speech in question is not obscene, not defamatory, not words tantamount to an act otherwise criminal, not an impairment of some other constitutional right, not an incitement to lawless action, and not calculated or likely to bring about imminent harm the State has the substantive power to prevent. No further inquiry is necessary to reject the State’s argument that the statute should be upheld.
60. White, 122 S. Ct. at 2544 (Kennedy, J., concurring).
61. Id. (Kennedy, J., concurring).
62. Id. at 2545 (Kennedy, J., concurring).
63. Id. (Kennedy, J., concurring).
64. Id. (Kennedy, J., concurring). Justice Kennedy stated, “[t]he State cannot opt for an elected judiciary and then assert that its democracy, in order to work as desired, compels the abridgment of speech.” Id. (Kennedy, J., concurring). Justice Kennedy added, “if Minnesota believes that certain sorts of candidate speech disclose flaws in the candidate’s credentials, democracy and free speech are their own correctives.” Id. (Kennedy, J., concurring).}
impermissible content-based restriction on a judicial candidate's campaign speech.\textsuperscript{65}

Justice Stevens authored a dissenting opinion in which he asserted that the majority erred in blurring the fundamental differences between judicial campaigns and campaigns for executive and legislative offices.\textsuperscript{66} He found that the majority had based its opinion on "two seriously flawed premises," namely an underestimation of the need for judicial impartiality and independence, and the incorrect assumption that judicial candidates' freedom of speech should mirror that of candidates for legislative and executive offices.\textsuperscript{67} Justice Stevens found the fact that judges were elected insufficient to allow judicial candidates to disregard the time-honored attributes of judicial office.\textsuperscript{68} He asserted that judicial candidates demonstrate that they are unfit to hold judicial office when they attempt to gain popularity by indicating how they would decide cases if elected.\textsuperscript{69} Justice Stevens stated that candidates who announce their views while campaigning inform the voters that they will decide cases according to their own beliefs, and that even if judges disregard campaign statements after being elected, Minnesota still has a compelling interest in prohibiting such statements.\textsuperscript{70} He also disagreed with the majority's finding that the announce clause did not serve Minnesota's interest in maintaining judicial impartiality, arguing that the clause was narrowly tailored to protect against party bias.\textsuperscript{71} Justice Stevens concluded by stating that the majority's premise that judicial elections should be governed by the same criteria as legislative and executive elections was "profoundly misguided."\textsuperscript{72}

Justice Ginsburg filed a dissenting opinion in which she argued that the announce clause was a constitutionally permissible accommodation in an area of the law marked by complex and com-

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  \item \textsuperscript{65} White, 122 S. Ct. at 2545 (Kennedy, J., concurring).
  \item \textsuperscript{66} Id. (Stevens, J., dissenting). Justice Stevens was joined in his dissent by Justices Souter, Ginsburg, and Breyer. Id. at 2546 (Stevens, J., dissenting).
  \item \textsuperscript{67} Id. (Stevens, J., dissenting).
  \item \textsuperscript{68} Id. at 2546-47 (Stevens, J., dissenting).
  \item \textsuperscript{69} Id. at 2547 (Stevens, J., dissenting).
  \item \textsuperscript{70} White, 122 S. Ct. at 2548 (Stevens, J., dissenting).
  \item \textsuperscript{71} Id. (Stevens, J., dissenting). For example, Justice Stevens argued that the State's interest in an impartial judiciary would be served by prohibiting a candidate from stressing an unbroken record of affirming rape convictions, which implies a bias against one party (the defendant) and in favor of another (the prosecutor). Id. (Stevens, J., dissenting).
  \item \textsuperscript{72} Id. at 2549 (Stevens, J., dissenting).
\end{itemize}
peting concerns. She began by noting that a judge's role differs fundamentally from that of an executive or legislative official in that the former represents the law, while the latter acts on behalf of a constituency. Like Justice Stevens, Justice Ginsburg determined that the majority erred in applying the principles of executive and legislative elections to judicial elections, and she argued that, in choosing to elect its judges, Minnesota was not precluded from creating election restrictions specifically tailored to electing judges. She faulted the Court for relying on cases involving executive and legislative elections, stating that such reliance was "manifestly out of place."

Justice Ginsburg found that the majority had erred by misrepresenting the Eighth Circuit's interpretation of the announce clause, which was subsequently adopted by the Minnesota Supreme Court. She stated that the lower courts' constructions of the clause narrowed its scope to prohibit only those statements that commit a judicial candidate to one position on an issue. Justice Ginsburg also faulted the majority for finding that the clause prohibited criticism of past judicial decisions if the criticism was coupled with a candidate's statement that he or she was not bound by stare decisis. Justice Ginsburg concluded by maintaining that the Court's erroneous interpretation of the announce clause exaggerated its actual prohibitions, and she asserted that campaigns conducted under the announce clause were more vigorous than the Court acknowledged.

73. Id. at 2559 (Ginsburg, J., dissenting). Justice Ginsburg was joined in her dissent by Justices Stevens, Souter, and Breyer. Id. (Ginsburg, J., dissenting).
74. Id. at 2550 (Ginsburg, J., dissenting).
75. White, 122 S. Ct. at 2551 (Ginsburg, J., dissenting).
77. White, 122 S. Ct. at 2552-53 (Ginsburg, J., dissenting). Justice Ginsburg cited In re Code of Judicial Conduct, 639 N.W.2d 55 (Minn. 2002), in which the Minnesota Supreme Court adopted the Eighth Circuit's construction. Id. (Ginsburg, J., dissenting). She also cited Hortonville Joint School District No. 1 v. Hortonville Education Association, 426 U.S. 482, 488 (1976), for the proposition that the United States Supreme Court must accept the interpretation of state law by the state's highest court. Id. at 2553 (Ginsburg, J., dissenting).
78. White, 122 S. Ct. at 2553 (Ginsburg, J., dissenting).
79. Id. (Ginsburg, J., dissenting).
80. Id. at 2553-59 (Ginsburg, J., dissenting).
The selection of judges by popular elections was rare at the time of the nation's founding. The first twenty-nine states to enter the Union selected the majority of their judges through processes that mirrored those of the federal system. A movement toward a popularly-elected judiciary began during the presidency of Andrew Jackson and was driven in part by his philosophy of favoring the election of all persons holding public office. States admitted to the Union during and after Jackson's presidency provided for elected judiciaries in their constitutions, and many previously-admitted states have amended their constitutions to allow the election of some or all of their judges. Presently, thirty-nine states select some or all of their judges through some type of election.

Restrictions on the speech of judicial candidates were not known to have existed during the 19th century. Elected judiciaries came to be viewed as plagued by corruption and incompetence in the early 20th century, which ostensibly led to the drafting and adoption of codes of judicial conduct.

The United States Supreme Court's jurisprudence addressing the freedom of speech during elections began with *Buckley v. Valeo*. In *Buckley*, the Supreme Court was asked to decide the constitutionality of various provisions of the 1974 amendments to the Federal Election Campaign Act of 1971. The petitioners alleged, *inter alia*, that provisions limiting the amount of money that a candidate could spend during a campaign violated the right to freedom of speech by directly restricting political communication. The petitioners reasoned that because modern political communication through mass media required the expenditure of money, limiting the amount of money that a candidate could

82. *Id.* at 716.
83. *Id.* at 716. Other factors that are said to have driven the movement toward an elected judiciary include criticism of *Marbury v. Madison*, 5 U.S. 137 (1803), judgments in favor of creditors, judicial corruption and hostility toward English common law. *Id.* at 717.
86. *Id.* at 2540.
90. *Id.* at 11.
spend effectively limited the amount of political speech in which the candidate could engage. The Supreme Court agreed, holding that the expenditure restriction unconstitutionally affected a candidate’s expression by restricting the number of persons reached, the number of topics discussed, and the depth of the discussion.

In *Brown v. Hartlage*, the Supreme Court considered whether the First Amendment prohibited the State of Kentucky from nullifying a successful election campaign because the candidate had promised to reduce his salary below that “fixed by law” if elected. During a campaign to become Jefferson County Commissioners, Carl Brown and Bill Creech asserted that Earl Hartlage, one of three incumbent commissioners, had engaged in fiscal abuse by attempting to double the commissioners’ salaries, which Brown and Creech claimed were already unjustifiably high. Creech, speaking on behalf of himself and Brown, pledged to lower their salaries immediately upon election. Brown and Creech were informed that promising to do so may have violated the Kentucky Corrupt Practices Act; the two immediately rescinded their pledge. Brown defeated Hartlage, while Creech lost the election.

Hartlage filed an action in a Kentucky state court to have the election voided. The trial court, finding a violation by Brown,

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91. *Id.*
92. *Id.* at 19. The Court noted that “[b]eing free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline.” *Id.* at 19 n.18.
95. *Id.* at 48. Bill Creech publicly stated:
We abhor the commissioners’ outrageous salaries. And to prove the strength of our convictions, one of our first official acts as county commissioners will be to lower our salary to a more realistic level. We will lower our salaries, saving the taxpayers $36,000 during our first term of office, by $3,000 each year.

*Id.* at 48.
96. *Id.* at 48-49. The challenged statute stated:
No candidate for nomination or election to any state, county, city or district office shall expend, pay, promise, loan or become pecuniarily liable in any way for money or other thing of value, either directly or indirectly, to any person in consideration of the vote or financial or moral support of that person. No such candidate shall promise, agree or make a contact with any person to vote for or support any particular individual, thing or measure, in consideration for the vote or the financial or moral support of that person in any election, primary or nominating convention, and no person shall require that any candidate make such a promise, agreement or contract.

KY. REV. STAT. ANN. § 121.055 (1982).
98. *Id.* Kentucky election law provided for the nullification of the election of one who violated section 121.055. *Id.* at 49. See KY. REV. STAT. ANN. § 120.015 (1982).
relied on the Kentucky Court of Appeals' decision in *Sparks v. Boggs*.\(^9\) *Sparks* held that candidates had violated the Kentucky Corrupt Practices Act by promising to serve at a yearly salary of $1, and promising to vote to give the remainder of their salaries to charity, where their salaries were "fixed by law."\(^{100}\) Notwithstanding the violation, the trial court declined to void Brown's election because it concluded that he had been legitimately elected in light of the retraction of the pledge and Creech's defeat.\(^{101}\)

The Kentucky Court of Appeals reversed, ordering a new election on the grounds that the retraction was legally insignificant, and that the trial court lacked the authority to balance the seriousness of the violation against the undermining of the electorate that would result from voiding the election.\(^{102}\) The United States Supreme Court granted certiorari after the Supreme Court of Kentucky denied review.\(^{103}\)

In an opinion by Justice Brennan, the Supreme Court held that the Kentucky Corrupt Practices Act, as applied by the Kentucky courts, violated the First Amendment.\(^{104}\) The Court began its analysis by acknowledging Kentucky's legitimate interest in maintaining the integrity of its electoral processes.\(^{105}\) Justice Brennan noted that when a state directly restricts a candidate's offer of ideas to voters, the First Amendment requires the restriction to be supported by a compelling state interest, and the restriction may not "unnecessarily circumscribe protected expression."\(^{106}\)

The Court found that the application of the statute to Brown's promise might be justified on three bases.\(^{107}\) First, Justice Brennan stated that, as a prohibition against buying votes, the statute did not violate the First Amendment.\(^{108}\) However, Justice Brennan found Brown's promise to reduce his salary if elected to be "very different in character from the corrupting agreements and solicitations historically recognized as unprotected by the First Amendment."\(^{109}\) The Court distinguished between an unconstitu-

\(^9\) 339 S.W.2d 480 (1960).
\(^{100}\) *Sparks*, 339 S.W.2d at 484.
\(^{101}\) *Brown*, 456 U.S. at 50.
\(^{102}\) Id. at 50-51.
\(^{103}\) Id. at 52.
\(^{104}\) Id. at 62.
\(^{105}\) Id. at 52.
\(^{106}\) *Brown*, 456 U.S. at 53-54.
\(^{107}\) Id. at 54.
\(^{108}\) Id. at 54-55.
\(^{109}\) Id. at 56-57.
tional promise to make private payments in exchange for votes and Brown's promise, which would benefit all taxpayers, not merely those who voted for him. Justice Brennan concluded that the First Amendment allowed a candidate to promise to confer some benefit on voters in their capacity as citizens, taxpayers, and members of the public.

The Court next addressed the argument that Brown's promise could be prohibited to avoid the possibility that the ability to hold office without pay would become an indispensable condition of candidacy. Justice Brennan conceded that Kentucky was legitimately concerned that wealthy persons of lesser ability might be chosen over better-qualified candidates with less money. He found, however, that Kentucky's attempt to further this interest by prohibiting Brown's promise violated the First Amendment. Specifically, the Court found that the application of the statute ran counter to the First Amendment's guarantee of the free exchange of ideas necessary to allow the people to choose between candidates for political office.

Finally, the Court addressed whether the application of the statute was narrowly tailored to serve Kentucky's interest in prohibiting factual misstatements in the context of an election. Justice Brennan found that the application of the statute to Brown's promise made him absolutely liable for factual misstatements while campaigning, and he concluded that the penalty for such misstatements did not afford ample "breathing space" to the free exchange of ideas guaranteed by the First Amendment. In its conclusion, the Court made it clear that the application of the statute, not the statute itself, had violated the First Amendment.

The first challenge to restrictions modeled upon the ABA's "announce clause" in federal court was Berger v. The Supreme Court of Ohio. In Berger, a candidate for a county judicial office sought a preliminary injunction barring enforcement of Canon 7B(1)(c) of

110. Id. at 58-59.
112. Id. at 59-60.
113. Id.
114. Id. at 60.
115. Id.
117. Id.
118. Id. at 62.
the Supreme Court of Ohio’s Code of Judicial Conduct. The candidate wished to discuss his views and make pledges and promises regarding how he would reform various court procedures if elected. The candidate argued that the canon violated his First Amendment rights by prohibiting criticism of judicial administrations and incumbents. He also asserted that the canon limited his campaign speech to stating that he would faithfully and impartially perform the duties of the office. Additionally, the candidate alleged that the canon’s uncertain scope rendered it unconstitutionally vague. Finally, he claimed that the canon deprived him of his Fourteenth Amendment right to equal protection of the law because it arbitrarily applied only to judicial candidates.

The district court denied the candidate’s motion for a preliminary injunction on the grounds that a substantial likelihood of success on the merits had not been shown. Judge Duncan rejected the argument that the canon prohibited criticism of judicial administrations and incumbents on the grounds that such criticism was not barred by the canon’s plain meaning. The court found that the purpose of the challenged “pledges and promises” clause of the canon was to prohibit appeals to special interests and prejudices. The court ruled that Berger’s intended pledges and promises were expressly permitted by the canon because they concerned the faithful performance of the duties of judicial office.

120. Berger, 598 F. Supp. at 71-72. Canon 7B(1)(c) states: 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. OHIO CODE OF JUDICIAL CONDUCT, Canon 7B(1)(c) (1984).
121. Berger, 598 F. Supp. at 72. For example, the candidate wished to publicly state that as a judge of the Division of Domestic Relations he would “first attempt to have the parties who appear before him mediate their disputes, without the presence of their attorneys, in order to remove some of the adversary affects (sic) of the divorce system upon the litigants.” Id.
122. Id.
123. Id.
124. Id. The candidate argued that the lack of clear standards with regard to what constituted “the faithful and impartial performance of the duties of the office” rendered the clause void for vagueness. Id. at 72.
125. Id.
126. Berger, 598 F. Supp. at 76.
127. Id. at 75.
128. Id.
129. Id.
The candidate’s arguments that the canon was unconstitutionally vague and violative of equal protection were rejected.\textsuperscript{130}

Judge Duncan opined that the canon was constitutional under a strict scrutiny standard.\textsuperscript{131} The court found that the state had compelling interests in protecting incumbent judges from false criticism and ensuring that candidates’ conduct preserved the actual and apparent integrity of incumbent judges and the bar.\textsuperscript{132} The court also noted the respect owed to “[t]he state’s interest in ensuring that judges be and appear to be neither antagonistic nor beholden to any interest, party, or person,” which it felt was advanced by the ‘announce’ and ‘pledges and promises’ clauses of the Canon.\textsuperscript{133} Judge Duncan denied the motion for a preliminary injunction,\textsuperscript{134} and the United States Court of Appeals for the Sixth Circuit affirmed.\textsuperscript{135}

In \textit{American Civil Liberties Union of Florida, Inc. v. The Florida Bar}, the United States District Court for the Northern District of Florida reached the opposite conclusion and granted a motion for a preliminary injunction barring enforcement of the “announce clause.”\textsuperscript{136} One of the plaintiffs was a candidate for a Citrus County, Florida judicial office who sought to criticize the incumbent judge and announce his views on disputed legal and political issues.\textsuperscript{137} He argued that his intended announcements would constitute discussion of disputed legal and political issues and would violate the prohibition.\textsuperscript{138} The defendants, the Florida Bar and the Florida Judiciary Committee, contended that because judges decide cases based on the facts and the law, rather than personal opinions, a candidate’s announcement of his or her views on disputed legal or political issues suggested that, if elected, the candidate’s decisions would be influenced by his or her personal opinions.\textsuperscript{139} The defendants claimed that this would diminish public confidence in the judiciary.\textsuperscript{140}

\textsuperscript{130} \textit{Id.} at 75-76.
\textsuperscript{131} \textit{Berger}, 598 F. Supp. at 75.
\textsuperscript{132} \textit{Id.}
\textsuperscript{133} \textit{Id.} at 75-76. (quoting \textit{Morial v. Judiciary Commission of La.}, 565 F.2d 295, 302 (5th Cir. 1977)).
\textsuperscript{134} \textit{Berger}, 598 F. Supp. at 76.
\textsuperscript{135} \textit{See} \textit{Berger v. The Supreme Court of Ohio}, 861 F.2d 719 (6th Cir. 1988).
\textsuperscript{136} \textit{744 F. Supp.} 1094, 1099 (N.D. Fla. 1990).
\textsuperscript{137} \textit{ACLU}, \textit{744 F. Supp.} at 1096.
\textsuperscript{138} \textit{Id.}
\textsuperscript{139} \textit{Id.} at 1097.
\textsuperscript{140} \textit{Id.}
The district court's opinion began by stating that, although the state may regulate the bar and the judiciary, regulations which burden speech based upon content carry a strong presumption of unconstitutionality and are appropriately analyzed under strict scrutiny. The court, however, recognized that judicial candidates need not be treated the same as candidates for other public offices, and noted that the pledges of conduct common in other campaigns were inappropriate in judicial campaigns.

The court maintained that, in the context of judicial elections, candidates had a right to make campaign speeches, and the public had a right to be informed about the candidates. The argument that Florida had a compelling interest in maintaining judicial integrity was accepted by the court, but the court rejected the argument that the announce clause was the most narrowly drawn means of advancing that interest. The court enjoined enforcement of the clause on the grounds that it unconstitutionally barred "announcements on almost every issue that might be of interest to the public and the candidates in a judicial race."

In Stretton v. Disciplinary Board of the Supreme Court of Pennsylvania, the United States Court of Appeals for the Third Circuit was asked to decide the constitutionality of the announce clause adopted by the Supreme Court of Pennsylvania. The plaintiff was a judicial candidate for the Court of Common Pleas of Chester County, Pennsylvania. He alleged that many topics that he wished to discuss during his campaign constituted "disputed legal or political issues," and that he had not discussed them to avoid violating the Pennsylvania Code of Judicial Conduct. The defendants maintained that discussion of the plaintiff's proposed topics was not prohibited by the Code.

141. Id.
142. ACLU, 744 F. Supp. at 1097 (citing Morial v. Judiciary Commission of La., 565 F.2d 295, 305 (5th Cir. 1977)).
143. Id.
144. Id. at 1098.
145. Id.
146. 944 F.2d 137, 138 (3d Cir. 1991).
147. Stretton, 944 F.2d at 139.
148. Id. The candidate wished to discuss, inter alia, the fact that all of the county's judges were Republicans, victims' rights, criminal sentencing, the application of "reasonable doubt," and the basic constitutional right to privacy. Id.
149. Id. at 140. The defendants were the Disciplinary Board of the Supreme Court of Pennsylvania, Robert H. Davis, Jr., and the Pennsylvania Judicial Inquiry and Review Board. Id. at 137.
The Third Circuit rejected the district court's finding that the announce clause was considerably overbroad and could not be narrowed. Judge Weis began by noting that strict scrutiny was the appropriate level of analysis in light of the clause's restriction upon political speech. Under strict scrutiny, the court of appeals found that Pennsylvania had a compelling interest in maintaining judicial integrity, and that Pennsylvania's interest in judicial integrity was served by the "announce clause."

The Third Circuit had to decide the scope of the clause in order to rule upon its constitutionality, and it concluded that the Supreme Court of Pennsylvania would narrow the clause to prohibit "a candidate only from announcing a position on an issue that may come before the court for resolution." Viewed in this light, the court of appeals upheld the clause on the grounds that it was narrowly tailored to serve Pennsylvania's interest in an impartial judiciary without unnecessarily prohibiting protected expression.

In Buckley v. Illinois Judicial Inquiry Board, the United States Court of Appeals for the Seventh Circuit ruled upon the constitutionality of Illinois Supreme Court Rule 67(B)(1)(c), which included the announce clause. While campaigning for a seat on the Illinois Supreme Court, the plaintiff, Robert Buckley, distributed campaign literature that touted his record of never having authored an opinion reversing a rape conviction. The Judicial Inquiry Board filed charges against Buckley with the Illinois Courts Commission. The Commission found that Buckley's campaign literature violated the rule, but decided not to sanction

150. Id.
151. Id. at 141-42.
152. Stretton, 944 F.2d at 142.
153. Id. at 143-44.
154. Id. at 144.
155. 997 F.2d 224, 225 (7th Cir. 1993). The challenged rule stated:
   [A] candidate, including an incumbent judge, for a judicial office filled by election or retention . . . 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 . . . 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. (quoting Ill. S. Ct. R. 67(B)(1)(c)).
156. Buckley, 997 F.2d at 226.
157. Id. The Judicial Inquiry Board enforces adherence to the rule by judges, while the Attorney Registration and Disciplinary Commission enforces adherence to the rule by attorneys. Id. at 225. Robert Buckley was an Illinois appellate court judge when he ran afoul of the rule. Id.
him. Buckley challenged the entire rule in federal district court on First Amendment grounds; the district judge dismissed the suit after narrowing the announce clause to cover only "statements on issues likely to come before the judge in a case."

The court of appeals began its analysis by pointing out that the case required resolution of a conflict between two time-honored principles: (1) candidates' freedom to discuss matters of interest to voters and (2) judges' duty to decide cases according to the law. Judge Posner recognized the difficulty of drafting a rule prohibiting judges from attracting votes by making commitments to decide cases a certain way, but found that the challenged rule attempted to prohibit such commitments "in the most comprehensive fashion imaginable." The court of appeals found that, while the rule's clauses effectively prohibited the intended statements, they prohibited far more than speech that merely cast doubt upon a candidate's impartiality.

Judge Posner found the district court's narrowing of the announce clause to prohibit only announcing one's views on issues likely to come before the court insufficient to preserve the clause's constitutionality. He reasoned that such a narrow interpretation was meaningless in light of the endless issues that might come before a court of general jurisdiction. The court of appeals emphasized that it was not empowered to effectively rewrite Rule 67(B)(1)(c) to avoid a finding of unconstitutionality.

Judge Posner concluded by pointing out that the ruling was at odds with the Third Circuit's holding in Stretton, which he distinguished by stating that the Stretton court had construed the announce clause to prohibit only those campaign statements that gave the impression that cases had been prejudged. The court further distinguished Stretton on the grounds that, unlike the in-

158. Id. at 226. Buckley lost the race for a seat on the Illinois Supreme Court. Id. at 225. Buckley was joined in challenging the rule by the Illinois Judges Association and Anthony L. Young. Id. at 226.
160. Buckley, 997 F.2d at 227.
161. Id. at 228. The court referred to the combined effect of the "announce" and "pledges and promises" clauses. Id.
162. Id.
163. Id. at 229.
164. Id.
165. Buckley, 977 F.2d at 230.
166. Stretton, 944 F.2d 137 (3d Cir. 1991).
167. Buckley, 997 F.2d at 230.
stant case, the Third Circuit's construction of the rule was less restrictive because it did not prohibit a candidate from commenting on his own record.\textsuperscript{168}

The United States Supreme Court's decision in \textit{Republican Party of Minnesota v. White} has clearly expanded the First Amendment rights of judicial candidates.\textsuperscript{169} In states which have enacted the announce clause, the decision narrows the degree of separation between judicial candidates' free speech rights and those of other candidates for public office by allowing judicial candidates to announce their views on disputed legal or political issues. To see how judicial campaigns will likely be conducted without the limitation imposed by the announce clause, one could examine the public statements and campaign literature of candidates in states which previously invalidated, or declined to enact, the announce clause.

The issues addressed by judicial candidates may broaden as judicial candidates utilize this new freedom, but it is unlikely that judicial candidates' campaign statements will mirror those of other candidates.\textsuperscript{170} Most judicial candidates are still subject to various campaign speech restrictions, and this narrow ruling clearly does not allow judicial candidates to make promissory campaign statements that rival those of their executive and legislative counterparts. With regard to whether the expanded range of permissible campaign statements under this ruling will affect judges' impartiality, only time will tell. Justice Scalia doesn't seem to think so, and he implicitly addressed this issue by noting that "one would be naive not to recognize that campaign promises are – by long democratic tradition – the least binding form of human commitment."\textsuperscript{171}

The expansion of First Amendment rights could be a double-edged sword for judicial candidates. While candidates will now be

\begin{itemize}
  \item \textsuperscript{168} \textit{Id.} The \textit{Buckley} court found the "announce" and the "pledges and promises" clauses to be unconstitutional. \textit{Id.} at 231. The different results in \textit{Stretton} and \textit{Buckley} apparently stem from the latter court's unwillingness to interpret the clause in a way that would preserve its constitutionality. \textit{See} \textit{Buckley}, 997 F.2d at 230. Judge Posner stated, "[i]t is not our proper business to patch up the rule – and it would be a patchwork job indeed, with the rule itself saying one thing and the judicial gloss on it another." \textit{Id.}
  \item \textsuperscript{169} \textit{122 S. Ct. 2528.}
  \item \textsuperscript{170} \textit{See} \textit{White}, \textit{122 S. Ct. at 2539}. Justice Scalia stated, "we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office." \textit{Id.} (responding to Justice Ginsburg's assertion that the majority opinion erroneously fails to distinguish between judicial candidates and candidates for executive and legislative offices).
  \item \textsuperscript{171} \textit{White}, \textit{122 S. Ct. at 2537}.
\end{itemize}
able to voice their opinions on more issues, nothing guarantees that doing so will better their chances of election. Voters are certainly intelligent enough to realize that impartiality is a desirable quality in a judge, and they may turn away from candidates whose behavior suggests that they have prejudged important legal issues. In addition, candidates who announce their views on “hot” legal issues risk having political groups actively opposing their candidacy based on their controversial views.

When Republican Party of Minnesota v. White is compared with the Supreme Court's prior rulings on election restrictions and content-based speech restrictions, the result is not surprising. The Supreme Court has consistently applied strict scrutiny to campaign restrictions and content-based speech restrictions, and such restrictions rarely meet the burden imposed. The strength of the Supreme Court's ruling turns upon whether one accepts its premise that judicial candidates, though different from executive and legislative candidates, are not sufficiently different to justify a broad, content-based restriction on their freedom of speech during an election. The Court's premise is sound. Arguably, the First Amendment rights of judicial candidates, and voters' interests in being informed about the persons for whom they vote, outweighed Minnesota's interest in preserving impartiality through such a broad, content-based speech restriction. It appears pointless to have an election in which the candidates are prohibited from distinguishing themselves based on their views. Moreover, it seems equally pointless to allow the public to elect judges while restricting information that voters may consider crucial to an informed decision.

The timing of the Court's ruling is commendable in the respect that it resolved some of the growing uncertainty that existed regarding judicial candidates' First Amendment rights. The constitutionality of the announce clause had been litigated in federal court for over fifteen years, and the inconsistency of lower court rulings had produced a situation in which genuine uncertainty

172. Id.

173. See, e.g., Burson v. Freeman, 504 U.S. 191 (1992) (applying strict scrutiny to uphold a Tennessee statute prohibiting solicitation of votes and display or distribution of campaign materials within 100 feet of an entrance to a polling place); Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214 (1989) (applying strict scrutiny to strike down a statute prohibiting, inter alia, political parties from endorsing or opposing candidates in primary elections); California Democratic Party v. Jones, 530 U.S. 567 (2000) (applying strict scrutiny to strike down a California proposition allowing voters in a primary to vote for any candidate regardless of the candidate's or the voter's party affiliation).
about judicial candidates’ First Amendment rights existed. Additionally, the lower courts’ strained attempts to narrow the scope of the announce clause to preserve its constitutionality had produced clauses that meant something fairly different from what the plain language suggested. Campaigning under laws that say one thing and mean something else is hardly conducive to candidates’ ability to fully express their ideas while remaining within the letter of the law, especially in light of the possible penalties for violating Minnesota’s announce clause. This is not a desirable state of the law, and rather than leave important First Amendment rights in a state of uncertainty, the Supreme Court wisely decided to rule upon the issue.

Republican Party of Minnesota v. White may mark the beginning of a line of cases in which the Supreme Court addresses the precise contours of judicial candidates’ First Amendment rights. Litigants seeking to attack the constitutionality of other prohibitions will surely be aided by the Court’s holding. In addition, judges who may rule on other judicial campaign restrictions have been provided with a strong precedent to follow when analyzing other restrictions.

Whether judicial candidates will find the outer boundaries of the Court’s ruling by making the promissory and highly politicized campaign statements that are common in executive and legislative campaigns remains to be seen. If judicial candidates abuse the limits of the Court’s holding by engaging in campaign conduct that truly debases judicial impartiality, states may decide to preserve judicial impartiality by either abandoning judicial elections or restructuring them to make judges less accountable to the electorate. Moreover, if judicial candidates wish to engage in the style

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174. White, 122 S. Ct. at 2531. Penalties included disbarment, removal from office, and suspension without pay. Id.
175. 122 S. Ct. 2528.
176. For example, in Weaver v. Bonner, decided on October 18, 2002, the United States Court of Appeals for the Eleventh Circuit, relying on Republican Party of Minnesota v. White, 122 S. Ct. 2528, held unconstitutional on First Amendment grounds two canons of the Georgia Code of Judicial Conduct. Weaver v. Bonner, 309 F.3d 1312 (11th Cir. 2002). The invalidated canons prohibited judicial candidates from negligently making false statements, making true statements that were considered to be misleading or deceptive, personally soliciting campaign contributions, and personally soliciting publicly stated support. Id. Interestingly, the opinion went beyond Republican Party of Minnesota v. White by holding that judicial candidates were entitled to the same First Amendment protections as legislative and executive candidates. Id.
177. See White, 122 S. Ct. at 2542-45 (O’Connor, J., concurring). Justice O’Connor discussed modified systems of judicial elections, and the “Missouri Plan” in particular, in which judges are appointed by an elected official and subsequently run unopposed in elec-
of campaigning and decision-making that characterizes executive and legislative offices, perhaps they should run for those offices.

Jacob McCrea