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David B. Bogard

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REPUBLICAN PARTY OF MINNESOTA v. WHITE: THE LIFTING OF JUDICIAL SPEECH RESTRAINT

David B. Bogard*

“What we have here is a failure to communicate.”¹

I. BACKGROUND

In 1996 Gregory F. Wersal, a lawyer licensed to practice in the State of Minnesota, decided to run for the position of Associate Justice of the Minnesota Supreme Court.² In his race against an incumbent, Mr. Wersal campaigned at numerous meetings of the Republican Party of Minnesota.³ As a result, an ethical complaint was filed against Wersal with the Minnesota Office of Lawyer’s Professional Responsibility alleging, among other things, that Wersal violated Canon 5(A)(3) of the Minnesota Canons of Judicial Conduct (“Announce Clause”), as it is applied to lawyers who are judicial candidates through Rule 8.2(b) of the Minnesota Rules of Professional Conduct.⁴ The Announce Clause states, in part, that “a candidate for judicial office . . . shall not . . . announce his or her view on disputed legal issues.”⁵ Wersal’s wife and brother announced that Wersal was in favor of “a strict construction of the Constitution.”⁶

In addition, candidate Wersal had distributed campaign literature critical of three decisions of the Minnesota Supreme Court.⁷ The Court in 1994 ruled that an in-custody confession must be tape-recorded or it would not be

* Judge Bogard is an Arkansas native. He graduated from Southern Methodist University in Dallas, Texas and received his L.L.B. from the University of Arkansas in Fayetteville in 1968. Governor Bill Clinton appointed Judge Bogard as Chancery Judge for the Third Division in 1981. In 1983, Judge Bogard was elected as Circuit Judge for the Sixth Division Circuit Court, where he served until he retired in January of 2003. Judge Bogard has authored numerous legal seminars, including “The Trial of Fatty Arbuckle,” which won national acclaim. He also produced the video “The Jury Trial as Seen Through the Eyes of Hollywood” for the William R. Overton Inn of Court, in which Judge Bogard serves as a charter member. Judge Bogard was named “Outstanding Circuit Judge” for three of the last four years of his judgeship.

1. COOL HAND LUKE (Warner Bros. 1967) (quoting Strother Martin, “Captain,” Road Prison 36).

2. See *Republican Party of Minn. v. Kelly*, 63 F. Supp. 2d 967, 970 (D. Minn. 1999) (indicating Wersal’s 1996 judicial candidacy).

3. *Id.* at 972.

4. *Id.*

5. *Id.* at 971–72.

6. *Id.* at 972.

7. *Republican Party of Minn. v. White*, 536 U.S. 765, 771 (2002).

allowed into evidence.⁸ Wersal stated, "Should we conclude that because the Supreme Court does not trust police, it allows confessed criminals to go free?"⁹ In 1993 the Court struck down, as a violation of the constitutional right to travel, a state law that limited welfare benefits to people moving into the state.¹⁰ "The Court should have deferred to the Legislature. It's the Legislature which should set our spending policies."¹¹ The Court, in 1994, ruled that a woman's right to privacy under the Minnesota Constitution meant the state must use welfare funds to pay for abortion.¹² Wersal opined, "[T]he idea that the State must pay for individuals to exercise their rights is almost unprecedented."¹³ Justice Ginsburg, in her dissent, noted Wersal's comment that the Court "'abandons all vestige of neutrality' in its pro-abortion stance."¹⁴

The complaint was dismissed by the Lawyer's Board, finding that his materials did not violate Canon 5 even as it found that the provision was, perhaps, constitutionally suspect.¹⁵ Nevertheless, Wersal withdrew his candidacy fearing further complaints would jeopardize his law practice.¹⁶

In 1998 Wersal once again announced his candidacy for Associate Justice of the Minnesota Supreme Court.¹⁷ Early on, he sought an advisory opinion from The Office of Lawyers Professional Responsibility as to whether or not it would seek to enforce the announce clause of Canon 5.¹⁸ The Office refused to render an opinion until Wersal provided it with examples of what he intended to say, which Wersal declined to furnish.¹⁹ Instead Wersal filed suit in the U.S. District Court for the District of Minnesota under § 1983 requesting declaratory and injunctive relief against various provisions of Canon 5.²⁰ The Republican Party of the State of Minnesota, alleging it was unable to judge the qualifications of Wersal under the Announce Clause, was listed, among others, as a petitioner along with Wersal.²¹ The District Court denied Petitioner's and granted the Respondent's

8. *Id.*

9. *Id.* at 771.

10. *Id.*

11. *Id.* at 811 (Ginsburg, J., dissenting).

12. *Id.*

13. *White*, 536 U.S. at 811.

14. *Id.*

15. *Republican Party of Minn. v. Kelly*, 63 F. Supp. 2d 967, 972-73 (D. Minn. 1999).

16. *Id.* at 973.

17. *Id.*

18. *Id.* at 973-74.

19. *Id.* at 974.

20. *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 859 (8th Cir. 2001).

21. *Id.*

motion for summary judgment, finding the Announce Clause constitutional.²²

Petitioners appealed to the Court of Appeals for the Eighth Circuit.²³ That court, in a 2-1 opinion affirming the district court's judgment, construed the Announce Clause to preclude "candidates only from publicly making known how they would decide issues likely to come before them as judges."²⁴ The Eighth Circuit held that the Announce Clause is a narrowly tailored limitation on campaign speech that serves a compelling state interest in maintaining an "independent and impartial judiciary" and an "equally important interest in preserving public confidence in that independence and impartiality."²⁵

The Petitioners then appealed the action to the United States Supreme Court alleging that the Announce Clause unconstitutionally restricted their right of free speech guaranteed by the First Amendment to the U.S. Constitution.²⁶ Certiorari was granted²⁷ and in June of 2002, in a 5-4 decision,²⁸ the Supreme Court reversed the findings of the Eighth Circuit.²⁹ Writing for the majority, Justice Scalia ruled that the Announce Clause violated the First Amendment and was thus unconstitutional.³⁰ In reversing the Eighth Circuit's ruling, the Court found that the state's interest of preserving the impartiality of the judiciary or appearance thereof, is not compelling; furthermore, the Supreme Court held that the Announce Clause was not sufficiently narrowly tailored to meet those goals even if they were compelling.³¹ Justice Scalia ruled that, "the First Amendment does not permit . . . leaving the principle of elections in place while preventing [the] candidates from discussing what the elections are about."³² Further, Justice Scalia opined, "There is an obvious tension between the article of Minnesota's Constitution which provides that judges shall be elected, and the Minnesota Supreme Court's announce clause which places most subjects of interest to the voters off limits."³³

22. *Kelly*, 63 F. Supp. 2d at 986; *see also Kelly*, 247 F.3d at 860-61.

23. *Kelly*, 247 F.3d at 861.

24. *Id.* at 881-82.

25. *Id.* at 867.

26. *Republican Party of Minn. v. White*, 536 U.S. 765, 770 (2002).

27. *Id.*

28. *Id.* at 766.

29. *Id.* at 788.

30. *Id.*

31. *Id.* at 776.

32. *White*, 536 U.S. at 788.

33. *Id.* at 787.

II. THE FIRST AMENDMENT AND THE JUDICIAL ELECTION PROCESS

The Announce Clause of Canon Five only pertains to statements made by candidates for judicial office.³⁴ Thus a violation of such a clause would only occur in a state that provides for an elected judiciary. At the present time a majority of the states, thirty-three in all, use popular elections to select or retain their judges.³⁵ The election of judges, however, does not go back as far as the origins of this country.³⁶ Originally, the King of England selected the judges for the colonies who served at the Crown's pleasure.³⁷ Consequently, the Crown constantly removed judges who made decisions frowned upon by the Crown.³⁸ The original colonists viewed the judges of the day not as independent arbiters of controversies but as pawns of the English authority.³⁹ Indeed, the Declaration of Independence states that the King "[h]as made judges dependent on his will alone for the tenure of their offices, and the amount and payment of their salaries."⁴⁰

When the colonists gained freedom from England, all thirteen original states similarly provided for the appointment of judges.⁴¹ This situation led to problems similar to those the colonists had with the Crown: appointed judges only served the interests of the male property owners who controlled all the appointments.⁴² Widespread resentment of this process led to the Jacksonian Democracy historical movement which resulted in the popular election of judges.⁴³ The state of Georgia was the first to amend its constitution in 1812 to provide for the election of the inferior courts.⁴⁴ By 1860, twenty-four of the thirty-four states had elected judiciaries.⁴⁵ At the present time, thirty-three states use popular elections to select or retain their judges.⁴⁶

34. See *Republican Party of Minn. v. Kelly*, 63 F. Supp. 2d 967, 971-72 (D. Minn. 1999) (quoting the Announce Clause and its headings as applying to "[a] candidate for a judicial office").

35. EVAN HAYNES, *SELECTION AND TENURE OF JUDGES* 101-35 (Nat'l Conf. Jud. Councils ed., 1944).

36. *Id.*

37. *Id.*; see also HARRY STUMPF, *AMERICAN JUDICIAL POLITICS* 133 (2d ed. 1998).

38. HAYNES, *supra* note 35, at 54-55.

39. *Id.* at 51-79.

40. DOCUMENTS OF THE CONSTITUTION OF ENGLAND AND AMERICA: FROM MAGNA CARTA TO THE FEDERAL CONSTITUTION OF 1789, at 103 (Francis Bowen ed., 1993).

41. HAYNES, *supra* note 35, at 101-35.

42. *Id.* at 87-89.

43. See *id.* at 88-89.

44. *Id.* at 96.

45. See *id.* at 101-35.

46. *Id.*

In 1857 Minnesota adopted the popular election process for its judiciary.⁴⁷ In 1912 the Minnesota Legislature mandated non-partisan judicial elections.⁴⁸ This election of judges created a particularly difficult situation for Minnesota and other states that elect their judiciary: The States have to address how to isolate a judge from the rough and tumble politics of the American electoral process so that he may maintain his impartiality and/or appearance thereof and still protect his First Amendment rights. Indeed, can it, in fact, be done? Traditionally, the states have opted to curtail the speech rights of the candidates under the presumption that each state has a compelling interest in ensuring impartiality.⁴⁹ The concept of the Announce Clause originated more than seventy-five years ago when the American Bar Association (ABA) adopted Canon 30 of the Model Canons of Judicial Ethics.⁵⁰ Canon 30 provided that a candidate for judicial office “should not announce in advance his conclusions of law on disputed issues to secure class support.”⁵¹ In 1972 the ABA adopted the Model Code of Judicial Conduct.⁵² Canon seven of that code contained the announce clause we deal with here.⁵³ In 1990 the ABA amended the 1972 canons to reduce the seven canons to five, and the ABA omitted the Announce Clause.⁵⁴ In place of the Announce Clause, the ABA substituted a “commitments clause” that forbade a candidate from making statements that “commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.”⁵⁵ A number of states followed the 1972 code and incorporated the Announce Clause in their respective codes.⁵⁶

47. See MINN. CONST. art. 6, § 7 (1857).

48. See Act of June 19, 1912, ch. 2, Minn. Laws, Spec. Sess. 4–6.

49. Michael R. Dimino, *Pay No Attention to that Man Behind the Robe; Judicial Elections, the First Amendment and Judges as Politicians*, 21 YALE L. & POL’Y REV. 301, 324.

50. LISA L. MILORDS, *THE DEVELOPMENT OF THE ABA JUDICIAL CODE* 140 (1992).

51. *Id.* at 140 n.3.

52. *Id.* at 3, 109.

53. See *id.* at 128 (prohibiting a judicial candidate from “announc[ing] his views on disputed legal or political issues”).

54. *Id.* at 8, 97–104.

55. *Id.* at 99.

56. Arkansas incorporated a form of the Announce Clause in its Canon 5, which prevented candidates from announcing their views on “disputed legal or political issues.” See REVISED ARK. CODE OF JUDICIAL CONDUCT Canon 5(A)(2)(d) (1993); see also *Beshear v. Butt*, 863 F. Supp. 913, 916 (E.D. Ark. 1994) (explaining the adoption and commentary of the Announce Clause). This provision was struck down in *Beshear* as being unconstitutionally overbroad, vague, and an impermissible restraint on the First Amendment free speech rights of a judicial candidate. *Beshear*, 863 F. Supp. at 917–18. The judge in that case had made a campaign promise that plea bargaining would not be accepted in his court. See *id.* at 915. By per curiam order in 1996, upon joint petition by the Arkansas Bar Association and the Association’s Special Committee on the Model Code, the Arkansas Supreme Court struck the offensive language from Canon 5 and substituted the current language that prohibits a candidate to “make statements that commit, or appear to commit the candidate with

In 1974 the Minnesota Supreme Court adopted a code of judicial ethics designed to assure non-partisan elections and to preclude political activities, except on measures to improve the law or legal system.⁵⁷ Contained in the 1974 code, of course, is the ill-starred restrictions on political activities.⁵⁸ Thus Minnesota attempted, as have most of the states, to open the selection of its judges to the popular choice of the citizens while attempting to preserve the impartiality and appearance of impartiality of a non-partisan judiciary.⁵⁹ In 1992 the Minnesota Supreme Court concluded that, “while the framers of our state constitution have developed a system of selection and election quite different from the federal scheme, they too designed a plan to recognize the uniqueness and independence of the state judiciary.”⁶⁰ In providing for the election of judges, the Minnesota Court’s adoption of speech safeguards meant that it believed the election of judges was significantly different from the election of other public officials.⁶¹ The state felt it had a compelling interest in having an impartial, independent judiciary, which was sufficient justification for the curbing of a candidate’s First Amendment rights.⁶²

Minnesota is not alone in attempting to structure its judicial elections so that judges can be selected by the voters without hindering the traditional role of an impartial judiciary. All states providing for the election of judges have provided for an array of laws, canons and rules to ensure an impartial and independent judiciary even though judges are required to periodically stand for election. In adopting the election process for the judicial branch, the states have attempted, through experimentation and trial, to balance the competing interests between an elected judiciary and the First Amendment.⁶³ It is this competing interest, or “tension,” that Justice Scalia found so disturbing.⁶⁴

The Announce Clause, as written in Canon 5 of the Minnesota Code, posed a problem for the district court upon being presented Wersal’s chal-

respect to cases, controversies or issues that are likely to come before the court.” REVISED ARK. CODE OF JUDICIAL CONDUCT Canon 5(A)(2)(d) (1993). This language, while not the same as the part of Canon 5 left alone by the Court in *White*, is less restrictive than the Announce Clause found invalid in *White*, because of the key words being “commit or appear to commit.” *Id.*; see *Republican Party of Minn. v. White*, 536 U.S. 765, 770 (2002) (distinguishing between announcing current views and promising support on a particular issue).

57. See MINN. STAT. ANN. Canon 5 (2003) (historical note).

58. *Id.* at Canon 5(a)(3)(d).

59. See, e.g., *Republican Party of Minn. v. Kelly*, 63 F. Supp. 2d 967, 975 (D. Minn. 1999) (explaining the historical records and legislative intent of Minnesota’s adoption of judicial elections).

60. *Peterson v. Stafford*, 490 N.W.2d 418, 420 (Minn. 1992).

61. *Id.* at 424–25.

62. *Id.*

63. See *Republican Party of Minn. v. White*, 536 U.S. 765, 787–88 (2002).

64. *Id.*

lenge to the Code's constitutionality. While feeling that Minnesota had a compelling interest in upholding the impartiality of its elected judiciary, the district court construed the clause to reach only disputed issues as were likely to come before the candidate if he were elected judge.⁶⁵ In doing this, the court was able to sustain Minnesota's position.⁶⁶ The Eighth Circuit adopted the district court's limiting interpretation by holding that the clause only reached the discussion of issues likely to come before the court.⁶⁷ The Minnesota Supreme Court shortly thereafter adopted the Eighth Circuit's interpretation of the Announce Clause.⁶⁸

III. RESTRICTION OF JUDICIAL CANDIDATES' SPEECH

Traditionally, the courts have held that a state's interest in regulating a judicial candidate's First Amendment rights stemmed from the difference between judicial candidates and candidates for other governmental offices.⁶⁹ The separation of powers principles embraced in both the Federal and Minnesota Constitutions⁷⁰ require the judiciary to remain independent. Minnesota is thus free to enact special rules dealing with speech of the judiciary to preserve the integrity of that branch. "This sentiment was echoed by the Seventh Circuit Court of Appeals when it stated that, the principle of impartial justice under law is strong enough to entitle government to restrict the freedom of speech of participants in the judicial process."⁷¹ The state "may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest";⁷² however, "an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest."⁷³ The rule has been stated as the *strict scrutiny* test: the state has the burden of proving that the restriction (Announce Clause) is both narrowly tailored to and serves a compelling state

65. *Republican Party of Minn. v. Kelly*, 63 F. Supp. 2d 967, 986 (D. Minn. 1999).

66. *Id.*

67. *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 881–82 (8th Cir. 2001).

68. *In re Code of Judicial Conduct*, 639 N.W.2d 55 (Minn. 2002).

69. *See, e.g., ACLU v. Fla. Bar*, 744 F. Supp. 1094, 1097 (N.D. Fla. 1990) (finding that "states need not treat candidates for judicial office the same as candidates for other elective offices"); *In re Chmura*, 608 N.W.2d 31, 39–40 (Mich. 2000).

70. U.S. CONST. arts. I–III; MINN. CONST. art. 3, § 1. Under the Minnesota Constitution the state government is divided into the legislative, executive and judicial branches and specifies that "[n]o person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided." MINN. CONST. art. 3, § 1.

71. *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 231 (7th Cir. 1993).

72. *Sable Comm. of Cal., Inc. v. Fed. Comm. Comm'n.*, 492 U.S. 115, 126 (1989).

73. *United States v. Grace*, 461 U.S. 171, 177 (1983); *see also United States v. Playboy Entm't Group*, 529 U.S. 803, 813 (2000).

interest.⁷⁴ The United States Supreme Court in *White* held, by a 5-4 vote, that the Announce Clause of Canon 5 failed both parts of the strict scrutiny test.⁷⁵

In applying the strict scrutiny test, Justice Scalia, writing for the majority, approached the Announce Clause to see if it “unnecessarily circumscribed protect[ed] expression.”⁷⁶ The appellate court had concluded that the state had established two interests as sufficiently compelling to justify the Announce Clause: preserving the impartiality of the state judiciary and preserving the appearance of impartiality of the state judiciary.⁷⁷ Justice Scalia was concerned that no one in either the district court or appellate court, both of which supported the announce clause, had defined “impartiality.”⁷⁸ He reasoned, and rightly so perhaps, that until one knew what it meant, one could not determine whether impartiality was indeed a compelling state interest, and if so, whether the Announce Clause was narrowly tailored to achieve it.⁷⁹ Justice Scalia then went on to set out the three definitions of impartiality: (1) the lack of bias for or against either *party* to the proceeding; (2) the lack of preconception in favor of or against a particular *legal view*; and (3) *open-mindedness* on issues, which means a willingness to consider views that oppose one’s preconceptions.⁸⁰ Justice Scalia felt that the first definition, lack of bias against a party, was the root, or intended definition.⁸¹ Scalia points out that respondents apparently approved this definition, as evidenced by their briefs advancing the proposition that an impartial judge was essential to due process.⁸² Justice Scalia found that the Announce Clause was not narrowly tailored enough to serve impartiality “inasmuch as it does not restrict speech . . . against . . . *parties*, but rather it restricts speech for or against particular *issues*.”⁸³ As worded, a judge would be pro-

74. *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989).

75. *Republican Party of Minn. v. White*, 536 U.S. 765, 775–84 (2002). The Announce Clause is not the only restriction of speech contained in Canon 5. MINN. STAT. ANN. Canon 5 (2003). It also contains the so-called “pledges and promises” clause which separately prohibits a candidate from making “pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.” *Id.* at Canon 5(A)(3)(d)(i). This portion of the canon was not challenged by petitioners and the majority opinion of the Supreme Court expressed no view on its viability. *See generally White*, 536 U.S. at 765.

76. *White*, 536 U.S. at 775 (citing *Brown v. Hartlage*, 456 U.S. 45, 54 (1982)).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 776–79.

81. *Id.* at 776.

82. *White*, 536 U.S. at 776. Respondents cited *Tumey v. Ohio*, 273 U.S. 510, 523, 531–34, which held a judge violated due process by sitting on a case in which it would be in his financial interest to find against one of the parties. *See also Johnson v. Mississippi*, 403 U.S. 212, 215–16 (1971).

83. *White*, 536 U.S. at 775–77.

hibited from taking a stand for or against a legal issue regardless of which party supported it. Thus, he found, the Announce Clause only barely promotes impartiality.⁸⁴

The majority opinion then earnestly begins an attack on the Announce Clause by finding that it is so “woefully underinclusive” as to render a belief that it supports the object of open-mindedness, a “challenge to the credulous.”⁸⁵ Justice Scalia referred to the fact that the clause applies only to statements made during a campaign.⁸⁶ For instance, to use his example, a candidate for judicial office may not say, “I think it is constitutional for the legislature to prohibit same-sex marriages.”⁸⁷ He may say the very same thing, however, up until the very day before he declares himself a candidate, and he may say it repeatedly (until litigation is pending) after he is elected. This “underinclusiveness,” according to the majority, destroyed the state’s credibility for its rationale for restricting speech.⁸⁸ The opinion then moves on to discuss, and attempt to refute, the *real* argument forming the basis for the Announce Clause and the Court’s minority viewpoint: “[T]he notion that the *special context of electioneering justifies an abridgement of the right to speak out on disputed issues.*”⁸⁹ Justice Scalia felt that this argument “sets our First Amendment jurisprudence on its head.”⁹⁰ The “underinclusiveness” stated earlier cannot be explained, Justice Scalia argues, by resort to the notion that the First Amendment provides less protection during an election campaign than at other times.⁹¹ Thus, we have the crux of the majority’s reasoning; judicial elections are really no different than any other election, for example elections for the legislature, as far as freedom of speech is concerned.⁹² The Court further reasoned that speech of judicial

84. *Id.* at 776. Scalia does recognize that some speech prohibited by the Announce Clause could well be used against a party as when a candidate states his unbroken string of convictions for rape. *Id.* at 777 n.7. Scalia states, “The question under our strict scrutiny test, however, is not whether the Announce Clause serves this interest *at all*, but whether it is *narrowly tailored* to serve this interest. It is not.” *Id.* (emphasis in original).

85. *Id.* at 780; *see also* Fla. State Bar v. B.J.F., 491 U.S. 524, 541–42 (1989) (stating that “a law cannot be regarded as protecting an interest ‘of the highest order,’ and thus as justifying a restriction upon truthful speech when it leaves appreciable damage to that supposedly vital interest unprohibited”) (citations omitted).

86. *White*, 536 U.S. at 783.

87. *Id.* at 779.

88. *Id.* at 779–80 (citing *City of Ladue v. Gilleo*, 512 U.S. 43, 52–53 (1994)).

89. *Id.* at 781 (emphasis added).

90. *Id.* at 780–84; *see also* *Wood v. Georgia*, 370 U.S. 375, 395 (1962) (holding that “[t]he role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance”).

91. *White*, 536 U.S. at 783.

92. *See id.*

candidates should not be treated differently than speech by judges when they are not in a political campaign for a judgeship.⁹³

Without doubt, in the normal election process, the right of the candidates to speak out on issues lies at the core of the process of electioneering: “[D]ebate on the qualifications of candidates’ is ‘at the core of the electoral process and of the First Amendment freedoms,’ not at the edges.”⁹⁴ Coinciding with this right to speak is the equally important right of the public to hear the views of the candidates’ so as to more intelligently evaluate the candidates’ individual viewpoints and personalities before choosing among them on election day: “In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow.”⁹⁵ Mr. Justice Brandeis observed that in our country “public discussion is a political duty.”⁹⁶ Further, as stated in *Brown*, the First Amendment

[E]mbodies our trust in the free exchange of ideas as the means by which the people are to choose between good ideas and bad, and between candidates for political office. The State’s fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech.⁹⁷

All this is, of course, absolutely correct. The state normally has no business telling a candidate for office what he can and cannot say or what he may or may not promise in the heat of a political campaign. But note, none of the previous paragraph’s cited cases dealt with judicial campaigns. Not one.

IV. AN ELECTION IS AN ELECTION

Justice Ginsburg, dissenting, refers to the majority’s reasoning as a unilocular, “an election is an election,” approach.⁹⁸ She and the rest of the dissenting justices see a judicial campaign as a distinctly different process in that judges are not political actors because “[t]hey do not sit as representa-

93. *Id.*

94. *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222–23 (1989).

95. *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976).

96. *Whitney v. California*, 274 U.S. 357, 375 (1927); *see also Brown v. Hartlage*, 456 U.S. 45, 60 (1982) (stating that “[i]t is simply not the function of government to ‘select which issues are worth discussing or debating’ in the course of a political campaign”) (quoting *Police Dep’t of Chicago v. Mosely*, 408 U.S. 92, 96 (1972)).

97. *Brown*, 456 U.S. at 60.

98. *White*, 536 U.S. 765, 805 (2002) (Ginsburg, J., dissenting).

tives of particular persons, communities, or parties; they serve no faction or constituency.”⁹⁹ It is the business of politicians to commit to sides on contentious issues because such conduct is “at the core of our electoral process,”¹⁰⁰ for they “enhance the accountability of government officials to the people whom they represent.”¹⁰¹ The dissenting justices reasoned that

[E]lected judges, no less than appointed judges, occupy an office of trust that is fundamentally different from that occupied by policymaking officials. Although the fact that they must stand for election makes their job more difficult than that of the tenured judge, that fact does not lessen their duty to respect essential attributes of the judicial office that have been embedded in Anglo-American law for centuries.¹⁰²

Justice Scalia differs. He maintains that Justice Ginsburg “greatly exaggerates” the difference between judicial and legislative elections:

[The] complete separation of the judiciary from the enterprise of ‘representative government’ might have some truth in those countries where judges neither make law themselves nor set aside the laws enacted by the legislature. It is not true of the American system. Not only do state court judges possess the power to ‘make’ common law, but they have the immense power to shape the [s]tate’ constitutions as well.¹⁰³

Thus, the majority of the Court has determined that state court judges who run for election are, in reality, no different from the legislators of the states when it comes to their post-election conduct and, thus, the rules for their election, as far as speech is concerned, should be no different.¹⁰⁴

The majority draws a distinction between elected judges and those otherwise selected.¹⁰⁵ Justice Scalia and his supporters do not dispute the importance of judicial impartiality and independence.¹⁰⁶ They do, however,

99. *Id.* at 806 (stating that “it is the business of judges to be indifferent to popularity”) (citing *Chisom v. Roemer*, 501 U.S. 380, 401 n.29 (1991)).

100. *Williams v. Rhodes*, 393 U.S. 23, 32 (1986).

101. *Brown*, 456 U.S. at 55.

102. *White*, 536 U.S. at 797 (Stevens, J., dissenting).

103. *Id.* at 784 (citing *Baker v. State*, 744 A.2d 864 (1999)).

104. *Id.* at 787–88. Justice Scalia also feels that even though states are free to do away with the election of judges, once they provide for them, they have no choice but to open the process to allow candidates to announce their positions:

The greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance. If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles.

Id. (citing *Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)).

105. *Id.*

106. *See id.* at 777.

suggest that once a state makes its choice to elect judges, its interest in judicial independence ceases to be a sufficiently compelling interest to justify restraints on the candidate's statements on the issues.¹⁰⁷ This author submits that regardless of the manner in which a state selects its judges, the interest it has in an impartial, independent judiciary is just as overpowering as in those other states. Due process, that is, a fair trial for all litigants, has never depended on whether the judge was elected or appointed. The duties of all judges are the same.¹⁰⁸ In other words, Minnesota does not forfeit its interest in an impartial and independent judiciary when it decides to elect its judges. The principles of due process do not change.

V. DUE PROCESS AND RESTRAINT OF SPEECH

Justice Ginsburg hammers the damage done to due process by the Court's decision:

The impartiality guaranteed to litigants through the Due Process Clause adheres to a core principle: "[N]o man is permitted to try cases where he has an interest in the outcome." Our cases have "jealousy guarded" that basic concept, for it "ensur[es] that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him."¹⁰⁹

The state's interest in guaranteeing due process includes eliminating not only actual bias but also the appearance of bias.¹¹⁰ Justice Ginsburg goes on to point out that "our Due Process Clause cases do not focus on bias against a particular party, but rather inquire more broadly into whether the surrounding circumstances and incentives compromise the judge's ability faithfully to discharge her assigned duties."¹¹¹

The Due Process Clause provides litigants the right to unbiased, impartial, open-minded judges, both as a matter of fact and as *a matter of perception*, but that right must be carefully weighed along with the First Amend-

107. *Id.*

108. *See, e.g.,* Stretton v. Disciplinary Bd., 944 F.2d 137, 142 (3d Cir. 1991) (finding that "[if] a state chooses to select its judges by popular election [it] . . . does not signify the abandonment of the ideal of an impartial judiciary").

109. *White*, 536 U.S. at 814 (Ginsburg, J., dissenting) (citations omitted).

110. *See, e.g.,* Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986) (finding that "[t]he Due Process Clause 'may sometimes bar trial by judges who . . . would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, justice must satisfy the appearance of justice.'") (citation omitted); *United States v. Microsoft Corp.*, 253 F.3d 34, 116 (D.C. Cir. 2001) (en banc) (ordering the disqualification of a judge for "destroy(ing) the appearance of impartiality").

111. *White*, 536 U.S. at 815-16 n.3.

ment rights presented in this case.¹¹² Thus, judges who take positions in advance through public statements on issues likely to come before them on the bench risk the impartiality that judging demands.¹¹³

VI. THE CAMPAIGN SYNDROME AND THE CROCODILE IN THE BATHTUB

In equating the election of judicial candidates with that of legislators who are affiliated with political parties, the majority in *White* makes a fundamental mistake. Judges, including elected ones, belong to an institution that is fundamentally apolitical and that depends, for its very legitimacy, on remaining at all times scrupulously impartial. Officials in the political branches of the government are properly elected on the basis of promises to effectuate policy commitments; therefore, they are expected to take the opinions of voters into account when making decisions. As Justice Frankfurter wrote, basic notions of due process and the nature of the role of the judiciary prevents judges from taking public opinion into account:

[J]udges are restrained in their freedom of expression by historic compulsions resting on no other officials of government. They are so circumscribed precisely because judges have in their keeping the enforcement of rights and the protection of liberties which, according to the wisdom of the ages, can only be enforced and protected by observing such methods and traditions.¹¹⁴

Justice Scalia feels judges are not unlike legislators in that judges not only possess the power to make common law but they, like the legislature, reshape the constitution as well.¹¹⁵ This reasoning, however, ignores the principle of *stare decisis*, which means that if an issue of law has been previously decided “there is ‘a heavy presumption that settled issues of law will not be reexamined.’”¹¹⁶ It is therefore the judiciary’s role “to interpret the law, not make it.”¹¹⁷ Thus judges make their decisions based upon a reasoned examination of the law, and the perception of their independence is pronounced because they do not decide issues based upon what the public desires or on campaign promises. Indeed, early on the Court recognized that

112. See Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059 (1996) (exploring the relationship between First Amendment rights and judicial ethics in judicial elections).

113. See *Aetna Life Ins. Co.*, 475 U.S. at 825.

114. *Bridges v. California*, 314 U.S. 252, 283 (1941) (Frankfurter, J., dissenting).

115. See discussion *supra* Part IV.

116. *Equal Employment Opportunity Comm’n v. Trabucco*, 791 F.2d 1, 4 (1st Cir. 1986).

117. See John Wallace, *Stare Decisis and the Rehnquist Court: The Collision of Activism, Passivism, and Politics in Casey*, 42 BUFF. L. REV. 187, 201 (1994).

the judiciary's "independence from political forces . . . helps promote public confidence in judicial determinations."¹¹⁸

Traditionally, the courts have held that a state's interest in regulating a judicial candidate's First Amendment rights stemmed from the difference between judicial candidates and candidates for other governmental offices.¹¹⁹ Minnesota is thus free to enact special rules dealing with speech of the judiciary in order to preserve the integrity of that branch. Possibly at the heart of Justice Scalia's distrust of the Announce Clause, however, is his opinion that statements made by candidates in judicial campaigns are not that different from those made at any other time.¹²⁰ In commenting on the state of Minnesota's argument that the Announce Clause relieves a judge from the pressure to rule a certain way because of campaign statements on issues, Justice Scalia states, "[S]tatements in election campaigns are such an infinitesimal portion of the public commitments to legal positions that judges (or judges-to-be) undertake, that this object of the prohibition is implausible."¹²¹ He thinks that before judges arrive on the bench, or thereafter, they have often committed themselves to various positions through briefs, opinions, and speeches.¹²² Thus, he states, comments during a campaign are no different.¹²³

The majority opinion is totally at odds with the realities of political campaigns based upon this writer's experience through twenty-two years as an elected judge, undergoing five campaigns for re-election, three of which were contested. Statements made during the heat of a campaign, or opinions or rulings made during that heated period, are light years away from those made at any other time. Such statements weigh heavily on all office holders but especially on judicial candidates.

Justice Stevens told the American Bar Association annual meeting in 1996: "It was 'never contemplated that the individual who has to protect our individual rights would have to consider what decision would produce the most votes.'"¹²⁴ Echoing this sentiment concerning attacks on judicial impartiality, Otto Kraus, a Justice of the California Supreme Court, observed that adjudicating controversial cases during an election is "like finding a crocodile in your bathtub when you go in to shave in the morning. You

118. See *N. Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 60 n.10 (1982).

119. See, e.g., *ACLU v. Fla. Bar*, 744 F. Supp. 1094, 1097 (N.D. Fla. 1990) (finding that "states need not treat candidates for judicial office as candidates for other elective offices"); *In re Chmura*, 608 N.W.2d 31, 39-40 (Mich. 2000).

120. *Republican Party of Minn. v. White*, 536 U.S. 765, 783 (2002).

121. *Id.* at 779.

122. *Id.*

123. *Id.*

124. Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308, 310 (1997) (quoting Florida Supreme Court Justice Ben Overton).

know it's there, and you try not to think about it, but it's hard to think about much else while you're shaving."¹²⁵ Any judge who has ever been through an election understands exactly what those crocodiles look like.¹²⁶ Justice Scalia makes light of such pressures during election campaigns (possibly because he has never run for public office):¹²⁷ "But elected judges—regardless of whether they have announced any views beforehand—*always* face the pressure of an electorate who might disagree with their rulings and therefore vote them off the bench."¹²⁸ While this is true, the dynamics of an election campaign—the "rough and tumble" if you will—heighten the effect of rulings and statements if for no other reason than the electorate is focused on the candidate and his activities more at this moment than at no other time. Members of that electorate are looking to the candidate to determine whether they should vote for him or his opponent. Voters are much more likely to hear statements made or cases tried during the election period. During the rest of the judge's career, he goes about his business trying cases with only a bump or two here and there. Most voters would be hard-pressed to identify any judge in regard to his rulings made day to day. Not many judges will ever be charged with trying a Timothy McVeigh, to cite the example used by Justice Scalia.¹²⁹

Barring only the "pledges and promises" part of Canon 5 will lead to a wholesale assault on the independence and impartiality of the judiciary of Minnesota and elsewhere. A candidate is now free to express views on issues that will leave little doubt as to how he would rule once the issue reaches his court.¹³⁰ All a candidate has to do now is say "While I cannot promise anything about how I would rule on the issue, I think all drunken drivers should be given the maximum sentences under the law." How, if the candidates were appearing before Mothers Against Drunk Driving (MADD), would such statements be interpreted by the members of that organization? How so to the members of the defense bar of that candidates

125. Gerald F. Uelman, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133 (1997).

126. Apparently only one of the current sitting justices has ever endured a judicial campaign, that being Justice O'Connor who served one term as Judge of the Maricopa Superior Court in Phoenix, Arizona from 1975–1979. See Biographies of Current Members of the Supreme Court, available at www.supremecourtus.gov/about/biographiescurrent.pdf (last visited July 1, 2003).

127. See *id.* (indicating that Justice Scalia was appointed as Associate Justice of the Supreme Court after having been appointed as a judge to the Court of Appeals for the D.C. Circuit).

128. *White*, 536 U.S. at 782 (Ginsburg, J., dissenting) (emphasis in original).

129. *Id.*

130. See *id.* at 820 (Ginsburg, J., dissenting) (asserting that the Announce Clause, now unconstitutional, prevented run-arounds pertaining to statements not technically pledges or promises).

jurisdiction? Is there any doubt whatsoever? Only in the realm of the majority in *White*, it seems, would voters not know how the candidates would rule in drunken driver cases.¹³¹ Only the Announce Clause would have prevented this type of end run and protected Minnesota's compelling interest in upholding the impartiality and independence of its judiciary. Experience has demonstrated the necessity of the Announce Clause and the insufficiency of the pledges clause, which on its face does not reach the range of campaign rhetoric that must be proscribed if the actual and perceived impartiality and independence of the judiciary is to be protected. The majority opinion offers no reasonable way to avoid this gutting of the principle of impartiality.¹³²

Nor would recusal effectively rebut the appearance of impartiality in these cases. First, there is no guarantee that the judge would recuse if asked. Recusal is never automatic. Second, it does not serve the state's compelling interest in having an impartial judiciary to have elected judges with built-in, publicly expressed bias towards particular issues or parties. Third, to reward the voters who put a judge in office specifically because of his views creates pressure on a judge to not recuse. Last, if, in fact, the judge makes the statements or promises with the hidden agenda of recusing when elected, he is perpetrating a fraud on the public and the state itself by never intending to carry through on his announcement. Perhaps most importantly, recusal does not remedy the loss of public confidence in the judicial system that would likely result if judicial candidates routinely opined on issues likely to come before them. This author submits that rather than falling back on recusal, the states should be permitted to focus on preventing disqualification in the first instance.

It is interesting that while Justice Scalia professes a "no harm, no foul" attitude on the Announce Clause, he refused to comment on how he would rule on a particular case when asked by Senate committee members.¹³³ Justice Scalia stated the following in his confirmation hearing:

Let us assume that I have people arguing before me to do it or not to do it. I think it is quite a thing to be arguing to somebody whom you know has made a representation in the course of his confirmation hearings, and that is, by way of condition to his being confirmed, that he will do this or do that. I think I would be in a very bad position to adjudicate the case without being accused of having a less than impartial view of the matter.¹³⁴

131. *Id.* at 780–81.

132. *See generally id.* at 770–88.

133. *Id.* at 818–19 n.4. (Ginsburg, J., dissenting) (citing to *The Nomination of Judge Antonin Scalia To Be Associate Justice of the Supreme Court of the United States, Hearings Before the S. Comm. on the Judiciary*, 99th Cong. 37 (1986)).

134. *White*, 536 U.S. at 818–19 n.4. It is interesting that Justice Scalia is seemingly refer-

Other Justices made similar statements.¹³⁵ Indeed, Justice Kennedy, who appears in his concurring opinion to hold that no restriction whatsoever, not even that of pledges, should be allowed in an election campaign¹³⁶ recognized the damage to the image of the judiciary by positioning oneself on an issue.¹³⁷ Justice Scalia counters this potential embarrassment by asserting that “the practice of *voluntarily* demurring does not establish the legitimacy of *legal compulsion* to demur.”¹³⁸ Nevertheless, even Justice Scalia understands that a judge announcing his viewpoint on an issue likely to come before him does not further the appearance of impartiality.¹³⁹

VII. POST WHITE

Justice Scalia has sounded the trumpet and the walls of judicial speech restraint have fallen. As a result of *White*, it will now be a simple matter for a candidate to telegraph, not so subtly, his or her views on any legal issue likely to come before him or her once elected. Judging by past conduct, we can expect that a candidate will not have to be particularly inventive to find ways around the pledge clause still left standing by *White*.¹⁴⁰ Judging by the comments of Justice Kennedy, even the pledge clause is far from safe.¹⁴¹ Woe unto the state judiciary if this comes to pass. Pity the poor honest, ethical judge who is running for reelection and is opposed by a ruthless aggressive attorney who wants to be elected at any cost. The judge will not be able to stand by in silence as his opponent promises any and everything to the electors in order to win votes. If anyone seriously doubts such a spectacle, I can only point to the legislative and executive campaigns of the past. The

ring to the issue of appearance of impartiality as to *issues* rather than parties. See his reference as to the “root” definition of impartiality discussed earlier herein. See discussion *infra*, Part III (discussing Justice Scalia’s reference as to the “root” definition of impartiality).

135. *White*, 536 U.S. at 804 (Ginsburg, J., dissenting).

136. Justice Kennedy states: “The state may not regulate the content of candidate speech merely because the speakers are candidates.” *Id.* at 794. “What Minnesota may not do, however, is censor what the people hear as they undertake to decide for themselves which candidate is most likely to be an exemplary judicial officer. Deciding the relevance of candidate speech is the right of the voters, not the State.” *Id.*

137. “I think if a judge decides a case because he or she is committed to a result, it destroys confidence in the legal system.” *Hearing Before the S. Comm. on the Judiciary*, 100th Cong. 144 (1987) (statement of Anthony M. Kennedy, Supreme Court nominee).

138. *White*, 536 U.S. at 783 (Ginsburg, J., dissenting) (emphasis in original).

139. See discussion *supra* Part III.

140. *White*, 536 U.S. at 783 (Ginsburg, J., dissenting).

141. *Id.* at 792–96 (Ginsburg, J., dissenting). Justice Ginsburg correctly described Justice Kennedy’s holding as stating that “no content-based restriction of a judicial candidates speech is permitted under the First Amendment While he does not say so explicitly, this extreme position would preclude even Minnesota’s prohibition against ‘pledges and promises’ by a candidate for judicial office.” *Id.* at 802 n.4.

actual and perceived impartiality and independence of the judiciary will be totally and irretrievably lost.

At least one case has already expanded on *White*, further removing restrictions on judges speech.¹⁴² In *Spargo*, the United States District Court in Utica, New York¹⁴³ widened the door opened by *White* and held that the state had no compelling interest in restricting a judge from actively engaging in political activities.¹⁴⁴ On May 8, 2003 the United States Court of Appeals for the Second Circuit temporarily stayed the district court's order pending oral argument before that body. Whatever the outcome of that case, the handwriting is on the wall. The opening salvos of the "Mother of All Wars" have been sounded and judicial impartiality and independence are in full retreat.

Should more weight be given to the due process rights of the litigant than to the free speech rights of the candidate? Which is more important? Do the speech rights of one judge reign paramount over the due process rights of all the citizens who will appear before him? When faced with this test question, the majority in *White* sadly failed, and the judiciary and the public's trust in same will suffer severe, perhaps fatal, damage.

142. *Spargo v. N.Y. State Comm'n on Judicial Conduct*, 244 F. Supp. 2d 72 (N.D.N.Y. 2003).

143. *Id.* at 88 (rejecting the argument that this case was distinguishable from *White*, the judge stated that in *White* the speech at issue was judicial candidates announcing views on issues; whereas, the political conduct here in a campaign is at issue).

144. *Id.* at 80–81 (stating that Judge Spargo allegedly engaged in the prohibited conduct by giving the keynote address at a Conservative Party dinner and that he worked for the Bush Campaign in Florida while serving as a judge).