[NOTE: This opinion has been edited for use by students and teachers. For ease of reading, no indication has been made of deleted material and case citations. Any legal or scholarly use of this case should refer to the full opinion.]

Republican Party of Minnesota v. White

536 U.S. 765 (2002)

Justice SCALIA delivered the opinion of the Court.

[The opinion began by discussing the narrow construction that the lower courts had given to the "announce clause." Those courts assumed that the Minnesota provision would allow for allow general discussions of case law and judicial philosophy.]

It seems to us, however, that – like the text of the announce clause itself-- these limitations upon the text of the announce clause are not all that they appear to be. First, respondents acknowledged at oral argument that statements critical of past judicial decisions are *not* permissible if the candidate also states that he is against *stare decisis.* Thus, candidates must choose between stating their views critical of past decisions and stating their views in opposition to *stare decisis.* Or, to look at it more concretely, they may state their view that prior decisions were erroneous only if they do not assert that they, if elected, have any power to eliminate erroneous decisions. [Also], construing the clause to allow "general" discussions of case law and judicial philosophy turns out to be of little help in an election campaign. At oral argument, respondents gave, as an example of this exception, that a candidate is free to assert that he is a "strict constructionist." But that, like most other philosophical generalities, has little meaningful content for the electorate unless it is exemplified by application to a particular issue of construction likely to come before a court – for example, whether a particular statute runs afoul of any provision of the Constitution. Respondents conceded that the announce clause would prohibit the candidate from exemplifying his philosophy in this fashion. Without such application to real-life issues, all candidates can claim to be "strict constructionists" with equal (and unhelpful) plausibility.

Respondents contend that this still leaves plenty of topics for discussion on the campaign trail. These include a candidate's "character," "education," "work habits," and "how [he] would handle administrative duties if elected." Indeed, the Judicial Board has printed a list of preapproved questions which judicial candidates are allowed to answer. These include how the candidate feels about cameras in the courtroom, how he would go about reducing the caseload, how the costs of judicial administration can be reduced, and how he proposes to ensure that minorities and women are treated more fairly by the court system. Whether this list of preapproved subjects, and other topics not prohibited by the announce clause, adequately fulfill the First Amendment's guarantee of freedom of speech is the question to which we now turn.

[T]he announce clause both prohibits speech on the basis of its content and burdens a category of speech that is "at the core of our First Amendment freedoms"-- speech about the qualifications of candidates for public office. The Court of Appeals concluded that the proper test to be applied to determine the constitutionality of such a restriction is what our cases have called strict scrutiny; the parties do not dispute that this

is correct. Under the strict-scrutiny test, respondents have the burden to prove that the announce clause is (1) narrowly tailored, to serve (2) a compelling state interest. In order for respondents to show that the announce clause is narrowly tailored, they must demonstrate that it does not "unnecessarily circumscrib[e] protected expression." *Brown v. Hartlage* (1982).

The Court of Appeals concluded that respondents had established two interests as sufficiently compelling to justify the announce clause: preserving the impartiality of the state judiciary and preserving the appearance of the impartiality of the state judiciary.

One meaning of "impartiality" in the judicial context – and of course its root meaning – is the lack of bias for or against either *party* to the proceeding. Impartiality in this sense assures equal application of the law. That is, it guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party. This is the traditional sense in which the term is used.

We think it plain that the announce clause is not narrowly tailored to serve impartiality (or the appearance of impartiality) in this sense. Indeed, the clause is barely tailored to serve that interest *at all,* inasmuch as it does not restrict speech for or against particular *parties,* but rather speech for or against particular *issues.* To be sure, when a case arises that turns on a legal issue on which the judge (as a candidate) had taken a particular stand, the party taking the opposite stand is likely to lose. But not because of any bias against that party, or favoritism toward the other party. *Any* party taking that position is just as likely to lose. The judge is applying the law (as he sees it) evenhandedly.

It is perhaps possible to use the term "impartiality" in the judicial context (though this is certainly not a common usage) to mean lack of preconception in favor of or against a particular *legal view.* This sort of impartiality would be concerned, not with guaranteeing litigants equal application of the law, but rather with guaranteeing them an equal chance to persuade the court on the legal points in their case. Impartiality in this sense may well be an interest served by the announce clause, but it is not a *compelling* state interest, as strict scrutiny requires. A judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law. As then-Justice Rehnquist observed of our own Court: "Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers." *Laird v. Tatum* (1972). Indeed, even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so. "Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias." *Ibid.* The Minnesota Constitution positively forbids the selection to courts of general jurisdiction of judges who are impartial in the sense of having no views on the law. Minn. Const., Art. VI, § 5 ("Judges of the supreme court,

the court of appeals and the district court shall be learned in the law"). And since avoiding judicial preconceptions on legal issues is neither possible nor desirable, pretending otherwise by attempting to preserve the "appearance" of that type of impartiality can hardly be a compelling state interest either.

A third possible meaning of "impartiality" (again not a common one) might be described as open-mindedness. This quality in a judge demands, not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case. This sort of impartiality seeks to guarantee each litigant, not an *equal* chance to win the legal points in the case, but at least *some* chance of doing so. It may well be that impartiality in this sense, and the appearance of it, are desirable in the judiciary, but we need not pursue that inquiry, since we do not believe the Minnesota Supreme Court adopted the announce clause for that purpose.

Respondents argue that the announce clause serves the interest in open-mindedness, or at least in the appearance of openmindedness, because it relieves a judge from pressure to rule a certain way in order to maintain consistency with statements the judge has previously made. The problem is, however, that statements 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. Before they arrive on the bench (whether by election or otherwise) judges have often committed themselves on legal issues that they must later rule upon. More common still is a judge's confronting a legal issue on which he has expressed an opinion while on the bench. Most frequently, of course, that prior expression will have occurred in ruling on an earlier case. But judges often state their views on disputed legal issues outside the context of adjudication – in classes that they conduct, and in books and speeches. Like the ABA Codes of Judicial Conduct, the Minnesota Code not only permits but encourages this. That is quite incompatible with the notion that the need for open-mindedness (or for the appearance of open-mindedness) lies behind the prohibition at issue here.

The short of the matter is this: In Minnesota, a candidate for judicial office may not say "I think it is constitutional for the legislature to prohibit same-sex marriages." He may say the very same thing, however, up until the very day before he declares himself a candidate, and may say it repeatedly (until litigation is pending) after he is elected. As a means of pursuing the objective of open-mindedness that respondents now articulate, the announce clause is so woefully underinclusive as to render belief in that purpose a challenge to the credulous.

Moreover, the notion that the special context of electioneering justifies an *abridgment* of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head. "[D]ebate on the qualifications of candidates" is "at the core of our electoral process and of the First Amendment freedoms," not at the edges. We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election.

Justice GINSBURG greatly exaggerates the difference between judicial and legislative elections. She asserts that "the rationale underlying unconstrained speech in

elections for political office – that representative government depends on the public's ability to choose agents who will act at its behest – does not carry over to campaigns for the bench." This 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 a true picture 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 States' constitutions as well. Which is precisely why the election of state judges became popular.

To sustain the announce clause, the Eighth Circuit relied heavily on the fact that a pervasive practice of prohibiting judicial candidates from discussing disputed legal and political issues developed during the last half of the 20th century. It is true that a "universal and long-established" tradition of prohibiting certain conduct creates "a strong presumption" that the prohibition is constitutional. The practice of prohibiting speech by judicial candidates on disputed issues, however, is neither long nor universal.

At the time of the founding, only Vermont (before it became a State) selected any of its judges by election. Starting with Georgia in 1812, States began to provide for judicial election, a development rapidly accelerated by Jacksonian democracy. By the time of the Civil War, the great majority of States elected their judges. We know of no restrictions upon statements that could be made by judicial candidates (including judges) throughout the 19th and the first quarter of the 20th century. Indeed, judicial elections were generally partisan during this period, the movement toward nonpartisan judicial elections not even beginning until the 1870's. Thus, not only were judicial candidates (including judges) discussing disputed legal and political issues on the campaign trail, but they were touting party affiliations and angling for party nominations all the while.

There is an obvious tension between the article of Minnesota's popularly approved 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. The disparity is perhaps unsurprising, since the ABA, which originated the announce clause, has long been an opponent of judicial elections. That opposition may be well taken (it certainly had the support of the Founders of the Federal Government), but the First Amendment does not permit it to achieve its goal by leaving the principle of elections in place while preventing candidates from discussing what the elections are about.

The Minnesota Supreme Court's canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violates the First Amendment. Accordingly, we reverse the grant of summary judgment to respondents and remand the case for proceedings consistent with this opinion.

It is so ordered.

Justice O'CONNOR, concurring.

I join the opinion of the Court but write separately to express my concerns about judicial elections generally. We of course want judges to be impartial, in the sense of being free from any personal stake in the outcome of the cases to which they are assigned. But if judges are subject to regular elections they are likely to feel that they

have at least some personal stake in the outcome of every publicized case. Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects. Even if judges were able to suppress their awareness of the potential electoral consequences of their decisions and refrain from acting on it, the public's confidence in the judiciary could be undermined simply by the possibility that judges would be unable to do so.

Moreover, contested elections generally entail campaigning. And campaigning for a judicial post today can require substantial funds. Unless the pool of judicial candidates is limited to those wealthy enough to independently fund their campaigns, a limitation unrelated to judicial skill, the cost of campaigning requires judicial candidates to engage in fundraising. Yet relying on campaign donations may leave judges feeling indebted to certain parties or interest groups.

Despite these significant problems, 39 States currently employ some form of judicial elections for their appellate courts, general jurisdiction trial courts, or both.

Minnesota has chosen to select its judges through contested popular elections instead of through an appointment system. In doing so the State has voluntarily taken on the risks to judicial bias described above. As a result, the State's claim that it needs to significantly restrict judges' speech in order to protect judicial impartiality is particularly troubling. If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.

Justice KENNEDY, concurring.

The political speech of candidates is at the heart of the First Amendment, and direct restrictions on the content of candidate speech are simply beyond the power of government to impose.

Minnesota may choose to have an elected judiciary. It may strive to define those characteristics that exemplify judicial excellence. It may enshrine its definitions in a code of judicial conduct. It may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards. 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. The law in question here contradicts the principle that unabridged speech is the foundation of political freedom.

The State of Minnesota no doubt was concerned, as many citizens and thoughtful commentators are concerned, that judicial campaigns in an age of frenetic fundraising and mass media may foster disrespect for the legal system. Indeed, from the beginning there have been those who believed that the rough-and-tumble of politics would bring our governmental institutions into ill repute. And some have sought to cure this tendency with governmental restrictions on political speech. Cooler heads have always recognized, however, that these measures abridge the freedom of speech – not because the state interest is insufficiently compelling, but simply because content-based restrictions on political speech are "'expressly and positively forbidden by'" the First Amendment. The State cannot opt for an elected judiciary and then assert that its democracy, in order to work as desired, compels the abridgment of speech.

If Minnesota believes that certain sorts of candidate speech disclose flaws in the candidate's credentials, democracy and free speech are their own correctives. The legal profession, the legal academy, the press, voluntary groups, political and civic leaders, and all interested citizens can use their own First Amendment freedoms to protest statements inconsistent with standards of judicial neutrality and judicial excellence. Indeed, if democracy is to fulfill its promise, they must do so. They must reach voters who are uninterested or uninformed or blinded by partisanship, and they must urge upon the voters a higher and better understanding of the judicial function and a stronger commitment to preserving its finest traditions. Free elections and free speech are a powerful combination: Together they may advance our understanding of the rule of law and further a commitment to its precepts.

There is general consensus that the design of the Federal Constitution, including lifetime tenure and appointment by nomination and confirmation, has preserved the independence of the federal judiciary. In resolving this case, however, we should refrain from criticism of the State's choice to use open elections to select those persons most likely to achieve judicial excellence. States are free to choose this mechanism rather than, say, appointment and confirmation. By condemning judicial elections across the board, we implicitly condemn countless elected state judges and without warrant. Many of them, despite the difficulties imposed by the election system, have discovered in the law the enlightenment, instruction, and inspiration that make them independent-minded and faithful jurists of real integrity.

By abridging speech based on its content, Minnesota impeaches its own system of free and open elections.

Justice STEVENS, with whom Justice SOUTER, Justice GINSBURG, and Justice BREYER join, dissenting.

There is a critical difference between the work of the judge and the work of other public officials. In a democracy, issues of policy are properly decided by majority vote; it is the business of legislators and executives to be popular. But in litigation, issues of law or fact should not be determined by popular vote; it is the business of judges to be indifferent to unpopularity.

Consistent with that fundamental attribute of the office, countless judges in countless cases routinely make rulings that are unpopular and surely disliked by at least 50 percent of the litigants who appear before them. It is equally common for them to enforce rules that they think unwise, or that are contrary to their personal predilections. For this reason, opinions that a lawyer may have expressed before becoming a judge, or a judicial candidate, do not disqualify anyone for judicial service because every good judge is fully aware of the distinction between the law and a personal point of view. It is equally clear, however, that such expressions after a lawyer has been nominated to judicial office shed little, if any, light on his capacity for judicial service. Indeed, to the extent that such statements seek to enhance the popularity of the candidate by indicating how he would rule in specific cases if elected, they evidence a lack of fitness for the office.

Of course, any judge who faces reelection may believe that he retains his office only so long as his decisions are popular. Nevertheless, the elected judge, like the lifetime appointee, does not serve a constituency while holding that office. He has a duty to uphold the law and to follow the dictates of the Constitution. He may make common law, but judged on the merits of individual cases, not as a mandate from the voters.

By recognizing a conflict between the demands of electoral politics and the distinct characteristics of the judiciary, we do not have to put States to an all or nothing choice of abandoning judicial elections or having elections in which anything goes. As a practical matter, we cannot know for sure whether an elected judge's decisions are based on his interpretation of the law or political expediency. In the absence of reliable evidence one way or the other, a State may reasonably presume that elected judges are motivated by the highest aspirations of their office. But we do know that a judicial candidate, who announces his views in the context of a campaign, is effectively telling the electorate: "Vote for me because I believe X, and I will judge cases accordingly." Once elected, he may feel free to disregard his campaign statements, but that does not change the fact that the judge announced his position on an issue likely to come before him *as a reason to vote for him.* Minnesota has a compelling interest in sanctioning such statements.

The disposition of this case on the flawed premise that the criteria for the election to judicial office should mirror the rules applicable to political elections is profoundly misguided. I therefore respectfully dissent.

Justice GINSBURG, with whom Justice STEVENS, Justice SOUTER, and Justice BREYER join, dissenting.

Legislative and executive officials serve in representative capacities. They are agents of the people; their primary function is to advance the interests of their constituencies. Candidates for political offices, in keeping with their representative role, must be left free to inform the electorate of their positions on specific issues. Armed with such information, the individual voter will be equipped to cast her ballot intelligently, to vote for the candidate committed to positions the voter approves. Campaign statements committing the candidate to take sides on contentious issues are therefore not only appropriate in political elections, they are "at the core of our electoral process," for they "enhance the accountability of government officials to the people whom they represent."

Judges, however, are not political actors. They do not sit as representatives of particular persons, communities, or parties; they serve no faction or constituency. They must strive to do what is legally right, all the more so when the result is not the one "the home crowd" wants. Even when they develop common law or give concrete meaning to constitutional text, judges act only in the context of individual cases, the outcome of which cannot depend on the will of the public.

Thus, the rationale underlying unconstrained speech in elections for political office--that representative government depends on the public's ability to choose agents who will act at its behest – does not carry over to campaigns for the bench. As to

persons aiming to occupy the seat of judgment, the Court's unrelenting reliance on decisions involving contests for legislative and executive posts is manifestly out of place.

[T]he Court ignores a crucial limiting construction placed on the Announce Clause by the courts below. The provision does not bar a candidate from generally "stating [her] views" on legal questions; it prevents her from "publicly making known how [she] would *decide* "disputed issues. That limitation places beyond the scope of the Announce Clause a wide range of comments that may be highly informative to voters. Consistent with the Eighth Circuit's construction, such comments may include, for example, statements of historical fact ("As a prosecutor, I obtained 15 drunk driving convictions"); qualified statements ("Judges should use *sparingly* their discretion to grant lenient sentences to drunk drivers"); and statements framed at a sufficient level of generality ("Drunk drivers are a threat to the safety of every driver"). What remains within the Announce Clause is the category of statements that essentially commit the candidate to a position on a specific issue, such as "I think all drunk drivers should receive the maximum sentence permitted by law."

The Announce Clause is thus more tightly bounded, and campaigns conducted under that provision more robust, than the Court acknowledges. Judicial candidates in Minnesota may not only convey general information about themselves, they may also describe their conception of the role of a judge and their views on a wide range of subjects of interest to the voters. Further, they may discuss, criticize, or defend past decisions of interest to voters. What candidates may not do--simply or with sophistication--is remove themselves from the constraints characteristic of the judicial office and declare how they would decide an issue, without regard to the particular context in which it is presented, *sans* briefs, oral argument, and, as to an appellate bench, the benefit of one's colleagues' analyses. Properly construed, the Announce Clause prohibits only a discrete subcategory of the statements the Court's misinterpretation encompasses.

The Court's characterization of the Announce Clause as "election-nullifying," "plac[ing] most subjects of interest to the voters off limits," is further belied by the facts of this case. In his 1996 bid for office, petitioner Gregory Wersal distributed literature sharply criticizing three Minnesota Supreme Court decisions. Of the court's holding in the first case--that certain unrecorded confessions must be suppressed – Wersal asked, "Should we conclude that because the Supreme Court does not trust police, it allows confessed criminals to go free?" Of the second case, invalidating a state welfare law, Wersal stated: "The Court should have deferred to the Legislature. It's the Legislature which should set our spending policies." And of the third case, a decision involving abortion rights, Wersal charged that the court's holding was "directly contrary to the opinion of the U.S. Supreme Court," "unprecedented," and a "pro-abortion stance."

Even as it exaggerates the reach of the Announce Clause, the Court ignores the significance of that provision to the integrated system of judicial campaign regulation Minnesota has developed. Coupled with the Announce Clause in Minnesota's Code of Judicial Conduct is a provision that prohibits candidates from "mak[ing] pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office." Although the Court is correct that this "pledges or promises"

provision is not directly at issue in this case, the Court errs in overlooking the interdependence of that prohibition and the one before us. In my view, the constitutionality of the Announce Clause cannot be resolved without an examination of that interaction in light of the interests the pledges or promises provision serves.

All parties to this case agree that, whatever the validity of the Announce Clause, the State may constitutionally prohibit judicial candidates from pledging or promising certain results. The reasons for this agreement are apparent. Pledges or promises of conduct in office, however commonplace in races for the political branches, are inconsistent "with the judge's obligation to decide cases in accordance with his or her role."

Prohibiting a judicial candidate from pledging or promising certain results if elected directly promotes the State's interest in preserving public faith in the bench. When a candidate makes such a promise during a campaign, the public will no doubt perceive that she is doing so in the hope of garnering votes. And the public will in turn likely conclude that when the candidate decides an issue in accord with that promise, she does so at least in part to discharge her undertaking to the voters in the previous election and to prevent voter abandonment in the next. The perception of that unseemly *quid pro quo* – a judicial candidate's promises on issues in return for the electorate's votes at the polls – inevitably diminishes the public's faith in the ability of judges to administer the law without regard to personal or political self-interest.

The constitutionality of the pledges or promises clause is thus amply supported; the provision not only advances due process of law for litigants in Minnesota courts, it also reinforces the authority of the Minnesota judiciary by promoting public confidence in the State's judges. The Announce Clause, however, is equally vital to achieving these compelling ends, for without it, the pledges or promises provision would be feeble, an arid form, a matter of no real importance.

Uncoupled from the Announce Clause, the ban on pledges or promises is easily circumvented. By prefacing a campaign commitment with the caveat, "although I cannot promise anything," or by simply avoiding the language of promises or pledges altogether, a candidate could declare with impunity how she would decide specific issues. Semantic sanitizing of the candidate's commitment would not, however, diminish its pernicious effects on actual and perceived judicial impartiality. To use the Court's example, a candidate who campaigns by saying, "If elected, I will vote to uphold the legislature's power to prohibit same-sex marriages,", will feel scarcely more pressure to honor that statement than the candidate who stands behind a podium and tells a throng of cheering supporters: "I think it is constitutional for the legislature to prohibit same-sex marriages," Made during a campaign, both statements contemplate a *quid pro quo* between candidate and voter. Both effectively "bind [the candidate] to maintain that position after election." And both convey the impression of a candidate prejudging an issue to win votes. Contrary to the Court's assertion, the "nonpromissory" statement averts none of the dangers posed by the "promissory" one.

By targeting statements that do not technically constitute pledges or promises but nevertheless "publicly mak[e] known how [the candidate] would decide" legal issues, the Announce Clause prevents this end run around the letter and spirit of its companion

provision. No less than the pledges or promises clause itself, the Announce Clause is an indispensable part of Minnesota's effort to maintain the health of its judiciary, and is therefore constitutional for the same reasons.

Judges are not politicians, and the First Amendment does not require that they be treated as politicians simply because they are chosen by popular vote. Nor does the First Amendment command States who wish to promote the integrity of their judges in fact and appearance to abandon systems of judicial selection that the people, in the exercise of their sovereign prerogatives, have devised.

For more than three-quarters of a century, States like Minnesota have endeavored, through experiment tested by experience, to balance the constitutional interests in judicial integrity and free expression within the unique setting of an elected judiciary. I would uphold it as an essential component in Minnesota's accommodation of the complex and competing concerns in this sensitive area. Accordingly, I would affirm the judgment of the Court of Appeals for the Eighth Circuit.