Very interesting.
Here we have laws that place judges and lawyers who run for election as judges in jeopardy of ending their career if what? — Did I hear that right? — If they provide their views on disputed legal or political issues? And they are running for public office? How do we know who to vote for if they can't speak to us?
Hmmm?

REPUBLICAN PARTY OF MINNESOTA v. WHITE

SUPREME COURT OF THE UNITED STATES
536 U.S. 765
June 27, 2002
[5 - 4]

OPINION: Justice Scalia/Rehnquist/O'Connor/Kennedy/Thomas...The question presented in this case is whether the First Amendment permits the Minnesota Supreme Court to prohibit **candidates for judicial election** in that State from **announcing their views on disputed legal and political issues**.

Since Minnesota's admission to the Union in 1858, the State's Constitution has provided for the selection of all state judges by popular election. Since 1912, those elections have been nonpartisan. Since 1974, they have been subject to 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."** This prohibition, promulgated by the Minnesota Supreme Court and based on Canon 7(B) of the 1972 American Bar Association (ABA) Model Code of Judicial Conduct, is known as the "**announce clause.**" Incumbent judges who violate it are subject to **discipline**, including removal, censure, civil penalties, and suspension without pay. Lawyers who

run for judicial office also must comply with the announce clause...Those who violate it are subject to **disbarment, suspension, and probation**.

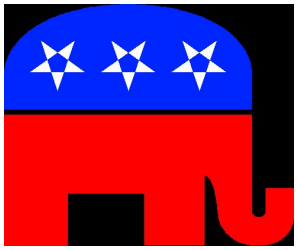
In 1996...Gregory Wersal ran for associate justice of the Minnesota Supreme Court. In the course of the campaign, **he distributed literature criticizing several Minnesota Supreme Court decisions on issues such as crime, welfare, and abortion**. A complaint against Wersal challenging, among other things, the propriety of this literature was filed with the Office of Lawyers Professional Responsibility, the agency which, under the direction of the Minnesota Lawyers Professional Responsibility Board, investigates and prosecutes ethical violations of lawyer candidates for judicial office. The Lawyers Board dismissed the complaint; with regard to the charges that his campaign materials violated the announce clause, it expressed doubt whether the clause could constitutionally be enforced. Nonetheless, fearing that further ethical complaints would jeopardize his ability to practice law, Wersal withdrew from the election. **In 1998**, Wersal ran again for the same office. Early in that race, he sought an advisory opinion from the Lawyers Board with regard to whether it planned to enforce the announce clause. The Lawyers Board responded equivocally, stating that, although it had significant doubts about the constitutionality of the provision, it was unable to answer his question because he had not submitted a list of the announcements he wished to make.

Shortly thereafter, Wersal filed this lawsuit...seeking a declaration that the announce clause violates the First Amendment and an injunction against its enforcement. Wersal alleged that he was forced to refrain from announcing his views on disputed issues during the 1998 campaign, to the point where he declined response to questions put to him by the press and public, out of concern that he might run afoul of the announce clause. Other plaintiffs in the suit, including the Minnesota Republican Party, alleged that, because the clause kept Wersal from announcing his views, they were unable to learn those views and support or oppose his candidacy accordingly...[T]he District Court found...that the announce clause **did not** violate the First Amendment...[T]he United States Court of Appeals...affirmed. We granted certiorari.

Before considering the constitutionality of the announce clause, we must be clear about its meaning. Its text says that a candidate for judicial office **shall not "announce his or her views on disputed legal or political issues.**"

We know that "announcing...views" on an issue covers much more than *promising* to decide an issue a particular way. The prohibition extends to the candidate's mere statement of his current position, even if he does not bind himself to maintain that position after election. All the parties agree this is the case, because the Minnesota Code contains a so-called **"pledges or promises" clause**, which *separately* 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" -- a prohibition that is not challenged here and on which we express no view.

There are, however, some limitations that the Minnesota Supreme Court has placed upon the scope of the announce clause that are not (to put it politely) immediately apparent from its text. **The statements that formed the basis of the complaint against Wersal in 1996 included criticism of past decisions of the Minnesota Supreme Court**. One piece of campaign literature stated that



"the Minnesota Supreme Court has issued decisions which are marked by their disregard for the Legislature and a lack of common sense." It went on to criticize a decision excluding from evidence confessions by criminal defendants that were not tape-recorded, asking "should we conclude that because the Supreme Court does not trust police, it allows confessed criminals to go free?" It criticized a decision striking down a state law restricting welfare benefits, asserting that "it's the Legislature which should set our spending policies." And it criticized a decision requiring public financing of abortions for poor women as "unprecedented" and a "pro-abortion stance." **Although one would think that all of these statements touched on disputed legal or political issues, they did not (or at least do not now) fall within the scope of the announce clause. The Judicial Board issued an opinion stating that judicial candidates may criticize past decisions, and the Lawyers Board refused to discipline Wersal for the foregoing statements because, in part, it thought they did not violate the announce clause.** The Eighth Circuit relied on the Judicial Board's opinion in upholding the announce clause and the Minnesota Supreme Court recently embraced the Eighth Circuit's interpretation.

There are yet further limitations upon the apparent plain meaning of the announce clause: **In light of the constitutional concerns, the District Court construed the clause to reach only disputed issues that are likely to come before the candidate if he is elected judge. The Eighth Circuit accepted this limiting interpretation by the District Court, and in addition construed the clause to allow general discussions of case law and judicial philosophy. The Supreme Court of Minnesota adopted these interpretations as well when it ordered enforcement of the announce clause in accordance with the Eighth Circuit's opinion.**

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. Second, limiting the scope of the clause to issues likely to come before a court is not much of a limitation at all. One would hardly expect the "disputed legal or political issues" raised in the course of a state judicial election to include such matters as whether the Federal Government should end the embargo of Cuba. Quite obviously, they will be those legal or political disputes that are the proper (or by past decisions have been made the improper) business of the state courts. And within that relevant

category, "**there 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." Third, 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.

In any event, it is clear that the announce clause prohibits a judicial candidate from stating 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 *stare decisis*.

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 pre-approved 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...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 circumscribe protected expression."

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. Respondents reassert these two interests before us, arguing that the first is compelling because it protects the due process rights of litigants, and that the second is compelling because it preserves public confidence in the judiciary.

Respondents are rather vague, however, about what they mean by "impartiality."...Clarity on this point is essential before we can decide whether impartiality is indeed a compelling state interest, and, if so, whether the announce clause is narrowly tailored to achieve it.

One meaning of "impartiality" in the judicial context...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...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." 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." 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 **openmindedness.** 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 openmindedness, 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; ("A judge may write, lecture, teach, speak and participate in other extra-judicial activities concerning the law..."). That is quite incompatible with the notion that the need for openmindedness (or for the appearance of openmindedness) 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...

Justice Stevens asserts that statements made in an election campaign pose a special threat to openmindedness because the candidate, when elected judge, will have a *particular* reluctance to contradict them. That might be plausible, perhaps, with regard to campaign *promises*. A candidate who says "If elected, I will vote to uphold the legislature's power to prohibit same-sex marriages" will positively be breaking his word if he does not do so (although one would be naive not to recognize that campaign promises are -- by long democratic tradition -- the least binding form of human commitment). But, as noted earlier, the Minnesota Supreme Court has adopted a separate prohibition on campaign "pledges or promises," which is not challenged here. The proposition that judges feel significantly greater compulsion, or appear to feel significantly greater compulsion, to

maintain consistency with *nonpromissory* statements made during a judicial campaign than with such statements made before or after the campaign is not self-evidently true. It seems to us quite likely, in fact, that in many cases the opposite is true. We doubt, for example, that a mere statement of position enunciated during the pendency of an election will be regarded by a judge as more binding -- or as more likely to subject him to popular disfavor if reconsidered -- than a carefully considered holding that the judge set forth in an earlier opinion denying some individual's claim to justice. In any event, it suffices to say that **respondents have not carried the burden imposed by our strict-scrutiny test to establish this proposition (that campaign statements are uniquely destructive of openmindedness) on which the validity of the announce clause rests...**

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. "Debate on the qualifications of candidates" is "at the core of our electoral process and of the First Amendment freedoms," not at the edges. "The 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." *Wood v. Georgia*[1]. "It is simply not the function of government to select which issues are worth discussing or debating in the course of a political campaign." We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election.

Justice Ginsburg would do so -- and much of her dissent confirms rather than refutes our conclusion that <u>the purpose behind the announce clause is not openmindedness in the judiciary, but the undermining of judicial elections</u>. She contends that the announce clause must be constitutional because due process would be denied if an elected judge sat in a case involving an issue on which he had previously announced his view. She reaches this conclusion because, she says, such a judge would have a "direct, personal, substantial, and pecuniary interest" in ruling consistently with his previously announced view, in order to reduce the risk that he will be "voted off the bench and thereby lose [his] salary and emoluments." 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. Surely the judge who frees Timothy McVeigh places his job much more at risk than the judge who (horror of horrors!) reconsiders his previously announced view on a disputed legal issue. So if, as Justice Ginsburg claims, it violates due process for a judge to sit in a case in which ruling one way rather than another increases his prospects for reelection, then -- quite simply -- the practice of electing judges is itself a violation of due process. It is not difficult to understand how one with these views would approve the election-nullifying effect of the announce clause. They are not, however, the views reflected in the Due Process Clause of the Fourteenth Amendment, which has coexisted with the election of judges ever since it was adopted.

[1]Case 1A-S-11 on this website.

Justice Ginsburg devotes the rest of her dissent to attacking arguments we do not make. For example, despite the number of pages she dedicates to disproving this proposition, we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office. What we do assert, and what Justice Ginsburg ignores, is that, *even if* the First Amendment allows greater regulation of judicial election campaigns than legislative election campaigns, the announce clause still fails strict scrutiny because it is woefully underinclusive, prohibiting announcements by judges (and would-be judges) only at certain times and in certain forms. We rely on the cases involving speech during elections only to make the obvious point that this underinclusiveness cannot be explained by resort to the notion that the First Amendment provides less protection during an election campaign than at other times.

But in any case, 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.

...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 candidate-speech restrictions of all the other States that have them are also the product of judicial fiat.) 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 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."...

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...

CONCURRENCE: Justice O'Connor...Respondents claim that "the Announce Clause is necessary ...to protect the State's compelling governmental interest in an actual and perceived...impartial judiciary." I am concerned that, even aside from what judicial candidates may say while campaigning, **the very practice of electing judges undermines this interest**.

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...

Moreover, contested elections generally entail campaigning. And campaigning for a judicial post today can require substantial funds...[T]he 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...**Even if judges were able to refrain from favoring donors, the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary...**

Despite these significant problems, 39 States currently employ some form of judicial elections...In 1906, Roscoe Pound gave a speech to the American Bar Association in which he claimed that **"compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the bench."**

In response to such concerns, some States adopted a modified system of judicial selection that became known as the Missouri Plan...Under the Missouri Plan, judges are appointed by a high elected official, generally from a list of nominees put together by a nonpartisan nominating commission, and then subsequently stand for unopposed retention elections in which voters are asked whether the judges should be recalled. If a judge is recalled, the vacancy is filled through a new nomination and appointment. This system obviously reduces threats to judicial impartiality, even if it does not eliminate all popular pressure on judges...

[T]he 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.

CONCURRENCE: Justice Kennedy...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...**

DISSENT: Justice Stevens/Souter/Ginsburg/Breyer...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...**

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...**

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...

DISSENT: Justice Ginsburg/Stevens/Souter/Breyer...[Not provided.]