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IN THE AFTERMATH OF REPUBLICAN PARTY OF MINNESOTA V. WHITE, STATE JUDICIAL CANDIDATES ARE UNCERTAIN AS TO WHAT REMAINS PROTECTED

Leigh A. Leonard

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community . . . . Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed . . . to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.¹

Democratic principles of government insist on protecting the right of the individual to cast an informed vote for the candidate of one’s choice in a popular election.² The First Amendment to the Constitution guarantees that Congress shall make no law abridging a person’s freedom of speech,³ and the Fourteenth Amendment extends that protection to prevent infringement by the states.⁴ The courts have vigorously guarded the freedom of speech in the context of political

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³ U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech.").

⁴ U.S. CONST. amend. XIV (extending the protection of speech under the First Amendment to apply in instances of state abridgement of the right to speak freely).
elections in order to protect the most fundamental element of our democracy, the right to vote.\textsuperscript{5} Courts have placed consistent emphasis on the value of public debate for the promotion of an educated electorate.\textsuperscript{6}

Presently, almost four-fifths of the states choose to select judges through various forms of public elections.\textsuperscript{7} State constitutions began instituting electoral systems of judicial selection in 1832 to counter the heightened abuse of unchecked judicial power and to prevent the use of judgeships in the patronage system.\textsuperscript{8} From the beginning, judges were recognized as performing a different function than other elected officials.\textsuperscript{9} Judges are required to be impartial about the parties and issues

\textsuperscript{5} See Buckley v. Valeo, 424 U.S. 1, 14-15 (1976). The Court has emphasized that the fundamental purpose of the First Amendment has been the protection of speech in the arena of political exchange:

Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order “to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”

\textit{Id.} at 14. In addition to the breadth of the First Amendment’s protection of speech, the Court articulated the connection between open public discourse and the individual’s right to cast an educated vote: “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 as a nation.” \textit{Id.} at 14-15. Because the electoral process was created with the understanding that the electorate would possess the information necessary to select capable officials, the right to vote inherently requires that access to candidate information be uninhibited. \textit{See id.}

\textsuperscript{6} See, e.g., \textit{id.} at 14-15; Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 222-23 (1989) (following Buckley v. Valeo and reiterating that the Court has repeatedly acknowledged the importance of open debate on the qualifications of candidates under an elected democracy); Mills v. Alabama, 384 U.S. 214, 218 (1966) (addressing the First Amendment’s protection of political discourse, the Court stated that, “[t]here is practically universal agreement that a major purpose of that [First] Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates . . . .”).

\textsuperscript{7} PATRICK M. MCFADDEN, ELECTING JUSTICE: THE LAW AND ETHICS OF JUDICIAL ELECTION CAMPAIGNS 9 (1990). Thirty-nine states subject some, if not all, of their appellate and trial court judges to some form of election. \textit{Id.}


\textsuperscript{9} The Way Forward: Lessons from the National Symposium on Judicial Campaign Conduct and the First Amendment, 35 IND. L. REV. 649, 652 (2002). The symposium outlined several principles including the idea that judicial elections differ from ordinary political elections because of the distinct role of judges. \textit{Id.} The role of judges, in contrast to the roles of elected legislators and executives, stems from three characteristics of judicial office: 1) the judicial process focuses on “due process rights and the rule of law;” 2) the separation of powers insulates judges from electoral accountability and makes them “responsible for most principled decision-making;” and 3) the present state judicial
before them in courts of law and, at times, are required to choose a route that runs contrary to popular opinion. Justice Scalia identified judges as being representatives of the law. As a representative of the law and not of the people, the task of a judge inherently differs from that of all other elected officials. As a representative of the law and an impartial trier of fact, a judge must sit before the litigants in a case without bias as to the parties and issues before him.

In order to serve the litigants’ interests in an impartial judiciary and the populous’ desire to hold judges accountable, the Minnesota legislature created a code to govern the conduct of the judiciary. The Minnesota Code and its American Bar Association (ABA) counterpart, the ABA Model Code of Judicial Conduct, include guidelines for the political activities of judges. The Minnesota Code Canon 5 states: “A candidate . . . shall not: make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office [or] announce his or her views on disputed legal or political issues.

selection process, viewed in an historical light, with a high level of electoral control, contradicts the original state intention for the judiciary. Id.

10. Justice Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. CHI. L. REV. 1175, 1180 (1989) (discussing Scalia’s views on judicial activism and principles of interpretation). Scalia recognizes the importance of a judge’s ability to stand up to the traditionally dominant will of the people in order to abide by the dictates of the law. Id.

11. Chisolm v. Roemer, 501 U.S. 380, 410-11 (1991) (Scalia, J., dissenting). Excluding judges from the plain meaning of the word representative, Justice Scalia defined a representative as a person who is both elected by the people and acts on behalf of the people. Id. Judges, although they may be elected, are not representatives of the people because they represent the law, which often requires them to “rule against the People.” Id. at 411.

12. The Way Forward, supra note 9; see Republican Party of Minn. v. White, 536 U.S. 765, 803-04 (2002) (Ginsburg, J., dissenting) (distinguishing between the functions of judges and other officials elected by the people, Justice Ginsburg pointed out that “[u]nlike their counterparts in the political branches, judges are expected to refrain from catering to particular constituencies or committing themselves on controversial issues . . .”).

13. MCFADDEN, supra note 7, at 71 (explaining that some critics would interpret a judge’s impartiality to include a necessary independence from his own personal “moral, social or political views” in the process of judicial decisionmaking).

14. See MINN. CT. R., MINN. CODE OF JUD. CONDUCT (2003) [hereinafter MINN. CODE OF JUD. CONDUCT] (stating, in the Preamble, the underlying purpose for the Code). In order to build consensus among state constitutional delegates, the supporters of judicial elections proposed other constitutional restraints to limit the politicization of the judiciary. See Hall, supra note 8, at 352. Examples of state constitutional restraints on the elected judiciary include: staggered judicial elections to prevent a massive judicial turnover; fixed terms of office; and prohibiting sitting judges from campaigning for other elected offices. Id.

In order to preserve the impartiality of the judiciary throughout the electoral process, the codes prohibit judicial candidates from making "promises and pledges" as to their conduct while in office (hereinafter referred to as the promise and pledge clause), and from announcing their personal opinions on disputed legal or political issues (hereinafter referred to as the announce clause).

The limits on judicial candidate speech debated in Republican Party of Minnesota v. White were promulgated by the Supreme Court of Minnesota based on the 1990 Amendments to the ABA Model Code of Judicial Conduct. The Code evolved from the Model Canons of Judicial Ethics—first formulated in 1924. These Canons recommended general ethical principles for the governing of judicial activities. The Model Canons were reformulated to become the Model Code of Judicial Conduct in 1972. The current version of the Model Code, revised in


[A] candidate . . . shall not: make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court . . . .

MODEL CODE OF JUD. CONDUCT Canon 5(3)(d)(i-ii) (1990). The Model Code revision to the announce clause was instituted in 1990. Id.; see also Republican Party of Minn. v. Kelly, 63 F. Supp. 2d 967, 973 (D. Minn. 1999). The Minnesota Code's announce clause was originally modeled after the Model Code of 1972 announce clause, which states: "[A] candidate . . . should not . . . announce his views on disputed legal or political issues . . . ."


18. See supra notes 15-16 and accompanying text.

19. See Republican Party of Minn. v. Kelly, 63 F. Supp. 2d 967, 973 (D. Minn. 1999) (explaining that the Minnesota Supreme Court refrained from adopting the exact language of the ABA Model Code, as it was amended in 1990).

20. Brief of Amicus Curiae American Bar Association at 6-7, Republican Party of Minn. v. White, 536 U.S. 765 (2002) (No. 01-521) (recounting the history of the ABA Model Code, including the original form of the announce clause dictating "that a candidate for judicial office 'should not announce in advance his conclusions of law on disputed issues to secure class support'"). See also MODEL CANONS OF JUD. CONDUCT Canon 30 (1924).


22. MODEL CODE OF JUD. CONDUCT (1972) (revising the Model Canons of 1924 in light of issues facing the modern judiciary).
1990, concretely addresses the issues and concerns emerging in judicial politics. The 1990 Code of Judicial Conduct amends the announce clause of the 1972 Code with a prohibition against candidate statements that either commit or appear to commit the candidate with respect to cases, controversies, or issues that may arise before the candidate if elected to the court. Additionally, the 1990 Code maintains the promise and pledge clause laid out in the 1972 Code. The ABA clearly identifies the objective of the Model Code of Judicial Conduct as the maintenance of an independent judiciary and the preservation of the honor and respect for the judicial office. The 1990 revisions to the Model Code, found in Canon 5, were intended to reflect the American Bar

23. MILORD, supra note 21, at 9. The Preamble to the Model Code emphasizes the functionality of text as it is applied to judicial and political conduct:

The new Preamble makes clear that because of their independent role in the American legal system, judges must act in a manner that maintains public confidence in that system . . . . Its purpose . . . is to set forth basic, enforceable standards for all judges and to assist them in establishing and maintaining high standards in their judicial and extra-judicial conduct.

Id. Canon 5 of the Model Code is entitled "A Judge or Judicial Candidate Shall Refrain from Inappropriate Political Activity." MODEL CODE OF JUD. CONDUCT Canon 5 (1990). This Canon elaborates on the specific activities associated with a judge's own election or a judge's support of another public official. See id.

24. See MILORD, supra note 21, at 50-51 (highlighting the change from a prohibition on announcements to a prohibition on statements of commitment). Furthermore, Milord explains that the alteration in the present code creates continuity with Canon 3(B)(9), which provides a rule governing public comment by sitting judges for matters still pending. Id. at 51.

25. Compare MODEL CODE OF JUD. CONDUCT Canon 5(A)(3)(d)(i)(1990) (stating "[a] candidate for judicial office . . . shall not: make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office"), with MODEL CODE OF JUD. CONDUCT Canon 7(C)(1972) (recommending that a candidate "should make no pledges or promises of conduct in office other than the faithful and impartial performance of the judicial duties of the office . . . ").

26. MODEL CODE OF JUD. CONDUCT Preamble (1990). The Preamble sets forth the principles of the American justice system, the role of the judiciary, the intention of the Code, and the clear purpose of maintaining an independent and impartial judiciary:

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and highly visible symbol of government under the rule of law.

Id.
Association's concern for the constitutionality of the restrictions on judicial candidate speech.

The Minnesota Code of Judicial Conduct and the ABA Model Code of Judicial Conduct set out to preserve the appearance of an impartial judiciary, as it was intended by the framers. Additionally, the Preamble to the Model Code confirms that the canons of judicial conduct should be enforced in accordance with the Constitution. The First Amendment to the United States Constitution has traditionally protected political speech from any form of encroachment. In one case, Gregory Wersal, a candidate for the Minnesota judiciary, filed a suit in federal court seeking a judgment declaring that the announce clause of the Minnesota Judicial Code violated the First Amendment. Wersal claimed that the announce clause limited his ability to speak candidly on political issues while vying for the votes of the general electorate.

The United States Supreme Court held that the portion of the announce clause of Minnesota's Canon 5, which prohibited judicial candidates from announcing their views as to political or legal issues, violated the First Amendment. Applying the strict scrutiny test to the speech limitation, the Court held that it need not decide whether a state's interest in maintaining an impartial judiciary is compelling because the Minnesota Code's announce clause failed to be narrowly tailored to the purported state interest in impartiality. The Court's holding decided a controversial issue among several of the federal circuits, but left it up to the various state supreme courts to decide the exact type of speech that

27. MILORD, supra note 21, at 44-50 (explaining how the debate over the revised language and the concern over the constitutionality of the clauses led the ABA to narrow the language of the Code to avoid free speech challenges).
28. MODEL CODE OF JUD. CONDUCT Preamble (1990); see also Republican Party of Minn. v. White, 365 U.S. 765, 775-76 (2002) (recognizing the State's contention, in accordance with the Model Code, that an interest in an impartial judiciary is compelling).
29. MODEL CODE OF JUD. CONDUCT Preamble (1990) ("[The Canons] should be applied consistent with constitutional requirements, statutes, other court rules and decisional law . . . ").
30. See Mills v. Alabama, 384 U.S. 214, 218-19 (1966) (explaining that the First Amendment, enforced against the states through the Fourteenth Amendment, especially protects the open discussions of candidates and matters respecting the political process); Cf. Monitor Patriot Co. v. Roy, 401 U.S. 265, 271-72 (1971) (stating that if the First Amendment's purpose was to encourage an open forum for the generation of novel ideas, then the First Amendment's most important application is to the electoral process).
31. White, 536 U.S. at 768-70 (seeking to estop the State of Minnesota from infringing on his right to free and open debate of issues during his campaign for election to the judiciary).
32. Id. at 769-70.
33. Id. at 788.
34. Id. at 776.
will be construed as permissible under the now defunct announce clause.\textsuperscript{35}

In light of the Court’s finding that the announce clause of the Minnesota Code of Judicial Conduct was unconstitutionally broad in its capture of political speech, this Note examines the open question of whether the promise and pledge clause of the Model Code of Judicial Conduct and similar state codes violates the First Amendment. Section I discusses the formation of the codes of judicial conduct, their underlying purpose, and the conflict that has arisen between the codes and a judicial candidate’s First Amendment rights. Section II details the issue that emerged in the Supreme Court’s decision of \textit{Republican Party of Minnesota v. White}. Section III addresses the Supreme Court’s ruling in \textit{Republican Party of Minnesota v. White} and the various opinions of the Court, which articulated three distinct concerns: the state systems of judicial elections, which favor accountability; the rights of a judicial candidate to protection of his political speech; and the underlying right of a litigant to an impartial jurist. Given the various opinions of the Court in \textit{Republican Party of Minnesota v. White}, Section IV attempts to reconcile whether the Court could ever find an appropriate balance between accountability, free speech, and impartiality under one of the current modes of judicial selection employed either on the state or the federal level. This Note analyzes, based on the Court’s rejection of the announce clause, whether the promise and pledge clause is unconstitutional under strict scrutiny. This Note concludes that, under \textit{Republican Party of Minnesota v. White}, state tribunals will be forced to examine the alternatives for promoting an impartial judiciary \textit{and} retaining judicial elections in order to curtail the infringement on speech perpetuated by the current judicial codes of conduct. Among the considerable options, the most viable for achieving the states’ interest in an impartial judiciary—while balancing the speech interest of candidates and the rights of litigants—may be for the states to follow the model employed by the Constitution for the federal judiciary.

\section*{I. THE DEVELOPING CONFLICT BETWEEN POLITICAL SPEECH AND JUDICIAL ETHICS}

\subsection*{A. The Model Codes Matured With an Eye on Strict Scrutiny}

The Model Canons of Judicial Ethics were originally drafted in 1924 as an initial and formal attempt to regulate judicial ethics.\textsuperscript{36} Although the

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code discouraged candidates from making conclusions of law in order to secure electoral support, the code did not prohibit speech on political issues, as long as candidates did not make their political party affiliation obvious. The first overhaul of the Model Canons took place nearly fifty years after the promulgation of the original. The Model Code of Judicial Conduct that emerged in 1972 had a renewed focus on the impartiality and independence of the judiciary. The most recent revision of the Model Code, formulated in 1990, resulted in changes that were intended to narrow the prohibitory language of the announce clause to withstand a First Amendment challenge. The current Model Code employs new language in the announce clause, but maintains the old language of the promise and pledge clause.

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37. MODEL CANONS OF JUDICIAL CONDUCT Canon 30 (1923). Canon 30 states: A candidate for judicial position should not make or suffer others to make for him, promises of conduct in office which appeal to the cupidity or prejudices of the appointing or electing power; he should not announce in advance his conclusions of law on disputed issues to secure class support, and he should do nothing while a candidate to create the impression that if chosen, he will administer his office with bias, partiality or improper discrimination. Id. This original Canon served as the foundation for future Canons to include a prohibition against political speech. See id.; see also MODEL CODE OF JUD. CONDUCT (1998).

38. MODEL CANONS OF JUD. CONDUCT Canon 28 (1924) (permitting judges to hold their own political views, yet prohibiting them from publicly advocating on behalf of a political party, except when necessary, for the promotion of their own electoral interests).


40. THODE, supra note 39, at 45; see contra Brief of Amicus Curiae American Bar Association, at 5, White (01-512) (finding the 1972 revisions to contain many of the same basic ideals for judicial conduct as the original Canons of 1924).

41. See Brief of Amicus Curiae American Bar Association, at 8, White (01-512) (recognizing the opportunity for conflict between the announce clause of the 1972 Model Code, the Minnesota Supreme Court revised the language in the 1990 Model Code to sustain First Amendment challenges).

42. Compare MODEL CODE OF JUD. CONDUCT Canon 5(A)(3)(d)(i) (1990) (stating that a candidate "shall not: make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of office"), with MODEL CODE OF JUD. CONDUCT Canon 7(B)(1)(c) (1972) (stating that a candidate "should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office").
B. The Clash Between State Election Oversight and the First Amendment

States maintain broad power to regulate their general elections. Yet that power "does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the state's citizens." In Mills v. Alabama, the Supreme Court held that political campaign speech deserves the utmost protection under the First Amendment. The First Amendment has special meaning in the context of government affairs and candidate discourse. In a democracy, the right of citizens to make informed decisions about candidates for political office is fundamental to the electoral process. In Buckley v. Valeo, the Court emphasized that "[d]iscussion of public issues and debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution." The Court stressed the importance of an informed democratic citizenry in order for citizens to make conscious leadership choices—to guide the nation or locality in accordance with the public will.

Although political speech is highly protected, situations may arise in which a legitimate need entitles a state to encroach on the First Amendment right to speech. In Brown v. Hartlage, the Court examined

43. See Tashjian v. Republican Party of Conn., 479 U.S. 208, 217 (1986) (explaining that Article I, Section IV of the United States Constitution entrusts the states with the responsibility of designating the time, place, and manner for the elections of representatives to the Federal government and state officers).
44. Id.
46. See id. (finding that the preservation of an open dialogue on matters of government and political candidates is one of the central purposes of the First Amendment).
47. See id. at 219; see also Monitor Patriot Co. v. Roy, 401 U.S. 265, 271-72 (1971) (stating that, if the First Amendment's purpose is to encourage an open forum for the generation of novel ideas, then surely the First Amendment's most important application is to the electoral process).
50. Id. at 14-15 (protecting one's freedom of political expression with respect to the system of government chosen by the founders is the intrinsic purpose of the First Amendment); see also Brown v. Hartlage, 456 U.S. 45, 53 (1982) ("The free exchange of ideas provides special vitality to the process traditionally at the heart of American constitutional democracy—the political campaign.").
51. See Valeo, 424 U.S. at 15 (1976). The Court expanded on the importance of an informed electorate to the democratic system stating, "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 as a nation." Id.
52. See Brown, 456 U.S. at 55 (explaining that the First Amendment protection of speech does not extend to illegal agreements merely because they take the form of words).
a Kentucky statute that sought to limit candidate speech and found that if the statute were applied narrowly under circumstances in which speech conflicted with another right, the state could properly limit candidate speech. In Brown, a candidate's illegal agreements and fraudulent statements, although they took the form of speech, were not deserving of protection under the First Amendment.

States, such as Tennessee, successfully have asserted the right to curb political speech when the right to free speech interferes with the right to vote—free and independent of intimidation. In Burson v. Freeman, the Court held that "a State has a compelling interest in protecting voters from confusion and undue influence." Additionally, the Court found a compelling interest in protecting the "integrity and reliability" of the election process. In analyzing the second prong of the strict scrutiny test, the Court in Burson found that limiting campaign activity within a reasonable area surrounding a polling place directly promotes the right to vote.

Additionally, the First Amendment is not absolute, and the Court has consistently found limits to the First Amendment in other arenas of speech, including obscenity. E.g., Miller v. California, 413 U.S. 15, 23 (1973) (finding obscenity to constitute an unprotected form of speech).

53. See id. The Kentucky Corrupt Practices Act prohibits candidates "from making expenditure[s], loan[s], agreement[s], or contract[s] as to action[s] if elected, in consideration for voter[s]." Id. at 49 (citing KY. REV. STAT. §121.055 (1982)).

54. Id. at 54-55. The Court found that some promises by candidates easily could be prohibited without constitutional infringement, yet others plainly exceed the bounds of state power to regulate political speech. Id. at 55. The conceivable and constitutional justifications for an intrusion on speech in Brown required that the statute be applied specifically as a ban on buying votes; an incentive for candidates lacking independent wealth; or an application of states' interest in curtailing factual misstatements. Id. at 54. An analogy can be drawn to demonstrate the limits of freedom of association: agreements to conspire to commit illegal conduct are impermissible, despite any infringement on an individual's right to association. Cf id. at 55. Therefore, certain statements in political speeches clearly can be prohibited because of their illegal nature, including intentional misstatements of fact. Id. at 60.

55. Burson v. Freeman, 504 U.S. 191, 198-99 (1992) (reasoning that when there is a conflict between protecting the constitutional right to vote and the First Amendment right to engage in political discourse, the state has a compelling interest in preserving the free and independent choice of the voter, so long as the protection is narrowly tailored).

56. Id.
57. Id. at 199.
58. Id. (citing Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 231 (1989)) ("The Court also has recognized that a State 'indisputably has a compelling interest in preserving the integrity of its election process.'"). The scope of the holding in Burson narrowly defined integrity as the result of protection against fraud in the election process. See id.
59. Id. at 199-200 (following the strict scrutiny test, once the compelling state interest has been established, the state "must demonstrate that its law is necessary to serve the asserted interest"). The Court found that prohibiting campaigning within a certain
1. The First Prong of the Strict Scrutiny Test: A Compelling State Interest

The suppression of speech is constitutional in limited circumstances, namely, when the state can demonstrate that its interest in the suppression is compelling: "When a State seeks to restrict directly the offer of ideas by a candidate to the voters, the First Amendment surely requires that the restriction be demonstrably supported by not only a legitimate state interest, but a compelling one, and that the restriction operate without unnecessarily circumscribing protected expression." Because freedom of speech is of fundamental importance within the democratic process, the Court traditionally has imposed the strictest level of scrutiny on state actions that seek to limit political speech.

In both *Brown* and *Burson*, the Court evaluated several compelling state interests asserted by parties supporting the regulation of political speech. In the effort to monitor judicial elections, judicial impartiality often creates the most frequently cited state interest. Impartiality is crucial because people look to the courts to act as neutral arbiters of disputes when divisive social and political issues confront society. In distance of the polls served as a proper means of protecting a voter’s right to cast a secret ballot and to ensure freedom from the fraud and intimidation. *Id.* at 199-201.


61. *E.g.*, *id.* (requiring a strict scrutiny test when the state intends to place limitations on the dissemination of a candidate’s campaign information and/or ideas); *Eu*, 489 U.S. at 225-26 (applying the strict scrutiny constitutional test to a state provision prohibiting political parties from endorsing candidates in primary elections); *Burson*, 504 U.S. at 197-98 (subjecting a restriction on political speech to the most rigorous standards of scrutiny and requiring the state to demonstrate a compelling state interest and narrowly tailored means to justify the prohibition on campaign speech within an area surrounding a polling location).

62. *Brown*, 456 U.S. at 54. The Court permitted a limitation on specific types of campaign speech, including vote buying, and to curtail purposeful misstatements of fact. *Id.*

63. *See e.g.*, Berger v. Sup. Ct. of Ohio, No. 87-3935, 1988 U.S. App. LEXIS 014657, at *7 (6th Cir. Feb. 14, 1989) (per curiam) (holding that the Ohio announce clause of the state code of judicial conduct furthered a state interest in “ensuring judicial integrity and impartiality”); see also ACLU v. Fla. Bar, 744 F. Supp. 1094, 1097 (N.D. Fla. 1990) (holding that the Florida announce clause is not the least restrictive means to protect the State’s compelling interest in maintaining the judiciary’s integrity).

64. Morial v. Judiciary Comm’n of La., 565 F.2d 295, 302 (5th Cir. 1977) ("Ours is an era in which members of the judiciary often are called upon to adjudicate cases squarely presenting hotly contested social or political issues"). Justice Rehnquist compared the role of judges to the role of an official in a basketball game:

The Constitution has placed the judiciary in a position similar to that of a referee in a basketball game who is obliged to call a foul against a member of the home team at a critical moment in the game: he will be soundly booted, but he is nonetheless obliged to call it as he saw it, not as the home court crowd wants him to call it.
Morial v. Judiciary Commission, the Fifth Circuit declared that the state has a compelling interest in protecting apparent and actual impartiality of the judiciary. The Western District of Kentucky extended the Fifth Circuit's conclusion in finding impartiality of the judiciary to be a compelling state interest:

We have no difficulty finding a compelling state interest in an impartial judiciary. An evenhanded, unbiased and impartial judiciary is one of the pillars upon which our system of government rests. To the degree appropriate, the conduct of judicial elections . . . may be regulated so as to meet that interest, even if freedom of speech is thereby constrained.

Campaign speech that commits a candidate to a particular stance on an issue upsets the "fundamental fairness" traditionally associated with an impartial and independent judicial system.

The preservation of integrity in the judicial branch serves as a second alleged state interest. Stretton v. Disciplinary Board of the Supreme

William H. Rehnquist, Dedicatory Address: Act Well Your Part: Therein All Honor Lies, 7 PEPP. L. REV. 227, 229-30 (1979). Maintaining judiciaries that are responsive to the populous is contrary to the intentions of the founders. See id.

65. 565 F. 2d at 302 ("The state's interest in ensuring that judges be and appear to be neither antagonistic nor beholden to any interest, party, or person is entitled to the greatest respect.").


67. See id. at 315 (concluding that the announce clause in the Kentucky Code of Judicial Conduct appropriately addresses the compelling state interest in limiting speech of judicial candidates in order to uphold the important principles of fairness and impartiality, which are cornerstones of our justice system); see Max Minzner, Gagged But Not Bound: The Ineffectiveness of the Rules Governing Judicial Campaign Speech, 68 UMKC L. REV. 209, 230-31 (1999) (citing Ackerson as the only federal case to focus significantly on the compelling interest of the states in preserving the impartiality, integrity, and fundamental fairness of the judiciary); see Mark Kozlowski, Striking Prohibitions on Elected Judges' Political Speech Threatens Further Erosion of Public Faith in Their Capacity to Act Impartially, N.J. L.J., July 29, 2002. Impartiality in judicial elections serves to protect against the public perception that judges have decided cases and issues before reviewing the specific facts of a case:

The essence of the judicial office is impartiality in fact and in appearance. A judicial candidate who takes specific positions on legal and political issues during a campaign may communicate—or be perceived as communicating—a willingness to prejudge certain types of cases. Should such a candidate be successful at the polls, his or her capacity to live up to the professional ideal of impartiality may well be compromised.

Id.

69. Compare Stretton v. Disciplinary Bd. of Sup. Ct. of Pa., 944 F.2d 137, 142 (3d Cir. 1991) (finding the actual and perceived integrity of the judiciary is an essential quality of a functioning system of government), with ACLU v. Fla. Bar, 744 F. Supp 1094, 1098 (N.D. Fla. 1992) (opining that Florida's announce clause, intended to protect a compelling state
Court of Pennsylvania\textsuperscript{70} confirmed the view that the public’s impression of the judiciary, as an institution with the highest standards of integrity, was vital to the function of state government and was a compelling state interest.\textsuperscript{71} In an essay on the impact of politics on the judiciary, one scholar seeks guidance from John Locke:

Judicial integrity is a vital element of a legitimate society because, as John Locke observed, as part of their social contract humans surrender their inherent rights of self-judgment and private dispute resolution to the processes of the political community in order to transcend an insecure and uncertain state of nature based on individual power.\textsuperscript{72} Therefore, because people rely on equitable treatment of public disputes, the judiciary must maintain an unbiased disposition.\textsuperscript{73}

Still, other states argue that their interest in limiting a judicial candidate’s speech is essential to protect litigants’ fundamental right to a fair and unbiased trier of fact.\textsuperscript{74} Judges selected through an unrestricted election process may become beholden to their campaign commitments.\textsuperscript{75} The ultimate consequence of an uninhibited freedom of political speech in the context of judicial elections could affect the constitutionally guaranteed rights of future litigants.\textsuperscript{76}

\textsuperscript{70} 944 F. 2d 137 (3d Cir. 1991).
\textsuperscript{71} Id. at 142.
\textsuperscript{72} David Barnhizer, "On the Make": Campaign Funding and the Corrupting of the American Judiciary, 50 CATH. U. L. REV. 361, 374 (2001).
\textsuperscript{73} Id. at 375 (citing Justice Anthony Kennedy’s comments on the need to sustain an impartial judiciary that is detached from the public will and committed to upholding the principle of independence and neutrality).
\textsuperscript{74} Minzner, supra note 68, at 235-36 (theorizing that campaign commitments and promises skew a judge’s objectivity and deprive litigants’ of their due process right to a fair and unbiased trial).
\textsuperscript{75} Buckley v. Ill. Jud. Inquiry Bd., 997 F.2d 224, 228 (7th Cir. 1993). To allow a judge to make a commitment to decide a particular issue in a particular way diminishes a judge’s ability to differentiate from that commitment once elected to the court. Id. Additionally, a judicial candidate, much like candidates for legislative or executive office positions, would naturally desire to uphold campaign commitments or promises, thus undermining the fundamental impartiality of his future decisions. Id.
\textsuperscript{76} See U.S. Const. amend. VI (guaranteeing the rights of an accused to an impartial jury of the State); Minzner, supra note 68, at 228-30, 235-36. Minzner proposes that states have taken the wrong course in defending the interests in regulating judicial campaign speech. Id. at 230. Rather than alleging an interest in impartiality, for the sake of the judicial image, parties should assert a compelling state interest in an independent judiciary for the purpose of protecting the litigants’ constitutional rights. Id. at 230, 235-36. The majority opinion in Republican Party v. White failed to find a constitutional conflict between the First Amendment rights of judges and the constitutional rights of litigants who go before judges who have made commitments during their campaigns, in large part
2. The Second Prong of the Strict Scrutiny Test: Narrow Tailoring

The second prong of the strict scrutiny test requires the state to demonstrate that the means employed are narrowly tailored to achieve the allegedly compelling state interest. For a limitation on speech to meet the "narrowly tailored" test, it cannot be overly broad in its capture of speech and it must relate to the state's asserted interests. Prior to Republican Party of Minnesota v. White, the lower courts divided over whether the announce clause of the Model Code of Judicial Conduct and similar state codes were overly broad. The breadth with which a court interprets the speech captured under a state code is the determining factor in whether it finds the code violates the First Amendment.

In Stretton v. Disciplinary Board of the Supreme Court of Pennsylvania, the court applied traditional canons of construction in order to achieve a narrow view that the announce clause was consistent with the Constitution. Stretton interpreted Canon 7 of the Pennsylvania Code,

because they found ambiguous the meaning of impartiality asserted by the respondents. See infra notes 106-10 and accompanying text for a discussion of the meaning of impartiality.

77. Brown v. Hartlage, 456 U.S. 45, 54 (1982) (indicating that limitations on speech are acceptable only when the limitations avoid infringing on otherwise guarded speech); see supra note 34 and accompanying text; see also Eu v. S.F. County Democratic Cent. Comm., 489 U.S. 214, 222 (1989) (stating that the traditional test for an action of the state that infringes on a fundamental right requires that the means directly meet the asserted interest).

78. E.g., Brown v. Hartlage, 456 U.S. at 53-54; Eu, 489 U.S. at 222.

79. Compare Stretton v. Disciplinary Bd. of Sup. Ct. of Pa., 944 F.2d 137, 142-44 (3d Cir. 1991) (interpreting the Pennsylvania counterpart to the Model Code Canon 5 (1990) as narrowly construed to apply strictly to types of judicial speech that would violate the compelling interests of the state of Pennsylvania), and Berger v. Sup. Ct. of Ohio, No. 87-3935, 1988 U.S. App. LEXIS 014657, at *6-7 (6th Cir. Feb. 14, 1989) (per curiam) (concluding that the Ohio equivalent to the Model Code Canon 7 (1972) was narrowly tailored because it afforded candidates room to run in a truthful, upright, and vigorous manner), and Ackerson v. Ky. Jud. Ret. & Removal Comm'n, 776 F. Supp. 309, 315 (W.D. Ky. 1991) (finding the Kentucky counterpart to the Model Code's announce clause to be sufficiently tailored to the compelling interest in maintaining an impartial and objective judiciary), with Buckley v. Ill. Jud. Inquiry Bd., 997 F.2d 224, 228 (7th Cir. 1993) (finding that the Illinois Supreme Court Rule 67 (B)(1)(c) extended beyond the bounds of limitations on speech, which could reasonably be considered to compromise judicial impartiality), and ACLU v. Fla. Bar, 744 F. Supp 1094, 1098-99 (N.D. Fla. 1990) (suggesting that Florida's announce clause is intended to protect a compelling state interest in judicial integrity, and concluding that the clause fails on the grounds that it is overly broad and captures too much political speech).

80. See Stretton, 944 F.2d at 142-43 (evaluating the announce clause within the Pennsylvania Canons of Judicial Conduct, and finding the Pennsylvania clause to be tailored narrowly due to the initial narrow construction by the counsels for the Disciplinary Board and Judicial Inquiry and Review Board).

81. Id. at 142-44 (highlighting the canon of construction that vests the courts with the duty to construe statutes or regulations to avoid constitutional questions whenever
which prohibits the announcement of views on "disputed legal or political issues," as a prohibition on only those issues that are likely to come before the court. The majority concluded that any issue likely to come before the court is properly outside the limits of acceptable judicial candidate speech.

In Buckley v. Illinois, the Seventh Circuit interpreted the announce clause and the promise and pledge clause of the Illinois Supreme Court Rules to be overly broad and an impermissible infringement on candidate speech. The Illinois rule contains a proviso that acts as a loophole to the total prohibition of political discussion: "[A judge] may announce his views on measures to improve the law, the legal system, or the administration of justice, if, in doing so, he does not cast doubt on his capacity to decide impartially any issue that may come before him." Although the defendants in Buckley v. Illinois attempted to persuade the court that the Illinois rule could be read narrowly, the court refused to construe the rule so that it would endure constitutional tests.

The court in Buckley v. Illinois recognized the conflict between its holding and that of the Third Circuit in Stretton. In addressing the
discrepancy, the Seventh Circuit found that the Third Circuit’s narrow interpretation of the announce clause, which prohibited only a candidate’s announcement of his position on an issue likely to come before the court, caused the Code’s announce clause to merge with the promises and pledge clause of the same Canon.9 Traditionally, canons of statutory construction dictate that the use of different words in a statute indicate an intent for those words to give different meanings; therefore, the Stretton court’s interpretation of the announce clause is incorrect because its interpretation is indistinguishable from the promise and pledge clause.90

II. AN UNSUCCESSFUL JUDICIAL CANDIDATE GOES TO THE BENCH

In 1998, Mr. Wersal, joined by several family members, the Republican Party, and its affiliated associations, filed a claim in federal court seeking an injunction against the enforcement of Canon 5 of the Minnesota Judicial Code of Conduct.91 This action was filed against Minnesota officials, including “the Chair of the Lawyers Board, the Director of the Office of Professional Responsibility and the Chair of the Judicial Board.”92 Count II of Wersal’s complaint challenged the constitutionality

circumscribed judicial candidates’ fundamental freedom of speech through a sweeping and impermissibly vague provision).

89. Id. at 230 (suggesting that the narrow interpretation of the Stretton court “fold[s] the ‘announce’ clause back into the ‘pledges or promises’ clause”).

90. ABNER J. MIKVA & ERIC LANE, LEGISLATIVE PROCESS 114-15 (Aspen Law & Business 2d ed. 2002) (listing some of the common canons of statutory construction, including the rule that “[a] statute should be construed such that none of its terms is redundant”).

91. Republican Party of Minn. v. Kelly, 996 F. Supp. 875, 875-76 (D. Minn. 1998). The plaintiff, Wersal, was a judicial candidate in the 1996 election for the position of Associate Justice on the Minnesota Supreme Court; he anticipated entering the judicial race in 1998 when he filed this claim. Id. at 876. Wersal’s wife and brother joined him as plaintiffs in the various counts of his claim against the Minnesota Code of Judicial Conduct because the Code restricted the political activity of a judicial candidate’s family. Id. at 876-77. Additionally, the Republican Party and its affiliated associations joined Wersal because the Minnesota Code of Judicial Conduct prohibited a judicial candidate’s political affiliation and activity with political organizations. Id. Together, plaintiffs sought an injunction against enforcement, claiming that the Minnesota Code violates fundamental rights of speech, association, and equal protection, which both the United States and Minnesota Constitutions guarantee. Id. 877-78. The Minnesota Code was revised in 1997 to clarify previous ambiguities; the prior version was thought to violate the First Amendment and the Equal Protection Clause. Id. at 876; see Republican Party of Minn. v. Kelly, 63 F.Supp. 2d 967, 972-73 (D. Minn. 1999).

92. Republican Party v. Kelly, 63 F. Supp. 2d at 970. The defendants in this action represented the various divisions associated with the enforcement of the Code of Judicial Conduct. Id. The Chair of the Lawyers Board oversees the Office of Professional Responsibility and promulgates opinions on issues of professional responsibility. Id. The Office of Professional Responsibility is responsible for the investigation and prosecution
of the code's "ban on judicial candidates announcing their views on disputed legal or political issues." During the course of Wersal's 1998 campaign, he refused to address media and public inquiries for fear that his statements would fall under the announce clause prohibitions on judicial candidate speech. The district court found the issue of suppressed speech justiciable even though neither the Office of Professional Responsibility nor the Lawyers Board found Wersal to have actually violated the announce clause within the codes of conduct during a prior campaign. The district court held that the announce clause was sufficiently narrow to meet the compelling state interest in protecting the impartiality of the judiciary.

On appeal to the Eighth Circuit, the petitioners asserted that if the district court's narrow construction of the announce clause applied only to issues that may come before an elected candidate, then the announce clause and the promise and pledge clause of Canon 5 become indistinguishable. The Eighth Circuit distinguished between a

of complaints against lawyers, and its Director determines whether and what discipline is warranted in individual cases. The Judicial Board's obligations are to "receive complaints, investigate, conduct hearings and make recommendations to the Minnesota Supreme Court concerning judges alleged to have violated the Codes of Judicial Conduct." The defendants argued that they only intended to enforce the announce clause only if the court were to rule that it was in fact constitutional. The court explained that "nonenforcement will not be an impediment to finding justiciability where the record does not show that the statute or rule at issue has been commonly and notoriously violated in the past." The district court found viable the plaintiffs' second count, which claimed that the announce clause of the Minnesota Code of Judicial Conduct was overly broad and therefore did not meet the narrowly tailored prong of the strict scrutiny test. Nonetheless, the court declined to grant injunctive relief because, "balanc[ing] hardships" between the candidate and the public interest, the state's interest in protecting the non-partisan status quo of present judicial elections was greater, whereas the candidate would have future opportunities to capitalize on political endorsements. The district court concluded: "[B]y interpreting the announce clause as only prohibiting discussion of a judicial candidate's predisposition to issues likely to come before the court, the announce clause serves the state's compelling interest in maintaining the actual and apparent integrity and independence of its judiciary, while not unnecessarily curtailing protected speech." Republican Party v. Kelly, 63 F.3d at 986.

Republican Party v. Kelly, 247 F.3d at 877; cf. supra note 90 and accompanying text (discussing the holding in Buckley v. Illinois that a narrow interpretation of the announce clause causes the announce and promise and pledge clauses to merge).
candidate’s pledge and an announcement of a candidate’s views and deemed both necessary in order to meet the compelling state interest in an impartial judiciary:

To be sure, the pledges and promises provision of Canon 5(A)(3)(d)(i) addresses the type of campaign conduct that most blatantly subverts the judicial office—pledges by candidates to make specific decisions on the bench. However, it does not reach the full range of campaign activity that can undermine the State’s interests in an independent and impartial judiciary.\textsuperscript{98}

The announce clause, the court said, necessarily reaches beyond the promise and pledge clause to limit a candidate’s speech with regard to personal views on the constitutionality of social issues or other original issues of law.\textsuperscript{99} Subsequently, the court determined that both announcements of political views and promises by judicial candidates frustrate the state’s compelling interest in maintaining an impartial judiciary, both in appearance and actuality.\textsuperscript{100}

III. THE COURT’S OPINIONS FAIL TO PROVIDE ADEQUATE GUIDANCE FOR CANDIDATES AND COURTS

Following the Eighth Circuit’s denial of an injunction against enforcement of the Minnesota Code, the Supreme Court granted certiorari to the petitioners’ appeal, but only on the issue of the announce clause.\textsuperscript{101} The Court first defined the limits of its review by narrowing the scope of the opinion to the issue of the announce clause.\textsuperscript{102}

\textsuperscript{98} Republican Party v. Kelly, 247 F.3d at 877.

\textsuperscript{99} Id. (explaining that these types of candidate statements do not explicitly prejudge legal issues, but rather lend themselves to establishing a candidate’s bias on issues that may come before the court).

\textsuperscript{100} Id. The court explained the dilemma candidates will likely face when permitted to commit themselves to political issues or predispose themselves to a particular legal issue during the campaign:

When a candidate is later called upon as a judge to preside over cases involving disputed issues about which he or she has made campaign announcements, the judge is placed in an awkward, if not impossible, position . . . having already expressed [his] opinion during the campaign, the judge risks appearing as though he or she prejudged the case rather than gave it due consideration in light of the law, arguments, and facts.

\textit{Id.} at 878. As a result, the judicial system’s legitimacy suffers a blow in the eyes of the public. \textit{Id.} On the other hand, the court noted, if the elected judge decides a case in a manner contrary to his espoused views on the campaign trail, the judge risks abandonment by his prior supporters. \textit{Id.}


\textsuperscript{102} Republican Party of Minn. v. White, 536 U.S. 765, 770 (2002) (distinguishing the promise and pledge clause from the announce clause based on their simultaneous existence within the Minnesota Code and similar codes of judicial conduct).
Justice Scalia, writing for the majority, announced that the Court refused to express any opinion on the promise and pledge clause of the Minnesota Judicial Code or the ABA Model Code, and that the Court only intended to rule on the announce clause. Additionally, all parties concurred that strict scrutiny was the proper test for a restriction on political speech.

The first prong of the strict scrutiny test requires the Court to find a compelling state interest. Although the Eighth Circuit purported found the preservation of actual and apparent impartiality was sufficiently compelling state interest, the majority abstained from definitively answering whether the first prong of strict scrutiny was met. According to Justice Scalia, impartiality can take on several meanings: 1) the absence of bias against either party in a judicial proceeding; 2) the lack of pre-formulated judgment on legal issues; and 3) open-mindedness. The majority disposed of each purported definition of impartiality, and ultimately determined that the announce clause was

103. Id. at 770-71 (stating that the promises and pledges clause was not challenged by the petitioner and therefore could not be reviewed).
104. Id. at 774-75 (explaining that in order to prove the validity of the “announce” clause, the respondents must demonstrate the clause’s narrow tailoring in meeting a compelling state interest).
105. Id.; see also supra note 61 and accompanying text (illustrating the first prong of the strict scrutiny test).
106. Id. at 775-76 (choosing to define impartiality in the judiciary as the absence of bias toward any one party in a court of law).
107. Id. (citing the traditional use of the word from WEBSTER’S NEW INT’L DICTIONARY 1247 (2d ed. 1950)). The use of impartiality to mean unbiased or equitable treatment of all persons similarly situated supports the claim that due process requires impartiality of the judiciary. 536 U.S. at 775-76.
108. 536 U.S. at 775-76 (finding that impartiality in a judicial context could mean a lack of preconceived opinions about relevant legal issues in a case).
109. Id. at 778 (explaining that open-mindedness is not an absence of prejudgment regarding legal issues, but rather receptiveness to the various legal arguments that might surround a given judicial question).
110. See id. at 775-80. Impartiality, defined as a lack of bias toward a litigating party, cannot qualify as the compelling state interest for the purpose of strict scrutiny because the announce clause of the Minnesota Code does not attempt to target this form of impartiality. See id. at 775-76. The announce clause does not seek to inhibit candidate speech regarding particular parties; instead it aims to curtail candidate discourse on political and legal issues. Id. at 776. Impartiality, interpreted to mean a lack of preconception is not a compelling state interest, according to the majority. Id. at 777-78. In fact, “[a] judge’s lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice . . . . It is virtually impossible to find a judge who does not have preconceptions about the law.” Id. at 777. Additionally, because preconceptions are not undesirable, suggesting that they do not exist for appearance’s sake cannot represent a compelling state interest. See id. at 778. Finally, the announce clause of the Minnesota Code does not protect open-mindedness as a form of impartiality. See id. at 778-79. Rather, jurists and attorneys commit themselves
short-sighted and grossly under-inclusive for the purpose of eliminating all statements that indicate a candidate's predisposition with regard to potential legal controversies.

The majority found an obvious conflict between a state's constitution, which provides for judicial accountability through elections, and state rules promulgated to protect the judiciary from over-politicization. The state's effort to regulate the manner of its elections ultimately burdened voter access to candidate views: "[T]he First Amendment does not permit . . . elections . . . [to take] 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.' Therefore, the First Amendment upholds a voter's right to full, educated participation in the democratic process, for as long as voters are called upon to exercise that right.

Justice O'Connor wrote a separate concurring opinion to emphasize the inaccuracy of the state's claim that the announce clause was necessary to protect the state interest in an independent and impartial judiciary. Justice O'Connor's concurrence shed light on the weakness of the state argument that exclusively puts forth impartiality and independence as compelling state interests. When impartiality and independence represent a state's only interests, such interests are easily satisfied within constitutional means by employing an alternate judicial selection system without risking an intrusion on the First Amendment rights of judicial candidates.

to positions on legal issues long before they consider candidacy, through their speeches, academic writings, and rulings on earlier cases. Id. In reality, the announce clause fails to capture all of the speech that might point to a candidate's impartiality or predisposition on legal issues, and this under-inclusiveness serves as the reason the announce clause fails the strict scrutiny test. See id. at 779-80.

111. See id. at 779-80 (finding that the Minnesota Code of Judicial Conduct makes no attempt to eliminate certain extra-judicial activities, including public speech and papers on jurisprudence, which surely indicate a judge's disposition on certain matters of law).

112. See id. at 787-88 (disallowing Minnesota and other states, who have chosen to elect their judges through popular elections, to attempt to restrict the information flow to the electorate).

113. Id. at 788.

114. See id. (stating that the election of the officials encompasses the strongest area of First Amendment protections for political speech).

115. Id. (O'Connor, J., concurring) (expressing her concern about the potential of judicial elections, by their very political nature, to contradict the asserted compelling interest in impartiality, irrespective of the words used in campaign speeches).

116. See id. at 792 (blaming the State of Minnesota for creating the problem of bias in the judiciary through its adoption of a popular election judicial selection process).

117. See id. at 788-90. Justice O'Connor was likely inferring that Minnesota and the other states that maintain popular judicial elections are simply asking for trouble in
Alternatively, Justice Kennedy concurred in the judgment but contended that the Court need not reach a strict scrutiny analysis of the speech restrictions. Justice Kennedy wrote that a fundamental right to speech can only be curbed when it infringes on another fundamental right. In the instant case, Justice Kennedy found that the state failed to assert protection of a conflicting fundamental right and therefore, the restriction was unconstitutional.

Justice Ginsburg and Justice Stevens, in dissent, distinguished between elected judges and other publicly elected officials. According to the

sustaining impartiality. See id. at 792. Rather than violate freedom of speech under the Constitution, states may alter their selection systems to eradicate altogether their political nature. See id. at 791-92.

118. Id. at 792-93 (concluding, under the First Amendment, that the speech of political candidates stretches the boundaries of the government's direct regulatory power); see also Erwin Chemerinsky, Restrictions on the Speech of Judicial Candidates Are Unconstitutional, 35 IND. L. REV. 735, 735 (2002) (asserting that the government should not require candidates' silence on issues that could influence a voter's choice). Prior to the Court's decision in Republican Party of Minnesota v. White, Indiana University's Law Review held a symposium on the First Amendment issues entwined in judicial campaigns. Id. Professor Chemerinsky articulated the position, later adopted by Justice Kennedy, which applies the strictest safeguards on political speech, regardless of the elected position sought by the speaker:

Government-imposed, content-based restrictions on the speech of political candidates, in virtually any circumstance, are unconstitutional. . . . If states are going to make judges and judicial candidates into politicians by requiring them to run for office or retention, then these individuals should have the same basic right to free speech as all others standing for election.

Id. To limit the information accessible to voters who are later asked to make an educated choice as to a candidate conflicts with established principles of democracy. Id.

119. See 536 U.S. at 793; Simon & Schuster v. Members of N.Y. Crime Victims Bd., 502 U.S. 105, 124 (1991) (Kennedy, J., concurring) (articulating his position on the narrow area in which the First Amendment can be trumped). If the law at issue is directed at speech traditionally unprotected by the First Amendment, then and only then will the Court allow limitations. Id. Otherwise, the provision or statute must be invalidated to conform to the fundamental right to Free Speech. Id.

120. See Republican Party of Minn. v. White, 536 U.S. at 792-93 (Kennedy, J., concurring). Justice Kennedy articulated his position on the important protection of First Amendment speech in Burson v. Freeman, 504 U.S. 191, 211-14 (1992) (Kennedy, J., concurring). In that case, Justice Kennedy held that the only instance in which one's First Amendment right can be inhibited is when the freedom of speech conflicts with another fundamental right protected under the Constitution. Id. at 213-14. Justice Kennedy also found voting a fundamental right for which the absolute right to expression must narrowly yield. Id.

121. Compare 536 U.S. at 795-96 (Kennedy, J., concurring) (finding that regulating the speech of any type of political or judicial candidate frustrates the very purpose of the First Amendment's special guard against limits on political speech), and id. at 783 (Scalia, J.) (clarifying that the majority's opinion is not based on equating judicial elections to elections for other political office, in terms of acceptable speech), with id. at 797-98 (Stevens, J., dissenting) (accusing the majority of resting its case on the lack of distinctions between a judge's right to express his opinion and the same right of any other elected
dissent, the important distinction between the rights and obligations of a judicial candidate and those of other elected officials should dictate the level of protection that freedom of speech affords their respective claims. Executive and legislative candidates are true political actors whose role is to represent their respective constituencies, whereas elected judges are responsible for interpreting the law without attachment to parties or the public will.

Additionally, Justice Ginsburg raised the issue of the interdependence between the promise and pledge clause and the announce clause, challenged in the instant case. Ginsburg explained that the promise and pledge clause is necessary to guard the due process and equal protection rights of litigants. She asserted that states are justified in prohibiting candidate expressions of commitment in order to protect official), and id. at 803-04 (Ginsburg, J., dissenting) (differentiating between the right of judges to speak out during campaigns from the right of other elected officials, based upon the obligations and expectations tied to each position).

122. Republican Party of Minnesota v. White, 536 U.S. at 805-07 (Ginsburg, J., dissenting). The First Amendment's protection of candidate speech for those officials serving in a representative capacity differs from the protection afforded candidate speech of those offices, which are intended to appear impartial:

Campaign statements committing the [political] candidate to take sides on contentious issues are . . . not only appropriate in political elections, they are “at the core of our electoral process . . . .” Judges . . . are not political actors. They do not sit as representatives of particular persons, communities, or parties; they serve no faction or constituency. “[I]t is the business of judges to be indifferent to popularity.”

Id. (citing Chisom v. Roemer, 501 U.S. 380, 401 n. 29 (1991)). Therefore, freedom from restrictions on speech in representative elections enables the public to formulate an educated choice. Id. In contrast, judicial candidates are not elected to serve as representatives; rather, they are elected to serve independent of partisanship. Id. at 806.

123. See 536 U.S. at 797 (Stevens, J., dissenting) (articulating the flaws of the majority opinion to include the “assumption that judicial candidates should have the same freedom ‘to express themselves . . . as do all other elected officials’”; see id. at 803-04 (Ginsburg, J., dissenting) (affirming Justice Stevens’ views and pointing out that judges, “[u]nlike their counterparts . . . are expected to refrain from catering to particular constituencies or committing themselves on controversial issues in advance of adversarial presentation”).

124. See id. 536 U.S. at 812-13 (Kennedy, J., concurring) (indicating that the announce clause’s constitutionality can only be looked at in light of its symbiotic relationship with the promise and pledge clause).

125. Id. at 814 (Ginsburg, J., dissenting). Justice Ginsburg favors an analysis of impartiality as a compelling state interest for the purpose of securing the due process rights of litigants: “The impartiality guaranteed to litigants through the Due Process Clause adheres to a core principle [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.”’ Id. (citations omitted). Whether the jurist has a direct or indirect interest in the outcome of the case need not be proven to show a denial of due process. Id. at 815. Rather, the mere appearance of bias is sufficient. See id.
against the possible temptation of a judge's bias. Justice Ginsburg ruled the promise and pledge clause constitutional and found the announce clause to be an indispensable component in maintaining the state interest in the preservation of due process and judicial impartiality. Although the majority and dissent clearly disagreed on the constitutionality of the announce clause, some members shared a general dissatisfaction with the inherent problems stemming from popularly elected judges. Justice O'Connor explained that the regulation of judicial candidate speech was not the least intrusive method of guarding a state's interest in impartiality. It is apparent from the Court's conflicting treatment of the promise and pledge clause—the majority's avoidance of the issue and the dissent's foretelling treatment of the clause—that the Court will see future challenges to the speech limitations within state codes of judicial conduct.

The question remains whether the promise and pledge clause of the Minnesota Code and similar state codes can survive the same exacting

126. Id. at 813-14 (Ginsburg, J., dissenting). Justice Ginsburg found that a second compelling interest for the "pledges and promises" clause was that it assists in maintaining the public confidence in the judiciary's independence. Id. at 817.

127. Id. at 819 (Ginsburg, J., dissenting). Justice Ginsburg said that the promise and pledge clause and the announce clause are effective only when coupled together for enforcement purposes. Id. A promissory statement can be avoided easily in the absence of the announce clause, and therefore, she concluded, both are distinguishable and necessary to maintain the interest in due process and impartiality of a judiciary. Id. at 820-21.

128. See id. at 788 (O'Connor, J., concurring) (doubting whether, in spite of the belief and intention that judges will not base decisions on the potential political consequences of a case, the nature of the electoral process makes a judge's consciousness of the political ramifications unavoidable); see also id. at 821 (Ginsburg, J., dissenting) (acknowledging the implicit disparity between the desire for an impartial judiciary and the political practice of judicial elections).

129. See id. at 791-92 (O'Connor, J., concurring) (detailing alternative forms of judicial selection employed by states, other than popular election). The alternatives to popular election of judicial candidates include: 1) non-partisan elections; 2) executive nomination and legislative confirmation; and 3) a "merit system" involving the initial appointment followed by unopposed retention elections. Id.; see also Sarah Mathias, ELECTING JUSTICE: A HANDBOOK OF JUDICIAL ELECTION REFORM 5 (1990) (describing various methods of judicial selection).

130. Compare Republican Party v. White, 536 U.S. at 770 (stating that because the petitioner did not challenge the promise and pledge clause it could not be reviewed), with id. at 812-13 (Ginsburg, J., dissenting). Justice Ginsburg articulated her opinion on the constitutionality of the promise and pledge clause of judicial codes of conduct even though the majority declared it was not at issue in the instant case. Id. In expanding her opinion beyond an evaluation of the announce clause, Justice Ginsburg recognized her defeat in this preliminary battle to defend the states' right to limit judicial candidate speech. See id. At the same time, she established the precedent for her argument with regard to the more narrowly focused promise and pledge clause. See id.
test that disabled the announce clause.\(^{131}\) Because the majority did not definitively indicate whether impartiality, integrity of the judiciary, or the due process rights of litigants were sufficient to meet the compelling state interest test, future challenges to judicial candidate speech restrictions could fail on either prong of the strict scrutiny test.\(^{132}\) The promise and pledge clause remains one of the last barriers to equalizing judicial and general political elections.\(^{133}\) Candidates will likely test this barrier in future litigation in order to push the Court to a more decisive conclusion.\(^{134}\) The Supreme Court, for now, has deferred to the state courts' determination on how to distinguish a statement that concerns a candidate's views on political or legal issues from one that promises or pledges certain conduct while in office.\(^{135}\) Furthermore, the division in the Court suggests that the ultimate question to be resolved is whether any modern judicial selection system can adequately balance the democratic desire for accountability with the individual's right to an impartial judiciary, without infringing on the judicial candidate or nominee's fundamental freedom of speech.\(^{136}\)

\(^{131}\) See Coyle, supra note 35 (predicting that new litigation on the constitutionality of the promise and pledge clauses is imminent because of the Supreme Court's ambiguous decision in Republican Party v. White).

\(^{132}\) Compare Chemerinsky, supra note 121, at 742 (disputing the claim that public confidence in the judiciary and judicial integrity are sufficient state interests to satisfy the first prong of strict scrutiny analysis), with Robert M. O'Neil, The Canons in the Courts: Recent First Amendment Rulings, 35 IND. L. REV. 701, 714-16, 723 (2002) (noting that various state interests, previously argued as sufficient to meet the first prong of the strict scrutiny test, have failed). O'Neil explains that the integrity of the judiciary, public confidence in the justice system, and the appearance of impartiality are insufficient interests. Id. Ultimately, the states must assert the vital interest in protecting the due process rights of individual litigants to meet the compelling state interest test. See id.

\(^{133}\) Mathias, supra note 129, at 33 (opining that promises and pledges have no place in the campaign for judicial office because judges are elected to be impartial and independent of the electorate). The greatest distinguishing factor between general political elections and judicial elections is that judges do not represent a constituency. See id. To that end, judicial candidates should not imply, through a political platform, that they can facilitate an agenda once installed into office. See id.

\(^{134}\) Coyle, supra note 35 (quoting the statement of Roy Schotland, of the Georgetown University Law Center, who claims that because the Court eliminated only the announce clause from state judicial codes, future candidates will inevitably challenge the remaining restrictions on speech under the First Amendment).

\(^{135}\) See Chemerinsky, supra note 121, at 739-40 (contending that the overwhelming problem with the Model Code restrictions on speech is the vague language employed in Canon 5(A)(3)(d)).

\(^{136}\) See Charles Gardner Geyh, The Elastic Nature of Judicial Independence and Judicial Accountability, in THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 167-68 (Gordon M. Griller & E. Keith Stott, Jr., eds., 2002) (discussing the various judicial selection systems invoked by state and federal constitutions in an effort to strike a balance between decisional independence, which protects against bias, and institutional independence, which protects against executive or legislative control over the judiciary).
IV. THE CAREFUL BALANCE BETWEEN IMPARTIALITY, THE FIRST AMENDMENT, AND JUDICIAL ACCOUNTABILITY

The conflict between maintaining both the appearance and the reality of an impartial judiciary and affording judicial candidates their rightful protection under the First Amendment has led many scholars and judges to theorize about the best form of judicial selection.\(^\text{137}\) Although the Constitution maintains a system of executive nomination and Senate confirmation of federal judges, the states rid themselves of exclusive executive appointments after the signing of the Declaration of Independence.\(^\text{138}\) At the time of the Declaration, states were weary of centralized control and feared a resurrection of the English system in which a King exclusively appointed judges.\(^\text{139}\) Following the era of Jacksonian democracy, the states began instituting electoral selection systems for judges with the aim of diminishing the elitists' control of state judiciaries.\(^\text{140}\) In the latter half of the nineteenth century, the judiciary fell victim to the problems that plagued the other elected branches,

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137. See, e.g., Mathias, supra note 129, at 33-42 (evaluating various non-legal solutions to the present conflict between public desire for accountability of the judiciary and the fundamental characteristic of an independent judicial branch); Behrens & Silverman, supra note 2, at 276 (theorizing that appointive systems, although imperfect, are the best systems for insulating judges from political influence); Matthew J. O'Hara, Restriction of Judicial Election Candidates' Free Speech Rights After Buckley: A Compelling Constitutional Limitation?, 70 CHI.-KENT. L. REV. 197, 235 (1994) (arguing that the only sure method of protecting judges from outside influences and political pressure is to enact life tenures for all judges, similar to the federal system). See also Geyh, supra note 136, at 167-71 (comparing the various state systems weighted in favor of accountability and institutional independence with the federal system, which places emphasis on decisional independence).


139. Knutson, supra note 138, at 199 (recounting the history of judicial selection in the states and attributing the change in the executive appointment process to the King of England's oppressive appointment and control over the English judiciary). The Declaration of Independence states: "He has made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries." THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).

140. Knutson, supra note 138, at 199 (crediting the presidency of Andrew Jackson for the era of popular democracy that followed him, which in turn led to the spread of state judicial elections throughout the country); see also Caleb Nelson, A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America, THE AMERICAN JOURNAL OF LEGAL HISTORY (1993), http://www.pbs.org/wgbh/pages/frontline/shows/justice/howdid/nelson.html (last visited Aug. 25, 2003) (articulating the view of several scholars who believe that the swift enactment of judicial election systems in the states in the mid-nineteenth century was due to an impulsive wave of democratic emotion and desire for a representative judiciary).
including corruption and party machines. Members of the judiciary became beholden to party machines, prompting the introduction of a "merit selection" system. The lasting presence of judicial elections, since their introduction in the first part of the nineteenth century, indicates strong popular approval for maintaining a system of accountability and democratic responsiveness in state judiciaries.

Neither eliminating the system of popularly elected judges nor instituting an appointment and retention process would necessarily insulate the judiciary from the pressures associated with retaining their judgships. The framers recognized that an independent judiciary was essential to enable federal judges to perform judicial review over the executive and legislative branches of government, and to make difficult or controversial decisions without fear of popular backlash. These concerns underlie the constitutional provisions regarding the appointment and life tenure of judges. Through their respective

141. Knutson, supra note 138, at 200-02 (explaining the ebb and flow of judicial selection systems, which eventually led to the introduction of the "merit" system of selection by Missouri in 1940). Knutson posits that the limitation on voter access to information about judicial candidates in early judicial elections contributed to the rise in political party influences over the candidacy and the subsequent election of judges. Id. at 200. Several states first attempted to curb the contradiction between impartiality and political bias by instituting non-partisan judicial elections. Id. Non-partisan elections were criticized for their inhibiting effect on the information made available to voters and the behind-the-scenes presence of political players. Id.

142. See Mathias, supra note 129, at 5 (1990). In a merit selection system, the state governor first appoints a judge from a brief list of candidates put forth by a nominating committee. Id. The judicial appointment is for a specific term and is followed by non-competitive retention elections in which the electorate vote for or against the continuance of office. Id.

143. See Geyh, supra note 136, at 167-70 (reasoning that state and federal judiciaries are successful in their attempts to achieve impartiality in a democratic system despite using differing methods).

144. See O'Hara, supra note 137, at 235. Executive officers likely prefer appointed judges because they believe that the appointment process gives them some control over the judiciary or, at the very least, the opportunity to select judges with strong loyalties to their appointing officer. Id. at 209. Contrary to this point, the Executive is not always satisfied by its attempts to control or influence the direction of the judiciary. See Robert H. Bork, Our Judicial Oligarchy, 67 FIRST THINGS 21-23 (1996). Despite the Reagan and Bush administrations' efforts to appoint federal judges with reputations for deciding cases based on original intent, the courts have been largely out of sync with those views. Id. Robert Bork argues that federal judges are neither accountable to the executive, nor to public sentiment, and have become reckless with decision-making that is leading our nation down a path of moral destruction. Id. at 21-23.

constitutions, the states have chosen to implement various systems of judicial selection, which vary from the federal system, because of their desire to give greater weight to accountability.\footnote{146}{Geyh, supra note 136, at 167-71 (accepting that states and the federal government have sought to balance the independence of the judiciary with the principles of accountability essential to a democracy through very different means). Although the states have sought lesser protection of the "decisional independence" of their courts than their federal counterparts have, state courts often have stronger systems of institutional independence, which emphasizes the separation of powers principles fundamental in both state and federal constitutions.\textit{Id.} at 169-70.}

To determine whether the state selection system of judicial elections are, as Justice O'Connor indicated in\textit{Republican Party of Minnesota v. White}, the least balanced form of judicial selection, the various forms of selection must be evaluated in light of the ideal balance between accountability, impartiality, and respect for the First Amendment.\footnote{147}{\textit{See Republican Party of Minn. v. White,} 536 U.S. 765, 788-89 (2002) (rejecting the state's argument that the restrictions on speech in the Minnesota Code of Judicial Conduct are necessary in order to protect the impartiality and independence of the state judicial system). \textit{See Mathias, supra note 129,} at 5 (explaining the four major selection processes, including: appointive systems, partisan elective systems, nonpartisan elective systems, and merit selection systems). Mathias suggests non-legal reforms that might serve as mechanisms for balancing the interests of judicial candidates, the electorate, and the states. \textit{Id.} at 33. The suggested reforms include: voluntary guidelines for judicial campaign speech, campaign monitoring committees, compacts with the media to report fairly on judicial candidate records and the issues of judicial campaigns, and third-party organizations who can defend those judicial candidates unfairly attacked during a campaign. \textit{Id.} at 33-38. \textit{See generally Geyh, supra note 136,} at 167 (comparing the federal and state systems of selection to determine which, if either, best meets the balance between accountability in a democratic government and independence).}

The merit selection system attempts to strike a balance between over-politicization, resulting from popular elections, and the original fear of executive branch influence.\footnote{148}{\textit{See Knutson, supra note 138,} at 202-07 (discussing the arguments for and against the merit system).}

Unfortunately, the recent decision by the Court in\textit{Republican Party of Minnesota v. White} did not indicate to what extent, if any, states may maintain limited restrictions on speech in their present electoral systems. The Court only indicated that states employing general limits on speech should develop systems of judicial selection that meet their interests in impartiality while steering clear of First Amendment violations.\footnote{149}{\textit{See Republican Party of Minn. v. White,} 536 U.S. at 787-88 (O'Connor, J., concurring).}
State judges, regardless of their intentions, are forced to enter the political arena as candidates in popular elections. It runs against the democratic principles of this nation to suggest that the electorate can make an informed decision while at the same time limiting the information they receive from candidates. These fundamental elements of democracy conflict with the ideal of impartiality that lies at the foundation of the American judiciary. Therefore, in an effort to balance the voters' right to be informed, the candidates' right to speak, and the citizens' interest in an impartial and unbiased judiciary, most states employ limitations on judicial candidate speech. The Supreme Court objected to this attempt to balance the rights of citizens with the interests of the states. Unfortunately, the Court has not solved the problem nor provided adequate guidance as to which method would best serve the competing interests. Rather, the state courts and judicial candidates are now responsible for blindly feeling their way through the remaining speech restrictions, which continue to separate judicial candidates from candidates for executive or legislative office.

150. See id. at 788-92 (O'Connor, J., concurring); Behrens & Silverman, supra note 2, at 277-96 (outlining the serious dilemmas created by judicial elections).

151. See supra notes 3-6 and accompanying text (discussing the fundamental purpose of the First Amendment's strict protection of political speech as providing the electorate with open access to candidate information so that they might make an informed decision).

152. See supra notes 9-12 and accompanying text (asserting the intention of the founders to create a government in which the judicial branch interpreted the law independent of the popular will).

153. See supra notes 15-16 and accompanying text (pointing to the Minnesota Code of Judicial Conduct and the ABA Model Code of Judicial Conduct as examples of the efforts to limit the political influence over judicial elections).


155. See supra notes 151-53 and accompanying text (analyzing the Court's decision and finding a lack of guidance from the Court as to permissible limitations on speech in a judicial election state and on the issue of which selection system properly meets the balance of all parties' interests).