

# Supreme Court Strikes Limits On Speech by Judicial Candidates

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**I**n a decision with wide impact on future judicial electoral campaigns, the Supreme Court has struck down as a violation of free speech all rules limiting the expression of views by judicial candidates on disputed legal or political issues or on "cases, controversies or issues that are likely to come before the court." *Republican Party of Minnesota v. White*, U.S., No. 01-521, June 27, 2002.

The Court's opinion, written by Justice Scalia, construed Canon 5 of the Minnesota Code of Professional Responsibility. Although somewhat different in language, the Minnesota Canon expresses the intent of Canon 5(A)(3)(d)(ii) of the ABA Model Code of Judicial Conduct, which states:

(3) A candidate for a judicial office: (d) shall not (ii) 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.

The New York analogue of the ABA rule is contained in 22 NYCRR, Section 100.5(A)(4)(d)(ii). Both the New York -ABA rule and other similar rules limiting the speech of judicial candidates are referred to as "announce" clauses (because they began, historically, in the form, "a judicial candidate shall not announce his views", etc.).

## Strict Scrutiny Required

Because the announce clause both prohibits speech on the basis of its content and burdens a category of speech (speech about the qualifications of candidates for public office) that is "at the core of our First Amendment freedoms," the Court is required to apply the test of strict scrutiny. Under this test, supporters of the announce clause must show that the clause is (1) narrowly tailored, to serve (2) a compelling state interest. In order to show that the clause is narrowly tailored, these supporters must demonstrate that it does not "unnecessarily circumscribe protected expression."

The Court rejected two arguments advanced in support of the announce clause -

- (1) that it preserves the impartiality of the state judiciary, and
- (2) that it preserves the appearance of the judiciary's impartiality. Construing the meaning of the word "impartiality," Justice Scalia concluded:

1. If "impartiality" means bias for a or against a party, the announce clause is ineffective because it addresses a candidate's views on issues, not on the merits of specific cases;

2. If "impartiality" means a lack of "preconception in favor of or against a particular legal view," it may be an interest served by the announce clause, but it is not a compelling state interest (which strict scrutiny requires). No one expects a judge to come to his office without some preconceptions about legal issues. As Chief Judge Rehnquist has pointed out, judges are in their middle years when they reach the bench
3. and have probably already announced their views on many constitutional issues.
4. If "impartiality" means "openmindedness," this quality in a judge demands "not that he have no preconception on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion."

There is little merit in the argument that the announce clause relieves a judge of the pressure to decide his cases consistently with his campaign statements. Candidates for the judiciary express their views in many contexts and over many years. The statements made by judicial candidates in election campaigns are such an infinitesimal part of the public and legal positions that judges take that it's implausible to justify the announce clause as a spur to their open mindedness.

Justice Scalia pointed out that restrictions on speech by candidates in judicial campaigns did not exist until 1924, when the ABA first adopted a provision essentially similar to the present rule. Before 1924, "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."

### **Four Judges Dissent**

The White case was decided by a 5-4 vote of the Court. Justices O'Connor and Kennedy wrote concurring opinions. Justices Stevens, Ginsberg, Souter and Breyer dissented. In her dissenting opinion, Justice Ginsburg argued that there is an essential difference between elections for judicial office and legislative or executive elections. "Unlike their counterparts in the political branches, judges are expected to refrain from catering to particular constituencies or committing themselves on controversial issues in advance of adversarial presentation. Their mission is to decide 'individual cases and controversies' on individual records (quoting an earlier dissenting opinion of Justice Stevens), neutrally applying legal principles, and, when necessary, 'standing up to what is generally supreme in a democracy: the public will' (quoting a law review article by Justice Scalia).

In a separate dissenting opinion, Justice Stevens argued that a judge has an obligation to uphold the law. "If he is not a judge on the highest court in the state, he has an obligation to follow the precedent of that court, not his personal views or public opinion polls..."