Judicial Elections and the First Amendment: Freeing Political Speech

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Introduction

In *Republican Party of Minnesota v. White*,[1] an important but underreported case,[2] the Supreme Court protected freedom of political speech by ruling that candidates campaigning for election possess a constitutional right to announce their views on ''disputed legal and political issues.'' Such a result might seem obvious, an unlikely topic for disagreement, and one hardly in need of judicial affirmation more than two centuries after the Bill of Rights, including the First Amendment, became law.[3] Thus, the opinion of the Court provokes the obvious question: Prior to *Republican Party of Minnesota*, didn't

[1] 122 S. Ct. 2528 (2002).

[2] Several cases from the October Term 2001 involving highly publicized issues including school choice (*Zelman v. Simmons-Harris*, 122 S. Ct. 2460), child pornography (*Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389), obscenity (*Ashcroft v. ACLU*, 122 S. Ct. 1700), takings (*Tahoe-Sierra Preservation Council Inc. v. Tahoe Regional Planning Agency*, 122 S. Ct. 1465), high school drug testing (*Board of Education v. Earls*, 122 S. Ct. 2559), execution of the mentally retarded (*Atkins v. Virginia*, 122 S. Ct. 2242), civil rights (*Correctional Services v. Malesko*, 122 S. Ct. 515), criminal law (*Harris v. United States*, 122 S. Ct. 2406, among others), and federalism (*Federal Maritime Commission v. S.C. State Ports Authority*, 122 S. Ct. 1864) attracted significant attention from the media that overshadowed *Republican Party of Minnesota v. White*. A handful of stories did appear. *See, e.g.*, George F. Will, *Minnesota Speech Police*, WASHINGTON POST, January 3, 2002, at A17; Robert S. Greenberger, *Supreme Court to Decide on Judicial Candidates' Speech*, WALL ST. J., March 12, 2002, at A28; Paul Rosenzweig, *Protecting Speech in Bench Elections*, WASH. TIMES, July 1, 2002, at A18; Mark Kozlowski, *Robed and Running*, LEGAL TIMES, July 8, 2002, at 35.

[3] The Virginia legislature ratified the first ten amendments to the Constitution on December 15, 1791, and was the last of the necessary eleven states to ratify the Bill of Rights. For that history, see ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776–1791 (1955); LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS (1999).

political candidates *already* have the right to discuss controversial issues?

For some candidates—those running for office in the legislative or executive branches of government—the answer is, ''of course.'' But for another class of candidates—those running in state elections for office in the judicial branch—the answer was ''no.'' The citizens of Minnesota elect their state court judges, but the government regulates what candidates are allowed to tell the voters.[4] Intentionally or not, Minnesota's censorship regime effected three anti-democratic results: elections without politics, campaigns without controversy, and candidates without free speech.

On June 27, 2002, the Supreme Court struck down the Minnesota prohibition barring judicial candidates from expressing their views on controversial legal and political issues, concluding that it violated the First Amendment. The decision represents a victory for freedom of speech, liberty, and democratic elections. The Court affirmed that in America we cannot have elections without politics, and we cannot have politics without robust and unfettered speech. Minnesota's attempt to sanitize its elections by gagging candidates deprived them of their right to express their views to the voters, and voters of the right to hear the views that would otherwise have been expressed. From a policy perspective, electing judges might be a bad idea. But once a state has chosen to elect its judges, candidates cannot be muzzled.

Although the Court reached the correct result, the opinion is troubling for several reasons that must give pause to First Amendment devotees. In what should have been an easy choice favoring free speech over censorship, the decision was a close 5–4 vote. In other words, the Court was one vote away from ruling that a candidate in a democratic election may not discuss disputed issues with the public. Even more troubling than the fact of the narrow majority is the content and tone of the dissent. Justice Ruth Bader Ginsburg, joined by Justice John Paul Stevens, who also wrote a separate dissent, simply ignores the Court's vast literature on the vital importance of political speech in American life. Both Ginsburg and Stevens

[4]The so-called ''announce clause'' prohibits a judicial candidate from ''announc[ing] his or her views on disputed legal or political issues.'' MINN. CODE OF JUDICIAL CONDUCT, Canon 5(A)(3)(d)(i)2000. Candidates are also barred from holding office in political organizations, attending political party events, seeking party endorsements, or soliciting funds for a political organization. Canon 5(1)(a), (d), (e).

promote their favored policy, trumping the First Amendment in the process. Also troubling, Justice Antonin Scalia's opinion for the majority, although grounded solidly on core First Amendment principles, suggests that, in other contexts not before the Court in this case, some speech by candidates might be regulated. A more expansive opinion might have better served the principles of limited government and the First Amendment. As we shall see, Justice Anthony Kennedy's concurrence points the way.

Republican Party of Minnesota v. White is not, therefore, the simple case that at first blush it might appear to be. Instead, it resurrects disturbing issues from the history of political speech in America; it illuminates disagreement among the justices about the central meaning of the First Amendment; it suggests the hidden motives of those who seek to regulate campaign speech; and it foreshadows how the Court might apply the First Amendment to the next great political speech case on its horizon, the recently enacted and immediately challenged regime of campaign finance regulation.

The significance of *Republican Party of Minnesota* can be understood best by placing the case in the context of what has gone before it. Therefore, Part I of this essay revisits briefly how American history, the scholarly commentary, and the Supreme Court have treated political speech during the past two-hundred years. Part II explains the origins of the relatively recent conflict between judicial elections and the First Amendment. Part III analyzes how the Supreme Court resolved that conflict correctly in *Republican Party of Minnesota*, and then criticizes the dissent. Part IV explains that campaign speech regulation, in addition to violating the First Amendment, is also bad policy because it is impractical and anti-democratic. The essay concludes by arguing for a constitutional bulwark against campaign speech regulation even stronger than the Court has been willing to erect.

Part I: The Curious History of Political Speech

''Congress shall make no law . . . abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.''[5] The text is brief. Rarely in American history have so few words inspired

[5] U.S. CONST. amend. I.

the writing of so many. During the last two-hundred years the First Amendment has inspired hundreds of significant judicial opinions, a few thousand books, and countless law journal, magazine, and newspaper articles. A literature so vast suggests that the First Amendment has always occupied a central place in American law and life. If Americans know nothing else about constitutional law, they know that the First Amendment guarantees them freedom of speech. Or does it? History tells a different story.

A. Legacy of Suppression?

The First Amendment has had a precarious history. Flouted at the close of the 18th century by the Sedition Act,[6] and ineffective through most of the 19th century, the Amendment attained significance only in the modern era, from about 1919.[7] Scholars of the Constitution and the Bill of Rights have disagreed on what those documents meant during the founding era. In a path-breaking book Leonard Levy argued that it was a time of suppression, not classical liberalism, and that our modern understanding of freedom of speech and the press would have seemed alien to the late 18th century American mind.[8] The long-neglected and surprising story of free speech in 18th and 19th century America reveals that the right to political expression, which we take for granted today, was often in jeopardy and even dangerous to exercise.

[6] Act for the Punishment of Certain Crimes, 1 Stat. 596 (July 14, 1798). Passed by the House of Representatives on July 11, the Sedition Act became law when signed by President John Adams on July 14. For more on the Act, see JOHN C. MILLER, CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS (1951); DONALD H. STEWART, THE OPPOSITION PRESS OF THE FEDERALIST PERIOD (1969); Walter Berns, *Freedom of the Press and the Alien and Sedition Laws: A Reappraisal*, 1970 SUP. CT. REV. 109; James P. Martin, *When Repression is Democratic and Constitutional: The Federalist Theory of Representation and the Sedition Act of 1798*, 66 U. CHI. L. REV. (1999).

[7] *See, e.g.*, ALBERT W. ALTSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES 71 (2000) (''Three prosecutions for violation of the Espionage Act of 1917 during World War I . . . commonly are seen as marking the beginning of modern First Amendment jurisprudence.''). Altschuler summarizes the consensus, but of course disputes over free speech preceded modern First Amendment jurisprudence. *See, e.g.*, DAVID RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS (1997).

[8] LEONARD W. LEVY, LEGACY OF SUPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY (1960). For Levy's second look back on the subject *see*, LEONARD W. LEVY, EMERGENCE OF A FREE PRESS (1985).

The Bill of Rights became law in 1791, but just seven years later the First Amendment was under attack. Partisan feuding between the Federalists, the party of George Washington and John Adams, and the Republicans, the Jeffersonian faction (also called Democrats derisively by their foes), resulted in the passage in 1798 of the Sedition Act. That statute made it a crime to ''write, print, utter, or publish . . . any false, scandalous, and malicious writing or writings, against the government of the United States, or either house of the congress of the United States, or the president of the United States, with intent to defame . . . or to bring them . . . into contempt or disrepute; or to excite against . . . any of them, the hatred of the good people of the United States.''[9] A Vermont congressman was convicted under the act, sentenced to 18 months in prison and fined; several Republican newspaper editors were prosecuted. Indeed, the raucous press was the true target of the Sedition Act, and many newspapers were put out of business.[10] Timed to expire when John Adams left the presidency, the act died in 1800.

In his important history of free speech from 1791 to 1868, Michael Kent Curtis documents not only the Sedition Act of 1798 but later efforts to suppress political speech from the antebellum era through the end of the Civil War.[11] The increasingly bitter sectional conflict over slavery provoked a series of free speech crises. From the 1830s on, the South tried to suppress the rising abolitionist crusade. Pro-slavery leaders lobbied the United States Post Office to ban abolitionist newspapers and publications from the mails, put bounties on anti-slavery leaders, forced the U.S. House of Representatives to ban the acceptance or discussion of anti-slavery petitions, and enacted laws in Southern states that punished anyone who spoke against slavery. Southerners schemed to ''extradite''—in other words, kidnap—abolitionists for trial for the capital crime of fomenting slave insurrections. In attempts to silence William Lloyd Garrison, he was ''hanged in effigy, censored, jailed, sued, hunted by mobs, threatened with assassination and almost lynched. The State of Georgia offered a $5000 bounty to anyone who kidnapped Garrison and brought

[9] Act for the Punishment of Certain Crimes, 1 Stat. 596 (July 14, 1798).

[10] *See* MILLER and STEWART, *supra* note 4.

[11] MICHAEL KENT CURTIS, FREE SPEECH, ''THE PEOPLE'S DARLING PRIVILEGE'': STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY (2000).

him to the state for trial on charges of seditious libel.''[12] At the U.S. Capitol a senator was nearly caned to death by an enraged Southerner. Mobs attacked abolitionist newspaper presses in several cities and murdered editor Elijah Lovejoy in Alton, Illinois. But the pro-slavery powers failed in their quest to manipulate the federal government into suppressing the national debate over slavery. That debate made possible the rise of a new Republican party and lifted Abraham Lincoln to the presidency.

Ironically, once in power the Republicans also suppressed speech. In a time of national crisis, free speech was a casualty of Lincoln's effort to win the war and preserve the Union. In 1862 Lincoln issued a proclamation stating that ''during the existing insurrection and as a necessary measure for suppressing same . . . all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice . . . shall be subject to martial law and liable to trial and punishment.''[13] Lincoln then suspended the writ of habeas corpus; thousands of people were arrested; a former congressman was seized for making an anti-war speech in Dayton, Ohio; Congress tried to expel a member who spoke against the war; and the *Chicago Times* newspaper was suppressed.[14] And of course from Reconstruction until the 1960s, the political speech of African Americans was suppressed widely throughout the South. In all of these controversies from the 1790s through the 1860s, political speech was suppressed because its opponents claimed that the speech was dangerous, undermined the social order, and threatened the stability of the government.

The era of modern repression began in 1917, during the First World War and the Russian Revolution. To isolate America from the bacilli of socialism and communism, many anti-war protestors

[12] James L. Swanson, *The Great Crusader: The Life and Times of Slavery's Most Fiery Foe, William Lloyd Garrison*, CHI. TRIB., Jan. 31, 1999, § 14, at 4 (reviewing HENRY MAYER, ALL ON FIRE: WILLIAM LLOYD GARRISON AND THE ABOLITION OF SLAVERY (1998)).

[13] THE COLLECTED WORKS OF ABRAHAM LINCOLN 429–32 (Roy Basler ed. 1956), *quoted in*, CURTIS, *supra* note 11, at 306.

[14] CURTIS, *supra* note 11, at 300–356. For the definitive treatment on free speech and liberty in the North during the Civil War, see MARK E. NEELY JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES (1991). See also, Michael Kent Curtis, *Lincoln, Vallandigham, and Anti-War Speech in the Civil War*, 7 WM. & MARY BILL RTS. J. 105 (1998).

were convicted under the Espionage Act and imprisoned. For speaking against the war Eugene Debs was sentenced to ten years in prison, and while incarcerated he received almost one million votes in the presidential election of 1920.[15] Looking back at these cases, constitutional scholar Steven Shiffrin wrote, ''The whole line is simply depressing.''[16] The suppression of political speech and dissent continued after the war ended in 1918. The story is so well known that there is no need to rehearse it at length here: the suppression of labor unions through ''criminal syndicalism'' laws; the criminalization of communist party membership; the establishment of patriotic loyalty oaths; the ''Red Scare'' of the 1950s; the suppression of the civil rights movement, and of dissenting speech, during the Vietnam War; and much more.[17] In 1791 the First Amendment proclaimed a glorious principle, but throughout our history a dark tradition of suppressing political speech has shadowed it.

B. Political Speech: The Central Purpose?

As in physics, where scientists seek the elusive unitary theory that will explain all things, the search in constitutional law for a grand theory of the First Amendment has obsessed scholars for half a

[15] Debs v. United States, 249 U.S. 211 (1919). For background on Debs see ZECHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES (1941); Harry Kalven, *Ernst Freund and the First Amendment Tradition*, 40 U. CHI. L. REV. 235, 237 (1973) (''To put the case in modern context, it is somewhat as though George McGovern had been sent to prison for his criticism of the [Vietnam] war.'').

[16] STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 73 (1990). The major W.W.I and postwar cases include *Schenck v. United States*, 249 U.S. 47 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Abrams v. United States*, 250 U.S. 616 (1919); *Gilbert v. Minnesota*, 254 U.S. 325 (1920); *Gitlow v. New York*, 268 U.S. 652 (1925).

[17] For several excellent texts, and for direction to all of the major cases, books, and articles, see for example, ZECHARIAH CHAFEE JR., FREEDOM OF SPEECH (1920); ZECHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES (1941); HARRY KALVEN JR., THE NEGRO AND THE FIRST AMENDMENT (1966); PATRICK S. WASHBURN, A QUESTION OF SEDITION: THE FEDERAL GOVERNMENT'S INVESTIGATION OF THE BLACK PRESS DURING WORLD WAR II (1986); HARRY KALVEN JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA (1988); STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE (1990); RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY (1992); ARTHUR J. SABIN, IN CALMER TIMES: THE SUPREME COURT AND RED MONDAY (1999); PETER IRONS, A PEOPLE'S HISTORY OF THE SUPREME COURT (1999).

century.[18] Contrarians counter that no such general theory is possible—that case law has made First Amendment doctrine too particularized and inconsistent for that.[19] Some of the leading commentators on the Constitution have concluded that protecting political speech was the original and central purpose of the First Amendment. Alexander Meiklejohn, whom Archibald Cox once described as ''perhaps the foremost American philosopher of freedom of expression,''[20] advocated this view in a series of books and articles.[21] Meiklejohn argued that freedom of speech is a precondition for self-government. According to his interpretation, the purpose of the First Amendment ''is to give every voting member of the body politic the fullest possible participation in the understanding of those problems with

[18] For one of the major works see, THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (1966). This book, a revised version of an article that appeared in the Yale Law Journal, anticipated Emerson's magnum opus, THE SYSTEM OF FREEDOM OF EXPRESSION (1970), one of the most influential books ever written about the First Amendment. The literature on alternative theories of freedom of speech is vast, and I shall make no attempt to record its bibliography here. For some of the major articles, see, for example, David A. Richards, *A Theory of Free Speech*, 34 UCLA L. REV. 1837 (1987); Steven Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*,78 NW. U.L. REV. 1212 (1983); Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985); Michael J. Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U.L. REV. 1137 (1983); Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245; Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554 (1991); William van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CALIF. L. REV. 107 (1982); Kenneth L. Karst, *Equality as Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975); Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 UCLA L. REV. 1405 (1987). For some of the major books not heretofore cited in this article, see for example, WALTER BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY (1957); ALEXANDER M. BICKEL, THE MORALITY OF CONSENT (1975); MELVILLE B. NIMMER, FREEDOM OF SPEECH (1984); LEE C. BOLLINGER, THE TOLERANT SOCIETY (1986); FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1986); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993); KENT GREENAWALT, FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH (1995); MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM (1991).

[19] *See, e.g.*, STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE (1990); HARRY KALVEN JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA (1998).

[20] ARCHIBALD COX, FREEDOM OF EXPRESSION 2 (1981).

[21] ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT (1948); ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1965); Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245.

which the citizens of a self-governing society must deal.''[22] In a landmark article Judge Robert H. Bork pursued the Meiklejohnian thesis.[23] Interested initially in only political speech, Meiklejohn came to define the spectrum of speech related to self-government broadly. Ultimately he assigned First Amendment protection to ''education . . . the achievements of philosophy and the sciences . . . literature and the arts.''[24] The issues raised by Meiklejohn still occupy First Amendment scholars, who have promulgated and debated competing, sophisticated, and, frankly, sometimes confusing theories of the nature and purpose of the First Amendment.[25] An expansive interpretation of the First Amendment has been in vogue for decades, and today the view that it safeguards only political speech is considered narrow, quaint, and even dangerous to liberty.[26] Nevertheless, all leading constitutional scholars believe that the First Amendment, whatever its scope, affords a high level of protection for political speech.[27]

C. Political Speech in the Supreme Court

Since the days of *Schenck*, *Debs*, *Abrams*, and the rest, the Supreme Court has declared one free speech principle repeatedly, comprehensively, and passionately: Freedom of political speech is at the heart of democracy and merits the highest level of constitutional protection. So many justices have embraced this principle in so many cases that it would seem unnecessary, under normal circumstances, to quote them at length to prove the point. But because the dissenters

[22] Alexander Meiklejohn, Political Freedom: The Constitutional Powers of the People 75 (1965).

[23] Robert H. Bork, *Neutral Principles & Some First Amendment Problems*, 47 Ind. L.J. 1 (1971).

[24] Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 Sup. Ct. Rev. 245, 255.

[25] *See supra*, note 18.

[26] *See, e.g.*, Steven H. Shiffrin, The First Amendment, Democracy, and Romance (1990).

[27] I leave for another day the discussion of various theories of the left which claim that the First Amendment is a source of oppression, not freedom. *See generally*, Bachmann, *The Irrelevant First Amendment*, 7 Comm. L.J. 3 (1985); Kairys, *Freedom of Speech*, *in* The Politics of Law: A Progressive Critique 253 (D. Kairys ed. 1982); Tushnet, *Corporations & Free Speech*, *in* The Politics of Law: A Progressive Critique 253 (D. Kairys ed. 1982).

in *Republican Party of Minnesota* dismissed them out of hand, it is important to note for the record exactly what the Supreme Court has said in defense of political speech. Many scholars identify the dissent of Justice Holmes in *Abrams* as the origin of modern First Amendment doctrine.

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.[28]

Eight years later, Justice Brandeis, writing in the notorious syndicalism case, *Whitney v. California*, justified freedom of political expression in what became one of the most celebrated passages in American law.

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government . . . the path of safety lies in the opportunity

[28] Abrams v. United States, 250 U.S. 616, 627–630 (1919) (Holmes, J., dissenting). The Holmes legacy is more ambiguous than his ringing pronouncement in *Abrams* might suggest. *Compare* ALBERT W. ALTSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES *with* RICHARD POSNER, THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES JR. *See also*, James L. Swanson, *A Historical Look at Free Speech and a Critique of Oliver Wendell Holmes*, CHI. TRIB., May 13, 2001, § 14, at 4.

> to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.[29]

Another four years passed before Chief Justice Hughes wrote in *Stromberg v. California* that ''The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system,''[30] and more than a generation later Justice Brennan proclaimed in *Garrison v. Louisiana* that ''speech concerning public affairs is more than self-expression; it is the essence of self-government.''[31]

In *Wood v. Georgia*, a case involving a contempt-of-court order, Chief Justice Warren wrote for the Court that ''Men are entitled to speak as they may please on matters vital to them; errors in judgment or unsubstantiated opinions may be exposed, of course, but not through punishment for contempt for the expression. Under our system of government, counterargument and education are the weapons available to expose these matters, not abridgement of the rights of free speech and assembly.''[32] And in *New York Times v. Sullivan*, the most important case in the history of defamation law, Justice Brennan wrote of ''a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'' That debate, he added, ''may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.''[33]

In *Cohen v. California*, the celebrated case involving the prosecution of a man who wore a jacket bearing the motto ''Fuck the Draft,'' Justice Harlan endorsed political speech.

[29] Whitney v. California, 274 U.S. 357, 375, 376 (1927).

[30] Stromberg v. California, 283 U.S. 359, 369 (1931).

[31] Garrison v. Louisiana, 379 U.S. 64, 66 (1964).

[32] Wood v. Georgia, 370 U.S. 375, 389 (1961) (citation omitted).

[33] N.Y. Times v. Sullivan, 367 U.S. 254, 270 (1964).

> The constitutional right of free expression . . . is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced directly into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests . . . That the air may at times seem filled with verbal cacophony is not a sign of weakness but of strength.[34]

And in *Buckley v. Valeo* the Court, although amenable to regulating financial contributions to candidates, emphasized the importance of allowing candidates to speak freely.

> The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates. *Indeed it is of particular importance that candidates have the unfettered opportunity to make their views known* so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day.[35]

Not only has the Supreme Court spoken repeatedly of the importance of political speech in general, it has stated specifically that judges are not immune from the democratic dialogue.

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.[36]

[34] Cohen v. California, 403 U.S. 15, 24 (1971).

[35] Buckley v. Valeo, 424 U.S.1, 52–53 (1976).

[36] Bridges v. State of California, 314 U.S. 252 (1941).

Part II: Judicial Elections and the First Amendment: Origins of the Conflict

Judicial elections, like freedom of speech, are an established American tradition. Although the Constitution mandated that federal judges be nominated by the president and appointed by and with the advice and consent of the Senate, and not elected, the states were free to select judges as their citizens saw fit. Ultimately the majority of states, including Minnesota, rejected the federal model and chose to select judges by popular election. For a long time the speech of state judicial candidates was not regulated.[37] The idea of imposing a speech code on judicial candidates is a creature of the 20th century, characterized by overweening government working in concert with special interests. Unsuccessful in their efforts to abolish judicial elections, the special interests sought as their fallback position to undermine elections indirectly by gagging campaign speech.

A. Judicial Elections

The purpose of judicial elections is undeniable: to retain for the people the right to hold judges accountable in some fashion. What other purpose do popular elections serve? Animated by the spirit of Jacksonian democracy, and in some Northern states by the notorious *Dred Scott* decision,[38] ''[b]y the time of the Civil War, the great majority of States elected their judges.''[39] The origin of judicial elections in Minnesota is especially illuminating. ''Minnesotans of both parties opted for an elected judiciary. Ultimately, they more feared the potential politics of an appointed bench and saw popular election as the proper remedy. Given the political climate, they desired more control over their judiciary. *That was the policy adopted by the people of Minnesota*. Minnesota's electorate has never since intimated a change in this policy.''[40] Notably, both the court of appeals opinion upholding the ''announce clause'' in *Republican Party of Minnesota*, and the dissenting Supreme Court justices who would have upheld it, overlook that inconvenient history.

[37] Republican Party of Minn. v. White, 122 S. Ct. 2528, 2540 (2002).

[38] Dred Scott v. Sanford, 60 U.S. (19 How.) 1857.

[39] Republican Party of Minn. v. White, 122 S. Ct. 2528, 2540 (2002).

[40] Republican Party of Minn. v. Kelly, 247 F.3d 854, 889 (8th Cir. 2001) (Beam, J., dissenting) (emphasis in original).

The decision to elect judges was controversial. One delegate to the Minnesota convention opposed the method because he feared that judges chosen by the people might oppose slavery and be inclined to ''Negro-worship.''[41] An advocate for elections left no doubt as to their purpose: ''We hear a great deal of talk about an Independent Judiciary. The phrase is in everybody's mouth. What does it mean? Independent of whom? Independent of what? Independent of the people . . . ? I say then that in order to correct the errors of Judges—and it may be important to correct them—the office should be made elective.''[42]

B. Speech Codes

The American Bar Association (ABA) opposes judicial elections and wants to abolish them.[43] The ABA seeks to elevate state court judges to the federal plane, where trial, appellate, and Supreme Court judges preside above the fray, insulated from campaigns and elections. Elections, so says the ABA, just like the lawyer advertisements that it squelched for decades until the Supreme Court admonished otherwise, threaten to undermine public confidence in the profession.[44] The ABA also opposes straight political Appointments, preferring ''merit'' selection by ''nonpartisan,'' ABA-approved elites who, naturally, will dominate the process. Unfortunately for the ABA, the citizens who need to be saved from judicial elections have shown little interest in saving themselves and in furthering the organization's agenda. In Minnesota, the people have resisted four attempts to amend their constitution and end judicial elections.

[41] *Id.* at 888.

[42] *Id.* at 889.

[43] MODEL CODE OF JUDICIAL CONDUCT Canon 5(C)(2), Cmt. (2000); AN INDEPENDENT JUDICIARY: REPORT OF THE ABA COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE 96 (1997).

[44] Bates v. State Bar of California, 433 U.S. 350 (1977). The ABA also impeded the civil rights movement by prohibiting attorneys connected to political organizations from soliciting plaintiffs for lawsuits, until the Supreme Court said otherwise. NAACP v. Button, 371 U.S. 415 (1963). In 1978 the Supreme Court struck down an attempt by a state to discipline an attorney who sought litigants for the ACLU. *In re* Primus, 436 U.S. 412 (1978). Indeed, ''[in] the space of fifteen years, the Supreme Court held ABA and state-sponsored provisions on solicitation to be in violation of the First Amendment to the Constitution on five separate occasions.'' Lloyd B. Snyder, *The Constitutionality and Consequences of Restrictions on Campaign Speech by Candidates for Judicial Office*, 35 UCLA L. REV. 207, 209 (1987).

''Thus, since first permitted to select its own judiciary, Minnesota has favored electorally-responsive judges.''[45]

If it cannot abolish judicial elections then the ABA wants to sabotage them, purifying them of speech that the ABA considers unsavory. To promote its mission the ABA has drafted a series of model codes, or canons, which it lobbies the states to adopt. These canons, when adopted, are not approved by democratically elected state legislatures or by the people through popular vote. Instead, state supreme courts promulgate them unilaterally and declare all members of the state bar subject to their discipline. Since 1974, Minnesota lawyers have been subject to a canon that prohibits a ''candidate for judicial office, including an incumbent judge,'' from ''announc[-ing] his or her views on disputed legal or political issues.''[46] The penalties for violating the speech canon are severe: incumbent judges may be suspended without pay, censured, or removed from office,[47] and lawyers are subject to probation, suspension, or disbarment.[48] Thus, although unable to ban elections, the ABA and the Minnesota Supreme Court were able to weaken them.

Part III: *Republican Party of Minnesota v. White*

The dispute that became *Republican Party of Minnesota v. White* began in 1996 when Gregory Wersal, a member of the state bar of Minnesota, ran for the post of associate justice of the Minnesota Supreme Court. His campaign literature criticized the court, including its past decisions on crime, welfare, and abortion. Subsequently, a complaint against Wersal was filed with the Office of Lawyers Professional Responsibility, the agency which, under the direction of the Minnesota Lawyers Professional Responsibility Board, investigates and prosecutes ethical violations of lawyer candidates for judicial office.[49] Although the Board dismissed the complaint, and even speculated whether the announce clause was constitutional, Wersal withdrew from the race, ''fearing that further ethical complaints

[45] Republican Party of Minn. v. Kelly, 247 F.3d 854, 890 (8th Cir. 2001) (Beam J. dissenting).

[46] MINN. CODE OF JUDICIAL CONDUCT, Canon 5(A)(3)(d)(i)(2000).

[47] MINN. RULES OF BOARD ON JUDICIAL STANDARDS 4(a)(6), 11(d)(2002).

[48] MINN. RULES OF LAWYERS PROFESSIONAL RESPONSIBILITY 8–14, 15(a)(2002).

[49] Republican Party of Minnesota v. White, 122 S. Ct. 2528, 2531 (2002).

would jeopardize his ability to practice law.''[50] When Wersal ran for associate justice again in 1998, he sought an advisory opinion from the Lawyers Board, inquiring whether it would enforce the announce clause. The Board demurred because he had failed to submit for approval a list of the announcements he wished to make. Wersal then filed suit in federal court seeking a declaration that the announce clause was unconstitutional. He complained that the clause chilled him from announcing his views to the press and the public. Other plaintiffs, including the Republican Party of Minnesota, joined his suit, arguing that without knowing Wersal's views, they could not decide whether to support him.

The district court ruled against Wersal,[51] and the Eighth Circuit affirmed.[52] In an attempt to save the announce clause, the court of appeals adopted what it claimed was a narrowing construction devised by the district court. The clause no longer barred candidates from announcing their views on disputed legal or political issues: it merely barred candidates from announcing their views on such issues likely to come before the court.[53] The court of appeals added its own gloss, concluding that candidates could discuss cases too. The Supreme Court of the United States granted certiorari to determine the constitutionality of the announce clause. Numerous other restrictions that Minnesota placed on judicial candidates were not before the Court.[54]

A. Opinion of the Court: The Primacy of the First Amendment

Justice Scalia's opinion for the Court, joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas, began with first principles. The burden would not be on the petitioners to persuade the Court to create a First Amendment exception to a presumptively valid anti-speech policy promulgated by the Minnesota Supreme Court. Rather, the burden was on respondents to demonstrate that such a policy was a constitutionally permissible exception to the First Amendment. Scalia emphasized that this hurdle would be difficult to overcome. ''We have never allowed the government

[50] *Id.*

[51] 63 F. Supp. 2d 967.

[52] Republican Party of Minn. v. Kelly, 247 F.3d 854 (8th Cir. 2001).

[53] *Id.* at 881–882.

[54] Republican Party of Minn. v. White, 122 S. Ct. 2528, 2532 (2002).

to prohibit candidates from communicating relevant information to voters during an election.''[55]

Scalia applied the same ''strict scrutiny'' test used by the Eighth Circuit to evaluate the constitutionality of the announce clause.[56] Under that test, the respondents must prove that the announce clause is narrowly tailored to serve a compelling state interest. ''The Court of Appeals concluded that respondents had established two interests as sufficiently compelling to justify the announce clause: preserving the impartiality of the state judiciary and preserving the appearance of the impartiality of the state judiciary.''[57] Scalia was dubious of how compelling such interests could be when they were so difficult to define. ''Respondents are rather vague, however, about what they mean by 'impartiality.' Indeed, although the term is used throughout the Eighth Circuit's opinion, the briefs, the Minnesota Code of Judicial Conduct, and the ABA Codes of Judicial Conduct, none of these sources bothered to define it.''[58] Does ''impartiality'' mean that judges should not be biased for or against actual, *individual* litigants in specific cases (friends, foes, family, former partners); biased against particular *classes* of litigants (African Americans, women, foreigners, all criminal defendants); biased for reasons of personal financial interest (as a stockholder, an investor, a beneficiary of fines); or biased against a legal theory or method of interpreting the law? Must judges' minds be blank slates unmarred by a judicial philosophy of any kind?[59]

[55] *Id*. at 2538.

[56] *Id.* at 2534–2535. ''As the Court of Appeals recognized, the announce clause both prohibits speech on the basis of its content and burdens a category of speech that is 'at the core of our First Amendment freedoms'—speech about the qualifications of candidates for public office. 247 F. 3d, at 861, 863. The Court of Appeals concluded that the proper test to be applied to determine the constitutionality of such a restriction is what our cases have called strict scrutiny, *id.*, at 864; the parties do not dispute that this is correct. Under the strict-scrutiny test, respondents have the burden to prove that the announce clause is (1) narrowly tailored, to serve (2)–a compelling state interest. *E.G., Eu v. San Francisco County Democratic Central Comm.,* 489 U.S. 214, 222 (1989). In order for respondents to show that the announce clause is narrowly tailored, they must demonstrate that it does not 'unnecessarily circumbscrib[e] protected expression.' *Brown v. Hartlage*, 456 U.S. 45, 54 (1982).''

[57] *Id.*, at 2535.

[58] *Id.*

[59] *Infra*, notes 81–82.

Scalia concluded that the interests asserted by Minnesota were neither compelling or narrowly tailored, and that the real ''purpose behind the announce clause is not openmindedness in the judiciary, but the undermining of judicial elections.''[60] Waving off dissents by Ginsburg and Stevens as overwrought and off point, Scalia assuaged them by noting that ''we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office. What we do assert, and what Justice Ginsburg ignores, is that, *even if* the First Amendment allows greater regulation of judicial election campaigns than legislative campaigns, the announce clause still fails strict scrutiny because it is woefully underinclusive, prohibiting announcements by judges (and would-be judges) only at certain times and in certain forms.''[61]

Justice O'Connor's concurrence confesses her prejudice against judicial elections. ''I am concerned that . . . the very practice of electing judges undermines'' an impartial judiciary.[62] Despite her personal distaste for a judiciary that is vulnerable to public opinion and that engages in fundraising, she accepts that she is not a policymaker, exercises restraint, shows deference to the states that choose to elect judges, and joins Scalia's opinion that the announce clause does not supersede the First Amendment. ''[T]he State's claim that it needs to significantly restrict judges' speech in order to protect judicial impartiality is particularly troubling. If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.''[63] Like Scalia, she is skeptical about the unspoken subtext of the announce clause. At oral argument she wondered if its purpose might be to shield incumbents from challenge.

In his concurrence, Justice Kennedy agreed that Minnesota cannot have it both ways. ''Minnesota may choose to have an elected judiciary. . . . What Minnesota may not do, however, is censor what the people hear as they undertake to decide for themselves which candidate is most likely to be an exemplary judicial officer. . . . The law in question here contradicts the principle that unabridged speech

[60] Republican Party of Minn. v. White, 122 S. Ct. 2528, 2538 (2002).

[61] *Id.* at 2539 (citation omitted).

[62] *Id.* at 2542 (O'Connor, J., concurring).

[63] *Id.* at 2544.

is the foundation of political freedom.''[64] Kennedy's brief opinion does much more, however, than simply concur in the judgment of the Court. He advances a theory that, as I will soon suggest, may be the best solution to the conflict between judicial independence and free speech.

B. The Dissent: In Policy's Thrall

The dissenters' central theme is obvious: Justices Stevens and Ginsburg do not like judicial elections. But they do like policy. Therefore, if there must be elections, then ''[j]udges are not politicians, and the First Amendment does not require that they be treated as politicians simply because they are chosen by popular vote.''[65] In other words, judicial candidates are ''different'' and have second-class First Amendment rights. Therefore, the majority was ''profoundly misguided'' to suggest that all candidates in all American elections enjoy an equal right to free speech.[66] Indeed, the idea that candidates for the judiciary should possess an unfettered right to express themselves on issues of public importance is ''seriously flawed.''[67]

Free speech is dangerous, warn the dissenters. Election campaigns deform judges into vote-seeking politicians, enslave them as cats-paws to the mob, and poison public confidence in the judiciary. Only by policing candidates' speech can we prevent them from pandering for votes by promising results in controversial cases after they take the bench. Only through censorship can we protect the Due Process rights of litigants who will come before these judges.[68] Only through government regulation can we preserve general public confidence in an impartial and openminded judiciary.[69]

Reading the dissents in isolation, without the benefit of the opinion of the Court, one would hardly know that *Republican Party of Minnesota* was an important First Amendment case. Their tone is cramped and bureaucratic, citing a variety of reports, law review articles, and

[64] *Id.* 2545 (Kennedy, J., concurring).
[65] *Id.* at 2559 (Ginsburg, J., dissenting).
[66] *Id.* at 2549 (Stevens, J. dissenting).
[67] *Id.* at 2546 (Stevens, J. dissenting).
[68] *Id.* at 2555 (Ginsburg, J. dissenting).
[69] *Id.* at 2549 (Stevens, J. dissenting).

lower court opinions to justify balancing two interests.[70] The dissents sound more like policy memos from the American Bar Association than Supreme Court opinions on the First Amendment. The silences are telling. There is no consideration of the uneven history of political speech in this country, no reference to the historical literature, no citation to the Court's grand precedents on the First Amendment, and no recognition of the right of citizens to hear from the candidates who seek their votes. Permeating the dissents is the unstated assumption that any policy problems arising from judicial elections must, naturally, be solved by government action.

A classic example occurs in Ginsburg's dissent when she writes, in so many words, that Wersal has little to complain about because the Lawyers Board that investigates and punishes speech did not ultimately rule against him.[71] What she fails to realize, however, is that the proper question is not, what did the board rule but, rather, why is there a speech board at all?

Part IV: The Case Against the Code

That the Minnesota speech code violates the First Amendment is reason enough to abolish it. But because those who favor censoring the speech of judicial candidates insist that *Republican Party of Minnesota v. White* is not an important First Amendment case, and resort instead to a variety of policy arguments to promote censorship, it becomes necessary to respond to those arguments. They are flawed for three reasons. First, they attempt to draw an impossible line between the kind of speech that does and does not indicate how a judge might decide a case. The announce clause turns regulators into linguistic gymnasts whose hopeless task is to hypothesize whether this turn of a phrase or that ''really'' means more than it actually says in words. Second, they celebrate a mythical creature

[70] *See* De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 38 WILLIAMETTE L. REV. 367 (2002); O'Neil, *The Canons in the Courts: Recent First Amendment Rulings*, 35 IND. L. REV. 701 (2002); Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059 (1996); P. McFadden, ELECTING JUSTICE: THE LAW AND ETHICS OF JUDICIAL ELECTION CAMPAIGNS 86 (1990).

[71] Republican Party of Minn. v. White, 122 S. Ct. 2528, 2554 (2002) (Ginsburg, J., dissenting) (''Wersal has thus never been sanctioned under the Announce Clause for any campaign statement he made. On the facts before us, in sum, the Announce Clause has hardly stifled the robust communication of ideas and views from judicial candidate to voter.'').

that does not exist—the judge with no views. Third, they suffer from a fatal case of paternalism. The announce clause harms the very people, the voters, that it claims to protect.

A: Linguistic Jujitsu: Announcements, Pledges, and Points in Between

Enforcement of the announce clause is unworkable because it is impossible to determine which speech should be suppressed. At exactly what point does a general statement become too specific, and thus forbidden? The dissents propose inconsistent and ambiguous rules that would make it impossible for a candidate to know when his political speech crossed the boundary between permissible and impermissible. Justice Ginsburg believes that the announce clause, properly interpreted, still gives candidates wide latitude to declare views on disputed legal and political issues; it merely bars them, she says, from discussing issues, and revealing how they might decide them, in disputes that are likely to come before them on the bench.[72] Of course that is no narrowing at all. Judge Richard Posner has explained how *any* controversial issue can wind up in court. ''There is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction.''[73] Thus, it is impossible to divide issues into those that will or won't come before a judge. Trying to do so is a futile exercise.

In dissent, Justices Ginsburg and Stevens state, separately, that they would apply two different, inconsistent standards to a candidate's speech. According to Ginsburg, ''[w]hat candidates may not do . . . is . . . declare how they would decide an issue.''[74] Stevens proposes a much stricter standard and would regulate *any* statements that ''obscure the appearance of openmindedness.''[75] Indeed, he insists that ''the judicial reputation for impartiality and openmindedness is compromised by'' any statement that ''emphasizes the candidate's personal predilections rather than his qualifications for judicial office.''[76]

[72] *Id.* at 2553 (Ginsburg, J., dissenting).

[73] Buckley v. Ill. Judicial Inquiry Board, 997 F. 2d 224, 229 (7th Cir. 1993).

[74] Republican Party of Minn. v. White 122 S. Ct. 2528, 2553 (2002) (Ginsburg, J., dissenting).

[75] *Id.* (Stevens, J. dissenting).

[76] *Id.*

Stevens and Ginsburg highlight their confusion and inconsistency by discussing the example of a candidate who campaigns on his prior judicial record. According to Stevens, ''Expressions that stress a candidate's unbroken record of affirming convictions for rape, for example, imply a bias in favor of a particular litigant (the prosecutor) and against a class of litigants (defendants in rape cases).''[77] Not so, says Ginsburg. Citing the record is fine. ''[P]lace[d] beyond the scope of the Announce Clause [is] a wide range of comments that may be highly informative to voters . . . [S]uch comments may include statements of historical fact ('As a prosecutor, I obtained 15 drunk driving convictions').''[78] Ginsburg provides other examples of permissible statements: '''Judges should use *sparingly* their discretion to grant lenient sentences to drunk drivers''' and '''Drunk drivers are a threat to the safety of every driver.'''[79] Stevens would likely ban such statements because they reveal a ''predilection'' for ruling against a class of litigants, drunk drivers. In contrast, Ginsburg would ban only the outright statement that she says ''essentially'' commits the candidate to a position: '' 'I think all drunk drivers should receive the maximum sentence permitted by law.' ''[80]

In fact, general statements of the type that the dissenters, or at least Ginsburg, would permit can telegraph as effectively as a blatant, explicitly stated promise how a judge might decide an issue. In any of Ginsburg's hypotheticals, the message is clear: things aren't looking good for drunk drivers. Surely she would not ban a candidate from announcing ''I believe in a color-blind society.'' Yet, how far is that statement of general principle from simply announcing ''I will vote against affirmative action.'' Although not an explicit promise, the color-blind society comment surely reveals a tendency, a predilection, that violates the Stevens standard. What about the following statement? ''The U.S. Supreme Court says that the death penalty is constitutional, and I say that the law has coddled criminals too long.'' How far is this announcement from pledging ''Don't worry, I won't be overturning too many death sentences on appeal''?

[77] *Id.* at 2548 (citation omitted) (Stevens, J., dissenting).

[78] *Id.* at 2553 (Ginsburg, J., dissenting).

[79] *Id.*

[80] *Id.*

The power of language is subtle. A speaker can convey messages without using specific words. Under the Stevens criteria for impartiality and openmindedness, it is hard to see how candidates could even discuss their general views, let alone speak about rival candidates and prior cases. The ambiguous nature of language demonstrates that a candidate can use almost any kind of statement to communicate with voters about his predilections. Thus, the only way to prevent candidates from telegraphing secret messages to voters—committing the sins of partiality, non-openmindedness, or the appearance of partiality—would be to ban a spectrum of speech much broader than even the announce clause, or Justice Ginsburg, contemplated. Indeed, the only way to stop candidates from hinting at their predilections is to ban language altogether from judicial campaigns.

The most convincing proof of the impossibility of regulating the meaning of language in a political campaign is the behavior of the Court in this case. Nine justices, learned experts in law and the Constitution, after extensive briefing, oral argument, and three months of contemplation, could not agree on which type of speech crosses the line. How then can a local speech board, working under the pressure of time and the heat of a political campaign, possibly make principled distinctions? And how could candidates ever know in advance when their speech might provoke investigation and punishment? They could, of course, submit all campaign literature, prepared speeches, and television commercials to the speech board, which would then rule on the permissibility of each communication. Aside from the obvious constitutional problems, such a scheme is absurdly impractical.

B. Openmindedness: Impartiality and the Myth of the Tabula Rasa Judicial Mind

The Minnesota announce clause seeks plateaus of ''independence,'' ''impartiality,'' and ''openmindedness'' that are neither possible nor desirable. No judge is totally ''neutral,'' approaching each case at exactly the midpoint between opposing sides or issues. Judges have preexisting theories about the federal Constitution, state constitutions, statutes, the common law, ''judicial restraint,'' ''judicial activism,'' and ''first principles.'' They do not reinvent the wheel and start from scratch in each case by asking themselves questions like ''What are enumerated powers?'' or ''What is strict scrutiny and

should I apply it?'' or ''What is the theory of original intent and do I believe in it?'' Prior to becoming candidates, many judges wrote law review articles, or gave speeches or interviews, taking positions on disputed issues. Does this mean that no author who ever adopted a position on a controversial issue can ever be a fair judge? Of course not. Does this mean that a judge who wrote an opinion in a prior case must never again be allowed to hear another case involving the identical issue because his prior opinion now taints him as impartial? Of course not. But in the alternative universe of announce clauses, isn't every judge with a prior record partial and closeminded the next time he hears a similar case?

Then-Justice Rehnquist identified the poverty and impracticality of this view long ago when a litigant attempted to force him to recuse himself in a case that involved an issue on which he opined while serving in the Department of Justice.

> Such a contention raises rather squarely the question of whether a member of this Court, who prior to his taking that office has expressed a public view as to what the law ought to be, should later sit as a judge in a case raising that particular question. . . . My impression is that none of the former Justices of this Court since 1911 have followed a practice of disqualifying themselves in cases involving points of law with respect to which they had expressed an opinion. . . .[81]

Opponents of judicial elections, advocates for the announce clause, and the dissenters in *Republican Party of Minnesota v. White* all celebrate the *beau ideal* of a judge whose predilections remain so hidden from the public that the judge does not even give the appearance of being predisposed on any issue or controversy. That view perpetuates the misconception of a judge as an empty vessel who simply looks up the law in a book and applies it to the case of the moment. Openmindedness becomes emptymindedness. Rehnquist stated the point well.

> Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they

[81] Laird v. Tatum, 409 U.S. 824, 830, 831, 835 (1972).

> had not at least given opinions as to constitutional issues in their previous legal careers. Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.[82]

Again, a few examples from the real world illustrate the point. It is well known that Chief Justice Rehnquist is more likely than Justice Stevens to find that a land use regulation is a taking. It is well known that Justice Scalia might be more likely than Justice Ginsburg to determine that a race-based, affirmative action program is unconstitutional. These observations are widely known among professors, lawyers, litigants, and the media. By having predilections, and by failing to conceal them, have these justices undermined the appearance of impartiality that the announce clause deems so compelling an interest? Or, by showing how an overarching theory of law and the Constitution inevitably influences the result in particular cases, have they exposed the myth of the openminded judge?

C. Confounding Democracy: How the Announce Clause Harms Voters by ''Protecting'' Them

The announce clause is paternalistic. It seeks to protect voters from potentially harmful speech that might cause them to lose faith in the judicial system. The clause is antidemocratic. It deprives voters of information about candidates during an election and it protects incumbents. The clause is cynical. It does not trust voters to elect ethical judges. If judicial elections need one thing more than anything else, it is more public interest and knowledge. Voters do not know much about candidates running for judicial office.[83] The announce clause impedes voter education and makes the market for information less efficient. Citizens cast their votes while possessing imperfect information, not because information about judges is a naturally scarce good, but because speech regulators make it artificially scarce through regulation. The announce clause increases the search costs

[82] *Id.* at 835.

[83] Lloyd B. Snyder, *The Constitutionality and Consequences of Restrictions on Campaign Speech by Candidates for Judicial Office*, 35 UCLA L. REV. 207, 211 (1987) (''By prohibiting judicial candidates from speaking about disputed legal and political issues, the ABA has diminished the ability of candidates to disseminate information that would make the electorate more knowledgeable about candidates and would make elections more interesting.'').

of citizens who want more information about judicial candidates. No election takes place under conditions of perfect information, of course, but unmuzzling the candidates will unleash a large amount of information for the voters' consumption. By making information about candidates artificially scarce, the announce clause helps incumbents, since they are always advantaged when information about alternatives is scarce.[84]

The regulators do not trust the citizens to sort out ethical candidates from unethical ones. The regulators also assume that voters will be seduced by the blandishments of pandering opportunists. Many voters, however, will take a long-term view and conclude that candidates who do not pander for votes will make better judges. They might reject candidates who cravenly express prejudices against litigants for reasons of race, ethnicity, religion, sex, or politics. They may reject candidates who seem to adopt positions not out of personal conviction but based on insincere political expediency. Opponents of judicial elections also assume that voters can be driven into a frenzy to oust a judge who wrote an opinion that the majority opposes. Evidence suggests that this occurs rarely.[85]

D. Freeing Political Speech

Justice Scalia's opinion for the Court, although it reached the correct result and recognized the central importance of political speech in the Court's jurisprudence, was a measured victory for the First Amendment. His aside that the speech of judicial candidates might be regulated in other contexts has no doubt inspired the regulators to go back to their drawing boards to attempt to craft

[84] *Id.* at 237 (''[I]t is not at all clear that the public will reject conscientious, competent judges who are willing to render decisions that do not conform to the popular political views of the day. Experience suggests that the public will not reject such judges.'') (citation omitted).

[85] Republican Party of Minn. v. Kelly, 247 F.3d 854, 895, 896, 899 (8th Cir. 2001) (Beam J., dissenting). ''Not surprisingly, then, in recent history prior to the 1998 election which spawned this suit, only two incumbent judges had lost elections.'' *Id.* at 899. As Judge Posner explains in the context of funding, equally applicable here when speech is a regulated good, ''Limiting campaign expenditures may create its own distortion of the market of ideas by making it harder to challenge incumbents. To get a foothold in the market, a new product has to be advertised more heavily than existing products, which are already familiar to consumers.'' RICHARD POSNER, FRONTIERS OF LEGAL THEORY (2001).

language for a new clause that will circumvent the Court's opinion.[86] And, because only the announce clause was before the Court, much of Minnesota's regime for controlling the speech and association of candidates remains intact. For example, judicial candidates are still forbidden to make pledges and promises, to identify their party affiliation to the voters, to seek the endorsement of political parties, and to speak before certain groups or attend their gatherings.[87] Thus, despite the result in *Republican Party of Minnesota*, judicial candidates still possess second class First Amendment rights.

There is, however, another approach that properly recognizes the right of all candidates to enjoy equal First Amendment protection. In a brief but insightful dissent Justice Kennedy, concurring in the result reached by the Court, proposed exactly that. Kennedy's fidelity to first principles would sweep away, at least in the context of First Amendment cases involving political speech during election campaigns, the complex analytical system of balancing tests, compelling interests, narrow tailoring, strict scrutiny, intermediate scrutiny, skeptical scrutiny, and rational basis that has bedeviled constitutional law for half a century. He would replace that complexity with the following simplicity: ''[C]ontent-based restrictions that do not fall within any traditional exception should be invalidated without inquiry into narrow tailoring or compelling government interests.''[88] Free speech wins. It will be interesting to see if Justice Kennedy expands this approach to embrace other categories of First Amendment cases, and whether other justices join him.

[86] Republican Party of Minn. v. White, 122 S. Ct. 2528, 2539 (2002). Justice Scalia probably had in mind the canon banning ''pledges'' and ''promises,'' which was not before the court. The ABA reacted swiftly. Six weeks after the Court's opinion the ABA announced ''a new national campaign . . . on behalf of a fair and impartial judiciary.'' An ABA Commission on the 21st Century Judiciary will ''conduct four public hearings across the country where judges, lawyers, bar leaders, academics, politicians and other interested citizens will address problems of increasingly politicized judicial campaigns and identify possible solutions.'' News Release, American Bar Association (Aug. 13, 2002).

[87] These restrictions on speech and association also conflict with the First Amendment, but it is likely that the petitioners did not raise them because they feared that the Court would be less likely to rule that they, as compared to the announce clause, suppressed freedom of speech.

[88] Republican Party of Minn. v. White, 122 S. Ct. 2528, 2544 (2002) (Kennedy, J., concurring). Kennedy named obscenity, defamation, criminal acts, and incitement to lawless action calculated or likely to bring about imminent harm as exceptions.

Justice Kennedy's solution alarmed Justice Stevens, who warned that ''Kennedy would go even further and hold that no content-based restriction of a judicial candidate's speech is permitted under the First Amendment.''[89] Stevens worries that candidates, freed from all restraints, might say anything. ''[T]his extreme position would preclude even Minnesota's prohibition against pledges or promises by a candidate for judicial office.''[90] Exactly. Stevens is right to see that Kennedy's approach would unmuzzle candidates, but he is wrong to oppose it. Judicial candidates *should* be allowed to say whatever they want, even announcing that after the election they will be open for business and soliciting bribes. They should be free to announce that they will vote to convict all African American criminal defendants, that they will side against all Muslims in contract disputes, that they will rule against all Jews in personal injury suits, that they will uphold every death sentence, and that, if it were up to them, before trial all accused rapists would be burned at the stake.

Voters are better informed if those positions are disclosed rather than kept secret. No judge exposing those beliefs would be elected. But some judges having those views, nondisclosed, might well be elected. And if that possibility highlights the potential for corruption inherent in judicial elections, then opponents of such elections should welcome this First Amendment free-for-all. If the opponents are right, then elections will become so degenerate, the candidates so depraved, the announcements, pledges, and promises so grotesque, that the public will rise up in disgust, amend their state constitutions, and abolish judicial elections.

But if they are wrong, something else will happen. Private speech and public opinion, not government regulation, will preserve the integrity of the judiciary. Numerous checks independent of the state exist to discourage unethical behavior by candidates and judges.[91] As Justice Kennedy states, ''The legal profession, the legal academy,

[89] *Id.* at 2549 (Stevens, J., dissenting).

[90] *Id.*

[91] To name a few independent checks: Judges issue written opinions explaining their decisions. Judges are subject to appellate review. Judges must comply with a rigorous code of professional conduct. Judges can recuse themselves, or be reversed for failure to do so, if they exhibit bias toward any of the litigants.

the press, voluntary groups, political and civic leaders, and all interested citizens can use their own First Amendment freedoms to protest statements inconsistent with standards of judicial neutrality and judicial excellence.''[92] In other words, democracy is its own corrective.[93]

Under this plan, the First Amendment, having driven out the regulators and been restored to its rightful place in the constitutional pantheon, will allow candidates in judicial elections to say whatever they want. The democratic process, and not government censorship, will deal with those who say what they should not. ''Free elections and free speech are a powerful combination: Together they may advance our understanding of the rule of law and further a commitment to its precepts.''[94] Under our Constitution, we must trust the people, and not the state, to protect themselves from unprincipled rogues.

Conclusion

This essay is not a brief arguing in favor of judicial elections. Perhaps Alexander Hamilton was correct to write in *Federalist* No. 78 that judges should be appointed, not elected. Justice Scalia was certainly right to point out the ''obvious tension between the article of Minnesota's popularly approved Constitution which provides that judges shall be elected, and the Minnesota Supreme Court's announce clause which places most subjects of interest to the voters off limits.''[95] But the dissenters were wrong in attempting to resolve that tension by treating the alleged consequences of judicial elections and the constitutional liberty of free speech as though they were competing policy choices. The First Amendment is not a mere policy option: It is an imperative.

[92] Republican Party of Minn. v. White, 122 S. Ct. 2528, 2545 (2002) (Kennedy, J., concurring).

[93] *See, e.g.* Snyder, *supra* note 83, at 235 (''Were judicial candidates afforded the right to speak freely about their beliefs on disputed legal and political matters and to make campaign pledges, the public would be able to weed out those candidates whose personal views were incompatible with the duties of judicial office.'').

[94] Republican Party of Minn. v. White, 122 S. Ct. 2528, 2545 (2002) (Kennedy, J., concurring).

[95] *Id.* at 2541 (Scalia, J.).

Republican Party of Minnesota v. White is not without its larger implications. Five justices ruled in favor of the central importance of the First Amendment and the principle that political speech is at the core of democracy and must be unfettered. What, if anything, does that suggest about how those justices will rule when litigation over the Bipartisan Campaign Reform Act of 2002 reaches the Court? And if four justices are willing to accept opaque definitions of ''impartiality'' and its ''appearance'' as compelling state interests that trump the First Amendment during an election campaign, what is the prospect that they will also support campaign finance regulation, justified by the compelling state interest to prevent ''corruption'' and its ''appearance'' in other elections? Time will tell.

In the meantime, the First Amendment prevailed in *Republican Party of Minnesota*. A compulsory speech code that misused government power to prohibit candidates from announcing their views on controversial legal and political issues had undermined the principles of limited government and freedom of speech. Censorship had turned free elections into faux elections. The Supreme Court was right to stand athwart this regime and identify it for what it was—unsound in practice, undemocratic in spirit, and unconstitutional in law.