The Supreme Court Limits State Censorship of Judicial Campaign Speech

*By Michael DeBow**

The election of state judges has been controversial at least since the Progressive Era.[1] For many years those uncomfortable with selecting judges through popular vote were successful, to one degree or another, in muzzling the speech of judicial candidates. In *Republican Party of Minnesota v. White*,[2] a five member majority of the Court struck down one of the most restrictive of these regulations, and set the stage for further debate on the proper conduct of judicial elections.

At issue was Minnesota's canon of judicial conduct that directed a "candidate for judicial office, including an incumbent judge" not to "announce his or her views on disputed legal or political issues."[3] Candidates who violated Canon 5(A) were subject to stringent penalties. Sitting judges could be removed, censured, suspended without pay, or subject to civil penalties. Lawyer-candidates faced disbarment, suspension, or probation.

The Minnesota canon was based on Model Canon 7(B) of the 1972 American Bar Association Model Code of Judicial Conduct. This canon, known as the "announce clause," was followed by eight other states that adopted strict limitations on judicial candidates' speech.[4] *Republican Party of Minnesota v. White* effectively ends state regulation through the "announce clause." What states may now do, consistent with the First Amendment, to regulate judicial campaign speech is not entirely clear from the face of the decision.

Procedural history. Gregory Wersal was a Republican candidate for the Minnesota Supreme Court in 1996 and 1998. His 1996 campaign literature included criticism of several past decisions of that court. One publication averred generally that the court "has issued decisions which are marked by their disregard for the Legislature and a lack of common sense." Wersal specifically criticized decisions that 1) excluded "from evidence confessions by criminal defendants that were not tape-recorded," 2) struck down "a state law restricting welfare benefits," and 3) required "public financing of abortions for poor women".[5]

Wersal's speech (along with other activities of his campaign not relevant here) provoked someone to file a complaint with the state agency charged with the enforcement of the Canons against lawyer candidates. However, that agency dismissed the complaint, in relevant part because of "doubts about the applicability of the announce clause to Wersal's campaign statements" and questions about "whether the clause was enforceable." Nonetheless, Wersal withdrew from his race, citing fears "that further ethical complaints would jeopardize his ability to practice law." When Wersal entered the 1998 race, he asked the agency for an advisory opinion as to whether it intended to enforce the announce clause of Canon 5. The agency declined to give the advice requested, because Wersal had not "provided . . . any particular statements he wished to make" for review and because the agency continued to have "significant doubts as to whether or not [the announce clause] would survive a facial challenge . . . ."[6]

Shortly after Wersal received this news he filed suit. The district court upheld Canon 5(A), finding that Minnesota had a compelling interest in "maintaining the actual and apparent integrity and independence of the judiciary" and that the canon was "narrowly tailored."[7] The latter finding depended to a large degree on the district court's construction of the Canon as applying only to candidate statements on issues "likely to come before the candidate if elected" and the weight it gave an earlier decision by the state Judicial Board that the canon "does not prohibit candidates from discussing appellate court decisions."[8]

A divided panel of the Eight Circuit upheld the district court. The appellate court approved of the district court's invocation of "[t]he longstanding principle that courts should construe laws to sustain their constitutionality,"[9] and likewise assessed not the text of the Canon as written, but as augmented by the gloss it had received from the state's enforcement agencies.[10]

Majority opinion. Justice Scalia, writing for the majority, declared the gloss on Canon 5(A) "not all that [it] appear[s] to be" for three reasons. First, the state acknowledged at oral argument that criticism of past appellate opinions is "*not* permissible if the candidate also states that he is *against stare decisis*." Second, "limiting the scope of the clause to issues likely to come before the court is not much of a limitation at all," since virtually anything now can be the subject of a lawsuit. Third, the state's construction of the clause to permit "'general' discussions of case law and judicial philosophy" is of little importance because such discussions are too abstract and bloodless to communicate much to voters.[11]

Justice Scalia then analyzed the canon using the "strict scrutiny" test, which requires that Minnesota "prove that the announce clause is (1) narrowly tailored, to serve (2) a compelling interest."[12]

The state continued to assert two "compelling interests" – preserving both the impartiality of the state judiciary, and the appearance of its impartiality. Justice Scalia's analysis of Minnesota's proffered interests is the most significant contribution the decision makes to the broader debate over state judicial selection. He noted that the state was "rather vague" about the meaning of "impartiality," and then considered three possible definitions. The state lost as to all three.

Justice Scalia dubbed the first definition – "lack of bias for or against either *party* to [a judicial] proceeding" — the "root meaning" and "the traditional sense in which the term is used." He concluded that the announce clause "is not narrowly tailored to serve impartiality . . . in this sense" because "it does not restrict speech for or against particular *parties*, but rather for or against particular *issues*."[13]

The second meaning – "lack of a preconception in favor of or against a particular *legal view*" – did not rise to a compelling state interest, because "[a] judge's lack of predis-

position regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law." Justice Scalia concluded his discussion of this point – perhaps the most insightful portion of the opinion – by noting that "since avoiding judicial preconceptions on legal issues is neither possible nor desirable, pretending otherwise by attempting to preserve the 'appearance' of that type of impartiality can hardly be a compelling state interest either."[14]

The third possible meaning – "openmindedness," described as a judge's willingness "to consider views that oppose his preconceptions, and remain open to persuasion" when hearing a lawsuit – was also rejected by the Court. Justice Scalia explained that the announce clause is so "woefully underinclusive" with respect to that goal "as to render belief in that purpose a challenge to the credulous."[15]

In the final section of the opinion, the majority rejected the argument that the announce clause fits within the category of "universal and long-established" traditions whose prohibition of certain conduct creates "a strong presumption" that the prohibition is constitutional. Justice Scalia noted the long history of state judicial elections (stretching back to 1812), and the long evolution of a variety of approaches to their regulation. In this light, the announce clause "relatively new . . . and still not universally accepted, does not compare well with the traditions deemed worthy of our attention in prior cases."[16]

What next for judicial elections? It is not clear what elements of state regulation of judicial speech would survive the same analysis deployed by the majority in *Republican Party of Minnesota v. White*. The litigation did not question the constitutionality of Minnesota's so-called "pledges or promises" canon, which prohibits judicial candidates from making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office."[17] (A number of states have such a regulation, modeled on the ABA's 1972 Code of Judicial Conduct.) The Minnesota decision also had no occasion to discuss the provision in the ABA's 1990 Model Code that is, in effect, the replacement for the announce clause. The 1990 provision, known as the "commitment clause," prohibits a judicial candidate from making "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court."[18]

Would either the pledges or promises clause or the commitment clause pass muster under *Republican Party of Minnesota v. White*? On the one hand, the majority opinion states clearly that it "neither assert[s] nor impl[ies] that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office."[19] On the other hand, it contains several passages that likely upset opponents of judicial elections, such as the observations that "We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election."[20] Along the same lines, the penultimate paragraph of the majority opinion explains that opposition to judicial elections "may be well taken . . . but the First Amendment does not permit it to achieve its goal by leaving the principle of elections in place while preventing candidates from discussing what the elections are about."[21] Doubtless there will be more constitutional litigation over state regulation of judicial elections. The four dissenters in *Republican Party of Minnesota v. White* clearly favor state regulation of judicial elections, and Justice O'Connor's concurrence shows real ambivalence due to her intense dislike of judicial elections.[22] In addition, the American Bar Association has expressed its strong disapproval of the majority opinion, and launched a public relations campaign to support new regulations on judicial campaign speech.[23] Given this lineup, the decision in *Republican Party of Minnesota v. White* may prove a victory of only limited scope for supporters of judicial selection through the electoral process.

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Footnotes

[1] Readers interested in the broader debate over state judicial selection should consult the recent Federalist Society white papers on this subject, reprinted as *The Case for Judicial Appointments*, 22 U. Tol. L. Rev. 353 (2002), and *The Case for Partisan Judicial Elections*, 22 U. Tol. L. Rev. 393 (2002).
[2] 536 U.S. ___, 122 S.Ct. 2528 (2002), *rev'g* Republican Party of *Minn. v. Kelly*, 247 F.3d 854 (8th Cir. 2001).
[3] Minn. Code of Judicial Conduct, Canon 5(A)(3)(d)(i) (2000).
[4] According to the National Law Journal, seven other states used this form of the "announce clause." See Marcia Coyle, "*New suits foreseen on judicial elections*," National Law Journal, July 8, 2002, at A1.
[5] 122 S.Ct. at 2532-33.
[6] 247 F.3d at 858-59.
[7] *Id.* at 860.
[8] *Id.* at 881-82.
[9] *Id.* at 881.
[10] *Id.* at 881-83.
[11] 122 S.Ct. at 2533-34 (emphasis in original).
[12] *Id.* at 2534.
[13] *Id.* at 2535 (emphasis in original).
[14] *Id.* at 2536.
[15] *Id.* at 2536-37.
[16] *Id.* at 2540-42.
[17] *Id.* at 2532.
[18] Quoted in id. at 2534 n.5 (noting that the commitment clause was adopted by the ABA "in response to concerns that the [announce clause] violated the First Amendment. . . .").
[19] *Id.* at 2539.
[20] *Id.* at 2538.
[21] *Id.* at 2541.
[22] *Id.* at 2542-43 (O'Connor,J., concurring). For his part, Justice Kennedy firmly cautioned against a blanket condemnation of elected judges. *Id.* at 2545-46 (Kennedy, J., concurring).
[23] http://www.manningproductions.com/ABA245/OMK/main.html and http://www.manningproductions.com/ABA245/OMK/release.html