PROFESSIONAL RESPONSIBILITY

JUDICIAL SPEECH CODES: SUPREME COURT REVIEW OF *REPUBLICAN PARTY OF MINNESOTA V. KELLY**

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MS. GRYPHON: *Republican Party of Minnesota v. Kelly* arose when Mr. Wersal, who was running for the Minnesota Supreme Court, filed an action in District Court. He did so after running a campaign during which he publicly advocated strict construction and criticized several opinions of the Minnesota Supreme Court.

Among other things, he challenged a canon of the *Minnesota Code of Judicial Conduct*. That canon prohibited a judicial candidate from expressing any views on any disputed legal or political issue. Mr. Wersal has argued that this provision, usually referred to as the Announce Clause, violates the First Amendment of the United States Constitution.

The District Court responded by construing the Announce Clause very, very narrowly, construing the clause as applying only to matters likely to actually come before the candidate if elected to judicial office. The provision was upheld. The plaintiffs appealed, and the 8th Circuit affirmed in a split decision, and *certiorari* to the U.S. Supreme Court was made and granted last year.

In the words of one panelist, this case was about where free speech meets due process. How can we ask candidates to run for office and then prohibit them from announcing their views on disputed issues? On the other hand, doesn't the state have a compelling interest in maintaining the integrity of its judiciary for the benefit of the parties who come before it?

Our first distinguished panelist today is Mr. Erik Jaffe. He is a practicing attorney in the area specializing in Supreme Court advocacy and other appellate advocacy and former law clerk for Justice Clarence Thomas and Judge Douglas Ginsburg of the D.C. Circuit. Mr. Jaffe practiced as an associate with Williams & Connolly for a number of years and now maintains his own practice. He has offered briefs for numerous Supreme Court cases, including most recently an *amicus* brief in *Republican Party of Minnesota v. Kelly*.

Please welcome Mr. Jaffe.

MR. JAFFE: My view on *Republican Party of Minnesota v. Kelly* can be summed up based on two of what I consider the essential factors of the case. One is that these judges face repeated elections — something that many of you might think is an abomination; something that I might think is an abomination. But it is in fact an assumption of this case. It is the core fact of this case. Therefore, it has to be considered.

The second thing is that, in state courts at least, there is a substantial amount of policy and value-based discretion. Those two facts, in innumerable ways, influence how one would analyze the First Amendment question.

So, first of all, I think they impact the level of scrutiny. The fact that there are elections means that you have to have strict scrutiny. I don't think that's terribly controversial, although periodically you will see some courts, and particularly the 8th Circuit below, questioning whether or not real strict scrutiny is appropriate — trying to diminish the level of strict scrutiny by analogy to civil servants, for example, where you don't quite have strict scrutiny, even though you're dealing with public speech. I think this is a mistake. I think it needs to be full-blown, pedal to the floor, strict scrutiny. This is a campaign; it's an election; it's to the public. I don't think there's any scenario under any theory of the First Amendment in which this would not be the very heart of what the First Amendment is about.

The second thing I think they impact, both the elections and the policy-based discretion, is the magnitude of the asserted state interests. People very casually say that there is a compelling interest in judicial integrity or there is a compelling interest in judicial independence. I think that's wrong. I don't think there is a compelling interest in judicial independence, certainly not in states that elect their judges. And, I do not think that what most folks think of as judicial integrity is actually what is at stake in this case.

So, judicial independence is the easier example to explain. Judges are supposed to be independent, but nobody bothered to ask, independent of what? Independent of political pressure? Independent of other elements of the government? Independent of personal bias? Independent of family bias?

I think most people want to say, independent of political and public pressure. And if that is the interest that we are asserting, it's a lie in states that elect their judiciaries because, by definition, those judges are not independent of political and public pressure. They are fully and completely and irrevocably dependent upon public pressure and politics for their jobs, for their continued tenure in office.

That strikes me as the most unbelievably obvious truism that I can think of, yet it seems to get overlooked in almost

every opinion where people wave their hand and say, judicial independence is a compelling state interest. If it were so compelling, we wouldn't be electing our judges. The fact that we are electing our judges suggests that the competing interest of judicial accountability has outweighed many interests in judicial independence.

So then, we are met with the question, in states that find judicial accountability, which is the antithesis of independence, to be of value, what is left of the interest or the concern for judicial independence. I do not go so far as to say it counts for nothing; I actually think there are some aspects of judicial independence that necessarily must be considered important, though perhaps not compelling.

The simplest example is the judge must be independent of personal bias as to the litigants in a case. You may not rule on your brother's lawsuit. You may not rule on your parent's lawsuit. I think that is a given. I think that's obvious. You need to be independent from those personal involvements that deal with the litigants before you.

I don't think a judge who has displayed a manifest bias toward a particular group in a case, for example, ought to sit on a case and evaluate that group. That is the kind of case-specific bias or group-specific bias that we would want judges to be independent of, and that I do not think the political process invites by its very existence in the electoral process. But that only goes to a very narrow portion of what judges do.

Judges look at the facts and decide who's telling the truth and who's lying. Judges take the laws and apply them to a given set of facts. And we expect them, if the law is clear, to not say in one case, "I think this law definitely means X" and in another case "I think the law definitely means Y," because you don't like the litigant. Those aspects of judging are plainly things that I think most people, maybe all people, would agree need independence from the judge.

The vast majority of what judges do, and in fact what we intend to fight about in elections, has nothing to do with that. It has to do with whether you are a strict constructionist. Are you a narrow constructionist? Do you find a penumbra around the Due Process Clause that is going to give you more room to create individual rights? Do you find affirmative action to be something that is important and compelling or not important and compelling? Do you find a woman's right to choose to be something that is of significant interest or not of significant interest?

Those are political choices. They are choices made in the interstices of otherwise clear law. It's where the law is not clear; it's where we expect judges to exercise discretion, to exercise judgment, not merely to act in a ministerial capacity.

In state courts, in particular, that happens all the time. The common law is the easiest example of that. Ambiguous state constitutional law is another easy example of that. But I think the common law probably is best. We expect judges to make the law. I know that sounds terrible in a Federalist Society convention, but we expect judges to make law.

Nobody told anyone that contributory negligence had to be there. Some judge thought it up. Nobody told him that it had to be comparative negligence. Some judge thought it up. And until a legislature says otherwise, that is the law, and the judge made it. If we are going to vote on legislators to make law, we are sure going to vote on judges who do exactly the same thing.

I think that is why you have a lot of states that elect their judges. It's not crazy — it's problematic, but it's not crazy, because they understand that judges create law, and therefore the public ought to have some say in who is making the law.

So, I think the interest, broadly defined, in judicial independence is not compelling. I think the interest is, in fact, one of judicial independence from individual biases, from biases that relate to specific cases; not from biases that relate to macro issues or to policy issues that relate to values. I think those values are an intrinsic portion of being a state court judge. So, that is how policy-based discretion plus the electoral process impact that.

The other way that those two facts impact the First Amendment analysis is that they impact narrow tailoring. We routinely say that there is a compelling state interest, but we narrowly tailor any restriction to achieve that interest. The simple answer in the narrow tailoring context is to say, well, there's a far narrower way to stop this judicial bias that everyone's worried about: appoint your judges. Or elect them once and never again.

The bias creeps in because there are recurring judicial elections, because if you say something the public doesn't like, they're voting you out of office. Well, if you want the public to have a say, give them a say once and make them elect someone for life or give them a say once and make them elect someone for 14 years with no recurring term.

All of those things will give you the right kinds of judicial independence without having anywhere near the impact on First Amendment rights that you have when you tell judges "you have to run for public approval but you can't tell them what you think about issues that they care about." That's a much greater burden on speech, and I think there are much easier ways of solving that problem.

Of course, we can eliminate elections entirely. We could have no elections of trial judges, for example. That, I think, is an interesting alternative, in that trial judges are the ones who are most immediately concerned with the individual litigants and the facts in the individual case, hence the type of bias that we are worried about most manifests itself at the trial level.

Once you hit the appellate level, of course, you are dealing much more with macro issues, issues of precedent. You are creating precedent. Perhaps in that situation, we're much less concerned with these supposed independence concerns than we would be about independent trial decisions.

The next thing I would like to point out about this interaction between elections and policy discretion, aside from how it impacts the First Amendment analysis, is that the balance between accountability and independence is actually a little

bit more difficult than I presented. It is troubling. It is very troubling that the same way that the public gets to influence judges in terms of their policy choices — in terms of being strict constructionists, in terms of having a more liberal or more conservative view of the constitutional provisions — that same policy concern could very well influence them over individual litigants.

The public could decide that John Doe was a horrible axe murderer who chopped up his six kids and wife, and you've got to convict him without looking at the evidence because the lurid TV shows and the lurid newspapers make the public go crazy. We don't want judges responding to that, but how do we balance?

We can't tell the public, exert your influence only on those discretionary items, but stop where you would exert influence on how you think the case ought to come out because you hate the particular litigant. There is no way of controlling and segregating that public influence.

I suppose the answer at the end of the day is that is troubling, and you may have a spillover in independence and accountability and you may have a spillover on things where judges are becoming accountable for the wrong things; they are becoming accountable for results rather than reasoning. But states that have chosen to elect their judges anyway, notwithstanding that concern, which is palpable to everyone and is laid out in the elections themselves, have made a judgment, a choice, that their judges are strong enough and strong-willed enough and honest enough to resist that. And if that choice is wrong, then the choice to have elections is wrong — not the choice to have free speech. I think with elections necessarily comes free speech. I think there is no way to separate the two.

The final point I would like to address is the point that you occasionally see in some of these decisions that public perception of integrity is as important as the reality. Even if there is no harm to actual judicial independence, the fact that the public might think there is harm is enough to regulate speech. My answer to that is nonsense. Nonsense, nonsense, nonsense. It's just not true. It's not even remotely true.

If the public incorrectly perceives a flaw, it is no basis for restricting speech; it is a basis for more speech. If they correctly perceive the flaw, that's a basis for fixing the flaw, for getting rid of elections; not for stopping the speech.

If what we are trying to do is to say, there's a real flaw there but we don't want the public to recognize it, we want to mask that flaw so there is confidence, my answer is instilling false confidence in the public is, in fact, the worst First Amendment violation. Masking the reality, deceiving the public into thinking their elected judiciary's actually independent, is a First Amendment abomination. That is not a compelling interest.

So overall, what I would do is I would like judges to speak out on anything on which they have discretion. If they have discretion to do something, I would let them express their views in ways that influence that discretion. That means policy choices, that means sentencing ranges within parameters. What I would not let judges do is promise to decide a specific case in a specific way or refuse to consider an issue. Refusing to consider an issue — that is a violation of the core of the judge's obligation.

The judge's obligation is to consider the arguments and decide, not to come in with an empty mind.

MS. GRYPHON: Next we'll hear from Professor Lillian BeVier. Professor BeVier is a professor of law at University of Virginia School of Law. She studies and teaches constitutional law with a special emphasis on First Amendment issues, among other subjects.

Professor BeVier also works on issues related to professional ethics. She has recently testified before the Senate Rules Committee and the Senate Judiciary Committee on the constitutionality and advisability of proposed campaign finance regulations.

Please welcome Professor BeVier.

PROFESSOR BeVIER: Thank you. I am very glad to be here among you today. What I want to do is warn you that I am going to take a position that even I am not sure I agree with.

As I came to this topic, really for the first time this fall, I was very surprised where I came out on it. You know, the Federalist Society always has one good guy and one bad guy and one good guy, one bad guy. I'm a bad guy today which is unusual for me—at a Federalist Society event anyway.

For my money, most of the approaches to the constitutionality of regulating judicial campaign speech try to fit a square peg, which is the speech of candidates for judicial office, into a round hole, namely First Amendment doctrine concerning candidates for legislative or executive offices.

It seems to me that neither First Amendment doctrine in general nor particular First Amendment cases, such as *Brown v. Hartlage*, for example, are quite adequate to the task of identifying, much less of satisfactorily sorting out, the interests that are in conflict when the subject is regulation of speech of candidates for judicial office.

One reason for this, to be sure, has to do with the fact that the First Amendment doctrine has become so formulaic, it pretends to invite analysts to play a sort of paint-by-numbers game and seems to promise that if one conscientiously recites the litany — is the regulation content-based? — does it achieve a compelling state interest by the least restrictive means? — then the questions will practically answer themselves.

In fact, however, far from eliminating First Amendment indeterminacy, the current doctrinal formulations tend only to disguise it, for they give little useful guidance about how to answer the hard questions. And this question before us today is a hard question. The doctrine, in other words, is like the Emperor who has no clothes—or like Burbank: there's no there there.

Of course, this aspect of First Amendment doctrine isn't unique to judicial campaign speech, but I think it is exacerbated in the context we are discussing. It is probably fair to predict that the Court is likely to say something to the effect that restrictions on judicial campaign speech are content-based restrictions on quintessential political speech at the very core of the First Amendment and thus are entitled to the strictest scrutiny.

But this approach has the potential to misrepresent, I think, the nature of the First Amendment stakes, even while it yields no clue as to the nature and weight of the interests on the other side. I would argue that the First Amendment interests at stake in judicial elections are, in fact, different — different in kind and not just in degree — from those that the Court has had before it in prior cases having to do with candidate speech. I would claim that candidates for judicial office are not legal or constitutional equivalents of either ordinary citizens or other elected officers, or candidates for other elected offices.

The extent of their First Amendment rights — in particular, their right to speak in their own behalf in their own election campaigns — ought not, in the first instance, to be measured by the same yardstick that applies to candidates for legislative or executive office. In other words, I take issue with the proposition that candidates for judicial office "no less than any other person have First Amendment rights to engage in the discussion of public issues and vigorously and tirelessly to advocate their own election."

Although it is constitutional, and I know quite common, to elect state judges by popular election, judicial elections are not the same at all as elections of legislatures and presidents or governors. Indeed, as Erik, I think, recognizes, judicial elections are an anomaly when considered both in the full context of our legal and political traditions, and in terms of separation of powers principles and the function of judges within a separated powers regime. Judicial elections put both rule of law norms and the Due Process Clause at substantial risk, and they invite judges to become embroiled in explicitly political pursuits. Thus, neither the First Amendment rules of the democratic political game nor its solicitude for individual speakers are necessarily the appropriate starting point of analysis when it comes to regulating the speech of candidates for judicial office.

I take up the first point first and ask you to consider what our rule of law tradition requires. Essentially, the goals to be advanced with the rule of law are regularity and even-handedness in the administration of justice and accountability in the use of governmental power.

The rule of law designates a whole cluster of values that are associated with conformity to law by government, and that includes, most particularly, conformity to law by judges. And consider, too, the Due Process Clause, which gives litigants the right to an impartial judge, to a decision based on facts presented by the litigants, evidence constrained by rules of relevance, and arguments of counsel based on the commands of existing law.

Fidelity to these norms is, in my view, central to our continuing as the nation that is governed by laws and not by men, where clear, impersonal, universally applicable general laws constrain the conduct of both individual citizens and those who govern them, and which secures to all citizens the promise that law itself and those entrusted to apply it will exhibit qualities of regularity, certainty, transparency and so forth. For all of its platitudinous quality, the boast that we are and relentlessly aspire to be a nation of laws, not men, is the bedrock of our entire legal system.

Those that argue that regulating the judicial candidate speech violates the First Amendment claim that simply by virtue of having to stand for election or retention, judicial candidates have become politicians by definition, indistinguishable in any meaningful sense from legislators or governors and accountable to precisely the same extent and in precisely the same way to the public. Moreover, they claim, judges are like other elected officials in that they often exercise discretion, and they naturally have personal views that are likely to affect their decisions. It seems to me, though, that these claims induly disregard institutional context and the constraints imposed on judges by the judicial office to which they aspire.

Practically everything about the structure of courts' decision-making processes and the role of judges within the judicial system differentiates courts from legislatures, for example, and judges from legislators. Elections for legislators is just one aspect in an ongoing conversation between citizens and their government, but judges do not engage in such a continuous dialog with the public at large.

As Roy Schotland has pointed out, other elected officials are open to meeting at any time, either openly or privately, with their constituents or anyone who may be affected by a decision in pending or future matters; judges are not. Other elected officials are free to seek support by making promises about how they will vote; judges are not. Other elected officials are advocates free to cultivate and reward support by working with their supporters to advance shared goals; judges are not. Other elected officials can pledge to change the law, and if elected, they often work unreservedly toward change; judges do not. Other elected officials participate in diverse and usually large multi-member bodies, and they do a lot of explicit compromising and vote trading; judges do not. Other elected incumbents build up support during their tenure through constituent casework, patronage, securing benefits for their communities and so forth; judicial incumbents do not.

Rule of law norms and the commands of due process imply, to me anyway, that judges are not supposed to be accountable for their decisions to public opinion about whether they are correct or not, no matter how well- or ill-formed public opinion may be. (Actually, I think the question of judicial accountability is huge here. I think it's one of the trickiest notions to get a handle on, but I certainly can not get a handle on it today!)

But judges do owe allegiance to the legal system itself, to the precedents and rules that are supposed to guide their decisions; and to the litigants whose cases come before them and the lawyers whose arguments they must consider.

Legal realists insist that judges have personal views that affect their decision-making. And those who would oppose restrictions on the speech of judicial candidates contend that this reality entitles the public to learn the candidate's personal views. With all due respect to the legal realists, judges still owe a duty to try cases impartially and, insofar as possible, to apply the law without regard to their own personal views, rather than straightforwardly to make it as politically accountable legislators.

It is not the judicial duty to attend to the policy whims of the political majority at any particular moment, except insofar as they have been duly enacted into law. Our system of representative democracy permits the majority's policy to be enacted into law by legislators and provides for judges to apply the law the majority passed. But at any given time a different majority may prefer simply to ignore existing law rather than to expend political effort to get it changed. That they may thus reward the judicial candidate who promises, even implicitly, to ignore it rather than to abide by it, ought to be irrelevant to the question of whether the First Amendment permits candidates for judicial office to speak as a candidate without restraint about legal and political issues.

In conclusion, let me indulge in a bit of legal realism of my own by acknowledging that, even if one were to accept my view of how we ought to frame the constitutional issue before us, I don't think there's a chance that that's going to happen, so you needn't worry. The question will remain whether we can inhibit the politicization of the judicial process with rule of law norms and due process constraints. It is not merely First Amendment doctrine or an indiscriminate insistence that judicial elections, because they are elections, must operate free of government distortion or control that stands in the way of achieving this objective. Other forces than the First Amendment have brought us to the point where judicial election campaigns threaten judicial impartiality. In recent decades, law has become ubiquitous, and legal rules and regulations govern seemingly every facet of American life. American citizens are notoriously litigious and show tendencies to become even more so. Courts place themselves at the center of most of the major social controversies of the day. Thus, the stakes in judicial elections are increasingly high for those individuals and groups who believe their interests are potentially at risk if the wrong candidate prevails. With the stakes becoming ever more significant, the prospect of inducing restraint on the part of judicial candidates or their advocates and opponents does not seem to be a bright one.

Thank you.

MS. GRYPHON: Next, I'd like to welcome Mr. Jan Baran to the panel. Mr. Baran is a partner at our host firm, Wiley, Rein and Fielding, where he is head of the firm's election law and government ethics practice. He is also a member of the litigation practice here. He is a former chairman of the ABA Standing Committee on Election Law and is a member of the ABA Commission on Public Financing for Judicial Elections.

He's the author of an *amicus* brief in this case, *Republican Party of Minnesota v. Kelly*, which he filed on behalf of the National Chamber of Commerce.

Please welcome Mr. Baran.

MR. BARAN: Thank you very much, and welcome to Wiley, Rein and Fielding.

I would like to start where Erik started, but I am going to take a slightly different tack than either Professor BeVier or Erik. I am going to start with the proposition that the people want to elect judges. Notwithstanding a Washington lawyer's view of the judiciary, which is enshrined in Article 3 of the Constitution, the citizens of 39 states insist that judges should be subject to electoral accountability and not be given lifetime appointments by the government.

For that reason, 53 percent of state appellate judges must run in contested elections for any initial term on the bench. That's 1,243 judges. Likewise, 66 percent of state trial court judges, which is almost 8,500 judges, must run in popular elections. Eighty-seven percent of all state appellate and trial judges in this country face some type of election for subsequent terms.

The fact is that elections create tension, which Professor Stephen Gillers of NYU calls the "one hand and the other hand dilemma." On the one hand, you expect judges to not make extra-judicial or prejudicial statements about the law, particularly about the controversial legal principles. At the same time, voters must obtain information in order to cast an informed vote. Likewise, there is a constitutional dilemma, which has already been referred to. The due process rights of litigants must be preserved and the First Amendment rights of candidates and their supporters must be honored.

The *Minnesota* case brings these dilemmas into focus, but unfortunately not in the best of circumstances. First, the version of Canon 5 used by the Minnesota courts is the broadest and the most unreasonable. Canon 5, for those of you who haven't read it all, is a very lengthy canon of the courts. It contains many, many restrictions, including restrictions on

candidates collecting contributions and how they can go about fundraising.

There is also a provision in there that prohibits candidates from making promises or pledges on how they will rule on specific cases. That provision is not at issue in this case. The only issue in this case is the Announce Clause, a version that was adopted by the ABA in 1972 and has since been abandoned as being extremely too broad.

The disputed clause prohibits any candidate for election to judicial office to announce his or her views on disputed legal or political issues. This clause can be read in Minnesota, and has been read by the Minnesota disciplinary committees, to prohibit any commentary about legal or political issues.

This results in what Professor Gillers has described as "the rule of silence." In order to avoid any possible claim of a violation of Canon 5, a candidate must limit herself to discussing safe topics, such as one's credentials — "I graduated from the state law school; I was on the Law Review; I was elected to the Order of the Coif." All of that is safe.

A candidate can comment, perhaps, on very innocuous dogmas, such as a promise to uphold the rule of law. Obviously, Mr. Wersel couldn't. He was a strict constructionist. And you might not be able to say "promise to uphold the rule of law" if you are saying that in response to a question about abortion rights, for example.

There is an observation by Judge Posner in the 7th Circuit case of *Illinois v. Buckley* that every potential subject of litigation can come before an elected judge. At the same time, this rule of silence may be impractical because it gives voters no valuable information and actually distorts the sources and flow of information — not from the candidates in their campaigns but from others, so-called third-party independent speakers, or in the modern vernacular of campaign finance reform, the "special interests".

I suggest that the reason the Announce Clause is now so common, and perhaps even the reason the court took the *Minnesota* case, is that judicial elections have become more like all other elections. In more and more states, the courts have become lightning rods for dissatisfied constituencies. As the result of public policy issues being resolved in courts rather than in legislatures, the bench is increasingly viewed as a political participant.

In saying this, I am not taking a position that any particular judicial decision is wrong or not within the province of the court, assuming the courts are performing their proper roles. They nonetheless are making big policy decisions that are leaving large, dissatisfied groups of the public, which is responding by mobilizing in these elections.

The Consequences are many. First, it means that judges, particularly statewide elected judges, must raise more and more money. Second, in those states with partisan elections, the political parties see judicial elections as part of the overall political agenda. This has made races for the bench in some states part of the overall partisan electoral warfare. And finally, independent groups are starting to wade into the breach with more and more spending.

In this escalating environment, the question now raised before the Court is what can the candidates themselves say about their own campaigns when more and more other voices are commenting on their races. Can the rule of silence silence everyone?

Thus far, there has been no attempt to impose restrictions on persons other than candidates, lawyers and those acting on their behalf. Yet the *Minnesota* case implicitly raises an important question. If candidates can be restricted in what they say because due process requires it, then to what extent does preservation of due process rights justify restrictions on what others say?

Thus, the two greatest issues that can come out of the *Minnesota* case are these. Assume that Minnesota's rule of silence is struck down. Where can the line be drawn? And if it is not struck down, then what are the implications for restricting statements in advertising by persons other than judicial candidates? As to the former question, it seems to me that Professor Gillers proposed a possible revised version of Canon 5's Announce Clause. His proposed rule is as follows: "A candidate for judicial office may state his or her general views on legal issues, but must make it clear that these views may only be tentative and subject to arguments of counsel and deliberation."

The proposed Gillers rule has an advantage of permitting candidates to speak, but also reinforces for the voters the fact that judges must judge; they cannot prejudge.

On the other hand, if the Supreme Court upholds Minnesota's version of Canon 5, there will be no need for the Gillers rule or any other revision of the Canon. Indeed, the effect of an affirmance will be potentially quite great. It would almost certainly require a holding that the due process rights of future litigants are greater than either the candidate's right to communicate legal opinions or the public's right to hear them. If so, such a constitutional conclusion would, at the very least, uphold the scheme of regulating judicial elections in ways that other elections could not be regulated.

In light of the dearth of Supreme Court decisions in the area of judicial elections, this case in my view may be only the first of many to address the constitutional and practical implications of the public's insistence on electing judges.

Thank you very much.

MS. GRYPHON: Finally, I'd like to welcome Professor David McGowan. He is an associate professor of law at the University of Minnesota School of Law.

Professor McGowan was a former law clerk to A. Raymond Randolph of the D.C. Circuit, and practiced with Skadden, Arps as well as with Howard Rice Nemerovski, before the move to pursue a career in academia.

Despite living in the state where *Republican Party of Minnesota v. Kelly* originated, he assures me he has no interest in the case, other than that which is purely academic.

Please welcome Professor McGowan.

PROFESSOR McGOWAN: Thank you. I was thinking I would come here and try to explain to people who might not understand what it is that the people of Minnesota are trying to do with the Announce Clause, but I'm a native Californian, and I've been trying to figure out for four years, since I've been there, what the people of Minnesota are trying to do, and I don't know yet, so I can't explain it very well to you. But I'm going to give it a shot.

I think the debate of the clause really comes down to whether you can have an election without electioneering. Erik says, no; an election is an election is an election. That is one way to look at it. That is not the only way to look at it. You cannot understand what an election is without having some sort of underlying theory of representation.

Perhaps, and I think this is particularly appropriate for a Federalist Society gathering, I can best summarize what Minnesota is trying to do by referring to Burke's Speech to the electors at Bristol, in which he said, "Your representative owes you not his industry only, but his judgment, and he betrays instead of serving you if he sacrifices it to your opinion."

What sort of reason is that in which the determination precedes the discussion? That is what is at stake. That is what we are talking about.

Now, I'm interested to see in the briefs, and I'm interested to see in the general discussions, people confidently asserting that Minnesota must have sacrificed any but the speaker or the analysts' version of elections by choosing to elect judges. If you elect judges — boom — you're going into full lock-stock-and-barrel Rococo free speech analysis that doesn't mean anything whatsoever, these verbal tags that the court throws out in the cases. They don't help you very much. But people define the state's interest for it. Think about that.

Minnesota both has elections and has Canon 5. Both of those are acts of the state. It is inadequate to deal with this problem, simply to declare that you look at one of them, load it up with your own normative presuppositions about what an election is, and then claim the problem is solved. It will not do because it ignores half of the state interest that you're talking about. I dare say that in other areas, particularly people associated with Federalist Society, would be hesitant to define the state's interest for it by ignoring half of its enactments.

So, that doesn't get us very far but at least frames what's really at stake. Now, when let me pick up on representation again. Let's say there is a theory; an election is an election is an election. What follows from that? First and foremost, why should we prohibit judges from making pledges? It's an election. Electors need to know, don't they? That implies a correspondence between the statement in the election that informs the electors and the performance of the judge after the electors have voted, based on that statement.

Why do voters need the expression? To make an informed decision. What makes the decision informed? The follow-through — which incidentally points out a great irony. It's often you see it in briefs and you see it in discussions over this. People say, well, you can recuse. If you've made a statement that goes too far, you can recuse as a judge, which means, if you put it plainly, you can make promises so long as you never put yourself in a position to carry them out.
This is all very grand.

May Minnesota have elections without electioneering? I haven't purported to answer that question yet, but it has to be answered that way, I think.

I'm going to make a couple of points, but let me interject some set of people who haven't been talked about as explicitly as they should be, and that's the litigants. There are electors and there are litigants.

I think Professor Fuller has a famous article in the *Harvard Law Review*, called "Forms and Limits of Adjudication", in which he pointed out that litigation is simply one form of social ordering. There are lots of forms of social ordering. There are elections. There are negotiations. There's collective bargaining. There's litigation. "What distinguishes litigation from other forms of social ordering?" Professor Fuller asked. He said, "It is the participation of the parties in a particular way by the presentation of proofs and reasoned argument based upon the proofs. Anything which diminishes the significance of the parties' participation through the presentation of proofs and reasoned argument diminishes litigation".

So let me pose this as a rhetorical question; I'll try to answer it at the end — I believe inadequately so because there aren't very good answers in this field. From the litigant's point of view, what is good about these veiled promises that we are talking about? What is good, from the litigant's point of view?

Now, we can talk about shades of gray and promises that aren't really promises and winking and nudging and all of the usual sorts of things that you do in campaigns. There wouldn't be an issue here, by the way, if candidates really just wanted to make anodyne promises of general, generic things. They want to convey real information to go to the reliance interest for the strong representation theory that I was just talking about.

So, all right. That's the bad crowd. Let's talk about the case. There's not a lot at issue here, and I mean that in the strictest sense. One of my favorite quotations is from Dean Acheson, who looked at people running around during crises and said, "Don't just do something, stand there." Think about it.

The clause in the American Bar Association Model Code of Judicial Ethics that corresponds most closely to

Minnesota's Canon 5 prohibits statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come up in court.

The Minnesota Canon prohibits a candidate from announcing his or her views on disputed legal or political issues. We've heard that. The 8th Circuit narrowing of the Minnesota standard said, "The restriction prohibits candidates only from publicly making known how they would cite issues likely to come before them as judges. General discussions of case law or tenets of judicial philosophy would not fall within the scope of the Announce Clause." That's out of the 8th Circuit.

The Minnesota Supreme Court, on January 29th of this year, issued an order adopting the 8th Circuit interpretation of the Canon as the governing aspect of the Canon in the state.

You can go after the ABA narrow 1990 version because it is very close to the narrowing construction that the 8th Circuit adopted. But I'm not sure why the Court would want to do that. If you try to distinguish between the set of verbal communications prohibited by the ABA Canon and the set of verbal communications — or any expression, actually — prohibited by the 8th Circuit narrowing construction, it is not at all clear to me that there is a difference in those sets; if there is, it's very slight. So, what are we going to do here?

You will notice the briefs for the petitioners in this case, if you read them. I cannot think of a way to state a premise to decide this case based on the strong theory of representation that we were just talking about that does not also logically compel one to strike down the pledge clause, which is not at issue in this case. Meaning that, a conscientious district court judge getting an opinion out of this case based on the notion that the electorate has a right to information would take a subsequent case challenging the pledge clause and using the logic that it would take to write this opinion and strike it down. That is based on the briefs on behalf of the petitioners.

What that means is that we are not going to get very far dealing with abstract, logical approaches to this. We are going to have to work in a sort of grubbing along fashion from the bottom up. Let me throw out a couple of things that we know doctrinally already about the speech clause. *Seattle Times v. Reinhart*, prior restraint — "A court may prohibit a party in litigation, even a newspaper, from publishing discovery materials gained through that litigation" — I'll ask afterwards if anyone disagrees with that.

United States v. Aguilar — we know that judges may be prohibited or sanctioned for disclosing wiretaps when they are judges, no First Amendment right there.

I won't mention *U.S. v. Microsoft*, except in passing — no first amendment right there.

Gentile and *Shepherd* both carve out some zone of permissible prohibitions on parties and counsel in pending cases.

All of those are different approaches to trying to protect in some sense the integrity of the judicial process, whatever that might mean, relative to the expression of people involved in that process. Those are all pending cases; those are all people involved in pending cases. So, you've got a much stronger poll there.

Those suggest that merely invoking the words "free speech" or this multi-tiered structure of doctrine that we got after *Police Department of Chicago v. Mosley* incorporated all this equal protection analysis of the free speech doctrine is not enough. What you are going to have to do is look at the facts and try and work up some way, taking into account that this is both an election and an election for judges.

Incidentally, there are plenty of people who get elected on promises or at least run on promises in a strict representational context that arguably entail the non-performance of the duties of office. That is not that uncommon. So, it is not enough simply to say, well, this is judges.

I think that you have to take into account the notion that you cannot isolate the campaign from the office. You have to take into account the notion that somebody who publicly makes this statement might think about that statement at a later time when a case pertinent to that statement comes before them. And the fact of having made the statement would reinforce a position to a greater degree than otherwise would have been the case without the statement, and therefore Professor Fuller's framework on diminishing the parties interests in presenting proof and reasonable argument comes into play.

I am going to leave you with this because I'm out of time at this point. Consider what verbal standard you adopt, if you apply standard First Amendment tools of vagueness. For example, let me read to you again the ABA Canon: "statements that commit or appear to commit the candidate" — appear to commit? Standard free speech analysis — you want to trot that out? Appear to whom? What does "commit" mean? I can strike that down in a half-heartbeat.

We are going to have to mow the lawn with reconciliation as best we can. But we're going to have to do it in a way that recognizes a state's interest in trying to preserve some zone of less than free-for-all discourse, whether it's only pledges or something else, when judicial candidates are involved. That is the only way to preserve that which makes litigation a distinct form of social order.

Thank you.

MS. GRYPHON: At this point, we have a brief opportunity for optional two-minute rebuttals by our speakers in the order in which they originally spoke. Mr. Jaffe, you'll have the first crack.

MR. JAFFE: Oh, there's so much to answer. But the easiest one to pick on is that neither Professor McGowan nor Professor BeVier spent much time talking about the fact that judges make law. State judges make law.

This notion of what it is to have a party-focused or litigant-focused judicial process completely ignores the existence of common law, and I dispute that model of state court litigation. It's simply not true. Parties have an interest, a very strong interest. I concede that much. It's just that they don't have the exclusive interest. They don't have the only interest, and this is, for all practical purposes, legislation by judging, not merely the resolution of individual disputes. The existence of precedent and the existence of rules that say you have to follow precedent, particularly if you're a lower court judge, I think make that indisputable.

As for Professor McGowan's Burkian theory of representation, I agree. You do owe your constituents a duty of judgment and not to bias or foretell your opinion. But you also owe them information on how you are going to exercise your judgment and what informs your judgment because you owe them the right to kick you out if they don't like what it is that you are bringing to your judgment.

There is a difference between promising a result in a particular case and telling them what will influence your judgment. You owe them that. The notion that we could enforce that in some reasonable way would say that this rule should apply to legislators just as much as it should apply to judges. And in fact, it should apply even more to executive branch elections.

The last thing I want to say is the analogy here that I would like to draw to election for state attorney general. There is no difference. State attorneys general have dual capacities. They create law, they exercise discretion and they also apply the law and are expected to do so in a fair, even-handed, impartial manner, and those things conflict when they have to run for election, and they have that dual capacity. I do not think there is realistically any difference between a judge and a state attorney general on those kinds of issues.

So, what do I think the role of the judge is? I think the role of the judge is to listen to argument, to consider the argument and to decide. I think those are the three defining features of a judge in any paradigm — federal, state, anywhere. And that's it.

The rest of this stuff, I just don't buy it. It's not true. I agree with Professor McGowan that we have to look at all of the state laws. We can't just look at Canon 5. We'll look at both, and the elections put the lie to what Canon 5 says.

Does that mean Canon 5 doesn't exist? No. It means the state has conflicting interests, and those in traditional First Amendment jurisprudence, whether we accept it now or not, make that interest non-compelling, even if it is valid. Those interests are perfectly valid. They're not compelling. They wouldn't be even substantial in a commercial speech matter. I don't deny their existence. I deny their magnitude.

MR. BARAN: I just have a couple of short comments.

First of all, with respect to Minnesota and Canon 5, I think Professor McGowan has equated both the will of the electorate to have elections with the decision of the Supreme Court judges to enact Canon 5. I mean, Canon 5 is an enactment by the Supreme Court and imposed on all the judges and, of course, their potential competitors for election. It does not represent the will of the electorate.

I agree with him in terms of the pledges and promises issue. Is that at risk in this case if the Announce Clause goes down? I think it is more defensible. I would agree if the Announce Clause goes down and even with the assistance of Professor Gillers of NYU, we really cannot create an Announce Clause that would work.

I do not think we are left sort of hopeless with candidates going out and making statements that we might not agree with because ultimately it is still going to be the judgment of the voters to decide whether statements, even if permitted under the judicial canons, are really becoming of a judge or a potential judge.

There is nothing, first of all, that compels judges to make prejudicial statements, even if that was allowed under Canon 5. Secondly, if they did, I believe that misstatements or bad statements by a judicial candidate are a reflection on him or her which will be taken into account by the electorate, which after all makes a decision on that individual.

PROFESSOR McGOWAN: I'll just say a couple of things. You can tell Erik and I are both former debaters.

On Jan's point on potential competitors, I forgot to say one thing, and I think this is terribly important. Probably, the best argument that I can think of for striking down this Canon is that if you get an incumbent judge who doesn't take the opinion writing task very seriously and thinks opinions are open letters to different constituencies, then there is a skew here because judges can electioneer, as Justice Blacking did in *Casey*, through opinions. I've got an article out there somewhere, if anyone's ever interested, suggesting ethical rules, and trying to get at that problem. They suffer from all the same deficiencies that these rules do. But that's a fair point.

It is an unlevel playing field, and I think that no matter how you come out on the campaign speech, we need to rein in some of these amazing opinions that say, "oh, the parties are here; that's nice. Now here's what I think about something."

On Erik, for most of the history of the republic, federal courts had common law-making authority, so you can argue about *Erie* and all of that but I don't know that there's a stark distinction. Holmes said that Congress makes laws wholesale

and judges make it retail. I think it would be hard to deny that there is interstitial lawmaking going on at the federal level, so I don't know that there is a hugely stark distinction.

But I take the point that there is, to some degree, some sort of evolution of law going on in any court. It may be greater in common law courts. I don't know that it has to be. I'd like to think that judges actually look at the parties and focus on the facts, and what you get are laws and externality, a byproduct of deciding a concrete case. But I know that that's something of a fiction.

On the magnitude of the interest, I think Erik is coming at the magnitude, working down from the democratic theory, and that is actually "what I'm saying is up for grabs here." What we are talking about is what does an election mean, and can a state define it its way? Those interests are going to correlate.

The speech clause may say, if you have an election, here is your form set of federal rules that go along with an election. That is at heart, I think, what is going on. If the interest in judicial independence is not compelling but merely interesting, then I really don't think that you can even ban pledges. I don't see why because this is a democracy. "Democracy" means rule by the people. There cannot be a more significant interest.

I disagree to some degree with the notion that it's just an enactment by the judges. If all of this is true, then the judges are just representatives and this enactment stands on no different footing than any act by a representative wielding delegated power. So, the canons are very much as representative of the will of the people of Minnesota as the statute, or as any other act.

AUDIENCE PARTICIPANT: The question is this. I think the U.S. Chamber has made a great contribution in a survey which is missing from the briefs. They had the Harris Poll do telephone interviews with 840-odd general counsels and other top litigators about how they rank the states. Minnesota came out tenth for impartiality and fifth in the competence of their judges.

My question is simple, don't you think that's entitled to respect?

MR. BARAN: Well, first of all, the study was not complete by the time we had to file the brief. But if you get a reply, Roy, you're welcome to submit it to the court.

The other findings in the study, as I recall, were that the top five worst states were all states that had elections, Mississippi, West Virginia, Louisiana, Texas and one other. And actually the five best states were states that had no elections.

What you have is a tension between an effort to try and put a finger into the dyke here by stopping the inherent, fundamental, underlying problem with electing judges with devices such as these types of announce clauses, which ultimately I don't think are related to the quality of the elections, nor will they necessarily work.

I don't think the reason Minnesota has a perceived good, dependable judiciary has anything to do with the Announce Clause. I think it is the culture in that state, and perhaps a fact that unlike some of these other states, they have not become a depository for a lot of controversial type litigation, whether it's tort reform, or whether they have state courts that basically are seen as unfair.

I don't think that is the situation in Minnesota. It certainly is in these other states that also have elections, have variations in an announce clause and simply have produced state judiciaries that have stimulated these types of controversies and reactions in the course of their own elections.

PROFESSOR McGOWAN: In Minnesota we ran into the phenomenon known as the state attorneys general litigation against the tobacco companies, out of St. Paul. There was a judge in St. Paul creating a document database that ran the entire country on local discovery rules, so we have had some wacky stuff. It seems not to have affected the overall culture, and I find that somewhat surprising.

MR. BARAN: Well, that's not the type of litigation that creates what we are witnessing in the states. If you had what is seen as a run-amok tort system, if you had a judiciary that was making other controversial conclusions, as did the Ohio judiciary with respect to school funding and things of that nature, I don't think that the tobacco litigation has prompted any sort of reaction anywhere in the country.

PROFESSOR McGOWAN: That's the problem.

AUDIENCE PARTICIPANT: Professor BeVier mentioned the difficulty of bringing traditional First Amendment analytical approaches to this issue. I just wanted to mention a couple other approaches, one that I came across in a circuit court of appeals case just the other day involving an analogous set of facts. It involved the constitutionality of a restriction on incumbent members of a state legislature from receiving campaign contributions while the legislature was in session.

The court, I think, said that was not an unconstitutional restriction. But the thought to uphold the restriction based

on the venerable legal maxim that "the fleas come with the dog", the dog in that case being, if you want to be in the state legislature, you have to accept the fleas of restriction. It seems to me that could be applied here. If you want to run for judge, you have to accept the restrictions the state has put on you. I'm not sure that was persuasive, though.

But let me suggest a different approach that I do want to ask the panelists about. That is, the First Amendment rights of the voters, the right to hear information; the right to obtain information. I think the Supreme Court has at least alluded to that right.

If my memory serves correctly, I think it was the *First National Bank of Boston v. Bellotti*, a well-known finance case in which the court said that the voters have a right to obtain information, too. I wonder if maybe that isn't the answer here. Don't approach it from the standpoint of what is the First Amendment right of a candidate for judge. Don't the lawyers have a right to ask these questions and to get an answer if they want to ask the question?

PROFESSOR BeVIER: What I would say from the doctrinal point of view (this answer doesn't really satisfy me, either) is that the notion of people having a right to the information is something that has mostly rhetorical force. If you have a right, then somebody else has a duty, and I just don't think there's a corollary duty.

AUDIENCE PARTICIPANT: I don't think they have a duty to speak; they don't have to answer the question. I think it's really the right to ask the question. But that right shouldn't be inhibited by prohibition the Announce Clause.

PROFESSOR BeVIER: Yes. Well, I take your point and I understand what you are suggesting but I don't think it is analytically pure to say that the public has a right to know in this context.

Basically, what you're saying is that this is an election; you're supposed to vote and you're supposed to actually care about what you're voting. And you're supposed to vote with some sort of knowledge about the candidates, and thus there is this aspect of keeping the voters in ignorance that is hard in my argument and I understand that.

I think this is a really hard.

AUDIENCE PARTICIPANT: Let me play devil's advocate with you, Erik, because I tend to be on your side on this very difficult issue. Is anything open? Is everything open in this? I'm thinking of the analogy to the federal context because right now we're seeing elections before the Senate Judiciary Committee, and they are not going well for the Bush Administration. We are seeing the imposition of an ideological litmus test.

Should candidates be asked in either state or federal to declare, "Are you a union member? Where do you stand on Big Tobacco?" And so on. It seems to me that the point where the kind of Burkian judgment that Professor McGowan spoke of maybe had to be exercised by the candidate themselves. And yet, will this kind of process, whereby we elect judges either at the Senate Judiciary level or the state level, just invite the kind of abuse of rule of law principles that Professor BeVier has so rightly pointed to?

I wonder what your thoughts are, not only on that, not only on the state but in the federal context as well.

MR. JAFFE: Sure. My answer to what the limits are, are implicit in my definition what the job for judges is, which is to hear, to consider and to decide. So, if you make a pledge or a promise not to do any of those things, you have effectively, anticipatorily violated your oath. I think we can stop people from saying, I will do something that's ultimately illegal or improper under your oath, just the same way I would stop someone from making a campaign promise that if elected as state senator, I'll take a bribe, I'd stop that, too. So, I think that's the limit. That's where I place the limit that answers Professor McGowan's question about how commitments are different. Some are; some aren't.

If I promise to be a strict constructionist, I'm not sure I'd have a problem with that, though it might violate my 'consider' criteria. And so, maybe I would say, "I am a strict constructionist. I'll certainly listen to someone arguing otherwise, but let me tell you I've thought about it for a long time. I'm a strict constructionist; I'll listen but I'm not promising you I'm going to agree with you." That works for me.

So, the question, then, is how do we compare this to the federal context and the litmus test? My answer is, I have no problem with litmus tests at the federal level. Zero. I think those questions are fine. I think the Congress can make the decision on anything it bloody well chooses. I think as for advice and consent, it's pretty much completely open-ended discretion for the Senate to take them or not take them, in the same way that the President, when choosing who to nominate, can put a litmus test and can ask those questions to the candidate privately.

What I think would be improper is if the candidate turned around and said, I promise to vote against Microsoft if you appoint me tomorrow. That would violate — once again, my notion of hear, consider, decide, it would violate my notion of a pledge. It would be a promise to violate your judicial oath. They can't do that.

SPEAKER: But suppose that I say, "Unless you say that, you're not going to get my vote on this committee?"

MR. JAFFE: Then I don't get your vote. I don't see why that's a problem.

SPEAKER: But there's a problem right now given —

MR. JAFFE: No. It's a political problem. It is not a constitutional problem, and it's not even an ethical problem. It is strictly a political problem because that is what Congress has the right to do — grant or withhold consent. And there is zero check on what they choose to exercise that right on. That is the nature of a political body.

So, if they want to know, will you overturn *Roe v. Wade* and you refuse to answer that, and so Biden says, well, then I won't vote for you if you don't answer me, the answer is, thank you very much, Senator. Vote your heart; I don't give a hoot. But that's my answer.

So, I think you're right. A conscientious judge, having their own sense of decorum, might well refuse to answer those questions. But I've never known decorum to be a constitutional requirement. I've never known it to be much of a concern of Congress.

If you want to be noble and ethical, stand up and tell Biden to stand up and shove his head somewhere. But, when he votes against you, you don't have any grounds to complain because it's a political process and he has every right to vote against you for telling him to shut up.

I don't have a problem with that. I may not like the result politically and personally but I have no legal problem with that.

AUDIENCE PARTICIPANT: One of the arguments that you have made today is that the integrity of the judicial process requires this kind of speech code. But can the argument also be made completely on the other side? An example from a real case in Georgia is an individual, a lawyer, who wanted to run against an incumbent Supreme Court justice. He wanted to make as part of his campaign the fact that this justice, because of her own personal biases, refused to uphold the death penalty, no longer recognized homosexual marriages, and basically wanted to make her own philosophy the law of the land, instead of upholding what the legislature had put in as laws. But he was not able to do that.

Doesn't that hurt the integrity of the process more than not being able to inform the public about this?

PROFESSOR BeVIER: I don't understand why he was not able to do that, in the sense that surely what the judge had done was a matter of public record. Isn't that right, or am I just being naive?

PROFESSOR McGOWAN: His hypothetical plainly violates the announce clause as read. If you read the announce clause, the disputed issue — it plainly violates it. Whether or not it's true.
The hypothetical works just find.

PROFESSOR BeVIER: But that's the flip side of the *Buffet* case in the 7th Circuit. There was a court of appeals judge who ran on the campaign ad or brochure that said, in all my years on the court of appeals in Illinois, I never reversed a rape conviction — which was factually accurate. But it was in violation of the announce clause under the ruling of the Illinois Disciplinary Committee. For that reason, it held unconstitutional because it was a factually accurate statement and, yes, rape is likely to be an issue that might come before the court of appeals again.

But there are other ways of handling that, and there was a question of whether, in fact, he was actually making a promise or a pledge, saying I'm never going to reverse a rape conviction ever again if I'm on the bench. Those are the type of practical, real issues that do come up and that are subject to this announce clause debate.

PROFESSOR McGOWAN: I think I just want to reinforce one thing. It would be a mistake to pretend that there is a sharp distinction between an announcement and a commitment. The one problem I have with this sort of verbal formulation — this is a very hard problem; I don't mean to imply that it's not — is that whatever verbal formulation you draw will invite deceptive masking or innuendo or this standard sort of "you know what I really mean."

Campaigning is not exactly a tribute to candor. You know, we're going to be candid. We're going to give the people the information they want. If you reserve any prohibited scope at all, including overt promises, then what you're really say is, we'll signal; we'll drop hints; we'll drop innuendos; and in the real world, that's how this is going to work.

It's what we do in the Senate Judiciary Committee: You are quite right about that. In the Souter confirmation, we actually had a debate over pledges because there was an explicit ethical debate. I do think it is an ethical question for judges, by the way. But this is not a fine distinction, and that's a lot of the problem.

AUDIENCE PARTICIPANT: My question is about the actual case. I'll give you my two assumptions.

Whatever they do with this case, it can be easily confined to a very specific factual scenario involving judges, and they can write it in a way that there would be very little collateral damage to any other First Amendment doctrine, which

means they get to do whatever they want.

At least one justice has been quite clear that he thinks electing state court judges is an abomination, and it would not shock me if his colleagues believe that same thing, as some of you expressed. Assuming a majority of the court feels that it's an abomination, how do you decide this case?

MR. JAFFE: If it's an abomination, what you do is say, "You've got to live with the consequences of that abomination, and you can't escape the consequences of that abomination by sacrificing the First Amendment." And then you wait for the due process case to arise. You wait for the proof of all the harms that make people want to pass clauses like the announce clause, that skew decisionmaking, that prejudice litigants. And then you strike down the elections.

But you don't distort First Amendment jurisprudence because you feel compelled to accept the initial abomination as if it weren't.

PROFESSOR McGOWAN: You mean, if they don't take the "don't just do something, stand there" approach?

I think what you're likely to see is an opinion that says pledges can be prohibited but beyond that the standards are too vague. And I really find it difficult to see how the 8th Circuit's narrowing construction can be distinguished from the existing American Bar Association prohibition on comments that appear to commit. If you really seriously apply speech clause doctrine, that's not going to go very far.

I am happy with that outcome. It doesn't solve in a logical, Euclidian fashion the competing interests. It is a resolution. It is a solution. That's, I think, what you're likely to see, and I'm comfortable with that, because this is very hard.

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