Supplementary Material

Chapter 11: The Contemporary Era—Democratic Rights/Free Speech/Advocacy

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Republican Party of Minnesota v. White, 536 U.S. 765 (2002)

Gregory Wersal during the 1990s campaigned to be an associate justice of the Minnesota Supreme Court. Minnesota law called for nonpartisan judicial elections, but also included an "announce clause" that declared, a "candidate for judicial office" shall not "announce his or view views on disputed legal or political issues." In 1996, complaints were filed against Wersal for making such assertions as "Should we conclude that because the [Minnesota] Supreme Court does not trust police, it allows confessed criminals to go free?" The Minnesota Lawyers Professional Responsibility Board dismissed these complaints. Nevertheless, when Wersal again ran for the Minnesota Supreme Court he filed a lawsuit against Suzanne White, the Chair of the Minnesota Board on Judicial Standards, claiming the "announce clause" was unconstitutional. The Republican Party of Minnesota, claiming an interest in hearing speech from candidates for judicial office, joined the lawsuit. Both the local federal district court and the Court of Appeals for the Eighth Circuit declared that the Minnesota law was constitutional. Wersal and the Republican Party of Minnesota appealed to the Supreme Court of the United States.

The resulting litigation pit lawyers against civil liberties organizations and divided state judges. Numerous bar associations, associations of judges and justices, good government groups, and several states filed amicus briefs urging the Supreme Court to declare the announce clause constitutional. The brief for the Conference of [State] Chief Justices stated,

> *The issue in this case presents squarely the role of judicial independence within state constitutional provisions for the separation of governmental powers as well as checks and balances. Only an independent judiciary, unencumbered by commitments to popular majorities, is able to discharge its historic constitutional obligations, including review of legislative actions produced by those same majorities. As this Court has recognized the "fundamental tension" between the requirements of an independent judiciary and the demands of electoral politics, so have the States acknowledged this tension and the differences between the work of legislators and the work of judges that underlies it. By enacting reasonable limits on judicial campaign conduct and speech, States have sought to strike a balance among the different constitutional pressures at work within a judicial elective process. The need for such limits has become increasingly evident under the "realities" of modern judicial campaigns, as judicial candidates come under pressure to win office with commitments, express or clearly implied, on the controversial political and legal issues of the day.*

An interesting alliance of the American Civil Liberties Union, the Chamber of Commerce, several state supreme court justices, and many Minnesota state representatives filed amicus briefs urging the court to lift restrictions on campaign speeches by candidates for the state judiciary. The brief of state supreme court justices maintained,

> *The central facts of recurring elections and state judicial law-making both increase the propriety and importance of judicial speech regarding issues on which courts exercise discretion and decrease the significance of judicial independence from public influence regarding such issues. While it remains true even in elected judiciaries that judges must be independent and impartial as to the facts and the litigants in individual cases, and ought not, therefore, make promises of how they will decide particular cases, that aspect of independence is not implicated by a ban on candidates announcing their views on legal issues. And although a jurist ought not commit to*

deciding even a legal issue a certain way—because it suggests improper refusal to consider contrary arguments—expressing views on legal issues is a far cry from such a commitment.

While judicial candidates should not be allowed to promise to violate their oaths—either by disobeying binding law or by refusing to consider the arguments of the parties—they should be protected by the First Amendment when expressing their views regarding issues on which jurists might differ in the exercise of their lawful discretion and judgment. For if reasonable jurists might differ over matters ultimately within their discretion, then the voters might likewise differ over who they want exercising discretion over such issues. The electorate thus has a vital constitutional interest in knowing the views of judicial candidates on issues over which they will have discretion, and the candidates have a vital constitutional interest in seeing that their views are conveyed to the public accurately and as the candidates think best.

The Supreme Court by a 5–4 vote declared unconstitutional the announce clause. Justice Scalia's majority opinion asserted that prohibiting justices from stating their opinions on legal issues was inconsistent with the state decision to elect justices and was not narrowly tailored to ensure judicial impartiality. Justice Scalia agreed that judicial elections and legislative elections were different. What campaign speech did he believe states could prohibit? Where did Justice Ginsburg draw the line? Who was correct? The five more conservative justices on the Rehnquist Courts voted to strike the law down, while the four more liberal justices insisted that the state regulation on speech was constitutional. What do you think explains the ideological divide on the court in this case?

JUSTICE SCALIA delivered the opinion of the Court.

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[T]he 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. 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, 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. In order for respondents to show that the announce clause is narrowly tailored, they must demonstrate that it does not "unnecessarily circumscrib[e] protected expression."

. . .

One meaning of "impartiality" in the judicial context—and of course its root meaning—is the lack of bias for or against either party to the proceeding. Impartiality in this sense assures equal application of the law. That is, it guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party. This is the traditional sense in which the term is used. . . .

We think it plain that the announce clause is not narrowly tailored to serve impartiality (or the appearance of impartiality) in this sense. Indeed, the clause is barely tailored to serve that interest at all, inasmuch as it does not restrict speech for or against particular parties, but rather speech for or against particular issues. To be sure, when a case arises that turns on a legal issue on which the judge (as a candidate) had taken a particular stand, the party taking the opposite stand is likely to lose. But not because of any bias against that party, or favoritism toward the other party. Any party taking that position is just as likely to lose. The judge is applying the law (as he sees it) evenhandedly.

It is perhaps possible to use the term "impartiality" in the judicial context (though this is certainly not a common usage) to mean lack of preconception in favor of or against a particular legal view. This sort of impartiality would be concerned, not with guaranteeing litigants equal application of the law, but rather with guaranteeing them an equal chance to persuade the court on the legal points in their case. Impartiality in this sense may well be an interest served by the announce clause, but it is not a compelling state interest, as strict scrutiny requires. A judge's lack of predisposition 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. As then-Justice REHNQUIST observed of our own Court: "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 had not at least given opinions as to constitutional issues in their previous legal careers." . . .

A third possible meaning of "impartiality" (again not a common one) might be described as open-mindedness. This quality in a judge demands, not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case. This sort of impartiality seeks to guarantee each litigant, not an equal chance to win the legal points in the case, but at least some chance of doing so. It may well be that impartiality in this sense, and the appearance of it, are desirable in the judiciary, but we need not pursue that inquiry, since we do not believe the Minnesota Supreme Court adopted the announce clause for that purpose.

[S]tatements in election campaigns are such an infinitesimal portion of the public commitments to legal positions that judges (or judges-to-be) undertake, that this object of the prohibition is implausible. Before they arrive on the bench (whether by election or otherwise) judges have often committed themselves on legal issues that they must later rule upon. More common still is a judge's confronting a legal issue on which he has expressed an opinion while on the bench. Most frequently, of course, that prior expression will have occurred in ruling on an earlier case. But judges often state their views on disputed legal issues outside the context of adjudication—in classes that they conduct, and in books and speeches. . . . That is quite incompatible with the notion that the need for open-mindedness (or for the appearance of open-mindedness) lies behind the prohibition at issue here.

The short of the matter is this: In Minnesota, a candidate for judicial office may not say, "I think it is constitutional for the legislature to prohibit same-sex marriages." He may say the very same thing, however, up until the very day before he declares himself a candidate, and may say it repeatedly (until litigation is pending) after he is elected. As a means of pursuing the objective of open-mindedness that respondents now articulate, the announce clause is so woefully underinclusive as to render belief in that purpose a challenge to the credulous.

Justice STEVENS asserts that statements made in an election campaign pose a special threat to open-mindedness because the candidate, when elected judge, will have a particular reluctance to contradict them. That might be plausible, perhaps, with regard to campaign promises. . . . But . . . the Minnesota Supreme Court has adopted a separate prohibition on campaign "pledges or promises," which is not challenged here. The proposition that judges feel significantly greater compulsion, or appear to feel significantly greater compulsion, to maintain consistency with nonpromissory statements made during a judicial campaign than with such statements made before or after the campaign is not self-evidently true. . . . In any event, it suffices to say that respondents have not carried the burden imposed by our strict-scrutiny test to establish this proposition (that campaign statements are uniquely destructive of open-mindedness) on which the validity of the announce clause rests.

Moreover, the notion that the special context of electioneering justifies an abridgment of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head. "[D]ebate on the qualifications of candidates" is "at the core of our electoral process and of the First Amendment freedoms," not at the edges. . . . We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election.

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[W]e 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 . . . is that, even if the First Amendment allows greater regulation of judicial election campaigns than legislative election 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. . . .

Justice GINSBURG greatly exaggerates the difference between judicial and legislative elections. She asserts that "the rationale underlying unconstrained speech in elections for political office—that

representative government depends on the public's ability to choose agents who will act at its behest—does not carry over to campaigns for the bench." This complete separation of the judiciary from the enterprise of "representative government" might have some truth in those countries where judges neither make law themselves nor set aside the laws enacted by the legislature. It is not a true picture of the American system. Not only do state-court judges possess the power to "make" common law, but they have the immense power to shape the States' constitutions as well. Which is precisely why the election of state judges became popular.

. . . The practice of prohibiting speech by judicial candidates on disputed issues, however, is neither long nor universal.

. . . [During the nineteenth century], not only were judicial candidates (including judges) discussing disputed legal and political issues on the campaign trail, but they were touting party affiliations and angling for party nominations all the while.

. . . Even today, although a majority of States have adopted either the announce clause or its 1990 ABA successor, adoption is not unanimous. Of the 31 States that select some or all of their appellate and general-jurisdiction judges by election, 4 have adopted no candidate-speech restriction comparable to the announce clause, and 1 prohibits only the discussion of "pending litigation." This practice, relatively new to judicial elections and still not universally adopted, does not compare well with the traditions deemed worthy of our attention in prior cases. . . .

There is an 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. (The candidate-speech restrictions of all the other States that have them are also the product of judicial fiat. The disparity is perhaps unsurprising, since the ABA, which originated the announce clause, has long been an opponent of judicial elections. That opposition may be well taken (it certainly had the support of the Founders of the Federal Government), 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. "[T]he greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance. If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles."

JUSTICE O'CONNOR, concurring.

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We of course want judges to be impartial, in the sense of being free from any personal stake in the outcome of the cases to which they are assigned. But if judges are subject to regular elections they are likely to feel that they have at least some personal stake in the outcome of every publicized case. Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects. . . . Even if judges were able to suppress their awareness of the potential electoral consequences of their decisions and refrain from acting on it, the public's confidence in the judiciary could be undermined simply by the possibility that judges would be unable to do so.

Moreover, contested elections generally entail campaigning. And campaigning for a judicial post today can require substantial funds. Unless the pool of judicial candidates is limited to those wealthy enough to independently fund their campaigns, a limitation unrelated to judicial skill, the cost of campaigning requires judicial candidates to engage in fundraising. Yet relying on campaign donations may leave judges feeling indebted to certain parties or interest groups. Even if judges were able to refrain from favoring donors, the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary.

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Minnesota has chosen to select its judges through contested popular elections instead of through an appointment system or a combined appointment and retention election system along the lines of the Missouri Plan. In doing so the State has voluntarily taken on the risks to judicial bias described above. As

a result, the 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.

JUSTICE KENNEDY, concurring.

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I adhere to my view, however, that content-based speech restrictions that do not fall within any traditional exception should be invalidated without inquiry into narrow tailoring or compelling government interests. The speech at issue here does not come within any of the exceptions to the First Amendment recognized by the Court. "Here, a law is directed to speech alone where the speech in question is not obscene, not defamatory, not words tantamount to an act otherwise criminal, not an impairment of some other constitutional right, not an incitement to lawless action, and not calculated or likely to bring about imminent harm the State has the substantive power to prevent. No further inquiry is necessary to reject the State's argument that the statute should be upheld." The political speech of candidates is at the heart of the First Amendment, and direct restrictions on the content of candidate speech are simply beyond the power of government to impose.

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Minnesota may choose to have an elected judiciary. It may strive to define those characteristics that exemplify judicial excellence. It may enshrine its definitions in a code of judicial conduct. It may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards. 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. Deciding the relevance of candidate speech is the right of the voters, not the State. The law in question here contradicts the principle that unabridged speech is the foundation of political freedom.

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If Minnesota believes that certain sorts of candidate speech disclose flaws in the candidate's credentials, democracy and free speech are their own correctives. The legal profession, the legal academy, 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. Indeed, if democracy is to fulfill its promise, they must do so. They must reach voters who are uninterested or uninformed or blinded by partisanship, and they must urge upon the voters a higher and better understanding of the judicial function and a stronger commitment to preserving its finest traditions. 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.

. . . In resolving this case, we should refrain from criticism of the State's choice to use open elections to select those persons most likely to achieve judicial excellence. States are free to choose this mechanism rather than, say, appointment and confirmation. By condemning judicial elections across the board, we implicitly condemn countless elected state judges and without warrant. Many of them, despite the difficulties imposed by the election system, have discovered in the law the enlightenment, instruction, and inspiration that make them independent-minded and faithful jurists of real integrity. . . .

These considerations serve but to reinforce the conclusion that Minnesota's regulatory scheme is flawed. By abridging speech based on its content, Minnesota impeaches its own system of free and open elections. The State may not regulate the content of candidate speech merely because the speakers are candidates. This case does not present the question whether a State may restrict the speech of judges because they are judges—for example, as part of a code of judicial conduct; the law at issue here regulates judges only when and because they are candidates. . . .

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

. . . The Court's reasoning, however, will unfortunately endure beyond the next election cycle. By obscuring the fundamental distinction between campaigns for the judiciary and the political branches, and by failing to recognize the difference between statements made in articles or opinions and those made on the campaign trail, the Court defies any sensible notion of the judicial office and the importance of impartiality in that context.

The Court's disposition rests on two seriously flawed premises—an inaccurate appraisal of the importance of judicial independence and impartiality, and an assumption that judicial candidates should have the same freedom "'to express themselves on matters of current public importance'" as do all other elected officials. Elected judges, no less than appointed judges, occupy an office of trust that is fundamentally different from that occupied by policymaking officials. Although the fact that they must stand for election makes their job more difficult than that of the tenured judge, that fact does not lessen their duty to respect essential attributes of the judicial office that have been embedded in Anglo-American law for centuries.

There is a critical difference between the work of the judge and the work of other public officials. In a democracy, issues of policy are properly decided by majority vote; it is the business of legislators and executives to be popular. But in litigation, issues of law or fact should not be determined by popular vote; it is the business of judges to be indifferent to unpopularity. . . .

By recognizing a conflict between the demands of electoral politics and the distinct characteristics of the judiciary, we do not have to put States to an all-or-nothing choice of abandoning judicial elections or having elections in which anything goes. As a practical matter, we cannot know for sure whether an elected judge's decisions are based on his interpretation of the law or political expediency. In the absence of reliable evidence one way or the other, a State may reasonably presume that elected judges are motivated by the highest aspirations of their office. But we do know that a judicial candidate, who announces his views in the context of a campaign, is effectively telling the electorate: "Vote for me because I believe X, and I will judge cases accordingly." Once elected, he may feel free to disregard his campaign statements, but that does not change the fact that the judge announced his position on an issue likely to come before him as a reason to vote for him. Minnesota has a compelling interest in sanctioning such statements.

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Even when "impartiality" is defined in its narrowest sense to embrace only "the lack of bias for or against either party to the proceeding," the announce clause serves that interest. 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). Contrary to the Court's reasoning in its first attempt to define impartiality, an interpretation of the announce clause that prohibits such statements serves the State's interest in maintaining both the appearance of this form of impartiality and its actuality.

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The Court boldly asserts that respondents have failed to carry their burden of demonstrating "that campaign statements are uniquely destructive of open-mindedness." But the very purpose of most statements prohibited by the announce clause is to convey the message that the candidate's mind is not open on a particular issue. The lawyer who writes an article advocating harsher penalties for polluters surely does not commit to that position to the same degree as the candidate who says "vote for me because I believe all polluters deserve harsher penalties." At the very least, such statements obscure the appearance of open-mindedness. More importantly, like the reasoning in the Court's opinion, they create the false impression that the standards for the election of political candidates apply equally to candidates for judicial office.

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JUSTICE GINSBURG, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE BREYER join, dissenting.

Whether state or federal, elected or appointed, judges perform a function fundamentally different from that of the people's elected representatives. Legislative and executive officials act on behalf of the voters who placed them in office; "judge[s] represen[t] the Law." Unlike their counterparts in the political branches, judges are expected to refrain from catering to particular constituencies or committing themselves on controversial issues in advance of adversarial presentation. Their mission is to decide "individual cases and controversies" on individual records, neutrally applying legal principles, and, when necessary, "stand[ing] up to what is generally supreme in a democracy: the popular will."

A judiciary capable of performing this function, owing fidelity to no person or party, is a "longstanding Anglo-American tradition," an essential bulwark of constitutional government, a constant guardian of the rule of law. The guarantee of an independent, impartial judiciary enables society to "withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."

The ability of the judiciary to discharge its unique role rests to a large degree on the manner in which judges are selected. The Framers of the Federal Constitution sought to advance the judicial function through the structural protections of Article III, which provide for the selection of judges by the President on the advice and consent of the Senate, generally for lifetime terms. Through its own Constitution, Minnesota, in common with most other States, has decided to allow its citizens to choose judges directly in periodic elections. But Minnesota has not thereby opted to install a corps of political actors on the bench; rather, it has endeavored to preserve the integrity of its judiciary by other means. Recognizing that the influence of political parties is incompatible with the judge's role, for example, Minnesota has designated all judicial elections nonpartisan. And it has adopted a provision, here called the Announce Clause, designed to prevent candidates for judicial office from "publicly making known how they would decide issues likely to come before them as judges."

The question this case presents is whether the First Amendment stops Minnesota from

I do not agree with this unilocular, "an election is an election," approach. Instead, I would differentiate elections for political offices, in which the First Amendment holds full sway, from elections designed to select those whose office it is to administer justice without respect to persons. Minnesota's choice to elect its judges, I am persuaded, does not preclude the State from installing an election process geared to the judicial office.

Legislative and executive officials serve in representative capacities. They are agents of the people; their primary function is to advance the interests of their constituencies. Candidates for political offices, in keeping with their representative role, must be left free to inform the electorate of their positions on specific issues. Armed with such information, the individual voter will be equipped to cast her ballot intelligently, to vote for the candidate committed to positions the voter approves. . . .

Judges, however, are not political actors. They do not sit as representatives of particular persons, communities, or parties; they serve no faction or constituency. . . . They must strive to do what is legally right, all the more so when the result is not the one "the home crowd" wants. . . .

Thus, the rationale underlying unconstrained speech in elections for political office—that representative government depends on the public's ability to choose agents who will act at its behest—does not carry over to campaigns for the bench. As to persons aiming to occupy the seat of judgment, the Court's unrelenting reliance on decisions involving contests for legislative and executive posts is manifestly out of place. . . . In view of the magisterial role judges must fill in a system of justice, a role that removes them from the partisan fray, States may limit judicial campaign speech by measures impermissible in elections for political office. . . .

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. . . Judicial candidates in Minnesota may not only convey general information about themselves, they may also describe their conception of the role of a judge and their views on a wide range of subjects of interest to the voters. . . . Further, they may discuss, criticize, or defend past decisions of interest to voters. What candidates may not do—simply or with sophistication—is remove themselves from the constraints characteristic of the judicial office and declare how they would decide an issue, without regard to the particular context in which it is presented, sans briefs, oral argument, and, as to an appellate

bench, the benefit of one's colleagues' analyses. Properly construed, the Announce Clause prohibits only a discrete subcategory of the statements the Court's misinterpretation encompasses.

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All parties to this case agree that, whatever the validity of the Announce Clause, the State may constitutionally prohibit judicial candidates from pledging or promising certain results. . . .

The reasons for this agreement are apparent. Pledges or promises of conduct in office, however commonplace in races for the political branches, are inconsistent "with the judge's obligation to decide cases in accordance with his or her role." . . . This judicial obligation to avoid prejudgment corresponds to the litigant's right, protected by the Due Process Clause of the Fourteenth Amendment, to "an impartial and disinterested tribunal in both civil and criminal cases," . . .

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. . . When a judicial candidate promises to rule a certain way on an issue that may later reach the courts, the potential for due process violations is grave and manifest. If successful in her bid for office, the judicial candidate will become a judge, and in that capacity she will be under pressure to resist the pleas of litigants who advance positions contrary to her pledges on the campaign trail. If the judge fails to honor her campaign promises, she will not only face abandonment by supporters of her professed views; she will also "ris[k] being assailed as a dissembler," willing to say one thing to win an election and to do the opposite once in office.

A judge in this position therefore may be thought to have a "direct, personal, substantial, [and] pecuniary interest" in ruling against certain litigants, for she may be voted off the bench and thereby lose her salary and emoluments unless she honors the pledge that secured her election. . . .

Given this grave danger to litigants from judicial campaign promises, States are justified in barring expression of such commitments, for they typify the "situatio[n] . . . in which experience teaches that the probability of actual bias on the part of the judge . . . is too high to be constitutionally tolerable." By removing this source of "possible temptation" for a judge to rule on the basis of self-interest, the pledges or promises prohibition furthers the State's "compellin[g] interest in maintaining a judiciary fully capable of performing" its appointed task: "judging [each] particular controversy fairly on the basis of its own circumstances."

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Prohibiting a judicial candidate from pledging or promising certain results if elected directly promotes the State's interest in preserving public faith in the bench. When a candidate makes such a promise during a campaign, the public will no doubt perceive that she is doing so in the hope of garnering votes. And the public will in turn likely conclude that when the candidate decides an issue in accord with that promise, she does so at least in part to discharge her undertaking to the voters in the previous election and to prevent voter abandonment in the next. The perception of that unseemly quid pro quo—a judicial candidate's promises on issues in return for the electorate's votes at the polls—inevitably diminishes the public's faith in the ability of judges to administer the law without regard to personal or political self-interest. . . .

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Uncoupled from the Announce Clause, the ban on pledges or promises is easily circumvented. By prefacing a campaign commitment with the caveat, "although I cannot promise anything," or by simply avoiding the language of promises or pledges altogether, a candidate could declare with impunity how she would decide specific issues. Semantic sanitizing of the candidate's commitment would not, however, diminish its pernicious effects on actual and perceived judicial impartiality. To use the Court's example, a candidate who campaigns by saying, "If elected, I will vote to uphold the legislature's power to prohibit same-sex marriages" will feel scarcely more pressure to honor that statement than the candidate who stands behind a podium and tells a throng of cheering supporters: "I think it is constitutional for the legislature to prohibit same-sex marriages." Made during a campaign, both statements contemplate a quid pro quo between candidate and voter. Both effectively "bind [the candidate] to maintain that position after election." And both convey the impression of a candidate prejudging an issue to win votes. Contrary to the Court's assertion, the "nonpromissory" statement averts none of the dangers posed by the "promissory" one.

. . . Judges are not politicians, and the First Amendment does not require that they be treated as politicians simply because they are chosen by popular vote. Nor does the First Amendment command States that wish to promote the integrity of their judges in fact and appearance to abandon systems of judicial selection that the people, in the exercise of their sovereign prerogatives, have devised.

. . .