

Minnesota v. White: Exploring a Judicial Candidate’s First Amendment Rights

Overview

In this lesson, students will explore the Supreme Court case *Republican Party of Minnesota v. White*, in which Minnesota Supreme Court candidate Greg Wersal challenged the state’s judicial election rules, claiming they limited his First Amendment right of free speech. After watching a documentary on the case and discussing the major themes, students will investigate how the First Amendment comes into play during judicial elections by participating in a mock judicial election.

Grades

10-11

NC Essential Standards for Civics & Economics

- CE.C&G.1.4: Analyze the principles and ideals underlying American democracy in terms of how they promote freedom
- CE.C&G.2.3: Evaluate the U.S. Constitution as a “living Constitution” in terms of how the words in the Constitution and Bill of Rights have been interpreted and applied throughout their existence
- CE.C&G.2.7: Analyze contemporary issues and governmental responses at the local, state, and national levels in terms of how they promote the public interest and/or general welfare
- CE.C&G.3.4: Explain how individual rights are protected by varieties of law
- CE.C&G.3.8: Evaluate the rights of individuals in terms of how well those rights have been upheld by democratic government in the United States.
- CE.C&G.5.2: Analyze state and federal courts by outlining their jurisdictions and the adversarial nature of the judicial process.

NC Essential Standards for American History II

- AH2.H.2.1: Analyze key political, economic, and social turning points since the end of Reconstruction in terms of causes and effects (e.g., conflicts, legislation, elections, innovations, leadership, movements, Supreme Court decisions, etc.).
- AH2.H.2.2: Evaluate key turning points since the end of Reconstruction in terms of their lasting impact (e.g., conflicts, legislation, elections, innovations, leadership, movements, Supreme Court decisions, etc.).

Essential Questions

- What purpose does the First Amendment serve?
- How does the right to freedom of speech play a part in everyday life?
- What types of speech does the First Amendment protect?
- What is judicial activism?
- Should public officials have more restricted speech than others?
- How should judicial elections be run?
- Should judges be held to a different standard than senators or other politicians?

Materials

- *Minnesota v. White*, Voices of American Law DVD Documentary
 - Available at www.voicesofamericanlaw.org
- *Minnesota v. White* Viewer’s Guide and Answer Key, attached
- Judicial Campaign handouts, attached
- *Republican Party of Minnesota v. White* Background and Opinion, attached

- Writing Prompt-Supreme Court Justices, attached

Duration

1 block period

Procedure

Warm-Up: Movie Promotion

1. Divide students into groups of 2-3. Tell each group that together, they are going to choose a movie they all like and try to convince the rest of class to watch the movie in a 1-2 minute presentation. At the end of each group's convincing presentation, the class will vote on which movie sounds most interesting.

Give students 2 minutes to come to a consensus on which movie they want to try and convince others to watch. Once each group has chosen a movie, assign half the groups as "unrestricted speech" groups and half as "restricted speech" groups. (To make this assignment random, teachers may want to write these terms on strips of paper, and have each group choose a slip.) Explain to students that the unrestricted speech groups can say anything to convince the class to go see their movies. The limited speech groups are NOT allowed to discuss:

- the plot of the movie,
- actors/actresses in the movie
- what they like about the movie

While the students in the restricted groups may grumble about their restrictions, explain that those are the rules and they'll just need to work within the confines given. Give students 4-5 minutes to prepare their presentation (remind students their final presentations should only be 1-2 minutes in length) and then allow each group to present to the class. After groups have presented, ask the class to discuss which movies they are most interested in seeing (based solely on the presentations and not any background knowledge of the movie they may have personally) and why. (It is likely that the movies chosen will be those described by unrestricted groups.) Further discuss:

- Why do you think we have chosen the movies we have chosen?
- Was it easier for some groups to convince us of their movies than others? Why?
- Why was it particularly more difficult for restricted groups to convince us to watch their movies?
- What if all advertisements on TV were restricted in similar ways? How would you know what movies you would like and what movies you would not like?
- Let's consider politicians in this light. If a politician was running for office and was told there were particular things he/she could not address, how might this affect the elections process? Considering that a politician was experiencing what you all in the "restricted speech" groups experienced, what challenges would he/she face? How much would you, as potential voters, be able to learn about him/her and how might this affect how you vote?

Documentary: *Minnesota v. White*

2. Explain to students that they are going to be watching a documentary about a case called *Minnesota v. White* that deals with a similar situation: restrictions on candidates running for judicial elections in the state of Minnesota. Before showing the documentary, ask students the following questions.
 - What do you think when you hear the phrase "freedom of speech"? Does this mean that you can say anything you want anywhere you want?
 - What are some restrictions on the freedom of speech? Can you say anything you want at school? Can you yell fire in a theater?
 - What are the benefits of having freedom of speech protected by the Constitution? Are there drawbacks as well? If so what are they?
 - What do we know about most politicians before we vote?
 - Often we know the politician's stance on: Abortion, Health Care, Economics, Gay Marriage, Crime

- Inform the students that here in North Carolina and in other states, judges are elected (rather than appointed like Supreme Court Justices). Discuss:
 - Do we want to know where judges stand on these issues before an election? Why or why not?
 - Should judges be held to a different standard than other politicians? Why or why not?

3. Show students the *Minnesota v. White* documentary.

- **Teacher Reference - Synopsis of the Case**

In 1996, attorney Greg Wersal decided to run for the Minnesota Supreme Court. Wersal was particularly concerned with judicial activism, but was limited in what he could say during his campaign by Minnesota’s Canon 5, or the “announce clause.” The announce clause provided that a candidate could not announce his or her views on a contested legal or political issue. Wersal’s opposition to canon 5 increased when, in 1998, the Minnesota Supreme Court modified canon 5 to make it unethical for a candidate to seek or accept endorsements from a political organization. With the help of the Republican Party of Minnesota, Wersal filed suit in federal court, claiming that the announce clause, restrictions on party endorsements, and fundraising were unconstitutional.

- **Viewing Options**

- You may choose to have students watch the documentary without any pauses while completing *Minnesota v. White Viewer’s Guide*.
- You may choose to stop the video at the times outlined below and ask students to discuss the questions listed. You may choose whether or not to distribute the “Questions to Answer for Minnesota v. White” worksheet.
 - **Discussion Point #1:** (*Pause at 3:03 seconds; right after canon 5 is read*). Ask the students what their reaction to the rule is: Why do you think this rule was created? What are the benefits of Canon 5? What are the drawbacks? Do you think voters should be able to know judge’s political views before an election? How much does this intrude on a person’s freedom of speech? What would you think if this rule applied to the people running for the legislature, senate, or even the president?
 - **Discussion Point #2:** (*Pause at 7:52 seconds; after Penny White finishes speaking*) Discuss: If you were Penny White, how would you respond to this criticism if there were no restrictions on your speech? How would you respond if Canon 5 applied and you were unable to discuss your political views?
 - **Discussion Point #3:** (*Pause at 17:38 seconds; after Wersal finishes talking about his cows*) Discuss: What do you think about Wersal’s technique to get coverage? If you saw Wersal and his cows, would you be more interested in what he was saying? Do you think these kinds of campaign tactics have a place in judicial elections for Supreme Court Justices? Why or why not? Wersal changed his name to “Carlson” as a way to get more votes. If you were to change your name during an election, what would you change it to? Example: Kennedy, Rockefeller, Windsor etc.

Participating in a Judicial Campaign

4. Once the documentary is over, explain that students will be participating in a judicial campaign. Divide the class into small groups of 3-4 students. Give each group one of the 4 attached fact sheets on various judicial candidates. Tell the students that each group is working on a judicial campaign for their assigned candidate. Their goal is to come up with the most effective advertisement they can. This can be a television commercial, a billboard, a radio ad, a combination of various techniques, or anything else they would like. Tell students that they can use any information they have in their ads and they can choose to have to the ad focus on the weaknesses of the opposing candidate if they would like.
5. Allow students to work on their advertisements for 15-20 minutes and then go over class expectations for being a respectful audience member. Have students draw the following chart on notebook paper and

instruct them to fill it in as they watch the advertisements (make sure students designate between different ads for the same candidate on their chart):

Judicial Candidate Name	What was in this presentation that makes me want to vote for this candidate:	What was in this presentation that makes me not want to vote for this candidate:

6. Have each group present their advertisement. After all presentations, have students review their notes and discuss which candidate they would vote for and why. Teachers may want to have the class actually vote to see which candidate would win. Further discuss:
- What was difficult about planning advertisements for judicial candidates?
 - What characteristics from advertisements did you find to be most effective and why?
 - If Canon 5 had applied to your judicial campaign, would you have advertised differently?

Court’s Opinion: *Minnesota v. White*

7. By either passing out the attached *Minnesota v. White* handout for students to read, or by simply summarizing and explaining the Court’s opinion to the class, ensure students understand how the Court ruled and further discuss:
- Do you agree or disagree with the Court’s holding and why?
 - Were you surprised by outcome of this case and why?
 - In the opinion, Justice Scalia argues that “debate on the qualifications of candidates is ‘at the core of our electoral process and of the First Amendment freedoms,’ not at the edges.” What does he mean by this? Do you agree or disagree that debate about candidates was what the writers of the Constitution had in mind with the First Amendment?
 - Justice Scalia also argues that the Canon 5 was a way to reduce the ability of voters to choose judicial candidate to undermine the election process. If that was the case, do you think the rule is effective with that goal in mind?
 - (Remind students that in some states judges are elected and in other states they are appointed by the Governor. All federal judges are appointed by the President.) In your opinion, should judges be elected by voters or chosen by other government officials? Explain. (Teachers can have students explore this further by completing the essay noted in “Additional Activities.”

Additional Activities

Assign the attached writing prompt on judicial elections in North Carolina.

Differentiation

Students with Special Needs

- Ensure that students are placed in mixed ability groups, preferably with no more than 4 students per group.
- Provide more structured campaign advertisement assignment limiting options for product.
- For students that have difficulty with presenting in front of class, allow them to create flyer or other tangible product to pass around class.

AIG

- Have students read the opinions for *Minnesota v. White*. After reading, have them write a concurring opinion or a dissenting opinion in response to Justice Scalia’s majority opinion.

Name: _____

Republican Party of Minnesota v. White Viewer's Guide

1. After a judge retires, who appoints a new judge who then runs as an incumbent?
2. What did Wersal want to focus his campaign on?
3. What is the provision being challenged in this case?
4. Why was the Tennessee Conservative Union upset with Penny White?
5. In what unusual way did Greg Wersal try to gain attention?
6. In 1998, what did the Supreme Court modify Canon 5 to restrict?
7. Who, besides Greg Wersal, decided to support a First Amendment lawsuit challenging canon 5?
8. What was the legal theory behind Greg Wersal's lawsuit?
9. Why did Wersal choose to register using his wife's maiden name- Carlson?
10. Who won the election- Gilbert or Wersal?

Republican Party of Minnesota v. White Viewer's Guide- ANSWER KEY

1. After a judge retires, who appoints a new judge who then runs as an incumbent?

The governor and the commission on judicial selection appoint a new judge who then runs as an incumbent.

2. What did Wersal want to focus his campaign on?

Wersal wanted to focus his campaign on judicial activism.

3. What is the provision being challenged in this case?

Wersal challenged the constitutionality of Canon 5 or the "announce clause".

4. Why was the Tennessee Conservative Union upset with Penny White?

The Tennessee conservative union was upset with Penny White because she held that a murderer needed to be resentenced.

5. In what unusual way did Greg Wersal try to gain attention?

Wersal wore a ball and chain and a name tag that said "prisoner"

6. In 1998, what did the Supreme Court modify Canon 5 to restrict?

The modification made it unethical for a candidate to seek or accept political party endorsements.

7. Who, besides Greg Wersal, decided to support a First Amendment lawsuit challenging Canon 5?

The Republican Party supported the lawsuit.

8. What was the legal theory behind Greg Wersal's lawsuit?

The legal theory was that the First Amendment protects political speech in elections.

9. Why did Wersal choose to register using his wife's maiden name- Carlson?

Wersal registered using his wife's maiden name he felt that in Minnesota, using a Scandinavian name would help him win the election.

10. Who won the election- Gilbert or Wersal?

Gilbert won the election.

Campaign Fact Sheet for Judge Caitlynn Crouch

You have been hired to create an advertisement for Judge Caitlynn Crouch's re-election campaign for the Supreme Court of North Carolina. You may choose to create a TV commercial, a radio commercial, a billboard or anything else that will convince voters to re-elect Judge Crouch. Additionally, you may choose to focus your ad on positive things about Judge Crouch or negative things about her opponent, Gregory Patrick. Before you create your ad, here is some information that may be helpful to you.

Location:

- Judge Crouch lives in North Carolina. The state is considered a moderate state.

Information About Judge Crouch

- Has lived in North Carolina all her life with her now ex-husband George, a doctor. She also raised her 4 children, Eva, Freddie, Sophia and George Jr. in North Carolina.
- Has served as a Judge in North Carolina for 15 years
- Judge Crouch is very active in the community. She volunteers at local high schools and colleges, overseeing mock trial competitions, and has competed in many marathons to raise money for local youth centers.
- Judge Crouch feels that she will do well with older voters, but is worried that she will lose votes to the younger, charismatic Gregory Patrick. She would like to focus on voters who are 18-30, but would also like the ads to appeal to other voters as well.
- In North Carolina, Supreme Court elections are non-partisan, meaning candidates are not representing a political party. Although a political party cannot endorse Judge Crouch, several groups have agreed to. You may choose to have any of the following groups endorse Judge Crouch in your ad:
 - Right to Life
 - Family Policy Council
 - Council of Conservative Citizens
 - American Family Association
- Although many people support Judge Crouch, she has faced some criticism as well:
 - Judge Crouch recently affirmed a death penalty sentence for a convicted murderer. When the man was later found to be innocent, Judge Crouch came under harsh criticism.
 - Although she donates her time and money to youth centers and public schools, Judge Crouch's 4 children attend Brisbane Academy, an exclusive private school. Some people have criticized Judge Crouch for this, and claimed that she is out of touch with North Carolina.
 - A group, Carolinians for Change, claims that Judge Crouch's views are out dated and that she has been on the bench for too long. This group claims that Gregory Patrick's youth would better serve North Carolina.
 - Recently, Judge Crouch and her husband George divorced. It is rumored that Judge Crouch had an affair with a much younger police officer. Critics say that this behavior undermines Judge Crouch's position on family values.

Criticisms of Judge Caitlynn Crouch

You may choose whether you want to attack the opposition in your ad, but if you choose to use this information, be careful how you present it:

- Judge Crouch recently affirmed a death penalty sentence for a convicted murderer. When the man was later found to be innocent, Judge Crouch came under harsh criticism.
- Although she donates her time and money to youth centers and public schools, Judge Crouch's 4 children attend Brisbane Academy, an exclusive private school. Some people have criticized Judge Crouch for this, and claimed that she is out of touch with North Carolina.
- A group, Carolinians for Change, claim that Judge Crouch's views are out dated and that she has been on the bench for too long. This group claims that Gregory Patrick's youth would better serve North Carolina.
- Recently, Judge Crouch and her husband George divorced. It is rumored that Judge Crouch had an affair with a much younger police officer. Critics say that this behavior undermines Judge Crouch's position on family values.

Campaign Fact Sheet for Gregory Patrick

You have been hired to create an advertisement for Gregory Patrick, a lawyer running for a judicial position. You may choose to create a TV commercial, a radio commercial, a billboard or anything else that will convince voters to elect Patrick. Additionally, you may choose to focus your ad on positive things about Gregory Patrick or negative things about his opponent, current judge, Caitlynn Crouch. Before you create your ad, here is some information that may be helpful to you

Location:

- Gregory Patrick lives in North Carolina. The state is considered a moderate state.

Information About Gregory Patrick:

- Gregory Patrick moved to North Carolina, the home state of his wife Elizabeth, 6 years ago. He has 2 young children, Elijah and Adelaide.
- Gregory Patrick has been praised for overcoming adversity and becoming a legal “whiz-kid”. Despite being raised by a struggling single mother, Gregory attended Hill University School of Law, the best law school in the country, on a full scholarship and graduated at the top of his class. His supporters say that Gregory’s background will help him be a great judge.
- Although Patrick is new to the state, he is beginning to become involved in the community. He donated a large amount of money to the public school that his 2 children attend, which the school used to build a new library. He also volunteers by giving legal advice to victims of domestic violence.
- Gregory Patrick has been praised for his charisma and his youth. Young voters in North Carolina are very supportive of Gregory, so he would like this ad to be aimed towards voters who are 30-60, but would still like the ads to appeal to younger voters.
- In North Carolina, Supreme Court elections are non-partisan, meaning candidates are not representing a political party. Although a political party cannot endorse Gregory Patrick, several groups have agreed to. You may choose to have any of the following groups endorse Gregory in your ad:
 - The American Civil Liberties Union
 - Planned Parenthood of America
 - MoveOn
 - Service Employees International Union
- Although Patrick has been praised as a potential fresh face in the Court House, but he has received some criticism as well:
 - Many have claimed that Gregory Patrick is too young to be a Judge. He has been a lawyer for 10 years and this is his first bid at a judicial office. At 36, he would be the youngest Judge to ever serve in North Carolina.
 - Gregory Patrick has only moved in North Carolina 6 years ago, and critics claim that he is not particularly active in the community.
 - Patrick was highly criticized for defending Phil Zachary and Maura Finley, who were accused of bombing 3 abortion clinics and killing 6 people in the process. Critics have argued that Gregory Patrick will be too lenient in sentencing and too sympathetic toward criminals.

Criticisms of Gregory Patrick

You may choose whether you want to attack the opposition in your ad, but if you choose to use this information, be careful about how you present it.

- Many have claimed that Gregory Patrick is too young to be a Judge. He has been a lawyer for 10 years and this is his first bid at a judicial office. At 36, he would be the youngest Judge to ever serve in North Carolina.
- Gregory Patrick has only moved to North Carolina 6 years ago, and critics claim that he is not particularly active in the community.
- Patrick was highly criticized for defending Phil Zachary and Maura Finley, who were accused of bombing 3 abortion clinics and killing 6 people in the process. Critics have argued that Gregory Patrick will be too lenient in sentencing and too sympathetic toward criminals.

Campaign Fact Sheet for John Taylor

You have been hired to create an advertisement for John Taylor, a judge running for re-election. You may choose to create a TV commercial, a radio commercial, a billboard or anything else that will convince voters to elect Taylor. Additionally, you may choose to focus your ad on positive things about John Taylor or negative things about his opponent, William Gaston. Before you create your ad, here is some information that may be helpful to you

Location:

John Taylor lives in North Carolina. The state is considered a moderate state.

Information About John Taylor:

- John Taylor has lived in North Carolina his whole life with his wife, Margaret. The couple met in Chapel Hill and have three children and five grandchildren.
- Taylor attended Garinger High School in Charlotte and graduated from UNC-Chapel Hill with his undergraduate degree in political science and UNC-Chapel Hill School of Law.
- Taylor worked as an attorney in private practice between 1969-1984 and sat on the Court of Appeals until 2000, when he first ran for the Supreme Court.
- Taylor is a deacon in his Southern Baptist church and at least once a year participates in a mission trip to other parts of the country to help the less fortunate. He spent many weeks working to help rebuild homes after Hurricane Katrina hit Louisiana and Mississippi.
- Middle-class voters in North Carolina have always been very supportive of Taylor, so he would like this ad to be aimed towards voters who are in the upper-class in order to sway new voters his way.
- In North Carolina, Supreme Court elections are non-partisan, meaning candidates are not representing a political party. Although a political party cannot endorse Gregory Patrick, several groups have agreed to. You may choose to have any of the following groups endorse Gregory in your ad:
 - National Rifle Association
 - Right to Life
 - Conservative Christian Fellowship
- Although Taylor won the election to the Court 8 years ago, some people in the state have concerns about him:
 - Many have claimed that John Taylor is too relaxed to be a Judge. When not hearing cases in court, he often dresses more casually (Hawaiian shirts and flip-flops) than his peers on the bench. He also enjoys cigars and will chew on one while listening to cases since there is no smoking in the courtroom.
 - John Taylor is very active in his church and some are concerned that he does not fully believe in a strict separation between church and state.
 - It is widely rumored that Taylor has a fondness for home brewed corn whiskey even though it is illegal in the state of North Carolina. He has never been arrested and there is no evidence that he produces alcohol illegally.

Criticisms of Judge John Taylor

- Many have claimed that John Taylor is too relaxed to be a Judge. When not hearing cases in court, he often dresses more casual than his peers on the bench. He also enjoys cigars and will chew on one while listening to cases.
- John Taylor is very active in his church and some are concerned that he does not fully believe in a strict separation between church and state.
- It is widely rumored that Taylor has a fondness for home brewed corn whiskey even though it is illegal in the state of North Carolina. He has never been arrested and there is no evidence that he produces alcohol illegally.

Campaign Fact Sheet for William Gaston, IV

You have been hired to create an advertisement for William Gaston IV, a former US Congressman running for the NC Supreme Court. You may choose to create a TV commercial, a radio commercial, a billboard or anything else that will convince voters to elect Gaston. Additionally, you may choose to focus your ad on positive things about William Gaston or negative things about his opponent, Judge John Taylor. Before you create your ad, here is some information that may be helpful to you

Location:

William Gaston lives in North Carolina. The state is considered a moderate state.

Information About William Gaston:

- Gaston comes from a very wealthy background and is the direct descendant of a Supreme Court justice in the early 1800s.
- Gaston was born in North Carolina, but left at age 17 when he was accepted for early admittance into Georgetown University in Washington, DC. After undergraduate he spent a year abroad backpacking around Europe before attending the Princeton School of Law. He returned to North Carolina 2 years before he ran for the NC Senate.
- Taylor worked as an attorney in a private firm between 1990 and 1994. In 1996, he was elected to the NC Senate and in 2000 he was elected to the US House of Representatives.
- Wealthy voters in North Carolina have always been very supportive of Gaston, so he would like this ad to be aimed towards voters who are in the middle class.
- In North Carolina, Supreme Court elections are non-partisan, meaning candidates are not representing a political party. Although a political party cannot endorse William Gaston, he was elected to both the NC Senate and the US House of Representatives as a Democratic candidate.
- Although Gaston has been elected to multiple positions in his lifetime, he has received some criticism as well:
 - Gaston only recently returned to North Carolina after spending much of his time in Washington, DC serving in the House of Representatives for the past 8 years.
 - Gaston has been a politician for a number of years, first serving in the NC State Senate and then in the US House of Representatives. Many critics argue that running for the NC Supreme Court will just be an extension of his political career.
 - Although Gaston has a law degree and practiced law for a short amount of time for a private firm, he has not practiced law in over 10 years. He has never held a judicial position.
 - Gaston is still a bachelor at 40 years old. Some people criticize his apparent lack of interest in participating in a long-term monogamous relationship. There were many rumors during his time in Washington that he was a “playboy.”

Criticisms of Judge William Gaston, IV

You may choose whether you want to attack the opposition in your ad, but if you choose to use this information, be careful how you present it.

- Gaston only recently returned to North Carolina after spending most of his time in Washington, DC while serving in the US House of Representatives for the past 8 years.
- Gaston comes from a very wealthy background and is the direct descendant of a Supreme Court justice in the early 1800s. Many people feel that he think he is entitled to the position.
- Gaston has been a politician for a number of year, first serving in the NC state senate and then in the US House of Representatives. Many critics argue that running for the NC Supreme Court will just be an extension of his political career.
- Although Gaston has a law degree and practiced law for a short amount of time for a private firm, he has not practiced law in over 10 years. Also, he has never held a judicial position.
- Gaston is still a bachelor at 40 years old. Some people criticize his apparent lack of interest in participating in a long-term monogamous relationship. There were many rumors during his time in Washington that he was a “playboy.”

Minnesota Republican Party v. White

Justice SCALIA delivered the opinion of the Court.

The announce clause both prohibits speech on the basis of its content and burdens a category of speech that is "at the core of our First Amendment freedoms"--speech about the qualifications of candidates for public office.

The Court of Appeals concluded that respondents had established two interests as sufficiently compelling to justify the announce clause: preserving the impartiality of the state judiciary and preserving the appearance of the impartiality of the state judiciary.

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.

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. Even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so.

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.

Respondents argue that the announce clause serves the interest in open-mindedness, or at least in the appearance of open-mindedness, because it relieves a judge from pressure to rule a certain way in order to maintain consistency with statements the judge has previously made. The problem is, however, that statements 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. 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. 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. "Debate 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.

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 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.

The Minnesota Supreme Court's canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violates the First Amendment. Accordingly, we reverse the grant of summary judgment to respondents and remand the case for proceedings consistent with this opinion. It is so ordered.

Justice O'CONNOR, concurring.

Minnesota has chosen to select its judges through contested popular elections instead of through an appointment system. 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.

The State of Minnesota no doubt was concerned, as many citizens and thoughtful commentators are concerned, that judicial campaigns in an age of frenetic fundraising and mass media may foster disrespect for the legal system. Indeed, from the beginning there have been those who believed that the rough-and-tumble of politics would bring our governmental institutions into ill repute. And some have sought to cure this tendency with governmental restrictions on political speech. Cooler heads have always recognized, however, that these measures abridge the freedom of speech – not because the state interest is insufficiently compelling, but simply because content-based restrictions on political speech are "expressly and positively forbidden by" the First Amendment. The State cannot opt for an elected judiciary and then assert that its democracy, in order to work as desired, compels the abridgment of speech.

Justice STEVENS, dissenting (with Souter, Ginsburg & Breyer):

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.

Justice GINSBURG, dissenting (with Stevens, Souter & Breyer)

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.

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 who 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. For more than three-quarters of a century, States like Minnesota have endeavored, through experiment tested by experience, to balance the constitutional interests in judicial integrity and free expression within the unique setting of an elected judiciary. I would uphold it as an essential component in Minnesota's accommodation of the complex and competing concerns in this sensitive area.

[NOTE: This opinion has been edited for use by students and teachers. For ease of reading, no indication has been made of deleted material and case citations. Any legal or scholarly use of this case should refer to the full opinion.]

Writing Prompt: North Carolina Supreme Court Justices

The Supreme Court of North Carolina is the state's highest appellate court. It consists of 6 associate justices and one chief justice who are elected by the people to 8 year terms in statewide nonpartisan elections. In recent years, there has been much controversy over judicial selection and retention in the NC Supreme Court. Some people believe that good justices are being removed from office by the people for reasons entirely unrelated to their performance in court. Instead of the people electing justices statewide, some argue, the governor should appoint justices to take office immediately, and then require them to participate in a "retention election" at least 18 months after their appointment. In a retention election, the people would simply vote "yes" or "no" as to whether or not the justices should be retained.

Write a letter to your representative in the NC General Assembly explaining whether or not you think state Supreme Court justices should be elected by the people or appointed by the governor. You may use the following information, your own experiences, observations, and/or readings.

"Only Russia, Switzerland and the United States elect any appellate judges. Here, only a small handful of states still elect their appellate judges by statewide partisan elections. Study after study has shown that the public of North Carolina simply is not informed about statewide judicial candidates for our appellate courts. The great majority of our citizens never bother to mark their ballots for either candidate in elections for appellate judges or justices. This makes it very easy for single issue groups of the right and left, which can only be described as extreme, to have an impact on appellate judicial elections far disproportionate to their numbers or to the public's acceptance of their views."

-Former NC Supreme Court Justice Burley Mitchell

"The principal argument of those who advocate nonpartisan election for the selection and retention of judges is that it removes partisan political considerations while ensuring the same type of judicial accountability as do partisan elections. Thus, so it is argued, judges are more likely to be selected based upon qualifications than upon political affiliation. Proponents of nonpartisan election also argue that such a system permits the people to retain their right to vote for judges, while at the same time reducing the frequent turnover on the bench that occurs in many partisan election states."

- Peter D. Webster, Florida State University Law Review

"The best method of selecting Supreme Court Justices is appointment by the Governor with the assent of a supermajority of the Senate. The supermajority requirement would be intended to prevent the appointment of persons known to be partisans of marginal political views that they might be tempted to impose on the people. Because governors and senators are themselves politically accountable to the people to be served if they seat a bad Justice, the case for Voter Confirmation as an additional requirement is less strong. It would, however, serve to emphasize that the Justices are not solely indebted for their power and status to partisan politicians, but also owe their power to all the people.

-Paul Carrington, Former Dean of Duke Law School

As you write your letter, remember to:

- Clearly state and support your opinion.
- Consider the purpose, audience, and context of your letter.
- Organize your letter so that your ideas progress logically.
- Include relevant details that clearly develop your letter.
- Edit your letter for standard grammar and language usage.