BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW

Minnesota Judicial Elections
Updated 03/16/04

1. Letter by Kent Gernander, President of the Minnesota State Bar and former member of the state Commission on Judicial Selection, responds to an op-ed by Greg Wersal, 2000 state Supreme Court candidate, which accused trial lawyers, and Gernander in particular, of wielding "undue influence" in judicial elections. (See Court Pester, March 15.) Gernander asserts that lawyers "care that our judges are qualified, fair, and independent of corrupting influences." The real problem, in his view, is Wersal's suggestion that candidates be allowed to carry political party endorsements and express their positions on controversial views: "nobody wants to face a judge whose mind is made up in advance or whose decision might be influenced by politics." Kent Gernander, *Parties Would Taint Judicial Elections,* Minnesota Star-Tribune, March 21, 2000.

2. Article blasts the Minnesota Republican Party for voting to endorse judicial candidates, saying, "No previous party…has brought its electoral weight to bear on judicial races, which by law and good sense are nonpartisan." In Minnesota, judges are barred by the judicial code of ethics from seeking endorsements or answering any questions about their political views. The editorial asserts, "Endorsements made and denied under circumstances like these are an outrage to both fairness and judicial independence. They are an attempt to bend the interpretation of the law to political demands…. The Republicans are making mischief with something precious, and Minnesotans should insist that they stop." *Endorsing Judges: GOP Move Undercuts Impartiality*, The Star Trib. (Minn.), June 12, 2000.

3. Article reports that three Minnesota Court of Appeals judges endorsed last week by the state Republican Party have asked the party to refrain from assisting their campaigns. Judges James Harten, Jill Flaskamp Halbrooks and G. Barry Anderson said partisan involvement in judicial elections threatens judicial independence and could erode public confidence in the impartiality of judges. The Republican Party's executive director stated, "I think it's safe to say that the party chair and the state executive committee will consider carefully any request made by the three judges in question." However, Secretary of State Mary Kiffmeyer (R) asserted, "The judiciary is political. They are elected. Let's get away from this notion that you can somehow purify elected positions…. I think what we want to do is strike a right balance." Robert Whereatt, *Endorsed Judges Tell GOP To Stay Clear*, Star Trib. (Minn.), June 13, 2000.

4. Thomas Neuville, a Minnesota Republican state senator, calls for an amendment to the state constitution which would eliminate the election of judges in favor of a

merit selection system. Neuville argues that the change would not greatly impact judicial selection in Minnesota since "nearly 90 percent of judges are first appointed [by the governor] under Minnesota's current `elective system.'" Under Neuville's plan, the Minnesota Senate would confirm each judicial appointment, "but only after conducting hearings to allow for public comment." Confirmed judges would serve for a term of eight years, and could be reappointed and confirmed for additional terms. Thomas Neuville, *A Better Way to Achieve Independent and Accountable Judiciary*, The Star Tribune (Minn.), June 22, 2000.

5. Article reports that the Minnesota Bar Association has voted to oppose the endorsement of judicial candidates by political parties. The group called judicial endorsements "a significant threat to judicial independence and impartiality and to public confidence in the integrity of the judicial system." The endorsement issue was raised two weeks ago when three appellate judges who were endorsed by the Republican Party shunned the party's support. Tony Sutton, executive director of the Minnesota Republican Party, said that his party would continue to endorse judicial candidates, despite the bar association's resolution. He stated, "I'm a little perplexed about why a group of people would want to keep the system closed. In a democracy, information is a good thing." Associated Press, *Lawyers Group Opposes Judicial Endorsements*, St. Paul Pioneer (Minn.), June 24, 2000.

6. Article reports that Minnesota governor Jesse Ventura has criticized the state Republican, Constitution and Reform parties for their recent endorsement of candidates in judicial elections. Minnesota judicial candidates "run on a nonpartisan ballot, most of them unopposed. Sitting judges are given a presumed electoral advantage because the word `incumbent' is beside their names on the ballot." Ventura stated that, because of party endorsements, "[t]he fairness and impartiality of our courts will be questioned by society and it will lead to a distrust of the judicial branch of government." Robert Whereatt, *Ventura Criticizes Party Endorsement of Judicial Candidates*, St. Paul Star-Tribune, July 7, 2000.

7. Article reports that a federal judge will not allow Minnesota Supreme Court candidate Greg Wersal to use his endorsement by the Republican Party to raise campaign funds. (See Court Pester, July 24). U. S. District Judge Paul Magnuson ruled that the issues raised by Wersal were decided in a 1998 case in which Wersal and the Republican Party challenged the prohibition against publicizing endorsements. In that case, a federal judge ruled that the limitations placed on First Amendment rights were permissible because the prohibition's purpose was to depoliticize judicial elections and ensure impartial judges. In response to Judge Magnuson's ruling, Wersal said "the Minnesota Supreme Court has created a set of rules that makes a sham out of these elections. They have stolen these elections from the people of Minnesota." Robert Whereatt, *Judge Rejects Judicial*

Candidate's Bid to Use GOP Endorsement, Minneapolis Star Tribune, August 1, 2000.

8. Column criticizes Minnesota's system of judicial elections as a "carefully designed incumbent protection plan that masquerades as a judicial election." The columnist notes the controversy surrounding state Supreme Court Justice candidate Greg Wersal's efforts to adopt "Carlson" as his middle name and observes that Wersal's opponent, incumbent James Gilbert, has claimed the name change gives Wersal an "unfair advantage" with the state's Scandinavian population. He contends that Justice Gilbert wields the truly unfair advantage: "When voters get to the judicial ballot, they will find James Gilbert's name accompanied by the word, 'Incumbent.' The same helpful hint to voters -- who typically know next to nothing about judges or their challengers -- is provided for every judicial race. No other public officials seeking re-election enjoy that distinction." The columnist praises Wersal's campaign as an "open rebellion" and contends that, in comparison, the candidate's middle name "is a minor threat to democracy." D. J. Tice, *What's in a Name?*, St. Paul (Minn.)Pioneer Planet, August 9, 2000.

9. Article reports that Minnesota State Representative Ron Abrams, a Republican, will sponsor a bill changing the system of judicial selection from popular election to the Missouri plan. Under the Missouri Plan, judges are first nominated by committee, appointed by the governor, and then stand for retention elections before the public. Rep. Abrams argues that the Missouri Plan will provide a strongly needed corrective to the increasing politicization of the state judiciary. According to Abrams, "first we have party endorsements, . . . the next step probably is endorsements and expenditures by groups interested in the outcome of litigation." This year, of 75 incumbents, 10 face challengers, including four Supreme Court justices. Robert Whereatt, *Legislator to Offer New Plan for Electing Judges*, Minnesota Star-Tribune, August 24, 2000.

10. Op-ed by Greg Wersal, 2000 Minnesota Supreme Court candidate, bemoans the influence of campaign contributions by trial lawyers in the state's judicial elections. The Minnesota Campaign Finance and Public Disclosure Board found that the Minnesota State Bar Association violated several campaign finance laws in failing to properly report its contributions to judicial candidates. Wersal charges, however, that "the influence of money is only part of the story. There are many interlocking interests between lawyer groups . . . and the judiciary." For instance, Kent Gernander, president of the state bar, also served on the Minnesota Commission for Judicial Selection and the Minnesota Lawyers' Professional Responsibility Board, which, according to Wersal, enforces unfair speech restrictions against judicial candidates. According to Wersal, such examples are redolent of "a system that gives far too much power and influence to an elite

group of lawyers . . . the lawyers who select the judges for appointment; the lawyers who suppress criticism of the judges; and the lawyers who fund the reelection campaigns." Greg Wersal, *See Why Minnesota Judiciary Could Use Campaign Reform*, Minneapolis-St. Paul Star- Tribune, March 10, 2001.

11. Article reports that the U.S. Court of Appeals for the Eighth Circuit has upheld Minnesota's regulations strictly limiting the involvement of judicial candidates with political parties. The laws prevent candidates from carrying party endorsements, speaking at party engagements, personally soliciting campaign funds, and disclosing their views on "disputed legal and political issues." Greg Wersal, three-time Minnesota Supreme Court candidate, and the state Republican Party challenged the regulations as violations of the First Amendment. The appellate panel voted 2-1 against their claim. The dissent from Judge C. Arlen Beam contended that judicial elections require unencumbered rights of speech and association for candidates: "Judges . . . have no more right than others to avoid the rigors of public debate. [The state's rules are] an unconstitutional self-insulating barrier between the judiciary and the public." Conrad DeFiebre, *Eighth Circuit Upholds State Judicial Election Rules*, Minnesota Star-Tribune, May 1, 2001.

12. Article reports that after Arkansas' recent switch to nonpartisan judicial elections, state politicians still anticipate the lingering appearance of partisanship. Next year will see 99 judicial positions up for nonpartisan contests. Gov. Mick Huckabee (R.) asserts, "It would be disingenuous to suggest that there would be no political involvement." In implementing legislation for the constitutional amendment establishing nonpartisan elections, the state legislature removed a ban on candidates' seeking party endorsements after a circuit court judge threatened to challenge the provision. Mark Kozlowski, Associate Counsel at the Brennan Center for Justice, points out that Minnesota's law preventing judicial candidates from seeking political endorsements has been upheld in federal court. Political consultants expect that nonpartisan elections will help conservatives since most of Arkansas is Democratic-leaning. They also expect the rise of third party advertising in jud! icial campaigns and rising campaign costs. Michael Wickline, *Arkansas Faces Shift in Judicial Elections*, Arkansas Democrat-Gazette, May 20, 2001.

13. Minnesota Supreme Court Justice Alan Page warned that campaign contributions are threatening elected judges' appearance of impartiality. Speaking before the National Press Club in Washington, D.C., Justice Page charged, "the very appearance that judges may be the puppets of their campaign contributors imperils the independence of the judiciary." He observed that state Supreme Court candidates last year raised $45 million for their campaigns, a 60% increase over the last cycle. Interest groups spent an additional $16 million in the most highly contested races. To defend judicial independence, Justice Page called on judicial

candidates to "forcefully disavow" advertisements by interest groups that suggest the candidate would "decide cases on anything other than the facts." Sarah McKenzie, *Page Warns of Dangers of Campaign Money in State Judicial Campaigns*, Minneapolis/St. Paul Star-Tribune, November 16, 2001.

14. Article reports that the U.S. Supreme Court will review a federal court challenge to a Minnesota rule preventing judicial candidates from stating their views on "disputed legal or political issues." Former Minnesota Supreme Court candidate Gregory Wersal had challenged a number of prohibitions on judicial candidate speech, such as the state's requirement that candidates neither seek nor accept political party endorsements. (See Court Pester, March 2.) Hearing Wersal's appeal, the U.S. Court of Appeals for the Eighth Circuit upheld Minnesota's restrictions but interpreted the ban on discussing legal or political issues to apply only to issues likely to appear as court cases. However, in 1993, the U.S. Court of Appeals for the Seventh Circuit found that even such a narrow interpretation violated the First Amendment for "there is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal." Additionally, federal courts in Arkansas, Florida, and Kentucky have struck down speech restrictions but similar rules have been upheld in Pennsylvania. The case is Republican Party of Minnesota v. Kelly, No. 01-521. Linda Greenhouse, *Judicial Candidates' Speech to Be Reviewed by Justices*, New York Times, December 4, 2001.

15. Editorial asks the U.S. Supreme Court to "do all voters a favor by finding . . . unconstitutional" Minnesota's rules prohibiting judicial candidates from speaking about legal and political issues. The Court has granted certiorari to the petition of Gregory Wersal, a 2000 Minnesota Supreme Court candidate whose campaign sought to emphasize his conservative philosophy. (See Court Pester, December 4.) For the editorial, speech restrictions, such as those in Ohio, force judicial candidates to do little besides "smile, and wave, and proclaim themselves to be upright people with children and spouses who love them. . . . Their philosophies of law and justice are kept secret." It urges the Supreme Court to recognize that "since judges are to be elected, it is only right that voters hear more from them than one could demand of a prisoner of war." *How Can Voters Judge?*, Cleveland Plain Dealer, December 5, 2001.

16. Editorial argues that the pending U.S. Supreme Court case about Minnesota's restrictions on judicial campaigns "raise[] valid concerns about judicial selection." It asserts that while the state constitution provides for judicial elections, in reality Minnesota operates by "a variation on what's called a 'retention system.'" The governor often selects judges to fill midterm vacancies. These judges then are identified as incumbents when they run for office. As a result, they face few opponents, and when opponents do emerge, voters generally support the

incumbent since they have little information on which to base their decision. The editorial argues that either the state ought to have full-fledged judicial elections, in which candidates run substantive campaigns, or a genuine merit selection system. *Campaign Restrictions*, St. Paul Pioneer Planet, December 6, 2001.

17. Article discusses last week's forum at the University of Minnesota concerning the state's judicial selection system. Minnesota Supreme Court Justice Alan Page, a former Minnesota Viking, stated that, as a minority, he found that appointive systems tend to prevent minorities from taking seats on the bench. In his interviews with his district's judicial selection commission, he had to combat the perception that he was little more than "a dumb black football player." However, as a judicial candidate, he was able to win a seat on the state's highest court. Page's colleague, Chief Justice Kathleen Blatz added that the state is "ahead of the curve" in terms of balancing accountability with independence because it has non-partisan judicial elections, a well-regarded merit selection process for lower court judges, and rules preventing candidates from knowing the identities of their campaign contributors. Keynote speaker Ohio Supreme Court Justice Alice Robie Resnick and Professor Roy Schotland of the Georgetown Law Center suggested that Minnesota could improve judicial elections by extending the terms of Supreme Court Justices in order to allow for greater concentration on judging instead of campaigning. Michelle Lorre , *Forum at U of M Explores Judicial Selection,Independence*, Minnesota Lawyer, December 10, 2001.

18. Editorial calls on the U.S. Supreme Court to allow judicial candidates to speak about their legal views. The High Court will decide whether Minnesota's prohibition of public discussion by judicial candidates of their political and legal views violates the First Amendment. (See Court Pester, December 4.) Noting that the paper's home state, Texas, has a similar rule, the paper contends, "the rules are a farce. Judges have opinions about key issues even if they keep mum. An examination of contributors to most judicial candidates already gives a good indication of their philosophical leanings." It concludes that "[g]ood judges can be counted on to make rulings based on the law regardless of their personal feelings, and free expression will give voters a better understanding of the judges they elect." *Give Judges Chance to Speak on Issues*, San Antonio Express-News, December 10, 2001.

19. Op-ed by Wy Spano, Publisher and Co-editor of Politics in Minnesota, responds to a recent column by George Will attacking Minnesota's prohibition of discussion by judicial candidates of contentious legal and political issues. (See Court Pester, January 3.) According to Spano, Minnesota's judicial election rules have ensured the integrity of the courts: "When there is an election with an opponent, we insist the election not be decided on the basis of the judge's political party nor do we allow there to be judicial bidding wars (I'll give shoplifters five

years! I'll give them 10!). The result: We have one of the nation's best judiciaries." He predicts, however, that the Supreme Court will agree with Will: "Soon Minnesota will be treated to tactics and themes found, for example, in the president's home state of Texas where, in the 2000 election, a judge who overturned a sodomy law received a letter demanding retraction or resignation from 14 Republican county chairs." Wy Spano, *Will's View on Judicial Selection, Alas, Will Probably Prevail*, Minnesota Star-Tribune, January 10, 2002.

20. Op-ed by Arne Carlson, former Governor of Minnesota, defends the state's restrictions on judicial candidate speech from a recent attack by George Will. (See Court Pester, January 3.) The Supreme Court is now considering whether Minnesota's regulations are an unconstitutional abridgement of the candidates' First Amendment rights. According to Carlson, "[i]f Will had his way, the high court would allow judges to announce how they intend to rule even before they take the bench." As a result, "the judiciary will simply become another legislative body possessing all of the partisan implications." Will's attitude ignores the Framers' desire to have judges "above the fray of partisan politics," a surprising oversight from "the student of history that George Will often professes to be." By maintaining the restrictions, Minnesota can be assured that "justice never has a party label." Arne Carlson, *Justice Should Never Have a Party Label*, Minnesota Star Tribune, January 17, 2002.

21. Op-ed by Oregon circuit Judge Ellen Rosenblum rebuts George Will's call for the end of candidate speech rules in judicial elections. (See Court Pester, January 3.) In Oregon, judicial elections are non-partisan and candidates are prevented from making "pledges or promises." Judge Rosenblum responds that "Will . . . fails to understand the proper role of the judiciary, and thus the special circumstances surrounding judicial elections." Asserting that Oregon's speech restrictions are "far narrower" than Minnesota's, which are currently being reviewed by the U.S. Supreme Court, she describes them as a "modest limitation on [a candidate's] speech rights reasonable in view of the laudable purpose behind it." Moreover, partisan elections would represent "a major step backward." Although Will contended that judicial appointments are preferable to elections, Judge Rosenblum rejoins that Oregon offers proof that judicial elections are a sound way to choose qualified and fa! ir judges. Ellen Rosenblum, *Oregon's Rules for Judges Work Well, Ensure Fairness*, The Oregonian, January 17, 2002.

22. Article reports: "a heated downstate contest for the Illinois Supreme Court and a case before the nation's highest court have renewed debate over the limits on political speech for judicial candidates in Illinois." Challenging incumbent Justice Rita Garman in the Republican primary, Judge Robert Steigmann has issued position papers calling for a state law to allow citizens to carry concealed weapons. Justice Garman has charged that the papers violate the state's judicial

canon preventing candidates from making statements that "commit or appear to commit" the candidate to particular decisions in cases. The U.S. Supreme Court is considering a challenge to the constitutionality of Minnesota's restrictions on judicial speech. Steven Lubet, Professor of Law at Northwestern University, states that "[t]he constitutional law is as uncertain as it's ever been" and that Illinois' current rules on judicial speech permit statements such as those of Judge Steigmann. James Bopp, who is arguing against Minnesota's codes, asserts that without freer speech, voters are forced to elect judges based on little more than "name, rank, and serial number." Daniel Vock, *Candidates Duel over Canons on Loose Cannons*, Chicago Daily Law Bulletin, January 21, 2002.

23. Article discusses the upcoming Supreme Court case on candidate speech restrictions in judicial elections, Republican Party of Minnesota v. Kelly. Minnesota Supreme Court candidate Gregory Wersal alleges that the state's provision banning candidates from offering statements on "disputed legal or political issues" violates the First Amendment and denies voters the knowledge they need to make an informed choice at the voting booth. Others worry that freer speech for candidates would further contribute to the politicization of judicial elections. A Justice at Stake survey reports that over half of state judges believe the tenor of court races has declined over the past five years. In addition, citing the amicus brief of the Brennan Center for Justice, the article notes that looser speech codes may "interact dangerously with the increasing role of money in judicial elections." A recent report by the Brennan Center, the National Institute on Money in Politics, and Justic! e at Stake, found that "a tidal wave of money" swept into the 2000 state Supreme Court elections of states such as Alabama, Illinois, Michigan, and Ohio. At the same time, the Justice at Stake survey found that over a quarter of the judges believe that campaign contributions have too great an influence on judicial decisions. Robert S. Greenberger, *Supreme Court to Decide on Judicial Candidates' Speech*, Wall Street Journal, March 12, 2002.

24. Article reports that today the Supreme Court will hear oral argument in Republican Party of Minnesota v. Kelly, a challenge concerning Minnesota's prohibitions on judicial campaign speech. Opponents of the state's prohibitions charge that the restrictions violate the First Amendment and prevent voters from making informed choices. Supporters counter that freer speech would accelerate the politicization of judicial elections brought on by the rising cost in campaigns. A report by the Brennan Center for Justice, the National Institute on Money in State Politics, and Justice at Stake, found that campaign fundraising in the nation's 2000 Supreme Court races increased by 61% compared with 1998, and 100% compared with 1994. Stephen Bokat, general counsel of the U.S. Chamber of Commerce, states, "[t]he money has come in from all sides. Increasingly, [court races are] where the action has been." North Carolina appellate judge James Wynn argues that the trends have prompt! ed a lack of voter confidence in

elected judges, citing a recent survey by Justice at Stake finding that 76% of voters believe that campaign contributors receive special consideration in court. Richard Willing, *High Court to Weigh Limits on Judicial Races,* USA Today, March 25, 2002.

25. Legal commentator Stuart Taylor, Jr. considers the Supreme Court case, Republican Party of Minnesota v. Kelly. The plaintiffs challenge Minnesota's "announce" clause, prohibiting judicial candidates from stating views on legal and political issues likely to appear before them. Taylor concedes that "speech restrictions that would be unthinkable in any other election are constitutionally appropriate in judicial elections" but argues that Minnesota's ban on judicial speech both goes too far and not far enough: "While carrying censorship of political speech to extremes, even a broad gag on candidates can at best plug only one hole in a very leaky boat." Minnesota's rule, broadly construed, would "censor[] all campaign speech excepting platitudes and biographical details." At the same time, it would fail to prevent candidates from disclosing their views because they can do so in judicial opinions or law review articles. Moreover, the rule would stop candidates from r! esponding to attacks by interest groups. The columnist concludes, " [t]he best way to elect good judges . . . is not to gag the candidates but to educate the voters." Stuart Taylor, Jr., *Gagging Judicial Candidates Won't Save State Courts*, National Journal, March 25, 2002.

26. Article discusses the Supreme Court case Republican Party of Minnesota v. Kelly, in which the High Court will review Minnesota's prohibitions on judicial candidate speech. The plaintiffs in Kelly assert that the restrictions preventing candidates from offering views on political and legal issues likely to come before the court hamper voters' ability to hold judges accountable. Plaintiffs' counsel James Bopp explains, "Because judges make law, their views about the law are relevant to voters. . . . A judge's impartiality is not reasonably questioned merely because she has previously expressed her views on the law." Bert Brandenburg of Justice at Stake, which monitors judicial developments, notes a difference in kind between court races and other types of election. "A judge is different from a legislator. A legislator is paid to make promises and keep promises but a judge is paid to hear cases impartially." In addition, the amicus brief of the Brennan Center for Jus! tice warns that "[o]ne deeply troubling consequence [of freer speech for candidates] is an increased incentive for judicial candidates to attempt to garner support -- in the form of votes, contributions, or advertising campaigns by interest groups -- by indicating how they will rule on issues likely to come before the courts." Warren Richey, *Speech Limits Weighed on Judge Candidates,* Christian Science Monitor, March 26, 2002.

27. Article reports that the Supreme Court's Justices "appeared deeply troubled" when considering the constitutionality of Minnesota's prohibition of judicial

candidate speech on issues likely to come before the court in Republican Party of Minnesota v. Kelly. According to the article, Minnesota's rule struck several of the justices as "too vague, unclear, restrictive or irrational to withstand challenge under the First Amendment." Responding to the fact that the rule allowed candidates to criticize previous cases but not discuss how they would rule in future cases, Justice Scalia exclaimed, "It's just a game, just a dance." After plaintiffs' counsel, James Bopp, asserted that while he thought Minnesota's rule was unconstitutional, a ban on explicit promises could be upheld, Chief Justice William Rehnquist retorted, "It's an extremely fine line you are arguing for." Deborah Goldberg, of the Brennan Center for Justice, which supports the rule, asserts: "I don't think thi! s bench has a very good conception of what it means to run for a judgeship." Roy Schotland, Professor of Law at Georgetown Law Center, who also supports the rule, adds: "There are 33 states with high court elections this fall, and there will be a donnybrook if the Minnesota canon is simply struck down." Tony Mauro, *Supremes Appear Wary of Restricting Judicial Campaigns*, American Lawyer, March 27, 2002.

28. Op-ed by Stephen Gillers, Professor of Law at New York University, takes up the Supreme Court case, Republican Party of Minnesota v. Kelly, a challenge to Minnesota's "announce" clause preventing judicial candidates from offering their views on legal and political issues likely to come before the court. Gillers charges that the restriction "violates the First Amendment . . . insults the public by implying that voters can't be trusted with information [and is] . . . unworkable." He contends that, at least with regard to Supreme Court elections, legal views are an important factor for voters to consider. Thus, while candidates should be barred from offering promises on how they will decide particular cases, they should be allowed to state their "general views on important legal issues." Gillers concludes, "It won't be easy to draw the line between a promise of particular rulings, which we should continue to forbid, and a general discussion of legal issues, which we should permit. But judges have tackled tougher jobs to protect free speech values and can handle this one, too." Stephen Gillers, *Let Judicial Candidates Speak*, New York Times, March 28, 2002.

29. Column urges the Supreme Court to uphold Minnesota's ban on judicial candidate speech addressing issues likely to come before elected candidates in Republican Party of Minnesota v. Kelly. "Normally, you might expect the editor of a . . . newspaper to [think] the more free speech the better. But this isn't normal, because it involves the Supreme Court. And when the Supreme Court gets involved with elections and speech, you're guaranteed trouble." Reviewing the oral argument in Kelly, the columnist claims that some of the justices shared the sentiment: "if you states are foolish enough to elect judges, then you'll have to deal with unrestricted campaign rhetoric." The columnist finds two problems with the argument. First, "all judges campaign for election, even those who are

appointed by the president or a governor. It's just a different type of campaigning." Second, with the increasing prominence of money in court races, relaxed speech codes would give rise to candidates making statements like "Vote for me I'll strike down any punitive damage award over $1 million." The columnist concludes, "judicial candidates have political biases and predilections like anyone else. . . . But, unlike politicians, judges should never have constituencies that they're obligated to serve." Scott Graham, *Supreme Court and Elections Don't Mix*, The Recorder (San Fran., Cal.), March 29, 2002.

30. Editorial demands that the Supreme Court uphold restrictions on judicial candidate speech in Republican Party of Minnesota v. Kelly: "An offer of a bribe is . . . a form of communication, but no one would suggest it's protected by the First Amendment. Neither should a campaign promise that promises, or seems to promise, a favorable ruling in exchange for a vote on Election Day." Considering the argument that given the power judges wield, voters should be able to inquire into their substantive views, the editorial retorts, "any voter who is attracted by that sort of rough justice should ask himself if he would like to have his own case heard by a judge who has telegraphed how he would rule." *Loose Judicial Lips*, Pittsburgh Post-Gazette, March 29, 2002.

31. Column laments that restrictive speech codes "make it nearly impossible for voters [in judicial elections] to inquire to any greater depth than you'd find in a neighborhood beauty contest. The net effect is that judges, once in office, are rarely challenged." The columnist charges judges exploit the electoral advantage of incumbency to short-circuit the electoral process by resigning midterm, allowing the governor to appoint successors who can then run as incumbents in the upcoming election. "The [state] Constitution thus is nullified by the very people who swear allegiance to it." The columnist hails the skepticism several Supreme Court Justices displayed when hearing a challenge to Minnesota's prohibitions on judicial candidate speech. Jim Wooten, *Take Muzzle Off Judicial Candidates*, Atlanta Journal-Constitution, April 2, 2002.

32. Column considers the issues at play in the Supreme Court case Republican Party of Minnesota v. Kelly, a challenge to Minnesota's prohibition of statements by judicial candidates on issues likely to come before them in court. Deborah Goldberg of the Brennan Center for Justice asserts: "Everybody agrees it is entirely appropriate to prohibit judicial candidates from making promises. The question is, short of specific promises about a specific case, what can they say?" The columnist recognizes a compelling interest in the restrictions: by "keeping judicial races from becoming the free-for-alls that other campaigns have become . . . [the restrictions] enhance the chance that when your freedom, your fortune, perhaps your life, is at stake in a court case, neither you nor the judge will worry that the right decision would break the judge's campaign pledge." At the same

time, though, the First Amendment justifies skepticism about the legitimacy of any election with speech restrictions. Rather than try to strike a balance between these two considerations, the columnist concludes that states should abolish judicial elections altogether. Ann Woolner, *Elections With No Promises, No Lies, No Future?,* Bloomberg News, April 5, 2002.

33. Article reports that "[t]he public's unfamiliarity with the [Ramsey County, Minn.] bench could be a key factor in this year's judicial elections." This year, two judges who were reprimanded for misconduct are seeking re-election. The Minnesota Board on Judicial Standards reprimanded Judge James Campbell for not following a plea agreement and for failing to maintain a judicial temperament. Judge Campbell also faces an ethical inquiry concerning his relationship with a man whom he helped who was involved in a drunk-driving accident. Judge John Finley received a reprimand when it was discovered that, as a county commissioner, he voted to grant a significant tax break to a company in which he held a 50% stake. Some observers predict that the scandals will have little impact on the judges' chances for victory. According to, J. Thomas Mott, the county's chief judge, "If you look at judicial elections in Minnesota, not that many incumbents have been defeated unless there'! s been a problem." Hannah Allam, *Judges' Woes May Be Election Factor*, St. Paul Pioneer Press, April 7, 2002.

34. Column charges that Minnesota "judges are simply defying the state's fundamental law by arranging to evade and undermine its call for elections." According to the columnist, state judges often step down only a few weeks before their terms end, allowing the governor to appoint a replacement who may then serve a full term. For example, state Supreme Court Justice Ed Stringer has announced that he will retire two months before election day, meaning that his replacement will not face election until 2004. According to the columnist, once appointees do face election, they win their seats handily because restrictions on judicial candidate speech prevent challengers from raising substantive issues in their campaigns, leaving voters with little to consider besides the candidates' prior experience. The columnist reminds Minnesota judges that the current system, despite its defects, "happens to be the method ordained by the state constitution, and Minnesotans have so far never decided to amend the document to change that." D.J. Tice, *Judges Again Contrive to Evade Constitution*, St. Paul Pioneer Press, April 12, 2002.

35. Op-ed by Deborah Goldberg of the Brennan Center for Justice, urges the Supreme Court to uphold Minnesota's restrictions on judicial candidate speech in Republican Party of Minnesota v. Kelly. According to Goldberg, the debate on the case has focused narrowly on the First Amendment rights of candidates and voters. "But in judicial elections, there is another constitutional right at stake: The right of the parties who appear in court to have their cases heard by unbiased

judges. . . ." She argues that the rule challenged in Kelly bolsters judges' commitment to fairness and impartiality by allowing each contestant to take the high road, knowing others will do so as well. If speech restrictions on judicial candidates are lifted, candidates who voice opinions on contentious issues will be rewarded with free media coverage, while those who remain silent will be attacked for "hiding from public scrutiny," making "the low road . . . be the only safe course to election." She concludes that "Minnesota should be entitled to say that judicial candidates willing to subordinate due process rights to the interests of their campaigns are not qualified for the state bench." Deborah Goldberg, *Due Process Is Paramount*, National Law Journal, April 15, 2002.

36. Article analyzes the Supreme Court's March 25 oral argument in Republican Party of Minnesota v. Kelly, a case which challenges Minnesota's canon barring judicial candidates from speaking about issues likely to come before them in court. Judicial independence advocates expressed surprise at the Court's focus on free speech issues at the expense of concerns about the effect of campaign rhetoric on judicial integrity. Justice Sandra Day O'Connor noted that the canon could give the upper hand to incumbents, who can express their views in their written opinions. In an apparent rebuttal to the argument that judicial elections should be different from other elections, Justice Anthony Kennedy said that the canon departed from "the usual philosophy that we do not allow the state to presume that the public is better off not having complete information." Tony Mauro, *When Robes Are Gags*, American Lawyer at 79, May 1, 2002.

37. Column criticizes the Minnesota Supreme Court for declining to identify how individual justices voted when two recent 3-3 votes - one member abstained - resulting in letting lower court rulings stand. The Court's spokeswoman said that in the event of a tie, "they have NOT issued an opinion. It is as if they denied review of the case entirely and the decision of the lower court stands." The columnist argues that, "as elected officials, the justices are accountable to the public," which has the right to know how the justices voted in these cases. The "public's business should be conducted in the open." Lou Gelfand, *Minnesotans Should Know How Justices Voted*, Minneapolis Star-Tribune, June 2, 2002.

38. Article reports that the Minnesota Republican Party will consider "whether to endorse judicial candidates in the state's two top court systems" as recommended by the party's Judicial Nominating Committee. The Committee voted to endorse Appeals Court Judge G. Barry Anderson for the Supreme Court seat held by Justice Paul Anderson, even though Barry Anderson is not seeking the seat. It also voted to endorse Minneapolis lawyer Jeffrey Sloan for the Appeals Court seat held by Judge Terri Stoneburner. The Committee's majority recommendations have come under fire from a minority report, which asserts that "in about the time it takes to watch 'Spider-Man' and with almost no information, the committee

recommended the removal of two sitting judges" and calls the decision a "mockery" of the party's endorsement process and the judicial system. Robert Whereatt, *GOP Weighs Whether To Endorse Judicial Candidates*, Minneapolis Star-Tribune, June 14, 2002.

39. Article reports that although the Minnesota Republican Party convention "adjourned without considering whether it would endorse judicial candidates, the party's executive committee did adopt a 'resolution of support'" for Minneapolis lawyer Jeffrey Sloan, who is running for the Minnesota Court of Appeals seat held by Judge Terri Stoneburner. (See Court Pester, June 18.) The executive committee did not adopt the other recommendation of the party's Judicial Nominating Committee, the endorsement of Courts of Appeal Judge G. Barry Anderson for the Minnesota Supreme Court. Although the resolution of support "is considered something less than a full-blown party endorsement," advocates of party endorsement hailed the resolution. A minority report from the Judicial Nominating Committee, by contrast, "suggested junking the entire concept of judicial endorsement by the party." Robert Whereatt, *GOP Panel Adopts 'Resolution of Support' for Judicial Candidate*, Minneapolis Star-Tribune, June 18, 2002.

40. Column discusses the U.S. Supreme Court's impending ruling on Republican Party of Minnesota v. White, a case challenging Minnesota's canon restricting the speech of judicial candidates. Asserting that "what's troubling today is that some judges and many observers of the courts don't really seem to believe that judges should set their biases aside and uphold the law," the columnist cites response to the recent death penalty rulings as evidence of approval of the idea that "judges should rule as philosopher kings." The columnist concludes, "In an age when so many opinion makers openly call on judges to impose personal moral judgments, we may be better off with elected judges" who can speak more freely, since "if judges are going to enforce their own moral sensibilities as the law, voters have a right to know what those sensibilities are." D.J. Tice, *Death Penalty Cases Set Stage for Ruling on Judges' Elections*, St. Paul Pioneer Press, June 26, 2002.

41. Article reports on reactions in Minnesota to the U.S. Supreme Court's recent decision striking down that state's canon restricting the speech of judicial candidates. Court of Appeals Judge Terri Stoneburner, who is facing a contested election this fall, said she is "puzzled about how it's going to play out," because "our personal opinions are just not relevant on this court." The plaintiff in the case, Greg Wersal, said he is now more inclined to run for a fourth time for the Minnesota Supreme Court as a result of the decision. Conrad deFiebre, *Judges, Candidates Adapt to New Election Rules*, Minneapolis Star-Tribune, June 29, 2002.

42. Editorial argues that, although "no lover of free speech and democracy can fault the U.S. Supreme Court" for ruling that judicial candidates "have a right to speak their minds to the voters," the very process of electing judges is flawed. The editorial advocates a merit selection process in Minnesota with retention elections, which would "preserve a precious asset - judicial independence - that, after Thursday's ruling, this state can no longer take for granted." *Gag Ruling / Change Judicial Election Law*, Minneapolis Star-Tribune, June 28, 2002.

43. Article discusses the career of Greg Wersal, the central plaintiff in the case challenging Minnesota's canon restricting the speech of judicial candidates, which the Supreme Court recently struck down. Wersal has run for Minnesota Supreme Court several times and initiated litigation against the restrictive canon as part of his attempt to rein in "what he calls out-of-control liberal state courts." Wersal credits his victory to the Minnesota judiciary's overreaction to his criticisms of the Minnesota Supreme Court when he was a candidate. "I was a little gnat, and they hit me with a sledgehammer by changing the rules," thus irritating the entire Minnesota Republican Party and leading to the successful lawsuit. Wersal hailed the U.S. Supreme Court's decision, which he said means that "you can elect people who will make the policy choices you're interested in." Conrad deFiebre, *Vindicated, Judicial Rules-Buster Wersal Soldiers On*, Minneapolis Star-Tribune, July 5, 2002.

44. Article reports that the Minnesota Supreme Court has ruled that "a Scott County judicial seat must be added to this year's ballot in a decision that sends a warning to judges who appear to time their retirements to prevent elections." In a 5-2 decision, the court granted the petition of potential candidate Todd Zettler, who asserted that the one-day gap left by the retirement of District Judge M. Eugene Atkins "is not long enough to allow [Governor Jesse] Ventura to appoint a successor." (See Court Pester, July 3.) Such "intentional manipulation of the timing" of retirements denied voters their constitutional right to choose a new judge by election, according to Zettler. Hannah Allam, *Minnesota: Judge's Seat Will Be Placed on Ballot*, Pioneer Press (St. Paul), July 4, 2002.

45. Column argues that in Republican Party of Minnesota v. White, the case in which a five-member majority of the U.S. Supreme Court struck down a Minnesota canon restricting the speech of judicial candidates, the justices should have explored a "middle course." According to this view, "the Tenth Amendment gives states broad power to structure state officeholding - especially judicial officeholding - but it does not give states free reign to censor and punish free-spirited critics and candidates." Thus, while states are not free to heavily restrict judicial candidate speech, it is also true that voters do not have a right to the final say as to who becomes a judge, and no judicial candidate has a right to serve on the bench. Thus, the authors conclude, states can constitutionally hold judicial

elections in which final victory may be denied to the winning candidate if a campaign oversight committee rules that the candidate has engaged in campaign tactics incompatible with judicial integrity. Akhil Reed Amar and Vikram David Amar, *Judicial Elections - The Sensible Middle Path that the Supreme Court Missed*, CNN.com, August 9, 2002.

46. Article reports that the Minnesota Republican Party "has taken the rare and controversial step of endorsing a candidate in a district court judicial race." However, Nathaniel Reitz, the candidate, "can't use the endorsement in his campaign, according to state judicial standards." The Republican Party is "split on the issue of whether endorsements are appropriate." (See Court Pester, June 20.) Republican delegate Richard Thomas said the endorsement was the result of "the fringe of the party greasing this for a particular candidate" and argued that the endorsement "really opens the door to political mischief." Bonn Clayton, chair of the First Judicial District Republican Committee, asserted that those who oppose endorsements favor judicial appointment and "are not in favor of democracy." The Democratic Party chair, Mike Erlandson, said his party would not offer endorsements, because "two political branches of government [are] enough." Amy Sherman, *Party Endorses Judicial Candidate*, St. Paul Pioneer Press, August 17, 2002.

47. Column reports that "twelve candidates (a jury's worth) are competing for a rare open seat" on Minnesota's First District bench in a race that "also features some of the first attempts by candidates for judgeships to exercise newly won rights to state their views." The seat was left vacant when the Minnesota Supreme Court ruled that Gov. Jesse Ventura could not appoint a replacement for Judge Eugene Atkins, who retired only one business day before the end of his term. (See Court Pester, July 9.) In another rare development, the Republican Party has endorsed candidate Nathaniel Reitz. (See Court Pester, August 20.) Although Reitz cannot publicize the endorsement, he has been "among the first to take advantage" of the U.S. Supreme Court's decision striking down Minnesota's restrictions on judicial candidate speech. On his web site, Reitz says he "believes the traditional family is the pillar of our society" and calls court rulings legalizing and funding abortion "wrong." D.J. Tice, *Rare Open Race Tests Judicial Selection System*, St. Paul Pioneer Press, August 28, 2002.

48. Article reports that judicial candidates are having a difficult time reaching a verdict on what should be said during the campaign season. Facing a primary election challenge, Minnesota Supreme Court Justice Paul Anderson said, "When electing a judge, you don't want someone who is precommitted. Challenger Allan Lamkin disagreed saying that it was wrong to restrict the free-speech rights of judicial candidates in the past. "The restriction made it impossible for voters to make intelligent choices," Lamkin said. "It was like putting a sack over the head

of the voter." Paul Gustafson, *Judges' Free Speech a Factor in Supreme Court Primary*, Star Tribune (Minneapolis- St. Paul, Minnesota), September 7, 2002.

49. Editorial assesses Internet resources available to a "conscientious voter" in Minnesota who wants to learn about judicial candidates despite reserved campaigns and the "laxity of news outlets" in covering judicial races. The editorial recommends three sites: http://www.mwlawyers.org, run by the Minnesota Women Lawyers, which has committees to vet candidates and make endorsements; http://www.minnlawyer.com, the site of the weekly newspaper Minnesota Lawyer; and http://www.hcba.org, run by the Hennepin County Bar Association. The Hennepin County Bar Association offers an "avalanche of detail," but it will no longer make public its evaluations of judges, though it will publish polls of how lawyers are planning to vote. These sites and a forum sponsored by the court-monitoring group WATCH and the League of Women Voters should help shed "light on the mystery" of judicial races. *Judging Judges: Click Here to See the Bench-Seekers*, Star Tribune (Minneapolis-St. Paul), October 1, 2002.

50. Article reports on the judicial races in Minnesota's First Judicial District, where in one case "an attorney convinced the Minnesota Supreme Court to order an election, rather than allow Judge Eugene Atkins to retire Jan. 2, which would have allowed the governor to appoint a successor." (See Court Pester, August 29.) The two candidates in the runoff for that seat, Charles Halberg and Carol Hooten, "aren't campaigning on partisan topics," though Halberg was previously a Republican state legislator. On the bench, Halberg said, "I'm going to look at the applicable law in any given case and apply the law as it exists." Hooten agrees that "judges don't belong in the political arena," noting, "I don't know if it's in the best interest of the public to have a judge who has announced an affiliation with a party and owes the political party anything for their election." Amy Sherman, *Candidates Say Political Arena Not for Judges*, St. Paul (Minn.) Pioneer Press, October 14, 2002.

51. Article reports that in Minnesota, "judicial elections continue to be rather staid, relatively low-budget affairs in which almost all candidates pledge to be fair and reveal nothing about their political views," despite a U.S. Supreme Court ruling striking down a Minnesota rule limiting the speech of judicial candidates. George Soule, the chairman of the Judicial Selection Commission, said, "I hope that our culture of nonpartisan, merit-based judicial selection continues into the future." Gregory Wersal, an attorney who brought the suit that resulted in the U.S. Supreme Court's ruling, has another suit before the Eighth U.S. Circuit Court of Appeals that "would knock down other restrictions in what judicial candidates can say." Wersal said, "By the time I'm done, I hope we have free and open judicial elections in the state and they will be treated like all other elections in this state."

Robert Whereatt, *Judicial Hopefuls Haven't Tried New Freedoms*, Star-Tribune (Minneapolis-St. Paul), October 19, 2002.

52. Article reports that "after winning one U.S. Supreme Court ruling that state judicial candidates should be allowed to speak their views on disputed issues, the Republican Party of Minnesota" and former judicial candidate Greg Wersal are "back in the courtroom," arguing "that those seeking judgeships should also be allowed to solicit campaign contributions, seek political endorsement, attend and speak at political conventions and identify themselves as party members." They contend that "throwing out most state rules limiting judicial candidates' behavior would lead to better-informed voters and more open elections." Alan Gilbert, Minnesota's chief deputy attorney general, argued that "letting judges align with a party in an election would pose bias problems later" and "pointed to a federal code of judicial conduct with similar rules limiting the political activity of sitting judges." Pam Louwagie, *Judicial Elections Rules Challenged Anew*, Star Tribune (Minneapolis-St. Paul, Minn.), December 11, 2002.

53. Article discusses the system of judicial selection in Minnesota, where most judges retire before the end of their terms, allowing the governor to appoint a replacement who then enjoys the advantage of being labeled an incumbent on the next ballot. As a result, "ninety-one percent of the current 297 trial and appellate judges were initially appointed," as were "six of seven justices on the state Supreme Court." The other justice, Alan Page, "had to sue to get an election scheduled in 1992." Many lawyers and judges argue that the system produces better judges. Supreme Court Chief Justice Kathleen Blatz, noting that all judges eventually face elections, said, "The Constitution does not weight elections over appointments." However, Bill Cooper, former chairman of the state Republican Party, decries what he calls a "system between lawyers and judges, et cetera, to keep control of the system and keep it out of the control of the electorate." Pam Louwagie, *Voters in Judicial Elections Just Go Through the Motions*, Minneapolis Star-Tribune, August 3, 2003.

54. Article reports that an advisory committee rewriting Minnesota's rules of judicial conduct has circulated a proposal that would allow judicial candidates to "share their views on hot-button political issues" but not to "make promises or pledges on those issues." If they do commit to rule a certain way, "they may not be able to hear cases involving those issues afterward." The U.S. Supreme Court struck down in 2002 the Minnesota canon "prohibiting judicial candidates from sharing their views." Committee member Kent Gernander said, "I think the committee believed that those provisions that are intended to separate politics from judicial elections ought to be retained" to the extent possible. However, Greg Wersal, the plaintiff in the Supreme Court case, said, "We're right back to, there's an immediate penalty for stating your view." The committee is currently accepting

public comment. . Pam Louwagie, *Drawing Lines on Judicial Speech*, Minneapolis Star Tribune, March 6, 2004.