I.
FREEDOM OF SPEECH

1. Content-Based and Content-Neutral Restrictions on Speech

Turner Broadcasting System, Inc. v. *Federal Communications Commission*, 512 U.S. 622, 114 S.Ct. 2445 (1994)

Justice KENNEDY delivered the opinion of the Court.

Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992 require cable television systems to devote a portion of their channels to the transmission of local broadcast television stations. This case presents the question whether these provisions abridge the freedom of speech or of the press, in violation of the First Amendment. On October 5, 1992, Congress overrode a Presidential veto to enact the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102–385, 106 Stat. 1460 (1992 Cable Act or Act). Among other things, the Act subjects the cable industry to rate regulation by the Federal Communications Commission (FCC) and by municipal franchising authorities; prohibits municipalities from awarding exclusive franchises to cable operators; imposes various restrictions on cable programmers that are affiliated with cable operators; and directs the FCC to develop and promulgate regulations imposing minimum technical standards for cable operators. At issue in this case is the constitutionality of the so called must carry provisions, contained in §§ 4 and 5 of the Act, which require cable operators to carry the signals of a specified number of local broadcast television stations.

There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment. *Leathers* v. *Medlock*, 499 U.S. 439, 444 (1991). Through "original programming or by exercising editorial discretion over which stations or programs to include in its repertoire," cable programmers and operators "seek to communicate messages on a wide variety of topics and in a wide variety of formats." *Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986). By requiring cable systems to set aside a portion of their channels for local broadcasters, the must carry rules regulate cable speech in two respects: The rules reduce the number of channels over which cable operators exercise unfettered control, and they render it more difficult for cable programmers to compete for carriage on the limited channels remaining. Nevertheless, because not every interference with speech triggers the same degree of scrutiny under the First Amendment, we must decide at the outset the level of scrutiny applicable to the must carry provisions.

At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our

political system and cultural life rest upon this ideal. Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right. Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion. These restrictions "rais[e] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc.* v. *Members of the New York State Crime Victims Bd.*, 502 U.S. (1991). For these reasons, the First Amendment, subject only to narrow and well understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals. *R.A.V.* v. *St. Paul*, 505 U.S. 377 (1992); *Texas* v. *Johnson*, 491 U.S. 397, 109 S.Ct. 2533 (1989). Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content. Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny. In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny, because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue.

Deciding whether a particular regulation is content based or content neutral is not always a simple task. We have said that the "principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989). The purpose, or justification, of a regulation will often be evident on its face. But while a content based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary to such a showing in all cases. Nor will the mere assertion of a content neutral purpose be enough to save a law which, on its face, discriminates based on content.

As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based. By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral. Insofar as they pertain to the carriage of full power broadcasters, the must carry rules, on their face, impose burdens and confer benefits without reference to the content of speech. Although the provisions interfere with cable operators' editorial discretion by compelling them to offer carriage to a certain minimum number of broadcast stations, the extent of the interference does not depend upon the content of the cable operators' programming. The rules impose obligations upon all operators, save those with fewer than 300 subscribers, regardless of the programs or stations they now offer or have offered in the past. Nothing in the Act imposes a restriction, penalty, or burden by reason of the views, programs, or stations the cable operator has selected or will select. The number of channels a cable operator must set aside depends only on the operator's channel capacity; hence, an operator cannot avoid or mitigate its obligations under the Act by altering the programming it offers to subscribers.

The must carry provisions also burden cable programmers by reducing the number of channels for which they can compete. But, again, this burden is unrelated to content, for it extends to all cable programmers irrespective of the programming they choose to offer viewers. And

finally, the privileges conferred by the must carry provisions are also unrelated to content. The rules benefit all full power broadcasters who request carriage—be they commercial or noncommercial, independent or network affiliated, English or Spanish language, religious or secular. The aggregate effect of the rules is thus to make every full power commercial and noncommercial broadcaster eligible for must carry, provided only that the broadcaster operates within the same television market as a cable system.

It is true that the must carry provisions distinguish between speakers in the television programming market. But they do so based only upon the manner in which speakers transmit their messages to viewers, and not upon the messages they carry: Broadcasters, which transmit over the airwaves, are favored, while cable programmers, which do not, are disfavored. Cable operators, too, are burdened by the carriage obligations, but only because they control access to the cable conduit. So long as they are not a subtle means of exercising a content preference, speaker distinctions of this nature are not presumed invalid under the First Amendment.

That the must carry provisions, on their face, do not burden or benefit speech of a particular content does not end the inquiry. Our cases have recognized that even a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys. *United States* v. *Eichman*, 496 U.S. 310, 315 (1990) ("Although the Flag Protection Act contains no explicit content based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government's asserted *interest* is related to the suppression of free expression").

Justice O'Connor, with whom Justice Scalia and Justice Ginsburg join, and with whom Justice Thomas joins as to Parts I and III, concurring in part and dissenting in part.

There are only so many channels that any cable system can carry. If there are fewer channels than programmers who want to use the system, some programmers will have to be dropped. In the must carry provisions of the Cable Television Consumer Protection and Competition Act of 1992, Congress made a choice: By reserving a little over one third of the channels on a cable system for broadcasters, it ensured that in most cases it will be a cable programmer who is dropped and a broadcaster who is retained. The question presented in this case is whether this choice comports with the commands of the First Amendment.

I agree with the Court that some speaker based restrictions—those genuinely justified without reference to content—need not be subject to strict scrutiny. But looking at the statute at issue, I cannot avoid the conclusion that its preference for broadcasters over cable programmers is justified with reference to content. The findings, enacted by Congress as § 2 of the Act, and which I must assume state the justifications for the law, make this clear. "There is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media." § 2(a)(6). "[P]ublic television provides educational and informational programming to the Nation's citizens, thereby advancing the Government's compelling interest in educating its citizens." § 2(a)(8)(A). "A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its

continuation." § 2(a)(10). "Broadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate." § 2(a)(11).

Similar justifications are reflected in the operative provisions of the Act. In determining whether a broadcast station should be eligible for must carry in a particular market, the FCC must "afford particular attention to the value of localism by taking into account such factors as whether any other [eligible station] provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community." § 4, 47 U.S.C. § 534(h)(1)(C)(ii). In determining whether a low power station is eligible for must carry, the FCC must ask whether the station "would address local news and informational needs which are not being adequately served by full power television broadcast stations." § 4, 47 U.S.C. § 534(h)(2)(B). Moreover, the Act distinguishes between commercial television stations and noncommercial educational television stations, giving special benefits to the latter. Compare § 4 with § 5. These provisions may all be technically severable from the statute, but they are still strong evidence of the statute's justifications.

Preferences for diversity of viewpoints, for localism, for educational programming, and for news and public affairs all make reference to content. They may not reflect hostility to particular points of view, or a desire to suppress certain subjects because they are controversial or offensive. They may be quite benignly motivated. But benign motivation, we have consistently held, is not enough to avoid the need for strict scrutiny of content based justifications. The First Amendment does more than just bar government from intentionally suppressing speech of which it disapproves. It also generally prohibits the government from excepting certain kinds of speech from regulation because it thinks the speech is especially valuable.

The must carry provisions are fatally overbroad, even under a content neutral analysis: They disadvantage cable programmers even if the operator has no anticompetitive motives, and even if the broadcaster that would have to be dropped to make room for the cable programmer would survive without cable access. None of the factfinding that the District Court is asked to do on remand will change this. The Court does not suggest that either the antitrust interest or the loss of free television interest are implicated in all, or even most, of the situations in which must carry makes a difference. Perhaps on remand the District Court will find out just how many broadcasters will be jeopardized, but the remedy for this jeopardy will remain the same: Protect those broadcasters that are put in danger of bankruptcy, without unnecessarily restricting cable programmers in markets where free broadcasting will thrive in any event.

Having said all this, it is important to acknowledge one basic fact: The question is not whether there will be control over who gets to speak over cable—the questionis who will have this control. Under the FCC's view, the answer is Congress, acting within relatively broad limits. Under my view, the answer is the cable operator. Most of the time, the cable operator's decision will be largely dictated by the preferences of the viewers; but because many cable operators are indeed monopolists, the viewers' preferences will not always prevail. Our recognition that cable operators are speakers is bottomed in large part on the very fact that the cable operator has editorial discretion.

Boos v. *Barry*, 485 U.S. 312, 108 S.Ct. 1157 (1988)

Justice O'Connor delivered the opinion of the Court.

The question presented in this case is whether a provision of the District of Columbia Code, § 22–1115, violates the First Amendment. This section prohibits the display of any sign within 500 feet of a foreign embassy if that sign tends to bring that foreign government into "public odium" or "public disrepute." It also prohibits any congregation of three or more persons within 500 feet of a foreign embassy.

I

Petitioners are three individuals who wish to carry signs critical of the Governments of the Soviet Union and Nicaragua on the public sidewalks within 500 feet of the embassies of those Governments in Washington, D.C. Petitioners Bridget M. Brooker and Michael Boos, for example, wish to display signs stating "RELEASE SAKHAROV" and "SOLIDARITY" in front of the Soviet Embassy. Petitioner J. Michael Waller wishes to display a sign reading "STOP THE KILLING" within 500 feet of the Nicaraguan Embassy. All of the petitioners also wish to congregate with two or more other persons within 500 feet of official foreign buildings.

II

A

Analysis of the display clause must begin with several important features of that provision. First, the display clause operates at the core of the First Amendment by prohibiting petitioners from engaging in classically political speech. We have recognized that the First Amendment reflects a "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 270 (1964), and have consistently commented on the central importance of protecting speech on public issues. Second, the display clause bars such speech on public streets and sidewalks, traditional public fora that time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Third, § 22–1115 is content-based. Whether individuals may picket in front of a foreign embassy depends entirely upon whether their picket signs are critical of the foreign government or not. One category of speech has been completely prohibited within 500 feet of embassies. Other categories of speech, however, such as favorable speech about a foreign government or speech concerning a labor dispute with a foreign government, are permitted.

Both the majority and dissent in the Court of Appeals accepted this common sense reading of the statute and concluded that the display clause was content-based. The majority indicated, however, that it could be argued that the regulation was not content-based. Both respondents and the United States have now made such an argument in this Court. They contend that the statute is not content-based because the government is not itself selecting between viewpoints; the permissible message on a picket sign is determined solely by the policies of a foreign government.

We reject this contention, although we agree the provision is not viewpoint-based. The display clause determines which viewpoint is acceptable in a neutral fashion by looking to the policies of foreign governments. While this prevents the display clause from being directly viewpoint-based, a label with potential First Amendment ramifications of its own, it does not render the statute content-neutral. Rather, we have held that a regulation that "does not favor either side of a political controversy" is nonetheless impermissible because the "First Amendment's hostility to content-based regulation extends to prohibition of public discussion of an entire topic." *Consolidated Edison Co.* v. *Public Service Comm'n,* 447 U.S. 530, 537 (1980). Here the government has determined that an entire category of speech—signs or displays critical of foreign governments—is not to be permitted. We most recently considered the definition of a content-neutral statute in *Renton* v. *Playtime Theatres, Inc.,* 475 U.S. 41 (1986). Drawing on prior decisions, we described "content-neutral" speech restrictions as those that "are *justified* without reference to the content of the regulated speech." *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 771 (1976).

The regulation at issue in *Renton* described prohibited speech by reference to the type of movie theater involved, treating "theaters that specialize in adult films differently from other kinds of theaters." But while the regulation in *Renton* applied only to a particular category of speech, its justification had nothing to do with that speech. The content of the films being shown inside the theaters was irrelevant, and was not the target of the regulation. Instead, the ordinance was aimed at the "*secondary effects* of such theaters in the surrounding community," effects that are almost unique to theaters featuring sexually explicit films, *i.e.*, prevention of crime, maintenance of property values, and protection of residential neighborhoods. In short, the ordinance in *Renton* did not aim at the suppression of free expression.

B

Our cases indicate that as a content-based restriction on political speech in a public forum, § 22–1115 must be subjected to the most exacting scrutiny. Thus, we have required the State to show that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." We first consider whether the display clause serves a compelling governmental interest in protecting the dignity of foreign diplomatic personnel. Since the dignity of foreign officials will be affronted by signs critical of their governments or governmental policies, we are told, these foreign diplomats must be shielded from such insults in order to fulfill our country's obligations under international law.

As a general matter, we have indicated that, in public debate, our own citizens must tolerate insulting, and even outrageous, speech in order to provide "adequate 'breathing space' to the freedoms protected by the First Amendment." A "dignity" standard, like the "outrageousness" standard that we rejected in *Hustler,* is so inherently subjective that it would be inconsistent with "our longstanding refusal to punish speech because the speech in question may have an adverse emotional impact on the audience."

We are not persuaded that the differences between foreign officials and American citizens require us to deviate from these principles here. The dignity interest is said to be compelling in this context primarily because its recognition and protection is part of the United States' obligations under international law. The Vienna Convention on Diplomatic Relations, April

18, 1961, which all parties agree represents the current state of international law, imposes on host states the special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

Republican Party of Minnesota v. *White*, 536 U.S. 765, 122 S.Ct. 2528 (2002)

Justice Scalia *delivered the opinion of the Court.*

The question presented in this case is whether the First Amendment permits the Minnesota Supreme Court to prohibit candidates for judicial election in that State from announcing their views on disputed legal and political issues.

I

Since Minnesota's admission to the Union in 1858, the State's Constitution has provided for the selection of all state judges by popular election. Minn. Const., Art. VI, § 7. Since 1912, those elections have been nonpartisan. Act of June 19, ch. 2, 1912 Minn. Laws Special Sess., pp. 4–6. Since 1974, they have been subject to a legal restriction which states that a "candidate for a judicial office, including an incumbent judge," shall not "announce his or her views on disputed legal or political issues." Minn. Code of Judicial Conduct, Canon 5(A)(3)(d)(i) (2000). This prohibition, promulgated by the Minnesota Supreme Court and based on Canon 7(B) of the 1972 American Bar Association (ABA) Model Code of Judicial Conduct, is known as the "announce clause." Incumbent judges who violate it are subject to discipline, including removal, censure, civil penalties, and suspension without pay. Minn. Rules of Board on Judicial Standards 4(a)(6), 11(d) (2002). Lawyers who run for judicial office also must comply with the announce clause. Minn. Rule of Professional Conduct 8.2(b) (2002) ("A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct"). Those who violate it are subject to, *inter alia*, disbarment, suspension, and probation. Rule 8.4(a); Minn. Rules on Lawyers Professional Responsibility 8–14, 15(a) (2002).

In 1996, one of the petitioners, Gregory Wersal, ran for associate justice of the Minnesota Supreme Court. In the course of the campaign, he distributed literature criticizing several Minnesota Supreme Court decisions on issues such as crime, welfare, and abortion. A complaint against Wersal challenging, among other things, the propriety of this literature was filed with the Office of Lawyers Professional Responsibility, the agency which, under the direction of the Minnesota Lawyers Professional Responsibility Board, investigates and prosecutes ethical violations of lawyer candidates for judicial office. The Lawyers Board dismissed the complaint; with regard to the charges that his campaign materials violated the announce clause, it expressed doubt whether the clause could constitutionally be enforced. Nonetheless, fearing that further ethical complaints would jeopardize his ability to practice law, Wersal withdrew from the election. In 1998, Wersal ran again for the same office. Early in that race, he sought an advisory opinion from the Lawyers Board with regard to whether it planned to enforce the announce clause. The Lawyers Board responded equivocally, stating

that, although it had significant doubts about the constitutionality of the provision, it was unable to answer his question because he had not submitted a list of the announcements he wished to make. Shortly thereafter, Wersal filed this lawsuit in Federal District Court against respondents, seeking, *inter alia*, a declaration that the announce clause violates the First Amendment and an injunction against its enforcement.

II

Before considering the constitutionality of the announce clause, we must be clear about its meaning. Its text says that a candidate for judicial office shall not "announce his or her views on disputed legal or political issues." Minn. Code of Judicial Conduct, Canon 5(A)(3)(d)(i) (2002). We know that "announc[ing] views" on an issue covers much more than *promising* to decide an issue a particular way. The prohibition extends to the candidate's mere statement of his current position, even if he does not bind himself to maintain that position after election. All the parties agree this is the case, because the Minnesota Code contains a so-called "pledges or promises" clause, which *separately* prohibits judicial candidates from making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office,"—a prohibition that is not challenged here and on which we express no view. There are yet further limitations upon the apparent plain meaning of the announce clause: In light of the constitutional concerns, the District Court construed the clause to reach only disputed issues that are likely to come before the candidate if he is elected judge. The Eighth Circuit accepted this limiting interpretation by the District Court, and in addition construed the clause to allow general discussions of case law and judicial philosophy. The Supreme Court of Minnesota adopted these interpretations as well when it ordered enforcement of the announce clause in accordance with the Eighth Circuit's opinion.

It seems to us, however, that–like the text of the announce clause itself–these limitations upon the text of the announce clause are not all that they appear to be. First, respondents acknowledged at oral argument that statements critical of past judicial decisions are *not* permissible if the candidate also states that he is against *stare decisis*. Thus, candidates must choose between stating their views critical of past decisions and stating their views in opposition to *stare decisis*. Or, to look at it more concretely, they may state their view that prior decisions were erroneous only if they do not assert that they, if elected, have any power to eliminate erroneous decisions. Second, limiting the scope of the clause to issues likely to come before a court is not much of a limitation at all. One would hardly expect the "disputed legal or political issues" raised in the course of a state judicial election to include such matters as whether the Federal Government should end the embargo of Cuba. Quite obviously, they will be those legal or political disputes that are the proper (or by past decisions have been made the improper) business of the state courts. And within that relevant category, "[t]here is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction." *Buckley* v. *Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 229 (CA7 1993). Third, construing the clause to allow "general" discussions of case law and judicial philosophy turns out to be of little help in an election campaign. At oral argument, respondents gave, as an example of this exception, that a candidate is free to assert that he is a "strict constructionist." But that, like most other philosophical generalities, has little meaningful content for the electorate unless it is exemplified by application to

a particular issue of construction likely to come before a court—for example, whether a particular statute runs afoul of any provision of the Constitution. Respondents conceded that the announce clause would prohibit the candidate from exemplifying his philosophy in this fashion. Without such application to real-life issues, all candidates can claim to be "strict constructionists" with equal (and unhelpful) plausibility.

In any event, it is clear that the announce clause prohibits a judicial candidate from stating his views on any specific nonfanciful legal question within the province of the court for which he is running, except in the context of discussing past decisions—and in the latter context as well, if he expresses the view that he is not bound by *stare decisis*.

Respondents contend that this still leaves plenty of topics for discussion on the campaign trail. These include a candidate's "character," "education," "work habits," and "how [he] would handle administrative duties if elected." Indeed, the Judicial Board has printed a list of preapproved questions which judicial candidates are allowed to answer. These include how the candidate feels about cameras in the courtroom, how he would go about reducing the caseload, how the costs of judicial administration can be reduced, and how he proposes to ensure that minorities and women are treated more fairly by the court system. Whether this list of preapproved subjects, and other topics not prohibited by the announce clause, adequately fulfill the First Amendment's guarantee of freedom of speech is the question to which we now turn.

III

As the Court of Appeals recognized, 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 the proper test to be applied to determine the constitutionality of such a restriction is what our cases have called strict scrutiny, the parties do not dispute that this is correct. Under the strict-scrutiny test, respondents have the burden to prove that the announce clause is (1) narrowly tailored, to serve (2) a compelling state interest. In order for respondents to show that the announce clause is narrowly tailored, they must demonstrate that it does not "unnecessarily circumscrib[e] protected expression." *Brown* v. *Hartlage,* 456 U.S. 45, 54 (1982). 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. Respondents reassert these two interests before us, arguing that the first is compelling because it protects the due process rights of litigants, and that the second is compelling because it preserves public confidence in the judiciary. Respondents are rather vague, however, about what they mean by "impartiality." Indeed, although the term is used throughout the Eighth Circuit's opinion, the briefs, the Minnesota Code of Judicial Conduct, and the ABA Codes of Judicial Conduct, none of these sources bothers to define it. Clarity on this point is essential before we can decide whether impartiality is indeed a compelling state interest, and, if so, whether the announce clause is narrowly tailored to achieve it.

A

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. It is also the sense in which it is used in the cases cited by respondents and *amici* for the proposition that an impartial judge is essential to due process.

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

B

It is perhaps possible to use the term "impartiality" in the judicial context (though this is certainly not a common usage) to mean lack of preconception in favor of or against a particular *legal view*. This sort of impartiality would be concerned, not with guaranteeing litigants equal application of the law, but rather with guaranteeing them an equal chance to persuade the court on the legal points in their case. Impartiality in this sense may well be an interest served by the announce clause, but it is not a *compelling* state interest, as strict scrutiny requires. A judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law. As then-Justice Rehnquist observed of our own Court: "Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers." *Laird* v. *Tatum*, 409 U.S. 824, 835 (1972). Indeed, 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. "Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias." The Minnesota Constitution positively forbids the selection to courts of general jurisdiction of judges who are impartial in the sense of having no views on the law. Minn. Const., Art. VI, § 5 ("Judges of the supreme court, the court of appeals and the district court shall be learned in the law"). And since avoiding judicial preconceptions on legal issues is neither possible nor desirable, pretending otherwise by attempting to preserve the "appearance" of that type of impartiality can hardly be a compelling state interest either.

C

A third possible meaning of "impartiality" (again not a common one) might be described as openmindedness. 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 openmindedness, or at least in the appearance of openmindedness, 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. Before they arrive on the bench (whether by election or otherwise) judges have often committed themselves on legal issues that they must later rule upon.

More common still is a judge's confronting a legal issue on which he has expressed an opinion while on the bench. Most frequently, of course, that prior expression will have occurred in ruling on an earlier case. But judges often state their views on disputed legal issues outside the context of adjudication—in classes that they conduct, and in books and speeches. Like the ABA Codes of Judicial Conduct, the Minnesota Code not only permits but encourages this. That is quite incompatible with the notion that the need for openmindedness (or for the appearance of openmindedness) lies behind the prohibition at issue here.

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

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. "The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." *Wood* v. *Georgia,* 370 U.S. 375, 395 (1962). We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election. 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.

Justice O'Connor, concurring.

I join the opinion of the Court but write separately to express my concerns about judicial elections generally. Respondents claim that "[t]he Announce Clause is necessary ... to protect the State's compelling governmental interes [t] in an actual and perceived ... impartial judiciary." I am concerned that, even aside from what judicial candidates may say while campaigning, the very practice of electing judges undermines this interest.

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

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

Despite these significant problems, 39 States currently employ some form of judicial elections for their appellate courts, general jurisdiction trial courts, or both. American Judicature Society, Judicial Selection in the States: Appellate and General Jurisdiction Courts (Apr.2002). Judicial elections were not always so prevalent. The first 29 States of the Union adopted methods for selecting judges that did not involve popular elections. As the Court explains, however, beginning with Georgia in 1812, States began adopting systems for judicial elections. From the 1830's until the 1850's, as part of the Jacksonian movement toward greater popular control of public office, this trend accelerated, and by the Civil War, 22 of the 34 States elected their judges. By the beginning of the 20th century, however, elected judiciaries increasingly came to be viewed as incompetent and corrupt, and criticism of partisan judicial elections mounted. In 1906, Roscoe Pound gave a speech to the American Bar Association in which he claimed that "compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the bench."

In response to such concerns, some States adopted a modified system of judicial selection that became known as the Missouri Plan (because Missouri was the first State to adopt it for most of its judicial posts). Under the Missouri Plan, judges are appointed by a high elected official, generally from a list of nominees put together by a nonpartisan nominating commission, and then subsequently stand for unopposed retention elections in which voters are asked whether the judges should be recalled. If a judge is recalled, the vacancy is filled through a new nomination and appointment. This system obviously reduces threats to judicial impartiality,

even if it does not eliminate all popular pressure on judges. The Missouri Plan is currently used to fill at least some judicial offices in 15 States.

Thirty-one States, however, still use popular elections to select some or all of their appellate and/or general jurisdiction trial court judges, who thereafter run for reelection periodically. Of these, slightly more than half use nonpartisan elections, and the rest use partisan elections. Most of the States that do not have any form of judicial elections choose judges through executive nomination and legislative confirmation.

Minnesota has chosen to select its judges through contested popular elections instead of through an appointment system or a combined appointment and retention election system along the lines of the Missouri Plan. In doing so the State has voluntarily taken on the risks to judicial bias described above. As a result, the State's claim that it needs to significantly restrict judges' speech in order to protect judicial impartiality is particularly troubling. If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.

City of Renton v. *Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925 (1986)

Justice REHNQUIST *delivered the opinion of the Court.*

This case involves a constitutional challenge to a zoning ordinance, enacted by appellant city of Renton, Washington, that prohibits adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. Appellees, Playtime Theatres, Inc., and Sea-First Properties, Inc., filed an action in the United States District Court for the Western District of Washington seeking a declaratory judgment that the Renton ordinance violated the First and Fourteenth Amendments, and a permanent injunction against its enforcement. The District Court ruled in favor of Renton and denied the permanent injunction, but the Court of Appeals for the Ninth Circuit reversed and remanded for reconsideration. We noted probable jurisdiction, and now reverse the judgment of the Ninth Circuit.

In May 1980, the Mayor of Renton, a city of approximately 32,000 people located just south of Seattle, suggested to the Renton City Council that it consider the advisability of enacting zoning legislation dealing with adult entertainment uses. No such uses existed in the city at that time. Upon the Mayor's suggestion, the City Council referred the matter to the city's Planning and Development Committee. The Committee held public hearings, reviewed the experiences of Seattle and other cities, and received a report from the City Attorney's Office advising as to developments in other cities. The City Council, meanwhile, adopted Resolution No. 2368, which imposed a moratorium on the licensing of "any business which has as its primary purpose the selling, renting or showing of sexually explicit materials." The resolution contained a clause explaining that such businesses "would have a severe impact upon surrounding businesses and residences."

In April, 1981, acting on the basis of the Planning and Development Committee's recommendation, the City Council enacted Ordinance No. 3626. The ordinance prohibited