
THE RULE OF LAW IN THE MARKETPLACE OF IDEAS:
PLEDGES OR PROMISES BY CANDIDATES
FOR JUDICIAL ELECTION

Judicial codes of conduct frequently prohibit candidates for judicial election¹ from making “pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.”² Yet, the judicial office itself requires a pledge, promise, and commitment to faithfully apply the law.³ Distinguishing a legitimate promise to follow the law from an illegitimate promise to disregard it is surprisingly difficult, and both types of promise allow voters to control judicial decisionmaking through the choice of judicial personnel. This Note explores the relationship between these forms of judicial precommitment, as well as the implications for the constitutionality of judicial speech regulations.

In one illustrative opinion, Oklahoma’s judicial ethics board found that the state’s prohibition of “pledges, promises, or commitments” forbade a candidate’s statement that “justice requires a fair system for all, especially little children who may be too small or unable to speak for themselves.”⁴ In the board’s view, the statement impermissibly “commit[ed] the judicial candidate, if elected, to favor certain parties in litigation, i.e., children.”⁵ Yet, as the statement itself suggested, children may be just the kind of “discrete and insular minorit[y]” that the Supreme Court directs courts to treat with solicitude.⁶ Can the state prohibit a candidate from promising to uphold her understanding of the law? Would such a prohibition serve the ends putatively advanced by judicial speech regulation?

¹ Thirty-nine states select or retain some or all members of their judiciaries through elections. Matthew J. Streb, *The Study of Judicial Elections*, in *RUNNING FOR JUDGE 1*, 7 (Matthew J. Streb ed., 2007). Some of those states employ partisan elections, in which candidates’ party affiliation is identified on the ballot. Others employ nonpartisan elections or a combination of appointment by political officials and periodic retention elections. *Id.*

² The quoted language is from the American Bar Association’s model code. See MODEL CODE OF JUDICIAL CONDUCT R. 4.1(A)(13) (2007). A number of states have adopted the ABA’s rule, with some slight modifications to its language. See, e.g., MD. CODE OF JUDICIAL CONDUCT Canon 5(b)(1)(D) (2005); OKLA. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d) (1997); WIS. SUP. CT. R. 60.06(3)(B) (2007).

³ See U.S. CONST. art. VI (stating that “judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution”).

⁴ Judicial Ethics Opinion 2007-1, 162 P.3d 246, 247 (Okla. Jud. Ethics Advisory Panel 2007).

⁵ *Id.* Similarly, a candidate in Oklahoma may not promise to be “Tough on Crime” or to provide “Justice for Victims.” *Id.*

⁶ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938); see also Tamar Ezer, *A Positive Right to Protection for Children*, 7 YALE HUM. RTS. & DEV. L.J. 1, 32 n.245 (2004) (observing that the status of children “is legally defined to be that of ‘minors’ possessing less power, and a more discrete and insular group is hard to imagine”).

These difficulties point to a fundamental conflict between the First Amendment and the rule of law. Judicial speech regulations seek to uphold a particular vision of the rule of law — according to which judges make decisions based on “judgment” rather than “will”⁷ — by weakening the link between the substance of judicial decisions and the political will of the electorate.⁸ The First Amendment’s “marketplace of ideas,”⁹ however, ensures that voters can choose between candidates with disparate judicial philosophies. Because voters will choose between candidates on the basis of the outcomes those candidates’ philosophies produce — as well as the political valence of those outcomes¹⁰ — a candidate’s firm commitment to a judicial philosophy unintentionally enables the politicization of judicial decisionmaking. Viewed through the prism of judicial selection, the law’s own aspiration towards predictability and precommitment through legal doctrine allows voters to influence the outcomes of judicial decisionmaking and thereby undermines the rule of law.

This Note argues that prohibitions on “pledges, promises, or commitments” are not narrowly tailored to a compelling state interest. States instead ought to prohibit any statements — including announcements — regarding specific individual parties or cases, as those statements implicate the process of application of law to fact that distinguishes judicial decisionmaking from ordinary politics. Part I provides a brief history of judicial speech regulation and surveys recent cases assessing those regulations under the First Amendment. Part II analyzes the constitutionality of prohibitions on “pledges, promises, or commitments.” Part III explores the competing principles at issue and proposes an alternative to the current approach. Part IV concludes.

⁷ THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (emphasis omitted); see also Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 788 (1995) (observing that, to the extent “judges in elective states are beginning to respond to majoritarian political pressures[,] . . . commitments to constitutionalism and, more generally, to the rule of law may be jeopardized”).

⁸ See *Republican Party of Minn. v. White*, 536 U.S. 765, 818 (2002) (Ginsburg, J., dissenting) (observing that judicial ethics codes aim to prevent judges from deciding cases so as to “discharge [an] undertaking to the voters in the previous election”).

⁹ *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (stating that the First Amendment seeks to ensure “an uninhibited marketplace of ideas in which truth will ultimately prevail”); see also *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (asserting that “the best test of truth is the power of the thought to get itself accepted in the competition of the market”).

¹⁰ Cf. Joseph R. Grodin, *Developing a Consensus of Constraint: A Judge’s Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969, 1979–80 (1988) (observing that, while it is the “courts’ job to render decisions which may be unpopular,” voters in an election tend to “cast their ballots on the basis of whether or not they like the results”).

I. JUDICIAL SPEECH REGULATION

The elected judiciary has been described as a “curiosity in our legal and political order.”¹¹ At least some of the anxiety surrounding judicial elections may be ascribed to the manner in which they merge law and politics: judges are meant to decide cases according to law, whereas elections are associated with majority rule.¹² Beginning in 1923, codes of judicial conduct worked to reassert the separation of law and politics through restrictions on the behavior and speech of candidates for judicial office. This Part surveys the history of those restrictions and their more recent conflict with the First Amendment.

Chief Justice Taft oversaw the introduction of a voluntary code for judicial behavior in 1923.¹³ In the midst of the legal realist attack on dominant modes of judicial thought,¹⁴ Chief Justice Taft’s canons took a stand in favor of the traditional, formalist view of the law as the “application of general law to particular instances.”¹⁵ In keeping with this stance, Chief Justice Taft’s code sought to establish a firm distinction between law and politics.¹⁶ Just as orthodox lawyers objected to the redistributive undertones of much policy-oriented jurisprudence,¹⁷ Chief Justice Taft’s canons instructed candidates that they should not “announce in advance . . . conclusions of law on disputed issues to secure class support.”¹⁸ Chief Justice Taft’s canons emerged from and sought to preserve a traditional view of the law as a neutral force distinct from the dangerously class-based impulses of democratic politics.

¹¹ David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 266 (2008).

¹² Cf. Grodin, *supra* note 10, at 1979–80.

¹³ See *Final Report and Proposed Canons of Judicial Ethics*, 9 A.B.A. J. 449 (1923) [hereinafter *Final Report*].

¹⁴ See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960*, at 6 (1992) (describing how the legal realist critique argued that formalist legal doctrine was “neither neutral, natural, nor necessary, but was instead a historically contingent and socially created system of thought”).

¹⁵ *Final Report*, *supra* note 13, at 451. This definition of the judge’s role is particularly striking because it came only eighteen years after Justice Holmes’s revolutionary assertion that “[g]eneral propositions do not decide concrete cases.” *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). Indeed, at the very moment that norms of unanimous decision-making were breaking down on the Court, see Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1314–25 (2001), Taft’s code asserted that judges “should adopt the usual and expected method of doing justice,” *Final Report*, *supra* note 13, at 451.

¹⁶ In particular, judges were to avoid any “suspicion of being warped by political bias.” *Final Report*, *supra* note 13, at 452. For an account of classical legal thinkers’ attempts to separate law and politics, see, for example, Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 467–68 (1897). Holmes writes that “judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage.” *Id.* at 467.

¹⁷ See HORWITZ, *supra* note 14, at 20 (describing the relation between formalism and the neutral liberal state).

¹⁸ *Final Report*, *supra* note 13, at 452.

As the “legislative” aspect of judging became normalized, the canons were revised in 1972 to reflect a more contemporary view of the judicial role. In place of legal formalism, the 1972 code emphasized an ethic of judicial professionalism.¹⁹ The 1972 code described the judge as a public intellectual²⁰ and instructed judges to “be faithful to the law and maintain professional competence in it.”²¹ While this ethic of professionalism abandoned legal formalism, it was equally insistent that judges maintain the separation of law and politics.²² To neutralize the threat posed by judicial elections, the 1972 code prohibited candidates from announcing their views on any “disputed legal or political issues” for any purpose whatsoever.²³ By limiting voters’ information, the 1972 code cabined the risk that politicized voters would use judicial elections to control legal decisionmaking.

This attempt to uphold the separation of law and politics collided with the First Amendment in *Republican Party of Minnesota v. White*.²⁴ The Minnesota ethics rule at issue mirrored the ABA’s language in prohibiting a judicial candidate from “announc[ing] his or her views on disputed legal or political issues.”²⁵ Writing for the Court, Justice Scalia applied strict scrutiny to find that the prohibition unconstitutionally burdened speech by candidates for judicial office.²⁶ Justice Scalia suggested that the state might have an interest in judicial openmindedness²⁷ and impartiality between parties to liti-

¹⁹ See generally CODE OF JUDICIAL CONDUCT (1972) (amended 1990) [hereinafter 1972 CODE]. For a similar move in legal scholarship, see Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533, 546 (1947). Frankfurter suggests that interpretation inherently involves judicial freedom, but he insists that judges are restrained by the “constraints imposed by the judicial function.” *Id.* at 533. For Frankfurter, the rule of law depends on the quality of personnel rather than the formalism of legal rules. See *id.* at 546.

²⁰ The code authorizes judges to “speak, write, lecture, [and] teach,” 1972 CODE, *supra* note 19, Canon 4(A), at 18, embracing a concept of the judge as a public intellectual “in a unique position to contribute to the improvement of the law,” *id.* 4(A) cmt., at 19. For a similar approach to the judicial role, see ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 236–37 (2d ed., Yale Univ. Press 1986) (1962). Bickel views the judge as a scholar “immerse[d] . . . in the tradition of our society” and “the thought and the vision of the philosophers.” *Id.* at 236. Through an ethic of scholarship, the judge avoids the threat of excessive discretion. See *id.* at 237.

²¹ 1972 CODE, *supra* note 19, Canon 3(A)(1), at 10.

²² Bickel, for instance, charges his philosopher-judges with fostering “enduring general values” that should not be “submitted to direct referendum.” BICKEL, *supra* note 20, at 27.

²³ 1972 CODE, *supra* note 19, Canon 7(B)(1)(c), at 29.

²⁴ 536 U.S. 765 (2002).

²⁵ *Id.* at 768 (quoting MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2000)) (internal quotation marks omitted).

²⁶ Justice Scalia characterized the ethics rule as a content-based restriction on “core” political speech regarding the “qualifications of candidates for public office.” See *id.* at 774. Accordingly, the ethics rule would be upheld only if it were narrowly tailored to a compelling state interest. See *id.* at 776.

²⁷ See *id.* at 778. Justice Scalia rejected the idea that the state might have an interest in a lack of precommitment to legal views, arguing that it is “virtually impossible to find a judge who does

gation.²⁸ Nevertheless, Justice Scalia found that the ethics rule was not narrowly tailored to either interest.²⁹ Discerning an attempt by the state to undermine judicial elections through the prohibition,³⁰ Justice Scalia questioned whether the separation of law and politics was possible or desirable in the context of the state judiciary.³¹ Even if opposition to judicial elections was well founded, Justice Scalia concluded, “the First Amendment does not permit [the state] to achieve its goal by leaving the principle of elections in place while preventing candidates from discussing what the elections are about.”³²

After *White*, the ABA revised its model code of judicial conduct to accommodate the Court’s holding.³³ Among other changes, the revised code omits the prohibition on announcements struck down in *White*³⁴ and broadens the existing pledges or promises provision to encompass “pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office” with regard to “cases, controversies or issues that are likely to come before the court.”³⁵ This revised restriction targets a narrower category of speech: statements that commit a candidate to a course of conduct other than the impartial performance of the judicial office. The re-

not have preconceptions about the law.” *Id.* at 777. However, Justice Scalia acknowledged that the state might have an interest in its judges remaining “open to persuasion.” *Id.* at 778.

²⁸ *See id.* at 775–76.

²⁹ *Id.* at 776–77, 779–80. With regard to impartiality, Justice Scalia observed that the prohibition was “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*.” *Id.* at 776. With regard to openmindedness, Justice Scalia observed that the prohibition targeted only “an infinitesimal portion of the public commitments that judges (or judges-to-be) undertake.” *Id.* at 779. Accordingly, Justice Scalia deemed the prohibition “woefully underinclusive.” *Id.* at 780.

³⁰ *See id.* at 782.

³¹ *See id.* at 784. While the “complete separation of the judiciary from the enterprise of ‘representative government’” might be well suited to civil law countries, Justice Scalia observed that “state-court judges possess the power to ‘make’ common law” as well as to “shape the States’ constitutions.” *Id.* Indeed, according to Justice Scalia, that legislative function was “precisely why the election of state judges became popular.” *Id.*

³² *Id.* at 788.

³³ *See* MODEL CODE OF JUDICIAL CONDUCT (2004) [hereinafter 2004 MODEL CODE]; *see also* Matthew J. Medina, Note, *The Constitutionality of the 2003 Revisions to Canon 3(E) of the Model Code of Judicial Conduct*, 104 COLUM. L. REV. 1072, 1081 n.42 (2004) (discussing the drafting history of revisions to the model code).

³⁴ 2004 MODEL CODE, *supra* note 33, at Canon 5(A)(3)(d). Earlier versions of the model code had already weakened the prohibition on announcements in response to doubts regarding its constitutionality. After 1990, the model code prohibited only statements that would “commit or appear to commit” a candidate to a particular position. Medina, *supra* note 33, at 1080 & n.40 (citing MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (1990) (amended 2004)). The 2003 revisions further weakened the prohibition by eliminating the “appear to commit” language. *See id.* at 1081.

³⁵ 2004 MODEL CODE, *supra* note 33, at Canon 4.1(A)(13). The model code further defines impartiality as “absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues.” *Id.* at pmb1.

vised code nevertheless pursues the same goal as earlier prohibitions. By hampering candidates' abilities to guarantee particular outcomes, the restriction attempts to weaken the link between the voters' choice of judge and the outcome of cases later brought before the bench.

A number of lower courts have subsequently addressed challenges to state codes prohibiting "pledges, promises, or commitments" by judicial candidates. Most cases have involved questionnaires sent to judicial candidates asking for their views on controversial issues like abortion, the death penalty, and same-sex marriage.³⁶ One case involved a candidate with prosecutorial experience who stated that "[w]e need a judge who will assist our law enforcement officers."³⁷ These cases raised questions regarding the interpretation of the prohibition on pledges, promises, and commitments as well as regarding the prohibition's constitutionality.

Several courts have struck down the prohibition as an unconstitutional burden on candidates' speech. These courts have sometimes interpreted the word "commitments" broadly, even going so far as to argue that there is "no real distinction" between the prohibition on "commitments" and the rule struck down in *White*.³⁸ Some of these courts have focused on the narrow tailoring aspect of the First Amendment analysis, relying, for example, on the fact that the clause includes only pledges, promises, or commitments made during the campaign, while excluding equally troubling statements made earlier in time.³⁹ These courts have also sometimes relied on the availability of less restrictive alternatives, including recusal provisions⁴⁰ and prohibitions on commitments regarding individual cases.⁴¹

Other courts have upheld the rule. One court construed the provision narrowly so that it prohibited pledges to "decide an issue or a case

³⁶ See, e.g., *Pa. Family Inst., Inc. v. Celluci*, 521 F. Supp. 2d 351, 357–58 (E.D. Pa. 2007); *Duwe v. Alexander*, 490 F. Supp. 2d 968, 970 (W.D. Wis. 2007); *Ind. Right to Life, Inc. v. Shepard*, 463 F. Supp. 2d 879, 883 (N.D. Ind. 2006), *rev'd on standing grounds*, 507 F.3d 545 (7th Cir. 2007); *Alaska Right to Life Political Action Comm. v. Feldman*, 380 F. Supp. 2d 1080, 1082 (D. Alaska 2005), *vacated in part as not yet ripe*, 504 F.3d 840 (9th Cir. 2007); *N.D. Family Alliance, Inc. v. Bader*, 361 F. Supp. 2d 1021, 1025–28 (D.N.D. 2005).

³⁷ *In re Watson*, 794 N.E.2d 1, 2 (N.Y. 2003) (per curiam). Another involved a facial challenge to a pledges or promises provision by a candidate for judicial office seeking prospective injunctive relief against the application of the rule. See *Carey v. Wolnitzek*, No. 3:06-36-KKC, 2008 WL 4602786, at *1 (E.D. Ky. Oct. 15, 2008).

³⁸ *Bader*, 361 F. Supp. 2d at 1041. Finding no distinction between the rules leads to the conclusion that the prohibition on "pledges, promises, or commitments" encompasses "the same type of constitutionally-protected speech guaranteed in [*White*]," and must be unconstitutional. *Feldman*, 380 F. Supp. 2d at 1083; see also *Bader*, 361 F. Supp. 2d at 1041.

³⁹ *Shepard*, 463 F. Supp. 2d at 889; *Bader*, 361 F. Supp. 2d at 1040.

⁴⁰ *Bader*, 361 F. Supp. 2d at 1042.

⁴¹ *Shepard*, 463 F. Supp. 2d at 889.

in a particular way,⁴² thereby permitting more general statements such as a promise “to uphold the First Amendment” or “be tough on crime.”⁴³ Some courts upholding the prohibition have asserted a strong state interest in judicial openmindedness, arguing that a judge who is perceived to be “close-minded on particular issues” will no longer be able to “fulfill the necessary role of impartial arbiter.”⁴⁴ These courts also sometimes distinguish statements made during a campaign from statements made at other times on the grounds that promises assume special significance in the context of a campaign.⁴⁵

II. FIRST AMENDMENT ANALYSIS

The Supreme Court’s opinion in *White* suggests that content-based restrictions on speech by candidates for judicial office will be upheld only when they are narrowly tailored to a compelling state interest.⁴⁶ This Part applies that standard to prohibitions on “pledges, promises, or commitments” and concludes that such prohibitions should be declared unconstitutional.

A. *Compelling Interest*

Prohibitions on pledges, promises, or commitments potentially serve at least two state interests: judicial independence and judicial openmindedness. Both interests may be compelling, but they are also limited by the degree to which the law itself binds decisionmakers to particular outcomes in advance of litigation.

1. *Independence.* — Courts identify an interest in judicial independence when they assert that “[j]udges should decide cases in accordance with law rather than with any express or implied commitments,”⁴⁷ and that it is “not appropriate that a judge reflect what the

⁴² Pa. Family Inst., Inc. v. Celluci, 521 F. Supp. 2d 351, 377 (E.D. Pa. 2007) (quoting Brief in Support of Motion for Summary Judgment at Attach. F, ¶ 4, *Celluci*, 521 F. Supp. 2d 351 (No. 07-1707)).

⁴³ *Id.* The court reasoned that a prohibition that swept in such statements would be overbroad, but that a less capacious prohibition was narrowly tailored to the state’s interest in openmindedness. *Id.*

⁴⁴ *Carey v. Wolnitzek*, No. 3:06-36-KKC, 2008 WL 4602786, at *9 (E.D. Ky. Oct. 15, 2008); see also *Celluci*, 521 F. Supp. 2d at 377 (upholding clause construed so as to prevent “candidates from promising particular rulings”); *Duwe v. Alexander*, 490 F. Supp. 2d 968, 975 (W.D. Wis. 2007) (noting a “very real distinction” between announcing a specific commitment and a general predisposition); *In re Watson*, 794 N.E.2d 1, 7 (N.Y. 2003) (per curiam) (suggesting that litigants have a right to a judge with a “mind that is open enough to allow reasonable consideration of the . . . issues presented”).

⁴⁵ See *Carey*, 2008 WL 4602786, at *12 (“[A]n individual cannot make a meaningful commitment to *rule* in a particular way as a judge unless he is a judge or actively seeking to become one.”).

⁴⁶ See *Republican Party of Minn. v. White*, 536 U.S. 765, 774–75 (2002).

⁴⁷ *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 227 (7th Cir. 1993) (Posner, J.).

community wants.”⁴⁸ Judicial independence would separate law from politics and ensure that judicial decisions are based solely on the former.⁴⁹ As an aspiration, judicial independence is deeply rooted in our legal system⁵⁰ and our philosophy of governance.⁵¹ The Supreme Court has observed that adherence to this ideal is the chief source of the judiciary’s legitimacy and authority.⁵² To the extent that pledges, promises, or commitments suggest that judges will decide cases according to the will of voters rather than the dictates of law, judicial elections conflict with this understanding of government under law.⁵³

Justice Scalia’s opinion in *White* casts some doubt on whether this understanding of judicial independence is, in fact, a compelling state interest. Justice Ginsburg’s dissent relied on the role of the courts as a “bulwark of constitutional government” and argued that the “announce” clause serves that interest by strengthening the state’s ban on “pledges or promises” by candidates for judicial office.⁵⁴ Justice Scalia, however, asserted that Justice Ginsburg “greatly exaggerate[d] the difference between judicial and legislative elections” because state court judges — like legislators — possess extensive authority to “make” law.⁵⁵ Given judges’ lawmaking functions, Justice Scalia suggested, it might be appropriate for states to allow politicization of their selection.⁵⁶

⁴⁸ *In re Kinsey*, 842 So. 2d 77, 93 (Fla. 2003) (Anstead, C.J., specially concurring) (quoting testimony of United States District Judge Lacey Collier).

⁴⁹ See, e.g., *White*, 536 U.S. at 798 (Stevens, J., dissenting) (contrasting “issues of policy,” to be decided by democratic vote, with “issues of law or fact”).

⁵⁰ The Constitution provides that state and federal judges are “bound by Oath or Affirmation, to support this Constitution.” U.S. CONST. art. VI. The judge’s constitutional duty is to the law, not the will of the voters. See *id.* art. III, § 2 (defining the scope of the “judicial Power”); see also *White*, 536 U.S. at 804 (Ginsburg, J., dissenting) (evoking the role of the courts as a “bulwark of constitutional government, a constant guardian of the rule of law”); *Buckley*, 997 F.2d at 227 (observing that “[j]ustice under law is as fundamental a part of the Western political tradition as democratic self-government and is historically more deeply rooted”).

⁵¹ John Locke, for instance, suggests that man emerged from the state of nature in order to obtain “a known and indifferent judge, with authority to determine all differences according to the established law.” JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 155 (Ian Shapiro ed., Yale Univ. Press 2003) (1690) (emphasis added).

⁵² See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 866 (1992) (“[T]he Court’s legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.”).

⁵³ See, e.g., Croley, *supra* note 7, at 726 (identifying a conflict between the attempt to constrain majority will and the election of judges); Pozen, *supra* note 11, at 327 (observing the “irony” that elective judges, while possessed of great authority to contravene majority will, are unlikely to exercise it because they are, themselves, elected).

⁵⁴ *White*, 536 U.S. at 804, 819 (Ginsburg, J., dissenting).

⁵⁵ *Id.* at 784 (majority opinion).

⁵⁶ See *id.*; cf. HORWITZ, *supra* note 14, at 272 (arguing for the inevitability of moral choice within the law).

Even if the state has a compelling interest in judicial independence, the state's interest is limited by the law's ability to guide judicial decisionmaking. To the extent that the law leaves judicial decisionmaking unconstrained, legal outcomes will be determined either by the discretion of the judge or the will of the public at large. The state has no compelling interest in favoring judicial whim over democratic decisionmaking.⁵⁷ At the same time, in cases where the law rigidly constrains judicial decisionmaking, the state lacks any interest in preventing judges from promising to follow the law. An explicit promise to "sentence convicted murderers according to applicable laws," for instance, would hardly compromise the separation of law and politics.

2. *Openmindedness*. — The state's potential compelling interest in judicial openmindedness would attempt to ensure that judges remain willing "to consider views that oppose [their] preconceptions, and remain open to persuasion, when the issues arise in a pending case."⁵⁸ A pledge, promise, or commitment by a judicial candidate contravenes this interest because it commits the candidate to a particular course of action on the bench and prevents consideration of contrary arguments when they are raised in court.⁵⁹ While acknowledging that judicial openmindedness "may well be . . . desirable," Justice Scalia in *White* did not decide whether it constitutes a compelling state interest.⁶⁰

As with judicial independence, this interest is limited by the ability of the law to constrain judicial decisionmaking. In the arena of judicial factfinding, the state's interest in openmindedness is well-grounded.⁶¹ To the extent judges "make" law, however, it may well be desirable for judges to be influenced by the democratic public; if so, a judge's lack of precommitments may be a vice rather than a virtue.⁶² If judges are fully constrained by a binding legal rule, on the other hand, the state has little interest in preserving their open mind; perhaps for this reason, Supreme Court nominees have been willing to state their views on the status of particularly well-entrenched prece-

⁵⁷ Justice Scalia made a similar point when he argued that judicial elections respond to the ability of judges to "make" law. See *White*, 536 U.S. at 784.

⁵⁸ *Id.* at 778.

⁵⁹ See *id.*

⁶⁰ *Id.* at 778–79. Justice Scalia instead went on to find that the regulation at issue was not narrowly tailored to such an interest. See *id.* at 779–80.

⁶¹ The law's strict rules regarding judicial notice, for instance, reflect suspicion of judicial reliance on factual preconceptions not introduced by the parties. See FED. R. EVID. 201.

⁶² Cf., e.g., CHRISTOPHER L. EISGRUBER, *THE NEXT JUSTICE*, at xi–xii (2007) (arguing that potential judges should be pressed to answer questions about their judicial philosophy); Elena Kagan, *Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919, 941 (1995) (book review) (arguing that the "real" confirmation mess is the degree to which senators do *not* press nominees on their views about particular issues). But see Stephen Carter, Essay, *The Confirmation Mess*, 101 HARV. L. REV. 1185, 1194 (1988) ("A nominee is not independent when she is quizzed, openly or not, on the degree of her reverence for particular precedents.").

dents while seeking Senate confirmation.⁶³ Where a judge has no choice but to apply a controlling rule of law, the ability to seriously consider arguments to the contrary would imply a lack of commitment to the judge's constitutional obligation.

B. *Narrow Tailoring*

Whether the prohibition on pledges, promises, or commitments is interpreted broadly or narrowly impacts the analysis of the rule's constitutional "fit" with the two interests identified above. This section analyzes two potential interpretations, although others may be available.⁶⁴ Under either interpretation, the rule lacks the narrow tailoring required by the First Amendment.

1. *Overbreadth*. — Interpreted broadly, the prohibition might reach any statement that committed a candidate to rule in a particular way on a particular legal issue or controversy, with the exception of a broadly-phrased promise of "impartial performance of the adjudicative duties of judicial office."⁶⁵ Because neither of the interests identified above reaches commitments to follow binding legal rules, this interpretation would render the prohibition overbroad.⁶⁶ In a state with a mandatory death penalty for some crimes, for instance, this interpretation would prohibit a candidate from promising to apply the death penalty to duly convicted individuals. Yet, such a promise might be of value to voters if a judge — perhaps motivated by moral scruples — refused to apply the death penalty where mandated by law.⁶⁷ The public has an interest in knowing that elected judges intend to follow

⁶³ See Michael J. Gerhardt, Essay, *Super Precedent*, 90 MINN. L. REV. 1204, 1216–17, 1219–20 (2006). For lower courts, not endowed with power to overturn precedents, such statements are even less problematic. See *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("[T]he Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

⁶⁴ For instance, the word "commitment" might be interpreted broadly to encompass the kinds of statements at issue in *White*. See, e.g., *N.D. Family Alliance v. Bader*, 361 F. Supp. 2d 1021, 1041 (D.N.D. 2005). This section addresses only interpretations sufficiently narrow to avoid falling within the direct holding of *White*.

⁶⁵ MODEL CODE OF JUDICIAL CONDUCT R. 4.1(A)(13) (2007). For instance, in *Pennsylvania Family Institute, Inc. v. Celluci*, 521 F. Supp. 2d 351 (E.D. Pa. 2007), one court noted a possible interpretation of the rule as allowing "pledges or promises to perform . . . judicial duties faithfully and impartially" and prohibiting any commitment regarding "an issue, case, or controversy." *Id.* at 376.

⁶⁶ Cf. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002) ("The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter.").

⁶⁷ See, e.g., *Croley*, *supra* note 7, at 737 n.144 (describing the electoral defeat of Chief Justice Rose Bird of California, who had voted to overturn a death penalty conviction each of the sixty-one times she was faced with the question). A broadly-worded promise to "faithfully apply the law" might imply the same meaning, but a specific promise more clearly communicates the candidate's intention to the voters and leaves less room for lawyerly ambiguity.

the law;⁶⁸ interfering with that interest serves neither the independence nor the openmindedness of the judiciary.

A less capacious interpretation might read the phrase “inconsistent with impartial performance of the adjudicative duties of the office” to exclude commitments to follow uncontroverted legal rules. A candidate could promise to follow mandatory sentencing guidelines, for instance, but could not promise to use sentencing discretion in a particular manner. While this approach would avoid targeting some legitimate speech, it would likely render the prohibition unconstitutionally vague.⁶⁹ Even where jurists agreed on how to approach an issue, the question of whether the law is settled by a mandatory legal rule would often prove difficult to answer.⁷⁰ Where jurists disagreed on how to analyze an issue, the line between “hard” and “easy” cases would prove even more difficult to draw: a promise not to find a right to same-sex marriage, for instance, might appear quite different through an originalist or living constitutionalist lens. Ethics boards would have broad and troubling discretion to determine what constitutes “settled law” and, as a result, what speech enjoys protection.⁷¹

Both interpretations also extend the prohibition beyond the state’s potential compelling interests by prohibiting pledges, promises, or commitments regarding issues where the law provides no guidance. The degree to which this objection merits attention depends on the frequency with which such cases arise;⁷² under some legal philosophies

⁶⁸ This argument presupposes that it is possible to identify cases where unambiguous legal rules control the outcome of judicial decisionmaking. In reality, the question of when and how often legal rules constrain decisionmakers is contested. See, e.g., Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549 (1993); Mark Tushnet, *Defending the Indeterminacy Thesis*, 16 QUINNIPIAC L. REV. 339 (1996). Nevertheless, most agree that a class of legally uncontested rules of decision does, in fact, exist. See, e.g., *id.* at 345 (conceding that “we can formulate hundreds of legal propositions that all would agree are . . . fully determinate,” if only because their meaning is clear in social context).

⁶⁹ Cf. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048 (1991) (finding state ethics rule void for vagueness because it “fails to provide ‘fair notice to those to whom [it] is directed’” (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 112 (1972) (alteration in original))).

⁷⁰ Cf. Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1324 (2008) (“[E]ven were there agreement on the location of the boundaries between [easy and hard cases], there may be no reliable way to make an *ex ante* determination of which category a particular case falls into.”).

⁷¹ See *Gentile*, 501 U.S. at 1051 (“The prohibition against vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement.”). Judicial candidates, unable to determine when they have “pass[ed] from the safe harbor . . . to the forbidden sea,” *id.* at 1049, might refrain from speech altogether. Cf. *Reno v. ACLU*, 521 U.S. 844, 871–72 (1997). The Court in *Reno* was particularly concerned about vague laws’ “obvious chilling effect on free speech.” *Id.* at 872.

⁷² See *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 485 (1989) (requiring that overbreadth be “substantial” in order to invalidate a statute (emphasis omitted)).

the law addresses literally every possible question.⁷³ For Justice Ginsburg in *White*, as for the drafters of the 1972 model code, judges are always at least imperfectly constrained by an ethic of legal professionalism and by the characteristics of the judicial office.⁷⁴ Justice Scalia, by contrast, asserts that where judges are not constrained by clear legal rules the line between legislation and adjudication becomes narrow or even nonexistent.⁷⁵ Justice Scalia's preference for rules over standards thus has the perhaps unexpected effect of limiting the scope of the state's interest in judicial independence and openmindedness.⁷⁶

While Justice Ginsburg's theory of professionalism could save the prohibition from this particular charge of overbreadth, courts should hesitate to uphold a content-based restriction on political speech on the basis of a highly contested theory of the judicial role.⁷⁷ A candidate for judge, for instance, might promise to use her unrestricted discretion to sentence drunk drivers to the maximum extent allowed by law.⁷⁸ Professional constraints imposed by the judicial office might conceivably lead us to prefer unconstrained judicial decisionmaking in sentencing to the candidate's pledge, but the benefits of judicial discretion in the sentencing context are hardly uncontested.⁷⁹ Indeed, the will of the democratic majority may be preferable to the personal discretion of the judge. Absent evidence to bolster a theory of judicial professionalism, courts should hesitate to uphold restrictions on speech on the basis of a "theoretical but unproven benefit of censorship."⁸⁰

⁷³ See, e.g., Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 11 (1983) (describing late-nineteenth-century legal thought).

⁷⁴ See *Republican Party of Minn. v. White*, 536 U.S. 765, 811 (2002) (Ginsburg, J., dissenting) (emphasizing that judges should not decide cases outside "the constraints characteristic of the judicial office," including "briefs, oral argument, and . . . the benefit of one's colleagues' analyses"); *supra* p. 1514 (discussing the 1972 code's reliance on an ethic of judicial professionalism).

⁷⁵ See *White*, 536 U.S. at 784 (majority opinion).

⁷⁶ This illustrates an important difference between Justice Scalia's formalism and the formalism of late-nineteenth-century jurisprudence. While classical formalism sought to provide a single answer to every legal question, see Grey, *supra* note 73, at 11, Justice Scalia's formalism abandons that aspiration as unrealistic. See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862-63 (1989). Because Justice Scalia acknowledges a class of cases where judges are not constrained by legal rules, Justice Scalia's formalism makes room for the collapse of the law-and-politics distinction within that set of cases. See *White*, 536 U.S. at 784 n.12 (rejecting the premise that "the judiciary is completely separated from the enterprise of representative government").

⁷⁷ See, e.g., *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2674 (2007) ("[W]e give the benefit of the doubt to speech, not censorship."); *Reno v. ACLU*, 521 U.S. 844, 885 (1997) ("The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.")

⁷⁸ See, e.g., *White*, 536 U.S. at 810 (Ginsburg, J., dissenting) (positing a similar statement).

⁷⁹ See, e.g., *Furman v. Georgia*, 408 U.S. 238, 255 (1972) (Douglas, J., concurring) (suggesting that "discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused").

⁸⁰ *Reno*, 521 U.S. at 885.

The state may also lack an interest sufficient to justify regulation of pledges, promises, or commitments by candidates regarding issues that the candidates subjectively believe are not open to debate. Although the issue of rights to same-sex marriage remains disputed, for instance, an originalist candidate's promise not to find such a right might be understood as a commitment to follow the law. The candidate's commitment could interfere with the state's interest in independence by allowing the public to select the judge on the basis of her views. Because the judicial office involves a promise to faithfully apply the law, however, the candidate and the public have a strong interest in this speech. Certainly, candidates could comply with their constitutional obligation to undertake to follow the law by declaring their fidelity to law at a high level of generality, but the public may have an additional interest in ensuring that judges follow what the public believes to be the "correct" version of the law.⁸¹ States should at least hesitate to prohibit speech so close to the heart of the judicial role.

2. *Underbreadth*.⁸² — In addition to sweeping in constitutionally protected speech, a prohibition on pledges, promises, or commitments — whether interpreted broadly or narrowly — will also fail to advance the state's interest in judicial openmindedness. Legal thought frequently aspires to cabin the discretion of legal decisionmakers, with the result that speech not formulated as a pledge, promise, or commitment can nevertheless commit a candidate to a particular course of action on the bench. A judge who wants to signal that she will not find a right to same-sex marriage in her state's constitution, for instance, might simply announce that she is an "originalist" in the model of Justices Scalia and Thomas.⁸³ While the law in that area would remain open to debate,⁸⁴ the judge would be no more willing to consider liberty-based arguments than a judge who had given the public her solemn oath to decide the case in a particular way.⁸⁵ The judge's mind would effectively be closed.

⁸¹ Cf. LARRY D. KRAMER, *THE PEOPLE THEMSELVES* 227 (2004) (arguing that it is the "right" and the "responsibility" of Americans to "say finally what the Constitution means").

⁸² See generally William E. Lee, *The First Amendment Doctrine of Underbreadth*, 71 WASH. U. L.Q. 637 (1993) (describing the relevant underbreadth doctrine).

⁸³ See, e.g., Fla. Judicial Ethics Advisory Comm., Op. 2006-18 (2006), available at <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2006/2006-18.html> (holding that candidates may declare their views on judicial philosophy or on the question of a constitutional right to same-sex marriage but may not commit to a particular holding on the bench). An originalist looks to history to identify "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." *Michael H. v. Gerald D.*, 491 U.S. 110, 128 n.6 (1989) (plurality opinion of Scalia, J.). Under that approach, there is no constitutional right to same-sex marriage.

⁸⁴ See, e.g., *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

⁸⁵ While one might argue that the originalist is bound by her judicial philosophy, rather than her commitment, that approach ignores the degree to which the statement "I am an originalist" is

For similar reasons, this prohibition would also fail to advance the state's interest in judicial independence. The judicial candidate who declares she is an originalist may not intend to subject her future judicial decisions to political control, but that is the inevitable effect. If the public votes for her on the basis of her judicial philosophy, knowing that philosophy's implications, her opinions on the bench will — in a very real sense — be determined by the public's political will.⁸⁶ Indeed, because political promises are often the “least binding form of human commitment,”⁸⁷ voters opposed to same-sex marriage would do better to vote for the sincere originalist than the pandering opportunist. The originalist judge may be constrained by law, but the voters who select her are not.

Lest this argument be accused of bootstrapping itself to the holding of *White*,⁸⁸ the same would be true even if the prohibition in that case had been upheld. As Justice Scalia suggested, the provision in *White* was itself underinclusive, as “statements in election campaigns are such an infinitesimal portion of the public commitments . . . that judges (or judges-to-be) undertake.”⁸⁹ Statements on the campaign trail vividly illustrate the connection between the views of judicial candidates and the outcome of individual cases. Even total silence on the campaign trail could not obscure that connection, however, as the views of most candidates could be discerned by other means.⁹⁰

III. ANALYSIS AND ALTERNATIVES

The preceding constitutional analysis implicates a more fundamental opposition between the separation of law and politics and the diversity of legal views fostered by the First Amendment. This Part explores that tension and its implications for judicial speech regulation. It then proposes a more narrowly drawn regulation directed toward the state's interest in guaranteeing the integrity of the judicial process and impartiality between parties to a dispute.

itself a form of commitment. The candidate who merely harbors unexpressed originalist views may feel free to change them at any time; the candidate who has informed the public of her philosophy may not, or at least may not do so with the same degree of impunity.

⁸⁶ Some voters may select an originalist candidate on the basis of issues other than same-sex marriage, but that circumstance is no different from voting in ordinary representative politics. The internal logic of a judicial philosophy may differ starkly from that of a political platform, but the two are virtually indistinguishable in the context of an election.

⁸⁷ *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002).

⁸⁸ See *id.* at 819–20 (Ginsburg, J., dissenting) (arguing that without the state's prohibition on announcements the prohibition on pledges or promises would be “easily circumvented,” *id.* at 819).

⁸⁹ *Id.* at 779 (majority opinion).

⁹⁰ *Id.* at 779–80.

A. *The Rule of Law in the Marketplace of Ideas*

One view of the rule of law, roughly understood as the principle that justice ought to be meted out under law and not political caprice, seeks to constrain judicial reasoning in order to produce single, determinate answers to legal questions.⁹¹ The First Amendment concept of a marketplace of ideas, by contrast, encourages the coexistence of a variety of viewpoints and modes of thinking.⁹² The marketplace of ideas seeks certainty, but only in the long term, and it views present discord as a means of achieving certainty in the future. The rule of law, by contrast, seeks certainty on a much smaller time frame — in particular, within the limits of a single legal dispute. Those ideas are fundamentally in conflict.

The search for a determinate source of law, distinct from arbitrary will, has formed the basis for an entire industry of scholarship. The nineteenth century's vision of law as deductive "science"⁹³ has given way to more contemporary philosophies: textualism,⁹⁴ originalism,⁹⁵ and attempts to discern answers from legislative intent⁹⁶ or a "rational continuum" of constitutional adjudication.⁹⁷ These visions share a common understanding of the judicial role: judges stand outside public opinion⁹⁸ but may not impose their personal will on society.⁹⁹ These theories also share an aspiration to intellectual hegemony, as they seek to limit the proper source of legal rules in order to cabin judicial dis-

⁹¹ See, e.g., Antonin Scalia, *The Rule of Law As a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) (observing that "[e]ven in simpler times uncertainty has been regarded as incompatible with the Rule of Law").

⁹² See, e.g., *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market . . .").

⁹³ See HORWITZ, *supra* note 14, at 5–6.

⁹⁴ See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION* 3, 23–25 (Amy Gutmann ed., 1997).

⁹⁵ See *id.* at 45 ("[T]he originalist at least knows what he is looking for.").

⁹⁶ See *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 96 (1992) (plurality opinion of O'Connor, J.) (stating that intent is the "touchstone" of any attempt at statutory interpretation (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985))).

⁹⁷ *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting). Justice Harlan counseled that while constitutional interpretation has been a "rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them." *Id.* at 542.

⁹⁸ See, e.g., BICKEL, *supra* note 20, at 239 (stating that the role of reflecting public opinion is a function to which the court is, "of all our institutions, least suited"); Scalia, *supra* note 94, at 47 (expressing concern that, if courts adopt the meaning of the Constitution to suit public opinion, it will be the "end of the Bill of Rights").

⁹⁹ See, e.g., BICKEL, *supra* note 20, at 236–37 (stating that a judge can only "hope for the ultimate assent of those whom otherwise he governs irresponsibly" if he applies "[f]undamental presuppositions"); Scalia, *supra* note 94, at 46 (criticizing judges who interpret the Constitution according to their own predilections).

cretion.¹⁰⁰ Each theory aspires to be the only theory of adjudication within its domain (that is, within statutory, constitutional, or other areas of adjudication); otherwise, each would lose its ability to constrain.

In the context of the marketplace of ideas — where those who select judges choose between candidates espousing multiple judicial philosophies — that attempt to bind judicial decisionmaking becomes counterproductive. In *White*, Justice Scalia imagined a hypothetical strict constructionist candidate and insisted that she be able to explain the consequences of her philosophy to the public.¹⁰¹ Justice Black's strict constructionism, of course, aimed to tamp down on judicial discretion and ensure that courts would decide cases according to law — as opposed to personal politics.¹⁰² The strict constructionist imagined in *White*, however, is entirely immersed in politics: she submits her understanding of strict constructionism to the public for its judgment. The judge herself is constrained by her judicial philosophy, but the public is not. And it is precisely *because* the judge is bound¹⁰³ that the public is able to draw a connection between its choice of judge and its choice of legal results.

Judicial speech codes attempt to reassert the separation of law and politics by concealing the thread running between judicial candidates, judicial philosophies, and decisions on the bench. As Justice Stevens remarked in *White*, when a judge in an election announces his views, he presents those views “as a reason to vote for him.”¹⁰⁴ For Justice Stevens, the judge's statement is problematic because it points to a connection between the public's choice of judge and the judge's later

¹⁰⁰ Justice Scalia has thus expressed his concern that the ability of the public to choose among “a whole series of proposals for constitutional evolution” will erode the rule of law. See Scalia, *supra* note 94, at 46–47 (expressing concern with diversity of judicial interpretations of the Constitution and suggesting that “if the people come to believe that the Constitution is *not* a text like other texts . . . well, then, they will look . . . for judges who agree with *them*”). Justice Harlan, meanwhile, argued strenuously that a view of the Constitution as a “rational continuum” could not coexist with a textualist approach. See *Poe*, 367 U.S. at 542–43 (Harlan, J., dissenting) (expressing strong disapproval of any attempt to limit due process analysis to the text of the Constitution and suggesting that, because constitutional interpretation consists of a rational continuum, “[n]o formula could serve as a substitute, in this area, for judgment and restraint,” *id.* at 542).

¹⁰¹ See *Republican Party of Minn. v. White*, 536 U.S. 765, 773 (2002) (observing that a candidate's claim to be a strict constructionist, “like most other philosophical generalities, has little meaningful content for the electorate unless it is exemplified by application to a particular issue”).

¹⁰² Justice Black thus expressed his fear that a “loose, flexible, uncontrolled standard for holding laws unconstitutional, if ever it is finally achieved, will amount to a great unconstitutional shift of power to the courts.” *Griswold v. Connecticut*, 381 U.S. 479, 521 (1965) (Black, J., dissenting).

¹⁰³ Justice Scalia's choice of strict constructionist philosophy is fortuitous because it illustrates how judicial philosophies become more open to political manipulation as they more successfully constrain judicial decisionmaking.

¹⁰⁴ *White*, 536 U.S. at 800 (Stevens, J., dissenting) (emphasis omitted).

decisions on the bench.¹⁰⁵ The problem with speech by judicial candidates is not that it creates a connection between the choice of judicial personnel and the decision of particular cases; that connection would exist even absent such speech. Rather, the problem with the prohibited speech is that it makes that connection obvious.

This approach must fail because the universe of protected speech and debate in which judicial elections occur is too vast to allow any speech code to successfully conceal the connection between the selection of judges and the outcome of future cases. The robust marketplace for ideas about the law extends beyond judicial elections to law reviews, public speeches, and countless other forums.¹⁰⁶ In those contexts, candidates are likely to have made numerous prior statements identifying or at least suggesting their position within legal debate. Public discussion of the law — the very thing that the First Amendment strives to foster — thus fatally undermines the attempt to separate law from politics.

Even if it were possible to obfuscate the connection between the choice of judge and the outcome of future cases, that obfuscation would have the perverse effect of undermining the legitimacy of the judiciary. A qualified judge must have a judicial philosophy capable of grounding that judge's decisions in law as opposed to politics. Then-Justice Rehnquist, declining to recuse himself from a case involving issues about which he had previously declared a point of view, therefore remarked that “[p]roof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* . . . would be evidence of lack of qualification, not lack of bias.”¹⁰⁷ If the legal philosophies of judges and judicial candidates were altogether obscured, judges would no longer appear to determine cases according to law and would no longer enjoy that claim to legitimacy. Yet, so long as candidates' legal philosophies remain visible, judicial decisionmaking will also remain subject to the control of public opinion.

All this suggests that, so long as law is believed to provide determinate outcomes according to a system of principles — and so long as judges do not agree on the identity of those principles — judicial elec-

¹⁰⁵ See *id.* Indeed, Justice Stevens condemned such speech even where the judge would feel free to change his views when confronted with the actual case. *Id.*

¹⁰⁶ *Id.* at 779 (majority opinion) (finding provision unconstitutionally underbroad on the grounds that “statements in election campaigns are such an infinitesimal portion of the public commitments . . . that judges (or judges-to-be) undertake”). While statements made on the campaign trail vividly illustrate the connection between the views of a judge and the outcome of individual cases, Justice Scalia suggested that sufficient evidence from other statements of that connection remains unregulated to render the rule “woefully underinclusive.” *Id.* at 780.

¹⁰⁷ *Laird v. Tatum*, 409 U.S. 824, 835 (1972).

tions will submit legal outcomes to the control of politics.¹⁰⁸ To the extent that judicial elections are “incompatible with an independent judiciary” because they suggest that “judicial decisions should be a reflection of the community,”¹⁰⁹ partial blame must lie with attempts to separate law from politics by constructing law as a framework of principles with specific and certain consequences. In the context of robust intellectual debate, where judges cannot agree on which principles and methodologies ought to inform legal judgment, a choice between judicial methodologies allows political actors to choose between sets of reasonably determinate legal outcomes. So long as judges bind themselves to determinate legal principles, political actors will use those commitments to advance political ends.

While this conflict between the rule of law and the marketplace of ideas is highly visible in the context of judicial elections, it is no less present in the context of the appointed judiciary. Observers have remarked upon a “phenomenon of selecting and confirming federal judges, at all levels, on the basis of their views.”¹¹⁰ Many commentators concerned with this state of affairs have focused on Senate confirmation hearings, asking in particular whether nominees should candidly discuss their positions on legal issues.¹¹¹ These discussions, which treat political influence on the courts as a subject for debate, elide the degree to which the politicization of the judiciary is a foregone conclusion in the context of the marketplace of ideas. So long as nominees have intellectual records, their philosophies will be discernable however hearings are conducted.¹¹² To the extent nominees have not participated in broader intellectual discussion about the law, they are likely to be deemed unqualified. A vigorous marketplace of ideas thus ensures that political control over the future direction of the judiciary is inevitable under appointment as well as elections.

The opposition between the marketplace of ideas and the rule of law also continues after judges take the bench. Judges’ commitments to legal philosophies may blind them to otherwise compelling arguments and retard the process of truthseeking fostered by a free market in ideas. Were it not for countervailing values fostered by the rule of law, one might even justify restrictions on pledges, promises, and commitments as necessary to preserve the free flow of ideas on the

¹⁰⁸ Cf. Scalia, *supra* note 94, at 47 (“If the courts are free to write the Constitution anew, they will, by God, write it the way the majority wants; the appointment and confirmation process will see to that.”).

¹⁰⁹ *In re Kinsey*, 842 So. 2d 77, 94 (Fla. 2003) (Anstead, C.J., specially concurring) (quoting testimony of United States District Judge Lacey Collier).

¹¹⁰ Scalia, *supra* note 94, at 47.

¹¹¹ See *supra* note 62.

¹¹² See Kagan, *supra* note 62, at 937 & n.30 (noting the problem posed by pre-confirmation statements for those who would limit consideration of nominees’ substantive views).

bench.¹¹³ Judges also sometimes change their minds when faced with compelling argumentation or sufficient public outcry.¹¹⁴ While made in good faith, such shifts in response to ongoing legal debate undermine the law's aspiration toward stability, determinacy, and neutrality. Even if judges never shift their positions, moreover, the mere fact of intellectual diversity fostered by the marketplace of ideas undermines the consistency to which the rule of law aspires.¹¹⁵

None of this is to say that the judiciary should abandon its attempt to separate law from politics.¹¹⁶ As the weakest branch of government, the judiciary's "power and . . . prerogative" to perform the judicial function "rest, in the end, upon the respect accorded to its judgments."¹¹⁷ That respect, in turn, depends upon the felt legitimacy of the courts against a background of expectations regarding the rule of law.¹¹⁸ In the context of the marketplace of ideas, however, judicial legitimacy must remain a work in progress undertaken through an ongoing public debate through which — in the long term — we "advance our understanding of the rule of law and further a commitment to its precepts."¹¹⁹ The struggle to legitimate judicial decisionmaking must occur through a process of careful attention to legal detail in judicial

¹¹³ Cf. Cass R. Sunstein, *A New Deal for Speech*, 17 HASTINGS COMM. & ENT. L.J. 137, 139 (1994) (suggesting that "what seems to be government regulation of speech might, in some circumstances, promote free speech"). This argument would suggest that pledges and promises by judges undermine their ability to fully participate in the marketplace of ideas, and that we should prohibit pledges and promises in order to prevent such interference. Because it proves so difficult to distinguish commitments to follow the law from commitments to disregard it, however, this would require prohibiting even a promise to adhere to the law.

¹¹⁴ See Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 629 (1993) (arguing that the "process of constitutional interpretation is dynamic, not static, giving primacy to different interpretations at different times").

¹¹⁵ A judiciary where decisionmakers approach questions from multiple perspectives is likely to reach less consistent and principled results than a judiciary where decisionmakers adhere to a single methodology, and outcomes will often depend on the order in which questions are presented. See Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 645 (2001) (describing the phenomenon of sequencing path dependence in judicial decisionmaking, in which the outcome of cases decided by multiple judges with differing ideologies may depend on the order in which cases are presented).

¹¹⁶ But see Friedman, *supra* note 114. Professor Friedman has suggested that courts serve "as facilitators and shapers of constitutional debate," *id.* at 668, and that theories of the law should be "used as arguments in the dialogue," *id.* at 680. While offering an insightful empirical account of the judicial process, Professor Friedman gives insufficient attention to the judiciary's felt or real need for legitimacy. See, e.g., *In re Kinsey*, 842 So. 2d 77, 93 (Fla. 2003) (Anstead, C.J., specially concurring) (comparing judicial elections to the rule of a lynch mob); Scalia, *supra* note 94, at 42 (expressing concern that the judiciary will lose its legitimacy if law becomes too closely aligned with politics); Penny J. White, *An America Without Judicial Independence*, 80 JUDICATURE 174, 177 (1997) ("[I]t is important that we support courageous independent judges so that they do not fall victim to the clamor of an excited people, the tyranny of public opinion.").

¹¹⁷ Republican Party of Minn. v. White, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 795.

opinions¹²⁰ and productive debate in the marketplace of ideas.¹²¹ No rule of judicial ethics will expunge politics from the law.

B. Proposed Alternative

While the ambitious ends sought by prohibitions on pledges, promises, or commitments will not be achieved through the regulation of judicial speech, ethics rules could successfully pursue some more modest goals. In particular, states could uphold the integrity of the judicial decisionmaking process through regulations prohibiting statements announcing views or making commitments with regard to parties or cases before the court or likely to come before the court.

Statements regarding particular litigants or cases — including commitments to decide particular cases in favor of particular litigants — cut to the heart of the notion that judges should decide cases according to the law. The outcome of a legal controversy should depend on the application of law to fact, not the identity of individual litigants.¹²² This model of decisionmaking according to generalized principles demands that every party should be confident that “the judge who hears his case will apply the law to him in the same way he applies it to any other party.”¹²³ This model of judicial decisionmaking — even more than ideals of formalism or professionalism — is deeply rooted in our constitutional tradition.¹²⁴ It is also part of the process of judicial decisionmaking through which judges mediate the conflict between the rule of law and the marketplace of ideas.¹²⁵

Unlike independence and openmindedness, this interest in impartiality among individual litigants could be effectively pursued through

¹²⁰ One state court — responding to the charge that it had “failed not only the entire judiciary, but also the citizens of this state” with its holding striking down a judicial speech regulation, *Griffen v. Ark. Judicial Discipline & Disability Comm’n*, 130 S.W.3d 524, 547 (Ark. 2003) (Corbin, J., dissenting) — observed that “our overarching duty on this court is to follow the law,” including the First Amendment, *id.* at 536 (majority opinion). The court therefore suggested, “[W]e have done exactly what is expected of us.” *Id.*; see also Gerald Lebovits, Alifya V. Curtin & Lisa Solomon, *Ethical Judicial Opinion Writing*, 21 GEO. J. LEGAL ETHICS 237, 237–38 (2008) (describing the ethical dimensions of judicial opinion writing and observing that opinions “provide accountability because they are open to the public”).

¹²¹ *Cf. White*, 536 U.S. at 794 (Kennedy, J., concurring) (suggesting that “[t]o strive for judicial integrity is the work of a lifetime,” but that this “should not dissuade the profession”).

¹²² The status of an individual as a member of a legally relevant group may be relevant to the process of legal decisionmaking, but such questions of status are distinct from individual identity. So, for instance, the proposed rule would not prohibit the statement that children, as a group, deserve particular judicial solicitude. See *supra* note 4 and accompanying text. However, it would prohibit a commitment to favor a *particular* child over similarly situated persons.

¹²³ *White*, 536 U.S. at 776.

¹²⁴ The Constitution restricts the judicial power to “cases” and “controversies,” indicating that judges should apply the law to individual litigants, rather than to broad, overarching issues. See U.S. CONST. art. III, § 2.

¹²⁵ See *supra* note 120 and accompanying text.

speech regulation. While judges can commit to general principles through discussion about the law, they cannot use the law to express favor for particular litigants.¹²⁶ Litigants cannot always be sure which substantive legal rules will apply to their particular situation, and even where there is no doubt how a legal rule would apply to a particular case there can be no assurance that the case will be decided on the basis of that rule and not on some other ground.¹²⁷ At the same time, prohibiting statements regarding individual cases or litigants would not sweep in constitutionally protected speech, as any statement at that level of specificity implicates the state's interest in having individual cases decided through the judicial decisionmaking process. Unlike pledges, promises, and commitments, statements regarding individual litigants are uniquely harmful and can be singled out.

By focusing on the level of specificity of judges' speech, as opposed to the use of words indicating commitment, this approach would orient judicial speech regulation toward the aspects of judicial decisionmaking that distinguish judges from ordinary politicians. It is at the level of the particular case or controversy that the judge is most constrained by courtroom procedures and the process of judicial decisionmaking.¹²⁸ At that level of specificity, even statements that are not phrased as pledges, promises, or commitments may imply a troubling degree of bias; for instance, one judicial candidate in New York insisted that "[w]e need a judge who will assist our law enforcement officers."¹²⁹ While not phrased as a pledge, promise, or commitment, this statement did suggest bias toward the state (a repeat litigant) in criminal prosecutions.¹³⁰ The statement is harmful because of its specificity, even if it does not commit the candidate.

This focus on specificity also suggests the importance of limiting the influence of campaign contributions in the context of judicial elections — either by restricting contributions or by requiring recusal by interested judges. Contributions by litigants or lawyers threaten the

¹²⁶ Rather, any such commitment would be contrary to the idea of the rule of law. *Cf.* *Vill. of Willowbrook v. Olech*, 528 U.S. 562 (2000) (per curiam) (acknowledging potential viability of "class of one" equal protection claims).

¹²⁷ Even where litigants can predict the consequence of a new legal rule for their particular case, those consequences occur as the result of a change that will also be applied to similarly situated litigants.

¹²⁸ By contrast, and within limits, favors by politicians for supporters are routine and expected.

¹²⁹ *In re Watson*, 794 N.E.2d 1, 2 (N.Y. 2003) (per curiam).

¹³⁰ The New York Court of Appeals in fact found that the statements did constitute a pledge or promise to favor certain litigants, given the context in which they were made. *Id.* at 4 ("[C]andidates need not preface campaign statements with the phrase 'I promise' before their remarks may reasonably be interpreted by the public as a pledge . . ."). That court's expansion of the idea of pledges or promises may create problems in the context of statements made at a higher level of generality, however, as such a broad definition of "promise" could even encompass the kinds of speech protected in *White*.

same kind of bias as do statements regarding individual cases or litigants.¹³¹ The special focus of the courts on deciding particular cases or controversies makes the feeling of indebtedness fostered by contributions more troubling than in the context of ordinary politics.¹³² Much more than any pledge, promise, or commitment regarding general issues of law, contributions by lawyers or litigants threaten to undermine the process of application of law to facts that characterizes the judicial process. Preserving that process — and not a more ambitious total separation of law from politics — should be the focus of judicial speech regulation.

IV. CONCLUSION

The rule of law is in tension with the marketplace of ideas, as the availability of multiple judicial philosophies designed to constrain judicial discretion will ultimately frustrate any attempt to sever law from politics. As a result of this tension, prohibitions of pledges, promises, or commitments are both overbroad and underinclusive and cannot pass First Amendment scrutiny. A more viable alternative would prohibit pledges, promises, or commitments directed at individual parties or cases. While abandoning quixotic attempts to sever the link between judges' views of the law and the views of those who select them, this approach would help to ensure that judges apply the law to facts in a neutral and openminded fashion.¹³³ While the independence and integrity of judicial processes cannot be guaranteed through restrictions on judicial speech, this modest rule would prevent the most outrageous promises to disregard the usual process of adjudication.

¹³¹ See *Republican Party of Minn. v. White*, 536 U.S. 765, 790 (2002) (O'Connor, J., concurring) (“[R]elying on campaign donations may leave judges feeling indebted to certain parties or interest groups.”).

¹³² See *Tumey v. Ohio*, 273 U.S. 510, 532 (1927) (asking, for purposes of due process analysis, whether a judge's potential bias toward a particular party “would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict”).

¹³³ Although the proposed rule would not apply outside the context of judicial campaigns, it would target the particularly harmful appearance of a quid pro quo that emerges in the context of a campaign. See *White*, 536 U.S. at 820 (Ginsburg, J., dissenting).