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W. Bradley Wendel

Cornell Law School, bradley-wendel@lawschool.cornell.edu

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THE IDEOLOGY OF JUDGING AND THE FIRST AMENDMENT IN JUDICIAL ELECTION CAMPAIGNS

W. BRADLEY WENDEL*

I. THE FIRST AMENDMENT IN JUDICIAL CAMPAIGNS	78
A. <i>The Law of Judicial Campaign Speech</i>	78
B. <i>First Amendment Principles in Related Contexts</i>	90
1. <i>Speech in Campaigns for Non-Judicial Office</i>	90
2. <i>Advertising by Lawyers—Taste and Public Image</i>	93
3. <i>Contempt of Court—the Value of Respect for the</i> <i>Judiciary</i>	95
4. <i>Speech by Government Employees</i>	101
II. THE JURISPRUDENCE OF JUDGING	104
A. <i>The Crocodile Hunter: Democracy in the Judicial</i> <i>Selection Process . . . But Not Too Much!</i>	104
B. <i>The Democratic Process and the Rule of Law</i>	107
APPENDIX: THE <i>REPUBLICAN PARTY OF MINNESOTA V.</i> <i>WHITE</i> DECISION	118

This article makes two observations about the current scheme of regulation of speech in judicial election campaigns. First, many of the restrictions that courts routinely enforce are constitutionally indefensible. Second, the difference between the regulation of judicial campaign speech and the speech of candidates for other electoral offices reveals a deep unease among judges with the concept of an

* Assistant Professor of Law, Washington and Lee University. I am grateful to Teresa Collett for the invitation to participate in this conference, Ed Brewer, David McGowan, Angie Purdy, and Margaret Raymond for valuable discussion of these issues, and Rebecca Miles for outstanding research assistance. Finally, the panelists and audience members at the *Ethics of Judicial Selection* conference, too numerous to mention individually, clarified my thinking to a considerable extent.

The decision of the U.S. Supreme Court in *Republican Party of Minn. v. White*, 122 S. Ct. 2528 (2002), came a week before this article was scheduled to go to press, so it was impossible to integrate a discussion of that opinion into the analysis here, beyond a scattering of citations in the footnotes. I have prepared a brief Appendix to this article addressing the case. Because of its relatively modest scope, however, the decision does not alter the landscape of the law dramatically, and many of the criticisms expressed in this paper remain unaddressed by the Supreme Court.

elected judiciary. The first argument is easier to defend, although it seems more controversial in light of the general acceptance by courts of severe limitations on campaign speech by candidates for judicial office. In short, the law governing judicial elections is so markedly out of step with the First Amendment that it is a wonder that so many judges uphold restrictions on speech that they would never countenance in other contexts. The second observation will require more effort to sustain, for it challenges the image of judging and the conception of the rule of law that is pervasive among many judges and observers of the judicial system. The ideology of judging, as I call it, is that there is a fundamental distinction between “legal” and “political” decision-making and that judges may engage in only the former. As one study commission report on the state judiciary confidently declares, “Judges are not democratic representatives They represent the rule of law, not the will of the majority.”¹ If that is true, then having judicial elections makes no sense. The obvious fact that we do have judicial elections suggests that the ideology of judging is not universally accepted, or at least that the picture is more complicated than the slogans suggest.

It is a commonplace that the rule of law is threatened by judges who make decisions on the basis of particular kinds of interests or commitments—say, partisan political affiliation—instead of deciding cases according to legal principles.² We cannot prohibit judges, who after all are only human, from having moral and political beliefs, biases, passions, attachments, and commitments; there is nothing wrong with a judge being pro-life or pro-choice, a civil libertarian or a socialist, as long as she keeps those beliefs appropriately compartmentalized.³ For example, federal law provides a recusal

1. Paul D. Carrington & Barbara E. Reed, *Report of the Task Force on Selecting State Court Judges*, in UNCERTAIN JUSTICE: POLITICS AND AMERICA'S COURTS 77, 88 (Citizens for Independent Courts, an Initiative of the Constitutional Project, The Century Foundation Press, 2000) [hereinafter *State Courts Task Force Report*]. See also *Republican Party of Minn. v. White*, 122 S. Ct. 2528 (2002) (Ginsburg, J., dissenting) (“Judges perform a function fundamentally different from that of the people’s elected representatives. Legislative and executive officials act on behalf of the voters who placed them in office; judges represent the Law.”) (internal alterations omitted).

2. See Stephen Shapiro, *The Judiciary in the United States: A Search for Fairness, Independence, and Competence*, 14 GEO. J. LEGAL ETHICS 667, 667–68 (2001); Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059, 1059 (1996); J. Clark Kelso, *Time, Place, and Manner Restrictions on Extrajudicial Speech By Judges*, 28 LOY. L.A. L. REV. 851, 856 (1995); Lloyd B. Snyder, *The Constitutionality and Consequences of Restrictions on Campaign Speech By Candidates for Judicial Office*, 35 UCLA L. REV. 207, 214 (1987).

3. Cf. Felix Frankfurter, *Mr. Justice Brandeis*, 55 HARV. L. REV. 181, 183 (1941)

remedy for judicial bias⁴, but the statute has been interpreted to permit judges to hold opinions on controversial legal issues.⁵ At this point, however, the law of judicial speech takes a bizarre turn. The ABA's Code of Judicial Conduct, along with a multitude of court decisions interpreting state versions of the Code, take the position that even though we cannot debar judges from having controversial political viewpoints, we should prevent them from *talking about* their beliefs. This approach flies in the face of firmly entrenched constitutional principles that limit the scope of permissible restrictions that may be placed on expression by government officials, political candidates, professional observers of the political process such as the news media, and interested members of the public. It is an affront to the value of transparency in government institutions, which has been recognized in so many Supreme Court decisions, such as the *Pentagon Papers* case.⁶ And finally, it suggests a response—mystification and propagation of a Noble Lie—that is contrary to the democratic values that are served by judicial elections.

The claim that courts often get the law wrong is not, by itself, terribly interesting. The question worth asking is *why* the ideology of judging has been so persistent in the face of so much First Amendment jurisprudence pointing in the other direction. To sum up the argument of the second section, the revulsion courts feel toward open, unfettered campaign speech can be traced to their deeply rooted fear that there may be no way to define objectivity in judicial decision-making. Judges suppress speech that seems too “political” because they are worried about becoming political actors themselves (collectively speaking, of course). To put it another way, if it were possible to construct an impersonal procedure for rendering clearly correct legal judgments, the identity, beliefs, commitments, and biases of the decision maker would be of no moment; one could measure the actor's judgments against the standard of correctness, and sanction deviations from the ideal.⁷ Because judging by its very nature

(“A man so immersed in affairs as Louis D. Brandeis must have closed the door on many of his interests when he went on the bench.”).

4. 28 U.S.C. § 455.

5. See, e.g., *Laird v. Tatum*, 409 U.S. 824, 830–35 (1972) (memorandum of Rehnquist, J.); *Rosquist v. Soo Line RR*, 692 F.2d 1107, 1112 (7th Cir. 1982); *United States v. Conforte*, 624 F.2d 869, 882 (9th Cir. 1980).

6. *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971). See also *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587 (1980) (Brennan, J. concurring); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838 (1978); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 554–55 (1976).

7. This argument has been influenced substantially by ANDREW STARK, *CONFLICTS*

inevitably requires the exercise of discretion, however, a regulatory system cannot determine *ex ante* what the right result would be in every case. For this reason, it is impossible to identify specific cases of deviations from the ideal, beyond suspecting that there might be some. Courts appear frightened of judges with strong interests and attachments, who starkly pose the threat of deciding cases according to their commitments and beliefs, instead of following the law, because they worry that in the absence of clear standards of correctness in judicial decision-making it will be impossible to identify the “bad” judges after the fact.

The paradigmatic case of judicial-campaign speech that brings the threat of punishment is something like a candidate addressing a rally of pro-life voters, pledging loyalty to their cause.⁸ If that candidate becomes a judge, observers wonder about the legitimacy of his decisions. Maybe all the cases that come before him, involving abortion issues, are decided correctly under the law, at least within the range of reasonable discretionary decisions. Or, maybe they are not. The problem is that we cannot tell whether the decisions are correct or not in all cases because we do not have an objective “yardstick” to lay alongside the judge’s decisions. (Again, if we did have such a yardstick it would not matter who the judge was or what his beliefs were; we could choose judges by lottery, as long as they had a basic level of competence with the objective framework of law.) Because a regulatory system cannot accurately identify deviations from the correct answer after the candidate takes the bench, however, it must respond much earlier in time, and visit sanctions upon speech or conduct that suggests a biased course of decisions in the future.⁹ Speech suggestive of political commitment thus becomes a proxy for the real underlying problem of biased decision-making, which is rendered unobservable by the discretionary, creative, and relatively unconstrained nature of the task of judging.

Naturally, a liberal democracy cannot prohibit *having* political beliefs and acting on them in the appropriate case; it would be grotesque to expect human judges to act like judging-machines. Because judging is inherently a discretionary act—that is, because legal decisions by their very nature cannot be simulated with computer algorithms or econometric models—we must expect that human decision makers will be influenced by their background beliefs

OF INTEREST IN AMERICAN PUBLIC LIFE (2000).

8. See *In re Sanders*, 955 P.2d 369, 375 & n.6 (Wash. 1998).

9. See STARK, *supra* note 7, at 121–22.

and interests.¹⁰ (A deep philosophical question, which I must put aside here, is whether any kind of judgment is possible without a background of experience against which the judgment can be made.¹¹) Judging is fundamentally a normative activity, and of course people disagree about normative issues. Some judges will tend to defer to electoral majorities; others are quicker to invalidate legislative action on constitutional grounds. In the context of a particular area—say, torts—some judges may favor the expansion of the rights of consumers to recover for injuries caused by defective products, while others are stricter in their adherence to traditional common-law requirements of showing fault and causation. In litigation, judges vary in their receptiveness toward alternative dispute resolution, settlement, party-controlled discovery, and taking cases away from the jury. This diversity is part of the familiar landscape of the American legal system.

Although judges' divergence on normative issues shows up operationally as *legal* dispositions, the tendency to decide cases in a certain way has its roots in a set of political assumptions. For example, a judge's position on deference to legislative majorities depends a great deal on whether she regards judges as anti-democratic mandarins or as guardians of individual rights against the tyranny of the majority. We can even call her position a "bias" in one direction or another, but that does not mean that it is a *harmful* bias, in light of the role of judges in a system that permits reasonable disagreement. No one suggests that judges should not take sides in a debate like this and, significantly, no one considers a judicial decision illegitimate merely because it is based in part on a contestable principle of political morality, such as the appropriate allocation of power between the legislative and judicial branches. If such a decision were suspect, there would be no such thing as dissenting and concurring opinions. In short, there is nothing wrong with reasonable disagreement among judges, provided it is based on a plausible

10. Snyder, *supra* note 2, at 235–36. In discussing the notion that Judges' personal opinions and attitudes influence their application of the law, Snyder notes that "[j]udges are not fungible commodities. Any competent criminal attorney practicing in any court in the country knows which judges are hard on criminal defendants and which are not." *Id.* at 236 (citations omitted). See also *Laird v. Tatum*, 409 U.S. 824, 834 (1972) (memorandum of Rehnquist, J.) ("The Term of this Court just past bears eloquent witness to the fact that the Justices of this Court, each seeking to resolve close and difficult questions of constitutional interpretation, do not reach identical results. The differences must be at least in some part due to differing jurisprudential or philosophical propensities.").

11. See HANS-GEORG GADAMER, *TRUTH AND METHOD* 99 (Joel Weinsheimer & Donald G. Marshall, trans., 2d rev'd ed., Crossroad Publ'g Corp. 1989) (1960).

interpretation of legal texts, in light of background values that are relevant to legal decision-making.¹²

I do not mean to deny that some biases, commitments, interests, and associations of judges are harmful to the maintenance of a fair and impartial judicial system. Of course it would be a terrible thing if a judge decided to strike down a statute because of a bribe he had received from some industry that would be harmed economically by the statute. But the set of harmful or pernicious biases is much smaller than the set of taboo topics in judicial elections. The real underlying problem is having some kind of “tainted” mental state, in which a judge would be unable to set aside her preexisting commitments to render a legally defensible decision.¹³ The wrong turn, therefore, comes for perfectly understandable reasons. Because the regulatory structure of the judicial system cannot ascertain and punish tainted states of mind, it does what seems to be the next best thing and punishes speech that could potentially be evidence of a tainted state of mind. Although this punishment-by-proxy is understandable, it is flatly ruled out by the First Amendment. This tension pervades the judicial speech cases I will consider in the next section.

I. THE FIRST AMENDMENT IN JUDICIAL CAMPAIGNS

A. *The Law of Judicial Campaign Speech*

I do not wish to discuss the structure of the law governing judges in detail.¹⁴ For the purposes of this analysis it is sufficient to observe

12. By “background values” I mean simply the kinds of policy reasons that are offered by lawyers and judges as a justification for an interpretation of a contested legal issue. For example, if a judge is deciding whether to impose a tort duty to protect against a particular kind of accident, she may take into account a familiar range of principles of political morality, such as whether the cost of preventing the accident is less than the expected loss, the deterrent effect of liability, the social benefit of the activity in question, corrective-justice considerations, expressive effects (such as refusing to dilute responsibility for an egregious act by spreading blame to less culpable actors), and so on. Other reasons, such as whether the judge likes one of the litigants, are obviously ruled out. The theorist who has most deeply explored the jurisprudential implications of non-positivistic legal values is Ronald Dworkin, in a series of works. *See, e.g.*, Ronald Dworkin, *TAKING RIGHTS SERIOUSLY* (1977); Ronald Dworkin, *A MATTER OF PRINCIPLE* (1985).

13. STARK, *supra* note 7, at 22–25. Stark argues that the inability to prevent politicians from developing interests that might give rise to a conflict, is why conflict-of-interest law focuses on preventing conduct that might give rise to the conflict of interest, or “tainted” mental state, in the first place. *Id.* at 23.

14. An excellent reference work is JEFFREY M. SHAMAN ET AL., *JUDICIAL CONDUCT AND ETHICS* (2d ed. 2000).

that state judicial conduct commissions, exercising delegated power from the state's highest court, impose numerous regulations that touch on the expressive liberties of judges. The overwhelming majority of jurisdictions have adopted rules based on one of two versions of the ABA's Model Code of Judicial Conduct.¹⁵ The ABA Code regulates speech by candidates for judicial office as well as sitting judges,¹⁶ and impose fairly stringent restrictions on judicial candidates.¹⁷ Some of the rules governing campaign speech are narrowly focused, such as the prohibition on making specific pledges of conduct other than promising to serve faithfully and impartially,¹⁸ "mak[ing] statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court,"¹⁹ or making knowingly false statements of fact.²⁰ Canon seven of the 1972 version, still in effect in many states, forbids judges and candidates for judicial office from stating their views on "disputed legal or political issues."²¹ Other rules are remarkably

15. For citations to state-specific versions of the rules, see *id.* at § 1.02 at 4–5. The ABA MODEL CODE OF JUDICIAL CONDUCT (1990) [hereinafter ABA CODE (1990)] is structured around broad "Canons" of ethics, with a series of more specific rules following. Somewhat oddly, the rules are customarily cited as "Canons," for example "Canon 3C(1)," a practice I will follow here.

16. ABA CODE Canon 5A(1), Canon 5E (1990). Canon 5A(1) provides that [e]xcept as authorized in Sections 5B(2), 5C(1) and 5C(3), a judge or candidate for election or appointment to judicial office shall not:

- (a) act as a leader or hold an office in a political organization;
- (b) publicly endorse or publicly oppose another candidate for public office;
- (c) make speeches on behalf of a political organization;
- (d) attend political gatherings; or
- (e) solicit funds for, pay an assessment to or make a contribution to a political organization or candidate, or purchase tickets for political party dinners or other functions.

ABA CODE Canon 5A(1) (1990).

Canon 5E further makes it clear that Canon 5 "generally applies to all incumbent judges and judicial candidates." ABA CODE Canon 5E (1990).

17. *Id.* Canon 5A(1)(a–e) (1990).

18. *Id.* Canon 5A(3)(d)(i) (1990).

19. *Id.* Canon 5A(3)(d)(ii) (1990).

20. *Id.* Canon 5A(3)(d)(iii) (1990).

21. ABA MODEL CODE OF JUDICIAL CONDUCT Canon 7B(1)(a) (1972) [hereinafter ABA CODE (1972)]. Canon 7 was superseded by Canon 5 in the 1990 version of the Code. See VIVI DILWEG, ET AL., MODERN JUDICIAL ETHICS (BASED ON THE MODEL CODE OF JUDICIAL CONDUCT (1990)) 90 (1992). Canon 7 reads: "A Judge Should Refrain from Political Activity Inappropriate to His Judicial Office." ABA CODE Canon 7 (1972). This lengthy Canon proscribed virtually all political activity except that "on behalf of measures to improve the law, the legal system, or the administration of justice." *Id.* at A(1)(4). Not surprisingly, Canon 7 or a similar provision has been the focus of much of the constitutional litigation over restrictions on speech by judges. See, e.g., Buckley v. Ill. Judicial Inquiry Bd., 997 F.2d 224, 225, 230–31 (7th Cir. 1993) (holding unconstitutional an

broad, such as the requirement that candidates act in a way that will “maintain the dignity appropriate to judicial office.”²²

All of these provisions are content-based restrictions on speech and, as such, would ordinarily be *prima facie* unconstitutional.²³ A content-based regulation is permissible only where it serves a compelling government interest and is narrowly tailored to accomplish that purpose.²⁴ Unfortunately, courts are not as consistent (or as honest) as they ought to be in analyzing whether a given regulation is content-neutral. Courts seem to have a tendency to label a restriction “neutral” when they have already decided, on other grounds, that the speech is of relatively low value.²⁵ This criticism is

Illinois Supreme Court rule that prohibited candidates running for judicial office from “announc[ing] his views on [a] disputed legal or political issue” unless to “improve the law, the legal system, or the administration of justice”); *Stretton v. Disciplinary Bd.*, 944 F.2d 137, 141, 144 (3d Cir. 1991) (upholding Canon 7 of the Pennsylvania Code of Judicial Conduct that prohibited a candidate for judicial office from “announc[ing] his views on disputed legal or political issues”); *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953, 955, 956 (Ky. 1991) (holding that Canon 7 of Kentucky Code of Judicial Conduct that prohibited a candidate for judicial office from “announc[ing] his views on disputed legal or political issues” unnecessarily violated judicial candidates’ First Amendment rights); *Republican Party of Minn. v. Kelly*, 247 F.3d 854 (8th Cir. 2001), *rev’d sub nom.* *Republican Party of Minn. v. White*, 122 S. Ct. 2528 (2002).

22. ABA CODE Canon 5A(3)(a) (1990).

23. Dozens of Supreme Court cases recite this standard, often along the way to holding that the regulation at issue is content-neutral. *See, e.g.*, *Hill v. Colorado*, 530 U.S. 703, 722–23 (2000) (finding Colorado statute content-neutral because it placed no restrictions on viewpoints or subject matter); *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 762–64, 772–73 (1994) (injunction imposing limited noise restrictions on abortion protesters was not content or viewpoint based); *Ward v. Rock Against Racism*, 491 U.S. 781, 791–76 (1989) (holding city ordinance requiring performers at city bandshell to use city provided sound equipment and technician to be content-neutral); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 295 (1984) (ruling prohibition against camping in Lafayette Park and the Mall in Washington D.C. satisfies content-neutral requirement because it is not applied in disagreement with the message presented); *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 803–05 (1984) (finding general principle prohibiting government from regulating speech in ways that favor some views at the expense of others is not applicable to ordinance prohibiting the posting of signs on public property because of no hint of bias or censorship exists). In a few cases the Court has used the content-neutrality standard as a basis for invalidating a restriction on speech. *See, e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380–81 (1992) (holding ordinance proscribing conduct that “one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender” facially invalid because it prohibits otherwise permitted speech); *Texas v. Johnson*, 491 U.S. 397, 417–18 (1989) (ruling that First Amendment prohibits governments from limiting the set of views for which certain designated symbols may be used).

24. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 624 (1994); *Simon & Schuster, Inc. v. N.Y. Crime Victims Protection Bd.*, 502 U.S. 105, 106 (1991).

25. *See, e.g.*, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 570–71 (1991) (holding that ordinance prohibits public nudity, not nude dancing); *City of Renton v. Playtime Theatres*,

theoretically interesting as applied in contexts like pornography regulation,²⁶ but in many cases involving campaign speech by attorneys, the non-neutrality of the regulation is patently obvious. On the scope of limitations the state may enforce on lawyers' speech, the Supreme Court of Kansas said that:

Upon admission to the bar of this state, attorneys assume certain duties as officers of the court. Among the duties imposed upon attorneys is the duty to maintain the respect due to the courts of justice and to judicial officers Disciplinary action can be exercised not only for the purpose of enforcing legal rights but for the additional purpose of enforcing honorable conduct on the part of the court's own officers.²⁷

In Kansas, therefore, a lawyer may praise a sitting judge extravagantly as a reincarnation of Solon, but may not make any suggestions that could be construed as disrespectful. This restriction is not only content-based, in that it reaches only statements about a particular subject (the wisdom of the judiciary), but it also discriminates on the basis of *viewpoint*, which places it in an even more suspect category. Viewpoint-based regulations, in which the state forces citizens to choose up sides and utter only the party line, are heavily disfavored under the constitution, which stresses that government should not have the power to impose orthodoxies of belief.²⁸ If citizens cannot be forbidden to make fun of the military in satirical skits,²⁹ and states cannot deny the Ku Klux Klan access to their "adopt-a-highway" program,³⁰ why should lawyers be prohibited from criticizing judges as part of a political campaign?

475 U.S. 41, 48–49 (1986) (finding that ordinance regulating location of adult theatres content-neutral because it was justified by secondary effects on community); *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 747 (1978) (finding radio broadcast contained "patently offensive sexual and excretory language"); *Young v. Am. Mini Theatres, Inc.* 427 U.S. 50, 70 (1976) (finding that society has a lesser interest in erotic materials with "arguably" artistic value); *United States v. O'Brien*, 391 U.S. 367 (1968) (not accepting view that destruction of draft registration certificate can be labeled "speech" merely because "the person engaging in the conduct intends thereby to express an idea").

26. *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 331–32 (7th Cir. 1985) (fact that pornography may be considered "low value" speech could not save ordinance from overbreadth).

27. *In re Johnson*, 729 P.2d 1175, 1179 (Kan. 1986).

28. See *Hill v. Colorado*, 530 U.S. 703, 735 (2000) (Souter, J., concurring); cf. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

29. *Schacht v. United States*, 398 U.S. 58, 63 (1970).

30. *Cuffley v. Mickes*, 208 F.3d 702, 709 (8th Cir. 2000).

The answer cannot be found in the oft-repeated cliché that lawyers are “officers of the court.”³¹ For one thing, the Supreme Court has recognized that lawyers are officers of *the court*, not of the government, a distinction that underscores the independence of lawyers from the state.³² Lawyers indeed frequently challenge the exercise of state power, rather than facilitating it. As a result, they cannot be excluded from the practice of law for having views that are contrary to the government’s, or at least for refusing to answer questions about those beliefs.³³ Nor can they be compelled, as a condition of belonging to a state bar association, to contribute to political causes with which they disagree.³⁴ Although *Baird* and *Keller* stand for the proposition that lawyers do not give up their expressive liberties in exchange for a license to practice law, the Supreme Court caused much mischief in this area by suggesting, in *Gentile v. State Bar of Nevada*, that the situation is quite the opposite.³⁵ The Court in that case was badly fractured, but the separate opinions were littered with dicta that have been seized upon by other courts to justify significant restrictions on attorney’s speech.³⁶ For example, Justice Rehnquist quoted Justice Cardozo’s statement that “[m]embership in the bar is a privilege burdened with conditions,” ignoring *Baird* and *Keller*.³⁷ He emphasized that even rights as fundamental as those guaranteed by the First Amendment may be subordinated to other interests that arise in litigation,³⁸ because the lawyer is an officer of the court, “an

31. See, e.g., *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1056 (1991); *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 601 n.27 (1976) (Brennan, J., concurring); *Cohen v. Hurley*, 366 U.S. 117, 124 (1961); *In re Sawyer*, 360 U.S. 622, 668 (1959) (Frankfurter, J., dissenting); *Howell v. State Bar of Tex.*, 843 F.2d 205, 207 (5th Cir. 1988); *Hirschkop v. Snead*, 594 F.2d 356, 366 (4th Cir. 1979); *Smith v. Johnston*, 711 N.E.2d 1259, 1264 (Ind. 1999) (stating that a lawyer, as officer of the court, cannot secure default judgment without first giving notice to adversary); *Gum v. Dudley*, 505 S.E.2d 391, 401 (W. Va. 1997) (stating that a lawyer, as an officer of the court, has a duty to inform the court of a settlement agreement, notwithstanding the duty of confidentiality owed to client); *In re Williams*, 414 N.W.2d 394, 397 (Minn. 1987); *Johnson*, 729 P.2d at 1179; *Hallinan v. Comm. of Bar Exam’rs*, 421 P.2d 76, 87 (Cal. 1966).

32. See, e.g., *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 378 (1866).

33. *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971).

34. *Keller v. State Bar of Arizona*, 496 U.S. 1 (1990).

35. 501 U.S. 1030 (1991).

36. See, e.g., *In re Palmisano*, 70 F.3d 483, 487 (7th Cir. 1995); *In re Swan*, 833 F. Supp. 794, 799-800 (C.D. Cal. 1993), rev’d sub nom, *U.S. v. Wunsch*, 84 F.3d 1110 (9th Cir. 1996); *In re Converse*, 602 N.W.2d 500 (Neb. 1999).

37. *Gentile*, 501 U.S. at 1066 (quoting *In re Rouss*, 116 N.E. 782, 783 (N.Y. 1917)).

38. See *id.* at 1073 (citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37 (1984) (holding that courts may issue protective orders limiting the dissemination of information obtained in discovery). This citation is inapposite, because the confidential information divulged by the parties in *Rhinehart* was obtained by the lawyer only pursuant to the

intimate and trusted and essential part of the machinery of justice.”³⁹ Justice Kennedy, on the other hand, suggested that the lawyer’s role as an officer of the court entailed greater expressive freedom, rather than less, because of the public’s right to be informed on how the criminal justice system works.⁴⁰

Although Justice Kennedy’s argument is more persuasive in light of the role of the lawyer in an open society, Justice Rehnquist’s opinion nevertheless stated the decision of the Court on the point that is relevant here—namely, the extent to which the First Amendment protects a lawyer’s speech in connection with a pending case.⁴¹ On that question, the Court held that a state may regulate speech by lawyers that is related to an actual ongoing case if it can show a substantial likelihood of material prejudice to the proceeding.⁴² Only by reading *Gentile* narrowly is it possible to avoid an irresolvable conflict with other cases such as *Baird*, *Keller*, and *In re Snyder*,⁴³ in which the Court sought to preserve the expressive liberties of citizens who become lawyers, and with the broader rejection by the Court of the idea that the government may demand that individuals surrender rights in exchange for government benefits.⁴⁴ As I will argue below, the constitutional analysis of cases involving judicial-campaign speech must be similarly sensitive to the reasoning of related First Amendment cases.

Another way in which courts frequently go astray in their analyses of judicial speech cases is by uncritically accepting the state’s proffered justification for regulating the expression at issue.⁴⁵ For

court’s power to order discovery; it is not information to which the lawyer (and therefore the newspaper) would otherwise have been entitled. *Rhinehart*, 467 U.S. at 34, 37.

39. *Gentile*, 501 U.S. at 1072 (quoting *In re Sawyer*, 360 U.S. 622, 668 (1959) (Frankfurter, J., dissenting)).

40. *See id.* at 1035 (Kennedy, J., opinion of the Court) (citing *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838–39 (1978); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980)).

41. *Id.* at 1074 (Rehnquist, C.J., opinion of the Court).

42. *Id.* at 1076 (Rehnquist, C.J., opinion of the Court); This standard is now incorporated into Rule 3.6(a) of the ABA Model Rules of Professional Conduct. MODEL RULES OF PROF’L CONDUCT R. 3.6(a) (1998).

43. *In re Snyder*, 472 U.S. 634, 646–47 (1985).

44. *See generally* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989); William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1446–47 (1968).

45. *See, e.g.,* *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 864 (8th Cir. 2001), *rev’d sub nom. Republican Party of Minn. v. White*, 122 S. Ct. 2528 (2002).

When the case went to the Supreme Court, however, the argument from underinclusiveness fared much better. Because the prohibition on candidates announcing their beliefs on contested political issues did not reach a substantial universe of public

example, one encounters repeated incantatory references to the “public’s confidence in the integrity of the judiciary,” as if a few critical comments by candidates will have a significant effect on the public’s perception of, and confidence in, the judicial branch.⁴⁶ Even courts which find some constitutional infirmity in some aspect of the state’s regulatory scheme generally state that they find the proffered interest in preserving the integrity of the judiciary to be a compelling one.⁴⁷ Although one must concede that the judiciary has a strong interest in its decisions appearing legitimate (it does not have its own army, after all⁴⁸), this interest does not necessarily entail a conclusion that putatively disrespectful speech ought to be suppressed. (In other words, the restriction on speech may fail the “narrow tailoring” prong of the First Amendment test for content-based regulations.) The conclusion that speech should be limited may be incorrect for empirical or normative reasons. Empirically, it may not be the case that campaign speech has the effect of diminishing public confidence in the judiciary. Normatively, even if speech does have this deleterious effect, there may be overriding reasons for permitting it.

On the first empirical point, it seems clear that all of the campaign speech in the world cannot possibly attract the attention of the occasional bombshell Supreme Court decision, such as *Brown v. Board of Education*,⁴⁹ *Roe v. Wade*,⁵⁰ *Boy Scouts of America v. Dale*,⁵¹ or *Bush v. Gore*,⁵² which suggests (rightly or wrongly) to the public that judges may not always be guided solely by the constitution and precedent. This kind of criticism is also leveled at the judiciary constantly by academics, pundits, legal affairs commentators, and of course other judges, in dissenting opinions. Justice Scalia, to take only

comments made by incumbent judges and lawyers who have not been officially declared candidates, the Court concluded that to believe in the state’s interest in ensuring the open-mindedness and fairness of judges was “a challenge to the credulous.” *Republican Party of Minn. v. White*, 122 S. Ct. 2528 (2002) [Slip op. At 14.] (2002).

46. See, e.g., *id* at 867; *Stretton v. Disciplinary Bd.*, 944 F.2d 137, 142 (3d Cir. 1991); *In re Hill*, 8 S.W.3d 578, 583 (Mo. 2000); *In re Broadbelt*, 683 A.2d 543, 548 (N.J. 1996).

47. See, e.g., *Kelly*, 247 F.3d at 864; *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 228 (7th Cir. 1993); *Morial v. Judicial Comm’n of the State of La.*, 565 F.2d 295, 302 (5th Cir. 1977); *Weaver v. Bonner*, 114 F. Supp. 2d 1337, 1342 (N.D. Ga. 2000); *In re Chmura*, 608 N.W.2d 31, 40 (Mich. 2000); *In re Kaiser*, 759 P.2d 392, 399 (Wash. 1988).

48. As Andrew Jackson is reputed to have said, in response to a decision he disagreed with, “John Marshall has made his decision; now let him enforce it.” Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics and Morality*, 21 STAN. L. REV. 500, 525 (1969) (quoting statement attributed to Andrew Jackson by the majority of historians).

49. 347 U.S. 483 (1954).

50. 410 U.S. 113 (1973).

51. 530 U.S. 640 (2000).

52. 531 U.S. 98 (2000).

the most obvious example, sees no reason not to suggest quite publicly that his colleagues are acting in an unprincipled manner.⁵³ Notably, the norm among judges has not always been that dissents are a free-fire zone, in which judges criticize one another openly. As Robert Post has shown, judges formerly took a much more restrained attitude toward public criticism, working hard to achieve unanimity and consensus, at least in their published opinions.⁵⁴ Significantly, this effort was driven by the same kinds of concerns that animate today's proponents of muzzling campaign speech, such as the fear that open dissension would jeopardize the perception of legitimacy enjoyed by courts. Because the practice among judges of refraining from open criticism has changed dramatically and the sky has not fallen, we can conclude that the connection between open criticism of judges and the public perception of the legitimacy of the judiciary is not as tight as is often supposed.⁵⁵

53. See, e.g., *J.E.B. v. Alabama*, 511 U.S. 127, 157 (1994) (Scalia, J., dissenting); *Lee v. Weisman*, 505 U.S. 577, 631 (1992) (Scalia, J., dissenting); *Georgia v. McCollum*, 505 U.S. 42, 69–70 (1992) (Scalia, J., dissenting). There are obviously many examples from other courts. One in particular is the concurring opinion in *Thing v. La Chusa*, 771 P.2d 814 (Cal. 1989) which explicitly refers to the effect that the majority's "arbitrary" rule will have on the integrity of the judiciary. *Id.* at 831 (Kaufman, J., concurring).

54. Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decision making in the Taft Court*, 85 MINN. L. REV. 1267 (2001).

55. The majority of a federal circuit court panel in a recent challenge to state regulations on judicial speech was unimpressed with the plaintiff's argument (picked up by the dissent) for underinclusiveness, that is, the challenger's observation that conduct other than campaign speech posed a threat, perhaps a greater threat, to the public's confidence in the judiciary. See *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 871 (8th Cir. 2001), *rev'd sub nom.* *Republican Party of Minn. v. White*, 122 S. Ct. 2528 (2002). The majority said that arguments from underinclusiveness are generally reducible either to demonstrations that a regulation discriminates on the basis of content, which the court conceded the Minnesota rules did, or a challenge to the evidence put forward by the government in support of the rule. The court then reviewed the state's evidence to "establish the empirical reality of the problems it purports to address." *Id.* The "empirical reality" of this problem, however, seems to be founded only on the conclusory assertions of judges, legislators, editorial writers, and some commentators that political speech by judicial candidates threatens the public's perception of the integrity of the judiciary. See *id.* at 868–71. This kind of showing will not do, particularly if a reviewing court is inclined to be at all skeptical of the state's proffered justification for restricting speech. By way of comparison, consider the U.S. Supreme Court's invalidation of portions of the Violence Against Women Act on the ground that the harm to be remedied by the statute had an insufficient nexus with interstate commerce to be justified as an exercise of Congress's power under the Commerce Clause. *United States v. Morrison*, 529 U.S. 598, 613 (2000). Finally, it is worth noting the utter worthlessness of the "widespread and longstanding consensus among members of the bench and bar about the necessity of restrictions on campaign speech that conveys a judicial candidate's propensity to decide cases in a particular way." *Kelly*, 247 F.3d at 879. There was a similar settled consensus about the necessity of restricting advertising by lawyers and the Supreme Court gave no weight at all

Secondly, the statements at issue in many of the cases disciplining judges and resulting in constitutional challenges are relatively innocuous from the standpoint of increasing public distrust of judges. The judge in *In re Kaiser*⁵⁶ announced that he was a “tough nonsense judge” and was “tough on drunk driving.”⁵⁷ As an incumbent, he had no doubt accumulated a public record of rulings on drunk driving cases that would have been no more or less probative of his political beliefs than his statements to the same effect. Another candidate described himself as a pro-life “Republican from the conservative side”⁵⁸ (surely not a common personality among sitting judges). The point is not whether these comments reveal political commitments; the issue is rather whether they would do anything to change the public’s opinion of judges. In other words, if the public already thinks that judges have points of view on disputed political issues, and decide at least some cases at least in part on the basis of those beliefs, then the statements by the candidates in these cases do not affect the status quo. Is anyone surprised when Justice Scalia attends a prayer breakfast sponsored by the Christian Legal Society and announces that he regrets the unfair scorn that he perceives religious believers suffer in the public domain?⁵⁹ Courts that uphold restrictions on these sorts of comments seem to assume that the public believes in a mechanical, formalistic conception of judicial decisionmaking that, of course, no judge actually endorses.

From the comfortable perspective of the armchair, I would be willing to hazard a guess that most American voters are relatively savvy about the process of judging. They would probably not be surprised that judges have opinions on a wide range of issues such as abortion, the proper scope of government, the importance of individual rights, how health care ought to be provided, and so on. Voters probably imagine that in most run-of-the-mill cases there is not much room for discretionary judgments, so most judges would reach

to this position in its decisions striking down state bans on advertising. *See, e.g., Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

56. 759 P.2d 392 (Wash. 1988).

57. *Id.* at 396. *See also In re Sanders*, 955 P.2d 369, 371 (Wash. 1998) (statement to a pro-life rally by judicial candidate who said “[n]othing is, nor should be, more fundamental to our legal system than the preservation or protection of innocent human life”).

58. *See* Amy M. Craig, Comment, *The Burial of an Impartial Judicial System: The Lifting of Restrictions on Judicial Candidate Speech in North Carolina*, 33 WAKE FOREST L. REV. 413, 413 (1998). *See also Deters v. Judicial Retirement and Removal Comm’n*, 873 S.W.2d 200, 201 (Ky. 1994).

59. Steven Lubet, *Judicial Independence and Independent Judges*, 25 HOFSTRA L. REV. 745, 748 (1997).

the same result. But in cases with relatively little precedent to go on, or legal rules that are fairly open-textured, judges may be influenced to some extent by their philosophical predispositions. Voters may even be gratified by the knowledge that judges are people too, who have a genuinely humanistic understanding of the effect of judicial decisions on the litigants.⁶⁰ In any event, as noted above, the image voters have of the way judges decide cases is probably much more influenced by actual cases, such as *Bush v. Gore* or any one of the high-profile criminal trials (of O.J. Simpson, the Menendez Brothers, the English nanny Louise Woodward, some shirttail member of the Kennedy family), than by campaign speech in local judicial races.⁶¹ The contrary position, that judges must be extraordinarily careful lest their comments about disputed legal and political issues erode the public's confidence in the judiciary, is far too broad. It is, as Roger Cramton recognizes, too close to a default rule that judges should never speak about matters of public concern, notwithstanding their experience and knowledge about the administration of justice, which would be a valuable contribution to public debate.⁶²

To be clear, let me emphasize that I do not regard misleading, inflammatory, distorted, and intemperate statements in election campaigns to be a positive good. In fact, I would like nothing more than to see high-minded discourse replace the pandering, fearmongering, and even lying that characterizes so many elections. On the other hand, no one would claim that any of the following has any intrinsic value:

- Publicly stating that Jerry Falwell's mother's first sexual experience was in an outhouse.⁶³

60. Jackson R. Sharman III, *The Listener, the Separation of Powers and the Ethics of Judicial Speech*, in *ETHICS IN THE COURTS: POLICING BEHAVIOR IN THE FEDERAL JUDICIARY* 19 (National Legal Center for the Public Interest 1990). The (elected) Chief Justice of the Wisconsin Supreme Court notes that "[j]udges who are running for election take the time to ride with law enforcement officers, make rounds with social workers and doctors, visit schools and factories, and lunch with the fork-and-knife clubs and bar associations," in order to develop an understanding of how the legal system affects its users. Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 977 (2001).

61. Studies have shown that the public's image of lawyers is not significantly influenced by lawyer advertising. See, e.g., Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805, 816 (1998).

62. Panel Discussion, *Professional Responsibility: Judges and the Press*, 2 ENGAGE 112, 117 (2001).

63. *Hustler Magazine v. Falwell*, 485 U.S. 46, 48 (1988).

- Uttering profane insults to police officers.⁶⁴
- Calling politicians or public figures fascists.⁶⁵
- Burning the American flag in front of veterans.⁶⁶
- Waving around pictures of bloody fetuses and screaming “baby killer” at physicians who perform abortions.⁶⁷
- Burning a cross in the front yard of an African-American family.⁶⁸
- Allowing the Ku Klux Klan to “adopt” a stretch of highway and put up a sign to that effect, at taxpayer expense.⁶⁹
- Neo-Nazis demonstrating in a town populated by a large number of survivors of the Holocaust.⁷⁰

It is not exactly going out on a limb to criticize the speakers in each of these cases, in moral terms, for causing a great deal of harm with little, if any, corresponding benefit.

At the same time, however, one must admit that these cases reveal a pattern of protecting a great deal of expression from government regulation, even where the harm from allowing the speech is great. This is the normative argument for protecting campaign speech. Courts refuse to allow restrictions on some speech that may or may not be intrinsically valuable for a number of familiar reasons: (1) standards of civility, temperance, or politeness easily become weapons of repression, which the government can use to suppress unpopular ideas;⁷¹ (2) we distrust the government’s power, so we don’t want it defining “good” and “bad” political viewpoints;⁷² (3)

64. *Lewis v. New Orleans*, 415 U.S. 130, 131 (1974); *Hess v. Indiana*, 414 U.S. 105, 107 (1973) (“[w]e’ll take the fucking street later”); *Gooding v. Wilson*, 405 U.S. 518, 519–20 n.1 (1972).

65. *Buckley v. Littell*, 539 F.2d 882, 893 (2d Cir. 1976) (the libel action resulted from a book calling William F. Buckley a fascist).

66. *Texas v. Johnson*, 491 U.S. 397, 399 (1989).

67. *Schenck v. Pro-Choice Network of W.N.Y.*, 519 U.S. 357, 362–63 (1997).

68. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 379 (1992).

69. *Cuffley v. Mickes*, 208 F.3d 702, 705 (8th Cir. 2000).

70. *Collin v. Smith*, 578 F.2d 1197, 1199 (7th Cir. 1978).

71. *Cohen v. California*, 403 U.S. 15, 24–25 (1971) (stating that “verbal tumult, discord, and even offensive utterance . . . [are] necessary side effects of . . . the process of open debate”). See also the licensing cases, which hold statutes unconstitutional that give government officials unbridled discretion to grant or deny parade permits. See, e.g., *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 137 (1992); *Cox v. Louisiana*, 379 U.S. 536, 56–57 (1965). Unless the official’s discretion is channeled through specific standards, the power to deny a license “creates an impermissible risk of suppression of ideas.” *Nationalist Movement*, 505 U.S. at 129.

72. See *R.A.V.*, at 505 U.S. at 390; *Lewis v. Wilson*, 253 F.3d 1077, 1082 (8th Cir. 2001) (noting that the government cannot restrict license plates even if against public policy); *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323, 330 (7th Cir. 1985) (noting insidious speech is protected because otherwise the government would control all the

because of the imprecision and manipulability of language, we fear chilling legitimate speech through regulations directed at speech for which the case for suppression is easier;⁷³ (4) we think it's a good thing to have a vigorous, open public sphere of discourse, where people are not afraid to try out new ideas, even though they may be shocking to majority sentiments;⁷⁴ (5) "[s]unlight is said to be the best of disinfectants"⁷⁵—only by bringing hateful and offensive ideas out into the open will we be able to understand, and therefore combat, them;⁷⁶ (6) it's impossible to regulate taste—one man's vulgarity is another's lyric;⁷⁷ (7) toleration is a virtue in a democratic society,⁷⁸ and what better way to learn toleration than to have to live with odious fellow citizens such as neo-Nazis, the Klan, and Larry Flynt?

None of these reasons is, by itself, conclusive of the argument that speech is entitled to a high degree of protection, but taken together, they reveal a strong preference in the constitutional scheme for individual expressive liberties as compared with collective values such as order, stability, dignity, civility, and respect for government. Of course, "judges are different"⁷⁹ in ways that permit proponents of speech regulation to distinguish any of the cases cited above. An anti-

institutions of culture); Henry Louis Gates, Jr., *Let Them Talk: Why Civil Liberties Pose No Threat to Civil Rights*, NEW REPUBLIC, Sept. 20 & 27, 1993 at 40–41.

73. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 292 (1964).

74. See JOHN STUART MILL, *ON LIBERTY AND OTHER ESSAYS* 36 (Stefan Collini, ed. 1989). As Justice Scalia noted, concurring in *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), "Avant-garde artistes such as respondents remain entirely free to *épater les bourgeois*; they are merely deprived of the additional satisfaction of having the bourgeoisie taxed to pay for it." *Id.* at 595–96 (Scalia, J., concurring).

75. *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (quoting LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY* 62 (1933)). If a judge exposed corruption by her colleagues, that report would surely lessen public confidence in the judiciary, but the report would nevertheless be a good thing. See Erwin Chemerinsky, *Is It the Siren's Call? Judges and Free Speech While Cases Are Pending*, 28 LOY. L.A. L. REV. 831, 834 (1995). Normatively, therefore, it is not the case that the public image of the judiciary should always be protected; it should be protected (if at all) only against the possibility of an *unjustified* loss of confidence in the integrity of judges. The argument for limiting speech gets harder at this point, because someone who favors broad restrictions on campaign speech must argue, for example, that a statement like "my opponent, Judge X, is an idiot," creates an unjustified diminution of confidence in the judiciary. If Judge X is in fact an idiot, however, the loss of public confidence would be justified, would it not?

76. See MILL, *supra* note 74, at 38–39.

77. *Cohen v. California*, 403 U.S. 15, 25 (1971).

78. See generally LEE BOLLINGER, *THE TOLERANT SOCIETY* (1986).

79. A refrain that recurs in cases and commentary. See, e.g., *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 862 (8th Cir. 2001), *rev'd sub nom.* *Republican Party of Minn. v. White*, 122 S. Ct. 2528 (2002); *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 228 (7th Cir. 1993); *Morial v. Judiciary Comm'n*, 565 F.2d 295, 305 (5th Cir. 1977); *In re Chmura*, 608 N.W.2d 31, 39 (Mich. 2000).

war protester may walk through a courthouse wearing a jacket which says “fuck the draft,”⁸⁰ while a judge would naturally be prohibited from putting up a sign in his courtroom with the same slogan. The point here, though, is not to draw case-by-case distinctions, but to show by broad analogy that the First Amendment requires courts to err well on the side of protecting speech, notwithstanding the potentially serious costs that may be imposed in terms of government interests such as securing order and civility. To the extent the legal system must be coherent, expressing “the virtue of integrity,” as Dworkin calls it,⁸¹ the constitutional cases in a number of analogous contexts show that collective values such as respect, decency, and maintaining debate on a “high plane,”⁸² must be subordinated to more individualist values (which have a social benefit) such as establishing a wide-open public sphere in which debate can be robust, vigorous, and uninhibited. If a court nevertheless permits discipline against judicial candidates for overly “political” speech, it has the not insubstantial burden of distinguishing the analogous cases. The following section develops this argument.

B. First Amendment Principles in Related Contexts

1. Speech in Campaigns for Non-Judicial Office

The Court has repeatedly said that political speech lies at the core of the First Amendment’s guarantee of liberty of expression, and that this core speech can be regulated only in furtherance of a compelling state interest, and only if there are no less restrictive means to accomplish that end.⁸³ Content-based restrictions are particularly suspect, indeed presumptively unconstitutional.⁸⁴ A series of cases

80. See *Cohen*, 403 U.S. at 16.

81. RONALD DWORKIN, *LAW’S EMPIRE* 225 (1986). Dworkin argued that “[t]he adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author—the community personified—expressing a coherent conception of justice and fairness.” *Id.* Dworkin further notes that “[a]ccording to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process.” *Id.*

82. *In re Donohoe*, 580 P.2d 1093, 1097 (Wash. 1978).

83. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 345–47 (1995); *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 222–23 (1989); *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976); RODNEY A. SMOLLA, *SMOLLA & NIMMER ON FREEDOM OF SPEECH* § 16:2 (3d ed. 1996); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 121–65 (1993).

84. See, e.g., *Burson v. Freeman*, 504 U.S. 191, 195, 197 (1992) (upholding as a time-

touching specifically on electoral campaign speech shows that the strict scrutiny framework applies in this context, and that many asserted state interests will be insufficient to justify restrictions on speech. For example, states cannot void an election on a showing that a candidate has made a false campaign promise.⁸⁵ States undoubtedly have a compelling interest in preventing bribery and corruption of elected officials, but the First Amendment requires states to regulate the evil directly, not indirectly through the prohibition on potentially misleading speech. If a candidate actually promised to vote a certain way in exchange for a campaign contribution, there would be no constitutional impediment to a prosecution for bribery in which the candidate's statement was part of the evidence against him; in the absence of actual bribery, however, the state's interest in protecting the voters from corrupt officials does not meet the "compelling interest" standard that is required for a content-based regulation of political speech.⁸⁶ Several reported cases involving judicial campaign speech correctly recognize that the utterances at issue are core political speech and that, accordingly, state regulations on this speech are subject to strict-scrutiny review.⁸⁷

In a similar vein, the Court has held that states must adopt a relatively hands-off posture toward campaign speech that is potentially defamatory.⁸⁸ In *Roy* a candidate for U.S. Senate sued a newspaper for libel that had called him a "former small-time

place-manner regulation a 100-foot buffer zone prohibiting certain political activity near polling places, but conceding the general principle that content-based restrictions on speech are presumptively invalid unless they pass strict-scrutiny review); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46–47 (1986) (articulating general principle that content-based regulations are presumptively invalid).

85. *Brown v. Hartlage*, 456 U.S. 45, 61 (1982).

86. *Id.* In a surprisingly conclusory analysis, Judge Posner states that speech by judicial candidates does not come within the protection of *Brown*. See *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 227–28 (7th Cir. 1993). Posner argues that judges are different in relevant respects from legislators or executive branch officials, so the mere fact that they are chosen in elections (even partisan elections) does not warrant treating judicial elections similarly to other elections. *Id.* at 228. A demonstration that this argument is ultimately unpersuasive must await the second section of the paper, on the ideology of judging. See *infra* Part II.A., notes 164–220, and accompanying text.

87. See, e.g., *Weaver v. Bonner*, 114 F. Supp. 1337, 1341–42 (N.D. Ga. 2000); *In re Chmura*, 608 N.W.2d 31, 40 (Mich. 2000). The court in *Weaver* largely tracked the analysis in *Chmura*. *Weaver*, 114 F. Supp. at 1342.

88. See *Monitor Patriot Co.* 401 U.S. at 270–71 (holding that regardless of whether a political candidate is considered a "public figure" or "public official," that "publications concerning candidates must be accorded at least as much protection under the First and Fourteenth Amendments as those concerning occupants of public office."); *Ocala Star-Banner Co.*, 401 U.S. at 300–01 (companion case to *Monitor Patriot Co.*).

bootlegger.”⁸⁹ The Court responded by permitting the newspaper to avail itself of the full panoply of protections to media defendants who are alleged to have libeled public officials or public figures.⁹⁰ The candidate was required to show *Sullivan* “actual malice”⁹¹—that is, publication of a defamatory falsehood with actual knowledge or reckless disregard of its possible falsity.⁹² Thus, under *Roy* and *Dameron*, the reasons for protecting potentially libelous speech in *Sullivan* apply to speech in election campaigns as well. The harm caused by this type of speech is outweighed by the social costs of a less protective rule—harm such as the “chilling effect” on public discourse that would be caused by the fear of defamation liability.⁹³ Even potentially much more serious harm, such as the attempt to overthrow the government by force, does not justify restricting the expressive liberties of political candidates, unless the state can satisfy the demanding “clear and present danger” standard.⁹⁴ The *Whitcomb* case shows that campaign speech is protected to the same extent as political speech by non-candidates, despite their closer relationship with actual government functions, and thus the enhanced ability to cause harm to democratic institutions.⁹⁵

Another set of decisions, the press-freedom cases, also reveals the Court’s attitude toward the public’s access to information about political candidates. In *Mills v. Alabama*,⁹⁶ the Court invalidated a state prohibition on election-day endorsements of candidates by newspapers, reasoning that it was inconsistent with the values of open discussion of government affairs.⁹⁷ As the Court observed, “there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs . . . includ[ing] discussions of candidates, structures and forms of government, the manner in which the government is operated or should be operated, and all such matters relating to political

89. *Monitor Patriot Co.*, 401 U.S. at 266–67.

90. *Id.* at 271–72.

91. *Id.* at 277.

92. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

93. *Weaver v. Bonner*, 114 F. Supp. 1337, 1342–43 (N.D. Ga. 2000); *In re Chmura*, 608 N.W.2d 31, 42 (Mich. 2000).

94. *Communist Party of Ind. v. Whitcomb*, 414 U.S. 441, 446–49 (1974) (striking down a state requirement that candidates pledge under oath that they do not advocate the use of violence to overthrow local, state, or national government).

95. *Compare Monitor Patriot Co.*, 401 U.S. at 270–71 (1971), and *Ocala Star-Banner Co. v. Dameron*, 401 U.S. 295, 300–01 (1971), with *Communist Party of Ind.*, 414 U.S. at 446–49.

96. 384 U.S. 214 (1966).

97. *Id.* at 220.

processes.”⁹⁸ In a somewhat different context, the Court held that a trial court could not prohibit a newspaper from publishing truthful information about a confidential investigation in progress,⁹⁹ revealing again the high social cost that the Court is willing to accept in order to safeguard the public’s access to information about the functioning of government processes. Other well known press-freedom cases, like the Pentagon Papers decision,¹⁰⁰ only underscore the First Amendment’s emphasis on transparency in government and the structural role that the press plays in securing the public’s right to know what goes on in official institutions.¹⁰¹

2. *Advertising by Lawyers—Taste and Public Image*

The organized bar has always regarded advertising by lawyers with the disgust reserved for the proverbial fly in the soup, and has engaged in a long-running battle with the courts to impose restrictions on the content of lawyers’ advertisements and solicitations. The first battle the bar lost was over the right of lawyers to advertise on the basis of price. In *Bates v. State Bar of Arizona*,¹⁰² the bar argued that permitting lawyers to advertise risks turning what was once a noble profession into a mere business.¹⁰³ The Court responded with yet another endorsement of the value of candor and transparency in public discourse: “[W]e find the postulated connection between advertising and the erosion of true professionalism to be severely strained. At its core, the argument presumes that attorneys must conceal from themselves and their clients the real-life fact that lawyers earn their livelihood at the bar.”¹⁰⁴ In other words, governments cannot deny citizens the right to speak the truth, even if the truth is somewhat unattractive. States responded to *Bates* by permitting some advertising by lawyers, but attempting to exercise control over the kinds of statements lawyers could make and the general tastefulness of the product. The attempt to regulate the dignity of advertising

98. *Id.* at 218–19.

99. *Landmark Communications v. Virginia*, 435 U.S. 829, 838 (1978).

100. *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

101. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587 (1980) (First Amendment has structural role in guaranteeing republican form of government); *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 570 (1976) (public’s right to know about a pending judicial proceeding outweighs interests of defendant in an untainted jury pool).

102. 433 U.S. 350 (1977).

103. *Id.* at 368.

104. *Id.*

largely ended with *Zauderer v. Office of Disciplinary Counsel*,¹⁰⁵ which prohibited the state of Ohio from sanctioning a lawyer for seeking personal-injury plaintiffs by running an advertisement with a picture of an IUD.¹⁰⁶ As long as advertising is not factually misleading, the Court held, the First Amendment prohibits most content-based restrictions on the communication.¹⁰⁷ It is true that the Court has been somewhat more deferential to state regulatory interests where it comes to solicitation of clients, but those cases generally emphasize the element of coercion that would be involved in face-to-face encounters between people with legal training and relatively less powerful potential clients.¹⁰⁸

The outlier in this otherwise relatively coherent area of the law is *Florida Bar v. Went For It, Inc.*,¹⁰⁹ which is something of an anomaly in light of the Court's recent laissez-faire attitude toward attorney advertising. In approving a state-imposed ban on direct-mail solicitation of accident victims within 30 days of the accident, the Court accepted the state's argument in justification of the restriction, that it was not concerned with the offense experienced by the recipients of solicitations, but rather "with the demonstrable detrimental effects that such 'offense' has on the profession"¹¹⁰ The Court's acceptance of the state's putative interest in protecting the image of the profession was surprising in light of numerous other commercial-speech decisions that refused to permit state regulation of expression for similar reasons.¹¹¹ The case is even more striking in comparison with a roughly contemporaneous decision prohibiting the

105. 471 U.S. 626 (1985).

106. *Id.* at 646-47.

107. *Id.* at 638. *See also* *Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91, 110-11 (1990) (permitting nondeceptive communication of fields of specialization by lawyers); *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 148-49 (1994) (permitting non-deceptive advertising with respect to lawyers and accountants).

108. *Compare* *Ohralik v. Ohio St. Bar Ass'n*, 436 U.S. 447, 465-67 (1978) (state may regulate in-person solicitation in circumstances likely to cause duress to the potential client), *with* *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 479 (1988) (states may not adopt a blanket ban on direct-mail solicitation; duress concerns are not present where potential client can just throw the letter in the trash can).

109. 515 U.S. 618 (1995).

110. *Id.* at 631.

111. *See, e.g., Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490-91 (1995) (striking down state ban on truthful advertisement of alcohol content of beer, justified as attempt to avoid "strength wars"). To elaborate, *Went for It* is out of step with *Rubin* to the extent that the state's interest in *Rubin* is understood as preventing negative externalities, such as overconsumption of beer or the poor public image of lawyers, as a result of advertising. *See* Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, 67 *FORDHAM L. REV.* 569, 582 (1998).

State of Florida from enforcing telemarketing restrictions against CPAs, which were also purportedly justified by the state's interest in maintaining the public image of the profession.¹¹² Even with *Went for It* in the mix, however, the Court's advertising and solicitation decisions reveal a preference for truthfulness, candor, and public access to information over the state's interest in preserving a favorable public image for the legal profession. Reading the advertising cases together with the press-freedom and political-campaign cases discussed in the previous section, underscores the Court's emphasis on transparency in public discourse: "[T]he disclosure of truthful, relevant information is more likely to make a positive contribution to decision making than is concealment of such information."¹¹³

3. Contempt of Court—the Value of Respect for the Judiciary

Two decades before *New York Times v. Sullivan*,¹¹⁴ the Supreme Court recognized the importance of allowing breathing space for public criticism of government officials, in this instance judges. In a series of decisions, the Court limited the traditional inherent power of courts to punish contempt, by requiring contempt decisions to comply the First Amendment's guarantee of freedom of speech and of the press.¹¹⁵ Under the contempt precedents, courts are permitted to punish speakers pursuant to their inherent power only where the speech poses a clear and present danger of substantially interfering with a pending proceeding.¹¹⁶ In *Bridges v. California*,¹¹⁷ for example, the Court reversed a criminal contempt conviction against the *Los Angeles Times*, on the ground that newspaper editorials and cartoons critical of judicial decisions did not pose a sufficient threat to the administration of justice.¹¹⁸ Subsequent Supreme Court decisions expanded *Bridges*, making clear that all trials, not just high-profile cases, have an element of public interest, and that judges must accept criticism of their disposition of cases, even in sharp or intemperate language.¹¹⁹ The Court even refused to permit a finding of contempt to

112. *Edenfield v. Fane*, 507 U.S. 761, 765 (1993).

113. *Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91, 108 (1990).

114. 376 U.S. 254 (1964).

115. *Bridges v. California*, 314 U.S. 252, 263 (1941); *Pennekamp v. Florida*, 328 U.S. 331, 336 (1946); *Craig v. Harney*, 331 U.S. 367, 375–76 (1947).

116. *Bridges*, 314 U.S. at 260–63.

117. 314 U.S. 252 (1941).

118. *Id.* at 273–75.

119. *Craig*, 331 U.S. at 376.

be predicated on a distortion of the factual record.¹²⁰ These cases therefore establish a broad sphere of protected expression around criticism of the judiciary, and underscore the principle that the harm permitting interference with expression must go beyond insults to dignity or the potential diminution of public respect for courts in order to justify regulation.

In broader terms, the contempt cases establish what might be called the Truman principle, after President Truman's aphorism that if you cannot take the heat, stay out of the kitchen: "Judges are supposed to be men of fortitude, able to thrive in a hardy climate."¹²¹ The Court specifically observed that protecting a judge's sense of personal dignity is not a valid justification for holding an attorney in contempt of court,¹²² and further warned against conflating offense to a judge's sensibilities with interference with judicial proceedings.¹²³ Finally, Justice Black in *Bridges* addressed the argument that insulting speech would tend to lessen the public's confidence in the judiciary:

The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.¹²⁴

Contemporary proponents of restrictions on judicial campaign speech are of course aware of these precedents, and thus offer different justifications for the regulations.¹²⁵ Randall Shepard, the Chief Justice of the Supreme Court of Indiana, recognizes the Truman

120. *Pennekamp*, 328 U.S. at 347-50.

121. *Craig*, 331 U.S. at 376. Cases of a more recent vintage involving criticism of judges by attorneys have picked up on the constitutional protections available in contempt cases and require the state disciplinary authority to show that an attorney's statements were made with some heightened degree of malice; in addition, many cases hold that discipline cannot be imposed on the basis of statements of opinion. *See, e.g.*, *Garrison v. Louisiana*, 379 U.S. 64, 65-67 (1964) (prosecutor calling judges lazy); *In re Green*, 11 P.3d 1078, 1082 (Colo. 2000) (attorney calling judge a racist in letter); *Standing Comm. v. Yagman*, 55 F.3d 1430, 1434 (9th Cir. 1995) (attorney in interview accusing district judge of being a bully, an anti-Semite, and a drunk).

122. *Offutt v. United States*, 348 U.S. 11, 14 (1954).

123. *Brown v. United States*, 356 U.S. 148, 153 (1958).

124. *Bridges v. California*, 314 U.S. 252, 270-71 (1941).

125. *See, e.g.*, Shepard, *supra* note 2, at 1090; Steven Lubet, *Judicial Discipline and Judicial Independence*, 61 L. & CONTEMP. PROBS. 59, 65 (1998).

principle, but argues that the interests of third parties are adversely affected by freewheeling judicial election campaigns.¹²⁶ All litigants, and potential litigants, suffer from a perception that judicial decisions are merely partisan, and not made on the basis of legal principles.¹²⁷ The trouble with this argument is that it proves too much. Suppressing critical speech certainly is a way to prop up the perceived legitimacy of any government institution, but it is inconsistent with the First Amendment to do so. An analogy may be useful. The *New York Times* recently reported on an increase in nasty squabbles and short tempers in jury deliberations, and suggested that the press coverage of the O.J. Simpson case may have contributed to a climate of cynicism about the jury system.¹²⁸ Accepting the *Times*'s sociological argument for a moment, and assuming that non-cynical behavior by jurors would be a good thing, it still does not follow that the appropriate response is to curb salacious press coverage of high-profile criminal cases.

In other words, in opposition to the systemic issue identified by Justice Shepard—the interest of litigants in a judiciary that is perceived to be impartial—there is a systemic interest in favor of looser rules governing speech in judicial campaigns. That interest is transparency. If a judge or candidate has a bias or interest that would make her unable to reach decisions impartially, the solution is to inform the voters, not suppress speech that touches on the potential bias. There would be no constitutional problem with any of the various proposals to regulate judicial campaigns that emphasize the delivery of *more* information to the public, such as “citizens committees” that comment publicly on candidates,¹²⁹ voter guides,¹³⁰ requirements that candidates declare the sources of the funds spent on judicial campaigns,¹³¹ and just good old fashioned criticism of judges who step over the line.¹³² Speech is the solution to the problem, not the cause.¹³³

126. Shepard, *supra* note 2, at 1090.

127. *Id.* at 1067.

128. Katherine E. Finkelstein, *Tempers Seem to be Growing Shorter in Many Jury Rooms*, N.Y. TIMES, Aug. 3, 2001, at B1.

129. See *State Courts Task Force Report*, *supra* note 1, at 102–03.

130. See Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 120–22 (1998).

131. *Id.* at 115.

132. See, e.g., Steven Lubet, *Bullying from the Bench*, GREEN BAG 2D, Autumn 2001 at 11, 11–12 (2001) (trenchantly criticizing United States District Judge Samuel Kent's penchant for mocking incompetent lawyers in published opinions).

133. See, e.g., *Brown v. Hartlage*, 456 U.S. 45 (1982). The Court in *Brown* said that

The only way speech might be the cause of a systemic problem is if it somehow *creates* the impermissible bias, rather than revealing evidence of it for the voters to consider or disregard. Some who favor greater regulation of judicial campaign speech worry about the effect of a *precommitment*, that is, a statement by a candidate that has the effect of locking the candidate into a position in the public's mind.¹³⁴ A lawyer who makes a big fuss about being tough on crime may have a difficult time granting a suppression motion upon taking the bench. It is worth wondering about the kind of psychology this position presupposes. The precommitment argument seems to imagine judicial candidates as blank slates who lack strong political beliefs until they commit publicly to some position. But if a candidate is genuinely and ardently pro-life, anti-gun, tough on crime, or whatever, then it seems highly unlikely that she will be in any better position to reverse course as a judge if she had kept her mouth shut as a candidate.¹³⁵ Perhaps the weight of public expectation would make the judge feel boxed in, but the experience with political candidates for other offices does not reveal a strong tendency of candidates to stick to their campaign positions.¹³⁶ A well known recent example is Bush *père's* "no new taxes" pledge, but virtually every candidate finds herself scrambling to explain a change of mind once in office.

In any event, if candidates are motivated to evade restrictions on speech that are aimed at preventing precommitments, they will quickly figure out how to communicate their positions to their

since occasional erroneous statements and even falsehoods are inevitable in free debate, the only remedy for untrue campaign speech that is consistent with the First Amendment is "more speech, not enforced silence." *Id.* at 61. A state judicial conduct commission may intervene in the marketplace of ideas without violating the First Amendment, for instance by issuing press releases censuring one of the candidates. *See Weaver v. Bonner*, 114 F. Supp. 1337, 1344-45 (N.D. Ga. 2000).

134. *See, e.g.,* *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 878 (8th Cir. 2001), *rev'd sub nom. Republican Party of Minn. v. White*, 122 S. Ct. 2528 (2002); *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 228 (7th Cir. 1993); *Deters v. Judicial Retirement and Removal Comm'n*, 873 S.W.2d 200, 205 (Ky. 1994); Ronald D. Rotunda, *Judicial Comments on Pending Cases: The Ethical Restrictions and the Sanctions—A Case Study of the Microsoft Litigation*, 2001 U. ILL. L. REV. 611; Snyder, *supra* note 2, at 228.

135. By analogy, consider the repeated statements by Justice Scalia that *Roe v. Wade* was wrongly decided and should be overruled. *Casey v. Planned Parenthood*, 505 U.S. 833, 979-1002 (1992) (Scalia, J., concurring in part and dissenting in part); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 532-37 (1989) (Scalia, J., concurring in part and concurring in the judgment). Given the strength of this belief, is it reasonable to argue that Justice Scalia would have been any more committed to overruling *Roe* if he had spoken publicly about his belief before being appointed to the Court?

136. *Republican Party of Minn. v. White*, 122 S. Ct. 2528 [Slip. Op. At 14] (2002) ("one would be naïve not to recognize that campaign promises are—by long democratic tradition—the least binding form of human commitment").

supporters in a kind of code. Take the *Sanders*¹³⁷ case from Washington State. Although the decision deals with the candidate's address to a pro-life group, it is worth noting that the principal feature of Sanders's campaign was his strong opposition to the Washington Supreme Court's refusal to recognize land-use and environmental regulations as "takings" of private property.¹³⁸ Notice, however, that no provisions in the Code of Judicial Conduct would prohibit Sanders from making an anodyne statement about his view of proper constitutional interpretation:

I believe judges should not read their own views into the Constitution, but should seek to apply the plain meaning of the text, with due attention to the intent of the Founders.

That statement would, in the context of the previous decisions of the Washington court, be an obvious signal that Sanders would take a different position if he were elected. Yet it would be permitted by the Code,¹³⁹ while a clearer statement would not:¹⁴⁰

"The takings decisions of the Washington Supreme Court are lousy. The Court, which is captive to environmental groups and other special interests, has forgotten about the importance of property rights to ordinary folks."

Not only would the second statement not create any greater precommitment on the part of Sanders—his views on takings were not about to change—but it differs from the first only in stating the obvious.

We should be wary of a regime of rules that encourages evasiveness and double-talk in public discourse about government affairs.¹⁴¹ Maybe uninformed voters would be fooled by the first

137. 955 P.2d 369 (Wash. 1998).

138. I was practicing law in Seattle at the time. Sanders's campaign attracted a great deal of notice from the bar, because it seemed to be a transparent attempt to influence the court on his pet issue of takings.

139. A broader rule, substantially identical to Canon 7 of the 1972 ABA Code, which would have prevented even the sanitized statement, was struck down as overbroad by the Seventh Circuit. *See Buckley*, 997 F.2d at 231.

140. *See, e.g., In re Hopewell*, 507 N.W.2d 911, 913, 918 (S.D. 1993) (suspending candidate for judicial office from private practice as a lawyer for stating that the incumbent had "a campaign treasury chest heavily laden with lavish contributions by politically influential lawyer and lobbyist, power brokers for liability risk insurance companies, finance, environmental polluters and heavily handed law enforcement establishment").

141. Alternatively, rules designed to prevent speech that could result in a precommitment might have the effect of encouraging candidates to make statements and promises to attract electoral support, only with boilerplate disclaimers attached to deflect sanctions. Consider this example from a 1998 Florida campaign: "Mike Burns is a tough, no-nonsense Prosecutor who believes in law and order. If elected, Mike understands his duty to uphold the law regardless of his personal views." *State Courts Task Force Report*,

statement into thinking that Sanders is not committed to one side or another of the takings issue, but savvy voters would not. Furthermore, if the evil to be prevented is a biased judge, we should not favor a rule that encourages candidates either to speak in code or to keep silent about their biases and hope to fly beneath the radar of opponents who could detect their commitments and alert voters. Thus, if it is more likely that Sanders's position on the takings issue will be recognized if he makes the second statement, that is all the more reason to let him make it.

To illustrate this point, consider a case from Arkansas in which a candidate for a trial judgeship stated publicly that he disapproved of plea bargains and would not enforce them.¹⁴² The federal district court enjoined enforcement of the provisions of the judicial disciplinary rules under which the Arkansas Judicial Commission sought to sanction the candidate.¹⁴³ The district court's decision furthers the interest in transparency that underlies the First Amendment—if candidates could not announce extreme or silly positions in advance, how are voters supposed to know that they shouldn't vote for them?¹⁴⁴ A candidate's opposition to plea bargaining seems clearly to be a good reason to vote against (or maybe *for*, if one is "tough on crime") that person for a judicial office. If judges avoided making statements of this nature because they feared discipline, the public would be deprived of quite useful information. Moreover, the candidate's speech is not the only information reaching the voters. Other speakers at this symposium have called attention to the changing environment of judicial elections, in which contested races are attracting substantial campaign contributions from interest groups and which have seen an upsurge in third-party funded issue advertisements.¹⁴⁵ If under *Buckley*

supra note 1, at 102. Which of these statements is to be believed, the "tough on crime" message or the promise of impartial performance? If *both* are believable, then the candidate has not precommitted himself to any particular position. If the state nevertheless seeks to impose sanctions on this candidate, it must argue that the disclaimer is not credible, which will be a most difficult proposition to establish in a disciplinary proceeding.

142. *Beshear v. Butt*, 863 F. Supp. 913, 915 (E.D. Ark. 1994). For a similar pledge, see SHAMAN, *supra* note 14, § 11.09, at 372 n.89 (describing unreported Kentucky case).

143. *Beshear*, 863 F. Supp. at 918.

144. See also *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953, 956 (Ky. 1991) (emphasizing importance of public access to information on which to make an informed decision about judicial candidates).

145. Mark Kozlowski, *Should the Regulation of Judicial Candidate Speech Regarding Legal and Political Issues Be Reconsidered?*, 43 S. TEX. L. REV. 161, 168–70 (2001); Anthony Champagne, *Coming to a Judicial Election Near You: The New Era in Texas Judicial Elections*, 43 S. TEX. L. REV. 9, 20 (2001).

*v. Valeo*¹⁴⁶ it is difficult to restrict campaign contributions by individuals and interest groups, and if these donations tend to make the public cynical about politicians, then enforcing prohibitions on speech under the rubric of “ethical” limitations would only exacerbate the problem by preventing judges from addressing voters’ concerns about partiality. Similarly, third-party issue ads are beyond the reach of judicial conduct commissions, and are likely to continue to be a factor in some elections. Since messages about candidates’ political positions will reach the public anyway, it is unfair to prevent judges from correcting false impressions that may be created by these ads.

4. *Speech by Government Employees*

Government institutions generally have more latitude to regulate the speech of their own employees, even speech touching on political concerns, than they do the expression of private citizens.¹⁴⁷ When the government is acting as an employer, not as a sovereign, it has some of the rights of an ordinary private employer, including the right to maintain order and discipline in the workplace. At the same time, government employees should not be compelled to surrender all of their expressive liberties in exchange for a job. The tension created by the government’s dual role as sovereign and employer generated a spate of litigation which seems to have settled down in recent years. The Court’s current position on government employees is that unless the employee is speaking out on a matter of public concern, she can be fired for substantially interfering with a government function,¹⁴⁸ even if the “interference” is just publicly criticizing her employer.¹⁴⁹ In addition, the government need not tailor its regulations as precisely as it otherwise would if dealing with the speech of private citizens. For example, the postal service could discipline an employee under a regulation prohibiting “rudeness to customers,” even though a comparable regulation would almost certainly be void for vagueness if applied to individuals who were not government employees.

The government-employee analogy has significant implications

146. 424 U.S. 1, 13, 29–38 (1976) (per curiam) (upholding provisions in a federal statute limiting campaign contributions to any single candidate from political organizations to \$5,000 per year; and from individuals to no more \$1,000 per candidate, and no more than \$25,000 total per year).

147. See, e.g., *United States Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 580–81 (1973) (upholding Hatch Act restrictions on political activities by government employees).

148. *Connick v. Myers*, 461 U.S. 138, 152–53, 154 (1983).

149. *Waters v. Churchill*, 511 U.S. 661, 679–81 (1994).

for the constitutional analysis of disciplinary rules which restrict statements by sitting judges. Under the standard in *Waters v. Churchill*,¹⁵⁰ a judge may be disqualified for making comments about a pending case, even though the comments do not reveal *actual* bias by the judge.¹⁵¹ The Supreme Court's recent approach is to defer to the state's asserted interest, as long as it is objectively reasonable and not an obvious pretext, and to more readily accept the government's contention about what it expects the disruptive effects of the employee's speech to be. Under *Waters*, an appellate court may reasonably conclude that a judge's statements about a litigant,¹⁵² or even "uncommon interest and degree of personal involvement in the subject matter"¹⁵³ reveal potential bias and therefore justify disqualification of the judge from presiding over further proceedings.¹⁵⁴

The problem comes when courts try to transpose the analysis of the constitutionality of speech restrictions on sitting judges into the context of judicial elections. The *Waters* analysis is a much less comfortable analogy with the regulation of speech in judicial elections, as opposed to day-to-day judicial business. In the context of elections, the government is not acting as employer, but as sovereign. This is obviously true with respect to challengers, but it has some plausibility with respect to incumbents as well. An incumbent is on the government payroll, to be sure, but is not carrying out a government function by running for office. Even an incumbent judge is not acting in a *public capacity* when campaigning. In addition, the nature of the speakers' interests and the public interest is much different in campaigns, as compared with the ordinary course of state business.¹⁵⁵

150. 511 U.S. 611, 681 (1994) (upholding firing of public hospital employee for making non-disruptive statements criticizing hospital policy on the grounds that the potential disruptiveness outweighed First Amendment concerns).

151. See, e.g., *United States v. Cooley*, 1 F.3d 985, 995 (10th Cir. 1993) (judge's appearance on national television stating his resolve to enforce court order prohibiting protesters from blocking entrance to abortion clinic required disqualification); *In re International Business Machines Corp.* 45 F.3d 641, 642, 644 (2d Cir. 1995) (judge's sharp criticisms of Justice Department for dismissing an action warranted mandamus relief).

152. *United States v. Microsoft, Corp.*, 253 F.3d 34, 115 (D.C. Cir. 2001) ("[a]pppearance [of bias] may be all there is, but that is enough to invoke the Canons and § 455(a) [of the federal recusal statute]").

153. *United States v. Cooley*, 1 F.3d 985, 995 (10th Cir. 1993).

154. This is also the reason that judges may be disciplined for making racist remarks. See, e.g., *In re Removal of a Chief Judge*, 592 So. 2d 671 (Fla. 1992).

155. See *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 864 (8th Cir. 2001), *rev'd sub nom.* *Republican Party of Minn. v. White*, 122 S. Ct. 2528 (2002) (applying strict scrutiny to regulations on speech by judicial candidates, rather than the lower scrutiny applicable to restrictions on speech by government employees, because of the importance

Recall that under *Waters*, and certainly under pre-*Waters* cases on government employee speech,¹⁵⁶ an employee has considerable latitude to speak freely on matters of public interest. An election campaign is the quintessential object of public interest, so the speech of candidates falls outside the deferential *Waters* framework. The often repeated policies of encouraging vigorous, robust debate in the public sphere are dominant in election campaigns, unlike the policies that come to the fore in the mundane employment setting that was the subject of the dispute in *Waters*.

To emphasize, there is nothing wrong with punishing judges who engage in biased decision-making, and there is no constitutional impediment to using the judge's words as *evidence* of impermissible bias, provided that we are focusing on the kind of bias that is proscribed by the Code of Judicial Conduct and relevant statutes.¹⁵⁷ My quarrel is with a regime of sanctions that clamps down too broadly on speech by candidates for judicial office, which is purportedly justified by the need to prevent the public from thinking that judges are biased. Not every reported comment reflecting a judge's personal political or moral beliefs is necessarily probative of bias, in the sense of being unable to set aside preexisting value commitments. Judges are supposed to have particular skill at making decisions solely on the basis of considerations that are internal to the law. In a recent case, the Third Circuit vacated a gag order that had been imposed on the litigants by a judge who feared influence on his decisions.¹⁵⁸ The appellate court said there was no risk of prejudice to the judge's decision-making ability because "judges are experts at placing aside their personal biases and prejudices, however obtained, before making reasoned decisions."¹⁵⁹ If this is true, then a judge who tells all

of the public's interest in access to information).

156. See, e.g., *Pickering v. Bd. of Educ. Township High Sch. Dist. 205, Will County*, 391 U.S. 563, 574 (1968) (holding that a public school teacher may criticize school board for spending too much on sports).

157. See, e.g., *Cleveland Bar Ass'n v. Cleary*, 754 N.E.2d 235 (Ohio 2001). Here, the court imposed a six-month suspension on a former judge who had offered to reduce jail sentence to probation if the defendant agreed not to have an abortion. *Id.* at 239. The comments at the sentencing proceeding and the judge's public account of her deliberations, given to a church group, were part of the record establishing the impermissible quid pro quo in sentencing. *Id.* at 239, 241.

158. *United States v. Scarfo*, 263 F.3d 80, 83–85 (3d Cir. 2001).

159. *Id.* at 94. On the other hand, other restrictions on conflict of interest, such as the statutes governing conduct by federal government officials, tend to focus on the susceptibility to influence a hypothetical official of minimal integrity, who is unable to resist the least pressure to exercise judgment on an impermissible basis. See STARK, *supra* note 7, at 32–34.

the world that he is pro-choice or anti-death penalty is not necessarily any less able to decide a case fairly than a judge who has not announced a similar commitment. Thus, we should not import the constitutional analysis of recusal and disqualification proceedings into judicial campaigns merely on the basis that incumbent judges are state employees.

II. THE JURISPRUDENCE OF JUDGING

A. *The Crocodile Hunter: Democracy in the Judicial Selection Process . . . But Not Too Much!*

By now everyone is familiar with the controversy over the *Bush v. Gore* case and the Supreme Court's role in the 2000 presidential election. Not surprisingly, each side of the debate views one of two absolutely irreconcilable positions as being quite beyond dispute. Gore partisans believe that the Supreme Court should not have stopped the ongoing recount, and should not have held the county recounts violative of equal protection. The statutory framework of Florida election law clearly provided for the recount procedure, and there were no constitutional reasons why that procedure should not have been followed. Thus, the only explanation for the decision is that a majority of the justices were motivated to do anything it took to ensure that Bush would be elected. The Bush camp, on the other hand, regards the possibility of establishment of separate recount standards in each county to be a travesty of the kind of orderly procedure that was contemplated by the Florida election laws and the constitution, and to be an obvious violation of the equal protection rights of the voters. Far from being illegitimate, the election was legitimized by the Court's intervention, which prevented Florida's electors from being selected for Gore on a constitutionally dubious procedure, which would have led to the appointment of a separate slate of electors by the Republican-controlled state legislature and a monumental donnybrook in the United States House of Representatives.

Without taking sides in this debate, one can wonder how it is possible for two such dramatically incompatible accounts of the same event to have emerged. Election-law scholar Richard Pildes has offered an explanation for the *Rashomon*-like quality of the competing stories of the 2000 election, which has interesting

implications for how we understand judicial elections.¹⁶⁰ Pildes argues that the Supreme Court decisions dealing with the constitutional constraints on elections are so open-textured that they provide very little guidance to any court considering an issue such as the one confronting the Supreme Court in the *Bush v. Gore* litigation.¹⁶¹ Since one can pretty much read the cases to support either side of a dispute, the images and normative ideals about democracy that a judge brings to the case become surpassingly important.¹⁶² For example, judges may think that democracy means order and structure, or they may understand democracy as involving a certain degree of chaos and tumult.¹⁶³ A judge who fears disorder, turbulence, political instability, and crisis is likely to disapprove of some kind of innovative election procedure, such as a blanket primary or even a multi-party televised debate. On the other hand, a judge who perceives the democratic system as essentially resilient and stable may tolerate a great deal more experimentation.

An aspect of the ideology of judging, shared by many judges and commentators, is that ordinary electoral politics is somehow corrupt, debasing, dishonoring—at least kind of icky. The language is extremely suggestive. Countless judicial opinions draw unflattering comparisons between idealized judicial elections and the petty bickering, distortions, puffery, flim-flam, and outright mendacity they perceive in campaigns for other offices.¹⁶⁴ Advocates for greater restrictions on speech by judicial candidates unsurprisingly share this view. Indiana Supreme Court Judge Shepard, for example, hopes to “set judges aside from the hurly-burly of sometimes unseemly political strife,” and keep judges removed from “regular rough-and-tumble politics,”¹⁶⁵ as if they might get their robes dirty among the hoi-polloi. The debasing of the democratic process in the rhetoric of judging is unfortunate, because it tends to reinforce the perception that judges regard themselves as an elite cadre of philosopher-kings, a position which is a fat target for debunking by legal scholars of all persuasions, from legal realists to critical theorists of various stripes to

160. Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695 (2001).

161. *Id.* at 696–97.

162. *Id.* at 697–710.

163. *Id.*

164. See, e.g., *Bundlie v. Christensen*, 276 N.W.2d 69, 72 (Minn. 1979) (reserving the right to interpret election law to prevent “unproductive squabbling”); *In re Donohoe*, 580 P.2d 1093, 1097 (Wash. 1978) (urging judicial candidates to keep their statements on a “high plane”).

165. Shepard, *supra* note 2, at 1067.

conservatives who decry “judicial legislation.”¹⁶⁶

There are serious aspects to the unflattering comparisons between judges and legislators, however. The threat to the rule of law or the independence of the judiciary is the subject of the next section. In addition, there is the Madisonian concern that politically responsive judges will be precisely that—politically responsive.¹⁶⁷ Popular majorities are not known for their solicitude for the rights of unpopular individuals. Elected judges who enforce procedural rights, such as Fourth Amendment protections against unreasonable searches and seizures or the Fifth Amendment rights guaranteed by *Miranda* can find themselves facing nasty election campaigns, particularly if the decision was in a death penalty case.¹⁶⁸ (There are obviously other hot-button issues, such as same-sex marriage,¹⁶⁹ flag burning, and abortion.) Evoking a wonderful image, California Supreme Court Justice Otto Kaus observed that making decisions without regard to their political consequences is like ignoring a crocodile in your bathtub while shaving.¹⁷⁰ The problem, therefore, becomes how to ensure that the protection of individual rights against the tyranny of the majority is not threatened by the fearsome crocodile lurking in the bathtub.

One solution is simply to trust elected judges not to “feed the crocodile,” as Wisconsin Supreme Court Chief Justice Shirley Abrahamson recommends.¹⁷¹ She states that in her own experience single-issue attack ads tend to backfire on their sponsors, an intuition that seems to have been confirmed by the Ohio campaign against Democratic Justice Alice Resnick.¹⁷² Voters have been known to react with disgust to ad hominem ads that distort the record of the

166. Thomas L. Jipping, *Legislating from the Bench: The Greatest Threat to Judicial Independence*, 43 S. TEX. L. REV. 141, 158–59 (2001).

167. See Abrahamson, *supra* note 60, at 978–87.

168. See, e.g., Stephen B. Bright, *Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308, 319–20 (1997).

169. See *Weaver v. Bonner*, 114 F. Supp. 1337, 1340 (N.D. Ga. 2000) (judicial candidate’s campaign attacking incumbent judge’s views on same-sex marriage, morals, and death penalty).

170. See Gerald F. Uelman, *Otto Kaus and the Crocodile*, 30 LOY. L.A. L. REV. 971, 974 (1997). This remark accounts for the otherwise puzzling prevalence of crocodile references in scholarship on judicial independence. See, e.g., Julian N. Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. COLO. L. REV. 733, 739–40 (1994).

171. Abrahamson, *supra* note 60, at 982–87.

172. Champagne, *supra* note 145, at 24–25.

opponent.¹⁷³ On the other hand, some cases, such as the campaign against Tennessee Supreme Court Justice Penny White, reveal the opposite pattern. In the case of Justice White, her vote to vacate a death sentence and remand for a new hearing became the basis of a concerted, and ultimately successful, effort by state Republican Party officials to unseat her.¹⁷⁴ The empirical evidence seems to be ambiguous on the effect of crocodile-feeding. More to the point of this analysis, however, the solution to the problem of skittish judges is not to try to muzzle the crocodile by punishing speech that might bear on public opinion. There is no way to completely cleanse the public domain of speech that makes references to the political beliefs of judicial candidates. Even under the most restrictive ABA Canons, candidates may pledge the faithful and impartial performance of their duties,¹⁷⁵ a loophole which permits a clever candidate to argue that she will be *more* faithful and impartial than her opponent, thereby implicitly criticizing the opponent's record. Moreover, issue-advocacy groups can always fill the void if judicial candidates themselves refrain from making prohibited comments.¹⁷⁶ In light of the inevitability of talk about politics, it is unfair to prohibit the candidates themselves from contributing a (hopefully) balanced rebuttal to charges leveled against them.

B. The Democratic Process and the Rule of Law

Any method of selecting judges has to respond to a pair of oppositional concerns: independence and accountability. It is possible to err too far in either direction. If judges are too accountable, they are at risk of responding to popular political pressure rather than legal protections that do not depend on the will of the majority. On the other hand, emphasizing independence at the expense of accountability creates the familiar "countermajoritarian difficulty."¹⁷⁷ Judges are empowered to interpret, even to nullify, decisions of the elected branches of government, relatively free of democratic process constraints. As a result, some degree of political control must be imposed on the practice of judging, so that the will of electoral

173. See *Weaver*, 114 F. Supp. at 1340.

174. See Traci V. Reid, *The Politicization of Retention Elections: Lessons from the Defeat of Justice Lanphier and White*, 83 JUDICATURE 68, 70 (1999); Myron Bright, *Judicial Independence*, 20 U. HAW. L. REV. 611, 614 (1998).

175. ABA CODE Canon 7B(1)(c) (1972).

176. See Champagne, *supra* note 145, at 15-26.

177. ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 16-23 (2d ed. 1986).

majorities is not constantly thwarted without recourse. In the federal judicial-selection process, that control is exercised by the Senate, which must confirm presidential nominees.¹⁷⁸ On the state side, the possibility exists of instituting direct electoral responsiveness to voters. Of course, going too far in the direction of ensuring democratic accountability creates its own problems, such as the threats to judicial independence that may be posed by single-issue campaigns (such as the anti-Penny White campaign, based on her vote in a death penalty case¹⁷⁹), distortions of the records of incumbent judges by challengers, and the ignorance of the majority of voters, who are unfamiliar with the records of judges and judicial candidates.

One question that sometimes goes underappreciated in the accountability vs. independence debate is what judges should be accountable for. The obvious answer is “biased decision-making” or something along those lines, but the response merely begs the question of what constitutes bias in judging. Of course there are easy cases, where judges take bribes and render decisions as a *quid pro quo*, but proponents of judicial accountability want to reach more than just the obvious cases of corruption. They want to squeeze politics out of law, as it were. The problem is, if we seriously believed that *some* political principles have no relevance to judging, there would be no point in having judges stand for elections. And indeed one of the committees that has studied campaign speech in judicial elections stressed that it was not recommending “restrictions on campaign speech that would punish a judicial candidate for personal opinions *or political beliefs*.”¹⁸⁰ In fact, not all talk about politics is banished from the rhetoric of judicial campaigns. Even though courts frequently allude to the ideal of neutrality in judging,¹⁸¹ they nevertheless must grudgingly admit that judges are humans, not machines, and that judges decide cases at least in part on the basis of political presuppositions. The question thus becomes how to draw a line between good and bad, high and low, or unbiased or biased, political beliefs, so that we can get a sense for what kinds of restrictions on speech are permissible.¹⁸² There is no escaping the

178. Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1204 (1988).

179. See *supra* note 174, and accompanying text.

180. *State Courts Task Force Report*, *supra* note 1, at 102 (emphasis added).

181. E.g., *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 864 (8th Cir. 2001), *rev'd sub nom.* *Republican Party of Minn. v. White*, 122 S. Ct. 2528 (2002); *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 227 (7th Cir. 1993); *Stretton v. Disciplinary Bd.*, 944 F.2d 137, 142 (3d Cir. 1991); *Morial v. Judiciary Comm'n*, 565 F.2d 295, 302 (5th Cir. 1977).

182. As Andrew Stark notes, all political officials have interests; the question is how

jurisprudential issue—we can only understand the kind of regulatory scheme we may permit regarding judicial speech if we understand the nature of the process of judging and, therefore, the nature of the information about this process to which the public is entitled.

I am not arguing that the mere fact of having judicial elections indicates that a state has sought to transform the practice of judging into something else, like legislating or executing the laws.¹⁸³ There is something distinctive about judging, as compared with other kinds of political action, and this distinctiveness is captured by the concept of the rule of law. Judges must decide cases according to law, rather than merely on the basis of political principle.¹⁸⁴ Legislatures, by contrast, are sometimes not even dignified with the assumption that they make judgments on the basis of principles—legislative action is stigmatized by legal scholars and political scientists (particularly those impressed by public choice theory) as being grounded solely on “deal-making, logrolling, interest-pandering, pork-barreling, horse-trading, and Arrobian cycling.”¹⁸⁵ Without being cynical, it is possible to make an obvious, but important observation: Any political institution made up of more than one person must face up to the possibility of disagreement. No matter how much we would like judicial decisions to be made on the basis of neutral principles, judges will inevitably differ in their interpretation of the law. Imagine the myriad, and mundane, ways in which we encounter interpretive disagreements in one area of the law, namely torts:

Applicable legal principles may be plural and conflicting. An example might be a case in which the principle of individual

we identify which interests are “encumbering,” in the sense that they could interfere with the official’s exercise of judgment. See STARK, *supra* note 7, at 119. A dizzying range of epithets has been used to label encumbering interests: influences, loyalties, concerns, emotions, predispositions, prejudgments, animuses, biases, affiliations, experiences, relationships, attachments, moral constraints, and ideological agendas. *Id.* I will use the term “bias” in the sense of Stark’s encumbering interests, to mean some kind of commitment, belief, or loyalty that interferes with a judge’s ability to decide a case within the constraints of the rule of law.

183. See *Buckley*, 997 F.2d at 228 (“Judges remain different from legislators and executive officials, even when all are elected”); *Stretton*, 944 F.2d at 142 (“The fact that a state chooses to select its judges by popular election . . . does not signify the abandonment of the ideal of an impartial judiciary . . .”); *In re Chmura*, 608 N.W.2d 31, 39–40 (Mich. 2000) (“By providing for the election of judges, the people of Michigan have not transformed judges into legislators or executives.”).

184. See, e.g., Stephen B. Burbank, *The Courtroom as Classroom: Independence, Imagination and Ideology in the Work of Jack Weinstein*, 97 COLUM. L. REV. 1971, 1980–81 (1997).

185. JEREMY WALDRON, *LAW AND DISAGREEMENT* 30 (1999) (taking a much more nuanced view of legislation).

responsibility, and assigning liability only to a wrongdoer, might conflict with the principle that a loss should not be allowed to fall on an injured person without compensation. (Imagine a court's deliberation about whether to permit a plaintiff to establish liability in a mass tort case on the basis of the defendant's share of the relevant market.¹⁸⁶)

Legal principles may be relatively clear at the core but present application questions at the margins. Consider a rule requiring that the defendant may be liable for infliction of emotional distress where he acted in an extreme and outrageous manner. Now, does that rule cover racial or sexual harassment?¹⁸⁷

The legal rule is actually stated in the form of a *standard*, which is a general principle containing little guidance as to how it should apply in particular cases. The classic example is the negligence standard in torts, usually stated in terms of what a reasonable person would do under the circumstances.¹⁸⁸

Framing the legal issue requires an interpretative account of the facts, so that posing the question conceals the extent to which a normative judgment has already been made. For instance, in *Fisher v. Carrousel Motor Hotel, Inc.*¹⁸⁹ the court described an incident of racial harassment as a battery, because the employee of the defendant snatched a plate out of the plaintiff's hand, while using a racial slur.¹⁹⁰

In each of these cases, one cannot simply "read off" the answer to the question by looking at a bunch of cases and statutes. A judge must engage in a process of interpretation which makes use of reasons that can be characterized (albeit unhelpfully) as "political" principles, such as a preference for free-market solutions over government regulation, or a confidence in the comparative advantage of courts over other institutions in responding to changing social conditions.

The principles of legal interpretation, including these sorts of

186. See *Sindell v. Abbott Labs.*, 607 P.2d 924, 925, 938 (Cal. 1980) (holding that each manufacture of the DES miscarriage preventive drug would be liable for the damages caused to various plaintiffs, who suffered an injury due to the drug, based on the amount of DES manufactured by each manufacturer, despite the absence of proof that a certain manufacturer supplied the actual dose of DES that caused the injury); *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1068 (N.Y. 2001) (a more modern application, denying market-share liability for firearms manufacturers).

187. See, e.g., *Jones v. Clinton*, 990 F. Supp. 657 (E.D. Ark. 1998) (a favorite example from recent events; state employee Paula Jones suing President Bill Clinton for sexual harassment said to have taken place while Clinton was still Governor of Arkansas).

188. The origin in the United States is *Brown v. Kendall*, 60 Mass. 292 (1850).

189. 424 S.W.2d 627 (Tex. 1967).

190. *Id.* at 629.

political principles, are constrained by second-order political principles that one may refer to as rule-of-law ideals.¹⁹¹ A judge cannot decide one of the disputes above on the basis of whether she likes one litigant better, or whether one party's lawyer is wearing a snappy suit, or according to the race or sex of the parties. At a very minimum, the rule of law demands that legal decisions be impartial, in the sense that like cases must be treated alike.¹⁹² "It is inherent in the especial character of law, as a body of rules and procedures, that it shall apply logical criteria with reference to standards of universality and equity."¹⁹³ The requirement of impartiality, or neutrality, may be understood as imposing a standard of interpretive fidelity to legal texts,¹⁹⁴ and may require specification of a secondary "rule of recognition"¹⁹⁵ that reveals when a moral or political principle has the status of law (as opposed to custom or positive rule of morality), or finally, may be cashed out in more detail according to criteria which specify when a decision is neutral.¹⁹⁶ Owen Fiss, for example, described the ideal of judging as follows:

The judge must stand independent of the interests of the parties or even those of the body politic (the requirement of judicial independence); the judge must listen to grievances he might otherwise prefer not to hear (the concept of a nondiscretionary jurisdiction) and must listen to all who will be directly affected by his decision (the rules respecting parties); the judge must respond and assume personal responsibility for that decision (the tradition of the signed opinion); and the judge must justify his decision in terms that are universalizable (the neutral

191. For a good recent overview, see Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 1 (1997). Rule of law ideals are familiar in the rhetoric of the political right as the principle that judges should not "opine their own policy preferences into law rather than apply the policy preferences enacted into law by the people." See the comments of Ninth Circuit Judge Diarmuid O'Scannlain in Panel Discussion, *Professional Responsibility: Judges and the Press*, 2 ENGAGE 112, 119 (2001).

192. See ROBERTO MANGABEIRA UNGER, KNOWLEDGE AND POLITICS 73 (1975).

193. E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 262 (Penelope A. Bulloch & Joseph Raz eds., 2d ed. 1977) (1961).

194. See, e.g., DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION {FIN DE SIÈCLE} 13 (1997).

195. See H. L. A. HART, THE CONCEPT OF LAW 94-95 (2d ed. 1994).

196. See, e.g., JOSEPH RAZ, THE AUTHORITY OF LAW 213, 215-16 (1979). According to Raz, a principle of government is law-like if it is "open, general, and relatively stable" to the point it is "capable of guiding the behavior of its subjects." *Id.* at 213-14. Raz's treatment has a great deal in common with Fuller's idea of the "inner morality of law." See, e.g., LON L. FULLER, THE MORALITY OF LAW (1964).

principles requirement).¹⁹⁷

Or, to put the point another way, the ideal of neutrality means that we can develop standards for recognizing a particular statement as authoritative which do not depend on the content of the utterance.¹⁹⁸

There is no need, for the purposes of this analysis, to develop a finely grained definition of the rule of law. For now it is sufficient to observe that this ideal requires that the decision maker maintain some degree of impartiality or neutrality between the parties and the positions they advance. Further, the rule-of-law ideal requires that judges put aside political, social, or moral beliefs that may interfere with impartial judging; these beliefs are problematic only when the judges are impervious to being swayed by the trial or appellate record or the governing law.¹⁹⁹ This thumbnail definition of legal neutrality does seem to capture the uneasiness felt by courts and commentators at the prospect of judges as political actors, and thus at political speech by candidates for judicial office. But it also shows that, in the absence of some stringent definition of the rule of law, which constrains the decision maker almost completely, a (finite) range of possible decisions can be justified as lawful.²⁰⁰ This is where observers of judicial campaigns begin to feel some unease over the lack of standards for objective legal judgments.

As long as society does not speak with one voice on any of the issues canvassed above, some disagreement among judges is inevitable. How, then, can we define biased judging, which would constitute a violation of the rule-of-law ideal of neutrality? One sometimes encounters the suggestion that biased judging might mean making decisions on the basis of the wrong kind of political principles. For example, Jack Balkin suggests that it is possible to distinguish “between the ‘high’ politics of political principle and the ‘low’ politics of partisan advantage.”²⁰¹ I wonder, however, whether that is a tenable

197. Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 754 (1982).

198. See JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN* 203 (1994).

199. Burbank, *supra* note 184, at 1999.

200. I am not arguing that the law is infinitely malleable. Some questions are underdetermined by governing law, but many have a clear correct answer. Ironically, given his standing as one of the leading lights of the critical legal studies movement, Duncan Kennedy has made this point quite effectively. See generally Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986) (discussing the inherent conflict judges face between “the law” and their initial “how-I-want- [the-case] to-come-out” reaction).

201. Jack Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1408 (2001).

distinction. Suppose, just hypothetically, that I am a registered Democrat. Surely I have made that decision for political reasons—essentially because I believe in a particular conception of the role of the national government in our lives. If I were a judge, seeking the advantage of the Democrats may be “low” in one sense, but it could also be motivated by “high” political principles, such as a worked-out theory of how liberty and equality ought best to be harmonized in a complex, pluralistic society.²⁰² High and low political principles could coincide in many cases, and it would be impossible to disentangle the motivational force of the two principles.

It is true that the problem with the *Bush v. Gore* case (the subject of Balkin’s article) is that the justices seemed to be voting for a “low” political outcome that was contrary to their usual “high” preference for local government control over national government power.²⁰³ One can always criticize a decision maker for inconsistency. But if the inconsistency critique were not relevant, it is not so clear that the justices should be faulted for making a decision on the basis of a political principle, just because that principle tends to map onto the platform of one party or another. In a slightly different context, it is hard to see why anyone was surprised to learn that George Bush’s nominee for Attorney General was vehemently pro-life, since Bush had made significant (albeit sometimes coded) overtures to social conservatives during his campaign. Yet many opposed Ashcroft’s nomination, precisely because his political stances coincided with one party’s platform. We will not make much progress by characterizing Ashcroft’s pro-life beliefs as either “high” or “low” politics, since, in fact, they are both.

Some courts have attempted to draw a line between qualities which are obviously germane to the role of judge, on which public comments are permissible, and characteristics of the candidate that are off-limits to public comment. “[U]nless [an] election is to be a pure popularity contest based on name recognition alone,” the Supreme Court of Kansas stated, the candidates must have some latitude to discuss the qualifications of their opponent.²⁰⁴ The court’s list of “qualifications,” however, is not without controversy. The court listed “the health, work habits, experience and ability of the candidates” as “matters of legitimate concern.”²⁰⁵ Putting aside the

202. *Id.* at 1408–10.

203. *Id.*

204. *In re Baker*, 542 P.2d 701, 705 (Kan. 1975).

205. *Id.* See also *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 882 (8th Cir. 2001), *rev’d sub nom.* *Republican Party of Minn. v. White*, 122 S. Ct. 2528 (2002) (permissible

question of whether a candidate's health is ever reasonably related to her qualifications for the job, this list of qualifications raises more questions than it answers. Does experience include a candidate's record? If a candidate is an incumbent, then her pattern of voting on, say, sentencing or bail decisions may show whether she is "tough" or "soft" on crime. If the candidate is a non-judge challenger, then her record of representing particular types of clients may be relevant to her ability to be impartial on the bench. What about ability? One could imagine a candidate arguing that her work in private practice on behalf of some group of clients uniquely qualifies her to be a judge. Perhaps a local court has a high proportion of domestic-relations cases, so a judge's experience as a family lawyer is relevant.

As soon as we admit speech relevant to experience and ability into the public forum, however, we either create the risk of endless litigation over artificial distinctions, or make it possible for the candidates to speak in code by ostensibly addressing the permissible subject while alluding to the *verboden* subject of political beliefs. Consider an interview given by Lance Ito, the judge who presided over the O.J. Simpson criminal trial, in which Ito related his perspective as an Asian-American judge and talked about his parents' ordeal of internment during World War II.²⁰⁶ Does this interview show that Ito has a particularly strong commitment to justice for unpopular minorities, or does it reflect a precommitment (and a campaign promise) to decide racial-discrimination claims in favor of the plaintiffs? There is no reason to suspect that Ito was speaking in code to his supporters during this interview, but there is also no reason to believe that another judge might not tell the same kind of story as an attempt to curry favor with a segment of the electorate, all the while claiming that the comments were merely relevant to the candidate's experience and qualifications.²⁰⁷

subjects for public comment include the candidate's "character, fitness, integrity, background (with the exception of their political affiliation), education, legal experience, work habits, and abilities").

206. See Chemerinsky, *supra* note 75, at 836.

207. Interestingly, even if Justice Ito were trying to signal to voters of color that he would be sympathetic to their concerns, this might be exactly the kind of message we should permit candidates to send. Apparently the framers of the Minnesota constitution adopted that state's system of judicial elections in the wake of the *Dred Scott* decision, in order to ensure that voters could turn out of office a judge who had the wrong kind of political beliefs. See *Kelly*, 247 F.3d at 865, 888. In light of this political history, it is obvious that a judge who did not believe in racial equality should be subject to the sanction of defeat at the polls. Thus, Justice Ito's comments are germane to the voters' exercise of a constitutionally protected process right.

Furthermore, if courts take the distinction between “comments reflecting experience” and “comments reflecting bias” seriously, they may significantly dampen campaign speech, as the candidates err well on the side of caution. One can easily imagine the chilling effect that would be created by the following rule:²⁰⁸

“Lawyers may make fair comment on the judge’s fitness so long as the comment does not call into question decisions of the court or question the integrity of the judicial system.”²⁰⁹

Indeed, the court held that a candidate’s statement that “[t]he state simply doesn’t get a fair trial in [the incumbent’s] court” impermissibly called into question the administration of justice.²¹⁰ If the judge’s “fitness” for office includes his ability to make impartial decisions, I cannot see why a comment that the judge is systematically biased against the state is not a fair comment on a relevant qualification of the incumbent. A dissenting judge made precisely this argument,²¹¹ but to no avail; candidates in Arizona would henceforth have to worry that their questions about the qualifications of their opponent might be construed as attacks on the integrity of the judiciary.

I will end with a proposal for drawing a line between “high” and “low” politics, or the sorts of political or philosophical beliefs and commitments that are *ideally* admissible in judicial election campaigns and those that are not. (First Amendment doctrine compels an even broader sphere of protection for speech in campaigns; this argument is

208. *In re Riley*, 691 P.2d 695 (Ariz. 1984).

209. *Id.* at 704.

210. *Id.* Incidentally, the *Riley* court grossly misapplied a significant principle established by the Supreme Court in *In re Sawyer*. The court read *Sawyer* as establishing the proposition that “lawyers who are candidates for judicial office may not impugn the integrity of the judicial system or question the decisions of the judge.” *Id.* at 709 (Holohan, J., dissenting). Actually the Court in *Sawyer* decided the case on a narrow nonconstitutional issue, holding that the evidence in the record was insufficient to establish whether the lawyer’s comments impugned the integrity of the court. *In re Sawyer*, 360 U.S. 622, 640 (1959). In *Sawyer*, the lawyer, defense counsel for several union members who had been charged with violating the Smith Act, gave a speech to union members at which she said the government’s crackdown on suspected Communists was unfair. *Id.* at 627–30. Thus, the *Sawyer* court did not agree on the appropriate constitutional framework to apply to lawyer-speech cases and certainly did not hold that lawyers, whether or not they are candidates for judicial office, are forbidden to criticize the integrity of the judicial system. In an important recent case, the Supreme Court has specifically cautioned lower courts that criticism by an attorney of a court’s decision should not necessarily be understood as an attack on the integrity of the judicial system as a whole. *In re Snyder*, 472 U.S. 634, 646–47 (1985). I discuss the *Sawyer* case extensively in W. Bradley Wendel, *Free Speech for Lawyers*, 28 HASTINGS CON. L.Q. 305, 330–35 (2001).

211. *See Riley*, 691 P.2d at 709 (Holohan, C.J., dissenting).

purely theoretical, an attempt to flesh out the jurisprudence of judging.) If we have to put a label on this position, it is a legal-process argument for demarcating a boundary around the activity of judging.²¹² The line between permissible and impermissible speech depends on the rhetoric of legal argument that we all learned in law school: If a value, policy, reason, or belief may be deployed in an argument for a legal conclusion, candidates for judicial office may talk about it, run on it, appeal to supporters who share it, brag about their commitment to it, and so on. Where governing legal texts are ambiguous, open-textured, contradictory, or otherwise formally structured in such a way that the correct legal decision is underdetermined, judges may refer to normative principles as guideposts for interpretation.

I do not intend this proposal to be controversial—indeed, I think it is justified by a moment's reflection on how judges decide cases.²¹³ In the torts examples cited above, a judge would be faced with questions that are not settled by precedent alone, and would have to decide how best to make sense of the competing policies in the law. Only the strictest formalist or positivist would contend that the decision in any of these example cases could be uncontroversially “read off” from the body of precedent, so that any competent judge would by necessity reach the same result.²¹⁴ Most judges and legal scholars would accept that the correct resolution of these clashing principles is something about which reasonable people, and judges, can disagree. Because the law is inevitably open-textured, there may be space for good faith divergence on the result a judge ought to reach in a particular case. We believe it neither possible nor desirable to eliminate discretion, judgment, contextual sensitivity, and what lawyers refer to as “equity” from the practice of deciding cases. A judge may have a great deal of confidence in the rightness of the decision she reaches, but it is not obviously true in a “self-certifying” way.²¹⁵ It does not carry on its face

212. See Fallon, *supra* note 191, at 18–21.

213. It would certainly be possible to give arguments for this picture of judging, but it would convert this article into something it was not intended to be—namely, a jurisprudential study of judging, rather than an analysis of how the First Amendment ought to be interpreted in judicial campaigns. If my assertions about judging are correct, I think the constitutional analysis follows naturally. I also think that if one disagrees with the constitutional analysis, it will be at the jurisprudential level. That is, someone who wishes to squeeze political speech out of judicial campaigns entirely probably accepts a conception of judging that is more formalistic and mechanical than this account. At the very least, I hope my argument has focused disagreement about the constitutional law of judicial election campaigns on the nature of the practice of judging.

214. DWORKIN, *LAW'S EMPIRE*, *supra* note 81, at 114–17.

215. WALDRON, *supra* note 185, at 111.

a guarantee of correctness, which would be sufficient to persuade those who would have reached a different decision if they had been the judge. This is the sense in which judges are political—and it's a good thing, too.

For this reason, competing views ought to be heard. Of course, at the time the judge renders her decision, the competing views become irrelevant, at least insofar as they might matter to the litigants who are bound by the judge's order. But the opposing beliefs do not disappear from the political arena—if the judge is on an appellate panel her decision may draw a dissent, and if the decision is on a high-profile matter it may attract attention and criticism in the popular media or scrutiny from legal scholars. Unless our goal is to isolate our judges in Olympian splendor from any popular reaction, these competing principles ought to form the basis of a discussion about the rightness or wrongness of the judge's decision. If people in society disagree about the political principles that ought to govern them, they ought to be permitted to have some say in the selection of officials who apply those principles through the mechanism of the law. The practice of judging is different from legislating or executing the law, it is true, but to the extent that judges have a role in creating and applying the law, it seems reasonable to permit some public criticism, feedback, and control. Because judges are additionally constrained by rule of law ideals, public accountability need not be as direct or immediate. Judges may be appointed by politically accountable representatives, either for life terms (as in the federal system) or for long terms of office, subject only to periodic recall elections. There ought to be some accountability, however, and for this control to be meaningful, the people who exercise it are entitled to information about the political beliefs of judges.

Perhaps the best way to characterize judges is as “quasi-political” officials. Because of their institutional commitment to the rule of law, they are somewhat remote from direct democratic control, but because judges make decisions at least partly on the basis of political principles over which reasonable citizens may disagree, they should not be insulated entirely from political pressure. There is tension here—the crocodile is still lurking in the bathtub—but it is inescapable. To conclude, it is worth underscoring that the one response we must rule out is to resolve only the symptoms of the tension by silencing speech about politics in judicial election campaigns. As long as the electoral process plays a role in selecting judges, the constitution does not permit states to insist that we adopt the dysfunctional coping strategy of pretending that there are no

crocodiles.

APPENDIX

THE *REPUBLICAN PARTY OF MINNESOTA V. WHITE* DECISION

Three months after the conference on the ethics of judicial selection, the United States Supreme Court granted certiorari in *Republican Party of Minnesota v. Kelly*,²¹⁶ a decision I referred to frequently in the main body of the article.²¹⁷ As this symposium issue was going to press, the Court handed down its decision in *Republican Party of Minnesota v. White*, voting by a narrow margin to reverse the Eighth Circuit.²¹⁸ The Court held that the so-called “announce” clause in the Minnesota Code of Judicial Conduct, prohibiting judges from announcing his or her views on disputed political or legal issues,²¹⁹ violated the First Amendment. Because the Minnesota rule was a content-based restriction on speech by judicial candidates, the Court applied strict scrutiny to the rule.²²⁰ As a result, the state sought to establish that its interest in preserving the impartiality, and the appearance of impartiality, of the judiciary was sufficiently compelling to overcome judicial candidates’ right to freely express their political beliefs and that the prohibition on candidates announcing their political views was narrowly tailored to accomplish this end. In the view of a majority of the justices, it failed to do so. The Court’s principal argument seems to be that the state’s prohibition on statements in judicial campaigns was “woefully underinclusive” in view of the numerous opportunities judges and lawyers have for speaking out on disputed political issues without fear of discipline.²²¹ Lawyers may teach, lecture, write law review articles and op-ed pieces up until the moment they become judicial candidates, and may resume much of this activity once they become judges, but for the brief period

216. 247 F.3d 854 (8th Cir. 2001).

217. For the grant of certiorari, see 122 S. Ct. 643 (2001).

218. 122 S. Ct. 2528 (2002).

219. MINN. CODE OF JUDICIAL CONDUCT, Canon 5A(3)(d)(i). This provision was picked up from the 1972 ABA Model Code of Judicial Conduct. See ABA CODE Canon 7B (1990).

220. *White*, 122 S. Ct. at 2534–35. Justice Kennedy, in his concurrence, stated his preference for a view, reminiscent of Justice Black’s First Amendment absolutism, that content-based restrictions that do not fall within any of the traditional exceptions (libel, obscenity, etc.) should be invalidated without regard to whether the regulation advances a compelling government interest. See *id.* at 2544 (Kennedy, J., concurring).

221. *Id.* at 2537.

of their declared candidacy, they are barred from making statements with the same content.

Writing for the majority, Justice Scalia made two points that are worth underscoring here. First, judicial elections and speech associated with judicial campaigns stand or fall together.²²² The reason for having elections for judges in the first place is to ensure democratic accountability for actors who, in the American common-law tradition, have a great deal of power to shape the law.²²³ Even trial-level judges “make” law, in the sense of creatively interpreting precedent and policy in novel situations, according to some conception or ideal of what the law ought to be.²²⁴ Vesting this power in judges and isolating them from democratic process controls risks creating a cadre of public officials with tremendous power but little accountability, precisely the objection that is frequently leveled against the federal judiciary.²²⁵ Once the citizens of a state have decided to make judges democratically responsive, it makes sense to employ mechanisms familiar from executive and legislative election campaigns, such as relatively unfettered speech by candidates. Justice Scalia resists the implication of this line of argument, that “the First Amendment requires campaigns for judicial office to sound the same as those for legislative office,” and criticizes Justice Ginsburg for attacking arguments the majority does not make.²²⁶ The majority’s reasoning does warrant Justice Ginsburg’s concern, however, because it depends on the overlap between reasons for having an elected judiciary and the familiar democratic process, accountability, and self-government rationales underlying the First Amendment’s robust protection for core political speech.²²⁷ In other words, it would be impossible to make a cogent argument for judicial elections without appealing to the very reasons that would justify a high degree of protection for speech by participants in that process.²²⁸

222. *Id.* at 2538.

223. *Id.* at 2539–40.

224. DWORKIN, *LAW’S EMPIRE* *supra* note 81, at 98–101, 254–58.

225. Justice Scalia, and Justice O’Connor in her concurrence, quite correctly notice the Jacksonian roots of sentiment in favor of judicial elections. *White*, 122 S. Ct. at 2540; *id.* at 2543 (O’Connor, J., concurring).

226. *Id.* at 2539. Justice Scalia rather disingenuously claims to be citing the cases on legislative elections only for the proposition that underinclusiveness is one reason to doubt that a restriction on speech is narrowly tailored to accomplish a compelling government interest. *Id.* Perhaps that is all that Scalia *intends* to invoke by citing these cases, but precedents do have a logic of their own, regardless of a judge’s purpose in citing to them.

227. See, e.g., ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

228. Justice Kennedy pointedly refers to the 1798 Sedition Act as an example of the

Second, Justice Scalia recognizes that judges are not automatons—they quite naturally approach their tasks with a set of beliefs, commitments, and interests.²²⁹ Although he of course would favor a particular judicial philosophy, he seems content to let strict constructionists and their opposite—perhaps polemically referred to as judicial activists—run for office and compete for the favor of voters. Moreover, he recognizes that platitudes about judicial philosophy are not terribly useful unless they are exemplified through discussion of particular cases or controversies that are likely to come before the court.²³⁰ Saying one is committed to following the law as it is written, not as one would like it to be, is less likely to be useful to voters than a clear statement that, for instance, reasonable environmental regulations are not unconstitutional takings of private property. Naturally, a judge's biases may be so strong that she is unable to put them aside and decide a case fairly on the merits. Interestingly, Justice Scalia has relatively little say about the remedy for this kind of bias, because his opinion concentrates on the underinclusiveness of the Minnesota rule, which does not reach other forums in which a judicial candidate's biases may have been expressed. In his concurrence, however, Justice Kennedy recommends the classic First Amendment corrective of more speech: "The legal profession, the legal academy, the press, and all interested citizens can use their own First Amendment freedoms to protest statements inconsistent with standards of judicial neutrality and judicial excellence."²³¹ If a judge is unable to set aside a belief or commitment, it would be better for all concerned if she made that quite apparent during the campaign, so that voters could take it into account.

Returning to California Justice Kaus's metaphor, the theme of the majority and concurring opinions is there is no way to remove all crocodiles from judicial bathtubs, consistent with the First Amendment. Elected judges always face the possibility of public wrath if they make unpopular decisions,²³² and there is no way to change this reality short of eliminating judicial elections altogether. The response to this feature of democracy is not to force judges to dissemble about their beliefs—addressing contested issues in vague,

kind of restriction on speech favored by those who believe that the rough-and-tumble of popular democratic politics will damage the reputation for integrity of government actors. *White*, 122 S. Ct. at 2545 (Kennedy, J., concurring).

229. *Id.* at 2536.

230. *Id.* at 2533–34.

231. *Id.* at 2545 (Kennedy, J., concurring).

232. *Id.* at 2538.

elliptical terms like “strict constructionist”—to permit voters to hear the unadorned truth. Contrariwise, the theme of the dissenting opinions is that there must be some way to conduct dignified elections for judicial office, so that the integrity of the judiciary is not threatened by the democratic process. To put it bluntly, the dissenting justices want the good features of elections—accountability to the public and representation of a diversity of viewpoints—without the ills they associate with “politics” in the pejorative sense. This must be what Justice Ginsburg means by her statement that Minnesota has not “opted to install a corps of political actors on the bench,”²³³ despite choosing to select judges on the basis of contested (albeit nominally non-partisan) elections. Justice Ginsburg’s argument proceeds from the assumption that elections for legislative office, and the campaign speech attendant upon those elections, are aimed at enabling the public to choose representatives who advance their political interests.²³⁴ It makes sense in this context to enable candidates to talk about their political beliefs and to make promises to vote one way or another in office because the justification for having an election for that office is premised on the nature of a legislative body as one that represents a diversity of clashing viewpoints about what is in the public interest.²³⁵ The judicial office is different, though, because the judge does not represent the parochial interests of constituents; rather, the nature of the judicial function is to “strive to do what is legally right.”²³⁶

The flaw in this argument is that it is impossible to square this description of the judicial role with the evident fact that the majority of states require judges to stand for election. If the only basis for regarding judges as competent or not were their fidelity to the law, there would appear to be no purpose in soliciting public feedback on their performance in the form of elections. Some sort of administrative agency could decide whether judges are incompetent to follow the law and remove them on that basis. The fact that we have elections can be explained only by admitting that what it means to decide a case with due respect for the law is *itself* a political question, on which reasonable citizens can disagree. Therefore, it is appropriate to submit this political issue to the voters. Justice Ginsburg’s response is that the criteria for choosing judges are different from the grounds

233. *Id.* at 2550 (Ginsburg, J., dissenting).

234. *Id.* at 2551 (Ginsburg, J., dissenting).

235. See generally WALDRON, *supra* note 185, at 119–49.

236. *White*, 122 S. Ct. at 2551 (Ginsburg, J., dissenting).

on which voters in legislative elections can choose a candidate,²³⁷ but a fundamental problem is not thereby elided—there is no clear *nonpolitical* boundary between the characteristics of a candidate that may properly be considered by voters as relevant to the candidate's potential performance in a judicial office and those that may not. Opening the field to discussions of “conception[s] of the role of a judge”²³⁸ just seems to invite the kind of speaking in code that smuggles in prohibited political pledges through the back door. For example, suppose a candidate was asked at a public forum for her views on the Ninth Circuit's Pledge of Allegiance decision. I submit that the following answers are identical in substance, although they would be treated differently under the announce clause, as Justice Ginsburg interprets it:

Permissible: I believe judges should be respectful of the text of the constitution, and the traditional moral values of our country.²³⁹

Impermissible: As a fundamentalist Christian, I think it is outrageous that our children cannot mention the name of God in schools. I would never make such a decision as a judge.

As long as voters are attuned to the nuances of candidate-speak, they will understand the impermissible subtext in the permissible text, particularly if the candidate's personal background gives them reason to understand it in this way. Because so many allusions to contested political issues can be packed into a statement about a candidate's conceptions of judging, it appears that Justice Ginsburg's position would have little effect beyond forcing candidates to repackage their messages to voters.

In closing, it is important to keep in mind that the *White* decision will by no means be the last word on the regulation of judicial candidates' speech. For one thing, the majority took pains to emphasize the narrow scope of its decision, limiting it to the “announce clause” and expressly declining to consider other restrictions, such as the prohibition on making pledges or promises of conduct in office.²⁴⁰ It also refused to decide whether the announce clause was equivalent to a provision in the ABA Model Code on

237. *Id.* (Ginsburg, J. dissenting).

238. *Id.* at 2553 (Ginsburg, J., dissenting).

239. Apparently one can go farther, considering that one of the petitioners, Gregory Wersal, was not disciplined for distributing a flier in the course of a judicial campaign that made statements such as “Should we conclude that because the Supreme Court does not trust police, it allows confessed criminals to go free?” *See id.* at 2554 (Ginsburg, J., dissenting).

240. *Id.* at 2532. The “pledges and promises” clause is found in ABA CODE Canon 5A(3)(d)(i) (1990).

making statements that appear to commit a candidate with respect to issues that are likely to come before the court.²⁴¹ Justice Ginsburg would have saved the announce clause by giving it the limiting construction placed on it by other courts, so that it would be equivalent to a prohibition on publicly stating how one would decide cases if elected.²⁴² Because the majority declined to address this limiting construction and four justices would have held the rule constitutional if it had been applied, it seems reasonable to expect a great deal of lower-court litigation applying the *White* decision to these other provisions respecting judicial candidates' speech. Perhaps some enterprising candidate will challenge the restriction on making pledges or promises, which all of the parties in the Minnesota litigation agreed was constitutional.²⁴³ Although a litigant may obtain recusal of a judge without showing actual bias, this due process-based right generally requires a showing of bias against an actual party to the litigation.²⁴⁴ The Court majority in *White* favored this narrow definition of impartiality, and concluded that the announce clause was not narrowly tailored to advance the government's interest in that specific narrow sense of impartial judging.²⁴⁵ Perhaps, then, the pledges and promises clause is similarly not narrowly tailored because many statements about political beliefs are not aimed at particular parties. A promise to be "tough on crime" is not aimed at any particular criminal defendant, for example. This expansive view of the First Amendment may be difficult for courts to swallow, but there is nothing in the majority's reasoning to rule it out.

241. *Id.* at 2534 n.5 (citing ABA CODE Canon 5A(3)(d)(ii) (1990)).

242. *Id.* at 2557–58 (Ginsburg, J., dissenting).

243. *Id.* at 2554 (Ginsburg, J., dissenting).

244. *See* Rotunda, *supra* note 134.

245. *White*, 122 S. Ct. at 2535.