Promises by Political Candidates Not Legally Enforceable in the USA

Keywords
agreement, campaign, contract, contracts, court, election, enforceable, law, legal, legislator, legislators, political, politician, politicians, president, promise, promises

Table of Contents

1. Introduction

The fundamental structure of the democracy government in the USA is that the highest-level government executives (e.g., president of USA, governors of states, mayors) and *all* of the members of the legislatures are elected by the citizens. So how do citizens decide which candidate for whom to vote? Most voters probably listen to campaign speeches and advertisements, then vote for the candidate who promises to accomplish what the voter prefers. This essay explains why promises made in such campaign speeches and advertisements are *not* legally enforceable promises.

This topic is important, because it is an opportunity to understand how law and politics interact in the USA, and a way of understanding not only civics, but also some points in constitutional law.

The scope of this essay is limited to promises by candidates for either executive (e.g., president, governor, mayor, etc.) or legislative branches of government, but *not* candidates for the judiciary. Some states (e.g., Florida and Texas) allow voters to elect judges. Candidates for judicial positions have the critically important criterion that a judge must be impartial, which severely limits a judicial candidate's ability to speak on substantive issues. I would solve the problem of false promises by candidates for the judiciary simply by making the judiciary appointed by the executive, with consent of the legislature. There have been several recent court cases on this topic.[1]

This essay is intended only to present general information about an interesting topic in law and is *not* legal advice for your specific problem. See my disclaimer at http://www.rbs2.com/disclaim.htm .

Finally, in this essay I use the masculine pronoun to refer to people of both genders, because I am tired of writing he/she.

---

[1] *Republican Party of Minnesota v. White,* 536 U.S. 765 (2002), after remand, 416 F.3d 738 (8thCir. 2005). See also: *Buckley v. Illinois Judicial Inquiry Board,* 997 F.2d 224, 228 (7thCir. 1993) (Posner, J.) ("Judges remain different from legislators and executive officials, even when all are elected, in ways that bear on the strength of the state's interest in restricting their freedom of speech."); *Pennsylvania Family Institute, Inc. v. Black,* 489 F.3d 156 (3dCir. 2007) (Pages 163-164 cite four law review articles on *White.*); *Kansas Judicial Review v. Stout,* 562 F.3d 1240 (10thCir. 2009); *Carey v. Wolnitzek,* 614 F.3d 189 (6thCir. 2010); *Bauer v. Shepard,* 620 F.3d 704 (7thCir. 2010).

There are many articles, including: Randall T. Sheppard, "Campaign Speech: Restraint and Liberty in Judicial Ethics," 9 GEORGETOWN J. LEGAL ETHICS 1059 (Summer 1996); Michael R. Dimino, "Pay No Attention to That Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians," 21 YALE LAW & POLICY REVIEW 301 (Spring 2003).

2. Overview of Reasons

There are several reasons why courts refuse to enforce promises made by political candidates. First, we examine a possible basis in contract law. Then we look at other types of reasons.

A. contract law

Can a politician make a legally enforceable contract with one voter, a class of voters, or the entire constituency? The answer seems to be *no,* for several reasons:

1. The subject matter is not proper for a legally enforceable contract. In common contracts, one person[2] agrees to surrender some *personal* legal right (e.g., ownership of a thing, his time, his money, or a legal right to do – or not do – something) that belongs to him personally in exchange for "good and valuable consideration".[3] The ability of an elected politician to do certain governmental acts is *not* his personal right, but a power conferred on him by virtue of his elected office.

2. A vote is *not* good and valuable consideration that will support a legally binding contract. Indeed, it is illegal (i.e., bribery or violation of state's Corrupt Practices Act) to offer something valuable in exchange for a vote. It is well settled contract law that an unlawful promise or illegal bargain voids a contract. See RESTATEMENT FIRST CONTRACTS § 512 (1932) (comment *c:* "A promise to vote for a particular candidate" in exchange for money is an illegal promise.) See also RESTATEMENT FIRST CONTRACTS § 567.

3. It can not be proved that an individual person voted for a particular candidate, because ballots are anonymous. This is an addition reason why a vote is *not* consideration that will support a legally binding promise.

4. Assuming that a political candidate who makes a promise is one party to a contract, who is the other party? All of the people in his constituency or only those people who relied on the promise in voting for that candidate? The contact fails for lack of a definite second party.[4]

---

[2] In this context, a corporation is a fictitious person recognized by a state as capable of suing and being sued.

[3] "Good and valuable consideration" is a historic legal phrase. In most cases such *consideration* is either (1) a thing of value (e.g., an automobile, a computer, a house, a cow, etc.), (2) a valuable service (e.g., services of a professional person, transportation, communications, etc.), or (3) money.

[4] *Schaefer v. Williams,* 15 Cal.App.4th 1243, 1246, 19 Cal.Rptr.2d 212, 214 (Cal.App. 4 Dist. 1993).

5. A politician when campaigning for election typically makes a promise in a speech, *not* a written document. If a politician promises to do something during his term of office, which is typically two-years to six-years, then the promise fails to be an enforceable contract, because of the statute of frauds. RESTATEMENT SECOND CONTRACTS §§ 110, 130.

6. As explained below in this essay there are various reasons (e.g., "political question" doctrine, immunity for official acts) why a court would refuse to enforce the contract. The refusal of a court to enforce the contract means that the promise(s) by a politicians was/were *not* a contract. RESTATEMENT SECOND CONTRACTS § 1.

B. freedom of speech

The First Amendment to the U.S. Constitution guarantees freedom of speech. Statements by political candidates are considered to be "political speech" by the U.S. Supreme Court, which gives such speech the *highest level* of protection under the First Amendment.

- *Mills v. Alabama,* 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.");

- *Monitor Patriot Co. v. Roy,* 401 U.S. 265, 272 (1971) ("And if it be conceded that the First Amendment was 'fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people,' *Roth v. United States,* 354 U.S. 476, 484, 77 S.Ct. 1304, 1308, 1 L.Ed.2d 1498, then it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.");

- *Buckley v. Valeo,* 424 U.S. 1, 14 (1976) ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' *Roth v. United States,* 354 U.S. 476, 484, 77 S.Ct. 1304, 1308, 1 L.Ed.2d 1498 (1957).");

- *N. A. A. C. P. v. Claiborne Hardware Co.,* 458 U.S. 886, 913 (1982) ("This Court has recognized that expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.' *Carey v. Brown,* 447 U.S. 455, 467, 100 S.Ct. 2286, 2293, 65 L.Ed.2d 263 [(1980)].");

- *Connick v. Myers,* 461 U.S. 138, 143-146 (1983) (discussing history of political expression by government employees);

- *FCC v. League of Women Voters of California,* 468 U.S. 364, 375-376 (1984) ("the expression of editorial opinion on matters of public importance, ... is entitled to the most exacting degree of First Amendment protection. [citing four cases]");

- *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749, 759 (1985) (Quoting *Connick v. Myers,* 461 U.S. 138, 145 (1983): "Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection. *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 913 (1982); *Carey v. Brown,* 447 U.S. 455, 467 (1980).");

- *R.A.V. v. City of St. Paul, Minn.,* 505 U.S. 377, 422 (1992) (Stevens, J., concurring in judgment) ("Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position; commercial speech and nonobscene, sexually explicit speech are regarded as a sort of second-class expression; obscenity and fighting words receive the least protection of all.").

- *McIntyre v. Ohio Elections Commission,* 514 U.S. 334, 346 (1995) ("Indeed, as we have explained on many prior occasions, the category of speech regulated by the Ohio statute occupies the core of the protection afforded by the First Amendment: [Quoting *Buckley v. Valeo,* 424 U.S. 1, 14-15 (1976) (per curiam).]");

- *Snyder v. Phelps,* 131 S.Ct. 1207, 1215 (2011) (Quoting *Connick v. Myers,* 461 U.S. 138, 145 (1983): "... speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.").

Simply stated: political candidates can say *anything,* without be held legally accountable in court.

As Justice Brandeis famously said, the remedy is more speech, *not* regulation of speech:

> If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.

Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

This declaration by Brandeis has been quoted with approval in majority opinions of U.S. Supreme Court, e.g.,

- *Brown v. Hartlage,* 456 U.S. 45, 61 (1982) ("In a political campaign, a candidate's factual blunder is unlikely to escape the notice of, and correction by, the erring candidate's political opponent. The preferred First Amendment remedy of 'more speech, not enforced silence,' *Whitney v. California,* 274 U.S. 357, 377, 47 S.Ct. 641, 648, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring), thus has special force.");

- *Texas v. Johnson,* 491 U.S. 397, 419 (1989);

- *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 498 (1996);

- *Republican Party of Minnesota v. White,* 536 U.S. 765, 781 (2002) (Quoting *Eu v. San Francisco County Democratic Central Committee,* 489 U.S. 214, 222-223 (1989): " '[D]ebate on the qualifications of candidates' is 'at the core of our electoral process and of the First Amendment freedoms [*Williams v. Rhodes,* 393 U.S. 23, 32 (1968)],' not at the edges.");

In *Republican Party of Minnesota v. White,* 536 U.S. 765, 775-779 (2002), the U.S. Supreme Court's majority opinion might be read to suggest that freedom of speech for judicial candidates is a more important value than the judicial obligation of impartiality.[5] The same respect for "freedom of speech" that permits judicial candidates to speak on issues will imply that any promises by those candidates are *not* legally enforceable, because there is no liability for protected speech.

C. separation of powers & "political question" doctrine

The fundamental structure of government in the USA is to have three separate branches of government: (1) legislative, (2) executive, and (3) judicial. Through the doctrine of "checks and balances", each branch can have a limited affect on the other two branches.

As a consequence of separation of powers, judges refuse to decide so-called "political questions", because those matters are exclusively the subject matter of the legislative and executive branches of government. Whether an elected politician had breached a promise to voters, or whether the politician had a good reason to breach a promise, is a political question.

The scope of the political question doctrine has a long history at the U.S. Supreme Court. See, for example:

- *Marbury v. Madison,* 5 U.S. 137, 170-71 (1803)("The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court. .... Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation.");

---

[5] However, note that the state had a separate clause, *not* at issue in the litigation in *White,* that prohibited judicial candidates from making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office." *White,* 536 U.S. at 770. Note that the state was "rather vague, however, about what they mean by 'impartiality.' " *White,* 536 U.S. at 775.

- *Luther v. Borden,* 48 U.S. 1, 42 (1849)(Court refused to decide which group was legitimate government of Rhode Island, decision was properly for U.S. Congress.);

- *Ohio ex rel. Davis v. Hildebrant,* 241 U.S. 565, 569 (1916);

- *Ohio ex rel. Bryant v. Akron Metropolitan Park District,* 281 U.S. 74, 79-80 (1930);

- *State of Arizona v. State of California,* 283 U.S. 423, 455, n. 7 (1931) (Citing seven cases, the Court declared that it can not inquire into motives of U.S. Congress in enacting a statute. Also cites four cases supporting "no inquiry may be made concerning the motives or wisdom of a state Legislature acting within its proper powers.");

- *Coleman v. Miller,* 307 U.S. 433, 443-46, (1939);

- *Baker v. Carr,* 369 U.S. 186, 217 (1962) (Six independent tests for existence of political question: "Prominent on the surface of any case held to involve a political question is found a [1] textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.");

- *Japan Whaling Ass'n v. American Cetacean Soc.,* 478 U.S. 221, 230 (1986)("The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.");

- *U.S. v. Munoz-Flores,* 495 U.S. 385, 394 (1990)("[The political question doctrine] is designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government; the identity of the *litigant* is immaterial to the presence of these concerns in a particular case.");

- *Walter L. Nixon v. United States,* 506 U.S. 224, 228 (1993)("A controversy is nonjusticiable – *i.e.,* involves a political question – where there is a 'textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it....' " quoting *Baker v. Carr,* 369 U.S. 186, 217 (1962).);

- *Vieth v. Jubelirer,* 541 U.S. 267, 277-278 (2004) ("In *Baker v. Carr,* 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), we set forth six independent tests for the existence of a political question: .... [¶] .... Laws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions.").

D. immunity

Because an elected politician's official acts are *not* from his personal legal rights, but from legal rights (i.e., powers) conferred on his elected position, that politician has immunity from civil prosecution for all *official* acts. Therefore, even if one could theoretically maintain a breach of contract action for failure to achieve a promise during a political campaign, and even if the promise were *un*protected by the political speech doctrine, the politician has immunity from civil prosecution by a grieved citizen.

I note in passing that a politician does *not* have immunity from criminal prosecution for acts outside of the proper, legitimate scope of his official powers, such as bribery or obstruction of justice. And a politician is always legally accountable for purely personal acts, such as committing a homicide or being sued in divorce court by his spouse.

executives

In the context of this essay the critical issue is whether the president of the USA or governor of the state, as elected executives, have immunity for their official acts The U.S. Supreme Court has rarely ruled on this issue:

- *Scheuer v. Rhodes,* 416 U.S. 232, 247-48 (1974) (governor of Ohio has qualified immunity);

- *Nixon v. Fitzgerald,* 457 U.S. 731, 749 (1982) ("... we hold that petitioner, as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his official acts. We consider this immunity a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history.").

State courts often hold that the state's governor has absolute immunity for acts that were properly within the scope of his official duties. See, for example:

- *Blair v. Walker,* 349 N.E.2d 385 (Ill. 1976);

- *Ball v. Carey,* 407 N.Y.S.2d 76 (N.Y.A.D. 3 Dept. 1978), *appeal denied,* 386 N.E.2d 264, 413 N.Y.S.2d 1027 (N.Y. 1978), *cert. den.,* 441 U.S. 924 (1979);

- *Aspen Exploration Corp. v. Sheffield,* 739 P.2d 150 (Alaska, 1987) (good discussion of history of doctrine of official immunity);

- *Mandel v. O'Hara,* 576 A.2d 766 (Md. 1990) (Governor has absolute immunity for civil prosecution for his approval or veto of bills from the legislature.);

- *Lindner v. Mollan,* 677 A.2d 1194, 1196-97 (Pa. 1996) (In Pennsylvania, all "high public officials" have absolute immunity from torts.).

legislators

Legislators have absolute immunity. The U.S. Constitution explicitly says "for any Speech or Debate in either House, they [i.e., Members of Congress] shall not be questioned in any other Place."[6] Note that courts have held that a president or governor is performing a legislative function when he approves or vetoes a bill.

- *Kilbourn v. Thompson,* 103 U.S. 168 (1881)(Speaker and members of U.S. House of Representatives *not* civilly liable for anything done in the House.);

- *Tenney v. Brandhove,* 341 U.S. 367, 377 (1951)("The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives.");

- *U.S. v. Johnson,* 383 U.S. 169, 179-185 (1966)(Detailed discussion of history of legislative immunity in context of criminal trial of former member of U.S. House of Representatives.);

- *U. S. v. Brewster,* 408 U.S. 501 (1972)(Former U.S. Senator could be prosecuted for bribery.);

- *Gravel v. U. S.,* 408 U.S. 606, 616-17 (1972)(Aide to U.S. Senator shares Senator's immunity.);

- *Doe v. McMillan,* 412 U.S. 306 (1973)(Members of U.S. House of Representatives absolutely immune.);

- *Eastland v. U. S. Servicemen's Fund,* 421 U.S. 491, 503-07 (1975)(Senators could subpoena bank records for investigation; senators absolutely immune from judicial interference.);

---

[6] U.S. Constitution, Art. I, § 6, cl. 1.

- *Bogan v. Scott-Harris,* 523 U.S. 44 (1998)(City council in Massachusetts had absolute immunity from civil claims under federal civil right statute for their "legislative acts".).

For more about immunity of elected politicians, see the venerable book by William Prosser and W. Page Keeton, PROSSER AND KEETON ON THE LAW OF TORTS, § 132 (5th ed. 1984).

E. history

The framers of the U.S. Constitution were distrustful of individual citizens, who were generally *un*educated and ignorant. Instead of directly electing a president by a nationwide majority of votes cast, voters actually choose "electors", who determine the president.[7] In the past, the voters trusted a local elector to make a good choice for them, but today electors are pledged to vote for the presidential candidate who received the most votes in their state.

Instead of having frequent referendums, voters in the USA elect legislators to make decisions for the voters. One hopes the legislator will do what is best for his/her constituents.

Political parties hold primary elections to allow voters to express their preference for candidates for president. Some delegates to nominating conventions of political parties are pledged to vote for a particular candidate, but only on the first ballot — after the first ballot, those delegates are free to make their own choice. Other delegates are *not* pledged to support a particular candidate at any time. Again, the political parties trust delegates, not voters, to chose the "best" candidate to nominate for an election for president of the USA.

If voters are unhappy with an elected politician, those voters have only three choices:
(1) not to re-elect that politician
(2) convince the legislature to impeach that politician
(3) some states have the possibility of having a special election to recall a governor or other elected state official.

F. practical considerations

A candidate for a legislature might have the intention of carrying out his/her promise in a campaign, but be unable to convince the majority of his/her colleagues in the legislature, so that the candidate's promise would be *un*fulfilled, despite no fault of the candidate. Similarly, a candidate for governor or president might have the intention of carrying out a promise in his/her campaign, but be unable to convince the majority of the legislature, so that the candidate's promise would be *un*fulfilled, despite no fault of the candidate.

---

[7] U.S. Constitution, Article II, § 1 and Twelfth Amendment.

Situations may change with time. For example, a candidate for the legislature may promise no tax increases, but, a year or two after being elected, vote for a tax increase, because the tax increase was the only realistic way to balance the budget after a change in the economy or after an unforeseeable event required a large expenditure. If judges were to enforce campaign "promises" in such contexts, it would arguably be judicial interference in legislative decisions, which is a violation of separation of powers.

Often the governor or president is from one political party, and a legislature has a strong majority of the opposite political party. In such a polarized environment, legal squabbles over alleged false campaign promises could paralyze the government. In a different context, President Gerald Ford pardoned Richard Nixon, in part to avoid paralyzing the government over Nixon's past misconduct. In another context, sexual harassment litigation — and eventually impeachment — did paralyze the government during Bill Clinton's presidency.[8] It may be better to refuse to prosecute some types of misconduct (e.g., false campaign promises) than to suffer the paralysis of government during such prosecutions. Notice that this alleged "paralysis of government" is a conclusion, *not* a reason.

Some kinds of false campaign promises are easy to detect. For example, consider a candidate who promises one thing to a special interest group, and a few weeks later promises the opposite to a different special interest group. Regardless of whether the candidate is changing his position (i.e., flip-flop) or engaging in meaningless pandering to special interest groups, voters should be wary of *any* promise by such a candidate.

3. Cases on Point

U.S. Supreme Court

- *Fortson v. Morris,* 385 U.S. 231, 235-36 (1966)("Consequently the Georgia Assembly is not disqualified to elect a Governor as required by Article V of the State's Constitution [when no candidate for Governor receives a majority of votes in an election]. Neither is it disqualified by the fact that its Democratic members had obligated themselves to support the Democratic nominee in the general election on November 8, 1966. That election is over, and with it terminated any promises by the Democratic legislators to support the Democratic nominee.").

Some states have passed statutes that proscribe candidates for political office knowingly making a false statement of fact about their opponent. In 1982, the U.S. Supreme Court held the Kentucky statute violated the First Amendment to the U.S. Constitution. In this case, the challenger for

---

[8] *Clinton v. Jones,* 520 U.S. 681, 692-695 (1997) (While president has immunity for official acts, there is no immunity for unofficial acts. At pages 702-706, the Court rejected Clinton's argument about paralysis ("impairment of the Executive's ability to perform its constitutionally mandated functions") of government.).

county commission promised to reduce the salaries of the commissioners, but retracted his promise when he learned that his promise "arguably violated a provision" of Kentucky statute. After the challenger won the election, the incumbent asked a state court to void the election, because of the illegal promise. In an unreported opinion, the Kentucky Court of Appeals voided the election, and the Kentucky Supreme Court refused to review the case. The challenger then appealed to the U.S. Supreme Court, which reversed the Kentucky court. This case involves criminal law and voiding an election, which issues are different from the topic of this essay. However, some issues overlap, and this case is worth citing here. In a nearly unanimous decision (one concurring opinion, one justice concurring in the result, and no dissents), Justice Brennan wrote:

> It is thus plain that *some* kinds of promises made by a candidate to voters, and *some* kinds of promises elicited by voters from candidates, may be declared illegal without constitutional difficulty. But it is equally plain that there are constitutional limits on the State's power to prohibit candidates from making promises in the course of an election campaign. Some promises are universally acknowledged as legitimate, indeed "indispensable to decisionmaking in a democracy," *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 777, 98 S.Ct. 1407, 1416, 55 L.Ed.2d 707 (1978); and the "maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means ... is a fundamental principle of our constitutional system." *Stromberg v. California,* 283 U.S. 359, 369, 51 S.Ct. 532, 535, 75 L.Ed. 1117 (1931). Candidate commitments enhance the accountability of government officials to the people whom they represent, and assist the voters in predicting the effect of their vote. The fact that some voters may find their self-interest reflected in a candidate's commitment does not place that commitment beyond the reach of the First Amendment. We have never insisted that the franchise be exercised without taint of individual benefit; indeed, our tradition of political pluralism is partly predicated on the expectation that voters will pursue their individual good through the political process, and that the summation of these individual pursuits will further the collective welfare.[footnote omitted] So long as the hoped-for personal benefit is to be achieved through the normal processes of government, and not through some private arrangement, it has always been, and remains, a reputable basis upon which to cast one's ballot.

Brown v. Hartlage, 456 U.S. 45, 55-56 (1982).

The Court held that this case was "far from any troublesome border" between illegal conduct (e.g., bribery, vote buying) and free political speech:

> It is clear that the statements of petitioner Brown in the course of the August 15 [, 1979] press conference were very different in character from the corrupting agreements and solicitations historically recognized as unprotected by the First Amendment. Notably, Brown's commitment to serve at a reduced salary was made openly, subject to the comment and criticism of his political opponent and to the scrutiny of the voters. We think the fact that the statement was made in full view of the electorate offers a strong indication that the statement contained nothing fundamentally at odds with our shared political ethic.

Brown v. Hartlage, 456 U.S. 45, 56-57 (1982).

There is no discussion in this case about the enforceability of the challenger's promise, probably because Kentucky statute fixed the salaries of county commissioners, "so Brown promised to do an act that he could not legally do." *Brown,* 456 U.S. at 50, n.5.

- *Buckley v. American Constitutional Law Foundation, Inc.,* 525 U.S. 182, 207 (1999) (Thomas, J., concurring) ("When a State's election law directly regulates core political speech, we have always subjected the challenged restriction to strict scrutiny and required that the legislation be narrowly tailored to serve a compelling governmental interest. [citing three cases]").

- *Republican Party of Minnesota v. White,* 536 U.S. 765, 780 (2002) ("... although one would be naive not to recognize that campaign promises are — by long democratic tradition — the least binding form of human commitment").

Lower U.S. Federal Courts

- *Davies v. Grossmont Union High School Dist.,* 930 F.2d 1390, 1398-99 (9th Cir. 1991)("To treat political rights as economic commodities corrupts the political process. Just as we would not enforce a contract stating that voter X will vote for candidate Y in exchange for a sum of money, ..."), *cert. den.,* 501 U.S. 1252 (1991).

In 2006, a federal court in Mississippi dismissed a request for an injunction based on an alleged breach of the Republican Party's "Contract with America" in 1994. The judge wrote:

> Plaintiff Ken Hurt, Democratic Nominee for Congress for the First Congressional District of Mississippi, has filed the instant action *pro se* seeking to enjoin his opponent, Congressman Roger Wicker, from running for re-election this November. In his complaint, plaintiff alleges that defendant has breached the "Contract With America" and should accordingly be barred from running based upon the doctrine of promissory estoppel. Defendant has presently moved for dismissal under Fed.R.Civ.P. 12, arguing that plaintiff's complaint was filed to "create publicity" and should be dismissed pursuant to the "political question doctrine." **....**
>
> This action is barred by the political question doctrine. A controversy is nonjusticiable — i.e., involves a political question — where there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Baker v. Carr,* 369 U.S. 186, 217, 82 S.Ct. 691, 710, 7 L.Ed.2d 663 (1962). In this case, I think this means: if folks can vote on it, stay out of it.
>
> The complaint in this case asserts a breach of contract action based upon 1) an alleged breach of a campaign promise and 2) defendant's policy decision to stand for re-election. Neither involves a justiciable matter.
>
> The issue of whether defendant has earned the right to stand for re-election as the Republican nominee for Congress in his district is a non-justiciable political matter which plaintiff improperly attempts to convert into a breach of contract action. Likewise, a Congressman's decision whether to stand for re-election is also a political matter not subject to review by the judiciary under any circumstances remotely presented by the facts alleged in this complaint.

> It is therefore ordered that defendant's motion to dismiss is granted.

Hurt v. Wicker, Not Reported in F.Supp.2d, 2006 WL 2727980 at *1 (N.D.Miss., 22 Sep 2006) (CIV A 106-CV-241-MD). Strangely, the plaintiff did *not* respond to defendant's motion to dismiss. Defendant Wicker won re-election with 66% of the vote.

Plaintiff sued President Obama and the Democratic National Committee, because the plaintiff alleged that Obama was not a "natural born citizen" as required in the U.S. Constitution. In part of the case, the trial court rejected plaintiff's claim that the Democratic Party National Platform was an enforceable promise.

> The "promises" that Plaintiff identifies are statements of principle and intent in the political realm. They are not enforceable promises under contract law. Indeed, our political system could not function if every political message articulated by a campaign could be characterized as a legally binding contract enforceable by individual voters. Of course, voters are free to vote out of office those politicians seen to have breached campaign promises. Federal courts, however, are not and cannot be in the business of enforcing political rhetoric.

Berg v. Obama, 574 F.Supp.2d 509, 529 (E.D.Pa. 2008) (dismissing case).

Plaintiff appealed (but not including the Democratic Party Platform argument) and the U.S. Court of Appeals affirmed. *Berg v. Obama,* 586 F.3d 234 (3dCir. 2009).

State Courts

- *Bush v. Head,* 97 P. 512, 515 (Cal. 1908) ("It has been held, in several well-considered cases, that a promise by a candidate to discharge the duties of the office for less than the lawful salary or compensation is contrary to public policy, as in the nature of a bribe. [citing five cases]").

In 1914, a citizen sued the mayor of New York City for "violation of certain ante-election pledges, promises, and representations made to the voters during the campaign", specifically a promise not to change the Civil Service laws. The trial judge denied relief to the plaintiff, simply because this was a case of first impression and plaintiff's counsel cited no legal authority for campaign promises constituted a contract.

> The novel theory is presented in behalf of the plaintiff that the defendant's ante-election promises constituted a contract between him and the voters of the municipality not to encourage during his term of office as mayor the passage of any state law looking to the amendment of the Civil Service Act, and that his breach of the contract entitles the plaintiff to an injunction enjoining the defendant during his term of office of mayor of the city of New York from advocating the repeal or change in the laws and charter provisions with respect to the Civil Service Law in force at the time when he was elected. The authorities cited by the learned counsel for the plaintiff do not in the remotest degree tend to establish the remarkable proposition that a contract may be predicated upon ante-election promises, entitling a voter to restrain the promisor from violating such promises. If the defendant may be restrained from advocating a measure which violates an ante-election promise, he might also be made subject to a mandatory injunction compelling him to affirmatively live up to such promises. The student of politico-legal science may discover a fertile field for research and thought in the study of the interesting question as to whether any legal method may be devised for

> compelling public officials to live up to the platforms of principles upon which they were elected, but in the absence of any authority or principle justifying the relief sought the motion to overrule the demurrer to the complaint will be denied, with $10 costs.

O'Reilly v. Mitchel, 148 N.Y.S. 88, 89 (N.Y.Sup. 1914).

While I believe the judge was correct to refuse to enforce the mayor's campaign promise, the judge should have given a better reason than the lack of precedent. In *any* case of first impression, there will *always* be an absence of precedent, but such absence of precedent is no reason for denying justice.

The Nebraska Supreme Court in 1945 considered a case in which the mayor and city council made "representations, promises and pledges" to the voters, and held those promises estopped the city government. *May v. City of Kearney,* 17 N.W.2d 448, 454-458 (Neb. 1945).

> To preserve self government public officials in charge of, or in obtaining control of, such large public financial and economic operations must be held to strict accountability for promises and pledges made to the electorate who under the law and by their votes confer these powers upon them, in order that the electorate may cast an intelligent ballot and protect their personal and property rights.

May v. City of Kearney, 17 N.W.2d 448, 455 (Neb. 1945). This case seems to be an exception to the general rule of *not* enforcing promises during campaigns.

In 1954, the Florida Supreme Court wrote:

> But be that as it may, we imagine that there have been no campaigns for Governor in recent years in which a part of the platforms of candidates was not a road building program and various promises would be made with reference to that matter. The fact that a candidate for Governor may have promised a group, or the citizens of a city, or county, that he would undertake to build a certain road, would be no basis for enjoining the building of such road.
>
> Many of the state roads have been designated by the Legislature as a result of promises. Much of the actual construction of state roads and bridges is the result of the fulfillment of promises made during a political campaign. If construction of a state road or a section thereof may be enjoined because it is the result of a promise, then all construction of state roads and bridges may be stopped by a dissatisfied taxpayer.

Webb v. Hill, 75 So.2d 596, 604-605 (Fla. 1954).

In 1968, a Dallas, Texas suburb had a dispute involving zoning of residential property.

> These pre-election campaign statements and promises, according to appellee [i.e., plaintiff], disqualify the members of the Council from participating in future official actions of the Council in passing or refusing to pass an amendatory ordinance.
>
> We do not agree. Campaign promises made in political races do not disqualify the successful candidates from exercising the duties of their offices after the election. To so hold would mean that very few successful candidates for political office would be able to qualify for their office or to perform their official duties. Under our theory of government the voters desire and even demand to be informed as to how candidates stand on the issues of the campaign. Public officials are often criticized for breaking campaign promises, but as the trial court in this case remarked, 'we would be a very peculiar society, if we couldn't turn ourselves around when we see we have made a mistake, * * *.' In any event public officials are not legally required to keep their campaign promises and whether they do or do not they are answerable to the voters at the next election, not to a particular private property owner.

> Property owners do not have a vested right to the use or disposal of their property so as to deny the City the exercise of its police power.

City of Farmers Branch v. Hawnco, Inc., 435 S.W.2d 288, 292 (Tex.Civ.App. 1968).

In 1970, the California Supreme Court held that promises by the city of San Jose did *not* void the merger election of a suburb. *Canales v. City of Alviso,* 474 P.2d 417, 423-426 (Cal. 1970).

Defendant in a 1977 case was a political candidate for the Vermont legislature who promised to donate his salary to fire and rescue departments in his district. Defendant won the election; Plaintiff lost the election. Plaintiff sued to declare promise *un*enforceable and to prevent the state from paying a salary to Defendant. The trial court dismissed the litigation and the Vermont Supreme Court held that there was no justiciable dispute:

> Since defendant Curran has been validly seated and is in fact serving as a member of the House of Representatives, he is entitled to the salary that goes with his office. Even assuming this action for relief was well laid, no injunction against the payment of those earnings is justified, and none will be ordered.
>
> With respect to the relief sought in connection with the advertised promise complained of, we come face to face with the issue of the standing of these plaintiffs to seek this remedy in this action. However much the promise runs afoul of Chapter II, Section 55 of the Vermont Constitution, we must examine the right of these plaintiffs to maintain this litigation against the defendants, independent of a proceeding under 17 V.S.A. § 1361. The declaratory judgment act, 12 V.S.A. § 4711, requires a case or controversy to support its invocation. *Robtoy v. City of St. Albans,* 132 Vt. 503, 504, 321 A.2d 45 (1974). With respect to the enforceability of the advertised promise, the plaintiffs are not parties to a dispute with the defendant Curran. Their personal or property rights are not adversely affected in a manner different from the public generally. An order or judgment from this Court would not resolve any presently subsisting justiciable dispute between the parties. Therefore, the judgment must be limited to the denial of the relief requested on this issue. *Robtoy v. City of St. Albans,* supra, 132 Vt. 503, 506, 321 A.2d 45 (1974). The action was properly dismissed below.

Pearl v. Curran, 376 A.2d 19, 22 (Vt. 1977).

In a 1984 zoning case, a Florida intermediate appellate court held that county commissioners were not required to be impartial, and prior statements on an issue by the commissioners did *not* disqualify them.

> It is fundamental to our system that the members of a county commission or any governing body of a political subdivision who act in that capacity do not do so as judges — subject to judicial canons and standards — but rather, using the term in its Aristotelian sense, as politicians. Any supposed errors in the substance of their views or the manner in which their opinions are expressed are therefore ordinarily subject only to relief at the polls, not in the courts. [citations to four cases]

Izaak Walton League of America v. Monroe County, 448 So.2d 1170, 1171 (Fla.App. 3 Dist. 1984). See the earlier case of *City of Farmers Branch v. Hawnco, Inc.,* 435 S.W.2d 288 (Tex.Civ.App. 1968), which has similar facts and issues.

In the year 2003 in Massachusetts, a candidate for mayor promised to give P a job after the candidate won the election, in exchange for P's time and efforts on the candidate's election campaign. The candidate won the election, breached the contract, and P sued. A trial court refused to enforce the contract and an appellate court tersely affirmed:

> Burns's breach of contract claim was premised on Rurak's [the mayor's] alleged promise to reward Burns with a municipal position for his efforts on the campaign. The motion judge ruled that any such promise was unenforceable as a matter of public policy. General Laws c. 56, § 35, inserted by St. 1946, c. 537, 11, prohibits a public official from
>
> > promis[ing] to use, directly or indirectly, any official authority or influence to confer upon any person ... an office or public employment ... upon the consideration or condition that the vote, political influence or action of any person shall be given or used in behalf of a candidate.
>
> The motion judge was correct in ruling that any such alleged contract was unenforceable on the grounds of public policy.

Burns v. Rurak, 59 Mass.App.Ct. 1102, Unpublished Disposition, 2003 WL 22024230 (Mass.App.Ct., 28 Aug 2003). In this case the consideration for the promise of a job was much more than one vote, yet the court — quite properly — refused to enforce the contract.

On a related topic, some states have passed statutes that proscribe candidates for political office knowingly making a false statement of fact about their opponent. The state of Washington declared its statute unconstitutional because the state "assumes that the government is capable of correctly and consistently negotiating the thin line between fact and opinion in political speech" and various other reasons. *Rickert v. Washington,* 168 P.3d 826, 829, ¶11 (Wash. 2007).

Conclusion

Voters should be cynical about the propaganda and false statements in speeches and advertisements by candidates for political office. Any promise contained in such speeches or advertisements is *not* legally enforceable. While there are good legal reasons for this rule of law, there are two ironic results:

1. Important choices of voters are being made on the basis of fiction, i.e., the *un*enforceable promises of political candidates.
2. The ingredients list on a can of dog food[9] is more truthful than a political candidate's speech.

Instead of rejecting the political process, perhaps voters should consider the political philosophy, personal values, and personal integrity of each candidate and then vote for the person who they most trust to make good decisions. And, if a politician makes a very bad decision, or a series of bad decisions, then the voters should elect a different candidate at the next election (or have a recall election, if allowed).

Bibliography

The authority for this essay is the case law cited above. However, the following note in a law journal by Mr. Neel discuss statutes in 17 states that regulate false statements of fact during political campaigns. Mr. Sencer mentions the same statutes at pages 463-465.

anonymous, "Developments in the Law: Elections," 88 HARVARD LAW REVIEW 1111, 1272-1298 (April 1975).

Richard F. Neel, Jr., Note, "Campaign Hyperbole: The Advisability of Legislating False Statements Out of Politics," 2 J. LAW & POLITICS 405 (Fall 1985) (recommending against statutes that regulate false statements in a political campaign).

Stephen D. Sencer, Note, "Read My Lips: Examining the Legal Implications of Knowingly False Campaign Promises," 90 MICHIGAN LAW REVIEW 428 (Nov 1991).

---

[9] 21 U.S.C. § 343 (misbranded food); *Magical Farms, Inc. v. Land O'Lakes, Inc.,* 356 Fed.Appx. 795 (6thCir. 2009) (food for alpacas was contaminated with contaminated with salinomycin, which was not listed on the label that had a "guaranteed analysis").

This document is at **www.rbs2.com/elecprom.pdf**
My most recent search for court cases on this topic was in April 2012.
created 27 Jan 2004, revised 29 Apr 2012

return to my homepage at http://www.rbs2.com/