Toward Meaningful Judicial Elections: A Case for Reform of Canon 7

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I. INTRODUCTION

Recent judicial elections in Washington have produced several surprises. In 1990, a then-unknown Charles Johnson upset Chief Justice Keith Callow. In 1992, two King County Superior Court candidates who received high bar ratings lost to opponents who received poor ones. Looking at these outcomes, some judges and attorneys have publicly questioned the ability of voters to choose good judges.

These observers would tend to agree with the voters in some other cases, however. The same voters who elected Johnson rejected the bid of former governor John Spellman for a seat on the supreme court. They retained a recently appointed justice from Spokane, Richard Guy. Guy's reputation within legal circles was excellent, but his name was hardly a household word. Why did the voters choose the person with the longest list of credentials in this latter case, while they skipped over those persons in the former cases?

This Comment suggests that while voters sometime value credentials differently than the legal establishment, more often

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3. Terrence Carroll & Gerald Shellan, Choosing Judges, SEATTLE POST-INTELLIGENCER, Nov. 29, 1992, (Focus) at 1.
4. See Grist For Analysis, supra note 1.
5. Id.
the answer lies in the quantity and quality of information available to the voters. Voters cannot make wise choices between candidates unless they know how the candidates differ from each other. Justice Guy had a simple message incorporating such a difference: elect a judge, not a politician. The voters apparently heeded the message. Most winning campaigns, whether judicial or partisan, are those that have a coherent message built on differences between the candidates. Identifying differences is easier for partisan candidates, however, than for judicial ones. Not only do judges not differentiate themselves by partisan labels, but they also impose on themselves a strict limit on discussing differences.

This self-imposed restriction is Canon 7 of the Washington Code of Judicial Conduct, which regulates political activity by judges and judicial candidates. To promote impartiality, Canon 7 greatly restricts what judges may discuss during campaigns. It specifically prohibits judges from talking about their views on disputed legal or political issues. Without either partisan labels or issues to distinguish one candidate from another, voters are left with such things as gender or name familiarity.

Even sophisticated voters become confused. Former State Attorney General Ken Eikenberry, himself a candidate for governor in 1992, confessed to being "clueless when it came to some of the county judges." To cure voter confusion, however, we do not need to change the electoral system to an appointed one. Instead, we need to change Canon 7 so voters can gain information about the qualifications and views of judicial candidates and make the electoral system work. This Comment argues that elections can give us good judges who are both accountable to the voters and able to decide cases impartially. To accomplish this, we must, in the words of one local media commentator, "take off the muzzle and allow judges to discuss issues."

But before one can propose change, one should understand the present system and the purposes it was designed to serve. Part II of this Comment examines Canon 7 and the balance it strikes between accountability and impartiality. Part III explores how the Canon has been interpreted in Washington

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7. Id. Canon 7B.
8. Id. Canon 7B(1)(c).
case law and ethics opinions and how those interpretations have kept information about judges out of the electoral process.

Part IV argues that Canon 7 should be changed because it undermines the accountability that the framers of the Washington Constitution intended to achieve through elections. Elections were so important to the framers of both the state and federal constitutions that they sought to specially protect political speech. Part V argues that the Canon contravenes the First Amendment of the U.S. Constitution and its corresponding state provision.

Part VI examines the judicial electorate, the sources of voter information, and the expectations of voters. This part concludes that Canon 7 should be changed because it is premised on faulty assumptions about voters.

Washington is not alone in trying to balance accountability and impartiality. Part VII of this Comment demonstrates that other states have chosen canons with fewer restrictions on campaign speech and have not seen negative results. Finally, Part VIII suggests a proposal for change.

II. Canon 7

Canon 7 of the Washington Code of Judicial Conduct regulates the political activities of judges and judicial candidates.¹¹

¹¹. Washington Code of Judicial Conduct Canon 7 provides as follows:
Judges Should Refrain from Political Activity Inappropriate to Their Judicial Office
(A) Political Conduct in General
(1) Judges or candidates for election to judicial office should not:
   (a) act as leaders or hold any office in a political organization;
   (b) make speeches for a political organization or candidate or publicly endorse a nonjudicial candidate for public office;
   (c) solicit funds for or pay an assessment or make a contribution to a political organization or nonjudicial candidate, attend political gatherings, or purchase tickets for political party dinners, or other functions, except as authorized in Canon 7(A)(2);
(2) Judges holding office filled by public election between competing candidates or candidates for such office, may attend political gatherings and speak to such gatherings on the judge's own behalf or that of another judicial candidate. Judges or candidates shall not identify themselves as members of a political party, and judges shall not contribute to a political party or organization.
(3) Judges shall resign their office when they become candidates either in a party primary or in a general election for a nonjudicial office, except that they may continue to hold their judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention, if they are otherwise permitted by law to do so.
It is divided into two parts. The first part seeks to restrict political activity generally by (1) restricting relationships with political organizations, (2) requiring judges to resign if they run for nonjudicial office, and (3) prohibiting speeches, fundraisers, and other political activities except on behalf of measures to improve the law, the legal system, or the administration of justice.  

The second part, which is at issue here, regulates campaign speech. Judicial candidates are prohibited from publicly stating their views on legal or political issues, making pledges of con-

(4) Judges should not engage in any other political activity except on behalf of measures to improve the law, the legal system, or the administration of justice.

(B) Campaign Conduct
(1) Candidates, including an incumbent judge, for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system election:

(a) should maintain the dignity appropriate to judicial office, and should encourage members of their families to adhere to the same standards of political conduct that apply to them;

(b) should prohibit public officials or employees subject to their direction or control from doing for them what they are prohibited from doing under this canon; and except to the extent authorized under Canon 7(B)(2) or (B)(3), they should not allow any other person to do for them what they are prohibited from doing under this canon;

(c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce their views on disputed legal or political issues; or misrepresent their identity, qualifications, present position, or other fact;

(d) should not permit false, misleading, or deceptive campaign advertising to be published or broadcast in behalf of their candidacy.

(2) Candidates, including an incumbent judge, for a judicial office that is filled by public election between competing candidates should not themselves solicit or accept campaign funds, but they may establish committees of responsible persons to secure and manage the expenditure of funds for their campaign and to obtain public statements of support for their candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from lawyers or others. Candidates' committees may solicit funds for their campaign no earlier than 120 days from the date when filing for that office is first permitted and not later than 30 days after the last elections in which they participate during the election year. Candidates should not use or permit the use of campaign contributions for the private benefit of themselves or members of their families. Candidates should comply with all laws requiring public disclosure of campaign finances.

(3) An incumbent judge who is a candidate for retention in or reelection to office without a competing candidate, and whose candidacy has drawn active opposition, may campaign in response thereto and may obtain publicly stated support and campaign funds in the manner provided in Canon 7(B)(2).

12. Id. Canon 7(A).
duct in office, and are required to maintain the dignity appropriate to judicial office.\textsuperscript{13}

Washington's Canon 7 is almost identical to the \textit{Model Code of Judicial Conduct} approved by the American Bar Association (ABA) in 1972, which has been adopted in all but three states.\textsuperscript{14} The \textit{Model Code} was formulated by the Special Committee on Standards of Judicial Conduct chaired by retired Justice Roger Traynor of the California Supreme Court.\textsuperscript{15} The fourteen member committee, of which half were judges, worked for two and a half years and went through thirteen drafts prior to reaching a final product.\textsuperscript{16}

The introduction to Canon 7 states that "[t]he fundamental need for impartiality and the appearance of impartiality of judges dictates that limits be placed on the political conduct of judges and candidates for judicial office."\textsuperscript{17} However, the commentary to Canon 7A(2) admits that "the tensions between the demands of political reality and the necessity that a judge be impartial . . . became fully evident to the Committee when it began considering the standards to apply to a candidate."\textsuperscript{18} The commentary speaks of compromise between the goal of impartiality and political necessity, but the tone is grudging: "As long as the system of electing judges is continued, the compromises must be made, but they should be recognized as such."\textsuperscript{19} It is worth noting that the Committee's goal was singular: impartiality.\textsuperscript{20} Political considerations were seen as an obstacle to achieving this goal, rather than as an independent and competing goal of accountability to the voters.\textsuperscript{21} The Committee appeared to want a purer world, in which the judicial branch of government would be less subject to majoritarian influences.

The enforcement of Canon 7 in Washington is delegated to the Judicial Conduct Commission, which consists of six public

\begin{itemize}
  \item \textsuperscript{13} Id. Canon 7(B).
  \item \textsuperscript{14} \textsc{Patrick M. McFadden}, \textit{ELECTING JUSTICE: THE LAW AND ETHICS OF JUDICIAL ELECTION CAMPAIGNS} 13 (1990). Montana, Rhode Island, and Wisconsin base their canons on the \textit{Model Canons of Judicial Ethics}, which were approved by the American Bar Association in 1924. \textit{Id}.
  \item \textsuperscript{15} \textsc{E. Wayne Thode}, \textsc{Reporter's Notes to the Code of Judicial Conduct} 1 (1973).
  \item \textsuperscript{16} \textit{Id.} at 42.
  \item \textsuperscript{17} \textit{Id.} at 95.
  \item \textsuperscript{18} \textit{Id.} at 96.
  \item \textsuperscript{19} \textit{Id}.
  \item \textsuperscript{20} \textit{Id}.
  \item \textsuperscript{21} \textit{Id.} at 96, 98.
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members appointed by the governor, two attorney members selected by the Washington State Bar Association (WSBA), and three judges, one each selected by the district, superior, and appellate court judges. The Commission investigates allegations of judicial misconduct, holds hearings, and imposes sanctions up to and including censure. The Commission may also recommend to the supreme court the suspension or removal of a judge. Judges seeking advice about Canon 7 or any other canon may request an opinion from the Ethics Advisory Committee set up by the supreme court to issue formal advisory opinions.

Candidates for judicial office who are not judges are subject to disciplinary proceedings by the state bar association for Canon 7 violations in the same manner that any attorney may be disciplined for violations of the Washington Rules of Professional Conduct. Attorney candidates are directed to the state bar association for advice about the canons, which is often provided informally.

23. Id. § 2.64.055.
24. Id.
25. Wash. Ct. G.R. 10 provides:

(a) The Chief Justice shall appoint an Ethics Advisory Committee consisting of seven members. Of the members first appointed, four shall be appointed for 2 years, and three shall be appointed for 3 years. Thereafter, appointments shall be for a 2-year term. One member shall be appointed from the Court of Appeals, two members from the superior courts, two members from the courts of limited jurisdiction, one member from the Washington State Bar Association, and the Administrator for the Courts. The Chief Justice shall designate one of the members as chairman. The committee (1) is designated as the body to give advice with respect to the application of provisions of the Code of Judicial Conduct to officials of the Judicial Branch as defined in article 4 of the Washington Constitution and (2) shall from time to time submit to the Supreme Court recommendations for necessary or advisable changes in the Code of Judicial Conduct.

(b) Any judge may in writing request the opinion of the committee. Compliance with an opinion issues by the committee shall be considered as evidence of good faith by the Supreme Court.

(c) Every opinion issued pursuant to this rule shall be circulated by the Administrator for the Courts. A request for an opinion is confidential and not public information unless the Supreme Court otherwise directs. The Administrator for the Courts shall publish regularly opinions issued pursuant to this rule.


27. Assistance with ethical questions is available by calling the WSBA Legal Department at (206) 727-8207.
III. THE CANON INTERPRETED

The heat of a political campaign has generated some interesting questions for the courts and other bodies charged with interpreting and enforcing Canon 7. Their interpretations have tended to narrow the scope of permissible speech.

The Canon affects candidates' speech in three ways: First, it requires that campaign speech be truthful and dignified. Second, it prohibits pledges and promises of conduct in office. And third, it bars candidates from discussing their views on disputed legal and political questions.

The Washington Supreme Court has held that the dignity requirement prohibits candidates from questioning the integrity of their opponents. In In re Kaiser, District Court Judge Kaiser attacked his opponent for receiving campaign contributions from DWI defense attorneys and suggested that his opponent would not be tough on DWIs. The court said that Kaiser's statements called into question "the integrity and impartiality of the judiciary." The court here seems to confuse Kaiser's criticism of one judicial candidate with criticism of the whole judicial system. One has to question whether the court can really mean that criticism of one judge says anything about the integrity of the judiciary.

The court relied on an Arizona case, In re Riley, which held that the dignity requirement prohibited the criticism of decisions, but that candidates were free to criticize a judge for "intemperate behavior, injudicious actions, lack of judicial temperament, unpredictability, and unnecessary delay." Thus Judge Kaiser's suggestion that his opponent's DWI decisions would be influenced by contributions from DWI defense attorneys was seen as criticizing decisions rather than injudicious actions. The court reached this conclusion despite the fact that there had been no decisions yet, just the arguably injudicious acceptance of campaign contributions.

The court's distinction in In re Riley is too fine, particularly given the charged arena of a campaign. It would seem that the

29. Id.
30. Id.
32. Id. at 277-78, 759 P.2d at 394-95.
33. Id. at 282, 759 P.2d at 396.
34. 691 P.2d 695 (Ariz. 1984).
35. Id. at 704.
court could draw a brighter line with regard to the kinds of permissible criticism of an opponent. Trying to interpret dignity leads to excessive caution on the part of candidates. Such caution denies voters access to unfavorable information about a judicial candidate even when the information is completely true and relevant to the judge's performance.

The court's decision also raises concerns about the practice, such as that of the Seattle-King County Bar Association (SKCBA), of publishing performance ratings of district and superior court judges. The characteristics rated include decision making, efficiency, and demeanor, and several judges have been rated "less than satisfactory." If organizations such as SKCBA are allowed to disseminate this information to bar members, it seems that candidates should be able to provide the same information to the public. In re Kaiser, however, seems to preclude such a practice, regardless of its usefulness.

"[P]ledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office" are the second area barred by Canon 7. The leading case is again In re Kaiser. Having held that it was undignified to conduct a negative campaign against his opponent, the court now went after Judge Kaiser's positive statements about himself. It held that statements made by Kaiser that he was "tough on drunk driving" constituted such pledges or promises. The court was influenced by the ABA Committee on Ethics and Professional Responsibility, which had issued an opinion that the promise of a "strict sentencing philosophy" was a violation of the canon. The court found that Kaiser's statement was indistinguishable from that of a Kentucky judge who had promised the United Mine Workers that he would give favorable treatment to union members.

One would like to believe that the court is not as naive as this decision would seem to indicate. Few citizens would find a general tough on crime pledge to be indistinguishable from a specific promise to a group whose members will come before the

39. Id.
40. Id. at 281, 759 P.2d at 396 (citing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1444 (1980)).
41. Id. at 280, 759 P.2d at 396.
court. Decisions like these are bound to have a chilling effect on the already tepid climate of a judicial campaign.

An even more difficult problem, however, is posed by the next clause of Canon 7B, which prohibits candidates from announcing "their views on disputed legal or political issues."\textsuperscript{42} Although its purpose is undoubtedly to avoid the appearance that a judicial candidate has prejudged an issue that will come before the court, pragmatists would just as surely point out that the legal and political views of judges are often accurate predictors of their decisions. The voters appear to be pragmatists too, ranking this kind of information about candidates very highly.\textsuperscript{43}

For example, many voters are interested in the candidates' general philosophies on abortion.\textsuperscript{44} However, because the Washington Ethics Advisory Committee has issued an opinion that bars candidates from stating their views on abortion, candidates may not answer questions on this subject directly.\textsuperscript{45}

Candidates are allowed, however, to list their endorsements from pro-choice or pro-life groups. In a front page story, the Seattle Times identified the Washington Supreme Court candidates who had been endorsed by the National Abortion Rights Action League (NARAL).\textsuperscript{46} The article quoted from NARAL questionnaires filled out by the candidates. Readers learned that one candidate had assisted at abortions during her training as a nurse, and that another had counseled a member of his family to have an abortion.\textsuperscript{47}

These admissions are permitted under Canon 7 because they are not opinions.\textsuperscript{48} However, one might well question why a candidate could, in theory, talk about her own abortion, but could not identify herself as pro-choice. It is difficult to see how the goal of impartiality is advanced by this "watch what I do, not what I say" approach.

\textsuperscript{43} See infra text accompanying note 113.
\textsuperscript{44} See generally Peter Lewis, State High-Court Endorsements Questioned—Backings Questionnaire By Abortion-Rights Group Raise Ethical Concerns, Seattle Times, Oct. 23, 1992, at A1 (supporting the idea that special-interest groups are concerned that candidates are dedicated to protecting the freedom of choice).
\textsuperscript{46} Lewis, supra note 44.
\textsuperscript{47} Id.
\textsuperscript{48} See Washington Code of Judicial Conduct Canon 7B(1)(c) (1992) (prohibiting announcement of "views on disputed legal or political issues").
Moreover, voters usually do not ask judicial candidates specific enough questions to compromise the candidate's ability to rule impartially. The Canon, however, makes no differentiation between asking whether a candidate is pro-choice and asking what would be reasonable time, place, and manner restrictions for abortion picketers. The former is the kind of general knowledge that voters are asking for; the latter is a comment upon a matter likely to come before the court. Whether the subject is abortion, the death penalty, or property rights, the voter has the right to enough information to place candidates on a philosophic continuum.

The prohibition on speaking about legal and political views has even been extended to conduct. The Ethics Advisory Committee was asked whether a judge could attend a fundraising dinner for an organization whose activities included lobbying and litigation to advance the legal rights of women. In answer, the Committee stated:

If an organization regularly engages in adversary proceedings in court and takes positions on disputed legal or political issues, a judicial officer should not purchase a ticket for and attend the organization's annual fundraising event. It does not matter if the ticket is complimentary because if the event is promoted as a fundraiser there is an appearance, which cannot be overcome, that the judicial officer supports activities in which the organization engages.

The opinion appears to be premised on Canon 7A, which regulates partisan political activity, and on Canon 7B(1)(c), which bars judicial candidates from announcing their views on disputed legal and political questions. Apparently, the Committee felt that attendance implied support, which implied agreement with political views, which implied announcement of those views. Although, in another case, the supreme court has rejected the idea of implying improper results from proper conduct, this advisory opinion is binding on candidates. By

49. The question was occasioned by the Northwest Women's Law Center auction.
51. Id.
52. In re Discipline of Stoker, 118 Wash. 2d 782, 827 P.2d 986 (1992). In Stoker, District Court Judge Fred Stoker had campaigned at both the Republican and Democratic booths at the Clark County Fair. Id. at 785-86, 827 P.2d at 987. The Judicial Conduct Commission concluded that he should be disciplined for his appearances because they implied that he was endorsed by both parties and that he was a member of both parties. Id. at 788, 827 P.2d at 988-89. The supreme court rejected the notion that a county fair was a political gathering. Id. More importantly, the court
extending its reach to conduct, the opinion worsens an already overbroad restriction.

IV. FRAMERS' INTENT

If those interpreting Canon 7 today tend toward one end of the impartiality-accountability spectrum, the founding fathers of Washington were at the other. They had good reason for desiring more accountability, however, because their experience with an appointed judiciary was not positive. The Organic Act of 1853,\(^53\) in which Congress set up the territorial government, provided for three appointed judges for the state.\(^54\) These three were to sit as a supreme court, as well as to individually ride a circuit within the state.\(^55\) These presidential appointees often had no interest in living in Washington, and absenteeism was a chronic problem.\(^56\)

Delegate Maginnes of Montana\(^57\) complained to his Congressional colleagues that the territorial judiciary was the worst part of territorial government because Congress thought the job so unimportant that it would send anyone.\(^58\) Between 1857 and 1862, the Washington Legislature memorialized Congress four times, asking for the authority to elect its judges.\(^59\) In 1865, Judge Wyche did not arrive in Walla Walla until one week into the court term and then left without finishing the term to travel east with Judge Oliphant.\(^60\) He also failed to notify the clerk of the court in Olympia so that the one remaining judge could be dispatched to Walla Walla.\(^61\) This triggered another memorial to Congress.\(^62\)

By the time the Constitutional Convention met in Olympia in July of 1889, the delegates seemed to take an elected judici-

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54. Id. § 9, 10 Stat. at 175.
55. Id.
58. Airey, supra note 56, at 276.
60. Airey, supra note 56, at 290 n.1.
61. Id.
ary for granted.\textsuperscript{63} Not only was their experience with appointments a bad one, there was a strong trend toward an elected judiciary. Every state to enter the union after 1846 elected its judges.\textsuperscript{64} Partisan considerations also dictated an electoral system, because the majority Republicans desired to control the courts as well as the legislature.\textsuperscript{65} Democrats at the Constitutional Convention tried unsuccessfully to prevent their opponents from gaining complete control. Democratic delegate C.H. Warner of Colfax moved for an amendment to provide minority representation: "If two judges are to be elected, no elector shall vote for more than one candidate therefor. If three judges are to be elected at such election each voter shall vote for two candidates therefor and no more."\textsuperscript{66} If the amendment passed, the Democrats could expect to pick up two of the five seats on the new supreme court. Accordingly, they caucused and agreed to vote as a bloc for the measure.\textsuperscript{67} Republicans, naturally, opposed it.\textsuperscript{68} If the rationale was partisan, the rhetoric was not; both sides claimed to be keeping politics out of the court.\textsuperscript{69} The Democrats claimed that the bench needed the political wisdom of both parties.\textsuperscript{70} The Republicans responded that having both parties represented on the court would politicize the body's decision making.\textsuperscript{71} Ultimately, the measure was defeated on a party line vote.\textsuperscript{72}

Democratic delegate J.J. Browne then made another attempt to depoliticize the court by offering an amendment that provided for a separate election date for judicial elections patterned after the Wisconsin system.\textsuperscript{73} He argued that a separate date would ensure that voters would not associate judicial candidates with political parties.\textsuperscript{74} The Republicans, hoping that

\textsuperscript{63} There was no discussion or debate with regard to an appointed judiciary.


\textsuperscript{65} \textit{Id.} at 32.

\textsuperscript{66} \textit{Oratory at Olympia, Tacoma Daily Ledger}, July 19, 1889, at 4.

\textsuperscript{67} \textit{Id.} at 4, 8.

\textsuperscript{68} \textit{Id.} at 4.

\textsuperscript{69} \textit{Id.}

\textsuperscript{70} \textit{Id.}

\textsuperscript{71} \textit{Id.}

\textsuperscript{72} \textit{Id.} at 8.

\textsuperscript{73} \textit{Taking a Rest, Spokane Falls Review}, July 21, 1889, at 1. Wisconsin holds nonpartisan elections on the first Tuesday in April and partisan contests on the first Tuesday in November. \textit{Wis. Stat.} § 5.02(5), (21) (1991-92).

\textsuperscript{74} \textit{One Clause Finished, Tacoma Daily Ledger}, July 21, 1889, at 4.
the electorate would make precisely those associations, defeated the amendment.\footnote{75}{\textit{Id.}}

Thus, for the State of Washington's first twenty years, judicial candidates were nominated at party conventions, and judicial races differed little from other political contests. During this period, voter participation in judicial elections was very high.\footnote{76}{SHELDON, \textit{supra} note 64, at 33.} Nearly all seats were contested, and because of partisan races and the prevalence of straight-ticket voting, voter roll-off was inconsequential.\footnote{77}{\textit{Id.} Roll-off refers to the percentage of voters who cast ballots in the high visibility races like president and governor, but who fail to vote in less visible races held on the same day. Roll-off averaged 3.9\% prior to 1912. \textit{Id.} at 40.}

Nomination by political convention gave way to the primary election system in 1912.\footnote{78}{\textit{Id.} at 34.} The primary contained both judicial and partisan races, but judicial candidates appeared on a separate, nonpartisan ballot.\footnote{79}{\textit{Id.} at 34-35. The legislature affected the change to a nonpartisan judiciary. The first bill passed in 1908, but was repealed because Republicans feared losing control of the supreme court in the 1910 elections. Nonpartisanship was reenacted in time for the 1912 elections. \textit{Id.} at 45 n.23.} The results of the reform were probably unexpected. Without partisan signals on the ballot, voter roll-off soared.\footnote{80}{Average roll-off between 1912 and 1932 was 38.9\%. \textit{Id.} at 40.} Interest groups, such as labor, replaced political parties in the campaign process, endorsing and working on behalf of their own slate of candidates for the court.\footnote{81}{\textit{Id.} at 34.} In 1924, the organized bar became involved for the first time—in reaction to a slate backed by the Seattle Central Labor Council.\footnote{82}{\textit{Id.} at 34-35.}

Something resembling the modern system of special interest politics was beginning to emerge.

The framers clearly intended that the judiciary be accountable to the populace. It appears that the system has moved away from this ideal in the interest of achieving greater judicial independence and impartiality through insulation from the heat of politics. Given the difficulty of proving that greater impartiality has been achieved, it is a fair question to ask whether we have given up too much.

\textit{1993 A Case for Reform of Canon 7}
V. Freedom of Speech

Those who wrote our state and federal constitutions recognized that information was critical to the election process. In the First Amendment to the U.S. Constitution\(^83\) and Article I, Section 5\(^84\) of the Washington Constitution, they guaranteed the right of all citizens to speak freely. In interpreting those guarantees, courts have placed a very high value on political speech. In *Buckley v. Valeo*,\(^85\) the U.S. Supreme Court declared that "[t]he candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election."\(^86\) Courts protect this highly valued speech by applying strict scrutiny to laws that restrict political speech based on content, requiring that the state show that the regulation is narrowly tailored to serve a compelling interest.\(^87\)

Canon 7 clearly restricts political speech based on its content, and thus is open to challenge on First Amendment grounds.\(^88\) To withstand such a challenge, the Canon would have to serve a compelling state interest and be narrowly tailored to that purpose.

There is no doubt that the state has a compelling interest in the impartiality of judges and in the integrity of the judicial system. As Justice Potter Stewart has said, "There could hardly be a higher governmental interest than a State's interest in the quality of its judiciary."\(^89\) However, satisfying the compelling interest portion of the test does not validate a regulation. To be constitutional, it must also be narrowly tailored.

\(^83\) U.S. CONST. amend. I provides that "Congress shall make no law . . . abridging the freedom of speech."

\(^84\) Wash. Const. art. I, § 5 provides that "[e]very person may freely speak, write and publish on all subjects, being responsible for the abuse of that right."

\(^85\) 424 U.S. 1 (1976).

\(^86\) Id. at 52.


It is difficult to consider a complete ban on the discussion of issues during a political campaign as being narrowly tailored. Several courts have agreed. The Kentucky Supreme Court considered the case of the candidate who had been charged with seven violations of the state’s judicial conduct code, encompassing all three of Canon 7’s speech provisions. He had allegedly (1) offended the dignity requirement by challenging his opponent to a televised debate, (2) made inappropriate promises of conduct in office by criticizing his opponent with regard to a particular case, and (3) announced his views on legal and political issues by criticizing a state law against carrying handguns by felons and the standard for court review of workers’ compensation cases.

The court focused on the prohibition against discussing legal and political issues. It found that this sweeping prohibition was unnecessary to prevent campaign statements that might indicate “predisposition or bias in favor of one litigant over another.” The court noted that such biased statements could be prohibited by a far more narrowly drawn canon.

This issue came to the Seventh Circuit in a case involving an Illinois appellate judge whose literature stated that he had “never written an opinion reversing a rape conviction.” In *Buckley v. Illinois Judicial Inquiry Board*, a unanimous panel held that the Illinois rule violated the First Amendment. Writing for the court, Judge Posner pointed out that the rule prohibited a judge from publicly stating his judicial philosophy: “[H]e cannot, for example, pledge himself to be a strict constructionist, or for that matter a legal realist . . . He cannot express his views about substantive due process, economic rights, search and seizure, the war on drugs . . . or the proper direction of health care reform.”

Judge Posner recognized that the issue involved a conflict between impartiality and the free flow of political speech, and that “only a fanatic would suppose that one of the principles

90. J.C.J.D., 803 S.W.2d at 954.
91. Id.
92. Id. at 956.
93. Id.
95. Id.
96. Id. at 230-31.
97. Id. at 228.
should give way completely to the other.  

He held that the state could not, in the name of impartiality, make “a rule so sweeping that only complete silence would comply with a literal, which is also so far as appears the intended and reasonable, interpretation of the rule.”

In overturning Canon 7, courts have also made the structural argument that an electoral system requires not only that candidates have a right to speak, but that the public has a concomitant right to be informed. The Kentucky Supreme Court said:

Other than allowing a judicial candidate to state a professional history, and promise faithful and impartial performance of duties if elected, the existing Canon strictly prohibits dialogue on virtually every issue that would be of interest to the voting public. Inasmuch as the purpose of an election is to give the electorate the opportunity to become informed on a judicial candidate’s qualifications for the position, which would include, among other things, knowledge of the law, and personal views and beliefs, the Canon fails in this respect. Instead, we are encouraging the public to judge candidates for our judiciary by not much more than their personal appearances.

Washington’s Canon 7 is identical in every relevant part to the canons overturned in Illinois and Kentucky. The issue is clearly drawn: Is Canon 7 tailored narrowly enough to prohibit only that speech which may detract from the integrity and impartiality of the judiciary? Under traditional First Amendment strict scrutiny analysis, the answer is no. When a regulation prohibits a judge from talking about how drunk driving should be punished, he is deprived of the right to express himself, and the voter is deprived of valuable information. The punishment of drunk driving can be clearly separated from the punishment of a particular drunk driver. Because a judicial candidate’s speech as to the latter can be distinguished from and prohibited without also prohibiting speech as to the former, Canon 7 is not narrowly tailored.

98. Id. at 227.
99. Id. at 231.
VI. THE VOTERS

As Oregon Supreme Court Justice Hans Linde has observed, "Once we gave up drawing our highest judges in a genetic lottery, by birth into the House of Lords, every system of judicial selection other than some form of competitive civil service examination had to be political." The inevitability of political competition has not stopped the questions of lawyers and judges about the people who vote in judicial elections.

Social scientists have tried to answer their questions. Many have compared the characteristics of voters and nonvoters, and several have looked at judicial electorates in particular. For example, David Adamany and Philip Dubois examined the characteristics of voters in several judicial races during the 1960s. They found that these voters had high levels of political interest and information, were more politically involved, were more likely to come from upper socioeconomic groups, and had stronger partisan identities. Moreover, these voters were significantly more likely than nonvoters to be familiar with controversial judicial issues of that era: defendants' rights, school prayer, and free speech.

Nicholas Lovrich and Charles Sheldon reported similar findings in more recent studies in Oregon and Washington. In Spokane County, primary voters were surveyed with regard to their knowledge of the court and their voting behavior in judicial elections. Survey respondents were given a short quiz about the functions of the Spokane County court system and asked to predict their own scores. Most could do so accurately. The results showed that voters were "good judges of their own level of informedness." The survey also showed that actual knowledge of the courts had a powerful impact upon

104. Id. at 746-54.
105. Id. at 749.
108. Id.
109. Id.
voting participation. Voters were far more likely than nonvoters to have a good knowledge of local government and an interest in public affairs.

These studies paint a picture of a judicial electorate that is more educated and involved than the general public, an electorate that knows something about the court system. If the studies are believed, judicial voters are able to make sophisticated distinctions between candidates when given sufficient information.

Additional studies asked voters what kind of information they wanted about judges. The judge's past record ranked first, closely followed by attitudes on substantive legal issues. Background and experience, and evidence of honesty and integrity, ranked third and fourth. Endorsements and bar polls were seen as much less important. Because Canon 7 prohibits some uses of a judge's past record and nearly all reference to attitudes on substantive legal issues, voters are not getting the kind of information they want.

One might ask how voters would use information about a judge's philosophy on legal issues. Some answers can be gleaned from voter attitudes about judicial accountability. The voters surveyed above were also asked to choose between four alternative views of the purpose of judicial elections, and their answers were compared to those of judicial candidates. The four alternatives form a continuum from accountability to independence:

Delegate Function: "Elections should tell the judges what the people want, and the judges should follow the people's desires."

Stewardship: "Elections should only inform the judges of the general feelings of the people so that judges won't become too isolated."

Sanctions Function: "Elections should serve the sole purpose of removing lazy, corrupt and incompetent judges from the county or state courts."

110. Id.
112. Id. at 475.
113. Id.
114. Id.
115. Id.
Trustee Function: "Elections should support those judges who are independent of public opinion and remain unaffected by the people's demands."116

The delegate function was supported by forty-two percent of the Washington voters, but only six percent of the judges.117 Thirty-seven percent of the Washington voters and fifty-six percent of the judges agreed with the stewardship function.118 However, the sanctions function appealed to both groups equally, attracting thirty-five percent, while the trustee function was picked by twenty-two percent of the Washington electorate and thirty-five percent of the judges.119 While a significant minority of the electorate desired an extremely accountable delegate function, more support was shown for the moderate positions. These results suggest that there is a great deal of common ground between judicial voters and candidates. The results also suggest that voters understand that the role of a judge is different from other elected officials and that they have appropriately different expectations. One may infer that, although the voters want to know a judge's general philosophy so that it can be compared to their own, they are satisfied with a very general correlation between the two. They do not expect or demand election promises; they just want judges who are not isolated from the feelings of the community.

While statistical pictures do not capture the complexity inherent in the group of more than a half of a million people who vote in judicial elections, the portrait that emerges from social science research does not support fears that the voters are unable to evaluate judicial candidates. These particular voters are well-informed about politics and government generally. The majority understand that judges have a different function than legislators and that some independence is desirable. They also want more information about where judicial candidates stand on issues. Unfortunately, by withholding this kind of information, lawyers and judges give the impression to voters that they cannot be trusted with that information.

116. Id. at 477.
117. Id. at 476.
118. Id.
119. Id. The numbers add to more than 100% because voters were allowed to agree with more than one statement.
VII. What Other States Do

The problems of balancing judicial impartiality with accountability to the voters are not unique to Washington. Thirty-one states elect trial judges, and twenty-three states elect appellate judges.\textsuperscript{120} Eleven have nonpartisan systems similar to Washington's.\textsuperscript{121} Of these eleven states, Oregon and Wisconsin provide good comparisons. The works of Adamany and Dubois, and Lovrich and Sheldon suggest that, like Washington, the judicial electorates of both states are more educated and informed than the general public.\textsuperscript{122} The two states, however, have taken quite different approaches to Canon 7.

Oregon has largely rewritten Canon 7.\textsuperscript{123} In the words of Oregon Supreme Court Justice Hans Linde, "We have decided that restrictions on debate cannot be squared with the election of judges any more than of other elected officials. Voters need and judges are entitled to judicial freedom of speech."\textsuperscript{124}

\textsuperscript{120} Citizen Knowledge, supra note 106, at 28 n.1 (citing Conference of State Court Administrators, State Court Organization, 1987 (Williamsburg: National Center for State Courts, 1988)).
\textsuperscript{122} See Adamany & Dubois, supra note 103, at 746-54; Judicial Voting, supra note 106, at 236-44.
\textsuperscript{123} Oregon Code of Judicial Conduct Canon 7 (1992) (in relevant part), reads as follows:

DEFINITIONS: "Political activity" is (1) making a public statement for, or (2) contributing or soliciting funds, services or property to, or (3) lending one's name to, a political purpose or political organization.

A "political purpose" is the purpose to elect or defeat one or more candidates for a nonjudicial public office or the purpose to promote or influence the passage or defeat of laws or regulations at any level of government. A "political organization" is any group whose primary purpose is a political purpose.

A. A judge may not engage in political activity which:

(1) involves persons, organizations or specific issues that will require a judge's disqualification under Canon 3(C); or

(2) creates a reasonable doubt about a judge's impartiality toward persons, organizations or factual issues that foreseeably may come before the court on which the judge serves, whether or not actual disqualification becomes necessary; or

(3) lends the support of the judicial office (as distinct from the judge as a private individual) to a cause other than the administration of justice; or

(4) jeopardizes the confidence of the public or of government officials in the political impartiality of the judicial branch of government.

\textsuperscript{124} Linde, supra note 102, at 2001.
Accordingly, Oregon eliminated the nebulous reference to dignity, as well as the restrictions on airing one’s legal or political views. In their stead are prohibitions against comments that might disqualify a judge in an actual case or that might undermine confidence in the nonpartisanship of the judiciary.125 Judges may not engage in political activities that create “reasonable doubt about a judge’s impartiality toward persons, organizations or factual issues that foreseeably may come before the court on which the judge serves, whether or not actual disqualification becomes necessary,” nor may they risk “the confidence of the public or of government officials in the political impartiality of the judicial branch.”126 Thus, the Oregon language is more specific than that of the Washington version as to the intended result of impartiality. The main difference between the Washington and Oregon versions, though, is that Oregon does not preclude general statements of political or legal philosophy. In most other regards, the canon parallels Washington’s.

Contrary to the fears underlying the Washington version of Canon 7, the increased freedom for judicial candidates in Oregon has not resulted in mud-slinging. The single discipline case decided by the Oregon Supreme Court under Canon 7 involved the solicitation of campaign funds rather than campaign speech.127 If anything, campaigns in that state have been more qualification oriented than in Washington.128

Wisconsin, on the other hand, is one of the three states to use the Model Canons of Judicial Ethics as its model.129 Nonpartisanship is strictly prohibited. Judges cannot participate in caucuses, endorsements, or other activities,130 but judges can attend activities sponsored by organizations having political agendas as a member of the public.131 Judges are also not allowed to commit in advance with respect to any case or controversy that might come before the court or make promises with

126. Id. Canon 7(A).
128. Balancing the Views, supra note 111, at 475-76.
130. Wis. S.C.R. 60.14 states as follows:
A judge shall not be a member of any political party or participate in its affairs, caucuses, promotions, platforms, endorsements, conventions or activities. A judge shall not make or solicit financial or other contributions in support of its causes or publicly endorse or speak on behalf of its candidates or platforms.
regard to conduct in office. Still, other than these few restrictions, judges are largely free to campaign as they see fit. Like Oregon, this wide-open policy has not resulted in abuse. Despite the fact that justices of the Wisconsin Supreme Court run only every ten years, most incumbents in recent years have drawn credible challengers and issues have been discussed. Incumbents have tended to win, but the close contests suggest that voters have been able to make a meaningful choice.

VIII. PROPOSAL FOR CHANGE

Canon 7 should be rewritten to allow for a flow of relevant information to the voters. The ABA has recognized at least part of the problem. In August of 1990, it amended the Model Code by replacing “announce his view on disputed legal or political issues” with “make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.”

The new canon should not stop there, however. First, the mandate to maintain the worthy, but lofty, concept of judicial dignity should be eliminated. The concept is too vague to include in a disciplinary code. Moreover, as interpreted by the Washington Supreme Court in In re Kaiser, requiring judicial candidates to be dignified effectively bars them from criticizing their opponents or their opponents’ decisions from the bench. This interpretation says that judicial candidates should not

132. Wis. S.C.R. 60.15 states as follows:
A judge who is a candidate for judicial office shall not make or permit others to make in his or her behalf, provises or suggestions of conduct in office which appeal to the cupidity or partisanship of the electing or appointing power. A judge shall not do or permit others to do in his or her behalf, anything which would commit the judge or appear to commit the judge in advance, with respect to any particular case or controversy or which suggests that, if elected or chosen, the judge would administer his or her office with partiality, bias or favor.

133. It is important to note, however, that there is a fairly stringent campaign finance regulation in Wisconsin that applies to both judicial and partisan candidates. Wis. Stat. § 11 (1991-92).

134. Adamany & Dubois, supra note 103, at 738 n.37.

135. Telephone Interview with the Wisconsin State Elections Board (Aug. 13, 1993). Of the last three supreme court justices to face reelection, only one, William Babitch, was unopposed. In 1990, incumbent Donald Steinmetz received 355,581 votes, 52% of those cast, compared to 330,067 for his opponent, Richard Brown. In 1989, incumbent Shirley Abrahamson prevailed over challenger Ralph Adam Fine by a vote of 485,169 to 397,378, or 55%. Id.

play a part in helping voters hold other judges accountable for the decisions they render. Nothing could be further from the ideal sought by those who wrote our constitution.

Second, the prohibition against promises of conduct in office should be clarified to apply to promises to specific parties or on specific cases. A judge who says she is tough on crime is making a statement of general philosophy. That philosophy is very relevant to the judge’s role in sentencing. In a democracy, the community has the right to decide how to punish criminals as a class. Although the community is not entitled to make the individual sentencing decisions, it is entitled to choose judges who share its philosophy. By frustrating that right, the current interpretation of Canon 7 denies the community its legitimate role in setting criminal policy.

Lastly, the supreme court needs to adopt rules that apply to both judges and to judicial candidates. No canon can cover every eventuality, and candidates need a source for more specific advice. The Ethics Advisory Board, the Judicial Conduct Commission, and the state bar cannot be allowed to give different advice to different groups. Control should be placed in the hands of the supreme court, who can be accountable to the voters for its decisions.

These changes will not undermine the impartiality of judges. Impartiality is a personal trait that cannot be legislated. The only way to foster impartiality is to remove from the system any built-in obstacles. Elections are not obstacles to impartiality. Elections are a way in which citizens can have input in the decisions of their government, including their courts. The voters do not care about individual litigants, but they do care about the law. Judicial candidates should talk about the law. Washington possesses an informed and informed electorate that is beginning to complain about the lack of information. It is time for bench and bar to face their responsibility and rewrite Canon 7.