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GAGGED BUT NOT BOUND: THE INEFFECTIVENESS OF THE RULES GOVERNING JUDICIAL CAMPAIGN SPEECH

Max Minzner*

JOHN DIXON DOESN'T THINK 20 STAB WOUNDS ARE ENOUGH . . . . On appeal to the Louisiana Supreme Court, six Justices agreed with the death sentence. ONLY JOHN DIXON DIDN'T . . . . HE DIDN'T THINK MORE THAN 20 TIMES WAS ENOUGH TO JUSTIFY THE DEATH PENALTY. WHAT ABOUT YOU? THERE COMES A TIME TO DRAW THE LINE. THE TIME IS NOW.1

Justice John Dixon's opponent ran this ad in a 1984 race for the Louisiana Supreme Court. A large dagger was printed next to the advertisement.2

Jay B. Mallot, Jr. Raped a Three Year Old Girl. He was found guilty and given 15 years in prison . . . . But—the story isn't over. One of Alaska's Supreme Court Justices, Jay Rabinowitz, tried to reduce his sentence. Thankfully, he was voted down by the other Justices. Justice Jay Rabinowitz has ruled continuously in favor of the criminals over the victims as he attempted in this case involving the rape and sexual abuse of a child. Justice Jay Rabinowitz wrote the decision legalizing marijuana in Alaska . . . .

Justice Jay Rabinowitz, in hundreds of cases and decisions, has shaped the Alaskan tort system, which has driven up medical and insurance costs and literally forced many businesses to close down!3

The American Bar Association (A.B.A.) has made a concerted effort to restrict campaign speech in judicial races. Canon 5A(3)(d) of the A.B.A. Model Code of Judicial Conduct ("the Canon") tries to prevent candidates from promising voters that the candidate will decide cases in a particular way if elected:

A candidate for a judicial office: . . . shall not: (i) make pledges or promises of conduct in office other than the faithful or impartial performance of the duties of the office; [or] (ii) make statements that commit or appear to commit the candidate with respect to cases or

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* Law Clerk, Judge Pamela Rymer, United States Court of Appeals for the Ninth Circuit. J.D. Yale Law School, 1999. I would like to thank numerous readers for their helpful suggestions, in particular Dean Anthony Kronman. A special thanks to all the judges and judicial candidates who mailed their literature to me, making the empirical section of this article possible.

2. See id. at 69.
3. Id. at 80. This ad ran in an Alaska retention election.
controversies that are likely to come before the court.\(^4\)

In some areas, this "gag rule" suggests that candidates cannot send certain messages to voters. For instance, they cannot promise to favor plaintiffs in their messages.

However, the Alaska and Louisiana examples discussed above also send messages to the voters about cases. Dixon's opponent told voters he would be tougher on murderers than the incumbent; the Alaskan advertisement implied that whoever replaced Rabinowitz would deal more harshly with child molestors. These statements are more circumspect than direct promises, but they have the same impact. Voters learn how judges will rule in future cases. Without saying so explicitly, judges can imply that they will be tougher in criminal cases than their opponents.\(^5\)

Curiously, it is not at all clear that these types of statements are prohibited by the Model Code. Disciplinary cases involving the more traditional explicit statements of policy views exist. Cases where candidates are accused of violating the Canons through insinuations and innuendo are much more rare. Candidates cannot say they will punish DWI offenders harshly.\(^6\) Yet, suggestive comments about a candidate's record, such as "I have always punished DWI offenders harshly," are unlikely to be sanctioned, even though they may send the same message to voters.\(^7\)

Whether these implied commitments are different from express promises depends on the motivating factor behind the Canon. If the goal is to uphold the public appearance of the courts, a difference does exist, since implied promises are by their nature more covert than express ones. However, if the goal is to prevent judges from winning elections based on promises of biased decisions, whether the promises are explicit or \textit{sub rosa} matters little. This article argues that while the text and the history of the gag rule would seem to indicate that implied commitments are prohibited, candidates have a wide variety of methods available to signal voters how they might decide cases if they reach the bench. Courts have failed to recognize the importance of limiting speech other than traditional policy promises due to a failure to adequately consider the most important motivating factor behind the gag rule: providing litigants impartial adjudication. Because courts have not made this the primary


\(^5\) Indeed, these statements may be more effective than outright promises. Rather than simply being more campaign promises from more politicians, they have the apparent infallibility of all factual statements. Almost certainly, Rabinowitz and Dixon wrote those dissents. Not only are the statements potentially more effective, they are safer for the candidate. They can imply how they will decide cases, but not be bound as they would by promising to vote a certain way.


\(^7\) "Advisory opinions aside, no judicial candidate, so far as can be determined, has ever been disciplined for truthfully reporting a suggestive record fact." Electing Justice, supra note 1, at 82. Patrick McFadden wrote this in 1990. But see Buckley v. Illinois Judicial Inquiry Bd., 997 F.2d 224 (7th Cir. 1993) (overturning the gag rule on First Amendment grounds). McFadden correctly notes that advisory opinions exist, but they too are rare and often do not involve campaigns. See Tex. Ethics Op. No. 191, Jan. 24, 1996 (holding that judges cannot write articles on decided cases, but analyzing the issue of prohibiting commentary about cases under Canon 3, rather than Canon 5).
consideration in the gag rule cases, speech occurs in campaigns that would otherwise be forbidden under the Canon.

I propose a new, functional interpretation of the gag rule. The Canon is rooted on the concept that there are messages that candidates want to send that voters should not hear. We have decided to deny a constituency that feels ill-informed the information that it most wants. The reason we have chosen this approach is to prevent voters from picking judges based on how they will decide cases. The implied content of a candidate's statements should be analyzed and it should be determined what voters will glean from this content. Statements should be forbidden if they cause constituents to vote based on how judges will decide cases.

The rest of the article is organized as follows. Part I is a history of the gag rule, examining how it developed into its modern form. Both the language and the history indicate that implied, as well as express, commitments are within the intent of the gag rule. Part II, however, shows the real world effect of the gag rule. I surveyed the judges who ran for the highest state appellate courts around the country and acquired as much of their campaign literature as possible. The material shows that candidates can and do signal voters in the ways the Canon hopes to prevent. Part III analyzes the major cases involving alleged violations of the gag rule, showing that courts have paid insufficient attention to the goal of impartial adjudication, causing the current prevalence of implied promises. The conclusion presents two benefits of a functional interpretation. First, a functional interpretation of the Canon would be constitutional under the First Amendment. Second, it provides a clear sanction, something the current Canons lack. Judges who have sent these signals to voters

8. See Charles H. Sheldon & Nicholas P. Lovrich, Jr., Judicial Accountability vs. Responsibility: Balancing the Views of Voters and Judges, 65 JUDICATURE 470, 475 (1982) [hereinafter Judicial Accountability] (finding that the “past record of the judge” and “attitudes on substantive legal issues” were two of the factors voters said they wanted to know the most about); see also Nicholas P. Lovrich, Jr. et. al., Citizen Knowledge and Voting in Judicial Elections, 73 JUDICATURE 28 (1989); Charles H. Sheldon & Nicholas P. Lovrich, Jr., Knowledge and Judicial Voting: The Oregon and Washington Experience, 67 JUDICATURE 234 (1983) for evidence that voters feel uninformed about judicial elections. These articles are all largely based on the same set of survey data done in the early 1980s. Unfortunately, few follow-up surveys of voter attitudes in judicial elections have been done.

9. Whether the gag rule is beneficial has been extensively debated. The argument over the philosophical underpinnings of the gag rule and the model of judging it presumes that it will continue to exist for a very long time. See, e.g., J. David Rowe, Note, A Constitutional Alternative to the ABA’s Gag Rules on Judicial Campaign Speech, 73 Tex. L. Rev. 597 (1995) (mixed views on the appropriateness of the gag rule); Matthew J. O’Hara, Note, Restriction of Judicial Election Candidates’ Free Speech Rights After Buckley: A Compelling Constitutional Limitation? 70 Chi.-Kent L. Rev. 197 (1994) (anti-gag rule); Daniel Burke, Note, Code of Judicial Conduct Canon 7B(1)(c): Toward the Proper Regulation of Speech in Judicial Campaigns, 7 Geo. J. Legal Ethics 181 (1993) (pro-gag rule); Lloyd B. Snyder, The Constitutionality and Consequences of Restrictions on Campaign Speech by Candidates for Judicial Office, 35 UCLA L. Rev. 207 (1987) (anti-gag rule). I do not attempt to support or defend the gag rule. This research could support either the position that the gag rule does not work because it is too weak or the stance that the gag rule should be eliminated because it is ineffective. I assume the gag rule is good, or at least, here to stay. I claim that the Canon is not doing what it is supposed to do — preventing voters from selecting candidates based on which litigants the candidate will favor.
must recuse themselves in cases involving issues toward which they have shown a bias.

I. THE HISTORY OF THE GAG RULE

No general, formal rules on judicial conduct existed for most of the nation's history. The year 1924 marked the first attempt at designing an American code of judicial conduct. The goal of the Canons was to protect litigants' right to impartial adjudication. Canon 13 stated that a judge "should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor, or that he is affected by the kinship, rank, position or influence of any party or other person." The 1924 version of the Code even imposed a gag rule:

A candidate for judicial position should not make or suffer others to make for him promises of conduct in office which appeal to the cupididity or prejudices of the appointing or electing power; he should not announce in advance his conclusions of law on disputed issues to secure class support, and he should do nothing while a candidate to create the impression that if chosen, he will administer his office with bias, partiality or improper discrimination.

The Canon does not clearly state what is acceptable, yet it indicates that the goal is protecting parties.

The new Canons were extremely popular at the time of their introduction. The commentary, though, does indicate a substantial suspicion about whether judges were treating litigants equally. "If Judges had nowhere transgressed by accepting presents or favors from litigants or lawyers, or made indiscreet investments or speculated on margin, why go so elaborately into the nature of these offenses against judicial ethics?" The Philadelphia Public Ledger echoed this sentiment. "[T]he very formulation of the principles here expressed, and by an authority such as this, is proof enough that there are Judges who need some such ethical reminders as are here contained." The concern reflects a belief that judges were not treating litigants fairly and impartially.


11. Id. at 768 (quoting CANONS OF JUDICIAL ETHICS, supra note 10, Canon 30).


14. Id. (quoting PHILADELPHIA PUB. LEDGER).
Sometimes it can be said that a judge's point of view too greatly influences his decisions. Sometimes judges become autocratic. Often they are disposed to procrastinate and to defeat justice by delaying it. None of these failings creates quite the same despair for democracy as the occasional evidence that one has of intimacy between judges and politicians who are not above asking favors. When a litigant stands in court and sees an influential friend of the party whispering familiarly to a smiling jurist, one [sic] gets sick at heart.15

The popularity of the 1924 Canons waned as time passed. The 1924 Canons were subject to substantial criticism for their vagueness.16 The goal behind the 1972 revisions was to shift the Canons from a list of moral exhortations to a particular guide of conduct; therefore, the Traynor Commission substantially rewrote the Code.17 This transformation was largely accomplished by adding specific lists of permissible judicial activities. For instance, the prohibition against taking gifts in the 1924 Code was nothing more than "he should not accept any presents or favors from litigants, or from lawyers practicing before him or from others whose interests are likely to be submitted to him for judgment."18 The Traynor commission transformed this to:

Neither a judge nor a member of his family residing in his household should accept a gift, bequest, or loan from anyone except as follows:
(a) a judge may accept a gift incident to public testimonial to him, a book supplied by publishers on a complimentary basis for official use, or an invitation to the judge and his spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice;
(b) a judge or member of his family residing in his household may accept ordinary social hospitality; a gift, bequest, favor or loan from a relative; a wedding or engagement gift, a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms as to other applicants.
(c) a judge or member of his family residing in his household may accept any other gift, bequest, favor or loan only if the donor is not a party or other person whose interests have come or are likely to come before him, and, if its value exceeds $100, the judge reports in the same manner as he reports compensation in Canon 6C.19

15. Id. (quoting RICHMOND NEWS-LEADER).
16. Justice Traynor, Chair of the 1972 Commission that revised the Canons, described the older version as "nicely encased ... in the language of 1924, [but] lack[ing] substance for survival an [sic] generation later ... Forty years later [the time from 1924 to 1964 when the revision process began] the Canons were no more than picturesque in their goodness. They were far from good enough to serve as signals for judges ... ." Roger J. Traynor, The Code is Clear, 1972 UTAH L. REV. 333, 333.
19. A.B.A. MODEL CODE OF JUDICIAL CONDUCT Canon 5B(4) (1972). The 1990 revisions modified this section. See MODEL CODE, supra note 4, Canon 4D(5).
This section of the Code became more specific, allowing gifts from litigants if given in ordinary interactions. The Code recognized that these are unlikely to cause the judge to treat one class of litigants differently from another.20

The gag rule became Canon 7(B)(1)(c) in the new Model Code, reading: “A candidate, including an incumbent judge, for judicial office . . . should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office [or] announce his views on disputed legal or political issues.”21 This section of the Code received little commentary at the time.22 However, the gag rule proved to be one of the most controversial sections of the 1990 Code. The 1990 revisions to the Model Code involving the gag rule were substantial, and were heavily discussed. The new Code changed the language forbidding a candidate from “announce[ing] his views on disputed legal or political issues.”23 The current Code now prohibits candidates from “making statements that commit or appear to commit the candidate with respect to cases or controversies likely to come before the court.”24 The older language had come under fire as being unnecessarily broad in scope, failing the First Amendment requirement for narrow tailoring.25

The new language is more closely tied to the goal of upholding the impartiality of judges and is aimed less at the stature of the courts. It is restricted to the issues on which the judges might have to rule. If the goal was to protect the public perception of judges, a restriction on discussion of all legal issues could be supported, as the stature of courts is damaged whenever judges descend into political topics. However, since the concern is protecting litigants, judges can be permitted to speak out on foreign policy and other topics not related to cases they may see. The language also seems to prohibit implied promises. While the old rules barred announcements, pledges or promises, which generally would indicate only explicit commitments were outlawed, the 1990 Canon requires that candidates also avoid statements that appear to commit them if elected. This recognizes that even if candidates are not promising action, they still may be indicating how they might decide cases.

One of the concerns in reshaping the Canon was “protect[ing] candidates from improper questioning in questionnaires and opinion polls, and from other requests from interested persons or groups for specific responses on issues.”26 This report and the committee notes accompanying Section 5A(3)(d) reflect a declining concern over the unseemliness of judges campaigning as politicians. For the first time, the Canon explicitly provides that the “[s]ection does not

20. Like the 1924 Code, the vast majority of states adopted the 1974 Model Code with minor modifications. Only Montana, Rhode Island, and Wisconsin chose to design their own codes. See Jeffery M. Shaman, et al., Judicial Conduct and Ethics § 1.02, at 4 (2d ed. 1995).
21. Model Code, supra note 4, Canon 7(B)(1)(c).
22. For example, the 1972 Utah Law Review devoted to the new Canons does not mention the rule. See generally 1972 Utah L. Rev. 333-478.
24. Id., Canon 5A(3)(d)(ii).
26. Model Code, supra note 4, at 846 note on Canon 5.
prohibit a candidate from making pledges or promises respecting improvements in court administration." Commentary that the court system is badly run is likely to cause listeners to lose faith in the judicial system, perhaps more quickly than pure politicking. The call for administrative reform directly asserts that the current legal system is not working correctly. What they do not say — what the Canon is designed to prevent — is that the wrong litigants are winning.

The language and history of the Canon indicates that express and implied commitments are covered. The trend from 1924 to 1990 was to tie the requirements ever more closely to protecting the ability of litigants to get an impartial determination of their claims. If this is the motivating concern behind the Canons, it does not matter whether the statements that candidates make are express or implied. Both types of statements provide a way for candidates to signal how they decide cases. However, as Part II shows, candidates currently make implied commitments and signal to voters how they will treat particular litigants.

II. THE 1996 CAMPAIGN

While academic debates rage over the appropriateness and constitutionality of the gag rule, no one has studied the Canon's effect on actual elections. No studies have been conducted on what candidates say to voters and what messages are conveyed by what they say. If the Canon does not constrain candidate speech, then arguments proclaiming an unacceptable abrogation of the First Amendment lose much of their force. However, if elections have degraded to nothing more than commentary on "the man in the moon and the weatherman," then those defending the Canon must rethink their position. This Part attempts to analyze what voters actually hear from candidates—what messages judges send to their constituents. The evidence shows that while explicit commitments are rare, candidates have developed a variety of methods that do indicate to voters what the candidate would do if elected. If the goal of the gag rule is to protect the right of litigants to impartial adjudication of their claims and to then protect judges who wish to be impartial from unreasonable political pressure, then substantial weaknesses exist in the system of regulating judicial speech.

I surveyed the candidates for the highest state courts, attempting to obtain their campaign literature. Eighteen states either never elect Supreme Court Justices or did not have elections in 1996. Of the remaining thirty-two, thirteen

27. Id. commentary to Canon 5A(3)(d).
30. These states are Alaska, California, Connecticut, Delaware, Hawaii, Illinois, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, South
only held retention elections and nineteen held head-to-head races. In May of 1997, I called the candidates from the states with head-to-head races and requested literature from their races. In the end, I received literature from eighteen candidates in fifteen races.

The rest of this section involves an analysis of the literature, looking at both what candidates said and how they said it. The approach I use is what I have described as "functionalist analysis." What do voters learn about candi-
dates when candidates put forward this message? The literature shows that candidates, either consciously or unconsciously, have selected modes of campaigning that can be read to communicate a tremendous amount about how they may decide cases. While some of the statements could be read in a different light, if voters are interested in how candidates might rule, they have a substantial amount information available.35

A. Slogans

The concept of a sound bite has traveled from legislative and executive campaigns to judicial ones. Candidates identify themselves by a tag line. This is perhaps the easiest and most common way candidates send messages to the public.36 It can tell the voters exactly where the candidate stands. It has the advantage of directness; voters are unlikely to misunderstand the content. It has the disadvantage that disciplinary commissions are equally unlikely to make that error. A number of the cases where candidates have been sanctioned have involved the use of inappropriate slogans.37 One example a candidate used this election cycle, “Integrity, Honesty, Competence,” is clearly innocuous. It associates the candidate with broad, non-controversial values that say nothing about particular litigants or cases that might come before the court. Similarly, “Making Our Courts Work For You”38 makes a generic statement about judicial reform. A very common choice of slogans used some variant on the family values theme. Candidates would identify themselves as a “Devoted [Spouse] and [Parent].”39

35. I am not primarily attempting to determine whether candidates did or did not violate the current ethics rules. These rules, of course, vary from state to state. While many are substantially identical to the Model Code of Judicial Conduct, many are not. My intent is to determine what signals the voters might receive from the campaign literature and how that relates to the goals of the Canons. Several of the judges I spoke to asked me not to reveal their names in connection with their literature. After much consideration, I agreed to keep them anonymous in order to obtain the most material possible. Of course, I could not identify some and leave others anonymous, so I have excluded all candidate names. This means I will avoid referring to candidates by state as well.

36. The most common tool used by every candidate I surveyed was name pushing. It is the most prominent item on each piece of literature. This prominence is certainly sensible from a campaign standpoint. Name identification is one of the most important factors in judicial elections. See, e.g., PHILLIP DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY 80-89 (1980). This name pushing is essentially a content-less statement. Candidates are asking voters to vote for them because the voter has heard of the candidate, nothing more. The signal that is being sent is nothing more than: “I exist.” The gag rule never contemplated reaching this sort of speech. The danger many critics of the gag rule point to is that this becomes the only factor that voters may use and that “the election [will] be a pure popularity contest based on name recognition alone.” In re Baker, 542 P.2d 701, 705 (Kan. 1975). As the rest of this Part points out, we are not yet at that catastrophe. Anyone advocating for gag rule expansion and greater restrictions on judges, though, must recognize that name pushing, already playing a substantial role in the campaign literature, will only become more widespread.

37. See, e.g., In re Haan, 676 N.E.2d 740 (Ind. 1997); Deters v. Judicial Retirement and Removal Comm’n, 873 S.W.2d 200, 203 (Ky. 1994).

38. Source on file with author.

39. Source on file with author.
A more interesting example is: “No Money From Lawyers!” The candidate using this slogan emphasized it heavily, placing it on everything he distributed from bumper stickers to brochures to lapel pins. This slogan sends no message about decisions the judge might make involving particular litigants or classes of litigants. Presumably, every party appearing before the court is represented by a lawyer. It does send an implied signal about those who do take money from lawyers, though. It is intended to indicate that those who do take money from lawyers are affected by it. The obvious interpretation is that judges will favor lawyers who donated and rule against those who did not. The drafters of the Canons seem to agree with this view.

The slogans that send the signals that the Canons are trying to prevent, tend to involve crime. One candidate ran on a very simple slogan: “Citizens should be safe, victims protected, and criminals punished.” Similarly, another used “[s]trong record against violent crime and a strong supporter of victims’ rights.” This content is non-controversial, of course, but is designed to indicate a perspective to the voter. A constituent asked to compare judicial candidates, one who ran on this slogan and one who did not, would almost certainly view this candidate as more likely to be somewhat “tougher” on crime. This is certainly the signal desired.

More serious examples of crime sloganeering exist as well. One challenger included on the outside of a public mailing the question: “Is your child safe from drug dealers with [the opponent] as judge?” and the statement “Stop letting crime pay. Vote ‘NO’ to [the opponent] for Supreme Court.” A large skull and crossbones emblem adorned the exterior of the mailing. Inside the pamphlet were further slogans. “[The opponent] defends drug dealers . . . [The opponent] is soft on crime . . . . [The candidate] is tough on crime . . . . Get tough on crime. Vote [the candidate]. Supreme Court Judge.” Here the candidate may not be explicitly promising to treat drug dealers more harshly than other litigants, but the intention is clear. This candidate will not be as soft on drug peddlers as his opponent; if you want harsh treatment for drug dealers, this is the candidate to elect.

A second candidate followed a similar approach. The outside of the pamphlet asked “Why Does Our Criminal Justice System Still Let Criminals ‘Get Away With Murder?’ Because we can’t change the system until we change the Courts.” It also stated that “[i]t’s time to take a stand for law abiding citizens.” The text of the inside was almost entirely slogans:

40. Source on file with author.
41. Model Code Canon 5C(2) prohibits solicitation of funds from attorneys or acceptance of money directly. Using a campaign committee to shield the candidate from the donations is acceptable. While this does not explicitly state that money has a corrupting influence, it clearly is motivated by that concern.
42. Source on file with author.
43. While this is also a statement about the candidate’s record, it lacks specific information, so I decided to consider it a slogan.
44. Source on file with author.
45. Source on file with author.
46. Source on file with author.
47. Source on file with author.
This Time We Can Put The Criminals and The Current System Away.
You may not be an attorney. But you rely on the criminal justice system. We all do.

Women are murdered in their own homes during robberies. Patrons are gunned down in grocery store parking lots. In fine neighborhoods, at shopping malls, and at ATM machines innocent people are robbed, assaulted and killed.

Face it. We Are All Targets.

Many of the people charged with violent crimes have prior criminal records but have escaped fitting punishment of past crimes. All thanks to special deals and plea bargains. We’re not talking about a few cases. Over 90% of [this state’s] cases involve special concessions to criminals. We’re talking about the safety of your family.


[This candidate] is the first good chance to seize the moment and alter the way our justice system favors the criminal. [This candidate] is running for Chief Justice of the [State] Supreme Court. He is a conservative.

[The candidate] Has Seen The Deal Making Process First Hand And He Wants to Stop It.

[This candidate] will work to reform the plea bargaining process. He supports a crime victim’s amendment to the state Constitution. He wants to put accountability back into the system.

The Next Chief Justice Will Serve For Eight Years. Most Felons Won’t Be In Prison That Long.

The people who like the judicial system the way it is have most of the money. The people who are okay with light sentences for hardened criminals have the media’s attention. We have you. And the truth.

Enclosed is my contribution of $__, to fight crime and stand up for crime victims and the citizens in [this state].

The most interesting aspect of this piece of literature is that it arguably does not violate the Code of Judicial Ethics. While it would depend on the state, the only item that could be considered a “pledge or promise” would be the call for plea bargain reform and a victim’s rights amendment, both of

49. Source on file with author.
which might well fall into the category of administrative improvement of the courts. No specific cases are mentioned; almost any action taken in a specific case might be consistent with the statements above, except perhaps extensive plea-bargaining. These slogans should violate the gag rule. A candidate is attempting to gather support by implying he will treat particular litigants differently.50

B. Credentials

Every candidate engaged in some form of credentialing as well. Candidates emphasized their past history to appear qualified to the voters. This is widely approved of as the most appropriate way to win votes by those calling for the strictest enforcement of the gag rule.51 Most of it sends only innocuous signals to the voters, telling them that the candidate has the experience necessary for the position. Candidates point out that they have been judges for fifteen years or are veterans. These signals are unlikely to send messages about particular types of litigants.

However, this practice may have a different effect when it is used to signal to voters on issues. Again, the major topic area in which this occurs involves crime. Candidates with criminal law experience would emphasize it, sometimes in a very low key manner. One candidate just listed credentials, stating that he had been a “U.S. Attorney . . . Chief Assistant Prosecutor . . . Special Agent, FBI.”52 This is representative of the approach many candidates with prosecutorial experience took. While highlighting such experience (this candidate took up one third of his space with these three credentials), they presented no additional commentary. While this is not a source of tremendous concern, no campaign literature mentioned criminal defense experience. It seems rather unlikely that while over half of the candidates had prosecutorial work to discuss while listing their credentials, no candidate ever reported any criminal defense work. It may be true that these candidates are not trying to commit to positions to get votes; it is possible that this sort of subtle emphasis does not indicate any lack of impartiality. Yet, it does say that candidates at least feel pressure to make these indications.

Some candidates went further than just listing prosecutorial credentials, focusing on criminal experience in other branches of government. A candidate with legislative experience mentioned multiple times his authorship of a “white-collar crime act and state-wide Grand Jury Act that helped prosecute criminals” and that “[w]hile in the legislature, he voted to make criminals work to pay their victims [and] helped pass laws to allow victims to have a say in sentencing and to require that victims be notified before their attackers

50. I did receive a copy of an August 1996 letter sent to the state judicial standards commission requesting they investigate these statements and take action. I could not find any source that stated whether formal proceedings were begun. The same letter alleges this candidate distributed copies of an anti-abortion lawsuit he filed before becoming a judge. I did not receive any literature to that effect.


52. Source on file with author.
come up for parole." The inherent implication is that this experience is relevant to conduct as a judge and there will be some action on the bench that corresponds to this work in the legislature.

A different candidate relied more heavily than most on his prosecutorial experience. "[The candidate] served as a Criminal Prosecutor for the . . . District Attorney's office where he earned a reputation as a no-nonsense prosecutor who pushed for maximum sentences for convicted violent criminals. In violent felony cases, [the candidate's] conviction rate was one of [the district's] highest." This too implies that the experience of prosecuting and the attitude of being no-nonsense and pushing for maximum sentences is relevant as a judge. The average voter is going to infer that one who pushed for maximum sentences before the court is going to mete out maximum sentences when he sits on the bench. This type of bootstrapping legislative and executive experience into judicial races raises an additional concern. The gag rule is predicated on a model of judging that assumes judges behave differently from legislative and executive branch members. The model hopes judges will interpret the law rather than make it. There are certainly grounds on which to criticize this model of judging, as many commentators have, claiming judges have substantial discretion and use it to further policy goals. Given, though, that we have implicitly adopted this model of judging in the Canons of Judicial Conduct, candidates substantially undercut it when they blend the judicial experience with that of other branches.

Candidates also used their judicial records to communicate information. One pointed out that "[a]s circuit judge, the [candidate] is the ONLY candidate for Supreme Court Judge who has actually thrown criminals in prison — and does so gladly." This is the sort of suggestive commentary on one's record that the Buckley court found unobjectionable, but it has the same implications as promising that the candidate will take strict action toward criminals. The same candidate used his opponent's record in a suggestive manner:

[The opponent] is running for Supreme Court Judge. He claims he's the only candidate to practice law before the federal court.

In truth, [the opponent] appeared before the federal appeals court ONLY ONCE — and that was to defend four drug dealers. These drug kingpins were arrested for selling dope to addict our children . . . robbing them of their innocence . . . and dooming them to a life of crime and misery.

[The opponent] got paid big bucks to keep his crooked clients from going to prison.

53. Source on file with author.
54. Source on file with author.


56. Source on file with author.
Crime is shooting through the roof, thanks to liberal judges. Like the ACLU, [the opponent] would rather coddle law-breakers than provide justice to the victim.

That's why as a legislator, [the opponent] voted against a bill requiring convicts to pay for the suffering and pain they caused their victims.

In fact, [the opponent] has NEVER sentenced anyone to prison.57

This was accompanied by a picture of a girl in her early teens purchasing what appear to be drugs from an older, rather disreputable-looking man. This is another case where the candidate avoids making specific promises on issues, but still clearly communicates his message.

While crime is the dominant issue in most of the literature I received, and it is the only issue that appeared in a number of races, it is not the only one candidates were talking about. Gambling played a major role in one race.

[The opponent] said: “Gambling is not reflective of our state's values.” . . . Then [the opponent] broke his word and took thousands of dollars from casino owners and gambling interests. [The ad went on to list four donations that the candidate alleges came from casino owners and attorneys.]

Now you can stop [the opponent] . . . and teach a lesson to politicians like [the opponent] who promise anything to get elected, then ignore the voters they represent!58

The outside of this pamphlet contained the opponent's picture with the words “Broken Promises” printed over it.59 This ad does not clearly convey information to voters telling how the candidate might rule on issues (although it is likely that anti-gambling voters are going to believe the candidate will rule in ways they would like). However, the ad highlights the dangers inherent in any sort of campaign statements containing any policy commentary when made in judicial races. No context is given for the statement “[g]ambling is not reflective of our state's values.”60 However, assuming that it was made in a judicial race, the voters are going to reasonably infer that the candidate meant something by it, and that the candidate meant that he or she would act on the basis of that philosophy if elected. While the statement may or may not be inconsistent with taking money from gambling interests, it does show that judicial candidates who make commentary of this sort may find themselves called on to defend their actions in light of their promises.

Some candidates tried to use specific cases, opinions, or authorship as campaign tools. One candidate distributed a copy of a law review article he had written on labor issues and another on a survey of recent case law from that state’s supreme court. Another distributed a list of all her published opinions. Since all opinions were listed, it is difficult to imagine that specific in-

57. Source on file with author.
58. Source on file with author.
59. Source on file with author.
60. Source on file with author.
formation was broadcast to voters. No one issue or vote was emphasized over another. However, when candidates focus on particular opinions, they can send messages to constituents. One incumbent justice discussed authorship of a major piece of tort reform legislation, and quoted two newspapers on the opinion. One stated that it “will bring fairness to business owners and others who have felt they’ve unfairly been treated.” The other called it “a first step toward returning sanity to the [state’s] civil judicial system.” The same candidate, in a fund raising letter, emphasized the same opinion:

We are finally moving in the right direction in reforming the Court. I am especially proud to have written, in my first term as Supreme Court Justice, the opinion that became the cornerstone for historic tort reform legislation passed last year. Finally sanity has been restored to [this state’s] punitive damage law. However, there is much more that needs to be done.

This, of course, does not promise that in the next case the justice will support the pro-business position, but it leaves that implication in the mind of the voter. The inference the candidate desires the voter to draw is that the attitude underlying that opinion will guide the judge’s future jurisprudence. Plaintiffs’ attorneys might be justified in feeling somewhat reticent about appearing before this particular jurist. In the same vein, another candidate passed out newspaper articles about a client she represented whose jury verdict she had preserved on appeal. The client was a woman who was shot by two men hired by her husband. Of course, representing a client simply means an attorney is acting as an advocate; taking a case says nothing about how the lawyer might rule if elected. However, once a candidate decides to select one case out of the multitude he or she has been involved in and chooses to highlight it in his or her campaign literature, that case and the position supported takes on particular significance. Voters could reasonably infer that this position had special meaning to the candidate and that plaintiffs might receive sympathy and thus fare somewhat better in this court.

C. Endorsements

Publicizing endorsements is another common mechanism used by many of the candidates. They gather votes by telling their constituents who else supports them. The most innocuous endorsements, of course, come from family members. More complicated issues arise when the endorsements are from community groups or individuals in the community who clearly represent a certain position. A candidate tells the voters how he might rule in drug cases by saying: “No wonder [the candidate] has the wide spread support of law enforcement officers like [county sheriff], who said: ‘A drug dealer does not want to come into [the candidate’s] court.’” Not too far from this is an endorsement publicized by another candidate from a law enforcement group:

61. Source on file with author.
62. Source on file with author.
63. Source on file with author.
[The candidate's] strong stand on the punishment of violent criminals and compassion for the victims of their crimes should be commended.

His stand that criminals should be accountable for their actions is applauded by our members. This type of true 'punishment of the guilty' perspective is what the people of [this state] expect of their elective representatives.64

It serves no benefit to allow candidates to signal voters by including third party quotes that the candidates themselves could not or would not say.

While the attached quotes exacerbate these examples, very often mere endorsement and the candidate's decision to publicize it is sufficient to send the signal to the voters. Multiple candidates indicated that they had been endorsed by the National Rifle Association. Given the well-known position of the N.R.A. on many legal issues that might come before a court, candidates are making some implications about their position on gun control when they put this endorsement in their literature. Whether or not they intend to follow the N.R.A.'s stance on these issues, the voters are likely to infer and expect that the candidate will do so. Chamber of Commerce endorsements, presented by a smattering of candidates, do not have same the inflammatory nature as those by the N.R.A., but they are included for a reason and send a message to a voter: the candidate understands the concerns of business owners. These types of endorsements are most effective with the people who pay the most attention to them, single-issue voters. If the only issue a constituent cares about is gun control, he or she is going to look closely at the N.R.A. endorsements.65

Lawyer endorsements were common in a number of the materials the candidates distributed. These endorsements can be particularly effective in judicial races, as many voters feel inadequately informed about candidates66 and turn to lawyers who are assumed to know more about the candidates. Lawyer endorsements, though, implicate the same ethical concerns that led to the ban on soliciting contributions from lawyers or even accepting them without first passing them through a campaign committee.67 Of course, endorsements, unlike money, are not the root of all evil, but the potential for prejudice is still there, if somewhat reduced. This is particularly serious when the candidates are running for courts with statewide jurisdiction. Judges with jurisdiction over only a limited portion of the state could theoretically garner endorsements from outside their district. State supreme courts, however, can potentially rule on any case filed by any attorney.

One endorsement is present in every partisan head-to-head race: the endorsement of a political party. Candidates run on a party ticket, aligning themselves (generally) with one of two camps. While this does make a generalized

64. Source on file with author.
65. Some candidates give a large number of endorsements, perhaps a dozen or so. This is unlikely to lead to an inference that they will favor certain litigants and more likely to imply they are active in the community, an implication that does not conflict with the Canon. However, this is only true if the endorsements span the political spectrum, rather than being clustered in one region. Candidates often list several endorsements from police organizations and none from criminal defense groups.
66. See Radosevich, supra note 55, at 140 (quoting the former Washington Attorney General as stating he was “clueless when it came to some of the county judges”).
67. See MODEL CODE, supra note 4, Canon 5(C)(2).
comment on where the candidate might stand on a myriad of issues, the question of partisan versus non-partisan races is not one to be answered by the Canons. The state legislature determines the type of elections in which judges will run. Even in partisan elections, though, candidates can focus with particular strength on their party membership and signal how they might decide particular cases. A Republican candidate had the following fund raising letter distributed on his behalf:

Nothing should be more important to Republican lawyers than the capture of the [state] Supreme Court. For the first time this century that goal is within sight.

... 

With a few notable exceptions, the Bar is dominated by Democrat attorneys. One reason for that dominance is the perceived career and political disadvantage of being a Republican ...

If we elect a Republican Chief Justice, no young attorney will feel the need to register as a Democrat in order to preserve the opportunity to serve in the Judiciary. The perception of Democratic dominance will be laid to rest for good.

...

A lot of big money is pouring into [the opponent’s] campaign. The tide is with us, but we cannot win this race without the participation of every Republican attorney. We all have a stake in this race. The new Chief Justice will serve for eight years. Our chance to change the political culture of the state will not occur again this century.

...

Anyone hesitant to openly challenge the incumbent should know that every attorney can give up to (and including) $100.00 to the campaign without appearing on a finance report. A spouse can give an additional $100.00. Those not worried about openly taking a stand can give up to $4,000.00.

...

Please send your contribution today to bring about a better [state] and the beginning of the Republican era in our state judiciary.68

No commitments are made and no policies are discussed, yet this text goes substantially beyond ordinary party identification. It gives a sense that Republican lawyers fare better in front of Republican judges. It furthers the

68. Source on file with author.
suspicion that rulings are apt to divide along party lines and that partisan politics partially determines who wins cases.

Newspaper endorsements, particularly from large commercial papers, generally do not implicate concerns regarding a particular class of litigants; they tend to be based on experience rather than particular issue positions.\(^6\) One paper, however, included a column from a local college student who endorsed the judge. The student's older brother and his wife had been murdered nine years before.

[The candidate] presided over this very prominent trial . . . .

The suspect was found guilty of two counts of premeditated murder. When it came time to sentence him, [the candidate] was ‘firm but fair.’ He sentenced the man to 90 years in prison . . . . [The candidate] said he wished he could have done more.

When I was in sixth grade, my class went on a trip to the courthouse. [The candidate] showed a clip of the trial and talked about it a little while. I'll never forget what he said next.

"I gave this man as much as the law would allow me to. Unfortunately, I couldn't do any more."

Thanks to [the candidate], I and the rest of my family can sleep a lot better at night knowing this man is off the streets . . . . So many times, criminals get off scot free and never pay the price for the brutal crimes they commit.

I'd like you to remember my and my sister-in-law's family's experience when you step into the voting booth on Nov. 5. Remember that [the candidate] is a fair man and cares about the families of victims. He is a man of honor and serves justice to those who deserve to pay. He helps keep [this state] safe by keeping criminals off the street.\(^7\)

The Canon does not and should not hold candidates responsible for what supporters say about them.\(^7\) Naturally, if a candidate solicits commentary or deliberately disseminates it widely, then it becomes his or her own statement. From the literature I received, there is no evidence that this article was either solicited or distributed by the candidate. However, this commentary was used in a race and shows a clear mechanism for avoiding the Canon. No conceivable regulation could constitutionally limit a voter's right to write an opinion column about a candidate for office; these statements are at the core of the First Amendment. Yet, by this mechanism, voters can receive the very signals the Canon is trying to prevent. The judge need not make an explicit commitment and the voters still have the opportunity to base their decision on the judge's position on the issues. This also highlights the utility of recusal as the correct remedy in these cases. No sanction can or should be filed against the author of such a piece. Reprimanding or punishing a candidate in some other

\(^6\) Specialized newspapers can cause a problem. See Deters v. Judicial Retirement and Removal Comm'n, 873 S.W.2d 200, 201 (1994). In Deters, the candidate made statements in a Catholic newspaper. See id. There was no indication of whether the newspaper endorsed him. If it had, and he publicized it, that might imply particular stances on positions, especially abortion.

\(^7\) Source on file with author.

\(^7\) The exception is when the supporters are family members. The gag rule requires candidates to encourage family to abide by the Canons if the family member is acting in support of the judicial candidate.
way is also inappropriate, particularly if there is no reason to think the candidate was involved in soliciting the third party statement. Recusal avoids punishing the candidate, protects the rights of litigants, and reduces the incentive for candidates to try and find third parties to endorse them suggestively.72

Of course, not all candidates used these mechanisms to signal voters. Several distributed brochures which simply contained the names of the candidates, a list of their credentials without any particular focus on one position, slogans with minimal implied content, and only neutral endorsements. While it is admirable that many take this approach, it is not sufficient if the Canon is to be effective. The incentive to make suggestive commentary is very high. I focused on the more creative literature for the same reasons voters will—it is inherently more interesting. The Canon is designed to preclude candidates from making commitments about actions they will take if elected to the bench. It simply is not fulfilling that function, particularly in the area of crime. Candidates can and do engage in a contest of who will commit to punishing criminals more severely. This is the very activity that the gag rule is designed to prevent. Part III attempts to determine why candidates have this ability. The answer lies in the interpretation that courts have placed upon the Canon.

III. JUDICIAL INTERPRETATION

While the drafters of the Model Code play a substantial role in the process of determining what speech is prohibited, courts are the final arbiters. Of course, the American Bar Association has no power to codify the Canons on its own. Implementation and enforcement is the exclusive province of the state legislatures and the court system.73 Below I analyze the major federal and state gag rule cases.74 For the most part, the courts have inadequately recognized the implied content of messages that candidates send to voters. Section A shows that a reason for this is that courts have not focused on the policy goal that is the appropriate motivating factor for the Canon. Courts have not paid

72. The recusal solution is less effective here. Judges simply cannot recuse from all criminal cases. However, some narrower range of recusal could be drawn. It might be possible for judges not to sit on drug cases if they became a campaign issue. Hopefully, though, the threat of forced recusal would encourage candidates not to make comments contrary to the Canon.

73. The process for enforcing these codes varies from state to state. Until about fifty years ago, judicial conduct was only subject to punishment by the executive, impeachment, or recall. See Edward J. Schoenbaum, A Historical Look at Judicial Discipline, 54 Chi.-Kent L. Rev. 1, 1-9 (1978). More appropriate ways of enforcing ethics codes developed as it became apparent that these mechanisms were too crude and too rarely used to be effective. States moved toward judicial review of judges' behavior, placing discipline in the hands of state supreme courts. See id. at 13-18. The recent innovation has been quasi-independent bodies, empowered with the ability to investigate complaints. Every state now has some independent organization to review judicial conduct. See IRENE A. TESTOR & DWIGHT B. SINKS, JUDICIAL CONDUCT ORGANIZATIONS 2 (2d ed. 1980). These organizations have many forms, but generally can investigate alleged violations and make recommendations for action to the state's highest court, which remains the final arbiter in judicial disciplinary cases.

74. Federal court cases have only arisen in the context of constitutional challenges to the Canon on either vagueness, or far more commonly, on First Amendment grounds. The state court cases tend to involve the direct question of whether a judicial candidate should be disciplined.
attention to the right of litigants to get a fair trial. Section B looks at the types of messages to which courts have reacted. In general, even when the courts articulate the correct standard, which is protecting litigant’s rights, they fail to note the danger in suggestive commentary.

A. Litigants’ Rights

In most cases, courts have failed to recognize that the goal of the Canon is to protect the right to a fair trial. Unless this is seen as the goal, courts will never focus on whether candidate statements indicate a predisposition to a particular litigant. The Supreme Court of Arizona dealt with the question of judicial speech in In re Riley and exemplified the error the courts tend to make. The error was not the final outcome. Whether Riley violated the Canon is not clear. What is clear is that the court did not consider the appropriate interests when making its determination. It found that maintaining the public reputation of the courts was the interest:

Lawyers who are candidates for judicial office may not impugn the integrity of the judicial system or question the decisions of the judge. . . . Lawyers may make fair comment on the judge’s fitness so long as the comment does not call in to question decisions of the court or question the integrity of the judicial system. For example, a lawyer may criticize a judge for unnecessary delay in reaching a decision, but may not question the decision itself except on appeal. This is not to say, however, that a lawyer may not publicly disagree with a judge’s decision. Proper avenues for questioning a decision include the appellate route and disciplinary proceedings where appropriate. What we condemn is conduct which denigrates the judicial system as a whole and undermines the public’s confidence in it.77

When a candidate questions a ruling of his opponent, he may or may not indicate a particular tendency to favor a class of litigants. Pointing out an error in logic or law in an opinion says nothing about how a candidate may rule in future cases. It does not even necessarily indicate that the candidate would overrule the opinion, depending on the candidate’s view of the role of precedent. The conduct to be condemned is not that which makes judges look bad in the eyes of voters; it is the conduct which causes litigants to be treated unfairly in court.

The first federal case to challenge the constitutionality of the gag rule, Berger v. Supreme Court of Ohio, involved relatively innocuous statements.

75. 691 P.2d 695 (Ariz. 1984).
76. In that case, the respondent had an extended history of conflict with an incumbent judge which culminated in running against him for the seat. The challenger criticized the incumbent for issuing a contempt order against the challenger, saying: “[I]t’s crazy, it’s absolutely insane” and was “motivated by revenge on the part of [the incumbent].” Id. at 703-04. The court found these statements to be violations. The challenger also commented on the incumbent’s “lack of judicial temperament and unpredictability,” which the court found to be protected speech. See id. at 704.
77. Id.
Berger wanted to promise to make litigants in divorce cases appear without their attorneys and go through mediation.\textsuperscript{79} The Ohio Disciplinary Counsel had taken the position that "candidates should refer only to their background, awards they have received and endorsements from groups that support them."\textsuperscript{80} When considering the merits, the court discussed the possibility that the impartiality of the judiciary might be impaired by campaign commentary, but emphasized that "the state has a compelling interest in assuring that its elected judges are protected from untruthful criticism and that judicial campaigns are run in a manner so as not to damage the actual and perceived integrity of state judges and the bar; hence, the provision against misrepresentation."\textsuperscript{81}

The more serious concern is the truthful criticism: candidates stating that cases were decided incorrectly. While Berger’s printed statements indicated little bias toward a particular group of litigants, the court here was focused only on the harm to judge’s reputations, not on the potential damage to litigants. No federal cases on the gag rule came for several years following Berger. American Civil Liberties Union v. Florida Bar,\textsuperscript{82} like Berger, was a preemptive strike on the Canon in which the candidate filed for a preliminary injunction. The candidate involved wanted to both announce his views on disputed issues and criticize the incumbent.\textsuperscript{83} The heart of the ACLU analysis of the Canon came when the court looked at the first prong of the test for a preliminary injunction: the likelihood the plaintiffs would succeed on the merits. In looking to the state’s interest in prohibiting this type of speech, the court did mention that judicial candidates cannot appropriately bind themselves in campaigns and still act in a judicial capacity.\textsuperscript{84} However, the court did little more than cite the proposition — the analysis seems driven by other concerns, focusing on the fact that lawyers can be held to higher ethical standards than the

\textsuperscript{79} Furthermore, he criticized the use of trial referees as excessive and cited deficiencies in the handling of domestic relations disputes. See id. at 72. He also wanted to discuss an undisclosed “platform.” See id.

\textsuperscript{80} Id. at 73 (quoting Disciplinary Counsel v. Hon. Loren E. Souers, Jr., Case Number DD843). The Counsel took the position that “the Code of Judicial Conduct prohibits candidates for judicial office from making comments that are critical of the incumbent, regardless of the truth or falsity of those allegations.” Id. These positions are inadequate because they are both under and over inclusive. Commentary on the incumbent usually will involve signaling a position with respect to particular litigants, but will not always. However, as was seen earlier, endorsements from groups, and the decision to emphasize some endorsements over others, often clearly indicate a judge’s stance on cases. See infra notes 47 - 60 and accompanying text. Despite these comments from the Disciplinary Counsel, the court refused to accept that the Ohio Supreme Court would interpret the Canon the same way, saving it constitutionally by allowing promises of administrative reform. The Commentary to the Model Code now explicitly allows promises of administrative reform. See MODEL CODE, supra note 4, commentary accompanying Canon 5.

\textsuperscript{81} Berger, 598 F. Supp. at 75.

\textsuperscript{82} 744 F. Supp. 1094 (N.D. Fla. 1990).

\textsuperscript{83} He believed such action would necessarily involve indicating his views. See id. The opinion does not indicate the statements he wished to make.

\textsuperscript{84} ACLU, 744 F. Supp. at 1097. The Court cites to Morial v. Judiciary Comm’n, 565 F.2d 295 (5th Cir. 1977), which dealt with a requirement that a judge resign before announcing a candidacy for a non-judicial office.
general public. The court analogized the gag rule to the ban on attorney advertising, where the key concern was that the advertisements would be misleading. This analogy is misplaced. The problem in cases of judicial campaigning is not that the statements might be misleading; it is that they might mean exactly what they say. Judges will be able to commit to positions to win votes and will find themselves forced to do so. The information judges may want to give is not relevant, unlike the messages in attorney advertisements, because we have deemed it not relevant. We do not want voters basing their choices on how judges may decide cases. The court concluded:

The court also thinks that the state wrongly assumes that members of a respected and learned profession cannot announce their views on legal and/or political issues without undermining the public’s confidence in the objectivity of the judiciary. As to relevance, the court is acutely aware that judges routinely exercise their discretion within the confines of the facts and the law. How judges choose to exercise that discretion is a matter of much concern to litigants, lawyers, and the public alike. That concern makes a judicial candidate’s views on disputed legal and political issues anything but irrelevant.

The fact the public wants to base its votes on how the judiciary uses its discretion does not make it acceptable. Since the important competing interest of providing impartial courts exists, the case for the Canon is much stronger than this court recognized. The concern is not for the public’s confidence in the judicial objectivity, it is for the objectivity itself.

Only one federal court case has recognized and given significant weight to the important state interest in preventing candidates from signaling voters about how they might decide cases. Ackerson v. Kentucky Judicial Retirement and Removal Commission is a well-reasoned and well-argued look at the competing interests underlying the gag rule. Ackerson ran for the Kentucky in-

85. See id.
86. The Supreme Court held in Bates v. State Bar of Arizona, 433 U.S. 350 (1977), that blanket bans on attorney advertising were unconstitutional. The ACLU court, in discussing this opinion stated “[s]uggesting that the public was being underestimated, the Court said that if the naivete of the public causes attorney advertising to be misleading, the proper remedy is more disclosure of information rather than less.” ACLU, 744 F. Supp. at 1098. The ACLU court went on to examine Peel v. Attorney Registration and Disciplinary Comm’n, 496 U.S. 91 (1990). “[T]he Court once again emphasized that there is a presumption favoring disclosure of information over concealment, for ‘disclosure of truthful, relevant information is more likely to make a positive contribution to decision-making than is concealment of such information.’” Id. (quoting Peel, 496 U.S. at 108).
87. ACLU, 744 F. Supp. at 1099.
88. This case was followed by ACLU v. Florida Bar, 999 F.2d 1486 (11th Cir. 1993), where a candidate was found to have standing to challenge Canon 7(B)(1)(a) of the Florida Code of Judicial Conduct, which requires candidates for judicial office to “maintain the dignity appropriate to judicial office.” That case was remanded to the district court, where no decision has been handed down yet. No direct appeal was taken in the first ACLU case, but a permanent injunction against enforcement of the gag rule was put in place. See ACLU, 999 F.2d at 1489, n.4.
89. 776 F. Supp. 309 (W.D. Ky. 1991). Ackerson involved the new Kentucky Code which was identical to the 1990 Model Code. The old Kentucky gag rule was found unconstitutional by the state supreme court. See infra notes 111 - 119 and accompanying text.
Intermediate appellate court and expressed an interest in making statements about the administrative matters facing the court. He also wanted to discuss general legal principles, including the right to privacy, the role of United States Supreme Court precedent, and the use of the federal rules of evidence in state court. He alleged that he feared sanction from the state disciplinary board if he made these comments. In its analysis of whether the Code is narrowly tailored, the court distinguished between comments involving administrative matters and those involving adjudicatory issues. It held that restriction of administrative commentary was not acceptable because it was not narrowly tailored to further the compelling government interest — the impartiality of the court toward particular litigants was not affected. However, when looking at the prohibitions on commentary involving substantive rulings, the court found:

"There is a compelling state interest in so limiting a judicial candidate’s speech, because the making of campaign commitments on issues likely to come before the court tends to undermine the fundamental fairness and impartiality of the legal system. . . . [P]re-election commitments by judicial candidates impair the integrity of the court by making the candidate appear to have pre-judged an issue without benefit of argument of counsel, applicable law, and the particular facts presented in each case.

The Ackerson court took an additional step rejected by every other federal court. It recognized that no real difference exists between explicit promises of decisions and implied bias toward a particular litigant. “The Canon’s proscription of the appearance of a commitment obviously addresses commitments made indirectly as opposed to those made directly. It is axiomatic that if one may not do something directly, one may not do it indirectly.” While the Ackerson court found this axiomatic, the next section shows that no other federal court and few state courts have done likewise.

B. Implicit Signaling

Courts generally have not recognized the dangers of implied commitments in candidate statements. Federal court cases have been particularly derelict in this regard. In Buckley v. Illinois Judicial Inquiry Board, the Seventh Circuit ruled the 1974 version of the gag rule unconstitutional as Buckley claimed a First Amendment right to point out that he had never voted to overturn a rape conviction. It is hard to imagine why Buckley would make this

90. These included the case backlog, case assignment, number of cases pending, personnel decisions, and travel expenses.
92. The court easily found a compelling state interest in “an evenhanded, unbiased and impartial judiciary.” Id. at 313.
93. See id. at 314.
94. Id. at 315.
95. Id. at 314.
96. These cases tend to appear in federal court based on challenges to the constitutionality of the gag rule. Courts evaluate the harm of the statement in an attempt to determine the strength of the state interest in eliminating them.
97. 997 F.2d 224 (7th Cir. 1993).
sort of statement except to intentionally send the signal that he knew would be received; he would rule against rapists if elected. Perhaps his impartiality would not have been compromised, but the statement certainly was intended to imply it would be. The Buckley court viewed the Canon as reaching well into the realm of protected speech — it had “the benefit of the insight into the scope of such a rule as is provided by a ruling such as that of the Illinois Courts Commission that condemned so innocuous a statement as a candidate’s report of his past record in ruling on a particular type of case.” Presumably, the court would not have found “I will never reverse a rape conviction” innocuous, but that is exactly what Buckley’s statement implied.

The Third Circuit came out with a position directly opposite from that of the Seventh Circuit. Stretton v. Disciplinary Board of the Supreme Court of Pennsylvania found the Canon constitutional. Samuel C. Stretton wanted to discuss a wide variety of issues, including the need for the election of judges with an activist judicial philosophy who would consider changes in society when making rulings, his views on criminal sentencing and the rights of victims of crime, the meaning of reasonable doubt, and the importance of a basic constitutional right to privacy. Without much discussion, the court found the Canon constitutional as applied to these statements. While the court might have meant the statements were not protected speech, the decision’s tone is more consistent with the interpretation that the “as applied” challenge failed for another reason. Officers of the body charged with enforcing the Canon asserted that they would not consider these statements violations. This is a serious failure to recognize implicit signaling. Statements about being an activist judge who believes in the right to privacy implicate a host of values; at a minimum, they strongly imply a pro-choice perspective on abortion and an opposition to sodomy laws. It is doubtful that any attorney representing a pro-life

98. See id. at 229.
99. In contrast to later decisions, Buckley seemed to focus on protecting the rights of litigants. The court found the Canon unconstitutional because it “reaches far beyond speech that could reasonably be interpreted as committing the candidate in a way that would comprise his impartiality should he be successful in the election.” Id. at 228. However, the court did not explain how this standard permits the statements Buckley made regarding rape.
100. Id. at 230. The Buckley court avoided a direct conflict with Stretton, discussed infra, by distinguishing it on the grounds that the Stretton court had the luxury of reading the Canon narrowly since there was no state court interpretation.
101. 944 F.2d 137 (3d Cir. 1991).
102. See id. at 139.
103. See id. at 140. The court’s analysis of the facial challenge is much better. Stretton makes a far more significant investigation into the concern over providing litigants a fair trial than, say, ACLU, discussed infra. Rather than the misplaced analogy to lawyer advertisements, the court compared the restriction to the Hatch Act ban on campaigning by government officials, a step Congress was permitted to take to make sure “governmental employees . . . ‘avoid practicing political justice.’” Id. at 141 (quoting United States Civil Serv. Comm’n v. National Ass’n of Letter Carriers, 413 U.S. 548, 565 (1973)). The court found a compelling interest in promulgating the Canon because “[i]f judicial candidates during a campaign prejudge cases that later come before them, the concept of impartial justice becomes a mockery.” Id. at 142. On the tailoring prong, the court chose to read the Canon narrowly, asserting that the prohibition on announcing views on disputed legal or political issues only applied to issues likely to come before the court. The court interpreted the statute this way to preserve constitutionality, finding that a broader reading violated the First Amendment. See id.
organization would be pleased to draw Judge Stretton. While the content of
the statements regarding reasonable doubt, criminal sentencing, and the rights
of victims are not clear from the opinion, certainly any criminal defense law-
wer would attempt to discover the content of the platform before appearing in
this court. These statements indicate how Stretton would decide cases.

Decided just ten days after Stretton, Beshear v. Butt\textsuperscript{104} came to the oppo-
site conclusion about the Canon. Unlike the preceding cases, Sanford Beshear
had actually been accused of violating the gag rule\textsuperscript{105}. Beshear had stated during
his campaign that he found plea bargains unacceptable and would not al-
low them in his court, and sued in federal court for a declaratory judgement
that the Canon was unconstitutional.\textsuperscript{106} The Beshear court gave little weight to
the motivating factor—protecting litigants—that lay behind the Canon. The
court seemed to think that no state interest was implicated if the issues were
open and above board. The court found it sufficient that the "[p]laintiff has
shown that his utterances were made in good faith and not designed to mis-
lead the public or pose a clear and present danger to the community."\textsuperscript{107} The bias to a particular group of litigants inherent in the statement "I will not al-
low plea bargains in my court"\textsuperscript{108} may not be immediately apparent, but it is
real and does pose a danger. It is a bias against defendants who are clearly
guilty and prosecutors with relatively less serious crimes. Those defendants
who have obviously committed a very serious crime will get tried and con-
victed for longer sentences than if they had pled. Similarly, prosecutors will
not have the capacity to bring the less serious cases. The state has the right to
prevent judges from making these decisions in order to get elected.

As in the Ackerson case, Kentucky provides an exception to the general
errors courts have made.\textsuperscript{109} In Deters v. Judicial Retirement and Removal
the court easily found a compelling government interest and held this version of the Code constitutional. The Deters decision stands out not because of the constitutional ruling, but because of the language it sanctioned. Deters described himself as "a pro-life candidate." While this is more direct than the comment Buckley made about rape convictions, Deters stands out for prohibiting a statement that is less than an explicit commitment.

Unfortunately, though, this opinion is unique in this regard. Courts have shown a reluctance to sanction implied promises. As noted earlier, judges have never been disciplined for making suggestive record comments. Nor do cases exist where candidates have faced charges for emphasizing endorsements from particular groups. It is not just that state supreme courts do not sanction candidates when these cases are presented; the cases apparently never come before the courts. That courts have not adequately focused on the right to impartial adjudication has led to the failure to sanction implied commitments. Implied commitments do not undermine the concerns that have motivated courts, such as protecting the image of the judiciary. However, this failure to sanction has serious consequences, as seen in Part II. A functional interpretation that prohibits statements indicating preferential treatment of one class of litigants over another cures this problem.

10. 873 S.W.2d 200 (Ky. 1994).
11. Id. at 204.
12. Id. at 203.
13. Deters did not help himself, though. He stated that "hopefully" the statement would provide him "a distinct edge in the race" since "you're in it to win. You do what it takes." Id. Given the failure of other courts to recognize implied promises, a less candid candidate might have fared better before the court.
15. A rare case even mentioning the consequences of implied promises was In re Stoker, 827 P.2d 986 (Wa. 1992), which lay outside the gag rule context. The court had to determine whether a candidate's appearance at the Democrat and Republican county fair booths violated the non-partisan requirements in Washington judicial elections. The Disciplinary Commission found Stoker violated the Canons, as "[a] given fairgoer, passing the booth [Judge Stoker] was occupying at the time, would be given the distinct impression that he was supported or endorsed by that political party." Id. at 995. The court rejected this interpretation, holding that "[w]hile we must hold judges and judicial candidates to the highest standards of conduct, we must, at the same time, avoid, without a clear factual basis, reading into proper conduct 'implied' results which constitute violations of the Code of Judicial Conduct." Id. This case does not control the court decisions on gag rule violations, but demonstrates a reluctance to enforce except in clear-cut circumstances.
16. Explicit commitments of action are more frequently sanctioned. The Indiana Supreme Court reprimanded a candidate in the 1996 county court election who distributed literature which pledged that he would "stop suspending sentences" and "stop putting criminals on probation." In re Haan, 676 N.E.2d 740 (Ind. 1997). The court recognized that this was essentially a commitment to decide cases "without regard to evidence or the applicable rules of law." Id. at 741. The State of Washington sanctioned promises to be the "toughest on drunk driving" and statements that he was "tough on drunk driving," as "sing[ing] out a special class of defendants and suggest[ing] that the DWI defendants' cases will be held to a higher standard when tried before [this judge]." In re Kaiser, 759 P.2d 392, 396 (Wa. 1988). In cases with a straightforward and obvious violation of the Canon, state supreme courts tend to correctly look at whether a litigant's right has been infringed.
IV. CONCLUSION

An interpretation of the Canon precluding speech indicating a bias for or against particular litigants has two additional major advantages over the current system. First, it meets the constitutional requirements of the First Amendment.117 A rule requiring judicial recusal if the judge shows a predisposition toward one type of litigants or another is clearly narrowly tailored to serve the goal of providing impartial adjudication. The only question is whether this interest is compelling.

The interest is compelling because the right protected is constitutional. Litigants have a constitutional due process right to a fair and unbiased hearing.118 The Supreme Court has established that failure to recuse in cases in which a judge has a personal interest contravenes due process. Most recently, in Aetna Life Insurance Co. v. Lavoie,119 the Court held that Aetna’s due process rights were violated when an Alabama Supreme Court justice heard a failure to pay a claim case in which he had an interest.120 “[U]nder the Due Process Clause no judge ‘can be a judge in his own case [or be] permitted to try cases where he has an interest in the outcome.’”121 Judges who make campaign commitments certainly have a direct interest in the outcome.122

Another major advantage of this functional interpretation is that it provides a clear and natural sanction. Judges who exhibit a bias in this manner would be required to act as they do whenever they have a bias. They would be required to recuse themselves. Enforcement of the Canons of judicial ethics has always been complicated. While states have the power to issue a wide variety of sanctions, including reprimanding judges, suspension, or even removal,

117. Gag rule constitutionality has sparked much debate and has been the primary topic in the literature on this section of the Code. See supra note 8. The concern was most serious under the 1974 version, prohibiting discussion of “disputed legal or political issues.” MODEL CODE Canon 7 (1974). Indeed, it led the A.B.A. to alter the language to its current form.

118. This argument relies heavily on a similar claim made in Shepard, supra note 12, at 1089.


120. The claim alleged insurer bad faith. At the time of the decision, the justice was a party in two separate Alabama lawsuits against insurance companies alleging a bad-faith failure to pay a claim. See id. at 813. The Court recognized that while bias did not support disqualification at common law, views had changed, and disqualification was the norm. See id. at 820. The Court pointed to the Model Code’s call for recusal if the judge is biased.

121. Id. at 822 (quoting In re Murchison, 349 U.S. 133, 136 (1955)).

122. At a minimum, they do not want to appear to have gone back on their word. The Court in Aetna did indicate that the judge must have a pecuniary stake in the outcome. See Aetna, 475 U.S. at 828. However, older opinions do not share this perspective. In re Murchison, 349 U.S. 133 (1955), found a violation when a judge sat as both the judge and grand jury. Rather than find a violation of the constitutional right to a grand jury (U.S. CONST. Amend. VI), the Court analyzed the case on due process grounds. Finding that the “interest” a judge must have to find a due process violation “cannot be defined with precision,” Murchison, 349 U.S. at 136, the Court noted that his observation of the grand jury testimony skewed the judge’s perspective and that he could not free himself from the influence of being part of the prosecution, albeit briefly. See id. at 137-38 n.8 (Apparently the trial judge here did consider himself part of the prosecution.). If briefly taking an advocate role violates due process, indicating a preference for certain parties should also be.
and have used each of these at some time, these tend to be crude methods and not very closely tied to the offense. The problems with enforcement are particularly severe in the context of elections. Courts are hesitant about invalidating elections based on Code violations. Yet any other sanction is inadequate; the candidate will have already won the prize. Failure to find an adequate remedy is rooted in misunderstanding the fundamental goal of the gag rule. If the gag rule were concerned with protecting the public's view of the judiciary, then no sanction would be adequate because the damage is already done. However, if the view is that the gag rule is supposed to protect the rights of litigants to a fair trial, the remedy is obvious. Commitments are eliminated by preventing the candidate from making them credible. The litigant's right to an impartial hearing implies a right to a different judge.

123. See SHAMAN, supra note 20, at 7.
125. For instance, Minnesota has determined that absent criminality, gag rule violations are not sufficient to invalidate an election. See Burns v. Valen, 400 N.W.2d 123 (Minn. Ct. App. 1987).
126. Examples of this can be seen in some of the cases cited above. While a reprimand is appropriate since Haan lost his Indiana judgeship race, what recourse would be available had he won? See In re Haan, 676 N.E.2d 740, 741 (Ind. 1997). Similarly, the Kentucky Supreme Court avoided a tremendous headache by declaring their gag rule unconstitutional. The suggested sanction for Justice Combs was three-month suspension without pay. See J.C.J.D. v. R.J.C.R., 803 S.W.2d 953, 954 (Ky. 1991). This provides little comfort for attorneys who come before the court with cases involving either workman's compensation or felons carrying firearms; both subjects on which Justice Combs campaigned. See id.
127. The Canons already mandate disqualification in this circumstance. Canon 3(E)(1) governs disqualification: "A judge shall disqualify himself in a proceeding in which the judge's impartiality might reasonably be questioned..." The Second Circuit has declined to find recusal constitutionally mandated. See Brown v. Doe, 2 F.3d 1236 (2d Cir. 1993). Brown participated in a highly publicized robbery of a Brink's armored truck. The trial lasted months, and after he was convicted he filed a habeas action alleging, among other errors, prejudice against him on the part of the trial judge. See id. at 1248. When the judge ran for reelection, he used the Brink's case, "tout[ing] the conviction and tough sentence." Id. The court found that:

[N]o one can be surprised if campaign literature exploits community concern about crime. What the trial judge said during his reelection may well justify disapproval by the bar, the state legislature, or a discerning electorate, but it is not fundamentally different from the kind of appeal that elected judges make when they urge that they are tough on crime, or compassionate, or strict with polluters.

Id. at 1248-49.
128. Recusal for campaign statements is rare. Indeed, there is "only one reported instance of a judge's campaign statements leading to a successful recusal motion." ELECTING JUSTICE, supra note 1, at 20. In State ex rel. LaRussa v. Himes, 197 So. 762 (Fla. 1940) (en banc), the court forced Judge Himes to recuse based on his campaign comments. He had stated that "the people are shot down in cold blood; the people are assaulted and their homes broken into, and what the people want is a judge who will put people like Philip LaRussa and his associates away..." Id. at 762. On another occasion, Himes stated that "people like Philip LaRussa and his associates cannot come into Court and get a license for gambling by a fine or to violate lottery laws by a fine, but he would put them in [jail] where they belonged." Id. Understandably, when Himes was elected and LaRussa came before him on a charge of violating the lottery laws, he was apprehensive and moved for a writ requiring Himes to recuse. The court did not
The problems now facing the gag rule are serious but not insurmountable. Courts have turned their backs on the traditional goal of the Canon: protecting litigants. While they have prevented candidates from making explicit commitments of action, the multitude of implied commitments candidates are making have exactly the same effect. The solution to this is to reconsider the way courts have looked at the gag rule. If a candidate makes statements indicating a propensity to favor one type of litigant over another, they should be required to recuse themselves from cases involving those sorts of parties. Under the current system, candidates have the means to send the signals to voters that we do not want them to hear; they have the capacity to give the voters the promises the Canon is designed to suppress. Until courts more accurately interpret the Canon or the language is changed, it will not be effective at preventing the electoral process from interfering with litigants’ rights.

analyze the case under the Canon of Judicial Ethics, but rather under the general Florida recusal statute. See id. at 763. The court held that "when a candidate for the judiciary [announces his position on policies and issues], he disqualifies himself to sit in any cause affecting the issue he advocates." Id. at 763. Unfortunately, this rule has not taken hold nationwide or even in the state of Florida in cases involving Judge Himes. See State ex rel. Fuente v. Himes, 36 So. 2d 433, 434 (Fla. 1948) (holding that defendant could not raise a disqualification claim based on the same statements from the 1940 campaign due to procedural default).