Public Financing of Judicial Elections: An Ethical Analysis

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INTRODUCTION

State judges in the United States occupy a special place in society. They are responsible for resolving a large majority of the conflicts that occur between citizens, government, and the law.[1] Society asks them to interpret the law intelligently and impartially, without considering anything but the facts and evidence placed before them.[2] Yet, for many state judges, they must be elected and reelected by the same public that asks them to be impartial and steadfast in their reading of the law.[3] While there was a time where judicial elections were "sleepy affairs," where little attention was paid to them and incumbents often won,[4] the importance of these elections has continued to grow with each coming year.[5]

As the importance has grown, so too has the focus on the implication of judicial elections, both on judges and on society generally.[6] This new focus on judicial elections has born a number of possible reform options designed to contain the worst effects and elevate the best.[7] One of these options is the public financing of judicial elections, which gives candidates access to government funds as a replacement to private individual or corporate donations.[8] This Note analyzes the public financing reform from the perspective of legal ethics, seeking to understand how such a proposal would impact the ethical landscape of judicial elections, in which there exists a number of problems.

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1. JOANNA SHEPHERD, THE AMERICAN CONSTITUTION SOCIETY FOR LAW & POLICY, JUSTICE AT RISK: AN EMPIRICAL ANALYSIS OF CAMPAIGN CONTRIBUTIONS AND JUDICIAL DECISIONS 1 (2013).

2. *Cf.* Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1666 (2015) (discussing the importance of maintaining the perception of an impartial judiciary).

3. Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why It Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1261 (2008).

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

5. *Id.* at 267-68.

6. *See, e.g.*, Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 645-652 (2009) (discussing how increased competitiveness of judicial elections causes judges to change their voting records or appeal to special interest groups willing to donate to their campaigns).

7. *See generally*, Raymond J. McKoski, *Living with Judicial Elections*, 39 U. ARK. LITTLE ROCK L. REV. 491 (2017) (discussing various reform measures to improve the judicial election process).

8. *See id.* at 499.

First, Part I discusses the state of judicial elections in the United States, arguing that not only is the judicial election growing more important, but both the rise of outside interest group spending and the loosening of speech restriction on candidates have changed how elections are won and lost. Second, Part II highlights four areas of concern regarding the ethics of judicial elections, arguing that (i) lawyers must determine if donating to judicial campaigns is a necessary component of advocacy, (ii) donations create the possibility that judges are presiding over cases involving donors, (iii) judges are incentivized to decide cases to improve reelection prospects, and (iv) the rhetoric required to attain and maintain judicial office calls into question the impartiality of the judiciary. These problems extend from how judges get their money to how they decide cases, and from judges to lawyers to the people whose cases are before the court.

Next, Part III introduces the public financing idea and illustrates how it would impact the ethical problems laid out in Part II. While public financing does eliminate a number of conflicts of interest for judges and lawyers, it does very little to change how funds are spent by candidates, or how outside groups spend their money. Finally, Part IV argues that public financing could prove more effective when it is part of a broader electoral reform package and recommends some possible changes to the ethical codes of conduct governing judges. Ultimately, while public financing does reduce the ethical concerns surrounding judicial elections, it alone is not enough to rectify all the proliferating problems that our new age of judicial politics has created.

I. STATE OF JUDICIAL ELECTIONS IN THE UNITED STATES

The judicial election is an almost-uniquely American tradition. No other major country comes close to electing as much of its judiciary as the United States.[9] Since the first judicial elections were devised in the Jacksonian Era, Americans have had to balance their competing desires for accountability and judicial independence.[10] In the instances where accountability proved more important, elections have won out.[11] Additionally, as both American society writ large and legal academia have come to accept that "judges do engage in policymaking on some level,"[12] it follows then that the electorate should have a say in who gets to make that policy.[13]

States utilize a number of different processes to select and retain their judges. There are five main ways that judges are appointed or retain their position.[14]

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9. Pozen, *supra* note 4, at 266.

10. Geyh, *supra* note 3, at 1261.

11. *See* Pozen, *supra* note 4, at 271 ("There are few disciplinary measures cruder or more powerful than the prospect of electoral defeat.").

12. Chisom v. Roemer, 501 U.S. 380, 399 n.27 (1991) (citing Gregory v. Ashcroft, 501 U.S. 452, 466-67 (1991)).

13. *See* Pozen, *supra* note 4, at 273-77.

14. Geyh, *supra* note 3, at 1263.

First, legislatures can nominate and confirm judges.[15] Second, governors can nominate judges and can confirm them either unilaterally or with the approval of the legislature or some other body.[16] Third, judges can be elected (or reelected) in partisan elections, where "the candidate's party will appear on a ballot."[17] Similarly, judges could be subject to nonpartisan elections.[18] Lastly, judges can be appointed though a "merit selection" process, where a nonpartisan nominating body would come up with a list of qualified candidates, and one is ultimately selected by the governor.[19] Most iterations of this system, often called the "Missouri Plan" after the first state to adopt it, include "retention" elections where the judge runs unopposed to allow the state to decide if they should stay another term.[20]

While each state makes its own choices in the selection of its judges, it is clear that judicial elections play an outsized role in determining the country's judiciary. In total, thirty-nine states select at least some of their judges through a public election.[21] Thirty-eight states elect judges to their highest court: sixteen by retention election, fifteen by nonpartisan elections, and seven by partisan elections.[22] Consensus about which system is best remains elusive—in part due to the reasons explained in Part II of this Note—but the pro-election camp clearly is winning currently.[23] Nearly 90 percent of all state judges are accountable to voters,[24] so the debate may now be shifting from whether to have judicial elections at all to how best to insulate judicial elections from the worst excesses of political accountability.[25]

Recent trends in judicial elections have illustrated that there are a number of things for reformers of judicial elections to be concerned about. First, the amount of money being spent in judicial elections has skyrocketed.[26] Some of this is probably due to greater numbers of contested elections,[27] but that does not account for all the increase.[28] State supreme court dockets have been getting

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15. *See* Teresa Nesbitt Cosby, *Picking the Supremes: The Impact of Money, Politics, and Influence in Judicial Elections*, 4 FAULKNER L. REV. 73, 80 (2012).

16. *Id.*

17. *Id.* at 79.

18. *Id.*

19. Geyh, *supra* note 3, at 1262.

20. Cosby, *supra* note 15, at 81.

21. *Judicial Selection: Significant Figures*, BRENNAN CENTER FOR JUSTICE (May 8, 2015), https://www.brennancenter.org/rethinking-judicial-selection/significant-figures [https://perma.cc/8PKU-RNWB].

22. *Id.*

23. McKoski, *supra* note 7, at 495-97.

24. Shepherd, *supra* note 6, at 639 (citing NAT'L CTR. FOR STATE COURTS, CALL TO ACTION: STATEMENT OF THE NATIONAL SUMMIT ON IMPROVING JUDICIAL SELECTION 12 (2002)).

25. McKoski, *supra* note 7, at 497.

26. ALICIA BANNON, CATHLEEN LISK, & PETER HARDIN, BRENNAN CENTER FOR JUSTICE WHO PAYS FOR JUDICIAL RACES?: THE POLITICS OF JUDICIAL ELECTIONS 2015-2016 2 (2016).

27. *Id.* at 640.

28. *See* BANNON ET AL., *supra* note 26, at 7 ("One recent pattern . . . has been that states that use retention elections, which were historically usually low-profile elections that attracted virtually no spending, have begun to experience high-cost elections as well.").

larger, as have those in state appellate courts, often with cases on controversial issues such as abortion and tort liability.[29] This greater possibility for judicial policymaking combined with the federal judiciary's growing acquiescence to state courts interpreting their own constitutions has made judgeships on the state level much more significant.[30] It is small wonder that spending is increasing dramatically.

This new money is not going just to the candidates' coffers; there is also an explosion of outside spending. In the wake of the Supreme Court's decision in *Citizens United v. FEC*,[31] the landscape has shifted in favor of allowing large contributions from political action committees ("PACs").[32] While a great amount of focus has been given to the effect of this ruling on national elections, the state-level judiciary has been similarly affected. Since *Citizens United*, outside spending in state judicial elections has increased every election cycle.[33] In the 2015-2016 election cycle, PACs and other interest groups spent $27.8 million in judicial elections, accounting for forty percent of all total spending.[34] These outside groups often have undisclosed donors and are separate from the candidate, who cannot direct how those groups spend their money.[35]

The rise of campaign contributions (both to candidates and PACs) has coincided with a shift in how candidates campaign and are portrayed. The Supreme Court decision in *Republican Party of Minnesota v. White*[36] struck down a former Canon of the *Model Code of Judicial Conduct* which prohibited judges from discussing their political views.[37] Since then, candidates for judgeships have used their opinions on hot-button issues for political gain.[38] Interest groups have also taken advantage of the loosening restrictions on judges' speech, having candidates answer questionnaires explaining their views on positions that may even-tually come before them.[39] Additionally, both the opinions and actions of candidates are being portrayed in a much more negative tone.[40] The Brennan Center for Justice found that not only are television ads more prevalent than ever—a sign that judicial elections are becoming more contentious—but thirty-five percent of all ads were negative (up from twenty-one percent in 2013–2014).[41] Therefore, in order to win their elections, judges are forced to spend more money than ever before on

29. Shepherd, *supra* note 6, at 643.
30. Geyh, *supra* note 3, at 1264-65.
31. 558 U.S. 310 (2010).
32. BANNON ET AL, *supra* note 26, at 7.
33. *Id*. at 8.
34. *Id*. at 7.
35. *Id*. at 8.
36. 536 U.S. 765 (2002).
37. *Id*. at 788.
38. Pozen, *supra* note 4, at 301.
39. Geyh, *supra* note 3, at 1269.
40. BANNON ET AL., *supra* note 26, at 33-36.
41. *Id*. at 33.

advertisements that portray their opponents more negatively than ever before, all the while being more overt in their own political and partisan leanings.

II. ETHICAL CONCERNS WITH JUDICIAL ELECTIONS

Both the structural realities and the recent changes to the judicial election process create potential ethical problems. These problems impact all actors within the legal system: lawyers, potential parties, and the judges themselves. First, lawyers are forced to confront the question of whether contributions to judicial campaigns are a necessary component of zealous advocacy. Second, campaign contributions create a web of conflicts of interests between lawyers, outside parties, and judges. Third, judges are incentivized to change their positions in an effort to be reelected. Lastly, judges are confronted with the tension between espousing political views to be elected and remaining impartial towards potential future cases.

A. LAWYERS AS ZEALOUS ADVOCATES

Lawyers, by the very nature of their profession, interact with elected judges more often than any other type of citizen. They do so in their professional capacity, representing their client's case in the hope of a favorable decision. However, the financial reality of judicial elections—winnings elections cost money, whether contributions are paid to the candidate directly or to outside groups—present lawyers with a difficult quandary.[42] Should lawyers contribute to judicial campaigns, betting on a favorable outcome at the risk of choosing the wrong candidate, or not contribute at all, hoping judges remain impartial but ceding a potentially important tool in advancing future clients' interests?

Ethical considerations aside for a moment, the reality is that many lawyers do contribute to campaigns.[43] In particular, lawyers contribute to the campaigns of the very judges that they consistently appear before on behalf of their clients.[44] Whether they intend to or not, judges appear to more commonly rule in favor of those who contribute to their campaigns.[45] In one particularly egregious example, a *New York Times* study of the Ohio Supreme Court revealed that one Justice voted for his contributors 91 percent of the time.[46] By *not* contributing, lawyers run the risk of hurting their clients' chances in court.[47]

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42. Keith Swisher, *Legal Ethics and Campaign Contributions: The Professional Responsibility to Pay for Justice*, 24 GEO. J. LEGAL ETHICS 225, 228 (2011).

43. *Id.*

44. *Id.*

45. *Id.* at 232-37.

46. Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES at A1 (Oct. 1, 2006).

47. Swisher, *supra* note 42, at 254.

This landscape presents the key ethical dilemma for the lawyer – should he contribute and, if so, how much? The *Model Rules of Professional Conduct* establishes the principle of "zealous advocacy" in the ABA's comment of Rule 1.3:

> A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take *whatever lawful and ethical measures are required* to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with *zeal in advocacy upon the client's behalf*.[48]

Therefore, the zealous advocate should consider campaign contributions as a potential tool in advancing the interests of his client. However, a more troubling question is whether he *must* contribute. Contributing to a judicial campaign is no doubt legal, but the ethics of it remain unclear. The comment in Rule 1.3 goes on to say that lawyers may "exercise professional discretion in determining the means by which a matter should be pursued," indicating that they could choose to not contribute and still uphold the ethical duty of diligent representation.[49] However, how strict a view any particular lawyer has on his duty to zealously advocate for his client will impact the extent to which he will exercise that discretion.[50] For example, under a "contextual view,"[51] where the lawyer seeks to act only in instances that "promote justice," lawyers may abstain from contributing for fear of tainting the judicial process.[52] On the other hand, in a world where the other party in a trial *has* contributed handsomely to a judge, the contextualist lawyer may contribute in an effort to even the playing field and prevent injustice.[53]

The first ethical obstacle the lawyer encounters is whether to contribute at all. However, once the lawyer (or a party before the court) does contribute, there arises a question of how to resolve the perceived conflict, if it needs to be resolved at all.

B. RESOLVING CONFLICTS OF INTEREST

Not surprisingly, judicial elections result in conflicts of interest in the courtroom.[54] The ability of both lawyers and potential parties to contribute combined with the fact that contributors seem to secure more favorable outcomes creates scenarios in which a judge is presiding over a case where some or all of the parties involved have played a financial role in his election. The initial question to answer is whether these situations are ethically problematic at all. If there is an

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48. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (AM. BAR. ASS'N 2016) (emphasis added) [hereinafter MODEL RULES].

49. MODEL RULES R. 1.3 cmt. 1.

50. Swisher, *supra* note 42, at 254–62 (measuring how lawyers view the obligation to contribute against different models of lawyer ethics).

51. WILLIAM H. SIMON, THE PRACTICE OF JUSTICE 9-10 (1998).

52. Swisher, *supra* note 42, at 260 (citing WILLIAM H. SIMON, THE PRACTICE OF JUSTICE 138 (1998)).

53. *Id*. at 261-62.

54. Liptak & Roberts, *supra* note 46, at A1.

ethical dilemma, the second question is whether the resolution of the conflict (usually the judge's recusal from the case) is effective in addressing the problem.

The growth in outside spending has brought conflicts of interest to the forefront of discussion on judicial elections.[55] Interest groups representing various businesses and industries have raised huge amounts of money to support judicial candidates in the hopes they are sympathetic to their cause.[56] Judges, ever more desperate for campaign funds, might feel compelled to rule more favorably for these interest groups, either to reward them for contributing or to convince them to contribute again.[57] As a result, litigants who do not contribute to a judge's campaign may be up against a slanted court.

The *Model Code of Judicial Conduct* does seem to provide disadvantaged litigants with some recourse. First, the preamble sets out that judges should "avoid both impropriety and the appearance of impropriety in their professional and personal lives," a sentiment echoed in Rule 1.2.[58] Secondly, Rule 1.2 also demands judges act in a way that will "promote[] public confidence in the independence, integrity, and impartiality of the judiciary."[59] This requirement of impartiality is imbued directly in the judge at Rule 2.2, such that he "must be objective and open-minded."[60] Lastly, the *Code* also provides a procedure by which judges disqualify themselves "in any proceeding in which the judge's impartiality might reasonably be questioned."[61] However, there is little language suggesting that the *Code* mandates either refusal of campaign contributions by potential parties or a judge's recusal from any case involving a contributing party. Canon 4, which discusses the actions of judges and judicial candidates in elections, makes no mention of contributions except for rules surrounding the establishment of campaign committees.[62]

Therefore, an argument that these conflicts of interest are unethical would center around the premise that presiding over a case involving a campaign contributor would decrease "public confidence . . . in the impartiality of the judiciary."[63] On its face, it is a plausible argument; judicial favoritism of any kind is something that "threatens the rule of law."[64] Additionally, whether or not judges *actually* practice favoritism towards their supporters is inconsequential, since the *Code* instructs them to avoid both "impropriety *and the appearance of impropriety*."[65] Opinion polls also demonstrate that the public clearly considers campaign

55. SHEPHERD, *supra* note 1, at 1.
56. Liptak & Roberts, *supra* note 46, at A1.
57. Pozen, *supra* note 4, at 289-90.
58. MODEL CODE OF JUDICIAL CONDUCT, pmbl., r. 1.2 (AM. BAR ASS'N 2010) [hereinafter MODEL CODE].
59. MODEL CODE R. 1.2.
60. MODEL CODE R. 2.2 cmt. 1.
61. MODEL CODE R. 2.11(A).
62. MODEL CODE R. 4.4.
63. MODEL CODE R. 1.2.
64. Pozen, *supra* note 4, at 291.
65. MODEL CODE pmbl.

contributions to be an influencing factor in judges' decisions,[66] suggesting that the impartiality of the judiciary is already compromised.

Currently, the mechanisms for addressing these conflicts of interest are not particularly effective. First, judges often decide challenges to their own impartiality, and you would be hard-pressed to find a judge willing to call himself bought by an interest group.[67] Additionally, in situations where the *Code* might require recusal or disqualification, states either have not put the law on the books or refuse to enforce it.[68]

Thus, the judge presiding over his supporters' legal disputes does raise some potential red flags, insofar as it rattles confidence in the judiciary's neutrality. For separate reasons, however, states and judges alike have been reluctant to impose strict requirements for recusal or disqualification. Therefore, we are left with two possible scenarios, neither of which are appealing. Either these conflicts of interests are not ethical problems for judges, despite the red flags present, or they *are* ethical problems but the solutions have simply been ineffective at fixing them. In either case, judges are often left to decide cases unimpeded. While sometimes decisions may be made to benefit contributors past and future, judges may also make decisions to benefit their prospects in an upcoming election.

C. POLITICALLY MOTIVATED SHIFTS IN JUDICIAL DECISIONS

Just as Senators and Congressmen take votes that could cost them at the ballot box, so too do elected judges make decisions that impact their reelection.[69] While the previous section dealt with the impulse judges face in deciding in favor of past and potential donors, judges also can preside over cases that have implications beyond the parties involved. In those instances, judges may consciously or subconsciously decide in a way that better sets them up for a potentially contentious election season.

Criminals cases are a prominent type of case where this impulse manifests.[70] Elected state judges often are the final arbiters for many criminal cases throughout the country.[71] Over the course of any criminal trial, judges make a number of decisions at key junctures which can prove to be the difference in how the trial

66. Swisher, *supra* note 42, at 238-40.

67. Pozen, *supra* note 4, at 291.

68. *Id*. at 291-92.

69. KATE BERRY, BRENNAN CENTER FOR JUSTICE, HOW JUDICIAL ELECTIONS IMPACT CRIMINAL CASES 7 (2015) ("Several studies have found that re-election and retention pressures cause judges to (1) sentence more punitively and (2) vote less frequently in favor of criminal defendants on appeals.").

70. *Id*.

71. *Id*. at 1 (citing SEAN ROSENMERKEL, MATTHEW DUROSE & DONALD FAROLE, JR., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T. OF JUSTICE, NCJ 226846, FELONY SENTENCES IN STATE COURTS, 2006 - STATISTICAL TABLES 9 (2009), available at http://www.bjs.gov/content/pub/pdf/fssc06st.pdf [https://perma.cc/MK7C-5ZER]).

ends.[72] Perhaps the most monumental of these decisions is sentencing and, in particular, the death penalty.[73] Even in instances where juries recommend against the death penalty, judges can still order criminal defendants to death.[74]

Justice John Paul Stevens once said that society should be wary of judges that "bend to political pressures when pronouncing sentence in highly publicized capital cases,"[75] and it appears that he was correct. Numerous studies have demonstrated that judges make noticeable shifts in their sentencing—both increasing the length of sentences and increasing the occurrence of death sentences—when they are approaching an election.[76] This shift applies to both the trial judges making the initial decision and appellate judges deciding on appeal.[77] However, judges do not change their behavior solely regarding the death penalty; they also increase sentences for convicted persons and convict more of them in election years.[78]

These shifts have become more noticeable, and more relevant, given the proliferation of television advertisements in judicial elections.[79] These ads have increasingly focused on criminal cases. In the 2013-2014 election season, the Brennan Center for Justice found that 56% of ads for judicial elections focused on "criminal justice decisions."[80] Ads calling certain judges "tough" or "soft on crime" proliferate the airwaves.[81] Given this political environment, it is not difficult to understand why some judges are inclined to rule more harshly against criminal defendants. Such a shift has two political benefits: a judge could package his own decisions into "tough on crime" ads and also beat back other candidates' accusations of being "soft on crime."

The dilemma that judges face here—to appear "tough on crime" or risk losing your job—does raise ethical concerns surrounding a judge's impartiality. First, Canon 2 clearly states that "a judge shall perform the duties of judicial office *impartially*, competently, and diligently."[82] Still more specific is Rule 2.4, which calls on judges to "not be swayed by public clamor or fear of criticism."[83] To the elected judge, there is no purer form of criticism than being voted out of office.

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72. *See, e.g.*, Richard R. W. Brooks & Steven Raphael, *Life Terms or Death Sentences: The Uneasy Relationship Between Judicial Elections and Capital Punishment*, 92 J. CRIM. L & CRIMINOLOGY 609, 612 (2002) ("Through discretion, judges can tailor punishments to conform to socially desirable objectives.").

73. *Id.* at 609.

74. *Id.*

75. Harris v. Alabama, 513 U.S. 504, 520 (Stevens, J., dissenting).

76. BERRY, *supra* note 69, at 2 (2015) (compiling studies on sentencing); Brooks & Raphael, *supra* note 72, at 637.

77. BERRY, *supra* note 69, at 9-11.

78. *Id.* at 7-9.

79. *Id.* at 1.

80. *Id.* at 3.

81. *Id.*

82. MODEL CODE Canon 2 (emphasis added).

83. MODEL CODE R. 2.4.

Therefore, for a judge to consider that when making a decision would arguably run counter to the ideal of the impartial judiciary.[84]

Additionally, one could make a more specific argument that such considerations and shifts to curry to public opinion are impermissible campaign activities. Canon 4 makes the wide-reaching statement that judges should not "engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary."[85] While the adjudication of cases already before the court is not explicitly a "political or campaign activity," Comment 1 to Rule 4.1 does distinguish judges from other elected officials in declaring that judges "[make] decisions based on the law and facts of every case," not the "expressed views or preference of the electorate."[86] This argument therefore is premised on the idea that a judge ruling with politics in mind is engaged in a political activity performed in order to get reelected.

The decisions of judges, whether political or not, are often discussed over the course of an election. However, the context in which such decisions are discussed, as well as the overall tenor and tone of judicial elections, provide for the final ethical concern with elections.

D. PARTISANSHIP AND NEGATIVITY IN JUDICIAL CAMPAIGNS

Just as the actions of judges are subject to ethical scrutiny, so too is their rhetoric. Candidates for judicial office, just like those for executive or legislative office, engage in campaigns that put forth a case for their election.[87] There are two types of rhetoric that present an ethical dilemma for the judicial candidate. The first is the urge to present a partisan argument for one's candidacy – that their election ensures a political win for one particular ideology. The second is the urge to argue against one's opponent by presenting them in a negative light.

First, elected judges have an incentive to present themselves in a partisan light. By partisan, I do not solely mean affiliation with a particular political party, although that is one type of partisanship.[88] I am referring more generally to the support of any particular cause or ideology.[89] The Supreme Court's decision in

84. *See* MODEL CODE R. 2.4, cmt. 1 ("An independent judiciary requires that judges decide cases according to the law and facts, without regard to whether particular laws or litigants are popular or unpopular with the public, the media, government officials, or the judge's friends or family. Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences.").

85. MODEL CODE Canon 4 (emphasis added).

86. MODEL CODE R. 4.1, cmt. 1.

87. *See* Pozen, *supra* note 4, at 317-24 (discussing how judicial elections are becoming "healthier" and more like their executive and legislative counterparts).

88. A number of states allow judges to affiliate with a political party and establish partisan judicial elections where judges run for office on specific party lines. *See, e.g.*, Kyle D. Cheek & Anthony Champagne, *Partisan Judicial Elections: Lessons from A Bellwether State*, 39 WILLAMETTE L. REV. 1357, 1358-63 (2003) (discussing the history and current relevance of partisan judicial elections).

89. *See Partisan*, MERRIAM-WEBSTER ONLINE (Dec. 19, 2018), https://www.merriam-webster.com/dictionary/partisan [https://perma.cc/7PH9-AG4R] ("feeling, showing, or deriving from strong and sometimes blind adherence to a particular party, faction, cause, or person: exhibiting, characterized by, or resulting from partisanship").

Republican Party of Minnesota v. White struck down laws that prohibited candidates for judicial office from "announcing their views on disputed legal or political issues."[90] Since that case in 2002, candidates have been able to present their views on hot-button issues such as abortion and same-sex marriage.[91] They are also willing to present themselves as kindred spirits with political officials, who inherently have a partisan lean.[92]

The ethical implications of increasingly partisan elections are similar to those raised by shifts in judicial decision-making. Rising partisanship questions the extent to which a judge is truly open to all parties and all opinions.[93] Where a judge who engages in a partisan campaigning style wins his election, he remains under an obligation to "uphold and apply the law . . . fairly and impartially" and to not "be swayed by public clamor or fear of criticism."[94] Announcing a particular policy position places a judge in a position where he cannot deviate from that lest he be voted out of office for not being in line with his constituents.[95] Therefore, there is a profound pressure to decide cases in line with his pre-announced ideology, even if the core facts of the case may incline an objective judge to decide otherwise.

Perhaps amplifying the desire to decide cases in a partisan way is the growing negativity of judicial campaigns writ large. More than one-third – 35% – of advertisements concerning judicial elections were negative in the 2015–2016 election season.[96] That is a 14% jump from the previous election cycle.[97] A common type of negative ad involved attacking a judge for his or her voting record concerning criminal cases, leading to the pejorative "soft on crime" label.[98] One such ad in Mississippi attacked a judge for calling for a person indicted for sex crimes to receive a new hearing due to ineffective counsel, accusing the judge of "siding with child predators."[99] Doubly concerning is that the ad was misleading: the court unanimously agreed that counsel *was* ineffective and the defendant was entitled to an evidentiary hearing, one step below the relief the so-called "pro-child predator" judge wanted.[100] Other examples of negative ads include those

90. 563 U.S. 765, 768 (2002).

91. Marie A. Failinger, *Can a Good Judge Be a Good Politician– Judicial Elections from a Virtue Ethics Approach*, 70 MO. L. REV. 433, 453-56 (2003).

92. *See, e.g.*, TV Advertisement: Judge Sarah Stewart (last visited Jan. 5 2019), *available at* https://www.brennancenter.org/analysis/buying-time-2018-alabama [https://perma.cc/5V65-V47Y] ("Like President Trump, Judge Sarah Stewart will protect our Second Amendment gun rights.").

93. Geyh, *supra* note 3, at 1272.

94. MODEL CODE R. 2.2, 2.4.

95. Geyh, *supra* note 3, at 1270-72.

96. BANNON ET AL, *supra* note 26, at 33. The Brennan Center characterizes both "attack" ads – which criticize an opponent – and "contrast" ads – which promote the candidate while criticizing another – as "negative" ads. *Id.*

97. *Id.*

98. *Id.* at 36.

99. *Id.* at 38.

100. *Id.*

which accuse judges of upholding racial discrimination[101] or of "siding with the illegal alien lobby."[102]

The ethical dilemmas surrounding the negativity of judicial elections concern two types of activity. First is the more problematic issue of *false or misleading* negative ads: judges are incentivized in a growing negative ad environment to sensationalize the negative attributes about their opponents.[103] Judges are under an obligation to "promote confidence" in the judiciary by avoiding "impropriety and the appearance of impropriety."[104] Comment 5 to Rule 1.2 lays out the test for the appearance of impropriety as whether a reasonable person would, among other things, question the judge's honesty.[105] Being caught in a lie, or a stretching of the truth, would probably cause people to question the honesty of the offending judge, and could undermine confidence in the judiciary. More specifically, Rule 4.1 calls on judges to avoid making false or misleading statements during a campaign.[106]

The second ethical dilemma would be negative ads generally. While there is no Rule requiring judges to be positive in everything they do, one principle of the Model Code is the maintenance of "the dignity of judicial office."[107] That sense of dignity arguably implies that there exists some unwritten expectation that judges do not campaign the same way other politicians do.[108] However, judges running for office clearly are trying to win, and in the current political and media environment, negative ads are an effective means to victory.[109] This places judicial candidates in an unenviable situation: the very strategies that may give them the best possible chance at victory—negativity and partisanship in both rhetoric and advertisements—are also the things that could call into question the "dignity" of the office a victory would allow them to occupy.

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These four ethical concerns are present as a result of various states' desire to provide their citizens with a means of holding their judiciary accountable. While these problems would disappear should states abandon judicial elections and adopt some other form of appointment, such political will may currently be non-

101. *Id*. at 39.

102. TV Advertisement: Judge Tom Parker (last visited Jan. 5, 2019), *available at* https://www.brennancenter.org/sites/default/files/analysis/Buying_Time/STSUPCT_AL_PARKER_INVASION.mp4 [https://perma.cc/7MJM-A2CP].

103. Failinger, *supra* note 91, at 456 ("They raise the worry that judicial candidates will adopt standard campaign practices that distort their opponents' views or rulings in order to get elected.").

104. MODEL CODE R. 1.2.

105. MODEL CODE R. 1.2, cmt. 5.

106. MODEL CODE R. 4.1(A)(11).

107. MODEL CODE pmbl., para. 2.

108. Failinger, *supra* note 91, at 461.

109. *Id*. at 461-62.

existent in some states.[110] In addition, despite the existence of these ethical questions, the vast majority of Americans continue to *want* to elect their state judiciaries.[111] Therefore, judicial elections are here to stay. The next logical step then is to determine which reforms to the electoral process, if any, can reduce or eliminate the ethical concerns innate to judicial elections.

The remainder of this Note addresses this question by looking at one such reform: public financing. Part III discusses what public financing is and how it would affect the ethical pitfalls of judicial elections. Part IV builds upon that analysis to determine how public financing fits in with broader electoral reform, and where there are possibilities for improvement.

III. PUBLIC FINANCING AND ITS ETHICAL IMPACT

States possess the ability to amend the electoral process to prevent or curtail the ethical concerns outlined in Part II. This Part addresses one such possible reform: the public financing of judicial elections. First, Section III.A introduces the reform idea and discusses one state—North Carolina—that has enacted a version of it. Then, Section III.B discusses how such a public financing law would impact the ethical dilemmas lawyers and judges face in a state that has judicial elections.

Public financing would affect the ethical landscape of judicial elections in multiple ways. First, lawyers are relieved of the burden of deciding between contributing to judges or risking unfavorable outcomes and do not have to convince clients to contribute. Additionally, judges do not have to curry favor with special interests because they can get funding from the public fund. However, public financing is not a panacea. Because public financing does not change *how* money can be used, the ethical risk of partisanship and negativity still exist. Also, judges are still incentivized to decide cases, particularly those involving criminal defendants, with an eye to reelection.

A. PUBLIC FINANCING AS AN ELECTORAL REFORM

The growing chorus for public financing of judicial elections has accompanied their rising cost and importance. The presence of money in elections necessarily creates the appearance of impropriety; that judges will favor some litigants over others depending on who contributed to their campaigns.[112] The creation of a public financing option appears to be a welcome solution to this impropriety: judges cannot be swayed to decide in favor of contributors if their only contributor is a government fund.[113] Even if public financing is not exclusive—meaning

110. McKoski, *supra* note 7, at 494.

111. *Id*. at 495-497.

112. Failinger, *supra* note 91, at 447-48.

113. Michael W. Bowers, *Public Financing of Judicial Campaigns: Practices and Prospects*, 4. NEV. L.J. 107, 116 (2003).

judges can raise money from elsewhere—having some public monies reduces the strain on judges to raise money from private donors.[114] There are also non-ethics benefits to public financing: it reduces the barrier to entry, meaning there will be "increase[d] competitiveness in judicial elections and make them a greater tool of accountability."[115]

Recognizing these potential benefits, the ABA has endorsed public financing of campaigns since 2002.[116] Four states have heeded the call of the ABA and instituted some form of public financing regime: New Mexico, North Carolina, West Virginia, and Wisconsin.[117] Only two of those states—New Mexico and West Virginia—have their public financing programs still intact.[118]

North Carolina's system, although now repealed, provides a good foundation for understanding how a public financing of judicial elections would function. The Judicial Campaign Reform Act (JCRA), passed in 2002, provided for public financing for all elections for appellate courts beginning in 2004.[119] The government would provide supreme court candidates with $200,000, and intermediate appellate court candidates with $140,000, but only if they raised $33,000 from at least 350 people in amounts less than $500.[120] However, these rules only applied to general elections; candidates could raise money in primary campaigns, so long as they did not spend more than $69,000.[121] Finally, the funds necessary to finance this program came from a $3 "check-off" on individuals' state tax returns and an optional $50 contribution by lawyers while paying their annual license fee.[122]

Every form of public financing differs based on how it addresses a series of questions. Some key questions that any public financing regime must answer include:

- Which elections are covered by the program?
- How much money is provided?
- Who gets the funds?
- When do candidates get the funds? During the general or primary?
- Can candidates fundraise elsewhere if they received funds?[123]

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114. *Id*.

115. *Id*.

116. AM. BAR ASS'N, PUBLIC FINANCING OF JUDICIAL CAMPAIGNS: REPORT OF THE COMMISSION ON PUBLIC FINANCING OF JUDICIAL CAMPAIGNS 30 (2002).

117. McKoski, *supra* note 7, at 500.

118. *Id*.

119. Bowers, *supra* note 113, at 116.

120. *Id*. at 117 (citing Eric Dyer, *Lawmakers Approve Bill Altering Judicial Elections: Nonpartisan Publicly Financed Campaigns for Appellate Court Posts Could Start in 2004*, GREENSBORO NEWS RECORD, October 2, 2002).

121. *Id*.

122. *Id*.

123. *See* Charles Gardner Geyh, *Publicly Financed Judicial Elections: An Overview*, 34 LOY. L.A. L. REV. 1467, 1473-75 (2001). I have excluded conversations about *how* such programs are financed because they do not implicate any ethical concerns specific to judges or lawyers.

How any system of public financing answers these questions will impact how candidates for judicial office interact with the electoral process. Still more, how candidates interact with the electoral process impacts the extent to which the ethical concerns outlined in Part II come to fruition. The next Section addresses this question.

B. IMPACT OF PUBLIC FINANCING ON JUDICIAL ETHICS

The public financing of judicial elections has numerous impacts on the ethics of both campaigning for and holding judicial office. Such impacts also extend to the lawyers and parties who may find themselves before such judges. However, while public financing solves some of the ethical concerns discussed earlier in this Note, it may only help others, and does not address the rest. Additionally, any of these ethical impacts are dependent upon the particular public financing regime in place, and the extent to which it reduces the need for non-public funding sources.

The most obvious benefit of a publicly-financed judicial election is that it nearly eliminates the need for campaign contributions.[124] There are two ways that this benefit manifests. The first is that since judges do not have to raise so much money to campaign, judges would be less beholden to deciding in favor of past or future donors. In North Carolina this proved true, as judges who took public funds in their elections were less likely to decide in favor of donors than judges who did not.[125] The second benefit is that lawyers do not feel the need to donate themselves or suggest that clients donate in an effort to curry favor. In the first election cycle in North Carolina after the passing of the JCRA, donations from attorneys and businesses dropped from over half of all donations to just fifteen percent.[126]

These impacts make sense, and should be welcomed by a public interested in reducing the perception of "pay-for-play" in its courts. Judges have an ethical duty to make the judiciary appear impartial.[127] While one could hope that judges would reject any questionable donations without a public financing option, the financial realities of present-day judicial campaigns have placed judges in a bind.[128] A public financing system would alleviate judges from this vice: they could simply take the public funds and avoid the perception of impropriety that comes from funding a campaign with the dollars of parties who will eventually come before you. As a result, lawyers and their clients are similarly relieved from

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124. *Id*. at 1471.

125. Morgan L. W. Hazelton et al., *Does Public Financing Affect Judicial Behavior? Evidence From the North Carolina Supreme Court*, 44 AM. POL. RES. 587, 608 (2016).

126. Brian P. Troutman, *Party Over – The Politics of North Carolina's Nonpartisan Judicial Elections*, 86 N.C. L. REV. 1762, 1775 (2008) (citing *Graphic: How the Public Campaign Fund Has Reduced the Role of Private Money in Elections for the N.C. Supreme Court*, N.C. CTR. FOR VOTER EDUC. (last visited Aug. 1, 2008)).

127. *See* MODEL CODE Canon 1.

128. *See* Bowers, *supra* note 113, at 113.

the pressure of donating: since judges are not "for-sale" as a result of the public financing, lawyers and clients do not have to put in a bid.

However, there are still some concerns that remain. First, public financing is not unlimited, and therefore there must be some limits to how much each candidate receives, and which candidates receive them. In North Carolina, candidates only received public funding if they amassed some amount of donations.[129] Therefore, the ethical concerns associated with donations—the lawyers' advocacy and judges' conflicts of interest—still do remain. However, these concerns would be on a much smaller scale, as it only concerns a fraction of the eventual cost of campaigning.

Secondly, in a system where public financing is not mandatory, there is the chance that a candidate refuses to publicly fund his election and reintroduces all the ethical considerations for lawyers and clients. While he may not be concerned with the ethical quandary of taking money from eventual parties, he would force other candidates to weigh the possibility of raising more money with the potential for perceived impartiality. However, it is possible that such a decision to privately fundraise looks particularly bad next to judges who have a shield of impartiality due to public financing.[130]

Finally, and perhaps most importantly, there still remains the major role that independent spending plays in present-day judicial elections. With each passing election cycle, independent political action committees (PACs) spend more money and play a more outsized role in determining which judges are elected to the bench.[131] In contrast with the actual candidates, who can seek public funds and are bound by restrictions surrounding them, interest groups operate in the world outside the public financing regime. Whether or not they interact with any candidate, their presence continues to create an incentive structure where candidates may feel compelled to decide in the favor of special interests who fund the pacts.[132] Unless legislatures address this question as well, then states may have a system where judges nominally opt for public funds to play up the appearance of impartiality, while really deciding cases in a way to curry favor with interest groups who fund their election efforts through independent PACs.

Even if the state is able to address all the ethical concerns surrounding donations that remain even after it implements a public financing plan, a public financing plan does nothing to stop electorally-motivated shifts in opinion or the

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129. *Id.* at 117 (citing Eric Dyer, *Lawmakers Approve Bill Altering Judicial Elections: Nonpartisan Publicly Financed Campaigns for Appellate Court Posts Could Start in 2004*, GREENSBORO NEWS RECORD, October 2, 2002).

130. *See* Troutman, *supra* note 126, at 1775-76. ("While the leading indicator of success prior to the JCRA seemed to be partisan affiliation, the new order created by the JCRA seems to produce prejudices based on who opts in to the program. In 2004, four of five judges elected statewide participated in the public financing program.").

131. BANNON ET AL, *supra* note 26, at 40.

132. *See supra* Part II.B.

negativity and partisanship in judicial campaigns. Regardless of which type of funds—public or private—a judge uses in his or her campaign, he or she may still make rulings in cases in an effort to boost his or her reelection efforts. Additionally, while public financing may limit the *amount* which a candidate could spend, he or she could still use the money to finance ads which are overtly partisan or negative in nature. While a legislature could theoretically place limitations on acceptors of public funds, these restrictions would undoubtedly raise the same constitutional questions of judicial free speech as *White* did nearly two decades ago.

IV. CHARTING A MORE ETHICAL PATH FORWARD

Public financing of judicial elections is a solid first step towards the improvement of the impartiality of both the electoral process specifically and the judiciary generally. However, there remain significant areas where even a robust public financing regime would not solve the ethical concerns inherent in our current system of judicial elections. This Part briefly lays out possible next steps forward for legislators and activists who wish to see a reduction in the ethical problems this Note has addressed. First, public financing should be considered as an integral component in a broader electoral reform package, with public financing seeking to be as complete and exclusive as possible. Second, the ABA and the states should revise their judicial codes of conduct to provide for more specific guidance on elections and recusals.

Public financing of judicial elections is not a panacea, but it is not a poison either. There are a number of effects that should make people excited about such a plan, not least of which is the idea that judges will work less for special interests and more for the ideal of the rule of law. However, one of the key takeaways from this Note is that it is not the solution to all our problems, and therefore must be implemented alongside other reforms which could solve other problems. An example of such a reform could be legislation that targets negative and misleading ads, which may resolve the ethical tension between winning and cutting negative ads. Another possibility would involve curtailing the power and the secrecy of independent PACs, either with robust disclosure requirements or spending restrictions. Such a law may reduce the importance of these PACs to the election of judges and would therefore enhance the benefit of public financing. The specific contours of these policies are left to other scholars and other articles, but the fact remains that public financing cannot stand alone: it is only one tool that must be used in concert with others to improve the ethics of the judicial election process.

Specific to the public financing plan, there are a number of variables which impact its effectiveness. First, public financing should be complete, in the sense that it offers candidates enough funding that they would be able to run a campaign on strictly public funds without sacrificing the hallmarks of present-day

campaigning. Using solely public funds would hardly be alluring if one didn't have enough money to purchase signs or produce televisions ads. The biggest impediment to this may well be government's ability to fund the public financing program.[133] However, states who wish to create a robust fund for this program have means by which they can accomplish this.[134]

The second variable affecting public financing program's effectiveness is its exclusivity as a funding source. When a judge decides to accept public funds, he or she should not be allowed to raise money from other sources. North Carolina had a program such as this, so other states may well be able to replicate it. However, as highlighted earlier, there still needs to be some way for the state to determine *who* get access to these funds. While a system where there is no fundraising requirement for public funds would eliminate any impropriety surrounding donations, it would allow unrealistic or unserious candidates take limited funds from legitimate contenders.[135] Therefore, the fundraising requirement should be as low as possible, or the maximum donation allowed should be capped, in order to minimize the ethical concerns surrounding any such fundraising.

One final recommendation which is separate from public financing or other electoral reforms concerns the codes of conduct against which we've measured those reforms. The ABA and the states should look to revise their rules of conduct for both judges and lawyers to include language regarding the issues raised in this Note. For example, The ABA could expand its Canon 4—either through official commentary or amended rules—to discuss more specifically what is considered ethical election behavior. An argument made here—say, that overtly negative "soft-on-crime" campaigning impermissibly denigrates the dignity of judicial office—could make its way into the Comments.

No matter what electoral reforms are put in place, there will probably still be *some* instances where judges are presiding over a case involving a party who contributed—whether directly or indirectly through a PAC—to their campaign. Therefore, another possible area of improvement would focus on the rules surrounding recusal, especially in instances where the party donated to a PAC which supported the judge. While PAC spending may be here to stay, the ABA and state legislatures can take steps to minimize the ethical impact on judicial elections and the judiciary's impartiality.

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133. Doug Bend, Note, *North Carolina's Public Financing of Judicial Campaigns: A Preliminary Analysis*, 18 GEO. J. LEGAL ETHICS 597, 604-05 (2005).

134. *Id*. at 606-08 (discussing ways that states can raise the money necessary for public financing of judicial elections).

135. *Id*. at 603.

CONCLUSION

Judicial elections, while theoretically wise and beneficial, come with a number of ethical gray areas. These concerns have only grown as our political climate trends more towards greater spending and fewer restrictions on it. Judges are placed in an incredibly unfair position: they must lose their job, or act in a way that should cause them to lose their job. Similarly, lawyers are asked to advocate for a system which incentivizes those who wish the upend the scales of justice. Public financing stands as a possible option to alleviate some of these concerns, but it is by no means a panacea. It still allows candidates to spend the money they do have in ways that incentivize them and their opponents to decide cases for electoral considerations, and to feed into the negativity and partisanship that should give us all pause. Aside from completely eliminating judicial elections, however, nothing will be able to solve every ill of the election process.

President and Chief Justice William Howard Taft once called judicial elections "demagogic," resulting in the election of judges "not because they are impartial, but because they are advocates; not because they are judicial, but because they are partisan."[136] Public financing, while not perfect, elevates the impartiality of the judiciary by refocusing judges away from campaigning and towards the business of the judiciary. However, in order to implement such a program, it may be necessary to ask judges to be advocates for this one last thing.

136. William H. Taft, *The Selection and Tenure of Judges*, 7 ME. L. REV. 203, 208-09 (1914).