NOTE

"Noisier, Nastier, and Costlier": Shoring Up Institutional Legitimacy in Judicial Elections Using a Legal Ethics Framework

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INTRODUCTION

Judicial elections are a conspicuous feature of the United States' third branch of government.[1] There are three main types of judicial election systems in the U.S.: partisan, nonpartisan, and reelection.[2] Among these three system types, there are more than sixteen unique combinations across different jurisdictions and levels of courts.[3] Thirty-nine of the fifty U.S. states conduct judicial elections to select or retain at least some of their judicial officers.[4] With seventy-eight percent of states holding judicial elections,[5] voting in judicial officers is more of the rule than the exception.

Amid the discussion on judicial elections is a concern about their cumulative effects on the judiciary's institutional legitimacy.[6] Professor James L. Gibson notes that "[i]nstitutions perceived to be legitimate are those with a widely accepted mandate to render judgments for a political community."[7] A prominent scholar of law and politics, Gibson describes institutional legitimacy as "perhaps the most important political capital [that] courts possess," and finds that certain judicial campaign activities place this institutional legitimacy under threat.[8] Gibson attributes this problem to specific campaign behaviors such as judicial candidates' receipt of campaign contributions and their use of attack ads.[9] But where threats to institutional legitimacy are present, there are also safeguards to provide a buffer against institutional decay. This Note focuses the majority of its

1. *See* Herbert M. Kritzer, *Law is the Mere Continuation of Politics by Different Means: American Judicial Selection in the Twenty-First Century*, 56 DEPAUL L. REV. 423, 431 (2007) ("The United States is almost unique in its use in the judicial selection and retention process. I know of only two exceptions. The first is Switzerland . . . The second exception . . . Japan[.]").

2. Bert Brandenburg & Roy A. Schotland, *Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns*, 21 GEO. J. LEGAL ETHICS 1229, 1232 (2008).

3. *Id.*

4. Rachel P. Caufield, *The Changing Tone of Judicial Election Campaigns as a Result of White*, *in* RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS 34 (Matthew Justin Streb ed., 2007) (noting that seventy-six percent of state trial court judges are elected to their initial term and eighty-eight percent must be reelected for subsequent terms, while fifty-three percent of state appellate court judges are elected to their initial term and eighty-nine percent must be reelected for subsequent terms).

5. *Id.*

6. James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and 'New-Style' Judicial Campaigns*, 102 AM. POL. SCI. REV. 59, 59 (2008).

7. *Id.* at 61.

8. *Id.* at 59.

9. *Id.* at 72 (importantly, while Gibson cites judicial candidates' receipt of campaign contributions and the use of attack ads as detrimental to courts' institutional legitimacy, he does not assign this negative impact to judicial campaigns more generally).

attention on assessing the application of two such safeguards: judicial independence and judicial accountability. Although there is much debate concerning the appropriate bounds of each mechanism (e.g., whether holding judicial officers to a heightened level of public accountability unduly stifles their independence), both are critical to preserving and enhancing institutional legitimacy.

Trust in our legal system is of first order importance. When our system of government seeks to have judicial accountability and independence work synergistically with (rather than antagonistically against) each other, we can be more effective in preserving and enhancing trust in our legal institutions. This is especially important in governing judicial elections, which appear to pit judicial accountability and independence mechanisms against each other. This Note argues that using a legal ethics framework satisfies both judicial accountability and independence mechanisms, and when applied within the context of judicial elections, can help guide judicial conduct that risks eroding public trust in the judiciary.

Legal ethics, broadly construed, represent an internalized commitment to the highest standards of the legal profession.[10] Using a legal ethics framework to shore up institutional legitimacy requires a thoughtful look at how legal ethics rules guide judicial conduct.[11] The goal under a legal ethics framework is to preserve and enhance the institutional legitimacy of the judiciary. Judicial accountability and independence are the principal mechanisms for accomplishing that goal.[12] Thus, under a legal ethics framework, striking "an optimal balance between judicial accountability and independence"[13] is only a means to achieving the end goal, which is preserving and enhancing public trust in the judiciary.

Part I discusses institutional legitimacy and its importance to the judiciary. To that end, it briefly explains judicial accountability and independence as well as the merits of using a legal ethics framework to shore up the judiciary's institutional legitimacy. Part I also proposes a legitimacy balancing test that, in conjunction with other judicial election reform efforts, could help enhance the institutional legitimacy of the judiciary. Part II briefly explains some of the ethics rules that govern judicial elections. It looks into the voters' dilemma and how public accountability—the public's capacity to hold judicial candidates accountable at the ballot box—is strained by a number of basic coordination problems. Some examples of these coordination problems include a general lack of awareness of relevant ethics rules, decentralized judicial campaign activity, and judicial misconduct of which the public is unaware.

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10. TERRENCE M. KELLY, PROFESSIONAL ETHICS: A TRUSTED APPROACH 14 (2018) ("True success [in professional ethics], however, comes from within, and the outward manifestation acknowledged by the public is only an [sic] evidence of what is unseen, the roots of which had their beginning perhaps long years before[.]").

11. *E.g.*, MODEL RULES OF PROF'L CONDUCT (2016) [hereinafter MODEL RULES].

12. *See* Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why It Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1260 (2008) ("Like judicial independence, judicial accountability is not an end in itself. It too serves other ends: To promote the rule of law, institutional responsibility, and public confidence in the courts.").

13. *Id.* ("[T]he perennial policy struggle is to strike an optimal balance between judicial independence and accountability.").

Parts III, IV, and V address how judicial elections have become "noisier, nastier, and costlier"[14] using Gibson's discussion on judicial candidates' policy pronouncements, attack ads, and campaign contributions as an organizing framework.[15] Part III addresses judicial candidates' policy pronouncements and provides a review of how politics have helped shape judicial selection thus far. This includes an empirically verified progression from merit-based to more partisanship-based considerations in the Senate Judiciary Committee's confirmation of Supreme Court nominees. It also includes the increasing pressure faced by judicial candidates to engage in more elaborate electoral calculations and other manifestations of political ambition. Part IV examines attack ads in judicial campaigns. It also considers how heightened levels of campaign intensity and technology have the potential to shape how judicial campaigns are conducted. Part V then delves into a discussion on judicial campaign contributions. It looks at money and its influence in judicial elections as well as the role that interest groups play in seeking their desired judicial election outcomes. Taken together, thinking carefully about judicial elections and their distinctiveness from legislative elections requires a measured comparison across their many components. While judicial elections have become "noisier, nastier, and costlier" over time, the legal ethics rules that help guide judicial conduct are still capable of keeping pace.[16] Indeed, the courts' distinctiveness from politics more generally is key to preserving and enhancing the judiciary's institutional legitimacy.

I. INSTITUTIONAL LEGITIMACY

> Courts derive their legitimacy, at least in part, by differentiating themselves from other political institutions: Citizens do not naturally distinguish between the judiciary and the other branches of government. That courts are special and different must be learned. Thus, those most ignorant about politics—are likely to hold views of courts and other political institutions that are quite similar: Courts are not seen as special and unique.[17]

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14. Melinda Gann Hall, *Partisanship, Interest Groups, and Attack Advertising in the Post-White Era, or Why Nonpartisan Judicial Elections Really Do Stink*, 31 J.L. & POL. 429, 437 (2016) (quoting Roy A. Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?*, 2 J.L. & POL. 57, 76 (1985)).

15. *See* Gibson, *supra* note 6, at 59:

> Many believe, however, that the legitimacy of elected state courts is being threatened by the rise of politicized judicial election campaigns and the breakdown of judicial impartiality. Three features of such campaigns, the argument goes, are dangerous to the perceived impartiality of courts: campaign contributions, attack ads, and policy pronouncements by candidates for judicial office.

16. *See* Hall, *supra* note 14 (quoting Roy A. Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?*, 2 J. L. & POL. 57, 76 (1985)) ("dire warnings about judicial elections becoming 'noisier, nastier, and costlier' were given over three decades ago in response to concerns about trends in the 1970s and early 1980s[.]").

17. Gibson, *supra* note 6, at 61.

Model Code of Judicial Conduct (Model Code) Rule 2.2 states that "[a] judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially."[18] A judge's compliance with the *Model Code* is thought to promote the institutional legitimacy of the judiciary, which is the courts' most important political capital.[19] Professor Gibson identifies three features of judicial campaigns that may pose a danger to courts' institutional legitimacy, namely: policy pronouncements by judicial candidates, attack ads, and campaign contributions.[20] Using a representative survey design, his study demonstrates that institutional legitimacy is not immutable—even for the judiciary.[21] This Note engages Gibson's three identified judicial campaign features to organize a wider discussion on how a legal ethics framework can be applied to examining judicial campaign activity that may pose risks to the judiciary's institutional legitimacy. Within Gibson's framework, this Note analyzes legal and political science literature (and congressional studies in particular) to examine parallels between judicial campaigning and traditional legislative campaign strategies. Included in this discussion is a consideration of how judicial accountability and independence can work together synergistically to preserve and enhance institutional legitimacy.

A. JUDICIAL ACCOUNTABILITY AND INDEPENDENCE

Judicial accountability and independence are both mechanisms for maintaining and building the judiciary's institutional legitimacy. Though they each perform separate functions under a legal ethics framework, they work together toward the shared goal of upholding the public's trust. Judicial accountability is an electoral safeguard against institutional decay. By requiring judicial candidates to face voters in an election, judges become electorally accountable to the public.[22] While this observation brings judicial campaigns into a wider discussion about election campaigns in general, there are important distinctions between judicial and

18. MODEL CODE OF JUDICIAL CONDUCT Canon 2 R. 2.2 (2020) [hereinafter MODEL CODE]. *See also* MODEL CODE Canon 2 R. 2.2 cmt. 2 ("Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question."); Brian Z. Tamanaha, *The Several Meanings of "Politics" in Judicial Politics Studies: Why "Ideological Influence" Is Not Partisanship*, 61 EMORY L.J. 759, 777 (2012) ("Under this [Model Code Rule 2.2] standard, a judge whose decision is subject to background political influences can still be an impartial, nonpartisan judge, as long as the judge does her best to render a decision based upon the law without consciously favoring one side or pursuing a particular objective.").

19. *See* Gibson, *supra* note 6, at 59.

20. *Id.* at 72.

21. *Id.* (Gibson's survey data indicates that campaign contributions and attack ads negatively impact the institutional legitimacy of courts and legislatures in like manner. However, for judicial candidates' policy pronouncements, Gibson finds that "policy pronouncements by judicial candidates cause little harm to courts" and "the same sort of policy pronouncements enhance the legitimacy of legislatures").

22. *See* Brandice Canes-Wrone, Tom S. Clark & Amy Semet, *Judicial Elections, Public Opinion, and Decisions on Lower-Salience Issues*, 15 J. EMPIRICAL LEGAL STUD. 1, 1 (2018) ("[J]udicial accountability is often favored by the public and can increase the legitimacy of the courts.").

legislative candidates and their respective campaign strategies that will be discussed later in this Note. Most notably, despite their salience throughout the United States, judicial elections produce "precious little" information for voters to decide upon.[23] Consequently, aside from media-covered scandals,[24] the public does not have much information with which to hold incumbents or challengers accountable to at the ballot box. This includes those judicial officers who break the law, their oaths, or both.[25]

While judicial accountability has its merits, it can also potentially cut against judicial independence.[26] Judicial independence is a rule-of-law safeguard against institutional decay. On one hand, like judicial accountability, judicial independence is key to maintaining and enhancing the institutional legitimacy of the legal system. On the other hand, unlike judicial accountability, judicial independence makes judges answerable to the law rather than to the public.[27] Judicial independence is at the core of the public's expectation for fair and impartial judges. Some of the merits of judicial independence, like the rule of law, even bear constitutional significance.[28] This also includes the separation of powers and ensuring that each litigant receives a fair and impartial process.[29] Under a legal ethics framework, judicial accountability and independence work synergistically together. Because they each appeal to different functions of the judicial office, both are required to sustain the judiciary's institutional legitimacy.

B. USING A LEGAL ETHICS FRAMEWORK

Juxtaposed side by side, judicial accountability and independence appear to hold diametrically opposed positions.[30] Like a zero-sum game, placing accountability and independence in tension with one another can suggest that to enhance one is to diminish the power of the other.[31] This Note challenges that presumption

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23. *See* Caufield, *supra* note 4, at 35 (citing PHILIP DUBOIS, FROM BALLOT TO THE BENCH 67 (1980)).

24. *See*, *e.g.*, Amanda Holpuch, *Louisiana Judge to Take Unpaid Leave After Using Racial Slur*, N.Y. TIMES (Dec. 15, 2021), https://www.nytimes.com/2021/12/15/us/michelle-odinet-burglary-racial-slur-sedative.html [https://perma.cc/GY7W-CQXQ].

25. *See generally* Michael Berens & John Shiffman, *Thousands of U.S. Judges Who Broke Laws or Oaths Remained on the Bench*, REUTERS (June 30, 2020), https://www.reuters.com/investigates/special-report/usa-judges-misconduct/ [https://perma.cc/TQL8-LMXH].

26. *See* Canes-Wrone, Clark & Semet, *supra* note 22, at 1.

27. *See* Brandenburg & Schotland, *supra* note 2, at 1231–32.

28. *Id.*

29. *Id.*

30. *See* Berens & Shiffman, *supra* note 25.

31. *See* Geyh, *supra* note 12, at 1261:

> In the context of judicial selection, the struggle to balance independence and accountability has played itself out over the course of more than two centuries, as five distinct methods of selecting judges—each striking the balance in different ways—have vied for preeminence. [These five methods of judicial selection are: (1) gubernatorial appointment coupled with legislative confirmation, (2) legislative appointment, (3) partisan judicial election, (4) nonpartisan election, and (5) a merit system wherein an independent commission reviews and approves a candidate pool from which the governor makes the final candidate selection.]

and argues that this zero-sum construction of judicial accountability and independence is a false dichotomy. Rather than adopting the zero-sum construction, this Note instead recommends using a legal ethics framework to affirm the synergistic relationship between judicial accountability and independence and recognize their joint role in preserving and enhancing public trust in the judiciary.

Examining legitimacy concerns within a legal ethics framework helps settle the debate between judicial accountability and independence by offering perspective on their potential synergy. Legal ethics rules and standards bridge the reputed divide by offering specific language in support of both judicial accountability[32] and independence[33] objectives alike. By affirming the importance of both objectives, legal ethics rules and standards form a framework for judicial accountability and independence to work together toward maintaining and building the judiciary's institutional legitimacy. Thus, while judicial accountability and independence are quite distinct from one another, they are nevertheless connected by legal ethics, understood as an internalized commitment to the highest standards of the legal profession.

C. APPLYING A LEGITIMACY BALANCING TEST

While judicial accountability and independence ostensibly pull in different directions, both objectives must be met in order for justice to obtain. In jurisdictions where judges are elected, communities expect the opportunity to hold judicial officers accountable at the ballot box. Relatedly, litigants at trial expect a fair and impartial process free of monetary and partisan influence. Whenever judicial accountability and independence are not clearly upheld in the judiciary, the public is adversely impacted. Thus, when judicial officers[34] or judicial election campaigns[35] come under public scrutiny, it is fair to question whether legal ethics

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32. *See* MODEL RULES scope:

> [16] Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

33. *See id.* at pmbl.:

> [11] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

34. *See* Holpuch, *supra* note 24.

35. *See* Nancy M. Olson, *Judicial Elections and Courtroom Payola: A Look at the Ethical Rules Governing Lawyers' Campaign Contributions and the Common Practice of Anything Goes*, 8 CARDOZO PUB. L. POL'Y & ETHICS J. 341, 343–44 (2010).

rules have become "inadequate to keep pace" with the times.[36] Skyrocketing increases in judicial campaign spending is but one salient concern.[37]

While it is valid to question legal ethics rules and their adequacy in governing judicial election behavior,[38] it is also important to question whether the appropriate balance between judicial accountability and independence was ever struck in the first place. Inadequate rules have their drawbacks, to be sure, but poor execution may set even adequate rules up for failure. When the appropriate balance between judicial accountability and independence is not in place and operative in the first instance, questions about the legitimacy of the judiciary are foreseeable and avoidable. For example, in situations where the voting public is uninformed about an elected judge's conduct on the bench or an elected district attorney's management of prosecutorial discretion, judicial accountability can be rendered inoperative at best and absent at worst. Likewise, situations involving accusations of vote buying suggest that judicial independence may be under siege from special-interest pressure and the growing demands of judicial campaign financing. Both judicial accountability and independence have a role to play in the pursuit of justice. Striking the right balance between the two objectives may be just as determinative of justice as having them present in the first instance.

This Note recommends conducting a legitimacy balancing test that, if implemented in conjunction with other judicial election reform efforts, could help enhance the institutional legitimacy of the judiciary. This proposed balancing test would consist of a two-pronged test in pursuit of two primary goals: (1) gauge the risk that certain judicial behaviors pose to the judiciary's institutional legitimacy, and (2) generate solutions that leverage the synergistic relationship between judicial accountability and independence. The first prong of the test would assess whether a particular judicial behavior poses an unreasonable risk to the judiciary's institutional legitimacy. If the first prong is met, then we move on to the second prong. The second prong of the test would consider what adjustments in judicial accountability and independence could be made—if any—to hold the judicial election behavior in question to the highest standards of the legal profession. When both prongs are satisfied, the judiciary's legitimacy is preserved, and institutional decay is avoided. When neither prong is satisfied, the judiciary risks falling short of its highest standards and denying justice to the public.

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36. *Id.* at 344.

37. Douglas Keith, *The Politics of Judicial Elections 2019-20*, BRENNAN CTR. FOR JUST., (Jan. 25, 2022), https://www.brennancenter.org/our-work/research-reports/politics-judicial-elections-2019-20 [https://perma.cc/G3PC-XUJ7] ("In 2019-20, state supreme court elections attracted more money—including more spending by special interests—than any judicial election cycle in history . . . an overall national spending record of $97 million, 17 percent higher than the previous record set in 2004 (adjusted for inflation).").

38. *See* Olson, *supra* note 35, at 343–44 (Olson suggests that while the MODEL RULES are "not entirely silent" on prohibiting conduct that "may improperly influence the judiciary" or appear to do so, "as judicial election campaigns become increasingly more expensive and polarized, the rules seem inadequate to keep pace").

II. THE VOTERS' DILEMMA

Judicial politics scholar Professor Melinda Hall stated that "one of the most basic precepts of politics is that elections are powerful legitimacy-conferring institutions."[39] But voters face a recurring dilemma in judicial elections, namely, the woeful lack of information for determining which of the judicial candidates is most deserving of that powerful legitimacy conferral. In cases where voters are unable to distinguish judicial candidates based on a lack of pertinent candidate information, their selections tend to look less like public accountability and more like an exercise in familiar name recognition.[40] When voters are unfamiliar with judicial candidates and other "down-ballot" candidates, they often cast their ballots "on the basis of name attractiveness" or name familiarity.[41] Voters who participate in this kind of voting behavior are said to be playing the "name game."[42] If voters are generally underinformed about the judicial candidates themselves,[43] how much less might they know about the rules[44] governing judicial candidates' behavior inside and outside of the courtroom? In order to make judicial elections more publicly accountable, ethics rules awareness must become more salient throughout the public. Take for instance Model Code Rule 2.11(A), which outlines the scenarios wherein a judge should "disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned."[45] Rule 2.11(A) "holds judges to a higher ethical standard than due process requires," but employs self-enforcement language rather than language tied more directly to public accountability.[46] Under Rule 2.11, disqualification (or "recusal" in many jurisdictions) is required of a judge "regardless of whether a motion to disqualify is filed."[47] Thus, Rule 2.11 provides judges with an opportunity to recuse themselves before the public must hold them accountable. This assumes the public is aware of judges' refusals to recuse themselves under applicable circumstances.

Public accountability provides a straightforward rationale for judicial elections, yet voters cannot hold judicial officers accountable at the ballot box for public misconduct of which they are unaware.[48] Reuters identified 3,613 cases across a twelve-year period (2008–2019) wherein states "disciplined wayward

39. *See* Hall, *supra* note 14, at 436.

40. Anthony Champagne, *The Politics of Judicial Selection*, 31 POL'Y STUD. J. 413, 414 (2003).

41. *Id.*

42. *Id.*

43. David Klein & Lawrence Baum, *Ballot Information and Voting Decisions in Judicial Elections*, 54 POL. RES. Q. 709, 710 (2001).

44. *See, e.g.*, MODEL RULES R. 4.1.

45. MODEL CODE Canon 2 R. 2.11(A).

46. Steele Trotter, *Williams-Yulee and the Changing Landscape of Judicial Campaigns*, 28 GEO. J. LEGAL ETHICS 947, 950 (2015).

47. MODEL CODE Canon 2 R. 2.11 cmt. 2 ("A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.").

48. *See* Berens & Shiffman, *supra* note 25.

judges" while hiding key details of their offenses from the public.[49] These key details included the identities of the judges themselves.[50] From among the cases Reuters identified and reviewed, it found that nine out of every ten judges involved in misconduct were granted approval to return to their judicial offices after being sanctioned. This approval was granted by parties knowledgeable of the judges' conduct.[51] Yet some of these judges went up for reelection and won before an unknowing public.[52] Such an outcome seems incompatible with a democratic ethic. The effort to keep the identities of the sanctioned judges hidden—which may be well-meaning—undermines the ability of the public accountability mechanism to function properly. Voters cannot vote out an incumbent judge whose professional misconduct was hidden from them until after election day. The lack of relevant and timely information on judicial candidates undermines trust in the judiciary, and in particular, its willingness to be held accountable by the public. Yet policy pronouncements are a way for judicial candidates to engage the public well before election day. What is more, they can alleviate the voters' dilemma by providing an information-rich comparison between judicial candidates.

III. POLICY PRONOUNCEMENTS BY CANDIDATES FOR JUDICIAL OFFICE

Despite the overall dearth of candidate information in judicial elections, judicial candidates' articulated views on disputed legal and practical issues can be a helpful source of information for the electorate. The Court held in *Republican Party of Minnesota v. White* that a state effort to prevent judicial candidates from making policy pronouncements on issues in general dispute (here the "Minnesota Supreme Court's canon of judicial conduct") was in violation of the First Amendment.[53] While judicial candidates retain the right to announce their views concerning legal and practical issues in general dispute,[54] they are prohibited by Model Code Rule 2.10(A) from making statements that impair the fairness of a trial or hearing.[55] Model Rules 2.10(B) and (C) provide further guidance on judicial statements. Model Rule 2.10(B) prohibits judicial candidates from making "pledges, promises, or commitments" that are not in keeping with the impartial

49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. Trotter, *supra* note 46, at 951.
54. *Id.*
55. *See* MODEL CODE Canon 2 R. 2.10(A) ("A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.").

performance of judicial office,[56] while Model Rule 2.10(C) requires judges to ensure that those subject to their authority "refrain from making statements that the judge would be prohibited from making by [Model Rule 2.10] paragraphs (A) and (B)."[57] Thus, judicial candidates can make policy pronouncements on issues of general legal or practical import by taking reasonable measures not to impair the fairness of pending or impending cases.

When judicial candidates issue policy pronouncements to promote themselves on the campaign trail, they can do so through a myriad of outlets. In fact, Model Code Rule 4.2(B)(2) permits judicial candidates to "speak on behalf of his or her candidacy through any medium," including commercial and radio advertisements, campaign literature, as well as websites and other web applications.[58] Judicial campaign committees may also make campaign statements on behalf of judicial candidates according to Rule 4.2(A)(3), but with an important caveat—judicial candidates must "review and approve" the content of these campaign statements (and related materials) *before* their campaign committees disseminate these materials out to the public.[59] Judicial candidates must also take reasonable measures to prevent other individuals from circumventing the rules pertaining to judges' political and campaign activities according to Model Rule 4.2(A)(4).[60] This rule charges judicial candidates with the responsibility to monitor campaign statements and other activities undertaken by anyone other than the judicial candidates and their respective campaign committees. In making policy pronouncements, judicial candidates must avoid the appearance of overt partisanship, which would not be in keeping with the impartial performance of judicial office.[61] While there has been an attitudinal shift from merit to partisanship in the Senate Judiciary Committee's evaluation of Supreme Court nominees,[62] it is vital to the judiciary's institutional legitimacy that such displays of partisanship be left to the politicians in the room.

A. FROM MERIT TO PARTISANSHIP

Nowhere is the attitudinal shift from merit to partisanship in the federal government more widely discussed than with the Senate Judiciary Committee and its voting on Supreme Court nominees. According to Professors Lee Epstein, René

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56. *See id.* at Canon 2 R. 2.10(B) ("A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.").

57. *Id.* at Canon 2 R. 2.10(C) ("A judge shall require court staff, court officials, and others subject to the judge's direction and control to refrain from making statements that the judge would be prohibited from making by paragraphs (A) and (B).").

58. *Id.* at Canon 4 R. 4.2(B)(2).

59. *Id.* at Canon 4 R. 4.2(A)(3).

60. *Id.* at Canon 4 R. 4.2(A)(4).

61. *See id.* at Canon 2 R. 2.10(B).

62. *See* Lee Epstein, René Lindstädt, Jeffrey A. Segal & Chad Westerland, *The Changing Dynamics of Senate Voting on Supreme Court Nominees*, 68 J. POL. 296, 305 (2006).

Lindstädt, Jeffrey Segal, and Chad Westerland, most scholars agree that Robert Bork's 1987 defeat as a Supreme Court nominee signified a "regime change" in Senate voting behavior.[63] The authors describe this regime change as one that "deemphasizes ethics, competence, and integrity and stresses instead politics, philosophy, and ideology."[64] The authors show that, after Bork's 1987 defeat, ideology became of "paramount concern to senators" in their consideration of Supreme Court nominees. While Supreme Court nominees' professional merit remains a significant factor in their success before the Senate Judiciary Committee, it is "the interaction of [nominees'] qualifications and ideology" that determines how senators cast their votes.[65]

There is evidence that suggests that the attitudinal shift from merit to partisanship was not limited to Senate Judiciary Committee's voting behavior or even, more generally, to the federal government.[66] State courts also experienced a shift toward more ideological concerns.[67] This shift was epitomized by "the 'new Federalism' of the Reagan era," which spurred the politicization of state court judges' decision-making.[68] During this era, many state court judges began referring to their respective states' constitutions to guide them in areas of the law where they had previously relied on the federal Constitution.[69] This gave state court judges more power, raising their profiles among interest groups who observed what state judgeships could accomplish.[70]

The seemingly one-sided increase in ideological intensity from approximately 1980 onward can be explained by the Republican party's transition from a relatively uncompetitive minority party to a serious contender vying for control of Congress.[71] This transition leveled the electoral odds between the Republican and Democratic parties to the point that the parties eventually reached competitive parity.[72] The two parties became equally competitive after nearly a half century of the Democrats largely maintaining control of the presidency, the Senate, and

63. *Id.* at 296, 298 (Professors Epstein, Lindstädt, Segal and Westerland empirically tested whether Robert Bork's 1987 Supreme Court nomination defeat represented a regime change for U.S. Senators' voting on Supreme Court nominees. While there is a "near-universal consensus" among scholars on the matter, their study further verifies this conventional wisdom with data).

64. *Id.* at 296.

65. *Id.* at 298 (quoting Charles M. Cameron, Albert D. Cover & Jeffrey A. Segal, *Senate Voting on Supreme Court Nominees: A Neoinstitutional Model*, 84 AM. POL. SCI. REV. 525, 530–31).

66. *See* Geyh, *supra* note 12, at 1260.

67. *Id.*

68. *Id.* at 1265 (quoting Emily Field Van Tassel, *Challenges to Constitutional Decisions of State Courts and Institutional Pressures on State Judiciaries*, *in* AM. BAR ASS'N, JUSTICE IN JEOPARDY: REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY 76–77, app. E at 3 (2003)) ("[T]he politicization of state constitutional decision-making coincides with the 'new Federalism' of the Reagan era and the willingness of many state appellate courts to look to their own constitutions for guidance in many areas of law previously left to the federal constitution[.]").

69. *Id.*

70. *Id.*

71. FRANCES E. LEE, INSECURE MAJORITIES: CONGRESS AND THE PERPETUAL CAMPAIGN 5 (2016).

72. *Id.*

the House.[73] One of the implications of the Republican and Democratic parties reaching competitive parity was that elections—even judicial elections—would become "noisier, nastier, and costlier."[74] This observation clearly maps onto modern-day concerns about judicial candidates' policy pronouncements, the proliferation of attack ads in judicial campaign messaging, and surges in judicial campaign contributions.

Competitive parity between the Republican and Democratic parties has set into motion what Professor Frances Lee describes as the perpetual campaign, one wherein each party adopts more confrontational strategies to win majority control.[75] The encroaching politization of the judiciary may likewise spur a perpetual campaign among judicial officials as well. While aspirations for election and reelection can invigorate public engagement and hold elected officials accountable, they can also encourage unintended electoral calculations that seek to serve self- rather than public interests.

B. ELECTORAL CALCULATIONS

Model Code Canon 3 states "[a] judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflicts with the obligation of judicial office."[76] This is a matter of judicial accountability that extends beyond the professional obligations of the judicial office itself. The rule requires judges to govern their "personal and extrajudicial activities" in a manner consistent with the fairness and impartiality expected of the judgeship. While it primarily charges judges to report their compensation, reimbursement of expenses, gifts, and other things of value, the rule also addresses a wider concern about judges governing their conduct to "minimize the risk of conflict" with their judicial responsibilities.[77] Thus, in addition to providing a measure of judicial accountability, Model Code Canon 3 also safeguards judges against potential conflicts of interest that might jeopardize their judicial independence.

Judges taking action to minimize conflicts of interests are engaged in strategic behavior, similar to the "electoral calculations" that condition congressional members' behavior.[78] These calculations serve "either particularistic or general interests" depending on which one best furthers congressional members' primary pursuit of reelection.[79] Congressional policy makers prioritize among competing general, group, and geographic interests—assuming each of these alternatives "would yield different electoral consequences."[80] According to the literature,

73. *Id.* at 1.
74. *See* Hall, *supra* note 14, at 437.
75. *See generally* LEE, *supra* note 71.
76. MODEL CODE Canon 3.
77. *Id.*
78. R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION 6 (1990).
79. *Id.*
80. *Id.* at 4–7.

once elected officials are in office, they tend to play defense with the decisions they make.[81] Consequently, they are generally more interested in utilizing their record to defend against attack.[82] Judges may be culpable of making similar electoral calculations with their legal rulings, with some calculations bearing problematic consequences. For example, studies have found that, statistically speaking, judges tend to issue lengthier sentences during election years.[83] While this defensive strategy may help ward off attack ads seeking to frame an incumbent judge as soft on crime (which is thought to be a political death sentence in many areas of the country), it can also alienate those who depend on judges to govern their conduct with fairness and impartiality, even when those judges are up for reelection.

C. REELECTION AMBITION

Widely considered to be one of the foremost scholars of the U.S. Congress, Professor David Mayhew introduced a straightforward theory to explain congressional behavior. He posited that members of Congress are "single-minded seekers of reelection" who base their decision-making on that reelection motivation.[84] In explaining how election results are typically interpreted by members of Congress, he stated, "[n]othing is more important in Capitol Hill politics than the shared conviction that election results have proven a point."[85] Mayhew's reelection theory is parsimonious yet powerful, tying together a wide array of insights offered by political science literature with one single assumption.[86] He explains that while his book's central theory is clearly oversimplified, he planned it this way purposefully, with the notion that "advancing a simple argument to its limits might have explanatory utility."[87] With that in mind, Mayhew's reelection assumption may have utility for explaining elected judges' behavior as well.

While Mayhew's reelection assumption may have some purchase on explaining judges' reelection activity, generally speaking, judges are not politicians.[88] On one hand, legislators' reelection activity might include how members of Congress allocate their time, seek publicity, take positions on issues, and engage each other, their constituents, and various interest groups.[89] On the other hand,

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81. *Id.* at 9–10 ("[L]egislators regularly attempt to *anticipate* how specific roll-call votes might be used against them and regularly adjust their votes in ways designed to forestall electoral problems . . . on ordinary issues as well as the major issues of the day.").

82. *Id.*

83. Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging the Judiciary by the Numbers: Empirical Research on Judges*, 13 ANN. REV. L. & SOC. SCI. 203, 210 (2017).

84. DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 5–6 (1974).

85. *Id.* at 71.

86. *Id.* at vii–xiv.

87. *Id.* at xiv.

88. MODEL CODE Canon 4 R. 4.5(A) ("Upon becoming a candidate for a nonjudicial elective office, a judge shall resign from judicial office, unless permitted by law to continue to hold judicial office.").

89. MAYHEW, *supra* note 84, at viii.

judges' reelection activity should, as a normative consideration, be considerably less self-interested. Judges should be single-minded seekers of justice for others rather than seekers of reelection for themselves. But there is some evidence that suggests this might not always be the case, particularly for higher state court judges, who can be perceived by interest groups as constitutional policy makers who are able to interpret their respective state constitutions in "new and different ways."[90] According to judicial conduct and ethics scholar Professor Charles Geyh, judges have a responsibility to uphold the public's trust by maintaining their distinction from legislators, which includes the exercise of judicial accountability and independence.[91] Geyh states, "[t]o the extent that judges are perceived as making constitutional policy when called upon to interpret their constitutions in new and different ways, it may blur the distinction between judges and legislators in the public mind and intensify calls to hold judges politically accountable for their decisions."[92] Thus, while judicial reelection is a valid ambition, judges' reelection activity should be aligned with the same conduct that gives the judiciary its institutional legitimacy in the first instance.

IV. ATTACK ADS

Model Code Rule 1.2 is concerned with "promoting confidence in the judiciary."[93] This includes judicial conduct that steers clear of "impropriety" in addition to conduct avoiding "the appearance of impropriety."[94] While attack ads are endemic to legislative elections and familiar to the public, this is not the case for attack ads in judicial elections.[95] Attack ads are a "relatively new phenomenon" in judicial elections, a fact differentiating courts from their legislative counterparts.[96] Nevertheless, there is a "voluminous" body of literature characterizing how the electorate is impacted by negative campaign advertisements, albeit without much consensus.[97] As with the arms race for campaign contributions to be discussed later in this Note, the increased use of political advertising in judicial elections has escalated campaign intensity and seems to have drawn the judiciary further into the political fray.[98]

A. POLITICAL ADVERTISING

Professor David O'Connell defines political advertising as "an attempt [by legislative candidates] to create a favorable image among their constituents through

90. *See* Geyh, *supra* note 12, at 1265.
91. *Id.*
92. *Id.*
93. MODEL CODE Canon 1 R. 1.2.
94. *Id.*
95. Gibson, *supra* note 6, at 60.
96. *Id.* at 62.
97. *Id.* at 61–62.
98. *Id.*

messages having little or no issue content."[99] Construed broadly, political advertising includes everything from televised attack ads to campaign yard signs. While O'Connell's political advertising definition is helpful, it can be problematic when considering judicial candidates, who do not have constituents like their legislative counterparts and who are already quite limited in their dissemination of information to voters. But despite these clear differences between judicial and legislative candidates, political advertising—even in the case of negative campaigning—is still "an essential tool for educating and engaging voters."[100] By engaging in political advertising, judicial candidates collectively disseminate "facts, assertions, and commentary [to the public] on the virtues and flaws of incumbents and challengers."[101] Political advertising can therefore be a helpful source of information for the public to decide between judicial candidates.

Even in nonpartisan judicial elections, political advertising has been shown to wield "considerable power" in determining voters' judicial candidate choice.[102] Ironically, nonpartisan judicial reelection campaigns "attract higher proportions of attack airings sponsored by interest groups . . . than [do] partisan elections on a race-by-race basis."[103] This is explained, in part, by the dearth of information available to voters on judicial candidates.[104] In absence of the partisan cues included on ballots in partisan judicial elections, voters may not seek out additional information on judicial candidates.[105] Thus, political attack ads—even "derisive" ones—may still be a useful source of publicly available information on judicial candidates.[106] While attack ads increase the overall cost for candidates seeking judicial office, their effectiveness further incentivizes their use in judicial campaign messaging.[107] This is especially true of candidates in nonpartisan judicial elections, as they generally raise even more money than candidates in partisan judicial elections.[108]

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99. David O'Connell, *#Selfie: Instagram and the United States Congress*, 4 SOC. MEDIA + SOC'Y 4, at 2 (2018).

100. *See* Hall, *supra* note 14, at 440.

101. *Id.*

102. *Id.* at 436 (citing DEBORAH GOLDBERG, SARAH SAMIS, EDWIN BENDER & RACHEL WEISS, THE NEW POLITICS OF JUDICIAL ELECTIONS 2004, at 1 (Jesse Rutledge ed., 2005)):

> Candidates increasingly rely on TV ads to reach voters who get little other information about judicial candidates, while interest groups appreciate the "cut-through value" that explosive negative ads can have in an otherwise low-profile election. The information deficit and the low turnout in judicial elections mean that TV ads have considerable power to shape the outcomes of the races.

103. *Id.* at 429.

104. *See* Champagne, *supra* note 40, at 414.

105. *See* Hall, *supra* note 14, at 433.

106. *Id.* at 429, 440.

107. *Id.* at 433–34.

108. *Id.* at 434 ("[C]andidates in nonpartisan elections actually raise more money than candidates in partisan elections, *ceteris paribus*" [i.e., all other things being equal]).

Understanding how the public interprets varying political advertising strategies is important to evaluating each strategy's effectiveness.[109] Professor Deborah Brooks and coauthor Michael Murov advance an understanding of the public's response to sponsored political ads.[110] This has important implications for how well voters are able to assess candidates for office and make their electoral determinations at the ballot box. The authors found that, on the whole, unknown independent groups' attack ads are more effective than candidates' attack ads.[111] Their findings suggest that the public is more likely to view an unknown independent group's sponsored attack ad as a more legitimate source of information than a candidate-sponsored attack ad. The public may be more likely to interpret a negative ad as a legitimate source of information if there is no obvious self-interest involved (as would be the case with a candidate-sponsored ad). Conversely, self-promotion is at least partially discounted by the public. In judicial elections, political advertising provides a critical source of candidate information for the public. Judicial campaign intensity increases as the public gains access to more information on judicial candidates.[112] This can have positive effects for voter mobilization to the polls.[113]

B. CAMPAIGN INTENSITY

One of the basic premises against judicial elections is that "campaigning diminishes citizen support for judges and courts, including trust and confidence believed to underlie judicial legitimacy."[114] This premise suggests that judicial campaigning has a negative impact on citizen support regardless of its form. But that is not the case for all judicial elections, particularly for nonpartisan judicial elections.[115] Challenging the basic premise that campaigns diminish citizen support for the judiciary, campaign intensity has been shown to positively impact nonpartisan judicial elections by mobilizing voter participation.[116] In these nonpartisan judicial elections, not only does campaign intensity increase the overall

109. *See generally* Deborah Jordan Brooks & Michael Murov, *Assessing Accountability in a Post-Citizens United Era: The Effects of Attack Ad Sponsorship by Unknown Independent Groups*, 40 AM. POL. RES. 383 (2012).

110. *Id*.

111. *Id*.

112. *See generally* Allison P. Harris, *Voter Response to Salient Judicial Decisions in Retention Elections*, 44 L. & SOC. INQUIRY 170 (2019).

113. *Id*.

114. Hall, *supra* note 14, at 438 n.29:

> Advocacy groups and other legal reform organizations have not expressed concerns that intensely contested elections replete with mudslinging and other forms of negativity will reduce voter participation. However, a basic premise of the case against contestable elections is that campaigning diminishes citizen support for judges and courts, including trust and confidence believed to underlie judicial legitimacy.

115. *Id*. at 438 n.30 ("Although attack ads have no impact on citizen participation in partisan elections, campaign negativity increases voter participation in nonpartisan elections.").

116. *Id*.

amount and quality of judicial candidate information, it also increases the availability of judicial candidate information to the public.[117]

Given that judicial campaigns in general are becoming more hotly contested—especially at the highest state courts—understanding campaign intensity's impact on the public certainly has purchase.[118] Similar to findings in congressional elections literature,[119] campaign intensity in judicial elections has been shown be an effective agent of voter mobilization.[120] Take for instance judicial retention elections, which generally do not draw large voter turnout.[121] Legal politics scholar Professor Allison Harris found that in judicial retention elections featuring higher levels of campaign intensity, like those following publicly salient judicial decisions, "those who vote often participate . . . at higher levels than usual."[122] This helps confirm that even in retention elections, which usually draw less voter participation than either contested partisan or nonpartisan judicial elections, campaign intensity can make a difference.[123] Even so, a higher level of voter turnout does not guarantee that judges will be assessed accurately at the ballot box. For instance, election scholars Professors Matthew Streb and Brian Frederick find that incumbent judges are at greater risk of losing a competitive judicial election when their respective state's murder rate has risen substantially.[124] The authors find that an escalated state murder rate can place incumbent judges at risk of electorate replacement, even in spite of their inability to prevent the rise of such a salient state-wide statistic.[125] To defend against more arbitrary forms of public accountability, judicial candidates have turned to social media technology to proactively engage the public and promote themselves before their respective electorates.[126]

C. TECHNOLOGY

How can elected judges better engage the public who will hold them accountable at the ballot box? If there is one mechanism that has the potential to bridge the information divide between judicial candidates and the public, it is technology. Professors Todd Curry and Michael Fix suggest that there may be a linkage

117. *See id.* at 437 ("Partisan elections, hotly contested seats, and substantial spending are particularly effective as agents of mobilization . . . [and are among] a variety of factors that increase the salience of the races and improve the information available to voters.").

118. Olson, *supra* note 35, at 346.

119. Kim Fridkin Kahn & Patrick J. Kenney, *A Model of Candidate Evaluations in Senate Elections: The Impact of Campaign Intensity*, 59 J. POL. 1173 (1997).

120. *See generally* Harris, *supra* note 112.

121. *Id.* at 170.

122. *Id.*

123. *Id.*

124. Matthew J. Streb & Brian Frederick, *Conditions for Competition in Low-Information Judicial Elections: The Case of Intermediate Appellate Court Elections*, 62 POL. RES. Q. 523, 534 (2009).

125. *Id.*

126. Todd A. Curry & Michael P. Fix, *May It Please the Twitterverse: The Use of Twitter by State High Court Judges*, 16 J. INFO. TECH. & POL. 379 (2019).

between judges' social media usage and their need to cater to specific voters to improve their reelection prospects.[127] By posting regularly on Twitter, judges leverage an effective and inexpensive way to engage their electorates. To that end, the authors found that judges who are elected to judicial office are more likely to engage the public using Twitter than judges who are appointed to judicial office.[128] Yet elected judges do not use Twitter in the same way that elected politicians do, preferring to engage in "self-personalization" activity rather than "policy-based campaigning" activity when they post to the online platform.[129] The authors found that this allows elected judges to indirectly advance their reelection goals through self-promotion while avoiding more "overtly political" forms of Twitter usage.[130]

While there is limited discussion of technology's role in judicial elections, there is a growing body of literature on congressional use of technology.[131] Professor O'Connell conducted a study examining congressional use of social media.[132] He analyzed 534 congressional members and 17,811 of their Instagram posts to examine how they engaged their constituents.[133] O'Connell found that congressional members' use of Instagram is consistent with their use of other social media platforms—an observation that lends his Instagram-related findings to some claim of generalizability.[134] He also found that younger congressional members' more personalized (and less formal) use of Instagram may have implications for a future change in how elected officials engage the public on social media. While technology has the potential to change the future direction of judicial campaigning, one element of judicial campaigning has already done so, and that is judicial campaign contributions.

V. CAMPAIGN CONTRIBUTIONS

Of all the moving pieces in a judicial campaign strategy, no element is as widely recognized as campaign contributions. Judicial campaign strategy is influenced by political campaign norms and conventions, and the primacy of fundraising is no exception. As judicial elections increase their visibility and ability to raise funds, judicial candidates' committees become more professionalized. This professionalization brings judicial elections even more closely in alignment with their more developed legislative counterparts. This has far-reaching implications for the public.

127. *Id*. at 379–80.
128. *Id*.
129. *Id*. at 380.
130. *Id*.
131. O'Connell, *supra* note 99, at 1–2.
132. *Id*.
133. *Id*. at 1.
134. *Id*.

Rule 4.1(A)(8) prohibits judicial candidates from directly soliciting financial support.[135] In doing so, the rule functions as a "prophylactic measure[]" against related forms of judicial conduct that have even the appearance of partiality.[136] While the rule arguably defends against the appearance of impropriety, it can also complicate the electoral machinery needed to power judicial campaigns. Because judicial candidates cannot directly solicit financial support, they must rely on their campaign committees to do so on their behalf.[137] This can have a negative impact on public accountability efforts. By requiring judicial candidates to outsource their financial solicitation function, Rule 4.1(A)(8) can strain the public's capacity to hold judicial candidates accountable because it compels the decentralization of judicial campaign activity. Decoupling judges from their campaign contribution activity requires the public to surveil and evaluate an ever-wider perimeter of actors connected to the judicial candidates themselves. For the public tasked with electing their judges to the bench, this rule can present coordination challenges.

According to the literature, attorneys numerically make up the largest class of donors to judicial elections.[138] On one hand, this gives attorneys a central role in supporting vital judicial campaign activity. On the other hand, some attorneys feel as though they must donate to judicial election campaigns, or otherwise risk receiving unequal treatment on future cases brought before those judges, which in turn could harm their clients.[139] As judicial campaigns grow more expensive, judicial campaign committees grow more proactive in their organizing, fundraising, and advertising efforts.[140] Judicial candidates and their committees must, as a matter of course, do what they can to adapt to ever-changing campaign dynamics.

The Supreme Court's decision in *Citizens United v. Federal Election Commission* seems to preclude any meaningful overhaul of current judicial campaign financing practices in the near future. In the decision, the Court held that the government may not suppress political speech—such as campaign contributions—due to the speaker's corporate identity under the First Amendment.[141] The *Citizens United* decision furthers the interests of campaign finance committees and other electioneers who seek to solicit contributions from business entities,

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135. MODEL CODE Canon 4 R. 4.1(A)(8) ("(A) Except as permitted by law, or by Rules 4.2, 4.3, and 4.4, a judge or a judicial candidate shall not: . . . (8) personally solicit or accept campaign contributions other than through a campaign committee authorized by Rule 4.4[.]").

136. Trotter, *supra* note 46, at 950.

137. *See* MODEL CODE Canon 4 R. 4.1(A)(8) ("(A) Except as permitted by law, or by Rules 4.2, 4.3, and 4.4., a judge or a judicial candidate shall not: . . . (8) personally solicit or accept campaign contributions other than through a campaign committee authorized by Rule 4.4[.]").

138. *See* Olson, *supra* note 35, at 342, 346.

139. *Id*. at 342–43.

140. *Id*. at 344–46.

141. Citizens United v. Federal Election Commission, 558 U.S. 310, 319 (2010). *See* Tamanaha, *supra* note 18, at 759 n.3 ("provoking controversy by holding that corporations have a constitutionally protected First Amendment right to participate in the electoral process through campaign contributions").

which are generally in better financial positions to make substantial campaign contributions than individual members of the public. Unfortunately, by infusing large sums of money into judicial elections, business entities have the potential to dilute the political speech of the electorate, especially members with lower socio-economic statuses. Business entities that make sizeable campaign contributions to judicial campaigns might also have the potential to garner more influence. This prospect alone could represent a complete affront to judicial accountability and independence.

A. MONEY AND ITS INFLUENCE

Model Code Rule 4.4(A) permits a judicial candidate to "establish a campaign committee" to administer their judicial campaign activity according to the *Model Code*.[142] According to Model Code Rule 4.4(B), judicial candidates direct their respective campaign committee to manage, among other things, the solicitation and acceptance of campaign contributions.[143] This is because money is one of the most fundamental drivers of campaign activity.[144] Money's primacy in campaigning cannot be overstated—it stimulates change and progress at nearly every stage of the electoral process.[145] According to Professor Mayhew, "[a]t the ballot box the only usable resources are votes, but there are resources that can be translated into votes: money, the ability to make persuasive endorsements, organizational skills, and so on."[146] He explains that while money cannot buy votes,[147] money may eventually be converted into something that results in the receipt of additional votes.[148]

A central concern of the role and influence of money in judicial and legislative campaigns is the notion that money might have the potential to "buy" judicial decisions, roll call votes, or dictate other desirable outcomes in a predetermined way.[149] Professors Richard Hall and Frank Wayman critique the vote-buying hypothesis and advance two hypotheses that, taken together, seek to provide a more

142. MODEL CODE Canon 4 R. 4.4(A).
143. *Id.* at Canon 4 R. 4.4(B).
144. *See* MAYHEW, *supra* note 84, at 39.
145. *Id.*
146. *Id.*
147. *See* 18 U.S.C. § 597 (1996):

> Whoever makes or offers to make an expenditure to any person, either to vote or withhold his vote, or to vote for or against any candidate; and Whoever solicits, accepts, or receives any such expenditure in consideration of his vote or the withholding of his vote—Shall be fined under this title or imprisoned not more than one year, or both; and if the violation was willful, shall be fined under this title or imprisoned not more than two years, or both.

148. *See* MAYHEW, *supra* note 84, at 39.
149. Gibson, *supra* note 6, at 62 ("The question of whether campaign contributions corrupt office holders—or whether such contributions contribute to the perception of corruption—is central in contemporary research on campaign finance.").

nuanced understanding of how money influences congressional behavior.[150] Their study also bears some insights that are helpful for examining judicial candidates' behavior. Specifically, the authors point to how the "rising tide of special-interest money" can indirectly influence elected officials' behavior by "changing the balance of power between voters and donors."[151] For judicial candidates, such a seismic shift in power could alter judicial election calculations, help or hinder campaign fundraising activity, and ultimately reshape elected officials' reelection prospects.[152] The authors' findings, in part, mirror a growing concern of judicial elections raising ever-higher levels of campaign contributions.[153] Gibson noted that "research has shown that campaign contributors in fact appear in courts before judges to whom they have given campaign contributions."[154] On a related matter, Olson noted, "It is no secret that candidates running for elected judicial office get most of their campaign contributions from attorneys. And, there is no question that it is both proper and desirable for attorneys to contribute to such election campaigns."[155] Given that most judicial campaign contributors are lawyers themselves, this is a worrying observation, though according to the literature, not entirely surprising.[156]

While campaign contributions have not been shown to literally buy judicial decisions or roll call votes, they still have the potential to influence other behaviors.[157] Take campaign contributions buying access, for instance. Professors Joshua Kalla and David Broockman conducted the first randomized field experiment measuring the "effects of contributions on policy makers' behavior," and found that campaign contributions do appear to facilitate greater levels of access.[158] Their findings suggest that campaign contributions help mediate

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150. *See* Richard L. Hall & Frank W. Wayman, *Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees*, 84 AM. POL. SCI. REV. 797, 797 (1990) (Hall and Wayman's first hypothesis centers on congressional committees. Whereas the vote-buying hypothesis would expect interest group expenditures to influence floor voting, the authors instead argue that "the effects of group expenditures are more likely to appear in committee than on the floor." Their second hypothesis centers on congressional members' legislative involvement. Here, the authors argue that the effects of interest group expenditures are more likely to appear in congressional members' involvement in "legislative services or effort" than in their voting behavior. In positing these two hypotheses, Hall and Wayman seek to address an important puzzle among theorists of institutional behavior, namely, how to measure the influence of moneyed interests on the legislative process in Congress).

151. *Id*. at 797–98.

152. *Id*. (citing BROOKS JACKSON, HONEST GRAFT: BIG MONEY AND THE AMERICAN POLITICAL PROCESS 107 (1988)).

153. *See* Keith, *supra* note 37.

154. Gibson, *supra* note 6, at 62.

155. Olson, *supra* note 35, at 342.

156. *See id*.

157. Joshua L. Kalla & David E Broockman, *Campaign Contributions Facilitate Access to Congressional Officials: A Randomized Field Experiment*, 60 AM. J. POL. SCI. 545, 545 (2016).

158. *Id*. at 548–53 (To conduct their study, Kalla and Broockman utilized a political organization to attempt to arrange meetings between the organization's donating district members and 191 congressional offices. The political organization randomly assigns whether it alerts the congressional offices that "prospective attendees had contributed to campaign." Based on their empirical analysis, the authors found that senior policy makers

individual access to elected officials and members of their campaign committee. Campaign contributions have also been found to mediate interest group access to elected officials.[159] For judicial officials, a potential connection between contributions and access might be yet another way that public accountability and independence are under threat by interest group money and its influence.

B. INTEREST GROUPS

Are judges unduly incentivized by interest groups and their campaign contributions? Model Code Rule 2.4(A) states that "[a] judge shall not be swayed by public clamor of fear of criticism."[160] This rule lies at the heart of judicial independence because it requires judges to issue their judicial decisions in accordance with the rule of law rather than the majority rule of the public. This includes the potential influence of interest groups. Model Code Rule 2.4(B) extends this guidance for judges by prohibiting a judge from allowing "family, social, political, financial, or other interests or relationships" to impair the judge's personal conduct or professional judgement.[161] And according to Model Code Rule 2.4(C), in addition to avoiding actual impropriety, "[a] judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge."[162] Taken together, Model Rules 2.4(A)–(C) require judges to establish boundaries against influences that might compromise their duty to fairness and impartiality.

One of the most important boundaries for judicial candidates to set is the boundary they establish between themselves and the interest groups that support them. When discussing interest groups and their campaign messaging for candidates, understanding *who* is behind the messaging is of paramount importance. For the public, campaigning messaging provides an opportunity to assess both the messenger and the message. Political communication scholars Professors Michael Franz, Erika Fowler, and Travis Ridout developed a conceptual framework to capture variation across interest group messaging strategies.[163] The authors categorize different types of interest groups as either "loose cannons" or "loyal foot soldiers."[164] Loose cannons describe those interest groups whose

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responded positively to the meeting requests "between three and four times more often" when they were informed that prospective attendees were political donors (policy makers had only a 2.4 percent response rate when told the attendees were "local constituents, compared to a 12.5 percent response rate when told the attendees were "local campaign donors"). While careful to note that their findings do not reveal *why* senior policy makers respond more readily to local campaign donors, their study's results are compelling nonetheless).

159. Marie Hojnacki & David C Kimball, *Organized Interests and the Decision of Whom to Lobby in Congress*, 92 AM. POL. SCI. REV. 775, 775–83 (1998).

160. MODEL CODE Canon 2 R. 2.4(A).

161. *Id*. at Canon 2 R. 2.4(B).

162. *Id*. at Canon 2 R. 2.4(C).

163. Michael M. Franz, Erika Franklin Fowler & Travis N. Ridout, *Loose Cannons or Loyal Foot Soldiers? Toward a More Complex Theory of Interest Group Advertising Strategies*, 60 AM. J. POL. SCI. 738, 738 (2016).

164. *Id*. at 738.

messaging strategies diverge from candidates' positions on issue debates. Loyal foot soldiers, on the other hand, describe those interest groups whose messaging strategies match candidates' position on issue debates. Generally speaking, candidates prize loyal foot soldiers over loose cannons.

Members of Congress can define their rules of engagement with interest groups in large part because they are well positioned to "accomplish tasks for an interest group that the group acting alone could not accomplish."[165] This same observation may apply to judicial officers and their biggest campaign contributors.[166] Professor Scott Ainsworth argues that by understanding how interest groups interact with members of Congress, one can also understand salient interest group strategies.[167] With recognized expertise in studying interest groups and lobbying, Ainsworth highlights congressional members' leading role in structuring their respective interactions with interest groups. This same insight might also be helpful in deciphering the layered relationship between judicial candidates and their majority-lawyer campaign contributors. If a similar power differential does exist between elected judicial officials and their campaign contributors—one where duly elected judicial officers are vested with power beyond the scope of their supporters' individual or collective powers—then it begs the question of how more public accountability could be brought to bear on governing the relationship between elected judicial officials and their interest group contributors.

CONCLUSION

Judicial elections are a conspicuous feature of the judiciary, made up of three main types (i.e., partisan, nonpartisan, and reelection)[168] and more than sixteen unique combinations across varying jurisdictions and levels of courts.[169] More the rule than the exception,[170] judicial elections have become an indispensable way of making elected judges accountable to the public. Trust in the judiciary is of first order importance, and a legal ethics framework can help guide judicial campaign activity that risks eroding public trust in the judiciary. The goal under a legal ethics framework is to preserve and enhance the judiciary's institutional legitimacy. Judicial accountability and independence are the principal mechanisms for doing so.[171]

While judicial elections have become "noisier, nastier, and costlier" over time, the legal ethics rules governing judicial elections are capable of keeping pace.[172]

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165. *Id.*

166. Olson, *supra* note 35, at 343–44.

167. Scott H. Ainsworth, *The Role of Legislators in the Determination of Interest Group Influence*, 22 LEGIS. STUD. Q. 517, 518–26 (1997).

168. *See* Kritzer, *supra* note 1, at 439.

169. *See* Brandenburg & Schotland, *supra* note 2, at 1232.

170. *See* Caufield, *supra* note 4, at 4.

171. *See* Geyh, *supra* note 12, at 1259–60.

172. *See* Hall, *supra* note 14, at 437.

From policy pronouncements and attack ads to campaign contributions, a legal ethics framework leverages judicial accountability and independence in a synergistic way. A legal ethics framework uses specific language in its rules and standards that is in support of both judicial accountability and independence. This includes their joint role in preserving and enhancing public trust in the judiciary. Taken together, thinking carefully about judicial elections and their distinctiveness from legislative elections requires an evolving comparison across multifaceted fronts. Using a legal ethics framework to shore up institutional legitimacy in judicial elections is key to preserving and enhancing the judiciary's distinctiveness from how politics are conducted more generally.