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## LIVING WITH JUDICIAL ELECTIONS

*Raymond J. McKoski\**

### I. INTRODUCTION

Some of the most educated and respected jurists, journalists, and scholars describe judicial elections in very unflattering terms such as awful,<sup>1</sup> unconstitutional,<sup>2</sup> idiotic,<sup>3</sup> scary,<sup>4</sup> unwise,<sup>5</sup> demagogic,<sup>6</sup> and doomed.<sup>7</sup> Those more olfactorily oriented complain that judicial elections smell<sup>8</sup> and stink.<sup>9</sup>

The organized bar consistently advocates for appointive judicial selection methods and against the popular election of judges.<sup>10</sup> The bar's opposi-

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1. James Podgers, *O'Connor on Judicial Elections: 'They're Awful, I Hate Them,'* AM. BAR ASS'N J. (May 9, 2009), [http://www.abajournal.com/news/article/oconnor\\_chemerinsky\\_sound\\_warnings\\_at\\_aba\\_conference\\_about\\_the\\_dangers\\_of\\_s/](http://www.abajournal.com/news/article/oconnor_chemerinsky_sound_warnings_at_aba_conference_about_the_dangers_of_s/).

2. Scott D. Wiener, Note, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 HARV. C.R.-C.L. L. REV. 187, 202-03 (1996) (arguing that judicial elections violate the Due Process Clause).

3. Noah Feldman, *Why Judicial Elections are Idiotic*, BLOOMBERG VIEW (Jan. 21, 2015, 11:14 AM), <https://www.bloomberg.com/view/articles/2015-01-21/why-judicial-elections-are-idiotic>.

4. Adam Linker, *Why Judicial Elections Are Scary (Hint: See the 2010 Court of Appeals Race)*, THE PROGRESSIVE PULSE (Apr. 5, 2010), <http://pulse.ncpolicywatch.org/2010/04/05/why-judicial-elections-are-scary-hint-see-the-2010-court-of-appeals-race>.

5. N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 209 (2008) (Stevens, J. concurring).

6. William Howard Taft, *The Selection and Tenure of Judges*, 38 AM. BAR ASS'N REP. 418, 423 (1913).

7. Ann M. Lousin, *Why Judicial Elections are Doomed*, CHI. DAILY L. BULL. (Apr. 23, 2011), <http://news.jmls.edu/wp-content/uploads/2011/04/20110423-cdlb-lousin.pdf>.

8. Editorial, *Cash v. Quality: Ohio's Judicial Elections Smell More of Money than Merit, and the Rules Must Change to Give Voters Meaningful Choices*, CLEVELAND PLAIN DEALER, Mar. 5, 2003, at B8.

9. See Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43 (2002).

10. See ABA COALITION FOR JUSTICE, JUDICIAL SELECTION: THE PROCESS OF CHOOSING JUDGES 7 (2008), [http://www.dphu.org/uploads/attachements/books/books\\_4176\\_0.pdf](http://www.dphu.org/uploads/attachements/books/books_4176_0.pdf) ("While any method of judicial selection may have flaws, it is the belief of the ABA, the American Judicature Society, and many legal experts and scholars across the nation that some form of merit selection should be used in every state.").

tion to an elected judiciary began long before the arrival of contentious, costly, and sometimes nasty judicial elections. During a speech before the American Bar Association (ABA) in 1913, Chief Justice William Howard Taft spoke in favor of the appointment of judges while severely criticizing judicial elections.<sup>11</sup> In Taft's view, judicial campaigns created a "disgraceful exhibition" resulting in the selection of judges, "not because they are impartial . . . not because they are judicial, but because they are partisan."<sup>12</sup> Thus, it comes as no surprise that the first model code of judicial conduct, drafted by the ABA committee chaired by Chief Justice Taft, warned that partisan political activity "inevitably" results in the perception that a judge is "warped by political bias."<sup>13</sup> Since the early twentieth century, the ABA has repeatedly emphasized its support of merit selection and opposition to the election of judges.<sup>14</sup> One observer accurately observed that the mission of the ABA is "to end judicial elections."<sup>15</sup> The majority of state bar associations agree with the ABA's position on judicial selection.<sup>16</sup>

Most court reform and citizens' organizations favor judicial appointments over elections.<sup>17</sup> Roscoe Pound, himself an opponent of judicial elections,<sup>18</sup> helped found the American Judicature Society in 1913, which led the

11. Taft, *supra* note 6, at 418.

12. *Id.* at 423.

13. CANONS OF JUDICIAL ETHICS Canon 28 (AM. BAR ASS'N 1924) (Canon 28 permitted judges in states with an elected judiciary to participate in political activities). *Id.*

14. See ABA, AN INDEPENDENT JUDICIARY: REPORT OF THE ABA COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE 96 (1997) ("The American Bar Association strongly endorses the merit selection of judges, as opposed to their election . . ."); ABA COALITION FOR JUSTICE, *supra* note 10, at 7 (urging that "some form of merit selection should be used in every state"); see also *Republican Party of Minn. v. White*, 536 U.S. 765, 787 (2002) (noting that the ABA "has long been an opponent of judicial elections").

15. Jessica Leval Mener, *The Aftermath of Citizens United v. Federal Election Commission: Preventing Impropriety While Encouraging the Free Flow of Information in Judicial Elections*, 24 GEO. J. LEGAL ETHICS 713, 730 (2011).

16. See, e.g., Henry E. Dugan, Jr., *Independent or Accountable*, 48 MD. B.J., at 28, 30 (Mar. 2015) ("The Maryland Bar Association (MSBA) has a long history of opposing competitive judicial elections . . ."); Bruce I. Petrie, Sr., *Political Patronage in Ohio: Governor Taft's Judicial Appointees*, 77 U. CIN. L. REV. 645, 653 (2008) ("The Ohio State Bar Association . . . has supported merit selection since the mid-[nineteen] thirties . . ."); Press Release, N.Y. State Bar Ass'n., New York State Bar Association Endorses Governor Spitzer's Merit Selection Plan (June 21, 2007), <http://www.nysba.org/CustomTemplates/Content.aspx?id=5819>; Tenn. Bar Ass'n., *TBA Votes to Support Constitutional Amendment on Judicial Selection: Merit Selection to be Made Part of the Process by Executive Order* (Oct. 24, 2013), <http://www.tba.org/press-release/tba-votes-to-support-constitutional-amendment-on-judicial-selection-merit-selection-to> ("TBA support for merit selection and retention elections goes back almost 50 years.").

17. See MELINDA GANN HALL, *ATTACKING JUDGES: HOW CAMPAIGN ADVERTISING INFLUENCES STATE SUPREME COURT ELECTIONS* 1, 1–2 (2015).

18. See Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 14 AM. LAW. 445, 450 (1906).

reform effort against popularly elected judges for more than a century.<sup>19</sup> The League of Women Voters,<sup>20</sup> Pennsylvanians for Modern Courts,<sup>21</sup> The Fund for Modern Courts,<sup>22</sup> the Institute for the Advancement of the American Legal System,<sup>23</sup> Justice for All,<sup>24</sup> and many other organizations urge states to abandon judicial elections. Many influential newspapers also advance the same position on their editorial pages.<sup>25</sup>

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19. See Michael E. DeBow & Brannon P. Denning, *Williams-Yulee v. The Florida Bar: The First Amendment, and the Continuing Campaign to Delegitimize Judicial Elections*, 68 VAND. L. REV. EN BANC 113, 122 (2015) (“The most important institutional platform for the crusade against judicial elections has been the American Judicature Society . . .”); National Center for State Courts, *News Release, American Judicature Society Dissolves the Center for Judicial Ethics*, (Oct. 1, 2014), <http://www.ncsc.org/Newsroom/News-Releases/2014/Center-for-Judicial-Ethics-Dissolution.aspx> (announcing that the Board of Directors of the American Judicature Society approved a plan to dissolve the Society).

20. See Seth S. Andersen, *The Voters’ Views on Judicial Merit Selection*, 56 WAYNE L. REV. 727, 729 (2010) (stating that the League of Women Voters of Michigan has long favored merit selection and retention); Roger E. Clark, *Colorado Bar Association President’s Message to Members: Forty Years of Judicial Merit Selection*, 35 COLO. LAW. 4, 4 (Apr. 2006) (stating that in 1996 the Colorado Bar Association and the League of Women Voters led the effort to amend the state constitution to provide for the merit selection of judges).

21. Pennsylvanians for Modern Courts, *Merit Selection Reform*, <http://pmconline.org/node/20> (advocating merit selection).

22. The Fund for Modern Courts, *Judicial Selection*, [http://moderncourts.org/programs-advocacy/judicial-selection\\_\(endorsing\\_merit\\_selection\)](http://moderncourts.org/programs-advocacy/judicial-selection_(endorsing_merit_selection)).

23. Zachary Willis, *IAALS Executive Director Provides Insight into Merit Selection Proposal in Pennsylvania*, Institute for the Advancement of the American Legal System (Dec. 4, 2013), <http://iaals.du.edu/blog/iaals-executive-director-provides-insight-merit-selection-proposal-pennsylvania>.

24. Brief for Justice at Stake, et al. as Amici Curiae Supporting Appellee, *Citizens United v. Federal Elections Comm’n*, 558 U.S. 310 (2010) (No. 08-205).

25. See, e.g., Editorial, *The Complexities of Keeping Judicial Candidates Appearing Impartial*, L. A. TIMES (Jan. 18, 2015), <http://www.latimes.com/opinion/editorials/la-ed-judges-campaign-donations-supreme-court-20150118-story.html> (“Ideally, states that elect their appellate court judges would move to an appointive system.”); Editorial, *Judges Just Wanna Have Fun: But the Court Says No. We Wish They Didn’t Have Elections, Too*, PHILADELPHIA DAILY NEWS (May 01, 2015) (“We do, however, constantly endorse the notion of merit selection for judges . . .”); Editorial, *Judicial Politics Run Amok*, N.Y. TIMES, Sept. 20, 2006, at A24 (“The problem is hardly isolated. Thirty-nine states still choose at least some judges by election, instead of some preferable form of nonelective merit selection system.”); Editorial, *More Calls for High Court Reform*, WIS. STATE J. (Apr. 13, 2011), [http://host.madison.com/wsj/news/opinion/editorial/article\\_8ab72be4-655c-11e0-8753-001cc4c002e0.html](http://host.madison.com/wsj/news/opinion/editorial/article_8ab72be4-655c-11e0-8753-001cc4c002e0.html) (“Merit selection remains the best way to ensure an impartial, experienced and highly-respected Wisconsin Supreme Court.”); see also Letter to Editor, *Merit Selection Supported*, HERALD-STANDARD (Mar. 3, 2016) (current and five former Pennsylvania governors writing in favor of merit selection); Editorial, *About Merit Selection: On Second, Third, and Fourth Thought*, ARK. DEMOCRAT GAZETTE (Mar. 6, 2016), <http://www.arkansasonline.com/news/2016/mar/06/about-merit-selection-20160306/> (“On merit selection, we’re starting to see the light. Which is easy to do when things are this dark.”).

Even staunch supporters of merit selection, however, admit that the overwhelming majority of Americans prefer an elected judiciary.<sup>26</sup> Polling data consistently illustrates that preference. For example, a poll in Alabama disclosed that 85% of respondents chose judicial elections as the best method of judicial selection.<sup>27</sup> In a poll of 500 registered voters in Oklahoma, 74% preferred electing judges and 22% preferred appointing judges.<sup>28</sup> Eighty percent of Ohioans support elections.<sup>29</sup> A survey in 2002 revealed that 78.5% of Illinois voters supported the election of judges.<sup>30</sup> A national survey conducted by Justice at Stake found that 76% of voters favored the election of judges while 20% supported judicial appointments.<sup>31</sup> A Harris Interactive Poll conducted for the ABA in 2002 disclosed that 75% of respondents were of the opinion that judges voted into office are more likely to be fair and impartial than judges appointed to office.<sup>32</sup> In 2008, Harris Interactive found that 55% of Americans favored electing judges and only 19% favored appointing judges.<sup>33</sup>

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26. See, e.g., Sandra Day O'Connor, "Choosing (And Recusing) Our State Court Justices Wisely": *Keynote Remarks by Justice O'Connor*, 99 GEO. L.J. 151, 152 (2010) ("[T]he polls today also show that a majority of Americans say they want to elect their judges . . .").

27. Editorial, *Mixed Signals: People Want to Elect Judges but Don't Know Them*, BIRMINGHAM NEWS, MAR. 26, 2000, at 2 ("First, the vast majority of Alabamians - 85 percent, according to the Mobile Register-University of South Alabama poll - believe electing judges is the best method.").

28. Michael McNutt, *Survey Shows Support for Electing Oklahoma's Appellate Court Judges, Justices*, THE DAILY OKLAHOMAN, Aug. 28, 2013.

29. Barbara S. Gillers et al., *Courts, Campaigns, and Corruption: Judicial Recusal Five Years After Caperton: A View from the Bench*, 18 N.Y.U. J. Legis. & Pub. Pol'y 549, 567-68 (2015) ("In 2012 it was asked for a poll I think of 1000 or more people, and eighty percent of those polled said, 'Yes, we want to continue to elect our judges here in Ohio.'"); see also Jennifer T. Nijman, *Better Way to Elect Our Judges*, 16 CBA RECORD 12, 12, (Oct. 2002) ("[M]ost polls and surveys reveal that a majority of the public wants to elect judges . . .").

30. SURVEY RESEARCH OFFICE, UNIV. OF ILL., ILLINOIS STATEWIDE SURVEY ON JUDICIAL SELECTION ISSUES 9 (2002) (cited in Cynthia Canary, *Know Before You Go: A Case for Publicly Funded Voters' Guides*, 64 OHIO ST. L.J. 81, 82 n.11 (2003) (finding that 78.5% of 830 Illinois voters supported or strongly supported the election of judges)); see also Kellyanne Conway, *Key Findings: Statewide Survey of 500 Likely Voters in Illinois* (2010), <http://www.fed-soc.org/publications/detail/key-findings-statewide-survey-of-500-likely-voters-in-illinois> (summarizing survey results as follows: 64% of likely voters surveyed said that voters should have the "greatest input on who is selected to serve as a Justice on the Illinois Supreme Court"; 14% would leave the responsibility with the legislature; 11% would leave the responsibility with lawyers; and 6% said it should be the governor's responsibility.).

31. Justice at Stake Campaign, *Justice at Stake Frequency Questionnaire 7* (2001), [http://www.justiceatstake.org/media/cms/JASNationalSurveyResults\\_6F537F99272D4.pdf](http://www.justiceatstake.org/media/cms/JASNationalSurveyResults_6F537F99272D4.pdf).

32. Harris Interactive, *A Study About Judicial Impartiality* 4-5 (Aug. 2002) (cited in James Bopp, Jr., *The Perils of Merit Selection*, 46 IND. L. REV. 87, 96, n.71 (2013)).

33. Harris Interactive, *Most Americans Want State Judges to be Elected* (2008), <http://media.theharrispoll.com/documents/Harris-Interactive-Poll-Research-Electing-judges-2008-10.pdf>.

The method of judicial selection in most states reflects the public's preference. Thirty-nine states hold elections for trial or reviewing court judges.<sup>34</sup> As a result, approximately ninety percent of state judges face the electorate to procure or retain their judicial posts.<sup>35</sup> The election of judges is so engrained in the psyche of the public that "no state has moved from contested elections to a merit selection system in more than 30 years."<sup>36</sup>

The reasons that the public prefers elected judges vary. A significant portion of voters simply does not trust the political branches of government.<sup>37</sup> Confidence in Congress hovers in the single digits and approximately a third of Americans report confidence in the presidency.<sup>38</sup> Public confidence in many state governments and state officials is also low.<sup>39</sup> A meager eighteen-percent of the people rate state governors, "very high" or "high" in honesty and ethics.<sup>40</sup> Among the states, Illinois finds itself at the very bottom of the confidence scale.<sup>41</sup> Only twenty-five percent of Illinoisans possess confidence in their state government with 74% expressing a lack of confidence in state officials.<sup>42</sup> The results of the Illinois poll should come as no surprise since four of Illinois's last seven governors served sentences in the federal penitentiary.<sup>43</sup> The most recently convicted Illinois governor was charged with, among other things, attempting to sell an appointment to a

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34. Michael S. Kang & Joanna M. Shepherd, *Judging Judicial Elections*, 114 MICH. L. REV. 929, 932 (2016) (reviewing MELINDA GANN HALL, *ATTACKING JUDGES: HOW CAMPAIGN ADVERTISING INFLUENCES STATE SUPREME COURT ELECTIONS* (2015)); see also ABA, *Fact Sheet on Judicial Selection Methods in the States*, [http://www.americanbar.org/content/dam/aba/migrated/leadership/fact\\_sheet.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/leadership/fact_sheet.authcheckdam.pdf).

35. Kang & Shepherd, *supra* note 34, at 932.

36. Alicia Bannon, *Rethinking Judicial Selection in State Courts*, BRENNAN CENTER FOR JUSTICE, 17 (2016), [https://www.brennancenter.org/sites/default/files/publications/Rethinking\\_Judicial\\_Selection\\_State\\_Courts.pdf](https://www.brennancenter.org/sites/default/files/publications/Rethinking_Judicial_Selection_State_Courts.pdf).

37. See Chuck Todd, Mark Murray & Carrie Dann, *Why the Lack of Confidence in American Institutions Is so Troubling*, NBC News (Dec. 21, 2016, 8:29 AM), <http://www.nbcnews.com/politics/first-read/why-lack-confidence-american-institutions-so-troubling-n698626> ("One of the most troubling developments in American politics, government, and media has been the loss of confidence in key institutions.")

38. Gallup, *Confidence in Institutions* (June 1–5, 2016), <http://www.gallup.com/poll/1597/Confidence-Institutions.aspx> (assigning confidence in Congress at 9% and in the presidency at 36%).

39. See Jeffery M. Jones, *Illinois Residents Least Confident in Their State Government*, Gallup (Feb. 17, 2016), <http://www.gallup.com/poll/189281/illinois-residents-least-confident-state-government.aspx>.

40. See Gallup, *Honesty/Ethics in Professions* (Dec. 7–11, 2016), <http://www.gallup.com/poll/1654/Honesty-Ethics-Professions.aspx>.

41. Jones, *supra* note 39.

42. *Id.*

43. DICK SIMPSON ET. AL., CHICAGO AND ILLINOIS, LEADING THE PACK IN CORRUPTION: ANTI-CORRUPTION REPORT NO. 5, at 2 (2012), [https://pols.uic.edu/docs/default-source/chicago\\_politics/anti-corruption\\_reports/leadingthepack.pdf](https://pols.uic.edu/docs/default-source/chicago_politics/anti-corruption_reports/leadingthepack.pdf) (stating that since 1970 four of the seven governors elected in Illinois have been convicted of corruption.).

seat in the United States Senate.<sup>44</sup> It is easy to understand why the people of Illinois might shy away from investing the judicial appointment power in the state's highest executive official.

Rhode Island residents also have a very low level of confidence in their state government.<sup>45</sup> Part of the reason for this failure in confidence may relate to problems in the state's judicial appointment process. For instance, former Rhode Island Governor Lincoln Chafee candidly admitted that state legislative leaders held several of his bills hostage until he appointed a former senate president to a lifetime judicial post.<sup>46</sup> Resistance to Chafee's legislative initiatives disappeared after he relented and made the appointment.<sup>47</sup> Similar incidents led one writer for Common Cause to describe Rhode Island's reputation for judicial selection "as an 'I know a guy' state."<sup>48</sup>

Some voters may simply have difficulty recognizing the "merit" in the appointive process where the governor makes appointments to a state's judicial selection commissions. For example, as of the end of 2016, the Republican governor of Iowa had named fifty-three people to the state's selection commission—all Republicans.<sup>49</sup>

Equally troubling for some voters is the legal profession's control over the judicial appointment process. Few doubt that the legal "profession has considerable confidence in its ability, directly or indirectly, to hold sway over nominating commissions' deliberations, and, consequently, over the final appointments of judges."<sup>50</sup> The public's lack of faith in lawyers' honesty and ethics translates into a lack of confidence in an appointment process controlled by the bar.<sup>51</sup>

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44. *Id.* (Rod Blagojevich "was ultimately convicted in 2011 of trying to sell the U.S. Senate seat vacated by Barack Obama.").

45. *See* Jones, *supra* note 39 (indicating that only one in three persons in Rhode Island have confidence in their state government).

46. Edward Fitzpatrick, *Chafee Reveals 'Smoking Gavel' in Judicial Selection*, PROVIDENCE J. (Nov. 11, 2015, 11:15AM), <http://www.providencejournal.com/article/20151111/NEWS/151119812>.

47. *Id.*

48. John Marion, *Merit Selection Should Mean Just That*, Rhode Island Common Cause, (May 13, 2014), <http://www.commoncause.org/states/rhode-island/news/merit-selection-should-mean-just-that.html>.

49. *See* Editorial, *Politics Plays a Role in Choosing Judges*, DES MOINES REGISTER, Dec. 4, 2016, at 4.

50. Charles H. Sheldon, *The Role of State Bar Associations in Judicial Selection*, 77 JUDICATURE 300, 302 (May 1994); *see also* Editorial, *Iowa's Total Recall: Voters Give Activist Judges the Boot. Lawyers are Shocked*, WALL ST. J., Nov. 6, 2010, at A12 (criticizing the domination of the "lawyers guild" in the judicial appointment process).

51. *See* Gallup, *supra* note 40 (indicating that three percent of respondents graded lawyers "very high" on honesty and ethics and fifteen percent graded lawyers "high" on those qualities); *see also* Seth Andersen, *Examining the Decline in Support for Merit Selection in the States*, 67 ALB. L. REV. 793, 795 (2004) (suggesting that "the low level of public confi-

Whatever the reason for the public's preference for judicial elections, that preference is unlikely to change. As a former president of the Michigan Trial Lawyers Association put it:

[I]n Michigan poll after poll after poll after poll: will you give up your right to elect justices or judges to the Court of Appeals? Never. Because people will never surrender their right to vote. They believe that that's a constitutional right, they won't give it up. They want the right to vote for them or not vote for them.<sup>52</sup>

Because judicial elections are here to stay,<sup>53</sup> advocates of the appointive process have shifted their efforts from advocating for merit selection to promoting election reforms designed to minimize the adverse effect that campaigns have on judicial impartiality in both fact and appearance.<sup>54</sup> But the proposed judicial election reforms have not fared any better than the crusade to convince the public to adopt the appointive method of judicial selection. This article argues that the legal profession should shift its effort away from ending or reforming judicial election in favor of new strategies to educate the public about the role of judges and the importance of judicial impartiality.

Part II examines the limited success of suggested judicial election reforms in building public confidence in the third branch of government. Part III offers non-controversial and low-cost proposals to counter the adverse impact of judicial elections on the public's perception of the impartiality and integrity of the judiciary. The proposals include (1) pre-judicial education; (2) mandating that candidates emphasize the importance of impartiality in their campaigns for judicial office; (3) improved judicial voter guides; (4) enhanced discipline for judges who advocate partiality or favoritism during elections campaigns or exhibit a lack of impartiality once on the bench; and

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dence in the legal profession . . . may play an increasingly important role in shaping attitudes towards merit selection”).

52. *Symposium Transcript: What's on the Horizon for Michigan Medical Malpractice*, 14 MICH. ST. U. J. MED. & L. 477, 516 (2010) (remarks of Jules Olsman).

53. As one Wisconsin observer commented:

Another real ruse is that merit selection is remotely doable in our state. More than three years worth of editorials has moved the public policy debate in Wisconsin over judicial selection not one inch . . . Instead of spinning our wheels arguing over whether it's better to appoint or elect judges, we should accept that we've been electing judges in Wisconsin for over 150 years and we will be electing them 150 years from now.

Mike McCabe, *The Real Debate Over How to Pick Judges* (Apr. 19, 2011, 11:04 AM), <http://blog.wisdc.org/search?updated-min=2010-12-31T22:00:00-08:00&updated-max=2011-07-07T10:11:00-05:00&max-results=50&start=27&by-date=false>. See also Dmitry Bam, *Restoring the Civil Jury in a World Without Trials*, 94 NEB. L. REV. 862, 884 (2016) (“It is clear, therefore, that judicial elections are not going away.”).

54. See Bam, *supra* note 53, at 885.

(5) requiring that judges explain denials of motions to disqualify on the basis of campaign contributions.

## II. EFFORTS TO REFORM JUDICIAL ELECTIONS

States have been slow to adopt any of the multitude of reforms touted to minimize the impartiality-impairing effects of judicial campaigns and campaign contributions.<sup>55</sup> Even when enacted, reform measures seldom reduce the adverse impact that contested judicial elections have on the public's view of judicial impartiality.<sup>56</sup>

### A. Non-Partisan Judicial Elections

Switching from partisan to non-partisan judicial elections is frequently suggested as a means of eliminating the implication that a party label dictates how a successful candidate will decide cases. And on its face, this proposal makes sense because political neutrality would seem to be a component of judicial impartiality. But removing party affiliation from the ballot does little to diminish party involvement in election campaigns. “Michigan and Wisconsin, both of which hold nominally nonpartisan judicial elections, recently hosted the most politicized supreme court elections in the country with intense campaign spending and partisan mobilization.”<sup>57</sup> Nor do non-partisan ballots prevent hot-button social, political, and legal issues like abortion, gun ownership, and transgender rights from dominating judicial election contests.<sup>58</sup> Moreover, voter participation in judicial elections without party labels tends to be lighter than in partisan races.<sup>59</sup> Most surprising, some studies show that judges in nonpartisan elections are “more responsive to public opinion than their counterparts who face partisan elections.”<sup>60</sup> This finding certainly contradicts the contention of nonpartisan election advocates “that nonpartisan elections insulate judges from pressure to cater to

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55. See *infra* Part II.A-E.

56. See *id.*

57. Michael S. Kang & Joanna M. Shepherd, *The Partisan Foundations of Judicial Campaign Finance*, 86 S. CAL. L. REV. 1239, 1256 (2013).

58. See Brian P. Troutman, Comment, *Party Over? The Politics of North Carolina's "Nonpartisan" Judicial Elections*, 86 N.C. L. REV. 1762, 1781 (2008).

59. Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 U. ILL. L. REV. 363, 386 (2013) (“Turnout is lower in nonpartisan elections. . . .”); Diane Slaughter Hamilton, *Chief Justice Starcher—An Unexpected Man*, W. VA. LAW., Jan. 1999, at 18, 20 (stating that in nonpartisan judicial races “voter turnout is unbelievable low”).

60. Brandice Canes-Wrone & Tom S. Clark, *Judicial Independence and Nonpartisan Elections*, 2009 WIS. L. REV. 21, 40–41.

political forces.”<sup>61</sup> Apparently recognizing these shortcomings, North Carolina recently abandoned the non-partisan election of supreme and appellate court judges in favor of partisan elections for those offices.<sup>62</sup>

## B. Publicly Financed Judicial Campaigns

Fifteen years ago, the ABA recommended that states publicly finance the campaigns of “serious candidates” for judicial office.<sup>63</sup> The ABA believed that public financing would free judicial elections from the perceived impropriety created by candidates taking campaign contributions from lawyers, litigants, and organizations interested in cases before the court.<sup>64</sup> But the strength of public financing is also its weakness. While public funding alleviates the concern of the voters that private contributions to a judge’s campaign committee influence judicial decisions,<sup>65</sup> it requires taxpayers to foot the bill for nasty, misleading, and sometimes downright false campaign advertising.<sup>66</sup> Understandably, the public is not anxious to do so.<sup>67</sup>

In 2002, North Carolina adopted a system of publically financed judicial elections.<sup>68</sup> The system was funded by a voluntary fifty-dollar contribution from lawyers and a three-dollar contribution that could be “checked off” on individual state income tax returns.<sup>69</sup> Participation by taxpayers and lawyers was less than overwhelming:

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61. *Id.* at 59.

62. Paul B. Johnson, *Major Court Changes Overlooked in Special Session Chaos*, HIGH POINT ENTERPRISE (Dec. 28, 2016) (stating that the passage of North Carolina Senate Bill 4 requires that the ballot include the party affiliation of candidates for the state supreme court and court of appeals); *but see* National Center for State Courts, *NC: So How Many Other States/Courts Elect Their Appellate Judges in a Partisan Manner? It’s Complicated* (Dec. 16, 2016), <http://gaveltogavel.us/2016/12/16/nc-so-how-many-other-states-elect-their-appellate-judges-in-a-partisan-manner-its-complicated> (stating that West Virginia ended partisan races for the Supreme Court of Appeals in 2015).

63. *See* ABA, PUBLIC FINANCING OF JUDICIAL CAMPAIGNS: REPORT OF THE COMMISSION ON PUBLIC FINANCING OF JUDICIAL CAMPAIGNS (2002), [http://www.americanbar.org/content/dam/aba/migrated/judind/pdf/commissionreport4\\_03.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/judind/pdf/commissionreport4_03.authcheckdam.pdf).

64. *Id.* at viii.

65. *See infra* note 101.

66. *See* Terry Carter, *Mud and Money: Judicial Election Turn to Big Bucks and Nasty Tactics*, A.B.A. J. 40, 40–43 (Feb. 2005) (“Sometimes the ads begin in such a way that you believe the candidate actually committed the crime. . . .”) (quoting Deborah Goldberg of the Brennan Center for Justice at the New York University School of Law).

67. *See* Troutman, *supra* note 58, at 1777 (noting that voluntary contributions to public funding for supreme court races in Wisconsin fell from 19.9% in 1979 to 8.7% in 1998) (citing Doug Bend, *North Carolina’s Public Financing of Judicial Campaigns: A Preliminary Analysis*, 18 GEO. J. LEGAL ETHICS 597, 605 (2005)).

68. *See* Troutman, *supra* note 58, at 1770–71.

69. *Id.* at 1773–74.

In addition to the seven percent of the general population who participated in the check-off method, attorney support for the program failed to meet expectations. While over a thousand attorneys signed on in support of the program, only twelve percent actually bothered to tender their voluntary contributions of fifty dollars.<sup>70</sup>

Following the lead of North Carolina, New Mexico, West Virginia, and Wisconsin adopted public financing for judicial candidates.<sup>71</sup> North Carolina abandoned the program in 2013, as did Wisconsin in 2011.<sup>72</sup> The inability or unwillingness of states to devote funds to underwrite political campaigns makes publicly financed campaigns for any office “rare.”<sup>73</sup> Even if money was available and partisan legislatures amenable to the public funding model, public financing cannot stem the tide of outside spending in support of or opposition to judicial candidates.<sup>74</sup>

### C. Disqualification

Some proponents of election reform suggest that the influence of money on judicial decisions can be avoided if ethics codes require that judges disqualify themselves from cases in which a litigant or litigant’s lawyer has contributed to the judge’s campaign.<sup>75</sup> This is not a new idea.<sup>76</sup> In 1999, the ABA amended Canon 3(E)(1) of the 1990 ABA Model Code of Judicial Conduct to mandate recusal when a litigant or lawyer contributed to a judge’s campaign above a certain monetary amount. The ABA left the contribution amount that would disqualify a judge to the individual jurisdiction adopting the model provision.<sup>77</sup> No state adopted the ABA’s recommendation.<sup>78</sup> Rule 2.11(A)(4) of the 2007 ABA Model Code of Judicial Conduct

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70. *Id.* at 1776–77 (citing Doug Bend, *North Carolina’s Public Financing of Judicial Campaigns: A Preliminary Analysis*, 18 GEO. J. LEGAL ETHICS 597, 604 (2005)).

71. John F. Kowal, *Judicial Selection for the 21st Century*, BRENNAN CENTER FOR JUSTICE 1, 4 (June 2016).

72. *Id.* at 4 n.12.

73. See Robert N. Hunter, Jr., *Do Nonpartisan Publicly Financed Judicial Elections, Enhance Relative Judicial Independence*, 93 N.C. L. REV. 1825, 1874 (2015).

74. See *id.* (“[T]he public financing program was not successful in curbing the influence of outside spending. . . .”); see also *Citizens United v. Federal Election Commission*, 558 U.S. 310, 365 (2010) (declaring the government’s attempt to limit corporate expenditures on behalf of or in opposition to a candidate for elective office unconstitutional).

75. See, e.g., David K. Stott, *Zero-Sum Judicial Elections: Balancing Free Speech and Impartiality Through Recusal Reform*, 2009 B.Y.U. L. REV. 481, 502 (2009) (“Strengthening each state’s recusal standards will solve the problem of zero-sum judicial elections.”).

76. See MODEL CODE OF JUDICIAL CONDUCT CANON 3(E)(1)(e) (AM. BAR ASS’N 1999).

77. *Id.*

78. Cynthia Gray, *Campaign Supporters and Disqualification*, 29 JUD. CONDUCT REP. 1, 1 (Fall 2007) (“No state has adopted this provision [Canon 3(E)(1)(e)] which was retained in the 2007 revised model code.”).

also provides for the disqualification of judges receiving contributions exceeding a designated amount.<sup>79</sup> But until the Supreme Court's decision in *Caperton v. A. T. Massey Coal Co.*, no state adopted Rule 2.11(A)(4).<sup>80</sup> *Caperton* determined that an extremely large campaign contribution might create an unconstitutional risk of actual bias requiring the judge's removal from a matter.<sup>81</sup> In the eight years since *Caperton*, five states have enacted rules requiring a judge's recusal after receiving a contribution of a specific amount.<sup>82</sup> One state, Utah, set a very low recusal threshold. Rule 2.11(A)(4) of the Utah Code of Judicial Conduct requires a judge's disqualification when

the judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has within the previous three years made aggregate contributions to the judge's retention in an amount that is greater than \$50.<sup>83</sup>

In 2010, the Wisconsin Supreme Court specifically rejected the proposition that a lawful campaign contribution by a litigant or lawyer could result in the disqualification of a judge.<sup>84</sup> The court considered such a rule

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79. Rule 2.11(A)(4) provides:

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality\* might reasonably be questioned, including but not limited to the following circumstances:  
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(4) The judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has within the previous [insert number] year[s] made aggregate\* contributions\* to the judge's campaign in an amount that [is greater than \$[insert amount]] for an individual or \$[insert amount] for an entity] [is reasonable and appropriate for an individual or an entity].

MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(4) (AM. BAR ASS'N 2007).

80. Gray, *supra* note 78, at 4.

81. *Caperton v. A.T. Massey Coal Co.*, 556 U.S.868, 884 (2009) ("We conclude that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent.").

82. See Cynthia Gray, *Judicial Disqualification Based on Campaign Contributions*, National Center for State Courts (Nov. 2016), <http://www.ncsc.org/~media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/Disqualificationcontributions.ashx>. The five states are Alabama, Arizona, California, Mississippi, and Utah. *Id.* at 2–4.

83. UTAH CODE OF JUD. CONDUCT R. 2.11A(4) (2014).

84. WIS. SUP. CT. R. 60.04(7) (2014) ("A judge shall not be required to recuse himself or herself in a proceeding based solely on any endorsement or the judge's campaign committee's receipt of a lawful campaign contribution, including a campaign contribution from an

undemocratic and feared that the rule would cause the public unjustly to equate acceptance of a contribution with a lack of integrity:

Disqualifying a judge from participating in a proceeding solely because the judge's campaign committee received a lawful contribution would create the impression that receipt of a contribution automatically impairs the judge's integrity. It would have the effect of discouraging "the broadest possible participation in financing campaigns by all citizens of the state" through voluntary contributions . . . because it would deprive citizens who lawfully contribute to judicial campaigns, whether individually or through an organization, of access to the judges they help elect.<sup>85</sup>

Eleven states reject both the Utah and Wisconsin approaches and instead simply remind judges to disqualify themselves when the "unconstitutional risk of actual bias" standard of *Caperton* is met, or when a contribution creates an appearance of impropriety.<sup>86</sup> For example, Michigan Rule 2.003(C)(1)(b) disqualifies judges when (1) there is "a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v. Massey*," or (2) a judge "has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct."<sup>87</sup> But even in the absence of Rule 2.003(C)(1)(b), Michigan judges are under a duty to comply with all Supreme Court decisions including *Caperton*, and under a duty to comply with the appearance of impropriety disciplinary standard in the Michigan judicial code.<sup>88</sup> So, as a practical matter, Rule 2.003(C)(1)(b) adds nothing to Michigan's disqualification jurisprudence. In an attempt to provide more guidance, some states include factors that a judge should consider in determining whether a contribution adversely affects the appearance of judicial impartiality.<sup>89</sup> Other states establish a rebuttable presumption that a lawful contribution does not require disqualification.<sup>90</sup>

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individual or entity involved in the proceeding." Nevada also refused to enact an automatic recusal rule when contributions reach a specified amount. Gray, *supra*, note 82, at 11–12.

85. WIS. S. CT. R. 60.04(7) cmt. July 2010 (2014) (internal citation omitted).

86. Gray, *supra* note 82, at 4–10. The eleven states are: Arkansas, Georgia, Iowa, Michigan, Missouri, New Mexico, North Dakota, Oklahoma, Pennsylvania, Tennessee, and Washington. *Id.*

87. MICH. CT. R. 2.003(C)(1)(b) (2010).

88. MICH. MODEL CODE OF JUDICIAL CONDUCT Canon 2A (2013) ("A judge must avoid all impropriety and appearance of impropriety.")

89. *See, e.g.*, GA. CODE OF JUDICIAL CONDUCT Canon 3(E)(1)(d) (2011).

90. *See, e.g.*, OKLA. CODE OF JUDICIAL CONDUCT R. 2.11(A)(4) (2011) ("Contributions within the limits allowed by the Oklahoma Ethics Commission will not normally require disqualification unless other factors are present."); N.M. CODE OF JUDICIAL CONDUCT R. 21-211 cmt. at 7 (2015) ("However, contributions made by attorneys to the campaigns of judicial candidates would not require a judge's disqualification in the absence of extraordinary circumstances.").

Jurisdictions adopting the ABA's model provision that campaign contributions exceeding a certain amount automatically disqualify a judge can claim that the rule insulates judges from the conscious or subconscious influence of money in politics, but only five jurisdictions have incorporated the model provision into their judicial codes since the ABA first suggested the rule in 1990.<sup>91</sup> One of those states requires recusal only where the contribution exceeds the amount permitted by state law.<sup>92</sup> The likelihood that other states will adopt an automatic contribution recusal rule is minimal, not only because most states have failed to do so in the last three decades,<sup>93</sup> but also because of the potential disadvantages of an automatic disqualification rule. It seems that the majority of states agree with the concerns expressed by Chief Justice John Roberts:

A rule requiring judges to recuse themselves from every case in which a lawyer or litigant made a campaign contribution would disable many jurisdictions. And a flood of postelection recusal motions could “erode public confidence in judicial impartiality” and thereby exacerbate the very appearance problem the State is trying to solve . . . . Moreover, the rule that Yulee envisions could create a perverse incentive for litigants to make campaign contributions to judges solely as a means to trigger their later recusal—a form of preemptory strike against a judge that would enable transparent forum shopping.<sup>94</sup>

Finally, states like Michigan, that decline to adopt automatic recusal rules and merely require disqualification when due process or the “appearance of impropriety” standard require, do little to relieve the tension between campaign money and judicial impartiality.<sup>95</sup> While a party may move

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91. See *supra* note 82 (listing the five states).

92. See ARIZ. CODE OF JUDICIAL CONDUCT R. 2.11(A)(4) (2016) (requiring recusal when “[t]he judge knows or learns by means of a timely motion that a party, a party’s lawyer, or the law firm of a party’s lawyer has within the previous four years made aggregate contributions to the judge’s campaign in an amount that is greater than the amounts permitted pursuant to A.R.S. § 16-905.”).

93. See *supra* notes 77–83 and accompanying text (discussing the adoption of an automatic contribution recusal rule by the states).

94. *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1671–72 (2015) (internal citation omitted).

95. See *Adair v. Mich. Dep’t of Educ.*, 709 N.W.2d 567, 579 (Mich. 2006) (“That a judge has at some time received a campaign contribution from a party, an attorney for a party, a law firm employing an attorney for a party, or a group having common interests with a party or an attorney, cannot reasonably require his or her disqualification.”); *Id.* at 580 (“There will simply be no end to the alleged “appearance of impropriety” if every contribution to a candidate, or every contribution to an opposing candidate, or every independent opposition campaign, is viewed as raising an ethical question concerning a judge’s participation in a case in which a contributor or an opposition contributor is involved.”).

for a judge's disqualification in a case in which the opposing party or lawyer contributed to the judge's campaign, "such motions hardly ever succeed."<sup>96</sup>

#### D. Voter Guides

Voter guides may not directly reduce the partisanship, monetary expenditures, or nastiness of a judicial campaign, but they can provide information concerning the candidates not readily available elsewhere.<sup>97</sup> That may be why voters overwhelmingly favor state produced voter guides for judicial elections.<sup>98</sup> Although some states have issued these guides "for generations,"<sup>99</sup> data on their use and effectiveness is lacking. There is some indication, however, that voters will make use of the resource if offered. In 2012, the Florida Bar distributed 350,000 voter guides in three languages.<sup>100</sup> The League of Women Voters included the same information in more than a million of the League's Florida voter guides.<sup>101</sup> In addition to the hard copy guides, the Florida Bar created "The Vote's in Your Court" website with links to the voter guide and other judicial election information.<sup>102</sup> Employing social media advertising, the website generated more than 10,300 "fans," 100,000 hits, and 39.6 million impressions.<sup>103</sup>

While judicial voter guides supply information describing the candidates' backgrounds, they do little to identify impartiality as the distinguishing characteristic of the judiciary. They also fail to encourage candidates to explain how they will ensure impartial decisions.<sup>104</sup>

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96. John Copeland Nagle, *The Recusal Alternative to Campaign Finance Legislation*, 37 HARV. J. ON LEGIS. 69, 87 (2000) ("Once elected, judges occasionally find themselves hearing a case in which one of their campaign contributors is representing one of the parties, or even where the party himself or herself was a contributor. Not surprisingly, the opposing party often moves to recuse the judge in such circumstances. Surprisingly, such motions hardly ever succeed.").

97. See Cynthia Canary, *Know Before You Go: A Case for Publicly Funded Voters' Guides*, 64 OHIO ST. L.J. 81, 83 (2003).

98. *Id.* at 88–90 (citing studies showing support for voter guides among voters to range between 77% and 92%).

99. Roy A. Schotland, *A Plea for Reality*, 74 MO. L. REV. 507, 526 n.58 (2009).

100. Gwynne A. Young, *It Was a Very Good Year*, 87 FLA. B.J. 4, 4 (June 2013).

101. *Id.*

102. *Id.*

103. *Id.*

104. See *infra* Part III.C.

### E. Other Suggested Reforms

Other proposals to reform judicial elections abound.<sup>105</sup> Some states conduct judicial elections in off years in an attempt to reduce the influence of political parties in the selection of judges.<sup>106</sup> Unfortunately, the most noteworthy effect of “off-year” contests is reduced voter turnout.<sup>107</sup> Other states instruct judges to insulate themselves from the identities of contributors to their campaigns.<sup>108</sup> While this rule may help soothe the consciences of reformers, its practical effect is nil because judges standing in the reception line at their fund-raising events cannot help but know who contributes to their campaigns. Even more importantly, unless a judge personally reviews contributor lists, there is no sure way to prevent support from unsavory or otherwise unwelcomed elements of society, and no rule should require that a judge’s first knowledge of an improper contribution come as a surprise by way of a newspaper article or a litigant’s motion to disqualify the judge. Other suggested reforms include life appointments for judges,<sup>109</sup> election for a single, long term of office with no possibility of retention,<sup>110</sup> and lengthening the term of judicial office.<sup>111</sup> Establishing contribution limits and enacting disclosure requirements for monetary campaign assistance

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105. See Symposium, *Call to Action: Statement of the National Summit on Improving Judicial Selection*, 34 LOY. L.A. L. REV. 1353 (2001) (suggesting twenty ways to improve judicial campaigns and elections).

106. See Anthony Champagne, *The Selection and Retention of Judges in Texas*, 40 SW. L.J. 53, 63 (1986).

107. See Bert Brandenburg & Roy A. Schotland, *Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns*, 21 GEO. J. LEGAL ETHICS 1229, 1234 (2008).

108. See, e.g., N.M. CODE OF JUDICIAL CONDUCT R. 21-402A(2) (2012) (directing that a judicial candidate “shall not seek to discover who has contributed to the campaign of either the judge or the judge’s opponent”); *Id.* at cmt. 16 (“Judicial candidates may be informed about the total amounts contributed to the campaign in order to make informed budgeting decisions relating to the campaign. Under most circumstances, however, judicial candidates should not be informed about the specific details of individual contributions.”).

109. See Darrell McGowan, *Life Tenure—An Indispensable Ingredient to an Independent Judiciary*, 75 ILL. B.J. 620, 622 (July 1987) (“Only a life tenure retention system such as the federal system can effectively eliminate political and interest group influence over the judiciary.”).

110. Michael R. Dimino, Sr., *Accountability Before the Fact*, 22 NOTRE DAME J. L. ETHICS & PUB. POL’Y 451, 451 (2008) (“[J]udicial terms of office should be long and non-renewable, such that there are neither reelections nor reappointments”).

111. Laura R. Porter, Comment, *The Necessity of Judicial Independence: Merit-Based Selection for Arkansas’s Court of Last Resort*, 68 ARK L. REV. 1061, 1088 (2016) (suggesting increasing the term of state supreme court justices from eight to twelve years); see also Luke Bierman, *Beyond Merit Selection*, 29 FORDHAM URB. L.J. 851, 864 (2002) (“Life tenure and long terms promote judicial independence.”).

receive widespread support,<sup>112</sup> but as Professor Geyh points out, “those reforms do nothing to curb the influence of independent campaigns.”<sup>113</sup>

Like the effort to convince the public to adopt merit selection, attempts to enact election reform have met limited success. That does not mean that we should abandon these reform efforts. It does mean, however, that it is time to institute a complementary approach to achieve the ultimate goal—increased public confidence in the judiciary. The legal profession should shift the emphasis from tinkering with election campaigns to convincing the public of the importance of judicial impartiality.

### III. PROPOSALS

To build public confidence in the judiciary, judicial candidates and the legal profession must help the public understand that judges are sworn to render impartial decisions and trained to ignore personal considerations in the decision-making process. The State and the profession’s efforts at teaching the public what makes judges different from political branch officials, has, to put it mildly, been deficient. A five-part educational campaign needs to start now. First, judicial candidates need to undergo mandatory pre-judicial education in the nature and importance of judicial impartiality. Second, the courts must amend judicial ethics codes to mandate that candidates discuss the concept of judicial impartiality during their campaigns. Third, in addition to providing candidate resumes, voter guides can easily incorporate information on the defining characteristics of the judiciary. Fourth, as an educational tool, judges should provide written reasons supporting the denial of motions to recuse based on campaign contributions. And in some ways, most importantly, the State must assure the public that, whether elected or appointed, judges who demonstrate partiality on the bench will receive an appropriate level of discipline.

#### A. Pre-Judicial Education

Few new judges fully understand the nature or demands of the job. Lawyers practice as partisan advocates.<sup>114</sup> Seeking justice is simply not part of most lawyers’ duties. Non-lawyer judges begin their service as judges

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112. See, e.g., Elizabeth K. Lamphier, Comment, *Justice Run Amok: Big Money, Partisanship, and State Judiciaries*, 2011 MICH. ST. L. REV. 1327, 1358–59 (advocating for broader campaign disclosure requirements).

113. Charles Gardner Geyh, *Judicial Selection Reconsidered: A Plea for Radical Moderation*, 35 HARV. J. L. & PUB. POL’Y 623, 640 (2012).

114. See Sande L. Buhai et al., *The Role of Law Schools in Educating Judges to Increase Access to Justice*, 24 PAC. MC GEORGE GLOBAL BUS. & DEV. L.J. 161, 175 (2011) (“Lawyers are trained to be partisan.”).

with even less appreciation for the core values of judicial independence, impartiality, and integrity.<sup>115</sup> Worse yet, some individuals are not only unprepared for their role as a member of the judiciary but also lack the capacity to ever carry out judicial duties impartially.<sup>116</sup> Regrettably, these difficulties plague many recently installed judges regardless of the judicial selection method by which they obtained office.<sup>117</sup>

Mandating that judicial candidates complete a “pre-judicial” education program before their names can be included on a ballot or submitted to an appointing authority would benefit the candidate, the judicial system, and the public in many ways. Specifically, pre-judicial education would (1) better prepare individuals to assume judicial office; (2) impart an understanding and appreciation for the ethical rules governing the activities of judges and judicial candidates; (3) reduce unethical campaign conduct; (4) give judicial aspirants “shared visions of impartiality”;<sup>118</sup> (5) demonstrate the judiciary’s commitment to a trained and impartial bench;<sup>119</sup> (6) provide information to voters and members of selection committees “regarding the interest level and aptitude of the candidates”;<sup>120</sup> and (7) encourage those not suited for the judicial role to “self-select out of the process.”<sup>121</sup>

Pre-judicial education programs should emphasize the defining characteristic of any judicial officer—impartiality. Historical examples of judges who lost friends, received death threats, and sustained property damage because of their commitment to the rule of law will serve to demonstrate the

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115. See Colin A. Fieman & Carol A. Elewski, *Do Nonlawyer Judges Dispense Justice*, 69 N.Y. ST. B.J. at 20, 20 (1997) (“Yet our experiences, as well as empirical data, indicate that lay justices are prone to ignoring the law and many may be biased toward authority figures, such as police, prosecutors, and property owners.”).

116. Keith R. Fisher, *Education for Judicial Aspirants*, 43 AKRON L. REV. 163, 164 (2010) (“Most Judges are ill-prepared for the challenges, personal and professional, of a judicial career, and many of them turn out to be ill-suited for the job.”).

117. See Wayne Doane, Note, *The Membership of Judges in Gender Discriminatory Private Clubs*, 12 VT. L. REV. 459, 461 (1987) (“[N]o selection method can guarantee the continued fitness of the judiciary.”).

118. ABA HOUSE OF DELEGATES, RESOLUTION No. 113, at 7, <http://www.americanbar.org/content/dam/aba/migrated/committees/judind/PublicDocuments/HODResolutionReportIJEAdopted113.authcheckdam.pdf>.

119. Cf. Fisher, *supra* note 116, at 201 (suggesting that pre-judicial education may result in judges “more consciously committed to fulfilling the ideals of the fair and impartial administration of justice for all”).

120. *Id.* at 170 (quoting the ABA Standing Committee on Judicial Independence, *Report of the Study Group on Pre-Judicial Education* 4–5 (2005)).

121. See Raymond J. McKoski, *Reestablishing Actual Impartiality as the Fundamental Value of Judicial Ethics: Lessons from “Big Judge Davis,”* 99 KY. L.J. 259, 317 (2011). Pre-judicial education could include other components such as the “nuts and bolts” of everyday judging and procedural and substantive law. *Id.*

necessity of this essential trait.<sup>122</sup> The curriculum should also underscore the importance of procedural fairness and the strict ethical requirements of conduct codes governing a judge's personal and professional lives. In elected judiciary states, the candidates can receive instruction on the special rules regarding raising money, improper campaign promises, misleading campaign statements, and the punishments imposed on candidates who violate these rules.<sup>123</sup> Finally, pre-judicial education should sensitize judges to the public's aversion to political contributions and the perceived influence that money has on judicial decisions.<sup>124</sup> Funding pre-judicial education programs through registration fees would avoid placing a financial burden on cost-conscious courts and legislatures.

Although endorsed by the ABA,<sup>125</sup> few states require any form of pre-judicial education.<sup>126</sup> Judicial aspirants in Ohio,<sup>127</sup> Mississippi,<sup>128</sup> New

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122. See, e.g., Dan T. Carter, "Let Justice Be Done": *Public Passion and Judicial Courage in Modern Alabama, Remarks at the Ray Rushton Distinguished Lecturer Series*, 28 CUMB. L. REV. 553, 566–67 (1998) (describing how Frank Johnson, a federal judge in Alabama from 1955 to 1979, suffered a cross burning in his yard, hundreds of death threats, and the detonation of a bomb at his mother's home in retaliation for his desegregation rulings).

123. See generally Symposium, *Call to Action: Statement of the National Summit on Improving Judicial Selection*, 34 LOY. L.A. L. REV. 1353, 1355 (2001) ("Educational programs on state election laws, judicial canons, and sanctions for violations should be conducted for all judicial candidates, together with their campaign staff, consultants, and interested family members. The legislature or judiciary, as appropriate, should mandate attendance at such programs and ensure that they are adequately funded.").

124. See Kathleen Hall Jamison, *Public Understanding of and Support for the Courts* 3, The Annenberg Public Policy Center (2007), [https://www.annenbergpublicpolicycenter.org/Downloads/20071017\\_JudicialSurvey/Judicial\\_Findings\\_10-17-2007.pdf](https://www.annenbergpublicpolicycenter.org/Downloads/20071017_JudicialSurvey/Judicial_Findings_10-17-2007.pdf) (reporting the results of a survey finding that 69% of respondents thought that raising money for judicial elections affects a judge's rulings to a moderate or great extent); see also *Justice at Stake/Brennan Center National Poll*, Questions 8, 9, 10, Brennan Center for Justice (2013), <https://www.brennancenter.org/sites/default/files/press-releases/JAS%20Brennan%20NPJE%20Poll%20Topline.pdf>.

125. ABA HOUSE OF DELEGATES, RESOLUTION No. 113, at 1 (2009), <http://www.americanbar.org/content/dam/aba/migrated/committees/judind/PublicDocuments/HODResolutionReportIJEAdopted113.authcheckdam.pdf> (endorsing "a voluntary pre-selection/election program designed to provide individuals with a better appreciation of the role of the judiciary and to assist them in making a more informed decision regarding whether to pursue a judicial career").

126. See Buhai et al., *supra* note 114, at 194 ("The issue of training and education of potential judges prior to their application for appointment or election to the bench has been raised by academia, but has been responded to in a very limited manner.").

127. OHIO CODE OF JUDICIAL CONDUCT R. 4.2(A)(4) (2017) (requiring completion of a "two-hour course in campaign practices, finance, and ethics"); Richard A. Dove, *Judicial Campaign Conduct: Rules, Education, and Enforcement*, 34 LOY. L.A. L. REV. 1447, 1456 (2001) ("Attendees receive a handbook containing the judicial conduct rules, advisory opinions and court decisions interpreting those rules, and materials detailing statutory campaign finance reporting requirements.").

York,<sup>129</sup> and South Dakota<sup>130</sup> must attend a two-hour seminar to receive certification as a candidate for judicial office. While helpful, these sessions are primarily devoted to the rules governing campaign conduct.<sup>131</sup> The failure to recognize pre-judicial education as a means of improving judicial impartiality, the overall fitness of judges, and public confidence in the judicial branch lies in the common but erroneous assumption that the method of selection determines the quality of a judiciary. As explained by Professor Strong:

Unfortunately, the current fixation with judicial selection procedures has usurped the more logical debate about judicial education as a means of ensuring and promoting excellence in judging. So long as judicial selection is seen as a proxy for judicial competence, the discussion about judicial education will be shortchanged.<sup>132</sup>

#### B. Requiring Judicial Candidates to Emphasize the Importance of Judicial Impartiality

Campaigning for elected judicial office fosters the image of a less than neutral judiciary. Stating personal opinions on hot-button campaign issues such as abortion; attending partisan political events; and accepting campaign contributions from lawyers, litigants, and special interest groups can portray judges as partisans and imply quid pro quo arrangements. Attempting to partly ameliorate these political facts of life, the 2007 ABA Model Code of Judicial Conduct suggests that candidates emphasize the duty of judicial impartiality when they express personal opinions on disputed legal, social, or political issues.<sup>133</sup>

Comment 13 to Rule 4.1 of the 2007 ABA Model Code advises that when announcing “personal views on legal, political, or other issues,” a judicial candidate “should acknowledge the overarching judicial obligation to apply and uphold the law, without regard to his or her personal views.”<sup>134</sup> Similarly, Comment 15 to Rule 4.1 suggests that candidates who respond to

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128. MISS. CODE OF JUDICIAL CONDUCT Canon 5(F)(7) (2004) (requiring completion of a “two-hour course in campaign practices, finance, and ethics”).

129. N.Y. CODE OF JUDICIAL CONDUCT Canon 5(A)(4)(f) (2015).

130. S.D. CODIFIED LAWS § 16-1A, app. Rule IV (2006) (requiring completion of a “two-hour course in campaign practices, finance, and ethics”).

131. *See id.*

132. S.I. Strong, *Judicial Education and Regulatory Capture: Does the Current System of Educating Judges Promote a Well-Functioning Judiciary and Adequately Serve the Public Interest*, 2015 J. DISP. RESOL. 1, 10 (2015).

133. *See* MODEL CODE OF JUDICIAL CONDUCT R. 4.1 cmts. 13 & 15 (AM. BAR ASS’N 2007).

134. *Id.* R. 4.1 cmt. 13 (Judicial conduct rules cannot prohibit a judicial candidate from announcing his or her personal views on contested legal, social, or political issues); *see* Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002).

media and interest group inquiries about “their views on disputed or controversial legal or political issues . . . should also give assurances that they will keep an open mind and will carry out their adjudicative duties faithfully and impartially if elected.”<sup>135</sup>

Suggesting that candidates emphasize the duty of impartiality when recounting their personal opinions shows that the ABA’s heart was in the right place when it adopted the ethical rules governing campaigning for judicial office. Comments 13 and 15 do not go far enough, however, because they are aspirational rather than mandatory.<sup>136</sup> As a result, a candidate may ignore the ABA’s sound advice with impunity.<sup>137</sup> To help the public understand that personal opinions do not dictate judicial decisions, the Comments must be made mandatory. Replacing the hortatory “should” with the mandatory “must” in both Comments achieves that goal.<sup>138</sup> As modified, Comments 13 and 15 would specifically require judges to acknowledge their duty to uphold the law without regard to personal views and assure the public that personal opinions do not interfere with judicial impartiality.

Mandating that a candidate emphasize judicial impartiality does not impose any burden on judicial office seekers unless a candidate intends to campaign on a platform of partiality, bias, and favoritism.<sup>139</sup> Indeed, before assuming office, a successful candidate must promise under oath that he or she will faithfully and impartially discharge the duties of judicial office.<sup>140</sup>

Moreover, the 2007 ABA Model Code already imposes a duty on candidates to make at least one statement during a campaign. Comment 3 of Rule 4.4 mandates that judicial candidates instruct their campaign committees of the ethical limits on fund-raising. “At the start of the campaign, the

135. MODEL CODE OF JUDICIAL CONDUCT R. 4.1 cmt. 15 (AM. BAR ASS’N 2007).

136. *Id.* Scope 2 (“Where a Rule contains a permissive term, such as ‘may’ or ‘should,’ the conduct being addressed is committed to the personal and professional discretion of the judge or candidate in question, and no disciplinary action should be taken for action or inaction within the bounds of that discretion.”).

137. *Id.*

138. *See id.* Scope 3.

139. A campaign for judicial office based on partiality, bias, or favoritism would violate judicial conduct codes. *See, e.g.*, MODEL CODE OF JUDICIAL CONDUCT R. 4.1(A)(12)(13) (AM. BAR ASS’N 2007); *Id.* R. 4.2(A)(1).

140. For example:

Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: “I, \_\_\_\_\_, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as \_\_\_\_\_ under the Constitution and laws of the United States. So help me God.”

candidate *must* instruct the campaign committee to solicit or accept only such contributions as are reasonable in amount, appropriate under the circumstances, and in conformity with applicable law.”<sup>141</sup>

If the Code can direct judges to instruct their campaign committees to follow the “applicable law” concerning fund-raising, it seems reasonable to presume that the Code could require judges to advise voters that they will comply with the “applicable law” requiring judicial impartiality.

Some might suggest that requiring candidates in judicial races to repeatedly reaffirm the promise of impartiality will degrade the concept or minimize its importance. To the contrary, branding the ideal judicial candidate as impartial simply provides notice to consumers about the fundamental characteristic of a special subset of public officials.<sup>142</sup> Like any other branding message, repetition is vital.<sup>143</sup> In addition, impartiality branding will distinguish members of the judiciary from all other governmental officials. Candidates for political branch positions may on occasion describe themselves as “independent” but never as “impartial.” Impartiality is reserved for the judiciary.<sup>144</sup>

### C. Voter Guides

Voter guides usually include information concerning the types of judicial office vacancies, the terms of office, and a resume describing each candidate’s education, previous work experience, and community activities.<sup>145</sup> Many guides also include a short essay in which a candidate explains why he or she is the best person for the job.<sup>146</sup>

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141. MODEL CODE OF JUDICIAL CONDUCT R. 4.4 cmt. 3 (AM. BAR ASS’N 2007) (emphasis added); *see also* ARK. CODE OF JUDICIAL CONDUCT R. 4.4 cmt. 3 (2016); MODEL CODE OF JUDICIAL CONDUCT Canon 5C(2) cmt. (AM. BAR ASS’N 1990) (“At the start of the campaign, the candidate must instruct his or her campaign committees to solicit or accept only contributions that are reasonable under the circumstances.”).

142. *See* Kristin L. Rakowski, *Branding as an Antidote to Indecency Regulation*, 16 UCLA ENT. L. REV. 1, 16 (2009) (“Branding, at its core, is a means of providing notice to consumers about the quality and characteristics of a product.”).

143. *See* Daniel E. Harmon, Editor, *Lawyer’s Online Branding Techniques: Strategizing & Deploying the Net to Build the Brand*, 12 LAWYER’S PC 1, 3 (Mar. 15, 2016) (“Repetition of the branding message is vital.”).

144. *See* RAYMOND J. MCKOSKI, JUDGES IN STREET CLOTHES: ACTING ETHICALLY OFF-THE-BENCH 45 (2017) (observing that the drafters of each ABA Model Code of Judicial Conduct considered “independence, integrity and impartiality as the ‘overarching fundamental values’ of judicial ethics”).

145. *See* Robert L. Brown, *Toxic Judicial Elections: A Proposed Remedy*, 44 ARK. LAW. 12, 40 (Fall 2009).

146. *See, e.g.*, North Carolina State Board of Elections, *2010 General Election Judicial Voter Guide for the NC Supreme Court and Court of Appeals*, at 4–8,

Most voter guides fail to highlight the importance of judicial impartiality. They also miss the opportunity to require a candidate to explain the significance of impartiality and to explain how the public can count on the candidate to ignore such things as friendships and campaign support in deciding cases. A Voters' Guide to Nebraska's Judicial Retention Elections makes a better than average attempt to enlighten the voting public on the importance of judicial impartiality.<sup>147</sup> The Guide emphasizes that judges must follow the law to the exclusion of the judge's "personal views, political pressure, or public opinion."<sup>148</sup> Further, voters learn from the Guide that faithful adherence to the law sometimes leads to unpopular decisions and that the proper remedy in such cases is to change the law, not the judge.<sup>149</sup> Sadly, however, the Guide answers the question, "What Makes A Good Judge?," without the mention of impartiality.<sup>150</sup>

In addition to providing biographical information and a brief candidate essay, some voter guides contain answers to questions put to the candidates.<sup>151</sup> But seldom do the questions specifically ask the candidates to address impartiality in either theory or practice. For example, the voter guide produced by the League of Women Voters of Orange County for the 2016 judicial election included the candidates' answers to the following questions:

- (1) Describe your philosophy of the judicial role, the qualities that are most important for the role, and the greatest challenges to the role;
- (2) Please describe a case or legal issue on which you worked of which you are particularly proud, or is reflective of your legal ability and work;
- (3) What, in your opinion, is the most important U. S. Supreme Court decision?
- (4) What do you perceive as the greatest obstacles to justice, if any? Why?<sup>152</sup>

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<http://islandfreepress.org/2010Archives/10.15.2010-GeneralElectionJudicialVoterGuide.pdf> (last visited Nov. 18, 2017).

147. State of Nebraska Judicial Branch, *Voters' Guide to Nebraska's Judicial Retention Elections* (2014), <https://supremecourt.nebraska.gov/media/voter>.

148. *Id.*

149. *Id.*

150. *Id.*

151. See, e.g., Oregon State Bar Association, *Oregon State Bar Judicial Voters Guide 2016*, [https://www.osbar.org/\\_docs/elections/jvg/1604/BakerL.pdf](https://www.osbar.org/_docs/elections/jvg/1604/BakerL.pdf).

152. League of Women Voters of Orange County, *2016 LWVOC Voter Guide*, <http://lwvovoterguide.org/orange-county-judge-group-1-eric-dubois>. The Kansas City Bar Association suggests sixty-five questions that might be put to judicial candidates. The word "impartiality" is not in any of the proposed questions. Kansas City Bar Association, *Sample Questions for Judicial Candidates*, [http://www.kcba.org/judicial/pdf/sample\\_questions\\_for\\_candidates.pdf](http://www.kcba.org/judicial/pdf/sample_questions_for_candidates.pdf).

The answers to these questions provide relevant information regarding a candidate's judicial philosophy. However, if the function of a voter guide is to help voters select the best candidate, the guide should direct judicial aspirants to define the duty of impartiality, describe how they will implement the concept in their courtrooms, and explain how they will avoid favoring campaign supporters. In this vein, one newspaper bluntly asks candidates "[a]re you uncomfortable accepting campaign contributions from lawyers who might appear in your court?"<sup>153</sup>

Describing the importance of judicial impartiality prominently in the front matter of voter guides and requiring judicial office seekers to address the issue in response to pointed questions will help the public understand the essence of judging and further reinforce the candidates' appreciation of the non-negotiable nature of judicial impartiality.

#### D. Explaining Denials of Motions to Disqualify Based on Campaign Contributions

Some commentators advocate for a rule that requires a judge to explain the reasons for granting or denying each motion to disqualify the judge.<sup>154</sup> That recommendation simply goes too far. No purpose is served, for example, by a judge explaining that she is recusing herself from a divorce case because the judge and her spouse are clients of a marriage counselor identified by the parties as a potential witness. On the other hand, an explanation of the reasons supporting the denial of a motion for disqualification based on campaign contributions can serve an important educational purpose. Explanations help the public and the press understand and appreciate the law and the practicalities attendant to an elected judiciary. Justice Wood's opinion in *Robinson Nursing and Rehabilitation Center v. Phillips*<sup>155</sup> provides a good illustration of the educational value of a written decision explaining the denial of a motion seeking a judge's disqualification because of contributions received by the judge's campaign committee.

In *Robinson*, the defendants-appellees moved to disqualify Justice Wood from any case involving a nursing home that "might affect Michael Morton and/or his nursing home businesses."<sup>156</sup> After summarizing the alle-

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153. *San Antonio Express-News Judicial Questionnaire/2012*, at 5, [http://extras.mysanantonio.com/pdf/2012judicial/Luz\\_Elena\\_D\\_Chapa\\_4th\\_Court\\_of\\_Appeals\\_Place\\_4.pdf](http://extras.mysanantonio.com/pdf/2012judicial/Luz_Elena_D_Chapa_4th_Court_of_Appeals_Place_4.pdf).

154. See, e.g., Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 589-90 (2005); Eric J. Segall, *Invisible Justices: How Our Highest Court Hides from the American People*, 32 GA. ST. U. L. REV. 787, 818 (2016).

155. 2016 Ark. 388, 502 S.W.3d 519, *aff'd in part, rev'd in part on other grounds*, 2017 Ark. 162, 519 S.W.3d 291.

156. *Id.* at 1, 502 S.W.3d at 520.

gations of the motion to disqualify, Justice Wood recites the universally accepted standard requiring a judge's recusal only when the judge's impartiality might be questioned by the ordinary, reasonable person "*who is informed of all the surrounding facts and circumstances.*"<sup>157</sup> The opinion then sets forth the relevant facts concerning the contributions to the judge's campaign committee.<sup>158</sup> After discussing the paucity of case law on the issue of campaign contribution-based recusal, the opinion highlights the general principles governing the issue, including (1) the sometimes overlooked duty of a judge to "sit,"<sup>159</sup> (2) the presumption of judicial impartiality, (3) the presumption that judges abide by their oath, and (4) that "[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal."<sup>160</sup>

Moving to the governing provision of the *Arkansas Code of Judicial Conduct*, Justice Wood cites the Code's agreement with the principle that campaign contributions do not automatically disqualify a judge.<sup>161</sup> She then lists the factors that the Arkansas Code directs judges to consider in determining whether the amount or nature of a contribution creates an appearance of impropriety.<sup>162</sup> Applying the factors to the facts before her, Justice Wood concluded that the circumstances did not create an appearance of partiality or otherwise justify abandoning her legal and ethical duty to participate in cases brought before the court.<sup>163</sup>

The value of the opinion as an educational tool is obvious. First, it sets forth the facts and law surrounding the disqualification issue in a concise, straightforward, non-technical fashion, thereby facilitating the public's understanding of the issues raised in recusal motions based on campaign contributions. Even more important in reducing the damage to the appearance of impartiality caused by judicial elections, the judge's reasoning in denying the recusal motion stands out as an objective assessment of the circumstanc-

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157. *Id.* at 3, 502 S.W.3d at 521 (emphasis in original) (quoting *Microsoft Corp. v. United States* 530 U.S. 1301, 1302 (2000)) (Rehnquist, C.J.). The opinion properly highlights the operative language because too often a judge's recusal is called for on partial or incorrect "facts."

158. *Id.* at 2, 502 S.W.3d at 521.

159. See MODEL CODE OF JUDICIAL CONDUCT R. 2.7 (AM. BAR ASS'N 2007) ("A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law."); ARK. CODE OF JUDICIAL CONDUCT R. 2.7 (2009) (same).

160. *Robinson*, 2016 Ark. 388, at 4, 502 S.W.3d at 522 (quoting *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 884 (2009)).

161. *Id.*, 502 S.W.3d at 522.

162. *Id.* at 4–5, 502 S.W.3d at 522. The factors include: (1) the size of contributions; (2) the degree of involvement of the contributor in the campaign; (3) the timing of the campaign and the proceeding; (4) the issues in the proceeding; and (5) other factors known to the judge. *Id.*, 502 S.W.3d at 522; see also ARK. CODE OF JUDICIAL CONDUCT R. 2.11 cmt. 4A (2016).

163. *Robinson*, 2016 Ark. 388, at 5–7, 502 S.W.3d at 522–23.

es. Unlike some decisions denying disqualification motions, it is not written in a defensive tone.<sup>164</sup> It does not criticize or question the motives of the movants. Justice Wood's approach is a neutral, matter-of-fact assessment of one of the issues in the case. Even those who might disagree with Justice Wood's decision would be hard pressed to fault the objectivity, neutrality, and impartiality evidenced by her reasoning.<sup>165</sup> Reasoned decisions on motions to recuse, like the opinion denying the disqualification motion in *Robinson*, will further public understanding of disqualification, campaign contributions, and judicial impartiality.

#### E. Disciplining Judges Who Demonstrate Partiality

No system of judicial selection can ensure the impartiality of every judge. That is one reason why the states created agencies tasked with investigating, charging, and adjudicating acts of judicial misconduct.<sup>166</sup> These judicial disciplinary bodies establish aggravating and mitigating factors employed in determining the appropriate degree of discipline imposed upon an offending judge. One might assume that transgressions demonstrating partiality would top the list of considerations relevant to setting a judge's punishment but that is not the case in most jurisdictions. In fact, in many states partiality does not even make the top ten list of aggravating sentencing factors.<sup>167</sup> For example, the Arkansas Supreme Court approved consideration of the following factors in determining the appropriate disciplinary sanction:

- (a) whether the misconduct is an isolated instance or evidenced a pattern of conduct;
- (b) the nature, extent and frequency of occurrence of the acts of misconduct;
- (c) whether the misconduct occurred in or out of the courtroom;
- (d) whether the misconduct occurred in the judge's official capacity or in his private life;

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164. See, e.g., *Cheney v. U.S. Dist. Ct. for D.C.*, 541 U.S. 913, 927 (2004) (Scalia, J., denying motion for recusal) (referring to "so-called investigative journalists").

165. See Max Brantley, *Justice Wood Refuses to Get Off Michael Morton Nursing Home Case*, ARK. TIMES: ARK BLOG (Nov.10, 2016, 10:19 AM), <http://www.arktimes.com/ArkansasBlog/archives/2016/11/10/justice-wood-refuses-to-get-off-michael-morton-nursing-home-case> (conceding that "[s]trictly speaking, [Justice Wood] might be right on her decision.").

166. See CHARLES G. GEYH ET AL., JUDICIAL CONDUCT AND ETHICS, § 1.05, at 1–18 (5th ed. 2015).

167. See, e.g., *In re Sevcik*, 877 N.W.2d 707, 714 (Iowa 2016) (failing to include partiality in the list of ten factors that the court considers in determining the appropriate sanction in judicial discipline cases); *In re Hagar*, 891 N.W.2d 735, 740–741 (N.D. 2017) (same); *In re Segal*, 151 A.2d 734, 736–38 (Pa. Ct. of Jud. Discipline 2016) (same).

- (e) whether the judge has acknowledged or recognized that the acts occurred;
- (f) whether the judge has evidenced an effort to change or modify his conduct;
- (g) the length of time of service on the bench;
- (h) whether there have been prior complaints about this judge;
- (i) the effect the misconduct has upon the integrity of and respect for the judiciary; and
- (j) the extent to which the judge exploited his position to satisfy his personal desires.<sup>168</sup>

These factors do not exclude consideration of a lack of impartiality in assessing the appropriate degree of discipline but the ten factors fail to announce to lawyers, judges, disciplinary commission members, and the public that partiality destroys the foundation of the judicial process and that partial judges deserve severe sanctions. Recognizing the enormous destructive impact partial judges have on the public's perception of the judiciary, New Jersey bases the severity of judicial misconduct, in part, on whether the misconduct "evidences lack of independence or impartiality."<sup>169</sup> By doing so, New Jersey advises every member of the judiciary and the voting public "of the high value placed on protecting judicial impartiality."<sup>170</sup>

Identifying the lack of impartiality as an aggravating factor in judicial disciplinary decisions only helps restore public confidence in the judiciary if disciplinary bodies actually use that aggravating factor to impose strict sanctions. Because the legitimacy of any state-sponsored adjudicatory system rests on the impartiality of its judges, the response to misconduct demonstrating partiality should be removal from office either permanently or temporarily as required by the circumstances.

Judicial candidates who advocate partiality or favoritism during a judicial campaign should face consequences commensurate with the damage they cause to the judicial system. Though sometimes they do,<sup>171</sup> they often do not. For example, in *In re Kinsey*,<sup>172</sup> the Florida Supreme Court "unanimously" condemned the campaign conduct of Judge Kinsey<sup>173</sup> because her

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168. *Judicial Discipline & Disability Comm'n v. Thompson*, 341 Ark. 253, 278–79, 16 S.W.3d 212, 226 (2000) (citing *In re Anderson*, 981 P.2d 426 (Wash. 1999)). These ten factors were first set forth in *In re Deming*, 736 P.2d 639, 659 (Wash. 1987).

169. *In re Seaman*, 627 A.2d 106, 122 (N.J. 1993) (citing *In re Yaccarino*, 502 A.2d 3 (N.J. 1988)).

170. *McKoski*, *supra* note 121, at 303.

171. *See, e.g., In re Rodella*, 190 P.3d 338, 350 (N.M. 2008) (removing a judge for among other things, promising campaign supporters that he would rule in their favor).

172. *In re Kinsey*, 842 So. 2d 77 (Fla. 2003).

173. *Id.* at 94 (Pariente, J. concurring).

campaign statements (1) included intentional misrepresentations,<sup>174</sup> (2) “promised favorable treatment for *certain parties and witnesses* who would be appearing before her,”<sup>175</sup> and (3) “affirmatively convey[ed] the message that it is permissible for judges to rule in a predisposed manner in certain types of matters which may come before them.”<sup>176</sup> The court recognized that the judge’s campaign epitomized the antithesis of the neutral magistrate and eroded the public’s faith in the integrity and impartiality of the judiciary.<sup>177</sup> The justices found that the judge was “guilty of serious campaign violations” that “simply cannot be tolerated in future elections” and therefore warranted a “severe penalty.”<sup>178</sup> The “severe penalty” imposed was a public reprimand and fine.<sup>179</sup> Unfortunately, the \$50,000 fine, though substantial, sent the message that a price can be placed on the importance of impartiality.<sup>180</sup>

Even more harm to public confidence in the judicial branch results when a judge doles out favors while on the bench. Judge Perrell Fuselier “fixed” multiple traffic tickets and other minor offenses for friends, the sheriff, a state representative, and campaign supporters.<sup>181</sup> In addition, the judge instituted an unauthorized “worthless check” program allowing merchants to bring a dishonored check directly to the court.<sup>182</sup> The court would then issue a demand letter to the maker of the check.<sup>183</sup> If the maker failed to pay the amount of the check and a “collection fee” within a specified period, the court clerk would issue an arrest warrant. The warrant was supported by a “probable cause” affidavit prepared by the clerk and stamped with a facsimile signature of the merchant.<sup>184</sup> If the defendant did not pay, he or she was arrested.<sup>185</sup> Judge Fuselier presided over the cases. The judge promised the merchants that he would be “strict” with offenders under the overarching philosophy that “[y]ou will pay or else you will stay in jail.”<sup>186</sup> Judge Fuselier justified his unauthorized court collection program by explaining that if a collection agency or lawyer in private practice could send a collection let-

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174. *Id.* at 90.

175. *Id.* at 89.

176. *Id.* at 84.

177. *See id.* at 98 (Lewis, J., concurring in part and dissenting in part).

178. *In re Kinsey*, 842 So. 2d at 92.

179. *Id.*

180. *Cf. id.* at 99 (Lewis, J., dissenting) (stating that assessing a fine “sends the message that ‘anything goes’ in judicial elections if a candidate has the financial ability to pay the monetary consequences”).

181. *In re Fuselier*, 837 So. 2d 1257, 1268–72 (La. 2003).

182. *Id.* at 1272.

183. *Id.*

184. *Id.* at 1272–73.

185. *Id.* at 1273

186. *Id.*

ter, so could he.<sup>187</sup> This explanation “astounded” the Louisiana Judiciary Commission.<sup>188</sup> Based on prior complaints lodged against the judge, the Commission found a pattern and practice of the judge exceeding his authority. “Indeed, the Commission felt Judge Fuselier has completely abandoned his role as a neutral arbiter. The Commission observed that these issues have been raised with Judge Fuselier in the past, but that he has not learned from the prior warnings.”<sup>189</sup> The Louisiana Supreme Court imposed an embarrassingly brief four-month suspension as discipline.<sup>190</sup>

Some very fine lawyers are simply not cut out for the role of a neutral, impartial decision-maker. Such individuals attain judicial office through both appointive and elective systems. The public has no right to expect a perfect judicial selection process. The public does have a right, however, to demand that the government remove judges who demonstrate an undeniable inability to comprehend the judicial role.

#### IV. CONCLUSION

With overwhelming public support for the election of judges and no clear-cut evidence that elected judges are less impartial than appointed judges, judicial elections are not going away soon. The widespread adoption of proposed reforms such as non-partisan elections, publicly financed campaigns, and automatic disqualification from contributor’s cases seems unlikely because of the debate over whether or not these reforms further the cause of increasing public confidence in the judiciary.

But there are several non-controversial, non-partisan, and low-cost ways to increase judicial impartiality, reduce the appearance of improper political influence on judicial decisions, and build public confidence in the integrity of the judiciary. Proponents of election reform measures or a particular form of judicial selection would find it difficult to criticize pre-judicial education, emphasizing impartiality in judicial selection and disciplinary processes, requiring judges to explain denials of disqualification motions based on campaign contributions, or voter guides that highlight the importance of judicial impartiality. As opposed to the debate over judicial selection methods or election reforms, ideology plays no role in the initiatives suggested in this Article. Pre-judicial education is not a Republican or Democrat issue, voter guides that emphasize impartiality do not contravene party platforms or bar association agendas, and enhanced discipline for the failure to exhibit judicial impartiality has been instituted in some states

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187. Fuselier, 837 So.2d at 1275.

188. *Id.*

189. *Id.* at 1276–78.

190. *Id.* at 1279.

without a backlash from judges or judges' organizations. And even if implementation of the suggested innovations fails to increase public confidence in the judiciary one iota, no harm would result and the relationship between the public and the judiciary, unfortunately, would remain exactly as it is today.