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What's More Important: Electing Judges or Judicial Independence? It's Time for Pennsylvania to Choose Judicial Independence

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What's More Important: Electing Judges or Judicial Independence? It's Time for Pennsylvania to Choose Judicial Independence

*Shira J. Goodman, Lynn A. Marks, and David Caroline**

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I. INTRODUCTION

Judicial independence is a much discussed and vaunted principle, but it is very difficult to obtain a clear or shared definition of what it means. To Pennsylvanians for Modern Courts (PMC), judicial independence means the ability of a judge or justice to perform the judicial function—ruling on motions; deciding cases; overseeing hearings, trials, and oral arguments; and making decisions that affect litigants—free from the influences of personal bias, popular opinion, political pressure, the desires of campaign supporters, or anything other than a full and fair reading of the law as applied to the facts at hand. This is both a lofty principle and the most basic definition of a judge's sworn duty. Unfortunately, judicial independence is not always easy to achieve or maintain.

One of the great threats to judicial independence in Pennsylvania is the manner in which judges are selected. Pennsylvania is one of six states that select all judges in partisan elections.¹ Pennsylvania uses a judicial selection system that from the outset creates special challenges to the ability of judges to achieve and maintain judicial independence.

Judges are different from other elected officials who serve in the executive and legislative branches. Electing judges, however, diminishes the distinction between judges and other elected officials. By treating judges like other elected officials as they strive to reach the bench, Pennsylvania has chosen a system that ignores the differences inherent in the judicial role. The danger is that the more we treat judicial candidates like candidates for other elected offices, the more that judges will be perceived to be just like other elected officials. Or, as former United States Supreme Court Justice Sandra Day O'Connor has said, electing judges leads the public to believe that "judges are [] politicians in robes."²

1. The other five states that elect all judges in partisan elections are Texas, West Virginia, Louisiana, Illinois and Alabama. See American Judicature Society, *Methods of Judicial Selection*, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state= (last visited Aug. 23, 2010).

2. Sandra Day O'Connor, Assoc. Justice, Ret., Supreme Court of the United States, *The Essentials and Expendables of the Missouri Plan*, The 2009 Earl F. Nelson Lecture at the Univ. of Missouri Sch. of Law (Feb. 27, 2009), in 74 MO. L. REV. 479, 488-89 (2009).

Several recent United States Supreme Court cases and their progeny have had and will increasingly continue to have the effect of undermining judicial independence in states that elect their judges. The clear trend in the case law reflects a seemingly conscious disregard for the differences between judges and other elected officials. The federal courts are challenging judicial election states to live with the consequences of their decision to elect judges.³

In Pennsylvania, these consequences have included more expensive, partisan, divisive elections. This experience has increased concerns that the electoral process—specifically fundraising and campaign contributions—will have an influence on future judicial decision making.

Living with the consequences in Pennsylvania leads to one conclusion: the solution that is designed to promote and protect long-term judicial independence. Stop electing judges—particularly appellate court judges—and change to a process designed to get the most qualified, fair, and impartial judges on the bench; Merit Selection, a hybrid system that incorporates elements of appointment and elective systems and adds a citizens nominating commission to evaluate and recommend candidates. Merit Selection is a system proven to promote and protect judicial independence and eliminate the damaging effects of electing judges while maintaining public input in the process of selecting judges.

Section II of this article will identify the inherent differences between judges and other officials and delineate how the electoral process erects special challenges to judicial independence. Section III will discuss the evolution of the judicial election process from one that recognized and protected the differences inherent in the judicial role to one that is steadily refusing to recognize those differences. Section IV will focus on the special problem of the role of money in judicial elections and the unique threats the fundraising process creates for judicial independence. Section V presents PMC's conclusion that judicial elections and judicial independence are increasingly becoming mutually exclusive, and it offers a challenge to Pennsylvania as well as a solution for protecting and maintaining judicial independence.

3. See, e.g., *Republican Party of Minn. v. White*, 536 U.S. 765, 792 (2002) (O'Connor, J., concurring) ("If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges."); *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002).

II. HOW DIFFERENT ARE JUDGES REALLY, AND HOW ARE THOSE DIFFERENCES IMPACTED BY JUDICIAL ELECTIONS?

Judges are different from elected officials in the legislative and executive branches. The difference is inherent in the judicial role, which requires a judge to impartially decide disputes between adversarial parties. Recognizing that judges are different is not very controversial. Indeed, even members of the United States Supreme Court have acknowledged that judges perform a unique role in society that is unlike that of the other two political branches:

There is a critical difference between the work of the judge and the work of other public officials. In a democracy, issues of policy are properly decided by majority vote; it is the business of legislators and executives to be popular. But in litigation, issues of law or fact should not be determined by popular vote; it is the business of judges to be indifferent to unpopularity.”⁴

Unlike legislators, mayors, and governors, judges are not supposed to have constituencies. We support and vote for legislators and executive branch leaders based on their positions on hot-button issues and their stated intentions about how they will deal with those issues when they take office. We cannot do the same for judges, for they are not allowed to tell us what they will do in office.⁵

Although other elected officials are expected to make campaign trail promises and are evaluated based on whether they keep

4. *White*, 536 U.S. at 797 (Stevens, J., dissenting); see also *id.* at 806 (Ginsburg, J., dissenting) (“Judges . . . are not political actors. They do not sit as representatives of particular persons, communities, or parties; they serve no faction or constituency. ‘[I]t is the business of judges to be indifferent to popularity.’” (quoting *Chisom v. Roemer*, 501 U.S. 380, 401 n.29 (1991))).

5. See, e.g., 35 PA. CODE OF JUDICIAL CONDUCT CANON 7B(1)(c) (2008):

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

....
(c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; make statements that commit the candidate with respect to cases, controversies or issues that are likely to come before the court; or misrepresent their identity, qualifications, present position, or other fact.

Id.

those promises, judges are generally prohibited from promising anything but the faithful performance of their duties.⁶ Judges owe their fidelity to the law, not to the political parties that endorsed them, the citizens who voted for them, or the donors who supported their campaigns.

Judicial independence is both a real commodity and a perceived one. It can be squandered or increased by judicial action. But the perception of judicial independence can also be lost or enhanced, without any action by a judge.

It is not enough that judges decide cases free from bias, outside influence, political pressure, popular will, and personal bias—though certainly that is the primary ideal underpinning our judicial system. The public must *perceive* and *believe* that judges do so. When the public perceives that judges are independent and decide cases free from any outside influence, this belief actually bolsters and increases judicial legitimacy and, by extension, judicial independence. This is because public confidence that judicial decisions are fair and impartial increases the ability of the courts to make difficult, unpopular decisions—that is, to continue to exercise independence.

The converse also is true. Even an erroneous public perception that judges are not acting independently, that the courts are subject to outside pressures and influences, can weaken the courts. As one commentator has wisely explained, “Where the courts are concerned, if it looks bad it is bad, so don’t do it. In the legal system, fairness is paramount and the appearance of fairness is . . . whatever comes right under paramount.”⁷

Studies demonstrate that individuals who live in states that elect judges are more cynical about their courts and are more likely to believe that “judges are just politicians in robes.”⁸ We believe this is because judicial elections embody several simultaneous threats to the ability of future judges to maintain and protect judicial independence.

6. See, e.g., *id.*

7. Ron Dzwonkowski, *When Cash, Courts, and Politics Mix*, DETROIT FREE PRESS, Feb. 22, 2009, available at <http://www.mcfn.org/related.php?article=189>.

8. See, e.g., THE ANNENBERG PUBLIC POLICY CENTER, PUBLIC UNDERSTANDING OF AND SUPPORT FOR THE COURTS 2 (2007), available at <http://www.law.georgetown.edu/Judiciary/documents/finalversionJUDICIALFINDINGSoc1707.pdf>.

A. *The Money Problem*

First and foremost is the money problem. It is a fact that judicial campaigns must raise money to operate. In a large state like Pennsylvania, with sixty-seven counties, it takes tremendous resources to run a statewide campaign for the appellate courts, with the attendant staff, travel, mass mailing, and television and radio advertising expenses.⁹

In recent years, elections have gotten even more expensive, and the fundraising wars have escalated. In 2009, the two candidates for the Pennsylvania Supreme Court together raised nearly \$4.7 million, including in-kind contributions such as media buys, donated postage, transportation, and any other non-cash donations.¹⁰ Interestingly, during this campaign, the candidates themselves were arguing about the money and whether “justice is for sale.”¹¹

In 2007, four candidates for the Pennsylvania Supreme Court raised close to \$8 million, including in-kind contributions.¹² That number is a record for total money raised in a Pennsylvania Supreme Court election, but the 2009 election fundraising set a record for an election with a single vacancy.¹³ Moreover, in 2007, now Justice Seamus McCaffery set a new fundraising record, bringing in \$2,340,350.78.¹⁴ However, that record was broken during the very next Supreme Court election in 2009, when Judge Panella raised \$2,705,365.01.¹⁵

The unavoidable truth is that the most frequent contributors to judicial campaigns are lawyers; law firms; and entities like businesses, unions, and special interest groups (including political parties) that are likely to appear in court before the judges they helped to elect.¹⁶ A newly released study by the American Judicial

9. See Shira Goodman & Lynn Marks, *Are Pennsylvania's Judges for Sale?*, PITTSBURGH POST-GAZETTE, Nov. 1, 2009, at B4.

10. Pennsylvanians for Modern Courts, Current Pennsylvania Election, <http://www.pmconline.org/node/48>, (last visited Aug. 18, 2010) (calculations based on campaign finance reports filed with the Pennsylvania Department of State).

11. Joan Orié Melvin, Justice, Pennsylvania Supreme Court, Statement made before Pennsylvania Press Club (Oct. 26, 2009) (“It’s pay to play, it’s justice for sale.”).

12. JudgesonMerit.org, Current Pennsylvania Election, <http://www.pmconline.org/node/48/> (last visited Sept. 29, 2010).

13. *Id.*

14. *Id.*

15. Current Pennsylvania Election, *supra* note 10.

16. LINDA CASEY, HIGH COURT CONTESTS: COMPETITION, CONTROVERSY AND CASH IN PENNSYLVANIA AND WISCONSIN 9 (2009), available at <http://www.followthemoney.org/press/ReportView.phtml?r=390>.

ture Society (AJS) of the 82 civil cases decided by the Pennsylvania Supreme Court during the 2008 and 2009 sessions found a striking overlap between contributors to the election campaigns of the sitting justices and those who later appeared before the Court as a lawyer, law firm, or party:

- In 60% of the cases, at least one of the litigants, lawyers, or law firms had contributed to the election campaign of at least one justice.
- In nearly one-third of the cases (32%) a single litigant, lawyer, or law firm had contributed to at least four of the six elected justices' election campaigns, which represents a majority of the court.¹⁷

These numbers are eye-opening and are likely to actually underreport the overlap because the AJS study only counted contributions from lawyer and law firm political action committees (PACs). This captured contributions by lawyers and law firms to justices made via those PACs, but it did not account for such indirect contributions to the justices that came via other PACs, which also might have been funded by lawyers, law firms, and litigants.¹⁸

The fact that campaign contributions that helped elect the presiding judges and justices were made by lawyers, law firms, and parties in the courtroom undermines public trust in the independence and impartiality of the courts. In 2009, a USA Today/Gallup poll reported that 89% of respondents called the influence of campaign contributions on judges' rulings "a problem."¹⁹ But this perception is not new. A 1998 poll commissioned by a special commission of the Pennsylvania Supreme Court revealed that nearly 90% of Pennsylvanians believe that campaign contributions affect judicial decision making at least some of the time.²⁰

17. American Judicature Society, Campaign Contributors and the Pennsylvania Supreme Court, <http://www.ajs.org/selection/jnc/docs/AJS-PAstudy3-18-10.pdf> (last visited Aug. 18, 2010) (noting that Pennsylvania's Supreme Court has seven justices; during 2008 and 2009, six of the sitting justices were elected and one was appointed to fill an interim vacancy).

18. American Judicature Society, *supra* note 17. ("Non-legal PACs, including political party PACs, provided nearly \$2.9 million, or 36 percent, of the campaign dollars raised by [the] justices serving on the Pennsylvania Supreme Court in 2008 and 2009.")

19. Joan Biskupic, *Supreme Court Case with the Feel of a Best Seller*, USA TODAY, Feb. 16, 2009, http://www.usatoday.com/news/washington/2009-02-16-grisham-court_N.htm.

20. Pennsylvanians for Modern Courts, History of Judicial Selection in PA, <http://www.pmconline.org/node/29> (last visited Aug. 18, 2010) (citing Lake Sosin Snell Perry & Associates and Deardourff/The Media Company Poll, Attachment to the Report of the Supreme Court's Special Commission to Limit Campaign Expenditures (1998)).

Another national poll conducted in 2001 revealed that 76% of Americans believe that campaign contributions influence decisions.²¹

These numbers leave no doubt that the public believes, rightly or wrongly, that campaign contributions and/or monetary support to judicial campaigns casts a shadow over judges' future decision making. This, in turn, leads the public to have less confidence that judges are impartial and independent.

In fact, judges themselves have expressed concern about the effect of campaign contributions on judicial decision making. In that same 2001 national poll, almost half of the 2,428 state court judges polled reported that they believed campaign contributions influenced decisions.²² This number is more startling than the data about the general public. When judges themselves express concern about the possible effect of campaign contributions on judicial decision making, we move from the realm of the electoral process affecting the perception of judicial independence to the realm of actual effects in the courtroom. As one commentator has noted, "As soon as people start to think there's a possibility justices can be affected by campaign contributions, quickly you're at a point where the pillars of the system can collapse."²³ When those people are judges themselves, we may have reached the point of the walls crumbling down.

B. The Problem of Obtaining Endorsements from Political Parties

The second threat to judicial independence inherent in the electoral process is the critical importance of obtaining the endorsements of local and state political parties. In states like Pennsylvania that use partisan contests to elect judges, political party endorsements are highly sought after by those seeking election to the statewide appellate courts.²⁴ In the early days of the election

21. Greenberg Quinlan Rosner Research Inc., Justice at Stake Frequency Questionnaire, *available at* http://www.greenbergresearch.com/articles/1617/1412_JAS_ntlsurvey.pdf.

22. Greenberg Quinlan Rosner Research Inc., Justice at Stake—State Judges Frequency Questionnaire, *available at* http://www.greenbergresearch.com/articles/1617/1411_JAS_judges.pdf.

23. Len Boselovic, *Are Campaign Contributors Buying Justice?*, PITTSBURGH POST-GAZETTE, Sept. 21, 2008, at A1 (quoting David Fawcett, attorney for Caperton in *Caperton v. Massey*).

24. See, e.g., Greg Palmer, *Panella Goes Unopposed for Democratic Supreme Court Nom*, KEYSTONE POLITICS, Mar. 10, 2009, <http://www.keystonepolitics.com/2009/03/panella-goes->

season, candidates travel the state, meeting with county political parties in an effort to gain support for the statewide political party's endorsement meeting. Although winning the party's endorsement does not guarantee victory in the primary election, it opens the door to more money and political party support in advertising and campaigning. A candidate's party affiliation and party endorsement, in particular, are often relied on heavily by voters who have little information about the competing candidates.²⁵

Political party affiliation should not matter when judges decide cases. After all, once they put on the robes, judges are not supposed to be identified as Republican or Democrat. Pennsylvania Supreme Court Justice Debra Todd expressed this eloquently in an op-ed following the recent election to fill a vacancy on her court:

The statue of Lady Justice . . . is often depicted holding the balanced scales of justice and wearing a blindfold. This depiction of Lady Justice embodies the ideal that justice must be rendered without reference to money, power, fear, favor, identity or political party. As a sitting justice of the Supreme

unopposed-for-democratic-supreme-court-nom.html (last visited Aug. 18, 2010); Peter Jackson, *GOP State Judge Pick Faces Opposition*, CENTRE DAILY, Feb. 8, 2009; Debra Erdley, *Pa. Supreme Court Justices Getting Rendell's Attention*, PITTSBURGH TRIBUNE-REVIEW, April 28, 2007, 2007 WLNR 8063132; Brett Lieberman, *4 Races for Judges Test Power of Parties*, PATRIOT-NEWS, May 16, 2007; Peter Jackson, *Democrats, Republicans Consider Judicial Endorsements*, CENTRE DAILY, Feb. 9, 2007.

25. See, e.g., Capitol Ideas, http://blogs.mcall.com/capitol_ideas/2009/05/the-debate-continues-appoint-or-elect-judges.html (May 22, 2009) ("Critics say that combination of factors has made the races the exclusive province of three constituencies: political party insiders, lawyers, and the big business interests who often find themselves in the courtroom. So instead of the voters picking judicial candidates based on their temperament, experience and qualifications, external factors such as geography, gender and party endorsements can often carry the day."); Bill White, *Some Voters Were Paying Attention*, ALLENTOWN MORNING CALL, May 21, 2009, at A19 ("I've been complaining for years about the way we choose state judges. I'm sure the vast majority of voters Tuesday had no clue about those candidates for Supreme, Superior and Commonwealth courts. They just guessed. The only thing we can be sure of is that it's very helpful for these candidates to have the support of the same party leaders who tend to run everything else in this state."); see also David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 294 (2008) (Addressing the argument against judicial elections that asserts it is unlikely "the public [will] be motivated to improve its knowledge of the candidates, given the extreme unlikelihood that any particular voter will have to come before any particular judge. Public opinion will therefore be driven by media soundbites and irrelevant or inappropriate factors; politics and appearances will win out over substance.")

Court of Pennsylvania, I am confident that Lady Justice is neither a card-carrying Republican—nor a Democrat.²⁶

But in Pennsylvania judicial elections, party affiliation, and political party support seem to matter quite a lot. During the 2009 Supreme Court election, the political parties emphasized the critical need to win the open seat because of the upcoming legislative redistricting process that will likely end up before the Supreme Court.²⁷ Indeed, Justice Todd expressed dismay that this subject had received such extensive media attention:

I was deeply disappointed and offended when I read certain media coverage of this month's Pennsylvania Supreme Court election results. For example, one newspaper properly heralded Judge Joan Orié Melvin as the winner of the election for Supreme Court justice with the headline "Orié Melvin Wins." But the subheadline continued, "The GOP will control state's Supreme Court after bitter race." The piece goes on to assert that the election ended "a bitter battle for political control of the high court."²⁸

Yet, Justice Todd seems to have misattributed blame to the media for the high attention paid to party labels. The political parties themselves made clear how important this election was to them.²⁹ Indeed, one of the bigger contributors this year to the election campaign was the state Republican Party on behalf of Joan Orié

26. Debra Todd, *Lady Justice is Nonpartisan*, PITTSBURGH POST-GAZETTE, Nov. 23, 2009, at B7.

27. Salena Zito, *Judging Gender's Impact*, PITTSBURGH TRIBUNE-REVIEW, Oct. 30, 2009, http://www.pittsburghlive.com/x/pittsburghtrib/news/pittsburgh/s_650561.html ("Both state party leaders, Republican Bob Gleason and Democrat T.J. Rooney, have called this race vital to the future of their parties."); Tom Infield, *Supreme Court Election Crucial to Redistricting, Leaders Say*, PHILADELPHIA INQUIRER, Oct. 28, 2009, at A1 ("Lt. Gov. Joe Scarnati's letter to fellow Republicans on behalf of state Supreme Court candidate Joan Orié Melvin was unusually blunt. 'Control of the Supreme Court is on the ballot this year,' he wrote March 3, 'and you know the courts play a key role in finalizing redistricting maps that will set the political landscape for the next decade.');" *id.* ("[S]tate Democratic leaders are just as frank as top Republicans in saying that to them, the court fight is all-important. It could influence the once-a-decade remapping of congressional and legislative districts after the 2010 U.S. Census. . . . Abe Amoros, spokesman for the Democratic State Committee [said] 'This year, we are looking at a 4-3 majority when Jack Panella wins, which will give us some hope at redistricting.'").

28. Todd, *supra* note 26.

29. See, e.g., Eric Heyl, *Top Court Race Drips with Mud*, PITTSBURGH TRIBUNE-REVIEW, Oct. 30, 2009, http://www.pittsburghlive.com/x/pittsburghtrib/news/columns/hey/s_650598.html.

Melvin, the victorious candidate.³⁰ Fundraising appeals by the parties emphasized the need to win the seat in order to be prepared for the upcoming legislative redistricting battle.³¹

Of course, redistricting litigation is not the only issue with partisan overtones that will reach the Supreme Court. Issues of statutory interpretation and the constitutionality of legislative action that are presented to the Court likely will be of great interest to the political parties. In a highly divided partisan legislature such as Pennsylvania's, it is clear that such litigation will engage the political parties. It must be very difficult for justices elected through the political system, endorsed by their parties, and supported by party leaders and officials to act impartially. Perhaps harder still, how can judges selected in such a fashion be perceived by the public to be acting impartially and independently?

C. *The Problem of Gaining the Support of Special Interest Groups*

A third threat to judicial independence inherent in the judicial election process is the need to curry favor with influential organizations that support or oppose candidates in judicial races. In the wake of case law that will be discussed later in this article, judicial candidates—in addition to seeking political party endorsements—now have more work to do in order to obtain the endorsements and support of special interest groups.³² In the past, some groups would make endorsements with little information because candidates would not speak out on the issues important to those groups. Now, those groups have more tools at their disposal to seek information from the candidates.

Special interest groups became very active surveying candidates in 2003, the first Supreme Court election in Pennsylvania following the United States Supreme Court's decision in *Republican Party of Minnesota v. White*,³³ which loosened and eliminated some restrictions on judicial candidates' freedom to discuss their

30. Campaign finance reports filed with the Pennsylvania Department of State reveal that the State Republican Party spent at least \$975,000 on media buys for the Orié Melvin campaign. The reports filed by the Orié Melvin campaign report corresponding "in kind" donations from the State Republican Party that match these numbers. The reports are available at Pennsylvania Dep't of State, Campaign Finance Reporting, <http://www.campaignfinance.state.pa.us/ReportSearchResults.aspx?RequestID=488074&StartRow=1&RowsPerPage=10> (last visited Aug. 23, 2010).

31. See, e.g., Infield, *supra* note 277.

32. See *infra* pp. 833-37.

33. 536 U.S. 765 (2002).

opinions on topics that might later come before them on the bench. In a report on the 2003 election, PMC explained:

While some simply requested that candidates identify their work experience, civic affiliations and relevant experience, others, emboldened by the new judicial canons, asked probing questions seeking clear pronouncements of candidates' positions on controversial issues that often are the subject of litigation in the state courts.³⁴

Such questions asked for the candidates' opinions about gay marriage, the intersection of religion and the public schools, the death penalty, and abortion.³⁵

PMC reported that other states were also beginning to see an increased use of candidate surveys, and noted that many of the organizations used a candidate's responses to their questions, and even failure or refusal to respond to the surveys, as the basis for candidate endorsements and support.³⁶ We predicted:

PMC expects to see more organizations submit increasingly detailed surveys as the post-*White* era continues. As groups become more sophisticated about their questions and their use of survey results, candidates likely will feel greater pressure to respond. It is unknown how a candidate's answers to such surveys would later affect his or her ability to rule in future cases and whether such answers could form the basis for recusal motions.³⁷

Recent elections in Pennsylvania have borne out this prediction, and it has become difficult for appellate court candidates seeking the endorsements and support of influential organizations throughout the state to avoid answering such questionnaires.

D. The Problem of Gaining Popular Support

The fourth threat to judicial independence inherent in the electoral process is the need to win the votes of those who go to the

34. PENNSYLVANIANS FOR MODERN COURTS, AS PENNSYLVANIA GOES, SO GOES THE NATION: A CASE STUDY OF A SUPREME COURT ELECTION IN THE POST-*WHITE* ERA 4 (2004), available at <http://www.pmconline.org/files/pagoes.pdf> [hereinafter AS PENNSYLVANIA GOES].

35. *Id.* at 5.

36. *Id.*

37. *Id.* at 7.

polls. As Justice O'Connor has noted, when judges' employment depends on popular election, their fate is tied up with every case they decide.³⁸ We understand that this effect may be weakened in a retention state like Pennsylvania, as opposed to states where judges run for reelection in contested races, but we are more concerned with how this impacts initial selection.

Judicial candidates may feel pressured to espouse and later act on opinions and views that conform to the prevailing popular opinion. The problem, of course, is that the judiciary is the branch upon which we depend to act in accordance with the law, even when it is unpopular to do so. The judiciary thus always has been seen as protecting the minority against the tyranny of the majority.³⁹ But by electing judges, we turn this notion on its head. How can a judicial candidate who espoused popular views act against those views once on the bench? Will he or she risk the label of hypocrite or the taunt of "read my lips" when the law requires a decision that contradicts a view set forth on the campaign trail or that is publicly unpopular?

E. Do these Problems End for Judges Once They Reach the Bench?

These unavoidable elements of the judicial election system exert forces on judicial candidates that influence how they campaign for the bench. Clearly, to earn the money, endorsements, support, and votes one needs to run successfully statewide requires a lot of work. The question is, what does that work entail and when does it end?

For candidates who run for elected positions in the executive and legislative branches, that work really begins once the election is over. Once elected, those officials must begin to satisfy the wishes of supporters who likely offered support in exchange for the performance of campaign promises.

38. *White*, 536 U.S. at 788-89 (O'Connor, J., concurring) ("if judges are subject to regular elections they are likely to feel that they have at least some personal stake in the outcome of every publicized case.").

39. THE FEDERALIST No. 78 (Alexander Hamilton) ("This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.").

For a judge, by contrast, that work—and all the relationship building it entailed—in theory is supposed to end once the election is over. But is that really possible? Perhaps more critically, even if it is possible, does the public believe that is what actually happens? In the next section we will explore why the evolution of the law applicable to the regulation of judicial elections has made what was already a difficult task for future judges, as well as for the watching public, nearly impossible.

III. THE EVOLUTION OF JUDICIAL ELECTIONS PRESENTS A GROWING THREAT TO JUDICIAL INDEPENDENCE

Recognizing the inherent difference between judges and other officials led the American Bar Association and many states, including Pennsylvania, to make some special distinctions in the judicial election arena.⁴⁰ Primarily, these distinctions affect what judicial candidates or sitting judges running for retention, reelection, or election to a higher court can and cannot do or say during the campaign.

There were, until recently, two key components to these special restrictions on judicial campaigns. First, the codes of judicial conduct limited the ability of judicial candidates to talk about hot button issues and make promises about what they would do if elected. Second, the codes set restrictions on how judicial campaigns were to handle fundraising.⁴¹

The *Pennsylvania Code of Judicial Conduct* adhered to both these trends, with the practical effect that for many years, judicial elections were low-profile affairs that didn't attract much media or public attention. Money was raised, but not nearly as much as in elections for legislative or executive offices. Candidates talked about their experience and reputations, and avoided making any controversial statements.⁴²

Much of this changed in the late 1990s and early 2000s when legal challenges were brought against some state Codes of Judicial Conduct.⁴³ In effect, these law suits raised the question: why should judicial elections be different from any other elections?

40. See, e.g., Roy A. Schotland, *Six Fatal Flaws: A Comment on Bopp and Neely*, 86 DENV. U. L. REV. 233, 237 (2008) ("All [39] states that have chosen to have some or all of their judges face some form of election have also chosen an array of state-constitutional differences between the judges and other elective officials. We cannot ignore that array.").

41. See, e.g., PA. CODE OF JUDICIAL CONDUCT CANON 7B(2) (2007)

42. See, e.g., Pozen, *supra* note 25, at 297.

43. See, e.g., *White*, 536 U.S. 765.

As a result of the ensuing litigation, judicial elections now look very different than they did just a few short decades ago. Judicial elections have become increasingly fierce; campaign spending has skyrocketed, interest group involvement has increased dramatically, and debates over political speech have rocked the traditional model.⁴⁴ Pennsylvania has not been immune from these changes.

A. *The Fall of the Speech Restrictions*

The issue of the different rules governing judicial elections—particularly the restrictions on what judicial candidates could say on the campaign trail—came to a head in the case of *Republican Party of Minnesota v. White*. In *White*, a judicial candidate for the Minnesota Supreme Court alleged that Minnesota’s announce clause, the judicial canon prohibiting judicial candidates from announcing their views on disputed legal or political issues, violated the candidate’s free speech rights by preventing him from responding to voter and media inquiries about his views.⁴⁵ The Minnesota Code provision read: “[A] candidate for a judicial office, including an incumbent judge, shall not announce his or her views on disputed legal or political issues.”⁴⁶

The candidate argued that without being able to hear him speak about his views, citizens and the press would be unable to make an informed decision about whether to support or oppose his candidacy.⁴⁷

The Supreme Court held that the Minnesota canon violated the First Amendment of the Constitution. Writing for the majority, Justice Scalia explained: “[T]he announce clause both prohibits speech on the basis of its content and burdens a category of speech that is ‘at the core of our First Amendment freedoms’—speech

44. See, e.g., JAMES SAMPLE ET AL., *THE NEW POLITICS OF JUDICIAL ELECTIONS 2006* 15 (2006), available at http://www.justiceatstake.org/media/cms/NewPoliticsofJudicialElections2006_D2A2449B77CDA.pdf; JAMES L. GIBSON ET AL., *THE EFFECTS OF JUDICIAL CAMPAIGN ACTIVITY ON THE LEGITIMACY OF COURTS: A SURVEY-BASED EXPERIMENT, PENNSYLVANIA, 2007* 1 (2008), available at http://www.allacademic.com/meta/p_mla_apa_research_citation/2/7/9/4/8/pages279484/p279484-1.php; Pozen, *supra* note 25, at 265-66.

45. *White*, 536 U.S. at 769-70.

46. MINN. CODE OF JUDICIAL CONDUCT CANON 5(A)(3)(d)(i) (2000). At the time of *White*, Pennsylvania’s “announce clause” was identical to Minnesota’s (*Compare* PA. CODE OF JUDICIAL CONDUCT CANON 7B(1)(c) (2000) *with* MINN. CODE OF JUDICIAL CONDUCT CANON 5(A)(3)(d)(i) (2000).).

47. *White*, 536 U.S. at 770.

about the qualifications of candidates for public office.”⁴⁸ The *White* Court, while recognizing the reasoning underpinning these types of restrictions—maintaining judicial independence by keeping judicial candidates from seeming to prejudge cases or issues while campaigning—held that states could not prohibit judicial candidates from stating and discussing their views on disputed issues.⁴⁹

The dissenters in *White* relied on the differences inherent in the judicial role, emphasizing that judicial candidates are unlike other candidates for public office and that this uniqueness calls for certain restraints on speech. In her dissent, Justice Ginsburg argued, “Unlike their counterparts in the political branches, judges are expected to refrain from catering to particular constituencies or committing themselves on controversial issues in advance of adversarial presentation.”⁵⁰ She thus argued that the speech restriction should be upheld.

Justice O’Connor’s concurrence is most compelling to those who study judicial elections and judicial independence because she specifically addressed the impact of judicial elections on the protection of “an actual and perceived . . . impartial judiciary.”⁵¹ Justice O’Connor cited the inherent tension between the role of the judiciary and the realities of electoral politics.⁵² She also noted the dangers inherent in the campaign process, particularly the fundraising.⁵³ Justice O’Connor noted the risks of both actual and perceived judicial bias in favor of campaign contributors and the damage this does to the impartial judiciary, but she concluded that these dangers were of the judicial election states’ own making:

Minnesota has chosen to select its judges through contested popular elections. . . . In doing so the State has voluntarily taken on the risks to judicial bias described above. As a result, the State’s claim that it needs to significantly restrict judges’ speech in order to protect judicial impartiality is particularly troubling. If the state has a problem with judicial

48. *Id.* at 774 (quoting *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 861, 63 (8th Cir. 2001)).

49. The announce clause was distinguished from a pledges or promises clause—which was not challenged in the case—which prohibits judicial candidates from promising to rule one way or the other on a particular issue.

50. *Id.* at 803-04 (Ginsburg, J., dissenting).

51. *Id.* at 788 (O’Connor, J., concurring).

52. *Id.* at 788-89.

53. *White*, 536 U.S. at 789-90.

impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.⁵⁴

These words were prescient and foretold what was to come in the arena of judicial elections. Justice O'Connor realized that the Supreme Court's decision laid down a gauntlet to judicial election states: if you want to elect judges, you must have real elections, and restrictions on speech and other expressive conduct cannot be justified by professed concerns for judicial independence. Again and again in the coming years, this gauntlet would be slapped in the faces of judicial election states: judges may be different, but judicial elections won't be.

B. *Post-White*

In the wake of *White*, many states revised their codes of judicial conduct to conform to the decision. For example, the Pennsylvania Supreme Court revised Canon 7 by striking the announce clause from the canon, although the pledges and promises clause remains. Canon 7B(1)(c) now reads:

B. *Campaign conduct.*

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

(c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; make statements that commit . . . the candidate with respect to cases, controversies or issues that are likely to come before the court; or misrepresent their identity, qualifications, present position, or other fact.⁵⁵

54. *Id.* at 792.

55. PA. CODE OF JUDICIAL CONDUCT CANON 7B(1)(c) (2008).. Although the post-*White* revision maintained the prohibition on making statements that commit or appear to commit a candidate with respect to cases or controversies, in March 2008, as a result of *Pennsylvania Family Institute v. Celluci*, 521 F. Supp. 2d 351 (E.D. Pa. 2007), the canon was again amended with the resulting deletion of the prohibition against statements that "appeared" to so commit a candidate. 38 Pa. Bull. 1445 (March 29, 2008), available at <http://www.pabulletin.com/secure/data/vol38/38-13/556.html>.

In a 2004 report, PMC analyzed the effect of the *White* decision on the 2003 Pennsylvania Supreme Court election, the first such election following *White* and the amendments to the canons: “The new canons were issued just before the start of the 2003 judicial campaign season. Therefore, the 2003 Pennsylvania elections afforded an entire election cycle conducted under the new rules and provided a good opportunity to study elections in the post-*White* era.”⁵⁶

The PMC report analyzed the operation of the election under the newly relaxed speech restrictions. During that race, the two candidates—Max Baer and Joan Orié Melvin—made very different decisions about whether to take advantage of the new freedom to announce their views and the “question, to speak or not, itself became the focus of debates and campaign trail rhetoric.”⁵⁷

Baer and Orié Melvin engaged in a lengthy back-and-forth about this topic during a televised debate:

Baer argued:

Judges have opinions, you wouldn't want a judge on the bench who didn't have opinions, who didn't have sufficient life experiences, hadn't thought about things enough, didn't care passionately about society enough to have opinions. And where Joan and I differ is that I'm willing to tell you mine, because I don't think an ignorant voter, I don't think an ill-informed voter is a good thing. I think you have a right to know what I feel, what I believe in, who I am. And so I tell you, with the caveat that I still am going to do my job as a judge. . . .

[Orié] Melvin responded:

A judge's personal beliefs are totally irrelevant when you apply the rule of law in any judicial decision making process. Members of the public need to believe that they have an even playing field. When you are going out speaking on the issues, the public believes there is a predisposition that this judge will rule consistently with what their personal beliefs are. Impartiality of the courts is a fundamental prerequisite to a fair hearing, and that can be deemed compromised by appearances alone. So it is not a question of Max stepping out and saying I will apply it and I won't use my personal beliefs.

56. AS PENNSYLVANIA GOES, *supra* note 34, at 1.

57. *Id.* at 3.

It's the appearance and the due process rights of litigants. . . . I have stated that I have a different view of *Minnesota v. White*. They did not mandate that we speak out on the issues in granting us First Amendment rights, and I feel that it erodes the public's trust and confidence in the courts.⁵⁸

As noted earlier in this article, following *White*, the use of candidate surveys and questionnaires by special interest groups also increased in Pennsylvania and throughout the nation.⁵⁹ Clearly, judicial elections would no longer be the sleepy affairs of the past.

C. *White Transformed Judicial Elections Beyond the Realm of Pure Speech*

White thus marked a major sea change in the conduct of judicial elections. But *White* was just the beginning. The trend in case law post-*White* indicates a continual loosening of the restrictions on judicial candidates. Some of these cases did not address simply speech per se, but other candidate actions that were viewed as expressive activity, including fundraising.

The issue of campaign contributions to judicial election campaigns has always been a cause for concern:

As a practical matter, so long as a state chooses to select its judges by popular election, it must condone to some extent the collection and expenditure of money for campaigns. Unquestionably, that practice invites abuses that are inconsistent with the ideals of an impartial and incorruptible judiciary. . . . There is no aspect of the electoral system of choosing judges that has drawn more vehement and justifiable criticism than the raising of campaign funds, particularly from lawyers and litigants likely to appear before the court.⁶⁰

Because of such long-standing concerns, Pennsylvania and many other states sought to address the unseemly issue of fundraising in judicial campaigns by prohibiting candidates from directly soliciting campaign funds themselves and instead requiring candidates to establish campaign committees to perform this task. Thus the Pennsylvania Canons provide:

58. *Id.* at 4-5 (quoting Televised Debate Between Max Baer and Joan Orié Melvin (Oct. 30, 2003)).

59. *See supra* pp. 829-30.

60. *Stretton v. Disciplinary Bd. of Sup. Ct.*, 944 F.2d 137, 144-45 (3d Cir. 1991).

Candidates, including an incumbent judge, for a judicial office that is filled by public election between competing candidates should not themselves solicit or accept campaign funds, or solicit publicly stated support, but they may establish committees of responsible persons to secure and manage the expenditure of funds for their campaign and to obtain public statements of support for their candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from lawyers.⁶¹

In theory, this restriction on direct solicitation of campaign contributions by candidates could prevent a candidate from knowing who contributed to his or her election campaign, but in practice, candidates generally attend their own fundraisers and also are required to sign each campaign finance report that delineates the donors to their campaign. In essence, this means that while the candidate cannot “do the ask,” he or she is very likely to “know the answer” to the question “who funded your campaign?”

This technical separation of the fundraising function from the judicial candidate has not had the effect of easing public concern about the influence campaign contributions and monetary support can have on future decisions in the courtroom. The polls discussed earlier in this article⁶² reveal a steady, if not increasing, public perception that campaign contributions are problematic, and may reflect a growing belief that “justice is for sale.” The post-*White* cases have not helped reduce this perception.

After the speech restrictions began to fall, the next targets were the prohibitions on direct solicitation by candidates. Most post-*White* cases actually struck down bans on direct solicitation by candidates, even though *White* had involved a very different issue.⁶³ The United States Court of Appeals for the Eighth, Eleventh, and Sixth Circuits in *White II*,⁶⁴ *Weaver v. Bonner*,⁶⁵ and

61. PA. CODE OF JUDICIAL CONDUCT CANON 7B(2) (2008).

62. See *supra* pp. 825-26.

63. See, e.g., Schotland, *supra* note 40, at 239 (“*White* does not touch this canon”); *Simes v. Ark. Judicial Discipline and Disability Comm’n*, 247 S.W.3d 876, 881 (Ark. 2007) (“The solicitation clause fundamentally differs from the announce clause analyzed by the Supreme Court in *White*”); see also Pamela S. Karlan, *The Supreme Court 2008 Term. Comments: Electing Judges, Judging Elections, and the Lessons of Caperton*, 123 HARV. L. REV. 80, 88 n.48 (2009) (noting that even the concurring justices in *White* highlighted the issue although the case did not involve campaign fundraising).

64. *Republican Party of Minn. v. White (White II)*, 416 F.3d 738 (8th Cir. 2005).

65. 309 F.3d 1312 (11th Cir. 2002).

Carey v. Wolnitzek,⁶⁶ respectively, found prohibitions on direct solicitation to violate the First Amendment.⁶⁷ Thus, the progeny of *White* have integrated judges further into the money side of their campaigns.

In *Weaver*, the Eleventh Circuit explained that prohibiting direct solicitation by candidates “completely chilled” expressive activity by judicial candidates while not actually protecting judicial independence:

The impartiality concerns, if any, are created by the State’s decision to elect judges publicly. Campaigning for elected office necessarily entails raising campaign funds and seeking endorsements from prominent figures and groups in the community. . . . The fact that judicial candidates require financial support and public endorsements to run successful campaigns does not suggest that they will be partial if they are elected. Furthermore, even if there is a risk that judges will be tempted to rule a particular way because of contributions or endorsements, this risk is not significantly reduced by allowing the candidate’s agent to seek these contributions and endorsements on the candidate’s behalf rather than the candidate seeking them himself. *Successful candidates will feel beholden to the people who helped them get elected regardless of who did the soliciting of support.*⁶⁸

Similarly, in *Carey v. Wolnitzek*,⁶⁹ the United States Court of Appeals for the Sixth Circuit invalidated Kentucky’s solicitation clause, which prohibited in-person solicitations, solicitation of potential donors with pending cases, speeches to large groups, and signed mass mailings. The court found the clause to be overbroad by extending beyond those potential donors with pending cases. The court also found troubling that although the canon prohibited

66. *Carey v. Wolnitzek*, No. 08-6468 (6th Cir. July 13, 2010).

67. See also, *Kansas Judicial Watch v. Stout*, 440 F. Supp.2d 1209 (D. Kan. 2006), *vacated and remanded in part* by *Kan. Judicial Review v. Stout*, 562 F.3d 1240 (10th Cir. 2009); *Carey v. Wolnitzek*, No. 3:06-36-KKC, 2008 WL 4602786, at *5 (E.D. Ky. Oct. 15, 2008) (applying strict scrutiny to Kentucky solicitation clause); *but see* *Bauer v. Shepard*, 634 F. Supp.2d 912, 953-55 (N.D. Ind. 2009) (upholding Indiana’s direct solicitation ban). In *White II*, on remand from the Supreme Court, the Eight Circuit Court of Appeals invalidated additional provisions of the code that prohibited judges from engaging in partisan activity and personally soliciting campaign contributions. *White II*, 416 F.3d at 766. But see *Siefert v. Alexander*, 08-CV-126-BBC (7th Cir. June 14, 2010) (reinstating Wisconsin prohibition against direct solicitation).

68. *Weaver*, 309 F.3d at 1323-24 (emphasis added).

69. 614 F.3d 189 (6th Cir. 2010).

direct solicitation, it did not prohibit a candidate's knowledge of a donation or an acknowledgement by the candidate of a donation:

Although the clause prevents judicial candidates from saying "please, give me a donation," it does not prevent them from saying "thank you" for a donation given. The clause bars any solicitation, whether in a large group or small one, whether by letter or one on one, but it does not bar the candidate from learning how individuals responded to the committee's solicitations. That omission suggests that the only interest at play is the impolitic interpersonal dynamics of a candidate's request for money, not the more corrosive reality of who gives and how much. If the purported risk addressed by the clause is that the judge or candidate will treat donors and non-donors differently, it is knowing who contributed and who balked that makes the difference, not who asked for the contribution.⁷⁰

Currently, Pennsylvania's prohibition against direct candidate solicitation remains in place.⁷¹ But the line of cases following *White* indicates that if challenged, there is a good chance that the prohibition would be declared unconstitutional.

It remains to be seen how such a change would affect Pennsylvania judicial elections and whether it would engender even greater public concern about the role of money in judicial elections. Certainly, some would argue that just as *White* permitted but did not require judicial candidates to engage in more revealing speech, a lifting of the direct solicitation ban might not result in direct fundraising by judicial candidates. However, with the ban lifted, potential donors might very well welcome the chance to speak one-on-one with the future judge about a campaign contribution. It would likely be difficult for a judicial candidate not to take advantage of the new freedom to directly solicit donors because donors might feel slighted if, under the new paradigm, a campaign manager or treasurer made the ask. In such cases it would be much harder, if not impossible, for a judge to plausibly claim ignorance about who supported the campaign.

70. *Carey*, 614 F.3d at 205.

71. PA. CODE OF JUDICIAL CONDUCT CANON 7B(2) (2008).

D. *The Transformation of Judicial Elections*

The post-*White* cases continued the transformation of judicial elections begun in *White*. Following *White*, there has been an inevitable slide toward making judicial elections into “real elections.” As the *Weaver* court explained when striking down prohibitions against judicial candidates using false or misleading statements, “the distinction between judicial elections and other types of elections has been greatly exaggerated. . . .”⁷²

Even if the distinction were alive and well before these cases, in the aftermath of *White*, the demise of the distinction was at hand. The *Weaver* court offers a compelling explanation for why this actually makes sense:

It is the general practice of electing judges, not the specific practice of judicial campaigning, that gives rise to impartiality concerns because the practice of electing judges creates motivations for sitting judges and prospective judges in election years and non-election years to say and do things that will enhance their chances of being elected.⁷³

Justice O’Connor, then, had it right in her concurring opinion in *White*: the threat to judicial independence is created by the judicial election process itself. Removing or reducing that threat must be accomplished, not by crafting special rules to govern judicial elections, but rather by finding another way to select judges.

Some argue that the “First Amendment should not be read to require states to make a stark choice between conducting judicial elections in a partisan fashion and doing away with judicial elections altogether,”⁷⁴ yet the trend since *White* seems to be doing exactly that. *White* is the beginning of the end of the justification that judicial elections will be different because judges are different. Although it is difficult to argue with the logic of the *White* decision, it is clear that this decision marks an important turning point in the effort to maintain judicial independence by treating judicial elections as special or different. The progeny of *White* demonstrate a swift progression to transform judicial elections into “real elections.”

72. *Weaver*, 309 F.3d at 1321.

73. *Id.* at 1320.

74. Kathleen M. Sullivan, *Sandra Day O’Connor Project on the State of the Judiciary: Republican Party of Minnesota v. White: What are the Alternatives?*, 21 GEO. J. LEGAL ETHICS 1327, 1344 (2008).

E. One More Nail in the Coffin—Citizens United v. FEC

The post-*White* cases demonstrate that *White* will be applied again and again to hold that restricting First Amendment expressive activity is not the way to solve the problems inherent in judicial elections. Judicial campaign fundraising and the negative perceptions it creates are among the most concerning elements of judicial elections. The money problem is one that gives many pause about electing judges. The money problem, however, will not be solved by limits on candidate fundraising, which has been deemed protected First Amendment activity. Moreover, the recent trend in the Supreme Court's treatment of campaign finance regulations, which has been to strike down many such regulations, seems poised to further exacerbate the problem of money in judicial elections.

A case decided earlier this year by the United States Supreme Court, *Citizens United v. FEC*,⁷⁵ confirms that the transformation of judicial elections is essentially complete. In announcing a critical change in long standing First Amendment law as it relates to campaign finance regulation, the Supreme Court drew no distinctions between judicial elections and elections for legislative or executive branch offices.⁷⁶ Clearly, the Court considered its decision to be generally applicable to all elections.

The Supreme Court's decision in *Citizens United*, focusing primarily on the right to free speech, granted corporate entities (and will apply to corporations and unions) a constitutional right to make independent expenditures in elections directly from their corporate coffers, without the need to establish separate political action committees to fundraise and spend money.⁷⁷ The decision, for all practical purposes, also invalidated the laws of Pennsylvania and 21 other states prohibiting such independent campaign expenditures.

This case—a major watershed in campaign finance law—did not specifically address judicial elections. To us, that is the key point. The majority's lack of concern about how its decision might impact judicial elections signals that the transformation of judicial elections was viewed as essentially complete. This did not go unnoticed, however. Justice Stevens in dissent lamented the effect of the Court's decision on judicial elections: "At a time when con-

75. 130 S. Ct. 876 (2010).

76. *Citizens United*, 130 S. Ct. at 968 (Stevens, J., dissenting).

77. *Id.* at 913 (majority opinion).

cerns about the conduct of judicial elections have reached a fever pitch . . . the Court today unleashes the floodgates of corporate and union general treasury spending in these races.”⁷⁸

PMC issued a press release the day the *Citizens United* decision was announced, arguing that the case likely would lead to more expensive, contentious judicial elections that would continue to undermine the appearance and reality of judicial independence:

In recent years, judicial elections have become more like elections for other public offices, despite the fact that judges are different from legislators and executive officers. Electing judges in expensive, partisan contests complete with negative ads, third-party spending, mass media campaigns and debates over “hot button” issues, makes it difficult to remember that judges are sworn to be impartial arbiters of the law. Instead, people worry that popular opinion, personal bias, and the desire to please campaign contributors or supporters will sway judicial decision-making. This is unacceptable, but it is the natural by-product of our electoral system. Justice Kennedy, writing for the 5-4 majority, discounted arguments that campaign contributions and expenditures create the appearance of influence and would “cause the electorate to lose faith in this democracy.” However, he failed to consider that the appearance of influence and access to *judges already* has been shown to cause voters to lose faith in our court system.⁷⁹

If *White* and its progeny stand for the proposition that judicial elections must be like elections for legislative and executive branch offices, the application of *Citizens United* to judicial elections is the logical extension of those cases. As restrictions on campaign fundraising, contribution limits and use of campaign funds are challenged—challenges which we predict will successfully come—it seems clear that the floodgates for money in judicial elections will open. In a recent speech to the National Association of Women Judges, Justice Ginsburg offered a telling assessment of

78. *Id.* at 968 (Stevens, J., dissenting).

79. Press Release, Pennsylvanians for Modern Courts and PMC Action, U.S. Supreme Court Lets the Money Roll In to Judicial Elections (Jan. 21, 2010), available at <http://judgesonmerit.org/2010/01/21/historic-u-s-supreme-court-decision-will-let-the-money-roll-in-to-pa-judicial-elections/>.

the *White* decision: “[It was] the ‘Gertrude Stein’ decision: ‘An election is an election is an election.’”⁸⁰

IV. WAS *CAPERTON V. MASSEY* THE INEVITABLE EFFECT OF THE TRANSFORMATION OF JUDICIAL ELECTIONS?

Last summer, the United States Supreme Court decided *Caperton v. Massey*, a case from West Virginia that asked whether Due Process requires recusal when a major financial supporter appears before a judge or justice whom his or her support helped to elect.⁸¹ In *Caperton*, the plaintiff coal company was challenging the failure of a newly elected West Virginia Supreme Court justice to recuse himself from participating in the appeal of a \$50 million verdict against the defendant.⁸² The grounds for the recusal motion were that the chief executive officer of the defendant coal company had spent \$3 million of his own money to support the election of the justice and the defeat of his opponent.⁸³ The justice won the election, twice refused to recuse, and twice cast the deciding vote that overturned the verdict.⁸⁴

The United States Supreme Court, in a five-four decision authored by Justice Kennedy, held that in some cases, circumstances—including the amount of the contribution, the proportional size of the contribution related to other campaign fundraising and expenditures, the probable impact of the contribution on the election, and the timing of the litigation—may require recusal because “there is a serious risk of actual bias.”⁸⁵

The Court made clear that the inquiry is not whether there was actual bias, but whether all the circumstances create too great a risk of bias:

Although there is no allegation of a *quid pro quo* agreement, the fact remains that Blankenship’s extraordinary contributions were made at a time when he had a vested stake in the outcome. Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when—without the consent of the other parties—a man chooses the judge in his own

80. Robert Barnes, *Ruth Bader Ginsburg Says She Would Forbid Judicial Elections*, WASHINGTON POST, Mar. 12, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/11/AF2010031105136.html>.

81. 129 S. Ct. 2252 (2009).

82. *Caperton*, 129 S. Ct. at 2256.

83. *Id.* at 2257.

84. *Id.* at 2257-58.

85. *Id.* at 2263.

cause. And applying this principle to the judicial election process, there was here a serious, objective risk of actual bias that required Justice Benjamin's recusal."⁸⁶

Without explicitly saying so, the majority acknowledged that campaign contributions to judicial candidates can poison the whole system. And the dissenters seemed to agree with this proposition. The Court, however, declined to set any guidelines for how judges should make recusal decisions in future cases, and the dissent argued that the majority opinion raised more questions than it answered.⁸⁷

The justices' disagreement about how to address the issue of judges presiding over cases involving lawyers or litigants that contributed to their campaigns demonstrates that there is no easy, sure-to-succeed solution in the context of judicial elections. Money—no matter what the amount—will always be involved in judicial election campaigns, and the public will continue to worry that the money could have a corrupting influence in future judicial decisions. After the oral argument in *Caperton* in March 2009, we posted the following on our blog, JudgesOnMerit.org:

Lyle Denniston over at [SCOTUSblog] offers a short . . . recap of today's oral argument in *Caperton v. Massey*:

Tugged between a sense that a constitutional ruling on judges' duty to take themselves out of cases if bias is suspected should provide very clear guidance, and a sense that it might be written only to apply in the most extreme factual scenarios, the Supreme Court set itself a difficult task. . . .

Here lies the big challenge presented by campaign contributions—when do they cross the line from the cost of doing business in a judicial election state to creating an impermissible appearance of bias. We think that's a tough line to draw, even for the United States Supreme Court.⁸⁸

86. *Id.* at 2265.

87. *Caperton*, 129 S. Ct. at 2269-72 (Roberts, C.J., dissenting). Chief Justice Roberts actually presented forty questions about recusal that he contends remained problematically unanswered by the majority's opinion. *Id.*

88. JudgesonMerit.org, [SCOTUSblog's] First Look at *Caperton* Argument, <http://judgesonmerit.org/2009/03/03/scotusblogs-first-look-at-caperton-argument/> (last visited Aug. 18, 2010).

As it turns out, we were right about how hard it would be for the Supreme Court to draw those lines. But the real question is should there actually be “costs of doing business” when it comes to judicial selection? We believe there should not be. The inability of the Supreme Court of the United States to provide clear guidance to judges about how and when campaign contributions should lead to recusal demonstrates that the problem lies in the judicial election system itself, as well as the Court’s own decision to treat judicial elections like elections for other offices.

The factual scenario presented in *Caperton* and the Court’s inability to devise a way to address it going forward seem to be the inevitable outcome of *White* and its progeny—the end product of transforming judicial elections into “real elections.” Money has always talked in elections, and now judicial elections are no different. The question is what happens in the courtroom after the election? Are judges different, such that the circumstances of their election will not impact how they act in office? The Court had a very difficult time answering that question. The facts of *Caperton* made that particular case an easy one, but the Court could not set out a set of bright line rules to govern elected judges generally.

This is troubling because it does nothing to solve the problems caused by the influence of money in judicial elections. If judicial elections are like all other elections, should the fact of campaign contributions matter at all once the judge reaches the bench? Some would certainly argue that it should not, but public opinion makes clear that it does.

So, if the fact of the contribution matters, how and when does it matter? That is the question that has been left open. Essentially, *Caperton* signals that in judicial election states, business should go on as usual. Keep electing judges, let contributions from lawyers and future litigants pour into judicial campaigns, and let judges decide on their own—without clear guidance—whether or not to recuse in any given case.

But that answer requires a sacrifice. There will be a decrease, at least in the perception of—and possibility also the reality of—judicial independence. We have long argued that treating judges like other elected officials until the moment they take the bench is antithetical to the fundamental notion that judges are different. By essentially requiring judges to campaign, raise money, vie for political endorsements, and curry favor with special interest groups, judicial election states have erected a system that equates judges with other elected officials.

V. PENNSYLVANIA MUST DECIDE: IS ELECTING JUDGES MORE IMPORTANT THAN PRESERVING AND PROTECTING JUDICIAL INDEPENDENCE?

Because elections make judicial candidates seem like all others running for election to public office, elections foster the perception that judges are not truly independent. The public needs to understand that judges are different and believe that judges act in accordance with their unique role. Judicial elections blur the critical distinctions between judges and other officials by treating judicial candidates like candidates for executive and legislative offices.

The public's perception of the judiciary is influenced by the process by which judges reach the bench.⁸⁹ We cannot treat judicial candidates like politicians, make them act like politicians, and then simply expect there to be a magic moment when they put on judicial robes and new rules fall into place.

The current process requires us to believe that once elected, judges become independent individuals free from the forces of political pressure, public opinion, campaign donors, or personal bias. But as judicial elections have been transformed, that has become more difficult for supporters to understand and for the public to believe.

White and its progeny force judicial election states to confront a critical question: is judicial independence a commodity worth protecting? If so, these cases, as Justice O'Connor predicted in her concurrence in *White*, tell us that doing so will require states that care about judicial independence to put their money where their mouths are and move away from electing judges.

Judicial elections are part of a broader ecosystem whose pieces are connected in complicated ways. The initial decision to elect judges set into motion a series of potential consequences for their performance in office. Subsidiary choices, such as the Court's decisions immunizing independent expenditures or judicial campaign speech from meaningful regulation, have themselves changed the nature of judicial elections in ways that may affect judges on the bench and shape the responses available to protect litigants against a risk of judicial bias. And the Court's ability to craft judicially manageable standards for dampening the constitutionally problematic consequences of judicial politics has its own political component.

89. See, e.g., THE ANNENBERG PUBLIC POLICY CENTER, *supra* note 8, at 2.

Caperton is thus only the latest chapter in an unfolding story.⁹⁰

As we see it, if this “unfolding story” continues along its trajectory, it will not have a happy ending unless judicial election states confront the choice that has been placed before them.

In Section I, we argued that four features of elections create special challenges to judicial independence. The transformation of judicial elections under the line of cases discussed herein have only exacerbated these challenges. The solution for Pennsylvania and other states that prize judicial independence as a critical value worthy of protection is to find another way to select judges. This way must honor the distinction between judges and other elected officials, get judges out of the fundraising business, and make clear that the judicial role is one that is accorded high value.

We believe the system best designed to do so is Merit Selection, and we have been advocating for the adoption of a Merit Selection system for Pennsylvania’s three statewide appellate courts.⁹¹ Merit Selection is a hybrid of appointive and elective systems that includes an independent, bipartisan citizens’ nominating commission to evaluate candidates and recommend the most qualified to the Governor. The Governor must nominate from the commission’s list of candidates, and the Governor’s nominee is subject to confirmation by the state Senate. After an initial term of four years, the judge would stand before the public in a nonpartisan retention election. If successful, the judge would serve a full ten-year term, after which he or she could again stand for retention every ten years until reaching the age of mandatory retirement.

Merit Selection is designed to put the most qualified,⁹² fair, impartial, and ethical judges on the appellate courts. It is a system which honors the special nature of the judicial role and focuses on

90. Karlan, *supra* note 63, at 102-03.

91. Although judicial elections pose dangers at all levels of the court system, the problems inherent in judicial elections—especially the money problem—are exacerbated at the appellate level. As a result, our current educational advocacy efforts are focused on implementing change at the level of the appellate courts. Most of the lobbying efforts are conducted by our affiliate organization PMCAction, a statewide nonpartisan, nonprofit organization that lobbies for court reform initiatives.

92. We emphasize qualifications because under the pending Merit Selection legislation, minimum qualifications related to years of experience, skill, reputation for honest and ethical behavior and judicial temperament would be required to be deemed qualified to serve on the appellate courts. This is in contrast to the current electoral system, which requires only that a candidate for the appellate courts be licensed as a lawyer in Pennsylvania, have been a Pennsylvania resident for one year, and have reached the age of 21. 42 Pa. Cons. Stat. § 3101(a) (2005).

the uniqueness of that role throughout the entire selection process. In doing so, it eliminates the four major threats to judicial independence inherent in judicial elections: the money, the need to seek political party endorsements, the need to obtain the support of special interest groups, and the need to curry favor with voters. We have repeatedly stated, “Merit [s]election puts the focus on the questions that matter most when selecting an appellate court judge: Is this person well qualified to serve on the bench and will he or she act impartially, honestly and with fidelity to the law?”⁹³

The truth is that we don’t know how different our judicial personnel would look if we were operating under a Merit Selection system. We believe judges should reach the bench not because of their fundraising prowess, campaigning ability, or because they hail from the region with the largest voter turn-out that cycle. Rather, individuals should reach the appellate bench because of their qualifications, skills, and reputations for the highest ethical behavior. We know there are many very good judges in Pennsylvania who certainly would be included among lists of highly qualified candidates for the appellate courts. But those judges reached the bench *despite* the electoral system, *not because of it*. We need a system that is designed to put that type of judge on the bench every time there is a vacancy on the appellate courts.

We do know that under Merit Selection, Pennsylvanians would no longer have to worry when they appear before the appellate courts whether their opponent or the opposing counsel contributed to one of the presiding judges or justices. No longer would any money flow directly from a litigant or lawyer to assist a future appellate court judge in reaching the bench. This is how the system should work. No one should ever have to worry about whether a campaign contribution affected a judicial decision. It should not ever be a consideration. But in our current system, it is.

If Pennsylvania truly values judicial independence as a commodity in both its forms—actual independence and the appearance of independence—it must take steps to protect and preserve that commodity. The steps taken in the past—special restrictions on judicial elections and judicial candidates—are no longer available. Bigger, more sweeping action is needed.

93. Shira J. Goodman & Lynn A. Marks, *Use Merit Selection to Pick PA Appellate Court Judges*, THE LEGAL INTELLIGENCER, Mar. 22, 2010, at 7.

The lesson of *White*, *Caperton*, and *Citizens United* is that judicial independence and judicial elections are mutually exclusive. The time has come for Pennsylvania to make a choice. One commentator called *White*, *Caperton*, and *Citizens United* the three “horse[men] of the apocalypse for lawyers, judges, and those who favor the direct election of state judges. . . . [They] spell doom for judicial elections.”⁹⁴ We certainly hope he’s right.

94. David Schenck, *Guest Column: The End of Judicial Elections?*, THE TEXAS TRIBUNE, Feb. 2, 2010, <http://www.texastribune.org/stories/2010/feb/02/guest-column-end-judicial-elections/>.